

**Minutes of the Meeting**  
**CUTS CCIER International Advisory Board**  
**Friday, December 02, 2022, Paris, France**

**Attendees:**

Pradeep S Mehta, Secretary General, CUTS International

**Members:**

Allan Fells, Former Chairman of the Australian Competition and Consumer Commission (ACCC)

**Guests:**

- Spencer Waller, Professor Loyola University Chicago School of Law, Senior Advisor to Chair of Federal State Commission (FTC) USA
- Reto Malacrida, Legal Counsellor (Head of the Government Procurement and Competition Policy Group), World Trade Organisation

**CUTS Staff:**

Shiksha Srivastava, Research Associate, CUTS CCIER

**Objective:**

The meeting of the CCIER International Advisory Board (IAB) is conducted on the side-lines of important global events, where a critical mass of members and other experts are expected to attend. The purpose of the meeting is to take stock of current activities of CUTS CCIER and discuss emerging issues, future projects. The members provide their insights and suggestions.

**Discussion Points:**

The discussion was held on the agenda which was prepared and shared with members beforehand. The major points of discussion were as follows:

- CUTS CCIER's work in the arena of inclusive digital economy, innovations, data privacy and e-commerce. The different projects were highlighted and emerging issues were discussed.
- Area of Future work: Issues of penalty collection by competition authorities in different jurisdictions.
- Area of future work: Climate Change and Competition Policy.
- Reconstituting the IAB

## **Key Takeaways:**

- 1. To understand how work on offline and online regulations will intersect and what the future holds in terms of scope, opportunities and financial sustainability for the organisation.**

Members were introduced to the ongoing and pipeline projects of CCIER on data governance; telecommunication and broadcasting; optimal and accountable regulation climate and competition.

Mr. Spencer Waller highlighted the issue of separating the emerging issues of digital economy and innovations from existing regulatory institutions. He mentioned that in the USA the Federal Trade Commission (FTC) is deliberating whether issues of data privacy should have a separate bureau. Herein, as CCIER has been working in the area of offline regulation for decades, the challenge will be to understand where the separation would be necessary between offline and online regulatory framework, and in which cases those have to be integrated. Here PSM highlighted the issue of data localisation and how it requires a separate regulatory framework.

Mr. Allan Fels highlighted the example of Australia where there has been an integrated digital platform. PSM here highlighted CCIER's project on "Elements of Ethical Framework for 6G and Creating Opportunities for India and Australia". India's recent efforts with creation of an Open Network for Digital Commerce was also discussed.

Mr. Reto Malacrida mentioned that e-commerce has been a major agenda even for WTO's work on multilateral and plurilateral agreements. Therefore, data localisation became an issue with international trade but many countries were not willing to make data localisation a part of their trade negotiations. On that point PSM added that the Trans Pacific Partnership had included a chapter on e-commerce. While discussing trade and e-commerce, Mr. Waller also discussed how the USA's stand towards trade has undergone a change. The USA currently doesn't have a trade promotion authority. Trade overall has become extremely crucial and contentious with the pandemic exposing vulnerabilities of global supply chains and technological innovations. Trade in semiconductors for example was one such contentious issue.

## ***Action Point:***

To explore how issues of online and offline regulatory reforms are being undertaken in jurisdictions such as the USA, Australia and European Union (EU). To understand the interface of Trade, e-commerce and data localisation. To suggest better domestic regulations and tech-innovations in India for improving its standing while negotiating Free Trade Agreements (FTAs) with EU, UK etc.

## **2. Competition Policy & Issue of non-collection of penalties by Competition Authorities**

The discussion started with Mr. Waller pointed out the recent executive order of the Biden administration on promoting competition and following a whole of government approach. On the issue of penalty collection, the interesting example of Brazil was discussed, where there was a legal provision whereby 10% of the fine was to be deposited before filing appeals, which has been declared unconstitutional (right to appeal). Currently, limited literature is available on this issue, therefore, members & guests were requested to present ideas and resources from their jurisdictions.

Mr Fels pointed out that Australia and the USA have a long history of civil fines. He suggested getting in touch with members of the law department of the Australian government and exploring publicly available historical records, for secondary research.

Mr. Waller explained the procedure of settlement in the USA and how it prevents this issue of non-collection. He explained that there are no fines or damages levied on anti-trust violations, the cases are settled between the defendant and the plaintiff, as the parties wish to avoid a class action suit. The administration sends out notices to the parties to settle the case for damages. An escrow account is created, where a percentage of the damages amount is collected. This is mandatory to be able to get legal relief. Both parties through their lawyers argue the claims. Then as per the administrative order, a pro-rata allocation of the damages is done through the funds collected and further deposited in the escrow account.

Mr. Malacrida compared this with an analogy of countervailing duties in international trade regulation. PSM mentioned that Prof Elenor Fox (also a member of CCIER IAB) pointed out that non-collection of penalties is a very novel and unexplored area of research and thus he appealed to the members and guests to provide support for the same.

The theory of deterrence and whether non-collection reduces deterrence would also be explored through this research. As a starting point, PSM highlighted the example of cement cartels in India. In this case, the companies which were colluding and the fine levied was covered by media, but in reality, only 0.2 percent of the fine amount was collected.

Mr. Waller gave a suggestion, that certain agencies, subject to proportionality, blacklist companies which have any civil or criminal conviction, by prohibiting them from doing business with the government until all the fines are collected. This was noted as a good policy measure which can be implemented in different jurisdictions where non-payment of fines is becoming a serious issue.

***Action Points:***

- (i) Research the publicly available historical records, of Australian authorities and departments
- (ii) Reach out to law department members of Australia and USA, for further information and primary research
- (iii) Suggest mandatory deposit of a percentage of penalty for availing remedy of appeal as a solution of non-collection of penalties
- (iv) Suggest prohibiting companies which don't pay their fines in full, from doing business with the government, including applying for tenders etc.
- (v) Possibly scale-up the research to include fines beyond ant-trust penalties and also include other penalties by different financial agencies

### **3. Climate Change and Competition Policy**

Mr. Fels emphasised that competition policy and law experts should have a seat at the table where discussions on business sustainability are happening. Competition policy needs to include sustainable policies and guidelines within its goals. [Mr. Simon Homes](#), a lawyer in the UK, was suggested as a good resource with a good body of work on this issue relationship between competition law and sustainability.

**Action Point:** Continue research with the larger agenda of plurilateralism and fostering competition, as ends. Other areas under this would be to explore the intersection of intellectual property and competition, in context of green technology.

### **4. Reconstitution of the IAB**

The members and guests suggested the following names:

- (i) Justice Charlotte wezi Malonda, High Court Judge-Commercial Court, former Chief Executive Officer Competition and Fair Trade Commission Malawi
- (ii) Teresa Moreira, Head Competition and Consumer Policies Branch, UNCTAD
- (iii) Angela Zhang, Associate Professor, Director of Philip K.H. Wong Centre for Chinese Law Department of Law, The University of Hong Kong

The guests were offered to be permanent members. Mr. Waller said that he would only be able to consider once his role as the advisor to the chair of USA FTC comes to be an end this month. Mr. Malacrida was happy to accept his membership. The members and guests also assured they would suggest more names upon consideration.

**Action Point:**

- (i) Follow up with the members and guests for more suggestions for the members of IAB.
- (ii) Follow up with the guests for their own membership in the CCIER IAB.
- (iii) Reach out to the suggested names and invite them for joining as members of the CCIER IAB.