



EMERGING ISSUES IN INTERNATIONAL TRADE AND INVESTMENT LAW

AN INTERNATIONAL ECONOMIC LAW CONSULTATION WORKSHOP

NOVEMBER 24, 2014
TORONTO, CANADA

CONFERENCE REPORT



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An International Economic Law Consultation Workshop

Conference Report

November 24, 2014
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ABOUT THE INTERNATIONAL LAW RESEARCH PROGRAM

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP will focus on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law.

ABOUT THE AUTHOR



Oonagh Fitzgerald is director of CIGI's International Law Research Program. She oversees the research direction of the program and related activities.

She has extensive experience as a senior executive of various departments of the federal government, including national security coordinator for the Department of Justice Canada, and legal adviser to the Department of National Defence and Canadian Forces.

Oonagh has taught at the University of Ottawa, as well as Carleton University, l'Institut international du droit de l'homme in Strasbourg, and the International Institute of Humanitarian Law in San Remo. She has a B.A. (honours) of fine arts from York University, an LL.B. from Osgoode Hall Law School, and was called to the Bar of Ontario in 1983. She holds an LL.M. from the University of Ottawa, an S.J.D. from the University of Toronto, and an M.B.A. from Queen's University.

EXECUTIVE SUMMARY

The purpose of this consultation workshop was to discuss emerging issues in international trade and investment law, to develop a more detailed research agenda and to identify research partners who would be interested in collaborating with CIGI's International Law Research Program (ILRP). In a round table format, 26 participants took part in the consultation workshop, with 14 participants making introductory comments. Attendees represented the following sectors: think tanks, private practice, public sector (domestic and international), non-governmental organizations, university faculties of law and other university faculties.¹

The workshop began with an overview of the emerging issues in international trade and investment law and the areas of overlap, then turned to issues in international trade law and issues in international investment law, and ended with a discussion about opportunities for specific and tangible research projects on international trade and international investment law. Topics included:

- plurilateral versus multilateral trade agreements;
- trade subsidies;
- improving processes in investor-state dispute settlement (ISDS);
- investor-state arbitration between developed economies; and
- specific opportunities to have impact on the development of international trade and investment law.

The key ideas and areas for future research identified during the workshop were as follows:

- Strike a multidisciplinary, multi-stakeholder research approach to international trade and investment and global value chain legal regimes.
- Consider how to reconcile and modernize World Trade Organization (WTO) and preferential trade and investment agreements to create policy space to address pressing global issues.

- Consider reforms that would harmonize, unify, modernize and enhance rule of law legitimacy in international investment agreements.
- Consider how to enhance international, transnational and domestic regulation in the global value chain for more equitable distribution of benefits and to control for environmental and human rights costs.

INTRODUCTION

The workshop's discussions were structured to separate out the topics of international trade, corporate social responsibility in the global supply chain and international investment. It quickly became evident, however, that there is significant overlap among the three topics: supply chain, trade and investment. Participants discussed governance gaps (outlined below) to be addressed and research to be done on regulation of corporate conduct in the global supply chain. The general consensus coming out of the workshop was that international trade and investment law is one of the more robust areas of international law, but that it may not be well suited to address issues that link trade or investment with the environment or human rights.

OBSERVATIONS FROM THE CONSULTATION WORKSHOP

Issues in Trade Law: Plurilateral versus Multilateral Trade Agreements

International trade and investment law, which for decades led the way in developing international rule of law, has come to a critical point in its evolution. With more than 3,000 bilateral investment treaties (BITs), a multiplicity of regional trade and investment treaties, and stalled multilateralism at the WTO, investor-state and state-to-state dispute settlement processes can lead to contradictory and incoherent rulings.

WTO dispute settlement processes, with their recognition of public international law and the availability of appellate review, are generally viewed as one of the successes in the development of twentieth-century international rule of law. There is growing concern, however, that the disputes coming before the WTO panels involve public policy issues of such complexity, breadth and significance that they cannot appropriately be decided by trade law experts. Having matters of climate change, environmental protection, global health, technology transfer, human development and human rights decided by a WTO panel of international jurists, operating under the framework of a trade agreement that uses the lens of free trade, arguably is not the optimal or most legitimate way to decide such important issues.

¹ The consultation workshop was conducted under the Chatham House Rule. Under this protocol, those present, including media, "are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed." For a full explanation of the Chatham House Rule, see: www.chathamhouse.org/about-us/chathamhouserule.

Issues in Trade Law: Trade Subsidies

With tariffs being reduced, subsidies are the only policy tool kit available to governments trying to encourage renewable energy development or manage the effects of the financial crisis. The goal of eliminating subsidies is arguably out of date. Economists have studied this question extensively and concluded that an agreement is not feasible. The question was raised whether a “carve-out” is needed for nascent industries to give them a chance to develop and survive. On the other hand, agricultural subsidies that have been protected are not economically sound, but the vested interests and fear are too strong to change this. An example was given of the microeconomic stability of local small-scale farmers in Tanzania being undermined by a foreign investor establishing an industrial-scale bakery. Some of the subsidy issues are really human rights and development issues.

There is a connection between international trade and investment law, sovereign debt, conduct of multinational corporations, human rights and climate change that is not effectively addressed by existing international law instruments or systems. Existing instruments and mechanisms tend to impede action to address the most pressing issues of the day.

Corporate Social Responsibility and the Global Value Chain

Participants considered the compromises embedded in John Ruggie’s Guiding Principles on Business and Human Rights. Grave human rights violations need serious remedies, not merely soft-law voluntary codes and mediation, although these are incremental improvements over the existing legal instruments. The issue of corporate social responsibility is one that brings together many of these areas and should be studied with a view to developing enforceable standards of conduct and mechanisms to hold corporations accountable for human rights violations, bribery and corruption, and environmental degradation committed in their operations around the world. An ILRP consultation workshop on the global value chain and corporate social responsibility was held in May 2015.

Issues in Investment Law: Adapting ISDS to New Global Challenges

ISDS provisions in BITs and regional trade and investment agreements are being used to challenge popular national regulation and to extract large monetary awards. Investor-state disputes involve significant commercial interests, may result in large monetary awards to private investors and concomitant burdens on taxpayers, and may challenge public policy of high importance to national governments and their citizens. International arbitration, developed as a tool to facilitate efficient dispute resolution between two commercial parties, is proving less adept for deciding matters of public policy involving a national government, its citizenry and a private

commercial party. The lack of transparency, impartiality, accountability, coherent jurisprudence, precedent and appellate structure, and the avoidance of established national courts in ISDS, is attracting growing criticism and arguably undermines its legitimacy as a means to settle important and costly matters of national public policy.

At this stage, ISDS and the WTO dispute settlement understanding (DSU) present rival models of global governance, each with their proponents and critics. The democratic critique of multilateral, plurilateral and bilateral trade and investment agreements is that they subject national policy and legal decision making to an international constitution and remove some important issues from the jurisdiction of domestic courts to be pursued in a flawed, non-transparent international dispute settlement system. The development critique is that developed countries establish the rules, which developing countries have no choice but to accept, and that the promise of investment leading to development has not been realized.

Supporters of ISDS point out that it works to depoliticize disputes and is based in customary law. It fills a need that state-to-state litigation cannot effectively address, as states do not want to champion all investor claims. Future research could consider improvements to address current concerns with ISDS: for example, working toward a system of consistent jurisprudence; doing away with “the right to be wrong” in ISDS through creation of a uniform appellate process; improving the factual record; allowing public interest interveners; removing bias and conflict-of-interest concerns by disqualifying panellists from practising ISDS litigation; improving independence of panellists and ethical standards for the practice of arbitration; establishing a standing investment tribunal; limiting access to ISDS by requiring exhaustion of local remedies first; requiring the investor to come to the arbitration process with “clean hands” (i.e., without outstanding claims against it by the local community); limiting the issues that can go to ISDS; limiting the amount of monetary awards; allowing states to carve out national policy exceptions to protect developmental, environmental and human rights objectives; requiring that the damages actually be caused by the violation (principle of state responsibility); and addressing the issue of equal protections for domestic industry.

FUTURE RESEARCH

Strike a Multidisciplinary, Multi-stakeholder Research Approach

- Create a forum for WTO DSU and ISDS experts, leading domestic jurists, human rights and environmental experts and political economists to discuss across their fields and identify the problems and possible solutions to dispute settlement involving developed and developing states, civil society and multinational corporate investors. Conduct

research in such a way as to show the many sides of the issues. Generate tools for public education and teaching so that civil society in the developed and developing world is better able to assess and contribute to reform.

- Analyze how measures to encourage transfer of climate change technology and protecting the human right to a safe environment can be reconciled with trade and investment obligations. Could there be an international consensus to not litigate on environmental issues?

Consider How to Reconcile WTO and Preferential Trade and Investment Agreements

- Consider whether multilateralism is presently in such a state of crisis that the only way to make progress in building resilient and responsive international rule of law is for like-minded groups to develop their own treaties. Does such behaviour undermine efforts to salvage multilateralism? Is this how we eventually arrive at multilateral agreement? (The norm is that entrepreneur states lead, and pull others to join.) Is there a way to save multilateralism by incorporating the plurilateral preferential trade and investment agreements into the WTO and permitting other states to accede if they meet the necessary conditions? How would such an arrangement deal with the requirement of consensus?
- If the new mega regional trade agreements use the WTO DSU, would the WTO be able to evolve to address the new issues at stake in these agreements (for example, a better balance of environmental and human rights considerations)? A substantive review of the WTO Subsidies Agreement could determine whether it is serving the policy purposes intended by governments. Study how to reconcile, rationalize or replace the varying and overlapping treaty obligations (for example, preferential trade agreements versus the general obligation of non-discrimination in the WTO)? New mega trade deals tend to include investment chapters. Research could focus on whether there would be interest in greater harmonization, although there may be preference for variation reflecting newer thinking about trade and investment (such as definition of investment, rules on establishment, recourse to local remedies).
- Given the above problems with working within the WTO, the business community is most focused on plurilateral trade agreements and BITs that can bring real economic improvements. What practical approaches can be taken to advance rule of law? Are there lessons from the WTO DSU that could be usefully adapted to ISDS?
- Study lessons learned from NAFTA, after 20 years, as an example of a relatively successful international trade and investment agreement: what worked, what did not, what

has improved, what still needs to be changed? Could it be modernized to address today's pressing issues, for example, clean energy and climate change, green economy and sustainable development? Were the improvements to ISDS sufficient to address the current global critiques of ISDS?

Consider Reforms to International Investment Agreements

- Study whether the time is right for a multilateral investment treaty to replace the more than 3,000 BITs. If this were contemplated, what would civil society want added to it (for example, counterclaims in domestic law)? Would this provide an opportunity to create an appellate body, and if so how would it interface with ISDS systems such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the International Centre for Settlement of Investment Disputes Convention? How would an appellate body deal with variations in language among different agreements (such as "most favoured nation" or "national treatment" clauses)? Is there a way to reconcile trade and investment treaties and processes to avoid forum shopping, inconsistent rulings and double awards? Or is it best to accept the occasional inconsistency in order to preserve what works in the WTO? Consider a norm entrepreneur project: revising a smaller number of BITs among willing innovator states to see how they could be harmonized, modernized and improved.
- Study whether it would be feasible to move away from arbitration as a means of ISDS to domestic adjudication of investor-state disputes and thereby improve global-rule-of-law capacity. How should domestic rule of law be enhanced to generate the needed confidence? An upcoming study by CIGI Senior Fellow Armand de Mestral will focus on ISDS between developed democracies with functioning domestic rule of law systems. What are the implications for ISDS when applied between developing and developed countries? As some developing countries withdraw from ISDS, should a substitute system be developed or could domestic courts and private international law adjudicate all issues appropriately?
- Address how to integrate sustainable development goals more carefully into international investment agreements by having more balanced objectives, including investor responsibilities, in that investors' interests are protected at the expense of domestic civil society. A case study could be the incorporation of social policy in the Black Economic Empowerment legislation in South Africa. Another area where balanced objectives are needed is in the foreign extractive industry, where investors should be required to protect the environment and human rights.

Consider How to Enhance International, Transnational and Domestic Regulation in the Global Value Chain

- Study regulatory issues that arise in relation to the global value chain: regulatory fragmentation and harmonization of standards; tax avoidance by transnational corporations; inequitable distribution of benefits; externalization of environmental and human rights burdens and social and political costs; limits of state jurisdiction; and the shift to private global regulation.
- Consider how to develop the Ruggie Principles on Business and Human Rights into an enforceable body of international, transnational and domestic law. Study how a treaty or model law could target a non-state actor conducting business globally. How can individuals enforce against corporations for human rights violations, bribery and corruption, and environmental degradation committed in their operations around the world? Consider whether this is best done through voluntary codes or through multilateral processes to ensure development of transparent standards. What is the appropriate role of governments with particular reference to the extractive sector?

CONCLUSION

The ILRP will lead and produce practical, balanced research that reflects the highest standards of international law expertise and draws on the knowledge and experience of public sector, private sector and academic experts. In order to pursue its research agenda, the ILRP will build partnerships with individuals and institutions with interest in and expertise on these issues. This first consultation workshop on emerging issues in international trade and investment law was an excellent first step in identifying the salient themes and experts. A working group will be created to shape the research agenda. The ILRP welcomes submissions about working group membership and its research work plan.

CONFERENCE AGENDA

November 24, 2014, 8:00–21:00

Boardroom, Royal York Hotel, 100 Front Street West, Toronto, Ontario

8:00 — Continental Breakfast

8:50 — Welcome and Introduction

9:00 — Overview of the Issues

Two Distinct Topics:

- Difference and Commonality in International Investment
- Trade Law

9:45 — Session 1

Issues in Trade Law: Plurilateral versus Multilateral Trade Agreements

- The case for providing great room for plurilateral agreements within the WTO system

11:00 — Health Break

11:15 — Session 2

Issues in Trade Law: Trade Subsidies

- Subsidies and development: prospects for greater liberalization of trade in agriculture in the WTO system or under plurilateral trade agreements?

12:30 — Working Lunch

Thematic discussion on corporate social responsibility standards in the global value chain

13:45 — Session 3

Issues in Investment Law: ISDS at Its Best

- Questions about conflict and convergence
- Why ISDS generally works
- The new look of ISDS (for example, in the Comprehensive Economic and Trade Agreement)

15:00 — Health Break

15:15 — Session 4

Issues in Investment Law: Adapting ISDS to New Global Challenges

- Process improvements in investor-state arbitration (transparency, participation, consistency)
- Investor-state arbitration between developed democracies
- Challenging the status quo of international economic law

16:30 — Session 5

Specific Opportunities to Have Impact on the Development of International Trade and Investment Law

18:30 — Dinner

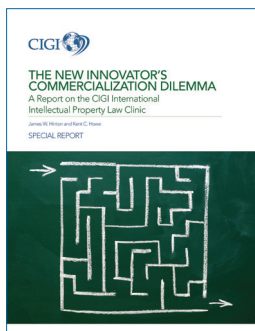
Continuation of informal discussion: Opportunities to have impact

- Organization of further research and collaboration

20:30–21:00 — Adjournment and Departures

CIGI PUBLICATIONS

ADVANCING POLICY IDEAS AND DEBATE



The New Innovator's Commercialization Dilemma

Special Report

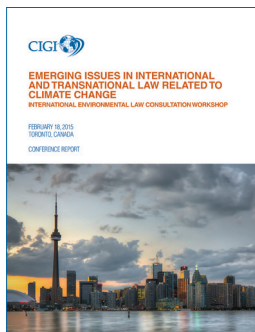
This report outlines the impetus behind the CIGI International Intellectual Property Law Clinic, which operated for three months in 2014. It consisted of a partnership among the CIGI International Law Research Program, Communtech (the Region of Waterloo's hub for commercialization of innovative technologies) and leading intellectual property law firms.



Law, Governance and Climate Change: An International Law and Policy Workshop in the Context of the UNFCCC COP 20

Conference Report

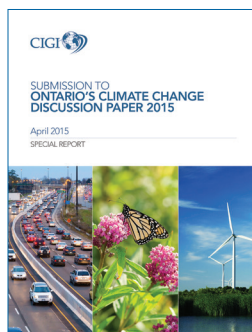
The Centre for International Sustainable Development Law hosted the workshop, in collaboration with the Pontificia Universidad Católica del Perú and the Centre for International Governance Innovation, along with numerous other partners. More than 50 scholars, policy makers, experts, practitioners and stakeholders were convened from more than 40 countries to explore emerging human rights, economic and environmental laws, policies and practices linking climate change with sustainable development, and to chart a new international research and education agenda.



Emerging Issues in International and Transnational Law Related to Climate Change

Conference Report

The CIGI International Law Research Program held its first multi-stakeholder environmental law consultation workshop in Toronto on February 18, 2015. This report summarizes observations from the workshop, and recommended areas for future international law research.



Submission to Ontario's Climate Change Discussion Paper 2015

Special Report

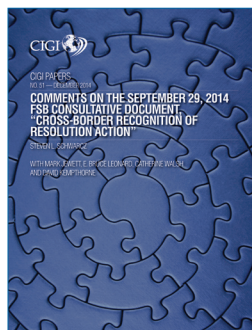
The International Law Research Program (ILRP) of the Centre for International Governance Innovation (CIGI) responds to select questions from Ontario's Climate Change Discussion Paper 2015, as part of a province-wide public consultation process by the Ministry of the Environment and Climate Change.



Peeling NAFTA Layers: Twenty Years After

CIGI Papers No. 68 Hugo Perezcano

The 20-year anniversary of the North American Free Trade Agreement (NAFTA) has been seen as another milestone in the ongoing trade relations among Mexico, Canada and the United States. It offers a good opportunity to assess how the agreement has worked and to consider whether regional integration can be enhanced. There are many ways to evaluate NAFTA. This paper undertakes a stratified analysis, while considering each party's perspective. Such an approach places NAFTA in its historical context while also looking forward, in order to reflect on whether a fuller integration can be achieved to assist the three parties in facing the significant global challenges of today.

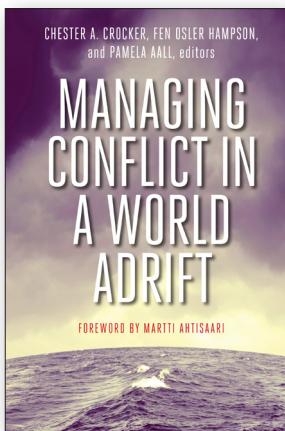


Comments on the September 29, 2014, FSB Consultative Document, "Cross-Border Recognition of Resolution Action"

CIGI Papers No. 51 Steven L. Schwarcz

On September 29, 2014, the Financial Stability Board's Consultative Document, "Cross-Border Recognition of Resolution Action," was released. This consultative document proposes a package of policy measures and guidance consisting of elements that jurisdictions should consider in order to prevent the costs and consequences of disorderly resolution procedures for large, complex and systemically important financial institutions and to promote effective cross-border resolution.

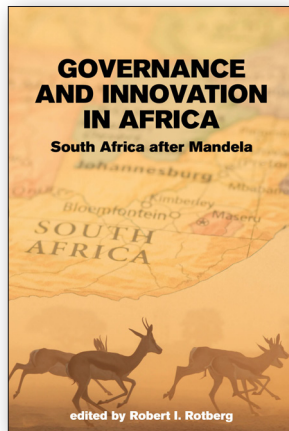
CIGI PRESS



Managing Conflict in a World Adrift
CDN\$50

Edited by Chester A. Crocker, Fen Osler Hampson and Pamela Aall

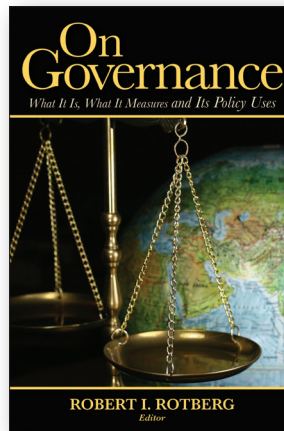
In *Managing Conflict in a World Adrift*, over 40 of the world's leading international affairs analysts examine the relationship between political, social and economic change, and the outbreak and spread of conflict.



Governance and Innovation in Africa
CDN\$25

Edited by Robert I. Rotberg

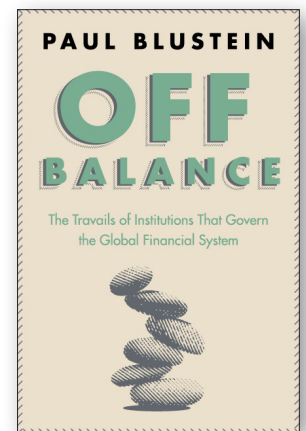
Courageous, intelligent, bold and principled political leadership is required if South Africa is going to build upon Mandela's legacy, according to the expert authors in *Governance and Innovation in Africa*.



On Governance
CDN\$25

Edited by Robert I. Rotberg

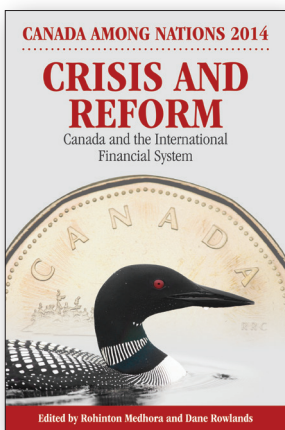
On Governance unpacks the complex global dimensions of governance, and proposes a new theory premised on the belief that strengthened, innovative national and global governance enables positive outcomes for people everywhere.



Off Balance
CDN\$25

Paul Blustein

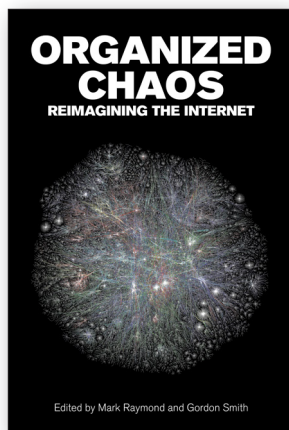
In *Off Balance*, award-winning journalist and author Paul Blustein weaves a compelling narrative that details the failings of international economic institutions in the global financial crisis that erupted in 2008.



Crisis and Reform
CDN\$32

Edited by Rohinton Medhora and Dane Rowlands

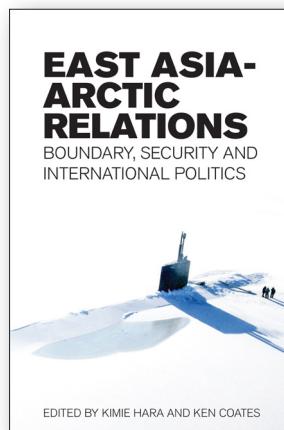
The 28th volume in the influential Canada Among Nations book series, *Crisis and Reform* examines the global financial crisis through Canada's historical and current role in the international financial system.



Organized Chaos
CDN\$25

Edited by Mark Raymond and Gordon Smith

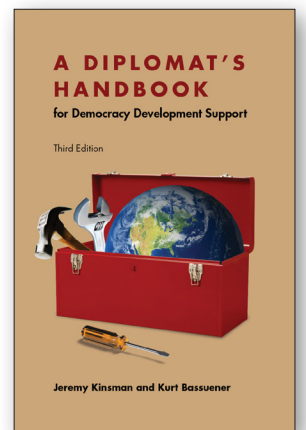
In *Organized Chaos*, leading experts address a range of pressing challenges, including cyber security issues and civil society hacktivism by groups such as Anonymous, and consider the international political implications of some of the most likely Internet governance scenarios in the 2015–2020 time frame.



East Asia-Arctic Relations
CDN\$25

Edited by Kimie Hara and Ken Coates

The culmination of an international collaborative project, *East-Asia Arctic Relations* is a focused and detailed conversation about the historic, contemporary and future dimensions of East Asian countries' relationships with and interests in the Arctic.



A Diplomat's Handbook
CDN\$28

Jeremy Kinsman and Kurt Bassuener

A Diplomat's Handbook for Democracy Development Support presents a wide variety of specific experiences of diplomats on the ground, identifying creative, human and material resources. This book focuses on the policy-making experience in capitals, as democratic states try to align national interests and democratic values.



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ABOUT CIGI

The Centre for International Governance Innovation is an independent, non-partisan think tank on international governance. Led by experienced practitioners and distinguished academics, CIGI supports research, forms networks, advances policy debate and generates ideas for multilateral governance improvements. Conducting an active agenda of research, events and publications, CIGI's interdisciplinary work includes collaboration with policy, business and academic communities around the world.

CIGI's current research programs focus on three themes: the global economy; global security & politics; and international law.

CIGI was founded in 2001 by Jim Balsillie, then co-CEO of Research In Motion (BlackBerry), and collaborates with and gratefully acknowledges support from a number of strategic partners, in particular the Government of Canada and the Government of Ontario.

Le CIGI a été fondé en 2001 par Jim Balsillie, qui était alors co-chef de la direction de Research In Motion (BlackBerry). Il collabore avec de nombreux partenaires stratégiques et exprime sa reconnaissance du soutien reçu de ceux-ci, notamment de l'appui reçu du gouvernement du Canada et de celui du gouvernement de l'Ontario.

For more information, please visit www.cigionline.org.

CIGI MASTHEAD

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