

THE CIGI-YORK INITIATIVE

REPORT OF THE “PANEL OF REPRESENTATIVES”¹ TO OSGOODE FACULTY COUNCIL CONCERNING THE PROTOCOL TO PROMOTE AND PROTECT ACADEMIC FREEDOM

JANUARY 6, 2011

The purpose of this report is to inform Osgoode Faculty Council of proposed revisions to the protocol that was approved by Faculty Council, as a condition of its approval of the initiative, on November 28, 2011. The report also provides background information on a significant outstanding issue that remains under discussion.

The panel has prepared this report and otherwise carried out its role as part of its mandate from to (a) work in collaboration with the Dean to communicate with the parties to the Agreement of August 2011, on request, to clarify/ explain the choice of language in the Protocol, (b) respond to any concerns those parties might have with the language and consider any alternative language that the parties might propose, and (c) report to Faculty Council on these matters, subject in all cases to final approval by Faculty Council of any changes to the Protocol and, in turn, of the initiative.

In the report, we have tended to err on the side of including details about changes and about the outstanding issue in an effort to avoid taking inordinate time to elaborate on this at Faculty Council. We are of course happy to respond to questions before and at the next Faculty Council meeting.

Process followed by the panel

The panel initiated its work shortly after it was established by Faculty Council on November 28, 2011, and this work is ongoing. The student member of the panel, Thomas Wilson, was identified by Student Caucus shortly after the panel was established and has participated in all discussions and decisions of the panel since that time. The panel’s discussions and decision-making were based mainly on email exchanges amongst the panel members or between the panel and Dean Sossin. Its decisions have thus far reflected agreement by all panel members. The discussions among panel members have taken place generally on an assumption of confidentiality within the panel, with some exceptions as indicated below.

The panel sought input on the language of the protocol from outside contacts with expertise in public-private partnerships in the academic sector and in labour law. This was the first time at which input from persons outside of Osgoode faculty was sought in the drafting of the protocol. It was thought important to seek this input given that the protocol was drafted by a small number of Osgoode faculty under significant time pressure and within a confidentiality

¹ The panel members include Thomas Wilson and Professors Carys Craig, Giuseppina D’Agostino, Francois Tanguay-Renaud, Gus Van Harten, and Stepan Wood.

envelope. The Dean was informed of the panel's intention to seek outside input and the input was sought on a confidential basis.² That said, the process for receiving input has not been particularly exhaustive and has involved fairly ad hoc exchanges with a limited range of persons who have volunteered their time. As such, the panel has indicated to the Dean that it might be useful to seek a legal opinion (perhaps jointly between OHFA and Osgoode) on highly technical aspects of the protocol, especially on dispute settlement as discussed further below.

Further input was also sought periodically from other colleagues who were involved in the drafting of the original protocol and those colleagues were apprised generally of the panel's proposals and of progress in discussions with the Dean.

All panel members attended a meeting on December 9, 2011 with Dean Sossin, Associate Dean Puri, and the Dean's Executive Assistants Amanda Wassermuhl and Michelle Berman, at which proposed revisions to the protocol were discussed. It is understood that this meeting took place after an earlier meeting of Dean Sossin and Associate Dean Puri with CIGI representatives. After the meeting on December 9, further discussions took place between the panel and the Dean on proposed revisions, resulting in the resolution of most issues except (especially) for the issue of dispute settlement/ enforceability as outlined later in this report.

Proposed revisions to the protocol

An attached version of the protocol, as revised, highlights most of the changes agreed between the panel and the Dean. In each case, a brief comment has been included to indicate the origin of the change. These comments have been generated by the panel for informational purposes and are not intended to reflect the views of the Dean or others. A small number of very minor changes to the protocol have not been highlighted.

The main changes are:

--in response to a request from the Dean, the panel agreed to modify language in the protocol to express more positively that it reflects a shared commitment of the parties to academic freedom etc.

--in response to a request from the Dean, the panel agreed to relocate provisions on collegial governance, allocation of funds, and earlier reforms of the initiative from the protocol to a separate document entitled Terms of Reference. The panel requested, and the Dean agreed, that this document be incorporated into the protocol and recognized as integral to the initiative and not inconsistent with the August Agreement, etc. in order to maintain the substance of the commitments in the original protocol.

² The panel this week sought and received the consent of Paul Cavalluzzo to report to Faculty Council that he is the outside expert in labour law who was consulted by the panel. It should be stressed that Mr. Cavalluzzo did not provide legal advice but did carry on an extended discussion with a panel member on options and language regarding dispute settlement/ enforceability in the protocol, and the panel has sought to put the various options to the Dean and CIGI as outlined later in this report.

--in response to comments from Professor Cameron, the protocol's definition of academic freedom was elaborated with the agreement of Professor Cameron, Dean Sossin, and the panel members.

--in response to a request from the panel, the Dean agreed to incorporate language clarifying that a decision to refuse to approve the CILGE budget requires the unanimous agreement of both the CIGI and the Osgoode members of the Steering Committee and that the Osgoode members of the Advisory Committee are to be selected by Osgoode rather than the Steering Committee.

--in light of ongoing discussions on the issue, the language on dispute settlement in the protocol has been removed at the Dean's request.

In some cases, the panel expressed disagreement with proposed changes to the protocol on the basis that they could undermine the protections provided in the protocol, and the Dean accepted the panel's position.

It should be stressed that the revisions have been based on collaborative and constructive discussions with Dean Sossin, in which dedicated efforts have been made at all times by the Dean and by panel members to achieve an agreeable outcome.

Outstanding issue: dispute settlement/ enforceability of the protocol

This issue has emerged as a significant outstanding question, although it remains under discussion and we are hopeful that a satisfactory resolution may still be achieved. The issue has proven to be quite complex. However, the panel's position has two basic elements: (a) the protocol should be enforceable, and (b) its enforcement should not depend solely on CIGI and the York University administration.

The underlying concern about enforcement for the panel arose from the non-endowment structure of the initiative and the fact that CIGI will hold the purse strings for the duration of the initiative. It was also thought important for CIGI, while agreeing to sign a strongly-worded protocol, to accept also that its commitments would be enforceable according to the terms of the protocol. More broadly, it was thought, as alluded to by the President when he appeared at Faculty Council, that the non-endowment structure of this initiative charts new ground for York University and, in some respects, for the Canadian legal academy.

In the original protocol, clause 34, enforcement was based on an incorporation of the existing arbitration clause from the August Agreement, which involves a dispute settlement process between CIGI and York University. Osgoode Hall Law School was also identified explicitly as a party that could trigger enforcement of the protocol based on this dispute settlement process. The process was based on arbitration pursuant to the Ontario Arbitration Act, which is understood to entail a commercial arbitration process. Faculty Council and faculty were

recognized as parties with rights or interests protected by the protocol. Finally, the protocol provided that decisions of Faculty Council on academic matters were not subject to any external dispute settlement process.

After seeking input from outside experts, the panel was informed that a weakness of the protocol was its lack of an enforcement mechanism that was independent of CIGI and the York administration, such that those parties could potentially collude to act in violation of the protocol or to disregard concerns expressed by Osgoode faculty, staff, students, etc. about threats to or encroachments upon academic freedom. Also, disputes about academic freedom are usually resolved, not by commercial arbitration, but by arbitrators with labour relations experience in the university sector. Finally, the panel was informed that the protocol should incorporate a limitation-of-jurisdiction clause, if the intention was to contain the role of the commercial arbitrator to non-academic matters, and a standard protection clause in order to preclude variation of the August Agreement or the protocol by a labour or commercial arbitrator.

Around the time that this input was received, the panel was informed by Dean Sossin that there were objections to aspects of the dispute settlement provisions in the protocol and that various provisions called for clarification. These included the provision for York's undertaking to ensure equivalent safeguards of academic freedom for Osgoode faculty as are enjoyed by other York faculty, which the Dean suggested should be moved to a side letter from York to OHFA. They also included a request for clarification of the provision stating that Faculty Council and faculty are parties with rights or interests that are protected by the protocol.

In response, the panel studied closely the issue of dispute settlement and sought further information from others with expertise in the field. It then proposed a dispute settlement process that would (1) contain the commercial arbitration process in the August Agreement and give Faculty Council or OHFA standing to seek judicial review or appeal of a commercial arbitrator's decisions, (2) allow Osgoode or OHFA to trigger an arbitration in order to enforce CIGI's obligations under the protocol and, where the triggering party was OHFA, to use a labour arbitrator with experience in the university sector, and (3) provide for a side letter commitment by York to a York-OHFA arbitration mechanism modeled on the YUFA collective agreement.

After further discussions with the Dean, it was apparent that there were objections, apparently from York, to aspects of this proposal. The Dean proposed an alternative model that appeared to incorporate items (1) and (3) above but without clear language in the protocol itself on the enforceability of CIGI's obligations under the protocol, whether sought by York/Osgoode or OHFA. This last point was regarded by the panel as a fundamental concern. In response, the panel communicated (on December 29, 2011) the following to the Dean:³

“We have found it very helpful these past weeks to clarify aspects of dispute settlement. That said, it seems we are some ways apart on the issue. As we see it, a strong Protocol

³ Our communication has been quoted verbatim only for the sake of efficiency in producing this report.

must be enforceable and its enforcement must not depend solely on CIGI and the York administration for its effectiveness. With respect, your current proposal in our view does not achieve these objectives because, among other things, it excludes any enforcement mechanism from the Protocol, refuses OHFA any opportunity to participate in or seek review of arbitration or court proceedings under the Protocol or the August Agreement, and removes the enforceability of York's proposed commitment to a general arbitration process. So we have reflected further on various options which we think would achieve the two key objectives and which are outlined below, in order of preference from our perspective. Given the importance of the issue for the Protocol as a whole, we ask that you put each of these options to CIGI as soon as possible and that we be informed whether CIGI considers any of them not to be agreeable, and if so why, so that we can inform Faculty Council accordingly.

Option 1 -- OHFA becomes a party to the Protocol

The simplest, clearest and strongest option in our view is to add OHFA as a party to the Protocol. This would recognize the important role and interests of faculty in the protection of academic freedom and allow for representation of that interest (as well as the related interests of academic staff and students) by the faculty association, which is the only viable actor in the picture that is independent of both CIGI and the York administration. It would also make it straightforward to ensure a strong enforcement mechanism by providing for either arbitration or court-based proceedings to enforce the Protocol at the instance of OHFA (or CIGI or York or Osgoode), such that the affected parties could all participate fully in the selection of an arbitrator, the process of the proceeding, the review of any decisions, etc. We do not understand why, if CIGI and York are serious about their commitments under the Protocol, they would not be amenable to this option. If any difficulties arise in relation to OHFA not yet having a mandate in relation to the initiative, then this can be resolved by language in the Protocol that invites OHFA to join the Protocol as a party in exchange for a commitment by OHFA to work collaboratively with the other parties and make best efforts to implement the protocol. For these reasons, we request and would very much appreciate it if this option were put to CIGI and if we were informed of their response including any rationales for rejecting this option.

Option 2 -- OHFA is not a party to the Protocol but is recognized as a protected third party that can seek enforcement

This is the next-best option as we see it. It is strong but more complex than option 1 and carries the uncertainty that OHFA's status as a third party enforcer might not be recognized by a court or arbitrator on the basis of privity of contract. This risk is significant but may prove acceptable if Option 1 is rejected by CIGI, although it would require careful drafting of the dispute settlement clause (we would prefer it if Osgoode and OHFA jointly sought legal advice on the appropriate language) and would depend on a provision for either arbitration or court-based proceedings in the Protocol. In either

case, the third party could trigger enforcement of the protocol and participate as a party to the arbitration or court proceeding. In the case of arbitration, the third party would have the right to consent to the choice of arbitrator. If agreement was not reached on an appropriate arbitrator, the matter could be referred to court with a requirement that the judge appoint an arbitrator who had experience in academic freedom etc. where the dispute related to academic rather than commercial matters.

Option 3 -- OHFA is not a party to the Protocol and cannot seek enforcement directly under the Protocol, but has limited participatory rights in any direct proceeding and can pursue a remedy indirectly against York in the event of an alleged breach by CIGI

We see this as a much weaker option than the above two, especially because CIGI and York could together decline to seek enforcement of the Protocol in the face of a violation by either or both parties, with OHFA and individual faculty unable to force the issue. We are very concerned about this potential situation given the obvious interest that York will have to maintain good relations with a major private funder. Further, the resort to a side arbitration process between OHFA and York exacerbates the existing limitations of any enforcement process in the faculty interest due to the associated additional cost, delay, and legal uncertainty of an indirect enforcement method, rooted in OHFA's status as the weaker party (i.e. OHFA has no budget and no capacity to raise funds other than by voluntary contributions). That said, with careful design it might be possible to craft an alternative whereby OHFA maintained some basic rights of participation in the other arbitration or court proceedings with an option to pursue indirect enforcement against York. This design would at least need to incorporate the following (again, we would prefer it if Osgoode and OHFA jointly sought legal advice on the appropriate language): (1) OHFA could seek judicial review or appeal of any commercial arbitration award under the August Agreement, especially on the issue of whether the arbitrator exceeded his or her jurisdiction by encroaching on matters of academic freedom etc. (incidentally, we see this as a component of all options to ensure that a commercial arbitrator cannot, with CIGI and York's acquiescence, exceed his or her jurisdiction by ruling on academic matters); (2) York/ Osgoode could not agree to appointment of an arbitrator without OHFA's consent to the individual arbitrator where OHFA felt that the dispute related to academic freedom etc.; (3) in the absence of agreement between the parties on the appointment of an arbitrator in any specific case, the judge would be directed to appoint by default a person with experience in matters of academic freedom etc. who was perceived as neutral vis a vis the affected parties including OHFA, after receiving input on prospective arbitrators from the affected parties including OHFA; (4) CIGI, York, and Osgoode would agree not to object to OHFA being added as a party to an arbitration or court proceeding in the discretion of the arbitrator or judge, and (5) York's commitment to side arbitration would be detailed and enforceable, as outlined in the next paragraph.

This brings us to the proposal that the undertaking by York to ensure that Osgoode faculty have equivalent safeguards of academic freedom etc. to those enjoyed by other

York faculty should be removed from the Protocol and conveyed instead in a side letter to OHFA and, in turn, that the side letter would speak to York and OHFA agreeing to an arbitration process. We understand that this envisions a general arbitration mechanism (rather than one limited specifically to the York-CIGI initiative) between OHFA and York, given that pressure may obviously be brought to bear on a faculty member, student, etc., as a result of the initiative but in ways not evidently related to it. We assume also that York is favourably disposed to such a mechanism regardless of the CIGI initiative (if this is not so then we request to be informed of this). On this basis, we do not understand why York would refuse to make its commitment to such a mechanism, in a York-OHFA letter, binding by way of referral to a neutral third party (with reference to the YUFA-based mechanism but on a single-arbitrator model [which we understand is now common practice for cost reasons]) following a certain cut-off for York-OHFA discussions. While we are flexible on the 90-day deadline, we think it sensible not to extend the deadline into the distant future and, in any event, not to extend it beyond the current OHFA Executive's term which ends on June 30, 2012. Further, we think that the side agreement between York and OHFA would need to make very clear York's indirect obligations and the availability of a remedy in relation to a breach by CIGI along these lines: 'If CIGI or York breaches the protocol in any way, including but not limited to a withdrawal or withholding by CIGI of funds that relates to or affects academic freedom or academic integrity in any way, then York shall provide an appropriate remedy to Osgoode Hall Law School, OHFA, and/ or any affected Osgoode faculty member(s), staff member(s), or student(s) including, where there is a withdrawal or withholding of funds, providing an amount of funds to Osgoode Hall Law School that is equivalent to the funds that were withdrawn or withheld.'

Also, and critically, the Protocol itself would need to contain an enforcement mechanism based on an arbitration or court-based proceeding, as between CIGI, York, and Osgoode, with OHFA having limited participatory rights as outlined above.

Obviously, option 3 has a number of permutations and complexities which can best be avoided, we think, by adopting option 1. In any event, we hope that by laying out a series of specific options in detail, CIGI will have an opportunity to reflect on the importance and value of a strong protocol as an integral component of the initiative and to choose an approach that is amenable from its perspective. We hope that one or more of these is agreeable and, on this point, we ask to be advised before January 5 whether CIGI objects to any of these options (or any of their various elements) and, if so, which ones and why, so that we can inform Faculty Council accordingly...."

At present, issues raised in this email are outstanding, although the panel remains optimistic that an agreeable resolution can be reached through ongoing collaboration with the Dean. We also do not wish to fault the Dean in any way for not having been in a position to provide an answer on these options to this date, given their complexity. To reiterate, the key elements of the panel's position have been, again, that the protocol should provide for a mechanism by

which CIGI's obligations can be enforced and that such enforcement should not depend solely on CIGI and the York University administration for its effectiveness.

Lastly, there is no doubt an element of fatigue about the initiative at this stage. However, we think it important in these final stages to ensure that the initiative is neither accepted based on a compromise of fundamental principles in the protocol nor rejected without the utmost efforts to offer a range of options by which the initiative can proceed based on fundamental principles. For this reason, we have continued to invest a great deal of time and energy working on the key outstanding issue of dispute settlement/ enforceability.

**Protocol to promote and protect academic freedom and academic integrity in the collaboration between the CIGI and Osgoode Hall Law School of York University
January 5, 2012**

Comment [GVH1]: The Dean proposed to change the original “safeguard” to more positive language, here and throughout the protocol. After discussion, the panel and the Dean agreed to “promote and protect”.

1. In this protocol:

- a. “academic freedom” means the freedom to examine, question, teach, and learn; to disseminate opinion(s) on any questions related to the individual’s teaching, service, professional activities, and research both inside and outside the classroom; to pursue without interference or reprisal the individual’s research, extramural, creative, or professional activities, and to freely publish and make public the results thereof; to criticize a contributor or the University or society at large; and to be free from institutional censorship. Academic freedom does not require neutrality on the part of the individual nor does it preclude commitment on the part of the individual. Rather, academic freedom makes such commitment possible. In all respects, academic freedom is a general right of the academic and is not specific to or narrowly defined by a faculty member’s specific area(s) of expertise.
- b. “academic partners” means York University and Osgoode Hall Law School.
- c. “Agreement” means the Agreement signed in August 2011 among the Centre for International Governance Innovation (a non-share capital corporation incorporated under the laws of Canada and hereinafter called “CIGI”) and York University (a university incorporated under the laws of Ontario and hereinafter called the University) (attached);
- d. “CIGI” means the Centre for International Governance Innovation.
- e. “CLA” means a faculty member who has a contractually-limited academic appointment;
- f. “contributor” means any private or public actor, external to the academic partners, that contributes funds or other support to the initiative or otherwise to York University or Osgoode Hall Law School.
- g. “Executive Director” means the executive director referred to in clause 7 of the Agreement and/ or the executive director of any other centre associated with the initiative;
- h. “faculty” means tenure-stream faculty at Osgoode Hall Law School of York University and any CLAs hired pursuant to the Agreement;
- i. “Faculty Council” means Faculty Council of Osgoode Hall Law School of York University;
- j. “faculty recruitment processes” refers to the rules and procedures for faculty recruitment as set by Faculty Council subject to the relevant rules and procedures of York University Senate.
- k. “initiative” means the development, establishment, construction, operation, modification, and/ or termination of any program and/ or centre based on the terms of this Agreement and affiliated with Osgoode Hall Law School;
- l. “OHFA” means the Osgoode Hall Faculty Association as the customary bargaining agent for Osgoode Hall Law School faculty;

Comment [GVH2]: The highlighted additions to the definition of academic freedom in this clause were proposed by Professor Cameron and agreed by the panel and the Dean.

Comment [GVH3]: The Dean proposed to replace “donor” with “contributor”. After discussion, the panel agreed, but expressed the view that this could be perceived as an attempt to avoid the University gifts policy. The change is reflected throughout the protocol.

Comment [GVH4]: The Dean proposed to include a reference to public actors, i.e. government, and the panel agreed, while expressing the view that, to bind the government would require an agreement to which the government was a party.

Comment [GVH5]: The Dean proposed to add the highlighted language as a means to strengthen the protocol and the panel agreed.

- m. “the parties” means the parties to the Agreement, namely CIGI, York University, and Osgoode Hall Law School;
- n. “program or centre” means the Centre for International Law in the Global Economy (CILGE) or any other program or centre that receives funding based on the terms of the Agreement;
- o. “Steering Committee” means the Steering Committee referred to in clause 3(a) of the Agreement; and
- p. “Terms of Reference” means the Terms of Reference for the program or centre (attached).

Comment [GVH6]: The attached Terms of Reference are new. They were developed after the Dean requested to move various clauses in the protocol to a separate document. After discussion, the panel and the Dean agreed to the attached Terms of Reference.

- 2. This protocol clarifies and elaborates on a collaboration involving CIGI and York University to establish a program and/ or centre affiliated with Osgoode Hall Law School. The purpose of the initiative is to advance research, teaching, and other scholarly activities (including contributions to public debate and policy activities) in the areas of international economic law (including trade, investment and finance), international intellectual property law, and international environmental law. The initiative is based on substantial funding from the Government of Ontario and Mr. Jim Balsillie.

Comment [GVH7]: The highlighted additions in this clause were requested by the Dean and agreed by the panel.

Principles of academic freedom and integrity

- 3. The parties recognize and agree that the success of the initiative depends on mutual trust and collaboration and on a shared commitment to ensure academic freedom, academic integrity, and the institutional autonomy of the academic partners. This includes the promotion and protection of the academic freedom of individual researchers and teachers who are engaged with the initiative, including faculty, students, and academic administrators, including the freedom to pursue research that may criticize the parties or a contributor. CIGI, York University and Osgoode Hall Law School share a commitment to these principles and agree to implement rigorous safeguards to ensure that the initiative does not infringe academic freedom, academic integrity, or the institutional autonomy of the academic partners.

Comment [GVH8]: The Dean requested to change the highlighted language in this clause and the next clause from “protection” etc. to more positive language. After discussion, the panel agreed.

- 4. The parties agree that the academic partners shall have exclusive decision-making authority over the setting of academic priorities, the recruitment or appointment of faculty, the renewal or termination of faculty, the tenure or promotion of faculty, the setting of research agendas of individual faculty or students, the admission of students, the creation or revision of academic programs, the design of curricula, the issuance of degrees, and all other matters relating to academic freedom and integrity. The sole exception to this principle is the role that has been played by the parties and/ or contributors in setting the subject areas for the initiative as described in Schedule “A” to the Agreement.

- 5. The parties agree that the Steering Committee will play an advisory role in the development of the initiative, consistent with and limited by the terms of this protocol.

Comment [GVH9]: The Dean requested the addition of language to this effect. After discussion, the panel agreed.

6. For greater certainty, any doubt in the interpretation of the Agreement, this protocol, or any other agreement or instrument relating to the initiative shall be resolved in favour of promoting and protecting academic freedom, academic integrity, and the institutional autonomy of the academic partners.

Academic policy and programming

7. The academic partners retain exclusive authority over all matters of academic policy and programming, determined as such in the sole and absolute discretion of Faculty Council, relating to the initiative. While it is expected that the Steering Committee will receive relevant information about decisions of Faculty Council, for greater certainty, the academic partners are under no obligation to provide notice of any decision of Faculty Council on any matter of academic policy and programming, notwithstanding any provision of the Agreement including but not limited to clause 6(c)(i) of the Agreement. Also for greater certainty, the authority of Faculty Council over such matters is not constrained or otherwise affected by any provision of the Agreement including but not limited to clauses 6, 8, 10, 24, or 25 of the Agreement.

Comment [GVH10]: The Dean requested the addition of this clarification. The panel agreed.

Comment [GVH11]: The panel requested inclusion of this reference to clause 6 after receiving input from an outside expert. The Dean agreed.

Recruitment and appointment of faculty

8. All decisions related to the recruitment and appointment of faculty shall be taken based on the faculty recruitment processes of the academic partners. No contributor, and no party other than the academic partners, shall have any decision-making role in the recruitment and appointment of faculty. The role of a contributor or such party shall be limited to providing suggestions on the identification of candidates for recruitment, notwithstanding any provision in the Agreement including but not limited to clauses 4, 14, 17, and 25 of the Agreement.

Comment [GVH12]: The Dean requested the addition of this adjective. The panel agreed but requested the remaining highlighted language, to which the Dean agreed.

Renewals of faculty appointments

9. All decisions related to the renewal of faculty appointments shall be taken based on processes that are designated and approved for this purpose by Faculty Council. These processes are expected to be based on aspects of the faculty recruitment and appointment process or the tenure and promotion process of Osgoode Hall Law School as determined and approved by Faculty Council. To ensure the promotion and protection of academic freedom, a contributor shall not have any role (including any role in making suggestions or in providing advice of any kind) in the renewal of any faculty appointment.

Academic freedom of faculty members

10. Faculty have the right to freedom of teaching and discussion and to freedom in carrying out research and disseminating and publishing the results. The planning and design of a research project, collection of data, and analysis and dissemination of results shall be under the control of the researcher and not a contributor or organizational partner. In the conduct

Comment [GVH13]: Language in the following clause of the original protocol stated that York would undertake to provide equivalent safeguards of academic freedom as are enjoyed by other York faculty. At the request of the Dean, this language has been moved to a separate letter from York to OHFA. The panel agreed, but sought clarification of York's commitment after receiving input from an outside expert. The content of the York-OHFA letter is still under discussion.

of their work, faculty and other researchers shall have access to all data and findings collected in a research project and shall retain the right to share results of their research with other academic researchers and to publish the product of their research without hindrance or delay. A contributor shall not have any influence over any matter of academic freedom or integrity relating to the initiative, notwithstanding any provision of the Agreement including but not limited to clause 25 of the Agreement.

Comment [GVH14]: The highlighted sentence was moved from the beginning to the end of the paragraph at the request of the Dean. The panel agreed.

- 11. The intellectual property of faculty and other researchers, inclusive of their research findings, shall be defined by the normal rules and procedures of the academic partners for the recognition and protection of such intellectual property.

Terms and conditions of employment of faculty

- 12. The salary and benefits of faculty appointed pursuant to the initiative shall be set in accordance with the normal policies and practices of the academic partners for faculty members of Osgoode Hall Law School. For greater certainty, no separate stipend shall be provided to any faculty associated with the initiative, other than the Executive Director, as a component of their academic appointment.
- 13. The terms and conditions of tenure-stream faculty appointed pursuant to the initiative shall be commensurate with those of other Osgoode Hall Law School faculty, except as follows in this clause. The teaching responsibilities of such faculty shall constitute approximately half of the regular teaching load of faculty at Osgoode Hall Law School and shall in general include, based on the normal procedures by which teaching responsibilities are assigned at Osgoode Hall Law School, responsibility for at least one high-enrolment course in the J.D. program. In addition to any administrative responsibilities they may be given in relation to the initiative itself, faculty appointed pursuant to the initiative shall take part fully in the governance and administrative activities (committees, etc.) of the academic partners.
- 14. Notwithstanding clauses 14 and 17 of the Agreement, which refer to faculty appointed pursuant to the initiative as tenured or tenure stream faculty, such faculty may be appointed by the academic partners with tenure, on a tenure-stream basis, or as CLAs. The parties expect that approximately half of the faculty appointed pursuant to the initiative will be CLAs, as determined by the academic partners.
- 15. All faculty who are appointed pursuant to the initiative shall be eligible for membership in OHFA according to its terms and conditions of membership. In this respect, it is expected that tenure-stream faculty associated with the initiative will become members of OHFA and that CLAs associated with the initiative may become OHFA members, in both cases as determined by OHFA.

Academic freedom and integrity of the Executive Director

16. The Executive Director of any program or centre associated with the initiative, once appointed, will be a tenured or tenure-stream faculty member of Osgoode Hall Law School who shall have all the protections of academic freedom of other faculty. The Director will be responsible for the direction and operations of the program or centre free from any actual or apparent pressure from any contributor on her or his academic freedom or integrity.

Collegial academic governance of the initiative

17. The process outlined in clauses 18 to 22 of this protocol is intended to ensure that: (a) the Executive Director is protected from any reasonable perception of improper influence by any contributor on her or his academic freedom or integrity or on that of the initiative as a scholarly endeavour and (b) the academic community of Osgoode Hall Law School has an ongoing and meaningful role in the governance of research, teaching, and other scholarly matters relating to the initiative. In this respect, the parties recognize that there are existing programs and activities at Osgoode Hall Law School Relating to the subject areas of this initiative, such as the Osgoode Intellectual Property Law & Technology Program (IP Osgoode), that are integral to the success of the initiative. A range of funding commitments in this respect are set out in the Terms of Reference. Decisions on the allocation of funding will be made by the Executive Director, consistent with the terms of this protocol and subject to the involvement and oversight of Faculty Council in the manner set out in the Terms of Reference.

18. A body will be designated and approved by Faculty Council for the collegial academic governance of the initiative. It is expected that:

- a. this body will be a new or existing committee of Faculty Council;
- b. the mandate of this body will include the provision of advice and support to the Executive Director and the receipt and consideration of periodic reports from the Executive Director;
- c. the make-up of this body will include both faculty whose research activities fall within and faculty whose research activities fall outside the subject areas of the initiative; and
- d. one or more, but not a majority of, members of this body may be faculty who are members of the Advisory Committee referred to in clause 5 of the Agreement.

In all respects, the designation, establishment, mandate, make-up, rules, procedures, and all other aspects of this body shall be determined and approved by Faculty Council.

19. The Executive Director shall provide an annual report to the Steering Committee on financial and administrative matters that are not matters of academic policy and programming. Pursuant to clause 3(a)(iv) of the Agreement, the Steering Committee shall approve the annual budget for the program or centre as provided by the Executive Director. For greater certainty, any decision by the Steering Committee not to approve the annual budget shall require the unanimous approval of the members of the Steering Committee

Comment [GVH15]: The highlighted language has been revised at the request of the Dean. Portions have been moved to the attached Terms of Reference. After discussion, the panel agreed to the changes.

Comment [GVH16]: The Dean requested the addition of this language and the panel agreed.

described in subparagraphs (b) and (c) of clause 4 of the Agreement. Such a decision shall be accompanied by written reasons and shall not be based on any grounds relating, directly or indirectly, to matters of academic policy or programming.

Comment [GVH17]: The panel requested this clarification and the Dean agreed.

Comment [GVH18]: Additional language in this sentence that a decision of the Steering Committee would be based on financial or administrative grounds was removed at the request of the Dean, with the panel's agreement. The addition of "directly or indirectly" in this sentence was requested by the panel and the Dean agreed.

20. The Executive Director shall provide an annual report to the body referred to in clause 18 of this protocol on matters of academic policy and programming, including on research, teaching, and other scholarly activities relevant to the initiative, according to relevant rules and procedures approved by Faculty Council. Where there is an apparent overlap between the reporting mandates outlined in clauses 19 and 20 of this protocol, then the relevant matters shall be assumed to be matters of academic policy and programming for the purposes of this Agreement, except that the Executive Director shall report on the relevant matters both to the Steering Committee and to the body referred to in clause 18 of this protocol.

Comment [GVH19]: The highlighted language in this clause was added at the Dean's request and with the panel's agreement.

21. Any reports or other documentation exchanged between the Steering Committee and the Executive Director shall be provided at or around the same time to the body referred to in clause 18 of this protocol. Any reports or other documentation exchanged between that body and the Executive Director shall be provided at or around the same time to the Steering Committee.

22. York University's representatives to the Steering Committee shall include the Dean of Osgoode Hall Law School and a faculty member at Osgoode Hall Law School selected annually by Faculty Council. The Advisory Committee, to be appointed by the Steering Committee pursuant to clause 5 of the Agreement, shall be comprised of globally recognized leaders in each of the three designated subject areas. The members of the Advisory Committee shall include no fewer than three faculty members of Osgoode Hall Law School, one in each of the three designated subject areas or analogous/ cross-cutting areas, to be selected by Osgoode Hall Law School.

Comment [GVH20]: This highlighted language was proposed by the Dean and agreed by the panel.

Comment [GVH21]: This highlighted language was proposed by the panel, but provided for selection by the Osgoode members of the Steering Committee. After discussion with the Dean, the panel and the Dean agreed on selection by Osgoode Hall Law School, on the understanding that the selection of Osgoode's members of the Advisory Committee will be subject to Faculty Council's authority.

Publication of this protocol and the initiative

23. The Agreement and this protocol shall be made public at the time that this protocol takes effect and shall be posted without unreasonable delay on the website of the program or centre. No agreement relating to the initiative that is not public has any legal effect unless that agreement has been provided to Faculty Council and Faculty Council has approved, by a two-thirds majority of its voting members, a motion to keep confidential the agreement or any portion of it.

Comment [GVH22]: The Dean requested that various provisions on the "Collegial governance of Osgoode-allocated funds", on "Disbursement of funds", and on "Other reforms to the initiative" be moved from the protocol to a separate Terms of Reference (attached). After discussion, the panel agreed.

Notice of any dispute and resulting termination of funding

24. In the event of a dispute under the Agreement or otherwise relating to the initiative, the salary and benefit costs of any personnel at the program or centre, in circumstances where those salary and benefit costs are otherwise paid through funds owed under the Agreement, shall continue to be paid through such funds for a period of six months after

notice of the dispute has been given by a party to the Agreement to another party to the Agreement. Upon receipt of notice of a dispute under the Agreement or otherwise relating to the Initiative, any party to the Agreement shall provide promptly a copy of such notice to the Dean of Osgoode Hall Law School who shall in turn provide a copy to Faculty Council at the earliest opportunity.

Pre-eminence of this protocol

25. The parties agree that this protocol amends and elaborates on, and in all respects takes precedence over, the Agreement and any other agreement(s) relating to the initiative and entered into by any one or more of the parties, to the extent of that party's or those parties' obligations. For greater certainty, this protocol is not subject to the terms of the Agreement, notwithstanding any provision to the contrary in the Agreement including but not limited to clause 21 of the Agreement.

26. In light of the shared goals of the parties to promote and protect academic freedom, academic integrity, and the institutional autonomy of the academic partners, and for greater certainty, the terms of this protocol shall prevail over any terms of the Agreement that are inconsistent with or otherwise limit, directly or indirectly, any provision of this protocol, including but not limited to clauses 3(a)(i) and 3(a)(ii) [concerning research agendas of individual faculty], clauses 3(a)(iii), 6(a), 6(c), and 22 [concerning appointment, renewal, and termination of faculty], and clause 3(a)(v).

Comment [GVH23]: The Dean requested that language in this and the next highlighted portion be modified to make it more positive. The panel agreed.

Comment [GVH24]: The additional references to the highlighted clauses were requested by the panel after receiving input from an outside expert. The Dean agreed.

Other provisions

27. The recruitment and appointment of faculty, hiring or appointment of staff and administrative personnel, and allocation of funds for research or other related expenses of the program or centre shall be consistent with the academic partners' policies on conflicts of interest. Related decisions shall be made in an objective manner and on objective grounds and must be seen to be so.

28. This protocol takes effect upon the signature of the protocol by all of the parties to the Agreement and approval of the initiative by Faculty Council. Any other agreement relating to this protocol, including any subsequent agreement, by any one or more the parties to the Agreement that purports to alter in any way this protocol shall take effect upon approval of the relevant alteration(s) by a two-thirds majority of the voting members of Faculty Council.

29. [Dispute resolution mechanism to be determined].

Comment [GVH25]: The issue of dispute settlement/ enforceability of the protocol remains under discussion, as outlined in the panel's attached report.

30. This protocol incorporates the Terms of Reference, the terms of which are integral to and not inconsistent with the initiative and shall prevail according to clauses 25 and 26 of this protocol, subject in all respects to the terms of this protocol.

Comment [GVH26]: The panel requested this language in conjunction with the relocation of various clauses to the Terms of Reference. The Dean agreed.

Attachment 1
Terms of Reference

1. These Terms of Reference elaborate on aspects of the initiative outlined in the Protocol to promote and protect academic freedom and academic integrity in the collaboration between the CIGI and Osgoode Hall Law School of York University (“the protocol”) and in the Agreement signed in August 2011 among the CIGI and York University (the Agreement). The Terms of Reference apply to the Centre for International Law in the Global Economy and to any other program or centre (the program or centre) that receives funding based on the terms of the Agreement. The Terms of Reference are subject in all respects to the terms of the protocol and the Agreement.

Comment [GVH27]: This language was proposed by the panel as a component of the Terms of Reference and the Dean agreed. The language in the Terms of Reference tracks generally the language previously incorporated into the protocol.

Collegial governance of Osgoode-allocated funds

2. The budget for the initiative shall include an annual minimum of \$100,000 in funding (disbursed based on actual expenditures) for internship, external placements, and other experiential educational opportunities in the areas of the program or centre’s activities.
3. The budget for the initiative will include an annual minimum of \$200,000 in funding (disbursed based on actual expenditures) for research and research collaborations at Osgoode Hall Law School in the areas of the program or centre’s activities.
4. The process for disbursement of funds referred to in clauses 2 and 3 of these Terms of Reference shall be approved by the body referred to in clause 18 of the protocol according to procedures approved by Faculty Council. It is understood that the model for approval of disbursement of these funds may include, in the discretion of the aforementioned body, a process for general disbursement of funds to all faculty, project-specific approvals, and/or approval of specific projects as recommended by the Executive Director based on general criteria set by the aforementioned body.

Comment [GVH28]: The Dean proposed the addition of this language and the panel agreed, while expressing the view that the language maintains the discretion of the specified Faculty Council body to decide how to allocate the funds that are subject to this clause.

Disbursement of other funds

5. It is understood that any other funds, beyond those referred to in clauses 2 and 3 of these Terms of Reference and otherwise associated with the initiative, that flow to Osgoode will be used for the benefit of students and faculty at Osgoode Hall Law School for research and teaching purposes consistent with the subject areas and objectives of the program or centre, and that the disbursement of such funds will be at the discretion of the Executive Director, subject to the terms of the protocol and the Agreement. An important principle of the initiative is to enhance access to learning and educational opportunities for Osgoode students without increasing the tuition costs of students.
6. The Executive Director shall develop and implement transparent, fair, and objective procedures specifying how faculty, post-doctoral appointees, students, and others can

Comment [GVH29]: This language was requested by the panel and agreed by the Dean. The panel also requested a commitment from York/Osgoode to Osgoode student groups as follows: “In the unlikely event that there is any adverse impact on the budget of Osgoode Hall Law School arising from the initiative, whether directly or indirectly, York University agrees that there shall not be any tuition increase to Osgoode students as a result of this adverse impact.” The panel understands that the Dean has agreed to this although an issue appears to have arisen recently as to its form. The panel is optimistic that this can be resolved.

apply for funding pursuant to the initiative and what evaluation and selection criteria will be used. The procedures shall include clear conflict of interest provisions.

7. To encourage collaboration and integration of the initiative in the general activities of Osgoode Hall Law School, the Executive Director shall consider the advice of the body referred to in clause 18 of the protocol when making decisions about disbursement of such funds and shall provide an annual report to that body on the outcomes of such disbursement. In this respect, the parties recognize that there are existing programs and activities at Osgoode Hall Law School relating to the subject areas of the initiative, such as IP Osgoode, that are integral to the success of the initiative and that, pursuant to the mechanism referred to in clause 7 of these Terms of Reference, will receive substantial funding as well as other forms of recognition and support from the initiative.

Comment [GVH30]: The Dean requested the addition of this language and the panel agreed.

Comment [GVH31]: The Dean requested this highlighted modification of the language. After discussion, the panel agreed.

8. The parties expect that the Executive Director, pursuant to her or his responsibilities under clauses 7 and 3(a)(iv) of the Agreement, in developing the mechanisms for allocating the program or centre’s budget will establish a transparent, equitable, and collegial approach to ensure the full participation of faculty in the activities of the program or centre.

Other reforms to the initiative

Comment [GVH32]: The Dean proposed that this portion of the protocol should refer to the list of commitments related to the library and the graduate program rather than to the various documents submitted previously to Faculty Council. After discussion and a review of the earlier documents, the panel agreed.

9. The parties agree that the components of the initiative relating to Osgoode Hall Law School’s graduate program, J.D. program, and library as set out below are compatible with the Agreement and are integral to the initiative, subject in all respects to the terms of the protocol.

10. In addition to the other needs of the program or centre, as identified by the Executive Director, the budget for the program or centre shall include sufficient funding to address program-related needs of Osgoode Hall Law School, such as in areas of the library and graduate administration.

11. The commitment to have the program or centre’s activities fully funded from CIGI funds includes a commitment that there will be no negative impact on the resources of Osgoode Hall Law School’s library, and that new services, licenses, collections, staffing needs, etc. will all be funded from the resources of the proposed program or centre, as needed.

12. Further to the input of the Osgoode Hall Law School Graduate Studies Committee, the following set of guiding principles will apply to the activities of the program or centre, and of faculty appointed pursuant to the initiative, relating to graduate legal education.

Comment [GVH33]: The following list of items is based on a cut and paste from the earlier Faculty Council documents on the graduate program, with some modification of language (proposed by the panel and agreed by the Dean) in order to clarify and ensure consistency with other language in the protocol.

a. The establishment of the program or centre does not affect or diminish the Graduate Program Director and Graduate Studies Committee’s ongoing responsibility for all aspects of the Graduate Program currently under their jurisdiction.

- b. The establishment of the program or centre does not affect or diminish Osgoode Graduate Program's commitment to offer opportunities to obtain research based LLMS and PhDs in a wide range of specializations.
- c. The establishment of the program or centre does not affect or diminish Osgoode's commitment, in light of the external funding support for students associated with the program or centre, to balance out opportunities for higher levels of financial support among all students entering Osgoode's Graduate Program. This may include, among other initiatives, giving priority consideration for internal scholarship funds that are not tied to subject areas and objectives of the program or centre.
- d. The establishment of the program or centre does not affect or diminish Osgoode's commitment that the additional graduate spaces related to the initiative will not reduce the number of spaces available to domestic or international students applying to the program in other fields.
- e. Osgoode students who receive scholarships related to the initiative, including those students who are to be based in Waterloo, will be subject to all currently existing Osgoode Graduate Program requirements, including participation in required coursework, and study groups, at Osgoode.
- f. All Osgoode graduate faculty will be eligible to supervise all students, regardless of their funding source.
- g. Notwithstanding the location of their offices, faculty appointed pursuant to the initiative will be expected to participate in person in the teaching and supervision of graduate students at Osgoode.
- h. Osgoode will budget for anticipated additional expenses relating to additional costs of overhead and administration of the Graduate Program at Osgoode resulting from the program or centre, including the need to provide services to students who may be located primarily in Waterloo.

Attachment 2
Agreement of August 2011
[see Faculty Council motion of November 28, 2011]