

<b>Title</b>	<b>1985 Trusts Convention: Report and proposed publication</b>
<b>Document</b>	<b>Prel. Doc. No 13B of January 2025</b>
<b>Author</b>	PB
<b>Agenda Item</b>	Item III.3.b
<b>Mandate(s)</b>	C&D Nos 55 and 56 of CGAP 2024
<b>Objective</b>	To provide a report on post-Convention work and propose future work on the HCCH 1985 Trusts Convention
<b>Action to be Taken</b>	For Decision <input checked="" type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input type="checkbox"/>
<b>Annexes</b>	Annex I – HCCH-STEP Survey on the HCCH 1985 Trusts Convention Annex II – Draft Table of Contents of Proposed Publication
<b>Related Documents</b>	<ul style="list-style-type: none"> <li>• <a href="#">Prel. Doc. No 15B of February 2024</a> - 1985 Trusts Convention: Update</li> <li>• <a href="#">Prel. Doc. No 10C of December 2022</a> - 1985 Trusts Convention: Updates and possible future work</li> <li>• <a href="#">Prel. Doc. No 14 of November 2021</a> - The HCCH 1985 Trusts Convention: Updates and possible future work</li> </ul>

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# 1985 Trusts Convention: Report and proposed publication

## I. Introduction

- 1 The *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (HCCH 1985 Trusts Convention or Trusts Convention) entered into force on 1 January 1992 and is to date in force in 14 jurisdictions.<sup>1</sup> In March 2024, the Council on General Affairs and Policy (CGAP) mandated the Permanent Bureau (PB) of the HCCH to continue to study the interpretation of analogous institutions for the purpose of Article 2 of the Trusts Convention, with a focus on:
  - a. clarifying the divergences in interpretation between the English and French versions of the Article; and
  - b. exploring whether analogous institutions would include foundations and endowments, institutions and developments relating to the waqf in the Islamic legal tradition, and decentralised autonomous organisations (DAOs) and other similar structures.<sup>2</sup>
- 2 CGAP also mandated the PB to continue monitoring developments relating to the Trusts Convention in order to identify areas for review and future work, and to develop promotional materials on the Convention, subject to available resources.<sup>3</sup>
- 3 In fulfilment of the mandate given by CGAP in 2024 and in previous years, this Preliminary Document (Prel. Doc.) reports on the findings of the PB's study of the interpretation of analogous institutions, including the outcomes of a joint survey conducted by the PB and the Society of Trusts and Estates Professionals (STEP). It is proposed that CGAP consider mandating the establishment of an online Working Group (WG) to review and finalise the outcomes of the study, with a view to its publication. The outcomes of the study not only reinforce the continuing relevance of the Trusts Convention, but its publication would also increase awareness of the Convention and improve its effective operation.

## II. Report on the study on institutions analogous to trusts (2020-2024)

### A. Background

- 4 The current work on the Trusts Convention started in March 2020 when, in response to the commitment of the PB to promote interest in the HCCH commercial and financial instruments, CGAP mandated the PB to “commence research and preparations in relation to the commercial and financial law questionnaire and the possible international conference to be held in late 2022, coinciding with the 30th anniversary of the entry into force of the Trusts Convention”.<sup>4</sup>
- 5 Prel. Doc. No 15 of December 2020,<sup>5</sup> presented to CGAP in 2021, highlighted challenges to a wider adoption of the Trusts Convention stemming from fundamental differences in relation to the interpretation of Article 2 and the types of institutions that would fall within its scope. Continuing questions relating to interpretation of the Convention were discussed, and it was suggested that

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<sup>1</sup> The Convention has 14 Contracting Parties: Australia, Canada (9 Territorial units), Hong Kong Special Administrative Region (China), Cyprus, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Panama, San Marino, Switzerland, and the United Kingdom (UK).

<sup>2</sup> “Conclusions and Decisions of the Council on General Affairs and Policy of the Conference (5-8 March 2024)”, C&D No 55, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Governance” then “Council on General Affairs and Policy” and “Archive (2000-2024)”.

<sup>3</sup> C&D No 56 of CGAP 2024.

<sup>4</sup> C&D No 39 of CGAP 2020.

<sup>5</sup> “The HCCH 1985 Trusts Convention: Updates and Possible Future Work”, Prel. Doc. No 15 of December 2020, available on the HCCH website at [www.hcch.net](http://www.hcch.net) (see path indicated in note 2).

the expanded membership of the HCCH provided an opportunity to gather inputs on the instrument from a more global perspective.<sup>6</sup>

- 6 Prel. Doc. No 14 of November 2021,<sup>7</sup> presented at CGAP 2022, noted the importance of the concept of “analogous institutions”. Annexed to this Prel. Doc. was a table, gathering information from jurisdictions representing a variety of legal traditions with a particular focus on civil law jurisdictions that have adopted trusts and / or have their own institutions analogous to trusts. The information gathered in that Annex formed the basis for the study in the following years.
- 7 Matters relating to the Trusts Convention were discussed in the HCCH Conference on Commercial, Digital and Financial Law Across Borders (CODIFI Conference) of 2022, held online from 12 to 16 September 2022, in a track of programming devoted to the Trusts Convention featuring four specific sessions on the instrument.<sup>8</sup> Experts at the CODIFI Conference identified a growth of recent initiatives in jurisdictions such as the People’s Republic of China, Hungary, Israel, Japan, Korea, Switzerland, and in various parts of Latin America, which have developed institutions analogous to trusts in the years following the conclusion of the Convention. Experts noted that engagement with these jurisdictions would support a wider understanding of trusts and analogous institutions and thus wider application of the Convention.<sup>9</sup> In light of those discussions, further work focusing on the scope and the interpretation of Article 2 of the Convention was considered timely and desirable for increasing interest in the Convention. This in turn led to the mandates at CGAP 2023 and 2024 for the PB to study the matter, as described in paragraph 1 above.
- 8 In 2024, STEP approached the PB for possible cooperation in relation to work on the Trusts Convention. The PB developed a Survey on the Trusts Convention (STEP Survey) aimed at practitioners of STEP, which contained questions relating to the current areas of work concerning Article 2 of the Convention and analogous institutions. The Survey was circulated to the members of STEP in July 2024, with a period for responses running to 9 August 2024. Further details about the input received in the Survey are provided in section II.B.2 below. The PB extends its thanks to STEP and its members for its interest and the excellent cooperation.

## **B. Overview of findings**

- 9 The study conducted by the PB on Article 2 of the Trusts Convention consists of two aspects: (1) divergences in interpretation between the English and French versions of Article 2, and (2) institutions analogous to trusts. This section presents a summary overview of the outcomes of the study.

### **1. Divergences in interpretation between the English and French versions of Article 2**

- 10 Challenges to the interpretation of the Convention were recognised at the time that the Convention was negotiated, due to the fact that the Convention deals with trusts, an institution arising from common law traditions.<sup>10</sup> The issue was examined by experts at the 2022 CODIFI Conference, who

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<sup>6</sup> *Ibid.*

<sup>7</sup> “The HCCH 1985 Trusts Convention: Updates and possible future work”, Prel. Doc. No 14 of November 2021, available on the HCCH website at [www.hcch.net](http://www.hcch.net) (see path indicated in note 2).

<sup>8</sup> “Digital Economy and the HCCH Conference on Commercial, Digital and Financial Law Across Borders (CODIFI Conference): Report”, Prel. Doc. No 3A of January 2023, Annex I, “Report of the 2022 inaugural HCCH Conference on Commercial, Digital and Financial Law Across Borders (CODIFI Conference)”, paras 11-16, available on the HCCH website at [www.hcch.net](http://www.hcch.net) (see path indicated in note 2).

<sup>9</sup> “2006 Securities Convention, 1985 Trusts Convention, 2015 Principles on Choice of Law: Update”, Prel. Doc. No 10A of January 2023, available on the HCCH website at [www.hcch.net](http://www.hcch.net) (see path indicated in note 2).

<sup>10</sup> Explanatory Report, p. 372, para. 12. See also A. Dyer and H. van Loon, “Report on Trusts and analogous institutions”, *Proceedings of the Fifteenth Session (1984)*, Tome II, *Trusts – applicable law and recognition*, p. 40, para. 57.

noted the importance of clarifying the divergences in interpretation between the English and French versions of the Article, including challenges raised by the French term “*patrimoine*”.<sup>11</sup>

- 11 It has been suggested that the challenges surrounding the term “*patrimoine*” may be resolved by acknowledging that *patrimoine* structures in civil law systems give rise to duties similar to those of a trustee – namely, “the personal assets of the trustee are not protected from liabilities which the trustee owes in the capacity of trustee”.<sup>12</sup> Moreover, it has been noted that there are other similarities, for example, that personal creditors of the trustee shall have no recourse against the trust assets, and that the trust assets shall not form part of the trustee’s estate upon their insolvency or bankruptcy.<sup>13</sup> Such non-exemption of trustee liability is also present in trusts law or case law of Bahrain, New Zealand, Singapore, Switzerland, and the UK.<sup>14</sup>

## 2. Analogous institutions

- 12 The PB’s study has moreover focused on which institutions in different jurisdictions are equivalent or analogous to trusts,<sup>15</sup> and how these institutions may serve to broaden the use and the acceptance of the Trusts Convention.
- 13 These matters were addressed in the 2022 CODIFI Conference, in a track of discussions devoted to the Trusts Convention and a specific session on “Attitudes Towards Trusts and Analogous Institutions”.<sup>16</sup> The conclusions of the 2022 CODIFI Conference provided the PB with a number of trends and topics for study, including the increasing number of initiatives on institutions analogous to trusts in civil law jurisdictions, hybrid approaches to trusts law in certain jurisdictions, the relevance of the concept of equitable ownership, and the rights and duties of trustees in a comparative law approach.<sup>17</sup>
- 14 In order to obtain insights from practitioners, the STEP Survey included questions to gather examples from practice of information on institutions that had been or could be considered analogous to trusts. The STEP Survey also included questions on relevant case law, legislation and other legal guidance relating to analogous institutions, as well as on other relevant developments that have arisen in practice. The questions of the STEP Survey are provided in Annex I. The answers received from STEP members pertained to six jurisdictions<sup>18</sup> and indicated relevant and updated materials, including recent case law and new legislation concerning trusts or analogous institutions in the context of application of the Trusts Convention. The responses to the STEP Survey indicated a continuing interest in institutions that may be analogous to trusts under Article 2, consistent with an increased acceptance in many jurisdictions of structures such as foundations and endowments. The responses to the STEP Survey also indicated a trend of increased recognition of trusts and analogous institutions through domestic law. It is also significant to note that results of the STEP

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11 See, for example, CODIFI Conference 2022, F. Nosedá, “Trusts Closing”, 16 September 2022, available at [https://youtu.be/emhldcYSepE?si=bKUy\\_RoBxlufey6t](https://youtu.be/emhldcYSepE?si=bKUy_RoBxlufey6t).

12 F. Nosedá, “Unpacking the trust concept: closing the common law–civil law gap”, p. 3, *Trusts & Trustees*, 2024. See also P. Mathews, “Square Peg, Round Hole? Patrimony and the Common Law Trust” in Valsán (ed.), *Trusts and Patrimonies*, Edinburgh University Press; The new Swiss Trust: Is it a trust?

13 Trusts Convention, Art. 11.

14 R. van der Veen, “Fiduciary duties and the 1985 Hague Trusts Convention”, *Trusts & Trustees*, Vol. 29, No 7, 2023, p. 647.

15 “The HCCH 1985 Trusts Convention: Updates and possible future work”, Prel. Doc. No 14 of November 2021 with Annex I, “List of Institutions Potentially Analogous to Trusts”, available on the HCCH website at [www.hcch.net](http://www.hcch.net) (see path indicated in note 2).

16 CODIFI Conference 2022, D. Beckner, G. Grisel, B. Lawson, M. Lupoi, “Attitudes Towards Trusts and Analogous Institutions”, 21 September 2022, available at [https://youtu.be/VmluKhE2Tq0?si=6YE0cfoa2G\\_DtKAW](https://youtu.be/VmluKhE2Tq0?si=6YE0cfoa2G_DtKAW).

17 Prel. Doc. No 3A of January 2023, Annex I, “Report of the 2022 inaugural HCCH Conference on Commercial, Digital and Financial Law Across Borders (CODIFI Conference)”, paras 11-16, available on the HCCH website at [www.hcch.net](http://www.hcch.net) (see path indicated in note 2).

18 Argentina, Israel, Italy, Malta, San Marino and the UK.

Survey show that, for example, Latin American jurisdictions have been applying the Convention to analogous institutions, without issues arising.

- 15 At CGAP 2023, Prel. Doc. No 10C of December 2022 raised the issue of the potential characterisation of assets held in Decentralised Autonomous Organisations (DAOs) as a form of trust, as well as the potential application of the Trusts Convention to provide legal recognition of DAOs across borders.<sup>19</sup> The concept of analogous institutions could potentially supplement or complement the practice of using incorporated entities to perform certain activities and functions within a DAO, which is known as “wrapping”, and may take a number of corporate, foundation, or trust-based forms.<sup>20</sup>
- 16 These findings illustrate the continuing relevance of the Trusts Convention, the increased awareness of and reliance on institutions which may be analogous to trusts, and the potential for the Trusts Convention to ensure greater legal certainty in the digital economy. The outcomes of the study may serve as helpful reference for practitioners in both current Contracting Parties and in States which are considering joining the Trusts Convention. The publication of these outcomes may also serve to show the benefits of joining the Trusts Convention as more jurisdictions recognise governance structures such as foundations, endowments, and DAOs in their domestic legislation.

### III. Proposed establishment of a WG to review and finalise the outcomes of the study

#### A. Proposed publication to consolidate the findings

- 17 The Trusts Convention will mark the 40<sup>th</sup> anniversary of its conclusion on 1 July 2025. In light of the findings of the study conducted since 2022 and the recommendations by subject-matter experts, it is proposed that CGAP consider the establishment of an online WG to review and finalise the outcomes of the study with a view to its eventual publication. A draft outline of the proposed publication is in Annex II.
- 18 The purpose of the proposed publication is three-fold. First, to consolidate the in-depth comparative research already conducted in relation to the interpretation of Article 2 of the Convention; second, to present the outcomes of the study as guidance for the effective operation of the Convention; and third, to increase awareness of the Convention globally and to encourage more States to join it. Subject to the views of the proposed WG, an online database accompanying the proposed publication may also be created, so that the data collected can be made accessible to aid legal practitioners in understanding the use of the Convention in relation to the recognition of trust institutions and / or institutions analogous to trusts between jurisdictions.

#### B. Timeline and resource allocation

- 19 If CGAP decides to establish the proposed WG, the WG would be convoked for an online meeting in the first half of 2025 with a view to reviewing a preliminary outline and version of the publication assembled by the PB, and to producing a draft for the comments of the Members in mid-2025.

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<sup>19</sup> “1985 Trusts Convention: Updates and possible future work”, Prel. Doc. No 10C of December 2022, at para. 17, available on the HCCH website at [www.hcch.net](http://www.hcch.net) (see path indicated in note 2).

<sup>20</sup> See “1985 Trusts Convention: Update”, Prel. Doc. No 15B of February 2024, available on the HCCH website at [www.hcch.net](http://www.hcch.net) (see path indicated in note 2); see Law Commission of England and Wales, Decentralised autonomous organisations (DAOs): A scoping paper (July 2024), available from <https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2024/07/DAOs-scoping-paper-110724.pdf>.

In terms of future work, the PB notes that the monitoring of DAOs will be continued under the Digital Economy Project, see “Private International Law Aspects of the Digital Economy: Report”, Prel. Doc. No 5 of December 2024, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Governance” then “Council on General Affairs and Policy”.

Members would be provided with a two-month period for comments; all comments received will be made available to other Members on the Secure Portal of the HCCH website.

- 20 The draft publication would then be finalised by the WG, taking into account the comments submitted by Members. The finalised draft would be re-circulated to Members for approval. In the absence of any objection within one month, the finalised draft will be taken to be approved; in the case of one or more objections, the PB will immediately notify Members of any objection and the document will be submitted to CGAP 2026. If approved, the PB will finalise and publish the outcomes of the study.

#### **IV. Proposal for CGAP**

- 21 The PB proposes the following C&D for CGAP's consideration:

CGAP welcomed the report of the study on the application and interpretation of Article 2 of the Trusts Convention and on the institutions analogous to trusts. CGAP thanked STEP and the experts who have contributed to this work in close cooperation with the PB.

CGAP mandated the establishment of a WG to review and complete the study on the application and interpretation of Article 2 and on the institutions analogous to trusts. The WG will meet online with a view to producing a draft for the comments of the Members in mid-2025. Members would be provided with a two-month period for comments, after which the draft would be iterated and finalised by the WG. The finalised draft would be re-circulated to Members for approval. In the absence of any objection within one month, the finalised draft will be taken to be approved and will be published. In the case of one or more objections, the PB will immediately notify Members of any objection and the document will be submitted to CGAP 2026.

CGAP welcomed the suggestion of the PB to produce an online database accompanying the proposed publication, subject to the views of the WG.

The WG will report to CGAP 2026.

## **ANNEXES**



## Annex I



## Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (HCCH 1985 Trusts Convention): Survey Questions

**Relevant Documents:** These documents trace the genesis and developments relating to the work at the HCCH on the HCCH 1985 Trusts Convention:

[Prel. Doc. No 15 of December 2020](#) - The HCCH 1985 Trusts Convention: Updates and Possible Future Work

[Prel. Doc. No 14 of November 2021](#) - The HCCH 1985 Trusts Convention: Updates and possible future work

[Prel. Doc. No 10A of January 2023](#) - 2006 Securities Convention, 1985 Trusts Convention, 2015 Principles on Choice of Law: Update

[Prel. Doc. No 15B of February 2024](#) - 1985 Trusts Convention: Update

1. Which institutions could be/are considered analogous to trusts for the purposes of Article 2 of the 1985 Trusts Convention according to your practice in one or more jurisdictions (including, for example, foundations and endowments, institutions and developments relating to *waqf* in Islamic legal traditions, and Decentralised Autonomous Organisations (DAOs) and other similar structures)? Please provide the institution that is analogous to trusts, as well as any legislation, case law, decision or other example that show that the relevant institution is analogous to a trust for the purposes of the Convention.

*\*Please see the table in Annex 1 of [Prel. Doc. No 14 of November 2021](#) - The HCCH 1985 Trusts Convention: Updates and possible future work*

Click or tap here to enter text.

2. Is there relevant case law, legislation and other legal guidance relating to institutions that have been considered institutions analogous to trusts (in particular in reference to the 1985 Trusts Convention)? Is there relevant case law, legislation or other legal guidance specifying that certain institutions are *not* considered analogous to trusts? Please provide, if possible, the text of the case law, legislation or other legal guidance.

*\*Please include both legislation that have enacted a trust or a trust-like arrangement by way of a specific statute and legislation concerning legal arrangements of a different tradition*

Click or tap here to enter text.

3. Please list any other relevant developments that have arisen in your practice in one or more jurisdictions in this field. Please also list articles or publications that you consider relevant to this field.

Click or tap here to enter text.

## Annex II

### Draft Table of Contents of Proposed Publication

The following is a draft table of contents intended for discussion at CGAP 2025.

#### Introduction

This document presents the outcome of the study conducted by the HCCH on the application and interpretation of Article 2 of the *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (Trusts Convention) and on the institutions analogous to trusts. It consists of two main sections: first, the outcomes of the study on the divergences in interpretation between the English and French versions of Article 2 of the Trusts Convention; and second, the outcomes of the study on the institutions analogous to trusts. The document adopts a comparative approach in both sections and aims to provide guidance in relation to the practical application of the Trusts Convention and, specifically, Article 2 of the Convention.

#### Part 1: Application / recognition of the Convention

The first part focuses on a report of the application and interpretation of (the characteristics enumerated in) Article 2 of the Trusts Convention. It has two subsections: (a) the treatment of the term “trust” in the operation of the Trusts Convention (with a focus on Art. 2) in jurisdictions that comprise Contracting Parties to the Convention; and (b) the interpretation of the term “trust”, or institutions that have the characteristics enumerated in Article 2 of the Trusts Convention, in non-Contracting Parties.

For each subsection, the State / jurisdiction, relevant sources of domestic law (including statutes and case law), current legal status of the Convention, and any institutions with characteristics enumerated in Article 2 of the Convention (and which may or may not be recognised as analogous to trusts in that jurisdiction) will be listed. Where relevant, the subsection will also include cases from these jurisdictions in relation to the recognition of foreign trusts or analogous institutions.

#### Part 2: Institutions analogous / potentially analogous to trusts

The second part sets out the jurisdictions that have adopted or created institutions or structures that share the characteristics as enumerated in Article 2 of the Convention. Each of these institutions and / or structures are examined in this section, including a description of their configuration, legal nature and functions. The section also examines how jurisdictions that do not natively recognise the concept of a trust recognise foreign trusts and analogous institutions. A preliminary list of such institutions includes:

- Foundations (e.g., *Stiftung*, *Stichting*) such as those found in the Bahamas, Liechtenstein, Malta, the Netherlands, and Panama;
- *Fiducia*, such as those found in Austria, Germany and the Netherlands;
- *Fideicommissum* or similar testamentary trusts;
- *Fideicomisos*, such as those found in Latin American countries with the exception of Brazil and Chile;
- *Prete nom*, such as those found in France;
- *Waqfs / waqafs / wakfs*, such as those found in the jurisdictions of the Islamic traditions;
- Customary trusts, such as those found in the Hong Kong Special Administrative Region (China), Malaysia and Singapore; and
- Decentralised Autonomous Organisations (DAOs).

For each institution within each jurisdiction, the report will include the description of the legal nature and function of the institution analogous to trusts, the source of the establishing legislation, relevant case law, and any other relevant information. Case law in relation to how each of these jurisdictions recognise (or do not recognise) the foreign trusts will also be included where relevant. This part consolidates the work done in the past few years, expanding on the list of institutions contained in Annex I of Prel. Doc. No 14 of 2021,<sup>21</sup> and including the results of the HCCH-STEP Survey.

### **Online database as companion tool**

It is proposed that this document be accompanied by an online database that would allow users to cross-reference, sort and filter the information provided in Parts 1 and 2. The online database would also provide a means by which the information could be extracted in tabular form for ease of reference and updating.

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<sup>21</sup> “The HCCH 1985 Trusts Convention: Updates and possible future work”, Prel. Doc. No 14 of November 2021, with Annex I, “List of Institutions Potentially Analogous to Trusts”, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Governance” then “Council on General Affairs and Policy” and “Archive (2000-2024)”.