

<b>Title</b>	Proposal for a Normative Project: Private International Law Issues Relating to Digital Tokens
<b>Document</b>	Prel. Doc. No 5B <u>REV</u> of <del>January</del> <u>March</u> 2024
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<b>Agenda Item</b>	Item II.6
<b>Mandate(s)</b>	C&D No 15 of CGAP 2023
<b>Objective</b>	To propose a normative project on the private international law issues relating to digital tokens
<b>Action to be Taken</b>	For Decision <input checked="" type="checkbox"/> For Approval <input checked="" type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input type="checkbox"/>
<b>Annexes</b>	Annex I: Selected Examples of Digital Tokens
<b>Related Documents</b>	N/A

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# Proposal for a Normative Project: Private International Law Issues Relating to Digital Tokens

## I. Introduction

- 1 This Preliminary Document (Prel. Doc.) outlines the private international law (PIL) issues relating to digital tokens and includes a proposal for work on these issues. The outline of this proposal for work was first put to the Permanent Bureau (PB) by a Member of the HCCH; the PB subsequently consulted various other Members on the merits of the proposal.

## II. Background: Digital Tokenisation and the PIL Issues Relating to Digital Tokens

- 2 Digital tokenisation allows tangible and intangible objects, rights and claims to be virtually represented and stored electronically, usually in decentralised or distributed storage mechanisms. There is currently no universal uniform definition of “digital tokenisation” or “digital tokens”. While recognising the lack of such a definition, the Bank for International Settlements (BIS) notes that tokenisation refers to the digital representation of value or rights.<sup>1</sup> Tokenisation can be an enabler of fast and secure transactions, including transfers, tracking and management of tokenised value or rights across borders. According to the BIS, tokenisation streamlines transactions, reducing the need for intermediaries and increasing the transparency and security of these transactions. Consequently, digital tokenisation has become one of the most prominent use cases of decentralised and distributed storage mechanisms in financial and capital markets in many jurisdictions.

- 3 Two trends are of particular interest. The first is the digital tokenisation of real-world assets by:
- creating a virtual representation of existing tangible assets;
  - storing these virtual representations on decentralised or distributed storage mechanisms (for example, using distributed ledger technology (DLT)); and
  - conventionally embedding their value and any rights or obligations associated with the real-world asset in the virtual representation.<sup>2</sup>

The relevant real-world assets, in particular where they are tangible assets, would typically be placed in custody to ensure continuous backing for the digital tokens. Tokenisation is currently being piloted for various real-world assets, such as real estate.<sup>3</sup>

- 4 The second trend relates to the focus that several jurisdictions have placed on fund tokenisation. These “digital funds” issue tokenised shares or units that represent investor interests, which are recorded and traded on distributed platforms rather than in the traditional registries or record-keeping systems.<sup>4</sup> Such digital funds have gained traction in leading fund jurisdictions worldwide, including France, Germany, Luxembourg, Singapore and the United States of America.<sup>5</sup> An example of a cross-jurisdictional tokenised fund is the collaboration between the BIS Innovation Hub, the

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<sup>1</sup> Bank for International Settlements (BIS), [Annual Economic Report Part III \(June 2023\)](#), p. 89.

<sup>2</sup> *Ibid.*, see also I. Aldasoro *et. al.*, “[The tokenisation continuum](#)”, 11 April 2023, pp. 1, 3. Tokenisation may include, for example, “the representation of pre-existing real assets on the ledger by linking or embedding by convention the economic value and rights derived from these assets into digital tokens”, see Organisation for Economic Co-operation and Development (OECD), [The Tokenization of Assets and Potential Implications for Financial Markets](#), (2020) OECD Blockchain Policy Series, p. 11.

<sup>3</sup> OECD, [The Tokenization of Assets and Potential Implications for Financial Markets](#), *ibid.*

<sup>4</sup> Investment Association, [UK Fund Tokenisation: A Blueprint for Implementation. Interim Report from the Technology Working Group to the Asset Management Taskforce](#), November 2023, p. 9.

<sup>5</sup> *Ibid.*, p. 16.

Swiss National Bank, the World Bank and the International Monetary Fund (IMF) to tokenise development funds, with the goal of promoting global economic development.<sup>6</sup>

- 5 Different jurisdictions have approached digital tokenisation in different ways. Some have simply extended the application of existing financial regulations to digital tokens. Others have adapted existing rules to accommodate the decentralised nature of token platforms. Still others have introduced bespoke legal frameworks, treating digital tokens as a new class of objects. In particular, the approaches to the tokenisation of funds vary across jurisdictions, and comprise various innovations related to backward and forward compatibility. For this reason, a *lex specialis* study focusing solely on PIL questions and on specific cross-border use cases of digital tokens, may be timely.
- 6 The digital nature of these tokens, compounded by their storage on decentralised or distributed storage mechanisms, necessarily raises issues of localisation which, in turn, have an impact on the PIL analysis. An examination of whether the traditional objective connecting factors could continue to apply for the various cross-border use cases of digital tokenisation is timely and desirable, given their growing adoption. The variety of actors and participants in transactions involving digital tokens may also challenge the application of traditional connecting factors, as there may be several objective connecting factors to a number of jurisdictions. The digital nature of this field also means that transactions may occur, and participants may be located, in different jurisdictions and locations. PIL questions regarding which law would be applicable and which forum would have jurisdiction would necessarily arise.
- 7 An additional complexity arises as the development of domestic substantive law relating to the various use cases of digital tokens has not been coordinated or uniform. This leads to a fragmented, possibly multi-jurisdictional, and multi-stakeholder arena, which may differ across the different use cases of digital tokenisation. An examination of the PIL issues is, therefore, desirable and timely.

### III. Proposed Study on PIL Issues Relating to Digital Tokens

#### A. Draft Scope of the Proposed Study

- 8 It is proposed that the Council on General Affairs and Policy (CGAP) consider mandating a study that will:
  - a. examine the PIL aspects of “digital tokens”, excluding aspects of substantive law;
  - b. focus on “digital tokens”, with “digital tokens” in this context referring to virtual representations, stored electronically on decentralised or distributed storage mechanisms (*i.e.*, where, for example, there may be issues of localisation raising questions of PIL), and may or may not include, for example (this is not an exhaustive list):
    - tokens identifying [and/or representing an interest in](#) real estate, [or a part thereof](#);
    - utility tokens;
    - payment tokens;
    - non-fungible tokens (NFTs);
    - stablecoins;
    - tokens representing certain claims;
    - other use cases of tokens as may be identified by subject-matter experts; and

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<sup>6</sup> C. Skingsley, Head of the BIS Innovation Hub, “[Shaping the future financial system in the public interest](#)”, Keynote Speech at the Conference “Exploring central bank digital currency: Evaluating challenges & developing international standards”, 28 November 2023, Washington DC, para. 50.

c. In the case of digital tokens linked to real-world assets, exclude consideration of aspects specific to the link.

9 As noted in paragraph 2 above, there is currently no universal uniform definition of “digital tokenisation” or “digital tokens”. For that reason, and taking into account the considerations raised by some HCCH Members, it is proposed that the subject-matter focus of the proposed study, including which “digital tokens”<sup>7</sup> should be included and / or excluded (incl., for example, whether the scope should be an inclusive list of granular use cases, or a list of excluded use cases), will be developed in consultation with the subject-matter experts and Observers (see process described below in para. 14).

10 Where necessary, the proposed study would include considerations of relevant (overriding) regulatory frameworks.

11 Subject to further analysis, and so as not to interfere with traditional PIL considerations in these fields, it is proposed that the study exclude from its scope any consideration of purely contractual or otherwise purely personal rights or duties between the holders of digital tokens or the participants in transactions involving digital tokens.

12 It is also proposed that this study exclude from its scope:

- a. Securities, whether held directly or indirectly, noting that questions of PIL regarding securities, both held with an intermediary and those held in a disintermediated system, are being examined within the study on “the 2006 Securities Convention and digital developments in respect of securities markets”;<sup>8</sup>
- b. Central Bank Digital Currencies (CBDCs), which comprise the subject-matter of a separate project focusing on the PIL implications of CBDCs;<sup>9</sup>
- c. Carbon credits, which comprise the subject-matter being proposed under a separate project focusing on the PIL questions relating to the carbon markets;<sup>10</sup> and
- d. Other possible use cases as may be identified by the subject-matter experts.

13 The PB will ensure coordination and alignment between the work in this proposed study on digital tokens and the ongoing work on the 2006 Securities Convention and digital developments in respect of securities markets, as well as on CBDCs, listed in paragraph 12(a)-(b) above. In the case that CGAP decides on mandating the exploratory work on carbon markets listed in paragraph 12(c), and in the case CGAP decides on mandating the proposed change of focus from CBDCs to cross-border payments systems,<sup>11</sup> the PB will also ensure coordination and alignment between these projects.

## B. Process of Proposed Study

14 Recognising the importance of avoiding fragmentation among legal instruments developed by different intergovernmental organisations on related subject matters and the importance of consistency with relevant existing instruments, including the UNIDROIT Principles on Digital Assets

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<sup>7</sup> [In scoping the study of “digital tokens”, the PB recognises the importance of consistency with existing instruments, including the UNIDROIT Principles on Digital Assets and Private Law, available on the UNIDROIT website at https://www.unidroit.org/wp-content/uploads/2024/01/Principles-on-Digital-Assets-and-Private-Law-linked.pdf.](https://www.unidroit.org/wp-content/uploads/2024/01/Principles-on-Digital-Assets-and-Private-Law-linked.pdf)

<sup>8</sup> See Conclusion and Decision (C&D) No 43 of CGAP 2023, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Governance” then “Council on General Affairs and Policy” and “Archive (2000-2023)”.

<sup>9</sup> See “Exploratory Work: Private International Law Aspects of Central Bank Digital Currencies (CBDCs)”, Prel. Doc. No 4 of January 2024 drawn up for the attention of CGAP 2024, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Governance” then “Council on General Affairs and Policy”, and C&D No 16 of CGAP 2023.

<sup>10</sup> See “Proposal for Exploratory Work: Private International Law Issues related to Carbon Markets”, Prel. Doc. No 7 of January 2024, available on the HCCH website [www.hcch.net](http://www.hcch.net) under “Governance” then “Council on General Affairs and Policy”.

<sup>11</sup> See Prel. Doc. No 4 of January 2024, para. 23.

and Private Law,<sup>12</sup> tThis proposed study will be undertaken in partnership with relevant subject-matter experts and Observers, with the goal of providing a report to CGAP at its 2025 meeting, including proposals for next steps. Alongside subject-matter experts and Observers identified by the PB, and in order to facilitate broad inclusion of national jurisdictions interested in this study, Members will be invited to nominate subject-matter experts to contribute to this study, including experts with legal or technical knowledge of digital tokens, and those with close connections with national projects relating to digital tokens.

15 The study will begin with a general, indiscriminate taxonomic study of existing international and regional instruments, as well as earlier and ongoing work on the topic in order to inform the discussions.<sup>13</sup> The study will also include consultations with the nominated experts and Observers throughout the year, such as the provision of responses to enquiries from the PB, as well as the voluntary submission of legal position papers and other policy papers. Experts will also be called upon to provide feedback in writing on a scoping paper that poses various questions on the PIL aspects of digital tokens.

16 Meetings are envisaged to be organised with the subject-matter experts and Observers. It is proposed that at least one meeting be held in person, with the possibility of remote participation. The timing of online and hybrid meetings will be determined on the basis of the nominations received and the location from which the experts will be participating. CGAP is also invited to consider mandating the PB to prepare for and organise a(n online) colloquium on digital tokens, subject to available resources.

#### IV. Proposal for CGAP

17 In light of the above considerations, the PB proposes the following C&Ds for CGAP's consideration: CGAP mandated the PB, in partnership with relevant subject-matter experts and Observers, to study the PIL issues relating to digital tokens. The PB will report to CGAP at its 2025 meeting on the outcomes of this study, including proposals for next steps.

CGAP also mandated the PB to prepare for and organise a[n online] colloquium on the topic, subject to available resources.

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<sup>12</sup> [UNIDROIT Principles on Digital Assets and Private Law](#), see *supra* note 7.

<sup>13</sup> [Recognising, for example, the work at UNIDROIT \(UNIDROIT Principles on Digital Assets and Private Law\), see \*supra\* note 7, at UNCITRAL \(Taxonomy of legal issues related to the digital economy, available as a preprint on the UNCITRAL website \[here\]\(#\)\), and at ELI \(ELI Principles on the Use of Digital Assets as Security, available on the ELI website \[here\]\(#\)\), among others; as well as the experts' conclusions from the exploratory phase of the HCCH-UNIDROIT Digital Assets and Tokens Joint Project, see Prel. Doc. No 3 of January 2024, available on the HCCH website \[www.hcch.net\]\(http://www.hcch.net\) under "Governance" then "Council on General Affairs and Policy".](#)

## **ANNEXES**

## Annex I: Selected Examples of Digital Tokens

Entity	Type of Tokenisation	Description
France	Real Estate	Tokenisation of AnnA Villa luxury property, facilitated by the Equisafe investment platform (2019). <sup>1</sup>
USA	Real Estate	Launch of the world's first commercial real estate tokenisation project (2018), the tokenisation of the St Regis Aspen Resort, a luxury ski resort by Elevated Returns and Solid Block. <sup>2</sup>
BIS Innovation Hub, Swiss National Bank, World Bank, and IMF	Funds	Pilot project (2024) on the tokenisation of development funds, with the goal of promoting global economic development. <sup>3</sup>
Australia and New Zealand Bank	Stablecoin	The development of a stablecoin between Australia and New Zealand Bank as a fully backed payment token tied to the value of an Australian dollar (2022). It has recently been used to purchase tokenised carbon credits. <sup>4</sup>
Tel Aviv Stock Exchange (TASE)	Funds	Project Eden (2023) consists of the issuance of a payment token for Israeli Shekels, and, in collaboration with the Israeli Ministry of Finance, the creation of a tokenised government bond. The project involved 12 banks (five domestic and seven international banks), which participated in a government bond auction on Bloomberg. The settlement occurred in real-time on a permissioned blockchain. Project Eden showcased the seamless settlement of a tokenised government bond using tokenised shekels. <sup>5</sup>
DigitalX	Real Estate	DigitalX, in partnership with Bricklet, introduced a tokenised real estate offering. This enables partial ownership in a tokenised fund, addressing financing gaps in the housing market. The tokenised fund allowed potential homebuyers to secure capital for their new home deposits, and fund investors to receive a yield from rent payments. <sup>6</sup>

<sup>1</sup> Forbes, "[Europe Completes Its First Ever Blockchain Real Estate Sale for EUR6.5 Million](#)", 30 June 2019; see also Tokenist, "[Equisafe Provides Update on France's First Real Estate-backed STO, has 15 Tokenisations Planned](#)", 2-November 2019, updated 26 May 2021.

<sup>2</sup> Venture Beat, "[Elevated Returns gets \\$18 million for St. Regis Aspen Resort 'tokenized real estate'](#)", 9 October 2018.

<sup>3</sup> BIS Innovation Hub, "[BIS Innovation Hub, Swiss National Bank and World Bank launch Project Promissa to test tokenisation of financial instruments](#)", 11 January 2024.

<sup>4</sup> Mastercard Fireblocks, "[Achieving Uniformity of Tokenized Money through Smart Contracts](#)", p. 5 and accompanying notes.

<sup>5</sup> *Ibid.*

<sup>6</sup> Mastercard Fireblocks, *supra* note 4, p. 6 and accompanying notes.