



Can El Salvador Bridge the Worlds of Cryptoassets and Investment Arbitration?



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Cryptoassets and investment arbitration are like different planets in distant galaxies, disconnected and oblivious of each other's existence.

However, El Salvador may prove to be what connects the two and potentially opens the door to cryptoasset-related investment disputes in the not-too-distant future.

El Salvador adopted Bitcoin as legal tender in September 2021.¹ The President of El Salvador, Nayib Bukele, put out the call to investors to mine Bitcoin in the country² and the government

¹ NY Times, 'In Global First, El Salvador Adopts Bitcoin as Currency' (7 September 2021) <<https://www.nytimes.com/2021/09/07/world/americas/el-salvador-bitcoin.html>> accessed 26 September 2022.

² M. Sigalos, 'El Salvador has just started mining bitcoin using the energy from volcanoes' in *CNBC Journal*, Section Crypto Decoded (1 October 2021) <<https://www.cnb.com/2021/10/01/el-salvador-just-started-mining-bitcoin-with-volcanoes-for-the-first-time-ever-and-theyve-already-made-269.html>> accessed 26 September 2022.

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created a digital wallet (called Chivo) for people and companies in El Salvador to store and transact with Bitcoin and U.S. dollars.³ President Bukele has also shared plans and models for a coastal smart city, known as Bitcoin City, that will supposedly be funded by government-issued bonds.⁴

Some of President Bukele's measures have still yet to be implemented a year after they were announced, and it is questionable whether they ever will be.⁵ However, assuming that at least some of these measures are eventually adopted

(and that they have the intended effect of attracting foreign investment into El Salvador), they could potentially give rise to investment disputes.

The question that comes to mind is how exactly the adoption of Bitcoin and cryptoasset-related policies might cause the worlds of cryptoassets and investment arbitration to meet. In order to properly answer this question, we need to understand what cryptoassets actually are, their different types, and finally how the different types might interact with investment arbitration.

First, it is necessary to establish a common ground regarding the issues to be discussed. Note, for example, that the term 'cryptoasset' is not interchangeable with 'cryptocurrency'. For just as the word 'art' can mean many different

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things (paintings, sculptures, or even a banana taped to a wall),⁶ cryptoassets can encompass many different types of assets including, but not limited to, cryptocurrencies.

'Cryptoasset' usually refers to a digital asset or digitized asset. Digital assets are those that only exist in the digital world, such as Bitcoin. Digitized assets are those that exist in the physical world but have been recorded in a digital format,

such as a deed to a house recorded in a digital public registry. This type of assets are referred to as 'tokens' when recorded in a blockchain.⁷

Blockchains operate by using tens, hundreds or even thousands of computers running the same software simultaneously, depending on the blockchain that is being used. In simplistic terms, the process of operating a blockchain to store and

³ Ibid.

⁴ CNN Business, 'El Salvador plans first 'Bitcoin City' backed by bitcoin bonds' (21 November 2021) <<https://edition.cnn.com/2021/11/21/tech/el-salvador-bitcoin-city/index.html>> accessed 26 September 2022.

⁵ El Salvador Perspectives Journal, 'Bukele's Bitcoin gambit one year later' (5 September 2022) <<https://www.elsalvadorperspectives.com/2022/09/bukeles-bitcoin-gambit-one-year-later.html>> accessed 26 September 2022.

⁶ R. Pogrebin, 'That Banana on the Wall? At Art Basel Miami It'll Cost you \$120,000' in *The New York Times* (6 December 2019) <<https://www.nytimes.com/2019/12/06/arts/design/banana-art-basel-miami.html>> accessed 26 September 2022.

⁷ A. Hayes, 'Blockchain Facts: What Is it, How It Works, and How It Can Be Used' in *Investopedia* (18 September 2022) <<https://www.investopedia.com/terms/b/blockchain.asp>> accessed 26 September 2022.



Cryptoassets may therefore potentially give rise to investment disputes that force tribunals to develop new standards under international law and oblige States to redefine their domestic laws

record transactions is called “mining”. Mining uses large amounts of electricity because it requires many computers (i.e. thousands) to run simultaneously and continuously. To put this into perspective, Bitcoin mining consumes more electricity than many countries do per year (such as Chile, Denmark or Finland).⁸

Second, having established what cryptoassets are, we must now understand that there are different types of cryptoassets with distinct legal characteristics, meaning that they may impact investment arbitration in different ways.

The crypto community is so young and has grown so quickly that regulators have fallen behind and playing catch up. Different countries regulate cryptoassets in different ways and there is no consensus on how to define the various

⁸ NY Times, ‘Bitcoin uses more electricity than many countries. How is that possible?’ (3 September 2021) <<https://www.nytimes.com/interactive/2021/09/03/climate/bitcoin-carbon-footprint-electricity.html>> accessed 26 September 2022.

types of cryptoassets. Fortunately, though, the crypto community tends to agree that there are at least four types:

- Payment tokens: Usually referred to as cryptocurrencies, these tokens operate as a medium of payment.⁹
- Utility tokens: These tokens enable the use of a specific service.¹⁰
- Asset tokens: Also called security tokens, these tokens represent an asset (be it a digital or digitized asset) and provide greater liquidity for specific types of assets.¹¹
- Non-fungible tokens: One-of-a-kind digital or digitized assets (hence the name non-fungible) that grant exclusive property rights over the asset.¹²

There are key differences between each type of cryptoasset. For example, a payment token operates as money, while a non-fungible token works as digital

⁹ Medium, ‘Payment tokens’ (14 November 2018) <<https://medium.com/coinbundle/for-beginners-payment-tokens-2caae2fcc1d8#:~:text=While%20the%20two%20commonly%20known%20categories%20of%20tokens,is%20often%20considered%20as%20a%20medium%20of%20payment.>> accessed 26 September 2022.

¹⁰ Bit2Me Academy, ‘What is a utility token?’ <<https://academy.bit2me.com/en/que-es-utility-token/>> accessed 26 September 2022.

¹¹ Luisa Fernanda Agudelo, ‘What is an Asset-backed token?’ in *Medium* (14 December 2019) <<https://micobo.medium.com/what-is-an-asset-backed-token-security-tokens-for-beginners-b77adf3a9710>> accessed 26 September 2022.

¹² BBC News, ‘What are NFTs and why are some worth millions?’ (23 September 2021) <<https://www.bbc.com/news/technology-56371912>> accessed 26 September 2022.

property. A dispute regarding property rights over a non-fungible token may have very little or even nothing to do with (from a legal and regulatory standpoint) a dispute regarding the use of a specific payment token.

Third, after understanding that there are different types of cryptoassets with different legal characteristics, we can now address the issue of how exactly cryptoassets may intersect with international arbitration.

There are already concrete examples of disputes regarding cryptoassets in international commercial arbitrations. The Binance dispute is one such example.¹³ This dispute is against an exchange for allegedly forcing investors to sell assets against their will, but had nothing to do with the complex and innovative features of cryptoassets.

From this dispute we can foresee that even though cryptoassets are disruptive and innovative technologies, they will not necessarily lead to disruptive and innovative ways of settling commercial disputes. In other words, the type of issues that will be raised in commercial arbitrations concerning cryptoassets will likely be solvable using existing laws, rules and soft law instruments. New legal resources should therefore not necessarily be required to appropriately address and resolve many of the issues

¹³ B. Akolkar, ‘European Investor Slaps ICC Arbitration Charges Against Binance, Seeks \$140M Compensation’ in *CoinSpeaker* (26 October 2021) <<https://www.coinspeaker.com/european-investor-icc-binance-140m/>> accessed 26 September 2022.

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raised in commercial disputes involving cryptoassets.

This is not necessarily the case for investment arbitration, which asks broader – and yet rather more nuanced – questions (such as what constitutes an investment or who is a protected investor) that cannot necessarily be answered right now in regard to cryptoassets or crypto-related activities. Cryptoassets may therefore potentially give rise to investment disputes that force tribunals to develop new standards under international law and oblige States to redefine their domestic laws.

In this sense, El Salvador may become a case in point. The following examples can illustrate potential ways in which cryptoassets or crypto-related activities may eventually intertwine with investment arbitration.¹⁴

As a first example, suppose that a foreign company invests in El Salvador and is forced to carry out all local transactions (e.g. paying employees and suppliers)

¹⁴ However, these examples are not exhaustive and are limited by our current knowledge of cryptoassets and crypto regulation to date. Evidently, as these technologies keep evolving (and regulation alongside them), the ways in which these examples may materialise will evolve with them.

There is a real possibility that cryptoassets create new standards in investment disputes

using the Chivo wallet. There have been some problems reported with this wallet, and it is still unclear at this stage how or even whether it will ultimately become a trusted means of payment within El Salvador.¹⁵ It is also unclear at this stage

¹⁵ El Salvador Perspectives Journal, 'Bukele's bitcoin gambit one year later' (5 September 2022) <<https://www.elsalvadorperspectives.com/2022/09/bukeles-bitcoin-gambit-one-year-later.html>> accessed 26 September 2022.

whether the wallet is centralised and controlled by the country's government.

However, let us assume that the technical problems with the Chivo wallet are resolved and foreign investors are obliged to use it to make payments within the country. If the Chivo wallet is built on a blockchain that is centralised and controlled

by the government of El Salvador (which, again, may or may not be true, but cannot be ruled out) then the government would have the power to freeze accounts within the wallet, or prohibit the repatriation of funds.

Disputes regarding those frozen funds could arise, as has happened in past investment arbitrations.¹⁶ In this particular example, investment tribunals would be forced to answer the question of whether assets stored in the Chivo wallet (which may include Bitcoin) are protected investments under international investment law.

Another hypothetical example is if El Salvador were to decide to issue asset tokens rather than sovereign bonds to finance its Bitcoin City. As explained before, it is still unclear how or when El Salvador will issue these bonds (or if it will at all). An investment dispute could potentially arise if El Salvador were to decide to issue asset tokens – rather than sovereign bonds – and default on its payments to investors under the terms of the asset token.

As mentioned before, regulators are not keeping pace with the growth of the crypto industry. Therefore, in this example, it would likely fall on investment tribunals to decide the legal nature of the asset tokens and whether or not they constitute protected

investments under international investment law, without much help or guidance from domestic laws.

A final hypothetical example of an investment dispute relating to cryptoassets involves the mining of cryptocurrencies. Continuing with the example of El Salvador, suppose that it passes a law aiming to promote mining investments in the country and that this law and statements made by the President cause mining investments to start pouring into El Salvador.

Taking this hypothetical situation a step further, suppose that five years down the line a new government assumes power in El Salvador and repeals the law based on public policy grounds, arguing that mining is hazardous to the environment and contributes to global warming. This would, essentially, render all the investments in El Salvador's mining worthless and potentially lead to investment disputes. In this case, investment tribunals would have to answer questions such as whether regulations based on public policy grounds that render investments in cryptoasset mining worthless constitute a proper exercise of government powers, or whether mining is even a protected investment under international investment law.

While the issue may seem straightforward (the investment being the facility and the equipment used to mine being a warehouse and its computers), public policy questions

lie underneath. Does mining harm the environment in a way that substantially impacts global warming, and if so, can it become a public policy issue that would entitle States to restrict or even ban the mining of cryptoassets? If the answer is yes, new public policy standards may arise in international investment law that affect any industry with the potential to substantially impact climate change.

Given growing global concern regarding climate change, it does not seem far-fetched to say that the climate crisis may soon become a public policy issue for some States and that banning environmentally hazardous activities, such as crypto mining, may likewise become an issue of public policy under public international law. In such cases, investment tribunals would be forced to decide whether States are allowed to expropriate (under the banner of public policy) investments in cryptoasset mining, and whether mining constitutes a protected investment under international investment law.

These are just some examples of how the worlds of cryptoassets and investment arbitration may end up intertwining. There is a real possibility that cryptoassets create new standards in investment disputes, especially as regulation catches up with the technology. Even though this all seems rather futuristic, El Salvador may speed us towards this new age by becoming the bridge that connects these two worlds.

¹⁶ C. Sanderson, 'Air Canada lands win against Venezuela' *Global Arbitration Review - GAR*, (14 September 2021) <<https://globalarbitrationreview.com/article/air-canada-lands-win-against-venezuela>> accessed 26 September 2022.

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