

**AN IMPOSSIBLE CHOICE FOR FOREIGN BANKS:
THE ROLE OF INTERNATIONAL COOPERATION IN
THE CLASH OF THE U.S. ANTI-MONEY
LAUNDERING ACT OF 2020 WITH SWISS AND
FRENCH BANK SECRECY LAWS**

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ABSTRACT

The introduction of the U.S. Anti-Money Laundering Act of 2020 dramatically broadened the government's ability to obtain information from foreign banks. This legislation created a substantial conflict for international banks, such as Swiss and French institutions, with correspondent accounts in the U.S. A bank in that situation may have to breach its country's bank secrecy laws to comply with a U.S. request; alternatively, the bank may comply with its country's laws but risk the cancellation of its U.S. correspondent accounts. The various international agreements that discuss collaboration with other countries' criminal investigations do not sufficiently address this novel conflict between the security interests of one nation and the privacy interests of another. Therefore, there is uncertainty and concern throughout the global banking community about an issue that will eventually arise, and which can create potentially devastating consequences for non-U.S. financial institutions. This paper discusses the ongoing tension between anti-money laundering laws and bank secrecy laws. Specifically, this work sets forth a series of recommendations for the international legal community to preemptively confront the problem that the Anti-Money Laundering Act of 2020 poses, with an emphasis on the importance of international cooperation in the fight against money laundering.

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ABSTRACT	25
INTRODUCTION	26
I. THE HISTORY OF GLOBAL MONEY LAUNDERING AND BANK SECRECY LAWS	29
II. THE CONFLICT BETWEEN AMLA 2020 AND SWISS AND FRENCH BANK SECRECY LAWS	37
III. CURRENT INTERNATIONAL LAW REGULATING TRANSNATIONAL CRIME, MONEY LAUNDERING, THE FINANCING OF TERRORISM, AND INTERNATIONAL COLLABORATION	43
IV. WHY EXISTING INTERNATIONAL LAW IS INSUFFICIENT TO ADDRESS THE CONFLICT THAT AMLA 2020 CREATED	48
CONCLUSION.....	52

INTRODUCTION

Imagine you are a bank attorney or compliance officer for a Swiss bank. Naturally, you ensure that the institution fully complies with all applicable law and any relevant long-established international agreements, but what happens when law enforcement from another country demands confidential information that is protected by Swiss law? What if refusing to provide that information could result in the cancellation of that bank's correspondent accounts? Should the bank breach its fiduciary obligations to its clients to comply with the demands of a foreign country? These are the precise issues that banks all over the world have faced since 2021, when the United States (hereinafter "U.S.") signed into law the U.S. Anti-Money Laundering Act of 2020 (hereinafter "AMLA 2020").

International banks with correspondent accounts in the U.S. have a simultaneous obligation to comply with their respective countries' bank secrecy laws and also with U.S. laws. For Swiss and French banks, for instance, their large U.S. presence compels them to adhere to U.S. law.² When an investigation into financial crimes such as money laundering

2. See generally Angelika Gruber, *Swiss banks court rich Americans a decade after tax drama*, REUTERS (Oct. 19, 2018), available at <https://www.reuters.com/article/swiss-banks-usa/swiss-banks-court-rich-americans-a-decade-after-tax-drama-idUSL8N1WX5GM> (last visited Nov. 29, 2023).

involves a foreign bank with a U.S. correspondent account, U.S. authorities may request information through a subpoena.³ Nations are expected to collaborate in fighting the global challenge that money laundering represents.⁴ This sentiment is echoed by multiple international treaties and conventions.⁵ The U.S. also has Mutual Legal Assistance Treaties (hereinafter “MLATs”) with several countries⁶ and is party to various multilateral conventions to facilitate information exchange and more accurately target international criminals.⁷

The emerging challenges stemming from ever-increasing criminal ingenuity emphasize the heightened need for collaboration between governments to capture perpetrators of transnational financial crime.⁸ Cryptocurrency, for example, has recently been linked with the cross-border laundering of billions of dollars.⁹ In developing international cooperation agreements to fight money laundering and financial crime, governments and international organizations such as the United Nations (hereinafter “U.N.”) need to balance the varying secrecy laws around the world with the law enforcement interests of governments.¹⁰ That balance is typically a delicate one, since ordinary citizens as well as major companies may perceive anti-money laundering laws as an ineffective invasion of their privacy.¹¹

3. 31 C.F.R. § 1010.670 (2023) (explicitly giving the executive branch authority to subpoena a foreign bank and terminate their correspondent accounts if it fails to comply).

4. See WILLIAM C. GILMORE, *DIRTY MONEY: THE EVOLUTION OF INTERNATIONAL MEASURES TO COUNTER MONEY LAUNDERING AND THE FINANCING OF TERRORISM* (Council of Europe Publishing, 4th ed. 2011).

5. See U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95 [hereinafter *Vienna Convention*]; U.N. Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209 [hereinafter *Palermo Convention*]; U.N. Convention Against Corruption, Oct. 13, 2003, 2349 U.N.T.S. 41 [hereinafter *Merida Convention*]; Treaty on Eur. Union, Feb. 7, 1992, 31 I.L.M. 247 [hereinafter *Maastricht Treaty*].

6. *Mutual Legal Assistance Treaties of the United States*, DEP’T OF JUST. (Apr. 2022), available at <https://www.justice.gov/criminal-oia/file/1498806/download> (last visited Nov. 29, 2023).

7. See *id.*; see also *Vienna Convention*; *Palermo Convention*; *Merida Convention*; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197.

8. See Gilmore, *supra* note 4.

9. *Crypto money laundering rises 30%, report finds*, BBC (Jan. 26, 2022), available at <https://www.bbc.com/news/technology-60072195> (last visited Nov. 29, 2023).

10. See Gilmore, *supra* note 4.

11. See Lanier Saperstein ET AL., *The Failure of Anti-Money Laundering Regulation: Where is the Cost-Benefit Analysis?*, 91 NOTRE DAME L. REV. 1, 1 (2015).

The AMLA of 2020¹² dramatically expanded the authority of U.S. federal law enforcement officials to subpoena any bank with correspondent accounts in the U.S.¹³ Crucially, elements of this law directly conflict with other countries' bank secrecy laws, notably with Swiss¹⁴ and French¹⁵ legislation that restrict a bank's ability to release information to foreign entities. The bank then faces two grim choices and an impossible decision: (1) it may either comply with the U.S. law and provide information to the U.S. government, thereby breaching its own country's bank secrecy laws, or (2) it complies with its country's bank secrecy laws by refusing to provide subpoenaed information to U.S. law enforcement, risking the loss of its correspondent accounts in the U.S.

A correspondent account is a special type of account that can receive deposits or make payments on behalf of a foreign bank.¹⁶ Given that correspondent banking is a critical component of international banking and trade, and that many foreign banks would be unable to otherwise transfer money around the world efficiently, losing a U.S. correspondent account is potentially catastrophic for any foreign banking institution.¹⁷

Today, existing international agreements are either too vague or insufficient to address how countries should respond to the legal conflict that AMLA 2020 created. This gap results in uncertainty among foreign banks on how to confront the equally unappealing options of violating their home country's law or not complying with U.S. law. Therefore, more clarity is needed for the benefit of banks, governments, and international entities alike. A new multilateral agreement, or at the very least an amendment to an existing treaty, is likely the soundest approach

12. AMLA § 6101(a); *see also* 31 U.S.C. § 5318.

13. Daniel L. Buhr et al., *The US Anti-Money Laundering Act 2020 and its Implications for Swiss Banks*, LALIVE (Feb. 12, 2021), available at <https://www.lalive.law/the-us-anti-money-laundering-act-2020-and-its-implications-for-swiss-banks> (last visited Nov. 29, 2023).

14. *Id.*

15. Sandeep Savla et al., *Navigating the conflict between the Anti-Money Laundering Act of 2020 and the French Blocking Statute*, NORTON ROSE FULBRIGHT (Jan. 18, 2022), available at <https://www.nortonrosefulbright.com/en/knowledge/publications/a5a5f4e4/navigating-the-conflict-between-the-anti-money-laundering-act-of-2020-and-the-french-blocking> (last visited Nov. 29, 2023).

16. 31 U.S.C. § 5318A(e)(1).

17. Kathleen A. Scott, *Work Continues on Addressing Correspondent Banking Decline*, 256 N.Y. L. J. 3, 3 (2016); *Role of U.S. Correspondent Banking in International Money Laundering: Hearing on S. Res. 395 Before the Permanent Subcomm. on Investigations of the H. Comm on Governmental Affs.*, 107th Cong. (2001) ("Without correspondent banking, in fact, it would often be impossible for banks to provide comprehensive nationwide and international banking services").

to clarify the conflict. Otherwise, this major area of uncertainty will continue to pose a significant legal challenge for the international banking industry.

This paper begins with an overview of the historical context surrounding money laundering and bank secrecy laws in Part I. Parts II and III discuss AMLA 2020, the conflict it created, and the current international legal framework relevant to these issues. Finally, this paper concludes in Part IV that the existing legal regime is insufficient to resolve this conflict and proposes a set of solutions grounded on the importance of international cooperation.

I. THE HISTORY OF GLOBAL MONEY LAUNDERING AND BANK SECRECY LAWS

Money laundering is the process of engaging in financial transactions to hide the source of illegally obtained funds.¹⁸ The practice dates back to merchants trying to avoid taxes in ancient China thousands of years ago.¹⁹ The more modern version of money laundering evolved in the 1920s during the Prohibition Era in the U.S., when the Mafia and gangs worked to disguise the provenance of their proceeds of crimes.²⁰ While these crimes are sometimes straightforward, law enforcement and juries often find it difficult to distinguish between legitimate transactions and those purposefully created to conceal funds.²¹ A common scenario that illustrates a clear instance of money laundering is where a drug trafficker receives money in exchange for drugs. Since the funds are “dirty;” that is, they come from illegal activity, the criminal may attempt to deposit the funds into the financial system (known as placement), then transfer the money to multiple financial institutions (referred to as layering), and finally, use the money to purchase goods or make business investments (described as integration).²² Once that three-step process is complete, the money is now “clean” and its illegal origin is hidden.

18. *Money Laundering*, INTERPOL, available at <https://www.interpol.int/en/Crimes/Financial-crime/Money-laundering> (last visited Nov. 29, 2023).

19. Shania Micallef, *The Evolution of Money Laundering from Ancient China to the Internet*, GRANT THORNTON (Aug. 26, 2021), available at <https://www.grantthornton.com/mt/insights/the-evolution-of-money-laundering-from-ancient-china-to-the-internet> (last visited Nov. 29, 2023).

20. *Id.*; Nicholas Ryder, *The Financial Services Authority and Money Laundering: A Game of Cat and Mouse*, 67 CAMBRIDGE L. J. 635, 635 (2008).

21. Matthew R. Auten, *Money Spending or Money Laundering: The Fine Line between Legal and Illegal Financial Transactions*, 33 PACE L. REV. 1231, 1232 (2013).

22. *History of Anti-Money Laundering Laws*, FINCEN, available at <https://www.fincen.gov/history-anti-money-laundering-laws> (last visited Nov. 29, 2023).

Globalization and technological innovations have further emboldened money launderers.²³ The law followed this evolution, with legislation to combat money laundering originating in the late twentieth century as a means to detect proceeds from drug trafficking.²⁴ Since then, the scope of these laws expanded to encompass not only organized crime, but also other illegal activities, including terrorism and its financing,²⁵ human trafficking,²⁶ and tax evasion.²⁷ The U.S. was one of the first countries to develop a body of law related to money laundering and to criminalize it.²⁸ The United Kingdom followed in 1986,²⁹ while the European Union (hereinafter “E.U.”) referred to money laundering as a crime beginning in 1993.³⁰ A variety of international treaties and conventions to address the issue were established beginning in the late 1980s and early 1990s.³¹

The fight against money laundering and the financing of terrorism is a global concern.³² Money laundering has long been viewed as a threat to the global financial system and an opportunity for criminals to finance

23. Micallef, *supra* note 19; *See generally* Hitesh Patel & Bharat S. Thakkar, *Money Laundering Among Globalized World*, in GLOBALIZATION - APPROACHES TO DIVERSITY (Hector Cuadra-Montiel ed., 2012).

24. Gilmore, *supra* note 4, at 53.

25. *Anti-Money Laundering and Countering the Financing of Terrorism*, U.S. DEP'T OF STATE, available at <https://www.state.gov/anti-money-laundering-and-countering-the-financing-of-terrorism> (last visited Nov. 29, 2023).

26. *Report to Congress on An Analysis of Anti-Money Laundering Efforts Related to Human Trafficking*, U.S. DEP'T OF STATE (Oct. 7, 2023), available at <https://www.state.gov/report-to-congress-on-an-analysis-of-anti-money-laundering-efforts-related-to-human-trafficking> (last visited Nov. 29, 2023); *Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants*, FIN. ACTION TASK FORCE (Jul. 2011), available at <https://www.fatf-gafi.org/en/publications/Methodsandtrends/Moneylaunderingrisksarisingfromtraffickingofhumanbeingsandsmugglingofmigrants.html> (last visited Nov. 29, 2023).

27. Ian M. Comisky, *May Tax Evasion Be Charged as a Money Laundering Offense? The Times Are A-Changing*, AM. BAR ASS'N. (Aug. 24, 2020), available at https://www.americanbar.org/groups/taxation/publications/abataximes_home/20aug/20aug-pp-comisky-money-laundering (last visited Nov. 29, 2023).

28. Joel Cohen & Linda Noonan, *Anti-Money Laundering Laws and Regulations USA 2022-2023*, INT'L. COMPAR. LEGAL GUIDES (May 19, 2022), available at <https://iclg.com/practice-areas/anti-money-laundering-laws-and-regulations/usa> (last visited Nov. 29, 2023).

29. Ryder, *supra* note 20, at 636.

30. Guy Stessens, *Money Laundering*, 77 REVUE INTERNATIONALE DE DROIT PÉNAL 201, 201 (2006).

31. *See infra* Sec. III.

32. *Anti-Money Laundering/Combating the Financing of Terrorism - Topics*, INT'L. MONETARY FUND, available at <https://www.imf.org/external/np/leg/amlcft/eng/amll.htm> (last visited Nov. 29, 2023); Gilmore, *supra* note 4, at 15.

their illicit activities.³³ This practice has an incalculable impact on local and international economies and the overall financial system.³⁴ Its effects are not limited to economic ones; money laundering also engenders social problems such as the expansion of criminal activity and the opportunity for unlawful actors to gain power.³⁵ The international threat of money laundering and the financial aspects of other crimes gained prominence as governments and lawmakers realized that targeting the profits of criminal groups was essential to bring an end to their illicit activities.³⁶

Laws aimed at detecting and stopping money laundering have long been in tension with another critical societal interest: privacy.³⁷ With financial information being among the most sensitive of data,³⁸ lawmakers recognize the importance of bank secrecy laws in protecting consumers and their information. In the U.S., for instance, this friction has consistently been at issue in cases that implicate the Fourth Amendment where citizens have asked courts—often unsuccessfully—to prevent government agencies from accessing their financial records.³⁹ Three major stakeholders have differing interests in this situation. Banks are especially concerned with privacy and confidentiality given the nature of the information they possess and their duty of confidentiality to their

33. Vito Tanzi, *Money Laundering and the International Financial System* 1-13 (Int'l Monetary Fund, Working Paper No. 96/55, 1996).

34. John McDowell & Gary Novis, *The Consequences of Money Laundering and Financial Crime*, 6 *ECON. PERSPS.* 6, 6 (2001); see also Richard Reimer & Sarah Wrage, *Legal Framework for Money Laundering in Europe*, HOGAN LOVELLS, available at <https://guide.hoganlovellsabc.com/legal-framework-for-money-laundering-in-europe> (last visited Nov. 29, 2023) (explaining that money laundering is a significant threat to many countries in Europe).

35. McDowell & Novis, *supra* note 34.

36. Gilmore, *supra* note 4, at 22.

37. See Robert S. Pasley, *Privacy Rights v. Anti-Money Laundering Enforcement*, 6 *N.C. BANKING INST.* 147, 147 (2002); Njaramba E. Gichuki, *The Conflict between Anti-Money Laundering Reporting Obligations and the Doctrine of Confidentiality for Legal Practitioners in Kenya*, 24 *J. MONEY LAUNDERING CONTROL* 607, 614 (2021). But see *Partnering in the Fight Against Financial Crime: Data Protection, Technology and Private Sector Information Sharing*, FIN. ACTION TASK FORCE (Jul. 2022), available at <https://www.fatf-gafi.org/en/publications/Digitaltransformation/Partnering-in-the-fight-against-financial-crime.html> (last visited Nov. 29, 2023) (“[T]hese interests are not in opposition nor inherently mutually exclusive”).

38. See *Protecting Personal Information: A Guide for Business*, FED. TRADE COMM’N (Oct. 2016), available at <https://www.ftc.gov/business-guidance/resources/protecting-personal-information-guide-business> (last visited Nov. 29, 2023).

39. See e.g., *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 54 (1974) (holding that the Bank Secrecy Act’s recordkeeping requirements were constitutional because they did not violate the Fourth Amendment); *United States v. Miller*, 425 U.S. 435, 444 (1976) (holding that bank records are not protected by the Fourth Amendment).

customers.⁴⁰ Consumers are worried about how their sensitive information is protected⁴¹ and ordinarily do not want their information disclosed to third parties, including law enforcement. Governments find this information invaluable in identifying and prosecuting crime.⁴² Bank secrecy laws are at the heart of this debate.

Experts disagree regarding the right balance between the security gained by preventing criminal activity and privacy as it relates to banking laws.⁴³ On one hand, some believe that the government's interest in fighting money laundering supersedes privacy in certain cases.⁴⁴ Conversely, critics of anti-money laundering regulation believe that such laws are ineffective in deterring criminals from laundering their money through banks.⁴⁵ They argue that bank secrecy laws largely fail at preventing criminal activity and are a major privacy concern for ordinary

40. See Victoria Finkle, *Banks Won't Be Able to Remain on Sidelines of Privacy Debate*, AM. BANKER (Mar. 3, 2019, 9:30 PM), available at <https://www.americanbanker.com/news/banks-wont-be-able-to-remain-on-sidelines-of-privacy-debate> (last visited Nov. 29, 2023).

41. Shiva Maniam, *Americans Feel the Tensions Between Privacy and Security Concerns*, PEW RSCH. CTR. (Feb. 19, 2016), available at <https://www.pewresearch.org/fact-tank/2016/02/19/americans-feel-the-tensions-between-privacy-and-security-concerns> (last visited Nov. 29, 2023).

42. *Combating Money Laundering and Other Forms of Illicit Finance: Administration Perspectives on Reforming and Strengthening Bank Secrecy Act Enforcement: Hearing Before the Comm. on Banking, Housing, and Urban Affs.*, 115th Cong. (2018) ("The ability to pursue investigative leads in transnational criminal investigations and terrorist financing cases using foreign bank records is vital to successful AML efforts on the international stage"); see also *Tackling Money Laundering and Terrorist Financing*, N.Z. MINISTRY OF JUST. (Nov. 1, 2022), available at <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/aml-cft> (last visited Nov. 29, 2023); *About Israel's AML/CFT Regime*, ISR. MINISTRY OF JUST. (Dec. 19, 2021), available at <https://www.gov.il/en/Departments/General/aml-regime> (last visited Nov. 29, 2023).

43. See generally Maria A. de Dios, *The Sixth Pillar of Anti-Money Laundering Compliance: Balancing Effective Enforcement with Financial Privacy*, 10 BROOK. J. CORP. FIN. & COM. L. 495, 498 (2016).

44. See Kenneth E. Himma, *Privacy Versus Security: Why Privacy is not an Absolute Value or Right*, 44 SAN DIEGO L. REV. 857, 860 (2007) ("[T]he various theories of legitimacy presuppose or entail that, other things being equal, security is, as a general matter, more important than privacy"); see also Pasley, *supra* note 37, at 155.

45. Richard K. Gordon, *Losing the War Against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing*, 21 DUKE J. COMP. & INT'L L. 503, 507 (2011) (arguing that anti-money laundering laws are inefficient and need to be rethought); Norbert Michel & Jennifer J. Schulp, *Revising the Bank Secrecy Act to Protect Privacy and Deter Criminals*, CATO INST. (Jul. 26, 2022), available at <https://www.cato.org/policy-analysis/revising-bank-secrecy-act-protect-privacy-deter-criminals> (last visited Nov. 29, 2023).

citizens.⁴⁶ For example, laws already in place before September 11, 2001 did not stop the terrorist attacks or their financing.⁴⁷ Rather, the terrorists consistently used money laundering, including transactions through U.S. banks, that went unnoticed, to fund their activities.⁴⁸

In 1986, the Money Laundering Control Act⁴⁹ in the U.S. and the Drug Trafficking Offences Act in the United Kingdom ushered a new era of fighting money laundering as a crime of its own.⁵⁰ Soon thereafter, the international community began to act more swiftly. The G7 countries established the Financial Action Task Force (hereinafter “FATF”) in 1989 as a response to growing concerns about drug trafficking and money laundering.⁵¹ In 1990, France created the Intelligence Processing and Action Against Clandestine Financial Circuits agency (abbreviated as “TRACFIN” in French) and charged it with investigating money laundering.⁵² The E.U. launched several different initiatives and directives, and international entities developed a more robust body of law to address money laundering.⁵³ At the same time, the methods used to launder money continuously evolved and rapidly became more creative. Some of the channels that criminals have employed to launder money include foreign bank accounts, cash couriers, credit cards, art, real estate, securities, casinos, business enterprises, and shell corporations.⁵⁴

The flip side to anti-money laundering laws usually involve bank secrecy laws and blocking statutes.⁵⁵ Countries around the world have

46. Saperstein et al., *supra* note 11, at 1.

47. Amos N. Guiora & Brian J. Field, *Using and Abusing the Financial Markets: Money Laundering as the Achilles’ Heel of Terrorism*, 29 U. PA. J. INT’L. L. 59, 62 (2014).

48. *Id.*; see also Kathleen A. Lacey & Barbara Crutchfield George, *Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms*, 23 NW. J. INT’L. L. & BUS. 263, 266 (2003).

49. Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956-1957 (2022); Money Laundering Control Act of 1986, 18 U.S.C. § 981 (2016).

50. Ryder, *supra* note 20, at 636.

51. Gilmore, *supra* note 4, at 91.

52. *TRACFIN 2020: Operations and Analysis Report*, TRACFIN (July 2021), available at https://www.economie.gouv.fr/files/2021-12/RA_TRACFIN_2020_VDEF_VANG_0.pdf (last visited Nov. 29, 2023).

53. See discussion *infra* Sec. III.

54. Gilmore, *supra* note 4, at 42; Ryder, *supra* note 20, at 636; Anthony Kennedy, *Dead Fish across the Trail: Illustrations of Money Laundering Methods*, 8 J. MONEY LAUNDERING CONTROL 305, 305 (2005); Alessandra Dagirmanjian, *Laundering the Art Market: A Proposal for Regulating Money Laundering Through Art in the United States*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 687, 689-90 (2019).

55. Monica Hanna & Michael A. Wiseman, *Discovering Secrets: Trends in U.S. Courts’ Deference to International Blocking Statutes and Banking Secrecy Laws*, 130 BANKING L. J. 692, 692-93 (2013).

secrecy laws of varying degrees. Mexican law, for instance, forbids banks from disclosing financial information to anyone other than the customer unless judicially ordered to do so.⁵⁶ A majority of countries follow the *Tournier* approach, which derives from a seminal English case decided in 1924.⁵⁷ That court held that banks have a duty not to disclose customer information, except when the disclosure is required by law.⁵⁸ This duty is implied in the bank's contract with the customer.⁵⁹ European nations have historically favored higher levels of bank secrecy in their laws.⁶⁰ Commonwealth countries like Britain, Canada, and Australia tend to have a medium level of secrecy, while Denmark, Germany, and France have stricter bank secrecy laws.⁶¹ The U.S. is in an interesting position: some view it as a country with low secrecy—perhaps because of the broad powers granted to law enforcement—but other organizations rank the U.S. as the most secretive jurisdiction in the world.⁶² The latter opinion is based on the perceived lack of transparency in the U.S. relating to company ownership and information exchange.⁶³ Several European countries like Austria, Luxembourg, and Switzerland are notorious for

56. *¿Qué Es el Secreto Bancario y Cómo Funciona?*, FORBES (May 12, 2022, 2:31 PM), available at <https://www.forbes.com.mx/que-es-el-secreto-bancario-y-como-funciona> (last visited Nov. 29, 2023); Roberto Noguez, *Secreto Bancario Sólo se Puede Romper si Hay un Juicio: CNBV*, FORBES (May 11, 2022, 3:50 PM), available at <https://www.forbes.com.mx/secreto-bancario-solo-se-puede-romper-si-hay-un-juicio-cnbv> (last visited Nov. 29, 2023). See also Juliana B. Carter, *Mexico's AML Regime Evaluated by the FATF: Systemic Improvement, but Suspicious Transaction Reporting and Law Enforcement Efforts Continue to Struggle*, BALLARD SPAHR LLP (Jan. 8, 2018), available at <https://www.moneylaunderingnews.com/2018/01/mexicos-aml-regime-evaluated-by-the-fatf-systemic-improvement-but-suspicious-transaction-reporting-and-law-enforcement-efforts-continue-to-struggle> (last visited Nov. 29, 2023) (explaining that the Mexican government's approach to anti-money laundering enforcement is generally viewed as weak by international organizations like FATF).

57. *Tournier v. Nat'l Provincial & Union Bank of Eng.*, [1924] 1 KB 461.

58. *Id.*; see also *Laydon v. Mizuho Bank, Ltd.*, 183 F. Supp.3d 409, 418 (2016) (discussing the duty of confidentiality established by the *Tournier* case); *United States v. Chase Manhattan Bank, N.A.*, 584 F. Supp. 1080, 1084 (1984) (outlining exceptions to the duty recognized by the *Tournier* case, such as “where disclosure is under compulsion of the law”).

59. Robert Stokes, *The Genesis of Banking Confidentiality*, 32 J. LEGAL HIST. 279, 279 (2011).

60. Philip R. Wood, *International Law of Bank Secrecy*, in CURRENT LEGAL ISSUES AFFECTING CENTRAL BANKS, VOLUME V (Robert C. Effros ed., 1998).

61. *Id.*

62. *Id.*; *Financial Secrecy Index 2022*, TAX JUST. NETWORK (2022), available at <https://fsi.taxjustice.net> (last visited Nov. 29, 2023).

63. *Country Detail: United States*, TAX JUST. NETWORK (2022), available at <https://fsi.taxjustice.net/country-detail/#country=US&period=22> (last visited Nov. 29, 2023).

their rigorous bank secrecy laws and practices.⁶⁴ One of the most famous and controversial examples of strict bank secrecy laws is Switzerland.⁶⁵ The Alpine country's bank secrecy tradition has existed for centuries, dating back to the 1700s.⁶⁶ Historically, the refusal of Swiss depository institutions to release their customers' confidential information helped protect vulnerable or persecuted people.⁶⁷ In the seventeenth century, these laws sheltered the Huguenots as they fled from persecution in France.⁶⁸ On the other hand, wealthy people trying to avoid taxation or those looking to conceal the real source of their funds found a tremendous opportunity to do so through these secretive Swiss banking laws.⁶⁹

The Swiss Banking Act of 1934, which is still in force today, further strengthened the confidentiality requirements for Swiss banks.⁷⁰ The law was partly a response to a 1933 regulation in Nazi Germany that criminalized—by penalty of death—holding any assets outside of Germany.⁷¹ The Banking Act, passed soon after three German citizens were executed, converted into law a safeguard that was already a common practice in Swiss banking.⁷² Switzerland was now effectively protecting the identity of German citizens fleeing persecution. That positive

64. Joel Slawotsky, *Reining in Recidivist Financial Institutions*, 40 DEL. J. CORP. L. 280, 321 (2015); Bradley J. Bondi, *Don't Tread On Me: Has the United States Government's Quest for Customer Records from UBS Sounded the Death Knell for Swiss Bank Secrecy Laws?*, 30 NW. J. INT'L L. & BUS. 1, 1 (2010).

65. See, e.g., Kanwar M. Singh, *Nowhere to Hide: Judicial Assistance in Piercing the Veil of Swiss Banking Secrecy*, 71 B.U. L. REV. 847, 847-48 (1991); Bondi, *supra* note 64; Lynnley Browning & Julia Werdigier, *U.S. wants more names from UBS*, N.Y. TIMES (Feb. 20, 2009), available at <https://www.nytimes.com/2009/02/20/business/worldbusiness/20iht-20ubs.20323354.html> (last visited Nov. 29, 2023).

66. Kalyeena Makortoff, *How Swiss Banking Secrecy Enabled an Unequal Global Financial System*, THE GUARDIAN (Feb. 22, 2022, 5:00 AM), available at <https://www.theguardian.com/news/2022/feb/22/how-swiss-banking-secrecy-global-financial-system-switzerland-tax-elite> (last visited Nov. 29, 2023).

67. Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325, 328-29 (1998).

68. Michele Moser, *Switzerland: New Exceptions to Bank Secrecy Laws Aimed at Money Laundering and Organized Crime*, 27 CASE W. RES. J. INT'L L. 321, 321 (1995).

69. David Pegg et al., *Revealed: Credit Suisse Leak Unmasks Criminals, Fraudsters and Corrupt Politicians*, THE GUARDIAN (Feb. 20, 2022, 12:00 AM), available at <https://www.theguardian.com/news/2022/feb/20/credit-suisse-secrets-leak-unmasks-criminals-fraudsters-corrupt-politicians> (last visited Nov. 29, 2023).

70. See Sébastien Guex, *The Origins of the Swiss Banking Secrecy Law and Its Repercussions for Swiss Federal Policy*, 74 BUS. HIST. REV. 237, 244 (2000); Bondi, *supra* note 64, at 4.

71. C. Todd Jones, *Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 NW. J. INT'L L. & BUS. 454, 455 (1992).

72. *Id.*

association between Swiss banking laws and World War II was undercut, however, by the infamous protection the laws provided to German Nazi officials during and after World War II.⁷³

Indeed, one of the first modern conflicts between the security interests of one country and the strict bank secrecy laws of another arose during World War II.⁷⁴ Surprisingly, a challenge to Swiss banking laws did not originate from the German Nazi government.⁷⁵ Instead, the request came from the U.S. government.⁷⁶ The Swiss had been moving their gold reserves to U.S. banks in preparation for a possible German invasion, but U.S. officials suspected that some of the gold was actually owned by the Nazis, and they were now taking advantage of the very law that was meant to stop them.⁷⁷ The Swiss fiercely refused to release information to the U.S. government at first, although they partially capitulated in the Bern Agreement.⁷⁸

Countries with strict bank secrecy laws such as Switzerland constantly face pressure from the international community to amend their laws, particularly from nations like the U.S. and Germany.⁷⁹ Some have gone as far as labeling these laws “immoral” because they allow criminals to freely conduct their illicit activities, and provide a haven for money launderers who naturally prefer to operate in countries with strict bank

73. *Swiss Bank Helped Launder Nazi Gold, Documents Show*, LOS ANGELES TIMES (Jan. 13, 1997), available at <https://www.latimes.com/archives/la-xpm-1997-01-13-mn-18207-story.html> (last visited Nov. 29, 2023); see also Guex, *supra* note 70, at 257. See generally Charisse Jones, *In Lawsuit Against Swiss Banks, A Hope to Do Justice to a Father's Memory*, N.Y. TIMES (Nov. 12, 1996), available at <https://www.nytimes.com/1996/11/12/nyregion/in-lawsuit-against-swiss-banks-a-hope-to-do-justice-to-a-father-s-memory.html> (last visited Nov. 29, 2023) (discussing a lawsuit that sought recovery of assets deposited by Holocaust victims in Swiss banks).

74. See Elliot A. Stultz, *Swiss Bank Secrecy and United States Efforts to Obtain Information from Swiss Banks*, 21 VAND. J. TRANSNAT'L L. 63, 81 (1988).

75. Jones, *supra* note 71, at 455-56.

76. *Id.*

77. *Id.*

78. Stultz, *supra* note 74, at 83-84 (explaining that after intense pressure by the U.S. government, Swiss authorities agreed in 1945 to demand disclosure from banks holding German assets).

79. Ray Flores, *Lifting Bank Secrecy: A Comparative Look at the Philippines, Switzerland, and Global Transparency*, 14 WASH. U. GLOBAL STUD. L. REV. 779, 779 (2015); Kalyeena Makortoff, *Swiss Consider Amending Banking Secrecy Laws Amid UN Pressure*, THE GUARDIAN (May 2, 2022, 12:00 AM), available at <https://www.theguardian.com/news/2022/may/02/swiss-consider-amending-banking-secrecy-laws-amid-un-pressure> (last visited Nov. 29, 2023); see also Niels Johannesen & Gabriel Zucman, *The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown*, 6 AM. ECON. J.: ECON. POL'Y 65, 66 (2014) (arguing that, in the context of fighting tax evasion, policy makers believe “the era of bank secrecy is over”).

secrecy laws.⁸⁰ Conversely, France has largely aligned its anti-money laundering regime with E.U. and FATF guidelines and directives.⁸¹ However, France has its own blocking statutes and secrecy laws that address these issues, such as the 1980 Blocking Statute⁸² and a provision in the French Monetary and Financial Code.⁸³ Compromises between nations with conflicting anti-money laundering law and bank secrecy law, often enshrined in international treaties and agreements, are necessary in view of the international nature of the crime.⁸⁴ Given that Swiss and French banks both have a substantial presence in the U.S., the interaction between U.S. law and the laws in those countries is highly relevant.

II. THE CONFLICT BETWEEN AMLA 2020 AND SWISS AND FRENCH BANK SECRECY LAWS

Financial crimes like money laundering have become more complex and harder for authorities to track.⁸⁵ One of the reasons is that new technologies and payment platforms, such as cryptocurrency, have made crime more difficult to detect and afford a layer of anonymity to users.⁸⁶ Consequently, the body of law covering money laundering and the

80. See Pegg et al., *supra* note 69; Gilmore, *supra* note 4, at 36-37.

81. See *infra* Sec. III.

82. Hanna & Wiseman, *supra* note 55; *The French Supreme Court Applies the 1980 Blocking Statute for the First Time and Strengthens the Conditions Under Which Evidence To Be Used in Foreign Litigation Can Be Obtained in France*, GIBSON DUNN (Jan. 17, 2008), available at <https://www.gibsondunn.com/the-french-supreme-court-applies-the-1980-blocking-statute-for-the-first-time-and-strengthens-the-conditions-under-which-evidence-to-be-used-in-foreign-litigation-can-be-obtained-in-france> (last visited Nov. 29, 2023) (explaining that the 1980 Blocking Statute prohibits French nationals or entities from disclosing financial information to foreign public officials).

83. *Code Monétaire et Financier*, RÉPUBLIQUE FRANÇAISE, available at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000045391888 (last visited Nov. 29, 2023); *Bank Secrecy Challenged by the Right to Evidence*, NOËLLE LENOIR AVOCATS, available at <https://www.noellelenoir-avocats.com/en/blog/media/Bank-secrecy-challenged-by-the-right-to-evidence> (last visited Nov. 29, 2023).

84. Gilmore, *supra* note 4, at 29.

85. *Tracing Dirty Money - An Expert on the Trail*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, available at <https://www.unodc.org/unodc/en/frontpage/2011/August/tracing-dirty-money-an-expert-on-the-trail.html> (last visited Nov. 29, 2023).

86. Lan Wei, *Cryptocurrency: Using Dark Markets to Shine Light on the Propriety of Regulation*, 2022 U. ILL. J. L. TECH. & POL'Y. 219, 247 (2022); Jeremy Ciarabellini, *Cryptocurrencies' Revolt Against the BSA: Why the Supreme Court Should Hold that the Bank Secrecy Act Violates the Fourth Amendment*, 10 SEATTLE J. TECH., ENV'T & INNOVATION L. 135, 176 (2020). *But see* John Bohannon, *Why Criminals Can't Hide behind Bitcoin*, SCIENCE (Mar. 9, 2016), available at <https://www.science.org/content/article/why-criminals-cant-hide-behind-bitcoin> (last visited Nov. 29, 2023) (arguing that forensic investigators have found flaws in cryptocurrency that make illegal activity easier to detect).

financing of terrorism have continued to evolve in an attempt to curb and accurately detect financial crime.⁸⁷ Nevertheless, the many measures taken since the 1970s to prevent money laundering have often not been particularly successful.⁸⁸

The first major law to impose reporting and recordkeeping requirements for financial institutions was the Bank Secrecy Act of 1970 (hereinafter “BSA”).⁸⁹ Despite its somewhat misleading name, the BSA—enforced today by the Financial Crimes Enforcement Network, or FinCEN—was not primarily focused on preserving confidentiality between banks and their customers. Rather, the main intent behind the law was to curb the high influx of illegal money coming into the U.S. due to the drug trade.⁹⁰ The BSA and subsequent U.S. laws imposed heightened disclosure standards on banks, minimum controls to detect criminal funds, and bank reporting of suspicious transactions to the U.S. government.⁹¹ The U.S. Congress was also concerned that American citizens were using the privacy afforded by bank secrecy laws in other countries to hide criminal activities.⁹²

The Right to Financial Privacy Act of 1978⁹³ attempted to reduce the extent to which the government could access an individual’s bank records, but that effort to place privacy over security did not last long.⁹⁴ In 1986, the Money Laundering Control Act officially criminalized money laundering in the U.S.⁹⁵ In the fifteen years that followed, several other laws were passed to build a more robust anti-money laundering regime.⁹⁶ In particular, the U.S. government took a number of prominent legislative actions in response to the terrorist attacks of September 11, 2001, such as the implementation of the Terrorist Finance Tracking Program and the passage of the PATRIOT Act.⁹⁷ Notably, one provision

87. See de Dios, *supra* note 43, at 500.

88. Gordon, *supra* note 45, at 551-52.

89. FINCEN, *supra* note 22.

90. Julie Stackhouse, *What is the Bank Secrecy Act, and Why Does It Exist?*, FED. RSRV. BANK OF ST. LOUIS (Apr. 23, 2018), available at <https://www.stlouisfed.org/on-the-economy/2018/april/what-bank-secrecy-act-why-exist> (last visited Nov. 29, 2023).

91. *Id.*

92. Robert W. Nuzum, *The Bank Secrecy Act, the Fourth Amendment, and Standing*, 36 LA. L. REV. 834, 834 (1976).

93. Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641.

94. *Right to Financial Privacy Act*, ELEC. PRIV. INFO. CTR., available at <https://epic.org/the-right-to-financial-privacy-act> (last visited Nov. 29, 2023).

95. Gilmore, *supra* note 4, at 23.

96. See FINCEN, *supra* note 22.

97. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, §

in the PATRIOT Act authorized U.S. law enforcement to request documents related to a foreign bank's correspondent account. The international community also prioritized the need to prevent and fight money laundering and the financing of terrorism after the September 11th attacks.⁹⁸

One of the most recent actions taken by U.S. lawmakers to address money laundering

involved AMLA 2020.⁹⁹ This legislation, created in an effort to further deter financial crimes, was a major update to the BSA and the existing anti-money laundering regime.¹⁰⁰ The Act imposes civil penalties as high as \$50,000 per day if a foreign bank fails to comply with a request for information and authorizes federal agencies to seek court orders to enforce their requests.¹⁰¹ Among the statute's most important provisions were the creation of a beneficial ownership database, an emphasis on the use of new technologies by criminals to launder money, and the dramatic expansion of the U.S. government's subpoena power over international institutions with correspondent accounts in the U.S.¹⁰² Section 319(b) of the PATRIOT Act¹⁰³ previously covered the authority to request documents from foreign banks, but AMLA 2020 amplified the government's powers by permitting officials to subpoena information regardless of any connection to a U.S.-based correspondent account.¹⁰⁴

319(b), 115 Stat. 272, 311 (2001) [hereinafter PATRIOT Act]; Susan G. Odoyo, *The Effects of U.S. Anti-Terrorist Laws on International Business and Trade*, 38 SYRACUSE J. INT'L. L. & COM. 257, 275-76 (2011).

98. INT'L MONETARY FUND, *supra* note 32.

99. Anti-Money Laundering Act of 2020, Pub. L. No. 116-283, 134 Stat. 3388 (2021).

100. Daniel P. Stipano, *New AML Law Will Help Banks Deter Illicit Finance. But There's a Catch*, AM. BANKER (Apr. 27, 2021), available at <https://www.americanbanker.com/opinion/new-aml-law-will-help-banks-deter-illicit-finance-but-theres-a-catch> (last visited Nov. 29, 2023).

101. Eytan J. Fisch et al., *US Enacts Historic Legislation to Strengthen Anti-Money Laundering and Counterterrorist Financing Legal Framework*, SKADDEN (Jan. 7, 2021), available at <https://www.skadden.com/insights/publications/2021/01/us-enacts-historic-legislation> (last visited Nov. 29, 2023).

102. *Four Takeaways on BSA/AML Reform under the Anti-Money Laundering Act of 2020*, THOMSON REUTERS (Aug. 9, 2021), available at <https://legal.thomsonreuters.com/en/insights/articles/4-takeaways-on-bsa-aml-reform> (last visited Nov. 29, 2023).

103. PATRIOT Act, *supra* note 97.

104. Brandon Fiscina, *Cross-Border Impacts of the Anti-Money Laundering Act of 2020*, COLUM. J. TRANSNAT'L L. (Apr. 7, 2021), available at <https://www.jtl.columbia.edu/bulletin-blog/cross-border-impacts-of-the-anti-money-laundering-act-of-2020> (last visited Nov. 29, 2023).

The laws in place before AMLA 2020 gave U.S. agencies the authority to subpoena “any foreign bank that maintains a correspondent account in the United States and request records related to *such correspondent account*, including records maintained outside of the United States relating to the deposit of funds into the foreign bank” (emphasis added).¹⁰⁵ The new provisions of AMLA 2020 dramatically expanded law enforcement’s powers with significantly broader language. The new law allows the U.S. government to subpoena “any records relating to the correspondent account *or any account at the foreign bank*, including records maintained outside of the United States” (emphasis added).¹⁰⁶ As a result, AMLA 2020 eliminated the limitation in the earlier law that focused solely on records related to the correspondent account, and instead provided broadened powers to U.S. investigators to subpoena not only the records related to the correspondent account, but also any account at the foreign bank.¹⁰⁷ Soon after AMLA 2020 was passed, FinCEN published a set of eight priorities in its fight against money laundering, which included foreign and domestic terrorist financing, transnational criminal organization activity, drug trafficking, and human trafficking.¹⁰⁸ These priorities likely played a significant role in Congress’s earlier decision to broaden the agency’s subpoena powers with the passage of AMLA 2020.

The new law immediately created confusion and caught the attention of the global banking community. An overhaul was arguably needed to bring money laundering laws up to date with today’s complex and globalized economy, especially since some of these provisions had not been updated since 2001.¹⁰⁹ The expansion of subpoena power, though, created a potential way for the government to circumvent the MLAT process.¹¹⁰ If federal investigators have the power to request information

105. 31 C.F.R. § 1010.670 (2023).

106. *New AML Subpoena Power Over Foreign Bank Records and New Enforcement Standards of the Anti-Money Laundering Act of 2020*, CURTIS (Jan. 27, 2021), available at <https://www.curtis.com/our-firm/news/new-aml-subpoena-power-over-foreign-bank-records-and-new-enforcement-standards-of-the-anti-money-laundering-act-of-2020> (last visited Nov. 29, 2023).

107. *Id.*

108. *Anti-Money Laundering and Countering the Financing of Terrorism National Priorities*, FINCEN (June 30, 2021), available at [https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20\(June%2030%2C%202021\).pdf](https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20(June%2030%2C%202021).pdf) (last visited Nov. 29, 2023).

109. Stipano, *supra* note 100; see Marc-Alain Galeazzi et al., *The Anti-Money Laundering Act of 2020*, 22 J. INV. COMPLIANCE 253, 253 (2021).

110. Andres Fernandez & Eddie A. Jauregui, *Key Provisions of the Anti-Money Laundering Act of 2020*, HOLLAND & KNIGHT (Jan. 13, 2021), available at

from a foreign bank, that essentially means that the U.S. no longer needs to rely on international treaties to obtain any documentation they may seek.¹¹¹ Ultimately, the effect of this provision might be that U.S. prosecutors have almost unlimited authority to obtain information from any international bank with a correspondent account.¹¹²

The passage of this law is so recent that concrete instances where the U.S. government has exercised this power have not been documented outside of the hypothetical realm. Nevertheless, two specific examples of countries where this conflict raised many eyebrows are Switzerland and France. Swiss law, as codified in Article 271 of the Swiss Criminal Code, prohibits unauthorized disclosure of information “in favor of a foreign state.”¹¹³ Revealing information relating to bank clients may even result in a prison sentence, a harsh consequence that that U.N. officials have criticized.¹¹⁴ A Swiss bank that receives a subpoena from another country may comply in certain circumstances, such as by limiting the release of information to data authorized by the Swiss Financial Market Supervision Act or by asking permission from the Swiss Financial Market Supervisory Authority.¹¹⁵ Still, following those steps may not result in the provision of information that fully conforms to the request in the subpoena. Essentially, a Swiss bank in this situation is between a rock and a hard place: it either violates its country’s laws by collaborating with

<https://www.hklaw.com/en/insights/publications/2021/01/key-provisions-of-the-anti-money-laundering-act-of-2020> (last visited Nov. 29, 2023).

111. *See id.*

112. Jamie Schafer et al., *The Anti-Money Laundering Act of 2020: The Remarkable Expansion of the U.S. Government’s Subpoena Power Over Foreign Financial Institutions*, PERKINS COIE (Nov. 4, 2021), available at <https://www.perkinscoie.com/en/news-insights/the-anti-money-laundering-act-of-2020-the-remarkable-expansion-of-the-us-governments-subpoena-power-over-foreign-financial-institutions.html> (last visited Nov. 29, 2023).

113. Patrick Eberhardt & Tigran Serobyán, *Anti-Money Laundering Law Reform in the United States: Swiss Banks Caught between a Rock and a Hard Place*, EVERSHEDES SUTHERLAND (Sep. 2021), available at https://www.eversheds-sutherland.com/documents/global/switzerland/legalcompass/LC_2021_08_EN_Banking_Finance.pdf (last visited Nov. 29, 2023); *see also* Marmin J. Michaels et al., *The DOJ’s Swiss Bank Program: Lessons Learned and the Road Ahead*, THOMSON REUTERS (Sep. 2016), available at https://www.globalcompliancenews.com/wp-content/uploads/sites/43/2016/10/LIT_AugSep16_Feature-SwissBank.pdf (last visited Nov. 29, 2023).

114. Hugo Miller, *Swiss Bank Secrecy Law Has ‘Chilling Effect,’ Says UN Expert*, BLOOMBERG (May 3, 2022), available at <https://www.bloomberg.com/news/articles/2022-05-03/swiss-bank-secrecy-law-has-chilling-effect-un-expert-warns#xj4y7vzkg> (last visited Nov. 29, 2023).

115. Eberhardt & Serobyán, *supra* note 113.

the U.S. government, or risks losing its all-important correspondent accounts in the U.S.¹¹⁶

The French Blocking Statute and the Banking Act of 1984 are other examples of laws that directly clash with the broad requirements of AMLA 2020.¹¹⁷ Similar to Switzerland's aforementioned law, this French statute generally forbids the release of economic or financial information to foreign entities if that information is meant to be used as evidence in prosecutions or judicial proceedings.¹¹⁸ The seminal case addressing issues arising from the French Blocking Statute and U.S. discovery requests created a balancing test that U.S. courts continue to use.¹¹⁹ Though application of the Blocking Statute is rare, breaking the law can be costly: violators can be fined, imprisoned, or both.¹²⁰ Clearly, no French bank wants to be in a position where it exposes itself to French authorities and the reputational damage that would surely result from such violations. On the contrary, those institutions are also heavily invested in U.S. business and their correspondent accounts.¹²¹ Some U.S. courts have explicitly opined that the interests of the American and French governments in stopping terrorism are more important than maintaining confidentiality between banks and customers.¹²² In an analogous way to their Swiss counterparts, French banks confronted with a U.S. subpoena could consult with France's Department of Strategic Information and Economic Security (abbreviated as "SISSE" in French)

116. Buhr et al., *supra* note 13.

117. See Jerome Barre, *Private Banking Confidentiality Provisions in France*, BARRE & ASSOCIES (Sept. 10, 2020), available at <https://www.lexology.com/library/detail.aspx?g=4f2c353a-7748-4830-8729-e54c77115ca4> (last visited Nov. 29, 2023).

118. Samantha Cutler, *The Face-Off Between Data Privacy and Discovery: Why U.S. Courts Should Respect EU Data Privacy Law When Considering the Production of Protected Information*, 59 B.C. L. REV. 1513, 1527 (2018); Savla et al., *supra* note 15.

119. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522 (1987) (holding that federal courts may compel foreign parties to release information regardless of any international treaties); see also Daniel Mandell, *Picking Up Where Aerospatiale Left Off: Merits-Based Discovery, Foreign Parties, And Uncertain Personal Jurisdiction*, JUDICATURE (2021), available at <https://judicature.duke.edu/articles/picking-up-where-aerospatiale-left-off-merits-based-discovery-foreign-parties-and-uncertain-personal-jurisdiction> (last visited Nov. 29, 2023).

120. Savla et al., *supra* note 15; Hanna & Wiseman, *supra* note 55.

121. See generally Lionel Laurent, *French Banks Eye U.S. Expansion after Years of Cuts*, REUTERS (Dec. 5, 2012, 8:05 AM), available at <https://www.reuters.com/article/frenchbanks-us/french-banks-eye-u-s-expansion-after-year-of-cuts-idUSL5E8MN9T920121205> (last visited Nov. 29, 2023).

122. *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 456 (E.D.N.Y. 2008) (“[T]he mutual interests of the United States and France in thwarting terrorist financing outweighs the French interest in preserving bank customer secrecy”).

before releasing information.¹²³ Yet, the exact course of action to be taken remains unclear.

III. CURRENT INTERNATIONAL LAW REGULATING TRANSNATIONAL CRIME, MONEY LAUNDERING, THE FINANCING OF TERRORISM, AND INTERNATIONAL COLLABORATION

As the world becomes more and more globalized, international collaboration in the investigation of cross-border crime has become critically important.¹²⁴ The increasingly transnational nature of crime, and especially money laundering, inspired a shift in policy from domestic prosecutions to international cooperation.¹²⁵ Further, given that no international organization by itself is tasked with addressing global crime, collaboration between countries becomes even more important in the fight against transnational crime.¹²⁶ The U.N. itself declares that one of its main functions is to create international law that advances worldwide security.¹²⁷

Multiple U.N. treaties have been developed over time to address the ever-changing threats of money laundering and terrorism.¹²⁸ The Vienna Convention in 1988 was the first to acknowledge the gap in international law connected to money laundering and the confiscation of assets obtained illegally.¹²⁹ Though participants in the Vienna Convention did not specifically focus on money laundering, their discussion of drug trafficking and its financing is widely seen as the precursor for every other international body of law about money laundering.¹³⁰ Importantly, the signatories agreed to cooperate and exchange information with one

123. Savla et al., *supra* note 15.

124. Gilmore, *supra* note 4, at 24.

125. *Id.* at 15.

126. See Tim Legrand & Christian Leuprecht, *Securing Cross-Border Collaboration: Transgovernmental Enforcement Networks, Organized Crime and Illicit International Political Economy*, 40 INT'L. POL. ECON. & PUB. POL'Y. 565, 565-66 (2021).

127. *International Law and Justice*, U.N., available at <https://www.un.org/en/global-issues/international-law-and-justice> (last visited Nov. 29, 2023).

128. Simon N.M. Young, *Money Laundering in International Law*, OXFORD BIBLIOGRAPHIES (Oct. 27, 2021), available at <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0233.xml> (last visited Nov. 29, 2023).

129. Gilmore, *supra* note 4, at 55.

130. Muhammad S. Korejo et al., *The Concept of Money Laundering: A Quest for Legal Definition*, 24 J. MONEY LAUNDERING CONTROL 725, 730 (2021).

another in Article 5 of the Vienna Convention.¹³¹ Despite the agreements reached at the convention, many parties to the treaty did not fully adhere to their promises in the years that followed.¹³²

A year later, in 1989, the G7 and the Commission of the European Communities established the FATF.¹³³ The issues of drug abuse and trafficking were becoming increasingly problematic for those powerful nations and their economies, which is why enhancing cooperation and multilateral judicial assistance were objectives at the heart the FATF's mission.¹³⁴ In 1990, the FATF issued the "Forty Recommendations,"¹³⁵ which as the name suggests, were a set of suggested guidelines that imposed no binding international law obligations for any country.¹³⁶ The creation of FATF and the issuance of its subsequent recommendations, which would later become the international standard for fighting money laundering, was largely a consequence of discussions in the late 1980s at two meetings: (1) the Vienna Convention and (2) the first Basel Accords, developed by the Basel Committee on Banking Supervision (hereinafter "Basel Committee").¹³⁷ Today, the FATF has more than thirty members, and hundreds of countries have committed to implementing its recommendations in their local laws.¹³⁸

Building on the progress made at the Vienna Convention and the birth of the FATF, the U.N. General Assembly continued to look at the

131. *Vienna Convention*, Art. 5(3), *supra* note 5. "In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy."

132. Jimmy Gurule, *The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances—A Ten Year Perspective: Is International Cooperation Merely Illusory?*, 22 *FORDHAM INT'L. L. J.* 74, 78 (1998).

133. Gilmore, *supra* note 4, at 91.

134. *Id.*

135. See *The FATF Recommendations*, FIN. ACTION TASK FORCE (2023), available at <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf> (last visited Nov. 29, 2023).

136. Howard Chitimira & Sharon Munedzi, *Overview International Best Practices on Customer Due Diligence and Related Anti-Money Laundering Measures*, 26 *J. MONEY LAUNDERING CONTROL* 53, 57 (2022).

137. Gilmore, *supra* note 4, at 98. The Basel Accords are a series of guidelines that inform a bank's regulatory obligations regarding capital and risk management practices. They are developed by a group of central bankers from around the world, the Basel Committee on Banking Supervision.

138. *Countries*, FIN. ACTION TASK FORCE (2023), available at <https://www.fatf-gafi.org/en/countries.html> (last visited Nov. 29, 2023).

issue of transnational crime as a permanent concern.¹³⁹ The U.N. Convention against Transnational Organized Crime, which became known as the Palermo Convention, was adopted in 2000 but was not effective until 2003.¹⁴⁰ The Palermo Convention required its signatory parties to make the “laundering of proceeds of crime” (in other words, money laundering) explicitly illegal.¹⁴¹ The Convention also enshrined in Article 7 the obligations of each country to establish a regulatory regime for financial institutions and to ensure that local law enforcement officials were able to cooperate and exchange information with their international counterparts.¹⁴² The treaty emphasized once again the importance of mutual legal assistance and cooperation between governments in prosecuting money launderers.¹⁴³ The Palermo Convention also established a model statute for countries to combat money laundering and human trafficking, which assisted in developing future FATF recommendations.¹⁴⁴ The September 11, 2001 terrorist attacks dramatically affected the legal landscape in numerous areas and accelerated the development of laws addressing anti-money laundering and terrorism financing.¹⁴⁵

During the first quarter of the twenty-first century, the connection between money laundering and corruption began to be more carefully scrutinized.¹⁴⁶ The various treaties, conventions, and guidelines—such as the FATF recommendations—of the past century had already focused on corruption as an issue closely linked to money laundering.¹⁴⁷ To more

139. Ian Tennant, *The Promise of Palermo: A Political History of the UN Convention against Transnational Organized Crime*, GLOBAL INITIATIVE AGAINST ORGANIZED CRIME (Oct. 2020), available at <https://globalinitiative.net/wp-content/uploads/2020/10/The-promise-of-Palermo-GI-TOC-Tennant.pdf> (last visited Nov. 29, 2023); see also Ian Tennant, *Fulfilling the Promise of Palermo? A Political History of the UN Convention Against Transnational Organized Crime*, 2 J. ILLICIT ECONS. & DEVELOPMENT 53, 54 (2021).

140. *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, U.N., available at <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (last visited Nov. 29, 2023).

141. *Palermo Convention*, *supra* note 5 at art. 6.

142. *Id.*

143. See Jan Wouters et al., *The International Legal Framework Against Corruption: Achievements and Challenges*, 14 MELBOURNE J. INT’L L. 1, 15 (2013).

144. Michael Anderson, *International Money Laundering: The Need for ICC Investigative and Adjudicative Jurisdiction*, 53 VA. J. INT’L L. 763, 770 (2013).

145. See Guiora & Field, *supra* note 47, at 74 (“The legal and political impact of the 9/11 attacks altered not only national security and international law, but rather the attacks changed *all* law”).

146. Nadim Kyriakos-Saad et al., *The Incestuous Relationship Between Corruption and Money Laundering*, 83 REVUE INTERNATIONALE DE DROIT PÉNAL 161, 161 (2012).

147. *Id.*

specifically address corruption, U.N. member states signed the U.N. Convention Against Corruption, also known as the Merida Convention, in 2003.¹⁴⁸ In line with its predecessors, the Merida Convention contains extensive commitments to international collaboration and information exchange in the context of investigating corruption and money laundering.¹⁴⁹ The analysis of money laundering and corruption as intimately connected issues continues to be a priority in the current efforts to prevent these crimes.¹⁵⁰

In addition to international treaties and guidelines sponsored by the U.N. and the FATF, money laundering, transnational crime, and collaboration are also consistently addressed within the E.U.¹⁵¹ Even before the inception of the E.U., European countries had already begun efforts to fight crime collaboratively.¹⁵² For example, countries such as Great Britain, Germany, and Switzerland all ratified the European Accord on Fighting Money Laundering in 1993.¹⁵³ While the E.U. has made great progress in developing a body of law that covers money laundering, the pan-European¹⁵⁴ consensus on the issue remains unclear and ambiguous.¹⁵⁵

The E.U. was a pioneer in developing a wide-ranging anti-money laundering regime as a multi-member organization.¹⁵⁶ Intergovernmental cooperation was a foundational principle of the E.U. from its creation through the Treaty on European Union (hereinafter “Maastricht Treaty”).¹⁵⁷ Title VI of the Maastricht Treaty explicitly designated “judicial cooperation in criminal matters” and “cooperation for the

148. *Merida Convention*, *supra* note 5.

149. Kyriakos-Saad et al., *supra* note 146, at 172.

150. See Daniel L. Stein et al., *Biden Highlights Anti-Money Laundering as a Tool to Combat Corruption*, REUTERS (Jan. 19, 2022, 10:11 AM), available at <https://www.reuters.com/legal/legalindustry/biden-highlights-anti-money-laundering-tool-combat-corruption-2022-01-19> (last visited Nov. 29, 2023).

151. Gilmore, *supra* note 4, at 221.

152. See, e.g., *European Convention on Extradition*, COUNCIL OF EUR. (1957), available at <https://rm.coe.int/1680064587> (last visited Nov. 29, 2023); *European Convention on Mutual Assistance in Criminal Matters*, COUNCIL OF EUR. (1959), available at <https://rm.coe.int/16800656ce> (last visited Nov. 29, 2023).

153. Moser, *supra* note 68, at 337.

154. The term “pan-European” refers to countries in Europe regardless of whether they are members of the E.U.

155. Leonardo Borlini & Francesco Montanaro, *The Evolution of the EU Law Against Criminal Finance: The “Hardening” of FATF Standards Within the EU*, 48 GEO. J. INT’L L. 1009, 1031 (2017).

156. *Id.* at 1030.

157. Gilmore, *supra* note 4, at 221.

purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime” as areas of common interest.¹⁵⁸ Between 1990 and 2018, the E.U. adopted several important directives touching on, and then criminalizing, money laundering.¹⁵⁹ The Council of Europe established MONEYVAL, a monitoring body charged with combating money laundering and the financing of terrorism, in 1997.¹⁶⁰ The priorities of U.S. and European money laundering legislation were slightly different in their early stages, but the parties’ interests and methods have converged over time.¹⁶¹ The international community’s views on deference to domestic secrecy laws have also changed; most countries now take the position that their interest in preventing and prosecuting money laundering should take precedence over secrecy.¹⁶² The trend in the international community, it seems, is to favor transparency over bank secrecy laws.¹⁶³

Another avenue to foster international collaboration is through the use of MLATs. MLATs are international treaties that help law enforcement officers obtain documents and records for their use in criminal investigations and judicial proceedings.¹⁶⁴ While the U.S. became a party to several MLATs following the Vienna Convention in an effort to implement its provisions, those agreements did not fully ensure compliance with the Convention’s obligations.¹⁶⁵ As a result, some commentators have suggested that the International Court of Justice (“ICJ”) and the U.N. Security Council implement stronger enforcement

158. *Id.*; *Maastricht Treaty* Title VI, Art. K1, *supra* note 5.

159. See Gilmore, *supra* note 4, at 221-36; Borlini & Montanaro, *supra* note 155, at 1030; *What is AMLD6 (6th EU Anti-Money Laundering Directive)?*, DOW JONES, available at <https://www.dowjones.com/professional/risk/glossary/anti-money-laundering/amld6-definition> (last visited Nov. 29, 2023).

160. *Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism*, COUNCIL OF EUR., available at <https://www.coe.int/en/web/moneyval> (last visited Nov. 29, 2023).

161. Mariano-Florentino Cuellar, *The Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 438-39 (2003).

162. Makortoff, *supra* note 79; see generally Carmina Franchesca S. Del Mundo, *How Countries Seek to Strengthen Anti-Money Laundering Laws in Response to the Panama Papers, and the Ethical Implications of Incentivizing Whistleblowers*, 40 Nw. J. INT’L. L. & BUS. 87, 120-21 (2019).

163. Flores, *supra* note 79, at 796.

164. DOJ, *supra* note 6; Virginia M. Kendall & T. Markus Funk, *The Role of Mutual Legal Assistance Treaties in Obtaining Foreign Evidence*, 40 LITIGATION 2 (2014), available at <https://www.perkinscoie.com/images/content/3/1/v2/31795/2014-winter-litigation.pdf> (last visited Nov. 29, 2023).

165. Gurule, *supra* note 132, at 120.

measures. MLATs are sometimes less attractive options to investigators and prosecutors because obtaining information through these treaties is time-consuming.¹⁶⁶ Taking this into account, prosecutors gained a significant advantage with the AMLA 2020, because they can now issue a subpoena to any bank with a U.S. correspondent account without the need to use the lengthy MLAT process.¹⁶⁷ The U.S. signed MLATs with Switzerland in January 1977 and with France in December 2001.¹⁶⁸ These continue to be a viable alternative to pursue investigative leads in those countries; however, it is unknown whether U.S. investigators will continue to rely on these MLATs when the AMLA 2020 provides a more timely and efficient process.

IV. WHY EXISTING INTERNATIONAL LAW IS INSUFFICIENT TO ADDRESS THE CONFLICT THAT AMLA 2020 CREATED

The expansion of the U.S. government's subpoena powers through AMLA 2020 created a significant conflict between U.S. law and foreign bank secrecy and privacy laws.¹⁶⁹ Both before and almost immediately after AMLA 2020 entered into force, law firms and attorneys all over the world started theorizing on the impact of these provisions on non-U.S. banks¹⁷⁰ and offered suggestions on how to react to this "catch-22" situation.¹⁷¹ Swiss banks, for instance, could partially comply, obtain clearance from their regulator before disclosing information, or opt to challenge each subpoena in U.S. courts.¹⁷² French banks could follow a similar approach by either consulting with their regulator before releasing documents or convincing U.S. authorities to rely on MLATs instead.¹⁷³ Although these are potential approaches to the matter, the international

166. Sarah Paul & Andrea Gordon, *Prosecutors' New Weapon in Cross-Border Investigations*, 265 N.Y. L. J. 58, 58 (2021).

167. *Id.*

168. DEP'T OF JUST., *supra* note 6.

169. Schafer et al., *supra* note 112.

170. See e.g. Buhr et al., *supra* note 13; Savla et al. *supra* note 15; Eberhardt & Serobyian, *supra* note 113; Jeanine P. McGuinness et al., *The Anti-Money Laundering Act of 2020*, ORRICK (Feb. 3, 2021), available at <https://www.orrick.com/en/Insights/2021/02/The-Anti-Money-Laundering-Act-of-2020> (last visited Nov. 29, 2023); *Anti-Money Laundering Act of 2020: New Legislation to Implement Comprehensive Modernization and Reform of the US AML/CFT Regime*, SULLIVAN & CROMWELL LLP (Dec. 17, 2020), available at <https://www.sullcrom.com/files/upload/sc-publication-anti-money-laundering-act-2020.pdf> (last visited Nov. 29, 2023).

171. Cutler, *supra* note 118.

172. Eberhardt & Serobyian, *supra* note 113.

173. Savla et al. *supra* note 15; see *supra* pp. 18-19.

community has not yet defined a course of action in connection with this issue, and there is no treaty on point.¹⁷⁴ All things considered, the U.S. has no incentive to engage in these discussions because, as it stands, AMLA 2020 provides its prosecutors much more freedom in their investigations.¹⁷⁵ Conversely, reaching an international agreement could lead to better cross-border cooperation.¹⁷⁶

The main challenge is finding a balance between various stakeholders' interests while reconciling security and privacy concerns. Banks may be justified in defending their *Tournier* duty to their customers, though banks and their employees can also be compromised.¹⁷⁷ The FATF guidelines help promote best practices, but they are only "soft law" and are not binding on any nation.¹⁷⁸ The situation is even more dire because despite the many anti-money laundering statutes in place in the U.S. and around the world, the law is not advancing at the same rapid pace as organized criminals and terrorist groups that aim to stay at least one step ahead of these laws with new, technologically-based methods of engaging in criminal activity.¹⁷⁹

One way to solve this puzzle is to interpret the Vienna Convention and its successors as already addressing and resolving the issue that AMLA 2020 created. Members to the Convention assumed and expected that fellow signatories would comply with its terms and cooperate as

174. For a discussion of a recent case involving a conflicts of law issue between the Swiss bank UBS and the U.S. government, *see* Bondi, *supra* note 64.

175. Paul & Gordon, *supra* note 166; *see also* Anya Wahal, *On International Treaties, the United States Refuses to Play Ball*, COUNCIL ON FOREIGN RELS. (Jan. 7, 2022, 5:08 AM), available at <https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball> (last visited Nov. 29, 2023) (arguing that while the U.S. is a party to hundreds of international treaties, it has also failed to sign or ratify treaties on which most other countries have acted).

176. *See generally* Maame N. Boateng, *Global Partnership Should Be the Way Forward to Combat Money Laundering*, 126 DICK. L. REV. 837 (2022) (arguing that global partnerships and information sharing are vital in stopping the threat of anti-money laundering).

177. Gilmore, *supra* note 4, at 36; *see also* *Ex-Bank Manager Sentenced for £255,000 Money Laundering*, CROWN PROSECUTION SERV. (May. 31, 2022), available at <https://www.cps.gov.uk/cps/news/ex-bank-manager-sentenced-ps255000-money-laundering> (last visited Nov. 29, 2023) (announcing the sentence of a former bank employee who helped criminals launder money); *Bank Employee Arrested For Defrauding Her Employer Of \$1.7 Million*, DOJ (Apr. 8, 2021), available at <https://www.justice.gov/usao-sdny/pr/bank-employee-arrested-defrauding-her-employer-17-million> (last visited Nov. 29, 2023) (announcing the arrest of a New York bank employee who misappropriated millions of dollars).

178. Erin McCartney & Paul Gumagay, *Enhancing Global Commitments and Enforcement Efforts to Combat Corruption*, 53 GEO. WASH. INT'L. L. REV. 431, 463 (2022).

179. Kristen Patel & William Lichtenfels, *Why We're Losing the Battle Against Illicit Finance*, LAW360 (Dec. 3, 2021), available at <https://www.law360.com/articles/1443170> (last visited Nov. 29, 2023).

necessary.¹⁸⁰ The drafters of the Vienna Convention built in an assurance that bank secrecy laws could not be used as an excuse to refuse collaboration.¹⁸¹ In 1997, the Swedish government explicitly pointed out that the Vienna Convention was meant to promote cooperation, and that bank secrecy laws undermine that purpose.¹⁸²

Swiss and French banks and their regulators could also challenge each subpoena in U.S. courts, which has been done before by banks from both countries (though often unsuccessfully).¹⁸³ Challenging every subpoena, however, would likely be cumbersome, expensive, and still leave the overall issue unresolved. Proposing that the U.S. government use existing MLATs to demand information rather than the broader tools at their disposal via AMLA 2020 is likely not practical either.

Another solution to this conflict may be to amend one or more of the existing international treaties on collaboration. Such an amendment could build on Article 5 of the Vienna Convention, which explicitly warns parties not to deny access to financial records on bank secrecy grounds.¹⁸⁴ A statement or subsection could be added to the Vienna Convention or one of its successors that more clearly commits parties to mutual collaboration and prioritizes security over bank secrecy. While the process of persuading all signatories to ratify this amendment could be rather lengthy, the effort might be worthwhile if it leads to a more meaningful conversation between the U.S. and countries like Switzerland and France.

An alternative option is to create a new international treaty or a statute with international force of law that directly addresses this conflict and provides clearer guidance to foreign banks. An international statute that follows the model statute proposed by the Palermo Convention, but also provides consequences for financial institutions that do not comply, might be the way forward.¹⁸⁵ The Basel Committee and/or the FATF would be well-suited organizations to work on this project. The Basel Committee and FATF are each comprised of international central bankers

180. Gilmore, *supra* note 4, at 56-57.

181. *Id.* at 59; Article 5(3) of the Vienna Convention reads: “a Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.”

182. Gilmore, *supra* note 4, at 59-60.

183. *See, e.g. Strauss*, 249 F.R.D. at 429 (denying *Crédit Lyonnais*’ motion for protective orders to shield the bank from discovery on the grounds of French bank secrecy laws); *Bodner v. Banque Paribas*, 202 F.R.D. 370, 374 (2000) (ordering disclosure of information by French banks despite the banks’ argument that French bank secrecy laws protected the data); *see also Eberhardt & Seroby*, *supra* note 113.

184. *See supra* note 131.

185. Anderson, *supra* note 144, at 773-74.

and industry representatives who attend regular meetings to reach a common understanding of regulatory standards, a form of which then becomes binding law in their respective countries. The conflict that AMLA 2020 produced could be addressed by regulators in these gatherings. They could develop, for instance, a set of criteria that define the importance of bank secrecy laws in international investigations. A sliding scale could be developed based on the level of prevalence of money laundering and financial crime in a particular country, whether those nations or their bank executives are more susceptible to illegal activity, such as corruption, and the number of nationals of a certain country that appear on the OFAC list or similar sanctions lists. A country with a high ranking on this scale would be subject to more stringent requirements that would outweigh that country's bank secrecy laws.

Further, a judicial body that can arbitrate disputes about international money laundering and conflicts like the one AMLA 2020 created would also contribute to better collaboration and more efficient prosecution of money launderers.¹⁸⁶ Such a body could be in the form of an intergovernmental organization that centrally receives tips from around the world,¹⁸⁷ or one of the international courts that already adjudicate similar disputes. An existing international court like the International Criminal Court (hereinafter "ICC") or the International Court of Justice (hereinafter "ICJ") could help countries in navigating this problem. One path might be to expand the jurisdiction of the ICC, which is currently limited to crimes like genocide, war crimes, and crimes against humanity, to include financial crimes.¹⁸⁸

Another option is to ask the ICJ to hear a specific dispute between, for example, the U.S. government and a Swiss bank (through their government) that is faced with the choice of whether to comply with a subpoena and thereby violate the Swiss bank secrecy law, or defy the subpoena and as a result lose their U.S. correspondent account. The ICJ would likely have jurisdiction to hear such a case if requested by the U.N. General Assembly, as it "may request advisory opinions on any legal question."¹⁸⁹ There is a limitation that both parties to a claim in the ICJ

186. *See id.* at 779.

187. For a similar proposal in the context of combating money laundering in the art market, see Lilia Chu, *Global Cooperation for an International Database Needed to Combat Money Laundering in the Art Market*, 54 GEO. WASH. INT'L. L. REV. 103 (2022).

188. *About the Court*, INT'L. CRIM. CT., available at <https://www.icc-cpi.int/about/the-court> (last visited Nov. 29, 2023).

189. *How the Court Works*, INT'L. CT. JUST., available at <https://www.icj-cij.org/en/how-the-court-works> (last visited Nov. 29, 2023).

must be member states,¹⁹⁰ and this would prevent banks from seeking recourse on their own. For the U.S., Switzerland, and France, that would not be an issue because these are member states of the ICJ and their governments would likely support their banks by bringing a claim to the ICJ. The creation of a new, neutral body or a subset of an existing court specially tasked with adjudicating disputes between a country's law enforcement, and foreign financial institutions that wish to avoid violating their country's bank secrecy laws but still maintain their U.S. correspondent accounts, would be a complex but helpful step in addressing the conflict that AMLA 2020 created.

CONCLUSION

The need for international cooperation to prevent money laundering is critical.¹⁹¹ In an increasingly globalized economy, domestic enforcement is no longer enough to detect and stop the highly complex activities of financial criminals.¹⁹² Today, foreign banks with correspondent accounts in the U.S. are trying to determine how to react if served with a subpoena authorized by AMLA 2020. A better international understanding of how to resolve this conflict, whether that happens through a new interpretation of existing treaties, introducing an amendment to those treaties, or creating new adjudicating bodies, is necessary before the conflict becomes even more problematic.

As Gilmore points out, combating money laundering requires that countries come together and work collaboratively.¹⁹³ Signatories to existing treaties may either decide to interpret the text of those agreements as if they already resolve the conflict, introduce an amendment to clarify those treaties, or create a new set of criteria that more clearly sets the rules to address issues that arise when the security interests of one country clash with the bank secrecy protections in another nation.

Certainly, this pressing legal issue cannot remain unresolved. An international dispute over the conflict between AMLA 2020's provisions and local bank secrecy laws is bound to occur. It would be wise for all parties, given the uncertainty surrounding this issue, to deal with this conflict in a collaborative manner and preemptively agree on concrete terms to address this situation when it inevitably arises. Even though there is little incentive for the U.S. to participate in these conversations

190. Anderson, *supra* note 144, at 785.

191. Gilmore, *supra* note 4, at 60.

192. *See id.*

193. Gilmore, *supra* note 4, at 59.

because AMLA 2020 benefits its law enforcement capabilities, there is some precedent for U.S. regulators adopting European standards to harmonize cooperation.¹⁹⁴ The Basel Committee, which has always included U.S. regulators, could set new standards for addressing this issue. Ultimately, all parties benefit from international collaboration in fighting money laundering. That has been the case since the 1980s, and the international law community should keep that in mind as it addresses this novel and greatly relevant issue.

194. See David Zaring, *Legal Obligation in International Law and International Finance*, 48 CORNELL INT'L. L. J. 175, 199-202 (2015) (explaining that U.S. regulators have considered replacing Generally Accepted Accounting Principles with standards developed by a European-based international organization).

