VOLUME 51 Fall 2023 NO. 1

SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE

SYRACUSE UNIVERSITY COLLEGE OF LAW

TABLE OF CONTENTS

Cite as: 51 SYRACUSE J. INT'L L. & COM.

ISSN 0093-0709

The *Syracuse Journal of International Law and Commerce* is owned, published and printed bi-annually by Syracuse University, Syracuse, New York 13244-1030, U.S.A. The *Journal* is one of the oldest student-produced international law journals in the United States and celebrated forty years of student-production in the Spring of 2013. Editorial and business offices are located at: Syracuse University College of Law, Dineen Hall, 950 Irving Avenue, Suite No. 346, Syracuse, New York 13244-6070 U.S.A.

The *Syracuse Journal of International Law and Commerce* actively seeks and accepts article submissions from scholars and practitioners in the field of public and private international law. The *Journal*, on occasion, holds international law symposia and publishes the papers presented therein in addition to its bi-annual volume of submissions.

Issue subscription rates, payable in advance, are: United States, $25.00; foreign, $30.00. Subscriptions are automatically renewed unless a request for discontinuance is received. Back issues may be obtained from William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, N.Y. 14068. To ensure prompt delivery, notification should be received one month in advance.

Member of National Conference of Law Reviews Member of National Conference of International Law Journals.

The *Syracuse Journal of International Law and Commerce* is indexed in the *Index of Legal Periodicals & Books, Current Law* and *Legal Resources Index*. Full text of selected articles is available on Lexis (database SYRJILC).

For more information, please visit:
https://jilc.syr.edu/

SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE

Letter from the Editor-in-Chief

Dear Valued Readers,

It is with great pleasure and a profound sense of accomplishment that I write to you, as we celebrate the remarkable milestone of 50 years since the inception of the Syracuse University Journal of International Law and Commerce. This half-century journey has been nothing short of extraordinary, marked by scholarly excellence, intellectual vigor, and a steadfast commitment to advancing the discourse in the fields of international law and commerce.

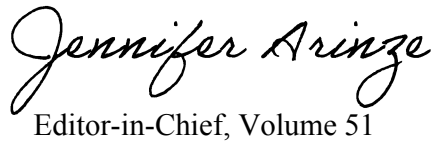
As we reflect on this momentous occasion, it is impossible not to be filled with gratitude for the countless individuals who have contributed to the success and legacy of our journal. From the founding members whose vision laid the groundwork for our publication, to the dedicated editors, authors, and reviewers who have tirelessly worked to uphold the highest standards of academic rigor, each one has played a pivotal role in shaping the journal into what it is today.

As we mark this special anniversary, we also look to the future with optimism and enthusiasm. The world is changing rapidly, presenting us with new challenges and opportunities in the realms of international law and commerce. Yet, we remain steadfast in our commitment to excellence, innovation, and the pursuit of truth. We will continue to push the boundaries of knowledge, to engage with pressing issues facing our global community, and to uphold the highest standards of scholarship and integrity.

On behalf of the entire editorial team, I extend my heartfelt gratitude to all our readers, contributors, supporters, and partners who have been part of this incredible journey. Your unwavering commitment and support have been instrumental in our success, and we are deeply grateful for your continued involvement and engagement. Thank you for being part of our story.

Here's to the next 50 years of the Syracuse Journal of International Law and Commerce!

With warmest regards,



Editor-in-Chief, Volume 51
Syracuse University Journal of International Law and Commerce

OFFICERS OF THE UNIVERSITY

Kent D. Syverud, *Chancellor and President*
Gretchen Ritter, *Vice Chancellor and Provost, Chief Academic Officer*

COLLEGE OF LAW ADMINISTRATION

Craig M. Boise, B.A., J.D., LL.M. Taxation, *Dean and Professor of Law*
Keith J. Bybee, A.B., M.A., Ph.D., *Vice Dean; Paul E. and Honorable Joanne F. Alper '72 Judiciary Studies Professor; Professor of Law; Professor of Political Science; Director, Institute for the Study of the Judiciary, Politics, and the Media; Senior Research Associate, Campbell Public Affairs Institute*
Kristen Barnes, A.B., J.D., Ph.D., *Associate Dean for Faculty Research; Professor of Law*
Kelly Curtis, B.A., J.D., *Associate Dean of Academic and Bar Success; Teaching Professor*
Shannon P. Gardner, B.A., J.D., *Associate Dean for Online Education; Teaching Professor*
Kathy Fox, B.A., M.B.A., J.D., *Assistant Dean of Enrollment Management*
Andrew S. Horsfall, B.A., J.D., *Assistant Dean of International Programs; Co-Director, LondonEx*
Lily Yan Hughes, B.A., J.D., *Assistant Dean of Career Services and Student Experience*
Jennifer L. Uryniak, B.S., *Assistant Dean of Finance and Administration*

FACULTY

Courtney Abbott Hill, B.A., J.D., *Associate Teaching Professor*
Rakesh K. Anand, A.B., J.D., *Professor of Law*
Robert Ashford, B.A., J.D., *Professor of Law*
Elizabeth A. August, B.A., J.D., *Teaching Professor*
James E. Baker, B.A., J.D., *Professor of Law; Director, Institute for Security Policy and Law; Professor of Public Administration, Maxwell School of Citizenship and Public Affairs (by courtesy appointment)*
Kristen Barnes, A.B., J.D., Ph.D., *Associate Dean for Faculty Research; Professor of Law*
Todd A. Berger, B.A., J.D., LL.M., *Professor of Law; Director, Advocacy Programs*
Peter D. Blanck, B.A., Ph.D., J.D., *University Professor; Chairman, Burton Blatt Institute*
Craig M. Boise, B.A., J.D., LL.M. Taxation, *Dean and Professor of Law*
Jennifer S. Breen, B.A., M.A., Ph.D., J.D., *Associate Professor of Law*
Emily Brown, B.A., J.D., *Associate Teaching Professor*
Keith J. Bybee, A.B., M.A., Ph.D., *Vice Dean; Paul E. and Honorable Joanne F. Alper '72 Judiciary Studies Professor; Professor of Law; Professor of Political Science; Director, Institute for the Study of the Judiciary, Politics, and the Media; Senior Research Associate, Campbell Public Affairs Institute*
Sanjay K. Chhablani, B.A., J.D., *Laura J. & L. Douglas Meredith Professor of Teaching Excellence 2017-2020; Professor of Law; Adjunct Professor, Forensic and National Security Sciences Institute, College of Arts and Sciences*
Maria Cudowska, LL.M., Ph.D., *Faculty Fellow*
Kelly K. Curtis, B.A., J.D., *Associate Dean of Academic and Bar Success; Teaching Professor*
Lisa A. Dolak, B.S., J.D., *Angela S. Cooney Professor of Law 2009-2022; Professor of Law*
David M. Driesen, B.Mus., M.Mus., J.D., *University Professor*
Jan Fleckenstein, B.A., M.L.S., M.S., J.D., *Teaching Professor; Director of the Law Library*
Shannon P. Gardner, B.A., J.D., *Associate Dean for Online Education; Teaching Professor*
Brian Gerling, B.S., J.D., *Professor of Practice; Executive Director, Innovation Law Center*
Gregory L. Germain, B.A., J.D., LL.M., *Professor of Law; Director, Bankruptcy Clinic*

Shubha Ghosh, B.A., Ph.D., J.D., *Crandall Melvin Professor of Law; Director, Syracuse Intellectual Property Law Institute*
Antonio Gidi, J.D., LL.M., S.J.D., Ph.D., *Teaching Professor*
Lauryn P. Gouldin, A.B., J.D., *Laura J. & L. Douglas Meredith Professor of Teaching Excellence 2022-2025; Crandall Melvin Professor of Law; Director, Syracuse Civics Initiative*
Jack M. Graves, B.A., J.D., *Teaching Professor*
Andrew S. Greenberg, B.A., J.D., *Teaching Professor*
Margaret M. Harding, B.A., J.D., *Professor of Law*
Laurie Hobart, B.A., J.D., M.F.A., *Associate Teaching Professor*
Paula C. Johnson, B.A., J.D., LL.M., *Professor of Law; Director, Cold Case Justice Initiative*
Arlene S. Kanter, B.A., J.D., LL.M., *Laura J. & L. Douglas Meredith Professor for Teaching Excellence 2005-2008; Professor of Law; Director, Disability Law and Policy Program; Faculty Director of International Programs; Professor of Disability Studies, School of Education (by courtesy appointment)*
Gary T. Kelder, B.A., J.D., LL.M., *Professor of Law*
Andrew T. Kim, B.A., J.D., *Professor of Law*
Nina A. Kohn, A.B., J.D., *David M. Levy L'48 Professor of Law*
Elizabeth G. Kubala, B.S., J.D., LL.M., *Teaching Professor; Executive Director of the Betty & Michael D. Wohl Veterans Legal Clinic*
Laura G. Lape, A.B., M.A., J.D., *Associate Professor of Law*
Monica M. Luna, B.A., B.A., M.A., J.D., *Teaching Professor*
Katherine A. Macfarlane, B.A., J.D., *Associate Professor of Law; Director, Disability Law and Policy Program*
Kevin Noble Maillard, B.A., J.D., M.A., Ph.D., *Professor of Law*
Robin Paul Malloy, B.S., J.D., LL.M., *Ernest I. White Chair and Distinguished Professor of Law; Kauffman Professor of Entrepreneurship and Innovation; Director, Center on Property, Citizenship, and Social Entrepreneurism; Professor of Economics, Maxwell School of Citizenship and Public Affairs (by courtesy appointment)*
Mary Helen McNeal, A.B, J.D., *Professor of Law; Director, LondonEx*
Suzette M. Meléndez, B.A., J.D., *Faculty Fellow for the Office of Strategic Initiatives in Academic Affairs and the Office of Diversity and Inclusion; Teaching Professor*
Aliza M. Milner, B.S., J.D., *Teaching Professor; Director, Legal Communication and Research*
Jessica R. Murray, B.A., J.D., *Associate Teaching Professor; Director, Transactional Law Clinic*
Robert B. Murrett, B.A., M.A., MSSI, *Deputy Director, Institute for Security Policy and Law; Professor of Practice, Maxwell School of Citizenship and Public Affairs*
Robert G. Nassau, B.A., J.D., *Teaching Professor; Executive Director, Office of Clinical Legal Education; Director, Low Income Taxpayer Clinic*
Keli Perrin, B.S., M.P.A., J.D., *Associate Teaching Professor; Managing Director, Institute for Security Policy and Law*
Gary J. Pieples, B.A., J.D., *Teaching Professor; Director, Criminal Defense Clinic*
Richard S. Risman, B.A., J.D., *Teaching Professor*
Michael A. Schwartz, B.A., M.A., J.D., LL.M., Ph.D., *Associate Professor of Law; Director, Disability Rights Clinic*
Kent D. Syverud, B.A., M.A. J.D., *Chancellor and President*
Mary C. Szto, B.A., M.A., J.D., *Teaching Professor*
Daniel Traficonte, B.A., J.D., Ph.D., *Associate Professor of Law*
C. Cora True-Frost, B.A., M.P.A., J.D., LL.M., *Bond, Schoeneck & King Distinguised Professor; Professor of Law*
Kristin L. Walker, B.A., J.D, *Professor of Practice; Faculty Director of Externships*
A. Joseph Warburton, A.B., M.G.A., J.D., M.S., Ph.D., *Professor of Law Professor of Finance, Whitman School of Management*
Danielle Wild, B.A., J.D., *Associate Teaching Professor*

FACULTY EMERITI

William C. Banks, B.A., J.D., M.S., *Professor of Law Emeritus*
Peter A. Bell, B.A., J.D., *Professor of Law Emeritus*
Leslie Bender, B.A., J.D., LL.M., *Professor of Law Emerita*
Christian C. Day, A.B., J.D., *Professor of Law Emeritus*
Richard A. Ellison, B.B.A., LL.B., *Professor of Law Emeritus*
Thomas R. French, B.A., M.L.S., M.A., J.D., *Professor of Law Emeritus*
Martin L. Fried, B.A., J.D., LL.M., *Crandall Melvin Professor of Estates and Trusts Emeritus*
Ian Gallacher, B.A., M.F.A., J.D., *Professor of Law Emeritus*
Hilary K. Josephs, A.B., J.D., Ph.D., *Dean's Distinguished Research Scholar of Asian Law Emerita*
Travis H.D. Lewin, B.A., LL.B., S.J.D., *Professor of Law Emeritus*
Thomas J. Maroney, B.A., LL.B., *Professor of Law Emeritus*
Janis L. McDonald, B.A., J.D., LL.M., *Professor of Law Emerita*
Robert J. Rabin, A.B., LL.B., LL.M., *Professor of Law Emeritus*
Sarah H. Ramsey, B.A., M.A., J.D., LL.M., *Laura J. & L. Douglas Meredith Professor for Teaching Excellence 2006-2009; Professor of Law Emerita*
William M. Wiecek, B.A., LL.B., Ph.D., *Chester Adgate Congdon Professor of Public Law and Legislation Emeritus*

DEPARTING FROM NATIONALISM V. INTERNATIONALISM: EXAMINING THE OE-KYUJANGGAK RESTITUTION MODEL AS A MEANS TO PROPOSE A NEGOTIATION METHOD THAT COULD PROTECT THE INTEREST OF BOTH THE COUNTRY OF ORIGIN AND MUSEUMS THAT HOLD THE CULTURAL HERITAGE.

Su Young Cho[†]

ABSTRACT

While several international treaties protect cultural properties from illicit trafficking and urge the return of those already looted, the effectiveness and enforcement of those treaties are seriously limiting. Also, while the disputes between the original country and individuals can be dealt with in the applicable jurisdiction or with monetary compensation, conflicts between the original country and museums expand further and impose political and ideological challenges, mainly because museums also represent their countries' cultural industries. The cultural property repatriation issue is currently bisected by nationalism and internationalism. Nevertheless, neither offers a satisfactory resolution for museums and the original country. Therefore, this article will discuss why existing treaties are limiting and will propose a negotiation method to adequately compensate museums and the original country. This article will support the method by focusing on cultural property restitution disputes regarding the Oe-Kyujanggak case and comparing similar cases found in the United States, France, and Italy.

[†] *Su Young Cho is a passionate advocate for the intersection of art history and cultural heritage law. Since her graduation from Fordham University with a major in Art History, art, law, and culture have captivated her.*

Su Young extends heartfelt gratitude to Professor Kristen Barnes and all the editors of the Journal of International Law and Commerce for invaluable guidance and mentorship throughout the research and writing process. Additionally, Su Young acknowledges the unwavering support from her family, who have always championed her pursuit of knowledge and exploration in the art world.

Driven by a profound conviction regarding the significance of safeguarding and valuing cultural heritage, Su Young continues to seek opportunities to contribute to both the art world and the field of cultural heritage law. This article is a testament to Su Young's joy and dedication to these intertwined disciplines.

INTRODUCTION

In 2011, more than a hundred years after the French expedition to Korea, about seventy-five volumes of stolen Oe-Kyujanggak archives were returned to Korea from France.[1] The Oe-Kyujanggak archives are Korea's cultural heritage, containing 260,000 items of Joseon Dynasty

1. *Returned Plundered Goods-On Loan*, HANKYOREH, (Apr. 15, 2011), *available at* https://english.hani.co.kr/arti/english_edition/english_editorials/473190.html (last visited Nov. 24, 2023).

Annals and the Diary of the Office of Royal Secretaries.[2] In 1866, French troops conducted a punitive expedition against Joseon Empire (now Korea) in retaliation for executing several French Catholic missionaries.[3] The troops attacked Ganghwa-do Island and took 297 books from the Oe-Kyujanggak archives.[4] In 1967, Dr. Byung Sun Park, a librarian at the French National Library, found stolen books of the Oe-Kyujanggak in a library warehouse.[5] This revolutionary discovery led the French and Korean governments and the French National Library to a long dispute of claim of ownership. Even the dispute gained nationwide attention from Korea, prompting a Korean civic movement requesting the return of the books.[6] The librarians of the French National Library strongly protested against the request and the movement, but the Korean and French governments eventually made an agreement to return the books at the 2010 G-20 Seoul Summit.[7] Although it was given as a five-year renewable loan, the agreement was a rare and successful repatriation model compared to other cultural heritage restitution cases.

Throughout history, numerous looted cultural heritages ended up in other countries' museums. Cultural artifacts from countries that have endured the colonial era or have been defeated in war are prominently displayed as trophies in the museums of dominant nations. As the significance of cultural properties has become increasingly apparent, many countries have signed treaties to recover them. Despite the efforts, countries still face difficulties in recovering their looted cultural properties due to legal and environmental restrictions. The limitations of the treaties normalized interstate lawsuits and negotiations between nations and divided arguments regarding the return of cultural property into two ideologies: nationalism and internationalism. These ideologies encourage a win-or-lose game between countries and museums and harm their

---

2. *History*, SEOUL NAT'L UNIV. KYUJANGGAK INST. FOR KOREAN STUD., (n.d.), *available at* http://e-kyujanggak.snu.ac.kr/kiks/main.do?m=01z04 (last visited Nov. 24, 2023).

3. K. Jack Bauer, *The Korean Expedition of 1871*, U.S. NAVAL INST., (Feb. 1948), *available at* https://www.usni.org/magazines/proceedings/1948/february/korean-expedition-1871 (last visited Nov. 24, 2023).

4. Mee-Yoo Kwon, *NGO to Demand Return of Royal Texts from France*, THE KOREA TIMES, (Jan. 26, 2010), *available at* http://www.koreatimes.co.kr/www/news/nation/2010/01/117_59739.html (last visited Nov. 24, 2023).

5. Hanna Lee, *Re-examining the Hidden Protagonist of the Return of Oegyujanggak Uigwe, Park Byung-sun*, MAEIL ECON., (Oct. 31, 2022), *available at* https://www.mk.co.kr/news/culture/10509522 (last visited Nov. 24, 2023).

6. Kwon, *supra* note 4.

7. *Korea, France Clinch Deal on Return of Royal Archive*, THE CHOSUNILBO, (Nov. 13, 2010), *available at* http://english.chosun.com/site/data/html_dir/2010/11/13/2010111300290.html (last visited Nov. 24, 2023).

reputations and integrity during legal proceedings or negotiations for a resolution. Therefore, an alternate dispute resolution method is needed not only to provide fair compensation to both the country of origin and the museums but also to protect the operational integrity of museums and the cultural identity of the country of origin. Departing from ideological warfare, this article suggests a government-level negotiation method to be used as a guideline for restitution cases by referencing the Oe-Kyujanggak repatriation model. This method is defined as an exchange loan type, in which an agreement forms a 'collective rental' that automatically extends every few years.[8] By presenting a form of lending, negotiation settlement between the government authorities aids the country where the return of cultural heritage is legally unattainable while also creating opportunities for both the country and museums to promote active academic and cultural exchanges.[9]

The following section of this article will define what a cultural property is and how significant cultural heritage is to the country of origin. It will illustrate the preservation of Korea's Gyeongbokgung Palace to describe the link between cultural heritage and the country's identity. Then, it will describe how the limitations of treaties on cultural heritage restitution impose legal challenges on the repatriation dispute and create polarized ideas such as internationalism and nationalism. It will provide a comprehensive analysis of internationalism and nationalism, particularly in the context of controversies concerning the repatriation of cultural heritage. Part III will conduct an in-depth analysis to elucidate the inadequacy of framing the restitution dispute within the context of either internationalism or nationalism. It will also argue how such framing even creates a win-or-loss game between museums and the country of origin. It will support this argument by illustrating the Elgin Marbles case studies and Chabad-Lubavitch's Movement case studies. Part IV will propose a government-level negotiation as an alternative dispute resolution method for addressing a cultural heritage repatriation dispute. This approach considers the respective interests of both the country of origin and the museum. It will suggest an Oe-Kyujanggak negotiation method as a partially ideal model and will compare it with the arbitration method to support the proposal.

---

8. Sang Chun Jung, *The Negotiation Process for the Restoration of Korean Manuscripts Stored at the French National Library and Assessment of the Korea-France Negotiations*, 33 J. OF KOREAN POL. AND DIPL. HIST. 235, 235 (2011).

9. *See Id.* at 256.

I. CULTURAL PROPERTY AND THE RESTITUTION PROBLEMS

A. Cultural Heritage and its Significance

According to UNESCO, Cultural heritage includes artifacts, monuments, sites, and museums with historical, symbolic, and social significance.[10] It encompasses both movable and immobile objects, but excludes festivals and celebrations.[11] Skills and ceremonies are sometimes encompassed under the cultural heritage.[12] Cultural heritage is considered an integral by-product of human activities and is deemed worthy of international and national protection because it can promote the enjoyment of cultural diversity.[13] It enriches the sense of group identity that helps to maintain social and territorial cohesion.[14] Cultural heritage signifies the nation's identity and history while also stimulating the economy through the attraction of tourists who can explore the country's culture.[15] Individuals in various countries have inherited cultural identity from the past and are making efforts to preserve and deliver this legacy to future generations.[16]

Cultural heritage, by its presence, has the power to both directly and indirectly influence a country's history, image, tourism, and even political power.[17] For instance, in Seoul, Korea, the site of Gyeongbokgung Palace lies at the city's heart.[18] All major government offices and the Korean Presidential Residence (the Blue House) surround the palace.[19] The palace was initially torn down during the Japanese occupation era, and the effort for restoration has been in progress since 1990.[20] Therefore, this palace symbolizes the cultural legacy of Korea and its

10. UNESCO Inst. for Stat., *Cultural Heritage*, UNESCO, (2009), *available at* https://uis.unesco.org/en/glossary-term/cultural-heritage (last visited Nov. 24, 2023).

11. *Id.*

12. Lyndel V. Prott, *'Cultural Heritage' or 'Cultural Property'?* CAMBRIDGE UNI. PRESS, *available at* https://www.cambridge.org/core/services/aop-cambridge-core/content/view/B17F38F4873BDA8B21EF1BEA7DCD7D45/S094073919200033Xa.pdf/cultural-heritage-or-cultural-property.pdf (last visited Nov. 24, 2023).

13. *Id*.

14. *Id*.

15. *Id*.

16. *Id*.

17. Prott, *supra* note 12.

18. *About the Palace: Introduction*, GYEONGBOKGUNG PAL. MGMT. OFF., *available at* http://www.royalpalace.go.kr:8080/html/eng_gbg/data/data_01.jsp (last visited Nov. 24, 2023).

19. *Id*.

20. *Id*.

achievement of political autonomy from Japan. The palace is accessible to the general public, allowing visitors to acquire knowledge about the history and immerse themselves in the Korean culture. The presence of the palace reinforces Korea's political foundation and sense of national identity.

B. Restitution Problems

Looting cultural property occurs not only after invasion but in all circumstances at any place, such as at auction houses, individual collections, and museums.[21] In 2020, the total seized stolen cultural properties was 854,742 worldwide.[22] The restitution process was especially complicated when the properties were found in libraries and museums since these institutions have complex ownership structures encompassing government and individuals.[23] Currently, cultural property collections in institutions are subject to long-term loans, while certain collections are designated as national heritage under government ownership.[24] When a country claims restitution against institutions, it may encounter legal challenges due to the country of the institution's legislation, sovereign immunity, and national ownership laws. Sovereign immunity is from the British common law doctrine that the government cannot be sued without its consent.[25] On the other hand, national ownership laws pertain to the possession of national heritage and prohibit their removal without the government's authorization.[26] A combination of these two principles imposes hardship on restitution disputes; if the country of origin's cultural heritage is announced as a national treasure in a different country, the cultural property's ownership belongs to the later government. The later government could then challenge the restitution claim under the previously stated laws.

Ineffective enforcement of cultural restitution treaties also poses significant challenges because they are often obstructed by jurisdictional

---

21. The International Criminal Police Organization **[**INTERPOL], Assessing Crimes Against Cultural Property 2020, 19 (September 2021).

22. *Id*. at 15.

23. Tehmina Goskar, *Ownership and Ethics in Public Museums*, CURATORIAL RESEARCH CENTRE, (Nov. 11, 2021), *available at* https://curatorialresearch.com/ethics/ownership-and-ethics-in-public-museums/ (last visited Nov. 24, 2023).

24. *Id*.

25. *Sovereign Immunity*, CORNELL LAW SCHOOL, *available at* https://www.law.cornell.edu/wex/sovereign_immunity (last visited Nov. 24, 2023).

26. Patty Gerstenblith, *Schultz and Barakat: Universal Recognition of National Ownership of Antiquities*, ART ANTIQUITY & L. 14 at 21, 21 (2009).

issues and lack of self-executing clauses.[27] If a cultural property dispute occurs between countries and individuals, either the property is seized by INTERPOL or police, or the original country pays monetary compensation to the individuals for the return of the property. If a dispute arises between a museum and the work's original country, it often escalates into a contentious situation, as demonstrated by the prolonged resolution process of the Oe-Kyujanggak issue that spanned over two decades.

Another concern surrounding restitution disputes between a country and a museum pertains to the potential consequences, which typically either damage the credibility of the museum's operation system or undermine the prestige and honor of a country. Both a country and a museum have the same purposes: to promote a culture to the public, to preserve the artwork, and to educate the public and scholars. However, the litigation or settlement of a claim of ownership always results in one party losing these purposes and/or interests. To protect the interests of both parties, disputes with the museum should be resolved in a manner other than arbitration or litigation.

C. Nationalism vs. Internationalism

The foundation of the restitution argument is largely divided into two theories: cultural nationalism and cultural internationalism.[28] Both terms gained attention after Merryman described them in his 1985 article "Thinking About the Elgin Marbles".[29] Cultural internationalism posits that cultural property is not linked to a nation or a territory but remains a cultural feature of mankind as a whole.[30] This theory generally suppresses restitution claims unless properties are acquired through illegal trade or crime.[31] According to this theory, the countries of the property's origin should not determine whether the object has illegally left their territory, as the property should be traded freely.[32] This also supports the 'universal museum' theory, wherein cultural artifacts are incorporated into other countries' museums as museums provide extensive care and support the public's education.[33] On the other hand, cultural nationalism asserts that the state of origin should keep the cultural heritage within its

---

27. *Id.*

28. IRINI A. STAMATOUDI, CULTURAL PROPERTY LAW AND RESTITUTION: A COMMENTARY TO INTERNATIONAL CONVENTIONS AND EUROPEAN UNION LAW 19 (2011).

29. Pauno Soirila, *Indeterminacy in the Cultural Property Restitution Debate*, 28 INT'L J.L. CULTURAL POL'Y, 1 (Apr. 01, 2021).

30. Stamatoudi, *supra* note 28, at 21.

31. *Id.*

32. *Id.*

33. *Id.* at 23.

own land.[34] As Gyeongbokgung illustrates, the advocates of cultural nationalism argue that many of the cultural properties should be viewed as an illustration of history.[35] They believe artifacts play a crucial role in shaping cultural definition, expression, and the formation of a collective identity and community, and people need exposure to those artifacts to ensure their cultural identity.[36]

However, the debate over nationalism and internationalism rather deepens the divide than leads to a resolution. To solve this issue, it is necessary to differently approach the possession of the title and place of the exhibition. The polarized framework is detrimental to both the country of origin and the museums as it leads to dichotomous thinking. For instance, restitution based on cultural nationalism would undermine the credibility of the museums as a cultural institution. On the other hand, if museums own the work on the grounds of cultural internationalism, the country of origin's culture would be scattered around the world, which may also raise diplomatic issues.

To respect the purpose and credibility of the museum as well as the culture of the original country, determining the location of the exhibition should be prioritized over the issue of determining ownership. Instead of transferring ownership, museums and the country of origin should enter a contract for a permanent rental renewal of the country of origin. Other factors, such as the facilitation of academic exchanges and the production of digital copies, may also be attached as provisional conditions.

II. LIMITATIONS OF THE TREATIES AND PROBLEMS OF THE NATIONALISM V. INTERNATIONALISM FRAMEWORK

A. Problems of Treaties

The previous two cultural property law theories stemmed from international legal instruments and treaties.[37] The three most influential international treaties that urge the protection of cultural property are the 1954 Hague Convention, the 1970 UNESCO Convention, and the 1995 UNIDRIOIT Convention.[38] The 1954 Hague Convention recognizes the importance of protecting cultural heritage during armed conflicts.[39] The

34. *Id.* at 28.

35. Soirila*, supra* note 29, at 3.

36. *Id.*

37. Stamatoudi, *supra* note 28, at 19.

38. *Id.*

39. *The Hague Convention*, UNESCO (May 14, 1954), *available at* https://en.unesco.org/sites/default/files/1954_Convention_EN_2020.pdf (last visited Nov. 27, 2023).

1970 UNESCO Convention expands the protection of heritage and prevents illicit import, export, and transfer of ownership of cultural property.[40] The 1995 UNIDROIT Convention concerns the illicit trade of cultural objects and urges countries not only to prevent it but also to return the objects that are stolen and illegally exported from their territory.[41] However, these treaties are not strictly enforceable as they don't offer adequate control systems nor build special tribunals to enforce them.[42] They are also not retroactive and often not self-executing.[43] Due to these limitations, those often remain as guidelines in most cultural property restitution disputes and are referenced in political or diplomatic negotiations, arbitration, and litigation before domestic tribunals or existing international courts.[44] Therefore, the outcome of restitution disputes varies from harmful precedents to scattered opinions based on the choice of forum and applicable law.[45]

B. Case Studies: Elgin Marbles

The Parthenon Marbles case, also known as the Elgin Marbles, is one of the most well-known cases of cultural property restitution. It demonstrates how a debate between cultural internationalism and nationalism escalates conflicts between nations. Between 1801 and 1812, the 7th Earl of Elgin, a British Ambassador of the Ottoman Empire tore numerous Parthenon sculptures into pieces and shipped them to England.[46] In 1983, the Greek government requested the return of the Elgin Marbles, but the British government declined in 1984.[47] Greece argued that the Marbles rightfully belong in Greece, namely on the Parthenon, due to the sculptures' intrinsic connection to Greek history and their spiritual essence.[48] Greece's argument resembles cultural nationalism, that history and culture form a complete puzzle when cultural heritage exists in its

40. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO (Nov. 27, 2023), *available at* https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural (last visited Nov. 27, 2023).

41. *1995 Convention*, UNIDROIT (June 24, 1995), *available at* https://www.unidroit.org/instruments/cultural-property/1995-convention/ (last visited Oct. 19, 2023).

42. ALESSANDRO CHECHI, THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES 1 (2014).

43. *Id.*

44. *Id.*

45. *Id.*

46. John Henry Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property*, MICH. L. REV., at 1882 (1985).

47. *Id.*

48. *Id.* at 1882-83.

own territory. Greece, however, did not sue Britain in court to claim repatriation of the Parthenon Marbles despite the international lawyers' advice.[49] The culture minister of Greece also denied the lawyers' opinion to bring the United Kingdom before the European Court of Human Rights due to concerns about the potential uncertainty of the international court's decision and the risky nature of litigation.[50] Also, if Greece brought its claim to the European Court of Human Rights, the United Kingdom would not have been bound by any decision.[51]

Despite Greece's argument, the British government rejected the restitution request based on cultural internationalism and the limitation of litigation. According to the British Museum, the Museum was functioning as a world museum with a collection of "shared humanity."[52] British Museum argued that the Marbles are an integral part of the world collection as they influence and embed various countries' cultures, including Egyptian, Persian, Greek, and Roman cultures.[53] This suggests that a museum ought to share the collection with the widest possible public, lend the collections worldwide, and benefit the scholars.[54] The British Museum's argument supports cultural internationalism, as cultural properties that ended up in other countries offer a sense of the broader cultural context and sustained interaction with several other cultures.[55] The British Museum also emphasized how it has lent the Marbles to the Acropolis Museum, the National Archaeological Museum, and the Museum of Cycladic Art in Athens and stimulated respectful collaboration and professional partnership with Greece.[56] Overall, the Museum appeared to prioritize its identity as a center of scholarly institution rather than centering its attention on the ownership dispute.

The Museum acknowledged that the ownership dispute will likely remain in favor of the British government due to Greece's limitation in

---

49. Liz Alderman, *Greece Rules Out Suing British Museum Over Elgin Marbles*, THE N.Y. TIMES, (May 14, 2015) *available at* https://www.nytimes.com/2015/05/15/world/europe/greece-british-museum-elgin-marbles.html (last visited Nov. 27, 2023).

50. *Id.*

51. Katerina Ampela, *The Parthenon Marbles and Greek Cultural Heritage Law*, THE LAWYERS' COMM. FOR CULTURAL HERITAGE PRES., (Jan. 6, 2023) *available at* https://www.culturalheritagelaw.org/The-Parthenon-Marbles-and-Greek-Cultural-Heritage-Law (last visited Nov. 27, 2023).

52. *The Parthenon Sculptures,* THE BRIT. MUSEUM, *available at* https://www.britishmuseum.org/about-us/british-museum-story/contested-objects-collection/parthenon-sculptures (last visited Nov. 27, 2023).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

pursuing legal action. If Greece wished to finally claim legal ownership, applicable authorities would have to investigate the legitimacy of the Marbles' acquisition and the British Museum's title.[57] However, the British Parliament has already been separately discussing the legitimacy of the acquisition and decided, based on the common law principle of *nemo plus juris ad alium transferre potest quam ipse habet*, or the right of the Crown to the Marbles, was not better than Elgin's right.[58] If Elgin had a good title, he could rightfully transfer ownership to the British government, and if he had a defective title, such title would have been transferred to the Crown.[59] Therefore, the future assessment of Elgin's title validation depends on two key factors: whether the Ottoman Empire at the time granted Elgin permission to remove the Marbles and whether the Empire had the authority to transfer rights to Elgin.[60] Currently, the only evidence that could address the title of Elgin is the *fìrman*, which was addressed by the Ottoman government and written in Turkish.[61] The original *firman* has been lost and survives as a form of Italian translation.[62] Without a clear determination of its authenticity, the document's credibility as admissible evidence in a trial is questionable.[63] Also, regardless of its authenticity, the context alone does not give permission for the transfer of property as the document lacks other evidence.[64] However, Greek civil law does not let the purchaser automatically become the owner for purchasing from a non-owner unless he acts in good faith.[65] Also, Section 4 of the Limitation Act 1980 suggests that the right of any person from whom property is stolen shall not be subject to the usual statute of limitations under sections 2 and 3(1) of this Act.[66] When the British Parliament was acquiring the Marbles, it did not examine the original document to assess the legality of Elgin's title, and Parliament acquired the Marbles under the knowledge that Elgin lacked evidence to support the removal of the Marbles.[67] Therefore, the British government's purchase from Elgin cannot be considered as a good faith

57. Ampela, *supra* note 51.
58. *Id.*
59. *Id.*
60. *Id.*
61. Ampela, *supra* note 51.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. Ampela*, supra note* 51.
67. *Id*.

acquisition.[68] However, that does not allow Greece to invalidate the title of the British government. While Greece argued that the Marbles were illegally taken by Elgin, the country has never sued the British government to seek the return of the stolen property.[69] Also, regardless of the authenticity of the *firman* document, it is hard to prove that Elgin stole the Marbles instead of acquiring them as a gift to the British Minister.[70] If Greece sued the Trustees of the British Museum in return, the remedy would likely be denied due to this ambiguity.[71]

In 2023, Greece also rejected the possibility of structuring the agreement to lend the Parthenon Marbles.[72] Greece restated its stance on the issue and refused to recognize the British Museum's jurisdiction, possession, and ownership of the Marbles as they are deemed to have been acquired through illicit means.[73] Greece supported its stance by bringing UNESCO's decision and international public opinion and exerted pressure on the British government to proceed with negotiations with Greece.[74] The Intergovernmental Committee for Promoting the Return of Cultural Property also urged the British government on its decision to use the UNESCO Mediation and Conciliation Procedures to respond to Greece's request for mediation.[75] Recently, Greece and the British Museum sought to negotiate the return of the sculptures.[76] Greece wanted to reunite the parts by receiving all of the pieces in its collection and put on display in their land for at least 20 years.[77] Greece was willing to supply the British Museum with loaning rotate selection of cultural properties.[78]

---

68. *Id.*

69. Merryman , *supra* note 46, at 41.

70. *Id.* at 42.

71. *Id.*

72. Harrison Jacobs & Tessa Solomon, *Greece Rejects Possibility of Parthenon Marbles 'Loan' in New Statement*, ARTNEWS (Jan. 6, 2023, 1:31pm), *available at* https://www.artnews.com/art-news/news/greece-rejects-parthenon-marbles-loan-plan-statement-1234652854 (last visited Nov. 27, 2023).

73. *Id.*

74. *Id.*

75. U.N. Educ. Sci. Cultural Org. (UNESCO) Intergovernmental Comm. for Promoting the Return of Cultural Prop. to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Rep. of the Secretariat on the follow-up to the recommendations and decisions adopted during the 21st session, ¶ ¶ 8-10, UNESCO Doc. ICPRCP/21/22.COM/Decisions (Sept. 27-29, 2021).

76. *See* Alex Marshall, *After 220 Years, the Fate of the Parthenon Marbles Rests in Secret Talks*, N.Y. TIMES (Jan. 17, 2023), *available at* https://www.nytimes.com/2023/01/17/arts/design/parthenon-sculptures-elgin-marbles-negotiations.html (last visited Oct. 13, 2023).

77. *Id.*

78. *Id.*

Conversely, the British Museum wanted to return the sculptures as a short-term loan in the form of a new Parthenon partnership.[79] Greece's desperate efforts to evade legal action not only pushed international law and conventions to their limits but also illustrated the significant need to implement a new negotiation method.

C. Case Study: Schneerson Library

The Schneerson Library is a collection of books that belonged to the Lubavitch rabbis before the Russian Revolution.[80] The collection is sacred Jewish texts on Chabad Chassidic tradition amassed by generations of Rebbes since 1772.[81] The collection consisted of two parts: "the "Library," which was nationalized during the Bolshevik Revolution, and the "Archive," which was plundered by the Soviet Union during the Second World War".[82] The collection became a part of Russian heritage following the plunder.[83] In 1915, the Lubavitcher Rebbes moved the Library to Moscow for safe storage as they fled from the German troops.[84] Then, when the Bolshevik regime nationalized the Schneerson Library, it became a state property and was deposited into what is today the Russian State Library.[85] Chabad requested the Russian government to return the Library to Chabad headquarters in the United States, but Russia refused to do so.[86] Chabad is an incorporated entity of a worldwide organization of Jewish religious communities that are part of the Chasidim movement, so Chabad had a significant interest in the Collection.[87] In 2004, Chabad of the United States brought its claim to the United States Federal Court, seeking the return of the collection for a default judgment under the Foreign Sovereign Immunities Act (FSIA).[88] The FSIA allows foreign states and governments to be sued in the United States federal courts under certain circumstances.[89] Chabad argued under the exception of FSIA,

---

79. *Id.*

80. Zvika Klein, *Chabad Demands Return of the Schneerson Library Archives from Russia*, JERUSALEM POST (Jul. 25, 2022, 8:39 PM), *available at* https://www.jpost.com/international/article-713047 (last visited Oct. 13, 2023).

81. Giselle Barcia, *After Chabad: Enforcement in Cultural Property Disputes*, 37 YALE J. INT'L L. 463, 464 (2012).

82. *Id.*

83. *Id.* at 464 n.12.

84. Klein, *supra* note 80.

85. *Id.*

86. *Id.*

87. Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 798 F. Supp. 2d 260, 263 (D.D.C. 2011).

88. *See id*, at 263.

89. 28 U.S.C.S. § 1330 (LexisNexis 2023).

foreign states cannot claim immunity in any case in which property rights are in violation of international law.[90] The court held that the FSIA does not bar the suit against the Russian government since it fulfills the requirement of the exception by carrying on commercial activity in the United States.[91] This suggests that the Russian State Library ("RSL") and the Russian State Military Archive ("RSMA") engaged in a contractual agreement with United States corporations to sell reproductions of materials in the RSMA's and RSL's archives and loan out the archives.[92]

However, Russia withdrew from the litigation due to fundamental incompatibility.[93] Russian cultural officials were aware that if Russia followed the United States' jurisdiction decision, the loan exhibition could be confiscated.[94] The Court simultaneously ordered the defendants to surrender the default judgment, but Russia refused to follow.[95] The Russian government has argued that the claim to return the collection is suspending exchanges of Russian art and American cultural artifacts among museums and universities.[96] Furthermore, the Russian government asserted that the collections in dispute are state property and are seen as a "treasure of the Russian people."[97] Russia's unwillingness to cooperate led the District Court to impose a daily fine of $50,000 on Russia for failing to comply with the court's order, which escalated already existing diplomatic tensions and weakened cultural exchange programs between the United States and Russia.[98] Russia then proposed transferring the works to a so-called Jewish Museum and Tolerance Center at a New Jewish Center in Moscow in 2013, but Chabad opposed it as there is only a small amount of collection had been transferred to that center.[99]

Noting the limitations of enforcing domestic jurisdiction against foreign countries, limitations also create legal difficulties when parties attempt to resolve the restitution issue through international law or

---

90. *Supra* note 87, at 264.

91. Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 466 F. Supp. 2d 6, 23 (D.D.C. 2006).

92. *See id*, at 24.

93. *Supra* note 87, at 264.

94. Barcia, *supra* note 81, at 466.

95. *Id.* at 465.

96. *Supra* note 87, at 265.

97. Graham Bowley, *Russia Fined $44 Million for Refusing to Hand Over Jewish Books*, N.Y. TIMES (Sept. 11, 2015), *available at* https://www.nytimes.com/2015/09/12/books/russia-fined-44-million-for-refusing-to-hand-over-jewish-books.html (last visited Oct. 29, 2023).

98. *Id*. *See also* Barcia, *supra* note 81, at 466.

99. Bowley, *supra* note 97.

domestic law. As The Schneerson Library case illustrates, domestic jurisdiction's enforcement of a judgment against a foreign country in a cultural property dispute is less likely to occur due to a lack of forceful international treaties regarding enforcement mechanisms.[100] If Russia had followed the decision, it would have undermined its legal claim against all cultural artifacts that were acquired during the nationalization of the Soviet Union.[101] As a consequence of this tension, the Schneerson Library had the potential to become a symbol of a cultural cold war between Russia and the United States.[102] Therefore, this case did not provide any advantages for either the organization or Russia; instead, it gave rise to diplomatic concerns that could have the potential to disrupt cultural exchange programs between the two states. It may have been a prudent decision to bring the claim for arbitration, since it offers the advantage of constraining both the amount of time and financial resources in settling the conflict.[103] Nevertheless, it is plausible that Russia may not choose to engage with the arbitration process in the future due to its preexisting skepticism over the legitimacy of the claim.

III. PROPOSING A NEGOTIATION METHOD

Considering the limitations of international and domestic law and treaties, this article proposes a government-level negotiation as an alternative dispute resolution method for a cultural heritage repatriation dispute. Among the several negotiation models available, the Oe-Kyujanggak model aligns most closely with complying with the interests of both museums and the country of origin. This model did not adversely affect the museum's credibility as a cultural institution and the country of origin's cultural identity. This model has three advantages: raising awareness of cultural identity, stimulating scholarly exchange between countries, and formulating a friendly diplomatic relationship between countries. To support this model, this article draws a comparison between this negotiation process and the arbitration model to provide additional insights into the proposal.

A. Oe-Kyujanggak's Successful Negotiation Settlement

At the November 2010 G20 Summit in Seoul, Korea, Korea and France negotiated a settlement regarding Oe-Kyujanggak books being available on a batch rental basis renewed every five years at the discretion

100. Barcia, *supra* note 81, at 468.
101. *Id.* at 473.
102. *See id.*
103. *Id.* at 471.

of the head of state, which was evaluated as a substantial return.[104] After this settlement, the archives have been returned distributivity four times.[105] It was the first case in Korea to negotiate a single diplomatic issue for over 20 years.[106] The lengthy duration of negotiations was due to the intensely polarized positions between the two countries, which made it difficult to reach a compromise. After the Foreign Ministry of Korea requested the return of the Oe-Kyujanggak books in July 1992, the French government rejected by assessing that even if they had been stolen by the French military, they could not be returned unconditionally because they were now protected as French national treasures.[107] On the other hand, Korea assessed that the only way to restore justice was through unconditional restitution because the stolen archives were not subject to the acquisition of prescription under international law, and France was illegally occupying the archive.[108] Following a prolonged dispute between the two countries, they transitioned from a government negotiation to a civil negotiation, before subsequently reverting to a government negotiation process.[109]

During the initial government negotiation from1992-1999, former French President Mitterrand suggested two proposals.[110] The first was to exchange the collection of Seoul National University Oe-Kyujanggak and the collection of France for a permanent lease form, and the other was to exchange the collection of France with an equivalent value of Oe-Kyujanggak for a permanent lease form.[111] However, Korea refused to exchange cultural property, arguing that it was "sending another child to bring back the other."[112] The negotiation was scattered, but it presented an opportunity to reach a resolution through the establishment of a long-term lease as a substantial return.[113]

---

104. *See* Min Jung Kim, *The Role of Civil Society Organization in the Conflict Among the French Government Ministries: The Return of Joseon Royal Book "Oe-Gyujanggak Uigwe,"* KOR. POL'L INFO. SOC'Y, 141, 142 (2016).

105. *Id.*

106. *Id.*

107. Sang Chun Jung, *Evaluating the Negotiation Process for the Restoration of Korean Manuscripts Stored at the French National Library*, KOR. SOC'Y OF FRENCH HIST, 193 at 198 (2007).

108. *Id*. at 199.

109. *Id.* at 201.

110. Kim, *supra* note 104, at 149.

111. *Id.*

112. Jung, *supra* note 107, at 211.

113. *See id.*

Next, scholarly professionals tried to enter into a civil negotiation from 1999 to 2004.[114] From this negotiation, Korea expected to exchange the copy of archives with the actual collections.[115] This time, France also suggested continuously holding ownership of the Oe-Kyujanggak books, while effectively leasing them to Korea, but after preparing several batches of Korean cultural properties to lend them to France.[116] This was a temporary revolving formula, such as renewing the lease every ten years.[117] Though it has the effect of enhancing global exposure to Korean cultural properties, the process of curating a list for circular rental could pose challenges to Korea.[118] As Greece asserted from the Elgin Marbles dispute, Korea also viewed the exchange of cultural property as establishing a harmful precedent in the field of international law, which might hinder the return of unlawfully acquired cultural property.[119] Although long-term loans are frequently employed in restitution resolution, the form of loan arrangement could present certain challenges as states cannot effectively guarantee the proper renewal of loans.[120]

Negotiations between France and Korea ended in 2011 at the G20 Summit with settling down to renewable rental in a 5-year unit.[121] Before the settlement at the G20 Summit, the Ministry of Foreign Affairs and Trade held summit meetings, ministerial meetings, and policy consultations to discuss the proper restitution method.[122] The topic of repatriation was continuously deliberated among the Ministry of Culture, Sports and Tourism, the Cultural Heritage Administration, and related organizations, such as the National Assembly.[123] Korean media entities also extensively circulated and promoted this matter to the general public, while civil organizations in Korea also voiced support for the return of the books.[124] As a result, the negotiation settlement of renewable loans was regarded as a diplomatic achievement for Korea, as it enabled Korea to circumvent practical and legal obstacles while simultaneously generating the interest

114. *Id.* at 201.

115. Kim, *supra* note 104, at 151.

116. Jung, *supra* note 107, at 203.

117. *Id*.

118. *Id*.

119. *Id.*

120. Marie Cornu, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*, 17 INT'L J. L. OF CULTURAL PROP. SOC'Y 1, 20 (2010).

121. Kim, *supra* note 104.

122. *See id.* at 152.

123. *Id.*

124. *Id.*

of its citizens in their cultural properties.[125] The ownership of the collection remained with France's Library, enabling the institution to sustain its research and public education by obtaining a copy of the collection and opening a new channel to discuss the exhibition's circulation.[126]

B. Comparing Arbitration with the Government-Level Negotiation

The other form of Alternate Dispute Resolution of litigation to resolve a cultural property restitution issue is international arbitration. It is a method of resolving disputes between parties in different jurisdictions which is referred by disputants to a decision maker who pronounces a legally binding decision.[127] Unlike litigation, parties can select their own procedures and choose their decision-maker through the parties' consent.[128] Arbitration is also largely utilized in cultural property restitution claims because the contestants may select arbitrators with the requisite expertise of the cultural property subject matter.[129] To prevent litigation under the various laws and judicial tribunals of multiple contracting states, it is encouraged to submit the cultural property dispute for a single arbitration tribunal.[130] Through arbitration, the parties are not bound by the strict and complicated rules of procedure, evidence, and remedies.[131] The tribunal has the authority to take into account theft or unlawful exportation that took place before the establishment of the cultural property treaties and allow equitable outcomes that are unavailable under the treaty.[132] Due to these advantages, arbitration is widely practiced for numerous cultural restitution disputes.

However, the arbitration does not protect the interests of both the museums and the country of origin. As discussed previously, museums and the countries of origin share similar goals regarding cultural property ownership. Both parties seek ownership to promote a culture to the public, preserve the artwork, and educate the public and scholars. These

---

125. Jung, *supra* note 8, at 255.

126. *Id*.

127. Ken Macdonald, *What is International Arbitration?* LEXOLOGY, *available at* https://www.lexology.com/library/detail.aspx?g=37d52ad9-2fef-44fc-8177-f6ef0957205b (last visited Sept. 6, 2023).

128. *Id.*

129. Evangelos I. Gegas, *International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property*, 13:1 OHIO STATE J. ON DISP. RESOL. 129, 151 (1997), *available at* https://kb.osu.edu/bitstream/handle/1811/79795/OSJDR_V13N1_0129.pdf?sequence=1.

130. *Id.* at 154.

131. *Id.* at 155.

132. *Id.*

goals are achieved when the cultural heritage serves the purpose of promoting a particular culture to the public by generating publicity, ensuring effective preservation, and facilitating access to the public and scholars. If each party of the cultural heritage restitution dispute relies on an arbitration approach, there is a potential to have a neutral and just outcome with a uniform interpretation of the UNESCO and UNIDRIOIT Convention.[133] However, the private process will be unable to influence public opinion, thereby discouraging additional exchange programs and increasing the chance that scholars and the public will be deprived of opportunities to learn more about another culture.[134]

The method of government-level negotiation will be able to successfully increase publicity both within and outside the country of origin, and the preservation of the artwork and importation of educational programs for the public and scholars will be automatically stimulated as a byproduct of diplomatic issues.

C. Promoting a Culture to the Public by Raising Awareness

Heightened public awareness of the importance of preserving cultural heritage made Korea's negotiation settlement of Oe-Kyujanggak possible.[135] When conflicts between government ministries become intense, unexpected outcomes can occur depending on the third party's problem-solving method.[136] Oe-Kyujanggak negotiation demonstrated how third parties can play significant roles in settling restitution.[137] In the case of returning the Oe-Kyujanggak, a civic/civil organization worked as the third-party actor.[138] Depending on their size, characteristics, and orientation, civic groups can influence the negotiation process through a variety of channels.[139] Numerous civic groups exert influence through large-scale protests or by issuing statements or claiming their agendas through petitions.[140] By adopting civic organizations' articulated statements, it is possible to proactively establish an advantageous position by introducing a new perspective while facilitating a more in-depth understanding of the policy.[141] One of the most influential civic organizations that protested for the restitution was an 'Association pour

133. *See id.* at 156.
134. Macdonald, *supra* note 127.
135. Kim, *supra* note 104, at 142.
136. *Id.* at 147.
137. *Id.*
138. *Id.*
139. *Id.*
140. Kim, s*upra* note 104, at 147.
141. *Id*.

la reunification en Corée du Sud du fonds documentaire des protocols royaux de la dynastie Joseon,'(Association for the Reunification of South Korea of the Documentary Fund of the Royal Protocals of the Joseon Dynasty) working with Paris University authorities and scholars who had a close relationship with the previous French Minister of Culture.[142] While the BNF librarians intensely protested against the restitution, this civic organization tried to persuade the French government to show generosity and not view the return of the Oe-Kyujanggak as cultural transactions.[143] If both France and Korea had brought this dispute to the arbitration tribunal, the panels would not likely have reflected the opinions of the civic organization. Moreover, there has been increased awareness of Oe-Kyujanggak among individuals in Korea and France due to the civic groups' vigorous campaign and media circulation to call for the return. Therefore, the government-led negotiation promotes cultural awareness in the public by dissolving diplomatic concerns and encourages the formation of a third party in the public that can potentially exert influence on the negotiation proceedings.

D. Preserving the Cultural Heritage Under the Increased Publicity

Due to the unique nature of government-level negotiations, political intervention can extend beyond the negotiation's outcome to promote the preservation of cultural heritage.[144] When museums receive a restitution claim from the country of origin, they emphasize their role in providing access to cultural properties to a larger public and acquiring a higher level of safety and protection than the country of origin.[145] When they are pressured to meet the negotiation, the museums try to maintain a good relationship with the country of origin to gain the country's cooperation and sponsorship.[146] The museums can be threatened to receive cultural and educational sanctions from the original country, such as a denial of scientific collaboration, loans for exhibitions, or threatened to cancel excavation permits that were provided for research.[147] For instance, when the Pennsylvania Museum of Archaeology and Anthropology entered into a negotiation of the "Troy Gold" with Turkey, Turkey's threat to pause the University of Pennsylvania's excavation projects played a

142. *Id*. at 154.

143. Jung, *supra* note 8, at 253.

144. Maria Shehade & Kalliopi Fouseki, *The Politics of Culture and the Culture of Politics: Examining the Role of Politics and Diplomacy in Cultural Property Disputes*, 23 INT'L J. OF CULTURAL PROP. 357–383 (2016).

145. *Id*. at 360.

146. *Id*. at 363.

147. *Id.*

significant role in settling the dispute.[148] Through exercising such bargaining power, the government can easily put pressure on the museums to implement a system to preserve the heritage or fulfill other demands.[149] If the ownership resides in the museums and a negotiation settlement is reached in the form of a permanent, renewable loan agreement, the museums are expected to have enhanced diligence in preserving and maintaining the heritage to make it available for rental purposes at appropriate moments.

E. Educating the Public and Scholars Through Maintaining a Good Reputation

If museums are required to repatriate the cultural heritage to the country of origin as mandated by arbitration, the public perception of the museums could be negatively affected. Museums are frequently placed in the restitution dispute because their legal position fluctuates.[150] Regardless of their position, museums can often be good-faith purchasers who unknowingly acquire artifacts with uncertain provenance.[151] In almost every dispute, the museums also face public relations problems and receive criticisms and commentaries questioning museum practices, management, and ethics.[152] Especially when the other museums involved in restitution disputes return the artifacts, the remaining museums that retain ownership of the cultural property face significant criticism.[153] For instance, due to the Elgin Marbles dispute, the British Museum received a high volume of criticism and was likely viewed as plundering the artifacts for their own interest.[154] Even if an arbitration judgment holds in favor of the museums, the arbitration method adheres to international law rather than the interests of each country and museums. Therefore, regardless of the outcome, the public will have a cynical perspective toward the museums, as if the museum is involved in a legal dispute due to their skeptical activity.

---

148. *Id*. at 364.

149. Shehade & Fouseki, *supra* note 144, at 364.

150. Charles L. Kirby, Stolen Cultural Property: Available Museum Responses to an International Dilemma, 104 DICK. L. REV. 729 (2000), *available at*: https://ideas.dickinsonlaw.psu.edu/dlra/vol104/iss4/9 (last visited Oct. 19, 2023).

151. *Id*.

152. *Id*. at 734.

153. *Id*. at 742.

154. Zareer Masani, *The British Didn't Plunder Antiquities, Like the Elgin Marbles. They Rescued Them.,* THE TELEGRAPH (May 28, 2022), *available at* https://www.telegraph.co.uk/news/2022/05/28/british-didnt-plunder-antiquities-like-elgin-marbles-rescued/ (last visited Oct. 14, 2023).

If museums and a country enter a permanent, renewable loan agreement, the public from both countries will have more opportunities to learn about the culture and history of the country of origin. Referring to the case of Oe-Kyujanggak, the public from both Korea and France were not aware of Oe-Kyujanggak's existence in the Library before the dispute occurred.[155] After the increase in public awareness during the protracted negotiation dispute, both Korea and France acknowledged Oe-Kyujanggak's cultural significance.[156] By refraining from initiating the arbitration process, the Library was able to curate the educational exchange provisions outlined in the agreement. As an illustration, the Korean and French governments initiated a digitalization project and engaged in collaboration with the French engineering team to test the process.[157] The National Museum of Korea even established plans for the Oe-Kyujanggak Academic Series in 2011, anticipating the launch of a comprehensive research project on the archives that would include both premium and standard copies.[158] The implementation of exchange programs and curriculums served to enhance the comprehension of Korean culture among the public in France and Korea. Had the restitution process undergone an arbitration process, the extensive planning of the scholarly/educational exchange provisions between both countries would not have progressed to this stage.

CONCLUSION

It would be unfounded to argue that international law is ineffective due to its lack of enforceability, but it does have significant limitations. Furthermore, despite the existence of diverse protective measures within domestic legislation pertaining to the transfer of cultural properties, there are situations that prevent restitution, even if other nations initiate legal proceedings to retrieve cultural properties. In some instances, mediation or arbitration by third parties may be a useful tool to utilize, but it is difficult to achieve mutual benefits for museums and countries from its

155. Jung, s*upra* note 107, at 193.

156. *Id*. at 196.

157. Ministry of Foreign Affairs, *Korea-France Joint Statement on the Outcome of the Digitalization Project for the Oe-Kyujanggak Archives* (Mar. 31, 2008), *available at* https://www.mofa.go.kr/eng/brd/m_5676/view.do?seq=306133&srchFr=&srchTo=&srch-Word=&srchTp=&multi_itm_seq=0&itm_seq_1=0&itm_seq_2=0&company_cd=&company_nm= (last visited Oct. 14, 2023).

158. Lee Kihyun, *Publication of the Oegyujanggak Uigwe Academic Series*, NAT'L MUSEUM OF KOR., *available at* https://issuu.com/museumofkorea/docs/nmk_v45/s/12339305 (last visited Oct. 14, 2023).

outcome. Therefore, a model of international, government-level negotiation will emerge as the most effective approach to satisfy both parties' interests. Given the case of the return of Oe-Kyujanggak, the negotiation model can be utilized to uphold and safeguard the cultural heritage of a nation by prioritizing substantial ownership transfer through diverse mechanisms, fostering cultural exchanges between nations, and emphasizing cultural identity rather than solely focusing on the determination of legal ownership.

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

Eduardo Kreimerman Meyohas[1]

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.

---

[1] *J.D. Candidate 2024, Syracuse University College of Law.* *I would like to thank my family for their support throughout my law school journey. I would also like to extend my sincere gratitude to Professors Dori Bailey, Aliza Milner, and David Reed, as well as the members of the Syracuse Journal of International Law and Commerce, for their editorial support.*

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 countries[6] 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 2020[12] 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 Swiss[14] and French[15] 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/abataxtimes_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/aml1.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 protected[41] 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 Act[49] 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 Statute[82] 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 1978[93] 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 Act[103] 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 (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 Serobyan, *Anti-Money Laundering Law Reform in the United States: Swiss Banks Caught between a Rock and a Hard Place*, EVERSHEDS 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* Marnin 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 & Serobyan, *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-European[154] 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. banks[170] 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 & Serobyan, *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 & Serobyan, *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 & Serobyan, *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).

PASS THE KUSH: ESTABLISHING A VIABLE JAMAICAN CANNABIS EXPORT INDUSTRY UNDER CURRENT INTERNATIONAL DRUG REGIME

Taville Francis[†]

[†] *Taville, a Jamaican-born, first-generation college and law graduate, draws upon her upbringing in an impoverished island nation to shape her research, focusing on innovative solutions to address poverty and socioeconomic disparities in marginalized communities. Graduating Summa Cum Laude from Syracuse University in 2018 with degrees in English and Political Science, her undergraduate thesis examined whether elected or appointed prosecutors employ different approaches to crime, showcasing her passion for understanding political dynamics and societal consequences.*

During her time at Syracuse University College of Law, Taville contributed as a member of the Syracuse Journal of International Law and Commerce, serving as Footnotes & Accuracy Editor. Her publication, "Prospects of Establishing a Viable Jamaican Medicinal Cannabis Export Industry Under Current International Drug Regime," demonstrates her expertise in the field.

As President of the Black Law Students Association, Taville demonstrated strong leadership, advocating for the academic, professional, and cultural needs of BIPOC students. Her legal experience includes roles as a Summer Associate at Hancock Estabrook and a Law Clerk at Harris Beach, where she honed her skills in legal research and litigation. Taville has accepted a postgraduate position at a prominent firm in Upstate, New York, commencing in the fall of 2024.

Her commitment to advocacy is evident through her contributions to the Syracuse University College of Law Disability Rights Clinic as a Student Attorney. Additionally, internships at the United States Attorney's Office and the Onondaga County District Attorney's Office further enriched her legal insights.

Taville acknowledges the invaluable guidance and support provided by esteemed colleagues and mentors throughout her scholarly journey, with special recognition to her mentor and Cannabis Special Counsel, William Wolfe, for his editing and advisory contributions to this article.

INTRODUCTION

Can a business built on an internationally controlled plant grow into a sustainable source of capital for an economically trodden island nation? The land of roots, rock, reggae, and the birthplace of Bob Marley[1] has approved well over a million pounds of cannabis exports to be shipped abroad.[2] This amount of cannabis exports could mean that Jamaica is finally ready to capitalize on the highly stigmatized herb its nation's reggae artists are known for singing about.

The global cannabis market is budding and is projected to reach $102.2 billion U.S. dollars by 2030.[3] Internationally, over the past five decades, countries have been moving toward liberalization of the

1. Robert Witmer, *Review: Roots, Rock, Reggae [film] by Jeremy Marre*, LAT. AM. MUSIC REV. / REV. DE MÚSICA LAT. AM. (1990), *available at* https://doi.org/10.2307/780130 (last visited Feb. 27, 2024).

2. Alicia Smith, *Gov't to Formulate Local Cannabis Policy Following Canadian Company Backlash*, JAM. OBSERVER (Mar. 7, 2023, 12:16 AM), *available at* https://www.jamaicaobserver.com/news/govt-to-formulate-local-cannabis-policy-following-canadian-company-backlash/ (last visited Feb. 27, 2024).

3. Grand View Research, *Legal Marijuana Market Size Worth $102.270.6 Billion by 2030*, GRAND VIEW RSCH. (2022), *available at* www.grandviewresearch.com/press-release/global-legal-marijuana-market (last visited Feb. 27, 2024).

cannabis plant and its by-products.[4] In 2015, Jamaica became the first Caribbean state to decriminalize the possession and personal use of ganja, as cannabis is locally termed on the island, in small quantities.[5] Subsequently, in September 2018, Jamaica sent the first commercial shipment of medical cannabis oil from the Caribbean to Canada for analytical testing purposes.[6] This shipment signaled Jamaica's first step in positioning itself as a global player in the growing medical Cannabis international export industry.

Accessing the global cannabis markets could help transform Jamaica's developing economy.[7] Although cannabis has been used by many for centuries, the cannabis industry is still in its infancy, leaving Jamaica with little guidance on establishing its international medical cannabis export industry. Jamaica needs to finalize import and export regulations that can support a viable industry, spur economic growth while maintaining health and safety, and sustain adherence to international drug treaties.

However, the state of the current international drug regime has stunted Jamaica's attempt to establish import/export regulations since 2015.[8] The government's inability to adequately find solutions for several legal issues in the international arena is the primary cause of this delay, as the impending regulations would need to include provisions that cover these issues.[9]

---

4. *See* Brian Maciver, *Cannabis Legalization World Map: Updated*, CANNABIS BUSINESS TIMES (July 2017), available at https://www.cannabisbusinesstimes.com/article/cannabis-legalization-world-map/ (last visited Apr. 10, 2024).

5. Parliament of Jamaica, *The Dangerous Drugs (Amendment) Act, 2015*, PARLIAMENT OF JAM. (2015), *available at* https://www.cla.org.jm/sites/default/files/documents/The%20Dangerous%20Drugs%20%28Amendment%29%20Act%2C%202015.pdf (last visited Feb. 27, 2016) [hereinafter DDAA].

6. MJBizDaily Staff, *First Medical Marijuana Shipment from Jamaica Head to Canada*, MJBIZDAILY (Dec. 17, 2021), *available at* https://mjbizdaily.com/first-medical-marijuana-shipment-from-jamaica-heads-to-canada/ (last visited Feb. 27, 2024).

7. Steven Davenport and Bryce Pardo, *The Dangerous Drugs Act Amendment in Jamaica: Reviewing Goals, Implementation, and Challenges*, 37 INT'L. J. OF DRUG POL'Y 60, 60-67 (Nov. 2016), *available at* https://www.sciencedirect.com/science/article/abs/pii/S0955395916302729#:~:text=In%20April%202015%2C%20the%20Government,for%20medical%20cannabis%20and%20hemp (last visited Feb. 27, 2024); The Economist, *Jamaica's Cannabis Gamble*, THE ECONOMIST (Apr.17, 2019), *available at* https://www.economist.com/the-americas/2019/04/17/jamaicas-cannabis-gamble (last visited Feb. 27, 2024).

8. Marta Rychert et al., *Issues in the Establishment of a Therapeutic Cannabis Market under Jamaica's Dangerous Drugs Amendment Act 2015*, 86 INT'L. J. OF DRUG POL'Y 1, 4-5, (Dec. 2020).

9. *Id.*

This note examines the legal issues that have surfaced because of cannabis's controversial scheduling in the United Nations (UN) drug treaties, and the Commission on Narcotic Drugs' failure to reschedule cannabis according to recommendations by the World Health Organization (WHO),[10] along with the changing global attitude towards cannabis in the international community.[11] Further, this note assesses the developing cannabis industries in other countries, comparing their approach to Jamaica's interim strategy to address limitations to accessing international markets imposed by U.N. drug treaties and U.S. federal drug policies.

Section II of this note recounts a brief history of international cannabis regulations focusing on those imposed by the UN. Section III analyzes several international approaches taken in a growing global trend toward liberalization of cannabis and the creation of markets for primarily medical but also local recreational use of cannabis. Section IV explains various legal issues that are hindering the establishment of a viable cannabis industry due to the inability of the international drug regime to support large scheme commercialization of highly scheduled drugs. Section V concludes this note with a recommendation for how Jamaica should draft its import-export legislation to avoid some of the risks associated with violating international drug treaties and maintaining good standing in international markets.

I. BACKGROUND

Cannabis has been regulated internationally since the 1925 UN Conference.[12] The cannabis plant existed before Christ and has many names, such as marijuana, ganja, hemp, and more.[13] Before global prohibition, humans used the cannabis plant for medicine, recreation, religious purposes, food, and its fibers to make rope and textiles.[14] Before global

10. WHO Expert Committee on Drug Dependence (ECDD), *WHO Cannabis Recommendations*, WORLD HEALTH ORG. (Jan. 24, 2019), *available at* https://cdn.who.int/media/docs/default-source/controlled-substances/unsg-letter-ecdd41-recommendations-cannabis-24jan19.pdf?sfvrsn=6070292c_2&download=true (last visited Feb. 27, 2024).

11. The Economist, *A Global Revolution in Attitudes Towards Cannabis Is Under Way,* THE ECONOMIST (Aug. 29, 2019), *available at* https://www.economist.com/international/2019/08/29/a-global-revolution-in-attitudes-towards-cannabis-is-under-way (last visited Feb. 27, 2024).

12. League of Nations, Second Opium Conf. Convention Chp. 3 Art. 4-5, Feb. 19, 1925 *available at* https://treaties.un.org/doc/Treaties/1925/02/19250219%2006-36%20AM/Ch_VI_6_6a_6bp.pdf (last visited Feb. 27, 2024).

13. John Hudak, MARIJUANA: A SHORT HISTORY 1-2 (2016).

14. *Id.* at 1-6.

prohibition, humans used the cannabis plant for medicine, recreation, religious purposes, food, and its fibers to make rope and textiles.[15]

Today, the plant is most known for the drug made from its flower that delivers a psychoactive effect.[16] The International Drug Control System defines cannabis as a drug with limited therapeutic advantages and a high potential for abuse.[17] As such, its use is limited to medical and scientific purposes, though the drug conventions do not define such purposes, creating a legal gap that further complicates legislation regulating cannabis use.[18]

A. *History of International Cannabis Regulation*

As late as the 1930s, the American Medical Association endorsed cannabis's potential medical value and low likelihood of addiction.[19] So, when did things go south? In the 19th century, concern with the growth of opium addiction, primarily in China, led to the creation of an international drug control system beginning with the Shanghai Opium Commission of 1909.[20] Then, the U.S. pursued use restrictions in the Hague Conventions of 1912 and the 1925, 1931, and 1936 drug conventions of the League of Nations. Not achieving its desired results, the U.S. exited the 1925 conference believing its policies were not strict enough.[21] During the 1940s and 50s, continued disorder of the illegal opium market resulted in U.S.-led efforts to create a new "single convention" to consolidate all existing drug treaties and establish a uniform regulatory system for global drug production to forcibly limit supply to "medical and scientific" needs.[22]

Although cannabis was not the initial focus of international drug control, at the turn of the 20th century, global social change led to

---

15. *Id.* at 1-6.

16. *Id.*

17. Single Convention on Narcotic Drugs, 1961, March 30, 1961, 520 U.N.T.S. 204; Protocol Amending the Single Convention on Narcotic Drugs, 25 March 1972, T.I.A.S No 8118, 976 UNTS 3 Article 5 [hereinafter 1961 Convention].

18. *Id.* at Art. 4(c)

19. John Collins, A Brief History of Cannabis and the Drug Conventions, AJIL Unbound, 114, 279-284 (Oct. 12, 2020) *available at* https://www.cambridge.org/core/journals/american-journal-of-international-law/article/brief-history-of-cannabis-and-the-drug-conventions/A8547C998A1D05173495BCD6012329C0 (last visited Feb. 27, 2024); *See also* [1961 Convention].

20. Francisco E. Thoumi, "Re-Examining the 'Medical and Scientific' Basis for Interpreting the Drug Treaties: Does the 'Regime' Have any Clothes?", *in* After The Drug Wars 19-29 (2016).

21. *Id.*

22. *Id.*

cannabis's inclusion on the list of controlled substances.[23] In 1932, cannabis was dropped from the British Pharmacopeia due to its "unpredictability" and the advent of "new and better" synthetic drugs that did away with ancient herbal remedies.[24] Then, the increasing recreational use and drug abuse of cannabis in the U.S. prompted states to prohibit its use, resulting in the Marijuana Tax of 1937.[25] During the same period, Ireland made cannabis illegal in 1934.[26] By the 1950s, many countries established strict regulations or prohibitions that both directly and indirectly targeted cannabis use.[27] This global rise in prohibitions led to cannabis's prescription as a narcotic drug listed in Schedule I and IV of the 1961 U.N. Single Convention on Narcotic Drugs (1961 Convention).[28] Thereafter, the stigma attached to cannabis has only recently begun to unravel.[29]

B. The United Nations Drug Conventions

The 1961 Convention was the first in a series of drug treaties that comprise the current international drug regime and is the primary international treaty that regulates narcotic drugs.[30] Three international conventions frame the current system of worldwide drug control.[31] These are the 1961 Convention, as amended by the 1972 Protocol, the 1971 Convention on Psychotropic Substances (1971 Convention), and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention).[32] These international drug control treaties provide a framework for countries to classify, control, and regulate drugs and substances while considering their potential for abuse,

---

23. *Id.*

24. Parliament.UK, *Chapter 2 History Of The Use of Cannabis*, *available at* https://publications.parliament.uk/pa/ld199798/ldselect/ldsctech/151/15103.htm (last visited Jan. 10, 2024).

25. Tod H. Mikuriya, *Marijuana in Medicine,* California Medicine (January 1969), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1503422/pdf/califmed00019-0036.pdf (last visited Feb. 27, 2024).

26. Sam Saarsteiner, *The History of Cannabis Regulation*, Clark Hill (Jul. 5, 2022) *available at* https://www.clarkhill.com/news-events/news/the-history-of-cannabis-regulation/ (last visited Feb, 27, 2024).

27. *Id.*

28. *See* 1961 Convention; *see Id.*

29. Mikuriya, s*upra* note 25.

30. International Narcotics Control Board, *1961 Convention*, *available at* https://www.incb.org/incb//conventions/index.html?lng=en (last visited Feb. 27, 2024).

31. *Id.*

32. *Id.*

medical use, and impact on public health.[33] The treaties, primarily the 1961 and 1971 Conventions, classify controlled substances into four schedules, beginning with Schedule I (most restricted) to Schedule IV (the least restricted). [34]

The 1961 Convention focuses on the illicit traffic and unauthorized consumption of controlled substances.[35] The Convention lists cannabis, cannabis resin, and its extracts under Schedule I, and until December 2020, on Schedule IV of its regulatory framework. Schedule I drugs are limited in all phases of trade to medical and scientific purposes, including manufacture, possession, use, and domestic and international trade.[36] The Convention also requires states that have ratified the treaties to require government participation in any phase of import and export through government authorizations such as licensing or state ownership.[37]

Under the 1971 Convention, cannabis derivatives, tetrahydrocannabinol, and delta-9-tetrahydrocannabinol (THC) are currently under Schedule I and II.[38] Drugs in Schedule I of this convention measured a high risk of abuse that pose severe risks to public health, with little to no therapeutic value acknowledged by the Commission on Narcotic Drugs (CND).[39] Schedule II includes drugs with a risk of abuse and low or moderate therapeutic value.[40] The 1971 Convention limits and controls the manufacture, export, import, distribution, and stocks of, trade-in, and use and possession of substances within Schedule I.[41] The 1971 Convention requires medical prescriptions for the lawful use of Schedule I and II substances.[42] Those distributing these regulated substances must use warning packaging and labeling and keep a distribution record.[43]

Broadening the scope of the treaties, the 1988 Convention goes further than the two preceding conventions, which primarily focus on

---

33. *Id.*

34. 1961 Convention, *supra* note 20, at Schedules.

35. Collins, *supra* note 19.

36. 1961 Convention Article 4(c).

37. *Id.* art.23.

38. UN General Assembly, *1971 Convention on Psychotropic Substances*, 9 December 1975, A/RES/3443. [hereinafter 1971 Convention].

39. *Id.* at Resolution II.

40. *Id.*; Sean Stephenson, *An Opening for Global Trade in Cannabis? What December's Vote under the UN Drug Treaties Mean for Global Cannabis Trade*, CAN. REGULATORY REV. (Nov. 26, 2020) *available at* http://www.canadaregulatoryreview.com/an-opening-for-global-trade-in-cannabis-what-decembers-vote-under-the-un-drug-treaties-means-for-global-cannabis-trade/ (last visited Feb. 27, 2024)

41. 1971 Convention at art. 5, ¶ 2.

42. *Id.*at Art. 2, ¶ 7 (a)(ii).

43. *Id.* at Art. 7, ¶ e.

preventing the diversion of drugs to illicit markets.[44] This Convention includes provisions that add precursor chemicals to the list of controlled substances and is the only convention to address personal consumption (recreational use) contrary to the requirements of the 1961 or the 1971 Conventions.[45]

Though not driven by cannabis regulation, together, the Conventions create a unified system of controls for cannabis, the cannabis plant, and cannabis resin.[46] Under Article 4 of the 1961 Convention, parties must "limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs."[47] The 1961 and 1971 Conventions place more than 100 controlled substances in four schedules according to their therapeutic value and propensity for abuse.[48] As a result of cannabis's category as a Schedule I drug among substances with a high potential for abuse and little to no therapeutic use (including heroin, fentanyl, and other opioids)[49], states that choose to allow medical and scientific production of cannabis need to follow the strict regulatory structures for opium production for their operation to be considered licit under the conventions.[50] Note that the conventions do not distinguish between legal and illegal drugs.[51] Instead, they specify the licit and illicit purposes and ways of handling the scheduled drugs.[52]

Still, there remains the question of whether the international drug regime has any force.[53] As treaties, the obligations the regime imposes

---

44. *See generally* U.N. Convention on Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf. 82/16, reprinted in 28 I.L.M. 493 (1988), 1582 U.N.T.S. 95. [hereinafter 1988 Convention]; *See generally* 1961 Convention; *See generally* 1971 Convention.

45. 1988 Convention, *supra* note 45, at Art. 3(2).

46. *See* John Collins, *Symposium On Drug Decriminalization, Legalization, And International Law – A Brief History of Cannabis And The Drug Convention*, Cambridge (Oct. 12, 2020), *available at* https://www.cambridge.org/core/services/aop-cambridge-core/content/view/A8547C998A1D05173495BCD6012329C0/S2398772320000550a.pdf/a-brief-history-of-cannabis-and-the-drug-conventions.pdf (last visited Feb. 27, 2024).

47. 1961 Convention at Art. 4(c).

48. 1961 Convention at Schedules; 1971 Convention at Schedules.

49. 1961 Convention at Schedule I.

50. 1961 Convention at Art. 2, ¶ 7.

51. 1961 Convention at Definitions; 1971 Convention at Definitions; 1988 Convention at Definitions.

52. *Id.*

53. Thoumi, *supra* note 20.

are not directly enforceable by a UN body.[54] Instead, the 1961 Convention established the International Narcotics Control Board (INCB) in 1968, which monitors and assists governments with treaty compliance as an "independent and quasi-judicial monitoring body for the implementation of the United Nations International drug control conventions."[55] The INCB is activated in the event of apparent violations of the treaties.[56] The INCB collaborates with participating states to propose appropriate remedial measures to governments not fully abiding by the provisions of the treaties or encountering difficulties in applying them.[57] When prompted by governments that have not taken steps necessary to remedy a severe situation of treaty non-compliance, the INCB has the discretion to call the matter to the attention of the parties concerned, the Commission on Narcotic Drugs and the Economic and Social Council.[58]

Article 14 of the 1961 Convention and Article 19 of the 1971 Convention set out measures that the INCB may take to ensure the execution of the provisions of those Conventions.[59] As a last resort, the INCB may recommend to member parties that they cease the import of drugs, the export of drugs, or both, to or from the concerned country or territory until "satisfied as to the situation in that country or territory."[60] To that end, the INCB publishes an annual report that provides recommendations based on evaluations and information received from countries and territories.[61] To date, the INCB has only invoked Article 14 of the 1961 Convention and Article 19 of the 1971 Convention concerning a limited number of States.[62] Afghanistan is currently the only state that action has been taken against under article 14 of the 1961 Convention.[63]

---

54. Dave Bewley-Taylor & Martin Jelsma, *The UN drug control conventions: The Limits of Latitude*, TRANSNAT'L INST. (March 2012), *available at* https://www.tni.org/files/download/dlr18.pdf (last visited Feb. 27, 2024).

55. *Mandate and Functions*, INT'L NARCOTICS CONTROL BD., *available at* https://www.incb.org/incb/en/about/mandate-functions.html (last visited Feb. 27, 2024).

56. *Id.*

57. *Id.*

58. U.N. Single Conference on Narcotic Drugs, art. 14(d), U.N. Doc., (Mar. 23, 1961) [Hereinafter 1961 Convention]; 1971 Convention *supra* note 38, at art.9.

59. 1961 Convention, *supra* note 58; 1971 Convention, *supra* note 58.

60. 1961 Convention *supra* note 58, at, art. 14.

61. Mandate and Functions, *supra* note 55.

62. *Treaty Compliance*, INT'L NARCOTICS CONTROL BD., *available at* https://www.incb.org/incb/en/treaty-compliance/index.html (last visited Feb. 27, 2024).

63. *Id.*

C. Cannabis for Medical and Scientific Use

The convention includes no accepted definition of what constitutes "medical and scientific use," creating a legal gap that seems to allow flexibility for ratifying countries to adopt various interpretations.[64] The conventions purposefully left undefined, the criteria for "medical and scientific use" to leave interpretive room within the conventions as they are meant to apply to countries worldwide.[65] The commentary on the 1961 Convention explicitly suggests just that by stating that the term "'medical purposes' does not necessarily have exactly the same meaning at all times under all circumstances."[66] Therefore, the term is open to national interpretation. This allowance of flexible interpretations suggests that there is room within the treaty framework for acceptance of uses that do not purport to illicit trafficking to be deemed as "medical" or "scientific" in purpose so long as it is "justified under the rational constitutional principles and basic concepts" of a nations legal system.[67]

According to legal experts in the Netherlands, the definition of "medical" in international conventions may be interpreted more broadly. This could encompass policy measures that extend beyond traditional medical treatments, such as the legalization and regulation of the cannabis markets so long as they promote public health, which is the primary concern of the treaties.[68] Nonetheless, the commentary on the convention does not purport to support such broad interpretation within the bounds of the treaty framework.[69] Scholars project that for parties that make changes toward "flexible interpretations" of specific "treaty provisions will over time become part of the acceptable scope for interpretation" of licit purposes.[70] That is, so long as they do not present a serious offense.[71] Under the 1988 conventions, a serious offense only constitutes drug

64. 1961 Convention, *supra* note 58; *Guidance on Drug Policy: Interpreting the UN Drug Conventions*, ALL PARTY PARLIAMENTARY GRP. FOR DRUG POL'Y REFORM 19 (2016), *available at* https://www.unodc.org/documents/ungass2016/Contributions/Civil/APPG_for_Drug_Policy_Reform/Guidance_print_copy.pdf (last visited Feb. 27, 2024); Thoumi, *supra* note 20.

65. John Collins, *Rethinking 'Flexibilities' in the International Drug Control System – Potential, Precedents and Model for Reforms*, 60 INT'L J. OF DRUG POL'Y 107, 108 (2018).

66. Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, U.N. Doc., (Mar. 25, 1972); Collins, *supra* note 65, at 109.

67. 1971 Convention *supra* note 38, at art. 22; Bewley-Taylor, *supra* note 54, at 15.

68. Bewley-Taylor & Jelsma, *supra* note 54, at 15.

69. *Id.*

70. *Id.* at 3.

71. *Id.* at 6.

trafficking, and the convention only marginally penalizes other drug offenses.[72]

II. A MOVE TOWARD INTERNATIONAL LEGALIZATION

Over the last two decades, a global trend has been toward legalizing marijuana.[73] Due to the changing attitude of the global community, and by the recommendation of the World Health Organization (WHO), twenty-seven of the fifty-three member states of the U.N.'s central drug policy-making body, the CND, voted to remove cannabis from Schedule IV in December of 2020.[74] Though the drug remains on Schedule I where it is still heavily regulated, more countries are now open to recognizing the medicinal and therapeutic uses of cannabis and more willing to make the drug available for medical purposes.[75] Currently fifty countries have adopted medicinal cannabis programs, while Canada, Uruguay, and twenty-one U.S. states have legalized cannabis for recreational use (including Washington D.C. and Guam).[76] Jamaica is one of the countries that has legalized cannabis for medicinal, therapeutic, scientific, and sacramental use.[77] Moreover, Jamaica has also joined an increasing number of countries that are entering the cannabis industry to import and export the plant under the Drug convention's medical and scientific trade exemption.[78]

It is essential to look to countries that entered the industry before Jamaica to see how they have navigated a highly regulated industry while keeping with the legal framework of the drug conventions. This section

---

72. U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 3, para. 4a, 7, 1988, 1582 U.N.T.S. 95

73. INCB, *The International Narcotics Control Board Expresses Concern over the Trend to Legalize Non-medical Use of Cannabis, which Contravenes the 1961 Single Convention on Narcotic Drugs*, INCB, (Mar. 9, 2023), *available at* https://www.incb.org/incb/en/news/press-releases/2023/international-narcotics-control-board-expresses-concern-over-the-trend-to-legalize-non-medical-use-of-cannabis—which-contravenes-the-1961-single-convention-on-narcotic-drugs.html (last visited Feb. 27, 2024).

74. *UN Commission Reclassifies Cannabis, yet Still Considered Harmful,* U.N. NEWS (Dec. 2, 2020) *available at* https://news.un.org/en/story/2020/12/1079132 (last visited Feb. 27, 2024).

75. *Id.*

76. *Id.*; Claire et al., *Where is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS (Feb. 16, 2023), *available at* https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization (last visited Feb. 27, 2024).

77. DDAA

78. Cannabis Licensing Auth., *Interim Measures to facilitate the Export of Cannabis for Medical, Scientific and Therapeutic Purposes*, CLA, (Jam.) *available at* https://www.cla.org.jm/sites/default/files/documents/Interim%20Measures%20-%20Export%20of%20Cannabis_0.pdf. (last visited Mar. 25, 2024).

analyzes the establishment of a medical cannabis industry in states that have somewhat avoided international backlash as a result.

A. Canada

In July 2001, Canada legalized medical cannabis use through implementation of the Marihuana Medical Access Regulations (MMAR).[79] Then, in October 2018, Canada enacted the Cannabis Act and became the second country to legalize the cultivation, possession, acquisition, and consumption of cannabis.[80] To do this, Canada removed cannabis from its Controlled Drugs and Substances Act, and it is now regulated similarly to alcohol.[81] In accordance with the statute, cannabis and its byproducts are taxed, and the government implements penalties for persons who provide cannabis to minors and for those who drive under the influence of the drug.[82] Restrictions are also in place to limit home production, distribution, public consumption, sale hours, and areas of permissible sale.[83]

Following treaty provisions for market regulation, Canada required Marijuana Related Businesses (MRBs) to have licenses to operate.[84] After legalization, licensed Canadian operators found it difficult to finance their establishments because most banks refused to offer loans to businesses whose primary dealings involved cannabis.[85] In 2018, Alterna Savings and Alterna Bank, were one of the few banks in the country willing to bank cannabis and as a result was the primary bank for two-thirds of the then 100 licensed growers.[86] Still, Canadian companies have some advantages over U.S. companies and those in developing nations regarding government support, access to capital markets, and a more supportive

79. Health Canada, *Understanding the New Access to Cannabis for Medical Purposes Regulations*, GOVERNMENT OF CANADA (Aug. 2016) *available at* https://www.canada.ca/en/health-canada/services/publications/drugs-health-products/understanding-new-access-to-cannabis-for-medical-purposes-regulations.html (last visited Mar. 25, 2024).

80. Cannabis Act, 2018 (S.C. 2018, c.16) (Can.), *available at* https://laws-lois.justice.gc.ca/eng/annualstatutes/2018_16/FullText.html#:~:text=The%20objectives%20of%20the%20Act,operating%20outside%20the%20legal%20framework (last visited Mar. 25, 2024).

81. *See id.*

82. *See id.*

83. *See id.*

84. Cannabis Licensing Auth., *supra* note 78.

85. Suzanne K. Daigle, *Legal Impediments to Banking Services for Recreational Cannabusinesses: Comparing Oregon to Canada*, 21 OR. REV. INT'l. L. 215, 224-25 (2020).

86. Doug A. Bloomberg, *Alterna CEO Embraced Weed Business When Nobody Else Would*, TORONTO STAR (Apr. 6, 2018), *available at* https://www.thestar.com/business/2018/04/06/alterna-ceo-embraced-weed-business-when-nobody-else-would.html (last visited Mar. 25, ,2024).

banking system.[87] These benefits allowed the Canadian cannabis industry to grow. By January 2019, Canadian cannabis was being sold online for recreational use, and the government and private companies also operated retail storefronts.[88] Still, Canada, with its cold climate, may be at a disadvantage compared to companies based in tropical environments such as Jamaica, where the weather and soil are optimal for high quality cannabis cultivation.[89] Consequently, Canada experienced periods of cannabis shortage from licensed operators, and the limited number of retailers in the industry.[90]

Also of consequence, the limited number of storefronts contributed to a disappointing sales volume for the industry.[91] Additionally, pricing in the legal market, was double that of the illegal market, making illegal cannabis a more attractive option for customers.[92] With that, regulated supplier issues in 2020 threatened to give the illicit cannabis trade an advantage and eventually led to a build-up in inventory of legal cannabis so much that companies believed they would remain in supply for the next two years without restocking.[93] These issues indicate a potential future need to import to increase supply, offer better quality options, and reduce prices.

---

87. Cannabis Licensing Auth., *supra* note 78; Kevin Harriott et al., *Prospects for Development of the Cannabis Industry*, JAM. FAIR TRADING COMM'N 1 (June 2022), *available at* https://jftc.gov.jm/wp-content/uploads/2022/08/2022.06.07-FTC-Study-into-the-Prospects-for-Development-of-the-Cannabis-Industry-1.pdf (last visited Mar. 25, 2024) [hereinafter Prospects].

88. Daniel T. Myran & Catherine R.L. Brown & Peter Tanuseputro, *Access to Cannabis Retail Stores Across Canada 6 Months Following Legalization: A Descriptive Study*, NATIONAL INSTITUTE OF HEALTH (Aug. 6, 2019), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6715107/ (last visited Mar. 25, 2024).

89. *Cannabis in Jamaica* ALCHIMIA GROW SHOP, *available at* https://www.alchimiaweb.com/blogen/cannabis-jamaica/ (last visited Mar. 25); William Turvill, *'The Legal Stuff Is Garbage': Why Canada's Cannabis Black Market Keeps Thriving*, THE GUARDIAN (Mar. 18, 2020), *available at* https://www.theguardian.com/society/2020/mar/18/cannabis-canada-legal-recreational-business (last visited Mar. 25, 2024).

90. Chris Wattie & Nichola Saminather, *Canada Kicks Off Muted Pot Party as 1st G7 Nation to OK Recreational Cannabis*, THOMSON REUTERS (Oct. 17, 2018), *available at* https://www.reuters.com/article/canada-marijuana/canada-kicks-off-muted-pot-party-as-1st-g7-nation-to-ok-recreational-cannabis-idUKL4N1WE6C9 (last visited Mar. 25, 2024).

91. Prospects, *supra* note 87.

92. *Id*. at ¶ 30.

93. Sean Williams, *The Canadian Marijuana Industry Has a Surprising $1 Billion Problem*, MOTLEY FOOL (Feb. 22, 2022), *available at* https://www.fool.com/investing/2020/02/22/the-canadian-marijuana-industry-has-a-surprising-1.aspx (last visited Mar. 25, 2024).

Nonetheless, Canada is a world leader in cannabis exports.[94] The North American nation has been exporting cannabis to markets around the world since 2016.[95] The foremost factor driving the rapid growth in cannabis exports is cannabis oil, the only legalized variant in the European Union, where the majority of the Canada's exports are directed.[96]

Still, according to one researcher, the vulnerabilities developed in the Canadian industry due to "mediocre product quality, uncompetitive pricing, […] and heavy regulatory burdens."[97] Later, this note addresses similar factors the Jamaican government must consider as it develops its own cannabis industry.

B. Uruguay

In 2013, Uruguay was the first nation in the world to fully legalize cannabis for medical and recreational use.[98] Uruguay's legislative framework requires customers to register to buy cannabis so that the government can monitor individual purchase ensuring that users cannot exceed monthly established limits.[99] Pharmacies are the only authorized retailers of the product.[100] However, customers can grow personal plants or purchase cannabis from not-for-profit cannabis clubs.[101] The government also sets fixed prices for cannabis products.[102] Currently, the government only permits four strains for retail, and each has a capped THC level of 9% (cannabis flower usually contains 15-30% THC per gram).[103]

---

94. *How Canada's Oversupply of Cannabis Is an Export Opportunity*, CAN. CANNABIS EXCH. (Oct. 25, 2022), *available at* https://canadiancannabisx.com/how-canadas-oversupply-of-cannabis-is-an-export-opportunity (last visited Mar. 25, 2024).

95. Matt Lamers, *Canadian Medical Cannabis Exports Tripled Last Year, as Race for European Market Position Intensifies*, MJBIZDAILY (Mar. 21, 2019), *available at* https://mjbizdaily.com/canadian-medical-cannabis-exports-tripled-in-2018 (last visited Mar. 25, 2024).

96. Adam Drury, *Top Countries Exporting Cannabis*, GREENRUSHDAILY (July 23, 2018), *available at* https://greenrushdaily.com/business/countries-exporting-cannabis (last visited Mar. 25, 2024).

97. Prospects, *supra* note 87, at ¶ 34.

98. *Global Cannabis: Uruguay*, MJBIZDAILY (Sept. 4, 2019), *available at* https://mjbizdaily.com/global-cannabis-uruguay (last visited Mar. 25, 2024).

99. Prospects, *supra* note 87, at ¶ 35.

100. *Id.*

101. *Id.*

102. *Id.*

103. Prospects, *supra* note 87, at ¶ 35*;* About Cannabis*, Government of Canada, available at* https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/about.html (last visited Mar. 25, 2024).

Yet, this South American nation is still not one of the top exporters of cannabis. Domestic suppliers seem to have their hands full with Uruguay's local demand for cannabis.[104] Though demand is high, the strict government regime led to low supply, with only 16 of 1,200 pharmacies enrolled to sell cannabis, with this number falling to 12 in 2018.[105] As of September 2019, the government has only issued two licenses for cultivation, and only two companies were growing for recreational markets.[106]

Further, Uruguayan cannabis companies have issues with financing since banks are reluctant to accept business from MRB for fear of U.S. retaliation.[107] In 2017, American banks, including Bank of America, sent letters that warned they would stop doing business with banks in Uruguay that provided services to state-controlled cannabis sales.[108] The letters were premised on the 2001 Patriot Act, which U.S. banks say prevents them from doing business with foreign banks that service the sale of federally illegal controlled substances.[109] This control includes cannabis, which is still federally illegal in the U.S.[110] A significant reason for legalizing cannabis in Uruguay was to divert proceeds away from the illicit trade of the substance to quell associated crimes while meeting local recreational needs.[111] This justification may be the constitutional principle that Uruguay uses to defend its flexible interpretation of the drug treaties to allow for a medical and recreational liberalization of cannabis and the establishment of a local market for both purposes. The American bank blockade seems to make achieving this social goal more difficult.

Nonetheless, North American companies have taken advantage of the legal regime by operating in Uruguay, where they enter the market by acquiring local companies, such as Aurora Cannabis and Khiron, with grower licenses and medicinal licenses.[112] The issue with North American ownership of the few viable cannabis companies is that unless Uruguay implements some protectionist measures, the cannabis market will

104. Drury, *supra* note 96.

105. Prospects, *supra* note 87, at ¶ 36.

106. *Id.*

107. Beatriz Spiess & Anabela Aldaz, *2020 Global Cannabis Guide Chapters–Uruguay*, JDSUPRA (Nov. 23, 2020), *available at* https://www.jdsupra.com/legalnews/2020-global-cannabis-guide-chapters-31623 (last visited Mar. 25, 2024).

108. Ernesto Londoño, Pot Was Flying Off the Shelves in Uruguay. Then U.S. Banks Weighed In, NY Times (Aug. 25, 2017), available at https://www.nytimes.com/2017/08/25/world/americas/uruguay-marijuana-us-banks.html (last visited Mar. 25, 2024).

109. *Id.*

110. 21 U.S.C. § 812.

111. Spiess & Aldaz, *supra* note 107.

112. *See* MJBizDaily, *supra* note 98.

not stimulate sufficient economic growth for the developing Uruguayan economy, which undoubtedly is yet another reason the country has legalized the drug.

C. United States

Federally, the United States regulates cannabis as a Schedule I drug according to the Controlled Substance Act of 1970 (CSA).[113] Cannabis is in a more restrictive category than cocaine, which is in Schedule II.[114] Schedule I substances are considered to have a high potential for abuse, with no currently accepted medical use and treatment in the United States.[115] The CSA prohibits the manufacture, distribution, sale, and possession of Schedule I substances with limited exceptions for medical and scientific purposes, much like the U.N. drug treaties.[116]

Nevertheless, the cannabis industry in the U.S. is in a unique position because though cannabis is federally illegal, thirty-eight states, three territories, and Washington D.C., have legalized its medical and/or recreational use.[117] This contradictory system is possible because, under the U.S. Constitution, each state retains its sovereignty and right to regulate matters of health and safety within its borders pursuant to its police power.[118] However, federal laws have affected the growth of the U.S. cannabis industry in states where it is legal in several ways. Namely, MRBs cannot transport cannabis across state lines, not even for transfers between states that have legalized it.[119] Nor can it be exported outside the United States, even under the medical and scientific exception, because international exports would be subject to federal restrictions.[120] Additionally, cannabis companies face formidable challenges with respect to accessing banking and financing services for their operations.[121] The crux of the issue lies in the fact that financial institutions and banks

113. 21 U.S.C. § 812.

114. *Id.*

115. *Id.*

116. 21 U.S.C. § 801.

117. *State Medical Cannabis Laws*, NCSL (updated Jun. 22, 2023), *available at* https://www.ncsl.org/health/state-medical-cannabis-laws (last visited Mar. 25, 2024).

118. U.S. CONST. amend. X

119. Olivia Wathne, *Transporting Marijuana: Laws and Regulations*, FINDLAW (Sept. 8, 2023), *available at* https://www.findlaw.com/cannabis-law/cannabis-laws-and-regulations/transporting-marijuana-laws-and-regulations.html (last visited Mar. 25, 2024).

120. *See generally id.*

121. William Wolfe, *US Cannabis Cos. Must Beware Predatory Lending Practices*, LAW360 (Oct. 26, 2022), *available at* https://www.law360.com/articles/1542981/us-cannabis-cos-must-beware-predatory-lending-practices (last visited Mar. 25, 2024).

that would offer services to MRBs that are authorized and licensed under state regulations are at risk of criminal prosecution under several federal statutes.[122] As a result, these MRBs face a significant hurdle in accessing the critical financial infrastructure required to operate and grow their businesses.[123] Thus, MRBs, though operating legally in their perspective states to grow, market, or sell cannabis, are essentially locked out of the banking system and have great difficulty maintaining a checking account, accepting credit and debit transactions, and paying tax revenues among other banking issues.[124]

In connection to banking, U.S. MRBs have limited ability to attract capital from institutional investors, leaving them vulnerable to a practice known as predatory lending, where financing agreements often include high-interest rates and equity transfers in exchange for capital.[125] Hence, in the U.S., cannabis is risky business as the current federal bank blockade subjects MRBs to predatory lending, and forcing companies to operate primarily in cash putting them at risk for crimes, such as theft and burglary, and ultimately limits their ability to expand.[126]

However, federal legislation provides some protection to MRBs in states that have legalized marijuana for medical or recreational use. The primary legislation that protects state medical and recreational marijuana programs is the Rohrabacher-Blumenauer Amendment.[127] This amendment prohibits the Department of Justice (DOJ) and the Justice Department's Drug Enforcement Agency (DEA) from using federal funds to prevent states from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.[128] Since Rohrabacher-Blumenauer is part of a congressional spending bill, it must be renewed every congressional year. For the fiscal year 2023, the legislation, also known as Rohrabacher–Farr amendment, was approved by the House in June of 2022, but did not pass in the Senate.[129] To avert government shutdown President Biden on November 16, 2023, signed a

122. *Id.*

123. *Id.*

124. *Id.*

125. Wolfe, *supra* note 121.

126. *Id.*

127. H. Amdt.332 to H.R.2578-114th Congress (2015-2016) (2023), *available at* https://www.congress.gov/amendment/114th-congress/house-amendment/332/text (last visited Mar. 25, 2024).

128. *Id.*

129. N.J. Cannabis Regul. Comm'n, PRN 2023-008, (N.J. 2023), *available at* https://www.nj.gov/cannabis/documents/rules/(F)%20PRN%202023-008%20(NJCRC%2017_30).pdf (last visited Mar. 25, 2024).

short-term bill, the Continuing Resolution (CR), making the Rohrabacher–Farr effective through February 2, 2024.[130]

Nonetheless, the DOJ investigates cannabis enterprises even in states with a legal system.[131] In several cases, the first review prompted a second request for information.[132] This review process creates more uncertainty in the market, and, for some that receive a second request for documentation, a significant effect on stock prices.[133] Additionally, the cannabis industry is still awaiting legislation to liberalize cannabis or, at a minimum, grant federal protections to banks that provide services to such companies.[134] The Secure and Fair Enforcement (SAFE) Banking Act is one such legislation that has passed the House several times. Still, it continually fails to pass in the Senate.[135] The SAFE Banking Act is proposed legislation that, if passed, would prohibit federal regulators from punishing banks, insurers, and other financial institutions for providing services to cannabis companies operating legally within states that have legalized marijuana.[136] The SAFE Banking Act could increase the number of financial institutions that provide services to MRBs, giving such businesses more banking and financing options, and reducing some risks associated with opening and sustaining MRBs.[137]

Still, though the passage of the SAFE Banking Act could potentially reduce some of the risks associated with U.S. cannabis, it would not be a

---

130. Scott Wong and Kate Santaliz, *Biden signs funding bill, averting a government shutdown*, NBC NEWS (updated Nov. 17, 2023), *available at* https://www.nbcnews.com/politics/congress/senate-approve-funding-government-shutdown-stopgap-bill-rcna125325 (last visited Mar. 25, 2024); Agustin Rodriguez et. al., *Georgia's Medical Marijuana Program: DEA Busts the Low-Dose Party Before It Starts*, JDSUPRA (Dec. 13, 2023), *available at* https://www.jdsupra.com/legalnews/georgia-s-medical-marijuana-program-dea-3513439/ (last visited Mar. 25, 2024).

131. James M. Cole, *Guidelines Regarding Marijuana Enforcement*, U.S. DEP'T JUST. (Aug. 29, 2013), *available at* https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (last visited Mar. 25, 2024).

132. Daigle, *supra* note 85.

133. Wolfe, *supra* note 121.

134. Alex Malyshev & Sarah Ganley, *Cannabis Industry Looks Ahead to 2023 After Facing Challenges in 2022*, REUTERS (Jan. 19, 2023 10:28 AM ET), *available at* https://www.reuters.com/legal/litigation/cannabis-industry-looks-ahead-2023-after-facing-challenges-2022-2023-01-19/ (last visited Mar. 25, 2024).

135. Dario Sabaghi, *The SAFE Banking Act's Potential Impact on The Marijuana Industry,* FORBES (Jan. 24, 2023 06:00 AM ET), *available at* https://www.forbes.com/sites/dariosabaghi/2023/01/24/the-safe-banking-acts-potential-impact-on-the-marijuana-industry/?sh=168aff75d31e (last visited Mar. 25, 2024).

136. *Id.*

137. *Id.*

complete solution.[138] So long as cannabis remains federally illegal, the industry will remain at high risk.[139] The only proper solution would be the federal legalization of cannabis or its removal from Schedule I of the CSA.[140] The country seems to be moving in that direction.[141] In 2022, President Biden announced that his administration would reform federal law to declassify marijuana as a Schedule I drug in the CSA, but he set no clear timeline for this initiative.[142]

Even with full legalization, the historical stigmatization of cannabis may still present issues for MRBs in the U.S. For instance, though Canada has legalized marijuana, Canadian MRBs still struggle to obtain bank accounts due to associated risks. Though, arguably, should the U.S. legalize marijuana, the results would differ as fear of ruining relations with U.S. banks and financial institutions is the root cause of foreign banks', including those in Canada, hesitation in working with MRBs.[143] Presently, U.S. federal banking laws present the most significant blockade to the growth of the international cannabis industry.[144]

In the meantime, U.S. cannabis companies have been working around the banking blockade in several ways. For one, "there is a growing trend of U.S.-based cannabis companies tapping into the Canadian capital markets to seek needed financing, bankruptcy protection, and the opportunity to list their company on the Canadian stock exchange."[145] Second, though most big banks refuse cannabis companies, according to the Financial Crimes Enforcement Network (FinCEN), about 755 financial institutions were banking cannabis in September of 2021.[146]

---

138. Wolfe, *supra* note 121.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Statement on Marijuana Reform*, 2022 DAILY COMP. PRES. DOC. 00883 (Oct. 6, 2022), *available at* https://www.govinfo.gov/app/details/DCPD-202200883 (last visited Feb. 28, 2024).

143. Neil Hartnell, *US 'Cut off' Fear on Marijuana Pursuit*, THE TRIBUNE (Oct. 28, 2020), *available at* http://www.tribune242.com/news/2020/oct/28/us-cut-fear-marijuana-pursuit/ (last visited Feb. 28, 2024).

144. Rohan Clarke, *Navigating the US "Green Rush": Anti-Money Laundering and De-Risking Implications for Banking Cannabis-Related Businesses in Jamaica,* 29(2) J. FIN. CRIME 564, 564 (2021).

145. Wolfe, *supra* note 121.

146. FIN. CRIMES ENFORCEMENT NETWORK, U.S. TREASURY, MARIJUANA BANKING UPDATE: MONTHLY COUNT OF DEPOSITORY INSTITUTIONS PROVIDING BANKING SERVICES TO MARIJUANA-RELATED BUSINESSES (Sept. 30, 2021), *available at* https://www.fincen.gov/sites/default/files/shared/305326_MJ%20Banking%20Update%204th%20QTR%20FY2021_Public_Final.pdf (last visited Feb. 27, 2024).

Additionally, MRBs are using cashless ATMs and turning to small banks and credit unions that are joining the industry and pairing up with corporate law firms that teach companies how to do their due diligence when seeking funding to avoid predatory lending.[147]

Though most big banks refuse cannabis companies,[148] the U.S. industry still has an advantage over those in developing countries with even fewer banking options. While there are federal banking protections for companies operating within the legal parameters of their U.S. states, no such protections are in place for foreign companies operating under the legal regimes of their country's drug laws. Jamaica is a prime example, that having legalized the scientific and therapeutic use of cannabis, is still struggling to work around the international drug laws and the U.S. federal bank blockade to establish a viable cannabis industry.[149]

D. Jamaica

Though many have regarded Jamaica as cannabis heaven, for over a century, Jamaican cannabis laws were among the strictest in the world.[150] With the relaxed international views on cannabis, Jamaica now looks to capitalize on the plant that has been a part of its nation's culture for generations, regardless of global and local prohibitionist attempts.[151]

1. History of Cannabis Regulation in Jamaica

Until the 2015 Dangerous Drugs Amendment Act (DDAA), illegal use, possession, production, and distribution of cannabis often carried severe penalties.[152] Under statutes before the DDAA, simple, low-level possession could sustain a conviction of three to five years in prison.[153] Further, in 2014, only a year before legalization, per capita arrest for

147. *See* Wolfe, *supra* note 121.

148. Clark, *supra* note 144.

149. *Id.*

150. *Id.*

151. *Id.*

152. Steven Davenport & Bryce Pardo, *The Dangerous Drugs Act Amendment in Jamaica: Reviewing Goals, Implementation, and Challenges,* 37 INT'L J. DRUG POL'Y 60, 60 (2016), *available at* https://www.sciencedirect.com/science/article/abs/pii/S0955395916302729?casa_token=3tn8P3VWYDkAAAAA:3I59OMH_7RFDZDQYnDHsHwdY_oef1T_E0CZeqqjNlLabh5veN1WUiExZnP6hWa6fQTt7wEsTIYQ (last visited Feb. 28, 2024).

153. The Dangerous Drug Act, JAM. MINISTRY OF JUST., Part IIIA § 7C (1948), *available at* https://laws.moj.gov.jm/legislation/statutes/D/The%20Dangerous%20Drugs%20Act%20(2)_0.pdf (last visited Feb. 28, 2024).

cannabis possession in Jamaica was more than double that of the United States.[154]

Jamaica participates in the three U.N. treaties established to control the illicit traffic of narcotic drugs and psychoactive substances.[155] Jamaica's obligation to observe the international drug conventions shapes the regulatory framework of its cannabis industry which aims to foster the legal cultivation, retail, import and export, research, development, and medical use of marijuana.[156] Due to Jamaica's financial interdependence on the U.S., a central enforcer of the U.N. drug conventions, it must take due diligence to avoid international repercussions.[157] This caution is especially warranted considering Jamaica's reputation as a major supplier of illicit marijuana in its region.[158]

According to a 2014 report by the INCB, Jamaica was the largest illicit producer and exporter of cannabis in Central America and the Caribbean, accounting for approximately one-third of cannabis produced in the Caribbean.[159] Facing scrutiny from powerful international agents, it is easier to understand why for decades, Jamaica developed strict cannabis laws as evidence that it was taking its best measures to comply with U.N. drug conventions and minimize illicit cannabis trade. Such restrictions seemed especially necessary since cannabis, until 2020, was classified on Schedule IV of the 1961 Convention along with the deadliest and most addictive opioids, including heroin, and recognized as having no therapeutic purposes.[160]

---

154. Davenport & Pardo, *supra* note 152, at 60-61.

155. *See* Anthony Clayton et.al., *Jamaica's Cannabis Industry: Policy Framework*, JAM. CANNABIS LICENSING AUTH., *available at* https://www.cla.org.jm/wp-content/uploads/2023/06/Jamaicas-Cannabis-Industry-Policy-Framework-002.pdf (last visited Feb. 28, 2024).

156. Press Release, Jam. Cannabis Licensing Auth., Due Diligence, the Cornerstone of Jamaica's Regulated Medicinal Cannabis Industry (Dec. 19, 2018), *available at* https://www.cla.org.jm/sites/default/files/documents/Due%20Diligence%2C%20the%20cornerstone%20of%20Jamaica%E2%80%99s%20regulated%20Medicinal%20Cannabis%20Industry_December%2019%2C%202018.pdf (last visited Feb. 28, 2024).

157. *Id.*

158. *Id.*

159. *Rep. of the Int'l Narcotics Control Bd. for 2014*, U.N. Int'l Narcotics Control Bd., U.N. Doc. E/INCP/2014/1 (Mar. 3, 2015), *available at* https://www.unodc.org/roseap/uploads/archive/documents/Publications/2015/incb/INCB_Annual_Report_2014_EN.pdf (last visited Feb. 28, 2024).

160. U.N. News, *supra* note 74.

2. Cannabis Regulation in Jamaica Today

In 2015, with the passage of the DDAA, Jamaica decriminalized personal cannabis possession of up to two ounces, legalized home cultivation of up to five plants, and established a commercial therapeutic cannabis market.[161] The DDAA also created the Cannabis Licensing Authority (CLA), an agency of the Ministry of Industry, Investment, and Commerce (MIIC), to establish and regulate the marijuana and hemp industry in Jamaica.[162]

The CLA issues five types of licenses for the cultivation, processing, research and development, retail, and transport of cannabis for medical, therapeutic, and scientific purposes.[163] The CLA also ensures that licensees comply with the terms and conditions of their licenses and the law.[164] The current regulations do not cover licenses for importing and exporting cannabis.[165] Jamaican cannabis import-export legislation has been underway since 2015, and though delayed, the Jamaican government has hinted that such regulations are in the finalization stage.[166] The passage of the impending law will make Jamaica one of ten countries with a cannabis export regime.[167] As an interim measure, the CLA grants export authorizations to licensees with valid import permits from the receiving country.[168] The regulations passed by the CLA still do not allow for the import of cannabis.[169] However, plant preparations, such as extracts and tinctures, may be imported with the approval of the Chief Medical Officer (CMO).[170]

---

161. DDAA

162. *Id.*

163. *Get the Facts - Cannabis Licensing*, JAM. INFO. SERV. (Mar. 27, 2019), *available at* https://jis.gov.jm/information/get-the-facts/get-the-facts-cannabis-licensing/ (last visited Feb. 28, 2024).

164. *Id.*

165. *Id.*

166. Albert Ferguson, *Regulations to Support Cannabis Export Coming—Green*, JAM. GLEANER (May 20, 2019), *available at* https://jamaica-gleaner.com/article/news/20190520/regulations-support-cannabis-export-coming-green (last visited Feb. 28, 2024).

167. Toni Allen, *Where in the World is Cannabis Legal?,* THCAFFILIATES (Feb. 5, 2024), *available at* https://thcaffiliates.com/legal-status-maps/ (last visited Feb. 28, 2024).

168. Cannabis Licensing Auth., *supra* note 78.

169. *Id.*; *Frequently Asked Questions*, CANNABIS LICENSING AUTH., *available at* https://www.cla.org.jm/faqs/ (last visited Feb. 28, 2024).

170. *Id.*

Since 2015, the CLA has granted 133 licenses.[171] As of May 2022, the CLA issued 156 Export Authorizations to more than 10 countries.[172] The impending regulations, once finalized, will replace the interim measures.[173] In the meantime, the CLA grants Export Authorizations to license holders to export cannabis inflorescence/buds and extracts from Jamaica to accepting countries worldwide.[174] The CLA also requires that the receiving country be a signatory to the U.N.'s International Drug Control Conventions.[175] Hence, for a Jamaican company to export cannabis products to a U.N. Drug Convention signatory such as Canada, which has legalized cannabis for medical and recreational use, a licensed Canadian entity must first apply to Health Canada for an importation license.[176] Then, only after the import permit is granted, can a licensed Jamaican company apply for an export permit from the CLA.[177]

For the 2023-2024 fiscal year, the CLA is projecting an increase in exports of cannabis for medical and therapeutic purposes, and reports that demand for Jamaican cannabis is increasing in the global marketplace.[178] Jacana, a prominent Jamaican cannabis company, states that this increase stems from three competitive advantages of building an international cannabis company based in Jamaica.[179] The first is having human capital with multi-generational experience in cannabis cultivation.[180] Second, optimal equatorial conditions allow for low-cost production of high-

171. *Licensing Statistics*, CANNABIS LICENSING AUTH., *available at* https://www.cla.org.jm/licensing-statistics/ (last visited Feb 28, 2024).

172. Chanel Spence, *CLA Projects Increase in Cannabis Exports*, JAM. INFO. SERV. (May 12, 2022) *available at* https://jis.gov.jm/cla-projects-increase-in-cannabis-exports/ (last visited Feb 28, 2024).

173. *No Hindrance to Commercial Exports while Import/Export Regulations are Impending***,** CANNABIS LICENSING AUTH. (June 2, 2020), *available at* https://www.cla.org.jm/sites/default/files/documents/Press%20release-Cannabis%20Licensing%20Authority%20-%20Clarification%20on%20Forbs%20Article%20-%20Companies%20Pulling%20Jamaican%20Investment%201.pdf#:~:text=permit%20is%20determined%20by%20the%20country%20issuing%20the,result%2C%20commercial%20quantities%20are%20not%20excluded%20from%20export. (last visited Feb. 28, 2024).

174. *Id.*

175. *Id.*

176. *See* Cannabis Licensing Auth., *supra* note 78.

177. *See Id.*

178. Spence, *supra* note 172.

179. *The Future for Jamaican Cannabis Has Never Been Greener*, JACANA JAM. (Nov. 2, 2023), *available at* https://jacana.life/the-future-for-jamaican-cannabis-has-never-been-greener/ (last visited Feb. 28, 2024).

180. *Id.*

grade or medical-grade cannabis.[181] Lastly, the world has a long-standing consumer association with Jamaica having the best cannabis.[182]

III. LEGAL ISSUES PREVENTING THE VIABLE ESTABLISHMENT OF A JAMAICAN CANNABIS IMPORT-EXPORT INDUSTRY

The medical cannabis market is one of the fastest-growing worldwide.[183] Only few countries, including Uruguay, Canada, Malta, Mexico, and Thailand, and 21 U.S. states, have liberalized recreational cannabis use.[184] However, approximately 30 countries have decriminalized recreational cannabis, meaning there is little to no penalties for those found in possession for personal or low-profile use.[185] Following this wave of legalization is a growing trend in the legalization of medical cannabis exports.[186]

In 2018, Jamaica became the first Caribbean Island to join the cannabis export industry with its shipment of medical cannabis oil to Canada.[187] The passage of the DDAA established a regulatory framework for Jamaica's budding cannabis industry by launching the CLA.[188] Consequently, the promulgation of local import-export regulations has been impending since 2015 due to international legal challenges that the country must circumvent to implement a therapeutic market and eventually, a viable export industry.[189] A primary concern stems from Jamaica's need to maintain favorable diplomatic relationships within the international arena by not violating the U.N. drug treaties.[190] Though the 1961 and 1971 Conventions permit cannabis use and its export for medical and scientific purposes, its status as a Schedule I drug makes regulating and developing a cannabis export industry considerably more complex.[191]

---

181. *Id.*

182. *Id.*

183. Nataliia Aliekperova et al., *Perspectives on formation of medical cannabis market in Ukraine based on holistic approach*, 2 J. CANNABIS RSCH. (2020).

184. *Id.*

185. Countries Where Weed is Illegal 2024, *World Population review*, https://worldpopulationreview.com/country-rankings/countries-where-weed-is-illegal (last visited Apr. 10, 2024).

186. *See Id.*

187. MJBizDaily, *supra* note 6.

188. Prospects, *supra* note 87, at ¶ 11.

189. Rychert et al., *supra* note 8.

190. *Id.*

191. *See* Jacana, *supra* note 179.

Further, while Jamaica's decriminalization of personal possession and use may operate permissibly with the current drug regime, there is still no internationally accepted definition of constitutes medical and scientific use, thus other countries, such as the U.S. are not required to accept Jamaica's interpretation of the drug convention provisions. This inconsistent system of treaty interpretation has created several challenges currently stunting the potential growth of the country's medical cannabis export industry.[192]

A. The International Drug Regime and Foreign Policy Considerations

Jamaica's international obligations have had a significantly impacted the reformation and implementation of the DDA.[193] Undeniably, the CLA is explicitly formulated to ensure Jamaica adequately observes the three international drug conventions.[194] A case study of the Jamaican cannabis market which included findings from interviews with twenty-two key informants (KIs) from the government, industry, academics, and NGO sector, revealed that civil servants and policymakers on the island often presented themselves as feeling powerless and dependent on international obligations.[195] Some KIs describes the limited policy choices that the government has proposed to propel the industry as evidence of policymakers' fear of potential international repercussions.[196]

Since Jamaica, for many years, held the record for being the largest illicit producer and exporter of cannabis herb, cannabis was a major issue for which Jamaica was monitored, evaluated, and punished.[197] Hence, before establishing a viable export industry, Jamaica must ensure that its domestic affairs and legal framework surrounding the cannabis industry are consistent with its international obligations.[198] The DDAA not only decriminalizes possession of up to two ounces of cannabis and the home growing of plants for personal use but also permits members of the Rastafarian faith to smoke cannabis for sacramental purposes.[199] Further, the CLA, created by the DDAA, establishes a regulated industry for cannabis' medical, therapeutic, or scientific applications.[200] The establishment

192. MJBizDaily, *supra* note 6.
193. Rychert et al., *supra* note 8.
194. Cannabis Licensing Auth., *supra* note 158.
195. Rychert et al., *supra* note 8.
196. *Id.*
197. *Id.*
198. *Id.*
199. DDAA
200. *Id.*

of a cannabis industry under the DDA created a series of issues that call into question whether the Jamaican regulatory framework is within the prohibitive parameters of the UN drug treaty regime.[201]

B. Is Jamaica's DDAA Policy Permissible under the Treaty Framework?

There is a set of questions that must be answered first.

First, can Jamaica decriminalize small-scale possession of personal use? As will be subsequently explained, the evidence suggests the answer is yes.[202] Though Article 3(2) of the 1988 Convention seems to require criminal penalties for the intentional "possession, purchase, or cultivation of narcotic drugs or psychotropic substances for personal consumption," the article also provides an "escape clause" for countries to deviate from penal sanctions if the "constitutional principles and the basic concepts of its legal system" require it.[203] This clause indicates there is no binding legal obligation for nations to criminalize possession for personal use under their domestic laws if it contradicts a fundamental principle of national law.[204] Strengthening this interpretation of the escape clause, in 2005, the INCB found that "the practice of exempting small quantities of drugs from criminal prosecution is consistent with the international drug control treaties."[205]

Second, is it permissible to allow Rastafarians to possess and smoke cannabis for sacramental purposes in places of Rastafarian worship? Again, this exception seems to be a reasonable interpretation under the escape clause considering that Several states have made exceptions in their domestic law for the sacramental use of controlled substances. For example, the U.S. exempts peyote use, a Schedule I substance, in connection with religious ceremonies of the Native America Church (NAC) from the controls and sanctions of the Controlled Substances Act of 1970 (CSA).[206] This exception is permissible within the bounds of the drug treaties as the escape clause within the 1988 Convention permits states the flexibility to deviate from strict enforcement of the convention when necessary to uphold "constitutional principles and the basic concepts of its legal system."[207] In the U.S. the Free Exercise Clause of the United

---

201. *Id.*
202. *Id.*
203. Bewley-Taylor & Jelsma, *supra* note 54.
204. *Id.*
205. *Id.*
206. 21 U.S.C. § 1307.31.
207. 1988 Convention, *supra* note 44, at art. 3 (1)(c).

States Constitution grants the NAC a constitutional right to use peyote for religious purposes in bona fide religious ceremonies as an exemption to the CSA.[208] While the general treaty obligation is for nations to limit possession and consumption exclusively to medical and scientific purposes, there is no binding legal obligation to prohibit personal consumption under their domestic laws if it contradicts a fundamental principle of national law.[209]

Moreover, in leu of the INCB's lack of criticism of the U.S.'s interpretation of the conventions to permit exceptions for sacramental use of scheduled substances for particular groups, Jamaica's policy of allowing sacramental use of Cannabis for Rastafarians under the DDAA should be seen a permissible policy option within the current drug treaty framework.

Third, can Jamaica establish a therapeutic cannabis export industry? The short answer is yes. A country permitting legal production can ship cannabis and its byproducts internationally to other allowing countries, but only for medical and scientific purposes while following strict convention guidelines. However, the market for medical and scientific cannabis is limited.[210] Jamaica must cash into several markets to create a lucrative export industry.[211] This may be what the country is trying to do when it established interim measures to export cannabis not only for medical and scientific, but also for therapeutic purposes.[212] The issue with that policy is whether "therapeutic" cannabis use falls under the "medical and scientific exception" of the drug treaty framework. Should Jamaica find legitimate grounds to interpret the provision of the conventions to denote that therapeutic use falls under the definition of medical and scientific use, that may make this policy of the DDAA permissible within the current treaty framework.

Under Section 9(a)(2) of the DDAA, medical therapeutic or scientific purposes include research, clinical trials, therapy and treatment, and the manufacture of nutraceuticals and pharmaceuticals.[213] Article 3(1)(a)(ii) of the 1988 Convention distinguishes between licit and illicit uses of the drug.[214] The commentary of this provision does provide for

208. 21 U.S.C. § 1307.31.

209. Bewley-Taylor & Jelsma, *supra* note 54.

210. Matt Lamers, *Jamaica Minister:'Cannabis Industry Not Hindered in Ability to Export,'* MJBIZ DAILY (Dec. 17, 2021) *available at* https://mjbizdaily.com/jamaica-minister-cannabis-industry-not-hindered-in-ability-to-export/ (last visited Mar. 25, 2024).

211. *Id.*

212. U.N. News, s*upra* note 74.

213. DDAA.

214. 1988 Convention, *supra* note 44.

the therapeutic use of cannabis but only for the treatment of drug addicts.[215] However, by nature of being in Schedule I, the convention does not recognize any therapeutic use of cannabis.[216] Though therapeutic medication, if prescribed by a licensed medical provider, should fit under the definition of medical use.[217] Further, the conventions commit themselves to permit countries to make the drug available for such purposes.[218]

Thus far, Jamaica has been reprimanded by the INCB or any other actors in the international community for its establishment of a therapeutic cannabis market. Moreover, flexible interpretations of specific, uncontested treaty provisions by state parties will over time become part of the acceptable scope for interpretation.[219]

C. Impediments to Financing the Industry Posed by U.S. Federal Banking Laws

Despite its legal status in Jamaica, domestic banks refuse to service the medical and therapeutic cannabis industry due to challenges created by the corresponding banking arrangements between Jamaican and U.S. banks.[220] Though 39 states, two U.S. territories, and Washington D.C. have legalized medical and or recreational use, cannabis is still federally illegal in the U.S.[221]

Two federal financial regulators, the Federal Deposit Insurance Corporation (FDIC) and the National Credit Union Administration (NCUA), wield authority over both federal and state banks through federal deposit insurance.[222] Hence, all banks must comply with federal statutes such as

---

215. Commission on Narcotic Drugs and the Economic and Social Council, *Commentary On The United Nations Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances 1988*, (New York: United Nations, 1998) *available at* https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Commentaries-OfficialRecords/1988Convention/1988_COMMENTARY_en.pdf (last visited Mar. 25, 2024).

216. Collins, *supra* note 19.

217. 1971 Convention at Resolution II, *supra* note 42.

218. Single Convention on Narcotic Drugs, *supra* note 20, at preamble; 1971 Convention at Resolution II, *supra* note 42, at preamble; 1988 Convention, *supra* note 44, at preamble.

219. Bewley-Taylor & Jelsma, *supra* note 54.

220. Matt Lamers, *Jamaica looks to slash cannabis license processing time, but banking remains major obstacle*, MJBIZDAILY (Mar. 30, 2022), https://mjbizdaily.com/jamaica-looks-to-slash-cannabis-license-processing-time-but-banking-remains-major-obstacle/ (last visited Apr. 10, 2024).

221. 21 U.S.C. § 812; Wolfe, *supra* note 121.

222. Moises Gali-Valeazquez, CHANGES NEEDED TO PROTECT BANKING AND FINANCIAL SERVICES WHEN DEALING WITH THE MARIJUANA INDUSTRY note 48-49 (LexisNexis 2016).

the CSA and the USA Patriot Act, to avoid losing their federal deposit insurance, having their charters revoked, and various other civil and criminal penalties.[223] Since cannabis is federally illegal, doing business with MRB puts banks at risk of federal prosecution, causing banks to largely refuse financial services to MRB.[224]

The CSA and the Patriot Act regulate U.S. banks. Both federal laws contain anti-money laundering provisions extending to foreign bank accounts.[225] Section 319 of the USA Patriot Act extends federal banking regulations to foreign banks with "an interbank account in the United States with a covered financial institution."[226] Under the USA Patriot Act, banks, including foreign banks, are prohibited from servicing accounts that "involve the manufacture, importation, sale, or distribution of a controlled substance [(as the CSA defines the term)]," which includes cannabis.[227]

Globally, many countries, especially developing countries such as Jamaica and other developing states, rely heavily on American banks for money transfers and trade proceeds.[228] Considering Jamaica's dependency on remittances from U.S. migrants[229], and its trade relationship with the U.S.[230], Jamaican banks are subject to the Patriot Act.

For instance, the U.S. is Jamaica's leading trading partner, accounting for almost 50% of the island's total trade in 2021.[231] In Jamaica, many banks are unwilling or hesitant to fund MRBs out of fear of

---

223. *Id.*

224. Wolfe, *supra* note 121.

225. 21 U.S.C. § 812; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. Law 107-56 (2001).

226. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. Law 107-56, §319 (2001).

227. Talib Visram, *The first country to legalize pot is taking it slow*, CNN (Sept. 16, 2018), *available at* https://money.cnn.com/2018/09/16/news/world/uruguay-cannabis-industry/index.html (last visited Mar. 25, 2024).

228. OECD, Making Development Co-operation Work for Small Island Developing States 21- 33, OECD Publishing, Paris, 2018 .

229. *Remittances in the Caribbean: "More Than Just Money"*, IOM UN MIGRATION REG. OFF. FOR CEN.., N. AM. AND THE CARIBBEAN, *available at* https://rosanjose.iom.int/en/blogs/remittances-caribbean-more-just-money (last visited Mar. 25, 2024).

230. *See* Prospects, *supra* note 87.

231. *Jamaica—Country Commercial Guide*, INT'L TRADE ADMIN. (July 12, 2022), *available at* https://www.trade.gov/country-commercial-guides/jamaica-market-overview (last visited Mar. 25, 2024).

breaching U.S. federal laws and being flagged for money laundering.[232] Effectively, U.S. federal laws have resulted in a financial impediment not only to the growth of its domestic cannabis industry but also to the international cannabis industry.[233]

Actors within the licensed Jamaican cannabis industry have expressed that the inability to access banking services has reduced opportunities for financing the sector.[234] Industry KIs spoke of many failed attempts to attract domestic investors.[235] Local investors fear losing their legitimate business accounts if they get into the business.[236] The head of the CLA and other leaders of government agencies involved in the industry stated that they could not get a bank account "for nearly a year."[237] With the current state of affairs, locals share the view that progress in the banking and financing of the cannabis industry depends mainly on policy changes in the U.S., rather than a domestic resolution.[238]

D. Emerging Protectionism

As a small, developing nation, Jamaica has fallen prey to the effects of globalization several times. Though lucrative, their bauxite, aluminum, tourism, and agricultural industries have all been foreign-dominated and, as a result, failed to provide sufficient profits to bolster sustainable economic growth for the country. Medical cannabis exports give Jamaica another chance to establish an industry that can make the country internationally competitive and spur significant profits. To achieve a viable but sustainable medical cannabis industry, Jamaica must protect domestic ownership and find markets willing to accept its exports.

However, the market for medical cannabis is relatively small thus far.[239] The number of nations importing meaningful quantities is limited to a handful that includes Australia, Brazil, Germany, and, only recently,

232. Latonya Linton, *Gov't Working to Resolve Banking Issues Affecting Medical Cannabis Sector*, JAM. INFO.N SERV. (Nov. 5, 2020), *available at* https://jis.gov.jm/govt-working-to-resolve-banking-issues-affecting-medical-cannabis-sector/ (last visited Mar. 25, 2024).

233. Clarke, s*upra* note 144.

234. Rycher, *supra* note 11.

235. *Id.*

236. Clarke, *supra* note 144.

237. Edmond Campbell, *Like the plague!- Banks will not touch cannabis players, still refuse to open accounts for them*, JAMAICAN-GLEANER (Nov. 1, 2019) *available at* https://jamaica-gleaner.com/article/lead-stories/20191101/plague-banks-will-not-touch-cannabis-players-still-refuse-open (last visited Mar. 25, 2024).

238. Linton, *supra* note 232.

239. Lamers, *supra* note 210.

Israel.[240] These nations have all begun to establish and increase their domestic production.[241] With few markets accepting imports, the industry is prone to protectionism. Canada, which has the most developed and largest medical cannabis market in the world, is not allowing commercial medical imports into the country.[242]

Recently, in early March of 2023, Cannaviva Jamaica Limited, an international Jamaican cannabis supplier, was granted the necessary permit by the CLA to import Canadian cannabis into Jamaica.[243] Industry actors were displeased that Canada, which is currently not allowing Jamaican cannabis exports into its markets, was granted permission to export to Jamaica.[244] The government is responding to the resulting uproar by promising to formulate a local cannabis policy to protect, support, and build the cannabis industry in Jamaica.[245] Jamaica's Minister of Industry, Aubyn Hills, hinted at future travel to Canada to secure a bilateral trade deal.[246] Hill also expressed that the government has authorized 2.5 million pounds of cannabis exports between 2018 and 2023, though only 1,608 pounds have been exported.[247] Still, the idea is, as a cannabis-exporting country, Hill stressed that "we want to export more, we want this industry to grow more."[248] For this growth to occur, Jamaica must find new markets and gain access to them by developing trade relationships.[249]

As the cannabis industry develops, there is local concern and need to protect domestic ownership of the industry while competing with the developed countries increasingly entering the market.[250] The government must balance accepting needed foreign investment while preventing locals from completely selling out their shares in the industry to foreigners.[251] The interim regulations include measures to protect local ownership of the industry.[252] For example, to obtain a CLA license for cannabis

240. Matt Lamers, *Canada Accused of Cannabis "Protectionism" by Blocking Imports—even as Exports Soar*, MJBIZDAILY (Aug. 19, 2020), *available at* https://mjbizdaily.com/canada-accused-of-cannabis-protectionism-by-blocking-imports/ (last visited Mar. 25, 2024).

241. *Id.*

242. *Id.*

243. Smith, *supra* note 2.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Smith, *supra* note 2.

249. *Id.*

250. Bewley-Taylor & Jelsma, *supra* note 54.

251. *Id.*; Daigle, *supra* note 85.

252. *See* Cannabis Licensing Auth., *supra* note 78.

handling, individuals must be "ordinary residents" or have resided in Jamaica for the past three years.[253] Also, licensed companies must demonstrate "substantial ownership and control by persons ordinarily resident in Jamaica."[254] However, foreign investment is an essential source of capital to finance the start-up costs of the industry.[255]

RECOMMENDATIONS

Considering the current state of the international drug regime, Jamaica's efforts to establish an international market for its cannabis will likely continue to be impeded by the international drug conventions and the U.S. bank blockade until cannabis and its by-products are removed from Schedule I of the 1961 Convention and the American CSA.

The UN Drug Treaties and U.S. anti-money laundering federal laws have simultaneously suppressed the growth of Jamaica's licit global medical and therapeutic cannabis trade businesses. Yet, according to the preamble of the UN Drug Convention, the ultimate goal of international drug control treaties is to combat illicit traffic and to "deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing," and the "abuse of psychotropic substances."[256] However, superseding these drug control issues are human rights and the concern with the "health and welfare of mankind."[257] Thus, one must ask whether the legal framework created by these treaties, backed by U.S. anti-money laundering foreign policies, is genuinely achieving the goals they set out to accomplish while avoiding human rights abuses.

The plain answer is no. Cannabis is the most used federally illegal drug in the U.S. Regardless of its international prohibition, cannabis remains the most widely used drug worldwide.[258] By restricting the lawful trade of the plant, the treaties, along with the U.S. anti-money laundering foreign policies, provide the basis for the illicit traffic of the drug.

Legalizing cannabis could divert proceeds from illicit traffickers and create profits for governments worldwide. The long-failed rationale for

---

253. *Id.*

254. *DDAA*.

255. Marta Rychert at al., *Foreign investment in emerging legal medicinal cannabis markets: the Jamaica case study,* GLOBALIZATION AND HEALTH 17, Apr. 1, 2021, at 38.

256. 1988 Convention, *supra* note 44.

257. Bewley-Taylor & Jelsma, *supra* note 54.

258. World Health Organization - Alcohol, Drugs and Addictive Behaviours Unit, *Cannabis*, WORLD HEALTH ORGANIZATION (2024), *available at* https://www.who.int/teams/mental-health-and-substance-use/alcohol-drugs-and-addictive-behaviours/drugs-psychoactive/cannabis (last visited Mar. 25, 2024).

cannabis prohibition has been dismantled by the WHO's Expert Committee on Drug Dependence, which in 2019 recommended that cannabis and several cannabis-related substances be rescheduled and removed from Schedule I.[259] Additionally, recently, the U.S. Department of Health and Human Services has recommended that Cannabis be removed from Schedule 1.[260] Both recommendations acknowledge that cannabis has medical purposes and is not as dangerous as its co-scheduled drugs like heroin and fentanyl.[261]

Further, as evidenced by Canada and Uruguay, even in countries that have legalized the drug to suppress criminal activities, complications with the drug treaties hindering its trade push individuals to the illicit market that can provide lower prices and less hassle to fulfill their medical and therapeutic needs. This is one way the drug treaties and U.S. anti-money laundering foreign policies contradict their objective of suppressing illegal trade. Rescheduling cannabis both in the drug conventions and in the U.S. could lead to significant progress on cannabis import and export not only in Jamaica but worldwide.

Further, by stigmatizing and essentially condemning ancestral, traditional, and religious uses of cannabis, there is a profound tension between human rights and the drug conventions. A global war on drugs has caused the disproportionate incarceration of racial and ethnic minorities despite evidence of mutual usage rates across races.

As evidenced by the trend in the global reshaping of attitudes towards cannabis, the UN drug treaties and the U.S. may be moving towards the liberalization of cannabis and its related substances. However, until then, Jamaica should do its best to develop its domestic cannabis trade to ensure a solid financial base once export impediments are lifted. Jamaica should include the measures below in its import-export legislation to achieve that end:

Continue to develop export-import legislation with flexible interpretations of the U.N drug conventions. However, it should ensure that it also reforms its constitution to include a persuasive legal argument that aligns with the "escape clause" for the purpose for which it has decriminalized cannabis. This will ensure that Jamaica is ready to launch as soon as U.S. federal legislation reschedules cannabis and or Congress finally agrees on a bill to support banking the licit trade.

---

259. WHO Expert Committee on Drug Dependence, *supra* note 10.

260. Christina Jewett & Noah Weiland, *Federal Scientist Recommend Easing restrictions on Marijuana*, NY TIMES (Jan. 12, 2024), *available at* https://www.nytimes.com/2024/01/12/health/marijuana-fda-dea.html (last visited Mar. 25, 2024).).

261. *Id.*; WHO Expert Committee on Drug Dependence, *supra* note 10.

Jamaica must develop domestic banks independent of the U.S. to source funding for its cannabis industry. This will encourage the expansion and legitimate trade of cannabis. It will also put the industry in an excellent place to expand its export operations. Establishing funding sources will also decrease the risks associated with cash-only businesses.

Policymakers should learn from Canada's internal failures associated with its attempt at protectionism by expanding the availability of legitimate herb supply to avoid diversion of its proceeds to illicit trade. This may include developing mutually beneficial bilateral trade relations. Countries like Canada and Uruguay seem to be having supply issues and, as a result, may need a second source of cannabis to meet the rising demands of their populations. Jamaica should start with these two industries.

THE U.S. CHIPS AND SCIENCE ACT OF 2022: A SELF-INTERESTED INDULGENCE IN FOREIGN TRADE AND SCIENCE OR A MODEL FOR FUTURE DEVELOPMENT?

Dr. Asif H. Qureshi[†]

ABSTRACT

This article focuses on the United States (hereinafter "U.S.") CHIPS and Science Act of 2022 and the U.S. Export Control Reform Act of 2018, with reference to the manufacture, export, and scientific research of certain types of advanced chips in and from the U.S. The article has a two-pronged objective. First, it analyzes the U.S.'s measures from the perspective of WTO law. Second, it explores, from an international law and policy standpoint, the research in science agenda set out in the legislation, i.e., with reference to the international law on the conduct of scientific advancement at the national and international levels. The author takes a critical approach to the U.S. management of its industrial policy on chips, including the science of chips, from an international standpoint.

[†] *Professor Dr. Asif H. Qureshi is a leading authority in Public International Law and International Economic Law currently holding a tenured Chair at the School of Transnational Law, Peking University since 2021. Between 2012 to 2021 he was a tenured Professor at Korea University, Korea. Prior to that he was a tenured Professor at the University of Manchester, UK since 1985. He is a barrister attached to Quadrant Chambers in London, UK. He has acted as a consultant for various governments and international organizations. He has held numerous Visiting Professorships worldwide. Professor Qureshi is the founding Editor-in-Chief of the Manchester Journal of International Economic Law. He has published over one hundred and forty articles/chapters/commentaries in international journals/books, and authored sixteen monographs/textbooks and edited works from leading international publishers. His work has been used and cited variously, including in the work of international economic organisations, and the WTO Appellate Body. Professor Qureshi is listed as an Arbitrator on the Panel of International Arbitrators by the Korean Commercial Arbitration Board; and Shenzhen Arbitration Commission, China. Since 2002 he has been a member of the Roster of Non-Governmental Panellists eligible for Panel service, appointed by the Dispute Settlement Body of the World Trade Organisation.*

Asif Qureshi graduated from the University of London, with an LL.M and PhD from the London School of Economics, UK. In 1988 he was an intern in the Legal Department of GATT in Geneva; in 1992 he was a Visiting Scholar at Yale Law School; and in 2016 he was a Visiting Professor in the IMF Legal Department. In 2018 he was conferred the Honorary Seoul Citizenship in South Korea.

INTRODUCTION

The recently enacted CHIPS and Science Act of 2022 (CHIPS Act), the CHIPS section of the Act, heralds a new U.S. position on its approach and priorities in trade, investment, and multilateral cooperation. Whilst it is certainly consistent with its arsenal of unilateral legislation already in place,[1] it is an innovation in the size, specificity, and departure from the underpinning ethos of international trade and investment. The CHIPS Act could be conceived as an example of an industrial policy in a nascent sector, albeit of a super-economy, wherein a long-lost child is the infant industry. In principle, there is no reason the infant industry call should only be the prerogative of developing countries. In the same vein, the U.S. response could be explained as an effort to co-exist in an international economy where there are differences in the *modus operandi* of dirigiste planned and market economies, respectively. Moreover, the U.S. response can be viewed as a reaction to a perceived failure in the WTO system in ensuring level playing fields in the interface between countries with market and state operators, in particular, in the fields of trade

1. *See* Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, §301, Special 301, 102 Stat. 1107 (1988); Trade Facilitation & Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 123 (2016); Trade Expansion Act of 1962, Pub. L. No. 84-794, 76 Stat. (1962).

remedies, technical barriers to trade, and unfair trade practices affecting U.S. workers.[2] If so, this unilateral approach to the extent that it is, is not the appropriate manner of bringing reform in the multilateral system. Similarly, the U.S. actions could be understood as partaking a new consciousness of what comprises 'necessity' and national security for the building blocks of technologically advanced economies. The legislation, however, must be proven to achieve these objectives. From a political perspective, if the legislation is a geopolitical economic foreign policy response to a possible Chinese invasion of Taiwan, it could signal a long-term U.S. reconciliation to China's One China approach to Taiwan. Finally, in economic analysis —- ultimately how this arrogation of the manufacturing of semiconductors (hereinafter referred to loosely as chips) to the U.S., with the cooperation of certain allied countries—impacts the chips industry worldwide, and generally on the manufacturing sector reliant on chips, is dependent on the long-term outcome of this reorganization of the sector in question.

The Science section of the CHIPS Act raises a distinct set of concerns.[3] It injects a significant amount of funds in scientific innovation in the chips sector. This targeted provision of funds impacts the freedom and independence of universities and research institutions in the U.S. The targeted provision of funds undermines their capacity to create a free and nurturing environment in the pursuit of diverse spheres of scientific research. The provision distorts, discourages, and disadvantages the pursuit of research that is non-prioritized under the Act; and that is of a theoretical as opposed to an applied nature. Whilst this may be the case with any kind of targeted research support from the government, that does not detract from what occurs when the amount of funding is substantial. The ethos of this directed research in science is not in service of humanity, it is an appropriation of the sciences in the interest of the U.S. alone. The fact that directed research is done by other States does not detract from the article's point, especially given the scales involved. Thus, it does not focus on the sciences with reference to the alleviation of poverty, underdevelopment, and diseases that afflict underdeveloped countries. Moreover, the manner of the disciplines and parameters set for scientific research, i.e., national security, Intellectual Property safeguards, ethical and social considerations, whilst in themselves understandable, are

2. *See* United States *Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process,* 113:4 AM. J. OF INT'L L. 822-31 (2019), doi:10.1017/ajil.2019. 59..

3. *See* 117th Congress Division B: Research and Development, Competition, and Innovation Act, Pub. L. No. 117-167, 136 Stat. 1366 (2022).

nevertheless inconsistent and incoherent with the advancement of mankind, including the ethos undermining the world trading system.[4] Thus, the Act inhibits scientific exchanges between disparate countries and the inclusion of the most talented scientists regardless of nationality. The Act inhibits the transfer of technology to other countries, which according to U.S. perceptions alone, present a threat to U.S. national security—defined to include economic security. This manner of a country's scientific research, based as it is on industrial policy, along with the methodology employed to facilitate it, provides unfortunate leadership to the world and relates to the dynamics of the international economic order. There should be a multilateral approach to certain scientific frontiers that are of common interest to humanity. To maintain such an expectation is not to deny State involvement at the national level in research.

In sum, the CHIPS Act raises important questions in various disciplines, i.e., law and economics, international economics, political economy, international economic law, and the public international law of research in the sciences. This paper will focus however on two broad themes: the WTO law and the international framework on cooperation in scientific endeavors.

I. THE US CHIPS AND SCIENCE ACT 2022

The Chips Act was enacted in July 2022. Authorization for this legislation is set out in Sections 9902-9906 of the William M. (Mac) Thornberry National Defense Authorization Act ("NDAA"). The CHIPS Act has two distinct areas of focus. The first (the chips section of the CHIPS Act) is on semiconductors, with three objectives—economic security, national security, and future innovation.[5] Economic security involves ensuring a significant manufacturing presence in the U.S., along with addressing any supply-chain obstacles for the US in the manufacture of chips. Moreover, the CHIPS Act is justified in the U.S. on the basis that the old U.S. model of R&D and commercialization abroad is no longer viable or in the interest of the U.S.[6] This is important because it is

4. Whilst the multilateral trading system as originally intended is concerned by the overall benefits to all states derived from David Ricardo's theory of comparative advantage, a state's industrial policy is essentially concerned with the state's own self-aggrandizement.

5. *A Strategy for The Chips for America Fund,* THE U.S. DEP'T. OF. COM., (Sept. 6, 2022), *available at* chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.nist.gov/system/files/documents/2022/09/13/CHIPS-for-America-Strategy%20%28Sept%206%2C%202022%29.pdf, (last visited Dec. 8, 2023).

6. *See Id.*

contended it for the continuation of the U.S.'s lead in innovation in this field.[7] This premise of course is not necessarily self-evident given contemporary technological advances in remote and distant working environments; and a comparison of the cost-benefit analysis of the new model and status quo. Additionally, there is the goal of ensuring U.S. national security concerns concerning sophisticated advanced chips manufacture and technology—including a US lead over China. Chips are essential components in electronics, with advanced versions necessary for both military and civilian applications. The U.S. wants to ensure its lead in innovation in the advanced chip sector. The achievement of these objectives is appropriately reflected in using the acronym CHIPS in the legislation, which stands for "Creating Helpful Incentives to Produce Semiconductors." The CHIPS section of the CHIPS Act creates a CHIPS America fund of $52.7 billion. Of this amount, some $39 billion is set to ensure chips manufacturing in the US and $11 billion for research and development.[8] According to the U.S. Department of Commerce, while this amount is large and significant (in terms of the costs involved in the manufacture and research in chips,) there is need for generating further financing from the private sector which is forecasted.[9]

The policy objectives underlying the legislation are premised on the assumption that this is the only way to ensure the economic and defense security of the U.S. through regular supply and research originating in the U.S.; the assumption that advanced semi-conductor technology would be stolen by countries competing with the U.S.; and the assumption that the apparatus in the legislation will ensure for the U.S. a lead in manufacture and innovation. Moreover, the chips initiative is set against the background of a significant amount of the semi-conductors currently being manufactured in Taiwan—a country susceptible to a potential hostile takeover by China, and, thus, leaving U.S. supply chains vulnerable in this event. It is also intended to redress the historical decline of manufacture in this sector in the U.S.; to respond to and mirror foreign state

---

7. *See Id.*

8. *See* Donna Dubinsky, Sreenivas Ramaswamy, and Jason Boehm, CHIPS for America Presentation, (Sept. 2022), *available at* chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.nist.gov/system/files/documents/2022/11/18/CHIPS%20Incentives%20Briefing%20Strategy%20Paper-Sept%202022.pdf, (last visited Dec. 8, 2023).

9. U.S. Dep't of Com., *Supra* note 5; *See also FACT SHEET: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China*, (Sept. 2022), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/ (Last visited Dec. 8, 2023).

subsidies in the manufacture of semi-conductors; and the need to adopt an industrial policy that departs from a *laissez-faire* market determined strategy, given that semi-conductors function as a building block in almost all electronic goods.[10] These considerations reflect the current-day geopolitical economic rivalry between the U.S. and China.[11] Furthermore, the CHIPS Act is part of a greater scheme which includes efforts aimed at ensuring cooperation in this sector with allied countries via Chip 4 Allies; [12] use of U.S. export controls to stop exports of high technology semi-conductors to China; and deterring an important global supplier, a Dutch manufacturing company, from supplying machinery that manufactures advanced semi-conductors to China.[13]

Second, the Science part of the CHIPS Act further authorizes a wide-range of funding for the advancement of U.S. scientific research to the tune of two hundred billion dollars.[14] This funding is available in specific areas of research and those that will contribute to the enhancement of U.S. competitiveness and national security. The legislation does not purport to inject funding in the sciences broadly—it lists research areas including the development of specific technologies.[15] The groupings are the energy, environment, computational sciences, artificial intelligence, the science of genome, and the aeronautics and space sectors.[16] The list does not cover all the sciences, for example: biology, evolution, behavioral sciences, infectious diseases, vaccination, and other sciences that may directly alleviate poverty.[17] This U.S. strategic approach to the sciences echoes the one taken by China in its Outline of the 14th Five Year Plan focusing on "quantum information, photonics, micro and

10. Shira Ovide, *Taxpayers for U.S. Chips*, The New York Times, (Aug. 10, 2022), *available at* https://www.nytimes.com/2022/08/10/technology/us-computer-chips.html (Last visited Nov. 11, 2023).

11. *Id.*

12. Christian Davies et al., *US struggles to mobilise its East Asian 'Chip 4' alliance,* Financial Times, (Sept. 12, 2022), *available at* https://www.ft.com/content/98f22615-ee7e-4431-ab98-fb6e3f9de032, (Last visited Dec. 8, 2023).

13. Suranjana Tewari and Jonathan Josephs, *US-China chip war: How the technology dispute is playing out*, BBC News, (Dec. 16, 2022), *available at* https://www.bbc.com/news/business-63995570, (Last visited Dec. 8, 2023).

14. *See e.g.*, Olive, *supra* note 10.

15. *See* 117th Congress Division B: Research and Development, Competition, and Innovation Act, Pub. L. No. 117-167, 136 Stat. 1366 (2022).

16. *Id.*

17. *Id.* The Act was not intended for these purposes. However, the science being promoted is specific and targeted. This focus is reinforced by the exclusion of certain equally compelling spheres of scientific priorities.

nanoelectronics, network communications, artificial intelligence, biomedicine, modern energy systems, and other major innovation areas."[18] In the U.S., the targeted financial incentives are accompanied by the creation of technological hubs and arrangements for employment diversity, national security, intellectual property, and ethical safeguards.[19]

In this manner, the legislation serves to advance various national objectives including: U.S. industrial strategy, U.S. competitiveness internationally, U.S. supply chains and employment, U.S. science and innovation globally, and U.S. national security.[20] This is an extremely ambitious "America First" legislation. While all nations are entitled to put their interests first within reason, many argue that states holding leadership positions in the world have a special responsibility in advancing global stewardship, along with an enlightened and initiative-taking approach to the development of humanity.[21]

II. FAIR TRADE OR TRADE DISRUPTION UNDER WTO LAW?

The U.S. measures concerning chips from the standpoint of the WTO are not only set in the CHIPS Act, but also in the U.S. Export Control Reform Act of 2018 (ECRA) which authorizes the U.S. to impose export prohibitions on advanced chips.[22] Under WTO law, these U.S. measures pose three distinct questions:

Are the various types of subsidies set out in the CHIPS Act the subject of WTO disciplines under the Agreement on Subsidies and Countervailing Measures (ASCM Agreement)?

Under both measures viz., ECRA and CHIPS Act, is China being discriminated against under Article 1 of GATT 1994?

Are there any quantitative restrictions being imposed on the exports from the U.S. of certain types of chips under Article XI of GATT 1994?

For reasons of space, the analysis here is not intended to be in-depth or exhaustive. Its main purpose is to highlight the key issues within the ambit of this paper.

---

18. *See* Chapter 4 of the Outline of the 14th Five-Year Plan (2021-2025) for National Economic and Social Development and Vision 2035 of the People's Republic of China.

19. *See* 117th Congress Division B: Research and Development, Competition, and Innovation Act, Pub. L. No. 117-167, 136 Stat. 1366 (2022).

20. *Id.*

21. This suggestion may seem idealistic. It is incumbent on scholars, however, to make it and to judge those who claim the higher moral ground in accord with those expectations.

22. Including the US Export Administration Regulations (EAR).

In June 2022, this author wrote with reference to aspects of ECRA in terms of conformity with U.S. WTO obligations.[23] On December 15, 2022, China instituted consultation proceedings in the WTO with reference to U.S. export prohibition measures on certain semiconductors under ECRA.[24] China's position under its consultations reflects in substance the questions this author raised in his work in relation to the compatibility of ECRA with WTO law. China, at the consultation phase at any rate of the proceedings, does not focus on the CHIPS Act, as such, nor does it raise any questions in terms of U.S. subsidies. The U.S. response at the consultation phase is grounded on its national security concerns.

Here the focus is in the first instance on a consideration of subsidies—given that it was not raised as an issue by China in its request for consultations with the U.S. Second, a brief consideration of China's allegations with respect to the export controls under ECRA within the framework of the WTO. Brief, because the case is still pending, and moreover this work is not intended as an exhaustive legal opinion. Finally, in outline form some observations on the U.S. defense, given the recent WTO jurisprudence on the meaning of national security.

A. Subsidies[25]

The WTO ASCM regulates two types of subsidies: actionable and prohibited subsidies.[26] R&D subsidies are no longer exempt from the disciplines of the ASCM and therefore such subsidies under the CHIPS Act are subject to the ASCM disciplines.[27] The CHIPS Act gives direct

---

23. *See* ASIF QURESHI, THE AMERICANISATION OF THE WORLD TRADE ORDER, at 128-43 (Routledge: June 2022).

24. *See* Request for Consultations by China, *United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies* WT/DS615 (Dec. 15, 2022).

25. *See* WOLFGANG MULLER, WTO AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES A COMMENTARY (CUP:2017); and Nu Ri Jung, *Are There 'Exceptions' to the SCM Agreement? Applicability of the GATT Exceptions Vis-à-Vis the International Rules on Subsidies*, 57 J. OF WORLD TRADE, ISSUE 3, 457-72 (2023).

26. *See Agreement on Subsidies and Countervailing Measures*, WORLD TRADE ORG., *available at* https://www.wto.org/english/docs_e/legal_e/24-scm.pdf (last visited Dec. 8, 2023).

27. *See* ASCM Agreement, *WTO Analytical Index*, WTO (Dec. 2021), *available at* https://www.wto.org/english/res_e/publications_e/ai17_e/subsidies_art8_oth.pdf (last visited Dec. 8, 2023) (Article 8(2)(a) of the ASCM making R & D subsidies non-actionable no longer applicable).

financial assistance to the chips manufacturing sector in various forms including tax credits and R&D funding.

First, all the financial assistance is specific to the chips sector under the ASCM.[28] Therefore, there is *prima facie* evidence of an actionable subsidy under the WTO dispute settlement system; or through countervailing measures provided, there is injury to a domestic industry. Evidence of an adverse effect is a requirement for an actional subsidy; for example, an injury to domestic industry of another; export displacement; and/or nullification or impairment of a benefit under GATT 1994.[29]

Thus, under Section 102 of the CHIPS Act, $52.7 billion is set out to enhance chips' domestic manufacturing capability, including research and development and workforce development programs. $39 billion of the $52.7 million is earmarked over a period of five years to implement the programs under Sec. 9902 of the NDAA (to incentivize investment in facilities and equipment in the U.S. for semiconductor fabrication, assembly, testing, advanced packaging, or research and development). $2 billion of this amount is explicitly set out for "legacy chip production" to further "economic and national security interests." A further $2 billion is set for "a CHIPS for America Defense Fund;" and $500 million for a CHIPS for an "America International Technology Security and Innovation Fund." Larger amounts beyond a set threshold of $3 billion can be received if they "(i) significantly increase the proportion of reliable domestic supply of semiconductors relevant for national security and economic competitiveness that can be met through domestic production; and (ii) meet the needs of national security."[30] In addition, under Sec. 107 of the CHIPS Act, there is a 25-percent tax credit for investments in semiconductor manufacturing and includes incentives for the manufacturing of semiconductors, as well as for the manufacturing of the specialized tooling equipment required in the semiconductor manufacturing process. This tax credit, albeit at the taxpayers' option, can be used to off-set taxes due.

Second, with reference to the subsidies being considered as prohibited subsidies. This is dependent on several considerations which touch upon export performance or local sourcing, as follows. The CHIPS Act is not only about enhancing the U.S. capacity to manufacture chips for

---

28. *Agreement on Subsidies and Countervailing Measures*, *supra* note 26, at 230 art. 2.1(b) n. 2.

29. *Id.* at 233 art. 5.

30. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, sec. 9902.

the domestic market alone, but also about increasing, albeit in the long run, the U.S. competitiveness globally.[31] There are aspects of the domestic capacity building in the chips sector, the fruits of which will not be insulated from the export market or parts of the export market. Some manufactures will be found in the world market or markets of some countries alone. There are indications in the legislation that promote local sourcing, for example the injunction to "incentivize investment in facilities and equipment in the U.S. for semiconductor fabrication, assembly, testing, advanced packaging;" or the prohibition to use technology or products albeit in association with a foreign entity of concern.[32]

The extraterritorial export control (including engaging in significant transactions involving expansion of manufacturing capacity in PRC) imposed on other countries is induced through the apparatus of financial assistance and therefore can be considered a subsidy related to export performance, albeit extraterritorially and in terms of negative performance. Under Section 9905, a provision is made for the creation of a Trust Fund to "secure semiconductors and measurably secure supply chains." Foreign participation in this Fund is subject to the foreign government maintaining "export control licensing policies on semiconductor technology substantively equivalent to the U.S. with respect to restrictions on such exports to the People's Republic of China." Section 102 also prohibits "the recipients of Federal incentive funds from expanding or building new manufacturing capacity for certain advanced semiconductors in specific countries that present a national security threat to the U.S."[33] This includes "expanding or building new manufacturing capacity" for the purposes of expanding exports from those specific countries. It should be noted here that expanding and building manufacturing capacity abroad can be facilitated through direct investment and/or necessary exports.

In sum, it is sufficient in this discourse to raise relevant questions and pointers generally in terms of this query. There is much in the jurisprudence of the WTO Appellate Body that is also relevant here—most notably, the cases involving the U.S. Measures Affecting Trade in Large

31. *See id.* (referring to economic competition); *see also id.* at sec. 9906 (referring to "leadership and competition of the US in microelectronic technology and innovation"). Moreover, the microtechnology is of use and will be used in various US export products in the future.

32. H.R. 6395, 116th Cong. § 9902 (2nd Sess. 2020).

33. *See* U.S. Dep't of Com., *supra* note 5.

Civil Aircraft.[34] Indeed, there are parallels here in the U.S. measures and facts involving R & D funding, including tax breaks concerned with the U.S. Aircraft industry. The U.S. in these cases was found to have been in violation of the ASCM.

B. ECRA Under WTO Law

The U.S. recently imposed tighter export controls on the export of chips to address U.S. national security and foreign policy concerns, including the pursuit of regional stability, by way of an amendment to its Export Administration Regulations (EAR), specifically aimed at China.[35] These are the subject of the Chinese complaint under the WTO.[36] The export controls concern (1) "advanced computing integrated circuits (ICs)," (2) "computer commodities that contain such ICs," and (3) "certain semiconductor manufacturing items." The controls comprise of (1) an expanded application of the Foreign Direct Product Rule[37] to supercomputer and semiconductor manufacturing end users by extending "the scope of foreign-produced items subject to license requirements for twenty-eight existing entities located in China on an Entity List;" and (2) introducing licensing requirements for "U.S. persons" that "support" the

---

34. *See* Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WTO Doc. WT/DS353/AB/R (adopted Mar. 12, 2012); Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint), Recourse to Article 21.05 of the DSU*, WTO Doc. WT/DS353/AB/RW (adopted Mar. 28, 2018). For analysis of this case, *see* Sara Angeleska, *United States–Measures Affecting Trade in Large Civil Aircraft – Second Complaint – Recourse to Article 21.5 of the DSU by the European Union (US – Large Civil Aircraft (2nd Complaint)*, 19 World Trade Rev. 472, 472-76 (2020); Jennifer A. Hillman and Kara M. Reynolds, *Article 21.5 DSU Appellate Body Report United States–Measures Affecting Trade in Large Civil Aircraft (Second Complaint); Spillovers from Defense R&D Add to the Tug-of-War between Panels and the WTO Appellate Body*, 20 World Trade Rev. 466, 466-478 (2021).

35. *See generally* 15 C.F.R. §§ 734, 736, 740, 742, 744, 762, 772, 774; *see also* Export Control Reform Act, 50 U.S.C. § 58.

36. *See* Export Control Reform Act, 50 U.S.C. § 58; *see* 15 C.F.R. § 730-774; *see* 87 Fed. Reg. 62,186 (Oct. 13, 2022). *See also* Chinese Complaint: WT/DS615/1/Rev.1, G/L/1471/Rev.1 (15 December 2022) & WT/DS615/1/Rev.1/Add.1 (19th September 2023).

37. A Foreign Direct Product Rule is a rule contained in the Export Administration Regulations that enables the extraterritorial application of U.S. export controls to transactions outside the US. These transactions involve a product wherein U.S. origin technology/software is used directly or indirectly where the foreign plant for manufacture of the product was itself produced using U.S. origin software or technology that is the subject of U.S. export controls; or the product is destined for certain designated countries of U.S. concern including China. *See* George W. Thompson, *The Foreign Direct Product Rule*, Thompson & Associates, PLLC, (Mar. 29, 2022), *available at* https://gwthompsonlaw.com/the-foreign-direct-product-rule/ (last visited Dec. 8, 2023); *see* 15 C.F.R. § 734.9.

development" or "production" of certain ICs in the PRC "even when the precise end use of such items cannot be determined by the "U.S. person."[38]

Where there are license requirements for regional stability reasons applied to China—these are "under a presumption of denial, based on the risk of these items being used contrary to the national security or foreign policy interests of the U.S., including the foreign policy interest of promoting the observance of human rights throughout the world."[39] In terms of the Foreign Direct Product Rule, the rule "imposes a license requirement for exports, re-exports, and transfers (in-country) of identified items" to or within and from the PRC. Specifically, the U.S. security and foreign policy concerns relate to the use of advanced computing ICs, "supercomputers," and semiconductor manufacturing equipment for enabling military modernization, including the development of weapons of mass destruction (WMD), and human rights abuses involving the monitoring, tracking, and surveillance of citizens.[40] China alleges that such export control measures are contrary to Articles X(1) and X(3) of GATT 1994 and Article VI of GATs on the basis that certain of the measures were not published promptly and/or administered fairly; Article 1 of GATT 1994 on the basis that all the measures singled out China; Article XI of GATT 1994 and Article 2 of TRIMs on the basis that certain measures through license requirements constituted quantitative restrictions; and Article 28 of TRIPS on the basis of violations of the rights of patent holders to assign and transfer patent rights.

C. National Security Defense

The U.S. response to the Chinese complaint has been in terms of its national security. Thus, the U.S. has entered consultations with China without prejudice to its view that:

Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement… Every Member of the WTO retains the authority to determine for itself those

38. *Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification*, THE U.S. DEP'T. OF. COM. (Oct. 13, 2022), *available at* https://www.federalregister.gov/documents/2022/10/13/2022-21658/implementation-of-additional-export-controls-certain-advanced-computing-and-semiconductor (last visited Dec. 8, 2022).

39. 15 C.F.R. §§ 734, 736, 740, 742, 744, 762, 772, 774; *see also* Export Control Reform Act, 50 U.S.C. § 58.

40. Dubinsky et al., *supra* note 8.

measures that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI of the GATT 1994, Article XIV bis of the GATS, and Article 73 of the TRIPS Agreement.[41]

There are three questions raised here: first, whether the national security exception under Article XXI of GATT applies to the ASCM; second, if it does, whether it is justiciable; and third, what is the scope of this exception? As to the first question, the relationship has not yet been formally decided in the WTO dispute settlement system.[42] According to Jung however, Article XXI of GATT 1994 applies to an actionable subsidy under the ASCM, but has a more restrictive bearing on export subsidies under the ASCM.[43] Yet, there are important considerations that suggest the security exception is in principle invokable with reference to the obligations on export subsidies as well under the ASCM.[44]

First, the ASCM is an elaboration and reinforcement of the disciplines under Article XVI of GATT 1994 concerning subsidies. It further strengthens the existing disciplines as far as a prohibited subsidy is concerned. It does not "contradict" it.[45] Article XVI:1 of GATT 1994 imposes a restriction on export subsidies. This restriction has been further strengthened in the ASCM to an outright prohibition. Thus, it is not so much that Article XVI:1 of GATT 1994 is permissive of export subsidies. Rather, it is restrictive of it. Second, the two sets of subsidy disciplines, in principle, should not be interpreted differently—especially given that both types of subsidies have an impact on competition between like goods in international trade. Moreover, there are several references in the ASCM to Article XVI of GATT 1994 that underpin coherence in the

41. Panel Report, United States-Measures on Certain Semiconductor and Other Products, and Related Services and Technologies Communication from the United States, WTO Doc. WT/DS615/4 (Jan. 12, 2023).

42. *See, e.g., Peter Van den Bossche & Sarah Akpofure, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994 (eds. World Trade Inst.,2020).*

43. *See* Jung, *supra* note 24.

44. *Id.* at Article XVI:1 (Article XVI:1 contains a general obligation to report all subsidies that operate to increase exports or decrease imports and to consult, on request with other Members on the possibility of limiting the subsidization. Stated differently, Article XVI of the GATT allows, as a general rule, provision of the export and import subsidies.48). Contra Nu Ri Jung (2023) op cit. Article XVI:1 contains a general obligation to report all subsidies that operate to increase exports or decrease imports and to consult, on request with other Members 'on the possibility of limiting the subsidization. Stated differently, Article XVI of the GATT allows, as a general rule, provision of the export and import subsidies.

45. *Id.*

WTO framework of subsidy disciplines. Third, the national security exception under Article XXI of GATT 1994 is underpinned by and set against the background of the inherent right of a State to safeguard its national security. In the circumstances, given that a State's national security partakes of its sovereignty it can only be displaced expressly, or circumscribed expressly as they have been under Article XXI of GATT 1994 (*contra* Article XX of GATT 1994 exceptions). This right to national security is grounded in sovereignty and international law, wherein it has historically had a wide scope. This background would be relevant in any interpretation of this relationship as per Article 31(3)(c) of the Vienna Convention of the Law of Treaties.

At present, the overwhelming weight of both academic[46] and WTO jurisprudence[47] is opposed to the way the U.S. has couched its national security defense to justify its departure from its obligations under the WTO. In four recent WTO Panel decisions as of December 2023, the Panels have unanimously refuted this national security stand.[48] Out of these four decisions one panel decision has been adopted; and three have been appealed and therefore not adopted by the Dispute Settlement Body. In this paper, the Panel decision involving Steel and Aluminum Products, has on its facts, a greater relevance to the U.S. response to the international manufacture of chips and therefore this decision will be the basis

46. *See, e.g.*, Tatiana Lacerda Prazeres, *Trade and National Security: Rising Risks for the WTO*, 19 WORLD TRADE REVIEW 137, 137-48 (2020); Andrew Emmerson, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?*, 11 J. INT'L ECON. L. 135, 135-54 (2008); Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 424-51 (1999); Wolfgang Weiß, *Adjudicating Security Exceptions in WTO Law: Methodical and Procedural Preliminaries*, 54 J. WORLD TRADE 829, 829-52 (2020). *See also* for a recent more practical approach to resolving the national security impasse in the WTO: Alan Wm. Wolff & Warren Maruyama, *Saving the WTO from the National Security Exception*, PETERSON INST. FOR INT'L ECON. (May 19, 2023), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453718 (last visited Dec. 21, 2023).

47. Panel Report, Russia—Measures Concerning Traffic in Transit, WTO Doc. WT/DS512/7 (adopted Apr. 26, 2019) [hereinafter Measures Concerning Traffic]; Panel Report, United States—Certain Measures on Steel and Aluminum Products, WTO Doc. WT/DS544/R (adopted Dec. 9, 2022). US appealed panel decision [hereinafter Measures on Steel and Aluminum]; and Panel Report, United States – Origin Marking Requirement WTO. Doc. WT/DS597/R (Panel Report circulated 21st December 2022) [Hereinafter Measures on Origin Marking] U.S. appealed Panel Decision). *See also* Saudi Arabia - Measures Concerning the Protection of Intellectual Property Rights WTO.Doc. WT/DS567/R (Panel Report circulated June 16th 2020. Saudi Arabia appealed panel decision).

48. *Id.*

of evaluating national security in what follows—against the background of the adopted Measures Concerning Traffic Case.[49]

First, the Panel in Measures on Steel and Aluminum does not consider that Article XXI(b) of the GATT 1994 is "self-judging" or "non-justiciable" in the sense argued by the U.S., nor that the provision contains a "single relative clause" that wholly reserves the conditions and circumstances of the subparagraphs to the judgment of the invoking Member.[50] Second, the phrase, "in time of war or other emergency in international relations," in Article XXI(b), relates to "a condition requiring immediate treatment"; and in the term "international relations," "relations" focuses on the "various ways by which a country, State, etc., maintains political or economic contact with another"; whereas, "the term 'international' may be defined as '[e]xisting, occurring, or carried on between nations' in contrast to 'an emergency in purely domestic or national affairs."[51] Third, "emergency in international relations" within the meaning of Article XXI(b)(iii) must be, if not equally grave or severe, at least comparable in its gravity or severity to a "war" in terms of its impact on international relations.[52] Furthermore, the "action for the protection of essential security interests must be 'taken in time of' an emergency in international relations."[53] Fourth, "essential security interests" refer to "circumstances of a certain gravity or severity in terms of their impact on the conduct of international relations."[54]

However, can these panel decisions be decisive in terms of the U.S. stand on national security? There are several issues implicated here. First, it is difficult to see if the U.S. can be persuaded with respect to its stand on national security as a matter of politics, with these decisions on their own. This is borne out by its continued mantra of the self- judging nature of the national security defense under Article XXI of GATT 1994, in the U.S. response to the Chinese complaint (at the time of writing under consultations between China and U.S. in the WTO Dispute Settlement

49. In both cases, the focus is on the supply/demand of a particular commodity: chips and "steel and aluminum." In both instances, U.S. measures implicate both national security and economic competitiveness. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 9902, 134 Stat. 3388 (2021).

50. US Measures on Steel and Aluminum, *supra* note 47, ¶ 7.128.

51. *Id.* ¶ 7.137.

52. *Id.* ¶ 7.139.

53. *Id.* ¶ 7.140.

54. *Id.* ¶ 7.141.

System), relating to chips.[55] The U.S. appears to be reluctant to comply with the Panel decisions as it has appealed the Measures on Steel and Aluminum and Measures on Origin Marking panel decisions.[56] Indeed, regardless of that, USTR Spokesperson Adam Hodge rejected the interpretation and decision of the Panel on U.S. Steel and Aluminum and observed that the U.S. will not alter its decision-making over its essential security to WTO panels.[57] However, despite the rhetoric with respect to Measures on Steel and Aluminum, the U.S. could take a more pragmatic approach in its response, if this decision were adopted. On the other hand, with respect to the Chinese complaint in the WTO on the U.S. measures concerning chips, the U.S. seems to have much more at stake. An adverse panel decision would more likely not be adhered to. Second, the panel decisions are set in a dispute settlement system made up of an additional layer of an appellate process, albeit at present not functioning. Moreover, two Panel decisions deliberating on national security have not yet been adopted by the Dispute Settlement Body given the U.S. appeals.[58] Therefore, there is a concern involving the weight that should be accorded to these panel decisions. Third, the Panel decisions are specific to the facts of the cases and are not caught necessarily in a framework of binding precedents Thus, the Panel in Measures on Steel and Aluminum emphasized that the "assessment of the Panel in this dispute concerns the U.S.'s specific arguments in connection with the existence of an emergency in international relations under Article XXI(b)(iii) and, in particular, its references to an international situation of global excess capacity in steel and

55. *See* United States–Measures on Certain Semiconductor and other Products, and Related Services and Technologies, [hereinafter U.S. Measures on Semiconductor], WTO Doc. WT/DS615/4 (Jan.12, 2023);
WT/DS615/7 (03/03/2023); WT/DS615/5 & 6 (16/02/2023).

56. Notification of an Appeal by the US under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/14 (Jan. 30, 2023); United States–Origin Marking Requirement Notification of an Appeal by the U.S. under Article 16 (WT/DS597/9) (Jan. 30, 2023).

57. Press Release, Off. of the U.S. Trade Representative, Statement from USTR Spokesperson Adam Hodge (Dec. 21, 2022), *available at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge-0 (last visited Dec. 8, 2023).

58. Panel Communication, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS554/24 (dated June 23, 2023); Panel Report, *United States–Origin Marking Requirement*, WTO. Doc. WT/DS597/R (Panel Report circulated 21st December 2022).

aluminum."[59] Fourth, a distinction needs to be made between the factors that are taken into account in making an objective assessment under the DSU, and factors that go in defining the scope of a member's national security. Thus, the Panel itself leaves the question open as to what the parameters of a member's national security are comprised of; for example, it observed that "in accordance with the ordinary meaning of its terms, subparagraph (iii) requires a distinct inquiry as to whether the actions were taken in time of an 'emergency in international relations' based on an objective assessment of relevant evidence and arguments." In other words, the Panel was not in abstract reflecting on the shape and contours of a member's national security interests, rather it was engaged in a consideration of whether the claims made on national security considerations were grounded on national security interests under the circumstances of the case.

D. Grounds for Appeal in the Steel and Aluminum Case

Finally, there are potential grounds for an appeal in the Steel and Aluminum case. An appeal has been lodged;[60] and, if deliberated upon, the appeal has relevance to the Chinese WTO challenge in relation to U.S. measures on chips. Such grounds of appeal constructed herein, if considered credible, have a bearing on the weight of the panel deliberations on national security thus far pronounced. These are not intended to be exhaustive.

First, with respect to the methodology availed by the panel in the Steel and Aluminum case, it may be argued that the panel erred in failing to consider at the outset the "threshold point of interpretive disagreement between the parties," i.e., "the extent to which the terms of Article XXI(b) of the GATT 1994 permit review of a Member's invocation of that provision by a panel established under the DSU." Rather, the Panel instead first considered whether there had been breaches of the substantive provisions of the WTO agreements GATT 1994 and the Safeguard Agreement. The subsequent interpretation of Article XXI(b) in terms of whether the Panel could review the U.S. decision on its national security concerns potentially could have become skewed—i.e., informed by the

59. Panel Report, *United States—Certain Measures on Steel and Aluminum Products*, ¶ 7.143, WTO Doc. WT/DS544/R (adopted Apr. 5, 2019) [hereinafter U.S. Measures on Steel and Aluminum].

60. Panel Communication, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/14 (dated Jan. 26, 2023) [hereinafter U.S. Measures on Steel and Aluminum (DS544/14)].

gravity of the departures from WTO obligations.[61] In addition, it was not necessary for the Panel to engage in an exhaustive interpretation of XXI(b) to answer the question of reviewability. The Panel, in adopting this *modus operandi*, did not properly set itself the task of interpreting whether Article XXI(b) allowed for review or not. Moreover, this approach of interpretation detracts from the Panel's Terms of Reference.

Second, grounds for appeal deal with substantive interpretations. It may be argued that the Panel erred when it observed there is no textual indication that the sentence endings in the subparagraphs of Article XXI(b) are merely illustrative, or that Article XXI(b) may apply to actions other than those described in the subparagraphs. The Panel observed that these considerations indicate that the subparagraphs are exhaustive in establishing the circumstances in which a Member may take the "action which it considers necessary for the protection of its essential security interests"[62] within the meaning of Article XXI(b).[63] It is not safe to infer merely from an omission of a textual indication that the paragraphs are non-exhaustive. Members of the WTO could not have understood that in signing the text of this agreement they were forever forsaking their capacity to invoke national security to the limited circumstances set out in Article XXI(b). Conceptions of national security can vary in time and according to the circumstances. In a sense, national security is assimilated to a sovereignty that is always a concept in a state of contestation. The only indication here is that there was no comprehensive focus and consensus on national security and that there was a presumption that the inherent right to preserve national security would remain intact. Furthermore, the Panel took a purely textual approach to defining national security when such a significant concept needs to be considered from the prisms of General International Law. International law has a bearing on the extent to which a State has complete discretion in defining its sovereignty and the related concept of national security within the framework of sovereign equality of States.[64]

Third, the Panel erred in expecting clarity concerning the scope and nature of the review of a member's invocation of Article XXI(b) of the

---

61. Note in Panel Report, United States–Origin Marking Requirement WTO. Doc. WT/DS597/R (Panel Report circulated 21st December 2022. U.S. appealed Panel Decision) the Panel did consider at least the reviewability/justiciability question at the outset (see ¶ 7.20).

62. *See id.* ¶ 7.83.

63. *See id.* ¶ 6.14.

64. *See* Qureshi, *supra* note 22, at 79–98.

GATT 1994 in proceedings under the DSU.[65] The standard of expectations here is too high. Additionally, this absence reinforces the U.S. claim. The Panel erred in not finding "any clear indication" in the materials made available to it by the parties' "self-judging nature" or "non-justiciability" of Article XXI(b) of the GATT 1994 as contended by the U.S.[66] Again, the Panel seems to be looking for an express reference. It could be that the lack of a clear indication was considered unnecessary given that the international practice—for example, the IMF practice—was to give deference to its members in this regard in the context of the invocation of national security by a member of the IMF.[67]

Fourth, the Panel does not explain the basis for suggesting that there is a presumption in favor of the member in interpreting Article XXI (b) of GATT 1994 as the Panel states: "In conclusion, the entirety of Article XXI(b) of the GATT 1994 is to be given meaning and effect in a manner that preserves the right and discretion of a Member to take action it considers necessary for the protection of its essential security interests under the conditions and circumstances described in subparagraphs (i) to (iii)."[68]

Fifth, did the Panel give an unduly narrow definition of "international relations" when relying on the dictionary meaning of the words? The Panel observed: "The relevant emergency within the meaning of subparagraph (iii) must be 'in international relations.'" It went on to elaborate the term "relations" may be defined as "[t]he various ways by which a country, State, etc., maintains political or economic contact with another," while the term "international" may be defined as "[e]xisting, occurring, or carried on between nations; pertaining to relations, communications, travel, etc., between nations." The phrase "international relations" may thus be understood to mean interactions between nations or national governments.[69] Somewhat in contrast, the Panel in *Saudi Arabia and Intellectual Property Rights* drawing on *Russia—Traffic in Transit* stated that while "political" and "economic" conflicts could sometimes be considered "urgent" and "serious" in a political sense, such conflicts will not be "emergencies in international relations" within the meaning of subparagraph (iii) "unless they give rise to defense and

65. *See* US Measures on Steel and Aluminum, *supra* note 47, ¶ 7.127.

66. *Id.*

67. IMF, *Decision No. 144-(52/51), Bilateralism and Convertibility*, IMF eLIBRARY (Aug. 14, 1952), *available at* https://www.elibrary.imf.org/downloadpdf/book/9781451942552/ch016.xml (last visited Dec. 8, 2023).

68. U.S. Measures on Steel and Aluminum, *supra* note 45, ¶ 7.128.

69. *Id.* ¶ 7.137.

military interests, or maintenance of law and public order interests."[70] Thus, in the *Saudi Arabia* and *Russia Traffic in Transit* cases where a circumstance results in the raising of an internal "maintenance of law and public order interests" as a consequence of an international occurrence—then that is a situation that falls within the ambit of being an international relationship. Moreover, the Steel and Aluminum Panel was influenced in its interpretation by the dictionary meaning of the words. This is not the right approach to interpreting a provision whose language is to be found in other international agreements wherein the same language has been given a different interpretation; granted, the context may be different.[71]

In conclusion, there is a strong probability of the panel in *United States–Measures on Certain Semiconductor* delivering a decision in favor of China. However, the overall outcome is not easy to predict. This is in some measure dependent on developments relating to appeals with respect to the *Steel and Aluminum* and *Origin Marking Requirement* cases—if these appeals are ever heard given the paralysis of the WTO Appellate Body.

III. INTERNATIONAL COMPETITION OR UNJUST COMPETITION IN SCIENTIFIC ENDEAVORS?

The "Science" part of the CHIPS Act raises important questions about global scientific advancement and the role of international law and policy in facilitating it. It is also significant with respect to the impact of subsidies, albeit for scientific advancement, on international trade. This has already been alluded to, and with respect to intellectual property rights, including the transfer of technology.

State funding for scientific research is common in most OECD countries. For example, in 2021, the total government budget allocation for research and development (R&D) in the U.S. was $165.56 billion; EU €156 billion; and Japan ¥81.46 billion.[72] Against this background, in

70. *See* Panel Report, Saudi Arabia–Intellectual Property Rights, ¶ 7.244-7.245, WTO Doc. WT/DS567/11 (Apr. 21, 2022) [hereinafter SA Intellectual Property Rights]; *see also WTO Analytical Index*, WTO, *available at* https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art73_jur.pdf (last visited Dec. 8, 2023).

71. Katia Yannaca-Small, *Essential Security Interests under International Investment Law*, ORG. FOR ECON. COOP. & DEV. [OECD] (2007), *available at* https://www.oecd.org/daf/inv/investment-policy/40243411.pdf (last visited Dec. 21, 2023).

72. *See Main Science and Technology Indicators*, at 68, Volume 2022 Issue 1 Table 57, ORG. FOR ECON. COOP. & DEV. [OECD] (2022), *available at* https://read.oecd-

2022, the CHIPS Act alone authorized $200 billion for R&D and commercialization spread over ten years. This is a significant amount allocated to a specific sector, albeit fundamental and critical to the advancement of technology for both civil and military use. Moreover, it is proffered specifically in a framework intended to advance the objective of increasing U.S. international competitiveness, with important consequences in the pattern of international trade, investment, and manufacture in the sector.[73] The U.S. CHIPS funding has the effect of thwarting scientific development and competition in another country through, for example, measures that withhold the dissemination of certain high technology science. Internally, such a massive amount of funding has an opportunity cost for research in other areas of scientific endeavors within the U.S.

Until now, there has not been much focus on the public international law dimension of research and development in science, although research in science has been the subject of much deliberation in terms of intellectual property law. Yet, international facilitation, coordination, cooperation, and safeguards have a role to play in the advancement of R&D. There is no one institution at the international level that is organized to facilitate and manage research in science globally.

At the level of General International Law, a State is presumed to have freedom with respect to its engagement in scientific research.[74] Some constraints to this freedom can be discerned, albeit fragmented and in exceptional circumstances, for example: where that research might have a negative transboundary impact;[75] partakes in the advancement (contra enforcement) of an activity that is contrary to a peremptory norm of international law; undermines individual, collective or state rights and prohibitions under General International Law, including the concepts of the common heritage of mankind and "accumulated scientific knowledge of indigenous people."[76] The presumed freedom for scientific research raises legal questions that call for clarification given that they touch on the extent of that freedom. What is meant by scientific research? Clarity

---

ilibrary.org/science-and-technology/main-science-and-technology-indicators/volume-2022/issue-1_4db08ff0-en#page68 (last visited Dec. 21, 2023).

73. *See* Chips Act, Pub. L. No. 117-167 (2022).

74. *See, e.g.*, The Case of the S.S. Lotus (Fr. v. Turk) (PCIJ: 1927) (several multilateral agreements also affirm although not expressly this freedom).

75. *See* Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, (Perm. Ct. Arb. 1938 & 1941).

76. *See* Anna-Maria Hubert, *The Human Right to Science and Its Relationship to International Environmental Law*, 31 EUR. J. INT'L L. No. 2 625, 636 (2020).

on this can be important, for example, in the allocation of rights in research in a spatial context to respective states. In a legal analysis, the meaning of scientific research is the subject of an objective evaluation and not open to the state to self-judge. Thus, "an objective test of whether a program is for purposes of scientific research does not turn on the intentions of individual government officials, but rather on whether the design and implementation of a program are reasonable in relation to achieving the stated research objective."[77] What is meant by freedom in scientific research? This is as significant in terms of the State as it is at the individual level. Is that freedom limited by an obligation to cooperate in scientific research with other nations and their citizens? This question is also about transferring knowledge and working toward certain community goals even if it raises the specter of protecting intellectual property rights.

At the level of conventional international law there are various agreements wherein "scientific research" of a certain genre is expressly regulated and/or prohibited.[78] Conversely, a certain level of research engagement may be called for by the State under international agreements,[79] for example, in the environmental field, the promotion of "scientific research, to encourage the exchange of scientific information and data about environmental protection."[80]

The freedom of a state in scientific research is also constrained by the individual's human right to science, and the state's obligation to ensure such a right.[81] The human right to science finds its primary expression in Article 15 of the International Covenant on Economic, Social and Cultural Rights, 1966.[82] Under this human right, first, everyone has the

77. *See*, ICJ: Whaling in the Antarctic (Austl. v. Japan: N. Z. intervening), 2014 paras 70-90 at para. 97: para. 97 (although this is a statement made in the context of interpreting the undefined term in the Article VIII of the International Convention for the Regulation of Whaling 1946 it is of equal relevance in terms of General International Law).

78. *See generally* the International Convention for the Regulation of Whaling 1946; the International Atomic Energy Agency; the 1972 Convention on the Prohibition of Biological Weapons; and the work of the International Atomic Energy Agency and associated Conventions on Nuclear Armaments.

79. *E.g.*, in the environmental and the health spheres.

80. Anna-Maria Hubert, *supra* note 76, at 626.

81. *See id.* at 629 (discussing these instruments albeit in the context of the environment).

82. Council of Europe*, International Covenant on Economic, Social and Cultural Rights*, COUNCIL OF EUROPE, *available at* https://www.coe.int/en/web/compass/international-covenant-on-economic-social-and-cultural-rights#:~:text=Article%2015,Economic%2C%20Social%20and%20Cultural%20Rights (last visited Nov. 13, 2023); *See* U.N.,

right to "enjoy the benefits of scientific progress and its applications." Second, everyone has the right to **"**benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author." Third, states need to take steps "to ensure 'the conservation, the development and the diffusion of science." Fourth, states "undertake to respect the freedom indispensable for scientific research and creative activity." Finally, the states party to the Covenant "recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific" field.

In sum, Article 15 sets out certain individual rights as well as obligations of the state to ensure the realization of those rights. These include not interfering or distorting freedom in scientific endeavors that come into play through subsidies or their lack of, along with an expansive umbrella of national security. In addition, the right to enjoy the fruits of scientific research, for example by denying exports, or interfering with supply chains established in response to market conditions, for further scientific research and its application—undermines this human right of science as it applies to everyone. Moreover, the state's responsibility extends beyond its borders in the "encouragement and development of international contacts." Whilst the texture of these rights and obligations generally is of a soft nature, they cannot be so easily dismissed given their articulation in various instruments, including international agreements. Indeed, they are relevant in the interpretation of WTO law and other international agreements containing provisions of scientific endeavors, for example in space and international maritime law, including General International Law norms on cooperation as between states applicable to the U.S. as per Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

Briefly, what follows are the outlines of such organized scientific cooperation arrangements in key areas of importance: maritime; space; health and nuclear science. They illustrate how states have avoided conflict in the pursuit of science; how they have organized systems of cooperation and navigated through concerns of safety and national security.

First, a comprehensive normative framework for marine scientific research is found in the Law of the Sea Convention 1982 (UNCLOS).

Universal Declaration of Human Rights: Article 27–28, UNITED NATIONS (Dec. 10, 1948), *available at* https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Dec. 8, 2023), (for other international instruments, the human right to science is also to be found).

UNCLOS allocates states' rights for marine insurance within maritime zones; clarifies liabilities for damage arising from such research; ensures marine research for the benefit of humanity; and incorporates a variety of processes for cooperation and development of marine scientific research. Thus, UNCLOS protects the right to engage in marine scientific research in the various maritime zones of the sea, giving priority to the coastal state in its territorial sea, continental shelf, and exclusive economic zone. In relation to the high seas, all States can engage in marine research.[83] On the other hand, with respect to the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, where state parties to UNCLOS may engage in marine research, all marine scientific research is to be exclusively conducted for peaceful purposes, and for the benefit of mankind as a whole.[84] In the conduct of marine research, member states of UNCLOS are liable for any damages occurring for such research,[85] and for encroaching on the rights of other member States.[86] Moreover, they cannot claim "any part of the marine environment of its resources" as a result of the research.[87] Finally, UNCLOS is littered with provisions with respect to the sharing of information;[88] cooperation, coordination, and transfer of technology in the sphere of marine scientific research.[89] Such engagements could contravene provisions of the CHIPS Act. Some reflection here may be necessary. In sum, there is a balance of state-centric and global approach to the engagement and sharing of marine scientific research.

Outside UNCLOS, the international community has also established Antarctic scientific cooperation endeavors in the "interest of all mankind" given the "the substantial contributions to scientific knowledge resulting from international cooperation in scientific investigation in Antarctica," whilst also acknowledging the need for "freedom of scientific investigation in Antarctica."[90]

---

83. U.N. Convention on the Law of the Sea, Art. 87, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

84. *Id.* at 72, art. 143.

85. *Id.* at 124, art. 263.

86. *Id.* at 117, art. 238.

87. United Nations Convention on the Law of the Sea Art. 24, U.N., Dec. 10, 1982, available at https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited Dec. 8, 2023).

88. *See id.* at art. 119.

89. *See id.* at art. 123, 143, 144, 200, 243, 266.

90. *The Antarctic Treaty*, NAT'L SCI. FOUND. Dec. 1, 1959, *available at* https://www.nsf.gov/geo/opp/antarct/anttrty.jsp (last visited Nov. 16, 2023).

Second, the International Space Law provides a universal framework for scientific research given its focus. Thus, first the objectives for research and exploration of the "Moon and other celestial bodies" are (1) for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind,"[91] and (2) in the "interest of maintaining international peace and security and promoting international cooperation and understanding."[92] Second, there is freedom for exploration and scientific research for all states "without discrimination of any kind" under the condition of "equality and in accordance with international law."[93] The CHIPS Act potentially hinders this equality. Third, states are enjoined to "facilitate and encourage international cooperation in" scientific research,[94] including the desirability of sharing of samples.[95] Generally, the Space Treaties are also littered with injunctions to cooperate and exchange information.[96] Fourth, the "use of any equipment or facility necessary for peaceful exploration of the Moon and other celestial bodies shall also not be prohibited."[97] This provision arguably could conflict with the U.S. CHIPS Act. Fifth, the Moon and other celestial bodies are the province and common heritage of all humanity. Therefore, states must ensure an equitable sharing of the Moon's resources.[98] States bear international responsibility if their scientific research and space exploration is contrary to their treaty obligations, including where harm and damages result on Earth "in air space or in outer space, including the Moon and other celestial bodies."[99]

---

91. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies art. 1, Jan. 27, 1967 [hereinafter Outer Space Treaty].; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies 1979 art. 4, 11, Dec. 18, 1979 [hereinafter Moon Treaty].; *See also* G.A. Res. 1962 (XVIII) (Dec. 13, 1963).; G.A. Res. 41/65 (Dec. 3, 1986).; G.A. Res. 51/122 (Dec. 13 1996).

92. Outer Space Treaty, *supra* note 91, at art. III.; Moon Treaty, *supra* note 91, at art. 6.

93. *Id.* at art. I.

94. *Id.*

95. *Id.*

96. *See generally id.* at art. 5 & 6.

97. Outer Space Treaty, s*upra* note 91, at art. IV.

98. *Id.* at art. 11(7).

99. *Id.* at art. VII.

The International Atomic Energy Agency (IAEA) is the principal forum for facilitating research in nuclear science.[100] Its framework represents a centralized approach to collaboration in nuclear research. The IAEA was established to "accelerate and enlarge the contribution of atomic energy to peace, health, and prosperity throughout the world"[101] through facilitating "research on, and development and practical application of, atomic energy for peaceful uses throughout the world."[102] In carrying out this mandate, the IAEA needs to ensure nuclear safety and that the research is conducted for peaceful purposes. The IAEA's approach to facilitating research is proactive and hands-on through the exchange of information and enabling the availability of special fissional materials. In addition, the IAEA also engages in a hands-on manner with its program on research through collaborative arrangements such as establishing International Centers based on Research Reactors (ICERRs), Collaborative Centers based in member states, and regional Cooperative Agreements. Nuclear research has a particular potency in terms of national security. Yet, despite this, a framework of cooperation and an enabling environment for a collective approach to nuclear research has been set up. The recent U.S. model of national security concerns does not sit well with this research approach.

The World Health Organization (WHO) was established to ensure the highest possible level of health for all people. To achieve this object, the WHO is to, *inter alia*, "stimulate and advance work to eradicate epidemic, endemic and other diseases," and "to promote co-operation among scientific and professional groups which contribute to the advancement of health," and to "promote and conduct research in the field of health."[103] As such, the WHO is the principal international institution charged with giving leadership in advancing science in human health. It does so by engaging in research itself, and by collaborating and coordinating research with other international organizations, non-state actors, academic institutions, academics, and WHO Collaborating Centers. In this manner, the WHO ensures that "access to new therapies, diagnostics, and vaccines under development is equitable and that they are available to all who need

100. International Atomic Energy Agency, *Overview*, HOME, *available at* https://www.iaea.org/about/overview (last visited Dec. 8, 2023).

101. Statute of the IAEA, art. 2, October 23, 1956; International Atomic Energy Agency.

102. *Id.* at art. 3.

103. *See*, *id.* at art. 2-3.

them."[104] Nevertheless, the work of the WHO could be thwarted by the US approach to the exports of certain advanced chips (where these are relevant to the work of the WHO).

These different regimes accommodate a balance of interests in scientific research. However, wherever there is a need to advance shared community goals, there is a collective perspective to scientific research that is underpinned by requirements of cooperation and coordination in scientific explorations, along with a requirement to share the fruits of the scientific pursuits. Research in chips does not obviously fall squarely within the frameworks discussed above. Yet, the U.S. could have drawn from the spirit that underpins these regimes concerned with scientific research.

Finally, the U.S. CHIPS Act not only adopts a unilateral approach to scientific research and its application, with reference to semiconductors, but it also has the effect of stifling innovative developments that rely on advanced semiconductors, specifically in China. Thus, chips are considered as being essential to the development of the auto industry, the computer sector, and artificial intelligence - to name but a few. The U.S. action comes against the background of the China-U.S. tensions, and this of course explains why there has been a blind spot in exploring a more internationalist management of research in the development of chips. Another reason would be the absence of an obvious international legal framework for scientific research that could take place in a manageable manner. There is no universal body that manages research in science for the benefit of humanity—despite the obvious need and benefits in the pooling of the world's resources for scientific advancement and development of nations. As outlined above, there are, however, piecemeal developments in normative frameworks.

One lesson that can be gleaned from state practice is the concept of "heritage of mankind" and the "accumulated knowledge of Indigenous people."[105] Thus far, the roots of the concept of the heritage of humankind are spatial—the deep seabed, and celestial bodies such as the Moon. In recent times, the concept has been stretched to "embrace human rights,

104. World Health Organization, *Science Division: Harnessing the Power of Science to Achieve Health for All,* WORLD HEALTH ORG. (2023), *available at* https://www.who.int/our-work/science-division, (last visited Dec. 8, 2023).

105. *See* Anna-Maria Hubert, *supra* note 76; Farida Shaheed, *The Right to Enjoy the Benefits of Scientific Progress and its Applications* (2012), *available at* https://digitallibrary.un.org/record/730844#record-files-collapse-header (last visited Dec. 8, 2023).

human genomes, and plant genetic resources."[106] This concept can be stretched to a technology such as a chip—a small piece of technology that is, in a sense, a building block of a greater whole. It has spawned over time through the development of a multitude of differing final manufactured products, and possibly wherein the use of these manufactured products is an inherent trajectory of further innovation. In short, the chip is a technological genome in the very fabric of the manufacturing industry that has become a common heritage of human technology. It is a piece of technology that has become—that has benefited from being, and upon which reliance has been placed —- a part of the accumulated knowledge of the modern manufacturing sector. This common legacy that has emerged can be managed as a whole or jointly between affected States and the collectivity of States with due regard to intellectual property rights.

In sum, in the continuum of technological advancement, where there exists a potential trajectory for further advancement, there is no scope for a state to unilaterally arrogate to itself an important building block involved in continued technological advancement. The status of the common heritage of humankind is acquired when the technology becomes a technological heritage albeit of an evolutionary kind. There are now layers of different building blocks in the electronics sector which have been developing for decades. These building blocks have become entrenched in the fabric of many industries and now our advanced civilization. Just as the "accumulated scientific knowledge of Indigenous people" needs to be protected,[107] there is a case for characterizing certain building blocks of modern technology as now partaking in the accumulated inheritance of an industry no longer capable of individual appropriation. To put it another way, the common chip and its continuing development have become the "common heritage of mankind." This is not to suggest, to reiterate, that the IPR rights of those involved in the development of chips are no longer to be recognized—it is to suggest that their complete lack of availability internationally undermines their common heritage character given their transformative nature in an industry.

Overall, there are sound policy reasons to adopt a multilateral approach to the advancement of R&D in chips, if the objective is to advance R&D. There are also persuasive principles embedded in the practice of

106. *See* Edwin Egede & Eden Charles, *Common Heritage of Mankind,* MARINE TECH. SOC'Y J. (2021), *available at* https://doi.org/10.4031/MTSJ.55.6.10 (last visited Dec. 8, 2023).

107. *Id.*

states and in the collective consciousness of the international community that push for an international approach that will be to the benefit of humanity. There are also models of cooperative architecture designed in international organizations that have coordinated, facilitated, and balanced the divergent concerns of states and stakeholders, including security ones. Such an enlightened approach would surely bury monumentally the divisive and disruptive approach into which billions of dollars are being invested. The political rivalry between the U.S. and China that is being cemented in this unilateral design of the economic chips market, is also dragging in third countries, much to the long-term detriment of international peace and harmony between nations. An international approach, however, is commendable.

CONCLUSION

The unilateral and coercive nature of the U.S. approach to R&D and its application including the manufacturing of chips points to unfair competition and discrimination. The U.S. CHIPS Act raises questions under the ASCM including violations of GATT 1994. For example, the *prima facie* evidence of the 25% tax credit for investments in semiconductors manufacturing intended to give the U.S. global leadership in the manufacture and export of chips is contrary to the ASCM. The R&D subsidies impacting exports cannot be justified under the ASCM; the prohibitions on building manufacturing capacity of certain advanced semiconductors in particular countries constitutes the unreasonable exercise of extraterritorial jurisdiction and is discriminatory. Moreover, the prohibition on exports of chips including re-exports from third world countries is contrary to the quantitative prohibitions under GATT 1994. The national security basis of the U.S.'s justification for its export restrictions is controversial under WTO law. With respect to the unilateral massive injection in R&D in chips, the U.S. could have authored a global architecture for the scientific advancement of chips with an even higher globally funded amount, including its multilateral management, thus eliminating the politically divisive impact of its current approach. To conclude, the U.S. has digressed from its international obligations, pandered to the basest of protectionist and nationalistic instincts, and deprived the international community of an enlightened direction in scientific advancement.