Is it Time for an International Convention on Online Gambling?

By Professor Marketa Trimble

At the 2011 International Gaming Conference organized by the International Association of Gaming Advisors (IAGA) on September 30 – October 2, 2011, I suggested to André Wilsenach, the CEO of the Alderney Gambling Control Commission, that the time is right for an international convention on online gambling. Our conversation concerned online gambling not only because of Mr. Wilsenach’s pioneering role in online gambling regulation but also because of the Conference’s focus on online gambling. Although not all Conference panels were organized to address online gambling specifically, the discussions always gravitated to the inescapable issues of online gambling regulation.

It might seem counterintuitive to suggest an international convention on online gambling at a time when even the various jurisdictions of individual countries (such as states in the U.S. or Länder in Germany) cannot agree on whether online gambling should be permitted at all, or if permitted, how it should be regulated. And yet discussions at the 2011 IAGA Conference evidenced a desire among gambling operators and regulators to see online gambling regulated at a federal, and not state or provincial, level (federal level in the U.S. and European Union level in Europe). There seemed to be a consensus among the participants that high-level legislation (a federal law in the U.S. or a directive in the European Union) would be beneficial for regulating gambling in the online environment. At the same time, the participants expressed concerns about the effective enforcement of regulation in a medium that lacks physical borders. Regulation has been successful when online gambling operators locate their servers in a regulator’s jurisdiction, but once the servers are outside the jurisdiction, the regulator’s enforcement power is severely reduced or nonexistent. From an operator’s perspective, a requirement to locate servers in every jurisdiction where the operator has an online gambling license is burdensome and technically difficult, particularly if the operator plans to take advantage of cloud computing solutions for multi-jurisdictional operations.

An international convention would greatly assist in the regulation of online gambling because the convention could address issues of enforcement on the internet while maintaining the ability of individual jurisdictions to regulate gambling in their jurisdictions in any manner they see fit, including the ability to disallow all forms of gambling entirely. And the convention would not even need to attempt to align countries’ approaches to regulation – the licensing and technological standards could be left upon each jurisdiction to define and implement individually (with the hope, perhaps, that these areas would ultimately undergo some degree of alignment). Instead of targeting issues on which jurisdictions disagree, the convention could focus on the one point on which all jurisdictions should agree – the need for effective enforcement of gambling activity in the online environment.

Effective enforcement on the internet of territorially fragmented regulation cannot occur without international cooperation among jurisdictions. Individual jurisdictions, as a practical matter, cannot raise borders on the internet to prevent unregulated websites from operating in their territory; although some jurisdictions attempt to do this by building firewalls or imposing filtering by internet service providers, public outcry and legal issues
of constitutional and human rights have put these methods into question. The least controversial method of territorial partitioning that currently exists relies on geolocation tools that website operators can use to identify the location of each individual internet user and tailor content according to the user’s location. Although this method has its flaws – about which I have written (forthcoming in the Fordham Intellectual Property, Media & Entertainment Law Journal; http://ssrn.com/abstract=1937960) – it continues to be improved and is increasingly relied upon by website operators, regulators and courts.

An international convention could support regulators in imposing geolocation obligations on online gambling operators located outside their own jurisdictions. Consider an example: Regulators in country A do not allow certain types of online games to be offered in A; however, website W offers such games on the internet worldwide, including in A. Website W operates from country B, where such games are permitted. Under the convention, upon request by the regulators of A, the regulators of B would assist the regulators of A by requiring W to employ geolocation tools to prevent users in A from accessing the games that are prohibited in A. An international convention would set the parameters and procedures for cooperation among countries and provide important protections for jurisdictions that do not allow gambling in their territories.

Not only is the time right for an international convention on online gambling, the subject matter is suitable for a solution at the international level. This is not to say that drafting a convention would be easy; even agreeing on key definitions is likely to be challenging. Many general, non-gambling-specific legal questions that have prevented countries from cooperating in enforcement on the internet would impact the negotiations. However, the great public interest in effective regulation of online gambling, whether based on moral grounds, a desire for tax revenue, or some other motivation, could push forward the negotiations. If the negotiations succeed in answering questions of enforcement in the area of online gambling, the answers could contribute to the general debate about effective enforcement of territorially defined laws on the internet.