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**PROPOSAL FOR AN INTERNATIONAL CONVENTION
ON ONLINE GAMBLING**

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Abstract

The proposal, which will be published as a chapter in a volume from the Internet Gaming Regulation Symposium co-organized by the William S. Boyd School of Law of the University of Nevada, Las Vegas, in May 2012, presents the outline of an international convention (“Convention”) that will facilitate cooperation among countries in enforcement of their online gambling regulations while allowing the countries to maintain their individual legal approaches to online gambling. Countries continue to vary in their approaches—some permit and regulate, and others prohibit online gambling, and even countries that permit and regulate online gambling approach the issue differently. Countries cannot enforce their own online gambling regulations without assistance from other countries—specifically, the countries where online gambling operators have their operations and/or their assets. Under the proposed Convention, national online gambling regulators would cooperate in the exchange of necessary information, in the licensing and standardization of technological requirements for online gambling operators, and, most importantly, in assisting with the enforcement of foreign country regulations by imposing geolocation and filtering requirements on online gambling operators. The chapter discusses the challenges that the proposal faces and suggests that the challenges can be overcome. Recent events in the online gambling world, such as “Black Friday,” demonstrate a pressing need for effective international cooperation among Internet gambling regulators, and the proposed Convention, by providing a solution to the vexing problem of enforcement of online gambling regulation on the Internet, can provide the impetus for national discussions on online gambling.

The chapter was preceded by the author’s blog post on the UNLV Law Blog: Marketa Trimble, *Is It Time for an International Convention on Online Gambling?*, October 3, 2011, available at <http://unlvlawblog.blogspot.com/2011/10/is-it-time-for-international-convention.html> (last visited June 19, 2012).

Proposal for an International Convention on Online Gambling

Marketa Trimble*

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Introduction

The regulation of online gambling¹ has generated much discussion in countries around the world, but the option to enhance national regulations by an international convention, although mentioned, has remained at the margins of the discussions.² It is surprising that this option has been neglected, because an international convention on online gambling could facilitate the effective enforcement of national online gambling regulations and respect individual national approaches to online gambling that have been or will be adopted. Regardless of a jurisdiction's approach to online gambling—whether it wants to allow and regulate online gambling or prohibit it partially or entirely—all jurisdictions would benefit from cooperation with other jurisdictions.

¹ This article uses the term “gambling” instead of “gaming” because it proposes international cooperation in the area that might be more accurately described as “gambling.” See *infra*.

² Marketa Trimble, *Is It Time for an International Convention on Online Gambling?*, October 3, 2011, available at <http://unlvlawblog.blogspot.com/2011/10/is-it-time-for-international-convention.html> (last visited Oct. 9, 2011). Recent proposals for cooperation appear to be either limited territorially or focused on the creation of a single new international regulation rather than cooperation among countries with various regulatory approaches. See, e.g., European Parliament Resolution of 15 November 2011 on online gambling in the Internal Market, 2011/2084(INI) (“[I]n some areas there would be clear added value from a coordinated European approach, ... given the cross-border nature of online gambling services.” *Id.*, par. 9); Margaret Devaney, *Online Gambling and International Regulation: An Outside Bet*, 18(3) Information & Communications Technology Law 273 (2009) (suggesting cooperation among EU member states); Katherine A. Valasek, *Winning the Jackpot: A Framework for Successful International Regulation of Online Gambling and the Value of the Self-Regulating Entities*, MICH. ST. L. REV. 735 (2007) (suggesting the creation of an international regulatory scheme); Eric Pfanner & Heather Timmons, *U.K. Seeks Global Rules for Online Gambling*, *The New York Times*, November 2, 2006; John D. Andriele, *A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States*, 37 VAND. J. TRANSNAT'L L. 1389 (2004) (suggesting an international regulatory scheme); John Warren Kindt & Stephen W. Joy, *Internet Gambling and the Destabilization of National and International Economies: Time for a Comprehensive Ban on Gambling Over the World Wide Web*, 80 DENVER U. L. REV. 111, 152 (2002). For proposals focused on criminal enforcement see Anthony Cabot, *Internet Gambling in the Information Age*, Nevada Lawyer, March 1999, 20-22, at p. 22; ANTHONY CABOT, THE INTERNET GAMBLING REPORT IV 395-403 (2001).

The problem with existing proposals for international cooperation in the matters of online gambling is that the proposals have focused on achieving uniformity in the national approaches to online gambling; be they partial or full legalization and regulation, or complete prohibition, all the existing proposals would require countries to agree on a single approach. However, the regulation of online gambling is unlikely to emerge as a uniform international law, at least not in the near future, because countries' views about online gambling vary greatly, and in federal countries such as the United States and Germany, even the individual states have very different opinions about online gambling.³ Past proposals have lacked sufficient support precisely because they have required countries to accept a uniform international standard. Although the adoption of a uniform international standard would be helpful from some perspectives,⁴ it appears unachievable now and anytime soon.

Because countries lack consensus about a proper approach to online gambling, online gambling regulation is and will continue to be based on territorially defined gambling laws, which, like most other national or state laws, are intended to apply only within the borders of a particular jurisdiction and extend beyond national borders only to the extent that they target conduct that has effects within a jurisdiction. Enforcing territorially limited laws on the Internet has been

³ See, e.g., Devaney, *supra* note 2, p. 276 (identifying “four categories” of “approaches towards Internet gaming:” “maximum protection/compliance, prohibition, laissez-faire and tolerance”). See also GREF Position Statement on Gambling on the Internet, Gaming Regulators European Forum, adopted May 15, 1998, *available at* <http://www.gref.net/statements.html> (last visited Mar. 30, 2012), par. 2 (“[I]t is a matter for individual Governments, either at national or at autonomous regional level, whether or not they wish to permit any forms of gambling to be offered on the Internet in their territories and, if they do, under what circumstances or conditions particular forms of gambling are to be allowed.”).

⁴ Proponents of legalization or prohibition of online gambling see the potential for a uniform standard to maximize their goals internationally (e.g., prevention of fraud, money-laundering and other criminal activities, protection of minors). One common benefit heralded by the proponents of a uniform standard for online gambling is the ease of enforcement of a uniform standard on the Internet. See also Kevin F. King, *Geolocation and Federalism on the Internet: Cutting Internet Gambling's Gordian Knot*, 11 COLUM. SCI. & TECH. L. REV. 41, 66-74 (2010) (presenting the arguments for and against “jurisdictional differentiation” in Internet gambling laws).

challenging, and online gambling laws suffer from the same enforcement problems that other territorially limited laws do.

Enforcement problems on the Internet are associated with countries' limited ability to enforce their laws against persons and entities outside the countries' territories. Regardless of the manner in which a country defines the territorial scope of its jurisdiction—whether prescriptive or adjudicatory—the territorial extent of its enforcement power, and therefore the true extent of its jurisdiction, is limited by its physical access to persons, accounts, or facilities, and by the willingness of other countries to enforce decisions rendered in the country. Only if a country can enforce its regulators' or courts' decisions by sanctioning an entity—by freezing its accounts or seizing its property, for example—or if it can persuade other countries to recognize and enforce its decisions against the entity abroad, will the country's law be effectively enforceable.

Because the Internet enables website operators to strategically locate their assets in various countries to avoid having a physical presence in countries of potential enforcement, it is often difficult, if not impossible, for countries to enforce territorially defined laws on the Internet directly against the operators. In their search for a means of effective enforcement on the Internet countries have sought to employ their enforcement power over entities other than website operators, such as Internet service providers or payment processors, whom the operators need in order to conduct business. While practically feasible, enforcement against these entities is not without controversy or practical limitations;⁵ as discussed further below, content filtering by

⁵ On the problems with “derivative liability” in online gambling regulation generally see, *e.g.*, Testimony of Eric Goldman before the National Gambling Impact Study Commission's Regulatory, Enforcement and Internet Subcommittee, December 1, 1998, *available at* http://eric_goldman.tripod.com/articles/gamblingarticle.htm (last visited June 16, 2012).

Internet service providers raises serious concerns about the protection of free speech and the freedom to conduct business, and enforcement against other third parties, such as payment processors, may not serve well the needs of the particular regulation.

Because of the limitations of a single-country regulation of Internet activity, it is important to seek international solutions to enforcement problems. The borderlessness of the Internet⁶ and the global business environment dictate international cooperation in enforcement. The strong public policies that shape the current or future national regulation of gambling in general and online gambling in particular should be the significant driving forces that will propel the negotiations of an international convention.

Solving the enforcement problems of online gambling regulation is certainly important from a public policy perspective, as countries strive to implement their policies. At the same time, gambling operators should be presented with a clear legal framework in which they can operate legally. Notwithstanding the apparently widespread lay perception that gambling operations are insufficiently regulated or not regulated at all, in many jurisdictions where it is legalized, the gambling industry is highly regulated, and the global players in the industry are accustomed to complying with multiple national regulatory schemes. These industry players should have the opportunity to shape their operations on the Internet while respecting multiple national territorially defined laws. Academics and practitioners have expressed a similar desire for clarity in the legal framework governing general global online operations for Internet intermediaries

⁶ The use of geolocation by website operators and filtering by Internet service providers challenges the original concept of the “borderless” Internet. See, e.g., Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567 (2012).

with respect to secondary liability concerning online content posted by third parties;⁷ a similar pro-business approach should be pursued in the area of online gambling.⁸

This chapter outlines a proposal for an international convention on online gambling (hereinafter referred to as the “Convention”) and analyzes some of the challenges that the drafters of such a convention will likely encounter. The intent is not to list all the provisions of the Convention but to provide outline material for critical review and discussion to propel further development of this proposal or inspire alternate proposals. Drafting the Convention would require extensive negotiations among countries with substantial input from gaming law experts, regulators, online gambling operators, and other stakeholders, including public health officials and representatives of civil society.

The analysis in this chapter demonstrates that the Convention would be feasible, although it would not be without challenges. Critics will question the solutions offered and argue that rather than supporting an international convention, the analysis below proves that an online gambling convention is not feasible and/or not helpful. There are indeed significant challenges to be

⁷ Many countries provide safe harbors that protect Internet service providers from liability for third-party content; however, no international agreement clarifies the transnational application of the rules. For proposals to solve the Internet service provider secondary liability issues see, *e.g.*, Graeme B. Dinwoodie et al., *The Law Applicable to Secondary Liability in Intellectual Property Cases*, 42 N.Y.U. J. INT’L L. & POL. 201 (2009); Principles on Conflict of Laws in Intellectual Property, European Max Planck Group on Conflict of Laws in Intellectual Property, Final Text, December 1, 2011, Article 3:604(2) and (3), *available at* <http://www.cl-ip.eu/files/pdf2/FinalText--December1-2011.pdf> (last visited Mar. 30, 2012) (proposing a special provision on secondary liability for intermediaries). For the relevant national legislation see, *e.g.*, E.g., 17 U.S.C. §512 (Digital Millennium Copyright Act); 47 U.S.C. §230 (Communications Decency Act); Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH L. 101 (2007); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Articles 12-15.

⁸ Some critics may point out the differences between the public’s perceptions of the public benefit provided by Internet intermediaries (whose activities are generally perceived as beneficial to society) and online gambling providers (whose contributions to the larger societal good are debated).

overcome: some challenges are law-related and raise issues no less significant than freedom of speech and national sovereignty; other challenges are practical and technological, such as the possibility that users will evade geolocation tools installed by website operators; and yet other challenges are political, such as overcoming public opposition to a strengthening of enforcement on the Internet. This chapter identifies and analyzes these various difficulties and suggests that they could all be successfully addressed.

Before outlining the individual provisions of the proposed Convention, this chapter offers some general thoughts about the motivations for the conclusion of an online gambling convention. Part I explains the suitability of online gambling for international action; both the Internet and gambling itself pose transnational challenges that imply an international solution. Part II discusses the question of the proper timing for the proposal and addresses the argument that the proposal may be premature, given the current variability of national and sub-national gambling regulations. It is precisely because countries are currently searching for viable solutions to online gambling regulation that this Convention would be timely. Part III presents the individual provisions of the proposed Convention, article by article. Each provision is justified, explained and discussed in view of its implementation. The Conclusions address potential arguments that critics may raise in opposition to the proposed Convention, including the lack of incentives for some countries to sign and adhere to the Convention, and contemplate the possible advantages of concluding the Convention within the World Trade Organization (“WTO”) framework.

I. The Suitability of Online Gambling for an International Convention

With few exceptions, online gambling has been debated at national levels rather than at the international level. The Antigua and Barbuda complaint filed with the WTO against the United States and the arbitration proceedings that followed are an example of online gambling being debated at the international level.⁹ In the European Union online gambling is not regulated at the EU level per se,¹⁰ but it has been subject to decisions by the Court of Justice of the European Union,¹¹ and online gambling has also been addressed by the European Commission and the European Parliament.¹² As the WTO and EU examples show, there are international and transnational legal frameworks that apply to online gambling;¹³ however, for now, online gambling regulations are primarily a matter of national or state law. Nevertheless, online gambling is suitable for an international convention, as explained in this section.

⁹ WTO Dispute DS285; Request for Consultations by Antigua and Barbuda filed on March 27, 2003, WT/DS285/1. See also Isaac Wohl, *The Antigua-United States Online Gambling Dispute*, Journal of International Commerce and Economics, July 2009, available at http://www.usitc.gov/publications/332/journals/online_gambling_dispute.pdf (last visited Mar. 30, 2012); I. NELSON ROSE, MARTIN D. OWENS, JR., INTERNET GAMING LAW, 252-265 (2d ed. 2009). See also Statement of Jay Cohen, President, Antiguan Online Gaming Association, Hearing before the Committee on Financial Services, U.S. House of Representatives, 111th Cong., No. 111-92, December 3, 2009, Appendix, pp. 235-236.

¹⁰ For EU legislation affecting online gambling see Green Paper on On-line Gambling in the Internal Market, COM(2011) 128 final, March 24, 2011, section 1.2, pp. 10-13 [hereinafter "Green Paper"].

¹¹ E.g., Dickinger and Ömer, Case C-347/09, September 15, 2011; Sjöberg and Gerdin, Joined Cases C-447/08 and C-448/08, July 8, 2010; Markus Stoß and others, Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, September 8, 2010. See also Martin Lycka, *Online Gambling: Towards A Transnational Regulation?*, 15(4) Gaming Law Review and Economics 179, 186-187 (2011) (discussing relevant case law of the Court of Justice of the European Union).

¹² Green Paper, *supra* note 10. For other activities of the European Commission in the area of online gambling see Gambling, The EU Single Market, European Commission, at http://ec.europa.eu/internal_market/services/gambling_en.htm (last visited March 29, 2012); Lycka, *supra* note 11, pp. 187-189 (on the activities of the European Commission in the area of gambling). See also European Parliament Resolution of 15 November 2011 on online gambling in the Internal Market, 2011/2084(INI).

¹³ Of course, given the maturation of the European Union it is arguable that any EU-level actions should be viewed at this point as more akin to actions taken by a federal country than a regional organization.

The problem of any national regulation on the Internet, including the regulation of online gambling, lies in the inability of a country to enforce its regulations against persons or entities outside the country who cause effects inside the country by acts that the persons or entities commit outside the country. For a country to be able to regulate effectively, its regulators must be able to prohibit operations by those who do not comply with its regulations. However, regulators can only enforce regulations on the Internet if they have enforcement power over a party (either directly against a website operator or indirectly against an intermediary)—meaning that the party’s officers, and/or its assets, including its servers, must be located within the regulating jurisdiction for enforcement actions to be effective.¹⁴ In fact, under such conditions, the regulation of an activity on the Internet can de facto expand with no territorial limits; a regulator may require a party to act in a certain manner on the Internet regardless of where any particular content is accessible.¹⁵

Concerns about the limitations of enforcement on the Internet, for example in the context of online gambling, have led jurisdictions to require that online gambling operators locate their servers within the countries’ territories if they want to obtain an online gambling license in these countries. For example, Nevada and the Isle of Man both require that online gambling operators licensed by their jurisdictions locate their servers in the jurisdictions’ territories.¹⁶ The Gaming

¹⁴ Naturally, parties may comply with regulation voluntarily and there are a variety of reasons for them to do so. On voluntary compliance in general see, *e.g.*, MARKETA TRIMBLE, GLOBAL PATENTS: LIMITS OF TRANSNATIONAL ENFORCEMENT 132 (2012).

¹⁵ This is the phenomenon that Michael Geist described as the rule of cyberlaw 2.0. Michael Geist, *Cyberlaw 2.0*, 44 BCLR 323, 357 (2003).

¹⁶ See, *e.g.*, Regulations of the Nevada Gaming Commission and State Gaming Control Board, section 14.010.10, as of March 12, 2012 (“The core components of an interactive gaming system, including servers and databases running the games on the interactive gaming system and storing game and interactive gaming account information, must be located in the State of Nevada except as otherwise permitted by the chairman or his designee.”). See also Statement by Mary Williams, Chief Secretary, Isle of Man Government, Hearing before the Committee on Financial Services, U.S. House of Representatives, 111th Cong., No. 111-92, December 3, 2009, Appendix, p. 235 (“A competent

Regulators European Forum has recommended that “those ... licensed [to operate online gambling] ... be required to establish their operation in the territory of the jurisdiction concerned so that the operation can be properly controlled an[d] policed.”¹⁷ Naturally, these types of requirements place significant limitations on global enterprises that intend to utilize cloud computing for their services or have other legitimate reasons why they might wish to locate their servers or other assets outside a particular licensing jurisdiction.

More importantly, even if a regulator imposes an obligation on online gambling operators to place their servers or other assets in the particular country, the regulator still faces problems with those operators who do not apply for a license in the regulator’s jurisdiction and have their assets located outside the jurisdiction but still provide online gambling to users connecting to the Internet from the regulator’s jurisdiction. In this familiar scenario, the regulator has very limited options on how to exclude such operators from operating in the regulator’s territory; the regulator cannot enforce any regulations against the operator *directly* if the regulator has no actual enforcement power over the operator.¹⁸

Countries have attempted to work around their inability to enforce their regulations on the Internet over parties outside their enforcement power through various means, and not only in the online gambling area. China uses its “Great Firewall” to prevent users in China from accessing

regulator of internet gambling must be able to impose effective sanctions against unregulated or non-conforming operators. The key officers and employees of the licensee must be located in the Isle of Man... The licensee’s data servers also must be located in the jurisdiction...”). See also Lycka, *supra* note 11, pp. 189 (listing Estonia, France, Bulgaria, Poland, and Romania as examples of countries that require online gambling servers to be located in their territories, and suggesting that the requirement might be incompatible with EU law).

¹⁷ GREF Position Statement on Gambling on the Internet, *supra* note 3, par. 3.

¹⁸ See, e.g., Report by Mr. Oxley to Accompany H.R. 4411, 109th Cong., Rept. 109-412, 2006, p. 9 (“According to the [American Gaming Association], its major concern is that offshore Internet gambling sites ‘frustrate important state policies, including restrictions on the availability of gaming within each State.’”).

prohibited websites outside China,¹⁹ and other countries have mandated content filtering by Internet service providers, such as cable companies that connect users to the Internet, to make content unavailable to users who connect to the Internet through their services.²⁰ In the United States authorities have taken action against online gambling operators by seizing their domain names²¹ and by targeting financial institutions used by the gambling operators.

Each of these means of enforcement on the Internet presents difficulties. Seizures of domain names are not very effective against operators who have no interest in conducting legal business in the jurisdiction that seized their domain name; the operator can merely continue to do business under a different domain name. Financial institutions, such as payment processors, have struggled to comply with laws that enforce anti-gambling regulations through the institutions.²² Firewalls and filtering by service providers raise serious human and constitutional rights issues.²³

¹⁹ For a description of the firewall see, e.g., Jyh-An Lee, Ching-Yi Liu, *Forbidden City Enclosed by the Great Firewall: The Law and Power of Internet Filtering in China*, 13 MINNESOTA J. L. SCI. & TECH. 125, 130-135 (2012). On other examples of nationwide filtering of the Internet by governments see also *id.*, 142-143.

²⁰ Jonathan Zittrain, Benjamin Edelman, *Documentation of Internet Filtering Worldwide*, Berkman Center for Internet & Society, Harvard Law School, available at <http://cyber.law.harvard.edu/filtering/> (last visited July 27, 2011).

²¹ E.g., *Commonwealth of Kentucky v. 141 Internet Domain Names*, Franklin Circuit Court, 08-CI-1409, Order of Forfeiture of Domain Defendants, March 8, 2012. For a review of laws applicable to seizures see Jack Mellyn, *"Reach Out and Touch Someone: The Growing Use of Domain Name Seizure as A Vehicle for the Extraterritorial Enforcement of U.S. Law*, 42 GEO. J. INT'L L. 1241 (2011). To the consternation of those who oppose seizures of domain names, the Internet Corporation for Assigned Names and Numbers (ICANN), which administers the domain name system, published a Guidance for Preparing Domain Name Orders, Seizures & Takedowns, available at <http://www.icann.org/en/about/staff/security/guidance-domain-seizures-07mar12-en.pdf> (last visited Mar. 30, 2012).

²² See, e.g., Hearing before the Committee on Financial Services, U.S. House of Representatives, 111th Cong., No. 111-146, July 21, 2010, comments by Edwin Williams, President and CEO of Discovery Federal Credit Union, p. 23; Testimony by Edwin Williams, *id.*, Appendix; Testimony of Wayne Abernathy on behalf of the American Bankers Association, Hearing before the Subcommittee on Domestic and International Monetary Policy, Trade, and Technology of the Committee on Financial Services, U.S. House of Representatives, April 2, 2008, No. 110-102, Appendix, pp. 46-58.

²³ See, e.g., Opinion by Advocate General Pedro Cruz Villalon in *Scarlet Extended SA v. Société belge des auteurs compositeurs et éditeurs (Sabam)*, Court of Justice of the European Union, C-70/10, April 14, 2011; Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171 (2010); Christoph B. Graber, *Internet Creativity, Communicative Freedom and a Constitutional Rights Theory Response to "Code is Law,"* i-call Working Paper, November 2010, p. 5, available at <http://ssrn.com/abstract=1737630>, last visited on February 6, 2011.

the Court of Justice of the European Union recently held that an obligation to implement time-unlimited general filtering violates the rights of both Internet users and Internet service providers.²⁴ The Stop Online Piracy Act proposed in the United States has been attacked on similar grounds.²⁵

With firewalls and filtering condemned for potentially violating fundamental rights, and enforcement through financial institutions criticized for the difficulties that the enforcement causes in practice, the least controversial and most straightforward method for achieving website operators' compliance with territorially defined laws, including online gambling operators' compliance with online gambling regulation, is through geolocation. Geolocation tools installed by website operators determine the location of a user and allow the operators to tailor content accessible to a user based on the user's location.²⁶ Geolocation can use data that a user self-reports and/or Internet protocol information;²⁷ however, additional data, such as the duration of ping requests, or GPS or Wi-Fi information, may also assist in identifying a user's location. There are a number of vendors who offer geolocation tools, with various degrees of

²⁴ *Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL (SABAM)*, Case C-70/10, November 24, 2011; *Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v. Netlog NV*, Case C-360/10, February 16, 2012.

²⁵ Stop Online Piracy Act, H.R. 3261, 112th Cong. (SOPA); Laurence H. Tribe, *The "Stop Online Piracy Act" (SOPA) Violates the First Amendment*, available at <http://www.scribd.com/doc/75153093/Tribe-Legis-Memo-on-SOPA-12-6-11-1> (last visited May 9, 2012).

²⁶ Today, geolocation tools rely on IP addresses; however, in the future, other data may assist operators in determining users' locations. On geolocation in general see, e.g., Trimble, *supra* note 6; Dan Jerker B. Svantesson, *"Imagine There's No Countries": Geo-Identification, the Law, and the Not-So-Borderless Internet*, 10 No. 9 J. INTERNET L. 1 (2007); Kevin F. King, *Geolocation and Federalism on the Internet: Cutting Internet Gambling's Gordian Knot*, 11 COLUM. SCI. & TECH. L. REV. 41 (2010). This chapter leaves aside the discussion of problems with verifying other user characteristics, such as age. Some technological solutions combine geolocation with verification of other information about the user; for example, SafetyNet combines geolocation with a fingerprinting device in its verification that both the user and the device (a USB key) are present in the same location. Responsible Gaming Networks Pty Ltd., Safety Net, http://www.responsible.com.au/page/internet_solution.html (last visited June 14, 2012).

²⁷ For an explanation of Internet protocol addresses see, e.g., Trimble, *supra* note 6, 594-597.

sophistication and accuracy,²⁸ in response to the demand from website operators who use geolocation tools for various purposes. For example, targeted advertising, price differentiation, and prevention of fraud can all be implemented with geolocation.

With increasing frequency, website operators employ geolocation tools not only voluntarily—for example, to enhance user experience or improve transaction security—but also mandatorily, to comply with territorially defined legal obligations, whether the obligations arise under contract or from legislation. Legislators, regulators, and law enforcement agencies have begun to consider and accept geolocation tools as the standard means for achieving compliance with territorially defined regulation on the Internet. The Italian government, for example, requires website operators to use geolocation tools to prevent users located in Italy from accessing certain online gambling content that is prohibited in Italy.²⁹ In Germany, several courts have accepted geolocation as “a viable and technically feasible method of determining website visitors’ locations,”³⁰ and have ordered website operators to use geolocation tools to limit access to certain content from particular German states.³¹ In an agreement between the U.S. Attorney’s Office for the Southern District of New York and PokerStars, an online gambling company

²⁸ E.g., Neustar (former Quova), <http://www.quova.com/> (last visited May 22, 2012); GeoComply, <http://geocomply.com/> (last visited May 22, 2012); Responsible Gaming Networks Pty Ltd., Safety Net, http://www.responsible.com.au/page/internet_solution.html (last visited June 14, 2012).

²⁹ According to Quova, one geolocation tools provider, “[g]eolocation technology is a requirement in online licensing applications in Italy. [...] An operator wishing to obtain an online gaming licence in Italy is required to note during its license application the technology that will be used for geolocation. [...] The use of geolocation technology is required in order to enable an operator to identify the geographical origin of the player who attempts to access the gaming website. This is needed in order to prevent Italians having [sic] access to non-authorised sites managed by the same operator. [...] France has studied Italy’s model and has developed a similar system which is expected to come into force some time during the year.” *Geolocation; Ensuring Compliance with Online Gaming Regulations*, Quova, 2010, p. 6.

³⁰ Oberverwaltungsgericht Nordrhein-Westfalen, 13 B 646/10, July 2, 2010. The decision refers to other German cases in which the German courts agreed that geolocation may be used to comply with their territorially limited decisions. See also Oberverwaltungsgericht Nordrhein-Westfalen, 13 B 676/10, July 13, 2010.

³¹ But *cf.* earlier opinions by German courts concerning geolocation, e.g. Oberverwaltungsgericht Lüneburg, 11 ME 399/08, April 3, 2009. “[I]t is not without a question whether at this time enough technically matured possibilities exist to exclude the internet access only from Lower Saxony.” *Id.*

operating out of the Isle of Man,³² the U.S. Attorney's Office required that PokerStars "utilize geographic blocking technology relating to I.P. addresses."³³

Although geolocation and the filtering of content by website operators based on user location defeats the borderlessness of the Internet,³⁴ enforcement problems remain: Utilizing geolocation for the purposes of compliance with territorially defined laws requires that a website operator install sufficiently effective geolocation tools to filter content based on a user's location. If operators from outside a jurisdiction do not install tools and do not filter content voluntarily (or do not do so properly) and thereby allow users from the jurisdiction to access content that is illegal in that jurisdiction, the regulators in the jurisdiction have no power to enforce the requirement to geolocate and filter if the regulators have no enforcement power over the operator (meaning that the regulators have no access to the operator's officers, assets, or servers). In such a situation—and absent enforcement against a third party such as an Internet service provider or a payment processor—the jurisdiction will need to obtain assistance from other jurisdictions that do have the requisite enforcement power over the operator. Facilitating this assistance is the primary goal of the Convention proposed in this chapter. While the regulation of the online gambling industry can also benefit from other aspects of international cooperation,³⁵ cooperation among countries in enforcement is the most significant reason to consider this international Convention.

³² PokerStars, <http://www.pokerstars.net/about/> (last visited Apr. 27, 2011).

³³ A letter by the U.S. Attorney for the Southern District of New York re *United States v. Pokerstars, et. al.*, 11 Civ. 2564 (LBS), April 19, 2011, *available at* <http://www.rakeback.com/images/doj-pokerstars-domain-name-reinstatement.pdf> (last visited Apr. 25, 2011), p. 1. In this case, the U.S. government's leverage over the company was the company's U.S.-registered domain name.

³⁴ See *infra* for a discussion of the evasion of geolocation.

³⁵ See, e.g., European Parliament Resolution of 15 November 2011 on online gambling in the Internal Market, 2011/2084(INI) (suggesting cooperation in setting common standards for operators or a framework directive at the EU level; *id.*, par. 15).

Online gambling is only one of the types of Internet conduct for which international cooperation could facilitate effective enforcement—any other conduct on the Internet faces the same enforcement problems that online gambling does. Online gambling, however, is particularly suited to pave the way for a model international convention on enforcement of national laws because countries have a strong and shared desire to enforce their online gambling laws. Notwithstanding the significant differences among jurisdictions in their views on gambling, there seems to be a common understanding that any regulation or prohibition of gambling activities must function effectively.³⁶ This understanding emanates from the strong public policies that underlie countries' approaches to gambling—moral perceptions,³⁷ concerns for the protection of consumers (players)³⁸ and public health,³⁹ the desire for tax revenue,⁴⁰ the need to prevent crime,⁴¹ and other policies. An equilibrium among the various public policies shapes each

³⁶ See, e.g., Statement of Tom Malkasian, Vice-Chairman of the Board, Commerce Casino, Hearing before the Committee on Financial Services, U.S. House of Representatives, No. 111-146, 111th Cong., July 21, 2010, Appendix; Green Paper, *supra* note 10 (“In view of recent trends, restrictions imposed to online gambling by each Member State can be expected to continue to vary considerably, with the effect that what is, or will become, considered a legal offer in one Member State will continue to be deemed “unlawful” (in that it has not been implicitly or explicitly authorised) in the territory of another Member State. It follows that, subject to the legal conditions set out above, effective enforcement will be essential to ensure the achievement of the objectives of a Member State's gambling policy.” *Id.*, 7.)

³⁷ See, e.g., Dickinger and Ömer, Court of Justice of the European Union, C-347/09, September 15, 2011, par. 45; Devaney, *supra* note 2, p. 274.

³⁸ See, e.g., Dickinger and Ömer, *supra* note 37, par. 100.

³⁹ See, e.g., Green Paper, *supra* note 10, pp. 19-23; Julia Hörnle, *Social Policy and Regulatory Models*, in JULIA HÖRNLE & BRIGITTE ZAMMIT, *CROSS-BORDER ONLINE GAMBLING LAW AND POLICY* (2010), 10-77, at 11-17; Executive Summary of the First Written Submission of the United States, WT/DS285 (Nov. 14, 2003), available at http://www.antiguawto.com/wto/11_US_Exec%20sum_1st_Written_Submissn_14Nov03.pdf (last visited Oct. 9, 2011); Kindt & Joy, *supra* note 2, pp. 114-116; Valasek, *supra* note 2, pp. 762-765.

⁴⁰ See, e.g., the Hearing before the Committee on Financial Services, U.S. House of Representatives, No. 111-146, 111th Cong., July 21, 2010.

⁴¹ See, e.g., Green Paper, *supra* note 10, pp. 26-29; Hörnle, *Social Policy and Regulatory Models*, *supra* note 39, pp. 17-22; Executive Summary of the Second Written Submission of the United States, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285 (Jan. 16, 2004), available at http://www.ustr.gov/webfm_send/794 (last visited Oct. 9, 2011); *Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, Court of Justice of the European Communities, C-42/07, September 8, 2009, par. 62-72; Kindt & Joy, *supra* note 2, pp. 118-121; Valasek, *supra* note 2, pp. 765-767.

country's legislative and regulatory solutions for gambling; national equilibria vary according to each country's historical, social, cultural and political makeup, and may be influenced by a country's current fiscal situation.

The differences among national solutions to online gambling do not prevent countries from negotiating an international convention to facilitate the effective enforcement of laws and regulations on online gambling. As opposed to the many international conventions that exist specifically to harmonize national laws, this Convention would be concluded to respect and maintain the differences in national approaches to online gambling and permit countries to enforce their individual solutions. All approaches would enjoy equal standing, regardless of whether online gambling would be permitted and regulated, or prohibited altogether.

It may transpire that countries that wish to permit and regulate online gambling have much common ground, and that there is room for negotiating an agreement that would transcend the “agree to disagree” framework of the limited convention that is proposed in this chapter. In fact, the increasing internationalization of the gambling industry suggests that online gambling regulation would benefit from cooperation among the regulators of countries that permit online gambling, particularly in the areas of licensing and technological standardization. For example, the recent developments concerning Full Tilt Poker revealed that regulators should cooperate if they wish to be successful in regulating businesses that operate in multiple countries.⁴² From an operator perspective, cooperation among regulators could bring large savings in resources; a

⁴² Full Tilt Poker Review, Report by Peter Dean to the Alderney Gambling Control Commission, March 26, 2012, available at <http://www.gamblingcontrol.org/userfiles/file/FTP%20Report%2026%20March%202012.pdf> (last visited Apr. 1, 2012); *Full Tilt Poker Licence Revoked by Alderney Authority*, BBC News, September 29, 2011, available at <http://www.bbc.co.uk/news/business-15115224> (last visited Apr. 1, 2012).

global operator such as WMS Industries, one of the leading manufacturers in the gambling industry and one that holds licenses in more than 380 jurisdictions,⁴³ would benefit from an agreement among national regulators on the unification of licensing standards, or at least the introduction of a uniform licensing application format. Technological standardization is another clear candidate for international cooperation among gambling regulators. The proposed Convention would not foreclose any possibilities for further conventions or agreements that would complement this proposed Convention or align any aspects of online gambling regulation not addressed in this Convention.

II. The Timing of a Convention

An international convention that would respect the differences in national approaches to online gambling should be desirable to all countries, regardless of their positions on online gambling, and the Convention is timely regardless of the fact that some countries wish to permit online gambling, some wish to prohibit it, and some are undecided; it is timely even given that within individual countries disagreements persist about whether online gambling should be permitted.⁴⁴ Despite the ongoing uncertainty about the current status and future development of online gambling regulation in some countries, this is the best moment to propose and negotiate an international convention on online gambling precisely because online gambling, at least from the global perspective, is in its formative stages.

⁴³ Scott Schweinfurth, Executive Vice President, WMS Industries, at the 2011 IAGA International Gaming Conference, Las Vegas, September 30, 2011.

⁴⁴ The dynamics of the developments in the regulation of online gambling are evidenced by the fact that a helpful November 2008 overview of various approaches to online gambling regulation is significantly outdated in March 2012. Hörnle, *Social Policy and Regulatory Models*, *supra* note 39, p. 29.

National online gambling regulations differ, and so do levels of national expertise in regulating gambling. Although some commentators have observed a general trend toward a liberalization of online gambling,⁴⁵ some anti-gambling stronghold jurisdictions maintain their positions against online gambling,⁴⁶ and even the countries that regulate online gambling differ in their approaches to regulation. The jurisdictions that regulate online gambling have the pioneering (and well-known) regulators who have developed the early regulations in the field; these regulators have made their jurisdictions popular for the registration of online gambling operators. For instance, the Mohawk Territory-Kahnawake Gaming Commission in Canada has regulated Internet gambling since 1999,⁴⁷ and Alderney,⁴⁸ Gibraltar,⁴⁹ the Isle of Man,⁵⁰ and Malta⁵¹ also are among well-known jurisdictions that regulate online gambling. Jurisdictions that make certain gambling illegal differ in whom and in what conduct they penalize. For example, U.S. legislation permits intrastate online gambling⁵² but makes gambling across state lines unlawful by prohibiting the “acceptance of any financial instrument for unlawful Internet gambling.”⁵³ South Africa regulates online gambling and penalizes not only companies that provide illegal online gambling in South Africa, but it also imposes liability on Internet service providers who allow

⁴⁵ See, e.g., Lycka, *supra* note 11, p. 180 (suggesting that “the regulatory trend leans towards liberalization, rather than towards restriction of online gambling markets”).

⁴⁶ See also *supra* note 3.

⁴⁷ Kahnawake Gaming Commission, <http://www.gamingcommission.ca/> (last visited May 22, 2012).

⁴⁸ Alderney Gambling Control Commission, <http://www.gamblingcontrol.org/> (last visited March 30, 2012).

⁴⁹ Remote Gambling, <http://www.gibraltar.gov.gi/remotegambling> (last visited March 30, 2012).

⁵⁰ The Isle of Man Gambling Supervision Commission, <http://www.gov.im/gambling/> (last visited March 30, 2012).

⁵¹ Malta’s Lotteries & Gaming Authority, <http://www.lga.org.mt/lga/> (last visited March 30, 2012).

⁵² Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362(10)(B) and (C).

⁵³ Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5363; see also Report by Mr. Oxley to Accompany H.R. 4411, 109th Cong., Rept. 109-412, 2006, p. 8 (“The ... Act ... prohibits the acceptance of any bank instrument for unlawful Internet gambling.”). For other related legislation in the United States see the Report by Mr. Sensenbrenner to Accompany H.R. 4411, 109th Cong., Rept. 109-412, 2006, pp. 8-9.

users in South Africa to access illegal online gambling websites and makes liable users who gamble on such websites.⁵⁴

Within individual countries, state or provincial legislation on online gambling may differ. The United States and Germany are examples of federal countries in which individual states disagree on online gambling policies; this makes a consensus on any gambling regulation at the federal level difficult, if not impossible. In Germany, during the negotiations of the 2007 treaty among the individual Länder, some of the Länder were in favor of legalizing online gambling, while others resisted.⁵⁵ The final wording of the 2007 treaty stipulated that the Länder would not legalize online gambling.⁵⁶ A new treaty, which replaced the 2007 treaty and was signed by fifteen of the sixteen Länder in December 2011, liberalizes online gambling to some extent.⁵⁷ The sixteenth Land, Schleswig-Holstein, had adopted its own law regulating online gambling in September 2011.

⁵⁴ In South Africa all three actors—the gambling website operator, the Internet service provider, and the end user—are liable for illegal online gambling. See *On-line Gambling Transactions Are Outlawed in South Africa*, GAUTENG GAMBLING BOARD, http://www.ggb.org.za/index.php?option=com_content&view=article&id=3:newsflash-2&catid=3:newsflash (last visited Nov. 19, 2011). Compare this with the situation in the United States, where the Unlawful Internet Gambling Enforcement Act of 2006 does not apply to players who place bets. Gerd Alexander, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act Is A Bad Bet*, 2008 DUKE L. & TECH. REV. 6, 29 (2008). See also Federal Wire Act, 18 U.S.C. § 1084 (2006); S. Rep. No. 588, 87th Cong., 1st Sess. (1961) (and its associated legislative history). Cf. also Strafgesetzbuch [StGB] [Penal Code], May 15, 1871, Reichsgesetzblatt [RGBI] 127, as amended, § 284-85 (on unlawful operating of gambling and participating in unlawful gambling).

⁵⁵ Julia Hörnle, *Social Policy and Regulatory Models*, *supra* note 39, pp. 36-37.

⁵⁶ *Id.*, p. 37.

⁵⁷ Caroline Freisfeld, *Glücksspielstaatsvertrag ist unterzeichnet*, Frankfurter Allgemeine, December 15, 2011, available at <http://www.faz.net/aktuell/wirtschaft/lotto-und-wetten-gluecksspielstaatsvertrag-ist-unterzeichnet-11564729.html> (last visited March 30, 2012).

In the United States, bills have been presented at the federal level to both legalize and regulate some or all forms of Internet gambling;⁵⁸ however, individual states hold opposing views on online gambling. For example, Nevada undertook steps toward legalizing online gambling as early as 2001,⁵⁹ but Utah has consistently voiced strong opposition to any form of gambling and in March 2012 adopted an act making a person “guilty of gambling” and making gambling and “intentionally provid[ing] or offer[ing] to provide any form of Internet or online gambling” punishable as a misdemeanor in Utah.⁶⁰ Additionally, the Utah act states that “[w]hether or not any federal law is enacted that authorizes Internet gambling in the states, this section acts as this state’s prohibition of any gambling, including Internet gambling, in this state.”⁶¹

Although online gambling regulation enforcement problems are not the root of all disagreements about regulation, online enforcement problems are certainly among the major concerns that critics of online gambling raise,⁶² and the concerns contribute to confusion about the feasibility of effective regulation of online gambling. If enforcement concerns could be removed from national discussions on online gambling regulation, an agreement on national regulation might be easier to achieve, meaning that the current unsettled state of affairs would in fact be assisted by an international convention of the kind proposed here.

Gambling operators who want to comply with national laws are ready for online gambling to be permitted and regulated in more countries, particularly in the United States. Manufacturers are

⁵⁸ Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 1174, 112th Cong.; Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act, H.R. 2366, 112th Cong.

⁵⁹ See, e.g., *Nevada’s Online Gaming Regulations, Changes Adopted December 22, 2011*, available at http://gaming.unlv.edu/reports/NV_online_reg_changes.pdf (last visited May 29, 2012).

⁶⁰ Internet Gambling, H.B. 108, Section 2(5).

⁶¹ Internet Gambling, H.B. 108, Section 2(5).

⁶² See, e.g., Kindt & Joy, *supra* note 2, p. 149; see also *supra* note 18.

creating applications for online gambling and many have tested their applications in either jurisdictions that permit online gambling or other jurisdictions as games not for stakes. For example, IGT provides online gambling applications outside the United States in countries that permit online gambling,⁶³ WMS sells online gaming applications in the United States where they are available on iTunes for users to play as non-gambling entertainment, and Aristocrat supplies online gaming applications to U.S. land-based casinos that want to prepare for any future legalization of online gambling in the United States. Additionally, some operators outside of the traditional gambling industry are engaged in activities that appear to be in preparation for legalized gambling; they offer non-gambling games on their websites or on social media websites.⁶⁴

Given the diversity of national opinions, it would be pointless to promote any uniform international approach to online gambling—regardless of whether a proposed approach might lead to the legalization or the prohibition of online gambling. However, a proposal that would make it possible to enforce differing national regulations on the Internet could facilitate the development of national laws on online gambling by removing the existing cross-border enforcement obstacles that discourage national legislatures from adopting national solutions.

The Convention proposed here would benefit even those jurisdictions with sophisticated regulatory frameworks for online gambling already in place. These jurisdictions could continue to offer advantageous conditions to online gambling operators while they also offered their

⁶³ IGT, Online and Mobile Gaming Partners, *available at* <http://www.igt.com/gb-en/games/online-and-mobile-gaming-partners.aspx> (last visited Oct. 8, 2011).

⁶⁴ Zynga serves as an example here. Paul Tassi, *Zynga Wants to Get Into the Online Gambling Game*, *Forbes*, January 23, 2012, at <http://www.forbes.com/sites/insertcoin/2012/01/23/zynga-wants-to-get-into-the-online-gambling-game/> (last visited Mar. 29, 2012).

turnkey regulatory solutions and other incentives to new operators to induce the new operators to base their operations in these jurisdictions. Operators would want to be based in sophisticated jurisdictions to benefit from those jurisdictions' favorable online gambling regulation and enjoy the convenience of dealing with experienced gambling regulators. To the extent that other countries tolerate the sophisticated jurisdictions' regulations, the sophisticated jurisdictions could regulate worldwide the conduct of the online gambling operators licensed by their jurisdictions.⁶⁵

Although the assistance obligation established in the Convention will constrain the worldwide reach of a jurisdiction's regulation, the Convention itself will still allow operators to benefit from that regulation worldwide, except in jurisdictions that request assistance from the regulating jurisdiction. Some countries already permit online gambling operators to operate in their territories without a national license as long as they hold a valid license in some specified country,⁶⁶ and this would continue to be possible even under the proposed Convention. For the jurisdictions in which gambling regulations require that licensees comply with the laws of foreign countries, the proposed Convention would not change the playing field but, as explained below,⁶⁷ only enhance the ability of local regulators to enforce their own regulatory framework.

III. Proposal for the Convention

This section suggests the content of individual Convention provisions and identifies and analyzes difficulties that the proposed solutions generate and concerns that they raise.

⁶⁵ Note that the proposed Convention does not address retrospective remedies; it provides only for the enforcement of prospective remedies—injunctions.

⁶⁶ Green Paper, *supra* note 10, p. 15.

⁶⁷ See *infra* Article 4.

Article 1 – The Scope of the Convention

The Convention establishes rules for cooperation among countries—parties to the Convention—in enforcing national rules concerning online gambling. Countries remain free to regulate gambling in any manner they deem proper; this freedom applies also to states and other smaller jurisdictions within a federation or confederation. The freedom to maintain its own national gambling laws does not mean that a country will be able to comply with the Convention without implementing the Convention into its national laws; it is very likely that the implementation will require existing national laws and regulations to be adapted or new laws to be adopted to comply with and assist in the functioning of the Convention. However, the implementation will not require countries to change their positions on the legality or illegality of online gambling; the countries that wish to permit and regulate online gambling and the countries that wish to prohibit online gambling may both continue to maintain their positions.

The Convention requires that countries respect various positions on online gambling as legitimate choices to be made by countries, and that the Convention operate equally without regard to which position a country adopts with regard to online gambling. The principle of non-discrimination among countries based on their stance on online gambling is important; countries should not give preference to assistance requests⁶⁸ from countries sharing the same position on online gambling that they do or delay requests from countries adhering to a different position.

⁶⁸ See *infra* Article 4 for a discussion of enforcement requests.

The Convention concerns only online gambling; it is not intended to apply to land-based gambling. This restriction on the scope of the Convention is meant to prevent the provisions of the Convention from being applied to land-based gambling issues, which might create unnecessary controversies that would impede the adoption of the Convention. However, if the negotiators to the Convention decide that some of the provisions of the Convention, such as the provision on cooperation in the exchange of information, would advance the international regulation of land-based gambling as well, parts of the Convention could also apply to land-based gambling.

Article 2 – Definitions

One of the most challenging tasks for the proposed Convention—as it is for any international convention—is the drafting of definitions, because definitions specify the scope of the Convention. The definitions should aim at the highest common denominator—the most comprehensive scope on which countries can agree—and would therefore not necessarily originate from national laws or other documents, although these are certainly places where negotiators could seek guidance.

“Online”

Whether the term “online” is used or is replaced by some other term, the Convention will apply only to activities that occur on the ubiquitous network that is known as the Internet. Because the

term “Internet” describes only one of the protocols that are used on the network, a more precise definition must be formulated.

International treaty and national law provisions that concern the Internet use general descriptions. For example, the Convention on Cybercrime applies to “computer systems,” which are defined as “any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data.”⁶⁹ This definition is too broad for the purposes of this Convention because the definition would include intranet gambling – for example, gambling offered on hand-held devices within the internal network of a land-based gambling operation. This type of gambling should remain outside the scope of this limited Convention. The definition that the European Commission proposed in its 2011 Green Paper on On-line Gambling in the Internal Market is similarly broad: “On-line gambling services are any services ... that are provided at a distance, by electronic means and at the individual request of a recipient of services.”⁷⁰ The definition of the Internet in the Unlawful Internet Gambling Enforcement Act may be closer to the definition appropriate for this Convention: “The term ‘Internet’ means the international computer network of interoperable packet switched data networks.”⁷¹

“Gambling”

One of the potentially contentious provisions of the Convention is the provision that will specify what types of gambling will be covered by the Convention. Listing specific games is clearly

⁶⁹ Convention on Cybercrime, Budapest, November 23, 2011, Article 1(a).

⁷⁰ Green Paper, *supra* note 10, p. 14.

⁷¹ Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §5362(5).

problematic since new games are being developed constantly; rather, a general definition should be formulated.

In the European Union, the definition in the 2000 E-Commerce Directive excludes from its scope “gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.”⁷² The 2006 Unlawful Internet Gambling Act defines gambling as “plac[ing], receiv[ing], or otherwise knowingly transmit[ing] a bet or wager,” and specifies the term “bet or wager” in detail.⁷³ In Nevada, “gambling” (or “gaming”) “means to deal, operate, carry on, conduct, maintain or expose for play any game ... defined [by the statute], or to operate an inter-casino linked system.”⁷⁴ The Nevada statute defines a “game” as “any game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value,” and provides a non-exhaustive list of examples of such games.⁷⁵ The definition in the Convention should be built on a compromise from among the various national, transnational, and state definitions.⁷⁶

It is important to keep in mind that each definition will be subject to a separate interpretation by each signatory country, which may, in the process of implementation, adjust its interpretation to its particular goals. This built-in flexibility for separate interpretations of the definition of the term “gambling” could likely facilitate an agreement on the general formulation of the term.

⁷² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Article 1(5)(d).

⁷³ Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §5362(1) and (10)(A).

⁷⁴ N.R.S. §463.0153.

⁷⁵ N.R.S. §463.0152.

⁷⁶ For examples of other national definitions of the term “gambling” see Lycka, *supra* note 11, p. 180.

“Requesting national authority”

According to the enforcement mechanism outlined in the Convention, a country’s national authority—the requesting national authority—will send a request for enforcement assistance to another country’s national authority—the requested national authority.⁷⁷ Ideally, there should be one or a limited number of requesting national authorities per country. The definition should be formulated generally and include an obligation for countries to communicate to a central repository—administered either by the country-depository of the Convention or by the Secretariat⁷⁸—the name and contact details of their national authorities.⁷⁹ This mechanism of communications allows countries to efficiently change the designations of their authorities and quickly update contact details whenever necessary.

“Requested national authority”

On the receiving end of the request for enforcement assistance is the requested national authority—the authority that receives requests from other countries’ requesting national authorities. While many countries might choose to designate one authority as both their requesting and requested national authority, other countries might decide to designate two different authorities to handle the separate functions. As with the definition of requesting national authority, the definition of requested national authority should be formulated generally

⁷⁷ See *infra* Article 4 for a discussion of the enforcement assistance.

⁷⁸ See *infra* Article 8.

⁷⁹ See *infra* Article 7.

and include a requirement that the names and contact details of requested national authorities be communicated to the central authority.⁸⁰

“National regulating authority”

While the enforcement provision employs the terms “requesting national authority” and “requested national authority,” other provisions of the Convention will use the term “national regulating authority.” In countries with legalized gambling, national authorities will exist to serve as the “national regulating authority.” In some countries these authorities may perform all three of the functions of “national regulating,” “requesting national,” and “requested national” authorities; in other countries these functions may be distributed between two or among three different authorities. Federal countries may designate multiple national regulating authorities—“national” in this case indicating that they are equivalent authorities of a single country, not that they are federal-level authorities. As with the requesting and requested national authorities, the names and contact details of national regulating authorities should be communicated to the central authority.⁸¹

A problem may arise for countries with no legalized gambling and no existing “national regulating authority” for gambling. To remedy the lack of an existing appropriate authority, the countries would have to appoint *some* national authority, even if it were not gambling related, to perform the functions of the “national regulating authority.” In countries that enforce anti-gambling laws, appropriate authorities may emerge within the general law enforcement agencies

⁸⁰ See *infra* Article 7.

⁸¹ See *infra* Article 7.

(such as the justice department, justice ministry, or attorney general's office). In countries with no gambling laws, or countries that have never enforced their anti-gambling laws, new authorities would have to be created or an existing authority would have to be tasked as the national authority within the meaning of the Convention.

Article 3 – Exchange of Relevant Information

To facilitate effective enforcement, countries should cooperate by exchanging relevant information via their national regulating authorities. This exchange of information must be without prejudice to national rules on data protection, whether they be rules on personal data protection (privacy rules) or other rules protecting certain types of data or data in certain situations. Countries should be permitted to deny requests for information if the requests concern protected data, or to postpone delivery of the data, for example if immediate delivery could jeopardize an ongoing criminal investigation.⁸²

It is important to maintain the discretion of the country that receives a request for information to deny or postpone the exchange of information. In addition to any legal barriers that may prevent the sharing of information with other jurisdictions, a country's reason for denying an exchange of information may stem from the country's doubt as to whether the request for information is in fact motivated by the goals of regulating online gambling and therefore within the scope of this Convention. The Convention could provide for a dispute settlement mechanism, as described

⁸² For a similar provision see, *e.g.*, the Council of Europe's Convention on Cybercrime, Article 27(5).

below,⁸³ to allow for the resolution of disputes concerning requests for information if the proffered ground for the denial or postponement of information exchange were contested by the requesting country.

Article 4 – Enforcement Assistance

The core of the Convention is the provision on enforcement assistance. Because a country cannot enforce its online gambling regulations against an operator with no assets or other presence in the country, the country must seek assistance from other countries where the operator does have assets or a presence. To effectuate enforcement, the requesting national authority of the country sends a request for assistance to the requested national authority of a country in which the operator has assets or some other presence. Countries that address the online enforcement problem by imposing indirect liability on and effectuating enforcement against third parties, such as payment processors (a solution adopted by the United States), can maintain such liability and enforcement mechanisms; however, the Convention certainly does not require that such indirect liability be imposed, and in fact is designed to facilitate an environment in which the indirect liability of and enforcement against third parties are not necessary.

The functioning of the enforcement assistance can be illustrated as follows: Authorities in country A, which prohibits online poker, discover that operator O offers online poker to users accessing O's website from A. The authorities in A cannot enforce country A's regulations against O because O has no assets in A; O operates from B, where all of its assets and officers

⁸³ See *infra* Article 9.

are located. Therefore, based on the proposed Convention, A's national requesting authority sends a request to B's national requested authority, which in response to A's request takes measures in B to make O use appropriate filters to prevent users in A from connecting to O's online poker site. O would have to use geolocation tools to determine the location of its users, and for any users connecting from A, O would have to adjust the content accessible to these users to meet A's regulations against online poker.

This scenario is only an illustration of the functioning of the mechanism; the enforcement assistance would certainly not be limited to online poker or to a complete denial of access to gambling. For example, other countries may seek an operator's compliance with technological requirements for online slot machines and request that the operator exclude users connecting from such countries from accessing particular slot machines.

The law of the requesting country will determine what decisions by which agency in the requesting country shall trigger the filing of an enforcement assistance request with a requested national authority, and the requesting country's law shall also provide for any appeals or remedies that the operator may pursue in the requesting country with regard to the effects of the enforcement assistance request. In the above example, A's law will specify the procedural and substantive requirements necessary for an agency in A to render a decision that causes A's requesting national authority to submit an enforcement assistance request to B's requested national authority. Once B's requested national authority receives the request, B's authority will not scrutinize whether A's request is based on a decision in A that complies with A's procedural and substantive requirements. If operator O wants to object to the submission of the request, O

must seek redress in A under A's law. A's requesting national authority would have to notify B's requested national authority if A's decision were to change, in which case B should cease enforcement against O.

The success of the mechanism is predicated on the use of geolocation tools and a limitation of access to content that is based on a user's location. Geolocation and filtering are not new to the gambling industry; for example, some existing online gambling operators already prevent users that connect to the Internet from the United States from connecting to their gambling pages. Online gambling operators also use geolocation tools to prevent fraud. However, the imposition of (as opposed to the voluntary compliance with) an obligation to geolocate in the requested country in order to filter out users from the requesting country presents legal difficulties and could raise concerns over free speech protections and the freedom to conduct business in the requested country. In addition to the legal issues it raises, enforcement based on geolocation is not free of technological problems.

Enforcement of Public Laws Applied by Administrative Agencies

One problem—perhaps the most significant problem—of the proposed enforcement assistance mechanism is that it concerns enforcement of 1) public laws and 2) decisions by administrative agencies. Countries are not obligated to assist each other in enforcing the decisions of their counterpart administrative agencies. Court decisions may often be recognized and enforced; although countries have failed to agree on an international convention to facilitate the

recognition and enforcement of foreign judgments,⁸⁴ the principle of international comity suggests that, save for exceptional circumstances, countries should recognize and enforce decisions of courts of other countries.⁸⁵ Arbitration decisions enjoy a greater certainty of enforcement abroad thanks to a widely-adopted and respected international convention on arbitration awards.⁸⁶ However, neither the principle of comity nor the international convention on arbitration awards extends to the recognition and enforcement of decisions that arise out of public laws (or laws that are penal in nature)—such as tax laws, for example—or decisions by administrative agencies. Decisions concerning the regulation of online gambling would be both based on public laws and likely rendered by administrative agencies. Although in many countries parties can file appeals with courts against decisions by administrative agencies, the Convention should not require appellate decisions; given the instantaneous nature of conduct on the Internet and the weight of public policy concerns that are involved, the Convention should permit a decision by an administrative agency to trigger the enforcement assistance of Article 4 with the understanding that the requested national authority will cease enforcement if the decision in the requesting country is overturned.

As for the decisions of a country's national authorities concerning public laws, other countries may choose to provide assistance to support such decisions; however, it is ultimately a matter for the requested country's authorities to decide as to whether the requested country will cooperate.

⁸⁴ The proposal to draft a convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters encountered great disagreement among the negotiating countries, and resulted in the adoption of a very limited Convention on Choice of Court Agreements. The negotiations of the general convention were reopened in 2012. *See* Ongoing Work on International Litigation and Possible Continuation of the Judgments Project, Preliminary Document No 5 of 5 March 2012, *available at* <http://www.hcch.net/upload/wop/gap12pd05e.pdf> (last visited Mar. 29, 2012).

⁸⁵ For the grounds for the non-recognition of a foreign-country judgment, see, e.g., Uniform Foreign-Country Money Judgments Recognition Act, 2005, Section 4.

⁸⁶ *See* Convention on the recognition and enforcement of foreign arbitral awards, 1958.

This discretion ensures that the assistance will not violate the requested country's national legal requirements. For example, a Red Notice issued by the International Criminal Police Organization (Interpol) notifies countries of a person of interest and of the request for a provisional arrest. Although the requested country may arrest the person, the Red Notice does not mandate that the person remain in custody nor that the person must automatically be handed over to the requesting country; the national law of the requested country will determine whether the person will remain in custody, and an extradition proceeding will determine whether the person will be extradited to the requesting country.⁸⁷ The different result in the case of the proposed Convention is that the decision by a requesting national authority should translate directly into a corresponding action by the requested national authority, with only a minimal basic scrutiny in the requested country; the basic scrutiny should ensure that no significant public policies of the requested country would be offended by the enforcement.

One solution to the problem of the enforcement of decisions concerning the gambling laws of foreign countries is to incorporate into a national law an obligation for gambling operators to comply with the foreign gambling laws of all countries in which the operators operate; only if an operator so complies will a country grant an online gambling license to the operator. This solution is known to the industry; for example, under Nevada law, “[a] licensee shall not, in a foreign gaming operation, knowingly ... [v]iolate a foreign, federal, tribal, state, county, city or township law, regulation, ordinance or rule, or any equivalent thereof, concerning the conduct of

⁸⁷ Similarly, when a judicial authority requests the cooperation of a foreign judicial authority through a letter of request or a letter rogatory, the foreign judicial authority should cooperate, but only within the limits of its own country's laws. The decision whether to provide the requested assistance (evidence) lies with the requested national judicial authority. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970, Articles 9 and 10.

gaming.”⁸⁸ In assessing applications for licenses, the Alderney Gambling Commission considers *inter alia* an applicant’s character and “the manner in which the applicant currently conducts any form of [online gambling] in any jurisdiction.”⁸⁹ The Commission “may have regard to any other licence ... allowing the applicant ... to conduct any form of gambling lawfully in ... another jurisdiction,”⁹⁰ loss of such a license,⁹¹ and “any penalties or sanctions ... imposed by gambling or other regulators outside Alderney.”⁹² The licensee must notify the Gambling Commission of any changes in the status of the licensee’s license in any foreign jurisdiction.⁹³ Additionally, Alderney imposes obligations on its licensees to comply with foreign online gambling advertising requirements,⁹⁴ and to “keep abreast of international developments as they affect the lawfulness” of online gambling to make sure that its licensees do not provide online gambling “where to do so would constitute criminal activity by its customers.”⁹⁵

While the incorporation of the obligation to comply with foreign gambling laws solves the problem of enforcement of foreign public laws, the foreign compliance requirement creates a new problem: The incorporation implies that a national regulating authority must assess the legality of the operator’s actions in a foreign jurisdiction under that jurisdiction’s laws. As the “Black Friday” situation has shown, the assessment of legality under foreign laws may be

⁸⁸ N.R.S. 463.720. “A foreign gaming operation” means a gaming operation outside the State of Nevada. N.R.S. 463.680. Originally, the statute required Nevada gaming licensees to obtain approval prior to operating gaming outside of Nevada, with the Gaming Control Board assessing the foreign gaming regulations before approving the licensee’s operations in the foreign jurisdiction. Since 1987 the assessment of foreign gaming regulations has not been required, and since 1993 no prior approval for foreign gaming operations has been required for Nevada licensees.

⁸⁹ Alderney eGambling Regulations 2009, as amended in 2010 and 2011, e.g., sections 21(1)(a) and (h), 22(b)(i), 41(1)(a), 42(1)(b)(i), 65(1)(a), 66(1)(a) and (h), 67(b)(i), 85(1)(a), 102(1)(a), 122(a).

⁹⁰ *Id.*, e.g., sections 21(2) and 41(2)(a), 42(2); for certificates section 58(1)(b)(i), 65(2), 66(2), 85(2).

⁹¹ *Id.*, e.g., section 41(3), 42(2).

⁹² *Id.*, e.g., section 41(2)(b).

⁹³ *Id.*, e.g., sections 4(h)(i), 6(h)(i), 8(1)(e)(i), 60(g)(i).

⁹⁴ *Id.*, sections 4(c)(ix), 6(c)(ix), 8(1)(c)(ix), 60(b)(ix).

⁹⁵ *Id.*, sections 4(f), 6(f), 8(d), 60(e).

difficult,⁹⁶ and only the national regulating authority of the foreign country can definitely assess the legality of actions in its jurisdiction. The enforcement assistance proposed in this Convention would enhance laws like the laws of Nevada and Alderney because it would provide a mechanism under which national regulating authorities would be notified of any illegal foreign conduct by their licensees, and it would set a standard for the licensees to follow to comply in a territorially limited manner with foreign regulatory requirements. Once notified of illegal conduct, national regulating authorities could act within the scope of their national laws; they would not enforce foreign public laws or decisions by foreign administrative agencies, but they would enforce their own national laws based on their own decisions.

In a country with a foreign compliance obligation, the national regulating authority may act against an operator as soon as it receives the relevant information under Article 3 of the Convention. While actions by a national regulating authority in response to information obtained under Article 3 would be only a matter of that authority's national law, an action by the requested national authority under Article 4 would be required as an international obligation under the Convention. As noted earlier, the Convention should provide for assistance in the enforcement of the decisions of administrative agencies with the understanding that any assistance would cease if the requesting national authority notified the requested national authority that the decision of the requesting country's administrative agency had been overturned by an appellate body. In such a case an operator who had been damaged by the decisions of the

⁹⁶ See, e.g., *Report by Peter Dean to the Alderney Gambling Control Commission, 26 March 2012*, available at <http://www.gamblingcontrol.org/userfiles/file/FTP%20Report%2026%20March%202012.pdf> (last visited May 14, 2012) (The Alderney Gambling Control Commission “takes the view, as do other reputable gambling regulators, that it cannot be responsible for interpreting or enforcing the laws of other jurisdictions.” *Id.*, par. 36.) On “Black Friday” in general see also I. Nelson Rose, *Poker's Black Friday*, 15 *Gaming Law Review and Economics* 327 (2011).

requesting country's authorities could pursue a remedy in a proceeding in the requesting country (not in the requested country) based on the requesting country's law.

The Convention must permit the requested national authority to scrutinize the content of a request against its own national public policy and allow for a public policy exception to enforcement of the request; however, the requested national authority cannot deny an enforcement assistance request solely because the request has as its objective the imposition of geolocation and filtering on the operator, because this form of enforcement is accepted by all countries who sign the Convention.⁹⁷ The means of achieving compliance with an order to geolocate and filter (*e.g.*, contempt orders) in the requested country will be governed by the law of the requested country. While an operator would not be able to object in the requested country to the requesting national authority's request (only a proceeding in the requesting country would be permitted for that purpose), the operator would be able to raise a public policy objection in the requested country against the enforcement of the request and would be a party to contempt proceedings in the requested country.

The Convention provides for a possibility for a requested national authority to deny enforcement assistance if the requesting country appears to have a viable means of enforcement against the operator (*e.g.*, against the operator's assets in the requesting country) but uses (or rather misuses) an enforcement assistance request under the Convention. Such a situation could conceivably occur if a requesting country were trying to save resources that it would have to expend to enforce a decision against the operator domestically. The requested national authority may

⁹⁷ See *infra* for a discussion of standards setting for geolocation.

decide sua sponte to deny enforcement assistance in this situation or decide to deny enforcement after an objection by the operator (who might have its own reasons for preferring enforcement in the requesting country instead of the requested country). Disputes between countries concerning this type of misuse of enforcement assistance requests could certainly arise and could be subject to the dispute resolution mechanism discussed below.⁹⁸

A Territorially Limited Remedy and Free Speech Concerns

The remedy that the Convention seeks to provide consists of the installation of geolocation tools and the filtering of content by an online gambling operator. The problem with the enforcement of such remedies on the Internet has been that even if the remedies are defined in a territorially limited manner (in the example above the remedy should prevent users connecting from A from accessing O's online poker), the remedies can have implications outside the specified territory (A), and in particular in the country where such measures must be installed and operated (B).

In the United States, the *Yahoo!*⁹⁹ and *Viewfinder*¹⁰⁰ cases demonstrate the problem. In *Yahoo!*, a U.S. court refused to enforce a French judgment that ordered Yahoo! to prevent users connecting to the Internet from France from accessing Nazi memorabilia offered on its pages. In *Viewfinder*, a U.S. court refused to enforce a French judgment that ordered a U.S. company to remove certain content that was found to infringe intellectual property rights in France. In both cases the U.S. courts found the foreign judgments to be contrary to U.S. public policy because the judgments

⁹⁸ See Article 9 *infra*.

⁹⁹ *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001), *rev'd en banc*, 433 F.3d 1199 (9th Cir. 2006).

¹⁰⁰ *Sarl Louis Feraud Intl. v. Viewfinder, Inc.*, 489 F.3d 474 (2d Cir. 2007).

did not comply with the robust free speech protections of the First Amendment to the U.S. Constitution.

The effects of the two French judgments were limited—or should have been interpreted as being limited—to the territory of France, meaning that they should have been satisfied by a territorially limited enforcement measure that would have affected only users connecting to the Internet from France. Arguably, geolocation and filtering based on user location would have allowed for such a targeted enforcement. However, the U.S. courts concluded that requiring U.S. companies to adjust their activities in the United States in the manner required by the French courts, even if only with effects outside the United States,¹⁰¹ would be incompatible with the First Amendment free speech protections under U.S. law. Similarly, consistent with a line of court decisions concerning foreign libel judgments, the 2010 SPEECH Act allows only foreign libel judgments that are compatible with the level of protection of free speech safeguarded by the First Amendment to be recognized and enforced in the United States, suggesting that also in these cases, enforcement will be impossible even if a remedy targets acts outside of the United States.¹⁰²

The question thus becomes whether the enforcement by a national gambling authority of its own decision based on a request by a foreign requesting authority (B’s decision prompted by A’s request) could cause the same free speech protection concerns that recognition and enforcement of foreign judgments concerning libel, intellectual property, or speech in general may pose.

¹⁰¹ Note that—at least at the time of the *Yahoo!* Decision—the issue of whether geolocation tools were sufficiently reliable was contested. See Declaration of Bennet Laurie in Lieu of Direct Testimony at 12, *Nitke v. Ashcroft*, 253 F. Supp. 2d 587 (S.D.N.Y. 2005) (No. 01 Civ. 11476).

¹⁰² Securing and Protecting our Enduring and Established Constitutional Heritage (SPEECH) Act, 28 U.S.C. §§ 4101–05 (2010).

Undeniably, a limitation on speech occurs not only in the requesting country (A) but also in the requested country (B); although only users connecting to the Internet from the requesting country (A) should feel the effects of the limitation, it is in the requested country (B) where the online gambling operator has to expend the resources to obtain and maintain geolocation tools and a content filtering system. However, this type of limitation on speech seems sufficiently tailored to the particular needs of the online gambling regulation.¹⁰³ The operator would have to prevent access only to users accessing the Internet from the requesting country (A) and only to the extent that the content accessible from the requesting country violates the requesting country's online gambling regulation. In countries that incorporate a foreign compliance requirement,¹⁰⁴ the geolocation and filtering will achieve compliance not only with the foreign online gambling regulation but also with the national law of the requested country that mandates compliance with foreign gambling laws.

It is possible that a requesting country may attempt to use an enforcement assistance request under the Convention to curtail free speech; for example, a country may send a request claiming that an operator is violating the country's laws while in fact the country is really seeking to censor the operator's speech—for example, to prevent the operator from endorsing on its website a candidate for a political position. For such situations, the Convention must preserve the discretion of the requested country to deny any enforcement assistance if the requested country suspects that the requesting country's request is prompted by motives that are not related to

¹⁰³ “Electronic communications related to gambling should be able to be regulated under the First Amendment, but only if such regulation are narrowly and precisely drawn in order to avoid chilling permissible electronic communications.” Testimony of Eric Goldman before the National Gambling Impact Study Commission's Regulatory, Enforcement and Internet Subcommittee, December 1, 1998, *available at* http://eric_goldman.tripod.com/articles/gamblingarticle.htm (last visited June 16, 2012).

¹⁰⁴ See *supra*.

online gambling regulation.¹⁰⁵ The dispute resolution mechanism proposed below could be employed to solve countries' disagreements on free speech.

Disputes about the scope of a remedy should be resolved within the requesting country. The requesting national authority should be specific in describing the material that should be made inaccessible to users connecting from the requesting country and in describing who should make the material inaccessible, and the requested country should enforce the specific decision of the requesting country. If an operator considers the requesting country's decision to be contrary to the requesting country's law, either in terms of subject matter or territorial scope, the operator should seek redress in the requesting country, not in the requested country.

Enforcement through Geolocation

A not insignificant problem of geolocation enforcement is the establishment of basic minimum standards that countries will use to judge whether geolocation is deemed sufficiently effective and therefore compliant. Standards are very important because, as Malcolm Sparrow has pointed out in his study on online gambling, "licensed sites may have an incentive to be lax with geolocation controls: excluding users from certain states lowers their overall customer base. Therefore, a regulator must ensure that geolocation controls are updated frequently and meet

¹⁰⁵ For example, as the Council of Europe's Convention on Cybercrime does, this Convention could formulate the exception to apply whenever the requested country "considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests." Council of Europe's Convention on Cybercrime, Article 27(4)(b).

desired standards of quality.”¹⁰⁶ In fact, the regulating authority of a requested country may not have sufficient incentive to impose on operators located in its territory a requirement to effectively geolocate and filter out users connecting from other jurisdictions. Therefore, it is necessary for countries to agree on minimum standards for acceptable geolocation.

Some critics will argue that no geolocation standard is sufficient for the purposes of compliance because they deem geolocation ineffective per se. Indeed, the effectiveness of geolocation can be diminished by users evading geolocation; tools exist that allow users to change the information on their Internet-connected devices that identifies their location, and cause the users to appear as if they are located in a jurisdiction other than the one in which they are physically located.¹⁰⁷

Although the reliability of geolocation tools continues to improve, so do the capabilities of tools designed to allow users to evade geolocation. At present the number of users evading geolocation based on Internet protocol addresses appears to be rising because geolocation and content filtering based on user location are becoming more pervasive, evasion tools are becoming increasingly user-friendly, and users are becoming more aware of location-based filtering.¹⁰⁸

¹⁰⁶ Malcolm K. Sparrow, *Can Internet Gambling Be Effectively Regulated? Managing Risks*, Hearing before the Committee on Financial Services, U.S. House of Representatives, 111th Cong., No. 111-92, December 3, 2009, Appendix, pp. 108-109.

¹⁰⁷ For an extensive analysis of the evasion of geolocation and its legal implications see Trimble, *supra* note 6.

¹⁰⁸ Contributing to the rising numbers of users evading geolocation tools is also the increasing awareness by users that website operators are tracking their activities on the Internet and the resulting use, by many users, of anonymization tools. The use of such tools may in some instances lead to the evasion of geolocation. See Trimble, *supra* note 6, 602-604.

The fact that geolocation may be evaded and that the legal status of acts of evasion of geolocation is unsettled may suggest that geolocation is an unsuitable compliance method.¹⁰⁹ However, geolocation methods are being improved constantly; they do not rely only on Internet protocol addresses but utilize other data, such as mobile telephone networks,¹¹⁰ GPS data,¹¹¹ and Wi-Fi signals.¹¹² When geolocation is augmented with additional information—including data that the user must provide that is difficult to alter—the ability to evade is diminished. To gamble online, users must provide a credit card number and a billing address, and usually additional information that allows the operator to verify their identity and age. Although the input of the additional data may be manipulated, the data can confirm or call into question the results of geolocation and decrease the chance that a user can successfully misrepresent his location.¹¹³ Additionally, it is possible that future legislative efforts will settle the legal status of the evasion of geolocation.¹¹⁴

Recent legislative proposals, if they have addressed the issue of geolocation, have formulated geolocation standards in general terms, leaving it upon regulatory agencies to determine the detailed requirements for geolocation tools. For example, according to the Unlawful Internet Gambling Enforcement Act of 2006, one requirement for a gambling operation to be excluded

¹⁰⁹ See Trimble, *supra* note 6; SOPA, *supra* note 25.

¹¹⁰ Testimony of Keith Marsden, Managing Director 192business.com, Hearing before the Committee on Financial Services, U.S. House of Representatives, 111th Cong., No. 111-92, December 3, 2009, Appendix, p. 272.

¹¹¹ *E.g.*, Responsible Gaming Networks Pty Ltd.'s Safety Net system with its USB Player Protection Key, *supra* note 28.

¹¹² *E.g.*, GeoComply, *supra* note 28.

¹¹³ Advice on where to obtain offshore accounts is readily available on the internet. See, *e.g.*, Radar O'Reilly, *Complete Guide to Offshore Accounts for Funding Online Casino and Poker Play*, 2007, available at http://www.blackjackforumonline.com/Complete_Guide_to_Offshore_Bank_Accounts.htm (last visited Oct. 17, 2011). For the response of a geolocation provider to the cybertravel problem see, *e.g.*, *What Is Screen Sharing Software and How Is It Used?*, <http://geocomply.com/blog/what-is-screen-sharing-software-and-how-is-it-used/> (last visited June 14, 2012).

¹¹⁴ See Trimble, *supra* note 6.

from the definition of “unlawful gambling” is that “the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include ... location verification requirements *reasonably designed to block access* to ... persons located out of such State.”¹¹⁵ One bill that has been proposed to amend the 2006 Act, the Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2011, would require that an Internet poker facility “demonstrate to the qualified State agency that such facility maintains appropriate safeguards and mechanisms, in accordance with standards established by the qualified State agency, ... to ... ensure, *to a reasonable degree of certainty*, that the individual placing a bet or wager is physically located in a jurisdiction that has not prohibited such bets or wagers at the time the bet or wager is placed...”¹¹⁶

Similarly, the Convention envisions that countries establish minimum standards for geolocation tools to meet in order to be considered effective measures under the Convention. The standards cannot be set in the Convention; they must be established separately in a manner that allows for necessary updating as the relevant technology develops. The standards should be set at the highest level possible and encourage competition in the geolocation tool market; countries should avoid imposing unreasonably detailed standards that would discourage competition among geolocation tool suppliers.

¹¹⁵ Unlawful Internet Gambling Enforcement Act of 2006, §5362 (10)(B)(ii)(I) (emphasis added).

¹¹⁶ Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2011, H.R. 2366, 112th Cong., section 104(d)(2) (emphasis added).

Article 5 – Cooperation in Licensing and Standardization of Technological Requirements

As mentioned earlier, cooperation among national regulating authorities in standardizing their licensing and technological requirements would be extremely beneficial. Harmonized licensing in multiple jurisdictions would not only decrease the regulatory burden on gambling operators, but it would also facilitate increased cooperation among national regulating authorities. Uniform technological requirements could bring savings in testing and regulatory approval processes.

It is possible that only some countries will be amenable to common licensing and technological standards, and therefore closer cooperation might need to be left to a separate bilateral or multilateral convention or agreement to be concluded outside this Convention. In such circumstances, the Convention could include a provision stating that the signatory countries wish to continue to pursue further cooperation in the areas of licensing and technological standards.

Article 6 – Cooperation in the Area of Responsible Gambling

The parties to the Convention should cooperate in the area of responsible or problem gambling, particularly by supporting and exchanging research on problem gambling, developing and sharing publications on problem gambling, and collecting data on problem gambling.

No responsible regulation of the gambling industry can overlook the issues of problem gambling, and countries have been active in collecting data on problem gambling. For example, according to the European Commission, fifteen of the twenty-seven EU member countries have conducted

some studies on problem gambling.¹¹⁷ In addition to government-sponsored studies,¹¹⁸ not-for-profit organizations supported by the industry, such as the National Center for Responsible Gaming,¹¹⁹ and research institutions¹²⁰ have collected information and supported research on problem gambling. It is both a matter of public interest and the responsibility of the gambling industry to pool industry resources at the international level and facilitate further research and development on strategies to address problem gambling.

Cooperation in the area of responsible gambling could include enforcement assistance concerning individual players' self-exclusion requests. If national gambling regulations provide for an option for a player to self-exclude from games—either completely by preventing access to games, or partially by setting limits on wagers or losses¹²¹—then online gambling operators should also comply with player self-exclusion requests—even if the online operators operate from other jurisdictions. Particular attention should be paid to protecting privacy in enforcement assistance requests that concern individual players; privacy should be protected in assistance requests relating to a player's specific requests for self-exclusion that apply to all online gambling sites accessible from the player's jurisdiction, even when the sites are operated from a different country. The player should receive information explaining that a self-exclusion request may require enforcement measures that necessitate the player's data being forwarded to a foreign requested national authority.

¹¹⁷ Green Paper, *supra* note 10, p. 20.

¹¹⁸ E.g., the National Gambling Impact Study Commission in the United States established by the National Gambling Impact Study Commission Act of 1996, Pub.L. 104-169, August 3, 1996.

¹¹⁹ National Center for Responsible Gaming, <http://www.ncrg.org/> (last visited Oct. 7, 2011).

¹²⁰ E.g., Große Studie zum Glücksspielverhalten, April 13, 2010, <http://www.schleswig-holstein.de/MWV/DE/Service/Presse/PI/2010/100413UkshStudieGluecksspiel.html> (last visited March 30, 2012).

¹²¹ See, e.g., Regulations of the Nevada Gaming Commission and State Gaming Control Board, sections 5A.070.9 and 5A.130, as of March 12, 2012.

Article 7 – Appointment of National Authorities

The Convention should include a provision that sets a time at which and a place where countries—parties to the Convention must deposit a document designating their national authorities under the Convention. As suggested above in the proposal for Article 2, these authorities will include the requesting national authority, the requested national authority, and the national regulating authority. Nothing in the Convention will prevent a country from designating a single agency to assume all three of the authority functions under the Convention. A country will also be free to designate multiple agencies to assume the functions of a single authority; for example, federal countries like Germany may wish to designate agencies in the individual Länder. The Secretariat (see below in proposed Article 8) could be the depository where countries would have convenient access to the information.

Article 8 – Secretariat

Although the creation of a permanent Secretariat to administer the Convention is not indispensable for the functioning of the Convention, it appears that a Secretariat would enhance the enforcement mechanism in the Convention if it were to function as a central “clearinghouse” to centralize Convention administration and maintain an expertise from which all countries could benefit. The Secretariat could serve as the depository of designations of national authorities under Article 7, the repository of problem gambling research studies (see Article 6), and the organizer of meetings on standards setting and enhanced cooperation (see Article 5).

Article 9 – Dispute Resolution

Situations may arise in which countries—parties to the Convention will disagree on the interpretation of the Convention or its application. A requested country may disagree with a requesting country on the true purpose for which information is requested under Article 3. A requesting country may object to a requested country’s postponement of the delivery of information under Article 3, or a requesting country may contest a requested country’s decision to deny assistance in enforcement under Article 4 because of the requested country’s suspicion that the requesting country’s request is unrelated to online gambling regulation and is politically motivated (or otherwise unrelated to online gambling).

For situations in which countries disagree either on an interpretation or an application of the Convention, the Convention should provide for a dispute resolution mechanism. First, countries should be encouraged to negotiate and resolve disputes amicably between themselves. Second, the Convention may provide for arbitration of disputes before an arbitration tribunal. Third, the Convention can establish its own dispute resolution mechanism. Fourth, disputes concerning the Convention could be filed with the International Court of Justice, and fifth, if the Convention were to be concluded within the WTO framework, disputes concerning the Convention could be resolved under the WTO Dispute Settlement Understanding.¹²²

¹²² Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement.

Conclusions

In the regulation of online gambling it is time for countries to agree to disagree. Since the need for the effective enforcement of national gambling regulations might be the only point on which countries can agree at a time when a consensus on gambling in general, and on online gambling in particular, appears unachievable—not only at the global level but even at the level of individual countries—the Convention proposed in this chapter is designed to facilitate the effective enforcement of national online gambling regulations without requiring that countries change their current or future positions on online gambling.

Interest in the conclusion of the Convention should be shared by governments and gambling regulators in all countries. While countries that prohibit online gambling obviously have strong incentives to conclude the Convention and gain increased enforcement of their laws, what will be the incentives for regulators in jurisdictions that license online gambling operators to operate worldwide? After all, these jurisdictions have benefited from their global approach to online gambling and are unlikely to have an interest in reducing their licensing territorially. However, such jurisdictions, if they regulate online gambling responsibly, already require their licensees to comply with the laws of other jurisdictions, and therefore the proposed convention does not change the *status quo* for the regulators and licensees in these jurisdictions. Gambling authorities in these jurisdictions, if they are serious about having their licensees comply with other jurisdictions' regulations, should welcome the Convention, which would assist them in detecting licensee non-compliance and promote licensee compliance with other countries' laws.

Legal and law-abiding online gambling operators also have incentives to support the conclusion of the Convention. It is important for the health of the industry to have an effective enforcement of gambling regulations. The integrity of games, personal data, and financial information must be protected to enhance players' and the general public's confidence, participation, and trust in the games offered on the Internet, and effective regulation is indispensable to achieving this goal. Gambling industry support of the Convention will emphasize the industry's commitment to its support of responsible gambling, which needs to be more than a public relations matter if the industry is to address problem gambling effectively. Additionally, the Convention will level the playing field for legal online gambling operators by reducing competition from illegal gambling sites.

Some critics may be of the opinion that the Convention—and the effective enforcement of national online gambling regulations—is unnecessary because market forces will weed out illegal operators. This opinion assumes that players will ultimately opt to play only on sites that are licensed by responsible (and freely competing) regulators because the players will value the licensing and oversight that are associated with high quality online gambling regulation. While the idea of unrestrained free competition among regulators is appealing, it seems unrealistic to expect players to have sufficient information to make rational and informed choices concerning gambling sites and regulators. Implementation of strong public policies that are associated with gambling and that call for, for example, the prevention of money laundering and the assurance of responsible gambling, cannot rely solely on free competition among regulators.

The approach that calls for reliance on unrestrained free competition among regulators also ignores the fact that jurisdictions have legitimate reasons for wanting to prohibit gambling in their territories, or regulate gambling in their territories differently from other jurisdictions. Religious, moral, health, and other considerations play important roles in shaping countries' approaches to gambling, including online gambling. When countries adhere to a democratic ideal that says that populations ought to be free to choose—within acceptable limits defined by fundamental human rights—solutions for themselves, countries should assist each other in enforcing these solutions within the territorial limits of individual countries.

Enforcement of laws on the Internet is complicated, and there is strong public resistance to proposals that are aimed at enhancing the enforcement of laws on the Internet (and that may include solutions that might not always comply with fundamental rights and freedoms). The negotiations of the Anti-Counterfeiting Trade Agreement showed the public's displeasure with enforcement measures targeting the Internet: under public pressure, the negotiators were forced to eliminate a proposed three-strike enforcement measure. The Stop Online Piracy Act proposed in the United States also generated overwhelming opposition from the public, industry, and academia. Indications that the International Telecommunication Union might be interested in assisting enforcement on the Internet were also met with criticism. Undoubtedly, careful public relations work will be necessary for the success of any international convention affecting the enforcement of laws on the Internet. In the case of this proposed online gambling Convention, the public must be assured of the limited scope of the Convention and the substantial public benefits that the Convention will provide. Most importantly, however, the Convention must be

carefully crafted to safeguard free speech, due process, and other rights, including the protection of privacy.

The proposed Convention is not a cure-all. Certainly, there will be countries that will opt not to negotiate and not to sign the Convention. Some countries may not participate because they intend to become safe havens for those online gambling operators who plan to offer online gambling to users accessing the Internet from anywhere, including from countries that prohibit online gambling or from countries that have different requirements for online gambling. Undoubtedly, the functioning of the Convention will improve as the number of countries—parties to the Convention increases. As with other international treaties, it will be up to the countries with strong diplomatic and economic positions to persuade other countries to join and abide by the Convention. The status of the Convention would be enhanced if it were concluded within the WTO framework, which would not only facilitate its wide adoption by WTO member states but also strengthen its functioning by providing an established dispute resolution mechanism with sanctions that could be used to force countries to comply with the Convention, if necessary.

The executive branch of the U.S. government received a mandate from Congress in 2006 to seek cooperation with other countries in the area of Internet gambling; in adopting the Unlawful Internet Gambling Enforcement Act of 2006, Congress instructed the U.S. Government to “encourage cooperation by foreign governments and relevant international fora,” particularly in detecting money laundering, corruption, and other crimes, and “advance policies that promote the cooperation of foreign governments, through information sharing or other measures, in the

enforcement of [the] Act.”¹²³ The proposal for the online gambling Convention suggested in this chapter would promote cooperation among governments in the enforcement of any online gambling regulation, whether it be current U.S. regulation, current Nevada regulation, current Utah regulation, or any other regulation by any other jurisdiction in the world—whether current or future.

¹²³ Unlawful Internet Gambling Enforcement Act, H.R. 4954, 109th Cong., 2006, Title VIII, section 803.