Choosing Between Liberalization and Regulatory Autonomy under GATS: Implications of U.S.-Gambling for Trade in Cross Border E-Services

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ABSTRACT

In 2005, the World Trade Organization (WTO) Appellate Body presided over United States—Measures affecting the cross-border supply of gambling and betting services (U.S.-Gambling), in which Antigua argued that U.S. criminal laws banning the provision of cross-border online gambling services violate U.S. commitments under the General Agreement on Trade in Services (GATS). For the first time, the WTO’s dispute settlement process directly addressed the application of GATS to domestic regulatory barriers restricting cross-border trade in services. This Article examines GATS rules on domestic regulation as well as the WTO Appellate Body and Panel decisions in the case and asks if the WTO has improperly restricted members’ ability to regulate domestic concerns. What

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will be the broader impact of the WTO's rulings for cross-border trade in e-services? Highlighting the difficulties that members face in trying to resolve the conflict between liberalization and regulatory autonomy in the context of cross-border e-services, this Article argues that the scope of GATS rules on domestic regulation needs to be refined if GATS is to remain an instrumental force in liberalizing trade in e-services. The Article concludes with proposals to guide the negotiations on domestic regulation to ensure that such regulations are not unnecessarily burdensome to trade in e-services. Identifying certain unresolved issues of U.S.-Gambling that characterize the tension between market access and domestic regulatory autonomy, it also argues that these issues must be addressed in the negotiations on domestic regulation if a desirable balance between regulatory autonomy and progressive liberalization of global e-services markets is to be achieved.

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