

# HOSPITALITY, POLITICS OF MOBILITY, AND THE MOVEMENT OF SERVICE SUPPLIERS UNDER THE GATS

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*[The movement of natural persons constitutes one of the modes of supply for services identified under the General Agreement on Trade in Services ('GATS'). However, entry regulations have been recognised as a major barrier to such movement. Proponents of strict visa requirements often justify their position by invoking the sovereign right of states to adjudicate the entry of foreigners into their territory. Highlighting the cumbersome nature of procedures for the application and processing of these visas, this article argues that the real barrier to the movement of persons is not created by states exercising their right to regulate cross-border movement but rather by the administration of that right in an unreasonable, subjective and discriminatory manner. Such conduct is inconsistent with art VI(1) of the GATS. A case study of Australian business visa requirements will be offered to give an account of the administration of the said right at the moment of the encounter between the foreigner (be it the foreign business person, tourist, or asylum seeker) and the host. The host (ab)uses his or her authority to interrogate the foreigner to establish the foreigner's 'genuineness', by asking questions for which honest answers are not easy to provide. This encounter will be discussed through engaging with Jacques Derrida's reading of Immanuel Kant's right to hospitality.]*

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## I INTRODUCTION

I think you either invite someone to your country to stay as a permanent resident or a citizen, or you don't.<sup>1</sup>

Is the relationship with the foreigner a matter of law? Is it only the would-be permanent resident or citizen to whom our request to come may be extended? In other words, is hospitality conditional upon available legal taxonomies? Or should the laws of hospitality determine the character of rules that regulate the movement of people across borders?

It might not be appealing to speak of hospitality towards *unknown*<sup>2</sup> foreigners in the presence of the circulating phobia of phantom security threats that allegedly 'come from outside'.<sup>3</sup> Under current circumstances, one might question the soundness of the argument that advocates a policy of openness towards foreigners who cannot be classified as permanent residents or citizens.

Despite this gloomy situation, this article examines the tradition, as well as the ethics, of hospitality in a hitherto largely unexplored context — international economic law. The aim is to explore the possibility of hospitality towards the foreigner who does not fall into one of the 'conventional categories' of aliens, namely 'immigrant' and 'refugee'. It will be shown that hospitality becomes timely and urgent in relation to visitors who do not fall under established juridical categories, and not only when 'unlawful' aliens, migrants, asylum seekers, refugees, stateless persons, would-be permanent residents and citizens are encountered.

This article asserts that the *General Agreement on Trade in Services*<sup>4</sup> offers a new locus for hospitality by regulating the movement of 'natural persons supplying services' and by stressing the importance of the 'orderly movement' of persons across national borders.<sup>5</sup> However, an examination of business visa regimes will demonstrate that domestic law is anything but close to realising this ideal 'order'. Part II of this article will offer an analysis of the regulation of cross-border movement of service suppliers under the *GATS* and its *Annex on Movement of Natural Persons Supplying Services under the Agreement* ('*MNP Annex*'). The purpose here is to define the general scope of mobility of service suppliers formulated by the *GATS*, and to offer insight into the characteristics of barriers to movement related to immigration policies and visa requirements. This

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<sup>1</sup> Australian Prime Minister John Howard made this statement in response to calls for seasonal labourers from Pacific Island nations to be given access to the Australian labour market, at the Pacific Island Forum in Papua New Guinea, October 2005: SBS Television, *SBS World News Australia*, 25 October 2005.

<sup>2</sup> Jacques Derrida, *Adieu to Emmanuel Lévinas* (Pascale-Anne Brault and Michael Naas trans, 1999 ed) [trans of: *Adieu à Emmanuel Lévinas*]: 'The "unknown" is not the negative limit of a knowledge. This non-knowledge is the element of friendship or hospitality for the transcendence of the stranger, the infinite distance of the other': at 8.

<sup>3</sup> Derrida uses the phrase 'come from outside' in the context of inviting guests into one's home: Jacques Derrida, *Of Hospitality* (Rachel Bowlby trans, 2000 ed) 125 [trans of: *De l'hospitalité: Anne Dufourmantelle invite Jacques Derrida à répondre*].

<sup>4</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1B (*General Agreement on Trade in Services*) 1869 UNTS 183 ('*GATS*').

<sup>5</sup> *Ibid* art XXIX (*Annex on Movement of Natural Persons Supplying Services under the Agreement*) [4].

part concludes by demonstrating that complex entry measures create problems that manifest primarily when those measures are applied inconsistently and without transparency. Parts III and IV are premised on the proposition that the main impediment to achieving the freer movement of natural persons is 'psychological' in nature.<sup>6</sup> A case study of the Australian business visa application procedure that applies to service suppliers (mainly from developing countries) makes explicit the conceptual and practical bases of this claim. These procedures will be examined against the imperatives of the right to hospitality in order to identify the discursive practices that embody the psychological character of this impediment to movement.

I will also explore what hospitality is, or should be, by addressing a number of questions. What does the right to hospitality comprise? Or more precisely, what is the *right* hospitality in terms of our ethical responsibilities towards foreign guests? Can the *right* hospitality inform the development of laws and policies on the movement of persons in international economic law? Answers to these and other questions will draw on the ideas of Jacques Derrida. Applying Derrida's views of the laws of hospitality illustrates the types of injustices embedded in the laws regulating the movement of certain groups of service suppliers. The possibility, scope and limits of hospitality in the framework of immigration rules and policies will also be addressed in relation to the juridical category of service suppliers.

The right to hospitality is not about offering a political or juridical *solution* to injustices engendered by the politics of mobility.<sup>7</sup> However, it can help us identify instances in which the law is insensitive to the needs and the comfort level of the Other. This article contends that the existing immigration formalities and entry regulations — which are, among other things, designed to protect the security of a nation — embody a profound suspicion of the Other that is extremely difficult to overcome. Consequently, the host's threshold — that is, its limit of tolerance — of the Other has become so low in some cases that some foreigners are unable to choose their destination freely, and are thus unable to benefit from opportunities offered by new economic circumstances.

In 2004, the World Commission on the Social Dimension of Globalization, established by the International Labour Organization, published a comprehensive report on globalisation and its consequences.<sup>8</sup> This report urged the establishment of '[a] multilateral regime for the cross-border movement of people that makes the process [of globalisation] more orderly and eliminates the exploitation of migrants [and thus] could offer considerable gains to all'.<sup>9</sup> In this context, the law of hospitality helps us to identify areas within the existing regime of transnational movement in which improvement is needed and/or

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<sup>6</sup> See *Preparation for the 1999 Ministerial Conference: Movement of Natural Persons under GATS*, WTO Doc WT/GC/W/160 (1 April 1999) [4] (Communications from Pakistan).

<sup>7</sup> See Ruth Buchanan, 'Perpetual Peace or Perpetual Process: Global Civil Society and Cosmopolitan Legality at the WTO' (2003) 16 *Leiden Journal of International Law* 673, 699. Buchanan argues that cosmopolitanism (of which the right to hospitality is an integral part) is not concerned with solving the problems of justice in the world.

<sup>8</sup> World Commission on the Social Dimension of Globalization, International Labour Organization, *A Fair Globalization: Creating Opportunities for All* (2004) <<http://www.ilo.org/public/english/fairglobalization/report/index.htm>> at 22 May 2006.

<sup>9</sup> *Ibid* [432].

possible, to enable us to reach out to those who have been, and still are, excluded and/or exploited by this regime.

## II THE GENERAL AGREEMENT ON TRADE IN SERVICES

The *GATS* is one of the 17 international trade agreements administered by the World Trade Organization. It is the first multilateral set of rules covering international trade in services, and the first to create a framework and a set of common rules for the progressive liberalisation of such trade.<sup>10</sup> The scope of the *GATS* is extensive, covering almost all services and major world markets. The *GATS* also regulates the methods used to supply services to customers in foreign markets and the way in which commercial operations are established in these markets.<sup>11</sup>

The *GATS* does not define 'services' but focuses on the supply aspect of a service. In this regard, although the *GATS* applies to measures which affect the trade in services,<sup>12</sup> 'trade in services' is defined as 'the supply of a service'.<sup>13</sup> Article I distinguishes four ways in which a service can be supplied, which are also known as 'modes of supply'.<sup>14</sup> The fourth mode of supply contemplates the 'presence of natural persons',<sup>15</sup> referring to individuals travelling from their own country to supply services in another, such as university professors who teach abroad as visiting scholars.

### A Principles of Non-Discrimination, Horizontal Commitments and National Immigration Policies

A considerable achievement of the *GATS* was that it extended free trade principles from trade in goods to trade in services, through the incorporation of two important principles of non-discrimination: 'most favoured nation'<sup>16</sup> and 'national treatment'.<sup>17</sup> Other principles relevant to this discussion are 'market access' and 'domestic regulation'. Under the principle of market access, a member of the WTO cannot restrict the entry of service suppliers from other members through, for example, quotas or economic needs tests, except as set out in their schedule of commitments.<sup>18</sup> The principle of domestic regulation requires that member state regulations are administered in a 'reasonable, objective and impartial manner'.<sup>19</sup> These principles aim to reduce barriers to trade in services and thus procure a more efficient and competitive trade environment.

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<sup>10</sup> World Trade Organization, *Understanding the WTO* (3<sup>rd</sup> ed, 2005) 33–6, available from <[http://www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/tif\\_e.htm](http://www.wto.org/English/thewto_e/whatis_e/tif_e/tif_e.htm)> at 22 May 2006.

<sup>11</sup> Paul Paton, 'Legal Services and the *GATS*: Norms as Barriers to Trade' (2003) 9 *New England Journal of International and Comparative Law* 361, 365.

<sup>12</sup> *GATS*, above n 4, art I(1).

<sup>13</sup> *Ibid* art I(2).

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid* art I(2)(d) ('Mode 4').

<sup>16</sup> *Ibid* art II.

<sup>17</sup> *Ibid* art XVII.

<sup>18</sup> *Ibid* art XVI.

<sup>19</sup> *Ibid* art VI. For further discussion of domestic regulation, see generally Aaditya Mattoo and Pierre Sauvé (eds), *Domestic Regulation and Service Trade Liberalization* (2003).

In addition to the general principles that apply to all member states equally, members may undertake specific commitments, which have significant implications for the scope of their obligations. In effect, the majority of *GATS* obligations are specific commitments that are ‘negotiated undertakings particular to each *GATS* signatory’.<sup>20</sup> They determine the full nature and extent of each member’s obligations under the *GATS* and are mandated by art XX. Article XX(3) explicitly provides that members’ schedules of specific commitments ‘shall be annexed to this Agreement and shall form an integral part thereof’.

A member’s schedule of commitments is an agreement based on a prior expression of their willingness to be committed to certain terms. It is an agreement between the committed member and each of the other individual members. Within this legal relationship, sector-specific commitments included in the schedule of commitment are equally legally binding. For instance, Australia’s commitment ‘concerning the entry and temporary stay of natural persons’ in relation to ‘service sellers, as business visitors’ is inscribed in its schedule of commitment.<sup>21</sup> It suggests that Australia has committed itself to refrain from applying additional restrictions on the entry of service sellers who otherwise qualify for entry under national laws, if they satisfy three conditions: their initial stay does not exceed 12 months; they travel to Australia for business purposes; and they do not intend to engage in work that might otherwise be carried out by an Australian citizen or Australian permanent resident.<sup>22</sup> In other words, the consequence of the inscribed commitments is that Australia is under an obligation to permit the ‘temporary entry’ of nationals of any other WTO member into Australia who meet all three conditions. This obligation applies even though Australia may not have any intention to commit itself to allowing, for example, the entry of service suppliers from certain WTO members. The same rationale applies to Mode 4 commitments inscribed in other members’ schedules of commitment. However, a later part of this article will suggest that in practice, obstacles such as non-transparent visa regimes prevent the freer movement of natural persons.<sup>23</sup> To better understand the nature of the barriers to free movement, we must first consider the rights of members to regulate the supply of services.

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<sup>20</sup> *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services*, WTO Doc S/L/92 (23 March 2001) [2] (Explanatory Note adopted by the Council for Trade in Services).

<sup>21</sup> *Australia — Schedule of Specific Commitments*, WTO Doc GATS/SC/6 (15 April 1994) 2–4 (Schedule of Concession).

<sup>22</sup> *Ibid* 4–5.

<sup>23</sup> See below Part IV.

B *States' Right to Regulate Cross-Border Movement*1 *The Scope of the Right*

The right of states to admit or exclude aliens is well established under international law.<sup>24</sup> It is 'usually considered an attribute of sovereignty and territoriality and is defended as an inherent power necessary for the self-preservation of the state'.<sup>25</sup> This right has been reinforced by para 4 of the *MNP Annex*, which states that '[t]he Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory'.<sup>26</sup> The *GATS* also does not apply to 'measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis'.<sup>27</sup> While the *MNP Annex* permits the use of measures that regulate entry, it stresses that these measures shall not be applied 'in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment'.<sup>28</sup>

A crucial question here is whether conditions of entry, or more precisely the manner in which member states exercise their right to regulate transnational movement, can be regarded as an impediment to market access. The *MNP Annex* stresses that '[t]he sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment'.<sup>29</sup> However, the *GATS* fails to clarify whether states' *administration* of visa measures could constitute an impairment or nullification of benefits. For instance, Country A may require a visa for service suppliers from certain countries, but may also require nationals of Country B to undergo extra security checks and to provide documents to support their application for an entry visa. Such additional requirements may make the visa processing period significantly longer for nationals of Country B in comparison to that of the nationals of other countries. Would this behaviour amount to impairment or nullification of benefits under Country A's commitments to Country B? Moreover, would Country A be regarded as being in breach of its obligations under the most favoured nation principle? As yet, there has been no judicial determination by the WTO's Dispute Settlement Body ('DSB') on this matter, and it is uncertain whether a member could ever successfully argue that, according to the DSB's current interpretation of WTO law, the mere *adoption* of entry regulatory measures in and of itself impairs or nullifies benefits accruing to a member under the *GATS*.

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<sup>24</sup> See James Nafziger, 'The General Admission of Aliens under International Law' (1983) 77 *American Journal of International Law* 804, 804. However, Nafziger challenges the historical foundation of the exclusionary proposition, arguing that the 'proposition that states have an absolute right to deny territorial access to all aliens has unusual resilience and resonance, but little historical or jurisprudential foundation': at 845.

<sup>25</sup> *Ibid* 804.

<sup>26</sup> *MNP Annex*, above n 5.

<sup>27</sup> *Ibid* [2].

<sup>28</sup> *Ibid* [4].

<sup>29</sup> *Ibid* (fn 1).

However, there may be sufficient grounds to make a case that the *administration* of visa requirements in a manner inconsistent with the *GATS* principle of domestic regulation amounts to a nullification or impairment of benefits under art 3(8) of the *Dispute Settlement Understanding*.<sup>30</sup> According to the *GATS* principle of domestic regulation, member states must administer measures affecting trade in services in a 'reasonable, objective and impartial manner'.<sup>31</sup> Paragraph 4 of the *MNP Annex* also states that measures regulating the entry of natural persons shall not be applied in a way that nullifies or impairs the benefits granted to Members under the terms of a specific commitment. There is significant empirical evidence supporting the claim that the application of immigration measures creates barriers to the movement of natural persons. For instance, Self and Zutshi argue that the procedural requirements for granting visas are a barrier to trade in services due to the significant discretionary powers held by issuing authorities.<sup>32</sup> Further, Ng and Whalley provide a striking account of the frustration caused by immigration formalities:

The web is rife with horrendous tales of delays and bureaucratic impenetrability of simultaneously comic and horrifying proportions. A wide range of problems span escalating visa fees, delays in issuance, randomness in decisions, complexities such as transit visas, collateral (add-on) costs (such as added costs to airlines), photograph and medical requirements for issuance, bureaucratic impediments (some countries now requiring dental records for some types of visas), and the use in some countries of visas as an inefficient tax mechanism.<sup>33</sup>

The concern that visa-related administrative procedures will effectively become obstacles to doing business under the *GATS* has been reflected in a number of negotiating proposals and statements made to the WTO Council for Trade in Services.<sup>34</sup> Developing countries in particular have suffered from onerous conditions of entry imposed by countries belonging to the Organisation for Economic Co-operation and Development. In April 2004, 18 developing countries issued a statement saying that there has not been 'any real improvement' in the Mode 4 commitments made by developed countries. This statement specifically called for de-linked Mode 4 offers accompanied by, among other things, the elimination of unfair restrictions on visas.<sup>35</sup>

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<sup>30</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401 art 3(8) ('*Dispute Settlement Understanding*').

<sup>31</sup> *GATS*, above n 4, art VI(1).

<sup>32</sup> Richard Self and Balkrishna Zutshi, 'Mode 4: Negotiating Challenges and Opportunities' in Aaditya Mattoo and Antonia Carzaniga (eds), *Moving People to Deliver Services* (2003) 27, 28.

<sup>33</sup> Chi-Yung Ng and John Whalley, *Visas and Work Permits: Can GATS/WTO Help or Is a New Global Entity Needed?* (2004) 2 <[http://www.ssc.uwo.ca/economics/newsletter/misc/2004/Ng\\_WhalleySep23.pdf](http://www.ssc.uwo.ca/economics/newsletter/misc/2004/Ng_WhalleySep23.pdf)> at 22 May 2006.

<sup>34</sup> International Centre for Trade and Sustainable Development and International Institute for Sustainable Development, *Doha Round Briefing Series: Trade in Services* (vol 3(3), December 2004) 4–5, available at <<http://www.ictsd.org/pubs/dohabriefings/index.htm>> at 22 May 2006.

<sup>35</sup> *Communication from Bolivia, Brazil, Chile, China, Colombia, Cuba, Dominican Republic, Ecuador, Egypt, Guatemala, India, Indonesia, Mexico, Nicaragua, Pakistan, Peru, Philippines and Thailand*, WTO Doc TN/S/W/19 (31 March 2004) [6] (Communication to a special session of the Council for Trade in Services).

## 2 National Security Exceptions

Public order and security are among the most commonly invoked rationales for various forms of trade restrictions.<sup>36</sup> Similarly, entry regulations and immigration formalities that constrain further liberalisation under Mode 4 are often justified as a matter of public policy and national security.<sup>37</sup> Indeed, both art XXI of the *General Agreements on Tariffs and Trade*<sup>38</sup> and a similarly worded provision in art XIV *bis* of the *GATS*<sup>39</sup> contain a general exception for members' actions necessary for, inter alia, the protection of essential security interests in times of war or of other emergencies in international relations, or in pursuance of its obligations under the *Charter of the United Nations* to maintain international peace and security. The language of the provisions allowing for national security exemptions is very broad. Cottier and Oesch observe:

To date, no clear interpretation of the scope of permissible security exceptions was able to emerge. While other provisions of the GATT were refined by side agreements or understandings, members preferred to remain silent on security exceptions in order to ensure maximum leeway.<sup>40</sup>

In regards to the movement of natural persons under Mode 4 of the *GATS*, widespread application of measures that are justified on 'national security' grounds has resulted in uncertainty and in major limitations on the market access of service suppliers from certain countries. In effect, these measures imply that the relevant government would grant market access only if certain conditions were met, demonstrating that the incoming service supplier has a 'clean' background and is therefore admissible.

This is not to suggest, however, that national security measures be abolished simply because the concept is vague or causes uncertainty. In fact, the majority of barriers to the movement of service suppliers arise from practices, principles or policies that are not easily categorised as 'measures' in the legal sense of the word.<sup>41</sup> Therefore, this article tries to illustrate the point that it is not the *adoption* of national security measures but their *application* that creates barriers to movement. In this sense, like any other measure affecting trade in services, national security measures applied to the movement of natural persons must be administered in a logical, impartial and reasonable manner.

These concerns are echoed in a report issued by the United Nations

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<sup>36</sup> Thomas Cottier and Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, The European Union and Switzerland* (2005) 468.

<sup>37</sup> International Centre for Trade and Sustainable Development and International Institute for Sustainable Development, above n 34, 3.

<sup>38</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*General Agreement on Tariffs and Trade*) 1867 UNTS 190.

<sup>39</sup> *GATS*, above n 4.

<sup>40</sup> Cottier and Oesch, above n 36, 470.

<sup>41</sup> See above n 28 and accompanying text.

Conference on Trade and Development ('UNCTAD'), which recognised that

[m]easures related to the entry of natural persons into a foreign country, as with visas and work permits, can be a serious administrative obstacle to trade in services by developing countries through mode 4, nullifying the value of the specific commitments made.<sup>42</sup>

Three main 'administrative obstacles' related to national security can be identified: the presumption of immigrant/settler status, the burden of proof borne by the visa applicant and the formalities involved in visa processing.

(a) *The Presumption of Immigrant/Settler Status*

A major concern for every host country is that temporary visitors, once admitted, may stay in the country permanently. The temporary nature of admissions under the *GATS* does not diminish this concern. As a result, immigration officials regularly treat people applying for temporary admission as potential permanent residents or migrants.<sup>43</sup> In the United States, for example, the legal basis for this treatment can be found in a provision of the *Immigration and Nationality Act of 1952*, which states that every alien is

presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status.<sup>44</sup>

(b) *The Visa Applicant Carries the Burden of Proof*

The above presumption places a burden of proof on visa applicants to adduce evidence to rebut their presumed immigrant status. For example, US immigration law requires that:

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa ... and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be.<sup>45</sup>

Therefore, a foreign service provider applying for a non-immigrant visa is required to present document(s) establishing that he or she is entitled to that kind of visa. Immigration laws, however, are often vague regarding what documents are required to discharge this burden.<sup>46</sup> As a general rule, applicants must show that they have residence in a foreign country, which they have no intention of

<sup>42</sup> UNCTAD, *Increasing the Participation of Developing Countries through Liberalization of Market Access in GATS Mode 4 for Movement of Natural Persons Supplying Services*, UN Doc TD/B/COM.1/EM.22/2 (18 June 2003) [23].

<sup>43</sup> Howard Dobson, 'Mode 4: A US Regulator's View' in Aaditya Mattoo and Antonia Carzaniga (eds), *Moving People to Deliver Services* (2003) 227, 227.

<sup>44</sup> *Immigration and Nationality Act of 1952*, 8 USC § 1184(b) (2006). In this context, the presumption of immigrant/settler status seems to go as far as to empower the Attorney-General to require, as a precautionary measure, 'a bond with sufficient surety', when deemed necessary: at § 1184(a)(1).

<sup>45</sup> *Immigration and Nationality Act of 1952*, 8 USC § 1361 (2006).

<sup>46</sup> See, eg, *Immigration and Nationality Act of 1952*, 8 USC § 1361 (2006).

abandoning, in order to overcome the presumption of immigration/settlement intent.<sup>47</sup> This may be established by showing that their overall circumstances, including social, family, economic and other ties to their country of residence, will compel them to leave the host country at the end of a temporary visit.

Problems may still arise from the fact that there is no consistency in the interpretation and processing of these factors. The presumption of immigrant/settler status means that a visa officer has the discretion to, but is not legally obliged to, draw certain inferences regarding the applicant's intention. As a result, the decision as to whether the applicant has adequately demonstrated compelling ties to the home country varies from one case to another.

(c) *Visa Processing*

Business visits typically require a visa. Despite the growing number of regional trade agreements or arrangements that contain mobility provisions rendering immigration formalities less stringent,<sup>48</sup> visa processing remains a significant impediment to the cross-border movement of service suppliers, especially those travelling from developing to developed countries. Service suppliers from developing countries often experience lengthy processing times and delays, which has an adverse impact on their ability to compete and nullifies the opportunities for market access otherwise extended in the schedules of commitments.

While visa classifications differ substantially from country to country, the configuration of the administrative rules and procedures are typically the same. Visa applicants are usually required to obtain an application package, which may include several application forms, and to provide a large number of documents in support of their application, including medical reports, police checks and bank statements. Ng and Whalley describe the laborious nature of this process:

Where certified documents are needed, legal fees are incurred in notarizing the relevant documents and there may be extra costs for medical examinations. All these requirements not only lengthen the application time [but] they also increase costs to the applicant.<sup>49</sup>

Conducting investigations and processing applications also generates a large amount of paperwork that is often onerous and restrictive. In addition, some countries require that applicants attend a personal interview before a final

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<sup>47</sup> See, eg, US Department of State, *US Visa Policy: New Procedures* (2002) <<http://www.unitedstatesvisas.gov/visapolicy/procedures.html>> at 22 May 2006.

<sup>48</sup> Examples include the European Economic Area, the North American Free Trade Agreement, the US Visa Waiver Program, the Australian Electronic Travel Authority Program ('ETA') and visa exemptions for OECD countries. See also Ng and Whalley, above n 33, 7–8; Julia Neilson, 'Labor Mobility in Regional Trade Agreements' in Aaditya Mattoo and Antonia Carzaniga (eds), *Moving People to Deliver Services* (2003) 93, 94–6; Julia Neilson and Oliver Cattaneo, 'Current Regimes for the Temporary Movement of Service Providers: Case Studies of Australia and the United States' in Aaditya Mattoo and Antonia Carzaniga (eds), *Moving People to Deliver Services* (2003) 113, 117–18, 123, 137.

<sup>49</sup> Ng and Whalley, above n 33, 9.

decision can be made on their applications,<sup>50</sup> thus prolonging the cost and delay, since an appointment for an interview must be scheduled well in advance.<sup>51</sup> Moreover, due to an increase in the practice of ‘racial profiling’<sup>52</sup> in the current security environment, certain nationalities and ethnic backgrounds — in particular Arabs and Muslims — must meet additional requirements. For instance, US law requires that male applicants complete an additional form if they are above the age of 16 and are nationals of Arab countries or of countries with large Muslim populations.<sup>53</sup> The following information needs to be provided in completing Form DS-157:

- A list of all the countries that the applicant has entered during the last 10 years;<sup>54</sup>
- The name, address and contact details of the applicant’s last two employers (not including the applicant’s current employer);<sup>55</sup>
- The details of all professional, social and charitable organisations to which the applicant belongs or has belonged, contributes or has contributed, or with which the applicant works or has worked;<sup>56</sup>
- The details of all educational or vocational institutions the applicant has attended, including their telephone numbers and addresses.<sup>57</sup>

<sup>50</sup> For example, the US requires all nonimmigrant applicants aged between 14 and 79 — other than tourists and visitors who enter the US under the visa waiver program — to attend an interview with a consular official: Embassy of the US (London, United Kingdom), US Department of State, *Nonimmigrant Visas* (2006) <[http://www.usembassy.org.uk/cons\\_new/visa/niv/index.html](http://www.usembassy.org.uk/cons_new/visa/niv/index.html)> at 22 May 2006. In comparison, Australian immigration law is more lenient. It does not normally require foreign applicants to attend an interview for a business visa, unless the collection of further information about the personal circumstances of the applicant is deemed necessary: see Commonwealth of Australia, Department of Immigration and Multicultural and Indigenous Affairs, *Application for a Business (Short Stay) Visa*, Form 456, available at <<http://www.immi.gov.au/allforms/pdf/456.pdf>> at 22 May 2006 (‘Form 456’).

<sup>51</sup> In 2005, the waiting period for nonimmigrant visa applicants to obtain a visa appointment at the US Consulate in Chennai, India was nearly five months: see Littler Global, ‘Chennai: 147 Day Wait Time for Nonimmigrant Visa Interview Appointments’ (20 July 2005) *Global Migration Insight Newsletter*, available at <<http://www.littlerglobal.com/index.cfm?event=GMIDetails&pubitemid=517#apa1>> at 22 May 2006. According to the British High Commission in Pakistan, non-settlement applications that require an in-depth interview (including applications for business purposes) are generally processed within 17 working days during off-peak periods: British High Commission (Islamabad, Pakistan), *Applying for a Visa* (2006) <<http://www.britishhighcommission.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1078996422473>> at 22 May 2006.

<sup>52</sup> Stephen Legomsky defines profiling as ‘targeting individuals who possess identifiable attributes that are believed to bear positive statistical correlations to particular kinds of misconduct’: Stephen Legomsky, ‘The Ethnic and Religious Profiling of Non-Citizens: National Security and International Human Rights’ (2005) 25 *Boston College Third World Law Journal* 161, 161. He adds that specific profiling attributes that are relevant to US immigration law include ethnicity, country of nationality, religion, gender and age: at 161–2. In addition, Volpp notes that racial profiling is undertaken with respect to persons who appear ‘Middle Eastern, Arab, or Muslim’: Leti Volpp, ‘The Citizen and the Terrorist’ (2002) 49 *UCLA Law Review* 1575, 1576. These groups of people have been, among other things, subjected to selective enforcement of law by US immigration officials: at 1575–80.

<sup>53</sup> US Department of State, *Supplemental Nonimmigrant Visa Application*, Form DS-157, available at <<http://foia.state.gov/FORMS/visa/ds0157.pdf>> at 22 May 2006 (‘Form DS-157’).

<sup>54</sup> *Ibid* Q9.

<sup>55</sup> *Ibid* Q2.

<sup>56</sup> *Ibid* Q13.

Applicants must also answer a question about whether they have ever performed military service. If the answer is in the affirmative, they need to provide information about the rank, military speciality, dates of service and the country in which the service was performed.<sup>58</sup> However, visa applicants are constantly reminded that neither the presentation of the required documents nor the provision of answers to these predominantly invasive questions will guarantee that a visa will be issued, as this decision remains entirely at the discretion of the immigration official.<sup>59</sup>

Although national security exemptions under the *GATT* and/or the *GATS* may provide a legal basis for the proposition that the barriers to movement created by visa arrangements are justifiable,<sup>60</sup> arguments based on national security concerns do not go so far as to justify the conclusion that such barriers are inevitable. Nevertheless, this article does not intend to advocate the total, or even partial, abolition of security measures, if such an abolition would have adverse effects. Such a course of action would be neither practical nor desirable. Instead, this article advocates a liberalisation of restrictions on the movement of natural persons under the *GATS*, acknowledging legitimate national security concerns and practical difficulties, but also recognising that the majority of barriers to movement manifest themselves at the procedural/administrative level. Such a balanced approach facilitates a logical and reasonable application of national security measures, engendering, among other things, an understanding of where the *real* barriers to movement lie.

### III THE RIGHT TO HOSPITALITY AND THE *GATS*

#### A *Kant's Cosmopolitan Right to Hospitality*

It is within the context of the facts presented in the previous section that the following analysis of the right to hospitality in international economic law is located. It must be noted, however, that this idea is not totally fanciful. In fact, a close reading of the *GATS* suggests that its political and legal framework is analogous to Kant's idea of the cosmopolitan right to hospitality — 'the right of an alien not to be treated as an enemy upon his arrival in another's country'.<sup>61</sup> For Kant, the right to hospitality would enable a foreigner only to 'claim a right of resort' but not to 'claim the right of a guest to be entertained'.<sup>62</sup> The latter right requires 'a special friendly agreement whereby he [the foreigner] might become a member of the native household for a certain time'.<sup>63</sup> According to the Kantian formulation, then, the right to hospitality does not entail a

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<sup>57</sup> Ibid Q17.

<sup>58</sup> Ibid Q15.

<sup>59</sup> See, eg, US Department of State, *US Visa Policy*, above n 47.

<sup>60</sup> See above n 37 and accompanying text.

<sup>61</sup> Immanuel Kant, 'To Perpetual Peace: A Philosophical Sketch' (Ted Humphrey trans, 1983 ed) [trans of: *Zum ewigen Frieden. Ein philosophischer Entwurf*] in Ted Humphrey (ed), *Perpetual Peace and Other Essays on Politics, History, and Morals* (1983) 107, 118.

<sup>62</sup> Immanuel Kant, 'Perpetual Peace: A Philosophical Sketch' (H B Nisbet trans, 1991 ed) [trans of: *Zum ewigen Frieden. Ein philosophischer Entwurf*] in Hans Reiss (ed), *Kant: Political Writings* (2<sup>nd</sup> ed, 1991) 93, 106 (emphasis omitted).

<sup>63</sup> Ibid (emphasis omitted).

straightforward right that would commit the native household to open its doors to foreigners.<sup>64</sup>

Similarly, under the *GATS*, WTO Members are under no obligation to entertain a foreign service supplier by providing him or her with occupation, as para 2 of the *MNP Annex* clearly states that it shall not apply to ‘measures regarding citizenship, residence or employment on a permanent basis’.<sup>65</sup> Furthermore, the *GATS* contains no *binding* obligation on member states to open their borders to foreign service suppliers. Nonetheless, it can be argued that the *GATS*, like the Kantian cosmopolitan law, encourages individuals to attempt to enter into relations with the inhabitants of another country. This can be inferred from para 4 of the *MNP Annex*, which provides that states may apply entry regulation measures ‘to protect the integrity of, and to ensure the orderly movement of natural persons across, [their] borders’.<sup>66</sup> This suggests that the *GATS*, which currently has 149 members,<sup>67</sup> realises the idea expressed by Kant that foreigners can, under the cosmopolitan law of hospitality, enjoy certain rights.

### B *From Kant to Derrida*

The Kantian political philosophy of a right to hospitality has received much attention recently,<sup>68</sup> primarily due to Derrida’s considerations and reinterpretations. In his work *On Cosmopolitanism*, the re-reading of Kant offered by Derrida focused on the possibility of transforming and improving the law of hospitality.<sup>69</sup> Derrida envisaged this possibility within ‘an historical space which takes place *between* the law of an unconditional hospitality, offered *a priori* to every Other, to all newcomers, *whoever they may be*, and the conditional laws of a right to hospitality’.<sup>70</sup> For Derrida, the right to hospitality is integral to the performance of ‘the duties of an unconditional friendship ... a friendship with the other, the distant, the unfamiliar’.<sup>71</sup> He regarded hospitality as an ‘absolute’ principle, the function of which was not to prevent the states from exercising powers to protect their homes.<sup>72</sup> Instead, Derrida saw hospitality as a principle that bonds communities, families and nations.<sup>73</sup> He also viewed

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<sup>64</sup> Ibid.

<sup>65</sup> *MNP Annex*, above n 5, [2].

<sup>66</sup> Ibid [4].

<sup>67</sup> See WTO, *Understanding the WTO: The Organization — Members and Observers* <[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)> at 22 May 2006.

<sup>68</sup> See generally Obrad Savić, ‘Figures of the Stranger as a Foreigner’ (2005) 11(1) *Parallax* 70; Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight’ in James Bohman and Matthias Lutz-Bachmann (eds), *Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal* (1997) 128; Jürgen Habermas, *The Inclusion of the Other* (2001).

<sup>69</sup> Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Mark Pooley and Michael Hughes trans, 1997 ed) [trans of: *Cosmopolites de tous les pays, encore un effort!*].

<sup>70</sup> Ibid 22 (emphasis added).

<sup>71</sup> Obrad Savić, ‘Introduction — Duty of Unconditional Hospitality’ (2005) 11(1) *Parallax* 1, 4.

<sup>72</sup> Derrida uses the terms ‘pure’, ‘absolute’ and ‘unconditional’ hospitality interchangeably to describe his interpretation of this concept of absolute hospitality. This article adopts the same approach in reference to Derrida’s work.

<sup>73</sup> Jacques Derrida, ‘The Principle of Hospitality’ (2005) 11(1) *Parallax* 6, 6.

hospitality as an ‘attempt’ — rather than a consequence or a prerequisite — ‘to render the welcome effective, determined, concrete, to put into practice’.<sup>74</sup> Derrida was clearly concerned about conditional hospitality, where the conditions are defined by the state and the foreigner is stripped of any ‘right to the internal hearth’.<sup>75</sup> He argued that this kind of control over the conditions of hospitality would unavoidably lead to violence and would eventually place the very essence of hospitality in danger.<sup>76</sup> In this context, Derrida’s use of the term ‘conditions of hospitality’ refers to

the ‘conditions’ which transform the gift into a contract, the opening into a policed pact; whence the rights and the duties, the borders, passports and doors, whence the immigration laws, since immigration must, it is said, be ‘controlled’.<sup>77</sup>

It is perhaps this concern with pure hospitality that led Derrida to express his discontent with ‘the thinker of the cosmopolitan right to universal hospitality’,<sup>78</sup> who, Derrida argued, has destroyed the very possibility of that which he had posited and determined, ‘due to the juridicality of his discourse’.<sup>79</sup> One wonders what Derrida could have found so objectionable about the juridical regulation of the relationship with the foreigner that he was compelled to accuse Kant, the thinker of the right to hospitality, of its destruction. What is so frustrating about ‘the becoming-law of justice’<sup>80</sup> in relation to the question of whether foreigners should receive hospitality? How could Kant destroy the right to hospitality by placing it ‘in danger of remaining a pious and irresponsible desire, without form and without potency, and of even being perverted at any moment’?<sup>81</sup>

The threat posed by the juridical regulation of the relationship with the foreigner does not exist only in the abstract. The following narrative of the Australian business visa requirements will help answer the questions raised above.

#### IV THE PARADOX OF HOSPITALITY AND AUSTRALIAN BUSINESS VISA REQUIREMENTS

##### A *The Form*

This section commences with an inquiry into the meaning of ‘movement’ according to the term ‘movement of natural persons’ as described in Mode 4 in the *GATS*.<sup>82</sup> Does movement refer to a change of place? Or does it refer to a change of status? In this context, movement can refer to passage from one place to another. It can also involve the passage from the point of departure to a point of arrival. In this sense, movement includes passage between two different

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<sup>74</sup> Ibid.

<sup>75</sup> Derrida, *Of Hospitality*, above n 3, 69.

<sup>76</sup> Ibid 69, 71.

<sup>77</sup> Derrida, ‘The Principle of Hospitality’, above n 73, 6.

<sup>78</sup> Derrida, *Of Hospitality*, above n 3, 69, 71.

<sup>79</sup> Ibid 71.

<sup>80</sup> Ibid 73.

<sup>81</sup> Derrida, *On Cosmopolitanism*, above n 69, 23.

<sup>82</sup> Above n 4.

geographical positions, positions of status or situations. For instance, passage can refer to the transition from the position of a citizen — as citizen of a particular political community or a citizen of the world — to the position of a foreigner.<sup>83</sup> This can be called ‘movement without movement’.<sup>84</sup>

Movement takes place across borders, edges and drawn lines, as well as in relation to the Other. A border is not only a cartographic boundary, but a point of arrival. The foreigner arrives at the border as a *foreigner*, to be dealt with as a question — a question for justice, a question of justice beyond law, and beyond the law of the host.

Migration law therefore regulates the encounter between the host and the foreigner at the point of arrival. It determines what should or should not be said, who should be received with welcome and who should be turned back.<sup>85</sup> It also determines the dialogue: its impressions, its moves and, most importantly, its language. In the language of migration, ‘application’ is the term used for the attempt by the foreigner to enter into relations with the host. If the attempt is successful, then the foreigner will be entitled, by law, to cross the border to present himself<sup>86</sup> to the host society as a ‘lawful alien’. ‘Visa’ is the document that certifies this entitlement. The essence of a visa can be questioned from different perspectives: is it a gift or a grant? Is it given out by the host for *nothing* or is it a privilege given out by the host only to those who can afford it? Is it a gift bestowed only upon those who use it responsibly, with the host possessing the power to define responsibility?

Australian migration law requires that foreign service suppliers wanting to visit Australia for business purposes apply for a visa.<sup>87</sup> There are two concepts contained in this requirement that must be examined. The first is embodied by the word ‘apply’. Requiring that certain foreign business visitors apply for a visa suggests that Australia does not welcome them unconditionally. Instead, those who want to enter into a relationship with the Australian host must first address the host, by appealing to it, by calling it and producing reasons explaining why he deserves to be welcomed. This is a precondition to the host’s hospitality. The visitor must apply in order to vindicate his entitlement to a visa. The host will respond to his application by considering his appeal, and may decide to grant him permission to enter *only* if he succeeds in establishing that his claims are indeed veritable. It is only at this point that he will be greeted with welcome.

<sup>83</sup> Gleeson CJ noted that ‘[a]lienage is a status’ in *Singh v Commonwealth* (2004) 209 ALR 355, 357.

<sup>84</sup> Giovanni Reale, *Plato and Aristotle: A History of Ancient Philosophy* (1990) 295.

<sup>85</sup> See generally Catherine Dauvergne, ‘Confronting Chaos: Migration Law Responds to Images of Disorder’ (1999) 5 *Res Publica* 23, 26–9.

<sup>86</sup> Derrida tends to use masculine pronouns in a non-gender-specific manner when he refers to the host and to the foreigner. To allow for the integration of Derrida’s writings, this article adopts the same approach when referring to these ideas.

<sup>87</sup> Nationals of the following countries are not considered ‘foreigners’ by Australian migration law and thus do not need to apply for a visa *before* entering Australia for a short business trip: Andorra, Austria, Belgium, Brunei, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong SAR, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malaysia, Malta, Monaco, Netherlands, Norway, Portugal, San Marino, Singapore, South Korea, Spain, Sweden, Switzerland, UK, US and Vatican City. These nationals are called ‘ETA-eligible passport holders’: see Commonwealth of Australia, Department of Immigration and Multicultural Affairs, *Australian Electronic Travel Authority* <<http://www.eta.immi.gov.au>> at 22 May 2006.

However, there remain several important but unanswered questions. How will the host make this decision? Will the decision be made according to the powerful tradition of hospitality and its embedded ethics?

The second concept that deserves scrutiny is the term 'visitor'. Who is a visitor? Derrida explains the notion of a visitor by drawing a distinction between a visitor and the one who comes to stay. In Derrida's view, what distinguishes a visitor is the fact that the visitor is one who calls upon us when we are unprepared for their arrival: 'visitation implies the arrival of someone who is not expected'.<sup>88</sup> He goes on to argue that it is visitation, not invitation, which tests our hospitality: '[i]f I am unconditionally hospitable I should welcome the visitation, not the invited guest, but the visitor'.<sup>89</sup>

Applying this notion to the context of transnational movement, it can be said that for a nation to claim a reputation of being hospitable and open to the demands of the coming Others, it must, by way of obligation and before all other guests, be able to welcome the visitor, whose coming has caught the nation by surprise. This is the primary moral imperative of pure hospitality. However, not every host is prepared to face the risks involved in extending such hospitality. Hence the border, the gate and the application that must be completed before the door is opened to the foreigner who claims to be a visitor.

The Australian host demands that the foreigner apply for a visa by filling out Form 456.<sup>90</sup> Applications must be made in writing, as the laws of the host give sanctity to text over action, intuition and the oral exchange of information. The foreigner is therefore forced to write and render himself readable because the host wants the truth be seen, rather than felt. Furthermore, the monologic characteristics of the 20 questions on Form 456 indicate that it is only the host who is entitled to ask questions, and it is the foreigner who must produce answers, without a corresponding right to question the questions.

## B Language

Just as the process of application makes it possible for the host to discover the truth about the applicant — who he is — it also discloses this truth in the consciousness of the applicant. For the applicant, the application form works like a self-assessment, as if it is the applicant who appropriates the first question: 'Who am I?', at the same time that the host addresses the foreigner with the question: 'Who are you?'

I am a foreigner. This is the first thing that the applicant discovers about himself — he becomes the 'foreigner by language'.<sup>91</sup> According to Derrida, 'the foreigner is first of all foreign to the legal language in which the duty of hospitality is formulated'.<sup>92</sup> The *foreignness* of the applicant becomes apparent

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<sup>88</sup> Jacques Derrida, 'Hospitality, Justice and Responsibility' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (1999) 65, 70.

<sup>89</sup> *Ibid.*

<sup>90</sup> Above n 50. Business visitors wishing to remain in Australia for more than three months must use Form 457, which is very similar to Form 456 in terms of content and pattern. Commonwealth of Australia, Department of Immigration and Multicultural and Indigenous Affairs, *Application for a Business (Long Stay) Visa*, Form 457, available at <<http://www.immi.gov.au/allforms/pdf/457.pdf>> at 22 May 2006.

<sup>91</sup> Derrida, *Of Hospitality*, above n 3, 17.

<sup>92</sup> *Ibid.* 15.

to him the moment he begins to read Form 456 — a *legal* instrument, printed in English, that must be completed in English. The Form presumes that all applicants understand the language of the host ‘in all senses of this term’.<sup>93</sup>

This exercise of linguistic authority by the host can be associated with what Derrida calls an ‘act of violence’.<sup>94</sup> This violence occurs as soon as the foreigner and the host enter into a dialogue, whereby the form of that dialogue is imposed by the host. The foreigner must defend himself within the constraints of the language of the host — language *as* host — before the host’s law. The host’s dominance of the foreigner is indicated by the fact that the foreigner must:

ask for hospitality in a language which by definition is not his own, the one imposed on him by the master of the house, the host, the king, the lord, the authorities, the nation, the State, the father, etc. This personage imposes on him translation into their own language, and that’s the first act of violence.<sup>95</sup>

The foreigner must therefore appeal to the host in a language that is recognised and sanctioned by the host. It is at this point that the foreigner finds himself caught by the first paradox of hospitality. As Derrida asks, ‘[m]ust we ask the foreigner to understand us, to speak our language, in all the senses of this term, in all its possible extensions, before being able and so as to be able to welcome him into our country?’<sup>96</sup>

### C *Name as Border*

The second paradox of hospitality, which in some ways can be associated with the first one, relates to the impossibility of translating one’s name. The foreigner’s name is the first and the most important feature of interest to the host. Derrida describes the instance of calling for the Other’s name:

to receive him, you begin by asking his name; you enjoin him to state and to guarantee his identity, as you would a witness before a court. This is someone to whom you put a question and address a demand, the first demand, the minimal demand being: ‘What is your name?’<sup>97</sup>

Asking the foreigner for his name is a constitutive element of hospitality that assumes that the host addresses the foreigner individually.<sup>98</sup> Accordingly, in a hospitable gesture, Part A of Form 456 asks for the visitor’s name, indicating that the host wants to call the foreigner by his name.<sup>99</sup> If the host is committed to respecting the foreigner’s right to hospitality, it is essential that the host knows to whom this commitment is being made. Therefore, it can be said that having a name is inscribed in the right to hospitality *as* right. As Derrida observes:

hospitality ... is not offered to an anonymous new arrival and someone who has neither name, nor patronym, nor family, nor social status, and who is therefore treated not as a foreigner but as another barbarian. We have alluded to this: the difference, one of the subtle and sometimes ungraspable differences between the

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<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid 27.

<sup>98</sup> Ibid.

<sup>99</sup> Form 456, above n 50, ‘Part A — Your Details’.

foreigner and the absolute other is that the latter cannot have a name or a family name; the absolute or unconditional hospitality I would like to offer him or her presupposes a break with hospitality in the ordinary sense, with conditional hospitality, with the right to or pact of hospitality.<sup>100</sup>

In other words, it is only unconditional hospitality that can be extended to the anonymous Other. This type of hospitality is given without asking questions, to *whomever* asks for it:

absolute hospitality requires that I open up my home and that I give not only to the foreigner (provided with a family name, with the social status of being a foreigner, etc.), but to the absolute, unknown, anonymous other, and that I *give place* to them, that I let them come, that I let them arrive, ... without asking of them either reciprocity (entering into a pact) or even their names.<sup>101</sup>

Unconditional hospitality has no limit, or to use the Derridean term, no 'threshold [that] marks the limits of one's own'.<sup>102</sup> It is *offered* without questioning. It is always inclusive and embracive. The foreigner is welcomed *before everything* and it is a 'welcome without reserve'.<sup>103</sup> As Derrida points out: 'Pure hospitality consists in welcoming whoever arrives before imposing any conditions on him, before knowing and asking anything at all, be it a name or an identity "paper"'.<sup>104</sup>

Derrida contends that unconditional hospitality, as an absolute desire, remains inaccessible.<sup>105</sup> It is particularly inaccessible in the context of our discussion given that unconditional hospitality is offered only to the absolute Other — the 'savage, barbaric, precultural, and prejudicial'<sup>106</sup> — who is 'descriptively unspecifiable'.<sup>107</sup> Position, status and place cannot be offered to the absolute Other. Here we are concerned with the foreigner who wants to be recognised as a business person. Therefore, he must be endowed with a name, and so to do everything to address him — to ask his name — does not violate the laws of hospitality. The foreigner is under an obligation to give his name in exchange for the host's hospitable welcome. However, this obligation does not reduce the right to hospitality to a contract that involves reciprocal commitments.<sup>108</sup> Instead, it is part of the ethics of hospitality to have a name and to be called by it.

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<sup>100</sup> Derrida, *Of Hospitality*, above n 3, 25.

<sup>101</sup> *Ibid* (emphasis in original).

<sup>102</sup> Michael Naas, *Taking On the Tradition: Jacques Derrida and the Legacies of Deconstruction* (2003) 154.

<sup>103</sup> Derrida, 'The Principle of Hospitality', above n 73, 6.

<sup>104</sup> *Ibid* 7.

<sup>105</sup> *Ibid* 6.

<sup>106</sup> Derrida, *Of Hospitality*, above n 3, 73.

<sup>107</sup> Edith Wyschogrod, 'Autochthony and Welcome: Discourses of Exile in Levinas and Derrida' (2003) 1(1) *Journal of Philosophy and Scripture* 36, 37, available at <<http://www.philosophyandscripture.org/EdithWyschogrod.pdf>> at 22 May 2006.

<sup>108</sup> Derrida, 'The Principle of Hospitality', above n 73, 6.

Derrida elaborates on the precise meaning of this concept of morality:

This familial or genealogical right [to hospitality] applying to more than one generation enables us to think about how this is not, basically, a question of the extension of the right or the 'pact' (... the foreigner doesn't only have a right, he or she also has, reciprocally, obligations, as is often recalled, whenever there is a wish to reproach him for bad behavior); it is not a question of a straightforward extension of an individual right, of opening out to the family and subsequent generations a right in the first place granted to the individual. No, that reflects, that lets us reflect upon the fact that, from the outset, the right to hospitality commits a household, a line of descent, a family, a familial or ethnic group receiving a familial or ethnic group. Precisely because it is inscribed in a right, a custom, an *ethos* and a *Sittlichkeit*, this objective morality ... presupposes the social and familial status of the contracting parties, that it is possible for them to be called by their names, to have names, to be subjects in law, to be questioned and liable, to have crimes imputed to them, to be held responsible, to be equipped with nameable identities, and proper names. A proper name is never purely individual.<sup>109</sup>

The last statement of the above passage is the key to understanding the effect of the 'name' in generating conflict between the conditions of hospitality and its ethics. This author's interpretation understands Derrida's statement to be that a proper name does not relate to one person it does not belong to a single member of a species or a group, nor does it have a separate existence isolated from others. How then, will the proper name of the foreigner affect the host's power of hospitality? Perhaps this question could be better answered by an investigation of the psychoanalytical function of the name at various encounters. Unfortunately, this article is not the appropriate forum for such an investigation. However, the following example may clarify the point being made about the way in which one's name provides the conceptual framework, as well as the mental constructs, used in understanding and relating to others.

Professor Saikal's account of his experience at the Los Angeles airport illustrates the effect of a Muslim name on the welcome extended to an Australian professor travelling to the US to attend an academic event: 'At the passport control, I was instantly and bluntly reminded that I had a Muslim name'.<sup>110</sup> He goes on to describe how his name effectively 'slowed' him down and 'blocked'<sup>111</sup> his passage:

*What do you do?* [the immigration officer asked]

'I am an academic with speciality on the Middle East and Central Asia.'

*Are you a professor or something?*

'Yes, I am a professor.'

*Professor of what?*

'Political science.'

<sup>109</sup> Derrida, *Of Hospitality*, above n 3, 23.

<sup>110</sup> Amin Saikal, 'The Stains on America's Welcome Mat', *The Age* (Melbourne, Australia), 19 November 2005, 11.

<sup>111</sup> I borrowed these terms from Sara Ahmed's account of her experience of name being a barrier to movement: Sara Ahmed, 'Be Very Afraid!' *New Internationalist* (Oxford, UK), March 2005, 14.

*What will you be doing in the United States?*

'I am here to attend a meeting ... at Princeton University and will return to Australia in three days' time.'<sup>112</sup>

Following this exchange, Professor Saikal was asked to accompany the immigration officer into a meeting room to provide answers to 'a few more questions'.<sup>113</sup> After 25 minutes of questioning, Professor Saikal was eventually greeted with the words '[w]elcome to the United States'.<sup>114</sup> He was denied welcome at the first instance, at the first encounter. Why? 'It was clear that I was profiled because of the mere fact that the officer at the passport control identified my first name "Amin" as a Muslim name'.<sup>115</sup> To say that 'welcome delayed is welcome denied' would not be too extreme a variation of the old saying in this case.

The question is whether asking the foreigner's name in order to offer them hospitality will have any impact on the hospitality itself. Is it compatible with the ethics of hospitality to ask the Other — who is asking for our hospitality — to identify themselves with a name but then deny them the right to hospitality or even subject them to hostile practices because they have the 'wrong name'?

As previously discussed, borders, including virtual borders such as the *locus* of visa processing centres overseas, are points of arrival where names are requested. Naas describes the moment of a name test on the border: 'There on the border, names are requested, and if one has the right name, the right origin, one is allowed to come and go freely, but if not, one must sneak in and out onto the bottom of the ship — or else in the bottom of a flatbed truck.'<sup>116</sup>

The 'right name' or the 'safe name', as well as the 'safe origin' — all of which open the doors without blockade — are determined by their oppositions: the 'wrong name', or 'unsafe name', or 'unsafe origins'. This can be better explained by referring to Derrida's threshold imagery. He posited 'threshold' as a concept that delimits the extent to which '[w]e extend our hospitality by opening our arms, doors, or borders'.<sup>117</sup> Thus understood, threshold is the essence of hospitality, that is, there is no hospitality without it.

On the other hand, it can be argued that the unrevealing nature of name — that is, the secret inscribed on it, the secret that has *always* failed us and will fail us again when we need to make friends — is due to the 'always exclusionary, selective, oftentimes harsh and implacable'<sup>118</sup> nature of the threshold. Threshold is where we stand in our relation to the Other and it is the Other's name that holds us there on the threshold. We are stuck on thresholds, although we *must* cross them at some point. This is why a name considered to be safe at one point in time may subsequently become an unsafe name at another point in time.

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<sup>112</sup> Saikal, above n 110, 11.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> Naas, above n 102, 157.

<sup>117</sup> *Ibid.* 154.

<sup>118</sup> *Ibid.*

Threshold can thus be understood as a location in life and a location in consciousness. Threshold, from a different perspective, refers to something *inside* the world that determines our reaction to the uncertain boundaries that exist between ‘us’ and the Other. It is produced and reproduced, laid and overlaid, but never relinquished. This explains the sheer existence and persistence of ‘right’ versus ‘wrong’ names. Threshold persists as a result of non-experimental processes, such as the one prompted by the fear of the unknown or unseen, fear of fear, fear of the *represented* fearsome. Threshold persists when we choose fear over getting to know of or about the Other, the stranger, the foreigner as an *individual being*. It can thus be argued that it is the conjectural and uncertain nature of the threshold that allows the question of hospitality to remain, ‘in its very conceptuality, an *open question*’.<sup>119</sup>

The airport narrative referred to above also serves to illustrate how threshold, or limit of tolerance, has become too low in relation to Muslim names. Those with Arabic names, or Arabic-sounding or Muslim-sounding names, are singled out and treated as risks, not as guests.<sup>120</sup> Their names lower the threshold of hospitality and close the doors of reception. Their name makes the encounter for them a traumatic rather than a pleasant experience, as they become subject to prejudice and differential treatment.

Can law be of assistance here? Surely law cannot readily be invoked to protect those subjected to prejudice, given that such treatments are obviously not *illegal*. That is, there is no law prohibiting immigration authorities from (mis)interpreting visa applicants’ names.<sup>121</sup> But framing this problem as one of legality ignores the fact that for the posited law, the problem of name simply does not exist. The problem is one of an abstract state; that is, it is the fate for those who have the ‘wrong name’ — like Professor Saikal — to become ‘excluded’. According to Derrida, name is always a forgotten problem: it is ‘by definition, in the realm of xenophobia; but it can also be forgotten in the name of a certain interpretation of “pragmatism” and “realism”’.<sup>122</sup>

From what has been said so far, the significance of name in the transformation of the ethics of hospitality into a politics of hospitality should now be evident. This can be seen in Naas’ powerful summary of the process through which names themselves become borders:

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<sup>119</sup> Ibid (emphasis in original).

<sup>120</sup> Professor Saikal states that he had made frequent visits to the US over several years but that ‘this time was nothing like the previous occasions’: Saikal, above n 98, 11. This can be taken to suggest that every encounter with the foreign Other may be the *first* encounter.

<sup>121</sup> For more examples of the accounts given by Muslims of their experience of questions asked at visa processing centres and at airports, see ABC Radio National, ‘Arabic Studies in America’, *Lingua Franca*, 30 October 2004, available at <<http://www.abc.net.au/m/arts/ling/stories/s1229735.htm>> at 22 May 2006. See also US Department of State, Bureau of Consular Affairs, *Consular Information Sheet: Tunisia* (2006) <[http://travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_1045.html](http://travel.state.gov/travel/cis_pa_tw/cis/cis_1045.html)> at 22 May 2006.

<sup>122</sup> Derrida, ‘The Principle of Hospitality’, above n 73, 7. Immigration authorities are under no obligation to give reasons as to why an application is rejected. Moreover, as mentioned earlier, Form 456 stresses that ‘[a]n application for a Business (Short Stay) visa can only be made outside Australia’: Form 456, above n 50, ‘Requirements’. This makes it literally impossible to seek a legal remedy when an application is rejected for having the ‘wrong name’ on it.

There on the border, names are asked, identities verified, origins checked, and intentions cleared. For when it comes to politics, to hospitality in or of the state, conditions are *always* stipulated. Names and borders — that is what would have to be central to any analysis of hospitality and to anything like a ‘deconstructive hospitality’: name and borders, name on borders, names as borders.<sup>123</sup>

#### D *The Right to Lie*

Another paradox of hospitality arises in relation to the foreigner’s status. The heading of Form 456 is printed in bold font, suggesting that it is to be used only by those applying for a ‘Business (Short Stay) visa’. Once the foreigner makes the decision to be identified by the host as a business person — that is, as soon as the foreigner speaks to the host in that capacity — he will be held responsible for that decision. In other words, the foreigner will be placed under an ethical and juridical obligation to justify himself. Form 456 makes this fact clear by posing the following question — ‘[w]ho should use this form?’<sup>124</sup> It subsequently provides its own answer to this question, saying that only ‘*genuine* business visitors seeking short-term entry to Australia’ should use Form 456.<sup>125</sup> This suggests that the visitors who decide to use Form 456 should have asked themselves prior to making an application: ‘*Am I a genuine business person?*’ This is an extraordinary, boundless, infinite and agitating question. It is introspective, another point of arrival for the foreigner; an inner arrival. It calls on the foreigner to give a responsible response, which is surely a ‘yes’ — yes, I *am* genuine. It is this question of who it is that utters the first ‘yes’ that displaces the foreigner, turning the tables on the host. Is it not the foreigner who is saying ‘yes’ to the host — instead of the host being the one who says ‘yes’ to the foreigner’s request to come in the first place? Is it not the foreigner who is showing hospitality by welcoming the host’s questions, whatever they may be, in defence of his proposition of genuineness and truthfulness? The foreigner must give a responsible yes, aware of the consequences of his response and the challenges that it poses to his *self* by allowing the host to question his morals, his ethics, his *genuineness*.

Further reading of Form 456 reveals that the host does not simply want to be *informed* that the foreigner is a genuine business person, he wants the foreigner to *confess* himself to be genuine. Section 39 of Form 456 requires that the applicant testify to his sincerity by making the following declaration: ‘I have *truthfully* declared all relevant details requested of me in this application’.<sup>126</sup> Thus, the foreigner is called on to speak, and to speak only the truth, in the language of the host. The foreigner is refused the ‘right to lie’, even for understandable or personal reasons.<sup>127</sup> This demand for truth constitutes the very ‘essence’ of the conditional law of hospitality and of the host himself as a state. Form 456 attests to this essentiality by instructing the foreigner that they ‘must answer all questions on this form honestly and completely. False or misleading

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<sup>123</sup> Naas, above n 102, 157 (emphasis in original).

<sup>124</sup> Form 456, above n 50.

<sup>125</sup> *Ibid* (emphasis added).

<sup>126</sup> *Ibid* ‘Part L — Declarations’ (emphasis added).

<sup>127</sup> Derrida, *Adieu to Emmanuel Lévinas*, above n 2, 20–3.

information may lead to refusal or cancellation of your visa, or penalties while in Australia'.<sup>128</sup> The host asserts an uncompromising stance on secrecy and dishonesty, warning that those who carry out such acts may not only be denied hospitality but may also be forced to pay for their infringement of the law of hospitality.

This process in which the foreign visitor is asked to declare his or her honesty reflects what Derrida calls 'this aporia of a right to hospitality'<sup>129</sup> — a paradoxical strain of moral reflection. In explaining this aporia, Derrida expands on Kant's powerful argument for an absolute prohibition against lying — even if it is likely to lead to another's death.<sup>130</sup> In Derrida's view, Kant's idea requires that one always speak the truth in every situation, whatever the consequences: 'For if one granted some right to lie, for the best reasons in the world, one would threaten the social bond itself, the universal possibility of a social contract or a sociality in general.'<sup>131</sup>

The same rule applies to the situation of hospitality — one must speak the truth even if it would risk one's right to that hospitality. According to Kantian theory, the foreigner must not only refrain from lying, but he must also stand upright, face to face with the host, to challenge the accusation of dishonesty. The onus of proof is thus on the foreigner.

Nonetheless, the host's gesture in asking for the truth deserves to be recognised. The host, one may argue, is making a hospitable gesture by inviting the foreigner to reason with the host, to make an argument for his genuineness — without actually expecting the foreigner to reason in response. Furthermore, the host is demanding reason to enable a rational welcome. But is a rational welcome possible, let alone desirable? To answer this, we need to examine what counts as reason and/or evidence here. In other words, which facts or which signs will satiate the posited law's taste for reason as evidence? What aspects of the foreigner's *being* does the law put to the test to approve his 'genuineness'? The criteria established by Form 456 stipulate that the 'personal attributes and business background [of the foreigner] should be relevant to the nature of [his] proposed business in Australia'.<sup>132</sup>

Therefore, the foreigner must face the challenging task of fitting his attributes, his 'history', into the legal category of a business person. However, the narrow spaces provided under each probing question on the seven page form leave the foreigner with very little room for narration. The foreigner must confess in writing, but must not write that which falls outside the information of interest to host. Nor is the foreigner permitted to lie. The foreigner must confess, while aware of the fact that the host's welcome is conditional on his confession — *all* of it — and on a belief in its 'genuineness'. If the host discovers that perjury has been committed — and it wants the foreigner to believe that it has the means and

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<sup>128</sup> Form 456, above n 50, 'Conditions'.

<sup>129</sup> Derrida, *Of Hospitality*, above n 3, 65.

<sup>130</sup> Ibid 151. Kant originally posited this idea in a striking discussion on the right to lie: Immanuel Kant, 'On a Supposed Right to Lie because of Philanthropic Concerns' in James Ellington (ed), *Grounding for the Metaphysics of Morals* (James Ellington trans, 1993 ed) [trans of: *Grundlegung zur Metaphysik der Sitten*].

<sup>131</sup> Derrida, *Of Hospitality*, above n 3, 67.

<sup>132</sup> Form 456, above n 50, 'Requirements'.

the might to verify his claims — the host will not only withdraw the welcome, but it will also punish the foreigner for dishonesty.

### E *Questions that Are Impossible to Answer ‘Truthfully’*

#### 1 *The Twilight Zone: Crime and Punishment*

What kind of questions is the host going to ask the foreigner to make him so anxious about the likelihood of the foreigner’s dishonesty? Is the host going to ask that which might tempt the foreigner to lie in answering them? Why should the foreigner have to answer all of the host’s questions? Can the foreigner not simply remain silent when unbearable and insurmountable questions are asked?

It has previously been mentioned that the foreigner must defend himself against a number of accusations. Dishonesty is one such accusation. In addition, the foreigner must also defend himself against the accusation that they have invaded the host’s home. The master of the house also seeks to obtain assurances from the foreigner that he will not violate his home. This may seem reasonable but it is in fact a drastic expectation. After all, it is one’s ‘own home that makes possible one’s own hospitality’.<sup>133</sup>

The right to protect one’s home is not completely at odds with the right to hospitality. On the contrary, the former conditions the latter in that it yields principles, terms, categories and criteria that help host states to distinguish between a guest and a burdensome arrival, or as Derrida puts it, a ‘parasite’.<sup>134</sup> In effect, the right of the master to protect his home opens the way for hospitality. Derrida expands on this concept:

In principle, the difference is straightforward, but for that you need a law; hospitality, reception, the welcome offered have to be submitted to a basic and limiting jurisdiction. Not all new arrivals are received as guests if they don’t have the benefit of the right to hospitality or the right to asylum, etc. Without this right, a new arrival can only be introduced ‘in my home,’ in the host’s ‘at home,’ as a parasite, a guest who is wrong, illegitimate, clandestine, liable to expulsion or arrest.<sup>135</sup>

Therefore, the host has no duty to extend hospitality to someone who seeks to obtain it by obsequiousness and flattery. This assumption corresponds to the reciprocity embedded in the Kantian formulation of the right to hospitality as a means of entering into ‘peaceful mutual relations’.<sup>136</sup> Kant also recognised the power of the host state to turn away an unwanted newcomer.<sup>137</sup> Similarly,

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<sup>133</sup> Derrida, *Of Hospitality*, above n 3, 53.

<sup>134</sup> *Ibid* 61.

<sup>135</sup> *Ibid* 59, 61.

<sup>136</sup> Kant, ‘Perpetual Peace’, above n 62, 106.

<sup>137</sup> *Ibid* 105–6.

expanding on Kant's idea, Derrida articulates the power of refusal as follows:

I want to be master at home ... *ipse, potis, potens*, head of house ... to be able to receive whomever I like there. Anyone who encroaches on my 'at home,' on my ipseity, on my power of hospitality, on my sovereignty as host, I start to regard as an undesirable foreigner, and virtually as an enemy. This other becomes a hostile subject, and I risk becoming their hostage.<sup>138</sup>

Perhaps to avoid such a risk, the Australian host requires the foreign applicant to provide further details of his attributes and history. Part D of Form 456 is scripted in such a way to empower the authorities to make a quick judgement about the extent of the 'foreignness' of the foreigner.<sup>139</sup> Questions are asked about the pasts of the foreigner and his family members. The answers given to these questions are of the utmost importance in the evaluation of the visa application. In practice, the decision as to whether there is a *prima facie* case for considering an application, or whether the applicant should be turned away on arrival, is made primarily on the basis of the information provided in this section of Form 456.

There are 12 questions in Part D of the form, which can be answered with either a 'yes' or a 'no'. Part D is a turning point in the process of a visa application, as it transforms the dialogue into an interrogation and then eventually into an inquisition. The first three questions in Part D ask about the foreigner's criminal record. Here the foreigner is confronted with the unforgiving attitude of the host and is asked to remember and to confess. The foreigner must be aware that this is not the time to forgive and forget, but the time to remember and be rebuked. The first question asks whether the applicant, or any member of the applicant's family, has ever 'been convicted of a crime or offence in any country (including any conviction which is now removed from official records)'.<sup>140</sup> The last part of this question seems to suggest that even if the criminal law of the country in which the crime was committed has forgiven the foreigner, the law of the host will not. Nor will it forgive the foreigner in cases where the action concerning the crime in question resulted in acquittal 'on the grounds of mental illness, insanity or unsoundness of mind'.<sup>141</sup> That is not all. The host's law will then go further and reopen the case, forcing the foreigner to undergo a retrial, where the host's law empowers immigration authorities to act as both judge and jury. The foreigner is given little chance to defend himself. If he wishes to do so, the only space provided for that purpose is a small box at the bottom of Form 456.<sup>142</sup>

The most dramatic instance of the interrogation occurs when Form 456 questions the foreigner about whether he has ever 'committed, or been involved in the commission of war crimes or crimes against humanity or human rights'.<sup>143</sup> At this moment, the encounter between the host and the foreigner can appropriately be described as a theatre of confession and repentance, of pardon

<sup>138</sup> Derrida, *Of Hospitality*, above n 3, 53, 55.

<sup>139</sup> Form 456, above n 50, 'Part D — Character'.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> However, the Form does say that should this space be 'insufficient', an 'additional statement' can be attached: *ibid.*

<sup>143</sup> *Ibid.*

and apology for all the transgressions, ignorance and sins that occurred in the past and that have the effect of excluding the foreigner from the hospitality and friendship of the host at present. There are two important points to be emphasised about this question. The first is that the foreigner is not questioned in the name of Australian national interest, but in the name of humanity. Accordingly, the foreigner must defend himself in front of all of humanity. Derrida elucidates the impossibility of decision, or 'undecidability' — the paralysis of indecision — when one is faced with crimes against humanity:

Indeed, if we start charging ourselves, while seeking forgiveness for them, with all of the past crimes against humanity, not a single innocent person would be left on earth, and hence there would be no-one left to sit in judgement or to arbitrate. We are all heirs, at least, of persons or events tainted in some basic, inward, ineradicable way by crimes against humanity.<sup>144</sup>

Following this view then, we might want to question the question. What justifies the authority, legal and moral, that the host claims when he requires the foreigner to *declare*, in good conscience, that the foreigner had no role *whatsoever* in any war crimes, or in crimes against humanity or human rights? Can there be a state that can claim that it has never committed nor had any part in acts of violence, oppression, aggression, persecution or genocide, be they legitimate or illegitimate? Surely not. Returning to the question posed by Form 456, one might want to ask: who has the right to accuse and who is able to defend when 'crimes against humanity' is the charge in the question? Who is to repent and who is to forgive? The second point to make in relation to the aforementioned question is that it strikes the foreigner with another absurdity: how is he supposed to be familiar with technical terms such as 'commission of a crime', 'war crimes' or 'crimes against humanity'? This absurdity becomes more obvious given the fact that there exists no such term as 'crime against human rights' in the vocabulary of international criminal law.<sup>145</sup> Is the host playing tricks here by way of this taxonomic invention to make an 'honest' answer even more impossible? Or does the host actually believe that a 'crime against human rights' *can* be committed? It is hard to imagine that any host state would be prepared to accept the implications of such a tremendous proposition.

Requiring the foreigner to respond to this series of complicated political questions has the effect of transforming the application for a business trip into an interrogation. Of course, the political nature of mobility and migration processes has been well documented from multiple perspectives.<sup>146</sup> As Dauvergne argues, 'in migration law there is no attempt to "hide" political decision-making in the

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<sup>144</sup> Jacques Derrida, 'Globalization, Peace and Cosmopolitics' (John Corbett and Brian Verity trans, 2004 ed) [trans of: *La mondialisation et la paix cosmopolitique*] in Jérôme Bindé (ed), *The Future of Values: 21<sup>st</sup> Century Talks* (2004) 110, 120.

<sup>145</sup> The jurisdiction of the International Criminal Court is limited to war crimes, genocide, crimes against humanity and the crime of aggression: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3, art 5(1) (entered into force 1 July 2002).

<sup>146</sup> See, eg, Rachel Silvey's survey of the contribution of feminist migration literature to the development of the critical social theory perspective on migration studies: Rachel Silvey, 'Power, Difference and Mobility: Feminist Advances in Migration Studies' (2004) 28 *Progress in Human Geography* 490.

guise of legal formalism'.<sup>147</sup> The above discussion attests to the political nature of decision-making — the way the foreigner is dealt with at the border reflects the host's political thought about the world. But how far can the migration law of the host go in political decision-making when the foreigner is simply asking for his right to hospitality, to enter into a peaceful commercial relationship with the host? To what degree is the law of the sovereign state free to adopt intrusive attitudes when it comes to welcoming the Other?

It is important to bear in mind that the purpose of the right to hospitality is to protect the foreigner against invasive, intrusive and unforgiving attitudes that impede, restrict or block his movement. It involves a notion of justice as right. This is precisely where law fails: 'justice is not the law. Justice is what gives us the impulse, the drive, or the movement to improve the law, that is, to deconstruct the law ... justice is always unequal to itself ... the call for justice is never, never fully answered.'<sup>148</sup> When Derrida spoke of the destruction of the right to hospitality, what he meant by the 'becoming-law of justice' is the regulation of the relationship between the foreigner and the host by law.<sup>149</sup> In the context of this article, it can be argued that the destruction of the right to hospitality occurs when the law of the host is given the power to judge the would-be visitors' culpability, or to delve into the private spheres of the foreigner's life, under the guise of determining his or her 'genuineness'. Hospitality is destroyed when the host treats the relationship with the foreigner as a matter of law, rather than as a matter of humanity. Destruction of hospitality is an unavoidable consequence of the approach in which welcoming the foreigner is regarded as a matter of political decision-making for the state.<sup>150</sup> The hospitality that is offered conditionally at the scenes of asking for 'forgiveness' is doomed to ultimate failure. As Derrida concedes:

since there is also no hospitality without finitude, sovereignty can only be exercised by filtering, choosing, and thus by excluding and doing violence. Injustice, a certain injustice ... begins right away, from the very threshold of the right to hospitality.<sup>151</sup>

## 2 *The Fearsome Image of the Foreigner*

Some argue that the ability of migration law to respond to global issues affecting the national interest is central to an analysis of the law's response to images of disorder.<sup>152</sup> Dauvergne, for instance, explains this ameliorating function of the law:

As new chaos looms, [migration] law can move quickly and precisely to order it ... External chaos, any condition which threatens the nation and against which it must be protected, provides a justification for controlling mechanisms in the

<sup>147</sup> Dauvergne, above n 85, 30–1.

<sup>148</sup> John Caputo (ed), *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (1997) 16–17.

<sup>149</sup> Derrida, *Of Hospitality*, above n 3, 73.

<sup>150</sup> 'To welcome the Other is to put in question my freedom': Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority* (Alphonso Lingis trans, 1988 ed) 85 [trans of: *Totalité et infini: essai sur l'extériorité*].

<sup>151</sup> Derrida, *Of Hospitality*, above n 3, 55.

<sup>152</sup> Dauvergne, above n 85, 32.

law, for control at the expense of all, even and especially against the human rights and obvious needs of others who are not members of the community.<sup>153</sup>

In the contemporary context, risks to national security constitute the most threatening image of disorder. What is distressing, however, is that such threats are conceived of as imported, as coming from outside. Accordingly, migration law, as the guardian of the border between inside and outside, performs its ordering task by constructing a protective wall between ‘us’ and ‘them’, insiders and outsiders.<sup>154</sup>

Against this background, one can understand why the Australian host uses Form 456 to ask the foreigner — who is now constructed as a potential threat — to declare honestly whether he has ever ‘been involved in any activities that would represent a risk to Australian national security’.<sup>155</sup> But what is national security? And what is *Australian* national security? Why are there separate categories for activities threatening Australian national security and crimes against humanity? Is it possible for someone to answer ‘no’ to the former but ‘yes’ to the latter? Is it possible for someone, who has committed a crime against humanity, the whole of humanity, not to be considered a threat to Australia and its ‘national security’? Or is the said distinction implying that a threat to Australian national security is inherently graver than, and thus distinct from, the threat posed by war crimes, crimes against humanity and human rights (whatever the latter may mean)?

Questions such as the ones posed by Part D of Form 456 reflect the point of arrival at which the right to hospitality clashes with concerns — real or unreal, justifiable or unjustifiable — regarding the protection of one’s home against a threat that is anonymous, unknown, but believed to be ‘out there’.<sup>156</sup> The disorder that provides the basis of migration law’s claim clashes with ‘the ordered identity’<sup>157</sup> which the foreigner needs to present. The difficulties that certain groups of aliens encounter in structuring such a representation of their *self* may be associated with what Derrida calls the perversion of the law of hospitality. As a consequence of this perversion, ‘one can become virtually xenophobic in order to protect or claim to protect one’s own hospitality, the own home that makes possible one’s own hospitality’.<sup>158</sup> Therefore, just as there will be no hospitality without the ‘sovereignty of oneself over one’s home’,<sup>159</sup> it would be difficult to conceive of hospitality where migration law, as the sovereign law, imposes a dreadful cost on the call for the right to hospitality by asking questions that cannot be answered truthfully.

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<sup>153</sup> Ibid 32–3.

<sup>154</sup> Ibid 33–4.

<sup>155</sup> Form 456, above n 50, ‘Part D — Character’.

<sup>156</sup> Professor Wyschogrod sees the possibility of being held hostage by the foreigner as part of the law of hospitality. She asks: ‘Is this acceptance of being hostage for the other not also the very law of hospitality?’ Wyschogrod, above n 107, 37. Similarly, Derrida argues that ‘[f]or unconditional hospitality to take place you have to accept the risk of the other coming and destroying the place ... stealing everything or killing everyone’: Derrida, ‘Hospitality, Justice and Responsibility’, above n 88, 71.

<sup>157</sup> Dauvergne, above n 85, 37.

<sup>158</sup> Derrida, *Of Hospitality*, above n 3, 53.

<sup>159</sup> Ibid 55.

## V CONCLUSION

The *GATS* provisions on the movement of natural persons can be described as a preliminary step towards an international regime for regulating temporary migration. One problem that remains, though, is the question of the best way in which to establish principles of conduct so as to ensure the orderly movement of people, as well as the fair and just treatment of workers and service suppliers when it comes to the application of entry regulation measures. No multilateral regime could succeed in tackling this problem unless it adequately and appropriately addresses domestic strategies for internal control, including dealing with discriminatory regulation of entry, the limitation of the rights and liberties of foreigners, and those that ‘fan the flames of racism and xenophobia by further stigmatizing foreigners’.<sup>160</sup> A successful multilateral process for regulating the orderly movement of people requires a redefinition of control — addressing areas where the overstressed concern for control prevails over the often downplayed desire to facilitate movement, while at the same time protecting the dignity of foreigners.

A detailed analysis of the operation of the right to hospitality, such as the case study offered in this article examining visa requirements for business persons wanting to enter Australia, allows us to explore the difficulties associated with establishing a fair multilateral regime regulating movement. Derrida’s notions of hospitality and threshold are particularly useful in identifying the points of arrival where the right to hospitality is violated, distorted, or rendered impossible to realise. Barriers to entry continue to exist at these points of arrival.

Inquiry into the possibility of a right to hospitality in international law exposes the tension embedded in the current politics of movement. State law is the source of this tension. Despite this fact, the *GATS* relies on state law to ensure the ‘orderly movement’ of people across borders, which gives power to the state to regulate arrivals without undertaking any ethical obligation regarding the terms on which it receives the foreigner.<sup>161</sup> This can result in a collision of hospitality and power, though these are not inherently contradictory principles — the law can be as protective as it can be repressive. Nevertheless it is this collision, this tension or conflict between the right of hospitality and the sovereign right of states to exclude foreigners, that has constituted the greatest hurdle to the liberalisation of the movement of natural persons under Mode 4 of the *GATS*.

The above case study shows that hospitality requires more than a mere invitation to *attempt* to enter into a relationship with another nation. This analysis allows us to distinguish between *inviting* foreigners, be they asylum seekers, migrants or service providers, and *welcoming* them by extending hospitality to them. Hospitality does not dispense with the state but instead it informs us about the ways in which the ‘best arrangements ... the least bad conditions, the most just legislation’<sup>162</sup> can be framed and enforced. As the right to hospitality is enjoyed only by the foreigner — that is, one must remain a

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<sup>160</sup> James Hollifield, ‘Migration, Trade, and the Nation-State: The Myth of Globalization’ (1998) 3 *UCLA Journal of International Law and Foreign Affairs* 623.

<sup>161</sup> *MNP Annex*, above n 4, [4].

<sup>162</sup> Derrida, ‘The Principle of Hospitality’, above n 73, 6.

foreigner in order to assert the right to hospitality — the state will enjoy the power, and in fact will be under the obligation, to invite, recognise and identify the foreigner in order to offer them hospitality. The configuration of state power is revealed when that power is used, or abused, to subject the foreigner (some groups more than others) to judicial and prejudicial attitudes exercised as conditions of hospitality.

Although the *GATS* sanctions discriminatory treatment of cross-border service suppliers under Mode 4 in terms of visa requirements,<sup>163</sup> the unfair treatment of certain groups of service suppliers raises concern over its broader claim for ‘transparency and progressive liberalization’, as well as its goal of providing a context for reciprocal and ‘mutually advantageous’ trade arrangements.<sup>164</sup> Unfair treatment of foreigners on the basis of name, race and nationality places the foreigner at risk of ‘becoming a relative nonstranger so that hospitality, which should be granted only to strangers, would then be granted only to relative relatives, to those who look, sound, and smell like us, to those who share our tastes’.<sup>165</sup>

If international economic law still sees promoting ‘fair’ trade as its primary mission, then it must find a way to invite a new meaning of fairness to inform the regulation of the movement of natural persons in order to eradicate the old assumption that trade should only be fair when it takes place between compeers, fellow citizens and fellow residents.

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<sup>163</sup> See above Part II.

<sup>164</sup> *GATS*, above n 4, preamble.

<sup>165</sup> Naas, above n 102, 159.