



Submission No 2

Inquiry into Australia's trade and investment relationship with Japan and the Republic of Korea

Name: Dr Luke Nottage

Private capacity

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Australian Senate - The Trade Sub-Committee of the
Joint Standing Committee on Foreign Affairs, Defence and Trade
Canberra, ACT – by email jscfadt@aph.gov.au

Dear Senate Sub-Committee

Submission to

Inquiry into Australia's trade and investment relationship with Japan and the Republic of Korea

I specialise in Japanese law in its socio-economic context.¹ I am pleased to provide this brief Submission on aspects of your Terms of Reference, namely:

- the nature of Australia's existing trade and investment relations with Japan;
- emerging and possible future trends in these relations;
- barriers and impediments to trade and investment with Japan for Australian businesses;
- opportunities for deepening existing commercial links, and developing new ones, with Japan; and
- the role of the government in identifying new opportunities and assisting Australian companies to access existing and potential opportunities in Japan.

In Appendix A, an essay commissioned by <http://theconversation.edu.au/> and also available on my 'Japanese Law and the Asia-Pacific' blog at <http://blogs.usyd.edu.au/japaneselaw/>, I identify various opportunities and impediments to improving Australia-Japan bilateral relations through a Free Trade Agreement, particularly following the 11 March disasters in Japan.

This ties into my broader thesis that FTAs in a post-GFC era need to go beyond 'business as usual', and seek to address various 'beyond the border' issues not just to

¹ My CV and biodata are available at <http://sydney.edu.au/law/about/staff/LukeNottage/>.

liberalise markets but also to entrench minimal regulatory standards, in order to promote more sustainable economic growth and greater democratic legitimacy.² For example:

1. We should incorporate in FTAs themselves, not looser ad hoc agreements between regulators, provisions that
 - a. encourage joint safety standard setting; and
 - b. require information-sharing among regulators relating to accidents and emergent serious risks related to consumer product safety accidents;³
2. Australia and Japan should take the lead in showing how FTAs (and investment treaties) can be used to provide a balanced “investor-state arbitration” (ISA) mechanism protecting foreign investors against illegal interference with their investments carried out by host states, eg by:
 - a. agreeing on wider exceptions to allow appropriate host state regulatory discretion regarding public health issues; and
 - b. encouraging respective national arbitral bodies like ACICA and JCAA jointly to develop Arbitration Rules that are more tailored to an appropriate balance of public and private interests involved in investor-state disputes, which Rules should then be incorporated into future treaties as an option for disgruntled investors to invoke in resolving their disputes fairly and cost-effectively for both sides.⁴

As another step towards greater legal harmonisation, Australia should anyway approach Japan about agreeing – in parallel to an FTA, as it relates also to point 2 above – on a regime allowing closer judicial cooperation, especially bilateral recognition of court judgments, along the lines of the recent Trans-Tasman Agreement on Court Proceedings.

I am happy to elaborate on any of these recommendations, including at any Senate Hearings that you may hold to examine and plan out Australia’s crucial bilateral relationship with Japan.

Yours sincerely,

² Nottage, Luke R., Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era (November, 19 2009). Sydney Law School Research Paper No. 09/125. Available at SSRN: <http://ssrn.com/abstract=1509810>.

³ See also Appendix B, my paper published in the current issue of the *Commercial Law Journal*, contrasting aspects of the legislative reporting regimes now found in Australia and Japan (and other major economies).

⁴ See Nottage, Luke R. and Miles, Kate, 'Back to the Future' for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests (June 25, 2008). In L Nottage & R Garnett (eds), 'International Arbitration in Australia', Federation Press: Sydney, 2010; Journal of International Arbitration, Vol. 26, No.1, pp. 25-58, 2009; Sydney Law School Research Paper No. 08/62. Available at SSRN: <http://ssrn.com/abstract=1151167>; but also my concerns about ‘overkill’ in ISA reform initiatives, expressed in Nottage, Luke R., The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic’s View of Australia’s ‘Gillard Government Trade Policy Statement’ (June 10, 2011). Transnational Dispute Management, forthcoming. Available at SSRN: <http://ssrn.com/abstract=1860505>.