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A Critical Discourse Analysis of the Intellectual Property Chapter of the TPP: Confirming What the Critics Fear

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Abstract

A host of organizations and citizens groups have convincingly pointed out that so called “Free Trade Agreements” have done more harm than good to the U.S. and other countries involved. Thanks to their protests, for the moment, the most ambitious multinational, neoliberal project of our young century, the Trans-Pacific Partnership (TPP), has been defeated. If the agreement had been adopted, the TPP would have shaped new rules of trade for over 8 million people, spanning 40% of the global economy. Using Critical Discourse Analysis (CDA), my study shows how the complex language of the actual treaty compared to its more simplistic and optimistic summary on the US Trade Representative website reveals the TPP to be a corporate power grab, depriving nation states, public institutions and individual citizens of their democratic rights.

Due to its central importance in a number of realms (entertainment copyrights, pharmaceuticals, the internet), my analysis focuses on the Intellectual Property (IP) chapter of the TPP. As labor leaders, environmentalists, internet defenders, concerned physicians, and others have pointed out, the IP chapter essentially would have essentially enforced a ratcheted-up version of US intellectual property law across member nations. Given the TPP’s raw financial motivation and the unequal economic status of signatory nations, an analysis of the IP chapter requires a methodology which centers on uncovering ideologies, power imbalances, gender inequalities and the like. CDA works well for this purpose as it aims to expose socially-constructed inequality by uncovering how public discourses such as laws and treaties relate to power structures and actually construct power itself. Using CDA, I will show how rhetorical devices such as implied audience, genre and style, as well as socio-economic, and historical/contextual representations hide power imbalances and erase subjectivities. CDA also welcomes quantitative measures such as computer-assisted linguistic and content analyses which add empirical weight to the conclusions of my investigation. When examining corpora such as the TPP full of legal jargon and qualifying hedges, computer-assisted content analysis offers a manageable way to characterize large or difficult bodies of textual data and often allows for broader and more valid interpretations. Content analysis is also useful for revealing non-obvious, but

meaningful patterns of language use. Thus through word counts, frequency tabulations, and collocations, I will show how multinational neoliberalism manifests itself in the full TPP Intellectual Property chapter which supports the construction of a world in the US neoliberal image. The chapter summary, on the other hand, emphasizes the promotion of economic democracy and the collective good. This rhetorical duplicity will be situated conceptually, in my essay which draws on the work of Norman Fairclough, Teun Van Dijk, David Harvey, Ruth Wodak, and others, to show how the TPP reflects and contributes to the discourse which naturalizes US corporate hegemony and exploitation.



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A Critical Discourse Analysis of the Intellectual Property Chapter of the TPP: Confirming What the Critics Feared

A host of organizations and citizens groups have convincingly pointed out that so called “Free Trade Agreements” have done more harm than good to the U.S. and other countries involved. Thanks to their protests, for the moment, the most ambitious multinational, neoliberal project of our young century, the Trans-Pacific Partnership (TPP), has been defeated. Activists, scientists, environmentalists, labor unions, concerned citizens and others opposed the treaty and created a tide of opposition which ultimately led the two 2016 presidential candidates to call for its elimination. Had it passed, the TPP would have gone far beyond existing “free trade agreements” such as NAFTA and granted ever more power to multinational corporations while depriving nation states, public institutions and individual citizens of their rights. Written in secrecy over seven years largely by corporate representatives, if it had been adopted, the TPP would have paved the way for further neoliberal, globalized trading that would have affected over 800 million people and 40% of the world economy.¹ Before the TPP’s downfall, 487 lobbying and business organizations spent millions to support the TPP in Congress by arguing that the TPP would bring increased commerce and trade to the US.² In its zeal to promote the TPP, and perhaps in a move toward transparency after years of working in secret, the Obama administration’s US Trade Representative posted the actual treaty online in November 2015. Because of its obtuse and esoteric language, few lay Americans could decipher the actual TPP text. Summary chapters of the treaty were also posted and written with far less legal terminology and with a different rhetorical purpose--to try and convince the average citizen that the TPP was beneficial. In this age of “fake news,” polarized opinion, misleading statements and outright falsehoods, it has become difficult to discern where the truth lies; nevertheless, a barrage of careful evidence revealing the treaty’s harmful effects chipped away at its support and prompted ever more individual citizens and citizens’ groups to voice their opposition. Thankfully, although since being elected, President Donald Trump has so far declined to reintroduce the TPP; however, he has indicated a desire to renegotiate the NAFTA treaty to include many of the worst provisions in the TPP.

My examination of the TPP using Critical Discourse Analysis (CDA) will illustrate that these so called “free trade agreements” contribute to a discursive

¹ “What Is the Trans-Pacific Partnership?,” *BBC News*, January 23, 2017, sec. Business, <http://www.bbc.com/news/business-32498715>.

² Will Tucker, “Millions Spent by 487 Organizations to Influence TPP Outcome,” *Truthout*, October 8, 2015, <http://www.truth-out.org/speakout/item/33170-millions-spent-by-487-organizations-to-influence-tpp-outcome>.

environment that relies on and helps a neoliberal worldview and economy, thereby turning citizens into unwitting participants in a corporate-driven market that takes advantage of them, rendering them alienated from their own subjectivity and agency. CDA is a method of analysis used by linguists to expose just such ideological work in which power imbalances are constructed through discourse. Also, this study offers evidence from quantitative and qualitative data that reveals that buried in the text of this trade deal are stipulations that would harm the vast majority of Americans, as well as the citizens of other nations. Specifically, the terms of the TPP will be shown to strengthen a globalized neoliberal trade agenda that will deprive nation states of due process in disputes with corporations, restrict the development of new and less expensive generic drugs, stifle the creativity of artists who rely on the internet to promote their work, and widen the already vast economic disparities between ruling elites and the average citizen in every signatory country.

A Closer Look at Neoliberalism

Neoliberal capitalism refers to the rebirth of the liberal economic ideas of the 19th century, which celebrated free market philosophies and laissez-faire economics, hence the term “*neo-liberalism*.”³ Spearheaded in the early 1970’s by economists F.A. Hayek and Milton Friedman, neoliberalism opposes Keynesian economics of government aid and market intervention in favor of free market fundamentalism and the privatization of formerly public services. Political proponents, Margaret Thatcher, Ronald Reagan, and others since have privatized formerly public entities such as energy, water, transportation, health, education, roads and prisons, shifting many of the costs of such services to individuals. Through the International Monetary Fund, the World Bank, the Maastricht treaty and the World Trade Organization, neoliberal policies have been imposed worldwide. In the process labor unions have been weakened and destroyed. Structural economic, social and political causes of poverty and other social ills are minimized or ignored. Massive tax cuts go to the rich, and businesses in every realm have been deregulated, so that

³ Pauline Johnson, “Sociology and the Critique of Neoliberalism Reflections on Peter Wagner and Axel Honneth,” *European Journal of Social Theory* 17, no. 4 (November 1, 2014): 516–33, doi:10.1177/1368431014534354.

many environmental, health and safety standards have disappeared.⁴⁵⁶⁷⁸ On the personal level, psychologists have found that neoliberalism seeks to cultivate social subjects who are competitive and individualistic, who must constantly strive to acquire new skills and “rebrand” themselves on social media to keep their workplace talents or social status known and secure. The neoliberal worker must be seen as self-reliant and entrepreneurial, lest he or she be replaced by someone who has more of these qualities. At the same time, because of the cutbacks in federal and state benefits, the neoliberal employee is anxious and insecure, too often living in a situation of precarity, without the public mental health services that might help to alleviate the psychic pain.⁹

David Harvey, leading scholar and critic of neoliberalism, has argued, “Neoliberalism has, in short, become hegemonic as a mode of discourse and has pervasive effects on ways of thought and political-economic practices to the point where it has become incorporated into the common sense way we interpret, live in and understand the world.” Harvey continues, “If markets do not exist, (in areas such as education, health care, social security, or environmental pollution), then they must be created, by state action if necessary.”¹⁰ Accordingly, the TPP attempts to open up digital production, a previously unregulated area of the market, to the discipline of copyright and intellectual property protocols to guarantee profit. Most recently neoliberalism has been buttressed by the financialization of capital worldwide, rendering shareholders and investors more important in investment decisions than consumers/citizens, employees, suppliers and even business owners. More nefarious effects of financialization have been the offshoring of financial

⁴ Ibid.

⁵ Zhuo Ban and Mohan Jyoti Dutta, “Minding Their Business: Discourses of Colonialism and Neoliberalism in the Commercial Guide for US Companies in China,” *Public Relations Inquiry* 1, no. 2 (May 1, 2012): 197–220, doi:10.1177/2046147X11435079.

⁶ William Davies, “Elite Power under Advanced Neoliberalism,” *Theory, Culture & Society* 34, no. 5–6 (September 2017): 227–50, doi:10.1177/0263276417715072.

⁷ David Harvey, “Neoliberalism as Creative Destruction,” *Annals of the American Academy of Political and Social Science* 610, no. 21 (2007): 22–44.

⁸ George Monbiot, “George Monbiot | Neoliberalism: The Ideology at the Root of All Our Problems,” *Truthout*, accessed September 3, 2017, <http://www.truthout.org/opinion/item/35692-neoliberalism-the-ideology-at-the-root-of-all-our-problems>.

⁹ Luigi Esposito and Fernando M. Perez, “Neoliberalism and the Commodification of Mental Health,” *Humanity & Society* 38, no. 4 (November 1, 2014): 414–42, doi:10.1177/0160597614544958.

¹⁰ David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2007).

capital to escape taxes, and an obfuscation of elite power as those exercising it through trade agreements have no public authority or visibility.¹¹ Thus, neoliberal capitalism has ushered in a new age of withering economic democracy and diminishing regulatory safeguards.

Critical Discourse Analysis: Fighting Power and Building Social Equality

Such potent and pervasive neoliberal discourse calls for a method of analysis that can uncover a text's opaque ideological proclivities. CDA, an evolving method of theory and research begun in the 1970's, "aims to reveal what kinds of social relations of power are present in texts both explicitly and implicitly."¹² Since I will use Norman Fairclough's work to guide my analysis, I will clarify here the meanings he assigns to certain terms. By *discourse* Fairclough is referring to "the language associated with a particular social field or practice (eg 'political discourse'), or a way of construing aspects of the world associated with a particular social perspective (e.g., a 'neo-liberal discourse of globalization')." ¹³ He calls a *discursive event* an "instance of language use, analyzed as text, discursive practice, and social practice"¹⁴ Finally, by *text*, Fairclough means "the written or spoken language produced in a discursive event"¹⁵ The text of the TPP thus fits both of these usages in that contains language associated with the practice of law and international trade regulations. Fairclough emphasizes that "the discursive event is shaped by situations, institutions and social structures, but it also shapes them," hence the hopeful dialectic at the heart of Fairclough's method.¹⁶ Fairclough, the pioneering founder, prolific theorist, and practitioner of CDA, also insists on the significance of discourse in constructing neoliberalism, citing Pierre

¹¹ Aeron Davis and Catherine Walsh, "Distinguishing Financialization from Neoliberalism," *Theory, Culture & Society* 34, no. 5–6 (September 2017): 27–51, doi:10.1177/0263276417715511.

¹² David Machin and Andrea Mayr, *How to Do Critical Discourse Analysis* (Sage Publications Ltd, 2012).

¹³ Norman Fairclough, "Critical Discourse Analysis and the Marketization of Public Discourse: The Universities," *Discourse and Society* 4, no. 2 (1993): 133–68.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Norman Fairclough and Ruth Wodak, "Critical Discourse Analysis," in *Discourse as Social Interaction* (London: Sage, 1997), 258–85.

Bourdieu, who forcefully argued that the international dominance which neoliberalism has achieved is in large part the dominance of a discourse.¹⁷

Other scholars write that CDA is “characterized by concerns about discourse as a site where ideologies, power relations and forms of social control are reproduced, and particular accounts of reality are naturalized. . .”¹⁸ CDA therefore does not hide its political objective, which, as Fairclough has put it, “is to use critique of discourse as a point of entry for critique of the existing social reality which can provide sound reasons for action to change it.”¹⁹ Frequently cited approaches to CDA include Teun Van Dijk’s “socio-cognitive” framework, which uses social-psychological investigations to uncover the reproduction of inequality²⁰; Ruth Wodak’s “discourse-historical approach,” which traces the history of phrases and arguments in the construction concepts such as racism²¹; and finally, Fairclough’s, “dialectical-relational” approach,²² which incorporates elements of the other two methods and gives added importance to analyzing the social discursive construction of social structures and ways of life. Fairclough’s method of analysis seems particularly appropriate for my investigation since he has studied both neoliberalism and globalization, and has identified a “neo-liberal discourse of globalization”²³ that should be exposed and challenged.

Fairclough defines his own method of CDA this way:

By CDA I mean discourse analysis which aims to systematically explore often opaque relationships of causality and determination

¹⁷ Norman Fairclough, “Neo-Liberalism – a Discourse-Analytical Perspective,” in *Proceedings of Conference on British and American Studies* (Conference on British and American Studies, Transilvania Brasov: Editura Universitatii, 2005), 1–18.

¹⁸ Deborah Cameron and Ivan Panovic, *Working with Written Discourse* (London: Sage Publications Ltd, 2014).

¹⁹ Norman Fairclough, “What Is CDA? Language and Power Twenty-Five Years On” 2014, https://www.academia.edu/8429277/What_is_CDA_Language_and_Power_twenty-five_years_on.

²⁰ Teun A. Van Dijk, “Social Cognition and Discourse,” in *Handbook of Language and Social Psychology*, ed. H Giles and W.P. Robinson (London: John Wiley and Sons, 1990), 163–183,

<https://pdfs.semanticscholar.org/118b/e3fef4af1de8e49a7693027734be35849e17.pdf>.

²¹ Ruth Wodak, “The Discourse Historical Approach,” in *Methods of Critical Discourse Analysis*, ed. Ruth Wodak and M Meyer (London: Sage, 2001), 87–122.

²² Norman Fairclough, “A Dialectical-Relational Approach,” in *Methods of Critical Discourse Analysis*, ed. Ruth Wodak and Michael Meyer (Thousand Oaks, CA: SAGE Publications Ltd, 2009), 162–86.

²³ Fairclough, “Neo-Liberalism – a Discourse-Analytical Perspective.”

between (a) discursive practices, events and texts, and (b) wider social and cultural structures, relations, and processes; to investigate how such practices, events and texts arise out of and are ideologically shaped by relations of power and struggles over power; and to explore how the opacity of these relationships between discourse and society is itself a factor securing power and hegemony.²⁴

Fairclough's Methodology of Critical Discourse Analysis

Fairclough's method, which has evolved over the years, has retained three basic elements. Referred to as a "Dialectical-Relational Approach," it calls for 1) the linguistic description of the formal properties of the text; 2) the interpretation of the relationship between the discursive processes/interaction and the text, where text is the end product of a process of text production and as a resource in the process of text interpretation; and 3) the explanation of the relationship between discourse and social and cultural reality. . . ."²⁵ In other words, Fairclough's CDA is oriented to textual detail, the production, distribution and interpretation/consumption of texts, and wider social and cultural contexts.²⁶ Fairclough has also recommended the use of corpus analysis, or investigations of large or jargon-laden bodies of textual data, for CDA projects. Although he warns that computer-assisted textual analysis is not an analytical tool by itself, "The capacity of corpus linguistics to produce quantitative information about very large collections of samples of language use makes it a potentially useful tool for language and discourse analysts of various types." I will use CDA to show how rhetorical devices such as implied audience, genre and style, as well as socio-economic, and historical/contextual representations are used to create power imbalances and erase subjectivities.

Fairclough's CDA: Discourse Practice, Textual Analysis and Cultural Context

What follows is a discussion of the process of discourse practices such as text production and consumption to be followed by a linguistic description of the TPP in its cultural and political context. Due to its central importance in a number of realms (entertainment copyrights, internet, pharmaceuticals, the internet, etc.), the Intellectual Property (IP) chapter of the TPP deserves particular attention. The

²⁴ Fairclough, "Critical Discourse Analysis and the Marketization of Public Discourse: The Universities."

²⁵ Fairclough, "What Is CDA? Language and Power Twenty-Five Years On."

²⁶ Fairclough, "Critical Discourse Analysis and the Marketization of Public Discourse: The Universities."

irony of the chapter's restrictive parameters on intellectual property as part of a "free trade" agreement has not been lost on its critics. This chapter of the TPP actually puts limits on how and when intellectual property can be shared and enjoyed rather than extending its free trade possibilities. There is little freedom of exchange regarding the movies, songs, videos, or images under copyright. Indeed, the IP chapter, concerned as it is with cultural texts of many kinds, contributes to the social construction of a neoliberal worldview and subjectivity as it puts forward as "common sense," ideas that are imbued with inequality in terms of gender, race, class and geographical location.

Posted on the website of the Office of the US Trade Representative, at 5,544 pages, the TPP is a monstrosity of legal restrictions.²⁷ Because of the Obama administration's desire to sell the TPP to the American people and business owners, the US Trade Representative website hosts simplified chapter summaries that present the treaty, not surprisingly, in positive, neoliberal-affirming terms. The Intellectual Property chapter's full text is 75 pages (25,949 words) while the chapter summary is 9 pages (2478 words).²⁸ A comparison of the US Trade Representative's promotion of the treaty on its web page in summary form with the treaty itself reveals a disturbing pattern of dissimulation, as the summary forecasts a favorable future for Americans if the treaty is adopted. This dissimulation is further corroborated by a computer assisted text analysis and a content analysis comparing the two documents that are discussed later in this article.

There are many cultural texts that construct the neoliberal hegemonic worldview, but among the most important have to be legal documents and treaties such as the TPP. CDA scholars have pointed out the great power of legal discourse because it is backed up by the authority of the state.²⁹ As opinion shapers, authors of international treaties are concerned with influencing important audiences at home and abroad. Readers could consist of politicians, business leaders, diplomats, government officials, journalists and the like, all of whom are important conveyors of information when it comes to attaining support for public policy and action,

²⁷ "TPP Full Text," accessed May 15, 2017, /trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

²⁸ "TPP Chapter Summary--Intellectual Property" (US Trade Representative), accessed August 1, 2016, <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Intellectual-Property.pdf>.

²⁹ Johanna Niemim-Kiesilainen, Paivi Honkatukia, and Minna Ruuskanen, "Legal Texts as Discourses," in *Exploiting the Limits of Law* (London: Ashgate, 2007), <https://www.utu.fi/en/units/law/faculty/people/Documents/Legal%20Texts%20as%20Ds.pdf>.

typically neoliberal economic plans. Average Americans are not usually addressed in these types of documents; indeed, they may be intentionally ignored.

The audience for the US Trade Representative's IP chapter summary, however, is constructed quite differently. The summary seems aimed at the general reader, an individual copyright holder, a business leader or a small business owner who wishes to find out about the treaty and the corporate and national parties involved. This is a fairly easy to read and much shorter document than the full chapter, and it uses language that contrasts sharply with the legalese and difficult-to-decipher prose of the full chapter itself. In their book on CDA, David Machin and Andrea Mayr emphasize the importance of uncovering ideologically veiled ways of naming or representing "social actors" or "participants" in discourse.³⁰ The summary paradoxically tries to imbue the reader with the sense of possibility and individual gain available to the neoliberal subject while also prodding the reader to become part of the collective "our" of the corporate project that assures the protection of multinational profits. However the subject constructed in the treaty is white, male and heterosexual; other subjectivities are omitted. Fairclough³¹ (2003) has pointed out that what is missing in a text is just as important as what is present; Machin and Mayr label it "suppression" when a social actor or activity is absent from a text.³² Such suppression is involved in the TPP's omission of the power differentials related to gender, race, class, and the LGBT community. Also, there is only minimal recognition of the power and income differentials between nations of the North and South. Such suppression serves to construct disempowered citizens who identify with the corporate state. The Human Rights records of several signatory countries, notably Malaysia and Brunei, are murderous when it comes to the LGBT community.³³³⁴ Obviously, given the dominance of patriarchal social structures throughout the TPP treaty countries, women and other minorities do not have the same access to economic resources as men do. The TPP's silence on these fundamental human rights issues renders the glowing promises impossible to fulfill for these disempowered members of society.

³⁰ Machin and Mayr, *How to Do Critical Discourse Analysis*. 77.

³¹ Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (London: Routledge, 2003).

³² Machin and Mayr, *How to Do Critical Discourse Analysis*.

³³ Boris Dittrich, "Transgender Woman Murdered in Malaysia," *Human Rights Watch*, February 24, 2017, <https://www.hrw.org/news/2017/02/24/transgender-woman-murdered-malaysia>.

³⁴ Dominique Mosbergen, "Being LGBT In Southeast Asia: Stories Of Abuse, Survival And Tremendous Courage," *Huffington Post*, October 11, 2015, sec. The WorldPost, http://www.huffingtonpost.com/entry/lgbt-in-southeast-asia_us_55e406e1e4b0c818f6185151.

Indeed, the public citizenry has also been omitted from the documents. The “Parties,” mentioned in the TPP refer to nation states, big pharmaceutical and agricultural multinationals, internet service providers (ISP’s) and multinational entertainment conglomerates. Citizens of member nations are referred to as “consumers,” ready to buy whatever they are pushed toward by market forces. The only mention of “natural person” is in regard to the copyright extension which is increased to 70 years after the creator’s death. In any case, generally the rights to content are in corporate hands, not those of the author’s or the public’s. Not surprisingly, this corporate-privileging trade agenda is not owned up to in the introduction of the US Trade Representative’s Intellectual Property chapter, which reads “The IP chapter creates a set of shared understandings regarding IP systems, including that the protection and enforcement of IP rights should contribute to innovation and the dissemination of technology to the mutual advantage of diverse stakeholders and in a manner conducive to social and economic welfare.”

CDA: Text Analysis

The first thing a reader notices about the IP summary chapter is the title, emblazoned in a large seal on the front page, “TPP – Made in America.” Thus begins a quest to convince working class Americans that they will again be key players in “our” nation’s industrial production. “With more than 95 percent of the world’s consumers living outside *our* [emphasis mine] borders, TPP will significantly expand the export of Made-in-America goods and services and support American jobs.” In fact the word *American* and its variations are used eight times in the summary. In the actual treaty chapter, of course, there is not one mention of the United States or *Americans*. This omission underscores the fact that no one nation can be revealed to have such privileges, since the treaty is more loyal to multinational corporations than to any one country or its citizens. Nevertheless, the summary continues with inclusive, nationalistic terminology, using the first person plural possessive pronoun, *our*, to include the reader with the rest of the Americans the treaty will benefit. Frequently readers are positioned among the creators, innovators, etc. constructing an identification with the cutting edge IP professional that they are encouraged to aspire to. Also, the IP summary consistently reduces the citizens of other nations to “consumers,” while giving the impression that Americans are great producers and exporters in spite of the fact that the US has a trade deficit with most nations that has grown substantially since the last major free trade treaty we signed, NAFTA.

In saying that “the chapter combines strong and balanced protections with effective enforcement of those protections, consistent with existing US law,” the US Trade Representative summary gives the impression that Americans need protection from other nations, who are implied to be more likely to cheat on

copyright and other areas of trade prescriptions. Declaring that the treaty is “consistent with existing US law” is a misleading statement because in the area of copyright, patents and pharmaceuticals, the treaty goes well further than US law, extending copyright length 25 years beyond current limitations, and thereby inflicting this extension on the other content creators of the world. Also, the “other” is framed as competitor. If the U.S. doesn’t secure these two billion new customers, some other nation will. Also, the chapter claims that the “TPP does not include any obligations on these ISPs [Internet Service Providers], yet, indeed, in the text of the treaty it does. (See section below)

In several places in the chapter summary, the authors refer to US producers as needing “protection” from illegal practices by other nations, thus casting them as “other” and therefore untrustworthy. This “othering” of the Asia-Pacific region continues in the chapter when the authors declare that “Regional piracy rates remain high, and cyber theft of trade secrets is rapidly growing. The region is also a thriving environment for the counterfeit industry.”³⁵ For example, the treaty is said to strengthen the “protection of the brand names,” “establish clear protection of works such as songs, movies, books and software programs,” extend “protection and enforcement of copyright in the digital age,” extend “market protection for biologics [medicines],” and “data protection.” On the other hand, the authors complain about “‘overprotecting’ [sic] geographical indications in ways that shut out US agricultural and food producers. . .” When the document states that US IP business accounts for so many dollars in trade, it is clear that the other nations in the region, except for Japan, are expected to be buying the US products, not manufacturing their own. As is the case with NAFTA in Mexico, a real danger is that the citizens of these countries will be forced to work for very low wages for international firms who use their labor to make products that will be exported back and sold to more developed nations.

Another area that deserves mention is the intertextuality of the IP chapter. Previous treaties, such as TRIPS, and GATT are frequently referred to in the summary, and the TPP is said to build on these earlier free trade agreements. The IP chapter is thus presented as a progression of important agreements culminating in the TPP. Ideologically this reinforces the view that the neoliberal increase of free trade in ever more areas of life is natural and beneficial, since this approach grows out of what the text presents as previously successful past treaties.

CDA: Linguistic Description

³⁵ “TPP Chapter Summary--Intellectual Property.” 3-9.

A comparison of the actual text of the treaty with the summary chapter reveals numerous obscurities and legal loopholes that seem to offer protections to nations and their citizens, when in actuality, the treaty's language has put in place ambiguities that opponents of the treaty fear would guarantee corporate sovereignty in perpetuity. As paired examples below will show, the language used in the treaty is duplicitous in many areas, allowing for claims in the summaries that the treaty is fair, protecting small businesses and consumers. In several instances, the summary chapter contradicts the actual IP treaty chapter. Below are some examples from the treaty that opponents have found the most troubling, followed by their affirmative simplification in the US Trade Representative summary.

From the US Trade Representative summary:

Enabling Public Health Protections

The chapter incorporates the Doha Declaration on the TRIPS Agreement and Public Health, and affirms that Parties are not prevented from taking measures to promote socio-economic well-being and to protect public health in response to epidemics such as HIV/AIDS.

Notice that regarding a country's "taking measures to promote . . . public health . . ." is stated in the negative, using the phrase "not prevented from" such promotions instead of a more positive affirmation of such an action.

From the actual TPP Treaty:

Article 18.3: Principles

- ii. A Party may, in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, *provided that such measures are consistent with the provisions of this Chapter.* [Italics mine]

The important words here, "provided that such measures are consistent with the provisions of this Chapter" are significant. While the beginning of the article above sounds as if the sovereignty of nation states is guaranteed so they can "adopt measures necessary to protect public health and nutrition. . .," the final clause makes clear that actions must be consistent with the many stipulations, limitations, and protections in the actual IP Chapter itself.

There are many references in the Trade Representative's summary about keeping medicines safe and accessible to the citizens of developing countries, but in the TPP itself, these promises ring hollow, couched as they are in vague and misleading language. Below are a few quotations which reveal contrasting US Trade Representative summary language and the TPP itself in the area of medicines.

From the US Trade Representative summary:

The TPP aims to promote "the development and availability of innovative and generic medicine."

From the TPP Treaty:

Article 18.53: Definition of New Pharmaceutical Product

For the purposes of Article 18.50.1 (Protection of Undisclosed Test or Other Data), a *new pharmaceutical product* [italics mine] means a pharmaceutical product that does not contain a chemical entity that has been previously approved in that Party.

This particular article of the TPP allows pharmaceutical companies to tweak the formula ever so slightly for a drug that has outlived its patent and declare this a slightly altered "new" drug and charge exorbitant prices for it. This process is known as "evergreening."

From the US Trade Representative summary:

Promoting the Development and Availability of Innovative and Generic Medicines

The Intellectual Property chapter also includes commitments to promote not only the development of innovative, life-saving drugs and treatments, but also robust generic medicine markets.

Yet, in the actual TPP treaty, the reader encounters several areas that will make the development and sale of generic medicines more difficult and expensive, lengthening the time before less costly generic drugs come on the market.

From US Trade Representative:

Protection for Regulatory Test Data

Promoting Investments in the Development and Testing of Safe and Effective Medicines and Agrochemical Products

The Intellectual Property chapter includes commitments related to protection of undisclosed test and other data generated to obtain marketing approval of pharmaceuticals and agricultural chemicals.

Article 18.49: Regulatory Review Exception

(b) If a Party permits, as a condition of granting marketing approval for a new pharmaceutical product, the submission of evidence of prior marketing approval of the product in another territory, that Party shall not permit third persons, without the consent of a person that previously submitted such information concerning the safety and efficacy of the product, to market a same or a similar product based on evidence relating to prior marketing approval in the other territory for at least five years from the date of marketing approval of the new pharmaceutical product in the territory of that Party.

Thus, signatory nations are required to consider as trade secrets all clinical trial data provided to regulatory agencies in support of a drug product's claims of safety effectiveness. This extends the term of data exclusivity, again lengthening or prohibiting the development of generic drugs which could use original clinical trial data in support of their production. Critics also point out that often private pharmaceutical companies receive public subsidies for clinical trials, and therefore the public should have the right to receive the cost savings of generic drugs developed from the clinical trials.

Another extension of patent protections occurs when the TPP turns to biologics, or drugs made from living organisms.

From the US Trade Representative Summary:

Biologics and Pharmaceutical IP

The TPP includes additional specific rules related to biologic medicines, reflecting the growing importance of these cutting-edge

technologies. These commitments are intended to promote innovation and promote access to affordable medicines in developing countries.

From the TPP Treaty:

Article 18.52: Biologics

1. With regard to protecting new biologics, a Party shall either:
 - (a) with respect to the first marketing approval in a Party of a new pharmaceutical product that is or contains a biologic, provide effective market protection through the implementation of Article 18.50.1 (Protection of Undisclosed Test or Other Data) and Article 18.50.3, *mutatis mutandis*, for a period of at least eight years from the date of first marketing approval of that product in that Party; or, alternatively,
 - (b) with respect to the first marketing approval in a Party of a new pharmaceutical product that is or contains a biologic, provide effective market protection:
 - (i) through the implementation of Article 18.50.1 (Protection of Undisclosed Test or Other Data) and Article 18.50.3, *mutatis mutandis*, for a period of at least five years from the date of first marketing approval of that product in that Party.

Thus, the patent protection for these frequently lifesaving and necessary drugs will remain in place for 5 to 8 years where before the TPP, biologics were not a protected class. The protections also apply to agricultural chemicals.

Turning now to another important area of the Intellectual Property section of the TPP, that dealing with entertainment, music, movies, and videos, we see one of the most blatant discrepancies between the full chapter and its summary. This occurs in this section devoted to Internet Service Providers and whether or not they are required to monitor content on their networks.

US Trade Representative's summary document

Internet Service Provider Safe Harbors

The Intellectual Property chapter requires Parties to establish copyright safe harbors for Internet Service Providers (ISPs). In the United States, safe harbors allow legitimate ISPs to develop their

business, while also helping to address Internet copyright infringement in an effective manner. Safe harbors have contributed to the flourishing of the most vibrant Internet, entertainment and e-commerce industries in the world. *TPP does not include any obligations on these ISPs to monitor content on their networks or systems* [Italics mine]. TPP also provides for safeguards against abuse of such safe harbor regimes

Internet Requirements

What the TPP Treaty Says about requiring Internet Service Providers to take down content:

- (ii) With respect to the functions referred to in paragraph 2(c) and paragraph 2(d), these conditions shall include a requirement for Internet Service Providers to expeditiously remove or disable access to material residing on their networks or systems upon obtaining actual knowledge of the copyright infringement or becoming aware of facts or circumstances from which the infringement is apparent, such as through receiving a notice of alleged infringement from the right holder or a person authorized to act on its behalf,

Also from the Treaty:

- (b) An Internet Service Provider that removes or disables access to material in good faith under subparagraph (a) shall be exempt from any liability for having done so, provided that it takes reasonable steps in advance or promptly after to notify the person whose material is removed or disabled.

From the US Trade Representative summary:

Strong and Balanced Copyright and Related Rights

The Intellectual Property chapter's copyright provisions establish commitments drawn from international norms to respect the rights

of creators and establish clear protection of works such as songs, movies, books, and software programs. They also include strong and balanced provisions on technological protection measures and rights management information, and advance transparency in systems for copyright royalty collection. As a complement to these commitments, the chapter also includes an obligation to promote balance in copyright systems through exceptions and limitations to copyright for legitimate purposes, such as criticism, comment, news reporting, teaching, scholarship, and research.

However, when one turns to the actual treaty, one finds that the “balance” has been tilted in favor of media conglomerates who own the vast majority of copyrights around the world.

From the actual TPP Treaty:

Article 18.63: Term of Protection for Copyright and Related Rights

Each Party shall provide that in cases in which the term of protection of a work, performance or phonogram is to be calculated (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author’s death; and

(b) on a basis other than the life of a natural person, the term shall be:

(i) not less than 70 years from the end of the calendar year of the first authorized publication of the work, performance or phonogram; or

(ii) failing such authorized publication within 25 years from the creation of the work, performance or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance or phonogram.

Hence, the copyright has been extended to the life of the creator plus 70 years, stifling innovation

From the US Trade Representative summary:

TPP gives partner countries two ways to meet a strong standard for effective market protection. One way is to provide a minimum standard of 8 years of data protection; the other way is to deliver a

comparable outcome through a combination of at least 5 years of data protection measures and a country’s other measures (e.g. regulatory procedures or administrative actions). Both paths will result in the first extended term of market protection for biologics medicines in a trade agreement, both paths create further incentive for innovators to develop lifesaving medicines, and both paths will meet the balance we have been seeking between innovation and access in TPP.

Computerized Linguistic Analysis

This mendacious stance in the summaries is confirmed by a quantitative and content analyses comparing both types of texts. When examining corpora such as the TPP full of legal jargon and qualifying hedges, computer-assisted content analysis offers a manageable way of characterizing large or difficult bodies of textual data and often allows for broader and more valid generalizations about content. Content analysis is also useful for finding non-obvious, meaningful patterns in language use. Through word counts, frequency tabulations, and collocations, I will show how multinational neoliberalism manifests itself in the TPP Intellectual Property chapter attempting to construct a world in the US neoliberal image. The US Trade Representative summary, on the other hand, claims to promote economic democracy and the collective good while strongly favoring business over government.

What Word Frequency Counts Tell Us about the IP Chapter in the TPP

Notice the predominance of words dealing with limitations, demarcations, property, enforcement, procedures, restrictions, respect (for rights as in copyrights) among the most common words used in the document. Compare that to the lack of terms such as welfare, people, stakeholders, creators, creative use of copyright material, cooperation, etc. The word “citizen” is not used at all in the IP text, but “consumer” makes a frequent appearance.

Word Frequency Count of Intellectual Property Chapter of TPP—Top Ten Words Used

Total Word Count = 25,949

Word	Total in IP Chapter
Protection	139
Provide	139
Respect	102
Rights	100
Procedures	99

Patent	94
Goods	89
Right	85
Copyright	83
Agreement	82

Since the overwhelming amount of Intellectual Property in the United States belongs to multinationals, the treaty concerns itself with protecting the power and rights of the corporations over those of other entities.

Other interesting findings are revealed in a comparison of word counts in the actual TPP treaty with the US Trade Representative’s Summary

TPP Intellectual Property Chapter Word Count = 25,949	US Trade Representative Summary of IP Chapter Word Count = 2478
80 Variations of “authorize” (s, ed, ing)	None
13 Variations of “prohibit”	None
46 Variations of “administer”	2 mentions of “administrative”
27 uses of “force”	1 mention of “force”
61 variations of “holder”	1 mention of “holders”
45 variations of “implement”	None
95 variations of “infringe”	5 infringement/s
45 variations of “subject/ing”	None
46 uses of “territory”	None

In keeping with the more directive and property-focused content of the full intellectual property text, many words with connotations of coercion and the force of law are employed. However, these words often don’t appear at all or appear far less frequently in the IP summary text. Thus the disciplinary aspects of the text are not as apparent in the summary version.

Collocation Analysis of the full TPP agreement

This chart shows the words most frequently associated with the phrase,

“Right to _____”
 or “_____ right to”

Prohibit	6
Authorize	6
Exclusive	6
Producers	3
Provide	3

Notice here that the rights accorded in the treaty are not the rights to protection, health, enjoyment, creativity, or safety, but those of copyright holders, their property, and their monetary interests.

In addition to purely quantitative linguistic analysis, I apply a text analysis program, DICTION, to uncover discursive strategies used to promote the neoliberal trade goals of the TPP by trade experts, corporate representatives and lawyers. DICTION offers empirical evidence, and thus is more convincing to some, of the decidedly pro-corporate content of the TPP. DICTION, developed by Roderick Hart at the University of Texas, has been found to be a reliable source of determining underlying themes and tone in public discourse in over 300 published studies. In analyzing a text, DICTION focuses on five variables to determine areas of rhetorical strength and weakness: *Certainty, Optimism, Activity, Realism, and Commonality*. In addition, DICTION, examines tone and content in large and small data samples in various specialized textual genres from newspapers to campaign speeches to philosophical essays and legal documents. Thus DICTION worked well in analyzing the actual TPP-IP chapter as well as the more popularized version of the chapter by the US Trade Representative. Below are the tabulations that were deemed statistically significant in terms of expected frequency by the DICTION analysis.

DICTION variables found in full TPP-IP Chapter	Expected Frequency	Definition of variable
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Praise —Language features affirmations of some person, group or abstract entity.	Lower than Expected	Includes terms isolating important social qualities, physical qualities, intellectual qualities, entrepreneurial qualities and moral qualities
Aggression —Language featuring human competition and forceful action	Higher than Expected	Terms connoting physical energy, social domination, personal triumph, excess human energy, disassembly and resistance
Passivity —Language highlighting agreed upon values of a group and rejecting idiosyncratic modes of engagement	Higher than Expected	Words ranging from compliance, docility, cessation and inertness

The DICTION analysis confirms many of the characteristics present in the full IP chapter. Since the chapter’s word frequency reveals its purpose is to shore up the power of corporations over nations, the public and individuals, the affective language of praise is lower than would be expected even in a legal document. Significantly, terms connoting “moral qualities” are not present, since the neoliberal project is amoral for the most part, concerned as it is with profit and markets. I would argue that these terms of praise are also associated with the individual agency of citizenship, and their absence indicates a lack thereof. On the other hand, terms of aggression are present in the document to a greater extent than is typical. Words of “social domination” and “personal triumph” are more likely to appear. Ironically, words associated with passivity are also found in higher than expected frequency perhaps because the underlying psychology of the chapter is restrictive and disempowering on an individual level.

Turning now to the IP summary, we see a different rhetorical purpose reflected in the DICTION analysis in the chart below, confirming the text’s persuasive, optimistic nature. Readers are reminded of all the advantages for them of the TPP for them from trade to cheaper medicines. There is lower than expected use of negatives and higher than expected use of optimistic language as the summary tries to convince readers of the soundness of the treaty and the opportunities for economic growth it presents. Finally, the text emphasizes the common purposes of the group of readers with the aims and goals of the USTR.

DICTION variables found in US Trade Representative Summary of TPP-IP Chapter	Expected Frequency	Definition of variable
Accomplishment —Words expressing satisfaction	Higher than Expected	Includes words referring to task completion, organized human behavior, capitalistic terms, modes of expansion, general functionality, programmatic language
Denial —Language of negativity	Lower than Expected	Use of negative contractions, negative function words
Optimism —Positive connotations	Higher than Expected	Language endorsing some person, group, concept or event or highlighting their positive entailments
Commonality —Group similarities	Higher than Expected	Language highlighting the agreed-upon values of a group and rejecting idiosyncratic modes of engagement

CDA: TPP as Culture Shaping Discourse and Counter Discourse

The government/corporate push for the TPP resulted in a fierce backlash and discursive resistance. Labor unions,³⁶ environmental,³⁷ public health and religious organizations,³⁸ and internet freedom groups³⁹ among others argued that the treaty

³⁶ Danielle Kurtzleben, “AFL-CIO Head Richard Trumka Explains Why Labor Unions Hate Obama’s Trade Deal,” *Vox*, April 20, 2015, <https://www.vox.com/2015/4/20/8445991/afl-cio-tpp-obama-trumka>.

³⁷ Samantha Page, “Environmental Advocates Tell Congress: Reject The TPP,” *ThinkProgress*, March 9, 2016, <https://thinkprogress.org/environmental-advocates-tell-congress-reject-the-tpp-eb9d3992666e>.

³⁸ Catherine Ho, “More than 50 Health, Religious and Labor Groups Urge Congress to Reject TPP Trade Deal,” *Washington Post*, April 12, 2016, <https://www.washingtonpost.com/news/powerpost/wp/2016/04/12/more-than-50-health-religious-and-labor-groups-urge-congress-to-reject-tpp-trade-deal/>.

³⁹ Andrew Griffin, “The ‘Biggest Global Threat to the Internet’ Was Just Approved, and You Probably Had No Idea,” *The Independent*, October 5, 2015, <http://www.independent.co.uk/life-style/gadgets-and-tech/news/tpp-signed-the-biggest-global-threat-to-the-internet-agreed-as-campaigners-warn-that-secret-pact-a6680321.html>.

would hamper the development of low cost medicines,⁴⁰ harm domestic industry and agriculture,⁴¹ and lessen the ability to create in the digital realm.⁴² Indeed, more than 1,500 such organizations came out against TPP (Citizens Trade Campaign),⁴³ thus creating a counter-discourse, which became very influential. Indicative of its controversial nature in the US, the treaty narrowly achieved “Fast Track” status by only one vote in the Senate. If ratified, the TPP would have tied the United States and eleven other Pacific Rim nations (New Zealand, Australia, Canada, Mexico, Peru, Chile, Japan, Malaysia, Singapore, Brunei and Vietnam) to the largest treaty ever negotiated, perpetuating a globalized, neoliberal hegemonic worldview favorable to US and multinational financial interests, while leaving most of the population in all signatory countries worse off than before.

Upon its public release, the TPP and especially the Intellectual Property (IP) chapter also received a great deal of negative commentary from scientific and technical and academic sources in the US and other nations. In a letter sent to Congress in 2016, two hundred prominent US academics, primarily economists, environmentalists and law professors, denounced it strongly, writing “This system undermines the important roles of our domestic and democratic institutions, threatens domestic sovereignty, and weakens the rule of law.”⁴⁴ Similarly, Obama’s Harvard Law School mentor Professor Larry Tribe, warned that the TPP would jeopardize the rule of law and undercut the United States’ democratic foundations. Nobel laureate Joseph Stiglitz, former California Supreme Court Justice Cruz Reynoso, and Columbia University Professor and UN Senior Adviser Jeffrey Sachs are among the signers, many of whom have supported past U.S. trade agreements. Prominent members of Congress such as Elizabeth Warren and Bernie Sanders

⁴⁰ Brook K. Baker, “Trans-Pacific Partnership Provisions in Intellectual Property, Transparency, and Investment Chapters Threaten Access to Medicines in the US and Elsewhere,” *PLoS Medicine* 13, no. 3 (March 8, 2016), doi:10.1371/journal.pmed.1001970.

⁴¹ Tyne Morgan, “How the TPP Would Affect Agriculture,” *AgWeb - The Home Page of Agriculture*, accessed May 15, 2017, <https://www.agweb.com/article/how-the-tpp-would-affect-agriculture--NAA-tyne-morgan/>.

⁴² Carolina Rossini, “Prominent Academics Respond to the TPP,” *Electronic Frontier Foundation*, August 30, 2012, <https://www.eff.org/deeplinks/2012/08/prominent-academics-respond-tpp>.

⁴³ “TPPOppositionLetter_010716 - TPPOppositionLetter_010716.Pdf,” *Citizen’s Trade Campaign*, January 7, 2016, http://www.citizenstrade.org/ctc/wp-content/uploads/2016/01/TPPOppositionLetter_010716.pdf.

⁴⁴ “Press Call: TPP Fight Escalates as Sen. Warren and Hundreds of Academics Oppose Tribunal System at Heart of Pact | Public Citizen,” *Public Citizen*, September 7, 2017, <https://www.citizen.org/our-work/globalization-and-trade/isds-tpp-academics-letter>.

condemned the treaty, as well as the National Conference of State Legislatures and pro-free trade think tanks such as the Cato Institute.⁴⁵ Lawrence Lessig, professor of law at Harvard Law School, affirmed that “TPP is a failed war continued. Let’s stop it.”⁴⁶ Many political and journalistic notables also chimed in against the treaty. Former US Labor Secretary Robert Reich lambasted the TPP for “delaying cheaper generic versions of drugs.”⁴⁷ And Paul Krugman, *New York Times* columnist, affirmed that the TPP was not really about trade. “It’s about intellectual property and dispute settlement; the big beneficiaries are likely to be pharma companies and firms that want to sue governments.”⁴⁸ Peter Rossman in *Jacobin* magazine echoed Krugman’s assertion that “the intellectual property provisions intensify corporate control over medicines, digital publishing, copyrights, patents, and biological resources, affecting every aspect of our lives.”⁴⁹ He continues, explaining that the term “investment” has been expanded to cover intellectual property, including trademarks, patents and copyrights, licenses, authorizations, franchises, debt instruments, and speculative tools like options, futures, and derivatives.⁵⁰ Further, if profits from these investments are hindered because of a nation’s environmental, public health or labor laws, corporations can sue the nations in question without due process under the nation’s legal system.

Undeniably the Investor-State Dispute Settlement process of the TPP is among the treaty’s most nefarious aspects. The body charged with deliberating such claims consists of three-person tribunals composed of corporate lawyers or other representatives who are not agents of a government. Given that US-based companies are the world’s largest producers of intellectual property, they have by far the most to gain from this treaty’s enforcement. Lastly, and perhaps most importantly in influencing the general public to oppose the treaty, several well-known Hollywood celebrities felt compelled to speak out and write President Obama, including Sean Penn, Cher, Susan Sarandon, Jennifer Hudson, Gwyneth

⁴⁵ Ibid.

⁴⁶ Rossini, “Prominent Academics Respond to the TPP.”

⁴⁷ Robert Reich, “Free Trade Used to Create American Jobs. Now It Puts Americans out of Work.,” *Newsweek*, March 15, 2016, <http://www.newsweek.com/free-trade-puts-americans-out-work-robert-reich-tpp-436994>.

⁴⁸ Paul Krugman, “This Is Not A Trade Agreement,” *Paul Krugman Blog*, 1430065842, <https://krugman.blogs.nytimes.com/2015/04/26/this-is-not-a-trade-agreement/>.

⁴⁹ Peter Rossman, “Against the Trans-Pacific Partnership,” *Jacobin Magazine*, May 13, 2015, <http://jacobinmag.com/2015/05/trans-pacific-partnership-obama-fast-track-nafta/>.

⁵⁰ Ibid.

Paltrow and Charlize Theron, as well as TV stars Ellen DeGeneres, William Shatner,⁵¹ Jay Leno⁵² and others.

In conclusion, it is hoped that this Critical Discourse Analysis has added evidence exposing what the TPP promoters wanted to hide: a hegemonic power play by government and corporate interests to fortify a worldwide neoliberal economic agenda. This brazen attempt by the administration and multinational corporate interests to manipulate the American public into supporting a treaty against its own interests has taken the profit motive to new levels. Nevertheless, the counter-discourse generated in response to TPP claims will continue to motivate opposition to the renewed effort to rewrite NAFTA in its image. A word of caution from Fairclough, however, is worth noting: “there is still a gap between arguing for a form of action, and actually taking action. . . . CDA can directly inform action to change social life only through dialogue with social actors who are in a position to undertake such action.”⁵³ Therefore, we as informed citizens would do well to answer Fairclough’s challenge when he declares that “social actors have to take the lead.”⁵⁴

⁵¹ “Sean Penn, Cher, Susan Sarandon and Other Celebrities Hope to Tie Taiji to TPP,” *The Japan Times Online*, February 6, 2014, <http://www.japantimes.co.jp/news/2014/02/06/national/sean-penn-cher-susan-sarandon-and-other-celebrities-hope-to-tie-taiji-to-tpp/>.

⁵² Joe Wolverton, “Why Are Hollywood Celebrities Protesting the TPP?,” *New American*, May 11, 2014, <https://www.thenewamerican.com/usnews/item/18231-why-are-hollywood-celebrities-protesting-the-tpp/>.

⁵³ Fairclough, “What Is CDA? Language and Power Twenty-Five Years On.”

⁵⁴ *Ibid.*

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Appendix A: "TPP in America: 18. Intellectual Property"

The Trans-Pacific Partnership (TPP) levels the playing field for American workers and American businesses, leading to more Made-in-America exports and more higher-paying American jobs here at home. By cutting over 18,000 taxes different countries put on Made-in-America products, TPP makes sure our farmers, ranchers, manufacturers, service suppliers, and small businesses can compete—and win—in some of the fastest growing markets in the world. With more than 95 percent of the world's consumers living outside our borders, TPP will significantly expand the export of Made-in-America goods and services and support American jobs.

EXECUTIVE SUMMARY

TPP's Intellectual Property (IP) chapter will help Americans take full advantage of our country's innovative strengths and help to promote trade and innovation, as well as to advance scientific, technological and creative exchange throughout the region. The chapter combines strong and balanced protections with effective enforcement of those protections, consistent with existing U.S. law. This will promote high standards of protection, safeguard

U.S. exports and consumers against IP infringement, and provide fair access to legal systems in the region to enforce those rights. Drawing from and building on other bilateral and regional trade agreements, it includes commitments to combat counterfeiting, piracy and other infringement, including trade secret theft; obligations to facilitate legitimate digital trade, including in creative content; and provisions to promote development of, and access to, innovative and generic medicines.

CHAPTER OVERVIEW

Common Understanding Relating to IP Systems

The Intellectual Property chapter creates a set of shared understandings regarding IP systems, including that the protection and enforcement of IP rights should contribute to innovation and the dissemination of technology, to the mutual advantage of diverse stakeholders and in a manner conducive to social and economic welfare.

Patents

- Effective and Clear Patent Standards

The Intellectual Property chapter defines a robust standard for patentability, consistent with international norms drawn from the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as well as other international best practices, including relevant exclusions. TPP Parties also agree to adopt the best practice of allowing a grace period in which certain public disclosures of the invention (e.g., in papers published by university researchers or small inventors) will not be used to deny a patent application.

- Cooperation and Transparency

Cooperation and transparency provisions on patenting in the IP chapter help facilitate the processing of patent applications in multiple jurisdictions, with a

minimum of red tape. These features should particularly benefit small- and medium-sized enterprises.

- Promoting the Development and Availability of Innovative and Generic Medicines

The Intellectual Property chapter also includes commitments to promote not only the development of innovative, life-saving drugs and treatments, but also robust generic medicine markets. Drawing on the principles underlying the “May 10, 2007” Congressional-Executive Agreement, included in agreements with Peru, Colombia, Panama, and Korea, the chapter includes transitions for certain pharmaceutical IP provisions, taking into account a Party’s level of development and capacity as well as its existing laws and international obligations.

- Enabling Public Health Protections

The chapter incorporates the Doha Declaration on the TRIPS Agreement and Public Health, and confirms that Parties are not prevented from taking measures to protect public health, including to respond to epidemics such as HIV/AIDS.

Protection for Regulatory Test Data

- Promoting Investments in the Development and Testing of Safe and Effective Medicines and Agrochemical Products

The Intellectual Property chapter includes commitments related to protection of undisclosed test and other data generated to obtain marketing approval of pharmaceuticals and agricultural chemicals.

Trademarks and Geographical Indications

- Clear and Predictable Trademark Disciplines

The Intellectual Property chapter includes commitments clarifying and strengthening protection of the brand names and other signs or symbols businesses use to distinguish their goods and services in the market-place.

- Keeping Generic Terms Available For U.S. Producers

The chapter helps address the potential for inappropriately “overprotect-ing” geographical indications in ways that shut out U.S. agricultural and food producers, including by providing opportunities for due process and requiring guidelines on

how TPP partners should determine whether a term is generic in its market, as well as safeguards for owners of pre-existing trademarks.

- Fair, Efficient and Accessible Procedures

The TPP Parties agree to efficient and transparent procedures governing trademark applications, including through electronic trademark registration mechanisms, reduction of red tape, ensuring respect for certification and collective trademarks, and promotion of regional harmonization of trademark systems.

Copyright

- Strong and Balanced Copyright and Related Rights

The Intellectual Property chapter's copyright provisions establish commitments drawn from international norms to respect the rights of creators and establish clear protection of works such as songs, movies, books, and software programs. They also include strong and balanced provisions on technological protection measures and rights management information, and advance transparency in systems for copyright royalty collection. As a complement to these commitments, the chapter also includes an obligation to promote balance in copyright systems through exceptions and limitations to copyright for legitimate purposes, such as criticism, comment, news reporting, teaching, scholarship, and research. .

- Internet Service Provider Safe Harbors

The Intellectual Property chapter requires Parties to establish copyright safe harbors for Internet Service Providers (ISPs). In the United States, safe harbors allow legitimate ISPs to develop their business, while also helping to address Internet copyright infringement in an effective manner. Safe harbors have contributed to the flourishing of the most vibrant Internet, entertainment and e-commerce industries in the world. TPP does not include any obligations on these ISPs to monitor content on their networks or systems. TPP also provides for safeguards against abuse of such safe harbor regimes.

Trade Secrets

- The Intellectual Property chapter requires TPP Parties to provide for the legal means to prevent misappropriation of trade secrets, including misappropriation conducted by State-owned enterprises. It also requires TPP Parties to establish criminal procedures and penalties for trade secret theft, including by means of cyber-theft.

IP Enforcement

- Effective IP Enforcement Systems

The IP chapter's commitments on enforcement ensure the availability of mechanisms to enforce intellectual property rights, including civil and administrative procedures and remedies, provisional measures, border measures, and criminal enforcement. For example, these measures include disciplines on camcording in movie theaters and theft of encrypted program-carrying satellite and cable signals.

- Counterfeit Goods in Cross-Border Supply Chains

The chapter includes robust commitments to tackle the challenges of trafficking in counterfeit trademark goods and pirated copyright goods within supply chains in the Asia-Pacific region. These provisions aim to close loopholes used by counterfeiters and to enhance penalties against trafficking in counterfeit trademark products that threaten health and safety.

- Effective Border Protection

The chapter ensures that border officials may act on their own initiative to identify and seize imported and exported counterfeit trademark and pirated copyright goods.

NEW FEATURES

Criminal Penalties for Trade Secret Theft

TPP is the first Free Trade Agreement (FTA) to require criminal penalties for trade secret theft, including by means of a computer system. This is a significant step forward for TPP Parties, and an important precedent in a region in which U.S. companies are facing significant challenges involving trade secret theft.

Clarifications Regarding State-Owned Enterprises

TPP is the first trade agreement to make clear that Parties cannot exclude State-owned enterprises from IP enforcement rules, including trade secret enforcement procedures, subject to certain TRIPS Agreement disciplines.

Tackling the Challenges of Asia-Pacific Counterfeit and Pirated Goods Supply Chains

TPP builds on previous U.S. FTAs that establish criminal penalties against trademark counterfeiting and copyright piracy consistent with U.S. law, breaking

new ground by including new provisions aimed at addressing concerns about cross-border supply chains of counterfeit and pirated goods, including those activities that threaten consumer health and safety.

Enforcement in the Digital Environment

TPP is the first FTA to clarify that IPR enforcement should be available against infringement in the digital environment and not just against physical products. Some countries in the WTO have asserted that existing IP enforcement commitments do not apply online or to digital products.

Promoting New Online Business Models for Delivering Content

TPP takes additional steps toward promoting legitimate digital trade, including the delivery of movies, music, software, and books online. In particular, the ISP copyright safe harbor section helps to provide certainty and predictability about the scope of the safe harbors, as in prior FTAs, while also reflecting the diversity of approaches in the TPP countries, and ensuring that existing effective systems, such as ones upon which rights holders, ISPs, and consumers have come to rely in the course of digital trade, can stay in place. TPP also recognizes the important role of collective management societies for copyright and related rights in collecting and distributing royalties through fair, efficient, transparent, and accountable practices, which promote a rich and accessible digital marketplace for content.

Copyright Exceptions and Limitations

As a complement to the TPP provisions aimed at providing effective protection and enforcement of copyright in the digital age and those aimed at ensuring respect for the rights of creators, the TPP requires that Parties continuously seek to achieve an appropriate balance in their copyright systems through providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research.

Preventing Domain Name Cyber-Squatting

In an effort to reduce domain name cybersquatting, the TPP ensures that, in connection with a Party's country-code top-level domain name registration system, appropriate remedies are available in cases of bad faith registration of domain names that are confusingly similar to registered trademarks.

Biologics and Pharmaceutical IP

The TPP includes additional specific rules related to biologic medicines, reflecting the growing importance of these cutting-edge technologies. These commitments

are intended to promote innovation and promote access to affordable medicines in developing countries. TPP gives partner countries two ways to meet a strong standard for effective market protection. One way is to provide a minimum standard of 8 years of data protection; the other way is to deliver a comparable outcome through a combination of at least 5 years of data protection measures and a country's other measures

(e.g. regulatory procedures or administrative actions). Both paths will result in the first extended term of market protection for biologics medicines in a trade agreement, both paths create further incentive for innovators to develop lifesaving medicines, and both paths will meet the balance we have been seeking between innovation and access in TPP. TPP also specifies the types of biologic products subject to the enhanced protection, and ensures that the Parties can review the provisions to keep pace with technological changes and other developments and recommend modifications, if appropriate. None of these provisions will change any U.S. healthcare program or the data protection that's in existing U.S. law.

Geographical Indications (GIs)

The TPP will enhance due process and other disciplines on the use of GIs to address growing concerns of U.S. exporters, whose access to foreign markets can be undermined through overly expansive GI protections advocated by certain countries whose agricultural producers compete with U.S. exporters.

Cooperation Activities

Building on cooperative work in other fora, the TPP Parties agree to endeavor to cooperate, including on IP issues relevant to small- and medium-sized enterprises, technical assistance for developing countries, and exchanging information on patent office search and examination results.

IMPACT

The United States, as an intellectual property-driven economy, is a center and global model for the development of 21st-century innovation, including in the Internet, medical, pharmaceutical technology, entertainment, agricultural, apparel, aerospace, and other rapidly advancing industries. American businesses, universities, and government labs conduct over \$450 billion per year in research and development—30 percent of the global R&D spending measured by the OECD. The United States is the world's leader in fiber-optics, satellite technology, and aviation. It has developed thriving arts and entertainment, Internet, and digital

industries. It is a center for the development of new medicines and biotechnology resulting in groundbreaking treatments and cures.

These industries thrive and rely on a sophisticated IP system, which creates incentives for investment in research and innovation not only through strong and balanced copyright, trademark, trade secret, and patent laws, but also through effective enforcement of IP rights. The data are striking—nearly 40 million American jobs were estimated to be directly or indirectly attributable to “IP-intensive” industries in 2012. American artists, inventors, and other innovators received \$128 billion in IP royalties, license fees, and payments for audiovisual services in 2013—39 percent of the world total. In 2014, the United States had an \$88.2 billion surplus in services trade with respect to IP-related licensing, which is, in turn, the driving force behind the U.S. trade surplus in services.

The Asia-Pacific region presents unique opportunities for U.S. innovators and creators. By 2030, estimates suggest, the region will be home to a middle class of 3.2 billion people. As such it will be the world’s fastest-growing market for a wide variety of innovative and creative products—from film, medicines, and new digital products for consumers, to civil aircraft and satellites for governments and businesses. America’s ability to serve this demand will help to underwrite a generation of growth in the United States, provide the revenue that will keep the United States at the leading edge of innovation and creativity in the future, and promote improvements in daily life, health, and safety throughout the region. Many of the TPP participants are already major markets for U.S. IP-intensive goods and services, and their companies are partners for U.S. creators and innovators. TPP offers a critical opportunity to deepen these relationships and create new ones.

The Asia-Pacific also presents critical challenges from an IP policy perspective. Regional piracy rates remain high, and cyber theft of trade secrets is rapidly growing. The region is also a thriving environment for the counterfeit industry. The trafficking in counterfeit goods drains revenues from innovative firms and threatens public health and safety through the proliferation of potentially adulterated medicines, unsafe auto parts, and other products. As home not only to a large and growing middle class, but also to over one billion people earning \$5 per day or less, the Asia-Pacific region is one in which promoting both the development of, and affordable access to, innovative and generic medicines requires effective and creative policies.

TPP’s IP chapter helps address these and related challenges, including through:

- Improving strong and balanced protection of rights and enforcement of laws;

- Bolstering incentives for the development of, and trade related to, IP-intensive products;
- Addressing common threats, including piracy, counterfeiting, and other related infringements, as well as misappropriation (including cyber theft) of trade secrets;
- Promoting transparent, efficient, and fair regulatory systems, including for patent and trademark application and registration;
- Promoting development of and access to innovative and generic medicines;
- Facilitating legitimate digital trade, including in creative content; and
- Preventing the spread of overly-restrictive geographical indication policies, including by safeguarding the rights of prior trademark owners and rules clarifying the use of generic terms.

