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TRADE AGREEMENTS AND DISABILITY INCLUSION: DEMYSTIFYING THE DISCONNECT BETWEEN BARRIERS AND POLICY SOLUTIONS

WORKING PAPER

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Abbreviations

AI	Artificial Intelligence
AP	Assistive Products
AAP	Affordable Assistive Products
AIT	Advanced Income Tax
AR	Augmented Reality
AT	Additional Tax
CD	Customs Duty
CNIPA	China National Intellectual Property Administration
CRPD	Convention on the Rights of Persons with Disabilities
CSR	Corporate Social Responsibility
FTA	Free Trade Agreement
GATE	Global Cooperation on Assistive Technology
GPA	Government Procurement Agreement
HSN	Harmonised System of Nomenclature
ICT	Information and Communication Technology
IGST	Integrated Goods and Services Tax
ILO	International Labour Organisation
IP	Intellectual Property
MFN	Most favoured Nation
NAFTA	North American Free Trade Agreement
RD	Regulatory Duty
SDG	Sustainable Development Goals
SME	Small and Medium Scale Enterprises
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UK FDCO	United Kingdom Foreign, Commonwealth & Development Office
UN CRPD	United Nations Convention on the Rights of Persons with Disabilities

UN ECOSOC	UN Economic and Social Council on Full Employment and Decent Work
UNFCC	United Nations Framework Convention on Climate Change
UN SDG	United Nations Sustainable Development Goals
UN UDHR	United Nations Universal Declaration of Human Rights
USMCA	United States Mexico Canada Agreement
US	United States
VAT	Value Added Tax
VR	Virtual Reality
WB	World Bank
WCAG	Web Content Accessibility Guidelines
WCO	World's Customs Organisation
WHO	World Health Organisation
WTO	World Trade Organisation

Preface

Trade agreements impact all lives, and they can disproportionately impact the lives of those who are marginalised or vulnerable. However, if negotiated through an inclusive lens, they can also lead to positive results for all, including marginalised groups such as persons with disabilities, women and indigenous communities. This study builds on a Trade and Investment Advocacy Fund (TAF2+) study from 2022, as it further explores the interaction between trade agreements and disability inclusion with a critical lens. The 2022 study established that even though this topic is at a very nascent stage of discussion, only about 27 percent of trade agreements include explicit provisions on disability inclusion. Using the findings from the 2022 study, this study will show that even though several agreements are vocal about disability inclusion, there is a disconnect between the barriers that persons with disabilities face and the content of disability provisions added in the current trade agreements. Once this gap is identified and assessed, the study proposes three policy recommendations. These proposals aim to broaden the current discourse in this area, ensuring that future provisions negotiated by policymakers can adequately address and respond to some of the critical challenges that persons with disabilities face.

Executive Summary

Trade agreements play a pivotal role in shaping the global economic landscape. Their influence extends beyond mere economic transactions, impacting the lives and well-being of people globally. Among the myriad groups affected by these agreements, persons with disabilities are particularly vulnerable. This research paper, building upon the foundation laid by the 2022 UK FCDO study, further explores and critically analyses the interaction between trade agreements and disability inclusion.

The 2022 study found that approximately 27 percent of trade agreements in force today have incorporated at least one explicit provision that relates to disability inclusion. These inclusions provide a useful basis for identifying the potential effects of negotiated trade rules, avoiding their undesirable, unintended or negative effects, and for designing complementary measures that can increase the voice and visibility of persons with disabilities. Whilst such preliminary inclusions are a positive starting point, a lot remains undone before trade agreements can work for all, including for persons with disabilities.

This study elucidates that a significant gap between the barriers that persons with disabilities face and the content of disability provisions in trade agreements persists. This is primarily because the barriers and challenges faced by persons with disabilities often go unaddressed within the scope and content of these agreements. This oversight not only diminishes the potential positive impact of trade on persons with disabilities, but also risks further marginalising them.

To date, trade agreements have covered a wide range of concerns, yet these provisions (with very few exceptions) focus on persons with disabilities mainly as employees or social and cultural actors and not as entrepreneurs or decision-makers. The current inclusions fail to cover issues that directly relate to the barriers exacerbated by international trade, the most significant being the restricted and unaffordable access to assistive devices.

The proponents of foreign trade have long advocated that trade liberalisation can increase availability and reduce costs related to assistive devices, as a result of higher exports and imports crossing international frontiers with lower tariff and non-tariff barriers. However, this study shows that this promise has not yet materialised in respect of assistive devices. This observation is based on three reasons:

Reason 1: The heightened intellectual property rights within preferential trade agreements have encouraged innovation, but they have also increased the cost of accessing assistive equipment as they have enabled private stakeholders to retain ownership of the equipment's intellectual property they design. The issue in this

regard stems from the persistent high number of patent years for innovations on assistive devices and patent laws in the majority of jurisdictions do not differentiate assistive devices from other patentable products.

Reason 2: Tariffs to trade are still high on disability-related products, and trade agreements have not helped in bringing down or eliminating such tariffs on assistive devices and other related equipment. This has further restricted persons with disabilities from accessing the support devices they need. Moreover, developing countries (based on the sample assessed in this study) generally impose a much higher import duty on assistive devices as compared to developed countries (based on the sample assessed here); yet 80 percent of one billion people worldwide with disabilities live in developing countries.

Reason 3: Another factor is lack of innovation in the inclusion and drafting of disability-related provisions. Currently, these provisions are often incorporated through a practice of copying and pasting, from previously negotiated agreements without sufficient efforts to adapt them according to the specific needs and conditions of countries and stakeholders. This template-based approach has resulted in lack of innovative and effective disability-related provisions in trade agreements.

These reasons highlight how trade liberalisation can adversely affect consumers with disabilities by reducing their affordability and accessibility to pharmaceutical products and assistive devices. Yet, current trade agreements still lack the language to ensure that the provisions negotiated by countries for such agreements can waive duties or patent protection for products and services primarily consumed by persons with disabilities. To address this problem and ensure that future trade agreements account for their potential impact on persons with disabilities, this paper proposes three policy recommendations:

1. **Innovate - Do Not Copy and Paste:** The drafting of provisions in trade agreements should be approached with originality and foresight. Merely replicating existing clauses from other agreements, without a thorough understanding of their true implications, is a disservice. Hence, policymakers need to look beyond current templates and consider additional commitments to benefit persons with disabilities. Each provision should be crafted based on a thorough understanding of the diverse challenges, needs and aspirations of stakeholders, including specifically, persons with disabilities, developed through wide ranging consultations and impact assessments
2. **Waive the Duty:** Tariff barriers, while serving economic interests, can inadvertently place undue cost burdens on persons with disabilities. Therefore, trade agreements should provide preferential market access and waivers to facilitate the import and export of assistive devices such as wheelchairs and prosthetics. This will help them avoid the tariff and non-tariff barriers that other pharmaceuticals products encounter. As an example, a valuable provision in this

respect could involve a reduction or a waiver of import duties on products that are essential for persons with disabilities.

3. **Relax Intellectual Property Rights Protection:** Intellectual property rights, while crucial for innovation and economic growth, can sometimes impede access to essential resources. Easing these rights, especially on assistive technologies and devices, can make these vital tools more accessible and affordable for persons with disabilities. The implementation of waivers, for instance, can play a transformative role in dismantling the various barriers that persons with disabilities often face in accessing healthcare, technology, education, and more.

I. Introduction

In a world where trade binds nations together, there are often marginalised groups who face unique challenges. Recognizing this has led to the inclusion of social issues in trade policy instruments, as countries are increasingly focusing on actors who have less access to international markets or those that receive disproportionately higher negative consequences from trade agreements. This can include indigenous communities, women as well as persons with disabilities. Hence, through Free Trade Agreements (FTAs), countries are not only endeavouring to reduce trade barriers but are also setting standards regarding a range of social issues such as labour standards, environmental protection and gender equality.[1] An increasing number of FTAs now seek to enforce better human rights' practices and these agreements can influence governments to make some improvements in certain human rights behaviours. Moreover, they can enforce the initial compliance that most human rights treaties cannot.[2]

With a more nuanced understanding of the impacts of trade liberalisation, there is a growing acknowledgement that gains from trade liberalisation are not automatic and they differ in their impact across groups.[3] Acknowledging that trade liberalisation yields both positive and negative effects underscores the importance of conducting research and gaining a deeper understanding of the relationship between trade agreements and their interactions with various segments of society.

Although persons with disabilities comprise more than 1 billion of the world's population, they continue to face a range of barriers that impact their ability to participate in various aspects of their lives, such as economic activities.[4] Yet, persons with disabilities and their interests remain at the margins of international economic governance.[5] Lack of attention to this issue has perpetuated discrimination against and led to the exclusion of persons with disabilities from systems of governance.[6]

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[1] Jean-Frédéric Morin, Andreas Dür, and Lisa Lechne 'Mapping the trade and environment nexus: Insights from a new data set', (2018) 18(1) Global Environmental Politics, 122.

[2] Hafner-Burton EM 'Trading human rights: How preferential trade agreements influence government repression' (2005) 59 (3) International Organization, 593.

[3] Caroline Dommen, 'On How the Human Rights Framework Can Contribute to Inclusive Trade Agreements', (2023) 57(1)Journal of World Trade 158, 158 -182.

[4] These barriers are discussed at length in the FCDO's 2022 study, and hence they will not be repeated here. For more information, see Amrita Bahri, 'Making Trade Agreements Work for Persons with disability: What's been Achieved and What Remains Undone?' (2022) United Kingdom Foreign, Commonwealth and Development Office and Cowater International Publication.

[5] Margrit Shildrick '*Dangerous Discourses of Disability, Subjectivity and Sexuality*'. (Springer, 2009); Felipe Jaramillo Ruiz, Rebecca Nielsen, Rodrigo Fagundes Cezar, 'The Inclusion Of Disability As A Non-Trade Issue In Preferential Trade Agreements', Global Social Policy 2023, 23(1) 148– 166

[6] Colin Barnes "Understanding the Social Model of Disability: Past, Present and Future", Nick Watson, Alan Roulstone, Carol Thomas (eds) *Routledge Handbook of Disability Studies.* (Routledge, 2013) 26, 26–43

This exclusion is particularly evident in the regulation of international economic and trade matters. This is the case even though a number of international instruments clarify and reinforce the role that economic governance institutions and policies can play in addressing these issues.[7] FTAs are, to some extent, beginning to address this, as their scope is gradually broadening. FTAs are now looking beyond the mere market access concerns as they cover a number of other objectives, including 'importing higher policy standards, strengthening regional policy coordination, locking-in domestic reforms, and even addressing foreign policy issues'.[8] In this sense, FTAs have included a range of considerations including, but not limited to, labour standards, environmental protection, women's rights and the rights of Indigenous peoples.[9] In addition, FTAs more recently have also been explicit in addressing inclusivity issues pertaining to the protection or promotion of persons with disabilities; yet, the existing scholarship on disability inclusion in trade is very limited.[10] While discussions on the relationship between international trade agreements and sustainable development have been widely discussed and investigated for the past two decades, there is little written about persons with disabilities and trade agreements specifically.[11]

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[7] Sandra Faccio 'Disability in EU trade and investment agreements' in Delia Ferri (ed) *Research Handbook on EU Disability Law* (Edward Elgar, 2020).

[8] Jean-Pierre Chauffour and Jean-Christophe Maur '*Preferential Trade Agreement Policies for Development: A Handbook*' (Washington, DC: World Bank, 2014).

[9] For more information, see International Labour Organization, 'Labour Provisions in Trade Agreements don't Hurt Business' (*ILO*, 18 July 2016) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_499348/lang--en/index.htm> accessed 23 December 2021; Immaculate Martínez-Zarzoso, 'Assessing the Effectiveness of Environmental Provisions in Regional Trade Agreements: An Empirical Analysis' (2018) 2018/02 OECD Trade and Environment Working papers <https://www.oecd-ilibrary.org/environment/assessing-the-effectiveness-of-environmental-provisions-in-regional-trade-agreements_5ffc615c-en> accessed 12 November 2021; José-Antonio Monteiro, 'The Evolution of Gender-Related Provisions in Regional Trade Agreements' (2021) ERSD-2-21-8 WTO Staff Working paper <https://www.wto.org/english/res_e/reser_e/ersd202108_e.htm> accessed 12 November 2021. Two recent FTAs that include provisions on Indigenous peoples are: Comprehensive and Progressive Agreement for Trans-Pacific Partnership (entry into force December 30, 2018) [hereinafter referred as CPTPP] and Free Trade Agreement between the United States of America, the United Mexican States, and Canada (enforced, 1 July 2020) [hereinafter referred as USMCA]. For more details, see Sergio Puig, *At the Margins of Globalization: Indigenous Peoples and International Economic Law* (Cambridge University Press, 2021).

[10] Except for a few recent publications on the topic, including Ruiz Jaramillo, Felipe, Rebecca Nielsen, and Rodrigo Fagundes Cezar 'The inclusion of disability as a non-trade issue in preferential trade agreements', (2023) 23(1) Global Social Policy 2023, 148, 148–166 and Amrita Bahri, 'Making Trade Agreements Work for Persons with disability: What's been Achieved and What Remains Undone?' (2022) UK Aid.

[11] Disability is a combination of individual factors (impairments) and social factors (barriers). ['Base Code Guidance: Disability inclusion in the global supply chain', Ethical Trading Initiative 2018 (supported by UK Aid)]; According to Article 1 of the UN Convention on the Rights of Persons with Disabilities (CRPD), persons with disability are "those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others". For the purpose of this study, the term "disability inclusion" refers to the promotion of participation of persons with disability in all aspects of society, including employment, on a basis of equality with others. [UN Convention on the Rights of Persons with Disabilities (CRPD)]

This study, building on the UK Foreign, Commonwealth & Development Office (FCDO) and Cowater International study from 2022, investigates the way disability concerns are currently included in FTAs and explores the limited scope of existing provisions regarding the rights of persons with disabilities.[12] The 2022 study established that although this topic is at a very nascent stage of discussion, about 27 percent of trade agreements include explicit provisions on disability inclusion. Using the findings from the previous study, this study will demonstrate that despite a number of agreements that include such provisions, a disconnect remains between the barriers that persons with disabilities face and the content of disability provisions integrated into existing trade agreements. Upon identifying and evaluating this gap, along with other deficiencies in the current negotiation of such commitments, the study presents a path forward to address and bridge this disconnect.

The key aim of the present study is to provide a blueprint for future trade negotiations on this topic so the provisions that are negotiated by policymakers can effectively address and respond to the unique challenges and opportunities that persons with disabilities experience. These findings therefore contribute to the understanding of how to integrate disability considerations in global trade governance. Moreover, in context of the current debate on which interests should or could be added to trade agreements, this paper demonstrates why trade negotiators should integrate disability inclusion in their trade agreement templates and provides recommendations on specific areas where disability inclusion interests can be enhanced – intellectual property rights, import tariffs and innovation in the design of inclusive provisions.

II. International Trade, Sustainable Development and Disability Inclusion: Clarifying the Links

Trade agreements serve as a means and a vehicle to promote sustainable development, in addition to lowering trade barriers. Various international instruments obligate us to ensure that trade agreements further sustainable development. An example of such instrument is the Marrakesh Agreement Establishing the World Trade Organisation (WTO), which states the following in its very Preamble:

[12] Amrita Bahri, 'Making Trade Agreements Work for Persons with disability: What's been Achieved and What Remains Undone?' (2022) UK FCDO and Co Water International, https://www.wto.org/english/tratop_e/womenandtrade_e/item6.3.pdf accessed 9 October 2023.

> *"Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."*[13]

This statement affirms that trade liberalisation is not the ultimate goal of the WTO but merely an instrument to achieve the goals embedded in the Marrakesh Agreement Establishing the WTO concluded in 1994.[14] One of these key objectives is sustainable development. A quarter-century later, the discourse in policy circles has evolved dramatically, and the term 'sustainable development' has become better understood and accepted in the context of trade regulations.

The 2030 Agenda for Sustainable Development recognizes international trade as an engine for inclusive and sustainable economic growth, and an important means to achieve the UN's 2030 Sustainable Development Goals (SDGs).[15] Further, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) specifically references the importance of international development and policies in addressing the rights of persons with disabilities. It is the main international treaty which recognizes and explains the rights of persons with disabilities and has been ratified by over 90% of the UN Member States since its adoption in 2006. In this context, the CRPD is frequently seen as a milestone achievement in disability human rights law and in disability inclusion activism.[16]

Countries have also incorporated a similar affirmation and recognition of the intersection between trade agreements and sustainable development in several bilateral and regional trade agreements. These developments show that the global community is aspiring to achieve harmony between trade and sustainable

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[13] Preamble, first recital, WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, (enforced, 15 April, 1994) 1867 U.N.T.S. 154, 33 I.L.M. 1144, [hereinafter 'WTO Agreement'].

[14] Preamble of the Marrakesh Agreement Establishing the World Trade Organization, (enforced, 15 April 1994).

[15] UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (*Refworld*, 2015) <https://www.refworld.org/docid/57b6e3e44.html> accessed 13 November 2020.

[16] There is also an Optional Protocol to the Convention that established a U.N. Committee on the Rights of Persons with Disabilities. For more details, see UN, 'Optional Protocol to the Convention on the Rights of Persons with Disabilities' (adopted 13 December 2006) A/RES/61/106 <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15-a&chapter=4&clang=_en>

development. There is a growing realisation that trade needs to be sustainable to ensure that countries can reconcile trade liberalisation with their important national interests. It also needs to be inclusive so as to better include and benefit marginalised players from international trade.[17]

The 2020 Coronavirus Pandemic has also intensified discussions on the nexus between trade and globalisation on the one hand, and non-trade values such as environmental protection, food security, labour standards, inequality and inclusion of marginalised communities on the other.[18] It has shown that national and global economies function better when they are inclusive and sustainable, where inequalities are addressed and sustainability considerations are properly accommodated.[19] This has led to a growing interest in better understanding the nexus between trade and sustainable development, with topics such as circular economy, equality and inclusion, climate change and plastic pollution acquiring prominence in trade policy debates.

More so than ever before, governments are reiterating the fundamental importance of ensuring that trade rules and multilateral cooperation leave the regulatory space needed by governments in the pursuit of economic growth along with sustainable development. The discriminatory and trade-restrictive measures adopted during the pandemic, affecting both imports and exports, have intensified the longstanding challenge as to how WTO's rules and exceptions may be interpreted and applied in a way that balances trade and non-trade interests. The crisis therefore presents an opportune moment to rethink the nexus between trade and sustainable development and explore how trade policies may contribute to 'building back better' in the post-COVID-19 world.

The UN 2030 Agenda is committed to leaving no-one behind and provides significant importance to disability inclusion and empowerment of persons with disabilities. In fact, the terms "persons with disabilities" or "disability" are explicitly mentioned

[17] Mehraj Ahmad Sheikh, Mushtaq Ahmad Malik and Rana Zehra Masood, 'Assessing the Effects of Trade Openness on Sustainable Development: Evidence from India' (2020) 5 (1) Asian Journal of Sustainability and Social Responsibility.; Inge Ropke, 'Trade, Development and Sustainability — a Critical Assessment of the "Free Trade Dogma"' (1994) 9(1) Ecological Economics 13; Arlo Poletti, Daniela Sicurelli and Aydin B. Yildirim, 'Promoting Sustainable Development Through Trade? EU Trade Agreements and Global Value Chains' (2020) 51(3)Italian Political Science Review/Rivista Italiana di Scienza Politica, 339.

[18] See, for instance, Amrita Bahri, Weihuan Zhou, Daria Boklan, *Rethinking, Repackaging, and Rescuing World Trade Law in the Post-Pandemic Era* (Hart Publishing, 2021); *UN Conference on Trade and Development, Impact of the COVID-19 Pandemic on Trade and Development* (United Nations, 2021); Anoush Der Boghossian, Amrita Bahri, 'Finding Feet on Trade Agreements: Empowering Women Entrepreneurs Amidst a Pandemic', (2023), 50, Legal Issues of Economic Integration, Issue 1, pp. 13-40, https://kluwerlawonline.com/journalarticle/Legal+Issues+of+Economic+Integration/50.1/LEIE2023002

[19] Katrin Kuhlmann et al, 'Re-conceptualizing Free Trade Agreements Through a Sustainable Development Lens' (*UNESCAP,* 2020) <www.unescap.org/sites/default/files/145%20Final-Team%20Katrin%20Kuhlmann-USA.pdf>.

eleven times throughout the 2030 Agenda for SDGs. The 2030 Agenda for SDGs clearly states that disability cannot be a reason or criteria for lack of access to development and the realisation of human rights. The UN 2030 SDGs framework includes five goals which explicitly refer to persons with disabilities, and other goals are focused on persons in vulnerable situations, which may include persons with disabilities.[20] The five explicit SDGs are:



- Goal 4, which seeks to guarantee equal and accessible education by building inclusive learning environments and providing the needed assistance for persons with disabilities



- Goal 8, which seeks to promote inclusive economic growth, full and productive employment allowing persons with disabilities to fully access the job market



- Goal 10, which encourages countries to emphasise the social, economic and political inclusion of persons with disabilities



- Goal 11, which encourages the creation of accessible cities and water resources, affordable, accessible and sustainable transport systems, providing universal access to safe, inclusive, accessible and green public spaces, with special attention to the needs of those in vulnerable situations, women, children, persons with disabilities and older persons



- Goal 17, which underlines the importance of data collection and monitoring of the SDGs, emphasis on disability disaggregated data

Other SDGs that could be interpreted to implicitly focus on creating an enabling environment for persons with disabilities include Goal 1 (that seeks to end poverty in all its forms) and Goal 3 (that seeks to ensure healthy lives and promote well-being for all). These explicit and implicit mentions and targeted goals focus on empowering the vulnerable including persons with disabilities and strengthening their access to

[20] United Nations, 'Sustainable Development Goals (SDGs) and Disability' (*UN*, 2016) <https://www.un.org/development/desa/disabilities/about-us/sustainable-development-goals-sdgs-and-disability.html> accessed 10 January 2022.

opportunities and resources. These goals are focused on unlocking the talent and potential of a vast community of persons with disabilities across all industries globally.[21]

This inclusion of disability-related interests in the UN SDGs, together with the global acceptance of UN CRPD, shows us that the efforts to promote disability inclusion are a global priority. Moreover, these commitments have already been agreed to in a universal format, and trade agreements can provide a framework for countries to implement these commitments in the trade arena. That brings us to the next question: why use trade agreements to empower persons with disabilities?

III. Why Use Trade Agreements to Empower Persons with disabilities?

International institutions can influence a government's human rights actions through two principal mechanisms: coercion and persuasion.[22] However, in the case of international trade, international policy institutions and instruments can influence domestic actions and rectify domestic conditions through three possible mechanisms: coercion, persuasion and motivation.

In the case of "Persuasion", institutions can supply targeted information to convince other actors of new ideas or norms that they otherwise do not adhere to, and it is therefore a process of changing actors' preferences and understandings of appropriate social behaviour to create new social facts. In case of negotiations of trade agreements, countries can provide specific information on how trade has impacted different communities and how it can empower marginalised sections of society through the inclusion of targeted commitments in the text of a given agreement.

"Coercion" is a threat or an act by a government to disrupt commercial exchange with the other state, unless that state complies with a given demand or requirement. Coercion can change behaviours by increasing the rewards of compliance or costs of

[21] Caroline Casey, 'Disability Inclusion isn't a tick-box exercise. It's Vital to Achieving the SDGs' (*World Economic Forum,* 2020) <https://www.weforum.org/agenda/2020/10/disability-inclusion-crucial-to-sustainability-development-goals/> accessed 14 February 2022.

[22] Emilie M. Hafner-Burton, 'Trading Human Rights: How Preferential Trade Agreements Influence Government Repression' (2005) 59(3) International Organization 593, 593-629.

defection through material rewards and punishments. During a trade agreement's negotiation, countries can compel the inclusion of social issues in the agreement's text under threats of withdrawing from such negotiations if their trade partners are not willing to assume certain social commitments. Post negotiations, once an agreement is in force, countries are still able to enforce compliance of provisions on social commitments from their trade partners under threats of suspending trade benefits or under rewards of extending more benefits.

"Motivation" refers to a process of inducing certain behaviour to achieve desired goals, which can also be used as a mechanism to help trade agreements work in respect of changing domestic behaviour. As such, governments can use these negotiating instruments to incentivize changes at the domestic level in other countries in exchange for an enhanced or unfettered market access. In short, the lure of market access to important markets can be used as an incentive through trade agreements. Moreover, trade agreements are increasingly going beyond their traditional subject-matters of market access and are seeking to incorporate disability inclusion for a number of other reasons, including the following:

1. Trade liberalisation and trade agreements, which are instruments of trade liberalisation, cannot be treated in isolation from their effects, which can go beyond economic consequences. For this reason, scholars have observed that 'human rights intuitively should prevail over trade norms, which, at the bottom, govern the movement of widgets across borders, not the right treatment of the individual in society'.[23] Scholars also observe that foreign trade is not a separate realm from human rights. If policy instruments regulating trade do not take into account their possible impact on different groups and especially on human rights, they can lead to countries opting for non-regulation of these undesirable impacts.[24]

2. The commitments on empowering persons with disabilities has already been agreed to in a universal setting (as shown in the previous section), and the CRPD calls on countries to cooperate among each other for this purpose.

3. Trade agreements can provide a platform for countries to cooperate. This argument makes more sense if we explore the nature of barriers that such

[23] Truyol Hernández, Berta Esperanza, and Stephen Joseph Powell, *Just Trade,* (New York University Press, 2009).
[24] Alan Tonelson, The race to the bottom: Why a worldwide worker surplus and uncontrolled free trade are sinking American living standards, (Westview Press, 2002)

individuals face, mainly the ones pertaining to their participation in the workforce and the economy, discrimination in accessing social services and financial assistance, stereotypes at workplace and in accessing markets as businesses, and others. Trade agreements can effectively impact labour standards, workplace safety, workers' treatment, wages and work standards, retirement benefits, provision of reasonable accommodation at workplace, and government protection programs. As such, they can serve as useful tools or rather complementary tools in addition to domestic changes and other instruments of international law and politics (such as human rights treaties and conventions). These standards can significantly help persons with disabilities address or overcome the barriers they face especially in regards to their economic independence.[25]

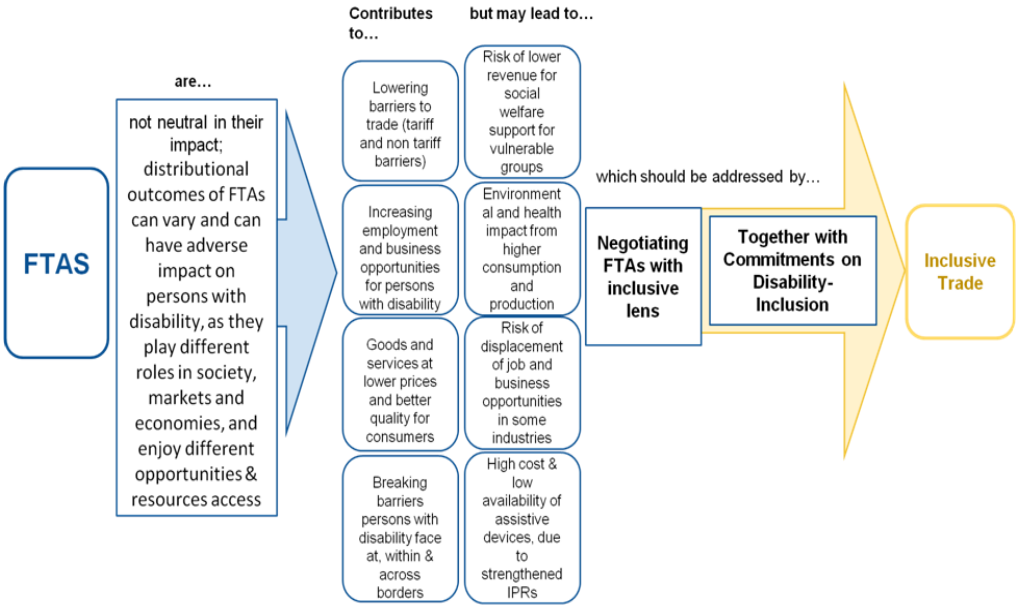
4. Trade is not solely about the exchange of goods and services; it can also positively affect the lives of persons with disabilities. First, trade agreements can have a positive impact if countries can negotiate preferential market access commitments that can help in reducing cost and increasing availability of assistive devices in their countries. Increased affordability and accessibility to assistive devices can help persons with disabilities participate fully in all aspects of daily life. Second, trade agreements can help in creating an inclusive trading environment by discouraging discrimination based on different abilities, creating more business and employment opportunities for all including for persons with disabilities, and discouraging possibly harmful laws or procedures. Hence, as the FCDO's 2022 study has shown, trade agreements can empower persons with disabilities, and therefore it is important to use trade agreements in a way that can enable them to work for the benefit of persons with disabilities.

5. Foreign trade and policies can also negatively impact the lives of persons with disabilities. Firstly, trade liberalisation may limit the policy space for governments to provide publicly-funded medical and social protection benefits, which has led to the privatisation of the medical industry in many places. Secondly, with increased levels of trade liberalisation, trade agreements have required countries to harmonise their policies and restrict subsidies or other unfair practices. As an example, restrictions on subsidies have negatively impacted some countries and deterred them from offering financial benefits for the manufacturing or sale of assistive devices. Furthermore, the privatisation of the medical industry, coupled with the entry of foreign-owned firms into healthcare sectors, has increased the

[25] Charlotte May-Simera 'Reconsidering sheltered workshops in light of the United Nations Convention on the Rights of Persons with Disabilities' (2006) (2018) 7(1) Laws 6.

prices for assistive devices even further, reducing affordability of reasonable access. Finally, the protection of intellectual property rights in trade agreements has exacerbated the problem, as it has further increased the cost of assistive devices and medicines by allowing private stakeholders to retain intellectual property of the medicines and equipment they design and develop. Hence, if trade agreements can have negative impact as they are generally dominated by commercial interests, then what better instrument to rectify these wrongs than trade agreements themselves. In other words, the negative impact of trade on persons with disabilities can effectively be mitigated by changing the way in which trade agreements – the legal and policy instruments of trade – are negotiated and implemented, as their design can help break the barriers that persons with disabilities face in respect of accessing economic opportunities.

Figure 1) Flowchart: How Trade Agreements Interact with Disability-Related Concerns?

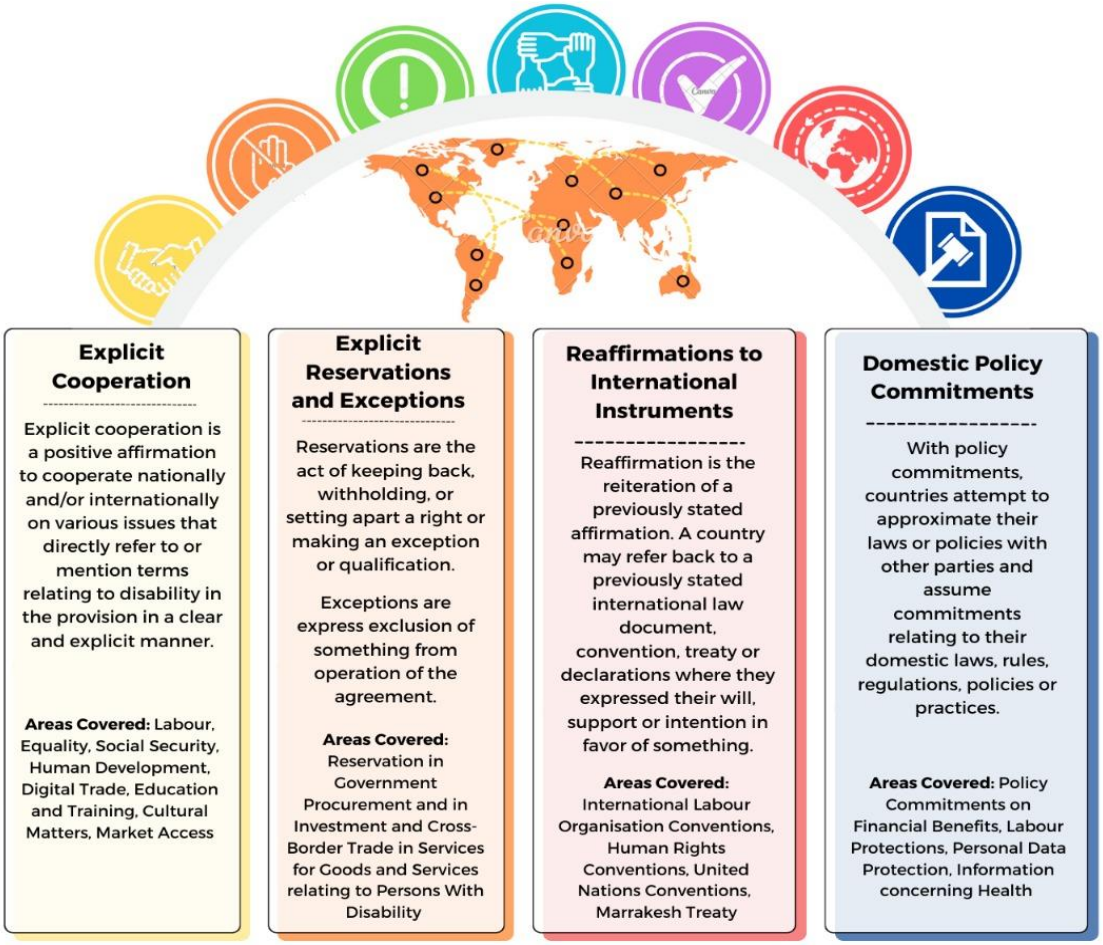


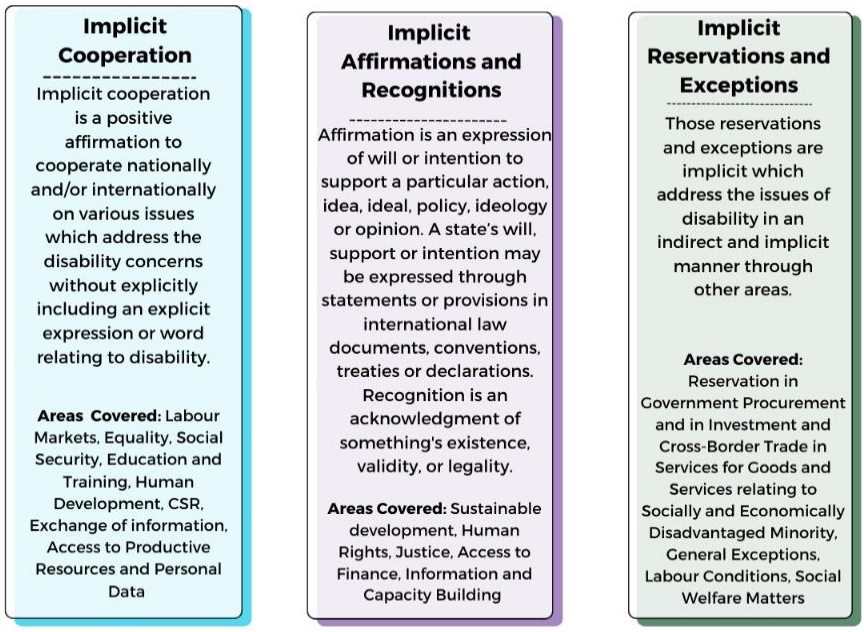
These points clearly demonstrate how trade agreements can be used to enhance the interests of persons with disabilities. Moreover, the integration of disability inclusion concerns in trade agreements can help in maximising the positive impact and minimising the negative impact that trade agreements can have on the rights and interests of persons with disabilities. However, this integration needs to be meaningful, and this integration approach needs to be designed in light of the barriers that persons with disabilities face. Currently, most of the disability-related provisions included in current agreements are superficial and do not engage with the unique barriers that prevent persons with disabilities from accessing economic opportunities. To better understand this problem, the following section will investigate the areas that current provisions focus on and then assess whether the areas that respond directly to their economic barriers are covered in existing FTAs or not.

IV. Focus Areas of Disability Inclusion Provisions

Recently, several countries have sought to incorporate disability inclusion concerns and commitments in their trade agreements. The FCDO's 2022 study found that out of 355 FTAs that were including in the assessment, 98 were found to have at least one disability-explicit provision that seeks to or focuses on the protection or promotion of persons with disabilities. Moreover, a number of other FTAs feature implicit provisions that relate to or somehow indirectly influence the interests of persons with disabilities. Countries have incorporated varied types of explicit and implicit provisions in their trade agreements. This study classifies these provisions in the following seven categories: Explicit Cooperation; Implicit Cooperation; Explicit Reservations and Exceptions; Implicit Reservations and Exceptions; Reaffirmations to International Instruments; Domestic Policy Commitments; and Implicit Affirmations and Recognition.

Figure 2) Focus Areas of Disability-Related Provisions in FTAs: Seven Categories





This illustration (Figure 2) shows that FTAs' provisions are framed in a number of ways, with different focus areas and purposes. However, most of the existing FTAs only include implicit commitments relating to the protection or promotion of interests of various marginalised or disadvantaged groups, which may be interpreted to include persons with disabilities. As such, these provisions are not focused on a particular group or community; rather, they extend to all minority groups that need protection and support. Countries with these implicit provisions have sought to empower or protect vulnerable people through work on different areas, including access to education, human resource development, access to finance, support measures in respect of foreign investment, trade in services, provision of social security, safety concerns, non-discrimination and cultural transformation to change stereotypes among others.[26]

Countries have also incorporated different kinds of explicit commitments in this respect; most of them are found either in the form of exceptions in chapters on government procurement[27], reservations in countries' schedules of specific

[26] See Article 99(1) of Stabilisation and Association Agreement between the European Communities and their Member States of the one part and the Republic of Albania, of the other part; Article 23.3 of Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed June 12, 2006; entry into force April 01, 2009).

[27] See Article 15.23 of Australia-Chile Free Trade Agreement; Article 174 of Trade Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Colombia, the Republic of Ecuador and the Republic of Peru, of the other part (signed July 30, 2008; entry into force 06 March, 2009).

commitments[28], or provisions on cooperation or on trade and sustainable development[29]. In addition, various agreements have incorporated explicit commitments as domestic policy commitments, wherein countries have sought an approximation of domestic laws to ensure minimum legal standards or rights mainly in respect of elimination of discrimination, protection of rights of persons with disabilities, provision of social security benefits, and protection of personal information and data relating to health or physical conditions.[30]

The most common explicit commitments identified are drafted in the form of exceptions, wherein countries have excluded from the operation of a given agreement, measures that relate to the goods or services of persons with disabilities[31]. Other provisions are drafted in the form of reservations, wherein countries have reserved the right to adopt or maintain any measure that can protect or support economically disadvantaged groups, including persons with disabilities.[32] Such reservations are usually included in the countries' schedules of specific commitments. Moreover, in a few agreements, countries have assumed commitments to engage in cooperation-based actions that can lead to the empowerment of persons with disabilities as employees or entrepreneurs or encourage related social or political activities (such as political dialogue, rehabilitation matters, and promotion of human rights).[33]

[28] See Article 28.7 of EU-Canada Comprehensive Economic and Trade Agreement (CETA) (signed October 30, 2016; entry into force September 21, 2017); Article 12.5 of United States-Korea Free Trade Agreement (KORUS FTA) (signed June 30, 2007; entry into force March 15, 2012).

[29] See Article 13.4 of EU-Vietnam Trade Agreement and Investment Protection Agreement signed June 30, 2019; entry into force August 01, 2020); Annex 3 of Canada-Costa Rica Free Trade Agreement (CCRFTA) (signed April 23, 2001; entry into force November 11, 2002).

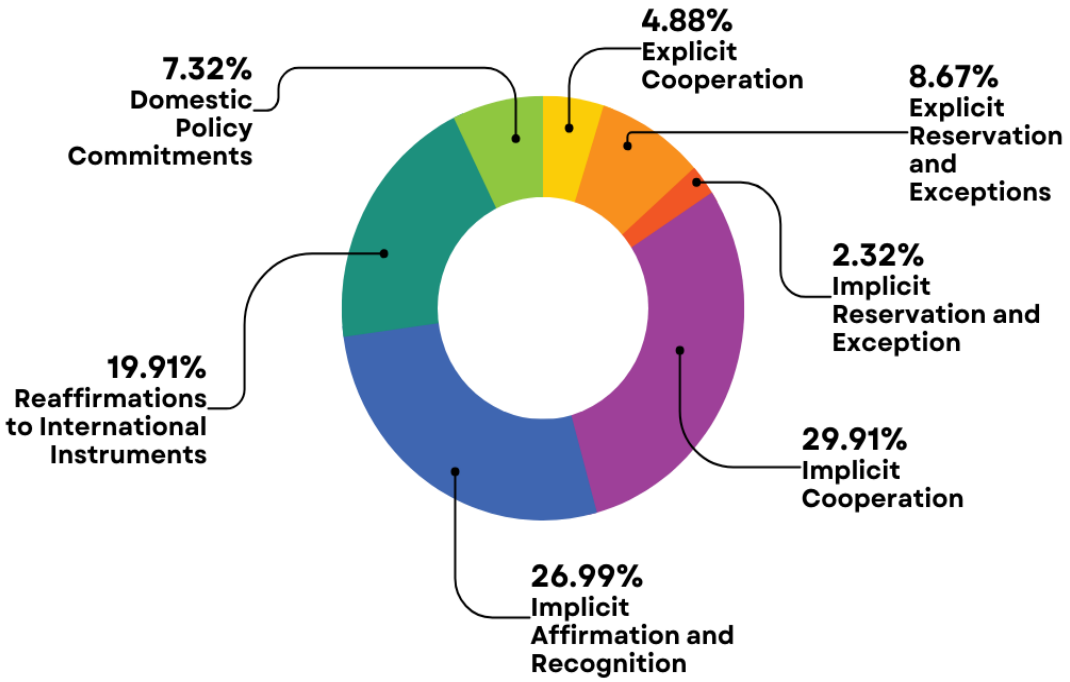
[30] See Article 22 of UK-Mexico Trade Continuity Agreement (TCA) (entry into force June 1, 2021); Article 101 of Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation (signed February 19, 2009; entry into force September 01, 2009).

[31] See Article 16.2 of Republic of Korea-Peru Free Trade Agreement (March 21, 2011; entry into force August 01, 2011); Article 9.3 of UK-Singapore Free Trade Agreement (UKSFTA) (signed December 10, 2020; entry into force).

[32] See Article 23.12 of United States–Mexico–Canada Agreement (USMCA); Article 323 of UK-Georgia Strategic Partnership and Cooperation Agreement (signed October 21, 2019; entry into force January 01, 2021).

[33] See Article 100 of Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Kosovo (enforced October 27, 2015); Article 101 of Free Trade Agreement Between the EFTA States and the Republic of Serbia (signed December 17, 2009; entry into force October 01, 2010).

Figure 3) Categories of Disability Provisions and their Frequency of Appearance in FTAs



*Number of Disability related provisions found in trade agreements divided as per Focus Area Categories

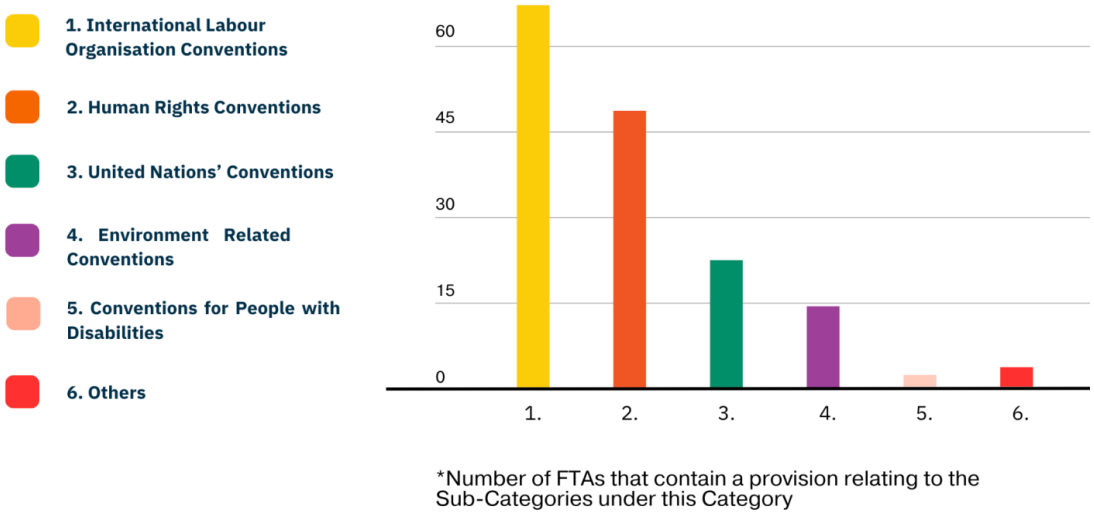
Notes: * Only trade agreements notified to the WTO and currently in force (as of March 2023) are included in this assessment.
** Some provisions are ambiguous or overlapping, and hence they may not have been accurately included in this count.
*** Some texts were not available online, and hence could not be accessed for the purpose of this study.

Figure 3 clearly shows that a significant majority of agreements have, at best, included implicit mentions, most commonly in the form of cooperation (on access of disadvantaged groups to labour markets, education and training, human development, exchange of information and protection of personal data).[34] Other implicit mentions are found in the form of reaffirmations to international instruments that may indirectly be related to disability concerns (such as the UN Human Rights Charter) or directly related to disability concerns (such as the UN CRPD or the UN

[34] See Article 13 of EU-UK Trade and Cooperation Agreement (signed December 2020, entry into force May 01, 2021); (signed December 2020, entry into force May 01, 2021); Annex 18-A of Canada-Korea Free Trade Agreement (CKFTA) (signed September 22, 2014; entry into force January 01, 2015).

2030 SDGs)[35] and affirmations and recognitions to social values (that include human rights, justice, sustainable development, social security and others)[36]. Although parties commit to cooperate on and promote these concerns, in reality their implementation remains a question as these commitments do not cater to a specific segment in the society. All these commitments, with very few exceptions, continue to be assumed on a voluntary and permissive basis as they are drafted with non-mandatory wording.

Figure 4) Reaffirmations to International Instruments: Key Focus Areas



Moreover, as shown in Figure 4, countries have practised a restrictive approach in terms of which international policy instruments they have reaffirmed their commitments to, as they have mostly limited these reaffirmations to treaties and instruments that have a broad scope. These instruments include International Labour Organisation (ILO) conventions (mainly the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up 1998)[37], and United Nations (UN)

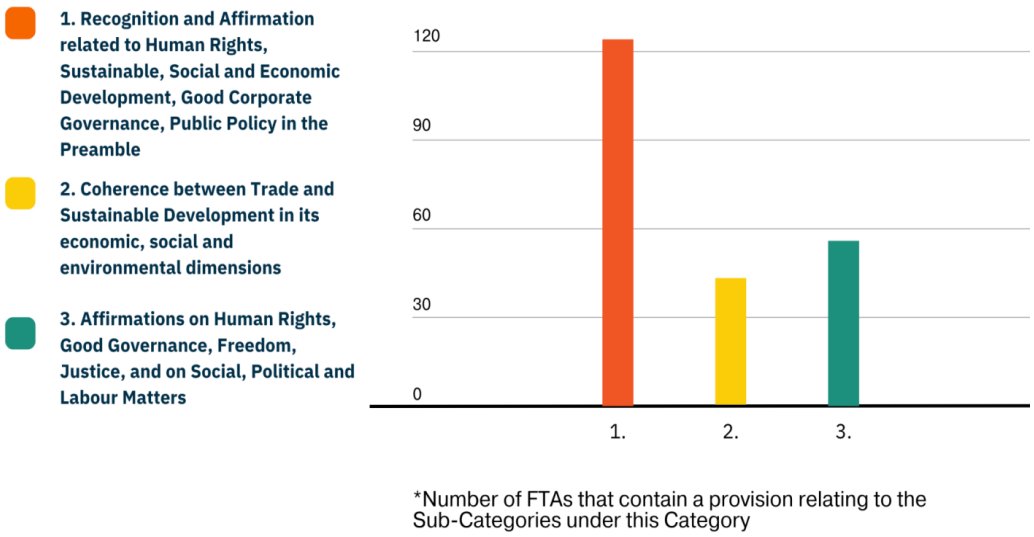
[35] See Preamble of UK-Tunisia Association Agreement (signed October 4, 2019); Annex 12.9 of Canada-Israel Free Trade Agreement (CIFTA) (entry into force September 1, 2019).

[36] See Article 107 of Trade Agreement between Colombia, Peru and Ecuador and the European Union and its Member States (signed May 15, 2019; entry in force December 31, 2020; See Article 80 of Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan (signed November 05, 2019; entry into force May 01, 2021).

[37] See Article 397 of EU-UK Trade and Cooperation Agreement; Annex 18-A of Canada-Korea Free Trade Agreement (CKFTA) (signed September 22, 2014; entry into force January 01, 2015).

conventions (UN Universal Declaration of Human Rights (UDHR) of 1948[38], UN Charter[39] and the UN Economic and Social Council on Full Employment and Decent Work (ECOSOC) of 2006)[40]. Only in exceptional cases, countries have sought to reaffirm their commitments in directly relevant treaties such as the UN CRPD. Moreover, less than 1 percent of agreements talk about the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (henceforth Marrakesh Treaty 2013), which provides for the exchange of accessible-format books across international borders by organisations.[41]

Figure 5) Implicit Affirmations and Recognitions: Key Focus Areas



Whilst the provisions of Implicit Affirmation and Recognition mention important values such as social and sustainable development, social justice, and human rights as key focus areas, mere recognition of these values is far from meaningful incorporation of concrete commitments that could enable persons with disabilities to better participate in trade or benefit from it. Nevertheless, most of these mentions appear in the preamble, which is a vital part of any international instrument or

[38] See Preamble of UK-Ukraine Political, Free Trade and Strategic Partnership Agreement (signed October 08, 2020; entry into force January 01, 2021)

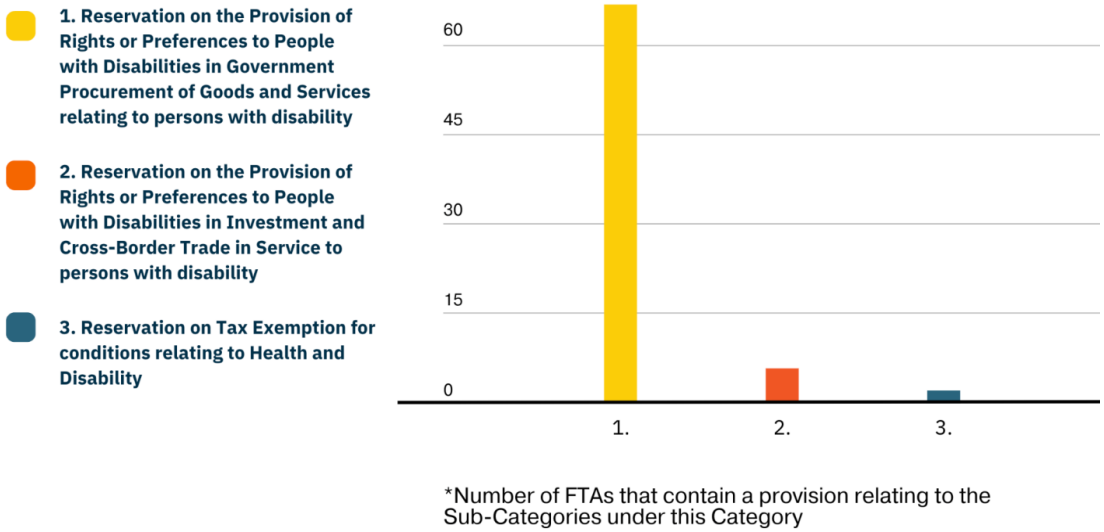
[39] See Preamble of Free Trade Agreement Between The States of The European Free Trade Association and The Republic Of Tunisia (signed December 17, 2004; entry into force June 01, 2005).

[40] See Article 13.1 of The United Kingdom's Free Trade Agreement with Iceland, Liechtenstein and Norway (July 08, 2021; entry into force September 01, 2022).

[41] See Article 14.3 of UK-Japan Comprehensive Economic Partnership Agreement (October 23, 2020; entry into force January 01, 2021).

agreement, as it can be instrumental in determining the intentions of negotiators or drafters of the agreement at the time it was concluded.[42]

Figure 6) Explicit Reservations and Exceptions: Key Focus Areas



When we turn to explicit inclusions, we see that the most common explicit inclusions are policy carve-outs drafted in the form of exceptions and reservations. Several trade agreements feature reservation-styled provisions relating to persons with disabilities. With these reservations, countries seek to withhold or set apart their "right to regulate", a measure that would otherwise fall under the scope of the agreement as that measure may relate to the protection of interests of persons with disabilities. Other provisions are drafted in the form of exceptions and are mostly found in chapters on government procurement.[43] By adding these exceptions, countries include an express exclusion of selected measures from the operation of a given agreement. It is important to note that these are defensive provisions. On the other hand, the reservations included generally pertain to granting special rights or preferences in the government procurement of goods and services relating to persons with disabilities.[44] This reservation on government procurement is an imitation of the

[42] Article 31 of the Vienna Convention on the Law of Treaties requires that an agreement must be interpreted in light of its context, object and purpose [Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679]

[43] See Article 15.23 of Australia-Chile Free Trade Agreement (entry into force March 6, 2009); Article 174 of UK-Andean Countries Trade Agreement (signed May 15, 2019; entry December 28, 2020).

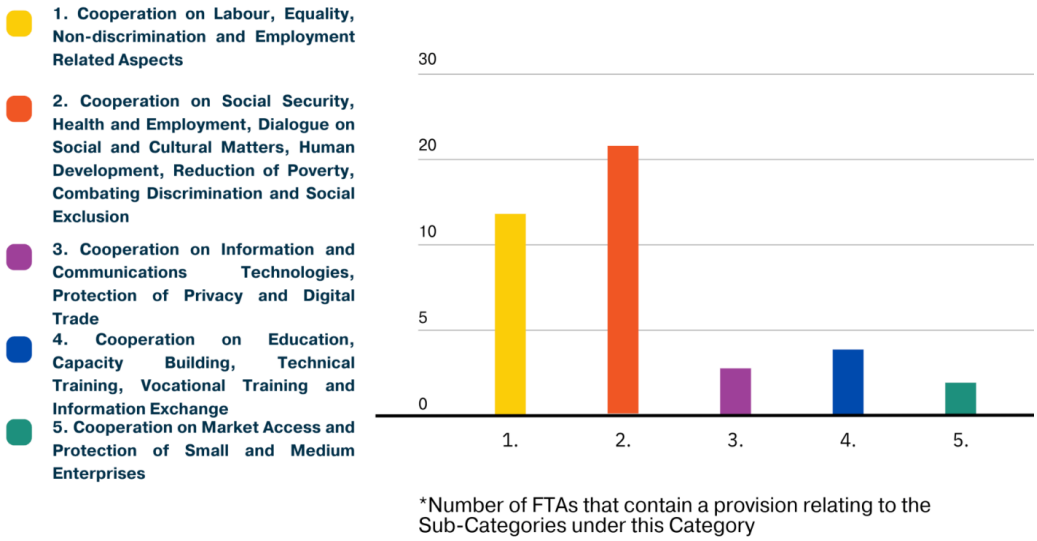
[44] See Annex 9 of European Union–South Korea Free Trade Agreement (signed October 06, 2010; entry in force July 01, 2011).

North American Free Trade Agreement (NAFTA)'s[45] minimal disability provision that was borrowed from the WTO Agreement on Government Procurement (GPA)[46], allowing the government to grant waivers or support without the risk of facing an action for regulatory inconsistency.

Only about four percent of all agreements studied include provisions that are drafted as affirmative commitments as countries attempt to engage in cooperation on a range of actions that include, but are not limited to the following: cooperation on labour standards[47], elimination of non-discrimination[48], enhancement of social security and health[49], dialogue on social and cultural matters[50], reduction of poverty and social exclusion,[51] exchange of information and protection of privacy,[52] access to education and capacity building,[53] and access to international markets for small businesses including those that are owned by persons with disabilities.[54] These provisions touch upon important concerns that in some way relate to the barriers persons with disabilities face in accessing economic opportunities; however, these provisions are drafted as best endeavour promises and not as legally enforceable or binding commitments. Hence compliance with them is completely voluntary for the countries that assume them.

[45] North American Free Trade Agreement (NAFTA) (entry into force January 1, 1994)
[46] Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1915 U.N.T.S. 103 [hereinafter referred as GPA]
[47] See Article 18.7 of Peru-Australia Free Trade Agreement (PAFTA)
[48] See Article 377 of UK - Ukraine FTA (signed October 8, 2020; entry into force January 1, 2021).
[49] See Article 65 of EU - Morocco Euro-Mediterranean Association Agreement (signed February 26, 1996; entry into force March 1, 2000).
[50] Article 399 of EU-UK Trade and Cooperation Agreement; Annex 18-A of Canada-Korea Free Trade Agreement (CKFTA) (signed December 30, 2020 entry into force May 01, 2021).
[51] See Article 44 of UK-Chile Association Agreement (signed January 30, 2019; entry into force January 01, 2021).
[52] See Protocol 5 Annex of UK-Morocco Association Agreement (signed October 26, 2019)
[53] See Article 20.2 of Peru-Australia Free Trade Agreement (PAFTA) (signed February 12, 2018; entry into force February 11, 2020).
[54] See Article 100 of Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Kosovo (enforced October 27, 2015).

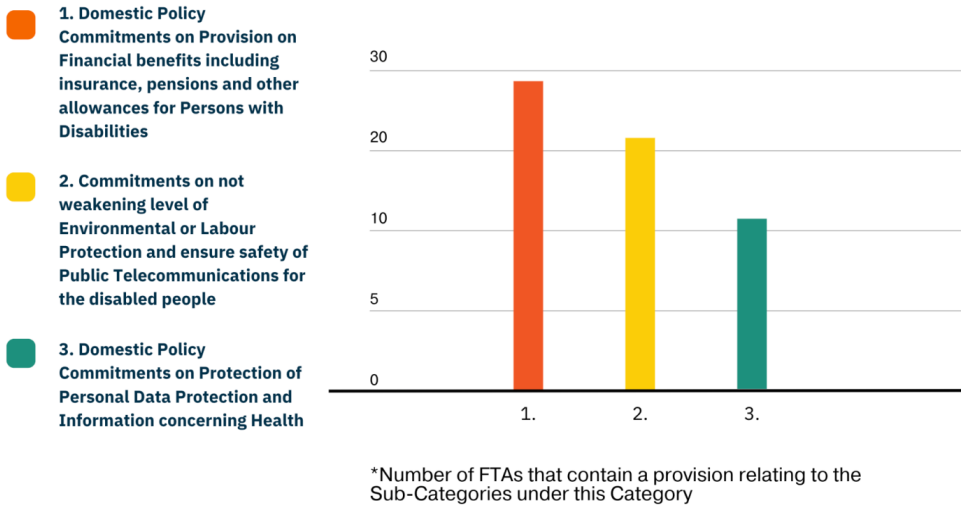
Figure 7) Explicit Cooperation: Key Focus Areas



As Figure 7 shows, wherever cooperation provisions have appeared in an agreement, they have most commonly covered traditional concerns that envision persons with disabilities as employees or as social actors, but not as business-owners, leaders or scientists or playing a significant role in another lucrative sector. Hence, cooperation-based explicit mentions have mostly focused on labour standards, elimination of discrimination, social exclusion and poverty, health and employment, human development and cultural matters. Other important matters have appeared infrequently, as very few agreements have included provisions that are specific about cooperation on Information and Communications Technology (ICT) and digital trade, education and capacity building, exchange of information pertaining to markets, access to international markets and protection of Small and Medium Scale Enterprises (SMEs)[55]. With the increasing importance of SMEs and the potential they can hold to empower persons with disabilities, it is disappointing to see that only a single FTA talks about the protection of SMEs owned by persons with disabilities to enhance their access to international markets.[56]

[55] See Article 19.14 of USMCA (entry into force July 1, 2020); Article 100 of Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Kosovo (enforced October 27, 2015).
[56] See Article 100 of Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Kosovo (enforced October 27, 2015).

Figure 8) Domestic Policy Commitments: Key Focus Areas



Finally, in several agreements, countries have sought to approximate their domestic laws or policies with other parties' laws or policies and assume commitments relating to their domestic laws, rules, regulations, policies or practices. These commitments could be explicit or implicit in nature. These provisions are different from the provisions that are cooperation-based, as they are drafted with binding expressions. As can be seen in Figure 8, these have usually included commitments on maintaining the labour standards, protection of international standards, provision of benefits (such as medical or life insurance, pensions and financial allowances) to persons with disabilities, and protection of personal data relating to a health condition.[57] These commitments are a step in the right direction, as one significant barrier that persons with disabilities face is their limited access to finance. Hence, commitments on the provision of pensions for instance play an imperative role because it gives persons above 60 years, that need even more healthcare and assistive support, greater access to finance. Such domestic policy commitments are much needed, provided they are implemented at the national levels. However, because most of the domestic policy commitments require the parties to revise or amend their domestic laws and policies, they could impose a significant compliance cost on the countries accepting or assuming such commitments, which is probably why they appear so infrequently in existing FTAs.

[57] Article 55 of UK-Kenya Economic Partnership Agreement (signed December 08, 2020; entry into force March 24, 2021).

V. The Disconnect between Barriers and Policy Solutions

As discussed in the previous subsection, whilst trade agreements have covered a wide range of concerns, these provisions (with very few exceptions) focus on persons with disabilities as employees or social or cultural actors and not on their roles as entrepreneurs or decision-makers. Moreover, the current inclusions do not cover issues that directly relate to barriers that are exacerbated by international trade, one of the most significant being the restricted and unaffordable access to assistive devices.

There is a disconnect between the barriers that have been exacerbated by the distributive impact of trade liberalisation and the policy solutions currently offered in trade agreements. The barriers that are left largely unaddressed in existing FTAs include access to finance, access to productive resources, access to e-commerce and digital trade opportunities, and access to and affordability of assistive devices. This study focuses on access to assistive devices to demonstrate a disconnect between the barriers experienced by persons with disabilities and policy solutions.

Even though the UN's CRPD stipulates that access to assistive technologies (AT) and assistive products (AP) is essential for all individuals, only about 10% of the people in need of AP and AT worldwide have access to them.[58] AP are external products (including devices, equipment, instruments or software), especially produced or generally available, which maintain or improve an individual's functioning and independence, and promote well-being.[59] Examples include (motorised) wheelchairs, spectacles, hearing aids, portable ramps, communication software, and pill organisers.[60]

Steinstra et al demonstrate that at times it is difficult for persons with disabilities to access information about the availability and suitability of AT that are relevant to their needs in their geographical areas.[61] This barrier is often more significant for a

[58] Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/Res/61/106 (Dec. 13, 2006); WHO. 2016a. Assistive technology fact sheet [Online].
Available: http://www.who.int/mediacentre/factsheets/assistive-technology/en/ [Accessed August 2017].
[59] Chapal Khasnabis, Zafar Mirza, and Malcolm MacLachlan 'Opening the GATE to inclusion for persons with disability' (2015) The Lancet 2229.
[60] Access to assistive technology for people with intellectual disabilities: a systematic review to identify barriers and facilitators
[61] Deborah Stienstra, Colleen Watters, Hugh Grant, Hui-Mei Huang and Lindsey Troschuk, 'Women with Disabilities: Accessing Trade' (*Status of Women Canada*, 2004) <http://www.disabilitystudies.ca/assets/ccds-womenwithdisabilitiesaccessingtrade-2004.pdf> accessed 16 February 2022.

person with disability who is also from an ethnic minority group or a woman, as these intersecting identity factors result in their further marginalisation and exclusion from information.[62] In addition to the problems in accessing the right information, persons with disabilities may also face affordability issues which are often partly caused by trade liberalisation. For example, following its entry into NAFTA with the United States (US) and Mexico, Canada experienced an increase in the cost of medicines and AP.[63] The US expects a similar problem with the "new NAFTA" (referred to as United States Mexico Canada, USMCA in this paper), as the agreement apparently contains provisions that can increase the cost of medicines in the US and extend monopolies of private companies in the market.[64]

The proponents of foreign trade have long advocated that trade liberalisation can increase the availability and reduce the costs related to AP, as a result of higher exports and imports crossing international frontiers with lower tariff and non-tariff barriers.[65] However, studies have shown why this promise has not materialised.[66] This can be attributed to two primary reasons: strengthened intellectual property rights and high tariff barriers imposed on imports and sales. A third reason could be the lack of innovation on negotiating and drafting disability-related provisions in the trade policy world.

1. Strengthened intellectual property rights

The need for AT is growing exponentially, with over one billion users currently in need and the figure is expected to reach two billion by 2050.[67] While the CRPD recognizes access to AT as a human right, patents can make these technologies prohibitively

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[62] For more info, see Michelle Meade et al, 'The Intersection of Disability and Healthcare Disparities: a Conceptual Framework' (2015) 37(7) Disability and Rehabilitation, 632.

[63] Deborah Stienstra, Colleen Watters, Hugh Grant, Hui-Mei Huang and Lindsey Troschuk, "Women with Disabilities: Accessing Trade" (*Status of Women Canada*, 2004) <http://www.disabilitystudies.ca/assets/ccds-womenwithdisabilitiesaccessingtrade-2004.pdf> accessed 16 February 2022.

[64] Jonathan Kimball, 'NAFTA 2.0: Obstacles to more Affordable Medicines' (*Association for Accessible Medicines*, 2020) <https://accessiblemeds.org/resources/blog/nafta-20-3-obstacles-more-affordable-medicines-us> accessed 5 February 2022.

[65] Assistive aids or devices can be defined as "specialized aids or devices used or needed by persons with activity limitations to help them perform daily activities or tasks" (Statistics Canada 2003: 5). Persons with disability use assistive devices and technology in their personal, educational, work, recreational and social lives, as these devices can help them increase their independence, build self-confidence and self-esteem, improve their quality of life, and break down barriers, while providing the tools for possible employment and educational opportunities. [Deborah Stienstra, Colleen Watters, Hugh Grant, Hui-Mei Huang and Lindsey Troschuk, 'Women with Disabilities: Accessing Trade' (*Status of Women Canada*, 2004) <http://www.disabilitystudies.ca/assets/ccds-womenwithdisabilitiesaccessingtrade-2004.pdf> accessed 16 February 2022.].

[66] Deborah Stienstra, Colleen Watters, Hugh Grant, Hui-Mei Huang and Lindsey Troschuk, 'Women with Disabilities: Accessing Trade' (*Status of Women Canada*, 2004) <http://www.disabilitystudies.ca/assets/ccds-womenwithdisabilitiesaccessingtrade-2004.pdf> accessed 16 February 2022.; Interview with two disability inclusion scholars [details withheld]

[67] Martine Abel-Williamson et.al., 'WIPO Technology Trends: Assistive Technology' (2021) WIPO, < https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1055_2021.pdf>.

expensive. The market for AT is shaped by demand as well as by legislations and policies including intellectual property (IP) laws.[68] IP provisions in trade agreements ensure protection for the creation or invention of artistic or innovative goods, the creation or invention of which sometimes requires a high sunk cost in the form of investment in research and development.[69] By granting exclusive rights to creators, IP laws incentivize investment in research and development, which in turn, stimulates innovation and drives progress in various fields, including medicine and medical-related equipment.

During the innovation process, the legal protection of the knowledge or the idea that will finally materialize in a product or a process plays an important role during the R&D phase; however, as a result, IP provisions restrict the production and marketing of such goods by other companies and provide exclusive rights to their investors/creators to offset their sunk cost.[70] Hence, this protection leads to higher prices for such equipment as it allows the owners of patented products to set the price since demand for medicines is generally price and income inelastic. By their essence, patents enable pharmaceutical manufacturers to charge higher prices than those that would have otherwise existed in a competitive environment, i.e., without a patent protection.[71] The strengthened intellectual property rights (IPR) commitments in preferential trade agreements have therefore increased this cost of access to assistive equipment as they have enabled private stakeholders to retain ownership of the IP of the equipment they design. While the "high prices are said to be justified by the need to recover costly investments in R&D, the magnitude of such investment, as well as the pricing of drugs in developing countries, has been strongly contested".[72]

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[68] *Ibid.*

[69] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]; The WTO's TRIPS Agreement sets minimum standards in the international rules governing patents, including patents on medicines, and countries also include similar commitments in their trade and investment agreements.

[70] Md. Deen Islam and others, 'Impacts of Intellectual Property Provisions in Trade Treaties on Access to Medicine in Low and Middle Income Countries: A Systematic Review' (2019) 15(88) Globalization and Health.

[71] See Article 28 of the WTO's TRIPS Agreement: "1. A patent shall confer on its owner the following exclusive rights:
(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing (6) for these purposes that product;
(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.
2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts."

[72] Colleen V. Chien, 'The Inequalities of Innovation', 72 Emory Law Journal 1 (2022) [author explores the relationship between patents, innovation, and the resulting inequality among corporations, countries and genders]

With the recent onset of the COVID-19 pandemic, and the AIDS and Ebola crisis in Africa in the past, the evidence and discussions on negative implications of patents on public health concerns have come to the centre of attention.[73] While it is true, as argued by some pharmaceutical industry players mainly in developed countries, that other factors such as infrastructure, logistics, know-how and professional skills play an important role in determining access to medical products, it is also true that the prices and availability of such products such as vaccines themselves also depend upon the existence of patents, ultimately determining how many will survive or die in global health pandemics like COVID-19.[74]

The equipment that persons with disabilities use are covered by this protection, and therefore these protections can have a significant impact on their accessibility and affordability. This is mainly because this category includes a wide range of items, from basic medical supplies like urinary catheters and pressure-relieving cushions to more specialised equipment like wheelchairs, walking aids, and assistive technologies for communication. While some of these items can be prescribed by a doctor or obtained through a professional healthcare assessment, the presence of patents can make even basic equipment prohibitively expensive. For instance, specialised wheelchairs and walking aids often incorporate patented technologies aimed at improving user comfort and mobility. While these innovations are valuable, they can also drive up costs, making these essential mobility aids inaccessible for many individuals with disabilities. Similarly, AP like communication aids is often patented, limiting the availability of more affordable alternatives. This is particularly concerning given that proper supply of this equipment is crucial for the safety, independence, and quality of life of persons with disabilities.

The issue of accessibility of educational material is also a limiting factor, especially for persons with print disabilities. Print disabilities may include conditions such as visual impairments, dyslexia, or physical disabilities that make it challenging to read standard print formats. According to available data, less than 7% of all book titles are accessible in formats that can be utilised by persons with print disabilities.[75] These formats may include Braille, audio books, or digital texts that can be read by screen-reading software. However, these resources due to limited supply, reduced

[73] Brook K. Baker, 'Patents, Pricing and Access to Essential Medicines in Developing Countries' (2009) 11 (7) American Medical Association Journal of Ethics, 527

[74] Aisling McMahon, 'Global equitable access to vaccines, medicines and diagnostics for COVID-19: The role of patents as private governance,' (2021) 47 (3) Journal of Medical Ethics, 142; Amrita Bahri and Renata Amaral, 'Gender Equality Provisions in Trade and Investment Agreements: Are They Widening the Negotiation Capacity Gap?', World Trade Review 239(1) (2024) 47.

[75] Paul Harpur And Nicolas Suzor, 'Copyright Protections and Disability Rights: Turning The Page To A New International Paradigm' UNSW Law Journal: Copyright Protections and Disability Rights, Vol. 36(3) 2013, 745, 745-778.

accessibility and lack of policy measures, are not widely accessible for the people who need them. This scarcity of accessible educational material is often referred to as "book famine."[76]

This is not merely an inconvenience but a significant barrier that can hinder social mobility, economic independence, and overall quality of life for these individuals. To address this issue, international efforts have been made, most notably through the Marrakesh Treaty.[77] This treaty aims to create a set of mandatory limitations and exceptions to copyright laws, allowing for reproduction and distribution of published works in accessible formats. While the Marrakesh Treaty represents a significant step forward, it is not a complete solution. One of the lingering challenges is the impact of IPRs, which still act as a barrier to the widespread dissemination of accessible educational materials. For example, publishers who hold the intellectual property rights to educational material may be reluctant to produce alternative formats due to concerns about copyright infringement or potential loss of revenue. This reluctance persists despite the legal frameworks provided by the Marrakesh Treaty, which are often subject to varying interpretations and implementations across different jurisdictions. Moreover, the WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, as well as IPR provisions in trade agreements, have mandated patent protection for medical inventions for more than a decade and in some cases, almost two decades.[78]

The Marrakesh Treaty and the CRPD have tried to address some of these issues, but they are limited in scope and implementation.[79] The concept of IP waivers is not just a legal construct but it is deeply embedded in the framework of international human rights. These waivers serve as a bridge between the often conflicting goals of encouraging innovation through IP rights and ensuring equitable access to essential goods and services. In this context, international instruments like the UDHR and the CRPD provide valuable guidelines. The UDHR, adopted by the United Nations in 1948, serves as a foundational text for human rights across the globe. Article 25 of the

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[76] Ibid.

[77] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled, 52 ILM 1312 (2013). [hereinafter Marrakesh Treaty] Read full text at: https://tind.wipo.int/record/28932.

[78] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

[79] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled, 52 ILM 1312 (2013). [hereinafter Marrakesh Treaty] Read full text at: https://tind.wipo.int/record/28932; Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/Res/61/106 (Dec. 13, 2006); WHO. 2016a. Assistive technology fact sheet [Online].
Available: http://www.who.int/mediacentre/factsheets/assistive-technology/en/ [Accessed August 2017]. Siva Thambisetty, 'Improving Access to Patented Medicines: Are Human Rights Getting in the Way?',(2018) LSE Law, Society and Economy Working Papers 3/2018, < http://eprints.lse.ac.uk/87540/1/Thambisetty_Access%20to%20Patented%20Medicines_Author.pdf>.

UDHR explicitly states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including medical care and necessary social services".[80] This article underscores the universality of the right to health and well-being, implicitly advocating for the removal of barriers that could hinder access to essential medical care and social services. IP waivers align with the spirit of Article 25 by potentially lowering the costs of patented medicines and technologies, thereby making them more accessible to all, including to persons with disabilities.

Moreover, the CRPD also acknowledges that access to AT is a human right. This is a significant commitment, given that the number of people in need of such an intervention is expected to double by 2050. IP waivers can play a crucial role in fulfilling this commitment by making AT more affordable and accessible. Moreover, these international commitments are not standalone entities but are often integrated into regional and national laws. For instance, many countries have ratified the CRPD and incorporated its principles into their domestic legal frameworks. Therefore, the inclusion of IP waivers in FTAs can serve as a practical mechanism to operationalize these international commitments. However, the current FTAs and their disability-related provisions are completely oblivious to this concern and its potential policy solution. This may not be completely unintentional, as there is a major downside to reducing the IP protection in this respect.

Because IP protection is instrumental in fostering innovation, reduced levels of such protection might reduce the motivation for companies to engage in further research and development and thus it can hamper future innovation in assistive devices and other related equipment. Hence, what is needed is a balanced IP framework that can support innovation and protect the rights holders but can also offer flexibilities to allow countries, where necessary and appropriate, to ensure access to crucial products such as medicines and assistive devices. However, striking this balance right is heavily challenging as the two interests on the opposite sides of the table are contradictory to each other. The complexities of this challenge were most recently witnessed at the WTO's Ministerial Conference 12, wherein WTO Members after intense debates adopted the TRIPS waiver decision that temporarily removes intellectual property barriers around patents for COVID-19 vaccines.[81]

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[80] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948)

[81] Council for Trade-Related Aspects of Intellectual Property Rights, 'Waiver From Certain Provisions Of The Trips Agreement For The Prevention, Containment And Treatment Of Covid-19' (May 2021) WTO IP/C/W/669/Rev.1 < https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669R1.pdf&Open=True> accessed 25 November 2022.

2. High tariff barriers imposed on imports and sales

Another challenge that trade liberalisation and its policy instruments have rather ignored so far is the discouragingly heavy taxes that are imposed on AP and other related equipment, which have further restricted reasonable access for persons with disabilities. For this study, the author assessed border taxes for a number of AP by a selected group of developed and developing countries. Two kinds of import tariffs are assessed for this study: basic custom duties and domestic taxes. Broadly, the total amount of tax levied on these devices or equipment such as Basic Custom Duties (BCD) and other domestic taxes such as Value Added Tax (VAT) and Goods & Services Tax (GST) were found to be higher in developing countries, in comparison to developed countries.[82]

In India for example, the total taxes imposed on the import of Braille typewriters is 37.88 percent (BCD[83] is 7.5 percent; education cess[84] is 0.075+0.15 percent; Integrated Goods and Services Tax (IGST)[85] is 28 percent).[86] The import tax imposed on tricycles is as much as 41.18 percent (which comprises BCD of 10 percent; IGST is 28 percent and education cess is 0.1+0.2 percent). In China, the total import taxes imposed on custom wheelchair seating cushions is as high as 31.21 percent (Most

[82] The developing countries assessed are: India, Bangladesh, China, Ethiopia, South Africa, Chile and Mexico. The developed countries assessed are: France, United Kingdom, Australian, the European Union. The devices included in this assessment include: Hearing aids, orthopedic or fracture appliances, braille typewriters and printers, wheelchairs, canes, ceiling track lifts, ramps, lift vans, prosthetic devices, orthotics, stair climbing power chairs, porch lifts, standing devices, tricycle, automatic door openers, door knob latch handle extenders, dressing aids, eating aids, gait trainers, screen magnifying software, screen readers, speech recognition software, cognitive aids, and some others.

[83] Basic customs duty is a type of tax imposed under the Customs Act, 1962. The basic customs duty charged differs from item to item, and the Central Government of India has the right to exempt or reduce any item from being taxed the basic customs duty.

[84] An "education cess" is an additional tax that is levied on the basic tax liability. The purpose of the cess is to fund educational initiatives and programs within the country.

[85] Integrated Goods and Services Tax (IGST) - IGST is a mechanism to monitor the inter-State trade of goods and services and ensure that the SGST(WBGST) component accrues to the consumer State in India.

[86] Data relating to import duties including all mentioned countries and products is derived from the following sources - 'World Braille typewriter imports from India' (Volza Grow Global) https://www.volza.com/p/braille-typewriter/import/coo-india/, accessed on September 29, 2023.; 'India Tricycle imports from China' (Volza Grow Global) https://www.volza.com/p/tricycle/import/import-in-india/coo-china/, accessed on September 29, 2023; 'Custom import duty of HS Code 84729093 after GST in India' (Seair Exim Solutions) https://www.seair.co.in/custom-duty/hs-code-84729093.aspx, accessed on September 29, 2023; 'Custom import duty of HS Code 87142020 after GST in India' (Seair Exim Solutions) https://www.seair.co.in/custom-duty/hs-code-87142020.aspx, accessed on September 29, 2023; 'Detailed Import Data of wheelchair seat cushion' (Zauba Exim Data) https://www.zauba.com/import-WHEELCHAIR+SEAT+CUSHION/hs-code-40149090-hs-code.html, accessed on September 29, 2023; 'Detailed Import Data of Splint' (Zauba Exim Data) https://www.zauba.com/import-splint-hs-code.html, accessed on September 29, 2023; 'Detailed Import Data of Crutches (Zauba Exim Data) https://www.zauba.com/import-crutches/hs-code-90211000-hs-code.html, accessed on September 29, 2023; 'China Customs Solutions' (Transcustoms) https://www.transcustoms.com, accessed on September 29, 2023; 'Operative Tariff Duty Calculator' (National Board of Revenue (NBR), Bangladesh Customs) http://bangladeshcustoms.gov.bd/trade_info/duty_calculator, accessed on September 29, 2023; 'HSN/SAC finder' (Zoho Books), https://www.zoho.com/in/books/gst/hsn-sac-finder/, accessed on September 29, 2023.

Favoured Nation (MFN) duty[87] is 17 percent; VAT[88] is 13 percent). In Bangladesh, the taxes imposed on the import of crutches is 31 percent (Customs Duty (CD)89 is 5 percent; VAT is 15 percent; Advanced Income Tax (AIT)90 is 5 percent; Additional Tax (AT)91 is 5 percent). The total import taxes levied on splint is 31 percent (CD is 5 percent, VAT is 15 percent; AIT is 5 percent; AT is 5 percent). For the import of text-speech reading devices, the import tax is 58.6 percent (CD is 25 percent; VAT is 15 percent; AIT is 5 percent; Regulatory Duty (RD)92 is 3 percent; AT is 5 percent). Similar import duty is charged on speech recognition and screen magnification software.93

Meanwhile in Australia, hearing aids, orthopaedic footwear and wheelchairs are imported without any import tax but they face a VAT of 10 percent and are subject to import processing charges.[94] The European Union also presents an interesting example, as the import taxes (including customs union duty[95], tariff preferences[96] and third country duty[97]) are 0 percent for almost all devices that are considered as AP for persons with disabilities such as wheelchairs, Braille printers, canes, crutches, ramps, hearing aids, lift vans, prosthetics, splints, stair lifts, tricycles and others.

In the United Kingdom (UK), there are no import duties levied on a number of devices used by persons with disabilities, but they are subject to a 20 percent VAT. However, some devices or equipment can be brought into the UK free from VAT and/or customs duty. This exemption applies if the importer is a person with a disability, a nominated

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[87] "Most-Favoured-Nation" ("MFN") treatment — requires Members to accord the most favourable tariff and regulatory treatment given to the pro- duct of any one Member at the time of import or export of "like products" to all other Members.

[88] Value Added Taxes is a type of tax that is assessed incrementally. It is levied on the price of a product or service at each stage of production, distribution, or sale to the end consumer.

[89] Customs Duty is a tax imposed on imports and exports of goods.

[90] Advance Income Tax (AIT) or Withholding Tax on Imports is a tax paid in advance on imported goods for commercial purposes.

[91] Additional Tax (AT) refers to any kind of additional tax that doesn't fit into the categories above, often used to raise additional revenue or regulate trade.

[92] Regulatory Duty (RD) RD is an additional customs duty that is imposed on imported goods in addition to the custom duty. It's generally meant to protect local industries and regulate trade.

[93]

[94] These are the relevant import processing charges: Import processing charge-air: 999.99%- formula- IF CIF&DUTY <= 1000 then 0 otherwise if CIF&DUTY > 1000 and CIF&DUTY <= 10000 then 88 AUD otherwise 190 AUD OR; Import Processing Charge – Sea: 999.99% See Formula: If CIF&DUTY <= 1000 then 0 otherwise if CIF&DUTY > 1000 and CIF&DUTY <= 10000 then 108 AUD otherwise 210 AUD.

[95] The Customs Union Duty applies to the import of goods across the external borders of the EU. The EU customs union applies the same tariffs to goods imported into their territory from the rest of the world, and applies no tariffs internally. In the case of the EU, this means that there are no customs duties to be paid when goods are transported from one EU country to another.

[96] Tariff Preferences refers to a tariff schedule under which one or more nations are given lower rates or other advantages over others.

[97] In principle, they are initially incurred for all goods imported into the European Union from non-Union countries. Third-country customs duties are therefore part of the import duties (customs duties, import turnover tax and other excise duties) that you have to pay.

carer importing them for personal use, or if it is a charity that provides them to persons with disabilities for personal use. This exemption also applies to devices used by persons with visual disabilities such as teaching aids and equipment used to produce talk-aloud books and Braille. However, generic wheelchairs are not eligible for this exemption.[98] Hence, not all goods used by persons with disabilities are exempt from VAT under this scheme.[99]

Based on the (limited) sample of developed and developing countries assessed for this study, we observe a paradoxical situation: developing countries generally impose a much higher import duty on AP as compared to developed countries; yet 80 percent of the one billion people with a disability worldwide live in developing countries.[100] In India, over 2.1 percent of its population live with at least one form of disability. Additionally, in China, nearly 6.2 percent of its population is living with a disability. Yet, both countries have applied discouragingly high taxes on the import of many crucial assistive devices.

The World Bank estimates that 20 percent of the world's poorest people have some kind of disability, and they tend to be regarded in their own communities as the most disadvantaged. Disability and poverty are closely interlinked, as disability can increase the likelihood of poverty, and conversely, poverty can increase the risk of disability. The development of a disability can have profound social and economic impacts, leading to a number of barriers that, in turn, can contribute to the cycle of poverty. At the same time, poverty can also be a precursor to disability, as people grappling with economic challenges often face difficulties accessing essential health care, proper nutrition, or secure living conditions, thereby increasing the likelihood of developing disabilities.[101] Moreover, it is generally acknowledged that people with fewer resources at their disposal are exceedingly exposed to conditions leading to disability. For example, women report higher incidence of disability than men, and women with disabilities are recognized to experience multiple forms of disadvantages and exclusions on account of both their gender and their disability.[102]

When it comes to disability in childhood, it is estimated that 90 percent of children living with a disability in developing countries are not in school, and this is mainly

[98] 'Pay No Customs Duty or VAT on Goods for Disabled People' (*GOV.UK*, 14 April 2023) <https://www.gov.uk/guidance/pay-no-customs-duty-or-vat-on-goods-for-disabled-people> accessed 29 August 2023.
[99] For a list of products and other requirements to apply for zero VAT, see <https://www.gov.uk/guidance/reliefs-from-vat-for-disabled-and-older-people-notice-7017>
[100] WHO, 'Disability and health' (*WHO*, 2021) <https://www.who.int/en/news-room/fact-sheets/detail/disability-and-health>
[101] Jackie Marchildon '5 Facts About Living with a Disability in the Developing World' (*Global citizen*, 23 November, 2018) <https://www.globalcitizen.org/en/content/disability-in-the-developing-world/>
[102] 'Disability Benefits, Facts, Statistics, Resources' (Disabled World, nd) <https://www.disabled-world.com/disability/>

due to the fact that in developing countries, children with disabilities are less likely to have access to education.[103] The UN SDG 4 looks to ensure inclusive and equitable quality education for all, and affirms that by 2030, all children should have equal access to education irrespective of disability. It is difficult to see how this goal will be met if developing countries continue to tax education devices and software such as Braille devices so heavily.

A related problem with tariffs levied on the import of these products is the generic codification system for tariff classification. The Harmonized commodity description and coding system is a multi-purpose international product nomenclature developed by the World Customs Organization (WCO)[104], often referred to as the Harmonized System. Harmonized System of Nomenclature (HSN) Codes are universally used to categorise traded goods. In this study, while assessing imposed tariffs, another issue came to light. Of the 70+ types of disability equipment researched[105], ranging from appliances for colostomies to manual wheelchairs, only about 30[106] had specific dedicated HSN Codes identifying them as AP for persons with disabilities. This leaves the majority of roughly 40[107] items falling into generic categories. For instance, gait trainers are classified under the HSN Code 95069990, which refers to "*Articles and Equipment For General Physical Exercise, Gymnastics, Athletics, Other Sports*"[108].

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[103] Jackie Marchildon '5 Facts About Living with a Disability in the Developing World' (Global Citizen 23 November 2018) <https://www.globalcitizen.org/en/content/disability-in-the-developing-world/>

[104] 'What is the Harmonized System (HS)?', World Customs Organization, https://www.wcoomd.org/en/topics/nomenclature/overview.aspx#:~:text=What%20is%20the%20Harmonized%20System,World%20Customs%20Organization%20(WCO).

[105] The following databases were used to retrieve the HSN Codes and the Import/Export Data - WTO Trade and Tariff Data - https://www.wto.org/english/res_e/statis_e/statis_e.htm; Gov.UK Trade Tariff Lookup - https://www.gov.uk/trade-tariff; Seair Exim Solution - https://www.seair.co.in/; Eximguru - https://www.eximguru.com/; Volza - https://www.volza.com/; Zoho Books - https://www.zoho.com/in/books/gst/hsn-sac-finder/

[106] Appliances for Colostomies; Augmentative & Assistive Communication systems (AACs); Braille printers; Braille Systems for reading and writing; Canes; Ceiling track lifts; Clubfoot brace; Continence pads; Crutches; Custom Wheelchair Seating; Elastic Stockings; Handicap Ramps; Hearing Aids; Hearing Aids and Cochlear Implants; Hearing loop; Lift vans; Mechanical wheelchairs; Orthotic and prosthetic devices; Orthotics prosthetic devices; Scooters; Sip-and-puff systems; Splint; Stair Climbing Power Chairs; Stairlifts and porch lifts; Standing devices; Tricycle For The Disabled; Trunk stabilizers and sit-up assist rails; Urinary Catheters.

[107] Pressure Relieving Cushions and Mattresses; Adapted writing utensils; Adaptive bikes and strollers; Adaptive switches for switch-enabled devices; Amplified telephone equipment; Automatic door openers; Child Walker; Computer keyboard and mouse alternatives; Computer screen enlargement applications; Door Knob latch handle extenders; Dressing aids (button hooks, zipper pulls, elastic shoelaces, sock aids, dressing sticks, etc.); Eating aids (adaptive utensils, non-skid bowls, long straws, straw holders, plate guards, etc.); Eye-tracking computer systems; Foldable Stretcher; Gait trainers; Hygiene aids (toothpaste and soap dispensers, bath mitts, long-handled sponges, etc.); IV Pole Lamp switch and wall light switch plate extenders; Leverage-operated car door openers; Loop scissors; Mobile apps for the visually impaired; Mobility and rehabilitation equipment; Mouth sticks and head wands; OCR software PARAPLEGIC WHEELCHAIR; Picture Based Instructions / Picture Exchange Communication System; Reminder wristwatches and portable devices; Risers for beds, chairs, couches, and tables; Screen magnification software; Screen readers; Smart Care Orthopaedic Appliances; Speech recognition software; Teletype phones; Text-to-speech readers; TTY software; Turning knob operators; Universal turning handles; Voice recognition programs; Voice-to-text typing software; Wheelchairs Walkers and rollators; Wheelchair computer and tablet mounts.

[108] *Detailed Import Data of gait*', Zauba Import Export Data, https://www.zauba.com/import-gait-hs-code.html

Such a generic classification is being used by importers because they do not have any other HSN Code which specifically relates to disability-specific equipment to classify such products.

This classification system has a negative repercussion. If a government is considering a reduction or elimination of border tariffs that they apply on the import of a disability-related product, they may only be able to do so for the products that are classified under specific disability-related HSN codes. The products that are currently classified under the generic codes, which are critical to the dignity, independence, and well-being of persons with disabilities, would not benefit from such reductions, unless the government prepares an additional list that contains disability-related products. Hence, this seemingly minor coding issue has far-reaching consequences for disability inclusion by further exacerbating the inaccessibility of essential equipment. However, because countries have the ability to set their own more detailed and specific classifications within these international codes, countries can possibly create distinctions between generic and specific disability-related equipment within their tariff schedules in order to allow for appropriate disaggregation, and possibly tariff reductions, for disability-related equipment.

3. Lack of innovation in disability inclusive provisions in FTAs

A third reason for disconnect between barriers and policy solutions is lack of innovation in the inclusion of disability-related provisions. This is mainly because the current inclusions are based on the common practice of copying and pasting provisions from previously negotiated agreements, without any attempt to adapt them as per the countries' and stakeholders' unique needs. This is predominantly the case for developed countries, as they negotiate such provisions with a predetermined template possibly used in their previous negotiations.[109] Most of the time, these templates are designed in and for the developed world, spearheaded by the European Union, the United Kingdom, Canada and the United States.[110] Hence, a large amount of such provisions on disability are deliberately copied from previous agreements.[111] Studies have found that at least 100 FTAs take 80 percent or more of their content -

[109] The inclusion of disability as a non-trade issue in preferential trade agreements

[110] Leonardo Baccini, Andreas Dür, and Yoram Z. Haftel. "Imitation and innovation in international governance: The diffusion of trade agreement design." in Andreas Dür and Manfred Elsig (eds) *Trade cooperation: The purpose, design and effects of preferential trade agreements* (CUP 2015), 167

[111] Todd Allee, and Manfred Elsig 'Are the contents of international treaties copied and pasted? Evidence from preferential trade agreements' (2019) 63(3) International Studies Quarterly, 603: 603-613.Are the Contents of International Treaties Copied and Pasted? Evidence from Preferential Trade Agreements

word for word - from other existing agreements.[112] Furthermore, it is important to note that both developed (with significant negotiation capacity) and developing countries (with limited negotiation capacity) copy and paste quite extensively, as governments with low negotiation capacity search for existing templates, and countries with high capacity push for their own templates and preferred language repeatedly.

Copying provisions from existing agreements is beneficial for a number of reasons, as it reduces the costs of bargaining; has a lower compliance cost and higher probability of compliance as these commitments have already been agreed to in a different agreement; and finally, it reduces the challenges of arriving at domestic consensus over specific issues that may require changing domestic laws and procedures.[113] It also means that the cost of negotiation is lower as the clause is adapted from an earlier agreement; and substantive costs are lower since the concession has already been made. Countries also tend to develop certain templates of agreements and provisions over a number of years or decades for the sake of convenience and familiarity.[114] Another benefit of this approach is that it can drive a process of change, where a trade partner country may try to imitate the approach of its other trade partner countries in respect of certain issues they do not fully comprehend or have expertise on.

However, using a different template can motivate a government to add issues they have traditionally not included in their trade agreements or within the scope of their trade policy agenda.[115] The main downside of this "copy and paste" approach is that it reduces innovation and makes the inclusion of new issues or policy solutions more difficult. The repetition and copying practices of such provisions, which is not only the case with disability-related provisions, but also found in provisions related to other social concerns such as gender equality, obstruct innovation in the negotiation and inclusion of more ambitious commitments that can effectively help such marginalised groups overcome their barriers. This is a practice very much prevalent in provisions on disability inclusion, as countries have most commonly opted for replicating and copying NAFTA's minimal disability provision that was borrowed from

[112]Todd Allie and Manfred Elsig 'Are the contents of international treaties copied and pasted? Evidence from preferential trade agreements' (2019 63(3) International Studies Quarterly 603, 603-613.

[113] Ibid

[114]Lisa Lechner 'The domestic battle over the design of non-trade issues in preferential trade agreements' (2016) 23(5) Review of International Political Economy, 840, 840-871

[115] Karolina Milewicz, 'Beyond trade: The expanding scope of the non trade agenda in trade agreements' (2018) 62(4) Journal of Conflict Resolution, 743, 743-773

the WTO GPA – a provision that places no further responsibilities on the assuming states and does not create any affirmative commitment in any respect.[116]

The three factors discussed above – intellectual property rights, high tariff barriers on imports and a lack of innovation in designing provisions for disability inclusion – demonstrate how trade liberalisation and agreements can negatively affect or exclude persons with disabilities from the benefits of trade.

VI. Policy Recommendations

The inclusion of disability-related interests in trade agreements has materialised in several legal provisions in various forms; however, the current inclusions are not revolutionary as this study has shown. The study has shown how trade liberalisation can have a negative impact on persons with disabilities as it can reduce the affordability of and access to essential pharmaceutical products or assistive devices. Yet, there is no visible attempt in the language of current trade agreements to waive duty or patent protection for products and services that are primarily consumed by persons with disabilities.

The discussion above has also shown that most disability-inclusive provisions are found in the form of general cooperation-based provisions included in social, cultural or sustainable development chapters. This shows that countries so far have equated disability concerns to social or cultural matters rather than enhancing economic participation and benefit and have avoided the inclusion of such provisions in other chapters such as those on SMEs, Corporate Social Responsibility (CSR), investment, market access, and digital trade.

The preliminary inclusions discussed in this study are promising starting points, yet there is much more to accomplish before trade agreements can work for all, including for persons with disabilities. This section puts forward three recommendations for trade negotiators to consider in future trade negotiations. These recommendations are not "one-size-fit-all", and hence some of them may be more suitable for some countries than for others. Recommendations should be considered in light of the political will, socio-economic needs, existing domestic laws and available resources. Moreover, the following three recommendations are by no means exhaustive. They are intended to spark an initial discussion on how policymakers can move beyond

[116] Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1915 U.N.T.S. 103 [hereinafter referred as GPA]

their existing templates and negotiate more inclusive trade agreements that work for all.

1. Innovate - do not copy and paste

Even though the understanding on disability concerns have evolved, and there is a gradually growing political willingness to include such concerns within trade policy context, this study has shown that the policymakers have not made any substantial alterations in the traditional GPA template relating to persons with disabilities. They have only on rare occasions added other clauses to address disability in different contexts. As discussed in the previous section, the repetition and copying practices of such provisions is not only found in the provisions relating to disability inclusion, but also in provisions addressing other social or sustainable concerns. For example, the majority of trade agreements have included gender equality provisions in the form of labour standards or as cooperation-based provisions. Moreover, some new generation trade agreements such as Canada-Chile[117] and Canada-Israel[118] have featured standalone chapters on trade and gender that are drafted with very similar provisions, structures and scope.

The frequent repetition of templated provisions within FTAs, especially those addressing concerns of marginalised communities, raises significant doubts about the efficacy of international trade policies in championing the causes of those that are traditionally overlooked groups, such as persons with disabilities. Despite advancements in recognizing and articulating disability considerations within trade policy context, the translation of theoretical acknowledgments or affirmations into actionable commitments and negotiations of barrier-responding policy solutions remains a looming challenge. The reluctance towards change or trying out new provisions in this respect not only stifles the progression toward a more inclusive trade environment, but it also critically undermines the depth and impact of dialogue between public and private sectors. Hence, this practice of using a pre-used template obstructs innovation in the negotiation and inclusion of more ambitious commitments that can effectively help such marginalised groups overcome their barriers. It also reduces the motivation of policymakers to investigate the actual problems that marginalised groups in their jurisdictions face and engage in discussions with them as that would require them to look beyond their templates. It is against this backdrop that the need for a strategic overhaul emerges, propelling nations toward drafting

[117] Modernized Canada-Chile Free Trade Agreement (CCFTA) (entry in force February 5, 2019) (hereinafter referred as Canada-Chile FTA)

[118] Modernised Canada-Israel Free Trade Agreement (CIFTA) (entry into force September 1, 2019) (hereinafter referred as Canada-Israel FTA)

policies that are reflective of actual challenges faced by persons with disabilities in the multifaceted arena of international trade.

The increasing trend of including disability-related concerns in negotiation of trade agreements also creates a need to strengthen informed dialogue between public and private sectors. For a variety of reasons, engagement of private sector groups is crucial to ensure that trade negotiations lead to inclusive as well as informed trade agreements. First, existing literature has shown how private sector can play a significant role in drafting international norms through negotiated trade agreements.[119] Second, private industries and companies are generally the key beneficiaries and victims of international trade policies, and hence some form of public-private coordination in conduct of trade negotiations is embedded in the very nature of such agreements.[120] Third, trade negotiators are often unaware of the specific barriers faced by persons with disabilities in their various economic roles, which limits their ability to identify or negotiate provisions that can successfully address these barriers. Fourth, persons with disabilities and their representative groups have crucial knowledge, evidence and experience that can inform trade negotiations, so their participation can inform the negotiation process with their practical insights.

For these reasons and beyond, efforts are needed to create a channel of communication between the concerned public and private stakeholders before, during and after negotiations. This gap can be bridged with the help of an institutionalised dialogue between public and private stakeholders. This mechanism can also help countries – particularly developing countries – overcome the capacity gap in trade negotiations as they can benefit from the inputs coming from the concerned private stakeholders. This exchange can help policymakers gain practical insights into the relevant barriers and incorporate them in their decision making. This could also incentivise the policymakers to look beyond the current templates and consider other kinds of commitments which might make a visible difference in the problems persons with disabilities face. In doing so, policymakers can consider a number of innovations which are informed by a multifaceted understanding of disability and the evolving advancements, such as the ones proposed below:

Access to AT and AP: An innovative - yet rather obvious - example is to increase access to AT and AP. The Assistive Technology Policy Programme in Norway, for

[119] Jessica Callista, 'Public–Private Consultation for Free Trade Agreement Negotiations in Canada and Indonesia' (2018) TPSA Research Report, <http://bahar.co.id/sites/default/files/PPC%20for%20FTA%20Negotiations%20-%20Jessica%20Callista%20(Jan%202018).pdf (accessed 9 August 2019)>

[120] Hyun-jung Je, Public–Private Relationships in Trade Policy-making (*World Scientific*, 2018)

instance, entitles people in need of AP to receive financial support for purchasing them under their national insurance scheme. However, a prevailing majority of these support programs are based in high income countries with little applicability in low- and middle-income countries. Therefore, adoptions of such programmes need to take into account the current variations in access to assistive devices across genders, ages and disabilities, in order to achieve their equitable access in their respective jurisdictions.[121]

ATs serve as pivotal tools in enhancing the autonomy and functionality of persons with disabilities, enabling them to circumvent physical and technological barriers. The lack of affordable and accessible AT in various regions poses a substantial impediment, isolating individuals with disabilities from active participation in societal and economic activities. Here, FTAs have the power to strategically cater to this aspect by reducing tariff and non-tariff barriers on AT, making them more accessible and affordable across borders. By incorporating provisions that encourage the exchange, as well as knowledge and technological transfer of AT development, FTAs can ensure that their innovations benefit a wider, global audience. Additionally, FTAs can further incentivise standards for such technologies, ensuring that these products are compatible with the needs of population across the globe, and foster the global distribution of high-quality assistive devices and software.

Creation of Accessible Digital Trade Infrastructure: The digital realm offers enormous potential for persons with disabilities, providing alternative avenues for communication, transaction, and information retrieval. However, this is contingent on digital infrastructures and platforms designed with a focus on accessibility, ensuring that user interfaces are navigable and usable by individuals with disabilities. FTAs can champion digital accessibility by incorporating provisions that mandate digital platforms engaged in international trade to adhere to accessibility standards, such as the Web Content Accessibility Guidelines (WCAG). Furthermore, through collaborative efforts in FTA negotiations, countries can formulate and harmonise regulations that ensure digital trade infrastructures are designed and operated with an inherent focus on accessibility, ensuring that digital trade does not perpetuate existing barriers for individuals with disabilities.

Virtual Reality (VR) / Augmented Reality (AR) Accessibility Initiatives: Virtual Reality (VR) and Augmented Reality (AR) have the potential to craft immersive and adaptable environments, facilitating virtual accessibility for persons with disabilities in scenarios that might be restrictive in the physical world. These technologies can simulate

[121] Brigitte Rohwerder, 'Assistive technologies in developing countries' (2018) Institute of Development Studies 2

experiences or modify interactions in a manner that is more navigable and comfortable for individuals with disabilities. FTAs can be instrumental in forming alliances for research, development, and dissemination of VR/AR technologies with a focus on accessibility. By entailing clauses that incentivize the co-development and sharing of accessible VR/AR solutions and ensuring that such technologies are traded with minimised barriers, FTAs can nurture a globally inclusive digital environment. Furthermore, fostering standardisation in accessible VR/AR technologies through FTAs ensures consistent experiences for persons with disabilities, irrespective of geographic boundaries. For example, Microsoft's Soundscape app utilises 3D audio technology to enable people with visual impairments to build a richer awareness of their physical space and environment, using AR to enhance real-world settings.

AI-Powered Assistive Solutions in Trade: AI also offers potential solutions to navigate the barriers encountered by persons with disabilities in trade, such as adaptive communication tools, intelligent mobility solutions, and personalised accessibility features in digital platforms. FTAs can serve as a conduit to facilitate the research, development, and transfer of AI-powered assistive technologies between nations. By integrating provisions that reduce barriers to sharing innovations, knowledge, and technological capabilities related to AI-driven assistive tools, nations can collectively enhance the accessible experience of persons with disabilities in international trade. Ensuring that AI ethical guidelines are universally adopted within FTAs also safeguards against potential biases and disparities in AI utilities that cater to such individuals in trade. For instance, Google's Lookout app uses AI to assist visually impaired individuals by identifying and providing auditory descriptions of objects and texts through the phone's camera, offering an accessible interface for their interaction with the physical environment.

Transnational Disability Entrepreneurship Networks: Transnational networks of entrepreneurs with disabilities can facilitate knowledge exchange, collaboration, and create collective bargaining power, ensuring that their specific needs and innovations are represented in global markets. FTAs have the ability to foster the growth and empowerment of transnational disability entrepreneurship networks by incorporating provisions that support the establishment and functioning of such networks. By reducing barriers in communication technologies, financial transactions, and collaborative platforms, and by acknowledging and incorporating the insights from these networks into policy-making, FTAs can ensure that the specific perspectives and innovations stemming from entrepreneurs with disabilities are recognized and integrated into global trade dynamics The UK's Global Disability Innovation Hub is one example of this advancement. As a collaborative platform, the Hub aims to accelerate disability innovation across the world through courses, research, and engagement activities by bringing together a diverse range of stakeholders and entrepreneurs.

2. *Waive the Duty*

Even though trade liberalisation and trade agreements are aimed at reducing the cost and increasing the availability of goods and services it has not managed to achieve this in respect of assistive devices. This is mainly because, as seen before, tariffs are still quite high on many disability-related goods despite the proliferation of trade agreements that are primarily aimed at bringing down the barriers to trade including tariffs. However, as this research has shown, trade agreements so far have not been able to reduce the tariffs for disability-related goods. For this to happen, trade agreements need to provide preferential market access and waivers to facilitate the import and export of assistive devices, which can allow them to avoid tariff and non-tariff barriers that other pharmaceuticals products continue to face.[122] One important aspect to consider for future trade negotiations is to include more targeted provisions that can directly address the barriers persons with disabilities face in accessing economic opportunities and resources. For example, one useful provision in this respect could be the inclusion of reduced import duty or a complete waiver of import duty on products that are essential for use by persons with disabilities. Negotiating such a provision is not about "reinventing the wheel"; some countries have already assumed these commitments as part of their domestic regulations. However, FTAs are lagging behind, as countries have not yet sought to negotiate duty waiver or duty reduction in the context of their trade agreements.

As mentioned previously, in the United Kingdom, goods that are to be used by persons with disabilities are exempt from paying custom duty (and VAT in some cases). These reliefs also apply to goods specially designed or adapted to provide educational, scientific or cultural help to people who are blind or partially sighted, such as items used for mobility assistance and for condition identification and awareness, teaching aids, equipment and digital media used to produce Braille and talking books as well as electronic reading machines.[123]

This is a good practice, and a step in the right direction, as it directly improves the financial accessibility of those items by reducing their costs. These practices should be part of future trade negotiations, directly facilitating commitments to waive or reduce import duties of assistive devices as part of a country's trade agreement.

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[122] Courtney McNamara, 'Trade Liberalization and Social Determinants Of Health: A State Of The Literature Review' (2017) 176(1) Social Science & Medicine, 1; Interview with representatives from international organizations [details withheld]

[123] For more details, see HM Revenue & Customs 'Pay no Customs Duty or VAT on goods for disabled people' (*Gov.UK* 17 July 2020)https://www.gov.uk/guidance/pay-no-customs-duty-or-vat-on-goods-for-disabled-people#:~:text=VAT-,You%20can%20bring%20goods%20into%20the%20UK%20from%20outside%20the,people%20for%20their%20personal%20use

One example of finding solutions in this respect - through international cooperation - is the World Health Organisation's (WHO) programme to promote Global Cooperation on Assistive Technology, which aims to increase access to high-quality affordable assistive products for everybody in need. The program is known as the Global Cooperation on Assistive Technology (GATE), and it has developed a priority APs' List, which represents a minimum list and includes 50 priority APs, that are selected on the basis of widespread need and impact on a person's life. Through this program, the WHO encourages countries to develop their own lists and commit to increasing the availability of products added on their individual lists.[124] Using this list of products, countries can negotiate concessions and agree to reduce or eliminate duties imposed on imports.

3. Ease Intellectual Property Rights Protection

The pharmaceutical industry is another example of how intellectual property rights can have both positive and negative impacts on accessibility. On one hand, patents serve as a crucial instrument for the development of pharmaceutical industry, contributing to better access to health systems worldwide.[125] However, patents often lead to higher prices for essential medicines, making them more inaccessible. These patents currently protect creations and technologies after a patent is granted and is valid through a series of legal procedures over a range of disability-related products including mobility assistive devices. Patent assignees own the right to exclude other inventors from using the claimed technical means or inventions, which in turn can result in low availability and high costs of such goods or technologies.

The concept of IP waivers has gained significant attention in recent years, particularly in the context of global health crises and social inequities. While the debate often centres on the pharmaceutical industry and access to essential medicines, the implications of IP waivers extend much further, especially for persons with disabilities. These waivers can serve as a transformative tool in dismantling the various barriers that individuals with disabilities often face in accessing healthcare, technology, education, and more. Waivers can allow for the production of generic versions of such equipment, thereby reducing costs and increasing accessibility. The IP waivers can also facilitate the development and dissemination of more affordable assistive technologies, thereby enhancing the quality of life for persons with

[124]WHO 'Priority assistive products list (APL)' (*WHO,* 2016b) [Online]. Available: http://www.who.int/phi/implementation/assistive_technology/global_survey-apl/en/ [Accessed 28 September 2016].Priority assistive Products List, WHO 2016b

[125] Silvia Silazar, 'Intellectual Property and the Right to Health' World Intellectual Property organisation (WIPO), < https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_3.pdf>.

disabilities. In the publishing sector, waivers can make it easier to produce and distribute educational material in Braille or audio books formats. This is essential for ensuring inclusive education, as mandated by international human rights laws. IP waivers can also have a more indirect, yet profoundly impactful, benefit: the promotion of research. By allowing for exceptions to patent laws for research purposes, waivers can stimulate the development of new, more affordable alternatives to existing patented technologies or medicines.

As such, an important step in this direction could be to negotiate terms on the easing of intellectual property rights for goods and services required by persons with disabilities. This commitment may be negotiated in a number of ways. One possible way to frame this is as an exception to patent regulations that may permit the production of generic versions of patented medicines and equipment under specific conditions, such as public health emergencies or for educational purposes.

Another type of provision could be presented in the form of a reservation, wherein countries reserve the right to exclude AT or educational materials from being patented, ensuring that these essential products remain accessible to all. Moreover, countries could assume affirmative commitments through cooperation, as FTAs can also serve as platforms for international cooperation in this field, particularly in the realm of research and development (R&D). By encouraging trade partners to collaborate on R&D programs, FTAs can facilitate the development of new, more affordable technologies and medicines. This is especially crucial in the field of AT, where innovation can significantly improve the quality of life for persons with disabilities. Finally, provisions for granting compulsory licences can also be integrated into FTAs. These licences can allow governments to produce or import generic versions of patented products without the consent of patent holder, usually in cases of extreme public health emergencies. While this is a more ambitious suggestion, it serves as an essential safety net, ensuring that life-saving medications and technologies remain accessible especially in dire circumstances.

In addition to waivers, FTAs could also include provisions that encourage or require the transfer of technology from more developed to less developed countries, particularly in sectors like healthcare to improve accessibility. Such provisions could require that any changes to IP laws or regulations be made publicly available and subject to public comment before implementation. This ensures that stakeholders, including organisations representing persons with disabilities, have a say in the process. Finally, FTAs may also include provisions for regular monitoring and evaluation of the impact of IP waivers on accessibility and affordability of essential goods and services for persons with disability. By weaving IP waivers into the fabric of FTAs, we may not merely facilitate economic cooperation but also address a critical human rights issue that impacts millions of persons with disabilities worldwide. This

approach aligns with international commitments like the UDHR and CRPD, serving as a practical mechanism to operationalize these matters.

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