


Including Disability in Business and Human Rights Discourse and Corporate Practice

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Abstract

Despite significant progress in business and human rights (BHR) discourse and the practices of multinational corporations (MNCs), persons with disabilities and disability rights are absent from both the key instruments and practice of BHR. This lacuna exists despite the near-universal ratification of the United Nations (UN) Convention on the Rights of Persons with Disabilities, as well as the fact that disabled persons constitute over 15 per cent of the global population and MNC operations impact them greatly and disproportionately. We argue that MNCs have a central role, responsibility and opportunity to foment change globally in fulfilling the human rights of persons with disabilities through their employment practices and by leveraging their economic power to fulfil other aspects of disability-based human rights. Doing so requires the development and self-enforcement of disability-specific human rights due diligence (HRDD) processes, and creating a general culture of diversity, equity and inclusion that encompasses disability.

Keywords: Business & Human Rights Treaty (B&HR), Convention on the Rights of Persons with Disabilities (CRPD), human rights due diligence (HRDD), multinational corporations (MNC), persons with disabilities

I. INTRODUCTION

Business and human rights (BHR) initiatives have flourished in the last two decades. These have resulted in an abundance of soft law,¹ a variety of mechanisms that monitor

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¹ For example, OECD Guidelines for Multinational Enterprises (2011); OECD Due Diligence Guidance for Responsible Business Conduct (2018), <http://www.oecd.org/investment/duo-diligence-guidance-for-responsible-business-conduct.htm> (accessed 5 March 2021); Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011).

voluntary compliance such as the United Nations Global Compact (UNGC),² domestic laws that impose extraterritorial human rights obligations on multinational corporations (MNCs),³ and an evolving treaty on BHR currently in its second draft.⁴ There are, of course, serious hurdles and opposition in framing a legally binding agenda on the role of MNCs within the international human rights architecture. The ‘race to the bottom’ is aided by the existing bilateral investment treaty regime, as well as the fact that both developed and developing states are uneasy about enacting and enforcing laws with respect to MNCs and human rights.⁵ By shifting the focus on what MNCs *should* be doing, rather than how states facilitate MNCs in their national legal order or effectively monitor their extraterritorial operations, it is no wonder that MNCs have resorted to voluntary undertakings under the general framework of what is known as corporate social responsibility (CSR).

The absence of concrete obligations on the part of states and MNCs is a striking feature of BHR that further helps explain why other more recent rights have failed to be featured in the broader BHR discourse.⁶ Clearly, if it is still debatable whether an MNC is allowed to pollute the underground potable water of a host state because the law of said state allows the discharge of pollutants, or because pertinent bilateral investment treaties might see interference as a form of indirect expropriation,⁷ the introduction of disability rights in this equation would find little, if any, support.

Yet, persons with disabilities number approximately 1 billion worldwide, or roughly 15 per cent of the total global population.⁸ On the basis of numbers alone, disassociating disabled persons from the emerging global BHR regime, particularly given the context and nature of disability-based human rights,⁹ removes discreet fundamental rights from BHR discourse and practice. Persons with disabilities, much like other vulnerable persons, are greatly impacted by weak host state laws and the strong bargaining power of MNCs to reduce the extraterritorial reach of powerful home state laws and enforcement mechanisms.

² For an analysis, see S Deva, ‘Global Compact: A Critique of UN’s “Public–Private” Partnership for Promoting Corporate Citizenship’ (2006) 34 *Syracuse Journal of International Law and Commerce* 107.

³ See, e.g., Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id> (accessed 5 March 2021); Modern Slavery Act 2015 (UK); Modern Slavery Act 2018 (Australia).

⁴ Human Rights Council, ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises’ (16 July 2018), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (accessed 5 March 2021). See also I Bantekas, ‘The Emerging UN Business and Human Rights Treaty and its Codification of International Norms’ (2021) 12 *George Mason International Law Journal* 1, <http://www.georgemasonjicl.org/issues/>

⁵ See KP Sauvart, ‘The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned’ (2015) 16 *Journal of World Investment and Trade* 11, and I Bantekas, ‘The Human Rights and Development Dimension of Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws’ (2020) 31 *Florida Journal of International Law* 339.

⁶ See J Nolan, ‘United Nations’ Compact with Business: Hindering or Helping the Protection of Human Rights’ (2005) 24 *University of Queensland Law Journal* 445.

⁷ Especially, *Tecnicas Medioambientales Tecmed SA v Mexico*, ICSID Merits (29 May 2003), para 116; see also *Compañía del Desarrollo de Santa Elena SA v Costa Rica*, ICSID Merits (17 February 2000), para 71.

⁸ United Nations, *Factsheet on Persons with Disabilities*, <https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html> (accessed 5 March 2021).

⁹ MA Stein, ‘Disability Human Rights’ (2007) 95 *California Law Review* 75.

In this manner, some states feel justified in refusing to fund the necessary costs for reasonable accommodation, accessibility, and non-discrimination inherent in the implementation of disability-compliant laws and policies, even though it has amply been proven that the exclusion of persons with disabilities from labour markets is detrimental to gross domestic product (GDP) related growth,¹⁰ among other national economic goals.

Globally, persons with disabilities experience high levels of socioeconomic exclusion.¹¹ Inequality in employment is particularly damaging because having a livelihood is imperative to avoiding or reducing both personal and intergenerational poverty, and income can in turn create opportunities to access and fulfil a wide range of human rights.¹² In the European Union (EU), for example, from 2006 to 2016, the employment rate of persons with disabilities was roughly 47 per cent compared with some 67 per cent for persons without a disability,¹³ and in low- and middle-income countries the employment rates were even lower.¹⁴ Worldwide, employed workers with a disability get paid less on average¹⁵ and are discriminated against in career advancement.¹⁶ Research has determined that these impacts cannot be explained by differences in productivity or human capital.¹⁷

Moreover, other impediments exist to employment, for example lack of accessible public transportation,¹⁸ a dearth of accessible information and communication technology (ICT),¹⁹ and workplaces that remain hostile to those with disabilities.²⁰ Consequent poverty rates are significant across both developed, developing, and least developed nations.²¹ The socioeconomic impact worldwide is significant in view of over

¹⁰ The World Bank periodically compiles global data on national social protection schemes. See World Bank Group, *The State of Social Safety Nets* (2018), <https://www.worldbank.org/en/topic/socialprotectionandjobs/publication/the-state-of-social-safety-nets-2018> (accessed 5 March 2021). In 2009, the ILO assessed annual national GDP losses in ten developing countries, three from Asia and seven from Africa, projecting annual GDP losses ranging between 3 and 7 per cent. S Backup, *The Price of Exclusion: The Economic Consequences of Excluding People with Disabilities from the World of Work* (ILO, 2009), https://www.ilo.org/wcmsp5/groups/public/-ed_emp/-ifp_skills/documents/publication/wcms_119305.pdf (accessed 5 March 2021).

¹¹ United Nations, *Disability and Development Report: Realizing the Sustainable Development Goals by, for and with Persons with Disabilities* (2018), available at: <https://social.un.org/publications/UN-Flagship-Report-Disability-Final.pdf> (accessed 5 March 2021).

¹² J Heymann, MA Stein and G Moreno (eds.), *Disability and Equity at Work* (Oxford University Press, Oxford, 2014).

¹³ European Commission, *Employment Rate of People by Type of Disability, Sex and Age*, https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=hlth_dlm010&lang=en (accessed 5 March 2021).

¹⁴ World Health Organization & World Bank, 'World Report on Disability' (2011) 237–38, https://www.who.int/disabilities/world_report/2011/report.pdf (accessed 5 March 2021).

¹⁵ United Nations, note 8, 158; Handicap International, 'Situation of Wage Employment of People with Disabilities: The Developing Countries in Focus' (2016) 28; G Ryder, *Getting People with Disabilities into Work Requires Data*, World Economic Forum (18 February 2020), <https://www.weforum.org/agenda/2020/02/getting-people-with-disabilities-into-work-requires-data/> (accessed 5 March 2021).

¹⁶ Handicap International, note 15, 29–31.

¹⁷ United Nations, note 11, 235; D Kruse et al, 'Why Do Workers with Disabilities Earn Less? Occupational Job Requirements and Disability Discrimination' (2018) 56 *British Journal of Industrial Relations* 798, 821–22.

¹⁸ HJ Boux and MA Stein, 'Accessing Employment and Transportation: The Role of the New York City Mayor's Office for People with Disabilities' (2021) 48 *Fordham Urban Law Journal* 1257, 1294–1324.

¹⁹ MA Stein and J Lazar (eds.), *Accessible Technology and the Developing World* (Oxford University Press, Oxford, forthcoming 2021).

²⁰ World Report on Disability, note 14, 240.

²¹ For example, a 2009 OECD study of 27 high-income countries indicates that persons with disabilities are more likely to live under the poverty threshold in 24 of these countries, and that in some of these countries (e.g., Australia, the US, and

one billion persons living with a disability.²² Nevertheless, the employment of persons with disabilities has been almost wholly absent from international initiatives addressed to MNCs. The UNGC,²³ for example, does not mention disability; the United Nations Guiding Principles on Business and Human Rights (UNGPs),²⁴ adopted five years after the United Nations Convention on the Rights of Persons with Disabilities (CRPD), only does so in the adjoining commentary. A notable and recent counter-example is the United Nations/International Labour Organization (ILO) Guide for Business on the Rights of Persons with Disabilities (UN/ILO GUIDE).²⁵

The almost total absence of persons with disabilities and disability rights from both BHR discourse and practice – this article is the first legal scholarship on point – is a profoundly harmful oversight. MNCs have a central role, responsibility, and opportunity to foment change globally in fulfilling the rights of persons with disabilities. In addition to improving their employment practices, MNCs can leverage their economic power to fulfil other aspects of the human rights of persons with disabilities within their purview by: making physical and virtual environments accessible; ensuring that vendors, distributors and supply chains require equal employment opportunity for workers with a disability, produce accessible products and services, and take affirmative actions to employ and advance in employment workers with a disability; acknowledging the existence and value of customers with disabilities, their households and friends, and marketing to such individuals; developing and implementing data accumulation and accountability processes, especially human rights due diligence (HRDD) processes – which as ongoing periodic audits, supersede irregularly applied human rights impact assessment (HRIA) instruments; and creating a general culture of diversity, equity, and inclusion of differences that includes disability. Acting in this manner would bolster rarely helpful CSR and diversity schemes, and position the business sector to become human rights change agents.

The next section surveys international- and national-level goals and obligations relating to the employment of persons with disabilities. Section III focuses on misconceptions regarding the productivity and cost of workers with disabilities and discusses avenues through which MNCs can internalize added economic benefits due to state-based measures when complying with human rights obligations. Section IV looks beyond disability-related employment to ways in which MNCs can help fulfil the human

(Korea) they are two to three times as likely to be poor. OECD, *Sickness, Disability and Work: Breaking the Barriers* (2009), <https://www.oecd.org/publications/sickness-disability-and-work-breaking-the-barriers-9789264088856-en.htm> (accessed 5 March 2021). The study was replicated by the World Bank in low- and middle-income countries, and found that countries in sub-Saharan Africa, Latin America and Asia significantly worse economic well-being existed for those with disabilities in 14 of 15 countries studied. The study also showed significantly higher rates in 11 countries of multidimensional poverty. S Mitra, A Posarac and B Vick, 'Disability and Poverty in Developing Countries: A Snapshot from the World Health Survey' (2011), <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/501871468326189306/disability-and-poverty-in-developing-countries-a-snapshot-from-the-world-health-survey> (accessed 5 March 2021).

²² World Report on Disability, note 14, 29.

²³ UNGC, 'The Ten Principles of the UN Global Compact (2000)', <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 5 March 2021).

²⁴ OHCHR, Guiding Principles on Business and Human Rights, HR/PUB/11/04 (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (accessed 5 March 2021).

²⁵ UNGC, ILO, *Guide for Business on the Rights of Persons with Disabilities* (UNGC Library, 2017), https://d306pr3pise04h.cloudfront.net/docs/publications%2FAccessible_Disabilities_Guide.pdf (accessed 5 March 2021).

rights of persons with disabilities. Section V examines the desirability and content of a HRDD that encompasses disability alongside other human rights.

II. LINKAGES BETWEEN BHR AND DISABILITY EMPLOYMENT

CRPD Article 4's obligation for States parties to review, revise, or promulgate positive disability-related legislation and policies has precipitated extensive law reform.²⁶ The World Policy Analysis Center, which generates and disseminates salient data,²⁷ reports that of the 193 UN member states: 53 per cent of low income, 63 per cent of middle income, and 66 per cent of high income countries have legislation with broad-based prohibitions on disability discrimination in the workplace;²⁸ and that in 42 per cent of low income, 45 per cent of middle income, and 69 per cent of high income countries, employers are required to provide reasonable accommodations to workers with disabilities.²⁹ What is unclear, however, is the extent of extraterritorial application of domestic disability protection laws – and in particular anti-discrimination laws in MNC home office countries which presumably are in the Global North – to local offices and operations. Subject to further research or court decisions, it currently is unknown, for example, if a United States (US) MNC would be bound by the Americans with Disabilities Act when operating outside of the US,³⁰ or whether an EU-based MNC would be bound by the EU's Framework Directive on Employment.³¹

At national level, a wide variety of policies exist as far as employing workers with disabilities. Many of these pre-date the CRPD, although this treaty has also precipitated dramatic change in this realm through the adoption of measures as part of state implementing obligations.³² Policies include: vocational training, habilitation and rehabilitation; employment services; quota regimes; self-employment initiatives; partially reserved occupations; preferential contracts; positive cultural attitude change campaigns;

²⁶ MA Stein, and JE Lord, 'Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities', in G Quinn and O Mjöll Arnardóttir (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) 17.

²⁷ World Policy Analysis Center, <https://www.worldpolicycenter.org/topics/disability/policies> (accessed 5 March 2021). In addition to the data set forth in World Policy Analysis Center, note 28, related data on Constitutional protections, protections for access to education, and other areas such as paid leave are covered for disability as well as other population sectors.

²⁸ World Policy Analysis Center, 'Does legislation prohibit discrimination at work based on disability?' (2018), <https://www.worldpolicycenter.org/policies/does-legislation-prohibit-discrimination-at-work-based-on-disability/does-legislation-explicitly-prohibit-discrimination-in-hiring-or-recruitment-on-the-basis-of-disability> (accessed 5 March 2021).

²⁹ World Policy Analysis Center, 'Are employers required to guarantee reasonable accommodation to workers with disabilities?' (2018), <https://worldpolicycenter.org/policies/are-employers-required-to-guarantee-reasonable-accommodation-to-workers-with-disabilities> (accessed 5 March 2021).

³⁰ In *Spector v Norwegian Cruise Line Ltd*, 545 U.S. 119 (2005), the US Supreme Court held that the ADA applied to a foreign entity operating within US waters, but declined to explicate its reasoning or its application beyond the case at bar. Conceivably, the Alien Tort Claims Act (US) permits foreign nationals to sue for tort violations of international law in US federal courts, assuming logistical and representative challenges can be overcome.

³¹ European Parliament Directorate-General for External Policies, 'The Extraterritorial Effects of Legislation and Policies in the EU and US' (2012), [https://www.europarl.europa.eu/RegData/etudes/STUD/2012/433701/EXPO-AFET_ET\(2012\)433701_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2012/433701/EXPO-AFET_ET(2012)433701_EN.pdf) (accessed 5 March 2021).

³² A catalogue of good practices posted on the ZERO Project's website as part of their annual review of innovative disability-related initiatives is available at <https://zeroproject.org/policy-type/2017/> (accessed 5 March 2021).

and collaborations with non-state actors. Equality measures directed towards people with disabilities or employers include trial employment; assistance in supported employment; vocational guidance; technical advice; and financial incentives including loan schemes, grants, subsidies, transportation assistance, and tax concessions.³³ Each of these policies can impact the hiring and retention of employees with disabilities, both directly (e.g., by providing job training and placements) and through the creation of incentives for MNCs and other employers (via tax incentives and reimbursement schemes).³⁴ These circumstances are well-demonstrated by the impact of national quota systems.³⁵

In contrast to the domestic and international initiatives and instruments (surveyed in the next sub-section) to employ persons with disabilities, MNCs have been largely left to their own devices. Notably, the UNGC, adopted in 2000, is directed towards '[t]he elimination of discrimination in respect of employment and occupation'³⁶ but does not mention disability. Similarly, the 2011 UNGPs were a breakthrough in recognizing the crucial role that the private sector plays in respecting and remedying human rights. Adopted five years after the CRPD, disability nevertheless goes unmentioned in the document's text and appears only in the adjoining commentary as one of many 'specific groups or populations that require particular attention' and who may face 'specific challenges'.³⁷ The concept of reasonable accommodation is totally absent. Hence, the UNGPs is a forward-looking CSR initiative, but nonetheless a CSR exercise without enforcement or disability provisions.

The 2017 UN/ILO GUIDE provides a strong exception from the routine oversight of workers with disabilities. Produced by the partnership of the UNGC and the ILO, it contains three policy and practice requirements for businesses: (1) having an explicit policy commitment to this area (to 'know and show' that it is protecting human rights); (2) conducting human rights due diligence regarding the company's current practices (and involving employees with disabilities in the process); and (3) have a remediation framework (for example, having a formal complaints procedure in place).³⁸ The 'business case' for protecting the human rights of persons with disabilities is also made by explaining the benefits in the four separate 'pillars' of: (1) business; (2) workplace; (3) marketplace; and (4) community.³⁹

A. The Existing International Legal Framework Linking Disability Employment to the BHR Discourse

States have long received UN encouragement on employing persons with disabilities, and are duty-bound via international instruments to respect and protect the human rights of

³³ MA Stein and PJS Stein, 'Beyond Disability Civil Rights' (2007) 58 *Hastings Law Journal* 1203, 1226.

³⁴ For an analysis of how such considerations impact individual employers, see MA Stein, 'The Law and Economics of ADA Accommodations' (2003) 53 *Duke Law Journal* 79.

³⁵ Debra Ruh, 'Tapping into Hidden Human Capital: How Leading Global Companies Improve their Bottom Line by Employing Persons with Disabilities (G3ict Global Initiative for Inclusive ICTs, 2016).

³⁶ UNGC, note 23, Principle 6.

³⁷ OHCHR, note 24, 12.

³⁸ UNGC, ILO, note 25, 1.2.

³⁹ *Ibid* at 1.3.

persons with disabilities in the workplace; obligations that are in synergy with the evolving BHR treaty. Following the CRPD, states have increasingly passed or amended related domestic legislation.

Various soft laws recognize or encourage the employment of persons with disabilities in the form of standard-setting devices. Chief among these are: the UN General Assembly's 1982 resolution on a World Programme of Action Concerning Disabled Persons;⁴⁰ the ILO's Recommendation (No. 168);⁴¹ the General Assembly's 1994 resolution Standard Rules on the Equalization of Opportunities for Persons with Disabilities;⁴² and the ILO's 1998 Fundamental Principles and Rights at Work.⁴³ While some of these were instrumental in framing the discussion and text of article 27 CRPD,⁴⁴ they have played no part whatsoever in the internal policies of MNCs, as well as the inclusion of disability rights in voluntary monitoring mechanisms, such as the UNGC, or the Organisation for Economic Co-operation and Development Guidelines on Multinational Enterprises (OECD Guidelines).

On the other hand, general human rights instruments, such as the International Covenant on Economic, Social, and Cultural Rights⁴⁵ (CESCR) (and its interpretive General Comment No. 5 on Persons with Disabilities⁴⁶) raise relevant state-based obligations relating to the employment of persons with disabilities.⁴⁷ Equally important is the ILO's 1983 Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159). Undoubtedly, it was the CRPD that engendered a paradigm shift in the legal rights of persons with disabilities, requiring that they be equally included in their communities.⁴⁸

⁴⁰ UN General Assembly, 'World Programme of Action Concerning Disabled Persons', Resolution 37/351 (15 September 1982) ('Many persons with disabilities are denied employment or given only menial and poorly remunerated jobs').

⁴¹ ILO, Vocational Rehabilitation and Employment (Disabled Persons) Convention No. 159 (1983), Labour Standards (declaring 'the need to ensure equality of opportunity and treatment to all categories of disabled persons, in both rural and urban areas, for employment and integration into the community'); ILO, Vocational Rehabilitation and Employment (Disabled Persons) Recommendation No. 168 (1983) ('Disabled persons should enjoy equality of opportunity and treatment in respect of access to, retention of and advancement in employment which, wherever possible, corresponds to their own choice and takes account of their individual suitability for such employment').

⁴² UN General Assembly, 'Standard Rules on the Equalization of Opportunities for Persons with Disabilities', Resolution 48/96 (4 March 1994) ('States should actively support the integration of persons with disabilities into employment').

⁴³ ILO, ILO Declaration on Fundamental Principles and Rights at Work (18 June 1998) (for example, 'the elimination of discrimination in respect of employment and occupation').

⁴⁴ See I Bantekas, F Penillas and S Trömel, 'Article 27', in I Bantekas, MA Stein and D Anastasiou (eds.), *The UN Convention on the Rights of Persons with Disabilities* (Oxford University Press, Oxford, 2018) 764–801.

⁴⁵ International Covenant on Economic, Social, and Cultural Rights, UN Treaty Series vol 993 (adopted on 16 December 1966, entered into force on 3 January 1976) ('The State Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work').

⁴⁶ OHCHR, 'CESCR General Comment No. 5: Persons with Disabilities' (9 December 1994), <https://www.refworld.org/pdfid/4538838f0.pdf> (accessed 5 March 2021) ('it is particularly important that artificial barriers to integration in general, and to employment in particular, be removed').

⁴⁷ ILO, 'Employment of People With Disabilities – A Human Rights Approach (Asia): Report of a Tripartite Technical Consultation' (18–20 January 2006), available at: https://www.ilo.org/wcmsp5/groups/public/—ed_emp/—ifp_skills/documents/publication/wcms_107853.pdf (accessed 5 March 2021) at 4.1.

⁴⁸ J Fiala-Butora, A Rimmerman and A Gur, 'Article 19', in Bantekas et al, note 44, 530–58.

Previously disempowered, silenced, and condemned to the margins of society,⁴⁹ the CRPD's passage – and near-universal ratification⁵⁰ – has engendered substantial law and policy reform, in part because states have been forced to consider for the first time, how to treat their largest minority group equally.⁵¹ Among the CRPD's fifty substantive articles, Article 5 (Equality and non-discrimination) defines the denial of reasonable accommodation as a prohibited form of discrimination;⁵² Article 8 (Awareness-raising) requires States parties to promote recognition of the abilities of workers with disabilities;⁵³ and Article 27 (Work and employment) is a mandate for states to encourage and ensure occupational equity for their populations of individuals with disabilities.⁵⁴ In addition to prohibiting discrimination, Article 27 includes a non-exhaustive list of positive measures that States parties can utilize in bridging the inequality and participation gap between employees with and without disabilities. These include: enabling 'effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training'⁵⁵ promoting 'employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment';⁵⁶ sponsoring 'the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures';⁵⁷ ensuring 'that reasonable accommodation is provided to persons with disabilities in the workplace';⁵⁸ stimulating 'the acquisition by persons with disabilities of work experience in the open labour market';⁵⁹ and supporting 'vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities'.⁶⁰

The Millennium Development Goals (MDGs), the globe's largest development programme, ran from 2000 to 2015,⁶¹ and was nearly entirely silent as to disability

⁴⁹ MA Stein, note 9.

⁵⁰ UN Department of Economic and Social Affairs, 'Ratifications and Signatures of the CRPD, Convention on the Rights of Persons with Disabilities' (27 August 2020), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 5 March 2021).

⁵¹ Stein and Lord, note 26.

⁵² Convention on the Rights of Persons with Disabilities, UN Doc A/RES/61/106 (adopted on 24 January 2007, entered into force on 3 May 2008), art 5 ('In order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided').

⁵³ Ibid at art 8(a)(iii) (State Parties shall 'promote recognition of the skills, merits and abilities of persons with disabilities, and of their contribution to the workplace and the labour market').

⁵⁴ Ibid at art 27(1) ('States Parties recognize the right of persons with disabilities to work, on an equal basis with others').

⁵⁵ Ibid at art 27(d).

⁵⁶ Ibid at art 27(e).

⁵⁷ Ibid at art 27(h).

⁵⁸ Ibid at art 27(i).

⁵⁹ Ibid at art 27(j).

⁶⁰ Ibid at art 27(k).

⁶¹ World Health Organization, 'Millennium Development Goals (MDGs)' (2000), https://www.who.int/topics/millennium_development_goals/about/en/ (accessed 5 March 2021).

despite the salience of the MDGs to the lived experience of persons with disabilities,⁶² and despite repeated urgings to include disability by notable economists and others.⁶³ Succeeding the MDGs, the Sustainable Development Goals (SDGs) are in operation from 2015 to 2030.⁶⁴ Due to effective disability rights advocacy the SDGs contain eleven references to persons with disabilities,⁶⁵ including SDG 8 which seeks to ‘Achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value’⁶⁶ and SDG 10 which undertakes to ‘Empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status’.⁶⁷ How much of the state action required by the SDGs will be achieved as far as persons with disabilities is concerned remains to be seen, but the United Nations seems hopeful and continues to monitor progress.⁶⁸

The evolving BHR treaty has been uneven in acknowledging disability. The initial 2019 document (also called the Zero Draft) referred to the CRPD and other international human rights treaties. The second, revised draft of 2020 acknowledges the CRPD only implicitly by noting the existence of and obligations under the unnamed nine core UN human rights treaties,⁶⁹ and twice recognizes persons with disabilities as being among the more vulnerable populations to human rights abuses caused by businesses.⁷⁰ In doing so, the putative BHR treaty advances the negative rights of persons with disabilities against human rights violations, which presumably include harmful impacts caused by displacement, pollution, the creation of inaccessible physical and virtual environments, and workplace discrimination. However, it remains unclear how thoughtfully, let alone progressively, the slim positive obligations language in the currently drafted Preamble – that ‘the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the state’⁷¹ – will be read and implemented by a BHR treaty body in conjunction with affirmative obligations from other instruments, including the CRPD and the SDGs,⁷² or how proactively (if at all) MNCs will respond to the BHR treaty’s mandates of their own initiative.

⁶² MA Stein, C McClain-Nhlapo and JE Lord, ‘Education and HIV/AIDs: Disability Rights and Inclusive Development’, in M Langford, A Sumner and A Ely Yamin (eds.), *Millennium Development Goals and Human Rights: Past, Present and Future* (Cambridge University Press, Cambridge, 2013) 274.

⁶³ J Wolfensohn, ‘Poor, Disabled and Shut Out, The Washington Post’ (3 December 2002), <https://www.washingtonpost.com/archive/opinions/2002/12/03/poor-disabled-and-shut-out/ad0289bb-9b22-44b6-94fc-9ca7212e9bb8/> (accessed 5 March 2021).

⁶⁴ UN Department of Economic and Social Affairs, ‘The 17 Goals, Sustainable Development Goals’ (2015), <https://sdgs.un.org/goals> (accessed 5 March 2021).

⁶⁵ P Harpur and MA Stein, ‘Children with Disabilities, Human Rights, and Sustainable Development’, in C Fenton-Glynn (ed.), *Children’s Rights and Sustainable Development: Implementing the CRC for Future Generations* (Cambridge University Press, Cambridge, 2019) 139.

⁶⁶ UN Department of Economic and Social Affairs, note 64, SDG 8.

⁶⁷ UN Department of Economic and Social Affairs, note 64, SDG 10.

⁶⁸ See Disability and Development Report, note 11.

⁶⁹ Human Rights Council, note 4, Preamble.

⁷⁰ Ibid at arts 6(3)(c) and 16(4).

⁷¹ Ibid at Preamble.

⁷² For an empirical and qualitative critique, see K Skarstad and MA Stein, ‘Mainstreaming Disability in the United Nations Treaty Bodies (2018) 17 *Journal of Human Rights* 1.

It is worth noting that the core idea of the BHR Treaty is that states are gatekeepers of MNC obligations, whether territorially or extraterritorially. States must therefore ensure that MNCs have HRDD processes in place and that they respect human rights, as is currently required by law in France and the Netherlands. Even more importantly, states must ensure that in the event of a breach involving identifiable victims, that domestic courts have jurisdiction, whether via tort or criminal law to adjudicate those claims. This would be consistent with the requirement for access to remedy under the UNGPs, including state-based, non-state-based, judicial, and non-judicial grievance mechanisms. Hence, it is important to incorporate CRPD-related obligations within HRIAs mandated by States parties and that national courts have jurisdiction over MNC-related disability cases.

III. EMPLOYING WORKERS WITH DISABILITIES

To employ persons with disabilities, MNCs must overcome two central and related misconceptions about disability and employment, namely: (1) the existence of a rational labour market; and (2) the relative productivity and costs, especially those related to reasonable accommodations, of workers with disabilities.⁷³ The costs and benefits to MNCs are impacted by what policies states adopt in response to their CRPD, SDGs, domestic, and other obligations.

A. Labour Markets

By and large MNCs adhere to a neoclassical (i.e., Western and capitalist) economic model of the labour market, which at its core presumes that the market is a neutral and efficient one; that employers, consciously and rationally in their own self-interest, maximize the net-marginal product of their employees within the labour market; and that inefficient employers – those hiring inefficient workers, or those not hiring efficient workers due to prejudicial practices – are punished by an efficient and self-patrolling market via profit losses.⁷⁴ These precepts have proven essentially correct when applied to mainstream workers (i.e., those who are biologically typical within the context of the market – nearly always male, able-bodied, and White in the Global North), as illustrated by several hundred years of Western economic functionality.⁷⁵ These same principles have also shown themselves to be vulnerable to market failures when applied to non-mainstream workers (i.e., those who are biologically atypical within the context of the market – very

⁷³ These two sections draw liberally from Stein, note 34. In doing so, we use American econometric sources and data, although the thrust of the arguments, and especially those used in this article, are universal. Beyond the two central misconceptions highlighted, myriad other reasons exist for low labour market participation by persons with disabilities and comprise its own discrete academic literature, including Heymann, note 12. We focus on how prejudice drives a labour market failure in order to underscore our contention that accountability via a human rights-based approach, and specifically via HRDD processes, is necessary to correct such failure and ensure equality for persons with disabilities.

⁷⁴ As explained by, among others, Nobel Prize-winning economist, and now journalist, GS Becker, *The Economics of Discrimination* (2nd edn, University of Chicago Press, 1971) 39–45.

⁷⁵ A Greenspan and A Wooldridge, *Capitalism in America: An Economic History of the United States* (Penguin Books, 2019).

frequently women, persons with disabilities, and those individuals having different racial or ethnic identities), as evidenced by economically irrational disparities globally in the hiring, remuneration, retention, and promotion of non-mainstream workers.⁷⁶ It is in response to these market failures, when coupled with public pressure, lawsuits, and/or enlightened self-interest, that MNCs deviate from the neoclassical labour market model and make in-roads in the diversity of their workforces.

Turning to the specific context of workers with disabilities, the first flawed assumption in the neoclassical economic labour market model is the unqualified acceptance of its efficiency. The paradigm posits that employers acting rationally will hire and maintain workers with the greatest net marginal product, while those who act irrationally will be disciplined by market forces and driven from competition. This premise, which is taken as a standard economic assumption and should, in the normal course of events be accurate, has questionable factual and normative elements as applied to the reality of workers with disabilities' experiences in the labour market. A primary objection to categorically applying the neoclassical model to the labour market is factual. To begin with, the standard economic model of analysis is premised on complete and symmetrical distribution of information to all actors within a given market. Yet not all markets function equally in this respect. Although an economic account of how information is disseminated might be true of financial markets, no parallel structure exists in the labour market.

Information asymmetry may also exist as to the possible tastes of employers and third parties toward workers with disabilities. Although empirical surveys of Fortune 500 executives,⁷⁷ senior executives,⁷⁸ and co-workers⁷⁹ uniformly report favourable attitudes toward employing individuals with disabilities, all available data fails to evince significant increases in the relative employment rate among that population. Two alternative conclusions can be drawn from this apparent paradox: either cognitive dissonance causes the individuals surveyed to believe they favour disability-related employment when in reality they do not, or those interviewed truly do espouse pro-disability inclusion sentiments, but because of an information asymmetry and a lack of effective internal implementation (notably the absence of a HRIA), this preference does not manifest itself when these individuals act on behalf of corporations (hence, the prevailing and continuing unemployment rates among the disability sector).⁸⁰ This scarcity of employment further denotes a market failure; under a neoclassical

⁷⁶ The data are copious. To illustrate the gender component, see World Economic Forum, *Global Gender Gap Report* (2018), <http://reports.weforum.org/global-gender-gap-report-2018/> (accessed 5 March 2021); an account of the commonalities between gender and disability exclusion in the workplace is given by R O'Brien, *Bodies in Revolt: Gender, Disability, and a Workplace Ethic of Care* (Routledge, 2005).

⁷⁷ T Kennedy Jr, 'Hiring People with Disabilities is Good Business', *The New York Times* (27 December 2018), <https://www.nytimes.com/2018/12/27/opinion/disability-rights-employment.html> (accessed 5 March 2021).

⁷⁸ N Geenen, 'Corporate Diversity Efforts Often Leave Out an Important Group: People With Disabilities', *Fortune* (23 August 2019), <https://fortune.com/2019/08/23/corporate-diversity-efforts-disability-inclusion/> (accessed 5 March 2021).

⁷⁹ A Pulrang, 'How To Make Workplaces More Welcoming For Employees With Disabilities', *Forbes* (4 November 2019), <https://www.forbes.com/sites/andrewpulrang/2019/11/04/how-to-make-workplaces-more-welcoming-for-employees-with-disabilities/#755a4ca953d8> (accessed 5 March 2021).

⁸⁰ We favour the second explanation, believing that MNCs can and should become drivers of economic empowerment.

economic model, companies with access to this information would act on whatever favourable economic incentives existed through generated externalities and consequently employ greater numbers of workers with disabilities.⁸¹

Next, contrary to the neoclassical labour market account, empirical studies conducted in the US, both before and after passage of the Americans with Disabilities Act (ADA),⁸² clearly demonstrate the persistence of employment discrimination as an obstacle to labour market opportunities for workers with disabilities.⁸³ In analysing the effects of employer practices, these studies, which assume information asymmetry in the labour market, distinguish the effects of economically rational behaviour from the effects of prejudicial behaviour. In other words, they distinguish between decisions arising from the use of indicators that substitute reliable generalizations about group characteristics from those which either wrongly assume or over-estimate the existence of those characteristics. Although assertions of prejudice have long been raised by members of the disability rights community, and were documented by the US Congress in the legislative findings section that it included in the ADA,⁸⁴ recognition of these asseverations, even when backed by empirical studies, has mainly eluded those commentators analysing disability accommodation mandates.

In the case of workers with disabilities, estimates of indicators that are meant to signal appraisals of productivity and accommodation cost are swayed by existing misconceptions about disabled workers that substitute for less easily obtainable, accurate information. This is because, excluding instances of purposeful prejudice, discrimination may also occur when a decision maker who lacks perfect information about the characteristics of the members of a given group bases her assessment on inaccurate 'indicators' that she believes can evaluate those individuals' present or future performance.⁸⁵ Additionally, even if economically efficient indicators were substituted for empirically incorrect ones, a market failure would continue because employers' discriminatory behaviour would be rewarded as efficient. Conversely, a system requiring economically empowered employers, rather than economically disempowered employees, to bear cost differentials incurred by disregarding rational economic discrimination may arguably be more efficient from a social welfare standpoint. Thus, although the baseline assumption that employers act in an efficient manner seeking to maximize their own profits usually appears correct, from at least one point of view, it is empirically invalid.

⁸¹ See below section III.C of this article.

⁸² Equal Opportunities for Individuals with Disabilities (2000), 42 U.S.C §§12101–12213.

⁸³ See, e.g., ML Baldwin, 'Estimating Wage Discrimination against Workers with Disabilities' (1994) 3 *Cornell Journal of Law and Public Policy* 276–90; ML Baldwin and WG Johnson, 'Labor Market Discrimination Against Men with Disabilities in the Year of the ADA' (2000) 66 *Southern Economic Journal* 548, 556–62; ML Baldwin and WG Johnson, 'Labor Market Discrimination Against Women with Disabilities' (1995) 34 *Industrial Relations* 555, 569–76; L Whitehurst, 'Disabled Americans Mark Milestone As Crisis Deepens Job Woes', *The Washington Post* (25 July 2020), https://www.washingtonpost.com/health/disabled-americans-mark-milestone-as-crisis-deepens-job-woes/2020/07/25/6537ac72-ce8e-11ea-99b0-8426e26d203b_story.html (accessed 5 March 2021).

⁸⁴ These are explicated in RL Burgdorf, Jr, 'The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute' (1991) 26 *Harvard Civil Rights-Civil Liberties Law Review* 413, 422–27.

⁸⁵ A Silvers and MA Stein, 'An Equality Paradigm for Preventing Genetic Discrimination' (2002) 55 *Vanderbilt Law Review* 1341, 1382.

Moreover, the neoclassical economic model asserts that once discriminatory practices are observed, employers who exercise distaste are disciplined by market forces that reduce their profit margins while increasing those of their non-discriminatory competitors.⁸⁶ As with the first premise, this theory has not been empirically demonstrated. Indeed, a logical application of the neoclassical economic paradigm would recount that prior to 1964, when American federal anti-discrimination laws injected inefficiency into the dynamics governing private employment relationships,⁸⁷ resulted in discriminatory firms either being penalized or driven from competition. We are unaware of any empirical evidence that supports this position. On the contrary, US markets have historically evinced (and continue to evidence) various forms of discrimination against non-mainstream workers, with and without disabilities.⁸⁸

Finally, the assertion of market failure within the neoclassically governed employment market is not unique. Claims that imperfect information undermines the efficiency of hiring decisions have arisen from econometric, economic, and civil rights sources. Additionally, the issue of whether and when to characterize decisions made in the context of imperfect information based on indicators believed to accurately evaluate future performance as statistically efficient or empirically unpredictable is at the heart of a longstanding debate. There are also examples of employers failing to capitalize on other economically beneficial actions which run contrary to what the neoclassical economic labour market model would suggest.⁸⁹ Consequently, although general acceptance of the neoclassical economic model is a valid departure point from which to begin an evaluation of the general labour market, unfettered belief in the self-corrective force of competitive market pressures within the labour field is, despite its popular currency, unproven.

B. Cost and Productivity

A second systemic shortfall in the neoclassical economic account is the tripartite assumption that (1) employees with disabilities require accommodations; (2) these accommodations are inherently costly; and (3) by nature, workers with disabilities are less productive than their non-disabled counterparts. Empirical studies have not established the prevalence of the need for accommodation among workers with disabilities. It is reasonable to assume that some percentage of employees with disabilities will require accommodations. The size of this group, however, depends

⁸⁶ See Becker, note 74.

⁸⁷ That year heralded the passage of the Civil Rights Act 1964 (US), which prohibited employment and other forms of discrimination on the basis of race, colour, religion, sex and national origin.

⁸⁸ CR Sunstein, 'Why Markets Don't Stop Discrimination', in EF Paul (ed.), *Reassessing Civil Rights* (Blackwell, 1991) 22.

⁸⁹ GS Lunney, Jr, 'Fair Use and Market Failure: Sony Revisited' (2002) 82 *Boston University Law Review* 975, 985; SA Glied, 'Health Insurance and Market Failure Since Arrow' (2001) 26 *Journal of Health Politics, Policy and Law* 957; M Klausner, 'Market Failure and Community Investment: A Market-Oriented Alternative to the Community Reinvestment Act' (1995) 143 *University of Pennsylvania Law Review* 1561, 1574; BS Black and RJ Pierce, Jr, 'The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry' (1993) 93 *Columbia Law Review* 1339, 1354; JC Coffee Jr, 'Market Failure and the Economic Case for a Mandatory Disclosure System' (1984) 70 *Vanderbilt Law Review* 717, 728.

upon the individual circumstances of present or prospective employees, the degree to which an employer's worksite and processes already are accessible, and how the term 'disabled' is conceived or measured. There is, however, no reason to suspect that every employee with a disability requires an accommodation, as counterexamples to any such broad generalization are abundant. Moreover, it conveniently and counterfactually overlooks the fact that all workers receive some form of accommodation as part of being human and having human needs (e.g., looking after family members, needing to see a dentist), and that all accommodations extract some kind of cost, whether overt or implicit.⁹⁰

Nor is it accurate to assume that workers with disabilities are by nature less productive than their counterparts who are free of disabilities (and therefore, necessarily fall into the categories of unemployable or employable as part of a charitable scheme). This may be true for some individuals with disabilities, just as certain non-disabled workers are less productive than the majority of disabled ones. Ultimately, individual productivity is a product of ability, aptitude, and attitude. A disabled employee who satisfies the requirements of her position without accommodation is clearly as productive as her non-disabled peers. When accommodations are needed to accomplish integral activities, the existence and degree of relatively lower net productivity is affected by the ability of that disabled worker to accomplish non-essential job functions, as well as the value of those supplementary services to her employer.

Two points, however, bear noting. First, as an empirical matter, forty years of empirical studies preceding the ADA indicate comparable overall productivity levels between disabled and nondisabled workers.⁹¹ For now it suffices to point out that, from an economic viewpoint, there is no discernable difference between the equivalent lower net products generated by (1) a worker with a disability who does not require an accommodation but who is less productive than a non-disabled peer; (2) the equally productive worker with a disability provided with a reasonable accommodation; or (3) the comparatively hyper-productive worker with a disability provided with a proportionately hyper-reasonable accommodation expense. Therefore, although some disabled workers will ultimately be less productive than their non-disabled peers, others may be more productive. Some will indeed require accommodations, and others will not. The assumption that any of these particular circumstances is always the case is empirically unfounded. Instead, a proper treatment assessing disability productivity should account for both positive and negative value fluctuations.

Reasonable accommodations can encompass a wide range of individualized adjustments to existing workplace conditions, but are mainly conceptualized as falling into one or both of two categories. The first category requires the alteration or provision of a physical plant, such as ramping a stair to accommodate the needs of an employee who uses a wheelchair. These types of accommodations involve 'hard' costs, meaning that they invoke readily quantifiable out-of-pocket expenses. Purchasing and installing a

⁹⁰ MA Stein, 'Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination', (2004) 153 *University of Pennsylvania Law Review* 579.

⁹¹ A good review of the literature is provided by R Greenwood and A Johnson, 'Employer Perspectives on Workers with Disabilities' (July–September 1987) *Journal of Rehabilitation* 37.

ramp, for example, is usually a one-time expenditure with a fixed and knowable cost. The second type of accommodation involves the alteration of the way in which a job is performed. This might mean not requiring a wheelchair-using store clerk to stack high shelves. These sorts of accommodations bring into play 'soft' costs, which are more difficult to quantify. This hypothetical employee might require a fellow worker to stack the high shelves while she staffed the register. Her circumstance might also necessitate that a human resource manager meet with other employees to explain the change in their daily duties, or that a supervisor be required to learn how to take these alterations into consideration when evaluating overall job performance.

Empirical studies of accommodation costs suggest that many of the engendered expenses are either nominal, or even cost-effective, because of the concomitant external benefits that are captured by providing employment to persons with disability. Among the seminal empirical studies of accommodation costs within corporations, Peter Blanck's concluded that many of these expenses were recurrently non-existent or minimal.⁹² Specifically, Blanck's examination of some 500 accommodations made by Sears, Roebuck and Co. from 1978 to 1997 established that the company provided nearly all of the accommodations at minimal cost. From 1978 to 1992, the average out-of-pocket expense for an accommodation was about \$120. From 1993 to 1996 that average dropped to \$45. Overall, 72 per cent of accommodations required no cost, 17 per cent carried an expenditure of less than \$100, one-tenth cost less than \$500, and only 1 per cent required inputs between \$500 and \$1000.⁹³ Other studies corroborate these results.⁹⁴

Some studies go even further than the results reported by Blanck, suggesting that employers capture tangible benefits when they provide accommodations. Essentially, these studies argue that the provision of accommodations are often profitable for employers. One US federal agency, for example, found that, on average, for every dollar spent on accommodation, companies saved \$50 in net benefits. Thus, although more than one-half of accommodations cost less than \$500, in two-thirds of those cases companies enjoyed net benefits exceeding \$5000. This is based on quantitative evidence finding that disabled workers receiving accommodations had lower job turnover rates and equivalent or lower absenteeism rates, thus saving their employers replacement expenses.⁹⁵ In addition to more readily calculable benefits, Blanck has also described 'ripple effects' emanating from the provision of accommodations, including economic benefits that may be difficult to quantify initially, but which are eventually internalized by employers. Among these desirable consequences are purported higher productivity, greater dedication, and better identification of qualified candidates for promotion. Employers may also enjoy fewer insurance claims, reduced post-injury rehabilitation costs, an improved corporate culture, and more widespread use by workers without

⁹² PD Blanck, *Communicating the Americans with Disabilities Act, Transcending Compliance: A Case Report on Sears, Roebuck and Co.* (Annenberg Washington Program, 1994).

⁹³ Ibid.

⁹⁴ For example, the Job Accommodation Network (a federally funded entity) reported to the US Congress that the typical accommodation cost was US\$ 200. President's Committee on the Employment of People with Disabilities, 'Report to Congress on the Job Accommodation Network' (26 July 1995).

⁹⁵ Ibid.

disabilities of efficiency-enhancing technologies previously utilized exclusively by their peers with disabilities.⁹⁶

C. State Impacts on Costs and Benefits

Inherent in any MNC economic cost–benefit calculation of employing workers with disabilities are state-generated factors arising from programming to comply with the CRPD, the SDGs, and domestic laws. Easier-to-quantify benefits arise from schemes that include: vocational training, habilitation and rehabilitation; employment services; quota regimes; partially reserved occupations; preferential and procured contracts; and public–private collaborations. Equality measures include funding for trial employment; financial and technical assistance in supported employment; vocational guidance; technical advice; and, pointedly, financial incentives such as loan schemes, grants, subsidies, transportation assistance, and tax concessions.⁹⁷ Harder-to-quantify benefits are those related to increasing a given MNC’s reputation within the corporate sector, among potential employees, with customers, and others, as a human rights enabling entity and one committed to diversity and inclusion.⁹⁸

IV. BEYOND EMPLOYMENT

Although direct employment of persons with disabilities is the main avenue through which MNCs can directly contribute to fulfilling the human rights of the global disability population, MNCs have immensely valuable additional opportunities related to accessibility, customers and communities, data and compliance, and cultures of inclusion.

A. Accessibility

MNCs can advance the human rights of person with disabilities by ensuring that the physical and virtual environments are readily accessible. Making MNC offices, as well as those of local branches, physically accessible not only makes those venues available to customers, business partners, vendors, supply chain personnel, and independent contractors with disabilities, it also lays the groundwork for more easily hiring and retaining employees with disabilities.⁹⁹ The same can be said, within the ever-increasingly virtual world, for making websites accessible to customers and business partners with disabilities.¹⁰⁰ The current inaccessible nature of MNC websites is inexplicable from a business model perspective – notably, why would any MNC not

⁹⁶ Blanck, note 93.

⁹⁷ Stein and Stein, note 33.

⁹⁸ These companies, for example, foster a reputation value for inclusion: Disability:IN, ‘The DEI Evolves – What’s New in 2019’ (25 September 2018), <https://disabilityin.org/disability-equality-index/the-dei-evolves-whats-new-in-2019/> (accessed 5 March 2021); DiversityInc, ‘The 2020 DiversityInc Top 50 Companies for Diversity’ (2020), <https://www.diversityinc.com/the-2020-top-50-diversityinc/> (accessed 5 March 2021).

⁹⁹ Stein, note 34, at 89 (noting the overlap customer and employee accessibility).

¹⁰⁰ BA Areheart and MA Stein, ‘Integrating the Internet’ (2015) 83 *George Washington Law Review* 449.

want more customers, blind or otherwise? – and rendering a web-based presence accessible also paves the way for future disability-related employment opportunities.¹⁰¹ More expansively, MNCs can ensure that vendors, distributors and supply chains produce accessible products and services, and themselves employ workers with disabilities.¹⁰² Precipitating these changes requires MNCs committing to Universal Design principles that ensure the greatest participation and use by the greatest number of people.¹⁰³

B. Customers and Communities

To date, MNCs have done little to acknowledge the existence and value of customers with disabilities, their households, and friends and supporters. Exceptions include rare instances of a person with a visibly discernable disability appearing in an MNC's advertisement,¹⁰⁴ or a dedicated line from an established brand, such as Tommy Hilfiger's adapted clothing offerings.¹⁰⁵ Concurrently, global (as well as national-level) disability rights communities have done exceedingly little to harness their economic leverage with MNCs to press for change relative to other identity-based communities.¹⁰⁶ Considering that persons with disabilities worldwide number over one billion, impacting about a quarter of all households,¹⁰⁷ the scope and magnitude of their inclusion would be significant and comprise a winning proposition for all involved.¹⁰⁸

¹⁰¹ J Lazar, A Olalere and B Wentz, 'Investigating the Accessibility and Usability of Job Application Web Sites for Blind Users' (2012) 7 *Journal of Usability Studies* 2.

¹⁰² J Lazar, DF Goldstein and A Taylor, *Ensuring Digital Accessibility through Policy and Process* (Morgan Kaufmann, 2015).

¹⁰³ GA Giannoumis and MA Stein, 'Conceptualizing Universal Design for the Information Society through a Universal Human Rights Lens' (2019) 8 *International Human Rights Law Review* 1.

¹⁰⁴ See, for example, T Byrum, 'See the Heart-Warming Nike Commercial Starring Elena Delle Donne and Her Sister Lizzie', *NBC Sports* (27 November 2019), <https://www.nbcsports.com/washington/wizards/see-heart-warming-nike-commercial-starring-elena-delle-donne-and-her-sister-lizzie> (accessed 5 March 2021); T Warren, 'Microsoft's Super Bowl Ad is All About the Xbox Adaptive Controller', *The Verge* (31 January 2019), <https://www.theverge.com/2019/1/31/18205193/microsoft-super-bowl-2019-commercial> (accessed 5 March 2021); D Griner, 'McDonald's Sweden Simulated Dyslexia on its Ads and Menus to Raise Attention for the Disorder', *Adweek* (4 October 2018), <https://www.adweek.com/creativity/mcdonalds-sweden-simulated-dyslexia-on-its-ads-and-menus-to-raise-attention-for-the-disorder/> (accessed 5 March 2021).

¹⁰⁵ N Gallucci, 'Tommy Hilfiger Unveils Innovative Clothing Line for People With Disabilities', *Mashable* (6 April 2018), <https://mashable.com/2018/04/06/tommy-hilfiger-tommy-adaptive-disability-friendly-clothing/> (accessed 5 March 2021).

¹⁰⁶ See, for example, M Exon and M Arrow, 'Eight Ads That Shatter Tired Gender Stereotypes', *The Guardian* (26 May 2015), <https://www.theguardian.com/media-network/2015/may/26/eight-ads-shatter-gender-stereotypes> (accessed 5 March 2021); C Murphy, 'Boycott for Black Lives: People Plan to Stop Spending in Companies That Don't Support BLM', *USA Today* (18 June 2020), <https://www.usatoday.com/story/money/2020/06/18/boycott-people-plan-stop-spending-stores-dont-support-blm/3208170001/> (accessed 5 March 2021).

¹⁰⁷ See World Report on Disability, note 14.

¹⁰⁸ Research has demonstrated the economic power of persons with disabilities, for example: M Yin, D Shaewitz, C Overton and D-M Smith, 'A Hidden Market: The Purchasing Power of Working-Age Adults With Disabilities', American Institutes for Research (April 2018), <https://www.air.org/system/files/downloads/report/Hidden-Market-Spending-Power-of-People-with-Disabilities-April-2018.pdf> (accessed 5 March 2021) (which sees persons with disabilities as the third-largest market in the US, and 'more than doubles when considering family members, caregivers, and others who prioritize goods and services that are inclusive of people with disabilities').

C. Data and Accountability

MNCs are uniquely positioned to develop data on disability-related employment, as well as the results of HRDD processes, both of which could be valuable in informing and advancing disability inclusion. National-level data varies as to the extent it captures or disaggregates disability data generally,¹⁰⁹ as well as accurately,¹¹⁰ and culling employment-specific data has proven difficult.¹¹¹ Data accumulation at the MNC level can be limited by non-discrimination and privacy laws as well as by perceptions (and misperceptions) about collecting such data.¹¹² Conversely, many states require or encourage MNCs to request self-disclosure from existing employees as a means of monitoring the status and progress of employing particular population groups;¹¹³ it ought to be noted that the issue of self-disclosure of disability is a complex and often highly personal one, influenced by social factors, including stigma.¹¹⁴ Despite these considerations, MNCs are uniquely situated to develop data about workers with disabilities, much as they have developed data in other, even more stigmatized areas, prominently child labour.¹¹⁵ That such data instruments are either not well known or disseminated in the context of disability speaks loudly to their need.¹¹⁶ Wholly absent and also crucially necessary are accountability instruments, and in particular HRDD processes, that can holistically assess the progress and shortcomings of MNCs in regard to persons with disabilities.¹¹⁷

D. Culture and Inclusion

MNCs can work to create a general culture of diversity and acceptance of difference that includes disability. Such actions would go far beyond current CSR schemes and social

¹⁰⁹ D Mont, 'Disability Employment Policy', in Social Protection Discussion Papers Series, World Bank Social Protection Unit (July 2004), <http://documents1.worldbank.org/curated/en/354671468762324616/pdf/301620PAPER0SP00413.pdf> (accessed 5 March 2021) at 3.6 and Table 3.1.

¹¹⁰ D Mont, 'Disability and Data – What Can We Count On?', World Bank Group Open Learning Campus (n.d.), <https://olc.worldbank.org/content/disability-and-data---what-can-we-count-on> (accessed 5 March 2021).

¹¹¹ Disability Employment Policy, note 110.

¹¹² BA Areheart and J Roberts, 'GINA, Big Data, and the Future of Employee Privacy' (2019) 128 *Yale Law Journal* 3; JE Harris, 'The Privacy Problem in Disability Antidiscrimination Law', in I Glenn Cohen, C Shachar, A Silvers and MA Stein, *Disability, Health, Law and Bioethics* (Cambridge University Press, Cambridge, 2020).

¹¹³ L Schumer, 'How to Disclose a Disability to Your Employer (and Whether You Should)', *The New York Times* (10 July 2019), <https://www.nytimes.com/2019/07/10/smarter-living/disclose-disability-work-employer-rights.html> (accessed 5 March 2021).

¹¹⁴ S Stefan, *Hollow Promises: Employment Discrimination against People with Mental Disabilities* (American Psychological Association, 2001); K Yoshino, *Covering: The Hidden Assault on our Civil Rights* (Random House Trade Paperbacks, 2007).

¹¹⁵ R Mookerjee and A Orlandi, 'Multinational Corporations and Child Labor' (2004) 33 *Global Economic Review* 4 (2004).

¹¹⁶ See, for example: National Organization on Disability, 2020 Disability Employment Tracker, NOD (2020), <https://www.nod.org/services/tracker-2/> (accessed 5 March 2021).

¹¹⁷ By contrast, the Canadian Human Rights Commission (CHRC) tracks disability employment and progress under the Employment Equity Act (Employer Obligations, CHRC – Equal Employment Opportunities (2020), <https://www.chrc-ccdp.gc.ca/eng/content/equal-employment-opportunities-0>) (accessed 5 March 2021). Similarly, under the quota system, Brazil too monitors disability employment (Leandro Martins Zanitelli, A lei de cotas para pessoas portadoras de deficiência nas empresas brasileiras: impacto e possíveis alternativas [The Law of Quotas for People with Disabilities in Brazilian Companies: The Impact and Possible Alternatives], (2013) 18 *Cien Saude Colet* 7). Neither is a private corporate initiative.

media activities, which have not demonstrated significant or lasting impact. Acting in this manner would reverse the historic eliding by MNCs of persons with disabilities from employment programmes, CSR activities, and diversity schemes, and position the business sector to become human rights change agents, shifting cultural expectations within MNCs and across society.

Having said that, some good (if imperfect) practices exist that work towards disability inclusion in the workplace. In 2010, the ILO founded the Global Business and Disability Network (GBD), now consisting of fourteen MNCs, twenty employers' organizations and national businesses and disability networks, and disabled peoples' organizations. Professing itself as an 'employer-led initiative that works to promote the inclusion of people with disabilities in workplaces around the world', the GBD is aimed at sharing knowledge and demonstrating the benefits to business of employing people with disabilities.¹¹⁸ The GBD works within the framework of its charter which contains ten principles 'to help enterprises achieve business success while simultaneously creating equal opportunities for people with disabilities'.¹¹⁹ Companies can become signatories to the Charter and achieve 'global recognition' for doing so. Accompanying the charter is a 'Charter Self-Assessment Tool' which contains ten multiple choice questions framed around the principles of the Charter to measure and improve a company's disability inclusion policies and practices.¹²⁰ Nevertheless, although the GBD is focused on 'rights', the words 'human rights' are nowhere to be found on the website. This lack of recognition of disability rights as part and parcel of human rights is concerning, as is the tiny number of companies involved.

Social media can also raise general disability awareness among MNCs, although no evidence supports its lasting or sustainable impact. Notably, and for the first time in its history, the World Economic Forum Conference in Davos held a panel discussion called 'The Business Case for Disability Inclusion' in December 2019. It stressed the need for collaboration, rather than competition, between industry leaders such as Procter & Gamble and Unilever.¹²¹ The guiding question was 'How can we set a new global standard for workplace equality that recognizes the value and worth of people living with a disability?'.¹²² The panel consisted of Duncan Tait (President and CEO, Fujitsu Ltd), Julie Sweet (CFO, North America, Accenture), Caroline Casey (Founder, Binc), Peter T. Grauer (Chairman, Bloomberg LP), Paul Polman (CEO 2009—2018, Unilever), and Carolyn Tastad (Group President, North America, Procter & Gamble). A helpful resource for the Davos meeting was created by Disability:IN.¹²³ Less positively, the language of human rights was nowhere to be seen, and the event was reported as a broad

¹¹⁸ ILO Global Business and Disability Network, <http://www.businessanddisability.org/> (accessed 5 March 2021).

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*; <http://www.businessanddisability.org/wp-content/uploads/2018/11/GBDNSelfAssesmentTool.pdf> (accessed 5 March 2021).

¹²¹ World Economic Forum Annual Meeting (24 January 2019), <https://www.weforum.org/events/world-economic-forum-annual-meeting/sessions/the-accessibility-revolution> (accessed 5 March 2021).

¹²² *Ibid.*

¹²³ Disability:IN, 'CEO Start Guide to Disability Inclusion: 2019 Davos Resource' (24 January 2019), <https://disabilityin.org/ceo-start-guide-to-disability-inclusion-2019-davos-resource/> (accessed 5 March 2021).

CSR initiative.¹²⁴ The Davos panel was part of a larger campaign called Valuable 500 (hashtag #valuable) seeking the commitment of 500 businesses to put diversity inclusion on their boards' agendas for 2019.¹²⁵ To date, some 300 CEOs have signed on;¹²⁶ the practical impact of this scheme is unknown.

V. THE IMPERATIVE OF DISABILITY-INCLUSIVE HRDD PROCESSES

Corporate due diligence, chiefly in respect of human rights and environmental risks, is an increasingly common feature of the operating cycle of large corporations. Consequently, developed states are increasingly requiring HRIAs, and beginning to compel HRDD processes, from their MNCs,¹²⁷ particularly in respect of operations abroad and they are also common in the work of international financial institutions,¹²⁸ UN bodies¹²⁹ and the EU,¹³⁰ among others. Besides the aforementioned public institutions, the majority of HRIAs are the result of industry-wide self-regulation. HRIAs required by law or the inter-governmental organizations discussed above do not demand a particular format; at best, they set out some baseline requirements (e.g., that in respect of indigenous persons their

¹²⁴ See, e.g., D Brodley, 'How Business Leaders are Introducing Disability Rights as a CSR Issue' (29 January 2019), <https://www.forbes.com/sites/denisebrodley/2019/01/21/how-business-leaders-are-introducing-disability-rights-as-a-corporate-social-responsibility-csr-issue/#524c2d42441b> (accessed 5 March 2021).

¹²⁵ HR Dive, '#Valuable Launches Disability Inclusion Campaign at WFF' (29 January 2019), <https://www.hrdiver.com/news/valuable-launches-disability-inclusion-campaign-at-wff/546919/> (accessed 5 March 2021).

¹²⁶ *Ibid.*

¹²⁷ See particularly Modern Slavery Act 2015 (UK). See 'Guidance for Reporting Entities', <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf> (accessed 5 March 2021); Modern Slavery Act 2018 (Australia); Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id>. For a useful English summary see European Coalition for Corporate Justice (ECCJ) (accessed 5 March 2021). See Business and Human Rights Resource Centre (BHRRC), 'France's Law on the Corporate Duty of Vigilance: A Practical and Multidimensional Analysis in English', <https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-a-practical-and-multidimensional-analysis-in-english> (accessed 5 March 2021).

¹²⁸ UN Committee on Economic, Social and Cultural Rights, 'Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights', UN Doc E/C.12/2016/1 (22 July 2016) paras 4 and 11. See for example recent reports, Human Rights Council, 'Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to Greece', UN Doc A/HRC/31/60/Add.2 (12 January 2016), paras 81(a), 83(b). The World Bank Group has set up quasi-judicial mechanisms, such as the Bank's Inspection Panel and the Multilateral Investment Guarantee Agency (MIGA) Ombudsman, which are competent to hear complaints concerning violations of the Bank's internal rules, not violations of human rights law, albeit as these arise from violations of assessments incumbent on corporate borrowers. An overview of the mandate and cases of the Inspection Panel is at <http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx> (accessed 5 March 2021).

¹²⁹ See Guiding Principles on Human Rights Impact Assessment for Trade and Investment Agreements, UN Doc A/HRC/19/59/Add.5 (19 December 2011); Guiding Principles on Extreme Poverty and Human Rights, UN Doc A/HRC/21/39 (18 July 2012); Human Rights Council, 'CESCR General Comment No. 24' (10 August 2017) paras 17, 21–22; Committee on the Rights of the Child, 'General Comment 19' UN Doc CRC/CG/19 (10 July 2016) para 47.

¹³⁰ 'European Commission Working Paper Operational Guidance on taking account of fundamental rights in Commission impact assessments', SEC(2011) 567 Final (6 May 2011). The CJEU has, in fact, emphasized the importance of such HRIAs in the adoption of primary and secondary EU legislation. See *Schecke and Eifert v Land Hessen*, Cases C-92/09 and C-93/09, ECLI:EU:C:2010:662. HRIAs are also required through two EU instruments, namely: the Directive on Public Procurement and the Directive on Non-Financial Information Disclosure. Under the latter, companies with over 500 employees are required to disclose information on policies, risks and results as regards their respect for human rights.

free, prior and informed consent be taken into consideration) and take it for granted that the results are not fabricated.

Where a HRIA is not demanded by a public entity under law or contract, it is voluntary and the same is true of the contents and format of such assessments. The majority of audits are performed largely by for-profit commercial entities that have established themselves as key actors in human rights and environmental audits, including Global Reporting Initiative (GRI)¹³¹ and KPMG Banarra,¹³² among others. These audit firms have set up their own standardized formats and procedures for undertaking HRIAs, although they do not necessarily see this process as a box-ticking exercise and hence each audit may contain different types of information.¹³³ Although it is now clear that HRIAs lack ethical standards,¹³⁴ both in terms of who and how they are compiled, they do nonetheless serve to mitigate risk for MNCs. The risk is multi-dimensional and includes brand image, damages to employees and other stakeholders, potential violation of pertinent agreements (e.g., concession, finance, sub-contractors) and violation of both host and home state laws. Internationally recognized frameworks for sustainability reporting include: the Sustainability Accounting Standards Board reporting framework, the GRI Sustainability Reporting Standards, the OECD Guidelines, the UNGC's Communication on Progress,¹³⁵ the International Organization for Standardization 26000¹³⁶ and the UNGPs Reporting Framework.¹³⁷ As companies vary in their size, operations and managerial control, among others, so do their human rights risks and the range of persons and entities affected.

Several important ethical considerations arise from the compilation and assessment of corporate human rights risks by external auditors. Chief among these is respect for participants, informed consent, specific permission required for audio or video recording, voluntary participation, participants' right to withdraw, full disclosure of funding sources, no harm to participants, avoidance of undue intrusion, deception techniques, issues with anonymity, participants' right to check and modify a transcript, confidentiality in respect of personal matters, data protection, enabling participation, ethical governance, provision of grievance procedures, appropriateness of research methodology, full reporting of methods, conflicts of interest, moral hazard and duty of care. Another ethical consideration that is largely ignored, is that auditors either do not

¹³¹ See GRI, 'GRI's Contribution to Sustainable Development 2016–2020' (2016), [www.globalreporting.org/resource/library/GRI%27s%20Contribution%20to%20Sustainable%20Development%202016-2020%20\(2\).pdf](http://www.globalreporting.org/resource/library/GRI%27s%20Contribution%20to%20Sustainable%20Development%202016-2020%20(2).pdf) (accessed 5 March 2021).

¹³² KPMG, 'Human Rights & Social Impact – Banarra' (n.d.), <https://home.kpmg/au/en/home/services/advisory/risk-consulting/climate-change-sustainability-services/human-rights-social-impact.html> (accessed 5 March 2021).

¹³³ Human rights audits are undertaken also by auditors in an individual capacity. Although the discussion on ethics is pertinent to them, in all other respects this paper deals exclusively with auditing firms.

¹³⁴ See I Bantekas, E Ezenagu, 'Ethical Considerations in Financial (Tax) and Non-Financial Corporate Human Rights Reporting', (2021) 28 *University of Miami International and Comparative Law Review* (forthcoming).

¹³⁵ UNGC, 'Communication on Progress' (n.d.), <https://www.unglobalcompact.org/participation/report> (accessed 5 March 2021).

¹³⁶ International Organization for Standardization, 'ISO 26000' (n.d.), <https://www.iso.org/iso-26000-social-responsibility.html> (accessed 5 March 2021).

¹³⁷ Shift, 'UN Guiding Principles Reporting Framework' (2018), <https://www.ungpreporting.org> (accessed 5 March 2021).

have, do not request, or do not understand the relevance of data and information that is not directly relevant to human rights risks. A typical example is corporate forum shopping by MNCs for countries with lax tax rules and detection systems,¹³⁸ or countries whose conflict of laws rules make it impossible for grievance tort claims to be litigated abroad.¹³⁹ None of these is a *prima facie* human rights concern, and it would be hard even for most lawyers to identify their linkages with human rights.¹⁴⁰ Yet, such forum shopping may be designed or destined to deny future victims of corporate human rights abuses of their right of effective access to justice, as well as fundamental socioeconomic rights as a result of poor tax collection.¹⁴¹

As far as the present authors are aware, there do not exist HRIAs, let alone HRDD processes, that account for disability-related impact by MNCs, or other corporations, in the sense described here.¹⁴² This is an important omission, which reinforces the view that some vulnerable persons are more invisible than others. By way of illustration, gender (whether intersectional or otherwise) as well as childhood, feature heavily in HRIAs, but corresponding impact on the disabled does not. Such an omission is striking in the revised 2020 draft of the BHR treaty. It is thus clearly evident that there is a lack of understanding of the linkages between disability and corporate impact in the design of HRIAs. The most obvious reason for this is the absence of disability experts or disability-related civil society organizations in the process of developing these evaluations. An additional reason has to do with the perception that the potential outcomes of a disability-based component in a HRIA or HRDD would entail a significant infusion of material and financial resources by the MNC/investor, as well as the host state, that would exponentially increase costs; the same is even more the case for HRDD processes which envision ongoing auditing and accountability. The previous sections in this article have demonstrated that such an assumption is simply misguided.

A human rights enabling and ethically responsible HRDD process to assess the impact of MNC activities on persons with disabilities would include, at a minimum, the following features.

- A quantitative assessment of the number of employees with disabilities across all the offices and operations of the MNC;

¹³⁸ Such a choice may be predicated, among others, on cost considerations (e.g., low or no pension contributions; light environmental compliance; light health and safety requirements), tax avoidance, or avoidance of public scrutiny by civil society organizations, especially in autocratic states. See UNCTAD, 'Increasingly Complex Ownership Structures of Multinational Enterprises Poses new Challenges of Investment Policy-Makers' (2015), <https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=303> (accessed 5 March 2021).

¹³⁹ Human Rights Council, note 4, arts 4(5) and 6(4).

¹⁴⁰ Human rights linkages to trade, investment, sovereign debt, privacy and other areas of commercial regulation or self-regulation have only been studied thoroughly in the last two decades and are generally the domain of specialists. See, e.g., C Lumina, 'Sovereign Debt and Human Rights: Making the Connection', in I Bantekas and C Lumina (eds.), *Sovereign Debt and Human Rights* (Oxford University Press, Oxford, 2018) 169; equally, I Bantekas, 'The Linkages between Business and Human Rights and their Underlying Causes' (2021) 43 *Human Rights Quarterly* 118.

¹⁴¹ In 2019, GRI adopted, following public consultation, the GRI 207/Tax 2019 Standard, with a view to promoting tax transparency in financial audits. Like all other standards mentioned in this article, this too is of a voluntary nature.

¹⁴² Increasingly, however, non-MNCs such as the International Finance Corporation and the World Bank are forwarding and advancing HRIAs that relate to persons with disabilities in development schemes. These can serve as precedents for the creation of disability-sensitive HRDDs.

- A qualitative assessment of the hiring, retention, and promotion of employees with disabilities across all the offices and operations of the MNC;
- An evaluation of the MNC's policies and governance structures relative to the hiring, retention, and promotion of employees with disabilities across all the offices and operations of the MNC;
- A qualitative investigation into the perspectives of human resources managers and area supervisors tasked with ensuring the diversity of the MNC's workforce;
- An evaluation of the physical and virtual accessibility of the MNC as it relates to employees with disabilities;
- An evaluation of the physical and virtual accessibility of the MNC as it relates to customers with disabilities;
- An evaluation of what and how well the MNC is doing to present itself outward as regards disability inclusion;
- An evaluation of what and how well the MNC is doing to create a general culture of diversity, equity, and inclusion of differences that includes disability;
- An evaluation of what grievance mechanisms have been put into place to pursue remedies, and how accessible these are to persons with disabilities;
- An evaluation of each of the above criteria as it relates to vendors, distributors and supply chains of the MNC; and
- An evaluation of the additional *indirect* and non-workplace impacts of MNC operations on adjacent communities and/or those displaced by corporate ventures. Although this article has largely focused on the disability-related impact of MNCs on direct stakeholders, there is a clear need for HRDD as regards indirect stakeholders, chiefly disabled persons in the host state that are neither potential employees, vendors, distributors or consumers.

VI. CONCLUSION

While human rights linkages are nowadays commonplace to even the most remote business, professional or other technocratic operations, disability remains largely invisible. It is no wonder that the CRPD was among the latest global human rights treaties, and is trailing far behind its predecessors in terms of implementation and enforcement. Moreover, many states are still apprehensive about abandoning their deeply entrenched medical model-based conceptions of disability, while others are wary of costs associated with disability rights. Within such a context of misunderstanding, corporations, whether domestic or MNCs, have shown extreme reluctance to engage, even in their voluntary undertakings, with their impact on persons with disabilities. Such an outcome is remarkable for several reasons. First and foremost, given that disabled persons constitute a sizeable chunk of the global population,

it is surprising that MNCs have under-estimated their consumer spending power, as well as their attraction to corporations that take disability rights seriously. Secondly, as the article has demonstrated, disability-related costs, such as accessibility are essentially minimal and in any event pay off in the long run. Thirdly, the employment of persons with disabilities creates significant benefits for corporations and provides no more burdens than the employment of non-disabled employees. There are no studies showing that qualified disabled employees perform less than their non-disabled counterparts. Finally, MNCs that are serious about their human rights footprint cannot ignore the invisible members of the communities in which they operate. Invisible members include those that are silenced by the state or dominant groups (e.g., LGBTQI), those that lack the power to take effective action themselves (e.g., elderly and disabled) and those that because of poverty or marginalization have no voice whatsoever (e.g., indigenous people). In recent years, advocacy campaigns have highlighted the exclusion of and impact on certain invisible groups, and as a result MNCs and inter-governmental entities that would otherwise ignore them have included them in their planning operations.¹⁴³

What is clear from this research is that unless an invisible group becomes part of routine corporate planning, whether on a voluntary or statute-based undertaking (which is the preferred option), such a group will never become visible. There are now numerous mechanisms to mitigate the misconceptions and apprehensions of corporations in respect of active engagement with persons with disabilities, and this is a sphere that is potentially rather profitable. Routine corporate planning can take the form of concrete corporate policies and commitment to adhere to the CRPD at the corporate level, as well as undertake HRDDs that effectively map, document, address and enhance the position of disabled persons in the corporation's zone of operations. Such a process requires either a new (to the market) disability-specific HRDD that takes into account the full range of employment and social impact issues arising from MNC operations, or a disability-related component in existing broader HRDDs. The main concern with the latter is that its drafters will simply try to lump disability issues within a broader social agenda that will, however, retain the invisible status of persons with disabilities. The authors of this article are proponents of the view that a comprehensive disability-specific HRDD, designed in a way that does not impose significant additional burdens on MNCs (and whose business case is clear and objective) is the best way forward. The authors are in the process of developing such a HRDD with the input of various stakeholders and hope that soon it will be a standard operating tool for all MNCs.

¹⁴³ For example, World Bank Operational Policy (OP 4.10) on Indigenous Peoples (July 2005), <https://ppfdocuments.azureedge.net/1570.pdf> (accessed 5 March 2021).