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Title

In the Best Interest of Children: A Proposal for Corporate Guardians Ad Litem

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Journal

UCLA Journal of International Law and Foreign Affairs, 26(2)

ISSN

1089-2605

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Publication Date

2022

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IN THE BEST INTEREST OF CHILDREN: A PROPOSAL FOR CORPORATE GUARDIANS AD LITEM

Angela N. Aneiros* & Jamie Darin Prenkert**

Children are frequently implicated in and impacted by business activities, and as such, they are corporate stakeholders. Yet children do not have a direct voice in corporate decision-making. Other stakeholders—employees, customers, and suppliers—can and do influence corporate strategy, but children lack the organization, standing, and legal capacity to assert similar influence. Instead of treating children as a coherent stakeholder group with rights and interests to be respected and supported, firms tend to view children only as potential victims or coveted consumers. That view is short-sighted. Recent international norm-building related to children’s rights and business point toward a more comprehensive consideration of children’s interests in the broad range of business activities. Children are community members with long-term interests in the health and vitality of the communities and environments within which businesses operate. Firms employ children’s parents, and employment practices directly impact children’s development, educational opportunities, and quality of life. Children’s

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The authors wish to acknowledge the Tobias Leadership Center, Indiana University, and the Center for Legal Studies & Business Ethics, Oklahoma State University, for sponsoring the 2021 Symposium on Ethical Leadership and Legal Strategies for Post-2020 Organizations. We also wish to thank Stephen Park, Todd Haugh, and Abbey Stemler for their helpful feedback on earlier drafts of this article. We are particularly grateful to Zachary Hart, a student at Indiana University Maurer School of Law, for his exceptional research assistance and editing. Finally, we thank the student editors of the *UCLA JOURNAL OF INTERNATIONAL LAW & FOREIGN AFFAIRS* for their careful work and collegial collaboration throughout the editing process. We of course take sole responsibility for any errors or omissions.

best interests substantially overlap with sustainable business practices and implicate human rights generally. Therefore, firms must develop the expertise to identify and give voice to the best interests of children, yet most firms currently lack the capacity to do so.

This Article introduces the first corporate model that can effectively advocate for children's best interests, which is an adapted version of the long-used guardian ad litem model used in family court proceedings. Courts appoint guardians ad litem when their decisions impact children, who cannot adequately represent themselves because they lack the sophistication or capacity to advocate or state their own best interests. Guardians ad litem serve as objective and impartial officials whose duty is to protect and advocate for the best interests of the children—and they serve only the children. This Article therefore asserts that companies should embed “corporate guardians ad litem” within their organizations to ensure that the best interests of children are considered in the development of corporate strategy and decision-making. The Article introduces three versions of the corporate guardian ad litem, namely, director-level, officer-level, and project-level.

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INTRODUCTION

According to Lise Kingo, former CEO and Executive Director of the United Nations Global Compact, “Children represent one third of the current global population—and 100% of our future.”¹ Business activity impacts children in a multitude of ways. Yet the prevailing conceptualization of business organizations and their relationships with children is traditionally narrowly defined and fails to take account of that broad set of interests. Outside of the few sectors that are explicitly targeted at children (for example, toys, early educational products or services, pediatric health and wellness, and the like), many companies pay little attention to their interactions or impacts on children.² Typically, to the extent that children factor into the decision-making calculus of businesses at all, they are viewed as either particularly vulnerable sources of risk to firms or as potential consumers.

Buoyed by recent shifts in norm-building at the international level, this Article asserts that the traditional conception of businesses’ interaction with children is wrongheaded. Instead, businesses should be taking account of and addressing the impacts they have on children and working toward making strategies and decisions in the best interest of children. Doing so not only respects children as an important stakeholder group but also bolsters the basis for a business’s social license, which requires it to take account of human rights—and, specifically,

1. LINA HÖÖK & MATS LIGNELL, CHILDREN’S RIGHTS: THE ULTIMATE DEFINITION OF SUSTAINABILITY 15 (2016).

2. See Valérie-Inés de La Ville, *Young People as Company Stakeholders? Moving Beyond CSR . . .*, 15 *YOUNG CONSUMERS* 3, 4 (2014) (“Yet, few [companies] rarely give due consideration to children as something other than customers unless compelled to do so, for example when exploitative child labour practices or dangerous products produce negative publicity and public pressure.”).

children's rights—as members of a global community. Moreover, a child-regarding orientation supports sustainable business practices. For example, firms employ children's parents, and their employment practices directly impact children's development, educational opportunities, and quality of life. In addition, children are community members with long-term interests in the health and vitality of the communities and the social and physical environments within which businesses operate.

To facilitate and support this reorientation of the relationship of business to children and to determine and advocate for the best interests of children, this Article forges a practical path. We propose the creation of “*corporate guardians ad litem*,” which are modeled on the long-standing practice of courts to appoint guardians ad litem when children's interests are at stake but they are not parties to the action before the court.

This Article proceeds in three parts. Part I addresses the status of children in the business environment and lays out the shift that is taking place. It first describes the traditional limited orientation. Then, it discusses how children are a vital stakeholder group. Part I concludes by situating the developments in the area of business and children's rights in the broader context of the international consideration of business and human rights. Part II discusses four implications for business that flow from the child-regarding orientation outlined in Part I. Those implications include: the need to center the best interests of children, the right of children to be heard and to participate in decisions that impact them, the longer-term view that a child-regarding orientation requires, and the need to build institutional capacity and expertise to deal with the prior three implications. Finally, Part III presents the proposal for corporate guardians ad litem. It describes the history and operation of legal guardians ad litem and then adapts that model for the business environment. Part III presents three versions of the corporate guardian ad litem model: director-level, officer-level, and project-level. Part III concludes by addressing two potential critiques of the corporate guardian ad litem proposal.

I. STATUS OF CHILDREN IN THE BUSINESS ENVIRONMENT

This Part describes the traditionally limited view of children in the business environment and offers two conceptualizations of children's status vis-à-vis business that more appropriately capture the host of ways that children's interests and business operations interact. Rather than the polarized approaches of considering children only as

either potential victims or coveted consumers, the two complementary approaches described below consider children as fully recognized stakeholders in a business and internationally recognized rights holders whose interests must be respected and promoted by businesses.

A. Children as Vulnerable Targets and Consumers

The two paradigmatic approaches businesses take in considering children and children's interests in their operations and decision-making are that of potential victims or coveted consumers. This limited viewpoint fails to recognize the full range of ways that children's interests and business operations intersect. Moreover, that cabined view presents operational and reputational risks to firms that adopt it. On the one hand, this nearsightedness is understandable. Media reports on children and business tend toward the sensational (which is not to say unserious).³ An example can be found in the U.K.-based chocolate company Cadbury, which anchors each end of its value chain with prototypical interactions with children—as vulnerable victims of exploitation on one end and vital consumers of its products on the other.⁴ In its supply chain, Cadbury deals with children as a risk factor. It has long-established business relationships with family-based cocoa farms in the West African countries of Ghana and Côte d'Ivoire. Some of the farms have traditionally used child laborers for their cocoa harvest. At the end of its value chain, Cadbury also deals with children, but in this context as vital consumers of its products. Children are an important, perhaps primary, customer of Cadbury's Dairy Milk bars and chocolate eggs. In recent years, Cadbury has faced criticism from nongovernmental organizations (NGOs) and others to address its role in child and slave labor on the one hand and the obesity epidemic on the other.⁵ In response, Cadbury has mis-stepped clumsily in its attempts to bolster its image.

With regard to child labor, Cadbury faced criticism for being slow to make firm commitments to fair trade and transparency for all of its product lines, despite having been the first major company to earn the "Fair Trade" certification for one of its leading products.⁶ As it relates

3. See Amanda Berlan, *Whose Business Is It Anyway: Children and Corporate Social Responsibility in the International Business Agenda*, 30 *CHILD. & SOC'Y* 159, 159 (2016) (noting that attention is often focused on sectors like fashion and large, multinational corporations).

4. De La Ville, *supra* note 2, at 4.

5. *Id.* ("The Cadbury case study exemplifies the paradoxical behaviour of multinational companies with regard to children. In Northern countries they address children as though they were consumers, whereas in Southern countries children are sometimes treated as cheap labour without rights.")

6. Berlan, *supra* note 3, at 162.

to obesity, Cadbury's "Get Active" initiative encouraged schoolchildren to collect tokens from chocolate bar wrappers that could be exchanged for sports equipment at their schools. The initiative came under fire: Children's health advocates noted that it would require children to purchase and potentially consume nearly 5,500 chocolate bars to get a set of volleyball posts.⁷

The Cadbury example highlights why these problematic paradigms of the child as either victim or consumer have developed. But according to Andrew Crane and Bahar Ali Kazmi in an influential study published in the *Journal of Business Ethics*, businesses who fail to understand the broad range of business impacts on children face two types of significant risk:

First, in the absence of such knowledge, firms will be attempting to manage strategically important relationships with children and their parents without having a full understanding of the context, dimensions, or implications of those relationships Second, business impacts on children tend to be intrinsically sensitive, and this in turn raises major reputation risks for firms.⁸

Thus, a more developed and comprehensive view of children and their relationship with businesses is necessary.

B. Children as Stakeholders

Stakeholder theory was first described by R. Edward Freeman in his seminal book, *STAKEHOLDER THEORY: THE STATE OF THE ART*.⁹ For Freeman, in order to truly succeed in the long-term, corporations must be managed for the benefit of all those affected by their actions.¹⁰ Further, stakeholder theory provides that not only should the corporation be managed for the benefit of stakeholders but those stakeholders should participate in the decisions that substantially affect them.¹¹

Children ought to be understood as a unique and distinct stakeholder group for any business. As stated by Freeman, a stakeholder

7. Dominic Timms, *Minister Blasts Cadbury over 'Sports Kit for Chocolate' Scheme*, *GUARDIAN* (May 20, 2004, 11:42 AM), <https://www.theguardian.com/media/2004/may/20/advertising.marketingandpr1#:~:text=A%20government%20minister%20today%20criticised,to%20get%20new%20sports%20equipment> [https://perma.cc/899R-THHF].

8. Andrew Crane & Bahar Ali Kazmi, *Business and Children: Mapping Impacts, Managing Responsibilities*, 91 *J. BUS. ETHICS* 567, 567–68 (2010).

9. R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* (Cambridge Univ. Press 2010) (1984).

10. See Timothy L. Fort, *Goldilocks and Business Ethics: A Paradigm that Fits "Just Right"*, 23 *J. CORP. L.* 245, 249–52 (1998).

11. See William M. Evan & R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation: Kantian Capitalism*, in *ETHICAL THEORY AND BUSINESS* 97, 101–05 (Tom L. Beauchamp & Norman E. Bowie eds., 3d ed. 1988).

group is “any group or individual who can affect, or is affected by, the achievement of a corporation’s purpose.”¹² Children certainly fall under this definition. The elimination of exploitative child labor and the provision of decent working conditions for young workers are certainly appropriate stakeholder concerns. So, too, are considerations surrounding ethical marketing and advertising to children.¹³ Still children’s interests that are affected by business operations are far broader,¹⁴ and the awareness of those interests has grown over the past several decades.¹⁵

Crane and Kazmi catalogued those broader stakeholder interests and issues that children represent. Their study explores both positive and negative impacts that businesses have on children, including the direct impacts firms produce and indirect impacts that firms create through some intermediary.¹⁶ The authors performed extensive and comprehensive content analysis of a variety of media, corporate, and NGO reports, publications, and websites over a five-year period to identify seven broad areas of stakeholder interests. Crane and Kazmi call those broad categories of corporate responsibilities to children “meta-impact” types of interactions businesses have with children.¹⁷ They are: (1) physical protection, which includes physical safety and health and fitness; (2) moral protection, which incorporates issues related to inappropriate content and products (either directly from the business or mediated through a service provided by the business) and exploitative work; (3) social and cultural participation, which has a positive and a negative aspect based on the type of social/cultural exposure the business facilitates; (4) economic well-being, which has personal and familial components; (5) education and employability, which can arise in business support for education, educational products, and vocational and employment training; (6) parental employment and family

12. FREEMAN, *supra* note 9, at iv.

13. See Berlan, *supra* note 3, at 5 (noting these two dominant stakeholder themes).

14. Crane & Kazmi, *supra* note 8, at 569 (“The [corporate social responsibility] debate has yet to take children seriously as a key area of responsibility for companies. The current debate has largely been dominated by a few specific issues, or has largely concentrated on the welfare of children far from home [in the United States]. Yet, corporations impact children just as much, if not more, within a firm’s domestic operations as they do in the sweatshops of Asia, and advertising is just one of a number of corporate functions that affects the lives of children.”)

15. *Id.* at 568 (“Children have begun to be identified as a distinct stakeholder group in themselves, with a unique set of expectations and responsibilities placed on firms as a result.” (citing Sheena Horgan, *Kids as Stakeholders in Business*, 6 *YOUNG CONSUMERS* 72 (2005))).

16. *Id.* at 570.

17. *Id.* at 570–73.

life, which includes parental working time, flexible work policies, and childcare; and (7) impacts on children's charities, which involves corporate giving and social partnerships.¹⁸ This far more varied and numerous range of intersections between children and business identified by Crane and Kazmi's study reveals the breadth of considerations that businesses may seek to incorporate into their strategy and operational decision-making.

Indeed, as Crane and Kazmi have suggested, a more detailed and nuanced approach to considering how business operations affect children's interests as a stakeholder group reaps benefits for the business. The U.K. Association of Chartered Certified Accountants has noted a number of these benefits, including improved risk management, an improved reputation that strengthens the business's social license to operate, enhanced workforce recruiting and retention, and greater stability and ability to focus on the future.¹⁹ Yet, even this conceptualization of children as stakeholders is somewhat incomplete, owing to the fact that it still focuses attention on how children's issues and interests impact the public image of the business and subsequently its profitability. Given the limits of that sort of instrumental consideration of children, the following Subpart moves beyond the concept of children as stakeholders and explores the status of children as rights holders who are entitled to respect independent of any public relations or financial concerns.

C. Children as Rights Holders

Throughout the twentieth century and into this millennium, a more developed notion of children as primary holders of basic human rights rather than passive subjects of duties owed by others has prevailed. This understanding of children should inform how businesses theorize their relationship to children.

1. Foundations of Children's Rights

The definitive expression of human rights obligations of the international community and, therefore, the foundation for children's rights is found in a series of declarations and covenants known as the International Bill of Human Rights. It consists of the Universal Declaration of Human Rights (UDHR),²⁰ the International Covenant on Economic,

18. *Id.* at 570.

19. ASS'N OF CHARTERED CERTIFIED ACCTS., ACCOUNTING FOR CHILDREN: IMPLEMENTING CHILD RIGHTS FOR BETTER BUSINESS 6 (2014). See *infra* Part C for an expanded discussion of the future orientation that accompanies a focus on children's interest.

20. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)

Social and Cultural Rights (ICESCR),²¹ and the International Covenant on Civil and Political Rights (ICCPR).²² The UDHR guarantees the rights of every individual,²³ which obviously includes children. To the extent that children are explicitly mentioned, though, they are treated as special cases in need of extra protection because of their vulnerability or as subjects under the control of parents.²⁴ The ICESCR similarly indicates that children may need special protection in various circumstances and reserves the right of parents to make educational and other decisions for their children.²⁵ The ICCPR provides to children specific rights, including the right to registration upon birth, the right to a name, and the right to acquire a nationality.²⁶ But the International Bill of Human Rights is otherwise short on explicit attention to children and childhood.

Other declarations by international bodies—primarily the International Labour Organization (ILO)—have relevance to children’s rights, particularly in market contexts. Those include expansions on the International Bill of Human Rights’ declarations against various forms of economic exploitation of children, including setting appropriate minimum ages for work.²⁷ ILO conventions also prohibit the worst forms of child labor, including all forms of slavery; the sale and trafficking of children; child prostitution; and dangerous work that is likely to harm the health, safety, or morals of children.²⁸

[hereinafter UDHR].

21. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

22. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

23. UDHR, *supra* note 20, art. 1 (“All human beings are born free and equal in dignity and rights.”); *see also id.* art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration . . .”); *id.* art. 3 (“Everyone has the right to life, liberty and the security of person.”). In addition, nearly all of the remaining articles proceed with all-inclusive language like “everyone,” “no one,” and “all.” *See, e.g., id.* art. 6 (using “everyone”).

24. Children and childhood are only explicitly mentioned twice in the UDHR. In relation to social protections and adequate provision for health and well-being, Article 25 of the UDHR addresses special care and assistance that is due in childhood and states that “[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection.” *Id.* art. 25, para. 2. Regarding the right to education, Article 26 gives parents primacy in choosing the education given to their children. *Id.* art. 26, para. 3.

25. *See, e.g.,* ICESCR, *supra* note 21, arts. 10, 13.

26. ICCPR, *supra* note 22, art. 24.

27. Int’l Labour Org. [ILO], *Minimum Age Convention*, ILO Doc. C138 (June 26, 1973).

28. Int’l Labour Org. [ILO], *Worst Forms of Child Labour Convention*, ILO Doc. C182 (June 17, 1999); *see also* Int’l Labour Conference, *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up* (June 15, 2010), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/

With the piecemeal nature of the attention to children's rights outlined above as the background, the prevailing international explication of the rights of children is the United Nations Convention on the Rights of the Child (CRC).²⁹ The United Nations (U.N.) General Assembly adopted the CRC on November 20, 1989, and it came into force on September 2, 1990, having been ratified by the requisite number of member nations.³⁰ Today, 196 countries are party to the CRC, including every member of the United Nations except the United States.³¹ Though the United States was actively involved in the drafting of the CRC and was an early signatory, no US President has submitted the CRC to the Senate for the advice and consent necessary for ratification.³² In addition, there are three optional protocols accompanying the CRC, which have been adopted by the U.N. General Assembly and have entered into force for states that are party to them. They are the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography;³³ the Optional Protocol on the Involvement of Children in Armed

wcms_716594.pdf [https://perma.cc/RNN5-NMVS] (declaring that all members of the ILO must effectively respect, promote, and realize the effective abolition of child labor, even if they have not ratified the relevant Conventions).

29. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. The preamble to the CRC references the UDHR, ICESCR, and ICCPR as laying the foundation for its more detailed treatment of children's rights. *Id.* at pmb1. ("Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind . . . , [and r]ecalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance" (footnotes omitted)).

30. *Children's Rights History*, HUMANIUM, https://www.humanium.org/en/childrens-rights-history [https://perma.cc/YW8H-PHMB] (last visited Mar. 19, 2021).

31. *Status of Ratification Interactive Dashboard*, UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUM. RTS., https://indicators.ohchr.org [https://perma.cc/PK9T-AVGZ] (select "Convention on the Rights of the Child" from pulldown menu) (last visited Mar. 19, 2021).

32. See Letter from Bernard Sanders et al., US Sens. and Reps., to Nikki Haley, US Permanent Rep. to the United Nations (June 12, 2018), https://www.documentcloud.org/documents/4502348-Congressional-Letter-to-Ambassador-Haley.html [https://perma.cc/H4LH-DZNS] (urging the Trump administration to present the CRC to the Senate for ratification); Martha Middleton, *ABA Adds Its Voice to Calls for the US to Ratify the Convention on the Rights of the Child*, ABA J. (Mar. 1, 2016, 1:10 AM), https://www.abajournal.com/magazine/article/aba_adds_its_voice_to_calls_for_the_us_to_ratify_the_convention_on_the_right [https://perma.cc/G7XF-9A76] (noting that the Obama administration had not presented the CRC to the Senate for ratification as of the beginning of its last year).

33. G.A. Res. 54/263, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (May 25, 2000).

Conflict;³⁴ and the Optional Protocol on a Communications Procedure.³⁵ Each has entered into force after being ratified by the requisite number of nations. These optional protocols are treaties in their own right. The first two provide substantive elaboration on the CRC and the third provides a mechanism for children to raise complaints about violations of their rights to the United Nations.

The CRC defines *child* as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”³⁶ As that definition suggests, the CRC does not incorporate a universalist or unbending concept of childhood. Rather, in addition to giving primacy to jurisdictional definitions of majority, the CRC Preamble recognizes that culture and tradition play important roles in defining childhood.³⁷ In this way, the CRC reflects the varying approaches and understandings of childhood that emerge from the perspectives of various disciplinary lenses.³⁸ Nonetheless, the rights articulated in the CRC extend to all facets of children’s lives, like health and well-being, education, protection from violence, freedom of expression, and more. Undergirding that broad range of topics are foundational general values. The CRC establishes four core principles that guide and frame children’s rights: (1) nondiscrimination,³⁹ (2) an expectation that the best interests of the child will be a primary consideration,⁴⁰ (3) a commitment to children’s survival and development,⁴¹ and (4) the establishment of a right for children to express their views and participate in decisions about them.⁴² Though these core principles are nominally addressed to parties to the CRC, they “are increasingly

34. G.A. Res. 54/263, Optional Protocol on the Involvement of Children in Armed Conflict (May 25, 2000).

35. G.A. Res. 66/138, Optional Protocol on a Communications Procedure (Jan. 27, 2012).

36. CRC, *supra* note 29, art. 1.

37. *Id.* pmb. (“Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child . . .”).

38. See GAMZE ERDEM TÜRKELLI, CHILDREN’S RIGHTS AND BUSINESS: GOVERNING OBLIGATIONS AND RESPONSIBILITY 7–13 (2020) (discussing the approaches of various disciplines, including philosophy, psychology, sociology, and law).

39. CRC, *supra* note 29, art. 2 (ensuring that states parties do not discriminate based on the child’s parents’ or legal guardians’ characteristics and requiring states parties to protect children from “all forms of discrimination or punishment” on those bases).

40. *Id.* art. 3 (requiring that the best interests of the child be a primary consideration “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”). See *infra* Part A for a more developed discussion of the commitment to the best interest of the child.

41. CRC, *supra* note 29, art. 6.

42. *Id.* art. 12. See *infra* Part IV(B)(1) for a more developed discussion of the right to expression.

being conceptualized as core principles for other children's rights duty bearers beyond the state.⁴³ As discussed more fully in the following Subparts, these core principles provide the foundation for Children's Rights and Business Principles, which speak directly to the activities of private firms.⁴⁴ That more expansive understanding of who is responsible for the human rights of children flows from a more developed vision of those rights. Specifically, under the CRC, "the child is now considered as a subject rather than an object of rights and duties."⁴⁵

2. Children's Rights and Business

In the wake of the shifting understanding of children from object to subject and the growing recognition that the CRC's general principles apply to more than state parties, children's rights as they relate to business enterprises and the operation of businesses in a transnational commercial environment have garnered attention from the U.N. and international civil society organizations focused on children's issues. That focus has occurred in the context of a broader discussion of the application of international human rights commitments and norms to business. This Subpart describes the broader business and human rights context and then details two particular models for the application and incorporation of children's rights in business and commercial activities, namely, the Children's Rights and Business Principles⁴⁶ and General Comment No. 16 by the United Nations Committee on the Rights of the Child, promulgated pursuant to the CRC.⁴⁷

a. Business and Human Rights Background

Around the mid-1990s, U.N. human rights bodies began to pay greater attention to the impact of globalization on the realization of human rights.⁴⁸ In an era defined by globalization and the attendant

43. TÜRKELLI, *supra* note 38, at 27.

44. *See infra* Subpart I.B.2.c.i.

45. FRANZISKA HUMBERT, *THE CHALLENGE OF CHILD LABOUR IN INTERNATIONAL LAW* 16 (2009).

46. UNICEF, *THE GLOB. COMPACT & SAVE THE CHILD., CHILDREN'S RIGHTS AND BUSINESS PRINCIPLES* (2012) [hereinafter CRBP], https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FCRBP%2FChildrens_Rights_and_Business_Principles.pdf [<https://perma.cc/2FDP-YYA5>].

47. U.N. Comm. on the Rts. of the Child, General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights, U.N. Doc. CRC/C/GC/16 (Apr. 17, 2013) [hereinafter General Comment No. 16].

48. *See, e.g.*, Commission on Human Rights Res. 1999/59, Globalization and Its Impact on the Full Enjoyment of All Human Rights, U.N. Doc. E/CN.4/Res/1999/59 (Apr. 28, 1999).

rise of multinational corporations,⁴⁹ businesses are increasingly influencing human rights practices around the world.⁵⁰ However, given the relative lack of binding international law to regulate labor practices in these industries,⁵¹ the international community has struggled to enforce human rights best practices. Transnational corporations operate beyond the singular reach of a particular national legal system in a globalized economy. That dynamic—exacerbated by the lack of an international regulatory framework and the fact that non-state market and social actors lack the organization and power to act in its place—has led to governance gaps.⁵² The U.N. has attempted or implemented several initiatives to address those governance gaps.

i. Global Compact

In 1999, the U.N. Secretary General created and presented to the international business community the Global Compact, which consists of ten principles addressing human rights, labor standards, the environment, and anti-corruption.⁵³ The ten principles are derived from the UDHR, the ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.⁵⁴ In joining the Global Compact, firms make three commitments: (1) to embed the principles in their organizational structures, (2) to report annually on their efforts and progress in doing so, and (3) to engage others locally

49. See, e.g., THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 9–10 (3d ed. 2007) (arguing that “the key agent of change, the dynamic force driving global integration [through the year 2000], was multinational companies.”).

50. See *The Global Human Rights Regime*, COUNCIL ON FOREIGN RELS. (June 19, 2013), <https://perma.cc/GSH7-AFVW?type=image> (“Many in the international community are reassessing economic, social, and cultural rights as IGOs increasingly link human rights to business practices and public health. Elsewhere, attention to the rights of women, minorities, and persecuted ethnic groups has steadily increased.”).

51. See Drusilla K. Brown, Alan V. Deardorff & Robert M. Stern, *Labor Standards and Human Rights: Implications for International Trade and Investment* 2 (IPC Working Paper Ser. No. 119, 2011).

52. Jamie Darin Prenkert & Scott J. Shackelford, *Business, Human Rights, and the Promise of Polycentricity*, 47 *VAND. J. TRANSNAT'L L.* 451, 467 (2014).

53. See *The Ten Principles of the U.N. Global Compact*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Mar. 19, 2021).

54. *Id.*; see UDHR, *supra* note 20; Int'l Labor Conference, [ILO], *ILO Declaration on Fundamental Principles and Rights at Work* (June 15, 2010), at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf [<https://perma.cc/VSPX-JQPD>]; U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF. 151/26 (Vol. I) (June 3-14, 1992); U.N. Convention against Corruption, *adopted Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005)*.

everywhere the firm has a presence.⁵⁵ While legally a nonbinding relationship the Global Compact is intended to use normative force to guide business practices with a framework for responsible and sustainable business practices.⁵⁶ Organizations that join the Global Compact commit to engage in dialogue, raise awareness, and voluntarily integrate its principles into their commercial relationships, including with business partners. Participating businesses are required to submit a Communication on Progress to inform stakeholders about progress made in their implementation of the principles.⁵⁷ In September 2015, the Member States of the U.N. adopted the Sustainable Development Goals (SDGs), seventeen goal statements to “define the world we want” by seeking to end extreme poverty, fight inequality and injustice, and protect the planet.⁵⁸ The Global Compact has incorporated the SDGs in its programming, providing businesses and other stakeholders with guidance on SDG advancement and realization.⁵⁹

Thus, the Global Compact is an instantiation of the growing recognition that businesses must take account of human rights and engage in responsible business practices that the United Nations had been concerned were being negatively impacted by globalization.

ii. Norms

In parallel with the founding and launch of the Global Compact, the U.N. Sub-Commission on the Promotion and Protection of Human Rights sought to draft a human rights instrument that, if adopted, would formally oblige transnational business entities to respect and promote human rights. The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms) would have imposed on businesses affirmative duties concurrent with states “to promote, secure the fulfillment of, respect, ensure respect of and protect human rights” within their

55. See *What's the Commitment?*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/participation/join/commitment> [<https://perma.cc/7952-HML7>] (last visited Mar 21, 2021).

56. See *Our Mission*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission> [<https://perma.cc/AMC6-C83Z>] (last visited Mar. 19, 2021).

57. UNITED NATIONS GLOB. COMPACT, BASIC GUIDE COMMUNICATION ON PROGRESS 5 (2019), https://d306pr3pise04h.cloudfront.net/docs/communication_on_progress%2FTools_and_Publications%2FCOP_Basic_Guide.pdf.

58. *The SDGs Explained for Business*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/sdgs/about> [<https://perma.cc/8TCV-JML9>] (last visited Mar. 19, 2021).

59. See *How Your Company Can Advance Each of the SDGs*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/sdgs/17-global-goals> [<https://perma.cc/57EQ-XFRP>] (last visited Mar. 19, 2021).

“sphere[] of . . . influence.”⁶⁰ The Norms were controversial and failed to gain any traction at the U.N.⁶¹ Ultimately, the U.N. Human Rights Commission bypassed the Norms in favor of establishing the mandate of John Ruggie, the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG).⁶²

iii. The Ruggie Framework

Because the Norms were simultaneously too ambitious and too limited, Ruggie’s “first official act was to commit ‘Normicide.’”⁶³ He could not see a path to consensus around the imposition of state-like duties on businesses, but only with regard to a restricted set of rights.⁶⁴ In his view, it was imprudent to rely on a top-down approach. Rather, over the course of six years, Ruggie avoided the controversy that attached to the Norms’ obligatory approach to a defined subset of human rights. Instead, he argued that a business’s social license included the business’s responsibility to respect human rights. The societal expectations that attach to engaging in commercial practice, as opposed to an application of legal human rights obligations, was the basis for his approach.⁶⁵

60. Comm’n on Hum. Rts., Sub-Comm’n on the Promotion & Prot. of Hum. Rts., Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

61. See John H. Knox, *The Human Rights Council Endorses “Guiding Principles” for Corporations*, AM. SOC’Y INT’L L. (Aug. 1, 2011), <https://www.asil.org/insights/volume/15/issue/21/human-rights-council-endorses-%E2%80%9Cguiding-principles%E2%80%9D-corporations> [<https://perma.cc/5CJW-H6YC>] (“[T]he Draft Norms proved to be controversial. While human rights groups strongly supported them, most corporations opposed them, and the governments on the Human Rights Commission decided not to adopt them.”).

62. See generally JOHN GERARD RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* (2013) (laying out comprehensive discussion of the history and origin of the SRSG mandate).

63. *Id.* at 158.

64. *Id.* at 47–60.

65. See John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, at 4–5, ¶ 9, Hum. Rts. Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), <https://undocs.org/en/A/HRC/8/5> [hereinafter *PRR Framework*] (“[T]he corporate responsibility to respect . . . is the basic expectation society has of business[.]”); see also Knox, *supra* note 61 (“The second principle—the corporate responsibility to respect human rights—appears in some ways to echo the Draft Norms. But Ruggie treated it as different in a crucial respect. In his view, the responsibility stems from *societal expectations* rather than human rights law.”).

Ruggie developed the Protect, Respect and Remedy Framework (“PRR Framework”)⁶⁶ as well as a set of principles to guide its implementation, the U.N. Guiding Principles on Business and Human Rights (Guiding Principles).⁶⁷ The U.N. Human Rights Council endorsed the PRR Framework and Guiding Principles,⁶⁸ giving them a level of legitimacy that the Norms never achieved. The PRR Framework rests on three pillars: “the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.”⁶⁹

Section II of the Guiding Principles, which includes Principles 11 through 24, indicates that the responsibility to respect human rights requires business enterprises to “avoid infringing on the human rights of others and . . . address the adverse human rights impacts with which they are involved.”⁷⁰ To fulfill this responsibility, Principle 15 indicates that business must have in place three things:

- a. A policy commitment to meet their responsibility to respect human rights;
- b. A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; [and]
- c. Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.⁷¹

The concept of “due diligence” is familiar to businesses. In general, it requires the collection and analysis of information to make an informed and reasonable decision. However, in the context of human rights, due diligence also requires a firm to assess the actual and potential impacts on rights holders that its own activities may cause, as well as impacts that can be directly linked with its operations, products, or services based on its business relationships.⁷²

Guiding Principles 18 through 21 outline the process and standards for performing human rights impact assessments. Completing

66. *PRR Framework*, *supra* note 65.

67. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Hum. Rts. Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), <https://undocs.org/en/A/HRC/17/31> [hereinafter *Guiding Principles*].

68. Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/RES/17/4, at 2, ¶ 1 (July 6, 2011).

69. *PRR Framework*, *supra* note 65, at 4, ¶ 9.

70. *Guiding Principles*, *supra* note 67, at 13, ¶ 11.

71. *Id.* at 15, ¶ 15.

72. *Id.* at 16, ¶ 17.

assessments allows a firm to identify and assess actual and potential impacts of its decisions, integrate the findings into its internal functions and processes, verify progress by tracking the effectiveness of its responses, and communicate all of this both internally and externally in ways that are accessible and sufficiently complete for transparency and accountability to interested stakeholders.⁷³ In other words, it requires firms to “know and show” both their responsibility and commitment to respecting human rights.⁷⁴

a. Extension of Children’s Rights through a Business and Human Rights Framework

The fruits of Ruggie’s work as the SRSG, described in the previous Subsection, have dominated the past decade of practice and scholarship in business and human rights.⁷⁵ Yet, his PRR Framework and Guiding Principles pay very little specific attention to children and their rights. This is even more true with respect to the duties and responsibilities businesses owe to children.

The PRR Framework lists “the abolition of child labour” in a table including a non-exhaustive list of rights that were alleged to have been the subject of corporate-related abuses, drawn from more than three

73. *Id.* at 17–20, ¶¶ 18–21.

74. *Id.* at 20, ¶ 21 cmt.

75. To be sure, Ruggie’s work as the SRSG, as embodied in the PRR Framework and the Guiding Principles, is broader than the voluntary commitments of the Global Compact and accomplished what the Norms could not, earning the endorsement of the U.N. Human Rights Council. *See supra* notes 65–69 and accompanying text. That is not to say, however, that his work was universally accepted or hailed and has been the subject of sharp critique as a half measure. *See, e.g.,* Surya Deva, *Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 78, 79 (Surya Deva & David Bilchitz eds., 2013) (arguing that the Guiding Principles undermined the goal of holding companies accountable for human rights violations by “treating human rights too lightly”). There are also ongoing efforts by member states, civil society and advocacy groups, and academics to push the business and human rights agenda more in the direction of the Norms, including through the development of a convention or treaty that would impose binding obligations on transnational corporations with regard to their human rights impacts. *See* U.N. Human Rts. Council, Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx> (last visited Mar. 21, 2021) [<https://perma.cc/MX8R-GQJS>] (describing the mandate of the intergovernmental working group on transnational corporations and other business entities with respect to human rights, which includes elaborating an international legally binding instrument on business and human rights); *see also* Larry Catá Backer, *Shaping a Global Law for Business Enterprises: Framing Principles and the Promise of a Comprehensive Treaty on Business and Human Rights*, 42 N.C. J. INT’L L. 417, 477–502 (2017) (discussing how the notion of principled pragmatism, which fueled Ruggie’s approach, could inform the treaty development).

hundred reports the SRSR reviewed.⁷⁶ Indeed, the entire point of the table is to illustrate that the Norms' approach of defining a set of particular rights that businesses should focus on was ill-advised, because "there are few if any internationally recognized rights business cannot impact—or be perceived to impact—in some manner."⁷⁷ Thus, the PRR Framework does little more than identify one area of children's rights among the universe of relevant human rights that can be impacted by business.⁷⁸ The Guiding Principles mention children only in a list of groups that are particularly vulnerable and subject to marginalization, harkening back to the traditional conception of children as object rather than subject.⁷⁹ The inclusion of children in such a broad group has been the subject of criticism for failing to recognize children's agency and unique social position.⁸⁰ Nonetheless, the corporate responsibility to protect outlined in the PRR Framework and elucidated in the Guiding Principles is broad and certainly encompasses children's rights. The lack of attention to children's rights in the PRR Framework and the Guiding Principles would not be appropriately understood as eschewing businesses' responsibilities to children, as the instruments do not

76. *PRR Framework*, *supra* note 65, at 15, ¶ 52 tbl.

77. *Id.* at 15, ¶ 52.

78. Children's rights are also mentioned in a footnote in the PRR Framework, exemplifying how international bodies are imposing more explicit expectations on states to "investigate and punish human rights abuse by corporations and provide access to redress for such abuse when it affects persons within their jurisdiction." *Id.* at 22, ¶ 83 & n.49 (listing as an example the recommendation of the Committee on the Rights of the Child that states should comply with an option protocol to the CRC addressing the sale of children, child prostitution, and child pornography by establishing criminal, civil, or administrative liability for such offenses). Therefore, this nod to children's rights is about the state duty to provide a remedy, rather than businesses' direct responsibilities.

79. *Guiding Principles*, *supra* note 67, at 8, ¶ 3 cmt.; *id.* at 14, ¶ 12 cmt. (listing children alongside "indigenous peoples; women; national or ethnic, religious and linguistic minorities; . . . persons with disabilities; and migrant workers and their families").

80. Olga Martin-Ortega and Rebecca Wallace argue:

The inclusion of children among other groups is problematic because children occupy a different position in society from that of other socially disadvantaged groups. Commentators have argued against considering children as members of a wider category of vulnerable people. In this regard, Nolan has highlighted that the inaccurate conceptualization of children as vulnerable, dependent and passive results in the lack of recognition of, and therefore capacity to exercise, their agency. This gives rise to a vicious circle, in which "false perceptions of children are reinforced by, and give rise to, the limited opportunities available to children to demonstrate their competence and agency.

Olga Martin-Ortega & Rebecca Wallace, *Business, Human Rights and Children: The Developing International Agenda*, 25 DENNING L.J. 105, 114 (2013) (footnote omitted) (quoting AOIFE NOLAN, CHILDREN'S SOCIO-ECONOMIC RIGHTS, DEMOCRACY AND THE COURTS 11 (2011)).

purport to describe all rights and situations to which their principles apply. Rather, they should be seen as requiring those principles to be adapted and tailored to the specific needs of children. Below are two examples of developments in that space.

i. Children’s rights and business principles

In 2012, UNICEF,⁸¹ The Global Compact,⁸² and Save the Children⁸³ took up the task of incorporating children’s rights squarely within the business and human rights conversation, publishing the Children’s Rights and Business Principles (CRBP), consisting of ten principles to guide business’s responsibility to respect and support children’s rights.⁸⁴ The CRBP incorporates the shift from viewing children as the object of human rights interest to the subject, as rights holders in their own capacity. In the Preamble to the CRBP, that sentiment is captured in the following quote:

As a result of their rapid physical and psychological development, children have survival and development needs that differ from those of adults. Children are particularly vulnerable to violence, exploitation and abuse, especially during emergencies. The impact of climate change and pollution on children can also be more serious and long-lasting than those on adults. At the same time, children make important contributions to their households, communities and societies. Children are key stakeholders of business—as consumers, future employees and business leaders, and as members of the communities and environments in which a business operates.⁸⁵

Like the PRR Framework and the Guiding Principles, the CRBP is a legally non-binding instrument that serves as a guide to the business community and a framework for fulfilling societal expectations that attach to responsible and sustainable business practices. The CRBP sets out two general action steps required of all businesses: the corporate *responsibility to respect* and the corporate *commitment to support* children’s rights. With regard to the former, businesses are charged with “avoiding any infringement of the human rights of others, including children, and addressing any adverse human rights impact with which

81. See generally *About UNICEF*, UNICEF, <https://www.unicef.org/about-unicef> (last visited Mar. 20, 2021) [<https://perma.cc/2BTH-9SCQ>].

82. See generally *Business as a Force for Good*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission> (last visited Mar. 19, 2021).

83. See generally *About Us*, SAVE THE CHILD., <https://www.savethechildren.org/us/about-us> [<https://perma.cc/2B3D-UQ9Q>] (last visited Mar. 20, 2021).

84. CRBP, *supra* note 46, at 12–35.

85. *Id.* at 12.

the business is involved.”⁸⁶ That responsibility applies not only to the business’s direct activities but also to its business relationships that are connected to its operations, products, or services.⁸⁷

The CRBP characterizes the responsibility to respect children’s rights as “the minimum required of business.”⁸⁸ The commitment to support children’s rights describes a higher level of engagement that the PRR Framework and Guiding Principles did not explicitly call for.⁸⁹ Specifically, the CRBP states that the commitment to support children’s rights requires “voluntary actions that seek to advance . . . children’s rights, through core business activities, strategic social investments and philanthropy, advocacy and public policy engagement, and working in partnership and other collective action.”⁹⁰ Despite that expansion of business responsibilities to include the commitment to support children’s rights, the CRBP highlights that the commitment is “encouraged even if not required.”⁹¹

The ten principles that comprise the CRBP are framed by the first, which expands on the responsibility to respect and the commitment to support by foregrounding the four core principles of the CRC (*i.e.*, non-discrimination, the best interest of the child, survival and development, and expression and participation).⁹² The responsibility to respect children’s rights requires appropriate policies and processes to be in place, which reflects the Guiding Principles’ “know and show” structure.⁹³ Firms need a specific policy statement that is approved at the most senior level of the business and incorporates relevant expertise; a due diligence process including child rights impact assessments (CRIAs), which identify and assess actual and potential adverse impacts on children’s rights, integration of CRIA findings across the business’s internal functions and processes, meaningful monitoring and tracking of the effectiveness of responses to identified impacts, external communication of those efforts; and child-sensitive processes that facilitate

86. *Id.* at 5.

87. *Id.*

88. *Id.*

89. *See* Martin-Ortega & Wallace, *supra* note 80, at 117 (making the point that the CRBP goes further to delineate the role of business and scope of responsibilities to children’s rights).

90. CRBP, *supra* note 46, at 5.

91. *Id.*

92. *Id.* at 14; *see supra* notes 39–43 and accompanying text (describing the core principles of the CRC).

93. *See supra* notes 70–74 and accompanying text.

remediation of impacts on children's rights that the business causes or to which it contributes.⁹⁴

The notion of child sensitivity in the due diligence and remediation processes was newly introduced in the CRBP and is vital to its orientation.⁹⁵ CRIAs, as a specialized application of the human rights impact assessment practice, are important not only because of the unique vulnerability of children and the potential long-term impacts on them when their rights are violated but also because comprehensive CRIAs can reveal when children are being neglected as stakeholders.⁹⁶ Notably, even the drafting process for the CRBP incorporated this child-regarding sensitivity. In 2011, there was a three-month consultation period involving more than six hundred business leaders, civil society representatives, and children.⁹⁷ The children participated through a specialized child participation strategy, which was designed to ensure they had equal footing as stakeholders in the initiative and to build their capacity to understand businesses' responsibility to respect and commit support for children's rights.⁹⁸ Specifically, over 400 young people engaged in interactions with Save the Children, Plan International, and UNICEF, among others, in nine countries to discuss the CRBP initiative.⁹⁹ Participants were diverse and included "children with disabilities, minority ethnic and language groups, indigenous children, orphaned children or children without appropriate parental care, children living below the national poverty line, children displaced by natural disaster or conflict, religious minorities[,] and children in exploitative forms of work."¹⁰⁰ Trained facilitators led these consultations according to a protocol that they were provided; however, facilitators were encouraged to adapt the process to accommodate the participant's needs and interests.¹⁰¹

The remaining Principles are organized in three broad areas of businesses' interaction with and potential impact on children: the

94. CRBP, *supra* note 46, at 14–16.

95. See Martin-Ortega & Wallace, *supra* note 80, at 118–19.

96. See Tara M. Collins & Gabrielle Guevara, *Some Considerations for Child Rights Impact Assessment (CRIAs) of Business*, 44 *REVUE GÉNÉRALE DE DROIT* 153, 161 (2014).

97. *Children's Rights and Business Principles Initiative Wraps Consultation Period*, U.N. GLOBAL COMPACT (Aug. 2, 2011), <https://www.unglobalcompact.org/news/138-08-02-2011> [https://perma.cc/334X-FWHG].

98. See generally SAVE THE CHILD. SWED., *HOW BUSINESS AFFECTS US: CHILDREN AND YOUNG PEOPLE SHARE THEIR PERSPECTIVES ON HOW BUSINESS IMPACTS THEIR LIVES AND COMMUNITIES* (2012) (detailing the child participation strategy and summarizing the input from the participating children).

99. *Id.* at 5 (noting that the countries in which these consultations occurred were Brazil, Argentina, Philippines, Zambia, Bangladesh, Ethiopia, Senegal, Paraguay, and Peru).

100. *Id.*

101. *Id.*

workplace (Principles 2–4), the marketplace (Principles 5–6), and the community and environment (Principles 7–10).

The CRBP's workplace focus expectedly addresses child labor in Principle 2;¹⁰² however, the emphasis is broader than that in Principles 3 and 4. Principle 3 highlights the responsibility of businesses to provide decent work that satisfies safe working conditions; protection from abuse and exploitation; access to gender-appropriate water, sanitation, and hygiene facilities; and support for workers who are parents and caregivers of children.¹⁰³ The last of those considerations is a particularly vital illustration of how children are stakeholders in business operations and decisions regarding issues that affect their families and how children's rights encompass far broader interests than their individual potential to be victims and consumers. For instance, a business may employ migrant parents who are forced to leave their children hundreds or thousands of miles away with other family or home community members. The impacts of that employment of migrant parents and the steps businesses may take to mitigate the potentially negative results of that family separation are of considerable import to children.¹⁰⁴ Principle 4 encourages businesses to ensure that children are protected and safe in all firm facilities, as well as when children are exposed to any of the business's activities regardless of whether those occur in the firms facilities. The lynchpin of Principal 4 is the voluntary commitment to develop a child protection code of conduct for the range of a firm's business operations.¹⁰⁵

The marketing and advertising components of the CRBP focus on the business's actual services and products as well as its communications to children about those services and products. Principle 5 highlights the corporate responsibility to ensure that products and

102. See CRBP, *supra* note 46, at 18–19 (highlighting the elimination of child labor, the mitigation of risks of harm to young workers, and the commitment to work with governments and other social partners to address the root causes of child labor).

103. *Id.* at 20–21.

104. See, e.g., *id.* at 21 (providing an example of a program to support children of migrant worker parents through the issuance of “love cards,” prepaid telephone cards that facilitate maintaining a connection between parent and child); HÖÖK & LIGNELL, *supra* note 1 at 19, 24, 27–28 (describing efforts by the Centre for Child Rights and Corporate Social Responsibility to address the working and living conditions for migrant parents, such as by providing training and support to Clas Ohlson, a Swedish home and hardware retailer, and Dongguan Concord Pottery, leading to the founding of a childcare center, as well as education, health, and social integration services). Parents need not migrate cross-country for their work conditions to impact their children's development. See Crane & Kazmi, *supra* note 8, at 579 (citing studies that show potential negative impacts on children as a result of excessive work hours required of parents).

105. CRBP, *supra* note 46, at 22.

services are safe for children and support children's rights.¹⁰⁶ Principal 6 prompts businesses to pay attention to their marketing and advertising communications so that they comply with national and local legal requirements, raise awareness of and "promote[] children's rights, positive self-esteem, healthy lifestyles and non-violent values," and do not exploit children's vulnerability.¹⁰⁷

Principles 7 through 10 address businesses and children's rights as they relate to the environment and the community. Principle 7 describes the corporate responsibility to take account of the impact that the business's environment and resource-use strategies have on children, their families, and their communities.¹⁰⁸ In addition, it highlights that children's interests must be considered when land is acquired or used for business operations or when resettlement is required.¹⁰⁹ Principles 8 and 9 address the specialized situations that children face and that businesses can exacerbate when firms arrange for the security of their assets and land¹¹⁰ and when the firms deal with emergencies that affect their operations, such as natural disasters and armed conflict.¹¹¹ Finally, the corporate responsibility to reinforce community and government efforts to protect children and fulfill the realization of their rights is addressed in Principle 10. That responsibility includes respecting the rule of law and paying taxes.¹¹² Moreover, the commitment to support extends to strategic social and philanthropic investment and awareness-raising.¹¹³

ii. Committee on the Rights of the Child General Comment
No. 16

The United Nations Committee on the Rights of the Child (the Committee) is one of ten U.N. human rights treaty-based bodies.¹¹⁴ It was created by the CRC for the purpose of monitoring and reporting on the treaty's implementation, and it consists of eighteen independent

106. *Id.* at 24–25.

107. *Id.* at 26.

108. *Id.* at 28.

109. *Id.*; *see also* Martin-Ortega & Wallace, *supra* note 80, at 119 ("This is particularly important because until now children have been largely neglected when considering the impact large investment projects requiring land acquisition have had on them, as well as how their health, livelihood and future development may be affected by the environmental consequences of commercial operations.").

110. CRBP, *supra* note 46, at 30.

111. *Id.* at 32.

112. *Id.* at 34.

113. *See id.*

114. *Human Rights Bodies*, UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> [<https://perma.cc/MW7M-Z757>] (last visited Mar. 20, 2021).

experts.¹¹⁵ The Committee has the authority to publish interpretations of the CRC's provisions through general comments.¹¹⁶ Such comments tend to focus on thematic issues or the work methods of the body.¹¹⁷ Though the legal status of general comments is somewhat murky, they are important interpretations of the CRC, and “[i]n practice, general comments have taken the form of a powerful and indispensable juridical tool that assists in reinforcing standards as well as in pushing at the boundaries of the law.”¹¹⁸

The Committee adopted and published General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights in 2013.¹¹⁹ Through General Comment No. 16, the Committee became the first treaty body to address the relationship between business and human rights in a general comment, doing so in the context of the broader work of the SRSG and following the release of the CRBP.¹²⁰ General Comment No. 16 is nominally directed at the state parties to the CRC and aims at ensuring that they fulfill their obligations pursuant to it. While the comment recognizes that “there is no international legally binding instrument on the business sector's responsibilities vis-à-vis human rights,”¹²¹ it also addresses “duties and responsibilities to respect the rights of children” that are incumbent

115. *Committee on the Rights of the Child*, UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> [<https://perma.cc/6UY8-YUF2>] (last visited Mar. 20, 2021). The Committee also monitors the implementation of two Optional Protocols to the Convention, which address the involvement of children in armed conflict and the sale of children, child prostitution, and child pornography. *Id.* It also administers a third Optional Protocol on a communications procedure that allows individual children to submit complaints under the CRC and the first two Optional Protocols. *Id.*

116. *See id.*

117. *See CRC General Comments*, CHILD RTS. INT'L NETWORK, <https://archive.crin.org/en/library/publications/crc-general-comments.html> (last visited Mar. 21, 2021) [<https://perma.cc/5JT5-4BTG>]; *see also* Philip Alston, *The Historical Origins of the Concept of “General Comments” in Human Rights Law*, in *THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY: LIBER AMICORUM GEORGES ABI-SAAB 763, 764* (Laurence Boisson de Chazournes & Vera Gowlland-Debbas eds., 2001) (describing general comments as “a means by which a U.N. human rights expert committee distills its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises” and noting “[i]n essence the aim is to spell out and make more accessible the ‘jurisprudence’ emerging from its work”).

118. Paula Gerber, Joanna Kyriakakis & Katie O'Byrne, *General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights: What Is Its Standing, Meaning and Effect?*, 14 MELB. J. INT'L L. 93, 103 (2013).

119. General Comment No. 16, *supra* note 47.

120. Gerber, Kyriakakis & O'Byrne, *supra* note 118, at 113; Martin-Ortega & Wallace, *supra* note 80, at 121.

121. General Comment No. 16, *supra* note 47, at 4, ¶ 8.

upon private business actors.¹²² It notes that states are obligated to hold businesses accountable if they fail to do so and that “business enterprises should not undermine the States’ ability to meet their obligations towards children” under the CRC.¹²³

General Comment No. 16 does not proceed through the CRC article by article or right by right. Rather, it focuses on the four core principles¹²⁴ of the CRC as the foundation for its discussion of the legal obligations on state parties and its explanation of policy recommendations for states and business entities.¹²⁵ It then proceeds with a section on the nature and scope of states parties’ legal obligations to ensure that children’s rights are realized in the context of business generally, outlining the state obligations to respect, protect, and fulfill children’s rights through well-enforced laws and standards, as well as to provide remedies and reparations for situations where those obligations are not met or where protective measures are ineffective.¹²⁶ That is followed by a lengthy section on “State obligations in specific contexts,” which includes service provision for children, the informal economy, and emergencies and conflict situations.¹²⁷ The section also includes an extensive discussion of states obligations as applied to global business operations, addressing issues of extraterritorial application of national law as well as obligations of home and host states of multinational business entities.¹²⁸

The meat of General Comment No. 16, and its major contribution to the responsibilities of business entities, comes in Section VI, which lays out the comment’s implementation framework. It requires states to adhere to the principle of the best interests of the child in the development of legislation and regulation that applies to business activities and operations.¹²⁹ In doing so, the comment exhorts the states to create a “clear and predictable legal and regulatory environment which enables business enterprises to respect children’s rights”¹³⁰ and then to enforce those laws and regulations by empowering and strengthening the reg-

122. *Id.*

123. *Id.* For a critique of General Comment No. 16’s failure to speak more directly to the obligations of private business entities as duty bearers to children, see Gerber, Kyriakakis & O’Byrne, *supra* note 118, at 121–24.

124. *See supra* notes 39–43 and accompanying text (describing the core principles of the CRC).

125. *See* General Comment No. 16, *supra* note 47, at 5–8, ¶¶ 12–23.

126. *Id.* at 8–10, ¶¶ 24–31.

127. *Id.* at 10–11, ¶¶ 32–37; *id.* at 14–16, ¶¶ 49–52.

128. *Id.* at 11–13, ¶¶ 38–46.

129. *Id.* at 6, ¶ 15.

130. *Id.* at 15, ¶ 53.

ulatory agencies that oversee the implementation of those standards.¹³¹ Most notably, reflecting the approach of the Guiding Principles and the CRBP, General Comment No. 16 indicates that states “should require businesses to undertake child-rights due diligence” in order to “ensure that business enterprises identify, prevent and mitigate their impact on children’s rights.”¹³² The comment indicates that businesses should extend their due diligence throughout all of their operations, including activities of subsidiaries and business partners.¹³³ Finally, states are prompted to encourage and, if appropriate, require public reporting by business enterprises of their children’s rights due diligence efforts, especially by large businesses as a capacity-building and educative practice for businesses of all sizes.¹³⁴ In parallel to requiring due diligence by businesses, General Comment No. 16 incorporates the practice of CRIAs for state-based legislative and policy efforts.¹³⁵

Thus, the application of the business and human rights framework to children’s rights under both the CRBP and General Comment No. 16 requires the centering of children’s interests in business strategy and the evaluation of business operations on the range of issues that confront businesses, not just those that put children most at risk or involve them as consumers of products or users of services.

II. IMPLICATIONS OF CENTERING CHILDREN’S INTERESTS

The corporate responsibility to respect children’s rights and the corporate commitment to support children as important stakeholders in business and as rights holders requires firms to center the core principles of the CRC. They must particularly focus on the best interests of children. And they must effectively give children a voice, as well as the right to be heard and participate in decisions that affect them. Moreover, a move toward child-regarding business practices will by necessity orient businesses to a longer-term view than the often-prevailing focus on short-term returns. Yet there are serious questions about whether businesses have the capacity and expertise necessary to incorporate this sort of child-regarding perspective. This Part explores these implications and what it means to focus on the best interests of children, to extend to children the right to be heard, and to confront the deficits of expertise that are needed to shift in this direction.

131. *Id.* at 17, ¶ 61(a).

132. *Id.* at 17, ¶ 62.

133. *See id.*

134. *Id.* at 18, ¶ 65.

135. *Id.* at 21, ¶ 78.

A. Focusing on the Best Interests of the Child

As indicated in prior parts, a core principle of children's rights, and thus a central requirement for taking children's interests and needs seriously in business operations, is a focus on the best interest of children. The CRC states, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a *primary* consideration."¹³⁶ Consistent with that centering of the best interests of the child in the CRC, the CRBP and General Comment No. 16 place it at the core of businesses' responsibilities.¹³⁷ Any conceptualization of children as vital stakeholders in a business would also take account of their best interests. Nevertheless, to say only that could be an exercise in circular reasoning. If all it requires to take account of the best interests of children as a primary consideration is to think about what is in the best interest of children, it would be a core principle without any teeth. In other words, what exactly does it mean to center the best interests of children, and how is can a firm determine what those best interests are in any given circumstance? The CRC and its Optional Protocols, as well as a general comment by the Committee, provide important guidance. Moreover, "as a concept and a legal doctrine, the best interests principle far pre-dates the CRC," which allows for additional elucidation.¹³⁸

The most extended treatment of the best interests concept as it relates to the children's rights and business context is in the Committee's General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration.¹³⁹ According to the Committee, the concept of the best interest of the child is intended to reinforce the development of children by supporting their full enjoyment of all rights.¹⁴⁰

136. CRC, *supra* note 29, art. 3, ¶ 1 (emphasis added).

137. See CRBP, *supra* note 46, at 14 (identifying the best interests of the child as one of the "four core principles that should underpin any action concerning children, whether taken by governments, parents, communities or the private sector"); General Comment No. 16, *supra* note 47, at 6, ¶¶ 15–17.

138. Wouter Vandenhoe & Gamze Erdem Türkelli, *The Best Interests of the Child*, in THE OXFORD HANDBOOK OF CHILDREN'S RIGHTS LAW 205, 206 (Jonathan Todres & Shani M. King eds., 2020).

139. See Comm. on the Rts. of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, at 4, ¶ 5, U.N. Doc. CRC/C/GC/14 (May 29, 2013) [hereinafter General Comment No. 14].

140. See *id.* ("The full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and to promote his or her

As described in General Comment No. 14, the best interests concept has three characteristics: (1) as a substantive right, (2) as an interpretive principle, (3) and as a rule of procedure.¹⁴¹ First, its nature as a right flows directly from the concept's long history and its specific mention in Article 3 of the CRC. Second, as an interpretive principle, it requires that the interpretation that best serves children's interests should be chosen when ambiguity would allow alternative interpretations.¹⁴² Third, and most relevant to this discussion, is its character as a rule of procedure. In that sense, the best interests concept "requires a systematic consideration of how children's rights and interests may be impacted by proposed decisions or actions not only when they affect children directly but also when they do so indirectly."¹⁴³

Though General Comment No. 14 is largely targeted to informing states parties to the CRC how to incorporate best interests, it is explicitly not limited to states. The Committee notes that the objective of General Comment No. 14 is "to promote a real change in attitudes leading to the full respect of children as rights holders," which has implications for "[d]ecisions made by . . . the private sector, including profit and non-profit organizations, which provide services concerning or impacting on children."¹⁴⁴ Thus, it is sweeping in its application. The comment obliges states to ensure that the best interests of children are a primary consideration not only in states' own actions but also in actions by private sector entities when their decisions concern or impact children.¹⁴⁵

Nonetheless, the Committee recognized that the best interests concept is complex and its "content must be determined on a case-by-case basis."¹⁴⁶ As a result, the best interests concept is situational, context-specific, flexible, and adaptable to the particular needs of the child or children in question.¹⁴⁷ Importantly, the best interests analysis requires respect of the full panoply of a child's rights, and an adult's judgment of what is in the best interests of a child or children does not excuse or override that obligation; nor should the flexibility of the standard be abused by adult decision-makers to engineer a particular

human dignity:").

141. *Id.* at 4, ¶ 6.

142. *Id.* at 4, ¶ 6(b).

143. TÜRKELLI, *supra* note 38, at 27.

144. General Comment No. 14, *supra* note 139, at 5, ¶ 12.

145. *Id.* at 5, ¶ 14(c).

146. *Id.* at 9, ¶ 32.

147. *Id.*

result.¹⁴⁸ Rather, in implementing the best interests analysis in decision-making, the comment provides implementation guidance, which lists the elements to be taken into account. They include: the child's view;¹⁴⁹ the child's identity;¹⁵⁰ preservation of the family environment and maintaining parental relations; care for the protection and safety of children; special care in situations of vulnerability, such as those involving children who are disabled, a member of a minority group, a refugee or asylum seeker, an abuse victim, shelter insecure, etc.; the right to health; and the right to education.¹⁵¹ These and other relevant interests must ultimately be subjected to an interdependent balancing analysis. But some considerations may be in conflict.¹⁵² Because children mature and develop in their capacities, the outcome of the balancing may change along with the evolution of children's physical, emotional, and educational needs and capabilities.¹⁵³

Therefore, the flexible balancing inherent in a best interest analysis requires some parameters and procedural safeguards. General Comment No. 14 identifies several: the right of the child to express their own views; the establishment of relevant facts by well-trained professionals; the need for timely decisions that are reviewable as children develop; the incorporation of professional expertise on child and adolescent development; legal representation when necessary; transparent and credible explanations for decisions; and CRIAs.¹⁵⁴ As to the last consideration, in the business context, the CRIA can be adapted to meet the expectations of the CRBP due diligence mandate while incorporating the best interests of children.

General Comment No. 14 recognizes some differences in this process when considering the best interests of an individual child versus those of a group of children or children generally. First, “[w]hen the interests of a large number of children are at stake, [decision-makers]

148. *Id.* at 3, ¶ 4; *id.* at 9, ¶ 34.

149. See *infra* Part B for a detailed treatment of issues related to this element.

150. Identity might include characteristics of a child such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, and personality. Preservation of identity is vital to a child's best interest. In particular instances, the relevant identity may be group-based. General Comment No. 14, *supra* note 139, at 13-14, ¶¶ 55-57. The term “children” in this context refers not only to children as individuals but also to children in general or to children who share a particular group identity. *Id.* at 7, ¶ 23.

151. See General Comment No. 14, *supra* note 139, at 13-17, ¶¶ 52-79.

152. *Id.* at 17, ¶ 81. For instance, the factors that suggest children are due special consideration and protection may be at odds with factors that are intended to empower children. General Comment No. 14 indicates that consideration of the child's age and maturity may assist in mediating such conflicts. See *id.* at 18, ¶ 83.

153. See *id.* at 18, ¶ 84.

154. *Id.* at 18-20, ¶¶ 89-99.

must find ways to hear the views of a representative sample of children and give due consideration to their opinions.¹⁵⁵ And in such instances, consultation with a multidisciplinary group of qualified professionals is important, particularly in the development of the CRIAs.¹⁵⁶

B. Appreciating the Right to Be Heard

The CRC's best interests of the child assessment requires the incorporation of a child's own views. Another core principle in the children's rights area requires that children be given an opportunity to express their views in all matters affecting them. However, it is not enough to give children the opportunity for voice; indeed, the CRC requires that children's views, once heard, be given appropriate consideration in matters that affect them.¹⁵⁷ This Subpart explores in greater detail what it means to provide children the opportunity to be heard, including the need to give those views due regard and to recognize the limits children may face in fulfilling this right.

1. Article 12 and the Right of the Child to Be Heard

The right of children to be heard and taken seriously is an essential value of the CRC.¹⁵⁸ Article 12 provides for the right of children to be heard in *all matters affecting them*, establishing that children hold rights independent of the rights derived from their vulnerability or dependency on adults.¹⁵⁹ Specifically, Article 12 states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.¹⁶⁰

While there had been considerable progress in implementing Article 12 since its 1989 adoption and 2002 reaffirmation, it remains apparent that the implementation of the child's right to be heard

155. *Id.* at 18, ¶ 91.

156. *Id.* at 19-20, ¶¶ 94, 99.

157. See *infra* Subsections B.1-2 for an overview of children's right to be heard.

158. Comm. on the Rts. of the Child, General Comment No. 12 (2009): The Right of the Child to Be Heard, at 5, ¶ 2, U.N. Doc. CRC/C/GC/12 (July 20, 2009) [hereinafter General Comment No. 12].

159. See *id.* at 8, ¶ 18.

160. CRC, *supra* note 29, art. 12.

continues to be impeded in many societies around the world.¹⁶¹ In 2006, responding to a need to better understand the requirements of Article 12 and how to implement it, the Committee held a Day of General Discussion themed “Speak, Participate and Decide – The Child’s Right to be Heard.”¹⁶² The discussion focused on exploring the contents and implications of Article 12.¹⁶³ Particular attention was given to the implications of Article 12 for child participation¹⁶⁴ in “all aspects of society.”¹⁶⁵ The objective of the discussion was to clearly identify the legal requirements under Article 12 and provide recommendations on how to effectively implement those requirements.¹⁶⁶ Thereafter, the Committee adopted and published General Comment No. 12 on the right of the child to be heard.¹⁶⁷

2. Relevant Requirements of Article 12

To fully understand the legal requirements of Article 12, the Committee conducted a legal analysis interpreting key phrases. First, the Committee explained, that use of the phrase “shall assure” in paragraph 1 is a legal term which leaves no room for discretion: State parties *must* assure the child be heard.¹⁶⁸ In doing so, State parties are obligated to take any and all appropriate actions to fully implement this right.¹⁶⁹

Turning to the phrase “in all matters affecting the child,” the Committee elaborated that a child must be heard if a matter under discussion affects the child.¹⁷⁰ The Committee refused to define “matters” by producing a list of subjects to be included; rather, the Committee explicitly supported a broad definition of “matters” and further deemed “matters” to “cover[] issues not explicitly mentioned in the Convention.”¹⁷¹ The

161. See General Comment No. 12, *supra* note 158, at 5–6 (noting implementation of children’s right to be heard has been impeded in most societies around the globe).

162. Comm. on the Rts. of the Child, Day of General Discussion on the Right of the Child to be Heard, at 1, ¶ 1 (Sept. 29, 2006) [hereinafter Day of General Discussion].

163. See General Comment No. 12, *supra* note 158, at 6, ¶ 5.

164. While the word “participation” is not in the text, it is widely understood that Article 12 embodies the right for child participation. See *id.* at 5, ¶ 3. The term participation has evolved and is now widely used to describe ongoing processes of considering children’s expressed views in decision-making, policymaking and preparation of laws and/or measures. See *id.* This includes information-sharing and dialogue between children and adults based on mutual respect. See *id.*

165. Day of General Discussion, *supra* note 162, at 1, ¶ 3.

166. See General Comment No. 12, *supra* note 158, at 6, ¶¶ 5–6.

167. *Id.*

168. *Id.* at 8, ¶ 19.

169. *Id.*

170. *Id.* at 10, ¶ 26. The Committee raised the concern that children are often denied the right to be heard even when it is obvious a matter is affecting them. See *id.* at 10, ¶ 27.

171. *Id.* at 10, ¶ 27.

Committee went further to state that the broad definition of “matters” must include “the social processes of their community and society.”¹⁷² Recognizing that children’s views may add relevant perspectives, the Committee explained that “[s]tates parties should carefully listen to children’s views wherever their perspective can enhance the quality of solutions.”¹⁷³

Once a child’s right to be heard is established, *how* the child will be heard needs to be addressed. Paragraph 2 states children shall be provided the opportunity to be heard “either directly, or through a representative or an appropriate body.”¹⁷⁴ Analyzing this phrase, the Committee laid out who can represent the child and the requirements of the representative. The representative can be the parent(s), a lawyer, or another person who has “sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.”¹⁷⁵ The representative must communicate the child’s view accurately and understand that they represent the interest of the child exclusively and not the interest of other parties.¹⁷⁶

The Committee recommended developing codes of conduct for representatives who are appointed to represent the child’s views.¹⁷⁷ Additionally, the Committee continuously recognized the need for training both those representing the child’s view and those hearing the views of children, acknowledging that “adults need preparation, skills and support to facilitate children’s participation effectively, to provide them, for example, with skills in listening, working jointly with children and engaging children effectively in accordance with their evolving capacities.”¹⁷⁸

172. *Id.*

173. *Id.*

174. Significantly, paragraph 2 applies specifically to a child being heard in any judicial or administrative hearing, *see id.* at 12, ¶ 35, however the mechanisms for how to be heard can be applied more broadly to include any venue, such as a boardroom.

175. *Id.* at 12, ¶ 36.

176. *See id.* at 12, ¶¶ 36, 37.

177. *Id.* at 12, ¶ 37.

178. *Id.* at 30, ¶ 134(g). *See generally id.* at 6, ¶ 7 (noting States parties will need to incorporate the general comment into training professionals working with children); *id.* at 14, ¶ 49 (noting States parties should provide training on Article 12 to professionals working with children); *id.* at 30, ¶ 134(g) (noting children can be involved in the training of adults); Day of General Discussion, *supra* note 162, at 4, ¶ 22 (encouraging consultation of children in developing school curricula); *id.* at 5, ¶ 27 (recommending institutions or children’s ombudsmen ensure children can easily voice their concerns); *id.* at 7, ¶ 39 (reminding States parties that the right of the child to be heard extends to all relevant settings without limitation).

Having established the right to be heard and how to be heard, the CRC requires children's views be given appropriate consideration. Under paragraph 1 of Article 12, the view of a child must be "given due weight in accordance with age and maturity of the child."¹⁷⁹ Under the Committee's analysis, this requires the view of a child to be "seriously considered when the child is capable of forming her or his own views"¹⁸⁰ and further clarifies that "age alone cannot determine the significance of a child's view."¹⁸¹ Thus, the due weight of the child's view must be evaluated on a case-by-case basis.¹⁸²

While age and maturity can be easily assessed for an individual child, that assessment becomes more difficult for a group of children expressing their views collectively. The CRC recognizes a distinction between an individual child and a group of children.¹⁸³ However, General Comment 12 states that "the best interests of children as a defined group have to be established in the same way as when weighing individual interests."¹⁸⁴ Therefore, if the best interests of a large number of children are at stake, the group must be given the opportunity to be heard and provide their views, and those views must be given due weight when making decisions.¹⁸⁵ Accordingly, the CRC provides both an objective of achieving the best interests of the child (through Article 3) and a methodology for reaching the goal of hearing either the child or the *children* (through Article 12).¹⁸⁶ Finally, General Comment 12 explains that the Committee has always interpreted procedures to include not only the participation of individual children and clearly defined groups of children, but also undefined groups of children.¹⁸⁷

3. Implementing Article 12

After clarifying the legal requirements of Article 12, the Committee provided the basic requirements for implementing the right of the child to be heard.¹⁸⁸ Any process involving a child's right to be heard and participate must adhere to the following nine characteristics:¹⁸⁹ (1) Transparent and informative—fully inform children of their right to

179. See General Comment No. 12, *supra* note 158, at 11, ¶ 28.

180. *Id.*

181. *Id.* at 11, ¶ 29.

182. *See id.*

183. *Id.* at 5, ¶ 9.

184. *Id.* at 15, ¶ 73.

185. *Id.*

186. *Id.* at 15, ¶ 74.

187. *Id.* at 18, ¶ 87.

188. *See id.* at 29–31, ¶¶ 132–34.

189. *Id.* at 29–31, ¶ 134(a)-(i).

express their viewpoint and how to participate; (2) Voluntary—children must not be forced to express their view or to participate; (3) Respectful—children’s views must be respected; (4) Relevant—the issues must be of real relevance to the child’s life; (5) Child-friendly—environments and working methods should be adapted to each child’s capacity; (6) Inclusive—participation must avoid existing patterns of discrimination and provide all children the opportunity to be heard; (7) Supported by training—adults need to be trained on how to effectively work with children; (8) Safe and sensitive to risk—adults must recognize the risk expression of views may involve and take steps to safeguard children from those risks; and (9) Accountability—follow-up and evaluation is essential, including with children regarding their participation and monitoring and evaluating children’s participation.¹⁹⁰

These characteristics have been identified as the nine requirements for implementing Article 12.¹⁹¹ Further applying these requirements, businesses have been advised to consider the requirements as an implementation framework when participating with children.¹⁹²

C. Extending the Focus to the Longer Term

A child-regarding orientation in business prompts a shift to more long-term thinking as well. Considering the best interests of children and giving them a voice and the opportunity to participate in decisions that affect those children can focus a business on sustainability considerations. Certainly, because children are generally expected to live longer than other stakeholder groups, their interests will be impacted by considerations further in the future as they deal with the impacts of business throughout their lifetimes. The CRBP notes this longer-view orientation. This is evident under Principle 7, which requires respect and support for children’s rights in relation to the environment and to land acquisition and use. The impacts of environmental degradation, climate change, and resettlement on children, though immediate, also reverberate far into the future.¹⁹³ In addition, long-term considerations related to marketing and advertising to children, which may be effective in the short term but harmful or off-putting down the road, are quite possible. Similarly, labor practices that may be cost effective in

190. *See generally id.* (discussing each of the nine strategies in greater detail).

191. *See id.* at 29–31, ¶¶ 132–34.

192. *See* GLOB. CHILD F., *Children’s Participation: How to Involve Children in Decision-Making*, 1, 10 (2020).

193. *See* CRBP, *supra* note 46, at 28; *see also* Gerber, Kyriakakis & O’Byrne, *supra* note 118, at 94 (“Some violations that affect populations generally . . . can result in irreparable harms that affect children more acutely than adults.”).

the short term can have long-lasting negative impacts on children.¹⁹⁴ And some practices may be more expensive in the short term but bring value both by respecting children's rights and preserving their interests in the long term.¹⁹⁵ That is not to say, however, that a child-regarding orientation requires a firm to eschew its long-term commercial viability in favor of the most expansive consideration of children's interests. The long-term view can consider the long-term sustainability of the firm itself while balancing the best interests of children. For example, in most cases, children's interests are not well served by a firm's decision that would put parents' livelihoods at risk by making the firm ultimately unprofitable and unsustainable for the long-term, even if that decision might serve other interests of children.

The shift to focus on children's interests is consistent with a more general sustainability outlook. The Association of Chartered Certified Accountants in the United Kingdom commented on this, saying:

Sustainability has become an established element of business strategy and planning. That being the case, no sustainability strategy can risk overlooking children and children's rights. If sustainability is about the future, what closer link to the future can a business have than through its interactions with children? How a business respects and supports children will be an important factor determining its future success.¹⁹⁶

Making the best interest of children a primary consideration also places businesses in line with the future orientation of United Nations' Sustainable Development Goals.¹⁹⁷ "After all, children's rights are the ultimate definition of sustainability."¹⁹⁸

194. Examples may range from obviously exploitative and harmful child labor practices or shortcuts on product safety to less obviously problematic but still impactful issues like health insurance benefits plan choices or expectations of long working hours for parent employees.

195. Examples could be providing childcare, making improvements to facilities to make them safer for children, or developing policies that allow parents more flexibility at work.

196. ASS'N OF CHARTERED CERTIFIED ACCTS., *supra* note 19, at 27.

197. See U.N. Dep't of Econ. & Soc. Affs., *The 17 Goals, SUSTAINABLE DEVELOPMENT*, <https://sdgs.un.org/goals> (last visited Mar. 21, 2021) [<https://perma.cc/6CHN-8U73>]; see also HÖÖK & LIGNELL, *supra* note 1, at 48 ("With the best interests of the child in mind, we now have the ability to bring child rights into any corporate environment, providing tailor-made support and solutions. This is good for business and good for children. The [CRBP] adds strength to the Sustainable Development Goals with what we believe is the ultimate definition of sustainability.").

198. HÖÖK & LIGNELL, *supra* note 1, at 6.

D. Recognizing Limitations of Institutional Capacity and Expertise

To center the best interests of children, honor the right of children to be heard, and shift the orientation of an organization to a long-term and sustainability-focused view—not to mention to engage in children's rights due diligence and prepare CRIAs—requires a firm to develop policies, processes, and personnel with capacities and expertise that most firms lack. Acting in the best interests of children requires expert assessment of children's characteristics, needs, and development.¹⁹⁹ The due diligence and CRIA processes may involve consultation and considerations from similar (and multidisciplinary) perspectives.²⁰⁰ Moreover, effecting children's right to be heard within the organizational structure of the firm requires both experience working with children and savvy business acumen. Expertise in child and adolescent development may not be represented in the typical project team, executive group, or board of directors.

Furthermore, most firms lack existing institutional capacity or will to adopt the child-regarding posture advocated in this Article and will need to develop it. Few companies have clear, comprehensive, and well-informed policies directed at their impacts on children. Consideration of such impacts tends to be separate and uncoordinated among business units. To the extent that most firms consider children as stakeholders, they do so as members of disaggregated groups rather than a coherent one; for instance, broader stakeholder groups might include children who are employees, consumers, or community members, rather than considering children as a unified stakeholder group in their own right.²⁰¹ In this approach, the particular and specific views of children are likely subsumed by the views of employees, consumers, and community members more generally. Thus, firms following this approach never consider the best interests of children in a unified way.

A Boston Consulting Group study of four hundred CEOs²⁰² commissioned by the World Child and Youth Forum in 2013 revealed some

199. See General Comment No. 14, *supra* note 139, at 19, ¶ 94.

200. See CRBP *supra* note 46, at 16 (“Opportunities to support children’s rights will often be identified through a business enterprises human rights due diligence processes, including through consultation with children and their families, *as well as with appropriate experts in children’s rights*” (emphasis added)); see also General Comment No. 14, *supra* note 139, at 19, ¶ 94 (noting a “multidisciplinary team” should be involved in the “formal assessment process”); *id.* at 20, ¶ 99 (noting CRIAs could be based on input from various sources).

201. Crane & Kazmi, *supra* note 8, at 581.

202. The CEOs were from 63 countries, half of them heading companies with a global business scope. GLOB. CHILD FORUM, *Summary of the Boston Consulting Group’s Global CEO Study 2013*, 1, 4 (2014). They were relatively evenly distributed among companies

of these gaps in expertise and institutional capacity while suggesting some reason for optimism regarding organizational will. The results suggested that few companies consider children's rights as central to their business.²⁰³ Most of the CEOs who responded to the survey did not see an economic incentive to employ efforts around children's rights. Those who did were largely instrumental in their thinking, considering possible positive impacts on brand value and customer acquisition through good public relations.²⁰⁴ The CEOs who were surveyed ranked children's rights as garnering the lowest prioritization among six major areas of sustainability focus, including environment, human rights (generally), corruption, community engagement, and labor standards.²⁰⁵

Slightly more than a quarter of the CEOs professed good knowledge of the CRBP.²⁰⁶ Only 16 percent of the respondents reported having in-house resources dedicated to children's rights.²⁰⁷ While those numbers are disappointing, 90 percent of the CEOs claimed to address children's rights in at least one way, though it was not clear that resulted in any meaningful action.²⁰⁸ Sixty percent of them said they were willing to increase their efforts in the future;²⁰⁹ however, 70 percent claimed they needed more examples of best practices and guidelines.²¹⁰ Finally, 73 percent of them would welcome more legislation in the area of children's rights, even if it resulted in greater cost.²¹¹

To move toward a children-centric approach for business will obviously require some significant effort, development of expertise, and institutional capacity building. However, by taking a child-centric approach, businesses will not only improve human rights generally, but they will also be able to address issues of sustainability more comprehensively.

characterized by yearly revenue as small (less than \$10 million), medium (\$10 million to \$1 billion), and large (more than \$1 billion). *Id.* Half were from service companies. *Id.* CEOs of manufacturing companies made up 22% of respondents, while financial and trade company executives comprised the remaining 28%. *Id.*

203. *Id.* at 5.

204. *See id.*

205. *Id.* at 6.

206. *Id.*

207. *Id.*

208. BOS. CONSULTING GRP., *Global CEO Study 2013 – Children's Rights and Business*, 1, 2 (2013).

209. *Id.* at 3.

210. GLOB. CHILD F., *supra* note 202, at 7.

211. *Id.*

III. THE CREATION OF CORPORATE GUARDIANS AD LITEM

As analyzed above, there is a growing international sense that businesses need to regard children as a legitimate and unified stakeholder group. Businesses must thereby treat children with the respect accorded to rights holders rather than simply cast them narrowly as potential victims or desirable consumers. Yet, as the previous Part noted, there are incredible challenges to such a shift in strategy and decision-making. More specifically, if the expectation is that businesses will consider the best interests of children and give them the opportunity to be heard and participate in that determination, that dramatic change in orientation reveals a chasm between current expertise and capacity and what is required to institute change.

This Part asserts that the establishment of “corporate guardians ad litem” would help firms achieve the child-regarding orientation for which we have argued. Individuals serving as corporate guardians ad litem (“CGAL”) will be able to address the most notable of the institutional capacity and expertise gaps. This proposal draws by analogy from the long-standing practice in courts to determine and represent children’s best interests and to provide voice to children in legal proceedings.

This Part proceeds with an explanation of the existing conceptualization of guardians ad litem, the proposed corporate guardian ad litem model, and its various forms, which are dependent on the size, structure, and resources of firms. This Part closes with a recognition and response to critiques that the proposal is likely to elicit.

A. Traditional Guardians ad Litem

Due to their legal incapacity, children do not have the ability to represent their own interests in court and cannot initiate or defend lawsuits without adult assistance.²¹² Consistent with CRC Article 12 and General Comment No. 14, guardianship law addresses the rights of all children affected by litigation to have their voices heard and their best interest protected with the assistance of a representative: the guardian ad litem (“GAL”). Traditionally, a GAL is an individual appointed by the court to represent the best interests of a legally incapacitated person

212. See Jonathan O. Hafen, *Children's Rights and Legal Representation – The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 424–25 (1993) (noting state laws reflect children lacking the capacity to represent their own best interests); see also Michael A. Olivas, “*Breaking the Law*” on Principle: An Essay on Lawyers’ Dilemmas, Unpopular Cases, and Legal Regimes, 52 U. PITT L. REV. 815, 826 (1991) (“[M]ost civil and criminal codes presume children are incapable of making legal judgments on their own.”).

during a particular litigation.²¹³ The evolution of guardianship law has established the authority of the court to appoint GALs for children in court cases to represent and protect their best interests.²¹⁴ There are two types of cases where a child may need a GAL: (1) when the child is a party to the lawsuit, and (2) when the child is not a party but the outcome of the litigation affects them.²¹⁵

1. Evolution of Guardianship in the United States

The law of guardianship has ancient roots, originated in Greek and Roman law,²¹⁶ subsequently incorporated into English common law.²¹⁷ Looking to the United States' history with GALs, the modern-day concept has evolved since its use in English common law, abandoned economic motives in favor of child welfare.²¹⁸ By the late nineteenth century, appointment of a GAL in US courts was well established. In cases where an infant sues or is sued, a guardian ad litem would be appointed.²¹⁹ At the turn of the twentieth century, the new

Federal Equity Rules of 1912 included Rule 70, providing a procedure to appoint GALs for infants and incompetents.²²⁰ Federal Equity Rule 70 was then incorporate into the Rule 17 of the Federal Rules of 1938.²²¹ Specifically, Rule 17(c) stated:

INFANTS OR INCOMPETENT PERSONS. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may

213. See *Guardian Ad Litem*, BLACK'S LAW DICTIONARY, 1, 57 (11th ed. 2019).

214. See *infra* Subsection 1 for an overview of the evolution of guardianship law.

215. See Howard A. Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 257–59 (1991).

216. See A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L.J. 33, 40–47 (1999) <https://theelderlawjournal.com/wp-content/uploads/2019/04/Ten-Years-After-Where-Is-the-Constitutional-Crisis-with-Procedural-Safeguards-and-Due-Process-in-Guardianship-Adjudication-1.pdf> (providing significant background on the role of guardianship in both Greek and Roman cultures).

217. See Richard.H. Helmholz, *Roman Law of Guardianship in England, 1300–1600*, 52 TUL. L. REV. 223, 231 (1978); see also Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 291 (1998).

218. Cynthia Grover Hastings, *Letting Down Their Guard: What Guardians Ad Litem Should Know About Domestic Violence in Child Custody Disputes*, 24 B.C. THIRD WORLD L.J. 283, 289 (2004).

219. George Whitworth Hoyt, *The Guardian Ad Litem*, 19–20 (1896) (LLB thesis, Cornell University) (on file with the Cornell University Law Library).

220. John E. Kennedy, *Federal Civil Rule 17(b) and (c): Qualifying to Litigate in Federal Court*, 43 NOTRE DAME L. REV. 273, 280 (1968) (citing JAMES LOVE HOPKINS, *THE NEW FEDERAL EQUITY RULES ANN.* (6th ed. 1929)).

221. See *id.*

sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian *ad litem*. The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.²²²

While Rule 17(c) established the current statutory authority of federal courts' power to appoint guardians, it did not mandate the appointment of a GAL.²²³

The 1967 US Supreme Court case of *In re Gault* established for the first time that children have a constitutional right to counsel in juvenile delinquency proceedings.²²⁴ Subsequently, the use of guardians ad litem in protecting the best interest of children in litigation gained significant momentum.²²⁵ In the 1960s and 1970s, as divorce rates increased and the concern over child abuse in the family grew, so did the importance of GALs.²²⁶ In response, the US Congress passed the Child Abuse Prevention and Treatment Act of 1975 (CAPTA).²²⁷ CAPTA further encouraged the use of GALs in child abuse and neglect cases by providing federal funding to states to appoint GALs to represent abused and neglected children.²²⁸ With the escalation of custody disputes due to rising divorce rates and the creation of no-fault divorces, the negative consequences on children's emotional and psychological well-being became a widespread social concern.²²⁹ Judges responded by appointing GALs for minors in order to protect the best interests of the child;²³⁰ thoroughly establishing authority of the court

222. FED. R. CIV. P. 17(c) (1938) (amended 2014).

223. See Donna S. Harkness, "Whenever Justice Requires": Examining the Elusive Role of Guardian Ad Litem for Adults with Diminished Capacity, 8 MARQ. ELDER'S ADVISOR 1, 2-3, 2 n.7 (2006) (noting federal courts appoint GALs pursuant to Rule 17(c)); *id.* at 12 n.55 (noting appointment of GALs under Rule 17(c) is discretionary).

224. *In re Gault*, 387 U.S. 1, 41 (1967) (holding the Due Process Clause of the Fourteenth Amendment requires the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child in proceedings to determine the juvenile's delinquency which may result in commitment to an institution).

225. Hastings, *supra* note 218, at 289.

226. See *id.* at 290.

227. See Michael J. Dale & Louis M. Reidenberg, *Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated*, 35 NOVA L. REV. 305, 323 (2011) ("The origin of the GAL approach to child protection is the federal Child Prevention and Treatment Act of 1975[.]").

228. *Id.* (quoting 42 U.S.C. § 5106(a)(b)(2)(xiii)).

229. Hastings, *supra* note 218, at 290.

230. *Id.*

to appoint a GAL to protect a child's best interest in any case where the child may be affected by some form of ongoing civil litigation, not only when they are a named party.²³¹ The modern-day concept of GALs was fully recognized.

2. Representation of the Child

Once it is established that a child may be affected by the outcome of litigation and the child's best interests need protection, the court may appoint a GAL to represent the child.²³² The selection of the GAL is generally at the discretion of the court; however, some states require prospective GALs to demonstrate or be certified to possess a certain expertise.²³³ Once appointed, the role and duties of the GAL vary greatly from state to state, subject to one fundamental principle: the GAL must protect the best interests of the child.²³⁴

a. *The Role and Duties of Guardians ad Litem*

While the role of GALs remains disputed,²³⁵ there are two main approaches: one asserts the role is to act as factfinder and reporter to the court, and the other contends the role is to act as an advocate.²³⁶ Ideally, guardians ad litem should fulfill both of these roles by being factfinders, using those facts to objectively evaluate the best interest of the child, and then advocating for those interests when reporting and making recommendations to the court.

As factfinders, GALs are viewed as the investigators of the court.²³⁷ As investigators, GAL duties include:

231. Davidson, *supra* note 215, at 258.

232. *See id.* at 257–59 (noting the court may appoint a GAL to protect the child's interests even if the child is not a party to the litigation).

233. *See infra* text accompanying notes 247–248.

234. *See generally* Kelly Crowe, *Statutory Provisions for Guardians Ad Litem in Guardianship Proceedings*, 39 BIFOCAL 94, 94–95 (July-Aug. 2018) (discussing how the roles of a GAL vary from state to state).

235. *See* Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 1014 (2006) (discussing the results of a fifty-six US jurisdictions survey revealing no two jurisdictions took identical approaches to the role of GALs).

236. *See* Crowe, *supra* note 234, at 94–95 (discussing the two competing philosophies).

237. The most common role for a GAL is the investigator role. Marcia M. Boumil et al., *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 46 (2011) (citing Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 262 (1998)). Generally, four other types of roles for GALs exist, including mental health evaluator, next-friend attorney, mediator, or a hybrid child's attorney. *Id.* (citing Lidman & Hollingsworth, *supra*, at 277).

[R]eviewing documents, reports, records and other information relevant to the case, meeting with and observing the children in appropriate settings, and interviewing the natural parents, foster parents or kinship caregiver, healthcare providers, such as doctors, hospital personnel, therapists for both children and parents, and any other person, such as school personnel, with knowledge relevant to the case.²³⁸

In other words, GALs are required to collect and examine evidence relevant to how the litigation, or outcome of litigation, may affect the child. This is the point when a child's voice will be heard, with legislators recognizing that part of determining what is in the minor's best interest is considering "the minor's preferences to the extent actually known or reasonably ascertainable by the guardian."²³⁹

In the role of the GAL as an advocate for the child's best interests, the GAL is an agent of the court and the duty conferred onto the GAL by the court is to advocate for the best interest of the child. While specific duties of the GAL differ by state, the requirement of evaluating the best interest of the child does not.²⁴⁰ As an objective standard, the evaluation of "best interest" is based more on what the child needs rather than what they or other parties to the lawsuit may want.²⁴¹ Therefore, unlike the role of an attorney, which is to advocate for their client's wishes, whatever those wishes may be, GALs advocate for the best interest of the child, sometimes *despite* the wishes of the parties.²⁴² For example, in evaluating the best interests, the Uniform Marriage and Divorce Act's model states that all of the following factors shall be included when determining the best interest of the child:

1. the wishes of the child's parent or parents as to his custody;
2. the wishes of the child as to his custodian;
3. the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
4. the child's adjustment to his home, school, and community; and

238. Boumil et al., *supra* note 237, at 46 (2011) (quoting Juvenile Court of Banks, Barrow, and Jackson Counties, State of Georgia, Piedmont Judicial Circuit Standing Order, *In Re: Attorney-Guardian ad Litem*, (Feb. 2, 2009)).

239. UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS ACT § 209(b)(7) (UNIF. L. COMM'N 2017).

240. *Id.* at § 115 cmt.

241. *See* Crowe, *supra* note 234, at 94 (noting the best interests standard is objective and based more on what the party needs than what the party wants).

242. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS ACT, *supra* note 239 at § 115 cmt. (explaining the difference between a guardian ad litem and an attorney for a respondent, and noting why the same person should not take on both roles).

5. the mental and physical health of all individuals involved.²⁴³

Thus, while the wishes of the parents (parties to the lawsuit) and the wishes of the child are taken into consideration, they are only part of the best interest of the child determination. If other factors, such as mental and physical health, conflict with the wishes of the parties, a GAL may determine the best interest of the child to be contrary to the parties' wishes.

Once the GAL examines all the evidence, the GAL will summarize the findings and generate a report for the court. Some states require the GAL to file a recommendation with the court.²⁴⁴ Recommendations are meant to inform the court of how the best interest of the child will be affected by the court case and what decision of the court would be best in respect to those interests.²⁴⁵

b. Expertise Required of a Guardian ad Litem

Currently, there is no uniform expertise requirement for becoming a GAL. However, there is an agreed upon belief on who should *not* be a GAL: anyone with a conflict of interest, such as the attorney representing the minor.²⁴⁶ In contrast, *who* can be appointed as a GAL, the training and experience required of the GAL, and the responsibilities of the GAL all vary greatly within the United States. Some states require the GAL to be an attorney, while others require GALs to be an attorney with a certificate in a GAL program or be an attorney with additional specialized training.²⁴⁷ Other states, such as California, require GALs to be a mental health professional in the state and obtain

243. UNIF. MARRIAGE AND DIVORCE ACT § 402 (1973).

244. See, e.g., CHILD'S BUREAU, *Representation of Children in Child Abuse and Neglect Proceedings*, 1, 23–24 (2018), <https://www.childwelfare.gov/pubpdfs/represent.pdf> [<https://perma.cc/4CXJ-3VJU>] (noting GALs must either be present in court or file written recommendations to the court in Florida).

245. See Charles T. Cromley, Comment, “[A]s Guardian Ad Litem I’m in a Rather Difficult Position,” 24 OHIO N.U.L. REV. 567, 576 (1998) (citing 42 USC.A. § 5106a(b)(2)(A) (ix)(II) (1988)).

246. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS ACT, *supra* note 239 § 115 (noting the GAL “may not be the same individual as the attorney representing the [minor].”).

247. Many states require an attorney. Florida requires an attorney in good standing with the Florida bar or certified by a Florida GAL program or a not-for-profit legal aid with a statewide training program. See Kevin E. McCarthy, *Guardians Ad Litem – Laws in Other States*, CONN. GEN. ASSEMBLY (Feb. 6, 2013), <https://www.cga.ct.gov/2013/rpt/2013-R-0099.htm> [<https://perma.cc/SPS4-T2RH>]. Alternatively, some states have requirements that can be waived by judges, such as Maryland, which requires the GAL to be an attorney who has at least six hours of training in specific topics, but the court has authority to waive the requirement. *Id.*

additional specialized training and experience prior to being appointed as a GAL.²⁴⁸

B. The Corporate Guardian ad Litem

Drawing from the use of GALs to represent and present the best interests of children in legal proceedings, firms can and should adapt a similar model to incorporate children's interests and rights into the business environment. To do so, corporations or designated third parties would appoint corporate guardians ad litem (CGAL). Like their legal counterparts and consistent with CRC's best interests concept, these CGALs would determine the best interests of children on a case-by-case basis, relying on expertise (either their own or through consultation) to establish the relevant facts, considering the particular characteristics of the children affected, and consulting with them to ensure their right to be heard.

Depending on size, resources, initiative, and commitment of the firm, CGALs could fill one or more of three distinct roles. For those firms that are ready to commit to a high-level, strategic focus to children's interests, a seat on the board of directors could be reserved for someone with expertise to sit as a director-level CGAL.²⁴⁹ That person's responsibility on the board would be to serve as the conduit of children's participation and right to be heard in board-level decisions that affect them. A CGAL on the board would also guide and advise the board from that position of expertise about best interests assessments the board should be doing and to perform due diligence when necessary.

To ensure that the director-level CGAL is fulfilling the responsibility to determine and represent children's interests, the board should rely on periodic evaluations of the director-level CGAL by independent third parties, likely NGOs or expert groups, whose missions are devoted to children's rights and sustainability. Otherwise, the position might be subject to capture and substitution of the best interests of children by the incumbent's own judgment or other strong interests.²⁵⁰ The

248. Under California law, a GAL must be a mental health professional who has forty hours of education and training in twenty-one areas and has participated in at least four custody evaluations within the prior three years. *Id.* Following this, the GAL must complete an additional eight hours of training in the twenty-one areas, and domestic violence training. *Id.*

249. See Crane & Kazmi, *supra* note 8, 582–83 (applying a model of corporate responsibility orientation to the incorporation of children's interests and indicating that this type of involvement would be "strategic" and "civil," the highest levels of orientation) (citing Simon Zadek, *The Path to Corporate Responsibility*, HARV. BUS. REV., Dec. 2004, at 125–32.).

250. See generally Vandenhole & Türkelli, *supra* note 138 (arguing that the flexible and

earlier-cited CEO study by the Boston Consulting Group revealed that board members are the most important influencers in the firm.²⁵¹ Thus, a director-level CGAL would provide both practical expertise and leadership and represent the child-regarding orientation of the firm.

At the day-to-day managerial level,²⁵² a firm could appoint an officer-level CGAL. The most effective form of this model would be a C-level executive with a direct report line to the CEO, rather than placing the officer within some specialized corporate social responsibility or sustainability functional area where the focus on children's interests would likely be subsumed or marginalized. The officer-level CGAL, like the director-level version, should bring to the job a particular expertise in child and adolescent development, experience working with children, and credibility in the corporate environment.²⁵³ This CGAL position could take primary responsibility for leading the children's rights due diligence and CRIA processes, calling on past experience to consult with relevant experts in various disciplines to inform the best interests assessment and to ensure that representative children's voices are provided the opportunity to be heard.²⁵⁴ The position should be subject to key performance indicators and evaluation metrics that focus specifically on how well the CGAL has represented children's rights and interests, rather than typical officer performance metrics.²⁵⁵

case-by-case nature of the best interests of the child makes it vulnerable to manipulation and bias).

251. See GLOB. CHILD F., *supra* note 202, at 7.

252. See Crane & Kazmi, *supra* note 8, at 582–83 (referencing a “children’s champion” or “child protection officer” as a role that could help a firm fulfill the managerial corporate responsibility orientation regarding children’s interests).

253. At one point in time, IKEA, the Swedish furniture and accessories company, appointed a Children’s Ombudsman, who also served as the communications manager. See Maurice Lévy, Mike Eskew, Wulf H. Bernotat, & Marianne Barner, *Who Owns the Long Term?: Perspectives from Global Business Leaders*, HARV. BUS. REV. (2007). Eventually, the individual was promoted to Senior Advisor for Sustainability, and the position of Children’s Ombudsman apparently was discontinued. See *Kickstarting Change*, IKEA LIVE: HOME AND IDEAS FROM IKEA FAMILY, 53 (2012), <http://docshare04.docshare.tips/files/27336/273369745.pdf> (identifying former Children’s Ombudsman, Marianne Barner, as Senior Advisor Sustainability). Nonetheless, IKEA has a high-level and public commitment to children’s rights, stating, “[a]t IKEA we say children are the most important people in the world.” *Id.* at 52, <http://docshare04.docshare.tips/files/27336/273369745.pdf> (quoting Steve Howard on *The Business of Change*); see also IKEA SUSTAINABILITY STRATEGY - PEOPLE & PLANET POSITIVE, IKEA 17 (updated 2020), <https://gbl-sc9u2-prd-cdn.azureedge.net/-/media/aboutikea/pdfs/people-and-planet-sustainability-strategy/people-and-planet-positive-ikea-sustainability-strategy-august-2020.pdf> [<https://perma.cc/2FKW-9AD6>] (“Children’s rights have always been at the heart of what we do, and we were part of the development, and now implementation of, the Children’s Rights and Business Principles.”).

254. See *supra* text accompanying notes 188–191.

255. One source of such indicators and metrics could be the codes of conduct for

Finally, to the extent that the size, scope, or commitment to a child-regarding orientation is not yet to the place that would allow the director- or officer-level CGALs to be in place, a firm could still make meaningful progress by appointing CGALs on a situational, ad hoc basis. For instance, one member of each project team could be tasked with acting as the CGAL for the project. Thus, in setting strategy on the project, during meetings, and in performance and execution of the project, there would always be someone at least attempting to ascertain and advocate for the best interests of children. This version of the model obviously sacrifices the level of deep expertise and productive capacity-building the other two versions would provide. But if it is accompanied by some commitment to training those who rotate through the temporary position of project-level CGAL over time, the accumulated experience should lead to greater ability, sensitivity, and expertise. Again, at least for purposes of the particular project, performance metrics for the individual filling the project-level CGAL should focus specifically on how well children's interests were identified and advocated. Nonetheless, in the absence of a centralized champion for children's interests, this version of the model runs the risk of failing to ever build sufficient institutional capacity to fully realize the benefits of the CGAL model for child-regarding business operations.

C. Critiques and Limitations of Corporate Guardians ad Litem

The corporate guardian ad litem model is by no means a perfect solution to capturing and voicing the interests of children vis-à-vis corporations. Thus, it is subject to reasonable critique. Prior to concluding, this Article addresses two such critiques.

First, unlike GALs who dedicate themselves to an individual child or set of siblings, CGALs would be required to be a voice for all children—both those within the company's nation of origin and outside. Determining that voice will be difficult because children in general and even in specific groups who may be particularly impacted by certain initiatives or projects of a business are not monolithic. Thus, it is fair enough to ask what it means for a CGAL to represent "children's interests" in this context.

To be sure, a case-by-case consideration that takes into account the unique needs and characteristics of a child is a foundational element of the best interests analysis. And if children are supposed to be heard and have the opportunity to participate in decisions affecting them, how

representatives who are appointed to present children's views. *See supra* note 177 and accompanying text.

could that be done by a CGAL facing a business impact that is national or global in scope? However, these are not questions unique to the CGAL model. These issues are baked into the process of a best interests analysis and the right to be heard and participate anytime a broader group of children or children in general are the subject of that analysis. General Comment No. 14 and General Comment No. 12 account for these instances, which of course also confront states actors with relative frequency.²⁵⁶ When the group of children impacted is large or undefined, the right to be heard should be facilitated by the CGAL by soliciting input from a representative sample of children, taking into account various means assisted by technology by which those opinions can be broadly collected.²⁵⁷ Indeed, the process by which the CRBP were developed modeled this approach.²⁵⁸

This critique is endemic to centering the best interests of children anytime an action has the potential for broad impact, whether in business or in government. It is not trivial, and the response provided above is not simple or easily accomplished. Indeed, the solution relies on the expertise and institutional capacity that this Article argues and is often otherwise lacking in firms, which has led us to recommend the CGAL model. As such, this Article's recommendation both highlights and effectively addresses this critique.

Second, one might argue that the appointment of any version of the CGAL runs the risk of marginalizing the focus on children by concentrating the responsibility for it in a single individual or position, rather than embedding it into the fiber of the organization at all levels. No doubt, in a firm otherwise uncommitted to reorienting its focus on children, this is a clear and present danger. Nevertheless, this Article does not recommend that the CGAL model should be used in isolation

256. See General Comment No. 14, *supra* note 139, at 9, ¶ 32 ("For collective decisions—such as by the legislator—, the best interests of children in general must be assessed and determined in light of the circumstances of the particular group and/or children in general."); *id.* at 10, ¶ 39 ("Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child's best interests. If harmonization is not possible, authorities and decision-makers will have to analyze [sic] and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations.").

257. See *id.* at 18, ¶ 91.

258. See *supra* notes 97–101 (describing the consultative process used in the development of the CRBP).

from or to the exclusion of the broader corporate responsibility to respect children's interests and rights and to support their realization.

As indicated in the CRBP, the responsibility to respect children's rights includes a policy commitment from the most senior level of the business, which is communicated internally and externally and is embedded in relevant policies and procedures throughout the organization.²⁵⁹ In addition, the findings of any due diligence process should be integrated across all relevant business functions.²⁶⁰ Thus, if a firm is properly committed to children's rights, it would not isolate and marginalize that commitment. Rather, the CGAL would spearhead efforts in response to any findings, bringing coherence and accountability to the firm's commitment to children.

CONCLUSION

This Article not only synthesizes how the international community is beginning to advance its understanding of the role children *should* play vis-à-vis business; it also proposes a radical, yet feasible, path to give children a voice so that they may influence corporate decision-making. While far from an all-encompassing solution, the corporate guardian ad litem model can assist in the reorientation of business to a more child-regarding approach, which respects children's rights, elevates children to the type of stakeholder status they deserve, and advances a longer-term view by business in support of sustainability.

* * *

259. CRBP, *supra* note 46, at 14.

260. *Id.* at 15.