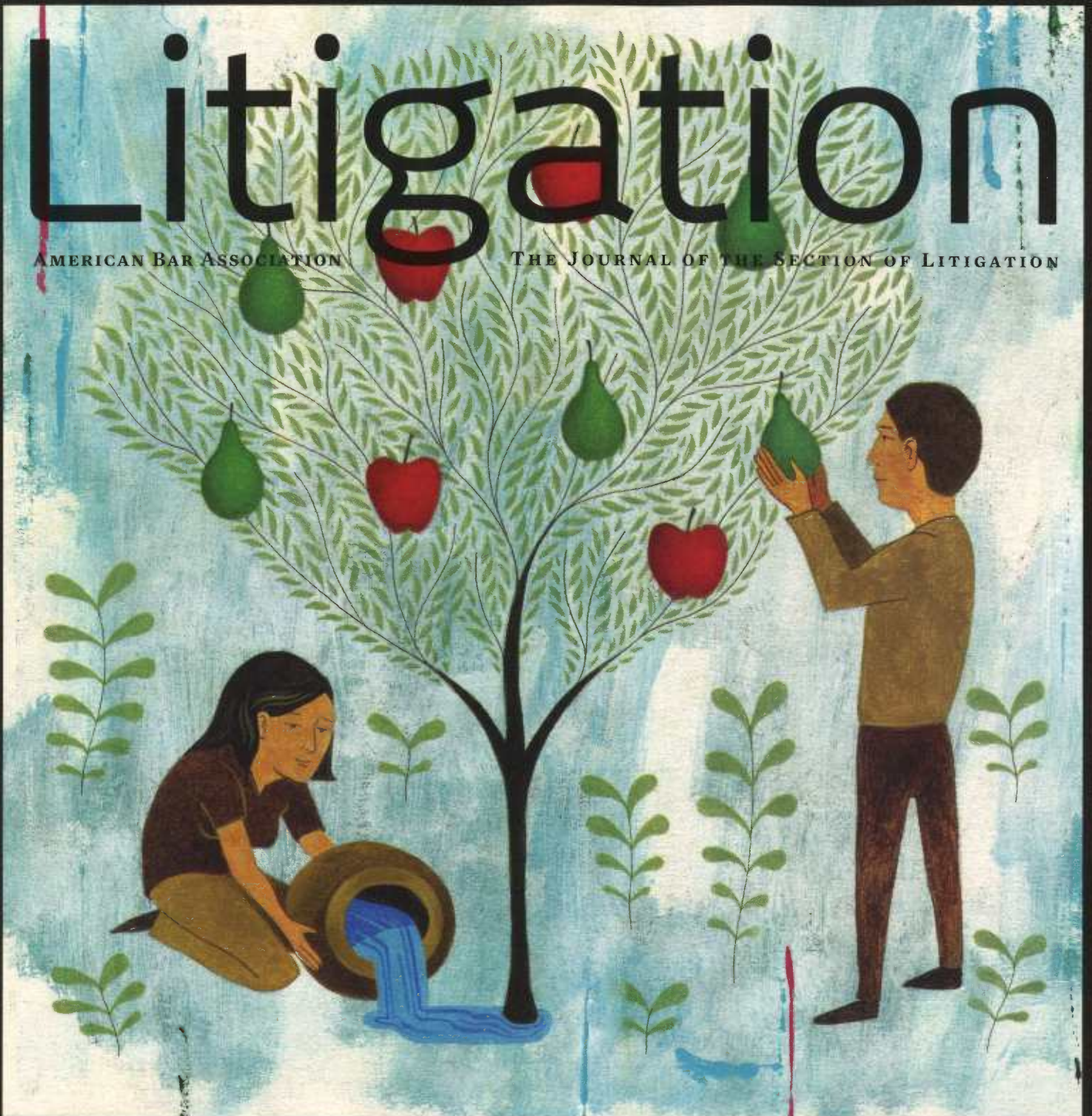


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UNDERSTANDING FOREIGN STATES' MANDATORY CORPORATE SOCIAL RESPONSIBILITY REPORTING

MIKHAIL REIDER-GORDON

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Henry Thoreau once mused, "What we call wildness is a civilization other than our own." Understanding other countries' national mores, standards, and priorities as they relate to human rights, the environment, labor practices, and other social and governance issues used to be the purview of the inquisitive scholar or traveler. For litigators representing business interests in the "wilderness" of other nations, in contrast, it was solely corporation law that dictated behavior. Little attention was paid to the positive or negative effects a foreign organization might have on the local population, rule of law, or ecosystem until the idea of corporate social responsibility (CSR) took root.

CSR has undergone a dramatic revolution—a revolution that should be front-of-mind for litigators working with transnational clients. The practice has

evolved from a nice idea or marketing opportunity to a business imperative mandating compliance. Today's CSR is characterized by enactments such as the California Transparency in Supply Chains Act, the Foreign Corrupt Practices Act, the UK Bribery Act, the pending Dodd-Frank Conflict Minerals Rules, the European Union's transparency and disclosure rules, and various other environmental and social laws and regulations. And with these new laws come new disclosure regimes.

CSR reporting is variously referred to as environmental, social, and governance reporting; integrated reporting; or Global Reporting Initiative compliance. Issues of nomenclature aside, they all share a similar focus on laws and business behavior at the intersection of three key areas: human rights (broadly

defined), impact on the environment, and how a company conducts itself with regard to corporate behavior such as bribery and labor laws. Disclosure is thus the name of today's CSR game.

Benefits and Risk of an Annual CSR Report

Compulsory or not, publishing an annual CSR report can both be beneficial and pose pitfalls. What is included in a company's CSR report may trigger government investigations, civil tort claims, and other actions. Failing to file, however, is in most countries a rapidly disappearing option. For example, in India, France, Brazil, and Malaysia, a listed company failing to file a CSR report runs the risk of being delisted. Those counseling companies doing work in these geographies must be particularly attuned to these evolving issues. Consider the following scenario.

Protestors amassed on Wednesday outside your client's headquarters in Paris. Their placards decried human rights abuses and called for an end to "the slave trade" at one of your client's Asia-based assembly plants. You had just finished a call with the general counsel when they phoned back to tell you that they had just been served with process by a nonprofit at their corporate offices in California. The suit was alleging that one of the company's most popular products, frequently touted for its green credentials because it was made with "90 percent recycled materials," was deceptive and that the client was engaged in "green washing."

The client prides itself on its reputation in the marketplace as an environmentally conscious corporation that is a great place to work. The company's annual report even had a section in it regarding efforts to source and incorporate recycled material into its products and touting its commitment to "treating all employees fairly" and its "effort to monitor its third-party

manufacturing operations in Asia.”

Later in the week, the senior vice president of Asian operations contacted general counsel to say that they had just received notice from an overseas securities regulator where their subsidiary was listed, informing them that because the company had failed to file the new mandatory CSR report, they were being investigated. Meanwhile, workers in the Asian assembly plant had gotten wind of the demonstrations in Paris and taken their story to the international press, alleging that local labor officials had been bribed to look the other way, allowing children to be hired on the assembly lines. By Monday, the company share price had dropped and appeared to be on the decline.

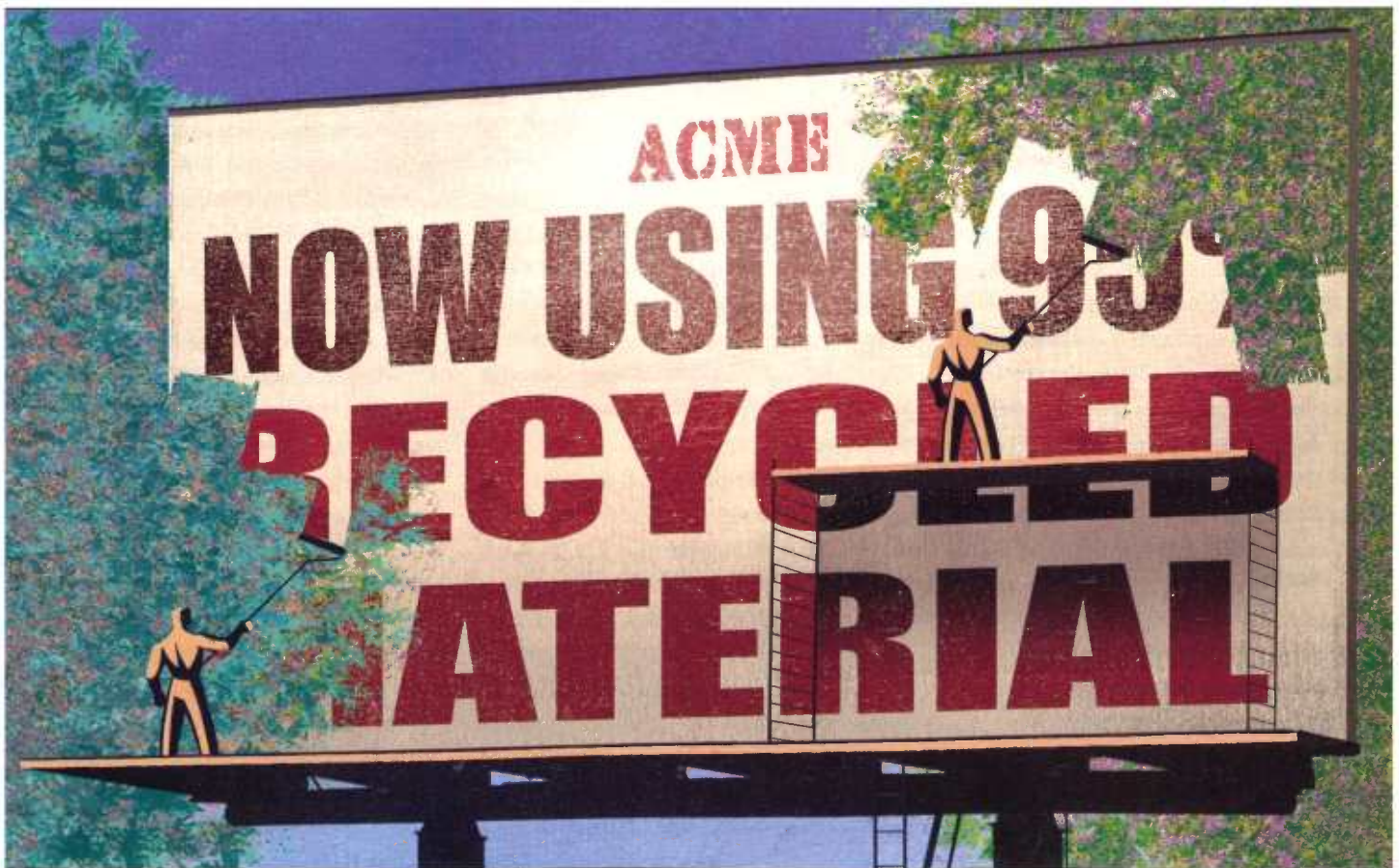
Consumer groups or human rights activists are frequently the first to raise a question or make an issue out of something a company has reported on, or failed to mention, in its CSR report. But

those inquiries can in turn prompt questions by authorities or regulators in host countries. An allegation of labor officials being paid to look the other way when children are involved or working conditions failing to meet standards can turn into a bribery investigation, prompting the interest of U.S. regulators as well as those in the host country. Conversely, an investigation into allegations of corruption may identify potential violations of labor rights or evidence of human trafficking. If a company has incorrectly claimed in its annual CSR report to have examined its supply chain and determined it clean, this could be grounds for a shareholder or consumer claim against the company for publishing false or misleading information. Corruption, human rights, environmental practices, and labor policies all roll up under CSR and increasingly are having material financial impacts on corporate balance sheets.

Truth or Consequences

If the company’s annual report touches on its CSR policy but fails to make mention of problems, boycotts can ensue and shareholder class actions may be launched against the company for failing to disclose critical information. (Consider, for example, 2012’s landmark \$100 million class action against cosmetic companies Estée Lauder, Avon, and Mary Kay over allegedly misleading “cruelty-free” claims). Attorneys counseling organizations issuing CSR disclosures must therefore ensure that the disclosures can be backed up by hard data.

In addition, if a company is listed on one of the exchanges that now require transparency but has failed to report fully and accurately the efforts it has made to meet CSR international norms (or has downplayed challenges in meeting CSR obligations), the company could be facing possible delisting,



prompting perhaps yet another shareholder lawsuit.

For example, in April 2010, the discount retailer Lidl was accused of false advertising over its claims that it promoted fair working conditions for workers in its supply chain. The Hamburg Consumer Protection Agency (Germany), supported by the European Centre for Constitutional and Human Rights and the nonprofit Clean Clothes Campaign, filed a civil suit against Lidl. The lawsuit alleged that the working conditions in Bangladeshi textile plants supplying Lidl did not meet internationally recognized standards and violated labor laws. Shortly after the lawsuit was launched (and, undoubtedly, after the company had expended significant resources on attorneys to conduct an internal investigation), Lidl agreed to retract its advertisements.

Mandatory CSR-related reporting already exists in Argentina, Austria, Belgium, Brazil, Denmark, China, France, Germany, Greece, India, Indonesia, Italy, Malaysia, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. Many directives of international institutions are now ratified by countries—for example, the United Nation's Guiding Principles on Business and Human Rights, ratified in 2011 (stating that all businesses have direct responsibility for *all* of the ways in which they have an impact and for preventing human rights abuses their actions may cause, while obligating them to ensure that adequate remedies exist to address reported abuses); mandatory environmental, social, and governance reporting efforts by the European Union (expected to be passed in 2013), the World Economic Forum, and the United Nations Declaration on the Rights of Indigenous Peoples. This means that between local country law and international treaties, many multinationals are obligated to comply with and report under multiple CSR reporting laws. That

wilderness of differing values in different countries can mean operating under conflicting and overlapping regulations, increasing the chance for violations of the disparate laws and follow-on investigations and litigation.

Increasingly, CSR policies have a direct impact on the legal department.

Many of the most recent international CSR reporting requirements have emanated from securities regulators. By way of illustration, in May 2008, the Shanghai Exchange issued the Shanghai CSR notice, informing all listed companies that, henceforth, they were expected to establish a CSR strategy and to file an annual report detailing what steps each company has taken to achieve its CSR elements (such as employee health and safety, and environmental quality). More recently, the Chinese Government's Assets Supervision and Administration Commission (SASAC) issued a directive in early January 2012 for sustainability reporting by all state-owned enterprises. Although the SASAC has not as yet specified a regime or framework for these companies to follow, Peng Hugang, head of the commission's Research Bureau, said the government expects all state-owned enterprises to publish CSRs by 2012. Spain, too, has just passed a Sustainable Economy Law (effective January 1, 2012), requiring all state-owned companies to produce sustainability reports and requiring all businesses with more than 1,000 employees to produce an annual CSR report and file it with the State Board of Corporate Social Responsibility.

Familiarity with the CSR reporting

standards required of businesses in the country or countries where your client is conducting business is crucial to building an advance defense via the CSR report. Corporate culture has typically removed both the general counsel's office and its external litigation team from CSR departments, lodging them in marketing, public relations, or even human resources. But increasingly, the CSR policies and the way in which a company discloses how it implements those policies have a direct impact on the legal department and, ultimately, the matters on which external litigators will defend the company. Stakeholders are increasingly sophisticated with respect to CSR reports and are checking internationally accepted reporting guidelines for comparison and benchmarking, meaning that companies and their counsel need to be cognizant of international norms of expected CSR behaviors and reporting.

The uptick in "name and shame" campaigns, consumer boycotts, shareholder lawsuits, and states willing to prosecute companies means that the risks involved in inaccurate disclosures cannot be ignored. Business trial lawyers as well as corporate counsel need to become conversant with human rights law, including anti-trafficking efforts, environmental law, and international mandatory CSR reporting standards, among other things. ■