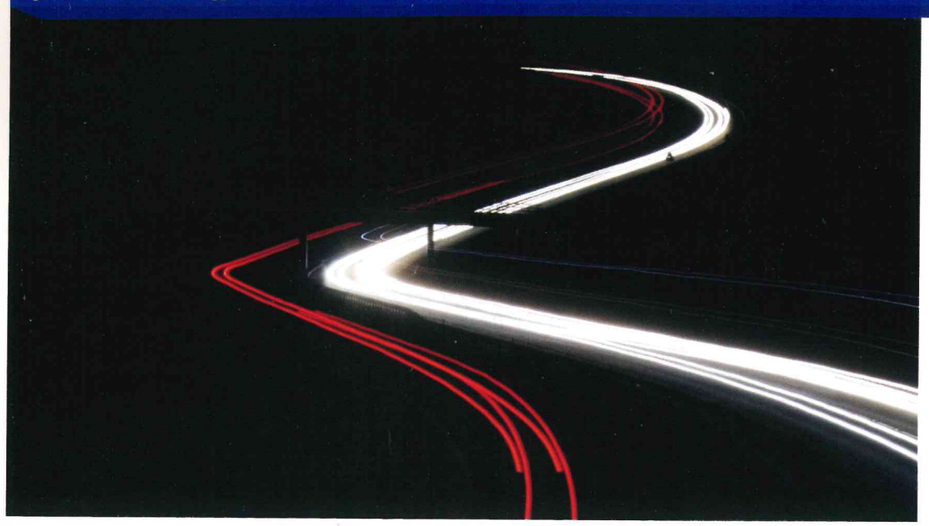


Business and human rights

Treaty road not travelled

John Ruggie explains why, at this time, a global treaty forcing companies to follow binding rules on human rights would not work and should not happen, despite calls from campaigners

Since July 2005, I have served as the United Nations secretary-general's special representative for business and human rights. My third report to the Human Rights Council has just been released. Drawing on 14 multi-stakeholder consultations and extensive research, it lays out a strategic policy framework for better managing business and human rights challenges.

The framework rests on three foundational principles: the state duty to protect against human rights abuses by business; the corporate responsibility to respect human rights; and the need for better access by victims to effective remedies.

The "protect, respect and remedy" framework itself is offered as the major recommendation to the Human Rights Council. It is intended to establish greater coherence and generate cumulative progress in the business and human rights domain. Under each of the framework's three principles, the report also addresses a broad range of specific measures, including changes in national laws and regulatory policies, international mechanisms and voluntary initiatives.

But there is one thing the report does not do: recommend that states negotiate an overarching treaty imposing binding standards on companies under international law.

Treaties form the bedrock of the international human rights system. Specific elements of the business and human rights agenda may become candidates for successful international legal instruments. But it is my carefully considered view that negotiations on an overarching treaty now would be unlikely to get off the ground, and even if they did the outcome could well leave us worse off than we are today.

This view may disappoint some stakeholders. Therefore, I am grateful for the opportunity to explain it.

Reservations

I have three main reservations about recommending to states that they launch a treaty process at this time. First, treaty-making can be painfully slow, while the challenges of business and human rights are immediate and urgent. Second, and worse, a treaty-making process now risks undermining effective shorter-term measures to raise business standards on human rights. And third, even if treaty obligations were imposed on companies, serious questions remain about how they would be enforced.

Human rights treaties can take a long time to negotiate, and still longer to come into force. Even soft law declarations that are not legally binding can take a generation to negotiate. For example, the Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly last year, was 22 years in the making.

We cannot simply tell victims of human rights abuses that rescue will be on the way in the year 2030 – if all goes well. Even if we were to go down the treaty route, we still need immediate solutions to the escalating challenge of corporate human rights abuses. UN high commissioner for human rights Louise Arbour has put this well, saying: "It would be frankly very ambitious to promote only binding norms considering how long this would take and how much damage could be done in the meantime."

A treaty-making process now risks undermining effective shorter-term measures to raise business standards on human rights

Professor John G Ruggie teaches at Harvard's Kennedy School and Law School, and is UN special representative for business and human rights. His third report to the UN Human Rights Council (UN document A/HRC/8/5) is available here www.business-humanrights.org/Links/Repository/965591

So, why not start the treaty-making process now, while simultaneously taking shorter-term practical steps? The challenges of business and human rights remain highly complex and the current consensus among states – which would have to negotiate, sign, and ratify any treaty – does not go far beyond "we need to do something about this problem". This poses at least four serious risks to achieving meaningful outcomes.

First, the strategic interplay between treaty negotiations and gaining state support for short-to-medium term solutions does not always work in favour of the latter. Where states are reluctant to do very much in the first place, as is the case for quite a few states in the business and human rights area, they may invoke the fact of treaty negotiation as a pretext for not taking other significant steps, including changing national laws – arguing that they would not want to "pre-empt" the ultimate outcome.

A second risk is posed by governments, non-governmental organisations and companies having limited capacity in this area. A treaty-making process, precisely because it could create legally binding standards, would demand greater attention and resources, to the probable detriment of practical and urgently needed innovations in the interim.

A third risk concerns the level of standards that would be incorporated into such a treaty. They would not match the highest voluntary standards today, but most likely reflect the lowest common denominator. Given the vast disparity that currently exists, this could be so low as to be counterproductive. In the wake of a treaty with low standards, pressure on all companies to perform at the highest voluntary levels – from NGO campaigns, socially responsible investments funds, consumer groups, and so on – would become less effective because companies could, and many would, respond that they were following newly pronounced international law.

Such a loss of social leverage would be even more probable, with worse effects, if a treaty with low standards were not ratified by enough states to become law.

Hard to enforce

Quite apart from these risks is the concern that treaties that are not or cannot be enforced rapidly lose legitimacy. I see four options for business and human rights.

One would be an international court for companies. But not even the most wishful of wishful thinkers believes that this is realistic for the foreseeable future.

Another is enforcement by host states – that is, where companies operate. But states that have ratified the existing human rights treaties already have the obligation to protect individuals within their territory or jurisdiction from corporate-related human rights abuses. If they are unwilling to discharge it, an additional treaty is unlikely to help. Moreover, while there may be a need to further clarify what legal obligations the state duty to protect vis-à-vis business entails, this isn't the sort of instrument treaty advocates have in mind. As for host states that have not ratified the existing treaties, it isn't self-evident why they would sign on to a new treaty imposing such obligations on companies. In short, the host state option might end up being either redundant or irrelevant.

A third option is enforcement by home states – where companies are incorporated or headquartered. But many if not most states are unlikely to embrace extraterritorial enforcement by others, claiming that it would constitute interference in their domestic affairs. Besides, home states are already legally permitted, if not necessarily willing, to take more extensive action to regulate overseas human rights harm by corporations based in them without arousing host state ire – as indicated in both my 2007 and 2008 reports. Pushing for new treaty obligations on extraterritorial enforcement, therefore, could backfire and reduce the scope of existing possibilities.

A final option would be to establish a new treaty body, as is the case for all other human rights treaties. If states agreed, companies would have to report on their human rights performance and the committee would express its views on compliance – which is what the "enforcement" powers of treaty bodies consist of.

Do the math

If this is the preferred approach, then the arithmetic needs to be explained. There are 77,000 transnational corporations, with about 800,000 subsidiaries and millions of suppliers – Wal-Mart alone has 62,000. Then there are millions of other national companies. The existing treaty bodies have difficulty keeping up with 192 member states, and each deals with only a specific set of rights or affected group. How would one such committee handle millions of companies, while addressing all rights of all persons?

Clearly some "sampling" procedure would have to be adopted, and that would become the object of political contestation. But even leaving politics aside, the sheer policy challenge of designing selection criteria for the universe of all businesses, only a tiny fraction of which is visible to the international community, is staggering.

None of these issues has been systematically addressed by advocates of an overarching treaty imposing binding international standards on companies; it is assumed that this must be the answer because the current system does not function well enough. I also believe that it is essential to strengthen the international human rights regime to bridge protection gaps in relation to business. But more readily achievable alternatives to the status quo exist, involving both mandatory and voluntary measures, which could be undermined by the risks described above.

In contrast, the proposed framework of "protect, respect and remedy" offers a platform for generating cumulative and sustainable progress without foreclosing further development of international law. ■

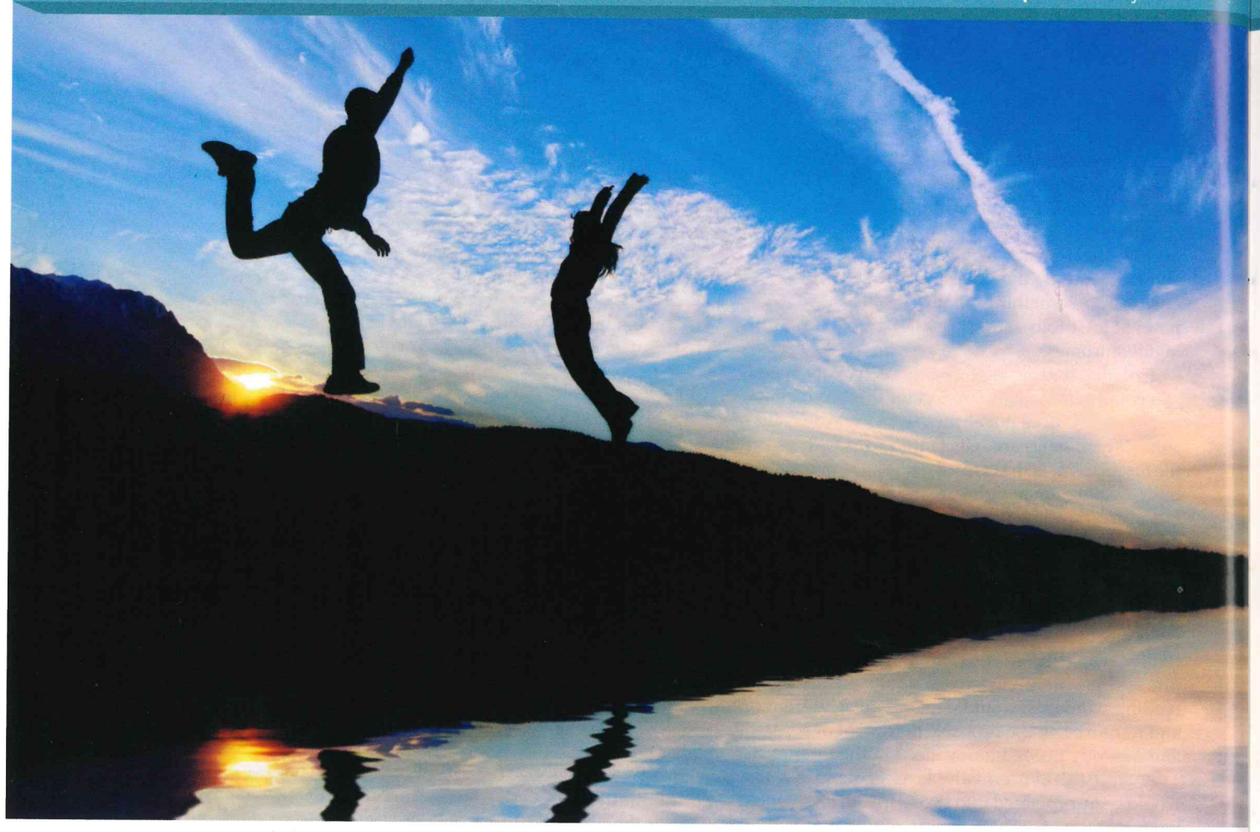
Ruggie: protect, respect and remedy

It is essential to strengthen the international human rights regime to bridge protection gaps in relation to business

Next month in Ethical Corporation

For more business and human rights analysis, read next month's Ethical Corporation for a **special report on the future for business and human rights** after John Ruggie's third report to the UN.

Plus: **Sir Geoffrey Chandler**, founder-chair, Amnesty International UK Business Group, 1991-2001, and formerly of Shell, on the strengths and weaknesses of Ruggie's proposed framework.



UN Global Compact

Is the Compact raising corporate responsibility standards?

No says Bart Slob, senior researcher at Dutch-based Somo and co-ordinator of GlobalCompactCritics.org

Yes, counters Georg Kell, executive head of the UN Global Compact

The Compact isn't tough enough

Bart Slob

Dear Georg,

When the Global Compact was created, in July 2000, several civil society organisations expressed their concerns about the UN partnering with business. Pierre Sané, Amnesty International's secretary-general at the time, said that for the Compact to be "effective and credible" there must be publicly-reported independent monitoring and enforcement via a sanctions system "so companies who are violating these principles cannot continue to benefit from the partnership".

Some questioned the Compact's assumption that the current form of globalisation could be made sustainable and equitable, the purely voluntary nature of the initiative, and the fact that some companies wrap themselves in the UN flag to "bluewash" their image.

Since 2000, you have adopted some measures to increase the credibility and effectiveness of the Compact, but unfortunately these measures have not led to higher standards of corporate responsibility.

The most relevant measures that have been implemented by the Compact in the past eight years are the policy on communicating progress and the grievance mechanism.

The policy on communicating progress requires participants to explain annually what they are doing to meet their commitment to the Compact's ten principles. Many companies fail to do this. Sanctions for such failure are unimpressive. Companies are deemed "inactive" only after failing to report within three years of signing up. The only immediate consequence for "non-communicating participants" is that they are marked as "non-communicating" on the Compact's website, denoted by a tiny yellow traffic triangle with an exclamation point in it.

"Measures to increase the credibility and effectiveness of the Compact have not led to higher standards of corporate responsibility" – Bart Slob

Another problem with the communications on progress is the quality and trustworthiness of the information provided. The information is often superficial, unclear and, in some cases, untrue. Transparency International in Argentina found in 2007 that companies reported a very large number of activities, many of which bore no relation to the ten principles of the Compact. In this way, the Compact unfortunately generates free publicity for companies that make a mockery of the flawed policy for communicating progress and do not seem to care about complying with international standards of corporate responsibility.

As for the grievance mechanism, its purpose is noble: "To promote continuous quality improvement and assist the participant in aligning its actions with the commitments it has undertaken with regard to the Global Compact principles." Despite this, complaints against Compact participants have not led to quality improvement or higher standards of corporate responsibility, for two reasons.

First, the mechanism lacks transparency. Your office does not divulge which companies are involved, who has made the complaints, or the specifics of the charges brought under the integrity measures. The public is kept in the dark about how many complaints have been raised since the creation of the grievance mechanism and how many companies have been removed from the list of participants as a result of conduct "detrimental to the reputation and integrity of the Global Compact".

Second, you limit the complaints procedure to instances that illustrate "systematic" or "egregious" abuses, yet these types of abuses are not clearly defined. This vague formulation makes it difficult for stakeholders to determine whether a breach has occurred, ie whether a company has failed to support and protect internationally proclaimed human rights or is complicit in human rights abuses.

The Compact could be an important stepping stone to the promotion of stricter, binding and universally acceptable standards, such as the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. As this initiative faded away, the Global Compact became the single UN-led effort in the area of corporate responsibility. John Ruggie, one of the Global Compact's architects, has declared that the UN Norms are dead. If this is indeed true, the UN needs to come up with something far more ambitious than the Global Compact to meaningfully and effectively address irresponsible corporate behaviour.

Kind regards,

Bart

Disclosure drives performance

Georg Kell

Dear Bart,

You are raising important issues and you are doing so with a deep understanding of the details. Unfortunately, you focus on a few trees and you don't seem to see the forest when assessing the UN Global Compact. Worse, you seem to fall victim to surreal projections of what the purpose of the Compact is and how it works.

Your main point is the old argument that the Compact does not work as a compliance-based system. As a matter of fact, the Compact never pretended to do so, nor was it designed as one. The fact that some observers continue to criticise the Compact for something it never pretended to be is remarkable. Ever since the inaugural launch on 26 July 2000, we have been very clear that the Compact is about learning, dialogue and partnerships. The UN does not endorse companies or their performance. Rather, it seeks to promote collaborative efforts, transparency and public accountability.

Our annual requirement to publicly report on progress made in the implementation of the Compact's principles (the "communication on progress") has led to

UN Global Compact for dummies

A beginner's guide to what the Compact is, and how it works.

What is the UN Global Compact?
A voluntary, principles-based initiative to encourage companies to follow responsible business practices.

What do member companies sign up to?
Companies agree to advocate the Compact's ten principles (which cover human rights, labour and environmental standards, and anti-corruption) and take steps to make them central to the way they do business.

How many companies have signed up?
The Compact has 3,800 members in more than 100 countries. It is increasingly popular in emerging markets, such as central and eastern Europe and China, where corporate responsibility is a relatively new concept.

How does the Compact get companies to follow its principles?
The Compact does this through 70 local networks, where member companies meet to share best practice with peers in the same region. These groups meet together in an annual Local Networks Forum. Every three years, the Compact holds its Leaders Summit, the most recent having taken place in July 2007.

How does it check that companies are making progress?
Every year, the Compact asks member companies to report on what steps they are taking to implement its principles, in so-called "communications on progress".

How does it check that companies are doing what they say?
The Compact does not verify whether companies are in fact doing what they claim in their communications on progress. As a non-binding, voluntary initiative, the Compact does not pass judgment on companies' performance against its principles. But since October 2006, 1,000 participants have been "delisted" – or named and shamed for failing to report on progress for two years running.

the de-listing of about 1,000 participants. True, there are great variations in the quality of reporting. But already it has helped to deal with free-riders and it has stimulated much social vetting and peer review. In addition, educators and financial analysts are increasingly using the information. The policy has also allowed us to team up with the Global Reporting Initiative and so help advance meaningful disclosure by companies on social and environmental issues on a global scale.

"The Compact is not a kangaroo court that passes judgment on issues we have neither the authority nor the detailed knowledge to address" – Georg Kell

Your concerns about our "grievance procedures" also miss the point. Yes, we do have a range of elaborate integrity measures, such as a procedure to encourage dialogue between participants and stakeholders on critical issues raised, as well as a strict policy on the use of our logo.

Increasingly, our local networks (of which there are more than 70) play a stronger role as facilitators in case of a conflict, and we support the existing mechanisms for dealing with complaints of the Organisation for Economic Co-operation and Development and the International Labour Organization. Through all these efforts, we promote transparency and practical solution-finding, and protect the UN brand from abuse. But the Compact is not a kangaroo court that passes judgment on issues we have neither the authority nor the detailed knowledge to address.

The Compact works on the assumption that public disclosure, leadership commitments and market-based incentives drive performance. Our first implementation assessment has confirmed that much progress has been made already in terms of building acceptance for the principles and driving them into organisations. As our research has also shown, serious implementation gaps still exist, particularly when it comes to ensuring that companies apply the principles to their supply chains and subsidiaries. Addressing these matters more effectively will be a major focus of our work as we move forwards.

Regarding your point about the UN Norms on human rights, I would remind you that the UN book on conventions is already about 2,000 pages thick! The issue is not that there is a lack of international guidance, but how to implement the existing guidance more effectively. And I don't think it is a secret that this will not improve as long as governments and societies don't make it happen. In many areas, business is far ahead, while governments all too often lack the political will or the capacity to ensure that existing regulatory frameworks are properly applied.

Under these circumstances, the Compact offers a useful guiding value framework for companies to organise their activities. But the initiative cannot resolve government deficiencies, and it was never conceived as a substitute for the rule of law. As a voluntary initiative, it can broaden understanding and acceptance of universal values and thereby reinforce good governance.

Best regards,
Georg

Go for compliance

Bart Slob

Dear Georg,
The Global Compact may not pretend to work as a compliance-based system, but I say it should. The argument may be old, but it is persistent and consistent. At the Leadership Summit in July 2007, Amnesty International's current secretary-general said it was "time to scale up on compliance". Many other civil society organisations, including Greenpeace, Oxfam, Friends of the Earth and ActionAid, have voiced similar concerns over the past eight years. It seems I am not the only one who has "fallen victim to surreal projections". I believe that visions of an improved Compact are not surreal, but optimistic and forward-looking.

The Compact is a very powerful initiative because it is backed by the UN. You have always said it is not meant to be a substitute for business regulation. In practice, however, its high profile has made it the only game in town when it comes to UN initiatives dealing with issues of corporate responsibility. That is why many civil society organisations expect so much of the Compact. It should be possible to revise the initiative's purpose and the way it works. Perhaps a different approach would enable the UN to effectively raise standards of corporate responsibility.

It is true that the requirement to report publicly on progress has led to the de-listing of "non-communicating" participants. This measure is based largely on technical and procedural grounds, and it does not deal adequately with the issue of free-riders. Although participants are expected to disclose information about their business practices regularly and can be removed from the list if they fail to do so, they cannot be de-listed for failing to comply with the ten principles. The system does not filter out the real laggards when it comes to corporate responsibility.

Companies such as PetroChina, a Chinese state-run oil company, can sign up and continue to do business as usual. While Dutch pension fund PGGM – a signatory to the UN Principles on Responsible Investment – and the European Parliament have decided to divest from PetroChina over its support for the Sudanese government, which has committed human rights violations in Darfur, PetroChina boasts about its entry to the Compact in its 2007 CSR report. The Compact is not raising PetroChina's standards of corporate responsibility. Furthermore, the participation of such a company is detrimental to the reputation of the Compact and the UN.

"It should be possible to revise the initiative's purpose and the way it works" – Bart Slob

Rather than relying on other initiatives and institutions such as the GRI, OECD, ILO, local Global Compact networks and governments to get companies to improve their behaviour, you need to take a leadership role. If not, other UN organisations should move beyond the pragmatism that underpins your strategy and set up a more ambitious initiative for corporate accountability.

Kind regards,
Bart

We're a bicycle – not a tank

Georg Kell

Dear Bart,
Allow me to frame your call for a compliance-based Global Compact in a different way: the Compact was designed as a smart bicycle to navigate some very uneven territory. Over time, we have gained quite a bit of pedalling power.

Compact: a smart bicycle

The Ten Principles of the UN Global Compact

Human rights

1. Businesses should **support and respect the protection of** internationally proclaimed human rights; and
2. make sure they are not **complicit** in human rights abuses.

Labour standards

3. Businesses should uphold the **freedom of association** and the effective recognition of the right to **collective bargaining;**
4. the elimination of all forms of **forced** and **compulsory labour;**
5. the effective abolition of **child labour;** and
6. the elimination of **discrimination** in respect of employment and occupation.

Environment

7. Businesses should support a **precautionary approach** to environmental challenges;
8. undertake initiatives to promote greater **environmental responsibility;** and
9. encourage the development and diffusion of **environmentally friendly technologies.**

Anti-corruption

10. Businesses should work against corruption in all its forms, including **extortion and bribery.**

It appears that you would like the Compact to be a tank instead, with superior firepower. While you may care more about targets hit, we are more concerned about distance covered. This is an important difference.

"While you may care more about targets hit, we are more concerned about distance covered" – Georg Kell

We believe that our focus on continuous performance improvement, dialogue and learning has produced some significant results throughout the years, showing how voluntary approaches can and do work.

Of course, this approach implicitly acknowledges that businesses are imperfect to begin with. But we have chosen the route of active engagement, and while it may make fewer headlines than open letters, it nonetheless keeps doors open to drive change.

You err in suggesting that the Compact's communication policy does not allow for performance evaluation. We have refined the process significantly, and it already forms the basis of information sought by analysts, investors, researchers, consumers, media and civil society groups. It enables you, not us, to make a better judgment on transparency and performance, even if it is – as you mentioned – the increasingly inconvenient truth that some companies need to do a much better job of disclosing their practices. You may not even be aware of it, but you and others are doing a great job in confirming our social vetting assumption: the Compact enforces public disclosure, but it is up to others to evaluate performance and demand change.

We are encouraged that PetroChina and other Chinese companies have decided to embrace the Compact and start to disclose information on environmental, social and governance matters. It not only supports my previous point, but shows the contribution the Compact is making to market integration.

The fact that institutional investors have decided to divest from PetroChina does not establish its complicity with crimes in Darfur. Divestment may make those selling stock feel ethical, but in the absence of globally binding solutions it is most probably doing more harm than good. It is like the captain of a sinking ship ordering all men to enter lifeboats while leaving women and children behind. No doubt, the issue of investment and conflict is complex, and we will put more work into it. Stay tuned.

A final point: I do feel at times that some observers of the Compact are actually not so much concerned about addressing poverty or achieving the initiative's other goals. I suspect that their chief concern is with the accumulation of power by business. If that is indeed so, I would suggest a closer look at competition policy, which strikes much closer to home.

Sincerely,
Georg

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Visit www.ethicalcorp.com to post your views in the comment box at the end of this and other debates. Or send a letter to editor@ethicalcorp.com. The best responses will be published in next month's print issue of the magazine. ■