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Four Design Criteria for any Future Contractarian Theory of Business Ethics

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ABSTRACT. This article assesses the quality of Integrative Social Contracts Theory (ISCT) as a social contract argument. For this purpose, it embarks on a comparative analysis of the use of the social contract model as a theory of political authority and as a theory of social justice. Building on this comparison, it then develops four criteria for any future contractarian theory of business ethics (CBE). To apply the social contract model properly to the domain of business ethics, it should be: (1) self-disciplined, i.e., not aspire results beyond what the contract model can realistically establish; (2) argumentative, i.e., it should seek to provide principles that are demonstrative results of the contractarian method; (3) task-directed, i.e., it should be clear what the social contract thought-experiment is intended to model; and (4) domain-specific, i.e., the contractarian choice situation should be tailored to the defining problems of business ethics.

KEY WORDS: contractarianism, Integrative Social Contracts Theory, theories of business ethics

The project for an Integrative Social Contracts Theory (ISCT) seeks to develop norms for corporate morality on the basis of a social contract model (Donaldson and Dunfee, 1999, 2000a, b; Dunfee, 2000). Analogous to classical contract theorists such as Hobbes and Locke, who used the contract model to specify conditions under which the national state can legitimately exercise its power, ISCT seeks to specify the conditions for socially responsible corporate conduct on the basis of a social contract model especially adapted for this purpose.

ISCT arguably is the most promising approach to business ethics currently available. But, as will be set out in thisarticle, ISCT can be shown to be relatively eclectic in its rendering of the social contract argument. To make this case, we draw upon the rich social contract tradition in the history of political theory. Much has been written both in terms of original political theories and of analysis in the secondary literature on that subject (Barry, 1989, 1995; Boucher and Kelly, 1994; Daniels, 1989; Freeman, 1990; Gough, 1957; Hampton, 1986, 1993; Kimlicka, 1991, 2002; Lessnoff, 1986; McClelland, 1996; Riley, 1982). Employing this whole body of knowledge, we undertake a comparative analysis of the manner in which the contract model was used in two earlier application fields, i.e., as a theory of political authority (notably by political theorists such as Hobbes, Locke, and Rousseau) and as a theory of social justice (by political theorists such as Ackerman, 1980; Gauthier, 1986; Nozick, 1974; Rawls, 1971, 1993, 2001; Scanlon, 1998).

This comparative analysis then suggests four application conditions for any future contractarian theory of business ethics (CBE). Three of these conditions would seem to follow from the inherent logic of the contract model and can be substantiated from the manner in which it was employed by some of these well-established earlier contractarians; a fourth condition stems from the defining characteristics of its new application field. To apply the contract model properly to the domain of business ethics, it should be: self-disciplined, i.e., it should not aspire results beyond what the contract model can realistically establish; argumentative, i.e., it should primarily be used as a ''moral proof procedure'' (Scanlon, 1982; Hampton, 1997, p. 135) and should seek to provide publicly justified reasons (D'Agostino, 1996, 2003; Gaus, 1990, 1996; Gauthier, 1995; Rawls, 1993, 1999a, b) that are demonstrative results of the contractarian method; task-directed, i.e., it should be clear what the social contract thought-experiment is intended to model; and it should be domain-specific, i.e., the contrac-

tarian choice situation should be tailored to the defining problems of business ethics. These four conditions turn out to be at once points of criticism of ISCT, currently the dominant instance of CBE, as well as design criteria for all future work on CBE. We will summarize these results in the form of four central theses.

The article is structured as follows: We will first outline the ISCT project, consider some crucial steps in the argument, and review some of the major empirical and theoretical criticisms, which have been given of this framework. We will then review the results of a comparative analysis of the use of the contract model in theories of political authority and of social justice. On the basis of this comparative analysis we will develop and discuss the four design criteria, which need to be taken into account when transposing the contract model to the domain of business ethics. In the concluding section, we will list some of the research topics flowing from this analysis to suggest a focus for future debate.

The project for an Integrative Social Contracts Theory (ISCT)

The leading idea of the ISCT project is to reconcile conflicts between norms that may come about in the context of international business or business activities involving different occupational groups or across economic communities. In any practice of international business there may well arise conflicts between (usually stricter) moral norms in the home country of the corporation and the (generally more lenient) standards practiced in the host country. To take a concrete example: British American Tobacco has an enlightened and restrictive policy on underage smoking in their Western markets (British American Tobacco, 2005) but this is simply not carried through in their markets in the developing world, such as in Kenya (Ash, 2006). This reflects first of all a difference in the relevant national legislation, which is much stricter in Western countries than in Africa. But it also demonstrates that BAT sets different moral standards regarding the desirability of the prevention of youthful smoking in the West and in countries such a Kenya.

The type of conflicts between norms, which ISCT addresses can also be seen between different occupational groups or between economic communities. Accountants, bankers, lawyers, or traders all have their specific norms relating to the exercise of their profession. Where different disciplines collaborate, profession-specific norms may come into conflict. Another category of such conflicting norms relates to different cultures in organizations. Big corporations commonly have a culture of their own which often involve a series of company-specific norms and values. If two or more of these corporations engage in business together company-specific value may clash.[1]

The important point to which ISCT draws our attention is that the more multi-national corporations (MNC's) work across national borders, and the more different occupational groups intermingle, the more likely these conflicts between community-specific moral norms will become. In the vocabulary of ISCT these local norms are referred to as microsocial contracts. This name underscores that the moral force of such a norm within an economic community rests on the consent and support of individual members of that community for that norm. The principal ambition of ISCT is to seek to adjudicate possible conflicts between microsocial contracts originating from different economic communities by means of identifying universal, more fundamental principles, called hypernorms.

In view of this general description of the project, two core questions will naturally arise to any reflective business practitioner (1) what hypernorms are there? and (2) why would we obey them? In the first part of this article we will analyze the structure of the argument ISCT develops in answer to these questions. This part is structured as follows. We will first look into the problem-statement of the project as a whole, explaining the reasons why ISCT must be deemed opportune in the present world of international business; we will then consider the precise role the social contract device plays in the ISCT argument; third, we look into the set up of the ISCT thought-experiment and the terms agreed by the contractors. Fourth, we will consider the methodology by which hypernorms are established. Finally, we will assess whether ISCT actually delivers on its promise. The resulting picture of the ISCT project will serve as a point of departure for our inquiry into design criteria for CBE.

ISCT's problem-statement

Donaldson and Dunfee provide various reasons justifying their project. For present purposes, we will focus on two of these justifications, a general and a more detailed one. The most general problem-statement for the introduction of the ISCT framework can be seen from the two examples with which the project is introduced in their book. These are both taken from the business practice of Royal/Dutch Shell and involve their dispute with the Ogoni, an indigenous people living in the Niger Delta; and the bad publicity over the Brent Spar affair (Donaldson and Dunfee, 1999, pp. 1–9).

The justification stemming from the Shell–Ogoni example is purely in promissory terms: the thrust of this argument is that problems arising in present-day international business are so complex and unique that we need some new, special technology to resolve them (1999, p. 3). The ISCT model purportedly is going to perform this function.

The second justification digs a level deeper, however. In addition to emphasizing the complexity of modern international business, it also provides an indication of why the current state of business ethics theory-building is insufficiently equipped to guide the practitioners. In this respect, ISCT seeks to improve upon currently available ethical theories, such as Kantianism, utilitarianism, virtue ethics or the stakeholder model. By their very nature, these general ethical theories are incapable ever to rise above a ''view from nowhere''. This second justification proceeds in three steps and comprises a problematization of the present state of business ethics theories, a more specific diagnosis, and the presentation of the ISCT-framework as a natural remedy. By way of problematization of the present state of business ethics theory-building the authors of ISCT point out that

> No single theory has emerged that is fully capable of providing guidance about the gamut of challenging business ethics matters … For want of a usable theory, many academics … have turned to the pivotal traditions of ethical theory – in other words, to the broad normative theories of consequentialism, virtue ethics, Kantian deontology, and pragmatism. … Yet, none of these philosophically inspired attempts has been fully satisfactory. What has gone wrong? Why has no one been able to use these singly or in combination, to establish a single, generally accepted paradigm in business ethics? (1999, pp. 12–13).

The accompanying diagnosis then runs as follows

> We believe the difficulty of such approaches lies largely in their imprecision. As sometimes happens when grand, broadly drawn theories are applied to specific issues, the results are blurry. … the pivotal traditions of ethical theory, when applied in undiluted form to real-world problems, have offered a 'view from nowhere.' They have been incapable of locating the complex, particular problems of corporations, industries, economic systems, marketing strategies, etc., in a way that would provide an institutional 'somewhere.' (1999, p. 13)

The third step in the argument then introduces ISCT as a remedy which aspires to bridge the gap between the sterile universalism of ''the view from nowhere'' and the danger of relativism which always accompanies too much particularism. So it will be helpful to now consider the role of the (macrosocial) contract argument in the ISCT project as compared to its function in other contractarian theories.

The role of the contract argument

The social contract model generally functions as a framework for justification in ethics. The idea here is that the legitimacy of social rules and institutions depends on their being freely and publicly acceptable to all individuals bound by them. If rational individuals in appropriately defined circumstances could or would agree to certain rules or institutions, then insofar as we identify with these individuals and their interests, what they accept should also be acceptable to us here and now as a basis for our cooperation.

But in the conceptual machinery of the ISCT framework this general idea is elaborated in two entirely different senses. Alongside microsocial contracts, which we already came across, the authors also distinguish a macrosocial contract. Microsocial contracts, which are characteristically discussed in the plural, refer to the set of ''extant, actual agreements existing within and among industries, national economic systems, corporations, trade associations, and so on'' (1999, p. 19). The social contract device serves here as a source of normativity for the various community-specific norms. Within the boundaries

of the community, these norms have normative force because a sufficient number of individual members subscribe to them. On the other hand, the macrosocial contract stands for the hypothetical style of contracting by means of a thought-experiment in the manner of some well-established social contract theories. It refers to ''broad, hypothetical agreements among rational people. Such contracts are designed to establish objective background standards for social interaction'' (*Ibid*.).

In addition to these two types of social contracts, the authors also distinguish three types of hypernorms: procedural, structural, and substantive (1999, p. 53). Procedural hypernorms refer to the preconditions of exit and voice, which are required to establish authentic local norms; structural hypernorms deal with organizing all matters necessary for the organization of the economic community, irrespective of any specific preferences of individual members; whereas substantive hypernorms serve directly to accommodate conflicting community-specific norms. The point to observe here is that only the first two categories of hypernorms result from the thought-experiment and the ensuing agreement of the contractors to the macrosocial contract. But the substantive hypernorms, the type of principle, which does the real work in the ISCT framework, can be discovered by anyone who goes to the trouble of surveying the relevant evidence. Substantive hypernorms therefore do not so much result from the contract, but they are to be *recognized*, not only by the contractors, but also by you and me. If we may take recognition to be a weaker form of agreement than rational consent, this distinction, therefore tends to loosen the connection between the substantive hypernorms and the macrosocial contract. It renders the function of the macrosocial contract less prominent within the conceptual machinery of ISCT. As far as the identification of substantive hypernorms is concerned we can do without the macrosocial contract.[2]

The set up of the ISCT thought-experiment

We shall now consider the manner in which ISCT models the initial contractual situation. We saw that the core of all contractarian approaches consists in the idea that all parties involved in the social contract would voluntarily *agree* to whatever the terms of the contract are. In most varieties this is treated as hypothetical, not actual agreement: addressees of the contract are bound by its terms because, situated in certain relevant conditions, it would be rational or beneficial for them to do so. Any social contract theory properly so called must therefore give some characterization of (1) the parties to the contract; (2) the situation in which they find themselves when concluding the contract, variously called ''state of nature'' or ''original position;'' (3) the common purpose which they seek to establish by means of the contract; and (4) their rationality and motivation to come to agreement.

On the question as to who exactly are party to the contract (and hence who should feel obliged by its terms) Donaldson and Dunfee remain relatively general. They refer to ''a diverse set of imaginary contractors (…) who represent the varied attitudes of the modern world'' (1999, p. 26). But the real question is whether the fact that the contractors are supposed to represent us amounts to a sufficient source for normativity. Why should *their* choice justify *our* adopting of the terms of the contract? (Daniels, 1989, p. xxxix, summarizing a point made by Nagel and Dworkin). Similarly, there is hardly any description of the pre-contractual choice situation offered by the authors of ISCT, while it is clear that the force of the contract argument crucially depends on the alternatives between which the contractors can choose and the background conditions against which contractors deliberate to get to agreement. Nor is there any specific purpose which the contract is supposed to bring about, apart from the rather general idea of 'providing guidance about the gamut of challenging business ethics matters' which emerged in the course of ISCT's problem-statement.

In fact, of the four categories of parameters of the collective choice situation mentioned above, Donaldson and Dunfee are most specific on the motivational assumptions of the contractors (1999, p. 26–36). These start with the idea of *an undetermined mix of contractor preferences*, in which some are greed driven, some altruistic, but most are simply somewhere in between these two. Contractors are bounded in their capacity for moral rationality and are only partially knowledgeable about

their status in the economic morality created by the contract. They are ignorant of their economic community and do not know their personal wealth. But they have settled understandings of deep moral values, which are used as ingredients for the moral norms the contract will sanction.

The terms of the macrosocial contract

Having thus characterized the contractarian choice situation, Donaldson and Dunfee go on to argue that contractors will agree upon a procedural model of four steps with which ISCT can be given its moral content (1999, p. 36–47). The suggestion here is that these four steps flow from consensus among contractors. Economic communities will be left as much ''moral free space'' to organize themselves as is possible without interfering with other communities. To the extent that these local norms are supported by a clear majority of the constituency and the preconditions of exit and voice are met, microsocial contracts can be seen as authentic norms. Where authentic norms conflict with the authentic norms of other communities, a balance must be struck on the basis of the more universal hypernorms, so as to decide which local norm should prevail. Fourth, if this weighing fails to adjudicate the conflicting norms, the ISCT framework provides for a set of rules of thumb so that conflicts can be eliminated according to the spirit of the contract.

Unfortunately, there is no logical link between the characteristics of the choice situation and the procedure for the accommodation of possible conflicts between community-specific norms. As set, the parameters simply do not warrant the conclusions drawn by the authors. The suggestion that an original position consisting of ''a diverse set of imaginary contractors'' motivated by ''an undetermined mix of contractor preferences'' would somehow naturally – let alone necessarily – produce unanimous consent on the four procedural rules specified by the authors, just does not follow. By the same token, one could make a plea for any other 'reasonable' principle. But such a plea would need no social contract thought-experiment.

There are, therefore, two crucial reasons why the social contract argument does not fulfill its proper function in the ISCT set up. First, the macrosocial contract is not used to derive the most important category of hypernorms. And second, to the extent that an accommodation procedure for conflicting microsocial contract is agreed upon, this is less than logically compelling.

Identifying substantive hypernorms

On the basis of the procedure sketched above, the authors of ISCT proceed to establish the moral content generated by the ISCT framework. For the purposes of the present text it is especially useful to consider the manner in which substantive hypernorms are identified (step 3 in the model) and how they can be regarded to actually accommodate conflicting community-specific local norms (the intended result of the procedure). If substantive hypernorms do not result from the contract, how *are* they established?

The method of identifying substantive hypernorms proceeds on a case-based approach. As the authors assert: ''Although hypernorms are universals, they will of necessity be identified and interpreted from the vantage point of a particular decision within a particular cultural environment'' (1999, p. 9). These decisions must be taken in view of whether there is a relevant hypernorm for the case ''prohibiting, affirming or circumscribing potential courses of action'' (*Ibid.*). The method of proof consists in collecting evidence supporting such hypernorms, which must then be weighed against possible counter-evidence denying the existence of such a hypernorm. The authors mention 11 possible sources from which such evidence can originate (1999, p. 60), but it is clear that this should not be seen as an exhaustive enumeration. Any other convincing evidence can certainly also be brought to bear. Alongside these sources they also mention three possible sources for counter-evidence to refute any presumptive hypernorms (1999, p. 60–1). A positive balance between supporting evidence and counter-evidence would lead one to make a ''rebuttable presumption'' that there is a hypernorm covering the particular decision.

In order to see how this working method is envisaged in the ISCT project it is helpful to see how the authors proceed in dealing with the four sample cases in their book, i.e., bribery, gender discrimination, workplace safety, and ethics in

marketing research. The first three examples have an international dimension, the issue of ethics in marketing research is set in a national context. Significantly, the empirical evidence collected for first three examples leads the authors to conclude that a presumptive hypernorm can be identified. Only in the case of deception in marketing research the evidence leads them to presume that there is no hypernorm allowing for such practice.

The first case is tested from the perspective of a manager for an airplane manufacturer who is considering a payment of $5 million to go personally to the Minister of Defense of a developing country. The evidence against such payments is derived from guidelines issued by organizations such as Transparency International, the OECD, the OAS, business codes such as the Caux Principles, laws in numerous countries, the opinions of leaders of major accounting firms, major religions, and major philosophies. All these sources support a presumption that bribe-giving would violate a hypernorm. Possible counter-evidence extenuating this practice may be found in the fact that there is a widespread acceptance of making payments of this type to gain jobs and enhance profits. But, the authors conclude, this counter-evidence would not be sufficient to overcome the presumptive hypernorm.

The issue of international gender discrimination is inquired from the case of a global express delivery firm, which must decide whether to assign women to drive a van in Saudi Arabia, a country which has customary norms prohibiting women from driving based upon interpretations of Islamic sources. Evidence against this selective type of gender discrimination is collected from the United Nations, the ILO, national laws of many countries, as well as major philosophies and religions. Adding up this evidence appears to meet the standard establishing a presumptive hypernorms against this practice. Possible counter-evidence may be found in the fact that the Saudi norm is based upon a religious interpretation; but then, the authors concede, this understanding is not shared by the vast majority of other Muslim countries. So, again, the – presumptive – conclusion is that there is a covering hypernorm for this case.

The issue of international workplace safety is illustrated from the case of a global chemical firm, which requires its workers around the world to wear helmets when overhead cranes are operating in the vicinity. Since workers in Korea protested against the helmets, the local manager decided to waive the helmet requirement. On the basis of ILO standards, major religious and philosophical precepts the authors conclude in this case that a presumptive hypernorm requiring feasible workplace safety practices is essential to protect the workers against serious physical injury. Although local norms do not require helmets and the workers themselves prefer comfort over safety, these objections do not appear sufficiently strong to overcome the presumption.

The one counter-example discussed in the book relates to a dilemma arising in the context of market research. Gathering information about their clients' products, a marketing research firm tells their interviewees that they are conducting an independent consumer survey. In this case another balance is struck. Against the practice pleads the general principle of truth-telling, which is supported by many religions, philosophies and laws, as well as in statements of proper business behavior made by many types of organizations. But in this case, the authors conclude that none of these rules are specific enough to apply to the question of whether one needs to volunteer information in this type of interaction.

This process of identifying substantive hypernorms is ''relatively easy and non-controversial,'' say Donaldson and Dunfee (1999, p. 63). But even in these four examples there may be more problems than the authors suggest. First, none of the examples employs a clear decision criterion for the establishment of a presumptive hypernorm. As Hartman et al. comment, in the context of an inquiry into hypernorms relating to international labor standards, ''how many hits are needed [for a norm] to be considered a hypernorm?'' (2003, p. 208). If we are to count the pieces of evidence supporting a possible hypernorm, all sources must carry equal weight as if they were values on a nominal scale. And more importantly: how can we weigh the evidence for and against? It would seem as if this is just loosely weighed on one's hand, rendering an intuitive judgment and an immediate outcome. And this suggests that we are dealing with an appeal to common sense by way of a decision procedure. The question what hypernorms can be arrived at on the basis of this procedure thus remains tantalizingly open.

Does ISCT deliver?

Having considered some of the pitfalls of ISCT as a social contract theory, we may now return to the question as to what extent ISCT actually succeeds in delivering on its promise to provide more concrete practical guidance. If push comes to shove the authors just draw conclusions on the four concrete examples just discussed, but even in these cases the actual contents of the covering hypernorm is not specified. That would otherwise be difficult on the basis of a single case, unless the covering hypernorm takes the form "it is forbidden to pay bribes" or something along these lines. The authors moreover indicate that the covering hypernorms, which are found in this manner, have a *presumptive* status, i.e., they can always be refuted again if the balance of the evidence for and against changes. While this may look like, and is in fact praised as an attractive and flexible procedure (1999, p. 74), it is unlikely to promote the tangibility of the idea of substantive hypernorms.

It is no surprise, therefore, that several commentators have criticized ISCT for the lack of more concrete substantive hypernorms (Rowan, 1997, 2001; Soule, 2002; Hartman et al., 2003; Van Oosterhout et al., 2006). But in spite of these exhortations, Donaldson and Dunfee have so far declined to provide a list of substantive hypernorms, pointing out that

> more precise definition of the issue, stemming from the process in which one first identifies the ethical decision and then seeks to identify relevant hypernorms, is more likely to produce results than a top-down analysis in which a simple, preexisting 'definitive list' list of hypernorms is used with deductive reasoning. (1999, p. 75).[3]

This presumably also means that Donaldson and Dunfee consider the compilation of a list of hypernorms to be a task for the community of business ethics scholars, and not merely a task resting on their shoulders. But, at least for the time being, it undermines ISCT's initial claim to be able to provide better practical guidance than the "pivotal" general theories. It is the combination of this claim and its omission not to come up with more concrete substantive hypernorms, which leads us to the conclusion that – as it presently stands – ISCT does not deliver. The question as to how we can do better, therefore imposes itself with some force. One suggestion would be to simply carry on with the work of identifying more substantive hypernorms following the four examples set out in the book so as to come to some system of substantive hypernorms. But in view of the inquiry above demonstrating that ISCT made only a limited use of the potential of the social contract argument, it is tempting to look into another possibility, i.e., of upgrading the theory to a full-blown social contract argument. In order to prepare the way for such an upgrade, the second part of this essay will sketch four design criteria, which should be taken into account in elaborating a better CBE.

Design criteria for CBE

ISCT was extensively criticized and commented upon, including in papers published in this journal (Calton, 2006; Douglas, 2000; Fort, 2000; Husted, 1999; Phillips and Johnson-Cramer, 2006). To attempt any exhaustive review would simply be beyond the scope of this article. But there is one point, which was not raised in any other of the numerous commentaries. This involves a diagnosis as to *why* the authors did not get the ISCT project afloat. The suggestion here is that most problems of ISCT can be traced to a misunderstanding of the *nature* of the contract device as a method of argument and the manner in which it is to be properly set up.

A robust method to retrieve hard and fast criteria for this purpose may be found in Wempe (2004, 2005). This author has inventoried some of the more renowned existing contract theories to see what use was made of the contract device and divided these into classical theories and modern theories. Classical theories dating from the 17th and 18th centuries used the contract device to establish the conditions for a legitimate exercise of political authority. Modern theories from the 20th century evoked the contract device to formulate principles of social justice. Table I compares the relevant qualities of these families of social contract theories so as to suggest an appropriate way to set up the contract model and apply it to the domain of corporate morality.

The two left columns in this table list a series of points of comparison on the basis of which the three families of social contract theories (listed in the three columns to the right) are being compared. These points of comparison are grouped into four categories: external logic, internal logic, domain characteristics, and theoretical assumptions made by these various social contract theories. The external logic refers to the parties that are being addressed and the (practical or theoretical) aims the theorist wants to establish or support by invoking the contract device. Hobbes, for example, is commonly understood to have used the contract model to combat the political fragmentation owing to the civil wars of his times. Hence, this is often taken to have been the practical aim of Hobbes' theory. But his argument may be also used to support a strong government in any other historical situation. Such a more indirect and abstract usage of his particular version of the social contract argument is referred to as the theoretical aim of his theory. The internal logic refers more specifically to the modeling of the pre-contractarian choice situation. This involves the specific argumentative strategy by which a theorist seeks to convince his audience to accept the specific terms of the social contract.

Domain characteristics are all the parameters of a particular application field which corresponding theories need to cater for. In this connection, Rawls coined the useful phrase "circumstances of justice" to characterize the general background conditions against which all central questions of social justice arise. In the comparative analysis in Table I this idea was generalized to the two other domains. Thus, we can inquire into the circumstances of political authority, i.e., the general backdrop against which all questions of political authority arise. And similarly, we can inquire into the circumstances of business ethics, meaning the general background common to all core questions of business ethics.

The theoretical assumptions will reflect the manner in which the theory adapts to the domain characteristics of its field. Each theory (or family of theories) can be shown to proceed from certain assumptions, which help to ensure that the theory adequately addresses its field. The theoretical assumptions of the three families of contract theories, which were compared in Table I, include access, exit and authority. An effective political authority is assumed in modern theories and CBE, but clearly not in classical theories, where political authority is a result rather than an assumption. Differences in the access and exit conditions to a community will have impact on the manner in which each family of theories deals with question who is to be party to the contract. In the period of nation building of the 17th and 18th centuries, access and exit were simply given and unproblematic, so that these assumptions are irrelevant for classical social contract theories. Rawls (1971) restricts his analysis to domestic society, interpreted as a closed system. The conditions of access and exit were, therefore, deliberately kept out of the perspective adopted by modern social contract theories.[4] For CBE, on the other hand, the conditions of access and exit would seem highly relevant. Questions relating to access and exit of stakeholders must be counted among the defining problems of business ethics.

Wempe used this comparative analysis as a framework to argue for the optimal use of the contract model across the three families of contract theories. But the very same framework may also be used to identify some more general boundary conditions for CBE, as is indicated in Table II.

The comparative analysis of the two families of established social contract theories suggests a number of main criticisms of current CBE, which can in turn be stated in the form of design criteria for any future CBE, as the elements of an architect's program of demands. These criteria may be seen as boundary conditions for a well-formed CBE and will be discussed as the criteria of self-disciplinedness, argumentativity, task-directedness and domain-specificity, respectively. The idea that most established social contract theories pursue some theoretical or practical aim bears on the question as to what can realistically be expected from a social contract argument. This will be elaborated below as the criterion of self-disciplinedness.

The idea that each well-formed social contract theory proceeds on some kind of problem–solution frame, by which the author seeks to point out to his audience *why* the particular terms of the contract are *logically compelling* for the contractors, is naturally related to the criterion of the argumentativity of a contract theory. The specific function of the modeling of the contractual choice situation is to allow the theorist to design this choice in such a way that it

TABLE I

A comparative analysis of three families of social contract theories

Points of comparison		Theories of political authority	Theories of social justice	Theories of corporate morality
External logic	Parties	Citizens	Representatives of free and equal citizens	Business and society
	Theoretical aim	Legitimacy of political authority	Legitimacy of basic structure	Normativity (and contents?) of corporate morality
Internal logic	Problem solution frame	e.g., Rousseau: Reconciling order with individual freedom	e.g., Rawls: endowment-insensitive, ambition-sensitive distributions	e.g., Donaldson and Dunfee: reconciling conflicting microsocial contracts
	Function of initial contractual situation	Models equality before the law	Models equal basic liberties; restrictions on social and economic inequalities	Models fair distribution of costs & benefits of corporate production
Domain characteristics	Background conditions	Circumstances of authority	Circumstances of justice	Circumstances of business ethics
	Target group	Natural	Fixed	Not yet fixed: the problem of stakeholder identification/legitimacy
Theoretical assumptions	Access	Membership historically given	Membership stipulated: society as a closed system	Membership contested: the problem of stakeholder legitimacy
	Exit	Formal exit, but historically in fact not exercised	No exit (by stipulation) society seen as a closed system	Voluntary, but burdened by opportunity costs
	Authority	Authority is established as the result of the social contract	Sanctioning authority to deal with problem of partial compliance	Sanctioning authority

Adapted from Wempe (2005)

TABLE II

The origins of the four design criteria for CBE

Points of comparison		Theories of political authority	Theories of social justice	Origins of design criteria for CBE
External logic	Parties	Citizens	Representatives of free and equal citizens	
	Theoretical aim	Legitimacy of political authority	Legitimacy of basic structure	Self-disciplinedness
Internal logic	Problem solution frame	e.g., Rousseau: Reconciling order with individual freedom	e.g., Rawls: endowment-insensitive, ambition-sensitive distributions	Argumentativity
	Function of initial contractual situation	Models equality before the law	Models equal opportunities	Task-directedness
Domain characteristics	Background conditions	Circumstances of authority	Circumstances of justice	Domain specificity
	Target group	Natural	Fixed	
Theoretical assumptions	Access	Membership historically given	Membership stipulated: society as a closed system	
	Exit	Formal exit, but historically in fact not exercised	No exit (by stipulation) society seen as a closed system	
	Authority	Authority is established as the result of the social contract	Sanctioning authority to ensure compliance	

produces the intended results. It may be that the theorist wants to screen some background factors, which would interfere with his purposes. Rawls, for example, designs his social contract thought experiment to neutralize the impact of talents in the negotiation process among contractors, as he believes differences in talent ought not to have moral consequences in the distribution of the cooperative surplus. In Table II this is incorporated in the criterion of task-directedness.

The general significance of domain characteristics and theoretical assumptions of any specific social contract theory is that one cannot expect the very same contract model operative in one domain (like political theory) to perform functions in another domain (like business ethics). To be effective, the contract model must be domain-specific. Classical political social contract theories operate under a specific set of domain characteristics and specific theoretical assumptions, and so do modern social contract theories and CBE. It seems unwarranted, therefore, to expect the Hobbesian framework to say something useful about the dilemma's of business ethics. If it did, this would be purely coincidental.

Self-disciplinedness

The idea of self-discipline serves to remind us that, when applied to either of these two earlier domains, the contract model was characteristically used to establish some general principles, which could help to regulate conflicting demands among citizens of a political community. In the case of classical social contract theories, the contract was used to specify the conditions of legitimate political authority, but not any concrete legislation. These theories were "less concerned with the content of law than with correctly identifying the person who was entitled to legislate, and most social contract thinkers were in fact quite conservative about the content of the law" (McClelland, 1996, p. 176).

Similarly, modern contract theories of social justice used the contract to work out a set of general principles in terms of which existing basic institutions could be evaluated. Rawls, for example, specifies two general principles for the basic structure but he leaves the content of the laws to be established in the legislative stage, where the contract model no longer has a part to play (1971, pp. 195–201; 1993, p. 338). For that reason, the suggestion we derive from the comparative analysis of the workings of the contract model in these two earlier domains is that the social contract for business should also be restricted to establishing general principles rather than concrete solutions to practical problems.

In the ISCT project, however, the contract seems to be invoked to establish some fairly concrete results. As we saw above, the authors intentionally proceed from individual cases and decide in each individual case whether a covering hypernorm applies. An interesting observation at this point is that many of the commentaries on ISCT are critical of Donaldson and Dunfee's reluctance to provide more examples of substantive hypernorms. Some of this criticism was already prompted by the three foundational articles expounding the ISCT framework[5] to which Donaldson and Dunfee then replied in the definite statement of their doctrine (1999, p. 74–81). That answer again provoked criticism by other scholars (Rowan, 2001; Soule, 2002; Hartman et al., 2003). For example, Mayer and Cava (1995) sought to employ the ISCT framework to the problem of international gender discrimination to conclude that it tries to steer a non-salient course in between a rationalist and an empiricist method of proof.[6] Husted (1999) also signaled problems in the application of the empirical methods used by the ISCT project which he illustrates on the basis of discriminatory practices in Mexico. Rowan (1997, 2001) concluded that failure to specify more concrete hypernorms is at odds with the promise to attend issues of business ethics more adequately than the extant general ethical theories. The very least ISCT would need to do would be to put together a "formalized partial list" (Rowan, 2001, p. 386). Soule also states that the ISCT project as set out in the 1999 book offers insufficient practical guidance. If informed scholars already disagree on the identification of hypernorms, it is just not realistic to expect managers to do so. Second, he compares ISCT with the project of Rawls, pointing out that this influential political philosopher would have done only half of his job had he not specified his two principles of justice. Like Rawls, Donaldson and Dunfee ought to make their project complete by providing "a few good managerial principles"

(Soule, 2002, pp. 118–119). Hartman et al. seek to apply the ISCT framework to the issue of global labor standards and conclude that it is capable of supporting universal labor rights, such as the rights to life and freedom of slavery, but it does not provide sufficient guidance for the more context-embedded "relative" rights such as the minimal level of safety consistent with a particular culture specific conditions (2003, pp. 208–210).

All these commentators, therefore, seem keen on making *more concrete* the practical significance of the ISCT framework. But if the idea of a self-disciplined CBE is sound, this would suggest that a more realistic way in which the contract model for business can provide practical guidance is along the lines of establishing "mid-level bridging principles" (Bayles, 1984) or the model of specification elaborated by Richardson (1990) rather than to seek *to resolve concrete policy issues*, such as are at stake in the examples discussed by the authors and their critics.[7]

This point is summarized in our first central thesis.

Thesis 1: The criterion of self-disciplinedness challenges much of the current criticism of the ISCT project, which encourages the authors to elaborate more concrete hypernorms so as to provide practical guidance. If we take the idea of a self-disciplined CBE seriously, the authors and the critics of ISCT may alike be shown to pursue an unrealistic idea of what the contract model can accomplish – indeed an unrealistic idea of applied theories more in general.

Argumentativity

Whereas the idea of self-discipline suggests that the social contract model should be used restrictively, the criterion of argumentativity reminds us that, in the hands of the "great" political theorists (Curtis, 1961), the contract model was typically used in an argumentative, and not merely in a stipulative fashion. The contract model can be used in a loose or a rather more strict sense. Perhaps, the loosest rendition of the contract argument would be to interpret it merely as an analogy. In this sense one could consider political obligations of citizens towards the state *as if* they were based on a contract. Classical social contracts were typically used in such a hypothetical sense. But it is precisely this hypothetical character of the contract argument, which makes it imperative for these theorists to argue why, given the conditions of the state of nature, *certain* obligations ought to be enforced, *rather than others*. Failing any such specific reasons the contract model would actually be reduced to a device for stipulating norms or guidelines the theorist thinks to be appropriate. Now, everyone is of course free to employ the contract argument in such a fashion. Our argument here is that only in its argumentative form the contract model does generate genuine added value. In its stipulative form the contract model would not contribute anything essential beyond the contract metaphor.

To make optimal use of the social contract model, it must be used as a "moral proof procedure" (Scanlon, quoted in Hampton, 1997, p. 135). That is to say, the contract must somehow render intelligible *why* the terms of the contract deserve to be subscribed by the contractors, and hence why they deserve to be adopted by the audience, which the contract theorist addresses. Moreover, these contractual terms must be based on reasons to which all interested parties are (or should be) susceptible, a condition which is discussed in the literature on the contractarian method as public justification or free public reason (Ackerman, 1980; D'Agostino, 1996, 2003; Gaus, 1990, 1996; Gauthier, 1986, 1995; Habermas, 1990; Rawls, 1993).

The idea of argumentativity can clearly be seen from established classical and modern contract theories. Hobbes' version of the social contract, for example, proceeds from a demonstration to all rational individuals (as characterized in part I of *Leviathan*) that it would be to everyone's benefit if all were to transfer their individual rights under the law of Nature to a sovereign. Similarly, the argumentativity of Rawls's project consists in his working method to deductively[8] derive the famous principles of his doctrine of "justice as fairness." His social contract model sought to specify the principles for a system of public reasons within which individuals can justify their pursuits to one another consistent with their self-conception as free and equal persons. Proceeding from some weak premises about human nature[9] and about the choice situation of the contractors, the thought-experiment must render intelligible why his famous principles of equal political

liberty, equal opportunity and the difference principle will be chosen.

As was explained in the discussion of the set up of its initial contractual situation, the argumentativity of the ISCT project is less than logically compelling. The ISCT thought-experiment does not warrant the resulting procedural model. Given the parameters as set, it is not at all clear why the contractors would opt for these four steps. And, more importantly, we saw that the social contract model turned out to be superfluous for the identification of the most important category of hypernorms, i.e., substantive hypernorms.

The implications for CBE can be summarized in a further central thesis.

Thesis 2: The contract model has had its best results if used as a "moral proof procedure." To set up a compelling proof, it must provide publicly justified reasons, which are to be derived as demonstrative results of the contractarian method.

Task-directedness

The third insight we derive from the comparative analysis in Table II is labeled the criterion of task-directedness. This is based on the observation that, in the more successful examples of the use of the social contract model, theorists always appear to work on the basis of a fairly precise task the contract is supposed to fulfill. All classical social contract theories of lasting value were intending to drive home a certain counter-intuitive conclusion. In general, this was the conclusion that rational individuals would be better off establishing the proposed form of political authority. The contract served to resolve the problem of collective action inherent in the organization of a political community, thereby bridging the opposition between individual and collective rationality.[10] Viewed from a purely individual perspective it is never attractive to give up the natural rights one enjoys under the state of nature. It is only through the contract perspective that the specific solutions defended by Hobbes or Locke can be justified to individual agents.[11]

With modern social contract theories, the contract model served to provide a more solid foundation to certain intuitive judgments about social justice. This can again be illustrated from Rawls' theory. Most people will intuitively subscribe to the view that effort should be rewarded in the distribution of the cooperative surplus. We can justify that people who work hard will be rewarded better than people who are born tired. Most people will also subscribe to the view that advantages, which are purely based on one's social background, gender or race, ought not to be rewarded. But not everyone will be convinced directly that the same also applies to talents. Yet, according to Rawls, advantages, which are purely based on talents, ought not to be taken into account when dividing the cooperative surplus. The compelling reason he provides for this point of view is that, like race, class and gender, talent is not something the individual agent can influence. In this example, the thought-experiment of the social contract thus helps to bring out more clearly some implications concerning our intuitive ideas about social justice, which by themselves may be less self-evident. The idea of an original position helps, as Rawls says, to "extract the consequences" of our notion of fairness (1971, p. 21). It seems evident that if we want to find proper employment for the contract argument in the context of business ethics we should be clear about what we want to establish before we can start modeling.

Of course, the ISCT proposal would seem to suggest an obvious candidate for such a task. This would be the idea to resolve conflicting norms in the context of international business, as was explained in part one of this article. But the point is that the problem of "conflicting norms" cannot be resolved in general. What the social contract model could contribute are leading principles, which could help to conceptualize the more concrete questions. So the challenge is to become more concrete than the ambition to resolve "conflicting norms" in general, but not so concrete as to descend to the level of resolving individual cases as in the four examples of substantive hypernorms provided by ISCT.

What could be possible tasks, which the social contract model could perform for us within the domain of business ethics? A workable compromise between the demands of self-disciplinedness and task-directedness may be the question as to which parties must be considered legitimate discussion partners. Applied to the Shell–Ogoni example this would imply the question whether the Ogoni must

be regarded as a legitimate talking partner for Shell. Another example of an appropriate mid-level question would be: what would a reasonable share in the net result of this business engagement? (Wheeler et al., 2002).

We have sufficiently explained (under the heading of the self-disciplinedness criterion) that it would not be realistic to expect to be able to calculate a percentage of the profits, but a well-defined task would need to provide the necessary information to model the initial contractual situation so that we can formulate principles which would help to better conceptualize this distributive question.

This result can be summarized as follows.

Thesis 3: To apply the social contract model successfully to the domain of business ethics we need to establish beforehand what function it should fulfill, so as to model the initial contractual situation accordingly.

Domain-specificity

The fourth and final insight, which can be derived from the comparative analysis in Table II concerns the fact that the contract model needs to be properly adapted to the domain to which it is applied. This insight goes under the label of domain-specificity. In the more renowned theories, the contract model was accurately focused on the appropriate domain characteristics. Classical social contract theories were able to allow relatively many degrees of freedom. The only hard criterion for a well-formed political contract was that the state-perspective was made more attractive than the pre-state perspective. It follows from this relatively open structure that more than one solutions fulfill this relatively light condition. Or, to put the same point in different words: according as the state of nature perspective was painted more grimly, the theorist could afford a less attractive political perspective. By itself, Hobbes' *Leviathan* does not at all look appealing, but it still is attractive as compared to the horrors of the state of nature. Similarly, Rousseau also has a relatively negative image of the state of nature, which corresponds to a relatively absolutist sketch of political authority.

As compared to the relatively coarse-grained argumentation of the various classical theories, modern social contract theories were much more precise. One might say that according as the aims these theories sought to establish became more ambitious, the set of instruments also had to be more refined. For classical social contract theories it was sufficient to argue that the establishment of political authority was advantageous to everyone when compared to the non-cooperative baseline (as in the state of nature) to arrive at a conclusion about its legitimacy. Modern social contract theories had to evoke far more fine-grained arguments to establish the conditions for a fair distribution of the cooperative surplus.

In the case of CBE, the contract model also needs to be fine-tuned to the domain to which it is applied. Defining issues of business ethics are set against the backdrop of collective production aimed at the creation of added value. These activities presuppose the establishment of an effective political authority to see to it that contractual obligations are honored and to sanction promises made. Typical issues for business ethics arise out of the attempt to weigh interests reaching beyond national borders and hence not covered by domestic laws. Typical issues for business ethics moreover involve considerations beyond economic calculus. The options of access and exit to the community, which CBE addresses, are entirely different from the access and exit conditions of the other domains.

It may be helpful to point out that the two last criteria, task-directedness and domain-specificity, while intrinsically related, are nevertheless also clearly distinct. The argument from domain-specificity has a wider reach and is intended as a warning for aspirant CBE theories not to rely on too direct copies of the contract model imported from other domains. This may be seen, for example, from the version of the social contract for business presented in Donaldson (1982), which seems too directly copied from Hobbes, Locke and Rousseau, and in Donaldson and Dunfee (1999), which is clearly more inspired by Rawls. The argument from task-directedness is more specific. It is also intended as a warning for aspirant CBE theorists, but what is at stake here is a clear idea about the *aim* with which we start modeling the initial contractual situation. The claim is that we need to know beforehand what to model before we can get to an adequate set up of this initial contractual situation. We already men-

tioned an example from the domain of modern social contract theories, i.e., Rawls' concern about the unwarranted impact of a morally irrelevant feature like talent in the process of establishing the principles of a fair distribution of the cooperative surplus. The relevant question for CBE, then, is as to the main morally irrelevant features we would like to exclude from the deliberations in the "state of individual production."[12]

The results of this paragraph can be summarized in the fourth and final thesis put forward in this article.

Thesis 4: In order to elaborate a well-formed CBE we need to specify the relevant differences in the domain characteristics of business ethics as compared to other problem fields to which the contract model has successfully been applied, notably political authority and social justice.

Conclusion and future research

This article has sought to draw attention to four crucial shortcomings which can be discerned in the application of the contract model to the domain of business ethics, as was done in the ISCT project, the presently dominant version of a CBE. We will conclude this article by summarizing its mains results and by delineating issues for future research.

A comparative analysis of the manner in which the contract model was applied in two more established domains served to make clear that the contract model always works within certain application conditions. Three of these follow from the logic of the contract model: the ideas of self-discipline, argumentativity, and task-directedness serve to remind us that there is something like an adequate, or even an optimal use which can be made of the social contract argument. The criterion of self-discipline suggests that if the model tries to reach beyond its natural carrying capacity, i.e., if it is employed to defend too specific results, the contract model will be unable to get to a sufficient level of generality. In the same way as Rawls intended his project specifically to support his particular conception of justice, applied to the design of the basic structure of society, business ethicists interested in the use of the contract model should not seek to derive solutions for concrete policy issues from the contract, but rather a particular conception of justice which can be used to conceptualize the mutually exclusive claims of competing demands by internal and external stakeholders. Typical questions which play a role here are as to what would constitute a fair distribution of the cooperative surplus (which may be called the problem of stakeholder accommodation); in what manner and to what extent parties cooperating in the production of economic value should take into account the interests of third parties external to their cooperation who may nevertheless be affected by that production under certain conditions. This is commonly referred to as the problem of stakeholder identification (cf. Mitchel et al., 1997; Phillips, 2003).

And the contract model must serve an argumentative purpose, i.e., it must persuade its audience by providing reasons to which the audience is susceptible. In this manner, it can also be used to screen extraneous factors from the reasoning process. For example, it would seem just reasonable that any trade or production, however profitable to the parties cooperating in that trade or production, may not harm other parties without adequate and sufficient compensation or voice. The criterion of task-directedness refers to the precise task to which contractarian business ethics needs to be directed, and what would be appropriate candidates for the extraneous factors in the context of typical business ethics problems for which we should be controlling. The definite answers to these questions are not for an individual business ethicist to decide. But it is important that somebody should point out this particular aspect of the methodology of the contract model.

The fourth condition to be taken into account when applying the contract to business ethics is that the model must be adapted to suit the defining problems of this field. Many characteristics of the business ethics' domain differ from the setting in which classical and modern social contract theories operated. Defining problems of business ethics reach beyond national borders and beyond the enforceable legal regulations. Therefore, a business ethics equivalent of the Rawlsian idea of circumstances of justice must be worked out by way of a sketch of the relevant factors which give rise to the characteristic questions of business ethics. Only if the contract argument is set up in accordance with these condi-

tions, it can do what it is supposed to do, i.e., help us to shape and reflectively equilibrate our intuitions about corporate morality.

Notes

[1] See Donaldson and Dunfee (1999, p. 40) for a list of examples of categories of possible economic communities.

[2] Similar analyses were made by Boatright (2000), Rowan (2001) and Soule (2002).

[3] This is confirmed once again the rejoinder to a series of book reviews of *Ties* (Donaldson and Dunfee 2000, p. 483).

[4] Rawls considers the problem of international distributive justice in Rawls (1999a, b).

[5] Donaldson and Dunfee (1994, 1995) and Dunfee and Donaldson (1995). Initial criticism on the lack of concrete substantive hypernorms was first voiced by Mayer and Cava (1995); and later by Husted (1999) and Hartman et al. (2002).

[6] ''If hypernorms are discoverable by reason and there is clearly a hypernorm of gender equality for work settings, the process of ethical analysis recommended by ISCT seems needlessly cumbersome; .... If hypernorms are discoverable by empirical inquiry, most multi-national managers could safely conclude that women are largely subordinate and disadvantaged in work settings'' (1995, p. 258).

[7] With the possible exception of Soule (2002). This critic does not discuss ISCT's application to any concrete cases, but merely calls for the formulation of ''a handful'' of good principles which practitioners could use'' (2002, p. 120). The core suggestion of his paper seems to overlap with Bayle's argument for mid-level bridging principles. Unfortunately, and curiously in view of his criticism of ISCT as ''lack[ing] sufficient moral content'' (2002, p. 114), he does not find the space to provide even a single example of such managerial principle.

[8] Of course his actual manner of proceeding falls short of this deductive ideal, as Rawlsian contractors choose from a list of alternative doctrines (sets of principles), rather than individual principles by themselves. (See Rawls, 2001, pp. 133–134).

[9] That is, that individuals are mutually dependent, that more is preferred to less, and that individuals are risk aversive.

[10] The idea of (a problem of) collective action refers to the notion that individual parties sharing an interest in a collective good (such as political authority) will not spontaneously contribute to the realization of that collective good (See Olson, 1965).

[11] But, see De Jasay for a generalization of the classical contract argument ''demonstrat[ing] that there is no public goods dilemma in Hobbes' fatal sense'' (1989, p. 4).

[12] We use the terminology of Donaldson (1982), but not necessarily the particular set up specified in that version of the social contract for business.

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