

**THE CHRYSLER BANKRUPTCY AND REORGANIZATION  
WITH FIAT: A UNITED STATES, RULES-BASED  
REGULATION SHOULD CONTROL FUTURE LABOR  
DISPUTES BETWEEN THE U.S. AND ITALIAN DIVISIONS**

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**ABSTRACT**

In late April of 2009, U.S. President Obama announced the government's reorganization plan for Chrysler LLC ("Chrysler"), promising a "quick, efficient, and controlled" bankruptcy.<sup>1</sup> Despite these strong words, the bankruptcy plan necessitated an international solution whereby the Italian car company Fiat purchased a 20 percent interest in Chrysler, allowing the reorganization to move forward.<sup>2</sup> This reorganization may create conflict of international proportions if the U.S. and Italian divisions diverge on a labor issue. This comment addresses Fiat's partial acquisition of Chrysler, explores the legal processes surrounding the formation of the multi-national company, and ultimately argues that a U.S. administered, rules-based regulation should control labor law disputes.

**INTRODUCTION**

Over the past three years, profound economic changes have impacted the United States, first in the housing market, then in the broader financial markets, and, finally, within the entire national economy.<sup>3</sup> This deepening financial recession plaguing the American

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\* BA, University of Michigan, 2008; JD, University of Wisconsin Law School, 2011. I thank my parents, family, friends, and Amy for much support and encouragement throughout the writing process. My inspiration for this article results from my upbringing in Metro Detroit where I passed by Chrysler's world headquarters each day on my ride to school. Though challenges remain, I am optimistic about the recovery currently underway in Detroit, and have hope for the city's future. Finally, I owe much to the thoughtful critiques of my colleagues on the Journal.

<sup>1</sup> Bill Vlasic, *Chrysler Cures A Bankruptcy, But Tests Loom*, N.Y. TIMES, May 28, 2009, at A1 (internal quotation marks omitted).

<sup>2</sup> *Id.*

<sup>3</sup> Christopher A. Coons, *Governing in a Time of Economic Challenge*, DEL. LAW., Fall 2009, at 22, 23.

landscape has influenced investors and automotive companies alike,<sup>4</sup> and as a result of the recession Chrysler filed for bankruptcy in the spring of 2009.<sup>5</sup> Headquartered in Auburn Hills, Michigan, Chrysler is one of the largest manufacturers and distributors of automobiles and other vehicles in the world.<sup>6</sup> Chrysler's U.S. network comprises approximately 3,200 independent automobile dealerships.<sup>7</sup> Despite its size and strong domestic sales record, increasingly adverse market conditions affecting the global economy in the second half of 2008 forced Chrysler to turn to the U.S. government for assistance.<sup>8</sup>

For the twelve-month period ending December 31, 2008, Chrysler generated a net loss of \$16.8 billion.<sup>9</sup> As a result, the U.S. government provided Chrysler \$4 billion to cover losses in the beginning of 2009.<sup>10</sup> The \$4 billion Troubled Asset Relief Program (TARP) loan, provided to the debtors on January 2, 2009, was an "interim measure designed to permit the Debtors to operate through the first quarter of 2009, the installation of President Obama's administration and a period of review prior to the established deadline of March 30, 2009 for certification and extension of the loan."<sup>11</sup>

Pursuant to the terms of the loan, Chrysler submitted a plan demonstrating how it would achieve and sustain long-term viability, energy efficiency, and competitiveness in the U.S. marketplace.<sup>12</sup> To effectuate this plan, Chrysler idled most of its plants, selling off a backlog of new cars and drastically scaling back spending on new product development.<sup>13</sup> Unfortunately, these measures proved futile when Chrysler again turned a severe deficit in spring 2009.<sup>14</sup> Although the U.S. government agreed to meet Chrysler's working capital needs through

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<sup>4</sup> Anita I. Anand, Response, *Rules v. Principles as Approaches to Financial Market Regulation*, 49 HARV. INT'L L.J. ONLINE 111, 111 (2009), [www.harvardilj.org/attach.php?id=172](http://www.harvardilj.org/attach.php?id=172).

<sup>5</sup> Vlastic, *supra* note 1, at A1.

<sup>6</sup> Motion of Debtors and Debtors in Possession ¶ 8, *In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009) (No. 09-50002 (AJG)).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* ¶ 25.

<sup>9</sup> *In re Chrysler LLC*, 405 B.R. at 89.

<sup>10</sup> *Old Carco LLC's Liquidation Plan for Former Chrysler Assets Wipes Out \$4B TARP Loan*, 21 Bankr. L. Rep. (BNA), at 1820 (Dec. 31, 2009).

<sup>11</sup> *Id.* "As security for the TARP loan, the U.S. Treasury was granted a first priority lien on all of the debtors' unencumbered assets (primarily certain parcels of real property)." *Id.*

<sup>12</sup> *In re Chrysler LLC*, 405 B.R. at 90.

<sup>13</sup> Vlastic, *supra* note 1, at A1.

<sup>14</sup> *In re Chrysler LLC*, 405 B.R. at 91.

April 30, 2009,<sup>15</sup> Chrysler filed for Chapter 11 bankruptcy shortly thereafter.<sup>16</sup>

Following the reorganization provision of Chapter 11 of the U.S. Code, Fiat agreed to purchase Chrysler's assets on June 10, 2009.<sup>17</sup> This purchase took place just hours after the U.S. Supreme Court denied objections surrounding the reorganization of Chrysler, permitting the transfer of management control to Fiat.<sup>18</sup> This reorganization and purchase cleared the way for the newly constituted Chrysler to emerge quickly from Chapter 11 bankruptcy.<sup>19</sup> Upon reorganization, Chrysler emerged with a new ownership structure: a union retiree trust owning 55 percent, Fiat holding a 20 percent share that could eventually grow to 35 percent, and the U.S. and Canadian governments owning minority shares.<sup>20</sup>

A discussion of the Chrysler bankruptcy and acquisition by Fiat is timely and of great importance because the suffering U.S. automobile industry adversely impacts countless individuals both nationally and internationally.<sup>21</sup> The Congressional oversight panel, formed to oversee Chrysler's reorganization, announced in September 2009 that shares in the company "will have to appreciate sharply" for taxpayers to receive repayment,<sup>22</sup> and taxpayers within the United States would possibly face significant losses due to the government bailout.<sup>23</sup> For instance, in May 2009, nearly 800 Chrysler dealers received notice that they would be dropped within the month.<sup>24</sup> Ward Drennen, who operated a dealership his great-grandfather opened 101 years ago, learned of his fate by a simple letter.<sup>25</sup> Fred Zuckerman, director of the Teamsters' automobile

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<sup>15</sup> *Id.*

<sup>16</sup> David Kiley, *Chrysler-Fiat Finalize Accord*, BLOOMBERG BUSINESSWEEK (June 10, 2009, 8:37 AM), [http://www.businessweek.com/bwdaily/dnflash/content/jun2009/db20090610\\_699415.htm](http://www.businessweek.com/bwdaily/dnflash/content/jun2009/db20090610_699415.htm).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Vlastic, *supra* note 1, at A1.

<sup>21</sup> *Id.*

<sup>22</sup> Christopher S. Rugaber, *Taxpayers Face Heavy Losses on Auto Bailout*, ASSOCIATED PRESS, Sept. 9, 2009, available at [http://www.usatoday.com/news/washington/2009-09-09-auto-bailout\\_N.htm](http://www.usatoday.com/news/washington/2009-09-09-auto-bailout_N.htm).

<sup>23</sup> *Id.*

<sup>24</sup> Bill Vlastic & Nick Bunkley, *Chrysler Tells 1 in 4 Dealers to Close Shop*, N.Y. TIMES, May 15, 2009 at A1.

<sup>25</sup> *Id.* This is just one example of the pain caused by the failing auto industry. Similar stories can be found all across the country.

transporters industry division, said, “It’s a shame our economy’s in the place where it’s at right now . . . Everybody’s willing to do things for barely nothing, just to put food on the table. . . [and] manufacturers are trying to take advantage of it.”<sup>26</sup>

Most importantly, international problems will likely arise because no international standard governs a labor dispute involving both the employees in the United States and the employees in Italy.<sup>27</sup> Collective bargaining is generally protected in the United States and in Italy, but no concrete mechanism is in place for specific problems that may arise,<sup>28</sup> implicating both the U.S. and Italian divisions of Chrysler. This comment proposes that a U.S.-style, rules-based, rather than principles-based, regulation should prevail if an international dispute arises. Generally, principles-based regulation refers to a broad set of standards that move toward a certain desired outcome,<sup>29</sup> and these standards may be accompanied by guidelines about how to achieve the outcomes.<sup>30</sup> In contrast, a rules-based regulation provides a concrete set of detailed rules to govern an entity’s behavior.<sup>31</sup> Such rules enable an entity to point to a specific mechanism to ensure compliance with the law.<sup>32</sup>

Part I of this comment provides background information on the Chrysler meltdown and the applicable bankruptcy laws triggered by the Chrysler reorganization. It will detail the collapse of the U.S. automobile industry and the bankruptcy law as it relates to the industrial market economies of both the United States and Italy. Part II of this comment introduces the global nature of an increasing number of business activities and the standards in place governing the international trade union movement. Part III analyzes the debate surrounding proposed solutions to industrial relations of international companies through the lens of the debate between rules- and principles-based regulation. Part IV synthesizes the proceeding sections, arguing that a U.S. rules-based

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<sup>26</sup> *Teamsters Claim GM and Chrysler Use Of Cheap Haulers Causing Danger, Job Loss*, 21 Bankr. L. Rep. (BNA) 1751 (Dec. 10, 2009).

<sup>27</sup> See J.P. Windmuller, S.K. Pursey & J. Baker, *The International Trade Union Movement*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 75 (R. Blanpain ed., 8th ed. 2004).

<sup>28</sup> See, e.g., *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964). See also Windmuller et al., *supra* note 27.

<sup>29</sup> Anand, *supra* note 4, at 111.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

regulation should control conflict that arises within Chrysler between the U.S. and Italian divisions because an unchanging rule should guide future conflicts.

## I. BACKGROUND INFORMATION

### A. THE COLLAPSE OF THE U.S. AUTOMOBILE INDUSTRY

For more than a century, the U.S. auto industry has played a central role in U.S. manufacturing.<sup>33</sup> The auto industry has provided “jobs to millions of people, wealth to tens of millions, and products by the hundreds of millions.”<sup>34</sup> These jobs were high-quality jobs permitting individuals a lifestyle that became synonymous with the American dream.<sup>35</sup> The wealth created by the auto industry enriched owners and managers, suppliers and communities, and stockholders throughout the country.<sup>36</sup> One scholar noted that the amount of wealth and jobs created by the U.S. automobile industry is “extraordinary and unmatched by any other industry anywhere in the world.”<sup>37</sup>

However, this boom did not last, and “in the latter half of the 20<sup>th</sup> century, the U.S. auto industry lost its way.”<sup>38</sup> The sharp downturn largely resulted from manufacturers’ failure to respond appropriately to the consumers’ changing demands and failure to produce different types of automobiles.<sup>39</sup> Specifically, the U.S. demand for cars, SUVs, minivans, and pickups “had been running at a rate of approximately 16 to 17 million units per year,” but “started to weaken during the summer of 2008.”<sup>40</sup> “[W]ith the financial crisis and the macro-recession in the fall of

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<sup>33</sup> John E. Kwoka, Jr., *The U.S. Auto Industry Under Duress: Fit, or Finished?*, COMPETITION POL’Y INT’L, Autumn 2009, at 49, 50.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* These jobs “taught skills, promoted mobility into the middle class, provided health care, and conferred retirement security on generations of Americans.” *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* “It squandered its competitive advantage, allowed itself to become vulnerable to forces beyond its control, lost its markets one by one to foreign rivals, and stared into the abyss of its complete demise.” *Id.*

<sup>39</sup> *Id.* at 53. In fact, “the initial inroads made by Japanese companies were due to offering cars with high quality at budget prices.” *Id.*

<sup>40</sup> *Id.* at 51.

2008, demand truly collapsed.”<sup>41</sup> These financial woes provided the perfect storm, laying waste to the U.S. automobile industry.<sup>42</sup> “As a consequence, [General Motor]’s stock price declined from its peak of \$94 in 2000 to about \$25” in 2008, and continued to steadily decrease.<sup>43</sup> “[I]n 2008, Ford’s losses totaled \$15 billion while Chrysler lost \$8 billion.”<sup>44</sup>

Although federal and state governments have long participated in the U.S. auto industry, their role has traditionally been limited to tax and other financial benefits, as well as unemployment insurance and similar indirect assistance.<sup>45</sup> The U.S. government intervention in the recent turmoil represented unprecedented government assistance, but it prevented the complete demise of the industry.<sup>46</sup> As a result, the U.S. government is now deeply involved and invested in the U.S. auto industry.<sup>47</sup>

## B. U.S. BANKRUPTCY LAW

Although Congress continues to debate the merits and intricacies of the bankruptcy code, today’s laws are largely shaped by two acts—The Bankruptcy Act of 1898 and The Bankruptcy Reform Act of 1978.<sup>48</sup> The Bankruptcy Act of 1898 “provided the first stable basis for American bankruptcy law.”<sup>49</sup> During this time period, “America underwent a radical transformation from a country of small and isolated

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<sup>41</sup> *Id.* “The effects of such demand declines are readily understood from some simple economics. Automobile manufacture is a high fixed-cost business, so that sales declines result in revenue losses that substantially exceed cost reductions in the short and medium runs.” *Id.*

<sup>42</sup> *Id.* at 51–52.

<sup>43</sup> *Id.* at 51.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 58. “With one exception, however, the government has not provided company-specific assistance where private capital markets declined to do so. That exception, of course, was the federal government bailout of Chrysler in 1980.” *Id.*

<sup>46</sup> *Id.* at 49.

<sup>47</sup> *Id.*

<sup>48</sup> Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV., Spring 1995, at 5, 23. This Comment provides a short summary of bankruptcy in the United States. Mr. Tabb’s article, however, provides a thorough history for the interested reader.

<sup>49</sup> See Norman W. Hawker, *Triumph of the Whigs: The Fifty-Fifth Congress and the Bankruptcy Act of 1898*, 15 MIDWEST L. REV. 109 (1997) (noting that the 1898 Act saw the Fifty-Fifth Congress meet during one of the more momentous moments in American history as America would abandon its isolationism and assume a major role in international relations by entering into the Spanish-American War).

communities . . . into a compact and industrial unit.”<sup>50</sup> Yet, much of the 1898 Act contrasts with today’s procedures because current law has a predominant goal of restructuring an entity in an effort to better aid the creditors and economy at large.<sup>51</sup> The Bankruptcy Reform Act of 1978 offered the first comprehensive reform of the federal bankruptcy law since 1898,<sup>52</sup> presenting a unique step in the history of bankruptcy legislation because it was the first major overhaul not in response to a severe economic depression.<sup>53</sup> This Act created the modern Chapter 11 bankruptcy laws, which streamline the reorganization practice and constitute the route taken by Chrysler.<sup>54</sup>

Chrysler’s restructuring effort is a result of Title 11 of the U.S. Code—the Bankruptcy Code.<sup>55</sup> Essentially, Chapter 11 permits a debt-ridden entity to continue functioning as an ongoing business rather than as an entity of assets awaiting liquidation.<sup>56</sup> Chapter 11 permits this restructuring and continued functioning of the business as a means to offer more value to its creditors and to the economy as a whole.<sup>57</sup> Thus, the Obama Administration sought a financier with whom Chrysler could restructure and eventually turn a profit and Fiat seemed to meet these requirements.<sup>58</sup> Upon restructuring with Fiat, Chrysler entered bankruptcy court for a “quick rinse,”<sup>59</sup> selling its assets to create the new company with the government providing the additional required financing.<sup>60</sup>

The § 363 Sale under Chapter 11 provides the integral piece of the Bankruptcy Code pertinent to Chrysler’s story.<sup>61</sup> Under § 363, a bankruptcy trustee or debtor-in-possession (in this instance, Chrysler) may sell the bankruptcy estate’s assets “free and clear of any interest in

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<sup>50</sup> *Id.* (internal quotation marks omitted).

<sup>51</sup> Jarrod B. Martin, Kristofer W. Nelson, Eric Rudenberg & Jonathan Squires, Note, *Freefalling With A Parachute That May Not Open: Debtor-In-Possession Financing in the Wake of the Great Recession*, 63 U. MIAMI L. REV. 1205, 1205 (2009).

<sup>52</sup> Tabb, *supra* note 48, at 32.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 35.

<sup>55</sup> *In re Chrysler LLC*, 405 B.R. 84, 89 (Bankr. S.D.N.Y. 2009).

<sup>56</sup> Martin et al., *supra* note 51, at 1205.

<sup>57</sup> *Id.*

<sup>58</sup> Michael J. de la Merced, *Short on Time and Options, Lawyers Remade Chrysler*, N.Y. TIMES, June 15, 2009, at B3.

<sup>59</sup> *Id.* It was considered a “quick rinse” because Fiat took management control of a new version of Chrysler only forty-two days after Chrysler filed for bankruptcy protection on April 30, 2009. *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> 11 U.S.C.A. § 363 (West 2009).

such property” as a means for the debtor to quickly sell assets.<sup>62</sup> This attracts buyers such as Fiat, who acquire protection from any successive liability, subject to certain exceptions, because the purchase itself will be free from liability.<sup>63</sup> Section 363 allows sale of the debtor company, although it will continue in business, because a functioning entity is often more valuable than one that has been shut down and is awaiting asset liquidation.<sup>64</sup>

### C. U.S. BANKRUPTCY LAW APPLIED TO THE CHRYSLER SCENARIO

Chrysler’s financial downturn began several years before filing for bankruptcy in 2009.<sup>65</sup> Responding to a reduction in profits, Chrysler initiated a restructuring effort in early 2007, seeking a partner with expertise in smaller, more fuel-efficient vehicles to increase its size and create a greater global presence.<sup>66</sup> For this reason, in 2007 and 2008, Chrysler discussed and negotiated a potential alliance with Fiat.<sup>67</sup> However, in the fall of 2008, the global credit crisis affected both dealers’ and consumers’ ability to acquire loans, causing a decline in consumer confidence and a sharp drop in vehicle sales.<sup>68</sup> This drastic downturn forced Chrysler to spend its cash reserves earmarked for reorganization with Fiat, in order to compensate for the reduction in cash flow, and caused it to abandon its restructuring efforts.<sup>69</sup>

Due to the global credit crisis, Chrysler requested government loans to keep itself afloat, seeking seven billion dollars and receiving four billion.<sup>70</sup> On February 20, 2009, President Obama established a task force composed of a group of investment bankers and a bankruptcy and restructuring attorney in order to evaluate Chrysler’s potential.<sup>71</sup> The task force ultimately determined that Chrysler could emerge as a viable

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<sup>62</sup> Michael J. Davis, *363 Sales in Bankruptcy*, DUPAGE COUNTY B. ASS’N BRIEF, Nov. 2009, at 27.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 28.

<sup>65</sup> *In re Chrysler LLC*, 405 B.R. 84, 90 (Bankr. S.D.N.Y. 2009). This adaptation of the facts is largely adopted from the Bankruptcy Court’s opinion granting Chrysler’s motion to sell substantially all of its assets under 11 U.S.C.A. § 363, but is largely edited. One should consult the opinion for a full discussion of the complicated facts.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 91.

entity.<sup>72</sup> Subject to several conditions and additional concessions from key stakeholders, the U.S. Treasury indicated its willingness to provide additional capital to fund the company.<sup>73</sup> The key component to obtain additional government capital included an alliance with Fiat.<sup>74</sup> Chrysler resumed negotiations, signing a revised term sheet for a Fiat alliance on March 29, 2009.<sup>75</sup> Accordingly, the U.S. government agreed to provide for Chrysler's working capital needs through April 30, 2009.<sup>76</sup>

Chrysler, Fiat, and New Chrysler—a newly created Delaware LLC formed by Fiat as an alliance entity for the restructuring deal—entered into an agreement on April 30, 2009.<sup>77</sup> Pursuant to this deal, Chrysler transferred substantially all of its operating assets to New Chrysler. In exchange for those assets, New Chrysler will assume certain liabilities of Chrysler and pay Chrysler \$2 billion in cash.<sup>78</sup> In return, Fiat will contribute to New Chrysler access to competitive fuel-efficient vehicle platforms, certain technology, distribution capabilities in key growth markets and substantial cost saving opportunities.<sup>79</sup> U.S. bankruptcy laws permitted Fiat's acquisition of a large share in the Chrysler reorganization,<sup>80</sup> setting the stage for an international conflict as no concrete standard governs both the U.S. and Italian employees.

## II. INTERNATIONAL LABOR RELATIONS

### A. LEGAL PRINCIPLES GOVERNING THE GLOBAL ECONOMY

Although rooted in U.S. law, the Chrysler reorganization will implicate international labor law by virtue of Fiat's acquisition.<sup>81</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 92 n.11. Upon the closing of the sale, the Governmental Entities will hold 12.31%, the U.S. Treasury will hold 9.85% and Export Development Canada will hold 2.46%, VEBA will hold 67.69%, and Fiat will hold 20%. Upon reaching certain milestones, Fiat's interest will increase to 35%, with the right to acquire an additional 16% by buying shares. Fiat cannot get control of New Chrysler until the outstanding debts to the U.S. Treasury and Export Development Canada are paid in full. *Id.*

<sup>78</sup> *Id.* at 92.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See generally Stephen B. Moldof, *The Application of U.S. Labor Laws to Activities and Employees Outside the United States*, 17 LAB. LAW. 417, 417–34 (2002).

“International labor law covers both the substantive rules of law established at the international level, and the procedural rules relating to their adoption and implementation” at the national level.<sup>82</sup> To this end, Chrysler exemplifies the current trend of many American businesses expanding operations beyond U.S. borders—either directly or through affiliations with foreign-based entities.<sup>83</sup> These international actions are important because they drastically impact the conduct of business and work activities performed in many locales.<sup>84</sup> As such, an international solution is necessary to govern employees in multi-national corporations because the employees may act solely to protect their own interests profoundly affecting workers located in other nations.<sup>85</sup>

Such selfish action between nations makes squaring legal precepts, built on the concept of a single-nation workplace, quite difficult in the current economic climate, because a single-nation workplace is no longer the norm.<sup>86</sup> The global economy of today, in addition to expanding ties between U.S. and foreign business entities, makes it increasingly important to carve out applicable legal rules to meet the changing demands.<sup>87</sup> These rules will impact the fundamental decisions of multinational corporations, including, but not limited to, where to place employees and the corresponding operations, as well as the terms and conditions that will apply in the workplace.<sup>88</sup>

Moreover, international financial activity has expanded dramatically in recent years due to the new opportunities for firms and investors arising from cross-border capital flow.<sup>89</sup> In the realm of international financial activity, national laws continue to play a large role,<sup>90</sup> and these differences between nations create conflict when inward-looking, selfish decisions by employees in one nation lead to increasing transaction costs and significant impediments to international

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<sup>82</sup> L. Sweptson, *International Labour Law*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 141, 141 (R. Blanpain ed., 8th ed. 2004).

<sup>83</sup> Moldof, *supra* note 81, at 417.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 417–18.

<sup>89</sup> Stavros Gadinis, Article, *The Politics of Competition in International Financial Regulation*, 49 *HARV. INT'L L.J.* 447, 447 (2008).

<sup>90</sup> *Id.* at 448. The national laws determine the creation of financial products, the rights of investors acquiring these products, and the licensing and conduct of firms offering these products to the public. *Id.*

financial activity with another nation.<sup>91</sup> Coordination among countries lowers costs through adoption of a set of cohesive regulatory standards.<sup>92</sup> Thus, cohesive, international legal policy is necessary to eliminate the compliance costs arising between different nations.<sup>93</sup>

Beyond the expansion of international financial activity, the underlying environment influencing business transactions has drastically changed because of the differences between cultures that must be merged to accommodate a multinational entity.<sup>94</sup> There is no assurance that future disputes will be addressed solely by reference to antiquated legal principles adopted in a different context.<sup>95</sup> In fact, differences between cultures are certain to impact business relations as different cultures combining to form one entity is increasingly the norm.<sup>96</sup>

Variations between cultures result from the differences in lifestyles and the varied learned pool of knowledge shared amongst the members of one culture.<sup>97</sup> A culture's lifestyle and knowledge arises from a complex pattern of traditions, beliefs, values, norms, symbols, and meanings that are shared to varying degrees by interacting members and then transmitted through everyday interactions among members from one generation to the next.<sup>98</sup> Ultimately, culture provides a framework for identity, group inclusion, and group-boundary regulations.<sup>99</sup> Thus, it is important to note cultural differences between the United States and Italy because the legal developments currently taking place, and the practices and authority to be implemented, will be greatly important to the workers in both divisions of Chrysler.<sup>100</sup>

Furthermore, cultural differences make a concrete, international rule difficult to implement because the United States applies a fundamentally different approach to employment than many other nations.<sup>101</sup> In almost every country besides the United States, there is an

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Moldof, *supra* note 81, at 418.

<sup>95</sup> *Id.*

<sup>96</sup> See DAVID C. THOMAS & KERR INKSON, *CULTURAL INTELLIGENCE: PEOPLE SKILLS FOR GLOBAL BUSINESS* (2004).

<sup>97</sup> *Id.* at 22-25.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See Swepston, *supra* note 82.

<sup>101</sup> See generally Donald C. Dowling Jr., *U.S.-Based Multinational Employers and the "Social Contract" Outside the United States*, 43 INT'L LAW. 1237, 1238 (2009).

implicit understanding that “employees offer up their good citizenship and earnest labor in exchange for a package of benefits” provided by the employer.<sup>102</sup> In contrast, the United States operates under a market-driven version of the common law employment-at-will doctrine.<sup>103</sup> The U.S. employment-at-will conception, distinct from employment laws elsewhere, generally does not force employers to provide their workers any gratuitous benefits.<sup>104</sup>

The increasingly global economy exacerbates the differences between these systems because a large percentage of the world’s multinational employers are based in the United States.<sup>105</sup> Although these enterprises are based in the United States, they cannot legally operate internationally under an American-style, market-driven employment system.<sup>106</sup> To this end, courts apply different standards in determining the application of U.S. labor and non-labor statutes in situations where foreign conduct is involved.<sup>107</sup>

The starting point in this analysis is the non-extraterritorial presumption.<sup>108</sup> This presumption enforces U.S. statutes beyond the territorial boundaries of the United States only when congressional

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<sup>102</sup> *Id.* at 1239. “[T]he terms of the modern ‘social contract’ in almost every country amount to an implicit and overtly employee-friendly bargain by which employees offer up their good citizenship and earnest labor in exchange for a viable package of benefits, protections, and a social safety net that is, in large part, provided by employers.” *Id.*

<sup>103</sup> *Id.* at 1241 n.12. “According to an American law school casebook on U.S. employment law, the U.S. employment-at-will doctrine: ‘developed more than 100 years ago. . . . [Under it], either employer or employee could sever the working relationship for any reason, or without reason [and without notice], as long as there was no explicit undertaking to the contrary. Courts were only interested in contractual commitments, and not in whether the conditions set out in the contract were fair in the eyes of a judge or the product of equal bargaining power.’” *Id.* (citing ROBERT RABIN ET AL., LABOR AND EMPLOYMENT LAW: PROBLEMS, CASES AND MATERIALS IN THE LAW OF WORK 11 (3d ed. 2002)).

<sup>104</sup> *Id.* at 1240–42 (explaining that U.S. employers generally do not have to provide a cap on hours worked; any holidays (paid or unpaid); any vacations (paid or unpaid); any paid sick leave or paid maternity leave; any medical insurance; any employer profit sharing; any year-end bonuses; or any severance pay or pre-termination notice).

<sup>105</sup> *Id.* at 1247.

<sup>106</sup> *Id.*

<sup>107</sup> *Moldof*, *supra* note 81, at 433; *see also* *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258–259 (1991) (holding that Congress had authority to enforce its laws extra-territorially beyond the United States, and whether Congress exercised that authority was a matter of statutory construction). *But see* *Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 923 F.2d 678, 679 (9th Cir. 1991) (holding that Congress did not intend the RLA to govern labor disputes in other countries, where the employees were based outside the United States and had worked exclusively outside the United States and who, in virtually all instances, were foreign nationals).

<sup>108</sup> *Moldof*, *supra* note 81, at 418. This principle was articulated in *EEOC*, 499 U.S. at 248.

intention indicates that they should apply.<sup>109</sup> Additional inquiry arises in the context of labor law regarding the extent to which conduct has an impact in or occurs within the United States.<sup>110</sup> This is an increasingly important body of law because “actions taken in the workplace in one nation can substantially impact the conduct of work in other nations.”<sup>111</sup> This volatile nature of the global economy can make it difficult to fix unchanging rules,<sup>112</sup> and these issues play a significant role in international transactions and relationships.<sup>113</sup>

## B. THE INTERNATIONAL TRADE UNION MOVEMENT

The international trade union movement has been growing for well over a century as trade unions continue to embrace international interests and commitments.<sup>114</sup> This movement is built upon millions of local unions that “form, develop, and pursue their primary tasks of defending and improving the conditions of life and work of their members mainly within national systems of industrial relations.”<sup>115</sup> Although local trade unions operate within national economic, social, political, and legal contexts, they nevertheless establish complex networks of international associations.<sup>116</sup> “In both the industrialized, developing and transition countries, international activities are an *increasingly* integral part of national trade union strategies.”<sup>117</sup> This burst of international consideration within trade union organizations will influence the U.S. and Italian employees of Chrysler because labor

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<sup>109</sup> Moldof, *supra* note 81, at 418; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(a-c) (1987) (stating that there are a number of factors to consider when determining which laws to apply, including: the link of the activity to the territory of the regulating state; the connections between the regulating state and the person principally responsible for the activity to be regulated; and the character of the activity to be regulated).

<sup>110</sup> Moldof, *supra* note 81, at 423; *see also* Dowd v. Int’l Longshoremen’s Ass’n, 975 F.2d 779, 788 (11th Cir. 1992) (holding jurisdiction properly extended to the action in question because the conduct, notwithstanding its foreign locale, had been intended to have, and in fact did have, substantial effects within the United States).

<sup>111</sup> Moldof, *supra* note 81, at 434.

<sup>112</sup> *Id.* at 418.

<sup>113</sup> *Id.* at 434.

<sup>114</sup> Windmuller et al., *supra* note 27, at 75.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 100 (emphasis added).

conflict between the two divisions necessarily takes on an international scope.<sup>118</sup>

Conflict pervades the international trade union movement because of the many varying economic ideologies.<sup>119</sup> As noted, the United States has a fundamentally different approach to employment than many other nations.<sup>120</sup> American labor organizations generally embrace the capitalist system, but many of their European counterparts practice a socialistic philosophy.<sup>121</sup> Additionally, some transnational facilities are located in highly organized areas of the world, while others function in basically non-union environments.<sup>122</sup> American labor organizations are generally decentralized to permit effective negotiation of plant rules at the local level, whereas most European trade unions tend to be highly centralized to accommodate industry-wide bargaining.<sup>123</sup>

These differences are aggravated when two national policies collide, because national laws play such a large role in regulating a nation's financial activity.<sup>124</sup> When national policies collide in an international agreement, the typical result is increased transactional costs, which in turn create obstacles to coordinating international financial activity.<sup>125</sup> As such, "[w]here an employment contract involves one or more foreign countries, it must be determined which of the different laws governs the contract before litigious questions can be resolved."<sup>126</sup> Reducing obstacles to international financial activity is justification for international policy coordination and rule agreement in the employment contract.<sup>127</sup>

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<sup>118</sup> *Id.* at 75.

<sup>119</sup> R. Blanpain, *Comparativism in Labour Law and Industrial Relations*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMICS* 3, 3 (R. Blanpain ed., 8th ed. 2004).

<sup>120</sup> See generally Dowling, *supra* note 101, at 1237.

<sup>121</sup> R. Blanpain, *The European Union and Employment Law*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMICS* 165, 172–73 (R. Blanpain ed., 8th ed. 2004). European labor law merely sets a framework, leaving a lot of room for national development and freedom of movement, which is embraced as a fundamental right of workers and their families. *Id.*

<sup>122</sup> Blanpain, *supra* note 119, at 6.

<sup>123</sup> Blanpain, *supra* note 121, at 187.

<sup>124</sup> Gadinis, *supra* note 89, at 448.

<sup>125</sup> Blanpain, *supra* note 121, at 187.

<sup>126</sup> F. Gamillscheg & M. Franzen, *Conflicts of Laws in Employment Contracts and Industrial Relations*, *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 213, 213 (R. Blanpain ed., 8th ed. 2004).

<sup>127</sup> Gadinis, *supra* note 89, at 448.

Furthermore, international trade unions have taken great care to craft their basic aims in general and non-offensive terms to avoid taking sides on divisive issues.<sup>128</sup> To accomplish this, these organizations emphasize beliefs and values shared by the largest possible number of constituents.<sup>129</sup> Selecting and attempting to fulfill basic, defined, and non-offensive aims is a beneficial practice because it leaves room to attempt more specific objectives within limited parameters.<sup>130</sup> Through this practice, large and positive change can result through increasingly multi-faceted and multi-dimensional circumstances.<sup>131</sup> For instance, long established unions in Europe and North America call for support from other regions in an effort to obtain recognition and collective agreements with multinational companies.<sup>132</sup> Yet, a major drawback these international units face is the task of mobilizing significant resources to address new important issues for the national organizations undergoing difficult and costly internal reforms.<sup>133</sup>

### III. THE RULES VERSUS PRINCIPLES DEBATE

The debate between a rules-based and principles-based regulation is quite narrow in scope.<sup>134</sup> A *rule* entails advance determination of what conduct is permissible between the parties to the agreement, leaving only factual issues for the adjudicator to decide when problems arise.<sup>135</sup> A *principle* entails leaving both the specification of what conduct is permissible and factual issues for the adjudicator to decide after conflict arises.<sup>136</sup> Arguments about definitions of rules and principles commonly emphasize the distinction between whether the law

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<sup>128</sup> Windmuller et al., *supra* note 27, at 78-79. For instance, the language might be crafted to avoid advocating for the transition from capitalism to socialism. *Id.*

<sup>129</sup> *Id.* at 79. These values include the defense of “human and trade union rights, firm opposition to totalitarian regimes, support for all genuine efforts to safeguard world peace, endorsement of the struggle for social justice, and demands for the fair distribution of wealth and incomes at national and international levels.” *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 101.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Anand, *supra* note 4, at 112.

<sup>135</sup> Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-60 (1992). For instance, a rule might prohibit “driving in excess of 55 miles per hour on expressways,” but a principle might merely “prohibit driving at an excessive speed on expressways.” *Id.*

<sup>136</sup> *Id.* at 560.

is given force *ex ante* or *ex post*.<sup>137</sup> Regarding the Chrysler scenario, a rules-based regulation would provide a detailed explanation of what conduct is permissible and what conduct is sanctionable. Conversely, a principles-based regulation would merely provide a minimum standard of conduct that must be met.<sup>138</sup> Although narrow in scope, the principles versus rules debate has garnered worldwide attention in recent years due to the era of corporate scandal epitomized by the Enron controversy.<sup>139</sup> Within and outside the United States, policymakers utilize these categories as a means to promote, reform, or proscribe legal systems.<sup>140</sup>

### A. RULES-BASED REGULATIONS

Rules-based regulation is deeply rooted within the United States as the cornerstone of both the legal system and social conscience; it has been the standard since the founding of the nation.<sup>141</sup> The Founding Fathers saw corporations as dangerous organizations “that, if not heavily regulated, would threaten the very freedom of their fledgling nation.”<sup>142</sup> In response to this feared threat, the original thirteen colonies put in place constitutional provisions that would regulate and put strict limitations on businesses.<sup>143</sup> This longstanding apprehension of corporate abuses has made rules preferable to principles in American corporate governance.<sup>144</sup> Furthermore, a rules-based regulation conforms to the precedent-driven U.S. legal system.<sup>145</sup> The traditional perspective on

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<sup>137</sup> *Id.* at 559.

<sup>138</sup> *Id.* at 560.

<sup>139</sup> Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of “Principles-Based Systems” in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411, 1411 (2007).

<sup>140</sup> *Id.* at 1413.

<sup>141</sup> Jonas V. Anderson, Note, *Regulating Corporations the American Way: Why Exhaustive Rules and Just Deserts Are the Mainstay of U.S. Corporate Governance*, 57 DUKE L.J. 1081, 1081 (2008). A rules-based regulation is rooted within the social conscience. The criminal justice system is a rules-based system of regulation that defines explicit prohibited conduct and dictates a corresponding punishment. *Id.*

<sup>142</sup> *Id.* at 1101.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1104.

<sup>145</sup> See generally Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (arguing that appeals to precedent do not reside exclusively in courts of law). “Forms of argument that may be concentrated in the legal system are rarely isolated there, and the argument from precedent is a prime example of the non-exclusivity of what used to be called ‘legal reasoning.’ Think of the child who insists that he should not have to wear short pants to school because his older brother was allowed to wear long pants when *he* was seven. . . . [I]n countless instances, out of law as well as in, the fact that something was done before provides, by itself, a reason for doing it that way again.” *Id.* at 572.

precedent focuses on the importance of yesterday's decisions as a means to decide today's conflicts.<sup>146</sup> Similarly, a rules-based regulation is established so that future decisions can be guided by a set and unchanging rule.<sup>147</sup>

Notwithstanding their underlying rationale, rules-based regulations have drawbacks.<sup>148</sup> They have pushed an increasing number of corporations to take their business outside the United States, where regulatory oversight is less stringent and compliance costs less exorbitant.<sup>149</sup> Additionally, a rules-based approach can encourage individuals to manipulate the rules to their benefit.<sup>150</sup> This attitude engenders a mindset to ask the wrong question: "Is it legal?" instead of "Is it right?"<sup>151</sup> Such attitudes should be discouraged because high-priced lawyers and skilled professionals often find a way through the thicket of regulations, as it is impossible to cover every conceivable scenario.<sup>152</sup> It is important that a regulation leads to compliance the rule and the appropriate manner of conduct, and does not encourage gamesmanship to avoid the rule.<sup>153</sup>

It can be difficult to comply with rules-based regulations because congressional efforts are often marked by elaborate compilations of rules and a high level of regulatory detail intended to address all situations.<sup>154</sup> When Congress imposes too many conditions and benchmarks, it can be difficult to follow through with the underlying rule.<sup>155</sup> Historically, detailed rules are championed to enhance credibility,<sup>156</sup> but increasing uniformity also decreases management's flexibility to make choices.<sup>157</sup> Despite these shortcomings, rules-based regulations can influence and direct the members of a community in a very short period of time while ensuring a minimum standard of practice and rapidly increasing trust in

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 573.

<sup>148</sup> Anderson, *supra* note 141, at 1084.

<sup>149</sup> *Id.* at 1083.

<sup>150</sup> Doug Macnamara, *Improving Governance Performance: Rules-Based vs. Principles-Based Approaches*, LEADERSHIP ACUMEN, Jan.–Feb. 2004, at 1, 3.

<sup>151</sup> Joshua Ronen, *Post-Enron Reform: Financial Statement Insurance, and GAAP Re-visited*, 8 STAN. J.L. BUS. & FIN. 39, 61 (2002).

<sup>152</sup> Macnamara, *supra* note 150, at 3.

<sup>153</sup> *Id.* at 1.

<sup>154</sup> Anderson, *supra* note 141, at 1086.

<sup>155</sup> *Id.*

<sup>156</sup> Ronen, *supra* note 151, at 62.

<sup>157</sup> *Id.*

the system.<sup>158</sup> Additional benefits arise from a rules-based regulation because individuals become better informed about rules than the uncertainty surrounding principles, thus allowing them to better conform their behavior to the law.<sup>159</sup>

## B. PRINCIPLES-BASED REGULATIONS

Principles-based regulations are beginning to draw praise from many influential U.S. political and business leaders who view the rules-based system as a “weight around the neck of U.S. capital markets.”<sup>160</sup> For instance, in January 2007, U.S. President George W. Bush cautioned that legislative rulemaking had created “excessive litigation and overregulation [that] threaten to make our capital markets less attractive to investors, especially in the face of rising competition from capital markets abroad.”<sup>161</sup> The chief benefit of a principles-based regulation is the freedom individuals have to comply with an agreed upon baseline as opposed to conforming to a complex and concrete formula designed to achieve desired ends.<sup>162</sup>

The freedom to achieve the agreed-upon baseline permits companies to exercise professional judgment in favor of the public interest.<sup>163</sup> This, in turn, increases individual, corporate, and societal utility as actors work toward baseline compliance.<sup>164</sup> The baseline creates a minimum standard of practice that can easily rise over time to influence business practices and positively impact the surrounding community.<sup>165</sup> Thus, principles influence a broad set of business practices affecting community expectations for corporations at large by allowing for a greater alignment between regulated business practice and community expectations.<sup>166</sup> If members of the community believe that businesses are skirting the baseline or are not genuine, they will signal that there is a problem.<sup>167</sup> This should compel businesses to achieve a higher standard

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<sup>158</sup> Macnamara, *supra* note 150, at 3.

<sup>159</sup> Kaplow, *supra* note 135, at 577.

<sup>160</sup> Anderson, *supra* note 141, at 1088.

<sup>161</sup> *Id.*

<sup>162</sup> Ronen, *supra* note 151, at 61.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Chris Brummer, *Corporate Law Preemption in an Age of Global Capital Markets*, 81 S. CAL. L. REV. 1067, 1100 (2008).

<sup>167</sup> Ronen, *supra* note 151, at 61.

of practice because most onlookers will not tolerate minimal or noncompliance.<sup>168</sup>

However, principles-based regulations suffer from the vagueness inherent in concepts such as materiality and fairness. Furthermore, when unaccompanied by some specific content, they create risks of after-the-fact managerial decision-making and arbitrary enforcement.<sup>169</sup> Therefore, some specificity reflecting rule-like characteristics is necessary to give meaning to the agreed-upon principles; in isolation, they are vulnerable to abuse.<sup>170</sup> While rules are more costly to create, principles can impose higher compliance costs because there is no concrete example of conduct that complies with the agreed-upon principle.<sup>171</sup> Additionally, when compliance with principles is relatively costly, the risk of non-compliance rises.<sup>172</sup>

The desirability of a rule versus a principle depends on the clarity with which one can define the importance of relative objectives.<sup>173</sup> This requires an evaluation and determination of importance for the entity: predictability and certainty versus fairness and context.<sup>174</sup> As a general rule of thumb, devaluing discretion in order to promote predictability and certainty dictates adopting rules; prioritizing fairness and contextual sensitivity leads to the formulation of principles.<sup>175</sup> However, rules may provide more certainty for contexts that are simple, stable, and involve small stakes, but less certainty when addressing complex, dynamic, high-stakes contexts.<sup>176</sup> This is especially true when new rules are adopted and subject to change during implementation and evolution.<sup>177</sup>

The foregoing discussion illuminates that there are tradeoffs when one system is chosen, and attempting to escape these tradeoffs might seem hopeless.<sup>178</sup> One scholar suggests that invoking moral values like fairness, equity, or community offers little promise.<sup>179</sup> This is

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<sup>168</sup> *Id.*

<sup>169</sup> Cunningham, *supra* note 139, at 1424.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 1425.

<sup>177</sup> *Id.*

<sup>178</sup> Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 70 (1983).

<sup>179</sup> *Id.* at 71.

important because such values are often advanced as beneficial ideals that might result from the looser, principles-based regulation.<sup>180</sup> “Since tradeoffs among values are unavoidable, the morally sensitive rule maker must reduce those conflicting values to some common denominator.”<sup>181</sup>

#### IV. APPLYING A U.S.-STYLE, RULES-BASED REGULATION TO CHRYSLER

Several options exist for implementing a governing model to control conflict arising between Chrysler’s U.S. and Italian divisions: a United States rules- or principles-based regulation or an Italian rules- or principles-based regulation.<sup>182</sup> Ultimately, enacting a rules-based regulation for Chrysler entails the advance determination of both the specific conduct that is permissible and that which is punishable for the U.S. and Italian divisions.<sup>183</sup> Conversely, a principles-based regulation would leave articulation of the specific conduct that is permissible and punishable for an adjudicator to decide after an incident has occurred.<sup>184</sup> This means that a principles-based system for Chrysler is one in which all, a majority, or even the most important details are left vague and would not be decided until after an incident between the U.S. and Italian divisions occurs, while a rules-based system defines concrete and pre-established provisions.<sup>185</sup>

Regarding Chrysler, the initial issue to decide is whether the United States or Italy will control the system implemented.<sup>186</sup> The regulatory model must take into account the differences between employment in the United States and in Italy, because nations often do not operate under the U.S. capitalist tradition.<sup>187</sup> The international trade union movement is gaining momentum in crafting policies to control international labor disputes, but corporations are still left to implement

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 72.

<sup>182</sup> Due to the limited scope of this Comment, the author argues only that a United States, rules-based regulation should be implemented to govern the Chrysler scenario, and not lay out what such a regulation might look like or how it would be implemented.

<sup>183</sup> Kaplow, *supra* note 135, at 559–60.

<sup>184</sup> *Id.*

<sup>185</sup> Cunningham, *supra* note 139, at 1426.

<sup>186</sup> Gamillscheg & Franzen, *supra* note 126, at 213. This source pertained to employment agreements at large, and is now being applied to the specific agreement between Chrysler and Fiat.

<sup>187</sup> See generally Dowling, *supra* note 101, at 1237.

many of their own policies because no settled and unified policy exists.<sup>188</sup> Therefore, a specific regulation must be set to control conflict between the two Chrysler divisions.

Ultimately, Chrysler must be governed by a U.S.-controlled, rules-based system despite Fiat's important role as an Italian automobile corporation directly involved in the Chrysler bankruptcy, because Fiat holds only a minority interest in Chrysler.<sup>189</sup> The U.S. government provided the majority of necessary funding and will remain the majority player until Chrysler becomes profitable.<sup>190</sup> As such, the United States should dictate the terms of the agreement because of the strong link between the industrial activity in Italy and the United States' majority ownership of Chrysler.<sup>191</sup> The conduct between these divisions, notwithstanding the foreign locale, was intended to have and has had substantial effects within the United States for the entirety of Chrysler's restructuring effort.<sup>192</sup>

Next, it must be decided whether a rules- or principles-based regulation should be implemented to control the Chrysler scenario. The chief benefit of a rules-based regulation is that Chrysler will be equipped to handle the many problems that might arise in a large, complicated entity before problems actually manifest themselves, and this contemplation should be utilized as a means to reduce confusion.<sup>193</sup> Implementing a rules-based regulation requires calculation of how the rules are to be applied, interpreted, enforced, or suspended within Chrysler.<sup>194</sup> This task seems more complicated than it truly is because "[a]t the end of the corporate law spectrum are provisions that establish a hierarchy of sources of legal authority."<sup>195</sup> This hierarchy of

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<sup>188</sup> See generally Windmuller et al., *supra* note 27. Windmuller's chapter details the development of the International Trade Union Movement, noting that there is no single model for labor relations, providing evidence for the proposition that corporations are able to implement their own policies.

<sup>189</sup> Vlastic, *supra* note 1, at A1.

<sup>190</sup> *Id.* This debate might be revisited at such future juncture when Chrysler pays back its debt and turns a consistent profit, but such speculation is beyond the scope of this Comment.

<sup>191</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(a) (1987).

<sup>192</sup> Vlastic, *supra* note 1, at A1.

<sup>193</sup> Schauer, *supra* note 145, at 573. This source provides the chief benefit of a rule and the author of this Comment applies it to the Chrysler scenario.

<sup>194</sup> Cunningham, *supra* note 139, at 1428.

<sup>195</sup> *Id.* at 1437. This issue is too broad to be covered thoughtfully within this comment, but it is sufficient to say that "[t]his hierarchy puts state corporation law statutes at the top, followed by articles of incorporation (the charter), then by-laws, and then contracts (with judicial decisions hovering throughout)." *Id.*

corporate authority provides the ordering mechanism necessary for Chrysler, and begins to shape the balance of power between the many participants of the corporation.<sup>196</sup>

This lends support to a U.S., rules-based regulation because concrete areas of corporate law are already in place to help fill in the confusing and difficult pieces that a corporation must establish to implement a rules-based regulation.<sup>197</sup> A massive corporation—like Chrysler—with various working parts should be organized to correspond with the external legal hierarchy documented in corporate law, as well as with internal corporate procedure.<sup>198</sup> This order and awareness can be achieved because a rules-based regulation will set out, ahead of time, the operations that will apply on all levels of the corporation, both nationally and internationally.<sup>199</sup> It is much more difficult to achieve a regulatory system with immense order and awareness in a principles-based regulation because of the vague nature of a principle.<sup>200</sup>

Next, a rules-based regulation specifically suits the Chrysler scenario because it can effectuate specificity, purpose, and results through the words and intentions behind the rules.<sup>201</sup> The rule maker can set a regulation that will produce maximum benefits for the employees in both the United States and Italy by implementing words that will be transparent, accessible, and congruent to the situations that will arise.<sup>202</sup> This means that a rational rule-maker will be very attentive to the probable effect of his choice of words upon the rule's intended audience.<sup>203</sup> This is increasingly important in the Chrysler scenario because cross-cultural differences will come into play.<sup>204</sup>

Understanding cross-cultural communications is essential because Chrysler operates on a global scale; implementing a rules-based regulation and doing business without understanding the culture of the

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<sup>196</sup> *Id.* at 1438.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Schauer, *supra* note 145, at 573.

<sup>200</sup> Cunningham, *supra* note 139, at 1424.

<sup>201</sup> Diver, *supra* note 178, at 67.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See generally Christopher Brett Jaeger, Response, *Defending A Social Learning Explanation: A Comment on the Origins of Shared Intuitions of Justice*, 62 VAND. L. REV. EN BANC 25, 34–35 (2009), <http://law.vanderbilt.edu/publications/vanderbilt-law-review/online-companion/index.aspx>.

customers or employees will likely lead to unsuccessful results.<sup>205</sup> An individual's fundamental values such as time orientations, thoughts about conflict and groups, collectivist or individualist values, and "face" are all influenced by an individual's culture.<sup>206</sup> This cross-cultural aspect of Chrysler lends support to a rules-based regulation because certainty is possible in a scenario where minor cultural differences between the two nations can become easily distorted.<sup>207</sup>

Furthermore, a rules-based regulation should be implemented to curb selfish action within Chrysler.<sup>208</sup> An explicit, rules-based regulation influences and drives members of the corporate community in a very short period of time because individuals immediately experience tangible results and are cognizant of the specific rules by which they must abide.<sup>209</sup> This increases trust in the system implemented and works to ensure a minimum standard of practice by virtue of the enumerated conduct that is permissible and tolerated.<sup>210</sup> Implementing a rules-based regulation dictates the very scenario under which the players will operate and creates a system for Chrysler that should minimize avarice and selfish action between the U.S. and Italian divisions.<sup>211</sup> Individuals in both locales become better informed about specific rules, rather than the uncertainty surrounding principles, thus allowing them to better conform their behavior to the law for the benefit of Chrysler.<sup>212</sup>

On the other hand, implementing a principles-based regulation within Chrysler would allow the U.S. and Italian divisions the freedom to comply with an agreed-upon baseline.<sup>213</sup> This would be a beneficial step because both divisions would be freed from conforming to specific rules highlighted by complex and concrete formulas.<sup>214</sup> Yet, this benefit is mitigated because principles inherently lead to vague concepts and execution.<sup>215</sup> This shortcoming would create excess complications due to the lack of specific guidance and content necessary to the many

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<sup>205</sup> See THOMAS & INKSON, *supra* note 96, at 25–26.

<sup>206</sup> *Id.*

<sup>207</sup> Jaeger, *supra* note 204, at 36.

<sup>208</sup> Macnamara, *supra* note 150, at 3.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 2–3.

<sup>211</sup> *Id.*

<sup>212</sup> Kaplow, *supra* note 135, at 622.

<sup>213</sup> Ronen, *supra* note 151, at 61.

<sup>214</sup> *Id.*

<sup>215</sup> Cunningham, *supra* note 139, at 1433.

employees in both the United States and Italy.<sup>216</sup> A rules-based regulation better suits the Chrysler scenario because this type of regulation leads individuals to become better informed about appropriate conduct.<sup>217</sup> Such regulation contrasts with the uncertainty that surrounds adoption of principles, and allows individuals to better conform their behavior to the law.<sup>218</sup>

Additionally, proponents of a principles-based regulation argue that such a regulation should control because principles set a minimum standard of practice that can easily rise over time.<sup>219</sup> As such, principles will influence a broad set of business practices for corporations at large to help the surrounding community.<sup>220</sup> However, this benefit is inapplicable to the Chrysler scenario because some specificity reflecting rules-based regulation is necessary due to the international scope of the labor divisions.<sup>221</sup> In isolation, and especially when there is a large and complicated corporate issue, a principles regime is vulnerable to abuse.<sup>222</sup>

As discussed, a rules-based regulation might encourage individuals within Chrysler to manipulate the rules in order to find loopholes and to avoid them altogether.<sup>223</sup> Chrysler should certainly be discouraged from analysis that seeks to skirt the rules, and one might argue that principles could be implemented as an alternative to define the system as a whole.<sup>224</sup> However, this concern is greatly mitigated because both the U.S. and Italian labor divisions are underneath the same umbrella—Chrysler. The fact that the two divisions' likelihood of success hinges on one another via mutual cooperation mitigates the concern that either division will take selfish action at the other's peril.

## CONCLUSION

Chrysler was able to meet difficult conditions and concessions so that the U.S. Treasury would aid the corporation during its cash crisis by providing working capital until a reorganization could be secured with

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<sup>216</sup> *Id.*

<sup>217</sup> Kaplow, *supra* note 135, at 622.

<sup>218</sup> *Id.*

<sup>219</sup> Brummer, *supra* note 166, at 1100.

<sup>220</sup> *Id.*

<sup>221</sup> Cunningham, *supra* note 139, at 1424.

<sup>222</sup> *Id.* at 1433.

<sup>223</sup> Macnamara, *supra* note 150, at 3.

<sup>224</sup> Cunningham, *supra* note 139, at 1438.

Fiat.<sup>225</sup> The U.S. government intervention in the Chrysler turmoil is significant because it represented unprecedented government assistance within the auto industry, and prevented its complete demise.<sup>226</sup> As a result, taxpayers within the United States face significant losses unless Chrysler can become a viable and profitable entity.<sup>227</sup>

This reorganization leaves Chrysler in the position of implementing either a U.S. or Italian rules-based or principles-based regime to control labor disputes between the foreign divisions because of the lack of a set, international law.<sup>228</sup> The reorganization of Chrysler with Fiat should be governed by a U.S.-administered, rules-based regulation because Chrysler operations have substantial effects within the United States and a concrete system of rules is necessary to mitigate future conflict between the U.S. and Italian branches.<sup>229</sup> The next step in the Chrysler scenario would be for Chrysler to create and implement a detailed rules-based regulation.

The Chrysler scenario exemplifies the current trend of many American businesses and their employees expanding business operations beyond U.S. borders—either directly or through affiliations with foreign-based entities.<sup>230</sup> Such international actions are critically important because they impact the conduct of business and work activities performed in many locales as a result of today's technology.<sup>231</sup> Thus, understanding cross-cultural communications is essential to the Chrysler scenario because business is conducted on a global scale,<sup>232</sup> and, because the international trade union movement continues to develop, an international solution has not been implemented.<sup>233</sup>

Ultimately, a U.S.-style, rules-based regulation should be implemented because of the strong link between the industrial activity in Italy and the United States' majority ownership of Chrysler.<sup>234</sup> A rules-based regulation allows individuals to become better informed about

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<sup>225</sup> *In re Chrysler LLC*, 405 B.R. 84, 90–91 (Bankr. S.D.N.Y. 2009).

<sup>226</sup> Kwoka, *supra* note 33, at 50.

<sup>227</sup> Rugaber, *supra* note 22.

<sup>228</sup> Swepston, *supra* note 82, at 161.

<sup>229</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(a) (1987).

<sup>230</sup> Moldof, *supra* note 81, at 417.

<sup>231</sup> *Id.*

<sup>232</sup> THOMAS & INKSON, *supra* note 96, at 25–26.

<sup>233</sup> Windmuller et al., *supra* note 27, at 79.

<sup>234</sup> *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(a) (1987). The activity's link to the United States supports U.S. regulation.

permissible conduct, compared to the uncertainty surrounding principles.<sup>235</sup> The Chrysler scenario necessitates a concrete, rules-based regulation to curb distortion and abuse of an agreed-upon principle because of the large stakes and multi-national employees.<sup>236</sup> It is critical that a regulation be predictable and certain because of the diverse Chrysler employees, cultural contexts, and corporate issues.<sup>237</sup> Such predictability and certainty in dealing with the U.S. and Italian employees can only be achieved through a U.S.-style, rules-based regulation.

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<sup>235</sup> Kaplow, *supra* note 135, at 622.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*