

# *Fordham International Law Journal*

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*Volume 42, Issue 5*

2019

*Article 9*

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## Countervailing Social Dumping—Regulating Ill Gotten Economic Gains

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NOTE

COUNTERVAILING SOCIAL DUMPING—  
REGULATING ILL GOTTEN ECONOMIC GAINS

*Ruarri Rogan\**

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### I. INTRODUCTION

Misery underlies Malaysia's expanding export industry. The misery is underpinned by social and economic factors related to the working conditions created by Malaysia's migrant labor policies. A lack of enforceable international labor standards allows the Malaysian government to depress the wages and social rights of migrant workers in Malaysia,<sup>1</sup> thereby depressing the global manufacturing labor market by undercutting the bargaining power of manufacturing laborers around the world.<sup>2</sup>

Independent reports assessing the social conditions of migrant workers in Malaysia show that Malaysian government officials are implicated in incidents of harassing legal migrant workers; in one such incident, industry health inspectors discovered that a sick factory worker suffered from an infection and rather than provide treatment, the inspectors reported the worker to government officials who arrested her, imprisoned her, and threatened her with deportation while her condition grew worse.<sup>3</sup> Many layers of Malaysian government—health workers, police, magistrates, and prison officials—were involved in the abuse of this particular migrant laborer.<sup>4</sup> Furthermore, the conditions that migrant laborers live in can be fatal—the Nepal embassy in Malaysia notes that since 2005, an average of twenty-five Nepalese workers in Malaysia dies every month because of “squalid living and working conditions, stress, work pressure, and family pressure and lack of rest.”<sup>5</sup>

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1. *See infra* Part IV.

2. *See infra* Part III.

3. WORKER RIGHTS CONSORTIUM, ASSESSMENT PROLEXUS BHD. (HONSIN APPAREL) MALAYSIA FINDINGS, RECOMMENDATIONS AND STATUS 2 (2014), available at <http://www.workersrights-test.org/wp-content/uploads/2016/02/WRC-Assessment-re-Prolexus-Bhd-Malaysia-4.23.2014.pdf> [<https://perma.cc/AXD2-EAYT>].

4. *Id.*

5. Workers live in unhygienic and dangerous conditions with ten people sleeping in a single room in shifts. Ariel Ramchandani, *Forced Labor Is the Backbone of the World's Electronics Industry*, *THE ATLANTIC* (June 28, 2018), <https://www.theatlantic.com/business/archive/2018/06/malaysia-forced-labor-electronics/563873/> [<https://perma.cc/L8US-M3KJ>]. In 2016, the Nepal embassy noted that over 300 Nepali workers (it is not clear which industry these

The impact of the poor social conditions experienced by Malaysian migrant workers is not confined to Malaysia and there are spillover effects that are felt in the United States.<sup>6</sup> While the economic hardship of manufacturing workers in the United States is often attributed to robots and automation, the growth of Malaysian low-wage manufacturing in the 1990s precipitated the decline of American manufacturing in the 2000s.<sup>7</sup> Research shows that the automation of manufacturing plays a smaller part in the decline of US manufacturing jobs than is popularly believed and that many US manufacturing jobs have not gone to robots but rather to assembly-intensive manufacturing jobs in countries,<sup>8</sup> like Malaysia, where forced labor artificially deflates the wage burden on employers and undercuts the competitiveness of US labor.<sup>9</sup> To put the scale of harm caused to American workers in perspective—the estimated six million manufacturing jobs that were lost by the United States to low-wage countries between 2000 and 2010 is larger than the number of jobs lost in the United States during the Great Depression.<sup>10</sup>

The various systems in place that regulate labor at an international level<sup>11</sup> provide no defense against the damaging spillover effects of the Malaysian government's policies that exploit migrant labor while diminishing the wages of migrants in Malaysia and manufacturing

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workers came from) had died in Malaysia (the Government of Nepal now bans seeking jobs there). Aishwardeep Kaur, *Guess How Much Migrant Workers Pay to Enter Malaysia*, CILISOS (May 8, 2018), <https://cilisos.my/5-ways-we-can-improve-the-working-conditions-of-migrants-in-malaysia/> [https://perma.cc/R9UV-TM64]. The average number of deaths is around 300 per year since 2005 with the majority of deaths being attributable to cardiac arrest. *Report: 386 Nepalese Migrant Workers Died Here in 2016*, FREE MALAYSIA TODAY (Jan. 21, 2017), <https://www.freemalaysiatoday.com/category/nation/2017/01/21/report-386-nepalese-migrant-workers-died-here-in-2016/> [https://perma.cc/T5VU-G6YK].

6. See *infra* Section II.A.3.

7. Susan Houseman et al., *Offshoring Bias in U.S. Manufacturing*, 25 J. ECON. PERSP. 111, 112-14 (2011), available at <https://doi.org/10.1257/jep.25.2.111> [https://perma.cc/ZF9L-KH5L].

8. Susan N. Houseman, *Understanding the Decline of U.S. Manufacturing Employment*, 25 UPJOHN INST. EMP. RES. (2018), available at <http://dx.doi.org/10.1257/jep.25.2.111> [https://perma.cc/5BEA-C7H7].

9. See Gwynn Guildford, *The epic mistake about manufacturing that's cost Americans millions of jobs*, QUARTZ (May 3, 2018), <https://qz.com/1269172/the-epic-mistake-about-manufacturing-thats-cost-americans-millions-of-jobs/> [https://perma.cc/9BY6-MRHC].

10. Robert D. Atkinson et al., INFO. TECH. & INNOVATION FOUND., *WORSE THAN THE GREAT DEPRESSION: WHAT EXPERTS ARE MISSING ABOUT AMERICAN MANUFACTURING'S DECLINE* 4 (2012).

11. See *infra* Part IV.

laborers around the world.<sup>12</sup> Evidence of the growing frustration with the lack of effective international labor regulation can be seen in the Trump administration's executive order in 2017, demanding an investigation into the relationship between trade with certain trading partners and "employment and wage growth in the United States."<sup>13</sup> The nexus of domestic labor conditions, international labor conditions, and free trade is likely to inform much of the debate over the 2020 US Presidential election on international relations and the economy<sup>14</sup> and this Note contributes to that debate with the contention that:

- a) Malaysia, a major trade partner of the United States, is illegally providing regulatory subsidies<sup>15</sup> to its export industry with pro-business policies that strip away the rights of migrant workers to attract foreign companies with a "continuous . . . stream of labor" and "harmonious industrial relations[.]"<sup>16</sup>
- b) The negative economic impact of Malaysia's migrant labor policy on US manufacturing laborers<sup>17</sup> makes Malaysian exports into the US subject to sanction under Title Nineteen, Section 1671

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12. See Houseman et al., *supra* note 8.

13. Exec. Order No. 13,786, 82 Fed. Reg. 18110 (2017) ("Topics on Which Commerce and USTR Seek Information to assist Commerce and USTR in preparing the Report, commenters should submit information related to one or more of the assessments called for in the Executive Order: For each identified trading partner with which the United States had a significant trade deficit in goods in 2016, the Report shall: (a) Assess the major causes of the trade deficit including, as applicable, differential tariffs, non-tariff barriers, injurious dumping, injurious government subsidization, intellectual property theft, forced technology transfer, denial of worker rights and labor standards, and any other form of discrimination against the commerce of the United States or other factors contributing to the deficit; (b) assess whether the trading partner is, directly or indirectly, imposing unequal burdens on, or unfairly discriminating in fact against, the commerce of the United States by law, regulation, or practice and thereby placing the commerce of the United States at an unfair disadvantage; (c) assess the effects of the trade relationship on the production capacity and strength of the manufacturing and defense industrial bases of the United States; (d) assess the effects of the trade relationship on employment and wage growth in the United States; and (e) identify imports and trade practices that may be impairing the national security of the United States.").

14. See Tara Golshan & Dylan Scott, *Democrats Are on the Brink of Completely Reorienting Their Party on Trade*, VOX (Mar. 30, 2019), <https://www.vox.com/policy-and-politics/2019/2/18/18215442/2020-democratic-presidential-candidates-policies-trade> [<https://perma.cc/Y7KU-QWVN>].

15. See *infra* Section II.A.

16. See *infra* note 20; Nicola Piper, Marie Segrave & R. Napier-Moore, *What's in a Name? Distinguishing forced labour, trafficking and slavery*, 2015(5) ANTI-TRAFFICKING REV. 1, 1 (2015), <http://www.antitraffickingreview.org/index.php/atrjournal/article/view/133/133> [<https://perma.cc/24C2-FMBQ>].

17. See *infra* Section II.A.

of the United States Code—the countervailing duty (“CVD”) statute.<sup>18</sup>

This Note proceed as follows. Part II gives a brief overview of the CVD statute, describes the process by which the CVD statute is applied to imports deemed to have benefited from a trade subsidy, and frames the problem of Malaysia’s migrant labor policy as an issue that could be addressed by countervailing duty law. Part III assesses whether countervailing duty law is a viable solution to the problem by analyzing the recognized application of the CVD statute to subsidies. Part IV addresses potential policy concerns implicated in using trade law to bridge gaps created by a lack of international labor market regulation. Part V concludes that even though the use of trade law is an imperfect solution, the ends of providing a needed disincentive to worker exploitation justifies the means because of the lack of other viable alternatives.

## II. THE NEXUS OF INTERNATIONAL TRADE AND DOMESTIC LABOR

The high volume of migrant workers in Malaysia, coupled with the prevalence of forced labor,<sup>19</sup> means that many laborers in Malaysia are not able to bargain for wages; accordingly, workers in the United States suffer because Malaysia is a major producer of goods for export and Malaysian migrant labor policy places downward pressure on the wages of American workers in the manufacturing sector. If a manufacturer is interested in moving a part of its production facilities to Malaysia, it is likely to encounter the Malaysian Investments and Development Authority (“MIDA”). MIDA advertises Malaysia as “heaven for foreign companies” and offers export manufacturers a package of pro-business policies that promise to provide a “continuous . . . stream of labor” together with “harmonious industrial

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18. *What are Anti-Dumping (AD) & Countervailing Duties (CVD)?*, U.S. CUSTOMS & BORDER PROT. (July 24, 2018), [https://help.cbp.gov/app/answers/detail/a\\_id/216/~/anti-dumping-%28ad%29-and-countervailing-duties-%28cvd%29](https://help.cbp.gov/app/answers/detail/a_id/216/~/anti-dumping-%28ad%29-and-countervailing-duties-%28cvd%29) [<https://perma.cc/5RVS-DLFU>].

19. Experts in the area of forced labor and human trafficking will urge caution in conflating the two concepts because although there is a close relationship between debt bondage, forced labor, and human trafficking—the concepts in this area are terms of art that need to be understood independently. See Piper, Segrave & Napier-Moore, *supra* note 16, at 1–9. For the purposes of this Note, a clear line is not always drawn between debt bonded labor, trafficked labor, and forced labor in the Malaysian export industry.

relations.”<sup>20</sup> While the advertised benefits to manufacturers of profitability and harmonious production are no doubt tantalizing, the unfortunate reality behind MIDA’s offer is that it is underwritten by forced labor and human trafficking.<sup>21</sup> The Government of Malaysia has constructed the benefits that MIDA offers to manufacturers—characterized, below, as regulatory subsidies<sup>22</sup>—by creating a system that keeps the costs of migrant labor artificially low while forcing labor markets in other countries to compete with depressed labor costs.<sup>23</sup> The following sections provide support for the central argument that the Government of Malaysia’s migrant labor policies are a form subsidy to Malaysian export manufacturers that the United States can sanction with the CVD statute.<sup>24</sup>

*A. “Regulatory Subsidy,” “Social Dumping,” and “Trade Injury”*

The CVD statute enables the United States Department of Commerce (“Commerce”), in response to a petition from a domestic plaintiff that alleges harm as a result of imported goods, to neutralize government subsidies that harm US domestic industry through the application of a tariff calculated to offset the subsidy.<sup>25</sup> The CVD

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20. *Why Malaysia*, MALAYSIAN INV. DEV. AUTH., <http://www.mida.gov.my/home/why-malaysia/posts/> [<https://perma.cc/88HT-T7TU>].

21. *See 2017 Trafficking in Persons Report*, *infra* note 109.

22. *See infra* Part II.

23. *See infra* Sections II.C.2 and II.C.3.

24. Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 *HARV. INT’L. L.J.* 47, 92 (1993).

25. If the [Department of Commerce] determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and

(2) in the case of merchandise imported from a Subsidies Agreement country, the Commission determines that—

(A) an industry in the United States—(i) is materially injured, or (ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy.

19 U.S.C. § 1671 (2012).

statute gives Commerce the authority to unilaterally impose a CVD<sup>26</sup> on goods from countries that, after a period of investigation, are deemed to have benefited from an impermissible government subsidy that materially injures a US industry.<sup>27</sup> Investigation proceedings into subsidies are triggered either by an interested party within the United States filing a petition,<sup>28</sup> or on motion by the Secretary of Commerce without a petition.<sup>29</sup> An interested party may be, among other things, a domestic manufacturer, a union, or a trade association representing an industry.<sup>30</sup>

Before describing CVD law in more detail, Section II.A provides necessary context by defining key terms, “regulatory subsidy,” “social dumping,” and “trade injury,” and their relationships to one another in the context of applying the CVD statute to Malaysian manufactured electronics imported into the United States. International trade law

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26. “The term ‘countervailing duty’ shall be understood to mean a special duty levied for the purpose of off-setting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise[.]” Agreement on Interpretation & Application of Articles VI, XVI & XXIII of the Agreement of Oct. 30, 1947, at n.4, As Rectified by the Proces-verbal of Dec. 17, 1979, T.I.A.S. No. 9619 (1980), <http://www.worldtradelaw.net/tokyoround/subsidiescode.pdf> [<https://perma.cc/WX22-U56N>].

27. If the Department of Commerce] determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States . . .

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy.

19 U.S.C. § 1671 (2012).

28. “(a) Initiation by administering authority. A countervailing duty investigation shall be initiated whenever the administering authority determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty under section 19 USC. § 1671(a) exist. (b) Initiation by petition.”

19 U.S.C. § 1671(a) (2016); *see also United States v. Roses Inc.*, 706 F.2d 1563 (Fed. Cir. 1983).

29. 19 U.S.C. § 1671(a) (2016).

30. 19 U.S.C. § 1677 (4), (9) (2016).



prohibits subsidies designed to promote exports<sup>31</sup> because free market principles deem subsidies as damaging to the efficient function of markets.<sup>32</sup> The term “regulatory subsidy” must be understood in contrast to the subsidies trade law ordinarily involves. The term “subsidy” generally refers to a government policy that lowers the costs of production to a given industry by directly providing economic support in the form of land, monetary support, materials, goods, or services at a reduced rate;<sup>33</sup> whereas a “regulatory subsidy” refers to a government policy that reduces the production cost to an industry by lowering certain transaction costs, such as the cost of waste disposal by allowing toxic dumping or the costs of transacting with third parties by deregulating labor law.<sup>34</sup>

“Social dumping” refers to the policies of exporting countries that artificially lower production costs by depressing labor rights<sup>35</sup> to export goods into importing countries that cannot compete with the exporter’s low wage costs.<sup>36</sup> Free market principles allow exporters with naturally occurring comparative wage advantages, such as lower labor costs due to a low cost of living, to exploit such advantages.<sup>37</sup> Governments that deregulate labor markets to stimulate their export industries with cost relief subsidies, however, may be subject to penalties if the act of deregulation causes a trade injury to the importing country’s domestic industry.<sup>38</sup>

The plain language of the CVD statute grants a plaintiff in the United States a cause of action against an exporting country when the

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31. Timothy Meyer, *Free Trade, Fair Trade, and Selective Enforcement*, 118 COLUM. L. REV. 491, 511–12 (2018).

32. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 806 (AM. LAW INST. 1987). International trade law prohibits subsidies designed to promote exports because free market principles view subsidies as damaging to the efficient function of markets. Richard B. Freeman, *International Labor Standards and World Trade: Friends or Foes?*, in *THE WORLD TRADING SYSTEM: CHALLENGES AHEAD* 87 (Jeffrey J. Schott ed., 1996).

33. *Subsidy*, BLACK’S LAW DICTIONARY (10th ed. 2014).

34. *Id.*

35. Elissa Alben, Note, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410, 1423 (2001); See generally Marc H. Klein, *The Single European Act and Social Dumping: A New Appeal for Multinational Collective Bargaining*, 12 U. PA. J. INT’L L. 411 (1991).

36. Alben, *supra* note 35, at 1417.

37. See Lance Compa, *International Labor Standards and Instruments of Recourse for Working Women*, 17 YALE J. INT’L L. 151, 152 n.4 (1992).

38. See Diane P. Wood, “Unfair” Trade Injury: A Competition-Based Approach, 41 STAN. L. REV. 1153, 1167-68 (1989).

country's government gives a "financial contribution"<sup>39</sup> to an export industry that provides an economic "benefit;"<sup>40</sup> where the subsidy is "specific"<sup>41</sup> to exports; and where the subsidy causes, or threatens to cause, a material injury to US domestic industry.<sup>42</sup> For Commerce to impose a duty on goods imported into the US there must be evidence of—

- i. an economic contribution to industry
- ii. that confers a benefit
- iii. which is specific to the export industry (i.e., not generally available), and
- iv. causes a material injury to a party in the United States.<sup>43</sup>

In the context of trade, "trade injuries" occur when a manufacturer in the importing country is unable to compete with the cost of production of imported goods without receiving a subsidy.<sup>44</sup> CVD law provides a cause of action to those who have suffered a trade injury as a result of imported products that receive subsidies.<sup>45</sup> Section II.B. describes how the CVD statute operates.

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39. A financial contribution may involve direct funding by a government or public entity to a producer, or the indirect transfer of funds through a funding mechanism or a private party. It includes:

- (i) A direct transfer of funds (e.g., grants, loans, equity infusions) or the potential direct transfer of funds or liabilities (e.g., loan guarantees);
- (ii) Foregoing or not collecting revenue that is otherwise due (e.g., tax credits, deductions from taxable income, import duties);
- (iii) Providing goods or services for less than adequate remuneration, other than general infrastructure;
- (iv) Purchasing goods for more than adequate remuneration.

*Enforcement and Compliance-Subsidy Allegation*, INT'L TRADE ADMIN., <https://enforcement.trade.gov/petitioncounseling/pcp-subsidy-allegation.html> [<https://perma.cc/HA4L-9562>].

40. *Id.*

41. *Id.*

42. A World Trade Organization ("WTO") Global Agreement on Trade and Tariffs ("GATT") panel has confirmed that government taxation relief that targets export industries constitutes an actionable subsidy. See John Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. 747 (1978); *infra* note 138. Countervailable subsidies include programs that "forego . . . revenue that is otherwise due, such as granting tax credits or deductions from taxable income[.]" *Id.*

43. See 19 U.S.C. § 1671 (1930).

44. See Jackson, *supra* note 38.

45. All parties to the WTO GATT agreement have their own CVD law. See *infra* notes 135, 144, 146, 147, 151.

*B. How the CVD Statute Operates*

Under the CVD statute, Congress has granted US industry representative or manufacturers, among others, standing to file a petition with Commerce and the International Trade Commission (“ITC”).<sup>46</sup> A petition by a domestic plaintiff in the United States against Malaysian exports must make a plea for relief against economic factors, such as depressed wages.<sup>47</sup> Here, the US domestic plaintiff would allege that the Government of Malaysia’s deregulation of migrant labor subsidizes Malaysian manufacturers by fostering a system that depresses wages and artificially lowers the costs of production. Once a plaintiff simultaneously files a petition that satisfies the requirements in sections 351.202 through 203<sup>48</sup> and alleges, for example, that imported goods have received a subsidy prohibited by the SCM Agreement, the CVD action is commenced.<sup>49</sup> After commencing a CVD investigation, Commerce and the ITC begin their parallel preliminary determinations and publish the results of the investigations in the Federal Register<sup>50</sup>—“[a] daily publication of . . . federal-agency regulations of general applicability and legal effect[.]”<sup>51</sup>

The ITC makes the preliminary determinations as to whether the imported goods under review have caused or threaten to cause material injury to US industry<sup>52</sup> and Commerce makes a preliminary determination<sup>53</sup> as to whether the alleged subsidies received by the imported goods listed in the plaintiff’s petition are export specific subsidies.<sup>54</sup> “Material injury” or threat of material injury includes, for example, depressed prices and is defined by Title Nineteen, Section

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46. Under 19 U.S.C. § 1671(a), there must be a determination of industry support: “(4)(A) . . . the administering authority shall determine that the petition has been filed by or on behalf of the industry, if—(i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product . . . .”

47. See 19 U.S.C. § 1677(7).

48. See 19 C.F.R. §§ 351.202-03 (2013) (CVD petition requirements).

49. 19 C.F.R. §§ 206.2, 207.10 (2015).

50. See 19 C.F.R. § 351.205.

51. *Federal Register*, BLACK’S LAW DICTIONARY (10th ed. 2014).

52. The USITC has limited discretion in terms of declining to investigate or rejecting petitions from domestic industries that sufficiently allege material injury. *Republic Steel Corp. v. United States*, 4 Ct. Int’l Trade 33 (1982).

53. See *id.* (stating the procedure for a preliminary determination); see also 19 C.F.R. § 351.205.

54. *U.S. Steel Corp. v. United States*, 33 Ct. Int’l Trade 1935 (2009), *remanded* 34 Ct. Int’l Trade 1193 (2010), *aff’d* 425 F. App’x 900 (Fed. Cir. 2011).

1677(7) of the United States Code.<sup>55</sup> The material injury element provides domestic industry in the United States with a cause of action and standing to file a petition<sup>56</sup> and the CVD petition is treated similarly to a plaintiff's initial pleading in a civil action.<sup>57</sup>

The ITC's preliminary determination of a material injury inquiry requires a finding of a "reasonable indication of material injury or threat of material injury."<sup>58</sup> The preliminary determination requires a lower level of analysis than the standard applied in a final

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55. (7) Material injury. (A) In general. The term 'material injury' means harm which is not inconsequential, immaterial, or unimportant . . . In making determinations under sections . . . [19 U.S.C. §§ 1671b(a), 1671d(b), 1673b(a), 1673d(b)], the Commission, in each case—

(i) shall consider— . . .

(II) the effect of imports of that merchandise on prices in the United States for domestic like products, and

(III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States; and

(ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports . . .

(F) Threat of material injury.

(i) In general. In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise, the Commission shall consider, among other relevant economic factors— . . .

(IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports . . .

19 U.S.C. § 1677(7).

56. See ANDREAS LOWENFELD, *PUBLIC CONTROLS ON INTERNATIONAL TRADE* 372-74 (2d ed. 1983); see also Peter Ehrenhaft, *What the Anti-Dumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for US Trade Policy*, 11 L. & POL'Y INT'L BUS. 1361 (1979); CURRENT ASPECTS OF INTERNATIONAL TRADE LAW, App. C (Patrick F. J. Macrory & Peter O. Suchman eds., 1982); Judith Hippler Bello & Alan F. Holmer, *The Trade and Tariff Act of 1984: Principal Anti-dumping and Countervailing Duty Provisions*, 19 INT'L L. 639 (1985).

57. *Republic Steel Corp. v. United States*, 4 Ct. Int'l Trade 33, 40 (1982) ("Even a rough analogy is sufficient to indicate that petitions should not be dismissed except for notable deficiencies."). See H.R. Rep. No. 96-317 (1979); see also S. Rep. No. 96-249 (1979), as reprinted in 1979 U.S.C.C.A.N. 381.

58. 19 U.S.C. § 1671b(a); see *Republic Steel Corp. v. United States*, 8 Ct. Int'l Trade 29, 31 (1984) ("the criterion for finding a reasonable indication of material injury should have been simply whether all subsidized or allegedly subsidized products of the same type could exert a combined effect on the domestic industry").

determination.<sup>59</sup> In addition to the requirement of “material injury,” a CVD will be applied only if, upon final determination, the value of the offending subsidy is found to exceed one percent of the total value of the goods.<sup>60</sup>

The “specificity” analysis for subsidies that are generally available requires Commerce to use the best information obtainable to engage in a sequential analysis to determine whether the subsidy is de facto specific despite its seeming general availability.<sup>61</sup> De facto specificity, as defined by Section 771(5A)(D)(iii) of the Tariff Act,<sup>62</sup> is found if Commerce identifies any one of the following factors: “(I) the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number; (II) an enterprise or industry is a predominant user of the subsidy; (III) an enterprise or industry receives a disproportionately large amount of the subsidy.”<sup>63</sup> Commerce may conclude its analysis in the affirmative, without proceeding further in the analysis, when any one of the above factors, analyzed sequentially, is found.<sup>64</sup> If Commerce makes a preliminary determination that Malaysia’s deregulation of the migrant labor market is a de facto export subsidy, then the ITC will make their determination as to whether the subsidy is, or threatens to be, a material domestic injury because of the subsidized imports.<sup>65</sup> Section II.C. shows that Malaysian labor policy satisfies the second factor in Commerce “specificity” analysis because Malaysian exporters are the predominant employers of migrant labor and therefore the “predominant user of the subsidy[.]”<sup>66</sup>

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59. See *Armstrong Rubber Co. v. United States*, 9 Ct. Int’l Trade 403, 405 (1985) (finding that USITC made an error in its preliminary determination which had the effect of turning a preliminary determination into a final determination).

60. *Al Tech Specialty Steel Corp. v. United States*, 29 Ct. Int’l Trade 276 (2005) (affirming that Department of Commerce can make affirmative determination in original countervailing duty investigation, and issue countervailing duty order, only if aggregate net countervailable subsidy equals or exceeds one percent *ad valorem*).

61. 19 C.F.R. § 351.502 (2019).

62. INT’L TRADE ADMIN., IMPORT ADMIN. POL’Y BULL. NO. 10.1, *Specificity of Subsidies Provided to State-owned Enterprises* (2010), <https://enforcement.trade.gov/policy/PB-10.1.pdf> [<https://perma.cc/22ZP-H8PA>].

63. See 19 U.S.C. § 1677(5A)(D)(iii) (2016).

64. See generally 19 U.S.C. § 1677 (the standard for determining whether a bounty or grant under 19 U.S.C. § 1303 or subsidy under 19 U.S.C. § 1677 has been conferred focuses on the effect of benefits provided to recipients rather than on nominal availability of benefits); *Cabot Corp. v. United States*, 9 Ct. Int’l Trade 489 (1985).

65. See 19 U.S.C. § 1675 (2016).

66. See 19 U.S.C. § 1677(5A)(D)(iii) (2016).

*C. Social Dumping Policies Satisfy the Plain Language of the CVD Statute*

Malaysian exporters are the predominant employers of migrant labor. While the CVD statute usually addresses subsidies in their ordinary sense,<sup>67</sup> it is an open question whether the CVD statute applies to Malaysian labor policies. To support the argument that the CVD statute applies to Malaysian migrant labor policy, Sub-Parts 1 and 2. show how Malaysia's labor policy satisfies elements i, ii, and iii of a CVD petition, and Sub-Part 3 demonstrates that Malaysian labor policy satisfies element iv by causing an economic harm to manufacturing laborers in the United States.

1. The Economic Benefit of Malaysian Labor Policy to its Export Industry

Malaysian labor policy is a regulatory subsidy that provides an economic benefit to its export manufacturing industry by deregulating migrant labor policies to allow for an increased supply of migrant labor as well as shifting cost burdens away from the manufacturers and onto the migrant workers.<sup>68</sup> The economic growth related to the Malaysian electronics industry<sup>69</sup> is linked to a regulatory environment that diminishes the welfare of workers in Malaysia<sup>70</sup> and abroad.<sup>71</sup> With a gross domestic product ("GDP") of US\$314 billion in 2017<sup>72</sup> and the

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67. See generally 19 U.S.C. § 1671a (2016).

68. *Supra* Section II.C.

69. The electronics industry, which is primarily export based, made up 36.7% of Malaysia's total export value in 2017. *Electrical and Electronics*, MALAYSIAN INT'L DEV. AUTH., <http://www.mida.gov.my/home/electrical-and-electronic/posts/> [ <https://perma.cc/E4WE-BSWF>].

70. *Malaysia – Peninsular Malaysia and Sarawak, Individual Case (CAS) - Discussion: 2018, on its 107th Session*, INT'L LABOR ORG. (2018), [https://www.ilo.org/dyn/normlex/en/?p=1000:13101:0::NO:13101:P13101\\_COMMENT\\_ID:3330953:YES](https://www.ilo.org/dyn/normlex/en/?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:3330953:YES) [ <https://perma.cc/PB3G-3SLV>]; see also Ragayah Haji Mat Zin, *Malaysia: Towards a Social Protection System in an Advanced Equitable Society*, 29 ASEAN ECON. BULL. 197 (2012).

71. See generally INT'L TRADE UNION CONFEDERATION, INTERNATIONALLY RECOGNISED CORE LABOUR STANDARDS IN MALAYSIA: REPORT FOR THE WTO GENERAL COUNCIL REVIEW (2010); AMNESTY INT'L, TRAPPED: THE EXPLOITATION OF MIGRANT WORKERS IN MALAYSIA (2010); SARAH BORMANN ET AL., MIGRATION IN A DIGITAL AGE: MIGRANT WORKERS IN THE MALAYSIAN ELECTRONICS INDUSTRY: A CASE STUDY ON JABIL CIRCUIT AND FLEXTRONICS (2010), [http://electronicswatch.org/migration-in-a-digital-age\\_3542.pdf](http://electronicswatch.org/migration-in-a-digital-age_3542.pdf) [ <https://perma.cc/43EK-5JCF>].

72. *Malaysia GDP, 2017*, WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=MY> [ <https://perma.cc/9HSQ-2NJD>].

total volume of exports at US\$217 billion in the same year,<sup>73</sup> the export industry makes up almost two-thirds of Malaysia's GDP.<sup>74</sup> Malaysia's current status as an export manufacturing economy grew out of a series of policies started in the 1990s that focused on Malaysia achieving "developed nation" status by the year 2020.<sup>75</sup> The Government of Malaysia enacted economic transformation policies through a succession of five-year plans that targeted the global export market to make manufacturing more dominant than agriculture.<sup>76</sup> Labor shortages presented a challenge to Malaysia's sixth five-year economic development plan spanning from 1991 to 1996, which emphasized macroeconomic growth through policies focusing on industrialization, manufacturing, and trade.<sup>77</sup>

Malaysia's export industry, which has strong representation from electronics and electrical ("E&E") manufacturers,<sup>78</sup> started lobbying the Government of Malaysia to loosen the restrictions on migrant labor in the 1980s.<sup>79</sup> In the early 1990s, the Malaysian government responded

73. *Export of Goods from Malaysia 2017*: STATISTA, <https://www.statista.com/statistics/319008/export-of-goods-to-malaysia/> [<https://perma.cc/PF2P-Y8GY>].

74. *Id.* Malaysia's 2017 GDP was US\$314 billion. Malaysia's 2017 revenue from exports was US\$217 billion. *Id.*

75. *Malaysian Economic Growth and Foreign Workers*, 3 *MIGRATION NEWS* (Sept. 1996), <https://migration.ucdavis.edu/mn/more.php?id=1039> [<https://perma.cc/WEE5-X5UP>].

76. See Cassey Lee & Lee Chew-Ging, *The Evolution of Development Planning in Malaysia*, 34 *J. SE. ASIAN ECON.* 438, 438-40 (2017).

77. See *id.*; see also Vijayakumari Kanapathy, *Controlling Irregular Migration: The Malaysian Experience* (ILO Asian Reg'l Programme on Governance of Labour Migration, Working Paper No. 14, 2008), [https://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms\\_160587.pdf](https://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms_160587.pdf) [<https://perma.cc/3GZ9-QP8Z>]; Amarjit Kaur, *Managing Labour Migration in Malaysia: Guest Worker Programs and the Regularisation of Irregular Labour Migrants as a Policy Instrument*, 38 *ASIAN STUD. REV.* 345 (2014).

78. *Electrical and Electronics Industry in Malaysia*, *FACTS & DETAILS*, [http://factsanddetails.com/southeast-asia/Malaysia/sub5\\_4e/entry-3697.html](http://factsanddetails.com/southeast-asia/Malaysia/sub5_4e/entry-3697.html) [<https://perma.cc/ZN8Q-3U2N>].

Malaysia is a major electronics producer and exporter. The electrical & electronics (E&E) industry is the leading sector in Malaysia's manufacturing sector, contributing significantly to the country's manufacturing output (26.94 percent), exports (48.7 percent) and employment (32.5 percent). In 2010, the gross output of the industry totaled [US]\$50.94 billion, exports amounted to [US]\$75.7 billion and created employment opportunities for 325,696 people. The major export destinations are USA, China and Singapore while the major import destinations are Taiwan, USA and South Korea.

*Id.*

79. Mohamed Ariff, *The Malaysian Economic Experience and its Relevance for the OIC Member Countries*, 6 *ISLAMIC ECON. STUD.* 1, 11 (Nov. 1998); ("In Malaysia, in the mid-

to the influence of the manufacturing industry and changed its migrant worker policy.<sup>80</sup> The changes in policy preceded consistent economic gains spurred by a boost in international trade.<sup>81</sup>

Malaysia is a historically agricultural country with fewer than nine million domestic laborers, and the government's shift in economic policy to focus on labor-intensive export manufacturing required a plan to increase the supply of labor.<sup>82</sup> The Government of Malaysia addressed the labor shortages by increasing the influx of labor with the guest worker program—a government-run initiative launched in response to demands from the Malaysian manufacturers who had

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1980's] [t]ariffs were reduced primarily to make imports cheaper and foreign workers were brought in large numbers to keep wages low."); Liz Gooch, *Foreign Employees Limited, Malaysia Is Suffering Through a Labor Shortage*, N.Y. TIMES (Aug. 31, 2009), <https://www.nytimes.com/2009/09/01/business/economy/01labor.html> [<https://perma.cc/VJF5-QMJ8>].

Mohamed Ariff, executive director of the Malaysian Institute of Economic Research, said the country's dependence on foreign labor was a result of a decision to "open the floodgates" to migrant workers in the late 1980s . . . then in manufacturing. Mr. Ariff said that in the early 1990s, when wages in the manufacturing sector were rising, factories had considered introducing labor-saving technology but that many had shelved those plans when the government let them employ more foreign workers.

*Id.*

In 1995, an explicit policy on the import of migrant labour was announced when the manufacturing sector, which was then the main engine of (export) growth, was also hit by labour shortage and had to hire contract migrant workers. In the 1995/96 annual national budget, the state sanctioned the import of migrant workers as an interim solution to meet excess demand for low-skilled labour while it pursued a longer-term strategy to increase productivity and expand the supply of skilled labour . . . This was an open acknowledgment that migrant labour played a vital role in supporting the dynamism of key sectors in the country. Malaysia's heavy reliance on foreign direct investment to drive export growth and to provide employment to local urban job-seekers meant that it could not risk an abrupt uprooting of footloose foreign firms until it could build up its domestic capabilities to drive growth. And during the economic upturn, foreign workers played a vital role in the macro-economic management of the economy.

Kanapathy, *supra* note 77, at 355, tbl. 2

81. Zainal Aznam Yusof & Deepak Bhattasali, *Economic Growth and Development in Malaysia: Policy Making and Leadership* 27-29 (WORLD BANK COMM'N ON GROWTH & DEV., Working Paper No. 27, 2008), [http://siteresources.worldbank.org/EXTPREMNET/Resources/489960-1338997241035/Growth\\_Commission\\_Working\\_Paper\\_27\\_Economic\\_Growth\\_Development\\_Malaysia\\_Policy\\_Making\\_Leadership.pdf](http://siteresources.worldbank.org/EXTPREMNET/Resources/489960-1338997241035/Growth_Commission_Working_Paper_27_Economic_Growth_Development_Malaysia_Policy_Making_Leadership.pdf) [<https://perma.cc/27JU-AVUN>].

82. *See generally* Kaur, *supra* note 77.



previously been unable to expand because of labor shortages.<sup>83</sup> In 1991, the government launched the Comprehensive Policy on the Recruitment of Migrant Labor,<sup>84</sup> which created a “Special Task Force on Foreign Labour” that approved migrant visa requests from export-oriented industries and focused on migration policies designed to promote Malaysia’s export economy.<sup>85</sup> The government’s migrant policy favors the export industry by placing fewer eligibility requirements on export manufacturers that make applications for work visas than domestic industry.<sup>86</sup>

In the year 2000, documented foreign labor made up twenty percent of Malaysia’s workforce of nine million laborers.<sup>87</sup> Malaysia’s trend of positive year over year five percent economic growth since the economic crash in 1998 up until 2018 positively correlates with the growth in migrant labor work permits and the number of migrant visas issued by the Government of Malaysia has doubled over twenty years.<sup>88</sup> Malaysia’s labor-intensive export manufacturing industry

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83. *See generally* Kaur, *supra* note 77.

84. Kanapathy, *supra* note 77.

85. *See* Kaur, *supra* note 77, at 354.

[i]n late 1994 the government formed a Special Task Force on Foreign Labour to handle/process foreign labour applications. This Task Force was intended to be a one-stop agency and it took over the task of processing foreign labour approvals from the Immigration Department. . . . The Immigration Department’s role was also expanded to include management of foreign labour recruitment; the identification of “appropriate” labour-source countries; and determination of eligibility of sectors/firms requiring foreign workers. Four sectors – agriculture, manufacturing, services and construction – were considered eligible for foreign worker employment, based on their contribution to the export-oriented component of the Malaysian . . . economy . . . .

Kaur, *supra* note 77, at 354.

86. Kaur, *supra* note 77, at 355 tbl.2.

87. U.S. DEP’T OF LABOR, BUREAU OF INTERNATIONAL LABOR AFFAIRS AND U.S. EMBASSY, KUALA LUMPUR, FLT 02-10, FOREIGN LABOR TRENDS: MALAYSIA 5 (2002), [https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1105&context=key\\_workplace](https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1105&context=key_workplace) [<https://perma.cc/FTU2-SPK2>].

88. *See* LEE HWOK-AUN & KHOR YU LENG, COUNTING MIGRANT WORKERS IN MALAYSIA: A NEEDLESSLY PERSISTING CONUNDRUM 1, 4 fig. 1 (2018), [https://www.iseas.edu.sg/images/pdf/ISEAS\\_Perspective\\_2018\\_25@50.pdf](https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2018_25@50.pdf) [<https://perma.cc/P8GT-FYSA>]. In the year 2000, Malaysia counted 800,000 foreign work permit holders and employed persons. In 2016, that number grew to 2,100,000.

employs the largest ratio of migrant workers.<sup>89</sup> The Malaysian national ratio for domestic-to-foreign labor is five-to-one on average; while on Borneo Island, in Sarawak province, in towns such as Mukah, Bintulu, Selangau, Sibuti, and Senadin, the percentage range of foreign laborers is up to forty percent.<sup>90</sup> The reliance on migrant labor is more extreme in export-focused regions along the trade corridor, such as the Kinabatangan district on Borneo Island, where foreign labor comprises sixty percent of the workforce.<sup>91</sup>

## 2. Policies that Favor Manufacturers and that Fail to Protect Migrant Workers

While the Government of Malaysia has shown a commitment to growing its economy,<sup>92</sup> there is lack of commitment to protecting migrant workers.<sup>93</sup> Malaysia has the worst possible ranking status for human trafficking violations<sup>94</sup> with a large amount of trafficked labor being to the benefit of the export-focused electronics industry fueling

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89. *Id.* at 7, tbl. 1; Jacob A. Jordaan, *Foreign Workers and Productivity in an Emerging Economy: The Case of Malaysia*, 22 REV. DEV. ECON. 148, 164 (2017) (“A comparison of the estimated effects of foreign workers across these various sets of industries indicates that, at least for the Malaysian case, positive productivity effects from the use of (low skilled) foreign workers are particularly pronounced in export oriented modern industries, characterized by assembly-intensive production processes.”).

90. Hwok-Aun & Leng, *supra* note 88, at 6 fig. 2.

91. Hwok-Aun & Leng, *supra* note 88, at 6 fig. 2.

92. *Why Malaysia*, *supra* note 20.

93. *Individual Case (CAS) – Discussion: 2014, Publication: 103rd ILC session – Malaysia*, INT’L LABOUR ORG., [https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3175038](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3175038) [https://perma.cc/66RF-EJRA].

The Worker member of the Philippines expressed the view that the situation of migrant workers [in Malaysia] had not improved . . . and required more appropriate and bold actions and initiatives. He indicated that Malaysia was a country of destination and, to a lesser extent, a source and transit country for trafficking in persons. The majority of trafficking victims voluntarily immigrated to Malaysia in search of a better life, and while many offenders were individual business people, large organized crime syndicates with connections to high government officials were also involved.

*Id.*

94. U.S. DEP’T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT 260 (2014), <https://www.state.gov/documents/organization/226847.pdf> [https://perma.cc/3XE5-3E48].

the country's economic growth.<sup>95</sup> The living conditions of migrant workers in Malaysia has drawn the attention of the United States Department of Labor, which identifies the root cause of the precarious way of life endemic to migrant workers in Malaysia as a gap between the Government of Malaysia's existing laws and the Government of Malaysia's lack of enforcement<sup>96</sup> of those laws.<sup>97</sup>

The Government of Malaysia's migrant labor policies place financial burdens on vulnerable migrant communities that lead to migrant indebtedness and forced labor.<sup>98</sup> One prominent example of the Malaysian government enacting policies that burden migrants and benefit manufacturers can be traced to the year 1991, when the government enacted an annual per-capita flat tax on migrant workers ("Foreign Worker Tax").<sup>99</sup> The Foreign Worker Tax was originally intended to discourage employer reliance on foreign workers by

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95. Ariel Ramchandani, *Forced Labor Is the Backbone of the World's Electronics Industry*, *THE ATLANTIC* (June 28, 2018), <https://www.theatlantic.com/business/archive/2018/06/malaysia-forced-labor-electronics/563873/> [<https://perma.cc/ML2P-VWTK>].

96. Evelyn Shyamala Devadason & Chan Wai Meng, *Policies and Laws Regulating Migrant Workers in Malaysia: A Critical Appraisal*, 44 *J. CONTEMP. ASIA* 19 (2014), <https://www.tandfonline.com/doi/citedby/10.1080/00472336.2013.826420> [<https://perma.cc/28QR-N3YJ>].

97. The US Department of Labor identifies Malaysia's treatment of migrant workers as a problem area and has allocated US\$70,000 to advocacy programs for workers' rights between 2015 and 2019. *An Independent Multi-Project Evaluation of Protecting the Rights of Migrant Workers Through Empowerment and Advocacy in Malaysia and Support for Labor Law and Industrial Relations Reform in Malaysia* (Oct. 19, 2018), <https://www.dol.gov/agencies/ilab/protecting-rights-migrant-workers-through-empowerment-and-advocacy-malaysia> [<https://perma.cc/7QN4-PMZM>].

98. PIYASIRI WICKRAMASEKARA, INT'L LABOUR ORG., *BILATERAL AGREEMENTS AND MEMORANDA OF UNDERSTANDING ON MIGRATION OF LOW-SKILLED WORKERS: A REVIEW* 26 (2015), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/publication/wcms\\_413810.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_413810.pdf) [<https://perma.cc/4CS7-WLGG>].

There is increasing attention on recruitment costs as a major cause of poor governance and protection gaps in labour migration (citation omitted). High . . . recruitment fees lead to high debt burdens and erode savings and remittances, and thus erode benefits from migration, for both origin and destination countries and migrants themselves.

*Id.*

*See generally* DIRECTOR-GENERAL, INT'L LABOUR ORG., *A GLOBAL ALLIANCE AGAINST FORCED LABOUR* (2005), <https://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf> [<https://perma.cc/9VM4-9USP>].

99. ILO REGIONAL OFFICE FOR ASIA AND THE PACIFIC, *REVIEW OF LABOUR MIGRATION POLICY IN MALAYSIA* 19 (2016), [https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms\\_447687.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_447687.pdf) [<https://perma.cc/SS8X-FARL>].

making the tax payable by employers.<sup>100</sup> However, employer groups successfully lobbied the government to shift the burden of paying the Foreign Worker Tax from employers to employees.<sup>101</sup> The tax raises significant revenue—close to half a billion in US dollars annually in 2012—with no guarantee of services or benefits to the taxed migrant population;<sup>102</sup> while MIDA promises foreign investors responsive governance and a “continuous” supply of “productive” and “harmonious”<sup>103</sup> workers in return for a tax that the employers do not pay.<sup>104</sup>

Despite taxing migrants, the Government of Malaysia does not deal with migrant laborers directly and migrants are largely managed by a system of agencies that charge unregulated fees for their services.<sup>105</sup> The intermediaries that charge fees to migrant workers are linked to both human-trafficking syndicates and Malaysian government officials.<sup>106</sup> The financial vulnerability of migrants is made worse by the burden of paying for additional employment-related services that can cost over Malay.RM2,000 (ringgits) per year<sup>107</sup>—approximately two months’ salary for the lowest paid worker.<sup>108</sup> The

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100. *Id.*

101. *Id.*

The Malaysian Government has imposed an annual levy on employment of foreign workers since 1992. Initially, it was payable by migrant workers but was shifted to employers in 2009 to encourage economic restructuring. In 2013, employers were granted permission to transfer the levy back to workers. The justification provided was that it would not represent a significant financial burden for migrants given the salary increase they would receive of between 30-50 per cent under the Minimum Wage Order.

*Id.*

102. See Ramchandani, *supra* note 95.

103. See *Why Malaysia*, *supra* note 20.

104. See *Why Malaysia*, *supra* note 20.

105. Kaur, *supra* note 77, at 361.

106. See *Individual Case (CAS)*, *supra* note 93.

107. See ILO REGIONAL OFFICE FOR ASIA AND THE PACIFIC, *supra* note 99, at 21 n.6.

The levy is just one of the eight government fees applied to employment of migrant workers: (1) Levy: MYR 410 - 1,850 (determined by sector); (2) Visit pass: MYR 60; (3) Visa: MYR 15 - 100 (determined by nationality); (4) Processing fee: MYR 125; (5) Security bond: MYR 250 - 1,500 (determined by nationality); (6) Foreign Worker Compensation Scheme: MYR 86 + 5 per cent service charge; (7) Health insurance premium: MYR120; and (8) Medical examination: MYR 180 – 190 (determined by gender).

See ILO REGIONAL OFFICE FOR ASIA AND THE PACIFIC, *supra* note 99, at 21 n.6. (citing 2014 Malaysian Ministry of Home Affairs data).

108. See ILO REGIONAL OFFICE FOR ASIA AND THE PACIFIC, *supra* note 99, at 21 n.6.

regulatory environment that imposes high costs on migrants often results in workers being forced into debt before they even enter the country.<sup>109</sup>

### 3. Material Injury to US Manufacturing Laborers

Malaysian labor policy, coupled together with Malaysia's dominance in export manufacturing, means that manufacturing laborers in the United States compete with the Malaysian labor force. The net result of this competition has been that many laborers in the US manufacturing industry have experienced stagnant wages or job losses.<sup>110</sup> Malaysian export manufacturers recruit substantial numbers of migrants and save employment costs on hiring migrants because of a regulatory environment that keeps migrants in a politically, physically, and economically vulnerable position, thereby contributing to lower labor costs.<sup>111</sup> Since 2000, the closure of more than 78,000 manufacturing sites in the United States,<sup>112</sup> has led to a twenty-eight percent decline in US manufacturing employment.<sup>113</sup>

Malaysia's labor policy presents a problem to the international labor market that the current regulatory framework does not address.

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109. *2017 Trafficking in Persons Report - Malaysia*, U.S. DEP'T OF STATE (June 27, 2017), <http://www.refworld.org/docid/5959ec93a.html> [<https://perma.cc/T6GQ-YN5L>]

[M]igrants are subjected to forced labor or debt bondage by their employers, employment agents, or informal labor recruiters when they are unable to pay the fees for recruitment and associated travel. Foreign workers employed by outsourcing or contract labor companies, which may or may not have oversight of personnel issues or day-to-day working conditions, have heightened vulnerabilities to exploitative labor conditions and a reduced ability to resolve disputes. Agents in labor source countries may impose onerous fees on workers before they arrive in Malaysia, in some cases causing debt bondage. Foreign workers in Malaysia and the companies that employ them are subject to a complex system of government fees for immigration processing, foreign worker levies, and other administrative processes. The law allows many of the fees, which are initially paid by employers, to be deducted from workers' wages, incentivizing employers to prevent workers from ending their employment before fees are recouped.

*Id.*

110. Houseman, *supra* note 8, at 20.

111. *See supra* Section II.C.2.

112. Houseman, *supra* note 8, at 5.

113. Guildford, *supra* note 9; Leo Gerard, *Who is Killing American Manufacturing?*, *INDUSTRY WEEK* (Feb. 23, 2016), <https://www.industryweek.com/who-is-killing-manufacturing> [<https://perma.cc/4S82-U5FM>].

Part II explained the link between trade law, Malaysian economic growth, the poor social conditions experienced by migrant laborers in Malaysia, and the economic hardship of manufacturing laborers in the United States. While Part II only hinted at the proposition that trade law may be a viable solution to the problems created by Malaysia's migrant labor policy, Part III presents a deeper analysis of the viability of that solution.

### III. TRADE LAW AS A SOLUTION TO ECONOMIC EXPLOITATION

Application of the CVD statute to the type of regulatory subsidies described in Part II would provide an economic disincentive to governments that seek to deregulate labor policy to achieve economic growth. Therefore, the CVD statute may address the problem of the regulatory gap in international labor regulation that allows the Malaysian government to exploit migrant workers by disincentivizing profit driven labor market deregulation.<sup>114</sup> The proposed solution begs the question of whether "regulatory subsidies"<sup>115</sup> fall within the scope of the CVD statute. If a CVD petition alleges a regulatory subsidy, Commerce would make the preliminary determination as to whether such a subsidy falls within the meaning of the statute. As discussed in Part II, there are four elements that need to be alleged in a plaintiff's CVD petition for Commerce to begin its investigation and preliminary determinations into alleged government subsidies: i) a contribution from the government, ii) that confers an economic benefit to industry, iii) and is not generally available, but is specific to the export industry, and iv) causes a material injury to a party in the United States.<sup>116</sup> While Part II provided an illustration of how Malaysian migrant labor policy arguably satisfied the elements of a CVD petition, Part III presents an analysis of a threshold issue: whether regulatory subsidies fall within the scope of the CVD statute.

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114. *See supra* Section II.C.2.

115. Trachtman, *supra* note 24, at 92.

116. *See supra* note 43.

*A. The Meaning of Subsidy*

The policies and processes for investigating subsidies are well defined but the meaning of the word “subsidy” is not.<sup>117</sup> Although the remedy of CVD is statutory, the definition of subsidy has been subject to common law development.<sup>118</sup> The remedy of CVD has existed in US trade law for over a century: first in 1897, in Title 19, Section 1303 of the United States Code, which allowed the Secretary of the Treasury to place duties on imported goods benefitting from any “bounty or grant.”<sup>119</sup> The CVD remedy to trade injuries is also in Section 753 of the Tariff Act of 1930, codified and incorporated into Title 19, Section 1671 of the United States Code after the passage of the Trade Agreements Act of 1979<sup>120</sup> and later amended by the Trade and Tariff Act of 1984.<sup>121</sup> Section 1303, repealed in 1994,<sup>122</sup> existed for some time alongside Section 1671, and applied only to countries not a party to the relevant international agreements; while Section 1671 applied, and continues to apply, to countries that are party to the international agreement on subsidies and countervailing measures (“SCM Agreement”).<sup>123</sup>

Before there were legislative attempts to define actionable subsidies, such as the 1979 Subsidies Code Annex,<sup>124</sup> the definition of

117. William Lay, *Redefining Actionable “Subsidies” Under U.S. Countervailing Duty Law*, 91 COLUM. L. REV. 1495 (1991).

118. See Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199 (1989); Charles J. Goetz et al., *The Meaning of “Subsidy” and “Injury” in the Countervailing Duty Law*, 6 INT’L REV. L. & ECON. 17–32 (1986).

119. Trachtman, *supra* note 24, at 92.

120. *Pub. L. No. 96-39*, U.S. GOVERNMENT PUBLISHING OFFICE, <https://www.gpo.gov/fdsys/pkg/STATUTE-93/pdf/STATUTE-93-Pg144.pdf> [<https://perma.cc/ZAN7-QNZ6>].

121. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 806, *supra* note 32.

122. 19 U.S.C. § 1303 (repealed. *Pub. L. No. 103-465*, title II, § 261(a), Dec. 8, 1994, 108 Stat. 4908).

123. See *Cabot Corp. v. United States*, 12 Ct. Int’l Trade 664, 671-72 (1988); see also Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 14, Annex 1A, Agreement on Subsidies and Countervailing Measures, [https://www.wto.org/english/docs\\_e/legal\\_e/24-scm.pdf](https://www.wto.org/english/docs_e/legal_e/24-scm.pdf) [<https://perma.cc/5925-DL8G>] [hereinafter SCM Agreement].

124. Agreement on Interpretation & Application of Articles VI, XVI & XXIII of the Agreement of Oct. 30, 1947, As Rectified by the Procesverbal of Dec. 17, 1979., T.I.A.S. No. 9619 (1980), <http://www.worldtradelaw.net/tokyoround/subsidiescode.pdf> [<https://perma.cc/9C93-HL34>] [hereinafter Subsidies Code]; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 806, *supra* note 32.

an actionable subsidy—or “bounty or grant”<sup>125</sup>—developed in the United States through the common law.<sup>126</sup> The definition continues to develop through the common law, where, for example, in 1985, after the SCM Agreement, in *Cabot Corp. v. United States*,<sup>127</sup> the Court of International Trade held that the term “bounty or grant” in Title Nineteen, Section 1303 of the United States Code has the same meaning as the term “subsidy” in the CVD statute.<sup>128</sup>

### 1. Specific Export Subsidies

CVD investigations deal with two types of subsidy: actionable subsidies and non-actionable subsidies. There are two types of actionable subsidy: a de jure export subsidy (such as a direct economic subsidy to the export industry referred to in Section II.A and de facto “specific” subsidies to the export industry, as described in *Cabot*).<sup>129</sup> Generally available subsidies are not countervailable because they are not “specific” to the export industry, as required by Title 19, Section 1677(5A).<sup>130</sup> In *Cabot*, a reviewing court affirmed Commerce’s determination that the “general availability” of a subsidy in theory did not defeat a finding of a subsidy when the subsidy was mainly used, in practice, by export manufacturers.<sup>131</sup> Similarly, even though domestic manufacturers in Malaysia may, in theory, apply for an allocation of guest worker visas—the data show that Malaysia is an export economy, that migrant policy concentrates migrant labor in export manufacturing areas, and that export manufacturers are the largest beneficiaries of Malaysia’s guest worker program.<sup>132</sup> Therefore, as in *Cabot*, a CVD

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125. A subsidy is the same as a “bounty or grant,” it is a benefit conferred upon “a specific enterprise or industry or group of enterprises or industries.” 19 U.S.C. § 1677(5).

126. See, e.g., *Downs v. United States*, 187 U.S. 496 (1903) (holding that a “bounty” was given by Russia to sugar exporters in the form of a saleable certificate of freedom from excise taxes); see also *Nicholas & Co. v. United States*, 249 U.S. 34 (1919) (affirming that the determination that England’s allowance against excise taxes on liquor exports was a countervailable “bounty”).

127. *Cabot Corp. v. United States*, 9 Ct. Int’l Trade 489 (1985); Trachtman, *supra* note 24, at 92.

128. See *Cabot Corp.*, 9 Ct. Int’l Trade, at 494-95. The holding in *Cabot* has been codified within the definitions of “countervailable subsidy.” See 19 U.S.C. § 1677(5); Trachtman, *supra* note 24, at 92.

129. See Trachtman, *supra* note 24.

130. See Trachtman, *supra* note 24.

131. See Trachtman, *supra* note 24.

132. See *supra* Section II.C.2.



petition can potentially claim that if the Government of Malaysia's migrant policies are subsidies, then they are export specific subsidies subject to a CVD order.

A successful CVD petition results in Commerce imposing a tariff on a specific imported good that has received an "actionable subsidy" from an exporting country.<sup>133</sup> The question of what counts as an actionable subsidy has no clear answer and investigations turn on direct and circumstantial evidence.<sup>134</sup> The application of a CVD to an exporting country's goods is subject to review by the World Trade Organization ("WTO"),<sup>135</sup> and such orders against non-actionable subsidies may be challenged and referred to the dispute settlement process at the WTO.<sup>136</sup> In the United States, final determinations on CVD petitions by Commerce and the ITC (either to apply or to not apply CVD) are also subject to domestic judicial review under Title Nineteen, Section 1516 of the United States Code.<sup>137</sup>

The applicable definitions of a "countervailable subsidy" to CVD orders issued under the CVD statute are in Title 19, Section 1677(5) ("CVD Definitions").<sup>138</sup> The CVD Definitions include government

133. See Kelly Phillips Erb, *As Trump Talks Tariffs, Here's What You Need To Know*, FORBES (Mar. 1, 2018), <https://www.forbes.com/sites/kellyphillipserb/2018/03/01/as-trump-talks-tariffs-heres-what-you-need-to-know/#200189d4195a> [<https://perma.cc/Y4DB-S928>].

134. See *American Spring Wire Corp. v. United States*, 8 Ct. Int'l Trade 20, 25-26 (1984) (quoting *SCM Corp. v. United States*, 4 Ct. Int'l Trade 7, 13 (1982)); 19 U.S.C. § 1671(a).

135. *Agreement on Subsidies and Countervailing Measures ("SCM Agreement")*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm) [<https://perma.cc/6J2B-HTSM>].

136. *A unique contribution*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) [<https://perma.cc/CV9H-Z563>].

137. See *Mannesmann-Sumnerbank Boru Endustrisi T.A.S. v. United States*, 23 Ct. Int'l Trade 1052 (1999) (CIT reviews and remands a CVD order on welded carbon steel line pipe, tubes, and pipes from Turkey to the extent of Commerce's calculation of importers' *ad valorem* subsidy rate in determining countervailing duty rate, because it deviated from prior practice).

138. 1677(5)—Countervailable subsidy.

(A) In general.

Except as provided in paragraph (5B), a countervailable subsidy is a subsidy described in this paragraph which is specific as described in paragraph (5A)

(B) Subsidy described. A subsidy is described in this paragraph in the case in which an authority

(i) provides a financial contribution . . .

(D) Financial contribution. The term "financial contribution" means . . .

ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,

(iii) providing goods or services, other than general infrastructure . . .

programs that act as a financial contribution or “price support”—within the meaning of Article XVI of the GATT 1994—to an exporting industry.<sup>139</sup> Examples of financial contributions to industry in Article XVI that apply to the Malaysian policies described in Part II include government actions to exempt export-focused industries from certain regulatory costs, such as the Foreign Worker Tax,<sup>140</sup> otherwise payable by the domestic industry.<sup>141</sup>

The definitions of subsidies that are subject to sanction under CVD law within the international framework are equally open-ended. While the SCM Agreement allows CVDs as a remedy for subsidies, and the Tokyo Round Subsidies Code Agreement (“Subsidies Code”)<sup>142</sup> provides guidance on the interpretation and application of CVD, both agreements remain deliberately vague<sup>143</sup> as to the definition of the term “subsidy.”<sup>144</sup> Neither the SCM Agreement nor the Subsidies Code requires countries implementing CVD remedies into their domestic code<sup>145</sup> to provide statutory definitions of the term “subsidy.”<sup>146</sup> The Subsidies Code does, however, provide a non-exhaustive list<sup>147</sup> of potential examples of subsidies within the Annex A or the SCM Agreement.<sup>148</sup> Malaysia’s policy of making the Foreign

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19 U.S.C. § 1677(5).

139. See generally *Article XVI-Subsidies*, WORLD TRADE ORG., [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art16\\_gatt47.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art16_gatt47.pdf) [<https://perma.cc/U6MA-F9HG>].

140. See *supra* Part II.

141. See *supra* Part II.

142. See Subsidies Code, *supra* note 124, at 4.

143. See William K. Wilcox, *GATT-Based Protectionism and the Definition of a Subsidy* 16 B.U. INT’L L.J. 129, 137 n.53, 163 (1998).

144. Lay, *supra* note 117, at 1496.

145. Malaysian CVD law provides that:

43. (1) When no applicable international obligation on countervailing and anti-dumping duties exist between Malaysia and the interested foreign government—  
 (a) countervailing and anti-dumping duties may be imposed without regard to an investigation referred to in sections 4 and 20; and (b) the Government shall be entitled to use any administrative and legal definition, methodology and procedure it deems appropriate, with regard to the investigations.

Laws Malaysia, Act 504, Countervailing and Antidumping Duties Act 1993, [http://www.miti.gov.my/miti/resources/fileupload/Countervailing\\_and\\_Anti-Dumping\\_Duties\\_Act\\_1993\\_\[Act\\_504\].pdf](http://www.miti.gov.my/miti/resources/fileupload/Countervailing_and_Anti-Dumping_Duties_Act_1993_[Act_504].pdf) [<https://perma.cc/2VLV-KGLJ>].

146. Lay, *supra* note 117, at 1496.

147. Wilcox, *supra* note 143, at 137.

148. (a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance . . .

Worker Tax payable by employees rather than employers<sup>149</sup> fits example (e) in Annex A: “(e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes<sup>150</sup> or social welfare charges paid or payable by industrial or commercial enterprises.” (“Annex (e)”) The Court of International Trade has affirmed that the definitions in the Annex fall within the scope of Commerce’s definition of a subsidy under Section 1677(5)(A).<sup>151</sup> Therefore, there is legal merit to the claim that, under the CVD Statute, Malaysian exports should be subject to countervailing duties designed to offset the benefit received from Malaysia’s migrant policy of shifting cost burdens from manufacturers onto migrants.<sup>152</sup>

Part II explains the proposition that Malaysia’s migrant labor policy, to the extent that the policy provides a benefit to manufacturers in Malaysia and causes traceable harm to persons in the United States, is a subsidy within the meaning of the CVD Statute. Part III demonstrates the process that Commerce undertakes in assessing CVD petitions that allege such subsidies. If Commerce either accepts or rejects a petition alleging a regulatory subsidy, parties to the decision may appeal the decision, and Title Nineteen, Section 1516 of the United

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(e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises . . .

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement.

See Subsidies Code *supra* note 124, at 17-18.

149. See *supra* Section II.C.3.

150. “The term ‘direct taxes’ shall mean taxes on wages, profits, interest, rents, royalties, and all other forms of income, and taxes on the ownership of real property.” See Subsidies Code, *supra* note 124, at 17 n.1.

151. *Can-Am Corp. v. United States*, 11 Ct. Int’l Trade 424, 430 (1987).

Commerce asserts that in order to be an export bounty, grant or subsidy within the meaning of the countervailing duty statutes the benefit bestowed must be linked to the exportation of the goods. The Court finds this interpretation of section 1677(5)(A) “export” subsidies to be consistent with the types of subsidies described in Annex A to the Agreement. The Court also finds the requirements that the alleged benefit be contingent upon export performance or that it stimulate export sales over domestic sales to be consistent with the other forms of export subsidies in Annex A, and holds that such requirements are reasonable criteria for determining whether the benefit bestowed is sufficiently tied to the exportation of the goods.

*Id.*

152. See *supra* Section II.C.3.

States Code provides that the Court of International Trade has jurisdiction over such reviews of Commerce's decisions.<sup>153</sup> If Commerce rejected the application of the CVD Statute to regulatory subsidies, a domestic plaintiff would have a right to file an appeal of the rejection with the Court of International Trade.<sup>154</sup> Similarly, if Commerce accepted the applicability of the CVD statute to exported goods from Malaysia that have benefited from Malaysia's migrant labor policy, the government of Malaysia would be likely to appeal the decision.<sup>155</sup> As a decision by Commerce to either accept or reject a petition against a regulatory subsidy may result in an appeal for judicial review, Part III discusses the broader implications of applying the CVD statute to regulatory subsidies. While Parts II and III described a gap in the regulation of international labor standards, Part IV explains the gap in more detail before Part V concludes that if trade law can bridge the gap, then the ends would justify the means.

#### IV. BRIDGING THE GAP IN INTERNATIONAL LABOR REGULATION

The CVD statute is an enforcement instrument designed to discourage foreign subsidies that cause injury to the markets of importing countries.<sup>156</sup> Part II showed that when a government like Malaysia's proves immune to exhortation and censure, international labor standards are jeopardized. Part II explains that CVD laws are often used by domestic industry in the United States against foreign importers perceived to be violating free trade principles.<sup>157</sup> Part III addresses the necessity of using trade law remedies to discipline poor labor standards in Malaysia.<sup>158</sup>

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153. See *supra* note 137, and accompanying text.

154. See *supra* note 137, and accompanying text.

155. See *supra* note 137, and accompanying text.

156. See Robert H. Lantz, *The Search for Consistency: Treatment of Nonmarket Economics in Transition Under United States Antidumping and Countervailing Duty Laws*, 10 AM. U. J. INT'L L. & POL'Y 993, 1009, 1009-15 (1995) (outlining the purposive theories of CVD laws in the context of importing countries and economic impact).

157. There have been over 600 Antidumping and Countervailing Duty investigations initiated against importers into the United States since January 1, 2000. INTERNATIONAL TRADE ADMINISTRATION, U.S. DEP'T OF COMMERCE, ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS INITIATED AFTER JANUARY 01, 2000 (2016), <https://enforcement.trade.gov/stats/inv-initiations-2000-current.html> [<https://perma.cc/92MJ-Q748>].

158. See *supra* Part III.

The common law development of the CVD definition of “subsidy” described in Section III.A suggests that although “regulatory” subsidies have not been a part of CVD actions by Commerce until now, it is possible for policies that deregulate labor markets to fall within the scope of the CVD statute by means of judicial interpretation rather than through statutory amendment. The International Labour Organisation (“ILO”), which is instrumental in defining, promoting, and promulgating international labor standards, only has enforcement powers limited to “exhortation and censure,”<sup>159</sup> which means that, in the absence of enforceable international labor standards,<sup>160</sup> there are few means available to prevent countries like Malaysia from exploiting migrant labor for economic benefit.<sup>161</sup> Despite a lack of global enforcement, the situation in Malaysia, where the government acts with impunity, is increasingly anomalous in the current climate of international labor regulation because—since the mid-1990s—free trade agreements increasingly include labor rights protections.<sup>162</sup>

The Trans-Pacific Partnership (“TPP”), a free trade agreement to which Malaysia and the United States were both negotiating parties,<sup>163</sup> promised to address Malaysia’s international labor regulation gap by providing “binding and fully enforceable obligations” to protect workers in Malaysia and the United States from exploitation.<sup>164</sup> In

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159. *Compa*, *supra* note 37, at 152.

160. Meyer, *supra* note 31, at 501.

161. *Compa*, *supra* note 37, at 152 n.4.

162. See generally Holger Janusch, *Labor Standards in U.S. Trade Politics*, 49 J. WORLD TRADE 1047, 1060-65 (2015).

163. See Cathleen Cimino-Isaacs, *Labor Standards in the TPP*, in *TRANS-PACIFIC PARTNERSHIP: AN ASSESSMENT* 261, 265–66 (Cathleen Cimino-Isaacs & Jeffrey J. Schott eds., 2016).

164. *The Trans-Pacific Partnership*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/TPP-Protecting-Workers-Fact-Sheet.pdf> [<https://perma.cc/G3QH-DYJ9>].

TPP helps improve conditions on the ground in TPP countries, by using binding and fully enforceable obligations to: Protect the freedom to form unions and bargain collectively; Eliminate exploitative child labor and forced labor; Protect against employment discrimination; Require laws on acceptable conditions of work related to minimum wages, hours of work, and occupational safety and health; Prevent the degradation of labor protections in export processing zones; Combat trade in goods made by forced labor in countries inside and outside TPP.

*Id.*

January 2017, however, the United States Trade Representative (“USTR”) announced the United States’ withdrawal from the TPP.<sup>165</sup> As a result, Malaysian labor practice remains unregulated while many other actors in international trade are regulated; the situation, therefore, presents a prisoner’s dilemma<sup>166</sup> to parties to other agreements with labor standards by only providing incentives to cooperate if participating countries believe that the benefits of cooperation outweigh the costs.<sup>167</sup> In the absence of the TPP, there is no binding agreement on Malaysia, and a unilateral move (such as filing a CVD petition against Malaysia) may be the only available means to preserve international labor regulation and to prevent the Government of Malaysia from exploiting a gap in the international regulatory framework to gain an unfair competitive advantage in trade.<sup>168</sup>

The idea of using trade law to discipline poor labor standards is not a new one.<sup>169</sup> In earlier articles, within the context of NAFTA, the possibility of using CVD as a disciplinary mechanism was raised and dismissed because of its association with protectionism.<sup>170</sup> Commentators in the 1990s concluded that applying CVD law to lax regulatory labor standards would likely require a change in the statute because Commerce would be reluctant to interpret the statute’s provisions in a way that linked labor and trade standards because the executive branch was pushing for trade liberalization and promoted the free market.<sup>171</sup> In the period following the passage of NAFTA, using

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165. *The United States Officially Withdraws from the Trans-Pacific Partnership*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP> [<https://perma.cc/7LEM-Q893>].

166. See ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* 7-12 (2006) (defining the prisoner’s dilemma as a theoretic concept that refers to bargaining situations where two people, acting selfishly and without cooperation, will come to a less ideal outcome than they would if they cooperated. A true prisoner’s dilemma means that participants are unable to communicate with one another when entering into agreements that dictate each other’s future choices and is often used as an analogy for international relations in situations where there is a lack of formal regulation).

167. “[A]void the adverse consequences of a prisoner’s dilemma, in which each participant, unsure of whether the others will cooperate, engages in behavior that is less optimal than cooperative behavior.” *Supra* note 24, at 83.

168. See *supra* Part IV.

169. See generally Wilcox, *supra* note 143; Janusch, *supra* note 162, at 1060-65.

170. Benjamin Rozwood & Andrew R. Walker, *Side Agreements, Sidesteps, and Sideshows: Protecting Labor from Free Trade in North America*, 34 HARV. INT’L L.J. 333, 348 (1993).

171. Trachtman, *supra* note 24, at 92.

CVD to discipline poor labor standards received less frequent discussion, perhaps due in part to the emergence and increasing use of labor-provisions in bilateral and multilateral<sup>172</sup> agreements.<sup>173</sup>

The withdrawal of the United States from the TPP removes the possibility of an explicit trade labor linkage between the United States and Malaysia, which leaves few alternatives to parties seeking to discipline Malaysian unfair labor practices that harm migrants in Malaysia and weaken the competitiveness of United States labor.<sup>174</sup> However, despite its withdrawal from the TPP, the USTR's changed course in trade politics may signal a willingness to use trade law<sup>175</sup> to discipline foreign labor violations that undermine the US labor market.<sup>176</sup> The United States executive branch recently began rethinking its approach to trade policy further to an Executive Order demanding a change to trade policy.<sup>177</sup> Evidence of these changes can be seen in Commerce's call for notice and comment in 2017, where the executive branch announced its intention to investigate policies that address the trade deficit that the United States has with significant trading partners.<sup>178</sup> As part of this effort, the executive branch has shown a clear interest in investigating the relationship with countries like Malaysia and examining potential linkages between the depressed

172. Axel Marx et al., *The Protection of Labour Rights in Trade Agreements: The Case of the EU-Colombia Agreement*, 50 *J. WORLD TRADE* 587, 588 (2016).

173. Janusch, *supra* note 162, at 1060-66.

174. K.S. Jomo, *Malaysia Urged to Withdraw Gracefully from Bad Trade Deal*, *THE STAR* (Aug. 13, 2018), <https://www.thestar.com.my/business/business-news/2018/08/13/withdraw-gracefully-from-bad-trade-deal/> [<https://perma.cc/RMB2-MMS4>].

175. Jacob M. Schlesinger, *New Nafta Shows Trump's Trade Strategy for Balancing Labor*, *WALL STREET J.* (Oct. 1, 2018), <https://www.wsj.com/articles/new-nafta-shows-trumps-trade-strategy-for-balancing-labor-business-interests-1538386203> [<https://perma.cc/8SFK-6WFY>].

176. Billy Melo Araujo, *Labour Provisions in EU and Mega-Regional Trade Agreements: Rhetoric and Reality*, 67 *INT'L COMP. L. Q.* 233 (2018).

177. "Pursuant to Executive Order 13786 of March 31 2017, the Secretary of Commerce and the United States Trade Representative (USTR), in consultation with the Secretaries of State, the Treasury, Defense, Agriculture, and Homeland Security and the heads of any other executive departments or agencies with relevant expertise, as determined by the Secretary of Commerce and the USTR, shall prepare and submit to the President an Omnibus Report on Significant Trade Deficits." *Public Comments and Hearing Regarding Administration Report on Significant Trade Deficits*, *FED. REGISTER* (Apr. 17, 2017), <https://www.federalregister.gov/documents/2017/04/17/2017-07827/public-comments-and-hearing-regarding-administration-report-on-significant-trade-deficits> [<https://perma.cc/F8D6-P3VR>]; Exec. Order No. 13,786, 82 *Fed. Reg.* 18110 (2017).

178. *See Public Comments*, *supra* note 177.

wages in the US manufacturing industry and the “denial of worker rights and labor standards” by trade partners with which it has large trade deficits.<sup>179</sup> The US executive branch may therefore be willing to open an investigation against Malaysia because:

- 1) the United States is one of Malaysia’s top five exporting destinations for electronics,<sup>180</sup>
- 2) the Government of Malaysia creates unfair competitive advantages that American labor cannot match<sup>181</sup> by permitting large-scale labor violations that artificially depress the cost of labor in Malaysia,<sup>182</sup> and
- 3) the United States has large trade deficits with Malaysia.<sup>183</sup>

#### A. *The Possibility of Judicial Review*

As noted at the end of Part III, whether Commerce accepts or rejects a CVD petition alleging a “regulatory subsidy,” either decision would be subject to judicial review by the petitioner or the respondent.<sup>184</sup> When Congress drafts statutes broadly, as it has done by

179. Exec. Order No. 13,786, 82 Fed. Reg. 18110 (2017).

180. *Malaysia Export Statistics*, GLOBALEDGE, <https://globaledge.msu.edu/countries/malaysia> [<https://perma.cc/K6M9-Z7PR>].

Malaysia is a major electronics producer and exporter. The electrical & electronics (E&E) industry is the leading sector in Malaysia’s manufacturing sector, contributing significantly to the country’s manufacturing output (26.94 percent), exports (48.7 percent) and employment (32.5 percent). In 2010, the gross output of the industry totaled US\$50.94 billion, exports amounted to US\$75.7 billion and created employment opportunities for 325,696 people. The major export destinations are USA, China and Singapore while the major import destinations are Taiwan, USA and South Korea.

*Electrical and Electronics Industry in Malaysia*, FACTS & DETAILS, [http://factsanddetails.com/southeast-asia/Malaysia/sub5\\_4e/entry-3697.html](http://factsanddetails.com/southeast-asia/Malaysia/sub5_4e/entry-3697.html) [<https://perma.cc/U8RE-EX4L>].

181. Houseman et al., *supra* note 7, at 12-14.

182. *See supra* Section II.A.

183. USTR data show that in 2013—the latest aggregate data available—Malaysia was the United States’ seventeenth largest supplier of import goods, with US\$27 billion in imports in 2013, US\$14.8 billion of which came from Malaysia’s E&E sector; In E&E, the United States only exports US\$5.4 billion worth of goods to Malaysia, creating a US\$9 billion deficit of U.S. E&E trade with Malaysia. *See Malaysia*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions/southeast-asia-pacific/malaysia> [<https://perma.cc/V3ZD-5BKJ>].

184. *See supra* note 137.



leaving the definition of ‘subsidy’ relatively open in the CVD statute, one canon of interpretation from *Textile Workers Union v. Lincoln Mills* suggests that Commerce implicitly delegates power to the judiciary to expand the federal common law in matters like trade, which are of clear federal interest.<sup>185</sup> Even though trade is a matter of federal interest under the *Lincoln Mills* canon, a reviewing court may still be reluctant to interpret the CVD statute in a manner that expands the law to address gaps in the regulatory framework and could express concerns that it is up to Congress, and not the judiciary, to specifically address such gaps through legislation. A chief concern in broadening the definition of subsidy to include a government’s failure to regulate a certain market may be that sanctioning a government’s inaction (a failure to regulate domestic labor markets) could allow Commerce to apply CVDs to cheap goods exported from countries with governments that lack the capacity to regulate.<sup>186</sup> Therefore, a reviewing court could

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185. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957) (holding that a broadly worded statute in an area of federal interest “authorizes federal courts to fashion a body of federal law”). Another example of broadly worded federal statutes deemed as open to federal common law expansion is the Sherman Antitrust Act, 15 U.S.C. §§ 1-38, which makes unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,” which is an area where federal courts have developed a vast area of federal common law interpreting the statute. See Jay Tidmarsh, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 590 n.26 (2006).

186. See generally Alf Hornborg, *Why You Can’t Have Free Trade and Save the Planet*, THE CONVERSATION (Apr. 30, 2018), <https://theconversation.com/why-you-cant-have-free-trade-and-save-the-planet-94128> [<https://perma.cc/PQ3G-GKWE>]; Alexander Tziamalis, *Explainer: What is Protectionism and Could it Benefit the US Economy?*, THE CONVERSATION (Mar. 1, 2017), <https://theconversation.com/explainer-what-is-protectionism-and-could-it-benefit-the-us-economy-73706> [<https://perma.cc/H37R-BFLE>]; Fred Smith, *Reflections on the Evolution of Trade Policy*, FORBES (Nov. 3, 2017), <https://www.forbes.com/sites/fredsmith/2017/11/03/reflections-on-the-evolution-of-trade-policy/#63bb8e811c45> [<https://perma.cc/PBJ7-4YNX>]; Otto Graf Lambsdorff et al., *Yes, Protectionism is a Promising Tool for Domestic Producers to Safeguard Their Margins*, THE INT’L ECON. (2017), [http://www.international-economy.com/TIE\\_Su07\\_TradeEnvSymp.pdf](http://www.international-economy.com/TIE_Su07_TradeEnvSymp.pdf) [<https://perma.cc/2FGZ-2M4J>]; Jeff Faux, *U.S. Trade Policy—Time to Start Over*, ECON. POL’Y INST. (Nov. 30, 2016), <https://www.epi.org/publication/u-s-trade-policy-time-to-start-over/> [<https://perma.cc/JTJ5-PKE7>]; James Roberts, *How Western Environmental Policies Are Stunting Economic Growth in Developing Countries*, THE HERITAGE FOUND. (Jan. 24, 2011), <https://www.heritage.org/global-politics/report/how-western-environmental-policies-are-stunting-economic-growth-developing> [<https://perma.cc/RJ6F-MSLK>]; THE INT’L ECON., *ASSESSING THE IMPACT OF EU PRECAUTION-BASED STANDARDS ON DEVELOPING COUNTRIES* (2004), [https://www.wto.org/english/forums\\_e/ngo\\_e/posp47\\_nftc\\_enlightened\\_e.pdf](https://www.wto.org/english/forums_e/ngo_e/posp47_nftc_enlightened_e.pdf) [<https://perma.cc/WD66-PJ5G>]; FLORIS VAN HEES, *PROTECTION V. PROTECTIONISM: THE USE OF HUMAN RIGHTS IN THE DEBATE FOR AND AGAINST THE LIBERALISATION OF TRADE* (2004), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.135.4282&rep=rep1&type=pdf> [<https://perma.cc/8M4C-SRQA>]; Makau

either uphold a negative determination (finding no subsidy in Malaysia's labor policy) or reverse a positive determination (a finding of a subsidy in Malaysia's labor policy) by Commerce, fearing broadening the scope of the CVD statute would threaten to open the floodgates of CVD petitions against any government's action or inaction that could bear the label of a regulatory subsidy.

While the fear of opening the floodgates is understandable, such a fear would be unwarranted in the case of Malaysia. The approach this Note advocates keeps the definition of a subsidy within the legal framework set out under both the SCM Agreement<sup>187</sup> and the definitions of subsidy under Section 1677(5)—as noted in Section III(A), the SCM Agreement, in Annex (e),<sup>188</sup> makes specific mention of government actions that exempt industrial enterprises from taxes.<sup>189</sup> The labor environment in Malaysia is not the result of the government being unable to enact regulation, but has rather been created by specific programs of deregulation.<sup>190</sup> Therefore, a reviewing court that accepted the theory of a subsidy suggested in this Note would not open the floodgates of CVD petitions because of the fact specific situation of Malaysia exploiting international regulatory gaps and taking purposive deregulatory action to shift social welfare charges away from industry and onto the labor force.<sup>191</sup> Therefore, one may allay prudential concerns about opening the floodgates of CVD petitions by limiting the expanded application of a subsidy in CVD proceedings to the extent of the definitions in Annex A of the SCM Agreement.<sup>192</sup>

#### V. CONCLUSION: DISINCENTIVIZING SOCIAL DUMPING

Unless action is taken to disincentivize Malaysia from using MIDA<sup>193</sup> to offer benefits to manufacturers that are underwritten by a hidden reality of forced labor, it is unlikely that the downward pressure on wages in the global manufacturing market will stop because international labor standards are not strongly enforced, and the US

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W. Mutua & Robert L. Howse, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, 6 HUM. RTS. DEV. ONLINE 51 (1999).

187. SCM Agreement, *supra* note 123, at ¶ 1.

188. *See supra* notes 148-65.

189. *See supra* note 148.

190. *See supra* Section II.C.2.

191. *See supra* Section II.A.

192. SCM Agreement, *supra* note 123, at Annex I.

193. *See Why Malaysia*, *supra* note 20.

withdrawal from the TPP means that Malaysia's policies are otherwise unregulated. If CVDs supply needed legal pressure that disincentivizes the Malaysian Government's policy path-dependence of relying on exploited migrant labor for economic gains, then the ends would justify the means. The international regulatory framework as applied to labor standards supplies few disincentives to governments who enact policies that discriminate against migrant labor, which undermines the global effort to create a baseline for labor standards. At the very least, characterizing the Malaysian government's deregulation as a subsidy provides a chance to fill the regulatory gap and establish an economic incentive to uphold basic labor standards that protect vulnerable Malaysian migrant laborers as well as economically disempowered US manufacturing laborers.