

# US trade: The rise of benefit corporations and stakeholder-capitalism businesses

---

Companies focused on broader public benefits and ESG principles face unique issues in international trade disputes





---

# US trade: The rise of benefit corporations and stakeholder-capitalism businesses

Companies focused on broader public benefits and ESG principles face unique issues in international trade disputes

By **Walter Spak and Jessica Lynd, White & Case LLP\***

\*Gregory Spak, Jay Campbell and Allison Kepkay contributed to the creation of this report.

---

**I**ncreasingly, companies worldwide are expanding the focus of their business models beyond maximizing shareholder profits to include other stakeholder values, such as:

- Operating in a more sustainable and responsible way to minimize harmful business effects on the natural environment, individuals and communities
- Incorporating objectives that benefit society and deliver value to a broader set of stakeholders (workers, community members and others)
- Providing environmental, social and governance (ESG) and other public benefits beyond their primary products and services

This movement has implications for companies, shareholders, workers and the public at large.

The impact of this movement on the international trading system and the ability of existing trade laws and agreements to account for it has not received much attention yet. But it should.

The agreements and laws that regulate international trade largely presume that companies operate only to make a profit. For example, US trade remedy laws focus on practices such as “dumping”: selling at prices below production cost and a reasonable profit. Imports can be considered to “injure” a domestic industry if that industry’s profit margins are sagging. Companies that receive inducements to achieve economic or social goals could be penalized for receiving subsidies. Key terms like “dumping,” “injury,” and “subsidy” all presume a free market orientation in which companies act with the primary focus of achieving and maintaining profits.

Our current notions of fair/unfair competition and fair/unfair trade derive from the power of the free market. According to free market theory, every company should have its chance to compete in a marketplace governed by rules, including the need to sell above the cost of production and to avoid “dumping” into foreign markets, unfair government subsidization and other activities that thwart competition.

But what happens when “benefit corporations” commit themselves to taking on additional costs in order to comply with enhanced environmental or labor standards? Should they be disadvantaged or conversely required to compete with imports that do not assume these additional costs? Should governments push companies to achieve broader societal goals? If so, then we may need to re-think the current agreements, laws and regulations that define fair and unfair trade.

Under current trade rules, US importers could be at risk of paying higher duties and other trade remedies, due to differences in how foreign benefit corporations produce goods and conduct their businesses—or could potentially leverage an ESG business model to eliminate or reduce trade remedies against them. Similarly, US benefit corporations could



**Benefit corporations should be mindful of how their socially conscious business model could be bolstered or hampered by trade laws**

be forced to compete against foreign corporations exporting to the US that do not abide by stakeholder-capitalism values.

Until trade laws in the US or at the World Trade Organization (WTO) adapt to account for the unique role that benefit corporations play in international competition, those businesses should be mindful of how their socially conscious business model could be bolstered or hampered by existing trade laws.

This report examines challenges and opportunities that may arise as companies pursuing societal benefit motives engage in international trade. We provide an overview of what board members, general counsel and other leaders of benefit corporations should consider when addressing allegations or pursuing their own petitions in US trade disputes in order to maintain competitiveness while pursuing ESG objectives, as well as suggestions for how the trade laws could change to accommodate the rise in stakeholder capitalism.

## THE RISE OF STAKEHOLDER CAPITALISM

Since at least the 1970s and the publication of Milton Friedman's "shareholder primacy" doctrine, throughout the hostile takeover business culture of the 1980s, and during the more recent linking of executive compensation to company profits or share price, many businesses and aspects of US competition law supported the view that the primary—if not sole—obligation of a business was to generate shareholder value or profit.<sup>1</sup>

However, in recent years, consumers, investors, the general public and others have inspired a movement to demand more of corporations than just profit maximization. This movement is shifting corporate focus from "shareholder primacy" to stakeholder capitalism and "doing good while doing well."

The shift is evident not only with individual companies, but also with



## Recently, consumers, investors, the general public and others have inspired a movement to demand more of corporations than just profits



**3,900+**

Certified B corporations worldwide

Source: B Lab

collective efforts in the business community.

In August 2019, the Business Roundtable issued the new Principles of Corporate Governance, which it calls a "modern standard for corporate responsibility."<sup>2</sup> These principles moved away from a shareholder-primacy model, which focused solely on financial and operational costs and benefits, towards a broader stakeholder-driven model that includes a focus on environmental and social risks and opportunities. In January 2020, the annual World Economic Forum convened in Davos under the theme of "Stakeholders for a Cohesive and Sustainable World" seeking to renew "the concept of stakeholder capitalism to overcome income inequality, societal division and the climate crisis."<sup>3</sup> Based on its Manifesto 2020, the program focused on "achieving maximum impact on the Forum's platform for public-private cooperation across six core areas of activity: Ecology, Economy, Society, Industry, Technology and Geopolitics."<sup>4</sup>

### Factors driving a growing movement

Businesses committed to public and expanded stakeholder benefits include ones chartered as "benefit corporations," "public benefit corporations," "low-profit/limited liability companies" (L3Cs), and "community interest corporations," as well as ones certified as "B corporations" and other

stakeholder-capitalism or mission-aligned companies committed to achieving ESG aims or a specified social benefit.

For clarity, this report refers to all of these and similar companies as "benefit corporations." For more detail, see "New legal structures for the increasing number of benefit corporations."

Several recent trends are driving this broader stakeholder-capitalism movement, including:

#### —Conscious consumerism —

Increasingly, customers seek to purchase products that are healthier, more environmentally sustainable, ethically made and able to benefit the community or a social purpose. Consumers want to support companies whose social, ethical and philosophical values align with their own.<sup>5</sup> Businesses, in turn, have responded to this "vote with your wallet" approach by changing their marketing and other practices to appeal to consumers attentive to the societal impacts of their shopping and consumption choices<sup>6</sup>

#### —Socially responsible investing (SRI) and ESG investing —

This conscientious market approach refers to investments that seek to achieve not only positive financial returns but also a long-term beneficial impact on societal, environmental and business performance.<sup>7</sup> The number of companies and funds that prioritize certain ESG factors—such as divesting from petroleum assets, increasing the number of women in leadership positions, etc.—has increased exponentially in recent years

#### —Charity brands —

A growing number of brands are attracting customers by incorporating some sort of philanthropy or donation into their business model. This is commonly achieved by making an in-kind or financial donation directly correlated with each purchase<sup>8</sup>

**–Corporate sustainability initiatives** – More and more companies are promoting sustainability goals in their supply chains, including labor and environmental standards, even without necessarily binding themselves to a particular model. For example, Louis Dreyfus Company’s sustainability initiative seeks to voluntarily achieve certain goals loosely aligned with the UN Sustainable Development Goals<sup>9</sup>

**–Business and human rights initiatives** – A growing number of national laws have implemented human rights standards and reporting requirements for businesses, influenced by the UN Guiding Principles on business and human rights.<sup>10</sup> In addition, in recent years, corporate benchmarking initiatives—public rankings that measure and compare human rights and recognized ESG issues—have grown<sup>11</sup>

Today, several countries and many US states have legal structures that allow businesses to establish themselves as benefit corporations. See Figures 1 and 2 on page 11.



**Several countries and many US states have legal structures that allow businesses to establish themselves as benefit corporations**

## NEW LEGAL STRUCTURES FOR THE INCREASING NUMBER OF BENEFIT CORPORATIONS

The movement to broaden stakeholder capitalism has resulted in, or at least coincided with, the creation of new corporate legal structures, including through charter and other certification mechanisms that effectively create legal obligations for companies in US states and other countries. Examples include:

### **Benefit corporations (as legally registered)**

New companies can incorporate as a “benefit corporation” in many US states and several other countries that have passed legislation creating this business form.<sup>12</sup> Notably, the corporate law in some countries does not need to add a new business form to permit companies to consider social benefits on equal footing with profit, because their corporate law already permits such flexibility. Examples of prominent benefit corporations and/or companies with benefit corporation certification include Patagonia and Athleta clothing brands, Kickstarter, Illy Coffee, and Unilever subsidiaries Ben and Jerry’s (ice cream) and Seventh Generation (cleaning products).

In addition, an existing company can elect to become a benefit corporation by amending its governing documents, which typically requires a two-thirds super-majority vote of all shareholders. The procedure for filing amendments in most US states is similar to that for any other corporate structure, with the addition of a statement declaring the company is a benefit corporation. Some states also require benefit corporations to name the specific public benefit they plan to pursue and to comply with certain reporting requirements.

Benefit corporations are treated like all other corporations for tax purposes, but benefit corporation status provides legal protections to balance financial and non-financial interests when making decisions—even in a sale scenario or as a publicly traded company. For example, directors may be required to consider other public benefits in addition to profits. Shareholders could then be prevented from using stock value declines as evidence for a lawsuit against the company. Transparency provisions in many of the statutes require benefit corporations to publish an annual report demonstrating their social and environmental performance using an independent third-party standard.

### **Low-profit limited liability company (L3C)**

An L3C generally is a hybrid of a traditional limited liability company (a private organization whose owners actively participate in management but face no personal liability for the organization’s obligations) and a non-profit business (a business that operates to benefit the general public without shareholders or any profit motive). With this blend, an L3C is a private company that earns profits while conducting its business to advance a certain cause or better social welfare. L3Cs are intended to help socially responsible businesses attract money from both foundations and private investors.<sup>13</sup>

### **Certified B corporations (non-profit certification)**

A “certified B corporation,” is a traditionally registered business that undergoes rigorous certification standards by a non-profit organization called the B Lab. To maintain this certification, the business must seek to balance purpose and profit, and must consider the impact of its business decisions on all stakeholders, including workers, customers, suppliers, community, the environment, etc. Many companies seek certification in order to build trust and value for their business.<sup>14</sup> Currently, more than 3,900 certified B corporations exist in 150 industries throughout 74 countries.<sup>15</sup>

---

# Q&A: The case for a market-wide approach to sustainable business practices

Frederick Alexander, Chief Executive Officer and founder of the Shareholder Commons—a nonprofit organization focused on issues and structures for a sustainable, just economy—discusses how systemic changes can help companies create value, while prioritizing the long-term health of capital markets and shareholder profits.

---

## Q: WHAT VALUE DOES THE SHAREHOLDER COMMONS PROVIDE TO COMPANIES COMPETING IN INTERNATIONAL TRADE?

**A: Alexander:** The Shareholder Commons uses a market-wide and systems-first approach to our thinking and activism. We believe in harnessing the power of universal owners—large institutional investors with diversified portfolios and financial interests in the well-being of the entire economy—to change market systems so that all companies create value and maximize profits through sustainable, humane practices.

For any company pursuing sustainability and public benefits, this type of systems-first approach would prevent other businesses from being able to externalize costs (causing individuals, communities and even competitors to bear the impact of their environmental pollution, lack of worker benefits and/or similar practices that harm others). Instead, all would be forced to compete based on the levels of sustainable value that they add, including to the economy, environment and society overall. An individual company can try to set up guardrails for itself, but it is much easier when many companies do it. That's something diversified shareholders can help create.

---

## Q: HOW WOULD YOU RESPOND TO THOSE WHO ARGUE THAT THE SOCIAL AND ECOLOGICAL BOUNDARIES YOU ADVOCATE FOR BUSINESSES SHOULD OCCUR THROUGH GOVERNMENT REGULATIONS?

**A: Alexander:** Shareholder stewardship can be an important complement to regulation. No

legal regime so far has been able to cause companies to change their practices and bear the full amounts of the environmental and social costs that they typically externalize to others. Moreover, acting only through legal regulations creates a “race to the bottom” among jurisdictions, where certain jurisdictions try to lift or loosen regulations in order to attract investment. Similarly, regulations alone can set up a direct conflict between abiding by the regulations and maximizing profits. This leads to lobbying against regulations in order to increase financial returns or following the letter of a law, but not its spirit.

In a systems-wide approach, investors recognize that the externalized costs of an individual company can impact their other investments, particularly when they hold diversified portfolios. We envision that shareholders can implement guardrails on portfolio companies to limit the negative sum externalities that a business can impose on others and then enforce these guardrails through votes against directors.

---

## Q: CAN AN EXISTING COMPANY CHANGE ITS LEGAL FORM TO BECOME A BENEFIT CORPORATION?

**A: Alexander:** Yes. In jurisdictions where benefit corporation legislation exists, companies can become benefit corporations relatively easily, usually through a charter amendment. For example, the entity is often known as a “public benefit corporation” (or PBC) in Delaware.

In some jurisdictions like Delaware, the company must specify one or more public benefits

that it will provide. In other jurisdictions, this specification is optional, but the company must still consider the interests of all stakeholders. The public benefit that a benefit corporation adopts can be almost anything: providing nutritious meals to children; a media company sharing accurate information with its news consumers; or some other purpose that corresponds to the company's business. We usually advise companies to state a meaningful, but not too narrow, benefit—so that they do not have to go back to shareholders frequently for approvals to modify the purpose.

---

## Q: HOW DO BENEFIT CORPORATION DIRECTORS BALANCE PROFIT WITH THEIR SHAREHOLDER VALUES?

**A: Alexander:** If directors find that a company's profit-seeking efforts conflict with shareholder values and/or the company's public benefit, then they should assess whether these profits are coming from negative value (such as by paying workers less). As a rule of thumb, a company's profits should come from adding value.

At the end of the day, benefit corporation status does not change the power dynamic between owners/shareholders and company managers. To that end, if managers focus on promoting shareholder interests, and if those shareholders are diversified across investments, then directors may find significant alignment between shareholder interests and the interests of other stakeholders. For example, a bank that is a benefit corporation might decide to lower its returns by using some of its capital to provide loans to assist marginalized communities where the return

---

on investment is less than it would otherwise be, because it believes that its diversified shareholders will benefit from the improvements to the economy due to increasing opportunities and addressing historical injustices.

---

**Q: WHAT VALUE DO CONSUMERS RECEIVE FROM BENEFIT CORPORATIONS?**

**A: Alexander:** Although value to consumers is often seen as low-cost goods and services, those lower prices often come with externalities that affect consumers and their communities, such as plastic deposited into oceans or inequalities extended through low-paying jobs. We think the goal for consumers should not be low prices, so much as accurate prices that are not artificially lowered through externalized costs or artificially raised through anticompetitive behavior. At that point, companies truly compete on visible full prices, without hidden costs or costs imposed on society and the environment.

---

**Q: HOW CAN THE BIDEN-HARRIS ADMINISTRATION SUPPORT BENEFIT CORPORATIONS?**

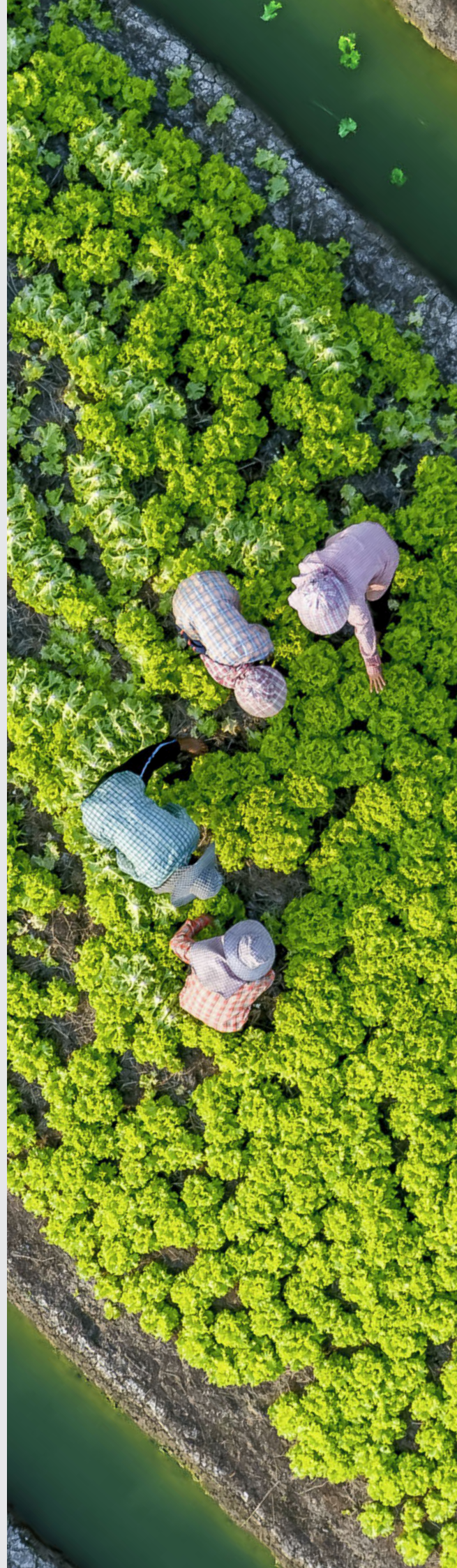
**A: Alexander:** The most immediate step the administration could take is to pursue “dual materiality” at the US Securities and Exchange Commission (SEC). Currently, the US corporate disclosure regime is “outside in” (it asks companies to disclose how external events and conditions may affect the company and its earnings.) A critical complement to this would be an additional “inside

out” disclosure that asks how the company’s business practices affect society and the environment. The Shareholder Commons recently submitted comments to the SEC in this regard. The European Union is developing a similar proposal.

In addition, the administration could take regulatory action (which would not need congressional approval) by clarifying that fiduciary duties under ERISA and under the Investment Advisors Act allow, or even require, that trustees guide companies in their portfolios to prioritize the health of social and environmental systems that diversified investors rely on.

A more far-reaching goal would be to mandate benefit corporation status for all companies over a certain size. Senator Elizabeth Warren previously proposed something similar in the Accountable Capitalism Act.

Finally, the administration should also consider “safe harbors” for investors to discuss social benefits across competing businesses without fearing an antitrust or Securities Act claim. The ESG Disclosure Simplification Act of 2021 (H. R. 1187) recently passed in the US House of Representatives included language proposing a study on these issues.



# Q&A: A global movement to use business as a “force for good”

Holly Ensign-Barstow, the Director of Stakeholder Governance and Policy for B Lab, a nonprofit that certifies companies as B Corporations, describes the benefits of making sure a company’s operations and business model include its entire social and environmental performance.

---

## Q: WHAT DOES B LAB’S CERTIFICATION PROCESS ENTAIL FOR COMPANIES?

**A: Ensign-Barstow:** To fulfill the performance requirements for B Lab’s B Corporation Certification, a company must first complete our B Impact Assessment (BIA), which is a free, confidential platform designed to help measure and manage a company’s positive impact on its workers, community, customers and the environment. A company seeking B Corporation Certification must receive a minimum verified total score of 80 across all impact areas on the BIA. B Lab’s verification process in order for a company to earn an overall reviewed score on the BIA includes sampling practices through a combination of phone interviews, documentation and onsite reviews. Each company must also meet legal requirements by adopting specific stakeholder governance criteria, which vary depending on where the company is incorporated and its legal entity type.

---

## Q: WHAT SOCIETAL AND STAKEHOLDER VALUES DO CERTIFIED B CORPORATIONS SUPPORT?

**A: Ensign-Barstow:** Certified B Corporations can provide positive social and environmental impacts in many different areas. Here are a few examples of Certified B Corporations that focus on different impacts:

- Cascade, an industrial manufacturer based in Grand Rapids, Michigan, is committed to hiring people who have been incarcerated and has convinced more than 100 local companies to adopt their own prisoner reentry programs
- Aerofarms is addressing our global food crisis by building, owning and operating indoor vertical

farms to grow safe, healthy food in a sustainable and socially responsible way

- Allbirds, dedicated to making sustainable footwear, has pledged that 100 percent of its wool will come from regenerative sources and all of its annual on-farm emissions from wool will be reduced or sequestered by the end of 2025
- RECIRC, a Black-owned, sustainable packaging company, aims to extend the life of packaging with a utility patented zero-waste, refillable, reusable and last-resort-recyclable packaging to preserve cosmetics, condiments and home care products, while reducing the use of plastic packaging

---

## Q: WHAT SHOULD MULTINATIONAL COMPANIES KNOW ABOUT B CORPORATION CERTIFICATION?

**A: Ensign-Barstow:** For companies that are the most committed, like Danone, we have rebuilt B Lab’s certification standards in order to allow large multinational companies to become Certified B Corporations. We are also helping a small number of multinational companies become certified. For other multinational companies, it will be a longer journey, especially because the change in fiduciary is a long process that includes educating investors. Last year, we launched a program called [B Movement Builders](#), specifically created for multinational companies that are on this journey and know it will take a few years, but would like to start engaging with us now. We are working on both public policy and capital markets strategies that will allow us to engage with policymakers and investors in removing impediments for all multinational companies to become Certified B Corporations.

---

## Q: WHAT VALUE DO CONSUMERS RECEIVE FROM CERTIFIED B CORPORATIONS AND OTHER BENEFIT CORPORATIONS?

**A: Ensign-Barstow:** When purchasing goods from these companies, consumers can have a level of assurance that the companies are not using “purpose” as just a marketing tool. Instead, they are actually committed to treating their workers well, are contributing to the economic and social well-being of the communities in which they operate and put their impacts on air, climate, water, land and biodiversity first in their business practices.

---

## Q: HOW CAN THE BIDEN-HARRIS ADMINISTRATION SUPPORT CERTIFIED B CORPORATIONS AND OTHER BENEFIT CORPORATIONS?

**A: Ensign-Barstow:** The administration could centralize the process of setting new policies and regulation agendas for this business population in a central hub, like at the National Economic Council (NEC). B Lab, in partnership with the US Impact Investing Alliance, has been helping to lead an effort that proposes this idea with a coalition representing more than 50 businesses, investors and civil society organizations. The idea is that a White House Initiative on Inclusive Economic Growth housed at the NEC could serve as a forum within the White House to engage corporations and investors alongside the government to achieve shared goals. B Lab also shares the same policy goals as the Shareholder Commons.





### **THE BIDEN-HARRIS ADMINISTRATION AND STAKEHOLDER-CAPITALISM BUSINESSES**

The Biden-Harris administration is poised to act in this area, and civil society is urging it to do so. A coalition of 50 impact-oriented organizations, including the non-profit group B Lab, has proposed the creation of a White House Initiative on Inclusive Economic Growth to coordinate federal policies around stakeholder-capitalism that would also support the administration's efforts to address three key crises: the COVID-19 economic fallout; a widening racial wealth gap; and climate change.<sup>16</sup> During his presidential campaign, President Biden seemed to embrace stakeholder-capitalism, saying it "isn't a new or radical notion; these are basic values and principles that helped build this nation."<sup>17</sup> Since taking office, President Biden has added to his staff professionals already engaged with stakeholder-capitalism ideas in the competition law sector. For example, Federal Trade Commission Chair Lina Khan previously critiqued the antitrust laws, arguing that factors such as workers' wages can also indicate anti-competitive behavior—

thus promoting a stakeholder-capitalism concept.<sup>18</sup>

The administration can begin promoting stakeholder-capitalism and benefit corporations through the US Department of Commerce (the DOC). As discussed below, the DOC could enforce the trade remedies laws in ways that incentivize and support benefit corporations and stakeholder-capitalism businesses.

Ultimately, however, trade remedies laws conform to WTO agreements, which were written with conventional business models in mind and were intended to be applied uniformly across all member countries.

If individual WTO member countries seek to incentivize benefit corporations on their own, without amending the WTO agreements, the results might be less than ideal. It is not difficult to imagine that an

individual WTO member country might incentivize and protect benefit corporations only when they are part of the country's domestic industry, but ignore or exploit benefit corporations when they are part of a foreign industry in a dispute.

### **OPPORTUNITIES AND RISKS FOR BENEFIT CORPORATIONS IN US TRADE PROCEEDINGS**

Due to their unique operating principles, stakeholder-capitalism businesses and benefit corporations can face different challenges and opportunities under various areas of US law that regulate competition.

In particular, international trade remedies cases in the US—namely antidumping duty (AD) cases and countervailing duty (anti-subsidy, CVD) cases—examine key issues of competition between:



**Stakeholder-capitalism businesses can face unique challenges and opportunities in US antidumping duty and countervailing duty cases**

1. Foreign businesses that export goods into the US and
2. US industries that compete within US markets against those foreign companies.

To ensure that their unique missions are not overlooked or considered “unfair” trading practices, stakeholder-capitalism businesses and benefit corporations should pay special attention to certain key considerations examined in trade remedy cases.

### Key considerations for AD and CVD cases

The actions of benefit corporations can affect certain key considerations relevant to important types of US trade disputes, including:

1. The US International Trade Commission (USITC)’s determinations of
  - a. Which goods manufactured by the US industry are “like” —or competitive with—the imported goods
  - b. The “conditions of competition” within an industry to determine whether an imported product is truly competing against a domestic product
  - c. Whether the allegedly unfairly traded imports are causing injury to the US producers of the “like” products or whether the injury is the result of something else



## Pay attention to key considerations examined in trade remedy cases, so that unique business missions are not overlooked or considered “unfair” trading practices

2. The DOC’s “fair comparisons” and other considerations in AD cases
3. The DOC’s examination of government-conveyed financial benefits in CVD cases

In AD investigations, a US company or industry petitions the DOC to impose antidumping duties on foreign products that are allegedly sold in the US market at a lower price than the sale price for the goods in the foreign producer’s home country (i.e., alleging that the goods are “dumped” in the US), thus causing “injury” to the US industry. The DOC then determines whether the dumping occurred, while the USITC determines whether the imports are injuring the US industry.

In CVD investigations, a US company or industry alleges that foreign goods imported into the US are being unfairly subsidized

in their home country (i.e., the foreign exporter or producer is receiving a financial contribution from the foreign government that benefits the foreign exporter or producer). The DOC then determines whether the alleged subsidization is happening and, if so, the amount of the subsidy, while the USITC determines whether the imports are injuring the US industry.

### Benefit corporations may merit unique product comparability, conditions of competition and causation analyses in AD and CVD cases

In both AD and CVD investigations, the USITC analyzes whether a domestic industry is materially injured or threatened by reason of the imports under investigation.

To do this, it must first define the US industry, by identifying the US producers of “like” products, which include identical products and those with similar characteristics and uses as the imported goods under investigation.<sup>19</sup>

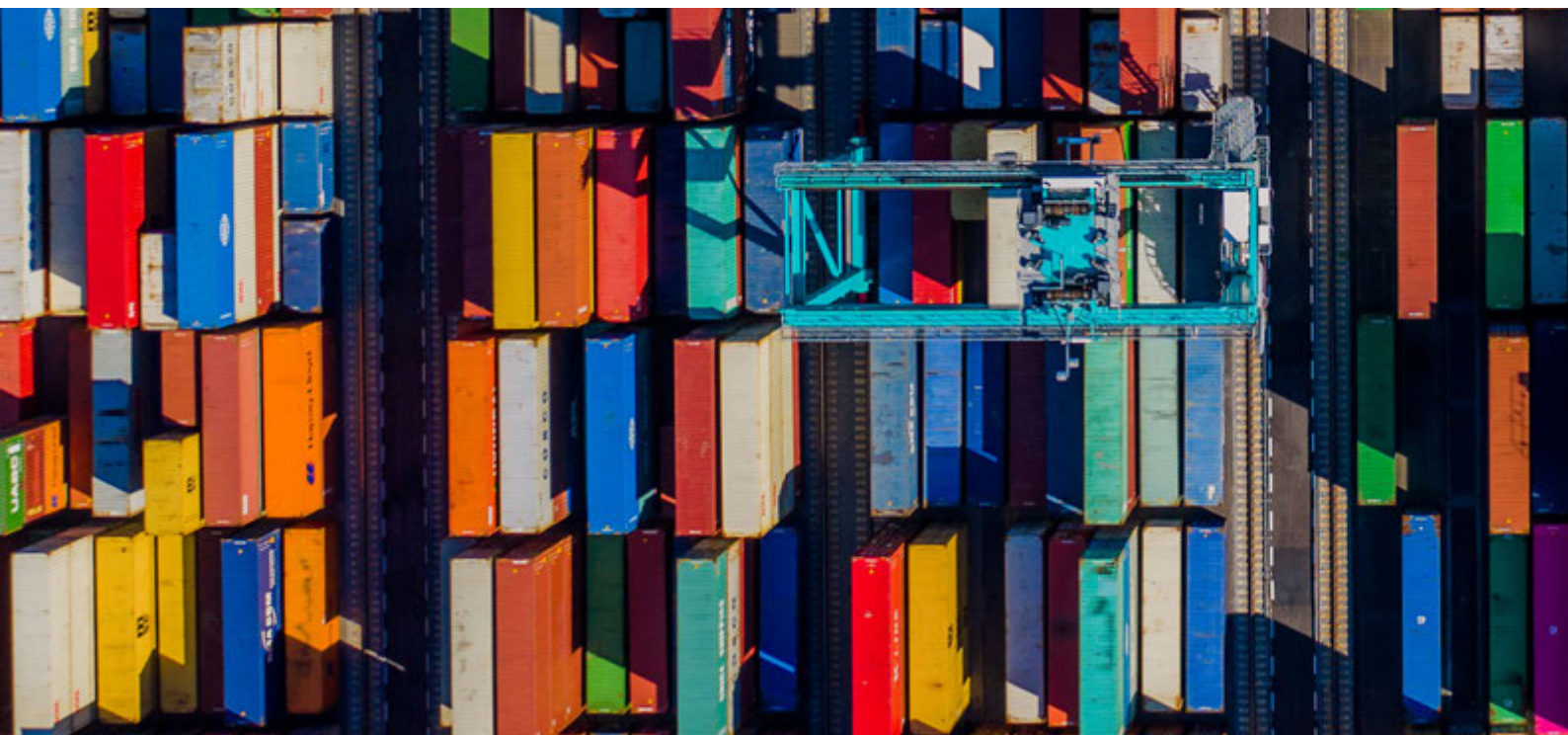
Similarly, the USITC will analyze the “conditions of competition” within an industry to determine whether an imported product is truly competing against a domestic product when it assesses the impact of imports on the affected domestic industry.<sup>20</sup> Among other considerations (such as business cycles or growing seasons), conditions of competition can



74

Countries with certified B corporations

Source: B Lab



include substitutability issues and distinctive market considerations. An industry that includes significant competition from benefit corporations could merit its own condition of competition analysis for that reason.

Finally, in its causation analysis, the USITC must assess whether any injury suffered by the US industry is the result of the unfairly dumped/subsidized goods or if other factors are causing that injury. That is, it is not enough that the US market is injured; it must be injured as a result of the dumping or subsidization specifically, and the USITC must determine whether other causes of the injury exist.

#### Product comparability in AD and CVD cases at the USITC

The question arises whether a good produced by a conventional company is truly “like” the same good produced by a benefit corporation. Under existing case law, the relevant considerations include:

- The manner of production
- Consumers’ views of the two products’ interchangeability
- Whether separate markets exist for the two products

For example, there is a distinction between organic agricultural goods and conventional agricultural goods. Organic and conventional corn can both be used to make tortillas,

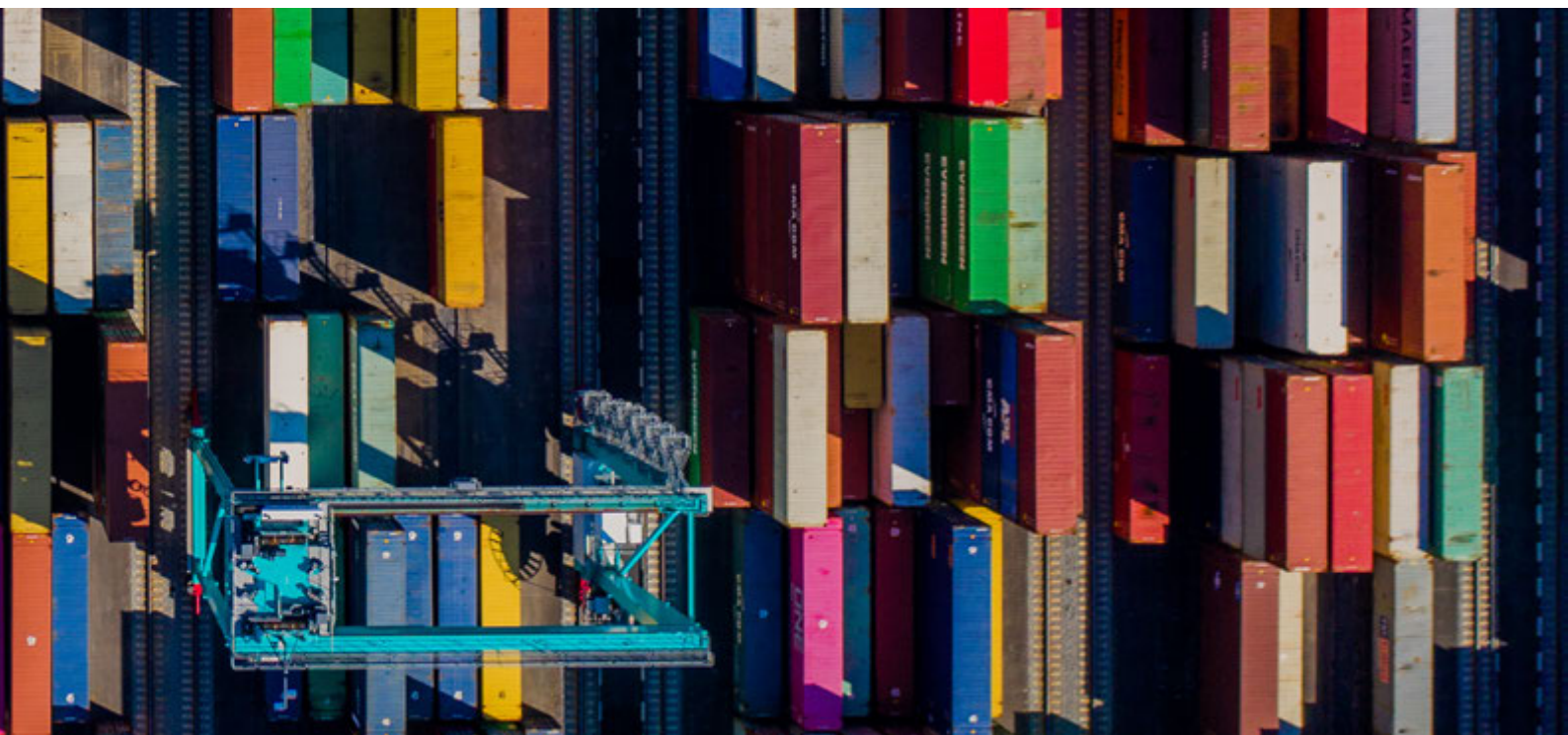
but they are produced differently (one may be grown with synthetic pesticides, the other cannot and may instead employ no-till farming methods and a more diverse ecosystem to help increase production). Moreover, the prices for organic and conventional corn differ, because organic-product consumers are generally willing and able to pay more for organic food products than conventional food products. At the extreme, producers might even recognize unique markets for organic and conventional corn due to consumer preference (some prefer tortillas with organic or non-GMO corn). In a recent USITC case, the subject product was explicitly defined as organic.<sup>21</sup>

Similar conclusions could be drawn regarding goods produced by benefit corporations. That is, the business form of the benefit corporation, with its mandate to achieve a social good in addition to generating profit, could require it to manufacture goods a certain way, even though the end-product may appear similar to a conventionally produced good. The “how” of production matters to the benefit corporation, and could be relevant to product comparability, just as the “how” of organic farming matters to some farmers and has already been considered relevant to product comparability at the USITC.

Moreover, if one company

minimizes environmental impact, uses recyclable materials and guarantees “living wages” to its workers, there is an argument that consumers might not perceive its goods as similar to those of a conventional company that does not value those considerations, even if the end-products are functionally similar.

In a case involving both US producers operating as benefit corporations and conventional US producers, how the USITC defines the “like” product could have significant implications for the agency’s injury analysis. If, for example, the US benefit corporations and stakeholder-capitalism companies were performing worse than their conventional counterparts, the US companies petitioning for AD/CVD duties might argue that goods produced by the benefit corporations are different than the goods produced by the conventional US producers. The USITC could then find separate like products—one consisting of the goods produced by US benefit corporations, and the other consisting of goods produced by conventional US producers. In such a case, the USITC might be more inclined to find that the imported goods injured an industry consisting of poorly performing benefit corporations than it would if it had considered the impact on all US producers in the industry—ESG-minded or not.



### Conditions of competition analysis in AD and CVD cases at the USITC

The USITC's "condition of competition" analysis is not strictly defined by statute, but is nonetheless required. Its aim is to ensure that a domestic product and a foreign product are actually competing with one another in order to assess injury to the US market as a result of imports of the dumped or subsidized foreign product. To that end, the USITC can consider nearly any factor relevant to competition between the goods, including issues of substitutability. For purposes of benefit corporations, substitutability factors would include whether consumers consider the producing company's form or values when making purchases. A purchaser committed to environmental sustainability, for example, might be more likely to purchase from a producer that is also committed to environmental sustainability practices in its production process.

Moreover, given that a benefit corporation considers profit in conjunction with other social values, while its non-benefit corporation competitor prioritizes only profit, then to the extent the two are competing, they may not be doing so on price. Thus, the USITC would have to determine on what basis the seemingly similar products did compete, if at all, and factor that into its injury analysis.

### Injury causation in AD and CVD cases at the USITC

Benefit corporation or stakeholder-capitalism business values might also affect the USITC's causation analysis.<sup>22</sup>

US AD and CVD laws require the USITC to determine not just whether a US industry is injured, but specifically whether:

1. The dumped/subsidized imports are causing the injury, or
2. Other factors are causing the injury.

It is not difficult to imagine that conventional suppliers and benefit



150

Industries with certified B corporations

Source: B Lab

corporation suppliers within the same industry might perform differently in terms of sales and profits.

For example, foreign benefit corporation producers could argue that their success in the US market at the expense of conventional US businesses is because consumers prefer sustainably produced products, even if those products are functionally the same—not because of dumping or subsidization.

On the other hand, US benefit corporations might seek to downplay the higher value consumers attribute to sustainably produced goods in an effort to demonstrate injury from lower-priced conventional products that are imported.

The advent of benefit corporations also raises questions about how injury is measured in the first place. Under the existing statute, the USITC examines a US industry's performance based on economic indicators only (output, sales, market share, profits, productivity, capacity utilization, wages and others).<sup>23</sup> However, the metrics of the US industry's performance arguably should be broadened if the US producers are structured to further ESG or similar aims, rather than simply to maximize profits.

These issues will have to play out in the data and details of individual cases, as they arise, and potentially in US policy as it evolves.

### Fair comparisons of foreign and US prices and other considerations in AD cases at the DOC

Another legal inquiry in an AD analysis that might become relevant in cases involving benefit corporations is the "fair" comparison of the foreign exporter's home market and US export prices. Under US law, the DOC is required to determine whether the foreign producer/exporter has engaged in "dumping" based on a fair comparison of the exporter's price in its home market (or comparison market) with the same exporter's price in the US market.

To make a fair comparison, the DOC will adjust the US price and the price in the comparison market back to the point where both sales are ready to be shipped from the factory gate (the "ex-factory" price). The differences between benefit corporations/stakeholder-capitalism businesses and conventional businesses could be relevant to achieving a fair comparison, because the necessary adjustments arguably could extend beyond mere transportation expenses (as one example) to include price adjustments created by benefit corporation endeavors.

### Fair comparison: Recent example

Although not involving benefit corporations specifically, the AD case for *Biodiesel from Argentina* involved an environmental regulation that was effectively monetized in the US market, but not in the foreign producer's home country. Consequently, the DOC adjusted the responding foreign producer's US price of biodiesel in order to make what it called an "apples to apples comparison" with the comparison-market price.

The US Renewable Fuel Standards program at issue in that case requires US fuel blenders to meet an annual renewable fuel volume obligation. They meet that obligation by reporting Renewable Fuel Identification number credits (RINs),



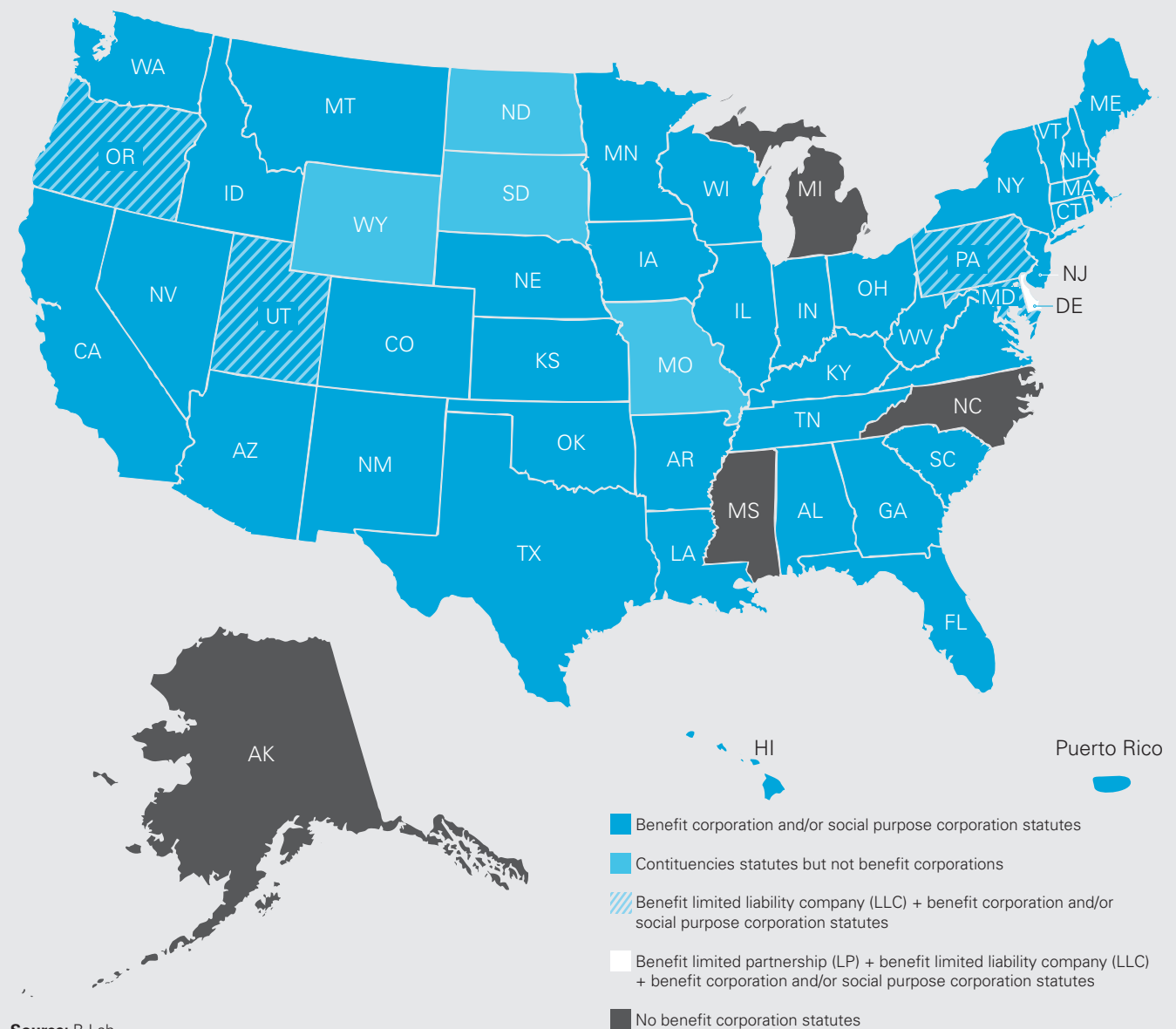
**One question is whether a good produced by a conventional company is truly "like" the same good produced by a benefit corporation**

**Figure 1: Countries with benefit corporation legal structures**



**Source:** B Lab (For additional analysis of benefit corporation and similar corporate forms in Europe, see: Antonio Fici, Social Enterprise Laws In Europe After The 2011 Social Business Initiative: A Comparative Analysis From The Perspective Of Worker And Social Cooperatives (Dec. 2020), available at [https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2021/06/Fici\\_Resource1-1.pdf](https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2021/06/Fici_Resource1-1.pdf); and European Social Enterprise Law Association, Social Enterprise in Europe Developing Legal Systems which Support Social Enterprise Growth (Oct. 2015), available at [https://esela.eu/wp-content/uploads/2015/11/legal\\_mapping\\_publication\\_051015\\_web.pdf](https://esela.eu/wp-content/uploads/2015/11/legal_mapping_publication_051015_web.pdf)).

**Figure 2: US jurisdictions with benefit corporation legal structures**



which can be sold either together with the biodiesel that generates the RINs or “detached” from the biodiesel and traded on a separate RINs market. The DOC determined that because the US had a special market for detached RINs, which it alleged added value to the biodiesel when sold in the US market, the US price—left unadjusted—was not comparable to the foreign price. Consequently, the DOC deducted what it claimed was the additional RIN value from the US price before comparing that price to the comparison-market price.

A similar approach could apply if benefit corporations create a certain product value or unique market in the US that does not also exist in the foreign exporter’s home market. If that value could be quantified, it could conceivably be factored into the fair comparison required by the dumping analysis. For example, if the US industry for a product is dominated by US benefit corporations that have been able to generate a premium on their products because consumers care about their sustainable production methods and are willing to pay more, and a foreign non-benefit corporation could potentially take advantage of that premium in its US sales simply because the market prices are generally higher, then the DOC might deduct that premium from the US price in the dumping calculation. This adjustment would effectively lower the foreign producer’s US price relative to its home-market price, and thereby increase the likelihood of a dumping finding. As a policy matter, such an adjustment would support the benefit corporation or stakeholder-capitalism values.

#### Level of trade adjustment

In AD cases, foreign producers often argue that their home-market prices are high because in their country, they have to include services that in the US are performed by distributors. This issue speaks to what the Tariff Act of 1930 calls the

“level of trade.”<sup>24</sup> Different levels of trade are based upon the different stages in the chain of distribution and sellers performing qualitatively and/or quantitatively different selling activities. The law allows for an adjustment when normal value is based on sales in the home market at a level of trade that is different from the sale in the US. If the goods are sold at different levels of trade in the two markets and that affects price, then the DOC can either limit the comparison to sales made at the same level of trade, or make an adjustment for the difference in value corresponding to the different levels of trade.

While not a “selling function,” the benefit corporation arguably provides a societal service that affects the product’s value and the DOC’s ability to compare that product with a product produced without regard to that societal service. Taken further, a benefit corporation’s “neutralization of externalities” — choosing to use business practices that reduce harm to stakeholders, instead of ignoring that harm and focusing on profit only—could be seen even as additional services. For example, if a product is made in an environmentally sustainable way, then the producer is providing not just the product, but also services that decrease wasteful energy use, reduce greenhouse gases and prevent plastic pollution, none of which would occur in a conventionally produced product. These ideas may seem like a stretch under current trade laws, but they are exactly the types of issues that will arise as more businesses make commercial decisions based on the interests of various stakeholders, instead of only shareholders.

#### Particular market situations: An alternate approach

If a unique market for a benefit corporation’s product exists in a foreign country but not in the US, then the foreign producer might argue that a “Particular Market Situation” exists (pursuant



**As businesses adapt their models to a stakeholder-capitalism approach, they should be careful to craft trade law arguments that protect their vulnerabilities**



to 19 U.S.C. § 1677b) in the foreign producer's home market, requiring the DOC to disregard the company's home-market sales in favor of its sales to a third market or constructed value for comparison with the foreign producer's sales in the US.<sup>25</sup>

In this scenario, a foreign benefit corporation would be advantaged in the dumping calculation by having its higher-priced home market sales replaced with lower-priced third-country sales. As a result, when the lower-priced sales (i.e., third-country sales) are compared to the exporter's US prices, it is less likely that the DOC would find dumping than if the higher-priced home-market sales were used for normal value.

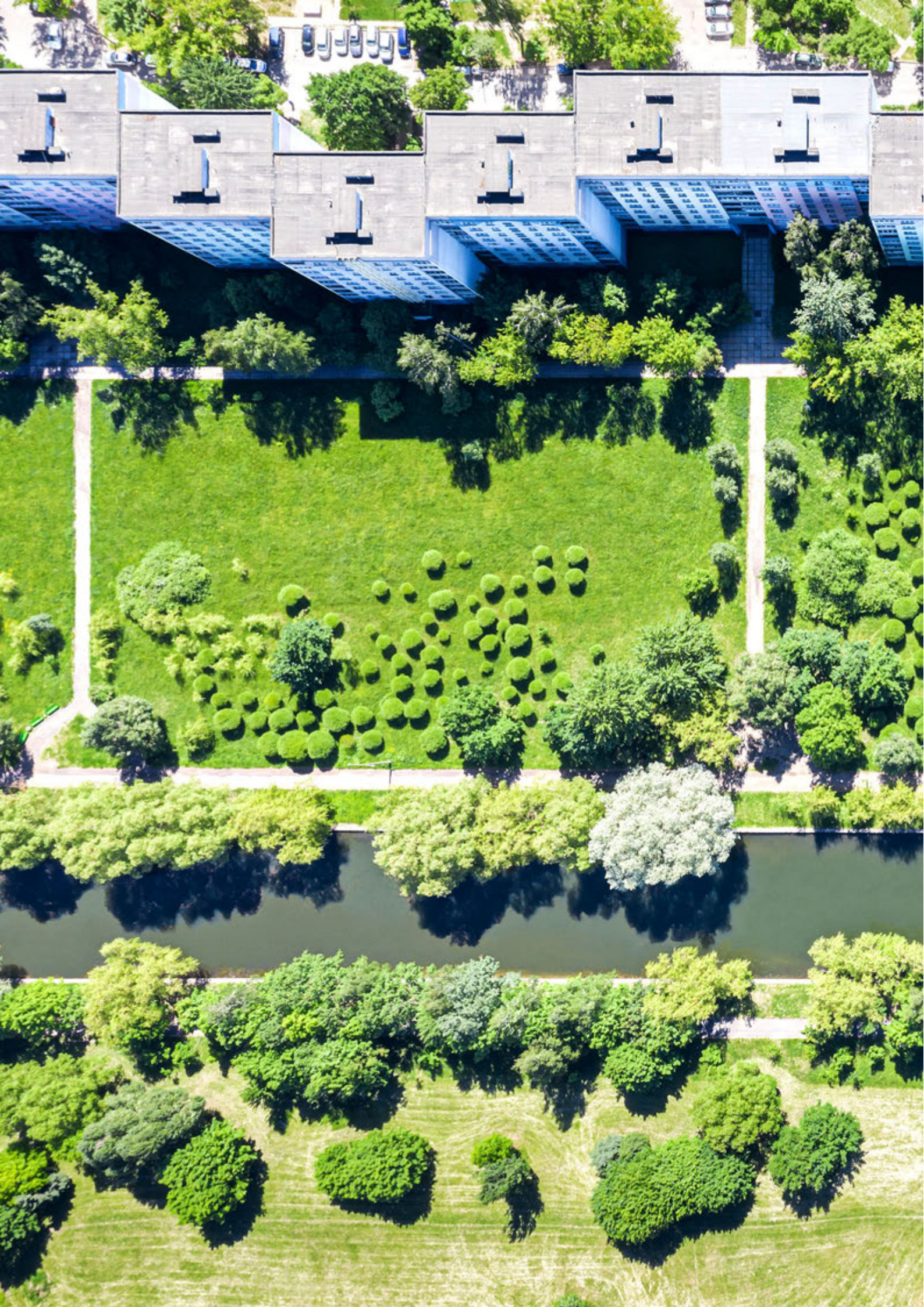
#### **Cost analysis impact: Another factor to consider**

Benefit corporation and stakeholder-capitalism considerations could also affect the cost analysis in a dumping calculation.

In AD cases, the DOC collects the foreign producer's cost of production for the merchandise under investigation. The DOC uses the foreign producer's cost-accounting information in various ways, including to eliminate from the comparison certain below-cost sales in the home market, and to calculate a "constructed value" for the foreign-market price when there are no usable comparison-market prices. ("Constructed value" equals the sum of the cost of production

for the good sold in the US market, selling and administrative expenses, and profit.)

A foreign benefit corporation or stakeholder-capitalism producer might incur higher production costs by using more expensive, yet sustainable, inputs or production methods. If that were true in a case where the DOC relied upon constructed value for comparison with the US price, then the producer would be prejudiced in the calculation and the DOC would be more likely to find dumping. That is, the stakeholder-capitalism exporter's high costs might make the constructed value side of the comparison appear to be a higher price than the US price side of the





comparison, thereby providing the illusion of dumping even if in reality the foreign producer's home-market and US prices were the same.

### CVD considerations at the DOC

Benefit corporations should also be aware of potential implications under US CVD law.

US law permits government subsidies when they are widely available to companies or industries within the subject country (i.e., the country whose exports are under investigation by the DOC). However, when a government limits the availability of a subsidy to a smaller group of recipients, it is assumed to distort trade and becomes countervailable under US CVD law. This analysis is known as whether a government subsidy is "specific" or not. In addition to this "specificity" analysis, CVD law assesses whether an exporter has received: (i) a financial contribution (ii) from the foreign government (iii) that confers a benefit.<sup>26</sup>

In the US and most other countries, incorporation as a benefit corporation does not give rise to a special tax benefit from the government. Therefore, it seems unlikely that simply existing as a benefit corporation or stakeholder-capitalism business could make the company vulnerable to subsidy allegations and correspondingly to countervailing duties.

However, one could imagine that a company with a social mission might engage in "impact litigation" —intentional legal disputes designed to change the law with the goal of fostering similar social values across companies in the industry—or to eliminate competition from businesses not sharing the mission, and use CVD law to do so. Cases not involving benefit corporations have creatively used the CVD law already to decrease competition from foreign exporters in instances where foreign governments were not enforcing environmental regulations.<sup>27</sup>

Moreover, if as a policy matter in the future, governments confer some sort of financial benefit in order to incentivize the creation and work of benefit corporations, then that benefit could be considered a countervailable subsidy by other jurisdictions. If governments do adjust laws to reflect a more pro-benefit corporation or stakeholder-capitalism business policy, then a policy of maintaining legal consistency between those laws and the competition laws, such as international trade laws, might require exceptions in the CVD law in order to protect mission-driven businesses from countervailing duties. Such exceptions would not be the first under the WTO agreements.

If the Biden-Harris administration or other WTO member country were to propose an amendment to the WTO Agreement on Subsidies and Countervailing Measures (CVD Agreement) or the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement), then they could rely on a precedent. When the CVD agreement was signed, it included a carve-out for certain "greenlight" subsidies that would otherwise have been impermissible. That is, although the named subsidies met the definition of a countervailable subsidy, the WTO members agreed to permit (i.e., consider "non-actionable") certain specific subsidies for policy reasons, including:

- "Assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations"
- "Assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms"
- "Assistance to disadvantaged regions within the territory of



47

US jurisdictions with benefit corporation legal structures

Source: B Lab

a member given pursuant to a general framework of regional development"<sup>28</sup>

Although the carve-out lasted only eight years, the environmental support, research and development incentives, and regional economic development assistance could serve as a model for making topical exceptions to the free trade regime, including certain exceptions for stakeholder capitalism values and methods.

### CONCLUSION

Most of the potential complications and outcomes outlined above were not considered by the US Congress and other WTO members, which previously considered only conventional businesses competing among themselves when drafting AD and CVD laws.

Yet they are exactly the types of issues that can arise as more businesses make commercial decisions based on the interests of multiple stakeholders, instead of only shareholders. To promote legal consistency and maintain fairness in the international trading system, WTO member countries should act jointly by adapting agreements to consider the growing stakeholder-capitalism model.

Until then, parties will need to construct their arguments carefully when a benefit corporation or stakeholder-capitalism business is involved in either side of an international trade case in the US.

As businesses increasingly adapt their models to a new stakeholder-capitalism approach and seek to add value through benefit corporation registration and similar certifications, they should be careful to craft trade law arguments that support their approach and protect their vulnerabilities. Preventative actions can help these companies continue to compete successfully amid cross-border trade and "do good while doing well."

## Endnotes

- 1 Friedman's article "A Friedman Doctrine: The Social Responsibility of Business is to Increase Its Profits," was published September 13, 1970 in *The New York Times*, available at <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>. However, others have argued that Friedman's article was not a singular launching pad for shareholder capitalism. See <https://corpgov.law.harvard.edu/2020/04/16/stop-blaming-milton-friedman/>.
- 2 <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.
- 3 <https://www.weforum.org/press/2020/01/stakeholder-capitalism-a-manifesto-for-a-cohesive-and-sustainable-world/>.
- 4 *Id.*
- 5 See <https://bthechange.com/marketing-myths-the-truth-behind-social-purpose-brand-campaigns-8f84dec6741d>.
- 6 See <https://www.nytimes.com/2019/10/01/smarter-living/sustainable-shopping-conscious-consumer.html>.
- 7 See <https://www.investor.gov/introduction-investing/investing-basics/glossary/environmental-social-and-governance-esg-investing>.
- 8 See <https://www.businessinsider.com/companies-that-give-back>.
- 9 See <https://www ldc.com/sustainability/our-approach>.
- 10 See UN Guiding Principles on Business and Human Rights, available at [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf).
- 11 See our recent reporting on this issue, available at <https://www.whitecase.com/publications/insight/bhr-benchmarks-2020-human-rights-benchmark-s-corporate-performance-rankings-rise>.
- 12 A list of states with benefit corporation legislation is available at <https://benefitcorp.net/policymakers/state-by-state-status?state=0>. Further information on benefit corporations in other countries is available at <https://static1.squarespace.com/static/5143211de4b038607dd318cb/t/593e4f29e3df286fa0049a9d/1497255766635/B-Corps-Benefit-Corporations.pdf>.
- 13 See <https://nonprofitub.org/starting-a-nonprofit/jargon-free-guide-l3c#:~:text=Well%2C%20what%20is%20a%20low,the%20organization's%20debts%20and%20obligations>.
- 14 See <https://bcorporation.net/>.
- 15 *Id.*
- 16 See An Urgent Call to Biden-Harris Administration: Create White House Initiative on Inclusive Economic Growth, available at <https://bcorporation.net/stakeholder-capitalism>.
- 17 <https://www.fastcompany.com/90586468/ceos-if-you-really-believe-in-stakeholder-capitalism-now-is-your-chance-to-make-it-real>.
- 18 See <https://www.theatlantic.com/magazine/archive/2018/07/lina-khan-antitrust/561743/>.
- 19 Material injury may be considered as material injury itself, threat of material injury or material retardation of the establishment of a domestic industry. The USITC is required to examine the volume and price effects of dumped/subsidized imports and the consequent impact of the imports on the domestic industry. The "domestic industry," in turn, consists of the US producers of the products "like" the imports subject to investigation. See generally 19 U.S.C. § 1677. See also 19 U.S.C. § 1677(10) ("Domestic like product" means "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation...").
- 20 19 U.S.C. § 1677(7)(C)(iii).
- 21 Organic Soybean Meal from India, USITC Pub. 5198 (Prelim) (May 2021) (excluding conventional soybean meal from the scope of investigation and distinguishing organic soybean meal as the subject merchandise), available at [https://www.usitc.gov/publications/701\\_731/pub5198.pdf](https://www.usitc.gov/publications/701_731/pub5198.pdf).
- 22 19 U.S.C. § 1671d(b) Final determination by Commission.  
(1) In general. The Commission shall make a final determination of whether  
(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**, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a). If the Commission determines that imports of the subject merchandise are negligible, the investigation shall be terminated.  
(See also identical language for determining injury in the context of a CVD investigation at 19 U.S.C. § 1673d(b)).
- 23 See 19 U.S.C. § 1677.
- 24 See sections 773(a)(1) and 773(a)(7)(A) of the Tariff Act of 1930. See also 19 C.F.R. § 351.412(a)-(c).
- 25 Constructed value generally uses the cost of production, selling and general/administrative expenses, and profit in order to calculate a normal value price to compare to US prices. See 19 C.F.R. § 351.405.
- 26 See 19 U.S.C. § 1677(5), (5A).
- 27 See Phosphate Fertilizers From Morocco And Russia Petitions For The Imposition Of Countervailing Duties Pursuant To Section 701 Of The Tariff Act Of 1930, As Amended On Behalf Of The Mosaic Company, Petition Vol II (June 26, 2020) (C-714-001) at II-16 ("The GOM's granting of permission to OCP to dump phosphogypsum waste from its phosphate fertilizer operations in bodies of water constitutes a financial contribution in the form of the provision of a good or services within the meaning of section 771(5)(D)(iii) of the Act."); See also Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Kingdom of Morocco (Feb 8, 2021) (C-714-001) at Comments 25 and 26 (finding that the program was properly initiated as countervailable but that for this period of investigation, the respondent did not use the program), available at <https://enforcement.trade.gov/frn/summary/morocco/2021-03011-1.pdf>.
- 28 WTO Agreement on Subsidies and Countervailing Measures, Article PART IV: NON-ACTIONABLE SUBSIDIES Article 8.2.



**Walter Spak**

Partner, Washington, DC

**T** +1 202 626 3606

**E** [wspak@whitecase.com](mailto:wspak@whitecase.com)

**Jessica Lynd**

Associate, Washington, DC

**T** +1 202 626 3682

**E** [jessica.lynd@whitecase.com](mailto:jessica.lynd@whitecase.com)

White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law, and all other affiliated partnerships, companies and entities.

This article is prepared for the general information of interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

[whitecase.com](http://whitecase.com)

© 2021 White & Case LLP