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Private sustainability standards in Switzerland and the World Trade Organization

Policy implications

- In principle, private sustainability standards grant a label to a retailer's product line upon compliance with ecological, social or economic sustainability criteria. Thus, they can help to bring about more sustainable production methods and consumption in Switzerland and abroad.
- However, the limited and controversial data on their actual environmental and systemic sustainability impact calls for increased rules on transparency, non-discrimination as well as technical assistance and cost-sharing arrangements.
- Further, discriminating private sustainability standards may trigger Switzerland's responsibility under the law of the World Trade Organisation (WTO), to the extent that the government provides incentives for or participates in a WTO-inconsistent standard's adoption and application.
- Should the abolishment of identified state measures not be possible, the government may enact and implement guidelines or rules for private sustainability standards, in order to address the discriminating and trade-restrictive features of such schemes.

The WTO law compatibility of Switzerland-based private sustainability standards

This policy brief examines whether Switzerland-based private sustainability standards align to internationally recognized sustainability criteria or exhibit discriminatory features. Upon positive findings, it surveys government measures that show linkages to private action. Finally, it assesses the risks that private action will be attributed to government under the rules of international law. Covered are all Switzerland-based

private sustainability standards applied to goods that require compliance with environmental sustainability criteria. Our list of standards stems from labelinfo.ch, Switzerland's most comprehensive label database. Switzerland-based private standards with no sustainability criteria, but potential WTO law relevance are also included.

Overview of Switzerland-based private sustainability standards

Agriculture and Viticulture:

A predominant number of Swiss producers comply with the IP-SUISSE (IPS) or the Bio Suisse (BS) standards. IPS excludes foreign products from certification, while BS only allows for importation and grants the Bud label if Swiss products are not sufficiently available. BS also grants preference for products from Europe/the Mediterranean Rim over other third-country products. The trade-restrictive effect of these standards is amplified as major retailers declare to source key product lines from certified products. Certification is reserved for domestic products with regard to various Switzerland-based private meat and milk products' standards and with the Vinatura label for wine.

Forestry:

A single Switzerland-based private standard is in place in the forestry sector. (German for "Swiss Wood") is an indication of the source without reference to sustainability criteria. However, it is recognized as a proof of sustainability in government procurement due to statutory regulations applicable to Swiss forestry.

Electronics and Textiles:

Retailers widely rely on internationally recognized sustainability standards with origin-neutral sustainability criteria. The limited number of Switzerland-based private sustainability standards do not exhibit discriminating features.

Cosmetics and Cleaning:

The number of Switzerland-based private sustainability standards is modest compared to the agricultural sector, but also showcases discriminating features. Domestic manufacturers' compliance with the Swissness legislation could additionally impede the competitive opportunities of imports. In regard to cleaning products, only Coop and Migros apply their own brand labels, both relying on origin-neutral sustainability criteria. However, Steinfels Swiss' standard "Maya" for eco-friendly cleaning and washing agents requires compliance with the Swissness legislation.

Private standards and WTO law

A core principle of the multilateral trading system is the prohibition of discriminatory conduct against and amongst foreign products. Measures affecting the competitive opportunities of foreign products without justification are not in line with the principles of national treatment (NT; impediment as compared to domestic

products) and the principle of most-favoured-nation treatment (MFN, impediment as compared to other foreign products). Inasmuch as the government participates in a private standard's adoption and application which runs counter to these principles, it may bear responsibility under WTO law based on the principle of attribution.

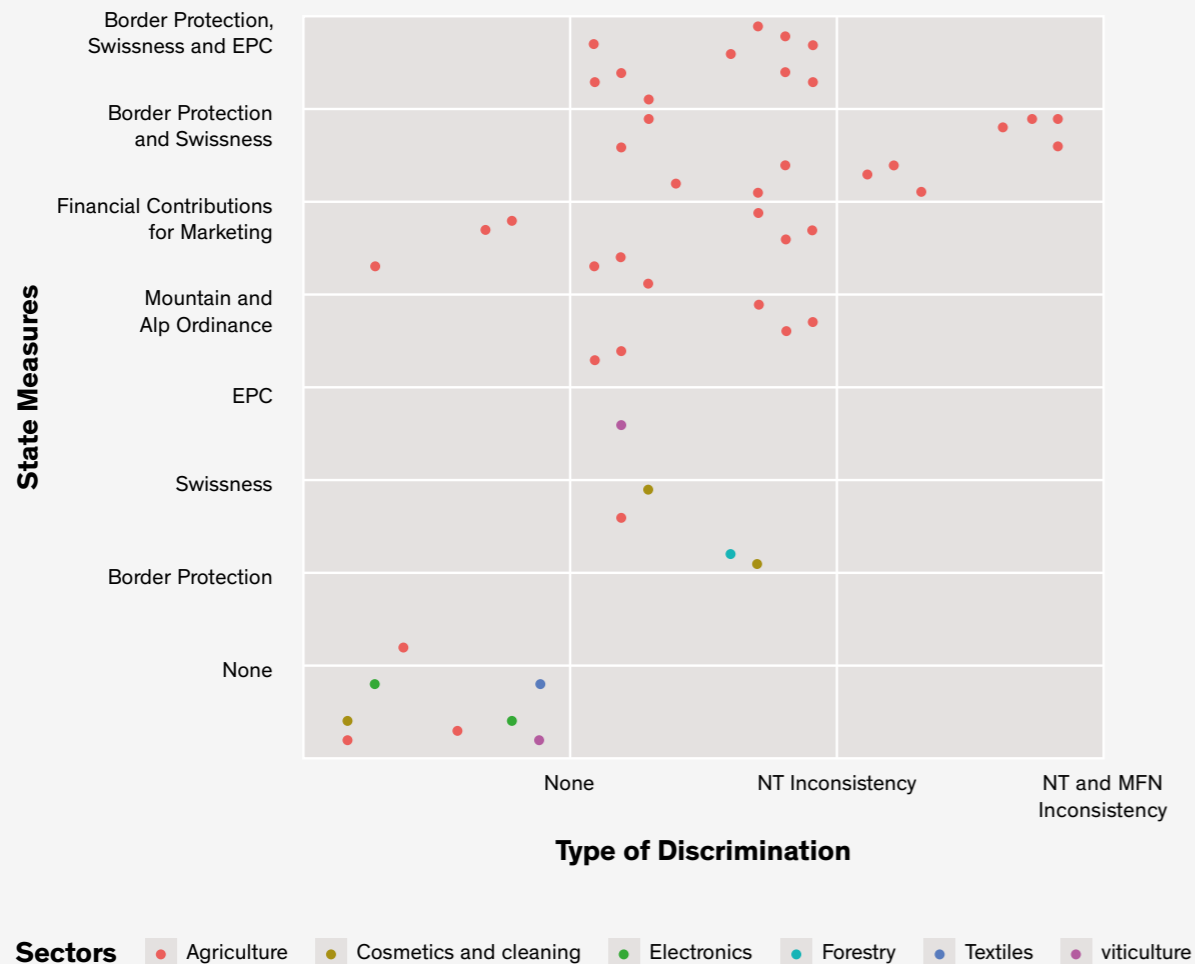


Figure 1: Types of discrimination of different state measures

An analysis of private sustainability standards in Switzerland

The analysis of Switzerland-based private sustainability standards as visualized in Figure 1 shows that behind these schemes there is more state than we think. The vertical axis of Figure 1 shows government measures connected to Switzerland-based private sustainability standards. On the horizontal axis, the standards are grouped into three categories: non-discriminating, inconsistent with the NT obligation and inconsistent with the NT and the MFN-obligation. The figure reveals that the majority of discriminating standards either has been inspired by government measures or has been adopted and/or implemented with the participation of government agencies. Based on this connection, the government may be held liable for discriminating private conduct. Amongst the government measures we identified, the following are of particular trade relevance:

1 Border protection for agricultural products: For fresh vegetables and meat products, import quotas are set if and to the extent that the supply of Swiss goods cannot cover the estimated domestic demand. Given the higher out-of-quota rates, importation is feasible only if domestic products are not available, and is as such, in part, tied to domestic purchases or production. This seems to have inspired the BS standard's design directly, as the BS discriminates against imports along the same lines (with explicit reference to statutory import provisions). Moreover, this system gives retailers an incentive to enter into long-term supply contracts with domestic producers' collectives and could lead to the attribution of the private behavior to the government.

2 The IPS and the Vinatura labels are based on the **Ecological Performance Criteria (EPC)**, a minimum standard for eco-friendly agricultural production in Switzerland. Compliance with the EPC is not only a prerequisite for farmers to receive direct payments from the government, the government also participates in the development of both standards and supports their implementation: VITISWISS was mandated by the Federal Office for Agriculture (FOAG) to elaborate the EPC for viticulture and IPS cooperates with FOAG and the Federal Office for the Environment (FOEN) in developing and monitoring compliance with the IPS. This could imply the government's responsibility under WTO rules.

3 The "Swissness" legislation defines criteria to use the Swiss indication of source on labels, consisting of one basic rule and a set of exceptions. Regarding foodstuffs, a minimum of 80 percent of the raw materials' weight must be domestic and essential processing must take place in Switzerland (in this respect, we find a link to Bio Suisse's ban on processed foreign products). Yet, a number of raw materials that are eligible to come within the 80 percent requirement are counted to half or not at all, depending on Switzerland's self-sufficiency grade as determined by FOAG. These exceptions are likely distorting consumer information and compromise the legitimacy of the origin information. The "Swissness" criteria for industrial products and cosmetics follow a similar structure, but are based on manufacturing costs instead of the raw materials' weight. Since standards that combine sustainability criteria and "Swissness" (thus discriminating against imports) explicitly refer to the Swissness legislation, the discriminating private behavior is likely to be attributed to the government under WTO rules.

Key messages

The number and design of Switzerland-based private sustainability standards varies substantially across industries. The sector of agriculture is characterized by a large number of schemes, which in principle grant priority to domestic products or exclude foreign ones from certification. Standards in the sectors of cosmetics, cleaning and forestry are fewer in number, but show a similar design. In contrast, a limited number of non-discriminating private sustainability standards are in place in the sectors of electronics and textiles, whereas no Swiss-based standards are applied to paper products, machinery and vehicles.

Our research shows that discrimination against imports in the sectors of agriculture and cosmetics closely correlates with protectionist state measures. Retailers' reliance on these standards amplifies their trade-restrictive effect. As the standards are connected to state measures, the private behavior may be attributed to the government and imply its responsibility for non-compliance with the WTO principles of non-discrimination. Should a cease of the identified state measures not be possible, the government may enact and implement guidelines or rules for private sustainability standards, in order to address the discriminating and trade-restrictive features of such schemes.

Summary

This policy brief examines the WTO law compatibility of Switzerland-based private sustainability standards across sectors. Hereby we take into account government support and incentives for their adoption and application.

Private standards are only subject to WTO law to the extent that the government provides incentives for or participates in a WTO-inconsistent standard's adoption and application. Due to such nexus between state measures and discriminating private behavior, in Switzerland trade law concerns may, in particular, arise in the sectors of agriculture and cosmetics.

There are substantial sectoral differences in the number and design of Switzerland-based private sustainability standards. Their level of exposure to WTO scrutiny also greatly differs depending on whether and to which extent the standards exhibit a nexus with state measures that restrict foreign competition in the Swiss market.

Trade law concerns arise in the sectors of agriculture and cosmetics: most Switzerland-based private sustainability standards in place exclude foreign products from certification. Their trade-restrictive effect is amplified as major retailers source key product lines from certified products. In cases where the discriminating private behavior is related to state measures, the government's responsibility cannot be excluded.

References

Ilaria Espa and Brigitta Imeli, 'Switzerland-based private sustainability standards and WTO law, WTI Working Paper No. 02/2022

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About NRP 73



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