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Switzerland-based private sustainability standards and WTO law^{*}

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There are substantial sectoral differences in the number and design of Switzerland-based private sustainability standards. Their level of exposure to World Trade Organization (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: the majority of 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 behaviour is related to state measures, the government's responsibility cannot be excluded under WTO rules.

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Overview

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

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. This condition may be considered fulfilled when the discriminating features of private sustainability standards draw inspiration from state acts that restrict foreign competition in the Swiss market. Trade law concerns may, in particular, arise in the sectors of agriculture and cosmetics. This is due to the nexus between state measures – especially the Swiss border protection for agricultural products, the Ecological Performance Criteria and the Swissness legislation – and discriminating private behaviour.

The landscape 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 (Bio Suisse) 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. Retailers' brand labels certifying "mountain" and "alp" origin are likewise reserved to complying Swiss products. In sum, most Switzerland-based private sustainability standards in the sector of agriculture exclude foreign products, while BS grants priority to domestic products and discriminates amongst foreign ones.

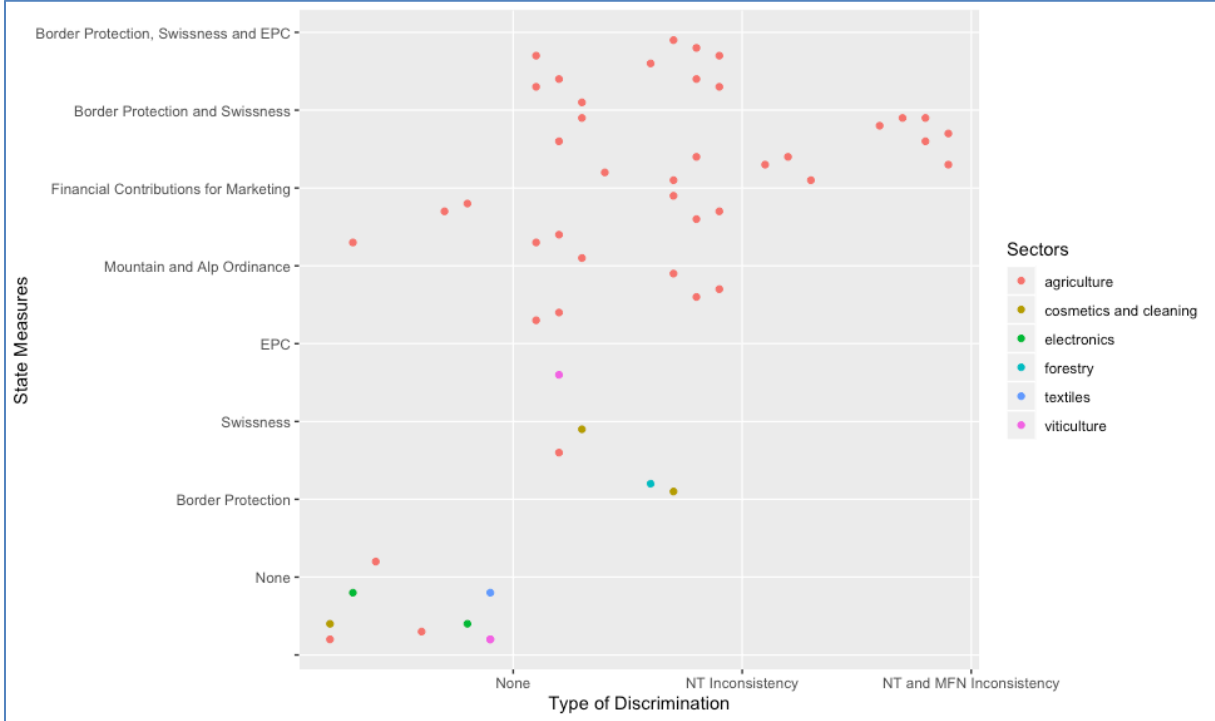
Forestry: A single Switzerland-based private standard is in place in the forestry sector. "Schweizer Holz" is an indication of source without reference to sustainability criteria. It requires compliance with statutory regulations and customary industry practices (approx. 56% of Swiss forests are certified with internationally recognized sustainability standards, and it is based on the Swissness legislation. However, it is recognized as a proof of sustainability in government procurement.

Electronics and Textiles: Retailers widely rely on internationally recognized sustainability standards with origin-neutral sustainability criteria. The modest 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 as compared to the sector of agriculture. As regards cosmetics, a sole scheme is in place: Coop Naturaline Swiss Cosmetics. Certification with this standard is only available for domestic products. Still, private conduct might be found to negatively affect the competitive opportunities of foreign products to the extent that most domestic manufacturers comply with the Swissness legislation. As regards cleaning, only Coop and Migros apply 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.

State measures behind private sustainability standards

Figure 1: The landscape of Switzerland-based private sustainability standards



As shown by Figure 1, there is more state than we think behind Switzerland-based private sustainability standards. The vertical axis 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 the discriminating private conduct.

Amongst the government measures we identified, the following appear to be of particular trade relevance:

Border protection for agricultural products A two-fold tariff system applies to agricultural products. Import quotas with a lower “in-quota” rate are opened up per product category. Beyond the in-quota volume, importation is often unprofitable given the manifold higher out-of-quota rates. For fresh vegetables and meat products, import quotas are opened if and to the extent that the supply of Swiss goods cannot cover the estimated domestic demand. Thus, importation is feasible only inasmuch as domestic products are not available, and is in part tied to domestic purchases or production.

The Ecological Performance Criteria (EPC) is a minimum standard for eco-friendly agricultural production in Switzerland; compliance is a prerequisite for farmers to receive direct payments. The IPS and the Vinatura label are based on the EPC; 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 in developing and monitoring compliance with the IPS.

The Swissness legislation defines criteria to use the Swiss indication of source on labels. These “Swissness” criteria are defined per product group (i.e. for natural products, foodstuffs and industrial products), and other than for natural products are structured as a basic rule and a set of exceptions.

As regards foodstuffs, min. 80% 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% requirement are counted to half or not at all, depending on Switzerland's self-sufficiency grade as determined by FOAG. The "Swissness" criteria for industrial products and cosmetics follow a similar structure, but are based on manufacturing costs instead of the raw materials' weight

Attribution of private behavior to the government and WTO law implications

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). Furthermore, product standards shall not be more trade-restrictive than necessary in order to achieve a legitimate policy goal, such as enhanced consumer information or the fight against misleading practices.

Private standards are subject to WTO law only to the extent that the government provides incentives for or participates in a WTO-inconsistent standard's adoption and application. 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. In this regard, we find that:

- The border protection for agricultural products seems to have inspired the BS standard's design directly, inasmuch as 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.
- The government participates in the development of the discriminating IPS and Vinatura standards, and supports their implementation.
- Standards that combine sustainability criteria and "Swissness" (thus discriminating against imports) explicitly refer to the Swissness legislation.
- Based on these nexus, the discriminating private behavior is likely to be attributed to the government under WTO rules. Further, we note that the Swissness legislation and the "border protection" received specific attention from Switzerland's major trading partners.

Attribution of the private behavior linked to the "border protection" and the EPC would imply the government's responsibility for non-compliance with the NT principle. In contrast, the Swissness legislation aims at a legitimate policy goal. The compatibility of the legislation and the corresponding private behavior under WTO law depends on whether their deviation from the NT principle can be justified. Notably, the exceptions built in the legislation might be found to distort consumer information and to exacerbate the trade-restrictive effect, arguably compromising prospects for successful justification.

Conclusion

The majority of Switzerland-based private sustainability standards discriminate against imports in the sectors of agriculture and cosmetics. Retailers' reliance on them amplifies their trade-restrictive effect. As the standards are connected to state measures, the private behavior may be attributed to the government and therefore imply its responsibility for non-compliance with the WTO principles of non-discrimination.