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Switzerland-based private sustainability standards and WTO law

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by Dr Ilaria Espa and Brigitta Imeli*

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Table of abbreviations

ACCTS	Agreement on Climate Change, Trade and Sustainability
BS	Bio Suisse
EPC	Ecological Performance Criteria (Ökologischer Leistungsnachweis)
EFTA	European Free Trade Association
EGA	Environmental Goods Agreement
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FOAG	Federal Office for Agriculture
FOEN	Federal Office for the Environment
FTA	free trade agreement
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Public Procurement
ICTSD	International Centre for Trade and Sustainable Development
IISD	International Institute for Sustainable Development
IPS	IP-SUISSE
ITC	International Trade Centre
MFN	most-favoured-nation treatment
NT	national treatment
SKW	Swiss Cosmetic and Detergent Association
SPS	sanitary and phytosanitary measures
TBT	technical barriers to trade
UNFSS	United Nations Forum on Sustainability Standards
US	United States
VITISWISS	Swiss Association for Sustainable Development in Viticulture
WTO	World Trade Organization

Executive Summary

This report examines the applicability of World Trade Organization (WTO) rules to Switzerland-based private sustainability standards and provides recommendations for a Swiss negotiating position on green labelling.

After an introduction to the topic (Section 1), Section 2 provides on overview of the most relevant features of Switzerland-based private sustainability standards with a view to assess their WTO compatibility. It consists of two parts. Section 2.1 conducts a stocktaking analysis on the varied landscape of Switzerland-based private sustainability standards.[†] The analysis shows that they vary greatly both in number and design 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 Switzerland-based standards are applied to paper products, machinery and vehicles.

Section 2.2 undertakes an attribution analysis and sets out potential WTO law implications in relation to Switzerland-based private standards. 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 the discriminating private behavior.

Section 3 provides policy recommendations on the multilateral, plurilateral and bilateral level for a Swiss negotiation position on private sustainability standards. On the multilateral level, the section first reviews Members' submissions related to private standards in the relevant WTO Committees, that is, the Committee on Technical Barriers to Trade (TBT) and the Committee on Trade and Environment (CTE). Trade talks on private standards have been characterized by high divergences across WTO membership. A group of Members, led by China, urged for disciplining private standards under the WTO's umbrella. Other Members, especially the European Union (EU) and the United States (US), emphasized that private standards fall outside of WTO's work. Switzerland did not submit any express statements in this context.[‡] However, it plays a proactive role in the ongoing plurilateral negotiations which have been launched in response to the multilateral stalemate. This report aims to provide support for this endeavor.

Switzerland may focus on greater transparency on standards' sustainability impact and increased financial and technical assistance. It could also undertake efforts towards creating a transparency mechanism, and thus amplify its endeavors in collecting market data on the global standards' landscape.[§] However, in view of the domestic standards' landscape, it appears

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[†] The primary source of the standards' list is Labelinfo.ch, which remains Switzerland's most comprehensive label database.

[‡] Its earlier proposal – recognizing labelling and consumer's choice as matters of great importance – has been expressly limited to governmental initiatives (WT/CTE/W/192, G/TBT/W/162).

[§] Since 2014, Switzerland funds the project "Global Survey on Voluntary Sustainability Standards (VSS)", performed by the International Trade Center and the Research Institute of Organic Agriculture. The project collects market data on the global landscape of private sustainability standards in order to facilitate policy and investment decisions. For more information see https://vss.fibl.org/.

sensible for Switzerland to advocate for the prevailing view that private schemes do not fall under the TBT Agreement's scope of coverage – which may not be altered by the adoption of best practice guidelines on private standards. This way it can minimize potential trade concerns relating to Switzerland-based private sustainability standards.

As to the plurilateral level, the report provides recommendations on the integration of sustainability standards into the Agreement on Climate Change, Trade and Sustainability (ACCTS). Experiences drawn from prior negotiations in and outside the WTO and existing sustainability standards highlight the key importance of the following factors: i) transparency on the environmental impact of sustainability standards, ii) open governance structure in standard-setting and iii) inclusiveness with regard to small and developing country producers.

On the bilateral level, recent practice in free trade agreements (FTAs) of the European Free Trade Association (EFTA) shows that (private) sustainability standards have a rightful place in FTAs. They may serve to promote products with an outstanding environmental performance, by communicating the corresponding information to consumers. On the other hand, sustainability standards may serve as a proof of sustainable production, combined with tariff preferences. In both cases, the incorporation shall take into account the principles highlighted above.

Section 4 assesses the opportunities and limits of reducing Switzerland's consumption-based environmental footprint thorugh private sustainability standards. To the extent that private sustainability standards provide transparent information on products' environmental impact, they can support sustainable purchase decisions. However, information on the actual environmental impact of (private) sustainability standards is available only to a limited extent and often cases suggests a controversial outcome. In most cases, these schemes do not provide information on products' overall environmental impact, but merely deliver information on one or more aspects of production. As a result, the risk is that incomprehensive information provided to consumers only affects lower levels of purchase decisions with a limited potential to reduce Switzerland's environmental footprint. In addition, the Swiss market is characterized by a high prevalence of private sustainability standards that restrict certification for domestic products. This way they fail to provide incentives for foreign producers to comply with the respective sustainability criteria and to reduce the environmental footprint embodied in imports.

Section 5 concludes. Annex 1 provides detailed information on the attribution analysis, covering the government measures dealt with in Section 3.2. Annex 2 is a database listing the standards covered in this report, including sustainability and origin requirements, as well as the standards' nexus to government measures.

Section 1: Introduction

Private sustainability standards deliver consumer information on products' physical characteristics and/or production methods. In principle, upon third-party assessed compliance with ecological, social or economic sustainability criteria, they grant a label and/or access to a retailer's product line.

Since the 1990s, there has been a sharp increase in the number and coverage of private sustainability standards, not least in response to an increased demand for certified products.[**] The Standards Map database[††] maintained by the International Trade Centre (ITC) lists over 250 sustainability schemes, and most of them are private standards.[‡‡] Growing demand for standard-compliant products has reportedly contributed propagating the spread of sustainable production methods and trade practices globally. The share of agricultural land with certified commodities continues to increase, in some cases surpassing the 20% mark.[§§]

However, data on the actual environmental impact of sustainability standards is available only to a limited extent, and in some cases suggests a controversial outcome. This is related, on the one hand, to the standards' design. Firstly, stricter certification conditions can lead to higher sustainability gains, but will likely decrease the participation of producers (with the highest potential for development). Thus, there seems to be a trade-off between a standard's global impact as a result of its greater inclusiveness and enhanced sustainability gains triggered by more ambitious requirements. Secondly, sustainability standards that focus on a narrow set of issues tend to be more ambitious, are easier to implement and are more likely to achieve their stated goals(they are also easier to be assessed against such goals). Yet, this approach carries the risk that the standard will miss important elements that influence sustainability outcomes.[***]

Another set of problems relate to the systemic effects of private sustainability standards. Their considerable market power may transform these schemes into factual market access requirements[†††], while financial and technical challenges of compliance and certification can

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[**] Further factors include civil society organization's lobbying and product differentiation strategies of various actors in global supply chains. Fabrizio Meliadò, Private Standards, Trade, And Sustainable Development: Policy Options for Collective Action. International Centre for Trade and Sustainable Development (ICTSD) (2017), p.10, with reference to ITC and European University Institute. 2016. Social and Environmental Standards: Contributing to More Sustainable Value Chains (2016).

[††] Available at: https://www.sustainabilitymap.org/standards.

[‡‡] Fabrizio Meliadò, Private Standards, Trade and Sustainable Development: Policy Options for Collective Action (ICTSD) (2017), p.10.

[§§] Julia Lernoud, Jason Potts, Gregory Sampson, Bernhard Schlatter, Gabriel Huppe, Vivek Voora, Helga Willer, Joseph Wozniak and Duc Dang, The State of Sustainable Markets – Statistics and Emerging Trends (ITC) (2018), p. 2 ff. Available at: http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Sustainibility%202018%20layout-FIN-web-v1.pdf.

[***] Cosbey et al., "Environmental Goods and Services Negotiations at the WTO," 47,. with reference to Agnew et al., "Environmental Benefits Resulting from Certification against MSC's Principles and Criteria for Sustainable Fishing."

[†††] Voluntary Sustainability Standards, Trade and Sustainable Development: 3rd Flagship Report of the United Nations Forum on Sustainability Standards (UNFSS) (2018), p.7. Available at: https://unctad.org/en/PublicationsLibrary/unfss_3rd_2018_en.pdf. See also: J. Bélanger and D. Pilling (eds.), The State of the World's Biodiversity for Food and Agriculture, FAO Commission on Genetic Resources for Food and Agriculture Assessments (FAO) (2019), p. 74. Available at: http://www.fao.org/3/CA3129EN/CA3129EN.pdf.

make the participation of small producers in developing countries prospectless.[‡‡‡] The reported exclusion of these groups from global supply chains is likely to negatively impact global food security, biodiversity and further social and economic sustainability considerations, and therefore reduce the potential for using trade as a means towards achieving inclusive economic growth and poverty reduction.[§§§] Lastly, some standards explicitly exclude foreign products by combining requirements on production methods and (domestic) origin. This way they limit the reach of their incentives and their positive contribution to domestic producers, instead of promoting more sustainable production methods globally. This report finds that such standards are widespread in the Swiss market.

In 2001, Switzerland underlined the importance of clarifying the TBT Agreement's scope of application to labelling schemes, with the view to minimize the threat of their misuse by government bodies for protectionist purposes.[****] Concerns relating to private standards' impact on market access have been voiced at the WTO since 2005 with greater intensity. While the multilateral trading system has the potential to address these concerns, the relevant rules' scope of application with respect to private standards is controversial. Attempts to define their notion and to develop best practice guidelines has remained unsuccessful, despite Members' significant efforts.

Existing studies on private standards and WTO law focus on the creation of new rules for, or on the explicit extension of existing rules to, private standards.[††††] However, no qualitative analysis on the landscape of private sustainability standards has been undertaken so far with the aim of dissecting any ascertainable nexus with government measures for the purposes of determining the applicability of WTO rules in place. The present research is a starting point to fill this gap. It delivers a case study on Switzerland, with a view to examining whether Switzerland-based private sustainability standards are captured by current WTO rules based on

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[‡‡‡] The implementation of private sustainability standards, especially in the absence of corrective measures, is reported to significantly reduce the participation of smallholders in global supply chains. Reasons of efficiency and competitiveness incentivize exporters to source from large suppliers who can i.e. document compliance at a lower cost. Fabrizio Meliadò, Private Standards, Trade, and Sustainable Development: Policy Options for Collective Action. International Centre for Trade and Sustainable Development (ICTSD) (2017), p.13. Clara Brandi u. a., "Sustainability Standards for Palm Oil", *The Journal of Environment & Development* 24, Nr. 3 (1. September 2015): 292–314, https://doi.org/10.1177/1070496515593775.; Monica Schuster und Miet Maertens, "Do private standards create exclusive supply chains? New evidence from the Peruvian asparagus export sector", *Food Policy* 43 (1. Dezember 2013): 291, https://doi.org/10.1016/j.foodpol.2013.10.004.

[§§§] Smallholder farms have a central role in local and global food security, which is negatively affected by their exclusion from global supply chains. International Fund for Agricultural Development and United Nations Environment Programme, Smallholders, Food Security and the Environment (2013). Available at: https://www.ifad.org/documents/38714170/39135645/smallholders_report.pdf/133e8903-0204-4e7d-a780-bca847933f2e. Large-scale farms bring about wider productive landscapes, becoming more homogenous in space and time in terms of their genetics and physical structure. Such changes will often have negative implications for the resilience of production systems, as biodiversity makes production systems and livelihoods more resistant to shocks, including to the effects of climate change. It is a key resource in efforts to increase food production while limiting negative impacts on the environment (FAO 2019), p. 74. Further concerns relate to the fragmentation, overlaps, multiplicity, credibility, and varying degrees of transparency in terms of how standards are set, how conformity with their requirements is assessed and audited, and the extent to which traceability systems are reliable (Meliadò 2017).

[****] WT/CTE/W/192, G/TBT/W/162.

[††††] Arthur E Appleton, Supermarket Labels and the TBT Agreement: '*Mind the Gap*'. Business. Law Brief 4, nr.1 (Fall 2007); Petros C. Mavroidis und Robert Wolfe, "Private Standards and the WTO: Reclusive No More", *World Trade Review* 16, Nr. 1 (Januar 2017): 1–24, https://doi.org/10.1017/S1474745616000379. ; Wouters, Jan and Geraets, Dylan, Private Food Standards and the World Trade Organization: Some Legal Considerations (March 1, 2012). Available at SSRN: https://ssrn.com/abstract=2274812.

a two-fold analysis: (1) a qualitative analysis of the landscape of Swiss private sustainability standards; (2) an investigation into whether government incentives to or participation in such standards' adoption and implementation can be discerned.

The research insights from the domestic standards' landscape flow into our recommendations for a Swiss negotiating position on private sustainability standards at the WTO.

Section 2: Swiss landscape of private sustainability standards: Questions of WTO law

2.1 Swiss landscape of private sustainability standards

2.1 General overview

The landscape of Switzerland-based private sustainability standards is quite varied across sectors having regard to both the number and the design of the standards in place. 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 Switzerland-based standards are applied to paper products, machinery and vehicles.

2.1.2 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 domestic products are not available in sufficient quantity or quality. The BS standard further foresees the priority of domestic processing and gives priority for products from Europe/the Mediterranean Rim over other imported goods and essentially prohibits air transport.[‡‡‡‡] 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 further Switzerland-based private meat and milk products' standards and with the Vinatura label for wine.[§§§§] Furthermore, retailers' brand labels for "mountain" and "alp" products are based on federal legislation that regulates the use of these terms for Swiss products. While the ordinance in itself does not affect the labelling of imports, retailers' reliance on it – as the ordinance provides no opportunity for the recognition of foreign products – leads to the exclusion of foreign "mountain" and "alp" products from the private schemes.[*****] In sum, most Switzerland-private sustainability standards in the sector of agriculture exclude foreign products, while the BS standard grants priority to domestic products, protects domestic processing operations and discriminates amongst foreign goods.

[‡‡‡‡] IP-SUISSE, Richtlinien Grundanforderungen Gesamtbetrieb (2020), available at: https://www.ipsuisse.ch/richtlinien-grundanforderungen-gesamtbetrieb/, p. 9; Bio Suisse — Standards for the production, processing and trade of "Bud" products Part V: Standards for operations outside of Switzerland and for imported products (2021), available at: https://www.bio-suisse.ch/media/VundH/Regelwerk/2021/standards_bio_suisse_2021_en.pdf p. 298 ff.

[§§§§] Vinatura's webpage and the VITISWISS guidelines for sustainable development are available at: <https://swisswine.ch/fr/professionels/vinatura-qui-sommes-nous>.

[*****] Cf.: Coop Pro Montagna standard, available at: https://www.coop.ch/de/inspiration-geschenke/labels/pro-montagna/philosophie-standards.html.

Table 2.1.1: Sector of agriculture. Overview of Switzerland-based private sustainability standards with origin criteria

Standard	Market relevance	Requirements
Bio Suisse Products comprised: Milk, meat, fruits and vegetables, eggs, cereals, processed agricultural products	Approximately 60% market share amongst organic products. Distributed under e.g. • Coop Naturaplan (95% of the product range) • Migros Bio (domestic products in all cases; imported ones may only comply with the EU organic directive) • Aldi Nature Suisse Bio • Manor Bio Nature plus	**Sustainability requirements**: **Environmental:** Provisions on sustainable resources use, use of pesticides and animal husbandry – going beyond the requirements of the EU/Swiss organic ordinance. **Social:** Regarding non-Swiss producers, compliance with the ILO fundamental rights at work; "fair trade" provisions for Swiss producers to agree on (non-binding) price and volume targets with retailers. **Origin requirements**: Priority for domestic products /products from Europe/the Mediterranean Rim. Prohibition to import entirely processed products .
IP-Suisse/ Vinatura Products comprised: Milk, meat, fruits and vegetables, eggs, cereals / Grapes and wine	IP-Suisse: Up to 26% market share, depending on the product category. Distributed under e.g. • Migros Terra Suisse • Migros Weide Beef • Aldi Suisse Garantie • Naturel • Agri Natura	**Sustainability requirements**: **Environmental:** Material requirements on animal husbandry (only IPS), land use, use of pesticides and biodiversity based on the Ecological Performance Criteria (additional requirements are of limited commitment). Vinatura wines must pass a degustation. Declaration of intent on sustainable resources use. **Social:** Declaration of intent on social aspects. **Origin requirements**: Swiss origin.
Mountain/alp labels Products comprised: Milk, meat, cereals, herbs	Standards in this category include: • Coop ProMontagna • Migors Heidi • Spar Schellen-Ursli • Schweizer Bergkräuter • Schweizer Bergprodukt/Schweizer Alpprodukt (official labels)	**Sustainability requirements**: Products must stem from the Swiss mountain or alp region as defined in federal legislation. **Origin requirements**: Swiss origin.

Local origin standards with exceptions Products comprised: Milk, meat, fruits and vegetables, eggs, cereals	Standards in this category include: • Migros Aus der Region. Für die Region • Coop Miini Region • Manor lokal • Regio.Garantie (with arguably the most problematic exceptions) • Alpinavera	**Sustainability requirements**: Noncompound products: In principle max. 30km distance between place of production and distribution. Compound products: 60-80% of the ingredients must come from the region defined by the standards. **Origin requirements**: Noncompound products: Swiss origin. Compound products: priority to Swiss products (even if more distant) in case an ingredient is not available in the defined region .

2.1.3 Cosmetics and cleaning

As regards cosmetics, a single Switzerland-based private sustainability standard is in place: Coop Naturaline Swiss Cosmetics. Certification with this standard is only available for domestic products (as defined under the Swissness legislation, See Annex 1.3.2).

Despite the low number of sustainability standards in the sector, private conduct might be found to negatively affect the competitive opportunities of foreign products. Most domestic manufacturers comply with the Swissness legislation (without or without sustainability requirements / certification under statutory requirements of organic production), which is likely to affect trade in inputs to the detriment.

As regards cleaning, only Coop and Migros have own sustainability standards in place (See Annex 2.2). Both schemes rely on origin-neutral criteria (*i.e.* there is no reference to the Swissness legislation). Steinfels Swiss' standard "Maya" for eco-friendly cleaning and washing agents appears as the industry's only private sustainability standard that requires compliance with the Swissness legislation and excludes foreign products.[†††††]

Table 2.1.2: Sector of cosmetics and cleaning. Overview of Switzerland-based private sustainability standards with origin criteria

Standards	Requirements
Coop Naturaline Swiss Cosmetics Products comprised: cosmetics	**Sustainability requirements**: Certification with the internationally recognized Cosmos standard. **Origin requirements**: Swiss origin.
Maya Products comprised: Professional cleaning agents (produced by Steinfels Swiss, a member of the Coop group)	**Sustainability requirements**: In material terms, the standard requires certification with the OECD Test 302 B extended. **Origin requirements**: Swiss origin.

[†††††] Steinfels Swiss is a division of the Coop cooperative. The Maya standard is available at: https://www.steinfels-swiss.ch/de/professional-care/maya-oekologisch-rein/.

2.1.4 Forestry

A single Switzerland-based private certificate of origin appears in the sector of forestry.[‡‡‡‡‡] "Schweizer Holz" is held by the umbrella organization of the Swiss forestry and timber industry, and requires compliance with statutory regulations, customary industry practices and the Swissness legislation.[§§§§§] Although it makes no reference to sustainability criteria, it is recognized as a proof of sustainable timber production for the purposes of government procurement. This practice is based on the argument that Swiss forest law is one of the strictest worldwide and guarantees, due to the high requirements and comprehensive implementation by the cantonal forestry services, sustainable forest use.[******]

2.1.5 Electronics

Main household appliances and electric lamps are subject to mandatory electricity consumption- and labelling requirements. The obligations are origin-neutral and are based on the applicable EU legislation.[††††††] Also beyond the mandatory energy label, voluntary governmental certifications have a predominant role in the sector.[‡‡‡‡‡‡]

The few private certifications in place are 'topten.ch' – the Swiss branch of an international program[§§§§§§] – and the international Climatop and EPEAT labels. Amongst retailers, only Coop extends its brand label 'Oecoplan' to electric appliances, which is based on governmental certifications and requires, uniquely in this sector, compliance with additional social criteria.

2.1.6 Textiles

Swiss retailers predominantly rely on internationally recognized private standards to showcase textiles produced in compliance with sustainability requirements. Two Switzerland-based private sustainability standards (the brand labels of Coop and Migros, See Annex 2.5) are in place in the sector. These are based on internationally recognized private sustainability standards, merely allowing the uniform appearance of ecological textile products.

At the time of writing, no government-backed labelling requirements exist. But the federal government, represented by FOEN and SECO, in cooperation with Swiss Textiles, amfori, and Swiss Fair Trade, has recently launched the Sustainable Textiles Switzerland 2030 initiative.[*******] The initiative aims to correct shortcomings (lack of transparency and multi-staged value chains) of private certification schemes by means of developing common

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[‡‡‡‡‡] However, more than 50% of Swiss forests are certified with internationally recognized sustainability standards (FSC or PEFC) .

[§§§§§] See: <https://www.holz-bois-legno.ch/lignum/downloads/reglement-label-zwischenversion-290519.pdf>.

[******] Koordinationskonferenz der Bau- und Liegenschaftsorgane der öffentlichen Bauherren, «Nachhaltig produziertes Holz beschaffen», available at: www.kbob.admin.ch/kbob/de/home/publikationen/nachhaltiges-bauen.html , referring to Antwort des Bundesrates vom 03.02.2010 auf die Interpellation 09.4026 «Ökologische Kriterien für Holzkäufe».

[††††††] See the website of the Swiss Federal Office of Energy, available at: <https://www.bfe.admin.ch/bfe/de/home/effizienz/energieetiketten-und-effizienzanforderungen.html>.

[‡‡‡‡‡‡] According to labelinfo.ch, governmental standards mostly applied in the sector are Blauer Engel, Energy Star, EU Ecolabel, Nordic Ecolabel, Österreichisches Umweltzeichen and TCO Certified.

[§§§§§§] Topten is an independent international program to create a dynamic benchmark for the most energy efficient products. In line with the international program, topten.ch lists the most energy efficient products available in Switzerland. The selection criteria are based on governmental labels and energy declarations, respectively the Energy Star, Blauer Engel and TCO labels. In line with this, the selection criteria applied are non-discriminatory, linked to the energy and environmental performance of products, but independent from their origin. The Swiss government is amongst the main supporters of topten.ch.

[*******] See: < https://www.sts2030.ch/targets/>.

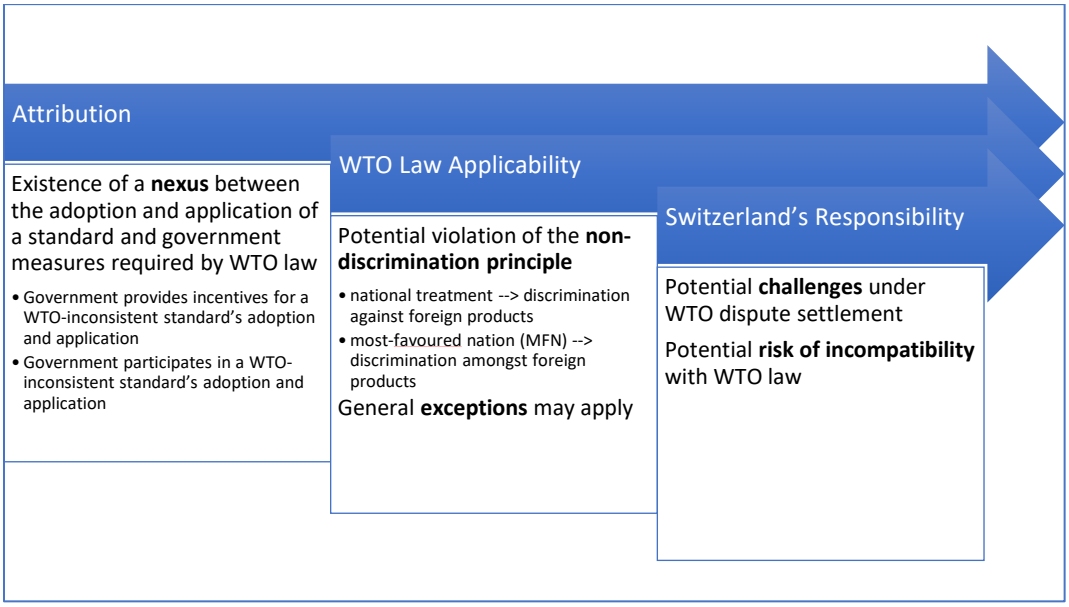
sustainability targets for 2030. Details of the programme are not yet available. However, we note that the "creation of added value to Swiss consumers" as foreseen by the initiative, especially if implemented under the Swissness legislation's framework, shall attach importance to the equal treatment of competing (and equally sustainable) products.[†††††††]

Section 2.2: Attribution analysis and potential WTO law implications

2.2.1 Overview: Private standards under WTO law

Private standards are subject to WTO law only to the extent that a government provides incentives for or participates in a WTO-inconsistent standard's adoption and application. (See Figure 2.2.1 below: Attribution under WTO law). In other words, it is the private standard's link to the government or a government measure which triggers the application of WTO rules.[‡‡‡‡‡‡‡]

Figure 2.2.1: Attribution under WTO law



A core principle of the multilateral trading system is the prohibition of unjustifiable discrimination against and amongst foreign products. The most relevant agreements for our analysis, the TBT Agreement and the General Agreement on Tariffs and Trade (GATT), also foresee it.[§§§§§§§] These agreements disallow Members from changing the conditions of competition to the detriment of imported goods (the so-called national treatment principle

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[†††††††] FOEN and SECO, Short Report, Future lab Sustainable Textiles and Clothing (22 March 2018), available at: <https://www.bafu.admin.ch/bafu/en/home/topics/economy-consumption/info-specialists/sustainable-textiles.html#246719909>.

[‡‡‡‡‡‡‡] The Appellate Body's statement in *US—COOL* is illustrative of this: "[…] detrimental effects caused solely by the decisions of private actors cannot support a finding of inconsistency with Art. 2.1 [TBT Agreement] […] [But] where private actors are induced or encouraged to take certain decisions because of the incentives created by a measure, those decisions are not 'independent' of that measure." Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, para. 291.

[§§§§§§§] Other WTO agreements contain more specific non-discrimination obligations. Prominently, Art. IV of the Agreement on Public Procurement (GPA) prohibits discriminatory treatment, while Art. X GPA provides that technical specifications in government procurement – increasingly private standards – should be formulated in terms of performance.

(NT)), or to discriminate amongst foreign goods (the so-called most-favoured nation (MFN) principle).

Discrimination may be justified, provided that it is the sole result of government endeavors to achieve a legitimate policy goal. This way the Agreements strive at a balance between Members' right to take (trade-restrictive) regulatory measures to achieve non-trade objectives, and the rights of other Members under basic trade disciplines. Legitimate policy goals include the provision of information on a product's origin to consumers, the fight against fraudulent practices and environment protection.

Product standards shall be based on internationally recognized norms where they exist. This obligation aims to prevent that product standards become overly trade-restrictive. More stringent rules may only be put in place if they are necessary to achieve a legitimate policy goal. Furthermore, product standards subject to WTO law shall comply with a number of procedural provisions, especially relating to transparency.

Table 2.2.1: Overview of applicable TBT provisions

TBT Agreement, Scope of application	Mandatory and voluntary product regulations, including sustainability standards granting a label upon compliance.
Art. 2.1 TBT	Prohibition of discrimination against and amongst imports, unless it stems exclusively from a legitimate policy distinction.
Art. 2.2 TBT	Prohibition of measures more trade-restrictive than necessary in order to achieve a legitimate policy goal.
Art. 2.8 TBT	Obligation to draft product regulations in terms of performance.
Arts 2.5, 2.9 and 2.12 TBT	Obligation to notify other Members of upcoming product regulations, allowing 90 days for comments. Obligation to provide justification upon request.
Attribution of private conduct	**Endorsement:** In line with Art. 4.1 TBT Agreement, Members shall • not encourage "recognized" private standardizing bodies[********] to act inconsistently with the TBT Agreement's principles • take reasonable measures to ensure their compliance with the TBT Agreement's governing principles. In line with existing jurisprudence, "recognition" means that the government acknowledges the existence and validity of the private body's activity in

[********] Art. 4.1 TBT Agreement refers to non-governmental bodies; the term is defined in Annex 1.8 TBT Agreement in broad terms, encompassing any body other than central or local government bodies. Furthermore, Annex 1.2 TBT Agreement makes clear that any standardizing body must have "recognized activities in standardization". However, there is much debate on Art. 4.1 TBT Agreement's scope, with views that exclude most private entities, and such that include most. To date, no jurisprudence exists. The interpretation adopted here is based on the principles of state responsibility under general international law, arguing that Art. 4.1 TBT Agreement imposes no additional obligation on Members to discipline private conduct, but merely reflects their obligation for those private actions they have endorsed. See: International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10) (November 2001), Art. 11; Arthur Appleton, 'Supermarket Labels and the TBT Agreement: Mind the Gap', Business Law Brief (Fall 2007), pp. 10–12; Enrico Partiti, 'What Use is an Unloaded Gun? The Substantive Disciplines of the WTO TBT Code of Good Practice and its Application to Private Standards Pursuing Public Objectives', in: Journal of International Economic Law 20(4) (2017), 829–854.

	standardization.[††††††††] Thus, recognition may be found to exist if the government is i) aware, or has reason to expect, that the body is engaged in standardization activities and ii) acknowledges the validity of that activity (i.e. by participation in the standard's development or providing support for its implementation). **Attribution:** WTO-inconsistent private behavior (e.g. the exclusion of foreign goods under a private sustainability scheme) may be attributed to the government if it is induced or encouraged by a government measure.[‡‡‡‡‡‡‡‡]

Table 2.2.2: Overview of applicable GATT provisions

GATT, Scope of application:	A broad set of measures including (beyond "standards and "technical regulations" in the sense of Annex A1 TBT Agreement) e.g. laws, regulations and requirements.
Art. III:4 GATT	Prohibition to change the conditions of competition to the detriment of imported goods in domestic market.
Art. I:1 GATT	Obligation to treat all competing foreign goods equally.
Art. XX GATT	Exception upon which a discriminating measure may be justified if it aims at a legitimate policy goal (e.g. if it relates to the conservation of natural resources). A prerequisite to this end is an even-handed implementation.
Art. X:1 GATT	Obligation to publish trade-relevant information promptly.
Attribution of private conduct	In line with jurisprudence, private conduct may be attributed to the government if it provides incentives for or participates in a standard's adoption and application. No attribution upon omission to discipline private conduct.[§§§§§§§§]

2.2.2 Attribution analysis

As explained above, attribution (and hence applicability of the relevant WTO rules) arises to the extent that the government provides incentives for or participates in a WTO-inconsistent standard's adoption and application. WTO law concerns can in particular arise where discriminating Switzerland-based private sustainability standards draw inspiration from state

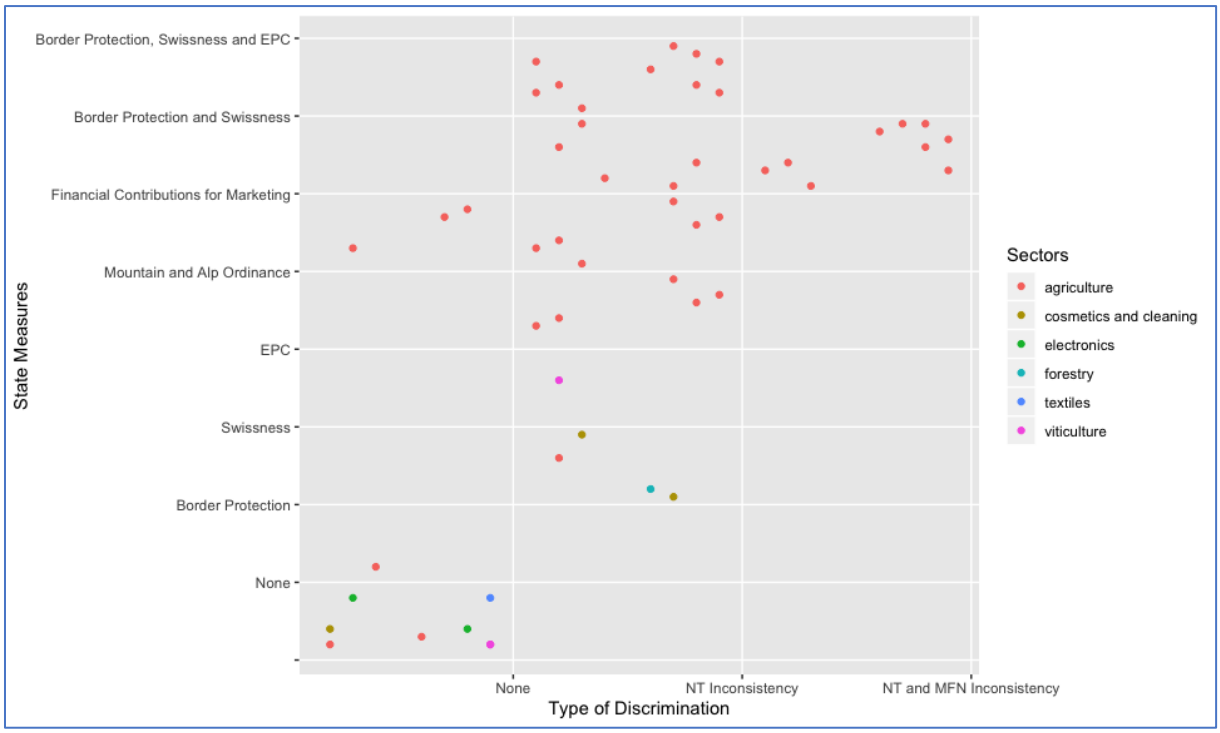
[††††††††] Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, para. 361 f.

[‡‡‡‡‡‡‡‡] As the Appellate Body observed, "while detrimental effects caused solely by the decisions of private actors cannot support a finding of inconsistency with Article 2.1 [TBT Agreement], the fact that private actors are free to make various decisions in order to comply with a measure does not preclude a finding of inconsistency. Rather, where private actors are induced or encouraged to take certain decisions because of the incentives created by a measure, those decisions are not "independent" of that measure." Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, para. 291.

[§§§§§§§§] In lack of bright-line rules distinguishing governmental and private actions, distinction shall be made on a case-by-case basis depending on the level of governmental involvement or incentives for private action. Attribution may be found if the private behavior is, directly or indirectly, imposed by law or governmental regulation. But Members have no obligation to exclude any possibility that governmental measures may enable privates, directly or indirectly, to restrict trade, where those measures are not trade restrictive. Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 149; Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/Rand Corr.1, adopted 16 February 2001, para. 11.19.

measures that restrict foreign competition in the Swiss market. An overview of these cases is provided in Figure 2.2.2 and Table 2.2.3.

Figure 2.2.2: Switzerland-based private standards' design and nexus to government measures



The border protection, the Ecological Performance Criteria (EPC) and the Swissness legislation appear to be of particular trade relevance as they show a direct link to discriminating private standards with considerable market power. The border protection and the Swissness legislation also received specific attention from Switzerland's major trading partners (See Annex 1.1 and Annex 1.3).*********

Table 2.2.3: Discriminating Switzerland-based private standards' nexus to government measures

Standard	Private behavior in conflict with WTO principles	Nexus for attribution
Bio Suisse Distributed under e.g. • Coop Naturaplan (95% of the product range) • Migros Bio (domestic products in all cases; imported ones may only comply with the EU organic directive) • Aldi Nature Suisse Bio • Manor Bio Nature plus	**NT conflict**: Priority for Swiss products. Prohibition of processed foreign products. **MFN conflict**: Priority for products from Europe/the Mediterranean Rim over other third-country products.	**Border protection (NT)**: Priority for domestic products, with express reference to statutory import provisions. Provisions for Swiss producers to agree on (non-binding) price and volume targets with retailers. The border protection for agricultural products arguably supports retailers' readiness to enter into long-term supply contracts with domestic producers' collectives (see below). **Swissness legislation (NT)**: Prohibition to import entirely processed products in line with the Swissness legislation.

********* In particular fn. 42 and fn. 59.

		Financial contributions for marketing: The federal government provides BS with financial contributions destined for sales support. FOAG points out in this respect that the focus must be on the products' Swiss origin instead of supporting the sale of imported organic products. **MFN** conflict not linked to government measures.
IP-Suisse/ Vinatura Distributed under e.g. • Migros Terra Suisse • Migros Weide Beef • Aldi Suisse Garantie • Naturel • Agri Natura	**NT conflict** Exclusion of foreign products.	**EPC**: IPS and the Vinatura label are based on the EPC. This links the organizations to the federal government, inasmuch as compliance with the EPC is a prerequisite for producers to receive direct payments (to attain the Vinatura label no certification beyond compliance with EPC is required, controls take place together). **Government participation in the standards' development and 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. **Financial contributions for marketing**: The federal government provides IPS with financial contributions destined for sales support. **Border protection**: Border protection for agricultural products arguably supports retailers' readiness to enter into long-term supply contracts with domestic producers' collectives (see below).
Mountain/alp labels • Coop ProMontagna • Migors Heidi • Spar Schellen-Ursli • Schweizer Bergkräuter • Schweizer Bergprodukt/Schweizer Alpprodukt (official labels)	**NT conflict** Exclusion of foreign products.	**Mountain and Alp Ordinance (SR 910.19)**: The Mountain and Alp Ordinance lays down the requirements to use the terms "mountain" and "alp" on Swiss products. While the ordinance does not affect the labelling of imports, it fails to provide for the possibility to recognize equivalent foreign standards. Since the ordinance is used as a basis for private labels, retailers exclude foreign "mountain" and "alp" products from their respective product ranges.

Local origin standards with exceptions • Migros Aus der Region. Für die Region • Coop Miini Region • Manor lokal • Regio.Garantie (with arguably the most problematic exceptions) • Alpinavera	**NT conflict** Noncompound products: Exclusion of foreign products. Compound products: Priority for Swiss products. .	**Financial contributions for marketing**: The federal government provides a part of these schemes (i.e. alpinavera, regio.garantie; excluded are retailers' schemes) with financial contributions destined for sales support. **Government participation in the development and implementation of regio.garantie:** Further, the Federal Office for Environment participates in the standard-setting of the regio.garantie scheme and provides support for its implementation (See regio.garantie, Annual Report 2018).
Coop Naturaline Swiss cosmetics Products comprised: Cosmetics	**NT conflict** Exclusion of foreign products.	**Swissness legislation**: The standard explicitly refers to the Swissness legislations, implying the exclusion of foreign products.
Maya Products comprised: Professional cleaning agents (produced by Steinfels Swiss, a member of the Coop group)	**NT conflict** Exclusion of foreign products.	**Swissness legislation**: The standard explicitly refers to the Swissness legislations, implying the exclusion of foreign products.
Schweizer Holz	**NT conflict** Exclusion of foreign products.	**Recognition in government procurement**: Compliance with statutory requirements can be sufficient proof of sustainability in government procurement. But restricting such proof in a tender to domestic goods is likely to be found in violation of the NT principle.[††††††††] **Swissness legislation**: The standard explicitly refers to the Swissness legislations, implying the exclusion of foreign products.

2.2.3 WTO law implications

Based on the nexus specified in Table 2.2.3, the private behavior in conflict with the NT principle may be attributed to the Swiss government under WTO rules; a detailed analysis for each measure listed in Table 2.2.3 is included in Annex 1. Trade law concerns may in particular arise in the sectors of agriculture and cosmetics, based on the border protection's, the EPC's and the Swissness legislation's connection to discriminating private behavior.

Attribution of the private behavior linked to the measures listed in Table 2.2.3 would imply the government's responsibility for non-compliance with the NT principle as enshrined in

[††††††††] Universität Zürich, Rolf H. Weber and Christine Kaufmann, Rechtsgutachten zur Verwendung von Schweizer Holz in Bauten mit öffentlicher Finanzierung (Rechtsgutachten II, RG II) 2015, S. 4.

Art. 2.1 TBT Agreement and Art. III:4 GATT. An exception in this respect is the Swissness legislation: its stated aim is to provide consumers with origin information and to prevent deceptive practices, which are recognized as legitimate policy goals.[‡‡‡‡‡‡‡‡‡] The WTO law compatibility of (the legislation and) the corresponding private behavior depends on whether their deviation from the NT principle can be justified. The exceptions provided for by the legislation (See Annex 1.3) might be found to distort consumer information and to exacerbate the legislation's trade-restrictive effect. Accordingly, prospects for successful justification may be compromised, meaning that the government would be held responsible (also) for the private behavior inconsistent with the NT principle.

Yet, the legal standing of private standards under WTO rules is controversial (See Section 4). So far no single case has been brought before WTO adjudicators in relation to trade restrictions that arise from such schemes.

In the sectors of electronics and textiles all standards are applied without origin-based distinction and are based, wherever possible, on internationally recognized norms. No conflict with WTO law appears.

[‡‡‡‡‡‡‡‡‡] Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, para. 7.651; Panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, para. 7.437.

Section 3: Switzerland in the WTO Discussions on Private Standards

The present section builds on the main inferences drawn from the Swiss landscape of private sustainability standards and assesses potential negotiating positions of Switzerland when addressing the issue of green labelling in the trading arena. Following the multi-layered governance approach, policy recommendations are formulated with regards to the multilateral, plurilateral and bilateral layers of governance.

3.1 Multilateral level

WTO discussions on private standards started in 2005, in response to trade restrictions faced by small farmers in developing countries. The concerns voiced at the WTO related to the negative trade effects of the EurepGAP (today's GlobalGAP, with BS's and IPS's participation) on imports of fresh fruits to the EU. In response, the EU declared that the EurepGAP is a private sector entity whose practices did not conflict with its internal laws.[§§§§§§§§§] However, a formal work programme on private standards was agreed on in 2008.

Multilateral discussions focused on adopting a working definition of private standards. New Zealand and China jointly proposed to define private standards as "written requirements" used in "commercial transactions", applied by a "non-governmental entity that is not exercising governmental authority". The draft definition explicitly stated that it is "without prejudice to the rights and obligations of Members" under the Agreement.[**********] Still, no meaningful progress towards a common position could be achieved.[††††††††††] This might be due to Members' fear of creating a precedent[‡‡‡‡‡‡‡‡‡‡‡] and possibly fostered by lack of WTO disputes targeting a Member's behavior in relation to private standards to date.[§§§§§§§§§§]

As a further initiative, China proposed to create "Best Practice Guidelines regarding Private Standards" to "encourage private standard setters and Members hosting such bodies to follow internationally recognized best practices in the preparation, adoption, application, certification, usage and supervision of private standards". China underlined that the guidelines were without prejudice to Members' rights and obligations under the relevant WTO Agreements.[***********] Egypt, Brazil and the Russian Federation (among other Members) supported the Chinese attempt, but it was opposed by the US, the EU and Japan. The EU submitted that "private standards, whatever their definition or meaning (there was no agreement in this regard, as discussions in the SPS Committee demonstrated), were documents which did not meet the

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[§§§§§§§§§] Committee on Sanitary and Phytosanitary Measures, Communication from Saint Vincent and the Grenadines, G/SPS/GEN/766 (27 February 2007).

[**********] See, e.g. G/W/SPS/281. These discussions took place in the SPS Committee but have direct relevance for the TBT Committee's work.

[††††††††††] For example, the EU suggested to replace "non-governmental entity" with "private body" and to delete the term "requirement", whereas a number of other Members (such as Argentina, Belize, Brazil and China) attached particular importance to including these terms within the definition. See: Committee on Sanitary and Phytosanitary Measures, Report of the Co-Stewards of the Private Standards E-Working Group to the March 2015 Meeting of the SPS Committee on Action 1 (G/SPS/55), Submission by the Co-Stewards of the E-Working Group, G/SPS/W/283 (17 March 2015), para. 9.

[‡‡‡‡‡‡‡‡‡‡‡] Similarly to the case in *US – Tuna II*, when the Appellate Body relied on a decision of the TBT Committee to decide whether an internationally recognized standard have existed (Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para 371).

[§§§§§§§§§§] Fabrizio Meliadò, Private Standards, Trade, and Sustainable Development: Policy Options for Collective Action, International Centre for Trade and Sustainable Development, 2017.

[***********] TBT/M/69 at para 3.372.

definition of standards under the TBT Agreement, and, as such, were outside the scope of the Agreement and, hence, of the Committee's work".[††††††††††††] Against this backdrop, the agenda has not been pursued further.

Switzerland did not submit express statements in these discussions. However, in 2001 it underlined the importance of clarifying the TBT Agreement's scope of application with regard to labelling schemes, so as to minimize the threat of their misuse by government bodies for protectionist purposes.[‡‡‡‡‡‡‡‡‡‡‡‡] It also pointed to challenges posed by divergent national or regional labelling requirements to developing countries, but also to interesting opportunities created by increasing environmental awareness in industrial countries, i.e. for organically produced coffee or tea, tropical fruits and jute. Switzerland did not address the TBT Agreement's applicability to private standards; its submission was "limited to marking and labelling requirements as enacted by government bodies" and did "not discuss non-governmental initiatives".[§§§§§§§§§§§§]

As our results show, the majority of Switzerland-based private sustainability standards in the sectors of agriculture (including viticulture and forestry) and cosmetics may run counter to the principles of non-discrimination foreseen by WTO law. Therefore, without a major reform in the domestic standards' landscape, it appears sensible for Switzerland to focus its efforts on greater transparency as regards standards' sustainability impact. Given the controversy surrounding sustainability standards' direct effect – some standards are "little more than greenwash" – transparency obligations could contribute to better sustainability outcomes.[**********] Furthermore, Switzerland could advocate for increased technical assistance and more effective cost-sharing arrangements: in the majority of cases producers bear all additional costs of implementation and certification with private sustainability standards, and only in a limited number of cases are these shared between producers and other supply chain actors or the sustainability scheme. Yet, ambitious cost-sharing arrangements and technical assistance could substantially reduce the trade-limiting effect of private sustainability standards faced by small producers in developing countries.[††††††††††††]

Switzerland may also undertake efforts towards creating a transparency mechanism. This way it could amplify its endeavors in collecting market data on the global standards' landscape. However, it shall not depart from the prevailing view that private schemes do not fall under the TBT Agreement's scope of application – which may not be altered by the adoption of best practice guidelines on private standards – and Members hosting private standardizing bodies may not be held responsible for private actions. This way it can minimize potential trade concerns relating to the Swiss standards' landscape.[‡‡‡‡‡‡‡‡‡‡‡‡‡]

The foreign trade pattern also permits to orientate the Swiss negotiating strategy on the domestic standards' landscape: exports concentrate in sectors characterized by limited

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[††††††††††††] TBT Committee, Minutes of the Meeting of 15-16 June 2016, Note by the Secretariat, G/TBT/M/69, paras 3.379-3.381.

[‡‡‡‡‡‡‡‡‡‡‡‡] WT/CTE/W/192, G/TBT/W/162.

[§§§§§§§§§§§§] WT/CTE/W/192, G/TBT/W/162.

[**********] Dauvergne and Lister, "Big Brand Sustainability," p. 38.

[††††††††††††] Fiorini et al., "Institutional Design of Voluntary Sustainability Standards Systems."

[‡‡‡‡‡‡‡‡‡‡‡‡‡] However, we reiterate that the most trade-restrictive Switzerland-based private standards are linked to state measures; their attribution to the government in line with standing WTO jurisprudence cannot be excluded.

application of private sustainability standards.[§§§§§§§§§§§§§] Further, exports in the sectors of textiles and agriculture – although characterized by an amplified use of private sustainability standards – are unlikely to be severely affected given the nature of the specific goods.[**********]

Lastly, Switzerland may undertake efforts to create a transparency mechanism – along the lines of the 2006' Transparency Mechanism for Regional Trade Agreements – under the TBT Agreement (or a joint mechanism under the TBT Agreement and the Agreement in Sanitary and Phytosanitary Measures), e.g. through a WTO General Council Decision. Such mechanism could respond to the concerns raised by Members in relation to the availability of information on the establishment and functioning of private standard schemes, while Members could clarify, similar to the Transparency Mechanism on Regional Trade Agreements, that factual presentations "shall not be used as a basis for dispute settlement procedures".[††††††††††††††] However, we suggest that Switzerland does not support China's initiative in creating "Best Practice Guidelines regarding Private Standards", as such agreement could be used in a dispute to "'clarify' the provisions of the covered agreements".[‡‡‡‡‡‡‡‡‡‡‡‡‡‡]

3.2 Plurilateral level

Plurilateral treaties cover a single or limited set of topics. Generally, they are negotiated by Members interested in joining the agreement. These Members decide whether to extend preferences to the entire WTO membership, or only to those states that ratify the plurilateral agreement.[§§§§§§§§§§§§§§]

Which of the two options is chosen affects the agreement's formal process of incorporation into the WTO legal order. In case the preferences are not extended to all Members, incorporation requires a consensus by the WTO Ministerial and can be blocked by a single Member.[**********] By contrast, an "inclusive" treaty can be adopted by a WTO Ministerial

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[§§§§§§§§§§§§§] Namely chemicals and pharmaceuticals, machinery, watches, metals, vehicles and jewelry. Cosmetics, despite that most products are not certified with third-party sustainability standards, have success in export markets, benefitting from the excellent reputation of "Swissness".

[**********] The export-oriented Swiss textile industry focuses on niche products, especially technical textiles, while private sustainability standards, in the first place, are applied to standard products. Main exports of agricultural goods – coffee and soft drinks, followed by chocolate and cheese – are likely to be subject to and successfully comply with non-discriminating private sustainability standards in Switzerland's major export markets.

[††††††††††††††] In this context we note that, since 2014, Switzerland funds the project "Global Survey on Voluntary Sustainability Standards (VSS)", performed by the International Trade Center and the Research Institute of Organic Agriculture. The project collects market data on the global landscape of private sustainability standards and thus facilitates policy and investment decisions. The data and a yearly global report is publicly available.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡] See fn. 30.

[§§§§§§§§§§§§§§] For more information see: Rudolf Adlung and Hamid Mamdouh, 'Plurilateral Trade Agreements: An Escape Route for the WTO?' WTO Working Paper ERSD-2017-03 (25 January 2017).

[**********] Article X:9 Marrakesh Agreement Establishing the World Trade Organization. Article XVIII General Agreement on Trade in Services explicitly allows additional commitments to be scheduled, but the GATT contains no parallel provision. Rather, so called 'Annex 4 plurilateral agreements', that impose additional disciplines on the use of non-tariff policies without being applied on an MFN basis must be agreed by all Mem-bers. In other words, their adoption requires *consensus*.

However, Members formally accepted the scheduling of non-tariff measures during the Uruguay Round negotiations; under Part III they can inscribe any non-tariff commitment they deem appropriate. Against this background the scheduling of non-tariff commitments are possible, but subject to the 'WTO public order'. In particular, Members shall not deviate from the MFN principle, nor diminish existing rights of other, non-participating Members. See: Hoekman and Mavroidis, "MFN Clubs and Scheduling Additional Commitments in the GATT," 388 f and 397 ff.

Decision, passed by the majority of the membership.[††††††††††††††] In the latter case, participating Members may see fit that the agreement only enters into force when a "critical mass" of Members have ratified it, with a view to reducing the possibility of freeriding behavior.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] In either case, for a plurilateral agreement to enter into force, the parties to the agreement must aim for a broad support.

Plurilateral negotiations towards the Environmental Goods Agreement (EGA) were launched in 2014 with the active contribution of Switzerland and 13 other Members.[§§§§§§§§§§§§§§§] The Parties intended to negotiate an agreement that eliminates tariffs on "environmental goods", and extend the benefits to all WTO Members.[**********] The EGA was foreseen to enter into force after a critical mass of Members joined. However, developing countries participated only to a very limited extent. Reasons for this are arguably the limited gains for developing countries: developed countries have already very low levels of tariffs on the (industrial) environmental goods they proposed, while a broader list incorporating agricultural products (in which many developing countries have a comparative advantage) would call for differentiation among 'like' products. However, developing countries are concerned that this approach would lead to discrimination based on e.g. social sustainability considerations.[††††††††††††††††] The negotiations are, at the time of writing, inconclusive and at a stall.

Negotiations on the Agreement on Climate Change, Trade and Sustainability (ACCTS) were launched in September 2019, with the participation of Switzerland, Costa Rica, Fiji, Iceland, New Zealand and Norway. The ACCTS is envisaged to include, besides tariff reduction on environmental goods *and services*, measures on the elimination of non-tariff barriers, including guidelines to inform the development and implementation of voluntary eco-labelling programmes and mechanisms.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Experience from prior negotiations in and outside the WTO[§§§§§§§§§§§§§§§§], and lessons drawn from (the shortcomings of) sustainability standards

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[††††††††††††††] However, decision-making without consensus is contested by some Members, seen to undermine the 'fundamental principles at the WTO'. Cf.: The Legal Status of 'Joint Statement Initiatives' and their Negotiated Outcomes, WT/GC/W/819 (19 February 2021).

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Mark Wu, WTO Environmental Goods Agreement: from multilateralism to plurilateralism, Panagiotis Delimatsis (ed), Research Handbook on Climate Change and WTO Law, Edward Elgar (2016), pp. 279-301, p. 283f.

[§§§§§§§§§§§§§§§] The other participants are Australia, Canada, China, Costa Rica, the EU, Hong Kong, China, Japan, Korea, New Zealand, Norway, Singapore, Chinese Taipei and the US.

[**********] Multilateral negotiations on the reduction or elimination of trade barriers on environmental goods and services in line with the Doha Development Agenda foundered, as Members failed to conduct these negotiations in a balanced and mutually beneficial manner. In short, technology exporting countries emphasized tariff reductions on environmental goods, while technology importing countries feared that results on tariff reductions will not bring about a proper balance and favored project-based or integrated approaches. Thomas Cottier and Donah Sharon Baracol Pinhao, WTO Negotiations on Environmental Goods and Services: A Potential Contribution to the Millennium Development Goals, UNCTAD/DITC/TED/2008/4, United Nations Conference on Trade and Development (2009), p. 1.

[††††††††††††††††] Jaime de Melo and Jean-Marc Solleder, 'Barriers to Trade on Environmental Goods: How Important They Are and What Should Developing Countries Expect From Their Removal, Centre for Economic Policy Research, Discussion Paper DP13320 (2018).

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Joint Trade Ministers' Statement on the 'Agreement on Climate Change, Trade and Sustainability' Initiative from 24 January 2020, available at <https://www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/internationale_organisationen/WTO/laufende-verhandlungen-.html>.

[§§§§§§§§§§§§§§§§] The listing procedures in the Convention on International Trade in Endangered Species and the Rotterdam Convention on Prior Informed Consent could inspire the ACCTS negotiators in establishing a (flexible) lists of environmental goods and services. Cf.: Aaron Cosbey, Soledad Aguilar, Melanie Ashton and Stefano

may support the swift conclusion of this undertaking. As regards sustainability standards, the following topics stand out:

Transparency on the environmental impact of sustainability standards: Often cases data on the actual environmental impact of sustainability standards is available only to a limited extent and/or suggests a controversial outcome. [**********] Some of these trade-offs are inherent in the standards' design. Firstly, stricter certification conditions can lead to higher environmental gains, but will likely decrease the participation of producers (with the highest potential for development). Thus, there seems to be a trade-off between global impact as a result of greater inclusiveness and enhanced environmental gains triggered by higher standards. [††††††††††††††††] Secondly, ecolabels that focus on a narrow set of environmental issues tend to have higher standards, are easier to implement and are more likely to achieve their stated environmental impact goals (they are also easier to be assessed against such goals), but may miss important elements that influence environmental outcomes.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Against this background, increased transparency on their actual environmental impact could raise the effectiveness and acceptance of (trade-restrictive) sustainability standards.

Open governance structure in standard-setting: Openness in the formative phase of standard-setting and inclusive governance features are important for the inclusion of views and influence from developing countries and small producers. It appears crucial that standard-setting is based on scientific evidence, involves developing country members and takes into account the interests of small-scale producers. This, in turn, plays a role in whether such actors will accept the legitimacy of standard-setting bodies and thus in the operational success of the ACCTS initiative.[§§§§§§§§§§§§§§§§§]

Inclusiveness with regard to small and medium-sized producers and producers in developing countries: Accusations of bias against small and developing country producers have beset a number of sustainability standards. Given that any (plurilateral) regime addressing trade and sustainability within the WTO will need the support of developing country Members, this is a key issue. Concerns that sustainability standards constitute hidden protectionism will not cease unless the perceived threats are addressed.

On the one hand, given the lack of built-in price premiums, certification (associated with environmental benefits) does not necessarily compensate for the higher costs sustained (costs of changing operations, costs of preparing and presenting information for certification, costs of certification, and costs of continuing compliance). Moreover, costs of certification are often borne by the producer alone, while the effects are enjoyed (also) by other supply chain actors

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Ponte, Environmental Goods and Services Negotiations at the WTO: Lessons from multilateral environmental agreements and ecolabels for breaking the impasse, International Institute for Sustainable Development (IISD) (2010), p. 3.

[**********] For example, a study issued by the Marine Stewardship Council that examined 10 fisheries schemes with the aim to identify benefits of certification; out of 62 certification conditions only 8 were found to most likely induce (in past) environmental gains. In the end, it is unclear whether certification brings about a positive environmental impact. IISD 2010, p. 47., with reference to David Agnew, Chris Grieve, Pia Orr, Graeme Parkes and Nola Barker, Environmental benefits resulting from certification against MSC's Principles and Criteria for Sustainable Fishing, MRAG UK and Marine Stewardship Council (2006).

[††††††††††††††††] IISD 2010, p. 47.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] For example the Smithsonian bird-friendly label for coffee sets the golden standard in terms of tree cover and bird habitat preservation, but it comes short of addressing other environmental issues, such as water and waste management in the coffee farm. IISD 2010, pp. 37 ff.

[§§§§§§§§§§§§§§§§§] Fred Gale and Marcus Haward, Public Accountability in Private Regulation: Contrasting Models for the Forest Stewardship Council and Marine Stewardship Council (2004) pp. 28-29.

and the standard systems. This holds especially true for ecolabels in fisheries and it is likely to be a major bone of contention in carbon labelling.[**********]

On the other hand, developing country producers face special difficulties in understanding requirements and getting certified under existing schemes. Technical assistance and financial aid (in return for increasing sustainable production) that supports capacity building would contribute to both environmental and development objectives.

3.3 Bilateral level

Switzerland currently has a network of 33 FTAs with 43 partners, in addition to the free trade agreements (FTAs) with the EU and the Members of the European Free Trade Association (EFTA).[††††††††††††††††] Most Swiss FTAs are jointly negotiated with other EFTA states, as the economic and political weight carried by the group strengthens its negotiating position.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] However, in some cases this approach is not suitable; for instance Switzerland concluded bilateral agreements with Japan and China.[§§§§§§§§§§§§§§§§§]

A study of the European Parliament from 2016 compares EFTA and EU FTAs and points to substantial differences in terms of their scope and ambition.[**********] EFTA agreements traditionally focus on core areas of market access, while post-1990 EU agreements are more comprehensive and value-driven. For example, the TBT chapters in EFTA FTAs do not go beyond WTO provisions, while the respective chapters in EU FTAs are more developed, in some cases including provisions on the mutual acceptance of conformity assessment procedures.[††††††††††††††††††]

This trend is to some extent also reflected in provisions addressing sustainability concerns. Binding commitments on environmental sustainability are essential elements of EU FTAs, and in recent agreements subject to a separate dispute settlement mechanism. In EFTA FTAs, these commitments are somewhat weaker and, in themselves, they are not subject to dispute settlement although they may be discussed in the FTAs' Joint Committee.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] However, most recent EFTA FTAs prove to narrow this gap – in response to concerns of civil

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[**********] Cf.: IISD 2010, p. 38.

[††††††††††††††††] Staatssekretariat für Wirtschaft, Freihandelsabkommen), available at < https://www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Freihandelsabkommen.html > accessed 22 December 2021.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] EFTA has a network of 29 FTAs covering 40 countries and territories outside the EU (<https://www.efta.int/free-trade/free-trade-agreements>). Given the national character of EFTA FTAs, individual EFTA states (unlike EU member states) may conclude their own bilateral schedules in some areas, such as agriculture.

[§§§§§§§§§§§§§§§§§] In the case of Japan, negotiations with the EFTA as a group have been considered, but ruled out due to differences in Japan's and individual EFTA state's trade structure; the FTA is in force since September 2009. As regards China, no EFTA negotiations were initiated as the country preferred from the outset individual negotiations; the FTA is in force since 1 July 2014, European Parliament, Comparing EU and EFTA trade agreements: drivers, actors, benefits, and costs (2016), p. 45.

[**********] European Parliament, 2016.

[††††††††††††††††††] European Parliament, 2016, p. 29f.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] The approach of dispute settlement for Trade and Sustainability Chapters differs from the general dispute settlement; it does not include sanctions, but involves, e.g. the publication of the panel report. Non-paper of the Commission services, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 11 July 2017, p. 3 <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf>.

society and environmental organizations[§§§§§§§§§§§§§§§§§§] – and introduce novel approaches to the standard chapter on Trade and Sustainable Development.

The importance of promoting sustainable development and protecting the environment are similarly acknowledged in the new generation of EFTA FTAs. Explicit references in the agreements' preamble and goal provisions make clear that these values must be taken into account in the interpretation of substantive provisions; measures that aim to protect the environment but deviate from the substantive provisions may be justified. Furthermore, in 2010 a new EFTA model chapter on Trade and Sustainability was proposed and since consistently included in FTAs. The chapter brings together provisions concerning environment and labour standards, for example by reaffirming the parties' rights and obligations under existing MEAs and calling upon them not to weaken the level of environmental protection provided by national legislation in order to encourage investment or to enhance a competitive trade advantage.[**********]

The EFTA-Indonesia FTA adopted a novel approach, linking tariff preferences to sustainability requirements for palm oil. In line with the treaty, imports of palm oil to Switzerland must comply with laws, policies and practices that are designed to protect Indonesia's ecosystem from degradation and pollution, and guarantee the rights of local communities.[††††††††††††††††††††] However, the provision is formulated in broad terms, leaving it unclear whether it only addresses Indonesian laws and policies, or extends to international rules that Indonesia committed to comply with. From a sustainability perspective, a broad interpretation should be preferred. In addition, effective implementation – which might include reference to private sustainability standards, as the principles and criteria of the Roundtable on Sustainable Palmoil, as well as to its Indonesian version – should be put in the foreground.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]

The chapter on trade and sustainable development in the FTA with MERCOSUR is based on the model chapter, but includes additional elements used for the first time in an EFTA FTA. For example, commitments regarding the sustainable management of forests (also present in the FTA with Indonesia) now include measures on the promotion of certification schemes. A new article is further incorporated on trade and sustainable agriculture and food systems, reflecting the parties' agreement to promote sustainable agriculture and associated trade.[§§§§§§§§§§§§§§§§§§] The agreement also furthers the extent to which sustainability-related commitments may be subject to dispute resolution. Beyond consultations within the Joint Committee, parties now may also use good offices or choose a mediation procedure, as provided for by the FTA's dispute settlement mechanism. In addition, parties can seek the

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[§§§§§§§§§§§§§§§§§§] For example the Green party is collecting signatures to launch a referendum against the FTA with MERCOSUR, as it regards the sustainability-related commitments as insufficient: <https://gruene.ch/wirtschaft/internationaler-handel/stopp-mercosur>.

[**********] State Secretariat for Economic Affairs, Conclusion of EFTA work on trade, environment and labour standards <https://www.newsd.admin.ch/newsd/message/attachments/19675.pdf>.

[††††††††††††††††††††] In particular, laws that protect primary forest, peatlands and other ecosystems of special importance; that protect the air and water from pollution; and that guarantee the rights of local and, in particular, indigenous peoples and farm workers. Art. 8.10, Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States, signed on the 16 December 2018.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Elisabeth Bürgi Bonanomi, Die Nachhaltigkeit im Handelsabkommen mit Indonesien mit besonderem Fokus auf die Regulierung des Palmöl-Imports, Studie im Auftrag der Agrarallianz Schweiz, Centre for Development and Environment, 15. März 2019, pp. 7-8.

[§§§§§§§§§§§§§§§§§§] Note by the EFTA Secretariat, EFTA – MERCOSUR Free Trade Agreement: Conclusion in Substance of the EFTA-MERCOSUR Free Trade Negotiations <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/mercosur/2019-08-24-EFTA-Mercosur-Chapter-Description-of-FTA.pdf>.

opinion of international organizations or bodies competent in the relevant field (especially MEAs in the case of environmental issues) in dispute settlement.[**********]

These examples show that (private) sustainability standards have a rightful place in FTAs. They can promote products with an outstanding environmental performance, by communicating the corresponding information to consumers. Sustainability standards may as well serve as a proof of sustainable production, combined with tariff preferences. In both cases, the incorporation shall take into account the principles highlighted when discussing priorities under the plurilateral level: i) the standards used in FTAs shall deliver a proof of actual environmental impact, ii) the governance structure shall be open at least to all parties to the respective FTA and iii) inclusiveness towards small and medium-sized producers shall be ensured by ensuring technical and financial assistance.

[**********] See at State Secretariat for Economic Affairs, Neun Behauptungen zum MERCOSUR-Abkommen im Faktencheck, Behauptung 5, available at <https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Freihandelsabkommen/partner_fha/partner_weltweit/mercosur.html >.

Section 4: Private sustainability standards as an avenue to reduce Switzerland's green footprint?

Switzerland's consumption-based environmental footprint oversteps planetary boundaries. While domestic production significantly increased its resource-efficiency over the last two decades, the level and patterns of consumption kept the overall footprint high, with a sharp rise in environmental impact generated abroad and imported as embodied environmental footprint.[††††††††††††††††††††]

Ecolabels can help to reduce environmental consumption to a sustainable level. Transparent information on products' environmental impact supports more conscious purchase decisions, and might reward companies that resort to more environmentally efficient products and production processes.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] However, due to the following reasons, the contribution of private schemes appears insufficient to steer consumer decisions effectively:

- Information on the actual environmental impact of (private) sustainability standards is available only to a limited extent and/or suggests a controversial outcome.[§§§§§§§§§§§§§§§§§§§§]
- Private sustainability standards, in most cases, do not provide information on products' overall environmental impact, but merely deliver information on one or more aspects of production, for instance on animal husbandry, the use of pesticides, and actions to conserve biodiversity. Therefore, they affect lower levels of purchase decisions, with a limited impact on reducing Switzerland's environmental footprint.
- Lastly, the Swiss market is characterized by a high prevalence of private sustainability standards that restrict certification for domestic products. This way they fail to provide incentives for foreign producers to comply with the respective sustainability criteria and to reduce the environmental footprint embodied in imports.

Against this background, information on products' *overall* environmental impact appears as a more efficient instrument to bring about sustainable consumption patterns. The federal government cooperates with the EU in developing methodological principles for the ecological assessment of products and raw materials over their entire life cycle.[**********] As this approach measures a range of environmental impacts captured in products, it is better suited to induce sustainable consumer decisions. In particular, life cycle standards are less vulnerable to the shortcomings of issue-specific labels, such as the promotion of products that perform well on one issue, but miss other elements with a major effect on sustainability outcomes. Furthermore, standards that provide information on the overall environmental sustainability impact of products support consumers at higher levels of purchase decisions.[††††††††††††††††††††††] For example, when planning a meal, the decision between animal or vegetable ingredients is

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[††††††††††††††††††††††] Octavio Fernández-Amador, Joseph Francois and Patrick Tomberger, MRIO linkages and Switzerland's CO2 profil, Aussenwirtschaft, University of St. Gallen, School of Economics and Political Science, Swiss Institute for International Economics and Applied Economics Research, vol. 67 nr. 3 (2016) pp. 47-63.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] This holds true if the labels provide accurate and timely information for consumers.

[§§§§§§§§§§§§§§§§§§§§] See Section 3.2, especially at fn. 46; Notably, the majority of standards applied in the Swiss market contain no binding requirements on energy use / the use of scarce resources: See Annex 2.

[**********] See the initiative "A single market for green products": <https://www.bafu.admin.ch/bafu/de/home/themen/wirtschaft-konsum/fachinformationen/nachhaltiger-konsum/produktumweltinformation.html>.

[††††††††††††††††††††††] Strategie Nachhaltige Entwicklung des Bundesrates 2016-2019: Aktionsplan, Chapter 4.2.1, Goal 1.4.; Niels Jungbluth, Sybille Büsser, Rolf Frischknecht, Marianne Leuenberger, Matthias Stucki, Feasibility study for environmental product information based on life cycle approaches, Study submitted by the ESU Services Ltd. to the Federal Office for the Environment (2011).

located on a higher level, whereas the decision between different types of vegetables or grains used for the vegetarian option on a lower level. Higher levels of purchasing decisions have a greater impact on environmental pollution. For instance, the amount of meat consumed each year plays a far more significant role in the overall environmental impact of a household than the choice between two different types of beef (conventional or organic).[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] However, the implementation of life cycle assessment is costly and challenging.[§§§§§§§§§§§§§§§§§§§§§]

At the WTO, life cycle labels are recognized as a method that informs consumers in a useful manner on the environmental impact of affected products, while restricting international trade in principle less than other methods. This is especially the case if the schemes are voluntary, allow all interested Members to participate in their preparation, and are transparent. As regards government standards, the obligations listed in Tables 2.2.1 and 2.2.2 directly apply, requiring that they be designed in an origin-neutral manner and not create unnecessary barriers or disguised restrictions on international trade. Furthermore, whenever available and appropriate, such measures shall be based on international standards, such as the standards on ecolabels developed by the International Organization for Standardization.[**********]

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] ESU Services (2011) p. 8.

[§§§§§§§§§§§§§§§§§§§§§] Major challenges include the availability of individual, rather than average, industry data; difficulties to assess the precise environmental impacts of various products; and difficulties to convert the results of life cycle impact assessment into a format easily understandable by consumers. Mark Goedkoop, Vairavan Subramanian, Renée Morin, Product Sustainability Information: State of Play and Way Forward (UNEP 2015).

[**********] The TBT Agreement does not contain a list of international standardizing bodies. However, the majority of standards developed by the International Organization for Standardization qualify as an "international standard" in the sense of Art. 2.4 TBT Agreement. For an overview of relevant standards see: <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100323.pdf>.

Section 5: Conclusion

Private sustainability standards can propagate sustainable production methods and consumption patterns in and outside of Switzerland. However, to exploit their full potential, further action is needed. Increased transparency with respect to ecolabels' overall environmental impact could induce better sustainability outcomes. In addition, more ambitious rules on financial and technical support could reduce private sustainability standards' detrimental impact on market access, especially affecting small producers in developing countries. Important is, however, that the rules are a result of concerted action, both with respect to global principles for standard-setters and to domestic labelling requirements.

Multilateral efforts at the WTO came to a stall, which might be overcome by an open plurilateral agreement. Switzerland's endeavors to this end should arguably attempt at addressing the main existing shortcomings in its domestic standards' landscape. As our data shows, the majority of Switzerland-based private sustainability standards also include information on origin. Against this background, Switzerland may direct the focus of negotiations towards increased transparency and improved institutional design of private standards: both topics have a major potential to address existing shortcomings in the standards' landscape, and represent a balanced compromise between North-South negotiation interests.

At the same time, it appears sensible for Switzerland to advocate for the prevailing view that private schemes do not fall under the TBT Agreement's scope of coverage – which may not be altered by the adoption of best practice guidelines on private standards. This way it can minimize potential trade concerns relating to the Swiss standards' landscape. On the longer term, the insights of this report could serve as a starting point for Switzerland to improve the WTO-law-compatibility of the domestic standards' landscape by i) eliminating trade-restrictive elements of government measures linked to private standards, and/or ii) disconnecting private schemes from government intervention.

Lastly, the increased use of life cycle standards – in cooperation with Switzerland's major trading partners – could help to reduce the country's consumption-based environmental footprint. Life cycle standards are less vulnerable to the shortcomings of issue-specific standards, such as the promotion of products that perform well on one issue, but miss other elements with a major effect on sustainability outcomes. Also, they influence consumer purchase decisions on higher levels, with greater environmental impact. Therefore, the ongoing efforts shall be continued and translated into policies on the retail level.[††††††††††††††††††††††]

[††††††††††††††††††††††] Cf.: DG Environment, 'Report on 2018-2019 stakeholder consultations regarding the potential future use of the Product and Organisation Environmental Footprint methods' (27 April 2020).

Annex 1: Attribution analysis per government measure

Annex 1.1: Border protection for agricultural products

Measure's description

The Swiss border protection for agricultural products establishes a priority for domestic meat products and fresh fruits and vegetables. This arises as a cumulative effect of the following factors:

High out-of-quota duties: As regards agricultural products, a two-fold tariff system applies. Tariff rate quotas with a lower "in-quota" rate are opened per product category. Beyond the in-quota volume, importation is often unprofitable given the manifolds higher out-of-quota rate.

Narrow and aimed definition of quotas: Switzerland's list of concession declared to the WTO was transposed into domestic law[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡], which involved splitting up the notified concessions into quotas and sub-quotas. This allows Switzerland to steer import quantities per product category.[§§§§§§§§§§§§§§§§§§§§§§]

Allocation methods: Import quotas are allocated to Swiss resident holders of a general import licence. The allocation of quotas to licence holders is subject to different allocation regimes:

'Global quotas' apply to wine products,[**********] sorts of egg products, animals of the horse genus and cereals for bread.[††††††††††††††††††††††††] Global quotas are allocated on a first come – first served basis in the order customs declarations are accepted.

'Individual quotas' apply to all remaining agricultural products, and are allocated to licence holders (however, the import rights can be traded). The allocation is conducted in line with one, or a combination of the following allocation methods, depending on the product concerned:

Auction sale: The quota volume is distributed in decreasing order starting from the highest price offered. The results of the auction are published in each case.

Domestic performance: Quotas are distributed either in proportion of the imports or the purchase quantity of domestic products by the licence holder in previous years. This allocation method is considered by the US as discriminative, because it puts companies that principally source imports at a disadvantage. The US considers beef, sheep meat and offal as particularly affected.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]

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‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ BBI 94.080, at p. 1012.

§§§§§§§§§§§§§§§§§§§§§§ For example, there is a separate quota for frozen cherries destined for yoghurt production, respectively a quota for cereals for bread production.

********** No general import licence is required for the importation of a number of natural wine sorts, up to yearly 100 liter wine from the own vineyard as well for sweet wines, wine specialties and mistelles; Arts 43 and 46 Ordinance on Viticulture and the Importation of Wine (SR 916.140).

†††††††††††††††††††††††† For on overview of the exact product groups included see: https://www.ezv.admin.ch/ezv/de/home/information-firmen/verbote--beschraenkungen-und-auflagen/wirtschaftliche-und-landwirtschaftliche-massnahmen/zollkontingente.html.

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ The border protection received particular attention from Switzerland's trading partners. For example, in the course of Switzerland's last trade policy review the US noted that "[t]he Secretariat states that the allocation of some tariff quotas use a "discriminatory system whereby the allocation of the tariff quota is contingent upon local purchase." This is particularly true for beef, sheep meat, and offal where 50% of the quota is allocated on the basis of a contribution to Swiss production. This provision is disadvantageous to companies that principally source product through imports. Will Switzerland explain why it considers this system to be in compliance with its WTO commitments?" (See WT/TPR/M/355/Add.1, p. 16).

For example: the tariff quota for red meat, divided into several subquotas, is allocated as follows:

The subquotas 5.1-5.6 (air dried or conserves of red meat; halal/kosher meat) are auctioned at 100%;

- The subquotas 5.72, 5.73 and 5.75 (bovine bands (i.e. used for the production of Bündnerfleisch), horse meat and goat meat both including offal) are auctioned at 60 % and allocated at 40% percent according to the number of slaughtered animals (domestic performance).
- The subquotas 5.71 (beef and offal) and 5.74 (sheep meat and offal) are auctioned at 50%, respectively allocated at 40% percent according to the number of slaughtered animals, and at 10 percent according to the number of animals auctioned on supervised public markets.[§§§§§§§§§§§§§§§§§§§§§§§§]

Temporal division of quotas and adjustment of in-quota quantities to domestic supply: Tariff quotas and subquotas are divided over the year and opened, depending on the product concerned, e.g. every four weeks, four times a year, or two times a year.[**********] In the case of fresh fruits and vegetables, no tariff quotas are opened if the domestic supply meets the estimated weekly demand.[††††††††††††††††††††††††††]

With regard to both meat products and fresh fruits and vegetables, FOAG determines the quantities released in each period of (sub)quota opening. To this end, it cooperates with the parties interested, respectively opens quotas only to the extent domestic supply does not meet the estimated weekly demand.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]

Attribution: Import restrictions reflected in private standards

The temporal division of tariff quotas and the adjustment of in-quota quantities to domestic supply establish the priority of sensible domestic products.[§§§§§§§§§§§§§§§§§§§§§§§§§§] Particularly affected are fresh fruits, vegetables and meat products.

Bio Suisse: This system of "priority" predicates BS's NT inconsistency, as importation to the out-of-quota duty is not economically feasible for BS. Thus, in case import quotas are insufficient (which depends on the ratio of domestic supply and demand), complying foreign products will not be imported, nor will they receive the Bud logo. We note that the BS standard explicitly refers to statutory import provisions.[**********] Based on this nexus, the

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[§§§§§§§§§§§§§§§§§§§§§§§§] Art. 14 ff. Ordinance on Slaughter Cattle and the Meat Market (SR 916.341).

[**********] See for example Art. 16 Ordinance on Slaughter Cattle and the Meat Market.

[††††††††††††††††††††††††††] Art. 5 Ordinance on the Import and Export of Vegetables, Fruit and Horticultural Products (SR 916.121.10); this applies only for the period quotas are 'managed'.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Art. 5 Ordinance on the Import and Export of Vegetables, Fruit and Horticultural Products and Art. 16 Ordinance on Slaughter Cattle and the Meat Market; If tariff (sub)quotas together with domestic production are not sufficient to meet the actual domestic demand, the Federal Council or FOAG (depending on the product) may increase the corresponding quotas.

[§§§§§§§§§§§§§§§§§§§§§§§§§§] This especially holds true as out-of-quota importation is not feasible on account of the high duties.

[**********] Please note that the private standard explicitly refers to statutory import provisions "Bio Suisse will restrict the use of the 'Bud' logo on products from outside of Switzerland if there is sufficient domestic production or if the entire production process takes place outside of Switzerland. […] Products which can mainly be supplied by domestic production in Switzerland and for which there are insufficient statutory import provisions may only be imported under individual import permits issued by Bio Suisse." (Bio Suisse – Standards for the Production, Processing and Trade of 'Bud' Products, Part V Standards for Operations Outside of Switzerland and

discriminating private behavior may be attributed to the government both under the TBT Agreement and GATT. Trade law concerns arise based on non-compliance with the NT principle as enshrined in Art. 2.1 TBT Agreement and Art. III:4 GATT.

Sector of agriculture (general): The "priority" of domestic products and the allocation of tariff quotas based on domestic performance give retailers an incentive to enter into long-term supply contracts with domestic producers' collectives. Corresponding obligations of "cooperation" are also reflected in the private standards.[††††††††††††††††††††††††] This vertical integration facilitates the emergence of discriminating retailer's schemes, like TerraSuisse and Coop Naturaplan, and supports the exclusion of foreign products from Switzerland-based schemes in general. Therefore, the government may be seen in violation of Art. 4.1 TBT Agreement as it fails to refrain from conduct encouraging "standardizing bodies" to act inconsistently with the TBT Agreement's principles. Also, we note that the border protection for agricultural products in itself exhibits features that are arguably in conflict with Art. 4 Agreement on Agriculture.

Annex 1.2: Ecological Performance Criteria

The EPC is a minimum standard for environmentally friendly agricultural production in Switzerland; compliance is a prerequisite for farmers to receive direct payments (Art. 11 Ordinance on Direct Payments, SR 910.13).

The IPS standard and the Vinatura label are based on the EPC; additional requirements laid down in the standards are of limited commitment (to attain the Vinatura label no certification beyond compliance with EPC is required, controls take place together). Furthermore, Vinatura's holder, the Swiss Association for Sustainable Development in Viticulture (VITISWISS), was mandated by FOAG to elaborate the EPC for viticulture[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡], and IPS cooperates with FOAG and FOEN in developing its standard and monitoring compliance.[§§§§§§§§§§§§§§§§§§§§§§§§]

Based on this nexus, the private behavior may be attributed to the government both under the TBT Agreement and GATT. A finding of attribution would trigger the government's responsibility for non-compliance with the NT principle as enshrined in Art. 2.1 TBT Agreement and Art. III:4 GATT.

Annex 1.3: Swissness legislation

The legislation defines criteria to use the Swiss indication of source on product labels and in advertisement. The criteria are defined per product group (i.e. for natural products, foodstuffs and industrial products) and are structured as a basic rule with sets of exceptions.[*************************]

The legislation's stated aim is to fight deceptive practices and to provide origin information to consumers. These endeavors are recognized as legitimate policy goals; if the legislation is found to work towards these objectives *in an even-handed manner*, its conflict with the NT principle

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for Imported Products, Version 2019, p. 262 f, Available at: https://www.bio-suisse.ch/media/VundH/Regelwerk/2019/EN/rl_2019_en_excerpt_part_v__6.2.2019.pdf).

[††††††††††††††††††††††††] See the provisions on "Volume planning" and "Setting fair prices" in Bio Suisse – Standards for the Production, Processing and Trade of 'Bud' Products – Part I Common Standards – 5 Fair trade relations, Version 2017, p. 40, Available at: https://www.bio-suisse.ch/media/VundH/Regelwerk/2017/EN/pf_rl_2017_1.6_e_gesamt_28.09.2017.pdf.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] See at the homepage of VITISWISS: https://swisswine.ch/de/node/510.

[§§§§§§§§§§§§§§§§§§§§§§§§] See at the webpage of IPS: https://www.ipsuisse.ch/konsumenten/engagement/messbarkeit/.

[*************************] For natural products no exceptions are in place.

can be justified. In the case of successful justification, the attribution of the corresponding private behavior would not trigger the government's responsibility. Therefore we first analyze the legislation itself, and in a second step we examine attribution. The legislation's varying requirements necessitate a separate analysis per product group.

Annex 1.3.1: Processed foodstuffs

Measure's description and WTO law consistency

Description:

Basic rule: To label a foodstuff as "Swiss", 80% of the raw materials' weight (respectively 100% of milk) must come from Switzerland and essential processing must take place in here.

Exceptions: Raw materials (temporarily) not available in Switzerland are not counted towards the 80% threshold, while raw materials with a self-sufficiency grade below 50% are only counted to half or not at all.[††††††††††††††††††††††††††] The applicable self-sufficiency grades and the exception lists are determined by FOAG, but no clear-cut rules on its approach are publicly available. As an example, for the purposes of "Swissness" tomato concentrate is not available in Switzerland since domestic tomatoes are destined for fresh consumption. Also exempted are e.g. purees and concentrates of apricot and blackcurrant for ice cream and bonbon production, and special rules apply to coffee and chocolate.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]

Possible NT conflict: On a question from the EU, Switzerland submitted that it does not expect the Swissness legislation to restrict international trade.[§§§§§§§§§§§§§§§§§§§§§§§§§§§§§] At the same time, it estimates the additional value of "Swissness" to amount to at least 20% of the retail price, which sets an incentive for manufacturers to comply with the legislation and to source raw materials domestically if they count towards the 80% threshold. Therefore, the Swissness legislation (already by its design) is likely to restrict international trade and affect the competitive opportunities of imports to the detriment. For this reason, the legislation appears to be in an initial conflict with the NT principle as enshrined in Art. 2.1 TBT Agreement and Art. III:4 GATT.

Prospects for justification: An (initial) conflict with Art. 2.1 TBT Agreement / Art. III:4 GATT can be justified on the prerequisite that the detrimental impact on imports stems exclusively from a legitimate regulatory distinction. But the contrary must be concluded if the measure constitutes arbitrary or unjustifiable discrimination. Relevant factors in this context are whether origin information is delivered as defined under the legislation and the consumer can be expected to understand it.

The legislation draws a distinction between "Swiss" and other products. In order to label a product as "Swiss", at least 80 % of the raw material's weight must be domestic and essential

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[††††††††††††††††††††††††††] Raw materials for which Switzerland has at least 50 percent self-sufficiency must be taken into account. Raw materials for which the degree of self-sufficiency is 20-49.9 percent shall be counted only to half. Raw materials for which the degree of self-sufficiency is less than 20 percent can be excluded from the calculation (Art. 48*b* Trademark Protection Law (SR 232.11)). For the self-sufficiency grade, see Annex I Ordinance on the use of the Swiss Indications of Source for Foodstuffs (SR 232.112.1); for the list of exceptions see Annex I and Annex II WBF Ordinance on the Use of Swiss Indications of Source for Foodstuffs (232.112.11).

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Art. 5.4 Ordinance on the use of the Swiss Indications of Source for Foodstuffs.

[§§§§§§§§§§§§§§§§§§§§§§§§§§§§§] See WT/TPR/M/355/Add.1, p. 40. The EU's question concerned i.e. i) how Switzerland assesses the impact of the new Swissness rules on imports of inputs and on the level of prices; ii) what prompted the decision to issue two sectoral regulations on watches and cosmetics; iii) what is the role of representatives of sectoral organizations under the new Swissness rules and how does Switzerland make sure that this role is not exercised to the detriment of competitors not represented by the organizations.

processing must take place in Switzerland. Yet, a number of raw materials that were 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. These exceptions arguably distort the information consumers receive with regard to the 80% threshold.

Furthermore, the legislation appears to balance the interests of domestic producers and manufacturers. It allows domestic products to be sold fresh at a higher price (e.g. tomatoes and apricots), while manufacturers may import "non-competing" products (e.g. tomato concentrate and apricot pulp) and label their products "Swiss". This questions the legislation's even-handed nature and, accordingly, its compliance with WTO-law. In this context we note that the BS standard explicitly states that the "processing requirement" serves to protect Swiss processing operations.[**********]

Attribution: Import restrictions reflected in private standards

Most Switzerland-based private standards in the agricultural sector (with or without explicit reference to the Swissness legislation) use the Swiss indication of source on their labels[††††††††††††††††††††††††††††], indicating compliance with the Swissness legislation. Based on this nexus, attribution under both the TBT Agreement and GATT is likely to be answered in the affirmative. Potential trade law concerns arise with regard to processed agricultural products. The exceptions are likely to inhibit successful justification, meaning that the government may be held responsible (also) for the NT-inconsistent private behavior under Art. 2.1 TBT Agreement and Art. III:4 GATT.

Annex 1.3.2: Cosmetic Products

Measure's description and WTO law consistency

Description: The Federal Council is entitled to specify sectoral "Swissness" criteria, in particular upon application by an industry. As of today, two sectoral ordinances are in place: for watches and for cosmetics.

The Ordinance on the use of the Swiss Indications of Source for Cosmetic Products (SR 232.112.3) was applied for by the Swiss Cosmetic and Detergent Association (SKW). It amends the "Swissness" requirements for industrial products with sectoral ones in order to take account of the specific features and interests of the industry.

Basic rule: To label a cosmetic product as "Swiss" the basic rule for industrial products requires that 60% of manufacturing costs is incurred in Switzerland. The sectoral ordinance specifies that these must include min. 80% of R&D costs. Further, the bulk must be manufactured, the products must be filled, and quality controls required by law must take place in Switzerland.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]

Exceptions: Excluded are costs for natural products which, due to natural conditions, cannot be produced or are not available in sufficient quantity in Switzerland. To this end the SKW is entitled to create a positive or negative list of available ingredients. The publication of a positive list is foreseen as soon as a member of the SKW requests an entry. In lack of a list,

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********** "Bio Suisse does not allow products that are entirely processed outside of Switzerland. Simple kinds of processing (e.g., drying, deep-freezing, pitting, cleaning, sorting) carried out directly in the land of origin are exempted. […] A derogation may be made from the policy of protecting Swiss processing operations if […]" (Bio Suisse – Standards for the Production, Processing and Trade of 'Bud' Products, Part V Standards for Operations Outside of Switzerland and for Imported Products, Version 2019, p. 263).

†††††††††††††††††††††††††††† Demeter and Delinat appear as the two sole exceptions.

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ Art. 48*c* Trademark Protection Law, Art. 3f Ordinance on the use of the Swiss Indications of Source for Cosmetic Products.

manufacturers may import ingredients without counting the respective costs towards their products' "Swissness", as they can assume that raw materials are "not available in Switzerland".[§§§§§§§§§§§§§§§§§§§§§§§§§§§§]

Possible trade law conflicts: The EU pointed to procedural biases, which the involvement of Swiss sectoral organizations in the legislations' development and implementation is likely to entail. In particular, the EU was concerned that sectoral organizations exercise their influence to the detriment of competitors not represented by the organizations (arguably in conflict with Art. 2.9.4 TBT Agreement).[****************************] The deviation from the "general rule" required by the sectoral ordinance (i.e. min. 80% of R&D costs instead of 60% of manufacturing costs) appears as an example to this end, causing the sectoral requirements to be more trade-restrictive than necessary.

The additional value of "Swissness" for cosmetics is estimated to account to up to 50% of the retail price. While international trade in components is unlikely to be affected, the legislation will foreseeably put competing foreign end products at a disadvantage. Therefore, its even-handed design and necessity to achieve a legitimate policy goal – to inform consumers on the products' origin and to prevent fraudulent practices – appear crucial to show compliance with Arts 2.1 and 2.2 TBT Agreement and Art. III:4 GATT, respectively. Exceptions, as highlighted above, play an important role in this inquiry. Similar to processed agricultural products, several cost positions from the calculation of manufacturing costs of cosmetics – prominently that of raw materials – are excepted. These exceptions seem to distort consumer information, but to advance the Swiss location. Manufacturers can import raw materials to a convenient price, but sell their products with an estimated 50% surplus.

Attribution: Import restrictions reflected in private behavior

The sector's sole Switzerland-based private sustainability standard, Coop Naturaline Swiss Cosmetics, explicitly refers to the Swissness legislation. Based on this nexus, attribution under both the TBT Agreement and GATT may be answered in the affirmative.

Notably, domestic manufacturers comply to a great extent with the Swissness legislation (mostly without sustainability requirements / certification of organic production in line with statutory requirements). Thus, the government-induced trade-restrictive private behavior is primarily manifested in the behavior of Swiss producers rather than in Switzerland-based private sustainability standards. Still, attribution is substantiated in the same way as with regard to private standards.

The exceptions could possibly inhibit successful justification, meaning that the government would be held responsible (also) for the private behavior inconsistent with the NT principle as enshrined in Art. 2.1 TBT Agreement and Art. III:4 GATT and the prohibition to apply standards more trade-restrictive than necessary as enshrined in Art. 2.2 TBT Agreement.

[§§§§§§§§§§§§§§§§§§§§§§§§§§§§] Unless indicated otherwise in the list for agricultural products: Paras 14 and 17 SKW Regelement, Verwendung schweizerischer Herkunftsangaben für kosmetische Mittel < https://www.skw-cds.ch/fileadmin/user_upload/161211_Reglement_f%C3%BCr_die_F%C3%BChrung_einer_Positivliste.pdf>.

[****************************] See at fn. 59.

Annex 1.3.3: Forestry

The Switzerland-based private certificate of origin "Schweizer Holz" is based on the Swissness legislation.[††††††††††††††††††††††††††††] Depending on the product concerned different rules come to application. Even-handed rules for natural products apply to log wood, leaving no room for trade law concerns. The Swissness rules for processed agricultural products apply i.e. to sawmill products, whereas those for industrial products apply to i.e. fiberboards and pellets for production facilities, evoking the same considerations previously expressed in the context of processed agricultural products and cosmetics.

Annex 1.4: Financial contributions for marketing

In the sector of agriculture, the federal government provides a number of private associations behind NT-inconsistent standards with financial contributions for sales promotion. The supported associations include IPS, BS, alpinavera and regio.garantie. With regard to BS, FOAG notes that "particular attention must be paid to ensuring that the Swiss origin of products is at the centre of attention".[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]

Financial contributions for marketing do not suffice to substantiate a nexus implying attribution. But they signal the government's endorsement towards the NT-inconsistent private behavior, which could trigger its responsibility under Art. 4.1 TBT Agreement.

Annex 1.5: Mountain and Alp Ordinance

Measure's description and WTO law consistency

The ordinance provides that the terms "mountain" and "alp" can only be used for the purposes of labelling and advertising if the product or the ingredient concerned stems from the Swiss mountain region as defined in the Agricultural Zoning Ordinance (SR 912.1).[§§§§§§§§§§§§§§§§§§§§§§§§§§§§] In principle, processing must also take place in the Swiss mountain region. Excepted is the use of the term "alp" in cases when reference is obviously made to a geographical region. The exception does not cover milk and meat products. Qualifying products are entitled to use the official labels.

The ordinance only applies to domestic products and does not affect the labelling of imports (which is only subject to the Law against Unfair Competition (SR 241)). But it fails to provide for the *possibility* to recognize equivalent foreign standards or products.[****************************]

The ordinance was enacted before EU Regulation 1151/2012, which establishes protection for 'mountain products' within the EU. The draft explanatory note to the Swiss ordinance states that depending on regulatory developments in the EU, it will be examined to which extent

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[††††††††††††††††††††††††††††] See <https://www.holz-bois-legno.ch/lignum/downloads/reglement-label-zwischenversion-290519.pdf>.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Bundesamt für Landwirtschaft, Landwirtschaftliche Absatzförderung, Umsetzungsprogramm 2019-21, p. 16. Available at: https://www.blw.admin.ch/blw/de/home/instrumente/qualitaets--und-absatzfoerderung/absatzfoerderung.html.

[§§§§§§§§§§§§§§§§§§§§§§§§§§§§] Art. 8 TBT Agreement provides that, wherever appropriate, the requirements of mandatory government standards shall be specified in terms of performance. The ordinance might be seen in conflict with this provision, as it defines "mountain" and "alp" regions in reference to the Agricultural Zoning Ordinance instead of specifying e.g. the required altitude and slope steeps.

[****************************] For example, the respective EU regulation provides in this respect that "For third-country products, mountain areas include areas officially designated as mountain areas by the third country or that meet criteria equivalent to those set out in Art. 18(1) of Regulation (EC) No 1257/1999." (Art. 31(2) EU Regulation 1151/2012).

mutual recognition between Swiss and EU regulations can be contractually regulated, in order to mutually improve the market access for mountain and alp products.

Further, the draft notes that, depending on the development of cooperation with the EU in this area, it should be examined at a later date to what extent the use of the official labels could be extended to foreign producers whose production standards meet the conditions of the Swiss Mountain and Alpine Ordinance.

Arguably, the EU framework does not meet the level of protection established by the Swiss Mountain and Alp Ordinance.[†††††††††††††††††††††††††††††] Yet, the schematic exclusion of (equivalent) foreign "mountain" and "alp" products from the Swiss scheme appears to be in conflict with the NT principle.

Attribution: Import restrictions reflected in private behavior

The ordinance is used as a basis for private labels. As a result, foreign "mountain" and "alp" products are excluded from retailers' respective product ranges. Given the private schemes' reference to federal legislation, attribution under both the TBT Agreement and GATT is likely to be answered in the affirmative. Attribution would imply the government's responsibility (also) for the NT-inconsistent private behavior under Art. 2.1 TBT Agreement and Art. III:4 GATT.

Annex 1.6: Recognition of "Schweizer Holz" as a proof of sustainability in government procurement

The Switzerland-based private certificate of origin "Schweizer Holz" is recognized as a proof of sustainable timber production for the purposes of government procurement, although it makes no reference to sustainability criteria. This practice is based on the argument that the Swiss forest law is one of the strictest worldwide and guarantees, thanks to the high requirements and comprehensive implementation by the cantonal forestry services, sustainable forest use.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]

In this context we reiterate, in line with Weber and Kaufmann,[§§§§§§§§§§§§§§§§§§§§§§§§§§§§§] that the application of purely origin-related criteria in a procurement tender goes against the principle of non-discrimination (also enshrined in the GPA). Compliance with statutory requirements can be sufficient proof of sustainability, but restricting such proof in public procurement to domestic goods is likely to be found in violation of the NT principle and the obligation to specify technical specifications, where appropriate, in terms of performance and functional requirements, rather than design or descriptive characteristics.[******************************]

[†††††††††††††††††††††††††††††] See: Rob McMorran, Fabien Santini, Fatmir Guri, Sergio Gomez-y-Paloma, Martin Price, Olivier Beucherie, Christine Monticelli, Alexia Rouby, Delphine Vitrolles et Guillaume Cloye, A mountain food label for Europe? The role of food labelling and certification in delivering sustainable development in European mountain regions, Table 2. Available at: https://doi.org/10.4000/rga.2654. This is relevant to show Switzerland's compliance with Art. 2.7 TBT Agreement.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Koordinationskonferenz der Bau-. Und Liegenschaftsorgane der öffentlichen Bauherren, Nachhaltig produziertes Holz beschaffen www.kbob.admin.ch/kbob/de/home/publikationen/nachhaltiges-bauen.html , referring to Antwort des Bundesrates vom 03.02.2010 auf die Interpellation 09.4026 «Ökologische Kriterien für Holzkäufe».

[§§§§§§§§§§§§§§§§§§§§§§§§§§§§§] Universität Zürich, Rolf H. Weber and Christine Kaufmann, Rechtsgutachten zur Verwendung von Schweizer Holz in Bauten mit öffentlicher Finanzierung (Rechtsgutachten II, RG II) 2015, S. 4.

[******************************] Arts IV:1 and X:2(a) GPA.

Annex 2: List of covered standards

Annex 2.1: Switzerland-based private standards in the sectors of agriculture and viticulture

<table>
<tr><td colspan="3">IP – SUISSE</td></tr>
<tr><td colspan="3"><u>Binding ecological requirements</u>
Cross-sectoral requirements on biodiversity and animal husbandry, as well as sector-specific requirements on e.g. pesticide use. These are, to a great extent, based on the EPC and further provisions of the Ordinance on Direct Payments (SR 910.13). Compliance with the EPC qualifies and entitles farmers to receive financial payments from the government.
<u>Recommendations on ecological performance</u>
General points to raise awareness among producers with regard to social aspects and sustainable production; a binding 10% reduction of CO_2 emissions as compared to 2016 is intended from 2020 on.
<u>Import restrictions</u>
Certification is only available to Swiss products.</td></tr>
<tr><td>Market share</td><td>Products comprised: Cereals, meat, milk, potatoes, rapeseed, eggs, fruit destined for juice, vegetables, processed agricultural products
Market share:
• 20 – 26% of meat
• 25% of cereals
• 1% of potatoes and milk
(Information by N. Hofer, IP-SUISSE)</td><td>Following labels are based on IP – SUISSE certification:
• Migros Terra Suisse
• Migros Weide Beef
• Aldi Nature Suisse
• Silvestri Weiderind
• Swiss Black Angus
• Pure Simmental
• Naturel
• Agri Natura
• Hochstamm Suisse label</td></tr>
<tr><td>WTO – law consistency</td><td colspan="2"><u>Private behavior</u>: Only products of Swiss origin (including the customs territory) may be certified with the standard. Equivalent foreign products are excluded from certification.
<u>Attribution</u>:
1) EPC: The standard is based on the EPC, a prerequisite for farmers to receive direct payments. Further, IPS cooperates with FOAG and FOEN in developing and monitoring compliance. Based on this nexus the discriminating private behavior may be attributed to the government both under the GATT and the TBT Agreement.
2) Border protection: The “border protection for agricultural products” as described under Annex 1.1 restricts competition and gives retailers a strong incentive to source domestic agricultural products. For those cases where there are no import quotas available (to the in-quota tariff), retailers are urged to ensure supply from domestic producers and enter into long-term supply arrangements. In turn, this supports private schemes in excluding foreign producers. This basis may suffice to conclude that the government fails to refrain from conduct encouraging “standardizing bodies” to act inconsistently with the TBT Agreement’s principles, triggering its responsibility under Art. 4.1 TBT Agreement.
3) Financial contributions for marketing: A part of the government budget for agricultural products’ sales promotion is earmarked for private</td></tr>
</table>

	standardizing bodies, including IPS. While financial contributions for marketing may not suffice to substantiate a nexus of attribution, they signal the government's endorsement towards the NT-inconsistent private behavior. The government's responsibility may be triggered under Art. 4.1 TBT Agreement. **Potential trade law concerns**: Principle of national treatment, as set out in Art. 2.1 TBT Agreement and Art. III:4 GATT/Art. 4.1 TBT Agreement in connection with Annex 3.D TBT Agreement (obligation to refrain from conduct encouraging "standardizing bodies" to act inconsistently with the TBT Agreement's principles).

Bio Suisse

Binding ecological requirements

Binding cross-sectoral and sectoral requirements on sustainable water, energy, forest and land use, use of pesticides and obligation to reduce CO_2 emissions. These criteria are more stringent than the ones laid down in the Swiss/EU organic ordinance and are applied indiscriminately as regards origin.

Binding social requirements

For non-Swiss production sites: Compliance with ILO Fundamental Principles and Rights at Work.
For Swiss producers: Obligation to participate in roundtable talks with retailers. In such talks, "(i)f one of the commercial partners so demands, binding target agreements must be concluded on the basis of the guidelines set forth in the 'Code of conduct for trade in 'Bud' products'". Bio Suisse explicitly encourages such agreements to include (non-binding) volume and price targets.

Import restrictions

Discrimination against imported products: Restrictions on the importation of complying non-Swiss products which can mainly be supplied by domestic production and for which there are insufficient statutory import provisions. Also, such complying products must not be labeled with the 'Bud' logo. Further, no foreign products can be imported if the entire production process takes place outside of Switzerland. ("A derogation may be made from the policy of protecting Swiss processing operations if the addition of a given processed product would serve the common interest by enhancing the appeal of the Bio Suisse 'Bud' range of products, if consumer expectations would not be disappointed, and if no Swiss processing operation could make such products.") With regard to plant breeding source material, the 'Bud' source from Switzerland should take precedence.

Discrimination amongst imported products: Priority of products from Europe/the Mediterranean Rim. Air transport is prohibited.

Market share	Products comprised: Milk, Meat, Fish, Fruit & Vegetables, Eggs, Cereals and processed agricultural products About 60% of organic products marketed in Switzerland are certified with the standard; 13% of all Swiss farms and 93% of all Swiss organic farms certified with the standard (Bio Suisse, Annual Media Conference Report, 2017)	Following labels are based on Bio Suisse certification: • Coop Naturaplan (min 95% sourced from Bio Suisse) • Migros Bio (direct recognition of Bio Suisse certified products & priority of Swiss products) • Migros Bio Weide Beef (with additional requirements on breed, feed and animal husbandry) • Manor Bio Nature plus (and Manor Nature plus for farms in conversion) • Fidelio(with additional requirements on animal

		husbandry and recommendations on breed) • KAG Freiland with additional requirements on animal husbandry and recommendations on breed) • Natura – Beef Bio • Aldi Nature Suisse Bio
WTO – law consistency	**Private behavior**: The standard gives priority to Swiss over imported products / products from the Mediterranean Rim over other third-country products. **Attribution**: **1) Border protection**: **Direct link**: The temporal division of tariff quotas and the adjustment of in-quota quantities to domestic supply establish the priority of sensible domestic products. Particularly affected are fresh fruits, vegetables and meat products. This system of "priority" shows a direct link to the BS standard's NT inconsistency: it is not feasible for BS to import foreign products to the out-of-quota duty. Thus, in case import quotas are insufficient (which depends on domestic supply and demand), complying foreign products will not be imported, nor will they receive the Bud logo. We note that the BS standard explicitly refers to statutory import provisions. Based on this nexus, the discriminating private behavior is likely to be attributed to the government under the TBT Agreement and GATT. However, we identified no direct link to the discriminating private behavior amongst imports (MFN-principle). **Indirect incentive:** The border protection supports private standard schemes in excluding foreign producers also indirectly, through retailers' behavior (See Annex 2.1, IPS). **2) Swissness legislation:** In order to use the Swiss indication of source on foodstuffs, the legislation requires that at least 80% of the raw material's weight stems from and essential processing takes places in Switzerland. In line with this, the standard i.e. restricts the importation of processed (other than simple kinds of processing, e.g., drying, deep-freezing, pitting, cleaning, sorting) products – notably with explicit reference to the restriction's aim to protect Swiss processing operations. Based on this nexus, the discriminating private behavior is likely to be attributed to the government under GATT and the TBT Agreement. **3) Financial contributions for marketing**: A part of the government budget for agricultural products' sales promotion is earmarked for private standardizing bodies, including BS. FOAG notes in this respect that "particular attention must be paid to ensuring that the Swiss origin of products is at the centre of attention". While financial contributions for marketing may not suffice to substantiate a nexus of attribution, they signal the government's endorsement towards the NT-inconsistent private behavior. The government's responsibility may be triggered under Art. 4.1 TBT Agreement. **Potential trade law concerns**: Principle of national treatment, as set out in Art. 2.1 TBT Agreement and Art. III:4 GATT/Art. 4.1 TBT Agreement in connection with Annex 3.D TBT Agreement. The Swissness legislation's and the corresponding private behavior's compatibility with WTO law depends on whether the deviation from the NT principle can be justified. While the legislation aims at a legitimate policy goal, the exceptions could hinder its justification: they reveal a design that distorts	

	consumer information and exacerbates the legislation's trade-restrictive effect, while balancing the interests of domestic producers and manufacturers.
VINATURA	
Binding ecological requirements Compliance with the EPC and a few additional requirements of limited commitment, which are concerned with biodiversity, soil management and pesticide use. These are laid down by VITSWISS (Swiss Association for Sustainable Development in Viticulture). **Recommendations on ecological performance** General points to raise awareness among producers with regard to sustainable water, energy and land use. **Other prerequisites for using the label** The use of the label does not require certification; controls take place together with the controls of compliance with the EPC. Wines must be submitted for a degustation and reach a certain performance; only vintage wines (Jahrgangswein) may be considered. **Import restrictions** The label is only available to Swiss products.	
Market share	Products comprised: Wines and grape
WTO – law consistency	**Private behavior**: Only products of Swiss origin qualify for the label. Foreign products are excluded from certification. **Attribution**: VITISWISS was commissioned by FOAG to elaborate the EPC in Viticulture (prerequisite for producers to receive direct payments). Compliance with the EPC forms the basic requirements to attain the Vinatura label. The "Vitiswiss-Projekt" and the use of the Vinatura label are also referred to in government documents as means to optimize water and energy consumption in order to reinforce the commitment towards consumers (FOAG, Vernehmlassung zu Agrarpolitik 2014-2017, Erläutender Bericht vom 23. März 2011, fn. 89). Based on this nexus, the discriminating private behavior may be attributed to the government both under the TBT Agreement and GATT. **Potential trade law concerns**: Principle of national treatment, as set out in Art. 2.1 TBT Agreement and Art. III:4 GATT/Obligation to refrain from conduct encouraging "standardizing bodies" to act inconsistently with the TBT Agreement's principles, as set out on Art. 4.1 in connection with Annex 3.D TBT Agreement.
Further meat labels	
Binding ecological requirements Animal husbandry and feed. **Recommendations** Breed. **Import restrictions**	

Certification is only available to Swiss products.	
Market share	Standards in this category include: • Coop Naturafarm • Natura-Beef / Natura-Veal • SwissPrimBeef/SwissPrimPorc • Swiss Quality Beef • Qualitätsmarke Schweizer Fleisch
WTO – law consistency	**Private behavior**: Certification with the above standards is only available for Swiss products; equivalent foreign products are excluded from certification. **Attribution**: While the Swiss border protection supports the exclusion of foreign products from certification, without further ties to the government a finding of "sufficient incentives" is unlikely. We also note in this context that a Member's mere failure to curtail private conduct may not trigger its responsibility for that behavior under the WTO Agreements. Recognition of the standard-setting bodies under the TBT Agreement does not stand to reason. In particular, there are no indices of government participation in the standard-setting processes, or of government endorsement by means of financial support or support in the standards' implementation. Thus, in our view, the government may not be held responsible for the private action as regards these schemes. **Potential trade law concerns**: No substantiated concerns appear.
Labels using the terms "mountain" or "alp"	
Binding sustainability requirements Compliance with the Mountain and Alp Ordinance (SR 910.19). The ordinance provides that the terms "mountain" and "alp" can only be used for the purposes of labelling and advertising if the product or the ingredient concerned stem from the Swiss mountain region as defined under the Agricultural Zoning Ordinance (SR 910.13). In principle, processing must also take place in the mountain region. Excepted is the use of the term "alp" in cases when reference is obviously made to a geographical region. The exception does not cover milk and meat products. Qualifying products are also entitled to use the official labels. **Import restrictions** The ordinance only applies to domestic products, and does not affect the labelling of imports (which is only subject to the Law against Unfair Competition (SR 241). However, it does not provide for the possibility to recognize equivalent foreign standards. Since the ordinance is used as a basis for private labels, retailers are likely to exclude foreign "mountain" and "alp" products from their respective product range – affecting the competitive opportunities of foreign products to the detriment.	
Market share	The following labels certify mountain or alp origin as defined under the Mountain and Alp Ordinance: • Coop Pro Montagna • Migros Heidi • Spar "Schellen-Ursli"

	• Schweizer Bergkräuter • Schweizer Alpprodukt /Schweizer Bergprodukt (official labels)
WTO – law consistency	**Private behavior:** Retailer labels define "mountain" and "alp" by reference to federal legislation. This implies the exclusion of foreign products from the respective retailer schemes. **Attribution:** The private schemes (explicitly) refer to the Mountain and Alp Ordinance. Based on this link, the discriminating private behavior may be attributed to the government both under the TBT Agreement and GATT. **Potential trade law concerns:** Principle of national treatment, as set out in Art. 2.1 TBT Agreement and Art. III:4 GATT.
Labels referring to local origin	
Binding sustainability requirements In principle "local" origin, allowing a maximum of 30 km distance of the production site from retail store or restaurant. Compound products must stem as a whole from the "region"; as regards composite products, 60 – 80% of the raw materials must originate in the designated region. Exceptions are provided in case a composite product's ingredients are not available in sufficient quality or quantity in the defined region. In such cases, with the exception of the main ingredient, the ingredients may come from anywhere in Switzerland or be imported if not available in Switzerland. **Import restrictions** Only local products qualify for the labels; priority to Swiss raw materials in case an ingredient for a composite product is not available in the region concerned.	
Market share	The following labels certify local/geographically confined origin: Standards containing exceptions • Migros Aus der Region. Für die Region • Coop Miini Region • Manor lokal • Regio.Garantie (with arguably the most problematic exceptions) • Alpinavera Standards without exceptions • Volg, Feines vom Dorf • Landi, Natürlich vom Hof • Spar, Frisch aus der Nachbarschaft
WTO – law consistency	**Private behavior**: Only products of local origin may be certified with the above standards. As regards the "group with exceptions", in case a raw material is not available in the concerned region, priority is given to Swiss ingredients. A number of further exceptions apply (e.g. the regio.garantie standard deems Swiss beet sugar as "local ingredient"). **Attribution**: A part of the government budget for agricultural products' sales promotion is earmarked for regional brands. This signals the government's endorsement towards the NT-inconsistent private behavior, and may trigger its responsibility under Art. 4.1 TBT Agreement. Further, FOEN participates in the standard-setting of the regio.garantie scheme and provides support for its implementation (See: regio.garantie annual reports 2018-2020). Based on this nexus, the discriminating private behavior may be attributed to the government both under the TBT Agreement and GATT.

	Potential trade law concerns: Providing origin information to consumers in a consistent manner is recognized as legitimate policy aim under the WTO Agreements and can justify a deterioration of competitive opportunities of imported products. However, the exceptions might be found to distort the origin information consumers receive and thus to contradict the standards' stated aims. Such finding would render the standards with exceptions incompliant with the NT obligation as set out in Art. 2.1 TBT Agreement and Art. III:4 GATT/imply the government's responsibility under Art. 4.1 in connection with Annex 3.D TBT Agreement.
'Open' labels	
Requirements on: Compliance with origin-neutral criteria, set out in terms of performance (e.g. compliance with the Swiss or the EU organic ordinance; with the 'Delinat' directive; vegetarian/vegan composition of a product).	
Market share	Switzerland-based labels in this category include • Globus Organic • Delinat • Demeter International labels used by (Swiss) retailers include • V-label • Spar Natur pur • Aldi Natur aktiv bio • Lidl Bio • Alnatura
WTO – law consistency	No indications of concern; these standards require compliance with origin-neutral criteria, set out in terms of performance in a coherent manner / based on international standards.

Annex 2.2: Switzerland-based private standards in the sector of cosmetics and cleaning

Coop Naturaline Swiss Cosmetics	
Binding ecological requirements Certification with the Cosmos standard (Cosmos Natural or Cosmos Organic) **Import restrictions** Compliance with the Swissness criteria for cosmetics as laid down in the Ordinance on the Use of Swiss Indications of Source for Cosmetic Products (SR 232.112.3)	
Market share	Products comprised: Cosmetics
WTO – law consistency	**Private behavior**: Besides compliance with the origin-neutral requirements of the international private standard Cosmos (set out in terms of performance), products must be "Swiss-made"; equivalent foreign products are excluded from certification. **Attribution**: The standard directly refers to the Swissness legislation. Based on this nexus, the discriminating private behavior may be attributed to the government under both GATT and the TBT Agreement.

	Potential trade law concerns: Principle of national treatment, as set out in Art. III:4 GATT and Art. 2.1 TBT Agreement. The Swissness legislation's and the corresponding private behavior's compatibility with WTO law depends on whether their deviation from the NT principle can be justified.
Coop Oecoplan	
Binding ecological requirements Certification with private international (FSC, GOTS, Ecocert), regional (EU eco-label) or national governmental (Blauer Engel, Österreichisches Umweltzeichen, Nordic Ecolabel) standards. **Binding social requirements** The producer must be signatory to the BSCI Code of Conduct. The implementation and monitoring of social requirements at production sites in high-risk countries must be carried out in accordance with the BSCI by means of a BSCI audit.	
Market share	Products comprised: Detergents and cleaning agents, textile cleaning
WTO – law consistency	No indications of concern; the standard requires compliance with origin-neutral criteria, set out in terms of performance. These criteria are also based on international standards.
Migros Plus	
Binding ecological requirements Certification with the OECD Test 302 B extended which requires "inherent" biodegradability (while the EU Ecolabel requires "ready" biodegradability in line with the OECD 301 standard)	
Market share	Detergents and cleaning agents, textile cleaning
WTO – law consistency	No indications of concern; the standard requires compliance with origin-neutral criteria, set out in terms of performance. These criteria are also based on international standards.
Maya	
Binding ecological requirements Certification with the OECD Test 302 B extended which requires "inherent" biodegradability (while the EU Ecolabel requires "ready" biodegradability in line with the OECD 301 standard) **Import restrictions** Compliance with the Swissness criteria for industrial products.	
Market share	Professional cleaning, including agents to be used in kitchen, for textiles, object cleaning and personal hygiene. Used in restaurants, hospitals, nursing homes and by providers of professional cleaning services.
WTO – law consistency	**Private behavior:** Besides compliance with the original-neutral requirements of the OECD Test 302 B extended (set out in terms of performance), products must be "Swiss-made"; equivalent foreign products are excluded from certification.

	Attribution: The standard directly refers to the Swissness legislation. Based on this nexus, the private behavior may be attributed to the government under both GATT and the TBT Agreement. **Potential trade law concerns:** Principle of national treatment, as set out in Art. III:4 GATT and Art. 2.1 TBT Agreement. The Swissness legislation's and the corresponding private behavior's compatibility with WTO law depends on whether their deviation from the NT principle can be justified.

Annex 2.3: Switzerland-based private standards in the sector of forestry

Schweizer Holz	
Binding requirements Compliance with statutory requirements, customary industry practices (approx. 56% of Swiss forest FSC/PEFC certified) and the Swissness legislation. Depending on the product concerned, different "Swissness" rules come to application. Even-handed rules for natural products apply to log wood, whereas the rules for processed agricultural products apply i.e. to sawmill products, and those for industrial products to i.e. fiberboards and pellets for production facilities. **Import restrictions** Certification is only available to "Swiss" products.	
Market share	Products comprised: timber and processed timber products
WTO – law consistency	**Private behavior:** The private standard directly refers to the Swissness legislation. Thus, attribution under GATT – and the government's responsibility for the private behavior in case the legislation is found to contradict Switzerland's national treatment obligation – seems likely. **Attribution:** The standard directly refers to the Swissness legislation. Based on this nexus, the private behavior may be attributed to the government under both GATT and the TBT Agreement. **Potential trade law concerns:** Principle of national treatment, as set out in Art. III:4 GATT and Art. 2.1 TBT Agreement. The Swissness legislation's and the corresponding private behavior's compatibility with WTO law depends on whether their deviation from the NT principle can be justified. Further, the application of purely origin-related criteria in a procurement tender goes against the principle of non-discrimination (also enshrined in the GPA). Compliance with statutory requirements can be sufficient proof of sustainability, but restricting such proof in public procurement to domestic goods is likely to be found in violation of the NT principle and the obligation to specify technical specifications, if possible, based on functional and not formally descriptive criteria.

Annex 2.4: Switzerland-based private standards in the sector of electronics

Coop Oecoplan
Binding ecological requirements Certification with private international (FSC, GOTS, Ecocert), regional (EU eco-label) or national governmental (Blauer Engel, Österreichisches Umweltzeichen, Nordic Ecolabel) standards. **Binding social requirements** The producer must be signatory to the Business Social Compliance Initiative (BSCI) Code of Conduct without any changes to the current version (requiring compliance with the ILO fundamental

conventions, the (UN) Guiding Principles on Business and Human Rights and the OECD guidelines for multinational enterprises). The implementation and monitoring of social requirements at production sites in high-risk countries must be carried out in accordance with the BSCI by means of a BSCI audit.	
Market share	Products comprised: Kitchenware, refrigerators, freezers and combination appliances
WTO – law consistency	No indications of concern. The standard requires compliance with origin-neutral criteria, set out in terms of performance and based on international standards.

Annex 2.5: Switzerland-based private standards in the sector of textiles

Coop Naturaline / Bio Cotton	
Requirements on: Binding ecological requirements • At the stage of production: compliance with the Bio Suisse / EU organic standard • At the stage of processing: compliance with a 'negative list' of substances harmful to human health and/or environment • Compensation payments for the annual CO_2 emissions of production sites Binding social requirements Compliance with the BSCI Code of Conduct as an 'entry criterion'; compliance with the SA 8000 standard on the mid-term	
Market share	Products comprised: Clothing and home apparel, cosmetic products
WTO – law consistency	No indications of concern. The standard requires compliance with origin-neutral criteria, set out in terms of performance and based on international standards.
Migros Eco / Bio Cotton	
Requirements on: Binding ecological requirements • At the stage of production: compliance with Global Organic Textile Standard / Bluesign System / Made in Green by Oeko-Tex / Interantionaler Verband der Naturtextilwirtschaft (IVN) "Best" standard • At the stage of processing: compliance with a 'negative list' of substances harmful to human health and/or environment • Compensation payments for the annual CO_2 emissions of production sites Binding social requirements Compliance with BSCI Code of Conduct.	
Market share	Products comprised: Clothing and home apparel, cosmetic products

WTO – law consistency	No indications of concern. The standard requires compliance with origin-neutral criteria, set out in terms of performance and based on international standards.