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Executive Summary: The Swiss Constitution and Its Contribution to Sustainable Trade in the Agri-Food Sector

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1. Introduction

On 24 September 2017, the Swiss population (78.7% voting “Yes”) and all cantons approved a constitutional amendment on food security. Similar to the EU’s “Farm to fork” strategy, the new Art. 104a of the Swiss Federal Constitution (hereafter “SFC”) addresses the whole food value chain from domestic production and the basis for production to the competitiveness of the value chain, food imports and exports, and consumption.¹ Regarding food imports, Art. 104a(d) SFC states that in order to guarantee the supply of food to the population, the Confederation shall create the conditions required for *cross-border trade relations that contribute to the sustainable development of the agriculture and food sector*. The provision clearly emphasizes that to ensure food security it is not only crucial to import food, but also that imports should be arranged in a way that enables sustainable development of the agri-food sector. Nevertheless, despite this clear commitment to trade that supports sustainable development of the agri-food sector, the exact legal scope of this objective remains insufficiently explored. In practice and in the legal community, the provision is generally interpreted narrowly, focusing on nominal access to international agricultural markets in order to ensure food security as such, and assuming that reducing negative domestic impacts through food imports will contribute sufficiently to sustainable development. However, careful examination of Art. 104a(d) SFC reveals that its contents go beyond such a narrow interpretation and that the constitutional amendment indeed calls for a new direction in the area of trade, food security, and sustainability.

2. Constitutional Interpretation and Implementation

2.1. Sustainability in the Constitution

Sustainability is one of the main constitutional principles enshrined in Switzerland’s Federal Constitution. Art. 2 SFC, which contains the constitutional objectives, states that the Swiss Confederation shall promote sustainable development and is committed to the long-term preservation of natural resources. Art. 73 SFC echoes this constitutional objective with regard to the protection of the *environment* and states that the Confederation and the Cantons shall strive to achieve a balanced and sustainable relationship between nature and its capacity to renew itself, on the one hand, and the demands placed on it by the population, on the other. Art. 104(1) SFC requires that Switzerland’s *domestic agricultural sector* contribute not only to reliable provision of the population with food, but also to the conservation of natural resources and the upkeep of the countryside. Finally, conservation of natural resources is one of the explicitly stated objectives in *foreign policy* under Art. 54(2) SFC.

From a systematic perspective, sustainability is expressed in the Federal Constitution by means of a general constitutional objective that is then taken up and specified in individual policy sectors such as environmental

¹ Cf. Explanatory Report on the Federal Council’s Counter-Proposal to the Popular Initiative “For Food Security”, <<https://perma.cc/25PJ-MBR5>> (accessed 5 July 2022), p. 19.

policy, domestic agriculture, and foreign policy. Art. 104a(d) SFC now adds a decidedly new dimension to this constitutional system. The provision emphasizes that sustainable development must be considered not only in domestic production, but also in *food imports*. While such a view would arguably already have been possible based on the combination of previous constitutional and foreign policy objectives, Art. 104a(d) SFC goes beyond this. Switzerland's diverse foreign policy objectives sometimes go hand in hand, sometimes they conflict with one another. For instance, promotion of human rights and democracy may be compromised by the Confederation's other obligation of safeguarding the interests of the Swiss economy abroad. Art. 54(2) SFC does not specify how such conflicting objectives should be resolved in practice, instead leaving their resolution entirely to the discretion of relevant authorities. However, in the area of cross-border trade of agricultural goods and food products, Art. 104a(d) SFC now provides for clearer weighting in favour of sustainable development. According to this new weighting of goals, conflicting objectives should now be resolved by ensuring that cross-border trade contributes to sustainable development of the agricultural and food sector. With regard to food imports, it is thus no longer acceptable to ignore the impact of food imports on sustainability by merely invoking the economic benefits of cross-border trade to the Swiss economy or other foreign policy objectives.

Art. 104a(d) SFC represents a *binding obligation* that mandates the Swiss federal government to implement cross-border trade relations that efficiently contribute to the sustainable development of the agri-food sector. While its binding nature is not in doubt, the provision itself does not contain specific measures to be taken to achieve its clearly articulated objective. In this way, Art. 104a(d) SFC gives authorities wide latitude in implementing this constitutional provision and achieving the goals contained therein.

2.2. Sustainability in Trade

Despite the discretion that authorities have in implementing Art. 104a(d) SFC, some important guidelines can be derived from the constitutional order. These constitutional guidelines are necessary because in practice and in the legal community a *trade and food security rationale* has often been applied to Art. 104a(d) SFC to date. According to this view, the reference to food imports in Art. 104a SFC only serves to emphasize that not only domestic production contributes to food security, but also that Switzerland is dependent on production outside its borders and thus on stable and secure market access and supply.² As a net agricultural importer, Switzerland imports about 40% of its food.³ Well-functioning and diversified trade relations are thus crucial to Switzerland's food security. Furthermore, due to its relative lack of natural resources, Switzerland is highly dependent on

² Federal Council Dispatch on the Popular Initiative "For food security", BBl 2015 5753, p. 5776 and 5780; Council of States, Economic Affairs and Taxation Committee, Committee, Report of 3 November 2016, <<https://perma.cc/XV3G-7WD6>> (accessed 5 July 2022), p. 12.

³ Federal Council Dispatch on the Popular Initiative "For food security", BBl 2015 5753, p. 5760.

imports of raw materials and means of production in general. Thus, food imports are a necessary condition for food security. This particular view of Art. 104a(d) SFC, which focuses exclusively on nominal access to international agricultural markets and largely ignores the aspect of sustainable development, is not supported by the weight given to sustainability in the Federal Constitution in general and in the wording of this provision in particular. Nor does the concept of food security itself allow for such a reading. While access to international agricultural markets is about the availability of and access to food (two of the dimensions of the concept of food security)⁴, agriculture and food production largely depend on the performance of ecosystems and their carrying capacity. Long-term food security can only be ensured if agriculture and food production are complemented by sustainable development. This particular understanding of food security is increasingly reflected in the approaches of relevant international actors.⁵

Aside from the trade and food security rationale, a one-sided focus on reducing impacts domestically is equated – in practice and the legal community – with a sufficient contribution to sustainable development in Art. 104a(d) SFC. According to this logic, imported means of production contribute to increasing the production of domestic agriculture and thus – just like the export of Swiss agricultural products – *promote the economic development* of the domestic sector. Further, the import of foodstuffs also contributes to sustainability by relieving burdens on Switzerland's own agricultural ecosystems. Without imported food, domestic production would have to be intensified so much – based on today's consumption patterns – that ecosystems would be massively overstrained. Consequently, it is reasoned, cross-border trade relations contribute to the *environmental development* of the domestic ecosystems. Regarding impacts abroad, the authorities understand Art. 104a(d) SFC as a general obligation to work at the international level to ensure that sustainability criteria are taken more into account in international trade.⁶ However, this understanding of Art. 104a(d) SFC, which focuses almost exclusively on the internalization of negative externalities domestically, does not do justice to the actual contribution of trade to sustainable development in the agri-food sector internationally. Negative externalities in cross-border trade relations do not stop at the national border.⁷ As Switzerland's foreign trade grows, its share of extra-territorial environmental, economic, and social impacts also increases. In 2015, for instance, cross-border trade

⁴ FAO, The State of Food Security and Nutrition in the World 2021, p. 190. Cf. Rome Declaration on World Food Security and World Summit Plan of Action, n 1.

⁵ High Level Panel of Experts on Food Security and Nutrition (HLPE), Food Security and Nutrition: Building a Global Narrative Towards 2030, Rome 2020, <<https://perma.cc/A5UR-5LZ9>> (accessed 5 July 2022), p. 9.

⁶ Council of States, Economic Affairs and Taxation Committee, Committee, Report of 3 November 2016, <<https://perma.cc/XV3G-7WD6>> (accessed 5 July 2022), p. 13.

⁷ Cf. OECD, Making Better Policies for Food System, OECD Publishing, Paris 2021, <<https://perma.cc/A2QH-95VG>> (accessed 5 July 2022), pp. 27–28.

accounted for 73% of the total environmental impacts resulting from Swiss consumption.⁸ More specifically regarding agricultural trade, more than 50% of the environmental impacts caused by food production and the supply to the Swiss population occur abroad.⁹ Therefore, when assessing the contribution of cross-border trade relations to the sustainable development of the agri-food sector, the impacts that occur during production and transport must also be taken into account. Article 104a(d) SFC requires that economic, environmental, and social aspects be given due consideration both at home and abroad. This makes the assessment of which regulatory measures actually contribute to the sustainable development of the agri-food sector a much more complex undertaking, as such an assessment can only be context-dependent and sector-specific, accounting for impacts at home and abroad.

3. Conclusion and the Way Forward

Art. 104a(d) SFC represents a binding obligation for authorities to enact regulatory measures that effectively contribute to the sustainable development of the agri-food sector when engaging in cross-border trade. It gives authorities a great deal of leeway in terms of how they may achieve this objective. This openness is in line with the manner in which the Federal Constitution deals with foreign policy in general. This policy area has traditionally been assigned to the federal government, giving it significant scope so as to accommodate the need for flexibility in foreign policy. The constitutional order lists various foreign policy objectives and acknowledges that they may conflict with each other. For this reason, there has traditionally been no specified hierarchy among these objectives. However, Art. 104a(d) SFC modifies this approach with regard to the agricultural and food sector – it continues to allow flexibility regarding measures, but not regarding objectives. Cross-border trade must now contribute to sustainable development and must not be neglected based on the exclusive pursuit of other foreign policy objectives, such as safeguarding the interests of the Swiss economy abroad.

Art. 104a SFC was introduced under the banner of “food security”. This has sometimes led to the misguided assumption that the provision is only concerned with securing access to international agricultural markets. In this outdated trade and food security rationale, food imports are seen as merely supplementing domestic self-sufficiency by allowing imports to increase food availability and access. This interpretation is inconsistent with the importance of sustainability in the new constitutional system and with the very concept of food security itself, which increasingly recognizes that the latter can only be achieved in the long run if food production is

⁸ Report of the Federal Council, Environment Switzerland 2018, p. 33.

⁹ Report of the Federal Council, Environment Switzerland 2018, p. 58.

based on sustainable development. When assessing which regulatory measures actually contribute to the sustainable development of the agri-food sector under Art. 104a(d) SFC, the authorities cannot focus only on the reduction of impacts of cross-border trade at home. Since most trade impacts occur at the agricultural production stage, they must be considered as well as those that occur along the value chain. Admittedly, such an endeavour is highly complex and requires a contextual and sector-specific approach, but it remains the only way to effectively measure the contribution of trade to sustainable development in the agri-food sector.

Finally, the Swiss constitutional order is characterized by its openness to international law and its commitment to comply with international obligations as far as possible. Art. 104a(d) SFC is therefore not to be understood as permitting measures that would violate these obligations. The binding constitutional objective, however, requires the authorities to use the leeway provided by international law to implement measures that can effectively contribute to sustainable development. This leeway varies depending on whether cross-border trade is conducted according to WTO rules, bilateral treaties with the EU, or preferential trade agreements. Under the CEPA with Indonesia, Switzerland and Indonesia have recently agreed to grant trade concessions conditional upon sustainability criteria by making a distinction between sustainable and conventional production in the case of palm oil.¹⁰ This regulatory framework, while not beyond criticism,¹¹ represents an innovative new trade policy that provides a possible answer to the question of how the Swiss government can implement Art. 104a(d) SFC by distinguishing between sustainable and unsustainable food imports in a fair, responsible, and balanced manner. While preferential trade agreements offer more flexibility and adaptability to address this question, new initiatives and smart trade policy mechanisms can also be created and tested at the bilateral and WTO levels and in accordance with international law.

¹⁰ Art. 8.10 para. 2 CEPA. Cf. Federal Ordinance on the Importation of Sustainably Produced Palm Oil from Indonesia at Preferential Tariff Rates.

¹¹ Aina Renner/Conradin Zellweger/Barnaby Skinner, Gibt es nachhaltiges Palmöl? Satellitenbilder zeigen: Auch auf zertifizierten Plantagen brennt es immer wieder, Neue Zürcher Zeitung, 10 May 2021, <<https://perma.cc/SYM9-LQQY>> (accessed 5 July 2022).