



# More Constitutional State

**The cases of Freirina and HidroAysén demonstrate that when our political leaders let themselves be carried away by illegitimate pressures and the fear to be put in an unpopular situation, they can make unreasonable decisions, join without much critical judgment or deliberation to the population's rallying cries or, what is the same, stop acting when they should do so.**

One of the basic principles of a modern constitutional democracy is the existence of the Constitutional State, that is, the simple but essential idea that our Republic is governed by laws and not by men –in the old definition of classic liberalism-; that representatives formulate general, abstract, impersonal rules, which are equally binding for those who govern and are governed, and that there are neither individuals nor groups which are above them. It is a basic condition not only for preserving individual rights and freedoms, but for social peace, democratic governability and development, which is the cornerstone of the last

decade's consensus that has enabled Chile to be on the point of entering the selected club of developed countries before this decade is over, and significantly reduce poverty. This way of doing things is what allows us to say that in Chile "the institutions work".

Unfortunately, some recent events have confirmed a trend whose origins go back to a decade ago: the progressive weakening of our Constitutional State as the only channel for public decision making. Concerning this matter, there has been a weak reaction from our political class. At the beginning of the present government, the institutional framework suffered a strong impact with the so-called "Barrancones" case. Now we are dealing with the closure of a plant belonging to the company of Agrosuper in the locality of Freirina (III Region); and the decision of Colbún to propose the indefinite suspension of the introduction to the Environment Impact

Assessment System regarding the HidroAysén project, based on the lack of consensus of the energy policy, an issue that has been going on for the last two governments of the *Concertación*, who were not visionary enough on this matter.

We are dealing here with two cases where, for different reasons but with common elements, our Constitutional State gets closer to the government of men –of passions and caprices would say modern people, or of surveys and populism we would rather say- and goes farther from the government of laws and rules.

An underlying idea of the former, which could be inferred from the actions and statements of the governing officials and the opposition, is that we are facing a new social paradigm: there are values –strangely, only those wielded by stakeholders who express themselves and exert pressure, many times with violence- that are above the laws and the administrative regulations formulated by the people’s representatives and those who exert the Executive Power, that offer juridical security and steady “rules of the game”. If the former is true –combined with the power acquired by opinion surveys in the last years to guide political decisions-, we are choosing as a country a course that we thought far away from our political, economical and social consensus of the last three decades: a sort of “Argentinization” of Chile.

### **HidroAysén**

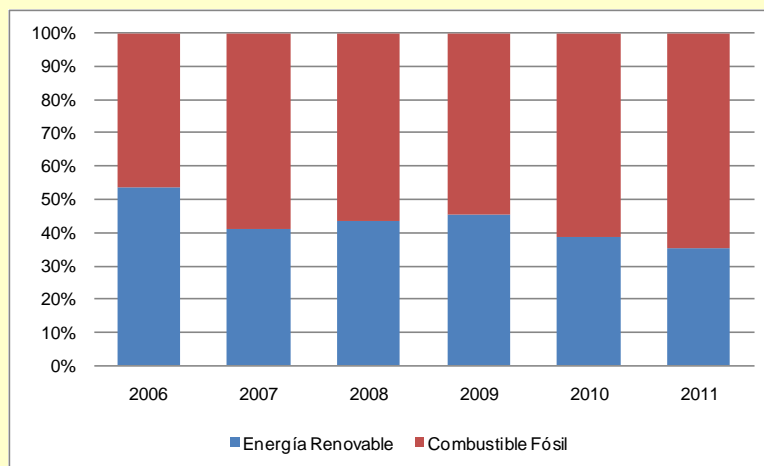
The HidroAysén project embraces five plants which should provide 2,750MW to the Central Interconnected System (SIC, in Spanish). The plants should have an annual average generation capacity of 18,430GWh and envisage a total area of reservoirs –considering the five hydroelectric plants- of 5,910 hectares (equal to 0.05% of the Aysén Region). The project also includes the construction of a transmission line connecting Aysén and Santiago, which considers an extension that, lineally measured, reaches 1,912km and includes 160km of submarine section.

It is a highly relevant project, since it would provide the country, as from 2021, a generation equal to 30% of the current production, based on a clean and renewable energy source. Therefore, it is a necessary structural project for the beginning of the next decade to meet a domestic energy demand that will go from the current 60,000GWh to 150,000GWh towards 2030.

On the other side, as shown in Chart 1, it is important to note that in the last years there is an increasing proportion of electric generation based on fossil fuels, which entails a more contaminant generation than that of renewable energies such as the hydroelectric. HidroAysén would substantially increase the contribution of clean and renewable sources to the country's energy matrix, so the project will be able to substantially reduce the emission of contaminants while removing thermoelectric projects, and thereby postponing the discussion about the nuclear option.

Chart 1

### ENERGY GENERATION BY TYPE OF SOURCE



Source: Prepared by LyD based on data from the CNE (National Energy Commission).

In this context, the project's possible suspension is not only bad news from the point of view of the capacity to provide the necessary supply to reach the goal of social and economical development that we have set ourselves, but it reflects the hard times for the country's current energy condition. In fact, we are facing increasing difficulties to develop projects, since the terms for approving the environmental permits and obtaining electric servitudes and concessions are increasingly complex and long, and at the same time, the public opinion's opposition to every initiative of electric generation and transmission is stronger.

Thus, the possibility that this issue impairs the country's development is increasingly close and generates legitimate concern. In this

perspective, what could replace the HidroAysén project if it is definitely not carried out? A project of these dimensions cannot be substituted by non-conventional renewable energies; there are not enough projects at a reasonable cost, their individual development scale is low and would require the construction of several thousand kilometers of transmission lines to connect them, some of these technologies have intermittent generation and low capacity factor (eolic and solar) and finally, the consequent intervention of surfaces and rivers makes it non viable. Of course, you could replace HidroAysén by thermal plants (7 or 8 additional plants that should be equally built by then), which is a more economically viable solution, but it would clearly not rely on the approval of the citizens, due to its environmental and territorial effects. And, obviously, nobody wants to talk yet about the nuclear option as an alternative.

Along these lines, Chileans should be interested in relying on hydroelectric projects with safe, clean and low-cost supply, which would allow reducing the emission of contaminants, reduce the energy costs and improve the country's competitiveness. It is necessary to plead for the institutional framework to operate and give enough juridical certainty to develop electric generation and transmission initiatives, avoiding unnecessary pressures that lead to postponing or even dismissing projects that are necessary for the country.

### **Freirina**

In 2011, Chile exported products for a total FOB value of US\$81,411 millions, from which US\$12,328 millions or 15.4% corresponded exclusively to food products and live animals. From these deliveries, the greatest share corresponds to fruit and legumes (46.57%), fish (31.96) and meat and meat preparations (7.84%)<sup>i</sup>, thus globally generating more than 700,000 jobs directly related to these activities<sup>ii</sup>, especially concentrated outside of the Metropolitan Region. Likewise, both the production and export growth is due to a business liberalization effort and to the fact that pork meat consumption in Chile increased by 3.7% in 2011, aligned with the economic growth of the country and a lesser availability of bovine meat in the market.

In this new scenario –Chile as a progressively relevant actor in the world food market-, the former Ministry of Agriculture, José Antonio Galilea, in the first meeting of the *Consejo Chile Potencia Alimentaria* at the end of 2010, called to deepen the successes, increase the

intersectoral work and set guidelines to locate Chile among the first ten food export countries in the world.

The Agrosuper project, located in Freirina and which has been the center of the controversy, takes a place in this scenario. The planned initial investment for more than US\$500 millions<sup>iii</sup> to build one the largest plants in the world<sup>iv</sup>, faces today a critical scenario, both for the company and the locality: the closure of the facility and the beginning of a sanitary proceeding; 1,500 jobs have been put at stake.

The main question is how they got to this point from the generation of bad odors coming from the plant and the first protests at the end of April organized by the community, which were strengthened by certain local authorities and parliament members of all sectors. Several factors have to be considered.

In the first place, the bad odors issue had already been detected –in a specific part of the production chain- and, since the technological solution undertaken by the company had failed, an alternative solution was being considered. In this process, the sectoral authority should have imposed fees and eventually take more drastic measures. In other words, the company's non-compliances which damaged the residents of Freirina could have been dealt with by the authorities in an organic manner, by means of their powers.

Nevertheless, the fact of blocking the road to the plant for five days – which prevented the company from taking measures or the authority to even correctly evaluate the situation-, is a failure of the State and particularly of the government and the use of police forces for not immediately restoring public order. Additionally, violent groups significantly damaged the company's property and 500,000 animals were unable to receive water and food during that time. The lack of control of public order and the failure to guarantee safety and freedom of passage were determinant factors for a manageable situation to escalate towards a potential sanitary alert.

In the second place, it is evident that the reaction of high government authorities, particularly the Ministry of Health, seems excessive; they did not only overstep the response capacity of local and sectoral authorities, but actions were taken –massive vaccination of nearby population- and regulatory decisions were made –closing the plant without even contacting the company-, whose technical reasons are unknown and seem rather motivated by political reasons in response

to the passions and rallying cries of protesters, than by prudential and proportional judgment. Therefore, the closure decision may face juridical questionings, for being illegal and arbitrary.

In the third place, the case highlights once again the institutional design errors that have not been resolved. It could be argued that both local and environmental institutional frameworks –most of all considering that the Superintendence of Environment has not yet taken up its duties in terms of its powers- were surpassed when the situation got worst. However, the use of the Sanitary Code to cope with a case like this – which provides the sanitary authority a series of extraordinarily intrusive and discretionary instruments-, should invite to evaluate the excesses to which it can lead and it is hardly reconcilable with the new environmental institutional frameworks and the associated regulatory techniques of supervision and sanction.

### **Conclusion**

The cases of Freirina and HidroAysén demonstrate that when our political leaders let themselves be carried away by illegitimate pressures and the fear to be put in an unpopular situation, they can make unreasonable decisions, join without much critical judgment or deliberation to the population's rallying cries or, what is the same, stop acting when they should do so. Usually, these impetuous decisions lead to bad solutions for the country.

Projects like those analyzed herein, that are so important at national level and for the country's development strategy, fail out of fear that the set of rules delivered by the Congress and the authority must additionally cope with the opinion of the respective stakeholders or the surveys' caprices. It is true that society changes, that the citizenship has greater demands, but they must be channeled by the authorities through the Constitutional State system.

The investment projects' portfolio to be developed in our country is very large. We are talking about over US\$20 billions only in the mining industry. Our authorities must give clear signals in the sense that these investments shall deal with an established route, rules of the game that are respected and the empire of the Constitutional State above any other consideration. In a representative democracy, the rules are approved and modified by the Congress and applied, in the administrative area, by the Executive Power. To depart from this path can lead us to seriously harm the political, economical and

social consensus that has been so favorable for Chile and which promises to take it towards development soon.

In brief...

### **MORE CONSTITUTIONAL STATE:**

- Recent events show the risks to our Constitutional State when authorities let themselves be carried away by populism and political motivations rather than by making the regulatory framework to prevail.
- In democracy, the use of illegitimate pressures, violence and crimes are unacceptable as a way of obtaining that the authority makes decisions of public significance. In this case, the authority is compelled, with the purpose of protecting the rights of third parties, to safeguard individual security and public order.
- Two key projects in their respective areas are concerned: HidroAysén, which is crucial in terms of the energy generation challenges for Chile in the mid-term, and the Agrosuper plant in Freirina, an example of the effort that the country is making to become an agro-industrial power and world class food exporter.

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<sup>i</sup> In 2011, pork production represented 38% of the total Chilean meat production, increasing to 527,857 standard tons accounting for US\$1,300 millions, which equals to an annual real growth of 5.9%. Exports totaled US\$443,155 millions, which meant an increase of 26% in value.

<sup>ii</sup> This includes the agricultural, livestock and fishing sectors, regardless if they are export products or not.

<sup>iii</sup> Material Fact, Securities Register Nr 1084.

<sup>iv</sup> This is also understood in the demand increase context and the market's increasing internalization, which is illustrated in a simple manner by the pork meat exports' growth: 7% of the domestic consumption is covered by imported meat, which seems quite limited, but hides the fact that in 2011 imports grew 18.6% in relation to 2010 and 165% in relation to 2009.