

Buenos Aires, March 6th, 2017

China Development Bank Corporation
Bank of China
Industrial and Commercial Bank of China
China Regulatory Bank Commission

Copy to:
Ministerio de Hacienda y Finanzas de Argentina
National Congress of Argentina

Subject: Argentinian Supreme Court decision regarding the Kirchner-Cepernic Hydropower Project (KCHP)

Dear Madams and Sirs,

First, the Coalition "Santa Cruz River without Dams" would like to express our best wishes. We also would like to take this opportunity to continue the efforts initiated last year by FARN in order to discuss our concerns with the Chinese banks and companies involved in the Kirchner-Cepernic Hydropower (KCHP) Project. The Coalition "Rio Santa Cruz Without Dams" is composed of Fundación Ambiente y Recursos Naturales (FARN), Aves Argentinas, Fundación Banco de Bosques, Fundación Vida Silvestre y Fundación Flora y Fauna Argentina and Fundación Naturaleza para el Futuro (FuNaFu) and was established as a response to the KCHP project because of its vast environmental implications on the last Patagonian glacial river and on the third largest ice concentration in the world.

With this letter, the Coalition would like to highlight the importance of the ruling of the Argentinian Supreme Court (December 21st, 2016) and to express our concerns regarding legal and financial pressure from the Chinese lenders that are manifested in the letter sent to the Ministry of Treasury and Finances (March 10th, 2016) which could prevent the full compliance of the Argentinian Supreme Court ruling by the Argentinian borrowers.

This past December 21st the construction of the dams has been suspended by a [unanimous precautionary ruling](#) of the Argentine Supreme Court. The Court's decision states that the building of the dams could not continue until a new environmental impact assessment (EIA) is properly and independently conducted and approved by the national and provincial appropriated government agencies, and a public consultation hearing takes place at the National Congress. The Argentinian Supreme Court stated that the Executive Power (the government of Argentina) has not fulfilled its obligations under the Law 23.879 (Law of Environmental Impact of Hydraulic Works)¹. The Argentine Supreme Court ruling came in response to a request for an injunction submitted by the Asociación Argentina de Abogados Ambientalistas de la Patagonia (December 2014)² and Fundación Banco de Bosques (October 2015)³, and substantiated by Art.41 of the Argentine Constitution⁴.

¹ <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/279/texact.htm>

² CSJ 005258/2014-00 "Asociación Argentina de Abogados Ambientalistas de la Patagonia c/Santa Cruz provincia de y otros/amparo ambiental" [Argentine Patagonia Environmentalist Lawyers' Association v. Province of Santa Cruz et al on environmental amparo action]. The opinion of the Attorney General's Office, which considered that the case was not under the CSJN's original jurisdiction, is available at: <http://www.mpf.gob.ar/dictámenes/2014%5CIGarcia%5Cdiciembre%5CAsoc.Abog.Amb.CSJ.5258.2014.pdf>

³ CSJ 004390/2015-00 "Fundación Banco de Bosques para el manejo sustentable de los recursos naturales c/Santa Cruz, provincia de y otros s/ acción declarativa de inconstitucionalidad" [Forest Bank Foundation for the sustainable management of natural resources v. Province of Santa Cruz et al on declaration of unconstitutionality].

⁴ The Supreme Court functions as a tribunal of last resort. Its rulings cannot be appealed. It is important to point out the independence of the Supreme Court from the Executive Branch. For example, the Supreme Court suspended the works of the mining company El Desquite S.A. in the province of Chubut. The ruling is available at: http://farn.org.ar/mineriayagua/documentos/fallo_villivar.pdf

However, we consider it to be unlikely that a new environmental impact assessment can be conducted in an independent and scientific manner if, prematurely, the KCHP Facility Agreement (which is strongly weighted in favor of the lenders) presumes the execution of the projects and imposes enormous financial burdens on the Argentinian government if the project is modified or canceled.

The China Development Bank Corporation (CDB), the Bank of China Limited, and the Industrial and Commercial Bank of China, warned the Argentinian government (in the letter sent on March 10th, 2016 referring to several clauses in the KCHP Facility Agreement including the “cross-default” clause related to the Belgrano Cargas Facility Agreement) that delays or cancellations will result in an “**event of default**” under the KCHP Facility Agreement and will trigger the “cross-default” clause in the Belgrano Cargas Facility Agreement. In addition, the Chinese banks indicated that the successful implementation of the KCHP project “...will also lay a foundation for future and deeper economic cooperation between China and Argentina.”

As the Supreme Court of Argentina recognized in its ruling of this past December “... **the magnitude of the project requires a profound reflection, scientifically proven, socially participatory and value-balanced...**” It would be desirable that the Chinese lenders publically ensure the space and time -without financial retaliation- such that the Argentinians are able to reassess the project according to their laws and fully comply with the Argentinian Supreme Court order, even if the result of the environmental impact assessment is a recommendation to not proceed with project.

In this regard, it is also important to keep in mind that the KCHP Facility Agreement Par. 6.4 regarding “Utilization” refers to lender participation taking place “*if the conditions...In the Agreement have been met*” and Par. 20.2 regarding “Compliance with Laws” points out that the Argentinian government “*shall comply in all respects with all laws to which it may be subject*”. Clearly, compliance with national law is one of those conditions, and unfortunately it has not been met in terms of Law 23.879. Now, the Argentinian government must fully comply with the Argentinian Supreme Court ruling which is considered the “law of the land.” These obligations are even specified in the Par. 20.17 “Environmental Compliance” and in the Par. 20.18 “Environmental Claims”. The latter makes it clear that an environmental claim can suffice in the proper circumstance as a “Material Adverse Effect”, which can be the basis for not proceeding with the project. Even more on point, Par. 21.8 makes it clear that a court order can serve as a Material Adverse Effect. On this basis, it is important that the banks guarantee that this clause will not be implemented if the new environmental impact assessment required by the Supreme Court establishes that the project should not go ahead for environmental reasons.

We also would like to call your attention to the implementation of the Chinese Green Credit Directive, especially in relation to the Art. 15 that points out that “*Banking institutions shall strengthen due diligence in credit granting (...) so as to ensure the due diligence is complete, thorough and detailed.*” It will be important to know if the Chinese lenders conducted appropriate due diligence per the terms of Art. 15 before granting the credit to the Argentinian government, and to know more specifically about the due diligence findings relating to the implementation of Law 23.879 and others laws on which the ruling of the Argentinian Supreme Court was based. Moreover, we urge that the Chinese lenders update their ex-ante EIA and credit-issuing risk assessment taking into account that the existing documents presented by the borrower are no longer valid.

We cannot stress enough the importance of the environmental and social risk evaluation in the KCHP project. In this regard, we consider the Green Credit Directive as an important tool not just to help the lenders to avoid making questionable investments but also to prevent the borrower from acquiring unnecessary and expensive debts.

Finally, we would like to inform you that in 25th November 2016, the Coalition “Santa Cruz River without Dams” has filled a complaint at the Argentinian Anti-Corruption Office regarding the appointment of Mr. Jorge Marcolini as a Sub-Secretary of Hydroelectric Power. According to the Law

25.188⁵ (Law Ethics of the Public Function), Mr. Jorge Marcolini should not have been appointed to this position due to conflict of interest based on the fact that he was Ingeniería y Asistencia Técnica Argentina S.A. (IATASA) Project Manager of a consultancy firm which praised the construction of the KCHP⁶. Recently, we have received a letter from the Anti-Corruption Office asking for more information about the case. We take this as a signal that a serious investigation is being conducted.

In line with the words of the President of the People's Republic of China at the last World Economic Forum annual meeting in Davos, asking the world's most powerful economies to develop a model of fair and equitable governance meeting the challenges of climate change, we hope that the ruling from the Argentinian Supreme Court provides the opportunity to suspend this project in order to ensure that it will not result in serious environmental and economic impacts.. Otherwise, we are afraid that the construction of the KCHP will be recorded in history as the most misguided Chinese-Argentinian collaboration, precisely at a time when protecting the glaciers to address climate change is of highest priority for humankind.

Sincerely,



⁵ <http://servicios.infoleg.gob.ar/infolegInternet/anexos/60000-64999/60847/texact.htm>

⁶The document "Determination of the "Height Flow" function (H-Q Curve) for Santa Cruz River to Argentino Lake output". Available at: http://www.santacruz.gov.ar/ambiente/audiencia_publica/Rio_Santa_Cruz/informe/Informe_Curva%20h-Q%20embocadura_%20Firma.pdf (pages 11-13).