CAUSA N° 162.765/02 "UNION DE USUARIOS Y CONSUMIDORES Y OTROS C/EN -M° ECONOMIA E INFRAESTRUCTURA -RESOL 20/02 S/AMP.PROC.SUMARISIMO (ART. 321 INC. 2C.P.C.Y C.)"

ARGENTINA

Reply expanding on question No. 13 in the Technical Secretariat' s note of 9-IX-02

13. Page 32, referring to the actual results obtained through application of the participation mechanisms, in addition to the signing of "almost twenty 'Letters of Commitment' by public agencies," states that "public hearings have been held under the aegis of public service regulatory bodies" and that "civil society organizations are involved on consultative councils and/or in controlling social plans." In connection with this, we would like to know whether there are any statistical data on these two types of responses given in the reply to the questionnaire and, if so, we would ask you to furnish those statistics.

The reply to question 13 reported that the country's executive branch of government had set up a Commission for the Renegotiation of Public Service and Works Contracts, which operates under the aegis of the Ministry of the Economy. Under Law No. 25.561, numerous public hearings were held to renegotiate 59 contracts and licenses in the fields of energy, water, transportation, and communications.

On September 24, 2002, the federal administrative courts ordered the suspension of public hearings as a precautionary measure while proceedings were ongoing.

Complete text of the judicial ruling:

"Union of Consumers and Users and others v. Min. Economy and Infrastructure Resolution 20/02 on constitutional relief."

Buenos Aires, September 24, 2002.

HAVING SEEN AND CONSIDERING:

1. Several users' and consumers' associations and the Buenos Aires City Ombudsman appear and, pursuant to the terms of Arts. 52, 53, and 55 of Law 24.240, file suit against the executive branch of government's Ministry of the Economy and Infrastructure, in order for the State to be ordered to comply with the process of renegotiating public service contracts in accordance with the guidelines set in Arts. 8, 9, and 10 of Law 25.561, Decrees 293/02 and 370/02, and Ministry of the Economy Resolution 20/02, and to refrain from *de facto* channels or administrative acts that would constitute a failure to observe or a violation of the regulatory framework set for the renegotiation of the aforesaid contracts.

They preliminarily request that, until this action is finally resolved, a precautionary measure be issued suspending the public hearings that, pursuant to the notices published in the press, were called for September 25, 26, and 30, and for October 7 and 9.

Complementing that measure, they also request, on a precautionary basis, that until the substance of this case has been resolved, the defendant refrain from ordering any price increases or reduction in obligations with respect to the companies covered by Resolution 20/02.

2. They claim, substantially, that the State is acting through *de facto* channels in an attempt to bring about a price increase with respect to at least some of the public services subject to renegotiation under Law 25.561, in breach of the procedural rules governing contract renegotiations; that the convocation of the hearings was not ordered by any administrative act and lacks any background to justify them or to state the need for or usefulness thereof; that there are no orders or provisions establishing rules for the procedure through which the alleged price increase is to be implemented; that there are no established provisions regarding the role of the Renegotiation Commission set up to direct the renegotiation process, neither is there any knowledge of the procedure to be followed in processing the aforesaid increases or, in particular, of the role to be assumed with respect to such possible decisions by the corresponding control agencies.

With specific reference to the hearings for which precautionary suspension is sought, they point out that they were not decided on by any administrative order; that in publicizing them use has been made of announcements in the national press, and not of publications in the Official Bulletin, save with respect to road concessions; that the venues are unclear, having been changed in some cases on up to three occasions (with respect to the hearings for electricity and gas); that the official who will be chairing the hearings is unknown, as is the role to be played by the regulatory bodies (on this point, they claim that the officers of some of the regulatory bodies (gas) have stated a desire not to participate); that some consumers' associations have been invited to represent the users, a posture that was rejected by the Ombudsman after ruling that some of the hearings were illegal and recommending in certain cases (public gas and electricity services) that the State respect the provisions of the legal regulatory frameworks applicable in each case.

In sum, they maintain that the State's behavior they criticize represents a serious and blatant affront on the principles of legality and due administrative process, undermines the task of renegotiating public service contracts decided on by the State as a result of the emergency law, with the actions of the government based solely on the logic of the "fait accompli" and using the institutional importance of public hearings to validate an emergency pseudo-increase.

3. After outlining the provisions that, under the economic emergency law, have been set for renegotiating public service contracts, it is maintained that the State has baselessly and unilaterally ordered the holding of public hearings with the sole aim of dealing with an urgent restructuring of prices that, they claim, had already been agreed upon with the suppliers, thereby making the hearings an empty procedure intended merely to validate those increases and to leave the renegotiation without effect.

4. That, preliminarily, it should be remembered that for measures such as these to be viable, the conditions described in Art. 230 of the Procedural Code, the regulatory adjective precept applicable to the mechanism, must have been met. Thus, while not affecting analysis of their ultimate reason, which, if negative, would make the resolution or final judgment ending the dispute illusory, we must demand, as an unavoidable prerequisite for admissibility, that the right invoked is real *(fumus bonus iuris)* and there is a danger of irreparable damage in delaying *(periculum in mora)*.

Thus, a basic requirement for the admissibility of the precautionary measures is that they be justified in the risk faced by the right in question or that will be at question in a later proceeding, ensuring that the ruling is not inofficious while upholding the equality of the parties.

5. Furthermore, it must be noted that precautionary measures are not an end in themselves; on the contrary, they are inevitably dependent on the issuing of a later final ruling, the practical result of which they ensure on a preventive basis, and although precautionary measures can be sought prior to or in conjunction with the main action, as in the case at hand, they must be intimately tied in with the purpose of the litigation, since it would undermine the purpose of the

caution were they not to correspond to the end result of a trial.

And it is for that reason that, as I have stated on previous occasions, in this matter there are no strictly autonomous precautionary measures, since such measures must also be with reference to a proceeding or trial of some nature, either underway or about to begin, that will analyze the existence or not of the right that, it is claimed, has been injured (arg. in Arts. 195, 207, and 230 of the Procedural Code).

6. Prior to beginning a study of the precautionary measure sought, it should be recalled that judges are not obliged to respond to all the arguments proffered by the parties, but only to those that are relevant to solving the conflict and to the extent that the allegations are duly grounded; and this demand must, in cases challenging the validity of state actions, be adequately correlated to the institutional gravity of the court decision sought. And I make this clear, because in the development of their initial submission, the plaintiffs offered remarks on the grounds and scope of judicial rulings made by other courts, which are opposed to the ruling which I hereby hand down, and such matters are unrelated to the dispute in hand and should be clarified within the framework of the relevant proceedings.

7. In the terms in which the measure has been put forward, I must first point out that the plaintiffs quote the law applicable to this case as being Arts. 52 and 55 of Law 24.240.

They base their standing for filing this suit, for the associations, on Arts. 42 and 43 of the nation's Constitution and, with respect to the ombudsman's office, on Art. 137 of the Constitution of the City of Buenos Aires and on Law No. 3 of the City.

The language of the Constitution enshrines, with respect to consumption, the right of users and consumers to protect their health, safety, economic interests, equal treatment, and dignity; in turn, Law 24.240, in regulating relations between users and consumers and the suppliers of goods and services (Arts. 1 and 2 of the Law), in its chapter dealing with legal actions, states that: "consumers and users may initiate legal action **when their interests are affected or threatened**," thereby also legitimating action taken by associations of consumers incorporated as conventional persons. As for the ombudsman's office, the cited precepts grant it broad powers for protecting and promoting human rights and other rights and guarantees enshrined in the Constitution and in the nation's laws, not only with respect to actions or omissions by the government, but also vis-à-vis the providers of public services.

In accordance with the precepts cited, I preliminarily find no obstacle to recognizing the plaintiffs as having standing for bringing this action.

8. As regards the typification in the case at hand of the definitions set forth in Art. 230 of the Procedural Code, seen in the terms described in the above considerations, the treatment of the matter should begin with an analysis – necessarily confined to the narrow scope that characterizes petitions such as this – of the relevant provisions of the emergency law and of the decrees dealing with the renegotiation process referred to in the law.

And, in that connection, I must begin by recalling that Law 25.561, on the public emergency and the reform of the financial system (BO 2002.I.07, special issue), ordered, with respect to the matters of present interest, that the executive branch of government be authorized to renegotiate the administration's contracts governed by instruments of public law – which includes those for public works and services – to which end attention had to be paid, in connection therewith, to the following notions: (1) the impact of pricing on economic competitiveness and on income distribution; (2) the quality of the services and the investment plans, when provided for in the contracts; (3) the interest of the users and the accessibility of the services; (4) the security of the systems covered; and (5) the profitability of the companies (Art. 9 of Law 25.561). It was also stipulated (Art. 10) that under no circumstance would the contractor companies or public service providers be authorized to suspend or amend their compliance with their obligations.

In light of the *usefulness of centralizing the contract renegotiation process,* with the

government applying standard guidelines to all contracts and enabling them to be dealt with in a swift and ordered fashion, the Ministry of the Economy was entrusted with carrying out the process. It was also deemed useful to create a *Renegotiation Commission* to help the Ministry in that task, to be made up by the different sectors involved, including the users and consumers.

For this purpose Decree 293/02 (BO 2002.II.14) was issued, Art. 1 of which lists the public services subject to contract renegotiation and sets a 120-day deadline for submitting the applicable proposals. Art. 2 also states that the Ministry must inform the providing companies, the legally registered consumers' associations, and the control and regulatory agencies, in order to receive their input and opinions. Worthy of particular note is Art. 3, which sets a Renegotiation Guide for all purposes in the economic criteria set down in Art. 9 of Law 25.561, adding that *particular* attention must be paid to the investments actually made, together with the other obligations agreed upon in the contracts.

Decree 370 of 22.II.02 defines the membership of the Renegotiation Commission, which is to be chaired by the Minister of the Economy and Infrastructure and made up of the heads of the subsecretariats involved in the provision of public services, the Secretariat of Competition, Deregulation, and Consumer Defense, a representative of the users' and consumers' associations, and an appointee representing the federal ombudsman.

Resolution 20/02 of the Ministry of the Economy approved the "Rules of Procedure for the Renegotiation of Public Services and Works Contracts" and set contract renegotiation guidelines for each individual sector.

Specifically, item 2.2 of that resolution provided that the renegotiation procedure (expressed in the preliminary, abbreviated terms proper to any precautionary decision) should be divided into four phases: Phase 1 – preparation of basic rules and guidelines to be followed by the Renegotiation Commission, invitations to the companies for the holding of informal talks, incorporation of their comments, and explanation of the content of the guidelines; Phase 2 – presentation, by the companies, of their renegotiation proposals, based on a description of the impact of the emergency, a summary of their recent economic and financial situations, how the contracts have evolved, details of indebtedness, and proposals for overcoming the emergency; Phase 3 – "rounds of discussions at a series of meetings, *working toward the reaching of agreements*"; Phase 4 – consolidating the agreements, drawing up final documents, and submitting them to the Ministry of the Economy.

The rules clearly indicate that the information the companies must give to the Renegotiation Commission must necessarily include details on their income and the mechanisms that already exist for updating prices, an analysis of the price reviews that have taken place during the lifetime of the concession or license, and those that are currently underway; they must also indicate the impact they expect their proposals to have on the service they provide, and this aspect must be correlated with the guidelines governing the renegotiation and set forth in Art. 9 of Law 25.561. But in addition, the proposals must also include future and ongoing investments, a summary of the economic and financial situation over the past three years, including cash flows, general balance sheets, profit-and-loss statements, details of indebtedness, operating costs, payment obligations vis-à-vis the nation and internal and external creditors, the level of compliance with the contract expressed through the relevant indicators, the quality of the service received by users, the monitoring mechanisms implemented by the companies, and the results attained.

Among the rules governing the renegotiation process, special mention should be made of the terms of Decree 1839 of September 16 last (in other words, from the same time as the convocation of public hearings addressed by this petition); this provision ***extended*** for 120 business days, following termination of the period set by Art. 2 of Decree 293 of 12.II.02, the deadline within which the Ministry of the Economy was required to forward to the government the contract renegotiation proposals generated by the renegotiating process. This arose because

of the impact of the current emergency situation and the negotiations with the multilateral agencies, which prevented *"swift progress with the assigned task."*

It was thus the government itself that recognized the delays affecting progress with the timetable for the renegotiation procedure, which does not, in principle, accord with the *speeding up* of formalities associated with the price reforms.

9. Things being so, and having described the regulatory framework to be observed by the renegotiation process, I find the right invoked by the plaintiff regarding the groundlessness of holding the public hearings that were convened to be sufficiently truthful as to provide a basis for granting the precautionary measure sought.

This is because, albeit said with the provisional nature proper to all precautionary measures:

(a) Holding the hearings **with the sole aim** of analyzing the requests for urgent price readjustments presented by the companies with concessions and licenses involved in the renegotiation process was not covered by the procedure set forth in resolution 20/02; instead, issuing such invitations would only seem justified in the final phases of the procedure, with the aim of comprehensively discussing the overall renegotiation proposals.

(b) It does not appear feasible, at this preliminary stage, to separate the matter of price modifications from the other issues that must be analyzed as a part of the comprehensive renegotiation of the service contracts, such as service quality, investment plans, levels of indebtedness, the profitability of the companies over previous years, their profit levels, etc., since all these were set down in Art. 9 of Law 25.561 as guidelines to direct the renegotiation process.

(c) The convocation notices did not indicate the participation in that decision of either the Renegotiation Commission or, more particularly, the regulatory agencies responsible for each service. At this juncture it should be noted that Resolution 308/02 of the Ministry of the Economy, a provision intended to complement and help interpret the rules governing the renegotiation process, makes it perfectly clear (Art. 2) that the enforcement authorities of the concession or licensing contracts for public services subject to the renegotiation process, together with the corresponding control agencies, *will continue to exercise their corresponding powers and duties as set forth in the rules defining their competence and the corresponding regulatory frameworks, without prejudice to the provisions of Law 25.561, Decrees 293/02, 370/02, and 1090/02, and their ancillary precepts.*

And this is particularly relevant with respect to the transportation and distribution of gas and electricity, the regulatory frameworks of which provide for holding public hearings prior to issuing resolutions on matters affecting the rights of users and consumers (Law 24.076) and, specifically, regarding modifications to prices by transporters and distributors (Art. 46 of Law 24.065); in both cases, the hearings must be held with the participation of the control agencies; thus, in accordance with the view expressed, the hearings called for September 25 and 26 were not in accordance with the requirements of the specific regulatory frameworks.

(d) Finally, since any decision regarding future price adjustments could only be based on these hearings taking place, on account of the shortcomings involved in the convocations, it would be frankly unacceptable to go ahead with them.

In the way in which they have been called, they appear as a mere formality, diametrically opposed to their true purpose, which is that of giving users a framework of free debate and due defense of their affected rights, exercising their right of participation (as an expression of a democratic society) as recognized in the Constitution; as has been correctly maintained, holding a public hearings not only offers a guarantee of reasonableness for users and an ideal instrument for defending their rights, but also a mechanism for consensus-building within public opinion, a guarantee of transparency in procedures, and an element of democratization of power (cf. Fed. Admin. Appeals Cham., IV court, in "Youssefian, Martín v.

State," judgment of 23.VI.98).

10. Finally, I also find grounds for the allegations of danger in delay, in that holding this hearings, under the conditions in which they have been convoked, would only validate the road toward illegality being followed by the State, with the damage that this would cause within society with respect to the perceptions it should have of the transparency, validity, and legal foundations of the procedures and decisions adopted by government authorities; this is particularly true in the current circumstances facing the nation.

Therefore, in accordance with the grounds expressed, finding present the circumstances in which measures such as the one requested are admissible,

I RESOLVE:

To admit the precautionary measure sought and, consequently, to order the suspension of the public hearings convoked within the framework of the renegotiation process begun under Law 25.561, with the sole purpose of considering an urgent restructuring of prices, until such time as they can take place as a part of a global renegotiation process.

As a corollary to the acceptance of the measure, due notice should be served on the State, on the companies providing the public services for which the hearings were being organized, and on the relevant regulatory agencies, of the suspension ordered hereby.

The petitioners are exempted from providing a security deposit in accordance with Art. 200(2) of the Procedural Code.

Let this be placed on record, and let notification be served today (Art. 36 of the Rules of Procedure of National Justice).

CLAUDIA RODRIGUEZ VIDAL
FEDERAL JUDGE

CAUSA N° 162.765/02 "UNION DE USUARIOS Y CONSUMIDORES Y OTROS C/EN -M° ECONOMIA E INFRAESTRUCTURA -RESOL 20/02 S/AMP.PROC.SUMARISIMO (ART. 321 INC. 2C.P.C.Y C.)"

Annex:

Law No. 25.561, Articles 8, 9, and 10.

Of obligations arising from administration contracts governed by the provisions of public law

ARTICLE 8 — As of the enactment of this law, in contracts entered into by the Public Administration under the precepts of public law, including those covering public services and works, clauses for dollar-based adjustments or based on other foreign currencies and clauses establishing indexes based on price indexes from other countries and any other indexing mechanism shall be void of all effect. The prices and fees arising from such clauses shall be set in pesos at the exchange rate of ONE PESO = ONE UNITED STATES DOLLAR.

ARTICLE 9 — The executive branch of the national government is authorized to renegotiate the contracts covered by the provisions of Article 8 of this law. With respect to contracts covering the provision of public services, the following guidelines shall be taken into account: (1) the impact of prices on economic competitiveness and on income distribution; (2) the quality of the services and the investment plans, when provided for in the contracts; (3) the interest of the users and the accessibility of the services; (4) the security of the systems covered; and (5) the profitability of the companies.

ARTICLE 10 — The provisions set forth in Articles 8 and 9 hereof shall in no circumstance authorize contractor companies or public service providers to suspend or amend their compliance with their obligations.