United Nations CCPR/C/125/D/2254/2013

International Covenant on Civil and Political Rights

Distr.: General
1 May 2019
English
Original: Spanish

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2254/2013*, **

Communication submitted by:	Marcos Siervo Sabarsky
Alleged victim:	The author
State party:	Bolivarian Republic of Venezuela
Date of communication:	10 June 2013
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 2 November 2012 (not issued in document form)
Date of adoption of Views:	27 March 2019
Subject matter:	Criminal proceedings and liquidation of a brokerage firm without due process
Procedural issues:	Exhaustion of domestic remedies; other procedures of international investigation or settlement
Substantive issues:	Right to a fair and public hearing by a competent, independent and impartial tribunal; pretrial detention; right to an effective remedy; equality before the law and non-discrimination
Articles of the Covenant:	2 (3), 9, 14 (1) and (3), 15, 16 and 26
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

1. The author of the communication is Marcos Siervo Sabarsky, a Venezuelan national born in 1967. He claims that the State party has violated his rights under articles 2 (3), 9 (1), 14 (1), (2) and (3), 15, 16 and 26 of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for the State party on 10 August 1978.

* Adopted by the Committee at its 125th session (4–29 March 2019).

** The following members of the Committee participated in the consideration of the present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

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The facts as submitted by the author

2.1 The author was a shareholder in and director of Venevalores Casa de Bolsa C.A. (Venevalores), a listed Venezuelan securities brokerage firm incorporated in 2007.

2.2 The National Securities Commission, now called the National Securities Regulator (SNV), filed a complaint against a number of listed companies or firms for illegal foreign-exchange transactions, which did not initially include Venevalores.[1] However, on 17 May 2010, the third court of first instance of Caracas issued a warrant to search the premises of Venevalores. On 19 May 2010, police officers and Public Prosecution Service officials raided the premises of Venevalores and arrested the author and the manager without a warrant. The author was detained for three days.

2.3 On 22 May 2010, an interim judge of the sixteenth procedural court of first instance of the criminal judicial circuit of the Caracas Metropolitan Area declared the author's detention invalid for failing to meet the requirements of article 44 of the Constitution. In spite of this, the author was placed in pretrial detention after being charged with illegal foreign-exchange transactions and criminal association on behalf of Venevalores under the Exchange Control Act, which had been amended on 17 May 2010.[2]

2.4 On 4 June 2010, SNV authorized the placement of Venevalores in administration, with cessation of its operations, and began to administer it. Among other reasons, SNV claimed that the transactions carried out by Venevalores could have violated the Exchange Control Act and thus harmed its creditors, clients and the integrity of the securities market as a whole.

2.5 On 5 November 2010, Venevalores shareholders held a general meeting, which the author could not attend and at which he was represented by his lawyers. At that general meeting, SNV appointed an administrator and recommended the dissolution and liquidation of Venevalores, which was finally ordered by SNV on 9 November 2010.

2.6 On 19 November 2010, the administrator appointed by SNV decided to initiate the necessary procedures to dissolve Venevalores, despite the fact that neither the administrative investigation nor the criminal proceedings had been completed.

2.7 On 17 May 2011, the author filed an administrative appeal for annulment with the Second Administrative Court, questioning the validity of the decisions by SNV to authorize the placement in administration and dissolution of Venevalores, on the grounds that they violated his rights to a fair trial and the presumption of innocence.

2.8 In May 2011, the author submitted a communication to the Working Group on Arbitrary Detention. On 30 August 2011, the Working Group found that the author's deprivation of liberty was arbitrary and that it violated articles 2 (3), 9, 10, 14, 15 and 26 of the Covenant.[3]

2.9 The author requested the fifth court of first instance of Caracas to change his deprivation of liberty to house arrest, since he was suffering from a cardiovascular condition; on 30 September 2011, the court finally agreed to his request. The proceedings were still pending at the time of submission of this communication.

[1] The National Securities Regulator is the body tasked with regulating and monitoring the effective functioning of the securities market, under the supervision and coordination of the Supreme Organ of the National Financial System. It is attached to the Ministry of People's Power for the Economy and Finance solely for administrative purposes.

[2] On 17 May 2010, the 2007 Exchange Control Act, which regulated several of the activities of brokerage firms, was amended. In the 2007 version, article 9 of the Act granted the Central Bank of Venezuela the exclusive right to buy and sell foreign currency and prescribed punishments for anyone who conducted such transactions without the Central Bank's involvement (a "foreign-exchange offence"). However, transactions involving securities trading were excluded from the definition of the offence. The 2010 amendment expanded the scope of a foreign-exchange offence to cover securities trading, thereby introducing a new criminal offence punishable by a fine and up to 6 years' imprisonment. This new provision was applied retroactively to several shareholders and directors of brokerage firms, who were prosecuted and deprived of their liberty.

[3] A/HRC/WGAD/2011/27.

2.10 On 19 May 2012, the author completed two years of precautionary measures depriving him of his liberty, exceeding the maximum period allowed under article 244 of the Code of Criminal Procedure.[4] Despite this, and notwithstanding the opinion of the Working Group on Arbitrary Detention, the precautionary measure was extended for another two years at the request of the Public Prosecution Service.

2.11 On 9 August 2012, Venevalores was dissolved without the direct participation of the shareholders, despite the financial sustainability of the company.

The complaint

3.1 The author claims that the State party violated articles 9 (1), 14 (1), (2) and (3), 15, 16, 26 and 2 (3) of the Covenant.

3.2 With regard to article 9 of the Covenant, the author submits that his arrest and subsequent detention were arbitrary, as he was arrested without a warrant and held in prison for 16 months and subsequently placed under house arrest. On 19 May 2012, the author completed two years of pretrial detention, thereby exceeding the maximum of two years established by domestic law. However, the precautionary measure was extended for another two years.

3.3 In the criminal proceedings, both the prosecutors and the judges were temporary and could therefore be removed at any time without the need for a disciplinary procedure. This situation is a violation of the right to be heard by an independent and impartial tribunal, as established by article 14 (1) of the Covenant. The judges in charge of the case were changed four times in 15 months. The executive branch of the State party has used these changes to try to influence the proceedings and, ultimately, to have the perpetrator convicted of non-existent offences.

3.4 The author also claims that his right to be tried without undue delay, as set forth in article 14 (3) (c) of the Covenant, has been violated. Two years after his arrest, his trial is still pending and it is not clear when the hearings will take place. This delay is attributable to the authorities of the State party, which have violated the maximum time limit for holding the oral hearing, counted from the date of arrest of the accused, since they have been unable to constitute a court composed of professional judges and lay judges (*escabinos*). Neither the large volume of work a court may face nor any administrative problems that may affect its functioning can relieve a State party of its obligations under the Covenant with regard to the right to be tried without undue delay.[5]

3.5 The author submits that the new Exchange Control Act, which was adopted on 17 May 2010 – the same day the search warrant was issued against Venevalores – was applied to him retroactively, in violation of his right to due process and the principle of *nulla poena sine praevia lege*, as recognized in article 15 of the Covenant. The conduct attributed to him was lawful under the Exchange Control Act of 2007.

3.6 The author claims that his right to recognition as a person before the law was violated, in that the precautionary measures to which he was subjected prevented him from lawfully defending his rights and interests in the administrative proceedings, in violation of article 16 of the Covenant. He was also unable to grant or register a power of attorney to enable him to participate in the meetings of Venevalores shareholders,[6] or perform other personal acts such as authorizing his minor child to leave the country.

3.7 Furthermore, he maintains that article 14 of the Covenant is also applicable to civil proceedings – in this case, the procedure for the placement in administration and

[4] Article 244 of the Code of Criminal Procedure provides that: "A custodial measure may not be ordered if it appears disproportionate to the seriousness of the offence and the circumstances of its commission and the likely penalty. Under no circumstances may it exceed the minimum penalty provided for each offence or a period of two years; in the case of more than one offence, the minimum penalty for the most serious offence shall be taken into account."

[5] The Committee's Views in *Sundara Arachige Lalith Rajapaske v. Sri Lanka*, (CCPR/C/87/D/1250/2004), para. 9.4.

[6] This statement seems to be inconsistent with paragraph 2.5 above.

dissolution of Venevalores – which directly affected his rights under the Covenant. He also maintains that these proceedings did not comply with the guarantees set out in article 14 (1), (2) and (3) (c) and (d). With regard to the administration and dissolution of the company, the authorities lacked independence and impartiality. Neither the administrative authority concerned nor the relevant judicial authorities had examined or verified the occurrence of the alleged offences that supposedly justified placing Venevalores in administration. The author submits that he never had adequate means to prepare his defence and was unable to participate fully in the proceedings, for example by presenting evidence, as there was no hearing once the relevant authority had decided to dissolve and liquidate Venevalores. Finally, he maintains that the appeal before the Administrative Court against the SNV decision, which is still pending, has been excessively delayed.

Additional information submitted by the author

4.1 In a submission dated 4 April 2014, the author states that on 6 March 2014 the fifth trial court of first instance of the Caracas Metropolitan Area dismissed the case against him on the grounds that the alleged act was not an offence, that is to say, it was not classified as such under the domestic legislation in force. According to the author, this information reinforces his argument that the acts described in the communication constituted violations of his rights to liberty of person and due process and not to be subjected to the retroactive application of criminal law. Since the alleged acts do not constitute a criminal offence, there is no justification for having conducted, over a period of almost four years, a criminal trial during which he was deprived of his liberty. The dismissal of the criminal case makes it clear that the deprivation of liberty had no basis whatsoever, and that it was an arbitrary and illegitimate measure.

4.2 In addition, the author informs the Committee about the procedural delay in the administrative lawsuit related to the decision to liquidate Venevalores. In the context of this lawsuit, the Political and Administrative Division of the Supreme Court rejected the author's appeal for annulment of the liquidation decision. He also alleges a violation of his right to have access to justice without undue delay in the administrative proceedings, since the court hearing the case had taken almost a year to hand down the relevant judgment. After the judgment had been handed down and the appeal had been lodged, the same irregularities and violations reappeared in the appeal process as a result of unjustified delays.

State party's observations on admissibility and the merits

5.1 In its observations of 29 December 2015, the State party submits that the communication is inadmissible because it is incompatible with the Covenant *ratione personae* and *ratione materiae*, since the Committee is not competent to hear matters relating to a public limited company governed by private and financial law. It recalls the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, which recognizes that "the fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals … does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights" (para. 9). This approach allows, in exceptional cases, individuals to argue that violations of the rights of a legal person may constitute violations of individual rights, provided that such rights can only be enjoyed in community with others, or by the establishment of legal persons. This interpretation does not cover the protection of the financial value of shares in a bankrupt company, nor does it offer shareholders a guarantee against, among other things, the lifting of a certain corporate veil.

5.2 The State party also submits that the communication is inadmissible for failure to exhaust available domestic remedies in relation to the criminal proceedings against the author and the administrative proceedings relating to the placement in administration and liquidation of Venevalores. With regard to the criminal proceedings, there has been no arbitrary or unlawful prolongation or delay in those proceedings. The author's allegations focus on the delay in constituting the court, which, after the legislation on criminal procedure had been amended, had to include citizens summoned as lay judges. The

institution of the lay judge acts as a safeguard for the new Venezuelan system of criminal procedure by ensuring that jurisdiction is exercised not only by members of the legal profession, but also by citizens called up for that purpose, who are on an equal footing with the parties involved. In addition, the lay judges decide jointly with the professional judge on guilt or innocence, but that only the professional judge may classify acts as an offence and determine the sanction applicable in the case of a conviction. Moreover, the criminal procedure system provides for an accused person to be tried by a single-judge court in the event that, after five summonses, not enough citizens have come forward to establish a mixed court. In the present case, the author of the communication never asked to be tried by a single-judge court or waived his right to be tried by lay judges. The process of selecting the lay judges did no harm to the author of the communication, since the process was carried out in full compliance with the law in force. Moreover, the author could have resorted to constitutional remedies, either on the grounds that a manifest error had been made in the interpretation of the Constitution in the criminal proceedings against him or on the grounds that a rule had been wrongly interpreted or applied, by filing an application for constitutional *amparo*, which is effective against omissions by the Supreme Court, or an application for the special remedy of judicial review of any cassation judgment.

5.3 With regard to the exhaustion of domestic remedies under the administrative procedure for the placement in administration and liquidation of Venevalores, the State party argues that these concern the rights of a commercial company. It also says that the application for an administrative remedy, whereby Venevalores sought the annulment of the SNV administrative decision ordering its liquidation, was filed on behalf of the firm, not the author. The State party also points out that the Second Administrative Court ruled on this application for annulment in October 2012, but the domestic procedures that are available to challenge the administrative decision to liquidate Venevalores have not yet been exhausted; these include an application for administrative review of the appeal judgment and, ultimately, an application for constitutional review.

5.4 Regarding the facts, the State party points out that the investigation into Venevalores was initiated pursuant to a complaint regarding alleged irregularities committed by Venevalores.[7] In response to that complaint, the Public Prosecution Service applied for a search warrant to gather evidence for the investigation into Venevalores. It was in this context that the author was arrested and duly brought before a court. Subsequently, the Public Prosecution Service laid charges against the author for illegal foreign-currency trading and criminal association, as provided for and sanctioned in article 9 (2) of the Exchange Control Act in force at the date of the transactions carried out by Venevalores[8] and article 6 of the Organized Crime Act. The tenth court of first instance of the Caracas Metropolitan Area authorized the opening of the trial, but replaced the charge of criminal association with that of conspiracy. The State party points out that, in response to a request from the author dated 14 July 2010, the sixteenth procedural court of first instance of the criminal judicial circuit of the Caracas Metropolitan Area ordered the author's house arrest. On 31 August 2012, the fifth trial court of first instance granted a non-custodial precautionary measure which required him to present himself at the courthouse every 15 days and banned him from leaving the country or the Caracas Metropolitan Area. The State party adds that the conditions in which the author was detained complied with human rights standards. Moreover, on 20 January 2014, in response to the author's appeal against the decision by the court of first instance to prolong the restrictive measures, the tenth chamber of the Appeal Court for the Metropolitan Criminal Judicial Circuit determined that the decision to prolong the precautionary measures was taken within the legal time limit and in accordance with the applicable procedural requirements, bearing in mind the complexity of the offences and the investigation into them, as well as the procedural delays caused by the author's appeals and other legal action taken by him.

5.5 With regard to the information concerning the dismissal of the criminal case for which the author was investigated, the State party maintains that when the investigation

[7] The complaint was filed by the then president of the National Securities Commission and received by the Public Prosecution Service on 12 May 2010.

[8] Official Gazette No. 38.879 of 27 February 2008.

into the case was opened, on 14 May 2010, the alleged acts of illegal foreign-currency trading were classed as an offence in article 9 of the Exchange Control Act. The transactions investigated were carried out in November and December 2009 and from January to May 2010, and were provided for and sanctioned by the Exchange Control Act in force at the time.[9] Thus, there was no retroactive application of the amended Exchange Control Act.[10] The State party states that the author was afforded the constitutional guarantee of the most-favourable-law principle, whereby the criminal legislation most favourable to the defendant is applied retroactively.

5.6 With regard to the author's allegations under article 9 of the Covenant, the State party submits that the court applied article 236 of the Code of Criminal Procedure, establishing that an act punishable by deprivation of liberty pursuant to article 9 of the Exchange Control Act had been committed and that there was well-founded evidence that the accused was the perpetrator of that act; and the court had made a reasonable assessment of the risk that he might attempt to flee or obstruct the search for the truth.

5.7 With regard to the author's allegations concerning the lack of independence and impartiality of the bodies that decided on his freedom, the State party points out that the judiciary is autonomous, independent and impartial and that its functional, financial and administrative autonomy is guaranteed, and that the judicial service offers tenured positions, promotion on merit and a guarantee of adequate remuneration. Against this legislative and institutional background, the reorganization of the judiciary meant that interim judges had to be appointed to fill the vacancies and guarantee continuity in the administration of justice. Thus, interim judges who exercised judicial functions could, on certain conditions, embark on a judicial career and enjoy the benefits that this brings, including job security. However, the reorganization, which involves a competitive recruitment process for all posts, is a particularly complex process in view of the number of courts, the new areas of competence created since 2000 and the need for all competitions to comply with constitutional provisions. In these circumstances, the State party argues that it has had to take steps to guarantee the constitutional rights related to the functioning of the judicial system. In this situation, after their work history has been reviewed, interim judges perform their duties on a temporary basis without taking a competitive examination: the lack of job security is therefore fully justified.

5.8 The State party argues that legal persons are not covered by the Covenant or its Optional Protocol as possible victims of human rights violations.[11] Furthermore, when the procedural guarantees provided for in article 14 of the Covenant are extended to proceedings related to civil or administrative rights, this does not imply that legal persons are considered victims of human rights violations. The State party reminds the Committee that the author of the present communication has alleged that due process guarantees were violated by the absence of an administrative procedure for the decision to administer and liquidate Venevalores, and the lack of time and resources to prepare a defence. The State party also recalls judgment No. 1894 of October 2012, which held that the administrative procedure under which Venevalores was placed in administration and subsequently liquidated was subject to the criteria established in the national legislation regulating the securities market, which involves a number of legal and regulatory norms that address the complex issue of the Venezuelan capital market. The purpose of the measures taken in the process of placing a company in administration, moreover, is to verify the financial state of the company and, if it is in difficulty, to take the appropriate steps to rectify the situation or, where necessary, order its liquidation or sale.

Author's comments on the State party's observations

6.1 In his comments of 21 November 2016, the author reiterates his previous allegations, adding that the dismissal of the criminal case against him on the grounds that the conduct

[9] Ibid.

[10] Official Gazette No. 5.975 of 17 May 2010. The State party adds that, on 19 February 2014, the Foreign-Exchange Regime and Illegal Practices Act duly repealed the Exchange Control Act of 14 September 2005, as amended in 2010 and 2013.

[11] The State party cites general comment No. 31.

that constituted the offence had been decriminalized demonstrates that the criminal law was applied to him retroactively. The author also reports that the appeal against the decision of the Second Administrative Court of 1 October 2012 was dismissed on 24 February 2016, after almost four years in the Political and Administrative Division of the Supreme Court. For its part, the Supreme Court ruling that upheld the contested judgment offers no further arguments.

6.2 The author submits that the complaints in the communication are based on direct personal violations of his rights under the Covenant as a consequence of his pretrial detention and the criminal proceedings directed against him and against Venevalores, of which the author was the majority shareholder and chairman. In addition, with regard to the State party's arguments questioning the competence of the Committee *ratione materiae*, the author argues that he has never directly denounced the violation of the right to property, but has denounced violations of the right to due process committed within the framework of the administration and liquidation administrative procedure.

6.3 The author contests the State party's argument that the same matter had been submitted to another international procedure, namely the Working Group on Arbitrary Detention. The latter is a special procedure of the Human Rights Council which, according to the Committee's jurisprudence, does not constitute a procedure of international investigation or settlement under article 5 (2) (a) of the Optional Protocol.

6.4 With regard to the exhaustion of domestic remedies, the author indicates that the State party has not explained what remedies the author should have exhausted or explained to what extent those remedies would be successful in the present case. Moreover, the author questions whether he could have lodged an application for constitutional *amparo* against omissions in the Supreme Court's judgment, or an application for the special remedy of judicial review of any cassation judgment. The State party does not say whether these remedies would have been effective or appropriate, and omits to mention that the author did apply for the remedies relevant to his case when he was in pretrial detention, which had been extended by the time the communication was sent, and that the remedies mentioned by the State party are special remedies, which in the Committee's view do not need to be exhausted, since they do not constitute effective remedies or have a reasonable expectation of success.[12] Furthermore, the author questions whether he could have asked to be tried by a single judge rather than a mixed court in the criminal proceedings against him. He maintains that he had no reason either to express a desire to be tried by a single judge or to reject a trial by a mixed court. In this case, the violation of the right to be tried without undue delay was caused not only by the delay in selecting the lay judges for the hearing, but also by the application of two different pieces of legislation during the proceedings – the Procedural Code in force in 2009 and the one that came into force in 2012, which eliminated the concept of lay judges. The author reiterates that more than two years went by without a hearing.

6.5 With regard to the exhaustion of domestic remedies in the administrative proceedings, the author points out that constitutional review and administrative review are exceptional remedies. In addition, the remedy of administrative review was suspended from the moment of its entry into force by the Constitutional Division of the Supreme Court and was eventually quashed by the Court. Likewise, through Venevalores, all the appeals available under administrative procedures were filed, including an application for the administrative remedy of reconsideration, an application to have the SNV decision to liquidate Venevalores annulled, and an appeal against the decision to reject this application.

6.6 With respect to the facts, the author points out that the third procedural court of first instance of the criminal judicial circuit of the Caracas Metropolitan Area issued a warrant to search the headquarters of Venevalores on 17 May 2010, which was executed two days later. This would mean that the court issued the search warrant on the same day that the amendment to the Exchange Control Act came into effect, eliminating from article 9 of the Act the exemption of securities transactions from the definition of a foreign-exchange

[12] The Committee's Views in *Muhonen v. Finland* (CCPR/C/24/D/89/1981) and *Ilmanri Länsman et al. v. Finland* (CCPR/C/52/D/511/1992).

offence; this amendment was intended to be applied retroactively to acts that had taken place between November 2009 and May 2010.[13] Thus, the author argues that he could not possibly have committed the offence of which he was accused, as no such offence was defined in law. It is surprising that on the very day that a law extending the definition or scope of an offence was published, a court should have already received a request to issue an administration order.

6.7 The author submits that the State party has not provided any evidence that the purposes of the criminal proceedings could not be served by less onerous measures than deprivation of liberty. He notes that the criminal proceedings in first instance took four years and that the administrative proceedings took a total of six years, exceeding the legal time limits for reasons that are unjustified and attributable to the State party itself. The State party claims that the temporary appointment of judges during the reorganization of the judiciary is evidence of the independence of the judiciary, when in fact it has had the opposite effect, since it has resulted in the judiciary being in a permanent state of transition after 17 years of the reorganization process. The State party recognizes, moreover, that 60 per cent of judges in the Bolivarian Republic of Venezuela are interim judges who can be freely appointed and removed, and who are not part of the judicial service. This lack of judicial independence was aggravated when 13 Supreme Court justices stepped down between October 2014 and 17 February 2016, claiming that they had been pressured by the State party to take early retirement in order to create vacancies for pro-government judges, who were to be appointed in December 2016 before the opposition took control of the National Assembly. The author attaches various reports by international bodies expressing concern about the lack of judicial independence in the Bolivarian Republic of Venezuela or directly condemning the precarious situation of interim judges and their lack of independence in deciding on the rights of individuals.[14]

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the case is admissible under the Optional Protocol.

7.2 The Committee takes note of the State party's argument that the same matter had been submitted to another international settlement procedure, namely the Working Group on Arbitrary Detention. The Committee notes, however, that the Working Group concluded its consideration of the matter by decision of 30 August 2011. Accordingly, the Committee considers that article 5 (2) (b) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

7.3 The Committee notes the author's claim that he is submitting the communication in a personal capacity and that, as a shareholder in and director of Venevalores, he has been personally harmed by the company's placement in administration and its liquidation. The Committee recalls its general comment No. 31, according to which "the fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals ... does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights" (para. 9). The Committee notes that, in the present case, the author is acting in a personal capacity, not as a representative of Venevalores, with regard to the criminal procedure that was carried out to investigate the offences of illegal foreign-currency trading, criminal association and conspiracy, which ultimately resulted in the dismissal of the case. It also notes that the author claims violations of his individual rights

[13] The amendment was published on 17 May 2010. At the time of the acts under investigation, the Exchange Control Act published on 27 February 2008 was in force.

[14] By way of example, the author cites the Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Venezuela, 2003 (OEA/Ser.L/V/II.118); the Annual Report of the Inter-American Commission on Human Rights 2007, chap. IV, Venezuela (OEA/Ser.L/V/II.130); and the Committee against Torture, CAT/C/VEN/CO/3-4, para. 16.

under the Covenant as a direct consequence of the placement in administration and liquidation of Venevalores; and that, with regard to the allegations brought before the Committee, he submitted applications for annulment to the domestic courts in his own name. The Committee therefore concludes that article 1 of the Optional Protocol is not an obstacle to the admissibility of the communication.

7.4 The Committee notes the State party's claim that domestic remedies had not been exhausted because the author could have exercised constitutional remedies in the criminal proceedings against him. However, the Committee notes that the State party has not specified what kind of effective and available remedies the author should have exhausted. The Committee also notes the author's assertions, which were not refuted by the State party, that neither the remedy of constitutional *amparo*, to challenge omissions in the Supreme Court's judgment, nor the special remedy of judicial review, to challenge any cassation judgment, would be available to him. In light of the foregoing, the Committee considers that the author exhausted the available domestic remedies, so that he may bring his allegations before the Committee.

7.5 With regard to the application for administrative review and the application for constitutional review of the decision of the Supreme Court in the administrative proceedings, which are mentioned by the State party, the Committee notes that both parties agree that such appeals are exceptional and discretionary. The Committee also takes note of the author's assertion, which is not contested by the State party, that the remedy of administrative review was suspended from the moment of its entry into force by the Constitutional Division of the Supreme Court and was eventually quashed by the Court. Accordingly, the Committee considers that the exceptional remedies invoked by the State party do not constitute an effective remedy for the purposes of the present communication and declares it admissible under article 5 (2) (b) of the Optional Protocol.

7.6 The Committee notes the author's claim that article 14 (1), (2) and (3) of the Covenant would be applicable to the administrative procedure for the placement in administration and dissolution of Venevalores. The author claims, in particular, that shareholders were not allowed to present arguments and evidence challenging the report on the administration procedure; that they were not granted access to documents to prepare their defence; and that the administration and liquidation decisions were not sufficiently reasoned. The Committee recalls, however, that the second sentence of article 14 (1) protects the right of everyone to a fair and public hearing by a competent, independent and impartial tribunal for the determination of their rights and obligations in a suit at law; and that the notion of a "tribunal" in that sentence "designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature".[15] Given that the National Securities Regulator was a purely administrative body that did not have these characteristics, the Committee considers that the guarantees contained in article 14 (1) are not applicable to the administration and liquidation procedure followed by the Regulator in the case of Venevalores.[16] The Committee therefore considers that the author's complaints with regard to this procedure are incompatible *ratione materiae* with article 14 (1), (2) and (3) of the Covenant, which were invoked by the author, and declares them inadmissible under article 3 of the Optional Protocol.

7.7 The Committee notes that the author claims a violation of article 2 (3) of the Covenant without justifying it. Accordingly, the Committee considers that this claim has not been sufficiently substantiated and declares it inadmissible under article 2 of the Optional Protocol.

7.8 The Committee takes note of the author's allegation that article 16 of the Covenant, guaranteeing the right to recognition as a person before the law, was violated by the undue extension of the precautionary measures to which he was subjected, depriving him of his

[15] General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 18.

[16] In this regard, see the Committee's Views in *Osío Zamora v. Bolivarian Republic of Venezuela* (CCPR/C/121/D/2203/2012), para. 8.5.

ability to defend himself in court or in relation to other private property-related or personal matters, such as the granting of permission for his minor children to leave the country. The Committee considers that these claims are insufficiently substantiated for the purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

7.9 With regard to the author's allegations under article 26 of the Covenant that he was denied equal treatment as a result of violations of due process, the Committee considers that, in light of the above finding that the procedural guarantees under article 14 (1) of the Covenant are not applicable to the administration and liquidation procedure in relation to Venevalores, and bearing in mind that the author has not explained how that procedure was discriminatory with regard to other market operators, or on what grounds he was allegedly discriminated against, the claim has not been sufficiently substantiated. The Committee therefore declares it inadmissible under article 2 of the Optional Protocol.

7.10 Nevertheless, the Committee considers that the author has sufficiently substantiated, for the purposes of admissibility, his claims under articles 9, 14 (1) and (3), and 15 of the Covenant, relating to his alleged arbitrary detention and the legal proceedings instituted. The Committee therefore considers that this part of the complaint is admissible and proceeds to consider it on the merits.

Consideration of the merits

8.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's allegations that he was arbitrarily and unjustly deprived of his liberty, in violation of article 9 of the Covenant. The author submits, in particular, that the justification for depriving him of his liberty was the commission of an act that was not punishable under the law in force at the time of the alleged act; that his pretrial detention was a violation of the provisions of the legislation on criminal procedure in force, that there was no prior judicial detention order and that there was a failure to respect the legal time limits for him to be brought before a judge and the maximum time limits for pretrial detention. The Committee notes the State party's arguments that the legal criteria for ordering the pretrial detention of an individual were met, and that all procedural decisions affecting his personal liberty were duly confirmed by the respective judicial bodies. However, the Committee notes that, according to the judicial documents provided by the author and not challenged by the State party, on 22 May 2010, the interim judge in charge of the sixteenth procedural court of first instance of the criminal judicial circuit of the Caracas Metropolitan Area declared null and void the author's arrest warrant of 19 May 2010, but did not order his immediate release, instead imposing a judicial measure of pretrial detention. The Committee further notes that the court's decision fails to include any arguments regarding a possible arrest in flagrante delicto, as required under article 44 of the Constitution. For its part, on 14 July 2010, in response to the author's challenge against the precautionary measures imposed on him, the same procedural court ordered his house arrest. Despite this, and as noted by the Working Group on Arbitrary Detention, the author, instead of being taken to his home, was taken to the Special Action Brigade of the Agency for Scientific, Criminal and Forensic Investigations, where he remained in detention until he was finally released at a later date. The Committee notes that, although the author had access to justice to challenge the legality of the precautionary measures, the judicial decisions that eventually deprived him of his liberty had no apparent legal basis and were not dealt with in accordance with the legal procedure in force. In light of the foregoing, the Committee finds that the author's rights under article 9 of the Covenant were violated.

8.3 The Committee notes the author's allegations under article 14 (1) of the Covenant relating to the judicial proceedings before the Second Administrative Court, which was to rule on the appeal for annulment of the decision to liquidate Venevalores. The Committee recalls that the concept of obligations "in a suit at law" set out in article 14 (1) of the Covenant includes procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as equivalent

concepts in the area of administrative law such as the appropriation of private property.[17] The Committee also recalls that, whenever domestic law entrusts a judicial body with a judicial task, the guarantees provided for in the first sentence of article 14 (1) of the Covenant are applicable, namely the right to equality before courts and tribunals, and thus the principles of impartiality, fairness and equality, as enshrined in that provision, must be respected.[18] Accordingly, the Committee considers that those guarantees are applicable to the proceedings before the Second Administrative Court. Similarly, the guarantees contained in article 14 (1) of the Covenant apply to the criminal proceedings against the author, which involved a number of precautionary measures that restricted his liberty of person.

8.4 The Committee notes the author's claim that all the judges involved in the criminal and administrative proceedings lacked independence and impartiality, in violation of article 14 (1) of the Covenant, because of the temporary nature of their appointments. The Committee recalls that the procedure for the appointment of judges and guarantees relating to their security of tenure are prerequisites for an independent judiciary, and that any situation in which the executive is able to control or direct the judiciary is incompatible with the Covenant.[19] In this regard, the temporary appointment of members of the judiciary does not exempt a State party from ensuring that the appropriate guarantees relating to the security of tenure of appointees are in place. Regardless of the nature of their appointment, members of the judiciary must be and must appear to be independent. Furthermore, temporary appointments should be exceptional and limited to specific time periods.[20] In the present case, the Committee notes the author's argument that the Second Administrative Court was composed of judges who were all provisional appointments and who could be dismissed peremptorily, without reason or any procedure and with no right of appeal, according to the jurisprudence of the Constitutional Division of the Supreme Court. The Committee also notes that, as part of the criminal proceedings against the author, the judges in charge of the case were replaced on four occasions in a period of 15 months. The Committee takes note of the arguments put forward by the State party to the effect that the appointment of interim judges is fully justified in the context of the reorganization of the judiciary, which seeks to implement the will of the Constituent Assembly relating to the system for the administration of justice. The Committee, in turn, notes that the process of reorganizing the judiciary, under way since 1999, has unduly prolonged the effective implementation of a judicial service that could guarantee the competence, stability and independence of judges. In the absence of any additional information from the State party to refute the author's allegations or demonstrate that guarantees of security of tenure for judges are in place – in particular, guarantees protecting them from arbitrary dismissal – and taking into account the context in which the author's company was placed in administration, the Committee considers that, on the basis of the information before it, the judges of the Second Administrative Court and the judges who took part in the author's criminal trial did not enjoy the necessary guarantees of independence provided for in article 14 (1) of the Covenant, in violation of this provision.

8.5 With regard to the author's claims concerning his right to be tried without undue delay, guaranteed under article 14 (3) (c) of the Covenant, the Committee notes that the author was subjected to custodial and restrictive measures without having been tried or convicted for the offences with which he was charged. Although the author exercised his legal right to challenge the judicial measure ordering his detention, the delay was due, in part, to the State party's ineffective implementation of the legislation on criminal procedure that allowed defendants to be tried by mixed courts composed of expert and lay judges. The author's allegations in this regard were not challenged by the State party; nor were any arguments put forward to justify the delay in setting up the mixed court provided for under

[17] General comment No. 32, para. 16.

[18] General comment No. 32, para. 7; the Committee's Views in *Perterer v. Austria* (CCPR/C/81/D/1015/2001), para. 9.2 (disciplinary proceedings against a civil servant) and *Griffiths v. Australia* (CCPR/C/112/D/1973/2010), para. 6.5.

[19] General comment No. 32, para. 19.

[20] See in this regard, inter alia, the judgment of the Inter-American Court of Human Rights of 5 August 2008 in *Apitz Barbera et al. v. Venezuela*, paras. 42–46.

the legislation on criminal procedure in force at the time. The Committee considers that, although the criminal proceedings lasted approximately four years, which could be considered normal for the investigation and trial of highly complex offences, such as those with which the author was charged, the delays in the implementation of the legislation on criminal procedure – in particular the delay in setting up the court – ended up affecting the author's right to be tried without undue delay, which in turn had an impact on his deprivation of liberty. The Committee recalls that the reasonableness of the delay in a trial has to be assessed on a case-by-case basis, taking into account the complexity of the case, the conduct of the accused and the manner in which the matter was dealt with by the administrative and judicial authorities.[21] In the circumstances of this case, the Committee is of the view that the State party's observations do not adequately explain how the delays in the proceedings can be attributed to the conduct of the author or the complexity of the case. Consequently, the Committee considers that the proceedings against the author suffered from undue delay, contrary to the provisions of article 14 (3) (c) of the Covenant.

8.6 Having concluded that there has been a violation of articles 9 and 14 in the present case, the Committee does not consider it necessary to rule on the existence of a violation of article 15 of the Covenant for the same acts.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 9 and 14 (1) and (3) (c) of the Covenant.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires that full reparation be made to individuals whose Covenant rights have been violated. The State party should therefore ensure, inter alia, that the author has access to judicial proceedings that are in accordance with the guarantees established in article 14 of the Covenant. Moreover, the State party should award the author appropriate compensation for the violations committed against him according to the present Views. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information on the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views in the official language of the State party and to disseminate them widely.

[21] The Committee's Views in *Cedeño v. Bolivarian Republic of Venezuela* (CCPR/C/106/D/1940/2010), para. 7.7.