

**PARTIALLY DISSENTING OPINION OF JUDGE DIEGO GARCÍA-SAYÁN
WITH RESPECT TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN
RIGHTS
IN THE CASE OF SALVADOR CHIRIBOGA V. ECUADOR
MARCH 3, 2011**

¹The Judgment on the Merits issued in this case by the Court on May 6, 2008, is clear regarding the standard for determining the amount of “just compensation,” as well as on how to make this determination. Thus, in this Judgment on reparations, the Court is not called to decide on how to reach that determination as it did so in the Judgment on the Merits by establishing that it would be done “by mutual agreement between the State and the representatives within a six month period after the notification of [the] Judgment.”

2.As is reported in this Judgment, the parties did not reach an agreement within the time limit which, in turn, had also been extended to February 15, 2009, at the request of the State. Upon reaching this deadline without having come to an agreement, the parties placed the matter in the hands of the Court to determine the reparations established in operative paragraph 5 of the Judgment on the Merits. That is what the Court has done in this Judgment on reparations.

The just compensation

3.The essence of the matter in regard to the determination of reparations lies in setting the amount that must be paid by the State for the expropriation of the property referred to in this case. In reaching that determination, the Court had as its starting point at least two clear and explicit factors. One is contained in Article 21(2) of the American Convention on Human Rights¹ and the other is a standard established by the Court in its Judgment on the Merits of May 6, 2008.

4.In regard to the determination of “just compensation” in this case, in the Judgment on the Merits,² standards are established to guide the assessment:

98.The Court considers that, in expropriation cases, in order for the just compensation to be adequate, the trade value of the property prior to the declaration of public interest must be taken into account and also, the just balance between the general interest and the individual interest as referred to in this Judgment [...].

5.In essence, there are two standards determined by the Court: a) the market value of the property “before the declaration of public interest” and b) “the just balance between the public interest and the private interest.” Both standards could have led to the establishment of an amount less than U.S. \$18,705,000.00 under paragraph 84 of this Judgment, and as a corollary, also below the U.S.\$9,435,757.80 in what regards interests established in the Judgment³, wherein the total compensation for these comes to a total of \$ 28,140,757.80.

Market value of the property prior to the declaration of public interest

2.The first aspect is the market value of the property “prior to the declaration of public interest.” In the Judgment, it is stated that the market value should be the value it was before the declaration of public interest. The Judgment explains and develops quite clearly the factual and legal circumstances prior to that declaration.

¹ Article 21(2) (Right to Private Property):

1.Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2.No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
[...]

² Cf. *Case of Salvador Chiriboga V. Ecuador*, supra note 1, para. 98.

³ Paragraph 101 of the Judgment on reparations.

3.To accurately determine the market value of a property as of a date prior to the declaration of public interest, namely May 13, 1991, is a complex task not only given the twenty years elapsed, but, essentially, because of the limits and restrictions imposed on the property several years prior.

4.A path to an appraisal is via an expert. As described in this Judgment, in the domestic and international transactions there have been different surveys carried out. Unfortunately, as shown and explained in this Judgment⁴, the idea of appointing an international expert for the possible expert assessment was unsuccessful. Therefore, we turn refer to the two opinions given in the domestic forum and the three rendered in the proceedings before this Court.

5.As stated in this Judgment, the case file shows that in the domestic procedures before the Ninth Court of Quito two expert reports were rendered: one of the expert Vicente Domínguez Zambrano and the other of the expert Manuel Silva Vásconez. After hearing the expert opinion of Dominguez by both parties before the Ninth Court, the appointment of expert Vásconez Silva was provided, whose opinion was issued in May 2008 and established the value per square meter "at the time of the survey" was U.S. \$ 63.83 m², which multiplied by the amount of land would give a total value of U.S. \$ 41,214, 233.12. This Judgment of the Court states, however, that the same expert had determined in 1996 that in said year the value per square meter was U.S.\$28.19 per m², which meant a total of U.S. \$ 18'201, 930.62.

6.It follows that from the two expert assessments carried out in the domestic forum, one was observed by both parties and the second, from the expert Silva Vasconez, determined a statistic of the values of 2008. The valuation made by the same expert in 1996 (five years after the declaration of public interest) determined the amount of U.S. \$ 18,201, 930.62. The Court could incorrectly use as a reference the amount set in 2008 as a possible prices. It could be a less distant reference point, of course, the value set by the same expert in 1996.

7.In the Judgment on reparations the essential content of the three valuations given as expert assessments before this Court is described⁵: Edmundo Gutiérrez del Castillo, Jake Jaramillo Gonzalo Barcia and Estupiñán Narváez. The first, proposed by the Commission and representatives, the second by the representatives, and, third, by the State.

8.The expert assessment by Edmundo Gutiérrez del Castillo takes into account a number of standards and indicators to arrive at the amount of reparation, which he determined (U.S. \$ 58,111,875.00). Between them, they mentioned that the land would have greater value because it was far removed from potential natural disaster zones, because in the area the properties have greater value (among other things for being close to shopping centers), because the infrastructure services available, because of the similar prices of real estate for sale in the area, because of the market value in the area and zoning (that allows the construction of buildings higher than 9m, which are more desirable).⁶ As shown, it does not appear to be a central issue, that of determining the value of this specific site, which is only briefly mentioned in this Judgment, as the succession of legal constraints imposed on the property since 1981.⁷ In light of this capital circumstance, many of the characteristics and conditions mentioned by the expert that are applied to other properties are not applicable to this expropriated land.

9.The opinion rendered by the expert Jakeline Jaramillo Barcia, on which the following Lumber is obtained U.S. \$ 65.33 per m², equivalent to U.S. \$ 42,180, 504.47 for the entire plot, to which the value of the eucalyptus forest must be added, is based on explicit criteria which is, as noted above, that of the "urban vocation" of the property. In her expert report, the expert took account the prices of similar nearby properties that were for sale. As can be seen, in this case, the expert report does not seem to have taken into account the essential circumstances of the assessment as determined by the limitations imposed on the property since 1981 and which did not make said property comparable to other properties for sale that were able to maintain the "urban vocation" which was legally denied to the expropriated property.

⁴ Paragraphs 13 and on of the Judgment on Reparations.

⁵ Paragraphs 49, 51, and 52 of the Judgment on Reparations.

⁶ Cf. case file on the merits, tome IV, folios 502 to 505.

⁷ Paragraph 71 of the Judgment on Reparations.

10. The third expert assessment, that of expert Gonzalo Estupiñán Narváez, was presented by the State, as mentioned prior. This expert noted that the expropriated land had not been considered "by the Municipal Planning as urban land or land that could be developed or urbanized," and that, since one could not build on it, criteria for appraisal of rural land should be applied, while considering its urban location. In one of his reports,⁸ this expert recalls the basis contained in the study by the Association of Expert Evaluators (APA). Once these fundamentals were outlined, he concluded that the amount determined by the appraisal of the APA was correct:

Whereas the valuation order explicitly states that it be made taking as reference the market value of the property being expropriated before the declaration of public interest (carried out in May 1991) "the market research investigation was carried out within the period of February to May 1991, wherein the unit value of \$ 9.36 USO was reached, multiplied by the total land area of 645,687,50 m' was determined at the fair price of \$ USO 6,043 .635.25.

11. Of the expert assessments presented in the domestic forum, two of them applied criteria of reference and conditions that do not highlight the limitations imposed on the property since 1981 for its development and use. The method of calculation used by the third expert appears to be closer in terms to the criteria laid down in the Judgment. Among other things because it combined unit values of rural land close to the nearest urban land. This does not make the property "rural" but it does distinguish it from appraisals that use said condition, use, or "urban vocation" to form the basis of the appraisal. The expert determination of market value at the date of the declaration of public interest does not appear, with particular clarity and sustainability for the purposes of this Judgment in the amounts such as those determined by the experts Gutiérrez del Castillo and Jakeline Jaramillo Barcia. Without necessarily stating that the expert Gonzalo Estupiñán Narvaez is the most appropriate assessment, there are elements to validly incorporate it as reference for the determination by the Court given that the objections appear to be less for purposes of this case.

12. In this Judgment on reparations, the Court established the relativism of most of the conclusions of the expert reports. The Court notes, in effect, that these reports "are based largely on a comparison of market prices of urban lots near the area, which are then adjusted considering the various factors of the property. On the other hand, it is evident that the expert Estupiñán Narváez parts from a rural value of agricultural basis in a nearby rural area and adjusts it to an area of Quito, based on market prices of both areas."

13. The logical conclusion of this is that the determination of the commercial value of the property "prior to the declaration of public use" can be derived from two expert assessments that are based and supported by standards and criteria distinct from those that consider the specific legal conditions of the property to be expropriated upon declaration of public interest. Thus, only the expert Estupiñán's assessment remains. Based on the valuation, however, an appraisal could not be reached as has been done in this Judgment, which triples that amount.

The just balance between the public and private interests

14. The second standard determined by the Court to establish a valuation is that of the "just balance between public interests and private interests." This must be in line with the former standard in order to determine "just compensation." Having carried out an organic and systematic incorporation of this standard, valuation estimates could have been drawn that are distinct from those set forth in this Judgment and more appropriate for establishing the "just balance" required by this Court.

15. In order to establish a "just balance," the Court determined in its Judgment on the Merits, in effect, that the competing interests at stake had to be analyzed. On the one hand, there is the finding of the Court that the expropriation was founded on reasons of public and social interest, and that there was "a legitimate or public interest based on environmental protection."⁹ And, on the other hand, there is the determination of the Court that the State breached its obligations in respect to "judicial guarantees, given that the proceedings have exceeded the reasonable time

⁸ Cf. case file on reparations, tome III, folios 569-591.

⁹ Case of *Salvador Chiriboga V. Ecuador*, *supra* note 1, para. 76.

and have lacked effectiveness. This has indefinitely deprived the victim of the property, as well as of the payment of just compensation, which has led to both legal and factual uncertainty and led to excessive imposed burdens, making such expropriation arbitrary.”¹⁰

16. The establishment of the “just balance between public interests and private interests” is important because it refers both to the legitimacy that a declaration of public interest may have in the determination of the valuation of the expropriated property. The standard of “just compensation” referred to in Article 21(2) of the Convention can not be understood, therefore, to be synonymous with “market value” but rather as a result of a process that combines several factors and criteria, those of which, incidentally, establish a market value but also the “just balance between public interests and private interests” that needs to be developed and applied to this case as a complementary factor.

¹⁷ In a different context, this issue has been addressed by the European Court of Human Rights in several cases. In *James and Others v. The United Kingdom*, the alleged violation of property rights established in Article 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms was assessed.¹¹ The Court referred to the “just balance” between the requirements of public interest and the protection of the fundamental rights of individuals.¹² The European Court has held that the terms for compensation are a fundamental element in the determination of whether a just balance was reached.

¹⁸ In this respect, the European Court handles flexible margins, but in any case, it takes away repeatedly, for various reasons, from the conceptual equivalence between “market value” and “just balance,” namely, what the Convention states as “just compensation” (and not “market value”). To arrive at the specific terms for a just compensation, it is necessary to analyze the context of the case, as it may determine that sometimes the “market value” of the expropriated property does not involve a proper balance between public interest and private interest. It should be noted, by way of example, that the European Court reached the conclusion that in a very special context such as German reunification, an expropriation is valid even when no compensation is provided.

19. Specifically, in the case *James and Others*, the European Court found that in certain circumstances, a compensation that is less than the “full market value” may be justified:

The taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Said Article does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of “public interest”, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value [of the property in question].

20. On its behalf, the Constitutional Court of Colombia established that:

fixing the value of compensation may be done with difficulty in an abstract and general manner, without taking into account the context of each case; rather, it requires the weighting of specific interests in each situation, so that the appropriate amount of compensation corresponds to what is fair.

21. The Constitutional Court, as a consequence, established that if the circumstances warrant, it would be possible to establish compensation less than the total harm produced by the expropriation:

This characteristic can provoke the judge to, upon weighing the interests in each case, set an amount for compensation that is less than the total damage caused by the

¹⁰ Case of *Salvador Chiriboga V. Ecuador*, *supra* note 1, para. 117.

¹¹ “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

¹² Cf. ECHR, “*Case James and Others v. United Kingdom*”. Judgment of February 21, 1986, para. 50.

expropriation, but without being able, given that the Legislative Act No. 1 of 1999, excluded the possibility of expropriation without compensation, to reach the conclusion that there is no room for an appropriate compensation, as has been stated.

22. Following this line of reasoning, the Constitutional Court ruled that compensation may take on a reparative function, but that "it does not always have to have a restorative function and, as such, needs not be comprehensive." It also found that the compensation should take into account the interests at stake and weigh them case by case:

Compensation must be fair, namely, it should be fixed taking into account the interests of the community and the affected person and, therefore, those interests must be weighed on a case-by-case basis. (...) The role of the compensation is, generally, of a reparative nature. It includes both consequential damages and loss of earnings. However, in some circumstances, when assessing the interests of the community and giving those interests special weight, it may be reduced to satisfy only a compensatory function. Furthermore, in different circumstances, when assessing the interests of affected person and giving these interests special constitutional value, as in the event of the family home and others that are set out in this Judgment, the compensation may, in both its amount and in its form of payment, take on a manner that makes it restorative.

²³ The Supreme Court of the United States has analyzed, as well, the issue of "just compensation" using as a reference, Amendment V of the Constitution which establishes that "private property may not be occupied for public use without a just compensation." While it is true that the Supreme Court's jurisprudence tends to establish that it is the "market value" that determines the just compensation required by the abovementioned amendment. This was held, for example, in the case of *U.S. vs. 50 Acres of Land* (1984), which stated that "just compensation should be measured, usually, by the market value of the property at the time of expropriation [be paid] in a contemporary money." However, the Supreme Court itself has stated that "when the market value is very difficult to determine or where its application may result in a manifest injustice to the owner or to the public interest," it is possible to depart from said standard.¹³ In *U.S. v. Commodities Trading*, the Court held that the consideration that is always present in such cases is "what compensation is 'just' for both the owner of the property being expropriated and for the public [State] who should pay the bill."

24. As noted in the jurisprudence of the courts cited in the prior paragraphs, the synonymy between "just compensation" and "payment of the market value" is incorrect. For said synonymy to be correct in the Inter-American System, the American Convention would have used those terms. The "just compensation" mentioned in Article 21(1) provides, therein, a context for greater discretion to determine compensation based on circumstances which are related to the market value of the property but incorporate the circumstances of general interest and public interest who are at the base of the legitimacy of the expropriation and are factors to be assessed in the determination of compensation. This is what the Court has done in the Judgment on the Merits when it determined that the valuation should be the result of a "just balance between the public interest and private interest."

25. With the abovementioned being established, the "just balance between public interests and private interests" as provided by the Court as a criterion, should take into account, of course, the damage caused to those expropriated, whom, as determined by the Court, suffer an infringement to their right to judicial guarantees and to the reasonable time, without to date, a compensation being receiving for the expropriated property. But, on the other hand, there are two crucial aspects that make the general interest and public interest.

26. First, there is the public interest that benefits from the result, that is, the Metropolitan Park, which is a benefit to all who can make use of its facilities and, going beyond that, for the entire population of the capital city who, with that Park, is provided a space for environmental protection and clean air.

27. Second is the budget of the State agency that is expropriating and promoting the project and plan of the Metropolitan Park, a municipal entity that has very limited resources and

¹³ Cf.. United States of America Supreme Court, "United States v. Commodities Trading Corp", 339 U.S. 121, pg. 123 (1950); United States of America Supreme Court, "Kirby Forest Industries, Inc. v. United States", 467 U.S. 1, 10, pg. 14 (1984).

income. Indeed, as reported by the State in the public hearing without it being contested, a large amount of compensation would affect the means of the limited budgetary resources of the Municipality of Quito whose initial budget for the so-called "social hub" was of U.S. \$290 million for 2008 and \$380 million for 2009. These elements could have been considered in way that balanced the interests at stake so as to better consider the impact of the compensation provided in the context of the proven public interest. Therefore, I consider that the Court should have weighed differently the balance between private interests and public interest in this case.

Conclusion

28. In the expert assessments aimed at determining the "market value prior to the declaration of public interest" to which we have stated have been used, in most of them, not affiliated with or arising from the succession of limitations on this right from 1981. Therefore, of the technical standards that in another context would have been perfectly appropriate are inapplicable or, at least, questionable in this case. It is the expert assessment by Estupiñan in which standards are provided that are more suited to those determined by the Court and in this particular case, the expert report on the "market value" sets an amount of just over U.S. \$ 6'000, 000.00 without having even weighed the balance between private interests and the larger public interest determined by the Court in its Judgment on the Merits.

29. In the balancing of conflicting interests the Court's reasoning in this case is centrally called upon. The main review of the different valuations derived from the expert opinions which appear to arise in this Judgment on reparations,¹⁴ is not, in my opinion, the task established by the standards set in the jurisprudence of the Court and in its Judgment on the Merits. The review between appraisal standards and technical approaches that disparate and incomparable among themselves is not the best way to set a number for determining the amount to be paid for the expropriation of the property. Addressed in the Judgment on reparations is the exercise of weighing competing interests,¹⁵ the conclusion reached appears to have been driven by the attempt to set a number by balancing between the highest and lowest valuations as established by the experts as doing otherwise would not allow for the establishment of the number U.S. \$ 18,705, 000.00 plus interest.

30. Accordingly, applying and integrating the standards established by the Court in its Judgment on the Merits to determine the compensation that should be paid for the expropriation, the amount of U.S. \$ 28,140,757.80 (including interest) is not clearly supported, which the State, i.e. the Municipality of Quito, would have to pay. Other elements should have been required in order to establish that the number set in paragraph 84 of this Judgment adequately reflects the combined market value before the declaration of public interest with the relevant factor of "just balance" determined by the Court.

Diego García-Sayán
Judge

Pablo Saavedra Alessandri
Secretary

¹⁴ Paragraph 63 of the Judgment on Reparations.

¹⁵ Paragraph 75 and on of the Judgment on Reparations.