PARTIALLY DISSENTING VOTE OF JUDGE LEONARDO A. FRANCO WITH RESPECT TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF SALVADOR CHIRIBOGA V. ECUADOR, OF MARCH 3, 2011.

1. In the Judgment on preliminary objections and merits in the *Case of Salvador Chiriboga* v. *Ecuador*, of May 6, 2008, the Court found a violation of the right to private property enshrined in Article 21 of the American Convention on Human Rights concerning the right to judicial guarantees [fair trial] and judicial protection enshrined in Articles 8(1) and 25(1), all in relation to Article 1(1) of that instrument, to the detriment of María Salvador Chiriboga.[1]

2. In that Judgment, the Court ruled that the determination of the amount and payment of compensation for damages for the expropriation of property, as well as any other measure to remedy the violations found, were to be made by agreement between the State and the representatives of the victims, thereby reserving the right to verify whether the agreement reached by the parties was under the American Convention on Human Rights.[2]

3. The representatives of the victims and the State did not reach an agreement within the period fixed by the Court, to which, pursuant to operative paragraph 5 of the Judgment on the Merits, the Court should resolve the controversy regarding reparations and make a decision without the support which might have been offered through the consensual will of the parties.

4. In the Judgment on the Merits, two standards were established to guide the assessment of the compensatory reparation for damages: a) the market value of the property "prior to the declaration of public interest"; and b) "the just balance between public interests and the private interests."[3]

5. While I concurred with the majority of the members regarding the Court's decision in the Judgment on preliminary objections and the merits, I am of the opinion that the use of the standards laid down for repairs for damages, could have led to the establishment of a lower amount than the one set in paragraph 84 herein. In this sense, I adhere to and share the standards that with greater expertise and experience are developed by Dr. Garcia Sayan and Dr. García Ramírez in the partially dissenting opinions that go with this Judgment.

6. On the one hand, it is important to note that different valuations carried out to determine the "market value" of the expropriated property, rendered both in the domestic forums and before this Court, demonstrate profound differences. The required "just balance" cannot stem more or less from the automatic adoption of a sort of "average" between numbers that are very different one from another.

7. While the so-called "market value" should be a reference when establishing the amount of compensation in cases of expropriation for reasons of public or social interest, in order to establish the purpose of a "just balance," the interests at stake in the case must be considered with special focus on the public interest. The need to harmonize and balance the rights at play, completely prevents the assimilation of the standard of "just compensation" referred to in Article 21(2) of the American Convention with the "market value," due to the influence that the public interest may exercise in a specific case. In that sense, the European Court of Human Rights has stated that legitimate public interest objectives such as those sought by measures for economic reform or those that are intended to further social justice may require less than the reimbursement of a market value.[4]

8. In this case, the Court saw the need to balance, on the one hand, that the State approved "a legitimate or public interest based on environmental protection,"[5] through the establishment of the Metropolitan Park which was to the benefit of all the inhabitants of the Municipality of Quito. On the other hand, the Court held that the State had breached its obligations in respect to

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[1] Cf. *Case of Salvador Chiriboga V. Ecuador*. Preliminary Objection and the Merits. Judgment of May 6, 2008, Series C No. 179, operative paragraph 2.
[2] Cf. *Case of Salvador Chiriboga V. Ecuador, supra* note 1, operative paragraph 4 and 5.
[3] Cf. Case of *Salvador Chiriboga V. Ecuador*, *supra* note 1, para. 98.
[4] Cf.. ECHR, "*Case of James and Others vs. The United Kingdom*", Judgment of June 21, 1986, para. 54; ECHR, "*Case of The Holy Monasteries v. Greece*", Judgment of December 9, 1994, para. 71, y ECHR, "*Case of Pappachelas v. Greece*", Judgment March 25, 1999, para. 48.
[5] Case of *Salvador Chiriboga V. Ecuador*, *supra* note 1, para. 76.

judicial guarantees, given that the proceedings had exceeded the time limit for reasonable settlement and, therefore, had no effect, indefinitely depriving the victim of her land, in addition to the payment for just compensation, making such expropriation an arbitrary one.[6]

9. However, I think that the budgetary capacity of the Municipality of Quito has not been duly considered within the factor of public interest, if there was an intention to properly assess the potential impact on the community's fiscal outlay required to make the payment for compensation awarded by the Court. An equity standard to consider the characteristics of the case would have required a special consideration of the public interest that would be potentially affected as a consequence of the payment of the Judgment on reparations ordered by the Court.

Leonardo A. Franco
Judge

Pablo Saavedra Alessandri
Secretary

[6] Case of *Salvador Chiriboga V. Ecuador*, *supra*no tae 1, para. 117.