Slide 5 Commentary

A professional valuer's task is mainly to read markets to estimate the market value of a property right on the assumption of the highest and best legally attainable use of that right.

The normative standards for professional valuers of such rights are articulated by the International Valuation Standards Council. These IVS define market value as follows:

> "Market value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion." (IVSC 2021, 104).

Slide 6 Commentary

Which means market value requires, to adapt a phrase from Shakespeare, the marriage of true minds without impediment. In cases of expropriation, this head of compensation is intended to provide the affected parties with enough money to purchase another property neither better nor worse than the one that was taken from them.

To understand what behaviours for willing buyers and sellers amount to being knowledgeable and prudent enough in a market for the agreement to be accepted as an example of market value, a professional valuer needs to understand the behavioural and other dynamics – the motives, means and opportunities active in the particular market – to be competent to assert expertise in it. That is, the circumstances of sales and other evidence are not to be taken at face value, but to be assessed and understood by the valuer. To demonstrate that expertise, the IVS provide guidance concerning what a valuer is expected to do, and what the valuer's client has a right to expect.

These standards hold true for ANY market, including those for unregistered and customary land, and ALL the methodologies include requirements to collate sufficient evidence as available to parties satisfying the market value definition, an explanation of how that evidence supports the valuer's estimate, and include both in the report to the client together with fit-for-purpose descriptions of the property itself.

The IVS recognise that

> 20.1. Property interests are normally defined by state or the law of individual jurisdictions and are often regulated by national or local legislation.
>
> In some instances, legitimate individual, communal/community and/or collective rights over land and buildings are held in an informal, traditional, undocumented and unregistered manner outside of a modern land administration and governance system. Before undertaking a valuation of a real property interest, a valuer must understand the relevant legal framework that affects the interest being valued.
>
> 20.2. A real property interest is a right of ownership, control, use or occupation of land and buildings. A real property interest includes informal tenure rights for communal/community and or collective or tribal land and urban/rural informal settlements or transition economies, which can take the form of possession, occupation and rights to use. (ibid.)

In several legal domains, the valuer is professionally responsible (and financially in cases of negligence or fraud) not only to the client, but to any other person who could be reasonably expected to act on the report.

Slide 7 Commentary

Internationally, many laws recognise that compensating for market value alone is not enough to satisfy the Principle of Equivalence: that affected parties should be no worse off after having had their property taken than they were before.

Other heads of compensation therefore include any special value to the owner, covering the costs for the disturbance involved in the taking, any injurious affection or severance reducing the value of any land not taken, and an allowance called “**solatium**”, which is to be provided as a solace for intangible losses which are not reducible to monetary terms but for which monetary compensation is the best that can be done at the time.

The term “**value to the owner**” means that it is not the value to the acquiring authority that is the issue. Rather, it is the amount of cash the person would reasonably rather pay than leave. That includes all the costs of dealing with the acquiring authority, the costs of moving and the like (**disturbance**), **injurious affection**, being the loss in value to any land not acquired resulting from the works (for example, heavy traffic and its noise, pollution etc.), and **severance**, being the loss in value to any remaining land because it is not as valuable as it was when it was more valuable jointly with the acquired land (for example, it no longer being big enough to live, or make a living, upon).

Slide 8 Commentary

The true minds (meaning willing, knowledgeable, prudent, and acting without compulsion) that engage in market value transactions hold many other values too. Market values swim in a sea of values, some of which are not for sale, and others of which are for sale to some degree. So the valuer is to know what a highest and best legal users of the property would be prepared to pay, and the motives (the values and their priorities) that would make them willing to do so.

For example, right now in Ukraine people are killing and dying for what each side considers to be “their” land. Each side knows that if the other wins, the socio-cultural values of that other side will be imposed on that land and its occupants, and their very identities may be compulsorily acquired along with the land concerned. As each valuation is at a particular date, when there is a war on, and land could be forcibly taken from you if you buy it, and even if not, you would no longer be able to live there and exercise your socio-cultural values, then clearly knowledgeable and prudent purchasers would account for such reductions in amenity in the price they would be prepared to pay.

However, some values you identify with and attach to land are non-transferable: No one values your ancestors like you do. You can’t put your identity attachment to the land on a stick and transfer it to another! Yet it may be very real to you, even if not to others.

Slide 9 Commentary

Many such values can be encountered by a valuer when valuing unregistered land, especially customarily held land, some of which may be assessable as part of the market value, and some of which may not. A beautiful view, for example, may make a residential property worth several times more than one nearby without it. Again, to participate in a market, one has to have the motive, the means, and the opportunity. You may have all the motive in the world, but if you do not have the means you simply cannot make your mark in the market.

The markets decide which values are expressed in market values, not legal institutions: they just provide the frame for market activity. So when any opportunity arises, a person with the means and enough motive will prevail over another with massive motives but insufficient means.

Especially within culturally relatively isolated indigenous land, this is such an important point that it is referred to in Article 8.2 of the United Nations Declaration the Rights of Indigenous Peoples (UN 2007):

> 8.2. States shall provide effective mechanisms for prevention of, and redress for:
>
> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
>
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
>
> (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
>
> (d) Any form of forced assimilation or integration …

Slide 10 Commentary

Similarly, the FAO's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) address expropriation and compensation matters in general under Article 16, and valuation related matters in particular under Article 18, including that:

> 18.2 Policies and laws related to valuation should strive to ensure that valuation systems take into account non-market values, such as social, cultural, religious, spiritual and environmental values where applicable.

Slide 11 Commentary

As any land salesman could have told you from the days of Ur of the Chaldees until now, and which the recently emergent sciences of behavioral economics and behavioral finance have confirmed and elucidated, such values are often, but not always, active in property markets.

So a major question is:

"To what extent can the market value and the other heads of compensation account for such social, cultural, religious, spiritual and environmental values in the market value of land, and when all that is said and done, what values of affected parties are disrupted and remain unaccounted for in terms of the UN Declaration on the Rights of Indigenous Peoples?".

Slide 12 Commentary

In answering this, valuers can go so far, but no further. Other professional disciplines are required, and when a valuer encounters such circumstances, as required the valuer should alert the client to the above and any other concerns which, in the valuer's professional opinion, should be pointed out to the client.

Suchlike is standard practice for a valuer when valuing registered land. There is often a responsibility to call in other experts (planners, engineers, quantity surveyors, site contamination experts, lawyers etc.) in standard valuation practice, and appropriate disclaimers and qualifications are to be added to the report as required. So depending on the circumstances, there may be a need to consult different professionals: experienced resettlement officers and academics, socio-cultural anthropologists, sociologists, psychologists … and impact assessment professionals?

Similarly, existing legal heads of compensation for expropriations, designed for within a uniform society, only go so far and no further in addressing indigenous rights. In my personal view, inter-socio-cultural displacements can be so different in kind from the intra--socio-cultural resettlements existing laws are mainly designed for as to perhaps require an additional head of compensation.

From my valuer's perspective, I note that our identities are constructed for us to survive and prosper in the environment we are born into. We become competent in that space as we grow up (absorbing language, social norms and networks, their beliefs etc.) and when we are separated from them, we may find our competencies wholly or partly obsolete. But such displacements may not only trigger the financial consequences of such competency disruptions: for some, they may trigger the challenges to one's very sense of being that wars are fought over.

That proposed new head of compensation might start from there.

Slide 13 Commentary

In other words, how are we to implement:

- The UN-recognised rights of indigenous people in legal domains where those concerns are not recognised as compensable when taken,
- The IVS recognition that informal rights can have value,
- The FAO's VGGT recommendations that they be considered in valuations, and
- The issues around non-market values identified in the UN-HABITAT/GLTN's Valuation of Unregistered Lands Policy and Manual,

all of which find support in peer-reviewed, published science?

The short answer: as is sometimes already the case, donor organisations may require recipients to comply with donor requirements in the loan agreement, and those donors' social safeguard policies should clearly and explicitly address those identified concerns.

Ideally, however, the countries themselves will come to understand the importance of these concerns and amend their laws accordingly.

In that respect, Satoshi has looked around, and here is what he has found.

Slide 28 Commentary

So back to the main question, Question 1:

"To what extent can the market value and the other heads of compensation account for such personal identity, social, cultural, religious, spiritual and environmental values in the market value of land, and when all that is said and done, what values of affected parties are disrupted and remain unaccounted for in terms of the UN Declaration on the Rights of Indigenous Peoples?"

Market value:

Only insofar as the values are expressed in that market by those with the motives, means and opportunities to do so, and who do so in terms of the market value definition.

This is the value required by most legislation, chosen so the dispossessed persons can go off and buy equivalent land somewhere else.

But the IVS recognise other values potentially more fit for purpose:

Slide 29 Commentary

Investment Value:

The value of an asset to the owner or a prospective owner given individual investment or operational objectives (may also be known as worth) (IVS 20.11).

My colleague Professor Peter Wyatt considers this value may be more fit for purpose when valuing indigenous lands, because valuers can then reflect upon the special value of the land to the affected persons, and open the valuers' monetary valuation skill sets to what is the best that can be done under the affected parties' circumstances.

Equitable Value:

This is the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties (IVS 20.6).

That is, it refers to a transaction between the actual parties involved, as distinct from the hypothetical parties in a market value transaction – for example an indigenous community and an acquiring authority. Therefore, the estimated amount will take into account the advantages and disadvantages accruing to both parties as a result of the transaction beyond those that market values will.

Slide 30 Commentary

Fair Market Value:

20.7. Fair Market Value

1. The Organisation for Economic Co-operation and Development (OECD) defines "fair market value" as the price a willing buyer would pay a willing seller in a transaction on the open market.

2. For United States tax purposes, Regulation §20.2031-1 states: "The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts"

20.8. Fair Value (International Financial Reporting Standards)

IFRS 13 defines "fair value" as the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date).

Therefore, for most intents and purposes, including ours, it does not offer more than market value.

Slide 31 Commentary

Question 2:

Under which "values" do spiritual values including intangible values people attach to cultural heritage; "community cohesion" (which create what is called social capital and generate positive values for beholders of such values as a basis of, for example, informal safety net); and "ecosystem services" that provide a basis of our existence, sources of livelihoods, etc. belong?

Slide 32 Commentary

Answer:

Equitable Value; Yes, insofar as they can be agreed in terms of monetary values.

Investment Value: Yes, depending upon how far the definition of investment can be stretched, and how far monetary valuation can compendsate for these.

Market and Fair Market Values. Yes, but only insofar as there is supply and demand for them in the market. Again: I can give or sell you my legitimate property rights over land, but they are neither the land nor my personal history and identity attachments to it.

So all are possible to some degree, but all may be insufficient when intercultural.

Slide 33 Commentary

Question 3:

Under what contexts can such "values" be counted in compensation in the context of compulsory acquisition?

Slide 34 Commentary

Answer:

As described above all are possible to some degree, but all may be insufficient, particularly in cases oof intercultural transfers, and yet still be the best that can be done at the time.

Slide 35 Commentary

Question 4:

What concrete challenges do valuers face in estimating/ monetizing such values?

Slide 36 Commentary

Answer:

While information technology has often atrophied the need for valuers to examine the circumstances of sales and other evidence to determine how robust it is as evidence for the relevant form of monetary value (market, investment, or equitable), that skill remains core to any professional valuation.

Below the References in this handout, you will find a list of the kind of inquiries a valuer may ask to determine market value on the basis of the value sets and reasoning that guided comparable market participants (UN-HABITAT 2018, Box 1, pp. 6-7). Such developmental processes towards understanding are similarly fundamental to adequately assess what is required to meet the Principle of Equivalence.

References.

A general discussion of the issues in the valuations of unregistered land between Dr Spike Boydell and Dr Mike McDermott is posted on YouTube at: https://www.youtube.com/watch?v=SJPAoasy0DA

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INDICATIVE QUESTIONS VALUERS MIGHT ASK WILLING BUYERS AND SELLERS RE THE IVS DEFINITION OF MARKET VALUE FOR THE VALUATION OF UNREGISTERED LANDS

(Source UN-HABITAT 2018, Box 1, pp. 6-7)

Market value is the estimated amount

Amount of what? Money, goods, services? Money? If so, what kind of money, and how? Lump sum, annuity, etc.? Goods? The exchange can be by barter between willing parties, one selling oranges and the other apples. What happens in this market environment? Services? In many societies, land is supplied on the basis of services being supplied. The valuer should ask, to whom, by whom and for what?

For which an asset or liability would exchange

What assets would exchange? In the context, are they likely to be abstract assets, concrete assets, or a combination? What means of exchange are available in the market and how are their rules trusted there, and enforced if need be? The valuer should always check the relevant laws and institutions that apply in that market and social market.

On the valuation date

[Because market values are dynamic] Every valuation should be at a past or present date.

Between a willing buyer and a willing seller

What would make the imagined buyers and sellers willing? Did social, cultural, religious, spiritual and environmental values play a role? Did they influence the arm's length? What are they after in buying or selling? Prestige? Subsistence? It is not enough to just assume that they are willing, because their motives should fit the knowledge, prudence and freedom requirements. Not only willing but also being able is implicit here, because the parties must be able to provide the estimated amount to the other party for the deal to go through. Market/social-market exchanges require motives, means and opportunity before knowledgeable, prudent and free buyers and sellers can exchange an asset. There are often two separate markets for the same piece of land – an internal and external market. Some transactions will be done on the internal market to other community members. Some transactions are done in the external market to developers, people moving into the community. There may be two levels of market prices and therefore market value. The valuation should be clear on which of these 'separate' markets is being valued.

In an arm's length transaction

This means that the parties are to be considered as being independent of one another; not connected in a manner that would influence the estimated amount of a transaction between them and would not influence the market in general.

After proper marketing

What would be the proper marketing (time) for the asset to attain its market value? Market value exchanges happen when both parties are aware of the highest and best use of the asset. What would it take for there to be a sufficiently large body of highest and best potential users aware of the land for this condition to be satisfied? Whatever that is for that particular market and social market, it is to be imagined by the valuer as having been achieved before the date of the valuation.

Wherein the parties had each acted knowledgeably, prudently and without compulsion

Do both parties know where the other party is coming from – what fact perceptions and value judgments are being brought to the potential exchange from both sides? And who are the real parties involved? Does the party representing the 'owner/s' really have that authority for all the affected parties concerning the land in question? How is that to be assured? Market value exchanges only happen when one party has not been taken advantage of by the other. The answers to these and other relevant questions in unregistered land markets will guide the valuer as to how that market, including the social market, works.