Compensation and Damages in International Law

The Limits of "Fair Market Value"

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I. INTRODUCTION

The calculation of compensation and damages always presents a particular challenge in legal proceedings. This is all the more true in international proceedings, where different legal systems, languages and traditions come together. International jurisprudence appears especially unpredictable in valuation matters. It is difficult to discern general principles or methodologies that are accepted on a wider scale. This is exacerbated by the fact that the judgments and awards often lack sufficient reasoning or consistency.

On the other hand, there is a considerable need for more clarity and predictability in international practice with regard to valuation. Also due to increasing international economic relations—public and private—the potential of conflicts increases. In such a situation, it is of particular interest for the parties to know how their rights and properties in all probability will be valued. There must be a possibility of estimating at least roughly the outcome of international proceedings in order to calculate the risks of such a costly undertaking.

A number of reasons can be identified for the existing lack of consistency and predictability. First, there is the use of terms. The obligation to pay an amount of money can be referred to, for example, as the duty to pay "compensation", "reparation", "indemnification" or "damages". These terms are used quite interchangeably¹ and are normally not linked to a specific legal subject matter.² Therefore, considerations that have been developed for one particular case are sometimes applied without sufficient

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¹ Black's Law Dictionary explains the term "compensation", inter alia, as "[p]ayment of damages, or any other act that a court orders to be done by a person who has caused injury to another. In theory, compensation makes the injured person whole." B. Garner (ed.), Black's Law Dictionary (St. Paul, Minnesota 2004) 301. Similarly, "damages" are defined as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." Ibid., 416. In the Oxford Dictionary of Law, "compensation" is referred to as "[m]onetary payment to compensate for loss or damage." E. Martin (ed.), A Dictionary of Law (Oxford 2002) 98. The term "damages" is defined as "[a] sum of money awarded by a court as compensation for a tort or a breach of contract. Damages are usually a lump sum award ... The general principle is that the claimant is entitled to full compensation (restituto in integrum) for his losses." Ibid., 133.

² As an exception, one may refer to "just compensation" or "adequate compensation", which are generally explained with regard to the Fifth Amendment of the U.S. Constitution as "the payment by the government for property it has taken under eminent domain—usually the property's fair market value, so that the owner is theoretically no worse off after the taking." Black's Law Dictionary, ibid., 301.
reflection to another case, where they might not fit. The different legal concepts behind the terms are mixed up and lead to confusion.3

Second, international practice often does not appropriately take into account that “value” is not an objective quality of things. As Immanuel Kant pointed out, value may only be understood as appreciation by persons.4 Without the needs and affections of persons, things would not have any value. “Value”, therefore, is a relative concept.

This is also reflected in business valuation practice. The U.S. Appraisal Foundation defines “value” in its Uniform Standards of Professional Appraisal Practices (USPAP) in the following way:

“... the monetary relationship between properties and those who buy, sell, or use properties ... Value expresses an economic concept. As such, it is never a fact but always an opinion of the worth of a property at a given time with a specific definition of value.”5

For the transformation of a specific legal claim into numbers—which is the process of valuation in legal proceedings—it is therefore necessary to identify the definition of value on the basis of the applicable legal rules. This, unfortunately, is rarely done.

Third, the principles and concepts of valuation as they have been developed in economic science and practice are not very familiar to many lawyers involved in international claims. Even if the precise numbers will normally be presented by economic experts, the understanding of the underlying concepts by counsel, judges and arbitrators is essential in order to evaluate the purported numbers and assumptions.

The present article tries to identify the most important principles which should be observed in the process of calculation of compensation and damages in international legal proceedings. It concentrates on claims of individuals against foreign States before international courts or international arbitral tribunals, be it directly or by the home State in the exercise of diplomatic protection. The main causes of valuation in such proceedings are expropriations, violations of international obligations (State responsibility) and breaches of contract.

3 The same is true in French, where the terms “indemnité”, “indemnisation”, “compensation”, “dommages” or “dommages-intérêts” are not carefully distinguished. This becomes particularly evident in the bilingual publications of the judgments of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). For example, in The Mavrommatis Jerusalem Concessions, the PCIJ held: “Le Gouvernement hellénique s’est principalement placé au point de vue que, déjà, il y a eu expropriation sans que l’indemnité due à ce sujet ait été payée à M. Mavrommatis; c’est cette indemnité que, en premier lieu, il réclame.” A few pages later, it reads: “[C]ette clause n’a, en fait, ni entraîné une expropriation ou une annulation des concessions de M. Mavrommatis, ni causé à celui-ci un préjudice quelconque qui puisse donner lieu à des dommages-intérêts dans le présent procès.” In English, in both cases, the term “compensation” is used. See The Mavrommatis Jerusalem Concessions, PCIJ 1925, Series A, No. 5, at 40 and 45 (emphases added). By contrast, in German, the term “Entschädigung” is generally not used interchangeably with “Schadenersatz”, the former having a broader meaning and being not necessarily linked with a legal obligation to pay. See, for example, D. Majer, Die Pragen der Entschädigung für ehemalige NS-Zwangsarbeiter in völkerrechtlicher Sicht, 29 Archiv des Völkerrechts (1991) 1.

4 I. Kant, Kritik der praktischen Vernunft. Grundlegung zur Metaphysik der Sitten, Vol. 7 (Frankfurt am Main 1968) 60.