

ALSA INTERNATIONAL MOOT COURT COMPETITION

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Case 2017

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The Facts

1. Vertland and Sanphancisco are parties to a bilateral investment treaty, which entered into force on 5 March 1976 (the “BIT”). An extract of the BIT is attached to this Memorandum.
2. Vertland is a developing country located in South East Asiana. After opening up its economy and establishing trade relations with various countries around the world in the late 1970s, Vertland has been rapidly developing and diversifying its economy. Keen to attract foreign investors, the Vertese government enacted a wide spectrum of investor-friendly policies. The policies were hugely successful, and resulted in an influx of foreign investors in Vertland. As such, foreign investments were, and to a certain extent, continue to be, prevalent in Vertland. In fact, Vertland was generally known to be a country that was friendly towards foreign investment and was the market of choice for many foreign investors. In this regard, there is a tendency for Vertese market trends to mirror global market trends. With the rise of technology companies in the 2000s, Vertland has likewise seen a substantial increase in the number of technology companies venturing into the country. With its large population and investor-friendly policies, technology companies have long regarded the Vertese economy as one with huge potential for growth.
3. One such technology company which decided to set foot in Vertland in 2007 is EZKar. EZKar is a company based in Sanphancisco, a country widely known to be the hotbed for technology companies. Set up in 2003, it is a private ride-hailing company which has set its sights on revolutionizing transport networks worldwide. Its founder had travelled to Vertland in 2004, and noticed that the Vertese public transport system was struggling to accommodate its ever-expanding population. Without an extensive railway network in place and insufficient public bus services, the Vertese population was highly dependent on taxis to get around. Yet, with weak regulations in place, taxi drivers were prone to touting and arbitrarily hiking fares. Service standards amongst taxi drivers were also often dismal and locals regularly cited concerns about safety. EZKar’s founder knew there and then that Vertland would provide an extremely fertile market for EZKar to grow.
4. On 6 March 2007, EZKar incorporated a wholly-owned subsidiary called EZKar-Vert in Vertland. Given that EZKar could possibly offer a solution to the troubled public transport system in Vertland, the then Vertese government saw EZKar as a welcome addition to the country. To facilitate EZKar-Vert’s entry into the industry, on 10 April 2007, EZKar-Vert and Vertland-Move (“V-M”), Vertland’s state-owned entity entrusted with the regulation of public transportation within Vertland, entered into

an agreement (“**V-M Agreement**”) that allowed EZKar-Vert to conduct its operations within Vertland with ease and exempted EZKar-Vert from the relevant licensing and safety laws otherwise applicable to transport services within the country for a period of 10 years (subject to renewal).

5. V-M is 100% owned by the Government of Vertland. Its powers and functions are vested in a Board of Trustees, which comprises of 5 members. Three of these members are government officials, whilst the remaining 2 are individuals from the private sector appointed by The President of Vertland. V-M retains a separate legal personality with its own budget. Under its Charter, VM has the right to sue and be sued.
6. Pursuant to the V-M Agreement, any dispute arising or of or relating to the same were agreed to be submitted for settlement by arbitration in accordance with the Rules of the International Chamber of Commerce (ICC).
7. The Vertese population, long frustrated with the lack of available transport options, was quick to accept the EZKar business model, which guaranteed safe and reasonably priced car rides around the country. As a result, pick up was quick, and EZKar-Vert quickly established operations in Vertland. It was hugely successful at its inception.
8. Nick Traviska is a businessman. He made his first millions in the garment manufacturing industry in his home country of Azuria and has recently branched out into other areas of business both in Azuria and abroad. He was also a college-roommate of one of the owners of EZKar. Sensing a money-making opportunity in EZKar-Vert, he reached out to EZKar and convinced them sell him a 49% stake in EZKar-Vert. EZKar readily accepted the offer as this allowed it to capitalise EZKar-Vert. Unbeknownst to many, Traviska’s mother was a citizen of Vertland, although she moved to Azuria after getting married. Under Vertese laws, since one of his parents is a Vertese citizen, Traviska is entitled to Vertese citizenship.
9. Unsurprisingly, the entry of EZKar-Vert had a severe impact on the taxi industry. Local taxis were shunned as a transport option, and taxi drivers saw an almost 50% drop in their daily earnings. Recognizing that it would be far more lucrative to be an EZKar-Vert driver, taxi drivers quit in droves. Others were enraged because of the significant loss of earnings.
10. The local taxi conglomerates were equally unhappy with EZKar-Vert. Many viewed EZKar-Vert as unfair competition, given that EZKar-Vert was a private hire vehicle

operator and would not be subject to the local licensing and safety laws regulating the taxi industry. In addition, taxi rental income was at an all-time low.

11. As a result, “anti-EZKar-Vert” demonstrations along the streets of Vertland’s business districts became commonplace, often bringing traffic in these districts to a complete standstill.
12. From 2010, things took a turn for the worse. While the Vertese economy had continued to rapidly develop, the benefits of development had not been equally spread across the population. The Vertese population began to view foreigners as “job thieves” and there was growing frustration with what the citizens perceived to be the government’s failure to consider the needs of its locals. It was therefore no surprise that the 2014 elections saw the victory of a hyper-nationalist political leader, Donweld Trunk. In his first post-election speech at the Vertland Presidential Palace, President Trunk stated: “*We are living through the greatest job theft in the history of the world. These foreigners – they’re taking our jobs. They’re taking our money. Now is the time to take it all back.*” It was clear that the once foreign investor-friendly Vertland was no more.
13. As a result of the increased nationalist fervour amongst the Vertese populace, protests at the offices of foreign companies soon became commonplace. In September 2015, following encouragement by the local taxi companies, hundreds of taxi drivers gathered at the office of EZKar-Vert to protest against EZKar-Vert’s operations. The protest turned violent quickly. Bricks and flares were thrown at the EZKar-Vert’s office premises and extensive damage was caused to the exterior of the building. The protestors eventually broke into the premises. EZKar-Vert’s panicked staff barricaded themselves in the top floors of the building and made multiple calls to the police for help. However, help did not arrive until late in the evening. By then, significant damage had been done, and the first few floors of the premises had even been looted.
14. President Trunk’s first act upon taking office in 2015 was to enact the following policies:
 - a. Restrictive tax regulations for foreign-owned enterprises: There was in place a Vertese government policy (which had been in place since 1979) of giving foreign companies investing in Vertland a 50% tax rebate for the first ten years of their presence in Vertland. The Trunk administration reversed this policy retroactively with effect from 2005 and demanded that all foreign companies

that had been enjoying the tax exemption pay back up to ten years of back taxes.

- b. Environmental regulations: In a bid to control carbon-emissions in Vertland, President Trunk's administration also sought to reduce private car ownership. Hence, it passed new laws imposing a special fee on all new private cars purchased: any purchaser of a new car would have to pay the Vertese Government an additional 50% of the open market value of the car in order to register the car. This new policy applied only to private cars, including private-hire vehicles such as those used for EZKar-Vert, and did not apply to cars purchased for use as taxis.
 - c. The Trunk PH Law: In an attempt to restrict and regulate private-hire vehicle operators, President Trunk's administration passed the Trunk PH Law with immediate effect. The Trunk PH Law, amongst others, (i) required private-hire vehicle operators to apply and obtain the necessary licences for the provision of private-hire vehicle services; (ii) prohibited private-hire vehicles other than taxis from charging customers on the basis of distance travelled; (iii) and prohibited the use by private-hire vehicles of geolocation software, which shows the location of nearby available vehicles to potential customers in real-time. The move to enact the Trunk PH Law was welcomed by Vertland's local taxi conglomerates, who incidentally, were the biggest funders of President Trunk's political campaign.
15. EZKar-Vert was immediately concerned by the slew of President Trunk's new regulations and their impact not only on EZKar-Vert's general operations, but also the rights that had been afforded to EZKar-Vert under the V-M Agreement. As a result, EZKar-Vert wrote to V-M on numerous occasions to seek discussions and negotiations on the V-M Agreement. These were ignored by V-M.
 16. Around the same time, President Trunk appointed a new Minister of Transport, Professor Emma Rutty. To address the shortage of public transport in Vertland, Professor Rutty commissioned a study that subsequently proposed the purchase of 500 new public buses to alleviate the public transport shortage in Vertland. The project turned out to a success as the public found taking buses to be a cheaper and more convenient method of transport than taking taxis. Gradually, fewer people made use of taxis or private-hire vehicle services such as those offered by EZKar-Vert. On the overall, it was estimated that use of taxis or private car services decreased by 7% in the course of 2015.

17. Separately, in 2011, EZKar-Vert was sourcing for a new office to accommodate its local operations. It found office premises at a commercial development owned by the Vertese Government, and entered into a lease agreement directly with the Vertese Government. Subsequently, due to various commercial reasons, the Vertese Government terminated the lease agreement. This was permitted under the lease agreement, except that, in breach of the lease agreement, the Vertese Government refused to return the deposit that EZKar-Vert had placed with it. This deposit amount was for the sum of \$75,000.00, equivalent to three months rental.
18. Also in early 2013, EZKar-Vert was sued by a man who had been hit by a car driven by a driver using the EZKar service. It turned out that this driver was a 16-year old who not even have a valid driving license (as 18 is the legal age for obtaining a driving license in Vertland). The lawsuit took some time to wind its way through the Vertese courts, but in the end the Vertese trial court found EZKar-Vert liable for failing to ensure that its drivers held valid licenses. Apart from awarding \$500,000 in damages to the plaintiff, the Vertese trial court also imposed \$100 million in punitive damages on EZKar-Vert. EZKar-Vert has appealed the judgment and the appeal is pending before the Vertese Court of Appeal.
19. By early 2016, EZKar found it no longer viable to continue with EZKar-Vert's operations in Vertland.
20. EZKar now seeks redress against Vertland.

**TREATY BETWEEN
THE GOVERNMENT OF THE REPUBLIC OF SANPHANCISCO
AND THE GOVERNMENT OF THE FEDERATION OF VERTLAND
CONCERNING THE ENCOURAGEMENT
AND RECIPROCAL PROTECTION OF INVESTMENT**

The Government of the Republic of Sanphancisco and the Government of the Federation of Vertland (hereinafter the “Parties”);

Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;

Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;

Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

Article 1: Definitions

For purposes of this Treaty:

[...]

“**covered investment**” means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.

“**investment**” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;

- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

“**investor of a Party**” means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

“**measure**” includes any law, regulation, procedure, requirement, or practice.

[...]

Article 3: National Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

Article 4: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the

establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.
3. If an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:
 - a. requisitioning of its covered investment or part thereof by the latter's forces or authorities; or
 - b. destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation], *mutatis mutandis*.

Article 6: Expropriation and Compensation

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
 - a. for a public purpose;
 - b. in a non-discriminatory manner;
 - c. on payment of prompt, adequate, and effective compensation; and
 - d. in accordance with due process of law and Article 5 [Minimum Standard of Treatment].

[...]

Article 12: Investment and Environment

1. The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.
2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.
3. The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.
4. For purposes of this Article, “environmental law” means each Party’s statutes or regulations, or provisions thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through the:
 - a. prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
 - b. control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or
 - c. protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas,

in the Party’s territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

[...]

Article 17: Denial of Benefits

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

- a. does not maintain diplomatic relations with the non-Party; or
 - b. adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.
2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

[...]

Article 21: Taxation

1. Except as provided in this Article, nothing in this Treaty shall impose obligations with respect to taxation measures.
2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration only if:
 - a. the claimant has first referred to the competent tax authorities of both Parties in writing the issue of whether that taxation measure involves an expropriation; and
 - b. within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.

[...]

Article 25: Other obligations

1. A Party shall fulfil any other obligations it may have entered into with regard to investments in its territory by investors of the other Party.