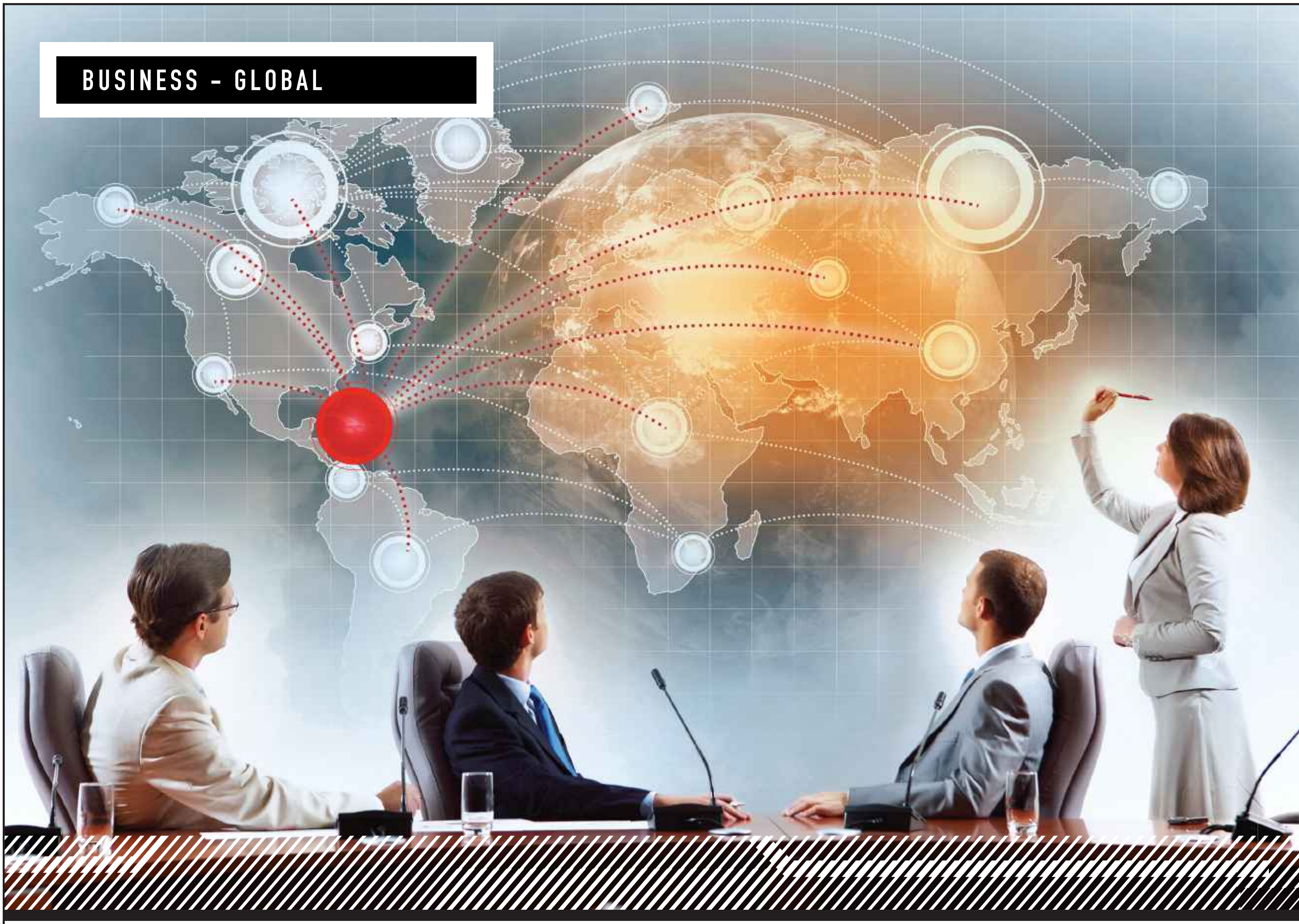


THE BVI:
CORPORATE EVOLUTION SERVING GLOBAL COMMERCE

by Greg Boyd

PERSPECTIVES AND PERCEPTIONS

The end of 2015 marked 20 years in the legal profession for me. During those two decades the legal landscape has changed dramatically owing to both technological advancement and commercial factors. Globalisation occurred and economic effects were felt on a worldwide basis.

As lawyers we now have computers on our desks, laptops in our bags and smart phones in our pockets which have all impacted on what we do and client expectations of how and when we deliver our advice. Law firms have expanded globally in reaction to increased cross-border activity and the need to provide round the clock service. Client meetings are routinely an electronic affair and billion dollar deals are closed through the email exchange of PDF scanned copies of executed documents between deal parties.

Commercially the last two decades can be associated with challenging times rather than the 'boom times' that preceded them. We have transitioned through Y2K and recovered from the effects of the 9/11 terrorist attacks on a primary financial centre, the Global Financial Crisis (GFC) and the ponzi scheme fund blow ups. Financial institutions once thought too big to fail have failed while others only survived owing to public sector bail out plans. Furthermore, China's former double-digit growth rate has slowed to something in the region of 5-7% sending oil and natural resource prices plummeting.

A failure to react appropriately to any one of the above factors can have severely adverse business consequences. The cost of getting it wrong can be operationally fatal. As with nature, the difference between extinction and survival (ignoring the effects of mankind for a moment) is a matter of evolution and the ability to adapt to changing factors and circumstances.

Few will argue that the conception of the BVI as an offshore finance centre was initially fuelled by its ability to provide tax efficient solutions for US businesses. And back in the boom period of the 70's and 80's it was considered commercially prudent for businesses to lower their operational costs and maximize profit; lowering the tax burden was part of that business function. However, fast-forward past the GFC to the stagnation of developed economies feeling the effects of their highest ever levels of public debt, budget deficits and soaring tax rates; tax efficiency has become the dirty term of rhetoric for many media publications and political snipers needing someone or something to blame for their worsening domestic fiscal crisis. Offshore finance centres (especially the BVI) have been in their cross-hairs ever since. A summary example follows: *Tax havens have been criticised because they often result in the accumulation of idle cash that is expensive and inefficient for companies to repatriate. The tax shelter benefits result in a tax incidence disadvantaging the poor. Many tax havens are thought to have connections to fraud, money laundering and terrorism.* This rhetoric may sell newspapers and play well to a part of the electorate not familiar with cross-border finance and the deployment of global capital; however, that does not translate into commercial reality nor does it solve their domestic fiscal crises. And, more importantly, it is not an accurate perspective of the valuable service the BVI provides to global commerce.

FDI – DRIVING GLOBALISATION

Foreign Direct Investment (**FDI**) is defined by the Organisation for Economic Co-Operation and Development (**OECD**) as follows: *"Cross-border investment by a resident entity in one economy with the objective of obtaining a long term interest in an enterprise resident in another economy."* The OECD also explains that these are usually long-term investments with a significant influence by the direct investor on the management and control of the enterprise (usually more than 10% of the voting power being acquired by the investor). In short, it's where a company from one country invests in a company or project in another country.

FDI flows have doubled from the previous decade and are ten times more than they were in the 1980s. FDI growth has increased year on year despite the GFC and countries have actually amended their investment policies to attract FDI as a means of counteracting the effects of the GFC. Public debt in developed markets hit unprecedented levels after the GFC while that effect was far less dramatic in developing countries (owing to their lack of linkage to the global financial markets). FDI to developed countries declined but increased to developing countries (developed economies being characterized by recovery while developing economies became associated with revenue). FDI has become the major economic driver of globalisation, accounting for over half of all cross border investments. Companies are rapidly globalising through FDI to access and serve new markets and customers, map out their value chains in the most efficient locations globally, and to access technological and natural resources. In other words, FDI fuels growth of Multinational Enterprises (**MNEs**) and promotes development in the emerging markets.

The deployment of FDI is channelled primarily through equity structures, as the key requirements for an FDI are structural in that they focus on management control and voting power. The effective deployment of FDI therefore *requires a corporate legal solution*. FDI is a primary catalyst for joint venture and cross-border merger and acquisition (**M&A**) activity.

THE BVI ADVANTAGE

Some will suggest that International Finance Centres are much alike. That is only correct up to a point; the evolution of any specific International Finance Centre will dictate its key strengths and advantages. With almost half a million active BVI Companies, the BVI has evolved to be the leading offshore corporate domicile offering an exceptional depth of corporate expertise and experience. Corporate advantage is the renown of the BVI.

Multinational investors will make investment decisions based on the risk profile of any given investment. Such factors will include geographic risk, political risk, economic risk and corporate risk. Certain of these risks can be insured against while others are beyond control or mitigation. Investors will not risk investing in a foreign market unless the prospects of success are reasonable and the legal structure is sufficient to protect the investment. The primary motivation to use the BVI is not tax driven but rather (and more importantly) to achieve a structural advantage that delivers management control and access to new markets while treating all investors equally or as commercially agreed. This structural advantage increases project viability through investment protection and enables FDI transactions to succeed.

The BVI advantage includes:

- Progressive legislation that evolves with business demands
- Commercially focused, responsible and sensible corporate governance
- Effective corporate structuring through unrivalled corporate flexibility
- Effective exit strategies
- Credible and efficient dispute resolution
- Transaction fluency achieved through skill set, expertise and professionalism
- Tax neutrality that ensures investor equality

These advantages are explained in more detail below:

Legislation: The BVI Business Companies Act is one of the most progressive corporate statutes in the world. Provisions were cherry-picked from the laws of Delaware, Ontario, Australia and England. And it is frequently reviewed and amended to meet market conditions or improve its functionality. This modern, flexible and commercially minded corporate legislation ensures that transactions proceed with maximum efficiency. Commercial parties get access to progressive laws and a stable and secure legal framework that can accommodate global market standards (for example, the enforcement of New York law or English law governed transaction agreements).

Corporate structuring: The BVI Company has unrivalled corporate flexibility and is successfully utilised from start-up, through the growth years of joint venturing, to a listed company on leading stock exchanges such as the London Stock Exchange, the Hong Kong Stock Exchange and the New York Stock Exchange. The BVI Company is a legally secure and internationally accepted platform for fundraising. Businesses that operate in jurisdictions that restrict access to international finance because of regulatory, political, legal complexity or development reasons often use a BVI Company as a holding company to the group or intermediary holding company within the group in order to enhance access to capital in the international market via equity investment, IPOs, project and acquisition debt financing. In addition, limited mandatory statutory requirements apply to the composition of the constitutive documents (the Memorandum and Articles of Association, the MAA) of a BVI Company which means that advisers are able to craft very transaction specific MAA (incorporating, for example, special economic and control rights and corporate governance requirements) that provide a robust structure and commercial certainty for the commercial parties. Commercial attributes include:

- *Neutrality:* Creation of a level playing field for investors; the BVI provides a neutral environment where commercial parties are able to structure deal parameters without any local or foreign law bias.
- *Class rights:* Key to private equity and capital raising transactions is the need to create preferential rights for the investor (voting, dividends, liquidation preferences etc.); easily achieved through a multiple share class structured BVI Company. Share classes with deal-shaped and class specific share rights (control and economic) including class specific director appointment rights and class specific distribution rights are easily catered for under BVI law.
- *Reserved matters:* Broad flexibility exists with respect to actions or activities that can be defined as reserved matters requiring enhanced corporate authorisation at director and/or shareholder level.
- *Limiting capacity:* The ordinarily broad corporate capacity of the BVI Company can be restricted to deal or project specifics.
- *Directing duty:* Designated directors can be empowered to act in the best interests of a parent company, specified JV partner or shareholder rather than the BVI Company itself.
- *Statutorily binding:* The MAA are, as a matter of statute, binding as between the shareholders themselves and between the shareholders and the BVI Company. Additionally, directors are under a statutory duty to comply with the MAA and to ensure the BVI Company complies with the MAA.
- *Private equity:* Much of the genius of BVI corporate law lies within the flexibility and adaptability of the BVI Business Company which ensures that it remains useful and adds value at every stage of the business life cycle. A BVI Company is an ideal vehicle for a start-up because it can be efficiently formed at a competitive cost, is subjected to a commercially appropriate degree of corporate governance and ownership and control rights can easily be safe-guarded. Additionally, as the venture progresses the BVI Company successfully navigates the growth years of equity and debt financings to exit via an IPO or company sale.
- *Investment funds:* There are a number of instances where a regulated fund product is able to overcome various global regulatory issues or hurdles that may have otherwise prevented the use of a BVI Company in certain circumstances. For example, there are a number of jurisdictions that actively seek to prevent the acquisition of assets in that country by an unregulated vehicle and there are certainly pockets of potential international investors that seek a degree of regulation in fund vehicles for reasons of credibility and the comfort that there is some form of third party oversight. However, one particular difficulty for investment professionals either operating a regulated fund within the emerging markets or having investment strategies focused on emerging markets is that there is inherently an above average investment risk and lower success profile, resulting in managers operating within this space receiving smaller investment commitments as compared to investment strategies focused on developed markets. Accordingly, a number of forms of the more traditionally operated regulated fund products are not useful because the applicable minimum investment thresholds (per investor) are not achievable. However, the ever progressive Financial Services Commission in the BVI (BVI FSC) identified this market

FIGURE 1
Foreign Direct Investments: Inward Flows
2014

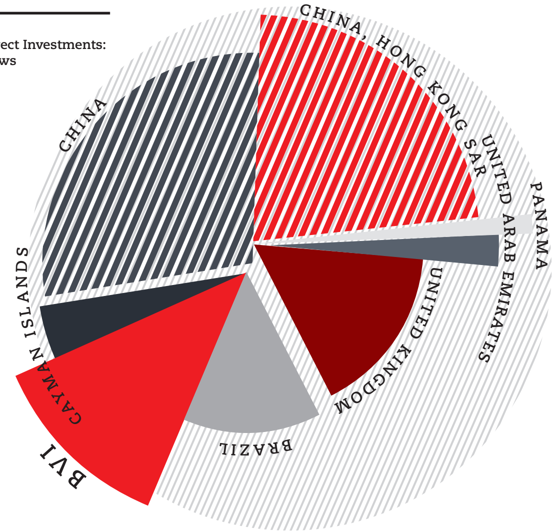


FIGURE 2
Foreign Direct Investments: Inward Flows
2013

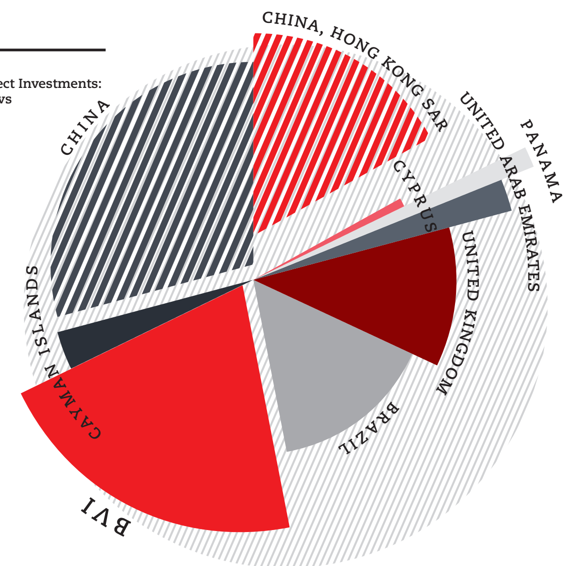
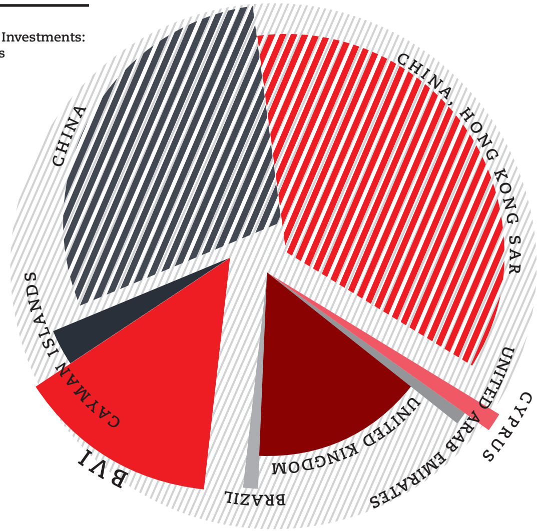


FIGURE 3
Foreign Direct Investments: Outward Flows
2014



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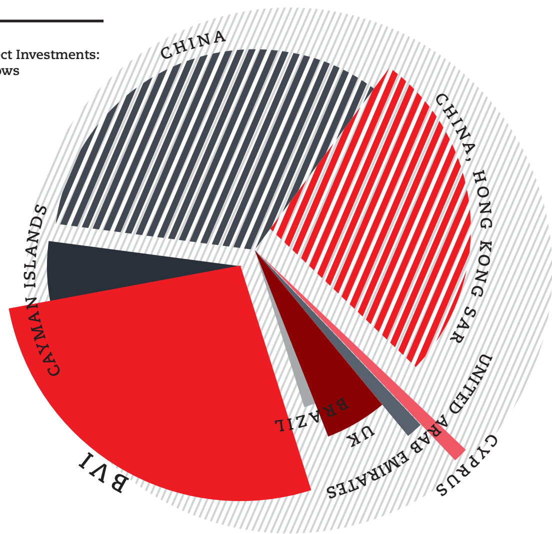
2013



issue and reacted by recently launching fund products specifically designed to provide the solution. The BVI's new incubator and approved funds are lightly regulated by the BVI FSC and offer a high degree of flexibility to the manager. The incubator fund has a very low minimum investment threshold and the approved fund has absolutely no investment threshold, addressing specifically the issues raised above. These new products offer a novel cost effective regulated platform for attracting investors and pooling investment capital for deployment into targeted start-ups; which is ancillary and catalytic to private equity.

Corporate governance and administration: The continuing obligations for BVI Companies and their management and owners are progressive, commercially focused, responsible, sensible and cost efficient; which facilitates multinational business functionality. The BVI Registry of Corporate Affairs has an efficient electronic filing system and recently introduced a premium service that includes extended hours of operation on business days (7:30am to 10:00pm) and a guaranteed four hour turnaround time for mergers and consolidations, continuations and discontinuations, amendments to the MAA and security registrations; thereby increasing service to the jurisdiction and its participants.

Exit strategies: The BVI Company's flexibility is ideal for effective and efficient transaction exit strategies, including:

- *IPO:* BVI Companies can be listed easily on the world's leading Stock Exchanges. BVI law does not have listing rules or a take-over code thereby providing the necessary flexibility for the BVI Company to comply with the relevant listing rules and take-over code of the relevant stock exchange. Taking a BVI Company private is an equally efficient process.
- *Company sale:* Shares of a BVI Company are easily transferred with certainty (owing to a modern system of share registration for proof of ownership).
- *Asset sale:* Assets are easily disposed of by a BVI Company as a matter of BVI law (while balanced against the protection of minority interests too).
- *M&A:* The BVI has a progressive merger code that even allows for the surviving company of the merger to be a foreign entity (effective minority protection provisions are statutorily applicable for dissenting shareholders with an out of court appraisal process for determining the fair value of the shares of the BVI Company).

Dispute resolution: The BVI Commercial Court offers efficiency, stability and predictability through strong case precedent and appeal rights to the UK Privy Council. Many of the leading shareholder and corporate dispute cases have been heard before the BVI Commercial Court (with many points of law having been ultimately determined by the Privy Council). The BVI Commercial Court is unlimited with respect to the nature of relief it can order in relation to breaches or potential breaches of the MAA (which is of prime appeal to venture parties that have ensured that the MAA have been properly crafted in line with their commercial objectives). Consequently, BVI litigators have extensive experience of the efficient resolution of shareholder and joint venture disputes. Transaction parties are more willing to form business relationships when they know that potential disputes can be settled efficiently and effectively.

Transaction fluency: The BVI is the largest offshore corporate domicile and owing to its high activity in the FDI space for over a decade there has been a superior accumulation of skills, knowledge and experience gained from routinely advising on multinational cross-border transactions. Structuring the transaction through the BVI frequently enables the transaction parties to access corporate stability with more efficient legal rules than those existing in the target or other jurisdictions. The commercially minded professional expertise and service of BVI law firms, corporate administrative service providers, accounting firms, insolvency practitioners and the BVI Commercial Court ensures that transaction fluency is optimised.

Tax neutrality: All too often tax neutrality is a misunderstood concept and confused with tax inversion or tax leakage. BVI Companies are exempt from income tax in the BVI, distributions from BVI Companies are not taxed within the BVI and no BVI tax is levied on capital gains realised on the shares, debt obligations or other securities of a BVI Company. In addition, there is, generally, no stamp duty imposed on the transfer of shares in a BVI Company. This ensures that multinational investors are treated fairly and equally and an extra layer of tax is not levied in the BVI in relation to a corporate structural solution. Operational profits of the BVI Company in a target jurisdiction will likely be subjected to local taxes in that target jurisdiction (as determined by local tax laws in that jurisdiction) and investor returns will likely be taxed in their home jurisdiction (again as determined by local tax laws in that home jurisdiction). Any tax efficiencies gained through the use of the BVI Company are afforded as a consequence of foreign rather than BVI legal factors. Those efficiencies must to be balanced against project or investment viability and the socio-economic benefits attributed to the success of any such project or investment. In short, has the local jurisdiction and its people benefited from the project or investment? And would the project or investment have been successful or even carried out were it not for the efficiencies available? Successful projects in emerging markets translate into added value for the development of that emerging market (job creation and infrastructure) and added value for the investor's supply chain and growth of its home economy (access to new markets, increased revenue and economic growth/recovery – which sustains or promotes employment and lifestyle in its home jurisdiction). Companies do not accumulate and stock pile idle cash reserves in the BVI – another misconception. The goal of any business is to maximise profit and that is achieved through reinvestment in the business or investment in research and development to grow the business; curtailing that investment would be counter intuitive to emerging and developed markets alike.

ADDING VALUE TO FDI THROUGH EVOLUTION

The BVI has an innovative regulatory system and continues to participate in international initiatives relating to transparency, mutual co-operation, information exchange, and anti-money laundering regulation to ensure that it provides an attractive environment for legitimate business transactions.

The BVI is recognized by the OECD as a compliant jurisdiction with respect to the exchange of tax information and the combatting and prevention of money laundering and terrorist financing.

The BVI continues to expand its treaty network through bilateral tax information exchange agreements (TIEAs) and automatic exchange of information. The BVI has entered into TIEAs with 27 jurisdictions[1]. The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Convention) was extended by the United Kingdom on 1 March 2014 to include the BVI which enables the BVI to exchange information upon request with more than 76 jurisdictions. The Convention was developed jointly by the OECD and the Council of Europe. The Convention is a multilateral instrument which allows for all forms of tax cooperation for combatting tax evasion.

The BVI has signed an Intergovernmental Agreement (**IGA**) with the United States in order to comply with the requirements of the Foreign Account Tax Compliance Acts (FACTA). The BVI has also signed an IGA with the United Kingdom to improve International Tax Compliance requiring BVI financial institutions to provide data on financial accounts held by its residents to the United Kingdom.

The BVI was among the first countries to commit to the new standard for automatic exchange of information developed by the OECD in the form of the Common Reporting Standard, and has committed to begin the first automatic exchange of financial account information by 2017.

The BVI is compliant with the recommendations of the Financial Action Task Force (FATF) on anti-money laundering and anti-terrorism terrorist financing. The BVI is a member of the Caribbean FATF, the EGMONT Group (sharing intelligence with other governments on financial crimes) and the International Organisation of Securities Commission (IOSCO).

The BVI remains a primary International Finance Centre for facilitating the flow of FDI to emerging markets. In 2013, the BVI was the World's fourth largest recipient of global FDI inflows, receiving US$92.3 billion . To put that in perspective for that year:

- the United States (the World's largest economy) attracted $159 billion ; and
- FDI inflow to the BVI was more than that received by India and Brazil combined.

Importantly, this is not direct investment or "idle cash" that remains in or is utilised in the BVI. Almost all of that FDI inflow to the BVI was deployed to other jurisdictions (FDI outflow was US$82.5 billion). The FDI is channelled through a BVI Company and deployed to other regions around the World to fund projects or acquire technology, resources and/or enterprises. It is the corporate attractiveness of the BVI together with the broad, effective and efficient relief available through the BVI Commercial Court and the political stability of the jurisdiction that provides a very secure legal environment advantageous for the structuring of legitimate FDI transactions.

Many FDI transactions will be connected with infrastructure and social development in the target jurisdiction (especially in emerging markets); project success then becomes less about financial gain and more about socio-economic factors such as job creation and primary infrastructure and services (water, power, healthcare and education). A structure that can protect the investment and promote project viability and success becomes essential.

Globalisation is dependent on functioning free markets and free trade. Accessing corporate advantage is consistent with the principles of free market specialisation. MNEs will seek out growth patterns that improve their supply and value chains – for example, accessing cheaper labour or resources in target markets. Similarly, using the BVI and the BVI Company for facilitating FDI transactions is a choice driven by corporate structural advantage.

The BVI has evolved from "tax haven" to the most progressive corporate International Finance Centre focused on maximizing the facilitation of FDI flows and global commerce. This has been achieved through the implementation of its progressive corporate laws and the flexibility of the BVI Business Company. The BVI's depth of expertise in relation to cross-border transactions (including, the resolution of disputes related to same) is a significant attraction factor for investors considering an FDI transaction; and the reason the BVI is more frequently chosen as the corporate solution for legitimate FDI transactions. -BB