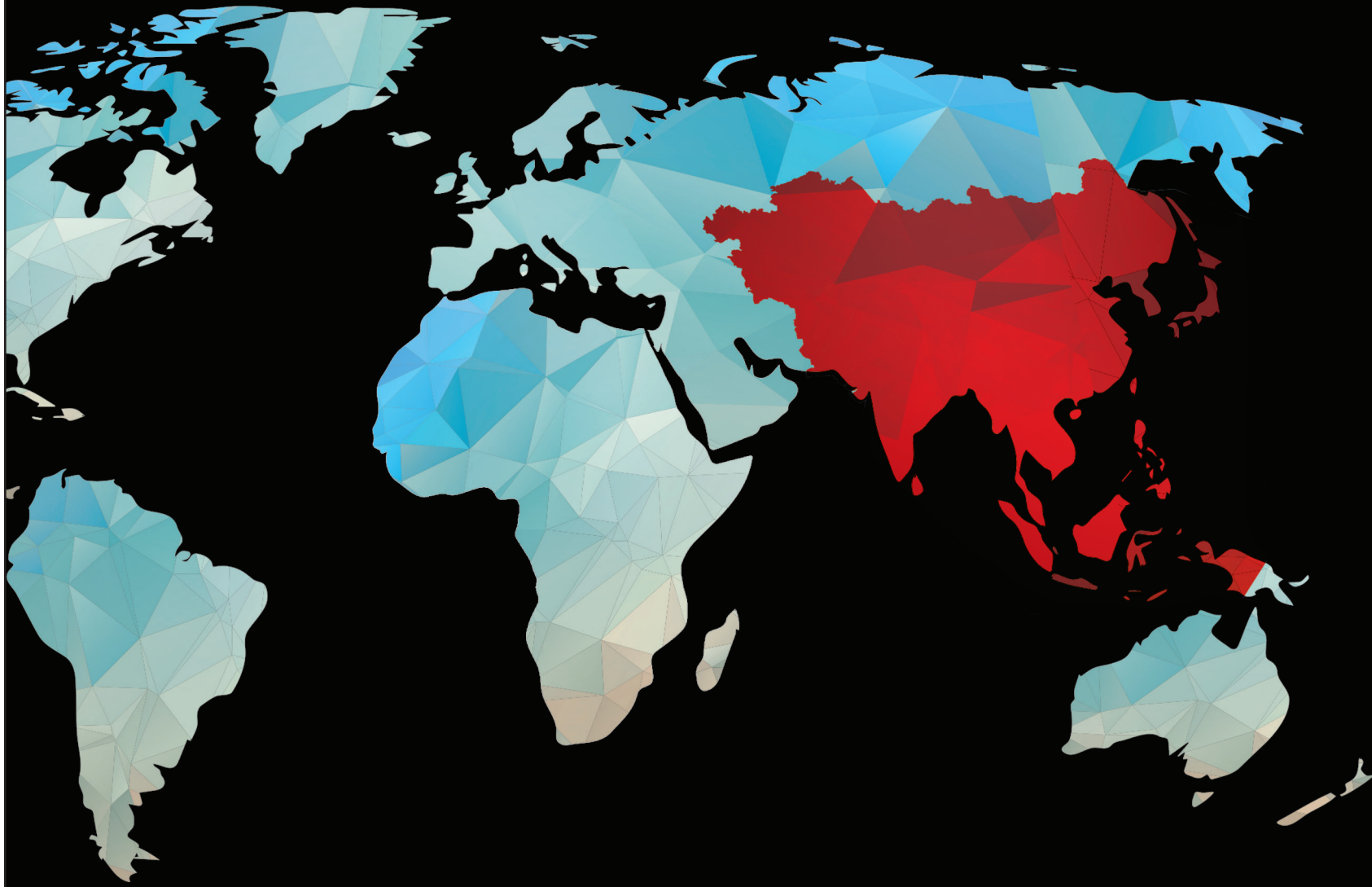


SPOTLIGHT: PIVOTING TO ASIA



EMERGING OPPORTUNITIES IN ASIA FOR BVI PRODUCTS

by Stephen Adams and Kristian Wilson

The Role of the BVI in Asia

The British Virgin Islands (BVI) is the world's leading corporate domicile, with approximately 454,000 active companies and over 500 active limited partnerships. The BVI plays a key role in structuring foreign direct investment (FDI), being the world's fourth largest recipient of global FDI inflows, receiving approximately US\$92 billion of global FDI in 2013.

In terms of outbound FDI, the BVI also plays a leading role in structuring investment into Asia. For example, the BVI is the second largest investor in the People's Republic of China (PRC), having provided US\$10.4 billion (or 9.1%) of inward FDI into that country in 2010, and approximately US\$1 billion (or 25%) of FDI into Taiwan in the same year. Similarly, the BVI is involved in structuring investment in other Asian nations. In the first quarter of 2011, the BVI was used as a platform to fund \$200 million worth of investment in Indonesia through 30 different projects, and between 1988 and 2012, the BVI was involved in structuring US\$15 billion (or 7.1%) of inward FDI into Vietnam, with investment in over 510 separate projects.

These facts clearly show that the BVI has been an important platform for structuring international trade and has played a key role in Asian FDI. However, past performance is no guarantee of future success, and this article will look at ways in which Asia may present new opportunities for the BVI, so that the jurisdiction may build upon its success in Asia and continue in its role as the pre-eminent offshore centre for Asian investors.

Sources of Success

Before considering the emerging opportunities, it will be instructive to look at the reasons why the BVI has been so successful in Asia. It is only through understanding the strengths of the BVI and its potential limitations, that we can understand how the Territory can build upon its successes and position itself for the future.

One of the key reasons for the BVI's success is the power of its brand in Asia. BVI companies are widely used by Asians to structure their investments and the name BVI is synonymous with offshore, with many Chinese investors simply referring to an offshore company as a "BVI". The reasons for this success can be seen in the strength of the Territory's product offering, as BVI companies are inexpensive to incorporate and maintain, offer a tax neutral investment platform and are easy to operate. Additionally, the BVI benefits from the highly skilled professionals who administer and advise in respect of BVI entities, the corporate flexibility offered by the BVI Business Companies Act, 2004 and the legal certainty provided by a dedicated commercial court.

Despite these numerous sources of strength underpinning its success, the offshore market in Asia is becoming increasingly competitive, and it is clear that the BVI must continue to fight hard to maintain its pre-eminent position as an offshore centre. Having identified the successes, it is important to consider some potential areas of opportunity for the BVI, specifically, areas in which the BVI offering is currently under-developed and new opportunities in Asia for BVI products.

Opportunities: Listings, Funds and Insurance

Although the BVI is the leading offshore incorporation jurisdiction, BVI companies are generally used in Asia as holding companies and simple investment vehicles. BVI companies are not commonly used as listing or fund vehicles, or for captive insurance. For example, the vast majority of listed offshore firms on the Hong Kong Stock Exchange are incorporated in the Cayman Islands (Cayman), although many of these firms have one or more BVI subsidiaries. Similarly, 55% of all hedge funds and 12% of all private equity funds are domiciled in Cayman and the BVI. However, the BVI's share of the funds market is just 10% of all hedge funds and 1% of private equity funds.

The aforementioned points illustrate that although the prevalent use of BVI companies in simple corporate structures attests to confidence in the BVI product, the BVI is under-utilised in higher profile and greater value transactions. There is no specific reason per se why BVI companies should not be used as fund or listing vehicles, and in fact there are certain flexibilities permitted by BVI law which make BVI companies more appealing for such structures. Success in this field will depend on marketing the BVI as an alternative or preferred platform for listings and fund formation.

It is recognised that Cayman dominates the listing and funds industry in Asia due to familiarity with the jurisdiction for these specific product lines. To a great extent, this has been due to the number of funds lawyers operating from Cayman, but it is also attributed to the historic presence of Cayman firms in Asia, where there has clearly been an inherent bias towards promoting Cayman structures. This structural bias can change however, as more BVI lawyers have relocated to Asia in recent years, creating an overseas pool of talent which is a valuable asset for the BVI. Given that the new generation of offshore lawyers in Asia have lived and worked in the BVI, and have a real understanding of BVI law and the regulatory regime, there is more opportunity to promote the BVI in higher value listing, funds and insurance structures.

This approach is likely to be amplified by the vigorous engagement of the BVI Government in Asia, which can be seen with the establishment of BVI Asia House in Hong Kong, under the stewardship of Elise Donovan; the recent secondment of Michelle Georges from the Financial Services Commission to Hong Kong and the inaugural BVI Business Asia Conference in Hong Kong in September 2014 which was attended by leading representatives from the BVI government, judiciary and industry. This engagement with Asia can only benefit the BVI as it allows policy makers to get a direct understanding of the Asian markets, listen to the needs of Asian professionals, take direct and positive action in Asia, and educate the Asian markets about the benefits of choosing the BVI as a platform for higher profile transactions.

Opportunities: New Prospects in Asia

There are also new opportunities for the BVI; limited partnerships being one potential area of growth. This is an area in which, historically and for no obvious reasons, the BVI has fallen behind Cayman. At the end of 2013, Cayman had 14,396 active partnerships, compared with 582 in the BVI.



This disparity is not due to any lack of demand, as Asian clients do have an interest in BVI limited partnerships. In fact, Bedell Cristin's Singapore office advised on the formation of a number of such partnerships in 2014. The main issue is that Asian professionals are simply unaware of the virtues of BVI partnership structures. It is therefore important to recognise that the BVI is not just simply a company incorporation jurisdiction.

Another opportunity arises with private wealth structures. As widely observed, the Asian middle class is growing, wealth is increasing and societies are aging. These developments are accompanied by a demand for innovative ways of maintaining and passing on private wealth. Given the familiarity in Asia with BVI companies as a means of structuring and investing wealth, the logical next step would be to promote the use of BVI trusts, such as Virgin Islands Special Trust Act (VISTA) trusts and private trust companies, in succession planning, and many practitioners are already promoting such structures within Asia.

A further opportunity arises with Chinese outward investment. A key development in the PRC has been the growing outbound investment of Chinese enterprise, supported by the state policy of 'going global'. Historically, the BVI has been the investment vehicle of choice for inward investment into the PRC, but there is no reason why the BVI should not also be a preferred vehicle for outward investment. Aside from the recognised advantages of offering a tax neutral and flexible investment platform, BVI companies also offer an advantage in cross-border transactions as joint venture vehicles and offer a neutral, stable and certain legal platform for the resolution of disputes. As a result, there is an obvious benefit for using BVI companies in structuring Chinese investment into overseas markets.

The BVI can also play a role with the growth of South East Asia as an investment market. Taking the funds industry as an example, there are a number of BVI funds which invest in the region and a handful of BVI funds that have been set up and operate within South East Asia. Similarly, with

the growth of inward FDI into the region, there may be opportunities in project finance or joint ventures, which are areas in which BVI companies are frequently used to structure inbound investment.

Potential opportunities may also emerge with the rise of the 'mid-shore' jurisdictions of Hong Kong and Singapore. Some observers consider these mid-shore jurisdictions as a threat to traditional offshore centres, given that they compete on cost, are established and well regulated financial centres, and also offer certain regional tax advantages. Although the mid-shore centres may impact on the incorporations market, particularly where the main driver for investment is to secure a regional tax advantage, it is likely that BVI companies will be used at other levels in holding, investment or acquisition structures, given the many legal and structural advantages to using a BVI company in contrast with a Hong Kong or Singaporean company. In particular, BVI companies are not constrained by the type of statutory or regulatory inflexibilities that exist in the mid-shore centres. As a result, there are grounds to promote the BVI as a flexible solution, where structural and legal demands take priority over tax considerations in structuring Asian investment.

Of course, these are just a few of the many opportunities open for BVI products, but the general point to consider is that there is space for the BVI to develop and expand market share in Asia. A key point to note, however, is that the ability of the BVI to capitalise on these opportunities will not only depend on identifying trends, but also on the ability of the BVI to keep providing solutions to legal and financial needs. This requires a government that is responsive to business, a regulator that can balance prudent oversight with commercial flexibility and legislation that remains on the cutting edge of commercial practice. The BVI is fortunate, as it currently has these elements in place, with a government and regulator that are keen to listen and are prepared to act, factors which suggest that the BVI is already well placed to take advantage of the emerging opportunities in Asia. **BB**