

Deepening the BVI's Footprint as a Global Corporate Domicile: A Constitutional Perspective

PRESENTED BY

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The impact of constitutional change on economic growth and development: Extracts from the Report of The Constitutional Commissioners 2005

‘Over the twenty five years after the introduction of the ministerial system, our political leadership, while in the process of their own maturation, were able to demonstrate the effective use of power in lightening the darkness in areas of education, health and generally to create an infrastructural base for giant strides in the economic development of the Territory.’

‘The Virgin Islands is a classic example of the use of power for the good of the people.’

The impact of constitutional change on economic growth and development: Extracts from the Report of The Constitutional Commissioners 2005 (continued)

‘The big question is how a micro-territory positions itself in a new global setting to continue to provide its people with enhanced quality of life and at the same time maintain a posture of dignity and cultural identity. It will not be possible to address this question until Virgin Islanders are prepared to deal with the ‘bogeyman.’ (independence)

‘However, this objective [greater constitutional authority] is being sought at the very time when British sovereignty in breath and depth is being eroded by European integration and internationally by treaty obligations, some of which have been demonstrated to be against the best interest of the Virgin islands.’

The impact of constitutional change on economic growth and development: Extracts from the Report of The Constitutional Commissioners 2005 (continued)

‘The Commission is of the view that the new global reality requires **creative relationships** beyond that of the former ‘official colonial mind’, which conceived of a linear progress from colony to nation – state. **Novel relationships** have to be explored that provide for the political aspirations of a people within a dignified setting other than being coerced into adopting a national status that is both unrealistic and unsustainable.’

‘...the Territory needs to be much more involved in its **external affairs by sitting at the table and making its own representation, particularly in matters of Financial Services**, regional and inter-Caribbean affairs. We so recommend.’

'The history of the British Virgin islands in the twentieth century has demonstrated the importance of legislative government in achieving progress. When the islands were more or less under external control before 1950, economic growth was negligible; thereafter, the restoration of a legislature enabling greater local participation in directing local affairs has been followed by rapid economic expansion. As such, therefore, the strengthening of the political machinery by permitting more self-government seems imperative if greater prosperity and eventually complete self-sufficiency are to be achieved.' – A History of the British Virgin islands by Isaac Dookhan p.234

The Seventh Preamble

‘Affirming that the people of the Virgin Islands have generally expressed their desire to become a self-governing people and to exercise the highest degree of control over the affairs of their country at this stage of its development.’

Self-governance – what does this mean or entail in a 21st Century global economy with strategic groupings, international trade agreements and interdependency among nations?

Several types of groupings, even amongst independent states, for strategic economic benefit and competitive advantage. Many examples, including the EU and Caricom.

Each requires a degree of surrender of sovereignty and ‘independence’.

Is ‘independence’ for BVI really the best or only way forward?

Governor's Special Responsibilities – External Affairs - section 60 of the Virgin Islands Constitutional Order 2007

Section 60 (4)

'...the Governor shall, by directions in writing, delegate to the Premier or to any other Minister designated by the Governor on the advise of the Premier, on the terms and conditions set out in subsection (5), responsibility for the conduct of external affairs as they relate to any matters that fall under the portfolios of Ministers, including-

(e) taxation and the regulation of finance and financial services; and

(f) European Union matters directly affecting the interests of the Virgin Islands.

Limitations on the exercise of Delegated Authority - Terms and Conditions – Subsection (5)

- (a) Separate authority from the Secretary of State to commence formal negotiations and to conclude a treaty or other international agreement;
- (b) Not to sign any political declaration, understanding or arrangement in the field of foreign policy, without approval;
- (c) No formal invitation to be issued to a Head of State of another country to visit BVI;
- (d) Cost of such activities to be borne by BVI Government;

Limitations on the Exercise of Delegated Authority - Terms and Conditions –Subsection (5) [continued]

(e) The Premier or other Minister must keep the Governor informed of any such activities; and

(f) The Premier or other Minister shall provide the Governor on request with a copy of all papers and information, including the text of any instrument under negotiation.

Other Limitations on the Exercise of Delegated Authority - subsections (6), (7) & (8)

Must be exercised in the best interests of the BVI.

Must not be prejudicial to the interests of Her Majesty.

Any disagreement regarding the exercise of such delegated authority shall be referred to the Secretary of State whose decision thereon is final.

Governor may, in certain circumstances, give directions as to the exercise of such functions, which must be followed.

Delegated Authority - Side Letters and Entrustments

'Side Letters' to 2007 Constitution – were negotiated and signed with the UK Government during the constitutional negotiations. In practice these have not been relied upon.

Section 60 – delegation of aspects of 'external affairs' have generally been handled through 'Entrustments' issued to the Premier by Secretary of State.

Scope of Entrustments :Some Entrustments cover a wide range of portfolios of governmental responsibility and others are more area specific.

The 2007 Entrustment - General

Followed-on from decisions reached during the constitutional talks with UK Government on delegated authority.

‘...to commence formal negotiations and to conclude agreements’ in certain specified areas.

Covers a wide range of areas and responsibilities.

Including ‘financial services’ - regulatory, supervision and promotion, and tourism.

This Entrustment is still in effect (not limited to a specific period). However, may be revoked at anytime.

The 2015 Entrustment – CHINA

Replaced the 2014 Entrustment.

Purpose: facilitating BVI developing links with PRC, HK Special Administrative Region (HK SAR) and Special Administrative Region of Macao (Macao SAR).

‘to commence formal negotiations and to conclude agreements’ with the Governments of the PRC, HK SAR or Macao SAR.

This is a very important ‘entrustment’.

An important practical consideration relating to the effectiveness of ‘entrustments’ is the interplay between the exercise of special authority by a Governor in key areas and the approach adopted by a Premier (and his Ministers) in the discharge of the functions delegated under an ‘entrustment’.

Another important factor, is the particular government in power in the UK and its approach to these matters – be it conservative or labour.

2015 Entrustment CHINA (continued)

Specific Areas covered:-

financial services, trade and investment, registration of ships, tourism, sport and culture (including through exchanges of delegations and participation in trade fairs);

To open office in HK (no diplomatic status).

Conditions include:-

Premier providing Governor with an annual report.

No agreement or instrument can be signed by BVI Government without prior approval of UK Government.

All financial obligations to be borne by BVI Government.

BVI Government must act in accordance with Protocols for Effective Financial Management (signed 23 April 2012) and Public Finance Management Act.

Some Important Recent Developments

French black list -off

EU blacklist – (pending)

Panama Papers –fall-out for BVI still being assessed.

Brexit – What will be UK's new relationship with the EU and how will it affect BVI? Is this an 'opportunity' for BVI?

Britain is leaving the EU but not leaving Europe - Prime Minister Theresa May

How important is the EU to the BVI economy?

BVI must be able to influence directly issues and decisions that affect directly or indirectly its economy and standard of living.

Is China and Asia more important to BVI economy going forward?

The case for Constitutional Review

Prevailing practice is to have constitutional reviews at approximately 10 year intervals.

Last review 2005 – New Constitution in 2007

Not always a comprehensive review- may relate only to specific areas/provisions, such as, definition of belonger status

Recent calls by Premier and Leader of the Opposition for constitutional review

What should be our approach to constitutional advancement?

Are we to be limited to minor changes and adjustments with no significant devolution of constitutional responsibility?

Are we to be limited strictly to the 'Westminster model' constitution?

Constitutional Advancement –what are our options

Associated Statehood – a thing of the past.

Is independence or the current status ‘overseas territory’ our only options?

UK’s position: the ‘as far as you can go short of independence’ approach.

Independence will require a referendum.

No ‘real’ public support for independence.

Can we sustain ‘independence’ both economically and practically?

What then is the way forward for BVI?

Size can be an advantage to governance- the British Virgin Islands

Size – A small population and small land mass, coupled with BVI's hard earned role as facilitator of global finance and transactions, should all be seen as advantages for developing and evolving into a well-run small territory and economy, and a model of good governance with effective checks and balances, fiscal oversight and accountability, adherence to sound democratic principles and the development of strong democratic institutions.

Other Advantages:-

Natural beauty and strategically well positioned geographically.

Constitutional governance and the rule of law, based on English common law.

A history of stable government, democratically held General Elections and smooth transition of power.

Two pillars of the economy – financial services and tourism – good reputation and track record.

Modern framework of laws and regulations relating to financial services.

Well regulated financial services industry.

Internationally respected commercial court.

Good reputation internationally (even in aftermath of Panama Papers).

Constitutional Advancement Short of Independence

A new and modern Constitutional construct and relationship with the UK needs to be forged.

This is of particular importance post Brexit and what will follow.

The Westminster model constitution needs to be revised and tailored to better suit governance of small territories.

New constitution must deepen democratic principles and institutions, and extent the involvement by elected representatives in negotiating directly with other governments and organizations on issues and affairs that do or will impact the BVI economy and standard of living of the people of BVI.

In short, BVI must be facilitated and empowered to chart and secure its own destiny, development and prosperity.

Facilitation includes: more meaningful representation and participation in Government, in governance and decision-making; greater transparency and accountability; better checks and balances; and better use of the scarce human resources in both public and private sectors.

Important Considerations – Legislative Branch

Election to House of Assembly – Is the mixed system (Territorial and District) serving us well? Should it be changed and, if so, to what, to provide for greater representative government?

Reform and modernization of the rules and procedures of the House of Assembly to foster increased efficiency, meaningful debate and public input before the passage of certain pieces of legislation.

Greater openness and transparency in the workings of the House of Assembly.

Reform and restructuring of Standing Committees and how they function, so as to improve effective oversight, transparency and accountability in Government.

Giving ‘teeth’ to the findings/recommendations of certain watchdog committees to facilitate effective checks on Government overspending and maladministration.

Important Considerations – Legislative Branch (continued)

Re-examine role of the opposition, including the Leader of the Opposition.

Reform and strengthening of the budget (Appropriations Bill) process and its effectiveness on good governance and accountability.

A Code of Ethics for Members of the House of Assembly and Ministers of Government.

Privilege of Members –limitations in a modern society designed to stamp out abuse.

Reporting function of Ministers to House of Assembly – mandatory obligation including provision of supporting documents and reports.

Questions and Answers- re-examine and reform process to provide for its effectiveness in ensuring full disclosure of pertinent decision-making by the Executive and supporting information (except national security).

Important Considerations - Executive Branch

Cabinet: Should the Governor continue to sit/preside in Cabinet? (s. 57 & s.66 Bermuda Constitution)

Enhanced role and powers of the Premier.

Number of Ministers – re-examine role and functions of Junior Ministers.

Vesting of executive authority and responsibility in Ministers for their respective portfolios. ('responsibility for the administration of any department' - s. 56 BVI Constitution and s. 61 Bermuda Constitution)

Specific devolution (not delegation) of executive authority for external affairs (except defence and administration of the courts) to the Premier and responsible Ministers, subject to appropriate reporting obligations and general oversight authority.

Complete devolution (not delegation) of executive authority in areas of financial services and tourism to Premier or responsible Minister, subject to specific limited constraints and reporting obligation.

The Public Service and Police Force- accountability, appointments and discipline
Establishment of 'City Councils' with executive authority and a budget – RT, EE/LL, WE, VG, Anegada & JVD.

Areas for growth of BVI Financial Services Industry

Growth prospects for BVI in Asia and Pacific Region (China, Singapore and Japan and India).

Also Africa and Latin America, particularly Brazil.

BVI needs to further leverage its credibility and good reputation in Asia.

Expanded use of Asia House

Frances Woo's 'Conversation': Perceived growth areas based on H1 2016: mergers and acquisitions facilitating construction, real estate and finance .

Private wealth growth – Asia and Pacific. Estimated to reach \$224 trillion in 2020.

Enhanced banking relationships –Chinese and regional banks.

New constitution must empower BVI to effectively chart its own course and compete in the global arena in financial services

Developing new areas of business and value added services.

Defending the financial services industry, its role in the global economy, its regulatory regime and its laws and practices, against unfair blacklisting, double standards, information leaks, and media attacks.

To be empowered constitutionally to negotiate directly (rather than through an intermediary or with the permission and sanction of the UK Government) with countries and governments, has distinct advantages for BVI. Thus enabling it to take advantage of new frontiers of business, to compete effectively in the global market, and continue to 'punch above its weight' on the world stage.

New Constitution must empower BVI to compete in the Global Economy (continued)

No one can or will protect BVI's interest better than BVI. In short, no one can have BVI's best interest at heart more than BVI.

Expanded use of BVI Asia office.

Deepen BVI's ability to do what is necessary in its interest to secure the future economic development of the Territory and to maintain the standard of living we have come to enjoy.

Financial services must become the constitutional purview and full responsibility of the BVI Government through the Premier and other Ministers, subject to key reporting functions to both the Governor and the House of Assembly.

The BVI, must become the 'model' for small states governance in a 21st Century global economy. This requires a 'new model' constitution.

In crafting a 'new model' constitution, consideration should be given to incorporating progressive empowering provisions in the constitutions of other countries, not just advocating for certain of the Bermuda provisions .

The way forward – A new constitutional relationship for the 21st Century

Comprehensive reform, and modernization of the Public Service - simplification of procedures and strengthening of key departments and agencies of Government, making BVI more 'friendly' to both local and foreign investment in all key sectors.(McKinsey Report).

Strengthening existing regime of laws and adoption of best practices for better governance, accountability and transparency.

Public education and input and on issues of major concern –this is of critical importance to move the country forward in the 21st Century.

Long term strategic planning- for economic, social and infrastructural development (where should BVI be in next 10 to 15 years).

Secure UK's agreement for constitutional review and a new and more modern constitution.

Fight for direct representation at the table and input in Brexit negotiations on issues affecting BVI.

Propose 'new model' constitution for the 21st Century - with target date of 2 to 3 years hence.

Justify new model constitution for BVI on sound legal and economic basis

Be bold and innovative in proposing new mode! Be courageous, realistic, pragmatic and flexible.

THANK YOU