British Institute of International and Comparative Law

Striking a Right Balance in the Digital Age: Preservation of Policy Space and Protection of Foreign Investors

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Outline

- New challenges of the digital age
- Regulatory responses
- Hypothetical case study

Digitisation stimulates FDI

- Economic and technological factors stimulate FDI activity
- Technological change and the digital economy considered by most respondents as positive factors fostering cross-border investments
- Cyber threats and data security are rising concerns among top executives
- 46% of executives who think this factor will lead to a decrease in FDI globally
- Source: World Investment Report 2017. Investment and the Digital Economy.

Challenges of digitisation

- The digital divide between developing and least developed countries, risk of further marginalization from the global economy
- Potential negative impact of automatization on employment and inequality
- Protection of security and privacy
- Risk of increasing dependency on a few global digital MNEs
- Fake news and misinformation by foreign actors

Regulatory response

- Each of these challenges requires a regulatory response, which may affect the interests of investors
- How to provide safe digital and cybersecurity environment?
- These responses can be expressed in domestic law or in international treaties
- States started to develop comprehensive cybersecurity regulation strategy

Comprehensive Cyber Strategy

- Secure Federal Networks and Information (including supply chain risk management, adopting best and innovate practices)
- Secure Critical Infrastructure (including protecting democracy, transportation, telecommunication)
- Combat Cybercrime and Improve Incident Reporting (including electronic surveillance, cooperation with other countries)
- Update Mechanisms to Review Foreign Investment and Operation in the United States

National Cyber Strategy of the United States of America (September 2018)

Comprehensive Cyber Strategy (USA)

6.3.3. To reduce the cyber threat from hostile foreign actors, we will:

• reinforce the application of international law in cyberspace in addition to promoting the agreement of voluntary, non-binding norms of responsible state behaviour and the development and implementation of confidence building measures;

• work with international partners, particularly through collective defence, cooperative security, and enhanced deterrence that our membership of NATO affords;

• identify both the unique and generic aspects of our adversaries' cyber activity;

• generate and explore all available options for deterring and countering this threat, drawing on the full range of government capabilities. We will take full account of other related factors, including country-specific strategies, international cyber priorities, and cyber crime and prosperity objectives;

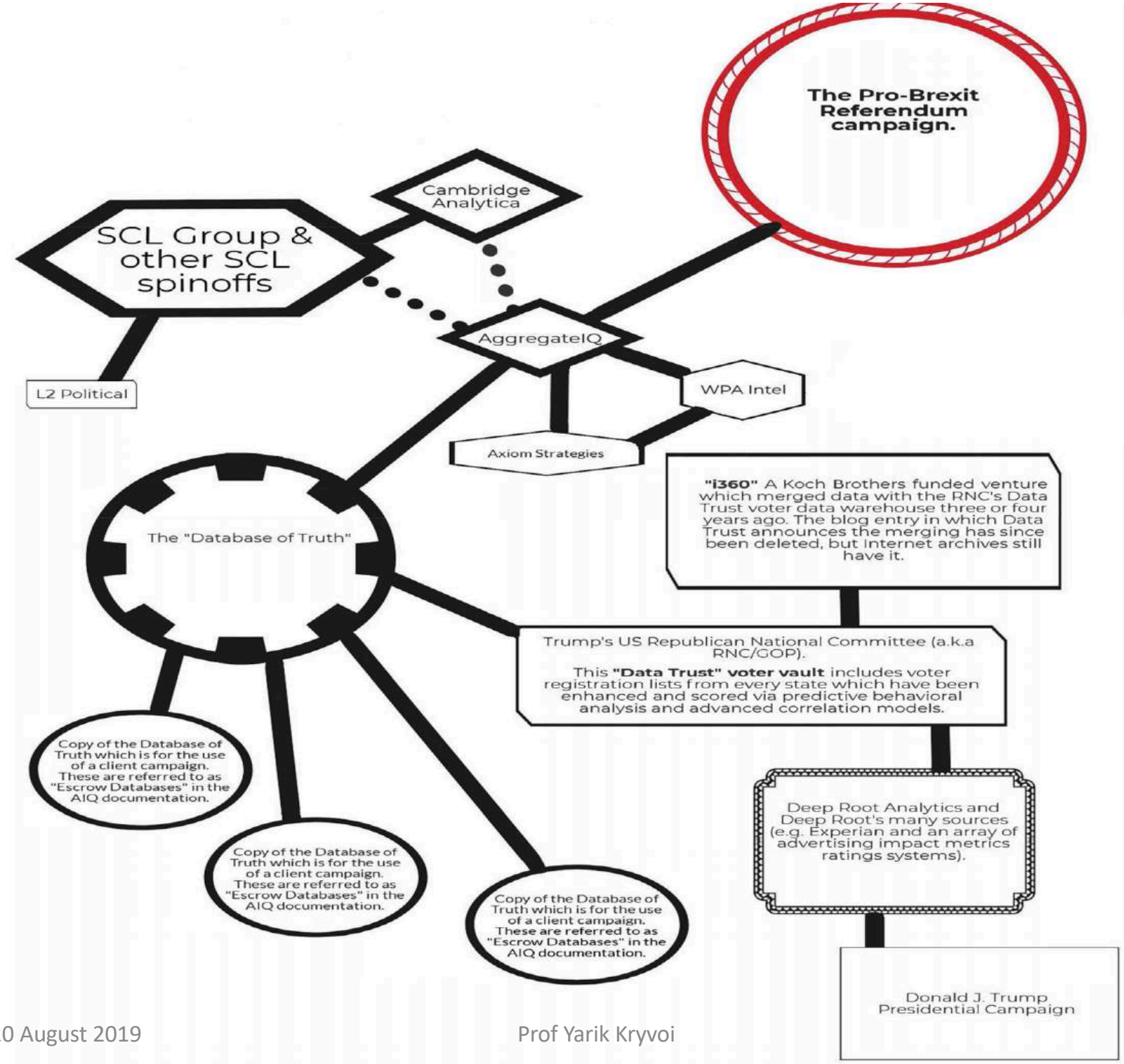
• use existing networks and relationships with our key international partners to share information about current and nascent threats, adding value to existing thought and expertise; and

• attribute specific cyber identities publicly when we judge it in the national interest to do so.

UK Government. National Cyber Security Strategy 2016-2021.

Comprehensive Cyber Strategy (UK)

- The big tech companies must not be allowed to expand exponentially, without constraint or proper regulatory oversight. But only governments and the law are powerful enough to contain them. The legislative tools already exist. They must now be applied to digital activity, using tools such as privacy laws, data protection legislation, antitrust and competition law. If companies become monopolies they can be broken up, in whatever sector. Facebook's handling of personal data, and its use for political campaigns, are prime and legitimate areas for inspection by regulators, and it should not be able to evade all editorial responsibility for the content shared by its users across its platforms.
- UK House of Commons. Disinformation and 'fake news': Final Report. 14 February 2019.


The Pro-Brexit Referendum campaign.
Cambridge Analytica
SCL Group & other SCL spinoffs
AggregateIQ
L2 Political
WPA Intel
Axiom Strategies
The "Database of Truth"
"i360" A Koch Brothers funded venture which merged data with the RNC's Data Trust voter data warehouse three or four years ago. The blog entry in which Data Trust announces the merging has since been deleted, but Internet archives still have it.
Trump's US Republican National Committee (a.k.a RNC/GOP).
This "Data Trust" voter vault includes voter registration lists from every state which have been enhanced and scored via predictive behavioral analysis and advanced correlation models.
Copy of the Database of Truth which is for the use of a client campaign. These are referred to as "Escrow Databases" in the AIQ documentation.
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Deep Root Analytics and Deep Root's many sources (e.g. Experian and an array of advertising impact metrics ratings systems).
Donald J. Trump Presidential Campaign

National Security in the Digital Age

- The national security notion: from military threats to protecting strategic industries
- States usually lack a comprehensive digital regulation strategy, covering domestic and international law
- In international investment agreements states increasingly clarify various provisions, including through treaty exceptions and exclusions
- Proportionality approach to reconcile conflicting interests of investors and states: is the measure taken in good faith, for what purpose and what are other alternatives.

Measures related to national security may include

- Foreign investment review mechanisms
- Restriction of access to certain sectors
- Expropriation of assets in sensitive areas
- Data localization
- Different legal regime for foreign investors
- Powers to block takeovers in high-tech industries
- States may also rely “national security” to acquisition of digital assets or cyber espionage

Conflicts between IIAs and other legal regimes

Table III.8.	IIAs and other bodies of international law and policies: policy challenges
Reduction of regulatory space	• Unexpected chilling effect on future, non-investment-related law-making • Exposure to ISDS
Administrative complexity (for States and investors)	• For States: difficulty in managing distinct but overlapping policy areas and international obligations • For investors: investment decisions taken in light of fragmented web of international (and national) laws
Dispute settlement	• Risk of isolated treaty interpretation • Litigation of one issue in multiple fora • In case of ISDS competence, uncertainty about interpretation

Source: UNCTAD.

Case study

- A large Asian private company operating in an EU State asserted a claim for excluding it from tenders on security grounds and the government's statements that the company poses a security threat because of its alleged links to its home state government. The Government also revoked its license to offer internet broadband service and the company has become a subject of cyberattacks. That caused resulted in losses for the investor - both financial and reputational.
- Let us imagine that the relevant treaty does not have an explicit national security exception (most treaties don't)

Free Trade Agreement of the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation with the Republic of Korea (2005)

ARTICLE 1

2. “Investment” means any kind of asset and particularly:

(a) a company;

(b) movable and immovable property as well as any other rights in rem, such as mortgages, liens, and pledges;

(c) shares, stocks or any other kind of equity participation in a company;

(d) bonds, debentures, loans and other forms of debt;

(e) claims to money or to any performance associated with a company having an economic value;

(f) intellectual property rights, technical know-how and goodwill; or

(g) rights conferred pursuant to law or contract such as concessions, licences, authorisations and permits, including any concession to search for, cultivate, extract or exploit natural resources.

National Treatment and MFN Treatment (Article 4)

1. Each Party shall accord to investors of another Party and their investments, in relation to the establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer, or other disposition, of investments, treatment that is no less favourable than that it accords to its own investors and their investments (national treatment) or to investors of any third State and their investments (MFN treatment), whichever is more favourable

General Treatment and Protection (Article 3)

1. Each Party shall in accordance with the provisions of this Agreement create and maintain stable, equitable, favourable and transparent conditions for investors of the other Parties to make investments in its territory.

2. Each Party shall accord to investments of investors of another Party fair and equitable treatment and full protection and security. No Party shall impair by unreasonable or discriminatory measures their operation, management, maintenance, use, enjoyment or disposal.

3. Furthermore, each Party shall observe any written obligation it may have entered into with regard to a specific investment by an investor of another Party, which the investor could rely on in good faith when establishing, acquiring or expanding the investment.

Health, Safety and Environmental Measures (Article 9)

1. Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Agreement that is in the public interest, such as measures to meet health, safety or environmental concerns.

Expropriation and Compensation (Article 13)

None of the Parties shall take, either directly or indirectly, measures of expropriation or nationalization, or any other measures having the same nature or the same effect, against investments of investors of another Party, unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law, and provided that provision is made for prompt, effective and adequate compensation...

Exceptions (Article 20)

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between States where like conditions prevail, or a disguised restriction on investors and investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures:

(a) necessary to protect public morals or to maintain public order;

(b) necessary to protect human, animal or plant life or health; or the environment; or

(c) necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement.

Questions?

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