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The FDI determinants for high-tech companies

by
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I left the world of international investment law over a decade ago, trading in the rarefied world of treaty negotiations and investor-state arbitration for the rough and tumble of corporate life. Doing so gave me a new appreciation for the practical importance of these tools—what they do well and what they miss—above all in the technology space.

Technology companies are not monoliths. Some make physical things, like semiconductors, laptops and data center equipment. Others make the digital tools that power our professional and personal lives, such as collaboration software, e-commerce sites and social media platforms. Still others provide the computing infrastructure that allows people and companies to connect seamlessly around the world. Some companies are sprawling businesses that do many of these things. Others are smaller, "best-of-breed" firms, that focus on a narrower set of activities.

Yet, virtually all tech firms depend on the movement of digital information across borders to reach customers and create value. In fact, "cross-border data flows" arguably have their greatest impact outside of the technology sector, by making companies in the manufacturing, agriculture, financial services, and other sectors more productive. Countries that enable data to flow freely have higher exports, whereas those that require the "localization" of data see reductions in GDP and productivity.

This has important implications for international investment policy because the "investments" that tech companies make are often different from those that other kinds of companies make. Tech firms often do not need to make significant capital expenditures or hire large numbers of people in order to have a positive impact on a market. In fact, for the vast majority of tech firms that lack the financial resources to establish facilities and data centers in a large number of jurisdictions, it is often the *absence* of a sizable physical or corporate presence that allows them to succeed.

By using cloud services to move data among large numbers of markets, tech firms can focus their scarce resources on developing innovations to serve governments, companies, entrepreneurs, and citizens. Financial services firms can access state-of-the-art cybersecurity tools to protect their global data and networks. Micro, small and medium-sized businesses in developing countries—including many women-owned firms—can use e-commerce platforms to market their goods and services to customers around the world. Farmers can avail themselves of global meteorological databases to optimize their deployment of crops in light of weather patterns. Governments can leverage video-, audio- and chat-based collaboration platforms to connect employees and deliver a wide range of health care, educational and other services to their citizens.

Governments, of course, have an interest in ensuring that tech firms' business activities also help advance their priorities. This is the case in areas where technology aligns with their policy goals, for example, by diffusing digital skills, supporting entrepreneurs and enabling access to global markets. It is also the case in areas where technology may create tension with public interests, such as in protecting personal privacy, ensuring public safety and protecting national security.

What does this mean for how governments should treat tech companies wanting to do business within their borders? Tech companies certainly care about traditional metrics of investment protection. They want to do business in stable, predictable environments, where governments provide fair and equitable treatment, do not discriminate on the basis of nationality and avoid uncompensated expropriations. But given the relative importance of data flows over physical investments, other types of policies are arguably more important. Specifically, governments that want to attract tech companies should pursue policies to:

- ensure that companies can move data freely into and out of the country, to allow them to provide their services;
- avoid applying taxes to digital services or the movement of data, to prevent discriminatory treatment of foreign firms (for example by making permanent the World Trade Organization (WTO) moratorium on the application of customs duties to electronic transmissions);
- avoid requirements that companies localize data, operations or infrastructure, to help them optimize their services and manage their costs;
- promote robust competition in the technology ecosystem, including through open and transparent public sector tenders, to ensure a level competitive playing field;

- adopt transparent, predictable and uniform approaches to tech regulation, including in the areas of privacy, cybersecurity and artificial intelligence, to provide certainty about the legal rules of the road;
- maintain strong protections for intellectual property rights, to enhance incentives to innovate; and
- invest in digital infrastructure, both human and physical, to ensure that citizens and organizations are fully equipped to participate in a digital world.

Tech firms contribute greatly to innovation, job creation and economic growth around the world. To encourage these companies to operate within their borders, governments need to think more expansively about their "investment" policies. This means more than ensuring fair, transparent and non-discriminatory treatment of established entities. It also means appreciating that cross-border data flows are the indispensable currency of international investment and commerce in every sector of the economy, and designing data and other policies that encourage companies to deliver the many benefits of economic empowerment and social connection that they promise.

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