



Regulating Cross-Border Data Flows in a Data-Driven World

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Complex Policy & Legal Landscape of Data Regulation

Different legal and regulatory disciplines relevant to different aspects of regulating data flows

- Data Protection Law, IP Law, Tax Law, Constitutional Law, Consumer Protection Law, Cyber Laws, Public International Law and Trade Law

Different Stakeholders Involved in Data Regulation

- Governments: Regulate in 'Public Interest'
- Private Sector: Providing and Maintaining Infrastructure for Data Flows; Innovating and adopting technologies
- Internet Multistakeholder Community: Engineering and Policy Issues



Overview of Presentation

Key questions:

- What aspects of regulating data flows are trade-related?
- How can WTO agreements respond to these regulatory concerns? What kind of provisions are required to address these concerns?

Key message:

- More well-balanced and comprehensive approach for enabling free and secure flows of data required in WTO disciplines that adapts to the global governance context for data governance
- Recent FTA disciplines (USMCA, CPTPP) are helpful benchmarks; but, WTO rules need to be tailored for the multilateral environment



A Variety of Regulatory and Policy Concerns Relevant to Data Flows

- Importance of Cross-Border Data Flows in Digital Innovation and Economic Growth; also, critical for managing social problems (eg, Big Data in developing countries)
- Data Protection and Cybersecurity Concerns; Protecting Consumer Interests
- National Security Concerns (e.g. cyber-attacks on critical infrastructure)
- Regulatory Access to Data for Law Enforcement
- Protecting Digital Rights of Users: Access to Internet, Access to Information and Privacy Rights



A Variety of Regulatory and Policy Concerns Relevant to Data Flows

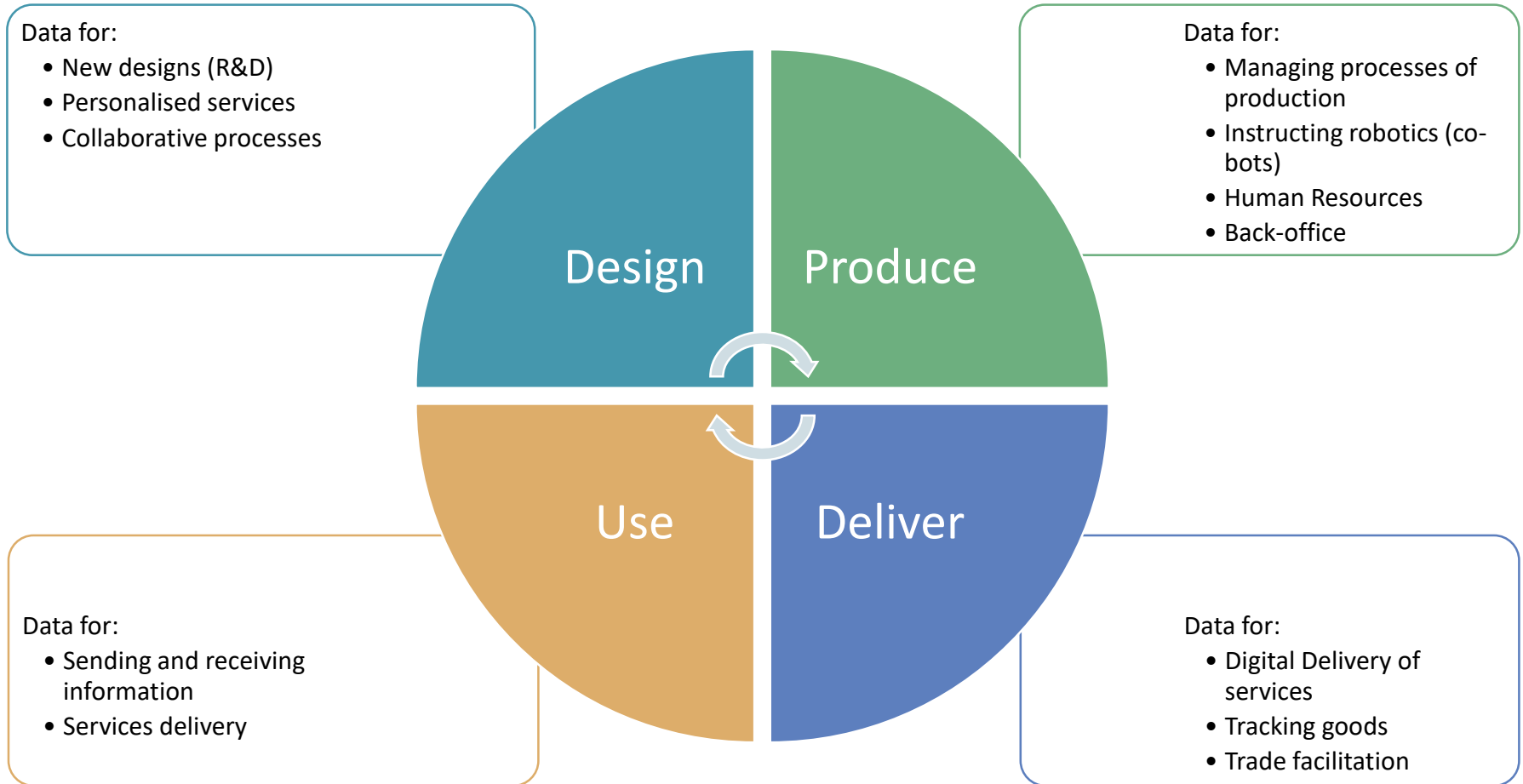
Digital Industrial Policy Narrative

- Tariff losses: need for a digital tax
- American-dominated data monopolies
- Boosting domestic digital Sector to promote development and digital inclusion

Cyber-Sovereignty

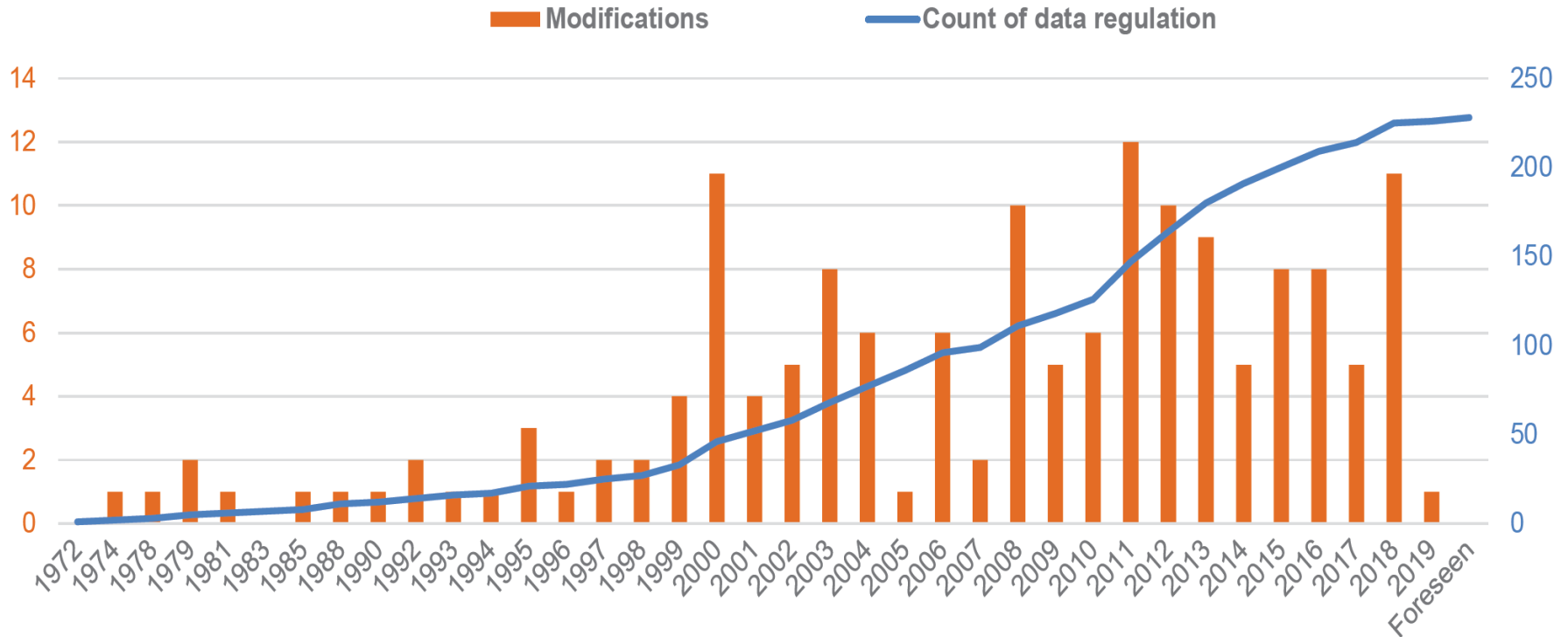
- Sovereign control over domestic information flows
- Data as a strategic resource
- Maintaining public order

The digital thread of modern manufacturing activities





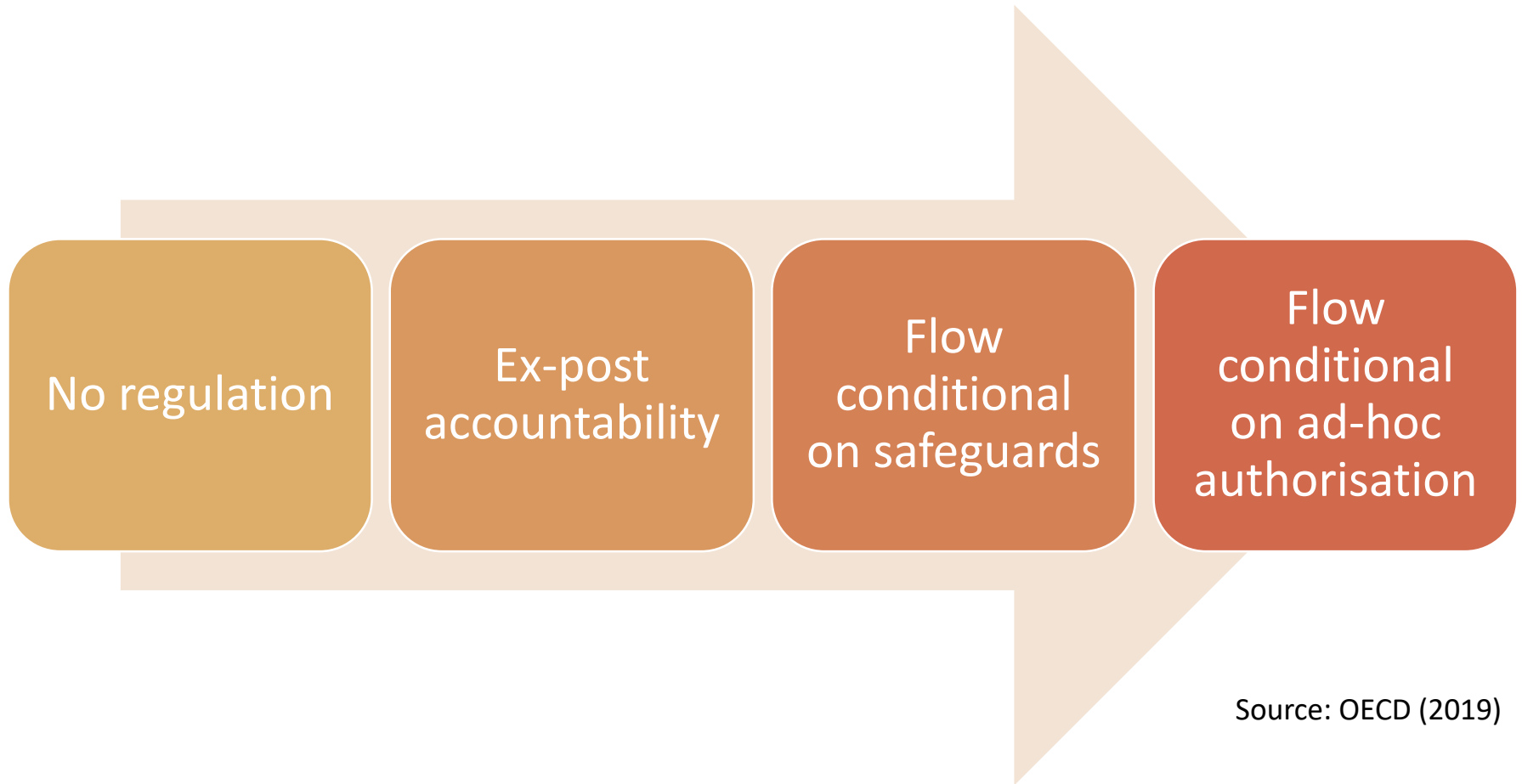
Growing Number of Data Regulations



Source: OECD (2019)



How Are Countries Regulating Data?



Source: OECD (2019)



Certain Aspects of Data Regulation Are Related to Intl Trade Law

- GATS exceptions only provide policy space to regulate but does not ensure that all Members adopt a basic framework for digital trade transactions; but:
- Ensuring data privacy and security are preconditions for cross-border data flows
- Basic regulations on ensuring business and consumer trust important to instil digital trust



Foundations of a Digital Trade Regime for Data Flows

Digital trust is the foundation of a digital trade framework

- Consumer-related privacy concerns, preserving rights of consumers, spam etc.
- Business trust: adequate protection of their IP, facilitating digital innovation, business certainty; adoption of best practices

Interoperability and transparency of regulations essential for data flows

- Need for accountability
- Alternative to regulatory harmonisation, building on GATS art VII
- Preventing ambiguous and opaque data laws and regulations

Experimenting with new regulatory approaches required to respond to unique challenges of a data-driven economy

- Unique multifaceted, complex nature of data challenges
- Moving towards co-regulatory approaches?



Legal Framework for Data Flows at the WTO

- FTAs as Benchmarks: Not always suited to the multilateral context
 - Development-related concerns
 - Diversity of ideologies and legal/regulatory frameworks ; Low levels of global digital trust
 - Low acceptance of risk-based approaches at multilateral level
- Standard-setting on data-related issues outside the scope of WTO law
- WTO is not isolated from global data governance processes



Legal Framework for Data Flows at the WTO

- Horizontal obligation on cross-border data flows and prohibition on data localisation with flexible and clear exceptions; but complemented by:
- Obligation on Members to adopt data protection frameworks; promote mutual recognition of privacy laws
- Enabling International Cooperation on Cybersecurity Issues; Adopting International Standards and Best Practices in Internet Security
- Integrating Online Consumer Protection Issues Holistically to Trade Laws
- Enabling Digital Innovation and Promoting Digital Trust: TBT-like disciplines, role of multistakeholder standards in WTO law
- Special and Differentiated Treatment for DCs/LDCs; Mandatory Technical Assistance Programmes.



Conclusion

- Ambitious programme for incorporating data-related provisions at the WTO: Balance different policy concerns given varying level of cyber risks and development-related concerns
- Increased participation and political good-will of WTO Members: Joint Statement Initiative is a starting point
- Cross-institutional engagement necessary for developing a balanced framework for data flows



Thank you!