



Pacific
E-commerce
Initiative

KEY AREAS OF E-COMMERCE REGULATION AND THE RULES PROPOSED THEREIN : BUSINESS TRUST, NET NEUTRALITY, OPEN GOVERNMENTAL DATA

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for Pacific Negotiators
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PACIFIC ISLANDS FORUM



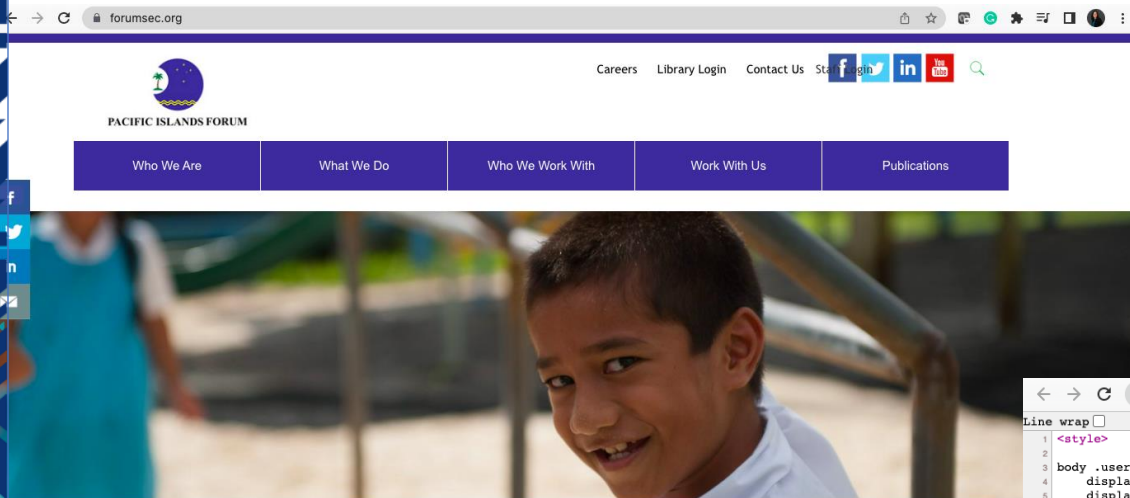
Outline

- Source Code
- Encoding
- Net Neutrality
- Open governmental data

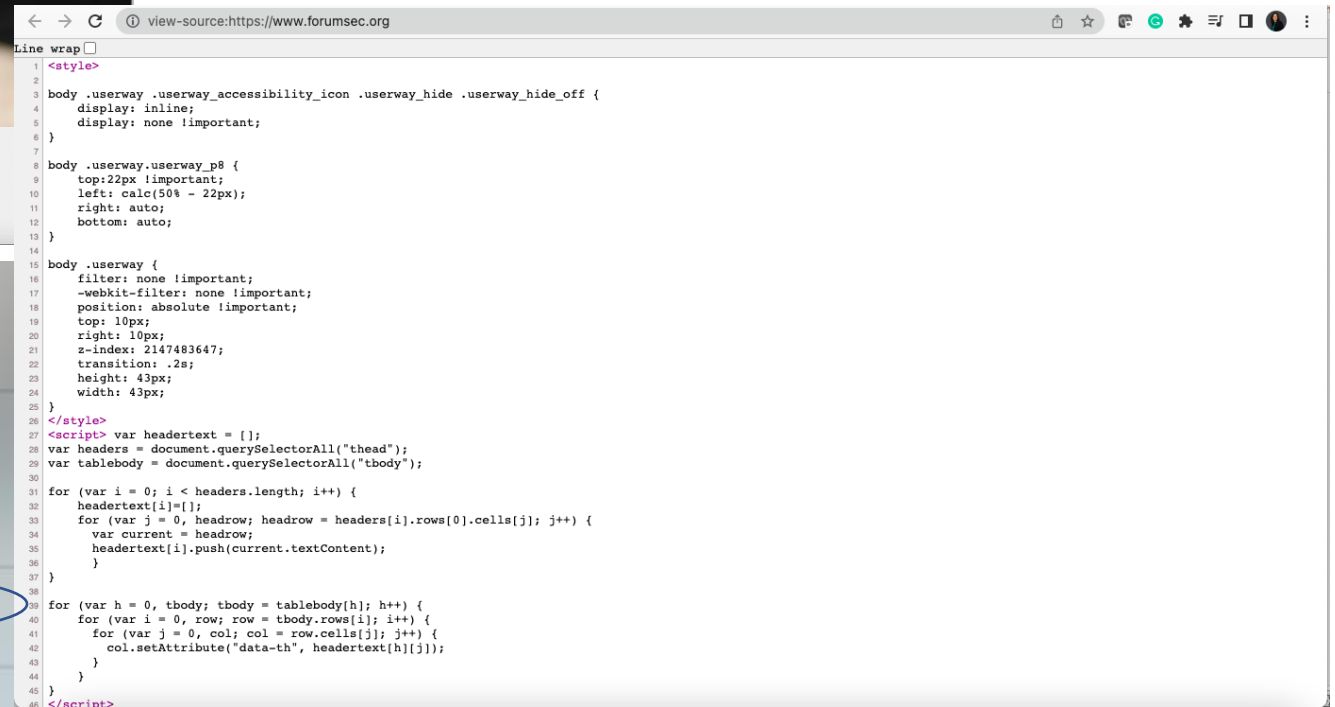
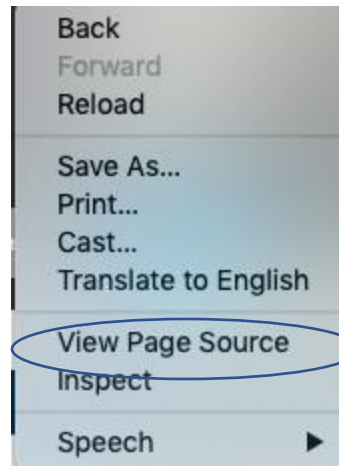
Overview

Topics	ASEAN ECA	RCEP Ch.12	AANZFTA Ch.10	UMSCA Ch.19	CPTPP Ch.14	DEPA	SADEA	UKSDEA	WTO JSI on e-commerce
ICT Products and use of cryptography						X	X	X	X
Open internet access				X	X	X	X		X
Source code				X	X		X	X	X
Open governmental data				X		X	X	X	X

Source Code (visuals)



Serving the Pacific: Our work and programs



Source Code disciplines: overview

Source code is a computer program written in a high level human readable language such as C++, JavaScript, Python, Fortran, R... [unofficial definition]

"Algorithm" means a defined sequence of steps taken to solve a problem or obtain a result.

- The source code proposal is a *new rule*.
- The source code could normally be subject to various types of intellectual property protection, such as copyright, patent, trade secret.
- The two provisions of the WTO covered agreements, the TRIMs and the TRIPS (the latter – as applicable to LDCs) do not prohibit source code transfer requirements (in the context of technology transfer).

Proprietary software v. OSS

The source code of proprietary or commercial software is **accessible only to the producer of that software** and is not accessible to purchasers of this software.

Open source software (OSS) is computer software available as open source code. A software program that has open source code allows parties other than the original programmer to freely access the underlying source code of the program.



Source Code rules in the FTAs and the WTO JSI

Elements	UMSCA Ch.19	CPTPP Ch.14	DEPA	SADEA	UKSDEA	WTO JSI on e-commerce
Prohibition to require the transfer of, or access to, source code of software as a condition for the import, distribution, sale, or use of that software, or of products containing that software	X	X		X	X	X
Prohibition to require the transfer of, or access to an algorithm expressed in the source code, as a condition for the import, distribution, sale, or use of that software, or of products containing that software	X			X*	X	X
Exception for software for critical public infrastructure		X				X
Exception for the developing countries and LDCs [NB: the TRIPS waiver]						X
Exception for open source licenses						
Exception for requiring bringing software in compliance with the regulations		X		X		
Exception for voluntary transfer of or granting of access to source code on a commercial basis by a natural or juridical person, for instance in the context of a public procurement or a freely negotiated contract.		X		X	X	X
Exception allowing a [government agency,] regulatory body [an enforcement body] or judicial authority of a [Party/Member] [or a [Party/Member] with respect to a conformity assessment body,] from requiring a person of another [Party/Member] [:]						
• for [an / a specific] investigation, inspection, examination, enforcement action, or judicial proceeding, [or the monitoring of compliance with codes of conduct and other standards,] subject to safeguards against unauthorised disclosure.	X			X	X	X
• to transfer or provide access to the source code of software [or an algorithm expressed in that source code] for the purpose of the imposition or enforcement of a remedy granted in accordance with that [Party's/Member's] law following an investigation, inspection, examination, enforcement action, or a judicial proceeding].				X		X
Exception related to enforcement of patents		X				

Example: UKSDEA Article 8.61-K, Source Code

1. Neither Party shall require the **transfer of, or access to, source code** of software owned by a person of the other Party, **including an algorithm expressed in that source code**, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.
2. For greater certainty, paragraph 1 does not apply to the **voluntary transfer** of, or granting of access to, source code of software by a person of the other Party, including an algorithm expressed in that source code:
 - (a) on a **commercial basis**, such as in the context of a **freely negotiated contract**; or
 - (b) under **open source licences**, such as in the context of open source coding.
3. Nothing in this Article shall preclude a regulatory body or a judicial authority of a Party, or designated conformity assessment body, from requiring a person of the other Party to preserve and make available. The Parties understand that this making available shall not be construed to negatively affect the status of the source code of software, including an algorithm expressed in that source code, as a trade secret. the source code of software, including an algorithm expressed in that source code, for an investigation, inspection, examination, enforcement action or judicial proceeding, or the monitoring of compliance with codes of conduct and other standards, subject to safeguards against unauthorised disclosure.
4. Paragraph 1 does not apply to transfers of, or the granting of access to, source code of software, including an algorithm expressed in that source code, for the purpose of the imposition, adoption or enforcement of a remedy granted in accordance with that Party's law following an investigation, inspection, examination, enforcement action or judicial proceeding.

Net neutrality disciplines: details

Elements	UMSCA Ch.19	CPTPP Ch.14	DEPA	SADEA	UKSDEA	WTO JSI on e-commerce
Definition of end-user						X
Exemption for private / corporate infrastructures						X
Access and use services and applications of user choice available on the Internet	X	X	X	X		X
[...] subject to reasonable [non-discriminatory] network management [that does not restricts traffic for commercial reasons]	X	X	X	X		X
connect the end-user devices of user choice to the Internet, provided that such devices do not harm the network	X	X	X	X		X
access [transparent and clear] information on the network management [practices / policies] of their internet access service supplier.	X	X	X	X		X
Exemption of content offered on exclusivity basis		X	X	X		X
Subject to applicable policies, rules, and regulations		X	X	X		X
Interrelation with the GATS commitments, including concerning Telecommunications / Reference Paper						X



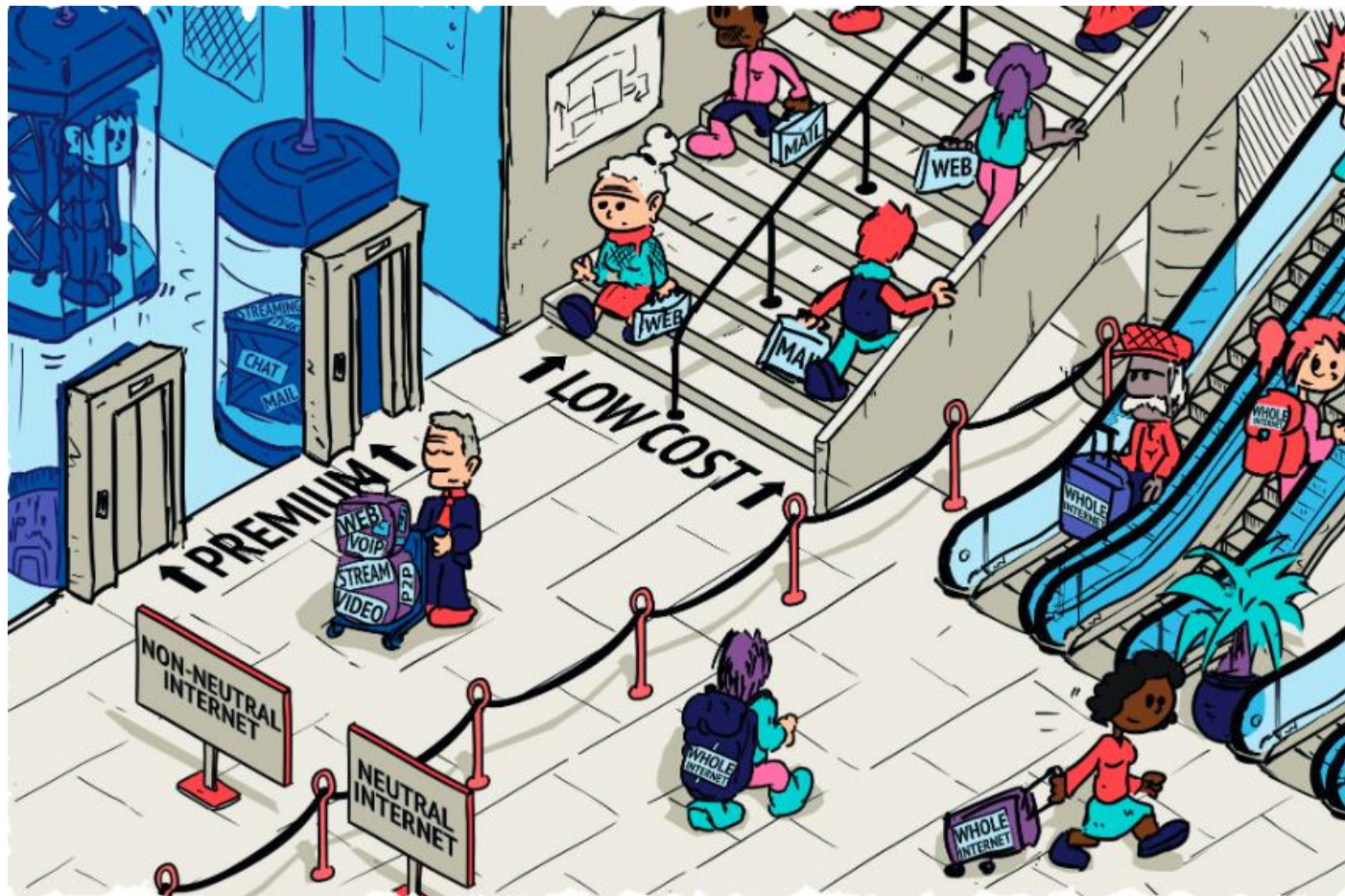
Example: DEPA Article 6.4: Principles on Access to and Use of the Internet

Subject to applicable policies, laws and regulations, the Parties recognise the benefits **of their consumers** having the ability to:

- (a) access and use services and applications of a consumer's choice available on the Internet, subject to reasonable network management*;
- (b) connect the end-user devices of a consumer's choice to the Internet provided that such devices do not harm the network; and
- (c) access information on the network management practices of a consumer's Internet access service provider.

* The Parties recognise that an Internet access service supplier that offers its subscribers certain content on an exclusive basis would not be acting contrary to this principle.

Net neutrality – demonstration (1)



The state of Internet, France, 2021, Arcep

Net neutrality – demonstration (2)

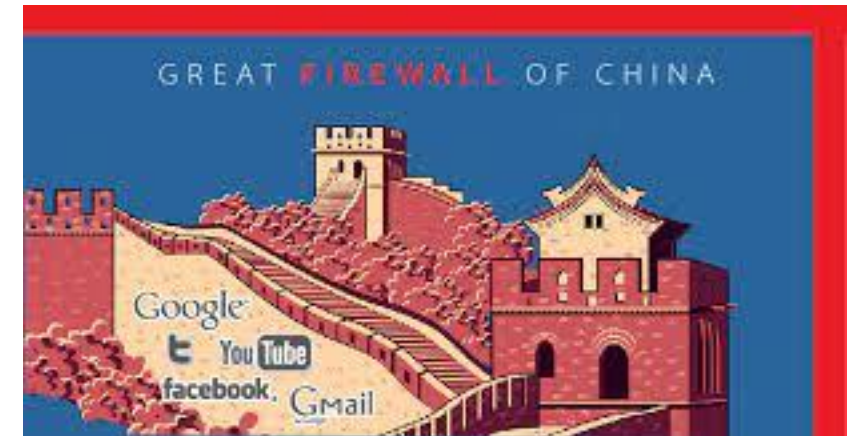


The state of Internet, France, 2021, Arcep

Net neutrality, demonstration (3)



The state of Internet, France, 2021, Arcep



Redress against the net-neutrality concerns (France)



The state of Internet, France, 2021, Arcep

Cryptography, encryption – definitions (WTO JSI)

"*Cryptography*" means the principles, means or methods for the transformation of data in order to conceal or disguise its content, prevent its undetected modification, or prevent its unauthorised use; and is limited to the transformation of information using one or more secret parameters, for example, crypto variables, or associated key management;

"*Encryption*" means the conversion of data (plaintext) through the use of a cryptographic algorithm into a [ciphertext / form that cannot be easily understood without subsequent reconversion (ciphertext)] [and/using] the appropriate [cryptographic] key;

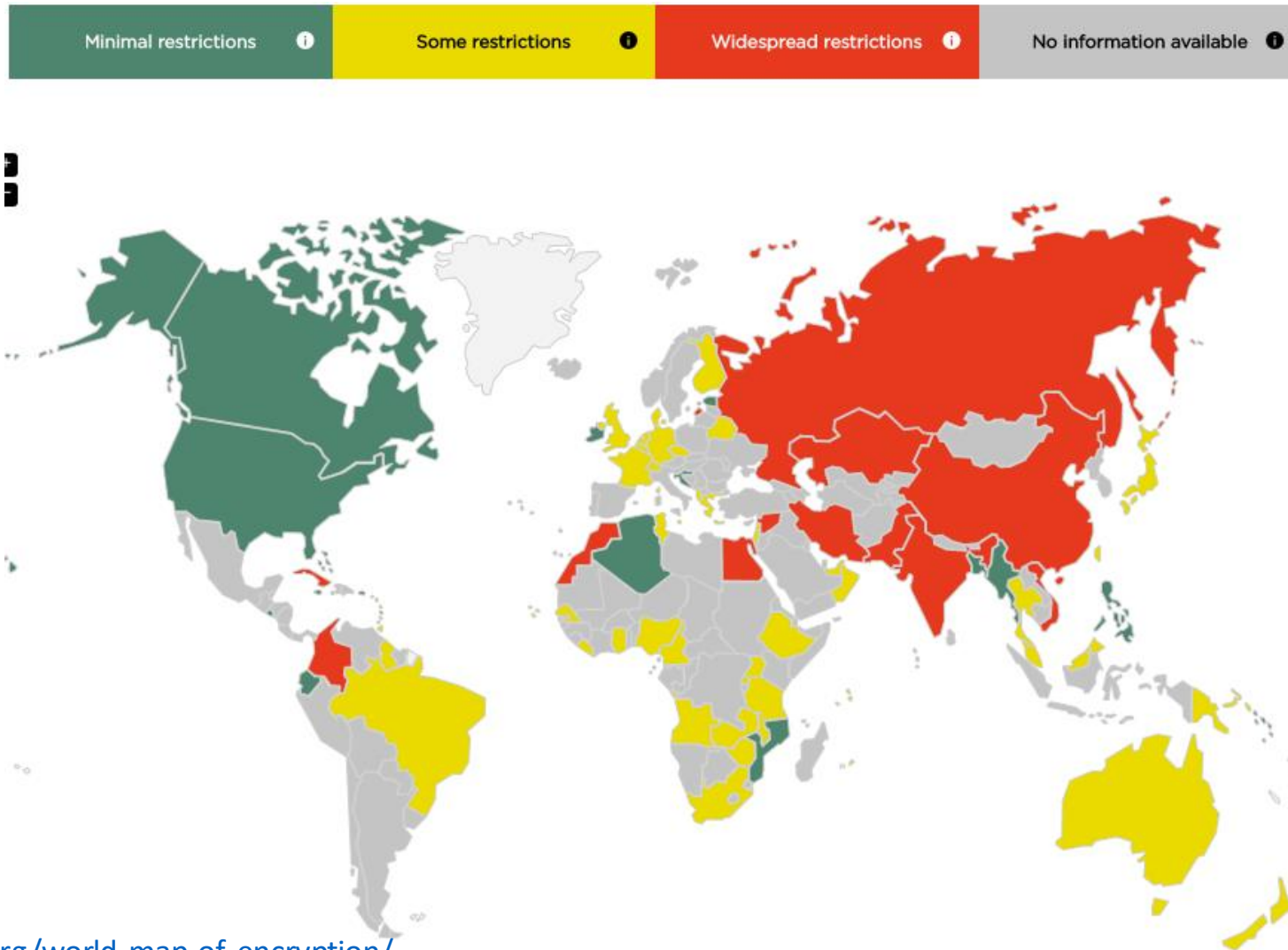
"*[Commercial] Information and communication technology product ([commercial] ICT product)*" means a product [, including digital products,] [that is designed for commercial applications and] whose intended function is information processing and communication by electronic means, including transmission and display, or electronic processing applied to determine or record physical phenomena, or to control physical processes

ICT Products and use of cryptography: main rules

3. [With respect to an ICT product that **uses cryptography** and **is designed for commercial applications**,] no [Party/Member] shall require a manufacturer or supplier of [a commercial ICT product that uses cryptography / the ICT product], as a condition of the manufacture, sale, distribution, import or use of the [commercial] ICT product, to:

- (a) **transfer or provide access to any proprietary information** relating to cryptography, including by disclosing a particular technology or production process or other information, for example, a private key or other secret parameter, algorithm specification, or other design detail, to that [Party/Member] or a person in the territory of that [Party/Member] ;
- (b) **partner or otherwise cooperate with a person in the territory of that [Party's/Member]** in the development, manufacture, sale, distribution, import, or use of the [commercial] ICT product; or
- (c) **use or integrate a particular cryptographic algorithm or cipher.**

World encryption map



Cryptography: exceptions

- Law enforcement / regulatory and judicial proceedings, remedies
- Financial sector and it's supervision
- Manufacturing and distribution of commercial ICT products by governments

Open governmental data disciplines: details

Elements	UMSCA Ch.19	DEPA	SADEA	UKSDEA	WTO JSI on e-commerce
Scope: Central Government data			X		X
Definition: Open Governmental data			X		
Definition: Metadata					X
Facilitation of public access do governmental information	X	X		X	X
Expansion of coverage of shared data [for the benefit of businesses or MSMEs]	X	X		X	X
Machine readable and open format	X	X	X		X
Searchable and retrievable	X				X
Timely updated					X
Accompanied by metadata				X	X
Anonymization			X	X	
Use of APIs			X	X	
Available at no or reasonable cost		X			X
Unrestricted use of governmental data					X
Cooperation	X	X	X	X	X

OGD and the business: example

