



April 11, 2022

**Public Comments to the U.S. Department of Commerce
Regarding the Indo-Pacific Economic Framework**

Filed electronically via www.regulations.gov, Docket No. ITA-2022-0001

Diane Farrell
Deputy Under Secretary for International Trade
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, D.C.

**Re: Request for Comments on the Indo-Pacific Economic Framework,
87 Fed. Reg. 13971, pp. 13971-2 (March 11, 2022)**

Dear Ms. Farrell:

The Entertainment Software Association (ESA) welcomes the opportunity to provide comments in response to the request for industry input by the U.S. Department of Commerce (Commerce) on the U.S. government's negotiating objectives in the proposed Fair and Resilient Trade Pillar of an Indo-Pacific Economic Framework (IPEF, or Framework). ESA is the U.S. trade association for companies that publish interactive entertainment software for video game consoles, handheld devices, personal computers, and the internet.¹ Our members not only create some of the world's most engaging interactive experiences for consumers, but also develop novel technologies that are at the cutting edge, such as virtual, augmented, and mixed reality hardware and software as well as the latest consoles and handheld video game devices.

In its Notice and Request for Comments, Commerce invites interested parties to submit comments to assist the Department in developing its negotiating objectives and positions for the proposed Framework. Of the areas of possible negotiation identified by Commerce, ESA's comments in this submission focus on: general negotiating objectives, digital and emerging technologies-related issues, and tax-related issues.

ESA supports the Administration's initiative to establish channels for critical economic dialogue with key partners in the Indo-Pacific region. However, as discussions progress the Administration should press for the authority to devote its resources to an enforceable agreement. The negotiation of a

¹ A list of ESA members is available at <https://www.theesa.com/about-esa/>.

comprehensive and enforceable free trade agreement (FTA) would provide the opportunity to seek high standards in rules not only for digital trade but also for modern intellectual property protection and enforcement among all of the parties to the proposed Framework. ESA values this opportunity, which we hope is the first of many, to provide comments and insight regarding the experience of our members in the markets found in the Indo-Pacific region. In particular, ESA seeks policies that: support the development of workable privacy regimes, enable the free flow of data across borders and prohibit data localization, prevent the forced transfer of technology, discourage overly burdensome regulation of content and digital services, reduce tariffs and customs duties, and support effective intellectual property protection and enforcement.

About the Industry

Video games are a vibrant part of American culture and an engine for growth in the American economy. ESA's members are among the world's leading publishers of computer and video games. They are the innovators, creators, publishers, and business leaders that are reimagining entertainment and transforming how we interact, learn, and play—including through engaging online services. As of 2021, almost 227 million Americans across the country play video games.² Nearly three-quarters of American households are home to at least one video game player.³ The COVID-19 pandemic demonstrated the power of online gameplay to connect with distant family and friends, and to meet new people.⁴ Studies have found that video games show a positive relationship to player wellbeing.⁵

The U.S. video game industry directly employed 143,045 personnel in 2019, averaging over \$121,000 in annual compensation.⁶ When accounting for direct, indirect, and induced economic impacts, nearly 429,000 U.S. jobs were sustained because of the presence and operations of the industry and its associated expenditures.⁷ The U.S. video game industry generated \$90.3 billion in annual economic output in 2019, and video game industry-related activity generated \$12.6 billion in federal, state, and local taxes, annually.⁸ Worldwide, the video game industry plays an integral role in the digital economy, with a global footprint of \$180.3 billion in 2021 and with 3 billion active gamers in the world.⁹

² ESA, *2021 Essential Facts About the Video Game Industry* at 2, <https://www.theesa.com/wp-content/uploads/2021/08/2021-Essential-Facts-About-the-Video-Game-Industry-1.pdf>.

³ *Id.*

⁴ See *2021 Essential Facts About the Video Game Industry* at 5, 7.

⁵ Johannes, Niklas, Vuorre, Matti and Przybylski, Andrew K., *Video game play is positively correlated with well-being*, Royal Society Open Science (February 17, 2021), available at <https://doi.org/10.1098/rsos.202049>.

⁶ TEconomy Partners, LLC, *Video Games in the 21st Century: The 2020 Economic Impact Report* at 1, <https://www.theesa.com/video-game-impact-map/wp-content/uploads/sites/2/2020/12/Video-Games-in-the-21st-Century-2020-Economic-Impact-Report-Final.pdf>.

⁷ *Id.*

⁸ *Id.*

⁹ Newzoo, *The Games Market and Beyond in 2021: The Year in Numbers* at <https://newzoo.com/insights/articles/the-games-market-in-2021-the-year-in-numbers-esports-cloud-gaming/?msclid=253ca1dfb0f611ec8b7a27790b7520d8>.

Common Sense Digital Trade Policies

Consumers are increasingly seeking to access game products through digital channels. To reach more consumers around the world, game publishers are embracing digital distribution to deliver engaging content, services, and more vibrant experiences. Thus, it is critical that the United States seek standards and, where possible, commitments from its trading partners consistent with the most recent U.S. free trade agreements to secure policies that encourage digital trade and innovation. Game publishers rely on the ability for data to flow across national borders so that players worldwide benefit from digital delivery of game content. The industry opposes tariffs on electronic transmissions, taxes on digital services, measures forcing companies to transfer technology, IP or other assets as a condition of doing business in a country, and policies that stifle data flows or otherwise discriminate against foreign companies, such as those requiring companies to build data centers or otherwise store data within a country to operate there.

Tariffs and Taxation

On customs duties, ESA urges the U.S. government to work bilaterally and multilaterally on strengthening the norms prohibiting the imposition of customs duties on electronic transmissions. This call for action is urgent in light of the move by certain countries to create tariff lines for digital content as well as signals by others of the desire and intent not to renew the World Trade Organization's moratorium on electronic commerce at its upcoming ministerial meeting.¹⁰ Given the global nature of video game services, delivery of content and player engagement, prohibiting customs duties on digital transmissions is of ultimate importance.

A related concern is the effort in some countries to impose taxes on digital services. ESA urges the U.S. to use the opportunity of an IPEF agreement to reaffirm the principle, present in U.S. e-commerce trade agreement chapters, of non-discriminatory treatment of digital products as well as language ensuring that laws on taxation of digital services do not themselves become a barrier to legitimate trade.

Provisions supporting strong e-commerce rules have been part of modern U.S. FTAs, including the U.S.-South Korea free trade agreement and the United States-Mexico-Canada Agreement (USMCA). An ambitious economic framework in the Indo-Pacific region should also include these provisions.

Privacy

The industry promotes consistent, nondiscriminatory data protection policies that protect consumers' personal information without stifling the ability of the industry to bring innovative content to consumers around the world. In particular, in order to avoid unnecessary restraints on trade and promote consistent obligations across data protection frameworks, the industry supports rules that are compatible with the EU's General Data Protection Regulation (GDPR), the latter of which has served as a model in other countries. As the U.S. and EU work to conclude their recently-announced agreement in principle to

¹⁰ Since 1998, WTO Members have maintained a moratorium on customs duties on electronic transmissions. However, in 2018, Indonesia issued Regulation No.17/PMK.010/2018 (Regulation 17), which amends the Indonesian Harmonized Tariff Schedule to add Chapter 99: "[s]oftware and other digital products transmitted electronically." These new tariff lines would cover many U.S. digital exports –potentially everything from subscription services for music, film, and publications; to cloud and other remote software services; to data used in manufacturing plants; and a broad catch-all category of "other digital products."

establish a more durable framework for transatlantic data flows, ESA asks the Administration to consult with industry in considering compatible approaches in other international markets. In the Indo-Pacific context, ESA asks Commerce to affirm private sector-oriented approaches, reaffirm principles found in the APEC Cross-Border Privacy Rules system, and seek compatibility among privacy regimes in a manner that fosters commercial integration rather than fragmentation.

Cross-Border Data Flows

As a technology-intensive sector, video game companies rely on broadband internet connections and data to deliver engaging gaming content, services and experiences to their consumers, who are based all over the world. For video game publishers, ensuring smooth data flows across national borders is crucial to providing the best game experience to players and to creating new and innovative business models for delivering digital content. Generally, the elimination of obstacles to the free flow of data across borders is designed to ease the ability of internet-native companies to conduct every-day business by increasing revenue opportunities for U.S. businesses from larger global markets and enabling more efficient product and service delivery architecture.

Differentiation of Data

As governments around the world, including the U.S. government, seek to regulate data transfers between consumers and content service providers, the video game industry urges the U.S. government to consider approaches that account for how different business models using data support different types of digital industries. A one-size-fits-all regulatory approach may stifle innovation in customized content delivery, a service which is essential to the video game industry. ESA also believes that not all data should be subject to the same regulatory treatment. Non-personal data in video games is of little, if any, value to consumers in the vast majority of circumstances. Regulation of this type of data may harm the free flow of information and potentially interfere with already existing regulation of personal data. The cautious consideration of evidence and information is necessary when crafting rules and policies in this space.

Data Localization and Storage

Laws that promote localization, protectionism, and other restrictions on data flows are counterproductive and impose unnecessary burdens on industry. While regulators often frame localization requirements as necessary to safeguard individual privacy or national security, their intent in fact may be less about data protection than other policy considerations. For example, by requiring local storage or data processing, governments may be providing favorable treatment to their local technology industries or economies. The opportunity for local law enforcement to gain easier access to the personal data of its citizens appears to be another important motivation. However, regulations that require video game companies to store data within a particular country create operational and financial challenges. They can also lead to a proliferation of databases containing personal information, which can then lead to enhanced security concerns as well as increased costs of development and maintenance.

Moreover, data localization rarely makes sense for network efficiency. Such regulations may force video game companies to limit their product offerings in jurisdictions with onerous requirements. Ultimately, such regulations could interfere with the growth of American video game companies, including

their ability to hire more American workers, and could limit the ability of the industry to reach consumers in new markets.

Technology Transfer

Any IPEF agreement should prohibit parties to the agreement from favoring national producers or suppliers of electronic products through discriminatory measures. In particular, governments should not be permitted to force companies to transfer their technology, intellectual property or other valuable commercial information to national entities as a condition of doing business. Some countries use these policies as a means of support for their own domestic champions at the expense of American companies, which are then placed at a competitive disadvantage. These policies constitute unfair competition, discourage U.S. companies from entering or expanding into markets, and distort free and fair trade.

AI Governance

In an industry at the forefront of creativity and innovation, one prominent example of innovation in interactive entertainment software is the use of AI processes in video games. Neural networks, deep learning, object recognition, image understanding, and reinforcement learning are all techniques employed to provide engaging gameplay experience for gamers. In video games, elements of AI are being used to generate responsive adaptive or intelligent behavior such as, for example, demonstrating human-like intelligence in game characters. Deep learning algorithms can also be used to render video content, which can then be combined with a game engine to create a hybrid graphics system for use in a video game or a motion picture. As AI technology matures, the video game industry will continue to incorporate innovations in computer vision, speech, audio, and natural language processing into video games, all of which are important in virtual and augmented reality games, and which are used to improve the gaming experience for disabled gamers.

In a joint press release issued March 29, 2022, the U.S. Department of Commerce (DOC) and Singapore's Infocomm Media Development Authority (IMDA) announced that, within the context of the U.S.-Singapore Partnership for Growth and Innovation, "DOC and IMDA will collaborate on efforts to develop interoperable artificial intelligence governance frameworks and support industry's adoption of ethical AI."¹¹ ESA looks forward to the opportunity to contribute to these discussions and similar discussions, should they arise, within the IPEF. The U.S. video game industry supports a legal and regulatory environment that regularly invites industry consultation and policies that encourage responsible innovation.

Online Service Provider liability

Video game companies maintain online platforms that host user generated content and are beneficiaries of the limitations on attendant liability afforded by Section 230 of the Communications Decency Act. Although ESA considers the inclusion of a provision on this issue an important objective in negotiating the Framework, it is imperative to maintain the distinction between immunity for online service providers in a Section 230 context and that under Section 512 of the Digital Millennium Copyright

¹¹ See *Press Release*, available at <https://sg.usembassy.gov/joint-press-release-new-collaboration-under-the-u-s-singapore-partnership-for-growth-and-innovation-pgi/>.

Act for copyright. Any provision modeled after Section 230 in a trade agreement must have a properly constructed exception for intellectual property infringement. The USMCA now includes precedent for this key principle, importing the language from the Trade in Services Agreement (TiSA), from which U.S. negotiators may draw.

Strong Intellectual Property Protection and Enforcement

Often what is being “traded” in digital trade is digital content, such as video games. As such, provisions on intellectual property (IP) in general (and copyright in particular) that protect video games against unauthorized access, download, and distribution, comprise a fundamental aspect of digital trade. Video game companies face a range of challenges in intellectual property protection and enforcement around the world that, if not addressed, could restrict sales of physical and digital games. Among other challenges, international piracy or theft of video games threatens the industry and its ability to grow and deliver new, innovative game content to consumers around the world. Industry IP priorities include seeking to ensure that governments:

- Have civil and criminal procedures for IP enforcement;
- Provide adequate legal protection and effective remedies against the circumvention of technological protection measures in order to safeguard content played on platforms from illegal copying and distribution; and
- Have adequate legal remedies for rights holders to address online IP infringement by facilitating a streamlined process for removing infringing content and appropriate safe harbors with respect to online service providers if they expeditiously remove infringing content when notified, consistent with U.S. law.

These fundamental principles are rooted in the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), and in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (together, the WIPO Internet Treaties). Any trade negotiation in the region should include as an imperative that member countries accede to and fully implement these treaties. Should the U.S. government decide to negotiate obligations regarding intellectual property rights and enforcement rules with trading partners in the Indo-Pacific region, ESA urges negotiators to seek further industry input and to do so within the context of a binding and enforceable trade agreement.

Good Regulatory Practices

As a general matter, ESA urges the U.S. government to seek commitments from IPEF partners that support transparency in domestic rulemaking regarding trade in or supply of technology-based goods and digital services, including a notice-and-comment process or other opportunity for stakeholders to provide input into rulemaking processes.

Conclusion

By advancing high standards and well-crafted rules in the areas of digital trade, intellectual property, and regulatory standards, an IPEF could provide an important vehicle for the U.S. video game industry to expand the creation and distribution of American entertainment software and hardware in

international markets, driving economic growth and the creation of high paying jobs. If the U.S. government determines to advance a comprehensive free trade agreement with IPEF partners, ESA would urge negotiators to seek cutting-edge rules on the protection of IP rights on the internet and the free flow of cross-border data to further enhance the digital economy.

Thank you for inviting our input on this important matter. We look forward to participating as these negotiations advance, and remain available to answer any additional questions you may have.

Respectfully submitted,

A handwritten signature in black ink that reads "Gina Vetere". The signature is written in a cursive, flowing style.

Gina Vetere
Senior Vice President and General Counsel
Entertainment Software Association