



VIA ELECTRONIC SUBMISSION

Office of the United States Trade Representative
Docket Number: USTR-2018-0026

Dear United States Trade Representative:

The interest of the Association of Art Museum Directors (“AAMD”) in the recent United States Trade Representative’s notices (as described in more detail below) stems from both fundamental constitutional concerns and concerns related to the core mission of art museums across the United States. The AAMD, founded in 1916, represents approximately 210 art museums in the United States, which in 2017 welcomed American and foreign visitors who made approximately 67 million visits to AAMD museums, all of which share a common mission and understanding of art’s role in today’s world. Globally, societies have held true to the belief that the artistic achievements of all civilizations should be represented in art museums, which uniquely offer the public the opportunity to encounter artworks directly in the context of not only their own cultures but others as well. Art museums provide the space where these works may educate, inspire and be enjoyed by all. These institutions work around the world to preserve, study and interpret our shared cultural heritage regardless of any current geopolitical conflicts. This notion is driven not only by policy considerations relating to the free exchange of ideas, but also by the lack of any real, long term, tangible economic benefit for any country that attempts to impose tariffs on artworks.

I. Introduction

The AAMD understands that, in a notice published on July 17, 2018 (the “July 17 Notice”), a modification of action was taken pursuant to the Findings of the Investigation into China’s Acts, Policies, and Practices was proposed relating to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974 published on March 22, 2018 (the “Section 301 Report”) in the form of an additional 10% *ad valorem* duty on certain products of China as classified in the Harmonized Tariff Schedule of the United States (“HTSUS”) subheadings set out in the Annex to the July 17 Notice (the “Initially Proposed Tariff”).

Such HTSUS subheadings include 9701.10.00 (*Paintings, drawings (other than drawings of 4906) and pastels, executed entirely by hand, whether or not framed*), 9701.90.00 (*Collages and similar decorative plaques, executed entirely by hand, whether or not framed*), 9702.00.00 (*Original engravings, prints and lithographs, whether or not framed*), 9703.00.00 (*Original sculptures and statuary, in any material*), 9705.00.00 (*Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological etc. interest*) and 9706.00.00 (*Antiques of an age exceeding one hundred years*) (collectively, the “Art Categories”).

The AAMD further understands that, in a notice published on August 7, 2018 (the “August 7 Notice”), an increase of the Initially Proposed Tariff from 10% to 25% was proposed (the “Proposed Tariff”), which would apply to the same HTSUS subheadings set out in the Annex of the July 17 Notice, including the Art Categories.

In connection with the July 17 Notice and August 7 Notice, you have asked interested parties to comment on, among other items, whether the specific tariff subheadings should be subject to increased duties, including whether the subheadings listed in the Annex should be retained or removed, or whether subheadings not currently on the list should be added. The AAMD believes that the Proposed Tariff should not apply to the Art Categories due to (i) the disproportionate economic and cultural harm that the Proposed Tariff would cause to the U.S. art market while making other art markets, including China’s, more competitive, (ii) the improper nature of including the Art Categories as targets of the Proposed Tariff due to their classification as “informational material” under 50 U.S.C. 1702(b)(3) (“IEEPA”), which prohibits the President from regulating the importation or exportation of any such “informational material” and (iii) protections afforded to the Art Categories under the First Amendment to the U.S. Constitution.

II. Harm to U.S. Markets

In the July 17 Notice, you asked commentators to address “whether imposing increased duties on a particular product would be practicable or effective to obtain the elimination of China’s acts, policies, and practices, and whether maintaining or imposing additional duties on a particular product would cause disproportionate economic harm to U.S. interests.” The AAMD believes that the Proposed Tariff’s application to the Art Categories would achieve only negative consequences for the United States.

Before analyzing the Proposed Tariff’s specific harms, the unprecedented nature of imposing tariffs on the movement of art should be considered. There historically have been and currently are no tariffs imposed by the United States on any nation’s works of art that fit within the Art Categories. Cultural objects, such as those covered under the Art Categories, have always been viewed as distinct from industrial and technological products where national economic interests play a more significant role. Setting aside the particular economic harm, the cultural harm to museums and society would be substantial if the Proposed Tariff was enacted. Art museums in the United States strive to keep collections current and bring the art of the world to U.S. citizens. The Proposed Tariff would directly impede a museum’s ability to do so and would likely cause major disruptions in the art market that would only succeed in making it more difficult for art museums to fulfill their mission.

In the Section 301 Report, your office explicitly states that “[t]he President instructed USTR to determine under Section 301 whether to investigate China’s law, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation or technology development.” The AAMD notes that products covered by the Art Categories have little to no bearing on the concerns set forth in the Section 301 Report. The only foreseeable consequence of the Proposed Tariff on such products would be a disadvantaged United States competing against newly strengthened markets. In their 2018 report on the current status of the global art market, Art Basel and UBS found that the

United States maintained the largest art market worldwide and accounted for 42% of sales by value while China accounted for 21% of sales by value. The Proposed Tariff, if imposed, would directly threaten the United States' economic dominance in the art market. Any product covered by the Art Categories would be significantly more expensive for a U.S. importer as compared to any other person in any other market globally.

Additionally, the Proposed Tariff incentivizes persons to keep products covered by the Art Categories in China domestically, thereby strengthening its art market and likely increasing its currently-held 21% portion of art sales by value. Take the example of a painting valued at \$50 million that was created in China by a Chinese artist, covered by the Art Categories and put up for sale. Art is not a fungible "good." It is unique. As a result, the 25% tariff on the \$50 million work does not protect United States artists because they cannot create the work hypothetically on offer in China. Whatever art they create is unique to them – just as the \$50 million work was unique to the Chinese artist.

Rather, under the Proposed Tariff, a U.S. importer seeking to buy the Chinese painting would be required to pay an additional \$12.5 million to bring this painting into the United States. All other proposed buyers, including domestic buyers in China, would not face this unnecessary cost and the lower price would give Chinese buyers (and all other foreign buyers) a major advantage as against U.S. importers.

Even more important, the Proposed Tariff would not only apply to artworks currently held in China, but potentially applies to all artworks of Chinese origin covered by the Art Categories regardless of ownership, location or time. Take, for example, a Chinese sculpture that was created in China one thousand years ago and left China hundreds of years ago to finally find a home in Paris with a French owner. Due to its designation as a product of China, the Proposed Tariff may apply in connection with a subsequent sale to a U.S. importer even though the sculpture does not involve any Chinese persons or entities and has no meaningful connection to China's policies and practices as outlined in the Section 301 Report. In order to truly appreciate the anti-competitive effects of the Proposed Tariff, imagine the U.S. importer who is competing with French or English or Russian buyers for the sculpture. The U.S. importer starts out the negotiations with a 25% handicap and must outbid the other buyers by more than 25% to acquire the work.

The above scenarios cannot be the intention of the Proposed Tariff, which ostensibly constitutes a response to China's "acts, policies or practices that are unreasonable or discriminatory and that burden or restrict U.S. commerce" per the Section 301 Report. Those objectives will simply not be met with regards to the Art Categories. In fact, the Proposed Tariff would likely bolster foreign art markets while hampering the ability of the United States to compete globally. Due to the lack of connection between the findings in the Section 301 Report and the Proposed Tariff's application to the Art Categories and the disproportionate harm to the United States art market that would result, the AAMD recommends the removal of the Art Categories from the scope of the Proposed Tariff.

III. “Informational Material” Protection

Under the IEEPA, the President is authorized to take certain economic actions due to unusual or extraordinary threats against the United States, including regulating foreign payments, prohibiting transactions involving property in which a foreign national holds an interest and prohibiting the importation of goods from the designated country. Importantly, these wide-ranging and unilateral executive powers may only be exercised after the declaration of an emergency. As such, the IEEPA represents close to the apex of Presidential power in the imposition of economic penalties for foreign activity. Even under such a powerful statute, Congress imposes certain restrictions on the President’s power, signaling that the President cannot prohibit all activity in connection with a foreign threat. Section (b)(3) of IEEPA states that the President may not regulate “the importation from any country, or the exportation to any country...of any information or informational materials, including not but limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact discs, CD ROMs, artworks and news wire feeds.” Emphasis added.

In implementing the IEEPA standard, the Office of Foreign Assets Control (“OFAC”) includes the same “informational material” exemption from sanctions imposed under its regulations. For example, in connection with sanctions imposed against Syria, OFAC excludes “information or informational material” and uses the IEEPA definition for such terms. Additionally, under 31 CFR 542.304, OFAC explicitly states that “to be considered information or informational materials, artworks must be classified under chapter heading 9701, 9702 or 9703” of the HTSUS subheadings, subheadings that cover many of the Art Categories.

As a result, currently, under the OFAC rules, sanctions against the Syrian government for their humanitarian atrocities are in place, but the importation and exportation of designated artworks of Syrian origin cannot be prohibited as a matter of law. The sanctions framework shows a strong policy preference in favor of the free movement of artwork and related materials that serve to benefit the public and which should not be used as tools to penalize persons or countries.

The Proposed Tariff effectively acts as an end-run around the limitations under both the IEEPA and OFAC regulations. U.S. policy cannot be implemented in such a contradictory fashion that, on the one hand, artworks of Syrian origin can be imported into the United States without any tariff or tax, notwithstanding sanctions placed on Syria, but on the other hand, artworks of Chinese origin would be subject to a 25% tariff. U.S. policy clearly maintains a preference for the free movement of art and this policy should not be cast aside by the Proposed Tariff.

IV. First Amendment Protection

The underpinning for the free movement of art rests in the First Amendment and its notion of free expression. Courts have long held that artistic expression is protected by the First Amendment (See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (515 U.S. 557, 1995) where the Court stated that the “painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll” are “unquestionably shielded” by the First Amendment). The broad nature of the Proposed Tariff directly restricts the ability of persons to

express their ideas through the medium of art in the United States. The Proposed Tariff is a form of restraint on artistic expression because it imposes a tax on the free movement of works of art – works of art that have nothing to do with China other than at some point in history they were created in China.

Congress has acted on numerous occasions to ensure that the free movement of artistic expression is protected. In 1988, Congress passed the Berman Amendment which added the “informational material” language to the IEEPA as detailed above. In 1994, Congress passed the Free Trade in Ideas Amendment which broadened the scope of “informational material” further to the today’s IEEPA standard. The United States has always ensured, through constitutional and statutory protection, that means of expression and methods of conveying information are protected from restrictions, even those placed against the worst offenders in the international system. The President should continue to follow this practice with respect to China and the Proposed Tariff.

V. Conclusion.

The AAMD understands that geopolitical challenges can require the United States to take certain actions in response to another government’s unfair practices. While such actions may be appropriate with respect to industries involved in manufacturing and technological development, the same standard should not be applied to works of art covered by the Art Categories. The very nature of the Art Categories is distinct from other economic sectors due to the integral role that art plays in our culture and in our American way of life, embedded in the First Amendment. Additionally, even if this were not the case, implementing the Proposed Tariff with respect to the Art Categories would only harm the United States economy as it would be the only nation of which we are aware with such restrictive tariffs placed on works of art of Chinese origin. Further, the current U.S. policy with respect to the IEEPA and the OFAC sanctions regime strongly suggests that the President’s authority to limit the importation and exportation of such works of art is questionable. Finally, the First Amendment acts as a bulwark to protect an individual’s right to free expression through such works of art.

Based on the foregoing, the AAMD recommends that the Art Categories be excluded from the Proposed Tariff.

Very truly yours,

Association of Art Museum Directors

By: 
Christine Anagnos, Executive Director