

Association of Art Museum Directors

Attachment to Request for Tariff Exclusion of collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological etc. interest;

HTSUS Subheading 9705000085 (the “Subject Category”)

The Association of Art Museum Directors (“AAMD”), founded in 1916, includes as its members the directors of more than 200 art museums in the United States.¹ In 2017, AAMD member museums welcomed 67 million visitors and served more than 4 million K-12 students in more than 46,000 schools throughout the United States.

American art museums share a common mission to educate Americans about the role of art in today’s world. Globally, societies have held true to the belief that the artistic achievements of all civilizations should be represented, studied and celebrated in art museums. American art museums provide the public spaces where art from all civilizations may educate, inspire and be enjoyed by all; they work around the world to preserve, study and interpret our shared cultural heritage, regardless of any current geopolitical conflicts; and they bring art from different eras and cultures to U.S. museum visitors. Unfortunately, the Tariff (as defined below), in addition to raising fundamental Constitutional issues, makes American art museums’ mission more difficult to achieve.

I. Executive Summary

The AAMD, on behalf of its members, hereby requests exclusion from the Tariff for the Subject Category as well as all Art Categories (as defined below).

In 2018, consistent with more than a century of U.S. policy, the U.S. Trade Representative initially excluded works of art from the Tariff. Notwithstanding this previous exclusion, the Tariff now includes a number of categories of Chinese-origin works of art imported to the United States from China or from third countries.

The announced purpose of the Tariff is to respond to China’s unreasonable and discriminatory activities that burden or restrict U.S. commerce; however, the imposition of the Tariff on Chinese-origin artwork would have the opposite effect: American buyers, a category that includes Americans who donate works to museums as well as American museums themselves, who wish to import Chinese-origin artwork will be at a competitive disadvantage. Such buyers would have to pay a tariff to bring the works into the United States, regardless of how long the works have been outside China. Conversely, Chinese buyers (as well as buyers in other countries) would benefit from lowered competition from American buyers.

In addition, the Tariff will hurt the United States art market as a whole. Dealers and auction houses are likely to avoid bringing works of Chinese origin into the United States for sale, as doing so would increase the cost. Perhaps most important, the Tariff violates the United States’ long-held

¹ The AAMD membership also includes directors of major museums in Canada and Mexico.

policy that art should not be subject to tariffs, and the duty-free entry of art into the United States should be encouraged for the benefit of all Americans.

II. Background

In a notice published May 17, 2019 (the “May Notice”), a modification of action was proposed in connection with the previous Findings of the Investigation into China’s Acts, Policies, and Practices 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 increase to 25% of the *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 May Notice (the “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”).

Please note that the AAMD is requesting exclusion for all of the Art Categories.

Previously, the Trade Representative had removed the Art Categories from the list of goods that would be subject to the Tariff. According to the May Notice, “(p)roduct exclusions granted by the Trade Representative on prior tranches from this investigation will not be affected.”² Based on this statement, the AAMD was surprised to see Art Categories included on the new list of HTSUS subheadings subject to tariff.

The 25% tariff was subsequently reduced to 15% pursuant to Notices of Modification of Section 301 Action published in the Federal Register on August 20 and August 30, 2019. Most recently, in a Notice of Modification of Section 301 Action published on January 15, 2019, the Trade Representative reduced the rate of the Tariff to 7.5%, effective as of February 14, 2020. While a positive step, this does not solve any of the problems outlined in this submission.

² “Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation,” *Federal Register* 84:96 (May 17, 2019), 22564.

The AAMD believes that the Tariff should not apply to the Subject Category in particular or the Art Categories in general, even at a reduced rate, due to (i) the harm that doing so would cause to American art museums, and thereby to the public, as well as to the museums' ability to educate and inspire the public; (ii) the disproportionate economic and cultural harm that the Tariff would cause to the U.S. art market, while advantaging other art markets, including China's; (ii) the improper nature of including the Art Categories as targets of the Tariff due to their classification as "informational material" under the International Emergency Economic Powers Act, 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.

III. Harm to U.S. Art Market

A. U.S. Policy Against Tariffs on Art.

In 1913, the United States abolished tariffs on most works of art.³ At the time, proponents made two primary arguments in favor of abolishing the tariff: First, they argued the tariffs were harming the art market in the United States. In the first year after increased tariffs were imposed on artwork in 1883, the United States' art market declined from \$3 million to \$673,000.⁴ Economics were not, however, the most potent argument for repeal of the 1883 tariff. Second, and arguably even more important may have been the outcry from artists, museum curators, collectors and members of the public that art was not a commodity but a source of education, culture and enlightenment that should not be taxed.

Those arguments – harm to the marketplace and loss of works of art that educate and inspire – are no less valid today. They are especially applicable to American art museums, almost all of which are nonprofit or governmental institutions with a mission to educate the American public, including millions of children, about the great cultures of the world. In fulfilling their mission, American art museums strive to keep their collections current, bringing new works of art and new ideas to American audiences. The Tariff would directly impede American art museums' ability to continue to do so.

B. No Protection For, Rather Harm to, the U.S. Art Market.

In the Section 301 Report, the Trade Representative explicitly stated 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." 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 Tariff on such products would be to disadvantage United States buyers, including American art museums, competing against newly strengthened markets, particularly Chinese markets.

³ See, Kimberly Orcutt, "Buy American? The Debate over the Art Tariff," *American Art* (Fall 2002), pg. 83. In 1909, the tariff had been lifted as to works of art over 20 years old.

⁴ *Id.*

In their 2019 report on the current status of the global art market, Art Basel and UBS found that the United States maintained the largest art market in the world and accounted for 44% of sales by value, an increase of 2% from 2018.⁵ China slipped from second to third (the United Kingdom rose to second), with China maintaining 19% of sales by value. In the same period, China sales at auction were second in the world to the United States (U.S. 40%, China 19%). The Tariff directly threatens the United States' economic dominance in the art market. Any work of art covered by the Art Categories would be more expensive for a U.S. importer as compared to a buyer in another country. At the same time, auction houses and dealers are likely to maintain or move their business outside the United States rather than bring works of Chinese origin into the United States for sale and incur an upcharge. This is especially problematic if works of Chinese origin not currently in China are moved to the growing Chinese art market because of the Tariff. Once the work is in China, in light of China's restrictive export laws, it may not be able to leave.

C. No Protection for U.S. Artists.

Unlike U.S. manufacturers or other businesses that may benefit from tariffs, there is no benefit for U.S. creators of art. Art is not a fungible good; each work of art is by definition unique. If a work of Chinese origin is not available to U.S. buyers, or is only available at an increased price, that does not mean U.S. buyers will shift their buying to U.S.-origin artwork. This is particularly true of American collectors and art museums, which often seek to acquire a Chinese-origin work of art specifically because of its origin and provenance.

C. No Negative Effect on China.

China has been a source of works of art to the rest of the world for hundreds of years. As early as the fifteenth century, Chinese porcelain and silk found its way into Europe. Works of art of Chinese origin that have been outside China for hundreds of years come to the international art markets, *e.g.*, New York, London, Paris, Vienna, all the time and are purchased by U.S. museums, collectors and dealers, or sold by U.S. auction houses. Most of these potential U.S. buyers will now pay a tariff to bring the works into the United States. While U.S. buyers will clearly be disadvantaged, China is not likely to care if a work of art that left China 200 years ago is not bought by a U.S. person. In fact, China will be pleased because Chinese nationals who want to buy works of Chinese origin and return them to China will be at a competitive advantage relative to U.S. buyers. This result is especially detrimental because the most significant competitors to U.S. buyers for works of Chinese origin are the Chinese, and as China's economy flourishes their purchasing power grows.

Furthermore, China already restricts the export of many cultural objects, and the United States has a Memorandum of Understanding with China that prohibits the importation of a vast array of archaeological material from China. As a result, the Tariff will be imposed for the most part on Chinese works of art that are not coming from China.

⁵ The Art Basel and UBS Global Art Market Report, *Art Basel*, <https://www.artbasel.com/news/art-market-report> (last visited Jun 13, 2019).

E. Summary.

The above scenarios cannot be the intention of the 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 simply will not be met with regard to the Art Categories. In fact, the Tariff will 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 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 Tariff.

IV. Special Harm to U.S. Museums - Donations

Donations of works of art are a significant – often the most significant – way in which U.S. art museums build their collections. Most American art museums’ collections are comprised of 80-90% donated works. The Tariff will chill that process. Donors often buy works abroad, then donate them to U.S. museums or provide the funds to U.S. museums to acquire works of art in the international marketplace.

Because the Tariff applies to Chinese-origin artworks regardless of their current location, donors willing to acquire a Chinese work outside the United States will pay an additional charge just to bring the work into the United States. This will likely deter American donors’ interest in the work or convince them to buy a lesser quality work for potential donation. Ultimately, the American public will suffer from the absence of great works of Chinese art in American museums.

Consider, for example, a Chinese porcelain that was created in China 500 years ago and found a home in London with an English owner in the eighteenth century. After the effective date of the Tariff, the object is put up for auction in London. One of the potential bidders is a patron of a U.S. art museum who wants to buy the work and donate it to the museum. Due to its designation as a product of China,⁶ the Tariff would apply if the work is purchased by the patron and imported into the United States from London, even though the object 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. Furthermore, the U.S. patron is now competing with Chinese, French, English, Russian or Middle Eastern buyers for the object, and the U.S. patron must outbid the other buyers by more than the amount of the Tariff to acquire the object.

I. “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. 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

⁶ Listing China as the country of origin (rather than the country of export) on such documents such as CBP Form 7501, will trigger the imposition of such a tariff.

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 Iran, 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 are all covered by the Tariff.

As a result, under the OFAC rules, sanctions against the Syrian government for its 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 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 7.5% tariff. U.S. policy clearly maintains a preference for the free movement of art, and this policy should not be cast aside by the Tariff.

VI. First Amendment Protection

One of the underpinnings 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 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 artistic expression and the open exchange of ideas are 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 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 Tariff.

VII. 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 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, the Tariff with respect to the Art Categories only harms the United States economy, as it is 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 Subject Category, specifically, as well as all the Art Categories be excluded from the Tariff.