

## SUBMISSION RESPONSE



### SECTION 301 ACTION: ENFORCEMENT OF U.S. WTO RIGHTS IN LARGE CIVIL AIRCRAFT (LCA) DISPUTE

DOCKET ID: USTR-2020-0023

#### SUBMISSION BY THE SCOTCH WHISKY ASSOCIATION (SWA)

##### KEY POINTS:

The Scotch Whisky and United States (U.S.) whiskey industries are closely interlinked. Tariffs applied to one industry harm both.

The 25% retaliatory tariffs applied to Single Malt Scotch Whisky and Scotch Whisky liqueurs are having a serious impact on U.S. small and medium businesses and American jobs, further exacerbated by the COVID-19 crisis.

Single Malt Scotch Whisky accounts for only 0.81% of the total value of US merchandise imports from the UK yet is bearing 58% of the UK's total tariff burden in the LCA dispute.

As the United Kingdom (UK) is no longer an EU Member State and leaves the EU Common Commercial Policy on December 31<sup>st</sup> 2020, it has no ability to influence the EU's approach to settling the LCA dispute. Targeting UK products, such as Scotch Whisky, delivers no leverage over the EU.

The SWA's advocacy since early 2018 has delivered a public commitment by UK Prime Minister Johnson to remove the EU's 25% tariff applied to U.S. Whiskeys as soon as the UK is legally able to do so, following its exit from the EU.

The Scotch Whisky industry has traditionally been a strong advocate of the U.S./UK Free Trade Agreement (FTA) negotiations. Continuing these efforts will only be possible if both the U.S. and the UK commit to eliminating their current tariffs on Scotch Whisky and U.S. whiskeys at the earliest opportunity.

Together with our partners in the U.S. distilled spirits industry, we strongly urge:

- the U.S., UK and European Union (EU) to de-escalate the current trade disputes, returning to a zero-tariff environment for the bilateral trade of distilled spirits at the earliest opportunity;
- the U.S. to remove the 25% retaliatory tariff on Single Malt Scotch Whisky and Scotch Whisky liqueurs through the current LCA review; and

- in return, the UK to remove the EU's 25% retaliatory tariff on American Whiskey in response to US Section 232 tariffs on steel and aluminium as soon as legally possible, on January 1<sup>st</sup>, 2021.

1] Enter general comments regarding the Section 301 investigation to enforce U.S. WTO rights in the Large Civil Aircraft dispute, or click "next" to proceed to questions specified in the Federal Register Notice. (OPTIONAL)

## **A: INTRODUCTION AND CONTEXT**

The Scotch Whisky Association (SWA) is the representative body of the Scotch Whisky industry. Our 74 member companies account for 95% of Scotch Whisky production. Over 90% of Scotch Whisky produced in the UK is exported, with the U.S. being the industry's largest market by value worldwide.<sup>1</sup>

## **AN INTER-DEPENDENT INDUSTRY**

For many years, we have worked closely with our partners in the Distilled Spirits Council of the United States (DISCUS) to open new market opportunities around the world for both U.S. distilled spirits and Scotch Whisky. We have sought to ensure that the principle of fair and reciprocal trade in our products is respected worldwide and to deliver tariff-free trade in distilled spirits across the Atlantic and globally. This has included a number of successful WTO disputes.<sup>2</sup> Consumers in the U.S. and the UK have benefited from mutual liberalised trade in our products for many years. This trade supports hundreds of thousands of jobs in the U.S.

In 1994, the U.S. and the European Union (EU) agreed a 'Zero for Zero' arrangement eliminating their tariffs on trade in whiskies and most other distilled spirits<sup>3</sup>. During the Transatlantic Trade and Investment Partnership (TTIP) negotiations, we worked with DISCUS to develop a draft Spirits Annex, which would have facilitated trade in distilled spirits further by promoting regulatory consistency between the U.S. and the EU. The SWA and DISCUS have advocated for a similar approach in the current U.S./UK Free Trade Agreement (FTA) negotiation. More recently, the U.S. and the UK concluded an agreement to continue recognition of the distinctive product status of Bourbon Whiskey and Tennessee Whiskey in the UK and Scotch Whisky and Irish Whiskey in the U.S., following the UK's departure from the EU.<sup>4</sup>

Working with DISCUS, the SWA has consistently called on the EU and the U.S. to return to tariff-free trade in spirits across the Atlantic. We have made this point repeatedly to the

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<sup>1</sup> Overall Scotch Whisky imports to the United States in 2018 were worth \$1,565,234,808. Source: USITC

<sup>2</sup> Korea (DS75 and DS84); India (DS352 and DS360); Philippines (DS396 & DS403)

<sup>3</sup> Memorandum of Understanding between the European Community and the United States of America on Spirituous Beverages, implemented in the European Union by Council Decision 97/360/EC of 24 March 1997.

<sup>4</sup> Agreement between the United States of America and the United Kingdom and Northern Ireland on the Mutual Recognition of Certain Distilled Spirits/Spirit Drinks, signed January 31 2019 <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/february/ustr-signs-wine-and-distilled>

European Commission ever since the EU imposed tariffs on U.S. whiskeys in June 2018 in retaliation for the U.S. imposition of tariffs on steel and aluminium. We continue to urge both the UK Government and the EU to eliminate EU tariffs on U.S. whiskeys. We are also pressing the EU not to escalate the dispute further in response to the forthcoming U.S. – Large Civil Aircraft (LCA) arbitral award. But these efforts will be made significantly more difficult if the U.S. maintains or increases its current 25% tariff on Single Malt Scotch Whisky and Scotch Whisky liqueurs.

By contrast, we believe that removing additional duties on Single Malt Scotch Whisky and Scotch Whisky liqueurs will pave the way for the UK Government to deliver on Prime Minister Johnson's pledge to remove U.S. spirits from its measures imposed in relation to U.S. steel and aluminium tariffs as soon as the UK fully leaves the EU on December 31, 2020.

That collaboration reflects the many connections between the U.S. Whiskey and Scotch Whisky industries. As well as ownership straddling the Atlantic, there are many links on the production side. For example, the American Whiskey industry exports Bourbon casks worth \$70 million annually to Scotland for use in the maturation of Scotch Whisky, our industry's single biggest import. Of approximately 30 million casks of maturing spirit in Scotland at any one time, 60% are Bourbon casks.<sup>5</sup>

## **SCOTCH WHISKY IN THE UNITED STATES**

In 2019, Scotch Whisky imports to the U.S. were worth \$1,464,457,076.<sup>6</sup> Scotch Whisky accounts for just 11.8% of overall US whisk(e)y consumption by volume, and only 3.6% of total U.S. spirits consumption by volume.<sup>7</sup>

Maintaining or increasing the current additional duties – or expanding their coverage to include Blended Scotch Whisky – would threaten existing American jobs. Such actions would also affect our members' future investment decisions, thereby reducing production and jobs in the U.S.. Furthermore, any such action would further harm American small and medium enterprises selling Scotch Whisky brands, as well as numerous companies and workers in the tourism and hospitality sectors across the United States. This was reflected in the 28,000 submissions to the previous Review of Action in January 2020, most made by American small and medium enterprises.<sup>8</sup> The many thousands of American jobs and businesses supported by these sectors are now under severe pressure due to the impact of the COVID-19 crisis, with independent industry estimates suggesting that 20-40% of American on-trade outlets may not survive.<sup>9</sup>

Given these facts, USTR should reject the notion that imposing tariffs on Scotch Whisky will support U.S. spirits production and sales. Indeed, given the interdependence of the U.S. Whiskey and Scotch Whisky industries, any measure that harms the Scotch Whisky industry is likely to harm its U.S. counterpart.

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<sup>5</sup> Source: SWA data

<sup>6</sup> Source: USITC

<sup>7</sup> Source: International Wine and Spirits Research (IWSR)

<sup>8</sup> Docket number USTR-2019-0003

<sup>9</sup> Source: International Wine and Spirits Research, *COVID-19 Market Snapshot*, April 17, 2020

## Questionnaire

[2a] Select one or more product categories applicable to or covered by your comment, or enter specific product(s) or HTS code(s) below.

### Search box with categories

Distilled Spirits

[2b] What specific product(s) are applicable to or covered by your comment?

### Search box with codes

Single Malt Scotch Whisky, Blended Scotch Whisky, Scotch Whisky liqueurs

[2c] Type or select the HTS subheading(s) or the statistical reporting number(s) applicable to the specific product(s) covered by your comment.

### Search box with codes

2208.30.30.30 - Irish and Scotch whiskies in containers each holding not over 4 litres

2208.70.00.30 – Scotch Whisky liqueurs in containers each holding not over 4 litres

[2d] What are the current or former EU Member state(s) applicable to or covered by your comment? (i.e., the origin of product.)

### Dropdown list of countries

United Kingdom

[3] Respond to the questions below if the product(s) you identified in Question [2] is currently subject to additional duties. (Annex I to the Federal Register notice lists products currently subject to additional duties.) If the product(s) you identified in Question [2] is not currently subject to additional duties, move to Question [4].

[3a] With respect to product(s) identified in your response to Question [2], what is your recommendation as to whether additional duties should be maintained? (OPTIONAL)

Remove Additional Duties

[3b] If you recommend the rate of additional duty be modified, you may provide a recommendation as to the revised rate of additional duty (as high as 100 percent).

0%

[4] Respond to the questions below if the product(s) you identified in Question [2] is NOT currently subject to additional duties. (Annex II to the Federal Register notice lists products for which additional duties of up to 100 percent previously had been proposed, but for

which no additional duties are currently imposed under the action. Annex III to the Federal Register notice lists additional products for which increased duties of up to 100 percent are now proposed.)

[4a] With respect to products listed in Annex II or III to the Federal Register notice, what is your recommendation as it relates to the inclusion of the specific product(s) on a revised list of products subject to additional duties? (OPTIONAL)

Oppose, Do Not Add Products to List

[4b] You may provide a recommendation as to the rate of additional duty to be imposed (as high as 100 percent).

0%

[5] Please comment on whether maintaining or imposing additional duties on a specific product of one or more specific EU Member state (or former Member state) would be appropriate to enforce U.S. WTO rights or to obtain the elimination of the WTO-inconsistent measures, and/or would be likely to result in the implementation of the DSB recommendations in the Large Civil Aircraft dispute or in achieving a mutually satisfactory solution.

The UK is no longer an EU Member State and leaves the EU's Common Commercial Policy on December 31<sup>st</sup> 2020. It therefore has no influence on whether and how the EU brings remaining EU Member States into compliance with their WTO obligations. We continue to work with our partners in the EU spirits industry to press the EU to reach a negotiated settlement with the U.S. and to avoid escalating matters with further retaliation in the wake of the forthcoming WTO Arbitrator's report in the Boeing dispute. However, as Scotch Whisky accounted for over 40% of total EU spirits exports and is now no longer an EU product, U.S. measures applied to Scotch are of no concern to the EU. This has been made very clear to us by EU officials. Indeed, given the large share of EU spirits exports that Scotch Whisky accounted for, spirits produced in the EU are no longer its largest agri-food export. Hitting Scotch delivers no leverage in resolving the Airbus dispute.

## **SCOTCH WHISKY – AN UNRELATED SECTOR**

As the evidence demonstrates, imposing 25% additional duties on Single Malt Scotch Whisky and Scotch Whisky liqueurs is hurting U.S. businesses and jobs, as well as the Scotch Whisky and wider U.S./UK spirits industries. The maintenance of existing additional duties, let alone their possible increase or expansion to Blended Scotch Whisky, would only exacerbate this damage.

It is difficult to see a connection between current and possible future additional duties levied on Scotch Whisky and the resolution of the LCA dispute. Distilled spirits are unrelated to aircraft production and producers have no commercial interests in aircraft. Indeed, Scotland, particularly the Speyside region, where most Single Malt production takes place, is

bearing approximately two thirds of the total monetary impact on the UK of existing tariffs (see below). Focusing retaliation so significantly and disproportionately on only one unrelated sector located in one economically fragile part of the UK will not address the WTO-inconsistent measures at issue in the LCA dispute, especially given that no Airbus production takes place there.

Furthermore, maintaining the existing measures and increasing and/or expanding them to other UK and EU-origin distilled spirits, such as gin, will simply cause further harm by encouraging the EU to target U.S. beverage alcohol categories in response, once the WTO Arbitrator has issued its report in the U.S. – LCA dispute (DS353) in fall 2020. Indeed, the EU has already consulted on its list of U.S. products for retaliation. That list includes brandy, rum, vodka, undenatured alcohol for human consumption and certain wines.

### **SCOTCH WHISKY SHARE OF TOTAL UK IMPACT**

Single Malt Scotch Whisky is bearing a disproportionate share of the UK's current exposure to additional duties.

The Scotch Whisky industry currently accounts for 58% of the total value of retaliatory tariffs imposed on UK merchandise imports to the U.S.. The Scotch Whisky trade impacted amounts to \$512 million out of a total of \$884 million for UK goods as a whole.<sup>10</sup> The next largest impacted UK sectors are Metals/Construction Equipment (\$82 million in 2018), Dairy (\$62 million in 2018) and Meat (\$51 million in 2018).

Total UK merchandise imports to the U.S. were worth \$63.2 billion in 2019. At \$512 million, Single Malt Scotch Whisky imports account for only 0.81% of total UK merchandise imports by value, yet are bearing almost 60% of the total UK tariff burden.

[6] Please comment on whether maintaining or imposing additional duties on specific products of one or more specific EU Member state (or former Member state) would cause disproportionate economic harm to U.S. interests, including small or medium size businesses and consumers.

The sheer scale of the 28,000 responses to USTR's Previous Review of Action<sup>11</sup>, many of which were from small and medium businesses in the American beverage alcohol and hospitality sectors, is itself a powerful demonstration of the harm that additional duties applied to Scotch Whisky and other beverage alcohol products is doing to American jobs and businesses.

Since October 18, 2019, Single Malt Scotch Whisky (2208.30.30 – Single Malt Irish And Scotch Whiskies (described in 2208.30.30) and Scotch Whisky liqueurs (2208.70.00 – Liqueurs and Cordials) imported into the U.S. from the United Kingdom have been subject to

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<sup>10</sup> 2019 trade data - Sources: USITC, Her Majesty's Revenue & Customs UK

<sup>11</sup> Docket number USTR-2019-0003

a 25% *ad valorem* import tariff.<sup>12</sup> In 2019, US imports of Single Malt Scotch Whisky were worth \$ 512,559,977.<sup>13</sup>

## **AMERICAN JOB IMPACTS**

Before the tariffs were imposed, industry models showed that tariffs on Scotch Whisky and EU spirits would have a significant negative impact on investment and jobs in the United States. As overall sales declined, jobs across all three tiers of the supply chain (producer, importer, wholesaler and retail) would be harmed.

DISCUS modelling<sup>14</sup> suggested that the imposition of a 25% *ad valorem* tariff would increase the retail price of Scotch Whisky by 13.5%, seeing sales fall by 9.6% and the loss of approximately 10,820 jobs across the supply and distribution chain. The same modelling suggested that the imposition of a 100% *ad valorem* tariff would increase the retail price of Scotch Whisky by 54.2%, seeing sales fall by 29.0% and the loss of approximately 32,828 jobs across the supply and distribution chain.

## **AMERICAN CONSUMER IMPACTS**

Industry modelling also suggested a harmful impact on tourism and hospitality sectors as consumer choice was reduced. Markets around the world where tariff and tax burdens are low see an explosion of consumer choice as more brands become affordable to more consumers. American consumers have benefited from the reduction in tariff and non-tariff barriers, leading to an increase in niche, 'craft' brands. The explosion in small craft distillers seen in the U.S. in recent years testifies to the benefits that U.S. spirits producers have enjoyed with the stimulus of competition.

Many consumers buy these products because of their provenance and are unlikely to shift to products produced elsewhere. Price increases resulting from tariffs have led to some smaller Scotch Whisky brands no longer being sold in the U.S..<sup>15</sup> This harms American consumers and U.S. businesses trading in these products, through reduced consumer choice and decreased revenues.

## **AMERICAN TAX IMPACTS**

The tariff impact on sales will reduce State tax revenues. As prices rise, so revenues fall as consumers trade down or out of the category. Modelling prior to the imposition of tariffs

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<sup>12</sup> 84 Fed Reg 55998 dated October 18, 2019

<sup>13</sup> Source: USITC and HM Revenue & Customs

<sup>14</sup> Source: DISCUS USTR submission (August 5, 2019). Analysis by the Distilled Spirits Council Office of Economic and Strategic Analysis. To calculate lost jobs, first, the impact of tariffs on retail prices by each category was calculated. The reduction in consumption as a result of price increases was then calculated using the price elasticity of demand. This followed an estimation of the decline in employment stemming from the lost consumption in the effected industries; namely, importers, wholesalers and retailers. After calculating the direct impact of job losses, direct-effect employment multipliers were used to estimate the total number of job losses.

<sup>15</sup> <https://www.nytimes.com/2019/10/17/business/scotch-whisky-brexit-tariffs.html>

estimated that a 25% tariff on all Scotch Whisky would reduce State excise tax revenues by \$17.7 million.<sup>16</sup>

## **EFFECTS SO FAR**

The 25% additional duties on Single Malt Scotch Whisky and Scotch Whisky liqueurs have caused damage to American businesses of all sizes and American jobs.

Exports of Single Malt Scotch Whisky from the UK to the U.S. since October 2019, have fallen substantially, down 30% to end-May 2020.<sup>17</sup>

Some of our members have stopped shipping Single Malt Scotch Whisky to the U.S. completely, or have reduced shipments or delayed the launch of new brands. Uncertainty is leading to a number of companies delaying investment decisions or deciding to hold off on investments they had previously committed to. Many companies have had to cut their U.S. expenditure and suspend plans to hire additional staff in the United States. Others have had to take steps to support their small and medium U.S. customers with cash flow issues that have arisen, exacerbated by the COVID-19 crisis.

U.S. third party importers and distributors are having to absorb much of the financial impact and, as a result, are investing less in promotional activity in the United States. That, in turn, means lost business for U.S. advertising agencies. The impact is being felt across the supply chain.

7] Use the field below to provide any additional information in support of your comment, taking account of the instructions provided in Section C of the Federal Register notice.

## **BILATERAL U.S./UK RELATIONSHIP**

The UK left the EU on January 31, 2020. The transition period will end on December 31, 2020, after which the UK will no longer be bound by the EU's Common Commercial Policy. Particularly at this time, we believe there is a real opportunity for both the U.S. and the UK to demonstrate leadership by delivering a bilateral agreement that showcases the benefits of fair and reciprocal trade to the world. Returning to tariff-free trade in whiskies across the Atlantic would create American jobs and growth, both in the distilled spirits industry and those that have been most hurt by COVID-19, particularly hospitality and tourism.

Removing Single Malt Scotch Whisky and Scotch Whisky liqueurs from additional duties – combined with the UK's removal of U.S. whiskeys from the EU's retaliatory tariffs in the steel and aluminium dispute on January 1, 2021 - would add significant momentum to the negotiation of an ambitious bilateral U.S./UK FTA following Brexit. We are confident that the UK Prime Minister takes the same view. For example, on November 7, 2019, we first secured his public commitment to remove the EU tariffs on U.S. whiskies imposed under the

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<sup>16</sup> Source: Industry modelling.

<sup>17</sup> Source: HMRC



232 steel and aluminium dispute as soon as the UK can legally do so, following the end of the transition period.<sup>18</sup> He has since repeated that commitment.

As traditional and powerful advocates of free and fair trade, the SWA has long been one of the most influential UK industry voices in advocating in favour of an ambitious U.S./UK FTA. We have indeed welcomed the launch of those negotiations, on May 5<sup>th</sup> 2020: <https://www.scotch-whisky.org.uk/newsroom/swa-calls-for-tariff-elimination-as-us-uk-free-trade-talks-begin/> However, our ability to continue doing so will depend on whether or not additional duties continue to be applied on Scotch Whisky in the United States.

Together with our partners in DISCUS, we believe that there is an opportunity for an ‘early harvest’ deal this year that would see both sides eliminate the current tariffs applied to whiskies under trade disputes in unrelated sectors. A distilled spirit ‘early harvest’ deal could build on the exchange of letters in 2019 securing the continued distinctive product recognition of Bourbon and Tennessee Whiskey in the UK and Scotch Whisky in the United States after the UK left the EU<sup>19</sup>. Such an agreement, if delivered, would add momentum to the overall negotiation and boost public support at a time when groups opposed to an ambitious deal are increasingly gaining influence.

By contrast, failure to deliver such an outcome will make it impossible for the UK Government to remove the 25% tariffs imposed on US whiskey. From a political perspective, no UK Prime Minister could make such a concession without securing reciprocal treatment from the U.S. for Scotch in respect of the Airbus additional duties.

## **REQUEST**

The distilled spirits industry is united across the Atlantic. Fair and reciprocal trade in our products over many years has brought substantial economic benefits, jobs and consumer choice to both the U.S. and the EU. The interrelated nature of our industry has also led to sustained shared success in markets overseas over many years. We strongly believe that the U.S. the UK and EU must focus on the issue at hand and not penalise sectors that are unrelated to the LCA dispute.

The SWA therefore fully supports the parallel submission made in response to this Review by our colleagues from the Distilled Spirits Council of the United States and partners, including the National Association of Beverage Importers, American Beverage Licensees, American Craft Spirits Association and the Wine and Spirits Wholesalers of America.

### **We urge all sides in the LCA dispute to:**

- **reach an early negotiated settlement,**

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<sup>18</sup>“ Once we come out of the EU, those tariffs will not apply” <https://www.thetimes.co.uk/article/eu-blamed-for-us-tariff-on-whisky-z38h3jskq>

<sup>19</sup> <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/february/ustr-signs-wine-and-distilled>

- **eliminate the existing tariffs applied to UK-origin beverage alcohol products, such as Single Malt Scotch Whisky and liqueurs, and to refrain from increasing existing tariffs or applying new tariffs to other products in our sector, and**
- **return to tariff-free trade in whiskies across the Atlantic at the earliest opportunity.**