

Meet the little-known U.S. panel that could throw out Boeing's case against Bombardier

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The best hope for shielding Canada's Bombardier Inc and its CSeries jetliner customers from massive trade duties imposed by the Trump administration is a little-known commission tucked away next to an expressway in Southwest Washington, D.C.

The U.S. Commerce Department on Tuesday slapped preliminary anti-subsidy duties of 220 per cent on the jets, which could effectively shut Bombardier out of the U.S. market if upheld, after rival Boeing Co launched a trade challenge accusing Canada of unfairly subsidizing the aircraft. The U.S. International Trade Commission could effectively throw out the Commerce Department's anti-subsidy duties against Bombardier if it finds that Boeing did not suffer the injuries it has alleged.

The case is outside the parameters of disputes normally handled by the ITC and could test the bipartisan panel's ability to withstand political pressure, U.S. trade experts say.

The preliminary duties imposed by Commerce were far above the 79 per cent sought by Boeing and more in line with duties against Chinese state-owned enterprises. The department has more leeway in determining duties against nonmarket economies such as China.

"This should be seen in the context of an administration that really likes protectionism, so the higher, the better," former ITC chairman Dan Pearson said of Commerce duty finding against Bombardier. "They decided to pile it on."

The ITC has rarely ever heard an aircraft case and not one of this magnitude. Normally, the commission deals with trade enforcement cases where a pattern of below-market pricing and injury has been well-established, such as through a flood of dumped imports and lost revenue or closed factories, such as in the steel sector.

"It's very far out of the norm. You're deciding this case on the basis of zero imports," said Georgetown University law professor Jennifer Hillman, a former ITC commissioner and World Trade Organization Appellate Body member.

In the Boeing-Bombardier case, the aircraft in question have not been imported into the United States yet — only ordered by U.S. carrier Delta Air Lines Inc.

A key question the ITC will need to answer is whether the 108-133 seat CS100 competes directly with Boeing's 737-700, which seats 126-149 passengers. Bombardier and Delta argue that Boeing did not offer the 737 for the Delta order.

But the larger 130-160 seat CS300, for which Delta holds options, is closer to the capacity of Boeing's 138-172 seat 737 MAX7 jetliner, according to literature from both companies. The ITC is normally seen as immune from political influence, with a total of six commissioners who are equally split between Democrats and Republicans. However, the panel currently has only four members, who are scrambling to cope with a bigger workload this year.

The Commerce Department notes in its press releases that it has launched 48 per cent more anti-subsidy and anti-dumping investigations under the Trump administration this year compared with last year.

All the commissioners are seasoned trade lawyers appointed by former presidents Barack Obama and George W. Bush. Chair Rhonda Schmidlein, a Democrat, and two other commissioners have experience working at the U.S. Trade Representative's office, while Republican David Johanson was the international trade counsel with the U.S. Senate Finance Committee.

President Donald Trump has nominated Jason Kearns, a USTR veteran who is now trade counsel to Democrats on the House Ways and Means Committee, to the ITC for a term expiring in 2024, but no confirmation hearing has been scheduled yet. Kearns had been previously nominated by Obama late last year.

Pearson, a trade consultant who recently left the libertarian Cato Institute, said the commissioners will hear arguments from Boeing that he believes will be "pushing the limits" of the ITC's authority.

Past aircraft trade dispute cases have been brought to the World Trade Organization, including years-long fights between Boeing and European rival Airbus SE and Bombardier and Brazilian rival Embraer SA.

"This is outside the normal way of dealing with trade friction in the aircraft sector, where all of the major producers have gotten subsidies," said Chad Bown, a senior fellow and trade expert at the Peterson Institute for International Economics.

"It kind of escalates the need for a grand bargain between companies and countries to limit international aircraft subsidies."