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Overzealous Advocacy: The Perils of Taking Inconsistent Litigation Positions *

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I. INTRODUCTION

As lawyers, one of our jobs is to zealously advocate for our client and to obtain the most favorable results possible within the bounds of the law and consistent with our ethical obligations as members of the bar. However, the line separating proper zealous advocacy from overzealous advocacy can, at times, be hard to draw. Setting the boundaries is especially difficult in cases where an advocate who has taken one position before a court, agency, or international forum is later tempted to take an inconsistent, or at least arguably inconsistent, position in another forum because it may lead to a better result for the client. When faced with this dilemma, lawyers must be mindful of the consequences such a course of action can have for them and their client. Potential consequences run from the extreme case in which counsel is judicially estopped from taking inconsistent positions, to closer calls which nevertheless risk damaging counsel's credibility or implicating applicable ethical rules of conduct. Counsel must thus carefully weigh the legal and ethical implications of a decision to take inconsistent positions.

This paper addresses three different scenarios using cases in which the government and private parties have taken inconsistent (or arguably inconsistent)

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positions in different forums. These cases are instructive and demonstrate the range of consequences that can flow from taking inconsistent litigation positions.

II. INCONSISTENT LITIGATION POSITIONS IN DIFFERENT FORA

A. Inconsistent Positions Taken At The World Trade Organization (WTO) And In U.S. Judicial Proceedings.

In June 2008, the United States (as well as Japan and Chinese Taipei) requested consultations with the European Communities ("EC") and its member States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").[2] The United States claimed that the tariff treatment that the EC and its member States gave to certain information technology products was inconsistent with the EC's commitments to provide duty-free treatment for these products under the EC Schedule of Concessions to the GATT 1994 ("EC Schedule") as modified to reflect commitments made under the Information Technology Agreement.[3] In particular, the U.S. claimed that the EC and its member States improperly imposed duties on certain information technology products contrary to their obligation to grant them duty-free treatment under the ITA.[4] Following consultations, which failed to resolve the

[2] *See* Request for Consultations by the United States, Japan, and Chinese Taipei, European Communities – *Tariff Treatment of Certain Information Technology Products*, WT/DS375/1, G/L/851 (June 2, 2008) (hereinafter "DS375 RFC").

[3] World Trade Organization, Ministerial Declaration on Trade in Information Technology Products of Dec. 13, 1996, WT/MIN(96)/16 (1996) (hereinafter "International Technology Agreement" or "ITA").

[4] *See* DS375 RFC at 1-2.

disagreement, the U.S., Japan, and Chinese Taipei[5] requested a WTO dispute settlement panel, which was established in September 2008.[6]

One type of product at issue in the dispute settlement proceedings was flat panel display devices ("FPDs"), including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and similar technologies.[7] The U.S. argued that following the implementation of the ITA, FPD's such as LCD monitors that were imported into the EC should be generally classified in CN[8] line 8528 51 00 and its predecessors and thus enter duty free.[9] CN 8528 51 00 covers monitors "[o]f a kind solely or principally used in an automatic data processing system [*i.e.*, computer] of heading 8471."[10] However, as a result of several EC regulations issued after the implementation of the ITA, the U.S. claimed that the EC and its member States began classifying certain FPDs under CN code 8528 59 90 (as video monitors) and applying duties of 14% to certain of these devices –

[5] Request for the Establishment of a Panel by the United States, Japan and Chinese Taipei, *European Communities – Tariff Treatment of Certain Information Technology Products*, WT/DS375/8, WT/DS376/8 and WT/DS377/6 (Aug. 19, 2008).

[6] Dispute Settlement Body: Minutes of the Meeting Held on Sept. 23, 2008, WT/DSB/M/256.

[7] *See* First Written Submission of the United States of America, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, 29 ¶ 55, WT/DS375, WT/DS376, WT/DS377 (March 5, 2009) (hereinafter "U.S. First Written Submission") (*citing* ITA at ¶ 2, Annex at ¶ 2(a), and Attachment B.).

[8] "CN" or "Combined Nomenclature" refers to further sub-divisions that were added to the normal six-digit Harmonized Schedule codes and extend them to the eight-digit level and beyond. *See* DS375 Panel Report at ¶ 7.22.

[9] *See* U.S. First Written Submission at ¶ 122.

[10] *See id.*

including LCD monitors.[11] This reclassification, the U.S. argued, was a violation of GATT 1994.[12]

Specifically, the U.S. argued before the Panel that the original tariff classification of the LCD monitors as "computer monitors" under 8528 51 00 was correct and that the EC acted inconsistently with Article II:1(b) of GATT 1994 by reclassifying these LCD monitors as "video monitors" under 8528 59 90 and thereby imposing ordinary customs duties on these products in excess of the bound rate established in the EC Schedule.[13] The Panel agreed with the United States, finding that the EC measures at issue were inconsistent with Articles II:1(a) and (b) of the GATT 1994.[14]

Meanwhile, in judicial proceedings before the U.S. Court of International Trade ("CIT") commenced approximately two and a half years prior to the DS375 dispute, the United States was defending the classification of similar LCD monitors by U.S. Customs and Border Protection ("CBP") against a challenge by BenQ America Corporation ("BenQ").[15] In that case, BenQ had imported Dell™ 2001FP Flat Panel Color Monitors for BenQ Corporation, a Taiwanese company that manufactured the monitors for

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[11] *See id.*

[12] *See id.* at ¶¶ 140-141.

[13] *See id.* at ¶¶ 122-140. For ease of reference, the classification of LCD monitors under CN code 8528 59 90 is referenced as classification as "video monitors" and the classification under 8528 51 00 (which incorporates 8471) as "computer monitors." The crux of the dispute was whether the fact that the LCD monitors were capable of accepting signals from sources other than computers (*i.e.*, video sources) rendered them video monitors or whether they remained computer monitors.

[14] *See* DS375 Panel Report at ¶¶ 8.4 and 8.5.

[15] *See BenQ America Corp. v. United States*, 683 F. Supp.2d 1335 (Ct. Int'l Trade 2010), *vacated by, BenQ America Corp. v. United States*, 646 F.3d 1371 (Fed. Cir. 2011).

Dell™.[16] At the time of entry, BenQ classified these flat panel LCD monitors under the Harmonized Tariff Schedule of the United States ("HTSUS") heading 8471, subheading 8471.60.45, both of which were duty free provisions.[17] CBP subsequently reclassified the LCD monitors under HTSUS heading 8528, subheading 8528.21.70 as "video monitors," which were subject to a 5% *ad valorem* duty.[18] BenQ protested the reclassification and filed suit in the CIT under 28 U.S.C. § 1518(a) challenging CBP's denial of its protest.[19]

At the CIT, the United States argued that CBP properly classified the LCD monitors as "video monitors" under HTSUS 8528 and thus subject to a 5% import duty.[20] BenQ, on the other hand, argued that the LCD monitors should be classified as display units for automatic data processing machines (*i.e.*, computer monitors) under HTSUS 8471 and thus duty free.[21] The CIT ruled in favor of the United States, and held that the LCD monitors at issue "were properly classified as 'video monitors' under subheading 8528.21.70 of the HTSUS."[22] In doing so, the CIT rejected BenQ's argument that it should apply a "principal function" test to determine if the principal function of the LCD monitors was that of a computer monitor or of a video monitor.[23] The CIT found instead

[16] *See BenQ America Corp.*, 683 F. Supp.2d at 1337.

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *See id.* at 1348.

[23] *See id.* at 1340.

that the classification of the LCD monitors can be classified simply by applying the HTSUS' general rules of interpretation.[24]

Although these two proceedings involve complicated issues of customs classification that are outside the scope of this paper, it at least appears that the United States took inconsistent litigation positions at the WTO and at the CIT. In DS375, the United States successfully challenged the EC's classification of LCD monitors as "video monitors" based in part on its argument that these monitors should be classified as "computer monitors" and thus duty free. Because the classification of these LCD monitors as computer monitors resulted in duty free treatment for U.S. imports into the EC and its member States, this litigation position helped advance the United States' interests. However, when faced with a similar question in the BenQ CIT litigation in which the United States' interest was in protecting the revenue it had collected from the reclassification of these LCD monitors as "video monitors" subject to duties, it appears that the United States took the opposite position and argued that CBP correctly classified the LCD monitors at issue in that case as "video monitors."

The United States maintained these arguably inconsistent positions in appellate proceedings before the Federal Circuit.[25] Although the CIT had affirmed CBP's decision to classify the LCD monitors as "video monitors" under HTS 8528 on grounds different than those argued by the United States,[26] on appeal the United States continued to argue

[24] *See id.*

[25] *BenQ America Corp.*, 646 F.3d at 1378

[26] *See id.* at 1375 ("The court, however, followed an approach somewhat different from that urged by either BenQ or the government.").

as it had at the CIT that the LCD monitors were correctly classified as "video monitors."[27]

The Federal Circuit vacated the CIT's decision, and remanded the case for further proceedings.[28] It thus remains to be seen whether the arguably inconsistent litigation position maintained by the United States in the domestic judicial proceedings will ultimately succeed or fail. But it appears that the United States maintained its position that the LCD monitors were properly classified as "video monitors," which appears to be inconsistent with its argument in DS375 that LCD monitors should be classified as "computer monitors."

This case presents a unique example of a single party espousing arguably inconsistent litigation positions in an international forum and in U.S. judicial proceedings. Given that the applicable laws and legal standards are not the same, it is unlikely that taking inconsistent litigation positions in these two forums will result in any finding of estoppel. However, taking arguably inconsistent litigation positions in these two forums could have potentially impacted the government's credibility if the inconsistency had been raised in the context of either proceeding. For example, if brought to their attention a judge or dispute settlement panel may view such an inconsistency as reflecting on the government's credibility and thereby view the government's arguments with a more jaundiced eye than they otherwise might.

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[27] *See id.* at 1378 ("Accordingly, the government states that the trial court's classification of BenQ's monitors as video monitors under heading 8528 should be affirmed.").

[28] *See id.* at 1380-81.

In addition, these inconsistent positions could potentially raise professional conduct issues under ABA Model Rule 8.4(d). This rule is potentially broad and forbids conduct that is prejudicial to the administration of justice. Given the tribunal's duty to maintain the integrity of the process, the taking of inconsistent positions in two different forums could implicate concerns about the proper administration of justice. At a minimum, this rule is something that should at least be considered by a lawyer when contemplating taking arguably inconsistent litigation positions between international and U.S. judicial proceedings.

B. Inconsistent Positions Taken In Judicial Proceedings.

The issue of inconsistent litigation positions comes up more frequently in judicial proceedings. One recent example comes from the long-running and always hotly contested area of zeroing,[29] in which the United States appears to have taken inconsistent litigation positions between the time it initially litigated and successfully defended its zeroing practice in original investigations and the time it faced new legal challenges to its zeroing practice based on the United States' decision to eliminate zeroing in the context of investigations. This arguable inconsistency can be shown by examining two important

[29] In antidumping proceedings the U.S. Department of Commerce ("Commerce") calculates a "dumping margin" by comparing the price a foreign exporter or producer sells the subject merchandise in its home market to the price that same or similar merchandise is sold in the U.S. market. Commerce then calculates a weighted-average dumping margin by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate U.S. prices of that exporter or producer. "Zeroing" refers to Commerce's practice whereby in this second step only positive dumping margins (*i.e.*, comparisons whereby the U.S. price is lower than the home market price) are aggregated, and negative margins (*i.e.*, comparisons whereby the U.S. price is higher than the home market price) are given a value of zero. *See Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005).

zeroing cases – 2005's *Corus Staal BV v. Dep't of Commerce*[30] and last year's *Dongbu Steel Co., Ltd. v. United States.*[31]

In *Corus*, the plaintiff appealed Commerce's decision in the antidumping duty investigation of hot-rolled steel from the Netherlands in which Commerce had "zeroed" Corus' negative dumping margins when it calculated its weighted-average dumping margin. The CIT affirmed Commerce's use of zeroing on the grounds that (i) sections 1677(35)(A) & (B) neither require nor prohibit Commerce from zeroing, and (ii) zeroing was a reasonable interpretation of the ambiguous statute under the *Chevron*[32] doctrine.[33] The case was then appealed to the Federal Circuit.

Before the Federal Circuit, Corus argued that the court should "draw a distinction in the application of section 1677(35) as between administrative investigations and administrative reviews."[34] Specifically, Corus argued that "the reference in section 1677f-1(d)(1)(A)(i) to 'weighted average' unambiguously contemplates the use of *all* subject merchandise in administrative investigations to calculate the weighted average, as opposed to section 1675(a)(2)(A)'s calculation of individual dumping margins for each export transaction in administrative reviews."[35] In plain English, Corus argued that in

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[30] 395 F.3d 1343 (Fed. Cir. 2005).

[31] 635 F.3d 1363 (Fed. Cir. 2011).

[32] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 81 L. Ed.2d 694, 104 S. Ct. 2778 (1984)(holding that the judicial branch must defer to reasonable agency interpretations of ambiguous statutory language when Congress delegated interpretive power to that agency by statute).

[33] *Corus Staal BV v. United States*, 259 F. Supp.2d 1253, 1261-63 (Ct. Int'l Trade 2003). The case was remanded on other grounds and final judgment was entered in *Corus Staal BV v. United States*, 283 F. Supp.2d 1357 (Ct. Int'l Trade 2003).

[34] *Corus*, 395 F.3d at 1347.

[35] *Id.* (emphasis in original).

original investigations the law required Commerce to calculate its weighted-average dumping margin using all prices for all subject merchandise, not just prices of transactions that yield positive margins as was done in administrative reviews. Corus had to make this distinction between reviews and investigations in order to avoid the precedential impact of the Federal Circuit's earlier decision in *Timken Co. v. United States*,[36] which had upheld Commerce's use of zeroing in administrative reviews.[37]

Commerce strongly opposed this argument on the ground that the different calculation methodologies used in investigations and reviews did not make it permissible to zero in reviews but not in original investigations and that the Federal Circuit's decision in *Timken* thus controlled. Specifically, in its brief at the Federal Circuit Commerce argued:

> Although the proceeding at issue in Timken was an administrative review (Timken, 354 F.3d at 1338-39) and not an investigation, this distinction is not dispositive because that case implicated Commerce's interpretation of the same statutory provisions at issue in this case – 19 U.S.C. §§ 1677(35)(A) and (B). There is no provision in the statute for applying the definitions of "dumping margin" and "weighted average dumping margin" differently in an investigation and a review.[38]

The Federal Circuit agreed with Commerce and held that while there were differences in the calculation methodology between reviews and investigations, these distinctions did not support zeroing in reviews but not investigations. "Our decision in Timken addressed Commerce's interpretation of section 1677(35); it is of no

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[36] 354 F.3d 1334 (Fed. Cir. 2004).

[37] *See Corus*, 395 F.3d at 1347.

[38] Brief for Defendant-Appellee, Department of Commerce at 18, *Corus I*, 395 F.3d 1343 (Fed Cir. 2005) (No. 04-1107), 2004 WL 3768287 at *18 ("*Commerce Corus Brief*").

consequence that it was decided in the context of a review."[39] The Federal Circuit thus affirmed Commerce's position that zeroing was permissible in both reviews and investigations based on its interpretation of 19 U.S.C. §§ 1677(35)(A) and (B).[40]

Fast forward to 2011 and the Federal Circuit's decision in *Dongbu Steel*. In that case, the issue was whether Commerce's decision to abandon its use of zeroing in the context of original investigations (using the average-to-average comparison methodology) rendered its continued use of zeroing in reviews unlawful.[41] Commerce had abandoned its use of zeroing in investigations in order to bring the U.S. into compliance with adverse WTO decisions on zeroing in investigations.[42] Dongbu argued that it was unlawful for Commerce to now interpret the same statutory provision – section 1677(35) – in two inconsistent ways, providing for zeroing in reviews but not investigations.[43] The CIT affirmed Commerce's continued use of zeroing in calculating Dongbu's dumping margin in the context of the administrative review at issue in the appeal.[44] Dongbu appealed, taking its arguments to the Federal Circuit.

The Federal Circuit disagreed with Commerce, vacating the CIT's decision and remanding the case back to Commerce with instructions to provide an explanation for why it was reasonable under *Chevron* for it to now interpret the same statutory provision

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[39] *Corus*, 395 F.3d at 1347.

[40] *Id.*

[41] *Dongbu*, 635 F.3d at 1369 ("The central question here is whether it is reasonable for Commerce to use zeroing in administrative reviews even though it no longer uses this methodology in investigations.").

[42] *See United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("Zeroing"), WT/DS294/R (circulated Oct. 31, 2005).

[43] *See Dongbu,* 635 F.3d at 1367.

[44] *Dongbu Steel Co. v. United States*, 677 F. Supp.2d 1353, 1366 (Ct. Int'l Trade 2010).

differently, providing for zeroing in reviews but not investigations.[45] The *Dongbu* decision triggered a series of new CIT cases in which parties argued that zeroing in reviews was unlawful. In turn, these cases resulted in a series of remands in which the CIT, relying on the Federal Circuit's *Dongbu* decision, directed Commerce to provide an explanation for its inconsistent interpretation of section 1677(35).[46] As part of its explanation on remand, Commerce pointed to differences in the calculation methodology between investigations and reviews.

For example, in *Union Steel* Commerce justified its inconsistent interpretation of section 1677(35) by stating that it interprets this provision based on the type of comparison methodology being applied in a particular type of proceeding.[47] "The Department considers that, among other things, its interpretation accounts for the inherent differences between the result of an average-to-average comparison on the one hand and the result of an average-to-transaction comparison on the other."[48] Thus, in defending its continued use of zeroing in administrative reviews Commerce is now arguing at least in part that the differences between reviews and investigations justify its inconsistent interpretation of section 1677(35). This is inconsistent with Commerce's earlier litigation

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[45] *Dongbu*, 635 F.3d at 1373.

[46] *See, e.g.*, *Union Steel v. United States*, Consol. Ct. No. 10-00106, Slip Op. 12-67 (May 25, 2012); *Union Steel v. United States*, Ct. No. 08-00101, Slip Op. 11-144 (Nov. 21, 2011) (stayed); *JTEKT Corp. v. United States*, Consol. Ct. No. 07-00377, Slip Op. 11-52 (May 5, 2011) (stayed).

[47] *See* Results of Redetermination Pursuant to Remand, *Union Steel v. United States*, Consol. Ct. No. 11-00083 (Ct. Int'l Trade Aug. 9, 2011) at 11, CM/ECF for Ct. No. 11-00083, document 49. The CIT affirmed Commerce's results of redetermination in *Union Steel v. United States*, Ct. No. 11-0083, Slip Op. 12-24 (Feb. 27, 2012). This decision was appealed and is now pending before the Federal Circuit. *See Union Steel v. United States*, Ct. No. 2012-1248, -1315 (Fed. Cir.)(pending).

[48] *Id.*

position maintained in *Corus* in which Commerce argued that the distinctions in the calculation methodologies between reviews and investigations did not justify zeroing in the former and not in the latter.[49]

The *Union Steel* case is pending before the Federal Circuit,[50] so it remains to be seen whether that court will accept Commerce's new and arguably inconsistent litigation position or whether it will find that Commerce's previous position as articulated in *Corus* must control. It does seem clear, however, that the Federal Circuit was aware of and troubled by the United States' inconsistent litigation positions in the *Corus* and *Dongbu* litigation. This is clear from the following passage in the *Dongbu* decision:

> We now turn to the reasonableness of interpreting the same statutory provision to have opposite meanings depending on the nature of the antidumping proceeding. The government asserts that inconsistent interpretations are permissible and contemplated by Congress. Defendant-Appellee's Br. 14, 16, 18; Oral Argument at 20:14-20:58. However, this court has expressly adopted the position taken by the government in earlier cases that there is no statutory basis for interpreting 19 U.S.C. § 1677(35) differently in investigations than in administrative reviews. Corus I, 395 F.3d at 1347; Brief for Defendant-Appellee, Department of Commerce at 18, 23-24, Corus I, 395 F.3d 1343 (Fed. Cir. 2005)(No. 04-1107), available at 2004 WL 3768287 at *18, 23-24.[51]

The Federal Circuit's specific reference to the earlier argument made by the United States in the *Corus* case indicates that the court carefully reviewed its previous zeroing decisions and the arguments made by the parties in those prior cases before reaching its decision in the *Dongbu* case. This is an indication that even in cases where an argument was made years earlier in a different proceeding, a party must consider the

[49] *See Commerce Corus Brief* at 18, 2004 WL 3768287 at *18.

[50] *See Union Steel*, Ct. No. 2012-1248, -1315.

[51] *Dongbu*, 635 F.3d at 1371 (emphasis added).

potential implications of taking an inconsistent position in a later and different proceeding.

C. Inconsistent Positions Taken At Administrative Agency And In Judicial Proceedings.

A third area in which the issue of inconsistent litigation positions can arise is between proceedings before an administrative agency and proceedings before a court. An example of this is provided by the case of *Thai Plastic Bags*.[52] This case illustrates the very real and detrimental consequences that can flow from taking inconsistent litigation positions in different forums.

The case involved a Thai plastic bag producer's appeal of Commerce's final results of an antidumping duty administrative review.[53] During the administrative review, Commerce preliminarily determined that the cost allocation methodology used by the foreign producer – Thai Plastic Bags Industries Group ("TPBG") – was distortive because it allocated costs to different products based on which facility produced them.[54] In Commerce's view, an adjustment to TPBG's reported costs was necessary because these cost differences were not attributable to differences in the physical characteristics of the merchandise.[55] Commerce then used these "adjusted" costs for purposes of its

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[52] *Thai Plastic Bags Industries Co., Ltd. v. United States*, 752 F. Supp.2d 1316 (Ct. Int'l Trade 2010).

[53] *See Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 65,751 (Dep't Commerce Dec. 11, 2009), and accompanying Issues and Decision Memorandum (Dec. 7, 2009).

[54] *See Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review,* 74 Fed. Reg. 39,928, 39,931-32 (Dep't Commerce Aug. 10, 2009).

[55] *See id.*

computation of the cost of production ("COP") and constructed value ("CV") of those particular home market products in its preliminary results.[56]

In its case brief before Commerce, TPBG contested the preliminary decision and argued that Commerce should use TPBG's reported costs without adjustment.[57] In the alternative, and in response to an argument made by the petitioner that Commerce should only use the adjusted costs for its differences in merchandise ("DIFMER") adjustment,[58] TPBG also argued that if Commerce used adjusted costs then those adjusted costs should be applied to all costs used in its dumping calculations, *i.e.*, for COP, CV, and DIFMER.[59] As support, TPBG argued "that the same concerns – the need for cost differences to be based upon physical differences – underlie the DIFMER, the sales below cost, and the CV calculations."[60] Commerce agreed with TPBG's alternative argument, and in the final results used the adjusted costs in its calculation of COP, CV and the DIFMER adjustment.[61]

Although Commerce had agreed with TPBG's alternative argument that if any adjustment was made to its costs such an adjustment needed to be made to all costs used in the dumping calculation, TPGB appealed, among other things, Commerce's decision to

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[56] *See id.*

[57] *See Thai Plastic Bags*, 752 F. Supp. 2d at 1321 (*citing* TPBG's case brief at 1).

[58] The DIFMER adjustment is an adjustment made to the home market price (*i.e.*, normal value) in instances where Commerce compares merchandise in the home market with merchandise in the U.S. market that is not identical in physical characteristics. Because Commerce is comparing "similar" but not "identical" merchandise, the DIFMER adjustment is made to compensate for these differences in physical characteristics. *See* 19 U.S.C. § 1677b(a)(4)(C).

[59] *See id.* at 1327 (*citing* TPBG's rebuttal brief at 1-4, 6).

[60] *See id.* (*citing* TPBG's rebuttal brief at 1-4, 6).

[61] *See Thai Plastic Bags Final Results*, Issues and Decision Memorandum at 3-5.

make any adjustment to its costs at all.[62] Specifically, TPBG argued that Commerce applied the wrong legal standard in deciding that TPBG's costs were distorted for purposes of COP and CV. As described by the court: "TPBG argues that Commerce cannot take physical differences into account when determining whether to accept reported costs for purposes of COP and CV, and may only address those physical differences in the DIFMER adjustment . . ."[63]

This argument, the court found, was contrary to TPBG's position before Commerce in the administrative proceedings where "TPBG argued . . . that when calculating COP, CV, and DIFMER, Commerce should use the same costs adjusted to reflect cost differences attributable to physical differences in the merchandise."[64] Plainly stated, the court found that TPBG had argued before Commerce that if it adjusted its costs those adjusted costs should be used for all cost calculation purposes (COP, CV, and the DIFMER adjustment); before the court, however, TPBG argued that the adjusted costs should only have been used for purposes of the DIFMER adjustment. The court found that "TPBG's position before this court is 'directly' and 'clearly' contrary to its position before Commerce during the administrative review."[65]

The consequences were dire. The court, *sua sponte*, found that TPBG's argument was barred by judicial estoppel.[66] This equitable doctrine provides that: "where a party

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[62] *See Thai Plastic Bags*, 752 F. Supp. 2d at 1318.

[63] *Id.* at 1327.

[64] *Id.*

[65] *Id.*

[66] *Thai Plastic Bags*, 752 F. Supp.2d at 1326. Although this is an equitable judicial doctrine, the Federal Circuit has held that "[j]udicial estoppel applies as much when one of the tribunals is an administrative agency as it does when both tribunals are courts." *Trustees in Bankr. of N. Am. Rubber Thread Co., Inc. v. United States*, 593 F.3d 1346,

assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."[67] In determining if the doctrine applied, the CIT examined three non-exclusive factors as articulated by the Supreme Court. First, "a party's later position must be clearly inconsistent with its earlier position."[68] Second, whether the party "succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled[.]"[69] Third, "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[70]

As to the first factor, the court found that "TPBG's position before this court is 'directly' and 'clearly' contrary to its position before Commerce during the administrative review."[71] The court also found that TPBG "succeeded in its argument before Commerce."[72] Finally, the court found that "TPBG would 'derive an unfair

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1353-54 (Fed. Cir. 2010)(*citing Lampi Corp. v. Am. Power Prods., Inc.*, 228 F.3d 1365, 1377 (Fed. Cir. 2000)).

[67] *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)(*quoting Davis v. Wakelee*, 156 U.S. 680, 689, 15 S. Ct. 555, 39 L. Ed. 578 (1895)).

[68] *Thai Plastic Bags*, 752 F. Supp. 2d at 1327 (citing *New Hampshire*, 532 U.S. at 750 (citations and quotation marks omitted)).

[69] *Id.* (*citing New Hampshire*, 532 U.S. at 750 (citations and quotation marks omitted)).

[70] *Id.* (*citing New Hampshire*, 532 U.S. at 750-751 (citations omitted)).

[71] *Id.*

[72] *Id.* at 1328 (*citing Thai Plastic Bags Final Results*, Issues and Decision Memorandum at 3-4).

advantage or impose an unfair detriment' on the government if allowed to switch their position on this issue here."[73] Based on its analysis of these three factors, the court held that TPBG's "claim on this issue is barred."[74]

This case illustrates the very real and serious consequences that can flow from a decision to take inconsistent litigation positions before an administrative agency and a court. In this particular example, counsel's desire to be a zealous advocate and obtain the most favorable result for its client backfired and actually resulted in the claim being barred from judicial review. To be sure, the doctrine of judicial estoppel is applied sparingly and has rarely been used as a basis for barring a party's claim.[75] Nevertheless, because the consequences are so severe, counsel considering taking inconsistent positions between an administrative agency and a court must do so only with great caution.

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[73] *Id.*

[74] *Id.*

[75] *See Horizon Lines v. United States*, 721 F. Supp.2d 1302, 1305 (Ct. Int'l Trade 2010) (declining to apply judicial estoppel to bar claim); *Shinyei Corp of Am. v. United States*, 31 CIT 622, 634, 491 F. Supp.2d 1209, 1219, n. 3 (2007*), rev'd on other grounds, Shinyei Corp. of Am. v. United States*, 524 F.3d 1274 (Fed. Cir. 2008) (finding no judicial estoppel); *Murata Mfg, Co, Ltd. v. United States*, 19 CIT 1375, 1384, 908 F. Supp. 978, 986, n. 8 (1995) (finding that judicial estoppel did not apply).

III. CONCLUSION

As the examples in this paper illustrate, the consequences of taking inconsistent (or arguably inconsistent) litigation positions in different forums can have a range of consequences. These consequences can run from the extreme case in which you may be judicially estopped from taking inconsistent positions, to closer calls in which you may be putting you and your client's credibility on the line or implicating applicable ethical rules of conduct. In drawing the line between zealous and overzealous advocacy, lawyers should consider these potential consequences so they can make fully informed decisions that are in their own best interest and the best interest of their clients.

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