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 clients 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 his 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 that 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 Article addresses three different scenarios using cases in which the government and private parties have taken inconsistent (or arguably

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inconsistent) 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 FORUMS

A. Inconsistent Positions Taken at the World Trade Organization and in U.S. Judicial Proceedings

In June 2008, the United States 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)."[1] The United States claimed 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 (ITA).[2] In particular, the United States 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.[3] Following consultations, which failed to resolve the disagreement, the United States, Japan, and Chinese Taipei requested a World Trade Organization (WTO) dispute settlement panel,[4] which was established in September 2008.[5]

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.[6]

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1. *See* Request for Consultations by the United States, *European Communities and Its Member States—Tariff Treatment of Certain Information Technology Products*, WT/DS375/1 (June 2, 2008).

2. *Id. See* World Trade Organization, Ministerial Declaration on Trade in Information Technology Products of 13 December 1996, WT/MIN(96)/16 (1996) [hereinafter International Technology Agreement].

3. Request for Consultations by the United States, *supra* note 1, at 1, 3.

4. Request for the Establishment of a Panel by the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *European Communities and Its Member States—Tariff Treatment of Certain Information Technology Products*, WT/DS375/8, WT/DS376/8, WT/DS377/6 (Aug. 19, 2008).

5. Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/256 (Nov. 14, 2008).

6. First Written Submission of the United States of America, *European Communities and Its Member States—Tariff Treatment of Certain Information Technology Products*, ¶ 55, WT/DS375, WT/DS376, WT/DS377 (Mar. 5, 2009) (citing International Technology Agreement, *supra* note 2, ¶ 2, annex ¶ 2(a), attachment B).

The United States argued that following the implementation of the ITA, FPDs such as LCD monitors that were imported into the EC should be generally classified in CN[7] line 8528 51 00 and its predecessors, thereby entering duty-free.[8] "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.'"[9] However, as a result of several EC regulations issued after the implementation of the ITA, the United States claimed that the EC and its Member States started classifying some FPDs under CN code 8528 59 90 (as video monitors) and applying duties of 14% to them—including LCD monitors.[10] This reclassification, the United States argued, was a violation of the GATT 1994.[11]

Specifically, the United States 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 the 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."[12] 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.[13]

Meanwhile, in judicial proceedings before the United States Court of International Trade (CIT) that commenced approximately two-and-a-half years prior to the DS375[14] dispute, the United States was defending the classification of similar LCD monitors by United States Customs and Border Protection (Customs) against a challenge by BenQ America Corporation (BenQ).[15] In that case, BenQ had imported Dell™ 2001FP

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7. "CN" or "Combined Nomenclature" refers to further subdivisions that were added to the normal six-digit Harmonized Schedule codes and extend them to the eight-digit level and beyond. Panel Report, *European Communities and Its Member States—Tariff Treatment of Certain Information Technology Products*, ¶ 7.22, WT/DS375/R, WT/DS376/R, WT/DS377/R (Aug. 16, 2010).

8. First Written Submission of the United States of America, *supra* note 6, ¶ 122.

9. *Id.*

10. *Id.*

11. *Id.* ¶¶ 140-141.

12. *Id.* ¶¶ 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.

13. Panel Report, *supra* note 7, ¶¶ 8.4-.5.

14. *See* Request for Consultations by the United States, *supra* note 1.

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

Flat Panel Color Monitors for BenQ Corporation, a Taiwanese company that manufactured the monitors for 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] Customs 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 Customs' denial of its protest.[19]

At the CIT, the United States argued that Customs properly classified the LCD monitors as video monitors under HTSUS 8528 and thus were 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, therefore, 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 that 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 Article, 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.[25] 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

16. *Id.* at 1337.
17. *Id.* at 1137-38 & n.7.
18. *Id.* at 1137, 1139 & n.8.
19. *Id.* at 1137.
20. *Id.*
21. *Id.*
22. *Id.* at 1348.
23. *Id.* at 1340 (internal quotation marks omitted).
24. *Id.* at 1339 n.9, 1340.
25. Panel Report, *supra* note 7, ¶¶ 8.4-.5.

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, the United States took the opposite position and argued that Customs correctly classified the LCD monitors at issue as video monitors.[26]

The United States maintained these arguably inconsistent positions in appellate proceedings before the United States Court of Appeals for the Federal Circuit.[27] Although the CIT had affirmed Customs' decision to classify the LCD monitors as video monitors under HTSUS 8528 on grounds different than those argued by the United States,[28] on appeal the United States continued to argue as it had at the CIT that the LCD monitors were correctly classified as video monitors.[29]

The Federal Circuit vacated the CIT's decision and remanded the case for further proceedings.[30] 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 seems the United States maintained its position that the LCD monitors were properly classified as video monitors,[31] which appears to be inconsistent with its argument in DS375 that LCD monitors should be classified as computer monitors.[32]

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

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26. *BenQ Am. Corp.*, 683 F. Supp. 2d at 1337.

27. BenQ Am. Corp. v. United States, 646 F.3d 1371, 1374-75 (Fed. Cir. 2011).

28. *Id.* at 1375 ("The court, however, followed an approach somewhat different from that urged by either BenQ or the government.").

29. *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.").

30. *Id.* at 1381.

31. *Id.* at 1375.

32. First Written Submission of the United States of America, *supra* note 6, ¶¶ 122, 140; *see also supra* note 12 and accompanying text.

credibility and thereby view the government's arguments with a more jaundiced eye than they otherwise might.

In addition, these inconsistent positions could potentially raise professional conduct issues under American Bar Association (ABA) Model Rule 8.4(d).[33] This rule is potentially broad and forbids "conduct that is prejudicial to the administration of justice."[34] Given the tribunal's duty to maintain the integrity of the process, taking inconsistent positions in two different forums could implicate concerns about the proper administration of justice. At a minimum, this rule should be considered by a lawyer 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,[35] 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.[36] This arguable inconsistency can be shown by examining two important zeroing cases: 2005's *Corus Staal BV v. Department of Commerce*[37] and 2011's *Dongbu Steel Co. v. United States*.[38]

In *Corus*, the plaintiff appealed the United States Department of Commerce's (Commerce) decision in the antidumping duty (AD)

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33. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2012).

34. *Id.*

35. In antidumping (AD) proceedings the United States 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.'" Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1345 (Fed. Cir. 2005) (quoting 19 U.S.C. § 1677(35)(B) (2006)). "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 id.* at 1345-46.

36. Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 Fed. Reg. 77,722 (Dep't of Commerce Dec. 27, 2006) (final modification).

37. 395 F.3d 1343.

38. 635 F.3d 1363 (Fed. Cir. 2011).

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.[39] The CIT had affirmed Commerce's use of zeroing on the grounds that (1) § 1677(35)(A)-(B) neither requires nor prohibits Commerce from zeroing and (2) under the doctrine set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[40] zeroing was a reasonable interpretation of the ambiguous statute.[41] 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."[42] Specifically, Corus argued, "[T]he 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."[43] In plain English, Corus argued that in 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 impact of the precedent set in the Federal Circuit's earlier decision in *Timken Co. v. United States*,[44] which had upheld Commerce's use of zeroing in administrative reviews.[45]

In its brief at the Federal Circuit, Commerce argued:

> Although the proceeding at issue in *Timken* was an administrative review . . . 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"

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39. *Corus*, 395 F.3d at 1345-46.

40. 467 U.S. 837, 843-44 (1984) (holding that the judicial branch must defer to reasonable agency interpretations of ambiguous statutory language when Congress delegates interpretive power to that agency).

41. Corus Staal BV v. U.S. Dep't of Commerce, 27 Ct. Int'l Trade 388, 396-97, 410 (2003). The case was remanded on other grounds and final judgment was entered in *Corus Staal BV v. U.S. Department of Commerce*, 27 Ct. Int'l Trade 1469 (2003).

42. *Corus*, 395 F.3d at 1347.

43. *Id.*

44. 354 F.3d 1334 (Fed. Cir. 2004).

45. *Corus*, 395 F.3d at 1347.

> and "weighted average dumping margin" differently in an investigation and a review.[46]

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 a finding that zeroing in reviews (but not in investigations) was permissible.[47] "Our decision in *Timken* addressed Commerce's interpretation of section 1677(35); it is of no consequence that it was decided in the context of a review."[48] 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)-(B).[49]

Fast forward to 2011 and the Federal Circuit's decision in *Dongbu*. 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.[50] Commerce had abandoned its use of zeroing in investigations in order to bring the United States into compliance with adverse WTO decisions on zeroing in investigations.[51] The Plaintiff-Appellant in *Dongbu* argued that it was unlawful for Commerce now to interpret the same statutory provision—§ 1677(35)—in two inconsistent ways, providing for zeroing in reviews but not investigations.[52] In a 2010 decision, the CIT had 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.[53] Dongbu appealed, thus bringing its arguments before 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 differently, providing for

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46. Brief for Defendant-Appellee at 18, *Corus*, 395 F.3d 1343 (No. 04-1107) (citation omitted).

47. *Corus*, 395 F.3d at 1347, 1349.

48. *Id.* at 1347.

49. *Id.*

50. Dongbu Steel Co. v. United States, 635 F.3d 1363, 1369 (Fed. Cir. 2011) ("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.").

51. *See* Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶ 3.1, WT/DS294/R (Oct. 31, 2005).

52. *Dongbu*, 635 F.3d at 1368.

53. Dongbu Steel Co. v. United States, 677 F. Supp. 2d 1353, 1355, 1366 (Ct. Int'l Trade 2010).

zeroing in reviews but not investigations.[54] The *Dongbu* decision triggered a series of new CIT cases in which parties argued that zeroing in reviews was unlawful.[55] 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 § 1677(35).[56] As part of its explanation on remand, Commerce pointed to differences in the calculation methodology between investigations and reviews.[57]

For example, in *Union Steel v. United States*, Commerce justified its inconsistent interpretation of § 1677(35) by stating that it interprets this provision based on the type of comparison methodology being applied in a particular type of proceeding.[58] "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."[59] 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 § 1677(35). This is inconsistent with Commerce's earlier litigation 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.[60]

The *Union Steel* case is pending before the Federal Circuit,[61] 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 is aware of and troubled by the United States' inconsistent litigation positions in *Corus*

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54. *Dongbu*, 635 F.3d at 1373.

55. *See id.*

56. *See, e.g.*, Union Steel Mfg. Co. v. United States, 837 F. Supp. 2d 1307, 1329, 1336 (Ct. Int'l Trade 2012); Union Steel v. United States, 804 F. Supp. 2d 1356, 1367-69 (Ct. Int'l Trade 2011) (stayed); JTEKT Corp. v. United States, 768 F. Supp. 2d 1333, 1342-43, 1363 (Ct. Int'l Trade 2011) (stayed).

57. *Union Steel*, 837 F. Supp. 2d at 1328-29.

58. *See* Results of Redetermination Pursuant to Remand at 11, Union Steel v. United States, Consol. Ct. No. 11-00083 (Ct. Int'l Trade Aug. 9, 2011), CM/ECF No. 49. The CIT affirmed Commerce's results of redetermination in *Union Steel v. United States*, 823 F. Supp. 2d 1346, 1360 (Ct. Int'l Trade 2012). This decision was appealed and is now pending before the Federal Circuit.

59. Results of Redetermination Pursuant to Remand, *supra* note 58, at 11.

60. *See* Brief for Defendant-Appellee, *supra* note 46, at 18.

61. *See supra* text accompanying note 58.

and *Dongbu*. This is supported by 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. . . . 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.[62]

The Federal Circuit's specific reference to the earlier argument made by the United States in *Corus* 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 *Dongbu*. This is an indication that even in cases where an argument was made years earlier in a judicial proceeding, a party must consider the potential implications of taking an inconsistent position in a later and different proceeding.

C. Inconsistent Positions Taken at an 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 found in *Thai Plastic Bags Industries Co. v. United States*.[63] This case illustrates the very real and detrimental consequences that can stem from taking inconsistent litigation positions in different forums.

The case involved a Thai plastic bag producer's appeal of Commerce's final results in an AD duty administrative review.[64] 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.[65] In Commerce's view, an adjustment to TPBG's reported costs was necessary

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62. Dongbu Steel Co. v. United States, 635 F.3d 1363, 1371 (Fed. Cir. 2011) (citations omitted).

63. 752 F. Supp. 2d 1316 (Ct. Int'l Trade 2010).

64. *See* Polyethylene Retail Carrier Bags from Thailand, 74 Fed. Reg. 65,751 (Dep't of Commerce Dec. 11, 2009) (final admin. review).

65. *See* Polyethylene Retail Carrier Bags from Thailand, 74 Fed. Reg. 39,928, 39,931-32 (Dep't of Commerce Aug. 10, 2009) (prelim. admin. review).

because these cost differences were not attributable to differences in the physical characteristics of the merchandise.[66] Commerce then used these "adjusted" costs for purposes of its computation of the cost of production (COP) and constructed value (CV) of those particular home-market products in its preliminary results.[67]

In its case brief before Commerce, TPBG contested the preliminary decision and argued that Commerce should use TPBG's reported costs without adjustment.[68] 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,[69] 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.[70] As support, TPBG argued, "[T]he same concerns—the need for cost differences to be based upon physical differences—underlie the DIFMER, the sales below cost, and the CV calculations."[71] 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.[72]

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 make any adjustment to its costs at all.[73] Specifically, TPBG argued that Commerce applied an inapplicable legal standard in deciding that TPBG's costs were distorted for purposes of COP and CV.[74] As described by the court, "TPBG argues that Commerce cannot take physical differences into account when

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66. *Id.*

67. *Id.* at 39,932.

68. *See Thai Plastic Bags*, 752 F. Supp. 2d at 1320-21.

69. 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)(6)(C), (a)(8) (2006).

70. *See Thai Plastic Bags*, 752 F. Supp. 2d at 1327.

71. *Id.* (citation omitted).

72. Memorandum from John M. Andersen, Acting Deputy Assistant Sec'y for Antidumping & Countervailing Duties Operations, to Carole A. Showers, Acting Deputy Assistant Sec'y for Imp. Admin. 4 (Dec. 7, 2009) (on file with the U.S. Department of Commerce) (regarding AD administrative review of polyethylene retail carrier bags from Thailand).

73. *See Thai Plastic Bags*, 752 F. Supp. 2d at 1318.

74. *Id.* at 1318, 1327.

determining whether to accept reported costs for the purposes of COP and CV, and may only address those physical differences in the DIFMER adjustment . . . ."[75]

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."[76] 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.[77] The court found, "TPBG's position before this court is 'directly' and 'clearly' contrary to its position before Commerce during the administrative review."[78]

The consequences were dire. The court, *sua sponte*, found that TPBG's argument was barred by judicial estoppel.[79] This equitable doctrine provides:

> [W]here a party 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.[80]

In determining if the doctrine applied, the CIT examined three nonexclusive factors as articulated by the United States Supreme Court. First, the Supreme Court required that "a party's later position . . . be clearly inconsistent with its earlier position."[81] Next, the Supreme Court looked at whether the party "succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the

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75. *Id.* at 1327.

76. *Id.* (footnote omitted).

77. *Id.*

78. *Id.*

79. *Id.* at 1326. Although this is an equitable judicial doctrine, the Federal Circuit has held, "Judicial estoppel applies just as much when one of the tribunals is an administrative agency as it does when both tribunals are courts." Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States, 593 F.3d 1346, 1354 (Fed. Cir. 2010) (citing Lampi Corp. v. Am. Power Prods., Inc., 228 F.3d 1365, 1377 (Fed. Cir. 2000)).

80. New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (quoting Davis v. Wakelee, 156 U.S. 680, 689 (1895)).

81. *Thai Plastic Bags*, 752 F. Supp. 2d at 1327 (quoting *New Hampshire*, 532 U.S. at 750 (internal quotation marks omitted)).

first or the second court was misled."[82] Finally, the Supreme Court examined "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."[83]

As to the first factor, the CIT found TPBG's position to be "directly and clearly" inconsistent with its position presented to Commerce at the earlier administrative review.[84] The CIT also found that TPBG "succeeded in its argument before Commerce."[85] Finally, the CIT found, "TPBG would 'derive an unfair advantage or impose an unfair detriment' on the government if allowed to switch their position on this issue here."[86] Based on its analysis of these three factors, the CIT held that TPBG's "claim on this issue is barred."[87]

This case illustrates the very real and serious consequences that can flow from the 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 the 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.[88] Nevertheless, because the consequences are so severe, counsel considering taking an inconsistent position on an issue depending on the forum (i.e., an administrative agency and a court) must do so only with great caution.

III. CONCLUSION

As the examples in this Article 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

82. *Id.* (quoting *New Hampshire*, 532 U.S. at 750 (internal quotation marks omitted)).
83. *Id.* (quoting *New Hampshire*, 532 U.S. at 750-51 (internal quotation marks omitted)).
84. *Id.* (internal quotation marks omitted).
85. *Id.* at 1328 (citations omitted).
86. *Id.*
87. *Id.*
88. *See, e.g.*, Horizon Lines, LLC 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 Ct. Int'l Trade 622, 634 n.3 (2007), *rev'd on other grounds*, 524 F.3d 1274, 1287 (Fed. Cir. 2008) (finding no judicial estoppel); Murata Mfg. Co. v. United States, 19 Ct. Int'l Trade 1375, 1384 n.8 (1995) (finding that judicial estoppel did not apply).

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.