REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

Second Division

COHACO MERCHANDISING & DEVELOPMENT CORP., FORTEM CEMENT CORPORATION, NGC LAND CORP., PABAZA IMPORT AND EXPORT INC., and PHILCEMENT CORPORATION,
Petitioners,

CTA CASE NO. 10185

-versus-

Members:
RINGPIS-LIBAN, *Chairperson,*
MODESTO-SAN PEDRO, *and*
FERRER-FLORES, *JJ.*

SECRETARY OF TRADE AND INDUSTRY, SECRETARY OF FINANCE, COMMISSIONER OF CUSTOMS, and CHAIRMAN OF THE TARIFF COMMISSION, ET AL.,
Respondents.

Promulgated:
AUG 07 2024
4:11 p.m.

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DECISION

RINGPIS-LIBAN, J.

THE CASE

The *Petition for Review* prays that:

1. The Court give due course to the instant *Petition for Review*;

2. Upon due consideration, reverse and nullify the decision of respondent Secretary of the Department of Trade and Industry (DTI) dated August 27, 2019, or DTI Department Administrative Order (DAO) No. 19-13, imposing final definitive safeguard duties against the importation of imported cement classified under ASEAN Harmonized Tariff Nomenclature (AHTN) Codes 2523.29.90 and 2523.90.00; and render a Decision finding petitioners not liable for any of the provisional and

definitive safeguard measures imposed by respondent Secretary of the DTI, and permanently enjoining respondents Secretary of the DTI, the Bureau of Customs (BOC), their officers, subordinates, personnel and agents, or any other person acting on their behalf or authority, from demanding and/or collecting by any manner from petitioners any and all safeguard duties on the petitioners' cement importations, as well as from collecting safeguard duties on future cement importations by petitioners; and

3. order respondents Secretary of the DTI, Secretary of Finance, and the Commissioner of Customs to immediately refund all safeguard bond and/or duties collected on imported cement classified under AHTN Codes 2523.29.90 and 2523.90.00 pursuant to Safeguard Measures Case No. 01-2018, in the amount of at least ₱384,645,135.00 as of date of filing of the instant *Petition* and all succeeding safeguard duties that will be collected on the said products thereafter.[1]

THE PARTIES

Petitioner Cohaco Merchandising & Development Corp. (Cohaco) is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal place of business at 2246 Don Chino Roces Avenue, Makati City.[2]

Petitioner Fortem Cement Corporation (Fortem) is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal place of business at 908 China Plaza Condominium, Tambacan Street, Santa Cruz, City of Manila.[3]

Petitioner NGC Land Corp. (NGC) is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal place of business at 250 Ibuna Street, City of Manila.[4]

Petitioner Pabaza Import and Export Inc. (Pabaza) is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines,[5] with principal place of business at 23/F NAC Tower, 32nd Avenue, Bonifacio Global City, Taguig.[6]

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[1] Prayer, *Petition for Review*, Docket – Vol. I, p. 45.
[2] Par. 2.1, Parties, *Petition for Review*, Docket – Vol. I, p. 11; Exhibit "P-530"
[3] Par. 2.2, Parties, *Petition for Review*, Docket – Vol. I, pp. 11 to 12; Exhibit "P527".
[4] Par. 2.3, Parties, *Petition for Review*, Docket – Vol. I, p. 12; Exhibit "P-533".
[5] Exhibit "P-526".
[6] Par. 2.4, Parties, *Petition for Review*, Docket – Vol. I, p. 12.

Petitioner Philcement Corporation (Philcement) is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal place of business at Garcia Road, Mariveles Diversion Road, Mariveles, Bataan.[7]

Public respondent Secretary is the head of the DTI (DTI Secretary) with the power to, among others, impose the provisional and definitive safeguard duties on imported products.[8]

Public respondent Commissioner of Customs (COC) is the head of the BOC, the government agency with the power and duty to collect provisional and definitive safeguard duties on imported products.[9]

Public respondent Secretary of Finance is the head of the Department of Finance (DOF) and is tasked to send out written instructions to the COC authorizing the imposition of safeguard measures.[10]

Public respondent Chairman (Chairperson) of the Tariff Commission (TC) is the head thereof, the governmental agency primarily tasked to conduct formal investigations to determine the necessity of the imposition of safeguard measures.[11]

The local manufacturers who were notified of and participated in the proceedings before the TC are likewise impleaded on an *ad cautelam* basis, as nominal parties (as private respondents) and for purposes of notification, to wit:[12]

1) Cement Manufacturers Association of the Philippines;
2) Cemex Holdings Philippines;
3) Apo Cement Corporation;
4) Solid Cement Corporation;
5) Holcim Philippines, Inc.;
6) Republic Cement and Building Materials, Inc.;
7) Taiheiyo Cement Philippines, Inc.;
8) Northern Cement Corporation;
9) Eagle Cement Corporation;
10) Goodfound Cement Corporation; N

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[7] Par. 2.5, Parties, *Petition for Review*, Docket – Vol. I, p. 12; Exhibit "P508"
[8] Par. 2.6, Parties, *Petition for Review*, vis-à-vis par. 13, *Answer*, Docket – Vol. I, p. 12 and Docket – Vol. II, p. 1014, respectively.
[9] Par. 2.7, Parties, *Petition for Review*, vis-à-vis par. 13, *Answer*, Docket – Vol. I, p. 12 and Docket – Vol. II, p. 1014, respectively.
[10] Par. 2.8, Parties, *Petition for Review*, vis-à-vis par. 13, *Answer*, Docket – Vol. I, p. 13 and Docket – Vol. II, p. 1014, respectively.
[11] Par. 2.9, Parties, *Petition for Review*, vis-à-vis par. 13, *Answer*, Docket – Vol. I, p. 13 and Docket – Vol. II, p. 1014, respectively.
[12] Par. 2.10, Parties, *Petition for Review*, vis-à-vis par. 13, *Answer*, Docket – Vol. I, p. 13 and Docket – Vol. II, p. 1014, respectively; Appendix A, *Petition for Review*, Docket – Vol. I, p. 50.

11) Big Boss Cement, Inc.; and
12) Mabuhay Filcement, Inc.

THE FACTS OF THE CASE

On September 10, 2018, pursuant to the relevant provisions of the Safeguard Measures Act and its Implementing Rules and Regulations, the DTI initiated ***motu proprio*** a preliminary safeguard investigation to determine whether the increased imports of cement are causing or threatening to cause serious injury to the domestic cement industry. The coverage of investigation is the importation of cement classified under AHTN Codes 2523.2990 and 2523.9000 from the years 2013 to 2017.[13]

On January 17, 2019, public respondent DTI Secretary issued DTI DAO No. 19-02[14] (*First Assailed DAO*), which was published on January 25, 2019 in the Manila Standard and the Business Mirror. The *First Assailed DAO* took effect on February 9, 2019.[15]

According to the Preliminary Investigation conducted by DTI, the volume of cement imports in absolute terms increased continuously from 2013 to 2017, that the increase rates compared with the previous years are as follows: in 2014- 70%, in 2015- 4,401%, in 2016-550%, and in 2017- 72%.[16] During the investigation, the market share of domestic manufacturers declined. Hence, the DTI found that the increased imports of cement were the substantial cause of threat to serious injury to the domestic industry.[17] Consequently, public respondent DTI Secretary, imposed provisional safeguard measures in the form of a cash bond amounting to ₱210.00/MT upon imported cement classified under ASEAN Harmonized Tariff Nomenclature (AHTN) 2017 Codes 2523.2990 and 2523.9000 (the "Subject Product").[18]

In the *First Assailed DAO*, the DTI tasked the Tariff Commission to conduct a formal investigation to determine the merits of imposing a definitive safeguard measure on importations of cement pursuant to Section 9 of Republic Act No. 8800 and its Implementing Rules and Regulations (IRR).

During the investigation, several parties, including the petitioners, filed their respective position papers, along with supporting data, on the imposition of safeguard measures against the importation of the Subject Product.[19]

[13] Exhibit "R-18", pp. 1-2.
[14] Exhibit "P-522".
[15] Par. 2, *Joint Stipulation of Facts and Issues* (JSFI), Docket – Vol. IV, p. 1479.
[16] Department Administrative Order No. 19-02, page 1.
[17] Department Administrative Order No. 19-02, page 2.
[18] Par. 3, JSFI, Docket – Vol. IV, p. 1479.
[19] Par. 5, JSFI, Docket – Vol. IV, p. 1479.

The Philippine Competition Commission (PCC) likewise submitted its *Position Paper*,[20] where it concluded that the imposition of safeguard duties on imported cement would have adverse effects on competition in the market.[21]

During the period of investigation (POI), or from 2013 until 2017, there were ten (10) cement manufacturers in the Philippines which comprise the local cement producing industry.[22]

Meanwhile, BOC Commissioner Rey Leonardo B. Guerrero issued Customs Memorandum Order (CMO) No. 12-2019, "Provisional Safeguard Duty of Imported Cement Classified Under AHTN Codes 2523.2990 and 2523.9000" dated February 14, 2019. A copy of the said CMO was filed before the UP Law Center on February 22, 2019.[23]

In its *Final Report* dated August 9, 2019 to the DTI, the TC found that "[t]he Philippine market for cement is composed of both locally-produced and imported cement with percentage shares to total supply of 93% and 7%, respectively, over the POI".[24] During the POI, or from 2013 until 2017, which was extended up to December 2018 for the purposes of the TC's formal investigation, "[c]ement was imported into the Philippines by domestic cement producers (4.4M MT or 31% of total imports) and importers/traders (9.8M MT or 69%)".[25]

The TC correctly found that the locally-produced Types I and IP cement are like products to the imported cement under consideration.[26] Moreover, the TC correctly found that Types I and IP cement are being imported into the Philippines in increased quantities.[27] "The increase in coal and fuel in 2018 (by 22% from 2017) can be attributed to the passage of RA No. 10963, or the Tax Reform for Acceleration and Inclusion (TRAIN) Act, which essentially increased the excise tax rates on coal, fuel, and mineral resources. RA No. 10963 took effect on 01 January 1, 2018. x x x While contributory to the impairment of the domestic cement industry, increases in power, coal and fuel costs are beyond industry control and plague every other Philippine manufacturing industry."[28]

In the *Final Report*, the TC recognized the existence of several other factors, such as high cost of production, high logistic costs, and high operating expenses, which have adversely affected the domestic cement industry.

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[20] Exhibit "P-521".
[21] Par. 6, JSFI, Docket – Vol. IV, p. 1479; Exhibit "P-509", p. 34.
[22] Par. 7, JSFI, Docket – Vol. IV, p. 1479.
[23] Par. 4, JSFI, Docket – Vol. IV, p. 1479.
[24] Par. 9, JSFI, Docket – Vol. IV, p. 1480; Exhibit "P-509", p. 41.
[25] Par. 10, JSFI, Docket – Vol. IV, p. 1480; Exhibit "P-509", p. 65.
[26] Par. 13, JSFI, Docket – Vol. IV, p. 1480.
[27] Par. 14, JSFI, Docket – Vol. IV, p. 1481.
[28] Par. 16, JSFI, Docket – Vol. IV, p. 1481; Exhibit "P-509", p. 109.

However, the TC likewise found that "[w]hile there were other factors that contributed to the impairment of the domestic cement industry, these were not substantial to cause serious injury to the local cement industry during the period of import surge."[29]

Further in its *Final Report*, the TC found that "[o]ver the POI, the gross value of the construction industry showed an increasing trend and is forecasted to further increase to more than PHP 1 trillion starting 2019."[30]

Respondent local manufacturers also imported the Subject Products during the POI. However, as stated in the *Final Report*, "[f]or purposes of determining whether cement (Type I and Type IP) is being imported into the Philippines in increased quantities, whether absolute or relative to domestic production, the importation of the domestic cement producers were excluded" by the TC.[31]

The TC reported that "there was no significant overall impairment in the position of the domestic industry during the POI that constitutes serious injury in accordance with RA No. 8800" and that "there [is] no finding of serious injury to the domestic cement industry."[32] However, the TC proceeded to the determination of the existence of threat of serious injury to the cement industry.[33] Based on its evaluation of the relevant factors, and in accordance with RA. No. 8800, the TC finds the existence of an imminent threat of serious injury and significant overall impairment to the position of the domestic cement industry in the near future.[34] Hence, the TC recommended the application of the appropriate definitive general safeguard measure on the importations of cement to prevent the imminent occurrence of serious injury to the Philippine cement industry.[35]

On August 27, 2019, public respondent DTI Secretary issued DAO No. 19-13 (*Second Assailed DAO*).[36]

In the *Second Assailed DAO*, public respondent DTI Secretary imposed the following definitive safeguard duties for three (3) years on the Subject Products, as follows:[37]

Year	Definitive Safeguard Duty
First (1st) year	₱250.00/MT or ₱10.00 per 40kg bag

[29] Par. 17, JSFI, Docket – Vol. IV, p. 1481; Exhibit "P-509", p. 110.
[30] Par. 18, JSFI, Docket – Vol. IV, p. 1481; Exhibit "P-509", p. 41.
[31] Par. 19, JSFI, Docket – Vol. IV, pp. 1481 to 1482; Exhibit "P-509", p. 72.
[32] Par. 8, JSFI, Docket – Vol. IV, p. 1480; Exhibit "P-509", p. 96.
[33] Final Report, p. 96.
[34] Ibid., p. 107.
[35] Ibid., p. 118.
[36] Par. 11, JSFI, Docket – Vol. IV, p. 1480; Exhibit "P-523", Docket – Vol. I, pp. 87 to 91.
[37] Par. 12, JSFI, Docket – Vol. IV, p. 1480.

Second (2nd) year	₱225.00/MT or ₱9.00 per 40kg bag
Third (3rd) year	₱200.00/MT or ₱8.00 per 40kg bag

On October 11, 2019, the present *Petition for Review* was filed.[38] The case was initially raffled to this Court's Second Division.

On November 27, 2019, private respondents Cement Manufacturers Association of the Philippines (CEMAP) and its members Taiheiyo Cement Philippines (Taiheiyo), Cemex Holdings Philippines (Cemex), Holcim Philippines, Inc. (Holcim) and Republic Cement and Building Materials, Inc. (Republic Cement) filed their *Answer/Comment*.[39]

On November 28, 2019, private respondent Big Boss Cement, Inc. (Big Boss Cement) filed a *Motion to Admit (The attached Answer dated 28 November 2019)*,[40] which was deemed admitted by the Court in the Resolution dated January 28, 2020.[41]

In the meantime, public respondents DTI Secretary, Secretary of Finance, Commissioner of Customs, and Chairperson of the TC posted their *Entry of Appearance with Motion for Additional Time to File Answer* on November 11, 2019,[42] which was noted and granted by the Court in the Resolution dated November 28, 2019,[43] and *Second Motion for Additional Time to File Answer* on December 5, 2019,[44] which was granted by the Court in the Resolution dated January 28, 2020.[45]

Also, on November 25, 2019, Laban Konsyumer Inc. filed an *Urgent Exparte Motion to Implead Laban Konsyumer Inc. as Intervenor and/or on an Ad Cautelam Basis, as Nominal Party and for Purposes of Notification*.[46] Petitioners filed their *Opposition [Re: Urgent Ex Parte Motion to Implead Laban Konsyumer, Inc. as Intervenor and/or on an Ad Cautelam Basis, as Nominal Party and for Purposes of Notification dated 25 November 2019]* on March 13, 2020;[47] while public respondents posted their *Comment (On the Urgent Ex Parte Motion to Implead Laban Konsyumer Inc. as Intervenor and/or on an Ad Cautelam Basis, as Nominal Party and for Purposes of Notification)* on November 26, 2020.[48] In the Resolution dated February 1, 2021,[49] the Court denied movant Laban Konsyumer Inc.'s *motion* for lack of merit, stating that movant Laban Konsyumer Inc. does not possess

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[38] Docket – Vol. I, pp. 8 to 49.
[39] Docket – Vol. II, pp. 895 to 907.
[40] Docket – Vol. II, pp. 912 to 915.
[41] Docket – Vol. II, pp. 1061 to 1062.
[42] Docket – Vol. II, pp. 843 to 848.
[43] Docket – Vol. II, pp. 910 to 911.
[44] Docket – Vol. II, pp. 937 to 944.
[45] Docket – Vol. II, pp. 1061 to 1062.
[46] Docket – Vol. II, pp. 869 to 873.
[47] Docket – Vol. III, pp. 1096 to 1108.
[48] Docket – Vol. III, pp. 1375 to 1379.
[49] Docket – Vol. III, pp. 1460 to 1476.

actual and material, direct and immediate legal interest in the matter in litigation or in the direct legal operation of then judgment.

Public respondents filed their *Answer* on January 8, 2020.[50]

The DTI *Records* for this case, consisting of one (1) folder, was submitted on January 20, 2020.[51]

The *Pre-Trial Conference* was set and held on November 16, 2020.[52] Prior thereto, private respondent CEMAP's *Pre-Trial Brief* was filed on November 11, 2020;[53] while public respondents' *Pre-Trial Brief* was filed *via* electronic mail on November 13, 2020.[54]

Petitioners submitted their *Pre-Trial Brief* on November 16, 2020,[55] while private respondent Big Boss filed its *Pre-Trial Brief* on November 17, 2020.[56]

On February 1, 2021, the parties submitted their *Joint Stipulation of Facts and Issues*,[57] which was approved and adopted in the Pre-Trial Order dated February 9, 2021.[58]

Trial then ensued, with both parties presenting and offering their respective documentary and testimonial evidence.

Petitioners offered the testimonies of the following individuals, namely: (1) Mr. Jose Francisco Miranda,[59] president of petitioner Pabaza; (2) Mr. Ross Kendrick Tan,[60] Finance and General Manager of petitioner Fortem; (3) Mr. Ferdinand Co,[61] president and General Manager of petitioner Cohaco and

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[50] Docket – Vol. II, pp. 1009 to 1047.
[51] Secretary of the Department of Trade and Industry's *Manifestation/Compliance* dated January 14, 2020, Docket – Vol. II, pp. 1055 to 1056.
[52] Notice of Pre-Trial Conference dated October 1, 2020, Docket – Vol. III, pp. 1133 to 1135; Minutes of the hearing held on, and Order dated, November 16, 2020, Docket – Vol. III, pp. 1243 to 1245.
[53] Docket – Vol. III, pp. 1162 to 1168.
[54] Docket – Vol. III, pp. 1204 to 1221.
[55] Docket – Vol. III, pp. 1259 to 1287.
[56] Docket – Vol. III, pp. 1292 to 1298.
[57] Docket – Vol. IV, pp. 1478 to 1488.
[58] Docket – Vol. IV, pp. 1504 to 1521.
[59] Separate folder submitted together with petitioners' *Compliance* filed on November 17, 2020, Docket – Vol. III, pp. 1229 to 1233; Minutes of the hearing held on, and Order dated, March 22, 2021, Docket – Vol. IV, pp. 1598 to 1599.
[60] Separate folder submitted together with petitioners' *Compliance* filed on November 17, 2020, Docket – Vol. III, pp. 1229 to 1233; Minutes of the hearing held on, and Order dated, March 22, 2021, Docket – Vol. IV, pp. 1598 to 1599.
[61] Separate folder submitted together with petitioners' *Compliance* filed on November 17, 2020, Docket – Vol. III, pp. 1229 to 1233; Minutes of the hearing held on, and Order dated, May 17, 2021, Docket – Vol. IV, pp. 1601 to 1602.

NGC; (4) Mr. Armand Joseph N. Morales,[62] Business Development Manager of petitioner Philcement; and (5) Ms. Maria Gracia L. Morfe,[63] the Court-commissioned Independent Certified Public Accountant (ICPA).[64]

The *Report* of the ICPA was submitted on May 18, 2021.[65]

On July 19, 2021, petitioners filed their *Formal Offer of Evidence*,[66] to which public respondents filed their *Comment on the Formal Offer of Evidence* on November 16, 2021.[67] In the Resolution dated February 22, 2022,[68] the Court admitted petitioners' offered exhibits, *except* for the following: (1) Exhibits "P-137", "P-139", "P-141", "P-153", "P-154", "P-156", "P-158", "P-160", "P-162", "P-164", "P-166", "P-168", "P-170", "P-172", "P-174", "P-176", "P-178", "P-180", "P-182", "P-184", "P-186", "P-188", "P-190", "P-192", "P-194", "P-196", "P-226", "P-228", "P-230", "P-232", "P-234", "P-235.2", "P-236", "P-238", "P-240", "P-242", "P-244", "P-246", "P-248", "P-250", "P-252", "P-254", "P-256", "P-258", "P-260", "P-262", "P-264", "P-266", "P-268", "P-270", "P-272", "P-274", "P-276", "P-278", "P-280", "P-282", "P-284", "P-286", "P-288", "P-290", "P-292", "P-294", "P-296", "P-298", "P-300", "P-302", "P-304", "P-306", "P-308", "P-438", "P-440", "P-442", "P-444", "P-446", "P-448", "P-450", "P-452", "P-454", "P-456", "P-458", "P-460", "P-462", "P-464", "P-466", "P-468", "P-470", "P-472", "P-474", "P-476", "P-481", "P-482", "P-483", "P-485", "P-487", "P-489", "P-491", "P-493", "P-495", "P-497", "P-499", "P-501", "P-503", "P-505", and "P-507", for failure to submit the originals for comparison; and (2) Exhibits "P-70" and "P-71", for not being found in the records.

Thereafter, petitioners posted their *Motion for Reconsideration [Re: Resolution dated 22 February 2022]* on March 17, 2022,[69] to which public respondents posted their *Comment on the Motion for Reconsideration dated 17 March 2022* on May 22, 2022.[70] The Court, in the Resolution dated September 19, 2022,[71] partially granted petitioners' *motion*, admitting in evidence Exhibits "P-226", "P-228", "P-230", "P-234", "P-238", "P-240", "P-242", "P-244", "P-252", "P-260", "P-262", "P-264", "P-266", "P-270", "P-278", "P-282", "284", "P-286", "P-288", "P-294", "P-296", "P-298", "P-300", and "P-438", but still denied the

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[62] Separate four (4) folders submitted together with petitioners' *Compliance* filed on November 17, 2020, Docket – Vol. III, pp. 1229 to 1233; Minutes of the hearing held on, and Order dated, May 17, 2021, Docket – Vol. IV, pp. 1601 to 1602.

[63] Docket – Vol. IV, pp. 1611 to 1618; Minutes of the hearing held on, and Order dated, May 17, 2021, Docket – Vol. IV, pp. 1601 to 1602.

[64] *Oath of Commission* dated March 15, 2021, Docket – Vol. IV, p. 1594; Minutes of the hearing held on, and Order dated, March 15, 2021, Docket – Vol. IV, pp. 1595 to 1597.

[65] Exhibit "P-534" (formerly marked as Exhibit "P-G", see Table of Exhibits attached to Commissioner's Report dated July 12, 2021, Docket – Vol. IV, pp. 1698 to 1707), Docket – Vol. IV, pp. 1619 to 1654, attached to petitioners' *Compliance* filed on May 18, 2021, Docket – Vol. IV, pp. 1604 to 1608.

[66] Docket – Vol. IV, pp. 1709 to 1725.

[67] Docket – Vol. IV, pp. 1741 to 1755.

[68] Docket – Vol. V, pp. 1808 to 1811.

[69] Docket – Vol. VI, pp. 2689 to 2696.

[70] Docket – Vol. VI, pp. 2748 to 2754.

[71] Docket – Vol. VII, pp. 2796 to 2804.

admission of Exhibits "P-137", "P-139", "P-141", "P-153", "P-154", "P-156", "P-158", "P-160", "P-162", "P-164", "P-166", "P-168", "P-170", "P-172", "P-174", "P-176", "P-178", "P-180", "P-182", "P-184", "P-186", "P-188", "P-190", "P-192", "P-194", "P-196", "P-232 P-235.2", "P-236", "P-246", "P-248", "P-250", "P-254", "P-256", "P-258", "P-268", "P-272", "P-274", "P-276", "P-280", "P-290", "P-292", "P-302", "P-304", "P-306", "P-308", "P-440", "P-442", "P-444", "P-446", "P-448", "P-450", "P-452", "P-454", "P-456", "P-458", "P-460", "P-462", "P-464", "P-466", "P-468", "P-470", "P-472", "P-474", "P-476", "P-481", "P-482", "P-483", "P-485", "P-487", "P-489", "P-491", "P-493", "P-495", "P-497", "P-499", "P-501", "P-503", "P-505", and "P-507", for failure to submit the originals for comparison.

In the meantime, in the Order dated June 29, 2022,[72] the present case was transferred to the Third Division of this Court.

For their part, public respondents offered the testimonies of the following individuals, namely: (1) Ms. Maria Guiza B. Lim,[73] Chief Trade-Industry Development Specialist, Import Remedy Measure Division, Bureau of Import Services, DTI; (2) Ms. Myra A. Echanes,[74] Supervising Trade-Industry Development Specialist, Import Remedy Measure Division, Bureau of Import Services, DTI; and (3) Ms. Maria Lourdes M. Saluta,[75]Director II,[76] Research, Investigation and International Trade Analysis Service, TC.

During the November 22, 2022 hearing, private respondent CEMAP manifested that it will adopt the pieces of evidence to be offered by public respondents and by agreement of the parties, the testimonies of CEMAP's witnesses were dispensed with.[77]

Public Respondents' Formal Offer of Evidence was posted on January 6, 2023.[78] Petitioners posted their *Comment/Objection [Re: Formal Offer of Documentary Evidence dated 6 January 2023]* on February 13, 2023.[79] In the Resolution dated May 18, 2023,[80] the Court admitted all of public respondents' offered exhibits.

Petitioners posted a *Proffer of Excluded Documentary Evidence* on July 31, 2023,[81] which the Court noted in a Minute Resolution dated August 15, 2023.

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[72] Docket – Vol. VII, in between pp. 2762 and 2763.
[73] Docket – Vol. V, pp. 1859 to 1873; Minutes of the hearing held on, and Order dated, March 16, 2022, Docket – Vol. V, pp. 1825 to 1826.
[74] Docket – Vol. V, pp. 1874 to 1892; Minutes of the hearing held on, and Order dated, March 16, 2022, Docket – Vol. V, pp. 1825 to 1826.
[75] Docket – Vol. V, pp. 1833 to 1858; Minutes of the hearing held on, and Order dated, November 22, 2022, Docket – Vol. VII, pp. 2808 to 2810.
[76] Also designated as Acting Director III, Refer to Transcript of Stenographic Notes at the hearing held on November 22, 2022, p. 7.
[77] Minutes of the hearing held on, and Order dated, November 22, 2022, Docket – Vol. VII, pp. 2808 to 2810.
[78] Docket – Vol. VII, pp. 2840 to 2845.
[79] Docket – Vol. VII, pp. 2859 to 2868.
[80] Docket – Vol. VII, pp. 2876 to 2877.
[81] Docket – Vol. VII, pp. 3066 to 3072.

Public respondents filed their *Memorandum via* accredited courier service and received by the Court on July 27, 2023,[82] while petitioners' *Memorandum* was posted on July 31, 2023.[83]

The present case was considered submitted for decision on August 15, 2023.

Thereafter, private respondent CEMAP, and its members Taiheiyo, Cemex, Holcim and Republic Cement, filed their *Manifestation* on September 13, 2023, stating that they are adopting the *Memorandum* dated July 25, 2023 filed by the Office of the Solicitor General, which the Court noted in the Minute Resolution dated September 18, 2023.

THE STIPULATED ISSUES

The parties agreed that the issues to be tried and resolved in this case are as follows, to wit:

> "A. FACTUAL ISSUES
>
> I. Whether there is a causal link between the increase in imports of the Subject Products and threat of serious injury to the domestic cement industry during the POI.
>
> B. LEGAL ISSUES
>
> I. Whether the domestic cement industry suffers threat of serious injury as defined under the relevant provisions of Republic Act No. 8800 or the 'Safeguard Measures Act.'
>
> II. Whether DTI DAO No. 19-13 is invalid for having been issued in violation of the *Safeguard Measures Act.*"[84]

Petitioners' arguments:

Petitioners argue as follows:

(I) the assailed DAOs are invalid for having been issued notwithstanding the absence of the elements under the Safeguard Measures Act, considering that:

[82] Docket – Vol. VII, pp. 2910 to 2963.
[83] Docket – Vol. VII, pp. 3075 to 3151.
[84] Issues for Resolution, JSFI, Docket – Vol. IV, p. 1483.

(a) as found by the TC, there is no serious injury to the domestic cement industry caused by the increase in importation of the Subject Products;

(b) there is no threat of serious injury to the domestic cement industry;

(b.1) based on the AFS of the domestic cement producers, the earnings before interest and taxes of the domestic cement industry from 2013 to 2017, their sales have grown, which shows that the local cement industry is very robust and healthy during the POI;

(b.2) from 2013 to 2018, domestic production of the subject products accounted for 93% of the supply to the domestic market;

(b.3) based on data obtained from the Philippine Statistics Authority (PSA) and the DTI, the average price of cement from 2013 to 2017 was relatively stable;

(b.4) despite the increase in the importation of the Subject Products, the domestic cement industry was able to increase the average selling price of cement from 2013 to 2016;

(c) the domestic supply of cement was inadequate to meet local demand, as shown by the fact that the domestic manufacturers themselves imported the Subject Products, as such, the increase in importation of the Subject Products was, in fact, necessary to augment the supply gap;

(II) even assuming solely for the sake of argument that there was any threat of serious injury to the domestic cement industry, the existence of other factors that contribute to the impairment of the domestic cement industry negates any causal link between the increase in importation of the Subject Products and the supposed threat of serious injury to the domestic cement industry; and

(III) the respondent Secretary gravely erred in ignoring the position of the PCC, which found that the imposition of safeguard measures on the Subject Products would weaken competitive pressure and endanger the realization of the huge benefits by the public and private sectors that a competitive landscape in the cement industry would bring.

Public respondents' counter-arguments:

Public respondents contend that:

(1) the issuance of the assailed orders is in accordance with the law, rules, and jurisprudence, hence, it was validly issued, to wit:

(a) respondent DTI Secretary is empowered under Republic Act (RA) No. 8800 to impose a general safeguard measure upon a positive final determination by the TC that Types I and IP cement products are being imported in the country in increased quantities to cause threat of substantial injury to the domestic industry;

(b) the DTI's determination that the imposition of safeguard measures is in the public interest, as anchored in the TC's factual findings, deserves great respect and finality;

(2) the conditions or elements for the imposition of a safeguard measure under RA No. 8800 and its implementing rules and regulations are present, to wit:

(a) the TC correctly found that locally-produced Types I and IP cement are like products to the imported cement under consideration, this finding is not disputed by petitioners;

(b) the TC correctly found that Types I and IP cement are being imported into the Philippines in increased quantities, this finding is not disputed by petitioners;

(c) the TC correctly determined the presence of a threat of serious injury to the domestic cement industry; and

(d) the TC correctly determined the existence of a causal relationship between increased imports of Types I and IP cement and the threat of serious injury to the domestic cement industry.

THE COURT'S RULING

The present *Petition for Review* lacks merit.

This Court has jurisdiction over the present case.

Section 29 of RA No. 8800,[85] otherwise known as the "Safeguard Measures Act" (the SMA), reads:

[85] AN ACT PROTECTING LOCAL INDUSTRIES BY PROVIDING SAFEGUARD MEASURES TO BE UNDERTAKEN IN RESPONSE TO INCREASED IMPORTS AND PROVIDING PENALTIES FOR VIOLATION THEREOF.

"SEC. 29. *Judicial Review.* – **Any interested party who is adversely affected by the ruling of the Secretary in connection with the imposition of a safeguard measure may file with the Court of Tax Appeals, a petition for review of such ruling within thirty (30) days from receipt thereof:** ***Provided, however,*** **That the filing of such petition for review shall not in any way stop, suspend or otherwise toll the imposition or collection of the appropriate tariff duties or the adoption of other appropriate safeguard measures, as the case may be.**

The petition for review shall comply with the same requirements and shall follow the same rules of procedure and shall be subject to the same disposition as in appeals in connection with adverse rulings on tax matters to the Court of Appeals." *(Emphasis added)*

Based on the foregoing provision, this Court may take cognizance of any petition for review filed by any interested and adversely affected party, of a ruling of the DTI Secretary in connection with the imposition of a safeguard measure under RA No. 8800, within thirty (30) days from receipt of the said ruling. Moreover, under the said law, it is clear that the filing of such petition for review shall not, in any way, stop, suspend or otherwise toll the imposition or collection of the appropriate tariff duties.

The same jurisdiction is likewise bestowed under Sections 7(a)(7) and 11 of RA No. 1125,[86] as later amended by RA No. 9282,[87] to wit:

"SEC. 7. *Jurisdiction.* — **The CTA shall exercise:**

(a) **Exclusive appellate jurisdiction to review by appeal,** as herein provided:

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(7) **Decisions of the Secretary of Trade and Industry, in the case of nonagricultural product, commodity or article,** and the Secretary of Agriculture in the case of agricultural product, commodity or article, **involving** dumping and countervailing duties under Sections 301 and 302, respectively, of the Tariff and Customs Code, and **safeguard measures under**

[86] AN CREATING THE COURT OF TAX APPEALS.
[87] AN ACT EXPANDING THE JURISDICTION OF THE COURT OF TAX APPEALS (CTA), ELEVATING ITS RANK TO THE LEVEL OF A COLLEGIATE COURT WITH SPECIAL JURISDICTION AND ENLARGING ITS MEMBERSHIP, AMENDING FOR THE PURPOSE CERTAIN SECTIONS OF REPUBLIC ACT NO. 1125, AS AMENDED, OTHERWISE KNOWN AS THE LAW CREATING THE COURT OF TAX APPEALS, AND FOR OTHER PURPOSES.

Republic Act No. 8800, where either party may appeal the decision to impose or not to impose said duties." *(Emphases added)*

"SEC. 11. *Who May Appeal; Mode of Appeal; Effect of Appeal.* — **Any party adversely affected by a decision, ruling** xxx **of** xxx **the Secretary of Trade and Industry** xxx **may file an appeal with the CTA within thirty (30) days after receipt of such decision or ruling** xxx.

xxx xxx xxx." *(Emphases added)*

In this case, on the basis of the aforequoted provisions of law, there is no doubt that this Court can take cognizance of the present *Petition for Review*.

DAO No. 19-13 was published on September 11, 2019 in the Business Mirror and Manila Standard,[88] and took effect "upon the issuance of the relevant Customs Memorandum Order or fifteen (15) days after the publication of the Order in two (2) newspapers of general circulation, whichever comes earlier."[89]

Counting from September 11, 2019, the thirty (30)-day period ends on October 11, 2019. Hence, the filing of the present *Petition for Review* on October 11, 2019 was timely made.

Purpose of Safeguard Measures under RA No. 8800

On July 17, 2000, RA No. 8800 was enacted codifying the provisions of Article XIX of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) Agreement on Safeguards. These agreements authorize the application of a safeguard measure if a product is being imported into the country in such quantities as would cause or threaten to cause serious injury to domestic producers of like or directly competitive products. RA No. 8800 authorizes the application of a safeguard measure upon a finding that a product is being imported into the country in increased quantities as to be a substantial cause of serious injury or threat to the domestic industry. Hence, the primary purpose of safeguard measures is not at all to generate revenue for the government, but to **provide protection to domestic industry threatened by import surges.**[90]

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[88] Pars. 1.3.1 and 1.3.2, *Petition for Review*, vis-à-vis pars. 9 and 10, *Answer*, Docket – Vol. I, p. 11 and Docket – Vol. II, p. 1013, respectively; Annexes "C" and "D", *Petition for Review*, Docket – Vol. I, pp. 93 to 96.

[89] Exhibit "P-523".

[90] *Filipino Metals Corporation, et al. vs. Secretary of the Department of Trade and Industry, et al.*, G.R. No. 157498, July 15, 2005.

The policy objective of RA No. 8800 is enunciated in Section 2 thereof, which reads:

> "SEC. 2. *Declaration of Policy.* — The State shall promote the competitiveness of domestic industries and producers based on sound industrial and agricultural development policies, and the efficient use of human, natural and technical resources. In pursuit of this goal and in the public interest, **the State shall provide safeguard measures to protect domestic industries and producers from increased imports which cause or threaten to cause serious injury to those domestic industries and producers**." *(Emphasis added)*

In *Southern Cross Cement Corporation vs. The Philippine Cement Manufacturers Corp., et al. (Southern Cross Cement),*[91] the Supreme Court explained that the SMA provides the structure and mechanics for the imposition of emergency measures, including tariffs, to protect domestic industries and producers from increased imports which inflict or could inflict serious injury on them.

Condition precedents to be satisfied before the DTI Secretary may impose general safeguard measure.

Section 5 of RA No. 8800 provides for the conditions for the application of general safeguard measures, to wit:

> "SEC. 5. *Conditions for the Application of General Safeguard Measures.* — The **Secretary shall apply a general safeguard measure upon a <u>positive final determination of the Commission</u> that a product is being <u>imported into the country in increased quantities</u>, whether absolute or relative to the domestic production, as to be a <u>substantial cause of serious injury or threat thereof to the domestic industry</u>; however, in the case of <u>non-agricultural products</u>, the Secretary shall first establish that the application of such safeguard measures will be in the <u>public interest</u>.**" *(Emphasis and underscoring added)*

In *Southern Cross Cement,* the Supreme Court explained that there are two (2) condition precedents before a general safeguard measure may be imposed, to wit:

> "All in all, there are **two condition precedents that must be satisfied before the DTI Secretary may impose a general**

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[91] G.R. No. 158540, July 8, 2004.

safeguard measure on grey Portland cement. First, there must be a positive final determination by the Tariff Commission that a product is being imported into the country in increased quantities (whether absolute or relative to domestic production), as to be a substantial cause of serious injury or threat to the domestic industry. Second, in the case of non-agricultural products the Secretary must establish that the application of such safeguard measures is in the public interest. xxx

xxx xxx xxx

Moreover, Rule 5 of the Implementing Rules and Regulations of the SMA, which interprets Section 5 of the law, likewise requires a **positive final determination on the part of the Tariff Commission before the application of the general safeguard measure**.

The SMA establishes a distinct allocation of functions between the Tariff Commission and the DTI Secretary. The plain meaning of Section 5 shows that it is the **Tariff Commission that has the power to make a 'positive final determination.'** This power, which belongs to the Tariff Commission, must be distinguished from the power to impose general safeguard measure properly vested on the DTI Secretary. **The distinction is vital, as a 'positive final determination' clearly antecedes, as a condition precedent, the imposition of a general safeguard measure. At the same time, a positive final determination does not necessarily result in the imposition of a general safeguard measure. Under Section 5, notwithstanding the positive final determination of the Tariff Commission, the DTI Secretary is tasked to decide whether or not that the application of the safeguard measures is in the public interest.**

It is also clear from Section 5 of the SMA that the positive final determination to be undertaken by the Tariff Commission does not entail a mere gathering of statistical data. In order to arrive at such determination, it has to establish causal linkages from the statistics that it compiles and evaluates: after finding there is an importation in increased quantities of the product in question, that such importation is a substantial cause of serious threat or injury to the domestic industry." *(Emphases and underscoring added)*

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Procedure set up by RA No. 8800 leading to the imposition of definitive safeguard measures.

In *Southern Cross Cement,* the Supreme Court further summarized the step-by-step procedures leading up to the imposition of definitive safeguard measures as follows:

> "xxx To better understand the dynamics of the procedure set up by the law leading to the imposition of definitive safeguard measures, a brief step-by-step recount thereof is in order.
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> 1. After the initiation of an action involving a general safeguard measure,[92] the DTI Secretary makes a preliminary determination whether the increased imports of the product under consideration substantially cause or threaten to substantially cause serious injury to the domestic industry,[93] and whether the

[92] Section 6 of RA No. 8800 provides:
"SEC. 6. *Initiation of Action Involving General Safeguard Measure.* — Any person, whether natural or juridical, belonging to or representing a domestic industry may file with the Secretary a verified petition requesting that action to be taken to remedy the serious injury or prevent the threat thereof to the domestic industry caused by increased imports of the product under consideration.

The petition shall include documentary evidence supporting the facts that are essential to establish:

(1) an increase in imports of like or directly competitive products;

(2) the existence of serious injury or threat thereof to the domestic industry; and

(3) the causal link between the increased imports of the product under consideration and the serious injury or threat thereof.

The Secretary shall review the accuracy and adequacy of the evidence adduced in the petition to determine the existence of a *prima facie* case that will justify the initiation of a preliminary investigation within five (5) days from receipt of the petition.

The Secretary may also initiate action upon the request of the President; or a resolution of the House or Senate Committee on Agriculture, or House or Senate Committee on Trade and Commerce.

In the absence of such a petition, the Secretary may, *motu proprio*, initiate a preliminary safeguard investigation if there is evidence that increased imports of the product under consideration are a substantial cause of, or are threatening to substantially cause, serious injury to the domestic industry.

The Secretary may extend legal, technical and other assistance to the concerned domestic producers and their organizations at all stages of the safeguard action."

[93] SEC. 7. *Preliminary Determination.* — Not later than thirty (30) days from receipt of the petition or a *motu proprio* initiation of the preliminary safeguard investigation, the Secretary shall, on the basis of the evidence and submission of the interested parties, make a preliminary determination that increased imports of the product under consideration are a substantial cause of, or threaten to substantially cause, serious injury to the domestic industry. In the process of conducting a preliminary determination, the Secretary shall notify the interested parties and shall require them to submit their answers within five (5) working days from receipt of such notice. The notice shall be deemed received five (5) working days from the date of transmittal to the respondent or appropriate diplomatic representative of the country of exportation or origin of the imported product under consideration.

When information is not applied within the above time limit set by the Secretary or if the investigation is significantly impeded, decision will be based on the facts derived from the evidence at hand.

imposition of a provisional measure is warranted under Section 8 of the SMA.[94] If the preliminary determination is negative, it is implied that no further action will be taken on the application.

2. When his preliminary determination is positive, the Secretary immediately transmits the records covering the application to the Tariff Commission for immediate formal investigation.[95]

3. The Tariff Commission conducts its formal investigation, keyed towards making a final determination. In the process, it holds public hearings, providing interested parties the opportunity to present evidence or otherwise be heard.[96] To repeat, Section 5 enumerates what the Tariff Commission is tasked to determine: (a) whether a product is being imported into the country in increased quantities, irrespective of whether the product is absolute or relative to the domestic production; and (b) whether the importation in increased quantities is such that it causes serious injury or threat to the domestic industry. The findings of the Tariff Commission as to these matters constitute the final determination, which may be either positive or negative.

Upon a positive preliminary determination that increased importation of the product under consideration is a substantial cause of, or threatens to substantially cause, serious injury to the domestic industry, the Secretary shall, without delay, transmit its records to the Commission for immediate formal investigation.

[94] SEC. 8. *Provisional Measures.* — In critical circumstances where a delay would cause damage which would be difficult to repair, and pursuant to a preliminary determination that increased imports are a substantial cause of, or threaten to substantially cause, serious injury to the domestic industry, the Secretary shall immediately issue, through the Secretary of Finance, a written instruction to the Commissioner of Customs authorizing the imposition of a provisional general safeguard measure.

Such measure shall take the form of a tariff increase, either *ad valorem* or specific, or both, to be paid through a cash bond set at a level sufficient to redress or prevent injury to the domestic industry: *Provided, however,* That in the case of agricultural products where the tariff increase may not be sufficient to redress or to prevent serious injury to the domestic producer or producers, a quantitative restriction may be set. The cash bond shall be deposited with a government depository bank and shall be held in trust for the importer who posted the bond. The duration of the provisional measure shall not exceed two hundred (200) days from the date of imposition during which period the requirements of the subsequent sections of this Act on the initiation of a formal investigation, notification and consultation shall have been met: Provided, That the duration of any provisional measure shall be counted as part of the initial period and any extension of the imposition of the definitive final safeguard measure.

When the provisional safeguard measure is in the form of a tariff increase, such increase shall not be subject or limited to the maximum levels of tariff as set forth in Section 401 (a) of the Tariff and Customs Code of the Philippines.

[95] Refer to Section 7 above-quoted.

[96] SEC. 9. *Formal Investigation.* — Within five (5) working days from receipt of the request from the Secretary, the Commission shall publish the notice of the commencement of the investigation, and public hearings which shall afford interested parties and consumers an opportunity to be present, or to present evidence, to respond to the presentation of other parties and consumers, and otherwise be heard. Evidence and positions with respect to the importation of the subject article shall be submitted to the Commission within fifteen (15) days after the initiation of the investigation by the Commission.

The Commission shall complete its investigation and submit its report to the Secretary within one hundred twenty (120) calendar days from receipt of the referral by the Secretary, except when the Secretary certifies that the same is urgent, in which case the Commission shall complete the investigation and submit the report to the Secretary within sixty (60) days.

> 4. Under Section 13 of the SMA, if the Tariff Commission makes a positive determination, the Tariff Commission 'recommends to the [DTI] Secretary an appropriate definitive measure.' The Tariff Commission 'may also recommend other actions, including the initiation of international negotiations to address the underlying cause of the increase of imports of the products, to alleviate the injury or threat thereof to the domestic industry, and to facilitate positive adjustment to import competition.'[97]

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[97] SEC. 13. *Adoption of Definitive Measures.* — Upon its positive determination, the Commission shall recommend to the Secretary an appropriate definitive measure, in the form of:

(a) An increase in, or imposition of, any duty on the imported product;

(b) A decrease in or the imposition of a tariff-rate quota (MAV) on the product;

(c) A modification or imposition of any quantitative restriction on the importation of the product into the Philippines;

(d) One or more appropriate adjustment measures, including the provision of trade adjustment assistance;

(e) Any combination of actions described in subparagraphs (a) to (d).

The Commission may also recommend other actions, including the initiation of international negotiations to address the underlying cause of the increase of imports of the product, to alleviate the injury or threat thereof to the domestic industry, and to facilitate positive adjustment to import competition.

The general safeguard measure shall be limited to the extent of redressing or preventing the injury and to facilitate adjustment by the domestic industry from the adverse effects directly attributed to the increased imports: *Provided, however,* That when quantitative import restrictions are used, such measures shall not reduce the quantity of imports below the average imports for the three (3) preceding representative years, unless clear justification is given that a different level is necessary to prevent or remedy a serious injury.

A general safeguard measure shall not be applied to a product originating from a developing country if its share of total imports of the product is less than three percent (3%): *Provided, however,* That developing countries with less than three percent (3%) share collectively account for not more than nine percent (9%) of the total imports.

The decision imposing a general safeguard measure, the duration of which is more than one (1) year, shall be reviewed at regular intervals for purposes of liberalizing or reducing its intensity. The industry benefiting from the application of a general safeguard measure shall be required to show positive adjustment within the allowable period. A general safeguard measure shall be terminated where the benefiting industry fails to show any improvement, as may be determined by the Secretary.

The Secretary shall issue a written instruction to the heads of the concerned government agencies to implement the appropriate general safeguard measure as determined by the Secretary within fifteen (15) days from receipt of the report.

In the event of a negative final determination, or if the cash bond is in excess of the definitive safeguard duty assessed, the Secretary shall immediately issue, through the Secretary of Finance, a written instruction to the Commissioner of Customs, authorizing the return of the cash bond or the remainder thereof, as the case may be, previously collected as provisional general safeguard measure within ten (10) days from the date a final decision has been made: *Provided,* That the government shall not be liable for any interest on the amount to be returned. The Secretary shall not accept for consideration another petition from the same industry, with respect to the same imports of the product under consideration within one (1) year after the date of rendering such a decision.

When the definitive safeguard measure is in the form of a tariff increase, such increase shall not be subject or limited to the maximum levels of tariff as set forth in Section 401 (a) of the Tariff and Customs Code of the Philippines.

5. If the Tariff Commission makes a positive final determination, the DTI Secretary is then to decide, within fifteen (15) days from receipt of the report, as to what appropriate safeguard measures should he impose.[98]

6. However, if the Tariff Commission makes a negative final determination, the DTI Secretary cannot impose any definitive safeguard measure. Under Section 13, he is instructed instead to return whatever cash bond was paid by the applicant upon the initiation of the action for safeguard measure."[99]

In this case, the DTI initiated, *motu proprio*, a preliminary safeguard investigation under Section 6 of RA No. 8800 to determine whether increased imports of cement are causing or threatening to cause serious injury to the domestic industry. The cement covered by the investigation is classified under AHTN Codes 2523.2990 and 2523.9000. The period covered by the investigation (POI) are the years 2013 to 2017.[100] Acting under Section 7 of RA No. 8800, the DTI found, after preliminary determination, that the increased imports of cement have cause serious injury to the domestic industry.[101] Hence, the DTI issued on January 17, 2019, DAO No. 19-02,[102] which imposed provisional safeguard measures, pursuant to Section 8 of RA No. 8800, in the form of a cash bond amounting to ₱210.00/MT upon imported cement classified under AHTN Codes 2523.2990 and 2523.9000 for a period of 200 days from the date of issuance by the BOC of the relevant CMO or fifteen (15) days after the publication of the DTI order in two (2) newspapers of general circulation, whichever comes earlier.

Thereafter, the TC issued Office Order No. 19-013 dated January 25, 2019,[103] creating a Task Force on Cement Safeguard Case to conduct a formal investigation on the importation of cement from various countries pursuant to Section 9 of RA No. 8800. It then issued a *Notice of Formal Investigation and Preliminary Conference* on January 28, 2019, which was published in two (2) newspapers of general circulation, *i.e.*, The Manila Times and Manila Standard, on even date.[104] Individual notices were likewise sent to various parties.[105] The preliminary conference was held on February 4, 2019 as scheduled,[106] which was attended to by representatives of local cement manufacturers, importers of cement, foreign embassies, media, *Bangko Sentral ng Pilipinas*, and DOF.[107]

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[98] *Id.*
[99] *Id.*
[100] Exhibits "R-18" and "R-19", Docket – Vol. V, pp. 2155 to 2185; Exhibit "P-522".
[101] Exhibit "R-20", Docket – Vol. V, pp. 2186 to 2243.
[102] In the Matter of the Preliminary Determination of the Safeguard Measures Case Against the Importation of Cement from Various Countries (AHTN Codes 2523.2990 and 2523.9000) (Safeguard Measures Case No. 01-2018); Exhibit "P-522".
[103] Exhibit "R-1", Docket – Vol. V, p. 1893.
[104] Exhibits "R-2" and "R-3", Docket – Vol. V, pp. 1894 to 1895.
[105] Exhibit "R-4", Docket – Vol. V, pp. 1896 to 1902.
[106] Exhibits "R-5" and "R-6", Docket – Vol. V, pp. 1903 to 1910.
[107] Exhibits "R-7" and "R-8", Docket – Vol. V, pp. 1911 to 1912.

A *Notice of Public Hearing* was then issued on May 2, 2019 which was published in two (2) newspapers of general circulation, *i.e.*, The Manila Times and Manila Standard, on May 4, 2019.[108] Individual notices were likewise sent to various parties.[109] The public hearings were conducted on May 20, 2019[110] and May 21, 2019.[111]

Thereafter, the TC issued its *Final Report* dated August 9, 2019 on the Formal Investigation on the Imposition of Safeguard Measure Against Importations of Cement from Various Countries (AHTN 2017 Subheading Nos. 2523.29.90 and 2523.90.00) Investigation No. SG-2019-OC-Cement.[112]

In the said *Final Report*, the TC made the following conclusions and recommendations:[113]

> **"12. CONCLUSION**
>
> In accordance with RA No. 8800, the Commission hereby concludes the following:
>
> 1. Eight (8) out of ten (10) local cement manufacturers represented the domestic industry in the formal investigation. This satisfies the domestic industry requirement under Section 4(f)[114] of RA No. 8800.
>
> 2. Locally produced Type I and Type IP cement are 'like' to imported Type I and Type IP cement.
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> 3. Type I and Type IP cement were imported into the Philippines in increased quantities, both in absolute terms and relative to domestic production, starting in 2016. The increase in volume of imports was recent enough, sudden enough, sharp enough, and significant enough.
>
> 4. While the domestic cement industry suffered injury, as evidenced by deteriorating trends in industry market share, sales, production, profits and capacity utilization during the POI, the overall impairment in its position was not of a degree that may constitute serious injury.

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[108] Exhibits "R-9" and "R-10", Docket – Vol. V, pp. 1913 to 1914 (or pp. 2060 to 2061).
[109] Exhibit "R-11", Docket – Vol. V, pp. 1915 to 1922.
[110] Exhibits "R-13" to "R-15", Docket – Vol. V, pp. 2079 to 2081.
[111] Exhibits "R-16" and "R-17", Docket – Vol. V, pp. 2082 to 2083.
[112] Exhibit "P-509"; Exhibit "R-12", Docket – Vol. V, pp. 1923 to 2057.
[113] Exhibit "P-509", pp. 115 to 118; Exhibit "R-12", Docket – Vol. V, pp. 2049 to 2052.
[114] Section 4(f) of RA No. 8800 provides "(f) 'Domestic industry' shall refer to the domestic producers, as a whole, of like or directly competitive products manufactured or produced in the Philippines or those whose collective output of like or directly competitive products constitutes a major proportion of the total domestic production of those products;"

5. There exists an imminent threat of serious injury and significant overall impairment to the position of the domestic cement industry in the near future, as shown by: (a) the significant rate of increase in cement importations starting 2016 until the first semester of 2019 thus pointing to the high likelihood that substantially increased importations will continue in the near future; (b) the substantial freely disposable production capacities of exporters that can accommodate increasing exports to the Philippines and the importance of the Philippines as an export market by top suppliers Vietnam and China indicating the high likelihood of substantially increased exports of cement to the Philippines in the near future; and (c) the significant deterioration in the overall position of the domestic cement industry during the period of import surge (i.e., declines in sales, market share, production, profits, and capacity utilization, and reduced ability to generate capital and/or investments to further modernize and expand capacities).

6. There is a direct and causal link between increased imports of cement and the imminent threat of serious injury and significant overall impairment to the position of the domestic cement industry in the near future. While there were other factors that contributed to the impairment of the domestic cement industry, these were not substantial to cause serious injury to the local cement industry during the period of import surge.

7. Serious injury to the domestic cement industry would occur imminently if a definitive safeguard measure against importations of cement is not applied.

8. The circumstances provided in Article XIX of GATT 1994 need to be demonstrated since the product under consideration (Type I and Type IP cement) is not the subject of any Philippine obligation or tariff concession under the WTO Agreement. Nonetheless, such inquiry is governed by the national legislation (RA No. 8800) and terms and conditions of the Agreement on Safeguards.

13. RECOMMENDATION

xxx xxx xxx

13.1 Recommendation

Based on its positive determination that domestic cement (Type I and Type IP) is 'like' to imported cement (Type I and Type IP) and that cement is being imported into the Philippines in increased quantities, and having established the existence of a causal link between the imminent threat of serious injury to the local cement industry in the near future and increased imports of cement, the Commission hereby recommends the application of the appropriate definitive general safeguard measure on importations of cement to prevent the occurrence of serious injury to the Philippines cement industry. The Commission further recommends that the definitive safeguard measure be applied for a period of three (3) years, starting from the date that provisional measure took effect in accordance with Rule 8.7 of the IRRs of RA No. 8800.

13.1.1 Amount of Definitive Safeguard Measures

The Commission recommends a specific duty of PHP 297 per MT (or PHP 12 per 40-kg bag) as the definitive safeguard measure to be imposed on importation of cement (Type I and Type IP). This recommended level of specific safeguard duty is the difference between the weighted average landed cost of imported cement and the average domestic ex-plant selling price of the local cement industry for the most recent year of the POI, i.e., 2018 (Table 13.1). Since it addresses the extent of price undercutting by cement imports based on the latest available data, the Commission believes that this level of safeguard may prevent the occurrence of serious injury to the domestic cement industry and will facilitate said industry's adjustment to the adverse effects of increasing cement imports.

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After reviewing the said *Final Report*, the DTI issued DAO No. 19-13 on August 27, 2019,[115] which reads, in part, as follows:

"Accordingly, the DTI has reviewed the Commission's findings and recommendation and has established that the imposition of the definitive general safeguard measure shall be in the public interest. While DTI is mandated to protect consumers, there is a need to balance this taking into account other sectors such as investors and industry which provide employment to Filipinos. There is also a need to moderate imports to balance trade. If local manufacturers can adequately supply domestic requirements, they

[115] In the Matter of the Definitive General Safeguard Measure on the Importation of Cement from Various Countries (AHTN Codes 2523.29.90 and 2523.90.00) (Safeguard Measures Case No. 01-2018); Exhibit "P-523".

need to be provided a level playing field to enable them to compete with imports. This will allow expansion of the country's manufacturing base and generate more jobs for Filipinos. Further, users of cement retain their option to choose between the local and imported cement since imports will still be allowed. The imposition of a safeguard measure is not expected to cause a shortage of cement in the domestic market considering that the cement manufacturers have sufficient capacity to meet domestic demand.

WHEREFORE, IN VIEW THEREOF, and pursuant to Section 13 of RA 8800, the DTI hereby, issued the following:

1. A definitive safeguard duty effective for three (3) years shall be imposed on imported cement from various countries to encourage and challenge the local cement industries to be globally competitive. The amount of the safeguard duty to be imposed for the first year shall be ₱250.00/MT or ₱10.00 per 40kg bag, for the second year – ₱225.00/MT or ₱9.00 per 40kg bag, and for the third year – ₱200.00/MT or ₱8.00 per 40kg bag.

2. The amount of the measure shall be subject to regular review to give DTI the opportunity to modify the amount of the duty if necessary. The duty shall be applied to cement classified under AHTN Codes 2523.29.90 and 2523.90.00

   Imports originating from developing counties listed in Annex A covered by Rule 8.8 of the IRR of RA 8800 shall not be subject to the definitive general safeguard measure. The composition of the developing counties on the de minimis list may change based on a review of the most recent data available as part of the annual review which will be conducted by the DTI during the implementation period.

3. Importers of cement originating from a country that is exempt from the safeguard duty shall submit a Certificate of Country of Origin (CO) issued by the authorized agency/office in the source country of manufacture subject to affixation of 'Apostille' to the document or authenticated by the Philippine Embassy/Consulate General, as applicable.

The application of the definitive general safeguard measure shall be monitored and reviewed in accordance with Sections 15 and 16 of RA 8800. The domestic cement industry is also directed to comply with its adjustment plan."

In this case, there is no question on the conduct of the proceeding leading up to imposition of definitive general safeguard measures.

In relation to the first condition precedent above stated, Rule 9.4 of the Implementing Rules and Regulations (IRR) of RA No. 8800, requires the TC to determine the following, *viz.*:[116]

> "RULE 9.4. The Commission shall conduct the formal investigation to determine the following:
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> RULE 9.4.a. If the domestic product is a like or directly competitive product to the imported product under consideration;
>
> RULE 9.4.b. If the product is being imported into the Philippines in increased quantities whether absolute or relative to the domestic production;
>
> RULE 9.4.c. The presence and extent of serious injury or the threat thereof to the domestic industry that produces like or directly competitive product; and
>
> RULE 9.4.d. The existence of a causal relationship between the increased imports of the product under consideration and the serious injury or threat thereof to the affected domestic industry."

A review of the TC's *Final Report* reveals that all of the above-mentioned requirements were established through an extensive evaluation of evidence and discourse which the Court has exhaustively reviewed and consequently considered as well.

Determination that the locally-produced Types I and IP cement are like products to the imported cement under consideration and increased volume of imports

In this case, both sets of litigants agreed that the TC correctly found that the locally-produced Types I and IP cement are like products to the imported cement under consideration[117] and that Types I and IP cement are being

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[116] DTI-DA-DOF-TC-BOC Joint Administrative Order No. 03-00, IMPLEMENTING RULES AND REGULATIONS PURSUANT TO REPUBLIC ACT 8800: "AN ACT PROTECTING LOCAL INDUSTRIES BY PROVIDING SAFEGUARD MEASURES TO BE UNDERTAKEN IN RESPONSE TO INCREASED IMPORTS AND PROVIDING PENALTIES FOR VIOLATION THEREOF" OTHERWISE KNOWN AS "THE SAFEGUARD MEASURES ACT".
[117] Par. 13, JSFI, Docket – Vol. IV, p. 1480.

imported into the Philippines in increased quantities.[118] However, the question raised herein is whether the TC correctly found that the domestic cement industry suffers threat of serious injury as defined under RA No. 8800 and that there was a causal link between the increase in imports of the Subject Products and threat of serious injury to the domestic cement industry during the POI.

It must be emphasized that factual findings of the TC on the existence of conditions warranting the imposition of general safeguard measures are binding on the DTI Secretary since the latter is not authorized to alter, amend or modify in any way the determination made by the TC. The DTI Secretary can ignore the TC's recommendation, but not its determination. This was explained in *Southern Cross Cement*, as follows:

> "The SMA establishes a distinct allocation of functions between the Tariff Commission and the DTI Secretary. The plain meaning of Section 5 shows that it is **the Tariff Commission that has the power to make a 'positive final determination.' This power, which belongs to the Tariff Commission, must be distinguished from the power to impose general safeguard measure properly vested on the DTI Secretary. The distinction is vital, as a 'positive final determination' clearly antecedes, as a condition precedent, the imposition of a general safeguard measure.** At the same time, a positive final determination does not necessarily result in the imposition of a general safeguard measure. **Under Section 5, notwithstanding the positive final determination of the Tariff Commission, the DTI Secretary is tasked to decide whether or not that the application of the safeguard measures is in the public interest.**
>
> It is also clear from Section 5 of the SMA that the **positive final determination to be undertaken by the Tariff Commission does not entail a mere gathering of statistical data. In order to arrive at such determination, it has to establish causal linkages from the statistics that it compiles and evaluates: after finding there is an importation in increased quantities of the product in question, that such importation is a substantial cause of serious threat or injury to the domestic industry.**
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> To better comprehend Section 13, note must be taken of the distinction between the investigatory and recommendatory functions of the Tariff Commission under the SMA.

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[118] Par. 14, JSFI, Docket – Vol. IV, p. 1481.

The word 'determination,' as used in the SMA, pertains to the factual findings on whether there are increased imports into the country of the product under consideration, and on whether such increased imports are a substantial cause of serious injury or threaten to substantially cause serious injury to the domestic industry. The SMA explicitly authorizes the DTI Secretary to make a preliminary determination, and the Tariff Commission to make the final determination. The distinction is fundamental, as these functions are not interchangeable. **The Tariff Commission makes its determination only after a formal investigation process, with such investigation initiated only if there is a positive preliminary determination by the DTI Secretary under Section 7 of the SMA.** On the other hand, the **DTI Secretary may impose definitive safeguard measure only if there is a positive final determination made by the Tariff Commission.**

In contrast, a 'recommendation' is a suggested remedial measure submitted by the Tariff Commission under Section 13 after making a positive final determination in accordance with Section 5. The Tariff Commission is not empowered to make a recommendation absent a positive final determination on its part. Under Section 13, the Tariff Commission is required to recommend to the [DTI] Secretary an 'appropriate definitive measure.' The Tariff Commission 'may also recommend other actions, including the initiation of international negotiations to address the underlying cause of the increase of imports of the products, to alleviate the injury or threat thereof to the domestic industry and to facilitate positive adjustment to import competition.'

The <u>recommendations of the Tariff Commission</u>, as rendered under Section 13, are <u>not obligatory on the DTI Secretary</u>. Nothing in the SMA mandates the DTI Secretary to adopt the recommendations made by the Tariff Commission. In fact, the SMA requires that the DTI Secretary establish that the application of such safeguard measures is in the public interest, notwithstanding the Tariff Commission's recommendation on the appropriate safeguard measure based on its positive final determination. The non-binding force of the Tariff Commission's recommendations is congruent with the command of Section 28(2), Article VI of the 1987 Constitution that only the President may be empowered by the Congress to impose appropriate tariff rates, import/export quotas and other similar measures. It is the DTI Secretary, as alter ego of the President, who under the SMA may impose such safeguard measures subject to the limitations imposed therein. A contrary conclusion would in essence unduly arrogate to the Tariff Commission the executive power to impose

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the appropriate tariff measures. That is why the SMA empowers the DTI Secretary to adopt safeguard measures other than those recommended by the Tariff Commission.

Unlike the recommendations of the Tariff Commission, its determination has a different effect on the DTI Secretary. <u>Only on the basis of a positive final determination made by the Tariff Commission under Section 5 can the DTI Secretary impose a general safeguard measure. Clearly, then the DTI Secretary is bound by the determination made by the Tariff Commission.</u>

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Moreover, **the <u>DTI Secretary does not have the power to review the findings of the Tariff Commission</u> for it is not subordinate to the Department of Trade and Industry ('DTI').** It falls under the supervision, not of the DTI nor of the Department of Finance (as mistakenly asserted by Southern Cross), but of the National Economic and Development Authority, an independent planning agency of the government of co-equal rank as the DTI. As the supervision and control of a Department Secretary is limited to the bureaus, offices, and agencies under him, **the DTI Secretary generally cannot exercise review authority over actions of the Tariff Commission. <u>Neither does the SMA specifically authorize the DTI Secretary to alter, amend or modify in any way the determination made by the Tariff Commission. The most that the DTI Secretary could do to express displeasure over the Tariff Commission's actions is to ignore its recommendation, but not its determination</u>.**" *(Emphases and underscoring added)*

Thus, the TC has the power to make a 'positive final determination' and DTI Secretary may impose definitive safeguard measure only if there is a positive final determination made by the TC. Such being the case, the DTI Secretary correctly considered the TC's positive final determination, as he was bound by the latter's factual determination.

It should be emphasized that factual findings of administrative officials and agencies that have acquired expertise in the performance of their official duties and the exercise of their primary jurisdiction are generally accorded not only respect but, at times, even finality if such findings are supported by substantial evidence. The Courts generally accord great respect, if not finality, to factual findings of administrative agencies, because of their special knowledge and expertise over matters falling under their jurisdiction.[119]

A reading of the TC's *Final Report,* shows that its factual findings were supported by data, figures, papers and documents provided by concerned parties and the TC also conducted ocular inspections and data verifications.[120]

Here, the TC found the existence of an imminent threat of serious injury and significant overall impairment to the position of the domestic cement industry in the near future.[121] *Apropos*, Section 4 of RA No. 8800 defines serious injury as follows:

> "(o) 'Serious injury' shall mean a significant impairment in the position of a domestic industry after evaluation by competent authorities of all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry concerned, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in levels of sales, production, productivity, capacity utilization, profit and losses and employment;"

Although the TC found that "there was no significant overall impairment in the position of the domestic industry during the POI that constitutes serious injury in accordance with RA No. 8800" and that "there [is] no finding of serious injury to the domestic cement industry,"[122] it should be emphasized that to impose safeguard measures, there should be a finding of serious injury <u>or threat</u> of serious injury to the domestic industry. Hence, there being no finding of serious injury to the domestic cement industry, the TC proceeded to the determination of the existence of threat of serious injury.

Rule 12.3 of the IRR of RA No. 8800 provides for the following matters to be considered in determining whether threat of serious injury exists, to wit:

> "RULE 12.3. **A determination of threat of serious injury shall be based on facts and not merely on allegations, conjectures or remote possibilities.** In making a **determination regarding the existence of a threat of serious injury**, the Secretary and the Commission, at their respective stages of investigation, shall **consider the following** among others:

[119] *Land Bank of the Philippines vs. Spouses Costo*, G.R. No. 174647, December 5, 2012.
[120] Pars. 3.4, 3.5 and 4 and Annex H, Exhibit "P-509", pp. 13 to 14 and 16; Exhibit "R-12", Docket – Vol. V, pp. 1947 to 1948, 1950 and 2089 to 2090.
[121] Exhibit "P-509", p. 107; Exhibit "R-12", Docket – Vol. V, p. 2041.
[122] Par. 8, JSFI, Docket – Vol. IV, p. 1480; Exhibit "P-509", p. 96; Exhibit "R-12", Docket – Vol. V, p. 2030.

RULE 12.3.a. **significant rate of increase in imports** into the Philippines indicating the likelihood of substantially increased importation, evidenced *inter alia* by the existence of letters of credit, supply or sales contract, the award of a tender, an irrevocable offer or other similar contracts;

RULE 12.3.b. **sufficient freely disposable, or an imminent, substantial increase in, production capacity of the foreign exporters** including access conditions they face in third country markets, **indicating the likelihood of substantially increased exports to the Philippines**;

RULE 12.3.c. **decline in sales or market share**, and a **downward trend in production**, profits, wages, productivity or employment (or increasing underemployment) in the domestic industry and its **inability to generate capital for modernization or maintain existing levels of expenditures for research and development**; and

RULE 12.3.d. growing inventories of the product being investigated whether maintained by the Philippine producers, importers, wholesalers or retailers.

Not one of these factors can, by itself, necessarily give decisive guidance, but the totality of the factors considered must lead to the conclusion that further increased imports are imminent and that, unless protective action is taken, serious injury would occur." *(Emphases added)*

First, the TC found that imports of Type I and IP cement by traders grew at significant rates during the period of import surge (2016-2018) and continued to significantly rise in 2019, despite the imposition of a provisional safeguard measure, indicating the high likelihood of substantially increased importations in the near future,[123] to wit:

"**9.2.1 Rate of Increase of Imports of Cement into the Philippines**

Imports of Type I and Type IP cement by traders increased at significant rates during the period of import surge and continued to rise in 2019 (Table 9.14). For the period of January to June 2019, imports of subject article amounted to 3.3M MT. This most recent level of imports is (a) greater than the import volume for the whole year of 2017; (b) is 80% higher than the import volume for the same period in 2018; and (c) represents

[123] Exhibit "P-509", p. 106; Exhibit "R-12", Docket – Vol. V, p. 2040.

fully 71% of the import volume for the entire year of 2018. Clearly, there was no chilling effect on cement importations despite the imposition of a provisional safeguard measure in February 2019. That the import situation has not abated in 2019 indicates the high likelihood of substantially increased importations of cement into the Philippines in the near future.

Table 9.14. Imports of Type I and Type IP Cement, By Traders ('000 MT): 2013-2019 (January to June)

Year	2013	2014	2015	2016	2017	2018	2018 (January to June)	2019 (January to June)
Imports by Trader	0	4	294	1,737	3,079	4,659	1,833	3,293
Growth Rate (%)	n.a.	n.a.	7,248.23	491.09	77.23	51.30	n.a.	79.69

Source: BOC-EIEDs[124]

The WTO Panel in *US-Lamb* considered that 'a continuation of imports at an already increased level' is sufficient to cause a threat of serious injury to the domestic industry."[125]

Second, the TC found that there are sufficient freely disposable cement production capacities in Vietnam and China, the major exporters of cement to the Philippines and the status of the Philippines as a top cement export market for said countries and imposes 0% MFN[126] and preferential tariffs on cement imports indicate the high likelihood of substantially increased exports of cement to the Philippines in the near future,[127] to wit:

"9.2.2 Production Capacities of Exporters

Vietnam and China were the top exporters of cement to the Philippines during the POI and until the first semester of 2019. Together, these two (2) countries accounted for 77% of total imported supply in the Philippine cement market during the period. The average annual growth rates of cement imports from these (2) countries increased exponentially, by 154% for Vietnam and 560% for China, during the period of import surge.

Moreover, the Philippines was a top country destination for both Vietnam and China. For Vietnam, the Philippines was the top export market and absorbed an average of 22% of Vietnamese cement exports during the period 2013-2017. As for China, the Philippines ranked 10th (for 2013-2017) and an average of 4% of Chinese cement exports entered the Philippines during the POI.

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[124] That is, "Electronic Import Entry Declarations."
[125] Exhibit "P-509", p. 97; Exhibit "R-12", Docket – Vol. V, p. 2031.
[126] That is, "Most Favoured Nation".
[127] Exhibit "P-509", p. 106; Exhibit "R-12", Docket – Vol. V, p. 2040.

Vietnam and China are both recognized as powerhouses in terms of cement production capacity. There are 107 cement facilities, belonging to 93 companies, with a total annual capacity of 120.9M MT in Vietnam. Vietnam is foreseen to further increase its cement capacity in the next three years (2020-2022) attributed to the aggressive expansion of local private players including Thanh Thang, Vissai, Thai Group (previously Xuan Thanh) and Long Son. Given the foregoing, Vietnam is expected to face a continuous cement surplus until 2027.

On the other hand, China's production volume in 2017 surpassed cement production by the rest of the world during same year, i.e., China produced a total of 2.4B MT of cement, while the rest of the world produced 1.7B MT. Currently, China has 238 integrated cement plants, 11 clinker plants, and 33 grinding plants with an installed capacity of 2.3B MT.

By comparison, the Philippines' average annual cement requirement during the POI was 25.2M MT and the local cement industry's ten (10) manufacturers have a combined effective mill capacity of 35.1M MT.

Combined with a Philippines MFN tariff rate of 0% and combined preferential tariffs of 0% under the ATIGA[128] and the ASEAN-China FTA,[129] the sufficient freely disposable production capacities of cement in major foreign suppliers Vietnam and China and the status of the Philippines as a top cement export marked for said countries indicate the likelihood of substantially increased exports of cement to the Philippines in the near future."[130]

Third, the TC found that there was a significant deterioration in the overall position of the domestic cement industry during the period of import surge,[131] to wit:

"9.2.3 Decline in the Domestic Cement Industry's Performance Indicators

<u>**Market Share of the Domestic Cement Industry**</u>

The domestic cement industry's average market share of 99% from 2013 to 2015 was not sustained in the subsequent years (Figure 32). During the period of import surge, the domestic cement industry saw successive significant declines in its market

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[128] That is, "Association of Southeast Asian Nations Trade in Goods Agreement".
[129] That is, "Free Trade Area".
[130] Exhibit "P-509", pp. 97 to 98; Exhibit "R-12", Docket – Vol. V, pp. 2031 to 2032.
[131] Exhibit "P-509", p. 106; Exhibit "R-12", Docket – Vol. V, p. 2040.

share (to 93%, 89% and 86% in 2016, 2017 and 2018, respectively) despite annual increases in market demand. In contrast, the share of the Philippine market captured by foreign cement doubled from 7% in 2016 to 14% in 2018 even though demand expanded at a lower rate (by 22%) between said years.

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<u>Sales of Type I and Type IP Cement By the Domestic Cement Industry</u>

Sales volumes of the domestic cement industry increased from 18.6 M MT in 2013 to 23.2M MT in 2016 when imports surged and 26.7M MT at the end of the POI. The rate of increase in the domestic industry's sales during the period of import surge was significantly lower than the increase in market demand and the expansion of its effective production capacities (Figures 33 and 34). The rate of growth of sales also weakened during the period of import surge (Figure 35). While its domestic sales were increasing, the domestic industry's EBIT [132] was declining, indicative of the import of the import-parity-pricing strategy adopted by local cement makers in response to the price undercutting by imported cement from traders (Figure 36).

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<u>Production of Type I and Type IP Cement By the Domestic Cement Industry</u>

Production volumes of the local cement industry increased from 18.9M MT in 2013 to 23.4M MT in 2015. This growth was arrested the following year when imports surged. In 2017 and 2018, output growth resumed but at a considerably slower rate than in the first three (3) years of the POI (Figure 37). Relative to the expansion in market demand and production capacity, the movement in production growth was significantly lower (Figures 38 and 39).

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<u>Capacity Utilization of the Domestic Cement Industry</u>

The domestic cement industry can fully supply the domestic requirement for cement. From an effective mill capacity of 25M MT in 2013, industry capacity increased to 35.1 M MT

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[132] That is, "Earnings Before Interest and Taxes".

five (5) years later. By comparison, annual demand levels were lower, e.g., 18.7M MT in 2013 and 32.4M MT in 2018 (Table 9.3).

Despite sufficient production capacity of the domestic cement industry relative to the annual national requirement, the improvement in mill utilization rates straggled behind the increase in production capacity and market demand during the latter half of the POI (Figure 40). A comparison of production and utilization growth rates shows the latter trailing the former during the period of import surge, indicating that production growth is too small vis-à-vis the expansion in effective capacity (Figure 41). Finally, the improvement in utilization rates was lower during the period of import surge (Figure 42).

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Profitability of the Domestic Cement Industry

While income from operations of the domestic cement industry showed an increasing trend from 2013 to 2016, this was halted in the latter part of the POI when imports surged (Figure 43). From an average annual growth rate of 15% in 2014 to 2016, income from operations went down by 51% in 2017 and further by 14% in 2018. Such a decline in profitability is alarming as it impacts negatively on the ability of the domestic cement industry to continue with its planned additional investments to modernize and expand capacity. Profitability indicators EBIT and ROS also started to decline during the period of import surge (Figures 44 and 45)."[133]

As regards the inventories of the product being investigated, the TC found that inventory levels are not an appropriate indicator of the local cement industry's position as the limited shelf life of cement means that domestic producers are forced to sell all their production and a situation of burgeoning inventories is carefully avoided.[134]

From the foregoing, guided by Rule 12.3 of the IRR of RA No. 8800, the TC's determination that there was threat of serious injury to the domestic cement industry has factual bases.

However, petitioners insist that there is no significant increase of imports from 2013 to 2018 since the domestic cement industry dominated the market, holding 93% of the market share; that during the POI, as found by the TC itself, the market share of the domestic cement industry never went below

[133] Exhibit "P-509", pp. 98 to 104; Exhibit "R-12", Docket – Vol. V, pp. 2032 to 2038.
[134] Exhibit "P-509", p. 105; Exhibit "R-12", Docket – Vol. V, p. 2039.

85%; that the TC also did not find any substantial increase, or imminent substantial increase, in production capacity contrary to the second indicator (Rule 12.3.b), and that the similar trend in the growth of both the demand for the Subject Products and the domestic sales volume shows that the domestic cement industry was able to capture the majority of the domestic market despite the increase in the importation of the Subject Products, contrary to the third factor (Rule 12.3.c).[135]

But contrary to petitioners' arguments, the Court finds that the TC's findings were adequately explained and supported by data or information it gathered from various parties as presented above. Hence, the TC's factual findings must stand.

Also, as correctly observed by public respondents, petitioners, although expressing disagreement with the interpretations, do not contest the validity of the data and, indeed, even cite them,[136] *albeit* drawing different conclusions. There is, however, no persuasive argument as to why their interpretations should take precedence over the DTI and TC's expert determinations.[137]

In the Resolution in the *Southern Cross Cement* case,[138] the Supreme Court has accorded great respect to the factual findings of the TC owing to its vaunted expertise and specialization, to wit:

> "xxx To insulate the factual determination from political pressure, and to assure that it be conducted by an entity especially qualified by reason of its general functions to undertake such investigation, **Congress deemed it necessary to delegate to the Tariff Commission the function of ascertaining whether or not the those factual conditions exist to warrant the atypical imposition of safeguard measures**. After all, the **Tariff Commission retains a degree of relative independence by virtue of its attachment to the National Economic and Development Authority, 'an independent planning agency of the government,' and also owing to its vaunted expertise and specialization.**" *(Emphases added)*

Moreover, petitioners stress that the *Final Report* concluded that there is supposedly a threat of serious injury in the near future, but this was immediately negated when the TC allegedly issued, thirty-eight (38) months after the *Final Report*, the SGD EXT Final Report wherein the period under review covers the years 2019 to 2021. Similar to the *Final Report*, in the SGD EXT Final Report, the TC found no serious injury. More importantly, it did not even find a threat

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[135] Pars. 81 to 82, petitioners' *Memorandum*, Docket – Vol. VII, p. 3113.
[136] Refer to pars. 89 to 128, petitioners' *Memorandum*, Docket – Vol. VII, pp. 3116 to 3134.
[137] Par. 45, public respondents' *Memorandum*, Docket – Vol. VII, p. 2933.
[138] G.R. No. 158540, August 3, 2005.

of serious injury. Accordingly, petitioners argue that the threat of serious injury as referred to in the *Final Report* is utterly baseless.[139]

However, it should be noted that said SGD EXT Final Report was not presented in evidence, hence, the Court cannot consider the same as it was not formally offered.[140] Moreover, it is incorrect to say that the TC's conclusion is utterly baseless when later on it is found that there was no serious injury or threat of serious injury that transpired in the near future as the imposition of definitive general safeguard duties during the said period might have contributed in the preventing or alleviating the occurrence of the threat of serious injury. Further, TC's conclusion were based on projections or trends derived from historical or available data at that time.

Causal link between the increased imports of the product under consideration and the serious injury or threat thereof.

The TC found the existence of a direct causal relationship between increased imports of cement and the imminent threat of serious injury and significant overall impairment to the position of the domestic cement industry in the near future. While there were other factors that contributed to the impairment of the domestic cement industry, these were not substantial to cause serious injury to the local cement industry during the period of import surge,[141] to wit:

> **"10.1 Impact of Increased Imports on the Domestic Cement Industry**
>
> The surge in imports of cement, which commenced in 2016, directly caused the deterioration in the overall position of the domestic cement industry in the latter half of the six (6)-year POI. In particular, increased volumes of low-priced cement imports by traders prevented the local cement industry from improving its performance and reaping the growth potential of a significantly expanding Philippine market for cement.
>
> The decline in the domestic cement industry's performance due to the surge in cement imports starting in 2016 was evidenced by the following:
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> a. In a growing domestic market for cement, the local cement industry's share slipped from an average 99% (2013-2015) to

[139] Pars. 87.1 to 87.2, petitioners' *Memorandum*, Docket – Vol. VII, p. 3115.
[140] Section 34, Rule 132, Revised Rules on Evidence.
[141] Exhibit "P-509", p. 110; Exhibit "R-12", Docket – Vol. V, p. 2044.

86% in 2018. Imports captured the growth in cement demand: the share of the market obtained by imports by traders rose from 1% (pre-surge) to 14% (end of the POI).

b. Due to the increasing market presence of cement imports starting 2016, domestic sales and production by the local cement industry lagged significantly behind the expansion of the Philippine cement market. Sales and production growth rates deteriorated considerably during the period of import surge and were significantly lower relative to the increase in the industry's effective capacities.

c. Although the domestic cement industry was able to anticipate larger requirements for cement in the future and installed the required capacity, the improvement in industry utilization rates significantly weakened due to the surge in imports that displaced sales of the local cement industry therefore crimping production. Effective capacities were not fully utilized in an expanding market.

d. While the local cement industry remained the dominant player in the domestic cement market, this was possible only because of the pricing strategy adopted by the industry to combat the price undercutting of cement imports by traders throughout the POI. Said pricing strategy ultimately proved costly to the local cement industry because it substantially weakened the industry's financial performance, i.e., operating income, sales returns, and EBIT markedly declined during the period of import surge. Decreasing cash flows put at risk the implementation of planned additional investments to modernize and increase capacity.

10.2 Impact of Other Factors on the Domestic Cement Industry

<u>High Costs of Production.</u> The cement industry had difficulty achieving cost competitiveness because of the high costs of power, coal and fuel which collectively accounted for around 13% of COPS.[142] The increase in coal and fuel in 2018 (by 22% from 2017) can be attributed to the passage of RA No. 10963, or the Tax Reform for Acceleration and Inclusion (TRAIN) Act, which essentially increased the excise tax rates on coal, fuel, and mineral resources. RA No. 10963 took effect on 01 January 2018.

While contributory to the impairment of the domestic cement industry, increases in power, coal and fuel costs are

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142 That is, "Cost to Produce and Sell".

> beyond industry control and plague every other Philippine manufacturing industry.
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> **<u>High Logistics Costs.</u>** Logistics costs include freight, travel expenses, and distribution costs. This additional cost of moving cement from plants made it difficult for the industry to match the already comparatively low-priced imports, especially in the Mindanao and Visayas regions. Logistic costs collectively accounted for almost 5% of COPS.
>
> Although contributory to the impairment in profitability of the domestic industry during the period surge, logistics costs were not the substantial cause of the imminent threat of serious injury to the domestic industry.
>
> **<u>High Operating Expenses.</u>** The amounts of operating expenses indicated in the consolidated income statement of the domestic cement industry were relatively constant during the latter part of the POI when imports surged. Included in operating expenses were the royalties, license and franchise fees paid by CeMAP member-companies (except Taiheiyo) to their parent companies, which accounted for an average 9% of their sales revenues.
>
> These fees, while contributory to the overall impairment in industry profitability, were not the principal cause of the impending serious injury to the local cement industry."[143]

However, petitioners argue that a multitude of factors exist which contributed to, or at the very least, substantially influenced, the impairment of the domestic cement industry which negates any supposed causal link between the increase in the importation of the Subject Products and any supposed serious injury or threat thereof to the domestic cement industry.[144]

Again, petitioners do not contest the validity of the data in the *Final Report* and, indeed, even cited them,[145] although drawing different conclusions. However, as above stated, the TC's conclusion are accorded great respect owing to its expertise and specialization.

The DTI Secretary established that the imposition of the safeguard measure will be in the public interest.

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[143] Exhibit "P-509", pp. 108 to 109; Exhibit "R-12", Docket – Vol. V, pp. 2042 to 2043.
[144] Par. 132, petitioners' *Memorandum*, Docket – Vol. VII, p. 3135.
[145] Refer to pars. 134 to 142, petitioners' *Memorandum*, Docket – Vol. VII, pp. 3136 to 3142.

After a positive final determination by the TC that the Subject Products are being imported into the country in increased quantities (whether absolute or relative to domestic production), as to be a substantial cause of serious injury or threat to the domestic industry, the DTI Secretary must establish that the application of such safeguard measures is in the public interest.

It is noteworthy that the Supreme Court has always grappled with the meaning of the term "public interest." Public interest", although not defined in the law, "is something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected; it does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question."[146] Moreover, the Supreme Court has defined "public interest" as too elastic, broad and comprehensive which may include most anything though of minor importance, but affecting the public.[147]

In this case, the DTI Secretary found that imposition of the definitive general safeguard measure shall be in the public interest, his reasons were stated in DAO 19-13,[148] which were already quoted earlier.

Again, in the Resolution in the *Southern Cross Cement case*,[149] the Supreme Court elucidated the subject matter as follows:

> "We recognize that Congress deemed it necessary to insulate the process in requiring that the factual determination to be made by an ostensibly independent body or specialized competence, the Tariff Commission. This prescribed framework, constitutionally sanctioned, is intended to prevent the baseless, whimsical, or consideration-induced imposition of safeguard measures. It removes from the DTI Secretary jurisdiction over a matter beyond his putative specialized aptitude, the compilation and analysis of picayune facts and determination of their limited causal relations, and instead **vests in the Secretary the broad choice on a matter within his unquestionable competence, the selection of what particular safeguard measure would assist the duly beleaguered local industry yet at the same time conform to national trade policy**. Indeed, the SMA recognizes, and places primary importance on the DTI Secretary's mandate to formulate trade policy, in his capacity as the President's alter ego on trade, industry and investment-related matters." *(Emphasis added)*

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[146] *Palad vs. Solis, et al.*, G.R. No. 206691, October 3, 2016.
[147] *In Re: Parazo*, G.R. No. 120348, December 3, 1948.
[148] Exhibit "P-523", Docket – Vol. I, pp. 87 to 91.
[149] G.R. No. 158540, August 3, 2005.

Clearly, respondent DTI Secretary's mandate is to decide, only after the TC's positive final determination, whether to apply safeguard measures and to determine the appropriate definitive measure as provided in Section 13 of the SMA.

To reiterate, the Court gives great weight to the decision of respondent DTI Secretary to apply safeguard measures on the ground of protecting public interest in this case. And to stress, elementary is the rule that courts will not interfere on matters which are addressed to the sound discretion of government agencies entrusted with the regulation of activities coming under their respective special technical knowledge and training.[150] The opinions and rulings of officials of the government called upon to execute or implement administrative laws, command respect and weight;[151] provided that the same are supported by substantial evidence.[152]

Petitioners also point out that the PCC stressed that the imposition of safeguard duties on cement would weaken competitive pressure and endanger the realization of huge benefits by both the public and private sectors that a competitive landscape would bring. Furthermore, the PCC stated that the imposition of safeguard duties would consequently result in the increase in the price of imported cement, which would distort competition since domestically manufactured cement would have enhanced ability and incentive to increase prices.[153] Hence, petitioners argue that respondent Secretary gravely erred in ignoring the position of the PCC.

However, the Court is unconvinced that the DTI Secretary ignored the PCC's position and finds that he took the same into consideration as the same was even cited in the *Final Report*, and DAO No. 19-13[154] stated that "Accordingly, the DTI has reviewed the Commission's findings and recommendation and has established that the imposition of the definitive general safeguard measure shall be in the public interest. While DTI is mandated to protect consumers, there is a need to balance this taking into account other sectors such as investors and industry which provide employment to Filipinos. There is also a need to moderate imports to balance trade. xxx"

At the risk of sounding repetitive, the Court emphasizes that the factual findings of administrative agencies are generally accorded not only respect but also finality when the decision and order are not tainted with unfairness or arbitrariness that would amount to abuse of discretion or lack of jurisdiction.

[150] *Batelec II Electric Cooperative Inc. vs. Energy Industry Administration Bureau (EIAB), et al.*, G.R. No. 135925, December 22, 2004.
[151] *Protector's Services, Inc. vs. Court of Appeals, et al.*, G.R. No. 118176, April 12, 2000.
[152] *Floralde, et al. vs. Court of Appeals, et al.*, G.R. No. 123048, August 8, 2000.
[153] Par. 146, petitioners' *Memorandum*, Docket – Vol. VII, p. 3145; Exhibit "P-509", p. 34; Exhibit "R-12", Docket – Vol. V, p. 1968.
[154] Exhibit "P-523", Docket – Vol. I, pp. 87 to 91.

These findings therefore must be respected, so long as they are supported by substantial evidence even if not overwhelming or preponderant. Substantial evidence means such amount of relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[155]

In sum, petitioners having failed to convince the Court that the TC and DTI Secretary's findings and conclusions were tainted with unfairness or arbitrariness or that these administrative bodies have grossly misappreciated evidence or acted in grave abuse of discretion, these findings and conclusions should be accorded great respect, and even finality.

WHEREFORE, in light of the foregoing considerations, the present *Petition for Review* is **DENIED** for lack of merit.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

I CONCUR:

(INHIBITED)
MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

CORAZON G. FERRER-FLORES
Associate Justice

ATTESTATION

I attest that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice
Chairperson

[155] *Quezon City Eye Center vs. Philippine Health Insurance Corporation, et al.*, G.R. Nos. 246710-15, February 6, 2023.

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice