Chapter 17

Southern Cross Cement Corporation v. Philippine Cement Manufacturers Corporation: Executive Power to Protect Local Industries

The state power to impose safeguard measures to protect domestic industries and producers from increased imports that result in or threaten serious injury to the local industry was discussed in *Southern Cross Cement Corporation v. Philippine Cement Manufacturers Corporation*.[1] More particularly, the case clarified certain provisions of Republic Act No. 8800 (RA 8800), also known as the Safeguard Measures Act (SMA).[2]

The Facts

In 2001, the Philippine Cement Manufacturers Corporation[3] (Philcemcor), an association of domestic cement manufacturers, filed with the Department of Trade and Industry (DTI) an application for the imposition of a definitive safeguard measure on the importation of gray Portland cement. Philcemcor alleged that gray Portland cement was being imported in increased quantities, thus causing declines in domestic production, capacity utilization, market share, sales and employment, as well as depressed local prices. The application was opposed by Southern Cross Cement Corporation, a domestic corporation engaged in the business of cement manufacturing, production, exportation, and *importation*.

In accordance with the procedure laid down in RA 8800, the Bureau of Import Services

of the DTI conducted a preliminary investigation, after which it determined the existence of critical circumstances justifying the imposition of provisional measures. Thus, on November 7, 2001, the DTI issued an Order imposing a provisional measure in the form of a safeguard duty equivalent to twenty pesos and sixty centavos (₱20.60) per forty- kilogram (40-kg) bag on all importations of gray Portland cement for a period not exceeding two hundred (200) days from the date of issuance by the Bureau of Customs (BOC) of the implementing Customs Memorandum Order, issued on December 10, 2001.

Also pursuant to RA 8800, the DTI referred the application for a formal investigation to the Tariff Commission (TC). On March 13, 2002, the Commission issued its Formal Investigation Report, in which it made the following negative recommendation:

> "The elements of serious injury and imminent threat of serious injury not having been established, it is hereby recommended that no definitive general safeguard measure be imposed on the importation of gray Portland cement."

After reviewing the report, then DTI Secretary Manuel Roxas II disagreed with the TC's conclusion that no serious injury to the local cement industry had been caused by the surge of imports. In view of this disagreement, the DTI requested an opinion from the Department of Justice (DOJ) on the DTI head's options on the Commission's recommendations. In response, then DOJ Secretary Hernando Perez rendered an Opinion stating that Section 13 of the SMA had precluded a review by the DTI secretary of the TC's finding that a definitive safeguard measure should *not* be imposed.

On April 5, 2002, the DTI secretary promulgated a Decision, in which he quoted the

TC's conclusions, but noted his disagreement. Citing, however, the DOJ Opinion advising the DTI that the latter was bound by the TC's negative finding, he disposed thus:

> "The DTI has no alternative but to abide by the [Tariff] Commission's recommendations.
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> "**IN VIEW OF THE FOREGOING,** and in accordance with Section 13 of RA 8800 which states:
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> ***'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.'***
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> "The DTI hereby issues the following:
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> "The application for safeguard measures against the importation of gray Portland cement filed by PHILCEMCOR (Case No. 02-2001) is hereby denied." (Emphasis in the original.)

Consequently, Philcemcor filed with the Court of Appeals (CA) a Petition for Certiorari, Prohibition and Mandamus, seeking to set aside the DTI Decision, as well as the TC's Report.

In its Decision promulgated on June 5, 2003, the CA granted Philcemcor's Petition in part. The appellate court ruled that it had jurisdiction over the Petition, which had alleged grave abuse of discretion. But the CA refused to annul the TC's findings, on the ground that factual findings of administrative agencies were binding upon the courts; and that courts should not interfere in matters addressed to the sound discretion of such agencies and

embraced within the latter's special technical knowledge and training.[4] Nevertheless, it held that the DTI secretary was not bound by the TC's factual findings, which were merely recommendatory and were within the ambit of his discretionary review. The dispositive portion of the CA Decision reads:

> "WHEREFORE, based on the foregoing premises, petitioner's prayer to set aside the findings of the Tariff Commission in its assailed Report dated March 13, 2002 is DENIED. On the other hand, the assailed April 5, 2002 Decision of the Secretary of the Department of Trade and Industry is hereby SET ASIDE. Consequently, the case is REMANDED to the public respondent Secretary of Department of Trade and Industry for a final decision in accordance with RA 8800 and its Implementing Rules and Regulations."

On June 23, 2003, Southern Cross filed a Petition before the Supreme Court, alleging that the CA had no jurisdiction over Philcemcor's Petition, as the proper remedy conformable to RA 8800 was a petition for review at the Court of Tax Appeals (CTA). Southern Cross further alleged that the TC's factual findings on the existence or the nonexistence of conditions warranting the imposition of general safeguard measures were binding upon the DTI secretary.

Despite the pendency of the Petition before the Supreme Court, the DTI secretary issued on June 25, 2003, a new Decision stating that -- in the light of the appellate court's Decision -- there was no longer any legal impediment to his decision on Philcemcor's application for definitive safeguard measures.[5] He ruled that, contrary to the TC's findings, the local cement industry had suffered serious injury as a result of the import surges.[6] Accordingly, a definitive safeguard measure on the importation of gray Portland cement was imposed, in the form of a definitive safeguard duty in the amount of ₱20.60 for every 40-kg

bag of the cement for three years.

On July 7, 2003, Southern Cross sought to enjoin the DTI secretary from enforcing his June 25, 2003 Decision by filing with the Supreme Court a Very Urgent Application for a Temporary Restraining Order and/or a Writ of Preliminary Injunction. On August 1, 2003, it likewise filed with the CTA a Petition for Review. Because of the double remedy resorted to by Southern Cross, Philcemcor filed with the Supreme Court (SC) a Manifestation and Motion to Dismiss the Petition, on the ground of deliberate and willful forum shopping.

The Issues

The issues raised were the following: (1) whether a Decision of the DTI secretary denying the imposition of a safeguard measure was appealable to the CTA; and (2) whether the DTI secretary could impose a general safeguard measure only upon a positive final determination by the Tariff Commission.

The Court's Ruling

On July 8, 2004, the Supreme Court (Second Division) promulgated its Decision.[7] The Court held that forum shopping had not been duly proven, as no malicious intent to subvert procedural rules was evident.

As regards the jurisdictional issue, the Court said that while the CA had certiorari

powers, the special civil action of certiorari was available only when there was no plain, speedy and adequate remedy in the ordinary course of law.[8] A plain, speedy and adequate remedy in the ordinary course of law was, however, provided by Section 29 of the SMA, which reads:

> "Section 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 CTA, 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.
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> 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."

The SC Second Division emphasized that jurisprudence had long recognized the legislative determination to vest in a specialized court the sole and exclusive jurisdiction over matters involving internal revenue and customs duties.[9] The CTA was one such court. By the very nature of its function, it was dedicated exclusively to the study and consideration of tax and tariff matters. Necessarily, it had developed an expertise on the subject.

More significantly, the Supreme Court held that the CTA had the jurisdiction to review the DTI secretary's Decision, even if that Decision did *not* impose any safeguard measure. The SC gave the following reasons.

First, split jurisdiction is abhorred. The power of the DTI secretary to adopt or withhold a safeguard measure emanates from the same statutory source. In deciding whether

or not to impose such measure, the DTI secretary evaluates only one body of facts and applies only one set of laws. Whether the determination is positive or negative, the reviewing tribunal will also be called upon to examine the same facts and the same laws.

Besides, the law expressly confers the task of judicial review on the CTA, the tribunal with the specialized competence over tax and tariff matters. The law mentions no other court that may exercise corollary or ancillary jurisdiction over the SMA.

Second, a plain reading of Section 29 of the SMA reveals that Congress did not expressly bar the CTA from reviewing a negative determination by the DTI secretary or confer on the Court of Appeals such review authority. According to the clear text of the law, *the CTA is vested with jurisdiction to review the DTI secretary's rulings "in connection with the imposition of a safeguard measure.*" Undoubtedly, the phrase "in connection with" not only qualifies, but clarifies, the succeeding one -- the "imposition of a safeguard measure." The phrase also encompasses the opposite or converse ruling, which is the non-imposition of a safeguard measure. The scope and reach of the same phrase pertain to all rulings of the DTI or the Department of Agriculture secretary, arising from the time of the application of a safeguard measure or of the *motu proprio* initiation of its imposition.

Third, "[w]here there is ambiguity, such interpretation as will avoid inconvenience and absurdity is to be adopted."[10] Even assuming *arguendo* that Section 29 does not expressly grant the CTA jurisdiction to review a negative ruling of the DTI secretary, the Court is precluded from favoring an interpretation that would cause inconvenience and absurdity.

Section 29 of the SMA is worded in such a way that it places under the CTA's judicial review all of the DTI secretary's rulings connected with the imposition of a safeguard measure. In the same way that a question of whether to tax or not to tax is properly a tax matter, so is the question of whether to impose or not to impose a definitive safeguard measure.

As regards the issue of the binding effect on the DTI secretary of the TC's factual determination, the Decision held that the DTI head could not impose a safeguard measure without a positive final determination by the Commission. It said that Section 13 prescribed certain limitations and restrictions before general safeguard measures could be imposed. But the most fundamental restriction, contained in Section 5, provides as follows:

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

The conditions precedent that must be satisfied before the DTI secretary may impose a general safeguard measure are as follows: *one*, there must be a positive final determination by the Tariff Commission that a product is being imported into the country in such increased quantities (whether absolute or relative to domestic production) as to be a substantial cause of serious injury or threat to the domestic industry; and, *two*, in the case of non-agricultural products, the secretary must establish that the application of a safeguard measure is in the

public interest.

According to the SC Second Division, the plain meaning of Section 5 was that only if the Tariff Commission rendered a positive determination could the DTI secretary impose a safeguard measure. The TC's power to make a "positive final determination" must be distinguished from the power to impose general safeguard measures, a power that is vested in the DTI secretary. A "positive final determination" 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 TC's positive final determination, the DTI secretary may decide not to apply the safeguard measure in the interest of the public.

The legislative intent should be given full force and effect, as the executive power to impose definitive safeguard measures is but a delegated power -- the power of taxation which is, by nature and by command of the fundamental law, a preserve of the legislature.[11] Section 28(2), Article VI of the 1987 Constitution, authorizes the delegation of the legislative power to tax, yet ensures the prerogative of Congress to impose limitations and restrictions on the executive exercise of this power. This provision states thus:

> "The Congress may, by law, authorize the President to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts within the framework of the national development program of the Government."[12]

The SMA empowered the DTI secretary, as alter ego of the President,[13] to impose definitive safeguard measures,[14] which were basically tariff imposts of the type spoken of in the Constitution. The law, however, did not grant the executive official full and uninhibited discretion to impose such measures.

The word "determination," as used in the SMA, pertained to the factual findings on whether imports into the country of the product under consideration had increased, and on whether the increase substantially caused or threatened to substantially cause serious injury to the domestic industry.[15]

According to the Decision, the law explicitly authorizes the DTI secretary to make a preliminary determination,[16] and the Tariff Commission to make the final one.[17] These functions are not interchangeable. The Commission makes its determination only after a formal investigation process, which in turn is undertaken only if there is a positive preliminary determination by the DTI secretary.[18] On the other hand, the latter may impose a definitive safeguard measure only if there is a positive final determination by the Commission. *In this respect, the DTI head is bound by the TC's determination.*

In contrast, a "recommendation" is a suggested remedial measure submitted by the Commission under Section 13, after making a positive final determination in accordance with Section 5. Under Section 13, the Commission is required to recommend to the DTI secretary an "appropriate definitive measure."[19] It "may also recommend other actions, including the

initiation of international negotiations to address the underlying cause of the increased imports of a product, to alleviate the resulting injury or threat on the domestic industry, and to facilitate a positive adjustment to import competition."[20]

Nothing in the SMA obliges the DTI secretary to adopt the recommendations made by the Tariff Commission. The SMA in fact requires the DTI head to determine if the application of safeguard measures is in the public interest, notwithstanding the TC's positive final determination.[21]

The non-binding force of the Commission's recommendations is congruent with Section 28(2) of Article VI of the 1987 Constitution. According to the mandate of this provision, only the President may be empowered by Congress to impose appropriate tariff rates, import/export quotas and similar measures. It is the DTI secretary, as the President's alter ego who, under the SMA and subject to its limitations, may impose the safeguard measures.

A contrary conclusion would in essence unduly arrogate to the Tariff Commission the executive power to impose the appropriate tariff measures. Thus, the SMA empowers the DTI secretary to adopt safeguard measures other than those recommended by the Commission.

Yet, the Court held that the DTI head did not have the power to review the findings of the Tariff Commission, which was not a subordinate agency of the DTI. The TC fell under the supervision of the National Economic Development Authority (NEDA), an independent government planning agency that was coequal with the DTI. In general, the DTI secretary

could not exercise review authority over actions of the Tariff Commission, as the former's supervision and control were limited to subordinate bureaus, offices, and agencies. Neither did the SMA specifically authorize the DTI head to alter, amend or modify the TC's determination. The most that the secretary could do to express displeasure over the actions of the Commission was to ignore its recommendation, but not its determination.

Finally, the Decision ruled that the mechanism established by Congress had put in place a measure of check and balance between two different governmental agencies with disparate specializations. The matter of safeguard measures was of such national importance that a decision either to impose or not to impose them could have had ruinous effects on companies doing business in the Philippines. Thus, it was ideal to put in place a system that would afford all due deliberation and call to the fore various governmental agencies exercising their particular specializations.

In sum, the SC (Second Division) held that the Court of Appeals had erred in remanding the case to the DTI secretary, with the instruction that the secretary could impose a general safeguard measure, even if there was no positive final determination from the Tariff Commission. More crucially, the CA did not acquire jurisdiction over Philcemcor's Petition for Certiorari, as Section 29 of RA 8800 had vested jurisdiction in the CTA. Consequently, the assailed CA Decision was an absolute nullity.

Because it was from the void CA Decision that the June 25, 2003 DTI Decision derived its legal basis, the latter former was consequently void. *The spring cannot rise higher than its source*.

Thus, the Supreme Court (Second Division) disposed as follows:

> "WHEREFORE, the petition is GRANTED. The assailed *Decision* of the Court of Appeals is DECLARED NULL AND VOID and SET ASIDE. The *Decision* of the DTI Secretary dated 25 June 2003 is also DECLARED NULL AND VOID and SET ASIDE. No Costs."

Motions for Reconsideration

On behalf of the public respondents, Philcemcor and the Office of the Solicitor General (OSG) filed Motions for Reconsideration and sought the referral of the case to the Court en banc. In a Resolution dated September 15, 2004, the Special Second Division referred the case to the Court en banc. On September 21, 2004, the full Court resolved to accept the referral. On March 1, 2005, the 15 members of the Court heard oral arguments

In the Resolution dated August 2, 2005, written also by Justice Dante O. Tinga, the Court en banc -- by a vote of 8-5-2[22] -- upheld the assailed Decision in toto.

My Separate (Concurring and Dissenting) Opinion

I wrote a Separate Opinion concurring in the Court's August 2, 2005 Resolution, insofar as it ruled that the CTA had jurisdiction to review the DTI secretary's Decision either imposing or not imposing a safeguard measure.[23] Accordingly, the CA acted arbitrarily in giving due course to the private respondent's Petition for Certiorari seeking to set aside the

DTI secretary's April 5, 2002 Decision. Therefore, its June 5, 2003 Decision was void and had no legal effect.

Having ruled that the CA Decision was void, the Supreme Court would have normally dismissed the present Petition. But the remaining issue was *purely legal and imbued with public interest,* because it touched upon the economic security of our domestic industries. Hence, I opined that it was proper for the Supreme Court to resolve the question once and for all, as an exception to the general rule. The resolution of the legal issue at the time would avoid unnecessary delays and costs, consistent with the Court's policy of prompt and proper administration of substantial justice.

In the same Separate Opinion, I dissented from the majority's holding that the DTI secretary was *bound* by the *negative* recommendations of the Tariff Commission and could thus impose a safeguard measure only when the TC would so recommend. **I said that the DTI secretary had the power to impose safeguard measures, even if the TC had not recommended the imposition.**

First, the power to tax (which includes the imposition of tariffs, duties and other imposts), while inherent in the State, can be exercised only by Congress, unless the Constitution allows that power to be conferred upon another government instrumentality.[24] Though primarily intended to protect domestic industries, the application of safeguard measures was essentially in the nature of a tariff imposition. The power to fix tariffs may, as an exception, be delegated by Congress to **the President** under Section 28 of Article VI of the

Constitution, which reads:

> "Sec. 28. x x x
>
> "(2) The Congress may, by law, authorize the President to fix, within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts within the framework of the national development program of the Government."

No other government executive or agency is mentioned in the Constitution.

The majority Resolution theorized that such power to fix tariffs may nevertheless be delegated by Congress to both the Tariff Commission and the DTI secretary "as agents of Congress." I opined that this theory plainly violated the constitutional provision cited above. Delegation by Congress of the power to impose tariffs to whomsoever it chooses (other than the President) is beyond its constitutional authority.

The only constitutional way to uphold the DTI secretary's imposition of tariffs under RA 8800 is to apply the "alter ego principle." In other words, the secretary imposes safeguard measures (like tariffs, import quotas, quantitative restrictions and so on), but only in representation and as the alter ego of the President in the field of trade and investment matters. Thus, the law must be construed as delegating to the President, through the latter's alter ego on trade, the power to impose safeguard measures.

Second, Section 1 of Article VII of the Constitution vests executive power in the President. As the Chief Executive of the Republic, the President exercises control over all

executive departments, bureaus and offices.[25] *Control* is defined as "the power of an officer to alter or modify or nullify or set aside what a subordinate officer ha[s] done in the performance of his duties and to substitute the judgment of the former for that of the latter."[26] The President's power extends to "all executive officers from cabinet member to the lowliest clerk. It is at the heart of the meaning of 'Chief Executive.'"[27]

The control power of the Chief Executive emanates from the Constitution; thus, no act of Congress may validly curtail it. While Congress specifies the "limitations and restrictions" on the President's authority to impose tariff rates, those limitations and restrictions must themselves conform to the fundamental law. They cannot infringe or restrict the constitutional power of the President to control the entire Executive Department.

Third, being an agency in the Executive Department, the Tariff Commission is necessarily subject to the control and supervision of the President. Hence, the TC's decisions and recommendations cannot tie the hands of the Chief Executive with finality, as effectively held by the majority.

Fourth, in imposing a safeguard measure, the DTI head merely acts as the President's alter ego. The President's power of control over any office in the Executive Department cannot be restricted or degraded by Congress. By the same reasoning, the exercise by the alter ego of such power of control over the TC's actions cannot be constitutionally curtailed by Congress. Through the constitutional power of control over the Executive Department, the President has the prerogative to affirm, modify or reverse any action of the Commission.

Thus, the DTI secretary -- as the alter ego of the President on trade matters -- may exercise, in the latter's stead, the same prerogative of affirmation, modification or reversal over any action of the Commission.

Fifth, under the same Section 28(2) of Article VI of the Constitution earlier mentioned, Congress may specify "limitations and restrictions" on the authority of the President to impose tariff rates. The latter is indeed bound by the valid restrictions or limitations laid down in RA 8800. Such statutory limitations and restrictions, however, must themselves conform to the fundamental law. They cannot infringe or dilute the constitutional power of the President to control the entire Executive Department.

Section 5 of that law specifies the conditions for the application of safeguard measures as follows: (1) the importation of a product in increased quantities, whether absolute or relative to the domestic production; (2) an actual or a threatened serious injury[28] to the domestic industry as a result of increased importation; and, (3) most important, the application of safeguard measures to serve the public interest. These are the substantial conditions or limitations specified by Congress for the imposition of such safeguard measures[29] by the DTI secretary (or, principally, the President) -- NOT the final determination or recommendation of the Tariff Commission that the first two factual conditions are present or absent.

Sixth, many immeasurable and indirect variables have to be assessed in ensuring that public interest is subserved. There are no definite parameters by which this fact may be

established solely by judicial authorities. Being indubitably a political question, such determination is addressed to a policymaker who is answerable to the people, not to a factfinder or investigatory body that has no electoral mandate. In the final analysis, the decision to impose a safeguard measure hinges on public interest, which is a political question best addressed by our people's elected officials led by the President.

Seventh, the interpretation of an administrative government agency tasked to implement a statute is generally accorded great respect and ordinarily controls the court's construction. [30] The Department of Agriculture, Trade and Industry; the Department of Finance; the Bureau of Customs; the NEDA; and the *Tariff Commission* were tasked under RA 8800 to implement its provisions. Thus, they jointly formulated the law's implementing rules, which included the following relevant provision:

> "Rule 13.2. **Final Determination by the Secretary**
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> "Rule 13.2.a. Within fifteen (15) days from receipt of the Report of the Commission, the Secretary shall make a decision, taking into consideration the measures recommended by the Commission."

Clearly, these implementing agencies understood that it was the DTI secretary who would make the final determination or decision. In making a decision, the secretary would merely *take into consideration* the recommendations of the Tariff Commission.

Additionally, in its own Order No. 00-02, the Commission described its task as "fact-finding and administrative in nature."[31] In interpreting the requirement of the law, it fully understood that "[b]ased on its findings, the Commission shall submit to the Secretary x x x

[its] Investigation Report [and] proposed recommendations x x x," among others.

TC Chairman Edgardo Abon was also cognizant of the role of the Commission. During the public consultation it conducted in relation to this case, he categorically stated that its members' "recommendation is but recommendatory. x x x. That's why the Tariff Commission's investigation is called fact-finding. x x x. [B]ut of course the recommendation can be persuasive because the [s]ecretary will have a strong argument, must really have a very, very strong arguments (sic) for him to overturn the recommendations. It has a persuasive effect, that's what [I'm] saying, but at the end of the day[,] you know … the Secretary has, for reason I think [that] in the law the matter of public interest is left to the discretion of the Secretary x x x."[32]

Indeed, the DTI secretary cannot arbitrarily issue a decision without substantial factual and legal bases. In making a final decision -- whether to impose or not to impose a safeguard measure -- the secretary is still bound by the conditions laid down in Section 5 of RA 8800. As earlier mentioned, those limitations are as follows: the importation of a product in increased quantities, whether absolute or relative to the domestic production; an actual or a threatened serious injury to the domestic industry as a result of the increased importation; and the application of the safeguard measure in the public interest.

These parameters should have allayed the petitioner's fear of a violation of due process in case of the DTI secretary's reversal of the TC's negative determination. Both may have the same factual moorings, on the basis of which they may have contrasting conclusions on the

need for a safeguard measure.

The August 3, 2005 Resolution further declared that "nothing in the SMA obliges the DTI Secretary to adopt the recommendations made by the Tariff Commission." If the secretary can reject a positive final determination of the Commission, what is the rationale behind binding the DTI head to a negative determination by the same body? This stance is apparently illogical.

Finally, the object and purpose of RA 8800 should be given utmost consideration and effect. The law was enacted primarily to protect or safeguard local industries and producers from the increased importation of foreign products that cause or threaten to cause serious domestic injury.

Thus, the courts must give domestic industries every opportunity to seek redress through the most expeditious means possible. On matters concerning policy questions, the political departments should have ample chances to make the proper determinations within their respective spheres of competency. *Be it remembered that in the imposition of safeguard measures, not only the analysis of technical data is involved, but likewise -- and, perhaps, in a more crucial sense -- the determination that such measures serve the public interest.* The proceeding does not merely relate to the settlement of conflicting claims of private parties but, more important, the achievement of the national policy to promote the competitiveness of domestic industries as a whole.

With respect to safeguard measures, the administrative agencies of the government,

particularly the Department of Trade and Industry, possess the necessary knowledge and expertise linked with policy concerns. The Department heads, especially because they serve as alter egos of the President, should not be needlessly restricted in the exercise of their discretion. They are the ones who know best how to address the nonjudicial interests of the people properly. Thus, before resorting to courts, all possible administrative means should be exhausted.

In line with this argument, I submitted that the Decision of the DTI secretary was properly appealable to the President. After all, the Chief Executive could not be deprived of the power to review, modify or reverse the actions of the alter egos. In the present case, the Constitution expressly mentions the "President" as the official whom "Congress may, by law, authorize" to impose "tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imports." Thus, in the Executive Department, the President should have the *final* say on such matters. Sadly, this argument was not raised by the parties.

With respect to the peripheral issue on forum shopping, I agreed with the Supreme Court's Resolution. The petitioner must answer for its failure to give timely information on the Petition for Review that it had filed with the CTA while this case was pending before the Court. But there being no showing of willful and deliberate forum shopping, the Petition did not deserve outright dismissal. Instead, petitioner's counsels should be sanctioned with severe censure.

Summary

In closing, I wrote the following summary of my Separate Opinion:

"The application of a safeguard measure, while primarily intended to protect domestic industries, is essentially in the nature of a tariff imposition. Pursuant to the Constitution, the imposition of tariffs and taxes may be exercised only by Congress. However, Section 28 of Article VI of the Constitution provides for an exception: it allows Congress to authorize the President to fix -- subject to such limitations and restrictions as it may impose -- tariff rates, quotas and other duties. To no official, other than **the President,** is that power allowed to be delegated.

"Consistent with the foregoing principle, RA 8800 must be construed as having delegated the power to apply safeguard measures to the President, through the *alter ego* on trade and investment matters -- the DTI secretary.

"While Congress may specify limitations in the President's authority to impose tariffs, such legislative restrictions must operate within the bounds of the Constitution. These limitations cannot impinge upon, restrict or overturn the President's constitutional power of control over the entire Executive Department.

"The power of control includes the right to modify or set aside a decision of a subordinate officer. The Tariff Commission, being a mere agency in the Executive Department, is necessarily subject to the control and supervision of the President. Hence, its decisions and recommendations cannot tie the hands of the Chief Executive with finality. Consequently, the DTI head, acting as the *President's alter ego* pursuant to RA 8800, may affirm, modify or reverse the Tariff Commission's recommendation.

"As I have said at the outset, the DTI secretary, as the prime mover of the country's trade and commercial affairs, must be given broad latitude in the pursuit of the agency's mandate. The country's topmost trade official, handpicked by the President, is presumed to possess the competence and the erudition to steer the Department towards the achievement of State goals within the DTI's sphere. As the Chief Executive's alter ego in the area of trade, the secretary must be allowed to exercise ample discretion on matters vested in the position. And so long as the Department head's decisions are not reversed or modified by the President, they should be accorded the highest respect by the courts.

"The principal duty of the judiciary is to adjudicate actual controversies involving rights and obligations of persons; it has no business interfering in the realm of policy making. Basic is the rule that courts should adopt a hands-off approach with respect to non-judicial concerns of government. The only ground upon which they can review apparently policy questions is when an act of an agency or instrumentality of government, including the Presidency and Congress, is blatantly contrary to law or the Constitution or clearly tainted with grave abuse of discretion.[33] In these exceptional instances, it becomes the bounden duty of the Court to nullify the act.[34]

"Otherwise, the official acts of the Executive and the Legislative Departments are presumed to be regular and done in good faith. Unless clear and convincing proof is presented to overthrow such presumption, the Court will resolve every doubt in their

favor.[35]

"Whether such acts are beneficial or viable is outside the realm of judicial inquiry and review. That matter is between the elected policy makers and the people.[36] To repeat, the Court's judicial role comes into play only when those acts are clearly unlawful or unconstitutional or performed with grave abuse of discretion. In nullifying them, the Court does so merely to uphold the rule of law. For indeed there can be no meaningful economic and social progress without an effective rule of law in place.[37]

"This Court should maintain its deferential stance respecting acts emanating from government agencies, especially those involving the economy. Far from being an unwanted interloper in economic matters not within its field of expertise, the Court, in recent Decisions nullifying government contracts,[38] steadfastly upholds one of the most revered policy axioms in the business community -- the 'leveling of the playing field.'[39] To paraphrase what the Court said in a recent case,[40] the 'Constitution and the law should be read in broad, life-giving strokes. They should not be used to strangulate economic growth or to serve narrow, parochial interests.' Rather, they should be construed to grant the President and his or her alter egos sufficient discretion and reasonable leeway to enable them to secure for our people and our posterity the blessings of prosperity and peace."[41]

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[1] GR No. 158540, July 8, 2001 and August 3, 2005.

[2] "Section 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."

[3] Philcemcor has since been renamed "Cement Manufacturers Association of the Philippines."

[4] Rollo, pp. 75-76 (citing *Litonjua v. Court of Appeals,* 286 SCRA 136, February 10, 1998 and *Sta. Ines Melale Forest Products Corporation v. Macaraig Jr.*, 299 SCRA 491, December 2, 1998).

[5] Rollo, p. 685. Prior to the promulgation of this new Decision, Southern Cross was already apprehensive that the DTI secretary might act favorably on Philcemcor's Petition in the light of the Court of Appeals ruling. Southern Cross sent a letter dated 19 June 2003 to DTI Secretary Roxas, informing him that Southern Cross would be appealing the Court of Appeals Decision to the Supreme Court, and that "[w]e trust that, in accordance with the Rules of Court, you will refrain from assuming jurisdiction or from taking any action on the Application for Safeguard Measures filed by Philcemcor until after the Supreme Court shall have finally decided on our appeal x x x." Rollo, pp. 679-680.

[6] Among the factors cited by the DTI as basis for holding that there was serious injury was the decline in sales volume during the period of the import surge. The sales volume decreased by 11.72% in 2000 and by 13.28% during the first three quarters of 2001. The DTI also cited the decline in the domestic industry's market share from 98.60% in 1998 to 79.23% in 2001, representing a 20% drop. The import surge had also caused the idling of seven dry kilns, a decline in actual production of the domestic industry by 7.2% from 1998 to 2001; a decrease in capacity utilization; and net losses to the domestic industry amounting to around ₱7.7 billion in 1999 and ₱5.5 billion in 2000. Rollo, pp. 688-690.

[7] Penned by Justice Dante O. Tinga; concurred in by Justices Reynato S. Puno, Leonardo A. Quisumbing, Ma. Alicia Austria-Martinez and Romeo J. Callejo Sr.

[8] *See* §1, Rule 65, 1997 Rules of Civil Procedure. See also *Building Care Corp. v. NLRC,* 335 Phil. 1131, 1138, February 26, 1997; *Bernardo v. Court of Appeals,* 341 Phil. 413, 425, July 14, 1997; *BF Corporation v. Court of Appeals,* 351 Phil. 507, 519, March 27, 1998; *Tan Jr. v. Sandiganbayan,* 354 Phil. 463, 469, July 10, 1998.

[9] *Secretary of Finance v. Agana,* 62 SCRA 68, 73, January 17, 1975. "The CTA is a highly specialized body specifically created for the purpose of reviewing tax cases," *Phil. Refining Co. v. CA,* 326 Phil. 680, 689, May 8, 1996; *CIR v. CA,* 338 Phil. 322, 336, April 18, 1997.

[10] *Interpretatio talis in ambiguis semper fienda est, ut evitur inconveniens et absurdum.*

[11] *See* §24, Article VI, Constitution. "The power of taxation being legislative, all the incidents are within the control of the Legislature." *Sarasola v. Trinidad,* 40 Phil. 252, 263, October 11, 1919 (citing *Genet v. City of Brooklyn*, 99 N.Y. 296 [1885]). See also *National Dental Supply Co. v. Meer,* 90 Phil. 265, 268-269, October 26, 1951; *Pepsi-Cola Bottling Company of the Philippines, Inc. v. Municipality of Tanauan,* 161 Phil. 591, 600, February 27, 1976).

[12] Article VI, §28(2), 1987 Constitution. *See* §13, RA 8800.

[13] "Without minimizing the importance of the heads of the various departments, their personality is in reality but the projection of that of the President. Stated otherwise, and as forcibly characterized by Chief Justice Taft of the Supreme Court of the United States, 'each head of a department is, and must be, the President's alter ego in the matters of that department where the President is required by law to exercise authority'." *Villena v. Secretary of Interior,* 67 Phil. 451, 464, April 21, 1939.

[14] The safeguard measures that the DTI secretary may impose under the SMA may take the following variations: (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 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; and (e) any combination of the above-described actions. Except for the provision of trade adjustment assistance, the measures enumerated by the law are essentially imposts, which are precisely the subject of delegation under the above-quoted constitutional provision.

[15] *See* §§5, 7, 8, 12 & 13, RA 8800.

[16] §7, RA 8800.

[17] §5, RA 8800.

[18] *See also* §9, RA 8800.

[19] "Upon its positive determination, the Commission **shall** recommend to the Secretary an appropriate definitive measure x x x."

[20] §13, RA 8800.

[21] *See* §5, in relation to §13, RA 8800.

[22] The eight members who voted for the Resolution were Justices Puno, Quisumbing, Austria-Martinez, Callejo, Azcuna, Tinga (*ponente*), Chico-Nazario and Garcia. I wrote a Separate (Concurring and Dissenting) Opinion, joined in by Chief Justice Davide; and Justices Ynares-Santiago, Sandoval-Gutierrez and Carpio Morales. Justice Carpio took no part, while Justice Corona was on official leave.

[23] I, however, made the following qualification:

> "Let me clarify, though, a rather loose statement in the Court's Resolution that the 'entire subset of rulings that the DTI [s]ecretary may issue x x x, including those that are provisional, interlocutory x x x' are in connection with the imposition of a safeguard measure; and also 'the phrase ['in connection with'] includes all rulings of the DTI [s]ecretary which arise from the time an application or *motu proprio* initiation for the imposition of a safeguard measure is taken.' Both statements seem to imply that *all* aforementioned rulings are therefore appealable to the CTA pursuant to Section 29.
>
> "It is a legal truism, however, that interlocutory orders are not subject to an appeal or a petition for

review until the main case is finally resolved on the merits. RA 8800 does not explicitly state which rulings of the DTI secretary are reviewable by way of a petition for review with the CTA. However, the Rules of Court and settled jurisprudence provide that only judgments or final orders disposing of the merits of a case may be the subject of appeals or petitions for review. Since RA 8800 does not amend the extant Rules (assuming *arguendo* that Congress had the power to amend the Rules of Court), they must be applied to the intended appeals." Separate Opinion, pp. 12-13. (Citations omitted.)

[24] *City of Ozamiz v. Lumapas,* 65 SCRA 33, July 15, 1975. For instance, under §5, Art. X of the Constitution, directly conferred on local governments is the power of taxation within their respective area jurisdictions.

[25] §17, Art. VII of the Constitution.

[26] Cruz, supra (citing *Mondano v. Silvosa,* 97 Phil. 143, May 30, 1955, per Padilla, *J.*).

[27] Bernas, Joaquin G., SJ, *The Constitution of the Republic of the Philippines: A Commentary* (1988), Vol. II, p. 204.

[28] §4(o) of RA 8800 defines serious injury as "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 of 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."

[29] The procedural requirements are stated in §§6, 7, 9 & 10. For other limitations, see §15.

[30] *Republic v. Sandiganbayan,* 355 Phil. 181, July 31, 1998.

[31] §2.

[32] The OSG's Memorandum, pp. 28-29. *See also* Philcemcor's Memorandum, pp. 21-22.

[33] There is grave abuse of discretion when an act is done contrary to the Constitution, the law or jurisprudence; or when it is executed whimsically, capriciously or arbitrarily out of malice, ill will or personal bias. *Information Technology Foundation of the Philippines v. Commission on Elections,* 419 SCRA 141, January 13, 2004 (citing *Republic v. Cocofed,* 372 SCRA 462, 493, December 14, 2001; and *Tañada v. Angara,* 272 SCRA 18, 79, May 2, 1997).

[34] See *Tatad v. Secretary of Energy,* 346 Phil 321, November 5, 1997; *Chavez v. Public Estates Authority,* 433 Phil. 506, July 9, 2002; *Agan v. Philippine International Air Terminals Co., Inc.,* 402 SCRA 84, May 5, 2003, and 420 SCRA 575, January 21, 2004; *Francisco Jr. v. House of Representatives,* 415 SCRA 44, November 10, 2003; *Information Technology Foundation of the Philippines v. Commission on Elections,* supra.

[35] *Tañada v. Angara,* 338 Phil. 546, 604-605, May 2, 1997.

[36] Ibid.

[37] *See* Panganiban's "Liberty and Prosperity," a speech delivered before the 10th National Convention of the Integrated Bar of the Philippines in Baguio City on April 20, 2005.

[38] *Chavez v. Public Estates Authority,* supra; *Agan v. Philippine International Air Terminals Co., Inc.,* supra; *Information Technology Foundation of the Philippines v. Commission on Elections,* supra.

[39] See Panganiban, *Leveling the Playing Field* (2004), pp. 46-59.

[40] *La Bugal B'laan v. Ramos,* GR No. 127882, December 1, 2004, per Panganiban, *J.*

[41] Separate Opinion, pp. 58-62.