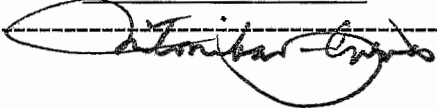


EN BANC

G.R. No. 250763 – MATTHEW WESTFALL, Petitioner, v. MARIA CARMELA D. LOCSIN, AMY LEUNG, NORIKO OGAWA, GIL-HONG KIM, DIWESH SHARAN, RAMESH SUBRAMANIAM, KEN L. CHEE, BIBIANA VICTORIA G. FRANCISCO, TAKEHIKO NAKAO, TOSHIO OYA, MAKOTO KUBOTA, CHRISTOPHER STEPHENS, RAMIT K. NAGPAL, AND DEBORAH STOKES, Respondents.

Promulgated:

April 16, 2024

X----------X

SEPARATE CONCURRING OPINION

LEONEN, J.:

I concur. The *ponencia* resolved the issue of functional immunity in line with the principle of judicial economy by applying the principle instead of ordering a remand for further appreciation of evidence. However, I offer further discussion on the applicability of functional immunity in support of the *ponencia*'s findings.

Petitioner Matthew Westfall (petitioner) filed a criminal complaint for libel and a separate civil action for damages against the respondent officers of the Asian Development Bank and members of its Screening Committee (collectively, the respondents). The Screening Committee reviewed petitioner's application for the Senior Technical Advisor (Urban and Water) position but found the application inadequate, which led the Screening Committee to reject the application. Petitioner claimed that the Screening Committee's comments on his application, as contained in separate documents, were "highly disparaging, grossly inaccurate and factually incorrect[,]"¹ and contained malicious language that maligned his reputation, credentials, and professional background.²

In their defense, the respondents claimed that as employees of the Asian Development Bank and members of its Screening Committee, they enjoyed diplomatic immunity from all legal processes in relation to their official acts. Petitioner then countered that diplomatic immunity does not cover "abusive and criminal acts."³

¹ *Ponencia*, at 3.

² *Id.*

³ *Id.* at 4.



The Regional Trial Court dismissed the complaint and upheld the respondents' claims of diplomatic immunity. It also dismissed the complaint against the Asian Development Bank's other officers because the petitioner failed to state a cause of action against them. The Regional Trial Court similarly dismissed the petitioner's subsequent Motion for Reconsideration.⁴

The petitioner's subsequent recourse to the Court of Appeals on a Rule 65 Petition was similarly dismissed for lack of merit. The Court of Appeals maintained the respondents' claims of immunity based on their official acts as employees of the Asian Development Bank.⁵

The petitioner then filed a Petition for Review on *Certiorari*⁶ with this Court, which was partially granted in an April 27, 2022 Resolution. This Court remanded the civil case to the trial court for the appreciation of the parties' evidence on whether the respondents' actions as members of the Screening Committee could be deemed official acts covered by diplomatic immunity.⁷

Thus, the respondents moved for reconsideration of the April 27, 2022 Resolution. They argue that the issue of diplomatic immunity poses a legal question that this Court may determine without remanding proceedings to the trial court. They further maintain that a remand of proceedings would negate their officers' functional immunity. In any event, the respondents argue that their actions, as members of the Asian Development Bank's Screening Committee, were "not abusive and defamatory."⁸

In response, the petitioner argues that the issue of whether the Screening Committee members' actions could be covered by the Asian Development Bank's grant of privileges and immunities is best determined by the trial courts after the reception of evidence. According to the petitioner, enforcing these processes will neither negate the functional immunity of the Asian Development Bank's officers nor interfere with the affairs of similarly situated international organizations. In any event, the petitioner insists that the Screening Committee's statements could not be official acts as they were "abusive and defamatory."⁹

The issues before this Court, as established by the respondents' Motion for Reconsideration and the petitioner's Opposition are as follows:

⁴ *Id.*

⁵ *Id.*

⁶ *Rollo*, at 3-64.

⁷ *Ponencia*, at 4-5.

⁸ *Id.* at 5-6.

⁹ *Id.* at 6.

- a. Whether these proceedings may be referred to the Court *En Banc*;
- b. Whether this Court erred in remanding the case to the Regional Trial Court for further proceedings; and
- c. Whether the respondents, as members of the Asian Development Bank's Screening Committee, may benefit from the "privileges and immunities" granted to the Bank's "[o]fficers and staff" under Article XII, Section 45 of the Agreement Between the Asian Development Bank and the Government of the Philippines Regarding the Headquarters of the Asian Development Bank.¹⁰

I agree with the *ponencia's* findings and offer further discussion in support of the same.

I

The novelty of the legal questions posed by the parties allows this Court to refer this case to the *En Banc's* deliberations. Our rules on how to operationalize the functional immunity of members, officers, and representatives of international organizations operating in the Philippines could benefit greatly from clarification. Similarly, the bench and bar stand to benefit immensely from the *ponencia's* discussion of this concept.

Thus, the *ponencia* helpfully distinguished between organizational immunity and functional immunity, as to their respective breadth and applicability.¹¹ I offer the following discussion on functional immunity, as a derivative and a necessary consequence of organizational immunity, to aid in emphasizing its scope and applicability.

Immunity, as enjoyed by States and international organizations, contemplates protection from another State's "legal or judicial processes," and from the adjudication of their legal relations.¹² Where a State generally subjects all persons and entities within its territory to its "power to administer justice[,] jurisdictional immunity operates as a "procedural bar on national courts' power to determine rights."¹³

Arigo v. Swift, citing *United States v. Guinto*, describes a State's jurisdictional immunity as having basis in the sovereign equality of States:

¹⁰ Agreement Between the Asian Development Bank and the Government of the Republic of the Philippines Regarding the Headquarters of the Asian Development Bank, December 22, 1966, available at https://www.adb.org/sites/default/files/institutional-document/32422/adb-phil-agreement_0.pdf (last accessed on August 6, 2024).

¹¹ *Ponencia*, at 10.

¹² Jurisdictional Immunities of States and International Organizations, p. 4.

¹³ Jurisdictional Immunities, pp. 4-5.

As applied to the local state, the doctrine of state immunity is based on the justification given by Justice Holmes that "there can be no legal right against the authority which makes the law on which the right depends." [Kawanakoa v. Polybank, 205 U.S. 349] There are other practical reasons for the enforcement of the doctrine. *In the case of the foreign state sought to be impleaded in the local jurisdiction, the added inhibition is expressed in the maxim par in parem, non habet imperium. All states are sovereign equals and cannot assert jurisdiction over one another.* A contrary disposition would, in the language of a celebrated case, "unduly vex the peace of nations." [De Haber v. Queen of Portugal, 17 Q. B. 171]¹⁴ (Emphasis supplied)

Arigo v. Swift further clarifies that the extent of a State's sovereign immunity may be determined according to the nature of the State's action being subjected to another State's legal processes:

This traditional rule of State immunity which exempts a State from being sued in the courts of another State without the former's consent or waiver has evolved into a *restrictive doctrine* which *distinguishes sovereign and governmental acts (jure imperii) from private, commercial and proprietary acts (jure gestionis)*. *Under the restrictive rule of State immunity, State immunity extends only to acts jure imperii.* The restrictive application of State immunity is proper only when the proceedings arise out of commercial transactions of the foreign sovereign, its commercial activities or economic affairs.¹⁵ (Citations omitted)

This distinction is important, as it establishes the boundaries of State immunity and sets the terms by which sovereigns interact with each other in the enforcement of their respective legal processes. Thus, I agree with the *ponencia's* discussion on the scope of sovereign immunity.¹⁶

I further agree with the *ponencia's* discussion on the key differences between sovereign immunity granted to states and their diplomatic representatives and the immunity granted to international organizations and their officials in the performance of their functions:

Thus, the privileges and immunities of diplomats and those of international officials are based on different legal foundations. Immunities awarded to diplomatic agents are based on customary international law, while those granted to officials of international organizations are based on treaty or conventional law. As succinctly put by Justice Reynato Puno, "[c]ustomary international law places no obligation on a state to recognize a special status of an international official or to grant him [or her] jurisdictional immunities. Such an obligation can only result from specific treaty provisions."

¹⁴ *Arigo v. Swift* 743 Phil 8, 44-45 (2014) [Per J. Villarama, *En Banc*] citing *United States v. Guinto* 261 Phil. 777 (1990) [Per J. Cruz, *En Banc*].

¹⁵ *Arigo v. Swift*, 743 Phil 8, 47 (2014) [Per J. Villarama, *En Banc*].

¹⁶ *Ponencia*, at 8-9.

As held by the Court in *Department of Foreign Affairs v. National Labor Relations Commission*, immunity-granting agreements "are treaty covenants and commitments voluntarily assumed by the Philippine government which must be respected." As such, their provisions are the primary criteria to be applied in suits where immunity is invoked. Thus, in ascertaining the scope of immunity invoked, courts must determine if the immunity is invoked by the organization itself or by specific personnel, then refer to the applicable treaty or agreement.¹⁷ (Citations omitted)

The *ponencia's* discussion reflects Justice Puno's Separate Opinion in *Liang v. People*,¹⁸ which aptly distinguished between the sources of immunities for States, as opposed to international organizations:


The privileges and immunities of diplomats and those of international officials rest upon different legal foundations. Whereas those immunities awarded to diplomatic agents are a right of the sending state based on customary international law, those granted to international officials are based on treaty or conventional law. Customary international law places no obligation on a state to recognize a special status of an international official or to grant him jurisdictional immunities. Such an obligation can only result from specific treaty provisions.

The special status of the diplomatic envoy is regulated by the principle of reciprocity by which a state is free to treat the envoy of another state as its envoys are treated by that state. The juridical basis of the diplomat's position is firmly established in customary international law. The diplomatic envoy is appointed by the sending State but it has to make certain that the agreement of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.

The staff personnel of an international organization — the international officials — assume a different position as regards their special status. They are appointed or elected to their position by the organization itself, or by a competent organ of it; they are responsible to the organization and their official acts are imputed to it. The juridical basis of their special position is found in conventional law, since there is no established basis of usage or custom in the case of the international official. Moreover, the relationship between an international organization and a member-state does not admit of the principle of reciprocity, for it is contradictory to the basic principle of equality of states. An international organization carries out functions in the interest of every member state equally. The international official does not carry out his functions in the interest of any state, but in serving the organization he serves, indirectly, each state equally. He cannot be, legally, the object of the operation of the principle of reciprocity between states under such circumstances. It is contrary to the principle of equality of states for one state member of an international organization to assert a capacity to extract special privileges for its nationals from other member states on the basis of a status awarded by it to an international organization. It is upon this principle of sovereign

¹⁷ *Ponencia*, at 13.

¹⁸ Separate Opinion of Justice Renyato Puno in *Liang v. People*, 407 Phil. 414 (2001) [Per J. Ynares-Santiago, First Division].



*equality that international organizations are built.*¹⁹ (Emphasis supplied; Citations omitted)

As regards the discussion on the “nearly absolute” nature of immunities granted to international organizations,²⁰ I submit that a distinction must be made between the absolute immunity granted to other sovereigns and their diplomatic representative and the immunity granted to international organizations:

Formally speaking, the immunity of international organizations has never been considered as absolute, unlike the immunity of states. *Only insofar as international organizations act within the powers conferred on them by the member states, can they rely on immunities. In practice, however, this ‘functional’ immunity has become quasi-absolute, as international organizations do not normally act ultra vires.* However, two movements in the case-law have tended to erode this immunity: the importation of restrictive immunity from the law of state immunity, and the application of human rights, the right of access to a court in particular. Obviously, international organizations could also decide to waive their immunity.²¹

In view of these distinctions, I join the *ponencia*'s call for a deeper analysis of the scope of applicability of these immunities and reiterate my separate opinion in *Arigo v. Swift*:

Our own jurisprudence is consistent with the pronouncement that *the doctrine of sovereign immunity is not an absolute rule.* Thus, the doctrine should take the form of *relative sovereign jurisdictional immunity.*

The tendency in our jurisprudence moved along with the development in other states.

States began to veer away from absolute sovereign immunity when "international trade increased and governments expanded into what had previously been private spheres." The relative theory of sovereign immunity distinguishes a state's official (*acta jure imperii*) from private (*acta jure gestionis*) conduct. *The distinction is founded on the premise "[that] once the sovereign has descended from his throne and entered the marketplace[,] he has divested himself of his sovereign status and is therefore no longer immune to the domestic jurisdiction of the courts of other countries."*

....
It is difficult to imagine that the recognition of equality among nations is still, in these modern times, as absolute as we have held it to be in the past or only has commercial acts as an exception. International law

¹⁹ *Id.*, at 432–433.

²⁰ *Ponencia*, at 10.

²¹ Cedric Ryngaert, Ige F. Dekker, Ramses A. Wessel, and Jan Wouters, *Judicial Decisions on the Law of International Relations*, 361 (2016)

has conceded *jus cogens* rules of international law and other obligations *erga omnes*. It is time that our domestic jurisprudence adopts correspondingly.

Considering the flexibility in international law and the doctrines that we have evolved so far, *I am of the view that immunity does not necessarily apply to all the foreign respondents should the case have been brought in a timely manner, with the proper remedy, and in the proper court. Those who have directly and actually committed culpable acts or acts resulting from gross negligence resulting in the grounding of a foreign warship in violation of our laws defining a tortious act or one that protects the environment which implement binding international obligations cannot claim sovereign immunity.*²² (Emphasis supplied; Citations omitted)

Thus, I join the *ponencia* in calling for greater judicial discernment in applying the rules on jurisdictional immunities not only in the context of sovereign immunity, but also in the context of international organizations and their officials.

II

Jurisdictional immunity accorded to international organizations, despite having a source and nature different from sovereign immunity, may be similarly examined in the context of the purposes for which these immunities were granted in the first place.

Immunity rules belong to the traditional standard rules of international organizations. It has long been accepted that international organizations and their staff need to enjoy immunity from the jurisdiction of national courts. The rationale for this immunity is different from that for state immunity. *While state immunity is based on the par in parem non habet imperium principle, the immunity of international organizations is generally founded on the principle of functional necessity: international organizations need immunity in order to be able to perform their functions.* They would not be able to do so if a national court could interfere in their work. Member states would not accept the exercise of jurisdiction by a court of one of them over acts or activities of 'their' organization.²³ (Emphasis supplied)

Thus, international organizations such as the Asian Development bank require certain privileges and immunities in order to maintain their independence and to ensure the unimpeded fulfillment of their mandate. This persistent reference to a "functionality rationale"²⁴ is reflected in the Asian Development Bank's Charter, from which it traces its existence,

²² *Separate Concurring Opinion* of Justice Marvic M.V.F. Leonen in *Arigo v. Swift*, 743 Phil 8, (2014) [Per J. Villarama, *En Banc*].

²³ Neils Blokker, Chapter 1: International Organizations: The Untouchables? in *Legal Aspects of International Organization*, 2–3 (2015).

²⁴ August Reinisch, Chapter 15: To What Extent Can and Should National Courts "Fill the Accountability Gap"? in *Legal Aspects of International Organization*, 313–314 (2015).

rights, powers, privileges, and functions.²⁵ Further, the same rationale serves as the “primary justification and yardstick”²⁶ for how States will give effect to the privileges and immunities agreed upon in the Bank’s Charter. A paper published by the Hague Journal on the Rule of Law undertook a similar discussion on the nature of immunities granted to international organizations, and specifically to various Multilateral Development Banks:

The immunities enjoyed by [Multilateral Development Banks] are routinely set out in their constitutive agreements. The immunities at the institutional level include immunity from judicial proceedings, immunity of assets from search, requisition, confiscation, expropriation or any other form of seizure, inviolability of archives, immunities from taxation. Immunities usually also extend to natural persons involved in these institutions’ operations including, for instance, “[a]ll governors, executive directors, alternates, officers and employees” who enjoy immunity “from legal process with respect to acts performed ... in their official capacity, ... from migration restriction, registration requirements and national service obligations” as well as from travel restrictions (IBRD 2012, Art. VII Sec. 8).

*The immunity accorded to [Multilateral Development Banks] was often considered absolute immunity (Klabbers 2015). Even then, despite the broad expressions of immunity in founding agreements, the drafters had followed a model similar to commercial banks, allowing judicial proceedings to be brought against these institutions by private individuals, particularly as regards their commercial dealings. The scope of activities that may be challenged at courts of course differ depending on the institution. For instance, International Bank for Reconstruction and Development (IBRD) and IFC agreements broadly allow for judicial actions to be brought in “a court of competent jurisdiction” in countries where the institutions have offices, appointed agents “accepting service or notice of process” or have “issued or guaranteed securities.” (IBRD 2012, Art. VII, Sec. 3; IFC 2012, Art. VI, Sec. 3). The Asian Development Bank (ADB) qualifies the exceptional permission for legal process “in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities.” (ADB 1965, Art. 50(1)) More restrictively, the Agreement Establishing the African Development Bank (AfDB) only allows for judicial proceedings “in cases arising out of the exercise of its borrowing powers.” (AfDB 2016, Art. 52(1)) *By measure of their limited immunity against judicial proceedings, [Multilateral Development Banks] may be distinguished from other entities under the legal heading of [International Organizations]: their immunity is absolute only vis-à-vis member states and limited in so far as they engage in commercial activities that may impact private individuals* (IBRD 2012, Art. VII Sec. 3; IFC 2012, Art. VI Sec. 3; AfDB 2016, Art. 52(2); ADB 1965, Art. 50(2)) Prior to the SCOTUS’ *Jam et al. v. the IFC* decision, however, courts in domestic jurisdictions had tended to follow the absolute immunity approach when applying it in practice. *Yet, in the time that has elapsed since most [Multilateral Development Banks] were established, their**

²⁵ Agreement Establishing the Asian Development Bank (The ADB Charter), December 4, 1965, available at <https://www.adb.org/sites/default/files/institutional-document/32120/charter.pdf> (last accessed on August 6, 2024).

²⁶ August Reinisch, Chapter 15: To What Extent Can and Should National Courts “Fill the Accountability Gap”? in 55 *Legal Aspects of International Organization*, 313-314 (2015)

operations that were once conceived as dealing directly only with borrower countries have expanded to bring them more and more in contact with rights-holders (Bradlow 2019). In the aftermath of Jam, it is likely that the practice of immunity will converge more closely with immunity as ascribed in the foundational documents of many [*Multilateral Development Banks*].²⁷ (Emphasis supplied; Citations omitted)

As an international agreement, member states are obligated to interpret the provisions of the Asian Development Bank's Charter "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."²⁸

Chapter VIII of the Agreement Establishing the Asian Development Bank (The ADB Charter) entitled "Status, Immunities, Exemptions and Privileges" provides the scope of immunity given to the Asian Development Bank and its personnel. Article 48's statement of purpose for these immunities provides that each member state accepts the grant of immunity to the Bank and its personnel to allow the Bank *to effectively fulfill its purpose and carry out its functions* in each member state's territory.

Chapter VIII
STATUS, IMMUNITIES, EXEMPTIONS AND PRIVILEGES

Article 48
PURPOSE OF CHAPTER

To enable the Bank effectively *to fulfill its purpose and carry out the functions entrusted to it*, the status, immunities, exemptions and privileges set forth in this Chapter shall be accorded to the Bank in the territory of each member.²⁹ (Emphasis supplied)

Chapter I, Articles 1 and 2 provide the Asian Development Bank's purpose and enumerate the functions necessary to carry out the same:

Article 1
PURPOSE

The purpose of the Bank shall be to foster economic growth and co-operation in the region of Asia and the Far East (hereinafter referred to as the "region") and *to contribute to the acceleration of the process of economic development of the developing member countries in the region*, collectively and individually. Wherever used in this Agreement, the terms "region of Asia and the Far East" and "region" shall comprise the territories of Asia and the Far East included in the Terms of Reference of the United Nations Economic Commission for Asia and the Far East.

²⁷ Gamze Erdem Turkelli, *The Best of Both World or the Worst of Both Worlds? Multilateral Development Banks, Immunities and Accountability to Rights-Holders*, 255-256, April 6, 2020, available at <https://link.springer.com/content/pdf/10.1007/s40803-020-00143-1.pdf> (last accessed on August 6, 2024)

²⁸ Vienna Convention on the Law of Treaties, January 27, 1980, Article 31(1).

²⁹ ADB Charter, Chapter VIII, Article 48.

Article 2
FUNCTIONS

To fulfill its purpose, the Bank shall have the following functions:

(i) to promote investment in the region of public and private capital for development purposes;

(ii) to utilize the resources at its disposal for financing development of the developing member countries in the region, giving priority to those regional, sub-regional as well as national projects and programmes which will contribute most effectively to the harmonious economic growth of the region as a whole, and having special regard to the needs of the smaller or less developed member countries in the region;

(iii) *to meet requests from members in the region to assist them in the coordination of their development policies and plans with a view to achieving better utilization of their resources, making their economies more complementary, and promoting the orderly expansion of their foreign trade, in particular, intra-regional trade;*

(iv) *to provide technical assistance for the preparation, financing and execution of development projects and programmes, including the formulation of specific project proposals;*

(v) to co-operate, in such manner as the Bank may deem appropriate, within the terms of this Agreement, with the United Nations, its organs and subsidiary bodies including, in particular, the Economic Commission for Asia and the Far East, and with public international organizations and other international institutions, as well as national entities whether public or private, which are concerned with the investment of development funds in the region, and to interest such institutions and entities in new opportunities for investment and assistance; and

(vi) to undertake such other activities and provide such other services as may advance its purpose.³⁰ (Emphasis supplied)

Thus, the Asian Development Bank's pursuit of these purposes and its actions in line with these functions are covered by its grant of organizational immunity against "every form of legal process[,]"³¹ subject to a specific exception for banking transactions, which were incorporated to provide means of enforcement for the Asian Development Bank's offered securities and services.³²

Article 50
IMMUNITY FROM JUDICIAL PROCEEDINGS

³⁰ ADB Charter, Chapter I, Articles 1 and 2.

³¹ ADB Charter, Chapter VIII, Article 50, par. 1.

³² Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations*, 294 (2018).

1. *The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the territory of a country in which the Bank has its principal or a branch office, or has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.*

2. Notwithstanding the provisions of paragraph 1 of this Article, no action shall be brought against the Bank by any member, or by any agency or instrumentality of a member, or by any entity or person directly or indirectly acting for or deriving claims from a member or from any agency or instrumentality of a member. Members shall have recourse to such special procedures for the settlement of controversies between the Bank and its members as may be prescribed in this Agreement, in the by-laws and regulations of the Bank, or in contracts entered into with the Bank.

3. Property and assets of the Bank, shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.³³

Concurrently, the Asian Development Bank's legal personality and capacity to act is necessarily exercised through its various personnel. Its organizational immunity is, therefore, operationally exercised by its officers, representatives, and employees whose *actions* should be consistent with their official functions and, thereby, enjoy functional immunity as a derivative of their organization's own immunity.³⁴

Article 55

IMMUNITIES AND PRIVILEGES OF BANK PERSONNEL

All Governors, Directors, alternates, officers and employees of the Bank, including experts performing missions for the Bank:

(i) shall be immune from legal process *with respect to acts performed by them in their official capacity, except when the Bank waives the immunity;*

(ii) where they are not local citizens or nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations, and the same facilities as regards exchange regulations, as are accorded by members to the representatives, officials and employees of comparable rank of other members; and

³³ ADB Charter, Article 50.

³⁴ Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations*, 242 (2018).

(iii) shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members.³⁵

By appreciating functional immunity as derived from organizational immunity, it is my opinion that the standard for assessing the applicability of immunity in either respect should be referred in the first instance to the treaty provisions establishing the functions and purposes for which an organization is granted immunity in the first place.

I wholly agree with the *ponencia's* approach to delineating whether an act is done in an official capacity by referring the same to a factual determination based on evidence submitted by the parties. However, the *ponencia's* conclusion appropriately highlights the need to "judiciously exercise" this discretion in determining the "suability or non-suability of the parties involved[.]"³⁶ I further agree that a court may exceed its discretion in delineating the applicability of functional immunity by exposing the organization and its personnel to unnecessary litigation in the course of determining their immunity.

Moreover, in inquiring into the suability or non-suability of the parties involved, courts may conduct such proceedings as may be warranted by the complexity of the facts. If the facts of the case are simple, the court can rule on the issue of immunity based simply on the contents of the complaint and its attachments. If further clarification is required, the court may require [an] exchange of pleadings, or even set a summary hearing where the complainant and bank personnel involved can thresh out their positions. It is important, however, that the court judiciously exercise its discretion and limit the proceedings to the minimum necessary. Otherwise, the immunity conferred would be rendered nugatory. (Emphasis supplied)

Through its erudite discussion, the *ponencia* aptly points out the difficulty of determining a person or entity's immunity from legal processes by referring the same determination to the very same process from which immunity is sought. The *ponencia* offers a viable solution and I share the *ponencia's* emphasis for courts to exercise the same power judiciously.

In this regard, I support the *ponencia's* approach of undertaking a preliminary establishment of a court's jurisdiction, which imposes the burden of proof on the complainant who insists that an act by an official of an international organization is inconsistent with their official functions or are otherwise *ultra vires*.

Immunity bars the exercise of jurisdiction by local courts. Thus, before a court could conduct further proceedings on a case, its

³⁵ ADB Charter Article 55.

³⁶ *Ponencia*, at 17.

jurisdiction must be established. Allegations in the complaint must be duly proven by competent evidence and the burden of proof is on the party making the allegation. It follows, then, that the complainant has the burden of establishing the jurisdiction of the court by proving the suability of the respondent and the *ultra vires* character of the latter's actions. If the complainant fails to discharge this burden at the very onset of the proceedings, respondent's immunity must be upheld and the complaint dismissed.³⁷ (Citations omitted)

However, I submit that courts must first undertake a preliminary review of the functions and purposes of an international organization, as contained in its enabling agreement, in determining whether the latter's officials, representatives, and personnel perform acts functionally necessary to such purposes and are therefore covered by functional immunity. Should the courts require further clarification on an officer's functional necessity, the courts may then undertake further action in determining the official duties and responsibilities of the same personnel in pursuit of its preliminary determination of jurisdiction.

Further, I submit the complexity identified by the *ponencia* in the subsequent paragraph of its discussion,³⁸ comes into play when courts are tasked with determining the necessity of specific actions, statements, or processes to an international organization's stated mission. These matters are further complicated when a complainant prays for the negation of functional immunity by presupposing that certain acts are *ultra vires*. Should the court's preliminary processes for determining jurisdiction fail to establish the applicability of functional immunity and the same personnel cannot be shown to fulfill a stated function or purpose in the organization's enabling agreement, then there is a need to establish, through competent evidence, how exactly their acts were done in an official capacity.

III

Applying the foregoing discussions to the present dispute, the lower courts correctly determined the applicability of functional immunity in favor of the respondent members of the Asian Development Bank's Screening Committee. The respondents performed actions functionally necessary to the Bank's mission and purpose of "fostering economic growth and cooperation in the region of Asia and the Far East" by "[assisting members] in the coordination of their development policies and plans[.]" and providing "technical assistance" in preparing, financing and executing "development projects and programmes[.]"³⁹ Further, the Court of Appeals held that:

In the Office Memorandum dated January 20, 2015, *the Screening Committee was created to conduct the review of applications for the*

³⁷ *Ponencia*, at 17.

³⁸ *Id.* at 17.

³⁹ ADB Charter, Chapter 1, Articles 1 and 2.

vacant positions. It is in this same memorandum that the Screening Committee was created and was assigned its general functions. Pertinent portions of the Office Memorandum reads [sic] as follows:

The Screening Committee will review applications, general [sic] a shortlist of candidates for each position...and conduct preliminary interviews. Attached [sic] please find the recruitment process and timetable for the Technical Advisor positions:

....

Next Steps: 1) Each screening committee member...will review the applicant list and will create their own shortlist. On the form provided, *please rank and comment on your selections.* The deadline for submitting the shortlist back to BPHP is on 26 January 2015.

2) All the shortlists provided by each committee member will be consolidated for discussion at the Screening Committee meeting on 30 January 2015, from 3:00 pm to 5:00 pm.

A reading of the above will reveal that the Screening Committee was created for the purpose of reviewing applications for the vacant positions within the ADB. It is also clear that, in performing this official function of assessing the applicants to the position, the Screening Committee is allowed to exercise its discretion in creating its own shortlist of candidates and, more importantly, directed to comment on the applications.⁴⁰ (Emphasis supplied, citations omitted)

Clearly, the acts complained of—the issuance of feedback documents on the petitioner’s application for the position of Technical Advisor (Urban and Water)—are essential to the Screening Committee’s purpose of screening applicants for open positions within the Bank.

The *ponencia*’s recourse to reviewing the case records in concluding that “[t]he [Screening Committee] was created for an official purpose,”⁴¹ not only arrives at the same conclusion, but also reflects the lower courts’ recourse to a further preliminary review of facts.

From this, it is clear that based on the key criteria agreed upon, respondents Loscin, et al. were given the discretion to comment on the qualifications of the applicants. Therefore, there is no doubt that respondents Loscin, et al. were acting in their official capacities when they committed the acts imputed to them. The statements complained of by petitioner were made by respondents Loscin, et al. in the course of their deliberations on his application for the position.⁴²

⁴⁰ The Court of Appeals *Decision* in CA-G.R. SP No. 154420, promulgated on April 22, 2019 and penned by Associate Justice Perpetua T. Atal-Paño, with the concurrence of Associate Justices Ricardo R. Rosario and Nina G. Antonio-Valenzuela at 14. This pinpoint citation refers to the copy of the Decision uploaded to the Court of Appeals website.

⁴¹ *Ponencia*, at 20.

⁴² *Id.* at 21.

I agree that the recourse to a deeper factual review was merited by the circumstances. The petitioner's allegation that the feedback documents contained malicious and defamatory statements against his character exhibit an assertion of a legal conclusion as basis to negate functional immunity. However, the *ponencia* correctly ruled that a plain reading of the Screening Committee's duties and responsibilities and the contents of the supposedly defamatory statements, regardless of inaccuracies and inconsistencies with the Bank's review standards,⁴³ negated the allegations of *ultra vires* acts. I understand the *ponencia's* need to categorically discuss these conclusions to fully resolve the present case.

In any event, I agree with the *ponencia's* ultimate conclusion that the respondent members of the Screening Committee enjoyed functional immunity in their performance of official actions. International organizations occupy a unique space in the landscape of foreign relations and should enjoy the necessary privileges and benefits that will allow them to effectively carry out their respective missions. By clarifying our courts' approach to determining the scope and extent of these privileges, this Court gives deeper meaning to our country's participation in the field of international law.

ACCORDINGLY, I vote to **PARTIALLY GRANT** the Motion For Partial Reconsideration *ad cautelam* with Motion to Refer the Case to the Court *En Banc* and to **REVERSE** and **SET ASIDE** the April 27, 2022 Resolution insofar as it partially granted the Petition and directed the reinstatement of the petitioner's complaint for conduct of further proceedings in Civil Case No. R-MKT-17-01365-CV.

I further vote to **AFFIRM** the dismissal of the complaint against all respondents and to **REINSTATE** the Regional Trial Court, Branch 138's August 17, 2017 Order, as affirmed by the April 22, 2019 Decision and the November 26, 2019 Resolution of the Court of Appeals in CA-G.R. SP No. 154420.



MARC M.V.F. LEONEN
Senior Associate Justice

⁴³ *Id.* at 22-23.