

MATTHEW WESTFALL, PETITIONER, VS. MARIA CARMELA D. LOCSIN, AMY LEUNG, NORIKO OGAWA, GIL-HONG KIM, DIWESH SHARAN, RAMESH SUBRAMANIAM, KEN L. CHEE, BIBIANA VICTORIA G. FRANCISCO, ...

G.R. No. 250763. April 16, 2024

Ponente: ZALAMEDA, J.

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ZALAMEDA, J.:

Functional immunity does not extend to all acts and utterances made by officials and personnel of the Asian Development Bank. The protection is limited, applying only to acts performed in an official capacity. Where the act is ultra vires, such as a crime or an act contrary to law, immunity does not apply. Courts have the power and duty to inquire into the factual basis of the invoked protection.

This resolves the Motion for Partial Reconsideration Ad Cautelam with Motion to Refer the Case to the Court En Banc and Set the Case for Oral Arguments (Motions)[1] filed by respondents 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 (collectively, respondents).

The Motions seek reconsideration of the Court's Resolution[2] dated April 27, 2022 insofar as it partly granted the Petition for Review on Certiorari (Petition) of Matthew Westfall (Westfall), reinstated his complaint for damages, and remanded the case to the trial court to determine if respondents Maria Carmela D. Locsin, Amy Leung, Noriko Ogawa, Gil-Hong Kim, Diwesh Sharan, Ramesh Subramaniam, Ken L. Chee, and Bibiana Victoria G. Francisco (Locsin et al.) were acting in their official capacities. Locsin et al. further pray that the case be referred to the Court En Banc and be set for oral arguments.[3] The dispositive portion of the assailed Resolution reads:

WHEREFORE, the Petition is PARTLY GRANTED. The Decision dated 22 April 2019 and Resolution dated 26 November 2019 of the Court of Appeals in CA-G.R. SP No. 154420 are MODIFIED. Petitioner Matthew Westfall's Complaint is REINSTATED and the trial court is DIRECTED to hear Civil Case No. R-MKT-17-01365-CV and determine if respondents Maria Carmela D. Locsin, Amy Leung, Noriko Ogawa, Gil-Hong Kim, Diwesh Sharan, Ramesh Subramaniam, Ken L. Chee, and Bibiana Victoria G. Francisco were acting in their official capacities and accordingly, decide if diplomatic immunity will apply.

The dismissal of the Complaint with respect to respondents Takehiko Nakao, Toshio Oya, Makoto Kubota, Christopher Stephens, Ramit Nagpal and Deborah Stokes for failure to state cause of action is AFFIRMED.

SO ORDERED.[4]

Antecedents

The Petition stemmed from a Complaint[5] for damages filed by Westfall against Locsin et al. for abuse of right and statements allegedly defamatory and damaging to Westfall's professional reputation. Westfall specifically

referred to statements in the VP Panel Notes[6] and Interview Report[7] describing his knowledge, experience, and capabilities. These documents were prepared by the Screening Committee (SC) for the position of Technical Advisor (Urban and Water) in the Asian Development Bank (ADB). Respondents Locsin et al. were members of the SC. Westfall, a former staff of the ADB, applied for the position but was not selected.

Aggrieved, Westfall resorted to ADB's internal grievance process on the ground that the selection process violated ADB's administrative procedures. He pointed to two documents from ADB that contained allegedly defamatory statements:

- The first document was a redacted copy of the VP Panel Notes[8] dated February 16, 2015 prepared by the SC. The document stated that "Mr. Westfall has been away from the urban sector work for quite some time and he has not kept his knowledge current." [9] Westfall considered this as "highly disparaging, grossly inaccurate and factually incorrect." [10] According to Westfall, the Notes included "highly defamatory language that maliciously maligned [Westfall's] reputation, imputed upon him alleged defects in his credentials and discredited his person and professional background." [11]
- The second document was the Interview Report, [12] likewise prepared by the SC, containing notes on Westfall's interview. He claimed that the Interview Report contained unfounded, deeply malicious, and false statements, as the statements failed to accurately reflect his strong performance evaluations and years of professional contributions to ADB. [13]

Petitioner also filed a criminal complaint for libel against the SC.

In their defense, Locsin et al. averred that, as ADB officers and employees, they are immune from all legal processes of any kind with respect to acts performed in their official capacities. [14] They further claimed that the complaint failed to state a cause of action with respect to respondents Takehiko Nakao, Toshio Oya, Makoto Kubota, Christopher Stephens, Ramit K. Nagpal, and Deborah Stokes (Nakao et al.).

Westfall countered that diplomatic immunity does not extend to respondents' allegedly abusive and criminal acts. [15] Also, both the complaint and annexes must be considered in resolving a motion to dismiss based on failure to state a cause of action. [16]

Sustaining Locsin et al.'s defenses of functional immunity and failure to state a cause of action, Branch 138, Regional Trial Court (RTC) of Makati City dismissed the complaint. [17] The RTC held that Locsin et al. have immunities with respect to acts performed in their official capacities. It then concluded that they "acted in the performance of their official duties for the nature of their work necessitated a discussion and recording of the candidate's merits and demerits." [18] The RTC further ruled that the complaint failed to state a cause of action with respect to respondents Nakao, et al. [19]

Westfall moved for reconsideration, but the RTC denied his motion. [20] On certiorari with the Court of Appeals (CA), the CA denied the petition for lack of merit. [21] It ruled that whether Locsin et al. acted in their official capacity is a question of fact, and, therefore, outside the purview of a Rule 65 petition. [22] However, even if the CA were to review the question of fact, it is convinced that there is sufficient evidence that Locsin et al., as members of the SC, were acting in their official capacity and within the scope of their authority. [23] The CA also affirmed the RTC's finding that the complaint failed to state a cause of action against Nakao et al. [24]

Hence, the Petition filed with this Court.

In the assailed Resolution dated April 27, 2022, [25] the Court reinstated Westfall's complaint but dismissed it as against Nakao et al. for failure to state a cause of action. The Court held that the immunity enjoyed by ADB officials extends only to acts done in their official capacity. Thus, before applying immunity, courts must first

conduct a factual inquiry to determine if an act was done in the performance of official duties.[26] Since the CA and the RTC simply applied diplomatic immunity without a thorough consideration of the facts on record, the Court remanded the case for further proceedings to determine if the alleged acts are covered by immunity.[27] Nonetheless, the Court affirmed the dismissal of the complaint as against Nakao et al. for failure to state a cause of action.[28]

Issues

Summarizing the arguments raised in the Motions, the issues for the Court's resolution are as follows:

- Whether the case should be referred to the Court En Banc and set for oral arguments;
- Whether the Court erred in remanding the case to the RTC for further proceedings; and
- Whether the Court committed a reversible error in failing to consider that the acts subject of the complaint were performed by Locsin, et al. in their official capacities and were not abusive and defamatory.

Specifically, in their motions, Locsin et al. pray that this case be referred to the Court En Banc as it involves novel questions of law, doctrines that may be modified or reversed, and a significant impact on businesses and local communities.[29] They also pray that the case be set for oral arguments to give Locsin et al. an opportunity to articulate their arguments in open court.[30]

Moreover, Locsin et al. claim that the Court erred in remanding the case to the RTC despite the absence of a question of fact. They aver that the difference in the versions of events advanced by them and Westfall is legal in nature.[31] The Court may validly rule on this question of law without remanding the case to the RTC.[32] Locsin et al. further argue that remanding the case to the RTC for further proceedings would render ADB officials' functional immunity nugatory.[33] The Court erred in failing to consider that the subject acts were performed by Locsin et al. in their official capacities and were not abusive and defamatory.[34]

Meanwhile, in his Opposition [Re: [Westfall's] Motion for Partial Reconsideration Ad Cautelam with Motion to Refer the Case to the Court En Banc and Set the Case for Oral Arguments] (Opposition),[35] Westfall asserts that Locsin et al. merely repeated the arguments in their Comment, which have already been passed upon by the Court.[36] Nonetheless, Westfall maintains that there exists contradictory factual allegations, which warrant a remand of the case to the RTC.[37] Particularly, whether the acts complained of are covered by the functional immunity of Locsin et al. is a question of fact.[38] Likewise, Westfall insists that the remand of the case does not render nugatory the functional immunity of ADB officials, nor does it open the door for interference in the conduct of ADB's internal affairs and other international organizations similarly situated.[39]

Further, Westfall submits that the assailed acts were not performed by Locsin et al. in their official capacity and were abusive and defamatory.[40] The determination of whether their acts were made pursuant to their official functions can only be made after a full trial on the merits.[41] Lastly, Westfall avers that there is no basis to refer the matter to the Court En Banc or to set the case for oral arguments.[42]

Verily, Our ruling on the complaint's failure to state a cause of action against Nakao et al. was no longer assailed by Westfall. Thus, this portion of the assailed Resolution is deemed final.

Ruling of the Court

After a thorough review and consideration of the arguments raised in the Motions, coupled with a second look at the documents and admissions on record, the Court resolves to partly grant the Motions insofar as they pray for the referral of the case to the Court En Banc and the reversal of the assailed April 27, 2022 Resolution.

As a preliminary matter, We emphasize that the Court En Banc is not an appellate court to which decisions or

resolutions of the divisions may be appealed.[43] Nonetheless, under exceptional circumstances, a case may be elevated to the En Banc, such as when a case raises novel questions of law or is of sufficient importance.[44]

We find these considerations present here. There is a dearth of jurisprudence on the nature and scope of immunities enjoyed by international organizations and their personnel. Moreover, the distinction among state, diplomatic, organizational, and functional immunities has not been clearly articulated in previous cases, thus lending confusion on the permissible actions that courts may take when immunity is invoked.

Nonetheless, the motion to set the case for oral arguments is denied for lack of merit. As will be shown, the records are sufficient to finally resolve the issue presented in the case at bar. Thus, We find no need to conduct oral arguments.

Officials and personnel of international organizations generally enjoy functional immunity. However, they may invoke immunities accorded to diplomatic agents if there is a treaty covenant or binding agreement to such effect

Going to the main issue, Locsin et al. urge the Court to rule on the merits, arguing that there is no question of fact.[45] Meanwhile, Westfall submits that the existence of contradicting versions as regards the selection process, and ultimately, the need to determine whether the acts complained of are covered by functional immunity, mean that there are questions of fact that need to be threshed out.[46]

We agree with Westfall. Whether an act was made in an official capacity, and thus covered by functional immunity, is a question of fact.

To finally delineate the extent of factual review in a suit involving functional immunity, We deem it proper to reiterate and further expound on the different kinds of immunities and, specifically, the scope of immunities enjoyed by international organizations and their personnel.

The nature and degree of immunities vary depending on who the recipient is.[47] As aptly pointed out by Chief Justice Alexander G. Gesmundo, the immunities granted from one entity to another, and those granted between an entity and its personnel, may vary in terms of source, breadth, and coverage.[48]

The most widely recognized immunity is state immunity, or that enjoyed by states themselves.[49] This immunity is derived from a recognition of another state's sovereignty.[50] A practical reason for the enforcement of the doctrine is to avoid undue vexation of the peace of nations.[51] As observed by the Chief Justice, the doctrine is both a generally accepted principle of international law and a matter of customary law.[52]

The effect of state immunity can trickle down to a state's officials and agents. While the doctrine generally pertains to the prohibition of suits against a state without its consent, it is also applicable to complaints filed against officials of the state for acts allegedly performed by them in the discharge of their duties.[53] This was illustrated in the case of *Minucher v. Court of Appeals*,[54] where the Court ruled that an agent of the United States Drug Enforcement Agency, whose diplomatic status was not adequately proven, was still entitled to the defense of state immunity from suit. This is because he acted within his official functions and duties; thus, his actions were imputable to the state. The Court held, thus:

But while the diplomatic immunity of Scalzo might thus remain contentious, it was sufficiently established that, indeed, he worked for the United States Drug Enforcement Agency and was tasked to conduct surveillance of suspected drug activities within the country on the dates pertinent to this case. If it should be ascertained that Arthur Scalzo was acting well within his assigned functions when he committed the acts

alleged in the complaint, the present controversy could then be resolved under the related doctrine of State Immunity from Suit.

The precept that a State cannot be sued in the courts of a foreign state is a long-standing rule of customary international law then closely identified with the personal immunity of a foreign sovereign from suit and, with the emergence of democratic states, made to attach not just to the person of the head of state, or his representative, but also distinctly to the state itself in its sovereign capacity. If the acts giving rise to a suit are those of a foreign government done by its foreign agent, although not necessarily a diplomatic personage, but acting in his official capacity, the complaint could be barred by the immunity of the foreign sovereign from suit without its consent. Suing a representative of a state is believed to be, in effect, suing the state itself. The proscription is not accorded for the benefit of an individual but for the State, in whose service he is, under the maxim — *par in parem, non habet imperium* — that all states are sovereign equals and cannot assert jurisdiction over one another....

....

A foreign agent, operating within a territory, can be cloaked with immunity from suit but only as long as it can be established that he is acting within the directives of the sending state.... The job description of Scalzo has tasked him to conduct surveillance on suspected drug suppliers and, after having ascertained the target, to inform local law enforcers who would then be expected to make the arrest. In conducting surveillance activities on Minucher, later acting as the poseur-buyer during the buy-bust operation, and then becoming a principal witness in the criminal case against Minucher, Scalzo hardly can be said to have acted beyond the scope of his official function or duties.

All told, this Court is constrained to rule that respondent Arthur Scalzo, an agent of the United States Drug Enforcement Agency allowed by the Philippine government to conduct activities in the country to help contain the problem on the drug traffic, is entitled to the defense of state immunity from suit.[55]

International organizations, like states, also enjoy immunity. Under international law, "such organizations are endowed with some degree of international legal personality such that they are capable of exercising specific rights, duties and powers." [56] They are set up by agreement between two or more states and organized as a means for conducting general international business.[57]

As pointed out by the Chief Justice during the deliberations of this case, the immunity granted to international organizations is not derived from a claim of sovereignty, but from a need to protect and pursue the organization's functions.[58] The *raison d'être* for such grant of immunity to international organizations is "to shield the affairs of international organizations, in accordance with international practice, from political pressure or control by the host country to the prejudice of member States of the organization, and to ensure the unhampered performance of their functions." [59]

In his separate opinion in *Liang v. People*, [60] Justice Reynato Puno further expounded on the rationale for the grant of immunity to international organizations, thus:

The generally accepted principles which are now regarded as the foundation of international immunities are contained in the ILO Memorandum, which reduced them in three basic propositions, namely: (1) that international institutions should have a status which protects them against control or interference by any one government in the performance of functions for the effective discharge of which they are responsible to democratically constituted international bodies in which all the nations concerned are represented; (2) that no country should derive any financial advantage by levying fiscal charges on common international funds; and (3) that the international organization should, as a collectivity of States Members, be accorded the facilities for the conduct of its official business customarily extended to each other by its individual member States. The thinking underlying these propositions is essentially institutional in character. It is not concerned with the status, dignity or privileges of individuals, but with the elements of functional independence necessary to free

international institutions from national control and to enable them to discharge their responsibilities impartially on behalf of all their members.[61]

There is a critical difference between the organizational immunity enjoyed by international organizations and the functional immunity of its personnel. As a rule, the immunity enjoyed by the organization is broader. Its scope is similar to the diplomatic prerogatives granted to diplomatic envoys.[62]

For instance, ADB's organizational immunity includes every form of legal process and only excludes very limited banking activities. These exceptions, in turn, are clearly spelled out.[63] As pointed out by Senior Associate Justice Marvic M.V.F. Leonen, the exclusion of specific banking transactions was incorporated to provide a means of enforcement for ADB's offered securities and services.[64] Thus, save for these services where enforcement may be necessary, the organizational immunity of ADB is nearly absolute.[65]

Notably, many of the cases discussing immunity in the context of international organizations, i.e., *International Catholic Migration Commission v. Calleja*,^[66] *Holy See v. Rosario, Jr.*,^[67] *Lasco v. United Nations*,^[68] and *Department of Foreign Affairs v. National Labor Relations Commission*,^[69] pertain to immunity enjoyed by the international organizations themselves.^[70] Thus, the doctrines on these cases should be understood to refer to organizational immunity.

Meanwhile, the immunity enjoyed by personnel of international organizations is different from that granted to the organization itself. They are entitled to immunity only with respect to acts performed in their official capacity, unlike international organizations which enjoy almost absolute, if not absolute, immunity.^[71] Officials of international organizations enjoy functional immunity, that is, only that necessary for the exercise of the functions of the organization and the fulfillment of its purposes.^[72] These officials are subject to the jurisdiction of local courts for their private acts, notwithstanding the absence of a waiver of immunity by the organization.^[73]

For instance, the immunity granted to ADB officials and personnel extends only to acts done in their official capacities.^[74] When ADB officials act in their official capacities, their immunity is not only sourced from their positions as such, but from the international organization itself, as their actions are imputable to the organization.^[75] This is similar to the principle observed in determining claims of state immunity.^[76] As accurately observed by Senior Associate Justice Leonen, ADB's organizational immunity is operationally exercised by its officers, representatives, and employees whose official actions enjoy functional immunity as a derivative of their organization's own immunity.^[77]

On this point, Associate Justice Amy C. Lazaro-Javier aptly observed that the terms diplomatic immunity and functional immunity are often used interchangeably.^[78] Thus, the Court deems it proper to differentiate the two kinds of immunities.

Diplomatic immunity refers to the immunity granted to diplomatic agents, such as heads of diplomatic missions and members of the diplomatic staff.^[79] The Vienna Convention on Diplomatic Relations spells out the scope of diplomatic immunity depending on one's rank and functions. In *Minucher*, the Court emphasized that diplomatic immunity must be restrictively construed, and should be understood to refer to the immunity enjoyed by diplomatic agents, thus:

The Convention lists the classes of heads of diplomatic missions to include (a) ambassadors or nuncios accredited to the heads of state, (b) envoys, ministers or internuncios accredited to the heads of states; and (c) charges d' affaires accredited to the ministers of foreign affairs. Comprising the "staff of the (diplomatic) mission" are the diplomatic staff, the administrative staff and the technical and service staff. Only the heads of missions, as well as members of the diplomatic staff, excluding the members of the administrative, technical and service staff of the mission, are accorded diplomatic rank. Even while the Vienna Convention on

Diplomatic Relations provides for immunity to the members of diplomatic missions, it does so, nevertheless, with an understanding that the same be restrictively applied. Only "diplomatic agents," under the terms of the Convention, are vested with blanket diplomatic immunity from civil and criminal suits. The Convention defines "diplomatic agents" as the heads of missions or members of the diplomatic staff, thus impliedly withholding the same privileges from all others. It might bear stressing that even consuls, who represent their respective states in concerns of commerce and navigation and perform certain administrative and notarial duties, such as the issuance of passports and visas, authentication of documents, and administration of oaths, do not ordinarily enjoy the traditional diplomatic immunities and privileges accorded diplomats, mainly for the reason that they are not charged with the duty of representing their states in political matters. Indeed, the main yardstick in ascertaining whether a person is a diplomat entitled to immunity is the determination of whether or not he performs duties of diplomatic nature.[80]

Under Article 31 of the Vienna Convention on Diplomatic Relations, a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He or she shall also enjoy immunity from the receiving state's civil and administrative jurisdiction subject to very limited exceptions.[81] In contrast, personnel of international organizations enjoy only such immunity as is necessary for the exercise of the organization and the fulfillment of its purposes.[82]

Thus, the privileges and immunities of diplomats and those of international officials are based on different legal foundations.[83] 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.[84] 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 [their] jurisdictional immunities. Such an obligation can only result from specific treaty provisions." [85]

As held by the Court in *Department of Foreign Affairs v. National Labor Relations Commission*, [86] immunity-granting agreements "are treaty covenants and commitments voluntarily assumed by the Philippine government which must be respected." [87] 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.

In his separate opinion in *Liang*, Justice Puno also emphasized that a bank official of the ADB is not entitled to diplomatic immunity.[88] Indeed, bank officials may not be considered diplomats under the Vienna Convention on Diplomatic Relations. The immunity enjoyed by bank officials must be traced to the organization's constituent instrument, multilateral treaties, or headquarters agreements.[89]

Thus, We clarify that officials and personnel of international organizations generally enjoy functional, not diplomatic, immunity. However, as pointed out by Associate Justice Amy C. Lazaro-Javier, in some instances, diplomatic immunity may be invoked by such officials and personnel if such immunity is conferred by a treaty or agreement.[90]

This was the case in *World Health Organization v. Aquino* [91] where the Court held that petitioner therein, the Acting Assistant Director of Health Services of the World Health Organization (WHO), is entitled to diplomatic immunity. This is because under Section 24 of the Host Agreement between the Philippine Government and the WHO, petitioner is entitled to "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law." Thus, any invocation of diplomatic immunity by an officer or personnel of an international organization must find basis in a treaty or similar covenant.

The applicability of functional immunity requires an inquiry into the capacity in which the bank officer or personnel was acting

Going to the specific treaty covenants applicable to ADB, ADB is governed by the Agreement Establishing the Asian Development Bank (ADB Charter) and the Agreement Between the Asian Development Bank and the Government of the Republic of the Philippines Regarding the Headquarters of the Asian Development Bank (Headquarters Agreement).

Article 50 of the ADB Charter lays down the scope of ADB's immunity as an organization, or its so-called organizational immunity, thus:

Article 50

IMMUNITY FROM JUDICIAL PROCEEDINGS

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. (Emphasis supplied.)

Meanwhile, Article 55 of the ADB Charter specifies the scope of immunity of bank personnel:

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[.] (Emphasis supplied.)

The same provisions are replicated in Articles III and XII of the Headquarters Agreement. Sections 44 and 45, Article XII of the Headquarters Agreement only further distinguish between the immunity enjoyed by certain ADB officers and other bank officers and staff. Governors, other representatives of member-states, Directors, the President, Vice-President and other executive officers agreed upon are immune "from legal process of every kind in respect of words spoken or written and all acts done by them in their official capacity." [92] Meanwhile, officers and staff of ADB are immune "from legal process with respect to acts performed by them in their official capacity except when the Bank waives the immunity." [93]

Based on Article 55 of the ADB Charter, liability for an official act can only come after a waiver by ADB. Even then, Section 44, Article XII of the Headquarters Agreement does not have a waiver proviso with respect to certain high-ranking officials of ADB, i.e., "Governors, other representatives of Members, Directors, the President, Vice-President and executive officers as may be agreed upon between the Government and the Bank." For this group of people, immunity applies so long as the acts were done in an official capacity. Meanwhile, for other ADB officers and staff whose immunity may be waived by the Bank, Section 49, Article XIII of the Headquarters Agreement provides that ADB "shall waive the immunity accorded to any person if, in its opinion, such immunity would impede the course of justice and the waiver would not prejudice the purposes for which the immunities are accorded."

The difference in scope between the two kinds of immunities dictates the nature of proceedings where such

protections are invoked. When the immunity of ADB as an organization is raised, there is little or no need to delve into the factual nuances of the case as the immunity is almost unqualified and extends to legal process of every form.[94] Thus, courts need only determine whether the case arises out of or is in connection with the exercise of ADB's banking functions for which immunity is waived. This determination can be done through a cursory reading of the complaint and its attachments or, at most, after exchange of pleadings.

Meanwhile, in a proceeding where functional immunity of a bank personnel is invoked, it is necessary to ascertain in what capacity the official was acting.[95] Such issue requires for its resolution evidentiary basis, specifically on the nature of the official's functions and the acts complained of. Courts cannot blindly adhere and take on its face a certification from the Department of Foreign Affairs (DFA) that a certain person is covered by functional immunity.[96] "The DFA's determination that a certain person is covered by immunity is only preliminary which has no binding effect in courts." [97] Mere invocation of the immunity clause does not ipso facto result in the dismissal of the case.[98]

In *Liang*[99] and *United States of America v. Guinto (Guinto)*,[100] the Court required further factual review before sustaining the invocation of immunity. As held in *Guinto*, "[o]nly after it shall have determined in what capacity the petitioners were acting at the time of the incident in question will this Court determine, if still necessary, if the doctrine of state immunity is applicable." [101] Thus, courts have the power and duty to inquire into the factual basis of the invoked immunity, especially since the protection extends to limited acts.

Instructive is the disquisition of Justice Reynato Puno in his separate opinion in *Liang*, thus:

VI

Who is competent to determine whether a given act is private or official?

This is an entirely different question. In connection with this question, the current tendency to narrow the scope of privileges and immunities of international officials and representatives is most apparent. Prior to the regime of the United Nations, the determination of this question rested with the organization and its decision was final. By the new formula, the state itself tends to assume this competence. If the organization is dissatisfied with the decision, under the provisions of the General Convention of the United States, or the Special Convention for Specialized Agencies, the Swiss Arrangement, and other current dominant instruments, it may appeal to an international tribunal by procedures outlined in those instruments. Thus, the state assumes this competence in the first instance. It means that, if a local court assumes jurisdiction over an act without the necessity of waiver from the organization, the determination of the nature of the act is made at the national level.

It appears that the inclination is to place the competence to determine the nature of an act as private or official in the courts of the state concerned...

....

Second, considering that bank officials and employees are covered by immunity only for their official acts, the necessary inference is that the authority of the Department of Affairs, or even of the ADB for that matter, to certify that they are entitled to immunity is limited only to acts done in their official capacity. Stated otherwise, it is not within the power of the DFA, as the agency in charge of the executive department's foreign relations, nor the ADB, as the international organization vested with the right to waive immunity, to invoke immunity for private acts of bank officials and employees, since no such prerogative exists in the first place. If the immunity does not exist, there is nothing to certify.

....

Third, I choose to adopt the view that it is the local courts which have jurisdiction to determine whether or not a given act is official or private. While there is a dearth of cases on the matter under Philippine jurisprudence,

the issue is not entirely novel.

....

. . . Considering that the immunity accorded to petitioner is limited only to acts performed in his official capacity, it becomes necessary to make a factual determination of whether or not the defamatory utterances were made pursuant and in relation to his official functions as a senior economist.[102] (Emphasis supplied)

Immunity bars the exercise of jurisdiction by local courts.[103] Thus, before a court could conduct further proceedings on a case, its 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.[104] 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.

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 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.

The Court shall rule on the merits of the case in the interest of judicial economy

Circling back to this case, as detailed in the assailed Resolution, the parties have conflicting submissions on the nature of the contested acts. Locsin et al. claim that their acts squarely fall within their official functions. Meanwhile, Westfall claims that the statements are malicious and defamatory; thus, they cannot be considered official.[105] Given this conflict, the CA and the RTC should have looked at the facts more closely to ascertain whether the statements are defamatory and, thus, ultra vires.[106]

Notably, in their Comment on the petition, Locsin et al. conceded that the petition raises questions of fact pertaining to the following issues: (a) whether Lacson et al.'s acts and conduct were done in their official capacity and not ultra vires; and (b) whether the statements in the VP Panel Notes and Interview Report are not abusive and defamatory.[107]

In the interest of judicial economy and efficiency, We reconsider Our directive to remand the case to the trial court for further proceedings. Instead, the Court shall proceed to resolve the factual issue and determine the applicability of functional immunity based on the facts on record.

Judicial economy refers to "efficiency in the operation of the courts and the judicial system; especially the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources." [108] The norm of judicial economy aims to prevent duplicating the efforts of the parties and the courts.[109] The Court has refused to remand cases for further proceedings when the parties have been given ample opportunities to argue their positions.[110] Besides, it is highly probable that, upon remand, the case would eventually reach this Court again.

For instance, in *Holy See v. Rosario, Jr.*, [111] the Court ruled that the issue of non-suability may be resolved without going to trial in light of the pleadings and admissions on record.[112] Thus, while the ordinary procedure

would be to remand the case and order the trial court to conduct a hearing to establish certain facts, the Court found that such procedure would be unduly circuitous given the pleadings and documents on record.[113]

Hence, to put an end to the controversy, We shall proceed to rule on the propriety of applying functional immunity. Upon a thorough review of the records, it is apparent that the parties have been given several opportunities to argue and substantiate their respective positions. They have attached numerous documents to their various pleadings. In fact, the parties refer to and rely on several common documents. Consequently, the dispute can be resolved by examining and considering these, as well as the uncontested facts. Further proceedings may only duplicate the parties' efforts and unduly strain the judiciary's resources.

We acknowledge that, in the assailed Resolution, the Court emphasized the lack of attention on Westfall's allegations, particularly those opposing the statements in the VP Panel Notes and Interview Report.[114] We stressed that the CA should have examined Westfall's allegations to determine if the statements were indeed false, malicious, and defamatory.[115] Only then can We fully dispel questions on the character of respondents' actions, i.e., whether these were made in an official or personal capacity.[116]

Upon further review, however, We find that these questions may be answered by a more thorough examination of the records. As will be shown, the Court need not pass upon the veracity of Westfall's claims on his professional background to resolve the main issue. Other factual circumstances, which are already pleaded and substantiated, reveal a clear picture of the capacity in which respondents Locsin, et al. acted. Thus, contrary to the assertions of Westfall, We find the records sufficient for the purpose of applying the prevailing doctrines on functional immunity.

Functional immunity does not extend to ultra vires acts, such as defamation or slander of another

Jurisprudence has recognized limited exceptions to the immunity enjoyed by officials of international organizations, particularly, ultra vires acts, as these are not part of their official functions. On this matter, the ruling of the Court in the cases of Liang[117] and Wylie v. Rarang[118] provide guidance. While Wylie did not involve officials of an international organization, its ruling is still instructive because the invoked immunity is also limited to official acts.

Liang involved an economist working with the ADB, who allegedly uttered defamatory words, i.e., imputation of theft, against a fellow ADB personnel.[119] Accordingly, the accused was charged with grave oral defamation.[120] However, the lower court subsequently dismissed the case on the ground that accused is covered by immunity from legal process. When it reached the Court, it was explained that trial should proceed because there must be a determination of what capacity accused was acting at the time the alleged utterances were made. The Court ruled that immunity is not absolute, as this is subject to the condition that the acts were done in an official capacity.[121] It explained that the imputation of theft is ultra vires and cannot be part of official functions, to wit:

[S]landering a person could not possibly be covered by the immunity agreement because our laws do not allow the commission of a crime, such as defamation, in the name of official duty. The imputation of theft is ultra vires and cannot be part of official functions. It is well-settled principle of law that a public official may be liable in his personal private capacity for whatever damage he may have caused by his act done with malice or in bad faith or beyond the scope of his authority or jurisdiction.[122]

Meanwhile, Wylie centered on an alleged defamatory publication of officials of the US Navy, which imputed

theft to complainant.[123] When they were sued for damages, the officers argued that they were immune from suit as the publication was made in their official capacities.[124] Notably, the Court agreed with the lower courts and found the officers liable.[125] Granted, the officers' act of screening the publication is part of their official functions.[126] However, the imputation of theft to complainant is a defamation against her character and reputation.[127] The Court found that such is a tortious act, which is ultra vires, and cannot be considered as part of official duty. Thus, the Court ruled that the officers were liable in their personal capacities.[128]

Following these cases, it is apparent that, for the ultra vires exception to apply, there must be a determination that the acts committed were done beyond the scope of official capacity, such as a crime or an act contrary to law.

Here, We find that the general rule of immunity, and not the limited exception, applies. The acts were performed in Locsin et al.'s official capacities. The statements were also not defamatory and malicious so as to fall under the limited exceptions.

The alleged acts were performed by respondents Locsin et al. in their official capacities

A perusal of the records would show that the alleged acts were performed by Locsin et al. in their official capacities as members of the SC.

The SC was created for an official purpose, which is to review the applications for vacant positions within the ADB.[129] Verily, Locsin et al. were appointed to the SC because of their respective positions in the ADB.[130] In an email dated 20 January 2015 sent by the Budget, Personnel, and Management Systems Department (BPMSD) of ADB for the review of the applications for Technical Advisors (Sector and Thematic Groups), the members of the SC were specifically instructed to comment on the applications for the positions, to wit:[131]

The Screening Committee will review applications, generate a shortlist of candidates for each position (recommended is a shortlist of 3 to 5 or whatever number you feel is appropriate) and conduct preliminary interviews. Attached please find the recruitment process and timetable for the Technical Advisor positions:

....

Next Steps:

Each screening committee member (DG or designated representative) will review the applicant list and will create their own shortlist. On the form provided, please rank and comment on your selections.[132] (Emphasis supplied.)

Likewise, in the VP Panel Notes, it was stated that the members of the SC met and agreed on key criteria to be applied in their evaluation:

A Screening Committee was established to review the applications, comprising of Directors General (DG) representing the Operations departments (DGs from CWRD, SARD, EARD, SERD, PARD, and PSOD); DG and Deputy DG BPMSD; DG RSDD; Director BPHP; and HR Business Partner. The Screening Committee met on 23 January 2015 and agreed on key criteria to be applied in evaluating applicants. During the week of 26 January 2015, each member of the Screening Committee submitted his/her recommended shortlist which were consolidated by BPMSD. On 30 January 2015, the Screening Committee met and agreed on a final shortlist, which was submitted to the Vice Presidents on 4 February 2015. Preliminary interviews by the Screening Committee were held from 9 to 13 February 2015.[133] (Emphasis supplied.)

From this, it is clear that, based on the key criteria agreed upon, Locsin et al. were given the discretion to comment on the qualifications of the applicants.[134] Therefore, there is no doubt that Locsin et al. were acting in

their official capacities when they committed the acts imputed to them. The statements complained of by Westfall were made by Locsin et al. in the course of their deliberations on his application for the position.

With the foregoing, We now resolve whether the imputed acts fall within the limited jurisprudential exception for ultra vires acts similar to those in *Liang and Wylie*, i.e., whether the statements were so malicious and defamatory so as to exceed Locsin et al.'s mandate as SC members.

The acts complained of do not fall under the jurisprudential exception for defamatory statements

After a re-examination of the pleadings and documents submitted by the parties, We find that the statements of Locsin et al. are not defamatory and ultra vires. There are differences between the factual circumstances in this case and those in the *Liang and Wylie* cases.

An allegation is considered defamatory if it ascribes to a person the commission of a crime, the possession of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance which tends to dishonor, discredit or put another in contempt, or which tends to blacken the memory of one who is dead.[135] In determining whether certain utterances are defamatory, the words used are to be construed in their entirety and should be taken in their plain, natural, and ordinary meaning as they would naturally be understood by persons hearing (or reading, as in libel) them, unless it appears that they were used and understood in another sense.[136]

We emphasize that a consequent personal embarrassment from insulting words does not automatically qualify said statement as defamation. The Court must still be satisfied that, from the entirety of the impugned writing, it is defamatory.[137] That the language is offensive to the plaintiff does not make it actionable by itself.[138] Even in civil cases, it must be shown that the defamatory imputation was published and that it was attended with malice.[139] Malice connotes ill will or spite and an intention to do ulterior and unjustifiable harm.[140]

Here, a plain reading of the entire VP Panel Notes and Interview Report reveals that the words used by respondents Locsin, et al. are but objective assessments of Westfall's accomplishments and experiences. To recall, the assailed statements described Westfall as follows:

"is not familiar with knowledge areas";
"has no recent participation in knowledge sharing activities nor has he kept up with his reading";
"has not used [media skills] on any key Bank projects in many years";
"reputation of not being able to deliver or follow through on projects";
"has been away from the urban sector for quite some time and has not kept his knowledge current." [141]

To negate the false and defamatory nature of the statements, Locsin et al. point out that the comments even included observations that boost Westfall's application.[142] On the other hand, Westfall avers that respondents fail to read the VP Panel Notes and Interview Report in their entirety.[143] Westfall argues that a cursory reading of the so-called "positive and encouraging opinions" alongside the comments which discredit him show that the statements were made to defame him.[144]

We find merit in Locsin et al.'s argument. The inclusion of positive remarks about Westfall's work and accomplishments[145] supports the conclusion that they were merely deliberating on the strengths and weaknesses of petitioner. We find that, taken as a whole, the statements only scrutinize Westfall's experience to assess his qualification, in view of Locsin et al.'s task to evaluate petitioner. The remarks consisted of views, opinions, impressions, and recommendations submitted by Locsin et al. as part of ADB's screening, selection, and appointment process. Were it not for Locsin et al.'s appointments to the SC, they would not have any reason to

comment on Westfall's qualifications. In contrast, the Wylie and Liang cases both involved the imputation of a crime, which is more easily construed as malicious.

Moreover, it does not appear that there was publication within the meaning of the law on defamation. The Wylie case involved an actual publication of a defamatory statement in an article distributed to military personnel.[146]

In this case, however, the VP Panel Notes and Interview Report are internal documents which are confidential in nature. Upon exhaustive review of the records, We note that there is an undertaking that the panelists will maintain the confidentiality of the proceedings.[147] It also appears that the Interview Report is a confidential document since per Westfall himself, an Interview Report is usually prepared during deliberation based on the conduct of said interview.[148]

Indeed, based on the Appeals Committee Report being cited by Westfall:

The Appeals Committee ... [r]eviewed on 14 October 2015 in camera the following confidential materials made available by BPMSD (a) interview reports on the three candidates who were shortlisted, (b) e-mail confirmation of interview reports by Screening Committee members, (c) VP Review Panel notes, and (d) briefing notes to the VP Review Panel;[149] (Emphasis supplied.)

Verily, said documents are confidential in nature and were intended to be used by the SC, the VP Panel, and the approving authorities for the selection process. As such, there is no publication to speak of. Applicable by analogy is the rule on statements made by public officers in the discharge of their official duties. It is settled that "a communication made by a public officer in the discharge of his official duties to another or to a body of officers having a duty to perform with respect to the subject matter of the communication does not amount to a publication within the meaning of the law on defamation." [150]

Notably, Westfall claims that the VP Panel Notes were "circulated among Locsin et al., as well as various departments in ADB." [151] Significantly, however, the allegation is not supported by any proof. Basic is the rule that one who alleges a fact has the burden of proving it by means other than mere allegations.[152] Based on the submissions in this case, the Court cannot conclude that said confidential documents were indeed disseminated outside of those privy to the screening process.

In any event, the documents were not meant to be circulated to other ADB personnel who had no participation in the selection process. Thus, there is no intention to tarnish the reputation of petitioner as the discussions regarding his qualifications were intended to be kept among respondents themselves and within the screening process.

While not binding on this Court, the discussion of the ADB Administrative Tribunal on this matter bears noting, viz.:

In the present case, the statements (the "crime" according to the Applicant) were all made in the framework of the selection process. In this context, the Tribunal also recalls the Appeals Committee's decision to uphold the Appeal was based on the shortcomings in the procedures and not on the contents of the statements made by the officials in the selection process. The statements were made in the process of the selection procedure and therefore, it was in an official capacity for which the persons are protected by the immunities that the Bank enjoys. These immunities are essential to the functioning of international organisations such as the ADB and well recognized by international law. It is for the Bank to decide whether or not it will waive these immunities in specific circumstances.[153] (Emphasis supplied.)

We find these conclusions sound based on the Court's own review of the records. Indeed, in the assailed Resolution,[154] We emphasized that there are doubts on the official nature of respondents' acts, considering the Report of the ADB Appeals Committee that "not all of ADB's relevant policies and procedures were correctly

applied in this case." [155] This finding impresses a possibility that some of Locsin et al.'s acts may be ultra vires.

However, a closer study of such Report reveals that, insofar as the VP Panel Notes and Interview Report are concerned, the findings of the ADB Appeals Committee primarily pertained to the poor quality and inaccuracy of the reports, thus:

Failure to adequately present and review qualifications: The Screening Committee notes, interview reports, and Summary Profile of Applicants were of generally poor quality and do not provide an entirely accurate summary of the Appellant's or the additional candidate's qualifications and experience. The interview notes in particular consisted of one-line summaries of major competencies and lacked the ratings that are normally provided. Also absent was the fact that the Appellant served as a Director of the Urban Services Division in CWRD, and that his performance reviews were exemplary. In contrast the assessments of the additional candidate's qualifications and experience were consistently generous, and in some cases inaccurate, despite less extensive documentation. Given that only a few members of the Screening Committee have had direct working relationships with the Appellant or the additional candidate to form a complete view of their performance or potential, the disparity of formal materials available to the Screening Committee, and the absence of minutes of the Screening Committee's meetings, more accurate documentation should have been required. [156]

The incompleteness and inaccuracy of the VP Panel Notes and Interview Report are insufficient to overcome functional immunity. That some statements may not be completely accurate as petitioner asserts does not render them defamatory and malicious. Inaccuracy per se does not establish ill intent. We share the conclusion of the ADB Appeals Committee that "[t]here is no evidence of willful intent" in this case. [157] At most, the errors are mere administrative infractions that the ADB may rectify through its own internal processes.

Thus, similar to the observation of the ADB, We find that respondents acted within the scope of their official capacities and did not act with malice or bad faith. It follows, therefore, that ultra vires exception to immunity does not apply.

With the official character of their acts, respondents Amy Leung, Noriko Ogawa, Gil-Hong Kim, Diwesh Sharan, Ramit Kumar Nagpal, Ken L. Chee, Makoto Kubota, and Bibiana Victoria G. Francisco may only be sued if ADB waives their immunity, following Section 45 of the Headquarters Agreement. [158] No such waiver was made here. Moreover, by virtue of Locsin's position as Director General, she enjoys immunity from legal process of any kind and is not subject to the waiver proviso, as provided in Section 44 of the Headquarters Agreement. [159]

In this regard, We clarify that Our ruling here does not necessarily apply to every utterance in the course of official duty within the ADB, some of which may not be covered by immunity. This Resolution is specifically premised on the facts of this case and the nature of screening proceedings. The evaluation, assessment, selection, and appointment of staff members or external candidates to an ADB staff position must necessarily include the candid evaluation of the applicant's qualifications, performance, and suitability. Pursuant to their official duty to evaluate the applicants, Locsin et al. were expected to utter remarks consisting of their subjective views, opinions, impressions, and recommendations. As they emphasized, Westfall applied for the promotion and thus freely subjected himself to ADB's selection and review process. [160] Ultimately, the application of immunity should be assessed by the courts on a case-to-case basis.

Westfall is not without recourse; ADB has an internal grievance and appeal system

The Court underlines that ADB's immunity from local jurisdiction by no means deprives labor, as well as Westfall, of their basic rights. [161] For ADB employees are not without recourse whenever there are disputes to

be settled. As stressed by Locsin et al., Article XIII, Sections 50 and 51 of the Agreement between Asian Development Bank and the Government of the Republic of the Philippines Regarding the Headquarters of the Asian Development Bank (Headquarters Agreement) set safeguards against potential abuse of ADB's functional immunity by its employees, officers, and staff members:

Section 50

The Bank recognizes that not all privileges, immunities, exemptions and facilities enjoyed by members of diplomatic missions are necessary for the effective performance of the functions and duties of the officials mentioned in Section 44 hereof.

Accordingly, the Bank and the Government shall, at the request of either, consult with each other with a view to determining in specific cases what particular privilege, immunity, exemption or facility is not necessary for the effective performance of the duties and functions of such officials and the Bank agrees to waive in such case such particular privilege, immunity, exemption or facility.

Section 51

The Bank shall take every measure to ensure that the privileges, immunities, exemption and facilities conferred by this Agreement are not abused and for this purpose shall establish the rules and regulations as it may deem necessary and expedient. There shall be consultation between the Government and the Bank, should the Government consider that an abuse has occurred.[162]

Verily, these provisions state that ADB and the Philippine Government, at the request of either party, may consult with each other to delimit the privileges, immunities, exemptions, and facilities enjoyed by ADB's employees, officers, and staff members. Further, ADB is mandated to take every measure and establish rules and regulations to ensure that such abuse is avoided. Should the Philippine Government consider that an abuse has occurred, the ADB is mandated to undergo consultation with the Philippine Government.[163]

To be sure, the Headquarters Agreement, together with ADB's internal review and appeal processes – which include recourse to independent panels,[164] outlines extensive legal remedies for individuals for the redress of their grievances.

Notably, Westfall did avail of ADB's internal appeals process. He exhausted the administrative review process in accordance with Sections 3 and 5 of Administrative Order 2.06.[165] Upon failure of the compulsory conciliation and administrative review to result in a settlement, he proceeded to initiate an appeal with the Appeals Committee. The latter ruled in Westfall's favor and recommended that his appeal be upheld. This was adopted by the ADB President. The same confirms that Westfall had an effective remedy within the ADB's internal justice system for any alleged irregularities in the screening process.[166]

In fine, if Westfall felt that Locsin et al. committed mistakes in the screening process, his remedy is not with the courts, in violation of the functional immunity of ADB's personnel, but through ADB's internal review process, which he availed of. Significantly, additional recourse and protection can be obtained through the Philippine Government or the Executive Department, as provided in the Headquarters Agreement.[167]

ACCORDINGLY, the Motion for Partial Reconsideration Ad Cautelam with Motion to Refer the Case to the Court En Banc and Set the Case for Oral Arguments is PARTLY GRANTED. The Resolution dated April 27, 2022 of this Court is REVERSED and SET ASIDE insofar as it partially granted the Petition by directing the reinstatement of petitioner Matthew Westfall's complaint and the conduct of further proceedings in Civil Case No. R-MKT-17-01365-CV. The dismissal of the complaint as against all respondents Maria Carmela D. Locsin, et al. is AFFIRMED. Accordingly, the Order dated August 17, 2017 of Branch 138, Regional Trial Court of Makati

City, as affirmed in the Decision dated 22 April 2019 and Resolution dated November 26, 2019 of the Court of Appeals in CA-G.R. SP No. 154420, is REINSTATED.

SO ORDERED.

Caguioa, Hernando, Lazaro-Javier, Inting, M. Lopez, Gaerlan, J. Lopez, Dimaampao, Marquez, Kho, Jr., and Singh, JJ., concur.

Gesmundo, C.J. and Leonen, SAJ., see separate concurring opinion.

Rosario,[*] J., no part.

[*] No part. Prior participation in CA Decision (CA GR SP No. 154420).

[1] Rollo, pp. 1179-1224.

[2] Id. at 1101-1121.

[3] Id. at 1120.

[4] Id. at 1121.

[5] Id. at 133-149.

[6] Id. at 192-195.

[7] Id. at 201.

[8] Id. at 192-195.

[9] Id. at 14.

[10] Id.

[11] Id. at 13.

[12] Id. at 201.

[13] Id.

[14] Id. at 205-209.

[15] Id. at 237-246.

[16] Id. at 246-252.

[17] Id. at 125-130. The August 17, 2017 Order in Civil Case No. R-MKT-17-01365-CV was penned by Presiding Judge Josefina A. Subia of Branch 138, Regional Trial Court, Makati City.

[18] Id. at 129.

[19] Id.

[20] Id. at 131-132.

[21] Id. at 65-83. The April 22, 2019 Decision in CA-G.R. SP No. 154420 was penned by Associate Justice Perpetua T. Atal-Paño and concurred in by Associate Justices Ricardo R. Rosario (now a Member of this Court) and Nina G. Antonio-Valenzuela of the Eleventh Division, Court of Appeals, Manila.

[22] Id. at 77.

[23] Id. at 80-83.

[24] Id. at 72-74.

[25] Id. at 1101-1121.

[26] Id. at 1111.

[27] Id. at 1115.

[28] Id. at 1120.

[29] Id. at 1212-1218.

[30] Id. at 1219.

[31] Id. at 1184-1188.

[32] Id. at 1192.

[33] Id. at 1193.

[34] Id. at 1198.

[35] Id., unpaginated.

[36] Id., unpaginated.

[37] Id., unpaginated.

[38] Id., unpaginated.

[39] Id., unpaginated.

[40] Id., unpaginated.

[41] Id., unpaginated.

[42] Id., unpaginated.

[43] Supreme Court Circular No. 2-89.

[44] Internal Rules of the Supreme Court, Rule 2, sec. 3.

[45] Rollo, p. 1183.

[46] Id., unpaginated.

[47] J. Puno, Concurring Opinion in *Liang v. People*, 407 Phil. 414, 425 (2001) [Per J. Ynares-Santiago, First Division].

[48] Reflections of C.J. Gesmundo, p. 4.

[49] Id.

[50] Id.

[51] See *United States of America v. Guinto*, 261 Phil. 777, 791 (1990) [Per J. Cruz, En Banc].

- [52] Reflections of C.J. Gesmundo, p. 4.
- [53] *United States of America v. Guinto*, 261 Phil. 777, 791 (1990) [Per J. Cruz, En Banc].
- [54] 445 Phil. 250 (2003) [Per J. Vitug, First Division].
- [55] *Id.* at 268-272. Emphasis supplied; emphasis in the original.
- [56] J. Puno, Concurring Opinion in *Liang v. People*, 407 Phil. 414, 423-424 (2001) [Per J. Ynares-Santiago, First Division].
- [57] *Id.*
- [58] Reflections of C.J. Gesmundo, p. 4.
- [59] *International Catholic Migration Commission v. Calleja*, 268 Phil. 134, 153 (1990) [Per J. Melencio--Hererra, First Division].
- [60] 407 Phil. 414 (2001) [Per J. Ynares-Santiago, First Division].
- [61] J. Puno, Concurring Opinion in *Liang v. People*, 407 Phil. 414, 430-431 (2001) [Per J. Ynares-Santiago, First Division]. Emphasis in the original.
- [62] *Id.* at 436.
- [63] See *Weinstock v. Asian Development Bank*, 2005 U.S. Dist. LEXIS 16870.
- [64] SAJ Leonen, Separate Concurring Opinion, p. 5.
- [65] J. Puno, Concurring Opinion in *Liang v. People*, 407 Phil. 414, 442 (2001) [Per J. Ynares-Santiago, First Division].
- [66] *Id.* at 442.
- [67] 308 Phil. 547 (1994) [Per J. Quiason, En Banc].
- [68] 311 Phil. 795 (1995) [Per J. Quiason, First Division].
- [69] 330 Phil. 573 (1996) [Per J. Vitug, First Division].
- [70] J. Puno, Concurring Opinion in *Liang v. People*, 407 Phil. 414, 423 (2001) [Per J. Ynares-Santiago, First Division].
- [71] *Id.* at 437.
- [72] See *id.* at 441-442.
- [73] *Id.* at 442.
- [74] Rollo, pp. 1111.
- [75] Reflections of C.J. Gesmundo, p. 8; J. Puno, Concurring Opinion in *Liang v. People*, 407 Phil. 414, (2001) [Per J. Ynares-Santiago, First Division].
- [76] Reflections of C.J. Gesmundo, p. 9.
- [77] SAJ Leonen, Separate Concurring Opinion, p. 6.
- [78] Reflections of J. Lazaro-Javier, p. 1.

[79] Reflections of J. Lazaro-Javier, p. 4; *Minucher v. Court of Appeals*, 445 Phil. 250, 265 (2003) [Per J. Vitug, Second Division].

[80] *Minucher v. Court of Appeals*, 445 Phil. 250, 264-265 (2003) [Per J. Vitug, First Division]. Emphasis supplied; emphasis in the original.

[81] Article 31 of the Vienna Convention on Diplomatic Relations reads:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

[82] J. Puno, Concurring Opinion in *Liang v. People*, 407 Phil. 414, 441-442 (2001) [Per J. Ynares-Santiago, First Division].

[83] *Id.*

[84] *Id.*

[85] *Id.* at 432.

[86] 330 Phil. 573 (1996).

[87] *Id.* at 582-583.

[88] J. Puno, Concurring Opinion in *Liang v. People*, 407 Phil. 414, 441 (2001) [Per J. Ynares-Santiago, First Division].

[89] Reflections of J. Lazaro-Javier, p. 4.

[90] *Id.* at 7.

[91] 150-C Phil. 471 (1972) [Per J. Teehankee].

[92] Headquarters Agreement, Art. XII, Sec. 44.

[93] Headquarters Agreement, Art. XII, Sec. 45.

[94] *Department of Foreign Affairs v. National Labor Relations Commission*, 330 Phil. 573 (1996).

[95] *Liang v. People*, 380 Phil. 673, 676 (2000) [Per J. Ynares-Santiago, First Division].

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] 407 Phil. 414 (2001) [Per J. Ynares-Santiago, First Division].

[100] 261 Phil. 777 (1990) [Per J. Cruz, En Banc].

[101] Id. at 799.

[102] Id. at 438-444.

[103] See *Arigo v. Swift*, 743 Phil. 8, 44-45 (2014) [Per J. Villarama, Jr., En Banc].

[104] *Bulanon v. Mendco Development Corp.*, G.R. No. 219637, April 26, 2023 [Per J. Hernando, First Division] at 7. This pinpoint citation refers to the copy of the Decision uploaded to the Supreme Court website.

[105] *Rollo*, pp. 1111-1113.

[106] Id. at 1113-1114.

[107] Id. at 832.

[108] *Ren Transport Corp. v. National Labor Relations Commission*, 788 Phil. 234, 244 (2016) [Per C.J. Sereno, First Division].

[109] See *Reburiano v. De Vera*, 877 Phil. 880, 899 (2020) [Per J. Carandang, First Division].

[110] See *Banco De Oro Unibank, Inc. v. International Copra Export Corp.*, 901 Phil. 88 (2021) [Per J. Leonen, Third Division].

[111] 308 Phil. 547 (1994) [Per J. Quiason, En Banc].

[112] Id. at 559.

[113] Id. at 560.

[114] *Rollo*, p. 1113.

[115] Id. at 1114.

[116] Id.

[117] *Liang v. People*, 380 Phil. 673, 676 (2000) [Per J. Ynares-Santiago, First Division].

[118] 284-A Phil. 842 (1992) [Per J. Gutierrez, Jr., Third Division].

[119] *Liang v. People*, 380 Phil. 673 (2000) [Per J. Ynares-Santiago, First Division].

[120] Id. at 676.

[121] Id.

[122] Id. at 677.

[123] 284-A Phil. 842 (1992) [Per J. Gutierrez, Jr., Third Division].

[124] Id. at 850.

[125] Id. at 859.

[126] Id. at 855.

[127] Id. at 859.

[128] Id.

[129] *Rollo*, p. 953.

[130] Id.

[131] Id.

[132] Id.

[133] Id. at 192.

[134] Id. at 953.

[135] Manila Bulletin Publishing Corp. v. Domingo, 813 Phil. 37, 56 (2017) [Per J. Martires, Second Division].

[136] Madrona v. Rosal, 281 Phil. 1, 10 (1991) [Per J. Davide, Third Division].

[137] Tulfo v. People, G.R. Nos. 187113 & 187230, January 11, 2021 [Per J. Leonen, Third Division].

[138] MVR Publications v. Islamic Da'wah Council of the Philippines, 444 Phil. 230, 241 (2003) [Per J. Bellosillo, En Banc].

[139] See Yuchengco v. Manila Chronicle Publishing Corp., 620 Phil. 697, 726-727 (2009) [Per J. Chico-Nazario, Third Division].

[140] Yuchengco v. Manila Chronicle Publishing Corp., 620 Phil. 697, 726 (2009) [Per J. Chico-Nazario, Third Division].

[141] Rollo, pp. 14-15.

[142] Id. at 1191.

[143] Id., unpaginated.

[144] Id.

[145] Id. at 201.

[146] Liang v. People, 380 Phil. 673, 676 (2000) [Per J. Ynares-Santiago, First Division].

[147] Rollo, p. 192.

[148] Id. at 405-406.

[149] Id. at 550-551.

[150] Alonzo v. Court of Appeals, 311 Phil. 60, 78 (1995) [Per J. Davide, Jr., First Division].

[151] Rollo, p. 13.

[152] Social Security System v. Commission on Audit, 888 Phil. 892, 903 (2020) [Per J. Caguioa, En Banc].

[153] Rollo, p. 538.

[154] Id. at 1114.

[155] Id. at 548.

[156] Id. at 557.

[157] Id. at 558.

[158] Rollo, pp. 225-226.

[159] Id. at 224.

[160] Id. at 823-824; 1111-1113.

[161] *International Catholic Migration Commission v. Calleja*, 268 Phil. 134, 153 (1990) [Per J. Melencio--Herrera, Second Division].

[162] Rollo, p. 907

[163] Id. at 1117.

[164] Id. at 445-456.

[165] Id. at 456.

[166] Id. at 25-26, 445-456, 519-559, 851-852.

[167] Id. at 21.

CONCURRING OPINION

GESMUNDO, C.J.:

I fully concur with the ponencia circulated by the esteemed Associate Justice Rodil V. Zalameda in the above-captioned case. I write this Concurring Opinion to share my perspective on the immunities granted to the Asian Development Bank (ADB) and its officials and personnel.

The Motion for Partial Reconsideration Ad Cautelam with Motion to Refer the Case to the Court En Banc and Set the Case for Oral Arguments (Motions) filed by respondents 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 (collectively, Locsin et al.) arose out of a Complaint for damages filed by Matthew Westfall (Westfall) against them.[1]

Westfall, a former staff member of the ADB, applied for the position of Technical Advisor (Urban and Water) but was not selected. Aggrieved, he availed of the ADB's internal grievance process. He alleged that Locsin et al., as members of the Screening Committee, made defamatory statements against him. This is supposedly evidenced by the VP Panel Notes and Interview Report, both of which the Screening Committee prepared. According to him, the Screening Committee's statements in these documents were unfounded, deeply malicious, and false. Locsin et al. allegedly maligned his reputation and discredited his professional background.[2]

Westfall also filed a criminal complaint for libel against Locsin et al. Thereafter, he filed the instant Complaint for Damages (Complaint) under Articles 19, 20, 21, and 33 of the New Civil Code before Branch 138, Regional Trial Court (RTC) of Makati City.[3]

Ultimately, the RTC dismissed the Complaint, holding that Locsin et al.'s actions were performed pursuant to their official capacities and were covered by functional immunity. The nature of the Screening Committee's work necessitated the discussion and recording of Westfall's merits and demerits. Subsequently, the RTC also denied Westfall's Motion for Reconsideration. Westfall then filed a Petition for Certiorari before the Court of Appeals (CA).[4]

The CA denied Westfall's petition for lack of merit. It held that the issue of whether or not Locsin et al. acted in their official capacities is a question of fact, and is outside the purview of a petition under Rule 65. In any case, the CA was convinced that Locsin et al. were acting in their official capacities and within the scope of their authority.[5]

Thereafter, Westfall filed a Petition for Review on Certiorari (Petition) before this Court. In a Resolution dated April 27, 2022, this Court partly granted the Petition wherein Westfall's Complaint was reinstated but was dismissed against Takehiko Nakao, Toshio Oya, Makoto Kubota, Christopher Stephens, Ramit K. Nagpal, and Deborah Stokes for failure to state a cause of action. The Court held that the immunity enjoyed by ADB officials pertain only to acts done in their official capacities. However, it was held that the courts *quo* must first conduct a factual inquiry to determine the propriety of applying immunity. Since both the CA and the RTC only applied immunity without considering the facts on record, the Court remanded the case for further proceedings. Hence, these Motions.[6]

The ponencia granted the Motions in part. It reversed and set aside the April 27, 2022 Resolution of the Court insofar as it directed the reinstatement of Westfall's Complaint regarding the conduct of further proceedings in the trial court. It affirmed the dismissal of the Complaint against all of the respondents and reinstated the August 17, 2017 Order of the RTC, as affirmed by the April 22, 2019 Decision and November 26, 2019 Resolution of the CA.[7]

The ponencia explained that officials and personnel of international organizations (IOs) generally enjoy functional immunity. However, they may invoke diplomatic immunity if there is a treaty or some binding agreement which allows them to do so. Though sometimes used interchangeably, diplomatic immunity is different from functional immunity. Diplomatic immunity refers to those granted to diplomatic agents, as provided under the Vienna Convention on Diplomatic Relations. Diplomatic agents enjoy immunity from the civil, criminal, and administrative jurisdiction of the receiving state, subject to a few exceptions. However, IOs and their personnel only enjoy immunity as necessary for the fulfillment of the IOs' purposes.[8]

The ponencia also observed that the question of the applicability of functional immunity requires an inquiry into the capacity in which the bank officer or personnel was acting. It recognized ADB's organizational immunity, as found in Article 50 of its Charter, as being nearly absolute. It contrasted this with the functional immunity of ADB's personnel, as found in Article 55 of the ADB Charter, which applies only to acts done in the personnel's official capacities. It declared that an *ultra vires* act by a bank personnel is not covered by any immunity. On this score, the ponencia held that in a proceeding where functional immunity of bank personnel is invoked, it is necessary to determine in what capacity the ADB personnel was acting.[9]

Thereafter, the ponencia declared that instead of remanding the case back to the lower courts, the Court should rule on its merits in the interest of judicial economy. Citing *Holy See v. Rosario, Jr.*,[10] the ponencia emphasized that the issue of non-suability may be resolved based on pleadings and admissions on record.[11] It found the records at hand to be sufficient and, thus, declared that the Court may proceed to determine the question of whether or not immunity applies to Locsin et al.'s acts.[12]

Citing *Liang v. People*[13] and *Wylie v. Rarang*,[14] the ponencia reiterated the prevailing rule that *ultra vires* acts, i.e., acts which are not part of their official functions, are recognized exceptions to the immunity enjoyed by officials of IOs. In *Liang* and *Wylie*, the Court held that uttering and/or publishing defamatory statements are *ultra vires* and cannot be considered part of one's official functions. Therefore, immunity does not apply to the individuals who uttered and/or published such statements, and they may be held personally liable for their actions.[15]

Applying the foregoing to the instant case, the ponencia held that the statements were made by Locsin et al. in their official capacities as members of the Screening Committee and, as such, the ultra vires exception to immunity does not apply. It observed that Locsin et al. were duly appointed to the Screening Committee, and they were specifically instructed to comment on the qualifications of the applicants for the technical advisor positions. It concluded that the statements for which Westfall took offense were made by Locsin et al. in the course of the Screening Committee's deliberations regarding his application. Moreover, it found that, in line with the well-established rules on defamation, Locsin et al.'s statements were merely objective assessments of Westfall's accomplishments and experiences. The inclusion of positive remarks, noted the ponencia, supports the conclusion that they were merely deliberating on Westfall's strengths and weaknesses. Further, it held that the supposed inaccuracy and poor quality of the documents were not enough to qualify the statements complained of as ultra vires. It observed that the documents which contain these statements were confidential in nature and were not even circulated to other personnel who were outside the selection process. Hence, it stated that there was also no publication as contemplated under the law on defamation.[16]

Finally, the ponencia pointed out that Westfall's remedy lies in ADB's internal grievance and appeal system. It observed that he, in fact, availed of ADB's internal appeals process, and the Appeals Committee actually ruled in his favor. The ponencia further indicated that Westfall may also seek recourse through the Philippine Government or the Executive Department, as provided in the Headquarters Agreement.[17]

I concur with the partial granting of the Motions, and write mainly to delve into the principles behind the organizational and functional immunity, respectively, enjoyed by the ADB and its personnel.

As explained by former Chief Justice Reynato S. Puno in his Concurring Opinion[18] in *Liang*, a reading of the immunity provisions in several treaties and conventions shows that the nature and degree of immunities granted vary depending on who the recipient is.[19] The immunities granted from one entity to another, and those granted between an entity and its personnel, may vary in terms of source, breadth, and coverage.

For instance, the most widely recognized immunity is that which is enjoyed by states themselves. The doctrine of state immunity is understood as a prohibition of suits against the state without its consent. This is mainly based on the principle that all states are sovereign equals and cannot assert jurisdiction over one another, as a contrary disposition would, "unduly vex the peace of nations." [20] In other words, foreign states derive immunity directly from their sovereignty.[21] This doctrine is both a generally accepted principle of international law and a matter of customary international law. As a manifestation of the Philippines' resolve to abide by the rules of the international community, We have even codified it in our Constitution.[22]

On the other hand, unlike states, IOs, such as the ADB, derive their immunity from their need to protect and pursue their functions, and not from a claim of sovereignty.[23]

IOs are generally formed on the basis of a treaty to fulfill a specific purpose and to carry out specific functions which characterize their activities.[24] Furthermore, IOs have a separate legal personality and a separate will from its member states.[25] This is because IOs must be independent and cannot simply "be a tool of its member states." The IOs' decisions reflect the will of the bank itself and not of one particular state.[26] Necessarily, an IO's constituent instrument vests particular immunities and privileges which enable it to properly fulfill its purpose and functions and ensure its independence from the control of any state.[27]

Therefore, a widely accepted method of examining an IO's claim of immunity is that of a functional approach, i.e., that an IO should enjoy a certain degree of immunity from the jurisdiction of local courts for it to be able to achieve its founding objectives.[28] This has been recognized as the doctrine of "functional necessity," which means that "an entity shall be entitled to (no more than) what is strictly necessary for the exercise of its functions

in the fulfillment of its purposes." [29]

This doctrine assumes that without the immunities and privileges granted to them, IOs will be unable to properly perform their functions due to interference with their work. [30] At the same time, it also recognizes that completely insulating IOs from judicial scrutiny may lead to an abuse of their responsibilities. [31] In other words, the doctrine of functional necessity aims to strike a harmonious balance between giving IOs sufficient leeway to do their activities while, at the same time, preventing states and their citizens from having no recourse whatsoever against IOs, regardless of the cause of action which may be available to them.

The wide acceptance of this doctrine is seen from courts of different jurisdictions, which have adopted a functional test when called to determine the level of an IO's immunity. [32] For instance, in Italy, their courts have looked into an IO's necessary functions in deciding whether immunity should be granted in relation to a labor dispute. [33] On the other hand, in the Netherlands, their Supreme Court has also held that IOs in their country enjoy functional immunity "in respect of all disputes which are immediately connected with the performance of the tasks entrusted to the organization [in] question." [34]

More importantly, in our jurisdiction, this doctrine of functional immunity has also been expressly recognized by the Court. In *International Catholic Migration Commission v. Calleja*, [35] it was held that:

There are basically three propositions underlying the grant of international immunities to international organizations. These principles, contained in the ILO Memorandum are stated thus: 1) international institutions should have a status which protects them against control or interference by any one government in the performance of functions for the effective discharge of which they are responsible to democratically constituted international bodies in which all the nations concerned are represented; 2) no country should derive any national financial advantage by levying fiscal charges on common international funds; and 3) the international organization should, as a collectivity of States members, be accorded the facilities for the conduct of its official business customarily extended to each other by its individual member States. The theory behind all three propositions is said to be essentially institutional in character. "It is not concerned with the status, dignity or privileges of individuals, but with the elements of functional independence necessary to free international institutions from national control and to enable them to discharge their responsibilities impartially on behalf of all their members." The *raison d'être* for these immunities is the assurance of unimpeded performance of their functions by the agencies concerned. [36] (Emphasis supplied)

This same doctrine is also found in *Lasco v. United Nations Revolving Fund for Natural Resources Exploration*, [37] *Callado v. International Rice Research Institute*, [38] *Ebro III v. National Labor Relations Commission*, [39] and *Department of Foreign Affairs v. National Labor Relations Commission*, [40] among others.

As pointed out by the ponencia, the ADB's immunities as an organization are laid out in Article 50 [41] of the ADB Charter and reiterated in Article III of the Headquarters Agreement. [42] These provisions show that, except for very limited banking activities, ADB's immunity as an organization is nearly absolute. [43] As further seen in Chapter VIII, Article 48 of the ADB Charter, the doctrine of functional necessity is expressly recognized as the basis for the immunities and privileges accorded to the ADB and its personnel:

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. (Emphasis supplied)

On the other hand, its purpose and general functions are laid out in Article 1 and 2 of the ADB Charter:

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.

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.

Unsurprisingly, the purpose and functions of the ADB are not very different from other multilateral development banks, which provide financial assistance to foster economic and social development in developing countries.[44] Given the foregoing, this Court must be mindful that the spirit which animates the immunity provisions in the

treaties creating the ADB is functional necessity.

Realistically, however, being creatures of legal fiction, IOs, like the ADB, may only fulfill their purpose and functions through actual persons, particularly, its officials and personnel. This principle was even recognized in the landmark Reparations Case of the International Court of Justice (ICJ).[45] There, the ICJ held that the United Nations (UN), an international organization, had the necessary legal personality to protect its representatives. Otherwise, the UN would be unable to function as it can only operate through its agents.[46]

Therefore, the immunities given to the IO as an institution must, to a certain extent, also be extended to its officials and personnel. They must also be free from the interference of the member states, to enable them to effectively perform their essential duties on behalf of the organization.[47] In essence, the functional necessity which provides basis for the organizational immunity of the IO is also the same basis for the immunity of its officials and personnel.

As pointed out by the ponencia, Article 55 of the ADB Charter provides that the officials and employees of the ADB are "immune from legal process with respect to the acts performed by them in their official capacity, except when the ADB itself waives the immunity." Articles 44 and 45 of the Headquarters Agreement only make a distinction between the immunity of certain ADB officers and of other bank officers and personnel.[48]

And here lies the crux of the present controversy – the need to determine whether Locsin et al., as members of the ADB's Screening Committee, were acting in their official or in their personal capacities. This determination is crucial because if Locsin et al. were acting in their official capacities, the immunity which applies is not only their immunity as personnel of the ADB, but the immunity of ADB as an organization.

As former Chief Justice Reynato Puno points out in his Concurring Opinion[49] in Liang, an international official is independent from the jurisdiction of local authorities for their official acts, "because those acts are not [theirs], but are imputed to the organization, and without waiver, the local courts cannot hold [them] liable for them." [50] He posits that even the IO itself cannot waive the immunity of its officer for their official acts, since this allows local authorities to assume jurisdiction over an individual for an act which is not technically theirs.[51] Therefore, it is the IO itself which should waive its own immunity and appear in court, and not the individual, except insofar as they appear in the name of the IO.[52]

Corollary, the personnel's acts which are done in their personal capacity (i.e., ultra vires acts) are carved out from the coverage of immunity without the need of a waiver from the IO.[53] An individual acting in their personal capacity necessarily means that their actions are not being done in furtherance of their IO's purpose and functions. Hence, the very purpose (i.e., functional necessity) of their immunity is absent, and the immunity given to them should be inapplicable to their actions.

In case of the ADB, this is recognized by Article XIII, Section 49 of the Headquarters Agreement which states:

Article XIII

Waiver of Immunities and Prevention of Abuse
Section 49.

The privileges, immunities, exemptions and facilities accorded in this Agreement are granted in the interest of the Bank and not for the personal benefit of the individuals themselves. The Bank shall waive the immunity accorded to any person if, in its opinion, such immunity would impede the course of justice and the waiver would not prejudice the purposes for which the immunities are accorded. (Emphasis supplied)

This is a familiar concept in our jurisdiction, as this Court has used the same principle in the determination of

claims of state immunity.

One of the incidents involved in the case of *United States of America v. Guinto*[54] is instructive. In that case, several officers of the U.S. Air Force and Air Force Office of Special Investigators (AFOSI; collectively, US officers) conducted a buy-bust operation on Luis Bautista (Bautista) who was working as a barracks boy in Camp O'Donnell, an extension of Clark Air Base.[55] As a result of the buy-bust operation, Bautista was dismissed from service. This led him to file a complaint for damages against the US officers.[56]

Ruling in favor of the US officers, this Court held that they were acting in their official capacity when they conducted the buy-bust operation against Bautista. Hence, it follows that they cannot be impleaded for acts imputable to their principal – the United States – which has not given its consent to be sued.[57] Citing *Sanders v. Veridiano*,[58] the Court reiterated the rule that officers being sued for their acts done within the scope of their authority means that it is their government which is ultimately being held liable for their acts.[59]

Applying the foregoing to the present case, it is clear that the Screening Committee was created for an official purpose – to review applications for vacant positions within the ADB. Moreover, Locsin et al., as its members, were even specifically instructed to comment on the applications.[60] Even from the lens of a strict functional necessity approach, there can be no doubt that Locsin et al.'s actions were necessary for the fulfillment of the ADB's purpose and functions. As mentioned earlier, the ADB can only act through its officers and personnel. Therefore, it has the prerogative to hire only the people whom it deems fit for the available roles therein. Locsin et al.'s act of providing comments as they meticulously and objectively screened applicants like Westfall directly advances this prerogative.

Moreover, a perusal of the statements made by Locsin et al. readily shows that they were not defamatory. As explained by the ponencia, the facts in the present case are different from the facts in *Liang and Wylie*, where this Court held that an official's immunity is inapplicable to defamatory statements which are considered *ultra vires*. [61] In *Liang and Wylie*, the officers therein imputed actual acts of theft to the complaining parties. On the other hand, Locsin et al.'s allegedly defamatory statements were actually their objective assessments of Westfall's weaknesses. Locsin et al. even made comments which boost Westfall's application. In short, these statements were not motivated by malice or ill-will, as a holistic examination of the documents illustrate otherwise.[62] Therefore, Westfall simply cannot cry defamation based on his myopic assessment of selected portions of the VP Panel Notes and Interview Report.

In fine, I fully concur with the ponencia's finding that Locsin et al. were acting in their official capacities when they made their comments in the VP Panel Notes and Interview Report. They are protected by their functional immunities, and the Complaint against them should be dismissed.

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 Set the Case for Oral Arguments by REVERSING and SETTING ASIDE the April 27, 2022 Resolution of this Court insofar as it partially granted the Petition by directing the reinstatement of petitioner Matthew Westfall's Complaint and the conduct of further proceedings. Further, I vote to AFFIRM the dismissal of the Complaint against respondents 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. Finally, I vote to REINSTATE the August 17, 2017 Order of Branch 138, Regional Trial Court of Makati City in Civil Case No. R-MKT-17-01365-CV, as affirmed in the April 22, 2019 Decision and November 26, 2019 Resolution of the Court Appeals in CA-G.R. SP No. 154420.

- [1] Ponencia, p. 2.
- [2] Id. at 3.
- [3] Id.
- [4] Id. at 4.
- [5] Id.
- [6] Id. at 4-5.
- [7] Id. at 27.
- [8] Id. at 7-12.
- [9] Id. at 13-17.
- [10] 308 Phil. 547 (1994) [Per J. Quiason, En Banc].
- [11] Id. at 559.
- [12] Ponencia, pp. 17-18.
- [13] 407 Phil. 414 (2001) [Per J. Ynares-Santiago, First Division].
- [14] 284-A Phil. 842 (1992) [Per J. Gutierrez, Third Division].
- [15] Ponencia, pp. 19-20.
- [16] Id. at 20-26.
- [17] Id. at 26-27.
- [18] J. Puno, Concurring Opinion in *Liang v. People*, 407 Phil. 414 (2001) [Per J. Ynares-Santiago, First Division].
- [19] Id. at 432-433.
- [20] *United States of America v. Judge Guinto*, 261 Phil. 777, 790-791 (1990) [Per J. Cruz, En Banc]. Note however that the doctrine of state immunity has evolved into a restrictive doctrine which distinguishes between sovereign acts (*jure imperii*) and private, commercial and proprietary acts (*jure gestionis*). See *Most Rev. Arigo v. Swift*, 743 Phil. 8, 47 (2014) [Per J. Villarama, En Banc].
- [21] Trillium Chang, *A Functional Framework to Balance Accountability with the Needs of International Organizations: International Organization Immunity Post-Jam*, 9 PENN ST. J.L. & INT'L AFF. 124, 154 (2021).
- [22] *United States of America v. Judge Guinto*, 261 Phil. 777, 790-791 (1990) [Per J. Cruz, En Banc]. See also CONST., art. XVI, sec. 3.
- [23] Trillium Chang, *A Functional Framework to Balance Accountability with the Needs of International Organizations: International Organization Immunity Post-Jam*, 9 PENN ST. J.L. & INT'L AFF. 124, 154 (2021).
- [24] Id. at 157.
- [25] Chengjin Xu & Bin Gu, *A Critique of Immunity for Multilateral Development Banks in National Courts*, 4 CJGG 49, 54-55 (2018).

[26] *Id.* at 55.

[27] Trillium Chang, A Functional Framework to Balance Accountability with the Needs of International Organizations: International Organization Immunity Post-Jam, 9 PENN ST. J.L. & INT'L AFF. 124, 157 (2021).

[28] *Id.*

[29] PETER H.F. BEKKER, THE LEGAL POSITION OF INTERNATIONAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES, 39 (1994). See Chengjin Xu & Bin Gu, A Critique of Immunity for Multilateral Development Banks in National Courts, 4 CJGG 49, 58 (2018). See also Trillium Chang, A Functional Framework to Balance Accountability with the Needs of International Organizations: International Organization Immunity Post-Jam, 9 PENN ST. J.L. & INT'L AFF. 124, 157 (2021).

[30] Trillium Chang, A Functional Framework to Balance Accountability with the Needs of International Organizations: International Organization Immunity Post-Jam, 9 PENN ST. J.L. & INT'L AFF. 124, 157 (2021).

[31] *Id.* at 157-158.

[32] *Id.* at 158.

[33] *Id.*

[34] *Id.*, citing *A. Spaans v. The Netherlands*, Hoge Raad, NJ 438 (1985).

[35] 268 Phil. 134 (1990) [Per J. Melencio-Herrera, Second Division].

[36] *Id.* at 149. See also J. Puno, Concurring Opinion in *Liang v. People*, 407 Phil. 414, 430 (2001) [Per J. Ynares-Santiago, First Division].

[37] 311 Phil. 795 (1995) [Per J. Quiason, First Division].

[38] 314 Phil. 46 (1995) [Per J. Romero, Third Division].

[39] 330 Phil. 93 (1996) [Per J. Mendoza, Second Division].

[40] 330 Phil. 573 (1996) [Per J. Vitug, First Division].

[41] Agreement Establishing the Asian Development Bank (ADB Charter), August 22, 1966, available at <https://www.adb.org/sites/default/files/institutional-document/32120/charter.pdf>, art. 50 (last accessed on March 20, 2024).

[42] Agreement Between the Asian Development Bank and the Government of the Republic of the Philippines Regarding the Headquarters of the Asian Development Bank (Headquarters Agreement), December 22, 1966, available at <https://www.adb.org/sites/default/files/institutional-document/32422/files/adb-phil-agreement.pdf>, art. III (last accessed on March 20, 2024).

[43] Ponencia, p. 10.

[44] Chengjin Xu & Bin Gu, A Critique of Immunity for Multilateral Development Banks in National Courts, 4 CJGG 49, 51 (2018).

[45] W. Paul Gormley, The Future Privileges and Immunities Required by the Personnel of Regional and International Organizations from the Jurisdiction of American Courts, 32 U. Cin. L. Rev. 131, 152-153 (1963).

[46] *Id.*

[47] Id. at 154.

[48] Ponencia, pp. 13-14.

[49] J. Puno, Concurring Opinion in *Liang v. People*, 407 Phil. 414 (2001) [Per J. Ynares-Santiago, First Division] (Emphasis in the original). See Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L L. 828, 855 (1947).

[50] J. Puno, Concurring Opinion in *Liang v. People*, id. at 437.

[51] Id.

[52] Id.

[53] Id. at 437-438.

[54] 261 Phil. 777 (1990) [Per J. Cruz, En Banc].

[55] Id. at 788.

[56] Id.

[57] Id. at 797.

[58] 245 Phil. 63 (1988) [Per J. Cruz, First Division]. See also *Shauf v. Court of Appeals*, 269 Phil. 750 (1990) [Per J. Regalado, Second Division] and *Khosrow Minucher v. Court of Appeals*, 445 Phil. 250 (2003) [Per J. Vitug, First Division].

[59] *United States of America v. Judge Guinto*, 261 Phil. 777, 797 (1990) [Per J. Cruz, En Banc].

[60] Ponencia, p. 20.

[61] Id.

[62] Id. at 21-26.

SEPARATE CONCURRING OPINION

LEONEN, SAJ.:

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]

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:

- Whether these proceedings may be referred to the Court En Banc;
- Whether this Court erred in remanding the case to the Regional Trial Court for further proceedings; and
- 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 Unired States v. Guinto, describes a State's jurisdictional immunity as having basis in the sovereign equality of States:

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."

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 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 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, 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 [M]ultilateral 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 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.

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

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

(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 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 co-operation 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 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, Loscin, et al. were given the discretion to comment on the qualifications of the applicants. Therefore, there is no doubt that 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 Loscin, et al. in the course of their deliberations on his application for the position.[42]

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.

[1] Ponencia, at 3.

[2] Id.

[3] Id. at 4.

[4] Id.

[5] Id.

[6] Rollo, at 3-64.

[7] Ponencia, at 4-5.

[8] Id. at 5-6.

[9] Id. at 6.

[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.

[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.

[17] Ponencia, at 13.

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

[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)

[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).

[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)

[27] Gamze Erdem Turkelli, *The Best of Borth 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.

[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).

[33] ADB Charter, Article 50.

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

[35] ADB Charter Article 55.

[36] Ponencia, at 17.

[37] Ponencia, at 17.

[38] Id. at 17.

[39] ADB Charter, Chapter I, Articles 1 and 2.

[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.

[43] Id. at 22-23.

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