INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

RENÉE ROSE LEVY DE LEVI
(CLAIMANT)

and

THE REPUBLIC OF PERU
(RESPONDENT)

(ICSID Case No. ARB/10/17)

AWARD

ARBITRAL TRIBUNAL
Mr. Rodrigo Oreamuno, President
Professor Bernard Hanotiau, Arbitrator
Professor Joaquín Morales Godoy, Arbitrator

Secretary of the Tribunal:
Mrs. Anneliese Fleckenstein

Representing the Claimant:

Mr. Carlos Paitán
Mr. Christian Carbajal
Mr. José Salcedo
Estudio Paitán & Abogados
Av. Manuel Olguín N° 501 Ofic. 1007
Centro Empresarial Macros
Santiago de Surco
Lima 33- Peru

Representing the Respondent:

Mr. Stanimir Alexandrov
Ms. Jennifer Haworth McCandless
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1501 K Street, N.W.
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Mr. Juan Pazos
Mr. Ricardo Puccio
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Date of dispatch to the parties: February 26, 2014

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Acronyms and Abbreviations

APPRI	Agreement between the Republic of Peru and the Republic of France on the Reciprocal Promotion and Protection of Investments
Banking Law	General Law on the Financial and Insurance Industry and Organic Law of the Superintendency of Banking and Insurance
Bank of America	Bank of America Securities LLC
BCP	Banco de Crédito del Perú
BCR	Banco Central de Reserva del Perú
BNM	Banco Nuevo Mundo
CAF	Corporación Andina de Fomento
CEPRE	Comisión Especial de Promoción para la Reorganización Societaria (Special Commission for the Promotion of Corporate Reorganization)
COFIDE	Corporación Financiera de Desarrollo S.A.
CONASEV	Comisión Nacional Supervisora de Empresa y Valores
COMEX	Sociedad de Comercio Exterior del Perú
Congressional Commission	Monitoring and Supervisory Commission to Investigate Possible Irregularities in the Process of Intervention and Liquidation of Banco Nuevo Mundo
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Institution Rules	Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
FONAFE	Fondo Nacional de Financiamiento de la Actividad Empresarial al Estado
MEF	Ministry of Economy and Finance
NMH	Nuevo Mundo Holding S.A.

PCSF	Programa de Consolidación del Sistema Financiero (Financial Industry Consolidation Program)
PwC	PricewaterhouseCoopers
SBS	Superintendency of Banking, Insurance, and Pension Fund Administration
SUBCOMMISSION	Working Subcommission of the Economic Commission of the Congress of the Republic to Evaluate the Intervention by the Superintendency of Banking and Insurance of NBK and Banco Nuevo Mundo

INTRODUCTION

1. This award is handed down in the arbitral proceedings initiated by Renée Rose Levy de Levi (hereinafter the **Claimant**) against the Republic of Peru (hereinafter the **Respondent** or **Peru**) concerning the alleged violation of the Agreement concluded on October 6, 1993 between the Republic of Peru and the Republic of France on the Promotion and Protection of Investments, which entered into force on May 30, 1996 (**APPRI**).

2. Generally speaking, the dispute arose because, according to the **Claimant, Peru** arbitrarily and illegally subjected Banco Nuevo Mundo **(BNM),** the shareholders of which were initially the father of the **Claimant**, Mr. David Levy Pesso, and then the **Claimant** herself, to a process of intervention, followed by its dissolution and liquidation. The **Claimant** contends that, by these actions, **Peru** violated several principles of the **APPRI** and the rights granted to her by that Bilateral Investment Treaty.

3. In drafting this Award, the Arbitral Tribunal took into account, analyzed, and carefully evaluated all the arguments of the parties, including their claims and defenses, as well as the documents, witness statements, expert reports and any further evidence produced by them. In formulating their allegations, the parties introduced and cited a number of awards and decisions on issues relevant to the decision on jurisdiction and to the merits of this case. The Tribunal considers it important to note that it is required to settle the dispute initiated by the **Claimant** by means of an independent analysis of the **APPRI**, of the ICSID Convention, of the ICSID Arbitration Rules, and of the particular circumstances of this case, which do not preclude the Tribunal from taking into consideration the conclusions reached by other international Arbitral Tribunals.

4. In this Award, the Tribunal makes particular reference to the arguments of the parties that it considered to be most relevant for its decision on jurisdiction and, subsequently, for its decision on the merits of the case. Even when it does not explicitly refer to all of the arguments put forward by the parties, the Tribunal's decision is based

on all of them, as regards the factors considered by the Tribunal to be decisive in reaching its decision.

I. PROCEDURAL HISTORY

5. On June 22, 2010, ICSID or Centre received a Request for Arbitration (the "Request") from Claimant against Respondent. On June 24, 2010, ICSID acknowledged receipt of the Request and transmitted a copy of the Request and its accompanying documentation to the Respondent and its Embassy in Washington, D.C.

6. On July 20, 2010, pursuant to Article 36(3) of the ICSID Convention and in accordance with Rules 6(1)(a) and 7(a) of the Institution Rules, ICSID's Secretary-General registered the Request, and on the same date, notified the parties of the registration, inviting them to constitute the Arbitral Tribunal as soon as possible.

7. On September 9, 2010, the Claimant filed a request for provisional measures. On September 14, 2010, the Secretary-General fixed time limits for the parties to present observations on the Claimant's request for provisional measures pursuant to Rule 39(5) of the ICSID Arbitration Rules.

8. On September 23, 2010, the Claimant invoked Article 37(2)(b) of the ICSID Convention and appointed Prof. Joaquín Morales Godoy, a national of Chile, as arbitrator. Prof. Morales accepted his appointment on October 5, 2010.

9. On October 1, 2010, the Respondent appointed Prof. Bernard Hanotiau, a national of Belgium, as arbitrator. Prof. Hanotiau accepted his appointment on October 5, 2010.

10. On October 7, 2010, the Claimant filed a second request for provisional measures. On September 15, 2010, the Secretary-General fixed time limits for the parties to present observations on the Claimant's second request for provisional measures, pursuant to Rule 39(5) of the ICSID Arbitration Rules.

11. Between October 5 and November 11, 2010, the parties exchanged submissions on the Claimant's requests for provisional measures.

12. By letter of October 25, 2010, the Claimant informed the Centre that 90 days had elapsed since the registration of the Request for Arbitration and the parties had been unable to reach an agreement on the appointment of the President of the Tribunal. As a result, the Claimant requested that the Chairman of the Administrative Council appoint the President of the Tribunal, pursuant to Rule 4 of the ICSID Arbitration Rules.

13. On November 15, 2010, the Claimant filed a withdrawal of its second request for provisional measures.

14. By letter of January 11, 2011, the Centre informed the parties that the Chairman of the Administrative Council had appointed Mr. Rodrigo Oreamuno, a national of Costa Rica, as President of the Tribunal.

15. On January 19, 2011, the Centre informed the parties and the Tribunal that the Arbitral Tribunal was deemed constituted by (i) Prof. Joaquín Morales Godoy, (ii) Prof. Bernard Hanotiau, and (iii) Mr. Rodrigo Oreamuno, President of the Tribunal, and that Mrs. Anneliese Fleckenstein, Legal Counsel, would serve as the Secretary to the Tribunal.

16. On March 21, 2011, the First Session and a hearing on the Claimant's request for provisional measures were held at the seat of the Centre in Washington, D.C. During that session, a procedural calendar for the conduct of the proceedings was agreed upon by the parties. The parties further submitted their oral arguments on the Claimant's request for provisional measures.

17. On June 17, 2011, the Tribunal issued a Decision rejecting the Claimant's request for provisional measures.

18. On July 11, 2011, the Tribunal issued Procedural Order No. 1 concerning

production of documents.

19. On July 12, 2011, the Tribunal issued Procedural Order No. 2 concerning production of documents.

20. On August 2, 2011, the Tribunal issued Procedural Order No. 3 concerning the procedural calendar.

21. On August 25, 2011, the Respondent filed its Memorial on Jurisdiction. On the same day, the Claimant filed its Memorial on the Merits.

22. On January 30, 2012, the Claimant filed its Counter-Memorial on Jurisdiction. On the same day, the Respondent filed its Counter-Memorial on the Merits.

23. On May 2, 2012, the Tribunal issued Procedural Order No. 4 concerning production of documents.

24. On May 14, 2012, the Tribunal issued Procedural Order No. 5 concerning production of documents.

25. On May 29, 2012, the Claimant filed a Reply on the Merits.

26. On September 26, 2012, the Respondent filed a Rejoinder on the Merits.

27. On October 18, 2012, pursuant to paragraph 13 of the Minutes of the First Session, the Tribunal issued a Decision joining the objections to jurisdiction to the merits of the proceeding. By letter of the same date, the Respondent withdrew its request for the bifurcation of the proceeding.

28. From November 12 to 20, 2012, the Tribunal held a hearing on jurisdiction and merits at the seat of the Centre in Washington D.C. Present at the hearing were, **for the Tribunal**: Mr. Rodrigo Oreamuno, President; Prof. Bernard Hanotiau; Prof. Joaquín

Morales Godoy; and Mrs. Anneliese Fleckenstein, Secretary of the Tribunal. For the **Claimant**: Mr. Carlos Paitán; Mr. Christian Carbajal; and Mr. Danny Quiroga, from Estudio Paitán & Abogados S. Civil. R. Ltda.; Ms. Renée Rose Levy de Levi; and Mr. Jacques Levy. For the **Respondent**: Mr. Stanimir A. Alexandrov; Ms. Jennifer Haworth McCandless; Ms. Marinn Carlson; Ms. Mika Morse; Mr. Gavin Cunningham; Ms. María Carolina Durán; Mr. Trey Hilberg; Ms. Kerry Lee; Ms. Eloise Repeczky, from Sidley Austin LLP; Drs. Ricardo Puccio and Aresio Viveros, from Estudio Navarro, Ferrero & Pazos; H.E. Walter Alban, Peru's Permanent Representative to the Organization of American States; Dr. Daniel M. Schydlowsky; Mr. Carlos Cueva; Ms. Erika Lizardo; Mr. Carlos José Valderrama, Representatives of the Republic of Peru; and Ms. Maria Esther Sanchez, from the Embassy of Peru in Washington, D.C.

29. On January 22, 2013, the parties filed simultaneous Post-Hearing Briefs. On February 21, 2013, the parties filed simultaneous submissions on costs.

30. On December 20, 2013, the proceeding was declared closed, pursuant to ICSID Arbitration Rule 38(1).

II. FACTS

31. The Arbitral Tribunal will describe below only those events that are of importance for the resolution of this case and will try to reproduce them in chronological order, whenever possible.

32. The **Respondent** ratified the **ICSID Convention** on August 9, 1993; the Convention entered into force on September 8, 1993.[1]

33. The **Respondent** approved the **APPRI** by the Presidential Decree No. 4-94-RE, published in the Official Gazette *El Peruano* on March 13, 1994. This Bilateral

[1] Memorial on the Merits, ¶ 17.

Investment Treaty entered into force on May 30, 1996.[2]

34. **BNM** (originally known as Banco Iberoamericano SAEMA – BANIBERICO) was incorporated in Peru on January 31, 1992 and changed its name to Banco Nuevo Mundo on October 6, 1992. By SBS Resolution No. 1455-92 of December 30, 1992, **SBS** authorized the start-up of **BNM**'s financial operations, which commenced on January 25, 1993.[3]

35. According to the **Claimant**, **BNM's** overseas investment companies are:

a. Corporación XXI Ltd., incorporated in the Bahamas on January 27, 1997.

b. Burley Holding S.A., incorporated in Panama on April 1, 1999; its change of name to Nuevo Mundo Holding S.A. was registered on July 16, 1999.

c. Holding XXI S.A., incorporated in Panama on July 12, 2000. Under the Stock Transfer Agreement dated August 29, 2000, Holding XXI S.A. acquired 52 percent of the shares held by Corporación XXI Ltd. in Nuevo Mundo Holding S.A. Effective June 25, 2008, Holding XXI S.A. changed its name to Corporación XXI Ltd. S.A. (Panama).[4]

36. In the Report on Resources and their Use, dated June 14, 2001, **SBS** stated:

"Banco Nuevo Mundo S.A. is part of the Economic Group consisting of the following:
Banco Nuevo Mundo S.A., Nuevo Mundo Holding, NMB Limited, Inversiones NMB SAC, Nuevo País S.A., Nuevo Mundo SAFI S.A., Holding XXI S.A., Corporación XXI Ltda., GREMCO S.A., CIA. Hotelera Los Delfines S.A., De Fábrica S.A., Apart Hotel S.A., GREMCO Publicidad S.A., Inmobiliaria Las Colinas S.A., Inmobiliaria Renerose S.A., Parques Comerciales S.A., and

[2] Ibid., ¶ 18.
[3] Ibid., ¶¶ 5 and 7.
[4] Ibid., ¶¶ 8 to 15.

Peruvian Mining Corporation S.A. ... it is established that within the Nuevo Mundo Economic Group there is a 'financial conglomerate' consisting of the following: Banco Nuevo Mundo S.A., Nuevo Mundo Holding S.A., NMB Limited, Inversiones NMB SAC, Nuevo Mundo SAFI S.A., and Nuevo País S.A., and the firms in this conglomerate are indirectly owned by four families, through Holding XXI S.A. (Levy Calvo family), Strategic Finance Corporation (Franco Sarfaty family), Mariola S.A. (Porudominsky Gabel family), and Pragati Investment (Herschkowicz Grosman family)...."[5] [Tribunal's translation]

37. In 1998, the FONAFE relaxed the existing policy on deposit placement and permitted State-owned companies to place deposits in private banks.[6]

38. The Minutes of the Extraordinary General Shareholders' Meeting of Corporación XXI Ltd. held on January 28, 1999 show that its shareholders Mr. Isy Levy Calvo and Mr. Jacques Levy Calvo assigned to their father, Mr. David Levy Pesso, their legal rights derived from their shares of stock in that company. The assignment "was extended to (i) any transfer of Corporación XXI Ltd.'s shares in NMH, the controlling shareholder of BNM, to any other overseas investment companies in the corporate structure of Grupo Levy; and (ii) the presence of Mr. David Levy Pesso as shareholder in any future overseas investment companies that may purchase the Corporación XXI Ltd.'s shares of stock in any family business."[7]

39. On May 28, 1999, the **BNM** General Shareholders' Meeting authorized a merger project whereby **BNM** would take over Banco del País, Nuevo Mundo Leasing Sociedad Anónima, and Coordinadora Primavera Sociedad Anónima. On August 6, 1999, by Resolution No. 0718-99, **SBS** authorized the merger.[8] This merger created a goodwill of S/. 47,5 million, which "included primarily the premium paid for the purchase of Banco del País in excess of the fair value of its identified assets and liabilities, which was

[5] Claimant's Exhibit IV-22, page 2.
[6] Counter-Memorial on the Merits, ¶ 148.
[7] Memorial on the Merits, ¶¶ 112 and 113; Claimant's Exhibit II-6.
[8] Memorial on the Merits, ¶¶ 215 and 216; SBS Resolution No. 0718-99, Respondent's Exhibit R-036.

recorded as a credit to a [sic] especially reserved account within net equity."[9] **SBS** allowed the amount to be credited to a special reserve account within net equity, to be amortized over a five-year period. On December 31, 1999, this goodwill amounted to S/. 43.5 million.[10]

40. On June 18, 1999, the President of the **Respondent** issued Presidential Decree No. 099-99-EF, which:

> "Authorizing issue of Peruvian treasury bonds and authorizing companies with multiple operations under the financial system to transfer part of their portfolio to the MEF".[11] This program allowed Banks "to temporarily exchange their under-performing loans for Treasury bonds. However, the loan portfolio exchange program did not allow banks to transfer loans rated as losses ("*pérdida*")—the highest risk rating through this exchange, the banks that participated could postpone recording loan loss provisions for their underperforming loans until they reacquired the loans over the course of four years under the program (plus one-year grace period). BNM benefited from this program by exchanging a portfolio of loans for US$33.7 million in bonds . . . ."[12] The Decree itself "...Authorize the Ministry of Economy and Finance to issue Treasury Bonds up to a total amount of US$400,000,000.00...Companies with multiple operations under the Financial System may transfer to the Ministry of Economy and Finance a portion of their portfolio, receiving in exchange the bonds... Neither the portfolio of credits classified as losses nor financial leasing arrangements may be subject to transfer... companies with multiple operations under the Financial System shall meet the following requirements: a) … have a Development Plan approved by the Office of the Superintendent of Banking and Insurance, which shall contain, among other elements, commitments for capitalizing earnings, reinforcement of internal

[9] Memorial on the Merits, ¶ 218.
[10] Respondent's Exhibit R-155, page 2; Memorial on the Merits, ¶ 218.
[11] Respondent's Exhibit R-030.
[12] Rejoinder on the Merits, ¶ 30.

controls and, if applicable, a commitment to make capital contributions in cash."[13]

41. On August 31, 1999, the **BNM** General Shareholders' Meeting agreed to reduce the Bank's equity capital by S/. 23,591,550.00 for the purpose of increasing the provisioning level, and to request **SBS's** permission to do so. **SBS** gave its permission in its Resolution No. 0894-99 of September 29, 1999.[14]

42. The Inspection Visit Report No. ASIF "A" 172-VI/99 (hereinafter "the 1999 Report"), submitted by **SBS** to **BNM** concerning the visit conducted from July 9 to August 20, 1999, stated that on September 27, 1999, there were discrepancies in the classification of the loan portfolio:

> "Discrepancies in the Loan Portfolio Ratings towards greater risk categories regarding than that assigned by the Bank totaled 127 debtors with liabilities amounting to S/. 206,880,000, which represented 53.3% of the number of evaluated debtors and 34.4% of the amount of the evaluated portfolio.[…] the General Management through unnumbered document dated September 2, 1999, informed that it had begun to re-rate the credits reported as discrepant."[15]

43. The l999 Report of **SBS** also indicated:

> "The following has been determined resulting from the evaluation and rating of the Loan Portfolio at June, 30, 1999.
>
> a. CRITICIZED LOANS: Loans subject to Critics amounted to S/.320,804,000 which represented 53% of the sample evaluated and 19% of the Loan Portfolio. The Criticized Credits with relation to the evaluated sample are comprised by Potential Problems S/.138,805,000 (23%), Deficient S/.152,522,000 (25%), Doubtful S/.25,866 (4%) and Loss S/.3,611,000 (1%) ... In the future, the Bank must act pursuant to Resolution SBS No. 572-97 of August 20 of this year.

[13] Respondent's Exhibit R-030.
[14] Respondent's Exhibit R-038, page 1.
[15] Respondent's Exhibit R-143, page 12.

c. BAD DEBT PORTFOLIO…

d. PROVISION DEFICIT: The Loan Portfolio rating result determined a specific provision deficit for uncollectable risk of 125 loans subject to critics for a total of S/. 21,536,000. . . At the closing of July 1999, new provisions have been constituted for S/.2,393,000 for observed loans, reducing the provision deficit to S/.19,143,000."[16]

44. In that Report, **SBS** also stated:

"2.2.2. REFINANCED LOANS

From the review made on a sample of 218 debtors, it was determined that most of them do not fit properly in the accounting registry and risk rating; not-complying with what is established in the Chart of accounts for Financial Institutions, Resolution SBS No. 572-97 and the own Bank standard named NOR-NEG-010/98.

a. It was verified that the Bank performed refinanced transactions with 35 debtors which balances at July 31, 1999, amount to S/. 1,842,000 and US$4,583,000, in some cases with interest capitalization, which were not registered in accounting as refinanced transactions. Likewise, the risk rating assigned to the mentioned debtors pertains to "Normal" category…

b. It is also worth noting that, in certain cases such transactions are created by the unusual practice of amortizing or paying loan installments with charge to past due current accounts, increasing the debt balance given *(sic)* no payments are received, sufficient to face new charges, evidencing that the notes or loans are reduced with the own Bank's resources.

The mentioned status was informed to the General Management through Memorandum No. 12-99-VII.BNM dated 99.08.11, specifying that the observation is reiterative. On 99.08.19, the General Management reports it has given instructions so that the active standards on the matter must be fulfilled, indicating also, having complied with the register of refinanced transactions

[16] Ibid., page 12.

observed in the years 1997 and 1998.

In this regard, we must indicate that even if the Bank complies with the recommendations made by this Superintendency, it is necessary to indicate that given incurred recidivism it deserves to be sanctioned pursuant to the Ruling of Sanctions of Resolution No. 310-98."[17]

45. **SBS** also found current account overdrafts and made the following recommendation in the 1999 Report:

"The Bank must reformulate the current politics about debtors which keep overdrafts in current account for long periods and created by cancellation of their Credit Cards or by charges to corresponding payments of their loans, to avoid, in the first place, the practice of charging loan payments on past due current accounts and in the second place, apply the last paragraph of Article 228 of the General Banking Law that facilitates the executive action on past due balances in current accounts."[18]

46. In the 1999 Report, **SBS** also noted the concentration of **BNM's** liabilities and recommended to "Stimulate the incentive for attracting alternative lower cost deposits, given that one of the risks the Bank faces is liquidity, to which it is vulnerable do to the excessive concentration of liabilities in few debtors. The Bank must continue with the reduction process of this concentration that has begun recently."[19]

47. On October 22, 1999, **SBS** adopted Resolution No. 0950-99 imposing a fine on **BNM,** because in the 1999 Report **SBS** had noted that **BNM:**

"… repeatedly omitted to register loan operations with evident signs of refinanced operations as such in its accounting records... both the Inspection Visit Report No. ASIF "A" 034-VI/97 corresponding to 1997, and the Inspection

[17] Ibid., pages 15 and 16.
[18] Ibid., page 16.
[19] Ibid., page 8.

> Visit Reports Nos. ASIF "A" 164-VI/98 and . . . corresponding to 1998 and 1999 respectively, inspectors observed that Banco Nuevo Mundo had carried out refinanced operations that were not registered as such in its accounting records; Such operations are being registered as new loans, thereby avoiding increasing the high risk portfolio and a bad rating; furthermore, interests and commissions are being registered in the accounting records as business income thereby infringing the Chart of Accounts for Financial Institutions, Resolution SBS No. 572-97 and the Bank's own rule called NOR-NEG-010/98."[20]

48. On October 25, 1999, the management of **BNM** was informed that "the accounting and financial records of Banco del País [with which **BNM** merged, as stated in paragraph 39 above], and in particular its loan portfolio figures, did not clearly reveal its economic and financial situation."[21]

49. On October 26, 1999, **BNM** sent a letter to **SBS** in response to the 1999 Report. On the subject of the current accounts, it stated:

> "Close monitoring of checking accounts has been implemented at various levels in order to avoid situations such as those observed by the Inspection Team."[22] The letter also referred to refinanced loans and stated: "The accounting has been brought up to speed for loans considered by the Superintendency to be refinanced during the 1997 and 1998 annual visits. Furthermore, instructions have been given to implement the most advisable approach for those specified by the Superintendency during the last visit."[23]

50. On November 24, 1999, **BNM** submitted for the consideration of **SBS** a plan for participation in the amount of US$34.5 million in the Loan Portfolio Exchange Program approved by Presidential Decree No. 099-99-EF (mentioned in paragraph 40 above).[24]

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[20] Respondent's Exhibit R-145.
[21] Respondent's Exhibit R-146, page 1.
[22] Respondent's Exhibit R-147, page 2.
[23] Ibid., page 2.
[24] Respondent's Exhibit R-041.

On December 15, 1999, in the Official Letter No. 13214-99, SBS approved the plan and stated that "qualifies this company as a potential beneficiary of Public Treasury Bonds Programs..."[25] The Program allowed **BNM** to exchange millions of dollars in loans from the commercial portfolio and the consumer portfolio for an equivalent amount in Treasury bonds. **BNM** would reacquire this transferred portfolio beginning in 2001.[26]

51. On January 17, 2000, **SBS** started another inspection visit to **BNM**, which was concluded on February 18 of that year. Following that visit, it prepared the Report No. ASIF "A"-028-VI/2000 (hereinafter "the Report of April 2000").[27] The parties discussed the type of visit conducted on those dates.[28] In this connection, the Report stated: "In accordance with Article 357 of Law 26702, by virtue of Memorandum No. 0529-2000 of January 17, 2000, the Inspection Visit to Banco Nuevo Mundo took place..."[29] [Tribunal's translation] (The article in question reads: "**INSPECTIONS**. Without prior notice and at least once a year and when it deems so convenient, the Superintendency shall make general and special inspections, directly or through auditing companies it authorizes, with the purpose of examining the situation of the companies supervised, determining the content and scopes of such inspections").[30]

52. The Report of April 2000 indicated that the goals of the visit included assessing and rating **BNM**'s consumer loan portfolio on December 31, 1999 and verifying the provisioning and the implementation of corrective measures, in accordance with the recommendations in the 1999 Report. The section of the executive summary entitled "Financial Accounting Aspect" indicates that there is a deficit of S/. 3,947,000 in the assets assigned, because **BNM** followed a procedure that did not comply with Circular No. B-2017-98 on provisions.[31] This section also indicates that there were no policy and procedure manuals and that 44.7 percent of the recommendations made by **SBS** in the

[25] Respondent's Exhibit R-046.
[26] Memorial on Jurisdiction, ¶¶ 53 and 54; Respondent's Exhibit R-044.
[27] Memorial on the Merits, ¶ 284.
[28] Ibid., ¶¶ 284 to 288; Counter-Memorial on the Merits, ¶ 155.
[29] Respondent's Exhibit R-156, page 1.
[30] General Law of the Financial and Insurance Systems, Organic Law of the Superintendency of Banking and Insurance, Respondent's Exhibit R-021.
[31] Claimant's Exhibit IV-4, ¶ 1.2.2.6.

previous Report were pending or in process of implementation.[32] **SBS** noted the high concentration of public deposits, which on February 28, 2000 accounted for 38.9 percent of total deposits "representing a potential liquidity risk."[33] [Tribunal's translation] The Report recommended that procedure manuals for the Consumer Loan Division, Nuevo País, should be approved, and that **BNM** should establish provisions in accordance with the above-mentioned Circular No. B-2017-98. It also recommended that **BNM** should supervise implementation of the pending recommendations and prepare a deposit plan to avoid concentration of short-term deposits.[34]

53. On April 25, 2000, Mr. Martín Naranjo Landerer, the Superintendent of Banking and Insurance, sent the Official Letter No. 4383-2000 to Mr. Jacques Levy Calvo, Chairman of the Board of **BNM** (who received it on May 9), in which he stated:

> "As a result of the Inspection performed [from January 17 to February 18, 2000], the following aspects must be highlighted, among others:
> The Administration's failure to abide by the rulings contained in articles 206 to 209 of the General Law, given that loans have been granted for amounts that exceed the 10% legal limit of cash equity, in Grupo Miyasato for S/. 9,626,000, since it has not included the company Del Pilar Miraflores Hotel as part of the group. At February 10, 2000, it exceeded the 10% legal limit of cash equity, without having sufficient collaterals to cover the amount of loans S/. 162,000.
> ...
> A reserve deficit in awarded assets for S/. 3,947,000 was determined, since the Bank used a proceeding that is not consistent with numeral 5) of Circular No. B-2017-98 which establishes that reserves must be provisioned for 20% of the net book value at the time of the awarding.
> ...
> The evaluation of the level of implementation of the recommendations contained in the 1999 report issued by this Superintendency showed that 44.7% of what has

[32] Ibid., ¶ 1.2.2.9.
[33] Ibid., ¶ 1.2.2.10.
[34] Ibid., ¶ 1.3.

been observed are pending and/or in correction process. Likewise, inspectors noticed that there is no consolidated supporting information that would allow the confirmation of the implementation of the recommendations indicated by the Bank.

The Bank shows a high concentration of liabilities through public institutions deposits and COFIDE lines; this situation represents a potential liquidity risk. Likewise, inspectors observed that despite its network of branch offices, the Bank has failed to diversify such concentration; 70% of the Bank's deposits are concentrated in the Headquarters."[35]

54. Starting in July 2000, State companies began to withdraw funds from **BNM**.[36]

55. On August 11, 2000, **SBS** made what the **Claimant** called a second inspection visit to **BNM**, which lasted until October 13 that year.[37] The **Respondent** stated that this was the regular visit and not a second annual visit.[38]

56. On August 29, 2000, Corporación XXI Ltd. transferred its shares in **NMH** to Holding XXI S.A., the shareholder of which was Mr. David Levy Pesso.[39]

57. Starting in August 2000, the withdrawal from **BNM** of privately-owned deposits reached over US$70 million.[40]

58. In September 2000, **BNM** was rated by Class & Asociados and by Apoyo & Asociados Internacionales S.A.C.; they gave it B+ and B ratings respectively.[41] The B+ rating "is granted to financial or insurance companies with sound financial strength. They are companies with a high business level, with good results in their key financial

[35] Respondent's Exhibit R-157.
[36] Memorial on the Merits, ¶ 297.
[37] Ibid., ¶ 289.
[38] Counter-Memorial on the Merits, ¶¶ 155 and 156.
[39] Memorial on the Merits, ¶ 114.
[40] Ibid., ¶ 296.
[41] Ibid., ¶ 223; Claimant's Exhibit I-1, page 36; Claimant's Exhibit I-5, page 1.

indicators, and a stable environment for the growth of the business."[42] The B rating is "granted to companies having good payment capacity of liabilities in the terms and conditions agreed, but it may deteriorate slightly with potential changes in the company, the industry it belongs to, or the economy."[43] Apoyo y Asociados Internacionales S.A.C. stated that "The development of its product portfolio during its seven-year operations and the recent merger with Nuevo Mundo Leasing and Banco del País, have led BNM to rank sixth in terms of loans granted and deposits received (seventh by the end of 1999), with a 4.5 percent and 2.8 percent market share, respectively."[44]

59. On September 12, 2000, **BNM**'s General Shareholders' Meeting agreed to increase its equity capital by S/. 17.49 million, and to create an optional reserve with the issuance of capital premiums for S/. 8.8 million.[45]

60. Also on September 12, Mr. Carlos Quiroz Montalvo, the head of the **SBS** visiting team, sent the Memorandum No. 21-2000/VIO/NM to Mr. Carlos Schroth Parra, **BNM's** Acting Risk Manager, consulting him about the composition of the consumer portfolio until June 30, 2000 because "includes loans other than consumer loans…, in which 165 debtors with a balance equivalent to S/. 1,449 thousand, report arrears greater than 100 days and they have a Normal risk classification." It also consulted him about a number of discrepancies in the classification of borrowers with consumer loans and the provision deficit of S/. 383 thousand.[46] On September 19, 2000, Mr. Schroth replied to **SBS** that he would coordinate with the Systems Unit to "adequately identify those loan facilities that do not correspond to Consumer Banking debt. We will also manually classify those clients that have expired loan debt according to the list you attached." He also indicated that the consumer loan automatic classification program would be implemented in one month's time and that, in the future, the requirements of SBS Resolution No. 572-97 would be met. Regarding the other discrepancies, he said that an automatic classification program had been designed and was operational, "the discrepancies of the existing

[42] Memorial on the Merits, ¶ 226.
[43] Ibid., ¶ 232.
[44] Claimant's Exhibit I-1, page 1.
[45] Memorial on the Merits, ¶ 242.
[46] Respondent's Exhibit R-273.

classifications can be overcome."[47]

61. On September 19, 2000, Mr. Carlos Quiroz Montalvo sent Memorandum No. 25-2000-VIO/NM to Mr. Edgardo Alvarez Chávez, **BNM** Division Manager for Business Operations, stating: "... we have become aware that some in the Bank's loan portfolio have acquired participation shares from the Multirenta Fund, through loan operations received (including leaseback)..."[48] On September 25, Mr. Alvarez sent a lengthy reply to Mr. Quiroz, basically stating that the Fund was financially and administratively independent of **BNM**; it included stocks registered in the Public Register of Securities and listed on the Lima Stock Exchange and the stock transactions on the secondary market complied with the rules of the Exchange.[49]

62. On September 28, 2000, Mr. Carlos Quiroz Montalvo transmitted Memorandum No. 27-2000-VIO/NM to Mr. José Castañeda Trevejo, **BNM** Operations Manager, concerning overdue lending operations recorded in the accounts as Current portfolio until June 30, 2000.[50] On October 2, 2000, Mr. Castañeda transmitted **BNM**'s reply, stating that he had instructed the Systems and Quality Department to make the change; he also stated that the due dates given in the report were not correct and that the leasings mentioned in the **SBS** memorandum were reported to the Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI) (National Institute for the Defense of Competition and the Protection of Intellectual Property).[51]

63. On October 4, 2000, Mr. Carlos Quiroz Montalvo transmitted Memorandum No. 28-2000-VIO/NM to Mr. José Castañeda Trevejo, informing him that in some operations interest not charged was recorded as income, in violation of SBS Resolution No. 572-97.[52] On October 12, 2000, Mr. José Castañeda and Mr. Edgardo Alvarez, of **BNM**, informed Mr. Quiroz that they had coordinated with the Systems Unit regarding the relevant change in "Account administration application . . . the corresponding department

[47] Respondent's Exhibit R-275.
[48] Respondent's Exhibit R-274.
[49] Respondent's Exhibit R-276.
[50] Respondent's Exhibit R-161.
[51] Respondent's Exhibit R-163.
[52] Respondent's Exhibit R-277.

will make the classification, taking regulation 527/97 and its modifications into consideration."[53]

64. On October 12, 2000, Mr. Carlos Quiroz Montalvo sent Memorandum No. 32-2000-VIO/NM to the General Manager of **BNM**, Mr. José Armando Hopkins Larrea, stating that **SBS** was concerned about refinanced operations that were not identified as such but as "Current Portfolio."[54] Mr. Eduardo Alvarez Chávez, Risks and International Manager, and Mr. Luis Gygax, Manager, replied that **BNM** was making arrangements to record refinanced and restructured operations correctly.[55]

65. In November 2000, **BNM** obtained overnight loans from **BCR**; Mr. Germán Suárez Chávez, the Chairman of **BCR**, informed Mr. Luis Cortavarría, the Superintendent of Banking and Insurance, in the Official Letter EF-No. 225-2000-PRES of December 5, 2000, that:

> "… the aforementioned banking company has been appealing to the Central Reserve Bank since November 13th, 2000 to cover its reserve requirement in foreign and domestic currency. Thus, fir the aforementioned month, the amount of granted loans has been, on average, $63.7 million US for a total of twelve days and S/. 97.5 million for two days (Sols). On December 4th, 2000 a loan to cover its reserve requirements in foreign currency for $73.0 million US was granted to Banco Nuevo Mundo."[56]

66. In late November 2000, **SBS** was monitoring **BNM**'s financial indicators on a daily basis. One such indicator was the liquidity ratio (the ratio of liquid assets to short-term liabilities, indicating whether the Bank has sufficient liquid assets to cover its immediate payment obligations), which was calculated by **BNM** and reported to **SBS**. Banks are required under Peruvian law to maintain liquid assets equal to 8 percent of

[53] Respondent's Exhibit R-278.
[54] Respondent's Exhibit R-164, page 1.
[55] Respondent's Exhibit R-166.
[56] Respondent's Exhibit R-123, page 1.

their short-term liabilities in local currency and to 20 percent in foreign currency.[57] **SBS** also took into account the adjusted liquidity ratio, excluding from liquid assets short-term loans such as interbank and **BCR** loans. In **BNM's** case, in November and December 2000, this ratio fell sharply to 6.5 percent in November and 1.89 percent in December in local currency; in foreign currency, it was 9.2 percent in November and 6.01 percent in December.[58]

67. On November 22, 2000, Mr. Jorge Mogrovejo González, Intendent, and Mr. Carlos Quiroz Montalvo, Chief of Visit, both from **SBS**, issued the Inspection Visit Report No. DESF "A"-168-VI/2000 (hereinafter "the Report of November 2000") relating to the visit to **BNM** from August 11 to October 13, 2000. According to this Report, the purpose of the visit was "to assess and determine the Bank's actual equity and to check and assess the procedures used by the Bank to identify and manage its lending risks. In addition, spot checks were made of the definition of earnings and compliance with regulations, among other important issues."[59] [Tribunal's translation] In section B of the executive summary, entitled Liquidity risks, the Report of November 2000 states:

> "1. The Bank has a high liquidity risk because of the large withdrawals in recent months, mainly by State-owned companies, which forced the Bank in November to perform rediscounting operations amounting to US$70 million over six days and to obtain interbank loans of US$266.6 million (a daily average of US$12.6 million), in order to meet reserve requirements. According to the latest reports, the Bank has a critically low level of available funds, which would not allow it to pay depositors and meet other liabilities due immediately.
>
> 2. It has a high concentration of deposits by public companies, amounting to S/. 319 million (at August 31, 2000) or 25.5 percent of the Bank's total deposits. This creates a potential liquidity risk because of the possibility of deposit withdrawals in significant amounts, as occurred in recent months."[60] [Tribunal's translation]

[57] Memorial on Jurisdiction, ¶ 65; Respondent's Exhibits R-024 and R-037.
[58] Memorial on Jurisdiction, ¶ 67.
[59] Claimant's Exhibit IV-6, page 1.
[60] Ibid., page 4.

68. In the Report of November 2000, **SBS** also stated:

"A large number of past-due, refinanced and restructured loans were identified as being recorded as 'Current Portfolio', totaling S/. 141.7 million (US$40.6 million), thereby contravening the stipulations of the Chart of Accounts for Financial Institutions... It is worth noting that this is a recurring observation, since the Report on Inspection Visit... corresponding to year 1997, as well as the... corresponding to years 1998 and 1999, respectively, included the observation that the Bank had refinancing operations that were not recorded as such. As a consequence of this situation, through Resolution SBS No. 0950-99 of October 22, 1999, the Bank was fined 20 Tax Units (*Unidad Impositiva Tributaria*-UIT)."[61]

69. The same **SBS** Report noted:

"The Evaluation and Classification of the Loan Portfolio found:
Criticized loans totaling S/. 728,494 thousand, representing 57 percent of the loans examined and 35 percent of the total portfolio...
Portfolio overconcentration...
Loan portfolio classification discrepancies, requiring placement in higher-risk categories than those assigned by the Bank for 141 debtors owing S/. 587,406 thousand, representing 46 percent of the portfolio examined and 48 percent of the number of debtors reviewed. This was evidence of incorrect portfolio classification by the Bank, in violation of the relevant regulations. The discrepancies concerned 94 debtors, of which 50 were classified as having potential problems and 44 were classified as being deficient; those two categories accounted for 85 percent of the discrepancies... It should be noted that, of the 141 debtors affected by discrepancies, 22.3 percent (45 debtors) were two or more levels below the correct classification, according to the regulations in force. This is a higher percentage than was found during the 1999 Inspection Visit (12.8

[61] Respondent's Exhibit R-065, page 3.

percent)."[62] [Tribunal's translation]

70. The Report also noted:

"E. EARNINGS: At June 30, 2000, income from interest on overdue lending operations recorded in "Current portfolio" and from current accounts with amounts overdue more than 60 days was overestimated in the amount of S/. 3,877 thousand (50 percent of net profits at that date), because of inappropriate system procedures applied to those operations, recording income in the financial statements that had not actually been received. . .

F. INTERNAL AUDIT:

The Internal Audit Office did not perform its control functions, in view of the serious observations made by the Superintendency in evaluating the portfolio: overdue, refinanced, and restructured operations all recorded in "Current Portfolio" for a total amount of S/. 141.8 million and income of S/. 3,877 thousand relating to overdue operations recorded as being current (50 percent of net profits)."[63] [Tribunal's translation]

71. In the conclusions of the Executive Summary of this Report, **SBS** indicated:

"The Superintendence has determined that the loan portfolio classification performed by the Bank does not meet, in general terms, the criteria established in Resolution No. 572-97 and complementary standards, giving rise to a loan loss reserves requirement for difficult to collect loans totaling S/. 79,182,000. However, as a consequence of loan loss reserves recorded in the following months with respect to the loan portfolio, the deficit at September 30 for this portfolio would be S/. 52,975,000.

When the total referred to in the preceding paragraph is added to the loan loss reserves requirement to cover debtors now classified as loss as a consequence of the transfer ordered buy the Supreme Decree 099-99-EF for S/. 13,038,000 and

[62] Claimant's Exhibit IV-6, pages 10 and 11.
[63] Ibid., page 5; English translation provided in Respondent's Exhibit R-065.

for the consumer portfolio requirement of S/.454,999 the result portfolio deficit of S./66,467,000. Once incorrectly recorded interest of S/. 3,877,000 is added, the final result is a total loss of S/. 70,344,000, meaning that the Bank's regulatory capital at September 30, 2000 is reduced by 25.7%. Consequently, in the short term, the Bank's Board of Directors must adopt actions, within the permitted legal limits, to bring about the reversal of this equity situation to ensure that growth of Bank operations is not affected."[64]

72. In section V, entitled "Solvency risk," this Report stated:

"The Bank's solvency, measured through risk-weighted assets and loans against the Bank's effective equity on September 30 of this year provides a leverage ratio of 8.25. Compared with previous months, this leverage decreased as a consequence of the Bank increasing its share capital in that month.

However, when taking into account the deficit in loan (sic) loss reserves found during the visit, the adjustment at September 30 for loan loss reserves performed by the Bank totaling S/. 57,306,000, incorporation of the portfolio corresponding to D.S. 099-99-EF that would result in an additional deficit of S/. 59,813,000 and finally goodwill for S/. 45,138,000, effective equity would rise to S/. 114.4 million, meaning that the Bank would require capital of S/. 111.5 (US$32 million) in order to be able to achieve a leverage ratio of 10 that would enable it to perform under normal conditions."[65]

73. On November 24, 2000, Mr. Jacques Levy Calvo, Executive Chairman of **BNM**, and Mr. José Armando Hopkins Larrea, Vice-Chairman and General Manager of **BNM**, transmitted Official Letter GG-169/2000 to Mr. Luis Cortavarría Checkley, Superintendent of Banking and Insurance, which stated:

"Following up with several conversations we have had with the Superintendency in the last few weeks, we hereby submit our proposal to perform a significant

[64] Claimant's Exhibit IV-6, page 7.
[65] Ibid., page 21; English translation provided in Respondent's Exhibit R-065.

reinforcement of Banco Nuevo Mundo.

Banco Nuevo Mundo ... along with the company "Inversiones NMB S.A.C." ... will purchase, as an investment, a real property of approximately 200 hectares ... The Bank would purchase a first and preferential participation in that property for an amount of US$37 MM, which would be paid to Gremco S.A. by the Bank by a cashier's check.

This investment would allow our shareholder Nuevo Mundo Holding... to increase the capital of the Bank in US$37MM, which consists of US$20 MM in preference shares...

After this increase of capital is performed, the capital of the Bank will be approximately US$73MM and the reserves will be approximately US$34MM."[66]

74. Because it considered that the land was not an appropriate substitute for a cash infusion of capital, **SBS** rejected the proposal of **BNM**.[67]

75. On Sunday, November 26, 2000, the Minister of Economy and Finance convened an emergency meeting with the SBS Superintendent and the CEOs of ten banks in Peru; **BNM** was not invited to that meeting.[68]

76. On November 27, 2000, Emergency Decree No. 108-2000 was promulgated, creating the Financial Industry Consolidation Program (**PCSF)**.[69] This program was "... aimed at facilitating the corporate restructuring of companies operating in the multiple sector of the national financial system, a program in which the State shall participate by means of issuing Public Treasury Bonds and granting a line of credit in favor of the Deposit Insurance Fund, whenever this does not imply profit to the shareholders of companies in question."[70]

77. On December 4, 2000, several emails (the Tribunal could not ascertain the

[66] Respondent's Exhibit R-283.
[67] Counter-Memorial on the Merits, ¶ 98; Rejoinder on the Merits, ¶ 134.
[68] Memorial on the Merits, ¶ 312.
[69] Ibid., ¶ 311.
[70] Respondent's Exhibit R-068.

identity of the sender) announced the intervention of **BNM** and suggested that depositors should withdraw their money from the Bank.[71]

78. On December 5, 2000, the CEO of **BNM** asked **BCR** for a loan of about US$10 million; in the Official Letter 225-2000-PRES of the same date, **BCR** agreed to lend US$1,2 million.[72]

79. On December 5, 2000, in the Official Letter 226-2000 PRES, **BCR** informed **SBS** that **BNM** had been excluded from the Electronic Clearinghouse because it had not settled its multilateral liability. This Official Letter indicated that "... Banco Nuevo Mundo had a multilateral liability position of US$9.2 million in foreign currency and S/. 4.1 million in national currency, so that its current accounts balances amounted to US$0.1 million and S/. 1.8 million, respectively. As a result, Banco Nuevo Mundo had a deficit of US$9.1 million and S/. 2.3 million."[73] [Tribunal's translation]

80. In Resolution No. 885-2000 of December 5, 2000, **SBS** declared that **BNM** was subject to the intervention regime and appointed Mr. Carlos Quiroz Montalvo and Ms. Manuela Carrillo Portocarrero as intervenors.[74]

81. In 1999 and 2000, **SBS** intervened in Banco Banex, Banco Orion, Banco Serbanco, and NBK Bank[75] and announced the dissolution and liquidation of those Banks.[76]

82. In Resolution No. 900-2000 of December 11, 2000, **SBS** resolved to submit a criminal complaint to the State Prosecutor against the persons responsible for the announcement of the intervention of **BNM** and who suggested the withdrawal of their

[71] Respondent's Exhibit R-172.
[72] Memorial on the Merits, ¶ 345.
[73] Claimant's Exhibit IV-9.
[74] Memorial on the Merits, ¶ 363; Claimant's Exhibit IV-15.
[75] Memorial on Jurisdiction, ¶ 110; Respondent's Exhibits R-042, R-052, R-059, and R-076.
[76] Memorial on Jurisdiction, ¶ 113; Respondent's Exhibits R-048, R-053, R-060, and R-092.

deposits from that bank. On the same day, **SBS** submitted complaint No. 081-00.[77]

83. Mr. Jorge Mogrovejo Gonzalez, Assistant Superintendent for Risks stated that: "when the SBS team arrived on BNM's premises around 15:00 hrs. on December 5, 2000 to notify BNM's officers that BNM had been intervened and to close the Bank, they discovered that BNM had voluntarily closed its doors before."[78]

84. On December 27, 2000, **PwC** (the firm hired to conduct the audit of **BNM**) submitted to the Management of that Bank a progress report on the audit of the financial statements for the year ending December 31, 2000 (hereinafter "the Progress Report"). It conducted "a preliminary review of the loan portfolio evaluation on September 30, 2000, as well as accounting observations identified preliminarily during our visit made in the second half of the month of October 2000 ... the accounting observations were identified with reference to balances on September 30, 2000 and, therefore, this progress report does not express a total or partial opinion on the soundness of the Bank's financial statements at that date."[79]

85. The Progress Report states:

> "1.1. Discrepancies in debtor ratings-
> In our preliminary evaluation of the Bank's loan portfolio at September 30, 2000, with a sample of 110 clients, we have determined discrepancies in the ratings of 52 debtors. This situation could create a provision deficit for loans at that date of approximately S/. 47,816,000."[80] In this same report, **PwC** stated: "In December 2000, the reserve for loans has been adjusted, increasing the corresponding provision by S/. 80.9 million, thereby addressing the observations of the Superintendence of Banking and Insurance (SBS) in its report of the inspection

[77] Respondent's Exhibit R-172.
[78] Memorial on Jurisdiction, ¶ 82; Respondent's Exhibits R-074 and R-075; Witness Statement of Mr. Jorge Mogrovejo, Respondent's Exhibit RWS-001.
[79] Respondent's Exhibit R-173, page 1.
[80] Ibid., page 2.

visit No. DESF "A"-168-VI/2000 dated November 27, 2000."[81]

86. Regarding refinanced operations, **PwC** stated in the progress report: "At September 30, 2000, certain leaseback operations aimed at refinancing past-due loans are presented on the Bank's financial statements as active loans."[82]

87. The **PwC** report of March 5, 2001 on the audit of **BNM** general balance statements on December 31, 2000 and December 31, 1999 (hereinafter "the Final Audit Report") indicated that the Bank had S/. 167,821,000 in refinanced and restructured loans for 2000, compared with S/. 33,545,000 in 1999. In addition, in 2000 it had S/. 394,187,000 in overdue loans and subject to judicial collection, compared with S/. 62,686,000 in 1999.[83]

88. The Final Audit Report was delivered to **SBS** on July 11, 2001.[84] Concerning the chronology of the conducted audit, Mr. Arnaldo Alvarado, a partner in **PwC**, stated the following:

> "Pursuant to ISA 560, PwC assessed new events and information that arose subsequent to the end of BNM's fiscal year. If those subsequent events or information revealed the true condition of BNM's assets during the fiscal year 2000, we determined that this information should have been reflected or disclosed on BNM's December 2000 financial statement. When our fieldwork ended on March 5, 2001, we completed our in-depth review of BNM's assets and also ended our investigation into subsequent events or information. Therefore, we included in our final audit report subsequent events or information that occurred between January and March 2001; but after March 2001, our review was limited to verifying that the SBS intervenors had made the adjustments that we recommended. We were not informed by BNM's management of the existence of

[81] Ibid., page 2.
[82] Ibid., page 3.
[83] Respondent's Exhibit R-080, page 13.
[84] Respondent's Exhibit R-236.

any subsequent events or information after March 5, 2001."[85]

89. According to section 15 of the Final Audit Report, entitled "Net earnings (loss) for the year," the net loss on December 31, 2000 was S/.328,875,000.[86]

90. On April 11, 2001, Emergency Decree 044-2001 (hereinafter "the Special Transitional Regime") added to Article 3 of Emergency Decree No. 108-2000 a paragraph to the effect that companies in the financial system subject to the Intervention Regime and recommended for asset transfer by CEPRE would be placed by the **SBS** under a Special Transitional Regime.[87]

91. On April 18, 2001, by Resolution No. 284-2001, **SBS** placed **BNM** under the Special Transitional Regime.[88]

92. On May 30, 2001, **BNM**, represented by the **SBS**, signed with Banco Interamericano de Finanzas (BIF) an "Agreement for Final Transfer of Corporate Equity Block as Part of the Corporate Reorganization Process".[89] Under the **PCSF** regulations, BIF would use funds from this program to cover losses that it had sustained as a result of the transfer. Section 3 of this Agreement indicated that the transfer would be conditional on the findings and the valuation by the auditors Medina, Zaldivar, y Asociados regarding **BNM**. Section 8 provided that BIF could withdraw from the Agreement after the auditors had submitted their report, if **PCSF** resources were insufficient to cover the equity deficit.[90]

93. On June 28, 2001, **SBS** adopted Resolution No. 509-2001 (published in the Official Gazette El Peruano of July 13, 2001) amending Article 5 of **BNM**'s bylaws to read: "The equity of the company is S/. 0.00 (zero and 00/100 Nuevos Soles)."[91]

[85] Second Witness Statement of Mr. Arnaldo Alvarado, September 26, 2012, Respondent's Exhibit RWS-013, ¶ 21.
[86] Respondent's Exhibit R-080, page 33.
[87] Respondent's Exhibit R-081.
[88] Claimant's Exhibit IV-20.
[89] Respondent's Exhibit R-086.
[90] Ibid.
[91] Claimant's Exhibit IV-25.

[Tribunal's translation]

94. In an extra-judicial interim measure requested by **NMH** against the **MEF** and **SBS**, the 26th Civil Court of Peru appointed Mr. Carlos Roberto Cardoza Maúrtua, Mr. Luis Esteban Sánchez Cáceres, and Mr. Tomás Alejandro Morán Ortega as Receivers of **BNM** from July 21 to August 6, 2001. The Receivers submitted their Report on August 29, 2001, in Resolution No. 56.[92]

95. The Receivers' Report can be summarized as follows: the General Manager of **BNM** and the Chairman of the Board of Directors remained in their posts during that period and the Bank basically kept the same staff, with monthly payroll costs of US$900,000, so the Receivers terminated the employment of some staff. The Bank kept all its branches open, although some of them could have been closed temporarily to save on administrative costs. The Receivers added that the description of the losses for the fiscal year of 2000 and the adjustments made to record them as of July 17, 2001 appeared to be contrary to accounting and auditing practice, which does not allow retroactivity. The Report also indicated that, at the end of the Receivers' intervention, **BNM** had US$87.3 million in available funds. The Receivers criticized the policy of paying interest to depositors at higher rates than those paid in the national financial system and noted that, starting in March 2001, there had been a reduction in collection rates and a deterioration of credit indicators. They also criticized the controls related to the granting, refinancing, valuation, and rating of portfolio loans and concluded that "... inadequate measures were applied at BNM in recent months, creating a high level of provisions."[93]

96. On September 17, 2001, the shareholders of **BNM** published a statement in the newspaper *El Comercio* containing "... a proposal for an integral solution which implies for us to continue working towards the country's development which is less costly for the States, allows for refund of deposits to our savers to be completed, avoids losing line of credits granted to us by our foreign banker... , allows to return the investments entrusted to us by friends and clients … which, ultimately, is better in economic and social terms,

[92] Claimant's Exhibit III-6.
[93] Ibid., pages 4 to 7, 9, 12, 13 and 15.

than the intended Banco Nuevo Mundo's equity block transfer to BIF, since it represents saving for the State in an amount of US$ 277,3 million ... includes the ability of the State to recoup its investment in subordinated bonds in an amount of US$63,3 million."[94]. In this statement, the shareholders proposed that Peru should, by various means, provide US$192,6 million and that the shareholders would proceed through "repayment/ refinancing of debt to local and foreign banks and reinstatement of credit lines ..." The proposal also included incorporation of an international banking company, which, in exchange for assignment of a share in the Bank's equity, would contribute a total of US$342,4 million.

97. On September 23, 2001, Mr. Jacques Levy Calvo, on behalf of **NMH,** submitted a proposal to the **MEF** "for a solution to the problem created by the intervention of Banco Nuevo Mundo."[95] [Tribunal's translation] This proposal included "the termination of BNM's intervention and resuming operations, with BNM's shareholders being responsible for BNM's entire debt. This would allow savers to recover their money, and the State to recover state companies' deposits and its investment in BNM's subordinate bonds... BNM's shareholders would pay in US$342 million and would incorporate an international banking company into the BNM's share ownership structure... The State would have to issue 10-year subordinate bonds—redeemable from the fifth year or convertible in BNM preferred shares—for US$63 million, and US$126 million would be used out of the fund established by Urgency Decree 108-2000 for the Financial Industry Consolidation Program, which BNM's shareholders would repay later."[96]

98. On October 18, 2001, the auditors Medina, Zaldivar, y Asociados submitted their "Report on certain items in the general balance sheet of **BNM** under the Special Transitional Regime as of April 30, 2001".[97] This Report indicated that the procedures applied did not constitute an audit of the financial statements of **BNM**, a valuation of the

[94] Respondent's Exhibit R-184.
[95] Claimant's Exhibit II-40.
[96] Memorial on the Merits, ¶¶ 442 and 443.
[97] Claimant's Exhibit I-3.

Bank's assets and liabilities, or a review of the Bank's internal controls.[98]

99. On October 18, 2001, by Resolution No. 775-2001, **SBS** ordered the dissolution and liquidation of **BNM**.[99] In the preambular paragraphs of that Resolution, **SBS** referred to the valuation of **BNM** made by the auditors Medina, Zaldivar, y Asociados and reviewed by **PwC**, in which it was determined that **BNM** had a negative balance of US$222,517,000, which exceeded by 1.5 times the limit of its accounting equity on November 30, 2000. That amount should have been covered by funds from the **PCSF**, but it was US$5,678,000 above the maximum limit.[100]

100. On October 19, 2001, **SBS** issued a communiqué announcing that "two audit firms of international reputation have completed a valuation of Banco Nuevo Mundo as of April 30, 2001, in order to determine the Bank's equity and therefore to estimate the share of the State and the Deposit Insurance Fund (FSD) in such process... The result of the valuation prepared and reviewed by both audit firms is a negative amount of minus US$217 million... increasing to US$222.5 million when operating losses are included . . . consequently, as required by law, SBS has ordered the liquidation of Banco Nuevo Mundo."[101] [Tribunal's translation]

101. On October 29, 2001, **SBS** issued Report No. DESF "A" 105/OT-2001 entitled "Deposits with Banco Nuevo Mundo, Liquidity Report" (hereinafter "the Deposit Report").

102. The Deposit Report indicated that **BNM** "… recorder total deposits in Dec.' 99 in the amount of US$287.1 million USD, which rose strongly due to the aggressive policy of Banco Nuevo Mundo in attracting new deposits. Thus, in March-00 deposits rose to $327.8 million USD and in July '00 they reached the highest figure in its history, $366.9

[98] Ibid., page 2.
[99] Memorial on the Merits, ¶ 446.
[100] Claimant's Exhibit IV-26; Respondent's Exhibit R-090.
[101] Claimant's Exhibit V-42.

million USD."[102]

103. This Report also notes that **BNM** requested a rediscount from BCR "beginning on 11/13/2000 for $70 million US in order to be able to cover its cash requirements."[103] "During 99 and Mar '00, the public deposits in Banco Nuevo Mundo showed a growing trend, going from $91.7 million US in Dec. '98 to $128.4 million US in Mar '00. Beginning in March '00, the public deposits moved into a band between US$90 million and US$125 million, but they always represented more than 30% of the Banco Nuevo Mundo deposits, their historic average being 32%."[104]

104. Regarding public-sector deposits, the Deposit Report noted: "In Oct '00 and Nov. '00 they dropped by $24.7 million US and by $7.7 million US respectively."[105] It also states: "… in Aug '00, Banco Nuevo Mundo concentrated 8.4% of the total funds of the public sector and in Nov. '00 the concentration was at 8.1%, a difference of just 0.3%... The private deposits, however, showed a growth trend from February '00 to July '00, when it reached a peak of $257.2 million US... private deposits contracted sharply, especially in Sept. '00 (by $25 million US). In Nov. '00 they shrank by $60 million US and the first three days of December saw private withdrawals of $27 million US."[106] "Consequently, between July 31 and December 5, 2000, private deposits shrank by $109 million US and public deposits by just $13 million US."[107]

105. The Congress of the Republic of Peru conducted an investigation of the **BNM** affair. With that aim the **Subcommission** was created and released its final Report on January 21, 2002.[108]

106. The conclusions of the **Subcommission**'s Report can be summarized as follows:

[102] Respondent's Exhibit R-091, page 1.
[103] Ibid., page 2.
[104] Ibid., page 3.
[105] Ibid.
[106] Ibid., page 5.
[107] Ibid.
[108] Memorial on the Merits, ¶ 332.

1. The information provided by the Superintendent to the **Subcommission** and the **SBS** Visit Report of November 22, 2000 are inconsistent; 2. The Superintendent contradicted himself when referring to Bonds DU-108-2000; 3. The Superintendent did not explain why he used the media to avoid financial panic at **BNM**; 4. **SBS** rushed to intervene in **BNM**; in addition, it could have sponsored and coordinated the use of monetary regulation funds to help **BNM** or could have encouraged **BCR** to support it with a rediscount of US$15 million; 5. The Receivers reported that the intervenors in **BNM** were affecting the economic value and the recovery process of **BNM** assets; 6. Between December 5, 2000 and September 30, 2001, **BNM** recovered portfolio worth US$139.8 million; 7. The Superintendency was not transparent with the Subcommission, it did not provide information or did so in a partial and untimely manner; 8. "The book assessment ordered by the Superintendent of Banks and Insurance Companies may be objected from a technical standpoint"; 9. "Enforcing such unusual and inappropriate accounting principles and the discretional and discriminatory behavior of the Superintendency of Banks and Insurance Companies as regards Banco Nuevo Mundo have resulted in a contingency for the Peruvian State reaching several dozen million dollars and may even preclude the reimbursement of depositors' funds..."; 10. "The Superintendency... acted with negligence when it failed to meet its obligation to undertake the consolidated oversight of financial conglomerates, such as Banco Nuevo Mundo."[109]

107. The **Subcommission** made several recommendations. These included recommendations that the Executive should appoint a new Superintendent to impartially investigate what had happened and that the Congressional Economic Commission should consider the advisability of asking the **MEF** to halt the **BNM** liquidation process.[110]

108. On April 16, 2002, **SBS** issued Report No. 01-2002-DESF-A concerning the removal of liens on certain properties of GREMCO S.A. This Report indicated that, in September 2000, GREMCO S.A. requested cancellation of a mortgage on a building it

[109] Claimant´s Exhibit I-6, pages 17 et seq.
[110] Ibid.

owned and that the General Manager and first Vice-Chairman of **BNM** partially removed the lien; on September 6, 2000, the deed cancelling and removing the mortgage was signed. The Report adds that the Board of Shareholders of **BNM** agreed to cancel several mortgages on other property of GREMCO S.A. and that the mortgage on land located between La Herradura and La Chira beaches in the amount of US$14,942,088.96 could also be used as collateral for some debts of the Compañía Hotelera los Delfines S.A. and the firm Fábrica S.A.[111]

109. On October 23, 2002, the 63rd Civil Court of Lima issued Resolution No. 18 in Case No. 3787-2001, concerning *amparo* proceedings brought by **NMH** against **SBS** and Mr. Luis Cortavarría Checkley. The Court overruled Resolution No. 509-2001 (referred to in paragraph 93 above) and stated that **SBS** should adopt a new resolution in accordance with its powers and as indicated in that ruling.[112]

110. **SBS** selected the consortium "Define-Dirige-Soluciones en Procesamiento" to serve as **BNM**'s liquidator and signed a contract with it on February 3, 2003. On February 4, 2009, when the contract expired, **SBS** appointed Mr. Yuri Martínez to perform the same function.[113]

111. On August 11, 2003, the Third Civil Chamber of the Supreme Court of Justice of Lima issued a resolution in Case No. 1794-02, confirming the Court's ruling (paragraph 109 above) but cancelling the item ordering **SBS** to issue a new resolution.[114]

112. On July 12, 2005, Mr. David Levy Pesso assigned his shares in Holding XXI S.A., without charge, to his daughter, the **Claimant** in this case, Ms. Renée Rose Levy.[115]

113. On July 26, 2005, Mr. Isy Levy Calvo and Mr. Jacques Levy Calvo signed the document entitled "Ratification of the Assignment of Legal Rights," which in its

[111] Respondent's Exhibit R-191, pages 2 to 4.
[112] Claimant's Exhibit III-7.
[113] Memorial on Jurisdiction, ¶102 and Counter-Memorial on the Merits, ¶ 251.
[114] Claimant's Exhibit III-8.
[115] Memorial on the Merits, ¶¶ 3 and 115.

preambular paragraphs stated:

"As recorded in the Minutes of the Extraordinary General Meeting of Shareholders of Corporación XXI Ltd. of January 28, 1999, THE ASSIGNORS [Mr. Isy and Mr. Jacques Levy Calvo] agreed to transfer their legal rights to THE SHAREHOLDER, Mr. David Levy Pesso.

In addition, in assigning their legal rights, THE ASSIGNORS agreed that THE SHAREHOLDER, as the head of the Grupo Levy... would retain and enjoy said legal rights not only in Corporación XXI Ltd. but also in any other existing and/or future companies in which the three shareholders participate in the family businesses.

Subsequently, on July 12, 2005, Mr. David Levy Pesso assigned without charge all his shares and rights in Holding XXI to Ms. Renée Rose Levy, who thus assumed ownership of the legal rights on the same terms as those on which they were granted to her father Mr. David Levy Pesso."[116] [Tribunal's translation]

114. The second part of the second clause in this document states:

"THE ASSIGNORS expressly and irrevocably express their agreement and their wish to ratify and maintain the agreements entered into concerning the scope of the assignment of legal rights as holders of shares owned by them in firms and companies in the Grupo Levy to the controlling shareholder, Ms. Renée Rose Levy.

The parties reiterate that THE SHAREHOLDER [Ms. Renée Levy] thus enjoys without restriction or any condition and for an indefinite period all the legal rights pertaining to the total block of shares held by each of them in the Grupo Levy companies."[117] [Tribunal's translation]

115. On November 11, 2005, the Permanent Civil Chamber of the Supreme Court of Justice of Peru issued ruling 473-2000 invalidating the claim brought by **NMH** against

[116] Claimant's Exhibit II-45, page 1.
[117] Ibid.

Resolution 775-2001 that ordered the dissolution and liquidation of **BNM** (paragraph 99 above).[118]

116. On October 11, 2006, the Permanent Constitutional and Social Chamber issued ruling No. 509-2006 confirming the ruling mentioned in the preceding paragraph.[119]

117. In the following section, the Tribunal will set out the positions of the parties regarding the jurisdiction of the Centre and the competence of this Tribunal. It will refer first to the arguments advanced by **Peru** and then to **Claimant**'s response; it will then rule on the positions of the two parties.

III. OBJECTIONS TO JURISDICTION

A. Respondent's Position

118. The **Respondent** submitted its Memorial on Jurisdiction, setting forth the following arguments:

a. The **Claimant** is not a protected "investor" under the **APPRI**, because she acquired her indirect interest in **BNM** "too late," almost five years after the events on which the claim is based took place. When **BNM** was intervened, the **Claimant** had no connection whatsoever to the Bank or to the dispute between the parties. Ms. Renée Levy came onto the scene five years after **BNM** was intervened, when she received a minority, indirect interest in that Bank for free.[120]

b. The interest acquired by the **Claimant** did not qualify as an "investment" under the **APPRI**. On July 12, 2005, **BNM** had no value and it was found to be illiquid and insolvent on the day that **SBS** intervened—December 5, 2000. The **Claimant's** interest in **BNM** "never had any value."[121]

[118] Memorial on the Merits, ¶ 469.
[119] Ibid., ¶ 479.
[120] Memorial on Jurisdiction, ¶ 117.
[121] Ibid., ¶ 118.

c. Nor does the **Claimant's** interest in **BNM** qualify as an "investment" under the **ICSID Convention**. In order for it to qualify as an investment, the Tribunal must find that certain fundamental elements exist: the **Claimant** must have contributed resources to the alleged investment, assumed risk, participated in a project of some duration, and contributed to the host country's economic development.[122]

d. **Peru** also considers that the **Claimant** has committed an abuse of process. In its view, whatever interest the **Claimant** did acquire had absolutely no value by 2005. The assignment of the shares in **BNM** was nothing more than an attempt to "manufacture jurisdiction over the claim."[123]

119. Regarding the first argument mentioned in the preceding paragraph (the **Claimant** is not a protected investor under the **APPRI**), **Peru** referred to the case of Phoenix Action against the Czech Republic, in which it was found that "bilateral investment treaty claims cannot be based on acts and omissions occurring prior to the claimant's investment."[124] **Peru** stated that the **Claimant** was not a protected investor when **BNM** was intervened on December 5, 2000.[125] In addition, on January 27, 1997, Mr. David Levy and his sons incorporated Corporación XXI in the Bahamas to serve as a holding company for **BNM**, but the **Claimant** did not directly or indirectly own any shares in **BNM** at that point[126] or in **NMH**, which owned 99.99 percent of **BNM** shares.[127] It was on July 12, 2005 when Mr. David Levy decided to endorse his shares for free to the **Claimant.**[128] In addition, the **Claimant** waited five more years before initiating this arbitration.[129] In conclusion, the **Claimant** was attempting to seek protection under the **APPRI** for events that occurred when she was not an investor in **BNM** and therefore not a protected investor under the

[122] Ibid., ¶ 119.
[123] Ibid., ¶ 120.
[124] *Phoenix Action Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award, April 15, 2009 (hereinafter "*Phoenix Action*"), ¶ 68.
[125] Memorial on Jurisdiction, ¶ 123.
[126] Ibid., ¶ 127.
[127] Ibid., ¶¶ 128 and 130.
[128] Respondent's Exhibit R-100.
[129] Memorial on Jurisdiction, ¶ 132.

APPRI.[130]

120. Concerning the second argument (the acquired interest does not qualify as a protected investment under the **APPRI**), **Peru** alleged that, although the **APPRI** does not define the word "asset," it is commonly understood to be something of value, and thus, the **APPRI** requires the **Claimant** to hold something of value in order to have an investment covered under that Agreement.[131] **Peru** noted that "the Bank in which the Claimant allegedly had an indirect interest no longer had any value, either as a going concern or in terms of its remaining assets. Likewise, the Claimant does not own a valid operating license for a banking and finance entity, because, when BNM was intervened, SBS ended BNM's operations."[132] Moreover, the fact that the **Claimant** received her interest in BNM for no consideration underscored BNM's lack of market value at the time; according to **Peru,** the "Claimant and her father were well aware that BNM had no value in 2005."[133] Thus, since the **Claimant's** interest was not an asset protected by the **APPRI**, the Tribunal lacks competence to hear this dispute**.**

121. In relation to the third argument (the interest is not an investment under the ICSID Convention), **Peru** stated, based on the case of Salini Costruttori S.p.A. and Italstrade S.p.A v. Kingdom of Morocco, that an investment under Article 25 (1) of the **ICSID Convention** must meet the following criteria: a substantial commitment of the investor's own resources; an assumption of risk; a certain duration of the activity; and a contribution to the economic development of the host country.[134] Additionally, **Peru** added that in the case of Fedax N.V. v. Republic of Venezuela, the Tribunal referred to an investment involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development.[135] Moreover, when the **Claimant** acquired her indirect interest in **BNM**, the Bank was not operating,

[130] Ibid., ¶ 133.
[131] Ibid., ¶ 134.
[132] Ibid., ¶ 138.
[133] Ibid., ¶ 139.
[134] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, July 23, 2001 (hereinafter "*Salini Costruttori*"), ¶ 52.
[135] *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction, July 11, 1997, ¶ 43; Memorial on Jurisdiction, ¶¶ 140 and 141.

was in liquidation, and had no hope of reviving its economic activities; consequently, the **Claimant** made no contribution, took no risk, held nothing of any duration, and did not contribute to **Peru**'s economic development.[136]

122. Based on the decisions in other arbitrations, **Peru** stated that, in order for an investment to exist, there had to be investment of the investor's own resources and a real intention to engage in economic operations.[137] In this case, "[t]here is also absolutely no sign of a real intention on Claimant's part to develop BNM's economic activities . . . would have been impossible... since the liquidator was in charge of the liquidation process. The Claimant knew all of this before she received her indirect interest and could have had no expectation that she could develop economic activity in Peru."[138]

123. With regard to the fourth argument (abuse of process), **Peru** stated that the principle of good faith had long been recognized in public international law and that several **ICSID** tribunals had concluded that there was no jurisdiction when a claimant had not acted in good faith or had in some way abused the process under the **ICSID Convention**.[139]

124. **Peru** further stated that the conclusion of the Arbitral Tribunal in the Phoenix Action case is applicable to this case. The Tribunal in that case stated that the transfer of shares had been not an economic investment but "a rearrangement of assets within a family to gain access to ICSID jurisdiction."[140] **Peru** emphasized that, when the **Claimant** received her indirect interest, she had no plans and no possibility of any plans to revive **BNM** as a going concern. According to **Peru** that "[t]he only logical explanation for the endorsement of Holding XXI shares from her father is that it was a

[136] Memorial on Jurisdiction, ¶ 142.
[137] *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (ICSID Case No. ARB/07/12), Decision on Jurisdiction, September 11, 2009, ¶ 84; *Phoenix Action*, *supra* note 124, ¶ 119.
[138] Memorial on Jurisdiction, ¶ 146.
[139] *Phoenix Action*, *supra* note 124, ¶¶ 106-112; *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, August 2, 2006, ¶ 230; *Mobil Corporation et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction, June 10, 2010, ¶¶ 184-185; *Europe Cement Investment and Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2), Award, August 13, 2009, ¶¶ 171-175; *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2), Award, September 17, 2009, ¶ 159; Memorial on Jurisdiction, ¶¶ 157 and 158.
[140] *Phoenix Action*, *supra* note 124, ¶ 140.

transaction designed to manufacture ICSID jurisdiction for this dispute by keeping the indirect ownership of BNM in the hands of a French national."[141]

125. **Peru** also claimed that the Tribunal could not rule in the present case, because in essence the **Claimant** was asking the Tribunal to second-guess Peru's reasons for the regulations that it issued and for the actions taken in line with those regulations. "Claimant is asking the Tribunal to step into the shoes of Peru's prudential regulator and second-guess its legally-mandated actions to stabilize the banking system during an economic crisis."[142] **Peru** stated that **SBS** had acted reasonably to protect **BNM**'s depositors, the public and the banking system, had taken the necessary measures to prevent the kind panic with respect to other banks and followed the explicit mandate of the law.[143]

126. **Peru** further stated that, if the Tribunal decided that it did have jurisdiction and analyzed the merits of the case, it would be setting a serious precedent and opening up the possibility of hundreds of claims by failed banks, thus effectively expanding **ICSID** jurisdiction beyond investment disputes.[144]

127. **Peru** concluded:

> "The Tribunal has before it a case in which it is being asked to substitute its own judgment for the technical decisions made by Peru's regulator to manage a widespread liquidity and solvency crisis that was affecting several banks at the time. The Tribunal cannot hear this case without impermissibly encroaching on the discretion of Peru's banking regulator to take necessary action to prevent a full-blown collapse of Peru's banking system."[145]

> "The banking regulator in this case was acting in strict compliance with Peruvian

[141] Memorial on Jurisdiction, ¶¶ 159 and 160.
[142] Ibid., ¶ 162.
[143] Ibid., ¶ 163.
[144] Ibid., ¶ 166.
[145] Ibid., ¶ 164.

law—indeed, its actions were mandated by law. Therefore, if this case were found to be admissible, in addition to judging whether the regulator acted in accordance with Peru's laws, the Tribunal would, in essence, have to examine whether Peru's banking laws and regulations constituted a *de jure* treaty violation."[146]

B. Claimant's Position

128. The **Claimant** stated that the share transfer was a legitimate act performed in good faith, owing to the progressive deterioration of Mr. David Levy's health;[147] it was done not with the aim of obtaining access to **ICSID** but in order to ensure continuity of the foreign nationality protected by the **APPRI**.[148]

129. The **Claimant** considered that the analysis of the status of a protected investor focuses on verifying whether the *Jus Standi* requirements are met in terms of: analyzing whether a protected investor existed when the investment was affected; analyzing the existence of a legitimate assignment of the right already held (power to file a claim before **ICSID** by virtue of the **APPRI**) to a third party and verifying whether there has been abuse of process.[149] In her post-hearing submission of January 22, 2013, the **Claimant** also stated that the **APPRI** established no requirement or limitation whatsoever to the effect that the initial investor necessarily had to be the claimant before ICSID, that rights to an investment can be validly assigned—including the power to submit a request for arbitration for injury suffered by the initial investor and assignor—since Jus *Standi* may be assigned.[150]

130. The **Claimant** also noted that "in those cases where no abuse of process has been found, the Arbitral Tribunals are competent to settle disputes arising out of State's measures that took place before the assignment, as well as those that took place after the

[146] Ibid., ¶ 165.
[147] Counter-Memorial on Jurisdiction, ¶¶ 37 and 77.
[148] Ibid., ¶ 109.
[149] Ibid., ¶ 111.
[150] Claimant's Post-Hearing Brief, ¶ 22.

transfer of the investment."[151]

131. The **Claimant** denied that her investment had no value: on the date when the investment was affected, it had considerable economic value and her claim was based on its impairment, since it was the **Respondent**'s actions themselves that substantially affected the value of the investment.[152]

132. Concerning the value of the assignment of **BNM's** shares, the **Claimant** mentioned the need to take into account the fact that the transaction was of an intra-family nature and the fact that the transfer was free of charge did not imply that the investment was valueless, "as it is only natural that no price was paid for such shares of stock."[153]

133. The **Claimant** stated that the jurisdictional requirements of Salini Costruttori v. Kingdom of Morocco[154] are fully met in the present case, as the existence and operation of a banking institution such as **BNM** for about eight years confirms the provision of funds,[155] risk taking, the existence of a project of a certain duration, and the contribution to the economic development of Peru.[156]

134. On the subject of the statements made by **Peru** concerning good faith, the **Claimant** affirmed that "it is not possible to create access to international jurisdiction in bad faith when such an access had already existed, both for the assignor of rights, David Levy, a French national, and for BNM itself, which has always been and continues being a juridical person of French nationality."[157] In addition, in this case there is continuity in French nationality of the investment; pre-existence of the right to ICSID arbitration before the transfer of shares of stock and assignment of rights to the **Claimant**; and pre-existence of the claims against the State's measures in the court lawsuits filed by **NMH**

[151] Counter-Memorial on Jurisdiction, ¶ 112.
[152] Ibid., ¶ 118.
[153] Ibid., ¶ 123.
[154] *Salini Costruttori*, *supra* note 134, ¶ 52.
[155] Counter-Memorial on Jurisdiction, ¶ 125; Claimant's Post-Hearing Brief, ¶ 20.
[156] Counter-Memorial on Jurisdiction, ¶¶ 124 and 127.
[157] Ibid., ¶ 129.

since 2001. Therefore, according to **Claimant** it is not possible in this arbitration to allege abuse of process based on a bad faith action.[158]

135. The **Claimant** further rejected **Peru**'s objection that the Tribunal cannot rule on the present claim; the **Claimant** did not ask the Tribunal to step in the shoes of the regulatory agency but requested that it determine whether the actions and omissions by agencies of the Peruvian State infringed principles and standards of international law and of the **APPRI**; the **Claimant** was not objecting to Peru's banking and financial regulations and was not disputing the worthiness and validity of domestic banking laws and regulations.[159] In addition, when considering the merits of this dispute, the Tribunal should consider whether the Respondent's institutions acted in accordance with Peruvian law or whether, on the contrary, by intervening, dissolving, and liquidating **BNM** they abused their powers and infringed international principles or standards.[160] The **Claimant** also stated that **Peru's** arguments meant that "… specific State's actions… should remain untouched and unrevised, taking sovereignty to the extreme of not being able even to assess its legitimacy."[161]

136. The **Claimant** also stated that neither the **APPRI** nor the **ICSID Convention** established rules relating to objections to the admissibility of a claim and that a number of arbitral precedents and doctrine considered it inadequate to analyze objections to the admissibility.[162]

137. In the following section, the Tribunal will analyze the objections submitted by **Peru** and the arguments put forward by the **Claimant** concerning ICSID´s jurisdiction and and the admissibility of the **Claimant**'s claims.

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[158] Ibid., ¶¶ 91 and 92.
[159] Ibid., ¶ 134.
[160] Ibid., ¶ 136.
[161] Ibid., ¶ 137.
[162] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction, January 14, 2004, ¶ 33; Andrea Bjorklund, *The Emerging Civilization of Investment Arbitration*, in Penn State law Review, Vol. 113;4, 2009, page 1285; Ian Laird, *A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in Salini v. Jordan and Methanex v. USA*, in International Investment Law and Arbitration. Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, 2005, page 222; Counter-Memorial on Jurisdiction, ¶ 139-142; Claimant's Post-Hearing Brief, ¶ 33 (h).

IV. THE TRIBUNAL ANALYSIS ON JURISDICTION

138. The Tribunal considers it necessary to reproduce the provisions of the **ICSID Convention** and of the **APPRI**, upon which the Tribunal's competence is contingent:

"Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person that had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person that had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State, unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance, or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes that it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such

notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)."

Article 8 of the **APPRI** states:

"(1) Any dispute arising with regards to an investment between one party and a national or company of the other Contracting Party shall be amicably resolved between the parties to the dispute.
(2) If such dispute has not been resolved within a period of six months from the time in which any of the parties to the dispute asserted it, it shall be submitted, at the request of any of the parties, to arbitration at the International Center for Settlement of Investment Disputes (ICSID), created under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, done in Washington on 18 March, 1965.
(3) A legal person constituted in the territory of one of the Contracting Parties and that before the emergence of the dispute was controlled by nationals or companies of the other Contracting Party shall be considered, for the effects of Article 25 (2) (b) of the convention mentioned in paragraph (2) above, as a company of that contracting party.
(4) Each contracting party grants its unconditional consent to submit disputes to international arbitration, pursuant to the provisions of this article.
(5) The arbitral award shall be definitive and binding."

139. The Tribunal first notes that **Peru** did not deny having consented to ICSID arbitration; this point will therefore not be analyzed in this award. Nor was there any discussion between the parties on the direct negotiations they had undertaken prior to the submission of the request for arbitration.

140. With regard to Article 25, paragraph 2(b), of the **ICSID Convention**, the Tribunal states that, as will be explained below, while the **Claimant** affirmed in various ways that her claim was made on behalf of **BNM** and that **BNM** is a party to the proceedings, she did not provide any evidence of her alleged representation and thus, **BNM** has not been

considered a claimant in these arbitral proceedings.

141. The **Claimant** asserted that her own and her father's French nationality had been indisputably proved; she also stated that she had never had the Peruvian nationality. Her French nationality has been substantiated on three separate occasions: on June 14, 2010, when the 6-month period of amicable negotiations lapsed, on 20 July, 2010, when the **Claimant**'s request for arbitration was registered, and before December 5, 2000, the day of **SBS**'s intervention in **BNM**, which gave rise to the present dispute.[163] In addition, pursuant to Article 8(3) of the **APPRI**, for those companies incorporated in Peru, which were under the control of French nationals before the events related to the dispute took place, the French control should have remained until the date of consent to ICSID arbitration, which is the case here.[164]

142. The **Claimant** also noted that none of the provisions of the **ICSID Convention** or of the **APPRI** required that the investor who made the initial investment be the only one able to invoke the protection of the **APPRI** to defend the investment. Claiming otherwise would mean that the title of the investment should have remained unchanged throughout the investment life and this would not be consistent with the very aim of the **APPRI**, which is to foster and encourage the normal flow of investments.[165]

143. In the opinion of the Tribunal, the **Claimant** substantiated her French nationality[166] and, contrary to the allegation of the **Respondent,**[167] the fact that she has other nationalities does not prevent her from claiming protection under the **APPRI**.

144. The **Respondent** alleged that what the **Claimant** received was an indirect and minority interest (paragraph 118(a) above). Several Arbitral Tribunals have repeatedly stated that investors with an indirect interest, including a minority interest, may on the basis of the **ICSID Convention** request protection of the rights accorded to them by an

[163] Counter-Memorial on Jurisdiction, ¶¶ 52, 55, and 56.
[164] Ibid., ¶ 58.
[165] Ibid., ¶ 94.
[166] Claimant's Exhibits VIII-1, VIII-2, and VIII-3.
[167] Counter-Memorial on the Merits, ¶ 263.

investment treaty.[168] In addition, the Tribunal points out that Article 1 of the **APPRI** is very clear in defining the concept of investment and stating that it includes shares "…whether minority or indirect, in the corporations constituted in the territory of one of the contracting parties."[169]

145. The **Respondent** also affirmed that the **Claimant** received her indirect interest too late, that is, five years after **BNM** had been intervened (paragraph 118(a) above). The Tribunal considers that shares may be assigned at any time with no effect on the rights of the assignee. The transmission of legal rights and endorsement of the shares could occur without affecting protection of the investment under the **APPRI**, provided that the other requirements of that treaty were met.

146. The **Respondent** also argued that **the Claimant** acquired her rights to the investment without charge (paragraph 118(c) above), since they were assigned to her by her father, Mr. Levy, in 2005. This Tribunal considers that the monetary value of assignments of rights and endorsements of shares does not affect the status of the initial investment. This was recognized by the Arbitral Tribunal in the case of Pey Casado v. Republic of Chile.[170] In light of the paragraphs above, the Tribunal will reject the first argument on jurisdiction advanced by **Peru**.

147. The **Respondent** also alleged that the interest acquired by the **Claimant** cannot qualify as an investment under the the **APPRI**, since on July 12, 2005 it had no value because **BNM** had been illiquid and insolvent since December 5, 2000, so that "the Claimant's indirect interest in BNM never had any value" (paragraph 118(b) above).[171]

148. It is clear that the **Claimant** acquired her rights and shares free of charge.

[168] *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic* (ICSID Case No. ARB/03/5), Decision on Jurisdiction, April 27, 2006, ¶ 68; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Jurisdiction, November 14, 2005, ¶ 90; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003, ¶47.
[169] Claimant's Exhibit 3, page 1 (Translation provided in Respondent's Exhibit R-019).
[170] *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Award, May 8, 2008, ¶ 542.
[171] Memorial on Jurisdiction, ¶ 118.

However, this does not mean that the persons from whom she acquired these shares and rights did not previously make very considerable investments of which ownership was transmitted to the **Claimant** by perfectly legitimate legal instruments. The fact that **BNM** had been insolvent since December 5, 2000 did not in itself mean that the investment made by her predecessors and validly acquired by the **Claimant** was valueless. This determination is one of the issues at stake in these proceedings and resolved in this award.

149. Article 1 of the **APPRI** states:

> "Such assets [including shares] should be or should have been invested in accordance with the legislation of the Contracting Party in the territory or in the sea areas in which the investment is made, before or after the entry into force of this agreement.
>
> Any modification to the form of the investment of assets does not affect its definition as an investment, provided that such modification is not contrary to the legislation of the Contracting Party in the territory in the maritime zone in which the investment takes place."[172]

150. In the opinion of the Tribunal, **BNM** was an investment made in accordance with the Peruvian legislation on banking matters, as confirmed by Resolution No. 818-91 of December 20, 1991, through which **SBS** authorized the operations of **BNM**. In addition, the **APPRI** entered into force on May 30, 1996, so that the requirements established in the first part of its Article 1 are met. For these reasons, the Tribunal will also reject **Peru's** second argument on jurisdiction.

151. As to **Peru**'s third argument—that the **Claimant**'s interest in **BNM** does not qualify as an investment under the ICSID Convention (paragraph 118(c) above) —the Tribunal considers that the initial investment made by the **Claimant**'s relatives meets all the requirements described by the **Respondent**: it provided resources to establish the

[172] Claimant's Exhibit 3, page 1 (Translation provided in Respondent's Exhibit R-019).

Bank and make it operational; risk was incurred in each of the operations, which were typical bank operations; the investment was of some duration and it contributed to the development of Peru, through the various services provided by **BNM** to the public and private sectors.

152. In addition to the points made in the preceding paragraph, the question whether **BNM** was an investment is clearly relevant to the merits and has no part in a discussion on jurisdiction. Here the Tribunal agrees with Professor Schreuer that:

> "These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention."[173]

153. Regarding **Peru**'s fourth argument—that there is abuse of process (paragraph 123 above) and that the assignment to the **Claimant** of the shares in Holding XXI does not constitute a good-faith investment (paragraph 124 above)—the Tribunal fully agrees with the **Respondent** about the importance of good faith in international law and specifically in investment arbitration issues. However, it considers that the **Respondent** did not succeed in proving the alleged bad faith of the **Claimant** and it is a well-known and accepted fact that bad faith cannot be presumed. Therefore, the Tribunal will also reject this argument on jurisdiction advanced by **Peru**.

154. With regard to the intention behind Mr. Levy Pesso's assignment of his shares to his daughter, the **Claimant**, the Tribunal considers that the fact that this transfer took place without charge does not demonstrate that it was an attempt "to manufacture jurisdiction,"[174] as the **Respondent** states. Firstly, because this is a transfer between very close family members and, secondly, because the transfer occurred in July 2005 and it was not until five years later that the **Claimant** decided to resort to ICSID arbitration. In conclusion, it is impossible to determine from the precise circumstances of this case that

[173] Schreuer, Christoph. The ICSID Convention: A Commentary. England: Cambridge University Press, 2001, 1466 pages, ¶ 122.
[174] Counter-Memorial on Jurisdiction, ¶ 120.

the assignment of shares in 2005 was an attempt to "manufacture" ICSID jurisdiction.

155. Lastly, the **Respondent** argued that the Tribunal is not competent to rule on the **Claimant**'s claims because that would oblige the Tribunal to examine actions taken by the authorities of Peru (paragraph 125 above). The Tribunal will refer in the subsequent paragraphs to this argument of the **Respondent**.

156. As indicated in paragraph 125 above, **Peru** stated that **SBS** acted reasonably to protect **BNM**'s depositors, took the necessary measures and followed the mandate of the law. Similarly, at the hearing, the representatives of **Peru** emphasized that "Peru's regulators acted at all times in accordance with Peruvian law. Indeed, their actions were required by Peruvian law. Given the high stakes involved during a financial crisis, the legally sanctioned actions of a banking regulator must be given the highest possible degree of deference."[175]

157. The Tribunal considers it important to reproduce Article 4(1) of the International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts, which reads:

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial, or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."[176]

158. In the Tribunal's view the fact that **SBS** is a banking and insurance regulatory body should not prevent it from analyzing and resolving the present dispute.

159. It is also important to consider the opinion of the Arbitral Tribunal in the case of LG&E Energy Corp. and others v. Argentine Republic:

[175] English Transcript, November 12, 2012, 188:7-14.
[176] Reproduced in Crawford, James. The ILC's Articles on State Responsibility. Introduction, text and commentaries. Cambridge University Press, 2004, page 132.

"International law overrides domestic law when there is a contradiction, since a State cannot justify non-compliance of its international obligations by asserting the provisions of its domestic law."[177]

160. In the Tribunal's opinion, **Peru** cannot argue that its organs—**SBS**, the **MEF,** or any other organ—acted in compliance with Peruvian law and that the Tribunal is therefore not competent to settle this dispute. On the contrary, it is the responsibility of the Tribunal to analyze whether the Peruvian State, through those or other organs, violated international norms and the **APPRI**.

161. The Tribunal fully agrees with **Peru** that it is unacceptable for an Arbitral Tribunal to "step into the shoes" of any organ and to "second-guess" its actions. In other words, an Arbitral Tribunal cannot substitute itself for a State organ or convert itself into an appeals body to examine acts or decisions of the relevant authorities. The Tribunal also notes that the **Claimant** did not ask the Tribunal to "step into the shoes" of **SBS**; the **Claimant** asked the Tribunal to "determine whether or not the specific actions and omissions by specific agencies of the Peruvian State on banking matters infringed principles and standards of international law and the Peru-France BIT. The Claimant is not objecting to Peru's banking and financial regulations in general as a *de jure* infringement of the Peru-France BIT. The worthiness and validity of domestic banking laws and regulations is not being disputed."[178]

162. The Tribunal concludes that its mission is preciselythat of determining whether the actions of **Peru** violated the **APPRI**. Logically, this is mission reserved for the merits phase of this case; for the above reasons, the Tribunal will also reject this argument on the admissibility advanced by the **Respondent**.

V. DECISION ON JURISDICTION

163. In light of the foregoing, the Tribunal rejects all of the Republic of Peru`s

[177] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability, October 3, 2006, ¶ 94.
[178] Counter-Memorial on Jurisdiction, ¶ 134.

objections to jurisdiction and declares that this Tribunal has competence to analyze the merits of the claim brought by Ms. Renée Rose Levy de Levi.

164. The Tribunal will decide later about the costs of this proceeding.

165. In the next chapter, the Tribunal will endeavor to describe the positions of the parties on the merits of the case, in order to analyze them and settle the dispute between them.

VI. POSITION OF THE PARTIES REGARDING THE MERITS

166. As identified in the Memorial on the Merits, the **Claimant** alleged that **Peru** infringed the standards of fair and equitable treatment, national treatment, and full protection and security; the **Claimant** also stated that in this case there was an indirect expropriation.[179] The Tribunal will now analyze the **Claimant**'s position regarding each of these standards and will then summarize the **Respondent**'s counter-arguments in each case.

A. Infringement of the Standard of Fair and Equitable Treatment

1. Claimant's Allegations

167. The **Claimant** cites Article 3 of the **APPRI** concerning the principle of fair and equitable treatment, whose paragraph 1 reads as follows:

> "**Article 3**
> Each of the Contracting Parties pledges to ensure, in its territory and sea areas just and equitable treatment, pursuant to the principles of international law, to investments of nationals and companies of the other contracting party, so that the exercise of the right thus recognized not be obstructed either in fact or in law."

168. The **Claimant** argues that, pursuant to Article 2 of the International Law

[179] Memorial on the Merits, ¶¶ 483 to 918.

Commission's draft articles on Responsibility of States for Internationally Wrongful Acts, a State's act infringing upon the principle of fair and equitable treatment can consist of an action or an omission.[180] The **Claimant** further asserts that the intention of the State is irrelevant to determine whether this standard has been infringed or not. The **Claimant** also lists the elements comprised in this principle:

a. Absence of any effect on legitimate expectations;

b. Guarantee of a transparent and predictable behavior;

c. Juridical stability and guarantees against abuse of power;

d. Guarantees against State acts involving bad faith, coercion, threats and harassment; and

e. Guarantees against court and administrative procedures that violate due process and the right to defense.[181]

a. Legitimate expectations

169. The **Claimant** states that legitimate expectations involve enabling the investor to make rational decisions based on the assurances provided by the host State guaranteeing a predictable regulatory framework and a consistent and transparent behavior; stability means that the host State will not unduly thwart legitimate expectations.[182]

170. The **Claimant** alleges that her legitimate expectations and those of **BNM** derive from the **APPRI** and from the operation start-up authorization (license) granted to **BNM** by **SBS** in Resolution No. 1455-92 of December 30, 1992,[183] "an administrative action

[180] Ibid., ¶ 487; Claimant's Exhibit X-5.
[181] Memorial on the Merits, ¶¶ 486 to 489.
[182] Ibid., ¶¶ 494 and 495.
[183] Claimant's Exhibit IV-2.

that created legitimate expectations of stability and return of investment."[184]

171. Relying on a quotation from Professor Schreuer, the **Claimant** notes that "… the investor's legitimate expectations [are] based on [a] clearly perceptible legal framework and on any undertakings and representations made explicitly or implicitly by the host State."[185] Based on the considerations of the Arbitral Tribunal in the case of Total S.A. v. Argentine Republic,[186] the **Claimant** submits that expectations may be based on regulations that are not specifically aimed at investors, such as long-term investment projects where regulatory certainty is required.[187]

172. The **Claimant** lists the following acts and omissions of **Peru** as violations of the standard of fair and equitable treatment, specifically with regard to legitimate expectations:

i. Preclusion of the Banco Financiero takeover operation: **SBS** decided that a capital increase was required but never formally notified **BNM**.[188] In the Reply on the Merits, the **Claimant** adds that the proposed merger was never formally evaluated by **SBS** and that, if it had taken place, the merger would have allowed the creation of a larger and more profitable bank. The refusal of **SBS** to approve the merger prevented **BNM** from improving its solvency, profitability, and liquidity.[189]

ii. Lack of transparency to change regulations and exclusion of **BNM**, specifically from the meeting on the restructuring of **PCSF,** during which no attention was paid to **BNM**. A lack of transparency was displayed by failing to consider the interest and economic purpose of all the players directly involved.[190]

iii. Abrupt and disproportionate withdrawal of State-owned companies' funds, implying

[184] Memorial on the Merits, ¶ 501.
[185] Schreuer, Christoph. "Fair and Equitable Treatment in Arbitral Practice." The Journal of World Investment & Trade, Vol. 6 No.3, June 2005, page 374.
[186] *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, ¶ 309.
[187] Reply on the Merits, ¶¶ 338 and 339.
[188] Memorial on the Merits, ¶ 505.
[189] Reply on the Merits, ¶ 351.
[190] Memorial on the Merits, ¶¶ 312, 506 to 508.

a violation of the investor's legitimate expectations and of the transparency and predictability of government agencies.[191]

iv. Refusal to counter financial panic: the State should have countered the rumors of an imminent collapse of **BNM**; its failure to do so constituted a serious omission.[192] In the Reply on the Merits, the **Claimant** also indicates that the **Respondent** failed to point out that the rumors "had already been spreading since before October 2000."[193] In addition, **BNM** had never asked **SBS** to make specific statements about its equity health but had asked it to make general statements about the stability and soundness of the financial system in general.[194]

v. The refusal by **BCR** to grant **BNM**'s request for a monetary regulation bailout loan: the refusal was unreasonable and "affected the investor's legitimate expectations and the guarantee of a predictable behavior by government authorities, which caused that very day BNM to default on its payments to the Clearinghouse, which was the grounds [sic] for SBS intervention."[195] The **Claimant** adds in the Reply on the Merits that the State had a constitutional mandate to protect the stability of the financial system and that **BCR**'s unjustified refusal and behavior to act as a private commercial bank departed from best international practice.[196]

vi. Impairment of the **BNM** loan portfolio, following **SBS**'s intervention, due to decisions taken by the intervenors, since "the investor expected from the State a minimum standard of diligence to ensure an optimal and transparent management of BNM's equity and loan portfolio."[197]

vii. Violation of the creditor priority to payments: the violation of the order of priority to payments, as established in Article 117 of the Banking Law, damaged the interest of

[191] Ibid., ¶¶ 509 to 513.
[192] Ibid., ¶ 516.
[193] Reply on the Merits, ¶ 364.
[194] Ibid., ¶¶ 366 and 367.
[195] Memorial on the Merits, ¶ 520.
[196] Reply on the Merits, ¶¶ 374 and 375.
[197] Memorial on the Merits, ¶¶ 526 and 527.

BNM's savers and shareholders and violated the investor's legitimate expectations.[198] The **Claimant** explains in the Reply on the Merits that the payments in question were overseas credit facilities rather than deposits of foreign banks.[199] She adds that the liquidators had received three **SBS** Resolutions ordering them to change the payment priority of the following overseas banks: Discount Bank & Trust of Zurich; Israel Discount Bank of New York, and Discount Bank S.A. of Luxembourg.[200] That was an open violation of the public interest and called into question the legitimacy of the State's actions concerning **BNM**'s intervention and liquidation.[201]

173. The **Claimant** also alleges that the measures adopted by the State do not meet the minimum requirements of proportionality, reasonableness, and predictability.[202] As an additional element, the **Claimant** mentions that, in order for the investor's legitimate expectations to be protected, the investor has to have acted in good faith. **BNM** and its shareholders had always acted in good faith[203] and their expectations had been affected in an abrupt, unpredictable and unexpected manner.[204]

b. Juridical stability

174. On the basis of doctrine, the **Claimant** affirms that the main elements of juridical stability are the publication and notification of new laws, regulations, and policies; the opportunity to comment on them; and their fair and transparent application. Additionally, prior participation of those potentially affected by future State measures is also necessary.[205] The **Claimant** stresses that she does not question the sovereign power of the State to amend regulations but states that any changes must be reasonable, non-discriminatory, made in good faith, and ensuring clear and predictable rules, with attention to the legitimate expectations of investors and without violating fundamental

[198] Ibid., ¶¶ 528 and 529.
[199] Reply on the Merits, ¶ 385.
[200] Claimant's Exhibit XI-16.
[201] Reply on the Merits, ¶¶ 387 and 388.
[202] Memorial on the Merits, ¶¶ 532 and 533.
[203] Claimant's Exhibits VI-18 and VII-21, p. 25.
[204] Memorial on the Merits, ¶¶ 535 and 542.
[205] Ibid., ¶¶ 554 and 555; Claimant's Exhibit VII-22, p. 291.

rights.[206]

175. The **Claimant** cites the following actions as violations of the guarantee of juridical stability: i) regulatory approach of the State to face liquidity problems (imposition of merger mechanisms through **PCSF**); ii) lack of transparency in the substantial change of current regulations; iii) violation of the creditor priority to payments; iv) contempt of court; and v) extra-legal actions against **BNM**.[207]

176. The **Claimant** stated that **PCSF** neglected the interest of and economic impact on all the parties involved and in particular, on **BNM**. In this respect, she added that once the meeting at the **MEF**, from which **BNM** had been excluded, was over and the public found out about the regulatory changes "the flight of private deposits in BNM intensified."[208] She reiterated that by making payments to foreign banks in the wrong order of priority (see paragraph 172(vii) above), **SBS** affected the public interest protected by banking regulations.[209] In the Reply on the Merits, the **Claimant** also states that nothing could justify discriminatory treatment consisting of inviting some banks to a meeting and excluding **BNM**, which was financially sound and had justified expectations of continuing to operate successfully.[210]

177. The **Claimant** also notes that "[t]he PCSF violated the expectations of rehabilitation of the banking institutions intervened, since the program forced intervened banks to transfer their assets en bloc. Entities that chose not to do it entered necessarily into a dissolution process, no longer being entitled to rehabilitation, unlike the regular regime."[211]

178. The **Claimant** also alleges that **SBS** had not obeyed the judicial decisions overturning Resolution No. 509-2001, which determined that **BNM**'s capital was S/. 0.00 (zero and 00/100 Nuevos Soles) (paragraphs 109 and 93 above), since "These Court

[206] Reply on the Merits, ¶¶ 391 and 392.
[207] Memorial on the Merits, ¶¶ 561 to 576.
[208] Ibid., ¶ 567.
[209] Memorial on the Merits, ¶ 570.
[210] Reply on the Merits, ¶ 354.
[211] Ibid., ¶ 402.

decisions, even though they were effective and in force, were not obeyed by SBS, insofar as [it] kept on validating the reduction of capital to zero (S/. 0.00) to justify the continuance with BNM liquidation and dissolution process, with the ensuing direct damage to the investment."[212]

179. The **Claimant** also affirms "… the existence or occurrence of State's actions with surreptitious, extra-legal intent."[213] She states that certain senior officials of the Executive Power of Peru intended to force the disappearance of the so-called small banks and that "… with a reasonable interpretation of the domestic law pre-existent to the temporary liquidity crisis at BNM, the investor could not have predicted a change of that nature in the regulatory framework, or the erratic behavior of senior officials of the Republic of Peru towards the investor."[214]

c. Arbitrary or discriminatory State actions and abuse of power

180. The **Claimant** notes the following as being arbitrary and discriminatory actions: i) Irregular accounting methods employed by the **SBS** intervention commissioners, who applied international accounting standards with respect to **BNM**'s financial statements retroactively, adversely affecting the Bank's net worth.[215] In the Reply on the Merits, the **Claimant** adds that: "… it has been substantiated that the auditor released his Opinion dated as of March 5, 2001 and Respondent does not explain why the auditor did not issue a supplementary opinion in June of that year as a result of the substantial changes made by the SBS Intervention Committee, a situation that is of certain formalities, such as establishing International Standards on Auditing, accounting and audit practice also is questionable".[216] ii) Deliberate impairment of the loan portfolio during the intervention and lack of technical and legal reports justifying the portfolio reclassifications ordered by the intervention commissioners.[217] In her Reply on the Merits, the **Claimant** also notes that the Receivers (mentioned in paragraph 94 above) corroborated these irregularities

[212] Memorial on the Merits, ¶ 572.
[213] Ibid., ¶ 574.
[214] Ibid., ¶ 576.
[215] Ibid., ¶ 585.
[216] Reply on the Merits, ¶ 419.
[217] Memorial on the Merits, ¶¶ 588 to 592.

and that the Report of Consorcio Define-Dirige, the liquidation firm appointed by **SBS**, questioned the work of the intervention commissioners in the accounting treatment of **BNM.**[218] iii) Rejection of **BNM**'s request for a loan from **BCR**, despite the fact that **BCR** "has the function to cover temporary liquidity shortages and guarantee the stability of the banking and financial industry."[219] According to the **Claimant**, this rejection was arbitrary because **BCR** used private banking criteria and did not play its role as industry stabilizer. iv) Arbitrary rejection of the **BNM** shareholders' recapitalization proposal designed to strengthen the Bank's equity and to terminate the Bank's participation in the **PCSF** Transitional Regime.[220] In her Reply on the Merits, the **Claimant** adds that **BNM** shareholders never received a response from the State to their proposal, in contrast to the treatment accorded to Banco Latino and Banco Wiese.[221] v) Reduction of **BNM**'s equity capital to zero, indirectly affecting **NMH** as a shareholder.[222] In her Reply on the Merits, the **Claimant** alleges that the sole purpose of the capital reduction to zero was to facilitate the disposal of the shareholders' assets by the State by declaring the dissolution of **BNM**.[223] vi) Declaration of dissolution of **BNM**, based on the report of Arthur Andersen, which clearly stated that it was not "a valuation of the business."[224] The report states: "the procedures applied do not constitute (i) an audit of the financial statements of the Bank, (ii) a valuation of the Bank's assets and liabilities, and/or (iii) a review of the Bank's internal controls,"[225] vii) ". . . serious omission by SBS and BCR of their responsibility for giving support and acting diligently to find ways to provide BNM with temporary liquidity; this contrasts with the preferred treatment given to other banks (Banco Wiese and Banco Latino), which . . . when faced with liquidity shortages, they were benefited with direct bailouts by the Peruvian State,"[226] and viii) " . . . the deliberate refusal no [sic] to face the market and reassure BNM savers, as well as to counter those

[218] Reply on the Merits, ¶¶ 424 and 425.
[219] Memorial on the Merits, ¶ 593.
[220] Ibid., ¶¶ 441 to 445 and 595.
[221] Reply on the Merits, ¶ 430.
[222] Memorial on the Merits, ¶ 596.
[223] Reply on the Merits, ¶ 447.
[224] Memorial on the Merits, ¶¶ 597 – 599.
[225] Claimant's Exhibit I-3.
[226] Memorial on the Merits, ¶ 600.

who spread the groundless rumors."[227]

181. In addition, the **Claimant** lists, among **Peru's** arbitrary and discriminatory actions, the following abuses of power:

a. Lack of access to remedies of challenge or appeal in domestic law, in order to "neutralize" the withdrawal of the State companies' funds by the **MEF** and to challenge the **SBS** intervention commissioners' financial management, the **SBS** Resolution declaring **BNM**'s intervention, the **SBS** Resolution reducing **BNM**'s equity to zero and the **SBS** Resolution declaring the dissolution of the Bank.[228] The **Claimant** indicates that in Peru those actions can be challenged only by a lawsuit, which is not an efficient solution because:[229] i) court proceedings are public, which undermines confidence in the market; ii) contentious proceedings last for years; iii) "the judicial ruling given by the Chamber of the Supreme Court of Justice was unfair, inadequate, and ineffective, violating the full protection and security standard"[230] [Tribunal's translation], and iv) according to the Banking Law, the rights and assets acquired by third parties in good faith during the intervention regime may not be subject to a court challenge.

b. Irregular accounting practice in the **BNM** balance sheet at year end (higher provision requirements with retroactive effect), when the State had exclusive control of **BNM** management.[231]

c. Contempt of court constituting government abuse of power: the reduction of equity capital to zero; the failure to restore **BNM** shareholders' right to recover an effective participation in the capital equity; and the failure to provide information on **BNM**'s

[227] Ibid., ¶ 603.
[228] Ibid., ¶ 606.
[229] Ibid., ¶ 609.
[230] Ibid., ¶ 609 (iii).
[231] Ibid., ¶ 610 to 612.

liquidation process.[232]

d. Bad faith, coercion, threats, and harassment

182. The **Claimant** also refers to the guarantee against State actions involving bad faith, coercion, threats, and harassment against the investor or the investment and mentions the following actions: i) coercion and aggressiveness in the lengthy inspection visit by **SBS**, which triggered speculation and false rumors about **BNM**'s solvency and was one of the reasons for the massive flight of private deposits from the Bank;[233] ii) reduction of **BNM**'s equity capital to zero "in order to facilitate the State's disposal of the property by declaring the dissolution of BNM;"[234] iii) coercion by encouraging the sale of an equity block to Banco Interamericano de Finanzas;[235] iv) bad faith in the declaration of **BNM**'s dissolution without a valuation of the entire equity;[236] v) coercion and harassment by criminal prosecution of **BNM**'s shareholders and managers in "numerous and irrational criminal lawsuits."[237] Concerning the criminal lawsuits, the **Claimant** also states that "BNM's shareholders and managers have been acquitted from more than 25 criminal prosecutions, which shows how arbitrary and groundless the filing of these criminal actions was by SBS."[238]

e. Violation of due process

183. Regarding the last aspect of the infringement of the standard of fair and equitable treatment, the **Claimant** alleges that a guarantee exists against judicial and administrative proceedings that violate due process and the right of defense. To this effect, the **Claimant** cites the following acts and omissions violating this guarantee: i) lack of transparency and violation of due administrative process by the regulatory change made in **PCSF**, implying exclusion of the so-called "small" banks, which were neither consulted nor notified; moreover, the opinion of all players in the banking and financial system was not

[232] Ibid., ¶ 613.
[233] Ibid., ¶ 618.
[234] Ibid., ¶ 619.
[235] Ibid., ¶ 620.
[236] Ibid., ¶ 621.
[237] Ibid., ¶ 622.
[238] Reply on the Merits, ¶ 453.

sought; and ii) lack of justification for SBS Resolution No. 775-2001 declaring the dissolution of **BNM**, based on SBS Resolution No. 509-2001, even though the latter was suspended by the Judiciary, resulting in a violation of due administrative process.[239]

2. Respondent's Response

184. The **Respondent** maintains, on the basis of several awards,[240] that a violation of the standard of fair and equitable treatment occurs when treatment rises to a level that is unacceptable from the international perspective. The onus is on the **Claimant** to demonstrate that **Peru**'s conduct did not meet international standards. The **Respondent** adds that the **Claimant** has failed to do so because her accusations are factually incorrect and because none of the **Claimant**'s allegations amount to a violation of the fair and equitable treatment standard.[241]

185. **Peru** notes that "BNM's former shareholders expected that the Respondent would guarantee them continued profits, growth through successful mergers, access to public and private deposits, automatic availability of credit, as well as bailouts and other protection if the Bank's fortunes should sour. However, BITs 'are not insurance policies against bad business judgments.' Instead, BNM's former shareholders 'should bear the consequences of their own actions as experienced businessmen.'" [242]

186. **Peru** recognized that the fair and equitable treatment obligation encompasses an obligation not to frustrate an investor's legitimate, investment-backed expectations and protects only "the basic expectations that were taken into account by the foreign investor to make the investment."[243] It added that those expectations have to be legitimate and reasonable and measured objectively. Several awards indicated that expectations are legitimate or reasonable if they are founded on some form of representation or

[239] Memorial on the Merits, ¶¶ 628 to 631.
[240] *S.D. Myers v. Government of Canada*, UNCITRAL (NAFTA), Partial Award, November 13, 2000, ¶ 263; *Eastern Sugar B.V. v. Czech Republic* (SCC Case No. 088/2004), Partial Award, March 27, 2007, ¶ 272.
[241] Counter-Memorial on the Merits, ¶¶ 288 to 291.
[242] Ibid., ¶ 294.
[243] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, May 29, 2003, ¶ 154.

commitment by the host State.[244]

187. **Peru** argues that the **Claimant** has not shown "how she or BNM's shareholders relied on any of the specific expectations identified in her Memorial in making any investment."[245] Indeed, it was inconceivable that the **Claimant** had such expectations in 2005 and she could not point to any promise or commitment made by the State with respect to her expectations.[246]

188. **Peru** stated that the **Claimant** asserts that **BNM**'s shareholders were entitled to a return on their investment, on the basis of an operation start-up authorization granted to **BNM** by **SBS** in 1992. It added, that is not a reasonable expectation because "The State cannot and does not guarantee a return on investment. It is incumbent on the investor to make sound business decisions; the BIT and its fair and equitable treatment obligation are not a guarantee of business success."[247]

189. As regards the merger with Banco Financiero, **Peru** affirms that the State never committed itself to approving all proposals for bank mergers but only to reviewing them, by assessing the legality of the proposal and its possible impact on the stability of the banks involved and on the banking system as a whole. **SBS** informed those concerned that a merger proposal would have to be accompanied by a plan to recapitalize **BNM**; in addition, the shareholders of that Bank never even submitted a formal merger proposal to **SBS**.[248]

190. **Peru** denies having made any statement indicating that **BNM** would be granted the unusual privilege of participating in the Government's decision-making regarding the promulgation of **PCSF**.[249] It also explains in its Rejoinder on the Merits that, when the meeting referred to by the **Claimant** was convened, **PCSF** had already been designed.

[244] Counter-Memorial on the Merits, ¶¶ 295 to 297; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award, January 19, 2007, ¶ 241.
[245] Counter-Memorial on the Merits, ¶ 298.
[246] Ibid.
[247] Ibid., ¶ 299.
[248] Ibid., ¶ 300; Rejoinder on the Merits, ¶ 277.
[249] Counter-Memorial on the Merits, ¶ 301.

The meeting was held one day before the program was announced publicly, so that the invited banks played no role in its formulation. In addition, the **Claimant** has not proved that **PCSF** caused her or **BNM**'s shareholders any harm. [250]

191. The **Respondent** also notes that **BNM**'s shareholders could not reasonably expect that State-owned companies would keep their deposits in BNM indefinitely. Those deposits had set terms and no guarantee of renewal. In addition, **SBS** had warned **BNM** against relying heavily on such deposits and on the need to diversify its deposits and to develop contingency plans.[251]

192. **Peru** indicates that the public deposits were not withdrawn all at once but when their terms expired over a twelve-month period, from January to December 2000. In addition, it was reasonable to expect that the deposits would not be stable, since they were placed through periodic auctions, in which State-owned companies continually shopped around for the highest interest rates.[252]

193. **Peru** states that investors could not have expected that State agencies would refute the rumors circulating about **BNM**'s solvency. While **BNM** had a right, under Peruvian law, to request that the Public Prosecutor file criminal charges against anyone who incited financial panic, it failed to exercise such right. **Peru** also notes that **SBS** had no legal obligation to make public statements about specific financial institutions.[253]

194. **Peru** also states that the **Claimant** has provided no evidence of her alleged request to **SBS** to make statements about the stability and soundness of the financial system and explains that the institutions concerned (**SBS** or **MEF**) were reluctant to make specific statements about **BNM,** not because the Bank was insolvent but because they knew it was in a weak financial situation.[254]

[250] Rejoinder on the Merits, ¶ 279.
[251] Counter-Memorial on the Merits, ¶ 302.
[252] Rejoinder on the Merits, ¶¶ 281 and 282.
[253] Counter-Memorial on the Merits, ¶ 303.
[254] Rejoinder on the Merits, ¶ 286.

195. Regarding the **Claimant**'s expectation that **BNM** would receive a loan from **BCR**, the **Respondent** states that Peru's laws clearly define the conditions upon which **BCR** loans are granted. It added that the **BCR** was not allowed to make an emergency short-term loan to **BNM** because **BNM** did not have sufficient collateral to secure the loan; the **Claimant** mischaracterizes the role of **BCR** as lender of last resort.[255] It is not true that **BNM** had sufficient collateral and the **Claimant** has not produced any evidence that it did. **BCR** has no constitutional or legal basis for ignoring the legal requirement regarding sufficient and eligible collateral; thus, the **Claimant** and her expert have completely mischaracterized the role of **BCR**.[256]

196. **Peru** notes that **BNM**'s shareholders could not reasonably have had any expectations of benefitting from or continuing to control the Bank's assets after its intervention had been ordered. The Banking Law states that, once a bank is intervened, its assets are sold, the bank is liquidated, and the recovered assets are used first to pay depositors, creditors and—if some residual value remains—shareholders.[257]

197. Regarding the order of priority for **BNM** payments during liquidation, **Peru** states that the payment of foreign banks had no impact on the **Claimant**, because **BNM**'s shareholders were last in the order of payment, so that any expectations they might have had in that regard were irrelevant.[258]

198. With regard to the allegation of violation of the guarantee of juridical stability, the **Respondent** explains that the decrease in **BNM**'s public deposits was consistent with the freedom of State-owned companies to invest their funds and to withdraw them at the end of the term of the deposits instruments, particularly in cases such as that of **BNM,** where there had not been any promise of renewal. The denial of the **BCR** loan was consistent with the legal requirements concerning the provision of sufficient collateral. **PCSF** did not change banking regulations in any way; it rather created a new benefit that banks could voluntarily choose to access. It insisted that the **BNM** liquidation process followed

[255] Counter-Memorial on the Merits, ¶ 305.
[256] Rejoinder on the Merits, ¶¶ 288 to 290.
[257] Counter-Memorial on the Merits, ¶ 307.
[258] Ibid., ¶ 308.

the laws on the order of priority for payments.[259] In addition, it is not clear what the **Claimant** means by stating that **BCR** acted as a private bank, since it has acted in conformity with the laws governing its powers and authorities.[260] It is nonsensical to argue that **BCR** should have acted in accordance with the alleged international best practices, which were used for the first time to respond to a global financial crisis that occurred one decade after the events in this case.[261]

199. **Peru** notes that "States parties to a BIT do not relinquish their traditional regulatory authority or forgo their ability to amend and adapt legislation over time."[262] Additionally it notes that Peru's legal framework did not undergo any significant changes during the financial crisis, and **SBS**, the **MEF,** and **BCR** applied the laws in a consistent manner when dealing with **BNM**: "the legal framework that was applied to BNM was at all times in line with the expectations of stability that an investor in Peru's financial system would have had."[263]

200. In the opinion of **Peru**, the transparency obligation refers to the ability of the investor to know "beforehand any and all rules and regulations that will govern its investments."[264] It has complied with that obligation by publishing all the legal requirements of **PCSF** and applying them consistently to the banks interested in participating. It has also acted transparently by making payments to creditors according to the priorities established by law. It rejects the **Claimant**'s conspiracy theory about the elimination of small banks.[265] **PCSF** did not force banks to do anything; it was designed to facilitate the reorganization of institutions in the national financial system. The program was subsequently expanded to include intervened banks, but on the understanding that any intervened bank would be liquidated and dissolved. For example, NBK Bank's assets and liabilities were sold through **PCSF** and the Bank was then placed

[259] Ibid., ¶ 310.
[260] Rejoinder on the Merits, ¶ 300.
[261] Ibid., ¶ 301.
[262] Counter-Memorial on the Merits, ¶ 313.
[263] Ibid., ¶ 315.
[264] *Tecmed*, *supra*, ¶ 154.
[265] Counter-Memorial on the Merits, ¶¶ 319 to 322.

in liquidation.[266]

201. Regarding the rehabilitation of **BNM**, **Peru** explains that, under the General Banking Law that option is only allowed for a bank in liquidation (not in intervention) and can only be initiated by at least 30 percent of the bank's creditors (not by its shareholders or directors).[267]

202. As for the allegations of discrimination, **Peru** states that the **Claimant** has not shown that arbitrary or discriminatory measures are in fact prohibited in the **APPRI** and that, at a minimum, she must show the existence of such a prohibition ("non-impairment" provision) in customary international law.[268] Citing doctrine, **Peru** states that "... not every exercise of discretion that departs from usual practice without a justification would rise to the level of prohibited arbitrariness."[269] It adds that "a breach would require showing intentional arbitrariness, a failure to act in good faith, and actual harm,"[270] and states that the **Claimant** has not proved any of those situations.[271]

203. **Peru** further states that a measure described as discriminatory must have been taken with the intention to harm the investor and must have caused actual injury.[272] Citing several arbitral awards, it states that "when a measure or a distinction reflects 'a reasonable relationship to rational policies,' such conduct is not unlawfully arbitrary or discriminatory."[273] Based on that line of reasoning, **Peru** states that, in light of **BNM**'s financial problems, it is evident that there was nothing arbitrary, discriminatory or abusive about the intervention of that Bank.

204. In particular, on the subject of the accounting practices used by **SBS** during the

[266] Rejoinder on the Merits, ¶ 306; Respondent's Exhibit R-092.
[267] Ibid., ¶ 307.
[268] Counter-Memorial on the Merits, ¶¶ 326 and 328.
[269] Counter-Memorial on the Merits, ¶ 330.
[270] Ibid.
[271] Ibid., ¶ 334.
[272] *Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award, June 25, 2001, ¶ 369 and n. 95.
[273] Counter-Memorial on the Merits, ¶ 332; *Saluka Investments B.V. v. The Czech Republic*, (UNCITRAL), Partial Award, March 17, 2006, ¶ 307; *Lauder v. The Czech Republic,* (UNCITRAL), Final Award, September 3, 2001, ¶ 232.

intervention, **Peru** states that the necessary adjustments had been made to the financial statements to reflect the true condition of the Bank. The reduction in the value of **BNM**'s assets during the intervention of the Bank was due to a re-evaluation of its financial state to reflect the financial problems caused by **BNM**'s management before the **SBS** intervention. In addition, given that the Bank was insolvent, the management of the assets by **SBS** could not have caused harm to the **Claimant**. Concerning the loan requested from **BCR** on December 5, 2000, **Peru** explains that **BCR**'s decision was not arbitrary because the law governing emergency loans specifically required the provision of sufficient collateral. As to the rescue plan proposed by **BNM**'s shareholders, the rejection was reasonable because the plan was not legally viable; in addition, the **Claimant** was not harmed by the rejection because the ownership interest of **BNM**'s shareholders would have been diluted or eliminated. With regard to the reduction of **BNM**'s shareholder equity to zero, **Peru** explains that **PwC** and **SBS** determined that **BNM** was insolvent and that its equity was therefore worth nothing.[274]

205. Regarding the basis for the decision to liquidate **BNM**, **Peru** states that **SBS** did not rely on the Arthur Andersen valuation, but on the fact that, under the Banking law, intervention is always followed by liquidation "regardless of the Bank's value." As for the rumors regarding **BNM**'s financial situation, the authorities were unaware of such rumors before the intervention and had a policy of not speaking to the public about specific institutions. In response to the **Claimant**'s allegation that it had given bailouts to other banks, the **Respondent** states that it had not bailed out the shareholders of any banks similarly situated to **BNM**. It is thus not true that there has been any discrimination against **BNM**. Concerning the withdrawal of public deposits, **Peru** maintains that public funds had been withdrawn not only from **BNM** but from all private-sector banks; in addition, the **Claimant** has not shown that the Bank's failure has been due to those withdrawals. It was rather the withdrawal of private deposits that caused **BNM**'s liquidity crisis.[275]

206. Concerning the **Claimant**'s allegation of abuse of power in acting in contempt of

[274] Counter-Memorial on the Merits, ¶¶ 335 to 339.
[275] Ibid., ¶¶ 340 to 343.

Peruvian judicial decisions, **Peru** states that "While the courts acknowledged the rights of BNM's shareholders to judicial review, the courts found that SBS was authorized—and indeed obligated—to dispose of BNM's assets in the process of liquidation and to determine if any residual value was left at the end of that process. Therefore, Peruvian courts did not conclude that SBS abused its power; further, SBS has not been in contempt of any court decisions."[276] Moreover, there were no judicial orders to produce information about **BNM**'s liquidation process; the one decision handed down has subsequently been annulled.[277]

207. **Peru** denies having acted against **BNM** in bad faith, with coercion, threats and harassment; the onus is on the **Claimant** to show that the alleged situations have existed. It has been concluded in the Vivendi II case[278] that "it is the severity and 'misuse of [] regulatory powers for illegitimate purposes' that distinguishes a wrongful act from the legitimate exercise of sovereign authority."[279] The **Claimant** has failed to establish any act of bad faith by the authorities and has even stated in her Memorial on the Merits that the actions of Peru "may" have been intended to affect the investment and to violate the fair and equitable treatment standard.[280]

208. Concerning the inspection visit of **BNM** conducted in August 2000, **Peru** states that it had been made in accordance with the law, was not unusually long, and was not the second visit of the year, since what had happened in January was a special examination of the consumer loan portfolio and not a full inspection visit.[281] Moreover, the reduction of **BNM**'s equity to zero was not a form of coercion, since the Bank was already insolvent and the publication of that fact in a resolution had no effect on the value of the Bank's equity and merely acknowledged a reality. The efforts to transfer **BNM**'s assets to another bank as a block were not acts of coercion but were expressly authorized by the Banking Law. It was not coercive for **SBS** to file criminal charges against the

[276] Ibid., ¶ 344.
[277] Ibid., ¶ 345.
[278] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Award, August 20, 2007, ¶ 7.4.24.
[279] Counter-Memorial on the Merits, ¶ 347.
[280] Ibid., ¶ 348.
[281] Ibid., ¶ 349.

directors and shareholders of **BNM**; it was its duty to do so.[282]

209. Countering the **Claimant**'s allegations of violations of due process, **Peru** pointed out that the **APPRI** cannot be construed as guaranteeing to the **Claimant** a right to participate in or comment in advance on **PCSF** and that "[a] right to comment on an emergency decree is not a guarantee that is generally considered indispensable to the proper administration of justice."[283] In addition, "no generally accepted standard of due process requires that all investors have the opportunity to attend government meetings, let alone participate in making governmental decisions."[284] Peru concluded that **PCSF** had no impact on the interests of **BNM**'s shareholders, as it was designed simply to benefit those institutions that chose to participate.[285]

210. **Peru** emphasizes that **SBS** has never disregarded any judicial decisions; the courts had not invalidated any of **SBS**'s administrative acts and the court claims of **BNM**'s shareholders have been consistently dismissed as unfounded.[286] Furthermore, there is no generally accepted norm requiring the Peruvian State to provide investors with an administrative review of administrative actions, in addition to the already existing judicial review.[287]

211. **Peru** denies that **BNM**'s shareholders did not have access to judicial review. They brought several court cases, in which they put forward their arguments and presented the evidence that they deemed appropriate. Based on several awards, **Peru** concludes that "[t]he substance of a judicial decision can lead to finding a denial of justice only 'when the decision is so patently arbitrary, unjust, or idiosyncratic that it demonstrates bad faith' or 'as an indication of lack of due process.'"[288] Moreover, Peru adds that **BNM**'s shareholders were able to challenge administrative decisions to reduce

[282] Ibid., ¶¶ 350 to 353.
[283] Ibid., ¶ 359.
[284] Ibid.
[285] Ibid., ¶ 361.
[286] Ibid., ¶ 362.
[287] Ibid., ¶ 363.
[288] Ibid., ¶ 366; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, July 29, 2008, ¶ 653; *RosInvestCo UK Ltd. v. Russian Federation* (SCC Arbitration V 079/2005), Final Award, September 12, 2010, ¶ 279.

public deposits, to decrease **BNM**'s shareholders equity and to liquidate **BNM** and in each case, they failed to substantiate their allegations.[289] As for the Supreme Court's ruling, confirming **SBS**'s decision to liquidate **BNM**, **Peru** states that the Court's findings were well-reasoned and not influenced by the alleged political pressure.[290]

212. The following section describes the **Claimant**'s allegations regarding the violation of the standard of national treatment, and the response of **Peru**.

B. Infringement of the National Treatment Standard

1. Claimant's Allegations

213. The **Claimant** reiterates that a State act violating international standards can be an act or an omission.[291] The **Claimant** indicates that the first paragraph of Article 4 of the **APPRI** governs the principle of national treatment of investors and of the investment itself: "[e]ach Contracting Party grants, in its territory and sea areas, to nationals or companies of the other party in matters regarding its investments and activities related to these investments a treatment not less favorable than that accorded to its nationals or companies, […]."

214. The **Claimant** also notes that the examination of the violation of that principle involves three essential factors: a) identification of comparator and the concept of similar circumstances; b) existence of unequal treatment and lack of reasonable justification; and c) irrelevance of the State's intention.[292]

215. The **Claimant** notes that this principle or standard protects foreign investors that are in similar circumstances to those of a national investor or his investment and is respected if the claimant investor is in the same industry or in direct competition with the comparator. It is also important to consider the reasonableness of the State's measure granting unequal treatment. In the same line of thinking, the Claimant states that **BNM**

[289] Counter-Memorial on the Merits, ¶ 368.
[290] Ibid., ¶¶ 369-370.
[291] Memorial on the Merits, ¶ 633.
[292] Ibid., ¶ 637.

was comparable to **BCP**, Banco Wiese, Banco Latino, and Banco de Comercio—all Peruvian Banks.[293]

216. In her Reply on the Merits, the **Claimant** also mentions other factors for comparing **BNM** with the above-mentioned banks: the benchmark banks performed the same functions, provided the same financial services, had a similar growth rate, and took similar risks.[294]

217. The **Claimant** notes that arbitral doctrine and case law have established that non-compliance with the national treatment standard occurs regardless of whether the State took into account the investor's nationality; for that reason there are *de jure* and *de facto* discriminatory measures. Relying on the case of *Feldman Karpa v. Mexico*,[295] she states that, once unequal treatment has been proved, the State has to show the existence of reasonable grounds for such treatment; otherwise, it would be a discriminatory measure violating the national treatment standard.[296]

218. The **Claimant** affirms that in January 2001, **SBS** and the **MEF** reassured the markets and countered the effects of the rumors circulating about the Peruvian banks **BCP** and Wiese Sudameris. In addition, national media published news confirming that affirmation (**Claimant**'s Exhibits V-29, V-30, V-31, V-32, V-33, V-34, V-35, and V-36). There were thus no reasonable grounds or objective public policy issues that would justify such unequal and discriminatory treatment.[297]

219. The **Claimant** also alleges that the State gave "disproportionate" help to Banco Wiese and Banco Latino and that, through **COFIDE**, it intervened in favor of Banco Latino by capitalizing its receivables, thus avoiding intervention. The State intervened via bailouts and rescue programs for amounts higher than those required for **BNM**, which needed only US$20 million. This amount could have been given through the mechanism

[293] Ibid., ¶¶ 638 to 644.
[294] Reply on the Merits, ¶ 467.
[295] *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, December 16, 2002, ¶ 176.
[296] Memorial on the Merits, ¶¶ 645 to 650.
[297] Ibid., ¶¶ 653 to 659.

of rediscount by **BCR** and other viable options, which would have prevented **BNM**'s intervention.[298]

220. The **Claimant** further cites the case of Banco de Comercio, whose main shareholder is the Peruvian State itself and which allegedly had a lower ratio than **BNM** but still managed to survive the liquidity crisis in the financial industry. The **Claimant** also notes that the Respondent has not provided the list of cash rediscounts given to the banks by **BCR** between August 2000 and August 2001, as ordered by the Arbitral Tribunal in its Procedural Order No. 1. This list would have shown the support received by other banks from the State, in contrast to the treatment accorded to **BNM**.[299]

221. The **Claimant** adds in her Reply on the Merits that **Peru**'s position that the market share of banks is a sufficiently reasonable indicator justifying unequal treatment has no merits.[300] According to the **Claimant**'s expert, Mr. Nicolas Dujovne, in December 1999, **BNM** was Peru's sixth largest bank and was an institution of systemic importance.[301]

222. The **Claimant** also notes that Article 20 of the Banking Law prohibits shareholders, managers, and directors of firms intervened by **SBS** to continue being qualified as the firms' "organizers." However, that rule did not apply to national shareholders who benefited from the bailout programs, such as Banco Latino, where the directors remained in office even after nationalization.[302]

223. In her post-hearing submission, the **Claimant** includes a section entitled: "The more favorable treatment given by SBS to Banco Wiese and Banco Latino during the financial crisis" and argues: "… it has been substantiated that the bailout schemes implemented by the State for local banks, did not preclude the possibility of rescuing banks by way of a direct or third-party contribution, and the permanence of some

[298] Ibid., ¶¶ 660 to 665.
[299] Ibid., ¶¶ 666 to 672.
[300] Reply on the Merits, ¶ 464.
[301] Expert Opinion of Mr. Nicolas Dujovne, May 15, 2012, ¶ 13.
[302] Reply on the Merits, ¶ 477.

directors. The contrary happened in the case of BNM, as the Banking Act underwent amendments through Emergency Decrees days before BNM was intervened which established new rules for bailout processes or bank interventions that ruled out any possibility of keeping it afloat by its shareholders, and hence the only alternatives were either the sale of assets or the dissolution and liquidation of the bank."[303]

2. Respondent's Response

224. **Peru** claims that **BNM** was not in like circumstances with **BCP**, Banco Wiese Sudameris, or Banco Latino. It also claims that a domestic investment was not in like circumstances with a foreign investment merely because the two companies were in the same industry or in a competitive relationship. It adds that an essential element of a national treatment analysis is the reasonable justification of any differential treatment. To this effect, if the differential treatment is reasonably based on a rational policy, the foreign and domestic investment will be considered not in like circumstances.[304]

225. **Peru** explains that Banco de Crédito and Banco Wiese Sudameris were the first- and second-largest banks in Peru and that, until November 2000, they had accounted for 44 percent of loans and 51 percent of deposits.[305] Banco Latino had a very large network of individual depositors, making its survival very important for the safety of Peru's banking system. In contrast, as of November 2000, **BNM** accounted for 4 percent of all loans in the financial system and 2 percent of deposits.[306] In addition, **BNM**'s depositors were not individuals but businesses, other banks and State-owned companies, so that its failure would not (and did not) destabilize the financial system.[307]

226. Considering the bank that was most similar to **BNM** at the time, **Peru** compares **BNM** with NBK Bank, which held 3.3 percent of loans and 1.9 percent of deposits in that country and which, on December 11, 2000, failed to pay its obligations and was excluded

[303] Claimant's Post-Hearing Brief, ¶ 138.
[304] Counter-Memorial on the Merits, ¶¶ 375 to 378.
[305] Respondent's Exhibit R-169.
[306] Ibid.
[307] Counter-Memorial on the Merits, ¶¶ 379 and 380.

from Peru's check-clearing process and intervened by **SBS**. NBK Bank came under the Special Transitional Regime and Banco Financiero acquired it under **PCSF**, so that its shareholders lost their ownership interest and investment.

227. **Peru** also affirms that the Superintendent did not, as the **Claimant** alleges, make any statements refuting rumors about the above-mentioned three banks; he made only general statements about the overall health of the banking system.[308] Regarding the Claimant's allegations about the way Banco Latino and Banco Wiese were bailed out by Peru, **Peru** states that "For Banco Latino, the Government committed funds and effectively nationalized the Bank; the shareholders' ownership stake was severely diluted and eventually eliminated. For Banco Wiese, the Government did not end up paying out any public funds, and in the process of that merger, Banco Wiese's shareholders likewise lost control and ownership of the Bank".[309] Consequently, even if Peru had treated **BNM** in the same manner than Banco Latino or Banco Wiese, which it could not have done, **BNM**'s shareholders would have lost ownership and control of the Bank.[310]

228. Concerning the case of Banco de Comercio, **Peru** points out that the **Claimant** did not explain the alleged similarities between that Bank and **BNM**. According to Peru, the **Claimant** also failed to prove her assertion that Banco de Comercio was treated more favorably than **BNM** by the Peruvian authorities. While **SBS** was required by law to intervene **BNM**, when that Bank stopped paying its obligations, this was not the case for Banco de Comercio, even if its liquidity indicators were weaker than those of **BNM**. The **Claimant** thus has failed to demonstrate violation of the national treatment standard in that respect.[311]

C. Refusal to Provide Full Protection and Security

1. Claimant's Allegations

229. The **Claimant** cites Article 5(1) of the **APPRI** as the rule governing the principle

[308] Respondent's Exhibits R-178 to R-180.
[309] Counter-Memorial on the Merits, ¶ 384.
[310] Ibid. ¶ 385.
[311] Ibid., ¶ 387.

of full protection and security: "Investments made by nationals or legal persons of a Contracting Party shall enjoy broad and full protection and security in the territory and maritime area of the other Contracting Party."[312]

230. The **Claimant** states that this principle can be violated by an action or an omission.[313] The **Claimant** also alleges that, according to doctrine and arbitral precedent, the full protection and security standard goes beyond physical integrity.[314] Moreover, an important element of full protection and security is the right of access to a system of adequate administration of justice.[315] Denial of justice can be created by the lack of access to a fair judicial system or by the contempt of court rulings on the part of government agencies; specifically in the case under consideration, contempt of court by **SBS** has been substantiated.[316]

231. The **Claimant** mentions the following occasions on which, in her opinion, the full protection and security standard has been violated:

"BNM and its investors were denied the possibility to:
(i) Have access to a fair and predictable dispute settlement system;
(ii) Have access to a judicial system whose decisions were fully and timely abided by the Peruvian government agencies; and
(iii) Have access to a judicial system impervious to public pressures exerted by other Powers of the State."[317]

232. The **Claimant** indicates that, according to doctrine and certain ICSID awards, two requirements must be met to establish denial of justice: a) exhaustion of previous remedies within the jurisdiction of the host State; and b) identification of the illicit

[312] Memorial on the Merits, ¶ 678.
[313] Ibid., ¶ 679.
[314] *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award, July 14, 2006, ¶ 408; *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Award, February 6, 2007, ¶ 303.
[315] Memorial on the Merits, ¶¶ 674 to 677 and 680.
[316] Ibid., ¶ 682.
[317] Ibid., ¶ 685.

conduct attributable to the judicial system that may not be righted by local remedies.[318] As regards exhaustion of remedies, the **Claimant** reiterates that **SBS** resolutions could not be challenged at an administrative level. As regards illicit conduct, the **Claimant** notes that the purpose of the Administrative Contentious process in Peru is to assess only the formal aspects of the administrative action and not to discuss the merits of a case, like the present one, related to **BNM**'s intervention and dissolution.[319]

233. The **Claimant** mentions the following situations of denial of justice:

i. Violation by **SBS** of the obligation to abide by court decisions concerning the declaration of inapplicability of SBS Resolution No. 509-2001, reducing **BNM**'s equity capital to zero;

ii. Open and illegal interference by the President of **Peru**, the President of Congress, and the Superintendent of Banking and Insurance, who in 2007 made statements to the media in order to influence the outcome of the Administrative Contentious Action filed by **BNM**'s shareholders against SBS Resolution No. 775-2001, ordering **BNM**'s liquidation and dissolution;

iii. Illegal authorization by Congress to the Executive Branch in relation to a law that would suspend the wage increase of the Supreme Court "Vocales", who would issue the ruling on the action brought by **BNM**'s shareholders against SBS Resolution No. 775-2001, ordering the dissolution and liquidation of that Bank; and

iv. Lack of analysis and motivation in the ruling issued by the Constitutional and Social Law Chamber of the Supreme Court of Justice on October 11, 2006, concerning the Administrative Contentious Action filed by **NMH** against SBS Resolution No. 775-2001. In the **Claimant**'s opinion, that ruling was arbitrary. [320]

[318] Ibid., ¶ 686; *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award, September 16, 2003, ¶ 20.33.
[319] Memorial on the Merits, ¶¶ 687 to 692.
[320] Ibid., ¶ 693.

234. The **Claimant** states that the violation of the full protection and security standard "questions the conduct of the judicial system as autonomous behavior, the illegality whereof is directly related to the adverse effects on the investor's economic rights."[321] In addition, the lack of access to a fair and effective judicial system from the perspective of international law implies that the court action filed by **BNM**'s shareholders challenging its dissolution and liquidation precluded any possibility of filing any other judicial action. The **Claimant** further states that the opinions given by the President of the Republic, the President of Congress and the Superintendent (here she refers to the video file appended to the Request for Arbitration as Exhibit 08) were openly public, coercive, and concerted.[322]

235. The **Claimant** notes in her Reply on the Merits that there was no efficient administrative defense available, since **SBS**'s decisions could be appealed only in the courts and not at an administrative level.[323] This is so because the Judiciary "may lack the technical or professional expertise to contend the State's 'truth' . . . making the Court review option in a formal remedy but inefficient for the investor's rights." Moreover, Administrative Contentious actions focus on issues of form rather than on the merits of the case.[324]

236. The **Claimant** also refers to international reports on the bias and corruption of the Peruvian Judiciary, which in 2007 was placed near the bottom of the ranking.[325]

2. Respondent's Response

237. **Peru** states that the **Claimant** has presented no evidence to support her serious allegation that the President of **Peru**, the Congress, and **SBS** interfered and improperly influenced the Supreme Court of Justice, which was reviewing **SBS**'s Resolution declaring **BNM**'s liquidation and dissolution. The **Claimant** also offers no evidence that

[321] Ibid., ¶ 694.
[322] Ibid., ¶¶ 695 to 698.
[323] Reply on the Merits, ¶ 484.
[324] Ibid., ¶ 488.
[325] Ibid., ¶ 496; Claimant's Exhibit XI-12.

the Supreme Court was influenced by the Congress's bill suspending the wage increase of that Court's Justices.[326] In addition, the **Claimant's** arguments are contradictory because she relies on reports issued by two congressional sub-committees regarding **SBS**'s actions and omissions and at the same time alleges that the Congress influenced, along with the Executive Branch, the Judiciary to the detriment of **BNM**.[327]

238. **Peru** states that it has, at all times, provided full protection and security to **BNM**'s shareholders, who have enjoyed unfettered access to the Judiciary. The **Claimant** is dissatisfied with the outcome of half a dozen lawsuits but did not offer any evidence that efficiency or expertise had been lacking in those processes or explain how the judicial review process was insufficient to provide due process and access to justice.[328] Regarding the Supreme Court's decision, to which the **Claimant** objected, **Peru** reiterates that it is, in fact, quite straightforward and well reasoned.[329] The **Claimant**'s unsubstantiated allegations of political pressure and the fact that **Peru**'s courts have been critiqued by international reports on judicial reform can have no bearing over the Supreme Court's decision.[330]

D. Indirect Expropriation

1. Claimant's Allegations

239. The **Claimant** alleges that in this case there has been indirect expropriation and that the value of the investment, and its legal and contractual rights protected by the **APPRI** have been gradually and systematically impaired.[331] Article 5(2) of the **APPRI** provides that: "[n]either Contracting Party shall nationalize or expropriate or take any measure depriving, directly or indirectly, nationals or legal persons of the other Contracting Party, from their investments made in its territory or in its maritime area, unless such measures are in the public interest, provided that these measures are not discriminatory, or against a particular commitment of one of the Contracting Parties with

[326] Counter-Memorial on the Merits, ¶¶ 371 and 372.
[327] Ibid., ¶ 372-373.
[328] Rejoinder on the Merits, ¶¶ 336 and 337.
[329] Ibid., ¶ 338.
[330] Ibid.
[331] Memorial on the Merits, ¶¶ 700 to 709.

nationals or legal persons of the other Contracting Party. Expropriation measures that may be adopted shall cause prompt and adequate compensation, the value of which, shall be equivalent to the real value of the affected investments, and shall be determined based on a normal economic situation and prior to any threat of expropriation […]."

240. According to the **Claimant**, **Peru**'s expropriatory measures were concentrated in the following actions: the lengthy second visit of **SBS** to **BNM**; the failure to neutralize the rumors about **BNM**'s financial situation; the impairment of the **BNM** loan portfolio during **SBS**'s intervention; the reduction by **SBS** of **BNM**'s equity capital to zero; the lack of an overall valuation of **BNM**'s equity before declaring its liquidation and dissolution; the lack of legal and technical reports on the intervenors' management that reclassified **BNM**'s portfolio and rendered its equity negative, which also led to the final expropriatory measures and to the declaration of the Bank's dissolution.[332]

241. The **Claimant** considers "that the objective mission of BCR and SBS of safekeeping the right of savers and overall stability of the banking and financial industry . . . *seemingly* constituted a sovereign regulatory measure by the State to try to justify a measure highly restrictive of the Claimant's right to property."[333] The **Claimant** also notes that, in order to determine the degree of expropriation of a State's measure, its effects on the protected investment should be considered.[334]

242. In the **Claimant**'s view, the deprivation of the investment in this case meets the requirements mentioned in the arbitral precedents on substantial[335] and absolute[336] deprivation. In effect, the **BNM** intervenors assumed the powers of **BNM**'s management and limited the powers of the Shareholders' Meeting; **SBS** reduced the Bank's equity capital to zero, taking away the shareholders' legal and economic rights, and ordered the Bank's dissolution, preventing it from being creditworthy and precluding the

[332] Ibid., ¶ 710 to 711.
[333] Ibid., ¶ 715.
[334] Ibid., ¶ 717.
[335] *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, August 30, 2000, ¶ 103.
[336] *Tecmed*, *supra*, ¶ 115.

shareholders from pursuing the purpose of the company.[337]

243. The **Claimant** states that "BNM was not having losses in its accounts or negative cash flows before the measure; accordingly, there has been substantial deprivation and the condition of having suffered a real, rather than theoretical, loss of the economic enjoyment of the investment on the part of Claimant [is met]."[338]

244. The **Claimant** adds that, as a result of the intervention, the investor lost effective control of the economic decision making and business of **BNM**. With the declaration of its dissolution and liquidation, the loss of control was complete and irreversible.[339] The **Claimant** quotes Articles 106 and 114 of the Banking Law governing the consequences of intervention, dissolution, and liquidation of a bank, which led to the loss of control on the investment and the extinction of **BNM**'s corporate purpose.[340]

245. The **Claimant** alleges that the economic damage "… *was not ephemeral nor was it minor*" and that "it was impossible for BNM to mitigate it."[341] In that connection, the **Claimant** lists the following "serious" events, explained "in terms of the economic impact:" a) **BCR**'s refusal to play the role of ultimate lender to provide liquidity to the financial system; b) the failure of **SBS** to counter the speculation and rumors, which created financial panic and a massive flight of funds; c) the abrupt withdrawal of State funds that led to the flight of privately-owned deposits; d) the intervention resolution of **SBS**, which resulted in the cessation of all **BNM**'s operations; e) the irregular accounting practice of the **SBS** intervention commissioners, which affected **BNM**'s economic results; f) the reduction of **BNM**'s equity capital to zero; g) the dissolution ordered by **SBS** on the grounds of a deficit of US$217 million, mostly the result of the impairment that occurred during the management of the **SBS** intervention commissioners; and h) the **SBS** Resolution ordering the dissolution and liquidation of **BNM**, rendering the Bank no

[337] Memorial on the Merits, ¶¶ 720 and 721.
[338] Ibid., ¶ 725.
[339] Ibid., ¶ 726.
[340] Ibid., ¶¶ 732 to 734.
[341] Ibid., ¶ 736.

longer creditworthy.[342]

246. The **Claimant** further notes that the effects of those measures could not be mitigated by **BNM**'s shareholders, despite the following actions, which they had taken or tried to take: capital increases; sale of portfolio; application for rediscounts at **BCR**; requests to **SBS** and the **MEF** to counter the financial panic; bailout plan; and proposal to take over Banco Financiero.[343]

247. The **Claimant** alleges that the arbitrariness of the measures was conspicuous and lists the following specific actions considered to be arbitrary: a) a second inspection visit by **SBS** in the same year showing that the discretionary power to make visits was not exercised prudently and reflecting abuse of authority, which created distrust in the market; b) the failure by **BCR** and **SBS** to neutralize speculation and rumors; c) the dramatic impairment of **BNM**'s loan portfolio during **SBS**'s intervention; d) the reduction of **BNM**'s equity capital to zero, which was illegal and was declared to be inapplicable in a Constitutional Action of Protective Measure (*Amparo*); d) the lack of a complete valuation of **BNM**'s equity at the time when the dissolution decision was taken by **SBS**; and e) the irregular accounting practices followed by the **SBS** intervention commissioners.[344]

248. The **Claimant** reiterates that "[t]he effects of the measures denounced on the Claimant's investment had a destructive impact from the very day they were imposed, since they affected the *trust* of the market, and their permanence, as it still lasts to date, were enough to thwart irreversibly any possibility of resuming the banking business."[345]

249. The **Claimant** emphasizes that, in the context of the expropriation measures, the concept of legitimate expectations was relevant and that the operating license granted to **BNM** by **SBS** "reflects an *explicit obligation* by the State of providing the required guarantees for the investor to carry out an investment, which, due to the nature of the

[342] Ibid., ¶ 737.
[343] Ibid., ¶ 741.
[344] Ibid., ¶ 746.
[345] Ibid., ¶ 750.

banking business, is of long term."[346] The investor had legitimate expectations to plan the growth of her investment, as substantiated by the takeover of Banco del País, the plan to purchase Banco Financiero, and the capital increases that took place until the year 2000, when **BNM** was intervened by **SBS**.[347] In addition, **BNM** ranked sixth among all Peruvian Banks in terms of equity and market share and had managed to consolidate important business relationships with overseas banks.[348]

250. The **Claimant** points out that, according to the "sole effects doctrine," if the expropriation exceeds the limits of arbitrary interference, then the investor should be compensated, regardless of the purpose or objectives of an alleged public interest of the government measure.[349] The intent of the expropriation does not constitute a necessary requirement for the State to be held internationally responsible.[350]

251. The **Claimant** refers to the existence of two positions regarding police powers: the first one, the "Radical Police Powers Doctrine" and the second one, the "Moderate Police Powers Doctrine." According to the **Claimant**, under neither of those doctrines can it be argued that, in this case, the actions of the State were based on public interest. The first theory establishes certain requirements for a measure to be arbitrary: that it should be clearly discriminatory and should have been imposed in bad faith and in violation of due process. The second theory takes into account the effects of State interference and the purpose of the measure, considering whether there exists a real public interest and legitimate expectations on the part of the investor; and there has to be proportionality between those elements. The proportionality test determines whether there was a balance between the public interest and the adverse effects of the measure.[351]

252. In the **Claimant**'s view, no public interest can be identified to justify the measures imposed by **SBS**. In addition, there is no certainty whatsoever that **BNM** has failed to comply with any law, since none of the **SBS** inspection visit reports had found

[346] Ibid., ¶ 760.
[347] Memorial on the Merits, ¶ 763.
[348] Ibid., ¶¶ 765 to 766.
[349] Ibid., ¶ 770.
[350] Ibid., ¶ 772.
[351] Ibid., ¶ 773 to 783.

serious irregularities; there had been only certain findings typical of the industry, in the midst of a liquidity shortage caused by the State itself. If **BCR** had wanted to protect the public's savings and the stability of the financial industry, it should have been the ultimate lender and **SBS** should have countered the rumors about the liquidation of **BNM.** Consequently, it was impossible to defend the reasonableness and proportionality of the measures based on any public interest justifying the substantial damage to the investor's rights and legitimate expectations.[352]

253. Citing Article 5 of the **APPRI**, the **Claimant** refers to the illegality of the expropriation measure and states that "… since the Peruvian State did not comply with the international commitment not to expropriate [that] it had assumed, this leads us to characterise the expropriatory act as wrongful and illegal."[353] Moreover, the wording of Article 5 of the **APPRI** provides that "any expropriation resulting from a measure, whether regulatory or not, infringing the requirements established by said article or by international law, is punishable and therefore entails the international responsibility of the host State."[354]

254. The **Claimant** then analyzes various aspects of Article 5 of the **APPRI**. The first element to be considered is the public utility, which would oblige the State to enact a law to authorize expropriation of the investment on the basis of that concept. In the case of **BNM**, according to the **Claimant**, the procedure established by law to execute an expropriation was not followed.[355] The **Claimant** then analyses two additional conditions that are not expressly provided for in the **APPRI** but may be considered part of the defense of Public Interest or Public Necessity. The **Claimant** cites Article 87 of the Political Constitution of Peru and Article 2 of the Banking Law regulating savings and the operation of the financial industry and notes that, in the Amparo action filed by **NMH**, **SBS** had stated that the purpose of the intervention was to protect the stability of the financial sector and the rights of **BNM**'s investors and creditors. According to the **Claimant**, **Peru** has not substantiated the purported public interest or utility of the

[352] Ibid., ¶ 787 to 792.
[353] Ibid., ¶¶ 800 to 801.
[354] Ibid., ¶¶ 801 and 804.
[355] Ibid., ¶¶ 809 to 810.

irreversible and destructive measure of intervention, dissolution, and liquidation of **BNM**.[356] BCR's conduct did not comply with its ultimate lender role in order to protect the public's savings. In addition, during the intervention, higher payment priority was given to foreign banks to the disadvantage of savers, proving the lack of public utility of the State's measure.[357]

255. The **Claimant** also states that this is a case of a bank with a sound equity position that was wound up and liquidated, in response to a temporary liquidity shortage caused by the State, by the political instability and by the public disclosure of widespread corruption in the Government, strengthening larger banks and restricting market competition.[358]

256. The **Claimant** also lists the following actions by the Peruvian authorities that were taken in bad faith and were discriminatory: i) **BCR**'s refusal to allow a rediscount; ii) enactment of **PCSF** without the participation of small banks; iii) **PCSF** favored the purchase of smaller banks and biased the merger negotiation processes; iv) lack of technical and legal justification for submitting **BNM** to the Transitional Regime; v) **SBS**'s contradictory conduct, since its second inspection visit Report did not state that **BNM** needed to increase its capital but it then claimed that an insufficiency of capital precluded the takeover of Banco Financiero; vi) the reduction of **BNM**'s equity capital to zero; vii) the lack of grounds for SBS Resolution No. 775-2001, ordering **BNM**'s dissolution; viii) the intervenor's use of an inconsistent method to manage **BNM**; and ix) the retroactive accounting of negative balances during the intervention.[359]

257. The **Claimant** also refers to a test of proportionality between the effects of the measure, the public interest, and the investor's legitimate expectations. If there is no balance between those factors, there has been a wrongful expropriatory act.[360] Additionally, the State's measures should be as non-invasive as possible and the use of

[356] Ibid., ¶¶ 812 to 816.
[357] Ibid., ¶¶ 818 to 819.
[358] Memorial on the Merits, ¶ 820 and 827.
[359] Ibid., ¶¶ 833 and 834.
[360] Ibid., ¶¶ 851 and 853.

discretionary powers should observe the principle of minimal interference.[361]

258. The **Claimant** further states that the implementation of a regime parallel to the one established by the Banking Law implied a change in the rules of the game in terms of the procedures for intervention and dissolution of banking companies, which clearly favored the transfer of small banks to large banks, affected shareholders' expectations and rights, and was not intended to maintain banks with a strong equity position in the market.[362]

259. The **Claimant** affirmed that it is possible to determine the severity of **SBS**´s intervention, which ended **BNM**´s operations; that the investor´s legitimate expectations were severely affected and, consequently that the intervention and the dissolution are null. In addition, she mentioned that, pursuant to international law, reducing the shareholders to equity to zero is a disproportionate measure. The **Claimant** additionally argued that even if the actions taken by **SBS** were legal under domestic law, they were illegal and arbitrary under international law. According to **Claimant**, **Peru** violated the principles of predictability, proportionality, good faith and legal security, infringed the principles of protection of investments and international law, and, therefore, should compensate the damages caused.[363]

260. In accordance with Article 5 of the **APPRI**, one requirement for an expropriation to be legal is that it should observe domestic law and due process. Compliance with due process requires: basic legal mechanisms of challenge; reviewing or appeal organs independent from the government agency that imposed or implemented the expropriation; reviewing organs with powers to revoke the measure and order payment of compensation; and the existence of clear and transparent procedural rules for appealing the measure.[364]

261. In the **Claimant**'s view, the measures for intervention and dissolution of **BNM**

[361] Ibid., ¶¶ 853 and 854.
[362] Ibid., ¶ 856.
[363] Memorial on the Merits, ¶¶ 864 to 868.
[364] Ibid., ¶¶ 870 to 873.

did not comply with the formal or material requirements established in the Peruvian General Expropriations Law.[365] According to the **Claimant**, "[t]he Peruvian legal system lacks an available, immediate, adequate and effective remedy," as **SBS**'s decisions were subject to appeal only through the courts and not through the administrative channels;[366] **SBS** ordered the dissolution of **BNM** despite the existence of an interim injunction suspending the effects of SBS Resolution No. 509-2001 that had reduced the Bank's equity capital to zero;[367] furthermore, the dissolution of **BNM** was based on a report that was not a complete valuation of equity; the **Claimant** reiterates that there was no efficient remedy to challenge **SBS**'s decision to liquidate and dissolve the Bank.[368] Likewise, due process was violated when the **MEF** excluded **BNM** from the meeting on the **PCSF** program and when the authorities interfered in the legal proceedings before the Supreme Court of Justice requesting the nullity of **SBS**'s resolution that declared **BNM**'s liquidation and dissolution.[369] All those facts lead to the conclusion that the expropriation has not complied with the due process requirement, provided for in Article 5 of the **APPRI**, and is therefore illegal.[370]

262. The **Claimant** also indicates that all the discriminatory measures that she had described violated the principles of non-discrimination and equal treatment and that Article 5 of the **APPRI** and international customary law provided that, in order for an expropriation measure to be considered lawful, it must not be performed on a discriminatory basis.[371]

263. The **Claimant** further notes that the Peruvian State has not fulfilled the obligation established in Article 5 of the **APPRI** to compensate for damage caused and that, in this case, "the damage caused entailed the complete destruction of the economic viability and

[365] Ibid., ¶ 874.
[366] Ibid., ¶ 876.
[367] Ibid., ¶¶ 877 to 880.
[368] Ibid., ¶¶ 881 to 884.
[369] Ibid., ¶¶ 885 to 886.
[370] Ibid., ¶ 887.
[371] Ibid., ¶¶ 888 to 898.

profitability of the Claimant's investment."[372]

264. The **Claimant** refers to the theory of mitigation of damage and lists the following actions taken by **BNM** to overcome the effects of the liquidity crisis created by the State's political crisis: a) increase in **BNM**'s capital agreed to on February 29, 2000; b) first issue of **BNM**'s mortgage bonds for up to US$20 million; c) increase in capital by public deed on September 12, 2000; d) creation of an optional reserve by issuing equity securities for S/.8.8 million; e) in October 2000, **BNM** informed **SBS** of the completion of the merger operation involving the takeover of Banco Financiero; f) the agreement of November 22, 2000 of the Board of Directors authorizing the sale of part of the portfolio for a maximum of US$50 million; g) on November 24, 2000, **BNM** concluded an Assignment of Loan and Leasing Operations Agreement with **COFIDE**, whereby **BNM** assigned its rights under a number of loan and leasing contracts for about US$105 million; h) the application to **BCR** for a loan of US$12 million; i) the bailout proposal made to the **MEF** on September 25, 2001; and j) Minutes No. 121 of the Board of Directors of **BNM** listing the measures taken to deal with the temporary illiquidity.[373]

265. The **Claimant** states that her conduct was proactive but that the responses were slow or inconsistent and sometimes non-existent; SBS Resolution No. 775-2001 declaring **BNM**'s dissolution and liquidation precluded any possibility of finding alternatives.[374]

266. With regard to the valuation of **BNM**, the **Claimant** notes that the Accounting Audit Expert Report established that there was no accounting basis for concluding that the Bank was insolvent. In addition, **Peru** has ignored previous relevant documentation about **BNM**'s solvency, such as the reports of risk rating agencies and the authorization given to **BNM** to be listed on the Stock Exchange.[375]

[372] Ibid., ¶ 902.
[373] Ibid., ¶ 913.
[374] Ibid., ¶ 914 to 918.
[375] Reply on the Merits, ¶¶ 501 and 505.

2. Respondent's Response

267. **Peru** states that not every regulatory measure that might adversely affect the value of an investment can be considered an expropriation.[376] As the **Claimant** has recognized in her Memorial on the Merits: "a non-compensable regulation is distinguished from an expropriation by, *inter alia,* the extent to which the investor was deprived of the investment and the character of the governmental measure."[377] In this case, **BNM**'s shareholders have not been deprived of any economic value or rights because **Peru**'s actions were exercises of its legitimate sovereign regulatory powers.[378]

268. According to **Peru,** there has not been any considerable deprivation of **BNM**'s shareholders' ownership rights. Before the **SBS** Resolution on the dissolution and liquidation of **BNM**, the investment had already lost its value, because the Bank had been insolvent since June 2000. On December 5, 2000, it could no longer pay its obligations and the **BNM** managers decided that day to close it, hours before **SBS**'s intervention.[379]

269. All banks in Peru were subject to the same legal framework and **BNM**'s shareholders would have been well aware of that framework. The inability of **BNM** to meet its obligations triggered mandatory intervention. The loss of the shareholders' control over the Bank derived from the financial failure of the Bank, rather than from the discretionary acts of the authorities. In addition, the shareholders "did retain their rights to the residual value of BNM (if any) once all of BNM's liabilities had been paid, as well as a right to judicial review of SBS's actions provided by Peruvian law, and no deprivation of those rights ever occurred."[380]

270. **Peru** adds that the expectations that the **Respondent** would guarantee long-term growth and return on investment were not reasonable or legitimate. The **APPRI** is not a guarantee of economic success, especially when the investment's growth depends on the

[376] Counter-Memorial on the Merits, ¶ 389.
[377] Memorial on the Merits, ¶¶ 714, 754, and 773 to 774.
[378] Counter-Memorial on the Merits, ¶ 390.
[379] Ibid., ¶ 392.
[380] Ibid., ¶ 396.

investor's management.[381] The **Respondent** claimed that a number of arbitral awards have confirmed that "a state cannot be liable for expropriation as a result of the legitimate exercise of its inherent power to regulate for the protection of, *inter alia*, public welfare and order."[382]

271. Peru stated that once **BNM** failed to meet its payment obligations, the intervention, liquidation, and dissolution of the Bank were mandated by, and undertaken in conformity with, the legislation in force.[383] In addition, the right to operate and control a bank is always contingent upon satisfying the regulator that the bank is sufficiently sound to receive deposits from the public.[384]

272. In the next section, the Tribunal will summarize the claims of the parties regarding damages and moral damages.

VII. CLAIMS FOR DAMAGES

A. Claimant's Position

273. According to the **Claimant**, "… any reference to the damage valuation method within the context of the expropriation clause of Article 5 of the Peru-France BIT shall be considered applicable to the valuation of the damages caused by the breach of the other international guarantee and protection standards."[385]

274. The **Claimant** further states that paragraphs 1 and 2 of Article 5 of the **APPRI** are not applicable to establish the amount of damages because they refer to cases of legal and not illegal, as in this case, expropriation; thus the **Claimant** states that she will consider the standard recognized in customary international law, "… consisting of comprehensive rules intended to restore all the damage caused and to redress all the

[381] Ibid., ¶ 398.
[382] Ibid., ¶ 399 to 400; *AWG Group Ltd. v. Argentine Republic*, (UNCITRAL), Award, July 30, 2010, ¶ 139; *Methanex Corporation v. United States of America*, (NAFTA), Final Award on Jurisdiction and Merits, August 3, 2005, Part IV, Chapter D, ¶ 7.
[383] Counter-Memorial on the Merits, ¶ 401.
[384] Ibid., ¶ 402.
[385] Memorial on the Merits, ¶ 986.

consequences of the unlawful act to the pre-existent situation, from the date of the act in question, projected until the payment date by the host State."[386]

275. The **Claimant** indicates that she would use the concept of "prompt, full and adequate compensation," but as in this case restitution of the assets is not possible, integral compensation will be sought.[387] The **Claimant** explains that Article 42(1) of the ICSID Convention provides for the coexistence of domestic law and generally recognized principles of international law to assess the value of the damages to be paid by the host State.[388] Based on this approach, the **Claimant** indicates that the Political Constitution of Peru recognizes the obligation to compensate, including for any potential damage. The **Claimant** also notes that *damnum emergens*, *lucrum cessans*, personal damages, and moral damages are recognized by the Peruvian Civil Code.[389]

276. Based on the quotations from various awards,[390] the **Claimant** refers to the principle of *restitutio in integrum* and explains that her Expert, Mr. Neil Beaton, assessed the requested damages by projecting them until the date of the Award, thus adopting an *ex post* calculation formula;[391] furthermore, the **Claimant**'s Expert, has estimated the corresponding interest from the date of issue of the Award until payment of the amount due; and used the valuation methodology to obtain the fair market value.[392]

277. According to the **Claimant** "… an *item* is put forward related to *personal damage* and *moral damage* that the **Claimant's** name and reputation has suffered, as a result of the media exposure of all acts that breached the obligations . . . the innumerable criminal prosecutions against Directors and senior officers of BNM, before the Jewish community and the impact on religious freedom, and finally, the severe impact before the business community, which taken together exceeds what legal doctrine understands as *exceptional*

[386] Ibid., ¶¶ 988 and 990.
[387] Ibid., ¶¶ 992 and 993.
[388] Ibid., ¶¶ 994 to 995.
[389] Ibid., ¶¶ 997, and 998.
[390] Ibid., ¶ 999; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28), Award, August 18, 2008, pages 132 to 134.
[391] Memorial on the Merits, ¶ 1000.
[392] Ibid., ¶ 1002.

circumstances for its application."[393]

278. The **Claimant** states that **BNM** had consolidated commercial relations, as it had been in operation since 1993; that before the intervention, the bank had generated ever-growing sales and profits every year, with a steady upward growth;[394] and that investment value losses are determined as of the day of the expropriatory act, and as well, the losses generated between the date of the expropriation and the estimated date of the Award.[395] The **Claimant** concludes that **Peru** should pay damages amounting to US$4,036 million.[396] The Claimant considers an interest rate of 11.11 percent as opportunity cost and that post-award interest, capitalized semi-annually, should be applied until the actual full payment.[397]

279. As regards moral damage, the **Claimant** states:

> "… the moral damages put forward is proposed before the Tribunal under two assumptions, one *subordinated* to the other . . . puts forward moral damage to the image and/or reputation caused by the State's conduct, first to the image of Grupo Levy, under control of Claimant, and if that is not accepted by the Tribunal, consider the objective damage to the reputation of BNM."[398]

280. The **Claimant** asks the Tribunal to "consider the redress for moral damages insofar as we are dealing with an *exception situation."*[399] The **Claimant** indicates that she suffered a severe damage to her reputation caused by the unlawful intervention in **BNM** and by the damage caused to senior officers and Directors of that Bank.[400]

281. The **Claimant** cites Articles 1984 and 1985 of the Peruvian Civil Code regarding

[393] Ibid., ¶ 1003.
[394] Ibid., ¶¶ 1007 and 1008; Expert Report of Mr. Neil Beaton, ¶ 42.
[395] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, July 24, 2008, ¶ 775.
[396] Memorial on the Merits, ¶¶ 1011 and 1012.
[397] Ibid., ¶¶ 1013 and 1014.
[398] Ibid., ¶ 1016.
[399] Ibid., ¶ 1021.
[400] Ibid., ¶ 1022.

non-property damages, which are further divided into personal damages and moral damages. In relation to personal damages, the **Claimant** indicates that it is considered to be an injury to the physical integrity, honor and good standing of a person.[401] The **Claimant** notes that, according to Article 1984, moral damages should be calculated not only in relation to an affected person but also to that person's family or closest ones and that the amount of such compensation depends completely on the judge's assessment of the circumstances.[402] In the field of international law, the **Claimant** indicates that moral damage includes coverage that affects the investor, the company's prestige, reputation, and credit, and the psychological damage produced by harassment, persecution, and coercion against the officers of the company.[403]

282. Based on the *Lemire v. Ukraine* case,[404] the **Claimant** identifies the following exceptional circumstances that harmed **BNM** and its shareholders: "public statements by Peruvian authorities against BNM's management to the degree that we are labeled 'swindlers' and 'white collar thieves;'"[405] legal prosecution against BNM's senior managers before civil and criminal courts; the imposition on Mr. David Levy Pesso of the obligation to sign in at court offices every month with the ensuing humiliation before the business community and the Jewish community in Peru; preventing Mr. David Levy Pesso from leaving the country for five years, save with prior authorization of a judge; exposing the dispute in the press; the legal impediment to undertake a banking project in Peru again; excommunication from the Jewish community because they had been labeled by the State as swindlers; prohibition by the Jewish community of Peru from burying Mr. Levy Pesso in the Lima Jewish cemetery; adversely affecting the health of the Levy family; excommunication of the Levy family and removal of minors of that family from schools; and suspension of real estate developments by the Peruvian authorities.[406]

283. The **Claimant** states that the damage to her image is not limited to herself but

[401] Ibid., ¶¶ 1029 and 1030.
[402] Ibid., ¶ 1032.
[403] Ibid., ¶¶ 1033 to 1035; *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award, February 6, 2008, ¶ 289.
[404] *Joseph C. Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, March 28, 2011, ¶ 333.
[405] Memorial on the Merits, ¶ 1037.
[406] Ibid., ¶ 1037.

involves her family name, and the business prestige and reputation of the Levy name.[407] The **Claimant** argues that "to the extent that the Peruvian State ... has recognized Grupo Levy as a family group that controlled a Financial Conglomerate…, a legal connotation is attributed in its own right, and therefore is entitled to claim damages to its good standing caused by the State's conduct, as a result of the destruction of the investment in BNM."[408]

284. According to the **Claimant,** the amount for moral damage should take into account: the loss of revenue streams by the **Claimant** and the Directors of BNM, as they were exposed to and condemned by public opinion as a result of the State's arbitrary conduct.[409] The **Claimant** argues that having substantiated French control of Grupo Levy, the family group as such is also entitled to the rights recognized in the **APPRI**.[410] Article 1(3) of the **APPRI** refers to family companies and capital, and **BNM** is a family company. The **Claimant** states that the damage to her image and reputation is not limited to herself, but is "consubstantial to 'Grupo Levy.'"[411]

285. The **Claimant** states that, in the event the above argument is not accepted, she is also invoking Article 4 of the **APPRI** in relation to the Most Favored Nation Clause and requests the application of the "Agreement between the Government of the Republic of Peru and the Government of the Republic of Italy for the Promotion and Protection of Investments . . . and/or in a supplementary manner, the Agreement between the Republic of Peru and the Federal Republic of Germany for the Promotion and Reciprocal Protection of Investments . . . concerning a broader concept and favorable of the term **legal persons**, as part of the concept of '**societies**.'"[412]

286. The **Claimant** further indicates that, in case the Tribunal decides not to award compensation for the damage to her reputation, as representative and controlling party of Grupo Levy, she requests that the compensation "be applied as damage to the reputation

[407] Ibid., ¶ 1045.
[408] Ibid., ¶ 1047.
[409] Ibid., ¶ 1052.
[410] Ibid., ¶ 1060.
[411] Ibid., ¶ 1061 to 1064.
[412] Ibid., ¶¶ 1065 to 1066.

of BNM."[413] The **Claimant**'s Expert, Mr. Neil Beaton, estimated the **Claimant**'s moral damages, through **BNM**'s "brand value", at US$2,953 million.[414]

B. Respondent's Position

287. The **Respondent** objects to the payment sought by the **Claimant** and insists that Ms. Levy did not acquire any shares in BNM or any of its holding companies before July 12, 2005, which is an insurmountable obstacle for the recovery of damages arising from the alleged acts and omissions of the State that occurred in the years of 2000-2001, and adds that, in 2005, the shares purchased by the **Claimant** had no value and, therefore, she had nothing to lose.[415]

288. According to the **Respondent**, the **Claimant** and her damages expert modeled the hypothetical development of BNM beginning in December 2000, under the assumption it was not intervened, even though the Claimant did not acquire her interest in the Bank until July 2005 and, therefore, never had anything at stake at the time when the intervention occurred.[416] Moreover, the **Respondent** asserts that "[i]t defies logic that a person can simply receive shares in a defunct company for nothing and then claim US$ 7 billion for alleged losses she never suffered."[417]

289. The **Respondent** also claims, based on the Report issued by its Expert, Mr. Brent Kaczmarek, that **BNM**'s capital had a negative value in June 2000, even before the first of the actions of the Peruvian authorities. That fact would make the amount of damages zero. It notes that the premise on which the **Claimant's** calculations are based (that **BNM** was a healthy bank and that it would prosper if the actions of the Respondent had not taken place) is false. It also points out that Mr. Beaton, the **Claimant's** expert, used BNM's misleading and unaudited financial statements of November 30, 2000 and

[413] Ibid., ¶ 1075.
[414] Ibid., ¶ 1076.
[415] Counter-Memorial on the Merits, ¶¶ 407 and 409.
[416] Ibid., ¶ 413; Rejoinder on the Merits, ¶ 345.
[417] Rejoinder on the Merits, ¶ 346.

ignored the 1999 and 2000 SBS Inspection Reports and the reports produced by **PwC**.[418]

290. According to **Peru**, the **APPRI** and principles of international law require valuation of loss at the time of the alleged treaty breach (*ex ante* approach), but the **Claimant's** expert's valuation is calculated on an *ex post* basis, as of 2010.[419]

291. Based on the opinion of its expert, Mr. Brent Kaczmarek, **Peru** points out several flaws in the **Claimant's** damages model.[420]

292. The **Respondent** also requests that the Tribunal award it moral damages suffered as compensation, separate and apart from and additional to any award of costs it incurred as a result of this proceeding in an amount to be determined at the Tribunal's discretion.[421]

293. **Peru** states that **BNM's** shareholders (and now, the **Claimant**) abused the administrative and judicial processes available to them and inflicted serious harm on the **Respondent's** reputation and the legitimacy of its response to **Peru's** financial crisis.[422] The shareholders brought six lawsuits in 10 years against the **Respondent** and thus interfered with the authorities' efforts to wind up the Bank's affairs efficiently. They also "induced their political allies to initiate two Congressional investigations;" filed a lawsuit against the Superintendent of **SBS** in the U.S. federal district court of the Southern District of New York, which was dismissed.[423] **BNM**'s shareholders have also engaged in a media campaign to undermine the **Respondent's** credibility. The **Claimant** even lobbied to damage **Peru's** international reputation by identifying herself as an American shareholder and tried to block the approval of the U.S.–Peru Free Trade Agreement in the U.S. Congress.[424]

[418] Counter-Memorial on the Merits, ¶¶ 414 to 416 and 418.
[419] Ibid., ¶ 419.
[420] Ibid., ¶¶ 427 and 428; Rejoinder on the Merits, ¶ 360.
[421] Counter-Memorial on the Merits, ¶ 431.
[422] Ibid., ¶ 435.
[423] Ibid., ¶ 436.
[424] Ibid., ¶ 435 to 439.

294. In relation to the **Claimant's** argument that she can claim damages for continuity of the investment, the **Respondent** argues that Ms. Levy "has not demonstrated how there was any continuity of investment, aside from the fact that Mr. Levy was her father, which is irrelevant for the purposes of proving that she is an investor protected by the BIT. [The] Claimant has not indicated any provision in the BIT that extends its protections to the relatives of covered investors."[425]

295. **Peru** concludes that neither the **Claimant** nor any of her experts challenged the findings of **SBS** contained in its Inspection Visit Reports, and simply conducted analyses of the bank's financial performance as if these reports never existed. Thus, the **Claimant**'s Expert's damages calculation, which is based on **BNM**'s flawed self-reported data, should be dismissed.[426]

VIII. THE PARTIES' CONCLUSIONS

296. The Tribunal will summarize below the principal arguments of the parties submitted in the post-hearing briefs dated January 22, 2013. First, it shall summarize the position of the **Claimant** and then that of the **Respondent**.

A. Claimant's Conclusions

297. The **Claimant** states that it is established that she is an investor protected by the **APPRI**; that she is of French nationality; that her dual citizenship is no impediment to having recourse to the **ICSID**; that **BNM** was the result of investments of Mr. David Levy; and that the very existence of the bank since 1992 is evidence of the investment made. The **Claimant** also states that there is no requirement that the initial investor be the person to make a claim before the ICSID and that there was no bad faith in the transfer of shares to her.[427] Moreover, the fact that the assignment of shares was free of payment can have no bearing on the legitimacy and validity of the transaction.[428] As the **Respondent** has not questioned the **Claimant**'s shareholding control on **BNM**, she has a legitimate

[425] Rejoinder on the Merits, ¶ 347.
[426] Ibid., ¶¶ 351 and 352.
[427] Claimant's Post-Hearing Brief, ¶¶ 12 to 25.
[428] Ibid., ¶¶ 26 to 28.

right to advance the present claims on her´s and **BNM**'s behalf.[429]

298. The **Claimant** states that she did not question Peru's sovereign right to issue regulations regarding banking and financial matters. She states, however, that in accordance with a number of ICSID cases, even in a crisis in this sector, arbitral tribunals have jurisdiction to rule on any measures affecting investment.[430] She adds that neither the **APPRI** nor the **ICSID Convention** contemplate rules on objections to admissibility.[431]

299. The **Claimant** confirms that the content of the SBS 2000 Inspection Visit Report on "goodwill" and treasury bonds are conservative estimates. With the evidence presented, it has been demonstrated that **BNM** was above the levels of liquidity of other banks; that its accounting and financial information was truthful; that **Peru** questioned neither the method of the expert, Mr. Leyva, in terms of determining the "ratios" in December 2000, nor the methodology and conclusions of the reports made by the Peruvian Congress.[432]

300. The **Claimant** concludes that **Peru** confused terms like "capital" and "losses" with "provisions" and confirms that there were no mismanagement or misleading accounting practices at **BNM**, which was also confirmed by Mr. Alvarado of **PwC** at the hearing. [433] The **Claimant** notes that **Peru's** submissions on **BNM's** policy of mobilization of loans are erroneous, since they included the Banco del País' portfolio. The Claimant affirms that the acquisition of that bank was made based on "accounting and legal due diligence procedures" and, in any case, the merger plan was approved by **SBS**. The **Claimant** states that, as regards the potential merger with Banco Financiero, this merger was also based on "due diligence," and that it included the participation of the

[429] Ibid., ¶¶ 29 to 31.
[430] Reply on the Merits, ¶ 323.
[431] Claimant's Post-Hearing Brief, ¶¶ 32 to 34.
[432] Ibid., ¶¶ 35 to 45.
[433] English Transcript, November 15, 2012, Alvarado at 828:13-18 and 829:1-14.

Bank of America.[434]

301. The **Claimant** states that the capital increase of **BNM** was not listed as a legal requirement in the **SBS** Inspection Visit Report of 2000, but as a suggestion to be implemented in the business plan within the next two years. In relation to the valuations of customers' assets as collateral for their loans, these were made by companies authorized by **SBS**. As regards operations carried out by the Multirenta Investment Fund, the **Claimant** states that they were made in accordance with the regulations and that Messrs. Levy did not interfere in the decisions of the Fund; the **Claimant** adds that the pertinent authorities never objected to officer Meza, who worked for both **BNM** and the Fund. The **Claimant** also states that the removal of the liens, days before **BNM**'s intervention, on GREMCO's properties was partial because liens were maintained on assets with a value of approximately US$35 million. The **Claimant** further argues that the valuations of those assets, *i.e.* of the lands offered as collateral, were made by companies registered with **SBS**.[435] As for the responsibility of **BNM**'s Management Staff, the **Claimant** contends that BNM engaged "in good management practices and that each of Respondent´s imputations lacks any factual grounds whatoever and bears no relationship to the specific functions of BNM officials".[436]

302. The **Claimant** rejects Peru's arguments in support of its position that it did not violate the international standards contained in the **APPRI**. **BNM** was not insolvent before the intervention and the Tribunal should not judge the conduct of the **Respondent** based on the domestic legal framework, but in light of the **APPRI** and international law; in addition, the discretion of a State ought not to be absolute and unlimited.[437]

303. Regarding the violation of fair and equitable treatment because it hindered the merger of **BNM** with Banco Financiero, the **Claimant** states that the Bank of America actively participated in that plan; there was "due diligence" and contracts were signed, but the operation was hindered when it met with unlawful hurdles in its path from

[434] Claimant's Post-Hearing Brief, ¶¶ 46 to 78.
[435] Ibid., ¶¶ 79 to 96.
[436] Ibid., ¶¶ 97 to 109.
[437] Ibid., ¶¶ 110 to 119.

SBS.[438] The **Claimant** adds that **SBS**'s refusal to counter the rumors about **BNM**'s financial situation violated the principle of fair and equitable treatment, as well as the national treatment standard. **SBS** not only was aware of these rumors but also countered them with respect to Banco Wiese and **BCP**.[439]

304. The **Claimant** states that **BCR** rejected **BNM's** emergency loan application without stating any reasons. Its refusal is inconsistent with the role of lender of last resort, regulated by the Peruvian legal system, as noted by the **Claimant's** expert, Mr. Forsyth, and indirectly by the **Respondent's** witness, Mr. Monteagudo, at the hearing. In addition, **Peru** affirms that **BCR** can act arbitrarily, based on its domestic law requirements regarding emergency loans and without giving reasons for its decisions. The **Claimant** concludes that for that very reason, BCR itself violated the standard of fair and equitable treatment regulated by the **APPRI**.[440]

305. The **Claimant** states that the Banking Law was modified by the Emergency Decrees, which established new rules on bailout and bank intervention processes, "… that ruled out any possibility of keeping it afloat by its shareholders, and hence the only alternatives were either the sale of assets or the dissolution and liquidation of the bank."[441] **Claimant** adds that this treatment was different from the one the **Respondent** afforded to Banco Wiese and Banco Latino, which allowed for the rescue of these banks through a direct or third-party contribution and that all this was against the national treatment standard, as provided for in Article 4 of the **APPRI**.[442]

306. The **Claimant** also argues that the feasibility of the damages valuation model has been demonstrated and she states that the *ex post* method presented by her expert, Mr. Beaton, was supported by decisions of the Supreme Court of the United States, while the **Respondent's** argument is based on direct expropriation cases and not on a proceeding such as this one, in which damages are being claimed for the time before and after the

[438] Ibid., ¶¶ 118 to 122.
[439] Ibid., ¶¶ 123 to 126.
[440] Ibid., ¶¶ 127 to 136.
[441] Ibid., ¶ 138.
[442] Ibid., ¶¶ 137 to 139.

intervention.[443]

307. The **Claimant** also notes that the Montecarlo model used by the expert, Mr. Beaton—which analyzes all probabilities for all possible scenario combinations, thus providing a result quite adjusted to reality—is the most advanced methodology used. The **Claimant** also underlines that the application of that model has not been objected by the **Respondent**.[444]

308. The **Claimant** concludes that the moral damage approach has legal support in Peruvian law and ICSID case law and the exceptional circumstances of this case were considered when adopting this approach.[445]

B. Respondent's Conclusions

309. The **Respondent** expressed the following conclusions: **BNM** was insolvent since at least as early as June 2000, that is, before the Government intervened and was a failed institution. **BNM** did not reveal in a proper manner the impact that its growing portfolio of risky loans had on its income and capital. It exaggerated its income by improperly classifying its consumer loans and recording the interest on those loans. **SBS** had determined in the Inspection Visit Report of 2000 that **BNM's** capital was 25.7 percent lower than that reported by **BNM** and concluded that **BNM** needed US$32 million to meet the capital requirement demanded by the Peruvian banking regulations. [446] **BNM**'s officials were aware of the situation, as Mr. Jacques Levy acknowledged at the hearing that he agreed with everything **SBS** had identified in its inspection visits to **BNM**. [447] According to the documentary evidence, the owners and managers of **BNM** were aware since 1997 of the violations of **Peru**'s banking laws and regulations;[448] Mr. Kaczmarek presented an analysis of the **SBS** Inspection Visit Reports from 1997 to 2000 and showed

[443] Ibid., ¶ 155.
[444] Ibid., ¶ 158.
[445] Ibid., ¶ 165.
[446] Respondent's Post-Hearing Brief, ¶¶ 1 to 10.
[447] English Transcript, November 13, 2012, J. Levy at 352:19-21.
[448] Rejoinder on the Merits, ¶ 69.

that the percentage of incorrectly classified loans increased every year.[449] At the hearing, **BNM**'s officials and Mr. Levy "…attempted to distance themselves form the memos and the problems they identified" and said they were not aware of the content of the memos, either demonstrating management negligence on their part or that their testimonies were not credible.[450]

310. The **Respondent** argued at the hearing that none of the **Claimant's** witnesses denied that **BNM**'s officials used the bank's resources to benefit affiliated companies.[451] In fact, Mr. Jacques Levy admitted at the hearing that **BNM** released, just a couple of days before its intervention, mortgages used as collateral for loans extended to the affiliated company Gremco.[452] The **Claimant's** witness, Mr. Meza, admitted that the participation of **BNM** in the Investment Fund had exceeded the level of support allowed by law and that **BNM** had found another mechanism, through sham transactions with the Bank's customers, to reduce its stake in the Fund.[453] The **Respondent** further noted that Mr. Kaczmarek proved that if the "goodwill credit" of the merger with Banco del Pais were removed, **BNM's** equity would fall below the minimum level required by law. He also indicated that if the deficit in the provisions was taken into account, the equity would also be below the legal minimum and, applying to **BNM's** financial statements as at June 30, 2000 the provisions for risky loans that **PwC** determined in its 2000 audit, he concluded that the capital adequacy ratio of **BNM** would be negative.[454] **Peru** also stated that **BNM** is wrong in asserting that loan loss provisions are not accounted for as losses or do not affect a bank's capital; it has been established that **BNM** was required to register the provisions each month as losses and consequently, its financial information was completely flawed.[455]

311. The **Respondent** also states that **BNM** did not use the government assistance to improve the situation of the bank but rather to take more risks. It notes that, during the

[449] English Transcript, November 17, 2012, Kaczmarek at 1315:14 and 1316:20.
[450] Respondent's Post-Hearing Brief, ¶¶ 11 to 15.
[451] Ibid., ¶ 16.
[452] English Transcript, November 13, 2012, J. Levy at 360:18-361:2.
[453] English Transcript, November 14, 2012, Meza at 684:7 to 686:8.
[454] English Transcript, November 17, 2012, Kaczmarek at 1314:14 – 1315:5 to 1320:17– 1322:16.
[455] Respondent's Post-Hearing Brief, ¶¶ 16 to 31.

hearing, the **Claimant's** experts failed to support the contention that the authorities violated any legal obligation of **Peru** or international best practices in the banking sector.[456] Mr. Jacques Levy at the hearing did not indicate how **BNM** allegedly informed **SBS** of the existing rumors against that bank.[457] Peru also indicates that the withdrawals of public deposits were not made only at **BNM** and that those that were made were insignificant compared to withdrawals of private funds. It reiterates that the **Claimant** failed to prove the causal link between the reduction of public deposits and the failure of **BNM**.[458] As regards the merger with Banco Financiero, **Peru** notes that, according to the statement of Mr. Jacques Levy, it was finalized and the only thing missing was the authorization of **SBS**, but there is no evidence to support those claims. **Peru** also states that Mr. Levy admitted at the hearing that he could not remember if any letter of intent had been signed, nor was it demonstrated that BNM had made a formal request to **SBS** on this merger.[459] It argues that there is no evidence that **BCR** unreasonably rejected **BNM's** request for an emergency liquidity loan and that the legislation clearly regulates the type of collateral required for these loans.[460] It also notes that the **Claimant** did not challenge the legality or suitability of the triggering event leading to **BNM**'s intervention on December 5, 2000.[461]

312. The **Respondent** highlights that the **Claimant** had initially resorted to far-reaching accusations of government corruption and conspiracy. These accusations, whether expressed in the **Claimant**'s Second Request for Provisional Measures, or in Mr. Jacques Levy's book about **BNM**, remain entirely unsupported.[462] The **Claimant** thereafter accused **Peru** of acting in bad faith in handling **BNM's** financial statements. According to **Peru,** the **Claimant** did not present any evidence to support these claims and it therefore rejects them in view of the fact that the losses in **BNM's** audited financial statements for the year 2000 were uncovered by **PwC**, a firm that had served as **BNM**'s

[456] Ibid., ¶¶ 34 to 36.
[457] Ibid., ¶¶ 37 and 38.
[458] Ibid., ¶ 39.
[459] English Transcript, November 13, 2012, J. Levy at 296:3-7.
[460] Respondent's Post-Hearing Brief, ¶ 42.
[461] Ibid., ¶¶ 34 to 44.
[462] Ibid., ¶¶ 45 to 49.

independent auditor for years.[463] The **Claimant** did not explain how the government could have manipulated **BNM's** books after the intervention without **PwC** having been part of that conspiracy. It notes that there is no proof of these serious allegations, nor did the **Claimant** explain how and why the Government would devise a conspiracy of such broad scope against **BNM** and the Levy family.[464]

313. The **Respondent** also indicates that **Peru's** regulatory authorities were not obliged to rescue any bank, much less **BNM**, whose financial situation was deteriorated due toits internal mismanagement.[465] It notes that Mr. Dujovne himself, the **Claimant's** expert, acknowledged that central banks have absolute discretion in their actions, provided they do not violate the law.[466] The **Respondent** indicates that **BCR** had the option to determine when to adjust the standards for the required collateral and to that end it had to take into consideration the overall financial system, not the needs of one specific bank; to require adjustment for a particular bank would undermine monetary policy regulation.[467] **Peru** reiterates that the shareholders of Banco Wiese and Banco Latino were not benefited, as they lost their entire investment.[468]

314. In relation to the claim for damages, the **Respondent** states that several problems are evident: the calculation does not reflect the damage suffered by the **Claimant**; it did not consider **BNM's** previous track record of growth and was based on erroneous information; also the amount claimed has constantly changed.[469] It notes that Mr. Beaton, the **Claimant's** expert, agreed that "no one got any money in 2005 . . . there was no value to distribute",[470] that he reviewed almost every document and knew that **SBS** and **PwC** had serious questions about the reliability of information that **BNM** had given **SBS** between August and October 2000. He also said that the amount of damages changed

[463] Ibid., ¶ 50.
[464] Ibid., ¶¶ 45 to 56.
[465] Ibid., ¶ 57.
[466] English Transcript, November 17, 2012, Dujovne at 1284:19 – 1285:1.
[467] Respondent's Post-Hearing Brief, ¶¶ 59 and 60.
[468] Ibid., ¶¶ 57 to 62.
[469] Ibid., ¶¶ 63 to 67.
[470] English Transcript, November 19, 2012, Beaton at 1510:15 – 1511:2.

from the time of the Request for Arbitration up to the hearing.[471] **Peru** claims that Mr. Beaton admitted at the hearing that the damage to reputation could not be attributed to any specific person or entity.[472] According to the **Respondent**, the **Claimant's** only goal in this proceeding is to manufacture jurisdiction, as she admitted that she had no connection with **BNM** at the time the events at issue in this dispute took place;[473] the fact that she did not pay any money for the shares is significant because it shows that they had no value.[474]

315. **Peru** concludes that the **Claimant** submitted a new argument in closing, that **BNM** should be considered a company in France, under Article 8(3) of the **APPRI**, which argument in the opinion of the **Respondent** is out-of-time and without merit, since **BNM** has never been a claimant in this proceeding.[475]

IX. THE PARTIES' REQUESTS FOR RELIEF

316. The **Claimant** requested that the Tribunal:

a. Admit her claim;

b. Declare that the Peruvian State violated the standards of fair and equitable treatment, non-discrimination, national treatment, full protection and security, and prohibition of indirect expropriation;

c. Declare "...the international responsibility of the Peruvian State and order that the Peruvian State pay the Claimant a compensation for damages of US$4,036 million . . . and a reparation for moral damage of US$2,953 million;"

d. Declare in both cases the recognition of an opportunity cost interest rate of 11.11 percent from the date of the Award up to the effective payment; and

[471] Respondent's Post-Hearing Brief, ¶ 68.
[472] English Transcript, November 19, 2012, Beaton at 1525:5 – 1527:3.
[473] English Transcript, November 13, 2012, R. Levy at 422:13-15.
[474] Respondent's Post-Hearing Brief, ¶¶ 70 to 73.
[475] Ibid., ¶ 74.

e. Order "that the Republic of Peru pay for all the expenses and costs incurred in the arbitral proceeding . . . plus any accrued interests and any other reparation that the Tribunal may deem pertinent."[476]

317. The **Respondent** requested that the Tribunal:

a. Dismiss the Claimant's claims for lack of jurisdiction, or in the event the Tribunal finds jurisdiction;

b. Dismiss the Claimant's claims for lack of merit;

c. Award moral damages to the Republic of Peru in the amount the Tribunal deems appropriate; and

d. Award Peru its costs, including counsel fees.[477]

318. In order to resolve the dispute between the parties, the Tribunal will examine below the arguments put forward by them. Although the analysis may seem repetitive, the Tribunal was forced to proceed in this manner in order to ensure that all of the arguments of the parties will be addressed. This approach was unavoidable because the **Claimant** used virtually the same facts (the alleged wrongful actions of the **Respondent**) to support her extensive claims about the way in which these actions violated the various standards that she invokes (fair and equitable treatment, national treatment, full protection and security, and indirect expropriation).

X. THE TRIBUNAL'S ANALYSIS OF THE SUBSTANTIVE ISSUES

A. Violation of the Standard of Fair and Equitable Treatment

319. The Tribunal agrees with the statement made by the **Claimant** that the legitimate expectations of an investor are linked to the standard of fair and equitable treatment. It

[476] Memorial on the Merits, ¶¶ 1077 to 1079.
[477] Counter-Memorial on the Merits, ¶ 441; Rejoinder on the Merits, ¶ 371.

also agrees that, for an investor to make a decision on an investment, an important element usually considered is the stability of the country's legal system. Now, in the opinion of the Tribunal, that stability does not mean a freezing of the legal system or making it impossible for the State to reform laws and other regulations in force at the time the investor made the investment.

320. As noted by Professor Schreuer: "[t]he standard of fair and equitable treatment is relatively imprecise. Its meaning will often depend on the specific circumstances of the case at issue."[478] For this reason, the Tribunal will examine each allegation of the **Claimant** to decide whether **Peru** actually violated the said standard.

321. In relation to the **Claimant's** argument that **SBS** Resolution No. 1455-92, which gave **BNM** permission to start operations, is "an administrative action that created legitimate expectations of stability and return of investment," the Tribunal considers that it is wrong to state that an authorization to begin operating in a commercial activity, whatever it may be, alone generates the expectation of a return on investment. The investor may indeed have that expectation, but based on the knowledge of the investor's own capabilities and internal and external factors.

322. With respect to the expectation of "a legal framework clearly perceptible," the Tribunal examined in this case the following aspects:

a. The Banking Law was in force in 2000 and continues to be in force today;

b. Emergency Decree 108-2000 was published in the Official Gazette, *El Peruano*;

c. **SBS,** in its Inspection Visit Reports, pointed out to **BNM** the problems it had detected and the rules that were violated in each case (as an example, see paragraphs 42-45, 47, 52, and 53 above); and

[478] Schreuer, Christoph. "Fair and Equitable Treatment in Arbitral Practice." *Journal of International Arbitration*, July-December 2006, 5: 29.

d. The **Claimant** did not complain that **SBS** had imposed a fine on **BNM.**

In light of the foregoing, the Tribunal concludes that the legal framework was clear and known by BNM's managers and shareholders.

323. In the opinion of the Tribunal, it is also important to note that shareholders and officials of **BNM** knew of the existing crisis before the **BNM** intervention; the **Claimant** herself notes the existence of a political and economic crisis in **Peru**.[479] Therefore, it was logical to assume that State authorities would take measures to maintain the stability of the financial system, as mandated by Peruvian law and, to that end, promulgate Emergency Decrees.

1. Legitimate expectations

324. As regards the acts and omissions alleged by the **Claimant** to be violations of legitimate expectations (paragraph 172 above), the Tribunal will analyze each situation separately**:**

a. Purchase and Takeover of Banco Financiero

325. The first claim of the **Claimant** in this matter relates to the **frustrated Banco Financiero purchase and takeover operation**; the **Claimant** states that **SBS** never notified that an increase in capital would be required for that entity to authorize the merger of BNM with Banco Financiero. At the hearing, Mr. Jacques Levy said, "At that point, we had a conversation. We were waiting for them to give us that in writing. And we would have complied with it."[480] The Tribunal does not understand the logic of the argument of violation of legitimate expectations put forward by the **Claimant**, as Mr. Levy was the President of the Board of **BNM**, a man very experienced in the banking world, as confirmed at the hearing, where he said that he had been in the banking business since the 1980s and had served as BNM's CEO since it started in 1992.[481] The

[479] Memorial on the Merits, ¶¶ 268 to 276.
[480] English Transcript, November 12, 2012, at 225:1012.
[481] Ibid., at 213: 5-17.

Tribunal therefore cannot understand how a person with as much experience in banking as Mr. Levy, and with knowledge of the crisis affecting Peru, could submit a preliminary proposal to SBS in October 2000[482] regarding the merger with the Banco Financiero and expect that SBS would indicate whether there should be an injection of capital. The **Claimant** herself affirms that, since July 2000, there were withdrawals of public sector deposits[483] and the private sector withdrew more than $70 million in August.[484] It is obvious, therefore, that the President of **BNM** knew that **BNM** required an injection of capital, with or without the requested merger.

326. It was also discussed at the hearing whether **BNM** in fact submitted a formal request to **SBS** regarding the merger of the bank with Banco Financiero. Concerning this matter, Mr. Jacques Levy, after the persistent questions of Mr. Alexandrov, attorney for **Peru**, answered as follows:

> "We did it the same way we had done in Banco del País. We had done it the first time. First you go to the superintendents and you talk to them and then they tell you 'Let's wait a while.' And they do not push the issue and say you will—you will do it otherwise. So we went to them, and we did it the same way we had done Banco del País. And this time he said exactly what he declares in the super in the commission. (Through Interpreter) In the economic commission, he has stated that we had the operation ready and that he was just waiting, or something to that effect."[485]

Obviously, that answer cannot be the basis for demonstrating the existence of a formal request regarding the merger.

b. Lack of transparency

327. The second claim of the Claimant is the lack of transparency concerning the

[482] Memorial on the Merits, ¶ 505.
[483] Ibid., ¶ 297.
[484] Ibid., ¶ 296.
[485] English Transcript, November 13, 2012, J. Levy at 297:9-22.

regulations on the PCSF and the failure to notify BNM of a meeting on the matter; the Claimant alleges that the meeting convened by the MEF regarding the PCSF (paragraph 75 above) did not take BNM into account, "had not even tried to find out what its position was with regard to the substantial legal changes planned, thus violating the investor's legitimate expectations."[486]

328. The **Claimant** does not explain the "substantial legal changes" that were made because of the **PCSF,** and moreover the Tribunal considers credible Peru's response that the banks that were invited to attend that meeting did not have a role in formulating the **PCSF**.[487] If one considers the chronology of the events, the above becomes clear: the meeting was held on Sunday, November 26, 2000; the regulation was promulgated on the 27th and published on the 28th of that same month. It does not seem plausible that the invited banks that attended the meeting would have contributed to the drafting of standards that were approved the next day and published immediately. The **Respondent** admits that it did not invite **BNM** to that meeting, but it is not logical to believe that, at that meeting, the "ten largest banks in Peru"[488] decided with the Superintendent and the Minister of the **MEF** on how to proceed. The Tribunal concludes that the meeting was called to explain the scope of the Emergency Decree and that the lack of notice to **BNM** could not have had the consequences the **Claimant** contends it had. In addition, the Emergency Decree was published in the Official Gazette, so it cannot be said that there has been lack of transparency.

c. Withdrawal of funds

329. The third claim of the **Claimant** refers to the **abrupt withdrawal of the funds of State enterprises**; the **Claimant** alleges that these "funds were legitimately considered by the Investor as an important variable of return on the investment."[489] The **Claimant** also notes that the withdrawals were sudden and disproportionate and without any

[486] Memorial on the Merits, ¶ 508.
[487] Rejoinder on the Merits, ¶ 279.
[488] Memorial on the Merits, ¶ 312.
[489] Ibid., ¶ 510.

contingency plan[490] and, therefore, directly affected **BNM**'s viability and liquidity.

330. The Tribunal finds that the **Respondent** had no obligation to prepare "a contingency plan" for the withdrawal of the State-owned funds. Like any public or private entity, the **MEF** could remove deposits when deemed expedient, especially because they had no maturity date after the date of their withdrawal. The fact that, from April 25, 2000, **SBS** indicated to **BNM** that it had a high concentration of public deposits and that there was a potential liquidity risk (paragraph 53 above) is extremely revealing. **BNM** had three months in 2000 to develop a contingency plan because withdrawals began in July of that year (paragraph 54 above, paragraphs 28 and 278 of the Reply on the Merits), so there was no factor of suddenness of which the **Claimant** complains. It is also important to note that, even in the 1999 Inspection Visit Report, **SBS** pointed out to **BNM** that it had a concentration of deposits and should "Stimulate the incentive for attracting alternative lower cost deposits,… given that one of the risks the Bank faces is liquidity, to which it is vulnerable do to the excessive concentration of liabilities in few creditors" (paragraph 46 above).

331. In paragraph 302 of her Memorial on the Merits, the **Claimant** includes some charts in order to assert that "the relative impact of such withdrawals was quite significant on BNM." Then, in paragraph 304, the **Claimant** points out that in October 2000, the impact of the withdrawal of public funds was critical. The **Claimant** stresses that the withdrawals did not follow an orderly schedule and the experts and the media criticized the withdrawal of funds and points out that the State was well aware of the illiquidity risk that its policy posed to **BNM**, which **SBS** also mentioned in the November 2000 report.[491]

332. The **Claimant** adds that "the withdrawal of funds was abrupt and systematic, and its relative impact was greater on BNM compared with all other banks in the Peruvian banking system."[492] The **Claimant** states in paragraph 303 of the Claimant's Memorial

[490] Reply on the Merits, ¶ 358.
[491] Claimant's Exhibit IV-6.
[492] Memorial on the Merits, ¶ 310.

on the Merits that the withdrawals of public funds from **BNM** between July and October 2000 amounted to US$24 million. The Tribunal found no reliable information on withdrawals from other banks, or any demonstration whatsoever of the disproportion and the alleged "relative impact". So as regards the withdrawal of public funds deposited in **BNM,** a discriminatory and disproportionate attitude by **Peru** against the **Claimant** has not been demonstrated.

d. Financial Panic

333. The fourth claim of the Claimant **refers to the State's alleged inaction in directly fighting against the financial panic**. The **Claimant** alleges that **SBS** failed to play its role as a stabilizer to counter the financial panic. The **Claimant** states that there was a legitimate expectation of the investor to expect quick, clear, firm, and diligent actions from **SBS** to stabilize the financial system. The Tribunal notes that the evidence presented at the hearing about the rumors transmitted by e-mail demonstrates that several persons warned about the intervention in **BNM**[493] and that bank officials reported that the spread of these emails is categorized under Peruvian law as the offense of Financial Panic.[494] As regards the emails of December 4, 2000 (referred to in paragraph 77 of this Award), which warned about the intervention in that bank, on December 11, **SBS** authorized the filing of a criminal complaint with the Public Ministry. Mr. Jacques Levy said in his first witness statement that, in the third week of October, he had a meeting with the Superintendent of Banks in which he requested that **SBS** perform its duty to stabilize the local banking industry and release an official statement assuring the stability thereof.[495] The Tribunal fails to find any documentation regarding this meeting or the request allegedly made by Mr. Levy. Copies of emails brought to the proceedings commenting on the **BNM** intervention are dated as of November 2000. The Tribunal also cannot understand how Mr. Levy or any other shareholder or senior officer of **BNM** with banking experience and knowledge of the possible effects of the rumors left no written record of the alleged request they made to **SBS**.

[493] Witness Statement of Mr. Jacques Levy Calvo, August 20, 2011, ¶ 52; Claimant's Exhibit JL-14.
[494] Respondent's Exhibit R-172.
[495] Witness Statement of Mr. Jacques Levy Calvo, August 20, 2011, ¶ 58.

334. Article 345 of the Banking Law states that **SBS** is a constitutionally autonomous institution, the purpose of which is to protect the interests of the public in the fields of the financial and insurance systems. Article 346 states that the said entity has functional, economic, and administrative autonomy. Article 347 states:

> "the Superintendency is responsible for the defense of the public interest; guaranteeing the economic and financial soundness of the individuals and corporations under its control; enforcing the legal, regulatory and statutory regulations governing their activities; practicing to that end the broadest control over all of their transactions and businesses; filing criminal claims against unauthorized individuals and corporations practicing the activities set forth in this law and closing their offices; and, as applicable, requesting the dissolution and liquidation of the violator."

335. In light of the aforementioned provisions, the Tribunal considers that **SBS** should contribute to the stability of the financial system, for which purpose it has discretionary powers, and that no bank has the power to require SBS to act in a certain way in order to disprove rumors.

336. In the opinion of the Tribunal, experience shows that, when there is a run on a bank, it is very difficult to control its impact and the actions that can be taken are very few, as they run the risk of producing the opposite effect to that intended. This is confirmed by the **Respondent's** experts, Messrs. Powell and Clarke.[496] For these reasons, the Tribunal cannot hold that there was a negligent attitude on the part of **SBS** in failing to rebut the rumors that had been circulating against **BNM**.

e. BCR Loan

337. The fifth claim of the **Claimant** was **BCR's dismissal of an emergency loan for monetary regulation**. The **Claimant** alleges that **BCR's** decision in dismissing **BNM**'s

[496] Expert Opinion of Mr. Robert L. Clarke, January 25, 2012, ¶ 54; Expert Opinion of Mr. Donald Powell, January 23, 2012, ¶ 28.

application for a loan of US$12 million was unjustified, although it was entitled to a certain number of rediscount operations, and that this dismissal affected the legitimate expectations of **BNM** and the guarantee of predictable behavior by State agencies.

338. In the opinion of the Tribunal, in the circumstances prevailing in Peru in 2000, it was not reasonable for **BNM** to expect approval, with absolute certainty, of the loan it requested. Although **BCR** is the "lender of last resort" in Peru, it is also obliged to demand sufficient collateral before granting a loan; **BNM** did not offer such collateral and for that basic reason its request was denied.[497] To bolster the argument that **BCR** acted arbitrarily and discriminatorily, the **Claimant** indicated in her Post-Hearing Brief that Peru's expert, Mr. Monteagudo, stated that **BCR** did not have to give reasons for its decisions on requests for loans.[498] The issue does not seem to have any greater importance in view of the evident lack of adequate collateral on the part of **BNM**, which was a key factor in the rejection of its request, and the undeniable fact that **BCR** was not obliged to accede to the request of **BNM**.

f. Impairment of the loan portfolio

339. The **Claimant**'s sixth claim is related to the **impairment of BNM's loan portfolio under the intervention**. The **Claimant** argues that the actions of the intervenors severely affected **BNM**'s equity**.**[499] The **Claimant's** claim is primarily on the report of the Receivers, which was studied carefully by the Tribunal. While it is true that the report includes several critiques of administrative and accounting issues, financial and credit management, and related to **BNM's** financial statements (paragraph 95 above), it also refers to a very short period of time from July 21 to August 8, 2001 (13 working days). In addition, the Tribunal does not find therein what the **Claimant** affirms: that the Receivers stated that the inappropriate policies applied during the intervention led to the arbitrary reclassification of the portfolio, which caused higher, substantial losses.[500] The

[497] Witness Statement of Mr. Juan Antonio Ramirez Andueza, August 25, 2011, Respondent's Exhibit RWS-002, ¶ 26; English Transcript, November 15, 2012, M. Valdez at 882:17-22 and 883:1-15.
[498] Claimant's Post-Hearing Brief, ¶ 134.
[499] Memorial on the Merits, ¶ 522.
[500] Ibid., ¶ 523.

Tribunal also notes that, however important the input of officials of the Judiciary, it seems difficult to base a solid criteria on their input based on the work of **SBS's** intervenors bringing about the consequences that the **Claimant** alleges. The **Claimant** also states that the investor expected an optimal and transparent management of **BNM's** equity and loan portfolio by the intervenors, which, in her opinion, did not happen.[501] It is noteworthy that the **Claimant** does not refer in any of her pleadings to the SBS final report dated February 28, 2003 and presented by the **Respondent** as Exhibit R-199 on the management of the intervenors. Nor does the **Claimant** refute in any of her pleadings **Peru's** assertion that the intervenors were able to recover S/. 559 million (US$160.7 million) for the benefit of **BNM's** depositors and creditors.[502] The Tribunal therefore concludes that, based on the report of the Receivers, the alleged impairment of the credit portfolio of **BNM** during the intervention cannot be regarded as proved.

g. Priority of payments

340. The **Claimant**'s seventh claim relates to the **violation of the priority of payments to creditors of BNM**. The **Claimant** alleges that the violation relates to payment to foreign banks that were creditors and not depositors and that these payments were made in accordance with the orders given by **SBS** to the company that served as **BNM's** liquidator, Consortium Define-Dirige. The **Claimant** argues that this action constitutes a violation of a fundamental rule of due process in bank intervention, the goal of which is to protect depositors. The **Claimant** argues that the Peruvian State violated the public interest and called into question the legitimacy of its actions concerning the intervention in and liquidation of **BNM**.[503]

341. The Tribunal reviewed the documents cited by the **Claimant** in her Memorial on the Merits and Reply on the Merits, and notes that in the **SBS** final report dated February 28, 2003 there is a section called "Liability for Working Capital."[504] [Tribunal's

[501] Ibid., ¶ 527.
[502] Counter-Memorial on the Merits, ¶ 219.
[503] Reply on the Merits, ¶¶ 387 and 388.
[504] Claimant's Exhibit IV-33; Respondent's Exhibit R-199.

translation] As the **Respondent** stated in its Rejoinder on the Merits,[505] that section of the report is clear in its explanation of why **SBS** changed several foreign banks from category D to B in payment order and why other creditors, such as the EFG Private Bank, did not change category. The Tribunal considers that the explanation contained in that **SBS** report is clear and does not violate the expectations that the **Claimant** may have had on the amount that would have been applicable to her according to the legal order of payments. In any case, the **Claimant**'s expectations in that respect have not been substantiated, as the **Respondent** clarifies that unpaid liabilities in the amount of US$ 87.076 million still exist.[506]

342. The **Claimant** concludes that, in general, the measures taken by the relevant authorities of the Peruvian State do not meet the minimum requirements of proportionality, reasonability, and predictability.[507] However, the **Claimant** has failed to prove those claims.

2. Legal stability

343. In relation to legal stability, the **Claimant** alleges that, at the time that the events giving rise to this proceeding occurred, there was in Peru a regulatory vision imposed, whereby the **PCSF** imposed bank mergers of smaller banks.[508] The **Claimant** argues that publication and notification of the regulations is essential, as is the right to comment on them and as is the right of any affected stakeholders to participate in their process of development. The **Claimant** further argues that changes in the regulations must be reasonable, non-discriminatory, made in good faith, and produce clear and predictable rules. The Tribunal notes that the amendments to the regulations to which the **Claimant** refers (the **PCSF** and the Special Transitional Regime) were published in accordance with the regulations in force. As noted above (paragraph 75) in this Award, although it is true that when some banks were invited on Sunday November 26, 2000 to a meeting in relation to the **PCSF, BNM** was excluded, that invitation was not so that those banks

[505] Rejoinder on the Merits, ¶ 238.
[506] Ibid., ¶ 239.
[507] Memorial on the Merits, ¶ 533.
[508] Ibid., ¶ 561; Reply on the Merits, ¶ 400.

could develop the regulations, which were promulgated and published immediately after the meeting. Nor does the Tribunal find satisfactory proof that the authorities forced the so-called "smaller banks" to merge with the large banks when the **PCSF** was promulgated. This latter program was approved by an Emergency Decree, which indicates that it is designed to facilitate corporate restructuring in the financial system. The Tribunal finds credible **Peru's** argument that it was created to benefit institutions that voluntarily chose to participate and thus facilitate mergers.[509]

344. The **Claimant** states that, after the meeting convened by the **MEF** to comment on the **PCSF,** "the flight of private deposits […] intensified."[510] The Tribunal finds that this claim has no basis in provided evidence. The meeting took place on November 26, 2000, and the decree was published two days later. According to the **Claimant**, "the flight of private funds" at BNM started in August 2000[511] and, as shown in a chart the **Claimant** provided on page 93 (Spanish version) and page 85 (English version) of the Memorial on the Merits, although withdrawals continued in November, they did not increase nor did they "intensify" after the meeting about the **PCSF**. That chart contains the following data: August 2000: US$272,337; September 2000: US$250,364; October 2000: US$256,037 and November 2000: US$201,899.

345. The **Claimant** argues that, with the **PCSF,** expectations for rehabilitation of the intervened institutions were violated, but the **Claimant** did not prove that BNM was a banking institution that could have requested rehabilitation under Peruvian law. The rehabilitation regulation states that "[c]reditors of a company which combined represent at least thirty percent of the company's liabilities may submit to the Superintendency a plan for the rehabilitation of the company."[512] The **Claimant** did not show that the said percentage of creditors (or any other) would have carried out that rehabilitation plan, or that **BNM** would have complied with the other requirements.

[509] Rejoinder on the Merits, ¶ 304.
[510] Memorial on the Merits, ¶ 567.
[511] Ibid., ¶ 296.
[512] Article 124 of the General Law of the Financial and Insurance Systems and Organic Law of the Superintendency of Banking, Insurance, Law 26.702, Respondent's Exhibit R-021.

346. The **Claimant** states that the violation in the priority of payments to creditors was a breach of the guarantee of legal stability. The **Claimant** also alleges that these payments were made in an illegal, non-transparent manner, infringing the public interest.[513] The Tribunal examined this issue in paragraph 340 above and felt satisfied with the explanation given in the **SBS** Final Report of February 28, 2003 as to why some foreign banks were paid first. The Tribunal finds no illegality or lack of transparency in the way in which the payments were made. The information on the payments was obtained by the **Claimant** from the **SBS** report. Therefore, the Tribunal does not consider that the actions of **SBS** with respect to these payments violated legal stability or had the harmful effects that the **Claimant** attributes to them.

347. The **Claimant** states that **SBS** violated legal stability when it did not abide by several court rulings. In it's Memorial on the Merits (281 in the English version), the **Claimant** affirms the following: "the 63rd Civil Court of Lima, on 23 October 2002, ruled in favor of BNM, which sentence was affirmed by Third Civil Courtroom of the Superior Court of Justice of Lima by the Decision issued on 11 August 2003 . . . declaring inapplicable to BNM such administrative measure, because it was illegal and unconstitutional, and recognized BNM's shareholders' rights. However, despite these Court Decisions, SBS issued SBS Resolution No. 775-2001… whereby it ordered the liquidation and dissolution of BNM, a clearly arbitrary measure against the Rule of Law, as it was based on Resolution No. 509-2001, even though this latter Resolution had no legal effects for BNM, as it was so declared by a Court decision, and therefore it was *res judicata*."[514] Having examined the timing of the rulings referred to, the Tribunal concludes that this argument is unsound. Resolution 509-2001 was issued on June 28, 2001, and the second one (775-2001)—which, in the opinion of the **Claimant**, is the one that did not abide by the court rulings, was issued on October 18, 2001. The two Decisions that, according to the **Claimant,** declared Resolution 509-2001 inapplicable are the 2002 and 2003 Decisions.[515] How could the **SBS** be held in contempt of court for those Decisions by issuing Resolution 775-2001 in 2001?

[513] Memorial on the Merits, ¶ 570.
[514] Ibid., ¶289.
[515] Claimant's Exhibits III-7 and III-8.

348. The **Claimant** alleges that, in this case, there were State actions with "surreptitious, extra-legal" intent[516] and spoke about the video of Mr. Carlos Boloña Behr, then Minister of Economy and Finance, which the **Claimant** had sent to ICSID along with her Request for Registration. The Tribunal finds that the **Claimant** added three videos to her Request for Arbitration, but the one relating to Mr. Boloña is unintelligible. It is noteworthy that the **Claimant** did not refer to him during the final hearing or in her post-hearing brief.

3. Acts that are arbitrary, discriminatory, and an abuse of power

349. The **Claimant** alleges that the standard of fair and equitable treatment was violated because of the following "arbitrary and/or discriminatory actions":[517] a) irregular accounting practices by **SBS's** intervenors in BNM; b) deliberate impairment of the loan portfolio during the **BNM** intervention; c) rejection of **BNM's** application to **BCR** for an emergency loan; d) arbitrary dismissal of BNM's proposal to strengthen its equity and leave the Special Transitional Regime; e) reduction of **BNM's** equity capital to zero; f) dissolution of **BNM** based on a report that did not carry out a complete valuation of the business; and g) serious omissions of **BCR** and **SBS** in failing to cooperate to find ways to provide **BNM** with liquidity.

a. Accounting practices

350. In relation to the accounting practices of **SBS's** intervenors, the **Claimant** bases her arguments on the testimony of witness Pablo Seminario and on two documents: the report[518] of the Congress Economy Sub-Commission investigating the involvement of **SBS** in two banks—the **BNM**'s and another—as well as the report[519] of the **BNM´s** Court Appointed Administrators.[520]

351. The **Claimant** alleges that, in 2001, the **SBS** Intervention Committee allowed the

[516] Memorial on the Merits, ¶¶ 574-576.
[517] Ibid, ¶ 584.
[518] Claimant's Exhibit I-6.
[519] Claimant's Exhibit III-6
[520] Memorial on the Merits, ¶¶ 415 to 421.

BNM loan portfolio to deteriorate, re-classified the risk level of loans granted, ordered that the resulting provisions be recognized in the Financial Statements as of December 2000, and other negative equity adjustments were deliberately accounted for retroactively.[521]

352. The **Claimant** cites from the report of the **Sub-Commission,** its conclusion holding that **SBS** altered **BNM's** equity position as it turned a net equity of US$72.3 million as of 30 November2000 into a negative equity of US$23.3 million as of 31 December 2000. The **Claimant** further states that the adjustment made by **SBS's** intervenor's in the "goodwill amortization" account, related to the merger with Banco del Pais, for over US$10 million was arbitrary and illegal. The **Claimant** also refers to the statement of Mr. Pablo Seminario, **BNM's** Loan Assessment Head Officer, who said that he was instructed by the **SBS** Intervention Committee to calculate retroactive provisions for portfolio risk, which agrees with the findings of the **BNM** Receivers.[522]

353. In relation to the adjustments to **BNM's** Financial Statements of 2000, the **Respondent** and Mr. Arnaldo Alvarado of **PwC** state that **SBS** made these adjustments in line with **PwC's** recommendations.[523]

354. It is important for the Tribunal to point out that, in the report of the **Sub-Commission,** there is no indication that any report of the firm **PwC** had been requested in order to assess the alleged retroactivity; the same applies to the Court Appointed Administrators, whose mission in **BNM** was, as noted before, very limited in time (from July 21 to August 6, 2001). In the opinion of the Tribunal, it is noteworthy that neither the **Sub-Commission** nor the Receivers are entities specialized in banking matters; the first is essentially a political body and the latter is not necessarily aware of these issues. No matter how respectable both groups may be, the Tribunal will evaluate their opinions bearing these factors in mind.

[521] Ibid., ¶ 415.
[522] Witness Statement of Mr. Pablo Hugo Seminario Olortigue, August 19, 2011, ¶ 35.
[523] Counter-Memorial on the Merits, ¶¶ 200 and 201; Second Witness Statement of Mr. Arnaldo Alvarado, September 26, 2012, Respondent's Exhibit RWS-013, ¶¶ 3 and 19.

355. The Tribunal is also of the opinion that it is relevant to indicate that in Mr. Seminario's testimony at the hearing, he doubted as to whether an email in which he indicated that he had made adjustments on the instruction of the auditors (**PwC**) had been properly worded.[524] That statement appears evasive and contradictory to the Tribunal. It is obvious that several years have elapsed between the date of this e-mail and the statement of Mr. Seminario, but to state that the wording of the message was not correct, that the interpretation of that message was not right, and that he had not imagined that in 2012 he would be discussing these issues, hardly seems credible.

356. During the testimony of Mr. Arnaldo Alvarado of **PwC**, counsel for the **Claimant** asked him about the adjustments:

> "Q. And the Intervention Committee agreed with the findings and the methodology that you used to carry out these recommendations, particularly to carry out the adjustments.
> A. That is correct. They agreed; they consulted with their respective operational centers, let us say, with the risks department, the accounting department, the loans department, and they incorporated the adjustments so that we could finally give an opinion on the financial statements."[525] [Tribunal's translation]

357. During the rest of the cross-examination of Mr. Alvarado by the **Claimant's** counsel, there was no success in rebutting the substance of Mr. Alvarado's witness statement on regarding alleged retroactive adjustments to **BNM's** financial statements in line with **PwC's** recommendations.

358. It is also important to consider that Mr. Edgar Choque de la Cruz, General Accountant of **BNM,** said in his written statement that the financial statements of the bank were "still open" on June 14, 2001 and that in April and June 2001 adjustments were made in the provisions for the year 2000.[526] The Tribunal finds that these statements

[524] English Transcript, November 14, 2012, Seminario at 511:14-22 and 512:1-19.
[525] English Transcript, November 15, 2012, pages 833 and 834.
[526] Witness Statement of Mr. Edgar Choque de la Cruz, August 20, 2011, ¶¶ 29 and 30.

confirm what was said by Mr. Alvarado in that **PwC** from March 5, 2001 until July 11, 2001, the date that **PwC** submitted its final audit position to **SBS**, kept pointing out the adjustments that were needed in consultation with **SBS's** intervenors, who at the same time were making those adjustments.[527]

359. In light of the foregoing, the Tribunal cannot confirm that the alleged accounting irregularities committed by **SBS** in **BNM's** Financial Statements have been proven.

b. Loans portfolio

360. As regards the alleged deliberate impairment of **BNM**'s loan portfolio during the intervention, the **Claimant** again bases her arguments on the report of the Receivers, which it has been repeatedly stated (paragraphs 339 and 354 above) that it was of a very short duration and did not consider, in relation to this argument, the final **SBS** report of February 28, 2003 regarding the intervention process. The other basis for the position of the **Claimant** on this issue was a report from April 1 to June 30, 2003, prepared by the Consortium "Define-Dirige-Soluciones en Procesamiento", in which, according to the **Claimant**, it was reported that this Consortium had "difficulties to get information from BNM" because of organizational problems that occurred during the intervention.[528] In other words, the "SUNAT"[529] copies of documents providing documentary support for the related purchase records were not properly arranged and there was disorder in Accounting. The **Claimant** also indicates that it is difficult to estimate how much of the S/. 155 million of higher provisions required by **SBS** relate to the portfolio impaired because of the poor management of the **SBS** Intervention Committee, and she claims that, of that amount, S/. 103 million are attributed exclusively to the intervention.[530]

361. The Tribunal does not find in the report of the Consortium any basis for the **Claimant's** assertion that there was a deliberate impairment of **BNM's** loan portfolio. It also fails to find in this report or in any of the evidence provided by the Claimant any

[527] Second Witness Statement of Mr. Arnaldo Alvarado, September 26, 2012, Respondent's Exhibit RWS-013, ¶ 6.
[528] Reply on the Merits, ¶ 118; Claimant's Exhibit XI-15, page 2.
[529] Superintendencia Nacional de Aduanas y De Administración Tributaria.
[530] Reply on the Merits, ¶¶ 118 to 123.

basis for the assertion that this S/. 103 million in provisions is attributable to the intervention in **BNM**. In the opinion of the Tribunal, the **Claimant's** argument is not clear, nor are her assertions proven. In her Reply on the Merits, the **Claimant** referred to the same subject as follows: "much of the 'loss' (of S/. 328 million appearing in BNM's Financial Statements as of 12/31/2000) is attributable exclusively to the State's intervention in BNM,"[531] and consisted of the elimination of "goodwill," increased provision requirements, and the natural impairment of the loan portfolio during the intervention.[532] This assertion also does not make the **Claimant's** argument more understandable.

362. As for the "goodwill," arising out of **BNM**'s merger with Banco del Pais, the **Claimant** does not explain why there was "arbitrariness and/or discrimination," on **SBS**'s intervenors for accounting that amount as a loss. The **Claimant** simply indicated that the loan had been previously approved by **SBS** itself. As regards the requirement for higher provisions, the **Claimant** states that "...the portfolio that had been temporarily exchanged for treasury bonds pursuant to a Bond-for-Portfolio Exchange Program had been reallocated in the Balance Sheet of BNM and recognized as a loss. This rearrangement was accompanied by higher provision requirements . . . in the amount of S/. 65 million."[533] In relation to the alleged impairment of the portfolio during the intervention, the **Claimant** affirms that, as long as those in charge of the intervention do not explain the situation, borrowers often fail to repay their loans to a bank under intervention, and she alleges that the **SBS** Intervention Committee did little to reduce that problem.[534] The Tribunal finds that the **Claimant** has failed to show how the events described affected the standard of fair and equitable treatment because they were arbitrary or discriminatory.

363. In a separate section, in her Reply on the Merits, the **Claimant** refers to the "requirement of higher provisions that zeroed BNM's equity." The **Claimant** speaks of **SBS**'s arbitrariness when **BNM** was assigned losses of S/. 328 million and states that this assignment was inconsistent with previous findings by **SBS** itself and due to **SBS's**

[531] Ibid., ¶ 110.
[532] Ibid., ¶ 111.
[533] Ibid., ¶ 112.
[534] Ibid, ¶ 113 to 115.

officials following an improper accounting practice and an ad hoc illegitimate methodology.[535] The **Claimant** states that, in the **SBS** report of the results of its 2000 Annual Inspection Visit, that entity identified a deficit of S/. 70 million in the provisions, compared to S/. 220 million found under the intervention. The **Claimant** also states that several adjustments in the accounts of **BNM** were technically incorrect and were made by the intervenors after the external auditors had completed auditing the bank.[536] In terms of methodology, the **Claimant** states that the intervenors assumed the roles of managers of the bank and for that reason it was unclear who made the risk assessment and loan portfolio classification and who performed the reclassification of **BNM's** portfolio.[537] The **Claimant** concludes that "there are reasonable indications that SBS arbitrarily applied an arbitrary methodology to reclassify borrowers and calculate of higher provisions, in order to punish the BNM's equity and attempt the argument of its insolvency. However, there is no evidence indicating that BNM had tried to conceal illegal accounting practices."[538]

364. The Tribunal cannot rely on the words of the **Claimant** to confirm that **SBS** intended to write down **BNM's** equity and "attempt the argument of [sic] its insolvency" and, on the contrary, it repeatedly finds that in **SBS**'s Inspection Visit Reports for several years, from 1997 to 2000, that agency pointed out several **BNM**´s irregularities. In some cases they were addressed by officials of **BNM** but not in others: in 1999 there were discrepancies in the classification of the loans portfolio of at least 127 borrowers (paragraph 42 above); that same year, problems were detected with the **BNM** provisions (paragraph 43(d) above); during 1999, **BNM** breached the regulations on refinanced loans (paragraph 44 above); and during the same year, **SBS** instructed **BNM** to reformulate the overdraft policies (paragraph 45 above). During the years 1997, 1998, and 1999, **BNM** carried out refinancing operations that were not recorded in the accounts as such and was fined by **SBS** for that (paragraph 47 above); in those same years and in 2000, **SBS** informed **BNM** about overdue, refinanced, and restructured loans that were

[535] Ibid., ¶ 125.
[536] Ibid, ¶¶ 127 to 133.
[537] Ibid., ¶¶ 126 to 139.
[538] Ibid., ¶ 146.

entered in the accounts as Current loan portfolio, contravening banking regulations (paragraph 68), **SBS** also informed **BNM**, that there were breaches by the Bank of the regulations related to loan limits (paragraph 53 above). In 2000, there were breaches of **SBS**'s resolutions concerning the classification of the loans portfolio (paragraph 71 above), which in many cases were tacitly approved by **BNM's** officials. These are described in paragraphs 60, 62, 63, and 64 above.

365. In relation to the allegation of the **Claimant** concerning the adjustments to **BNM's** accounting made by the intervenors after the external auditors completed their work, the **Respondent** explains that these adjustments were made according to the recommendations of **PwC**, and insists that the allocation of losses was never made retroactively. In paragraph 202 of its Counter-Memorial on the Merits, **Peru** indicates that the adjustments were recommended by **PwC**, which was confirmed in the statement of Mr. Arnaldo Alvarado, a partner at the company that is a member of PwC, who performed the audit.[539] Mr. Alvarado explains that on March 5, 2001, the field audit work was finished but because of the recommendations made by the auditors to the intervenors, they completed the report on July 11 of that year and correctly dated it, according to ISA 700 standard,[540] with the date on which the fieldwork was finished, that is March 5.[541] These explanations appear reasonable to the Tribunal. The Tribunal does not believe that the **Claimant** has demonstrated that the retroactive adjustments were made in order to "attempt the argument of its insolvency" as alleged, or that such acts were arbitrary and discriminatory.

366. The Tribunal deems it important to point out—not only for this matter, but for others related to **BNM's** accounting and audit work performed by **PwC**—that it was **BNM** that retained that company from 1997 to 2000 to audit its Financial Statements.[542] Mr. Arnaldo Alvarado said in his statement that he has 20 years of experience as auditor

[539] Second Witness Statement of Mr. Arnaldo Alvarado, September 26, 2012, Respondent's Exhibit RWS-013, ¶ 3.
[540] International Standards on Accounting, Respondent's Exhibit R-296, ¶ 23.
[541] Second Witness Statement of Mr. Arnaldo Alvarado, September 26, 2012, Respondent's Exhibit RWS-013, ¶¶ 8 to 10.
[542] Witness Statement of Mr. Arnaldo Alvarado, January 30, 2012, Respondent's Exhibit RWS-003, ¶ 3; Counter-Memorial on the Merits, ¶ 15.

of financial institutions and insurance companies.[543] **PwC** also is a company of well-known international prestige. These facts enable the Tribunal to conclude that the audit work performed when **BNM** was intervened was done in compliance with accounting best practices.

c. BCR loan

367. In relation to the alleged arbitrariness in **BCR** rejecting **BNM**'s application for an emergency loan, the **Claimant** insists that BCR has the function to cover temporary liquidity shortages and guarantee the stability of the banking system and also, in this case, **BNM** had not used up the number of requests to which it was entitled by law. Thus the **Claimant** states that the said rejection was arbitrary and based on private-banking criteria.[544] The **Claimant** states that **BCR** had the legal authority to grant the loan and acted arbitrarily in denying it. However, that argument is contrary to what was stated by her expert witness at the hearing, Mr. Dujovne, who explained that "the Banco Centro de Reserva del Peru had the authority, according to the charter, to provide loans, due to liquidity, to Banco Nuevo Mundo… Legally it was authorized and it was at the discretion of the Banco Central del Peru to use that authority or not."[545] Even if the statement that **BCR** should have acted as lender of last resort is considered valid, the **Claimant** herself cites the same legal requirements that **BCR** was obliged to demand in order to grant the emergency loan to **BNM**: paragraph b) of Article 59 of the BCR Charter Act, which refers to the need for "first-rate trading securities," and paragraph b) of Article 78 of the Statute, which refers "any other adequate collateral at **BCR**'s discretion".[546] For the Tribunal, the citing of this legislation by the **Claimant** and the statement of Mr. Dujovne confirm that **BCR** was obliged by law to ask **BNM** for sufficient guarantees in order to grant the requested loan, and therefore its rejection—because BNM had not granted these guarantees—was not arbitrary.

[543] Witness Statement of Mr. Arnaldo Alvarado, January 30, 2012, Respondent's Exhibit RWS-003, ¶ 4.
[544] Memorial on the Merits, ¶¶ 593 and 594.
[545] English Transcript, November 17, 2012, page 1253.
[546] Memorial on the Merits, ¶¶ 342 and 343.

d. BNM proposal

368. On September 23, 2001, **NMH** sent a proposal[547] to the **MEF** that, according to the **Claimant**, the **MEF** arbitrarily rejected. According to the **Claimant**, the proposal included terminating **BNM's** intervention and restarting its operations, with **BNM's** shareholders being responsible for **BNM's** entire debt. According to the **Claimant, BNM** received no response.[548] In her Reply on the Merits, the **Claimant** expands on this claim and confirms that **BNM** never received a response to its proposal, in contrast to the treatment accorded to the bailout programs of Banco Latino and Banco Wiese, which were offered a rescue program.[549] **Peru** explained the reasons why **MEF's** officials felt that the plan proposed by the shareholders of **BNM** was neither feasible nor possible from a legal standpoint.[550] **Peru** insisted on the fact that, under the Banking Law, the rehabilitation of a bank requires the participation of at least 30% of the bank's creditors and that **BNM**'s shareholders had not actually proposed contributing their own funds. The Tribunal finds there are no counter-arguments of the **Claimant** (except her assertion that the plan was feasible because the bank was solvent)[551] that would invalidate the explanations of the **Respondent**.

369. Regarding the difference in treatment that, according to the **Claimant,** was given to **BNM**, compared to the treatment accorded to Banco Latino and Banco Wiese, the Tribunal notes that this allegation was presented in a single paragraph of the Reply on the Merits,[552] without more explanation other than a footnote referring to two documents[553] in none of which does the Tribunal find a basis for the arguments of the **Claimant**. The first document is a "PowerPoint" presentation on an Economic and Financial Crimes Commission of Inquiry for the years 1990 to 2001. This document refers to Banco Latino but gives no explanation or even remotely demonstrates the **Claimant's** allegations with respect to **BNM**. The second document is the "Report of the Investigation Committee

[547] Claimant's Exhibit II-40.
[548] Memorial on the Merits, ¶¶ 441 to 445.
[549] Reply on the Merits, ¶ 430.
[550] Counter-Memorial on the Merits, ¶¶ 237 to 248
[551] Reply on the Merits, ¶ 432.
[552] Ibid, ¶ 430.
[553] Claimant's Exhibits XI and XI-10-04.

responsible for complying with the findings and recommendations arrived at by the five Commissions of Inquiry for the 2001-2002 legislative session," [Tribunal's translation] prepared in July 2003. This report sharply criticized **SBS**'s attitude to Banco Latino, Banco Wiese, and Interbank. Much of this criticism was to the effect that SBS did not act firmly enough on visits made to these banks, according to the Inspection Visits Reports, and that the bailout programs involved a lot of money. In no way does this report prove the **Claimant's** allegations discussed in this paragraph. Moreover, the **Claimant** did not refer to those two documents neither at the hearing nor in her post-hearing submission.

e. Reduction of capital

370. The **Claimant** stated that the "arbitrary, illegal, and unconstitutional reduction of **BNM**'s capital to zero" indirectly affected the investor, as it deprived **NMH** of its standing as shareholder of **BNM**; affected its right to property and right to participate in **BNM**'s remaining assets that could result from the liquidation.[554] The **Claimant** draws the attention of the Tribunal to the fact that, pursuant to Article 107 (1) of the Banking Law:

> "[w]hen a bank is intervened, SBS is entitled to determine the real capital equity thereof and offset any losses against legal reserves and, if necessary, against equity capital."[555]

371. In paragraph 125 of her Reply on the Merits, the **Claimant** states that she does not question the authority of **SBS** to exercise such power (to determine the real equity capital of a bank), but rather the fact that it arbitrarily imputed losses in the amount of S/. 328 million to **BNM**. In the opinion of the Tribunal, it is obvious that the **Claimant** contradicts herself when she claims that the capital reduction made by **SBS** was arbitrary and illegal and then argues that **SBS** is empowered to determine the real capital of **BNM**. The Tribunal confirmed this contradiction in examining the text of Article 107 of the Banking Law, which states that **SBS** has the power during the intervention to determine

[554] Memorial on the Merits, ¶¶ 422-427 and 596.
[555] Reply on the Merits, ¶ 124.

the effective equity and offset of losses by charging legal reserves and voluntary reserves, and if applicable, the capital stock.

372. On a related topic, it is necessary to analyze the **Claimant's** argument that if **SBS** had not issued Resolution 509-2001, the liquidation of **BNM** would have been prevented.[556] According to Article 114(1) of the Banking Law, companies comprising the financial system shall be dissolved after an intervention declared under Articles 104 and 105. Article 105 regulates the intervention period and indicates that once this period has expired "the corresponding resolution shall be issued, ordering the dissolution of the company and the commencement of the relevant liquidation process." On the basis of these provisions, the Tribunal concludes that if a bank is not rehabilitated it must be liquidated. For this reason, it is of the opinion that **Peru's** response that "the General Banking Law, requires that *all* intervened entities must be liquidated, regardless of their solvency position,"[557] is enough to justify SBS's actions.

f. Dissolution

373. The **Claimant** states that **SBS's** arbitrary conduct is evidenced by its Resolution No. 775-2001 declaring **BNM's** dissolution based on an accounting report prepared by the company Arthur Andersen, which did not carry out a complete valuation of **BNM's** equity.[558] The **Claimant** considers that such conduct violated the fair and equitable treatment standard established in the **APPRI**.[559] **Peru** alleges that the valuation carried out by the company was not the basis for placing **BNM** in liquidation, as **SBS** was required by law to liquidate **BNM**, regardless of the value of the bank at the time.[560] In her Reply on the Merits, the **Claimant** states that regardless of whether or not **SBS** relied on this report when it referred to it in the Resolution No. 775-2001, "SBS gave a wrong message to the market regarding the soundness of BNM's equity, which, as it has been substantiated, was a solvent bank before the intervention, which in itself is an arbitrary

[556] Memorial on the Merits, ¶¶ 437 and 596.
[557] Rejoinder on the Merits, ¶ 318.
[558] Memorial on the Merits, ¶¶ 597 to 598.
[559] Ibid, ¶ 599.
[560] Counter-Memorial on the Merits, ¶ 236.

act."[561] The Tribunal has carefully studied Resolution 775-2001 and notes that, indeed, among the fourteen recitals it contains, **SBS** makes reference to the fact that the Arthur Andersen company made a valuation of **BNM**, which **PwC** reviewed and that on April 30, 2001 there was a negative amount of US$217,062,000, which, by adding **BNM's** existing operating losses of US$5,455,000 was increased to US$222,517,000.[562] In the opinion of the Tribunal, the reference to the study by Arthur Andersen was not the basis for the resolution that decreed the dissolution. In the recitals to that resolution it is stated that, according to the financial statements of **BNM** audited by **PwC**, **BNM's** losses amounted to S/. 328.875.366,91. The Tribunal therefore concludes that the resolution that decreed the dissolution of **BNM** cannot be described as arbitrary simply because in its recitals also referred to the study prepared by Arthur Andersen.

g. Omissions of SBS and BCR

374. **The Claimant** also alleges that there was a serious omission by **SBS** and **BCR** in their responsibility to give support and act diligently to find ways to provide **BNM** with temporary liquidity, which contrasts with the preferential treatment those entities gave to Banco Wiese and Banco Latino, which benefited from bailouts, thereby providing evidence of discriminatory treatment. The **Claimant** also notes that the withdrawal of funds of State companies from banks had a significantly stronger and disproportionate impact on **BNM** than on other banks with the same business activity level.[563]

375. In relation to the alleged failure to search for alternatives for **BNM**, which according to the **Claimant** was a treatment different compared to the other two mentioned **Peruvian** banks, the Tribunal will analyze this situation later when referring to the national treatment claim raised by the **Claimant**.

376. As for the second argument put forward, on the withdrawal of deposits of state companies, the Tribunal did not find any proof to substantiate the **Claimant's** repeated allegation that these withdrawals had a greater impact on **BNM** than on other banks. The

[561] Reply on the Merits, ¶ 440.
[562] Respondent's Exhibit R-090.
[563] Memorial on the Merits, ¶¶ 600 and 601.

Claimant admitted that "... the withdrawal of State deposits was widespread,"[564] but she has not proved her claim that it affected **BNM** more than other banks, nor has she proved that this alleged greater impact was to be blamed on the State companies.

377. With respect to **SBS's** alleged deliberate failure to reassure **BNM's** savers, the **Claimant** states that "the deliberate refusal … no (sic) only to face the market and reassure BNM savers, as well as to counter those who spread the groundless rumors of a possible intervention, are arbitrary omissions committed by SBS."[565] As stated in paragraph 333 above there is no evidence that **BNM** informed **SBS** of the electronic messages provided in Exhibit JL-14, which started with the one dated November 30, 2000. The Tribunal did not find evidence that any **BNM** officer sent copies of those messages to **SBS** or sent any communication to that entity informing it of the rumors. Moreover, as the Tribunal stated in paragraph 336, the scope of action of public entities in the face of a run on a bank is very limited and any action may not only be ineffective but also counterproductive.

378. In the case of **BNM,** it was established that **SBS** filed a criminal complaint against the person who sent the December 4 electronic message prompting the withdrawal of money from **BNM** (paragraph 77 above). In relation to the alleged failure to "face the market and reassure BNM savers,"[566] the **Claimant** seems to suggest that **SBS** must refer specifically to that bank, but in the subsequent Reply on the Merits she claims that she never requested that **SBS** make particular statements about the soundness of **BNM's** equity, but that **SBS** should have made general statements about the stability and soundness of the financial system in general.[567] The Tribunal concludes that the **Claimant's** position on the alleged failure of the authorities to prevent the run on the bank is not clear; it also finds that **SBS** and **BCR** did not have a legal obligation to act in the manner suggested by the **Claimant**; and that the effects of the suggested action—had it been taken—would not necessarily have benefited **BNM**.

[564] Reply on the Merits, ¶ 276.
[565] Memorial on the Merits, ¶ 603.
[566] Ibid.
[567] Reply on the Merits, ¶¶ 366 and 367.

379. The **Claimant** further alleges that the following are actions demonstrating abuse of Government power and constitute arbitrary or discriminatory acts and abuses of power:

a. Lack of access to remedies to challenge or appeal in domestic law: the **Claimant** argues that Peruvian law does not provide an efficient and immediate remedy at the administrative and judicial level to directly challenge the withdrawal of the State's funds, the intervenor's actions, the declaration of intervention of a bank, or the resolution ordering the reduction of its capital and its dissolution. The **Claimant** argues that the recourse to court action is not efficient for the following reasons: because the proceedings are public and that affects the trust placed in the investor's management and credibility; the administrative contentious action filed by **NMH** lasted around six years; the decision of the Supreme Court Chamber was unfair, inadequate and inefficient because according to the Banking Law, the rights and assets acquired by third parties in good faith during the intervention regime may not be subject to a court challenge so there was no way to challenge actions of disposal of the bank's equity.[568]

b. Irregular accounting practices: the **Claimant** insists that the recognition of higher provision requirements with retroactive effect infringed international accounting standards and that action adversely affected **BNM's** equity, which is an act contrary to the Rule of Law.[569]

c. Contempt of final court orders: the **Claimant** alleges that the following acts constitute abuse of power: reduction of **BNM's** equity capital to zero; "the restitution of BNM's shareholders' right to recover an effective participation in the capital equity" and "the production of information related to BNM's liquidation process."[570]

380. The Tribunal will discuss below, together with the **Claimant's** argument

[568] Memorial on the Merits, ¶¶ 606 to 609.
[569] Ibid, ¶¶ 610 to 611.
[570] Ibid., ¶ 613.

concerning the "refusal to provide full protection and security" (paragraph 406 below), the **Claimant's** allegation set forth under sub-paragraph a) above, on the alleged lack of access to direct and efficient remedies. Regarding her allegations about the alleged irregularities committed by **SBS's** officers **in BNM's** accounting when it was intervened, the Tribunal analyzed this issue in paragraphs 339, 350 et seq., and 360. As for the alleged disobedience to court rulings, the Tribunal addressed the issue of the resolution ordering the reduction of **BNM's** equity capital in paragraphs 370, 371, and 372 above.

4. Bad faith, coercion, threats and harassment

381. In paragraphs 614 to 623 of the Memorial on the Merits entitled "Guarantee against State's acts involving bad faith, coercion, threats and harassment against the investor or the investment," the **Claimant** refers to the following facts: a) "the effects of the second visit of SBS to BNM;" b) "reduction of BNM's equity capital to zero (S/. 0.00);" c) "encouragement and attempt to sell an equity block;" d) "declaration of BNM dissolution without a valuation of the entire equity;" and e) "criminal prosecution against BNM's shareholders and managers." The Tribunal will consider each of these events in turn.

a. SBS' visit

382. As regards the visit of **SBS** from August to October 2000, the **Claimant** contended that it was a State action of coercion and aggressiveness that affected the trust of savers in **BNM**, because it lasted so long, and it triggered speculation and false rumors that eventually led to the massive withdrawal of private deposits from the Bank.[571] The **Respondent** replied that the visit to **BNM** in August 2000 took 60 days and provided a table with the average length of visits to other banks.[572] In this table the Tribunal notes, for example, that the visit to Scotiabank lasted from September 26 to November 29, 2011 (64 days); **SBS** visited Banco Financiero from March 23 to June 3, 1999 (72 days); and it visited Citibank from July 24 to October 24, 2000 (92 days). According to this table, the

[571] Ibid., ¶ 618.
[572] Respondent's Exhibit R-226.

average length of visits during 1999 and 2000 was 74 days. The Tribunal also notes that Article 357 of the Banking Law provides the authority to conduct inspections "at least once a year," which means that the entity can perform more than one visit if deemed necessary. The **Respondent's** evidence further shows that it was not only **BNM** that had two visits from **SBS** in a year: in 1999, Banex had had two and in 2000 Banco Financiero had also had two.[573] Thus, the Tribunal cannot conclude that **SBS's** second visit to **BNM** was more prolonged or frequent than usual or made in bad faith, under coercion, threats or harassment against the investor or her investment. Nor has the **Claimant** proved, in the opinion of the Tribunal, that the said visit triggered speculation and rumors about **BNM**.

b. Reduction of equity capital

383. As regards the resolution ordering the reduction of **BNM's** equity capital to zero, the **Claimant** states that it was an arbitrary procedure to facilitate the State's disposal of the property of the bank, by declaring the dissolution of **BNM**.[574] The Tribunal cannot find any explanation of the **Claimant** to support the conclusion that the act was done in bad faith, or under coercion, threats or harassment against the investor or the investment. Moreover, **Claimant** herself accepted in paragraph 124 of her Reply on the Merits (cited in paragraph 370 above) that, once a bank is intervened, **SBS** has the power to determine the amount of real capital of the intervened entity; the **Claimant** has also stated that she does not question the authority of **SBS** to exercise this power; what she objects to is that a certain amount for losses was arbitrarily assigned to **BNM**.[575] This argument has been dealt with by the Tribunal in paragraph 373 of the present award.

c. Sale of equity block

384. As regards the "encouragement and attempt to sell an equity block," the **Claimant** alleges that it "…constitutes a State's action of coercion; such equity block was made up of its most liquid assets, i.e. a customer portfolio that does not belong to the State, using the CEPRE of BNM in favor of Banco Interamericano de Finanzas (BIF) and

[573] Ibid.
[574] Memorial on the Merits, ¶ 619.
[575] Reply on the Merits, ¶ 125.

exert pressure on the investor with the threat of BNM's dissolution and liquidation."[576] The **Respondent** states that even if **SBS** were to sell the assets and liabilities of an intervened bank as a block to another bank, SBS would still liquidate the unsold remnants of the intervened bank, as was done with the NBK Bank, which was acquired by Banco Financiero, and was placed thereafter in liquidation.[577] The Tribunal does not believe that **SBS** pressured the investor with the "the threat of BNM's dissolution and liquidation,[578] it is of the opinion that it was not a threat, but the compliance of **SBS** with a legal obligation ordering the dissolution and liquidation of an intervened bank. As **Peru** notes,[579] the Special Transitory Regime functioned as a continuation of the intervention regime and **SBS** had to fulfill the same legal mandate,[580] even when the bank's assets were sold, as it was the case of **NBK** Bank.

d. Dissolution

385. Regarding the "declaration of BNM dissolution without a valuation of the entire equity," the **Claimant** alleges bad faith on the part of the State in using the report of the Arthur Andersen company, which refers specifically to an equity block as the basis for the alleged integral valuation of **BNM's** equity, even though the report states that the company did not audit the financial statements of **BNM**, nor did it conduct a valuation of its assets and liabilities.[581] **Peru** states that **SBS** did not rely on the Arthur Andersen valuation when it placed **BNM** in liquidation, since the decision to liquidate **BNM** had nothing to do with **BNM**'s value, but with the legal provision requiring all intervened banks to be liquidated so that any remaining assets can be disposed of.[582] Article 105 of the Banking Law effectively orders the dissolution of intervened banks after the legal period of intervention has ended. Therefore, the Tribunal has no doubt that **Peru** was required by law to dissolve and liquidate **BNM** and therefore bad faith cannot be attributed to it because it obeyed a rule. The fact that **SBS** also took into account the

[576] Memorial on the Merits, ¶ 620.
[577] Counter-Memorial on the Merits, ¶ 235; Respondent's Exhibit R-092.
[578] Memorial on the Merits, ¶ 620.
[579] Counter-Memorial on the Merits, ¶ 231.
[580] Respondent's Exhibits R-082 (Articles 21-24) and R-077.
[581] Memorial on the Merits, ¶¶ 451 and 452; Claimant's Exhibit I-3.
[582] Counter-Memorial on the Merits, ¶ 235.

Arthur Andersen study at the time of ordering the dissolution and liquidation of **BNM** does not alter the fact that it was obliged to act as it did and thus, **SBS**'s actions were not taken in bad faith.

e. Criminal Prosecution

386. Regarding bad faith, coercion, threats, and harassment alleged by the **Claimant** and demonstrated, according to her, by the "criminal prosecution against BNM's shareholders and managers,"[583] the Tribunal notes the following: Article 358 of the Banking Law imposes a clear obligation on the Superintendent. This obligation requires that the Superintendent inform the prosecutors of "the criminal offences that have been detected in the course of the inspections practiced on the institutions subject to its control." As the Superintendent is not a specialist in criminal law, the facts that seem suspicious must be notified to the Office of the Public Prosecutor, where they will be analyzed and a decision will be made as to whether they will be submitted to the judicial authorities, which ultimately will determine whether these facts are criminal or not. Again, the performance of a legal obligation by the Superintendent cannot be considered an "action of coercion and harassment" of persons linked to **BNM**.

5. Due Process

387. As a final complaint regarding the standard of fair and equitable treatment, the **Claimant** alleges that **SBS** violated the guarantee of due process and the right of defense. The **Claimant** states that due process can be violated by both the administrative and the judicial authorities and refers to the two following situations:[584] a) "lack of transparency and violation of administrative due process in the regulatory variation," and b) "grounds of SBS Resolution No. 775-2001 that declared the dissolution of BNM based on a resolution declared illegal and unconstitutional."

a. Change in the regulations

[583] Memorial on the Merits, ¶ 622.
[584] Ibid., ¶¶ 627 to 631.

388. In relation to the first allegation concerning the change in regulations, the **Claimant** states that the enactment of the **PCSF** "involved the exclusion of the so-called smaller banks" and was decided with an "absolute lack of transparency and violating the due process as not all the parties involved in the banking and financial industry were notified, nor were their opinions heard, as was the case of **BNM**, especially when it was one the banks directly affected in its property, due to the State's intention of transferring the equity of the small banks in favor of the larger banks in Peru."[585] The **Respondent's** response is that **BNM's** rights were not at issue in the enactment of the **PCSF** program, which did not impose any requirements at all on any financial institutions. The **PCSF** program simply aimed at benefitting those institutions that chose to participate in order to facilitate voluntary mergers. "Thus, the PCSF decree had no impact on the vested property interests of BNM's shareholders, and they had no entitlement to participate in or comment in advance upon it."[586]

389. Although the **Claimant's** claim is made in an allegation of violation of due process, in the **Claimant's** Reply on the Merits she states in addition that "nothing could justify a discriminatory treatment" in relation to **PCSF**. It is the opinion of the Tribunal that the **MEF**'**s** notice of the meeting concerning the **PCSF** was only for information purposes and was not intended to develop that program with the collaboration of the invited banks. If the Peruvian Government had not published these regulations in the Official Gazette, *El Peruano*, the **Claimant** could have alleged a violation of due process because the regulatory changes would have been implemented without their prior publication. Although one might have been convenient that the Peruvian authorities had extended the invitation to all banks, the fact that they did not do so does not violate due process; if **BNM's** shareholders thought that they were affected by the published regulations, they could have asked the authorities to enact the clarifications deemed necessary or tried to challenge it by taking the appropriate legal action. Furthermore, it is the opinion of the Tribunal that the Peruvian State may issue the regulations it deems appropriate, without being obliged to consult possible stakeholders on the content

[585] Memorial on the Merits, ¶¶ 628 and 629.
[586] Counter-Memorial on the Merits, ¶ 361.

thereof.

b. Dissolution

390. The second argument of the **Claimant** in this matter was that the reduction of **BNM's** equity capital to zero was the basis for the dissolution of the bank, even though the Judiciary had suspended the effectiveness of the administrative action in Resolution No. 509-2001, which ordered that reduction, and therefore **SBS** violated administrative due process.[587] The Tribunal already issued its ruling on this matter in paragraph 347 above.

391. After reviewing all of the **Claimant's** allegations concerning her claim of violation of the fair and equitable treatment standard, the Tribunal concludes that **Peru** did not violate that principle by any of the actions of which the Claimant complains; consequently the **Claimant's** arguments in that respect will be dismissed.

392. The Tribunal shall now consider the arguments of the **Claimant** related to the violation of the national treatment standard.

B. Violation of the National Treatment Standard

393. The parties appear to have reached some level of agreement on certain of the elements that must be examined in order to determine whether there is a violation of the national treatment standard as the **Claimant** alleges, namely:

a. Identification of the "comparator" and the concept of similar circumstances (according to the **Claimant**); identification of one or more national entities that were in circumstances similar to **BNM** (according to the **Respondent**);

b. Existence of unequal treatment and the lack of reasonable justification (according to the **Claimant**); need for the **Claimant** to prove that **BNM** received less favorable treatment than its national peers (according to the **Respondent**); and

[587] Memorial on the Merits, ¶ 630.

c. The irrelevance of the State's intention (according to the **Claimant**); proof that the State acted without reasonable justification (according to the **Respondent**).[588]

The **Claimant** compares **BNM** with **BCP** and Banco Wiese and refers to the Peruvian Government's reaction to rumors that were reported about the alleged insolvency of these banks;[589] the **Claimant** also compares **BNM** with Banco Wiese and Banco Latino, in relation to the bailout measures.[590] While the **Claimant** also compares the liquidity ratio of Banco de Commercio with the one of **BNM**,[591] she does not substantiate what acts of the State involved a more favorable treatment towards Banco de Comercio. The **Respondent** disagrees with the **Claimant** with respect to the banks that the **Claimant** used for comparison with **BNM** and points out the differences between them. The **Respondent** also states that, in the end, the outcome for all these banks was the same, that is, dissolution and liquidation; it further contends that the bank most comparable with **BNM** is NBK Bank, the owners of which also lost their equity holding.[592]

394. On the national treatment standard, the Tribunal considers necessary to review Article 4 of the **APPRI**. The first paragraph of that Article states:

> "Each Contracting Party grants, in its territory and sea areas, to nationals or companies of the other party in matters regarding its investments and activities related to these investments a treatment not less favorable than that accorded to its nationals or companies, or the treatment accorded to nationals or companies of the most favored nation if this latter is more favorable. In this regard, the nationals authorized to work in the territory and sea area of one of the contracting parties shall enjoy the material facilities appropriate for the exercise of their professional activities."

395. The Tribunal will first examine whether, indeed, there were similarities between

[588] Ibid., ¶ 637; Counter-Memorial on the Merits, ¶ 375.
[589] Memorial on the Merits, ¶ 654.
[590] Ibid., ¶¶ 660 to 662.
[591] Ibid., ¶ 667.
[592] Counter-Memorial on the Merits, ¶ 379 to 385.

the banks referred to by the **Claimant**, and will then determine if there was a more favorable treatment granted to them than to **BNM**, in violation of the above-mentioned Article 4.

396. In light of the parties' agreement on the need to first identify the domestic entities that were in similar circumstances with **BNM,** the Arbitral Tribunal considers, as noted by other arbitral tribunals,[593] that discrimination only exists between groups or categories of persons who are in a similar situation, after having assessed, on case-by-case basis, the relevant circumstances. The banks cited by the **Claimant** are in the same sector (banking) and are regulated by a common entity, the **SBS**. Notwithstanding this common denominator, the Tribunal considers that, as the banking sector is a sensitive area for any country, there are marked differences between the various banks operating in it. For example, there are banks primarily engaged in asset management and investment, others in corporate and consumer banking, such as **BNM**.[594] The market segment in which a bank is primarily engaged shows how different it is from other banks and determines whether or not they are competitors.

397. In order to consider the consequences of a bank's failure, one has to consider the segment and the number of individuals affected, its market share, and other similar factors.

398. **Peru** introduced into this proceeding several facts that in the Tribunal´s opinion proof that **BNM** was not in like circumstances with Banco Wiese, **BCP**, and Banco Latino. **BCP** was the first- and Banco Wiese the second-largest bank in Peru up to November 2000 and together they accounted for 44 percent of the loans in this country and 51 percent of deposits. In contrast, **BNM** had 4 percent of loans and 2 percent of deposits up to November 2000.[595] These facts were not challenged by the **Claimant** and are quite close to the figures she has presented about **BNM**: it was in sixth position in

[593] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, August 27, 2009, ¶ 402; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Award on the Merits Phase 2, April 10, 2001, ¶ 75; *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL (NAFTA), Award, May 24, 2007, ¶ 87.
[594] Memorial on the Merits, ¶ 209.
[595] Counter-Memorial on the Merits, ¶¶ 379 and 380; Respondent's Exhibit R-169.

terms of loans granted and deposits received (seventh by the end of 1999), with a market share as of June 2000 of 4.5 percent (loans) and 2.8 percent (deposits).[596] **Peru** has also stated that Banco Latino did not differ so much from **BNM** in terms of size but in terms of its far-reaching network of individual depositors, which was not the case of **BNM**, whose clientele mainly comprised companies, other banks, and State-owned enterprises.[597] These elements of comparison between these four banks are convincing in the opinion of the Tribunal.

399. The criteria used by the **Claimant** were that **BNM**, **BCP,** and Banco Wiese were companies in the same financial sector that developed their activities in mutual competition.[598] The **Claimant's** expert, Mr. Beaton, pointed out that **BNM** performed the same functions as the other identified banks, that is, they provided similar financial services, had a similar growth rate, and took similar risks. In addition, they also had the same corporate clients as well as individual customers.[599]

400. The Tribunal considers that the benchmarks criteria used by the **Claimant** are very general. The Tribunal further notes that the **Claimant** has presented throughout the proceedings different versions of **BNM**'s position in the Peruvian banking system: sometimes **BNM** was part of the so-called "smaller banks," at other times it was not in that category and was a bank with systemic importance. To illustrate, the Tribunal will refer to some of the **Claimant's** statements:

a. The **PCSF** put in place merger mechanisms forcing smaller banks, including **BNM**, to merge and despite the latter's developing equity strength;[600]

b. The enactment of the **PCSF** was designed jointly with the main largest banks of the

[596] Memorial on the Merits, ¶ 210; Claimant's Exhibit I-1.
[597] Counter-Memorial on the Merits, ¶ 172.
[598] Memorial on the Merits, ¶ 655.
[599] Reply on the Merits, ¶ 467; Refutation Report of Mr. Neil J. Beaton, May 15, 2012, ¶ 46.
[600] Memorial on the Merits, ¶ 561.

country, without the participation of the smaller banks, including **BNM**;[601]

c. The **MEF** ordered the withdrawal of public funds held as deposits in small banks, such as **BNM**;[602]

d. "Set [sic] in December 1999, BNM was the sixth-largest bank by size in Peru. With a market share of deposits of 2.3 percent and with assets making 3.4 percent of all commercial banks in Peru. To contextualize this size, the size equivalent to BNM in the United States would be an entity of a similar size to that of U.S. Bancorp, and Citibank. Thus, the BNM was an institution with systemic importance;"[603] and

e. "BNM indicators demonstrate objectively that the impairment of equity soundness would implicitly entail a systemic risk, and in addition to that, it was not a small bank, given the size it had achieved as of 1999 in terms of market share."[604]

401. Given the above, the Tribunal finds it impossible to determine the position of **BNM** in the Peruvian banking system. Furthermore, the Tribunal cannot determine whether **BNM** was comparable to other banks mentioned by the **Claimant**. Consequently, it cannot analyze whether the treatment that the Peruvian Government gave to these banks was different from that received by **BNM**. In the absence of sufficient evidence, the Tribunal can only surmise that when there was a different treatment, this was due to the existence of justifiable circumstances.

402. To complete the analysis of this issue, the Tribunal will transcribe what was said by the **Claimant** in her post-hearing submission:

> "...it has been substantiated that the bailout schemes implemented by the State for local banks, did not preclude the possibility of rescuing banks by way of a direct or third-party contribution, and the permanence of some directors. The contrary

[601] Ibid., ¶ 833.
[602] Ibid., ¶ 264.
[603] Reply on the Merits, footnote 319, page 109.
[604] Ibid., ¶ 473.

happened in the case of BNM, as the Banking Act underwent amendments through Emergency Decrees days before BNM was intervened which established new rules for bailout processes or bank interventions that ruled out any possibility of keeping it afloat by its shareholders, and hence the only alternatives were either the sale of assets or the dissolution and liquidation of the bank."[605]

403. The Tribunal fails to understand the **Claimant's** argument, which suggests that **Peru** amended the Banking Law through Emergency Decrees promulgated just before the **BNM** intervention, in order to include new rules to rescue or intervene a bank. In particular, the Tribunal could not determine if the **Claimant's** argument is that the legislation was amended only to harm **BNM** while for other banks such reforms were not implemented.

404. In the light of foregoing, the Tribunal will reject the allegation of violation by **Peru** of the national treatment standard in relation to **BNM**.

405. In the next section the Tribunal will consider the **Claimant's** argument that **Peru** did not provide full protection and security for her investment.

C. Refusal to Provide Full Protection and Security

406. The Tribunal fully agrees with the description made by the **Claimant** that the standard of full protection and security has gone from referring to mere physical security and has evolved to include, more generally, the rights of investors.[606]

407. The **APPRI** regulates the guarantee of full protection and security in paragraph 1 of Article 5, which states: "The investments made by nationals or companies of one contracting party shall enjoy broad and full protection and security in the territory and in the sea area of the other contracting party."

408. The **Claimant** states that, in her case, the denial of justice originated in the lack of

[605] Claimant's Post-Hearing Brief, ¶ 138.
[606] Memorial on the Merits, ¶ 675 to 676.

a fair judicial system and failure to comply with the Peruvian courts' judgments.

409. In relation to the alleged failure by **SBS** to comply with judicial decisions, the **Claimant** states that "… these Court Decisions ordered the restitution of BNM's shareholders' right to recover an effective participation in the capital equity of BNM. Despite the declaration of inapplicability of SBS Resolution 509-2001 by the Judiciary, SBS used such resolution as the grounds to illegally and unconstitutionally declare BNM's liquidation and dissolution."[607]

410. The Tribunal studied carefully the judgments dated October 23, 2002 and August 11, 2003 in which it was determined that Resolution SBS 509-2001 was inapplicable and that **SBS** could not issue another resolution. Both judgments recognized **SBS**'s power to determine the capital of the intervened company, the shareholders' right to challenge the decisions of **SBS**, and the right to rule on any surplus that may belong to them. The Tribunal finds, therefore, that Resolution 509-2001 was declared inapplicable by the judgments and that the shareholders of **BNM**, once the process of liquidation had come to an end, could participate in the surplus. The Tribunal therefore concludes that there has been no failure to comply with those judgments at this time. The Tribunal also addressed this issue in paragraph 347 above.

411. The **Claimant** cites the following from the "Harvard Draft Convention on the International Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners": "Denial of justice exists when there is a denial, unwarranted delay, or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees that are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment."[608]

412. In connection with the above quotation, the Tribunal considers it useful to point out the following:

[607] Ibid., ¶ 693.
[608] Ibid., ¶ 683.

a. The **Claimant** did not allege that she was prevented from submitting her claims in Peru;

b. Nor did she demonstrate that there was any undue delay in judicial proceedings brought by her;

c. Nor did she allege or demonstrate that she was prevented from accessing the courts, which clearly dealt with her requests;

d. She did not prove any serious deficiency in the administration of justice, such as, for example, lack of notice of decisions, refusal to hold hearings, or denial of the right to be heard;

e. She did not indicate which of her fundamental guarantees were breached during the legal proceedings she filed in Peru; and

f. While she has stated that some judgments of the Judiciary were unfair, she did not explain in what sense they were, nor did she present evidence to support her statement.

413. In paragraph 380, the Tribunal left open the examination of the **Claimant's** other arguments because they are closely linked to the claims discussed in this section. These shall be examined now.

414. The **Claimant** alleges that Peruvian law does not provide efficient remedies against decisions of some organs. She states that there are no efficient and immediate administrative or judicial remedies against the withdrawal of funds by the State; the intervenor's actions; the resolution declaring **BNM'**s intervention; or the resolution ordering the reduction of **BNM'**s equity capital and declaring **BNM'**s dissolution. The **Claimant** also argues that there are no administrative remedies to directly challenge these actions. The only choice is to have recourse to court action (except against the withdrawal of the funds, which may not be challenged even in court), but this is not an

efficient, adequate, and immediate solution. The **Claimant** insists that the courts are not efficient because the proceedings are public and thus affect the customer's trust in the investor. In addition, they take very long. The administrative contentious action brought by the **NMH** lasted around six years; the decision of the Supreme Court Chamber was unfair, inadequate, and ineffective. According to the Banking Law, the assets acquired by third parties in good faith during the intervention regime may not be subject to a court challenge, so there is no means to challenge actions of disposal of equity.[609]

415. **Peru** does not deny that in law there is no administrative procedure to challenge certain of **SBS**'s acts, such as those indicated by the **Claimant**. It adds that "there is no generally accepted norm requiring a State to provide administrative review of administrative actions, nor is such administrative review considered indispensable to the administration of justice."[610]

416. The Tribunal agrees with **Peru** in that there is no obligation for States to provide for administrative review of decisions of their organs or entities. Possibly because of this lack of remedies for administrative review, **BNM's** shareholders had, since 2000, brought various civil and constitutional proceedings against several decisions issued by **SBS**, in each of which their claims received due process. The Tribunal is aware that in at least one of those legal proceedings, **NMH** requested provisional measures in order to replace the **BNM** intervenors with judicially appointed administrators and that request was initially resolved in its favor.[611] The Tribunal concludes that the Peruvian judicial system does provide remedies to protect the rights of persons subject to its jurisdiction in this area.

417. As stated in paragraph 231 above, the **Claimant** considers that the standard analyzed in this section has been violated in that **BNM** and its investors did not have access "to a fair and predictable dispute settlement system." The Tribunal finds that the **Claimant** did not prove this assertion nor explained why, in her opinion, the decisions issued by the courts in civil and constitutional litigation were unfair and unpredictable.

[609] Ibid., ¶¶ 606 to 609.
[610] Counter-Memorial on the Merits, ¶ 363.
[611] Respondent's Exhibit R-199, page 2.

418. The **Claimant** also alleges that she had no access to a judicial system where decisions were enforced fully and in a timely manner by the Peruvian Government's agencies. This argument is discussed in paragraphs 429 et seq. of this Award, along with others that the **Claimant** raised in paragraph 693 of her Memorial on the Merits.

419. The **Claimant** also states that there was "wrongful conduct attributable to the judicial system and to the State," and that in Peru the only purpose of the administrative contentious action is to challenge the formal aspects of the administrative action at issue not the merits of a case. She states that the Judiciary must be truly effective and therefore she "denounces and proves that the conduct of the Peruvian State and its Judiciary violated the Peru–France BIT, in particular the 'full protection and security' standard."[612]

420. The **Claimant** further argues that the Judiciary "… may lack the technical or professional expertise to contend the State's 'truth'... making the Court review option in[to] a formal remedy but inefficient for the investor's rights,"[613] adding that an administrative contentious action only focuses on issues of form rather than on the merits of the case.[614]

421. The **Claimant** stated that in the Peruvian Administrative Contentious via it is not possible to examine the merits of the matters. The Tribunal considers that, even if true—which it considers unnecessary to determine—that feature of the Peruvian judicial system is not *per se* a violation of the **APPRI**, nor of any international legal standard. Besides, the **Claimant** failed to prove that the fact that the Peruvian judicial system is formal and not really effective nor in which way the Peruvian State and that system violated the **APPRI**, and particularly the standard of full protection and security.

422. In support of its argument that the Peruvian judicial system is not effective, the **Claimant** cites Article 10 of the Administrative Proceedings Act,[615] which enlists the grounds for annulment of administrative acts. The grounds are focused on the formal

[612] Memorial on the Merits, ¶ 692.
[613] Reply on the Merits, ¶ 488.
[614] Memorial on the Merits, ¶¶ 690 to 691.
[615] The link provided by the Claimant in footnote 339 of the Memorial on the Merits does not appear to work.

aspects of the administrative acts and as a result, the **Claimant** argues that the Peruvian courts were not in a position to review the merits of the Resolutions issued by **SBS** declaring **BNM**'s intervention and dissolution.

423. **The Claimant** also cites an article by Mr. Alexis Mourre entitled "Some comments on the denial of justice in public and private international law after Loewen and Saipen"[616] [*Algunos comentarios sobre la denegación de justicia en el derecho internacional público y privado después de Loewen y Saipen*] which must be considered in context and not in isolation. This author states: "… international law imposes on States the obligation of having a judicial system whereto any person may have effective, not only technical, access to justice... As a matter of principle, by not exercising the remedies available under the local judicial system, the victim loses the right to claim that such a system does not comply with the international obligations of the State to which she belongs."[617] [Tribunal's translation]

424. The quotations in the previous paragraph refer to a situation in which an error or a failure of a judicial system can generate a denial of justice, because it is not capable of being rectified by existing remedies, that is, an error by a court that the judicial system does not allow a higher court to correct. As explained below, in the opinion of the Arbitral Tribunal, there is no similarity between the allegations of the **Claimant** and the situation to which the cited author refers. The **Claimant** provides the following evidence regarding the Peruvian court proceedings: i) the judgment of the Superior Court of Lima issued in Case number 3787-2001 of the Sixty-Third Civil Court of Lima, constitutional judgment of October 23, 2002 (Exhibit III-7); ii) the judgment of the Superior Court of Lima delivered in Case number 1794-2002 of the Third Civil Chamber, Judgment of August 11, 2003 (Exhibit III-8); iii) the judgment of the Constitutional Court issued in Case number 1219-2003-HD/TC, constitutional ruling of January 21, 2004, (Exhibit III-9); iv) the judgment of the Supreme Court of the Republic issued in Case number 473-2001/LIMA by the Permanent Civil Chamber, judgment of November 11, 2005 (Exhibit III-10); and v) the judgment of the Supreme Court of the Republic issued in Case number

[616] Claimant's Exhibit VII-20.
[617] Ibid., page 51.

509-2006/LIMA of the Constitutional and Social Permanent Courtroom, judgment of October 11, 2006 (Exhibit III-12). In relation to such evidence, the Tribunal notes that the last judgment was issued in an administrative contentious dispute on appeal, in which **NMH** appealed the lower court ruling. The first recital of this judgment states: "the administrative contentious action under Article 148 of the Constitution is aimed at legal control by the Judiciary of the actions of the public administration subject to administrative law and the effective protection of the rights and interests of any person subject thereto." [Tribunal's translation] It is clear that in the proceeding in which these judgments were issued there was no such gross denial of justice, as referred to by Mr. Mourre. This Tribunal also notes that **NMH** requested that SBS Resolution number 775-2001 (on **BNM's** dissolution) be declared invalid, and that all administrative actions contained in that resolution be declared invalid. This also contradicts the argument of the **Claimant** that **BNM** and its representatives did not enjoy legal protection. Additionally, the Tribunal finds that these court rulings demonstrate access to justice in **Peru**.

425. In short, in the opinion of the Tribunal, neither the **Claimant's** arguments nor the evidence provided by her support her assertions about the inability of the Peruvian legal system to correct its errors or the alleged inadequacy of the administrative contentious courts.

426. The Claimant did not prove that the Peruvian courts "lack the technical or professional expertise to contend the State's 'truth.'"[618]

427. The **Claimant** also bases her argument regarding the alleged lack of defense on her inability to obtain the evidence she needed. She states:

> "The same may be said with regard to SBS's repeated contempt of court, reflected on a number of resolutions, for as long as they were effective, that ordered BNM's shareholders furnish information related to BNM's liquidation and

[618] Reply on the Merits, ¶ 488.

dissolution process (JLevy ¶ 8,...)."[619]

428. Paragraph 8 of the Witness Statement of Mr. Levy, to which the **Claimant** refers, does not prove the alleged failure of **SBS** to provide her with the information;[620] it is a simple statement that the Levy family made efforts to access some documentation on **BNM** in which it was interested.

429. In relation to the allegation that **BNM** and its investors were unable to access a judicial system impervious to public pressures exerted by the main Branches of Government,[621] the Tribunal understands that this is the same allegation the **Claimant** made in the Request for Arbitration, in which she states:

> "...political power interfered with the neutrality and impartiality of the Supreme Court, forced to declare unfounded the lawsuit instituted by the vehicle company Nuevo Mundo Holding S.A. ... as is seen from the Decision of the Constitutional and Social Courtroom, of the Supreme Court on 11.10.2006. In other words, the Judiciary upheld the SBS resolution ordering the illegal liquidation of BNM."[622] [Tribunal's translation]

430. Moreover, in the Memorial on the Merits the **Claimant** refers to an "open and illegal interference by the President of the Republic of Peru and the President of Congress, as well as by SBS Superintendent (see video appended to the Request for Registration), which, acting together, in 2007 offered on one same day public declarations to the media, with the single and clear goal of influencing the final result of the Administrative Contentious Action in Court, which had been filed by BNM's shareholders against SBS Resolution 775-2001 that ordered BNM liquidation and dissolution."[623]

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[619] Memorial on the Merits, ¶ 573.
[620] Witness Statement of Mr. Jacques Levy Calvo, August 20, 2011, ¶ 8.
[621] Memorial on the Merits, ¶ 685.
[622] Request for Arbitration, ¶ 63.
[623] Memorial on the Merits, ¶ 693 (ii).

431. The **Claimant** argues that the above-mentioned Decision of October 11, 2006 "… was not a simple legal error exempting the State from responsibility, but the Supreme Court favored SBS's position overlooking all the analysis, sufficient motivation [sic] and reference to BNM's shareholders' arguments."[624]

432. The Tribunal is of the opinion that the **Claimant's** assertion that the alleged interference of public officials referred to in paragraph 429 above, which, according to her, occurred in 2007 may have influenced a Decision issued in 2006, does not make any chronological sense.

433. The Arbitral Tribunal is not, nor can it be, a form of appeal against the judgments of the courts of Peru. However, the Tribunal will refer to some aspects of the Decision issued on October 11, 2006 by the Constitutional and Social Permanent Court of the Supreme Court of Justice of Peru. The Arbitral Tribunal is mindful not to review that Decision, but will evaluate the arguments of the **Claimant** that said Decision overlooks all the analysis, and lacks sufficient motivation and reference to BNM's shareholders' arguments (paragraph 431 above), and that this proves the influence of and interference from the other Branches of the Peruvian Government.

434. The Decision sets out the facts as requested by **NMH**; it quotes the rules applicable to the case; discusses the four allegations of **NMH**; gives reasons and explains why, on each occasion, the Supreme Court considered that the wrongs raised by the claimant were unfounded; notes that the remaining wrongs did not impact on the rendered Decision because they are repetitions, and mentions the rules on which the Courtroom decided to "record in its Decision only the essential principles on which it is based." [Tribunal's translation] It also indicates which facts were not proven by **NMH**; it analyzes the approaches of the Chief Prosecutor of Administrative Contentious Actions and, in its dispositive paragraphs, declares unfounded the claim brought by **NMH**.

435. For these reasons, the Tribunal considers unfounded the **Claimant's** allegations

[624] Ibid., ¶ 693 (iv).

that this judgment overlooks "all the analysis, sufficient motivation [sic] and reference to BNM's shareholders' arguments."

436. On the same subject, the **Claimant** alleges another type of pressure on the Judiciary. She notes that the dates on which the statements referred to in paragraph 429 above were issued, the Congress of the Republic of Peru empowered the Executive Branch by law to suspend pay increases for the Justices of the Supreme Court where the request of **NMH** was being examined. The **Claimant** explains that, on September 27, 2006 the full Congress passed a bill that would reduce the remuneration of Supreme Court "Vocales". Following the approval of that bill it would be submitted to the "President of the Republic, who has constitutional powers to veto the bill."[625] The **Claimant** states that the press referred to these pressures and she submits a number of newspaper articles that were issued at that time.

437. The **Claimant** also states that, on October 3, 2006, the Peruvian Congress passed a bill that would reduce the monthly remuneration of the Supreme Court "Vocales". On October 11, the Constitutional and Social Courtroom of the Supreme Court of Justice of Peru delivered the judgment cited above, and on October 24 the President of Peru vetoed the bill "as a reward to the docile behavior of the Supreme Court to his earlier warnings."[626]

438. The **Claimant** states that "[t]he Supreme Court, misusing its powers and violating the right to effective judicial protection, interpreted in a restrictive manner a judgment affirmed by an appellate court, issued in a court proceeding different from the case it was trying. The excess committed by the Tribunal illegally distorted the meaning of the rulings that favored NMH in the process it filed against the illegal reduction of BNM's capital to zero."[627]

439. In the opinion of the Tribunal, the **Claimant** made serious claims without

[625] Ibid., ¶¶ 473 and 474.
[626] Ibid., ¶ 481.
[627] Ibid., ¶ 480.

explaining or substantiating them; besides, she did not indicate how the Court exceeded its powers or illegally modified what had been decided, "in a court proceeding different from the case it was trying."

440. In relation to the bill that was discussed in 2006 by which the wages of the Justices of the Court would be reduced, the Tribunal reviewed the newspaper articles that the **Claimant** provided, and observed the following:

a. It was the President of the Supreme Court who asked the President of the Republic to "comply with" the law in question.

b. The President of the Court told the media that "we are not averse to austerity . . . . The head of the Judiciary also said he agreed with judicial reform but that Congress cannot do it unilaterally, given that it must respect the autonomy of the Judiciary. We hope that the Congress will invite us to participate in discussions that are taking place because, if it is going to legislate for us, obviously it should invite us to participate."[628] [Tribunal's translation]

441. It follows from these newspaper articles that judicial reform was being carried out in Peru at the time that included the budget issue, as stated by the President of the Supreme Court, referring to austerity and judicial reforms. For these reasons, and because of the lack of proper evidence to the contrary, the Tribunal cannot conclude that the reform referred to by the **Claimant** was intended to pressure the Judiciary to decide against **BNM's** shareholders.

442. **BNM** had been operating in Peru since 1993. Mr. Jacques Levy, Executive President of **BNM,** is an experienced banker who not only knew the banking business but also the institutional reality of that country. When investors created **BNM** they counted not only on his experience and knowledge of the Peruvian reality but—as always in these cases—on the advices from various professionals, including lawyers, who knew the legislative structure of the country and, especially, the Judicial Branch. So these investors

[628] Claimant's Exhibit V-53.

knew that, as happens in other countries, this system had its own peculiarities, strengths and weaknesses. For these reasons, this Tribunal cannot endorse the **Claimant**'s statements that sometimes denigrate the Judiciary of the Republic of Peru, calling it corrupt, subject to influences from other Branches of Government, incompetent, inefficient and slow, and at other times refer repeatedly to the failure to comply with the decisions rendered by the courts of that Judiciary that decided in her favor. The investors that founded **BNM** were familiar with the organization of the Judiciary in **Peru**, which, as in other countries, has its virtues and faults. The **Claimant** cannot claim now that this Arbitral Tribunal, under the pretext of the alleged violations of the **APPRI**, should examine the decisions of the Judicial Branch and its very organizational structure.

443. This Tribunal cannot rule therefore, based on the evidence submitted, that the actions of the Legislative and Executive Branches affected the impartiality of the Judges who delivered the judgment of October 11, 2006, or the alleged violations of the **APPRI** of which the **Claimant** accused the Judiciary of the Republic of Peru.

D. Indirect Expropriation

444. The **Claimant** cites paragraph 2 of Article 5 of the **APPRI,** which provides that "[n]either Contracting Party shall nationalize or expropriate or take any measure depriving, directly or indirectly, nationals or legal persons of the other Contracting Party, from their investments made in its territory or in its maritime area, unless such measures are in the public interest, provided that these measures are not discriminatory, or against a particular commitment of one of the Contracting Parties towards the nationals or legal persons of the other Contracting Party. Expropriation measures that may be adopted shall cause prompt and adequate compensation […]"[629]

445. The **Claimant** alleges the existence of a "creeping expropriation" from **SBS's** extended visit in August 2000 until the declaration of **BNM**'s dissolution. **SBS's** visit in August 2000 was discussed in paragraph 382 above, where the Tribunal concluded that the said visit was not long, it was not made in bad faith, under coercion, threats or

[629] Memorial on the Merits, ¶ 702.

harassment against the investor or the investment, and the **Claimant** did not prove that it was the cause of the speculation or rumors about **BNM's** precarious financial situation.

446. The **Claimant** also alleges that the effects of the indirect expropriation were increased by the following actions: **SBS's** second Inspection Visit; **SBS**'s failure to neutralize the rumors; the impairment of the loan portfolio under the intervention; reduction of **BNM's** equity capital; lack of an overall valuation of **BNM's** equity when the decision to dissolve BNM was being made; and the lack of legal and technical reports during the period **BNM** was under intervention that would support the reclassification of the portfolio and the need for higher provisions.[630] The Tribunal determined that there is no proof that the **SBS** was aware, before December 4, 2000, of the rumors about **BNM** (paragraph 333 above). In paragraph 339 of this Award, the Tribunal stated that it was not possible to determine if indeed there was an impairment of the loan portfolio during the intervention; regarding Resolution SBS 509-2001 ordering the reduction of **BNM**'s equity capital to zero, the Tribunal made its observations with respect to the fact that the Resolution was declared inapplicable by the Peruvian courts (paragraphs 349 and 412 above). In paragraph 373 above, the Tribunal noted that the Arthur Andersen study was not the basis for the dissolution of **BNM**. In relation to the reclassification of **BNM's** portfolio, the Tribunal analyzed the matters relating to accounting practices in paragraphs 350 to 359 of this Award. Below is an analysis of the circumstances that occurred during the last days of **BNM**.

447. The **Claimant** alleges that, with the administrative declaration of liquidation and dissolution of **BNM**, the loss of investment was total and irreversible.[631] It is therefore essential to analyze why BNM reached the stage of dissolution and liquidation.

448. On December 5, 2000, **BNM** came under the intervention regime; on April 18, 2001, BNM was subjected to the Special Transitional Regime; on October 18 of that year that Regime was terminated, for that bank and its dissolution and liquidation was ordered.

[630] Ibid., ¶ 710.
[631] Ibid., ¶ 726.

449. According to Article 104 of the Banking Law, the grounds for intervention in a bank are:

"1. Suspension of payment of their obligations;
2. Non-compliance during the surveillance procedure, with the commitments assumed in the agreed recovery plan or with the regulations of the Superintendency in accordance with the provisions of Title V of this section;
3. In the case of companies of the financial system, whenever positions subject to credit risk or market risk represent twenty-five (25) times more than the total effective equity;
4. Loss or reduction by more than 50% of the effective equity; and
5. . . . ".

450. Article 106 of the same law determines the consequences of the intervention:

"The following are unavoidable effects of the intervention procedure, and they shall prevail for as long as it lasts:
1. The competence of the shareholders' meeting shall be limited exclusively to the issues dealt with in this chapter;
2. The suspension of the company's business;
3. The application of the necessary portion of the company's subordinate debt, if applicable, to absorb the losses, after having complied with the provisions of Point 1 of Article 107;
4. The application of the prohibitions contained in Article 116, as from the publication of the resolution determining the submission to the intervention procedure; and
5. Other steps which the Superintendency may deem relevant to ensure compliance with the provisions of this chapter."

451. Article 114 of the Banking Law provides:

"Companies comprising the financial system and the insurance system shall be

dissolved by substantiated resolution of the Superintendency due to the following reasons: 1. The case referred to in Article 105 of the Law...” In the same article, the consequences are indicated: “… the company shall cease to be subject of credit, shall be exempted from any future taxes and shall not be subject to the obligations prescribed by the Law for active companies, including the payment of fees to the Superintendency.”

452. In this case, the declaration of intervention was based on paragraph 1 of Article 104, as **BNM** was excluded from the Electronic Clearinghouse in Peru, as it had not settled its multilateral liability. “Banco Nuevo Mundo was a multilateral debtor of US$9.2 million in foreign currency and S/. 4.1 billion in local currency, while the balances in its current accounts at the Bank amounted to US$0.1 million and S/. 1.8 million, respectively. As a result, Banco Nuevo Mundo had a deficit of US$9.1 million and S/. 2.3 million.”[632] [Tribunal’s translation] This was not denied by the **Claimant** in this arbitration. What the **Claimant** alleged repeatedly is that the Bank had a temporary liquidity problem that was caused by the **Respondent** and that the latter did not help to solve it. Therefore, the Tribunal will review what happened to **BNM** before the intervention.

453. The **Claimant** states that “[t]he arbitrariness of the measure is conspicuous because it is an instance, as it is known in international law, of a measure that exceeds the regulatory framework of Peru.”[633] She notes that “the concept of arbitrariness suggests a decision that is not based on justice, law, or reason, but on personal preference or, essentially, caprice or the unlimited use of power.”[634] She identifies the following arbitrary actions: a second inspection visit carried out by **SBS**; **SBS’s** omission to counter the rumors; impairment of the portfolio during the intervention; the reduction of **BNM’s** equity capital to zero; the lack of valuation of **BNM’s** equity when the decision to dissolve **BNM** was being made; and the irregular accounting practice applied by intervenors in order to justify the negative equity of the bank. Each of these events was

[632] Claimant’s Exhibit IV-9; Respondent’s Exhibit R-072.
[633] Memorial on the Merits, ¶ 743.
[634] Ibid., ¶ 745.

discussed earlier in this Award and nowhere did the Tribunal find arbitrariness, bad faith, coercion, abuse of power, injustice, absence of law, personal preference, or unlimited exercise of power by the Peruvian authorities.

454. **Peru** claims that the shareholders`s investment in **BNM** had lost its value before the Bank was intervened and that the Bank was already insolvent in June 2000. By the time of the intervention, **BNM** was not solvent and had such a liquidity crisis that it could no longer cover the checks it had issued or fulfill its obligations to its customers. Therefore, on December 5, 2000 **BNM**'s managers closed the bank hours before **SBS** intervened in **BNM**. According to **Peru**, because the investment was worth nothing, it had no economic value of which **BNM's** shareholders could have been deprived.[635] **Peru** adds that investors' vested rights are not absolute and unconditional, but are subject to limitations, and in the present case, all banks were subject to the same legal framework with which the shareholders of **BNM** should have been familiar.[636]

455. Mr. Arnaldo Alvarado, who oversaw the **PwC** audit of the annual financial statements of **BNM** from 1997 to 2000, made the following clear in his January 30, 2012 written statement on the audit procedure: audits begin in August or September with a discussion with the management of the company to plan the audit, and with a review of the company's internal financial controls and a review of the company's preliminary financial statements. In December, the auditors review the updated financial statements and this process is usually complete by the second quarter of the following year. The procedure follows the standards set in **SBS** regulations, otherwise the "International Accounting Standards" (IAS), as approved by the Accounting Standards Board [*Consejo Normativo de Contabilidad*], and, lastly, the "United States Generally Accepted Accounting Principles" (USA GAAP).[637]

456. During the preliminary review of **BNM**'s financial statements of 2000, **PwC** identified several problems showing that there were losses that **BNM** had not reported in

[635] Counter-Memorial on the Merits, ¶ 392.
[636] Ibid., ¶¶ 395 and 396.
[637] Witness Statement of Mr. Arnaldo Alvarado, January 30, 2012, Respondent's Exhibit RWS-003, ¶¶ 6, 10, and 12.

its financial statements. Among the problems identified were the following: discrepancies in classifying the risk of borrowers; lack of documentation for consumer loans and mortgage loans; refinanced loans recorded as current ("vigentes"); failure to properly value deteriorating investment assets; no inventory of fixed assets; deficit of loss provisions for recovered, but not yet sold, collateral assets; expenses that should be fully realized; inconsistency in accounting for debts owed to other banking entities; and need to reevaluate the "goodwill" from **BNM**'s merger with Banco del Pais. In total **PwC** identified unrecorded losses of S/. 121.5 million.[638] Mr. Alvarado also explained that the audit uncovered losses in addition to those identified during the preliminary analysis and the **SBS** Inspection Visit Report of August-October 2000.[639]

457. Mr. Alvarado specifically indicated in his first Witness Statement that:

> "PwC's audit identified extensive losses and recommended to BNM 'In Intervention' (that is, to the SBS intervenors) that those losses should be reflected in BNM's financial statements as of December 31, 2000. The SBS intervenors agreed with and implemented PwC's recommendations. In total, based on PwC's recommendations and the intervenors' implementation of those recommendations, the final financial statements showed that BNM had S/. -329 million in losses as of 31 December 2000."[640]

458. The **Respondent** explains that **BNM** could not continue to participate in the loan portfolio exchange program after it was intervened (paragraph 40 above) because it would no longer be able to reacquire the loans in the future (Article 4 of Supreme Decree 099-99-EF, which created the Loan Portfolio and Treasury Bond Exchange Program).[641] Therefore **BNM's** contract with the Government was terminated the day after the intervention and the loans were placed back onto **BNM's** balance sheet, along with the requirement to increase its loan loss provisions. The result of this was that S/. 65 million

[638] Ibid., ¶¶ 21 and 22.
[639] Ibid., ¶¶ 23 and 24.
[640] Ibid., ¶ 26.
[641] Respondent's Exhibit R-030.

was required to cover the risk of those loans.[642]

459. The **Respondent** further explains that, during its inspection visit of August-October 2000 to **BNM**, **SBS** only examined 58 percent of that Bank's loan portfolio, while **PwC** examined hereafter in the final audit of **BNM**'s financial statements of 2000, nearly all of **BNM's** documentation.[643]

460. The Tribunal notes that, in accordance with paragraphs 2.1 and 2.2 on page 14 and 2.1.1 and 2.1.2 on page 15 of the Applicable **SBS** Regulations in the Financial System for the Assessment and Classification of Debtors and Requirement of Loan Loss Reserves, restructured and refinanced loans are recorded in a higher-risk category.[644] Thus, additional loan loss provisions should be allocated to account for the risk of non-payment.[645] This is also in accordance with paragraph 4 of Article 132 of the Banking Law, a provision that enumerates several mechanisms to reduce the depositors' risks.

461. The **Respondent's** expert witness, Mr. Kaczmarek, exhibits in his report[646] the following tables showing the data from the **SBS** Inspection Reports that were issued from 1997 to 2000:

Table 6: Deficit in the Provisions Observed in SBS Inspections in 1997, 1998, and 1999

Calc.		1997	1998	1999
[A]	Number of Debtors in the Portfolio Evaluated	79	80	238
[B]	Number of Debtors Reclassified by SBS	14	38	127
[C]=B/A	Percentage of Number of Debtors Reclassified by SBS	18%	48%	53%
[D]	Total Loans Portfolio (in S/. '000)	862,188	1,480,408	1,661,165
[E]	Evaluated Portfolio (in S/. '000)	234,421	316,755	601,944
[F]=E/D	Percentage of Total Portfolio Evaluated	27.19%	21%	36%

[642] Counter-Memorial on the Merits, ¶ 36; Financial Statements as of December 31, 2000 and December 31, 1999, audited by PwC, Respondent's Exhibit R-080, pages 3 and 4.
[643] Counter-Memorial on the Merits, ¶ 37; Witness Statement of Mr. Arnaldo Alvarado, January 30, 2012, Respondent's Exhibit RWS-003, ¶ 10.
[644] Respondent's Exhibit R-023.
[645] Counter-Memorial on the Merits, ¶ 38; Respondent's Exhibit R-021.
[646] Expert Report of Mr. Brent C. Kaczmarek, January 30, 2012, Table 6, ¶ 99 and Table 8, ¶ 140.

[G]	Evaluated Portfolio Reclassified by SBS	29,725	138,576	296,880
[H]=G/E	Percentage of the Portfolio Evaluated	13%	44%	34%
[I]=G/D	Percentage of Total Loans Portfolio	3%	9%	12%
[J]	Total Additional Provisions Required by SBS	1,743	11,094	21,536
[K]	Total Provisions	14,587	27,229	46,877
[L]=K/J	Percentage of Increase Required by SBS	12%	41%	46%

Table 8: Review of Loan Portfolio by SBS

Calc.		**2000**
[A]	Number of Debtors in the Portfolio Evaluated	295
[B]	Number of Debtors Reclassified by SBS	141
[C]=B/A	Percentage of Number of Debtors Reclassified by SBS	**48%**
[D]	Total Loans Portfolio as of Jun-30-2000 (in S/. '000)	2,221,412
[E]	Evaluated Portfolio as of Jun-30-2000 (in S./'000)	1,288,386
[F]=E/D	Percentage of Total Portfolio Evaluated	**58%**
[G]	Evaluated Portfolio Reclassified by SBS	587,406
[H]=G/E	Percentage of the Portfolio Evaluated	**46%**
[I]=G/D	Percentage of Total Loans Portfolio Evaluated	**26%**

462. It is therefore clear from these tables that during the period 1997-2000 the number of **BNM's** reclassified debts grew.

463. The **Respondent** indicates that, to hide the impairment of its loan portfolio and avoid the requirement for increased loan loss provisions, **BNM** restructured troubled loans and recorded them as "current" loans.[647] The Tribunal confirmed in paragraphs 43, 44, 52, 60, 71, and 72 above that during the years 1999 and 2000 SBS had informed **BNM** of the existence of situations involving non-compliance with the applicable regulations (Circular B-2017-98 and Resolution SBS No. 572-97). In addition, in 1999 **BNM** was fined because in the 1997 and 1998 reports **SBS** found that **BNM** refinanced transactions not recorded as such in the accounts, but rather as new loans (paragraph 47 of this Award).

464. The **Respondent** states in its Counter-Memorial on the Merits that **BNM** used

[647] Counter-Memorial on the Merits, ¶ 38.

other tactics to hide the overdue loans in its loans portfolio. The first tactic was related to the "overdraft," through which a borrower of the Bank could charge repayment of its loan, even though the bank account had an insufficient balance. Thus, the overdue loans appeared as paid on time and the borrower's bank account had a negative balance equal to the amount of the unpaid loan.[648] The second tactic had to do with the leaseback operations, where **BNM** would purchase an asset from a delinquent borrower to cancel an overdue loan and then lease the asset back to the same borrower at terms that were similar to the original loan. This way, **BNM** was recording the overdue loans as closed and paid and the leasing operations as new and normal loans, thus removing risky overdue loans from its books.[649]

465. On October 12, 2000, **SBS** expressed to **BNM** its concerns as regards the refinanced operations classified as current loans and requested information on the corrective measures that would be taken; **BNM's** Risk and International Manager responded to that communication and accepted **SBS's** findings (paragraph 64 of this Award).

466. The **Claimant** indicates in her Reply on the Merits that her expert witness, Mr. Dujovne, stated that "Banco Nuevo Mundo was an institution with adequate levels of liquidity and solvency... showed a better performance than the industry average. Neither BNM indicators nor the performance of the SBS, nor its risk rating, nor the perception that sophisticated bank depositors held of the bank, support the hypothesis that this entity showed the problems that Mr. Powell (Peru's expert) suggested in his report."[650] The **Claimant** challenges the US$22.43 million loan loss provisions required by **SBS** at the end of October 2000, which amount is radically different from the US$220 million deficit in **BNM's** loan loss provisions according to **SBS** at the end of the 2000 accounting year.[651] She criticizes the method used by **SBS** during its visits, since that institution makes a 100 percent projection, but despite that method, in this case, **SBS** said it needed to intervene in **BNM** to appraise the portfolio based on 100 percent of **BNM's**

[648] Counter-Memorial on the Merits, ¶¶ 41 to 43.
[649] Ibid., ¶¶ 45 to 47.
[650] Reply on the Merits, ¶ 45; Expert Opinion of Mr. Dujovne, May 15, 2012, page 6.
[651] Reply on the Merits, ¶ 50.

portfolio.[652] She states that there was no technical basis for arguing that, with a trend based on the findings during **SBS**'s visit, it could not determine whether a bank was insolvent.[653] She also indicates, based on the words of her expert witnesses, Mr. Zapata and Mr. Leyva,[654] that "the 1998 and 1999 reports issued by **SBS** at no time warn[ed] about an impairment of **BNM's** equity placing it in a state of insolvency, let alone show any evidence that **SBS** adopted any measures on this regard."[655]

467. The **Claimant** also refers to the reports from the **SBS** visits of 1998, 1999, and 2000. Regarding the first report, the **Claimant** concludes that the provisions deficit was seven percent of **BNM's** equity, which did not affect **BNM's** financial strength.[656] With regard to the 1999 report, the **Claimant** further states that the reclassification of accounts made by **SBS** showed that the credit risk of customers with the largest debt owed to **BNM** was minimal and states that the effect on assets was covered by **BNM** and did not affect its operational capacity in the market.[657] As regards the April 2000 report, the **Claimant** contends that **SBS** did not detect discrepancies or increased provision requirements that could cause a deficit that would affect equity.[658] As regards the November 2000 report, she states that the provisions deficit identified by **SBS** had been "fully covered by BNM."[659] She claims that the deficit "did not entail in any manner whatsoever a situation of insolvency for **BNM**."[660] The **Claimant** concludes that these reports showed no evidence whatsoever that **BNM** was financially unviable or insolvent and that, according to the Accounting Audit Report prepared by her witnesses, Messrs. Jaime Vizcarra and Justo Manrique, **BNM's** "stock capital had grown at higher rates than the gross national product of Peru."[661]

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[652] Ibid., ¶ 52.
[653] Ibid., ¶ 54.
[654] Expert Report of Mr. Walter Leyva and Mr. Jose Zapata, May 10, 2012, ¶¶ 110 to 139.
[655] Reply on the Merits, ¶ 57.
[656] Ibid., ¶ 61.
[657] Reply on the Merits, ¶¶ 63 to 64; Expert Report of Mr. Walter Leyva and Mr. Jose Zapata, May 10, 2012, ¶¶ 127 to 129.
[658] Reply on the Merits, ¶ 66; Expert Report of Mr. Walter Leyva and of Mr. Jose Zapata, May 10, 2012, ¶ 150.
[659] Reply on the Merits, ¶ 72.
[660] Expert Report of Mr. Walter Leyva and Mr. Jose Zapata, May 10, 2012, ¶ 161.
[661] Reply on the Merits, ¶ 73; Expert Report of Mr. Jaime Vizcarra Moscoso and of Mr. Justo Manrique Aragon, May 28, 2012, ¶¶ 35-40.

468. In connection with the November 2000 **SBS** report, the Tribunal considers it necessary to reiterate that Mr. Jacques Levy, at the hearing on November 13, 2012, stated that he agreed with all the findings of **SBS** in that report.[662] In his statement he said: "When it was my administration, I agreed with the information and all the findings of the Superintendents, everything."[663]

469. **Peru** states that the **Claimant's** arguments set forth in her Reply on the Merits were based on financial data deliberately distorted to hide the true condition of **BNM**.[664] It notes that, although **SBS** examined only part of **BNM's** loan portfolio, it estimated that 57% of the loans of that bank were risky. According to the information provided by **BNM** to **SBS** only 25% of its portfolio was in such condition.[665] **Peru** affirms that: "[b]ecause BNM failed to record the appropriate amount of risky loans, BNM also failed to record the appropriate amount of loan loss provisions... As a result, BNM had been overstating its income. Not only do loan loss provisions have an immediate impact on a bank's income, they also impact a bank's capital. This is because a bank's capital can be increased by the amount of profit that the bank earns and retains as capital."[666]

470. **Peru** claims that "as a result of BNM's underestimating the riskiness of its borrowers and not registering the appropriate amount of loan loss provisions, BNM's self-reported income was inflated, and ... its self-reported capital was much higher than it should have been."[667] These findings, according to **Peru**, undermine the assertions of the **Claimant** and her experts, Mr. Leyva and Mr. Zapata. According to the information reported by **BNM** (and on which Mr. Leyva and Mr. Zapata relied in his report), that Bank "had a loan loss provision coverage of 100.7 percent as of June 30, 2000... thus Mr. Leyva concludes that BNM had loan loss provisions worth more than the value of its overdue loans and more than similarly sized banks."[668] However, **SBS** determined in its 2000 inspection that **BNM's** loan loss provision coverage was 62.4 percent, while the

[662] English Transcript, November 13, 2012, J. Levy at 336:17-22 and 337:1-4.
[663] Ibid., J. Levy at 352:19-21.
[664] Rejoinder on the Merits, ¶ 14.
[665] Ibid. ¶ 15.
[666] Ibid. ¶ 16.
[667] Ibid.
[668] Rejoinder on the Merits, ¶ 18.

average of similar sized banks was 88.4 percent coverage.[669]

471. In addition to **Peru's** arguments in the preceding paragraphs, the Tribunal considers it important to point out what **PwC** said on December 27, 2000, when it delivered its progress report on the audit performed:

> "In our preliminary evaluation of the Bank's portfolio at September 30, 2000, with a sample of 110 clients, we have determined discrepancies in the ratings of 52 debtors. This situation could create a provision deficit for loans at that date of approximately S/. 47,816,000."[670]

472. In this Progress Report, **PwC** also referred to several heads of loss, the total of which was fully detailed in Mr. Arnaldo Alvarado's first written witness statement of January 30, 2012, in which he pointed out **BNM's** total losses as of September 30, 2000 were S/. 121.5 million.[671]

473. The Tribunal concludes, in relation to the content of the preceding paragraphs, that **BNM** did not fully comply with the banking regulations of Peru concerning loan loss provision requirements, and that it is true that during the inspection visits by **SBS** officers from 1997 to 2000 the problems already indicated were detected. However, it was in the audit conducted by **PwC** (which began its relationship with **BNM** when the latter was operating under normal operating conditions and ended when the bank was intervened) in 2000 that the real value of the provisions and **BNM's** losses were able to be determined.

474. In view of the facts stated in the preceding paragraphs, the Tribunal concludes that the intervention was necessary because, ultimately, **BNM** breached its obligations and often violated the regulations contained in the Banking Law and other related legal provisions. While it is true that the Tribunal cannot state with certainty that **BNM** was bankrupt since June 2000, it is of the opinion that it is clear that, at that time, the bank

[669] Ibid.
[670] Respondent's Exhibit R-173.
[671] Witness Statement of Mr. Arnaldo Alvarado, January 30, 2012, Respondent's Exhibit RWS-003, ¶ 22; Respondent's Exhibit R-173.

was burdened with serious problems that **SBS** had been pointing out in its reports, which **PwC** substantiated and even confirmed the existence of other, bigger problems. Based on this evidence, the Tribunal concludes that in December 2000, **BNM** was not a solvent bank and that, in accordance with the Banking Law, SBS had to intervene in the bank. Subsequently, **SBS**, by way of **PwC's** audit, determined that **BNM** had losses of S/. 328,875,366.91 and it was therefore not possible for it to continue in the Special Transitional Regime. Given that the circumstances for rehabilitation were not present, **SBS** proceeded, also in compliance with the Banking Law, to the dissolution and liquidation of **BNM**.

475. In relation to the **Claimant's** claim that **BNM** was indirectly expropriated, this Tribunal agrees with the conclusion reached by another Arbitral Tribunal: "… in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation."[672]

476. The Tribunal is of the opinion that **SBS** intervened in **BNM** pursuant to the laws in force. Later, when it received the **PwC** audit report it ordered—also in accordance with the applicable law—the dissolution and liquidation of the bank. These were legitimate acts of "police power" characteristic of bank officials because, according to Article 2 of the Banking Law, the main purpose of the Law is "… to provide for the competitive, solid and reliable operation of the financial and insurance systems, so as to contribute to national development."

477. Relying on Article 5 of the **APPRI,** the **Claimant** argues that to carry out the expropriation legally, the Peruvian State should have enacted a law authorizing the expropriation of the investment, stating the public interest or necessity.[673] The Tribunal has carefully examined this argument and has concluded as stated in the following paragraph.

[672] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case ARB/03/19), Decision on Liability, July 30, 2010, ¶ 139.
[673] Memorial on the Merits, ¶ 809.

478. In the opinion of the Tribunal, it is not true that there was an expropriation in the case of **BNM**, as affirmed by the Claimant. What happened was a repeated non-compliance with the banking regulations by **BNM**, which moreover took risks in times of a considerable liquidity crisis that affected it, causing it to fail to perform its obligations and to close its offices. These acts made its intervention and subsequent dissolution and liquidation inevitable. As several Arbitral Tribunals have repeatedly pointed out, no investment treaty is an insurance or guarantee of investment success, especially when the investor makes bad business decisions.[674]

479. In view of the content of the preceding paragraphs, the Tribunal also considers unfounded the **Claimant's** arguments concerning "the permanent effects of the measure;" the "investor's legitimate expectations affected;" "the intent of the government measure;" and "the proportionality test of the measure."[675]

480. The **Claimant** has further stated that the actions of the Executive Branch, of **BCR**, and of **SBS** are not non-compensable regulatory acts under international law.[676] For the reasons set forth below, the Tribunal also considers that this argument is without merit.

481. The **Claimant** also questioned "…the effects on the investment caused by substantial change in baking [sic] regulations decided by the Republic of Peru."[677] She notes that the Banking Law is an avant-garde legislation, a modern legal framework but with the implementation thereof by the **PCSF**, "the Peruvian State inclined a level floor in order for larger banks to take over smaller banks, with the ensuing change of conditions that severely affected the equity of the investment."[678] She further stated, in relation to the **PCSF** "that this legislation intended to rearrange market competition in

[674] *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, November 13, 2000, ¶ 64; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award, May 25, 2004, ¶ 178; *CMS Gas Transmission Company v. Republic of Argentina* (ICSID Case No. ARB/01/8), Decision on Jurisdiction, July 17, 2003, ¶ 29; *Eudoro Olguín v. Republic of Paraguay* (ICSID Case No. ARB/98/5), Award, July 26, 2000, ¶ 73.
[675] Memorial on the Merits, ¶¶ 747 to 799 and 849 to 868.
[676] Ibid., ¶¶ 822 to 834.
[677] Ibid., ¶ 828.
[678] Ibid., ¶ 830.

favorable conditions for larger banks to the detriment of smaller banks, regardless of efficiency and competition considerations, we are before a violation of protection standards under international law."[679] The **Claimant** did not explain nor demonstrate the "substantial change in baking regulations" that she alleges. Nor did she prove that "the legislation intended" to favor large banks, regardless of market efficiency or how standards of protection were violated.

482. The **Claimant** argues that the type of relationship that must exist between international law and domestic law is important because the former has a role to play in controlling the legality of the State's actions under the criteria of proportionality and lack of arbitrariness. She also indicates that, in case of conflict, international law should prevail and that a State may not invoke the provisions of its internal law in order to evade its international responsibility.[680]

483. The Tribunal generally agrees with the ideas expressed by the **Claimant** summarized in the preceding paragraph but, in light of the particular facts of this case, concludes that there was no such conflict between the two legal systems, nor should any international liability for the facts presented by the **Claimant** be attributed to **Peru**. **BNM's** own breaches of the banking regulations led to **SBS's** intervention in the Bank. Once **SBS** had confirmed the improper accounting practices, it determined the total losses incurred by the bank and, according to the Banking Law requirements, its dissolution and liquidation were inevitable.

484. The **Claimant's** arguments are mainly based on her contention that there was a conspiracy on the part of the Peruvian authorities, which generally wanted the "smaller banks" of that country to disappear and, specifically, to harm **BNM** and its shareholders. Neither the oral or written arguments of the **Claimant** nor the evidence adduced by her have convinced the Tribunal of the existence of such a conspiracy. Besides, the Tribunal is of the opinion that it is illogical that the Government of Peru (or any government) would decide to take action to trigger or aggravate a financial crisis. The Tribunal simply

[679] Ibid., ¶ 844.
[680] Ibid., ¶¶ 835 to 839.

cannot be convinced that the actions taken by the **Respondent** intended to harm the stability of the financial system or the public's confidence in it. These alleged intentions by the Peruvian Government are even more unlikely in times of a financial crisis such as the one that existed in Peru when BNM faced its most severe problems.

485. In the preceding paragraphs, the Tribunal has examined in detail the **Claimant's** allegations of violations of the **APPRI** committed by Peruvian officials to her detriment. The Tribunal has found in all cases that the **Claimant** did not conclusively prove any of these accusations. In the following paragraphs, the Tribunal will refer to situations in which the Peruvian authorities, rather than harmed **BNM**, tried to help it.

486. Some of the actions of the **Peruvian** regulatory authorities, which were helpful to **BNM**, were:

a. On August 4, 1999, **SBS** authorized **BNM** to account for the "goodwill," arising out of the Bank's merger with Banco del Pais as an intangible asset to be amortized over a five-year term.[681]

b. On August 6, 1999, by Resolution 0715-99, based on Article 62 of the Banking Law that grants it discretion in the matter, **SBS** approved the capital increase of **BNM** through capitalization of the surplus from the revaluation of **BNM**'s headquarters.[682]

c. **SBS** authorized **BNM** to make provisions for doubtful debts, charged on its capital, for approximately S/. 28 million.[683]

d. On September 29, 1999, **SBS** authorized **BNM** (based on Articles 64 and 349 of the Banking Law that grants it discretion to do so) to reduce its capital by S/. 23,591,550, so that its level of provisions would be increased.[684]

[681] Memorial on the Merits, ¶ 218.
[682] Counter-Memorial on the Merits, ¶ 117; Respondent's Exhibit R-035.
[683] Respondent's Exhibit R-155, page 14.
[684] Counter-Memorial on the Merits, ¶ 121; Respondent's Exhibit R-038.

e. On December 15, 1999, **SBS** authorized **BNM** to participate in the Treasury Bonds Program, created by Supreme Decree No. 099-99/EF and Ministerial Resolution number 134-99-EF/77, up to an amount of US$34.5 million.[685]

f. As of November 13, 2000, **BNM** received from **BCR** to cover its reserve in foreign and national currency the average sum of US$67.3 million in twelve days and S/. 97.5 million in two days; moreover on December 4, 2000 (one day before the closing of **BNM**) the Bank was granted a loan of US$73 million to cover its reserve requirements in foreign currency.[686]

487. The above-mentioned actions disprove the **Claimant's** argument that the Peruvian authorities intended to harm **BNM**, its shareholders, and directors.

E. Conclusions Concerning the Problems of BNM

488. The Arbitral Tribunal has carefully assessed the oral and written submissions of the parties and the documentary and other evidence provided by them and came to the conclusions set out below. The bottom line is that, although there were several causes that led to the failure of **BNM** (including, and to a significant degree, the economic crisis in **Peru** during 1999 and 2000), it was ultimately the actions of its shareholders and employees that brought it to ruin.

489. In the following paragraphs, the Tribunal details some of the specific facts that, in its opinion, caused the collapse of **BNM**.

490. First, the fact that several restructured and refinanced loans were recorded in the current loan portfolio, which enabled **BNM** to record as income interest that had not yet been charged. This accounting mismanagement had been detected repeatedly since 1997

[685] Respondent's Exhibit R-046.
[686] Respondent's Exhibit R-123.

and caused **SBS** to impose a fine on that Bank.[687]

491. Moreover, the excessive concentration of public deposits put **BNM** in a vulnerable situation. **SBS** repeatedly warned the Bank's officials of this situation.[688]

492. On September 6, 2000, the directors of BNM partially removed various liens on properties of GREMCO (a construction company, the owners of which were shareholders of **BNM**) valued at US$20.4 million, which were collateral for a loan from **BNM**.[689] This fact was also acknowledged by Mr. Jacques Levy at the hearing.[690]

493. On December 1, 2000, just a few days before **BNM** was intervened, the Combined Ordinary and Extraordinary General Meeting of Shareholders of **BNM** agreed to remove some additional collateral involving other properties pledged by GREMCO for a loan from **BNM**.[691] This fact was also acknowledged by Mr. Jacques Levy at the hearing.[692]

494. **BNM** improperly included as income the interest not received from current accounts receivable frozen for periods longer than 60 days, in clear contravention of **SBS** Resolution Number 572-97. According to Memorandum 28-2000-VIO/NM of October 4, 2000 issued by Mr. Carlos Quiroz, Head of the SBS Inspection Visit, that inadequate accounting represented S/. -459,884,343 and US$-900,629.35.[693]

495. **BNM** favored companies associated with the shareholders of the Bank and fell into bad banking practices. According to Report No. 05-2002-VE/DESF "A" called "Case: Levy Group (formerly GREMCO) Loan Debt", prepared by Carlos Quiroz Montalvo, Head of the Inspection Visit, Norma Talavera Arana, Analyst, and Alfonso

[687] Respondent's Exhibit R-143, ¶¶ 15 and 16; Claimant's Exhibit IV-6, page 3; and Respondent's Exhibit R-080, page 13.
[688] Respondent's Exhibit R-143, ¶ 1.5.13; Respondent's Exhibit R-157, page 2; Respondent's Exhibit R-065, page 18; Respondent's Exhibit R-067, ¶ 6.
[689] Respondent's Exhibit R-191, ¶ 7.
[690] English Transcript, November 13, 2012, J. Levy at 358:22 and 359:1-17.
[691] Respondent's Exhibit R-191, ¶¶ 8 to 12.
[692] English Transcript, November 13, 2012, J. Levy at 360:17-22 and 361:1-2.
[693] Respondent's Exhibit R-277.

Villanueva Velit, Analyst, dated July 12, 2002, **BNM** was the main source of funding for the group of companies and as of December 5, 2000, the debt amounted to US$27,594,000. That report states, inter alia, that GREMCO´s assets under financial lease **BNM** did not require "technical reports of independent appraisers... for the assets ... granted under leaseback operations; hence it has not been possible to actually know the real value of those assets."[694] Another similar irregularity was confirmed at the hearing by Mr. Carlos Quiróz Montalvo, Head of the **SBS** Inspection Visit, who indicated that the GREMCO lands had been overvalued for purposes of using them as loan guarantees given by **BNM**. [695]

496. **BNM** also favored companies associated with its shareholders through a real estate fund: in late August 2000, **BNM** had 944 bonds with a nominal value of US$944,000.00 in the Real Estate Multi-Income Investment Fund, dedicated to real estate investment in Peru. The management company was Multifundos SAFI S.A. In October 2000, **BNM** purchased 20,426 participation shares for the value of US$2,829,000 from **NHM**.[696] All real estate purchased by the Fund belonged to GREMCO S.A., except for Bembos Commercial Premises.[697]

497. Mr. Roberto Meza Cuenca, General Manager of Multifondos SAFI, was also serving as Manager of Leasing (a department of **BNM**) in October 2000, but did not indicate this fact in his written statement of May 17, 2012.[698] This double position of Mr. Meza contradicts the response that Mr. Edgardo Alvarez, Business Manager of **BNM**, gave on September 25, 2000, when he sent a communication to Mr. Carlos Quiroz from the **SBS**,[699] telling him that the Fund was independent, financially and administratively, from **BNM**. Besides, it casts doubts, in the Tribunal`s opinion, about the transparency of the Funds administration with respect to **BNM**.

[694] Respondent's Exhibit R-195, pages 1 and 7.
[695] English Transcript, November 15, 2012, Montalvo at 719:3-6.
[696] SBS Report No. 02-2002-VE/DESF "A," Respondent's Exhibit R-192, ¶ 10.
[697] Ibid., ¶ 15.
[698] English Transcript, November 14, 2012, page 712; Respondent's Exhibits R-268 and R-282 and Claimant's Statement of May 17, 2012.
[699] Respondent´s Exhibit R-276.

498. **BNM** increased its lending during the crisis in Peru. The produced evidence shows that in 1999 **BNM's** lending rate was much greater than that of the other banks in Peru.[700]

499. The merger of **BNM** with Banco del País caused **BNM** problems; the minutes of **BNM's** Board Meeting, number 105 of October 25, 1999 state:

"the accounting and financial records of Banco del País, and in particular its loan portfolio figures did not clearlry reveal economic and financial situation.

Furthermore... it had been established that should a loss arise from false or incorrect information, each party must assume its respective loss or, failing that, reduce its share of stock."[701]

As a result of the decision, **BNM** requested that **SBS** authorize a reduction in its share capital and the authorization states:

"Since it is necessary to strengthen the level of reserves of Banco Nuevo Mundo, the General Assembly of Shareholders, held on August 31, 1999, agreed to reduce its share capital by the amount of S/. 23,591,550..."[702]

500. Apart from the above-mentioned facts the Arbitral Tribunal considers that some of the leading officials of **BNM** acted negligently or took improper actions in managing that bank and its relations with the Peruvian authorities. The Tribunal previously adverted to the lack of seriousness with which they treated the recommendations given to them by **SBS**. One other fact that confirmed the Tribunal's opinion was the statement of Mr. Edgar Choque de la Cruz, who held the post of **BNM's** General Accountant (a key officer in any bank). When asked about the relevant documents issued by **SBS**, he said repeatedly (six times) that he was not aware of them because they were confidential or

[700] Respondent's Exhibit R-297, page 1.
[701] Respondent's Exhibit R-146.
[702] Respondent's Exhibit R-038.

were addressed to the Directors of **BNM**.[703] It is clear to this Tribunal that Mr. Choque acted with great negligence and that the organizational structure of **BNM** was very poor, which undoubtedly contributed greatly to its collapse.

501. The handlings described were clearly contrary to the best banking practices and violated Peruvian regulations in this matter. In the opinion of the Tribunal, these improper actions were the root cause of the collapse of **BNM**.

502. The Tribunal finds it necessary to refer to the following: In her closing arguments, the **Claimant** challenged the testimony of Mr. Luis Cortavarría, SBS Superintendent, for his relationship with Mr. Carlos Boloña Behr, who was penalized under the criminal law in Peru. At the hearing, counsel for the **Claimant** said: "Mr. Carlos Boloña Behr, the Minister of Economy, is closely linked to Mr. Cortavarría... when Mr. Carlos Boloña was appointed Minister of Economy, Mr. Cortavarría was appointed superintendent...in our view, there is a link of confidence between these two individuals."[704]

503. Conversely, the **Claimant's** counsel also stated at the hearing: "Mr. President, here we are not questioning the personal appropriateness of the other officers in the hierarchical structure of the SBS. What we are questioning is their professional aptness or skill."[705]

504. The Tribunal has carefully reviewed the matter and concluded that there is no reason to doubt the adequacy and integrity of officials of **SBS,** since no evidence was presented in the arbitral proceedings that would lead to the opposite conclusion.

F. Claims for Damages and Moral Damages

505. The **Claimant** sought payment of damages allegedly suffered by her and further requested that **Peru** compensate her for moral damages. The **Respondent** requested that

[703] English Transcript, November 14, 2012, Choque at 578:8-22, 579:1-15, and 602:1-18.
[704] English Transcript, November 20, 2012, Paitán at 1593:11-19.
[705] Ibid., Paitán at 1594: 9-13.

Claimant compensate **Peru** for moral damage, which, in its words, it suffered.

506. Given that the Tribunal will reject the **Claimant's** arguments about violation of the standards of fair and equitable treatment and national treatment, as well as those concerning the obligation of full protection and security and indirect expropriation, the Tribunal will inevitably deny the **Claimant's** claims for damages and for moral damages.

507. **Peru** requested that the Tribunal "award it moral damages for the injury inflicted on **Respondent** by **Claimant** in the course of this dispute."[706] According to **Peru** "[n]ot only have BNM's former shareholders (and now, **Claimant**) abused the administrative and judicial processes available to them, but they have attempted to inflict serious harm on the Respondent's reputation and the legitimacy of its response to Peru's financial crisis."[707]

508. The **Respondent** explained that the shareholders of **BNM** abused the administrative and judicial processes available to them by bringing six claims against **Peru** over ten years, prompting two investigations by the Peruvian Congress, and initiating a lawsuit against the Superintendent in the State of New York. It also argued that they conducted a media campaign aimed at undermining the credibility of the **Respondent** and tried to block the adoption of the Free Trade Agreement between Peru and the United States of America. With all these actions the sharedolders of BNM caused an enormous moral damage to **Peru**.[708]

509. In the opinion of the Tribunal, the fact that shareholders of **BNM** submitted six or more complaints before various courts or took other actions in Peru does not constitute per se an abuse of the administrative or judicial processes. As for the media campaign, the **Respondent** refers to the publication of articles and interviews given to various media by shareholders of **BNM**, and to Mr. Jacques Levy's book.[709] The Tribunal notes that neither Mr. Levy, nor **BNM**, nor its shareholders are part of this arbitration

[706] Counter-Memorial on the Merits, ¶¶ 431 et seq.
[707] Ibid., ¶ 435.
[708] Ibid., ¶¶ 436 to 439.
[709] Respondent's Exhibit R-210.

proceeding. In relation to the last argument of the **Respondent** on the alleged attempt to block the adoption of a treaty with the United States of America, the **Respondent** has not demonstrated what concrete actions of the **Claimant** it is complaining about, what damage this alleged action caused to **Peru,** and how it is linked to the issue discussed in these proceedings.

510. In view of above analysis, the Tribunal will also reject the **Respondent**´s request to order the **Claimant** to pay for the moral damage it allegedly suffered.

XI. COSTS

511. Each party requested that the Tribunal order the other one to pay its costs and expenses in relation to this case, and to compensate it for moral damages.

512. Article 61(2) of the ICSID Convention provides:

"In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

513. At the first session between the parties and the Tribunal held on March 21, 2011, the following was established:[710] "The parties shall defray the direct costs of the proceedings in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs."

514. On February 21, 2013, both parties filed their submissions on costs. Claimant's costs amount to a total of US$2,229,829.61, including legal and expert fees, and ICSID advances. Respondent's costs amount to a total of US$5,238,568.81 including legal and

[710] English Transcript, March 21, 2011, at 12:4-17.

expert fees and ICSID advances. [711]

515. Neither the ICSID Convention nor its Rules or Regulations provide guidance as to the criteria to be used by the Tribunal when allocating costs between the parties. There is no uniform practice of Tribunals when allocating costs.[712] Some tribunals have followed the "loser pays all" approach whereby the costs follow the event.[713] Others have awarded costs to one party on the basis of the other party's conduct during the proceeding;[714] while other tribunals have divided the costs and expenses equally among the parties.[715]

516. For the reasons discussed extensively above, the Arbitral Tribunal shall deny both parties' requests for moral damages.

517. In regards to the parties' requests on costs, both sides have repeatedly indicated that, from 1999 to 2000 Peru was hit with a financial crisis. The Tribunal considers that, although the bankruptcy of BNM was caused by its own administration, it was also influenced by the economic context in Peru. The Tribunal also found in paragraph 500 of this Award, that some of the leading officials of **BNM** acted with negligence or took improper actions in managing that bank and its relations with the Peruvian authorities.

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[711] At the time of the parties' submissions on costs, ICSID had requested three advances. On June 24, 2013, ICSID requested a fourth advance of US$150,000 from each party. Thus the amounts have been adjusted by the Tribunal to reflect this final call for funds.

[712] Schreuer, *supra* note 172, page 1229.

[713] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award, October 2, 2006; *Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation* (ICSID Case No. ARB/92/2), Award, May 4, 1994, 5 ICSID Report 4; *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment, June 29, 2005; *Telenor Mobile Communications AS v. Republic of Hungary* (ICSID Case No. ARB/04/15), Award, September 13, 2006.

[714] *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Award, January 6, 1988, 4 ICSID Reports 61; *Zhinvali Development Ltd. v. Republic of Georgia* (ICSID Case No. ARB/00/1), Award, January 24, 2003, 10 ICSID Report 3; *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award, September 16, 2003.

[715] *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Award, November 20, 1984, 1 ICSID Report 413; *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award, April 30, 2004; *Consortium R.F.C.C. v. Kingdom of Morocco* (ICSID Case No. ARB/00/6), Award, December 22, 2003; *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Award, March 9, 1998. In *Robert Azinian and others v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, November 1, 1999, the Tribunal considered the possibility of awarding costs as "[t]he list of demonstrably unreliable representations made [by the Claimants] before the Arbitral Tribunal is unfortunately long" and "[t]he credibility gap lies squarely at the feet of Mr Goldenstein, who without the slightest inhibition appeared to embrace the view that what one is allowed to say is only limited by what one can get away with." However, ultimatley, the Tribunal decided to divide the costs equally, mainly acknowledging the fact that the investor-State dispute settlement mechanism was a novel system, ¶¶ 125-126. This is no longer the case here.

Furthermore, the Tribunal denied both parties' request for moral damages. For these reasons, the Tribunal finds that it is fair and appropriate that Claimant should pay its cost associated with this arbitral proceeding, the costs of ICSID and the fees and expenses of the arbitrators. Respondent shall bear its own costs and expenses. So will be ordered in the operative part of this Award.

XII. DISSENTING OPINION OF PROFESSOR JOAQUIN MORALES GODOY

518. Professor Morales has appended a Dissenting Opinion in which he explains his points of disagreement with the Majority's findings in this Award.

XIII. DECISION

519. For the foregoing reasons, the Majority has decided:

i. To declare that it has jurisdiction over the present dispute;

ii. To dismiss in its entirety the arguments brought forward by Ms. Renée Rose Levy de Levi in her written and oral submission against the Republic of Peru;

iii. To reject the request of the Republic of Peru that compensation be granted for moral damages allegedly suffered as a result of the Claimant's actions;

iv. To reject the request of the Claimant that compensation be granted for moral damages allegedly suffered as a result of the Republic of Peru's actions

v. Ms. Renée Rose Levy de Levi shall pay her own costs and fees associated with this arbitral proceeding, the costs of ICSID and the fees and expenses of the arbitrators. The Republic of Peru shall bear its own costs and expenses.

Prof. Bernard Hanotiau
Arbitrator
Date: 30.1.2014

Prof. Joaquín Morales Godoy
Arbitrator
Date: 7.2.2014

Mr. Rodrigo Oreamuno B.
President of the Tribunal
Date: 14-2-2014