

## DISSENTING OPINION

### I. GENERAL REMARKS

1. First of all, this dispute is a very complex case of investment in the Peruvian financial sector, which has been ongoing for about three years. Regardless of my recognition of and respect for my renowned colleagues and upon a serious and responsible analysis, I could not find a common position on how my colleagues have construed the facts and the law to dismiss Claimant's complaint about Peru's liability for compliance with international obligations under the Bilateral Investment Treaty executed between the Republic of Peru and the Republic of France (hereinafter, indistinctively, APPRI).

2. Pursuant to Article 48(4) of the ICSID Convention, I hereby issue a dissenting opinion on the merits, which is herein detailed and grounded. Notwithstanding, I agree with the decision on jurisdiction included in the Award.

3. Indeed, I disagree with all the answers from my colleagues as regards the analysis and weighing of the facts, as well as the appraisal of documentary and testimonial evidence. Not only because I believe they have misread and misunderstood the facts in terms of banking and monetary regulation, and they failed to understand the auditing methods and the effects of the Respondent's failure to submit the evidence required by the Tribunal, but also because they have failed to state the grounds for putting aside equally important and relevant documentary and testimonial evidence questioning the essence of the Respondent's arguments in my colleagues' conclusions, with a view to disregard the elements that amount to violations of the standards of Fair and Equitable Treatment and National Treatment.

4. Generally, disagreements arise in these proceedings that individually would not have motivated me to express a dissenting opinion, but I think that the factual and legal analysis is so inaccurate and inconsistent in both legal and accounting terms that I have no choice but to express my disagreement based on my experience and knowledge. In my opinion there has been no thorough and well-grounded weighing of documentary and testimonial evidence, as well as an absolute lack of motivation in settling the claims. So much so that "the reasoning" of point A to point B could not be followed—which I will explain in my dissenting opinion—but my colleagues' approach has been to take for granted all the Respondent's documents and testimonies concerning the absence of liability of SBS and BCR for the externalities resulting from the transitory liquidity problems of BNM in 2000, which eventually frustrated the investment of a protected investor.

5. First, the absence of an explanation on the Claimant's request for Inference on the Respondent's failure to provide information on BNM's "commercial portfolio", despite the fact that this is the basis for arguing BNM's insolvency and qualifying it as "junk portfolio", but which was not made available to this Tribunal upon request to the Respondent. The same happens with the failure to provide information on monetary rediscounts granted by BCR to other banks in November and December 2000, when BNM's request was rejected, which was not made available by the Respondent to this Tribunal either. As regards the foregoing, I fail to understand the reasons of the majority vote failed to consider the provisions of Rule 9.5 of the IBA Rules on the Taking of Evidence in International Arbitration.

6. Also, as for the acknowledgement of PriceWaterhouse Coopers (hereinafter, PwC) on the inexistence of “window dressing” in BNM’s figures, another main argument of the State on the insolvency and underperformance as of December 5, 2000, I am surprised that despite the certainty of the accounting information, there is an apparent lack of motivation by my colleagues in disregarding balance sheets and financial statements that would prove BNM’s solvency as of December 5, 2000, as well as the information available to the public on SBS website, including PwC’s audit reports and findings on the liquidity, solvency and proper management indexes published in the 2000 Reports of Risk Rating Agencies based on accounting records.

7. Second, I cannot accept that SBS bears no responsibility for countering rumors and financial panic against BNM, having actively intervened in favor of other banks on those dates. The lack of a technical criterion to decide that BNM was not a comparable bank in the analysis of the National Treatment standard, based on adjectives to determine whether or not it was a “small bank”— adjectives that do not fit into an analysis that should be based on economic indexes provided by SBS as to market share, loan portfolio and customers in common with the other banks. Likewise, the absence of State liability for the withdrawal of funds by public companies, despite the evidence that the bidding process thereof was part of a State policy to tackle the 1998 crisis.

8. Lastly, the BCR’s role as ultimate lender of Peru, when BNM did provide collateral by means of leased assets for the monetary rediscount requested on December 5, 2000, which was rejected for no reason. The majority believes that the lack of guarantees by BNM is evident, which is inconsistent with BCR’s documents addressed to SBS.

9. Given the complexity of the case, I shall describe the facts as objectively and thoroughly as possible and not in a fractioned way. I intend to create a timeline of all the circumstances around the dispute brought before this Tribunal and thus be true to all relevant facts. I shall then share my dissenting opinion on the merits in the analysis of the Fair and Equitable Treatment and National Treatment standards.

## II. DISSENTING POSITION ON THE FACTS

10. The Respondent ratified the ICSID Convention on August 9, 1993; the Convention entered into force on September 8, 1993.

11. The Respondent approved APPRI by the Presidential Decree No. 4-94-RE, published in the Official Gazette El Peruano on March 13, 1994. This Bilateral Investment Treaty entered into force on May 30, 1996.

12. 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.

13. 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. (Panamá).

14. 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 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 (Herschkowitz Grosman family)...” [Tribunal’s translation.]

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

16. 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 Pessa, 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 Pessa as shareholder in any future overseas investment companies that may purchase the Corporación XXI Ltd.’s shares of stock in any family business.”

17. 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 approved the merger. This merger created a goodwill of S/. 47 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 recorded as a credit to a [sic] especially reserved account within net equity.” 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.

In relation to this merger, Apoyo y Asociados stated that “the development of their product portfolio during its seven years of operation and the recent merger with Nuevo Mundo Leasing and Banco del País, have enabled (BNM) to rank sixth in placements and deposits.”

18. 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 Economy and Finance Ministry.” 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 . . . .” 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 controls and, if applicable, a commitment to make capital contributions in cash.”

19. 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.

20. 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 that were at that time known to the management of BNM:

“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.”

...In the list of debtors attached to the Inspection Report, it can be noted that 50% of the 127 discrepant risk ratings shows a discrepancy of just one category. This discrepancy is related to credits rated as Normal, which should have been classified as having potential problems (CPP, for its Spanish acronym). Pursuant to the Risk Rating Regulations, CPP is the second lower-risk category.

21. The 1999 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.
- 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."

22. 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 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 Superintendence, 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."

23. 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.”

24. In the 1999 Report, SBS also noted the concentration of BNM’s assets and recommended “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.”

...In the 1999 Report, SBS concludes;

“...the general management’s responsiveness to implement the recommendations is remarkable—a situation we deem acceptable for the purposes of changing and reinforcing internal controls—which will eventually result in good governance practice”

In June 2000, the Report of the Risk Classification Firm Apoyo stated that “as regards delinquency of the loan portfolio, there is no evidence so far on the improvement of delinquency ratio in the entire financial system due to the economic recession, and therefore such ratio kept on growing to 10.05% by the end of June [2000], higher than the 8.33% reached by the end of 1999. This ratio incorporates the reserves worth USD 310.9 million.”

“It should be noted that the bank’s increased delinquency has not affected the classification of the portfolio, since the portfolio has grown with the new placements classified as normal.”

25. 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 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.”

... The Resolution does not impose a serious penalty, but resolves as follows: “First, Banco Nuevo Mundo shall be charged with a fine in the amount of 20 Tax Units (*Unidad Impositiva Tributaria*, UIT, for its Spanish acronym) [i.e. S/.56 thousand or USD 20 thousand approximately] for the reasons stated in the preamble...”

26. 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.” On August 6, 1999, the merger with Banco del País was approved by means of SBS Resolution No. 076-99, stipulating as follows: “said companies

have submitted the supporting documentation referred to by SBS Resolution No. 514-96 TUPA and that this Superintendence finds satisfactory. This was informed by the Department of Evaluation of the Financial System "A" by means of Report ASIFA123-OT-99, with the favorable opinion from the Deputy Superintendence of Legal Advice"

27. 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." The letter also referred to refinanced loans and stated: "The accounting has been brought up to speed for loans considered by the Superintendence 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 Superintendence during the last visit."

... The letter further stated that BNM had "(p)roceed(ed) to make new provisions, additionally, for improvements of procedures, strengthening the Risk Committee." "The Bank directed the modification of the procedures to constitute the Executive Committee in order to avoid conflict of interests."

28. 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). 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..." 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 at the beginning of 2001.

29. 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"). The parties discussed the type of visit conducted on those dates. 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..." [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 Superintendence 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. The SBS 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. 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 previous Report were pending or in process of implementation. 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.” [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.

The SBS Report of April 2000 further states: “In August 1999, SBS approved the merger of BNM with Banco del País, Nuevo Mundo Leasing and Coordinadora Primavera, with the first absorbing the other entities. As a result of this merger, the issuer increased the total value of its equity and improved its status in the market.”

...Additionally, this Report also states that “BNM has created the Nuevo País division, engaged in consumer banking, with a portfolio of approximately 42 thousand customers and which operates with the independence necessary to operate efficiently.”

...Lastly, it notes that “The management of the bank’s portfolio has allowed it to position itself seventh in the system in terms of loans granted, as well as the deposits received.”

31. 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 Superintendence showed that 44.7% of what has 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."

As a consequence of the observations made in the SBS Report of April 2000, SBS imposed a fine on BNM by means of SBS Resolution No. 312-2000 on May 2, 2000, stating as follows: "FIRST. Banco Nuevo Mundo shall be charged with a fine in the amount of S/1,426 [USD 400 approximately]."

32. In response to the communication from SBS, its Executive Chairman sent a letter on October 26, 1999 explaining that "As of today, we can state that the issue has been resolved because the liability of the three companies mentioned falls within the legal limits, which addresses the recommendation made by the Superintendency."

33. On June 30, 2000, Class & Asociados stated:

As to BNM's portfolio, Class & Asociados concluded:

#### "II.4 QUALITY OF ASSETS

The financial and economic circumstances of the economy have made it difficult for several important customers of the bank to meet their obligations (...). BNM experiences a deterioration of its portfolio, presenting by the end of the first semester of 2000 a portfolio that was overdue and refinanced equivalent to 7.19% of its total loans, lower than the average shown by the financial system, which is 11.59%."

According to Apoyo & Asociados, in June 2000, BNM's Normal portfolio was 79.1%, higher than the average of 63.8%. Up to 91.2% of the portfolio was [sic] comprised by the first two categories (Normal and CPP). The critical portfolio (Deficient, Doubtful and Loss) accounted for 8.8% of its portfolio, lower than the average 16.1% (Apoyo Report, Exhibit I-2).

"As regards the delinquency of the loan portfolio, to date, there is no evidence of an improvement of the delinquency ratio in the entire financial system due to the economic recession, and thus this delinquency ratio's rising trend continued, with the system reaching a delinquency ratio of 10.05% by the end of June, higher than the 8.33% reached by the end of 1999, a ratio which incorporates the reserves worth USD 310.9 million."

[...]

Moreover, while the debt portfolio increased by 79% in the first semester, the delinquency ratio rose to 57.8%, lower than the figure recorded by the financial system, but higher than the 3.92% of the end of 1999. Refinanced loans featured a similar trend, increasing by 131% and thus representing 3.92% of all collaborations (6.70% for the system by the end of June 2000)."

#### "III.2. MANAGEMENT

III.2.1. Policy and Procedure Manual.

Comment. The policy and procedure manual is permanently subject to an amendment process as a result of the regulations issued, especially those related to risk management and consumer loan operations.”

34. Starting in July 2000, State companies began to withdraw funds from BNM.

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

36. 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 Pessa.

37. Starting in August 2000, the withdrawal from BNM of privately-owned deposits reached over US\$70 million.

38. 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. 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 indicators, and a stable environment for the growth of the business.” 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.” 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.”

...

The Report of Class & Asociados on Management stated as follows: “during the first semester of 2000, the bank underwent an organizational restructuring process aimed at reinforcing the risk unit and the special business division, as well as the very structure of the bank, to better handle current problems in order to achieve the objectives set.

...

Participation of shareholders in Management. Positive. Comment. There is direct participation of the bank’s shareholders through the board of directors (...) in that regard, shareholders, as a member of the board of directors, establish future objectives and basic management standards of the entity. Action plans and their performance are evaluated at the managerial level, which is then reported to the board of directors. In this way, the bank’s needs are not directly related to its shareholders’ interests.”

...

In the last inspection visit, SBS stressed the lack of a Policy and Procedure Manual for management of credit risk. Currently, there are policies and procedures in place for analyzing and granting loans, but they have not yet been unified in a single document, which does not mean that they are not applied or used.”

...

Thus, the process for granting loans is initiated by the Business Division, which has direct contact with the bank's customers. Its role is limited to submitting loan proposals subject to evaluation, approval, rejection or delegation to the analysis department, the latter having full decision-making autonomy."

39. CLASS & Asociados uses actual evaluation methods, rather than assumptions like SBS, for the same period under analysis. By June 2000, the situation of the Bank remained stable.

"

II.2 SOLVENCY					
Main Indicators	1996	1997	1998	1999	June-00
Tolerance to Loss	7.43%	7.37%	8.33%	10.45%	9.98%
Economic Indebtedness	12.46	12.57	11.00	8.57	9.02
Leverage Ratio (Basel)	10.87	10.02	9.50	9.04	8.95
Global Leverage Ratio				9.08	9.04
Comment: Since the previous year-end closing, the bank's economic indebtedness has shown a growing trend, whilst there have been no material changes in its equity capital. This behavior is supported mainly by the 13.2% increase in liabilities payable over the course of the year. Had it not been for the significant increase in provisions for loan losses, as a consequence of the considerable increase in the overdue and refinanced portfolio, [sic] BNM's economic debt.					

According to Apoyo, same paragraph.

In late June, the equity (S/. 229.2 million) accounted for 8.56% of total assets, a lower share than that recorded as of December 1999 (9.79). Thus, the Bank's accounting indebtedness rose over the level recorded in December 1999 from 9.21 to 10.68. However, the global parking index fell from 9.08 to 8.57 in the same period, basically due to a reduction of risk-weighted assets, since the increase of the Bank's assets was mainly recorded among very low-risk assets."

...

APOYO Classification stated:

"As regards liquidity ratios, a marked improvement was noted by late June following an adjusted liquidity during the month of December. The total available funds rose to S/.373.2 million, 54% higher than that recorded by the end of 1999.

Moreover, concerning the liquidity ratios required by SBS, there was also an improvement. In June, the Bank recorded an average ratio of 10.80% in national currency and 22.74% in foreign currency, higher than the 8%

and 22.6%, respectively, by late 1999. Its greater liquidity allowed the Bank to hold a net interbank loan placement position.”

40. 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. After this increase, BNM’s equity capital rose to S/.180 million.

41. 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. 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 classifications can be overcome.”

42. 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)...” 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.

43. 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. 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 leaseings 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).

44. During October 2000, BNM engaged in negotiations to acquire Banco Financiero. On this transaction, the Congressional Subcommittee stated:

“4.18) The Superintendency of Banks and Insurance noted that Banco Nuevo Mundo was taking steps and negotiations to acquire Banco Financiero (...). In order to materialize this operation and its financing, Banco Nuevo Mundo had agreed with Bank of America Securities LLC on the structure of the operation and its

financing, as evidenced by the engagement letter dated 01.12.99, signed by both parties and supplemented with the 'Preliminary Evaluation of the Merger of Two Banking Entities, the preparation of which was entrusted to Grupo Apoyo Consultoría."

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

46. 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." 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.

47. Based on the public information produced by SBS, BNM's relative position in the banking system was as follows:

<b>Créditos Vencidos y en Cobranza Judicial / Colocaciones Brutas</b>	
LATINO (1)	21.10
SANTANDER CENTRAL HISPANO	14.65
DE CREDITO	11.79
INTERBANK	11.33
DE COMERCIO	10.31
WIESE SUDAMERIS	9.90
STANDARD CHARTERED	9.12
NBK BANK	8.62
FINANCIERO	7.82
NUEVO MUNDO	7.46

The ratio of Loans that are Overdue and Subject to Judicial Collection to BNM's total Gross Loans was lower than that of other Banks indicated, with BNM showing better indicators than the system's average.

<b>Provisiones para Colocaciones Moneda Extranjera / Colocaciones Atrasadas Moneda Extranjera</b>	
NUEVO MUNDO	79.08
LATINO (1)	76.71
DE COMERCIO	75.97
SUDAME-RICANO	71.41
CITIBANK	69.58
SANTANDER CENTRAL HISPANO	64.41

BNM's ratio of provisions to its overdue portfolio shows a higher-than-average indicator.

<b>Reservas / Capital Social</b>	
NUEVO MUNDO	32.35
STANDARD CHARTERED	31.49
INTERBANK	29.88
SANTANDER CENTRAL HISPANO	6.96
NBK BANK	6.55
FINANCIERO	5.32
SUDAME-RICANO	5.00
INTERAMERI-CANO DE FINANZAS	4.61
CITIBANK	4.10
LATINO (1)	-
DE COMERCIO	-

The indicator of existing reserves in relation to BNM's share capital describes a better position than that of the rest of the System.

48. 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, for 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."

49. On November 22, 2000, Mr. Jorge Mogrovejo González, Assistant Superintendent for Risks, 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." [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." [Tribunal's translation.]

...

...As for liquidity indicators, information reviewed and published by SBS on the financial statements for the whole banking system shows that cash-bank ratios among BNM's immediate obligations as of June 2000 provide a liquidity indicator that is better than the average of the system.

50. 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)."

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

51. 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 Superintendence 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)." [Tribunal's translation.]

52. 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 by the Supreme Decree 099-99-EF for S/. 13,038,000 and 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."

53. 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."

54. In view of the findings described above, the Inspection Report of November 2000 presents a scenario where the bank's equity has been impaired, namely: "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/.57,300 ,000, incorporation of the portfolio corresponding to DS 099-99-EF that would result in an additional deficit of S/.59,813,000 and finally goodwill for S/.45.138 Million, effective equity would rise to S/.114.4 million, meaning that the Bank would require capital of S/.111.5 million "USD 32 million" in order to be

able to achieve a leverage ratio of 10 that would enable it to perform under normal conditions.” [Tribunal’s Translation]

55. Upon analyzing the situation of the banks in the financial system and the SBS inspection visits of several banks between 1997-2000, the Congressional Investigation Committee of the Republic of Peru determined that, as a result of the crisis context, they had identified some common observations in the System.

56. On December 27, 2000, PwC included in its Progress Report the comment made by BNM’s management on compliance with the increase of provisions, specifically: “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 visit No. DESF “A”-168-VI/2000 dated November 27, 2000.” [Tribunal’s Translation]

57. In the course of the merger with Banco Financiero, SBS conditioned the continuation of the merger upon a capital increase. 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 Superintendence in the last few weeks, we hereby submit our proposal to perform a significant 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.”

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

...The SBS did not take into consideration the fact that BNM’s proposal considered a short-term conversion into cash of the contribution of the land, with the participation of an important investment bank [Salomon Smith Barney].

58. 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.

59. On November 27, 2000, Emergency Decree No. 108-2000 was promulgated, creating the Financial Industry Consolidation Program (PCSF). 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.” In the final part of the Decree, the PCSF stated as follows: “the enforcement of conflicting provisions shall be suspended.”

60. On December 1, 2000, CONASEV authorized the listing, registration and quotation of Class A and Class B Shares of BNM in the Lima Stock Exchange Register.

61. On December 1, 2000, several emails (the Tribunal could not ascertain the identity of the sender) announced the intervention of BNM and suggested that depositors should withdraw their money from the Bank.

62. On January 21, 2002, the Congress of the Republic of Peru issued a Report in regards to SBS' knowledge of the rumors, concluding: “the superintendent of banking failed to support before this subcommission the reasons why he did not appear before the media between October and November 2000, so as to avoid financial panic in Banco Nuevo Mundo, which was eventually the main cause of its intervention.”

63. 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.

64. 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.” [Tribunal's translation.]

65. 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. Based on information from SBS, on that date BNM's net worth as of November 30, 2000, five days before its intervention, was S/.255 million, with accumulated profits of S/. 8.7 million.

66. In 1999 and 2000, SBS intervened in Banco Banex, Banco Orion, Banco Serbanco, and NBK Bank and announced the dissolution and liquidation of those Banks.

67. Some days after the date of intervention of BNM (December 5, 2000), the SBS issued SBS Resolution No. 900-2000 dated December 11, 2000, which read as follows: “in the past few days, different media outlets have been disseminating information about an alleged situation of solvency and liquidity of the companies under the financial system, which would also motivate their intervention by the SBS. The facts described above have created financial panic and therefore the public is massively withdrawing their funds from the companies of the financial system.”

68. 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 announcing the intervention of BNM and for suggesting the withdrawal of their deposits from that bank. I should note that this arbitrator has no knowledge

from the record that the criminal complaints have resulted in final criminal convictions. On the same day, SBS submitted complaint No. 081-00.

69. 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."

70. 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."

71. 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." 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 visit No. DESF "A"-168-VI/2000 dated November 27, 2000."

... The Bank's Equity as of November 30, 2000 was 255 million, 147 thousand Nuevos Soles.

72. 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."

73. 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.

74. This Report was delivered to SBS on July 11, 2001. 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 any subsequent events or information after March 5, 2001."

...Since December 5, 2000, the Management has supervised SBS's intervenors, in charge of the closing balance sheet for the fiscal year 2000, which revealed that BNM had a negative balance.

75. According to section 15 of the Final Report, entitled "Net earnings (loss) for the year," the net loss on December 31, 2000 was S/.328,875,000. According to paragraph 5.6 of the Congressional Economic Subcommittee's Final Report, "from December 5, 2000 to September 30, 2001, Banco Nuevo Mundo has achieved a portfolio recovery of USD 139.8 million at an average monthly recovery rate of USD 14 million. Likewise, as of September 30, 2001, Banco Nuevo Mundo has earned higher income (USD 29 million) than other operating banks of the system, such as Banco Interamericano de Finanzas, which attempted to acquire it."

76. 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.

77. On April 18, 2001, by Resolution No. 284-2001, SBS placed BNM under the Special Transitional Regime.

78. 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". 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.

...The audit report prepared by Medina, Zaldivar y Asociados (Arthur Andersen) states that: "in compliance with generally accepted Peruvian auditing standards, the procedures applied do not constitute: "(i) an audit of the bank's financial statements, (ii) an appraisal of the bank's assets and liabilities, and/or (iii) a revision of the bank's internal controls."

79. 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)." [Tribunal's translation.]. On July 27, 2001, NMH filed a Constitutional Action of Protective Measure (*Amparo*) against Resolution No. 509-2001-SBS. The court decision dated October 23, 2002 makes reference to the proceedings before the Twenty-Sixth Civil Court of Lima, stating that "the Twenty-Sixth Civil Court for Lima granted them a precautionary measure to suspend the effects of Emergency Decrees

Nos. 108-2000, 027-2001 and 044-2001, Ministerial Resolutions Nos. 174-2000, 179-2000, 024-2001, 104-200-ef, 124-2001-ef and 131-2001-ef, and Superintendence Resolutions Nos. 885-2000 (in the part related to the appointment of intervenors) and 284-2001, as well as the effects of the balance sheet prepared by the Superintendence of Banking and Insurance on December 31, 2000.”

80. 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.

81. 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.”

82. 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, 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.” . 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.

83. 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.” [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.” [There is no indication on the record or the case file that this proposal had been formally rejected by the State.]

84. 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. This Report indicated that the procedures applied did not constitute an audit of the financial statements of BNM, a valuation of the Bank's assets and liabilities, or a review of the Bank's internal controls.

85. On October 18, 2001, by Resolution No. 775-2001, SBS ordered the dissolution and liquidation of BNM. 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.

...Article 21 of the Regulations of Special Regimes and Liquidation of Companies of the Financial System and the Insurance System, SBS Resolution No. 455-99 of May 25, 1999, states: “Duties and Powers of Representatives. Representatives, depending on whether liquidation affects a company of the financial or the insurance system, shall perform the following acts (...) (5) order the valuation of all company assets.”

86. 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.” [Tribunal's translation.]

87. 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”).

88. 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 this history, \$366.9 million USD.”

89. 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.” “During 99 and Mar '00, the public deposits in Banco Nuevo Mundo showed a growing trend, from \$91.7 million US in Dec. '98 to \$128.4 million US in Mar '00. Beginning in Mar '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%.”

90. 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." 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 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." "Consequently, between July 31 and December 5, 2000, private deposits shrank by \$109 million US and public deposits by just \$13 million US."

...According to BCR's sources, the development of withdrawals at BNM from July to late November 2000, amounted to USD 40 million, with approximately USD 69 million of withdrawals in BNM from December 1 to 5, 2000, due to the financial panic.

"DUTIES OF BANCO NUEVO MUNDO

	Banco Nuevo Mundo						
	National Currency		Foreign Currency		Total USD	Variation %	Concentration in the Public Sector
	Private Sector	Public Sector	Private Sector	Public Sector			
Jul-00	104	302	262	137	516	1%	43%
Aug-00	120	273	276	132	521	-3%	40%
Sep-00	117	277	268	127	507	-5%	41%
Oct-00	133	241	252	121	480	-8%	40%
Nov-00	118	235	222	117	439		42%
Var. Nov vs. July	14	-67	-40	-20	-77	-15%	

Source: BCRP, included Cofide Equity and Debt

91. The Congress of the Respondent conducted an investigation into the BNM affair. With that aim the Congressional Economy Subcommittee for the Assessment of SBS Intervention in NBK Bank and Banco Nuevo Mundo was created (Subcommission), which released its final Report on January 21, 2002.

92. The conclusions of the Subcommittee's Report can be summarized as follows:

1. The information provided by the Superintendent to the Subcommittee 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 Superintendence was not transparent with the Subcommission, it did not provide information or did so in a partial and improvised 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 discretionary and discriminatory behavior of the Superintendence 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 Superintendence. . . acted with negligence when it failed to meet its obligation to undertake the consolidated oversight of financial conglomerates, such as Banco Nuevo Mundo."

93. 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.

94. 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 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.

...Medina Zaldivar (Arthur Andersen) states that Gremco covered the provisions broadly, based on guarantees that doubled this amount.

Placements:

USD 12,621,448

Soles: 60,908

Equivalent USD 12,438,628

Equivalent S/. 45,034,043

Provisions: S/. 17,580,154

Guarantees: S/. 32,067,571

95. 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.

96. SBS selected Consorcio 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.

97. 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 but cancelling the item ordering SBS to issue a new resolution.

98. On July 12, 2005, Mr. David Levy Pesse assigned his shares in Holding XXI S.A. without charge to his daughter and the Claimant in this case, Ms. Renée Rose Levy.

99. 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 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 Pesse.

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 Pesse 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 Pesse." [Tribunal's translation.]

100. 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." [Tribunal's translation.]

101. 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 Resolution 775-2001 ordering the dissolution and liquidation of BNM (paragraph 99 above).

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

103. In the following section, I will set out the positions of the parties regarding the merits.

### III. ANALYSIS AND DISSENTING OPINION ABOUT SUBSTANTIVE ISSUES

#### A. Violation of the standard of fair and equitable treatment

104. 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 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.

105. 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." For this reason, the Tribunal will examine each allegation of the Claimant to decide whether Peru actually violated the said standard.

106. 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." I believe that a series of facts and State acts would create legitimate expectations for the investor, which are not limited to the issuance of a governmental authorization to set up a bank in Peru, such as authorizing capital increases, authorizing audits as per international accounting standards, authorizing mergers with banks, addressing requests for state funds by means of public bidding processes, applying general regulations to asset treatment in ordinary and exceptional market situations, among others.

107. With respect to the expectation of "a legal framework clearly perceptible," I 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. The findings in SBS' Inspection Reports for the years 1998, 1999 and 2000 failed to determine the existence of material economic or managerial damage caused by the interruption of its activities.
- d. Claimant did not question SBS's findings and remarks remedied within the statutory timeframe.

108. In my opinion, 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. Therefore, it was logical to assume that State authorities would take measures to maintain the stability of the financial system in observance of basic criteria of legal security and preservation of material aspects of the rules of the banking and financial sectors, as mandated by Peruvian law and, to that end, promulgate Emergency Decrees.

1. Legitimate expectations

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

a. Purchase and Takeover of Banco Financiero

110. 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." I believe that there was no specific amount of capital increase required by SBS in order to grant the authorization in the course of the merger with Banco Financiero. Likewise, unlike my colleagues, I do note that there was a capital increase proposal by BNM on November 27, 2000, disregarded by SBS.

Therefore, BNM could not have formally submitted the merger project before SBS without first obtaining the authorization of the proposal of capital increase submitted to SBS.

b. Lack of transparency

111. The second claim of the Claimant is the lack of transparency concerning the 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."

112. The emergency decree under the PCSF and the emergency decree then created by the Special Transitional Regime define a new legal framework to regulate banking entities subject to an intervention process, providing for the sale of an equity block and the dissolution and liquidation of a bank as the only alternatives to overcome a banking liquidity crisis. The emergency decree states that any provision against such program would be suspended, which means that the alternative under Article 124 of the banking law on restructuring programs for banks undergoing dissolution with support from creditors, was not applicable. This is further confirmed by a series of newspaper articles of that time, written by renowned Peruvian economists, which explained that Peruvian regulations on processes of intervention of banking entities had changed.

113. As regards the meeting between the banks and the State, 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. Unlike my colleagues, I believe that preventing BNM from participating was more than a mistake by the State: it generated loss of confidence among participating banks as regards the future of BNM. This conclusion is based on SBS' own information which evidences a material reduction of interbank loans from the other banks to BNM, following the date of the aforementioned meeting. Therefore, there was an adverse reaction towards BNM as a result of the meeting and its absence.

c. Withdrawal of funds

114. 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.” The Claimant also notes that the withdrawals were sudden and disproportionate and without any contingency plan and, therefore, directly affected BNM’s viability and liquidity.

115. Stating that there was no legal obligation to prepare a contingency plan to withdraw state funds means establishing an overly severe standard for an investor within a good faith regulatory framework. While I agree with the State’s argument that Peruvian law does not require to prepare a contingency plan, unlike my colleagues, I believe that, under international law, the State might be held accountable for its acts adversely affecting the obligations undertaken under an international Treaty.

116. It has been proven in this proceeding that the State had been depositing public funds at BNM by public auction. BCR’s Annual Report for 1999-2000 reveals that there was a state policy to provide the financial system with public funds, designed to face the effects of an illiquidity process caused by the economic and political crisis. The State was aware of the damage on the system’s liquidity ratios by the flight of private funds, as well as of the impact that unplanned withdrawals of its funds would have on the Peruvian banking system. This objective context leads me to conclude that the State aggravated BNM’s illiquidity situation, caused by rumors, and thus motivated the intervention of the entity.

... This conclusion relies upon the State’s behavior after the facts denounced, related to treatment of public fund management in the banking system. By Ministerial Resolution No. 087-MEF (2001), the State issued the regulations that set guidelines for fund withdrawal from the banks, confirmed by the statement of Mr. Mogrovejo, SBS’s former officer and witness for the Respondent.

117. 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.

118. 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.” The Claimant states in paragraph 303 of the Claimant’s Memorial on the Merits that the withdrawals of public funds from BNM between July and October 2000 amounted to US\$24 million.

The Article by Mr. Figueroa, submitted by Claimant, is particularly interesting. Mr. Figueroa states that “the main stylized fact that triggers the subsequent intervention is the cancelation of deposits of state companies. The strong withdrawal of deposits from the public sector arises from the tight liquidity of the government. By December, the public sector deficit had considerably increased and kept a clearly increasing trend.”

...in the period July-November 2000, Nuevo Mundo lost, in national currency, 67 million from state companies, but only 14 million in the private sector. The opposite occurred in foreign currency, with losses in the private

sector doubling losses of public funds. In general, Banco Nuevo Mundo lost 15% of its total deposits which, together with its high concentration (42%), explain why it was intervened before NBK.” [Tribunal’s Translation]

I have found objective evidence of the impact of state deposit withdrawals from BNM, considering the size ratio of withdrawn amounts, with the level of concentration that BNM had been experiencing—a discriminatory and disproportionate attitude by Peru against the Claimant.

d. Financial panic

119. 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 on the rumors transmitted by e-mail demonstrates that several persons warned about the intervention in BNM and that bank officials reported that the spread of these emails is categorized under Peruvian law as the offense of Financial Panic. 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. In this regard, I recall that I have no record that the criminal complaints have resulted in final criminal convictions against the defendants. 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.

120. It is not enough to analyze Mr. Levy’s statement individually. However, I think the facts described in the Congressional Subcommittee’s Report are relevant, which states that “the superintendent of banking failed to support before this subcommission the reasons why he did not appear before the media between October and November 2000, so as to avoid financial panic in Banco Nuevo Mundo, which was eventually the main cause of its intervention.” The conclusion is not about a political entity, but about an objective fact.

121. Moreover, in light of BCR’s information on the obligations of BNM, we may see that there is a margin of USD 69 million in withdrawals from BNM from early December to its intervention (that is, 5 days), which proves that there actually was financial panic against BNM in particular.

122. 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 Superintendence 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.”

123. In light of the aforementioned provisions, I consider that SBS should contribute to the stability of the financial system, for which purpose it has discretionary powers.

124. The Respondent's experts, Messrs. Powell and Clarke, stated that the impact of the flight of deposits from a bank is difficult to control, and that there is not much the Regulatory Agency can do due to a risk that might produce adverse effects. However, the Peruvian experience proves the opposite. In this case, the banking regulator acted before the media in a timely manner when bank runs adversely affected Banco de Crédito. This measure was effective and stopped bank runs. It should be noted that in this case BNM, through Mr. Levy, requested that the regulator issue a general statement that the financial system was sound, that there was a safe deposit fund, and that promoting financial panic was considered an offence.

e. BCR Loan

125. 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 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.

126. In my opinion, the role of BCR goes beyond the role of a private lender that provides liquidity. Therefore, the interpretation of Mr. Forsyth is credible, who states in his second report that "BCR is a stabilizer of the financial system, as it has the power to affect it and is responsible in that regard. Especially, there is no stable monetary system without a stable financial system, and vice versa." To perform such role, the BCR had exclusive tools such as the reduction of reserves, benchmark interest rates, and other monetary policies.

127. In this regard, the investor expected to receive a motivated answer to its loan request to BCR. In the Official Letter No. 225-2000-PRES dated December 5, 2000, BCR rejected the loan request on the grounds of insufficient collateral provided by BNM.

128. Unlike my colleagues, I see that BNM did indeed offer collateral consisting of a package of leased assets for the aggregate amount of the loan, recognized by BCR itself in the Official Letter No. 225-2000-PRES dated December 5, 2000. Therefore, unlike the majority, the motivation in the rejection letter was insufficient. As a result, the investor was not aware of the reason why most of the assets of the leased package were not considered by BCR as collateral. Based on the scope of Article 59 (b) of BCR's Organic Law and Article 78 (b) of the BCR's Bylaws which "permits any other security acceptable to BCR", BCR's rejection should have stated the grounds.

...Was there certainty that the loan requested by BNM would be approved? Definitely. A series of documents from BCR show that the economic crisis in Peru was at its final stage by the end of 2000 and that the State's economic resources were not a problem, unlike the Argentine crisis, as evidenced by the support through the issuance of treasury bonds under bailout and merger programs, such as in Banco Latino, Banco Wiese, Banco Interbank, and others. The request for monetary rediscount was in the amount of USD 12 million approximately, a small amount in relation to the figures under the aforementioned programs, which ensured that BNM would receive a loan from BCR.

...Another aspect related to the certainty of receiving a loan from BCR is the fact that no information was provided to the Tribunal on monetary rediscounts granted by BCR to other banks for the same period requested by BNM. Procedural Resolution No. 1 issued by the Tribunal on July 11, 2011 instructed the Respondent to produce said information during discovery or exchange of evidence between both parties. Unfortunately, the Respondent failed to deliver such information, which not only prevents from finding comparative conducts but, unlike the majority, it is not fair to require that the Claimant show a specific level of certainty on this issue.

129. Therefore, I consider that there was a violation of the investor's legitimate expectations to obtain both a monetary rediscount and an explanation of the reasons for the rejection of its collateral.

130. In this regard, the statement of Mr. Monteagudo in the Post-Hearing Brief is crucial, who stated that BCR did not have to give reasons for its decisions on requests for loans. This acknowledgment may be accepted under domestic law, but is unacceptable from the perspective of international investment law. Nonetheless, my colleagues make no further reference to it.

f. Impairment of the loan portfolio

131. 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. 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. The Tribunal also notes that, however important the input of officials of the Judiciary, it seems difficult to use this as the grounds for instituting a critical judicial proceeding 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. 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. 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. In my opinion it shows that it was not a toxic and irrecoverable portfolio, as alleged by SBS, and that such assertion is inconsistent with the argument of insolvency, bad accounting practices and mismanagement presented by the majority.

g. Priority of Payments

132. 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.

133. The Tribunal has 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." [Tribunal's translation.] The explanation provided by the State is not enough to persuade me. The banks' requests to reclassify their credit and enjoy a higher payment priority was not thoroughly evaluated by SBS, nor was there data cross-checking to compare their different sources, taking into account that it would lead to a better collection position to the detriment of BNM's depositors. In line with the foregoing, I see from the Final Report issued by Banco Nuevo on February 28, 2003, that the accounting records of such interests in BNM should have been classified as working capital, rather than savings or deposits. Said records were audited by PwC and made available to SBS, which the majority disavows, granting deference to the evidentiary and testimonial aspects on account of its State capacity.

134. My dissenting opinion concludes that the measures taken by the relevant authorities of the Peruvian State do not meet the minimum requirements of proportionality, reasonability, and predictability. However, the Claimant has provided evidence to prove those claims.

## 2. Legal Stability

135. 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 encouraged bank mergers of smaller banks. 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 argued 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.

136. In light of the regulations applied by the State, there was evidently a material change in the rules applied to banking restructuring processes. This is reflected by the fact that, at first, shareholders and their creditors had the power to file rehabilitation proceedings under Article 124 of the banking law. However, such alternative was frustrated by the entry into force of the regulations created under the PSCF.

137. Both parties have stated that the purpose of the creation of the PCSF was to restructure the banking system in two ways only: (i) sale of an equity block and (ii) dissolution and liquidation of the bank being intervened. Moreover, the parties agree that the 2001 Special Transitional Regime allowed the SBS to negotiate and execute agreements for asset transfer with interested banks, as was the case of BNM subject to intervention with Banco Interamericano de Finanzas. On this last point, I note that the provisions of the banking law have been modified by excluding shareholders from the entire process of negotiation of the main asset of a banking entity—the equity block consisting of its commercial portfolio.

138. In my view, I conclude that there was a violation of the legitimate expectations of the investor as regards legal stability, restructuring processes and dissolution of banking institutions in Peru.

139. The Claimant states that, after the meeting convened by the MEF to comment on the PCSF, “the flight of private deposits [...] intensified.” 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 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 or “worsen” 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.

140. The Claimant argues that, with the PCSF, expectations for rehabilitation of the intervened institutions were violated. 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 Superintendence a plan for the rehabilitation of the company.” As mentioned above, I find that the emergency decree created under the PCSF provided for two alternatives for intervened banks. Moreover, where the decree states “the enforcement of provisions inconsistent herewith shall be suspended,” I understand that the rehabilitation under Article 214 of the Banking Law was suspended.

141. 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. I have already examined this point above and found the State’s lack of arguments in that regard. Consequently, the priority of payments under Peruvian law has been violated.

142. The Claimant states that SBS violated legal stability when it did not abide by several court rulings. In its Memorial on the Merits (281 in the English version), the Claimant states 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*.” While the timeline of court decisions on Resolution No. 775-2001 took place at a later time, I have analyzed the *amparo* judgment which confirms the existence of previous precautionary measures. This shows that SBS violated court orders and, as a consequence, the issuance of SBS Resolutions Nos. 509 and 775 infringed upon the legal stability standard.

143. The Claimant alleges that, in this case, there were State actions with “surreptitious, extra-legal” intent 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 and the official transcriptions of the video tape dialogues, made by the Congress of the Republic of Peru.

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

144. The Claimant alleges that the standard of fair and equitable treatment was violated because of the following “arbitrary and/or discriminatory actions”: 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

145. 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 of the Congress Economy Sub-Commission investigating the involvement of SBS in two banks—the BNM’s and another—as well as the report of the BNM Board of Receivers.

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

147. 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 November 2000 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.

148. 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.

149. It is important to point out 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 Board of Receivers, whose mission in BNM was, as noted before, limited in time (from July 21 to August 6, 2001).

150. 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.” [Tribunal’s translation.]

151. 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.

152. 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. The Tribunal finds that these statements 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.

153. With all due respect, I should say that my colleagues do not realize we are dealing with two different accounting methods, applied by PwC, one before December 5, 2000, and the other from December 6 of the same year, with very different consequences. In the 1999 Audited Report and the Preliminary Report of PwC, the going-concern method was applied, for example, by not considering goodwill as an expense. A different situation occurs in the Audited Report as of December 31, 2000, prepared by PwC, in which that same goodwill is treated as an expense, thus applying a gone concern accounting method. The same distinction is observed in the treatment of specific accounting items, such as fixed assets and deferred assets which are treated as expenses in the 2000 Audit Report, unlike the report audited by PwC in 1999.

154. This is an arbitrary act as the method applied by PwC and permitted by SBS generates an artificial reality to consider all balance accounts against equity, which reflects the huge loss of S/. 329 million of BNM by December 31, 2000 and a lower return on the investment. This conclusion is more evident if we consider the recovery of USD 160.7 million of the commercial portfolio during the intervenor’s performance, inconsistently classified as a loss portfolio by SBS.

b. Loans portfolio

155. 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. In other words, the “SUNAT” 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.

156. The Claimant referred that “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,” and consisted of the elimination of “goodwill,” increased provision requirements, and the natural impairment of the loan portfolio during the intervention. The majority of this Tribunal disavows without any support that the chart on page 21 of the Inspection Report dated November 2000, describes the accounting items that SBS would apply against equity in a hypothetical or reasonable scenario if the bank were then to be liquidated. The intervention of BNM converts this hypothetical scenario to a real one, since the new legal situation of BNM would not allow it to generate its own cash flow for compliance with such obligations, which is why I consider that the intervention *did* cause such losses. The position of treating obligations as of September 2000 as a loss, which were not yet due, is grotesque and lacks of motivation.

157. As for the “goodwill,” arising out of BNM's merger with Banco del Pais, the Claimant explains why there was “arbitrariness and/or discrimination,” on SBS's Intervention Committee for accounting that amount as a loss. The Claimant indicated that the loan had been previously approved by SBS itself. The Report audited at the close of December 31, 2000 states that it used the going-concern method for the intervened BNM, although the goodwill was charged to loss without considering that SBS Resolution No. 775-2001 declaring the dissolution of BNM was issued on October 18, 2001. In other words, the grounds for annulling goodwill as an expense would have been effective on or after (not before) the issuance of SBS Resolution No. 775, which amounts to arbitrariness of SBS.

...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.”

...unlike the majority, these higher provisions trigger the very declaration of intervention of BNM by SBS. SBS's position to charge everything to expenses reflects that it considered that intervening BNM meant a complete halt to its activities, with no option of rehabilitation. However, PwC arbitrarily applied a going-concern method, as the punishment for being creditworthy takes place by means of the declaration of Dissolution and Liquidation of the bank.

158. 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 officials following an improper accounting practice and an ad hoc illegitimate methodology. 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. 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. 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.

159. My conclusion does not merely rely upon the identification of two accounting methods applied to BNM by PwC; one, a going concern before the intervention and, the other, a gone concern method after the intervention date—December 5, 2000—which accounts for a loss of S/.329 million in a very short period, at closing on December 31, 2000. At this stage of my reasoning, I take into account the Claimant's request for Inference in relation to the documents supporting the reclassification of the commercial portfolio, pursuant to Procedural Resolution No. 5, and the State's reply denying availability of such information.

160. This lack of relevant documents makes me recognize the requested inference in favor of the Claimant and, accordingly, the disregard of the argument of impairment of the commercial portfolio and generation of higher provisions due to alleged deficits, as argued by the State after the intervention of BNM, "against the interests of the Claimant".

161. As mentioned at the beginning of this dissent, pursuant to Rule 9.5 of the IBA Rules on the Taking of Evidence in International Arbitration, this conclusion is consistent with a series of relevant facts presented during the proceedings. On the one hand, the statement of Mr. Alvarado, a member of PwC who stated at the Hearing that there was no dishonest or unlawful accounting practice at BNM, and therefore the State's claim of a bank with deceptive accounting practices is groundless.

162. Therefore, I rely on BNM's accounting data on SBS's website, as well as on the conclusions of the Risk Rating Agencies and the conclusions in PwC's audited reports for 1998 and 1999. Finally, I rely on the fact that during the intervention USD 160.7 million of the commercial portfolio could be recovered.

163. As for the Claimant's argument on the readjustments performed by intervenors in BNM's accounting records, the Respondent pointed out that said adjustments were made following PWC's recommendations, and stressed that they were not retroactive. On this particular issue, I find that the application by PWC of a gone concern accounting method, as noted in the preceding paragraph, was the reason why BNM was charged with expenses that determined its accounting insolvency. In that regard, again, I consider that the application of such a method was arbitrary, whether there were retroactive entries or not. Arbitrariness is associated with the use of an accounting method on BNM, which created an unreal financial position and hence an insolvency situation that actually did not exist.

c. BCR Loan

164. 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. The Claimant states that BCR had the legal authority to grant the loan and acted arbitrarily in denying it.

On this issue, I refer to my conclusions in the preceding paragraphs.

d. BNM Proposal

165. On September 23, 2001, NMH sent a proposal 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. 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. 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. 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.

166. In this regard, the Tribunal clearly understands that there was a proposal by BNM's shareholders to overcome the intervention, that there was an *ad hoc* rescue plan for Banco Latino and Banco Wiese—approved by the State—and that BNM's proposal was never answered. As it can be seen, the State provided practical solutions for Banco Latino and Banco Wiese, but not for BNM. As regards the Respondent's argument on the absence of a rehabilitation proposal signed by at least 30% of creditors, I stand by the preceding paragraphs in the sense that the PCSF suspended the enforcement of every rule against it, including such 30% requirement.

167. 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 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 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, Financiero 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. This shows a clear difference in treatment in relation to other banks with performance indicators less efficient than BNM's and with State loan facilities of hundreds of millions of dollars. The majority of this Tribunal stated that in no event may these reports support the Claimant's arguments, but conducted no further analysis.

e. Reduction of capital

168. The Claimant states 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. 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."

169. 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.

170. This could contain an apparent inconsistency. However, based on the foregoing, arbitrariness is not determined by the illegitimate exercise of powers by SBS, but by the use of an accounting approach that created an artificial loss of S/.329 million, inconsistent with the portfolio recovery of USD 160.7 million.

171. 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. 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 majority of this Tribunal assumes that if a bank is not rehabilitated it must be dissolved, which shows unawareness of the text of Peruvian law. SBS Resolution No. 455-99, paragraph 5, requires the previous valuation of the bank's assets as a condition to issue a dissolution and liquidation ruling, and the majority specifies no grounds for SBS deviating from this law.

f. Dissolution

172. 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. The Claimant considers that such conduct violated the fair and equitable treatment standard established in the APPRI. 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. 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 act." 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.

173. Resolution No. 755 clearly states that it relied upon Arthur Andersen's report to issue the decision to dissolve and liquidate BNM. The USD 127-million loss accounts for 97% of the aggregate loss that SBS used as a benchmark to establish that BNM exceeded the permissible threshold to access PCSF. This fact is unquestionable in SBS's reasoning upon deciding to dissolve and liquidate BNM.

174. Arbitrariness is present when SBS states that it relies upon a valuation performed by Arthur Andersen, while the same report of the company says it does not, namely: "pursuant to generally accepted Peruvian auditing standards, the procedures applied do not constitute: (i) an audit of the bank's financial statements, (ii) an appraisal of the bank's assets and liabilities, and/or (iii) revision of the bank's internal controls. Therefore,

we shall not render any further opinion in that regard.” The loss established by A/A is the benchmark used to assert that BNM was not eligible for the PCSF, which constitutes an arbitrary act.

g. Omissions of SBS and BCR

175. 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.

176. 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 above-mentioned Peruvian banks, I will analyze this situation later when referring to the national treatment claim raised by the Claimant.

177. As for the second argument put forward, on the withdrawal of deposits of state companies, Mr. Figueroa’s report is substantive evidence of the Claimant’s claim.

178. 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.” As mentioned above, the Congressional Subcommittee of the Republic of Peru accepts the credibility of the banking superintendent’s statement regarding his knowledge of the rumors and the financial panic since October 2000 and that he did not take any action at the mass media level. It has also been proven that Mr. Levy requested a general decision from SBS on the system’s stability, which was not made, and finally, it has been proven that in the Peruvian case SBS’s intervention by rejecting rumors was successful, as was the case with Banco de Crédito del Perú. Therefore I consider that there was an arbitrary omission committed by the regulator against BNM.

B. Violation of the national treatment standard

179. 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

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

180. The Claimant also compares BNM with Banco Wiese and Banco Latino, in relation to the bailout measures. While the Claimant also compares the liquidity ratio of Banco de Comercio with the one of BNM. 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.

181. 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 shall accord in its territory and maritime zone to nationals or companies of the other Party, in respect of their investments and activities in connection with such investments, treatment that is no less favorable than that accorded to its nationals or companies, or the treatment accorded to nationals or companies of the most favored nation, if the latter is more advantageous. For this purpose, nationals who are authorized to work in the territory and maritime zone of either Contracting Party shall be entitled to enjoy the material facilities appropriate for the exercise of their professional activities."

182. First examine whether there were indeed similarities between the banks referred to by the Claimant and then determine if there was a more favorable treatment granted to them than to BNM, in violation of the above-mentioned Article 4.

183. In light of the parties' agreement on the need to first identify the domestic entities that were in similar circumstances with BNM, I agree with the Arbitral Tribunal considers, as noted by other arbitral tribunals, 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. Unlike the majority, I note that Banco de Crédito del Perú, Banco Latino, Interbank and Banco Wiese are all commercial banks operating with both individual and business customers, which means that they are all operating in the same sector. With regard to Banco Latino, I note that it held a small market share and with liquidity ratios below those of BNM according to the SBS's own information as of November 2000 ranking the system's banks by size.

184. 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. 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. 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.

185. Peru introduced into this proceeding several facts that, in my opinion, fail to prove that BNM was not in like circumstances with Banco Wiese, BCP, and Banco Latino. The State's argument that BCP and Banco

Wiese should be distinguished from BNM on account of the greater market share of the first two has no objective basis, in my opinion. There is no motivation from the majority. Based on the experience in other investment-related awards, a higher or lower market share is irrelevant to set the relevant benchmark for comparison. We can cite Thunderbird Gaming Corporation c. Mexico (see paras. 175-183), Corn Products International v. Mexico, and especially, Tza Yap Shum (para. 267) which established that the benchmark for comparison could be based on companies of different sizes engaged in the same business.

186. In the case of Banco Latino, it is even more grotesque, since Peru recognizes that it is not unlike BNM in terms of market share and size. Even so, absent any support, the majority does not deem it comparable. In both scenarios, I am confident that we are dealing with comparable companies.

187. As I previously stated, Banco Wiese and Banco Latino are subjected to a special *ad hoc* program to rescue its assets, while the proposal of BNM's shareholders did not receive any response from the State, and much less a rescue process for the bank. On the other hand, in the case of Banco de Crédito del Perú, it has been shown that SBS took a proactive position in countering financial panic in the market, a different situation than its omission before the rumors, of which it was cognizant since October 2000, which adversely affected BNM.

188. In the light of foregoing, I am of the opinion that it is appropriate to accept the allegation of violation by Peru of the national treatment standard in relation to BNM.

189. At this point, having found that the Peruvian State is internationally liable for violating the Peru-France APPRI in terms of the standards of Fair and Equitable Treatment and National Treatment, I shall cease to express my views on the issues raised in the arbitration.

#### C. Conclusions concerning the problems of BNM

190. My conclusion 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.

191. In my opinion, the problems of BNM arose out of a temporary liquidity problem that generally affected the Peruvian banking system during 1999-2000 that was aggravated by the flight of State deposits from private banks, and in the case of BNM, SBS's failure to counter the financial panic that had affected it since October 2000.

192. Not every crisis mitigates the State's liability. The Argentine case is the clearest example of a State of Necessity where the very existence of the State was at stake. The Peruvian case is not a severe crisis. The other experience is represented by the crisis in Paraguay, where the discussion focused on the duties of oversight, supervision and auditing of the agents of the financial market. The Peruvian case is also different because, given BNM's problems, the Peruvian state agencies committed not only serious omissions, but also took concrete and identifiable steps, which collectively triggered an illiquidity situation at BNM that led it to non-compliance with its obligations before BCR's Clearinghouse. Consequently, the acts and omissions attributed to Peru by the Claimant are sufficient to constitute a wrongdoing punishable by the applicable APRI [*sic*], and thus it cannot be considered exempt from liability.

193. Moreover, BNM was not an insolvent bank as of June or even as of December 2000, based on reports from PwC, on the Risk Rating Agencies and, especially, on the testimony provided by Mr. Quiroz, who stated that the bank's solvency ratios would not allow him to assert BNM's insolvency, nonetheless, he stated the opposite in his written statements submitted in this proceeding. Additionally, the statement of Mr. Alvarado of PwC, who mentioned that there were no deceptive accounting practices at BNM, which could imply improper management in order to conceal BNM's actual financial position, supports the conclusions in the Risk Rating Agencies' Reports concerning the liquidity, solvency and management of BNM. All this evidence has been disregarded by the majority of this Tribunal for no apparent reason.

194. Finally, I believe that the management of BNM, in terms of the handling of the loan portfolio and the control areas, did not cause the liquidity problems that led to the SBS intervention. Proper accounting records and the Risk Rating Agencies' Reports are objective and self-reliant documents that allow for that conclusion. There are other management actions of which the State has complained that should be considered in the relevant analysis of the award on damages.

195. Pursuant to Rule 19 of the Procedural Rules of this arbitration, I deem it proper to issue an Award on Liability, sanctioning the Republic of Peru in light of the findings made during the proceeding, reserving the right to issue an award on damages in the subsequent months.

#### IV. COSTS

196. 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"

197. At the first session between the parties and the Tribunal held on March 21, 2011, the following was established: "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."

198. For the reasons discussed extensively above, the Arbitral Tribunal shall deny all requests of the Claimant. It also denies the Respondent's request for moral damages.

199. For these reasons, I find that it is fair for each party to pay the fees and expenses they incurred in connection with these arbitration proceedings and that both parties cover half the cost of the fees and expenses of ICSID and the fees and expenses of the arbitrators. The foregoing is based on the fact that this Tribunal has unanimously declared to have jurisdiction and I do not see any reasons to partake in a procedural abuse nor in a frivolous claim that would justify requiring the Claimant to pay all costs pertaining to the fees and expenses of the arbitrators and ICSID. More importantly, and in support of my opinion on the costs, I refer to *Metalpar S.A. and Buen Aire S.A. (Claimants) v. Argentine Republic (Defendant)*, ICSID Case No. ARB/03/5, Award on the Merits, paragraph 234, which reads:

“234. Legal costs: The Tribunal is not unaware of the fact that, for external or internal reasons, or a combination of both, due to the fault or not of its governments, it is in fact true that the Argentine Republic experienced a catastrophic situation in late 2001 and during the early months of 2002, which to some extent altered all commercial relations in existence at the time in its territory. To avert this crisis, it was necessary for authorities of Argentina to take a series of emergency measures that, although in the long run had a beneficial effect on Claimants, also constituted a factor disruptive to the business relationships which their subsidiary had with their customers and to the contracts executed with them. The Tribunal has affirmed that such measures did not adversely affect Claimants’ investments; however, it cannot be denied that they distorted Metalpar Argentina S.A.’s business activities in which Claimants had, indirectly, invested. Out of fear of what had taken place, and the impossibility of being able to foresee in early 2003 the consequences that could derive from such measures, Claimants’ were driven to initiate these arbitration proceedings in February 2003. Argentina’s defense brought to light the weak points of Claimants’ case; their conduct in the proceedings as regards evidence contributed to weakening their claim. However, there is no doubt that Argentina cannot consider itself to have played no part in the alteration suffered by the legal relations existing between Metalpar Argentina S.A. or its debtors and the commotion its actions caused Claimants. Due to these considerations, the Tribunal considers it fair that each party cover the costs they incurred in relation to this arbitration proceeding.”

200. Lastly, regarding paragraph 234 cited above, I note that there are clear similarities with this present case which, in my opinion, justify my dissenting position on the decision on costs.

[SIGNED AND DATED]

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Professor Joaquín Morales Godoy

Date: