PRIVATE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF CHILE AND THE REPUBLIC OF CUBA ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

The Government of the Republic of Chile and the Government of the Republic of Cuba, hereinafter referred to as the "Contracting Parties";

Desiring to intensify economic cooperation in the mutual benefit of both States;

Intending to create and maintain favourable conditions for investments of investors of one Contracting Party in the territory of the other party, involving transfers of capital;

Recognizing the need to promote and protect foreign investment with a view to promoting the economic prosperity of both States;

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement:

1. The term "investor" designates the following subjects who has made investments in the territory of the other Contracting Party in accordance with this Agreement:

a) Natural persons who according to the laws of each Contracting Party, are considered as Chilean nationals or citizens.

b) Legal entities, including companies, corporations, business associations or any other entity duly constituted or otherwise organised under the law of that Contracting Party, having their seat, as well as their effective economic activities in the territory of that Contracting Party.

2. The term "investment" means any kind of property or right related thereto, provided that it has been made in accordance with the laws and regulations of the Contracting Party in whose territory it was made and shall include, in particular, but not exclusively, the following:

a) Movable and immovable property as well as any other rights in rem, such as mortgages, liens, pledges and usufructs;

b) shares, social quotas or any other type of economic participation in companies;

c) Rights of loans or any other provision having economic value;

d) Intellectual property rights, including copyrights and industrial property rights, such as patents, technical processes, trade marks or trade names, trademarks, industrial designs, business names, know-how and goodwill;

e) Concessions conferred by law or under contract, including concessions to cultivate, extract, explore or exploit natural resources.

3. "Territory" includes, in addition to the land, sea and air space under the sovereignty of each Contracting Party, the marine and submarine areas in which they exercise sovereign rights and jurisdiction, in accordance with their respective laws and international law.

Article 2. Scope

This Agreement shall apply to all investments made before or after its entry into force by investors of one Contracting Party, in accordance with the laws of the other Contracting Party in the territory of the latter. However, it shall not apply to

differences or disputes which have arisen prior to its validity or directly related to events before its Entry into Force.

Article 3. Promotion and Protection of Investments

1. Each Contracting Party shall, subject to its general policy in the field of investment, encourage investments in its territory of investors of the other Contracting Party.

2. Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not hinder the management, maintenance, use, enjoyment, extension and sale and liquidation of such investments by unreasonable or discriminatory measures.

Article 4. Treatment of Investments

1. Each Contracting Party shall ensure fair and equitable treatment within its territory to investments of investors of the other Contracting Party and shall ensure that the exercise of the rights recognized shall not be hindered in practice.

2. Each Contracting Party shall accord to investments of investors of the other Contracting Party in its territory treatment no less favourable than that accorded to its own of investments or investors to investors of any third country, whichever is more favourable.

3. Where a Contracting Party grants special advantages to investors of any third State by virtue of an agreement establishing a free trade area, customs union, economic union, a common market or any other form of regional economic organization or by virtue of any agreement relating wholly or mainly to taxation matters, that Party shall not be obliged to accord such advantages to investors of the other Contracting Party.

Article 5. Free Transfer

1. Each Contracting Party shall allow investors to without delay of the other Contracting Party, after fulfilment of the corresponding tax obligations, the transfer of funds related to investments in a freely convertible currency, in particular, though not exclusively:

a) Profits, dividends, interests and other returns;

b) Repayments of loans from abroad in connection with an investment;

c) The capital or proceeds from the sale or the total or partial liquidation of an investment;

d) The proceeds of the settlement of a dispute; and compensation pursuant to article 6.

2. Transfers shall be made in accordance with the rate of exchange prevailing on the date of transfer, according to the law of the Contracting Party which has admitted the investment.

Article 6. Expropriation and Compensation

1. Neither Contracting Party shall take any measures depriving, directly or indirectly, to its investment of an investor of the other contracting party unless the following conditions are met:

a) The measures are taken for a public purpose or national interest and in accordance with the law;

b) The measures are not discriminatory; and

c) The measures are accompanied by provisions for the payment of prompt, effective and adequate compensation.

2. The compensation shall be based on the market value of investments affected the immediately preceding the date on which the measure becomes public knowledge. Where it is difficult to determine the value, the compensation shall be determined in accordance with generally recognized principles of valuation and equitable, taking into account the invested capital depreciation, capital, repatriated until that date, replacement value and other relevant factors. Any delay in payment of compensation shall accrue interest at a normal commercial rate from the date of expropriation or loss until the date of payment. Where it is difficult to determine the amount of the fee, this shall be determined by agreement between the parties. In the absence of agreement, shall apply the LIBOR rate.

3. The legality of expropriation, nationalization or any other measures having an equivalent effect and the amount of compensation may be claimed in ordinary judicial procedure.

4. Investors of either Contracting Party whose investments in the territory of the other contracting party are losses due to a war or any other armed conflict, a national state of emergency, civil disturbance or other similar events in the territory of the other Contracting Party, shall receive from this latter, as regards restitution, indemnification, compensation or other settlement, a treatment no less favourable than that which the Contracting Party accords to investors of any third country nationals or any third State.

Article 7. Subrogation

1. If a Contracting Party or an agency authorised by it has granted a contract of insurance or other form of financial guarantee against non-commercial risks with regard to an investment by one of its investors in the territory of the other contracting party, the latter shall recognize the rights of the first contracting party to the rights of subrogation of the investor, when it has made a payment under the contract or guarantee.

2. If a Contracting Party has paid to its investor and has taken by its rights and benefits, the investor shall not claim such rights and benefits to the other Contracting Party, except with the express authorization of the first contracting party.

Article 8. Settlement of Disputes between a Contracting Party and an Investor of the other Contracting Party

1. Disputes arising under this agreement between one Contracting Party and an investor of the other Contracting Party which has made investments in the territory of the first shall as far as possible, be settled through amicable consultations.

2. If consultations fail to produce an solution within three months from the date of request for settlement, the investor may submit the dispute to:

a) The competent courts of the Contracting Party in whose territory the investment was made; or

b) An ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

c) An arbitral tribunal established under paragraphs 3 to 6 of article 9 of this Agreement.

To this end, each Contracting Party gives its advance and irrevocable consent that any dispute may be submitted to this arbitration. To this end, the parties waive the requirement of exhaustion of domestic judicial remedies.

3. Once the investor has submitted the dispute to the competent court of the Contracting Party in whose territory the investment has been made or the arbitral tribunal, the choice of one or other of the procedure shall be final.

4. For the purposes of this article, any legal person which is constituted in accordance with the legislation of one Contracting Party and which, before the emergence of the dispute was found in possession of investors of the other Contracting Party, shall be treated as a juridical person of the other Contracting Party.

5. The arbitral awards shall be final and binding for the parties in litigioy shall be implemented in accordance with the domestic law of the Contracting Party in whose territory the investment has been made.

6. The Contracting Parties shall seek, through diplomatic channels matters related to disputes submitted to court proceedings or international arbitration in accordance with the provisions of this article, until the relevant processes are completed, except where the other party in the dispute has not complied with the court decision or the decision of the arbitral tribunal, under the terms established in the respective decision or award.

Article 9. Settlement of Disputes between the Contracting Parties

1. Disputes arising between the contracting parties concerning the interpretation and application of this Agreement shall be settled as far as possible through amicable negotiations.

2. If an agreement is not reached within six months from the date of the notification of the dispute, any of the Contracting Parties may refer the dispute to an Ad-hoc Arbitral Tribunal in accordance with the provisions of this Article.

3. The arbitral tribunal shall consist of three members and shall be constituted in the following manner: within two months after the date of notification of the request for arbitration, each Contracting Party shall appoint an arbitrator. These two arbitrators within thirty days after the appointment of the last one, shall select a third member who shall be a national of a third State, who shall chair the Tribunal. The designation of the Chairman shall be approved by the Contracting Parties

within thirty days after the date of his nomination.

4. If within the periods specified in paragraph 2 of this article, the appointment has not been made or required the approval has been granted, either Contracting Party may request the President of the International Court of Justice to make the appointment. If the President of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Contracting Party, the Vice-President shall make the appointment, and if the latter is prevented or is a national of either of the Contracting Parties, the judge of the Court who in antiguedad and who is not a national of one of the Contracting Parties shall make the appointment.

5. The President of the Tribunal shall be a national of a third State with which both contracting parties maintain diplomatic relations.

6. The arbitral tribunal shall decide on the basis of the provisions of this Agreement and the principles of international law and the general principles of law recognized by the contracting parties. The Tribunal shall decide by a majority of votes and shall determine its own procedural rules.

7. Each Contracting Party shall bear the costs of the arbitrator, as well as those relating to its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs of the proceedings shall be removed in equal parts by the contracting parties unless they agree otherwise.

8. Decisions of the arbitral tribunal shall be final and binding on both Contracting Parties.

Article 10. Consultations

The Contracting Parties shall consult on any matter relating to the application or interpretation of this Agreement.

Article 11. Final Provisions

1. The Contracting Parties shall notify each other when their constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force thirty days after the date of the last notification.

2. This Agreement shall remain in force for a period of fifteen years and thereafter shall be extended for an indefinite period. Within fifteen years, this Agreement may be denounced at any time by either contracting party giving 12 months notice, communicated through diplomatic channels.

3. With respect to investments made prior to the date that was made effective notice of termination of this agreement its provisions shall remain in force for a further period of fifteen years from that date.

4. This Agreement shall apply irrespective of the existence of diplomatic relations between the two Contracting Parties.

Done at Havana within ten days of January 1996, in duplicate in the Spanish language, both texts being equally authentic.

For the Government of the Republic of Chile

For the Government of the Republic of Cuba

At the signing of the Agreement for the Promotion and Reciprocal Protection of Investments The Government of the Republic of Chile and the Government of the Republic of Cuba, agreed on the following provisions which constitute an integral part of this Agreement:

Ad Article 4

It is confirmed that investments referred to in paragraph 2 of article 4 are those governed by the legislation of each country that protects foreign investment.

Ad Article 5

1. The invested capital may be transferred only after one year after its entry into the territory of the Contracting Party,

except that it provides for more favourable treatment.

2. A transfer shall be deemed to be made "without delay" when it has been made within the period normally necessary for the completion of the formalities transfers. The term, which in no case shall exceed 60 days, shall commence at the time of delivery of the request duly submitted.

Done at Havana within ten days of January 1996, in duplicate in the Spanish language, both texts being equally authentic.

For the Government of the Republic of Chile

For the Government of the Republic of Cuba

NOTE NO. 45/98

The Embassy of the Republic of Cuba presents its compliments to the Honorable Ministry of Foreign Affairs of the Republic of Chile -Directorate of Legal Affairs- on the occasion of referring to note No. 009423, dated 15 May 1996, which is transcribed below:

I have the honour to address you in relation to the Agreement on the Promotion and Reciprocal Protection of Investments, signed in Havana on 10 January 1996.

In this regard, I would like to propose to Your Excellency that Article 8 of the aforementioned Agreement, entitled ''Settlement of Disputes between a Contracting Party and an Investor of the other Party'', for better application, be interpreted as follows:

1. The advanced and irrevocable consent that each Contracting Party gives according to the final paragraph of paragraph 2 so that any dispute may be submitted to arbitration, includes the arbitration proceedings that an investor may initiate before any of the arbitration tribunals that paragraph 2 establishes, that is, before an Ad hoc Arbitration Tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or before an Arbitral Tribunal as set forth in paragraphs 3 to 6 of Article 9 of this Agreement.

2. The sentence set out in the final paragraph of paragraph 2, which provides: ''For these purposes the Parties waive the requirement of exhaustion of domestic judicial remedies'', shall in no case and under no circumstances be construed as contrary to or restrictive of the final and irrevocable sole option for jurisdiction that the Agreement itself enshrines in Article 8.3.

Accordingly, when an investor refers a dispute to the competent tribunal of the Contracting Party in whose territory the investment was made, set out in paragraph 2 (a), or to any of the arbitral tribunals set out in paragraph 2 (b) and (c), the choice of either procedure shall be final. If the above proposal is accepted by your Government, I have the honour to propose that this Note and its reply shall constitute an Agreement between the two Governments, which shall enter into force on the same date as the above-mentioned Agreement on Reciprocal Promotion and Protection of Investments, signed at Havana on 10 January 1996.

The Embassy of Cuba in Chile has the honor to communicate the agreement of the Government of the Republic of Cuba with the contents of the above transcribed note, being agreed, in accordance with the contents of the same, that the referred note and this answer constitute an agreement between both Governments, which shall enter into force on the same date as the aforementioned Agreement between the Republic of Cuba and the Republic of Chile for the Promotion and Reciprocal Protection of Investments, signed in the City of Havana on January 10, 1996.

The Embassy of the Republic of Cuba avails itself of this opportunity to renew to the Honorable Ministry of Foreign Affairs of the Republic of Chile -Direction of Legal Affairs- the assurances of its highest and most distinguished consideration.

Santiago, April 24, 1998.

To the Honourable Ministry of Foreign Affairs of the Republic of Chile

Directorate of Legal Affairs