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Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Attn: Section 1377 Comments
Office of the United States Trade Representative
1724 F Street, NW.
Washington, DC 20508

Re: USTR Section 1377 Request for Comments Concerning Compliance with
Dominican Republic-Central America Free Trade Agreement (“CAFTA”)
by the Republic of Guatemala

Dear Ms. Blue:

On behalf of our client, Americatel Guatemala, S.A. and its related parent company, we are filing these comments pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 3106) (“section 1377”).

1. History of Americatel Guatemala S.A.

Americatel Guatemala, S.A. is wholly owned by Iselo Holdings LLC, a private U.S. company which provides long distance telecommunication services to Central American countries since 1990. Americatel Guatemala was founded in June 2006 as a result of the opportunities that CAFTA provided to U.S. companies willing to invest in the CAFTA countries. Americatel Guatemala operates in El Salvador and Guatemala and serves more than 0.5 billion minutes yearly in the data and international long distance market, employing over 100 workers.

2. Factual Background

In March 1998 Americatel Guatemala, S.A. (“Americatel”) entered into an Interconnection Agreement (or the “Agreement”) with “Telgua”, the dominant provider of local and long distance telephony services in Guatemala. Pursuant to the terms of the five-year Agreement, Americatel was to receive eight E-1s every six months for its initial capacity under the

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Agreement for a total of sixteen E-1s.¹ In addition, in October of each year both parties must meet to review the other party's proposal and agree on increases in E-1s for the next two years. Through October of 2002, Telgua ignored this requirement and Americatel did not receive the appropriate number of additional E-1s.

Additionally, Telgua was not applying the payment formula set forth in the Interconnection Agreement arguing that it had the right under law to charge based on a different formula. Consequently, Americatel filed an arbitration proceeding in order to confirm the validity of the payment formula set forth in the Interconnection Agreement. In August 2002, the arbitration panel reaffirmed that Americatel was to pay charges to Telgua based upon the formulas established in the original Interconnection Agreement.

Moreover, in October 2002 Americatel requested the Superintendencia de Telecomunicaciones (SIT), the Guatemalan Telecommunications Agency, that the SIT enforce Americatel rights against Telgua. As part of the negotiations held at the end of 2002 and because of the pressure imposed by the SIT, Telgua agreed to provide Americatel four additional E-1s which were connected in December 2002 and Americatel was able to provide its services with twenty operating E-1s.

The Interconnection Agreement with Telgua provides that it must be renewed on same or better terms of the expiring five-year agreement. In the event that the parties cannot agree on a new contract, the original contract remains in effect and the SIT, through an administrative (government ruling) process, will resolve the issue. The final administrative ruling on this issue is still pending.

In March 2003, most of the interconnection agreements with Telgua that had been entered into in 1998 with other operators, including Americatel's, were expiring and Telgua was making the renewals difficult with the other operators, as well. Therefore, in order to protect the continuity of the telecommunication services in Guatemala and avoid any threat to the interconnected operators by the incumbent operator, SIT issued a decision (Providencia 028-2003). Through this Providencia, SIT prohibits either party from disconnecting any capacity of the other party until all outstanding issues between the parties have reached a final resolution. At the time the Providencia was issued, Americatel continued to have twenty E-1s. As such, until there is a final resolution of this matter through an administrative or legal process in Guatemala, the SIT Providencia should mean that Americatel continues to have its status quo which is twenty E-1s in place.

¹ E-1s are lines that are necessary for international telecommunications. An E -1 carries signals at 2 Mbps (32 channels at 64Kbps, with 2 channels reserved for signaling and controlling).

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3. Disconnection of Four E-1s

On October 6, 2006, Americatel received a letter from Telgua stating that they would be disconnecting four E-1s claiming that Americatel was in default under its obligations as set forth in the August 2002 arbitration decision regarding the payment formula. Although Americatel's payments were always determined based on the formulas set forth in the Interconnection Agreement, Telgua had a different interpretation of such formulas. On October 7, 2006, Telgua, unilaterally and without any supporting law or official decision, disconnected four of Americatel's twenty E-1s.

On October 10, 2006 Americatel's counsel filed a request for a provisional "Amparo" (preliminary injunction) before a judge of first instance in a Guatemalan Court prohibiting the disconnection of the four E-1s and ordering Telgua to reconnect the four E-1s. Under an Amparo, a judge has seven days to render a decision. During this time the judge held meetings with both Americatel's and Telgua representatives. On the date that the decision had to be rendered, the judge was absent and a new judge was required to make the decision. The new judge refused to decide the Amparo alleging that he did not have enough information and asked Americatel to take the Amparo to the appellate level. The judge decided against issuing a preliminary injunction as, in his opinion, the parties should continue a permanent injunction request through the formal Amparo process. No official reason for the denial of the preliminary injunctions was provided. The decision only stated that the request for the Amparo was "No aconsejable" (not recommended) which is allowed in Guatemala. However the judge is still required to make a decision on the permanent Amparo, which decision is still pending. It is important to note that given the unexpected cut off of the E-1s during the weekend and the expeditious nature of the Amparo proceeding, Americatel was unable to provide a copy of the 2003 Providencia, and the judge was not aware of its existence. This is particularly important because through this Providencia, SIT expressly prohibits either party from disconnecting any connection capacity of the other party..

On December 17, 2006, Americatel filed an appeal of the provisional Amparo with the Constitutional Court which was also denied. This decision was based on the information that was initially provided to the lower court which did not mention the 2003 Providencia..

On October 11, 2006 Americatel presented a "Denuncia" (complaint) to the SIT requesting the SIT to order Telgua to reconnect the four E-1s. The SIT did not take any action on this request. Therefore, on October 26, 2006 Americatel filed another Amparo at the second appellate level directly (as required under Guatemalan law when the action involves the government) requesting SIT to order Telgua to reconnect the four E-1s.

On or around November 2, 2006, the appellate court also refused to issue the provisional Amparo against the SIT stating "No aconsejable por el momento" (not recommended for the

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moment). It needs to be noted that the president of the court, who was the primary judge hearing the case, was not present for this decision and the decision was rendered by another member of the court. Americatel took this up to the Constitutional Court which is currently reviewing this request for Amparo against the SIT for failing to act.

On November 2, 2006 the SIT issued a Providencia prohibiting Telgua from taking any illegal actions but did not specifically order Telgua to reconnect the four E-1s.

On November 9, 2006, Americatel requested from SIT a clarification of the Providencia to include the order to Telgua to reconnect the four E-1s. Americatel met with the SIT, which refused Americatel's request to do anything further. The SIT did not give any specific reason for taking no further action.

On November 30, 2006, SIT issued a resolution stating that it is not competent to make a decision to order Telgua to reconnect the four E-1s because the dispute between Americatel and Telgua is subject to the arbitration process involving the Interconnection Agreement between Americatel and Telgua. The SIT has completely ignored the 2003 Providencia and made no comments as to why it was not applicable. As such, the SIT has failed to enforce its own decision and argues that this is a contractual dispute instead of a clear violation of Guatemalan laws and regulations as well as a violation of the provisions of CAFTA's Telecommunications Chapter.

An administrative appeal was filed on December 8, 2006 with the Ministry of Communications. This appeal is also pending and the request for the Amparo is still in the Constitutional Court.

From a commercial and technical point of view, the disconnection of the four E1's had a serious negative impact on the quality of the services due to the fact that at the time Telgua decided to unilaterally disconnect 20% of Americatel's capacity, Americatel was rendering its services to its customers at full capacity with fully loaded and exceeding demand. Therefore, this resulted in a significant decline in the quality level of Americatel's telecommunications services, which in turn resulted in a subsequent decrease in the volume of business and deterioration of the relations with its customers.

4. CAFTA violations by Telgua

Under CAFTA, suppliers of public telecommunications services, such as Telgua must comply with strict interconnection obligations imposed by Article 13.3 of CAFTA's Telecommunications Chapter. Specifically, Article 13.3.1(a) requires that each Party (i.e., the Republic of Guatemala) shall ensure that suppliers of public telecommunications services in its territory provide, directly or indirectly, interconnection with the suppliers of public telecommunications services of another Party.

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Moreover, Article 13.4 imposes additional obligations to major suppliers of public telecommunications services by which each Party shall ensure that major suppliers in its territory accord suppliers of public telecommunications services of another Party treatment no less favorable than such major suppliers accord to their subsidiaries, their affiliates, or non-affiliated service suppliers regarding: (a) the availability, provisioning, rates, or quality of like public telecommunications services; and (b) the availability of technical interfaces necessary for interconnection. Section 4 and 5 of this article provides the following:

Unbundling of Network Elements

4. (a) Each Party shall provide its telecommunications regulatory body the authority to require major suppliers in its territory to offer access to network elements on an unbundled basis on terms, conditions, and at cost-oriented rates that are reasonable, non-discriminatory, and transparent for the supply of public telecommunications services.
- (b) Each Party may determine the network elements required to be made available in its territory, and the suppliers that may obtain such elements, in accordance with its law and regulations.

Interconnection

5. (a) General Terms and Conditions

Each Party shall ensure that major suppliers in its territory provide interconnection for the facilities and equipment of suppliers of public telecommunications services of another Party:

- (i) at any technically feasible point in the major supplier's network;
- (ii) under non-discriminatory terms, conditions (including technical standards and specifications), and rates;
- (iii) of a quality no less favorable than that provided by such major suppliers for their own like services, for like services of non-affiliated service suppliers, or for their subsidiaries or other affiliates;
- (iv) in a timely fashion, on terms, conditions (including technical standards and specifications), and, subject to Annex 13.4.5, cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the suppliers need not pay for network components or facilities that they do not require for the service to be provided; and
- (v) on request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

It is clear that Guatemala has repeatedly failed to comply with its international obligations under CAFTA. Telgua has consistently violated Americatel's interconnection rights under CAFTA's telecommunications Chapter. Similarly, through delays, refusals to decide and incomplete resolutions, SIT and Guatemalan Courts have provided no remedies to solve this unfair situation.

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Americatel hereby respectfully requests USTR to investigate this situation in Guatemala and to monitor Americatel's efforts to ensure that the four E-1s or any other applicable network are available in Guatemala in the manner required by CAFTA's Telecommunications Chapter.

We encourage USTR to work with Telgua and the Guatemalan government to immediately achieve this result as an effective regulatory authority with the powers necessary to ensure compliance with its decisions will enhance compliance with CAFTA obligations and commitments and minimize barriers in telecommunication markets. Americatel, a United States company, which invested in Guatemala, is suffering substantial monetary losses each and every month that it does not have access to the four E-1s. This loss is estimated to being the range of US\$150,000.00 to US\$200,000.00 per month, and these losses have been occurring since the beginning of Oct. 2006 for a total loss to date to the company of over US\$500,000.00.

Furthermore, as Americatel's customers calls are not put through, Americatel has not only lost customers but its reputation as a reliable source of telecommunications services has been greatly diminished and has compromised future business for the company.

We appreciate this opportunity to provide our views and we would be pleased to provide any additional information that would be helpful in the review.

Sincerely,



Chandri Navarro-Bowman