December 17, 2004

Gloria Blue
Executive Secretary
Trade Policy Staff Committee
ATTN: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

RE: **AUSTRALIA, CHINA, COLOMBIA, FRANCE, GERMANY, INDIA, JAPAN, MEXICO, SINGAPORE, SOUTH AFRICA AND SWITZERLAND:** *WTO General Agreement on Trade in Services*

AUSTRALIA: *U.S.-Australia Free Trade Agreement*

SINGAPORE: *U.S.-Singapore Free Trade Agreement*

NICARAGUA: *U.S.- Central American Free Trade Agreement*

Dear Ms. Blue:

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 3106 ("Section 1377"), CompTel/ASCENT hereby responds to the request of the Office of the United States Trade Representative ("USTR") for comments regarding compliance with U.S. telecommunications trade agreements.

CompTel/ASCENT was formed in November 2003 by the merger of the two leading trade associations in the competitive telecommunications industry, the Competitive Telecommunications Association ("CompTel") and the Association of Communications Enterprises ("ASCENT"). With 350 members, CompTel/ASCENT is the largest and oldest association in the U.S. representing competitive facilities-based carriers, providers using unbundled network elements, global integrated communications companies, and their supplier partners. CompTel/ASCENT, which is based in Washington, D.C., includes companies of all sizes and profiles that provide voice, data and video services in the United States and around the world.

CompTel/ASCENT members share a common objective: to create and sustain true competition in the telecommunications industry, both domestically and internationally. With the development of liberalized regulatory regimes and competitive market conditions in a growing number of countries, many CompTel/ASCENT members have made significant investments in telecommunications facilities and services outside the United States. CompTel/ASCENT appreciates the opportunity to present its Members' experiences in Australia, China, Colombia, France, Germany, India, Japan, Mexico, Nicaragua, Singapore, South Africa, and Switzerland.

Over the part two years, CompTel/ASCENT has focused on two particular trade concerns that arise in many countries, and particularly in the countries noted in these Comments: (1) fixed-to-mobile termination rates that far exceed cost and are discriminatory; and (2) excessive pricing and discriminatory provisioning of local access leased lines. CompTel/ASCENT also has noted previously a failure to unbundle the elements needed to provide broadband access. As described below, these concerns constitute violations of relevant trade agreements.

CompTel/ASCENT has been raising these issues for at least the last three years. Yet USTR has taken few concrete steps to address them. The WTO panel decision in the U.S.-Mexico case[1] gives USTR firm legal grounds upon which to act against both excessive fixed-to-mobile termination rates and lack of access to leased lines. CompTel/ASCENT urges USTR to use the key conclusions made by the panel to finally remove these anti-competitive and illegal market barriers.

Fixed-to-Mobile Termination Rates. Excessive mobile termination rates are a particular problem in Europe, Latin America and Japan.

Fixed-to-mobile termination rates are a form of interconnection under Section 2.1 of the Reference Paper.[2] Therefore, according to Section 2.2, major suppliers must provide interconnection under "non-discriminatory terms, conditions . . . and rates" and at "cost-oriented rates that are transparent, reasonable, having regard to economic feasibility." Arguably, all mobile operators are "major suppliers" with respect to their network and customers because no other carrier can access that customer. Even if the market is defined more broadly, most of the major offenders cited in these comments are the former monopoly carrier which qualifies as a major supplier even under a broader market definition.

The U.S.-Mexico Panel Report makes it clear that "cost-oriented" means pricing based on the costs incurred in supplying the service, in this case the interconnection service.[3] In the U.S.-Mexico case, the panel compared the cost of international fixed line

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1 Mexico - Measures Affecting Trade in Telecommunications Services, WT/DS/204/8 (June 9, 2004) ("U.S.-Mexico Panel Report").

2 Section 2.1 of the Reference Paper defines interconnection as a "linking of suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken."

3 U.S.-Mexico Panel Report at ¶ 7.168.

interconnection with that of domestic fixed line interconnection. The Panel found that costs for interconnection at the border that are 75% higher than costs for domestic interconnection are not "cost-oriented" for purposes of the Reference Paper and, where there is no price competition, are not "reasonable" for purposes of the GATS Telecom Annex.[4]

That same analysis can be applied to fixed-to-mobile rates. In the countries cited in these comments, fixed-to-mobile rates exceed domestic fixed interconnection by even greater magnitudes. In the European Union (EU), interconnection prices to the mobile network are in most cases more than 10 times higher than charges for interconnection to the fixed network. Clearly, the mobile rates are not “cost-oriented” and any WTO member which has taken on the standard Reference Paper obligations is violating its obligations by failing to take action to lower those rates.

In some cases, the fixed-to-mobile rates are also discriminatory. Mobile operators charge higher prices for fixed-to-mobile interconnection than they charge their own customers for connection to another mobile customer. This also is a clear violation of the interconnection obligations.

For those WTO members that have agreed to provide market access for cross-border services, high rates for terminating international calls on the mobile network violate Section 5(a) of the GATS Telecom Annex. The U.S.-Mexico Panel Report made it absolutely clear that the GATS Telecom Annex obligations apply to any scheduled service, including telecommunications services.[5] Further the Panel concluded that the requirement that access to and use of the public telecommunications network be supplied on “reasonable” terms and conditions includes the price of access. So pricing for access to the mobile network must be “reasonable.” While “reasonable” does not mean “cost-oriented,” according to the Panel, it noted that rates that exceed cost by a substantial margin may not be reasonable.[6] This clarification of Article 5(a) of the GATS Telecom Annex supports CompTel/ASCENT’s arguments that the WTO members cited in these comments are violating their WTO commitments by continuing to permit excessive fixed-to-mobile rates. In addition, Art. 5(b) requires that access be on “non-discriminatory” terms and conditions. As noted above, this is not the case in some of the WTO members cited in these comments.

A number of countries mentioned in last year’s comments have begun proceedings to bring fixed-to-mobile rates into line with cost. France and Australia have taken significant steps and are to be commended for their actions, although problems still remain in both countries. In other countries, as noted in these comments, nothing has changed.

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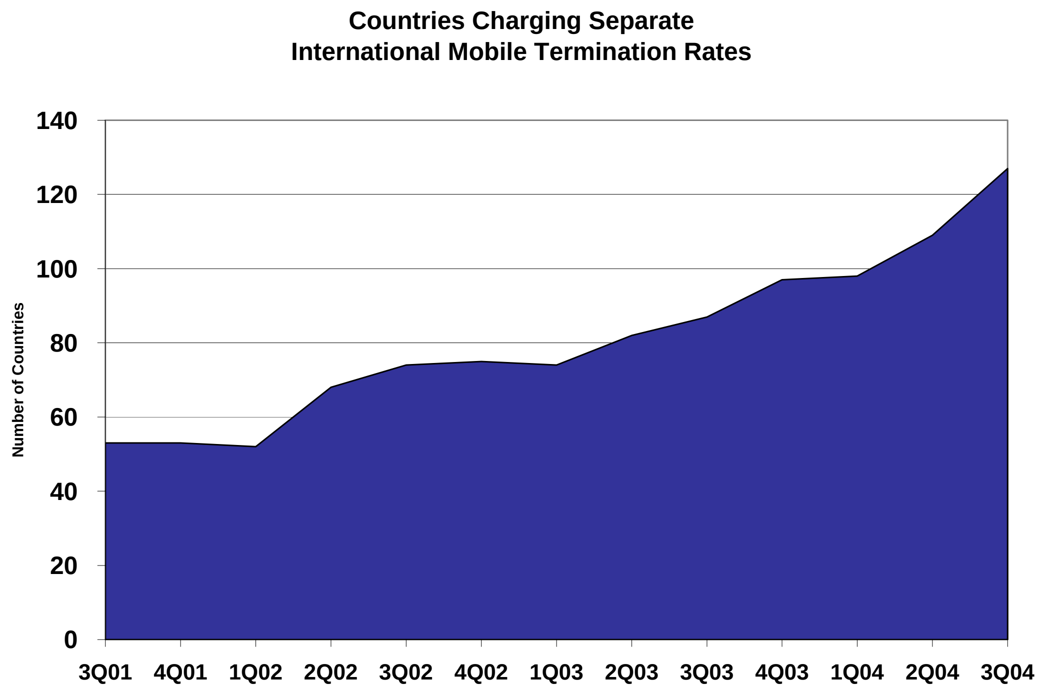
[4] *Id.* at ¶¶ 7.216 and 7.335.

[5] *Id*. at ¶ 7.295.

[6] *Id*. at ¶ 7.334.

Allowing mobile operators to continue to charge excessive fixed-to-mobile rates and to engage in anti-competitive practices reduces economic efficiency and ultimately harms U.S. consumers. In addition, fixed network operators, many of whom are already facing severe financial challenges in a difficult market, are significantly harmed by these practices. The fixed network operators not only bear the high interconnection cost but also are forced to sell to their own customers at a loss as they compete directly with mobile network operators and vertically integrated fixed-mobile operators that sell fixed-to-mobile calls at prices that are below the cost of termination.

The chart below demonstrates that mobile operators in an increasing number of countries are adding charges related to international mobile termination.



Compliance: In order to comply with their WTO obligations, CompTel/ASCENT submits that national regulatory authorities should implement in their respective markets effective regulatory controls with respect to fixed-to-mobile interconnection, including cost-oriented pricing and price squeeze tests. Non-discrimination obligations also should be established to ensure that vertically-integrated carriers cannot use their market power in anti-competitive ways.

Armed with the findings in the U.S.-Mexico Panel Report, USTR should strongly express to the countries cited in these comments and others the necessity of bringing down fixed-to-mobile rates in line with fixed-to-fixed in order to avoid violating relevant trade agreements. USTR should file comments in the current FCC proceeding[7]

[7] The Effect of Foreign Mobile Termination Rates on U.S. Customers, Notice of Inquiry, FCC 04-247 (rel. Oct. 26, 2004).

describing the obligations imposed on WTO members and in similar proceedings pending before other regulatory authorities.

Excessive Pricing And Discriminatory Provisioning Of Local Access Leased Lines; **Failure to Provide Unbundled Network Elements**. Local access leased lines are the primary way for competitive carriers to reach a broad market. Timely availability and cost-oriented pricing of these lines is essential for the delivery of broadband services. Unbundled network elements, particularly bitstream access, is another way for competitive carriers to provide cost-effective, high speed access to the Internet.

Failure to make available local access leased lines is a violation of the GATS Telecom Annex. WTO members, which have scheduled voice or data services on a facilities or resale basis, have an obligation to ensure that carriers from other WTO members have access to and use of the public telecommunications transport network on “reasonable and non-discriminatory terms and conditions” under Section 5(a) of the GATS Telecom Annex. In addition, Section 5(b) requires that these WTO members ensure that service suppliers of other WTO members have access to private leased circuits for the supply of a scheduled service.

Together, the Section 5 obligations impose a requirement for access to and use of local access leased lines on reasonable and non-discriminatory terms and conditions, including price. The scope of this obligation, as interpreted by the U.S.- Mexico Panel Report, has already been described. As noted in these comments, many WTO members have failed to meet this obligation.

Failure to provide unbundled network elements and excessive pricing for the elements that are provided are violations of Section 2.2 of the Reference Paper. That section requires "cost-oriented" pricing, which as noted above, the U.S.-Mexico WTO Panel concluded means pricing based on the costs incurred in supplying the service, in this case the interconnection service. Section 2.2 goes on to require that interconnection be provided in a manner that is "sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided."

As USTR noted in its 2004 Report, lack of access to local access leased lines "hinder[s] the ability of basic and value-added service suppliers to provide competitive services using these wholesale inputs." The same analysis applies to failure to provide cost-oriented unbundled network elements, such as bitstream access. As a consequence, competitive carriers are not able to provide alternative network access to satisfy customer demand.

Compliance: The U.S.-Mexico Panel Report has clarified the obligations of WTO Members. USTR should urge WTO Members and their regulatory authorities to promptly and fully comply with those obligations.

AUSTRALIA WTO Violations – ***Reference Paper and GATS Telecom Annex***
U.S.- Australia Free Trade Agreement

Local Access Leased Lines – Excessive Prices and Lack of Transparency**:** CompTel/ASCENT has long noted the excessive prices of local access leased lines in Australia In September 2004, the Australian Competition and Consumer Commission ("ACCC") issued a discussion paper seeking to review the pricing of Digital Data Access Service, which is supposed to be cost-oriented. Public comments have been filed and ACCC is expected to issue its draft report with findings in early 2005. The comments received by the ACCC in this proceeding clearly demonstrate that, for data access services, rates offered by Telstra to its wholesale customers are far in excess of rates charged in other jurisdictions. Until the ACCC acts to lower Telstra's prices, Australia will be in violation of its obligations under the GATS Telecom Annex to provide access to leased lines on reasonable terms, including price. In addition, excessive pricing violates Australia's commitments under Sections 12.2 and 12.12 of the U.S.-Australia FTA ("Australia FTA").

There is a lack of transparency in ACCC's review process that makes it extremely difficult for Telstra's competitors to gather the data needed to demonstrate to the ACCC the excessive pricing and anti-competitive conduct by Telstra. The ACCC does not publish the cost data provided by Telstra, which is used to establish the indicative prices that the ACCC has set.

This failure, at a minimum, is inconsistent with the spirit of the transparency provisions of the Australia Free Trade Agreement and may actually be a violation of those provisions. The Australia FTA imposes a much higher standard of transparency than that contained in the GATS. Section 20.3(2) imposes a requirement for notice and public comment on regulatory proceedings. Section 20.4(1) states that if a proceeding relates to a specific party, that party should have an opportunity to present relevant facts and arguments. In the absence of information to rebut, Telstra's competitors cannot take advantage of the rights provided by the Australia FTA.

Excessive Fixed-to-Mobile Termination Rates**:** In 2004, the ACCC determined that mobile termination should be regulated as a "declared service" and the rates should be subject to progressive reductions ending at a rate of 12 Australian cents per minute in 2007. This determination is progressive and praiseworthy. However, excessive rates will remain in place for the foreseeable future given the slow pace of scheduled reductions. Further, at least one of the mobile operators in Australia has filed suit to overturn the determinaton. Therefore, while the problem of fixed-to-mobile rates in Australia has improved, the rates may still constitute a violation of the cost-oriented obligations imposed on major suppliers by Section 2.2(b) of the Reference Paper and Section 12.11 of the Australia FTA.

CHINA WTO VIOLATIONS – ***GATS, Reference Paper and GATS Telecom Annex***

China is entering year four of its WTO membership, to date, there has been little actual foreign direct participation in the China telecommunications market, notwithstanding the tremendous opportunity presented by the absolute size and relative growth rate of that market. This absence of foreign participation in one of the most attractive growth markets in the world can be explained only by China's retention of high barriers to entry.

There is wide recognition that China has taken a number of positive steps to implement its WTO telecommunications services commitments, including abolishing some outdated regulations. However, its reform efforts in many key areas have been slow, inconsistent and not always with a progressive effect.

***Lack of Transparency and Independent Regulator*:** China's WTO Schedule of Commitments included adoption of the GATS Reference Paper, which binds China to establish an independent, impartial regulatory authority and a pro-competitive regulatory regime. Although China has adopted or revised many laws to comply with other WTO commitments, the long-awaited Draft Telecom Law remains pending, and is unlikely to to passed for at least another year. The Telecom Law is needed to establish and enforce rules supporting emerging operators, to ensure transparent processes for the formulation of new regulations (in consultation with affected companies and interested parties), to ensure equivalent national treatment between Chinese-invested and foreign-invested telecom operators, and to establish an independent and impartial regulator.

The current regulator, the Ministry of Information Industry ("MII"), is not "independent" because one of its primary functions continues to be operational oversight of the state owned enterprises.[8] This was demonstrated again with clarity in November when, in an effort to manage competition between the four main telecom operators, MII instructed these companies to exchange leaders according to MII preferences. MII has continued a troubling pattern of issuing rules distinctly favorable to state owned enterprises, using a very non-transparent process, without inviting public discussion or comments from industry. This protection of state owned enterprises deters competition from new entrants, and as a result, erodes market forces that otherwise would drive the incumbent carriers to provide global quality services.

***High Registered-Capital Requirement for Basic Service Operators*:** Shortly after China's accession to the WTO was approved in 2001, China adopted The Regulation on Foreign-Invested Telecom Enterprises (State Council Order 333), including a stipulation that Foreign Invested Telecom Enterprises (FITEs) engaging in "basic telecom services" have a minimum registered capital of RMB 2 billion (about US$240 million). This licensing fee violates China's GATS obligations because it is "more burdensome than necessary to ensure the quality of the service" and "a restriction on the supply of the service." This significant barrier to entry does not comply with the domestic regulation principles in Article VI(4) of the GATS and "could not reasonably

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[8] USTR has recognized the lack of impartiality of MII, stating: "The current regulator, MII,while nominally separate from the current telecommunications operators, maintains extensive influence and control over their operations and continues to use its regulatory authority to disadvantage foreign firms." USTR, 2004 Report to Congress on China's WTO Compliance (Dec. 11, 2004) at 75.

have been expected" when China's commitments were made, as required by Article VI(5)(a)(ii) of the GATS. The unjustified amount of this capital requirement bears no relationship to reasonable commercial or public interest requirements to ensure the qualifications of a license applicant. The registered capital requirement should be eliminated or drastically reduced to a level that reflects the true capitalization needs for a new entrant.

***Choice of Chinese Partner for Basic Telecom Service*:** In accordance with Chinese regulation, the parties eligible to be the Chinese partner in a FITE for basic telecom services are restricted to the current six state-owned basic telecom operators. The regulation is a measure that restricts or requires "specific types of legal entity or joint venture through which a service supplier may supply a service," one of the permitted market access limitations according to GATS Article XIV if it is included in a WTO member's schedule of specific commitments. But this additional limitation does not appear in China's Schedule of Specific Commitments and is therefore invalid. This limitation on the choice of Chinese partners for basic telecom services joint ventures violates China's WTO obligations and should be abolished.

***Local Access Lines*:** The restructuring of the domestic telecom industry in China in mid-2003 created two dominant carriers of domestic fixed line infrastructures in their respective regions of operation (China Netcom in Northern China and China Telecom in the rest of China). Each provider is a major supplier in its respective region for the provision of leased line services. The Chinese Government, however, has failed to implement measures to ensure a leased line provisioning and pricing regime with clearly defined and measurable service targets among all operators, to prevent anti-competitive practices in provisioning customer access lines via bottleneck facilities. As a result, leased line provisioning is costly, subject to lengthy and inconsistent lead times, and provisioned without service level assurances for reliability. USTR should urge the Chinese Government to adopt such rules consistent with its obligations under the GATS Telecom Annex.

***Resale of Domestic and International Service*:** MII has removed the "resale of telecom services" from its updated version of telecom services classification issued in 2003 and it appears that resale is simply not allowed under the current regulatory environment. There is no published clarification from MII on the legality of resale and to which category of telecom service it belongs. China agreed to schedule its commitments in accordance with the Chairman's note, which states that services can be provided on a facilities or resale basis unless otherwise specified in a WTO member's schedule. China's Schedule of Specific Commitment has no limits on resale. This regulatory ambiguity should be clarified to allow foreign operators to provide scheduled services through resale.

COLOMBIA WTO VIOLATIONS -- *GATS*

Unreasonable Domestic Regulation. CompTel/ASCENT members have been prevented from entering the Colombia market for international service as a result of the immense licensing fee of approximately US$150 million. The size of this fee is inconsistent with Colombia's GATS obligations.

Article VI(4) of the GATS states that licensing requirements should not be "more burdensome than necessary to ensure the quality of the service" and "not in themselves a restriction on the supply of the service." On its face, this astronomical licensing fee violates Article VI(4); it is an absolute barrier to entry and not needed to ensure the quality of international services. The provisions of Article VI(4) apply to provisions enacted after the entry into force of relevant GATS obligations which "could not reasonably have been expected of that Member at the time the specific commitments" were made. Colombia's trading partners had no "reason to expect" adoption of such an astronomical licensing fee at the end of the basic telecom negotiations.

The size of the licensing fee also violates Colombia's general GATS obligations to administer its regulations affecting telecommunications services in a “reasonable” manner. The U.S.-Mexico Panel Report concluded that reasonable means “something of such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose."[9] Clearly, this fee is not appropriate or suitable to the provision of international services and should be removed.

FRANCE WTO VIOLATIONS – *GATS, Reference Paper and GATS Telecom Annex*

***Excessive Fixed-to-Mobile Termination Rates*:** Regulation of the mobile sector in France has improved significantly since CompTel/ASCENT’s 2004 report. On December 10, 2004, the French regulator, L’Autorité de Régulation des Télécommunications (“ART”) ordered Orange France, SFR and Bouygues Télécom to lower fixed-to-mobile interconnection rates by 36% over two years beginning January 1, 2005. This decision will bring France much closer to complying with its Reference Paper obligation that major suppliers provide cost-oriented interconnection to their networks.

There are two problems with ART's decision. First, the reductions are not immediate but come into force over a period of time. This permits the three mobile operators to continue charging excessive rates for a significant period of time. Second, the decision does not apply to interconnection of international incoming calls, a significant omission. There is no reason to treat international incoming calls differently than domestic incoming calls. Until ART takes further action, France will be violating not only the pricing obligations of the Reference Paper and the GATS Telecom Annex but also the provisions in each prohibiting discrimination in interconnection.

Lack of Independence of the ART: CompTel/ASCENT continues to be concerned over the lack of independence of ART. It effectively shares oversight with the Finance Ministry, which also is the majority owner of the major supplier, France Telecom. Section 5 of the Reference Paper requires that the regulatory body be separate from, and not accountable to, any supplier of basic telecommunications services. The

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[9] U.S.-Mexico Panel Report at ¶ 7.182.

arrangements between ART and the Finance Ministry call into question ART's independence. This conclusion is supported by a recent review by the Organization for Economic Co-Operation and Development, which noted an "insufficient distance between the government as owner of the incumbent and policy maker in the telecommunications sector."[10]

***Local Access Leased Lines and Interconnection – Lack of Cost-Oriented Pricing, Lack of Reasonable Access and Discriminatory Provisioning*:** ART has taken a number of actions to make FT's prices for local access leased lines more reasonable so that competitors can offer viable local access. These decisions have not been sufficient and access to FT's leased lines is still not available on reasonable terms and conditions, including price, as required by the GATS Telecom Annex. In addition, FT has not implemented ART's RIO decisions. FT refuses to implement LRIC pricing, provides critical data months late, imposes unreasonable penalties in its interconnection offer, and sets up a price squeeze situation vis-a-vis cheaper retail digital subscriber line ("DSL") access lines. FT has not provided a wholesale price for DSL bitstream interconnection, although it does offer a retail package for both asymmetric digital subscriber line ("ADSL") and symmetric digital subscriber line ("SDSL") variants. ART has proposed that FT offer a wholesale price, but it is not clear if and when that decision will be finalized and implemented.

FT unilaterally has degraded the quality of service commitments contained in its local access leased line contracts with new entrants, and substantially stiffened the terms of such contracts. FT provides better treatment to its retail arm in the "premium" service that it offers to its own clients covering repair times and guarantees on downtime. These terms are not available to its competitors. FT's failure to provide local access leased lines on reasonable terms and conditions, implement cost-oriented pricing, provide information in a timely manner, offer a wholesale price for advanced services or provide non-discriminatory provisioning are clear violations of France's obligations under Section 2.2 of the Reference Paper and Article 5 of the GATS Telecom Annex.

Discriminatory Mobile Termination Rates and Anti-Competitive Conduct: The French market has been characterized by discriminatory and anti-competitive access to the mobile networks on the part of Orange France and SFR and the discriminatory termination charges levied by all mobile operators in favor of calls from other mobile networks. Orange France and SFR are both vertically-integrated carriers and, as such, are able to employ a price squeeze strategy by discounting retail prices on fixed-to-mobile termination but charging fixed operators high termination rates on mobile networks. Such discrimination in the terms and conditions for access to and use of the public mobile telecommunications network in France violates the GATS Telecom Annex.

[10] Organization for Economic Co-Operation and Development, Report on Regulatory Reform in Telecommunications – France (6 July 2004), available at http://www.oecd.org/dataoecd/36/35/32482712.pdf, at Box 6.

CompTel/ASCENT commends the French Government for recognizing the anti-competitive nature of the actions by Orange France and SFR. It has adopted a test to determine whether a price squeeze strategy is being employed which takes account not only of termination rates but also commercial costs, such as bad debt and cost of sales. CompTel/ASCENT will continue to monitor the market to determine whether the French Government action is sufficient to correct the discriminatory and anti-competitive conduct.

Discriminatory Loans*:* In its 2004 Comments, CompTel/ASCENT pointed out that the French Government's decision to make available a 9 billion Euros loan facility (in the form of a "shareholder's advance") to FT may violate the national treatment obligation under the GATS. The European Commission determined that this facility constituted forbidden State aid but decided not to require the French Government to revoke it. While FT has not drawn on this facility, it remains available, enhancing FT's credit worthiness to the detriment of its competitors. CompTel/ASCENT believes that this loan violated one of the most fundamental GATS obligation -- national treatment. USTR should make its concern clear to the French Government.

GERMANY WTO OBLIGATIONS *Reference Paper and GATS Telecom Annex*

It is discouraging to report that the negative situation in Germany described in CompTel/ASCENT's 2004 Comments and in USTR's 2004 Section 1377 Report has deteriorated, largely as a result of the enactment of the new German Telecommunications Act ("New TKG") in June 2004.[11]

The entry into force of the New TKG at the end of June 2004 has exacerbated the difficulties for DTAG's competitors, leaving them in regulatory limbo. In addition, the New TKG threatens to further undermine the existence of an independent regulator and to prevent action on Germany's excessive and discriminatory mobile termination rates. The New TKG will make it even harder to adopt *ex ante* regulation by requiring a determination of "double dominance" (that is dominance in both the retail and wholesale market) before such regulation can be imposed.[12] It is too early to say how RegTP will apply this "double dominance" test, but it is potentially a significant problem.

The European Union's new regulatory framework requires all member states to analyze specified markets in order to determine the appropriate regulatory remedies. Unlike many EU member states, RegTP started that process very late, waiting for passage of the New TKG. As a result, RegTP will not finalize the required market analysis until the end of 2005.

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11 This is also the view of the German Monopoly Commission's Annual Report: Hauptgutachten der Monopolkommission: http://www.monopolkommission.de/bund.htm, ¶¶ 53 to 55, rel. October 2004.

12 The explanatory notes on this provision of the New TKG explicitly state that the double dominance test has the objective of justifying exclusion of mobile operators from *ex ante* rate regulation.

RegTP has decided not to enforce *ex ante* regulation for Deutsche Telekom's (DTAG) retail prices and, most likely, wholesale prices under the prior TKG rules until it finishes its market reviews.[13] At the same time, RegTP will not apply new regulation under the New TKG until the market review process is finished.[14] Therefore, competitors in Germany currently face a limbo situation – they have neither the old *ex ante* price control regime nor any new remedies. This creates a lot of uncertainty for the competitors and favors DTAG.

RegTP's policy shift, without any public input, from *ex ante* to *ex post* regulation goes along with a reluctance or unwillingness to apply the new regulatory tools that the New TKG provides and that do not depend on a market analysis. For instance, RegTP could order DTAG to offer wholesale products at the same time as it offers its end user products and can prevent DTAG from tying products unfairly and/or offering products below costs. RegTP has failed to take these actions.

Lack of Independent Regulator and Transparency**:** CompTel/ASCENT has noticed persistent political pressure on RegTP in 2004. This development is hardly coincidental, given that the German Government still holds a direct and indirect ownership interest of about. 43% in DTAG. The New TKG appears to strengthen the political influence over RegTP. It gives the Federal Economics and Labor Ministry ("BMWA") the power to centralize decision-making on market definitions, market analysis and remedies in the "Presidential Chamber," that is, the body composed of the president and vice-presidents of RegTP. These persons are selected based on political criteria and not necessarily because of expert knowledge or experience. In addition, the New TKG gives the BMWA the power to issue "general directions" that RegTP must follow. Together these features render decision-making subject to political control and calls into question the impartiality of RegTP.

The New TKG also narrows the broad scope of discretion normally granted to a regulatory authority in Europe. The New TKG prescribes certain types of remedies, rather than leaving the decision to RegTP, and also imposes the "double dominance" test described above, which the relevant European directives do not require.

There has also been a lack of transparency in the operation of RegTP. The EU Tenth Implementation Report[15] states that neither RegTP's Official Journal nor its

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[13] RegTP's decision is based on a preliminary injunction of the Cologne Administrative Court of September 2004, regarding DTAG's retail pricing. Without formal rulemaking or consultation, RegTP expanded the court's ruling to cover both wholesale and retail pricing.

[14] The European Commission has noted in its Tenth Implementation Report that it needs "to be verified" whether RegTP's decision not to enforce *ex ante* price regulation under the old TKG until the completion of the market analysis is in compliance with the EU Framework Directive. *European Electronic Communications Regulation and Market 2004 (Tenth Report)* ("Tenth Implementation Report") available at http://europa.eu.int/information_society/topics/ecomm/all_about/implementation_enforcement/annual reports/Tenthreport/text_en., Annex 2 (Germany) at 95.

[15] Tenth Implementation Report, Annex 2 at 99.

regulatory decisions have been fully published on the Internet up to now. Transparency also is a problem in another respect. In rate applications, for example, for leased line tariffs, DTAG has submitted heavily censored cost information and incomplete information about the model used to calculate its costs. Although constantly criticized for permitting this omission, RegTP has not required DTAG to make its cost information and cost model transparent. While this is not the type of transparency particularly required by WTO obligations, it demonstrates the lack of impartiality of RegTP and its failure to take actions to make sure that DTAG is not acting in an anti-competitive manner.

***Provision of Local Access Leased Lines on Discriminatory Conditions and at Unreasonable Prices*:** CompTel/ASCENT noted in its 2003 and 2004 Comments that DTAG treats its competitors less favorably than its affiliates and itself in the provisioning of local access leased lines. Unbelievably, regulatory efforts to enforce non-discriminatory provisioning are still unresolved. The court review of the 2002 RegTP decision on non-discriminatory access to leased lines has not yet been decided by the relevant court.[16] Consequently, DTAG's competitors still do not have firm delivery times and service level standards for the wholesale product and are unable to offer unqualified retail products to their customers.

The quality of and tariffs for local access leased lines are both problems. In 2004, there have been an increasing number of leased line outages during working hours, likely due to DTAG’s maintenance work outside of the agreed times for leased line maintenance. The prices for leased lines are among the highest in Europe, though there is no evidence to support significantly higher costs in Germany.[17]

By allowing the quality of service to deteriorate and costs that are significantly higher than average European costs, Germany is violating the GATS Telecom Annex, which requires the provision of access to the public switched network on nondiscriminatory and reasonable terms and conditions, including price.

Failure to Provide Unbundled Network Elements. The New TKG provides that RegTP can only require DTAG to provide unbundled access to certain parts of its network after July 1, 2008. Currently, DTAG bundles voice and data access elements together. If a competitor wants to provide wholesale access services, such as data broadband services or voice-over-the-internet, it must also purchase switching services from DTAG.[18] In addition, DTAG has no obligation to provide access to partial private

[16] CompTel/ASCENT addressed in depth its concerns about the lack of transparency in the operation of German appeals courts and the length of the proceedings in its 2004 comments. These concerns remain valid. All major decisions taken by RegTP become mired in the appeal process.

[17] *See*, Tenth Implementation Report, Annex 2 at 41.

[18] In Germany, this combination of voice and data access is referred to as "bundled resale." In the United States, it more resembles the “loop” network element which is also subdivided for unbundling purposes into a separate unbundled network element, the high frequency portion of the loop, for provision of data only.

circuits. This is not in line with the European Commission's recommendation on relevant product and service markets.[19]

These failures to regulate are a violation of Section 2.2 of the Reference Paper, which requires that interconnection be made available in a manner that is "sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided."

***Excessive Fixed-to-Mobile Termination Rates and Anti-Competitive Pricing*:** Germany’s mobile termination rates remain far in excess of cost in violation of Section 2.2 of the Reference Paper and Section 5 of the GATS Telecom Annex. Unlike France, RegTP has failed to designate either DTAG’s T-Mobile nor Vodafone D2 as having significant market power with a legal obligation to provide cost-oriented, carrier grade interconnection (fixed-to-mobile termination) to fixed operators. The data shows that German fixed-to-mobile rates are between 333% above LRIC cost model estimates, and approximately 46% above European best practice.

The retail price for fixed-to-mobile calls offered by T-Mobile and Vodafone D2 are close to or in some cases below the “wholesale” interconnection rate. For example, T-Mobile offers retail fixed-to-mobile minutes in the context of bundled offers to corporate closed user groups or large customers at rates below the interconnection rate.[20] T-Mobile and Vodafone D2 can engage in these “tied” arrangements as a result of their vertical integration. These arrangements also result in a price squeeze on competitors, who are forced to pay high mobile interconnection rates. These actions are anti-competitive on their face, forcing fixed operators, including some CompTel/ASCENT members, either to lose those customers or sell at a loss.

The Reference Paper requires Germany to have measures in place to prevent anti-competitive practices. The U.S.-Mexico Panel Report makes it clear that "anti-competitive” practices include any action that lessens rivalry or competition in the market. The list in paragraph 1.2 of the Reference Paper is not exhaustive.[21] RegTP has consistently refused to adopt the measures necessary to regulate this anti-competitive conduct, despite statements regarding the anti-competitive nature of these vertically integrated firms, voiced by the German Monopoly Commission and Federal Cartel Office, many carriers’ groups, and the European Commission. Its failure is a violation of the Reference Paper requirement to have measures in place to prevent anti-competitive conduct. Germany has other tools that it could use to prohibit this kind of anti-competitive tying arrangements but it has failed to act.

***Provision of Broadband Services*:** The German Government is in breach of Sections 1.1 and 2.2 of the Reference Paper because it has failed to implement measures

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[19] Commission Recommendation of 11 February 2003 on Relevant Product and Service Markets, Doc. No. C (2003) 497.

[20] These types of arrangements are referred to as "'mobile virtual private networks."

[21] U.S. Mexico Panel Report at ¶ 7.232.

to prevent DTAG from engaging in anti-competitive conduct with respect to provision of broadband DSL service and also because it has not required DTAG to provide interconnection needed for its competitors to provide similar services. For example, as noted above, RegTP has never required DTAG to offer private partial circuits, which let competitors benefit from cost benefits generated by the bundling of bandwidth on the trunk segments of leased lines.

Nor has RegTP required DTAG to offer bitstream access to its competitors on a wholesale basis. Similarly, it has not acted to identify and prohibit anti-competitive use of DTAG's overwhelming market power in the leased-line and DSL-markets in the VoIP sector through bundling services, or the exercise of that market power in the VoIP sector through other means, even though the New TKG gives RegTP that authority.[22] The Tenth Implementation Report notes with serious concern DTAG's margin squeeze strategy and its practice of bundling various broadband offers to undermine competition.[23]

Furthermore, RegTP has not acted, as permitted by New TKG, to require DTAG to offer IP-based and ATM-based network interconnection. Without this bitstream access, competitors cannot provide competitive broadband services.[24] RegTP has the power, but has refused, to impose on DTAG the obligation to provide the necessary technical parameters for the interconnections (ATM and IP), quality parameters, delivery terms and commercial conditions for bitstream access products.[25]

INDIA WTO CONCERNS – *GATS Commitments and GATS Telecom Annex*

***Unreasonable Domestic Regulation*:** India has a general GATS obligations to administer its regulations affecting telecommunications services in a "reasonable" manner. Further, licensing requirements should not constitute an unnecessary barrier to trade. In its comments in 2004, CompTel/ASCENT stated that India's current fee of US$5.7 million for an international services license, as well as the related build-out requirements and annual fees, were serious barriers for new market entrants.

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22 See German Competitive Carriers Association's (VATM) Position Paper "VoIP" available at http://www.vatm.de/images/dokumente/stellung/2004/18.pdf. Germany holds last place in broadband competition among the 15 existing EU Member States. If the new Member States are included, Germany is third from last, followed only by Poland and Cyprus.

23 Tenth Implementation Report, Annex 2 at 101. RegTP's lack of action regarding access to all parts of DTAG's network is of particular concern because DTAG can expand its market power in the broadband services market into the VoIP market without any interference or regulation by RegTP. DTAG holds a dominant market position (89%) in the DSL market segment (the highest for an incumbent within the original 15 EU member states), largely as a result of RegTP's failure to regulate DTAG's below-cost pricing of its DSL service. Tenth Implementation Report, Annex 2, Figure 70 and VATM's VOIP position paper.

24 Tenth Implementation Report at 98.

25 See VATM's Position Paper "Bitstream" (English), available at http://www.vatm.de/images/dokumente/stellung/2004/17.pdf

Unfortunately, India is proposing to maintain these barriers, at least in the short term, rather than do away with them. Under the latest Draft Recommendations for Unified License, Department of Telecommunications and Telecom Regulatory Authority ("TRAI"), the Indian regulator, is proposing to slightly reduce the license fee and the associated performance bond. The annual licensing fee would be reduced from the present level of 15% of net revenues to 6%. In addition, TRAI has proposed to maintain excessive buildout requirement. Licensees must install an international gateway switch and establish a minimum of four regional points of presence (“POPs”) within India. Further, under the TRAI proposal, switchless service resale would not be permitted until some future date. These reforms, while marginally better than the existing regime, are based on the payment of high fees and substantial build-out requirements. As such, they constitute unreasonable domestic regulation and constitute formidable barriers for entry into the Indian market.

A similar problem exists with the recent decision by the Department of Telecommunications (“DOT”) to establish a special licensing category for IP Virtual Private Network Services. While allowing foreign entry into this market is laudable, the proposed licensing fee is approximately US$2.3 million for a nationwide license and the proposed annual fees are 8% of gross revenues. This proposal also constitutes a violation of India’s GATS obligations with respect to domestic regulation.

Access Deficit Charges. CompTel/ASCENT has pointed out in the past the discriminatory nature of the access deficit charges (“ADC”) imposed by India as a way to fund rural communications. Although India has not taken on the standard interconnection and universal service obligations contained in Sections 2 and 5 of the Reference Paper, it is subject to the obligations in Section 5(a) of the GATS Telecom Annex to provide access to and use of the public telecommunications network on reasonable and nondiscriminatory terms and conditions for the supply of a service included in its schedule. The ADC is effectively a charge for access to and use of the public telecommunications network that is applied in a discriminatory and unreasonable manner in contravention of Article 5(a).

All international calls terminating in India are subject to payment of a surcharge of Rps. 4.25 (US$.095) per minute. This burden on international service providers and their customers is not shared by domestic providers and is thus discriminatory.

TRAI has indicated that it is likely to reduce the ADC beginning January 1, 2005, with the objective of phasing out the surcharge in two to three years. But there is no guarantee that the ADC will be removed and in the meantime, it is inconsistent with India’s obligations under Section 5(a) of the GATS Telecom Annex.

Submarine Cable Capacity. CompTel/ASCENT is seriously concerned that India continues to violate its WTO commitment to ensure reasonable and non-discriminatory access to certain submarine cables, vital component of India’s public telecommunications network controlled by Videsh Sanchar Nigam Limited’s (“VSNL”).

VSNL's CompTel/ASCENT appreciates the Government of India’s efforts to help facilitate a partial settlement of the matter earlier this year, which resulted in the release of a fraction of the available capacity. However, as USTR correctly recognized, in its 2004 Report, the settlement merely provides a short term solution. In fact, the underlying lack of access still remains.

VSNL, India’s dominant carrier, controls access to all but one submarine cable landing on Indian territory. We are concerned particularly with VSNL’s exercise of its monopoly control of FLAG Europe Asia cable, which lands at VSNL’s cable landing station serving Mumbai and other high technology centers where many U.S. multinational corporations are located. VSNL still refuses to permit interconnection and access to the unused capacity on this cable. VSNL's refusal: 1) creates an artificial shortage of undersea cable capacity into and out of India; 2) results in exorbitant prices for the cable capacity that is made available; and 3) prevents “upgrades” to the existing cable system that would alleviate the capacity shortage. This refusal is a blatant use of VSNL's monopolistic control of submarine cable capacity to force competitors to use submarine cable capacity on a new, wholly-owned, VSNL submarine cable.

VSNL’s restrictions on access to submarine cable capacity violates India's general obligation to allow access to and use of the public telecommunications network under Article 5(a) of the GATS Telecom Annex. In this case, VSNL fails to provide ANY access.

In its 2004 Report, USTR said it would "continue to closely monitor this situation.” Accordingly, we urge USTR to encourage the Government of India to adopt and enforce clear regulations governing provisioning and pricing of submarine cable capacity that will provide a permanent solution to this issue. Specifically, USTR should urge India to adopt regulations that require VSNL to allow competitors to: (a) obtain cost-oriented interconnection with any cable through VSNL's cable landing stations; (b) physically co-locate the equipment necessary to upgrade cable capacity at VSNL's cable landing station; (c) connect in the cable landing station to any operators’ equipment at any technically feasible point; and (d) access backhaul links in a timely manner under terms, conditions, and rates that are cost-oriented, transparent, and non-discriminatory.

Competitive Safeguards: India should implement measures that will prevent major suppliers from engaging in anti-competitive practices. Two providers, Bharat Sanchar Nigam Ltd (“BSNL”) and Mahanagar Telephones Nigam Ltd (“MTNL”), have market power in domestic long distance, fixed line services and mobile serves in their respective geographic regions. Together, these two carriers control more than 90 percent of India’s fixed line market. Currently, sufficient rules are not in place to require structural and accounting separation of BSNL and MTNL’s multiple lines of business, nor are there safeguards in place to prevent anti-competitive pricing practices. Although India has not taken on the standard Reference Paper obligations, India has signaled through its unilateral liberalization over the past two years that it wants a competitive market. The establishment of pro-competitive safeguards is essential to achieving that objective.

JAPAN WTO VIOLATIONS - *Reference Paper and GATS Telecom Annex*

Japan continues to make significant strides in market liberalization, particularly with the adoption of the 2003 Telecom Business Law. We are pleased that NTT took positive steps to implement this law in 2004.

We remain concerned that tariffs for NTT/East and NTT/West local leased circuits are unreasonable, in violation of Japan's commitments under the Section 5 of the GATS *Telecom Annex*. The Ministry of Internal Affairs and Communications ("MIC") has commissioned a set of benchmarks for local leased circuits, but unfortunately MIC has not included the key "last mile" distance of 2-5 kms in its study but instead focused on longer distances lines. This is a serious omission and will allow NTT/East and NTT/West to continue to charge excessive prices for access to their networks.

CompTel/ASCENT also is concerned that MIC has not reconsidered its decision in 2003 to allow *increased* interconnection rates despite on-going appeals by the industry. Costs to provide interconnection did not increase in 2003 and, as a result, the increased rates are not cost-oriented, as required by Section 2.2 of the Reference Paper.

MEXICO WTO VIOLATIONS – *Reference Paper, GATS Telecom Annex and GATS Commitments*

As a result of the U.S.-Mexico Panel Report, which found that Mexico violated its WTO obligations in a number of respects, Mexico agreed to take certain actions to bring its laws and regulations into compliance with the panel recommendations. Although progress was made as a result of the panel report, Mexico has yet to fully comply with its WTO obligations.

Off-Net Interconnection: For interconnection of long distance calls to Telmex's network for cities that Mexico has not opened to competition or that are otherwise not subject to equal access interconnection arrangements, or for cities where a new competitive carrier does not have a network, Telmex charges that competitive carrier a "resale" tariff rate. The resale rate is currently about 6.5 cents per minute, almost four times the level of a cost justified rate. The resale rate is based, without cost-justification, on a 25% discount from Telmex's commercial rates to customers. Similar regional interconnection is routinely available in competitive countries for 2 to 3 cents per minute. Thus Telmex's off-net interconnection rate is not "cost-oriented," in violation of Mexico's obligations under Section 2 of the Reference Paper.

Local Interconnection and Discriminatory Access to Public Telecommunications Network: Mexico has failed to ensure interconnection to local competitors on a timely and non-discriminatory basis and of a quality no less favorable than that provided for its own like services in violation of its obligations under Section 2 of the Reference Paper. Telmex fails to provide interconnection quality standards that result in routing and programming failures for competitors' local service traffic.

In addition, Telmex fails to provide access to the public telecommunications network on non-discriminatory terms in order for its competitors to provide services covered by Mexico’s GATS commitments, as required by Section 5(a) of the GATS Telecom Annex. It refuses to provide local number portability despite the requirements of Mexican law. In addition, Telmex has imposed a discriminatory "bill and keep" system that excludes data traffic that benefits only Telmex. These practices prevent full and fair competition and deprive competitors of the ability to provide scheduled services.

Anti-Competitive Practices**:** Problems arising as early as 1997 continue to plague competitors because Cofetel has not taken the measures needed to prevent anti-competitive practices by Telmex, as required by Mexico's commitments under Section 1 of the Reference Paper. Cofetel has not enacted dominant carrier regulation. Therefore Telmex is free to engage in numerous anti-competitive practices. It has denied its competitors phone lines needed to provide service, priced its own services at predatory rates, refused to allow other carriers to interconnect to its network, and withheld fees it owes competitors. Furthermore, Mexico allows Telmex to offer DSL services while Telmex’s competitors are unable to provide that service since Telmex refuses to unbundle the local loop, even for bit stream access. Even in cases where measures have been adopted, Cofetel has taken no action to enforce the measures.

Similarly, Mexico has not enforced its regulations requiring Telmex to offer a billing and collection service to its competitors under non-discriminatory terms and conditions. Telmex has refused either to provide such requested services or to disclose the terms and conditions under which it provides such services to its affiliates.

Prohibition on Foreign Control**:** Mexico should eliminate its prohibition on foreign control of Mexican "concessionaires" (facilities-based carriers), which is contrary to Mexico's WTO obligations.

NEW ZEALAND WTO VIOLATIONS – ***Reference Paper and GATS Telecom Annex***

New Zealand is violating its WTO obligations with respect to high mobile termination rates Mobile termination rates in New Zealand are among the highest in the Asia Pacific region**,** in some cases more than 14 times higher than the rates paid to terminate calls on fixed networks in New Zealand. Further, New Zealand’s international operators have indicated that they may increase these rates to even higher levels. As noted in the introduction, these rates violate New Zealand’s WTO obligations to provide cost-oriented interconnection and access to and use of the public telecommunications transport on terms and conditions that are “reasonable.”

The New Zealand Commerce Commission has commenced a proceeding to investigate fixed-to-mobile rates. The Commission has released a draft report, which expresses a preliminary view that fixed-to-mobile rates (for 2G networks only) should be regulated and based on a long-run incremental cost model. However, there is no guarantee that the Commission will confirm this view. If the Commission changes its mind and recommends against regulation of fixed-to-mobile rates, the Minister of Communications cannot override that decision and no government action will be taken. If the Commission confirms its preliminary view in favor of regulation, then the Minister will have to decide whether or not to accept the Commission's recommendation before mobile rates can be regulated.

NICARAGUA Central American Free Trade Agreement

In November 2004, despite the international movement towards cost-based interconnection rates, Enitel, the incumbent carrier in Nicaragua, sought to increase the interconnection rates for calls originating abroad and terminating in Nicaragua. Enitel also sought to introduce a significant surcharge on all international calls to fixed and mobile phones in Nicaragua. Enitel's actions represent impermissible unilateral amendments of the termination rate agreements that exist between Enitel and U.S. carriers. Nonetheless, when U.S. carriers declined to agree to these unilateral rate increases, Enitel partially disrupted carrier services.

Nicaragrua has signed the Central American Free Trade Agreement ("CAFTA") and these actions by Enitel are not consistent with CAFTA. Section 13.2(1) of CAFTA requires Nicaragua to provide access to and use of the public telecommunications network on terms and conditions that are reasonable and nondiscriminatory. There is no evidence that terminating international calls on the Enitel network result in additional costs to Enitel so there is no cost justification for the increases. Moreover, it is discriminatory to impose a surcharge on international in-coming calls and not other types of calls.

In the CAFTA, Nicaragua promised to undertake cost-oriented interconnection rates for major suppliers (which would include Enitel) within one year of entry into force of the agreement. Prior to that time, Nicaragua has agreed that "interconnection cannot be increased and, in fact, should be proportionally reduced to achieve a cost-oriented rate at the end of the transition period." Interconnection includes interconnection of international calls to Enitel's network, according to the U.S.-Mexico Panel Report. Enitel's actions are a direct violation of Nicaragua's CAFTA undertakings.

SINGAPORE U. S. – Singapore Free Trade Agreement

Singapore has taken a number of actions in 2004 to correct problems noted in CompTel/ASCENT's 2004 Comments. It has issued a decision allowing operators greater access at submarine cable landing stations, resulting in significantly greater access for market participants. It also has confirmed its decision designating SingTel's local leased circuits as a mandated wholesale service subject to cost-oriented price regulation. We applaud both of these pro-competitive actions and believe they indicate Singapore's commitment to an open market for telecommunications services.

We have some concern over the proposed interconnection rules for the portion of the circuit from SingTel's exchange to the customer premises, although we remain cautiously optimistic that this issue will be resolved. We urge USTR to monitor this matter closely to ensure that the interconnection for local leased circuits at SingTel's local exchanges are structured for efficient carrier-to-carrier handoffs.

We also are concerned by the exclusion of the telecommunications sector from the Competition Act, which was recently adopted in Singapore. Although the Singapore telecom regulator has the ability to control competition in the telecom sector through its Competition Code, the Code does not contain the right of judicial review provided for in Article 9.11 of the U.S.-Singapore FTA. Singapore has, however, represented that the exclusion of the telecom sector is not meant to be permanent. CompTel/ASCENT urges USTR to closely monitor the developments in this area.

SOUTH AFRICA WTO VIOLATIONS – *GATS*

CompTel/ASCENT is please that the Government of South Africa has announced its intentions to open the sector to further competition beginning February 1, 2005, and that the Independent Communications Authority of South Africa ("ICASA") has initiated proceedings to develop the necessary regulatory framework. We specifically welcome the decision to provide VANS operators with a greater choice in selecting the facilities to provide a wide range of value-added services, including voice, to their customers. These initiatives address many of the concerns raised in previous filings by CompTel/ASCENT.

We remain concerned, however, about VANS ownership restrictions. We noted previously that the Department of Communications issued regulations requiring a minimum 15% shareholdings in VANS operators with annual turnover of one million Rand and above by "historically disadvantaged individuals" by October 1, 2005. On December 2, 2004, ICASA proposed increasing this discriminatory minimum shareholding in VANS operators by such individuals to 30%. This constitutes a limitation on the participation of foreign capital, in violation of GATS Article 16(2)(f). South Africa's WTO commitments on VANS does not reserve the right to restrict foreign ownership for VANS.

SWITZERLAND WTO VIOLATIONS – *Reference Paper and GATS Telecom Annex*

Broadband Access (Leased Lines, Bitstream Access and Unbundling). The Swiss Government has failed to act to compel Swisscom, the former monopoly, to provide non-discriminatory wholesale access to Swisscom's network to provide the same type of sophisticated broadband access services that Swisscom offers to its end users. Although a 2003 Telecommunications Decree requires Swisscom to offer interconnected leased lines, full and shared unbundling and bitstream access on non-discriminating terms and at cost-oriented rates, Swisscom willfully refuses to comply and has suffered no consequences. At least one competitive carrier has instituted interconnect proceedings with the regulator, the Federal Office of Communications ("FOC"), on all three of these items but the regulator has not acted.

Simply adopting a regulation is not sufficient. FOC must enforce Swisscom's regulatory obligations. The failure to compel Swisscom to provide local loop unbundling at cost-oriented prices and on non-discriminatory terms and conditions or to provide leased lines and bitstream access on similar terms and conditions constitutes a violation of Switzerland's commitments under Section 2 of the Reference Paper and Section 5 of the GATS Telecom Annex.

***Ex-ante regulation*:** Swiss law currently restricts the ability of the FOC to impose ex-ante regulation, particularly in connection with interconnection obligations. One of the goals of proposed amendments to the Swiss Telecoms Act is to provide the FOC with clearer authority to act in advance of anti-competitive conduct. The draft law, however, does not contain such authority. Instead, it sets a limit on interconnection disputes at seven months, after which FOC could impose interconnection obligations on Swisscom. The FOC decision could be substantially delayed through appeals proceedings, which are not subject to any time limits. Thus, the proposed amendments do not satisfy Switzerland's obligations to ensure interconnection on the terms and conditions set out in the Reference Paper, to require publication of a reference interconnection offer and timely resolution of interconnection disputes.

CompTel/ASCENT urges USTR to ensure that the Swiss Government enacts regulatory measures in its legislation that enables Switzerland to comply with its Reference Paper commitments.

***Excessive Fixed-to-Mobile Termination Rates*:** Fixed-to-mobile termination rates in Switzerland are far from cost-oriented and are discriminatory, in violation of Section 2.2(b) of the Reference Paper and Section 5(a) the GATS Telecom Annex. Swisscom's mobile affiliate, the largest mobile network operator in Switzerland, charges fixed operators rates to terminate calls on its mobile network that are far higher than those charged for termination on the fixed network. In fact, the level of Swiss mobile termination rates is among the highest in Europe, although there is no evidence that costs are that much higher in Switzerland.

Furthermore, mobile operators in Switzerland discriminate against fixed network operators. Mobile operators charge fixed network operators a far higher rate than the rate the mobile operators charge their own customers for connecting to other mobile customers or customers on the mobile operator's own fixed network (or that of its affiliated carrier). This type of discriminatory pricing violates the Reference Paper requirement that interconnection be provided on non-discriminatory terms and conditions, including prices.

CONCLUSION

For the reasons described above, CompTel/ASCENT urges the Office of the U.S. Trade Representative to work aggressively with the Governments of Australia, China, Colombia, France, Germany, India, Japan, Mexico, Nicaragua, Singapore, South Africa and Switzerland to address market access barriers and anti-competitive practices in their markets. USTR should take appropriate actions to ensure that these countries ensure fair and non-discriminatory market conditions in accordance with their respective trade commitments.

Sincerely,

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Emerging Markets & International Affairs