

PARALYSIS BY PHANTOM: PROBLEMS OF THE ITU FILING PROCEDURES

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Abstract

The international procedures through which intended satellite systems are notified to the ITU, and later systems have to be co-ordinated with earlier, is in danger of paralysis through notification of systems which are unlikely to be implemented. This abuse of procedures is presently under consideration in the ITU. Proposed solutions, 'due diligence' by states in investigating proposals submitted to them, or a suitable 'filing fee' are considered. The paper suggests that in addition recourse might be had to the doctrine of 'implied powers' of international organisations, to justify the ITU itself refusing to accept such notifications. As it notes, this paper now contains material not available at the time of its initial delivery.

c F. Lyall, 1996
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Introduction

The International Telecommunication Union plays a major role in the functioning of telecommunications generally. Its roles in the allocation of radio frequencies, in ensuring the propriety of frequency assignments, in the use of those assignments, in the matter of orbits, and in the coordination of systems are fundamental to the modern use of outer space, and particularly for the various space telecommunication networks. To fulfil these roles the ITU has developed various mechanisms and procedures. Unfortunately some of these procedures have, within recent years, been abused. It is time to seek to abate this nuisance, which in an international sense is a 'public nuisance' although it has been to an extent been acquiesced in by those who should know better.

The problem (properly the problems) outlined below has been identified by the ITU. The Plenipotentiary Conference of the Union which was held in Kyoto in 1994, adopted Resolution 18, calling for a review of various important issues concerning international satellite coordination. Three objectives were identified for this review: equitable access and the efficient establishment and development of satellite networks; that coordination procedures should meet the needs of administrations while preserving the interests of other services; the examination of technical advances in relation to allotment plans to see whether they provide a flexible and efficient use of the spectrum and the geo-stationary orbit. These objectives comply

with the requirements of the ITU's basic documents.

Simultaneously, the Kyoto Conference also adopted Resolutions 15 and 39. The first of these involves a review of the rights and obligations of all the members of sectors of the ITU so as to enhance the responsiveness of the ITU to the changing telecommunications environment. Financial questions are not irrelevant in that review. However, under Resolution 19 separate but linked consideration is being given to the strengthening of the financial base of the Union.

Work has proceeded under each of these three Resolutions, but none of the reviews has reached the point of final recommendations. The 1995 Radiocommunication Assembly established a Special Committee on Regulatory/Procedural Matters, and inter alia charged that Committee with work under the three Resolutions. The Special Committee has sought the views of the ITU members and named two Rapporteurs to prepare draft reports for the Special Committee meeting in January 1997. On the basis of discussion then, and probably with other input, the Director of the Radiocommunication Sector will make a final report to the World Radiocommunication Assembly later that year.

When the initial form of this paper was drafted interim reports and submissions by interested parties were not available to me. Some now are, particularly through Internet access.¹ I have, however, thought it best to retain the broad-brush approach of the Beijing paper, while inserting some (but not all) reference to the newly available documentation. The sketch of the matter presented in China has provided not to be wholly inaccurate, and in sketch form may be more useful for this forum rather than an attempt to track detail. Those wishing to pursue the matter in further detail are directed to the ITU web-site.²

The Problem

By Article III of the Outer Space Treaty, International Law applies in Outer Space, and that principle would now appear to have become customary international law as well as being treaty-based. Under Article VI of the Treaty states bear international responsibility for national

activities in Outer Space, and are under a duty to authorise and continuingly to supervise their nationals' use of Outer Space.

Telecommunications is a major area in which states discharge these obligations. Naturally, however, the bald words of Articles III and VI are too imprecise. For detail of the obligations one has to look at International Law as made within the framework of the International Telecommunication Union, obligations which in their principle go back to the origins of the ITU.

Under the ITU Radio Regulations, as amended, a state Member of the ITU notifies to the Bureau of the ITU Radiocommunication Sector its intention to assign the use of a particular frequency or more usually a set of frequencies, and, where appropriate, an orbital slot on the geostationary orbit, to an operator for use by a space system. This procedure is engaged in whether the intended operator is the state itself, whether the operator will be an international organisation for which that particular state acts,³ or whether the operator will be some other entity such as a company amenable to the licensing jurisdiction of the state.

When the Radiocommunication Sector of the ITU receives such notification, the notification is checked for conformity with the Table of Allocations of the Radio Regulations, and the Master International Frequency Register is also checked to see whether any other system has previously been registered to use those frequencies and orbit. Any problem with each other systems is followed up. Receipt of the notification is brought to the attention of member Administrations. If there is no apparent difficulty with the notice the ITU enters the assignment as received in the appropriate register, the Master International Frequency Register, and the information is published by the ITU in its weekly bulletin.

Of course, just as one terrestrial radio station may intrude on another, any space system may impinge on another space system, and the coordination of systems is important. Under the ITU system, the use of the radio spectrum requires systems using compatible or similar frequencies properly to integrate what they do so as to secure the efficient use of the radio spectrum.⁴ Causing interference to other systems is also specifically prohibited.⁵ And, of course, apart from the legal obligations, the fixed and

unalterable laws of physics form a constraint. It is not too much to say that in space telecommunications, the precepts of physics are the ultimate *ius cogens*!

These matters antedate the opening of space. Terrestrial radio systems interfere with other as it is, but matters would be much worse had not states at an early stage in radio history established the Table of Allocations, and the procedures for the notification of assignments to the ITU.⁶ Further, it was early and easily accepted that priority of notification of an assignment which conformed to the Table of Allocations, meant that assignment should be protected from harmful interference. Priority of notification came therefore to assume great importance. Indeed, it has come to be referred to in the somewhat pejorative expression - 'first come, first served'. This formulation is overstated, but it is true that states coming later into the ITU forum have on occasion felt that their needs were not equitably protected, the older states having already 'notified' frequencies and orbital positions which the newcomers might have wanted to use. Further, through substitution of satellites a state may continue to use slots and frequencies that were originally notified for a previous satellite.

Nonetheless, until recently the principle of priority through notification worked well, preventing much dispute and squabbling, since it meant that potential disputants were not working from a position of equality. One state did have a priority in the matter. This did not mean that a state having priority was under no duty to seek to accommodate the requirements of the newcomer. It did, however, mean that the newcomer was under greater pressure to make concessions in discussions between them. The onus in the matter was clear. The later had to contact the earlier. The earlier can to some extent stand on its rights. And of course, other existing systems have a greater authority than planned, or even more hypothetical, systems. The existing and even the well-nigh existing deserves greater consideration than the possible or the may-be.

In the past, when these procedures and requirements were being worked out, not too many states were involved in licensing and in notifying systems. In addition there were not too many systems to be dealt with. Now, the demand for space systems is considerable and this has been aggravated by geography. God did not see

fit to distribute habitable land equally round the globe, so centres of population are not regularly distributed round the world. It follows that orbital positions which 'see' population centres, or which can encompass both sides of an ocean, are more useful than others. These positions are therefore sought by many satellite systems.

The problem has therefore emerged that some states have proved willing to notify the ITU of intended assignments of orbits and frequencies for a projected system, when the system exists only in a tentative form (if that) in the mind of their proposers. The intention has been, it seems, to obtain whatever advantage can be got through making notification to Geneva and getting the system entered on the Master International Frequency Register. As we have seen, under the 'rules' the registered notification has 'priority' and later systems have to seek coordination with these 'prior' systems.

Of course, this is an abuse of the system. The system of notification/registration worked on the basis of proven and 'real' requirements. However, just as some countries have notified systems beyond their own requirements for national telecommunications so as to gain financially through leasing or otherwise engaging in business, so others have sought to gain a priority by notifying systems which have barely entered the planning stage, let alone progressed through it.

Five major variants of the fundamental problem arise.

First, states which have more fully planned and in a sense therefore 'real' systems to notify, have found themselves under an obligation to coordinate their systems with systems which exist only on paper - hence the phrase 'paper satellites'.

Second, the fact of the quasi-spurious nature of a filing is not always obvious. This can deter others from proceeding with a system proposal.

Third, the result could be a 'compromise' solution in which the earlier 'system' is 'modified' in the abstract in exchange for a real concession by the other side.

Fourth, the filing and coordinating procedures within the ITU has become clogged by the administrative procedures which any filing triggers. The detail of a notified system have to be checked against the Table of Allocations and any other regulations, as well as against the detail

of any relevant prior notified systems. The ITU has also had to cope with its duty to seek to arrange an accommodation between competing systems. ITU effort is wasted when one of these is a phantom, but has been through the notification and registration procedure, and the other is a later, but nonetheless a 'real' system lacking only the magic protection of priority of notification to the ITU.

Fifth, a related problem is that systems once established do not always fully conform to the parameters indicated in the notification filed with the ITU. This is not quite the same problem as the others, but could be tackled to an extent by the same solutions as the others.

The problem of filings which do not result in working systems has been known about for some years, and is now being attacked through the work of the Radiocommunication Advisory Group (RAG) with a view to action by the ITU. I outline the main proposals so far as I understand them, and add another of my own.⁷

Due Diligence

As indicated above, it is the responsibility of a state to supervise and license the activities in Outer Space of those subject to its jurisdiction. It is the right and duty of states alone to engage in the ITU filing process. It has therefore been thought that, were states properly carrying out their functions - exercising due diligence in the exercise of their responsibilities - the problem would be diminished if not elided.

This is an attractive suggestion. But of course it does imply that some states have been less than diligent in the past. While some may bridle in anger at such a suggestion, it is a fact of life that that is indeed the cause of the present problem. What assurance is there that states which have not exercised 'due diligence' in the past will suddenly change their behaviour?

Cynicism aside, it can be argued that what must be sought is a means through which 'due diligence' can be encouraged.

A US Discussion paper in 1996 outlines certain possibilities,⁸ which others have later agreed with. In particular it is suggested that the information required to be notified to the ITU by an 'assigning' state could be extended. This would go some way to show that a proposal is real, and that it has already gone some way towards implementation. Thus, were launch

dates and completion dates for stages of spacecraft and other construction supplied as well as the current bare information as to location, and frequencies, there would be a greater assurance that the notification is of a system that will be proceeded with.

While this is attractive, it has some problems. Present regulations require notification up to nine years in advance of commissioning the system, and it may be unrealistic to demand detail that far in advance. (The Radio Regulations Board has suggested four years).⁹

On the other hand some provision could be included under which particular information was to be supplied closer to completion of the project. That would permit a running check to be kept on progress. A notification which failed timeously to supply information on progress could then simply be deleted, and its 'assignments' made available for others without the need to coordinate with the prior and now expired system.

However, there is a fundamental problem with such an idea. The initial filing would still require ITU action, and the clogging of the system by filing would not be eased.

An alternative variant of this possibility is to keep such checks on the genuineness of a proposal within the competence, and therefore perhaps the confidentiality of the state administrations. States could be encouraged to require more information to be supplied and substantiated within the national licensing or authorising procedure before proceeding to notify the ITU, and without passing on that data to the ITU. Such information could be kept confidential in detail on commercial grounds. Of course, the cloak of 'commercial confidentiality' could in turn be itself abused, but there may be more to gain by requiring that a state at least certify that it has been satisfied as to such matters as the commercial viability of the applicant, of the project, and the detail of the planning and scheduling of the system. Should the project not be proceeded with the state would have been shown to have failed in its duty, and that alone might be a sufficient sanction.

The trouble is, of course, that it would seem that some states have already failed to be embarrassed by it being known that they engage in such unscrupulous, and I would say, immoral failure to exercise 'due diligence'. Would more publicity for such failures be a solution?

Whatever one thinks of these points, a renewed stress on 'due diligence' coupled with some more obvious indicators as to full compliance with the duty, has some advantages. In form the 'due diligence' approach is simple. It emphasises state responsibilities which already exist both under the Outer Space Treaty and the ITU system. Some might also stress that in that 'due diligence' puts the onus on states rather than on an international organisation, it thus recognises state sovereignty and guards against its diminution.

On the other hand, we got where we are at present by trusting states. Some more transparency is needed so that they can be seen to do their duty. And, even if other mechanisms are brought into play, increased transparency in all forms of governance is rarely a bad thing. In the case where an actual working system is found not to correspond with the information in the notification to the ITU, publicity may also be useful.

But there remains one huge flaw in such an emphasis on 'due diligence'. Not only does it assume (or encourage) states to do their duty, it assumes that all states are equally competent in supervising, checking and scrutinising the material involved. That patently is not so, and the problem is likely to get even worse as entrepreneurs persuade small states to make use of their rights under the ITU system to license speculative endeavours. In the discussion of this paper in Beijing, it was suggested that the solution would be for states of marginal competence to hire consultants to do the work for them. However, a) that assumes that a state is willing in effect to admit its inability adequately to discharge its international obligations, b) it still leaves the state with the duty of evaluating the advice it is given, and c) it assumes that the "consultant" interest is undividedly devoted to the international interest in the matter. None of these need be so.

Filing fee

Another set of proposals would attach a filing fee to any notification to the ITU.¹⁰ Were those setting up the space system to have to meet a significant financial cost as part of the filing process, that might well deter some at least of the more outrageous or frivolous proposals.

Various forms of the filing fee can be conceived. The fee might be a 'good faith' deposit, returnable to the system operator once the system was operational. Interest on the deposit would help offset the costs of processing the notification. Again, if a working system is found not to conform to its notified data, the filing fee should be forfeit.

On the other hand, the fee could simply be a 'processing fee' which could accurately reflect the cost of putting the notification through the ITU procedures, and thereby help ITU finances through making those who produce the work pay for its execution. Cost recovery for facilities provided has its attractions.¹¹

Finally some mixture of the two extreme 'filing fee' approaches could be taken - a proportion of the fee returnable in due course while some proportion would be retained to offset the ITU costs. This could also be adapted to the case where the system as activated does not quite fit the original notification. Thus were the system not brought into service within a specified period, or were its characteristic found not to conform to the filing, the deposit would be forfeit in whole or in part to the ITU.

What might be a suitable figure for the fee is, of course, a question. A UK/Luxemburg paper¹² speaks in terms of returnable deposit of 2% of the cost of each satellite in the system multiplied by a charge for the amount of spectrum space sought computed in units of 1000 MHz. If the fee were not to be returnable, it could be set somewhat differently, relating it clearly to processing cost. In any case it would be wise perhaps, as the US/Luxemburg paper suggests, to exempt from the calculation the first 1000 MHz of spectrum sought for either national services only, or in the case of systems to be set up for the use of less-developed countries.

Implied Powers?

Although it is likely that the problems of the phantom satellite will be tackled by legislative changes within the framework of the ITU, I find myself wondering whether in a suitably obvious, not to say clamant, case the ITU itself might not take action, for example, by refusing to process a filing which it suspects does not represent a fully and genuine intention to establish a space system. Alternatively it might include in its procedures the requirement of additional information that

would allow it to form a view as to the reality of a notification which has been sent to it, and proceed accordingly. If either or both possibilities outlined under the separate headings above are not adopted, or prove inadequate, could not the ITU itself act?

The principle is, of course, that an international organisation not only has the powers expressed in its constituent documents. In addition, by international law, it has the powers which it requires in order to fulfil its function.¹³ The ITU has therefore more powers than are expressed in its Constitution and Convention. Already it has exercised discretion in a matter of filing. When the Kingdom of Tonga filed for a large number of assignments, the matter was referred back to the Kingdom, and an agreed solution arrived at.¹⁴ The same could be done in the case of a notification which is suspected to lack reality.

Were the ITU to exercise such a power, other questions might then be tackled. Could the ITU not refer back a notified assignment which goes beyond the telecommunications requirements of a Member State, or where the state may reasonably be doubted to have the competence properly to supervise the activities of its licensee? This would prevent the use of a state as a 'post-box', and the exploitation of a state's 'rights' under international law in an environment where states do not have rights - outer space.¹⁵ I would prefer to see such a development, but suspect that I will wait a long time to see it.

Conclusion

The problem of processing filings which are unlikely ever to eventuate in actual working satellite systems is real. Steps are being taken to deal with it. If formal steps are not taken the ITU itself could lawfully take some steps that might help deal with the matter.

NOTES

- 1 See below, n.7.
- 2 See <http://www.itu.ch>.
- 3 Thus the US acts for INTELSAT, the UK for INMARSAT, and France for EUTELSAT.
- 4 ITU Constitution, arts. 1.2.a) and b) and 44.
- 5 ITU Constitution, art.45.
- 6 This was first done through the International Radio Union which fused with the International Telegraph and Telephone Union to form the ITU at simultaneous conferences of the two Unions held in Madrid in 1932. The current system was basically established during the re-formation of the ITU following the Second World War.
- 7 What follows may be more fully followed in such ITU documents as the "Final Report of Region 3 Forum for Resolution 18" (Kyoto, 1994) Region 3-APSCC-Doc.13; Rapporteur, SC-5 "Rapporteur's Initial Draft Report", Doc. SC-RG5/33; and "Special Committee on Regulatory Procedural Matters devoted to Resolution 18 (Kyoto, 1994), Rapporteur Group SC-4, Preliminary Report of the Rapporteur" (David M. Leive) 13 September 1996, Doc. SC-RG4/39. See also the draft paper "Views of the Radio Regulations Board on Resolution 18 (Kyoto, 1994)" Doc. RRB96/22-E.
- 8 "The Use of "Due Diligence" in Frequency Coordination of GSO FSS Satellite Networks", USA, Doc. RAG96-1/19.
- 9 See the draft "Views of the Radio Regulations Board on Resolution 18 (Kyoto, 1994)" Doc. RRB96/22-E.
- 10 Cf. Luxembourg material cited in n.12.

- 11 Cf. the Canadian paper, "Review of the Financial Foundations on the Union", ITU-2000, Doc. 3-E, 21 October 1996.
- 12 "Due Diligence Considerations", U.K./Luxembourg June 1996, submitted as part of the work of RAG96. Cf. "Some Further Aspects of the Financial Approach to Due Diligence" Luxembourg, RES18-R1/7-E and "Some Financial Considerations Arising from Consideration of Resolution 18 that Relate to the Review under Resolution 39," ITU-2000, Luxembourg Doc 2-E.
- 13 Reparation for Injuries Suffered in the Service of the United Nations, 1949 ICJ Rep. 174; (1949) 43 AJIL 589.
- 14 M.L. Smith, 'Legal and Policy Developments in International Satellite Communication' 1991 34 Proc. Int. Inst. Sp. Law 342-7 at 345-6; D. Riddick, 'Why does Tonga own Outer Space?', 19 Air and Space Law 15-29.
- 15 As outer space cannot be subject to claims of sovereignty, a state can not have any 'right' in outer space (art. II, Outer Space Treaty).