International Atomic Energy Agency comments on ICANN's *Initial Report on the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process*

The International Atomic Energy Agency (IAEA) is pleased to submit the following comments on the present Initial Report. These comments discuss why the recommendations in the Initial Report are inadequate to meet the needs of IGOs like the IAEA and do not properly reflect the status of such IGOs in international law.

As regards the protection of the interests of IGOs in the Domain Name System (DNS), the IAEA reiterates the view expressed in the *Open Letter from Intergovernmental Organizations on the Expansion of Generic Top Level Domains* that these interests are best protected by excluding the registration by third parties of the names and acronyms protected under Article 6*ter* of the Paris Convention for the Protection of Industrial Property at the top and second levels. As an IGO, the IAEA is entrusted by its Member States with important functions to promote nuclear safety, nuclear security, and nuclear safeguards as well as to promote the peaceful use of nuclear energy. Any protective mechanism other than a preventative one would require the Agency to divert public funds from these aims in order to preserve its reputation and public confidence.

However, if a curative mechanism to protect IGO rights is considered, the IAEA submits that it is desirable to design one that IGOs may effectively use. In effect, the real question facing the Working Group is whether it wants IGOs to resolve domain-name related disputes within the framework of an ICANN-sponsored mechanism akin to the Uniform Rapid Suspension (URS) and Uniform Domain Name Dispute Resolution Policy (UDRP) mechanisms or if it would rather IGOs to work outside this framework, as is the current practice of the IAEA. The IAEA submits that it is in the interests of ICANN and of domain-name registrants to establish curative mechanisms usable by all IGOs. The Initial Report does not propose such curative mechanisms.

Recommendation #2 is a welcome step forward in this regard, as it formally recognizes the legal reality that IGOs derive the protection of their names and acronyms from Article *6ter* of the Paris Convention. Like many IGOs, the IAEA does not register its names or acronyms as trademarks with domestic authorities. The pursuit of such protection would be superfluous in light of Article 6*ter* and therefore an inefficient use of public resources. In order for the ICANN curative mechanisms to be usable by the IAEA, they will need to recognize the protection afforded to the names and acronyms of IGOs by Article 6*ter*.

Despite this recommendation, the IAEA would still not be in a position to use the current or the proposed URS and UDRP mechanisms because of their "Mutual Jurisdiction" provisions. Acceptance of these clauses would likely require the IAEA to waive the immunity it enjoys under international law. Under Article XV of the Statute of the IAEA and as elaborated in Article III, Section 3, of the Agreement on the Privileges and Immunities of the IAEA, the IAEA "*shall enjoy immunity from every form of legal process*" in its Member States. This immunity facilitates the operations of the IAEA by allowing it to operate under the unified legal framework that its Member States have created for it, rather than inefficiently dedicating public resources to compliance with 168 legal regimes and worrying about potential litigation in as many court systems. Because of this, the IAEA does not submit to the jurisdiction of the courts of Member States and cannot agree to contractual terms that might constitute a waiver of its immunities. The mutual jurisdiction clauses of URS and UDRP are just such terms. Consequently, the IAEA is not in a position to use URS or UDRP, even though there currently are domain names registered by third parties that abuse the IAEA acronym.

The dispute resolution and rapid relief mechanisms proposed under points 2 and 3 of the IGO "Small Group" Proposal (Annex E to the Initial Report) would allow IGOs like the IAEA to participate in ICANN curative mechanisms because final recourse to a national court would be replaced by

arbitration. As the WIPO Arbitration and Mediation Center and the United Nations each note in their observations, arbitration is the standard mode of dispute settlement used in disputes between IGOs and other parties and is also commonplace in commercial settings. All IAEA contracts with outside parties include an arbitration clause. Its inclusion in a narrowly tailored curative mechanism for IGOs would not represent a departure from standard legal practice and would instead facilitate the rapid and cost-effective settlement of IGO DNS disputes in a manner that preserves the rights of all stakeholders.

Regarding the possibility raised in the Initial Report that an IGO proceed through an agent or assignee in the current URS or UDRP mechanisms, the IAEA is in general agreement with the comments of the OECD that raise concerns that such an assignment might not be effective and may weaken an IGO's rights in its name or acronym. Moreover, such a possibility is contrary to the goals of URS and UDRP. Both of these processes are designed to be accessible, cost-effective, and usable by rights-holders of any size with a minimum of legal support in cases where a domain has been registered in a clearly abusive fashion. The involvement of a third party would unnecessarily complicate proceedings under the curative mechanisms and pose an additional financial burden on IGOs, which, as the Initial Report recognizes in Recommendation #5, should be minimized rather than increased in light of the global public interests that IGOs serve.

In light of the above, Recommendation #4 should be revisited and amended to better reflect the realities of IGOs and their need for curative mechanisms that do not require submission to the jurisdiction of national courts and waiver of immunities.

IAEA

23 March 2017