



# **Protocol**

**on**

**Policy and Regulatory Framework for NEPAD**

**ICT Broadband Infrastructure**

**For Eastern and Southern Africa**

# PROTOCOL ON POLICY AND REGULATORY FRAMEWORK FOR NEPAD ICT BROADBAND INFRASTRUCTURE FOR EASTERN AND SOUTHERN AFRICA

## PREAMBLE

**We**, the Ministers responsible for information and communication technologies (ICTs) and / or Telecommunications from the below listed Member States of the African Union in Eastern and Southern Africa:

The Republic of Angola  
The Republic of Botswana  
The Republic of Burundi  
The Democratic Republic of Congo  
The Republic of Djibouti  
The Republic of Eritrea  
The Republic of Ethiopia  
The Republic of Kenya  
The Kingdom of Lesotho  
The Republic of Madagascar  
The Republic of Malawi  
The Republic of Mauritius  
The Republic of Mozambique  
The Republic of Namibia  
The Republic of Rwanda  
The Somali Republic  
The Republic of South Africa  
The Republic of Sudan  
The Kingdom of Swaziland  
The United Republic of Tanzania  
The Republic of Uganda  
The Republic of Zambia  
The Republic of Zimbabwe

**ENJOINED** as Member States of the African Union;

**CONSIDERING:** the principles and objectives stated in the Constitutive Act of the Union;

**INSPIRED** by the New Partnership for Africa's Development (NEPAD)'s recognition that; new information and communication technologies (ICTs) have opened up new windows of opportunity for African countries as tools that can accelerate their economic growth and development; the goals for a Common Market and an African Union can benefit immensely from the revolution in technology; the use of ICTs can bring unprecedented comparative advantages to the African continent; and that the need for the promotion and involvement of the private sector in meeting African's development challenges is imperative;

**RECALLING** the decision of the NEPAD Heads of State and Government Implementation Committee of March 2003 in Abuja, Nigeria to prioritize, *inter alia*, the Eastern African Submarine Cable Project and the associated NEPAD ICT Broadband access fibre optic project for landlocked countries;

**NOTING** positive efforts that the High Contracting Parties in their respective territories, regional trade blocs to which the High Contracting parties are members and NEPAD through the e-Africa Commission and other international development organisations such as the United Nations, African Telecommunications Union, the International Telecommunication Union, the African Development Bank, the World Bank and the Commonwealth Telecommunication Organization have taken and are taking to improve connectivity in Eastern and Southern Africa and to develop appropriate ICT policy and regulatory frameworks;

**NOTING FURTHER** positive efforts made by African and non-African telecommunications companies to facilitate and hasten the implementation of the Eastern Africa Submarine Cable System (EASSy) and other broadband network infrastructures in the region;

**RECOGNIZING** the need to build on the momentum already generated by the various stakeholders to fast-track the realization of broadband ICT infrastructures in the region;

**RECOGNIZING FURTHER** that lack of adequate submarine and terrestrial broadband infrastructure to support high-speed, high-quality, reliable and affordable electronic communications in our respective countries, and the Eastern and Southern Africa region is one of the major obstacles to economic and social development;

**DETERMINED** to alleviate poverty through greater use of ICTs which are of high-speed, high-quality and reliability through a regional approach based on a competitive provision of services anchored on a broadband regional infrastructure operating on open access principles;

**CONVINCED** of the need to mobilize our own and international resources and to ensure the involvement of private sector in the implementation of interstate, regional policies, programmes and projects with a view to addressing the acute shortage of broadband capacity in the Region and to tackle legal, policy and regulatory obstacles to cross-border provision of infrastructure and services;

**APPRECIATING** that the treaties establishing the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Inter-Governmental Authority for Development (IGAD), and the Southern African Development Community (SADC) enjoin their Members States to work towards harmonization of policies in the ICT sector and in particular to work towards improving connectivity amongst their members and the world;

**APPRECIATING FURTHER** the critical importance and relevance of Article 63 of the Treaty establishing the African Economic Community mandating Member States to; develop, modernise, coordinate and standardize their national telecommunications networks in order to provide reliable interconnection among Member States; establish a Pan-African Telecommunications Network and ensure its utilization and maintenance;

**INTENDING** to facilitate the formation of special purpose vehicle or vehicles (“SPV/s”) to construct, own, operate and maintain a NEPAD ICT Broadband Infrastructure Network in Eastern and Southern Africa comprising the submarine and terrestrial network or networks;

**INTENDING FURTHER** that the SPV/s formed in terms of this Protocol operates in accordance with the NEPAD Objectives and Principles set forth in Annex 1 of this Protocol and that it should conduct its business in accordance with Open Access Principle as set forth in Article 11;

**IN FURTHERANCE** of the principles of the African Union stated in Article 4 of the Constitutive Act of the Union being in particular the promotion of self-reliance within the framework of the Union and the promotion of social justice to ensure balanced economic development;

**IN PURSUANCE** of Article 3 of the Constitutive Act of the African Union which mandates Member State to coordinate and harmonize policies between existing and future Regional Economic Communities;

**BEARING IN MIND** that this Protocol is an instrument to facilitate the coordination and harmonization of the ICT policies and regulatory frameworks of the High Contracting Parties' countries and the existing Regional Economic Communities of which the High Contracting Parties are members;

**BEARING IN MIND FURTHER** the principles of international law governing relations between States;

**WISHING** to contribute to the harmonious, balanced, equitable and sustainable development of the High Contracting Parties' territories and the Region by facilitating the speedy establishment of the regional ICT Broadband Infrastructure Network or Networks on Open Access Principles and harmonization of policies and regulatory frameworks of the High Contracting Parties to achieve these objectives.

**HEREBY AGREE AS FOLLOWS:**

## CHAPTER I

### Definitions

#### Article 1

*For the purposes of this Protocol unless the context otherwise requires;*

*“Affordability”* means that the wholesale charges for using the NEPAD ICT Broadband Infrastructure Network, whilst recognising relevant costs for investing in and operating the Operating Entity/Entities shall be set as low as possible for all authorised service providers making use of the network in order to maximise the usage and benefits of the network and minimise the cost to End-Users.

*“African led Special Purpose Vehicle/Vehicles”* means a registered body corporate entity/entities, company and / or organisation which shall be formed in terms of this Protocol to participate in the construction, ownership, maintenance and / or operation of the Submarine NEPAD ICT Broadband Infrastructure Network for Eastern and Southern Africa and / or any section thereof through the Hybrid SPV as majority shareholder.

*“Agreement”* means this Protocol.

*“Authorised Service Provider”* means any service provider (international gateway operators, ISPs, academic institutions, etc.) which is licensed, exempted and / or allowed by law, regulation, contract and / or in any lawful manner by a High Contracting Party, to make use of the Regional Network to provide national, regional and / or international service to End Users.

*“COMESA”* means the Common Market for Eastern and Southern Africa.

*“CRASA”* means the Communications Regulators Association of Southern Africa.

*“EAC”* means the East African Community.

*“Eligible Entity/Entities”* means entity or entities entitled to participate as shareholders in the Operating Entity/Entities in terms of Article 8.

*“Electronic Communication Services”* means services which consist wholly or mainly of the transmission and routing of signals on communication networks, including telecommunications services and transmission services in networks used for broadcasting.

*“End Users”* means the consumers of the services provided by Authorised Service Providers who make use of the Regional Network.

*“Harmonisation”* means the dynamic process of establishing mutually complimentary policies, legislation, rules, standards, practices or systems between High Contracting Parties on the basis of agreed minimum requirements for purposes of facilitating the realisation of the objectives of this Protocol.

*“High Contracting Party”* means a State which is a signatory to this Protocol.

*“Hybrid Special Purpose Vehicle/Vehicles”* means a registered body corporate entity/entities, company and / or organisation which shall be formed in terms of this Protocol either specifically for the construction, ownership, maintenance and / or operation of the Submarine NEPAD ICT Broadband Infrastructure Network for Eastern and Southern Africa and / or any section thereof which shall be made up of the African led SPV, which shall be the majority, and operators participating in their individual capacities.

*“ICTs”* means Information and Communication Technologies.

*“IGA”* means the Inter-Governmental Assembly established in terms of Article 18.

*“IGAD”* means Inter-Governmental Authority for Development.

*“Interconnection”* means the physical and logical linking of networks which allows users of one network to communicate with users of the same or other networks. Services may be provided by the parties involved in the interconnection or by other parties who have access to the network.

*“International currency”* as shall be determined by the SPV/s

*“Landlocked State”* means a State which has no sea coast.

*“NEPAD ICT Broadband Infrastructure Network”* means the ICT networks in Eastern and Southern Africa linking and / or connecting the High Contracting Parties with each other and / or the rest of the world and could either be terrestrial network or submarine cable and / or both as the case may be, established in terms of this Protocol.

*“Non-discrimination”* means that there shall be no preferential treatment in the terms and conditions, including charges for using the network or networks owned by the SPV/s, to any service provider whether it is an owner of the network or a third party, taking into account policy development and harmonisation objectives for the participating countries in the region.

*“Open Access”* means that any Authorised Service Provider shall have access to any network facility and any network service of the regional open access network on terms and conditions that are non-discriminatory, transparent and affordable to all parties and that the Operating Entity/Entities shall not compete with Service Providers in provision of retail services.

*“Open Access Principle”* means the principle that the Operating Entity/Entities should comply with as set out in Article 11.

*“Operating Entity/Entities”* means Special Purpose Vehicles, companies and / or organisations which shall be formed in terms of this Protocol specifically for the construction, ownership, maintenance and / or operation of the NEPAD ICT Broadband Infrastructure Network for Eastern and Southern Africa and / or any section thereof.

*“Policy and Regulatory Issues”* means those aspects affecting or relating to the Operating Entity/Entities which are of primary interest to the High Contracting Parties as Sovereign States and which have implications on the attainment of the objectives of this Protocol and the NEPAD principles.

*“Pure Special Purpose Vehicle/Vehicles”* means a registered body corporate entity/entities, company and / or organisation which shall be formed in terms of this Protocol specifically for the construction, ownership, maintenance and / or operation of the NEPAD ICT Broadband Infrastructure Network.

*“Region”* means Eastern and Southern Africa composed of countries which have signed, ratified and / or acceded to this Protocol as may be applicable.

*“Regional Network”* means the NEPAD ICT Broadband Infrastructure Network for Eastern and Southern Africa.

*“Regulated Return on Investment”* means the determined measure of the profitability of the Regional Network expressed as a periodic percentage return and calculated as Income divided by Investment.

*“Retail Services”* means Services offered by Authorised Service Providers to End Users.

*“SADC”* means Southern African Development Community.

*“Service”* means electronic communications services provided for remuneration which consist wholly or mainly of the transmission and routing of signals on communication networks, including telecommunications services and transmission services in networks used for broadcasting.

*“Services Layer”* means the layer of a communications system used to deliver any kind of Service.

*“Shareholders Agreement”* means an agreement drawn up at the inception of a business, and which defines the relationships amongst the shareholders, and how the business is to be managed.

*“Transparency”* means that the terms and conditions, including all relevant charges, for using the Regional Network shall be publicly available. There shall be a reference offer which shall be sufficiently unbundled to ensure that Service Providers are not required to pay for facilities that are not necessary for the wholesale Service they require. A description shall be made available of relevant offerings broken down into components according to market needs, and associated terms and conditions including charges.

*“Transport Infrastructure Layer”* means all kinds of infrastructure used to carry national, regional and / or international electronic communications services.

*“Wholesale Services”* means all types of electronic communication services offered by the Operating Entity/Entities to Authorised Service Providers.

## **CHAPTER II**

### **Objectives of the Protocol and General Undertaking**

#### **Article 2**

##### **Objectives**

1. The objectives of this Protocol are:
  - a. To promote and facilitate the provision of ICT broadband infrastructure to support high-quality, high-speed and reliable electronic communications in Eastern and Southern Africa and with the rest of the world at Affordable Price for End Users based on Open Access Principles;
  - b. To secure the rollout of broadband open access infrastructure in the Region as provided for in this Protocol with the involvement of the private sector.
  - c. To facilitate the incorporation and / or utilisation of existing national and / or regional networks, subject to agreement by the IGA and the High Contracting Party concerned, where applicable, practicable and / or feasible, into the NEPAD ICT Broadband Infrastructure Network.
  - d. To address legal, policy and regulatory obstacles in relation to the provision of cross-border infrastructure and services in the Region and beyond by encouraging and promoting Open Access Principles and Harmonisation of ICT policies and regulatory frameworks in the Region.
  - e. To encourage the use of the infrastructure developed in terms of this Protocol to support a dynamic, competitive provision of cross-border services and applications at Affordable Price and increased volumes amongst the countries of the Region and with the rest of the world.
  - f. To ensure that the infrastructure constructed pursuant to this Protocol is designed to contribute to the development and promotion of the economic, social and cultural integration of the African Continent as envisaged in the African Union Constitutive Act.
  - g. To facilitate access for Authorised Service Providers, in territories of High Contracting Parties, to international fibre optic cables at Affordable Prices.

## **Article 3**

### **General Undertaking**

1. All High Contracting Parties undertake and commit to creating favourable conditions for the construction, operation and maintenance of the NEPAD ICT Broadband Infrastructure Network for purposes of facilitating cross-border infrastructure development, ensuring the availability of affordable high-speed, high-quality and reliable electronic communication services in respective countries, throughout the Region and generally improving domestic, regional and international connectivity.
2. The High Contracting Parties shall refrain from any unilateral and / or collective action or actions that may hinder the attainment of the objectives of this Protocol.
3. Each High Contracting Party undertakes, in accordance with its own laws, to ensure that the establishment, ownership, funding, management and general operation of the Operating Entity/Entities is in accordance with the provisions of this Protocol.
4. The Parties undertake to take the necessary steps to harmonise their legal, policy and regulatory frameworks for purposes of achieving the objectives of this Protocol.
5. Subject to the provisions of this Protocol, the Operating Entity/Entities shall in each High Contracting Party's territory be subject to and operate in terms of the laws of the concerned High Contracting Party.
6. Each High Contracting Party shall, acting in accordance with its own constitutional procedures, take all necessary steps to ensure the enactment and dissemination of such legislation and policies as may be necessary for the implementation of this Protocol.

## **CHAPTER III**

### **Establishment, Objectives, Ownership and Governance of the Operating Entity/Entities**

#### **Article 4**

##### **Establishment of the NEPAD ICT Broadband Infrastructure Network**

1. With full regard to the principles set forth in the Preamble to this Protocol and the objectives stated in Article 2 above, the High Contracting Parties hereby agree and undertake to individually within their territories and collectively within the Eastern and Southern African region to facilitate the construction of the NEPAD ICT Broadband Infrastructure Network to carry electronic communications services within the territory of each High Contracting Party and across the Region and connecting to the rest of the world in terms of the provisions of this Protocol.

#### **Article 5**

##### **Formation of the Operating Entity/Entities**

1. The High Contracting Parties, with full regard to the principles set forth in the Preamble to this Protocol, hereby agree to facilitate the formation of an entity/entities, the special purpose of which would be to construct, own, maintain and operate the Regional Network in accordance with the provisions of this Protocol.
2. It is hereby agreed, for the avoidance of doubt, that Article 5.1 shall not exclude the formation of a number of entities for purposes of the construction, ownership, maintenance and / or operation of the Regional Network and / or any section thereof and generally for purposes of giving effect to the provisions of this Protocol.
3. Notwithstanding paragraph 2. above, it is hereby agreed that the terrestrial section of the Regional Network shall be managed and / or owned by an entity/entities formed for the purpose.

#### **Article 5A**

##### **Formation of the Hybrid SPV**

1. The High Contracting Parties, with full regard to the principles set forth in the Preamble to this Protocol, hereby agree to facilitate the formation of a Hybrid SPV to construct, own, operate and maintain the Eastern Africa Submarine System (EASSy).
2. The Hybrid SPV shall be owned and managed by the African led Special Purpose Vehicle/Vehicles and individual telecommunication companies.

## **Article 6**

### **Juridical Personality**

1. The Operating Entity/Entities established pursuant to Article 5 shall, within the territory of each High Contracting Party:
  - a. Have legal personality with the capacity and power to enter into contracts, acquire, own or dispose of movable and or immovable property and to sue and be sued.
  - b. Have such legal capacity as is necessary for the proper exercise of its powers and performance of its functions.
2. All the High Contracting Parties undertake, within their territories, and subject to their own laws, to take such steps as are necessary for purposes of giving effect to the provisions of this Article.

## **Article 7**

### **Objectives of the Operating Entity/Entities**

1. The objectives of the Operating Entity/Entities shall include:
  - a. The promotion of open, Non-Discriminatory and Affordable Access to international communications for citizens of the Region and the African Continent.
  - b. The facilitation of economic and social integration of the Region and the African Continent through the provision of ICT broadband infrastructure.
  - c. The embodiment and promotion of cooperation amongst African countries.
  - d. The promotion of equal ownership and participation by entities and Governments of the Region in the Pure and African led Special Purpose Vehicles.
  - e. The promotion and encouragement of technology transfer and skills development amongst the countries of the Region.
  - f. The empowerment of locally-owned, small to medium enterprises through the provision of goods and services to the SPVs and Operating Entities while being consistent with cost efficiency principles.

## **Article 8**

### **Ownership Principles of the Pure and African led Special Purpose Vehicles**

1. The ownership structure of the above Special Purpose Vehicles shall be such that:
  - a. It ensures equal participation by Eligible Entities in all countries of the Region.
  - b. At all times, the majority shares in the Pure Special Purpose Vehicles shall be owned by African owned private or public entities and or Governments.
  - c. The shares in the African led Special Purpose Vehicles shall be owned by African private or public entities and or Governments.
  - d. It reflects collaboration between African countries.
  - e. The ownership of the Special Purpose Vehicles is distinct and separate from the management and operation of the entity/entities including capacity allocation and leases.
  - f. It ensures affordability of equity by prospective shareholders.
2. There shall be three categories of shareholders – namely:
  - a. Operators Licensed to provide international communication services and other providers of international communication services recognised by the Governments of the Region which shall be the predominant category.
  - b. National non-operator entities that the High Contracting Parties may nominate subject to IGA's approval.
  - c. The Governments of the High Contracting Parties, represented by the IGA.
3. All the Eligible Entities shall, regardless of the category of shareholders the entity may belong, each have equal shareholding.

## **Article 8A**

### **Ownership Principles of the Hybrid SPV**

1. The ownership structure of the Hybrid SPV shall be such that:
  - a. At all times, the majority shares in the Operating Entity/Entities shall be owned by the African led SPV.
  - b. Notwithstanding Article 8A.1.a above, the relationships and rules of engagement between and among the shareholders of the Hybrid SPV shall be mutually agreed within a Shareholders' Agreement supported by a Construction and Maintenance Agreement and / or other agreements that

might prevail. For the avoidance of doubt, any rule, regulation or relationship that shall be incompatible with the NEPAD principles as set out in Annex 1 shall be null and void.

2. There shall be four categories of shareholders – namely:
  - a. Operators Licensed to provide international communication services and other providers of international communication services recognised by the Governments of the Region which shall be the predominant category.
  - b. National non-operator entities that the High Contracting Parties may nominate subject to IGA's approval.
  - c. International Telecommunications Operators subject to approval by the IGA.
  - d. The Governments of the High Contracting Parties, represented by the IGA.
3. All the Eligible Entities shall, regardless of the category of shareholders the entity may belong, each have equal shareholding in the Pure and African led Special Purpose Vehicles.

## **Article 9**

### **Governance of the Special Purpose Vehicle/Vehicles**

1. Subject to the provisions of this Protocol, the Special Purpose Vehicle/Vehicles shall be run on generally accepted commercial principles and in accordance with such Shareholders' Agreement as the shareholders may conclude.
2. The Shareholders Agreement concluded in terms of this Article shall inter alia:
  - a. Incorporate and accept Open Access Principles as set forth in Article 11.
  - b. Create such classes of shares with such rights as the shareholders may determine; provided however that;
    - i. There shall be a Golden Share, to be held in trust by a representative of the IGA and such Golden Share shall entitle the IGA's representative to be a member of the Board of Directors of the Special Purpose Vehicle/Vehicles and to exercise the power of veto over issues specified in Article 9(2) (d) below.
    - ii. Save for the holder of the Golden Share, any other holder of any class of shares other than ordinary shares, shall not be entitled to participate in the ownership and governance structure of the entity/entities.
  - c. Notwithstanding Article 9.2.b above, the shareholders of the Special Purpose Vehicle/Vehicles shall be entitled to give the IGA's representative in the Board of Directors such additional rights and privileges as they may deem appropriate.
  - d. Incorporate and recognise the policy and regulatory oversight role of the IGA as provided for in Article 18.

- e. Incorporate and give effect to the principle of Regulated Return on Investment and undertake to comply with the IGA's directives, taking into account cost efficiency, including the cost of capital.
- f. Recognise and provide for the appointment of the Board of Directors by the shareholders and the appointment of one director by the IGA.
- g. Take into account the need to ensure geographical and gender representation in the appointment of the Board of Directors of the Special Purpose Vehicle/Vehicles.
- h. Have a general provision entrenching an undertaking by the shareholders to ensure that the Special Purpose Vehicle/Vehicles shall be run in accordance with the principles, objectives and purposes of this Agreement.
- i. Provide for such other issues and matters that are generally provided for in the Shareholders' Agreement and / or which the shareholders may deem appropriate or necessary for inclusion.

## **CHAPTER IV**

### **Rights and Obligations and Operating Principles of the Operating Entity/Entities**

#### **Article 10**

##### **Rights and Obligations**

1. The Operating Entity/Entities shall, within the territory of each High Contracting Party and across the region:
  - a. Provide a regional backbone infrastructure to support cross-border broadband communication services on a Non-Discriminatory, open access basis, and at Affordable Prices to countries in Eastern and Southern Africa and to the rest of the world.
  - b. Facilitate and / or participate in the construction of the NEPAD ICT Broadband Infrastructure Networks, and subject to the provisions of this Protocol, ensure access to landing points for all Authorised Service Providers from the High Contracting Parties on Open Access Principles generally and on Non-Discriminatory, fair and transparent basis in particular.
  - c. Negotiate, where applicable and commercially desirable, bulk capacity requirements for all Authorised Service Providers connected to the Regional Network and purchase the same in bulk from other international operators to meet the requirements of all Authorised Service Providers connected to the Regional Network provided that any individual Service Provider whether or not connected to the Operating Entity/Entities who wishes to negotiate their own capacity requirements with other regional and international operators and purchase the same would be free to do so without reference to the Operating Entity/Entities.
2. Paragraph 1.c above shall not in any way affect the validity of existing contracts which Authorised Service Providers within the Contracting Parties' territories may currently have with any entity and / or entities for the carrying of international traffic.
3. The Operating Entity/Entities shall, within High Contracting Parties' territories and subject to provisions of this Protocol be entitled to:
  - a. Lease any type of infrastructure or capacity it might need for its operations from any entity, including but not limited to infrastructure and capacity available from power, water, railway, oil, gas and similar utility companies and or corporations.
  - b. Lease any of its infrastructure, including dark fibre, to Authorised Service Providers in High Contracting Parties' territories that may want to lease it.
  - c. Be a regional and international gateway operator for leased capacity and switched regional and international wholesale traffic.

- d. Provide national leased capacity at any bandwidth to Authorised Service Providers.
  - e. Provide any wholesale national, regional and international electronic communications services as might be necessary for the advancement of the objectives of this Protocol.
4. The Operating Entity/Entities shall, independent of ownership and management structure, conduct business and / or businesses in accordance with the principles and guidelines provided for in this Protocol.
  5. Notwithstanding anything provided for in this Protocol, the Operating Entity/Entities shall be subject to policy and regulatory oversight by IGA, national regulations, and international standards.

## **Article 11**

### **Operating Principles for the Operating Entity/Entities**

1. The High Contracting Parties undertake to ensure that the Operating Entity/Entities shall be operated and run in their respective countries and across the Region in accordance with the Open Access Principle - namely:
  - a. All Authorised Service Providers shall be offered services by the Operating Entity/Entities on fair, transparent and Non-Discriminatory terms and conditions.
  - b. Authorised Service Providers shall be offered Transport Infrastructure Layer access to different capacities depending on their requirements.
  - c. End Users shall be free to choose any local Authorised Service Provider connected to the Regional Network.
  - d. The Operating Entity/Entities shall not compete with Authorised Service Providers (its customers) by offering services at the Services Layer directly to End Users.
  - e. The Operating Entity/Entities shall be formed, owned and operated in such a way as to facilitate competition and to foster innovation at the Services Layer, and where practical and commercially viable at all levels, with a view to maximising usage of the network and benefits to the End Users.
2. Each High Contracting Party shall take such action as is necessary, within its jurisdiction, for the purposes of making effective, in terms of its own laws, the provisions of this Article.

## **CHAPTER V**

### **Policy, Regulatory and Licensing Principles**

#### **Article 12**

##### **Policy and Regulatory Principles**

- 1 To facilitate the establishment of the Regional Network in terms of this Protocol, the High Contracting Parties undertake that they shall collectively and individually, within such time as they may agree upon at the signing hereof,:
  - a. Where necessary, amend their existing policy and regulatory frameworks and / or promulgate new policy and regulatory frameworks to ensure that their policy and regulatory systems are harmonized and are aligned to the requirements for the establishment, ownership, maintenance and operation of the NEPAD ICT Broadband Infrastructure Network in terms of this Protocol; and
  - b. Harmonise their policy and regulatory frameworks with the objective of promoting of Open Access Principle as stated in Article 11 of this Protocol and the NEPAD Objectives and Principles as set forth in Annex 1 of this Protocol.
- 2 The time frame within which the High Contracting Parties undertake to have harmonised their policy and regulatory frameworks in terms of paragraph (1) above shall be set with due regard to the legal processes and procedures of each High Contracting Party, and once agreed such time frame shall form an Annex to this Protocol.
- 3 Disputes between the Operating Entity/Entities and Authorised Service Providers within territories of the High Contracting Parties shall be settled in accordance with the legal and regulatory framework of the High Contracting Party in which the dispute arose.

#### **Article 13**

##### **Legal and Licensing Principles**

1. To facilitate the establishment of the Regional Network in terms of this Protocol, the High Contracting Parties undertake that they shall collectively and individually within their respective countries, within the period agreed to in terms of Article 12 of this Protocol:
  - a. Where necessary, amend their existing licensing frameworks and or introduce new licensing frameworks that recognize different types of licences at different layers of the network and / or exempt the Operating Entity/Entities from licensing requirements that could inhibit its operations in terms of the Open Access Principles.

- b. Where necessary amend their existing law and or introduce new legislation to allow for the licensing of the Operating Entity/Entities so as to enable it to provide services as outlined in this Protocol.
    - c. In those jurisdictions where infrastructure for national, regional and or international telecommunications services is owned by one Network Service Provider in terms of national law, amend and / or introduce new legislative changes to facilitate the licensing of the Operating Entity/Entities as a Wholesale Sale Service Provider or equivalent.
  2. Generally undertake to facilitate and ensure that the Operating Entity/Entities is licensed, permitted and / or otherwise authorized to operate in their territory regardless of whether the Government of the concerned country or any Service Provider from the country invests in the network or not.
  3. In the event that any High Contracting Party has not effected the necessary legal, policy and regulatory changes to facilitate the operation of the Operating Entity/Entities in its territory as outlined in this Protocol within such time as the High Contracting Parties may have agreed to in pursuance to Article 12, the High Contracting Parties hereby undertake to take such measures as are necessary to exempt the Operating Entity/Entities from the provisions and or application of their laws and policies to the extent that the same are inconsistent with the provisions of this Protocol.
  4. Recognising the objectives of the Operating Entity/Entities, in particular its objective of minimising costs to End-Users and the need to address the Region's developmental objectives, the High Contracting Parties agree that:
    - a. Licence fees for the Operating Entity/Entities shall be principally to cover administration costs incurred by regulators of the region, and shall not in any event be higher than an amount agreed to by the IGA.
    - b. The Operating Entity/Entities shall be exempted from all annual, including turnover related licence fees in all the High Contracting Parties' countries,.
    - c. The initial term for the licence to be issued to the Operating Entity/Entities shall be 15 (fifteen) years with an option to renew.
  5. In pursuance of the objectives of harmonization, the High Contracting Parties undertake to promote coordination amongst their respective regulatory bodies so as to ensure that the Operating Entity/Entities is subjected to agreed and standardised terms and conditions of licence across the Region.
  6. In view of the provision of paragraph 5. above, the High Contracting Parties agree that model standardised policy frameworks, regulatory instruments, and or licences, shall be developed in line with the provisions of this Protocol from time to time, and that they shall endeavour that their regulatory practices comply with such model standardised regulatory instruments.

## **CHAPTER VI**

### **Financial and Tariff Principles for the Operating Entity/Entities**

#### **Article 14**

##### **Financial Principles**

1. Subject to the provisions of this Protocol, the Operating Entity/Entities shall be operated in accordance with generally accepted sound financial principles.
2. The capital structure of the Operating Entity/Entities shall be optimised by using equity, debt and or quasi-equity to ensure affordable communications services for End Users.
3. The Operating Entity/Entities shall be structured in such a way as to ensure affordability of equity by prospective shareholders.
4. Bearing in mind the need to ensure Affordable Access to reliable, efficient and affordable communication services in the Region, the Operating Entity/Entities shall be run and operated so as to achieve fair and reasonable Return on Investment.

#### **Article 15**

##### **Principles for Determination of Wholesale Charges**

1. Access charges, interconnection charges, usage charges and any other wholesale tariffs and / or charges that the Operating Entity/Entities may levy shall be established in accordance with Article 11 of this Protocol, and in addition be in conformity with the following:
  - a. Tariffs and charges for all wholesale bandwidth and switched services in the reference offer shall, in all applicable cases, be independent of distance and be based on capacity provided in order to ensure equitable access to all participating countries and Service Providers in the region.
  - b. Tariffs and charges shall be uniform, and be denominated in one international currency. The only factor that may influence price variations in local currency for Services offered by the Operating Entity/Entities shall be the exchange rate fluctuations in the territory of a participating party.
  - c. There shall be no internal settlement or transit charges for regional cross-border traffic, as long as the traffic is carried by the Operating Entity/Entities.
2. Notwithstanding the provisions of Article 15.1.c above, Authorised Service Providers that are connected to the Operating Entity/Entities may be entitled to compensation for traffic that terminates into their respective networks, regardless of the origin of the traffic. The framework for charging and compensation model between the Operating Entity/Entities and other service providers connected to the Regional Network shall be developed following consultations and negotiations with the concerned stakeholders provided, however, that such a model shall be in accordance with this Agreement.

## **CHAPTER VII**

### **Article 16**

#### **Access to Undersea and Terrestrial Broadband Fibre Optic Cable Systems**

##### **A Access to International Undersea Fibre Optic Cable Systems**

1. The High Contracting Parties, recognizing the exceptional position of countries with existing or planned international fibre optic cable systems and the special needs of Land Locked States, agree that countries that have landing points for existing, planned or future international and regional fibre optic cable systems shall issue a licence(s) to and / or authorise the Operating Entity/Entities in their countries in accordance with the provisions of this Protocol to ensure that the Operating Entity/Entities has direct access to such cables.
2. The terms and conditions, including charges, for access to landing points imposed on the Operating Entity/Entities shall, where the fibre optic cable is part of the NEPAD ICT Broadband Infrastructure Network, be set in terms of the provisions of this Protocol.
3. In the event landing points are not part of the Regional Network, the coastal High Contracting Parties undertake to use their best endeavour to ensure that the terms and conditions, including charges, imposed on the Operating Entity/Entities are affordable, transparent and fair.
4. The obligation created by this Article shall exist and be binding on all the High Contracting Parties notwithstanding the fact that neither a specific High Contracting State Party nor any entity from within its territory participates in the Operating Entity/Entities as an investor and / or in any capacity, if they choose not to.

##### **B Access to Broadband Terrestrial Network**

1. The High Contracting Parties, recognizing the natural physical interconnectedness of their respective territories, agree to facilitate access to sectors of their electronic networks that shall be identified to be part of the regional terrestrial network.
2. Where new sections of the network need to be constructed, the High Contracting Parties agree to facilitate the Operating Entity/Entities to construct such networks.
3. The High Contracting Parties, recognising the importance of this network to the regional as well as national overall socio-economic development, agree to facilitate and encourage the use of this regional network.
4. The obligation created by this Article shall exist and be binding on all the High Contracting Parties notwithstanding the fact that neither a specific High Contracting Party nor any entity from within its territory participates in the Operating Entity/Entities as an investor and / or in any capacity, if they choose not to.

## **CHAPTER VIII**

### **Dispute Settlement**

#### **Article 17**

### **Dispute Settlement**

1. If any dispute or difference of any kind whatsoever shall arise between the High Contracting Parties or between any of the Eligible Entities in connection with or arising out of the Protocol, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation.
2. If, after thirty (30) days, the parties have failed to resolve their dispute or difference by such mutual consultation, then either party may give notice to the other party of its intention to commence arbitration in accordance with the rules of the African Union.
3. Notwithstanding any reference to arbitration herein, the parties shall continue to perform their respective obligations under the Protocol or any Agreement or Contract arising there from, unless otherwise agreed.

## **CHAPTER IX**

### **The Inter-Governmental Assembly and the Implementing Agency**

#### **Article 18**

##### **Establishment of the Inter-Governmental Assembly**

1. To facilitate the realisation of the objectives of this Protocol, the High Contracting Parties hereby form the Inter-Governmental Assembly (IGA) which shall be composed of all High Contracting Parties.
2. The IGA shall give consideration to those aspects of the Operating Entity/Entities which are of primary interest to the High Contracting Parties as Sovereign States and which have implications on the attainment of the achievement of the objectives of this Protocol. It shall have the power to give consideration to general policy, regulatory and long term objectives of the Operating Entity/Entities consistent with the principles, purposes, scope and activities of the Operating Entity/Entities as provided for in this Agreement.
3. Each High Contracting Party shall have one vote in the IGA.
4. The IGA shall have the following functions:
  - a. Facilitate and assist in promoting the NEPAD ICT Broadband Infrastructure Network, including the East African Submarine System (EASSy) Cable.
  - b. Be the holder of the Golden Share in the Special Purpose Vehicle/Vehicles.
  - c. Appoint a director to the Boards of Directors of the Special Purpose Vehicle/Vehicles, which director shall have the power of veto over Policy and Regulatory Issues.
  - d. Have oversight role in respect of issues of a Policy and Regulatory nature.
  - e. Approve non-telecommunication entities wishing to join and / or invest in the Special Purpose Vehicle/Vehicles in accordance with Article 8(2).
  - f. Ensure the highest level of African ownership and leadership in the Special Purpose Vehicle/Vehicles.
  - g. Promote and ensure domestic buy-in and encourage stakeholders to participate in the Special Purpose Vehicle/Vehicles.
  - h. Ensure that the Operating Entity/Entities uphold the Open Access Principles, the NEPAD Principles as well as Policies and Regulatory provisions of the Governments of the region and that the Operating Entity/Entities generally operate in accordance with their purposes and objectives as spelt out in terms of this Protocol.
  - i. Determine and enforce Operating Entity/Entities' Regulated Return on Investment.

5. The IGA shall meet at least once a year and / or at such time as may be convened by the Chairperson of the IGA provided however that a special meeting may be called on request by at least 50% plus one of the High Contracting Parties.
6. The IGA shall have the power to determine its procedures including the election of its chairperson.
7. Decisions of the IGA which have a bearing on the Special Purpose Vehicle/Vehicles shall be in the form of directives and once duly issued shall be considered as annexes to this Protocol.
8. The secretariat of the IGA shall be the NEPAD e-Africa Commission.
9. The administrative costs of the IGA and its secretariat shall be funded through a levy imposed on the Operating Entity/Entities.

## **Article 19**

### **Implementing Agency for the Protocol**

1. The NEPAD e-Africa Commission shall be the implementing agency and the secretariat for this Protocol and shall accordingly be responsible for the following:
  - a. Submit regular reports to the Summit of the Heads of State and Government Implementation Committee of NEPAD and the IGA on the progress regarding the establishment of the Operating Entity/Entities in Eastern and Southern Africa.
  - b. Coordinate efforts of the High Contracting Parties in the implementation of this Protocol.
  - c. Identify potential private sector, development partners and other potential partners that may assist in ensuring the successful and speedy implementation of this Protocol.
  - d. Be the Convenor of the IGA, upon instruction of the chairperson.
  - e. Represent the IGA on the Board of the Special Purpose Vehicle/Vehicles as and when so mandated.
  - f. Carry out any such activity as the IGA may direct in pursuance of the objectives of this Protocol.

## **CHAPTER X**

### **Miscellaneous Provisions**

#### **Article 20**

##### **Annexes to the Protocol**

1. The Annexes to this Protocol shall form an integral part of this Protocol.

#### **Article 21**

##### **Amendments to the Protocol, Annexes and Inclusion of Annexes**

1. Any High Contracting Party may propose an amendment to this Protocol, an amendment of an existing annex or the inclusion of a new annex to this Protocol.
2. A proposal contemplated in 1. shall be transmitted to the Secretariat of the IGA, which shall table such proposal at the next meeting of the IGA.
3. The IGA shall reach a decision on the proposal by a two-third majority of the High Contracting Parties and shall thereafter transmit the decision to the Secretariat of the IGA, which shall in turn submit the proposal to the High Contracting Parties.
4. The High Contracting Parties, preferably acting through the Minister responsible for ICTs and / or Telecommunications, shall decide on the proposal by a two-third majority.
5. In case of a proposal to amend an existing annex or include a new one, the decision shall be made by the IGA by consensus.

#### **Article 22**

##### **Signature, Ratification and Accession**

1. This Protocol shall be open for signature by or on behalf of any High Contracting Party.
2. The High Contracting Parties shall:
  - a. Ratify the Protocol in accordance with their constitutional procedures;
  - b. Amend, repeal, if required, national legislation to give effect to the provisions of this Protocol; and
3. Any Eastern and Southern African State may accede to the Protocol subject to accepting the provisions of this Protocol.

## **Article 23**

### **Entry into Force**

1. This Protocol and any subsequent amendments thereto shall enter into force on ratification by at least 51 (fifty one) percent of the High Contracting Parties.
2. This Protocol shall come into force in relation to the acceding state on the date its instrument of accession is deposited with the African Union and the NEPAD e-Africa Commission.

## **Article 24**

### **Depositary**

1. This Protocol, drawn up in 3 (three) original text, English, French and Portuguese, all of which are authentic, shall be deposited with the Chairperson of the African Union and the NEPAD e-Africa Commission who shall transmit a certified true copy to all signatory parties.

## **Article 25**

### **Withdrawal from the Protocol**

1. Any High Contracting Party wishing to withdraw from the Protocol shall notify by giving one year notice in writing to the African Union and the NEPAD e-Africa Commission.

## **Article 26**

### **Relationship with other International Agreements**

1. This Protocol shall not alter in any way the obligations of any High Contracting Party stemming from a bilateral or multilateral agreement to which such a High Contracting Party is also a party at the time of signing of or accession to this Protocol.
2. High Contracting Parties affirm their intention to ensure that their existing agreements with each other are progressively adapted over time to comply with the provisions of this Protocol.
3. High Contracting Parties shall ensure that all future agreements concluded by them with other High Contracting Parties or non-High Contracting Parties comply with the provisions of this Protocol.

**IN WITNESS WHEREOF, WE**, the Ministers responsible for information and communication technologies and / or telecommunications in Eastern and Southern Africa have signed this Protocol.

**DONE AT** .....this .....Day of .....2006 in three original texts in the English, French and Portuguese languages all being equally authentic, provided that in case of inconsistencies and differences in interpretation the English text shall prevail.

<b>HIGH CONTRACTING PARTY</b>	<b>DATE OF SIGNING /ACCEDING</b>
For and on behalf of the Republic of Angola	
For and on behalf of the Republic of Botswana	October 16, 2006
For and on behalf of the Republic of Burundi	
For and on behalf of the Democratic Republic of Congo	November 29, 2006
For and on behalf of the Republic of Djibouti	
For and on behalf of the Republic of Eritrea	
For and on behalf of the Republic of Ethiopia	
For and on behalf of the Republic of Kenya	
For and on behalf of the Kingdom of Lesotho	August 29, 2006
For and on behalf of the Republic of Madagascar	August 29, 2006
For and on behalf of the Republic of Malawi	August 29, 2006
For and on behalf of the Republic of Mauritius	November 20, 2006
For and on behalf of the Republic of Mozambique	
For and on behalf of the Republic of Namibia	
For and on behalf of the Republic of Rwanda	August 29, 2006
For and on behalf of the Somali Republic	
For and on behalf of the Republic of South Africa	August 29, 2006
For and on behalf of the Republic of Sudan	
For and on behalf of the Kingdom of Swaziland	
For and on behalf of the Republic of Tanzania	August 29, 2006
For and on behalf of the Republic of Uganda	August 29, 2006
For and on behalf of the Republic of Zambia	November 30, 2006
For and on behalf of the Republic of Zimbabwe	October 16, 2006

## **ANNEX I      OBJECTIVES AND PRINCIPLES OF NEPAD**

### **NEPAD'S PRIMARY OBJECTIVES**

1. To eradicate poverty.
2. To place African countries, both individually and collectively, on a path of sustainable growth and development.
3. To halt the marginalization of Africa in the globalization process and enhance its full and beneficial integration into the global economy.
4. To accelerate the empowerment of women.

### **PRINCIPLES OF NEPAD**

1. Good Governance as a basic requirement for peace, security and sustainable political and socio-economic development.
2. African ownership and leadership, as well as broad and deep participation by all sectors of society.
3. Anchoring the development of Africa on its resources and resourcefulness of its people.
4. Partnership between and amongst African peoples.
5. Acceleration of regional and continental integration.
6. Building the competitiveness of African countries and the continent.
7. Forging a new international partnership that changes the unequal relationship between Africa and the developed world.
8. Ensuring that all Partnerships with NEPAD are linked to the Millennium Development Goals and other agreed development goals and targets.

## **ANNEX II**

### **TIMETABLE FOR HARMONISATION OF NATIONAL POLICIES, LEGISLATION AND REGULATION TO CONFORM TO THIS PROTOCOL.**

High Contracting Parties hereby agree, with reference to Article 12 and 13, to ensure that their national policies, legislation are modified, adapted or amended to conform to the principles enunciated in this Protocol by March 31<sup>st</sup> 2008.