

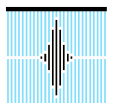


Draft Final Protocol on

High Level Policy and Regulatory Framework for NEPAD

Broadband ICT Infrastructure

For Eastern and Southern Africa



EXPLANATORY NOTE ON THE DRAFT PROTOCOL ON THE NEPAD BROADBAND ICT INFRASTRUCTURE FOR EASTERN AND SOUTHERN AFRICA

Background

1. The Draft Protocol on High Level Policy and Regulatory Framework for the NEPAD Broadband ICT Infrastructure is partly based on the Report on “NEPAD Broadband ICT Infrastructure for Eastern and Southern Africa” prepared by the Commonwealth Telecommunications Organization and ICT Consultants (Pty) Ltd (Botswana) for the NEPAD e-Africa Commission on high level policy and regulatory agreements required for developing and operating an open access broadband information and communications technology (ICT) infrastructure for Eastern and Southern African Region. The Report was presented and accepted by the meeting of Policy Makers and Regulators on 7 April 2006 which took place in Pretoria, South Africa. The accepted Report focused *only* on the policy and regulatory aspects of the development of a terrestrial broadband ICT infrastructure for Eastern and Southern Africa. The Draft Protocol is, however, inclusive of policy and regulatory aspects of the submarine cable portion of the proposed NEPAD Broadband ICT Infrastructure. There was no separate study on policy and regulatory aspects of the submarine cable section of the proposed network. It was assumed that the policy and regulatory issues would be the same for both the terrestrial and submarine cable.
2. In addition to the CTO Report referred to above, the input for the Draft Protocol included agreed points from the meeting of the Policy Makers and Regulators of 7 April 2006 and the conclusions and recommendations of the Inter-Governmental Working Group meeting that took place in Kigali, Rwanda on 7 May 2006. We have also considered inputs from Communications Regulatory Association of Southern Africa (CRASA) in the preparation of the Draft Protocol where appropriate. .
3. We have also incorporated the outcome of the meeting of Legal Experts which took place in Johannesburg, South Africa from 22nd to 23rd May 2006 as well the inputs of Policy Makers meeting of 2nd and 3rd June 2006 which was held in Johannesburg, South Africa. It is our opinion that we have incorporated all the suggestions made by the various parties.

The Legal Basis for the Proposed Protocol

4. In general protocols are treaty implementing tools. That is, a protocol provides specifics in relation to the implementation of an international agreement and or treaty. Countries that conclude a protocol should in general all be party to an international treaty/agreement that mandates them to conclude protocols in specific areas and or sectors.
5. The greatest challenge for this project in relation to coming up with protocols has been to identify a regional and or international agreement that it can be based on. Such a treaty must in its provisions and or as one of its objectives, the promotion of objectives similar to those of NEPAD Broadband ICT

Infrastructure for Eastern and Southern African. In addition, all the countries which are or are desirous of being party to the proposed NEPAD Broadband ICT Infrastructure for Eastern and Southern Africa should be parties to the concerned agreement. However, countries which are potential parties to the proposed protocol belong to different and diverse regional economic communities such as EAC, COMESA and SADC. They are, however, all members of the African Union.

6. We identified two international agreements of potential application to the proposed protocol. These are the Constitutive Act of the African Union and the Treaty establishing the African Economic Community.
7. All countries in the proposed project are members of the African Union and almost all have ratified the Treaty establishing the African Economic Community.
8. Of the above two treaties, the Treaty establishing the African Economic Community is of particular relevance to this project. Article 63(2) of the Treaty enjoins Member States to, inter alia, “develop and coordinate their national telecommunications networks in order to provide reliable interconnection amongst Member States; to establish a Pan-African Telecommunications Network and to ensure its utilization and maintenance.”
9. It is clear that the Treaty establishing the African Economic Community contemplates a project similar to the one which is the subject of the proposed protocol. We have, however encountered a technical problem regarding the possibility of basing the proposed protocol on the Treaty establishing the African Economic Community. Our research has revealed that some countries have either not signed and or ratified the Treaty. Djibouti, Eritrea and Somalia did not sign the Treaty (We wish to apologize in advance should, for whatever reason, our findings turn out to be incorrect in this respect). It is thus inapplicable to them. We accordingly exercised caution and not based the proposed protocol on the Treaty establishing The African Economic Community notwithstanding that it appears, from a legal perspective to be providing a clearer legal basis for the conclusion of the proposed protocol.
10. We accordingly based the proposed protocol on the Constitutive Act of the African Union. Articles 4 of the Constitutive Act includes the promotion of self-reliance within the framework of the Union and the promotion of social justice to ensure balanced economic development as some of the Union’s operational principles. Article 3, for its part, lists the objectives of the African Union as to accelerate the political and socio-economic integration of the continent as well to coordinate and harmonize policies between existing and future Regional Economic Communities. Combined, these two articles give the legal basis for the protocol as proposed.
11. It should be noted that the Terms of Reference for the study on NEPAD Broadband ICT Infrastructure for Eastern and Southern Africa demanded the preparation of protocols as one of the key outputs. We did not, therefore, investigate the possibility of using other legal instruments with the potential to achieve the purposes of the study other than the use of protocols.

Structure of the Proposed Protocol

12. The main objective of the proposed protocol is to facilitate and or commit the parties to the construction and operation of the NEPAD Broadband ICT Network for Eastern and Southern Africa on open access principles. It further aims at providing for the formation of single special purpose entity/entities for the carrying out of the said construction, ownership, maintenance and operation of the proposed Regional Network. It does not propose to form a purely treaty based international organization. Given that there is an intention to involve private sector in the provision of the proposed network, the Draft Protocol commits countries to undertake to introduce policy and regulatory reforms to facilitate the formation and operation of the open access network independent of who owns such a network. However, there are other overriding policy objectives (other than open access principles) which had to be given effect to. This includes the need to ensure that the network is constructed, owned, maintained and operated in line with NEPAD Objectives and Principles.

13. The proposed protocol is divided into ten chapters as follows:
 - 13.1 *CHAPTER I: Definitions* – provides definitions of words and phrases used in the protocol.

 - 13.2 *CHAPTER II: Objectives of the Protocol and General Undertaking.* This chapter provides the objectives of the protocol as being the promotion and facilitation of broadband ICT infrastructure to support high-quality, high-speed and reliable telecommunications, broadcasting and Internet connectivity in Eastern and Southern Africa. More critically, the objectives of the proposed protocol include the need to address legal, policy and regulatory bottlenecks to the provision of cross border ICT services, *inter alia*, through harmonization of policy and regulatory frameworks of the contracting parties. Accordingly, it provides a number of general undertakings that would lead to harmonization.

 - 13.3 *CHAPTER III: Establishment, Objectives and Governance of the Operating Entities/Entities:* This chapter, *inter alia*, commits contracting parties to agreeing to the construction of the Regional Broadband Infrastructure; the formation of the special purpose entity/entities for the construction, maintenance, ownership and operation of the Network. The chapter provides in detail guidelines that would ensure that the entity/entities is driven by Africans in particular High Contracting Parties. Governance and ownership principles are provided for under this chapter. The proposed entity/entities would be a hybrid to the extent that while being a private entity, it would be subject to regulatory frameworks based on treaty provisions.

- 13.4 *CHAPTER IV: Rights and Obligations and Operating Principles of the Operating Entity/Entities:* To ensure consistency in the manner in which the Operating Entity/Entities is established and operated and that the objectives of the protocol are realized, countries would commit to giving the entity/entities, within their territories, certain specific rights and obligations. In particular, the countries would commit to ensure that the Operating Entity/Entities within their territories operate in accordance with open access principles and the objectives of the protocol as well as NEPAD objectives and principles.
- 13.5 *CHAPTER V: Policy, Regulatory and Licensing Principles:* This chapter commits signatories to introduce within their countries policy and regulatory reforms to ensure that the Operating Entity/Entities could be set up and operated in terms of the open access principles. It is a critical component of the proposed protocol as it calls for some form of policy and regulatory harmonization which has the potential to alter the ICT sector in respective countries depending on the level of liberalization. It, *inter alia*, deals with licensing requirements and applicable steps that must be taken to ensure harmonisation in this area.
- 13.6 *CHAPTER VI: Financial and Tariffs Principles for the Operating Entity/Entities:* This is also a critical component of the proposed protocol. It binds countries to subject the Operating Entity/Entities to open access related tariffs for its services. However, in realization of the potential role of the private sector, the chapter makes an important provision to the effect that the entity/entities shall be operated in accordance with sound financial principles.
- 13.7 *CHAPTER VII: Access to Existing or Planned International Undersea Fibre Optic Cable Systems* – this chapter commits signatories to addressing the specific needs of landlocked countries in relation to access to planned and existing undersea optic fibre cables.
- 13.8 *CHAPTER VIII: Dispute Settlement* – provides for dispute settlement mechanism. The proposed approach is to encourage amicable dispute resolution failing which resort has to be made to arbitration. While we are basing the protocol on the Constitutive Act of the African Union, we advise against subjecting commercial disputes to the mechanism set up under the Constitutive Act. Such mechanism is ill-suited to commercial disputes and too prolonged.

13.9 *Chapter IX: The Inter-Governmental Assembly and the Implementing Agency* – This chapter establishes the Inter-Governmental Assembly and designates the NEPAD e-Africa Commission as its secretariat. The IGA would play a crucial role of policy and regulatory oversight. It would be entitled to appoint one representative to the Board of Directors of the Operating Entity/Entities who shall have the power of veto over policy and regulatory issues. The purpose is to ensure that the primary developmental objectives of the High Contracting Parties are not derailed.

13.10 *Chapter X: Miscellaneous Provisions:* This chapter deals with general issues such as the status of annexes and others.

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

PREAMBLE

We, the Ministers responsible for information and communication technologies 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 African Union;

INSPIRED by the New Partnership for Africa's Development (NEPAD)'s recognition that; new information and communication technology (ICT) tools have opened new windows of opportunity for African countries to 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 Implementation Committee of March 2003 in Abuja, Nigeria to prioritize, *inter alia*, the Eastern African Submarine Cable Project and the associated NEPAD 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 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;

RECOGNIZING 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 East African Community, the Southern African Development Community (SADC), the Inter-Governmental Authority for Development (IGAAD) and the Common Market for Eastern and Southern Africa (COMESA) enjoin their Members States to work towards harmonization of their 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 vehicles (“SPVs”) to construct, own, operate and maintain a NEPAD Broadband ICT Infrastructure in Eastern and Southern Africa comprising of the submarine cable and the terrestrial networks;

INTENDING FURTHER that the SPVs formed in terms of this Protocol should operate 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 African 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 of the Union 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 backbone ICT infrastructure 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 Broadband ICT Infrastructure 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.

“Agreement” means this Protocol.

“Authorised Service Provider” means any service provider which is licensed, exempted and or allowed by law, regulation, contract and or in any lawful manner 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.

“EAC” means the East African Community.

“Eligible Entities” means 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 in 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 has signed this Protocol.

“ICTs” means Information and Communication Technologies.

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

“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

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

“NEPAD Broadband ICT Infrastructure” means the ICT network in Eastern and Southern Africa linking and / or connecting the High Contracting Parties with each other and / or with 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 a network, 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 an entity/entities, company and / or organisation which shall be formed as a special purpose vehicle in terms of this Protocol for the construction, ownership, maintenance and / or operation of the NEPAD Broadband ICT Infrastructure for Eastern and Southern Africa and / or any section thereof.

“Policy and Regulatory Issues” means 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 objectives of this Protocol and the NEPAD principles.

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

“Regional Network” means the NEPAD Broadband ICT Infrastructure 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.

“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.

“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 and or any other eligible organisation and or institution.

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 broadband ICT 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. Subject to agreement by the IGA, facilitate the incorporation of existing national and/ or regional networks, where applicable, practicable and / or feasible, into the NEPAD Broadband ICT Infrastructure.
 - 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 among 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 create favourable conditions for the construction, operation and maintenance of the NEPAD Broadband ICT Infrastructure 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 improve domestic, regional and international connectivity.
2. The High Contracting Parties shall refrain from any unilateral and or collective action 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 Broadband ICT Infrastructure

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 Broadband ICT Infrastructure 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 owned by a single entity formed for the purpose.

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 Operating Entity/Entities' objectives 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 integration of the Region and the African Continent through the provision of ICT broadband network.
 - 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 NEPAD Broadband ICT Infrastructure.
 - e. The promotion and encouragement of technology transfer and skills development amongst the countries of the Region.
 - f. The empowerment of small to medium enterprises owned by citizens of the High Contracting Parties by giving them priority consideration in the procurement and outsourcing of goods and services.

Article 8

Ownership Principles of the Operating Entity/Entities

1. The ownership structure of the Operating Entity/Entities shall be such that:
 - a. It ensures equal opportunity for participation by Eligible Entities in all countries of the Region.
 - b. At all times, the majority shares in the Operating Entity/Entities shall be by African owned private or public entities and or Governments.
 - c. It reflects collaboration between African countries.
 - d. The ownership of the Operating Entity/Entities is distinct and separate from the management and operation of the entity/entities including capacity allocation and leases.
 - e. 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. 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
3. All the Eligible Entities shall, regardless of the category of shareholders the entity may belong, each have an equal shareholding in the Operating Entity/Entities.

Article 9

Governance of the Operating Entity/Entities

1. Subject to the provisions of this Protocol, the Operating Entity/Entities 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 Principle 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 Operating Entity/Entities 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 Operating Entity/Entities shall be entitled to give the IGA's representative in the Board of Directors such other and 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 and to this end provide for the power of veto by the IGA's representation in the Board over issues of a Policy and Regulatory nature.
- e. Incorporate and give effect to the principle of Regulated Return on Investment and undertake to comply with the IGA's directives in this respect.
- f. Recognise and provide for the appointment of the Board of Directors by the shareholders and the appointment of one director by the IGA who shall have the power of veto over Policy and Regulatory Issues.
- g. Take into account the need to ensure geographical and gender representation in the appointment of the board of directors of the Operating Entity/Entities.
- h. Have a general provision entrenching an undertaking by the shareholders to ensure that the Operating Entity/Entities 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 basis and at Affordable Prices to countries in Eastern and Southern Africa and to the rest of the world.
 - b. Construct broadband network cable(s), 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 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 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 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 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 its ownership and management structure, conduct itself and its 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.

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 be 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 Layer Services of different capacities depending on their requirements.
 - c. Any Authorized Service Provider shall be free to provide services on the Regional Network.
 - d. End Users shall be free to choose any Authorised Service Provider connected to the Regional Network.
 - e. The Operating Entity/Entities shall not compete with Authorised Service Providers (its customers) by offering services at the Services Layer directly to End Users.
 - f. 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 Broadband ICT Infrastructure 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 Contract 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 authorized to operate in their territory regardless of whether the Government of the concerned country or any Service Provider from the country invest 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 only cover administration costs incurred by regulators of the region in preparing the necessary licences, and shall not in any event be higher than the 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 practice 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 over 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 Broadband ICT Infrastructure 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 operator from within its territory participate 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 regions 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 State Party nor any operator from within its territory participate 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. Any dispute between the High Contracting Parties regarding the interpretation or the application of the provisions of this Protocol shall be amicably settled by the High Contracting Parties to the dispute.
2. In the event the High Contracting Parties fail to settle the dispute amicably, then the parties in dispute shall refer the matter to be arbitrated upon by an arbitrator acceptable to all the parties in the dispute.
3. In the event the parties in dispute fail to agree as to the arbitrator, then the matter shall be referred to the Chairperson for the time being of the African Union, who shall following consultations with the parties in dispute, appoint the arbitrator.
4. The arbitrator shall have the power to determine its own procedures for the dispute.
5. The costs of arbitration, if any, shall be borne by the High Contracting Parties in dispute equally.
6. The decision of the arbitrator appointed pursuant to this Article shall be final and binding on the High Contracting Parties to the dispute.

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 EASSy Cable.
 - b. Be the holder of the Golden Share in the Operating Entity/Entities.
 - c. Appoint one director, preferably the Chief Executive Officer of the NEPAD e-Africa Commission, to the Boards of Directors of the Operating Entity/Entities, 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 Operating Entity/Entities in accordance with Article 8(2).
 - f. Ensure the highest level of African ownership and leadership in the Operating Entity/Entities.
 - g. Promote and ensure domestic buy-in and encourage stakeholders to participate in the Operating Entity/Entities.
 - h. Ensure that the Operating Entity/Entities upholds 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 operates in accordance with its purpose and objectives as spelt out in terms 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 NEPAD e-Africa Commission provided however that a special meeting may be called on request by 75% 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 Operating Entity/Entities 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 operating 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 implementation of this Protocol.
 - d. Be the Convenor of the IGA.
 - e. Represent the IGA on the Board of the SPV(s) 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 NEPAD e-Africa Commission 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 and shall thereafter transmit the decision to the NEPAD e-Africa Commission, 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, 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 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 NEPAD e-Africa Commission.

Article 24

Depository

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 NEPAD e-Africa Commission who shall transmit a certified true copy to all signatory parties.

Article 25

Withdrawal from the Protocol

2. Any High Contracting Party wishing to withdraw from the Protocol shall notify by giving one year notice in writing to the Secretariat of 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 ATthisDay of2006 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.

For and on behalf of the Republic of Angola	
For and on behalf of the Republic of Botswana	
For and on behalf of the Republic of Burundi	
For and on behalf of the Democratic Republic of Congo	
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	
For and on behalf of the Republic of Madagascar	
For and on behalf of the Republic of Malawi	
For and on behalf of the Republic of Mauritius	
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	
For and on behalf of the Republic of Somalia	
For and on behalf of the Republic of South Africa	
For and on behalf of the Republic of Sudan	
For and on behalf of the Republic of Swaziland	
For and on behalf of the Republic of Tanzania	
For and on behalf of the Republic of Uganda	
For and on behalf of the Republic of Zambia	
For and on behalf of the Republic of Zimbabwe	

ANNEX 1: 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.