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AFRICAN REGIONAL INTELLECTUAL PROPERTY  
ORGANIZATION (ARIPO)

COUNCIL OF MINISTERS

**FOURTEENTH SESSION**

*Kampala, Uganda, November 28 and 29, 2013*

**CONSIDERATION OF THE REVISED ARIPO LEGAL  
FRAMEWORK FOR PLANT VARIETY PROTECTION.**

## **I. INTRODUCTION**

1. At the Twelfth Session of the Council of Ministers held in Gaborone, Botswana from November 26 to 27, 2009, the Council approved the proposals for ARIPO to develop a policy and legal framework which will form the basis for the development of the ARIPO Protocol on the Protection of New Varieties of Plants. The Council further directed the Secretariat to use existing models in the Member States, particularly Kenya and Ghana for the preparation of the legislative framework and ensure that efforts are made by the Secretariat for the implementation of the decision of the Council of Ministers.
2. Following the decision of the Council of Ministers, the ARIPO Secretariat requested technical assistance from International Union for the Protection of New Varieties of Plants (UPOV) in the preparation of policy and legislative frameworks on the protection of new varieties of plants. As a result of the request, in consultation with the UPOV Office, a draft legislative framework was prepared for the Organization in 2010.
3. During the Regional Workshop on ARIPO Draft Legislative Framework on Plant Variety Protection held in Accra, Ghana from July 25 to 29, 2011, the policy framework that was prepared by the Secretariat of ARIPO and the draft regional framework on Plant Variety Protection prepared in consultation with the UPOV Office, were reviewed by experts from the member states who had been selected from the Intellectual Property Offices and Ministries of Agriculture including plant variety protection offices. International Organizations present at the Workshop included UPOV, United States Patent and Trademark Office (USPTO), Community Plant Variety Office of the European Union (CPVO), French National Seed and Seedling Association (GNIS), African Intellectual Property Organization (OAPI) and representatives of the seed industry. Comments and suggestions made during the regional workshop have been incorporated into the draft legislative framework.
4. At the First Session of the Technical Committee of the Administrative Council held at the ARIPO Headquarters in Harare, Zimbabwe on September 1 and 2, 2011, the Committee reviewed the background document and the draft regional legal instrument on the protection of new varieties of plants in the Member States of the Organization and recommended to the Secretariat to provide input on policy options that the Member States could consider in developing their national plant variety protection systems, situation and gap analysis in the member states on agricultural production and food security, the relationship that will exist between the proposed regional plant variety system and national systems as well as the technical assistance that ARIPO will provide to member states to address identified gaps. The draft Legal

Instrument submitted to the Thirteenth Session of the Council of Ministers took into account the recommendations of the Technical Committee.

5. During the Thirteenth Session of the Council of Ministers that took place in Accra, Ghana from December 1 to 2, 2011, the Council endorsed the draft Legal Framework and considered it as work in progress. The Council recommended that the Secretariat of ARIPO ensures that the draft Legal Framework is reviewed by the Member States of the Organization as well as other relevant stakeholders so that the revised version can be submitted to the Council, at its Fourteenth Session.
  
6. Following the decision of the Thirteenth Session of the Council of Ministers, the Secretariat of ARIPO prepared a road-map to guide the process of revising the document in consultation with Member States as well as establishing an ARIPO draft protocol on the protection of new varieties of plants for possible adoption by Member States at a Diplomatic Conference. The stages involved in the road-map are as follows:
  - (i) Adoption of the ARIPO legal Framework by the Thirteenth Session of the ARIPO Council of Ministers (December, 2011);
  - (ii) Review of the Framework by member States (February to April, 2012)
  - (iii) Review by experts (June, 2012);
  - (iv) Consideration of the revised framework by the Thirty-sixth Session of the Administrative Council (November, 2012);
  - (v) Organization of one regional consultation (July, 2013);
  - (vi) Adoption of the final text and decision on possible Diplomatic Conference by the Fourteenth Session of the Council of Ministers (November, 2013);
  - (vii) Formulation of the framework into draft Protocol and drafting of Implementing Regulations (December, 2013 to January, 2014);
  - (viii) Submission of the draft Protocol to Member States for review and UPOV Council for examination in conformity with the 1991 Act of the UPOV Convention at its Session in March, 2014;
  - (ix) Development of institutional framework for the implementation of the Protocol;
  - (x) Diplomatic Conference (August, 2014); and
  - (xi) Adoption of the institutional framework and implementing regulations by the Administrative Council of ARIPO (November, 2014).
  
7. In November 2012, the Administrative Council of ARIPO, at its Thirty-sixth Session considered the revised ARIPO Regional Legal Framework for the Protection of New Varieties of Plants which had been critically examined by experts from the Member States of the Organization taking into account existing Plant Breeders Acts and Bills of Member States as well as the UPOV Convention. The Council endorsed the revised text and expressed the view

that the proposed regional workshop should involve all stakeholders to ensure that the views of farmers and breeders are taken on board.

## **II. REGIONAL WORKSHOP ON THE ARIPO DRAFT LEGAL FRAMEWORK FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**

8. A Regional Workshop on the ARIPO Draft Legal Framework for the Protection of New Varieties of Plants was held in Lilongwe, Malawi from July 22 to 25, 2013 with the aim to review the Draft Legal Framework adopted by the 13<sup>th</sup> session of the Council of Ministers as work in progress. As requested by the 36<sup>th</sup> session of the Administrative Council, that took place in Zanzibar, United Republic of Tanzania, in November 2012, the review took into account the comments submitted by civil society organizations to the Director General of ARIPO. Seventeen ARIPO Member States were represented at the Workshop, namely: Botswana, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sierra Leone, Somalia, Swaziland, Uganda, United Republic of Tanzania, Zambia and Zimbabwe. Four cooperating partners were represented at the expert review meeting namely: UPOV, CPVO, USPTO, OAPI. Experts from seed trade associations of Kenya and Malawi, civil society organizations and international experts i.e. African Agricultural Technology Foundation (AATF), African Centre For Biosafety (ACB) and Community Technology Development Organisation (C.T.D.O) contributed to the Workshop.
9. The Workshop was organized in 2 parts: the first part focused on the international perspective and the situation in Africa on plant variety protection, as well as the comments made by stakeholders on the Draft Legal Framework; and the second part focused on the review of the Draft Legal Framework with the experts from Ministries of Agriculture and IP Offices. At the end of the Workshop, the experts requested the ARIPO Office to send a circular to the participants in the expert meeting by July 30, 2013, seeking information on the following:
  - (i) Agricultural and indigenous vegetable crops for which there is an historical common practice of using the product of the harvest for replanting in their territory (farm saved-seed);
  - (ii) The acreage that defines a small holder farmer in their territory; and
  - (iii) National agricultural research centers that have capacities to undertake the examination of new varieties of plants (DUS).
10. A matrix showing the responses prepared by the experts from the IP Offices and Ministries of Agriculture of ARIPO Member States, to the comments

made by the civil society organizations on the Draft Legal Framework is attached to this document as Annex I.

### **III. THE PROVISIONS OF THE REVISED DRAFT ARIPO LEGAL FRAMEWORK FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**

11. It is recalled that during the Thirteenth Session of the Council of Ministers in Accra, Ghana in 2011, the Council approved the Draft ARIPO Legal Framework for the Protection of New Varieties of Plants as work in progress. Following this decision, the Secretariat of ARIPO sent copies of the draft instrument to all member states to review for comments and suggestions of improvement. The Secretariat also in cooperation with UPOV organized an expert meeting to review the substantive articles of the legal instrument. The reviewed text was considered by the Administrative Council at its Thirty-sixth Session in Zanzibar and noted. In July, 2013, a regional consultative workshop was organized by ARIPO in collaboration with UPOV and United States Patent and Trademark Office (USPTO) to bring together experts from the IP Offices and Ministries of Agriculture to critically examine the substantive articles of the legal texts in order to submit a revised text for consideration by the Fourteenth Session of the Council of Ministers. Annex II contains the revised draft legal framework for the protection of new varieties of plants. Some of the key provisions discussed and agreed upon during the workshop are outlined below:

#### **Farm-Saved Seed Provisions**

12. The farm-saved seeds provision is provided for under Article 22 (exemptions to the breeders' rights) of the draft legal instrument. This provision enables small holder farmers to use for propagating purposes on their own holdings, the product of the harvest which they have obtained by planting on their own holdings the protected varieties. In this regard, the farm-saved seeds provision restricts the breeders' right in relation to any protected variety and may be considered in relation to selected crops where the product of the harvested crop is known to be used for that purpose. The wording of this provision is consistent with the UPOV Convention (1991). The wording also indicates that it may be considered inappropriate to introduce farm-saved seeds for agricultural or horticultural sectors such as fruits, ornamentals and vegetables where it has not been a common practice for the harvested material to be used as propagating material.
13. During the regional consultative meeting the experts amended Article 22 to include vegetables with a historical common practice of saving seeds in Africa. It was also added that where such traditional practice of saving seeds occur, small holder farmers shall not be required to pay any

remuneration or compensation to the breeder. The Workshop requested the ARIPO Secretariat to send letters to all the member states to request for the list of agricultural and indigenous vegetable crops for which there is a historical common practice of using the product of the harvest for replanting in their territory (farm saved-seed) Annex III of this document contains a table showing the list of agricultural crops submitted by the member states of the Organization.

#### **Arrangement for the Examination of Distinctiveness, Uniformity and Stability (DUS)**

14. The ARIPO Office, may, for the purpose of the examination of distinctiveness, uniformity and stability, consult the member states to identify competent national testing centres for the DUS examination. At the implementation stage of the Protocol, the Member States of the Organization will be required to identify competent testing centres who will be accredited for carrying out DUS testing in respect of granting ARIPO breeders Rights. The necessary institutional arrangements will be developed in due course.

#### **Enforcement Measures at the National Level**

15. Member States would be called upon to put in place the necessary enforcement measures to protect breeders' rights.

#### **Arrangements for Receipt of Application at the ARIPO Office and National Authorities (PVP Offices)**

16. As it is the case under the Harare and the Banjul Protocols, member states may receive applications on behalf of ARIPO and transmit the same to the ARIPO Office. The draft legal instrument makes provision for this arrangement.

#### **ARIPO Office Procedure for Granting Breeders Rights**

17. The structure of the ARIPO Secretariat should be re-organized or changed to put in place a system for the granting of plant breeders rights. This may take the form of either establishing a separate directorate to deal with plant variety protection matters or integrate the system into the existing structure. It is however proposed that given a special nature of plant variety protection, a separate department/directorate should be established for the implementation of the legal framework.

### **Appeals Board for PVP**

18. The draft instrument has made provision for a board of appeal in line with the arrangement under the Harare Protocol and the TRIPs Agreement to hear appeals against the decisions of the Office.

### **Fee Sharing Mechanisms between the ARIPO Office and National Authorities**

19. The fee schedule under this legal instrument will be determined by the Administrative Council, at a later stage, after the possible adoption of a Protocol for the protection of new varieties of plants. It should be borne in mind that, in the case of plant variety protection examination fees, they will have to be paid to the examination centres or paid for the purchasing of test results.

## **IV. ONE GRANT SYSTEM**

20. The draft legal framework sets out the provisions relevant for the protection of new varieties, the measures for conducting examination of varieties, scope of breeders' rights, measures regulating commerce, variety denomination and nullity and cancellation of breeders' rights. The draft legal instrument provides for the definition of a territory which requires policy decision by the Council of Ministers. Since the instrument has been drafted to be consistent with the UPOV Convention, the Organization may need a policy decision in this respect. According to the UPOV Convention "a territory in relation to a Contracting Party, means, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an intergovernmental organization, the territory in which the constituting treaty of that intergovernmental organization applies". In the preparatory work for the Thirteenth Session of the Council of Ministers, a request for clarification of territory in UPOV was sought. Three policy options regarding the meaning of territory were provided as follows:
  - (i) The first policy option is where "the territory of ARIPO means that any application filed and granted under the regional instrument with the ARIPO Office shall be automatically valid in all the member states of the Organization;
  - (ii) The second policy option is where "the territory of ARIPO means that any application filed and granted under the regional instrument shall be automatically valid in all the contracting states (those ARIPO member states that will accede to the regional PVP System); and

- (iii) The third policy option is where an application for a breeder's right shall designate the contracting state to the regional instrument for which the breeder's right is requested to be granted. Under specific reasons, a designated state is entitled to make a written communication to the ARIPO Office that if a breeder's right is granted by the ARIPO Office, that breeder's right shall have no effect in its territory.

This option is consistent with the current ARIPO Protocols.

21. During the Thirteenth Session of the Council of Ministers, the Council expressed the view that since the legal framework was at its developmental stage, further studies should be carried out and that preferably option (iii) above, which is consistent with the current practices under the Harare and Banjul Protocols could be maintained. The Secretariat therefore consulted with International Organizations that have put in place similar framework to seek information concerning the existing systems and learn from their experiences. The following Organizations were consulted: CPVO, OAPI, Association of South East Asian Nations (ASEAN) and UPOV's experiences with national and regional plant variety offices in its members.
22. It is against this background that the experts who participated in the regional Workshop in Malawi in July, 2013, expressed the view that Option 2 provided greater flexibility ( see paragraph 20) and appears to be consistent with the UPOV Convention. Option 2 allows for Contracting States to provide the one grant system of plant breeders' rights and be the most effective way for promoting varietal development in the member states of the Organization, in particular, and in Africa as a whole. It was also felt that this option will also allow the proposed ARIPO system to interact effectively with national systems through sharing of resources and provision of centres of excellence as well as mutually supportive enforcement measures for the effective grant of breeders' rights.

## **V. LIST OF AGRICULTURAL CROPS**

23. In order to implement Article 22 of the draft ARIPO Legal Instrument for the protection of New Varieties of Plants, the Administrative Council is supposed to come up with a list of Agricultural Crops for the purposes of implementing the farm-saved seed provisions.
24. Letters were sent to all the Member States, particularly the Experts who attended the Workshop the Workshop in Malawi to provide information on the agricultural and indigenous vegetables for which there is a historical common practice of using the product of the harvest for re-planting in their territory (farm-saved seeds). The letter further requested information on the acreage/tonnage that defines a small holder farmer in the respective Member

States as well as National Agricultural Research Centres that have the capacities to undertake the examination of new varieties of plants (DUS). Responses were received from Botswana, Gambia, Ghana, Kenya, Sierra Leone, Zimbabwe and Rwanda. The summary of the inputs is annexed to this document as Annex III.

## **VI. ESTABLISHMENT OF AN ADMINISTRATIVE COUNCIL FOR PLANT VARIETY PROTECTION**

25. The Administrative Council of ARIPO has been established under Article VII of the Lusaka Agreement. It consists of Heads of Offices dealing with the administration of intellectual property in the member states of the Organization, provided that any member may nominate any other person or persons to represent it in the Administrative Council whom it considers to have the requisite knowledge of intellectual property. The primary functions of the Administrative Council is to formulate and direct the execution of policies with respect to the activities of the Organization and give directions to the Secretariat concerning its work.
26. Historically, the Administrative Council has focused its attention on Industrial Property due to the fact that until 2004, the Organization was mainly dealing with Industrial Property. At the Ninth Session of the Council of Ministers held in Dar es Salaam, Tanzania in August 2003, the Council adopted the proposal for the Organization's name to be changed from African Regional Industrial Property Organization to its current name "African Regional Intellectual Property Organization". The name change was effected in November, 2004. This is because of the extended mandate given to the Organization by the Council at its 8<sup>th</sup> Session in Mangochi, Malawi on August 21 and 30, 2002 to include the protection of Copyright and Related Rights as well as the protection of Genetic Resources, Traditional Knowledge and Expressions of Folklore.
27. At the Eleventh Session of the Council of Ministers that took place in Maseru, the Kingdom of Lesotho, in 2007, the Secretariat of ARIPO submitted proposals for the restructuring of the Organs of the Organization to include the Heads of Copyright Offices and provide better platform for the Implementation of the mandate on Copyright and Related Rights. The Council requested the Secretariat to carry out studies on how best to restructure the organs of the Organization for better synergies and effectiveness.
28. Between 2008 and 2010, the Organization strengthened its activities in the area of traditional knowledge and expressions of folklore. This led to the adoption of the Swakopmund Protocol in August, 2010. As a result of this milestone achievement, efforts have also been made towards the development

of policy framework for the Implementation of the Nagoya Protocol on Access and Benefit Sharing arising from the use of genetic resources and the development of Regional Legal Instrument for the protection of new varieties of plants.

29. Following the recent developments of the Organization in the fields of Copyright, Plant Variety Protection, Genetic Resources, Geographical Indications, traditional knowledge and expressions of folklore, it became necessary for the Organization to consider how best to administer different regimes of intellectual property owing to the fact that different IP regimes fall under the umbrella of different Ministries and are administered by different public institutions in the Member States of the Organization.
30. It is within this context that the Experts in Plant Variety Protection proposed that a separate Administrative Council should be constituted by the Council of Ministers of ARIPO to address the *sui generis* nature of plant variety protection and also enable relevant Ministries, including the Ministries of Agriculture, to play a leading role in the protection, promotion and enforcement of Plant Breeders Rights for sustainable agricultural development and productivity.
31. The experts recommended that the ARIPO Office, in consultation with ARIPO Member States, should develop options for the institutional arrangements concerning the Administrative Council. The proposed options will consider the establishment, functions and operational aspects of the Administrative Council for the Legal Framework and relationship with the existing organs of the Organization. The proposed options should take into account similar arrangements in other international organizations.

### **Structure and Functions of WIPO General Assemblies**

32. The WIPO General Assembly occupies a critical position as the main deliberative, policy making and representative organ of the Member States. It provides a unique forum for multilateral discussion of the full spectrum of international issues on intellectual property. WIPO has four organs, namely, the General Assembly, the Conference, the Coordination Committee and the Secretariat called the International Bureau. The General Assembly consists of all states party to the WIPO Convention that are also members of any of the Unions. The Unions of the General Assembly are mainly 2, i.e. the Paris (Industrial Property) and Berne (Copyright) Unions. Each has an Assembly consisting of the Member States and executive Committee. The other Unions have an assembly but no executive committee. The General Assembly has the highest authority of all the organs.

33. The WIPO Conference consists of all states party to the WIPO Convention and discusses matters of general interest in the field of intellectual property, as well as to establish WIPO's programme of technical assistance and the budget for that programme. The Coordination Committee consists of the Executive Committee of both the Paris and Berne Unions.
34. The agency operates through individual member states meeting in committees, assemblies, and working groups, which are coordinated by the WIPO Secretariat. Most Member States appoint career civil servants from their capitals to participate in meetings and negotiations. WIPO committees work according to a consensus-based decision-making structure, which generally means no action is taken unless all member states agree.
35. Civil society or non-governmental organization (NGO) participation is allowed at WIPO through an accreditation process that takes place once a year to obtain official "observer" status. Besides governments and civil society, WIPO also allows for intergovernmental organization (IGO) participation in its meetings.

#### **Structure and Functions of the Organs of OAPI**

36. OAPI is a sister Intellectual Property Organization based in Yaounde, Cameroun. The Organization was created by the Bangui Agreement of March 2, 1977. It has currently 17 Member States mostly from the French-speaking countries. The Organization has 3 organs, namely, the Administrative Council (composed of Ministers responsible for IP), High Commission of Appeal and the Directorate General.
37. It is to be pointed out that OAPI provides a centralised (one-grant) system which allows applicants to make one application and obtains protection in all the 17 Member States. The Administrative Council is also composed of Ministers responsible for Intellectual Property in the Member States, who are mainly from the Ministries of Trade and Industry and Justice. OAPI administers Industrial Property, Copyright and Plant Variety Protection.

#### **VII. RECOMMENDATIONS OF THE THIRD SESSION OF THE TECHNICAL COMMITTEE**

38. During the Third Session of the Technical Committee of the Administrative Council of ARIPO that took place at the Headquarters of the Organization in Harare, Zimbabwe from October 2 to 4, 2013, the Committee reviewed the document and carefully considered the proposals to restructure the competent organs of the Organization in pursuance of the extended mandates given to the Organization by the Council of Ministers at its Eighth Session that took place in Mangochi, Malawi, 2002.

39. After having considered the possible restructure of the Administrative Council in particular, the following three scenarios were proposed:

**(i) The establishment of three (3) Technical Committees to deal with technical IP issues related to Industrial Property, Copyright and Related Rights and Plant Variety Protection**

This proposal has the advantage of allowing experts within each of the domains to address policy issues including documents prepared by Secretariat for submission to the Administrative Council. It also enables the Chairmen of the Committees who are themselves experts in their respective domains to make direct submissions to the Administrative Council for decision-making. In this respect, the Chairmen have the opportunity to participate in the decision-making process of the Administrative Council.

**(ii) The establishment of three (3) sub committees for Industrial Property, Copyright and Related Rights and Plant Variety Protection that will report to the established Technical Committee**

This scenario can be implemented without changing the current structure of the Administrative Council except to create three (3) sub-committees or Working Groups to deal with the technical issues of each of the domains and report to the technical Committee. It raises the question of the composition of the Technical Committee and also the reporting mechanism at the Administrative Council since it will be the Chairman of the Technical Committee who will report to the Administrative Council the work undertaken by both the Working Groups and the Technical Committee itself.

**(iii) The inclusion of experts from Copyright and Plant Variety Offices in the delegations of the Administrative Council**

This scenario requires a policy decision by the Council of Ministers to ensure that at any sitting of the Administrative Council, Heads of Copyright and Plant Variety Protection Offices form part of the delegations of Member States attending such meetings.

40. The Technical Committee recommended to the Secretariat to revise the document and include the proposed scenarios for discussion by the Administrative Council before it is submitted to the Council of Ministers as part of the document that has been prepared for consideration by the Council of Ministers.

41. Following the recommendations of the Technical Committee, the Secretariat of ARIPO has included the three scenarios in this document for consideration by the Administrative Council in guiding the discussions on the scenarios by the Council of Ministers.

**VIII. APPROVAL OF THE DRAFT ARIPO LEGAL INSTRUMENT, REVIEW OF THE LEGAL FRAMEWORK BY UPOV COUNCIL AND THE ORGANIZATION OF DIPLOMATIC CONFERENCE**

42. The Council of Ministers will be required to make a determination on the way forward in respect of the specific policy issues highlighted below.

**Approval of the Revised Draft ARIPO Legal Framework and the development of ARIPO Protocol for the protection of New Varieties of Plants**

43. Following the review of the ARIPO Legal Framework by the Administrative Council at its Thirty-sixth Session and the revision of the framework by the member states and experts through national and regional consultative processes, it is proposed that the Fourteenth Session of the Council of Ministers considers the revised draft legal framework which is annexed to this document as Annex II and approve it for the development of ARIPO Protocol for the protection of new varieties of plants (ARIPO Plant Breeders Rights) to enable for the granting of ARIPO Breeders' Rights. This important development will provide the means for Africa to enhance sustainable agricultural development and productivity.
44. It is further proposed that the Council of Ministers determine the road-map for the adoption of the Protocol through a Diplomatic Conference. In this regard, the venue and date for the Diplomatic Conference could be considered to facilitate the process. Furthermore, it is proposed that the Council of Ministers give approval for the draft legal framework on PVP to be reformulated into a draft Protocol and the preparation of draft implementing regulations by a Consultant (Draftsman) in preparation for the Diplomatic Conference. The active involvement of the Ministries of Agriculture and agric-based research institutions in the Member States of the Organization will be critical for the realization of this noble objective.

**Submission of the Proposed Draft Protocol for the Examination by UPOV Council at its Session in March, 2014**

45. In view of the fact that the draft instrument has been made consistent with the UPOV Convention (1991 Act) to enable the Organization to join UPOV to benefit from the rich experience of its seventy-one members, it is proposed that the Council of Ministers approve for the draft Protocol to be submitted to

the UPOV Council session that will take place in March, 2014 for examination on the conformity of the Draft Protocol with the provisions of the UPOV Convention. It should be mentioned that, last year two Member States of the Organization namely: Ghana and the United Republic of Tanzania submitted their legislation to the UPOV Council and received positive advice on the conformity of their legislation with the UPOV Convention.

46. **The Council of Ministers is invited to make comments on this document and its Annexes as it deems fit and take note of paragraphs 24 and 25 as basis for the establishment of list of agricultural crops for the Organization, opt for the most suitable scenario for the restructure of the Administrative Council of the Organization and approve the proposals contained in paragraphs 22, 39 to 41.**

**[End of Document]**

**Annexes follow**