



INTELLECTUAL PROPERTY (IP) AND TRADE IN THE AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA)

CAROLINE B NCUBE¹

Introduction

This policy brief discusses intellectual property (IP) aspects of trade within the the African Continental Free Trade Area (AfCFTA). It addresses the opportunities and challenges presented in order to make recommendations about aspects that women’s business associations (WBAs) may wish to pursue during consultation processes. To contextualize this policy brief, an example of a woman owned, and managed, enterprise will be used as an illustration throughout. The enterprise’s context and concerns will be used to illustrate some of the aspects discussed.

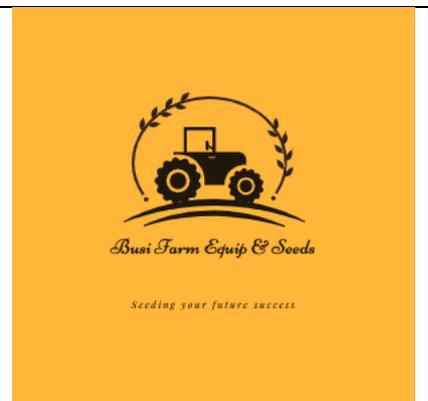
Meet Busi Farm Equip & Seeds

The business: a small enterprise (SME) run by Busi N, an agricultural specialist who breeds pest-resistant seeds and designs and manufactures small scale equipment for farmers. The business also services, maintains and repairs farm equipment. The business has 10 employees.

Location: Gaborone, Botswana

Trading: in Botswana, South Africa and Zimbabwe with plans to expand into the rest of the Southern African Development Community (SADC) region and ultimately, across the African continent

Business concern: how can we leverage the opportunities presented by the AfCFTA, specifically with regards to IP?



Logo generated from <https://www.designevo.com/logo-maker>

Box 1: Busi Farm Equip & Seeds

What is Intellectual Property?

IP refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce’ (WIPO, 2004). IP law grants IP rights, which are a legal mechanism through which eligible work is protected, primarily through the creation of exclusive economic rights through which the right-holder controls reproduction, adaptation and distribution, among other economic activities. For example, the holder of an IP right has the right to stop other people from making the protected product and distributing it. These rights are

¹ Caroline B Ncube is Professor and hold a research chair in Intellectual Property, Innovation & Development at the Department of Commercial Law at the University of Cape Town, South Africa. She has prepared this policy brief having been contracted as an international consultant with the International Trade Centre.

typically classified into (a) copyright and related rights and (b) industrial rights, including patents, designs, trademarks and trade secrets. Definitions of some of these types of IP rights are tabulated below. IP rights enable people and businesses to earn recognition or financial benefit from what they invent or create. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish.

Patents	A patent is an exclusive right granted for an invention – a product or process that provides a new way of doing something, or that offers a new technical solution to a problem. A patent provides patent owners with protection for their inventions. Protection is granted for a limited period, generally 20 years.
Trademarks	A trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises. A trademark registration will confer an exclusive right to the use of the registered trademark. The term of trademark registration can vary, but is usually ten years. It can be renewed indefinitely on payment of additional fees.
Industrial Designs	An industrial design refers to the ornamental or aesthetic aspects of an article. A design may consist of three-dimensional features, such as the shape or surface of an article, or two-dimensional features, such as patterns, lines or color. Industrial designs are applied to a wide variety of industrial products and handicrafts: from technical and medical instruments to watches, jewelry and other luxury items; from house wares and electrical appliances to vehicles and architectural structures; from textile designs to leisure goods.
Geographical Indications	A geographical indication is a sign used on goods that have a specific geographical origin and possess qualities or a reputation due to that place of origin. Most commonly, a geographical indication consists of the name of the place of origin of the goods. Agricultural products typically have qualities that derive from their place of production and are influenced by specific local geographical factors, such as climate and soil.
Copyright and Related Rights	Copyright laws grant authors, artists and other creators protection for their literary and artistic creations, generally referred to as “works”. A closely associated field is “related rights” or rights related to copyright that encompass rights similar or identical to those of copyright, although sometimes more limited and of shorter duration. The beneficiaries of related rights are: performers (such as actors and musicians) in their performances; producers of phonograms (for example, compact discs) in their sound recordings; and broadcasting organizations in their radio and television programs.
Plant variety protection	Plant variety protection, also called a “plant breeder’s right” (PBR), is a form of IP right granted to the breeder of a new plant variety. According to this right, certain acts concerning the exploitation of the protected variety require the prior authorization of the breeder. Plant variety protection is an independent <i>sui generis</i> form of protection, tailored to protect new plant varieties and has certain features in common with other IP rights.
Utility models	A utility model is an exclusive right granted for an invention, which allows the right holder to prevent others from commercially using the protected invention, without his authorization, for a limited period of time. In its basic definition, which may vary from one country (where such protection is available) to another, a utility model is similar to a patent.

Sources: WIPO (2004); UPOV (2018); UNECA, AU, AfDB & UNCTAD (2019)

Table 1: Types of IP

Although there are international agreements that contain minimum IP law standards and principles, each country has its own IP laws. Intellectual property rights are granted in each country under national laws and are described as being ‘territorial’. A business needs to assess its products and services and determine which IP rights are applicable and which ones it wants to secure. So, to return to the example of Busi Farm Equip & Seeds, see Box 2 below for the possibilities. Also remember that other laws may apply to the business’ products. For example, Seed Certification laws, e.g. Botswana’s Seeds Certification Act (Chapter 35:07).

This business is based in Gaborone, Botswana. Based on Botswana's national IP laws, it may obtain the following IP and other rights, if the protection requirements are met.

IP Laws: Industrial Property Act, 2010 (Act No. 8 of 2010) and Copyright and Neighboring Rights Act, 2000 (Chapter 68:02, as amended by Act No. 6 of 2006).



pest-resistant seeds
- **plant variety rights**



logo and Business name - **trade mark and/or trade name**



small scale equipment and spare parts - **patent, utility model or industrial design**



servicing and maintenance of equipment - **trade secret protection of know-how and processes**



manuals and brochures issued with equipment and parts - **copyright**



Business website - **domain name registration, copyright in website, trade marks used on site**

Customer lists – **trade secrets**

Box 2: possible IP protection for Busi Farm Equip & Seeds

IP and Trade

IP in its various forms, may apply to goods and services that are the subject of trade are therefore important to businesses. For example, a product sold by a business may have patent or design protection and may be sold under a brand name protected as a trademark. Such IP protection gives the business exclusive rights over the product which they then leverage to secure market share. Intellectual property is therefore relevant to trade in both goods and services.

As explained above, IP rights are granted in terms of national laws and the rights are limited to national territories. If a business is trading across borders, it has to obtain IP rights in all the territories it is trading in. For example, if an enterprise producing farm machinery in Botswana (Busi Farm Equip & Seeds), protected by a patent and trademark registered in Botswana, wants to trade in neighbouring countries it has to register the same rights in those territories as well. If the rights are not registered, the enterprise would be unable to stop others from exploiting the technology and using the mark or brand in those neighbouring countries. While it would still be able to trade in the neighbouring countries, its business would be more vulnerable. Another example is the well-known telecommunications company MTN that trades across the African continent, it has secured its trademark in the territories in which it operates.

IP Within the AfCFTA Agreement

IP negotiations fall within phase two of AfCFTA negotiations² which will now continue through virtual means due to the travel and gathering restrictions imposed as a result of the COVID-19 pandemic. A Protocol on IP will be negotiated. Once concluded, it will stand alongside 5 other protocols, as depicted in Figure 1 below.

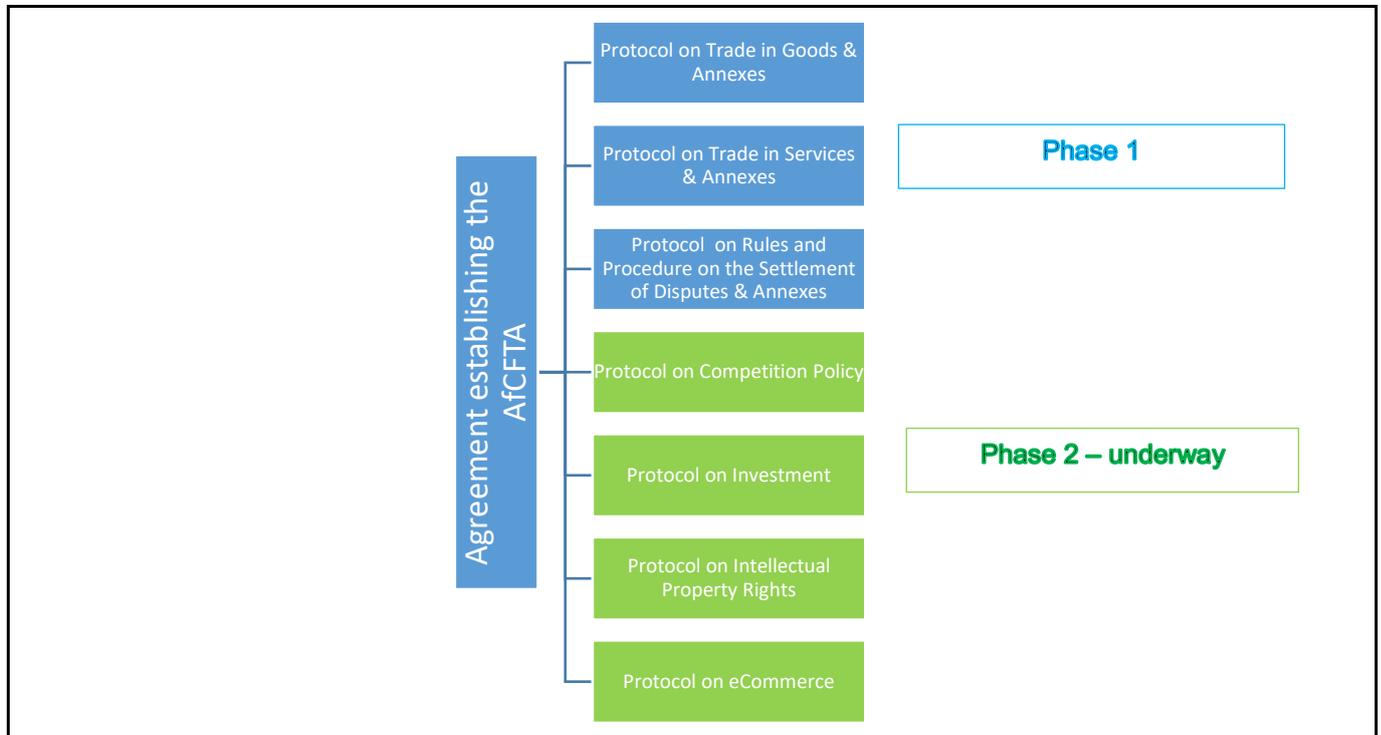


Figure 1: the AfCFTA Agreement and its Protocols

The Protocols and Annexes are an integral part of the Agreement and they constitute what is known as a single undertaking.³ The Agreement establishing the AfCFTA states that the state parties shall ‘co-operate on investment, IP rights and competition policy’⁴ in order to fulfil and realise the objectives of the Agreement.

What is there to say about IP in the AfCFTA IP Protocol?

IP is already comprehensively regulated on the continent because there are binding international agreements which many African states are party to and all states have national IP laws supported by relevant institutions that register IP rights. The most significant binding international agreement is the World Trade Organization (WTO)’s Agreement on Trade-related aspects of IP rights (TRIPS Agreement). Beyond the TRIPS Agreement, there are at least 25 other international agreements regulating IP to which many African Union (AU) member states are party. This section will focus on the TRIPS Agreement due to its primacy and significance. However, as influential as it is, it is also important to note that not all AU member states are bound by the TRIPS Agreement because they are not members of the WTO.

This agreement sets minimum standards for the protection of IP rights. In some instances, it leaves what is known as policy space for WTO member states to determine an appropriate approach for their developmental context, as long as the agreed minimum standards are met. Similarly, other international agreements regulating IP rights typically leave some policy space to party states to create national IP laws that correspond their development priority needs, provided that they respect the international minimum standards established under the relevant agreement. This means that the IP Protocol could have a role in giving direction on how AU member states may wish to use their policy space in crafting national laws.

² Agreement establishing the AfCFTA article 7.

³ Agreement establishing the AfCFTA articles 1(c), 1(s) and 8.

⁴ Article 4(c).

In other cases, the TRIPS Agreement does not regulate certain aspects at all. For example, it does not provide in detail for the protection of plant variety protection (PVP) and Plant Breeders Rights (PBR), which are very significant for Africa's agriculturally based economies which support many farmers who depend on traditional farming practices and the seed industry. It is also important to businesses such as the one used in the example, Busi Farm Equip & Seeds. The TRIPS Agreement requires countries to provide an effective level of protection either through patent protection or a system created specifically for the purpose ("*sui generis*"), or a combination of the two. This means that party states have an option regarding such protection and may be guided by the IP Protocol in this regard if they have not already signed onto a particular form of protection. Exercising this option, some countries have become party to the International Convention for the Protection of New Varieties of Plants (UPOV Convention) of December 2, 1961, as revised on March 19, 1991 (UPOV 1991) and ARIPO and SADC have adopted Protocols based on UPOV 1991 although they have not yet come into force.⁵ These developments have generated a lot of debate and discussion. The AU has a non-binding model law which includes plant breeders' rights (see Table 3 below) which countries may use to draft national laws.

A second example is the protection of traditional knowledge (TK) and traditional cultural expressions (TCEs). Many small businesses in Africa trade in TK and TCE related goods and services, see some examples in Box 3. The protection in the TRIPS Agreement does not always cover them because they do not meet protection requirements. For example, because they are usually known in a community for generations, they are not 'new' for patent purposes and they are also not 'original' and captured in a material form (e.g. written or recorded) for copyright purposes. That is why there are continuing discussions about suitable protection at WIPO's Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore (IGC) and why ARIPO has the Swakopmund Protocol to provide special unique protection for them. Several African countries also have *sui generis* laws. For example –

1. Kenya - Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016
2. Zambia - Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act, No. 16 of 2016 and
3. South Africa - Protection, Promotion, Development and Management of IK Systems Act, Act 6 of 2019.

www.mitimeth.com - 'eco-friendly handicrafts like home décor and personal accessories from weeds prevalent on Nigeria's waterways' using weaving techniques of Sabo Community in Ibadan.



Woven Wonders from Natural Fibers

Transforming Waste. Building Livelihoods.
Using Art, Crafts and Design.



Helvi Mpingana Kondobolo Cultural Village in Tsumeb, Namibia

<https://hmkcv.business.site/>
cultural village offering guided tours and handicrafts



Traditional textiles

Picture by Munfarid1 - Own work, CC BY-SA 4.0,
<https://commons.wikimedia.org/w/index.php?curid=90110403>

Box 3: examples of TK and TCE based businesses

⁵ ARIPO: The Arusha Protocol (2015) for the Protection of New Varieties of Plants. Ghana, The Gambia, Mozambique, São Tomé and Príncipe, and Tanzania (all of which are LDCs) have signed the protocol but it will only come into force one year after four ARIPO member states ratify it. The protocol has not yet come into force because it has not yet achieved the required number of ratifications. SADC draft PVP Protocol.

The TRIPS Agreement places different obligations on countries at different levels of development. For example, least developed countries (LDCs) have been granted a ‘grace period’ technically called a transition period during which they do not have to comply with the whole of the agreement. This period was initially for ten years but has been extended several times and will now run until 1 July 2021, or earlier should the LDC become a developing country before that date. Therefore, LDCs currently have the policy space to make unique IP regimes that are appropriate to their socio-economic development during these grace periods. These grace periods may be extended in future, if the TRIPS Agreement member states agree.

On the African continent there are also some relevant IP binding and non-binding instruments and institutions at AU level or from the regional IP organisations and the regional economic communities, as depicted in Table 3 below. The membership of these organisations is varied and some AU member states are not members of either of the regional IP organisations. In addition, each country has already established institutions for the registration and administration of rights such as patent and trademark offices, either in the national space or through a regional IP organisation. Accordingly, the provisions of the IP Protocol would have to address aspects that are not already addressed. For instance, this means that there is no need for the Protocol to address the registration of IP rights.

AU level	<p><i>Continental Strategy on GIs</i>, Second Ordinary Session of the Specialised Technical Committee (STC) on Agriculture, Rural Development, Water and Environment (Ministers’ Session) in October 2017 (AU, 2017 STC2/ARDWE/MIN).</p> <p>Statute of the Pan-African Intellectual Property Organisation (PAIPO), 2006</p> <p>Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, 2000;</p>
Regional Organisations	<p>IP African IP Organization (ARIPO)⁶</p> <p>Protocols on Patents, Industrial Designs and Utility Models 91982); Trademarks (1993); Protection of Traditional Knowledge and Folklore (2010); Protection of New Varieties of Plants (2015)</p> <p>Policy Framework on Access and Benefit Sharing Arising from the Use of Genetic Resources (2016); Guidelines for the Domestication of the Marrakesh Treaty, 2016</p> <p>Agenda on Copyright and Related Rights (2017); Model Law on Copyright & related rights (2019); Guideline to Audiovisual contracts (2020)</p> <p>* ARIPO employs a harmonisation model through which Member States elect which Protocols to join. They retain their national IP laws and offices. It is possible to apply for some rights through the ARIPO system and to designate some or all ARIPO Member States for the registration rights.</p>
	<p>(OAPI)⁷</p> <p>Bangui Agreement of 1977 and its protocols (I – X) (revised 2015, revised text to come into force in November 2020)</p> <p>* OAPI a unitary system with a uniform legislation, a common office, centralised procedures which grants IP rights over the entire OAPI territory.</p>
Regional Economic Communities	<p>COMESA Regional Policy on IP rights and Cultural Industries</p> <p>EAC Regional IP Policy on the Utilization of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National IP Legislation and draft IP Policy, 2018</p> <p>ECOWAS TRIPS Policy & Guidelines, 2012</p> <p>SADC draft Regional Framework and Guidelines on IPR, 2018</p> <p>COMESA-EAC-SADC Tripartite FTA – phase 2: IP</p>
National	National legislation and institutions

Table 2: African IP instruments and institution

<p>Summary: aspects that the AfCFTA can address in the IP Protocol</p> <ul style="list-style-type: none"> <input type="checkbox"/> Not covered in the TRIPS Agreement <input type="checkbox"/> Where options are provided in the TRIPS Agreement

⁶ Member States: Botswana, eSwatini, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sao Tome & Principe, Sierra Leone, Somalia, Sudan, Tanzania, Uganda, Zambia and Zimbabwe. Observer States: Angola, Burundi, Egypt, Ethiopia, Eritrea, Mauritius, Nigeria, Seychelles and South Africa.

⁷ Member States: Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Mauritania, Niger, Senegal, Chad and Togo.

Opportunities and Challenges for Women Entrepreneurs and Producers

Intellectual property rights are instrumental to small and medium sized enterprises because they enable them to: [1] protect and build on some of their innovations; [2] position themselves competitively in [national, regional and] global markets; [3] gain access to revenue by signalling current and prospective value to investors, competitors and partners; [4] access knowledge markets and networks; [5] open up new commercial pathways or segment existing markets'.⁸ Small and medium sized enterprises also face significant resource and knowledge constraints which they may overcome by relying on open and collaborative approaches. Specifically, the following challenges have been identified:⁹

1. Limited financial resources for research and development (R&D)
2. Restricted market influence
3. Lower standing as innovation partner
4. Cost of securing and enforcing IP
5. 5.Less systematic management capability

A collaborative and open approach to innovation and its protection may entail relying on unregistered rights such trade secrets and sharing some information in appropriate circumstance, a strategy shown to be used by women entrepreneurs manufacturing home and personal care products in South Africa.¹⁰ Recent research across several African countries has shown that collaborative dynamics are prevalent and require an IP framework that supports collaboration and open approaches to knowledge appropriation (de Beer et al, 2020).

Businesses should develop IP portfolios and manage them well because this is a good investment which presents an opportunity for them to grow their market. A portfolio is the collection of the IP rights that the enterprise owns, is licensed to use by the right holder or is allowed to use by law. The portfolio enables the enterprise grow its clientele and to commercially exploit technologies or innovations. The IP portfolio must be part development and implementation of a Business Strategy for an enterprise, whatever its size. Steps that must be taken include identifying possible IP rights (see Box 2 above) making a list of IP rights that the business already has. Box 3 below is an example of how an enterprise may build an IP portfolio, centered around its major innovation, in this case, farming machinery that is protected by a patent.

Busi Farm Equip & Seeds Intellectual Property Portfolio	
Copyright :	Website, customer manuals, training manuals, drawings or sketches of machinery and parts drafted in the development process
Trade secrets:	Customer lists, know-how relating to machinery; plant breeding processes, training manuals limited to enterprise, materials used in development of machinery and parts
Patents:	Inventive products of processes related to machinery
Industrial designs:	Ornamental or aesthetic machinery parts
Trademarks:	Distinctive name, logo, packaging
Plant variety rights	Seeds
* the enterprise will have to have patents, industrial designs and trademarks registered in all the countries where it trades	



Box 4: an example of an IP portfolio (Busi Farm Equip & Seeds)

⁸ OECD (2011) *Intellectual Assets and Innovation: The SME Dimension, OECD Case studies on SMEs and Entrepreneurship* https://www.oecd-ilibrary.org/industry-and-services/intellectual-assets-and-innovation_9789264118263-en at p.9 .

⁹ Krause, W; Schutte, C & du Preez, N (2012) 'Open innovation in South African small and medium-sized enterprises' (CIE42 Proceedings, 2012) 203-1 – 203-16.

¹⁰ Kraemer-Mbula, Erika and Tau, Vincent 'Country Study on Innovation, Intellectual Property and the Informal Economy: Informal Manufacturers of Home and Personal Care Products in South Africa' WIPO CDIP/13/INF/4, 8-9 (2014)

Small and medium sized enterprises face significant challenges in the creation and maintenance of their IP portfolios. These challenges include their lack of awareness and knowledge of IP. This is an internal challenge that exists with the enterprise. In those cases where they have the requisite knowledge, external challenges such as the administrative complexity and the costs attendant on registration and enforcement of IP rights arise. These internal and external obstacles to their use of IP rights are particularly acute when SMEs operate internationally because they then have to navigate the laws and institutions of other countries.

In addition to the above challenges, women entrepreneurs face the further challenge of being under-represented when it comes to the registration and ownership of IP (de Beer, Degendorfer, Ellis & Gaffen, 2017, 2). A recent South African case study has demonstrated that the IP system has a tendency to disempower women, 'especially rural African women crafters whose works [is] created in collaborative communities' (Oriakhogba, 2020, 146). Further, women owned small and medium sized enterprises experience the lack of adequate IP protection as a barrier to trade (WTO & World Bank 2020).

Looking Forward and Conclusion

Women in Africa face multiple challenges across the range of entrepreneurial settings, from micro, to small and medium sized enterprises, in both the formal and informal sectors (Mburu-Ndoria, 2019). AU member states will continue to negotiate the provisions of the IP protocol. It is recommended that this be done in a consultative and transparent manner, so that stakeholders, like women in business, can add their contributions to discussions.

What would women in business want to see in the IP Protocol?

1. protection of existing policy spaces from erosion by trade agreements and the encouragement of common policy approaches across the continent so that benefits may be secured for entrepreneurs;
2. support for national efforts to craft appropriate legislative and policy frameworks that enable SMEs and MSMEs to flourish,
3. a gender sensitive and responsive approach, and;
4. management of regional cooperation in a way that aligns the existing IP instruments and institutions on the continent so it is easier for businesses that trade in different countries to understand and work with the IP laws in different countries.

The above is very important because the IP system in Africa is very diverse and somewhat fragmented, because African states have different developmental contexts and legal systems. However, the goal of achieving coherence or alignment would not be to create uniformity because this would be inappropriate, but the aim would be to secure agreement on basic policy directions which can then be used at national level to craft laws that are appropriate for national contexts. Further, considering IP within the AfCFTA presents a good opportunity to set in place programs and structures that support small and medium sized enterprises, especially those owned by women to make full and meaningful use of their IP so that they can trade effectively across the continent.

Suggestions for the AfCFTA and the BIAT/SSDP

In order to better serve women entrepreneurs and prepare them for intra-Africa trade, it is recommended that WBAs ask for the following be done:

1. Introduction of programs and campaigns to raise awareness about the strategic opportunities offered by IP rights within national territories and the AfCFTA.
2. Knowledge awareness campaigns about the variety of IP instruments and the strategic objectives they serve (e.g. how to use ARIPO, OAPI and WIPO systems to apply for rights).
3. IP education and training, bringing services and expertise closer to enterprises (e.g. not only having services in large cities).
4. Address the issues that make it more difficult for women to acquire IP rights.
5. Address enterprises' financial constraints in their access to IP rights.
6. Make the IP system easier to navigate, for example, by offering administrative support for enterprises or introducing streamlined and simpler processes.
7. Improve cross-border IP information, co-ordination and enforcement for enterprises operating internationally.

Further information

ARIPO Filing Procedures <https://www.aripo.org/aripo-filing-procedures/>

de Beer, J., Degendorfer, K., Ellis, M. & Gaffen, A. 2017. Open AIR Briefing Note - Integrating Gender Perspectives into African Innovation Research. Available at <https://openair.africa/wp-content/uploads/2018/11/Briefing-Note-Gender-2017-09-21.pdf> accessed 20 June 2020.

Mburu-Ndoria, Emily (2019) Information and communications technologies (ICT) services and digital trade in the African Continental Free Trade Area (AfCFTA)

OAPI Concept de la PI <http://oapi.int/index.php/en/propriete-intellectuelle/concept-de-la-pi>

WIPO (2004) What is Intellectual Property?
https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf

WIPO (2005) Inventing the Future - An Introduction to Patents for Small and Medium-sized Enterprises
<https://www.wipo.int/publications/en/details.jsp?id=132&plang=EN>

WIPO (2006) Making a Mark - An Introduction to Trademarks for Small and Medium-Sized Enterprises
<https://www.wipo.int/publications/en/details.jsp?id=106&plang=EN>

WIPO's Indigenous Entrepreneurship Program <https://www.wipo.int/tk/en/entrepreneurship.html>

WIPO's IP for Business services <https://www.wipo.int/sme/en/>

WIPO (2017) Protect and Promote Your Culture, A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities <https://www.wipo.int/publications/en/details.jsp?id=4195>

World Trade Organisation and World Bank (2020) 'Women and Trade: The role of trade in promoting gender equality' https://www.wto.org/english/res_e/publications_e/women_trade_pub2807_e.htm