

less than projected. Prospecting agreements governed by contract law allows the parties to draft their own agreement according to their wishes. It therefore emerges as a flexible method of protecting TM, as long as all the parties are aware of the issues involved.

VIII. GEOGRAPHICAL INDICATIONS

India has proposed that in order to harmonize the CBD and TRIPS, geographical indications (GI) should be expanded to protect more forms of TK. They clearly envisaged that a strong GI system would have hindered the well known neem patent in the USA. In practice, however, it is unclear how this would have been the case.¹⁴² TRIPS article 22 outlines that geographical indications: “. . . identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.” TRIPS article 23 outlines additional protection for wines and spirits. This method offers a way that rights could be maintained for an unlimited amount of time. It does not confer a monopoly right on a few individuals. Geographical indications: “. . . reward producers that are situated in a certain region and that follow production practices associated with that region and its culture and customs. They are designed to reward goodwill and reputation created or built up by a group of producers over many years, and in some cases over centuries.”¹⁴³

Perhaps best known for the protection of regional foods, such as wine or cheese, GI have been proposed as a method for protecting TK. It is uncertain how effective this would be in practice.¹⁴⁴ Most GI are French, where special attention is paid to products that are distinctive due to a combination of cultural and territorial factors. Regional associations have established standards for particular products. National laws’ enforcement upholds the integrity of the geographical indication.¹⁴⁵

A more relevant example, used to protect indigenous products, is American Indian arts and crafts. Particularly in the case of Southwestern tribes, non-native producers were using inauthentic methods and materials to make products put forth as genuine. The state of New Mexico passed the Indian Arts and Crafts Protection Law that gives retailers the duty of determining if a product was made by a Native American by hand. Somewhat controversially, there is no test to determine whether an item was made using traditional methods. Only after examination by a retailer can it then can bear a distinctive label stating it is an authentic, hand made Indian product.¹⁴⁶ As is clear with the latter point, it would be quite difficult for a non-specialist to determine if the

142 See Kruger, *supra* note 40.

143 See Downes, *supra* note 122 at 272.

144 See Tomer Broude, *Taking Trade and Culture Seriously: Geographical Indications and Cultural Protection in WTO Law*, 26 U. PA. INT'L ECON. L. 633 (2005).

145 See L. Berard and P. Marchenay, *Tradition, Regulation, and Intellectual Property: Local Agricultural Products and Foodstuffs in France*, in *VALUING LOCAL KNOWLEDGE* 230, 238 (1996).

146 See Sandra L. Pinel and Michael J. Evans, *Tribal Sovereignty and the Control of Knowledge*, in *INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCE BOOK* (1994).