Protection of ‘handicraft’ as geographical indications under municipal law, TRIPS and BTAs vis-à-vis CETA: ‘Bangladeshi Jamdani’ as case study

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Handicrafts often demonstrate indigenous knowledge, traditional cultural expressions of artisans, small or big tribes and even nations at large. Crafting communities invest their labours and merits from generation to generation to create aesthetic and artistic handicrafts that both reflect their intellectual inputs and represent their community life styles, enabling them to benefit from protection under the geographical indications (GIs) regime. Even though these handicrafts may be protected as GIs under the provisions of international instruments and municipal laws (as enacted by around 160 countries), the international legal position on GIs is still a mess. Bangladesh and India, two friendly neighbours of South Asia, have had many things in common for centuries. A few years back, India registered at least three products, that is Jamdani, one variety of mango and Nakshi Katha, which are undoubtedly of Bangladeshi origin and their historic Bangladeshi roots are well documented long before the idea of protection of these products through GIs emerged. Taking the ‘Jamdani’ handicraft of Bangladesh as a case study, this paper intends to explore the doctrinal, legal issues along with the potentials and pitfalls of protecting handicrafts as GIs under national and international legal frameworks. Highlighting the ongoing tensions with India over Jamdani and analysing relevant legal issues, this article will propose some suggestions that Bangladeshi policy makers may consider to settle the dispute in a pacific manner. Such a discussion would ultimately enable the consumer to make an informed decision with respect to potentially buying misleading products and assist other countries facing similar problems relating to a GI of the same product being available in different jurisdictions.

Keywords: TRIPS Agreement, geographical indications, misleading the consumers, handicraft, Jamdani

1 INTRODUCTION

The rampant political economy has placed many cultural and traditional issues in the domain of trade and commerce that conventionally were beyond the business arena. The western ‘Neo-liberalism’ theory as reflected in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (hereinafter referred to as ‘TRIPS...
Agreement’ has unblocked the avenues for including goods and items with traditional and cultural elements in domestic and international trade. Concomitantly, ‘handicrafts’ items as embodiments of Traditional Cultural Expressions (TCEs) are now well suited to obtaining commercial dividends. For example, ‘Jamdani’ is a distinctive type of Bangladeshi handicraft with a traditional weaving style and cultural elements resulting from the contribution of the skilled artisans, married with an ecological process of cotton production practised in some parts of the present Bangladesh for centuries. Therefore, a handicraft like ‘Jamdani’ may be treated as a geographical indication (GI) because it encapsulates unique geographical ingredients and quality attributable to indigenous ‘Jamdani artisans’.

Even though during the last two decades or so, the protection of GIs has witnessed worldwide resurgence, it has, nevertheless, proved to be an intractable issue as well. Regrettably, the legal protection regimes for ‘handicrafts’ as GIs are yet to be settled under the international system, although many States have been treating them as GIs or sui generis intellectual property under domestic legal measures. Relatedly, the legal means of protecting handicrafts as GIs or extending the level of protection for all GIs is central in the multilateral, regional and bilateral negotiations of World Trade Organization (WTO) members. Needless to say, the developing nations and Least Developed Countries (LDCs), with their serious histories of concerns regarding western-dominant Intellectual Property Rights (IPRs), are currently trying to push forward their own agendas, including the protection of their cultural properties from western onslaughts. Perhaps the Doha Development Agenda is the glaring example that substantiates the new insights of the LDCs and developing nations.

Highlighting ‘Jamdani handicraft’ as a case study, this contribution will explore the following research questions: (a) What are the doctrinal and/or theoretical foundations of protecting GIs and their possible interfaces with ‘handicraft’ products? (b) To what extent have the TCEs, traditional knowledge or ‘intellectual input’ of indigenous local communities (ILCs) pushed the ‘handicraft’ products as distinct intellectual property? (c) How far may ‘handicraft’ be protected as a GI under the existing legal frameworks,
ranging from domestic and international systems to bilateral or plurilateral agreements? The paper will further seek to identify pitfalls and potentials that Bangladesh, as a LDC, might encounter while protecting ‘handicraft item’ in general and ‘Jamdani’ in particular under the umbrella of GIs.

In dealing with these questions and concerns, this paper is divided into five major parts other than the introduction and conclusion. Section 2 deals with the ontological analysis of GI, where the evolution of GI through different international instruments is projected. In this part, the historic roots and references to Jamdani linking it with Bangladeshi origin are also sketched, followed by the theoretical justification of the protection of Jamdani handicrafts and the normative legal framework on handicrafts as GIs. Section 3 highlights Bangladeshi municipal law on GIs and covers the protection of Jamdani under multilateral and bilateral agreements. Section 4 explores the prospective and available mechanisms beyond national jurisdiction to protect GIs like ‘Jamdani’ through multilateral agreements, for example TRIPS and bilateral agreements. In this part a recent development by the European Union and Canada by way of a free trade agreement, that is the Comprehensive Economic and Trade Agreement (CETA), is discussed to introduce the countries suffering to protect their GIs with the hope that the countries will be able to explore the possibility of opting to consider similar ventures even though they are part of multilateral agreements like TRIPS. Section 5 encapsulates the pitfalls and potentials for protection of Jamdani handicrafts, issues and concerns with national and international branding, and the implications of the dispute between Bangladesh and India over Jamdani. Section 6 evaluates Bangladesh’s exclusive ownership of Jamdani as TCEs and ingenuity, to prevent misleading the consumers and avoid unfair competition. This part also refutes the suitability of Jamdani for the Homonymous Protection System and suggests the right protection forum to raise the concerns regarding Jamdani and to settle the issue in a pacific manner.

2 GEOGRAPHICAL INDICATIONS: AN ONTOLOGICAL ANALYSIS

Even though in one of the earliest treaties on intellectual property, the Paris Convention on Intellectual Property 1883, the industrial properties of a product, *inter alia*, with indications of source or appellation of origin, were protected, and the Madrid Agreement on Indications of Sources 1891 provided for the seizure of goods with false or deceptive indications, the international legal position on GIs *is a mess*.6 Different international organizations, like the World Intellectual Property Organization (WIPO), WTO and the European Commission, and regulators from various countries around the world have attempted to define GI in their municipal legal instruments.

In general terms, the concept of ‘GI’ is used to denote the signs or names used in connection with any goods with a view to indicating their geographical origin.7 Article 22 of the TRIPS Agreement defines GIs as the ‘indications which 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’. Thus, from this definition it is apparent that the signs, names and terms, in relation to GIs, are used in order to show the link between the quality of the goods and the place of origin. Three main issues are involved in this definition, that is: (a) goods in general (as some countries include services also); (b) origin from a specific geographic area; and (c) special quality, reputation or characteristics of the goods due to that geographic origin. These three issues are significant for the consumers as well as the producers because the quality, characteristics or special features of the goods are essentially attributable to the particular place due to human and/or natural factors.

From the protectionism point of view, different nomenclatures are used to designate the GI products around the world,8 and their legal protection systems are heterogeneous and not homogeneous in essence due to the differences in legal protection and approaches adopted by the different jurisdictions.9 Some terms are used – alone, interchangeably or in combination – to denote GI as an embodiment of special connection between the goods and their place of origin. For instance, GIs are closely related to and seemingly identical with the terms Appellations of Origin (AO) and Indications of Source (IS), and these terms are also used in some international treaties.10 It may be noted that despite the scope for confusion and overlap, GIs are distinct from both AO and IS.11

The concept AO is used to mean ‘the geographical name of a country, region, or locality, which serves to designate a good originating therein, [and] the quality and characteristics which are due exclusively or essentially to the geographical environment, including natural and human factors’.12 Thus, the AO is a designation of the place where certain quality standards and characteristics are associated with a product. In some jurisdictions, the words ‘designations of origin’ and ‘origin signs’ are also used instead of AO.13 On the other hand, an IS (indication de provenance) specifies the genuine link between the ‘indication’ and ‘geographical origin’ of the goods to show the roots of a particular good or item.14 Plausibly, indications of source do not deal with the quality and characteristics of goods per se, whereas the AO does so imperatively. AOs, as a special kind of GI, are identical with the GIs as far as quality and place of origin of any product are concerned.

10. For example, the term ‘Indications of Source’ was used in the Paris Convention for the Protection of Industrial Property 1883, the Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods 1891, the International Convention on the Use of Appellations of Origin and Denominations of Cheeses (Stresa Convention) 1951. Whereas, the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (as entered into force in 1958 and last amended in 1979) used the term ‘Appellations of Origin’.
Even though the TRIPS Agreement, the widely accepted multilateral treaty in respect of IPRs including GIs, has significant impacts on IPRs and trade, many international instruments remain significant to GIs. The TRIPS Agreement defines the GIs in a groundbreaking manner, encompassing the GIs great economic and juridical value. It defines GIs as ‘[i]ndications which 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’. Thus, the TRIPS Agreement has put forward the basis of GI protection based on the quality and characteristics of the goods with regard to their origins so that the producers may trade their products for a better price on one hand and, on the other, the consumers may get the genuine and quality goods.

It may be pertinent to share here that GIs can be protected under the common law doctrine of ‘passing off’ to prevent misleading and confusing the consumers and to avoid unfair competition. ‘Passing off’, being a tort, a legal wrong, occurs when one businessman intends to present goods and services in a manner which may injure the business, reputation or goodwill of another trader. One may note that there are three elements of the tort of ‘passing off’, that is, firstly, consumers are aware of the reputation or goodwill of the plaintiff’s product, with its distinctive features; secondly, the defendant has, with or without intention, misrepresented the product to the consumers and made them believe it is the plaintiff’s product; and finally, the plaintiff has suffered or may suffer losses because of such activities of the defendant. However, the law of tort, having no statutory basis, has very limited practical applications in most of the developing countries. As the law of tort of passing off is apparently ineffective in protecting GIs, the enactment of statutory law to protect GIs has, therefore, become the preferred choice for most countries.

Already around 160 member countries of the TRIPS Agreement have a national legal framework on GIs, consequent to their treaty obligations, by way of special law or integrated in the general law on intellectual property. These municipal laws on GIs, including the laws on GIs as applicable in Bangladesh and India, the two countries mainly discussed in this paper, have replicated similar types of ideas as reflected in the TRIPS Agreement.

In a nutshell, GIs are signs, names, or terms to indicate or identify the origin of any particular goods/items with the quality or characteristics which are essentially linked to a certain country, locality or place. As a result, traditional and historical but non-geographical names can also be protected along with geographical names due to their

15. See n 10.
link with a particular place. This system has been adopted under the intellectual property system in order to galvanize the development of the producers of such goods and also to guarantee the authenticity of specific products for the consumers.

Various types of products, for example agricultural and foodstuff products like fresh meat, meat products, cheese, oils and fats, fruits, vegetables and cereals, beer, water, bread, pastry, confectionery, wines, spirit drinks and aromatized wines, etc. can be registered as GIs. Besides, handicrafts and pottery, etc. can also be protected. The example of Guacamayas as handicrafts of Boyaca in Colombia can be shared in this regard, where the villagers manufacture traditional handicrafts from straw (known as ‘paramo’ and ‘subparamo’) and fique. This handicraft is registered as a GI.20

Handicrafts, including traditional handicrafts (also known as artisanal or craft products, traditional creative crafts or works of artistic or traditional craftsmanship), are produced by artisans, completely by hand or with the help of handmade tools or even by using machinery. However, the artisan’s direct manual contribution remains the most substantial component of the finished product, and representations or expressions bear the symbol of the artisan’s culture. Handicrafts encompass a wide variety of goods made of raw materials and there is no particular restrictions on the production quantity and no restriction on consistency of production (ie two exactly alike).

Various international organizations have already recognized the importance of handicrafts, containing TCEs in design, appearance and style, due to the involvement of specialized and traditional techniques, skills and knowledge.21 Even though a universally agreed definition of ‘handicrafts’ is not available, WIPO specified some characteristics of handicrafts. The distinctive features of handicrafts can be utilitarian, aesthetic, artistic, creative, culturally attached, decorative, functional, traditional, or religously and socially symbolic and significant. In the case of ‘traditional handicrafts’, these are transmitted from generation to generation and linked to an indigenous or local community.22

Different aspects of handicrafts can be protected by different forms of intellectual property, for example the know-how can be protected by patent and as a trade secret, whereas the external appearance can be protected as copyright or industrial design, and the reputation can be protected by trade mark, collective or certification marks, GI or unfair competition law. The registration of Jamdani, a very famous and historically known Bangladeshi handicraft, in India, triggering tensions and anxieties, form the main issue of contention in this paper.

2.1 ‘Jamdani handicraft’: an introductory overview

The handloom industry of the region formerly known as Bengal received the highest recognition due to its glorious past. During the time when Dhaka became the capital of the Mughal Emperor in 1608, the finest form of cloth – that is, Muslin – received

21. For instance, UNESCO has endorsed the different varieties of handicrafts considering their ingredients as the reflections of their traditional and cultural properties. See, 8th UNESCO Conference of the ‘Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage’ held at Azerbaijan in 2013.
patronage from the Mughal emperors. During the time of Emperor Jahangir (1605–1635), ‘Dacca Muslin’ could be manufactured 15 yards long and one broad, weighing only 900 grains. Of the various types of Muslin, Shabnam or the ‘evening dew’ was a rare kind which became invisible when laid wet on the grass and thus, became indistinguishable from the evening dew. ‘Ab-e-rawan’ or the ‘running water’ type of Muslin became invisible in water. It is reported that during the great Exhibition of London in 1851, the Muslin of Dacca occupied a prominent place and the British press widely covered this marvellous Muslin fabric from Dacca.

The handloom craftsmen community of the Delta region now known as some areas near to Dhaka, that is Demra, Rupgonj, Ruposhi, deserve the credit for creating Dacca Muslins. Historically, in the mid-nineteenth century many weaving establishments were quite active by using the water network of ‘Dacca’. It is widely acknowledged that the later generations of Muslin craftsmen have been designing and producing Jamdani up to now and currently, while the ‘Jamdani handicraft’ industry has been producing the ‘superior quality Saree’ from the ‘Sonargaon’ areas in particular and some other areas near to Dhaka, that is Dhamrai, Titabari and Norsingdi in general. The natural factors of these regions, that is, moisture, temperature and overall climatic conditions have contributed to some extent, if not completely, to the artistic and famous crafting of Jamdani.

Jamdani is a surviving variety of world-renowned Muslin cloths, yet Dacca Jamdani was more precious than the Muslins. Researchers revealed that the price paid for Dacca Jamdani during Emperor Jahangir’s time is an indication of their highest artistic merit. A price of Ab-e-rawan measuring 10 x 2 cubits and weighing only 900 grams was worth Rs. 400, while the Jamdani made for Emperor Aurangzeb cost Rs. 1250. Even in 1776, the price of a piece of best quality Dacca Jamdani was Rs. 450.

Jamdani is a very special, distinctive and unique type of Bangladeshi handicraft, with a traditional weaving style and specific cultural elements. These have been created by the Jamdani community who have been nourishing and nurturing them from generation to generation. Though ‘Saree’, a special long cloth that Bangladeshi women wear in different festivals as well as in their daily life, is popular, many other

23. Dacca Muslin was the finest form of cloth. For a comparison between French, English and Dacca Muslin on the diameter of threads (parts of an inch) and a comparative demonstration of threads, number of filaments and diameter of filaments, please see, AK Singh, Modern World System and Indian Proto-industrialization: Bengal 1650–1800 (Northern Book Centre, New Delhi, India 2006) 59–60.
25. Ibid.
27. Ibid.
29. Jamdani is much older than Muslim rule in Bengal as it is also found in the book of Periplus of the Erythraean Sea and in the accounts of Arab, Chinese and Italian travellers and traders. From the Arthasastra (about 300 AD), various historical accounts, folklore and slokas, it may be assumed that very fine fabrics were available in Bengal as far back as the first century AD. See, for reference, Z Mahrurk Banu and M Reza, Banglapedia: National Encyclopedia of Bangladesh, Vol. 5 (Asiatic Society of Bangladesh) 371.
dresses can be produced from *Jamdani*. In this handicraft, the weaving style and the traditional craftsmanship are the unique ‘intellectual inputs’ that have been developed by the *Jamdani* community for more than four centuries. The handicraft has attained high standards, great quality and reputation, which are attributable to the ecological production of cotton and the unique finishing of it by the skilled ‘*Jamdani* community’.31

2.2 Theoretical justifications of IPRs *vis-à-vis* the protection of ‘*Jamdani* handicraft’

The justifications for the protection of IPRs by the State’s mechanisms are founded upon different doctrinal and philosophical nuances.32 John Locke’s ‘Labour and Merit Theory’ or ‘Compensatory Justice Argument’ places labour as the justification for entitlement to the fruits derived from such labour.33 Thus, inventors or creators should enjoy the benefits of their labour.34 In this way, intellectual property should be protected in order to exclude third parties and to ensure that the interests of the inventors are protected. On the other hand, George Hegel’s ‘Personality Theory’ illustrates the link between the creations and the personality of the creator, which justifies the ethical claims of exploiting such work by the creator.35 According to the Hegelian approach, the creator has a legitimate justification to exploit the results and benefits of such property due to the connection between the work and the personality of the creator.36 ‘Utilitarian Theory’ is dominantly shaping the landscape of IPRs and justifies the governance by State mechanisms. Principally, the ‘Utilitarian Approach’ argues that intellectual creativeness has practical implications and economic value. If those properties are not protected in a systematic way, then there is an unlikelihood of fostering such work by the creators or inventors. In a fair and just society, the investment of labour and resources must have feasible and legitimate ways to be returned to the investors.37 Concomitantly, intellectual properties should be protected by the appropriate legal frameworks and effective mechanisms, not only within the State territories but also in international regimes.

Juxtaposing *Jamdani* as intellectual property with the aforesaid theoretical and philosophical justifications would expose its compatibility as intellectual property. From Locke’s perspective, the Bangladeshi crafts community has a valid justification to enjoy the benefits of their creative work. This justification carries the merits of validity because *Jamdani* communities have been expending their valuable time, energy and labour for centuries. On the basis of Hegelian orientation, the *Jamdani* community

31. The Geographical Indication (GI) Journal No. 01, March 2016, Published on 4 August 2016, Department of Patents, Designs and Trade Marks, Government of Bangladesh.
35. Ibid.
should enjoy the benefits due to their longstanding connection with this artistic handicraft. Finally, from the ‘Utilitarian’ approach, owing to the practical significance and economic value of their work, the Jamdani community is entitled to see a return on their investments through the fair process adopted by the State.

Unlike other IPRs, the nature of GI is collective, whereas other forms of IPRs are in general criticized because of their overwhelming monopolistic nature. In IP jurisprudence, there is a delicate tension in balancing the asymmetries of the monopoly of the IPRs holders and the interests of the consumers. On the issue of the right balance, GI jurisprudence is highly sound and compatible with moral and philosophical intuitions. The proposition of community or collective rights presupposes the idea of ‘personal but unselfish’ property rights within the community which advance the common good. This notion is supported by John Rawls’s philosophy of ‘redistributive policies’ to lessen the structural hardship of individual rights. Ideally, recognizing the entitlements of the Jamdani community in Bangladesh and the redistribution of benefits among them from generation to generation suit ‘Jamdani’ within the theories of IPRs.

2.3 Normative legal framework on ‘handicrafts’ as GI and ‘Jamdani handicraft’

Normatively, the GI jurisprudence is based on the link between quality and ‘terroir’ or territory that predominantly indicates natural factors as contributing to GI. Regrettably, natural features like air, environment and the overall climate of a particular place may often fail to endorse all the catalysts of GI. Particularly in the handicraft industry, the skills and crafting style used by the artisans would be conspicuously absent, if only the ‘terroir’ or natural factors are considered. It is argued that the traditional concept of terroir or natural factors as the only justification of GI protection is obsolete now. Thus, arts and traditional contributions by artisans in handicraft products have secured their place in the GI regime. Yet, the normative international legal framework in this area has remained obscure until now. Handicrafts with artistic and cultural expressions have been protected around the world by the special orientation of Cultural Protection Law, or under Unfair Competition Law, sui generis protection systems or GI law. However, the New Geneva Act of the Lisbon Agreement on Appellation of Origin and Geographical Indications may add a significant advancement over the existing

41. In France the concept of ‘terroir’ was developed exclusively for the protection of wines and spirits, and was originally used to protect those products from fraudulent imitations, J Hughes, ‘Champagne, Feta, and Bourbon: The Spirited Debate about Geographical Indications’ (2006) 58 Hastings Law Journal 299–307.
43. Ibid 1–53.
international protection system. Importantly, it has endorsed the human contributions that are hugely present in the handicrafts products.

Debate over the inclusion of handicrafts, with the traditional weaving style and integration of cultural expressions of a particular community, as intellectual property is part of a broad discourse of recognizing traditional knowledge and cultural expressions within the orbit of IPRs.\textsuperscript{45} In the current political economic system that many term ‘Neo-Colonialism’, intangible things like cultural issues are also placed in the domain of economic affairs.\textsuperscript{46} Intrinsically, the commodities/products with cultural expressions as the embodiment of particular culture and tradition have additional appeal to consumers. Thus, the handicraft industry has great value not only from the cultural perspective but also as earning economic dividends, both within and beyond any national jurisdictions. Hence, cogent justifications for recognizing as GIs handicrafts whose artistic quality and reputation is associated with a particular region or artisan community, to protect them in domestic and global markets, are gaining ground. In addition, the ongoing negotiations and extension debate under the TRIPS Agreement and the EU-led proposal for inclusion of non-wine products within the purview of the GI protection system may further the discourse to add handicraft under this umbrella.\textsuperscript{47} The new proposal, that is to establish the multilateral registration system for GIs and extended protection at the WTO under Doha Mandate, led by EU, logically contains the notion of including handicrafts products as GIs. Practically, States have already started to accord their handicraft items protection. For instance, only within the Indian domestic sphere, there are a number of handicrafts which have traditional styles and cultural reflections of their own,\textsuperscript{48} and these are already registered and given protection. Thus, the domestic and global IPRs can neither completely refuse nor ignore the growing efficacy of handicraft products and their harnessing under the GI regime.

Reiterating the contributing factors of GI, either human or natural factors or a combination of both, would show that they are squarely behind the protection of GIs.\textsuperscript{49} The \textit{Jamdani Saree} of Bangladesh, with indigenous craftsmanship and traditional weaving, has been a flagship Bangladeshi handicrafts for a long time due to its special characteristics and quality. The special quality or characteristics of ‘\textit{Jamdani}’, with its traditional weaving, have made the said craft famous and attractive to consumers. Thus, it would be just to conclude that the ‘\textit{Jamdani} handicraft’ of Bangladesh is protectable under current flexibilities or spaces available in the international system, and if a specific normative international framework for handicraft comes into existence in the future, certainly it would receive protection under that as well. Ideally, it is compatible with the notion of GIs that has already been deployed in many jurisdictions, including Bangladesh and India.

3 GEOGRAPHICAL INDICATIONS UNDER THE BANGLADESHI MUNICIPAL LEGAL REGIME: A SNAPSHOT

It is understandable that as there has been to date no specific international instrument for the protection of GIs, it will be tough to trace municipal laws in this area in a developing country like Bangladesh. Nevertheless, there are actually some provisions available in the existing Bangladeshi laws which can be interpreted to provide protection for GIs. For example, section 6(1) of the Trade Marks Act 1940 (Act No. V of 1940) which was in force earlier and was replaced by the latest Trade Marks Act 2009 (Act No. XIX of 2009) refused the registration of any one or more words having reference to the character or quality of the goods with a geographical name as trade mark, which put another way means the collective protection of geographical indications. It is pertinent to mention here that the present Trade Marks Act of 2009 has also adopted the same language as was in the previous law.

Very recently, Bangladesh has established a formal legal framework and institutional mechanisms for GIs by enacting the Geographical Indications of Goods (Registration and Protection) Act 2013 (Act No. LIV of 2013) and by framing the Geographical Indications of Goods (Registration and Protection) Rules 2015. These initiatives were taken for the benefit of potential foodstuffs, agricultural products and handicrafts. The law defines geographical indications in relation to agricultural or natural or manufactured goods, as that which identifies its originating country or territory, or a region or locality of that country or territory, where any specific quality, reputation or other characteristic of the goods is essentially attributable to its geographical origin, and in the case where such goods are manufactured goods, one of the activities of either production or processing or preparation of the goods concerned conceivably takes place in such territory, region or locality, whatever the case may be.

This law has been given a special status over other law as section 3 of the Act provides that the provisions of the law shall prevail notwithstanding anything contained in any other law for the time being. Besides, this law has envisaged an institutional arrangement for the protection and supervision of GIs. As required by the law, the Bangladesh government has already set up a separate Geographical Indication Unit, with necessary staffing, under the Ministry of Industries in order to manage GI-related affairs.

The Bangladeshi Law on GIs provides that they must be registered and the application for registration can only be made by an association, institution, government body or authority established or registered under existing laws and representing the interest of GI producers. The law outlines the detailed procedure for the registration of GIs along with the objection procedure for any interested party. To that end, in the case of dispute, any concerned party may send the objection in writing, to which the opposite party needs to respond. The Registrar is the final authority to settle the dispute. He or she would provide the opportunity for a hearing, if any party so desires, and would finally pronounce his or her decision. The validity of a registered GI will primarily last for five years, subject to renewal for a further period of three years each time.

51. Ibid section 2(9).
52. Ibid sections 4 and 5.
53. Ibid sections 9, 10 and 15.
54. Ibid sections 13 and 14.
55. Ibid section 16.
It is apparent that the ‘Jamdani handicraft’ is a perfect fit to be protected as a GI in Bangladesh, and as a result the government has recently registered it as a GI under class 25.\textsuperscript{56} It is a famous item that has attained the high standards, quality and reputation attributable to the ecological production of cotton and the unique finishing of it by the skilled ‘Jamdani community’ over a long period of time.\textsuperscript{57} Moreover, since collective application for registration of GIs has been prescribed as a prerequisite, Jamdani fulfils this criterion of a collective or community right as well. It is owned and managed by the crafts community, from generation to generation. This aligns the handicraft squarely with community interests rather than the monopoly rights of particular individuals. Furthermore, GIs are generally non-licensable and place emphasis on \textit{in situ} manufacturing to ensure the authenticity and quality of the products.\textsuperscript{58} Bangladeshi legislation has also incorporated the aspect of the non-transferability of registered GIs.\textsuperscript{59} As a community right, Jamdani may well be protected under Bangladeshi law with the condition of ‘non-transferability’. The interests of the community may be protected through the \textit{in situ} mechanisms as adopted by the municipal law. Thus, Jamdani can be accorded effective protection under the existing GI law of Bangladesh, that is, Act No. LIV of 2013.

4 AVAILABLE MECHANISMS BEYOND NATIONAL JURISDICTION TO PROTECT JAMDANI

4.1 The protection of Jamdani under multilateral agreements like TRIPS

Internationally, the TRIPS Agreement regime of GIs postulates the basis for the protection of GIs in general and overall guidelines for the measures to be taken by the member States in particular.\textsuperscript{60} This Agreement has given certain flexibilities to the member States to adopt appropriate methods of implementing obligations under it.\textsuperscript{61} The Agreement stipulates a two-tiered system giving enhanced protection to wines and spirits but leaving options open to member States for adopting legal means for the protection of other agricultural products, handicrafts and foodstuffs.\textsuperscript{62} The extension debate on non-wine products is a burning issue and a matter of great discontent among WTO members.\textsuperscript{63} Many members, including the EU, want an equal level of protection for all the products, and, if this happens, goods like handicrafts will enjoy equal protection along with foodstuffs and agricultural products under the

\textsuperscript{56} The Geographical Indication (GI) Journal No. 01, March 2016, Published on 4 August 2016, Department of Patents, Designs and Trade Marks, Government of Bangladesh.

\textsuperscript{57} The Geographical Indication (GI) Journal No. 01, March 2016, Published on 4 August 2016, Department of Patents, Designs and Trade Marks, Government of Bangladesh.


\textsuperscript{59} The Geographical Indications of Goods (Registration and Protection) Act 2013 (Bangladesh), section 19.

\textsuperscript{60} Articles 22–24, TRIPS Agreement 1995.

\textsuperscript{61} Article 22(2) in conjunction with article 1 of the TRIPS Agreement 1995.


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TRIPS Agreement, since from the way article 22.1 of the TRIPS Agreement has defined GIs, it is unclear whether any handicraft can be protected as a GI. However, as per the TRIPS requirements regarding the authentic origin of products and cultural integrity doctrine, a conclusion may be drawn in favour of protecting handicrafts as GIs under the TRIPS regime.

It is worth stating here that since the TRIPS Agreement has given the power to the member States to fix their GI items and to adopt appropriate mechanisms to grant them legal protection, the member States are free to give protection to any items of their choice, including handicrafts. However, in doing so, member States must not cross the boundaries set by the TRIPS Agreement and discriminate against any other member States through their activities. Moreover, the TRIPS regime of GI places an emphasis on origin and authenticity. Thus, traditional and cultural property may serve as an indication of origin and authenticity.

The fifth session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore endorsed that handicraft items can be protected under GI as the embodiment of traditional cultural expressions. GI jurisprudence also propagates that GIs not only identify the place of origin but also ensure the ‘intellectual input’ in those products. Thus, the ‘intellectual input’ is one of the key issues that justifies the protection of such products as intellectual property. As far as Jamdani is concerned, it is considered that the weaving style and the traditional methods of craftsmanship are the unique ‘intellectual inputs’ that have been developed by the Jamdani community for a long period of time. The ‘intellectual input’ in Jamdani, along with its quality and characteristics, contribute to its overall suitability as a geographical indication. Logically, it is to be inferred that the ‘Jamdani handicraft’ may be protected under the TRIPS regime as a GI.

4.2 Protecting Jamdani under bilateral agreements

International trade and commerce is quickly shifting towards the TRIPS Plus regime of bilateralism where the United States of America and some other developed countries have been playing a pivotal role. The intrinsic difficulties or disadvantages that are associated with multilateral agreements may be one of the reasons for many states preferring to opt for bilateral arrangements. Such bilateral agreements can also be used to protect the GIs.

65. Ibid.
66. Article 1, the TRIPS Agreement, 1995.
Bangladesh, alongside multilateral treaties like the TRIPS Agreement, has also been trying to enhance its trade relations with various countries through bilateral treaties. Protecting ‘Jamdani handicraft’ through the bilateral agreements that Bangladesh has already struck or may enter into with other countries is a good option for the country. Bangladesh may look forward to gaining benefits from the EU market, even though market demands for Jamdani in the EU might be a matter of concern. Presumably, a good deal of market demand should exist there because Bangladesh has a history of exporting huge amounts of readymade garments items into the EU market.

The EU protects GIs based on EC Regulation 510/2006, which provides for mechanisms to protect agricultural products and foodstuffs. This Regulation extends the protection of GIs to the EU and other foreign countries. A detailed application procedure is enumerated in article 5 of the Regulation. Under the Regulation, non-EU producers of GIs may also apply for protection in terms of EU jurisdiction without the reciprocity of protection in their national jurisdiction.\(^72\) Apparently, ‘Jamdani handicraft’ may not get protection under the EU Regulation since it only deals with agricultural items and foodstuffs.\(^73\) However, since the EU is a leading proponent of equal (extended) protection under the TRIPS Agreement for all the products, including handicraft products, if members protect them in their domestic jurisdictions, a positive assertion may be drawn. Hence, it may be logically argued that Bangladesh may harness the benefits from Jamdani by applying the protection under the EU GI regime. Additionally, Bangladesh has several bilateral agreements on trade issues with the EU whereby the country may seek recognition and protection of ‘Jamdani’ in the EU jurisdiction.\(^74\) After providing protection of Jamdani under its domestic law, if Bangladesh moves for such protection in the EU jurisdiction, it can be anticipated that there is a good possibility that the EU would respect this approach.

It is relevant to share here that Bangladesh and the USA have signed the Trade and Investment Cooperation Framework Agreement (TICFA), 2013, to explore and strengthen mutual trade and investment bilaterally. The Agreement specifically recognizes that both States will be obliged to protect and enforce the IPRs as protected by their domestic laws and shall be bound to follow the norms set by international treaties like WTO-TRIPS.\(^75\) Although Bangladesh and the US protect their GIs in different ways – the former through a sui generis system of GI Law and the latter through certificate marks under the Trade Mark Law – Bangladesh may reap the benefits for Jamdani under the TICFA. Thus, a bilateral treaty like TICFA may greatly contribute to protecting and harnessing Jamdani in the USA market.

### 4.3 Towards new horizons of GIs through FTAs: exploring the Canada-EU FTA

The widely accepted advantage of TRIPS is that it has attracted a huge number of parties to be part of the WTO package. Nevertheless, perhaps, it is not the sole


\(^74\) For example, the Cooperation Agreement between the European Community and the People’s Republic of Bangladesh (2001) envisages mutual cooperation and assistance in bilateral trade relations. Available at the Official Journal of the European Community.

\(^75\) See the Trade and Investment Cooperation Framework Agreement (TICFA) 2013, Preamble and art 5.
trading system which WTO members are relying on. In addition to that, there are a number of Free Trade Agreements (FTAs) which have been negotiated and agreed by members of the WTO. Arguably some of the provisions of these FTAs go beyond the standards of TRIPS that make the WTO rules either obsolete or partially relevant to the parties of FTAs.\textsuperscript{76} In contrast, regional FTAs like the North American Free Trade Agreement (NAFTA), which came onto the scene before the TRIPS Agreement, has incorporated almost similar provisions to TRIPS with regard to the prohibition of unfair competition, as delineated in section 10 bis of the Paris Convention, 1883, the prohibition of the misleading use of GIs, and restrictions in the case of creating confusion among consumers.\textsuperscript{77} It is certainly a critical question as to why the members of NAFTA agreed to adhere to similar terms to TRIPS although subsequently they did not agree to a \textit{sui generis} protection system in the TRIPS negotiation. In particular, the United States had vehemently opposed the idea of a \textit{sui generis} protection system for GIs, which had been strongly supported by the EU.\textsuperscript{78} Perhaps common trends of GI protection, under either trade marks or certificate marks by the USA and Canada, had persuaded them in the negotiations to include GI-related provisions in the NAFTA.

The EU is a strong proponent of extended and international protection of GIs. The EU’s position is in favour of extended protection under article 23 of TRIPS to include items beyond wines and spirits pertaining to foodstuffs, handicrafts and agricultural items.\textsuperscript{79} However, the deadlock in the TRIPS Council over GI negotiation has pushed the EU to go for bilateral trade and free trade agreements with its trading partners.\textsuperscript{80} The EU has negotiated a number of bilateral trade agreements (BTAs) and FTAs with its counterparts to reflect the concept of ‘global Europe’ in its trade and commerce. Between 2009 and 2014, the EU and Canada negotiated a particularly groundbreaking FTA – namely, the Comprehensive Economic and Trade Agreement (CETA). It is believed that CETA will provide an unprecedented opportunity to EU-Canadian enterprises and business entities will enjoy mutual benefits.\textsuperscript{81} Along with other issues, GIs are included in this FTA.

Chapter 22 of CETA deals with issues related to IPRs and GIs are included as well.\textsuperscript{82} Article 7.1 defines ‘geographical indication as an indication which identifies an agricultural product or foodstuff as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation or other characteristic of the product is essentially attributable to its geographical origin’.\textsuperscript{83} Two distinct issues

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\textsuperscript{77} North American Free Trade Agreement (NAFTA) 1994, section 1712.


\textsuperscript{82} Article 1.1 of this chapter specifically delineates the trade and commerce in relation to the intellectual properties of the parties. It further provides that parties must accord adequate protection and effective enforcement mechanisms for the IPRs of the parties.

are visible in this definition: (a) although both the parties are members of TRIPS they have replaced TRIPS’s term ‘goods’ with ‘agricultural product or foodstuff’, to denote the GIs; and (b) it also maintains the similar TRIPS provisions of ‘exclusivity or attributable test’ between the item’s quality and its originating place. Why does CETA only include agricultural products or foodstuffs and does not include wines and spirits? Reasonably so, the EU and Canada have a separate bilateral agreement for the protection of wines and spirits, and therefore those are excluded from CETA.84

While it is too early to judge the exact impact of the GI-related provisions of CETA, it may, however, represent conflicting positions between the parties on many aspects, particularly in relation to Canada’s commitments under NAFTA.85 Furthermore, potential conflict may arise in the domain of protection mechanisms between the EU and Canada because the former accommodates a wide range of items under a sui generis system whereas the latter protects GIs under trade mark law. Another difficulty that the parties may confront is how the ‘exclusivity’ of quality and originating place would be tested or determined by Canada, which protects GIs under trade mark law. Generally, trade mark registration does not deal with the quality of the product unless it is registered as a certificate mark. There may be deviation in standards because the EU employs different mechanisms within the sui generis method to protect its GIs.

Despite the complications, it will certainly be treated as a great achievement for the EU to have protection for its GIs in Canada as well. CETA will create a big market for GIs both in the EU and Canada. As the EU is a proponent of the extended accommodation of GI products beyond wines and spirits, along with international protection of GIs, the EU’s global position may open up new horizons for handicraft products to be protected as GIs. At this current juncture, it is rather unfortunate for the developing nations whose traditional cultural flagships and handicrafts are placed beyond the purview of GIs in FTAs. For example, the Andean Community of Nations protects handicrafts items as GIs, however, those handicrafts are not protected under the FTA between the EU, Columbia and Peru.86 Similarly, CETA covers the exclusivity of GIs for agricultural products and foodstuffs but not for artisanal products, at least not explicitly. However, the successful negotiation of CETA puts forward the argument that States may negotiate with other trade partners to include new items on their lists of GIs and reap mutual benefits thereby. Perhaps it would not be unwise to submit that TRIPS Plus mechanisms like FTAs have been opening up new avenues for GIs beyond traditional products, where handicrafts could potentially be included.

5 TOWARDS DOMESTIC PROTECTION OF ‘JAMDANI HANDICRAFT’:
PITFALLS AND OPPORTUNITIES

It has already been raised that, at least from the legal aspect, ‘Jamdani handicraft’ is eligible to be protected as a GI under the relevant Bangladeshi law. However,

Bangladesh as a LDC might face some serious challenges and genuine setbacks in protecting its GIs in general and Jamdani in particular. Most of the LDCs have some inherent challenges in enacting and enforcing intellectual property laws. Intellectual property issues and laws thereof are not particularly popular because of many recognized reasons in developing countries. Intellectual property protection is predominantly based on the territoriality principle; hence, the Bangladeshi authorities are required to register potential GI products under national law.

The Department of Patents, Designs and Trademarks (DPDT) under the Ministry of Trade has already started to take applications for the registration of GIs. Registration of particular items is the first step but only the tip of the iceberg; hence, many challenges associated with the protection system are yet to be faced and overcome. In the case of Jamdani, the awareness of craft industries, craftsmen and the public at large is highly warranted for its effective protection, particularly at the outset of the registration process.

Like any other domestic regimes, Bangladesh might face some challenges because of the collective registration system under the GI law of Bangladesh. Even though the Bangladesh Small and Cottage Industries Corporation (BSCIC) has already applied for registration as an authorized representative of the Jamdani community, it would face huge a challenge in accommodating all the stakeholders of the Jamdani crafting community. Despite the difficulties that the registration authority might face, without the active participation of Jamdani communities, the protection would not result in any benefits at the grassroots level. The law makers of Bangladesh have realized this too and have undertaken to secure the representation of all the stakeholders. That is why the application for registration of a GI specifies the applicants, appellation, relevant geographical area, products and their essential characteristics.

In this case, the application for registration of ‘Jamdani’ has distinctively covered all relevant issues in order to establish its exclusivity. Plausibly, the peculiarity of the GI system is that intrinsically it has a collective approach, but, within this, it has the inherent aspect of extending benefits to the individual as well. Yet again, within the joint registration system, individual benefits may also be conferred if appropriate steps are taken. The Registrar of GIs needs to play a vital role so that stakeholders are properly represented in the application and eventually receive the fruits of the protection of Jamdani. As a matter of fact, Jamdani has been owned and managed by large portion of the crafting community. It might be a difficult task for the GI Unit, on the one hand, to determine the appropriate Jamdani craftsmen and other stakeholders and, on the other, to distribute

89. The Geographical Indications of Goods (Registration and Protection) Act 2013 (Bangladesh), section 9.
90. Ibid sections 4 and 5.
91. For more see WIPO Model Law for Developing Countries on Appellations of Origin and Indications of Source.
93. Ibid.
the benefits equitably and proportionately to all. However, in order to make the task easier with regard to the identification of the right craftsmen, different information and communication technology tools, mobile networks and a national identity card database can be used.

5.1 National and international branding of ‘Jamdani’: issues and concerns

The branding of any product _prima facie_ does not have any legal implications that require to be dealt with. Nevertheless, the legal protection of such a brand is of huge significance. Due to the overwhelming domestic protection of IPRs, the global or regional protection of GIs is complicated. Since Bangladesh is not a member of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1958, for obvious reasons international protection of _Jamdani_ through this Lisbon Agreement will not be available for Bangladesh.

It is a matter of fact that WIPO has been trying to upgrade the international registration system under the Lisbon Agreement so that international registration becomes easier for the stakeholders. Concomitantly, WIPO has initiated a significant step forward in the international registration of AO and GI. Besides, some WTO members have also raised the issue of an international registration system for GI in the agenda of the TRIPS negotiation under the Doha Round.

Under the existing system, international protection for any GI products intrinsically involves a challenging process, particularly for handicraft items. It involves serious administrative costs and represents a huge enforcement burden for the States that seek it. Reasonably for countries like Bangladesh, protection of IPRs at the international level would be cumbersome as well. Quality controlling and proper monitoring are other aspects of challenges that Bangladesh might face in protecting _Jamdani_ in the global market. GI regimes typically offer a periodic renewal system to ensure the proper qualities of concerned goods or products are maintained. Since the Bangladeshi GI law contains a provision on the requirement to renew the GI items periodically, the Bangladeshi authority needs to be vigilant in implementing those provisions of law strictly.

Branding _Jamdani_ would largely be dependent on the appropriate policy actions rather than the existing legal framework. In a globalized business world, for the GIs to produce real benefits and financial dividends, investment in advertising and marketing is a must. Further, the branding of any particular GI may act as an effective

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97. Ibid 454.
marketing tool that enables the consumers to differentiate between similar goods.\textsuperscript{101} Desirably, after ensuring legal protection, Bangladeshi policy makers should also adopt appropriate measures to promote ‘Jamdani handicraft’ domestically and internationally. International treaties like the TRIPS Agreement have given member States the flexibility to adopt appropriate measures so that IPRs could be legally protected, while at the same time no barrier could impede legitimate trade and commerce.\textsuperscript{102} In branding Jamdani, special attention should be given to the communities that have been guarding the flame to keep alive the culture and heritage of ‘Jamdani handicraft’ from generation to generation.

5.2 Implications of a prospective Indo-Bangla dispute over Jamdani: a delicate issue ahead

Bangladesh and India, particularly the West Bengal region, share many homogenous issues, both historically and culturally. During the British regime, in the then undivided India, both the territories were under the same singular authority. Later on, the two States came into existence as India and Pakistan, and subsequently Bangladesh emerged from East Pakistan. In many areas of common interest both Bangladesh and India maintain friendly relations, yet they have disputed issues. For example, both countries have discontents with each other in water sharing of joint rivers, tensions over borders, etc. Regrettably, a recent dispute over GIs in relation to Jamdani handicraft along with the Fazli mango and the Nakshi Katha could add another area of discomfort between the two friendly nations.

In response to an application made by the Uppada Handloom Weavers Co-operative Production and Sale Society Limited and two other registered societies of Uppada Kothapalli mandal of the East Godavari district, the Chennai-based Geographical Indications Registry of India has registered ‘Uppada Jamdani Sarees’ (Application no. 122) as allegedly originated from Andhra Pradesh\textsuperscript{103} under its own GI law.\textsuperscript{104} The move to register Uppada Jamdani Sarees was actually started by the local Jamdani workers more than twenty years ago when they filed their claim in the office of the Registrar of Patents at Chennai. Thus, it is evident that India has already registered the term ‘Jamdani’ as its own GI. This step by India has resulted in deep concerns among the Bangladeshi people, particularly among the stakeholders of the handicraft industry as there are significant differences in weaving style, design and price between the Jamdani of Dhaka and Uppada. Even the Indian sources claim that Jamdani has its root in Dhaka.

Naturally, it is plausible that India’s claim over this famous handicraft of Bangladesh may cause a serious roadblock in the interests of Bangladeshi stakeholders. GIs are of great significance for nations, irrespective of their economic position, because they may contribute to the reputation and goodwill of the product concerned;\textsuperscript{105} hence, the Indian claim may result in the loss of huge financial dividends as well as irreparable damage

101. Ibid 82.
102. Articles 1 and 8, the TRIPS Agreement, 1995.
to traditional Bangladeshi handicraft industries. Undeniably, Bangladesh has well founded concerns because of the genuine fear of losing its tangible and intangible assets.

The famous instance of the Indian Basmati Rice case can be used as a useful reference in this current Jamdani dispute between these two friendly states. In late 1997, an American company, RiceTec Inc. was granted a patent by the US Patent and Trademark Office (USPTO) to call the aromatic rice grown outside India ‘Basmati’. India protested the actions of RiceTec on the ground of, *inter alia*, non-disclosure of true origin and creating a misconception for buyers. It was also submitted that India has been protecting Basmati rice for a long time as plant varieties under the legal mechanisms of the Indian Seed Act 1966. As a result RiceTec lost against the Indian claim on Basmati rice. As with Basmati rice, similar objections of non-disclosure of true origin and creating misconceptions in consumers may also be raised by Bangladeshi producers with regard to the ongoing Jamdani dispute with India.

6 TOWARDS EXCLUSIVITY ON ‘JAMDANI HANDICRAFT’: HOW FAR MAY BANGLADESH GO?

Maintaining exclusive ownership over any particular item is very important and forms the central issue in IP regimes. Likewise, exclusivity over the term ‘Jamdani’ is of huge significance for Bangladesh. Questions may be raised over whether Bangladesh has cogent legal grounds to respond to the Indian claim for using the ‘Jamdani’ tag to denote its own handicraft? Bangladeshi stakeholders may express concerns; however, this would be ultimately futile unless they have cogent legal justifications to defend their interests. Pertinently, in the next section, the chances of Bangladesh establishing exclusivity over the term ‘Jamdani’ will be explored.

6.1 Jamdani as a reflection of Bangladeshi Traditional Cultural Expressions (TCEs) and ingenuity

The ingenuity that Jamdani has achieved over the years due to artisan skills, cultural inputs and traditional weaving style may legally underpin the exclusivity of Bangladesh over it. The factual issues and justifications may also be linked to a legal paradigm. Within the current international legal trade regime under the TRIPS Agreement, to which Bangladesh and India both are member States, Bangladesh may forward its normative arguments supported by historical, traditional and cultural issues to substantiate its position on the title of ‘Jamdani’. As per the definition of a GI in the TRIPS Agreement, it has justified the protection of its GI based on the quality and characteristics of goods with regard to their origin, along with other factors. Arguably, the TRIPS Agreement has reflected the essence of ‘authenticity of origin’, which acts as a

double-edged sword, that is, protecting consumers from being misled, on the one hand, and, on the other, simultaneously helping the producers to protect their products.110 Historically, in the mid-nineteenth century there were some sorts of weaving establishments that were located in the waterways network of the then ‘Dacca’.111 Thus, Jamdani had its roots in different areas of Bengal that currently comprise the Dhaka district.112 Furthermore, it is well documented that during the Mughal rule, there were handlooms in almost all the villages of the Dhaka district, which were famous for making superior quality Jamdani.113

Bangladesh may claim its exclusivity over Jamdani, contending that it is its own cultural property. It is pertinent to share here that the international organization the United Nations Educational, Scientific and Cultural Organization (UNESCO) has endorsed the protection of cultural issues worldwide and UNESCO has recognized ‘Jamdani handicraft’ as the ‘sole tradition’ and ‘intangible cultural heritage’ of Bangladesh.114

The evolving international trade jurisprudence is also placing great importance on goods that demonstrate the cultural or traditional expressions of nations. The old dogma of the non-trading aspect of cultural goods is day-by-day becoming outdated, and States are endorsing that cultural goods have great market value to consumers due to their traditional and cultural expressions. Moreover, seeking protection of cultural goods is an integral part of defending such goods from piracy and emulation by others. Thus, ‘Jamdani handicraft’ may be regarded as a reflection of Bangladeshi TCEs and should be protected as such.

6.2 Preventing the misleading of consumers and unfair competition

The reputation or goodwill that most often attaches to the source of origin is intrinsically relevant to the protection of GI.115 As far as quality and reputation are concerned, the Bangladeshi Jamdani Saree is of higher quality and has a more famous brand value than the alleged Indian one which is registered in a small Uppada village of Andhra Pradesh. The issues pertaining to quality and reputation are equally applicable not only for Bangladeshi customers but also in Indian markets. Thus, the Indian authorities using the Jamdani tag has the potential both to create confusion in the market and mislead the consumers.

The legal regime under article 22(2) in particular and also article 22(3) of the TRIPS Agreement, read in conjunction or separately, explicitly restricts the member States from using GIs in a manner that creates confusion and misleads the public. The scheme of the TRIPS Agreement is to protect consumers from low quality goods and prevent unfair competition in the market. Furthermore, the TRIPS Agreement has endorsed and incorporated the meaning of unfair competition as reflected in the Paris

110. Ibid art 22(2).
113. Ibid 371.
114. 8th UNESCO Conference of the ‘Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage’ held at Azerbaijan in 2013.
Convention, 1883. In fact, the principle of unfair competition, in today’s context, is an elastic one and is not limited to confusions in the market. Rather, it may encapsulate other issues such as ‘dilution, the depreciation of goodwill or reputation, or even attempts to derive undeserved benefits from a GI’. The doctrine of unfair competition is lucidly described in the landmark case International News Service v Associated Press as ‘reaping where someone has not sown’.

Certainly, since both India and Bangladesh are under the TRIPS regime, they are obliged not to adopt any policy that facilitates confusion and misleads consumers in general and allows unfair competition in particular. To be TRIPS compliant, both the States have already enacted domestic GI Laws to prevent the misleading use of GIs that might create confusion and unfair competition. Thus, in response to the Indian claim, Bangladesh may maintain the exclusive right over Jamdani under the overall scheme of avoiding ‘misleading consumers’ and ‘unfair competition’, as reflected in international and national intellectual property regimes.

6.3 The non-suitability of Jamdani with the homonymous protection system

The homonymous GI refers to GIs with similar terms which are spelled or pronounced alike, but are worthy of independent protection under the GI regime. Situations may arise within and beyond the territory of any country. In particular, homonymous protection is a complicated system when it applies to cross-border matters. An ideal example would be ‘Basmati rice’ which is grown in Indian and Pakistani territories and protected by both States under the same name.

From a protectionism perspective, it is worth exploring whether India and Bangladesh may simultaneously protect ‘Jamdani’ as an homonymous GI. Arguably, it may be

116. Under the Paris Convention, 1883, article 10bis (2) in relation to ‘Unfair Competition’ stated that ‘any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition’. And section 10bis (3) further provided that

The following in particular shall be prohibited:

(i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
(ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
(iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

118. 248 US 215 (1918).
submitted that because of the territorial enforcement of GI, both countries may protect ‘Jamdani handicraft’ under the same terms. Under the domestic legal regime, Indian GI law also provides scope for the registration and protection of homonymous GIs.123 Similarly, Bangladeshi GI law postulates identical provisions.124 It is to be noted that the laws of both the countries permit the co-existence of homonymous GIs unless they potentially create confusion in the market and mislead consumers.

Regarding international trade regimes, the TRIPS Agreement contains provisions for the protection of homonymous GIs, albeit that these are currently explicitly applicable to wines and spirits.125 The TRIPS Agreement has thus provided some guidelines that have to be taken into consideration by the member States while according protection to similar types of wines and spirits. Significantly, the TRIPS Agreement requires member States to determine practical conditions upon which homonymous GIs can be differentiated from each other and simultaneously to ensure the equitable benefits for each producer of a homonymous GI. The domestic legislations of Bangladesh and India have incorporated a similar notion to the TRIPS Agreement with regard to the protection of homonymous GIs.126 Moreover, the TRIPS Agreement delineates that the use of similar names must not be deceptive, that is, it must not mislead consumers and also must not create any act of unfair competition.127 Besides the TRIPS Agreement, EU Regulation 1151 of 2012 is another significant instrument addressing homonymous GIs both regionally and globally. The Regulation stipulates that ‘a homonymous name which misleads the consumer into believing that products come from another territory shall not be registered even if the name is accurate as far as the actual territory, region or place of origin of the products in question is concerned’.128 Thus, it may be concluded that the proposition of homonymous protection of ‘Jamdani handicraft’ by both Bangladesh and India will not be tenable under the domestic and international GI regimes. Harnessing Jamdani as a homonymous GI entails a great risk of resulting confusion along with misleading consumers, which is prohibited under the national and international legal frameworks and trade policies.

6.4 Forums to raise the Jamdani issue: possible options for India and Bangladesh
With all the evidence and references from historical texts and databases on Intangible Cultural Heritage maintained by UNESCO which indicate that Jamdani is a Bangladeshi product,129 the concerns of Bangladesh related to Jamdani may be raised in some appropriate forums. It is relevant to share here that in a number of instances official authorities

125. The TRIPS Agreement 1995, art 23(3).
126. Section 10, the Geographical Indications of Goods (Registration and Protection) Act, 1999 (India), and Section 7, the Geographical Indications of Goods (Registration and Protection) Act, 2013 (Bangladesh).
127. Articles 22(2) and 23(3), the TRIPS Agreement 1995.

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have claimed that the government is going to protest and contest India’s claim over the Uppada Jamdani Saree; however, the claim is still in the form of media statements and no visible steps have been taken.

Ideally, the issue should be discussed in bilateral forums, among diplomatic, ministerial or commercial representatives of India and Bangladesh, this being the most preferable dispute settlement mechanism. If bilateral negotiations result in good outcomes, the Bangladeshi authorities may apply to the Indian jurisdiction for the cancellation of the registration of disputed GI items, namely Uppada Jamdani. In this respect, an application has to be presented to the competent authority – the Registrar of GI under Indian GI law – to finalize the issue. Any party, whether Bangladesh or India, if aggrieved by the decision of the Registrar, may apply to the Appellate Board constituted under Indian GI law. The Decision of the Appellate Board shall be final and conclusive in this regard at the domestic level.

Nevertheless, after exhaustion of the domestic remedies, if unsuccessful, any party may proceed to WTO dispute settlement mechanisms, which function in three phases. Initially, a mandatory consultation between Bangladesh and India would be negotiated that would last for at least sixty days. Secondly, if the negotiation is unsuccessful, the parties may request that the Dispute Settlement Body (DSB) establish a ‘Panel’, which is typically comprised of three members who are independent individuals from countries other than those in dispute. Any party aggrieved by the decision of the ‘Panel’ can appeal to the Appellate Body. Finally, both countries have to implement the decision of the DSB.

Thus, if Bangladesh and India decide to opt for the abovementioned mechanisms of the WTO, it may not set a good example of conduct between the two friendly countries. The Basmati rice case should be distinguished from the Jamdani case here as in that case, a company (ie RiceTec Inc) was involved. In this present scenario, two states are involved and that is the reason the amicable settlement system, discussed above, should be considered in order to maintain a friendly relationship between the two neighbours.

7 CONCLUSION

The protection of ‘handicrafts’ as GIs is undoubtedly a complicated issue due to many factors, including the absence of a specific international normative legal framework. Nevertheless, ongoing negotiations at the WTO under the Doha Development Agendas may open up avenues for the inclusion of handicraft items as GIs within the international protection system. Undeniably, ‘handicraft’ products, in many cases, tend to reflect the TCEs and traditional knowledge of the artisans. Moreover, those products may vividly manifest special qualities that are essentially due to the skills of certain

131. The Geographical Indications of Goods (Registration and Protection) Act 1999 (India), section 27.
133. Article 64 of the TRIPS Agreement subject to articles XXII and XXIII of the General Agreement on Tariffs and Trade (GATT) 1994.
communities and/or the climatic conditions of particular territories. The conceptualization of GIs that is reflected in the TRIPS Agreement has augmented the scope of handicrafts to be protected under the umbrella of GIs. Furthermore, the doctrinal or theoretical bases for protecting GIs and their interfaces with handicrafts reinforce the claim of protecting handicrafts as GIs. From all aspects, Jamdani as a Bangladeshi handicraft is eligible to be protected as a GI. Bangladesh has already started the process of domestic protectionism. In so doing, Bangladesh might face hurdles in ensuring that equitable benefits are shared among all stakeholders, most significantly with the poor artisans. In transnational or international protection, Bangladesh might encounter administrative costs, quality control, branding and also the Indian claim over the title of ‘Jamdani’. While protecting this famous handicraft item, a dispute with India over Jamdani would represent a great roadblock for Bangladesh. As has been shown in this article, under all the basic doctrines of the TRIPS Agreement, ranging from ‘authenticity of origin’ and ‘cultural integration’ to ‘misleading consumers’ and ‘unfair competition’, Bangladesh has cogent legal justifications for exclusive ownership over Jamdani as a handicraft. With so many references in historic texts, UNESCO has also declared Jamdani to be a product of Bangladesh. The homonymous protection available to both Bangladesh and India should not be encouraged as that may tend to mislead consumers and such an outcome is strictly prohibited by the domestic legislations of both the States as well as under the TRIPS Agreement. Therefore, as a matter of urgency, Bangladeshi policy makers need to take the initiative to settle this dispute with India in a pacific way, since there are a number of opportunities for Bangladesh to protect Jamdani, with the country potentially reaping the benefits of plurilateral agreements like the TRIPS Agreement or bilateral agreements such as TICFA, or negotiations for instruments like CETA could even be considered.