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**The Inadequacy of Compliance Theory:  
A Case Study of Saudi Arabia and TRIPS**

Thesis submitted in fulfilment of the requirements for a  
Doctor of Philosophy (PhD) Degree in Law

May 2022

# The Inadequacy of Compliance Theory: A Case Study of Saudi Arabia and TRIPS

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## **Dedication**

This work is dedicated to the souls of my relatives who passed away while I was studying for my PhD: my maternal grandmother Latifa (Al Ahsa, 2020), my paternal aunt Mariam (Al Ahsa, 2020), my great-aunt Mariam (Al Ahsa, 2019), my paternal aunt Samira (Al Ahsa, 2018), and my paternal uncle Youssef (Al Ahsa, 2017).

I was always planning to celebrate with all of you after returning to the motherland. But as William Goldman said, 'This is life on earth, you can't have everything.' May God bring me together with all of you in another, better place, where I believe we can have everything we want.

An earthly life ends and another begins. Speaking of which, I also dedicate this work to our coming baby, God willing. Her suggested name is Maali, which means noble, sublime, excellency, greatness, and eminence.

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First and foremost, all praise is due to Allah for all things in the past, present and future.

Then thanks go to my mom, to whom I apologise for my absence in order to study for my PhD.

Then thanks go to my dad, my educator, teacher and mentor.

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Finally, thank you to the health workers. You are the heroes of the pandemic, and have my gratitude for saving me from possible death.

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## **Declaration**

I, Omar Alsaeed, declare that this thesis is entirely my own original work, and where other sources were used they have been fully referenced. I also confirm that this thesis has not been submitted to the University of Warwick or any other university, either in part or in full, for any degree or diploma.



# **The Inadequacy of Compliance Theory: A Case Study of Saudi Arabia and TRIPS**

## **Abstract**

Innovation and emerging technologies continue to drive the marketplace and global economy, increasing the convergence of international companies working with each other and necessitating the negotiation and adoption of new legal agreements between states. International trade law has sought to maintain the integrity of the global market by protecting intellectual property (“IP”) and establishing international agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), that ensure the protection of IP rights and related rights at the international level. Compliance with such agreements has been the subject of considerable debate among legal scholars, many of whom wrestle with binary frameworks that depict states as either compliant or non-compliant. This study investigates one international actor, the Kingdom of Saudi Arabia (“the KSA” or “the Kingdom”), and the factors that govern the extent of its compliance with international legal agreements, and particularly with TRIPS. Adopting a library-based, qualitative analytical approach, this thesis discusses the lack of consensus over the relationship between compliance and implementation and the absence of a suitable theory that examines compliance comprehensively. First, a distinction is drawn between the KSA’s implementation of TRIPS and its compliance therewith, and the gap between the two is assessed. Next, through a critique of various theories of compliance, the challenges it presents even for those states that wish to comply are considered. Finally, Jacobson and Weiss’s comprehensive model of compliance is applied to the case of the KSA to develop a deeper understanding of the Kingdom’s complex relationship with TRIPS and with international legal agreements generally. The findings suggest that scholars may be better served by a sliding scale model as opposed to the widely practised binary model.

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## Abbreviations

BoE	Bureau of Experts at the Council of Ministers in the Kingdom of Saudi Arabia
BSA	Business Software Alliance
CEAS	Common European Asylum System
CETA	Comprehensive Economic and Trade Agreement
DSB	Dispute Settlement Body
EPL	English Premier League
EU	European Union
FDI	foreign direct investment
FTA	free trade agreement
GCC	Gulf Cooperation Council
GDP	gross domestic product
GSP	Generalized System of Preferences
ICC	International Criminal Court
IDC	International Data Corporation
IEA	international environmental agreement
IEL	international environmental law
IIPA	International Intellectual Property Alliance
IP	intellectual property
IPO	Intellectual Property Owners Association
IPR	intellectual property rights
JCCI	Jeddah Chamber of Commerce and Industry
KSA	Kingdom of Saudi Arabia
LDCs	least developed countries
MNC	multinational corporation
NGO	non-governmental organization
NIPST	National Intellectual Property Strategy
NOR	non-oil revenues

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OIC	Organisation of Islamic Cooperation
SAIP	Saudi Authority for Intellectual Property
TPP	Trans-Pacific Partnership Agreement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
TTIP	Transatlantic Trade and Investment Partnership
TWAIL	Third World Approaches to International Law
UN	United Nations
UNSC	United Nations Security Council
US	United States of America
USTR	Office of the United States Trade Representative
WB	World Bank
WCO	World Customs Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

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## Chapter 1: Introduction

### 1.1 Introductory Remarks

Over the last 20 years, states worldwide have experienced major changes because of globalisation. Driven by these technical, economic and industrial developments, the laws prescribing international relations have undergone unprecedented shifts, specifically in terms of the scope of international legal institutions. International trade agreements are a major contributing factor in this transformation, and their extensive development has highlighted the importance of investigating the capacity of both individual states and the international community to promote compliance with international legal obligations. International trade law continues to develop and, crucially, compliance with new international agreements, not to mention acceptance of stated legal obligations by all signatories to them, is essential to substantiate the legitimacy of these treaties and the principle of the systemisation of rules and regulations internationally.<sup>1</sup>

The Kingdom of Saudi Arabia (hereinafter “the KSA” or “the Kingdom”) has been a member of the World Trade Organisation (hereinafter “the WTO”) since 2005, contributing to the creation of a robust multilateral merchandising system.<sup>2</sup> Under the umbrella of the WTO, the Kingdom has also entered into numerous agreements. To ensure it maintains pace with global changes, the KSA’s compliance with the global legal obligations set out in such international agreements should be reviewed comprehensively. One significant agreement in this regard is the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter “TRIPS”).<sup>3</sup> With a focus on one type of intellectual property (hereinafter “IP”) covered by this agreement, namely copyright,<sup>4</sup> this thesis

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<sup>1</sup> Chiara Giorgetti, ‘Why Should International Law Be Concerned about State Failure’ (2010) 16 ILSA Journal of International and Comparative Law 469.

<sup>2</sup> WTO, ‘Member Information: Kingdom of Saudi Arabia and the WTO’ <[www.wto.org/english/thewto\\_e/countries\\_e/saudi\\_arabia\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm)> accessed 26 March 2021; Raj Bhala, ‘Saudi Arabia, the WTO, and American Trade Law and Policy’ (2004) 38 International Lawyer (ABA) 741; Ahmed bin Hamdan, ‘Increased Opportunities for Saudi Products and Services Access to International Markets: The Kingdom’s Accession to the World Trade Organization Is a Historic Step for the Saudi Economy Under the Reign of King Abdullah’ (*Al Riyadh Newspaper*, 22 July 2006) <[www.alriyadh.com/173639](http://www.alriyadh.com/173639)> (in Arabic) accessed 23 July 2021.

<sup>3</sup> For other examples of the obligations that coincided with the Kingdom’s accession to the WTO, see WTO, ‘Accessions: Saudi Arabia’ <[www.wto.org/english/thewto\\_e/acc\\_e/a1\\_arabie\\_saoudite\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_arabie_saoudite_e.htm)> accessed 26 March 2021.

<sup>4</sup> For further details, see WTO, ‘TRIPS: A More Detailed Overview of the TRIPS Agreement’ <[www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)> accessed 2 April 2023.

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uses the KSA's compliance of its obligations under TRIPS as a case study to examine current theoretical frameworks designed to measure and explain the factors that influence states' compliance with international law. In addition to highlighting the implications of the numerous international standards set out in this agreement, including the positive and negative aspects of compliance and the progress and retardation of agreements, this review will serve to identify areas of weakness or failure in these frameworks and current compliance theory that can then be resolved.

### **1.2 Rationale for Studying the Case of the KSA and TRIPS**

Much of this thesis revolves around the compliance of the KSA with its obligations under TRIPS in relation to copyright in order to better understand and test theories of compliance that have emerged from the international law and international relations academics. Before embarking on these endeavours, however, two fundamental questions must be addressed: First, why does the KSA matter? Second, why does TRIPS and specifically copyright matter?

#### **1.2.1 Why the KSA matters**

This thesis is premised on the idea that, to better test conventional theories explaining states' implementation and compliance with international legal agreements, states should be studied for this purpose separately, as many states operate under unique conditions. A review of the relevant bodies of literature, however, reveals that the lion's share of academic research in this field concentrates on certain Western states, which in many cases share analogous cultural and legal backgrounds. To truly test the generalizability of theories regarding the implementation of and compliance with international legal agreements, a more diverse sample of countries must be studied, one which includes at least some of those that have been overlooked or under-researched. Therefore, this thesis has chosen to focus on an exceptional case, namely the KSA.

The KSA is undoubtedly a unique case for several reasons, as will be discussed throughout this thesis. For now, it may be helpful to demonstrate its difference by comparing the KSA with other members of the Gulf Cooperation Council (hereinafter "the GCC"), which was established on 25



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May 1981.<sup>5</sup> The GCC countries share similar historical, social, educational, cultural, political, religious and legal settings.<sup>6</sup> In addition, the GCC countries have a similar source of economic power, as they collectively control some of the world's largest oil reserves.<sup>7</sup> Despite these broad similarities, the Kingdom has certain characteristics that distinguish it from other GCC member countries and that can influence, either positively or negatively, its compliance with international legal agreements, including TRIPS.

Unlike the other five GCC countries, which were colonised by the British, the Kingdom has never been colonised.<sup>8</sup> In terms of both size and population, it is the largest country within the GCC region.<sup>9</sup> In addition to oil and gas, the KSA has other rich natural resources, including phosphate, uranium, gold and raw materials.<sup>10</sup> Geopolitically and economically, the Kingdom is located at the crossroads of three continents – Africa, Europe and Asia.<sup>11</sup> Hence, it has become one of 'the world's most important commercial trading hubs'.<sup>12</sup> Importantly, 'Saudi Arabia stands at the heart of a fast-growing region of over 424 million consumers [...].bordered by the Red Sea to the west and by the Arabian Gulf to the north-east, two of the world's busiest shipping routes'.<sup>13</sup> The two holiest sites in Islam, Mecca (Makkah Al Mukarramah) and Medina (Al Madina Al Monawara),

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<sup>5</sup> Secretariat General of the Cooperation Council for the Arab States of the Gulf, 'The Charter' (*The Cooperation Council for the Arab States of the Gulf, Secretariat General*, 2023) <[www.gcc-sg.org/en-us/AboutGCC/Pages/Primarylaw.aspx](http://www.gcc-sg.org/en-us/AboutGCC/Pages/Primarylaw.aspx)> accessed 12 March 2023.

<sup>6</sup> Paul J Rich, *Creating the Arabian Gulf: The British Raj and the Invasions of the Gulf* (Lexington Books 2009) 106.

<sup>7</sup> Majed A Al Suwailem and Abdullah Aldayel, 'Crude Oil Reserves Metrics of GCC Members' (*King Abdullah Petroleum Studies and Research Center (KAPSARC)*, 2020) <[www.kapsarc.org/research/publications/crude-oil-reserves-metrics-of-gcc-members/#:~:text=As of December 2018%2C the,world's estimated proven crude reserves.](http://www.kapsarc.org/research/publications/crude-oil-reserves-metrics-of-gcc-members/#:~:text=As%20of%20December%202018,the%20world's%20estimated%20proven%20crude%20reserves.)> accessed 12 March 2023; Organization of the Petroleum Exporting Countries (OPEC), 'OPEC Share of World Crude Oil Reserves' (*Organization of the Petroleum Exporting Countries*, 2022) <[www.opec.org/opec\\_web/en/data\\_graphs/330.htm](http://www.opec.org/opec_web/en/data_graphs/330.htm)> accessed 12 March 2023; Worldometer, 'Oil Reserves by Country' (*Worldometer*) <[www.worldometers.info/oil/oil-reserves-by-country/](http://www.worldometers.info/oil/oil-reserves-by-country/)> accessed 12 March 2023.

<sup>8</sup> Rich (n 6); Worldatlas, '10 Countries Which Have Never Been Colonized By Europeans' (*Worldatlas*) <[www.worldatlas.com/history/10-countries-which-have-never-been-colonised-by-europeans.html](http://www.worldatlas.com/history/10-countries-which-have-never-been-colonised-by-europeans.html)> accessed 12 March 2023.

<sup>9</sup> Worlddata.info, 'Member States of the GCC: Gulf Cooperation Council' (*Worlddata.info*) <[www.worlddata.info/alliances/gcc-gulf-cooperation-council.php#:~:text=The GCC is an alliance,percent of the world population](http://www.worlddata.info/alliances/gcc-gulf-cooperation-council.php#:~:text=The%20GCC%20is%20an%20alliance,percent%20of%20the%20world%20population)> accessed 12 March 2023.

<sup>10</sup> The National Industrial Development Center (NIDC), 'Natural Resources' (*The National Industrial Development Center (NIDC)*) <[www.ic.gov.sa/en/invest-in-saudi-arabia/natural-resources/](http://www.ic.gov.sa/en/invest-in-saudi-arabia/natural-resources/)> accessed 12 March 2023.

<sup>11</sup> NIDC, 'Locations' (*The National Industrial Development Center (NIDC)*) <[www.ic.gov.sa/en/invest-in-saudi-arabia/locations/](http://www.ic.gov.sa/en/invest-in-saudi-arabia/locations/)> accessed 12 March 2023.

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

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are located in the KSA, rendering the country the largest religious hub in the Muslim world.<sup>14</sup> So important is this unique characteristic of the Kingdom that it has been described by some scholars as the ‘unnamed international capital of the Muslim World’.<sup>15</sup>

Although Sharia (Islamic law) is one of the main legal sources in the region, the KSA is the only GCC member states in which Sharia is the supreme constitutional and legal source.<sup>16</sup> Many scholars, including Hamzah, Zegers, Vassiliev and Alsubaie, believe that Hanbali jurisprudence, the school of Islamic law that predominates in the KSA, favours strict interpretations of Islamic law and practices.<sup>17</sup> Indeed, Hamzah and Piscatori contend that this characteristic places the Kingdom at ‘the conservative endpoint of a Muslim state spectrum’,<sup>18</sup> in that it is not open to liberal interpretations of law or legal reforms.<sup>19</sup>

As Piscatori has observed, these unique characteristics can seem paradoxical:

[R]eligious asceticism but modernisation, supposed guardian of the Holy Places of Islam but closely allied with the United States, historically ambivalent towards outsiders but a member of the G20. Even as it undergoes social and economic, though not political, transformations as outlined in its Vision 2030, [the KSA] remains enigmatic to many observers, even notorious to some.<sup>20</sup>

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<sup>14</sup> Purva Desphande, ‘The Role of Women in Two Islamic Fundamentalist Countries: Afghanistan and Saudi Arabia’ (2001) 22 *Women’s Rights Law Reporter* 193, 198; James Stevens Curl, ‘Qibla’ in *A Dictionary of Architecture and Landscape Architecture* (OUP 2006) <[www.oxfordreference.com/view/10.1093/acref/9780198606789.001.0001/acref-9780198606789-e-5902?rsk=ncjcEY&result=1](http://www.oxfordreference.com/view/10.1093/acref/9780198606789.001.0001/acref-9780198606789-e-5902?rsk=ncjcEY&result=1)> accessed 12 March 2023; John L Esposito (ed), ‘Mihrab’ in *The Oxford Dictionary of Islam*, (2003) <[www.oxfordreference.com/view/10.1093/acref/9780195125580.001.0001/acref-9780195125580-e-1511#](http://www.oxfordreference.com/view/10.1093/acref/9780195125580.001.0001/acref-9780195125580-e-1511#)> accessed 12 March 2023.

<sup>15</sup> Dawood Hamzah, *International Law and Muslim States: Saudi Arabia in Context* (Routledge 2021) 9, 117; Tim Niblock, *Saudi Arabia: Power, Legitimacy and Survival* (Routledge 2006).

<sup>16</sup> Bureau of Experts at the Council of Ministers (BoE), ‘Basic Law of Governance’ (*Bureau of Experts at the Council of Ministers*, 1992) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/16b97fcb-4833-4f66-8531-a9a700f161b6/1>> accessed 28 March 2021.

<sup>17</sup> Hamzah (n 15) viii; Jean-Benoit Zegers, ‘Foreign Investment Protection in Saudi Arabia’ (2003) 9 *Yearbook of Islamic and Middle Eastern Law* 65, 79; Alexei Vassiliev, *The History of Saudi Arabia* (Saqi Books 2000) 67; Mohammed F Aljeday Alsubaie, ‘Review of the Saudi Anti-Sexual Harassment Law: Evolution and Challenges’ (2020) 14 *Law and World* 21, 36.

<sup>18</sup> Hamzah (n 15); James Piscatori, ‘Foreword’ in Dawood Hamzah, *International Law and Muslim States: Saudi Arabia in Context* (Routledge 2021) xii.

<sup>19</sup> Hamzah (n 15); Niblock (n 15); Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd edn, The Islamic Texts Society 2003) 259; Abbas Amanat and Frank Griffel (eds), *Islamic Law in the Contemporary Context* (Stanford UP 2007) 184.

<sup>20</sup> Piscatori (n 18) xi.

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Such tensions can create legislative contradictions (which are explored in detail in Chapter 4 of this thesis) between Hanbali jurisprudence and international law, which ‘appears to have gone beyond the dimension that was initially envisioned’ and now ‘intrude[s] significantly into legislative matters that are purely domestic’.<sup>21</sup> Crucially, this renders the investigation of interactions between international law and the Saudi legal system both complex and challenging. With empirical substantiation, this thesis aims to engage with and illuminate these challenges, with particular focus on the KSA’s compliance with the obligations set out under the TRIPS Agreement. It also aims to show how the Kingdom's legal framework, which stems from Islamic law, could be receptive to international norms and conventions – in other words, to demonstrate that its legal framework is not only adaptable but also able to cope pragmatically with the demands of what scholars such as Piscatori call ‘international coexistence’,<sup>22</sup> which refers to the mutual interests of Muslim states and the West.<sup>23</sup>

Within the rich and growing body of literature on this topic, very few studies have comprehensively examined the issue of nation-state compliance with the obligations set out under TRIPS in relation to the Kingdom, despite its geopolitical, economic and historical importance as outlined above. This study seeks to fill that gap, and in so doing contribute significantly to the wider debate over compliance theory in the context of Islamic law and modern international law.

### **1.2.2 Why TRIPS and the issue of copyright matter**

This thesis is also premised on the idea that, to test the fitness of conventional theories designed to explain states’ implementation of and compliance with international legal agreements, each agreement should be studied separately, as each contains distinctive elements and focuses on specific areas of law. TRIPS is particularly problematic for several reasons, especially in the context of the KSA. For example, while all six GCC countries are members of the WTO,<sup>24</sup> the Kingdom was the last county in the region to accede.<sup>25</sup> Bahrain and Kuwait, which became WTO members in 1995, were the first countries in the region do so.<sup>26</sup> Qatar and the United Arab of

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<sup>21</sup> Hamzah (n 15) 4.

<sup>22</sup> Piscatori (n 18) xi.

<sup>23</sup> *ibid.*

<sup>24</sup> World Trade Organization (WTO), ‘Gulf Cooperation Council (GCC)’ (*World Trade Organization*) <[https://gtad.wto.org/region\\_project.aspx?grpId=49](https://gtad.wto.org/region_project.aspx?grpId=49)> accessed 26 March 2023.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

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Emirates (UAE) have been members since 1996, and Oman joined in 2000.<sup>27</sup> Not only is the KSA the most recent country in the GCC region to acquire membership (in 2005), but it took twelve years of complex negotiations before its application was approved.<sup>28</sup>

Furthermore, the subject of IP, and especially copyright, is one which requires particular study within the context of Sharia. The KSA is considered one of the most Sharia-compliant countries.<sup>29</sup> Because IP is a modern concept, the views of Muslim jurists tend to be mixed, and most are attributed to modern Muslim jurists.<sup>30</sup> Moreover, while there have been many debates among the main schools of Islamic thought about *heiaza* (tangible/physical possession) as a species of property, IP has been given less attention.<sup>31</sup> It is therefore especially important to investigate IP as a form of property as defined in Sharia, especially within the context of the Kingdom's compliance with TRIPS, both because the Saudi legal system is based on Sharia and because there is evidence that the Saudi government has recently been inclined to comply with TRIPS.<sup>32</sup> For example, the Saudi government recently established the Saudi Authority for Intellectual Property (hereinafter "SAIP") as the only competent authority for IP in the Kingdom, and launched the National Intellectual Property Strategy (hereinafter "NIPST") as an IP ecosystem.<sup>33</sup>

Copyright and related rights should be given particular attention for several reasons. For example, some schools of Islamic jurisprudential differentiate knowledge and science from other activities,

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<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*; Dabbeeru Neelakanteswar Rao, 'Saudi Arabia's Accession to WTO: Future Challenges' (*Social Science Research Network*, 2007) 1 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=957589](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=957589)> accessed 27 March 2021.

<sup>29</sup> See, for example, Ziad A Al-Sudairy, 'The Constitutional Appeal of Shari'a in a Modernizing Saudi State' (2010) 2 *Middle East Law and Governance* 1, 2; Silke Elrifai, 'Machteld Zee, *Choosing Sharia: Multiculturalism, Islamic Fundamentalism & Sharia Councils*'; John R. Bowen, *On British Islam: Religion, Law and Everyday Practice in Shari'a Councils*' (2016) 14 *International Journal of Constitutional Law* 1034, 1035–1036.

<sup>30</sup> Hamzah (n 15) 210–215; Silvia Beltrametti, 'The Legality of Intellectual Property Rights Under Islamic Law' [2009] *The Prague Yearbook of Comparative Law* 55.

<sup>31</sup> See, for example, Hamzah (n 15); Dawood Adesola Hamzah, 'Impact of International Law on the Application of Islamic Law in Saudi Arabia' (PhD thesis, SOAS University of London 2015); Bashar H Malkawi, 'The Alliance between Islamic Law and Intellectual Property: Structure and Practice' (2013) 10 *University of St Thomas Law Journal* 618.

<sup>32</sup> BoE (n 16). See also sub-s 1.4.2 and 1.4.3.

<sup>33</sup> WIPO, 'Saudi Arabia Gears up on IP' (*World Intellectual Property Organisation*, 2020) <[www.wipo.int/wipo\\_magazine/en/2020/03/article\\_0008.html](http://www.wipo.int/wipo_magazine/en/2020/03/article_0008.html)> accessed 25 March 2023; BoE, 'Regulating the Saudi Authority for Intellectual Property' (*Bureau of Experts at the Council of Ministers*, 2018) <<https://laws.boe.gov.sa/BoeLaws/Laws/Viewer/3afb71af-27a0-4562-a6df-a9f600fd973b?lawId=6cf17f84-7a45-4ff1-a61a-a9f600fd90bd>> (in Arabic) accessed 25 March 2023; Saudi Press Agency (SPA), 'HRH Crown Prince Launches National Intellectual Property Strategy' (*Saudi Press Agency*, 22 December 2022) <[www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2411825](http://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2411825)> accessed 25 March 2023.

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such as trade and industry, ,<sup>34</sup> which they argue cannot be equated because ‘a person should dedicate himself to spreading his knowledge without the expectation of financial reward’.<sup>35</sup> Additionally, unlike other areas of IP covered by TRIPS such as trademarks, which are primarily of interest to merchants, and patents, which are often associated with industry and producers, copyright and related rights concern most people and are linked to numerous aspects of ordinary life.<sup>36</sup> Furthermore, because the KSA is more dependent economically on oil than creativity and innovation, Saudi society is unlikely to view compliance with copyright and related rights as essential.<sup>37</sup> More importantly, unlike other trade and economic agreements, such as those relating to customs and commodities, whose scope tends to be narrow, copyright and related rights are difficult to police and easy to infringe, especially in the current era of rapid technological development.<sup>38</sup> In view of these factors, and given that, in some cases, at least, compliance depends primarily on the orientation of the state's and its people towards an agreement, the KSA's compliance with TRIPS, and particularly with its obligations in relation to copyright and related rights, is an important focus for research.

### **1.3 Thesis Investigation**

The KSA has been widely praised for the significant steps it has taken to make TRIPS applicable to its current domestic legislation.<sup>39</sup> Ironically, despite its efforts, the Kingdom is not yet fully compliant with TRIPS, as this thesis will demonstrate. This discrepancy between effort and outcome necessitates a thorough investigation of the KSA and its obligations under TRIPS, in a way that challenges current theories designed to assess states' compliance with international law.

Among the previous studies of this topic, only a few examine the effects of international law on the KSA. Moreover, a not insignificant number of these studies were published in the 1970s and early 1990s. These include Mohammed Madani's 1970 PhD thesis investigating the relationship between the Kingdom's domestic law and international law by examining its oil agreements with

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<sup>34</sup> Malkawi (n 31) 627; Hamzah (n 15) 212–213; Jamaal al-Deen Zarabozo, ‘The Copyright Issue – Shaykh Jamal Zarabozo’ (*Muslimmatters.org*, 2010) <<https://muslimmatters.org/2010/01/08/the-copyright-issue/>> accessed 14 March 2023.

<sup>35</sup> Malkawi (n 31) 624.

<sup>36</sup> For further details, see WTO, ‘TRIPS: A More Detailed Overview of the TRIPS Agreement’ (n 4).

<sup>37</sup> See sub-s 1.2.1 and 1.3.6.

<sup>38</sup> See sub-s 7.2.1.5.

<sup>39</sup> See, for example, Section 1.5.

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foreign companies;<sup>40</sup> Hamad Sadun Al-Hamad's 1973 PhD thesis exploring the legislative process and the development of the KSA;<sup>41</sup> and Al-Farsy's 1990 book titled *Modern and Tradition: The Saudi Equation*.<sup>42</sup> Although they all engage with the intersectionality of the Kingdom's domestic law and international law, these studies are detached from modern legislation, such as TRIPS. Indeed, even those studies that were undertaken more recently seem incomplete in that they do not provide appropriate analytical tools through which the questions of this thesis can be answered satisfactorily. These include Hamzah's doctoral thesis entitled 'Impact of International Law on the Application of Islamic Law in Saudi Arabia';<sup>43</sup> his subsequent book, entitled *International Law and Muslim States: Saudi Arabia in Context*;<sup>44</sup> and Abdulrahman's thesis entitled 'Intellectual Property Rights in the Kingdom of Saudi Arabia in Light of Sharia and the TRIPS Agreement'.<sup>45</sup>

Despite the KSA's historical, religious and geopolitical importance, as stated earlier, the researcher has been unable to locate any studies that comprehensively examine its compliance with and implementation of international legal agreements, including TRIPS. The researcher also has been unable to find any study that investigates the Kingdom's compliance with the international legal obligations to which it has agreed from a theoretical perspective. This study aims to engage critically with this line of inquiry and to contribute to the body of scholarship on the intersectionality of Islamic law, domestic law and international law as well as theories of compliance.

### **1.3.1 Research problem: Conceptual and theoretical issues related to implementation and compliance**

Before proceeding, however, two fundamental problems must be addressed. The first and perhaps lesser of the two is a conceptual problem; the second is theoretical and forms the core of this thesis. The conceptual problem has arisen from the lack of consensus over the distinction between

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<sup>40</sup> Mohammed O Madani, 'The Relationship between Saudi Arabia Domestic Law and International Law: A Study of the Oil Agreement with Foreign Companies' (PhD thesis, George Washington University 1970).

<sup>41</sup> Hamad Sadun Al-Hamad, 'The Legislative Process and the Development of Saudi Arabia' (PhD thesis, University of Southern California 1973).

<sup>42</sup> Fouad Al-Farsy, *Modernity and Tradition: The Saudi Equation* (Kegan Paul International 1990).

<sup>43</sup> Hamzah (n 31).

<sup>44</sup> Hamzah (n 15).

<sup>45</sup> Abdulrahman Alabdulkarim, 'Intellectual Property Rights in the Kingdom of Saudi Arabia in Light of Sharia and the TRIPS Agreement' (SJD dissertation, Pennsylvania State University 2017) <<https://elibrary.law.psu.edu/sjd/3/>> accessed 3 April 2023.

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compliance and implementation,<sup>46</sup> which remains unresolved despite ongoing discussion among international legal scholars concerning states' implementation of and compliance with international legal agreements. The theoretical problem has arisen from the lack of a coherent and comprehensive theory regarding what motivates nations to obey or contravene the international legal obligations to which they have consented. This problem persists despite the development of multiple theories explaining various aspects of states' compliance with international law.

Current compliance theories may have contributed to the idea that compliance is binary, in the sense that countries are either compliant or non-compliant. This thesis takes a different view. It suggests that a state's compliance depends on various factors, each of which exerts a certain degree of influence on that state's behaviour. None of the existing theories has been able to explain the interplay between these factors. Instead, they have primarily sought to explain the phenomenon of compliance as the result of one or a very limited number of factors.

Although compliance cannot be calculated mathematically, it is possible to identify patterns of compliant behaviour, and to deduce from them the factors that contribute to that behaviour, under what circumstances and to what effect. As Oliver Wendell Holmes, one of the most well-known American judges of the 20th century, famously observed, 'the law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics'.<sup>47</sup> Therefore, 'in order to know what it is, we must know what it has been, and what it tends to become'.<sup>48</sup> Accordingly, Holmes promotes Griffiths' view that legal systems and cultural and societal aspects are necessarily related, by emphasising the significance of complex phenomena such as historical, social and political circumstances that play a vital role in making the law powerful and compelling.<sup>49</sup> By considering these factors, it may be possible to develop a new and deeper understanding of the reasons for compliance and non-compliance, explaining the fissure between implementation and compliance as well as helping to make compliance more achievable.

It is clear from the range and complexity of factors that ultimately influence whether a country

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<sup>46</sup> For the key terms and definitions used in this thesis, see Section 1.5.

<sup>47</sup> Oliver Wendell Holmes Jr and Oliver Wendell Holmes Sr (eds), *The Common Law* (Harvard UP 2009) xxiv.

<sup>48</sup> *ibid* xxiv, 5.

<sup>49</sup> See *ibid* xxiv, 5; Alfred Knight, *The Wizards of Washington: Triumphs and Travesties of the United States Supreme Court* (iUniverse 2006) 47; John Griffiths, 'Is Law Important?' (1979) 54 *New York University Law Review* 339.

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achieves a state of compliance that compliance is not binary but instead exists on a sliding scale. Hence, to obtain a fuller explanation of the phenomenon, it would be beneficial to widen the theoretical discussion and integrate the ideas of earlier scholars into a more elaborate framework of specific factors that can influence compliance. It is this framework, described in this thesis as a sliding scale approach, that the author develops.

The preoccupation of some theorists with the subject of compliance may stem from their firm belief in the importance of comprehending the relationship between international law and states' behaviour.<sup>50</sup> For example, without a clear perception of this connection and an understanding of the factors that can have an influence thereupon, legal scholars would be unable to provide appropriate advice concerning policy or strategy relating to international law,<sup>51</sup> or examine the role of international agreements comprehensively,<sup>52</sup> or devise a workable solution or functional theory of global statutory and organisational cooperation.<sup>53</sup> Guzman goes further, declaring that the inability to comprehend when and why nations follow international law and comply with the legal obligations to which they have consented threatens 'to undermine the very foundations of international law'.<sup>54</sup> Therefore, gaining a more comprehensive understanding of the factors that influence compliance is arguably an essential first step towards strengthening the compliance of individual states and reinforcing and developing international law.

Accordingly, the concerns raised in this thesis reach beyond the Kingdom's compliance with its obligations to encompass the compliance of WTO members at large, and the group of international

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<sup>50</sup> Andrew T Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 California Law Review 1823, 1826–1827. Scholars from disciplines other than international law have frequently expressed a degree of scepticism about its role in governing the global system and often disregard international law entirely. In addition to Guzman, see, for example, George W Downs, David M Rocke and Peter N Barsoom, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50 International Organization 379; Joshua Kleinfeld, 'Skeptical Internationalism: A Study of Whether International Law Is Law' (2010) 78 Fordham Law Review 2451; Shirley Scott, 'Beyond Compliance: Reconceiving the International Law-Foreign Policy Dynamic' (1998) 19 Australian Year Book of International Law 35; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999); Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Thomas Risse and Beth Simmons (eds), *The Handbook of International Relations* (SAGE Publications 2002); Thomas H Lee, 'International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today Case Studies in Conservative and Progressive Legal Orders' (2004) 67 Law and Contemporary Problems 147.

<sup>51</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 50) 1826.

<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*



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institutions that assume responsibility for overseeing such obligations. In addition, some aspects of the debate emerging from conventional theories of compliance have tended to be based principally on a model of statehood that is liberal, democratic, and largely European.<sup>55</sup> These particular types of states have often enjoyed a long history of engagement with international law, which may have led to an instrumental or even formalistic approach to its implementation.<sup>56</sup> The KSA does not conform to that model, however, as it is not liberal, democratic or European.<sup>57</sup>

Based on the above premises, the current study seeks to contribute to the field of compliance theory through the analysis of potentially relevant factors that influence the KSA's implementation of and compliance with TRIPS. While not detracting from the importance of understanding the factors and circumstances influencing the KSA's compliance with TRIPS, this thesis aspires to go beyond merely analysing these characteristics. For example, current and future studies of compliance might reach more wide-ranging conclusions, and make more appropriate recommendations, by first recognising the value of those models that offer a more comprehensive understanding of the factors that contribute to compliance and relying on one of these. Put differently, some researchers might find the discussion in this thesis useful in prompting a reconsideration of several questions related to implementation and compliance, including (i) what constitutes a reasonable delay in compliance; (ii) under what circumstances, if any, non-compliance can be justified or at least considered acceptable; (iii) what are some of the nuances that distinguish implementation from compliance; (iv) by what strategies can states' compliance be enhanced; (v) what legal and regulatory mechanisms are needed to provide more concrete advice for developing international law or international agreements; and (vi) whether it is possible to devise a model through which the degree of a state's compliance can be more precisely determined. These issues are addressed throughout this thesis.

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<sup>55</sup> See, for example, Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 50) 546–548; Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Macmillan 2017) 29–30.

<sup>56</sup> See, for example, Eric A Posner, 'Liberal Internationalism and the Populist Backlash' (2017) 49 *Arizona State Law Journal* 795; Mario Prost, 'Hierarchy and the Sources of International Law: A Critique' (2017) 39 *Houston Journal of International Law* 285; David S Law, 'Alternatives to Liberal Constitutional Democracy' 77 *Maryland Law Review* 223; Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503.

<sup>57</sup> The contextual uniqueness of the KSA is also highlighted in Chapter 5 and Chapter 6 (Section 7.3) of this thesis.

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### **1.3.2 Research question**

The main research question pursued in this thesis is as follows:

What is the appropriate theoretical approach to facilitate better understanding of the factors that influence the KSA's compliance with TRIPS?

To answer this question, it is crucial to establish the key elements that inform the general framework of the thesis. Among the sub-issues to be considered are the following: (1) how to distinguish between the KSA's implementation of the provisions under the TRIPS Agreement into its domestic laws and its compliance therewith; (2) the contextual uniqueness of the KSA and what distinguishes it from other countries; (3) why and how to go beyond the doctrinal lens of Sharia to explore what makes the KSA alter its behaviour in relation to the commitments to which it has consented; (4) the potential underlying reasons why a gap appears between the Kingdom's implementation of and its compliance with TRIPS; (5) what the KSA/TRIPS case study can teach us about existing theories of compliance, and the limitations of those theories when applied to the current investigation; and (6) the reasons for selecting Jacobson and Weiss' approach for the purposes of this study.

### **1.3.3 Hypothesis**

This thesis is premised on the hypothesis that compliance is not a binary phenomenon. States are not either compliant or non-compliant; rather, compliance is better conceived as a sliding scale, allowing researchers to account for a variety of complex factors that influence a state's degree of compliance. In this sense, the KSA may be said to demonstrate a state of compliance despite some instances of infringement – or, *mutatis mutandis*, a state of non-compliance despite some episodes of compliance. In the context of TRIPS, two factors may account for the state of the KSA's compliance despite some instances of infringement. These are (a) the international pressures generated by the terms of the Agreement and (b) the inherent benefits of being party to it. This tension begs a salient question: In the context of TRIPS, how has the KSA preserved a balance between its domestic law, which is associated with and intrinsic to Islamic law, and secular international law?

Moreover, although a definition of compliance will be provided for the purposes of this thesis, objective analysis of the precise meaning of the term remains challenging. For example, it may be

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impossible for individual states to reach perfect or absolute compliance with a particular international legal agreement.<sup>58</sup> As Ann Kent observed:

[I]n reality, there is a level of acceptable practical compliance in the light of regime norms and procedures. Moreover, this acceptable level is subject to change across case studies, time, and occasions. The level actually achieved by states is also subject to variation.<sup>59</sup>

Accordingly, even if consensus on what constitutes full compliance was possible, something less than this is often acceptable.<sup>60</sup> Variation and controversy may arise among individual states as there is no explicit agreement regarding what degree of compliance is adequate: what some member states consider practical compliance might not be perceived as such by other parties to the same agreement.<sup>61</sup> It is from this perspective that ‘the nature of compliance and the standards for measuring compliance are by and large relative rather than absolute’.<sup>62</sup>

Consequently, evaluating the degree to which a state is compliant is ultimately a matter of judgment or persuasion, which has clear implications for the current investigation of the KSA’s compliance with TRIPS.<sup>63</sup> Despite the obvious challenge, this presents for an objective evaluation of compliance, the pursuit of clarity remains a significant aim of researchers in this field. In turn, this creates a unique opportunity for original scholarship, motivating researchers to seek a better understanding of the subjectivity that can inform a state’s understanding of compliance. Towards this end, a more comprehensive understanding of the factors that influence states’ compliance must first be developed. These processes are examined in more detail in Part II of this thesis (Chapters 5-7).

In light of the variations in its conception and practice, this thesis argues that compliance is better investigated, not with the theories that dominate the literature, but with Jacobson and Weiss’s

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<sup>58</sup> Thomas, *Assessing Intellectual Property Compliance in Contemporary China* (n 55) 26.

<sup>59</sup> Ann Kent, *China, the United Nations, and Human Rights: The Limits of Compliance* (U of Pennsylvania Press 1999) 232-233.

<sup>60</sup> Thomas, *Assessing Intellectual Property Compliance in Contemporary China* (n 55) 26.

<sup>61</sup> This view is supported by Gerald Chan, *China’s Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights* (World Scientific Publishing 2006) 66.

<sup>62</sup> *ibid.*

<sup>63</sup> Edith Brown Weiss and Harold K Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 2000) 4.

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model, which lends itself to a more layered examination. Jacobson and Weiss's approach is particularly relevant to this study, as it pertains to copyright and neighbouring rights protection under TRIPS. It also offers a valuable complement to other compliance theories, helping to improve their application.

This thesis offers a unique, original perspective to the body of legal literature in that it:

1. Challenges the utility of existing theories of compliance and highlights their inability to account for the array of factors relevant when evaluating the behaviour of states toward international legal agreements.
2. Uses the KSA, a uniquely under-discussed actor in international law, as its main source of inquiry and provides a salient example of how models of compliance, built-in Western thought and absolutist politics, are ineffective when applied to states that do not resemble a Eurocentric ideal.
3. Proposes the sliding scale model as an alternative model of investigating compliance, heretofore understudied in contemporary legal debate.

### **1.3.4 Methodology**

A library-based qualitative research methodology was employed in this study. The data collected may be divided into four broad categories based on four specific research topics: (1) the gap between the KSA's implementation of TRIPS and its compliance therewith, (2) the complexities involved in the pursuit of compliance, (3) theories of compliance, and (4) the compliance factors included in the model employed in this study.

With regard to the first topic, this thesis has relied mainly on the following sources: (a) official reports issued under the supervision of intergovernmental organisations concerned with IPR protection, such as the WTO and the World Intellectual Property Organisation (hereinafter "WIPO"), the Office of the United States Trade Representative (hereinafter "USTR") and the International Intellectual Property Alliance; (b) other WTO member states; (c) statements by the Saudi government; and (d) numerous journal articles reviewing international legal agreements and domestic legal systems. With respect to the second topic, the complexity of compliance, the thesis

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has closely interrogated the body of available literature (chiefly in the form of journal articles reflecting various points of view) on the factors affecting the compliance of individual states with the international legal obligations to which they have agreed, including that of the KSA with TRIPS.

In relation to the third topic, the range of relevant theories, this thesis has adopted a multidisciplinary approach by seeking primarily to pursue the original sources in the legal and international relations academies from which each theory emerged. Finally, to analyse the compliance factors included in the model used in this study, a wide variety of primary source material was collected mainly from the following: (a) reports concerned with IPR protection such as the annual report of global software piracy carried out by the Business Software Alliance in partnership with International Data Corporation; (b) various official documents and legal texts issued by the WTO; (c) the provisions of the TRIPS Agreement itself; (d) statistical data from surveys such as that of the piracy-monitoring company MUSO; (e) official statements by the Saudi government; and (f) numerous journal articles.

### **1.3.5 Limitations**

This study is subject to at least two major limitations. The first concerns the nature of the subject itself – i.e. states' compliance with international law. As previously noted, even with a more precise definition of the term, particular difficulties arise when assessing compliance in practice.<sup>64</sup> Indeed, while compliance is a key term in global legal discourse, used to express the role of states in supporting the intended outcomes of international law, operationalising it as a variable remains problematic.<sup>65</sup> For example, a researcher cannot fully determine a state's compliance with its international legal agreements merely by reviewing its domestic laws.<sup>66</sup> Therefore, investigations into compliance must extend beyond merely evaluating the extent to which an agreement has been implemented in the domestic law of a state.<sup>67</sup>

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<sup>64</sup> Thomas, *Assessing Intellectual Property Compliance in Contemporary China* (n 55) 26.

<sup>65</sup> Jacobson and Weiss (n 63) 1–2; Thomas, *Assessing Intellectual Property Compliance in Contemporary China* (n 55) 26; Guzman, 'A Compliance-Based Theory of International Law' (n 50) 1826–1830.

<sup>66</sup> Jacobson and Weiss (n 63) 2.

<sup>67</sup> *ibid* 4.

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Additionally, review of the available literature has highlighted various critical factors and circumstances known to influence states' compliance.<sup>68</sup> However, as previously noted, most of this research has focused on a model of statehood that is liberal, democratic, and primarily European.<sup>69</sup> This model of statehood may have led to an instrumental or even formalistic approach to its implementation; thus, it may have facilitated the study of its compliance with international legal obligations.<sup>70</sup> By contrast, the KSA's legal and political systems are based on a statehood model comprising elements that are not present in most other modern states. First, the KSA has an Islamic identity built upon a legal system grounded in Sharia and second, it is governed by an absolute monarchy.<sup>71</sup> To date, the author has been unable to locate any studies that comprehensively examine the motives of states structured as unitarian Islamic absolute monarchies in complying with their international legal obligations.<sup>72</sup> Indeed, even those studies with a theoretical focus that have attempted to comprehensively examine the compliance factors at play among other types of states seem to be generally limited.<sup>73</sup>

These limitations do not undermine the fundamental basis of this thesis, however. Indeed, as previously noted, they highlight a unique opportunity for original scholarship. Hence, this study will motivate researchers to better understand the issues and considerations that inform compliance.

### **1.3.6 Scope of the study**

This study aims not only to comprehend the factors and circumstances contributing to the Kingdom's compliance, or otherwise, with TRIPS, important though that is, but to inspire future scholars to revisit those issues related to compliance which are still open to debate in the legal academy. Among the questions yet to be answered are the following: (i) By what nuances can the implementation of an international agreement by a state be distinguished from that's state's compliance therewith? (ii) How and to what extent can existing theoretical approaches to states' compliance with the legal obligations to which they have consented be developed? (iii) Is it

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<sup>68</sup> For details, see Chapters 2 to 7 of this thesis.

<sup>69</sup> See, for example, Posner (n 56) Prost (n 56); Law (n 56); Slaughter (n 56).

<sup>70</sup> *ibid.*

<sup>71</sup> BoE (n 16).

<sup>72</sup> See Chapters 4 to 7 of this thesis.

<sup>73</sup> For details, see Chapters 2 and 3 of this thesis.

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possible to devise a more suitable sliding scale model through which the degree of a state's compliance can be more precisely determined? and (iv) Under what circumstances is it reasonable for a state to delay compliance with international legal agreements, and for how long?

In light of the above-stated ambition, and to prevent the scope of the current investigation from becoming too broad, the researcher has limited the analysis of potential compliance factors presented later in this thesis in the following ways. First, rather than aim to identify the most critical factors or determine the degree of influence each factor exerts, the analysis will seek primarily to understand how each factor has influenced or can influence the KSA's compliance with TRIPS. Despite their importance, determining the most critical factors or identifying the degree of influence each exerts would be premature at the current stage of research. The primary purpose of this thesis is to demonstrate the value of the sliding scale model proposed herein in providing a more comprehensive explanation of the factors that contribute to the compliance behaviour of individual states. Legal scholars will then be better equipped to determine the most critical factors and the degree of influence each exerts.

Second, rather than analysing all the IP areas covered by TRIPS, most of the discussion will focus on infringements of copyright and related rights. Of the areas of IP covered by TRIPS, copyright is the most broadly familiar and most relevant to the case study of the KSA.<sup>74</sup> Reports of the USTR's Special 301 Report concerning the global state of IPR and those of the SAIP have indicated that infringements of copyright in the Kingdom remain one of the most serious concerns, if not the most serious, of all the areas of IPR.<sup>75</sup> Furthermore, the latest WTO Trade Policy Reviews of the KSA issued in 2021 states that '[the Kingdom] has never been a complainant under the

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<sup>74</sup> See, for example, (WTO), 'TRIPS: A More Detailed Overview of the TRIPS Agreement' (n 4).

<sup>75</sup> Regarding the USTR's Special 301 Reports, see, for example, USTR, '2021 Special 301 Report' (2021) 57–58 <[https://ustr.gov/sites/default/files/files/reports/2021/2021\\_Special\\_301\\_Report\\_\(final\).pdf](https://ustr.gov/sites/default/files/files/reports/2021/2021_Special_301_Report_(final).pdf)> accessed 11 February 2022; USTR, '2020 Special 301 Report' (2020) 54–55 <[https://ustr.gov/sites/default/files/2020\\_Special\\_301\\_Report.pdf](https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf)> accessed 11 February 2022; USTR, '2019 Special 301 Report' (2019) 57–58 <[https://ustr.gov/sites/default/files/2019\\_Special\\_301\\_Report.pdf](https://ustr.gov/sites/default/files/2019_Special_301_Report.pdf)> accessed 11 February 2022. Regarding the SAIP's reports, see, for example, SAIP, '2020 Annual Report of Intellectual Property Enforcement' (2020) 1–4 <[https://static.saip.gov.sa/a/r/n/o/web/Respect\\_Report\\_2020.V16.pdf](https://static.saip.gov.sa/a/r/n/o/web/Respect_Report_2020.V16.pdf)> (in Arabic) accessed 11 February 2022; SAIP, '2019 Annual Report of Intellectual Property Respect Department' (2019) <[www.saip.gov.sa/wp-content/uploads/publications/2019\\_Intellectual\\_Property\\_Respect\\_Report.pdf](http://www.saip.gov.sa/wp-content/uploads/publications/2019_Intellectual_Property_Respect_Report.pdf)> (in Arabic) accessed 11 February 2022; SAIP, '2019 the First Annual Report for the Year 1440-1441 AH' (2019) 29 <[www.saip.gov.sa/wp-content/uploads/publications/2019\\_Annual\\_Report.pdf](http://www.saip.gov.sa/wp-content/uploads/publications/2019_Annual_Report.pdf)> (in Arabic) accessed 11 February 2022.

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WTO dispute settlement mechanism, but it was a respondent in two cases'; interestingly, of the areas of IP covered by TRIPS, 'alleged infringements of copyrights' were included in both cases.<sup>76</sup>

Finally, the fact that the KSA is not considered an industrialized country raises at least two points that underscore the importance of focusing on infringements of copyright and related rights.<sup>77</sup> For example, while it is unlikely that Saudi companies and factories claim ownership or benefit from a claim of ownership of a patent that they do not own, it is not inconceivable that they will benefit from copying patented inventions.<sup>78</sup> Second, in addition to the fact that the number of foreign trademarks that are registered annually in the KSA is more than six times greater than the number of local trademarks registered in the same period, there is growing awareness of the difference between an original and a replica.<sup>79</sup> Nevertheless, research by the Saudi Consumer Empowerment Index has shown that 47.2% of consumers have bought a copycat product even though they knew that such a product copies or imitates a product sold by a well-known brand.<sup>80</sup>

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<sup>76</sup> Trade Policy Review Body in the World Trade Organization, 'Trade Policy Review, Report by the Secretariat: The Kingdom of Saudi Arabia' (2021) 29 <[www.wto.org/english/tratop\\_e/tpr\\_e/s407\\_e.pdf](http://www.wto.org/english/tratop_e/tpr_e/s407_e.pdf)> accessed 10 February 2022. For details of the two cases at issue (nos DS528 and DS567), see WTO, 'Saudi Arabia — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights: Request for Consultations by Qatar' (2017) 1–2 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/528-1.pdf&Open=True>> accessed 10 February 2022; WTO, 'Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights: Request for the Establishment of a Panel by Qatar' (2018) 2 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/567-3.pdf&Open=True>> accessed 10 February 2022.

<sup>77</sup> Rao (n 28) 1; United Nations Industrial Development Organization (UNIDO), 'Saudi Arabia Country Competitiveness Profile 2019 (Report)' (2020) 21, 83, and 85 <<https://stat.unido.org/content/publications/saudi-arabia-country-competitiveness-profile-2019;jsessionid=D30E1CAE4F9EE1BC4AE926861303960F>> accessed 14 February 2022; Oxford Reference, 'Industrial Countries' (2022) <[www.oxfordreference.com/view/10.1093/oi/authority.20110803100002206#:~:text=This group includes Canada%2C Japan,Switzerland%2C and the United Kingdom.](http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100002206#:~:text=This group includes Canada%2C Japan,Switzerland%2C and the United Kingdom.)> accessed 14 February 2022.

<sup>78</sup> Cotropia and Lemley, for example, suggest that 'To infringe a copyright ..., defendants must copy the protected IP from the plaintiff, directly or indirectly. But patent infringement requires only that the defendant's product falls within the scope of the patent claims.' Christopher A Cotropia & Mark A Lemley, 'Copying in Patent Law: Frontiers in Empirical Patent Law Scholarship' (2009) 87 North Carolina Law Review 1421.

<sup>79</sup> Ipsos, 'The Most Influential Brands in Saudi Arabia 2018' (2018) <[www.ipsos.com/sites/default/files/ct/news/documents/2019-04/most\\_influential\\_brands\\_ksa\\_-\\_2018\\_-\\_top\\_10\\_overview\\_0.pdf](http://www.ipsos.com/sites/default/files/ct/news/documents/2019-04/most_influential_brands_ksa_-_2018_-_top_10_overview_0.pdf)>; Zina Ali, 'Saudi Brands Lead Trademarks to Rising 365% in 5 Years' *Al Watan* (Abha, 2 October 2021) <[www.alwatan.com.sa/article/1088375](http://www.alwatan.com.sa/article/1088375)> (in Arabic) accessed 14 February 2022; Hisham Mahmoud, 'The Trade in Counterfeit Goods Is an Untamable Economic Beast: \$1.82 Trillion in a Year' *Al Eqtisadiyah* (Riyadh, 2 May 2021) <[www.aleqt.com/2021/05/02/article\\_2084171.html](http://www.aleqt.com/2021/05/02/article_2084171.html)> (in Arabic) accessed 14 February 2022.

<sup>80</sup> See, for example, The Saudi Consumer Empowerment (Consumer Protection Association: Saudi Arabia), 'Study of Saudi Consumer Empowerment Index' (2019) 17 <<https://cpa.org.sa/page/70/>> (in Arabic) accessed 14 February 2022. <https://haraj.com.sa/> is one of the most popular sites where people buy and sell counterfeit products, even though they know that some of these products are not original. The following link, which is constantly updated, shows many examples of those sellers and buyers offering or searching for original and fake Dior bags. 'Dior Bags' (*Haraj website for E-Commerce*, 2022) <<https://haraj.com.sa/search/شنتط ديور>> (in Arabic) accessed 14 February 2022.



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In restricting the scope of the study in this way, it is not the intention of the researcher to suggest that studying other IP areas is unimportant, or that there is no value in identifying the most critical factors influencing states' compliance behaviour. Rather, the objectives of this study can be achieved without detailing every IP area or determining which factors have the most influence on the KSA's compliance with TRIPS. It would arguably also be unreasonable in a detailed analytical and theoretically focused study such as this one to pursue all the different areas of IP, as this could distort the research outcomes. However, future studies may wish to set different aims and employ other methods in order to more deeply investigate these issues and others that fall outside the scope of this study.

### **1.4 Background**

#### **1.4.1 Intellectual property protection today**

At the time of writing, numerous new agreements concerning IP protection are being negotiated by various individual states. Other negotiations have been finalised, and some of the agreements to emerge from them were approved and adopted while this thesis was being completed. Given the limited space available for discussion, full details of these developments could not be pursued in this thesis. Moreover, most of these new and proposed arrangements do not apply to the KSA. However, rather than undermine the current study, these developments underscore the importance of investigating compliance with IP treaties and highlight the value of this type of study, as the need for IP protection is likely to persist.

Among the newly proposed arrangements is the Transatlantic Trade and Investment Partnership (hereinafter "TTIP"), a so-called mega-regional agreement which was the subject of extensive debate by both the European Union (hereinafter "EU") and the United States of America (hereinafter "US") from the autumn of 2013 until 2017, when then-US President Donald Trump withdrew from the negotiations.<sup>81</sup> Other examples include the Comprehensive Economic and

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<sup>81</sup> In mid-April 2019, the Council of the EU announced that the negotiations were 'obsolete and no longer relevant'; European Union, 'EU Negotiating Texts in TTIP' (*European Union*, 2019) <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>> accessed 2 April 2021. The proposed agreement has received global attention, including from dozens of legal scholars and academic research centres with legal expertise. See, for example, Stefan Martinic and Mihael Maljak, 'Certain Controversial Issues of EU-US Trade Negotiations Leading to the Signing of the Transatlantic Trade and Investment Partnership (TTIP)' (2014) 10 *Croatian Yearbook of European Law and Policy* 341; Patrick Hugg and Sheila Wilkinson, 'The 2014 European Parliament Elections and the Transatlantic Trade and Investment Partnership: Economics and Politics Collide' (2015) 24 *Journal of Transnational Law & Policy* 117; Mark Weaver, 'Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions,

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Trade Agreement (hereinafter “CETA”) signed by Canada and the EU, Chapter 20 of which contains 50 articles on issues concerning the protection of IP.<sup>82</sup> In addition, more than 18 states have entered into free trade agreements (hereinafter “FTAs”) with the US that cover some aspects of IPR.<sup>83</sup> Similarly, the EU is imitating the US approach to extending ties with its partners at both the economic and trade levels, having concluded multiple agreements through Council representatives with states such as South Korea and Singapore.<sup>84</sup> Negotiations about a possible FTA between India and the EU began in mid-2007, but obstacles to IP protection have prevented their completion.<sup>85</sup> Finally, there have been intense negotiations between eleven countries, including Australia, Brunei, Chile, Malaysia, Mexico, Peru and Vietnam, toward concluding the Trans-Pacific Partnership Agreement (hereinafter “TPP”), with the aim of including some aspects of IPR.<sup>86</sup>

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Reconciliation, and Future Trade Implications’ (2015) 29 *Emory International Law Review* 225; Marta Ortega Gomez, ‘European Union Intellectual Property Standards in the Framework of the Ongoing Negotiations of a Free Trade Agreement between the EU and India’ (2015) 19 *Spanish Yearbook of International Law* 181; Hansjoerg Hepp, ‘TTIP - New Thrust for the Transatlantic Alliance’ (2013) 19 *Law and Business Review of the Americas* 441; Law and Business Review of the Americas, ‘Remarks by United States Trade Representative Michael Froman at the Transatlantic Trade and Investment Partnership First Round Opening Plenary’ (2013) 19 (2) *Law and Business Review of the Americas* 135; Jessi Patton, ‘Case for Investor-State Arbitration under the Proposed Transatlantic Trade and Investment Partnership’ (2014) 4 *Arbitration Brief* 75.

<sup>82</sup> Government of Canada, ‘Canada-European Union Comprehensive Economic and Trade Agreement (CETA)’ (*The Government of Canada*, 2021) <[www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng)> accessed 2 April 2021; European Union, ‘CETA Chapter by Chapter’ <[https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/index\\_en.htm](https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/index_en.htm)> accessed 1 April 2021. For examples of scholarly discussions during the negotiations phase, see James Mathis, ‘Multilateral Aspects of Advanced Regulatory Cooperation: Considerations for a Canada-EU Comprehensive Trade Agreement (CETA)’ (2012) 39 *Legal Issues of Economic Integration* 73; Jeremy de Beer, ‘Implementing International Trade Agreements in Federal Systems: A Look at the Canada-EU CETA’s Intellectual Property Issues’ (2012) 39 *Legal Issues of Economic Integration* 51; Stephane Paquin, ‘Federalism and the Governance of International Trade Negotiations in Canada: Comparing CUSFTA with CETA’ (2013) 68 *International Journal* 545; Pierre Marc Johnson, Patrick Muzzi and Veronique Bastien, ‘The Voice of Quebec in the CETA Negotiations’ (2013) 68 *International Journal* 560; Ljiljana Biukovic, ‘Transparency Norms, the World Trade System and Free Trade Agreements: The Case of CETA’ (2012) 39 *Legal Issues of Economic Integration* 93.

<sup>83</sup> Gomez, ‘European Union Intellectual Property Standards in the Framework of the Ongoing Negotiations of a Free Trade Agreement between the EU and India’ (n 81).

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

<sup>86</sup> For examples of scholarly discussions about the proposed arrangement, see Pratyush Nath Upreti, ‘From TPP to CPTPP: Why Intellectual Property Matters’ (2018) 13 *Journal of Intellectual Property Law & Practice* 100; Deborah Gleeson and others, ‘The Trans Pacific Partnership Agreement, Intellectual Property and Medicines: Differential Outcomes for Developed and Developing Countries’ (2018) 18 *Global Social Policy* 7; Deborah Elmas, ‘The Trans-Pacific Partnership: The Challenges of Unraveling the Noodle Bowl’ (2013) 18 *International Negotiation* 25; Angeline Couvreur, ‘New Generation Regional Trade Agreements and the Precautionary Principle: Focus on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union’ (2015) 15 *Asper Review of*

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Despite these developments, TRIPS remains the most relevant such agreement for the KSA, which has established training programs and concluded several memoranda of understanding and agreements on IPR with other members of the GCC which notably resemble and promote TRIPS.<sup>87</sup> For these reasons, TRIPS is more relevant to the case study of the KSA than the other agreements discussed above.

### 1.4.2 The KSA's obligations under the WTO

Despite its vast oil resources, which have turned it into 'the world's largest oil exporter' and raised it into the top 20 states in terms of the world's biggest economies, the Kingdom is classified as a developing country.<sup>88</sup> Although the KSA was already heavily involved in international trade prior to its acceptance into the WTO, it took twelve years of complex negotiations for its application for WTO membership to be approved.<sup>89</sup> On 11 December 2005, the KSA became the 149th member of the WTO.<sup>90</sup> Since then, the Kingdom has been party to the design and implementation of a potent multilateral merchandising system.<sup>91</sup>

In view of the fact that over 70% of the KSA's gross domestic product (hereinafter "GDP") is based on overseas trade, negotiations have focused on the Kingdom attaining greater market access

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International Business and Trade Law 265; Peter K Yu, 'TPP and Trans-Pacific Perplexities' (2014) 37 Fordham International Law Journal 1129.

<sup>87</sup> See, for example, BoE, 'GCC Patent Law' (*Bureau of Experts at the Council of Ministers*, 2001) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/f95138ff-0892-49b0-921c-a9a700f1c37f/2>> accessed 3 April 2021; BoE, 'Trademark Law of the States of the Cooperation Council for the Arab States of the Gulf' (*Bureau of Experts at the Council of Ministers*, 2016) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/b2d0decd-a691-45b9-9af0-a9a700f1e86f/2>> accessed 3 April 2021; Secretariat General of the Gulf Cooperation Council (GCC), 'The Intellectual Property Training Center in the Cooperation Council States Holds a Training Program on Trade-Related Aspects of Intellectual Property Rights in Cooperation with the Danish Intellectual Property Office' (*Cooperation Council for the Arab States of the Gulf, Secretariat General*, 2021) <[www.gcc-sg.org/ar-sa/MediaCenter/NewsCooperation/News/Pages/news2021-3-25-2.aspx](http://www.gcc-sg.org/ar-sa/MediaCenter/NewsCooperation/News/Pages/news2021-3-25-2.aspx)> accessed 3 April 2021 (in Arabic); Secretariat General of the GCC, 'Achievements, Sixth: International Cooperation' (*General Secretariat of the Gulf Cooperation Council*, 2021) <[www.gcc-sg.org/ar-sa/CooperationAndAchievements/Achievements/EconomicCooperation/CooperationintheFieldofPatents/Achievements/Pages/InternationalCooperation.aspx](http://www.gcc-sg.org/ar-sa/CooperationAndAchievements/Achievements/EconomicCooperation/CooperationintheFieldofPatents/Achievements/Pages/InternationalCooperation.aspx)> accessed 3 April 2021 (in Arabic); King Abdulaziz and His Companions Foundation for Giftedness and Creativity (Mawhiba), 'Intellectual Property' (*King Abdulaziz and His Companions Foundation for Giftedness and Creativity*) <<https://services.mawhiba.org/Services/WorldDayofIntellectualProperty/Pages/SaudiWorldDay.aspx>> accessed 3 April 2021 (in Arabic).

<sup>88</sup> Shaun Clark and others, 'Why Isn't Saudi Arabia a Developed Country, Despite Having Oil Resources?' (*Quora*, 2018) <[www.quora.com/Why-isnt-Saudi-Arabia-a-developed-country-despite-having-oil-resources](http://www.quora.com/Why-isnt-Saudi-Arabia-a-developed-country-despite-having-oil-resources)> accessed 27 March 2021; Rao (n 28) 1.

<sup>89</sup> Rao (n 28) 1.

<sup>90</sup> WTO, 'Accessions: Saudi Arabia' (n 3).

<sup>91</sup> WTO (n 2); Rao (n 28) 1.

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to foreign products and services through full compliance with its WTO obligations.<sup>92</sup> Despite the many benefits of accession to date, the Kingdom faces enormous challenges to achieving full compliance with the obligations to which it has consented and which it has implemented under the WTO.<sup>93</sup>

The legal system of the KSA is based on Sharia,<sup>94</sup> which has led it to enter into specific legal agreements regarding many of the economic activities associated with its WTO obligations. Some of these agreements were wholly consistent with the existing provisions of Sharia, while others were only included as part of a package of reforms to the Kingdom's existing laws.<sup>95</sup> For example, the KSA sees itself as committed to applying Sharia in every circumstance and in all cases.<sup>96</sup> This has led to tensions over concessions in matters related to Islamic law and an ongoing conflict between international trade law and Sharia, specifically in regard to prohibited goods (i.e., alcohol and pork-related food products), the Sharia requirement of the zakat tax, and certain forbidden services in the banking and insurance sectors, which have raised questions about the KSA's ability to fully comply with its obligations under the WTO.<sup>97</sup> The issue of Sharia therefore lies at the heart of concerns about the KSA's ability to fulfil the objectives of the WTO and implement the reforms that were a condition of its accession.<sup>98</sup>

Since joining the WTO, the KSA has engaged in a constant struggle for trade liberalisation.<sup>99</sup> US trade policy asserts that the KSA, like other Middle Eastern countries, must comply with WTO requirements.<sup>100</sup> However, Bhala argues:

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<sup>92</sup> Karen Elliott House, *On Saudi Arabia: Its People, Past, Religion, Fault Lines--and Future* (reprint edn, Alfred A Knopf 2013).

<sup>93</sup> Raj Bhala, 'The Intersection of Islam and the WTO: Three Shari'a Issues in the WTO Accession of Saudi Arabia' (2003) 21 *Law in Context* 152.

<sup>94</sup> BoE (n 16).

<sup>95</sup> Raj Bhala and Shannon B Keating, 'Diversity within Unity: Import Laws of Islamic Countries on Haram (Forbidden) Products' (2013) 47 *The International Lawyer* 343.

<sup>96</sup> BoE (n 16).

<sup>97</sup> Bhala (n 2).

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.*

<sup>100</sup> Daniel Pruzin, 'US, Others Urge Saudis to Make Proposals to Reinvigorate Efforts for Accession to WTO' (2002) 19 *International Trade Reporter* (BNA) 334.

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The Kingdom's WTO accession odyssey . . . is a tale of ever-increasing demands, driven often by the US, for market access and trade liberalization. The odyssey is really a cycle of 'demand – concede', with the US firmly asking and the Kingdom typically giving in. The demands cover all aspects of commercial relations – goods, services, intellectual property rights (IPR) and FDI [foreign direct investment].<sup>101</sup>

When the KSA joined the WTO in 2005, it simultaneously ratified a substantial number of international trade agreements, including TRIPS, after exhaustive negotiations.<sup>102</sup> The Kingdom subsequently accepted an amendment to the TRIPS Agreement on 29 May 2012,<sup>103</sup> meaning it now subscribes to minimum standards to protect certain classes of IP rights.<sup>104</sup> This fact explains the importance of the Kingdom's legal compliance with the IP rights protections specified under TRIPS. Moreover, compliance with the Agreement should be viewed as an acknowledgement that further negotiations will be required in future in relation to new multilateral and bilateral agreements which aim to protect IP rights by imposing higher standards.<sup>105</sup> TRIPS also incorporates a number of prior agreements establishing IP rights, including the Paris Convention and the Berne Convention.<sup>106</sup>

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<sup>101</sup> Bhala (n 2) 753.

<sup>102</sup> World Intellectual Property Organization (WIPO), 'Other IP Treaties, IP-Related Multilateral Treaties > Contracting Parties/Signatories> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (Total Contracting Parties : 164)' (*WIPO IP Portal*) <[www.wipo.int/wipolex/en/other\\_treaties/parties.jsp?treaty\\_id=231&group\\_id=22](http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22)> accessed 21 November 2018.

<sup>103</sup> WTO, 'Amendment of the TRIPS Agreement' <[www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm)> accessed 6 June 2021.

<sup>104</sup> Paul E Salmon, 'A Short Guide to International IPR Treaties' (*The US Department of State's Bureau of International Information Programs (IIP) Publications*) <[web.archive-2017.ait.org.tw/infousa/zhtw/DOCS/iprbook.pdf](http://web.archive-2017.ait.org.tw/infousa/zhtw/DOCS/iprbook.pdf)> accessed 16 September 2021.

<sup>105</sup> Sisule Musungu and Graham Dutfield, 'Multilateral Agreements and a TRIPS-plus World: The World Intellectual Property Organization (WIPO)' (December 2003) TRIPS Issues Paper No 3 <[https://quino.org/sites/default/files/resources/Multilateral-Agreements-in-TRIPS-plus-English\\_0.pdf](https://quino.org/sites/default/files/resources/Multilateral-Agreements-in-TRIPS-plus-English_0.pdf)> accessed 13 May 2021.

<sup>106</sup> According to the WIPO, 'this Agreement constitutes Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as the "WTO Agreement"), which was concluded on April 15, 1994, and entered into force on January 1, 1995. The TRIPS Agreement binds all Members of the WTO'. Article II:2 of the WTO Agreement also indicates the aforementioned information. See, for example, WIPO, 'Agreement Between the World Intellectual Property Organization and the World Trade Organization (1995): Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994): Provisions Mentioned in the TRIPS Agreement of the Paris C' <[www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_223.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_223.pdf)> accessed 6 June 2021; WTO, 'WTO Analytical Index: WTO Agreement – Article II (Jurisprudence)' <[www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/wto\\_agree\\_art2\\_jur.pdf](http://www.wto.org/english/res_e/publications_e/ai17_e/wto_agree_art2_jur.pdf)> accessed 6 June 2021.

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Specifically, TRIPS preserves the rights held by producers of various forms of IP, including trademarks, patents, and industrial designs.<sup>107</sup> By accepting the terms of the TRIPS Agreement, the KSA has taken on additional international legal obligations as an individual State. This alignment with the demands and standards of international legal obligations also means that the Saudi government and its people can claim certain benefits from international legal structures.<sup>108</sup> However, benefits are not easily guaranteed, for either Saudi or foreign corporations, local or global investment bureaus, or indeed any person or organisation interested in trade-related IP.<sup>109</sup> The fact that concerns have been raised about the KSA's ability to comply with its commitments under TRIPS suggests that the processes of attaining and bestowing these rights is complex. Similar concerns led to the 12-year-long negotiations prior to the KSA's accession to the WTO noted above.<sup>110</sup>

Three further observations highlight the need for a comprehensive understanding of the Kingdom's compliance with TRIPS. First, the concerns that have been raised are not confined to the Kingdom's compliance with its agreed obligations under TRIPS; rather, as previously stated, they extend to the compliance of all Member States and international institutions as a group when assuming responsibility for overseeing such obligations. Problems affecting compliance could arguably erode the very foundations of international law if their various dimensions and consequences are not researched and contextualised.<sup>111</sup>

Second, the KSA's Islamic identity is a lens through which a significant number of legal scholars have viewed the KSA's implementation of and compliance with international agreements, including TRIPS.<sup>112</sup> As discussed in Chapter 4, there are a number of possible explanations for the

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<sup>107</sup> Specifically, 'copyright and related rights; trademarks; geographical indications; industrial designs; patents; layout-designs (topographies) of integrated circuits; protection of undisclosed information; and control of anti-competitive practices in contractual licences'. WTO, 'Uruguay Round Agreement: TRIPS: Preamble' <[www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_02\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_02_e.htm)> accessed 13 May 2021.

<sup>108</sup> Ali Al Zahrani, Khaled Abdel Tawab and Adnan Al Omar, *The Principles of Law with Particular Reference to the Applicable Regulations in Saudi Arabia* (2nd edn, Jarir Bookstore 2013) 29 (in Arabic).

<sup>109</sup> *ibid* 30.

<sup>110</sup> Rao (n 28); Bhala (n 2).

<sup>111</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 50) 1826.

<sup>112</sup> For example, see Alabdulkarim, 'Intellectual Property Rights in the Kingdom of Saudi Arabia' (n 45) 86.; Turki Abdullah M Al Nasser, 'Implications of Inconsistencies between Imposed International Law and Sharia Law in Saudi Arabia, with Special Reference to Copyright Law' (PhD thesis, University of Kent 2014); Geoffrey Fisher, 'Sharia Law and Choice of Law Clauses in International Contracts' (2005) *Lawasia Journal* 69; Muamar Hasan Salameh, 'The Principle of Separation of Powers between Sharia and the Positive Law: A Case Study on the Constitutional System

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dominance of this type of study. However, while the relationship between the legal system in the KSA and the provisions and principles of Islamic law and its connection to the Kingdom's implementation of its international legal obligations are vital, this thesis aspires to acknowledge and extend beyond that discussion. An examination of the KSA's compliance from a different perspective will help improve our understanding.

Finally, compliance with TRIPS is becoming increasingly relevant for the success of the Kingdom's 'Vision 2030'.<sup>113</sup> For example, a primary goal of the Vision is to maintain the growth of the non-oil economy, thereby reducing the Kingdom's dependence on oil as a source of revenue.<sup>114</sup> Official statements by the KSA government recently have suggested that compliance with IPR would serve to raise non-oil revenues (hereinafter "NOR").<sup>115</sup> Put differently, some have argued that the fight against IP rights infringement would have significant long-term benefits for the Saudi economy,<sup>116</sup> including encouraging innovation, preserving rights, promoting business activity, attracting foreign corporations to local markets, reducing unemployment problems and

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of Saudi Arabia' in Atho Mudzhar and others (eds), *Proceedings of 1st International Conference of Law and Justice - Good Governance and Human Rights in Muslim Countries: Experiences and Challenges (ICLJ 2017)* (Atlantis Press 2017); Ingrid Ileana Nicolau, 'Matrimonial Contracts and the Rights of Women in Islam: A Saudi Arabia Case Study' (2018) 9 *Journal of Law and Administrative Sciences* 72; Al-Sudairy, (n 28) 1; Ahmed A Altawyan, 'Sharia as Law in International Commerce: Challenges in Attracting International Investors to Saudi Arabia and Achieving a Major Goal of Vision 2030' (2017) 6 *International Journal of Business and Management Studies* 323.

<sup>113</sup> For further details, see Saudi Vision 2030, 'Our Vision' (*Saudi Vision 2030*) <[www.vision2030.gov.sa/en/node](http://www.vision2030.gov.sa/en/node)> accessed 1 April 2021.

<sup>114</sup> Saudi Vision 2030, 'Thriving Economy' (*Saudi Vision 2030*) <[www.vision2030.gov.sa/en/themes/2](http://www.vision2030.gov.sa/en/themes/2)> accessed 1 April 2021; Saudi Vision 2030, 'National Transformation Program' (*Saudi Vision 2030*) <[www.vision2030.gov.sa/en/programs/NTP](http://www.vision2030.gov.sa/en/programs/NTP)> accessed 1 April 2021; Saudi Vision 2030, 'Vision Progress' (*Saudi Vision 2030*) <[www.vision2030.gov.sa/en/vision-progress](http://www.vision2030.gov.sa/en/vision-progress)> accessed 1 April 2021; Raja Almarzoqi and Assil El Mahmah, 'Non-Oil Revenue and Economic Growth on Major Net Oil Exporters? Evidence from Saudi Arabia' (2020) *Journal of Economic Structures* (under review) 1 <[www.researchsquare.com/article/rs-132808/v1](http://www.researchsquare.com/article/rs-132808/v1)> accessed 1 April 2021.

<sup>115</sup> See, for example, WIPO, 'Saudi Arabia Gears up on IP' (n 33); SPA, 'The Saudi Authority for Intellectual Property Organises an Introductory Meeting with Business Owners in the Council of Saudi Chambers' (*Saudi Press Agency*, 2018) <[www.spa.gov.sa/1812778](http://www.spa.gov.sa/1812778)> accessed 9 April 2021 (in Arabic).

<sup>116</sup> See, for example, Pamela J Smith and others; Herbert Hovenkamp, 'Response: Markets in IP and Antitrust' (2011-2012) 100 *Georgetown Law Journal*, 2133, 2143.

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generating new jobs.<sup>117</sup> The KSA's Vision 2030 seeks to achieve the aforementioned benefits,<sup>118</sup> and the Kingdom considers compliance with IPR helpful in achieving that end.<sup>119</sup> Accordingly, developing a more comprehensive understanding of the factors that can influence the KSA's compliance with TRIPS would be an important contribution to the success of the Kingdom's Vision 2030.

### 1.4.3 Major developments in intellectual property in the KSA

Since the launch of the Saudi Vision 2030 in April 2016, the KSA has undergone a major transformation in every respect, including significant positive developments in its legal, economic, cultural and health systems.<sup>120</sup> A comprehensive strategic framework, the Saudi Vision 2030 was developed with the primary objectives of establishing (1) a vibrant society, (2) a thriving economy, and (3) an ambitious nation; as such, it seeks to diversify the KSA's economy, transform its public services, and improve performance in all sectors.<sup>121</sup> The impact of this national transformative scheme touched almost every aspect of life in the Kingdom, including the area of IP.<sup>122</sup>

Two significant developments in IP have been derived from the Saudi Vision 2030, and particularly from its National Transformation Program. The first and foremost is the establishment of SAIP in 2018 by Ministerial Council Resolution No. 410.<sup>123</sup> Prior to this, IP was regulated by

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<sup>117</sup> See, for example, Ioana VasIU and Lucian VasIU, 'Criminal Copyright Infringement: Forms, Extent, and Prosecution in the United States' (2019) 4 University of Bologna Law Review 229, 229–231; Bryan Mercurio, 'Intellectual Property Rights and Economic Development' (2010) 3 Law and Development Review 65; Al Zahrani, Abdel Tawab and Al Omar (n 108) 29; Khaled Al Ruwais and Rizk Al Rayes (eds), *An Introduction to the Study of Legal Science* (5<sup>th</sup> edn, Al Shegry 2012) 18-22 (in Arabic); Maha Shaban, "'Intellectual Property" and Its Impact on the Economy and the Local Community' (*Al Ghad Newspaper*, 5 August 2015) <<https://alghad.com/الملكفة-الفكرفة-وأثرها-على-الاقتصاد-/>> (in Arabic).

<sup>118</sup> For further details, see Saudi Vision 2030, 'Our Vision' (n 113); SPA, 'General / "Intellectual Property": One of the "The National Transformation Program (NTP)" Initiatives to Preserve Rights and Stimulate Innovation and Creativity' (*Saudi Press Agency*, 2021) <[www.spa.gov.sa/viewstory.php?lang=ar&newsid=2209473](http://www.spa.gov.sa/viewstory.php?lang=ar&newsid=2209473)> accessed 9 April 2021 (in Arabic).

<sup>119</sup> Saudi Vision 2030, 'Our Vision' (n 113); 'General / "Intellectual Property"' (n 118); SPA (n 115); WIPO, 'Saudi Arabia Gears up on IP' (n 33).

<sup>120</sup> For further details, see Saudi Vision 2030, 'Our Vision' (n 113); Saudi Vision 2030, 'Thriving Economy' (n 114); Saudi Vision 2030, 'National Transformation Program' (n 114); Saudi Vision 2030, 'Vision Progress' (n 114); Almarzoqi and El Mahmah (n 114).

<sup>121</sup> *ibid.*

<sup>122</sup> See, for example, WIPO, 'Saudi Arabia Gears Up on IP' (n 33); BoE (n 33); SPA, 'HRH Crown Prince Launches National Intellectual Property Strategy' (n 33).

<sup>123</sup> Almirkaz, 'Ministerial Council Resolution No (410) Dated 06/28/1438 AH' (*Almirkaz*) <[www.almirkaz.com/saudi-laws-directory/3528/أنظمة-التجارة-والإستثمار/الترتفبات-التنظفمفة-للهفئة-السعودفة-للملكفة-الفكرفة/](http://www.almirkaz.com/saudi-laws-directory/3528/أنظمة-التجارة-والإستثمار/الترتفبات-التنظفمفة-للهفئة-السعودفة-للملكفة-الفكرفة/)> (in Arabic) accessed 3 April 2023.



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and administered through several governmental bodies.<sup>124</sup> The Patent Office was under the auspices of King Abdulaziz City for Science and Technology; copyright was overseen by the Ministry of Media; trademarks were registered in the Ministry of Commerce.<sup>125</sup> The SAIP was established not only to bring all types of IP under one umbrella, but also to ‘to regulate, support, develop, sponsor, protect, and promote intellectual property in the Kingdom in accordance with best international practices, and enforce relevant provisions’.<sup>126</sup>

The SAIP could be described as a semi-governmental body, because, although it is a government office, it operates somewhat like a private entity in that it has a board of directors and a CEO.<sup>127</sup> It works at a fast pace and has an impressive record of achievements locally and internationally.<sup>128</sup> The SAIP differs from other IP offices by virtue of its wide mandate, having been vested with responsibility for all matters related to IP.<sup>129</sup> In addition to receiving IP applications, the SAIP is charged with the execution and protection of IP rights.<sup>130</sup> The SAIP also helps innovators and authors to create, invest in and protect their IP.<sup>131</sup>

Thanks to the achievements of the SAIP in improving the IP sector in the KSA,<sup>132</sup> another important development was supported through the Saudi Vision 2030, namely, the launch of the NIPST in December 2022.<sup>133</sup> Because IP protection involves so many stakeholders from across the public and private sectors, the Saudi government sought to develop an IP ecosystem whose actors would work together to achieve the KSA’s ambition to be ‘a leader in intellectual property’.<sup>134</sup> The NIPST was established to accomplish this goal and to support an ‘innovation and creativity-based economy’.<sup>135</sup> The NIPST is built upon four principal pillars: IP Creation, IP

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<sup>124</sup> *ibid*; WIPO, ‘Saudi Arabia Gears up on IP’ (n 33).

<sup>125</sup> Almirkaz (n 123); WIPO, ‘Saudi Arabia Gears up on IP’ (n 33); SAIP, ‘Saudi Authority for Intellectual Property (SAIP): From Vision to Launch’ (*SAIP*, 2021) 22, 4 <[https://static.saip.gov.sa/a/r/n/o/web/Saudi Authority for Intellectual Property \(SAIP\) From Vision to launch.pdf](https://static.saip.gov.sa/a/r/n/o/web/Saudi%20Authority%20for%20Intellectual%20Property%20(SAIP)%20From%20Vision%20to%20Launch.pdf)> accessed 3 April 2023.

<sup>126</sup> SAIP, ‘Statute of the Saudi Authority for Intellectual Property’ (*SAIP*, 2022) <[https://externalportal-backend-production.saip.gov.sa/sites/default/files/2023-02/0\\_التنظيم.pdf](https://externalportal-backend-production.saip.gov.sa/sites/default/files/2023-02/0_التنظيم.pdf)> accessed 3 April 2023.

<sup>127</sup> SAIP, ‘CEO Word’ (*SAIP*) <[www.saip.gov.sa/en/about/ceo/](http://www.saip.gov.sa/en/about/ceo/)> accessed 3 April 2023.

<sup>128</sup> See, for example, sub-s 1.3.6.

<sup>129</sup> WIPO, ‘Saudi Arabia Gears up on IP’ (n 33); BoE (n 33).

<sup>130</sup> *ibid*.

<sup>131</sup> SAIP, ‘CEO Word’ (n 127).

<sup>132</sup> Such achievements could be read via: SAIP, ‘Reports’ (*SAIP*) <[www.saip.gov.sa/en/reports/](http://www.saip.gov.sa/en/reports/)> accessed 3 April 2023.

<sup>133</sup> SPA, ‘HRH Crown Prince Launches National Intellectual Property Strategy’ (n 33).

<sup>134</sup> *ibid*.

<sup>135</sup> *ibid*.

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Administration, IP Commercialization, and IP Protection.<sup>136</sup> Through its initiatives and programs, the NIPST strengthens cooperation in IP protection and support between several bodies including the Ministry of Justice, the Ministry of Commerce, the Ministry of Investment, and the Ministry of Education.<sup>137</sup> In this way, the NIPST makes clear that IP protection in the KSA is not the responsibility of a single authority, but it is a mandate given to all relevant stakeholders.

The above-mentioned developments demonstrate the dramatic growth of the IP sector in the KSA and the range of its activity, including enablement, awareness and investment. While this work is vital for improving the Saudi IP system, the immense progress the Kingdom has made in these areas does not necessarily indicate the degree to which it implements and complies with its obligations in relation to IP under international law.

### 1.5 Key Terms and Definitions

In preparation for in-depth analysis of the Kingdom's compliance with TRIPS, it is useful to elucidate the fundamental concepts referenced in this thesis, define key terms, and clarify the objectives of the current study. Therefore, in this subsection, the terms *implementation* and *compliance* will be defined and distinguished. Although slightly removed from the core focus of this thesis, the term *effectiveness* will also be defined because of its relevance to the study of compliance.

It is worth acknowledging here that the state is not a separate entity from its political leadership (i.e., the government), those who make and interpret the law (i.e., the legislature, the judiciary) and the electorate (i.e., its citizens), therefore all may be held responsible, albeit it to varying degrees, for the state's compliance/non-compliance. This point will be examined in more detail in Chapter 7.

As noted above, a conceptual problem has arisen from the lack of consensus regarding what distinguishes compliance from implementation. Compliance is sometimes called implementation; likewise, implementation is sometimes called compliance. For example, because of the prevalence

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<sup>136</sup> *ibid.*

<sup>137</sup> SAIP, 'National Intellectual Property Strategy 2022-1444' (*Saudi Authority for Intellectual Property*) <[https://externalportal-backend-production.saip.gov.sa/sites/default/files/2022-12/وثيقة\\_الاستراتيجية\\_الوطنية\\_وثيقة\\_engfinal.pdf](https://externalportal-backend-production.saip.gov.sa/sites/default/files/2022-12/وثيقة_الاستراتيجية_الوطنية_وثيقة_engfinal.pdf)> accessed 25 March 2023; SAIP, 'National Strategy: Why a National Strategy?' (*Saudi Authority for Intellectual Property*) <[www.saip.gov.sa/en/national-strategy/](http://www.saip.gov.sa/en/national-strategy/)> accessed 25 March 2023.

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of infringements within the Kingdom, the KSA's IP systems have been criticised and its compliance with TRIPS has been queried.<sup>138</sup> At the same time, however, and despite these criticisms, other scholars have noted the widespread praise the Kingdom has enjoyed in response to the measures it has taken to make TRIPS applicable to its current domestic legislation.<sup>139</sup> Some researchers, such as Urban, go further, viewing the KSA as a role model for other states attempting to comply with TRIPS.<sup>140</sup>

The definition of compliance adopted in this thesis takes the current investigation beyond the mere

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<sup>138</sup> For example, see Thamer Al Maliki, 'Intellectual Property Violations Cost the Kingdom \$100 Billion' *Al Yaum* (Dammam, 31 March 2011) <[www.alyaum.com/articles/810634/المخترعات-أحد-الطلاب-أثناء-القيام-بشرح-أحد-المخترعات](http://www.alyaum.com/articles/810634/المخترعات-أحد-الطلاب-أثناء-القيام-بشرح-أحد-المخترعات)> (in Arabic) accessed 23 July 2021; WTO, 'Dispute Settlement, DS567: Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights' (*World Trade Organisation*, 2020) <[www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds567\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm)> accessed 30 March 2021; Office of the United States Trade Representative (USTR), '2009 Special 301 Report' (2009) 1, 6, 31 <[https://ustr.gov/sites/default/files/2009\\_Special\\_301\\_Report\\_FINAL.pdf](https://ustr.gov/sites/default/files/2009_Special_301_Report_FINAL.pdf)> accessed 13 May 2021; The International Intellectual Property Alliance (IIPA), 'Copyright Protection and Enforcement Around the World' (2008) 2008 Special 301 Report 10, 15, 16, 122–121 <[https://ustr.gov/archive/assets/Trade\\_Sectors/Intellectual\\_Property/Special\\_301\\_Public\\_Submissions\\_2008/asset\\_upload\\_file141\\_14486.pdf](https://ustr.gov/archive/assets/Trade_Sectors/Intellectual_Property/Special_301_Public_Submissions_2008/asset_upload_file141_14486.pdf)> accessed 13 May 2021; Mark Atkinson, 'Counterfeiting: A Dangerous Game' (*Gulf Business*, 21 November 2011) <<https://gulfbusiness.com/counterfeiting-a-dangerous-game/>> accessed 30 March 2021; USTR, '2018 Special 301 Report' (2018) 7, 9, 14, 24, 70 <[https://ustr.gov/sites/default/files/files/Press/Reports/2018\\_Special\\_301.pdf](https://ustr.gov/sites/default/files/files/Press/Reports/2018_Special_301.pdf)> accessed 13 May 2021; European Parliament, 'Written answer: Broadcast piracy of European content in Saudi Arabia' (4 October 2018) P8\_RE(2018)003871 <[www.europarl.europa.eu/RegData/questions/reponses\\_qe/2018/003871/P8\\_RE\(2018\)003871\\_EN.pdf](http://www.europarl.europa.eu/RegData/questions/reponses_qe/2018/003871/P8_RE(2018)003871_EN.pdf)> accessed 13 May 2021; 'Ministry of Media Issues Statement on Accusations of Wimbledon Championship Regarding BeoutQ Channels' (*Saudi Press Agency*, 7 July 2018) <[www.spa.gov.sa/1782553](http://www.spa.gov.sa/1782553)> accessed 30 March 2021; Reima Al-Jarf, 'Intellectual Property and eLearning at Saudi Universities: Problems and Solutions' (2013) *Quality and Efficiency in eLearning: Proceedings of the 9<sup>th</sup> International Scientific Conference "eLearning and Software for Education, Bucharest, 25-26 April 2013"* vol 1, 243; William Clatanoff and others, 'Saudi Arabia's Accession to the WTO: Is a "Revolution" Brewing?' (2006) 13 *The Middle East Policy Council* 1; Lolwa Naser Mohamed Alfadhel, 'Trademark Enforcement through Border Measures: The Case of the Gulf Cooperation Council States (GCC)' (PhD thesis, Queen Mary, University of London 2017) 21, 45, 50, 52–53.

<sup>139</sup> For example, see USTR, 'Saudi Arabia's Accession to the World Trade Organization (WTO): WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)' (*Office of the United States Trade Representative*, 2005) 1 <[https://ustr.gov/archive/assets/Document\\_Library/Fact\\_Sheets/2005/asset\\_upload\\_file12\\_7938.pdf](https://ustr.gov/archive/assets/Document_Library/Fact_Sheets/2005/asset_upload_file12_7938.pdf)> accessed 31 March 2021; WTO, 'Trade Policy Review: The Kingdom of Saudi Arabia, Concluding Remarks by the Chairperson' (*World Trade Organisation*, 2016) <[www.wto.org/english/tratop\\_e/tp\\_r\\_e/tp433\\_crc\\_e.htm](http://www.wto.org/english/tratop_e/tp_r_e/tp433_crc_e.htm)> accessed 31 March 2021; Christiane Bou Khater, 'Intellectual Property Rights in the Light of the Saudi Arabia's Vision 2030' (2018) 4 *International Journal of Law* 154; Jennifer Urban, 'The Struggle for Middle Eastern Nations to Join the World Trade Organization' (*Social Science Research Network*, 2016) 1 25–26 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2400765](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400765)> accessed 31 March 2021; Afida Mastura Muhammad Arif, 'An Analysis of Copyright Protection in Saudi Arabia' (2014) 56 *International Journal of Law and Management* 38; Nadia Shehzad, 'Developing Intellectual Property Regimes in the Gulf: Utilising Intellectual Property for Positive Economic Growth' (2012) 2 *World Journal of Social Sciences* 231; Malik R Dahlan and Hani Zedan, 'Saudi Arabia: Royal Succession Reforms, Judicial Reforms, SAGIA Economic Cities Initiative, and WTO Accession' (2008) 14 *Yearbook of Islamic and Middle Eastern Law* 339; Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (OUP 2018) 404; David Price, *The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates* (Routledge 2012) xi.

<sup>140</sup> Urban (n 139) 26.

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evaluation of the extent to which an international agreement has been implemented to an examination of a state's domestic legislation and context.<sup>141</sup> Those essential measures that an individual state adopts to align its domestic legislation with its international legal agreements are more frequently described here as *implementation*.<sup>142</sup> Others such as Webster have referred to such measures as 'paper compliance'.<sup>143</sup>

By contrast, *compliance* as used in this thesis refers mainly to 'whether countries in fact adhere to the provisions of the accord and to the implementing measures that they have instituted'.<sup>144</sup> It should be noted from the outset, however, that the theories examined in this study have defined the factors which influence compliance from a variety of angles.<sup>145</sup> Therefore, even with a clearer definition of the concept of compliance, a fundamental theoretical issue remains to be addressed.

The term *effectiveness* has also been used in the model adopted in this study.<sup>146</sup> However, assessing the effectiveness of the TRIPS agreement in the context of the KSA falls outside the scope of this thesis. Legal scholars can judge the effectiveness of an international legal agreement within a compliant member state by observing two standards.<sup>147</sup> The first is whether the state's compliance with that accord contributes to achieving the stated objectives set out in the agreement, such as reducing distortions and impediments to international trade, in the case of TRIPS.<sup>148</sup> The second is whether its compliance helps to address the behaviour that the agreement was devised to define and tackle, such as IP rights infringements in the case of TRIPS.<sup>149</sup>

Given that a premise of this thesis is that the KSA has implemented TRIPS but there remains some

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<sup>141</sup> Harold Karan Jacobson and Edith Brown Weiss, 'A Framework for Analysis' in Edith Brown Weiss and Harold Karan Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 2000) 4–6.

<sup>142</sup> *ibid* 4.

<sup>143</sup> Timothy Webster, 'Paper Compliance: How China Implements WTO Decisions' (2014) 35 *Michigan Journal of International Law* 525, 533–535; Thomas, *Assessing Intellectual Property Compliance in Contemporary China* (n 55) 26.

<sup>144</sup> Jacobson and Weiss (n 63) 4.

<sup>145</sup> See Chapter 6 of this thesis.

<sup>146</sup> Jacobson and Weiss (n 63) 5.

<sup>147</sup> *ibid*.

<sup>148</sup> Jacobson and Weiss's model supports this view; Jacobson and Weiss (n 63) 5. See also WTO, 'Uruguay Round Agreement: TRIPS, Preamble' <[www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_02\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_02_e.htm)> accessed 31 March 2021.

<sup>149</sup> Jacobson and Weiss's model supports this view. Jacobson and Weiss (n 63) 5. See also TRIPS pt III, s 1 (General Obligations), art 41. WTO, 'Part III - Enforcement of Intellectual Property Rights' <[www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_05\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm)> accessed 31 March 2021.

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uncertainty about its compliance, it would be premature to investigate the effectiveness of TRIPS in the Kingdom without first assessing the state's compliance therewith. Consequently, this thesis will focus specifically on matters relating to the KSA's compliance with TRIPS by adopting a more comprehensive model of compliance.

### **1.6 Thesis Structure**

Following this introductory chapter, the argument in this thesis will proceed in two parts. In Part 1 (Chapters 2-4), the author will review the current literature that explores compliance. This will dispel some ongoing confusion with regard to the issue of implementation. In this part of the thesis, the author will introduce the case study of Saudi Arabia and its compliance with international law. This will serve to highlight some of the specific issues that must be taken into account, as well as some of the assumptions regarding compliance that underpin the work of other commentators and that need to be challenged (in relation to Sharia, for example). In Part 2 (Chapters 5-7), the author seeks to correct the blind spots that have emerged in the current ways in which compliance is determined by foregrounding critical international legal literature. Some aspects of this literature, whilst not engaging directly with compliance, are useful for understanding the barriers to compliance and relating these to the structure of international law more generally. From this literature and the tradition of legal thinking, one learns to appreciate that beyond the positivist approach to compliance, international relations must be centred. This leads to both a richer and more realistic approach to compliance. Again, this literature will be tested in the context of Saudi Arabia in particular.

The specific focus of each chapter is as follows. Chapter 2 examines the problems related to, and states' experience of, implementing and complying with the international legal obligations to which they have consented. In addition to establishing the mechanisms by which all individual states are governed when complying with international legal agreements, Chapter 2 seeks to delineate the assessment criteria by which they are measured in order to determine whether the binary approach is even feasible. It also seeks to establish whether the issue of states' compliance is a problem exclusively for the KSA or it is a global concern. Chapter 3 considers compliance issues related to membership in the WTO specifically. Critically, the chapter explains the variation in compliance with the WTO and other international organisations, establishes the normative practices governing the degree of compliance by sovereign nation-states, and begins to build the

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case as to why the binary approach to compliance should be challenged. Chapter 4 narrows the focus further to the KSA's implementation of and compliance with its international legal obligations, highlighting the various factors that are particular to the Kingdom from the standpoints of legal governance and philosophy and thereby demonstrating the difficulty of applying the same criteria to all nations when investigating compliance behaviour. Chapter 5 highlights some of the most important advantages and disadvantages of the disciplines from which the major theoretical formulations of compliance have merged. This chapter also seeks to investigate the need for alternative models, ones which are more flexible and inclusive of nation-states which seek to be compliant but which operate under different models of leadership. Chapter 6 applies the relevant theories to states' compliance, with particular reference to the KSA's compliance with TRIPS. This chapter also establishes how the Kingdom's unique position frustrates existing models due, for example, to its governing system of Sharia, which exerts an influence on compliance that cannot be ignored. Chapter 7 builds on and deepens this discussion by analysing the compliance factors identified in the more inclusive model developed by Jacobson and Weiss. As well as demonstrating why this model is the most appropriate of all existing models, the chapter suggests that, on the evidence from the KSA case study, a sliding scale model provides a more balanced, comprehensive and fairer tool for measuring compliance. This thesis concludes with a summary of the most salient points raised in the preceding chapters, some of the contributions to existing scholarship on compliance, and recommendations for further research (Chapter 8).

**PART I: THE COMPLEXITY OF COMPLIANCE: A CRITICAL  
REVIEW OF CURRENT INVESTIGATIONS CONCERNING  
STATES' COMPLIANCE WITH INTERNATIONAL LAW**

## **Chapter 2: Problems Affecting States' Compliance with their International Legal Obligations**

### **2.1 Introduction**

The aims of Part I of this thesis are threefold. First, it seeks to demonstrate that compliance is not problematic only for the Kingdom of Saudi Arabia (hereinafter “the KSA” or “the Kingdom”) or only for the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter “TRIPS”); rather, it is a global concern that must be carefully addressed. Secondly, Part I aims to demonstrate that current theories of compliance do not capture all the factors which contribute to the various problems affecting states' compliance with their international legal obligations. The third aim is to determine whether any of the studies reviewed below offers an appropriate theoretical approach through which to facilitate a better understanding of the factors that influence the KSA's compliance with the TRIPS Agreement, and if so, to what extent.

Towards these ends, the author conducted a critical review of currently available studies on states' compliance with their international legal obligations. This review examined several aspects of this body of literature, including (1) the various methods used to investigate compliance; (2) the conclusions reached; (3) the type of factors or compliance-related problems considered; and (4) the applicability of the approaches taken in these studies to the current case study of the KSA's compliance with TRIPS. Accordingly, data regarding the legal obligations associated with international law have been drawn from a wide range of contexts.

There is one further comment to make before proceeding. Originally, this thesis was not designed as a comparative study as its primary purpose is to examine the case study of the KSA's compliance with the TRIPS Agreement. More specifically, its major preoccupation is to develop a comprehensive understanding of what motivates the KSA to comply or otherwise with the commitments it has undertaken by virtue of ratifying and implementing TRIPS. However, the KSA is but one of many countries that face problems in complying with various international legal obligations. Therefore, understanding compliance is relevant not only for the KSA but for all states involved in international legal agreements



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<sup>1</sup> because compliance-related problems threaten the very foundations of international law.<sup>2</sup> In other words, full compliance helps to validate treaties and the systems of rules and regulations of which they are a part.<sup>3</sup> In addition, compliance by Member States following implementation of the legal obligations covered by the international agreements to which they have acceded indicates their level of commitment to these agreements.<sup>4</sup>

Two types of research fall mainly outside the scope of Part I of this thesis, which includes this chapter. The first are those studies that develop theoretical questions or offer more comprehensive models (e.g., hybrid or mixed models, which combine theories emerging from the legal academy with those emerging from the international relations academy) that postulate the reasons for states' compliance.<sup>5</sup> Not only are there relatively few of these works, but they are mostly theoretical in nature or tend to complement relevant theories. With one exception, these works will be discussed in Part II of this thesis.

The second type of research excluded from Part I comprises the many other studies that, like this thesis, are concerned with the compliance of individual states with their legal obligations. There are two reasons for excluding this type of study. First, studies conducted on implementation and compliance, although generally narrow in scope, are so numerous as to make their inclusion impracticable. Second, even if it were possible to include all available studies on compliance in one thesis, some of these would be excluded to avoid repetition of points already made. For these reasons, Part I will focus primarily on studies that serve the three aims stated above.

### **2.2 Compliance Problems: A Review of Cases from Around the World**

This thesis engages primarily with the question of what theoretical approach is most appropriate to facilitate better understanding of the factors that influence the KSA's compliance with TRIPS. The previous chapter established the key elements which inform the general framework of the thesis, and which thereby serve to answer this vital question. Rather than present a critical comparative review of states' compliance with IP issues or specific types of agreements, the primary goal of this chapter is to analyse the inherent problem of compliance

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<sup>1</sup> See Section 1.1 of this thesis.

<sup>2</sup> See, for example, Andrew T Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823, 1826.

<sup>3</sup> See, for example, Chiara Giorgetti, 'Why Should International Law Be Concerned about State Failure' (2010) 16 *ILSA Journal of International and Comparative Law* 469.

<sup>4</sup> *ibid.*

<sup>5</sup> For further details, see Part II of this thesis.

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per se with various international legal obligations. Towards this end, it sets out to investigate the problem of states' non-compliance in general with the international legal obligations to which they have consented, with the intention of understanding the methods used in compliance studies, the conclusions reached and the compliance-related factors considered. It will then be possible to assess the approaches taken in these cases in terms of their applicability to the current study of the KSA's compliance with TRIPS, leading to a deeper understanding of KSA's compliance and/or non-compliance with the Agreement in subsequent chapters.

### **2.2.1 Australia's compliance with the Refugee Convention**

The issue of compliance with international conventions and obligations, and particularly with multilateral agreements similar to TRIPS, is a global concern. For example, Archbold undertook a major study to determine the extent of Australia's compliance with its legal commitments under the Refugee Convention.<sup>6</sup> Citing key statistics and experts' reports, she observed that some actions taken against refugees and asylum seekers were incompatible with Article 31 of the Convention,<sup>7</sup> which prohibits arbitrary detention and requires provision of economic and social rights.<sup>8</sup>

In her seminal article, Archbold concluded that a new framework should be developed to provide a more explicit agreement to guarantee Australian compliance with the international legal treaties it has signed by engaging a third party, in the form of a state that accepts all human rights treaties.<sup>9</sup> That is, Archbold offers a solution to Australia's compliance problems by proposing it receive assistance from other countries with the domestic capacity to help it comply with the Refugee Convention.<sup>10</sup> Moreover, Archbold proposed possible solutions to the problem of state non-compliance, calling upon members to rethink the effectiveness of international agreements.<sup>11</sup> Despite the usefulness of the methods employed in her examination, from the perspective of this thesis, a weakness of Archbold's study is its failure to provide an accurate definition of compliance, or to design an appropriate mechanism to more

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<sup>6</sup> Lisa Jane Archbold, 'Offshore Processing of Asylum Seekers - Is Australia Complying with Its International Legal Obligations?' (2015) 15 QUT Law Review 137.

<sup>7</sup> *ibid.* Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Convention Relating to the Status of Refugees: Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons Convened under General Assembly Resolution 429 (V) of 14 December 1950' <[www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.23\\_convention%20refugees.pdf](http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.23_convention%20refugees.pdf)> accessed 25 July 2021.

<sup>8</sup> Archbold (n 6).

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.* 156.

<sup>11</sup> *ibid.*

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comprehensively investigate states' compliance with their international statutory obligations. Moreover, her study does not offer a suitable rationale for why individual states do or do not comply with their international statutory obligations. Ultimately, the study offers no explanation of the drivers of past compliance, and no predictors of future compliance.

### **2.2.2 The Common European Asylum System: Compliance problems among European Union member states**

In 2018, Schmälter carried out a systematic and empirical analytical study to explore the reaction of the European Commission to non-compliance with the Common European Asylum System (hereinafter "CEAS") by European Union (hereinafter "EU") Member States.<sup>12</sup> According to Schmälter, while the fundamental responsibility for compliance lies with the Member States themselves, the Commission, as 'guardian of the agreements', should help them to achieve it.<sup>13</sup> Nevertheless, many human rights organisations not only have increasingly condemned EU Member States for breaching the commitments to which they consented under the CEAS, but have accused the EU itself of turning a blind eye to their non-compliance.<sup>14</sup> This serious accusation, as Schmälter has called it, drove her to focus specifically on the European Commission when addressing EU Member States' compliance with the CEAS.<sup>15</sup>

Accordingly, Schmälter systematically examined the instruments the European Commission employs to enforce states' compliance with their legal obligations under the CEAS. In her study on the Commission's enforcement strategies, Schmälter scrutinised and evaluated the following five instruments: (1) 'providing financial assistance to states'; (2) 'entrusting EU agencies and networks to provide assistance in implementation and compliance'; (3) 'initiating infringement proceedings'; (4) 'naming and publicly shaming of non-compliers'; and (5) 'persuasion of governments of the normative legitimacy of EU asylum policies'.<sup>16</sup> Her study revealed that, although the European Commission has made significant efforts to apply the first two of these instruments, it hesitates to use the other three.<sup>17</sup> Schmälter's analysis also showed that although the Commission has made some attempt to employ infringement proceedings and

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<sup>12</sup> Julia Schmälter, 'A European Response to Non-Compliance: The Commission's Enforcement Efforts and the Common European Asylum System' (2018) 41 *West European Politics* 1330.

<sup>13</sup> *ibid.* See also Treaty on the Functioning of the European Union (TFEU) art 258 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E>> accessed 8 May 2021.

<sup>14</sup> Schmälter (n 12). See also, for example, Amnesty International, 'The Human Cost of Fortress Europe: Human Rights Violations against Migrants and Refugees at Europe's Borders' (Amnesty International 2014) 29.

<sup>15</sup> Schmälter (n 12).

<sup>16</sup> *ibid.*

<sup>17</sup> *ibid.*

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publicly criticise compliance laggards (such as Greece and Italy), these endeavours remain insufficient and somewhat tentative, with the result that these two instruments have rarely been utilised.<sup>18</sup>

Interestingly, despite its exploratory nature and focus on the European Commission's response to non-compliant states in the context of the CEAS, Schmälter's study underscores the importance of identifying and understanding the true reasons for the failure of these states in relation to compliance prior to investigating how and how effectively compliance is enforced:

Future analyses should be substantiated by applying a two-step approach: first identifying the concrete reasons for non-compliance, and only in a second step scrutinising the Commission's enforcement practices. This would more clearly demonstrate for which member state the Commission uses which instrument and, thereby, unambiguously clarify whether the Commission uses the right instrument for the right purpose.<sup>19</sup>

While this suggestion is consistent with the premise of this study (namely, that the reasons for an individual state's compliance are significant), this author would challenge the second step in Schmälter's proposed approach. On the one hand, if Schmälter's aim was to optimise the performance of the European Commission as an enforcer, or if the solution to the problem of states' non-compliance with the CEAS were confined solely to the Commission's enforcement practices, then the above-recommended two-step method would be acceptable, since the aim here is quite different. On the other hand, it is possible that a solution to the problem of non-compliance with the CEAS by EU Member States lies deeper than the use of the five instruments Schmälter identified. Determining whether or not this is the case, however, remains subject to the outcome of the first step. Therefore, it is unlikely that one could make accurate inferences or predict future solutions and developments without first developing a more comprehensive understanding of the actual reasons influencing individual states' compliance, or otherwise, with their legal obligations. Thus, while scrutinising the enforcement practices the European Commission may be appropriate if one's objective is to optimise its performance as an enforcer (and assuming effective enforcement was all that was needed to ensure compliance), for the purpose of conceptualising accurate and comprehensive solutions to the problem of states' non-compliance, step two in Schmälter's proposed approach seems

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<sup>18</sup> *ibid.*

<sup>19</sup> *ibid* 1347.

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premature.

### 2.2.3 Achieving compliance through force or coercion: Using the Generalized System of Preferences to resolve international investment disputes

More recently, Rosenberg and Fox assessed the extent of states' compliance with their international legal obligations in relation to resolving international investment disputes, using Argentina, Ecuador, and the Russian Federation as case studies.<sup>20</sup> A major aim of their study was to outline a compelling mechanism to force countries involved in such disputes to comply with their international legal obligations.<sup>21</sup> The authors concluded that the likelihood of compliance could be increased by using preferential trade programs as a deterrent device, in other words, by suspending the trade preference advantages of non-compliant states.<sup>22</sup>

The main reason why Rosenberg and Fox specifically chose the Generalized System of Preferences (hereinafter "GSP") as a retaliatory mechanism for non-compliance is that developing countries such as Argentina, Ecuador and the Russian Federation are permitted to benefit from the program provided they 'uphold certain statutory standards to maintain their eligibility'.<sup>23</sup> Hence, a salient feature of the GSP is its unilateral and non-reciprocal nature, which enables some developing countries to obtain many advantages, such as preferential prices and lower or no import tariffs, that developed countries do not receive.<sup>24</sup> Using this type of deterrent, the United States of America (hereinafter "US") and the EU have been able to force these countries to comply with their international legal commitments.<sup>25</sup> Rosenberg and Fox therefore conclude that using such programs as deterrent devices can be a critical factor in securing an individual state's compliance with its international statutory obligations.<sup>26</sup> Despite the advantages of Rosenberg and Fox's work, including the diversity of the countries selected for the case study, their work did not comprehensively explain those factors that influence those countries' compliance. Moreover, Rosenberg and Fox's proposed an approach that could be

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<sup>20</sup> These case studies were chosen for their relevance at the time of publication. Charles B Rosenberg and Peter D Fox, 'Leveraging the Trade Preference Program to Secure a State's Compliance with International Law Obligations' (2013) 14 *Journal of World Investment & Trade* 1009.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.* For further details on beneficiary states, see, for example, United Nations Conference on Trade and Development (UNCTAD), 'Generalized System of Preferences List of Beneficiaries' <<https://unctad.org/webflyer/gsp-list-beneficiaries>> accessed 14 May 2021.

<sup>24</sup> *ibid.*; Rosenberg and Fox (n 20). For more information about this decision, see WTO, 'Legal Texts: Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries' <[www.wto.org/english/docs\\_e/legal\\_e/enabling1979\\_e.htm](http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm)> accessed 14 May 2021.

<sup>25</sup> Rosenberg and Fox (n 20).

<sup>26</sup> *ibid.*

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subject to the same criticism as that directed towards Schmälter's approach above, which seems premature.

### 2.2.4 Côte d'Ivoire's compliance with the International Criminal Court: Searching for more efficient mechanisms to deter non-compliance

To better understand the mechanism of deterrence and its effect on securing states' compliance in the context of the International Criminal Court (hereinafter "ICC"), Bocchese investigated the case of Côte d'Ivoire.<sup>27</sup> Specifically, his work examined 'the circumstances under which the threat of ICC prosecution has proved successful in deterring the commission or escalation of mass atrocities'.<sup>28</sup> In the conclusion to his study of the internal situation in Côte d'Ivoire between 2004 and 2011, Bocchese pointed out that originally, the mere threat of ICC prosecution had rarely, if ever, demonstrated its usefulness; nevertheless, he found that successful deterrence relied exclusively on two crucial causal variables: (i) 'the likelihood of arrest or prosecution before the ICC' and (ii) 'leadership survival'.<sup>29</sup>

The first variable, the probability of arrest or punishment, is principally focused on the credibility of the threat (i.e., is primarily concerned with the enforcer).<sup>30</sup> Bocchese observed that to enhance the credibility of the threat requires the support of significant powers who must demonstrate a genuine willingness to bear the costs and consequences of enforcement, and in particular, to face up to the potential political and economic challenges associated with it.<sup>31</sup> This alone is not a sufficient deterrent, however; equal attention must be paid to the second variable, which is primarily concerned with those for whom enforcement poses the greatest threat – in other words, with the expectations of states' leaders about their ability to remain in power in the short term when they are facing a very credible threat of punishment by the ICC.<sup>32</sup> Bocchese found that the threat of ICC prosecution was most successful when leaders had a positive outlook ((i.e., were optimistic about their chances of remaining in power), because then they had something of value to lose.<sup>33</sup> By contrast, when a leaders did not expect to survive politically (i.e., had a negative outlook), the threat of punishment typically triggered what is known in the legal literature as the 'Peace vs Justice' conflict, in which, rather than prevent

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<sup>27</sup> Marco Bocchese, 'Coercing Compliance with the ICC: Empirical Assessment and Theoretical Implications' (2016) 24 Michigan State International Law Review 357.

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

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noncompliance, the presence of international accountability mechanisms can impede conflict resolution.<sup>34</sup> In these circumstances, avoiding punishment through compliance is often less important, because the threatened leader may see no option but to resist; moreover, they may assume that they have nothing to lose from perpetrating violence in future.<sup>35</sup>

Although they have several significant advantages over more general studies of compliance, both Rosenberg and Fox's study and Bocchese's are flawed in some other respects, particularly in relation to the questions posed in this thesis. For example, while Rosenberg and Fox have established a critical factor that can force states to comply, their work does not offer a comprehensive explanation for what brings countries into compliance or otherwise, concentrating instead on specific aspects related to pressurising non-compliant states. Furthermore, they do not discuss the reasons for the failure of Argentina, Ecuador and the Russian Federation to comply in depth; rather, they simply reference petitions and lawsuits against the three states as evidence of non-compliance. Therefore, while Rosenberg and Fox's work may be useful for scholars pursuing retaliation or deterrence mechanisms and their effects on securing the compliance of individual states with their international legal obligations, it does not offer appropriate analytical tools through which the questions posed in this thesis can be answered satisfactorily.

Bocchese's work is superior in two salient ways. First, it confirms the observation noted in Subsection 1.3.3 that any investigation into the compliance of individual states will be highly subjective.<sup>36</sup> Moreover, he demonstrated that the factors that contribute to whether a state achieves or fails to achieve compliance vary not only across case studies but also within individual case studies.<sup>37</sup> Despite the apparent challenges inherent in the objective investigation of compliance, however, Bocchese has found those variations tremendously helpful in explaining his argument that more than one variable or factor must be considered to successfully address the problem of states' non-compliance with the ICC through deterrence.<sup>38</sup>

The second attribute of Bocchese's work which distinguishes it from that of Rosenberg and Fox is that it not only establishes deterrence-based enforcement as a critical factor, but also

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<sup>34</sup> *ibid.* For further details related to the ongoing 'peace versus justice' debate in the context of states' compliance with the ICC, see, for example, James F Alexander, 'The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact' (2009) 54 Villanova Law Review 1.

<sup>35</sup> Bocchese (n 27).

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

<sup>38</sup> *ibid.*

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pinpoints when and how that mechanism can be effectively utilised.<sup>39</sup> Bocchese's observations are based on extensive analysis of numerous cases that occurred between 2004 and 2011.<sup>40</sup> Despite these advantages, Bocchese's investigation is subject to the same criticisms that apply to Rosenberg and Fox. More specifically and most importantly, his explanation for the compliance of individual states with international law is severely limited and incomplete. Therefore, it cannot be included as a decisive factor to address the problem investigated in the current study.

Another deficiency of both these studies is the considerable unlikelihood that their outcomes can be generalised to all other cases. In other words, the primary objective of both works is to explain the role of deterrence mechanisms in forcing states to comply with their international legal obligations. While the use of retaliation or deterrence mechanisms may be perfectly acceptable and justifiable in some contexts and may even in some cases be the only logical solution to the problem of a state's non-compliance with international law, this approach may be impracticable or invalid in other contexts and may even cause severe adverse consequences which are inconsistent with the intended outcomes of the global legal regime.

### **2.2.5 Compliance problems in Africa, Asia, Latin America and the Pacific**

The two-step approach proposed by Schmälter highlights the importance of expanding our understanding of what motivates nations to comply or not to comply with their international legal obligations. This point has been emphasised by a study carried out by Merry to examine the effects of colonialism on the law, with the aim of developing both the theory of law and colonialism and the theory of law and domination.<sup>41</sup> Using states in Africa, Asia, Latin America, and the Pacific as examples, Merry observed that the 'dual legal system: one for the colonised peoples and one for the colonisers' engendered by colonialism creates numerous obstacles to positive compliance, because de-colonisation necessitates the development of new legal and political systems, which is made additionally challenging by the fact that some colonial systems have endured for decades.<sup>42</sup> Moreover, although the formal colonial era ended some time ago in many cases, the majority of ex-colonial states still suffer from its legacy, leading their governments to create an integrated legal system designed to overcome the duality

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<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

<sup>41</sup> Sally Engle Merry, 'Review Essay: Law and Colonialism' (1991) 25 *Law & Society Review* 889.

<sup>42</sup> *ibid.* 890.



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Merry described.<sup>43</sup> Many post-colonial states seek ‘to resurrect and implement the remnants of indigenous, precolonial law’, which could pose additional challenges to compliance with international laws and norms.<sup>44</sup>

Although it is not focused principally on compliance, another essential insight from Merry’s study is that the more extensive the model we use (in this case, that of postcolonialism), the more we understand about the factors affecting compliance. The better we understand these factors, the more able legal scholars are to offer appropriate policy-related or strategic advice regarding the development of the global legal regime.<sup>45</sup> In other words, Merry’s work highlights the impact of historical and cultural factors on states’ compliance.<sup>46</sup> By including factors such as these, states’ compliance behaviour can be better understood and influential factors more readily perceived, thereby contributing to a fuller understanding of the high degree of subjectivity associated with the issue of compliance, and further embedding international law.<sup>47</sup>

The evidence presented by Merry suggests that the historical developments that shape the legal norms of a state have an actual effect on its current compliance.<sup>48</sup> It follows that any analysis of compliance should take account of the historical, cultural, religious, social, and political contexts of the state in question. Placing the issue within a very narrow legal framework prevents researchers interested in international law from developing a full, accurate understanding of the reasons why individual states comply with their legal obligations in some instances and disobey in others.<sup>49</sup> Legal scholars therefore would benefit from acknowledging those factors that contribute to the subjectivity of their analysis.

In this regard, many legal scholars support the argument that the theoretical framework through which compliance factors are conceptualised must be expanded, although the analytical tools they offer are not suitable for this study, and they do not demonstrate in detail how to do so. For example, Griffiths has suggested a different interpretation of the relationship between legal systems and the cultures and societies in which they operate, ‘a conception in which legal rules

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<sup>43</sup> Merry (n 41).

<sup>44</sup> *ibid.*

<sup>45</sup> This point has also been suggested by Guzman, ‘A Compliance-Based Theory of International Law’ (n 2) 1823.

<sup>46</sup> Merry (n 41).

<sup>47</sup> Abbott has suggested the same holds true for legal rules and institutions in general. Kenneth W Abbott, ‘International Relations Theory, International Law, and the Regime Governing Atrocities in Internatal Conflicts’ (2004) 36 *Studies in Transnational Legal Policy* 127.

<sup>48</sup> Merry (n 41). See Chapter 7 of this thesis for a more comprehensive analysis of compliance factors.

<sup>49</sup> See also Guzman, ‘A Compliance-Based Theory of International Law’ (n 2).

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no longer stand in an essentially causal relation to those phenomena, but are rather seen as an inseparable aspect of them'.<sup>50</sup> In line with this view, some legal sociologists including Griffiths have interpreted the concept of law from a perspective which considers legal regulations as independent variables when analysing social phenomena.<sup>51</sup> This approach may help to take the investigation into individual states' compliance with their international legal obligations to another level.

Another supporter of expanding the theoretical framework used to conceptualise the factors affecting compliance is Holmes,<sup>52</sup> one of the most well-known American judges of the 20th century,<sup>53</sup> who famously stated that 'the law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics'.<sup>54</sup> Therefore, 'in order to know what [the law] is, we must know what it has been, and what it tends to become'.<sup>55</sup> Accordingly, Holmes expands on Griffiths' view that legal systems and the culture and society in which they operate are necessarily related, emphasising the significance of complex phenomena such as historical, social and political circumstances, which can play a vital role in making the law powerful and compelling.<sup>56</sup> By considering these factors, it may be possible to develop a different understanding of why states do and do not comply, thereby explaining the fissure between implementation and compliance, and helping to make compliance more achievable.

Nevertheless, despite their valuable observations, neither Holmes nor Griffiths provides appropriate analytical tools through which the questions of this thesis can be answered satisfactorily.

### **2.2.6 Compliance by the US and Canada with international environmental law (IEL)**

Hall's study of the role of citizens in the US and Canada in securing the compliance of these states with international environmental law (hereinafter "IEL") provides another context for analysis.<sup>57</sup> Hall gives two main reasons why he chose to focus primarily on citizens as a key

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<sup>50</sup> John Griffiths, 'Is Law Important?' (1979) 54 *New York University Law Review* 339.

<sup>51</sup> *ibid.*

<sup>52</sup> Oliver Wendell Holmes Jr and Oliver Wendell Holmes Sr (eds), *The Common Law* (Harvard UP 2009).

<sup>53</sup> Alfred Knight (ed), *The Wizards of Washington: Triumphs and Travesties of the United States Supreme Court* (Universe 2006) 47.

<sup>54</sup> Holmes and Holmes (n 52) xxiv.

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid.*; Holmes and Holmes (n 52).

<sup>57</sup> Noah D Hall, 'The Evolving Role of Citizens in United States-Canadian International Environmental Law Compliance' (2007) 24 *Pace Environmental Law Review* 131.

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factor in addressing states' non-compliance with international environmental agreements.<sup>58</sup> First, he contends that relying exclusively on national governments to tackle the different challenges associated with international environmental coherence has proved insufficient.<sup>59</sup> According to Hall, this inadequacy stems from the apparent reluctance of national governments to raise environmental claims against other states, whether for fear of retaliation, or because they have committed the same type of violation in the past.<sup>60</sup> Second, Hall notes that in the context of the agreements which he has selected for investigation, citizens (by which he means 'individual persons, non-governmental organisations, and sub-national governments')<sup>61</sup> play a significant role in assuring their countries' compliance with IEL.<sup>62</sup>

Accordingly, Hall provides a robust alternative approach that relies on citizens to raise the level of compliance by the US and Canada with the Great Lakes Water Quality Agreement (GLWQA),<sup>63</sup> the Air Quality Agreement (AQA),<sup>64</sup> and the North American Agreement on Environmental Cooperation (NAAEC).<sup>65</sup> While noting that there are several ways in which citizens can contribute more significantly to ensuring compliance, Hall's work focuses on the use of a country's domestic environmental law, when available, to sue violator companies.<sup>66</sup> In his recommendations for future solutions, Hall highlights other ways to harness the potential of citizens to influence states' compliance, such as raising their awareness of international environmental issues so that they become more engaged and therefore more able to influence government policy and behaviour.<sup>67</sup> However, the current lack of empirical evidence makes it difficult to measure the extent or impact of citizen influence on this issue in the US and Canada. In fact, Hall considers these methods to be merely supportive rather than decisive factors in

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<sup>58</sup> *ibid* 131–136.

<sup>59</sup> *ibid* 132.

<sup>60</sup> *ibid*.

<sup>61</sup> *ibid* 135.

<sup>62</sup> *ibid*.

<sup>63</sup> For further information about the agreement, see, for example, United States Environmental Protection Agency (EPA), 'Great Lakes Water Quality Agreement (GLWQA)' <[www.epa.gov/glwqa](http://www.epa.gov/glwqa)> accessed 25 August 2019; ArcGIS, 'A Story Map: Great Lakes Water Quality Agreement (GLWQA)' <[www.arcgis.com/apps/MapJournal/index.html?appid=468390316cb14a9788b226c22dad4b0d](http://www.arcgis.com/apps/MapJournal/index.html?appid=468390316cb14a9788b226c22dad4b0d)> accessed 25 August 2019.

<sup>64</sup> For more information about the agreement, see, for example, Government of Canada, 'Canada-United States Air Quality Agreement: Overview' <[www.canada.ca/en/environment-climate-change/services/air-pollution/issues/transboundary/canada-united-states-air-quality-agreement-overview.html](http://www.canada.ca/en/environment-climate-change/services/air-pollution/issues/transboundary/canada-united-states-air-quality-agreement-overview.html)> accessed 25 August 2019.

<sup>65</sup> Hall (n 57) 135. For more information about NAAEC, see, for example, CEC Secretariat, 'North American Agreement on Environmental Cooperation: Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, 1993' <[www.cec.org/about-us/NAAEC](http://www.cec.org/about-us/NAAEC)> accessed 25 August 2019.

<sup>66</sup> Hall (n 57) 133, 134, 160.

<sup>67</sup> *ibid* 160.

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securing the compliance of these states.<sup>68</sup>

Hall's work has both advantages and disadvantages when applied to the current study of the KSA and TRIPS. Two of the most salient benefits are worth mentioning here. The first is the very high degree of precision with which Hall defines the terms "citizen" and "compliance". For example, in addition to defining citizens as 'persons, organizations, and governments that are not a party to traditional formal international treaties and agreements under the Westphalian tradition',<sup>69</sup> Hall's definition of "compliance" clearly distinguishes it from other overlapping concepts, particularly "implementation".<sup>70</sup> Furthermore, not only does Hall share the view of this researcher that it is difficult to define the term compliance in the field of law, but the definition he adopts is almost identical to the one which this study employs.<sup>71</sup>

The second advantage of Hall's work relates to its qualitative contribution in analysing one of the factors affecting compliance. Most theories postulate these factors through a specific lens, focusing on what could be described as formal factors, such as statesmen, laws and institutions.<sup>72</sup> By contrast, Hall's study explains how citizens can play a major role in addressing the problem of the US and Canada's non-compliance with the GLWQA, the AQA and the NAAEC.<sup>73</sup> In other words, while Hall's study is not comprehensive, it highlights a factor that has not been extensively studied in the context of the compliance theories that will be discussed in Chapter 6. Hall's work, therefore, may support the argument of this thesis that existing compliance theory is inadequate for the study of the KSA's compliance with TRIPS.

That said, Hall's approach has some disadvantages that make it inapplicable to the current

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<sup>68</sup> *ibid.*

<sup>69</sup> *ibid* 135.

<sup>70</sup> 'Compliance focuses not only on whether implementing measures are in effect, but also on whether there is compliance with the implementing actions. Compliance also measures the degree to which the actors whose behavior is targeted by the agreement, whether they be local governmental units, corporations, organizations, or individuals, conform to the implementing measures and obligations. The concept is much broader than solely that of enforcement, because it draws attention to ways of bringing countries into compliance with their obligations, not just on how to handle violations after they occur.' *ibid* 136, citing Edith Brown Weiss. See also Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1999) 32 (5) *University of Richmond Law Review* 1555, 1563.

<sup>71</sup> Hall (n 57) 136.

<sup>72</sup> These theories and the disciplines from which they have emerged are discussed in Chapters 5 and 6 of this thesis. For more information, see Marcus PL Gustafsson, 'Compliance and Membership Value in International Economic Law' (2017) 48 *Georgetown Journal of International Law* 1201; Asher Alkoby, 'Theories of Compliance with International Law and Challenge of Cultural Difference' (2008) 4 *Journal of International Law and International Relations* 151; Kenneth W Abbott, 'Commentaries on Kenneth W Abbott, Modern International Relations Theory: A Prospectus for International Lawyers' (2000) 25 *Yale Journal of International Law* 273; Abbott (n 47).

<sup>73</sup> See Hall (n 57) 135.

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study. First, apart from their level of awareness, the degree to which citizens are allowed to participate in policymaking and in what form varies from one country to another. For example, whether it is possible for citizens to bring about compliance by states which are not representative democracies and do not operate as liberal governments is a matter of debate.<sup>74</sup> More specifically, because the KSA is not a liberal state, some argue that the Kingdom will deliver less than expected compliance because its citizens are unable to play a crucial role in encouraging its compliance with the global legal regime.<sup>75</sup> Considering the intrinsic contrast between citizens' role in the US and Canada and those in the KSA, the applicability of Hall's approach is at best uncertain.<sup>76</sup> Thus, this model may be invalid and ungeneralizable, particularly to the unique context of the KSA's compliance with TRIPS.

The second disadvantage of Hall's work is its lack of comprehensiveness. Without detracting from the essential importance of understanding the role of citizens in securing the compliance of their state with the international legal commitments to which it has agreed, the current thesis aspires to extend beyond identifying a single compliance factor. Even if the validity of Hall's approach and its applicability to the case of the KSA were not in doubt, its value would be sufficiently marred by its incompleteness. Revealing citizens to be a factor affecting compliance could contribute to a deeper understanding of their actual role in states' compliance with international law; equipped with this knowledge, the possibility of using citizens to raise the level of compliance in those states can then be considered. Even so, Hall's approach may be only partially applicable, if at all, to this study, as citizens cannot be the only factor influencing states' compliance with the global system, nor can it guarantee compliance. Consequently, despite the valuable insights his work has contributed, these two weaknesses prevent the adoption of Hall's approach in this research.

### 2.2.7 China's compliance with intellectual property rights

Although, as previously stated, the focus of the analysis presented in this chapter is not on works that seek to develop a more comprehensive model to explain the factors influencing the

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<sup>74</sup> See, for example, Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *The Handbook of International Relations* (SAGE Publications 2002) 547 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=347260](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=347260)>.

<sup>75</sup> This has been suggested by various scholars and theorists within the debate over the compliance of liberal and illiberal states with international law, including Slaughter, Keohane and Nye, Brown Weiss and Jacobson, Henkin, Doyle, Raustiala and Victor, and Checkel. Raustiala and Slaughter (n 74) 547–548.

<sup>76</sup> For further details on representing uncertainty in general, see, for example, Enrico Zio and Nicola Pedroni, 'Literature Review of Methods for Representing Uncertainty' (*Institut pour une Culture de Sécurité Industrielle*, 2013) 1 <[www.foncsi.org/en/publications/collections/industrial-safety-cahiers/literature-review-uncertainty-representation/CSI-uncertainty-representation.pdf](http://www.foncsi.org/en/publications/collections/industrial-safety-cahiers/literature-review-uncertainty-representation/CSI-uncertainty-representation.pdf)> accessed 7 September 2019.

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extent to which states comply with their international legal agreements, Thomas' study of China's compliance with IP rights protection applies such a model.<sup>77</sup> The purpose in discussing it here is to highlight the differences between this more inclusive approach and that of the studies examined previously.

Thomas' study examines China's intellectual property (hereinafter "IP") system following its accession to the World Trade Organisation (hereinafter "the WTO") and evaluates the factors influencing China's compliance behaviour.<sup>78</sup> One of the most critical advantages of Thomas's work is her use of a more comprehensive approach (the same approach used in this thesis) to explore the reasons for China's non-compliance with TRIPS. Thomas concludes by acknowledging that external pressure alone will not induce China to be fully compliant.<sup>79</sup> Rather, collaborative efforts will be needed to ensure the country is both willing and able to comply with TRIPS.<sup>80</sup>

In line with the central premise of this thesis, Thomas asserts that 'studies of compliance with international obligations have been too narrow in scope and that a more inclusive approach to relevant factors is necessary'.<sup>81</sup> This recommendation creates a unique opportunity for original scholarship such as this thesis, which adds at least two significant dimensions to the study of states' compliance with international law. First, it retests Thomas' model in a fundamentally different context by applying it to the case study of the KSA. Second, it underscores the importance of developing more comprehensive models to understand the reasons why individual states do or do not comply with their international legal agreements.

Despite its advantages, there are several problematic gaps in Thomas' work. Many of these arise from its focus on a case study which, as will be shown in Chapter 4, differs from that of the Kingdom in many ways. Thomas' seminal research concentrates almost exclusively on the background to the Chinese legal system, including historical transformation and reforms, the development of the Chinese IP system, and the factors affecting China's compliance with

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<sup>77</sup> Kristie Thomas, 'China's Post-WTO Intellectual Property System: Assessing Compliance with the TRIPS Agreement' (PhD thesis, University of Nottingham 2008). See also Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Macmillan 2017).

<sup>78</sup> Thomas, 'China's Post-WTO Intellectual Property System' (n 77); Thomas, *Assessing Intellectual Property Compliance in Contemporary China* (n 77).

<sup>79</sup> Thomas, 'China's Post-WTO Intellectual Property System' (n 77).

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.* ii.

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TRIPS.<sup>82</sup> While these elements are important, given that China is a member of the WTO and a party to international legal agreements, the legislative and political differences between China and the KSA limit the relevance of these factors for the current study. The jurisdictional context of the communist regime in China, for example, would have different implications for compliance than that of the Saudi legal system, which is based on Sharia.

Furthermore, although Thomas suggests that there is a high degree of subjectivity and variation associated with the issue of states' compliance with international law, she does not explain its source. Moreover, Thomas' study does not review in any depth other cases of compliance by individual states. By contrast, this thesis seeks not only to demonstrate that the concept of compliance varies from one agreement to another depending on the characteristics of the obligations they create, but to provide examples that illustrate the lack of a consensus on what constitutes a reasonable level of compliance internationally. The current study also endeavours to show that the subjective nature of the concept and the disparities in its application are more easily explained once a solid understanding of the factors influencing states' compliance has been established.

Equally importantly, this study argues that we should go beyond the lens of Sharia to explore what makes the KSA change its behaviour towards its commitments. As will be shown in Chapter 4, many previous scholarly works have attempted to understand the KSA's engagement with international law through the lens of Sharia using a purely doctrinal method. This may explain the increasing popularity of attributing compliance or non-compliance to the Sharia factor. However, this thesis argues that gaining a more comprehensive view would benefit legal scholars by deepening their understanding of other potential influences on the Kingdom's behaviour, thereby diminishing the attribution of its compliance behaviour to Sharia or the KSA's Islamic identity. Thus, while Thomas's study has inspired this study, it differs from hers in several key aspects, including its goals, research methods, selected case study, and scientific contribution.

That said, Thomas' study and this thesis do have two salient points in common, which this author has not observed in any other work that adopts a similarly comprehensive approach. The first is its focus on compliance with IP rights protection under TRIPS. To the best of the author's knowledge, Thomas is the only scholar to apply a more inclusive model to TRIPS, and to use

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<sup>82</sup> Thomas, 'China's Post-WTO Intellectual Property System' (n 77).

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this type of model in the context of the WTO. The second point of commonality between Thomas' and the current study is the selection of Jacobson and Weiss's model; this study incorporates the same factors, providing an interesting springboard for discussion. Thus, despite the vast differences in their goals and scientific contribution, the commonalities between Thomas's and the current study are valuable for comparative purposes.

### 2.3 Concluding Remarks

This chapter set out to examine the inherent problem of compliance per se alongside the general problem of states' non-compliance with the international legal obligations to which they have consented. In so doing, it is not concerned with a particular country or group of countries, or a specific international commitment. Rather, it considers a range of examples derived from studies conducted to investigate the factors affecting the compliance of individual states with their international legal obligations. On this basis, there are at least three observations that merit mention. Before outlining these observations, however, it is worth noting that the term *compliance* is subjective; as such, it has been defined, enacted, contested and justified differently by different states in different types of agreements. This may be due to the problematic nature of international law, which continues to be viewed as 'a product of Euro-Christian civilization and [which] was for many centuries a European law of nations'.<sup>83</sup> Importantly, 'its foundation as it is understood today lies firmly in the development of Western culture and political organization',<sup>84</sup> further complicating the definition, enactment and justification of (non)compliance around the world.

The first observation is that the various studies reviewed above support the assertion that the issue of states' compliance is a global concern, and not a problem exclusively for the KSA. Compliance-related problems in numerous individual states have been discussed in this chapter, including Côte d'Ivoire, Australia, Argentina, Ecuador, the Russian Federation, the US, Canada, and China. The number and variety of these examples reinforce the importance of understanding what motivates nations to adhere to or contravene their international legal obligations, which, as noted in Chapter 1, can help to enhance the consistency of international

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<sup>83</sup> Dawood Hamzah, *International Law and Muslim States: Saudi Arabia in Context* (Routledge 2021) 38; Dawood Adesola Hamzah, 'Impact of International Law on the Application of Islamic Law in Saudi Arabia' (PhD thesis, SOAS University of London 2015) 40; R Jennings and A Watts (eds), *Oppenheim's International Law* (vol 1, 9th edn, Longman 1992) 87–91.

<sup>84</sup> Hamzah, 'Impact of International Law on the Application of Islamic Law in Saudi Arabia' (n 83) 40; DJ Harris, *Cases and Materials on International Law* (6th edn, Sweet & Maxwell 2004) 12.



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law.<sup>85</sup> Furthermore, the problem of non-compliance is associated with a range of international agreements concerning a range of legal matters, including international human rights, IP rights, various fields related to global trade, environmental protection, and international crime, among others. The ubiquity of non-compliance creates problems for international law, as compliance substantiates the authority of treaties and of the systems of rules and regulations of which they are a part.<sup>86</sup> Compliance may also indicate the level of interest and commitment with which countries uphold such agreements.<sup>87</sup>

The second observation is that the roots of international law are beset by multiple problems which current theories of compliance cannot explain on their own. It follows that the causes of non-compliance can vary, and include the political, social, cultural, historical, geographical, administrative, and economic features of the states concerned, as well as their legal norms; this was shown in Thomas's study, which applied the same, more comprehensive approach used in this thesis to explore the reasons for China's non-compliance with TRIPS.<sup>88</sup> The variety of these causes reinforces the argument that current compliance theory is inadequate for a more comprehensive investigation into the KSA's compliance with TRIPS.

The discussion above indicates that the reasons why states do or do not comply cannot be explained by the factors postulated by these theories, most of which focus on formal factors, such as statesmen, laws, and institutions. Accordingly, the aims of this thesis would not be accomplished if the framework used to answer the questions explored herein was limited to those factors. Hence, a more comprehensive model of the factors that influence compliance is needed, one which complements the relevant theories and enables a deeper understanding of when and why nations follow international law.

Third, despite the many advantages of the studies analysed, none offers a suitable solution or satisfactory explanation through which the specific problem of the KSA's compliance with TRIPS can be addressed. There appear to be at least two primary reasons for this. First, some of these theories make no serious attempt to explain why a state complies with its agreed international legal obligations in some instances but not in others. Rather, they typically focus on specific aspects of the compliance issue, such as recognising the importance of states' compliance with their international legal obligations, acknowledging the importance of

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<sup>85</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 2) 1826.

<sup>86</sup> See, Giorgetti (n 3).

<sup>87</sup> *ibid.*

<sup>88</sup> Thomas, 'China's Post-WTO Intellectual Property System' (n 77).

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investigating the reasons for their compliance or non-compliance, highlighting the potentially severe implications of non-compliance, identifying areas of compliance or non-compliance, and devising and developing a range of strategies for preventing or reducing the likelihood of non-compliance.

As first steps towards an understanding of certain aspects of states' implementation of and compliance with international legal agreements, this type of focus has several important advantages. Equally if not more importantly, however, studies of this type fail to develop a comprehensive understanding of the reasons for individual states' compliance. Studies of this type therefore are less relevant for this thesis because the analytical tools they offer are not appropriate for the questions this thesis seeks to answer. Those studies that have endeavoured to explain compliance factors employ methods, models or analytical approaches that are inapplicable to this thesis.

The second major reason relates only to those studies that have endeavoured to explain compliance factors, which remain inadequate in two ways. First, like the relevant theories of compliance that will be examined in Chapter 6, most of these studies have focused primarily on a limited number of specific factors in developing their understanding of what influences states' compliance with international law. Hall, for example, focuses exclusively on the role of the citizens of a state in securing their government's compliance with its agreed international legal commitments. Second, the few studies that have attempted to develop a more comprehensive understanding of the reasons for (non)compliance are problematic in other ways.

As discussed above, each of the scholarly works reviewed in this chapter is weakened by various limitations and shortcomings, despite their importance for this thesis. The contextual uniqueness of the KSA also prevents the application to this thesis of either the methods and approaches employed by these studies or their analysis. Accordingly, this chapter sought to demonstrate how and why the questions posed in this research remain unanswered, despite the diversity of countries and international legal agreements examined in the relevant literature.

## **Chapter 3: WTO Compliance Issues**

### **3.1 Introduction and Overview**

This chapter highlights compliance-related problems arising from membership in the World Trade Organisation (hereinafter “WTO”) and examines how these problems are addressed in the literature.

The context selected for this study, namely, the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter “TRIPS”), is subject to WTO provisions. Hence, the WTO can be considered an independent entity or a semi-autonomous system that can be negatively or positively affected by its members. As previously noted, this is due to the fact that compliance with WTO rules and provisions contributes significantly to creating confidence in the organisation itself, particularly among Member States, and indicates the stability and operational effectiveness of the system.<sup>1</sup> To ensure effectiveness, an inclusive assessment of members’ responsiveness to the agreements that operate under its auspices is needed. Among the indicators of good performance are the management of issues contributing to noncompliance, the progress of agreements, and the identification and correction of points of weakness. Accordingly, this chapter aims to draw the attention of researchers interested in matters related to the WTO to the importance of understanding the variables and circumstances that can influence the compliance behaviour of WTO Member States.

Assessing compliance with WTO rules and regulations is vital because compliance not only reflects the importance which Member States ascribe to them but also can help to preserve the system of rules and regulations.<sup>2</sup> For example, the compliance of the Kingdom of Saudi Arabia (hereinafter “the KSA” or “the Kingdom”) with TRIPS is coveted by the WTO, not only to combat breaches of intellectual property rights (hereinafter “IPR”) but also to protect both TRIPS itself and the regulatory authority of the WTO. Consequently, the compliance of WTO Member States with the agreements supervised by the organisation deserves consideration, as an indicator of both

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<sup>1</sup> See, for example, Chiara Giorgetti, ‘Why Should International Law Be Concerned about State Failure?’ (2010) 16 *ILSA Journal of International and Comparative Law* 469.

<sup>2</sup> For example, see Chapter 1, Section 1.1. See also Giorgetti (n 1).

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the development of states' national systems, such as the Kingdom's intellectual property (hereinafter "IP") system, and of the potency with which the global standards set by the WTO are imposed.

Despite this, only a few studies have utilised more inclusive models built on theoretical questions to understand the factors contributing to states' compliance. Even more surprisingly, apart from those conducted by Thomas,<sup>3</sup> none of these studies has been carried out in the context of the WTO. By contrast, there is extensive literature on various aspects of the issue of compliance with WTO requirements, including its various forms,<sup>4</sup> the problems arising from it,<sup>5</sup> possible solutions to those problems,<sup>6</sup> and the factors that generally motivate states to comply or not to comply,<sup>7</sup> albeit

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<sup>3</sup> Kristie Thomas, 'China's Post-WTO Intellectual Property System: Assessing Compliance with the TRIPS Agreement' (PhD thesis, University of Nottingham 2008); Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Macmillan 2017).

<sup>4</sup> See, for example, James C Hartigan, 'In or Out? Standards, Discretion, Compliance and the WTO' (2016) 39 *The World Economy* 738; Md Rizwanul Islam and Naimul Muquim, 'The Scope for Trade Restrictions to Address the Lack of Compliance with Fire Safety Standards in Garment Factories of Bangladesh' (2015) 49 *Journal of World Trade* 153; Gary Horlick and Judith Coleman, 'The Compliance Problems of the WTO' (2007) 24 *Arizona Journal of International and Comparative Law* 141; Marcia Don Harpaz, 'China's WTO Compliance-Plus Anti-Dumping Policy' (2011) 45 *Journal of World Trade* 727; Shalini Amnee Neeliah and Daya Goburdhun, 'Complying with the Clauses of the SPS Agreement: Case of a Developing Country' (2010) 21 *Food Control* 902.

<sup>5</sup> See, for example, Matilda J Brolin, 'Procedural Agreements in WTO Disputes: Addressing the Sequencing Problem' (2016) 85 *Nordic Journal of International Law* 65; Juscelino F Colares, 'The Limits of WTO Adjudication: Is Compliance the Problem?' (2011) 14 *Journal of International Economic Law* 2011; Brendan P McGivern, 'Seeking Compliance with WTO Rulings: Theory, Practice and Alternatives' (2002) 36 *International Lawyer (ABA)* 141; David Palmeter, 'Compliance with WTO Rulings and Other Procedural Problems' (2001) 4 *Journal of World Intellectual Property* 291; Liran Aliav, 'A Solution for Developing Countries' Problem with WTO Noncompliance' (2012) 35 *Loyola of Los Angeles International and Comparative Law Review* 1.

<sup>6</sup> See, for example, Michael R Williams, 'Pirates of the Caribbean (and Beyond): Developing a New Remedy for WTO Noncompliance' (2009) 41 *George Washington International Law Review* 503; Di Hao, 'Compliance Problems under WTO Disputes Settled by Mutually Agreed Solution' (2018) 49 *Georgetown Journal of International Law* 887; Asif H Qureshi and Minyoung Ko, 'WTO Appellate Body Interpretations of TRIPS: Problems and Perspectives' (2015) 15 *Asian Business Lawyer* 81; William J Davey, 'Compliance Problems in WTO Dispute Settlement' (2009) 42 *Cornell International Law Journal* 119; Kateryna Holzer, 'Proposals on Carbon-Related Border Adjustments: Prospects for WTO Compliance' (2010) 4(1) *Carbon & Climate Law Review* 51.

<sup>7</sup> See, for example, Fernando Lopes Ferraz Elias, 'International Legal Compliance in the WTO' (2014) 11 *Brazilian Journal of International Law* 258; Rachel Brewster and Adam Chilton, 'Supplying Compliance: Why and When the United States Complies with WTO Rulings' (2014) 39 *Yale Journal of International Law* 201; Douglas Ierley, 'Defining the Factors that Influence Developing Country Compliance with and Participation in the WTO Dispute Settlement System: Another Look at the Dispute over Bananas' (2002) 33 *Law and Policy in International Business* 615; Laylah Zurek, 'The European Communities Biotech Dispute: How the WTO Fails to Consider Cultural Factors in the Genetically Modified Food Debate' (2007) 42(2) *Texas International Law Journal* 345; Omphemetse S Sibanda, 'An Assessment of WTO Compliance by the South African Anti-Dumping Regime in Respect of the Determination of Causation' (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 173.

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in a very limited way.<sup>8</sup> On this point, Thomas concludes that ‘studies of compliance with international obligations have been too narrow in scope and that a more inclusive approach to relevant factors is necessary’.<sup>9</sup>

Indeed, Lee likened scholars working on WTO issues in general to blind persons striving to determine the shape of an elephant by touch alone:<sup>10</sup>

[N]o matter how many commentators attempt to analyze the WTO, none is able to capture the whole of the beast. Although numerous scholars have attempted to assess how successful the WTO has been so far, their answers have been dependent on the particular feature analyzed and the perspective of each analyzer, much like the accounts of the blind people in the parable.<sup>11</sup>

Lee describes his own work as proceeding in the same vein, in that it focuses primarily on one aspect of the WTO (‘a country’s efforts to correct a violation of the TRIPS Agreement as found by a WTO decision in the Dispute Settlement Body’), which he deems limited.<sup>12</sup> However, while no single study can address all aspects of the organisation, collectively and individually they are essential for the development of the WTO.<sup>13</sup> On the principle that ‘what cannot be completely attained, should not be completely discarded’,<sup>14</sup> we should not stop exploring those parts of the ‘beast’, as Lee describes it, that are accessible merely because it is not possible to examine all its parts at once.

Moreover, assuming that none of the lenses through which these studies view the topic is sufficient to explain the variation in the compliance behaviour of different WTO Member States, the

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<sup>8</sup> Lee has preceded me in this observation. Edward Lee, ‘Measuring TRIPs Compliance and Defiance: The WTO Compliance Scorecard’ (2011) 18 *Journal of Intellectual Property Law* 401, 403.

<sup>9</sup> Thomas, ‘China’s Post-WTO Intellectual Property System’ (n 3) ii.

<sup>10</sup> Lee (n 8) 403.

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.* 403–404.

<sup>13</sup> In the above-stated context, I mean WTO, whereas Abbott is referring to differences among the various approaches drawn from scholarly works related to international relations and international law that seek to explain the reasons for states’ compliance. Abbott adds that such pursuits would ‘thereby . . . contribute, in even a small way, to improving global governance and ultimately the human condition’. Kenneth W Abbott, ‘International Relations Theory, International Law, and the Regime Governing Atrocities in Internatal Conflicts’ (2004) 36 *Studies in Transnational Legal Policy* 127, 131.

<sup>14</sup> Cornelis Hulsman (ed), *The Sharia as the Main Source of Legislation?: The Egyptian Debate on Article II of the Egyptian Constitution* (Tectum Verlag 2012).

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persistence and diversity of these endeavours are valuable in themselves. Perhaps one of their most important and relevant benefits is that they facilitate, however minimally, the continued progress of the WTO and help to maintain consistency with the foundations of the organisation.<sup>15</sup> Accordingly, while continuing in the same vein as its predecessors, the current study seeks to add a new dimension to previous literature by contributing, in even a small way, to improving the WTO both through its precise focus on the KSA and TRIPS and by drawing upon current research into compliance with international law.

It is important to emphasise before proceeding that this chapter is not primarily or exclusively designed to compare or criticise those studies concerned with the WTO, but to provide examples of WTO-related compliance issues and to explore how they have been addressed in the literature. The intention in so doing is to extrapolate from the cases highlighted by the studies reviewed below the factors that lead to non-compliance with international legal regimes generally. At the very least, identifying these factors would confirm that no single compliance theory can fully and persuasively explain the compliance of a given Member State with a particular WTO agreement.

### **3.2 WTO Compliance Issues: A Review of the Current Literature**

While ensuring the stability of the WTO may have a positive effect on the international arena, various problems have already emerged in relation to the WTO that may adversely affect that stability. One of the most crucial and delicate of these is that of non-compliance with WTO provisions and rules. This problematic issue has attracted worldwide attention from scholars and academic research centres with legal, economic, and political expertise. The most salient of these studies are discussed below.

#### **3.2.1 Obstacles to compliance with dispute settlement under the WTO**

In his 2009 investigation of obstacles to compliance and their impact on dispute resolution under the WTO,<sup>16</sup> Davey found that, despite the tangible outcomes of state-to-state dispute settlement regimes, this generally positive effect was less pronounced when the overall statistics were

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<sup>15</sup> Guzman further suggests that ‘the absence of an explanation for why [individual states do or do not comply with their agreed international legal commitments] threatens to undermine the very foundations of the discipline’. Andrew Guzman, ‘A Compliance-Based Theory of International Law’ (2000) 90 California Law Review 1823, 1826.

<sup>16</sup> Davey (n 6).

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examined and both the essence and timeliness of compliance procedures were considered.<sup>17</sup> Interestingly, for those cases in which the WTO conflict settlement mechanism functioned within the agreed timeframe, Davey observed that the national records of developing countries were much better than those of developed countries, including those of the United States of America (hereinafter “US”) and the European Union (hereinafter “EU”).<sup>18</sup> Based on these findings, Davey proposed measures such as doubling the penalties for delays in compliance to encourage states to comply within a specific timetable, claiming these proposals could limit cases of non-compliance.<sup>19</sup>

### **3.2.2 Forms of non-compliance with WTO rulings**

Davey’s work contrasts with an earlier study by McGivern, who looked for methods to achieve compliance with WTO rulings.<sup>20</sup> McGivern argued that the imposition of reprisals or the threat of retaliation against Member States whose non-compliance was preventing dispute resolution within the framework of the WTO offered no incentive to achieve compliance, except in rare cases.<sup>21</sup> It was essential, therefore, to apply the rulings and recommendations of the WTO’s Dispute Settlement Body (DSB) effectively to confirm the ongoing probity of the operating system.<sup>22</sup> Even so, McGivern argued that compliance was not guaranteed by the practice of automatically implementing the decisions of dispute settlement panels and the Appellate Body and approving requests for retaliatory measures, such as sanctions and suspension of concessions, against those who do not comply.<sup>23</sup>

A further examination of the practices adopted by Member States to troubleshoot and maintain compliance with their legal obligations under the WTO was carried out by Horlick and Coleman.<sup>24</sup> They divided forms of non-compliance with WTO rulings into three broad categories: ‘(1) prior non-compliance, (2) delay, and (3) non-compliance’, whether ‘open’, or ‘disguised’.<sup>25</sup> The authors pointed out that, although the rate of non-compliance did not indicate an actual crisis, the impact

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<sup>17</sup> *ibid* 119–122.

<sup>18</sup> *ibid*.

<sup>19</sup> *ibid* 125–128.

<sup>20</sup> McGivern (n 5).

<sup>21</sup> *ibid* 157.

<sup>22</sup> *ibid*.

<sup>23</sup> *ibid*.

<sup>24</sup> Horlick and Coleman (n 4).

<sup>25</sup> *ibid* 141.

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of the issue was essentially cumulative, due to the non-resolution of the majority of cases.<sup>26</sup> At present, it appears that preventing the embarrassingly open spread of non-compliance currently will be financially costly.<sup>27</sup> Despite their strengths, however, the above-mentioned studies by McGivern and Horlick and Coleman are too narrow in scope to fully explain the compliance behaviour of Member States.

### **3.2.3 ‘Stealthy non-compliance’ in the context of global trade and technology**

Following a similar track to Horlick and Coleman, Patterson observed that the threat of severe sanctions has produced a form of asymmetry which encourages what he calls ‘stealthy non-compliance’, in which states in the global South seek to limit the trade and technology advantages enjoyed by the West ‘by individually feigning compliance with the existing principles, norms, rules, and decisional calculus, and by collectively working to reconfigure the nature and objectives of the trade and technology regimes’<sup>28</sup> By way of example, Patterson cites Susan Sell, who ‘documents various instances of Southern nations acquiescing on paper and then doing the barest minimum to avoid US retaliation for violations of intellectual property rights’.<sup>29</sup>

According to Patterson, the vast majority of states in the global South are not in fact compliant with certain constraining regimes under the WTO, although they pretend to be whenever possible.<sup>30</sup> Patterson observed that states submit to pressure to comply only occasionally and only temporarily, whenever they find themselves vulnerable to severe penalties.<sup>31</sup> Moreover, it can be extremely difficult to differentiate between feigned and genuine compliance because of the ambiguity over what constitutes compliance.<sup>32</sup> Concerning their reasons for feigning compliance, Patterson opined that most of these states feel trapped by WTO provisions and rules that thwart their pursuit of fair trade.<sup>33</sup> Therefore, most nations of the global South tend to devote their efforts to promoting their own development and national security rather than weaken themselves by

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<sup>26</sup> *ibid* 143–144.

<sup>27</sup> *ibid* 144.

<sup>28</sup> Rubin Patterson, ‘Global Trade and Technology Regimes: The South’s Asymmetrical Struggle’ (2005) 4 *Perspectives on Global Development & Technology* 379, 381.

<sup>29</sup> *ibid* 388.

<sup>30</sup> *ibid* 379–381, 388.

<sup>31</sup> *ibid* 379.

<sup>32</sup> *ibid* 379, 388–889.

<sup>33</sup> *ibid* 379.



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complying with systems that serve the interests of other countries more than their own.<sup>34</sup>

However, after further research, Patterson discovered that the roots of non-compliance and the problems it creates lie deeper than either of these explanations suggests, and can be traced to the period before and during the drafting of an international legal agreement.<sup>35</sup> The trade and technology regimes supervised by the WTO illustrate this problematic issue.<sup>36</sup> Patterson contends that states in the global south that wish to develop such a regime must align its features to the values, objectives and operational dynamics of the Western powers.<sup>37</sup> In addition to its negative impact on Southern states that already struggle to comply with some WTO requirements, this enforced alignment has created other problems, one of the most significant of which is ‘the West-South asymmetrical struggle over technology and trade’.<sup>38</sup> This is a complicated and thorny problem for the WTO, too, as this asymmetrical struggle has generated an indifference among those states toward achieving compliance with its agreements.<sup>39</sup>

### 3.2.4 Compliance problems associated with the perceived equity of WTO obligations

Patterson’s interpretation of the problems caused in the drafting of international legal agreements recalls the conclusions reached by other studies in this area, including those by Thomas,<sup>40</sup> Kamal,<sup>41</sup> Benoiel and Salama,<sup>42</sup> Brindley,<sup>43</sup> Chon,<sup>44</sup> and Beltrametti.<sup>45</sup> For example, doubts continue to be

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<sup>34</sup> *ibid* 379, 389.

<sup>35</sup> *ibid* 379.

<sup>36</sup> *ibid*.

<sup>37</sup> *ibid* 379–380, 385.

<sup>38</sup> Patterson (n 28) 379.

<sup>39</sup> Patterson (n 28).

<sup>40</sup> Thomas, ‘China’s Post-WTO Intellectual Property System’ (n 3); Thomas, *Assessing Intellectual Property Compliance in Contemporary China* (n 3).

<sup>41</sup> See, for example, Alaa Kamal, ‘The GATT and the Looting of the South: World Trade Organisation (WTO)’ (*Modern Discussion Institution*, 2003) <[www.ahewar.org/debat/show.art.asp?aid=5276](http://www.ahewar.org/debat/show.art.asp?aid=5276)> accessed 5 October 2019 (in Arabic); Alaa Kamal, ‘The GATT and the Looting of the South: The GATT and the Contradictions of the Main Parties’ (*Modern Discussion Institution*, 2003) <[www.ahewar.org/debat/show.art.asp?aid=5181](http://www.ahewar.org/debat/show.art.asp?aid=5181)> accessed 6 October 2019 (in Arabic); Alaa Kamal, ‘The GATT and the Looting of the South: Orphans at the Table of Uruguay’ (*Modern Discussion Institution*, 2003) <[www.ahewar.org/debat/show.art.asp?aid=5246](http://www.ahewar.org/debat/show.art.asp?aid=5246)> accessed 6 October 2019 (in Arabic); Alaa Kamal, ‘Conclusion: The GATT and the Looting of the South’ (*Modern Discussion Institution*, 2003) <[www.ahewar.org/debat/show.art.asp?aid=5739](http://www.ahewar.org/debat/show.art.asp?aid=5739)> accessed 6 October 2019 (in Arabic).

<sup>42</sup> Daniel Benoiel and Bruno Salama, ‘Towards an Intellectual Property Bargaining Theory: The Post-WTO Era’ (2010) 32 *University of Pennsylvania Journal of International Law* 265.

<sup>43</sup> Timothy Brindley, ‘Conflicting Values in International Intellectual Property Standards for Pharmaceuticals: Western Frameworks vs Islamic Traditions in the Middle East’ (Master’s dissertation, Georgetown University 2014).

<sup>44</sup> Margaret Chon, ‘Intellectual Property and the Development Divide’ (2006) 27 *Cardozo Law Review* 2821.

<sup>45</sup> Silvia Beltrametti, ‘The Legality of Intellectual Property Rights under Islamic Law’ in T Mach and others (eds), *The Prague Yearbook of Comparative Law* (The Prague Centre for International and Comparative Law 2010) 55.

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raised about the equity of the obligations imposed by the WTO in relation to international IP, which are perceived to serve the interests of a few specific countries at the expense of many other states.<sup>46</sup> This body of work thus implies that an international legal agreement must be perceived to be legitimate and equitable for parties to be willing to comply with it.<sup>47</sup>

Interestingly, Beltrametti and Brindley reported that, contrary to usual practice in relation to the IPR of foreigners, people in Middle Eastern nations such as Qatar, Oman, Algeria, and Yemen, tend to respect local products.<sup>48</sup> By way of explanation, Beltrametti pointed out that many Muslim people in the Middle East today do not comply with international IP law because they are unconvinced of the equity or legitimacy of this type of agreement.<sup>49</sup> A large part of the reason for this is their belief that Western countries stress the importance of protecting sources of technological development, in order to withhold knowledge and technology from other countries.<sup>50</sup> For example, Egypt has IP laws in effect, but its people are not wholly convinced that Islam or the law forbids the unauthorised use of IP.<sup>51</sup> Many people remain deeply convinced that IP is merely an intrusion by Western powers intended to constrain other states' economies.<sup>52</sup>

It is not my intention in discussing these studies to detail the struggle over technology and trade and the protection of IPR, chiefly because these tensions are historical and have been discussed adequately by other scholars.<sup>53</sup> Instead, my purpose is to show the relevance of that struggle and its potential impact on the core concern of this thesis, namely compliance, which has been described as 'one of the most central questions in international law'.<sup>54</sup> Therefore, regardless of the

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<sup>46</sup> See, for example, Benoliel and Salama (n 42) 265–266; Chon (n 44) 2848–2849, 2858; Kamal, 'The GATT and the Looting of the South: Orphans at the Table of Uruguay' (n 41); Kamal, 'The GATT and the Looting of the South: The GATT and the Contradictions of the Main Parties' (n 41); Brindley (n 43) 3 and 22; Thomas 'China's Post-WTO Intellectual Property System' (n 3) 115–117; Beltrametti (n 45) 9, 103, 106.

<sup>47</sup> See, for example, Beltrametti (n 45) 9, 103, 106; Thomas 'China's Post-WTO Intellectual Property System' (n 3) 115–117.

<sup>48</sup> Beltrametti (n 45) 103–104; Brindley (n 43) 47–48.

<sup>49</sup> Beltrametti (n 45) 9.

<sup>50</sup> *ibid*; Brindley (n 43) 3, 22.

<sup>51</sup> Brindley (n 43) 22.

<sup>52</sup> Beltrametti (n 45) 103–104; Brindley (n 43) 47–48.

<sup>53</sup> Jakob Cornides, 'Human Rights and Intellectual Property: Conflict or Convergence' (2004) 7 *Journal of World Intellectual Property* 135; Alan S Gutterman, 'The North-South Debate Regarding the Protection of Intellectual Property Rights' (1993) 28 *Wake Forest Law Review* 89; Fanni Weitsman, 'TRIPS, Access to Medicines and the "North-South" Conflict after Doha: The End or the Beginning?' (2006) 6 *Asper Review of International Business and Trade Law* 67; Peter Drahos, 'Developing Countries and International Intellectual Property Standard-Setting' (2002) 5 *Journal of World Intellectual Property* 765.

<sup>54</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 15) 1826.

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strengths and weaknesses of the arguments made by those who seek to impose higher levels of IPR protection, what matters most for the current study, and perhaps for the WTO, are their implications for compliance. In other words, regardless of whether it is possible to resolve such tensions, the variation in the degree to which the WTO Member States comply with these agreements should be better understood.

### **3.2.5 Administrative solutions to non-compliance**

To address the question of how to manage non-compliance, Lee proposed that a scorecard system be adopted through which benefits would be bestowed on states in return for their compliance with TRIPS.<sup>55</sup> The objectives of this system would be to deliver higher levels of transparency, facilitate comparisons between Member States, and support those Member States that are prepared to review breaches.<sup>56</sup> In addition to criticism of the use of a scorecard generally and of the specific model he proposed, Lee anticipated objections from those who did not recognise the problem and therefore saw no need for any change in practice.<sup>57</sup> Furthermore, Lee suggested a specific criterion for judging the effectiveness of the WTO in stimulating compliance when he asserted that ‘a true test of any institution is its ability to handle the controversies that are difficult to resolve’.<sup>58</sup>

As Lee acknowledged, however, difficulties arise when making an overall evaluation of states’ compliance through the WTO website, despite the wealth of information accessible there.<sup>59</sup> He also acknowledged that his study was very limited and covered only one small aspect of the issue of states’ compliance with their legal obligations under the WTO.<sup>60</sup> He thus joins the list of scholars whose work does not explain why states comply in some cases and not in others. Moreover, his work is not based on any theoretical question or model designed to postulate the reasons for compliance.<sup>61</sup>

By contrast, the work of Fernando Lopes Ferraz Elia is notable for its framing of the political and juridical contexts that inform the way in which WTO rules are implemented, its consideration of

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<sup>55</sup> Lee (n 8) 404, 412.

<sup>56</sup> *ibid* 404.

<sup>57</sup> *ibid* 440–444.

<sup>58</sup> *ibid* 404.

<sup>59</sup> *ibid* 445.

<sup>60</sup> *ibid* 403.

<sup>61</sup> *ibid*.

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the characteristics that affect non-compliance when classifying states according to their progress towards compliance, and its use of WTO statistics when analysing the forms of non-compliance.<sup>62</sup> Emphasising that ‘the issue of compliance is central to the functioning of international institutions, the WTO at the forefront’, Elias offered a range of systemic modifications that could enhance compliance.<sup>63</sup> In his view, the strength and vitality of the legal framework of the WTO depend on its capability to induce its members to comply with its rules and decisions.<sup>64</sup> To improve the implementation of WTO decisions, Elias suggested a number of ‘practical changes’, including replacing the suspension of concessions with fines; (ii) retroactivity so as to encourage compliance within a reasonable period of time; and a mechanism through which the level of sanctions could be increased over time, thereby preventing non-compliance ‘from becoming a viable option’.<sup>65</sup>

Elias’s suggestions for ways to improve compliance with WTO rulings are informed by his investigation into some of the factors that influence non-compliance. While this two-step approach is advantageous, his study has some limitations in the context of the current study of the KSA and TRIPS. First, rather than focus on a specific Member State or a particular agreement, Elias’ analysis is very general. Having drawn a distinction between those factors that influence non-compliance in developed and developing countries, he examines only essential factors, such as structural aspects of the WTO system, the fear of losing sovereignty, non-compliance by other members, and the lack of technical capacity. Consequently, while his work may be useful in revealing other issues associated with compliance, it does not provide suitable analytical tools to fully uncover why a given state does or does not comply with its obligations under international law.

### **3.3 Problems Arising from Ambiguity and Imprecision in Legal Language**

A review of the literature indicates that the use of ambiguous language in international legal agreements is a particularly critical and controversial issue for scholars of compliance. The aim of this section is to present and respond to these arguments as fully and as objectively as possible.

Among other things, this debate illuminates the differences between the WTO and some other

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<sup>62</sup> Elias (n 7) 258.

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid* 258–259.

<sup>65</sup> *ibid* 273–274.

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international organisations and demonstrates how and why the notion and boundaries of states' compliance often vary, depending on the type of commitments involved. Such comparisons underscore one of the essential points of the thesis, namely, that there is a high degree of subjectivity and variation associated with states' compliance with international law. These arguments are developed in the remainder of this chapter.

The use of ambiguous language in international legal accords has been accepted conventionally and may even be desirable in some contexts.<sup>66</sup> Peace agreements in particular exemplify the benefits of using vague language to motivate states to comply with global legal obligations.<sup>67</sup> Specifically, ambiguity can be used to establish a grey area in which the interests pursued by the parties involved can be coordinated, thereby increasing the likelihood that non-compliant states can be brought back into compliance.<sup>68</sup> For example, as Pehar has noted, vague language was useful in the context of the 'Six-Point Agreement' signed by Egypt and Israel in the 1970s, when a negotiated solution seemed unachievable.<sup>69</sup> To bring the parties back into compliance, Point 2 of the agreement was written in intentionally ambiguous language.<sup>70</sup> That ambiguity enabled Israeli negotiators to interpret the agreement as merely another call to resume peace talks with Egyptian negotiators unconditionally.<sup>71</sup> This return to the negotiations drove Israel to comply with United Nations Security Council (hereinafter "UNSC") Resolution 340, which called for an 'immediate and complete ceasefire' between the warring parties, despite having refused to adhere to it

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<sup>66</sup> See, for example, Itay Fischhendler, 'When Ambiguity in Treaty Design Becomes Destructive: A Study of Transboundary Water' (2008) 8 *Global Environmental Politics* 111–112; Minju Kim and Hyo-Young Lee, 'Looking beyond the DOHA Negotiations: A Possible Reform of the WTO Agricultural Subsidies Rules' (2017) 12 *Asian Journal of WTO and International Health Law and Policy* 171, 192; Anthony D'Amato, 'Purposeful Ambiguity as International Legal Strategy: The Two China Problem' (Northwestern University School of Law Scholarly Commons, Faculty Working Papers No. 94, 2010) 2–3, 7, and 10 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1093&context=facultyworkingpapers>> accessed 14 December 2021; Drazen Pehar, 'Use of Ambiguities in Peace Agreements' in Jovan Kurbalija and Hannah Slavik (eds), *Language and Diplomacy* (DiploProjects 2001) 163, 180, 190, 192, 195–196 <[www.diplomacy.edu/sites/default/files/Language\\_Diplomacy\\_Chapter11.PDF](http://www.diplomacy.edu/sites/default/files/Language_Diplomacy_Chapter11.PDF)>.

<sup>67</sup> See generally, Fischhendler (n 66); Kim and Lee (n 66); D'Amato (n 66); Pehar (n 66).

<sup>68</sup> See, for example, Kim and Lee (n 66) 192; D'Amato (n 66) 2–3, 7, 10; Pehar (n 66) 163, 180, 190, 192, 195–196.

<sup>69</sup> Pehar (n 66) 178–179.

<sup>70</sup> *ibid.* Point 2 states the following: 'Both sides agree that discussions between them will begin immediately to settle the question of the return to the 22 October positions in the framework of agreement on the disengagement and separation of forces under the auspices of the United Nations.' The Israel Ministry of Foreign Affairs, '17 The Six-Point Agreement 11 November 1973' <[www.israel.org/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/17TheSix-PointAgreement-11November1973.aspx](http://www.israel.org/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/17TheSix-PointAgreement-11November1973.aspx)> accessed 14 October 2019.

<sup>71</sup> Pehar (n 66) 179.

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previously.<sup>72</sup> The two steps in this process are characteristic: First, the intentionally ambiguous language in the Six-Point Agreement enabled Israel's return to the negotiations; actual compliance with UNSC Resolution 340 was then achieved because of and following its return to the negotiations.<sup>73</sup>

Point 2 was interpreted very differently by Egyptian negotiators on the other side of the conflict,<sup>74</sup> who perceived it simply 'as a clear demand that Israel withdraw its armed force in accordance with UNSC Resolution 340', without pre-conditions.<sup>75</sup> Although managing such diametrically opposed perceptions is challenging, in this case, the 'syntactical ambiguity' of the resolution ultimately led the non-compliant party to comply.<sup>76</sup> As Pehar explains, the only practicable and feasible method to ensure that talks resumed and that a solution was reached in a manner which allowed one of the two parties to save face was to include that ambiguous provision.<sup>77</sup> This tactic, which Henry Kissinger termed 'constructive ambiguity',<sup>78</sup> has been widely used in political and diplomatic circles during the fifty years since then,<sup>79</sup> and reflects the premise that the use of ambiguous language in international legal agreements can be not only acceptable, but preferable.<sup>80</sup>

The claim that ambiguity has a positive impact on states' compliance with international law is not universally accepted, however, and in fact has been challenged on various grounds. In addition to pointing out other compliance-related problems arising from ambiguity in the context of peace agreements,<sup>81</sup> critics of this approach make the following three points in response to the argument

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<sup>72</sup> *ibid* 178. For the full text of the resolution, see UNSCR, Resolution 340 (1973) S/RES/340 <[www.securitycouncilreport.org/un-documents/document/ip-sres-340.php](http://www.securitycouncilreport.org/un-documents/document/ip-sres-340.php)> accessed 17 March 2022.

<sup>73</sup> Pehar (n 66) 178–179.

<sup>74</sup> *ibid*.

<sup>75</sup> *ibid* 179. According to Pehar, 'The syntactical link they [the Egyptian negotiators] saw fit was the one between "return to the October 22 positions" and "under the auspices of the UN".' *ibid*.

<sup>76</sup> Pehar (n 66) 178–179.

<sup>77</sup> *ibid* 178. Stevenson reached almost the same conclusion regarding the Good Friday Agreement (GFA), which was signed in 1998 by the British and Irish governments and eight Northern Irish political entities. 'Although it is a remarkable diplomatic achievement, the Good Friday Agreement could not have been reached without "constructive ambiguity".' Jonathan Stevenson, 'Irreversible Peace in Northern Ireland?' (2000) 42(3) *Survival: Global Politics and Strategy* 5.

<sup>78</sup> Kim and Lee (n 66) 192; Pehar (n 66) 178.

<sup>79</sup> See, for example, Kim and Lee (n 66) 192; Pehar (n 66) 178; D'Amato (n 66) 2–4; Bill Keller, 'Mitt and Bibi: Diplomacy as Demolition Derby, A Review of the Latest Foreign Policy Missteps of Bibi Netanyahu and Mitt Romney in the Middle East' (*The New York Times*, 12 September 2012) <<https://keller.blogs.nytimes.com/2012/09/12/mitt-and-bibi-diplomacy-as-demolition-derby/?hp>>.

<sup>80</sup> See, for example, Kim and Lee (n 66) 192.

<sup>81</sup> See, for example, Fischhendler (n 66) 112–113, 136; Omar M Dajani, 'Forty Years without Resolve: Tracing the Influence of Security Council Resolution 242 on the Middle East Peace Process' (2007) 37 *Journal of Palestine Studies*

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discussed above.

First, close reanalysis indicates that the example provided by Pehar did not involve ambiguity as much as a conscious strategy for inducing compliance. The intentionally ambiguous language in Point 2 of the Six-Point Agreement did not lead either Egypt or Israel to comply with the agreement itself; rather, it drove the two states to comply with UNSC Resolution 340, a separate commitment. In other words, constructive ambiguity was planted in Agreement A to stimulate compliance with Agreement B. Hence, this case and others like it are more accurately described as examples of alternative creative means exploited to provide non-compliant states with a degree of flexibility. Accordingly, the success of such cases does not indicate that ambiguity over a state's international legal obligations is unproblematic, let alone capable of inducing that state to comply with its commitments. However important flexibility may be for improving states' compliance with their legal obligations, it should be distinguished from ambiguity in all its forms, especially when unintentional.

Second, even if one were to grant, for the sake of argument only, that ambiguous phrasing had indeed led Egypt and Israel to comply with Point 2, such cases tend to be a matter of practical necessity.<sup>82</sup> Put differently, the causal relationship between the use of ambiguous language and states' compliance with their commitments within the context of peace agreements may be unique and ungeneralizable to other types of international legal obligations.<sup>83</sup> Fischhendler supports the conclusion that the use of ambiguity in complicated situations such as peace accords may be exceptionally effective, because it can bring disputes to a close, irrespective of the possibility of causing other conflicts at some point in the future.<sup>84</sup> Be that as it may, its success in the context of other international legal accords is more difficult to guarantee.<sup>85</sup>

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24, 24, 35–36; Ramon Miguel C Samson, 'The Law of Philippine Peace Processes: Agreements, Issues, and Engagement in Peace-Building after Conflict' (2015) 59 *Ateneo Law Journal* 1255, 1322–1323; Khaled Elgindy, 'When Ambiguity Is Destructive' (*The Brookings Institution*, 2014) <[www.brookings.edu/opinions/when-ambiguity-is-destructive/](http://www.brookings.edu/opinions/when-ambiguity-is-destructive/)> accessed 18 November 2019.

<sup>82</sup> Fischhendler (n 66) 112–113, 136; Dajani (n 81) 24, 35–36; Samson (n 81) 1322–1323; Elgindy (n 81).

<sup>83</sup> Lesaffer concluded that '[t]his ambiguity led scholars to turn their backs on the general customs and laws of peacemaking', which may explain why 'peace agreements' are 'inherently ambiguous in terms of the traditional system and classifications of international law'. Randall Lesaffer, 'On the Law of Peace: Peace Agreements and the *Lex Pacificatoria*' (2011) 24 *Leiden Journal of International Law* 519, 519–520.

<sup>84</sup> Fischhendler (n 66) 111–113, 131–132.

<sup>85</sup> *ibid* 112–113, 136; Dajani (n 81) 24, 35–36; Samson (n 81) 1322–1323; Elgindy (n 81); Lesaffer (n 83).

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Third, one of the most controversial aspects of accords that contain ambiguous language is that they are more likely to create severe intellectual or hermeneutical conflicts between parties.<sup>86</sup> To add insult to injury, particularly in relation to those agreements to which there are many parties, a party may ‘insist on [its] own, unilateral interpretation of an ambiguous provision and [may] not recognise ambiguity qua ambiguity’.<sup>87</sup> Even assuming that all the parties to an agreement acknowledge ambiguity qua ambiguity, there is often no guarantee that this recognition will ensure compliance; in fact, it may even open the door to other problems. For example, the recognition of vagueness qua vagueness by one party leads to the recognition that other parties have an equal right to interpret the meaning of an ambiguous provision from their own perspectives.<sup>88</sup> While this may reduce the likelihood or severity of hermeneutical conflicts among the parties involved,<sup>89</sup> allowing different interpretations can create other problems for compliance, including discouraging or delaying its occurrence, reducing its quality, and causing avoidable variations in compliance levels.<sup>90</sup> It follows that whether or not there is recognition of ambiguity qua ambiguity, its use entails risks<sup>91</sup> that can adversely affect states’ compliance.

In terms of its relevance to the discussion in this chapter, perhaps the most important point to be made regarding the implications of ambiguity is that numerous legal researchers, including those discussed above, have shown that ambiguity is particularly damaging to compliance by the WTO Member States.<sup>92</sup> For example, the European Communities and the US claimed that India was not in compliance with its obligations in relation to ‘Patent Protection for Pharmaceutical and Agricultural Chemical Products’ under TRIPS. In fact, ambiguity in the provisions of Articles 42–

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<sup>86</sup> See, for example, Pehar (n 66) 188–189.

<sup>87</sup> *ibid* 189.

<sup>88</sup> See, for example, the best possibilities or scenarios described by Pehar (n 66) 188–189.

<sup>89</sup> *ibid*.

<sup>90</sup> See, Kim and Lee (n 66) 192–193; Judith Goldstein and others, ‘Introduction: Legalization and World Politics’ (2003) 54 (3) *International Organization* 385, 386; Dwijen Rangnekar, ‘Context and Ambiguity in the Making of Law: A Comment on Amending India’s Patent Act’ (2007) 10 *Journal of World Intellectual Property* 365, 366, 378; Turki Al Saud, ‘A Comparison between the Dispute Settlement Procedures in the International Court of Justice and the World Trade Organisation’ (Master of Philosophy thesis, Brunel University 2009) 242.

<sup>91</sup> Pehar (n 66) 189.

<sup>92</sup> Pavan S Krishnamurthy, ‘To Enforce or Manage: An Analysis of WTO Compliance’ (2018) 32 *Emory International Law Review* 377, 380, 404; Rangnekar (n 90) 365; McGivern (n 5) 148–149; Hao (n 6) 887; Stephanie Hartmann, ‘Recognizing the Limitations of WTO Dispute Settlement: The Peru-Price Bands Dispute and Sources of Authority for Applying Non-WTO Law in WTO Disputes’ (2016) 48 *George Washington International Law Review* 617, 647; Kim and Lee (n 66) 192–193.



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48 of the Agreement had led to misinterpretation.<sup>93</sup> Similarly, the US lodged a complaint concerning the European Community's compliance with the 'Protection of Trademarks and Geographical Indications for Agricultural Products' as stated in TRIPS and the GATT 1994 Agreement. In fact, some compliance requirements had been misinterpreted due to the ambiguity both of these requirements and of the issue of compliance itself.<sup>94</sup> Ambiguity and inconsistency in Articles 21.5–22, which concern the period and procedure for determining compliance and the deadline for receiving retaliation requests after the expiration of the compliance period, have led to problems with WTO Member States' compliance with the decisions of the DSB.<sup>95</sup> Writing about this problem, McGivern comments that it 'has arisen principally because of poor drafting in the DSU. WTO Members have responded to this ambiguity in two ways'.<sup>96</sup> Finally, ambiguity in Articles 3.5 and 3.6 of the DSU has caused problems for the compliance of WTO member states. Hao has suggested that this ambiguity has given parties to disputes room to use Mutually Agreed Solution (MAS) systems improperly, in a manner incompatible with their WTO obligations: 'The ambiguity of the regulations gives WTO members [what Antonello Tancredi termed] excessive "scope for manoeuvre"'.<sup>97</sup>

As well as demonstrating that problems with and complaints about WTO compliance have been caused by ambiguity,<sup>98</sup> scholars have provided precise explanations of how and why vagueness in WTO provisions and rules can diminish the degree and quality of compliance, to the detriment of its Member States.<sup>99</sup> While recognising that 'draft[ing] legal documents that clearly determine the outcome of every set of facts that may occur in the future' is tremendously difficult,<sup>100</sup> these

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<sup>93</sup> WTO, 'DS50: India — Patent Protection for Pharmaceutical and Agricultural Chemical Products' <[www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds50\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm)> accessed 4 December 2019; WTO, 'DS79: India — Patent Protection for Pharmaceutical and Agricultural Chemical Products' <[www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds79\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds79_e.htm)> accessed 4 December 2019. For an analysis of an almost similar case, see Rangnekar (n 90).

<sup>94</sup> WTO, 'DS174: European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs' <[www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds174\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds174_e.htm)> accessed 5 December 2019. An analytical study by Krishnamurthy of WTO member states' compliance with its rules and regulations also briefly highlighted this complaint; Krishnamurthy (n 92) 392.

<sup>95</sup> WTO, 'Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement' <[www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm)> accessed 1 March 2021.

<sup>96</sup> McGivern (n 5) 148–149.

<sup>97</sup> Hao (n 6) 887, 906; Antonello Tancredi, 'EC Practice in the WTO: How Wide Is the Scope for Manoeuvre' (2004) 15 *European Journal of International Law* 933.

<sup>98</sup> See, for example, Krishnamurthy (n 92) 392.

<sup>99</sup> See, for example, Kim and Lee (n 66) 192–193.

<sup>100</sup> See, for example, Seth M Azria, 'Salem Press Encyclopedia' [2019] *International Business Law* 7, 3.

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scholars raise concerns which challenge the view that the deliberate use of vague language is an important means of enhancing a country's compliance with international law.

In relation to the WTO's agricultural subsidies regime, for example, Kim and Lee have expressly acknowledged that arguments concerning the generally positive effect of ambiguity on states' compliance with international law are inapplicable to the particular case of the WTO because the WTO differs from other international organisations in that the decisions made through its dispute settlement mechanism are binding.<sup>101</sup> The resulting obligation on that mechanism to explain the precise meaning of ambiguous WTO legal texts could be disadvantageous for WTO Member States,<sup>102</sup> Promulgating agreements whose language can be interpreted in various ways may inhibit the ability of the system to facilitate effective and consistent decision-making, leading to dissatisfaction among WTO Member States.<sup>103</sup> For these reasons, the authors argue, 'the cost of maintaining structurally inconsistent rules' will prove unsustainable in the long-term.<sup>104</sup>

### **3.4 Analysing Variation in Compliance with the WTO and Other International Organisations**

While ambiguity is valuable in some instances, we must conclude that this does not apply to the WTO. Much of the reason for this conclusion lies with the criteria for, indicators of and variations in what determines the acceptable level of compliance by individual states with their various obligations under international law.<sup>105</sup> In other words, while compliance is a key term in global legal discourse, used to express the role of states in supporting the intended outcomes of international law,<sup>106</sup> its operationalisation has been and continues to be inconsistent, raising objective questions about the most appropriate methods of assessing the degree of states' compliance with international law.<sup>107</sup> The many complexities associated with measuring the level of compliance achieved by individual states with their various obligations under international law

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<sup>101</sup> Kim and Lee (n 66) 192–193.

<sup>102</sup> *ibid* 192.

<sup>103</sup> Kim and Lee (n 66) 192–193.

<sup>104</sup> Kim and Lee (n 66) 192.

<sup>105</sup> Ann Kent, *China, the United Nations, and Human Rights: The Limits of Compliance* (U of Pennsylvania Press 1999) 232–233. See also Kim and Lee (n 66).

<sup>106</sup> Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Thomas Risse and Beth Simmons (eds), *The Handbook of International Relations* (SAGE 2002) 538–539.

<sup>107</sup> Gerald Chan, *China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights* (World Scientific Publishing 2006) 66.

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make this task particularly challenging.<sup>108</sup> In his study of compliance in four different contexts under international law (trade, arms control, environmental protection and human rights), Chan confirmed that the issue of compliance is subject to variables that are often difficult to control tightly:

The picture of global compliance is uneven and rather complex, since the nature of international politics is largely anarchical . . . . Consequently, what is compliance to some may not be regarded as such by others. Seen in this light, the nature of compliance and the standards for measuring compliance are by and large relative rather than absolute.<sup>109</sup>

Accordingly, it would be a challenge for any legal scholar to accurately judge the degree of states' compliance with two different international legal agreements using the same standard or standards of measurement. It also seems unlikely that the causes of disparities in compliance can be perceived without a good understanding of the reasons why states fail to comply with the international legal obligations to which they have consented. To clarify the type of variations inherent in the concept of compliance, it is helpful to reconsider the two cases of the Six-Point Agreement and the WTO dispute settlement system discussed previously.

On the one hand, delayed compliance often appears to be relatively acceptable, or at least comprehensible, in the context of peace agreements, perhaps because, in times of war, any attempt to open or revive negotiations, even one which delays compliance, is better than continuing violence.<sup>110</sup> In such complicated and dangerous scenarios, the pursuit of peace can be a higher priority than achieving compliance,<sup>111</sup> and a negotiated delay in compliance, although highly contentious legally, should be considered in light of this.<sup>112</sup> On the other hand, because any delay is contrary to Article 3.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, delayed compliance per se can be viewed as a problem for the WTO dispute settlement

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<sup>108</sup> See, for example, Ann Kent (n 105) 232–233; Chan (n 107) 66.

<sup>109</sup> Chan (n 107) 66.

<sup>110</sup> This matter was discussed in more detail in Subsection 2.2.4, in the context of the Côte d'Ivoire's compliance with the International Criminal Court (ICC). See also Marco Bocchese, 'Coercing Compliance with the ICC: Empirical Assessment and Theoretical Implications' (2016) 24 Michigan State International Law Review 357; James F Alexander, 'The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact' (2009) 54 Villanova Law Review 1.

<sup>111</sup> Bocchese (n 110); Alexander (n 110).

<sup>112</sup> *ibid.*

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system.<sup>113</sup> As Reich observed, the well-known legal maxim that ‘justice delayed is justice denied’ applies to such a system.<sup>114</sup> This difference between peace agreements and WTO agreements may explain why securing compliance in the context of the WTO dispute settlement system is not only essential but should also proceed without unnecessary delay,<sup>115</sup> as a prompt settlement indicates that the organisation is functioning effectively.<sup>116</sup>

### 3.5 Concluding Remarks

As discussed in Chapters 1 and 2, subjectivity and variation are features of the literature concerning states’ compliance with international law, which highlights the continually changing degree to which states are compliant, the relativity of the standards used to measure their compliance, and the variety of factors that influence their behaviour and decision making with regard to compliance. Despite these limitations, comparative analysis of the differences between the context of peace agreements and that of WTO agreements not only has shown that the concept of compliance can differ from one agreement to another depending on the characteristics of the obligation arising from each agreement, but also explains why there is a lack of consensus on what constitutes a reasonable level of compliance internationally. Moreover, the results of that analysis support a key contention of the current research, namely, that a better understanding of the roots of these problems is unlikely without a solid understanding of the factors that influence states’ compliance with the international legal commitments they have accepted. This, in turn, underscores the importance of one of the main arguments of the current thesis, namely, that the more extensive the model we use, the better we will understand the factors that affect compliance. The better we understand those factors, the greater the benefits for legal scholars, not least among which is a deeper perception of the reasons for the observable disparity in the implementation of international legal agreements.

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<sup>113</sup> ‘The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.’ WTO, ‘Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement’ (n 95) art 3.3. See also Arie Reich, ‘The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis’ (2017) 2017/11 1, 21–22 <[https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW\\_2017\\_11.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf?sequence=1)>.

<sup>114</sup> Reich (n 113) 21.

<sup>115</sup> WTO, ‘Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement’ (n 95); Reich (n 113) 1, 21–22.

<sup>116</sup> *ibid.*

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While the complex nature of compliance is clear from previous studies, they do not explain what motivates a state to comply, particularly under the umbrella of the WTO. Moreover, their key focus has been on specific aspects of compliance, such as forms of non-compliance and other problems arising from it, or else they have only considered specific factors affecting a state's compliance with WTO provisions and rules. Therefore, a more rigorous framework based on a wide range of theoretical questions designed to explain the reasons for the KSA's compliance or otherwise with TRIPS is still required. To this end, the theoretical aspects of compliance will be highlighted in Part II of this thesis.

Before proceeding to Part II, however, a key point must be emphasised. As various scholars have observed, the origins of non-compliance are more intricate than the literature suggests.<sup>117</sup> To explain the function of non-compliance in the context of the global legal regime, these roots must be disaggregated.<sup>118</sup> Towards this end, Cogan grouped the causes of non-compliance into three broad levels: 'the individual, the communal, and the structural'.<sup>119</sup> Having investigated various cases of non-compliance by individual states, Cogan provided the following in-depth explanation of the first level:

On the surface, noncompliance is simply a function of the wrongdoer's ability and will – that is, the wrongdoing State's capacity or incapacity to comply with the law, as well as its desire to comply. Incapacity can be based on several factors: ambiguity in the rules themselves [ . . . ]; limitations on the State's ability to take actions necessary to obey the rule, such as financial or technological deficiencies [ . . . ]; or, more simply, a mistake or a lack of intention to disobey [ . . . ]. Capacity-based noncompliance, or what might be better described as intentional noncompliance, on the other hand, results from a State's wilful decision to violate the law, which is based on the State's calculation of its interests, a complicated amalgam of advantages and disadvantages, costs and benefits, particular to, among other things, the primary rules, participants, and facts

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<sup>117</sup> Vaughan Lowe, David M Malone and Christian Tomuschat, 'Comments on Chapters 16 and 17' in Michael Byers and Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (CUP 2003) 477–481; Jacob Katz Cogan, 'Noncompliance and the International Rule of Law' (2006) 31 *Yale Journal of International Law* 189, 193.

<sup>118</sup> Cogan (n 117) 193, 194.

<sup>119</sup> *ibid* 194.

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involved at any one moment.<sup>120</sup>

As Cogan indicates, non-compliance can be ingrained beyond the capacity of an individual state to address; it can also be brought to the fore by the fragility of the international community structures governing how that state produces, transplants, and manages rules.<sup>121</sup> For example, Franck showed how non-compliance can be caused by inadequacies in the international community that call into question the integrity and legitimacy of structures resulting from ‘substantive and procedural flaws’<sup>122</sup> and other imperfections that arise when establishing legally binding international rules.<sup>123</sup> Likewise, the obstacles governments can encounter when internationalising legal norms indicate shortcomings in the legal process; these flaws can decrease the extent to which authorities believe they must comply with those laws.<sup>124</sup> Non-compliance might also occur because of the failure of the international community to supervise the implementation of rules, thereby limiting its interaction with and influence over individual states. In this way, the connections and mutualism that are essential for encouraging compliance are weakened.<sup>125</sup> Inadequacies in acclimatisation or acculturation can also result in non-compliance.<sup>126</sup> Consequently, the international community’s behaviour can be a key factor inhibiting full compliance.

Defiance can arise from the failure of individual states and the international community to persuade other countries to embrace its rules.<sup>127</sup> The inability to obey is another barrier to compliance, as when a structural deficit in the global regime prevents the enforcement of international legal norms and regulations and limits the control that global organizations and institutions are able to exert.<sup>128</sup> For example, procedural gaps can increase the probability of disobedience.<sup>129</sup> This issue arises

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<sup>120</sup> *ibid.*

<sup>121</sup> *ibid* 194–195.

<sup>122</sup> *ibid* 194.

<sup>123</sup> *ibid.* For further details, see Jose Alvarez, ‘Quest for Legitimacy: An Examination of the Power of Legitimacy among Nations by Thomas M Franck’ (1991) 24 *New York University Journal of International Law and Politics* 199.

<sup>124</sup> Cogan (n 117) 194. For further details, see Harold Koh, ‘Why Do Nations Obey International Law?’ (1997) 106 *The Yale Law Journal* 2599.

<sup>125</sup> Cogan (n 117) 194–195. For further details, see Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard UP 2009).

<sup>126</sup> Cogan (n 117) 194. For Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law’ (2004) 54 *Duke Law Journal* 621.

<sup>127</sup> Cogan (n 117) 194–195.

<sup>128</sup> *ibid* 195.

<sup>129</sup> *ibid.*

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when states underestimate the consequences of non-compliance (e.g. sanctions), with the result that a country's evaluation of the cost-benefit ratio is imprecisely calibrated.<sup>130</sup> A further failure might arise from Member States engaging in 'operational non-compliance',<sup>131</sup> as in the case of community-based preconditions and national incompatibilities that give compliance a different meaning.<sup>132</sup> Exceptional cases of non-compliant behaviour can also occur when external factors coincide in a particular way.<sup>133</sup> Ultimately, however, operational non-compliance indicates the presence of a functional hole in the global statutory regime, and an intention on the part of some countries to violate that regime.<sup>134</sup>

Having examined numerous studies on the compliance of individual states with a range of legal obligations in Chapters 2 and 3, the focus now turns to the available literature on the KSA's compliance with its international legal obligations. Sharia, the most familiar lens through which the relevant legal sources have gained their perspective on this topic, is the primary focus in Chapter 4, which also provides a brief rationale for the popularity of this lens and explains its implications for the current study.

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<sup>130</sup> *ibid.*

<sup>131</sup> *ibid.*

<sup>132</sup> *ibid.*

<sup>133</sup> *ibid.*

<sup>134</sup> *ibid.*

## **Chapter 4: The KSA's Implementation of and Compliance with International Law: A Critical Dialogue with the Literature**

While it is important to understand the relationship between the legal system in the Kingdom of Saudi Arabia (hereinafter “the KSA” or “the Kingdom”) and Islamic law and its implications for the Kingdom’s compliance with international law, the aim of this chapter is to take the discussion beyond these points. Specifically, it unpacks the intersectionality of Sharia law, the Saudi legal system, and international law, with particular focus on intellectual property rights (hereinafter “IPR”), including the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter “TRIPS” or “the Agreement”). It argues that, shaped largely by international pressure, economic and political interests, nationalism, and social position, among other factors, the KSA has become open and receptive to international law and has constantly reworked its strict traditionalist school of jurisprudence to expand and transform its domestic laws. The chapter then aims to demonstrate first, that Sharia (Islamic law) is a broad concept whose definition varies from one country to another, and that this has legal implications,<sup>1</sup> and second, that the KSA’s Islamic identity may be less significant than other factors in shaping its compliance behaviour.

### **4.1 Sharia Law and International Law: Implications for Domestic Law**

To adequately examine the KSA’s implementation of and compliance with international legal agreements, including TRIPS, one must first understand the intersectionality of Sharia law, the legal system of the Kingdom, and international law. Underpinned by Western (Eurocentric) values, the traditional vision of international law was, by and large, of ‘a non-interventionist system in the domestic law-making of individual nation-states’.<sup>2</sup> In this model, individual nation-states enter treaty relations that prioritise their various interests ‘as defined by themselves’.<sup>3</sup> Over time,

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<sup>1</sup> Maria Bhatt, ‘The Role of Shari’a in International Commercial Arbitrations’ (2018) 36 *Wisconsin International Law Journal* 46, 85.

<sup>2</sup> Dawood Hamzah (ed), *International Law and Muslim States: Saudi Arabia in Context* (Routledge 2021) xvii–xviii.

<sup>3</sup> *ibid* xvii.



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however, the perception of international law as a non-interventionist system has steadily diminished.<sup>4</sup> As Hamza has observed:

The present widened scope of modern international law as well as its overwhelming trans-national impact has resulted in direct and/or indirect intrusions into matters and issues that were hitherto basic national and domestic affairs of individual states, which has led to anxieties in some states.<sup>5</sup>

The ‘scope of international law today is immense’, as Evans has rightly put it.<sup>6</sup> In other words, as an established system, international law today regulates not only relationships between individual states, but also states and various international organisations.<sup>7</sup> As Hamza further argues,

modern nation-states and particularly Muslim-majority states, whose domestic laws are underpinned by the *sharia*, are generally curtailed in their domestic legislative agendas as their domestic laws are susceptible to the influences and monitoring of international norms.<sup>8</sup>

Under such conditions, it is impossible to ignore the effect of international law on domestic law.<sup>9</sup> This raises many essential questions regarding the application of Islamic law as the domestic law of the Kingdom.<sup>10</sup> Traditionally Sharia is construed as a primary source of Islamic law in Muslim countries, including the KSA.<sup>11</sup> It is seen ‘as divine in nature and thereby immutable’.<sup>12</sup> Consequently, Islamic law is often perceived as unable to ‘accommodate the encroachment of contemporary international law in the domestic law-making of modern Muslim-majority states’.<sup>13</sup>

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<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.* 4. Hamza’s observation supports the conclusion reached by earlier scholars. See Charlesworth and others, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *Sydney Law Review* 423, 424.

<sup>6</sup> Hamzah (n 2) 1; Malcolm David Evans (ed), *International Law* (7th edn, CUP 2014) 31.

<sup>7</sup> Hamzah (n 2) 1.

<sup>8</sup> *ibid.* 4.

<sup>9</sup> *ibid.* xvii.

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*; The Bureau of Experts at the Council of Ministers in the Kingdom of Saudi Arabia (BoE), ‘Basic Law of Governance’ (*The Bureau of Experts at the Council of Ministers in the Kingdom of Saudi Arabia*, 1992) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/16b97fcb-4833-4f66-8531-a9a700f161b6/1>> accessed 28 March 2021.

<sup>12</sup> Hamzah (n 2) xvii.

<sup>13</sup> *ibid.*

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Today, however, the Kingdom not only is part of the international legal order but it continues to adopt domestic law that is based on Islamic law.<sup>14</sup> In the past, lawmakers in the KSA invoked textual authority (e.g., the Quran, Hadith, and statements by religious scholars) to substantiate claims or resolve disputes related to economic and trade activities.<sup>15</sup> Today, however, legal practices stemming from Islamic traditions are shaped largely by international pressures, economic interests, nationalism, and social position, among other factors.<sup>16</sup> Many Muslim countries, including the Kingdom, have reworked Islamic traditions to expand and transform their domestic laws.<sup>17</sup> More specifically, concepts such as ‘sovereign discretion’ (*siyasa shar‘iyya*), ‘legal eclecticism’ (*takhayyur*) and ‘public interest’ (*maslaha*) have been heavily deployed by the Saudi government over the past two decades to validate different legal innovations, including IP.<sup>18</sup> The KSA has incorporated international law into its domestic IPR legislation, especially in such areas as copyright law, patent law, and trademark law.<sup>19</sup> For example, under Royal Decree No. M/41 of 2.7.1424H corresponding to 30 August 2003, the KSA has enacted a copyright law,<sup>20</sup> in which the protection of computer software, data, sound recordings, and audio-visual works is explicitly outlined.<sup>21</sup> Laws and regulations pertaining to the use of foreign works, types of infringements,

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<sup>14</sup> *ibid*; BoE (n 11).

<sup>15</sup> James Piscatori, ‘Foreword’ in Dawood Hamzah (ed), *International Law and Muslim States: Saudi Arabia in Context* (Routledge 2021) xi–xii; Hamzah (n 2) 61–78; Mohammad Hashim Kamali (ed), *Principles of Islamic Jurisprudence* (3rd edn, The Islamic Texts Society 2003) 8–11.

<sup>16</sup> Piscatori (n 15) xii.

<sup>17</sup> *ibid*.

<sup>18</sup> *ibid*; Kamali (n 15) 7–44.

<sup>19</sup> Hamzah (n 2) ix; Piscatori (n 15) xiii. For further details of these laws, see BoE, ‘Copyright Law’ (*Bureau of Experts at the Council of Ministers*, 2003) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/67d159e6-ee98-4efc-a2ee-a9a700f17083/2>> accessed 14 March 2023; BoE, ‘Law of Patents, Layout Designs of Integrated Circuits, Plant Varieties, and Industrial Designs’ (*Bureau of Experts at the Council of Ministers*, 2004) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/6cfde53b-e803-49be-b2c6-a9a700f1c434/2>> accessed 14 March 2023; BoE, ‘GCC Patent Law’ (*Bureau of Experts at the Council of Ministers*, 2001) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/f95138ff-0892-49b0-921c-a9a700f1c37f/2>> accessed 14 March 2023; Bureau of Experts at the Council of Ministers (BoE), ‘Law of Trade Marks’ (*Bureau of Experts at the Council of Ministers*, 2002) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/3ec4414f-2ec5-48b1-bcb4-a9a700f1aa2b/2>> accessed 14 March 2023; BoE, ‘Trademark Law of the States of the Cooperation Council for the Arab States of the Gulf’ (*Bureau of Experts at the Council of Ministers*, 2016) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/b2d0decd-a691-45b9-9af0-a9a700f1e86f/2>> accessed 14 March 2023.

<sup>20</sup> BoE, ‘Copyright Law’ (n 19).

<sup>21</sup> Hamzah (n 2) 217; BoE, ‘Copyright Law’ (n 19).

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piracies and penalties based on the requirements of the Berne Convention also are detailed.<sup>22</sup> Indeed, this process of re-working Islamic traditions is indicative of how Islamic law applied in the Kingdom respects international law.<sup>23</sup> As Piscatori argues, 'scriptural sources, customary practice, and the broad purposes of the law (maqasid al-shari'a) are invoked to endorse modern copyright, patent, and trademark rules' in the Kingdom today.<sup>24</sup>

It is important to acknowledge that the concept of IP is a new subject in the context of Islamic jurisprudence.<sup>25</sup> In fact, the concept is not expressed explicitly or directly in the holy Quran or the sayings of Prophet Mohammed, Peace Be Upon Him.<sup>26</sup> Consequently, any debate over IP in the context of the Quran and the Sunnah is a matter of interpretation.<sup>27</sup> Because IP is a modern concept, the views of Muslim jurists tend to be mixed and attributed to modern Muslim jurists.<sup>28</sup> For example, while there is agreement among the main schools of Islamic thought that property rights deserve recognition, some jurisprudential schools do not recognise IP 'as a species of property'.<sup>29</sup> This is mainly due to a lack of consensus on 'the proper criterion for what could be considered mal [money]'.<sup>30</sup> Opponents of IP rights argue that 'heiaza [physical possession] is the only acceptable criterion for money',<sup>31</sup> a view which excludes intangibles as property.<sup>32</sup> Opponents also differentiate knowledge and science from other pursuits, such as trade and industry, on the grounds that the former cannot be equated with the latter:<sup>33</sup> 'A person should dedicate himself to spreading his knowledge without the expectation of financial reward.'<sup>34</sup>

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<sup>22</sup> Hamzah (n 2) 217; World Trade Organisation (WTO), 'Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization' (2005) WT/ACC/SAU/61 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/ACC/SAU61.pdf&Open=True>> accessed 02 April 2023.

<sup>23</sup> Hamzah (n 2).

<sup>24</sup> Piscatori (n 15) xiii.

<sup>25</sup> Hamzah (n 2) 210–215.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid* 212; Bashar H Malkawi, 'The Alliance between Islamic Law and Intellectual Property: Structure and Practice' (2013) 10 University of St. Thomas Law Journal 618, 624.

<sup>30</sup> Malkawi (n 29) 624.

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid* 627; Jamaal al-Deen Zarabozo, 'The Copyright Issue – Shaykh Jamal Zarabozo' (*Muslimmatters.org*, 2010) <<https://muslimmatters.org/2010/01/08/the-copyright-issue/>> accessed 14 March 2023; Hamzah (n 2) 212–213.

<sup>34</sup> Malkawi (n 29) 627.

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There is another, more favourable view of IP rights, which most schools of Islamic thought support and which is based on several counterarguments.<sup>35</sup> Its proponents argue, for example, that ‘the proper criterion [for what constitutes property] should be manfa'a [usefulness]’, an interpretation which can include both tangibles and intangibles.<sup>36</sup> Moreover, the concept of IP rights has been harmonised with Islamic law by both religious scholars and modern Muslim jurists under the umbrella of ‘masalih-cum-maqasid al-Shari’ah’, which means public interests that share the ‘overall goals of the Shari’ah’.<sup>37</sup> As Hamzah has observed:

Muslim scholars have classified the entire scope of masalih-cum-maqasid into three categories in order of importance, namely, the essential masalih, or daruriyyat, followed by the complementary benefits, or hajjiyyat, and then the embellishments or tahsiniyyat. The essential interests are categorized under five values, namely, faith, life, lineage, intellect, and property. They maintain that these five values are essential to normal order in society as well as to the survival and spiritual well-being of individuals, while neglecting or annihilating them will cast doom over the entire society.<sup>38</sup>

Sharia law always strives to promote the aforementioned values with the intention of preserving the survival of society.<sup>39</sup> Islamic law, for instance, not only prohibits theft, but considers it a publishable offence, because it puts ‘the protection of private property’ at risk.<sup>40</sup> According to Islamic law, both ownership and property acquisition are inherent human rights.<sup>41</sup> In Islam, the right to property is always exclusive to the individual owners as long as they use it properly in a way that does not cause harm to others.<sup>42</sup> At the same time, ownership of property can ‘be transferred only through legitimate methods’.<sup>43</sup> The inviolability of private ownership of property

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<sup>35</sup> *ibid*; Zarabozo (n 33); Hamzah (n 2) 212–215.

<sup>36</sup> Malkawi (n 29) 624.

<sup>37</sup> Hamzah (n 2) 215.

<sup>38</sup> *ibid* 211.

<sup>39</sup> *ibid* 210–211; Mohammad Hashim Kamali (ed), *Maqasid Al-Shariah Made Simple (Occasional Papers Series 13)* ((The International Institute of Islamic Thought (IIIT) n.d.) 1–4.

<sup>40</sup> Hamzah (n 2) 211; Kamali (n 39) 3.

<sup>41</sup> Hamzah (n 2) 211; Hayatullah Laluddin and others, ‘Property and Ownership Right from an Islamic Perspective’, *Advances in Natural and Applied Sciences*, (2012) 6 American-Eurasian Network for Scientific Information 1125, 1126.

<sup>42</sup> Hamzah (n 2) 211; Laluddin and others (n 41) 1126.

<sup>43</sup> *ibid*.

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is firmly upheld in the holy Quran: ‘And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with [the] intent that [you] may eat up wrongfully and knowingly a little of (other) people's property.’<sup>44</sup> In the Hadith, Prophet Mohammed, Peace Be Upon Him, also warns us that ‘no property of a Muslim is lawfully held by his brother except what he gives him from the goodness of his heart, so do not wrong yourselves’.<sup>45</sup> It is within this religiously grounded framework that modern Muslim jurists recognise and domesticate IP rights today.<sup>46</sup> Leading members of the Permanent Committee for Islamic Research and Issuing Fatwa, as well as the KSA’s Council of Senior Scholars, which includes Sheikh Abdullah bin Suleiman al-Manee, Sheikh Abdulaziz Al-Sheikh, Sheikh Bakr Abu Zaid, Sheikh Saleh Al-Fawzan and Sheikh Abdullah bin Ghudayyan, Abd al-Aziz ibn Baz and Sheikh Muhammad ibn al-Uthaymeen, see copyright law as a means of respecting and observing the rights of others.<sup>47</sup>

Not only are these jurists considered to be ‘representatives of the conservative Saudi Arabian religious establishment[s]’ such as the above-mentioned Committee and Council, but the fatwas they issue can serve as landmark cases in the Kingdom.<sup>48</sup> Nevertheless, all emphasise the

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<sup>44</sup> The Quranic Arabic Corpus, ‘Verse (2:188) - English Translation: Chapter (2) Sūrat l-Baqarah (The Cow)’ (*The Quranic Arabic Corpus*) <[https://corpus.quran.com/translation.jsp?chapter=2&verse=188#:~:text=Yusuf Ali%3A And do not,of \(other\) people’s property.](https://corpus.quran.com/translation.jsp?chapter=2&verse=188#:~:text=Yusuf%3A%20And%20do%20not,of%20(other)%20people's%20property.)> accessed 14 March 2023.

<sup>45</sup> Hamzah (n 2) 211; Muhammad Al Ghazali (ed), *Fiqh Us Seerah: Understanding the Life of Prophet Muhammad* (2nd edn, Dar UL Thaqafah 2022) (in Arabic).

<sup>46</sup> Hamzah (n 2) 211–212.

<sup>47</sup> *ibid* 212; Zarabozo (n 33); Hussain Al-Shahraani (ed), *Huqooq Al-Ikhtiraa’ Wa Al-Taleef Fi Al-Fiqh Al-Islami* (Dar Taibah 2005) (in Arabic); The Organisation of Islamic Cooperation (OIC) (formerly the Organization of the Islamic Conference), ‘Majallat Majma Al-Fiqh Al-Islami: Session 5, 1988’ (1988) 3 The Organisation of Islamic Cooperation (OIC) (formerly Organization of the Islamic Conference) 2267, 2267 (in Arabic); Sheikh Abdul Aziz bin Abdullah bin Baz and others, ‘Fatwa No. 18845 on Tapes Copyright’ (*Permanent Committee for Scholarly Research and Ifta*) <[www.alifta.gov.sa/Ar/IftaContents/Pages/FatawaDetails.aspx?cultStr=ar&IndexItemID=85968&SecItemHitID=94974&ind=21&Type=Index&View=Page&PageID=4728&PageNo=1&BookID=3&Title=DisplayIndexAlpha.aspx#حقوق طبعا الأشربة](http://www.alifta.gov.sa/Ar/IftaContents/Pages/FatawaDetails.aspx?cultStr=ar&IndexItemID=85968&SecItemHitID=94974&ind=21&Type=Index&View=Page&PageID=4728&PageNo=1&BookID=3&Title=DisplayIndexAlpha.aspx#حقوق%20طبعا%20الاشربة)> (in Arabic) accessed 15 March 2023.

<sup>48</sup> Unlike the Common Law or Anglo-Saxon legal tradition, there are no landmark cases explicitly binding on judges in KSA. Arguably, however, fatwas issued by the Permanent Committee for Islamic Research and Issuing Fatwa as well as the KSA Council of Senior Scholars can serve as landmark cases. Hamzah (n 2) 212; Khaled Al Ruwais and Rizk Al Rayes (eds), *An Introduction to the Study of Legal Science* (5th edn, Al Shegrey 2012) 18-22 (in Arabic); Ali Al Zahrani, Khaled Abdel Tawab and Adnan Al Omar, *The Principles of Law with Particular Reference to the Applicable Regulations in Saudi Arabia* (2nd edn, Jarir Bookstore 2013) 29 (in Arabic); Jørgen S Nielsen and Lisbet Christoffersen (eds), *Shari’ah As Discourse: Legal Traditions and the Encounter with Europe* (Routledge 2010) xv. Alzaid has classified 36 domestic cases as possibly landmark cases in the Kingdom. He also has analysed 17 cases that are considered to embody judicial principles in the field of international copyright, which are selected from the WIPO Symposium on Enforcement of IPRs. Ibrahim Alzaid, ‘Domestic and International Principles and Judicial Precedents in the Field of Copyright’ (*The Saudi Authority for Intellectual Property*) 1

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importance of IP rights, citing statements from the holy Quran and the sayings of Prophet Mohammed, Peace Be Upon Him, as proof of the validity of the concept.<sup>49</sup> Individuals, whether Muslims or non-Muslims, have a private right to invent or even write something which could belong to the individual owner.<sup>50</sup> An individual may then make money from this invention, for example.<sup>51</sup> From this perspective, Islamic law respects and protects IP rights.<sup>52</sup> Through two different fatwas issued on somewhat similar cases, the Standing Committee of Religious Scholars of Saudi Arabia ruled firstly that ‘it is illegal to reproduce a copyrighted work of others unless one has explicit authorization to do so’.<sup>53</sup> The second fatwa, issued in mid-2022, stated that Islam forbids infringement of intellectual property rights and requires a person to respect the rights of others’; it warned against ‘seizing these rights [from others] or benefiting from them without the permission of their owners’.<sup>54</sup> This second fatwa was supported and highly celebrated by the Saudi Authority for Intellectual Property (hereinafter “SAIP”), which was established in 2018 by the Saudi government as the only competent authority for IP in the Kingdom.<sup>55</sup> Accordingly, anyone

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<<https://drive.google.com/file/d/1faxrT9745XWJ3iMJdK4sVJekTbvWHaKp/view>> (in Arabic) accessed 17 March 2023.

<sup>49</sup> Hamzah (n 2) 212.

<sup>50</sup> *ibid* 212–213; Nielsen and Christoffersen (n 48) 39; Zarabozo (n 33); Malkawi (n 29) 618, 623–624; OIC (n 47) 2267 (in Arabic); Islamic Fiqh Academy (ed), *Resolutions and Recommendations of the Council of Islamic Fiqh Academy 1985–2000* (The Council of the Islamic Fiqh Academy 2002) 89, 192–193.

<sup>51</sup> Hamzah (n 2) 212–213; Nielsen and Christoffersen (n 48) 39; Zarabozo (n 33); Malkawi (n 29) 623–624; OIC (n 47) 2267 (in Arabic); Islamic Fiqh Academy (n 50) 89, 192–193.

<sup>52</sup> OIC (n 47) 2267 (in Arabic); Islamic Fiqh Academy (n 50) 89, 192–193.

<sup>53</sup> Hamzah (n 2) 213; Zarabozo (n 33); Sheikh Abdul Aziz bin Abdullah bin Baz and others (n 47); Sheikh Abdul Aziz bin Abdullah bin Baz and others, ‘Fatwa No 18453’ (*Permanent Committee for Scholarly Research and Ifta*) pt 13, 188

<[www.alifta.gov.sa/Ar/IftaContents/Pages/FatawaDetails.aspx?View=Page&PageID=4729&CultStr=ar&PageNo=1&NodeID=1&BookID=3](http://www.alifta.gov.sa/Ar/IftaContents/Pages/FatawaDetails.aspx?View=Page&PageID=4729&CultStr=ar&PageNo=1&NodeID=1&BookID=3)> (in Arabic) accessed 18 March 2023.

<sup>54</sup> Saudi Press Agency (SPA), ‘Permanent Committee for Ifta: Islam Forbids Infringement of Intellectual Property Rights and Does Not Allow Seizing Them’ (*Saudi Press Agency*, 2022) <[www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2344416](http://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2344416)> accessed 18 March 2023; Permanent Committee for Scholarly Research and Ifta, ‘Standing Committee for Fatwa: Islam Prohibits the Infringement of Intellectual Property Rights and Does Not Permit Their Appropriation’ (*Permanent Committee for Scholarly Research and Ifta*) <[www.alifta.gov.sa/Ar/News/Pages/FatwacomminuityRights.aspx](http://www.alifta.gov.sa/Ar/News/Pages/FatwacomminuityRights.aspx)> (in Arabic) accessed 18 March 2023.

<sup>55</sup> Suliman AlAnzi, ‘Intellectual Property to 24 Akhbaar: We Are Studying with the Ministry of Justice Compensations for Copyright Infringements’ (*Argaam*, 2022) <<https://akhbaar24.argaam.com/article/detail/630313/-الملكية-الفكرية-ملكية-الملك>> (in Arabic) accessed 18 March 2023; SPA, ‘His Eminence the Grand Mufti of the Kingdom of Saudi Arabia Receives the CEO of the Saudi Authority for Intellectual Property’ (*Saudi Press Agency*, 2022) <[www.spa.gov.sa/2247259?lang=ar&newsid=2247259](http://www.spa.gov.sa/2247259?lang=ar&newsid=2247259)> (in Arabic) accessed 18 March 2023; World Intellectual Property Organisation (WIPO), ‘Saudi Arabia Gears up on IP’ (*World Intellectual Property Organisation*, 2020) <[www.wipo.int/wipo\\_magazine/en/2020/03/article\\_0008.html](http://www.wipo.int/wipo_magazine/en/2020/03/article_0008.html)> accessed 28 March 2023; BoE, ‘Regulating the Saudi Authority for Intellectual Property’ (*Bureau of Experts at the Council of Ministers*, 2018)

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who purchases software, a book or a tape which is copyrighted legally agrees to the conditions of that copyright.<sup>56</sup> In other words, it is Islamically illegal to pirate such products.<sup>57</sup> This line of argument is derived from Hadiths such as (i) ‘a man’s property may not be taken except with his goodwill’; and (ii) ‘You are most entitled to take wages [ie reward] for doing a Ruqya [the healing method based on the recitation of the Quran and hadith] with Allah’s Book’.<sup>58</sup> In this context, it could be argued that IP rights need to be examined and conceptualised within maqasid al-Shari’ah, which means the overall goal of Shari’ah, with the intention of protecting the interests of humanity.<sup>59</sup> Statements regarding IP rights made by leading jurists and advisors to the Royal Court, including Sheikh Abdullah bin Suleiman al-Manee, Abd al-Aziz ibn Baz and Sheikh Muhammad ibn al-Uthaymeen, align with the spirit of TRIPS.<sup>60</sup> As a signatory to The 1883 Paris Convention for the Protection of Industrial Property in 2003 and The Berne Convention for the Protection of Literary and Artistic Works in 2004, the KSA appears to harmonise these two conventions through ‘masalih-cum-maqasid al-Shari’ah’.<sup>61</sup>

### 4.2 The Predominance of Sharia and Islamic Identity as a Critical Lens with which to Analyse the KSA’s Implementation of and Compliance with International Law

Islamic law offers holistic guidance on how to govern and regulate trading and economic activities

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<<https://laws.boe.gov.sa/BoeLaws/Laws/Viewer/3afb71af-27a0-4562-a6df-a9f600fd973b?lawId=6cf17f84-7a45-4ff1-a61a-a9f600fd90bd>> (in Arabic) accessed 18 March 2023.

<sup>56</sup> Hamzah (n 2) 213; Zarabozo (n 33); Sheikh Abdul Aziz bin Abdullah bin Baz and others, (n 53) (in Arabic); Sheikh Abdul Aziz bin Abdullah bin Baz, Sheikh Abdulaziz Al-Sheikh, Sheikh Bakr Abu Zaid (n 47) (in Arabic).

<sup>57</sup> *ibid.*

<sup>58</sup> Sheikh Abdul Aziz bin Abdullah bin Baz and others, (n 53) (in Arabic); Permanent Committee for Scholarly Research and Ifta (n 54) (in Arabic); Sahih Al-Bukhari, ‘76 Medicine: (34) Chapter: Conditions for Doing Ruqya with Surat Al-Fatiha’ (*Sunnah*) <<https://sunnah.com/bukhari:5737>> accessed 19 March 2023; Mishkat Al-Masabih, ‘11. Business Transactions: (11b) Chapter: Wrongful Appropriation and Loan - Section 2’ (*Sunnah*) <<https://sunnah.com/mishkat:2946>> accessed 19 March 2023; Khadher Ahmad, Mohd Anuar Ramli and Nor Azian Ab Rahman, ‘Understanding the Use of Ruqyah (Healing Method Based on The Quran and Hadith) in the Treatment of Disease: Analysis Based on Fiqh Al-Hadith Al-Imam Al-Bukhari’ (2016) 14 Brill 168.

<sup>59</sup> Hamzah (n 2) 215; Piscatori (n 15) xiii; Nielsen and Christoffersen (n 48) 41; Zarabozo (n 33).

<sup>60</sup> Hamzah (n 2) 212; Zarabozo (n 33); Nielsen and Christoffersen (n 48) 162–163.

<sup>61</sup> Hamzah (n 2) 216; WIPO, ‘Berne Notification No. 288: Berne Convention for the Protection of Literary and Artistic Works’ (*World Intellectual Property Organisation*, 2022) <[www.wipo.int/treaties/en/notifications/berne/treaty\\_berne\\_288.html](http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_288.html)> accessed 19 March 2023; WIPO, ‘Berne Convention for the Protection of Literary and Artistic Works’ (*World Intellectual Property Organisation*) <[www.wipo.int/treaties/en/ip/berne/](http://www.wipo.int/treaties/en/ip/berne/)> accessed 19 March 2023.

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in the KSA.<sup>62</sup> Importantly, this generic guidance is always open to interpretation and capable of adapting to conditions within the relevant framework of the Holy Quran and the Sunnah of the Prophet.<sup>63</sup> Unsurprisingly, numerous studies have highlighted issues associated with the KSA's implementation of and compliance with its legal responsibilities under international agreements, and the way in which the Kingdom engages with legal matters in various contexts, both internally and internationally. Many of these studies focus on the KSA's Islamic identity and the relevance of Sharia to successful compliance. Among the most notable scholars in this regard are Bhala and Keating,<sup>64</sup> Fisher,<sup>65</sup> Rosato,<sup>66</sup> Salameh,<sup>67</sup> Nicolau,<sup>68</sup> Al-Sudairy,<sup>69</sup> Al-Jarbou,<sup>70</sup> Muaygil,<sup>71</sup> Alshahrani,<sup>72</sup> Alharbi,<sup>73</sup> and Altawyan.<sup>74</sup> The KSA's close legal relationship to Sharia has also received attention from various international organisations, academic research centres, countries that have trade and political relations with the Kingdom, and international conferences, including

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<sup>62</sup> Hamzah (n 2).

<sup>63</sup> *ibid.*

<sup>64</sup> Raj Bhala and Shannon B Keating, 'Diversity within Unity: Import Laws of Islamic Countries on Haram (Forbidden) Products' (2013) 47 *The International Lawyer* 343; Raj Bhala, 'The Intersection of Islam and the WTO: Three Shari'a Issues in the WTO Accession of Saudi Arabia' (2003) 21 *Law in Context: A Socio-Legal Journal* 152; Raj Bhala, 'Saudi Arabia, the WTO, and American Trade Law and Policy' (2004) 38 *International Lawyer (ABA)* 741.

<sup>65</sup> Geoffrey Fisher, 'Sharia Law and Choice of Law Clauses in International Contracts' [2005] *Lawasia Journal* 69, 74, 80.

<sup>66</sup> Steven M Rosato, 'Saving Oklahoma's "Save Our State" Amendment: Sharia Law in the West and Suggestions to Protect Similar State Legislation from Constitutional Attack' (2014) 44 *Seton Hall Law Review* 659, 677–678, 680.

<sup>67</sup> Muamar Hasan Salameh, 'The Principle of Separation of Powers between Sharia and the Positive Law: A Case Study on the Constitutional System of Saudi Arabia' in Atho Mudzhar and others (eds), *Proceedings of 1st International Conference of Law and Justice: Good Governance and Human Rights in Muslim Countries: Experiences and Challenges (ICLJ 2017)* (Atlantis Press 2017) <[www.atlantis-press.com/proceedings/iclj-17/25891414](http://www.atlantis-press.com/proceedings/iclj-17/25891414)>.

<sup>68</sup> Ingrid Ileana Nicolau, 'Matrimonial Contracts and the Rights of Women in Islam: A Saudi Arabia Case Study' (2018) 9 *Journal of Law and Administrative Sciences* 72.

<sup>69</sup> Ziad A Al-Sudairy, 'The Constitutional Appeal of Shari'a in a Modernizing Saudi State' (2010) 2 *Middle East Law and Governance* 1.

<sup>70</sup> Ayoub M Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia' (2004) 19 *Arab Law Quarterly* 5.

<sup>71</sup> Ruaim Muaygil, 'The Role of Physicians in State-Sponsored Corporal Punishment: A View from Saudi Arabia' (2016) 25 *Cambridge Quarterly of Healthcare Ethics* 479.

<sup>72</sup> Bandar Alshahrani, 'A Critical Legal Analysis of the Impact of Male Guardianship System on Women's Rights in Saudi Arabia' (2016) 12 *Journal of Islamic State Practices in International Law* 31.

<sup>73</sup> Mohammad Alharbi, 'Key Challenges Facing Online Dispute Resolution in Saudi Arabia' (2019) 88 *Journal of Law, Policy and Globalization* 76.

<sup>74</sup> Ahmed A Altawyan, 'Sharia as Law in International Commerce: Challenges in Attracting International Investors to Saudi Arabia and Achieving a Major Goal of Vision 2030' (2017) 6 *International Journal of Business and Management Studies* 323.



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Oxford Islamic Studies Online,<sup>75</sup> the International Conference of Law and Justice,<sup>76</sup> the World Trade Organisation (hereinafter “WTO”) Secretariat,<sup>77</sup> and the Department of State of the United States of America (hereinafter “US”).<sup>78</sup> Such intense interest in the KSA’s Islamic identity is grounded upon certain established facts and prevalent opinions about the Kingdom. First, Sharia is the primary legislative source in the KSA, and the 1992 Basic Law of Governance states that any agreement to which it is a party must be consistent with the provisions and principles of Sharia.<sup>79</sup> For some scholars, this fact is a sound and sufficient justification for interpreting the KSA’s interaction with international law through the lens of Sharia, explaining why “Sharia” and “Islamic law” are referenced so often in countless legal studies concerning the rules and regulations of the KSA.<sup>80</sup>

As noted by Telhami and Hill,<sup>81</sup> Bhala,<sup>82</sup> Al-Sudairy,<sup>83</sup> and Al-Jarbou,<sup>84</sup> perceptions of the KSA’s standing in the Muslim World is another significant reason for the prominent focus on its Islamic identity. Evidence of the Kingdom’s unique self-positioning among Muslims abounds.<sup>85</sup> One salient indicator is the number of important international Islamic organisations that are based in

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<sup>75</sup> See, for example, Eleanor Abdella Doumato and Joseph Albert Kéchichian, ‘Saudi Arabia’ (*Oxford Islamic Studies Online*, 2021) <[www.oxfordislamicstudies.com/article/opr/t236/e0709](http://www.oxfordislamicstudies.com/article/opr/t236/e0709)> accessed 5 January 2020; ‘Saudi Arabia, Islam In’ (*Oxford Islamic Studies Online*, 2021) <[www.oxfordislamicstudies.com/article/opr/t125/e2114#](http://www.oxfordislamicstudies.com/article/opr/t125/e2114#)> accessed 5 January 2020.

<sup>76</sup> Salameh (n 67).

<sup>77</sup> See, for example, Trade Policy Review Body in the World Trade Organization (WTO), ‘Trade Policy Review, Report by the Secretariat: The Kingdom of Saudi Arabia’ (2016) <[www.wto.org/english/tratop\\_e/tpr\\_e/s333\\_e.pdf](http://www.wto.org/english/tratop_e/tpr_e/s333_e.pdf)> accessed 28 July 2021.

<sup>78</sup> See, for example, The US Department of State (USDS), ‘Saudi Arabia Annual Human Rights Reports Submitted to Congress by the US Department of State’ (2010) 33a The US Department of State 2243; USDS Bureau of Democracy, ‘Saudi Arabia 2018 Human Rights Report’ (2018) <[www.state.gov/wp-content/uploads/2019/03/SAUDI-ARABIA-2018.pdf](http://www.state.gov/wp-content/uploads/2019/03/SAUDI-ARABIA-2018.pdf)> accessed 18 May 2021.

<sup>79</sup> The Bureau of Experts at the Council of Ministers, ‘Basic Law of Governance’ (n 11).

<sup>80</sup> See, for example, Bhala, ‘Saudi Arabia, the WTO, and American Trade Law and Policy’ (n 62) 742; Salameh (n 67) 10, 12; Al-Sudairy (n 69) 5, 12; Al-Jarbou (n 70) 12–13; Muaygil (n 71) 480; Alshahrani (n 72) 50; Alharbi (n 73) 78; Altawyan (n 74) 332; Doumato and Kéchichian (n 75); WTO (n 77) 19; USDS Bureau of Democracy (n 78) 1; USDS, ‘Saudi Arabia Annual Human Rights Reports’ (n 78) 2243.

<sup>81</sup> Shibley Telhami and Fiona Hill, ‘Does Saudi Arabia Still Matter? Differing Perspectives on the Kingdom and Its Oil’ (2002) 81 *Foreign Affairs* 167, 172.

<sup>82</sup> Bhala, ‘The Intersection of Islam and the WTO’ (n 62) 152; Bhala, ‘Saudi Arabia, the WTO, and American Trade Law and Policy’ (n 62) 742, 747, 750–751.

<sup>83</sup> Al-Sudairy (n 69) 4–5.

<sup>84</sup> Al-Jarbou (n 70) 12.

<sup>85</sup> See, for example, Dalia Fahmy, ‘5 Facts about Religion in Saudi Arabia’ (*Pew Research Center*, 12 April 2018) <[www.pewresearch.org/fact-tank/2018/04/12/5-facts-about-religion-in-saudi-arabia/](http://www.pewresearch.org/fact-tank/2018/04/12/5-facts-about-religion-in-saudi-arabia/)> accessed 23 July 2021.

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and supervised by the KSA. Perhaps the most prominent of these is the Organisation of Islamic Cooperation (hereinafter “OIC”), which has been described as ‘the second largest inter-governmental organisation after the United Nations’.<sup>86</sup> Furthermore, the KSA holds two of the Muslim world’s holy cities, Mecca (Makkah Al Mukarramah) and Medina (Al Madina Al Monawara).<sup>87</sup> It is also the keeper of the Kaaba, in whose direction every Muslim must turn for prayer (*qiblah*), and which receives millions of Muslim pilgrims annually.<sup>88</sup> Thus, many other Islamic countries can be expected to look to the Kingdom, both as the geographic centre of their shared faith and as one of the world’s largest oil producers and one of the top 20 states in terms of the size of its economy, and therefore an influential participant in international trade negotiations.<sup>89</sup> In this sense, the KSA is arguably at the forefront of the intersections between Sharia and international norms.<sup>90</sup>

For these reasons, it can be difficult for legal scholars to resist selecting the Kingdom as a case study, not only for the purpose of understanding Sharia as existing law and as ‘one of the world’s three major legal systems’,<sup>91</sup> but also to explore ways to tackle the overlap between Sharia and

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<sup>86</sup> Organisation of Islamic Cooperation (OIC), ‘History’ <[www.oic-oci.org/page/?p\\_id=52&p\\_ref=26&lan=en](http://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en)> accessed 8 January 2020. See also, for example, OIC, ‘Custodian of the Two Holy Mosques, Chairman of the Islamic Summit, Patronizes OIC Golden Jubilee’s Festivities’ <[www.oic-oci.org/jubilee/?lan=en](http://www.oic-oci.org/jubilee/?lan=en)> accessed 8 January 2020.

<sup>87</sup> Purva Desphande, ‘The Role of Women in Two Islamic Fundamentalist Countries: Afghanistan and Saudi Arabia’ (2001) 22 Women’s Rights Law Reporter 193, 198.

<sup>88</sup> James Stevens Curl, ‘Qibla’ in *A Dictionary of Architecture and Landscape Architecture* (OUP 2006) <[www.oxfordreference.com/view/10.1093/acref/9780198606789.001.0001/acref-9780198606789-e-5902?rskey=ncjcEY&result=1](http://www.oxfordreference.com/view/10.1093/acref/9780198606789.001.0001/acref-9780198606789-e-5902?rskey=ncjcEY&result=1)> accessed 24 July 2021; John L Esposito (ed), ‘Mihrab’ in *The Oxford Dictionary of Islam*, (2003) <[www.oxfordreference.com/view/10.1093/acref/9780195125580.001.0001/acref-9780195125580-e-1511#](http://www.oxfordreference.com/view/10.1093/acref/9780195125580.001.0001/acref-9780195125580-e-1511#)> accessed 24 July 2021; ‘Monthly Statistics of Umrah: 7% Rise in Number of Coming Pilgrims Compared to Last Year’ (*Saudi Press Agency*, 9 May 2019) <[www.spa.gov.sa/viewfullstory.php?lang=en&newsid=1922054](http://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=1922054)> accessed 24 July 2021; General Authority for Statistics, ‘Hajj Statistics 2019 - 1440’ (2019) <[www.stats.gov.sa/sites/default/files/haj\\_40\\_en.pdf](http://www.stats.gov.sa/sites/default/files/haj_40_en.pdf)> accessed 24 July 2021.

<sup>89</sup> See, for example, Dabbeeru Neelakanteswar Rao, ‘Saudi Arabia’s Accession to WTO: Future Challenges’ [2007] Social Science Research Network 1 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=957589](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=957589)> accessed 22 December 2019.

<sup>90</sup> See, for example, Telhami and Hill (n 81) 172; Bhala, ‘The Intersection of Islam and the WTO’ (n 62) 152; Bhala, ‘Saudi Arabia, the WTO, and American Trade Law and Policy’ (n 62) 742, 747, 750–751; Al-Sudairy (n 69) 4–5; Al-Jarbou (n 70) 12.

<sup>91</sup> Altawyan (n 74) 324. The two other major legal systems are common law and Roman or civil law. See, for example, Gamal Moursi Badr, ‘Islamic Law: Its Relation to Other Legal Systems’ (1978) 26 American Journal of Comparative Law 187, 187–188; Ann Black, Hossein Esmaeili and Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Edward Elgar 2013) 4–9. Note also that Badr defines ‘major world legal systems’ as ‘those legal systems whose application extended far beyond the confines of their original birth places and whose influence, through reception of their principles, techniques or specific provisions has been both widespread in space and enduring in time’. Badr (n 91) 187.

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international law. Bhala's work on Saudi Arabia provides a good example in this regard. As well as outlining the economic and strategic logic of doing so, Bhala explains why the KSA is an appropriate focus for investigating the intersection of Islam and WTO in terms of the Kingdom's position as an important Islamic nation.<sup>92</sup> For example, Bhala's study, 'The Intersection of Islam and the WTO: Three Shari'a Issues in the WTO Accession of Saudi Arabia', begins with a quote from Telhami and Hill: 'The key role that Saudi Arabia plays psychologically and symbolically in the lives of Muslims worldwide cannot be underestimated.'<sup>93</sup> In another article, Bhala asserts as fact that 'no Muslim credibly proclaims total disinterest in Saudi Arabia',<sup>94</sup> adding, '[t]o them, the accession of the Kingdom, and its participation in the WTO, takes on significance far beyond the commercial significance that arises from WTO entry terms set for other Muslim countries'.<sup>95</sup> In view of these observations, the focus on the KSA in the current research will help to explain the intersections and conflicts between Sharia law and international norms.

### **4.3 Beyond Sharia: Arguments for Examining the KSA's Compliance Behaviour through Other Lenses**

While the Kingdom's implementation of its international legal commitments has undoubtedly been influenced by the robust relationship between its legal system and the provisions and principles of Islamic law,<sup>96</sup> the underlying causes of change in the KSA's behaviour towards the measures it has implemented cannot be fully explored through the lens of Sharia, nor can the overlap between Sharia and the KSA's obligations under international law be fully explained.

There are three reasons for this. First, despite its importance, Sharia is only one factor among many that influence the KSA's compliance to a greater or lesser degree. It is therefore illogical to focus exclusively on Sharia or indeed any one factor when trying to develop a full understanding of the reasons why KSA complies with its agreed international legal obligations in some instances but not in others. A range of factors therefore is needed to explain such variations in the KSA's

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<sup>92</sup> See, for example, Bhala, 'The Intersection of Islam and the WTO' (n 62) 152; Bhala, 'Saudi Arabia, the WTO, and American Trade Law and Policy' (n 62) 750–751.

<sup>93</sup> Telhami and Hill (n 81) 172 (as cited in Bhala, 'The Intersection of Islam and the WTO' (n 62) 152).

<sup>94</sup> Bhala, 'Saudi Arabia, the WTO, and American Trade Law and Policy' (n 62) 750.

<sup>95</sup> *ibid* 751.

<sup>96</sup> The Bureau of Experts at the Council of Ministers, 'Basic Law of Governance' (n 11).

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implementation of and compliance with international law. Equipped with this knowledge, it will be possible to develop innovative solutions to issues leading to non-compliance with TRIPS. Such a more comprehensive view should, in turn, help diminish the attribution of any non-compliance to the KSA's Islamic identity.

Second, while the KSA is 'considered the birthplace of Islam',<sup>97</sup> its importance for other Islamic and non-Islamic nations is debatable. This debate has deep ideological, political and historical roots. The long-standing conflict between Saudi Arabia and Iran, for example, raises questions about the KSA's importance in the Muslim World.<sup>98</sup> The fact that the Kingdom was not invited to the mini-Islamic summit hosted by Malaysian Prime Minister Mahathir Mohamad in late December 2019 also casts doubt on the KSA's standing among Muslim nations.<sup>99</sup> Regardless of the KSA's importance for Muslims, the factors that influence its compliance with international law do not necessarily apply to other Islamic countries, previously, currently, or in the future.<sup>100</sup> Not only will the unique circumstances of each country shape its interaction with international law, but any such direct correlation between nations would be inconsistent with the notion of state sovereignty.<sup>101</sup> Moreover, before oil was discovered in the KSA, the importance of the country in

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<sup>97</sup> Desphande (n 87) 198; Myada Omar El-Sawi, 'Beyond the Tiers of Human Trafficking Victims: Islamic Law's Ability to Push the Muslim World to the Top of the United States Trafficking Tier Placements and into Compliance with International Law' (2011) 39 *Georgia Journal of International and Comparative Law* 391, 414.

<sup>98</sup> See generally, Behzad Diansaee and Vladimir Yurtaev, 'The Prospect of the Relationship between the Islamic Republic of Iran and the [Kingdom of] Saudi Arabia: Plausible Scenarios' (2017) 10 *Journal of Politics and Law* 83.

<sup>99</sup> The three presidents who attended that summit were Recep Tayyip Erdogan of Turkey, Emir Tamim bin Hamad Aal Thani of Qatar, and Hassan Rohani of Iran. See for example, Saima Shabbir, 'Saudi Arabia Denies Asking Pakistan to Skip Malaysia Summit' (*Arab News*, 22 December 2019) <[www.arabnews.com/node/1602131/saudi-arabia](http://www.arabnews.com/node/1602131/saudi-arabia)>; Middle East Media Research Institute (MEMRI), 'Kuala Lumpur Summit 2019: A Bid By Qatar, Turkey, Malaysia, Iran To Challenge Saudi Arabia's Standing in Muslim World', Special Dispatch no 843 (*MEMRI*, 2019) <[www.memri.org/reports/kuala-lumpur-summit-2019-bid-qatar-turkey-malaysia-iran-challenge-saudi-arabias-standing](http://www.memri.org/reports/kuala-lumpur-summit-2019-bid-qatar-turkey-malaysia-iran-challenge-saudi-arabias-standing)> accessed 25 December 2019; P Prem Kumar, 'Mahathir's Muslim Summit Turns Malaysia-Saudi Ties Bitter: The Kingdom May Cut Hajj Pilgrimage Quotas for Malaysians in Retaliation' (*The Nihon Keizai Shinbun*, 24 December 2019) <<https://asia.nikkei.com/Politics/International-relations/Mahathir-s-Muslim-summit-turns-Malaysia-Saudi-ties-bitter>>.

<sup>100</sup> For further discussion of the concept of causation and its usages, see, for example, Richard W Wright and Ingeborg Puppe, 'Causation: Linguistic, Philosophical, Legal and Economic' (2016) 91 (2) *Chicago-Kent Law Review* 461, 501–202.

<sup>101</sup> For a brief definition of sovereignty from a political perspective, an explanation of how this concept evolved historically, and the relationship between sovereignty and international law, see 'Sovereignty: Politics', *Encyclopædia Britannica* <[www.britannica.com/topic/sovereignty](http://www.britannica.com/topic/sovereignty)> accessed 29 December 2019. For further discussion on the concept of sovereignty and its application, bearing in mind that both are subject to change from time to time, see Stephen D Krasner (ed), *Problematic Sovereignty: Contested Rules and Political Possibilities* (Columbia UP 2001) 5–12.

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the region was largely symbolic,<sup>102</sup> suggesting that petro-wealth is a potential factor in the growing influence of the Kingdom.<sup>103</sup> Moreover, the KSA brand of Hanbali/Wahhabi Islam is arguably one of the least popular forms of Islamic law,<sup>104</sup> whose growing influence some scholars, such as Kalpakian, Mirkow, and Friedhoff, have attributed to petro-dollars.<sup>105</sup> These considerations limit the applicability of the KSA as a case study and constrain its ability to explain the overlap between the body of Islamic legislation and international law.<sup>106</sup>

The third reason a full understanding of the overlap between Sharia and international law cannot be achieved solely through the case study of the Kingdom is the nature of Sharia itself.<sup>107</sup> While there is agreement among the main schools of Islamic thought, Sharia is such a broad concept<sup>108</sup> that some degree of subjectivity can be introduced when laws are applied and practised.<sup>109</sup> Such variations are conventionally accepted because Sharia's authority is grounded 'in the sincerity of the jurisprudential reasoning that generates it', regardless of the correctness of the result.<sup>110</sup>

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<sup>102</sup> See, for example, Kelly M McFarland (ed), *Foreign Relations of the United States, 1977–1980, Volume XVIII, Middle East Region; Arabian Peninsula* (USDS, Office of the Historian, 2015) 451–731 <<https://history.state.gov/historicaldocuments/frus1977-80v18>>.

<sup>103</sup> *ibid.*

<sup>104</sup> Cameron Zargar, 'Origins of Wahhabism from Hanbali Fiqh' (2017) 16 *UCLA Journal of Islamic and Near Eastern Law* 65; Jack Vahram Kalpakian, 'A Tug-of-War over Islam: Religious Faith, Politics, and the Moroccan Response to Islamist Violence' (2008) 50 *Journal of Church and State* 119, 130.

<sup>105</sup> Kalpakian (n 104) 130; Frank J Mirkow, 'The Nature of Saudi Arabian Strategic Power: Implications for American Foreign Policy' (1993) 17 *Fletcher Forum of World Affairs* 157, 158–159; Anna Friedhoff, 'Bras and Ballots: Comparing Women's Political Participation in Pakistan and Saudi Arabia' (2013) 15 *Oregon Review of International Law* 271, 289; Mahmood Monshipouri and William Chu, 'The Flaws of the Proliferation Cascade Scenario: Iran-Saudi Relations in Perspective' (2016) 12 *International Studies Journal (ISJ)* 1, 14.

<sup>106</sup> For further scholarly discussion regarding the body of Islamic legislation and its varied applications, see, for example, Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (CUP 2016); Shaheen Sardar Ali, 'Teaching and Learning Islamic Law in a Globalized World: Some Reflections and Perspectives' (2011) 61 *Journal of Legal Education* 206; Shaheen Sardar Ali, 'Exploring New Directions in the Islamic Legal Traditions: Re-Interpreting Shari'a from Within' (2013) 9 *Journal of Islamic State Practices in International Law* 9.

<sup>107</sup> See, for example, Roberta Tontini, *Muslim Sanzijing: Shifts and Continuities in the Definition of Islam in China* (Lam edn, Brill 2016) 8; Asifa Quraishi-Landes, 'The Sharia Problem with Sharia Legislation' (2015) 41 *Ohio Northern University Law Review* 547–552.

<sup>108</sup> Altawyan notes that 'Islam deals with all aspects of life, including faith, politics, economics, and personal matters, such as sexual intercourse, hygiene, etc.'. Altawyan (n 74) 324.

<sup>109</sup> See, for example, Tontini (n 107) 8. See also the explanations provided in Quraishi-Landes (n 107) 545, 547–552.

<sup>110</sup> Quraishi-Landes (n 107) 548–549. Indeed, such a case even occurred during the lifetime of the Prophet Muhammad (Peace be upon him), who accepted two different interpretations of one text related to Sharia: 'When the Prophet (Peace be upon him) returned from the battle of Al-Ahzab (The confederates), he said to us, 'None should offer the Asr prayer but at Bani Quraiza . . . The Asr prayer became due for some of them on the way. Some of them decided not to offer the Salat but at Bani Quraiza, while others decided to offer the Salat on the spot and said that the intention of the Prophet (Peace be upon him) was not what the former party had understood. And when that was told to the

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Because these differences in practices can occur, not only from one era or country to another but in the same era and country, including the Kingdom,<sup>111</sup> it is important to clarify what we mean by Sharia when examining any given case, whether the definition we adopt is specific (for example, when studying the TRIPS Agreement and the practice of Sharia in Country A or B) or general (for example, when studying the tension between the TRIPS Agreement and the principles of Sharia). Assuming that the practice of Sharia in the KSA is the same as in other countries could lead legal researchers to fall into the fallacy of false analogy. The concept of Sharia ‘transcend[s] its narrow juridical application in what is defined in Arabic as *fiqh* (i.e., Islamic jurisprudence)’,<sup>112</sup> which is comprised of multiple jurisprudential schools.<sup>113</sup> As noted above, variations in the interpretation of the law are acceptable and may be even desirable.<sup>114</sup> The variety of interpretations derives from the practice of independent reasoning (*ijtihad*) that is encouraged by various Sunni schools of thought,<sup>115</sup> including Sharia law in the KSA.<sup>116</sup> Involved as they are in the domestic legal systems of Islamic states and in determining the implementation of and compliance with international legal systems, each of the four most famous Sunni schools of thought – namely, the Hanafi school, the Maliki School, the Shafi’i School and the Hanbali School<sup>117</sup> – could, despite the differences between them, play a role in developing the concept of “compliance”. The KSA is primarily governed by the Hanbali School of Sharia, ‘whose origins are attributed to Ahmad ibn Hanbal in ninth-century Baghdad’, and therefore any policy in relation to contracts is considered part of this School in the first instance.<sup>118</sup> Reliance upon the fundamental doctrines emanating from Sharia provisions is also the first preference among Islamic jurisprudential schools (specifically, the

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Prophet (Peace be upon him) he did not blame anyone of them.’ Al-Bukhari, ‘Sahih Al-Bukhari 946, Book 12 (Fear Prayer), Hadith 5’ (*sunnah*) <<https://sunnah.com/urn/9025>> accessed 27 December 2019.

<sup>111</sup> See Quraishi-Landes (n 107) 548–549; Bhatt (n 1) 48–49.

<sup>112</sup> Tontini (n 107) 8.

<sup>113</sup> ‘Law: Sunni Schools of Law’ (*The Oxford Dictionary of Islam: Oxford Islamic Studies Online*) <[www.oxfordislamicstudies.com/article/opr/t125/e1335](http://www.oxfordislamicstudies.com/article/opr/t125/e1335)> accessed 30 December 2019.

<sup>114</sup> Quraishi-Landes (n 107) 547–552; Bhatt (n 1) 48–49; Al-Bukhari (n 110).

<sup>115</sup> Quraishi-Landes (n 107) 548–549; Intisar A Rabb, ‘Ijtihād’ (*The Oxford Encyclopedia of the Islamic World: Oxford Islamic Studies Online*) <[www.oxfordislamicstudies.com/article/opr/t236/e0354](http://www.oxfordislamicstudies.com/article/opr/t236/e0354)> accessed 30 December 2019.

<sup>116</sup> See, for example, Bhatt (n 1) 48–49.

<sup>117</sup> ‘Law: Sunni Schools of Law’ (n 113).

<sup>118</sup> See, for example, ‘Hanbali School of Law’ (*The Oxford Dictionary of Islam: Oxford Islamic Studies Online*) <[www.oxfordislamicstudies.com/article/opr/t125/e799](http://www.oxfordislamicstudies.com/article/opr/t125/e799)> accessed 23 December 2019.

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Hanbali school) and a primary source of legislation in the Kingdom.<sup>119</sup>

Two observations about the way in which Sharia is applied, especially in the Kingdom, emerge from this discussion. First, while some have suggested that giving judges more discretion when interpreting Sharia demonstrates ‘the degree of flexibility and pragmatism employed by Islamic law’,<sup>120</sup> it can also be argued that contestable interpretations undermine the operation of the provisions and principles of Islamic law, particularly when different judges in two similar cases issue two contradictory judgments. In contrast to most other Muslim states, much of Islamic law is not codified in the KSA,<sup>121</sup> a feature some scholars, such as Al-Sudairy and Bhatti, argue stems from the history of the Hanbali school and the teachings of Wahhabism.<sup>122</sup> The inherent legal uncertainty thus created may explain why some parties, particularly foreign investors in the KSA,

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<sup>119</sup> Hussein bin Abdul Aziz Al al-Sheikh, the Imam and Preacher of the Prophet’s Mosque who is also a high court judge in the Holy City of Madinah, has cited Royal Decree No 1033 on 20/3/1347 AH. The Royal Decree endorsed the decision of the KSA’s Judicial Body No 3 on 7/1/1347 AH, in which it was decided that the course of the judiciary in all courts should be compatible with the school of Ahmad ibn Hanbal (the Hanbali School of Sharia). However, in the event that it is impossible to apply the teachings of this school to a particular matter or that the matter at issue is contrary to the public interest, judges may, after research and consideration, apply other Islamic schools of thought. Hussein bin Abdul Aziz Al Al-Sheikh, *The Judicial Principles in Islamic Law: The Relationship of the Judicial System in the Kingdom of Saudi Arabia with Judicial Principles in Islamic Law* (Noor 2005 (1426 AH)) 46–47 <[www.noor-book.com/كتاب-المبادئ-القضائية-في-الشريعة-الإسلامية-وارتباط-النظام-القضائي-في-المملكة-العربية-السعودية-بها/](http://www.noor-book.com/كتاب-المبادئ-القضائية-في-الشريعة-الإسلامية-وارتباط-النظام-القضائي-في-المملكة-العربية-السعودية-بها/)> pdf.

<sup>120</sup> Bashar H Malkawi, ‘Intellectual Property Protection from a Sharia Perspective’ (2013) 16 Southern Cross University Law Review 87, 92. See also Jennifer Wacek, ‘The Multivocal Shari’a in History and Literature’ (2011) 28 Wisconsin International Law Journal 299, 310, 314–115, 322.

<sup>121</sup> Saud Alhassan Saud Abdulaziz Al Saud, ‘Making Sense of Judicial Remedies in Saudi Arabia: An Insider View’ (2016) 3 Indonesian Journal of International & Comparative Law 127, 130; Hossein Esmaeili, ‘On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabia Legal System’ (2009) 26 Arizona Journal of International and Comparative Law 1, 30–31; Abdulaziz H Al-Fahad, ‘Ornamental Constitutionalism: The Saudi Basic Law of Governance’ (2005) 30 Yale Journal of International Law 375, 395. It is important to point out, however, that the Kingdom announced wide-ranging legal reforms in early 2021, paving the way for codified laws. These laws include the Personal Status Law, the Civil Transactions Law, the Penal Code for Discretionary Sanctions and the Law of Evidence. See, for example, Natasha Turak, ‘Saudi Arabia Announces Major Legal Reforms, Paving the Way for Codified Law’ (CNBC, 2021) <[www.cnn.com/2021/02/09/saudi-arabia-announces-legal-reforms-paving-the-way-for-codified-law.html](http://www.cnn.com/2021/02/09/saudi-arabia-announces-legal-reforms-paving-the-way-for-codified-law.html)> accessed 28 July 2021. It is also important to mention that the Law of Evidence was issued on 30 December 2021 and published on January 7, 2022. See Bureau of Experts at the Council of Ministers, ‘The Law of Evidence’ (*Bureau of Experts at the Council of Ministers*, 2022) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/2716057c-c097-4bad-8e1e-ae1400c678d5/1>> (in Arabic) accessed 16 January 2022. In addition, Crown Prince Mohammed bin Salman Al Saud recently announced that ‘the Civil Status Bylaw [the Personal Status Law] is expected to be issued during the first quarter of 2022’. See ‘HRH Crown Prince Issues Statement on the Occasion of Issuing Regulation of Evidence’ (*Saudi Press Agency*, 28 December 2021) <[www.spa.gov.sa/viewstory.php?lang=en&newsid=2316473](http://www.spa.gov.sa/viewstory.php?lang=en&newsid=2316473)> accessed 16 January 2022.

<sup>122</sup> Al-Sudairy (n 69); Bhatt (n 1). On the other hand, Esmaeili notes that ‘there may not be any problem with codifying Hanbali jurisprudence in a series of well-organized and well indexed volumes of codes based on the view of the majority of Hanbalifuqaha represented by an assembly of senior Saudi ulama. However, there still remains strong resistance in Saudi Arabia against the notion of codifying Shari’ah law’. Esmaeili (n 121) 31.

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prefer other laws or regulations to be applied to their contracts.<sup>123</sup>

The subjectivity with which Sharia can be applied leads to a second observation of particular relevance for this chapter, namely, that while the Hanbali school is not always a binding authority for Saudi judges,<sup>124</sup> the concept of Sharia is much broader than the way in which it is practised within the Saudi judicial system.<sup>125</sup> This observation supports the suggestion that studying the limited aspects of Sharia adopted by the Saudi Arabian legal system will not enable a comprehensive explanation of the intersection between Sharia and international norms. At the same time, it challenges the supposition that choosing the KSA as a case study will contribute to a holistic understanding of the overlap between Sharia and international legal obligations, because each state, including Islamic states, has unique features that explain its compliance with international law. This is particularly true in the contemporary era, which has witnessed significant changes arising from the dynamism of international trade law. These changes reflect the emergence of other influential variables and factors that were not prominent in the past, especially considering the ongoing changes in the social-cultural, political-administrative, and economic spheres and vital global developments in international legal agreements.<sup>126</sup> Importantly, both transnational trading activities and policies, for example, are considered essential components of international law. In this context, ‘notions of reciprocity and a desire to depend on other nations’ observance of rules lead many nations to observe rules even when they do not want to’.<sup>127</sup> The international significance of the KSA, for example, which ‘holds some 25% of the remaining proven oil reserves in the world’, is derived from

the global dependence on its oil and gas [...]. For example, Saudi Arabia’s leading markets in 2004 were: the United States (18.5% of all exports), Japan (15.2%), South Korea (10.1%), and China (5.7%). Correspondingly, its leading export suppliers within the same period were the United States (9.3% of all imports), Germany (6.6%), Japan (6.5%), and

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<sup>123</sup> Altawyan (n 74) 323–324.

<sup>124</sup> Al Al-Sheikh (n 119) 46–47.

<sup>125</sup> See, for example, Tontini (n 105) 8; ‘Law: Sunni Schools of Law’ (n 113).

<sup>126</sup> These spheres and their implications for compliance are discussed in more detail in Chapters 2, 6, and 7 of this thesis.

<sup>127</sup> John Howard Jackson (ed), *The World Trade Organization, Constitution and Jurisprudence* (Routledge 1998) 9–10.



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the United Kingdom (5.3%). Its impact on security issues in the Gulf and the wider Middle East is also significant [...].<sup>128</sup>

Oil booms enabled the KSA not only to engage in economic and trading activities but also to enter into various international treaties.<sup>129</sup> For example, it led the KSA to create the Jeddah Chamber of Commerce and Industry (hereinafter “JCCI”) in 1946 to engage with local and international companies.<sup>130</sup> Gradually, the KSA began to expand the JCCI across the Kingdom and engage in trading activities with regional and multinational cooperation.<sup>131</sup> Recognising the potential domestic and international benefits of international law,<sup>132</sup> the Kingdom always striving to balance its political interests and the spiritual unity of the Muslim Community (Ummah) beyond Sharia law.<sup>133</sup> One case in point is the KSA’s opposition ‘to the establishment of pan-Arab or pan-Islamic political formations’.<sup>134</sup> As Harrison observes:

[The Kingdom] refused to endorse plans aimed at transforming independent Arab countries into a larger unity. [It] had little enthusiasm of the pro-unity propaganda of both Arab nationalists in Syria and the Muslim Brothers in Egypt in the 1930s.<sup>135</sup>

This does not necessarily imply, however, that the KSA’s strong commitment to Islamic law has diminished in any way, let alone that the Kingdom is hostile to other Arab countries.<sup>136</sup> But as Harrison observes, ‘the evolution of Saudi foreign policy had none of the strong, deep-seated anti-Western sentiments prevalent in other Arab countries such as Egypt, Syria, and Iraq’ after the long

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<sup>128</sup> Hamzah (n 2) 117–118.

<sup>129</sup> Dawood Adesola Hamzah, ‘Impact of International Law on the Application of Islamic Law in Saudi Arabia’ (PhD thesis, SOAS University of London 2015) 113–114.

<sup>130</sup> *ibid* 114; GOV.SA, ‘Jeddah Chamber’ (*GOV.SA*, 2023) <[www.my.gov.sa/wps/portal/snp/agencies/agencyDetails/AC351!/ut/p/z0/04\\_Sj9CPykssy0xPLMnMz0vMAfljo8zivQIsTAWdDQz9LQwNzQwCnS0tXPwMvYwNDaz0g1Pz9L30o\\_ArAppiVOTr7JuuH1WQWJKhm5mXlq8f4ehsbGqoX5DtHg4ALQpqPA!!/](http://www.my.gov.sa/wps/portal/snp/agencies/agencyDetails/AC351!/ut/p/z0/04_Sj9CPykssy0xPLMnMz0vMAfljo8zivQIsTAWdDQz9LQwNzQwCnS0tXPwMvYwNDaz0g1Pz9L30o_ArAppiVOTr7JuuH1WQWJKhm5mXlq8f4ehsbGqoX5DtHg4ALQpqPA!!/)> accessed 29 March 2023.

<sup>131</sup> Hamzah (n 129) 114; Federation of Saudi Chambers, ‘Council of Saudi Chambers Establishment’ (*Federation of Saudi Chambers*) <<https://fsc.org.sa/about-csc/introduction-about-csc/establ-of-csc/?lang=en>> accessed 29 March 2023.

<sup>132</sup> Hamzah (n 129) 123–133.

<sup>133</sup> *ibid* 122–128.

<sup>134</sup> *ibid* 116; Martin Harrison, ‘Saudi Arabia’s Foreign Policy: Relations with the Superpowers’ (1995) CMEIS Occasional Paper No 46, 7 <<https://dro.dur.ac.uk/119/>> accessed 29 March 2023.

<sup>135</sup> Harrison (n 134) 7–8.

<sup>136</sup> Hamzah (n 129) 134.

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confrontations that followed World War I.<sup>137</sup> This is evidenced by what Hamzah and Bhatia describe as the ‘dualist method of domesticating international law to its domestic legislation’ through which the KSA incorporated international legal agreements into its local legal system.<sup>138</sup> In this model, international legal agreements fall under the executive competence of (i) ‘His Royal Majesty’s Government’, (ii) ‘the Consultative Council’ and (iii) ‘the Council of Ministers’.<sup>139</sup> To be specific, ‘under Article 70 of the Basic Law of Governance, international agreements entered into come to force as domestic laws following their ratification by Royal Decree and enactment by the Consultative Council and Council of Ministers’.<sup>140</sup> In this way, the KSA resolves apparent conflicts between Sharia and international law through various measures stemming from Islamic law and by exercising judgment through the practice of independent reasoning (Ijtihad) and consensus (Ijmaa).<sup>141</sup> In relation to the Kingdom's domestic legislation, Hamzah explains the rules of interpretation employed for this purpose as follows:

(i) an international agreement could not override a rule of Shari'ah (e.g., the prohibition on the importation, sale or consumption of alcoholic beverages could not be supplanted by an international agreement); (ii) given an apparent inconsistency between an international agreement and domestic law, the text of each would be interpreted so as to avoid any conflict; and (iii) where the text did not resolve the conflict, recourse could be had to the intent and purpose of the agreement and the law. Where a conflict still existed, the conflict would be resolved following the rule that a new law or international agreement to which the Kingdom had agreed was superior to previous laws or international agreements (with the exception noted above that no law or international agreement could overturn a Shari'ah rule). This is exemplified by the accession of Saudi Arabia to the Vienna Convention on the Law of Treaties 1969, pursuant to the relevant rules.<sup>142</sup>

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<sup>137</sup> Harrison (n 134) 8; Hamzah (n 129) 117.

<sup>138</sup> Hamzah (n 129) 119; KL Bhatia, *Textbook on Legal Language and Legal Writing* (Universal Law Publishing 2010) 252.

<sup>139</sup> Hamzah (n 129) 119.

<sup>140</sup> *ibid* 121.

<sup>141</sup> Quraishi-Landes (n 107) 548–549; Hamzah (n 2); Rabb (n 115); Bhatt (n 1) 48–49.

<sup>142</sup> Hamzah (n 2) 117–118; Hamzah (n 129) 120–121.

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As the above attests, the Kingdom does not dichotomise Islamic law and international law.<sup>143</sup> Instead, it perceives them as mutual in the sense that Sharia law is receptive to a large part of international law (including predominantly Western law) and that international law can be improved through the application of Islamic values.<sup>144</sup> This perception and the approach it has engendered help to explain ‘why [the Kingdom] is on the membership list of a number of regional and international organizations ... [and] is also a party to many international treaties’.<sup>145</sup> These essential variables must be given appropriate jurisprudential analysis in the case of the modern KSA, described as ‘the nerve centre of Islamic law’ and a significant player in a secular international community.<sup>146</sup> It is therefore important to move beyond Sharia when analysing the Kingdom’s implementation of and compliance with international legal agreements.<sup>147</sup>

### **4.4 Summary and Concluding Remarks**

The KSA’s implementation of and compliance or otherwise with international agreements and how the Kingdom interacts with legal matters in various contexts, both internally and internationally, have been examined in numerous studies through the highly disputed lens of Sharia and the KSA’s Islamic identity. There are two possible reasons why the terms “Sharia” and/or “Islamic law” appear so frequently in these studies. First, Sharia is the primary legislative source in the Kingdom, and the 1992 Basic Law of Governance states that agreements must not contradict the provisions and principles of Sharia. This fact alone may explain why numerous scholarly works have attempted to understand the KSA’s interaction with international law through the lens of Sharia using a purely doctrinal method. Second, the KSA’s perceived status in the Muslim world as the birthplace of Islam and the keeper of the holy cities of Mecca and Medina may have led some legal scholars to believe that the KSA can be used as a case study to explain the intersections and conflicts between Sharia law and international norms.

While such studies have helped to develop understanding of the relationship between the

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<sup>143</sup> Hamzah (n 129) 134–135.

<sup>144</sup> *ibid* 134–135, 263–264 and 267.

<sup>145</sup> *ibid* 135.

<sup>146</sup> *ibid* 114–115.

<sup>147</sup> Hamzah (n 2); Hamzah (n 129).

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provisions and principles of Islamic law and the Saudi legal system and its influence on the Kingdom's implementation of its international legal commitments, they are not impartial. In addition to their tendency to be focused on implementation rather than compliance, these studies can be criticised on three other grounds. First, the importance of the KSA in the Muslim world is open to debate. Moreover, Sharia is a vast, general concept and its application and practice in law can be subjective. These observations give rise to a second criticism, namely, that assuming that the practice of Sharia in the KSA is the same as in other countries may lead scholars of international law to fall into the fallacy of false analogy. Therefore, it seems highly unlikely that an accurate understanding of the overlap between the obligations of Sharia and those of international law can be achieved by focusing exclusively on the KSA. The third and final criticism is that, despite the undeniable importance of Sharia, it is only one factor, and its significance in terms of its influence on the degree to which the KSA complies with its obligations under international law is diminished when compared with that of the cultural, socio-political and economic factors that together have pushed the KSA to seek a necessary balance between international law and Sharia. Foregrounding these factors in our jurisprudential analysis in the case of contemporary Saudi Arabia, a major player in a secular international community, would enable us to consider the merits of counterarguments pertaining to Sharia as a dominant analytical lens.<sup>148</sup> Crucially, such efforts help to explain how the KSA, by striking a balance between Sharia and international law, has been able to realise both domestic and international benefits and at the same time seek modernisation without secularisation.<sup>149</sup> Specifically, by placing Sharia on a sliding scale of influence, the full range of factors affecting the Kingdom's compliance can be perceived more readily and the reasons for variations in its behaviour can be better understood. It may then be possible to discern the causes of disparity in the implementation of international legal agreements in other contexts as well.

Interestingly, while many studies have focused explicitly on Sharia, none of the standard theories of compliance refers expressly to the motives for compliance in a country with an Islamic identity, such as the KSA. Instead, they tend to reflect a model of statehood that is liberal, democratic, and predominantly European. This is interesting for two reasons. First, while countless legal works

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<sup>148</sup> Hamzah (n 2).

<sup>149</sup> Hamzah (n 129) 182, 267; David Long, *Culture and Customs of Saudi Arabia* (Greenwood Press 2005) 30.

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have focused on the KSA's Islamic identity, compliance theory does not explicitly mention Sharia and may not even allude to it, despite its crucial importance for many states in promoting or inhibiting implementation of and compliance with international law. Second, compliance theories often shed light on particular types of states that have often enjoyed a long history of engagement with international law, leading to an instrumental or even formalistic approach to its implementation. The KSA, however, does not conform to these models; it is not a liberal state, nor is it democratic or European. It therefore offers a unique research opportunity to go beyond the factors highlighted by traditional compliance theory and develop a broader framework in which the characteristics of countries with an Islamic identity and governed by an absolute monarchy, such as the KSA, can be placed and discussed.

Finally, similar to Chapters 2 and 3, lenses other than Sharia have been adopted to investigate the KSA's implementation of and compliance with international law, and its engagement with legal matters generally.<sup>150</sup> Some of the conclusions proceeding from those studies in Chapters 2 and 3 apply equally to those that have been conducted concerning the KSA's compliance with international law.<sup>151</sup> For the purposes of the current research, however, those studies are weakened by a lack of focus and in any case are too few in number when compared either to those that use the lens of Sharia or the KSA's Islamic identity, as discussed in this chapter, or those reviewed in Chapters 2 and 3. Despite its widespread use to examine the KSA's implementation of and compliance with international law, it is essential to go beyond the lens of Sharia to explore the factors that influence the KSA's behaviour towards the commitments to which it has consented.

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<sup>150</sup> For example, Vlieger has suggested that 'Sharia barely influences conflicts between domestic workers and their employers' in both the KSA and the Emirates, suggesting that factors other than Sharia influence compliance with different legal matters in the Kingdom. Antoinette Vlieger, 'Sharia on Domestic Workers: Legal Pluralism and Strategic Maneuvering in Saudi Arabia and the Emirates' (2010) 12 *Journal of Islamic Law & Culture* 166.

<sup>151</sup> See Sections 2.4 and 3.5 for details.

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**PART II: A THEORETICAL INVESTIGATION INTO COMPLIANCE**

## **Chapter 5: Compliance Theories and the Disciplines from which They Have Emerged**

Three themes emerged from the evidence presented in Part I of this thesis regarding the factors that can influence compliance: (1) the problems states experience in implementing and complying with their international legal obligations; (2) issues related to compliance with legal obligations arising from membership in the World Trade Organisation (hereinafter “WTO”); and (3) the particularities of the implementation of and compliance with those obligations by the Kingdom of Saudi Arabia (hereinafter “the KSA” or “the Kingdom”).

In Part II, which is comprised of Chapters 5-7, the aim is to investigate whether the approach taken by Jacobson and Weiss is more likely than others to facilitate an understanding of the factors that influence the Kingdom’s compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter “TRIPS”). There are several justifications for dividing Part II into three separate chapters. The fundamental purpose of Chapter 5 is to highlight the major theoretical formulations of compliance in the context of the disciplines from which they have emerged and to highlight some of the most important advantages and disadvantages of these disciplines. Importantly, theoretical knowledge offers a deeper understanding of the concept of compliance theory alongside its onto-epistemic rationality. Chapter 6, on the other hand, foregrounds the application of compliance theory, with the intention of understanding how things work in the real world. In this chapter, the relevant theories are applied to specific states, with reference to the KSA and TRIPS. In this sense, Chapters 5 and 6 complement each other to facilitate a deeper understanding of compliance theory and praxis. Finally, Chapter 7 builds on and deepens the preceding discussion by analysing the compliance factors identified by Jacobson and Weiss.

### **5.1 Introduction**

Over the last two decades or so, since before the KSA’s accession to the WTO, the legal systems concerned with the protection of intellectual property (hereinafter “IP”) in the Kingdom have been strictly scrutinised by both the state and some other member states as part of the KSA’s

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membership campaign.<sup>1</sup> The KSA's domestic IP systems consequently have undergone a series of reforms, which are ongoing.<sup>2</sup> As discussed in Chapter 1, the KSA is generally celebrated for what has been described as its compliance with TRIPS in the wake of the measures it has taken to make the agreement compatible with its current domestic legislation.<sup>3</sup>

Praise for the Kingdom in this regard is evident in (i) official reports issued under the supervision of intergovernmental organisations concerned with the protection of intellectual property rights (hereinafter "IPR"), such as the WTO<sup>4</sup> and the World Intellectual Property Organisation

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<sup>1</sup> See, for example, Mohamed Salem Abou El Farag, 'Intellectual Property Rights Protection and Enforcement in Arab Countries: Some Reflections on the United States Special 301 Report of 2009' (2010) 7 *Manchester Journal of International Economic Law* 31; Alhanoof AlDebasi and David Price, *Protecting Intellectual Property in the Arabian Peninsula: The GCC States, Jordan and Yemen* (Routledge 2018) 89; Bureau of Economic Affairs: Information and Studies Center, 'Protection of Industrial Property in the Kingdom of Saudi Arabia (KSA) within the Framework of the World Trade Organization (WTO)' (2016) 20 <[www.chamber.org.sa/sites/Arabic/InformationsCenter/Studies\\_Documents/حماية الملكية الصناعية بالمملكة العربية السعودية في إطار منظمة التجارة العالمية.pdf](http://www.chamber.org.sa/sites/Arabic/InformationsCenter/Studies_Documents/حماية الملكية الصناعية بالمملكة العربية السعودية في إطار منظمة التجارة العالمية.pdf)> (in Arabic); Salah Al-Hejailan, 'Legal Developments in Saudi Arabia' (1998) 4 *Yearbook of Islamic and Middle Eastern Law* 338; Abdullah Alassaf and Bruno Zeller, 'The Legal Procedures of Saudi Arbitration Regulations 1983 and 1985' (2010) 7 *Macquarie Journal of Business Law* 170; The Bureau of Economic and Business Affairs, 'Custom Report Excerpts: Saudi Arabia' (*US Department of State*) <[www.state.gov/report/custom/92f4f5621c/](http://www.state.gov/report/custom/92f4f5621c/)> accessed 22 May 2021.

<sup>2</sup> See, for example, Nadia Shehzad, 'Developing Intellectual Property Regimes in the Gulf: Utilising Intellectual Property for Positive Economic Growth' (2012) 2 *World Journal of Social Sciences* 231; Malik R Dahlan and Hani Zedan, 'Saudi Arabia: Royal Succession Reforms, Judicial Reforms, SAGIA Economic Cities Initiative, and WTO Accession' (2008) 14 *Yearbook of Islamic and Middle Eastern Law* 339; David Price, *The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates* (Routledge-Cavendish 2012); Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (OUP 2018); Al-Hejailan (n 1).

<sup>3</sup> For example, see (among others) The Office of the United States Trade Representative (USTR), 'Saudi Arabia's Accession to the World Trade Organization (WTO): WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)' (2005) 1 <[https://ustr.gov/archive/assets/Document\\_Library/Fact\\_Sheets/2005/asset\\_upload\\_file12\\_7938.pdf](https://ustr.gov/archive/assets/Document_Library/Fact_Sheets/2005/asset_upload_file12_7938.pdf)> accessed 31 March 2021; WTO, 'Trade Policy Review: The Kingdom of Saudi Arabia: Concluding Remarks by the Chairperson' (4 and 6 April 2016) <[www.wto.org/english/tratop\\_e/tpr\\_e/tp433\\_crc\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp433_crc_e.htm)> accessed 31 March 2021; Christiane Bou Khater, 'Intellectual Property Rights in the Light of the Saudi Arabia's Vision 2030' (2018) 4 *International Journal of Law* 154; Jennifer Urban, 'The Struggle for Middle Eastern Nations to Join the World Trade Organization' (*Social Science Research Network*, 2016) 1, 25–26 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2400765](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400765)> accessed 31 March 2021; Afida Mastura Muhammad Arif, 'An Analysis of Copyright Protection in Saudi Arabia' (2014) 56 *International Journal of Law and Management* 38; Shehzad (n 2); Dahlan and Zedan (n 2); Dreyfuss and Pila (n 2) 404; Price (n 2) xi.

<sup>4</sup> WTO, 'Trade Policy Review: The Kingdom of Saudi Arabia: Concluding Remarks by the Chairperson' (4 and 6 April 2016) (n 3); WTO Working Party on the Accession of the Kingdom of Saudi Arabia, 'Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization' (2005) 78; WTO, 'WTO General Council Successfully Adopts Saudi Arabia's Terms of Accession' (11 November 2005) <[www.wto.org/english/news\\_e/pres05\\_e/pr420\\_e.htm](http://www.wto.org/english/news_e/pres05_e/pr420_e.htm)> accessed 22 May 2021; WTO, 'Trade Policy Review: The Kingdom of Saudi Arabia: Concluding Remarks by the Chairperson' (25 and 27 January 2012) <[www.wto.org/english/tratop\\_e/tpr\\_e/tp356\\_crc\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp356_crc_e.htm)> accessed 22 May 2021.



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(hereinafter “WIPO”);<sup>5</sup> (ii) statements issued by other WTO Member States;<sup>6</sup> (iii) statements by the Saudi government;<sup>7</sup> and (iv) numerous journal articles reviewing international legal agreements and domestic legal systems.<sup>8</sup> The resulting narrative of successful compliance has led some researchers, such as Urban, to go further and view the KSA as a role model for other states attempting to comply with TRIPS.<sup>9</sup> Other sources of equal stature, however, have criticised Saudi Arabia’s IP systems, and have queried its compliance with TRIPS, noting the prevalence of infringement within the Kingdom.<sup>10</sup>

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<sup>5</sup> The World Intellectual Property Organization (WIPO), ‘Opening of New WIPO External Offices during the 2018/19 Biennium’ (26 September 2017) 33 <[www.wipo.int/edocs/mdocs/govbody/en/a\\_57/a\\_57\\_7.pdf](http://www.wipo.int/edocs/mdocs/govbody/en/a_57/a_57_7.pdf)> accessed 9 June 2021.

<sup>6</sup> Mohammed El Said, ‘The Accession of Arab Countries to the TRIPS-Agreement: The Past, the Present and the Future’ (2014) 11 *Manchester Journal of International Economic Law* 60; USTR, ‘Saudi Arabia’s Accession to the WTO’ (n 3); WTO, ‘Trade Policy Review: The Kingdom of Saudi Arabia: Concluding Remarks by the Chairperson’ (4 and 6 April 2016) (n 3); The Bureau of Economic and Business Affairs (n 1).

<sup>7</sup> WTO, ‘Trade Policy Review: The Kingdom of Saudi Arabia: Concluding Remarks by the Chairperson’ (4 and 6 April 2016) (n 3); Permanent Delegation of the Kingdom of Saudi Arabia to the European headquarters of the UN in Geneva, ‘National Statements at WIPO Meetings: Statement of Saudi Arabia’ (*World Intellectual Property Organization*, 2017) 2–6 <[www.wipo.int/edocs/mdocs/govbody/ar/a\\_55/a\\_55\\_sa.pdf](http://www.wipo.int/edocs/mdocs/govbody/ar/a_55/a_55_sa.pdf)> (in Arabic) accessed 8 April 2019; Loeffler Tuggey Pauerstein Rosenthal LLP, ‘Terms of Saudi Arabia’s Accession to the WTO’ (2006) 13(1) *Middle East Policy Council* 24; WTO Trade Policy Review Body, ‘Report by the Kingdom of Saudi Arabia’ (14 December 2011) Trade Policy Review WT/TPR/G/256, 12 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/TPR/G256.pdf&Open=True>> accessed 27 May 2021.

<sup>8</sup> Elizabeth Mirza Al-Dajani, ‘Post Saddam Restructuring of Intellectual Property Rights in Iraq through a Case Study of Current Intellectual Property Practices in Lebanon, Egypt, and Jordan’ (2007) 6 *John Marshall Review of Intellectual Property Law* [i]; Khater (n 3); Arif (n 3); David Price, ‘The Dynamics of Intellectual Property Protection in the Arab Gulf States’ (2007) 3 *International Review of Business Research Papers* 147; Saudi Industrial Development Fund, ‘Export in Focus: WTO Benefits and Requirements on KSA’ (2010) 1–9; Urban (n 3).

<sup>9</sup> Urban (n 3) 26.

<sup>10</sup> WTO, ‘Dispute Settlement, DS567: Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights’ (2019) <[www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds567\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm)> accessed 12 April 2019; USTR, ‘2018 Special 301 Report’ (2018) 7, 9, 14, 24, 70 <[https://ustr.gov/sites/default/files/files/Press/Reports/2018\\_Special\\_301.pdf](https://ustr.gov/sites/default/files/files/Press/Reports/2018_Special_301.pdf)>; USTR, ‘2009 Special 301 Report’ (2009) 1, 6, 31 <[https://ustr.gov/sites/default/files/2009\\_Special\\_301\\_Report\\_FINAL.pdf](https://ustr.gov/sites/default/files/2009_Special_301_Report_FINAL.pdf)>; International Intellectual Property Alliance (IIPA), ‘Copyright Protection and Enforcement Around the World: IIPA’s 2008 Special 301 Report’ (2008) 10, 15, 16, 122–121 <[https://ustr.gov/archive/assets/Trade\\_Sectors/Intellectual\\_Property/Special\\_301\\_Public\\_Submissions\\_2008/asset\\_upload\\_file141\\_14486.pdf](https://ustr.gov/archive/assets/Trade_Sectors/Intellectual_Property/Special_301_Public_Submissions_2008/asset_upload_file141_14486.pdf)>; Mark Atkinson, ‘Counterfeiting: A Dangerous Game’ (*Gulf Business*, 21 November 2011) <<https://gulfbusiness.com/counterfeiting-a-dangerous-game/>>; Thamer Al Maliki, ‘Intellectual Property Violations Cost the Kingdom \$100 Billion’ (*Al Yaum*, 31 March 2011) <[www.alyaum.com/articles/810634/](http://www.alyaum.com/articles/810634/)> accessed 14 April 2019 (in Arabic); European Parliament, ‘Written Answer: Broadcast Piracy of European Content in Saudi Arabia’ (4 October 2018) P8\_RE(2018)003871 (*European Parliament*, 2018) <[www.europarl.europa.eu/RegData/questions/reponses\\_qe/2018/003871/P8\\_RE\(2018\)003871\\_EN.pdf](http://www.europarl.europa.eu/RegData/questions/reponses_qe/2018/003871/P8_RE(2018)003871_EN.pdf)> accessed 19 May 2021; Reima Al-Jarf, ‘Intellectual Property and eLearning at Saudi Universities: Problems and Solutions’ [2013] *Conference Proceedings of «eLearning and Software for Education» (eLSE)* 243; William Clatanoff and others, ‘Saudi Arabia’s Accession to the WTO: Is a “Revolution” Brewing?’ (2006) 13 *Middle East Policy Council* 1; Abdulrahman

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The debate over the KSA's implementation of and compliance with TRIPS raises two main issues. First, it underscores the confusion evident in the body of available literature over the difference between the concepts of implementation and compliance. Because of the lack of consensus regarding what distinguishes one from the other,<sup>11</sup> the two terms are often used interchangeably, reflecting the simultaneous praise and criticism the KSA receives. As used in this thesis, however, *implementation* refers to those essential measures that an individual state adopts to align an international legal agreement with its internal legislation.<sup>12</sup> Webster has described such measures as 'paper compliance'.<sup>13</sup> By contrast, as used in this thesis, *compliance* refers mainly to 'whether countries in fact adhere to the provisions of the accord and to the implementing measures that they have instituted'.<sup>14</sup> Thus the definition of compliance adopted here takes the current investigation beyond the mere evaluation of the extent to which a state has implemented an international agreement to an examination of its domestic legislation.<sup>15</sup>

Secondly, perceptions concerning the extent of the Kingdom's compliance with TRIPS reflect a number of factors that do not wholly account for its efforts to comply. One is the period that has elapsed since the KSA joined the WTO (more than fifteen years, not including the twelve years of negotiations prior to accession), during which time the KSA has amended many of its IP laws.<sup>16</sup> Another relates to the numerous steps the KSA has taken to implement current domestic legislation that is applicable to TRIPS. The final point concerns the fact that KSA has affirmed its obligation

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Alabdulkarim, 'Intellectual Property Rights in the Kingdom of Saudi Arabia in Light of Sharia and the TRIPS Agreement' (SJD dissertation, Pennsylvania State University 2017) 19; Lolwa Naser Mohamed Alfadhel, 'Trademark Enforcement through Border Measures: The Case of the Gulf Cooperation Council States (GCC)' (PhD thesis, Queen Mary, University of London 2017) 21, 45, 50, 52–53. As discussed in Subsection 1.3.1 of this thesis, the divergence in scholarly opinion on the KSA's compliance with the TRIPS Agreement stems from the lack of consensus over the distinction between "compliance" and "implementation".

<sup>11</sup> See Subsection 1.3.1.

<sup>12</sup> Harold Karan Jacobson and Edith Brown Weiss, 'A Framework for Analysis' in Edith Brown Weiss and Harold Karan Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 2000) 4.

<sup>13</sup> Timothy Webster, 'Paper Compliance: How China Implements WTO Decisions' (2014) 35 *Michigan Journal of International Law* 525, 533–535.

<sup>14</sup> Jacobson and Weiss (n 12) 4.

<sup>15</sup> *ibid* 4–6.

<sup>16</sup> See, for example, AlDebasi and Price (n 1) 83; Dabbeeru Neelakanteswar Rao, 'Saudi Arabia's Accession to WTO: Future Challenges' (*Social Science Research Network*, 2007) 1 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=957589](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=957589)> accessed 27 March 2021.

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to demonstrate prompt compliance with TRIPS.<sup>17</sup> During the negotiations phase prior to its accession to the WTO, the Kingdom chose to forgo the option of a transitional period, which is typically designed to facilitate compliance. Rather it committed itself to fully implementing TRIPS into its national legislation.<sup>18</sup> By so doing, the KSA acquired the obligation to fully comply with the terms of the agreement as soon as it was implemented, rather than accepting the special treatment available to WTO member states depending on their level of development. These three points elucidate the KSA's efforts to comply with TRIPS.

Understanding compliance factors is, as Guzman has argued, 'one of the most central questions in international law',<sup>19</sup> without which legal scholars are unable to provide appropriate advice concerning policy or strategy relating to international law, examine the role of international agreements comprehensively, or devise a workable solution or functional theory of global statutory and organisational cooperation.<sup>20</sup> Guzman goes further, declaring that the inability to comprehend when and why nations follow international law and comply with the legal obligations to which they have consented threatens 'to undermine the very foundations of international law'.<sup>21</sup> Therefore, gaining a more comprehensive understanding of compliance factors is arguably an essential first step in strengthening individual states' compliance and reinforcing and developing international law. The concerns raised by critics of the Kingdom stretch beyond its compliance with its legal obligations; rather, they have relevance for the compliance of WTO members at large and the group of international institutions that assume responsibility for overseeing those obligations. For this reason, there is value in reviewing the KSA's compliance with TRIPS.

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<sup>17</sup> See, for example, WTO Trade Policy Review Body, 'Report by the Kingdom of Saudi Arabia' (n 7) 12; USTR, 'Saudi Arabia's Accession to the WTO' (n 3); Urban (n 3) 25–26; Working Party on the Accession of the Kingdom of Saudi Arabia (n 4) 78; Mounir Awad and Essam Abdullah, 'Al Zhd: Local Companies Will Enter into Fierce Competition with Foreign Companies (Saudi Arabia's Accession to the WTO Makes It More Capable of Protecting Their Interests)' (*Al Riyadh*, 21 April 2006) <[www.alriyadh.com/148087](http://www.alriyadh.com/148087)> accessed 15 April 2019 (in Arabic).

<sup>18</sup> WTO Trade Policy Review Body, 'Report by the Kingdom of Saudi Arabia' (n 7) 12; USTR, 'Saudi Arabia's Accession to the WTO' (n 3); Urban (n 3) 25–26; Working Party on the Accession of the Kingdom of Saudi Arabia (n 4) 78; Awad and Abdullah (n 17).

<sup>19</sup> Andrew T Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823, 1826.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

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Despite the development of numerous theories to explain various aspects of states' compliance with international law, however, the lack of a coherent and comprehensive interpretation of what motivates nations to obey or contravene their obligations gives rise to a fundamental theoretical problem, even when compliance is more precisely defined.<sup>22</sup> For example, the range of relevant theories that have emerged from the disciplines of law and international relations may have contributed to the idea that compliance is binary. To investigate compliance, however, as argued above, a sliding scale model is necessary. These theories will be closely examined and analysed in Chapter 6. In preparation for that discussion, the present chapter aims to provide an overview of the two disciplines that have devised the major theoretical formulations of compliance and to highlight some of the most important advantages and disadvantages of each.

### 5.2 An Overview of Compliance Theories and the Disciplines from which They Have Emerged

Numerous theorists have acknowledged the urgent need to identify and address the factors impacting a state's compliance.<sup>23</sup> Their preoccupation with the subject of compliance may stem from their belief in what Guzman describes as the ability of international law to alter state behaviour, at least in some circumstances.<sup>24</sup>

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<sup>22</sup> *ibid.*

<sup>23</sup> See, for example, Jose Alvarez, 'Quest for Legitimacy: An Examination of the Power of Legitimacy among Nations by Thomas M Franck' (1991) 24 *New York University Journal of International Law and Politics* 199; Thomas Franck, *Fairness in International Law and Institutions* (OUP 1995); Thomas Franck, 'Fairness in Fairness Discourse' (2001) 95 *American Society of International Law Proceedings* 167; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard UP 1995); Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard UP 2009); Harold Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181; Harold Koh, 'Why Do Nations Obey International Law?' (1997) 106 *The Yale Law Journal* 2599; Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *The Handbook of International Relations* (SAGE 2002) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=347260](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=347260)> accessed 27 November 2018.

<sup>24</sup> Andrew T Guzman, 'International Law: A Compliance Based Theory' (2001) UC Berkeley School of Law Public Law and Legal Theory Working Paper No 47, 47 1 <<https://ssrn.com/abstract=260257>> accessed 28 July 2021. See also Guzman, 'A Compliance-Based Theory of International Law' (n 19) 1823, 1826–1827; George W Downs, David M Rocke and Peter N Barsoom, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50 *International Organization* 379; Joshua Kleinfeld, 'Skeptical Internationalism: A Study of Whether International Law Is Law' (2010) 78 *Fordham Law Review* 2451; Shirley Scott, 'Beyond Compliance: Reconceiving the International Law-Foreign Policy Dynamic' (1998) 19 *Australian Year Book of International Law* 35; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999) 8; Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 23); Thomas H Lee, 'International Law,

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Despite rising interest in the issue of compliance, however, the literature on international law is arguably thin.<sup>25</sup> Although discussion is ongoing on many fronts within the discipline concerning the global legal regime and its influence on states, a satisfactory theory of compliance that can address the problem this study explores has yet to emerge.<sup>26</sup> The literature on international relations is also insufficient, despite the efforts of scholars to devise theories of states' compliance with international law.<sup>27</sup>

Although the reasons for the deficiencies of the available theories of compliance are multifaceted, they can be broadly summarised as follows. First, there is no explicit agreement among theorists regarding what analytical tools should be used to uncover why individual states do or do not comply with their international legal obligations.<sup>28</sup> In fact, no one theory is capable of fully explaining the KSA's compliance with TRIPS. One reason for this is the type of lens through which most of these theories postulate compliance, which has led them to focus on what might be described as more formal factors, such as statesmen, laws and institutions.<sup>29</sup> Of equal importance, however, is the high degree of subjectivity that can inform the understanding of compliance; it is

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International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today' (2004) 67 *Law and Contemporary Problems* 147.

<sup>25</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 19); Pavan S Krishnamurthy, 'To Enforce or Manage: An Analysis of WTO Compliance' (2018) 32 *Emory International Law Review* 377; Asher Alkoby, 'Theories of Compliance with International Law and the Challenge of Cultural Difference' (2008) 4(1) *Journal of International Law and International Relations* 151; William C Bradford, 'International Legal Compliance: An Annotated Bibliography' (2005) 30 *North Carolina Journal of International Law and Commercial Regulation* 379; Dirk Pulkowski, 'Testing Compliance Theories: Towards US Obedience of International Law in the Avena Case' (2006) 19 *Leiden Journal of International Law* 511.

<sup>26</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 19); Alkoby (n 25); David Collins, 'International Law Theories: An Inquiry into Different Ways of Thinking' (2017) 18 *Melbourne Journal of International Law* 476.

<sup>27</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 19); Alkoby (n 25); Krishnamurthy (n 25); Kenneth W Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in International Conflicts' (2004) 36 *Studies in Transnational Legal Policy* 127; Kenneth W Abbott, 'Modern International Relations Theory: A Prospectus in Retrospect and Prospect' (2000) 25 *Yale Journal of International Law* 273; Chidebe M Nwankwo, 'Yenkong Ngangjoh Hodu, Theories and Practices of Compliance with WTO Law' 2 *International Human Rights Law Review* 2013; Christiana Ochoa, 'Corporate Social Responsibility and Firm Compliance: Lessons from the International Law-International Relations Discourse' (2011) 9 *Santa Clara Journal of International Law* 169.

<sup>28</sup> See, for example, Abbott, 'International Relations Theory' (n 27); Abbott, 'Modern International Relations Theory' (n 27); Guzman, 'A Compliance-Based Theory of International Law' (n 19); Franck, 'Fairness in Fairness Discourse' (n 23); Koh, 'Why Do Nations Obey International Law?' (n 23); Chayes and Chayes, *The New Sovereignty* (1995) (n 23).

<sup>29</sup> Marcus PL Gustafsson, 'Compliance and Membership Value in International Economic Law' (2017) 48 *Georgetown Journal of International Law* 1201. See also, for example, Abbott, 'International Relations Theory' (n 27); Alkoby (n 25).

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critical that this be included in the analysis so that influential factors can be more readily perceived.<sup>30</sup> In other words, even if all the available theories were gathered into one template, a more comprehensive model would still need to be constructed to investigate the KSA's compliance with TRIPS.

The second reason for the deficiency of current theory relates to the unique context of the KSA. Although the available literature highlights various factors known to influence states' compliance, as noted in Chapter 1, most of these have focused on a model of statehood that is liberal, democratic, and primarily European, and which has enjoyed a long history of engagement with international law.<sup>31</sup> This model of statehood may have led to an instrumental or even formalistic approach to the implementation of agreements to which such states are party.<sup>32</sup> This in turn may facilitate the study of their compliance with their international legal obligations.<sup>33</sup> The KSA's legal and political systems, however, are based on a model of statehood whose elements are not present in most other modern states. First, the KSA has an Islamic identity built upon a Sharia-based legal system, which may alter the Kingdom's interaction with the international legal system.<sup>34</sup> Second, it is governed by an absolute monarchy, which may also influence the processes of policy adoption.<sup>35</sup> To date, the author has been unable to locate any studies that comprehensively examine

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<sup>30</sup> Ann Kent, *China, the United Nations, and Human Rights: The Limits of Compliance* (U of Pennsylvania Press 1999) 232–233.

<sup>31</sup> Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 23). Guzman, 'A Compliance-Based Theory of International Law' (n 19); Anne-Marie Slaughter, 'A Liberal Theory of International Law' (2000) 94 *American Society of International Law Proceedings* 240; Anne-Marie Slaughter, 'The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations' (1994) 4 *Transnational Law & Contemporary Problems* 377; Alez Mills and Tim Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (2005) 18 *Leiden Journal of International Law* 1; Tatiana E Sainati, 'Divided We Fall: How the International Criminal Court Can Promote Compliance with International Law by Working with Regional Courts' (2016) 49 *Vanderbilt Journal of Transnational Law* 191.

<sup>32</sup> Eric A Posner, 'Liberal Internationalism and the Populist Backlash' (2017) 49 *Arizona State Law Journal* 795; Mario Prost, 'Hierarchy and the Sources of International Law: A Critique' (2017) 39 *Houston Journal of International Law* 285; David S Law, 'Alternatives to Liberal Constitutional Democracy' (2017) 77 *Maryland Law Review* 223; Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503.

<sup>33</sup> Posner (n 32); Prost (n 32); Law (n 32); Slaughter, 'International Law in a World of Liberal States' (n 32).

<sup>34</sup> The Bureau of Experts at the Council of Ministers, 'Basic Law of Governance' (1992) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/16b97fcb-4833-4f66-8531-a9a700f161b6/1>> accessed 28 March 2021.

<sup>35</sup> *ibid.*

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what motivates states that are structured as unitary Islamic absolute monarchies to comply with international law.

The third reason for the deficiency of current theory concerns the way by which each discipline has devised the major theoretical formulations of compliance and the type of data provided by each discipline.<sup>36</sup> Compliance theory originated from two major fields: law and international relations.<sup>37</sup> How each discipline has contributed to the understanding of compliance is explored in the remainder of this chapter, with the aims of illuminating the strengths and weaknesses of each and demonstrating ‘the value of interdisciplinary cross-fertilization’.<sup>38</sup>

### 5.3 The Legal Academy

As commonly characterised, one of the key features of the work of international legal scholars is their belief that international law can affect the conduct of individual states.<sup>39</sup> This view accords with solid, experiential evidence showing that the global legal system matters.<sup>40</sup> Nonetheless, the mere existence of international law or the influence of external pressure cannot be the only way to bring states into compliance with the global system, nor can it guarantee compliance.<sup>41</sup> Non-compliance may have other causes that cannot be excluded;<sup>42</sup> thus, despite its strength, international law is not necessarily a sufficient basis for a comprehensive theory that can explain

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<sup>36</sup> Abbott, ‘International Relations Theory’ (n 27) 128–129; Guzman, ‘A Compliance-Based Theory of International Law’ (n 19).

<sup>37</sup> Guzman, ‘A Compliance-Based Theory of International Law’ (n 19); Abbott, ‘International Relations Theory’ (n 27).

<sup>38</sup> See also Abbott, ‘International Relations Theory’ (n 27) 127.

<sup>39</sup> Guzman, ‘A Compliance-Based Theory of International Law’ (n 19) citing Abram Chayes and Antonia Handler Chayes, ‘On Compliance’ (1993) 47(2) *International Organization* 175; Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn, Columbia UP 1979) 46–48.

<sup>40</sup> Beth A Simmons, ‘Money and the Law: Why Comply with the Public International Law of Money’ (2000) 25 *Yale Journal of International Law* 323; Guzman, ‘A Compliance-Based Theory of International Law’ (n 19).

<sup>41</sup> Richard W Wright and Ingeborg Puppe, ‘Causation: Linguistic, Philosophical, Legal and Economic’ (2016) 91 *Chicago-Kent Law Review* 461; Peter C Cartensen, ‘Poor Financial Performance of Deregulated Airlines: Competition as Causation or Only Correlation? Reflections on Professor Dempsey’s Article’ (2008) 45 *Houston Law Review* 487; Christian Borgelt and Rudolf Kruse, ‘Probabilistic Networks and Inferred Causation’ (1997) 18 *Cardozo Law Review* 2001; Geoffrey Samuel, ‘Have There Been Scientific Revolutions in Law?’ (2016) 11 *Journal of Comparative Law* 186. In the conclusion to her study of China’s post-WTO IP system and its compliance with the TRIPS Agreement, Thomas acknowledges that external pressures alone will not achieve full compliance with the IP system in the long term. Kristie Thomas, ‘China’s Post-WTO Intellectual Property System: Assessing Compliance with the TRIPS Agreement’ (PhD thesis, University of Nottingham 2008) ii.

<sup>42</sup> See, for example, Cartensen (n 41); Samuel (n 41).

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the reasons why a state complies with the international legal obligations to which it has agreed.<sup>43</sup> Accordingly, it could be argued that the compliance theories put forward by legal scholars fall short because they are incomplete.<sup>44</sup>

Other factors that may contribute to the insufficiency of the compliance theories devised by international legal scholars relate to the approach they take in their work. For example, instead of providing a coherent and comprehensive framework for interpreting what motivates nations to comply, some theorists merely suggest that a ‘remarkably rich’ number of constituent factors can be used to better define what constitutes compliance.<sup>45</sup> Others seem to offer a more explicit model with which to explain a state’s compliance behaviour by identifying specific criteria for determining compliance, but the definitions on which they rely are too broad; thus, not only do they fail to provide appropriate and universal definitions, but some of the potential factors they identify could lead to prejudice.<sup>46</sup> Other legal theorists focus almost exclusively on state-specific factors in ascertaining compliance, and thereby fail to account for other influences beyond state control,<sup>47</sup> while some tend to limit the scope and focus of their explanation to certain key characteristics of international commitments, thereby disregarding other factors associated with the indispensable roles played by states in compliance.<sup>48</sup>

In some cases, the nature of the scholar’s area of focus and their great proficiency therein lead to a preoccupation with developing ‘doctrinal strategies’ to strengthen individual states’ compliance and reinforce international law.<sup>49</sup> Put differently, legal scholars may be most capable of answering

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<sup>43</sup> Guzman, ‘A Compliance-Based Theory of International Law’ (n 19). See, for example, Samuel (n 41).

<sup>44</sup> Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 23) 544–545; Guzman, ‘A Compliance-Based Theory of International Law’ (n 19); Abbott, ‘International Relations Theory’ (n 27).

<sup>45</sup> See, for example, Henkin (n 39); Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 23) 540.

<sup>46</sup> Guzman, ‘A Compliance-Based Theory of International Law’ (n 19). See, for example, Franck, *Fairness in International Law and Institutions* (n 23); Franck, ‘Fairness in Fairness Discourse’ (n 23).

<sup>47</sup> Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 23) 540.

<sup>48</sup> See, for example, Franck, *Fairness in International Law and Institutions* (n 23); Franck, ‘Fairness in Fairness Discourse’ (n 23); Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 23) 541.

<sup>49</sup> Abbott, ‘International Relations Theory’ (n 27) 128; Collins (n 26); Guzman, ‘A Compliance-Based Theory of International Law’ (n 19); Alkoby (n 25); Robert O Keothane, ‘Compliance with International Commitments: Politics within a Framework of Law’ (1992) 86 *American Society of International Law Proceedings* 176; David H Moore, ‘Constitutional Commitment to International Law Compliance’ (2016) 102 *Virginia Law Review* 367; Georgios Dimitropoulos, ‘Compliance through Collegiality: Peer Review in International Law’ (2016) 37 *Loyola of Los Angeles International and Comparative Law Review* 275.



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doctrinal questions,<sup>50</sup> which may explain why numerous researchers advocating for such an approach often propose specific, limited solutions focused on developing pure legal phenomena and values.<sup>51</sup> These types of theories may be helpful when pursuing doctrinal analyses of compliance, such as answering the question of whether the state has ‘legally’ complied with its obligations.<sup>52</sup> However, to address the research problem posed in this thesis, it is much more important to look beyond the doctrinal lens and explore what makes a state change its behaviour towards its commitments.<sup>53</sup>

The above discussion supports the conclusion that the legal academy plays a prominent role in understanding some aspects of compliance, especially in terms of pursuing doctrinal analyses of compliance. Despite this, legal scholars have not reached an explicit consensus on what analytical tools can be used to uncover what motivates a state to comply with its commitments. In addition, the theories that have emerged from this academy are incomplete, meaning no single legal theory of compliance can provide a clear framework for addressing the question posed in this thesis. Therefore, it is essential to investigate whether incorporating theories from another discipline into the current discussion would be helpful in addressing the problem examined in this research and, more precisely, in correcting the inadequacy of the compliance theory advanced by the legal academy.

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<sup>50</sup> Abbott, ‘International Relations Theory’ (n 27) 128.

<sup>51</sup> *ibid.* Guzman, ‘A Compliance-Based Theory of International Law’ (n 19). See, for example, Roozbeh (Rudy) B Baker, ‘Customary International Law: A Reconceptualization’ (2016) 41 *Brooklyn Journal of International Law* 439; Harlan Grant Cohen, ‘Finding International Law: Rethinking the Doctrine of Sources’ (2007) 93 *Iowa Law Review* 65; Roda Mushkat, ‘Counterfactual Reasoning: An Effective Component of the International Law Methodological Armor’ (2017) 18 *German Law Journal* 59; Guillermo J Garcia Sanchez, ‘To Speak with One Voice: The Political Effects of Centralizing the International Legal Defense of the State’ (2017) 34 *Arizona Journal of International and Comparative Law* 557.

<sup>52</sup> Abbott, ‘International Relations Theory’ (n 27); Abbott, ‘Modern International Relations Theory’ (n 27); Guzman, ‘A Compliance-Based Theory of International Law’ (n 19); Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 23) 551.

<sup>53</sup> Dimitropoulos (n 49); Guzman, ‘A Compliance-Based Theory of International Law’ (n 19); Abbott, ‘International Relations Theory’ (n 27); Mushkat, ‘Counterfactual Reasoning: An Effective Component of the International Law Methodological Armor’ (n 51); Saleh Al-Sharieh, ‘Toward a Human Rights Method for Measuring International Copyright Law’s Compliance with International Human Rights Law’ (2016) 32 *Utrecht Journal of International and European Law* 5.

### 5.4 The International Relations Academy

As generally characterised, one of the fundamental features of the work of international relations scholars is their remarkable ability to perform three equally important yet very different intellectual tasks:<sup>54</sup> *description*, *explanation* and *institutional design*.<sup>55</sup> The first involves describing rules and institutions, with particular attention to those political elements upon which the law is formed, including, but not limited to, ‘the interests, power, and governance structures of states’.<sup>56</sup> By describing these actors, information, ideas and institutions may be better understood, and thus the methods of their operation and interaction may also be more readily perceived.<sup>57</sup> The second task involves explaining political behaviour, especially in terms of law-related conduct.<sup>58</sup> For example, international relations researchers seek to determine the actors related to a matter, the motives and circumstances that make their conduct change, and the different causal paths by which these motives influence them.<sup>59</sup> This approach may facilitate understanding of those political behaviours that generally impede compliance.<sup>60</sup> Therefore, the importance of explanation may lie, at least, in its foreseeable future applications.<sup>61</sup> This importance may be seen in the third intellectual task that international relations scholars undertake, that of ‘predicting future developments and designing institutions capable of affecting behavior in desirable ways’.<sup>62</sup>

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<sup>54</sup> Kenneth W Abbott, ‘Elements of a Joint Discipline’ (1992) 86 *American Society of International Law Proceedings* 167.

<sup>55</sup> Abbott, ‘International Relations Theory’ (n 27); Abbott ‘Modern International Relations Theory’ (n 27).

<sup>56</sup> Abbott also points out that ‘the political perspective is shared by sophisticated legal scholars’; Abbott, ‘International Relations Theory’ (n 27) 129. Abbott also cites L Henkin, ‘International Law: Politics, Values and Functions General Course on Public International Law’ (1989) 216 *Recueil des Cours, Académie de Droit International de la Haye* 9.

<sup>57</sup> Abbott, ‘International Relations Theory’ (n 27) 129.

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.*; Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 23) 544–545.

<sup>60</sup> Abbott, ‘International Relations Theory’ (n 27); Pulkowski (n 25). See also, for example, Brian D Lepard and others, ‘Why Obey International Law? Theories for Managing Conflicts with Municipal Law’ (2003) 97 *Proceedings of the 12th Annual Meeting of the American Society of International Law* 111; Joel P Trachtman, ‘International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law’ (2010) 11 *Chicago Journal of International Law* 127.

<sup>61</sup> Abbott, ‘International Relations Theory’ (n 27) 130; Abbott also states that ‘institutional design is at the heart of current interdisciplinary collaboration’. Chayes and Chayes, *The New Sovereignty* (1995) (n 23); Stepan Wood, Anne-Marie Slaughter and Andrew S Tulumello, ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’ (1998) 92 *American Journal of International Law* 367; Peter Roderick, James Cameron and Jacob Werksman (eds), *Improving Compliance with International Environmental Law* (Earthscan 1996).

<sup>62</sup> Abbott, ‘International Relations Theory’ (n 27) 130.

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Brett, Donaldson and Koskenniemi note the value of taking politics, economics, and history into account when studying international law,<sup>63</sup> arguing that doing so can help develop ‘international rules or institutions’ as well as ‘legal and governmental practices’.<sup>64</sup> This does not necessarily imply, however, that international legal scholars must see eye to eye with scholars from other disciplines on these topics or even ‘share similar interests and knowledge’.<sup>65</sup> Rather, establishing points of contact between the disciplines would enable legal scholars to identify issues that can be explored in a multidisciplinary way and to reveal how the pursuits of the legal academy differ from those of other fields.<sup>66</sup>

In her most recently published work, entitled ‘Law, Interdisciplinarity and Wicked Problems’, Jensen explains the importance, roles, and functions of multidimensional or interdisciplinary approaches in addressing complex research problems:

Interdisciplinarity does not advocate that disciplinary segmentation should be abandoned or has no use. Disciplinary segmentation is a breakdown of the universe or phenomena into more manageable parts to simplify the study of it, which has been and is vital to advancing knowledge. Interdisciplinarity simply advocates that to determine a [sustainable] resolution to complex problems, it is necessary to synthesise insights from the different, relevant disciplines. Phenomena are not characterised by discipline; the disciplines simply characterise the way in which we study them. In other words, disciplines are the lenses through which we observe phenomena. To truly understand phenomena, which is a prerequisite for resolving the problem they pose or any related

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<sup>63</sup> See, for example, Annabel Brett, Megan Donaldson and Martti Koskenniemi, ‘Introduction: History, Politics, Law: Thinking through the International’ in Annabel Brett, Megan Donaldson and Martti Koskenniemi (eds), *History, Politics, Law: Thinking through the International* (CUP 2021); Martti Koskenniemi, ‘The Pull of the Mainstream’ (1990) 88 *Michigan Law Review* 1946; Martti Koskenniemi, ‘The Politics of International Law - 20 Years Later’ (2009) 20 *European Journal of International Law* 7; Jean-François Thibault, ‘Martti Koskenniemi: Indeterminacy’ (*CLT*, 2017) <<https://criticallegalthinking.com/2017/12/08/martti-koskenniemi-indeterminacy/>> accessed 17 February 2022.

<sup>64</sup> Brett, Donaldson and Koskenniemi, ‘Introduction: History, Politics, Law’ (n 63) 2.

<sup>65</sup> *ibid* 2.

<sup>66</sup> *ibid* 3.

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problems, the parts have to be put back together or, at least, considered.<sup>67</sup>

In this sense, Jensen indirectly supports the international relations academy's views concerning the need for interdisciplinarity, which adds a significant new dimension to the study of the KSA and TRIPS and through which the literature on compliance with international law generally can be further innovated and developed. One advantage of the compliance theories that have emanated from the international relations academy is that they shift attention away from doctrinal questions to other potentially influential factors. In addition, they do not confine the reasons for compliance to state-associated factors.<sup>68</sup> In view of the seminal qualitative contributions made by the international relations academy, lawyers and legal scholars could benefit from international relations theories in several ways,<sup>69</sup> first, by deepening their understanding of the purposes, sources, and meaning of other law-related institutions, and second, by enhancing the assessment of the functioning and efficiency of legal arrangements in the real world.<sup>70</sup> Thus, the international relations academy can contribute to expanding the search circle toward new areas of study concerning the question of compliance, where legal researchers and practitioners can play their most significant role in developing international law.<sup>71</sup>

Despite these advantages, the standard theories of compliance that emanate from the international relations academy can be considered flawed in some respects.<sup>72</sup> Like the theories that emerged from the legal academy, international relations scholarship has been criticised for being

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<sup>67</sup> Jeanette Hoj Jensen, 'Law, Interdisciplinarity and Wicked Problems' (2020) 48 *University of Western Australia Law Review* 100, 109.

<sup>68</sup> Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 23); Abbott, 'International Relations Theory' (n 27); Guzman, 'A Compliance-Based Theory of International Law' (n 19); Abbott, 'Modern International Relations Theory' (n 27). Irish, Ku and Diehl suggest that 'the traditional objective of international legal scholars was not to explain the behavior of states. Rather, the primary objective of most international law scholarship historically was to determine which rules or standards have acquired the status of law'. Adam Irish, Charlotte Ku and Paul F Diehl, 'Bridging the International Law-International Relations Divide: Taking Stock of Progress' (2013) 41 *Georgia Journal of International and Comparative Law* 357.

<sup>69</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 19); Abbott, 'International Relations Theory' (n 27); Abbott, 'Modern International Relations Theory' (n 27).

<sup>70</sup> Abbott, 'International Relations Theory' (n 27) 130.

<sup>71</sup> *ibid*; Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 23); Irish, Ku and Diehl (n 68); Guzman, 'A Compliance-Based Theory of International Law' (n 19); Jeffrey L Dunoff and Joel P Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflict' (2004) 36 *Studies in Transnational Legal Policy* 211.

<sup>72</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 19); Abbott, 'International Relations Theory' (n 27). Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 23) 544–545.

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incomplete.<sup>73</sup> The various solutions proposed to address compliance problems have tended to focus principally on limited and specified aspects, such as the main political characteristics of individual states.<sup>74</sup> The adoption of such a narrow and incomplete approach – based, for example, on liberal theories<sup>75</sup> or the reputational model<sup>76</sup> – could obscure or undermine the framework within which compliance factors can be comprehensively understood. Furthermore, and perhaps more importantly, the work of these scholars frequently expresses a certain degree of scepticism about the role that international law can perform in governing the global system,<sup>77</sup> and often disregards international law entirely.<sup>78</sup> Even worse, perhaps, some international relations scholars try to take on the role of international lawyers or legal researchers without appropriate experience or being well-informed about the discipline.<sup>79</sup>

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<sup>73</sup> See, for example, Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 23); Guzman, 'A Compliance-Based Theory of International Law' (n 19).

<sup>74</sup> See, for example, Abbott, 'International Relations Theory' (n 27); Abbott, 'Modern International Relations Theory' (n 27); Ochoa (n 32); Guzman, 'A Compliance-Based Theory of International Law' (n 19); Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 23); Christopher C Joyner, 'Review: International Law Is, as International Relations Theory Does?' (2006) 100(1) *American Journal of International Law* 248; Edward T Swaine, 'Interdisciplinary Perspectives on International Law and International Relations' (2015) 11 *Journal of International Law and International Relations* 85.

<sup>75</sup> For more details and further discussion of liberal theories, see, for example, Slaughter, 'A Liberal Theory of International Law' (n 31); Slaughter, 'The Liberal Agenda for Peace: International Relations Theory and the Future of the Untied Nations' (n 31); Guzman, 'A Compliance-Based Theory of International Law' (n 19); Stephens (n 31); Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 23); Sainati (n 31).

<sup>76</sup> For further discussion of the reputational model/theory of compliance, see, for example, Henkin (n 39); Guzman, 'A Compliance-Based Theory of International Law' (n 19); Andrew T Guzman, 'Reputation and International Law' (2006) 34 *Georgia Journal of International and Comparative Law* 379; Andrew Kydd, 'Reputation and Cooperation: Guzman on International Law' (2009) 1 *International Theory* 295; Roda Mushkat, 'State Reputation and Compliance with International Law: Looking through a Chinese Lens' (2011) 10 *Chinese Journal of International Law* 703; George W Downs and Michael A Jones, 'Reputation, Compliance, and International Law' (2002) 31 *Journal of Legal Studies* S95; Markus Burgstaller, 'Amenities and Pitfalls of a Reputation Theory of Compliance with International Law' (2007) 76 *Nordic Journal of International Law* 39; Rachel Brewster, 'Pricing Compliance: When Formal Remedies Displace Reputational Sanctions' (2013) 54 *Harvard International Law Journal* 259; Jong Hee Park and Kentaro Hirose, 'Domestic Politics, Reputational Sanctions, and International Compliance' (2013) 5 *International Theory* 300.

<sup>77</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 19). See also, for example, Abbott, 'International Relations Theory' (n 27); Abbott, 'Modern International Relations Theory' (n 27); Jones (n 76); Irish, Ku and Diehl (n 68); Simmons (n 40); Downs, Roche and Barsoom (n 24); Kleinfeld (n 24); Scott (n 24).

<sup>78</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 19). See also, for example, Irish, Ku and Diehl (n 68); Byers (n 24); Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 23); Mark A Pollack, 'Is International Relations Corrosive of International Law? A Reply to Martti Koskenniemi' (2013) 27(2) *Temple International & Comparative Law Journal* 339; Lee (n 24); Jennifer L Erickson, 'International Law and the Great War' (2016) 51 *Tulsa Law Review* 521.

<sup>79</sup> Jan Klabbers, 'The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinary' (Winter 2004/Spring 2005) 1 *Journal of International Law and International Relations* 35.

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The conclusion reached by the international relations academy that international law is irrelevant can also be challenged on the grounds of inconsistency.<sup>80</sup> For example, that conclusion is at odds with the relevant empirical and anecdotal evidence presented by the legal academy for the weight of international law and its ability to play an influential role in national decision making.<sup>81</sup> Moreover, the idea that international law is irrelevant is difficult to reconcile with the fact that considerable time, energy and funds have been invested in building it.<sup>82</sup> For example, having observed the difficulty and duration of the Uruguay Round of negotiations to establish the WTO and its apparent effect on the political fortunes of the aspiring governments, Guzman wondered: ‘If it is the case that international law does not matter, why did states devote so many resources to these negotiations?’<sup>83</sup> In other words, why would states expend so many resources to enter into an agreement that will have no effect on their behaviour?<sup>84</sup> Furthermore, if international law is unimportant and has no independent influence on states’ behaviour, why do countries often seek to declare their innocence when they are alleged to have violated a law?<sup>85</sup> Such inconsistencies

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<sup>80</sup> See, for example, Downs, Rocke and Barsoom (n 24); Kleinfeld (n 24); Scott (n 24); Lee (n 24); Guzman, ‘A Compliance-Based Theory of International Law’ (n 19); Byers (n 24); Pollack (n 78); Erickson (n 78); Francis A Boyle, ‘The Irrelevance of International Law: The Schism between International Law and International Politics’ (1980) 10 California Western International Law Journal 193. Some international relations scholars tend to view international law as an epiphenomenon only. Hence, they attribute the reason for compliance with random coincidences occurring between international law ‘whose content is said to be largely controlled by powerful states in any event’ and the self-interest of individual states. See, for example, Guzman, ‘A Compliance-Based Theory of International Law’ (n 19); Abbott, ‘International Relations Theory’ (n 27); Abbott, ‘Modern International Relations Theory’ (n 27); Anne-Marie Slaughter Burley, ‘International Law and International Relations Theory: A Dual Agenda’ (1993) 87(2) American Journal of International Law 205; Benedict Kingsbury, ‘Reviewed Work: *Sovereignty: Organized Hypocrisy* by Stephen D Krasner’ (2000) 94 The American Journal of International Law 591.

<sup>81</sup> Henkin (n 39) 46–48; Chayes and Chayes, *The New Sovereignty* (1995) (n 23); Guzman, ‘A Compliance-Based Theory of International Law’ (n 19); Simmons (n 40). See also, for example, Lakshman Guruswamy, ‘Book Review: *International Oil Pollution at Sea* by Ronald B Mitchell’ (1997) 91 American Journal of International Law 207.

<sup>82</sup> Guzman, ‘A Compliance-Based Theory of International Law’ (n 19) 1837.

<sup>83</sup> *ibid.*

<sup>84</sup> Guzman, ‘A Compliance-Based Theory of International Law’ (n 19). Guzman also gives several examples involving the application of customary international law in several contexts, including foreign investment, human rights, and environmental protection. See, for example, Andrew T Guzman, ‘Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’ (1998) 38 Virginia Journal of International Law 639; David Weissbrodt and others, *International Human Rights: Law, Policy, and Process* (4th edn, Carolina Academic Press 2009); David G Victor, Kal Raustiala and Eugene B Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (MIT Press 1998).

<sup>85</sup> Henkin (n 39) 43; Guzman, ‘A Compliance-Based Theory of International Law’ (n 19) 1838.

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suggest that international relations theories generally overlook a potentially important factor that deserves consideration when examining states' compliance, including that of the KSA.<sup>86</sup>

### 5.5 Concluding Remarks

A number of salient observations can be made in relation to the preceding discussion. First, the intellectual tasks of description, explanation and institutional design performed by international relations scholars contrast starkly with what Koskenniemi terms 'anti-instrumentalist legal styles'.<sup>87</sup> That said, Koskenniemi contends, and Abbott agrees, that such differences between the legal and international relations academics are principally a matter of personal and intellectual 'style'.<sup>88</sup> Ultimately, the goal of both is to enable researchers to achieve their aims using the most appropriate means,<sup>89</sup> suggesting that the reasons for states' compliance with their international legal obligations may be best understood by combining the two approaches.

Second, comparative analysis of the contributions of scholars in each discipline proves 'the value of interdisciplinary cross-fertilization'.<sup>90</sup> Nevertheless, as Klabbers has observed, it is not enough simply to adopt an interdisciplinary approach; several conditions must be met to ensure that its aims are effectively realised.<sup>91</sup> Among the most prominent of these conditions are (1) the ability to prove the usefulness of the approach, in terms of developing the discipline itself; (2) the use of a suitable scientific methodology to avoid obfuscation; and (3) preservation of its distinctively legal character.<sup>92</sup> Emphasising the uniqueness of this approach, Klabbers notes that 'the best work in international law tends to be individual work that is well-informed about neighbouring

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<sup>86</sup> The Kingdom is one of the countries that invested a considerable amount of time, energy and financial resources to join the WTO. In addition, although the KSA was heavily involved in international trade prior to joining the WTO, its application for WTO membership took twelve years of complex negotiations. See, for example, Rao (n 16) 1; WTO, 'Member Information: Kingdom of Saudi Arabia and the WTO' <[www.wto.org/english/thewto\\_e/countries\\_e/saudi\\_arabia\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm)> accessed 26 March 2021.

<sup>87</sup> Abbott, 'International Relations Theory' (n 27) 131. See also, Martti Koskenniemi, 'The Place of Law in Collective Security' (1996) 17 Michigan Journal of International Law 455.

<sup>88</sup> Kenneth W. Abbott (n 27) 131.

<sup>89</sup> *ibid.*

<sup>90</sup> Abbott, 'International Relations Theory' (n 27) 127. See also, for example, Abbott, 'Modern International Relations Theory' (n 27); Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 23); Roda Mushkat, 'Dissecting International Legal Compliance: An Unfinished Odyssey' (2009) 38 Denver Journal of International Law and Policy 161; Klabbers (n 79).

<sup>91</sup> Klabbers (n 79).

<sup>92</sup> *ibid.*

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disciplines'.<sup>93</sup> These observations help to illuminate the factors influencing the KSA's compliance with TRIPS, which in turn contributes, even if only in a small way, to the development of international law.<sup>94</sup> Consequently, in Chapter 6, rather than classify them by their academy of origin, the relevant theories of compliance will be examined in order of historical development.

Third, the KSA's compliance with TRIPS cannot be fully analysed through the available theories of compliance. On the one hand this is due to the general inadequacy of these theories, which limits their ability to explain why any state complies with its agreed international legal obligations in some instances and not in others. The unique context of the Kingdom, which has not been well researched by compliance theorists, is another reason for their inability to answer the research question posed in this thesis.

Fourth, every approach to explaining states' compliance with international legal agreements has shortcomings which limit its usefulness. Thus, despite the many advantages of understanding the various aspects of compliance, none of the theories that have emerged from the two disciplines discussed in this chapter provides a suitable analytical tool with which to fully uncover why the Kingdom does or does not comply with international law. Therefore, a more comprehensive approach remains to be identified and developed to better address this research problem.

Finally, although no abstract theory is likely on its own to uncover the decisive factor through which to explain compliance behaviour, collectively, these theories do offer essential data that can be utilised for that purpose. For example, existing theories have implied that there are various factors, each of which exerts a certain degree of influence on a state's compliance. The range and complexity of the factors that ultimately influence whether a country achieves a state of compliance strongly suggest that compliance is not binary but instead exists on a sliding scale. It follows that, to obtain a fuller explanation, it would be beneficial to widen the range of theoretical

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<sup>93</sup> *ibid.*

<sup>94</sup> Abbott, 'International Relations Theory' (n 27) 131. Abbott makes this point in the context of legal rules and institutions in general, thereby contributing, 'in even a small way, to improving global governance and ultimately the human condition'. The KSA can be included here because it is subject to international law.



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discussions and integrate those ideas into a more elaborate framework of specific factors that can influence compliance. These points are discussed in turn in Chapters 6 and 7.

## **Chapter 6: The Application of Compliance Theories to States' Compliance, with Particular Reference to the KSA and TRIPS**

### **6.1 Introduction**

Chapter 5 demonstrated that the available compliance theories that have emerged from the disciplines of law and international relations are deficient in various ways. This chapter elaborates on the general observations discussed in Chapter 5 which help to explain this deficiency. Towards this end, the major theories of compliance are discussed in turn, with particular reference to their applicability to the specific case study of the Kingdom of Saudi Arabia (hereinafter “the KSA” or “the Kingdom”) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter “TRIPS”).

### **6.2 Consent Theory**

One of the earliest and best known efforts to comprehend when and why nations follow international law was that of Henkin, whose seminal book, *How Nations Behave*,<sup>1</sup> was first published in 1968.<sup>2</sup> In the second edition, published in 1979,<sup>3</sup> Henkin, a legal scholar who also dabbled in foreign policy studies,<sup>4</sup> opined: ‘It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.’<sup>5</sup> This quotation represents the core of Henkin’s theory, which has since spread widely amongst

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<sup>1</sup> Henkin was not the first to attempt to comprehend when and why nations follow international law and comply with their legal commitments. Those earlier attempts were not as popular as Henkin’s, however. For example, Alvarez stated that ‘The new compliance scholars recognize that the “why” question has not been totally ignored in the past. Much of the work of many international lawyers in the UN era has attempted to show how international law is created and enforced. Long before Louis Henkin gave voice to what many international lawyers believe as an article of faith, the real world effects of treaties, custom, or other sources of international law have been a central preoccupation for international lawyers as well as for those who have seen international lawyers’ aspirations as a blight on the making of optimal foreign policy.’ Jose E Alvarez, ‘Why Nations Behave [Comments], A Symposium on Implementation, Compliance and Effectiveness: Foreword’ (1998) 19 Michigan Journal of International Law 303, 306.

<sup>2</sup> Louis Henkin, *How Nations Behave: Law and Foreign Policy* (FA Praeger 1968).

<sup>3</sup> Louis Henkin, *How Nations Behave: Law and Foreign Policy* (revised 2nd edn, Columbia UP 1979).

<sup>4</sup> Columbia Law School, ‘Louis Henkin: 1918-2010’ <[www.law.columbia.edu/faculty/louis-henkin](http://www.law.columbia.edu/faculty/louis-henkin)> accessed 5 February 2020; Lyonette Louis-Jacques, ‘RIP Professor Louis Henkin, Human Rights Scholar (1917-2010)’ (The University of Chicago Library, 17 October 2010) <[www.lib.uchicago.edu/about/news/rip-professor-louis-henkin-human-rights-scholar-1917-2010/](http://www.lib.uchicago.edu/about/news/rip-professor-louis-henkin-human-rights-scholar-1917-2010/)> accessed 6 February 2020.

<sup>5</sup> Henkin, *How Nations Behave* (n 3) 47.

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scholars, lawyers, politicians, researchers, and academics. Two of the most important groups are the legal scholars, who tend to support the argument that the global legal system matters and influences states' behaviour, and the theorists, who have sought to understand the reasons why individual states comply with their agreed legal obligations. For example, Koh, one of America's leading legal experts and one of the key theorists of states' compliance with international law,<sup>6</sup> has described Henkin's assertion above as 'the sentence that launched a thousand articles'.<sup>7</sup> Similarly, Slaughter<sup>8</sup> and Powell<sup>9</sup> have deemed this sentence as one of four memorable pithy expressions which have led so many scholars to interpret or respond to Henkin's foundational text that Slaughter and Powell have described it as 'a puzzle',<sup>10</sup> while Raustiala and Slaughter have commented that Henkin's work 'set the standard of the period and remains a touchstone for compliance scholars'.<sup>11</sup>

Henkin's theory can be examined from several angles. In the context of traffic law, for example, Henkin's theory implies that drivers tend to comply with the law and drive on the designated side of the road not because they are compelled to do so or because they are afraid of punishment if they do not, but simply because they recognise the importance of respecting traffic rules and they expect others to act in the same way. In other words, most drivers are cautious because they perceive caution to be in their own best interest. Moreover, and regardless of the penalties that might be imposed on them for breaking the law, they can also imagine the dire consequences if they fail to comply.<sup>12</sup> Occupants of a residential building adhere to the relevant law and do not

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<sup>6</sup> For further biographical details, see Yale Law School, 'Harold Hongju Koh: Sterling Professor of International Law' (*Yale Law School*) <<https://law.yale.edu/harold-hongju-koh>> accessed 6 February 2020.

<sup>7</sup> Harold Hongju Koh, 'Louis Henkin (1917-2010)' (*Opinio Juris*, 2010) <<https://opiniojuris.org/2010/10/15/louis-henkin-1917-2010/>> accessed 6 February 2020.

<sup>8</sup> For biographical details, see 'Anne-Marie Slaughter: Bert G Kerstetter '66 University Professor of Politics and International Affairs, Emerita' (*The Trustees of Princeton University*) <<https://scholar.princeton.edu/slaughter>> accessed 6 February 2020.

<sup>9</sup> For biographical details, see 'Catherine Powell' (*Fordham University School of Law*) <[www.fordham.edu/info/23172/catherine\\_powell](http://www.fordham.edu/info/23172/catherine_powell)> accessed 6 February 2020.

<sup>10</sup> Anne-Marie Slaughter and Catherine Powell, 'Louis Henkin (1917-2010): The Power of His Ideas Live On' (22 October 2010, *Opinio Juris*) <<http://opiniojuris.org/2010/10/22/louis-henkin-1917-2010-the-power-of-his-ideas-live-on/>> accessed 6 February 2020.

<sup>11</sup> Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', in Walter Carlnaes, Thomas Risse and Beth Simmons (eds), *The Handbook of International Relations* (SAGE Publications 2002) 540.

<sup>12</sup> Likewise, in his review of the second edition of Henkin's book, Rubin notes Henkin's observation 'that all statesmen assume the binding force of some fundamental rules such as: treaties must be obeyed [ . . . ] and that failure to observe

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disturb or harm each other for the same reasons, namely, that it is in their own best interests to do so. As these examples illustrate, Henkin's theory defines the 'likelihood of compliance' from the perspective of a cost-benefit ratio.<sup>13</sup> According to Henkin, states' compliance with international law is governed by the same principle, which is that international legal rules must be upheld to create a friendly, peaceful world that respects World Order.<sup>14</sup> Henkin's theory suggests that states can be expected to be naturally concerned with ensuring compliance.<sup>15</sup>

Nearly two and a half decades after he wrote it, Henkin stood by his assertion, the validity of which he believed could be inferred from one of the most important developments in international law of the 21st century, namely, the invasion of Iraq by the United States of America (hereinafter "US").<sup>16</sup> Henkin argued that although the Bush administration invaded Iraq without the formal consent of the United Nations Security Council (hereinafter "UNSC"),<sup>17</sup> it attempted to justify its behaviour towards the global legal regime, claiming, for example, that the US had received prior approval for the invasion from the UNSC.<sup>18</sup> This inference suggests that states are eager to show respect and comply with principles of international law, thereby confirming Henkin's assertion that almost all individual states will almost always comply with almost all the international legal commitments to which they have consented.

Henkin's theory of compliance is informed by two essential elements, the first of which is the context in which it was developed. At the height of the Cold War almost seven decades ago, there was growing scepticism amongst diplomats and scholars about the role that international law could

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these rules has the most dire consequences. Those consequences rarely involve the use of force'. Henkin, Rubin writes, goes on to assert that states observe international law 'not only because wise statesmen are aware of the legal order, but also because it is in their most obvious interest to do so, regardless of the jurisprudential difficulties they may have in grasping the system. If a treaty is ignored, other promises will not be trusted and political influence is reduced.' Alfred P Rubin, Book Review, *How Nations Behave* (2nd edn) (1979) 12 *Vanderbilt Journal of Transnational Law* 809, 809.

<sup>13</sup> 'That nations act on the basis of cost and advantage may seem obvious, but the notions of cost and advantage are not simple and their calculation hardly precise.' Henkin, *How Nations Behave* (n 3) 50.

<sup>14</sup> *ibid* 47.

<sup>15</sup> *ibid*.

<sup>16</sup> Slaughter and Powell (n 10).

<sup>17</sup> *ibid*.

<sup>18</sup> *ibid*.

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perform in governing the global system and national decision making.<sup>19</sup> For example, some scholars argued that, unlike domestic law, which is applied and supported through a system of judges and executors, one of whose main jobs is to assure compliance with the state's legal regulations,<sup>20</sup> international law has no value because of the absence of an actual enforcer.<sup>21</sup> Because international legal scholars did not respond adequately to this argument at the time,<sup>22</sup> Henkin devoted himself to undermining the reasoning of its proponents, declaring that compliance does not necessarily require an enforcer and that other factors are essential for success.<sup>23</sup> In other words, Henkin's theory seeks not only to explain how nations behave and why they comply with international law but also to quell doubts about the influence of international law.

The second element informing Henkin's theory is his belief that the fact a state has given its consent, or has implemented an international legal agreement into its domestic law, is sufficient basis for declaring that state to be in compliance with those obligations to which it has consented.<sup>24</sup> This is mainly because of the sovereignty enjoyed by states,<sup>25</sup> according to which no state is 'subject to any external authority unless it has voluntarily consented to such authority'.<sup>26</sup> Hence, so proponents of this theory argue, consent to be bound generates a new legal commitment, which in turn causes countries to comply with those commitments.<sup>27</sup>

Four major criticisms have been directed at Henkin's theory. First, the assertion that a state's consent to comply implies the state has indeed become compliant or will comply with its international legal commitments rests on a mere assumption. In the context of the KSA, for

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<sup>19</sup> See Section 5.4. See also, Lori Fisler Damrosch, 'In Memoriam: Louis Henkin (1917-2010)' (2011) 105 *American Journal of International Law* 287, 291.

<sup>20</sup> Damrosch (n 19); Alvarez (n 1); William J Brisk, 'Word Politics Verbal Strategy Among the Superpowers: How Nations Behave Law and Foreign Policy' (1972) 57 *Cornell Law Review* 99.

<sup>21</sup> See generally, Damrosch (n 19); Alvarez (n 1); Brisk (n 20).

<sup>22</sup> Damrosch (n 19) 291.

<sup>23</sup> *ibid.*

<sup>24</sup> See, for example, Andrew T Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823, 1833–1834.

<sup>25</sup> *ibid.* 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted.' Hugh Handeyside, 'The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?' (2007) 29 *Michigan Journal of International Law* 71, 74.

<sup>26</sup> Louis Henkin, *International Law: Politics, Values and Functions: General Course on Public International Law* (Martinus Nijhoff 1990) 27.

<sup>27</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 24) 1833.

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example, applying consent theory would lead to the conclusion that the Kingdom has successfully complied with TRIPS, as it has consented to be bound by the agreement. However, as discussed previously in this thesis, the prevalence of infringement within the Kingdom has led to criticism of its intellectual property (hereinafter “IP”) systems and raised doubts about its compliance with TRIPS. This is despite the fact that the KSA not only has consented to be bound by the obligations contained within TRIPS but also has received praise for its implementation of the agreement into its domestic law,<sup>28</sup> and is even viewed by some researchers, such as Urban, as a role model for other states attempting to comply with TRIPS.<sup>29</sup>

The second criticism, which stems from the first, is that Henkin’s theory is focused not on compliance but on implementation, and to an even greater extent on consent. Thus, Henkin’s theory is too limited for the purposes of this thesis, which goes beyond a state’s consent to or even its implementation of an international legal obligation to an examination of its domestic legislation and the context in which it is situated.

Third, Henkin’s approach is marred by the problem of non-completion. Even if we agree that international law does matter and exerts an independent influence on states’ behaviour, there are other factors that affect states’ compliance with international law, as was demonstrated in Part I of this thesis. Thus, while Henkin presented important evidence to demonstrate the strength of international law and its influential role in national decision making, compliance behaviour has other causes that must also be considered. The limited scope of Henkin’s theory makes it insufficient to explain why states do or do not comply with their agreed international legal obligations.

The fourth criticism, which, like the third, highlights a limitation of Henkin’s theory, is that it suggests that compliance depends primarily on statesmen.<sup>30</sup> This is illustrated by Rubin’s

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<sup>28</sup> As previously noted, the Kingdom’s implementation of TRIPS has been praised in various sources, including several official reports issued under the supervision of intergovernmental organizations concerned with IP rights protection such as the WTO and the World Intellectual Property Organization (WIPO), many other WTO member states, and numerous researchers whose work concerns international legal agreements and domestic legal systems.

<sup>29</sup> Jennifer Urban, ‘The Struggle for Middle Eastern Nations to Join the World Trade Organization’ [2015] Social Science Research Network (SSRN) 1, 26.

<sup>30</sup> Noah D Hall, ‘The Evolving Role of Citizens in United States-Canadian International Environmental Law Compliance’ (2007) 24 Pace Environmental Law Review 131.

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comments on Henkin's theory, which explicitly and repeatedly refer to statesmen as a decisive factor in states' compliance with international law.<sup>31</sup> In the context of intellectual property rights (IPR), however, both private corporations and individual rights owners can play an important role in encouraging compliance with international responsibilities and allegiances.<sup>32</sup>

Henkin's theory has been challenged by numerous researchers. For example, in his study of compliance with international environmental law (IEL) by the US and Canada, Hall explains that he focused primarily on the citizenry of the two countries as a key agent in addressing the various challenges associated with IEL because exclusive reliance on national governments to tackle them has proven insufficient. Furthermore, he points out that the nature of the agreements on which his investigation focused depends considerably on the role of citizens when it comes to assuring their nation's compliance with IEL.<sup>33</sup>

To summarise, while there is abundant evidence of the importance of international law and its effect on national decision making, it seems highly unlikely that a deep understanding of the reasons for states' compliance with international law can be achieved by selecting Henkin's theory as the analytical lens, for the reasons given above.

### **6.3 Cost-Benefit Ratio Theory**

In the wake of Henkin's endeavour, Neuhold, an Austrian jurist with specialisation in both the legal academy and the international relations academy,<sup>34</sup> sought to comprehend what makes states change their behaviour towards commitments by which they have consented to be bound. Like Henkin's theory to some extent, Neuhold's theory defines the 'likelihood of compliance'

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<sup>31</sup> Rubin (n 12) 809.

<sup>32</sup> For example, Koh's transnational legal process theory, examined below, introduced other compliance factors which may affect the Kingdom's compliance with TRIPS, and which also go beyond the finite elements tackled by Henkin's theory.

<sup>33</sup> Hall (n 30).

<sup>34</sup> For further biographical details, see, for example, Vienna School of International Studies, 'Neuhold, Hanspeter' <[www.da-vienna.ac.at/en/The-Academy/About-the-Academy/Faculty/MoreInformation/Id/4/NEUHOLD-Hanspeter](http://www.da-vienna.ac.at/en/The-Academy/About-the-Academy/Faculty/MoreInformation/Id/4/NEUHOLD-Hanspeter)> accessed 24 February 2020.

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exclusively in terms of a ‘cost-benefit’ ratio.<sup>35</sup>

There have been two stages in the development of Neuhold’s theory, each of which has had its own effect on the content of the theory. The first stage culminated in 1976, when Neuhold published an article in which he largely agreed with Henkin’s point that, ‘as a rule, the subjects of international law, first and foremost sovereign states, comply with the rules of their legal system, even in cases where such observance evidently entails disadvantages for them’.<sup>36</sup> The second stage is marked by Neuhold’s realisation that the global situation had changed since he first published his theory. States throughout the world had undergone unprecedented shifts in terms of the scope of political conflicts and economic and technological development, especially in the areas of transport and communication, which had accelerated the process of globalisation.<sup>37</sup> These extensive changes had led to the introduction of new and more complex variables regarding states’ compliance with the global legal system.<sup>38</sup> Accordingly, almost a quarter of a century later, in 1999, those changes drove Neuhold to revisit his simple cost-benefit analysis of states’ compliance.<sup>39</sup>

Neuhold concluded that a state’s decision to comply or otherwise with its international legal commitments proceeds from three key variables that are often taken into account by decision-makers.<sup>40</sup> The first variable is ‘the magnitude and consequences of possible sanctions’.<sup>41</sup> For example, ‘rational governments’, as Neuhold describes them, will attempt to estimate as precisely as possible the material and immaterial harm that could be caused to that government or the state as a whole following a violation of international law.<sup>42</sup> Based on these calculations, decision-

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<sup>35</sup> Hanspeter Neuhold, ‘Die Einhaltung Des Völkerrechts in Einer Aussenpolitischen Kosten-Nutzen-Analyse’ (1976) 19 German Yearbook of International Law 317; Hanspeter Neuhold, ‘The Foreign-Policy “Cost-Benefit-Analysis” Revisited’ (1999) 42 German Yearbook of International Law 84.

<sup>36</sup> Neuhold, ‘Die Einhaltung Des Völkerrechts in Einer Aussenpolitischen Kosten-Nutzen-Analyse’ (n 35); Neuhold, ‘The Foreign-Policy “Cost-Benefit-Analysis” Revisited’ (n 35) 84.

<sup>37</sup> Neuhold, ‘The Foreign-Policy “Cost-Benefit-Analysis” Revisited’ (n 35) 85–86.

<sup>38</sup> *ibid* 84–87.

<sup>39</sup> *ibid*.

<sup>40</sup> *ibid* 87–91.

<sup>41</sup> *ibid* 88.

<sup>42</sup> *ibid*.



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makers will choose either compliance or non-compliance, whichever is least expensive.<sup>43</sup>

The second variable decision-makers consider is ‘the probability of these sanctions being imposed on them’.<sup>44</sup> The existence of a sanction, no matter how severe, does not necessarily imply that this sanction will indeed be applied; at the same time, the application of a sanction may result in damages that can extend to those who have not violated international law, and may even hurt the country or countries by whom the sanction has been imposed.<sup>45</sup> For example, resorting to armed force in response to non-compliance by other countries is certain to involve casualties and other significant costs, not only for the state in breach of its commitments but also for the state or states applying armed force. Likewise, trade boycotts often affect not only the economic interests of the country or countries that have been sanctioned but those of the country or countries imposing that punishment.<sup>46</sup>

The third variable is ‘the likelihood of the detection of the violation’.<sup>47</sup> In some cases, a state may expect that its breach of an international legal commitment will escape notice, even if only temporarily.<sup>48</sup> These opportunities for non-compliance arise in various situations, and are especially enticing to those weaker parties which have been implicated in an ‘unequal’ international agreement.<sup>49</sup> In the areas of disarmament or arms control and nuclear weapon tests, for example, decision-makers might be able, at least for some time, to conceal their non-compliance due to the challenges involved in inspecting suspect sites; more generally, an opportunity for non-compliance may arise when a legal rule has been formulated in an ambiguous way.<sup>50</sup>

In several respects, Neuhold’s theory is superior to Henkin’s. For example, Neuhold’s theory explains in more detail the difficulties that can arise from the high cost of bringing states back into compliance with international law, as in the examples of the use of armed force and trade boycotts

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<sup>43</sup> *ibid* 78–88.

<sup>44</sup> *ibid* 88.

<sup>45</sup> *ibid*.

<sup>46</sup> *ibid*.

<sup>47</sup> *ibid*.

<sup>48</sup> *ibid*.

<sup>49</sup> *ibid* 89.

<sup>50</sup> *ibid* 88–90.

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discussed above. Put differently, Neuhold has demonstrated how the damage done by such actions can extend to include those who have not violated international law and may equally hurt the country or countries that are attempting to bring other states back into compliance.

Second, by identifying the three key variables discussed above, Neuhold offers a more explicit cost-benefit analysis to explain states' compliance than the relatively simple model developed by Henkin. Third, although Neuhold examines compliance primarily from the perspective of a cost-benefit ratio, his model goes beyond that one factor. The factors that can be inferred from that model include the type of commitment to which the state has consented, or the characteristics of the activity associated with that commitment, and the way in which international legal agreements are formulated. These factors may influence states to comply with the global legal system.

Despite these advantages, Neuhold's theory has been subject to various criticisms, many of which have also been levelled at Henkin's theory. For example, Neuhold's theory emphasises the role of government decision-makers, suggesting that a state's compliance or otherwise with a given agreement depends on a limited number of actors. However, as previously noted, both private corporations and individual rights owners also can play an important role in ascertaining compliance with IPR. Thus, Neuhold's cost-benefit analysis model of compliance is not sufficiently comprehensive and therefore cannot address the research questions posed in this thesis.

### **6.4 Legitimacy Theory**

Described as 'a prominent expert on international law in all its aspects',<sup>51</sup> Franck sought to move away from theories that focus on cost-benefit ratios, such as Henkin's and Neuhold's, to an almost purely legal theory that relies on the legitimacy of international legal rules and the perception of a fair and operational deal.<sup>52</sup>

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<sup>51</sup> Dennis Hevesi, 'Thomas Franck, Who Advised Countries on Law, Dies at 77' (*The New York Times*, 29 May 2009) <[www.nytimes.com/2009/05/30/nyregion/30franck.html?ref=obituaries](http://www.nytimes.com/2009/05/30/nyregion/30franck.html?ref=obituaries)>. For further biographical details, see New York University School of Law, 'In Memoriam: Thomas Franck, Leader in International Law' (*New York University School of Law*, 2009) <[www.law.nyu.edu/news/FANCK\\_IN\\_MEMORIAM](http://www.law.nyu.edu/news/FANCK_IN_MEMORIAM)> accessed 2 March 2020; Chris Borgen, 'Remembering Tom Franck: The Challenge of the Engaged Life' (*Opinio Juris*, 2009) <<http://opiniojuris.org/2009/05/28/remembering-tom-franck-the-challenge-of-the-engaged-life/>> accessed 2 March 2020.

<sup>52</sup> See Thomas M Franck, *Fairness in International Law and Institutions* (Oxford Scholarship Online 2012).

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With the end of the Cold War, international legal scholars finally felt free of the need to demonstrate the very existence of international law.<sup>53</sup> A number of significant developments contributed to that emancipation. For example, the solid, practical, experiential evidence previously presented by many other international legal scholars had shown that the global legal system matters.<sup>54</sup> Second, new developments such as the fall of the Berlin wall and ‘a decade of obsession with “regimes”’ had led to the prediction of a new era of international cooperation, encouraging the emergence of other scholarly trends that concentrated on the specific properties of the law itself.<sup>55</sup> One of the most prominent scholars to embrace these new directions was Franck, who proclaimed that:

Like any maturing legal system, international law has entered its post-ontological era. Its lawyers need no longer defend the very existence of international law. Thus emancipated from the constraints of defensive ontology, international lawyers are now free to undertake a critical assessment of its content.<sup>56</sup>

Accordingly, Franck’s theory of compliance tended to explain a state’s compliance behaviour by exclusively and critically focusing on the content of the international legal agreement with which it has agreed to comply.

Although Franck’s theory appears to be multifaceted, it leads to one major conclusion, namely, that a state’s decision not to comply – or, put differently, the reason why doubts emerge within a state about the integrity and legitimacy of an agreement to which it has consented – arises exclusively from certain imperfections that develop when establishing, internalising, and managing an international legal rule<sup>57</sup> – in other words, from those ‘substantive and procedural

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<sup>53</sup> Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 11) 541.

<sup>54</sup> I have deduced this from other scholarly work. See, for example, Beth A Simmons, ‘Money and the Law: Why Comply with the Public International Law of Money’ (2000) 25 *Yale Journal of International Law* 323; Guzman, ‘A Compliance-Based Theory of International Law’ (n 24).

<sup>55</sup> Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 11) 541.

<sup>56</sup> Franck (n 51) 6.

<sup>57</sup> Jacob Katz Cogan, ‘Noncompliance and the Rule of Law’ (2006) 31 *Yale Journal of International Law* 189, 194; Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 11) 541. See also, generally, Franck (n 51); Thomas M Franck, *The Power of Legitimacy among Nations* (OUP 1990).

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flaws' that reduce the fairness and precision of the law.<sup>58</sup> These substantive and procedural flaws include (1) not only a lack of transparency and clarity in the language of the rule but also its inability 'to clearly communicate its intent in specific situations';<sup>59</sup> (2) a lack of cohesion, in the sense that the rule is inconsistent in application or context with other international legal rules;<sup>60</sup> and (3) the obstacles that can be encountered by a government when internalising legal rules and norms because of shortcomings in 'the symbolic validation of a rule, or of a rulemaking process or institution'.<sup>61</sup> Such flaws can occur when a rule crosses a national boundary, whereupon that rule becomes less able 'to exert a pull to voluntary compliance'.<sup>62</sup>

Accordingly, 'this notion of compliance-pull, rather than compliance itself, is actually the dependent variable of [Franck's] analysis'.<sup>63</sup> In the context of Saudi Arabia, a key implication of this model is that the KSA's decision to comply with an international legal agreement depends on how the Kingdom perceives the equity and precision of the commitments imposed upon it by that accord.

There are other limitations to Franck's theory besides its insistence that the perceived legitimacy of the rules per se is the decisive factor in states' compliance, as can be illustrated by applying his theory to the case study of the KSA and TRIPS. In the final phases of the negotiations to accede to the World Trade Organisation (hereinafter "WTO"), the Kingdom committed itself to fully implement TRIPS into its national legislation with no transitional period.<sup>64</sup> Consequently, unlike many other developing countries seeking WTO access at the time, the KSA was required to

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<sup>58</sup> Cogan (n 56) 194; Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 11) 541; Franck (n 51); Franck (n 57).

<sup>59</sup> Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 11) 541.

<sup>60</sup> *ibid.*

<sup>61</sup> Symbolic validation 'occurs when a signal is used as a cue to elicit compliance with a command. The cue serves as a surrogate in place of enunciated reasons for obedience'. Franck (n 51) 92.

<sup>62</sup> Franck (n 51) 91.

<sup>63</sup> Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 11) 541.

<sup>64</sup> See, for example, WTO Working Party on the Accession of the Kingdom of Saudi Arabia, 'Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization' (2005) 79; The Office of the United States Trade Representative (USTR), 'Saudi Arabia's Accession to the World Trade Organization (WTO): WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)' (2005) 1 <[https://ustr.gov/archive/assets/Document\\_Library/Fact\\_Sheets/2005/asset\\_upload\\_file12\\_7938.pdf](https://ustr.gov/archive/assets/Document_Library/Fact_Sheets/2005/asset_upload_file12_7938.pdf)> accessed 21 March 2020.

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immediately comply with the terms of the agreement as soon as it had been implemented.<sup>65</sup> Given that the KSA had raised other issues throughout the negotiations process that could have affected its subsequent compliance with its WTO commitments, it seems possible that, had it been concerned about the unfairness or imprecision of TRIPS, it could have expressed these concerns at some point, yet it did not.<sup>66</sup> Instead, most of the concerns raised by the KSA concerned other matters, in particular, those related to Sharia.<sup>67</sup>

The fact that the representative of the KSA more than once affirmed that the Kingdom agreed to immediately implement all its obligations under TRIPS<sup>68</sup> suggests that the KSA had no concerns about the fairness and precision of the agreement other than those raised during the various phases of the negotiations. Nevertheless, as previously demonstrated, criticism of Saudi Arabia's IP systems continues, and doubts about its compliance with TRIPS persist, due to the prevalence of infringement. This in turn suggests that the perceived legitimacy of the agreement does not affect the KSA's compliance, and that other factors explain its behaviour in relation to TRIPS, including the other concerns raised during the negotiation process. It is possible that the KSA had reservations about the legitimacy of its obligations under TRIPS but did not air those concerns during the negotiations and chose instead to affirm its willingness to implement the agreement immediately and in full in order to gain trade concessions in other areas. Nevertheless, even if the KSA did express doubts about the integrity and legitimacy of TRIPS, to achieve the objectives of this thesis, it remains indispensable to investigate other potential factors.

Still another limitation of Franck's theory in terms of its applicability is the great difficulty of measuring some of its elements. For example, Franck pointed out that symbolic validation involves

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<sup>65</sup> For example, the Kingdom expressed a need to review some of its existing regimes in order to make them more consistent with WTO provisions and rules. It also clarified that the period of review would extend beyond its accession. Some of the obligations reviewed related to the import regime; others related to policies affecting trade in services, specifically insurance services; and some related to border measures. And yet, as detailed in point 272 in the report of the working party on the KSA's accession to the WTO: 'The representative of Saudi Arabia stated that Saudi Arabia would apply fully all the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights from the date of accession to the WTO, without recourse to any transition period. The Working Party took note of this commitment.' WTO Working Party on the Accession of the Kingdom of Saudi Arabia (n 64) 41–42, 59, 87, and 94–95.

<sup>66</sup> See generally, WTO Working Party on the Accession of the Kingdom of Saudi Arabia (n 64).

<sup>67</sup> *ibid* 32–34, 52, 66, 84, and 91–92.

<sup>68</sup> *ibid* 79, 87.



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is being complied with because it is legitimate; its legitimacy is proven by the states that comply with it, and this is an index of the validity or legitimacy of that rule.<sup>74</sup> While such an argument may be deductively valid, it is unable to prove the assertion as it includes no evidence that can be clearly distinguished from the conclusion reached. Trimble, for example, a proponent of legitimacy theory, acknowledges that '[his] claim that compliance [with international law] may depend on acceptance of its legitimacy, which in turn can be enhanced by its domestication, may be difficult to prove empirically'.<sup>75</sup> Therefore, despite the importance of legitimacy as a potential influence on states' compliance, Franck's theory is weakened by an absence of evidence other than the premise on which it is based.

To sum up, Franck's theory is helpful in several respects. It offers a more explicit legal model to explain a state's compliance which demonstrates the importance of the perceived legitimacy of the international legal rules with which that state is expected to comply. Nevertheless, its limitations are such that it cannot deliver the comprehensive analysis of compliance behaviour required for this thesis.

### 6.5 Chayes and Chayes's Managerial Model

In the last decade of the twentieth century, Abram Chayes<sup>76</sup> and Antonia Handler Chayes<sup>77</sup> developed an alternative theory to those that have defined the likelihood of successful compliance as dependent on coercive mechanisms or another strict enforcement method, such as military force or economic sanctions.<sup>78</sup> One leading reason for their rejection of the enforcement-based

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<sup>74</sup> See, for example, Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Macmillan 2017) 27.

<sup>75</sup> Keohane, 'International Relations and International Law: Two Optics' (n 73) 5. For more detail about Trimble's original work, see Philip R Trimble, 'International Law, World Order, and Critical Legal Studies' (1990) 42 *Stanford Law Review* 811.

<sup>76</sup> For further biographical details of this scholar, see, for example, 'Abram Chayes, 77' (*Harvard Law School*, 2000) <<https://today.law.harvard.edu/abram-chayes-77/>> accessed 24 April 2020; Harvard Law School, 'Professor Abram Chayes (1922-2000)' (*Harvard Law School*) <<https://hls.harvard.edu/dept/ils/summer-work-abroad/professor-abram-chayes-1922-2000/>> accessed 24 April 2020.

<sup>77</sup> For further biographical details of this scholar, see, for example, 'Antonia Handler Chayes: Professor of Practice of International Politics and Law' (*The Fletcher School of Law and Diplomacy*) <<https://fletcher.tufts.edu/people/antonia-handler-chayes>> accessed 24 April 2020.

<sup>78</sup> See, for example, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard UP 1995) 2–3. See also, for example, Neuhold's theory examined above, which defines 'likelihood of compliance' exclusively from the perspective of a 'cost-benefit' ratio. The point

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compliance model is that its application often involves considerable costs, plus there is some doubt about its legitimacy,<sup>79</sup> particularly when this type of model is used for political purposes or is applied only to the weakest parties to an agreement.<sup>80</sup> To address these limitations, Chayes and Chayes began with the premise that countries have a natural general propensity to comply; accordingly, they suggested replacing the enforcement model with what they termed ‘the managerial model’, which depend mainly on ‘a cooperative, problem-solving approach’.<sup>81</sup>

Chayes and Chayes have co-authored several works on states’ compliance with international law that have given shape to the managerial model.<sup>82</sup> The fundamental premise of that model is that nations have a general propensity to comply with their international legal obligations.<sup>83</sup> This propensity is the product of three factors: (1) efficiency, (2) interests and (3) norms.<sup>84</sup>

Regarding the first factor, Chayes and Chayes argue that even when calculated from an economic perspective, compliance is the most efficient and least expensive option, especially when a complex bureaucracy is involved.<sup>85</sup> Decisions are often difficult to reach, and as such are not without costs, nor indeed are they always possible.<sup>86</sup> Individual states invest considerable resources to decision making, not least in terms of the enormous time and effort required to prepare, draft, negotiate, and monitor their agreement commitments.<sup>87</sup> Consequently, the decision-making process tends to involve a multitude of complex calculations.<sup>88</sup> Deciding to comply, so the

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here is that his theory has determined three key variables that influence states’ decision to comply with or to deliberately violate their international legal commitments. All these variables take the sanctions factor into account.

<sup>79</sup> *ibid.* Chayes and Chayes made the same observation as Neuhold regarding the second variable influencing the decision to comply (or not) with the global legal system. For example, imposing sanctions is both delicate and costly and will involve casualties, ‘not only for the state against which they are directed [. . .] but also for the sanctioning states’. *ibid.* 2; see also Neuhold, ‘The Foreign-Policy “Cost-Benefit-Analysis” Revisited’ (n 35) 88.

<sup>80</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 2–3.

<sup>81</sup> *ibid.* 3–4; Abram Chayes and Antonia Handler Chayes, ‘On Compliance’ (1993) 47 *International Organization* 175, 176.

<sup>82</sup> Abram Chayes and Antonia Handler Chayes, ‘Compliance Without Enforcement: State Behavior Under Regulatory Treaties’ (1991) 7 *Negotiation Journal* 311; Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard UP 2009); Chayes and Chayes, *The New Sovereignty* (n 77); Chayes and Chayes, ‘On Compliance’ (n 81).

<sup>83</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 1–4; Chayes and Chayes, ‘On Compliance’ (n 81) 175–178.

<sup>84</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 4; Chayes and Chayes, ‘On Compliance’ (n 81) 178–187.

<sup>85</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 4; Chayes and Chayes, ‘On Compliance’ (n 81) 178–179.

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*



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theory goes, would save states the trouble of recalculating the costs and benefits of non-compliance, thereby preserving resources.<sup>89</sup> This, in turn, would ‘generat[e] an efficiency-based rationale for compliance’.<sup>90</sup> For this reason, Chayes and Chayes opined that the decision to comply is normal organisational behaviour, and those who propose otherwise carry a heavy burden of proof on their shoulders.<sup>91</sup>

The second factor leading to the general propensity of states to comply is that international legal agreements are put in place to serve the interests of the parties to that agreement.<sup>92</sup> Therefore, the proposition that a state would comply with its obligations only when it is in its interest to do so suggests that some obligations are unrelated to their interests.<sup>93</sup> According to Chayes and Chayes, however, the opposite is true.<sup>94</sup> In their model, the most fundamental principle of the international legal system is that a state is not legally bound to comply with any commitment unless it has given, or if it has not given, its consent.<sup>95</sup> International legal agreements are consent-based instruments; thus, those agreements have no force or effect unless the negotiating states have agreed to them.<sup>96</sup> As such, individual states have no need to conclude an agreement that does not correspond with their interests in the first instance.<sup>97</sup> Accordingly, the way in which an international legal accord is drafted and finalised is intended to ensure that its subsequent outcome will express, at least up to a point, an accommodation of the negotiating parties’ interests.<sup>98</sup>

The final consideration is norms.<sup>99</sup> As Chayes and Chayes pointed out, it is generally accepted that international legal agreements become legally binding on the parties that have ratified them.<sup>100</sup> In the same way as individuals commonly feel obligated to follow or comply with the law, perhaps

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<sup>89</sup> *ibid.*

<sup>90</sup> Guzman, ‘A Compliance-Based Theory of International Law’ (n 24) 1830. See also Chayes and Chayes, *The New Sovereignty* (n 78) 4; Chayes and Chayes, ‘On Compliance’ (n 80) 178–179.

<sup>91</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 4; Chayes and Chayes, ‘On Compliance’ (n 81) 179.

<sup>92</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 4–5; Chayes and Chayes, ‘On Compliance’ (n 81) 179–180.

<sup>93</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 3; Chayes and Chayes, ‘On Compliance’ (n 81) 179.

<sup>94</sup> Chayes and Chayes, ‘On Compliance’ (n 81) 179.

<sup>95</sup> *ibid.*

<sup>96</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 4; Guzman, ‘A Compliance-Based Theory of International Law’ (n 24) 1833.

<sup>97</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 4–5; Chayes and Chayes, ‘On Compliance’ (n 81) 179–180.

<sup>98</sup> *ibid.*

<sup>99</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 8–9; Chayes and Chayes, ‘On Compliance’ (n 81) 185–187.

<sup>100</sup> *ibid.*

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because they have been socialised to do so,<sup>101</sup> so it is with states: the phrase *pacta sunt servanda* (treaties are to be obeyed) is often referred to as a basic norm of the global legal system.<sup>102</sup> Therefore, the provisions included in any treaty to which countries have formally consented will entail a legal commitment to comply and will presumptively be ‘a guide to action’.<sup>103</sup> Chayes and Chayes therefore concluded that countries generally feel a sense of responsibility to adjust their behaviours according to governing norms.<sup>104</sup> Accordingly, the authors rejected the realists’ argument that the calculation of interests is the only compliance factor that ultimately governs individual behaviours, because such an argument denies the importance of operating the normative commitment in global affairs.<sup>105</sup>

In the context of the KSA’s compliance with TRIPS, Chayes and Chayes’s managerial model, like Henkin’s consent-based theory, rests on a preconceived assumption that the Kingdom is at least inclined to comply with TRIPS, and that any instances of non-compliance are generally inadvertent. This assumption has clear implications. As the authors themselves state, ‘if we are correct that the principal source of noncompliance is not wilful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly’.<sup>106</sup> Accordingly, their model identified three deep-rooted factors, which they described as ‘infrequently recognized in discussions of compliance’, that obstruct compliance:<sup>107</sup> (1) ambiguity and vagueness in the language of an agreement; (2) a state’s incapacity to comply with its undertakings an agreement, arising from a lack of the ‘requisite scientific, technical, bureaucratic, and financial wherewithal’, which discourages or even prevents that state from developing an effective national enforcement regime; and (3) the failure of the agreement to take account of ‘the

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<sup>101</sup> *ibid.*

<sup>102</sup> *ibid.*

<sup>103</sup> *ibid.*

<sup>104</sup> ‘The norm is itself a “reason for action” and thus becomes an independent basis for conforming behavior.’ Chayes and Chayes, *The New Sovereignty* (n 78) 8–9. As evidence for their argument that ‘the strongest circumstantial evidence for the sense of an obligation to comply with treaties is the care that states take in negotiating and entering into them’, the authors pointed to testimony by the US Department of Defense during the Cold War, which ‘repeatedly sounded the theme that arms control treaties with the Soviet Union were important in providing the stability of expectations and predictability the Pentagon needed for sound strategic planning’. Chayes and Chayes, ‘On Compliance’ (n 81) 186–187.

<sup>105</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 8; Chayes and Chayes, ‘On Compliance’ (n 81) 185.

<sup>106</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 22.

<sup>107</sup> *ibid* 10; Chayes and Chayes, ‘On Compliance’ (n 81) 188.

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temporal dimension of the social, economic, and political changes' that can occur within a state during the negotiations stage, at the point of signing and concluding an agreement, or during the period before all member states have achieved successful compliance.<sup>108</sup>

The managerial model tends to generate managerial, and therefore limited, solutions – i.e., approaches to resolving instances of noncompliance that are tailored to the specific context in which the problem has arisen. In the context of the KSA's compliance with TRIPS, one such solution might involve ensuring transparency and addressing the ambiguity surrounding the requirements of TRIPS and the performance of member states.<sup>109</sup> Chayes and Chayes argue that transparency can play an essential role in strategic interaction among member states,<sup>110</sup> directing them towards achieving compliance by (i) facilitating a coordinated approach to the agreement's norms among states that make independent decisions; (ii) providing reassurance of equal treatment under the law to those member states whose compliance hinges on evidence of comparable behaviour by other parties to the agreement; and (iii) deterring those member states pondering non-compliance.<sup>111</sup>

Chayes and Chayes' contention that compliance problems result from ambiguity or poor communication informs their view that the mechanism used in the traditional 'mandatory' dispute settlement systems should be replaced.<sup>112</sup> Thus, in this model, dispute resolution could be another tool through which to reinforce the Kingdom's compliance.<sup>113</sup> At the same time, however, the KSA's failure to comply should not lead to the imposition of binding penalties,<sup>114</sup> but rather to an approach focused on alternative mechanisms that facilitate successful coordination, such as organising relatively informal forums in which individual states can 'share information and clarify their expectations', considering the views of the conciliators, and taking the opinions of the

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<sup>108</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 10–17; Chayes and Chayes, 'On Compliance' (n 81) 188–197.

<sup>109</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 22; Chayes and Chayes, 'On Compliance' (n 81) 204.

<sup>110</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 22.

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.* 24; Guzman, 'A Compliance-Based Theory of International Law' (n 24) 1832.

<sup>113</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 24–25; Guzman, 'A Compliance-Based Theory of International Law' (n 24) 1832.

<sup>114</sup> *ibid.*

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disputants.<sup>115</sup> Chayes and Chayes consider such alternative mechanisms to be critical, not merely because states have a propensity to comply and because they share with all other parties to a given agreement the same interest, but also because such mechanisms observe ‘the niceties of sovereignty’.<sup>116</sup>

One of the most salient advantages of the Chayes and Chayes model is its variety, since it seems to tie together several themes in international law literature with some insights from international relations theory.<sup>117</sup> For example, the model not only includes legal elements such as norms and a focus on international law as law, but also considers some other elements such as economic and political changes and states’ interests. This combination enables a more comprehensive understanding of the factors that can affect compliance with international law, which may, in turn, help to underscore one of the essential points of this thesis, namely, that the more extensive the model we use, the more we understand the factors affecting compliance. The greater our understanding of these factors, the easier it is for legal scholars to provide appropriate policy-related or strategic advice when needed concerning the development of the global legal regime, including WTO.

Despite the significant advantages of the managerial theory, it has several limitations that make it unlikely on its own to address the specific problem explored in this study. For example, those solutions suggested by the model that focus on enhancing coordination efforts to stimulate higher levels of compliance seem to be based on the assumption that the Kingdom is inclined to comply with TRIPS for reasons of efficiency, self-interest, and respect for norms.<sup>118</sup> However, this assumption must first be validated against the case in question; then, and only then, can more suitable and relevant solutions be more readily and effectively reached. For example, what if the KSA violates TRIPS because the agreement is contrary to its interests?<sup>119</sup> Or, what if the interests

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<sup>115</sup> Guzman, ‘A Compliance-Based Theory of International Law’ (n 24) 1832; Chayes and Chayes, *The New Sovereignty* (n 78) 24–25.

<sup>116</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 4–7, 24–25; Chayes and Chayes, ‘On Compliance’ (n 81) 178–185.

<sup>117</sup> See also, Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 11) 542.

<sup>118</sup> Chayes and Chayes, *The New Sovereignty* (n 78) 1–4; Chayes and Chayes, ‘On Compliance’ (n 81) 175–187.

<sup>119</sup> As Guzman has observed, ‘When a state violates the law because the law is contrary to its interests, [. . .] the managerial model breaks down. When the states’ interests are at odds, as is true in instances of intentional violation,

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of the signatories to TRIPS are at odds?<sup>120</sup> How would a ‘nonmandatory’ dispute resolution lead to compliance in such circumstances?<sup>121</sup> Accordingly, a solution to the problem of noncompliance by WTO member states may require more than the use of such institutional-coordination-based managerial techniques. That said, verifying whether or not this is the case remains subject to the outcome of the first step, i.e. comprehensively identifying the factors affecting states’ compliance with their legal obligations. Finally, it may go without saying that the managerial theory is weakened by its incompleteness. Even in the absence of the limitations mentioned above, the managerial factor cannot be the only method that always influences states’ compliance.

### 6.6 The Transnational Legal Process

In the last decade of the twentieth century, the increasing popularity of constructivist theories corresponded with legal scholarship that has long been concerned with the normative foundation of compliance.<sup>122</sup> Raustiala and Slaughter, for example, have pointed out that

Franck’s legitimacy theory suggested that state behavior is determined not by rational calculation but by normative processes and specifically legitimacy. Even managerial theory stresses the key role of norms of behavior and the social context within which non-compliance is addressed. In these norm-oriented theories enmeshment in a legitimate, iterated, transnational process of legal production and interpretation cabins state behavior vis-à-vis international law.<sup>123</sup>

Furthermore, they argue, both constructivist theory and legal scholarship concerned with the normative foundation of compliance that rose more rapidly in the 1990s were ‘built on or reflected earlier treatments of the role of norms and law’; indeed, ‘[m]uch IL scholarship echoes the flavor and ontology of constructivist theory’.<sup>124</sup>

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the states conduct negotiations “in the shadow” of potential sanctions.’ Guzman, ‘A Compliance-Based Theory of International Law’ (n 24) 1832.

<sup>120</sup> *ibid.*

<sup>121</sup> *ibid.*

<sup>122</sup> Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 11) 544; Thomas, *Assessing Intellectual Property Compliance in Contemporary China* (n 74) 28.

<sup>123</sup> Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 11) 544.

<sup>124</sup> *ibid.*

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Koh's model of the 'transnational legal process' or 'obedience' with international legal agreements is a prominent example of this approach.<sup>125</sup> Koh described a 'process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic legal system'.<sup>126</sup> Koh pointed out that if the question is 'Why does a state comply?', the short answer is: Because of this process.<sup>127</sup>

Koh introduced this theory in the late 1990s and has continued to defend it up to the present time.<sup>128</sup> In his recent book, *The Trump Administration and International Law*,<sup>129</sup> Koh urged the various actors, both inside and outside government, to leverage the features of his theory as a counter-strategy to curb what he described as the excesses of the Trump administration and to preserve America's constitutional commitments to comply with binding international standards.<sup>130</sup>

In various local and international fora, Koh<sup>131</sup> especially emphasised the importance of cooperation between public and private actors in bringing states into compliance with international law.<sup>132</sup> Koh

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<sup>125</sup> See, for example, Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 11) 544; Thomas, *Assessing Intellectual Property Compliance in Contemporary China* (n 74) 28. Examples of Koh's published works that have helped shape his theory include the following: Harold Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181; Harold Koh, 'Why Do Nations Obey International Law?' (1997) 106 *The Yale Law Journal - Faculty Scholarship Series* 2599; and Harold Hongju Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' (1998) 35 *Houston Law Review* 623.

<sup>126</sup> Koh, 'The 1998 Frankel Lecture' (n 125) 626.

<sup>127</sup> *ibid.*

<sup>128</sup> Harold Hongju Koh, 'The Trump Administration and International Law' (2017) 56 *Washburn Law Journal* 413; Harold Hongju Koh, *The Trump Administration and International Law* (OUP 2019); Craig Martin, 'Symposium: The Assumptions of Koh's Transnational Legal Process as Counter-Strategy' (*Opinio Juris*, 2018) <<http://opiniojuris.org/2018/02/26/symposium-the-assumptions-of-kohs-transnational-legal-process-as-counter-strategy/>> accessed 1 June 2020.

<sup>129</sup> Koh, 'The Trump Administration and International Law' (n 128); Koh, *The Trump Administration and International Law* (n 128).

<sup>130</sup> Koh, 'The Trump Administration and International Law' (n 128) 414–415; Martin (n 128).

<sup>131</sup> For further biographical details of this scholar, see, for example, Harold Hongju Koh, 'The Obama Administration and International Law' (*The United States Department of State*, 2010) <<https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>> accessed 1 June 2020; Jess Bravin, 'State Department's Top Lawyer Heading Out' (*The Wall Street Journal*, 7 December 2012) <<https://blogs.wsj.com/law/2012/12/07/state-departments-top-lawyer-heading-out/>>.

<sup>132</sup> See, for example, Koh, 'Why Do Nations Obey International Law?' (n 125) 2604, 2626–2627; Koh, 'The 1998 Frankel Lecture' (n 125) 649–650; Koh, 'Transnational Legal Process' (n 125) 181–182. Koh describes his model as 'the theory and practice of how public and private actors, including nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret, internalize, and enforce rules of transnational law'. Koh, 'Why Do Nations Obey International Law?' (n 125) 2626. In another article, Koh adds that 'these transnational actors need both public and private stages upon which to interact. Available stages encompass governmental and nongovernmental fora competent to declare both general norms of international law (e.g., treaties) and specific

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identified six key categories of actors involved in this process:<sup>133</sup> (1) ‘transnational norm entrepreneurs’, including nongovernmental transnational organisations and individuals who are able to mobilise and influence public opinion, domestically and internationally;<sup>134</sup> (2) ‘governmental norm sponsors’, such as the United Nations (hereinafter “the UN”) Human Rights Commissioner;<sup>135</sup> (3) ‘transnational issue networks’, which Koh described as ‘epistemic communities’ that include private foundations or individuals with recognised experience in a particular field;<sup>136</sup> (4) ‘interpretive communities and law-declaring fora’ that are ‘capable of receiving a challenge to a nation's international conduct, then defining, elaborating, and testing the definition of particular norms and opining about their violation’;<sup>137</sup> (5) ‘bureaucratic compliance procedures’, which are adopted mainly by legal advisers in domestic governmental institutions in order to comply with community interpretations of the relevant international norm;<sup>138</sup> and (6) ‘issue linkages’, including institutional habits that domestic bureaucratic actors develop to promote ‘internalisation’<sup>139</sup> and interconnectivity between different international legal obligations.<sup>140</sup> According to Koh, it is because of these interlinkages that individual states which fail to honour their global commitments in a specific field fall into a vicious cycle of noncompliance with other international agreements in that field.<sup>141</sup>

Koh argued that compliance would be achieved when an individual or an organisation embraces rules-induced behaviour, indicating that they have internalised the relevant norms and incorporated them into their own internal value system.<sup>142</sup> By this reasoning, the KSA’s compliance with its international legal obligations is not brought about through the anticipation of enforcement but by

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interpretation of those norms in particular circumstances (e.g., particular interpretations of treaties and customary international law rules [...]). Koh, ‘The 1998 Frankel Lecture’ (n 125) 649.

<sup>133</sup> Koh, ‘The 1998 Frankel Lecture’ (n 125) 646–647.

<sup>134</sup> *ibid* 647–648.

<sup>135</sup> *ibid* 648.

<sup>136</sup> *ibid* 649.

<sup>137</sup> *ibid* 649–651.

<sup>138</sup> *ibid* 651–653.

<sup>139</sup> Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 11) 547.

<sup>140</sup> Koh, ‘The 1998 Frankel Lecture’ (n 125) 653–655.

<sup>141</sup> *ibid*.

<sup>142</sup> Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 11) 544; Koh, ‘Why Do Nations Obey International Law?’ (n 125) 2600–2601; Koh, ‘The 1998 Frankel Lecture’ (n 125) 628.

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incorporating rules and norms into its own local legal system.<sup>143</sup> In other words, the principal reason for a state's compliance is that the rules of transnational law, after passing through other domestic and external stages, were ultimately internalised into the state's national legal system.<sup>144</sup> This internalisation or incorporation has, in turn, been triggered and fostered by what Koh termed the 'transnational legal process', which involves three key sequential steps:<sup>145</sup> (1) provoking 'interaction' or communication (or perhaps a series of interactions and communications); (2) provoking 'interpretation' or analysis of the norm; and (3) provoking 'internalisation' or introspection in relation to that norm.<sup>146</sup> These components are not self-operative but often need to be led by specific activators other than the parties to the agreement; in other words, they are influenced mainly by non-state actors.<sup>147</sup> Koh also identified a number of factors which have led to the emergence of the actors who have played a major role in provoking interaction, interpretation, and internalisation, which have led to successful compliance subsequently.<sup>148</sup> These factors include the declining sovereignty of states, the increasing engagement of non-state actors such as international organisations and institutions, the increasing indistinguishability between the public and the private spheres, the speedy evolution of international legal rules, and the growing overlap between national and international systems.<sup>149</sup>

The first component of Koh's three-pronged strategy, which explains the KSA's success (or lack thereof) in complying with TRIPS, is empowering more public and private actors to interact repeatedly and to participate jointly in that process.<sup>150</sup> These actors include intergovernmental organisations, foreign and local non-governmental organisations, private companies, and

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<sup>143</sup> Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 11) 544.

<sup>144</sup> See, for example, *ibid*; Koh, 'Why Do Nations Obey International Law?' (n 125) 2600–2601; Koh, 'The 1998 Frankel Lecture' (n 125) 628.

<sup>145</sup> Raustiala and Slaughter, 'International Law, International Relations and Compliance' (n 11) 544.

<sup>146</sup> See, for example, Koh, 'Why Do Nations Obey International Law?' (n 125) 2603, 2646; Koh, 'The 1998 Frankel Lecture' (n 125) 626, 644, 677; Harold Koh, 'Transnational Legal Process' (n 125) 183–185.

<sup>147</sup> See, for example, Koh, 'The 1998 Frankel Lecture' (n 125) 647–648, 680–681.

<sup>148</sup> Koh, 'Why Do Nations Obey International Law?' (n 125) 2603–2604. Koh points out that these transformations in turn provide 'a fascinating window into how internationalists have chosen to think about the role and function of international law'; *ibid* 2604.

<sup>149</sup> *ibid*.

<sup>150</sup> See, for example, Koh, 'Why Do Nations Obey International Law?' (n 125) 2649–2653, 2656; Koh, 'Transnational Legal Process' (n 125) 200–201, 203–205.



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‘transnational moral entrepreneurs’ interested in protecting IP rights.<sup>151</sup> The importance of such actors stems from the notion that the ‘transnational legal process is not self-activating’, but instead requires certain actors to consciously take action to influence that process.<sup>152</sup> The role of these actors is therefore essential: they act as process activators of interaction.<sup>153</sup> According to Koh’s theory, the greater the number of transnational actors concerned with IP issues, the greater the likelihood that they will be empowered to interact with each other, perhaps repeatedly.<sup>154</sup> The more they interact with each other, the easier it is to move forward to the next level of the transnational legal process.<sup>155</sup> In the context of the KSA, the more we succeed in moving forward toward the further step, the more important IP issues become in the Kingdom, and in turn the greater the degree of compliance with TRIPS the Kingdom can achieve.<sup>156</sup>

If the real purpose of interaction is to develop a shared understanding of the IP rights standards that can be applied against infringers, then actors must look for new fora or improve existing ones in which to articulate and interpret these norms.<sup>157</sup> Among the best known examples of platforms through which actors can meet for this purpose are major international conferences and various domestic, regional, and international judicial and quasi-judicial bodies.<sup>158</sup> In the context of TRIPS, for example, these actors play critical roles not only as instigators of interaction, but also as producers of new fora for interpreting the legal norms of the agreement.<sup>159</sup> By encouraging such group discussions, those interested in protecting IP rights ‘can also seek to expand the interpretive community that determines the contours of a legal norm and whether that norm has been violated

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<sup>151</sup> Koh, ‘Why Do Nations Obey International Law?’ (n 125) 2656.

<sup>152</sup> Koh, ‘The 1998 Frankel Lecture’ (n 125) 647, 679–681.

<sup>153</sup> *ibid* 677.

<sup>154</sup> See, for example, Koh, ‘Why Do Nations Obey International Law?’ (n 125) 2656; Koh, ‘The 1998 Frankel Lecture’ (n 125) 677.

<sup>155</sup> Koh, ‘Why Do Nations Obey International Law?’ (n 125) 2655–2658; Koh, ‘The 1998 Frankel Lecture’ (n 125) 677–679.

<sup>156</sup> *ibid*.

<sup>157</sup> Koh, ‘Why Do Nations Obey International Law?’ (n 125) 2656; Koh, ‘The 1998 Frankel Lecture’ (n 125) 678.

<sup>158</sup> See, for example, Koh, ‘Why Do Nations Obey International Law?’ (n 125) 2611–2612, 2656; Koh, ‘The 1998 Frankel Lecture’ (n 125) 649–651, 655, 637–638. These law-declaring fora include ‘treaty regimes; domestic, regional, and international courts; ad hoc tribunals; domestic and regional legislatures; executive entities; commissions of international publicists; and nongovernmental organizations’; *ibid* 649–650. Other credible interpreters of an international norm include ‘executive entities (such as the UN Security Council or the President of the United States); international publicists; and nongovernmental organizations’. Koh, ‘Why Do Nations Obey International Law?’ (n 125) 2640.

<sup>159</sup> Koh, ‘The 1998 Frankel Lecture’ (n 125) 678.

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in particular instances'.<sup>160</sup> Hence, the act of collective interpretation can assist in resolving problems arising from ambiguity or indeterminacy in the language of the agreement,<sup>161</sup> thereby helping the KSA perceive the compliance requirements demanded by the agreement more clearly, especially with respect to TRIPS legal norms.<sup>162</sup>

The final component of Koh's three-pronged strategy, as applied to the specific context of the KSA, is the Kingdom's domestic internalisation of TRIPS legal norms.<sup>163</sup> According to Koh, once the relevant norms have been articulated and interpreted, it becomes clear that the most effective means to motivate someone to pray, for example, or to quit smoking, to begin jogging, or to pay their taxes is not to force them to do so (at least not initially), but to persuade them to think of themselves as devout, or as non-smokers, joggers, or taxpayers.<sup>164</sup> Subsequent generations will then be unlikely drift towards another way of life as these norms will have been passed on to them and will have already become a *fait accompli*.<sup>165</sup> By analogy, the most efficient legal system is the one whose aim is to be constitutive, in the sense that it seeks to constitute and transform an individual's identity.<sup>166</sup> Importantly, this approach helps to move the behaviour toward internalisation and normativity, which not only ensures social compliance with declared rules, but also can gradually transform and reconstitute an individual's identity 'from lawless to law-abiding'.<sup>167</sup> The same is true of the compliance of individual states such as the KSA with international law.<sup>168</sup> Accordingly, public and private actors must generate and develop mechanisms by which legal norm-internalisation can be provoked, as a first step towards

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<sup>160</sup> *ibid.*

<sup>161</sup> *ibid* 671–674.

<sup>162</sup> Koh, 'Why Do Nations Obey International Law?' (n 125) 2656; Koh, 'The 1998 Frankel Lecture' (n 125) 678.

<sup>163</sup> See, for example, Koh, 'Why Do Nations Obey International Law?' (n 125) 2634; Koh, 'The 1998 Frankel Lecture' (n 125) 679; Koh, 'Transnational Legal Process' (n 125) 199, 203–205.

<sup>164</sup> Koh, 'Why Do Nations Obey International Law?' (n 125) 2646; Koh, 'The 1998 Frankel Lecture' (n 125) 628–629, and 644. Koh has also argued that 'particular instances of national compliance with international law can be explained as a complex combination of the same five factors [. . .]: coercion, self-interest, rule-legitimacy, communitarianism, and internalization of rules through socialization, political action, and legal process'. *ibid* 633–634.

<sup>165</sup> Koh, 'The 1998 Frankel Lecture' (n 125) 633, 679.

<sup>166</sup> *ibid* 629.

<sup>167</sup> Koh, 'Why Do Nations Obey International Law?' (n 125) 2602–2603; Koh, 'The 1998 Frankel Lecture' (n 125) 628–629, 636–637, 675–676.

<sup>168</sup> Koh, 'The 1998 Frankel Lecture' (n 125) 636–637, 676.

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internalisation of political and social internalisation.<sup>169</sup> In the long run, these mechanisms set the stage for the socialization of international norms, thereby bringing about changes in the behaviour of the state.<sup>170</sup> Thereafter, IP rights activists can easily make those international legal norms represented by TRIPS ‘feel familiar’ to the Kingdom’s political actors.<sup>171</sup> According to Koh’s theory, such a step would in turn pave the way for final ratification of international agreements by the abstaining states because de facto internalisation will have become an accomplished fact indeed.<sup>172</sup>

As with all the compliance theories examined previously, Koh’s model of the transnational legal process has both advantages and disadvantages when applied to the specific case study of the KSA’s compliance with TRIPS. With regard to its advantages, Koh’s theory goes beyond the role of states (or statesmen as decision makers) in achieving nations’ compliance with international law; it also highlights other determinants and endeavours to explain how, why and when they work. For example, whereas almost all the theories reviewed previously in this chapter have focused almost exclusively on the issues of compliance horizontally, i.e., at the state-to-state level, Koh’s theory includes specific vertical components that must be provoked by non-state actors to eventually bring about compliance.<sup>173</sup> The inclusion of these factors is highly important, not least because they help to explain how public and private actors can operate and interact to develop international law more constructively and to highlight other factors that may affect the Kingdom’s compliance with TRIPS, thereby providing a somewhat more comprehensive understanding of the factors that may affect compliance with international law generally.

The second advantage of Koh’s three-pronged strategy is its ability to answer some of the questions explored in this thesis, which in turn may help to solve some of the puzzles inherent in compliance itself, such as the variations, disparities, subjectivity, and associated variables discussed above. Among the key obstacles to compliance previously highlighted are the following: (i) the variety of

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<sup>169</sup> *ibid* 679.

<sup>170</sup> *ibid* 632–634.

<sup>171</sup> *ibid* 679.

<sup>172</sup> *ibid*.

<sup>173</sup> See also, for example, *ibid* 626–627, 635–636, and 677; Koh, ‘Why Do Nations Obey International Law?’ (n 125) 2608, and 2655–2656.

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and variation in the factors affecting whether or not states comply with international law; (ii) disagreements over the appropriate criteria or indicators of, and the complex variations associated with, what determines an acceptable level of compliance by a state with its diverse obligations under international law, including the KSA's compliance with TRIPS; (iii) disparities among individual states in the implementation of and compliance with international legal agreements; and (iv) the frequency of delay in achieving compliance with ratified legal obligations, even when transitional periods are not taken into account. These issues may also explain (v) the significant degree of subjectivity in the currently available literature concerning the question of compliance, including conflicting interpretations of international legal norms.

In view of these obstacles, it may be of interest to law makers to neutralize the causes of them, in which case why not try to use Koh's three-pronged strategy to curtail (relatively, at least) some of the above-listed problems? It must also be emphasised, however, that this question is entirely based on the assumption (i.e. Koh's claim) that if we follow this approach, international legal norms will be more easily domesticated and internalised into states' internal value systems and will become broadly 'socialised' before the final ratification of an agreement.<sup>174</sup> If this assumption is proven to be correct, then Koh's model may help to minimize the problems associated with the subject of compliance, such as the disparities among individual states in the implementation of international legal agreements; the various challenges that can affect states' compliance with the commitments to which they have consented; disagreements over the interpretation of international legal norms or about what determines the acceptable level of states' compliance; and delays in compliance following the implementation of an agreement. Presumably, these issues are carefully and proactively considered, not only before the compliance phase, but before the implementation stage as well. Thus, if these problems are resolved or at least mitigated through the use of his model, this could be considered a second advantage of Koh's theory or, more specifically, of the three-pronged strategy discussed above.

However, Koh's theory suffers from certain limitations that undermine its advantages. For example, Koh's three-pronged strategy is highly unlikely to be generalisable to every type of

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<sup>174</sup> See, for example, Koh, 'The 1998 Frankel Lecture' (n 125) 679, 632–633.

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international legal commitment. This is partly, if not mainly, due to the ongoing dynamism of some parts of the international legal order, such as that which relates to international trade law. This may, in turn, reflect the reality that the conditions for world trade are continually changing, making it unrealistic to expect agreements to remain static for an extended period. The global trade associated with IP is an excellent example of these rapid developments, having undergone major changes, especially since the beginning of the new millennium, leading to the formulation of several international agreements to protect IP.<sup>175</sup> Koh's three-pronged strategy, by contrast, requires international legal norms to be passed on to successive generations and ultimately incorporated into the internal value system of a state before an agreement is finally ratified.<sup>176</sup> His theory thus seems unable to keep pace with the dynamic developments of the global trade associated with IP.

A second limitation of Koh's approach is its focus on implementation rather than compliance, as evidenced by his suggestion that his three-pronged strategy paves the way for the eventual ratification of international legal agreements:

Activists inside and outside of participating governments can act to conform governmental conduct to unratified treaties. Such action sets the stage for eventual ratification of these treaties by the abstaining nations on the ground that de facto internalization has already become a *fait accompli*.<sup>177</sup>

Interestingly, and perhaps surprisingly, this emphasis is placed despite the fact that Koh provided a precise definition of compliance as the condition in which 'people are both aware of the rule and consciously accept its influence, but do so in order to gain specific rewards [. . .] or to avoid specific punishments'.<sup>178</sup> In other words, rather than explain why states comply with the commitments to which they have consented, Koh merely describes 'an empirical pathway to obedience' – or, more specifically, a pathway to the incorporation of international norms into a state's legal system – and

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<sup>175</sup> See Subsection 1.4.1.

<sup>176</sup> See, for example, Koh, 'The 1998 Frankel Lecture' (n 125) 628, 632–633, 677–679.

<sup>177</sup> *ibid* 679.

<sup>178</sup> Obedience, by contrast, occurs 'when a person or organization adopts rule-induced behavior because the party has internalized the norm and incorporated it into its own internal value system'. *ibid* 628.

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details ‘the ways in which transnational actors and practices influence this process’.<sup>179</sup>

The final disadvantage of Koh’s theory is that it remains incomplete in itself, as the following statement indicates:

The idea of obedience can be integrated with other theories of explaining norm-internalization to create a broader working theory of compliance with international law.<sup>180</sup>

This observation suggests that Koh recognised that his theory cannot on its own explain norm-internalization (or implementation, as it is referred to in this thesis), let alone demonstrate what makes states change their behaviour in relation to the obligations arising from agreements which they have ratified. Thus, despite the significant advantages noted above, Koh’s transnational legal process model or obedience model of compliance will fail to provide a comprehensive explanation for the KSA’s compliance with TRIPS.

### 6.7 Reputational Theory

In 2002, professor of law and political science Andrew Guzman<sup>181</sup> offered a rival theory which considers factors related to reputation in order to illustrate the motives involved in compliance or non-compliance.<sup>182</sup> Guzman’s theory is based on the premise that nations tend to behave in a rational, self-interested way.<sup>183</sup> While this premise is similar to that which underlies Chayes and Chayes’ theory, there are small but important differences between the two. For example, Chayes and Chayes claim that the general propensity of nations to comply with their international legal obligations is the product of three types of factor, the first of which is interests-related.<sup>184</sup> While Guzman’s theory is also based on the idea that nations tend to behave in a rational, self-interested way, ‘no assumption is made regarding the way

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<sup>179</sup> Raustiala and Slaughter, ‘International Law, International Relations and Compliance’ (n 11) 544.

<sup>180</sup> Koh, ‘The 1998 Frankel Lecture’ (n 125) 679.

<sup>181</sup> For further biographical details of this scholar, see ‘Andrew T Guzman: Dean and Carl Mason Franklin Chair in Law, and Professor of Law and Political Science’ (*USC Gould School of Law*, 2020) <<https://gould.usc.edu/faculty/?id=72117>> accessed 6 July 2020.

<sup>182</sup> Guzman, ‘A Compliance-Based Theory of International Law’ (n 24).

<sup>183</sup> *ibid* 1827, 1841 and 1886–1887.

<sup>184</sup> See, for example, Chayes and Chayes, *The New Sovereignty* (n 78) 1–4, 22; Chayes and Chayes, ‘On Compliance’ (n 81) 175–178, 178–187.

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in which states identify their self-interest'.<sup>185</sup> Rather, Guzman argues that in some circumstances, a country may deem non-compliance to be in its self-interest.<sup>186</sup>

Guzman argued that states comply with international law because they are concerned about their reputation and the impact of direct sanctions resulting from violation.<sup>187</sup> In this sense, compliance occurs as a result of a state's well-founded concern about the implications of non-compliance for its reputation and the consequences of possible sanctions.<sup>188</sup> In the context of the KSA, Guzman's model predicts that the Kingdom will seek to comply with its international legal obligations, including TRIPS, to maintain its international reputation and to avoid direct sanctions for non-compliance.

In mid-2020, after the Kingdom had expressed an interest in the takeover of one of the clubs in the English Premier League (hereinafter "EPL"), several voices emerged, demanding that the deal be rejected on the grounds that the KSA is home to and is supportive of a pirate service which has been illegally streaming football matches.<sup>189</sup> If this allegation proves to be true, it would constitute as a flagrant violation of TRIPS; it is, therefore, a very serious allegation,<sup>190</sup> particularly because the KSA committed itself to the full implementation of TRIPS into its national legislation with no transitional period,<sup>191</sup> and because the state has already received extensive praise for having done so, as previously noted. Moreover, according to critics of the Kingdom, the EPL itself has been

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<sup>185</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 24) 1825–1830, 1832, 1841, 1860–1872.

<sup>186</sup> *ibid.*

<sup>187</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 24).

<sup>188</sup> See, for example, Guzman, 'A Compliance-Based Theory of International Law' (n 24) 1825, 1827, 1850–1851.

<sup>189</sup> For further details, see, for example, Dan Roan, 'Newcastle United Takeover: Saudi Deal Must Be Blocked, MP Tells Government' (*The BBC*, 19 June 2020) <[www.bbc.co.uk/sport/football/53104800](http://www.bbc.co.uk/sport/football/53104800)> accessed 10 July 2020; Joe Moore, 'Good News Newcastle Takeover: £300m Saudi Arabia Deal Could Be Approved by the Premier League THIS WEEK' (*talkSPORT*, 22 June 2020) <<https://talksport.com/football/720430/newcastle-takeover-300m-saudi-arabia-approved-premier-league/>> accessed 10 July 2020; Chris Knight, 'Newcastle Takeover Headlines with Saudi Measures against Piracy and Staveley's Ongoing Court Case' (*The Evening Chronicle*, 9 July 2020) <[www.chroniclive.co.uk/sport/football/football-news/newcastle-takeover-headlines-saudi-measures-18571847](http://www.chroniclive.co.uk/sport/football/football-news/newcastle-takeover-headlines-saudi-measures-18571847)>; Sean Ingle, 'Saudi TV Piracy Ruling Puts Newcastle Takeover under Renewed Scrutiny' (*The Guardian*, 16 June 2020) <[www.theguardian.com/football/2020/jun/16/newcastle-takeover-latest-saudi-arabia-tv-piracy-ruling-released-by-wto-premier-league-pressure](http://www.theguardian.com/football/2020/jun/16/newcastle-takeover-latest-saudi-arabia-tv-piracy-ruling-released-by-wto-premier-league-pressure)>. To view 'all the latest Newcastle United takeover headlines with updates on alleged Saudi piracy', see, for example, 'Newcastle United Takeover' (*The Evening Chronicle*, 10 July 2020) <[www.chroniclive.co.uk/all-about/newcastle-united-fc-takeover](http://www.chroniclive.co.uk/all-about/newcastle-united-fc-takeover)>.

<sup>190</sup> WTO, 'Intellectual Property: Protection and Enforcement' (*World Trade Organisation*) <[www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm)> accessed 10 July 2020.

<sup>191</sup> See, for example, WTO Working Party on the Accession of the Kingdom of Saudi Arabia (n 64) 79; USTR (n 64) 1.

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pirated by this service.<sup>192</sup> Opponents of the deal inferred some of this information from a case that was being heard in the WTO, although final judgement had yet to be issued.<sup>193</sup>

In response to this criticism, the Kingdom has submitted a statement to the WTO's dispute settlement Panel, the most relevant aspect of which, in the context of the current discussion, is the Kingdom's contention that the claims made against it are based on false information intended to damage its reputation.<sup>194</sup> The KSA further alleged that not only did Qatar (the claimant member state) leak this information, but it did so in a way that contrasts starkly with the WTO's dispute settlement Panel's findings.<sup>195</sup> Thus, 'unless corrected immediately, the false impressions created by the leak will remain in the public consciousness and continue to cause injury'.<sup>196</sup> The KSA also insisted that no state should be made to bear the burden of loss or damage to its interests, such as the economic and reputational damage resulting from a breach of the WTO's confidentiality rules.<sup>197</sup>

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<sup>192</sup> See, for example, Ingle (n 189); Knight (n 189); Roan (n 189).

<sup>193</sup> On 7 October 2021, the Public Investment Fund (PIF), the sovereign wealth fund of the KSA, and Newcastle United Limited (Newcastle United) announced that the PIF had officially finalised the acquisition of 100% of Newcastle United. Saudi Press Agency, 'PIF Leads Investment Group in Acquiring Newcastle United Football Club' (*Saudi Press Agency*, 2021) <[www.spa.gov.sa/viewstory.php?lang=en&newsid=2293513](http://www.spa.gov.sa/viewstory.php?lang=en&newsid=2293513)> accessed 3 February 2022; NUFC, 'An Investment Group Led by the Public Investment Fund (PIF), and also Comprising PCP Capital Partners and RB Sports & Media (the "Investment Group"), Has Completed the Acquisition of 100% of Newcastle United Limited and Newcastle United Football Club Limi' (*NUFC*, 2021) <[www.nufc.co.uk/news/latest-news/pif-pcp-capital-partners-and-rb-sports-media-acquire-newcastle-united-football-club/](http://www.nufc.co.uk/news/latest-news/pif-pcp-capital-partners-and-rb-sports-media-acquire-newcastle-united-football-club/)> accessed 3 February 2022; PIF, 'Who We Are: PIF Is Leading the Charge to Create New Sectors, Companies and Jobs, and Achieve Vision 2030's Objectives' (*PIF*, 2021) <[www.pif.gov.sa/en/Pages/AboutPIF.aspx](http://www.pif.gov.sa/en/Pages/AboutPIF.aspx)> accessed 3 February 2022.

After the KSA's reconciliation with Qatar (the claimant member state) and in the wake of the Kingdom's acquisition of the club, the WTO announced on 27 January 2022, that the WTO had received a communication on 29 December 2021 from the delegation of the KSA who requested that it be circulated to the DSB. That communication confirmed 'the suspension of appellate proceedings in [this] dispute [. . .] pursuant to the terms of the Al-Ula Declaration signed on 5 January 2021'. WTO, 'Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights: Communication from the Kingdom of Saudi Arabia' (*WTO*, 2022) 1 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/567-9.pdf&Open=True>> accessed 3 February 2022.

<sup>194</sup> WTO, 'Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights: Communication from the Kingdom of Saudi Arabia (Systemic Issue of the Lack of Remedy to the Breach of Confidentiality in WTO Dispute Settlement Proceedings)' (16 June 2020) WT/DSB/COM/9, 2 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DSB/COM-9.pdf&Open=True>> accessed 11 July 2020.

<sup>195</sup> *ibid.*

<sup>196</sup> *ibid.*

<sup>197</sup> *ibid.* In its statement, the Kingdom referenced an article by Ingle, which it claimed contained confidential and misleading information. Sean Ingle, 'Newcastle Takeover in Serious Doubt as WTO Rules Pirate TV Channel Is Saudi'



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The Kingdom's allegation that claims about its non-compliance with TRIPS were meant to damage the reputation of the state suggests that it has linked the preservation of its own international reputation with achieving compliance with TRIPS. This may, in turn, suggest that Guzman's theory is applicable to the KSA's compliance with TRIPS.

Having said that, Guzman's theory may prove only that there is a correlation between the KSA's reputation and compliance, not that concern for its reputation causes compliance.<sup>198</sup> The considerable efforts that the Kingdom has made recently to comply with its commitments under TRIPS, such as aiming to block 231 websites which are known to have been violating TRIPS for many years,<sup>199</sup> cannot be taken as evidence that concern for reputation drives compliance, because KSA took these actions only after these criticisms, which could have hindered the proposed takeover, emerged. Moreover, the author has been unable as yet to locate any statement submitted by the KSA to the WTO or other official source that clearly demonstrates the importance of reputation as a reason for the Kingdom's compliance with TRIPS. The author was therefore lucky to locate the KSA's statement in the course of his research, enabling a more in-depth analysis of the application of Guzman's theory in this context.

Another important lesson to emerge from the above discussion is that concern for its reputation may not on its own have provided the Kingdom with an incentive to comply or promoted its compliance with TRIPS. In other words, Guzman's theory may not be self-activating but may

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(*The Guardian*, 26 May 2020) <[www.theguardian.com/football/2020/may/26/newcastle-takeover-in-serious-doubt-as-wto-rules-pirate-tv-channel-is-saudi](http://www.theguardian.com/football/2020/may/26/newcastle-takeover-in-serious-doubt-as-wto-rules-pirate-tv-channel-is-saudi)> accessed 11 July 2020. For details of this case and to follow the latest developments, see WTO, 'Dispute Settlement, DS567: Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights' (WTO, 2020) <[www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds567\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm)> accessed 11 July 2020.

<sup>198</sup> For further discussion about the concept of causation and its usages, see, for example, Richard W Wright and Ingeborg Puppe, 'Causation: Linguistic, Philosophical, Legal and Economic' (2016) 91 *Chicago-Kent Law Review* 461, 501–202.

<sup>199</sup> Saudi Authority for Intellectual Property (SAIP), 'SAIP Aims to Block 231 Websites That Violate Regulations and Rights' (SAIP) <[www.saip.gov.sa/en/إل-موقعاً-231-حجب-الملكية-الفكرية-تستهدف-حجب-231-موقعاً-إل](http://www.saip.gov.sa/en/إل-موقعاً-231-حجب-الملكية-الفكرية-تستهدف-حجب-231-موقعاً-إل)> accessed 13 July 2020. These websites include (i) Mawqie Al Bahith Al Elmi (The Scientific Researcher Website), 'The Scientific Researcher: The Largest Database of Pictured Books, Scientific Research and Manuscripts on the Internet' <<https://k-tb.com/>> accessed 13 July 2020 (in Arabic); (ii) Mawqie Jama Aldurus Al Elmia (Scientific Lessons Collector Website), 'Scientific Lessons Collector Website' (Mawqie Jama Aldurus Al Elmia) <<https://dro-s.com/>> accessed 13 July 2020 (in Arabic); (iii) Mawqie Jama Al Kutub Al Musawara (The Pictured Book Collector Website) <<https://kt-b.com/>> accessed 13 July 2020 (in Arabic); and (iv) Mawqie Jama Al Buhuth W Alrasayil Al Elmia (Research and Scientific Thesis Collector Website) <<https://b7oth.com/>> accessed 13 July 2020 (in Arabic). All four sites were available during the data collection period but have since been blocked, suggesting that SAIP has achieved its objective.

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instead require other actions by different actors to influence the process, such as those who have openly criticised the Kingdom, questioning its compliance with the Agreement. Likewise, had serious doubts with the potential to hinder the takeover not been raised recently about the Kingdom's compliance with TRIPS, it is arguable that no action would have been taken against those websites which are known to have been violating TRIPS for years. Accordingly, Guzman's theory may require modification as follows. For reputation to be a deciding factor in a state's behaviour, (i) that state must have a strong interest in maintaining its international reputation; (ii) it must calculate the implications of non-compliance for its reputation and the potential consequences of possible sanctions; and (iii) pressure must be applied to that state which puts its reputation at risk.

Although it is possible to apply Guzman's theory to explain the KSA's compliance with TRIPS, that approach is marred by several limitations. Like Neuhold's cost-benefit analysis model of compliance<sup>200</sup> and the calculation of interests proposed by Chayes and Chayes in their managerial model of compliance,<sup>201</sup> Guzman's theory is incomplete. However, that this weakness is a feature of Guzman's work seems, at least to this author, particularly strange and surprising, because Guzman developed his theory regarding the relationship between compliance and reputation at the dawn of the new millennium. In this sense, his reputational model can be considered the most recent of the compliance theories examined in this chapter. Given that Guzman cites Henkin, Franck, Chayes and Chayes, and Koh in his work, he clearly was aware of these earlier compliance theories.<sup>202</sup> Moreover, Guzman has criticised these theories as incomplete:<sup>203</sup>

To date, neither conventional international law scholars, nor those adopting an international relations approach, has presented a satisfactory model that is capable of explaining why states comply with international law in some circumstances and violate

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<sup>200</sup> See also Chayes and Chayes's criticism of those theories which include elements that define the likelihood of successful compliance from the perspective of coercive mechanisms and other hard enforcement methods, such as military and economic sanctions. Chayes and Chayes, *The New Sovereignty* (n 78) 2–3.

<sup>201</sup> See Section 6.5 concerning the weaknesses of Chayes and Chayes' theory, particularly in relation to the factor of self-interest.

<sup>202</sup> Guzman, 'A Compliance-Based Theory of International Law' (n 24) 1825–1836.

<sup>203</sup> *ibid* 1825–1836.

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it in others.<sup>204</sup>

Furthermore, having identified shortcomings in Koh's model of transnational legal process, Guzman commented that 'without a more complete theory of why these actors follow the law, the theory remains unsatisfactory'.<sup>205</sup> Interestingly, however, despite this critique, Guzman's own theory suffers from the same flaw. For example, as was demonstrated in Chapter 4 of this thesis, Sharia and the KSA's Islamic identity are often cited in the literature as an essential factor in the Kingdom's implementation and compliance with international legal agreements, including TRIPS,<sup>206</sup> which suggests that other factors besides reputation contribute to states' behaviour towards the agreements which they have signed. Accordingly, as with the other compliance theories examined above, Guzman's work cannot be selected as a decisive approach through which to develop an understanding of the KSA's compliance with TRIPS. Consequently, the search must continue for a more comprehensive model through which to achieve the objectives of this thesis.

### 6.8 Conclusion

The main conclusion to be drawn from this chapter is that the KSA's compliance with TRIPS cannot be fully analysed through the available theories of compliance. This is due to the general inadequacy of these theories which limits their ability to explain why any state complies with its agreed international legal obligations in some instances and not in others. In addition, each approach to explaining states' compliance with international legal agreements has specific shortcomings which limit its usefulness. Thus, despite their significant contributions to understanding the various aspects of compliance, none of the above theories provides a suitable analytical tool with which to fully uncover why the Kingdom does or does not comply with the

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<sup>204</sup> Andrew T Guzman, 'International Law Matters: A Theory of Compliance (A Compliance-Based Theory of International Law)' (*The University of California, Berkeley School of Law*, 2001) 2, 75 <[www.google.com/url?client=internal-element-cse&cx=009897613207788849675:ziggeafa8q8&q=https://www.law.berkeley.edu/files/guzmanComplianceandIL.doc&sa=U&ved=2ahUKEwi6qpnajMrqAhWgUxUIHYz8CuEQFjAAegQIAhAB&usg=AOvVaw2y1M\\_Kf1RJ9poArxEP-Hqa](http://www.google.com/url?client=internal-element-cse&cx=009897613207788849675:ziggeafa8q8&q=https://www.law.berkeley.edu/files/guzmanComplianceandIL.doc&sa=U&ved=2ahUKEwi6qpnajMrqAhWgUxUIHYz8CuEQFjAAegQIAhAB&usg=AOvVaw2y1M_Kf1RJ9poArxEP-Hqa)> accessed 13 July 2020.

<sup>205</sup> *ibid* 13; Guzman, 'A Compliance-Based Theory of International Law' (n 24) 1836.

<sup>206</sup> See, for example, Sections 4.2 and 4.3.

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international statutory obligations to which it has consented. Thus, there is still a need to identify and develop a more comprehensive approach to better address this research problem.

Although no abstract theory is likely to uncover the decisive factor in explaining compliance behaviour on its own, as a group, these theories can be utilised for that purpose. Collectively, they identify a wide range of factors, each of which exerts a certain degree of influence on a state's compliance. The range and complexity of the factors that ultimately influence whether a country achieves a state of compliance strongly suggest that compliance is not binary but instead exists on a sliding scale. It follows that, to obtain a fuller explanation of the phenomenon, it would be beneficial to widen the range of theoretical discussions and integrate those ideas into a more elaborate framework of specific factors that can influence compliance. Towards this end, Chapter 7 aims to show that Jacobson and Weiss's approach can be a valuable complement to the theories discussed above, helping to deepen the analysis.

## **Chapter 7: Towards a More Comprehensive Analysis of Compliance Factors: Jacobson and Weiss's Model**

### **7.1 Introduction**

This thesis engages with the question of what theoretical approach can facilitate better understanding of the factors that influence the compliance of the Kingdom of Saudi Arabia (hereinafter “KSA” or “the Kingdom”) with the Agreement on Trade-Related Aspects of Intellectual Property (hereinafter “TRIPS” or “the Agreement”). To address this critical question, the previous chapter charted the development of theories designed to explain the fundamental factors that govern a state’s compliance with international law. As evidenced by that discussion, these theories have adopted a range of approaches to defining compliance, each of which has contributed significantly to our understanding of the practice. Nevertheless, none of the theories discussed thus far provides appropriate analytical tools to comprehensively identify the factors responsible for a state’s compliance with those international legal commitments which it has ratified. Hence, it is necessary to expand the search for a more inclusive approach to the investigation of compliance, and through which the objectives of this study can be satisfied.

Perhaps one of the most salient observations regarding the various theories and studies reviewed thus far concerns the wide range of factors that can influence states’ implementation of and compliance with their international legal agreements. In the context of the KSA and its compliance with TRIPS, these potential factors can be grouped into four categories. The first category addresses the characteristics of the activity which TRIPS was devised to define and then tackle, namely, intellectual property (hereinafter “IP”) rights infringements. In Chapter 3, for example, the differences between the WTO and some other international organisations in relation to the use of ambiguous language in international legal agreements were explained. More specifically, that chapter demonstrated how and why issues related to the notion and boundaries of states’ compliance with their international legal obligations can often vary, depending on the activity

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involved.<sup>1</sup> The second category comprises the substantive and procedural provisions of TRIPS that may influence compliance by member states.<sup>2</sup> For example, Frank's theory highlights those compliance problems arising from 'substantive and procedural flaws' that occur when establishing and internationalising an international legal rule.<sup>3</sup> The third category concerns the influence of the international environment on states' willingness to compliance with TRIPS; the compliance behaviour of other member states is an example of this type.<sup>4</sup> For example, Chayes and Chayes argue in part that the behaviour of other states involved in an agreement can motivate a state to comply with that agreement,<sup>5</sup> while aspects of Koh's theory stress the importance of cooperation between public and private actors in various fora at both the local and the international level to bring states into compliance with international law.<sup>6</sup> The fourth category involves factors affecting the Kingdom itself – i.e., state-specific factors such as the activity of its leaders and citizens.<sup>7</sup>

These four categories of factors have been outlined by Jacobson and Weiss, who designed and developed the model chosen for this study and who reached the same conclusion regarding the plurality and diversity of potential influences on states' compliance behaviour:

Many factors may affect a country's implementation of and compliance with international accords. We are interested in how several interrelated factors affect the extent to which, and the way in which, countries have met their commitments.

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<sup>1</sup> See also Edith Brown Weiss and Harold Karan Jacobson, 'A Framework for Analysis' in Edith Brown Weiss and Harold Karan Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 2000) 6.

<sup>2</sup> *ibid.* For further details, see Chapters 3 and 6 of this thesis.

<sup>3</sup> See, for example, Jacob Katz Cogan, 'Noncompliance and the Rule of Law' (2006) 31 *Yale Journal of International Law* 189, 194; Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *The Handbook of International Relations* (SAGE 2002) 541 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=347260](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=347260)> accessed 27 November 2018; Thomas Franck, *Fairness in International Law and Institutions* (OUP 1995); Thomas M Franck, *The Power of Legitimacy among Nations* (OUP 1990).

<sup>4</sup> Weiss and Jacobson (n 1) 7. For further details, see Chapter 6 of this thesis.

<sup>5</sup> See, for example, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard UP 1995); Abram Chayes and Antonia Handler Chayes, 'On Compliance' (1993) 47 *International Organization* 175; Abram Chayes and Antonia Handler Chayes, 'Compliance Without Enforcement: State Behavior Under Regulatory Treaties' (1991) 7 *Negotiation Journal* 311.

<sup>6</sup> See, for example, Harold Koh, 'Why Do Nations Obey International Law?' (1997) 106 *The Yale Law Journal* 2604, 2626–2627; Harold Hongju Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' (1998) 35 *Houston Law Review* 181–182.

<sup>7</sup> Weiss and Jacobson (n 1) 7. For further details, see Part I and Chapter 6 of this thesis.

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These factors include characteristics of the activity; characteristics of the accord; the international environment; and factors involving the country.<sup>8</sup>

Jacobson and Weiss's expressed interest aligns with one of the most important goals of this study, namely, developing a comprehensive model to explain when and why nations follow international law and comply with the legal commitments to which they have consented. Given that collectively, theories of compliance tend to support the view that compliance is non-binary, a sliding scale model would seem to be the most suitable tool for investigating states' behaviour in this regard. Put differently, the theoretical literature implies that there are various factors, each of which can exert a degree of influence on a state's compliance. The greater the number of potential factors, the clearer it becomes that compliance is non-binary. Nevertheless, it is possible to identify patterns of compliant behaviour, and to deduce from them the factors that contribute to that behaviour, under what circumstances and to what effect. Hence, to obtain a fuller explanation, it would be most beneficial to integrate the theories discussed previously into a more elaborate framework of specific potential compliance factors. With this objective in mind, Jacobson and Weiss's model, which was developed primarily to investigate countries' compliance with international environmental agreements (hereinafter "IEAs"), has been chosen here as a framework for analysing the KSA's compliance with TRIPS.

As shown in Figure 7.1 below, the four categories described above can be divided into two main groups: non-state-specific factors and state-related factors.<sup>9</sup> The former refers to those factors that may influence the compliance of the World Trade Organisation (hereinafter "WTO") member states who have signed up to TRIPS, including that of the KSA.<sup>10</sup> This group of non-state-specific factors can be further subdivided into three categories as follows: the specific characteristics involved in the activity of IP infringements, the detailed properties associated with TRIPS, and characteristics related to the international environment.<sup>11</sup> The second main group is comprised of

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<sup>8</sup> Weiss and Jacobson (n 1) 6.

<sup>9</sup> Jacobson and Weiss (n 1) 6–8. See also, for example, Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Macmillan 2017) 32.

<sup>10</sup> Jacobson and Weiss (n 1) 6–8.

<sup>11</sup> *ibid.*

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those factors with particular relevance to the specific case of the KSA.<sup>12</sup>

Analysing the various potential compliance factors listed under these two headings is the focus of the next two sections, which will refer, as much as possible, to the KSA's compliance with its international legal commitments under TRIPS. Before proceeding with this detailed analysis, however, it is important to note that this thesis aspires not only to understand the factors and circumstances influencing the KSA's compliance with TRIPS, important though that is, but to encourage future researchers to re-examine issues related to compliance which remain open to debate among legal scholars. These issues include the following: (i) what constitutes a reasonable delay in compliance; (ii) under what circumstances non-compliance may be justified or acceptable; (iii) the distinction between implementation and compliance; (iv) the most appropriate strategies for enhancing states' compliance; (v) the legal and regulatory mechanisms required for developing international law and agreements, with the aim of facilitating compliance; and (vi) the development of a sliding scale model through which the degree of a state's compliance can be more precisely comprehended. Many of these issues have been addressed earlier in this thesis; the last three are explored in more detail in this chapter.

In light of this aspiration, and to prevent the scope of this chapter from becoming too broad, the current analysis has been limited as follows. First, rather than analyse all the IP areas covered by TRIPS, most of the discussion will focus on infringements of copyright and related rights.<sup>13</sup> Second, rather than aim to identify the most critical factors or determine the degree of influence each factor exerts, the analysis will seek primarily to understand how each factor has influenced or can influence the KSA's compliance with TRIPS. It should not be inferred from these limitations that investigating other IP areas is unimportant, or that there is no value in determining the most critical factors, merely that the objectives of this study can be achieved without doing so. Future researchers may wish to set different aims and employ other methods in order to more deeply

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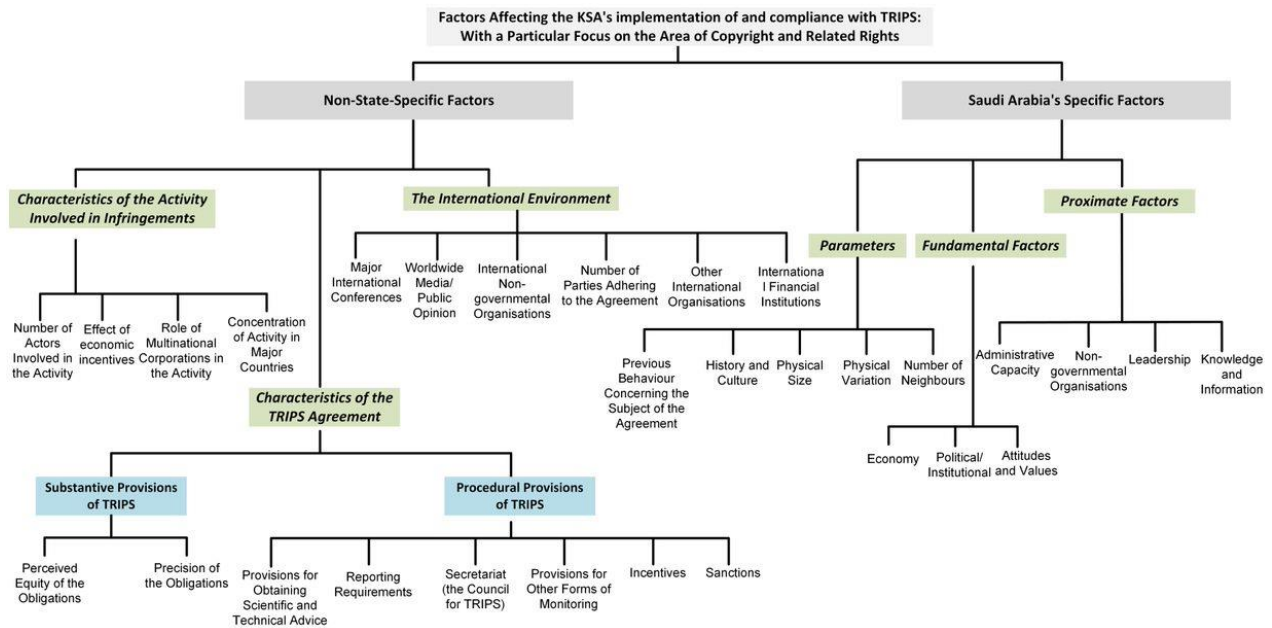
<sup>12</sup> *ibid* 7–8.

<sup>13</sup> 'The areas of intellectual property that [TRIPS] covers are: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data.' World Trade Organization (WTO), 'TRIPS: A More Detailed Overview of the TRIPS Agreement' <[www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)> accessed 3 January 2021.



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investigate these issues and others that fall outside the limited scope of this chapter.



**Figure 7.1:** Factors affecting the KSA’s implementation of and compliance with TRIPS, with particular focus on the areas of copyright and related rights (adopted from Jacobson and Weiss).<sup>14</sup>

## 7.2 Implementation of TRIPS: Non-State-Specific Factors Affecting Compliance with the Agreement

The first main group in the proposed model is that of non-state-specific factors.<sup>15</sup> As shown in Figure 7.1 above, this group includes the characteristics of TRIPS, the characteristics of the infringing activity, and key features of the international environment.<sup>16</sup> Most of the factors listed

<sup>14</sup> Edith Brown Weiss and Harold Karan Jacobson, ‘Assessing the Record and Designing Strategies to Engage Countries’ in Edith Brown Weiss and Harold Karan Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 2000) 537.

<sup>15</sup> Jacobson and Weiss (n 1) 6–7.

<sup>16</sup> *ibid.*

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under these three categories will be analysed in the context of infringements of copyright and related rights. Other parts of the analysis will include the different IP areas covered by TRIPS, including infringements of copyright and related rights.

### **7.2.1 Characteristics of the activity involved in IP rights infringement**

The first main category under non-state-specific factors includes the characteristics of the specific activity involved in an international legal agreement.<sup>17</sup> As specified by Weiss and Jacobson, four subfactors fall under this category:<sup>18</sup> The number of players participating in the activity; the potential impact of economic incentives; the role of multinational corporations (hereinafter “MNCs”) in or in relation to the activity; and the location of the activity.<sup>19</sup> Regarding TRIPS, the specific activity under consideration is the infringements of IP rights.<sup>20</sup> TRIPS encompasses various areas of IP referenced above, all of which may also be subject to infringement.<sup>21</sup> Due to space constraints and the thematic focus of this thesis, the analysis of the four subfactors in this category will focus on infringements of copyright and related rights.

#### ***7.2.1.1 Number of actors involved in the infringement***

The first subfactor which may prevent full compliance with TRIPS is the number of players participating in infringements of copyright and related rights.<sup>22</sup> In their study, Jacobson and Weiss confirmed the conventional wisdom that the greater the number of actors engaged in the activity in question, the more difficult it becomes to regulate it.<sup>23</sup> In the context of TRIPS, the number of actors engaged in infringing IP rights is especially difficult to determine accurately, not only because of the vast numbers of actors involved in IP rights infringement worldwide, but also because the activity is often shrouded in obscurity or opacity and therefore difficult to observe.<sup>24</sup>

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<sup>17</sup> *ibid.*

<sup>18</sup> Jacobson and Weiss (n 1).

<sup>19</sup> Jacobson and Weiss (n 14) 521–523.

<sup>20</sup> Jacobson and Weiss (n 1) 6.

<sup>21</sup> WTO, ‘TRIPS: A More Detailed Overview of the TRIPS Agreement’ (n 13).

<sup>22</sup> Jacobson and Weiss (n 14) 521.

<sup>23</sup> *ibid.*

<sup>24</sup> Regarding the opacity associated with the subject of intellectual property, see, for example, Abraham Bell and Gideon Parchomovsky, ‘Restructuring Copyright Infringement’ (2020) 98 *Texas Law Review* 679, 688–691; Anuradha Maheshwari, ‘IP Based Financing Scoping Hypothecation of Trademarks’ (2020) 11 *Journal of Indian Law and Society* 24, 24, 39–40. As for the vast numbers of actors worldwide infringing IP rights, see, for example, Ioana

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Commenting on the vagueness associated with the subjects of IP, Story, for example, famously stated that

copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.<sup>25</sup>

Numerous legal scholars have observed the difficulties involved in handling IP infringements, including Bell and Parchomovsky,<sup>26</sup> Morris,<sup>27</sup> Lindsay,<sup>28</sup> Gilden,<sup>29</sup> and Parker,<sup>30</sup> all of whom have noted how difficult it is to observe, distinguish and act against an infringement because such activity can happen in myriad ways.<sup>31</sup> Another example is Bejesky, who noted that copyright ‘is more difficult to contend with due to trade secret violations involving infringements that can occur in myriad ways and operate on relatively general provisions open to much interpretation’.<sup>32</sup> This type of activity is not exclusively problematic for the KSA’s compliance but may extend to that of all parties to the agreement. Hence, TRIPS member states should take such difficulties into account, regardless of the number of actors involved in the activity. That said, the conventional wisdom concerning the relationship between the number of actors involved in the activity and the

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Vasiu and Lucian Vasiu, ‘Criminal Copyright Infringement: Forms, Extent, and Prosecution in the United States’ (2019) 4 *University of Bologna Law Review* 229, 232, 249; Annemarie Bridy, ‘The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform’ (2020) 22 *Vanderbilt Journal of Entertainment & Technology Law* 323, 327–328; Kristelia Garcia, ‘Monetizing Infringement’ (2020) 54 *UC Davis Law Review* 265, 287, 299. This topic is explored in further detail in Subsection 7.2.1.4 below.

<sup>25</sup> As quoted by Bell, Parchomovsky, and Howell. Bell and Parchomovsky (n 24) 688; Timothy D Howell, ‘Intellectual Property Pirates: Congress Raises the Stakes in the Modern Battle to Protect Copyrights and Safeguard the United States Economy’ (1996) 27 *St. Mary’s Law Journal* 613, 662–663. For further details about this case, see, for example, The Caselaw Access Project (CAP) Harvard Law School, ‘Folsom v Marsh, 9 F. Cas 342, 344 (CCD Mass 1841) (no 4,901)’ <[https://cite.case.law/f-cas/9/342/#ref\\_footnote\\_0\\_1](https://cite.case.law/f-cas/9/342/#ref_footnote_0_1)> accessed 24 January 2021.

<sup>26</sup> Bell and Parchomovsky (n 24) 688–691.

<sup>27</sup> Sean Morris, ‘Private Intellectual Property Regulation in Public International Law’ (2019) 26 *UC Davis Journal of International Law & Policy* 147, 150, 168.

<sup>28</sup> David Lindsay, ‘Website Blocking Injunctions to Prevent Copyright Infringements: Proportionality and Effectiveness’ (2017) 40 *University of New South Wales Law Journal* 1507, 1515, 1525.

<sup>29</sup> Andrew Gilden, ‘IP, RIP.’ (2017) 95 *Washington University Law Review* 639, 641–645.

<sup>30</sup> Matthew W Parker, ‘Dying to Spite the Graveyard: Thailand and the Necessity of Creating a Culture-Based IP Enforcement Paradigm’ (2016) 18 *Asian-Pacific Law & Policy Journal* 93, 94.

<sup>31</sup> Morris (n 27) 150; Lindsay (n 28) 1515, 1525; Gilden (n 29) 641–645; Parker (n 30) 94.

<sup>32</sup> Robert Bejesky, ‘Investing in the Dragon: Managing the Patent versus Trade Secret Protection Decision for the Multinational Corporation in China’ (2004) 11 *Tulsa Journal of Comparative & International Law* 437, 457.

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ease or difficulty of regulating that activity is particularly significant in the context of TRIPS.<sup>33</sup>

### 7.2.1.2 Impact of economic incentives

Similar to the cost-benefit theories discussed in Chapter 6, which suggest that in some cases, for some states, the economic costs of compliance outweigh its benefits, economic motives may be closely related to the specific activity of violations of copyrights and related rights.<sup>34</sup> Some studies have gone even further, suggesting that economic incentives not only have a sizeable effect on many infringers, but also are among the dominant subfactors which can weaken compliance with TRIPS.<sup>35</sup> Thomas, for example, has determined that, in a very high number of cases, economic motives are the primary cause of breaches globally.<sup>36</sup>

Even when viewed from a macroeconomic perspective, and on the assumption that non-compliance brings only immediate or short-term gains,<sup>37</sup> some individuals and smaller companies may view infringements of IP rights, such as trademark counterfeiting and content piracy, as a means of saving money or as a source of economic gain.<sup>38</sup> Despite the potential mutual benefits of non-compliance for many individuals and firms, however, some have argued that IP infringement would have detrimental long-term and large-scale impacts on the Saudi economy, as discussed in Chapter 1.<sup>39</sup> The potential benefits of IP protection include encouraging innovation, preserving

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<sup>33</sup> Jacobson and Weiss (n 14) 521.

<sup>34</sup> See, for example, Hanspeter Neuhold, 'Die Einhaltung Des Volkerrechts in Einer Aussenpolitischen Kosten-Nutzen-Analyse' (1976) 19 German Yearbook of International Law 317; Hanspeter Neuhold, 'The Foreign-Policy "Cost-Benefit-Analysis" Revisited' (1999) 42 German Yearbook of International Law 84. See also Garcia (n 24) 293–294; Tamas Fezer, 'Do the Math - Copyright Infringements and Damages' (2017) 6 Acta Universitatis Sapientiae: Legal Studies 45, 45; Andra Cristina Onisor, 'Fighting Online Copyright Infringements: A Neutral Role of Internet Access Providers' (2016) 2016 Revista Romana de Drept al Afacerilor 79, 90.

<sup>35</sup> See, for example, Kristie Thomas, 'China's Post-WTO Intellectual Property System: Assessing Compliance with the TRIPS Agreement' (PhD thesis, University of Nottingham 2008) 59.

<sup>36</sup> *ibid.*

<sup>37</sup> Pamela J Smith and others, 'How Do Copyrights Affect Economic Development and International Trade?' (2009) 12 Journal of World Intellectual Property 198, 198, 212; Herbert Hovenkamp, 'Response: Markets in IP and Antitrust: Intellectual Property (and Markets): An Enduring Concern' (2012) 100 Georgetown Law Journal, 2133, 2143.

<sup>38</sup> John Quiggin and Dan Hunter, 'Money Ruins Everything' (2008) 30 Hastings Communications and Entertainment Law Journal (Comm/Ent) 203.

<sup>39</sup> See also, for example, Pamela J Smith and others (n 37) 2133, 2143; Vasiiu and Vasiiu (n 24) 229, 229–231. Official statements by the Saudi government recently have also suggested that compliance with IPR would serve to raise non-oil revenues (NOR). WIPO, 'Saudi Arabia Gears up on IP' (*World Intellectual Property Organisation*, 2020) <[www.wipo.int/wipo\\_magazine/en/2020/03/article\\_0008.html](http://www.wipo.int/wipo_magazine/en/2020/03/article_0008.html)> accessed 9 April 2021; 'The Saudi Authority for Intellectual Property Organises an Introductory Meeting with Business Owners in the Council of Saudi Chambers' (*Saudi Press Agency*, 2018) <[www.spa.gov.sa/1812778](http://www.spa.gov.sa/1812778)> accessed 9 April 2021 (in Arabic).

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rights, promoting business activity, attracting foreign corporations to local markets, reducing unemployment and the problems associated with it and generating new jobs, all of which have significant long-term benefits for the local economy and the national income.<sup>40</sup> Hence, economic issues associated with copyright infringements may be better addressed through, for example, educating the public about the importance of IP rights protection or securing solutions for those who feel they have no choice but to infringe them.

Another solution is what Garcia calls ‘remedial infringement’, which affirmatively encourages non-compliance with the different types of copyright as ‘the lesser of two evils’.<sup>41</sup> Garcia contends that this approach is best suited to copyright holders for whom piracy represents neither the only nor necessarily the biggest threat.<sup>42</sup> Some copyright holders, for example, are at greater risk from what is commonly referred to as ‘grey market resellers’, who operate outside authorised channels.<sup>43</sup>

Garcia presents a number of case studies covering different types of copyright, for example, in the music, publishing, and video game industries,<sup>44</sup> which demonstrate that infringements can benefit copyright holders by reducing their costs.<sup>45</sup> According to Garcia, if rights holders are ‘not going to see any money anyway’ due to infringements of their copyrighted works, they will not be willing to bear additional costs such as customer service expenses.<sup>46</sup> Hence, these rights holders have found that ‘the best way to minimize [their] expenses [. . .] is to shut down the key resellers by encouraging prospective secondary key buyers to simply infringe instead’.<sup>47</sup> Resellers of this type

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<sup>40</sup> Vasiu and Vasiu (n 24) 229–231; Bryan Mercurio, ‘Intellectual Property Rights and Economic Development’ (2010) 3 *Law and Development Review* 65; Ali Al Zahrani, Khaled Abdel Tawab and Adnan Al Omar, *The Principles of Law with Particular Reference to the Applicable Regulations in Saudi Arabia No Title* (2nd edn, Jarir Bookstore 2013) 29 (in Arabic); Khaled Al Ruwais and Rizk Al Rayes, *An Introduction to the Study of Legal Science* (5th edn, Al Shegry 2012) 18–22 (in Arabic); Maha Shaban, “‘Intellectual Property’ and Its Impact on the Economy and the Local Community’ *Al Ghad Newspaper* (Amman, 5 August 2015) <<https://alghad.com/الملاكية-الفكرية-وأثرها-على-الاقتصاد-و>> (in Arabic).

<sup>41</sup> Garcia (n 24) 293.

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.* For further discussion of the grey market, see, for example, Vartan J Saravia, ‘Shades of Gray: The Internet Market of Copyrighted Goods and a Call for the Expansion of the First-Sale Doctrine’ (2009) 15 *Southwestern Journal of International Law* 383.

<sup>44</sup> Garcia (n 24) 283.

<sup>45</sup> *ibid.* 293–295.

<sup>46</sup> *ibid.* 295.

<sup>47</sup> *ibid.*

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can be a major source of annoyance for copyright holders:

In addition to not making any money on the resale of game keys, developers say that fake and broken keys cost them tons of money in customer service efforts – so much so, that they’ve begun encouraging prospective reseller clients to pirate their games instead.<sup>48</sup>

As Garcia explains, consumers who think they have purchased a legitimate product are ‘likely to feel entitled to complain when something goes wrong. Pirates, on the other hand, are notoriously low maintenance’.<sup>49</sup>

### 7.2.1.3 Role of multinational corporations

The third subfactor is the role of MNCs.<sup>50</sup> As discussed in Chapter 6, Koh’s theory highlights the important roles that public and private actors including MNCs can play in facilitating engagement with and interpretation of international rules, and their internalisation into states’ national legal systems.<sup>51</sup> In the context of IP rights, however, MNCs can also be viewed as antagonistic to those who infringe IP rights, especially those smaller, less visible companies that benefit economically from such infringements.<sup>52</sup> One reason for this is suggested by Belanger and Chen, who have suggested that

The typical MNC may approach compliance by finding out what the law “says” and then proactively becoming compliant to that standard, irrespective of

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<sup>48</sup> *ibid* 293.

<sup>49</sup> *ibid* 295.

<sup>50</sup> Jacobson and Weiss (n 14) 521–522.

<sup>51</sup> See also, for example, Harold Koh, ‘Why Do Nations Obey International Law?’ (1997) 106 *The Yale Law Journal* 2599, 2626; Harold Hongju Koh, ‘The 1998 Frankel Lecture: Bringing International Law Home’ (1998) 35 *Houston Law Review* 623, 649.

<sup>52</sup> Dinmukhamed Eshanov, ‘The Role of Multinational Corporations from the Neoinstitutionalist and International Law Perspectives: The Concept of the Three-Level Game’ (2008) 16 *New York University Environmental Law Journal* 110, 168–169; Yong Jian Wang, ‘Further Protection of Intellectual Property Rights in the WTO: Linking Transfer of Technology with Foreign Direct Investment’ (2005) 8 *Journal of World Intellectual Property* 797, 797–798, 799, and 800–801; A Samuel Oddi, ‘TRIPS–Natural Rights and a “Polite Form of Economic Imperialism”’ (1996) 29 *Vanderbilt Journal of Transnational Law* 415, 432, 460, and 462; Kitsuron Sangsuvan, ‘Small Business in the WTO: Small Fish in a Big Pond or Globalization 3.0’ (2015) 23 *Michigan State International Law Review* 341, 370–371; Hannah Murphy, ‘NGOs, States and the WTO: Towards a Governance-Centred Perspective’ in Hannah Murphy (ed), *The Making of International Trade Policy: NGOs, Agenda-Setting and the WTO* (Edward Elgar Publishing 2010) 23.

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enforcement. By contrast, for smaller domestic companies, the view may be “if I haven’t been asked to do it, there is no need to do it, even if clearly written in the book”.<sup>53</sup>

This does not mean that the role of MNCs is to promote compliance; rather, it is to protect their own economic interests. In other words, while the interests of MNCs may appear to favour compliance, this is not always the case.<sup>54</sup>

The role of MNCs in protecting IP rights was most evident in the ten years before the birth of the WTO, during which they began to take steps to protect their rights and organised to demand higher standards of IP protection.<sup>55</sup> The increasing acceptance of the value of a corporation’s intangible assets may have been one of the primary factors behind the intense involvement of MNCs in the international IP arena.<sup>56</sup> May and Sell, for example, point out that

Although the corporate animator producing a work for hire is hardly the image of the lone artist with his quill in the garret, the romantic notion of authorship’s natural rights has benefited the Walt Disney Corporation. As has historically been the case, once again intellectual property protection has been used to support the consolidation and control of important and valuable commercial assets.<sup>57</sup>

In other words, the more robust the international IP standards and the higher the level of compliance with them, the greater benefits for MNCs. Thus, the underlying goal of MNCs has tended to be to defend their commercial interests rather than to support the economic development

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<sup>53</sup> Brian Belanger and Brian Chen, ‘Dealing with Legal Gray Areas (and Selective Enforcement) in China’ (2013) 6 *International In-House Counsel Journal* 1, 7. See also, Jacobson and Weiss (n 14) 521.

<sup>54</sup> Thomas (n 9) 45–46, and 59; Susan K Sell, ‘The Intellectual Property Committee and Transnational Mobilization’ in Susan K Sell (ed), *Private Power, Public Law: The Globalization of Intellectual Property Rights* (CUP 2003) 96, 98–99, and 100.

<sup>55</sup> See, for example, Eshanov (n 52) 168–169; Oddi (n 52) 432; Murphy (n 52) 23.

<sup>56</sup> See, for example, Thomas (n 9) 59; Wagdy M Abdallah and Athar Murtuza, ‘Transfer Pricing Strategies of Intangible Assets, E-Commerce and International Taxation of Multinationals’ (2006) 32 *International Tax Journal* 5, 5–7.

<sup>57</sup> Christopher May and Susan K Sell, ‘The Twentieth Century: Intellectual Property Rights Consolidated’ in Christopher May and Susan K Sell (eds), *Intellectual Property Rights: A Critical History* (Lynne Rienner Publishers 2006) 152–153.

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of the countries in which they operate.<sup>58</sup> Such failure to take national development priorities into account will elicit local hostility, which will in turn reduce the likelihood of compliance in some TRIPS member states.<sup>59</sup>

The much-discussed divide between developing and developed countries provides salient evidence that the involvement of MNCs does not ensure or even encourage compliance by TRIPS member states.<sup>60</sup> The resistance of developing countries in the southern hemisphere to the imposition of higher levels of IP rights protection did not stem from support for infringements per se.<sup>61</sup> For example, developing countries, already lacking strong technological foundations, have expressed concern that increasing the level of mandatory IP rights protection would create many problems for them.<sup>62</sup> One such problem is the activity of trade monopolies, which increases the price of commodities, thereby preventing those countries from achieving their national targets, specifically in relation to research and economic development.<sup>63</sup> Compliance is likely to pose a particular problem for developing countries, for whom achieving a higher degree of compliance may often be at the expense of their other national interests.

Thus, while MNCs' contribution to raising the level of international IP protection has been significant, their involvement is not always positively associated with compliance by TRIPS member states; in some case, it may even hamper compliance.<sup>64</sup> As Thomas has observed,

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<sup>58</sup> See, for example, Eshanov (n 52) 112, 122, and 168; Wang (n 52) 799; Oddi (n 52) 432 and 460; May and Sell (n 57) 157.

<sup>59</sup> Thomas (n 9) 59; May and Sell (n 57) 157.

<sup>60</sup> See, for example, May and Sell (n 57) 155, 157, and 158; Sell (n 54) 108–120; Barbara K Woodward, 'The Roles of Non-State Actors in Lawmaking within the Global Intellectual Property Regimes of WIPO and TRIPS' (2012) 14 *International Community Law Review* 33, 42, 43–44, 61; Carlos M Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (Zed Books 2000) 3, 5; Alan S Gutterman, 'The North-South Debate Regarding the Protection of Intellectual Property Rights' (1993) 28 *Wake Forest Law Review* 89.

<sup>61</sup> See, for example, Correa (n 60) 5; Thomas (n 35) 45.

<sup>62</sup> See, for example, Woodward (n 60) 44; Correa (n 60) 5; May and Sell (n 57) 158; Christopher May, *World Intellectual Property Organization (WIPO): Resurgence and the Development Agenda* (Routledge 2007) 32; Gutterman (n 60); Ezzat Kenawy, 'The Economic Importance of the Agreement on the Protection of Intellectual Property Rights: A Field Study on Application of the Pharmaceutical Industry in Egypt' (2001) 92 *Contemporary Egypt Journal: Egyptian Society for Political Economy, Statistics and Legislation* 63 (in Arabic).

<sup>63</sup> See, for example, Woodward (n 60) 44; Correa (n 60) 5; May and Sell (n 57) 158; May (n 62) 32; Gutterman (n 60); Kenawy (n 62) (in Arabic).

<sup>64</sup> See also, for example, Eshanov (n 52) 168; Oddi (n 52) 432, and 460; Thomas (n 35) 59; Gutterman (n 60).



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MNCs are sometimes perceived as just seeking to protect their own interests with little or no regard to the economic development of the developing countries. Hence, the role of MNCs in the field of intellectual property is a significant driver towards stronger protection, but may not be a wholly positive factor in encouraging compliance amongst smaller developing WTO members as vocal MNCs can cause local hostility.<sup>65</sup>

### 7.2.1.4 Location of infringing activity

The fourth and final subfactor in this category is the location of the infringing activity.<sup>66</sup> As may be understood from Jacobson and Weiss's model, in order to restrict and neutralise an infringement activity, one must know where that activity is taking place.<sup>67</sup> In other words, the greater the geographical scope of an activity, the more difficult it becomes to pursue and curtail that activity and the more probable it is that pressure to comply will need to be applied universally.<sup>68</sup>

In relation to TRIPS, while the rates of infringements of copyright and related rights differ from one state to another, infringing activity is widespread and not confined to particular states or geographical areas.<sup>69</sup> This can be seen from three recent surveys. The first of these is the annual report on global software piracy carried out by the Business Software Alliance (hereinafter "BSA") in partnership with International Data Corporation (hereinafter "IDC"), published most recently in mid-2018.<sup>70</sup>

The BSA's report covers more than 110 countries, including the KSA,<sup>71</sup> across six regions as

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<sup>65</sup> Thomas (n 35) 59.

<sup>66</sup> Jacobson and Weiss (n 14) 522.

<sup>67</sup> Jacobson and Weiss (n 1) 6; Jacobson and Weiss (n 14) 522–523; Thomas (n 9) 60.

<sup>68</sup> *ibid.*

<sup>69</sup> Regarding the vast numbers of actors worldwide infringing IP rights, see, for example, VasIU and VasIU (n 24) 232, 249; Bridy (n 24) 327–328; Garcia (n 24) 287, 299.

<sup>70</sup> Business Software Alliance (BSA), 'Software Management: Security Imperative, Business Opportunity: BSA Global Software Survey' (2018) <[https://gss.bsa.org/wp-content/uploads/2018/05/2018\\_BSA\\_GSS\\_Report\\_en.pdf](https://gss.bsa.org/wp-content/uploads/2018/05/2018_BSA_GSS_Report_en.pdf)>; BSA, 'Software Management: Security Imperative, Business Opportunity: BSA Global Software Survey — In Brief' (2018) <[https://gss.bsa.org/wp-content/uploads/2018/06/2018\\_BSA\\_GSS\\_InBrief\\_US.pdf](https://gss.bsa.org/wp-content/uploads/2018/06/2018_BSA_GSS_InBrief_US.pdf)>; BSA, '2018 BSA Global Software Survey: Software Management: Security Imperative, Business Opportunity (Key Findings)' <<https://gss.bsa.org/>> accessed 15 February 2021. Reports from previous years can be found here: BSA, '2018 BSA Global Software Survey' <[www.bsa.org/reports/2018-bsa-global-software-survey](http://www.bsa.org/reports/2018-bsa-global-software-survey)> accessed 15 February 2021.

<sup>71</sup> BSA, 'BSA Global Software Survey' (n 70) 1, 17; BSA, 'BSA Global Software Survey — In Brief' (n 70) 1; BSA, '2018 BSA Global Software Survey (Key Findings)' (n 70); BSA, '2018 BSA Global Software Survey' (n 70).

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follows: the Asia-Pacific, Central and Eastern Europe, the Middle East and Africa, Latin America, Western Europe, and North America.<sup>72</sup> The study indicated that despite a 2% overall decline from 2016, unlicensed software remains widespread worldwide, accounting for 37% of ‘software installed on personal computers’ in 2017.<sup>73</sup> For example, according to the 2017 study, unlicensed software usage remained most prevalent in the Asia-Pacific region (57%), Central and Eastern Europe (57%), the Middle East and Africa (56%) and Latin America (52%), despite modest declines (1-5%) from 2013 and 2015 (Table 7.1).<sup>74</sup> The lowest rates were in North America (16%) and Western Europe (26%).<sup>75</sup>

**Table 7.1: Use of Unlicensed Software by Region, 2013, 2015, 2017**

<b>Region</b>	<b>2013</b>	<b>2015</b>	<b>2017</b>
<i>Asia-Pacific</i>	<b>61%</b>	<b>62%</b>	<b>57%</b>
<i>Central &amp; Eastern Europe</i>	<b>61%</b>	<b>58%</b>	<b>57%</b>
<i>Middle East &amp; Africa</i>	<b>59%</b>	<b>57%</b>	<b>56%</b>
<i>Latin America</i>	<b>59%</b>	<b>55%</b>	<b>52%</b>
<i>Western Europe</i>	<b>29%</b>	<b>28%</b>	<b>26%</b>
<i>North America</i>	<b>19%</b>	<b>17%</b>	<b>16%</b>

In the KSA, the overall rate of unlicensed software installation was 47% in 2017 — down just 2% (to 49%) from 2015, 3% (to 50%) from 2013, and 4% (to 51%) from 2011.<sup>76</sup> Although this is one of the five lowest rates of unlicensed software installation among more than 28 Middle Eastern

<sup>72</sup> BSA, ‘BSA Global Software Survey’ (n 70) 5, 12–13; BSA, ‘BSA Global Software Survey — In Brief’ (n 70) 1–2.

<sup>73</sup> BSA, ‘BSA Global Software Survey’ (n 70) 2; BSA, ‘BSA Global Software Survey — In Brief’ (n 70) 1; BSA, ‘2018 BSA Global Software Survey (Key Findings)’ (n 70).

<sup>74</sup> BSA, ‘BSA Global Software Survey’ (n 70) 12–13; BSA, ‘BSA Global Software Survey — In Brief’ (n 70) 2–3.

<sup>75</sup> *ibid.*

<sup>76</sup> BSA, ‘BSA Global Software Survey’ (n 70) 11; BSA, ‘BSA Global Software Survey — In Brief’ (n 70) 3.

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and African countries,<sup>77</sup> the commercial value of unlicensed software in the KSA was the highest overall in the region – \$1,638 billion in total.<sup>78</sup>

**Table 7.2: Use of Unlicensed Software in Middle East & Africa by Country, 2011, 2013, 2015, 2017**

<b>Country</b>	<b>2011</b>	<b>2013</b>	<b>2015</b>	<b>2017</b>
<i>Algeria</i>	<b>84%</b>	<b>85%</b>	<b>83%</b>	<b>82%</b>
<i>Bahrain</i>	<b>54%</b>	<b>53%</b>	<b>54%</b>	<b>52%</b>
<i>Botswana</i>	<b>80%</b>	<b>79%</b>	<b>79%</b>	<b>80%</b>
<i>Cameroon</i>	<b>83%</b>	<b>82%</b>	<b>82%</b>	<b>80%</b>
<i>Egypt</i>	<b>61%</b>	<b>62%</b>	<b>61%</b>	<b>59%</b>
<i>Iraq</i>	<b>86%</b>	<b>86%</b>	<b>85%</b>	<b>85%</b>
<i>Israel</i>	<b>31%</b>	<b>30%</b>	<b>29%</b>	<b>27%</b>
<i>Ivory Coast</i>	<b>81%</b>	<b>80%</b>	<b>80%</b>	<b>79%</b>
<i>Jordan</i>	<b>58%</b>	<b>57%</b>	<b>56%</b>	<b>55%</b>
<i>Kenya</i>	<b>78%</b>	<b>78%</b>	<b>76%</b>	<b>74%</b>
<i>Kuwait</i>	<b>59%</b>	<b>58%</b>	<b>58%</b>	<b>57%</b>
<i>Lebanon</i>	<b>71%</b>	<b>71%</b>	<b>70%</b>	<b>69%</b>
<i>Libya</i>	<b>90%</b>	<b>89%</b>	<b>90%</b>	<b>90%</b>
<i>Mauritius</i>	<b>57%</b>	<b>55%</b>	<b>54%</b>	<b>52%</b>
<i>Morocco</i>	<b>66%</b>	<b>66%</b>	<b>65%</b>	<b>64%</b>
<i>Nigeria</i>	<b>82%</b>	<b>81%</b>	<b>80%</b>	<b>80%</b>
<i>Oman</i>	<b>61%</b>	<b>60%</b>	<b>60%</b>	<b>60%</b>
<i>Qatar</i>	<b>50%</b>	<b>49%</b>	<b>48%</b>	<b>47%</b>

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

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<i>Reunion</i>	<b>40%</b>	<b>39%</b>	<b>39%</b>	<b>38%</b>
<b><u>KSA</u></b>	<b><u>51%</u></b>	<b><u>50%</u></b>	<b><u>49%</u></b>	<b><u>47%</u></b>
<i>Senegal</i>	<b>78%</b>	<b>77%</b>	<b>75%</b>	<b>74%</b>
<i>South Africa</i>	<b>35%</b>	<b>34%</b>	<b>33%</b>	<b>32%</b>
<i>Tunisia</i>	<b>74%</b>	<b>75%</b>	<b>74%</b>	<b>73%</b>
<i>Turkey</i>	<b>62%</b>	<b>60%</b>	<b>58%</b>	<b>56%</b>
<i>United Arab Emirates</i>	<b>37%</b>	<b>36%</b>	<b>34%</b>	<b>32%</b>
<i>Yemen</i>	<b>89%</b>	<b>87%</b>	<b>87%</b>	<b>88%</b>
<i>Zambia</i>	<b>82%</b>	<b>81%</b>	<b>81%</b>	<b>80%</b>
<i>Zimbabwe</i>	<b>92%</b>	<b>91%</b>	<b>90%</b>	<b>89%</b>
<i>Other Africa</i>	<b>86%</b>	<b>85%</b>	<b>84%</b>	<b>83%</b>
<i>Other Middle East</i>	<b>87%</b>	<b>85%</b>	<b>84%</b>	<b>85%</b>
<i>Total Middle East &amp; Africa</i>	<b>58%</b>	<b>59%</b>	<b>57%</b>	<b>56%</b>

Further evidence is provided by Letić, who conducted a comparative statistical analysis of piracy over the last two decades for DataProt.<sup>79</sup> Letić’s study included countries from various geographic locations, including the United States (hereinafter “US”), Russia, Indonesia, Turkey, India, and the United Kingdom (hereinafter “UK”).<sup>80</sup> Furthermore, it examined numerous elements being violated, including television (hereinafter “TV”) episodes, stream-rippers,<sup>81</sup> music, TV shows, downloading of copyrighted materials, and the movie industry.<sup>82</sup> Letić concluded that although legal options have been increasing year by year, the number of copyright infringements remains

<sup>79</sup> Jovana Letić, ‘Piracy Statistics for 2020 – People Would Still Download a Car’ (*DataProt*, 2019) <<https://dataprot.net/statistics/piracy-statistics/>> accessed 15 February 2021.

<sup>80</sup> *ibid.*

<sup>81</sup> Stream-ripping involves obtaining a permanent copy of audio or audio-visual content that is streamed online. Once a copy is created and saved, a user can access it offline and share it between devices and with other users. Jennifer Allen, ‘What Is Stream Ripping?’ (*Lifewire*, 3 June 2020) <[www.lifewire.com/what-is-stream-ripping-4686282](http://www.lifewire.com/what-is-stream-ripping-4686282)> accessed 2 May 2022.

<sup>82</sup> Letić, ‘Piracy Statistics for 2020 – People Would Still Download a Car’ (n 79).

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alarming and a cause for concern.<sup>83</sup>

**Table 7.3: Countries Involved in and Types of Copyright Infringement**

<b>Countries in Study</b>	<b>Types of Copyright Infringement</b>
<i>United States (US)</i>	<b>Television episodes</b>
<i>Russia</i>	<b>Stream-rippers</b>
<i>Indonesia</i>	<b>Music</b>
<i>Turkey</i>	<b>TV Shows</b>
<i>India</i>	<b>Downloading Copyrighted Materials</b>
<i>United Kingdom (UK)</i>	<b>Movie Industry</b>

(Source: Leticć, 2019)

The third and final survey is one of MUSO’s most recent projects, undertaken during the COVID-19 lockdown in Spring 2020.<sup>84</sup> Describing itself as ‘the global authority on digital piracy’,<sup>85</sup> MUSO claims to have a digital content database covering more than 190 countries as well as millions of devices around the world, empowering copyright holders to overcome digital piracy.<sup>86</sup> In one of its most recent works, MUSO has shown that the already high rate of film and TV piracy has risen even more dramatically since the imposition of lockdowns in March 2020 in response to the COVID-19 pandemic.<sup>87</sup>

<sup>83</sup> *ibid.*

<sup>84</sup> MUSO, ‘Film & TV Piracy Surge During COVID-19 Lockdown’ <[www.muso.com/magazine/film-tv-piracy-surge-during-covid-19-lockdown](http://www.muso.com/magazine/film-tv-piracy-surge-during-covid-19-lockdown)> accessed 15 February 2021. For a summary report of past years, see MUSO, ‘Global Piracy Increases Throughout 2017, MUSO Reveals’ <[www.muso.com/magazine/global-piracy-increases-throughout-2017-muso-reveals](http://www.muso.com/magazine/global-piracy-increases-throughout-2017-muso-reveals)> accessed 15 February 2021.

<sup>85</sup> *ibid.*

<sup>86</sup> MUSO, ‘About MUSO’ <[www.muso.com/about-us/background](http://www.muso.com/about-us/background)> accessed 19 February 2021.

<sup>87</sup> MUSO, ‘Film & TV Piracy Surge During COVID-19 Lockdown’ (n 84).

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**Table 7.4: Increase in TV & Film Piracy Visits during COVID-19 Lockdown (22 February – 25 March 2020)**

TV Piracy		Film Piracy	
Country	Percentage	Country	Percentage
<i>Italy</i>	<b>41%</b>	<i>Italy</i>	<b>66%</b>
<i>UK</i>	<b>30%</b>	<i>India</i>	<b>63%</b>
<i>Portugal</i>	<b>28%</b>	<i>Spain</i>	<b>50%</b>
<i>Russia</i>	<b>27%</b>	<i>Portugal</i>	<b>47%</b>
<i>India</i>	<b>24%</b>	<i>Canada</i>	<b>45%</b>
<i>Spain</i>	<b>18%</b>	<i>UK</i>	<b>43%</b>
<i>France</i>	<b>13%</b>	<i>USA</i>	<b>41%</b>
<i>Canada</i>	<b>12%</b>	<i>France</i>	<b>41%</b>
<i>Germany</i>	<b>12%</b>	<i>Germany</i>	<b>36%</b>
<i>USA</i>	<b>12%</b>	<i>Russia</i>	<b>18%</b>

Like those by the BSA and Letić, the MUSO survey covers countries from different continents, including the US, Russia, Canada, France, India and Germany. As shown in Table 7.4 (above), the largest increases in film piracy were observed in Italy (66%), India (63%) and Spain (50%).<sup>88</sup> TV piracy, on the other hand, increased most dramatically in Italy (41%), the UK (30%), Portugal (28%) and Russia (27%).<sup>89</sup> It has been suggested that the relatively low rate of TV piracy is due to the absence of live sport during the early months of the pandemic.<sup>90</sup>

### 7.2.1.5 Concluding explanatory remarks

Three observations arise from the discussion above. First, irrespective of the size of the audience reached, infringements of copyright and related rights occur worldwide and are not limited to any

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*

<sup>90</sup> ‘Coronavirus: UK Film Piracy Surges during Lockdown’ (*BBC*, 27 April 2020) <[www.bbc.co.uk/news/technology-52443185](http://www.bbc.co.uk/news/technology-52443185)> accessed 19 February 2021.

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particular TRIPS member state.<sup>91</sup> The data reported in the surveys discussed above also demonstrates that infringing activities are not found exclusively in either the developing or the least developed countries (hereinafter “LDCs”), nor only in states into whose domestic laws the TRIPS provisions have not been well implemented, but can also occur in the more developed countries.<sup>92</sup>

The second observation is that the worldwide rate of infringement of copyright and related rights are high, continuous, and ongoing. With the ubiquity of smart devices such as smartphones and Internet Protocol television (IPTV), it is now easy to commit infringing activities around the world from no fixed location.<sup>93</sup> Nevertheless, there has been a degree of decline, albeit slight, in the rate of some forms of copyright infringement, perhaps indicating an increase in the degree of compliance. Other explanations are possible, however, including, as previously noted, the decline in shipments of PCs and the lack of live sport during the early months of the pandemic.<sup>94</sup>

The third and final observation concerns the suggestion that knowing the main locations of an activity that infringes an international legal agreement facilitates efforts to restrict and neutralise that activity.<sup>95</sup> The above analysis suggests that it would not be easy to monitor and circumscribe the precise location in which infringing activities are occurring because of their vast geographical scope. This is especially so when dealing with an opaque activity such as IP infringement, as discussed above. Given the difficulty of identifying exactly where infringing activities occur, some have argued that it is better to concentrate pressure on an individual member state responsible for

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<sup>91</sup> In addition to the surveys discussed above, see, for example, VasIU and VasIU (n 24) 229, 232, 249; Bridy (n 24) 323, 327–328; Garcia (n 24) 265, 287, 299.

<sup>92</sup> For examples of the Member States classification lists, see the following links. Note, however, that: ‘There are no WTO definitions of “developed” or “developing” countries. Developing countries in the WTO are designated on the basis of self-selection although this is not necessarily automatically accepted in all WTO bodies.’ WTO, ‘Groups in the Negotiations’ <[www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm)> accessed 26 February 2021; WTO, ‘Who Are the Developing Countries in the WTO?’ <[www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm)> accessed 26 February 2021; WTO, ‘Least-Developed Countries’ <[www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm)> accessed 26 February 2021.

<sup>93</sup> For more information and recent discussion regarding IPTV, see, for example, The Office of Communications (Ofcom), ‘Information on Internet Protocol TV’ <[www.ofcom.org.uk/tv-radio-and-on-demand/advice-for-consumers/television/iptv](http://www.ofcom.org.uk/tv-radio-and-on-demand/advice-for-consumers/television/iptv)> accessed 20 February 2021; Andy Maxwell, ‘Europol Says Pirate IPTV Services Are Upping Their Game During COVID-19’ (*TorrentFreak*, 25 April 2020) <<https://torrentfreak.com/europol-says-pirate-iptv-services-are-upping-their-game-during-covid-19-200425/>> accessed 20 February 2021.

<sup>94</sup> BSA, ‘BSA Global Software Survey’ (n 70) 12; ‘Coronavirus: UK Film Piracy Surges during Lockdown’ (n 90).

<sup>95</sup> Jacobson and Weiss (n 1) 6; Jacobson and Weiss (n 14) 522–523.

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a high proportion of all infringing activity rather than several member states, each of which makes only a small contribution to the total.<sup>96</sup> Although theoretically sound, in practice such an approach may hamper compliance in some cases. For example, concentrating pressure on a single member state may be perceived as unequal treatment, discouraging that state from greater compliance.<sup>97</sup>

### 7.2.2 Characteristics of TRIPS

The second main category included under non-state-specific factors relates to the characteristics associated with TRIPS itself.<sup>98</sup> Although the analysis presented in this chapter is focused primarily on infringements of copyright and related rights, the analysis offered in this subsection contributes more broadly to an understanding of those characteristics of TRIPS that may influence states' compliance with the different areas of IP with which TRIPS is concerned. It is also difficult to separate the area of copyright and related rights from other IP areas when the characteristics of TRIPS are under consideration.

In the more inclusive model developed by Jacobson and Weiss, eight characteristics are identified as potentially influencing states' implementation of and compliance with international legal agreements.<sup>99</sup> As shown in Figure 7.1 above, these are: (i) perceived equity of the obligations; (ii) precision of the obligations; (iii) provisions for obtaining scientific and technical advice; (iv) reporting requirements; (v) provisions for other forms of monitoring; (vi) the role and effectiveness of the secretariat; (vii) incentives; and (viii) sanctions.<sup>100</sup> Before forming an opinion about the compliance of any member state, including that of the Kingdom, with TRIPS, it is essential to first consider whether the characteristics of that agreement do indeed facilitate compliance. The eight characteristics listed above can thus be divided into two key groups, one comprised of the substantive provisions of TRIPS and the other comprising the procedural provisions of the agreement.<sup>101</sup>

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<sup>96</sup> Thomas (n 9) 60.

<sup>97</sup> *ibid.*

<sup>98</sup> Jacobson and Weiss (n 1) 6; Jacobson and Weiss (n 14) 523–528.

<sup>99</sup> Jacobson and Weiss (n 14) 523–528.

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.* 528.



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### 7.2.2.1 Substantive provisions

Two characteristics (subfactors) are included in this group,<sup>102</sup> both of which relate to the way in which the substantive provisions of the agreement are phrased.<sup>103</sup> The first concerns whether member states perceive TRIPS as legitimate and equitable;<sup>104</sup> the second concerns whether the obligations contained in the Agreement were drafted unambiguously.<sup>105</sup>

#### Perceived equity of the obligations

This subfactor recalls the legitimacy-based theory of compliance put forward by Franck.<sup>106</sup> As discussed in Chapter 6, Franck's theory holds that the willingness of states to comply with an agreement depends on the legitimacy of the international legal system and the perception that the terms of that agreement are both substantively and procedurally fair and operational.

#### Precision of the obligations

This subfactor recalls two other points discussed in Chapter 6. The first relates to Neuhold's cost-benefit ratio theory,<sup>107</sup> according to which there are circumstances in which decision-makers may expect that their breach of an international legal commitment will go undetected, even if only temporarily.<sup>108</sup> Neuhold identifies this as one of three variables influencing whether or not a state decides to comply.<sup>109</sup> One such variable is the extent to which a legal rule has been formulated ambiguously.<sup>110</sup>

The second point relates to the managerial theory of compliance proposed by Chayes and Chayes.<sup>111</sup> One of the key premises of that theory is that states, including the KSA, have at least a

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<sup>102</sup> Jacobson and Weiss (n 1) 6; Jacobson and Weiss (n 14) 528.

<sup>103</sup> Jacobson and Weiss (n 14) 528.

<sup>104</sup> Jacobson and Weiss (n 1) 6; Jacobson and Weiss (n 14) 523–524, 528.

<sup>105</sup> *ibid.*

<sup>106</sup> See generally, Thomas M Franck, *Fairness in International Law and Institutions* (OUP 1998).

<sup>107</sup> See, for example, Neuhold, 'Die Einhaltung Des Völkerrechts in Einer Aussenpolitischen Kosten-Nutzen-Analyse' (n 34); Neuhold, 'The Foreign-Policy Cost-Benefit-Analysis Revisited' (n 34).

<sup>108</sup> Neuhold, 'The Foreign-Policy Cost-Benefit-Analysis Revisited' (n 34) 88.

<sup>109</sup> *ibid.*

<sup>110</sup> *ibid* 88–90.

<sup>111</sup> See, for example, Chayes and Chayes, *The New Sovereignty* (n 5) 1–4; Chayes and Chayes, 'On Compliance' (n 5) 175, 175–178.

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general propensity to comply with agreements,<sup>112</sup> and that any points of non-compliance are an inadvertent result of other errors or problems with the agreement.<sup>113</sup> One such problem is the ambiguity and indeterminacy of the language of the Agreement.<sup>114</sup>

### 7.2.2.2 Procedural provisions

Six subfactors are included in this group: (i) provisions for obtaining scientific and technical advice; (ii) reporting requirements; (iii) the role and effectiveness of the secretariat; (iv) provisions for other forms of monitoring; (v) incentives; and (vi) sanctions.<sup>115</sup>

#### Provisions for obtaining scientific and technical advice

The first subfactor to consider is whether the provisions of TRIPS clarify how to obtain scientific and technical advice or the financial support that the more capable countries have offered to help less capable parties comply with their commitments under the agreement.<sup>116</sup> If so, does this assistance contribute to achieving compliance?<sup>117</sup>

#### Reporting requirements

The second subfactor to consider is whether TRIPS has a dedicated line of communication through which parties can submit their reports and notify the Council of regulations which may influence IP rights, which, in turn, may affect the reporting member's compliance.<sup>118</sup> It is important to emphasise, however, that reporting requirements are intended to facilitate compliance and should

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<sup>112</sup> *ibid.*

<sup>113</sup> Clarifying this point, Chayes and Chayes stated that 'if we are correct that the principal source of noncompliance is not wilful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly.' Chayes and Chayes, *The New Sovereignty* (n 5) 22.

<sup>114</sup> *ibid* 10–17; Chayes and Chayes, 'On Compliance' (n 5) 188–197.

<sup>115</sup> With reference to subfactors (i), (ii), (iv), (v) and (vi), Jacobson and Weiss have pointed out that they "relate to procedures that we have found facilitate the implementation of and compliance with the accords. These findings have implications for the drafting of treaties". Jacobson and Weiss (n 14) 528.

<sup>116</sup> *ibid* 525. This and other details relating to obtaining scientific and technical advice are detailed under Articles 67 (Technical Cooperation) and 69 (International Cooperation) of TRIPS. See WTO, 'Part VI — Transitional Arrangements' <[www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_08\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_08_e.htm)> accessed 26 February 2021; WTO, 'Part VII — Institutional Arrangements; Final Provisions' <[www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_09\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_09_e.htm)> accessed 23 February 2021.

<sup>117</sup> Jacobson and Weiss (n 14) 525.

<sup>118</sup> *ibid* 525–526. In fact, reporting requirements are detailed under art 63(2) of TRIPS. See WTO, 'Part V — Dispute Prevention and Settlement' <[www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_07\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_07_e.htm)> accessed 23 February 2021.

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not create an additional administrative burden, particularly for smaller member states.<sup>119</sup>

### The role and effectiveness of the secretariat

The third subfactor relates to the secretariat of the international legal agreement, one of whose roles is to supervise the efforts of states to meet their reporting requirements.<sup>120</sup> In the current context, the secretariat is the Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter “the Council for TRIPS”).<sup>121</sup> In addition to processing and analysing reports, the Council for TRIPS performs various other vital roles with the aim of enabling and monitoring compliance by TRIPS member states.<sup>122</sup> Among these are offering parties to the agreement the opportunity to consult on issues associated with the agreement, providing and reviewing technical cooperation and assistance, and mediating between conflicting parties to help them avoid using ‘the formal dispute settlement process’.<sup>123</sup>

### Provisions for other forms of monitoring

The knowledge that the implementation of an agreement will be observed by an external body can be a potent stimulus for precise reporting, which itself can contribute to compliance.<sup>124</sup> This applies particularly when an external party is better informed about some aspects of the agreement than the government of the member state.<sup>125</sup> Accordingly, to promote compliance, it is vital to involve other relevant bodies, such as non-governmental organisations (hereinafter “NGOs”) and intergovernmental organisations (hereinafter “IGOs”), to help the Council for TRIPS monitor IP

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<sup>119</sup> Jacobson and Weiss (n 14) 526.

<sup>120</sup> This subfactor is related to both compliance and reporting requirements. As Jacobson and Weiss have indicated, ‘What happens to the reports is also important.’ *ibid.*

<sup>121</sup> *ibid.* Indeed, Articles IV(5) and VI(6) on the ‘Structure of the WTO’ state that the Council for TRIPS ‘shall operate under the general guidance of the General Council’. Art 68 on ‘Council for Trade-Related Aspects of Intellectual Property Rights’ also explains the Council’s roles. See WTO, ‘Marrakesh Agreement Establishing the World Trade Organization’ <[www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm)> accessed 24 February 2021; WTO, ‘Part VII — Institutional Arrangements; Final Provisions’ (n 116).

<sup>122</sup> Jacobson and Weiss (n 14) 526; WTO, ‘Marrakesh Agreement Establishing the World Trade Organization’ (n 121); WTO, ‘Part VII — Institutional Arrangements; Final Provisions’ (n 116).

<sup>123</sup> Jacobson and Weiss (n 14) 526; WTO, ‘Marrakesh Agreement Establishing the World Trade Organization’ (n 121); WTO, ‘Part VII — Institutional Arrangements; Final Provisions’ (n 116); Thomas (n 9) 56.

<sup>124</sup> Jacobson and Weiss (n 14) 527.

<sup>125</sup> *ibid.*

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standards at the international level.<sup>126</sup>

One of the most important bodies in the world of IP is the World Intellectual Property Organisation (hereinafter “WIPO”), which, as stated in Article 2(3) of the WTO-WIPO cooperation agreement, helps to monitor the operation of TRIPS.<sup>127</sup> The WTO also grants observer status on the Council for TRIPS to numerous IGOs to enable these bodies to be informed on matters of direct interest to them.<sup>128</sup> These bodies include the World Bank (WB), the World Customs Organisation (WCO), and the Cooperation Council for the Arab States of the Gulf (GCC), whose headquarters are located in the Saudi capital, Riyadh.<sup>129</sup>

### Incentives

The fifth subfactor to consider is whether the agreement facilitates compliance by providing incentives for member states.<sup>130</sup> Incentives can be an important tool for advancing compliance, particularly by less developed nations.<sup>131</sup> Part VI of TRIPS, which concerns ‘Transitional Arrangements’, states that LDCs should be given incentives, including financial and other assistance, to facilitate their compliance with the agreement.<sup>132</sup> In practice, however, as Thomas has observed, incentives are offered less frequently than this part of the agreement seems to suggest.<sup>133</sup> Therefore, to address the reluctance of some states to comply, it was subsequently decided that the more developed countries should submit annual reports of their contributions under Part VI of TRIPS.<sup>134</sup>

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<sup>126</sup> *ibid* 526–527.

<sup>127</sup> WTO, ‘WTO-WIPO Cooperation Agreement’ <[www.wto.org/english/tratop\\_e/trips\\_e/wtowip\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/wtowip_e.htm)> accessed 25 February 2021. See also World Intellectual Property Organisation (WIPO), ‘WIPO’s Strategic Goals’ <[www.wipo.int/about-wipo/en/goals.html#:~:text=International Cooperation on Building Respect,WIPO to Deliver its Programs](http://www.wipo.int/about-wipo/en/goals.html#:~:text=International Cooperation on Building Respect,WIPO to Deliver its Programs)> accessed 25 February 2021.

<sup>128</sup> WTO, ‘International Intergovernmental Organizations Granted Observer Status to WTO Bodies’ <[www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm](http://www.wto.org/english/thewto_e/igo_obs_e.htm)> accessed 25 February 2021.

<sup>129</sup> *ibid*; Cooperation Council for the Arab States of the Gulf (GCC), ‘About GCC’ <[www.gcc-sg.org/en-us/AboutGCC/Pages/Primarylaw.aspx](http://www.gcc-sg.org/en-us/AboutGCC/Pages/Primarylaw.aspx)> accessed 25 February 2021.

<sup>130</sup> Jacobson and Weiss (n 14) 527.

<sup>131</sup> *ibid*.

<sup>132</sup> Part VI of TRIPS states that least-developed members should be given incentives to facilitate their compliance with the agreement. WTO, ‘Part VI — Transitional Arrangements’ (n 116).

<sup>133</sup> Thomas (n 35) 57.

<sup>134</sup> *ibid*.

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In the specific case of the KSA, the incentive of a transitional period granted to developing countries may not apply, as discussed in Chapters 5 and 6 of this thesis.<sup>135</sup> Although the KSA was classified as an ‘Asian developing WTO member’ and therefore was entitled to avail of the 10-year transition period for the implementation of IP rights protection, the Kingdom committed itself to fully implement TRIPS into its national legislation with no such transitional period.<sup>136</sup> Put differently, the KSA could have requested a transitional period for adapting to TRIPS before it was obligated to comply with the agreement, as it had with some of its other obligations set out under the WTO.<sup>137</sup> For example, the working party on the KSA’s accession to the WTO reported that the Kingdom wished to review some of its existing regimes to ensure its practices were consistent with WTO provisions and rules and clarified that the period of review would extend beyond its accession. The obligations at issue were those related to (i) the import regime, (ii) policies affecting trade in services, specifically insurance services, and (iii) border measures.<sup>138</sup> Nevertheless, to the best of the researcher’s knowledge, the Kingdom did not explicitly request to use this incentive. The decision to forgo the incentive may indicate the KSA’s sincere intention or willingness to comply with TRIPS. If so, this would suggest that the incentive of a transitional period did not play a significant role in the KSA’s compliance with TRIPS.

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<sup>135</sup> For further details of some of the incentives granted to WTO country members, see WTO, ‘Part VI — Transitional Arrangements’ (n 116); WTO, ‘Developing Countries’ Transition Periods: Provisions for Developing Countries, Economies in Transition from Central Planning, and Least-Developed Countries’ <[www.wto.org/english/tratop\\_e/trips\\_e/factsheet\\_pharm04\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/factsheet_pharm04_e.htm)> accessed 27 February 2021.

<sup>136</sup> See, for example, WTO Working Party on the Accession of the Kingdom of Saudi Arabia, ‘Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization’ (2005) 79; The Office of the United States Trade Representative (USTR), ‘Saudi Arabia’s Accession to the World Trade Organization (WTO): WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)’ (2005) 1 <[https://ustr.gov/archive/assets/Document\\_Library/Fact\\_Sheets/2005/asset\\_upload\\_file12\\_7938.pdf](https://ustr.gov/archive/assets/Document_Library/Fact_Sheets/2005/asset_upload_file12_7938.pdf)> accessed 21 March 2020. For a complete list of the member states in this and the other groups involved in the Doha negotiations, see WTO, ‘Map of Negotiating Groups in the Doha Negotiations’ <[www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_maps\\_e.htm?group\\_selected=GRP002b](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_maps_e.htm?group_selected=GRP002b)> accessed 27 February 2021; WTO, ‘The Doha Round’ <[www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm)> accessed 27 February 2021.

<sup>137</sup> WTO Working Party on the Accession of the Kingdom of Saudi Arabia (n 136) 41–42, 59, 87, and 94–95.

<sup>138</sup> On the other hand, ‘The representative of Saudi Arabia stated that Saudi Arabia would apply fully all the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights from the date of accession to the WTO, without recourse to any transition period. The Working Party took note of this commitment.’ *ibid.*

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### Sanctions

Recognising that the compliance of individual states cannot always be achieved through the “carrot” of incentives alone, international legal agreements can adopt a “stick”-based approach in the form of sanctions.<sup>139</sup> For example, in their study of states’ compliance with IEAs, Jacobson and Weiss observed that the threat to impose a trade ban or restrictions has led some non-compliant states to modify their practices.<sup>140</sup>

While there are, as stated above, specific incentives to encourage compliance by TRIPS member states’, sanctions for non-compliance are rather unclear.<sup>141</sup> The primary function of the TRIPS Council is not to identify or impose sanctions on non-compliant members, but rather to facilitate and encourage their compliance with the agreement.<sup>142</sup> Therefore, the only path for imposing sanctions for non-compliance is perhaps by the WTO Dispute Settlement Body (DSB).<sup>143</sup> In light of the above discussion, we may conclude that TRIPS tends to adopt an incentive-based approach rather than use coercive power against non-compliant member states.

### **7.2.2.3 Concluding remarks**

While understanding the state-specific factors affecting a member state’s compliance with a given agreement is essential, it is equally important for legal researchers to recognise the potential influence of the above eight characteristics on that state’s compliance with that agreement. As has been shown, non-compliance may be rooted in problems that began prior to or during the stage of

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<sup>139</sup> Jacobson and Weiss (n 14) 527.

<sup>140</sup> *ibid* 527–528.

<sup>141</sup> Regarding incentives, see WTO, ‘Part VI — Transitional Arrangements’ (n 116); WTO, ‘Developing Countries’ Transition Periods’ (n 135). Regarding sanctions, the official WTO website states that ‘[t]he DSB has authority to establish dispute settlement panels ... and authorize suspension of concessions in the event of non-compliance with those recommendations and rulings.’ Accordingly, it is arguable whether ‘a suspension of concessions’ can rise to reach the level of ‘sanctions’. WTO, ‘Dispute Settlement Body’ <[www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_body\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm)> accessed 1 March 2021. See also the reference to the lack of clarity of the sanctions under TRIPS in Thomas (n 35) 57.

<sup>142</sup> See Part VII of TRIPS (Institutional Arrangements: Final Provisions), arts 68 (Council for Trade-Related Aspects of Intellectual Property Rights) and 71 (Review and Amendment). Thomas (n 9) 57–58; WTO, ‘Part VII — Institutional Arrangements; Final Provisions’ (n 116); WTO, ‘TRIPS Council Regular Meetings’ <[www.wto.org/english/tratop\\_e/trips\\_e/intel6\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel6_e.htm)> accessed 1 March 2021.

<sup>143</sup> Thomas (n 35) 58. For further information, see, for example, WTO, ‘Dispute Settlement Body’ (n 141); WTO, ‘Dispute Settlement: Legal Text (Understanding on Rules and Procedures Governing the Settlement of Disputes), Annex 2 of the WTO Agreement’ <[www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm)> accessed 1 March 2021.

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accession to or implementation of the agreement. An international legal agreement which is vaguely formulated, for example, may lead a state to interpret its provisions differently than intended despite having an unequivocal propensity to comply.<sup>144</sup> Likewise, an accord that does not provide the necessary scientific and technical advice or financial cooperation could disincentivise LDCs that had been interested in complying with its obligations. Therefore, before forming an opinion on the extent to which a given state has complied with a particular agreement, it is essential first to consider whether the characteristics of that agreement encourage and facilitate compliance therewith.

The foregoing discussion aimed to explain the potentially significant role that the eight characteristics can play in facilitating implementation of and compliance with international legal agreements by individual member states, and how and why the specific characteristics of TRIPS influence compliance with that agreement. This explanation was accompanied by a brief analysis of these characteristics, some of which were applied to the specific case study of the KSA and TRIPS.

Finally, the above analysis sought to estimate the degree of influence of some of these characteristics on member states' compliance with TRIPS. A more detailed analysis of these characteristics is presented in the work of Thomas discussed above, which primarily aimed to answer the following question: 'What are the characteristics of the TRIPS Agreement that may affect a Member's compliance with it?'<sup>145</sup> Indeed, Thomas' work endeavoured not only to investigate the eight characteristics but to define in more detail their level of influence on members' compliance with TRIPS.<sup>146</sup>

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<sup>144</sup> Indeed, this problem has occurred in the context of states' compliance with TRIPS. Regardless of whether states have a general propensity to comply, the ambiguity and lack of clarity in some TRIPS provisions have led to several compliance problems. For example, Part III of TRIPS ('Enforcement of Intellectual Property Rights') art 41 can be interpreted variously, while art 42 has been interpreted differently by India. This interpretation was also rejected by the panel. See WTO, 'Part III — Enforcement of Intellectual Property Rights' <[www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_05\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm)> accessed 2 March 2021. For further discussions about Part III, see Thomas (n 9) 52; UNCTAD-ICTSD, *Resource Book on TRIPS and Development* (CUP 2005) 579–585.

<sup>145</sup> Thomas (n 35) 17.

<sup>146</sup> *ibid* 58. To understand why Thomas's work is inadequate, see Chapter 2 of this thesis.

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### 7.2.3 International Environment Surrounding IP Rights Protection

The third and final main category included under non-state-specific factors affecting compliance with TRIPS is the international environment.<sup>147</sup> Jacobson and Weiss's model lists six subfactors under this category as potentially influencing implementation of and compliance with specific international legal commitments.<sup>148</sup> As shown in Figure 7.1 above, these are as follows: (i) major international conferences; (ii) worldwide media/public opinion; (iii) international NGOs; (iv) the number of members adhering to the agreement; and (v) other international organisations, which may include (vi) international financial institutions.<sup>149</sup>

Since many of these elements were considered in previous sections, they will be divided here into three main groups according to three specific criteria.<sup>150</sup> The first criterion relates to the role of international organisations; the second concerns worldwide media and public opinion, and the third is the number of WTO member states adhering to TRIPS.<sup>151</sup> The results of the analysis presented in this section indicate that, unlike its role in states' compliance within the field of IEAs, the international environment does not play a prominent role in encouraging compliance with TRIPS.<sup>152</sup> This conclusion is explained in more detail in the next three subsections.

#### 7.2.3.1 Role of international organisations

Many international bodies operate in the arena of IP, particularly IGOs and industrial pressure groups.<sup>153</sup> In addition to the Council for TRIPS, these bodies include: (i) the WIPO, (ii) the IDC and (iii) the BSA; these three have been discussed in detail earlier in this chapter. Other relevant bodies include (iv) the International Intellectual Property Alliance (IIPA), which was established in 1984; (v) the Intellectual Property Owners Association (IPO), which was formed in 1972; and (vi) the IP Institute, which describes itself as dedicated to assisting IP holders in several different

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<sup>147</sup> Jacobson and Weiss (n 1) 7; Jacobson and Weiss (n 14) 528.

<sup>148</sup> Jacobson and Weiss (n 14) 530.

<sup>149</sup> Jacobson and Weiss (n 1) 7; Jacobson and Weiss (n 14) 528–530.

<sup>150</sup> Thomas (n 35) 61.

<sup>151</sup> These six subfactors are divided somewhat differently by Thomas, on the grounds that Jacobson and Weiss's model 'is not restricted to [IP] protection, [therefore] some of these factors may be more relevant than others'. *ibid.*

<sup>152</sup> Jacobson and Weiss (n 14) 528.

<sup>153</sup> See also Thomas (n 35) 61.



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ways.<sup>154</sup>

Despite the number of international bodies active in the IP field, in terms of promoting compliance, their impact is insignificant. There are two main reasons for this. First, as stated above, the primary function of these bodies is often limited to reporting on or monitoring the operation of TRIPS and advocating for higher standards of IP protection.<sup>155</sup> Second, many of these organisations are located in the US and therefore may provoke the same resentment that MNCs face when pressing countries to raise their levels of IP protection.<sup>156</sup>

### 7.2.3.2 *Worldwide media and public opinion*

While this subfactor may have been influential during the drafting of TRIPS, it has not played a prominent role in encouraging compliance with the agreement.<sup>157</sup> Recalling the role played by MNCs in the struggle over technology, trade and IP rights protection discussed previously (Section 7.2.1.3), the lack of a global consensus about what constitutes an adequate standard of IP protection is clear.<sup>158</sup> As has been noted, developing countries resist pressure to increase IP rights protection out of concern that, because their technological infrastructure is weak,<sup>159</sup> raising the level of IP rights protection will lead to other thorny problems.<sup>160</sup> These tensions between the desire to protect IP and other national interests can significantly weaken or limit the power of public opinion and the media to induce greater compliance.

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<sup>154</sup> WTO, 'Marrakesh Agreement Establishing the World Trade Organization' (n 121); WTO, 'Part VII — Institutional Arrangements; Final Provisions' (n 116); WTO, 'WTO-WIPO Cooperation Agreement' (n 127); WIPO, 'WIPO's Strategic Goals' (n 127); BSA, 'BSA Global Software Survey — In Brief' (n 70); International Intellectual Property Alliance (IIPA), 'International Intellectual Property Alliance (IIPA) Representing the US Copyright-Based Industries for Over 30 Years' <<https://iipa.org/about/>> accessed 5 March 2021; Intellectual Property Owners Association (IPO), 'ABOUT IPO' <<https://ipo.org/index.php/about/>> accessed 5 March 2021; IP Institute, 'About the IP Institute - Who We Are' (*IP Institute*) <<https://ip-institute.org.uk/who.html>> accessed 5 March 2021. The role of other bodies in promoting states' compliance with TRIPS has been discussed previously (Section 7.2.2.2). For example, the WTO grants observer status to the Council for TRIPS to numerous bodies, including the WB, the WCO and the GCC. WTO, 'International Intergovernmental Organizations Granted Observer Status to WTO Bodies' (n 128).

<sup>155</sup> *ibid.*

<sup>156</sup> Thomas (n 35) 62.

<sup>157</sup> See, for example, Sell (n 54) 96, 98–99, and 100.

<sup>158</sup> See, for example and also generally, Rubin Patterson, 'Global Trade and Technology Regimes: The South's Asymmetrical Struggle' (2005) 4 *Perspectives on Global Development & Technology* 379.

<sup>159</sup> Correa (n 60) 5; Woodward (n 60) 44; May and Sell (n 57) 158; May (n 62) 32; Gutterman (n 60); Kenawy (n 62) 63 (in Arabic).

<sup>160</sup> See, for example, Correa (n 60) 5.

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### 7.2.3.3 *Number of parties adhering to TRIPS*

A large number of states are currently members of TRIPS.<sup>161</sup> Having such a large number of signatories has several potential advantages, not least of which is increasing recognition of the importance of TRIPS on a broader international scale.<sup>162</sup> That said, it is difficult to determine whether the number of parties within the TRIPS system has had a positive influence on their subsequent compliance. As previously noted, this is due in part to the lack of global consensus about what constitutes an adequate standard of IP protection, which has had negative consequences for compliance by some member states. For example, some nations in the global South feel trapped by WTO provisions and rules, which thwart their passionate pursuit of fair trade. Therefore, they tend to focus their efforts on promoting their own development and national security rather than weaken themselves by complying with systems which they perceive as serving the interests of other countries. This suggests that the fact there are a significant number of TRIPS members does not necessarily create momentum towards greater compliance.<sup>163</sup>

### 7.2.4 **Concluding Remarks**

Various non-state-specific factors that potentially impact the compliance of TRIPS member states, including that of the KSA, have been examined in this section. Although Jacobson and Weiss's model of the non-state-specific factors that affect TRIPS member states' compliance is demonstrably capable of addressing the apparent inadequacies of the theories discussed in Chapters 5 and 6, an additional subfactor, 'Exceptional circumstances', may be necessary to make it fit for purpose.<sup>164</sup> Currently, for example, an unprecedented set of circumstances resulting from the COVID-19 pandemic is affecting the entire world, and TRIPS member states are not immune to its impact. In response to this adversity, India and South Africa have launched a proposal, co-

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<sup>161</sup> For details of the number of WTO member states (which has reached 164, not including 25 observer governments), the provisions on transitional arrangements of TRIPS, and the WTO member states to which the agreement applies, see WTO, 'Members and Observers' <[www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)> accessed 8 March 2021; WTO, 'Part VI — Transitional Arrangements' (n 116); WTO, 'Frequently Asked Questions about TRIPS [Trade-Related Aspects of Intellectual Property Rights] in the WTO' <[www.wto.org/english/tratop\\_e/trips\\_e/tripfq\\_e.htm#WhatAre](http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#WhatAre)> accessed 8 March 2021.

<sup>162</sup> Jacobson and Weiss (n 14) 529.

<sup>163</sup> Patterson (n 158) 379 and 389.

<sup>164</sup> Chapters 2-4 also demonstrated how and why the various works cited in those chapters fail to meet the aims of this study.

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sponsored by a group of member states,<sup>165</sup> which requests a temporary waiver of some TRIPS obligations to give states the time and space they need to overcome the other serious challenges arising from the global pandemic.<sup>166</sup> Therefore, to achieve the aim of this thesis, which is to develop a more comprehensive understanding of the factors influencing states' compliance with the international legal obligations to which they have consented, it may be beneficial to include this subfactor in Jacobson and Weiss's model.

### **7.3 Implementation of TRIPS in Saudi Arabia: State-Associated Factors Affecting Compliance with the Agreement**

#### **7.3.1 Introduction**

As is evident from the preceding discussion, Jacobson and Weiss's model of the non-state-specific factors that affect TRIPS member states' compliance complements the theories discussed in Chapter 6. In other words, the above investigation supports the conclusion that Jacobson and Weiss's model is capable of addressing the apparent inadequacies of the works discussed earlier in this thesis. Hence, the main research question pursued in this thesis has been answered, as an appropriate theoretical approach that improves understanding of the factors that influence the KSA's compliance with TRIPS has been identified. Also in Chapter 6, the major theories of compliance were discussed with particular reference to the specific case study of the KSA and TRIPS. In light of the above, the analysis in this section will use Jacobson and Weiss's model to expand upon, clarify, and underscore the most salient points from the discussion in previous chapters. Accordingly, without detracting from the essential importance of understanding the details of country-related factors, the researcher will carry out the current analysis with two main aims in mind.

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<sup>165</sup> WTO, 'Members Discuss Intellectual Property Response to the COVID-19 Pandemic' <[www.wto.org/english/news\\_e/news20\\_e/trip\\_20oct20\\_e.htm](http://www.wto.org/english/news_e/news20_e/trip_20oct20_e.htm)> accessed 11 March 2021; WTO, 'Members to Continue Discussion on Proposal for Temporary IP Waiver in Response to COVID-19' <[www.wto.org/english/news\\_e/news20\\_e/trip\\_10dec20\\_e.htm](http://www.wto.org/english/news_e/news20_e/trip_10dec20_e.htm)> accessed 11 March 2021; WTO, 'Members Discuss TRIPS Waiver Request, Exchange Views on IP Role amid a Pandemic' <[www.wto.org/english/news\\_e/news21\\_e/trip\\_23feb21\\_e.htm](http://www.wto.org/english/news_e/news21_e/trip_23feb21_e.htm)> accessed 11 March 2021.

<sup>166</sup> *ibid.*

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The first is to provide a more detailed explanation of how and why Sharia and the KSA's Islamic identity are less significant than other factors that can influence the degree to which the KSA complies with its obligations under international law, including TRIPS. This aim recalls Chapter 4, in which the researcher engaged in critical dialogue with earlier studies, highlighting issues associated with the KSA's implementation of and compliance with its legal responsibilities under international agreements and how the Kingdom engages with legal matters in various contexts, both internally and internationally. As discussed in that chapter, numerous scholarly works have examined the KSA's interaction with international law through the highly disputed lens of Sharia using a purely doctrinal method.<sup>167</sup> In contrast, the argument advanced in this thesis is that by placing Sharia on a sliding scale of influence, the full range of factors affecting the Kingdom's compliance can be perceived more readily and the reasons for variations in its behaviour can be better understood. It may then be possible to discern the reasons for disparity in the implementation of international legal agreements in other contexts as well. Therefore, Jacobson and Weiss's model presents an obvious and convenient opportunity to highlight some examples of the potential factors, including Sharia, that may influence the KSA's behaviour towards the commitments to which it has consented.

The second main aim of the current analysis is to explore in more depth the contextual uniqueness of the KSA and what distinguishes it from other countries in terms of its compliance with international legal agreements, including TRIPS. This aim recalls the high degree of subjectivity and variation associated with the issue of states' compliance with international law discussed in

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<sup>167</sup> Among the most notable works in this regard are Ahmed A Altawyan, 'Sharia as Law in International Commerce: Challenges in Attracting International Investors to Saudi Arabia and Achieving a Major Goal of Vision 2030' (2017) 6 *International Journal of Business and Management Studies* 323; Ruaim Muaygil, 'The Role of Physicians in State-Sponsored Corporal Punishment: A View from Saudi Arabia' (2016) 25 *Cambridge Quarterly of Healthcare Ethics* 479; Bandar Alshahrani, 'A Critical Legal Analysis of the Impact of Male Guardianship System on Women's Rights in Saudi Arabia' (2016) 12 *Journal of Islamic State Practices in International Law* 31; Raj Bhala and Shannon B Keating, 'Diversity within Unity: Import Laws of Islamic Countries on Haram (Forbidden) Products' (2013) 47 *The International Lawyer* 343; Muamar Hasan Salameh, 'The Principle of Separation of Powers between Sharia and the Positive Law: A Case Study on the Constitutional System of Saudi Arabia' in Atho Mudzhar and others (eds), *Proceedings of 1st International Conference of Law and Justice: Good Governance and Human Rights in Muslim Countries: Experiences and Challenges (ICLJ 2017)* (Atlantis Press 2017) <[www.atlantis-press.com/proceedings/iclj-17/25891414](http://www.atlantis-press.com/proceedings/iclj-17/25891414)>; Geoffrey Fisher, 'Sharia Law and Choice of Law Clauses in International Contracts' [2005] *Lawasia Journal* 69.

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Chapters 1-3.<sup>168</sup> In Chapter 2, for example, the researcher observed that the roots of international law are beset by multiple issues which current theories of compliance cannot explain on their own. It follows that the causes of non-compliance can vary, and include the political, social, cultural, historical, geographical, administrative, and economic features of the states concerned. Therefore, in addition to Sharia and the absolute monarchy, Jacobson and Weiss's model can be used also to explore other factors that may apply to the unique case of the Kingdom in relation to its compliance with TRIPS. This would, in turn, deepen understanding about potentially relevant factors that should be considered when examining the variation in the compliance behaviour of different WTO Member States.

As shown in Figure 7.1 above, the second main group in the proposed model is comprised of state-specific factors,<sup>169</sup> of which there are three. The first involves the basic parameters of the KSA, the second concerns the fundamental factors, and the third refers to the proximate factors.<sup>170</sup> Each of these state-specific factors is analysed below, with particular focus on infringements of copyright and related rights.

### 7.3.2 Parameters

Parameters refer to the main features of the KSA which may influence its compliance behaviour in relation to TRIPS.<sup>171</sup> As shown in Figure 7.1 above, five subfactors fall under this factor: (i) The Kingdom's previous behaviour in relation to infringements of copyright and related rights covered by TRIPS; (ii) the KSA's history and culture; (iii) the KSA's physical size; (iv) the physical (i.e., topographical) variation within the Kingdom; and (v) the number of countries that border the Kingdom.<sup>172</sup>

The first parameter to consider is the KSA's previous behaviour (if any) in relation to compliance with copyright and the related rights covered by TRIPS.<sup>173</sup> Compared to Britain, for example,

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<sup>168</sup> See, for example, Ann Kent, *China, the United Nations, and Human Rights: The Limits of Compliance* (U of Pennsylvania Press 1999) 232-233.

<sup>169</sup> Jacobson and Weiss (n 1) 7-8.

<sup>170</sup> Jacobson and Weiss (n 14) 529-535.

<sup>171</sup> Thomas (n 9) 33; Jacobson and Weiss (n 14) 529-535.

<sup>172</sup> Jacobson and Weiss (n 14) 529-535.

<sup>173</sup> *ibid.*

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where the concept of intellectual property was established almost 400 years ago,<sup>174</sup> the Kingdom does not have a long history of engagement with IP law. IP legislation in the Kingdom dates back to 1939,<sup>175</sup> when the state adopted what came to be known as ‘the Law of Trade Marks’.<sup>176</sup> Since then, Saudi policymakers have been working on expanding and developing the Kingdom’s IP system.<sup>177</sup> In the early 1980s, the KSA became a Member of the WIPO and subsequently ratified several international agreements supervised by the WIPO.<sup>178</sup> The Kingdom’s current copyright law was issued and published in the last quarter of 2003.<sup>179</sup> On 11 December 2003, the KSA joined the Berne Convention, an international treaty administered by the WIPO which is focused on ‘the protection of works and the rights of their authors [i.e., copyright]’.<sup>180</sup> The Convention was then entered into force in the Kingdom in mid-March of 2004.<sup>181</sup> These developments indicate that the Kingdom only begun to engage in IP law in the final decades before it acceded to the WTO and has proceeded slowly along the path to implementation.<sup>182</sup> For these reasons, its previous

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<sup>174</sup> The Statute of Monopolies, introduced as an Act of Parliament in 1624, is widely recognised as the first statutory expression of patent law. B Sherman and L Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (CUP 1999) 207.

<sup>175</sup> WIPO, ‘Saudi Arabia Gears up on IP’ (n 39).

<sup>176</sup> WIPO, ‘Saudi Arabia Gears up on IP’ (n 39); Saudi National Portal for Government Services, ‘SAIP Starts to Receive Trademark Applications’ (*Saudi National Portal for Government Services*, 2021) <[www.my.gov.sa/wps/portal/snp/content/news/newsDetails/CONT-news-160220202/!ut/p/z0/04\\_Sj9CPykssy0xPLMnMz0vMAfIjo8zivQIsTAwdDQz9LQwCXQ0CnV0MfYyNQgWM\\_M30g1Pz9L30o\\_ArAppiVOTr7JuuH1WQWJKhm5mXlq8f4ezvF6Kbl1perGtoZmBkZACE-gXZ7uEAhklKhA!!/](http://www.my.gov.sa/wps/portal/snp/content/news/newsDetails/CONT-news-160220202/!ut/p/z0/04_Sj9CPykssy0xPLMnMz0vMAfIjo8zivQIsTAwdDQz9LQwCXQ0CnV0MfYyNQgWM_M30g1Pz9L30o_ArAppiVOTr7JuuH1WQWJKhm5mXlq8f4ezvF6Kbl1perGtoZmBkZACE-gXZ7uEAhklKhA!!/)> accessed 4 May 2022. For details of the current Law of Trade Marks in the KSA, see Bureau of Experts at the Council of Ministers (BoE), ‘Law of Trade Marks’ (*Bureau of Experts at the Council of Ministers*, 2002) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/3ec4414f-2ec5-48b1-bcb4-a9a700f1aa2b/2>> accessed 4 May 2022. The first trademark ever registered in the Kingdom was ‘Kabriat Al Sheila’, which was registered in the late 1940s. CNN Arabic, ‘Do You Know What the Oldest Brands in Saudi Arabia Are?’ (*CNN Arabic*, 2020) <<https://arabic.cnn.com/business/article/2020/03/04/saudi-arabia-oldest-trade-marked-companies#:~:text=وبدأت وأعلنت غوغل عن إلغائها حدث، بسبب المخاوف من فيروس كورونا=&text=والأفراد وحمايتها السعودية في العام 1939، التجارية للشركات والمؤسسات>> accessed 4 May 2022 (in Arabic).

<sup>177</sup> WIPO, ‘Saudi Arabia Gears up on IP’ (n 39).

<sup>178</sup> *ibid.*

<sup>179</sup> BoE, ‘Copyright Law’ (*Bureau of Experts at the Council of Ministers*, 2003) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/67d159e6-ee98-4efc-a2ce-a9a700f17083/2>> accessed 4 May 2022.

<sup>180</sup> WIPO, ‘Berne Notification No. 288: Berne Convention for the Protection of Literary and Artistic Works’ (*World Intellectual Property Organisation*, 2022) <[www.wipo.int/treaties/en/notifications/berne/treaty\\_berne\\_288.html](http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_288.html)> accessed 4 May 2022; WIPO, ‘Berne Convention for the Protection of Literary and Artistic Works’ (*World Intellectual Property Organisation*) <[www.wipo.int/treaties/en/ip/berne/](http://www.wipo.int/treaties/en/ip/berne/)> accessed 4 May 2022.

<sup>181</sup> WIPO, ‘WIPO-Administered Treaties’ (*World Intellectual Property Organisation*) <[wipolex.wipo.int/en/treaties/parties/remarks/SA/15/](http://wipolex.wipo.int/en/treaties/parties/remarks/SA/15/)> accessed 4 May 2022.

<sup>182</sup> See also Nadia Naim, ‘An Examination of the Intellectual Property Regimes in the Gulf Co-Operation Council (GCC) States and a Series of Recommendations to Develop an Integrated Approach to Intellectual Property Rights’

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behaviour in relation to protecting IPRs seems unlikely to facilitate and encourage its implementation of and compliance with TRIPS. As is evident from the discussions in Chapters 1 and 5, although the Kingdom was already heavily involved in international trade prior to accession, it took twelve years of complex negotiations for its application for WTO membership to be approved, during which the KSA amended many of its IP laws.<sup>183</sup> In light of these observations, the developments in Saudi IP law during that 12-year period and after the Kingdom's accession are arguably much greater than those that occurred before.

The second parameter is the history and culture of the KSA, under which heading falls the influence of Sharia.<sup>184</sup> The historical impact of Islamic law is repeatedly highlighted as a key influence on the Kingdom's contemporary culture and, therefore, on its legal system, including domestic IP law.<sup>185</sup> As explained in Chapter 4, while it is not always the binding authority for Saudi judges, the Kingdom is primarily governed by the Hanbali School of Sharia, and therefore the appropriacy of any policy related to contracts is considered part of this School in the first instance.<sup>186</sup> The Hanbali School of Sharia acknowledges four key sources of law, the first of which is *The Quran*.<sup>187</sup> Although it does not deal with specified legal matters,<sup>188</sup> *The Quran* does establish certain goals and principles that must be fulfilled.<sup>189</sup> The second source is the *hadith* (i.e., the

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(University of Bradford 2015) 91–92 <<https://bradscholars.brad.ac.uk/bitstream/handle/10454/17386/naim%2Cn.pdf?sequence=1&isAllowed=y>> accessed 10 May 2022.

<sup>183</sup> See, for example, Dabbeeru Neelakanteswar Rao, 'Saudi Arabia's Accession to WTO: Future Challenges' (*Social Science Research Network*, 2007) 1 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=957589](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=957589)> accessed 27 March 2021; Alhanoof AlDebasi and David Price, *Protecting Intellectual Property in the Arabian Peninsula: The GCC States, Jordan and Yemen* (Routledge 2018) 89.

<sup>184</sup> Jacobson and Weiss (n 14) 529–535.

<sup>185</sup> See, for example, Raj Bhala, 'The Intersection of Islam and the WTO: Three Shari'a Issues in the WTO Accession of Saudi Arabia' (2003) 21 *Law in Context* 152; Bashar H Malkawi, 'Intellectual Property Protection from a Sharia Perspective' (2013) 16 *Southern Cross University Law Review* 87, 92; Abdulrahman Alabdulkarim, 'Intellectual Property Rights in the Kingdom of Saudi Arabia in Light of Sharia and the TRIPS Agreement' (SJD dissertation, Pennsylvania State University 2017) <<https://elibrary.law.psu.edu/sjd/3/>> accessed 13 May 2021. For further details, see Chapter 4 of this thesis.

<sup>186</sup> See Hussein bin Abdul Aziz Al Al-Sheikh, *The Judicial Principles in Islamic Law: The Relationship of the Judicial System in the Kingdom of Saudi Arabia with Judicial Principles in Islamic Law* (Noor 2005 (1426 AH)) 46–47 <[www.noor-book.com/كتاب-المبادئ-القضائية-في-الشرعية-الإسلامية-وارتباط-النظام-القضائي-في-المملكة-العربية-السعودية-بها-.pdf](http://www.noor-book.com/كتاب-المبادئ-القضائية-في-الشرعية-الإسلامية-وارتباط-النظام-القضائي-في-المملكة-العربية-السعودية-بها-.pdf)>; 'Hanbali School of Law' (*The Oxford Dictionary of Islam: Oxford Islamic Studies Online*) <[www.oxfordislamicstudies.com/article/opr/t125/e799](http://www.oxfordislamicstudies.com/article/opr/t125/e799)> accessed 23 December 2019.

<sup>187</sup> 'Hanbali School of Law' (n 186); Ziad A Al-Sudairy, 'The Constitutional Appeal of Shari'a in a Modernizing Saudi State' (2010) 2 *Middle East Law and Governance* 1, 3–4, 14–15.

<sup>188</sup> *ibid.*

<sup>189</sup> *ibid.*

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Sunna), which record the words, deeds and practices of the Prophet Muhammad (Peace be upon him).<sup>190</sup> The third prominent source of law is *ijma*, which refers to a consensus of Islamic scholars on a point of law.<sup>191</sup> The fourth source is *Qiyas*, which refers to the use of analogical reasoning to interpret points of law.<sup>192</sup> These sources guide the determination of which acts are *farḍ/wajib* (mandatory/obligatory), *mandub/sunnah* (recommended), *mubah* (permissible), *makruh* (undesirable) and *haram* (absolutely prohibited). These five categories of *ahkâm* (rulings) influence and undergo change within the framework of the TRIPS obligations.<sup>193</sup>

Arguably, TRIPS generally covers three principal categories of Sharia rulings: those which are prohibited, those which are permitted, and those which are obligatory. Sharia, therefore, provides a platform for the consideration of any decision, including whether or not to comply with TRIPS. The broad principles that affect compliance with TRIPS have been summarised by Alabdulkarim, as follows:

Trades, contracts, and property are sacred and entitled under Sharia rules. Commercial ethics, fair competition and good faith are underlined by Sharia, as are honesty and fairness in trade. Sharia prevents taking others' property and profiting by unlawful actions. Additionally, unlawful ownership and trade in forbidden items, such as alcohol and drugs [and pork-related food products], are prohibited. Therefore, Sharia recognizes morals, fairness, and honesty among traders in commercial dealings.<sup>194</sup>

These general principles of Islamic law influence the degree of compliance with TRIPS the Kingdom can achieve. In sum, any international legal obligation is generally regarded as enforceable as far as it conforms to Sharia. Any aspect that is deemed to be prohibited under Islamic law, by contrast, such as *darar* (harm), *mayser* (obtaining profits without labour), *gharar*

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<sup>190</sup> *ibid.*

<sup>191</sup> *ibid.*

<sup>192</sup> *ibid.*

<sup>193</sup> Sayyid Abul A'la Maududi, 'The Islamic Concept of Life (3/3)' (*Alukah*, 2015) <[http://en.alukah.net/Shariah/0/6803/1/wajib\\_makruh/](http://en.alukah.net/Shariah/0/6803/1/wajib_makruh/)> accessed 8 May 2022.

<sup>194</sup> Alabdulkarim, 'Intellectual Property Rights in the Kingdom of Saudi Arabia' (n 185) 86. See also Raj Bhala, 'Saudi Arabia, the WTO, and American Trade Law and Policy' (2004) 38 *International Lawyer* (ABA) 741.



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(indeterminacy), *riba* (usury or the charging of interest),<sup>195</sup> gambling or IP involving elements prohibited by Sharia, would be considered unenforceable.<sup>196</sup>

The third parameter is the physical size of the Kingdom.<sup>197</sup> According to MapFight,

With a land area of approximately 2,150,000 km<sup>2</sup> (830,000 sq mi), [the KSA] is geographically the largest sovereign state in Western Asia, the second largest in the Arab world (after Algeria), the fifth largest in Asia, and the 12th-largest in the world.<sup>198</sup>

Judged on the basis of physical size alone, the KSA is the largest country among the countries of the Middle East and the second largest among the countries of the Middle East and Africa listed in Table 7.2 above.<sup>199</sup> Only Algeria is larger, by approximately 11%.<sup>200</sup> As Table 7.2 shows, however, the overall rate of unlicensed software installation in Algeria in 2017 was 82%, while it was 47% in the KSA.<sup>201</sup> Accordingly, although the overall rate was much higher in Algeria than in the Kingdom, when the physical size of a country is incorporated into a sliding scale of

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<sup>195</sup> Alabdulkarim, 'Intellectual Property Rights in the Kingdom of Saudi Arabia' (n 185) 86–92.

<sup>196</sup> For example, Article 1 of the Law of Procedures before the Board of Grievances states that 'Courts shall apply to cases before them provisions of Shari'ah laws, in accordance with the Qur'an and Sunnah of the Prophet (peace be upon him), and laws promulgated by the State that do not conflict with the Qur'an and Sunnah, and their proceedings shall comply with the provisions of this Law'. BoE, 'Law of Procedures before the Board of Grievances' (*Bureau of Experts at the Council of Ministers*, 2013) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/f2f7b465-b576-4f47-a8e7-a9a700f27202/2>> accessed 8 May 2022. The Law of Procedures before the Board of Grievances has been translated into English by the Human Rights Library of the University of Minnesota. See Human Rights Library, University of Minnesota, 'Law of Procedure before Sharia Courts – Saudi Arabia' (*Human Rights Library, University of Minnesota*, 2000) <[http://hrlibrary.umn.edu/research/saudi-arabia/law\\_of\\_procedure.html](http://hrlibrary.umn.edu/research/saudi-arabia/law_of_procedure.html)> accessed 8 May 2022. Similarly, Section (a) of Article 4 of the Law of Patents, Layout Designs of Integrated Circuits, Plant Varieties, and Industrial Designs states that 'The protection document shall not be granted if its commercial exploitation violates the Shari'ah (Islamic law)'. BoE, 'Law of Patents, Layout Designs of Integrated Circuits, Plant Varieties, and Industrial Designs' (*Bureau of Experts at the Council of Ministers*, 2004) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/6cfde53b-e803-49be-b2c6-a9a700f1c434/2>> accessed 8 May 2022. Article 4 of the Law of Patents, Layout Designs of Integrated Circuits, Plant Varieties, and Industrial Designs has been translated into English by the WIPO. See WIPO, 'Saudi Patent Office' (*World Intellectual Property Organisation*) 2 <[www.wipo.int/export/sites/www/scp/en/exceptions/replies/saudi\\_arabia.pdf](http://www.wipo.int/export/sites/www/scp/en/exceptions/replies/saudi_arabia.pdf)> accessed 8 May 2022.

<sup>197</sup> Jacobson and Weiss (n 14) 529–535.

<sup>198</sup> MapFight, 'Saudi Arabia' (*MapFight*) <<https://mapfight.xyz/map/sa/>> accessed 9 May 2022.

<sup>199</sup> World Population Review, 'Middle East Countries 2022' (*World Population Review*, 2022) <<https://worldpopulationreview.com/country-rankings/middle-east-countries>> accessed 9 May 2022; Worldometer, 'Largest Countries in the World (by Area)' <[www.worldometers.info/geography/largest-countries-in-the-world/](http://www.worldometers.info/geography/largest-countries-in-the-world/)> accessed 9 May 2022.

<sup>200</sup> Worldometer, 'Largest Countries in the World (by Area)' (n 199); Comparea, 'Algeria Is 11% Larger than Saudi Arabia' <[www.comparea.org/SAU+DZA](http://www.comparea.org/SAU+DZA)> accessed 9 May 2002.

<sup>201</sup> BSA, 'BSA Global Software Survey' (n 70) 11; BSA, 'BSA Global Software Survey — In Brief' (n 70) 3.

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influence, the effect of this rate is somewhat reduced in Algeria compared to the Kingdom because Algeria is larger than the KSA. By contrast, Bahrain's overall rate of unlicensed software installation in 2017 (52%) was only 5% higher than that of the KSA.<sup>202</sup> In terms of physical size, however, the KSA is approximately 2,829 times larger than Bahrain, the smallest of the countries in the Middle East.<sup>203</sup> Consequently, the KSA will arguably have a much higher degree of compliance than Bahrain when the parameter of physical size is considered in the context of a sliding scale of influence.

The fourth parameter is the physical variation within a country, which can be related to its physical size.<sup>204</sup> The perceived level of compliance with TRIPS achieved by the Kingdom, for example, may differ when the physical variation of member states is considered as part of the analysis. For example, the KSA's overall rate of unlicensed software installation was 47% in 2017, while in China it was 66%,<sup>205</sup> suggesting that the Kingdom has a much higher degree of compliance than China. However, the physical differences between the KSA and China are highly significant, not only because China is approximately 4.5 times bigger and has a higher degree of physical variation than the KSA, but also because China, with a population density of 153 people per km<sup>2</sup>, is much more densely populated than the Kingdom, where there are only 16 people per km<sup>2</sup>.<sup>206</sup> Such variations have implications for states' compliance behaviour. Feder, for example, noted that the huge size of China prevents effective monitoring of compliance with TRIPS.<sup>207</sup> Feder considered the physical size of the state and its physical variation as major obstacles preventing China from

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<sup>202</sup> *ibid.*

<sup>203</sup> World Population Review, 'Middle East Countries 2022' (n 199); Comparea, 'Saudi Arabia Is 2,829 Times Larger than Bahrain' <[www.comparea.org/BHR+SAU](http://www.comparea.org/BHR+SAU)> accessed 16 May 2022.

<sup>204</sup> Jacobson and Weiss (n 14) 529–535.

<sup>205</sup> BSA, 'BSA Global Software Survey' (n 70) 10, 11; BSA, 'BSA Global Software Survey — In Brief' (n 70) 2, 3.

<sup>206</sup> Comparea, 'China Is 4.5 Times Larger than Saudi Arabia' <[www.comparea.org/CHN+SAU](http://www.comparea.org/CHN+SAU)> accessed 16 May 2016; Worldometer, 'Saudi Arabia Population (LIVE)' (*Worldometer*, 2022) <[www.worldometers.info/world-population/saudi-arabia-population/](http://www.worldometers.info/world-population/saudi-arabia-population/)> accessed 9 May 2022; Worldometer, 'China Population (LIVE)' (*Worldometer*, 2022) <[www.worldometers.info/world-population/china-population/](http://www.worldometers.info/world-population/china-population/)> accessed 9 May 2022. 'The majority of Saudi Arabia is uninhabited due to its extensive harsh, dry desert that experiences wide temperature ranges. Less than 2% of the land in Saudi Arabia is arable and the percentage is dropping.' TeachMideast, 'Saudi Arabia' (*Middle East Policy*) <[https://teachmideast.org/country-profiles/saudi-arabia/#:~:text=The majority of Saudi Arabia,and the percentage is dropping.](https://teachmideast.org/country-profiles/saudi-arabia/#:~:text=The%20majority%20of%20Saudi%20Arabia,and%20the%20percentage%20is%20dropping.)> accessed 9 May 2022. For a further comparison of the physical variations between KSA and China, see, for example, NationMaster, 'Geography Stats: Compare Key Data on China & Saudi Arabia' <[www.nationmaster.com/country-info/compare/China/Saudi-Arabia/Geography](http://www.nationmaster.com/country-info/compare/China/Saudi-Arabia/Geography)> accessed 9 May 2022.

<sup>207</sup> Gregory S Feder, 'Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, but You Can't Make It Drink' (1996) 37 *Virginia Journal of International Law* 223, 253.

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realising its desire to comply with its commitments because it does not have ‘the means to do so effectively’.<sup>208</sup> Indeed, one participant in Thomas’s research who worked for an MNC in China, commented that ‘[IP protection is] much better in some areas of China than others – China is not a single country but more like a series of smaller countries!’<sup>209</sup> Indeed, Thomas acknowledges that the enormous differences between China’s large and small cities and inland regions make it very difficult to generalise about the Chinese IP system as a whole.<sup>210</sup> In turn, the physical variation within individual states helps to explain the variations in the rates of IP infringements among the TRIPS member states.

The fifth (and final) parameter is the number of countries that share a border with the KSA.<sup>211</sup> As Jacobson and Weiss’s model and Thomas’s work make clear, this can affect the compliance of WTO member states which have signed up to TRIPS in two ways. First, an individual state may utilise the IP systems of a neighbouring state as a model when establishing or improving its own IP system.<sup>212</sup> Second, the greater the physical size of a member state and the greater the number of neighbours it has, the more challenging it is for customs officials to enforce IP law at that state’s borders.<sup>213</sup>

The KSA shares land borders with seven countries (Iraq, Jordan, Kuwait, Oman, Qatar, United Arab Emirates, and Yemen),<sup>214</sup> and ‘maritime boundaries’ with a further five (Bahrain, Egypt, Eritrea, Iran, and Sudan).<sup>215</sup> According to the hypothesis suggested by Thomas and Jacobson and Weiss, this parameter is likely to influence the KSA’s compliance behaviour, because the state has a relatively large number of neighbours. Indeed, in its 2015 annual report, Saudi Customs stated that ‘political instability in some neighbouring countries contributes to smuggling attempts of prohibited goods into the Kingdom, which requires immense efforts to confront the risks and

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<sup>208</sup> *ibid.*

<sup>209</sup> Thomas (n 35) 114.

<sup>210</sup> *ibid.*

<sup>211</sup> Jacobson and Weiss (n 14) 529–535.

<sup>212</sup> *ibid.* 532; Thomas (n 9) 115.

<sup>213</sup> Jacobson and Weiss (n 14) 532; Thomas (n 9) 115.

<sup>214</sup> Helen Chapin Metz (ed), ‘Geography’ in *Saudi Arabia: A Country Study* (GPO for the US Library of Congress 1992) <<http://countrystudies.us/saudi-arabia/14.htm>> accessed 17 May 2022.

<sup>215</sup> Marineregions.org, ‘Saudi Arabia · MRGID 8356’ <[www.marineregions.org/eezdetails.php?mrgid=8356](http://www.marineregions.org/eezdetails.php?mrgid=8356)> accessed 16 May 2022.

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smuggling through the customs ports'.<sup>216</sup> By contrast, the GCC states seem to contribute positively to the KSA's compliance with TRIPS. In addition to establishing an IP training centre for GCC countries, several agreements on IP have been established to strengthen intellectual property protection among neighbouring countries.<sup>217</sup> These IP agreements include the Trademark Law of the States of the Cooperation Council for the Arab States of the Gulf,<sup>218</sup> the GCC Patent Law,<sup>219</sup> and the Uniform GCC Customs Law.<sup>220</sup>

### 7.3.3 Fundamental factors

In the more inclusive model developed by Jacobson and Weiss, three subfactors are listed as fundamental factors with the potential to influence the KSA's compliance with TRIPS.<sup>221</sup> As shown in Figure 7.1 above, these are (i) economic considerations, (ii) attitudes and values in the Kingdom, and (iii) political and institutional influences.<sup>222</sup> Each of these is discussed in turn below.

Economic factors seem to have a significant positive influence on the Kingdom's implementation of and compliance with TRIPS. For example, and as noted in Chapters 1, 5 and 6, some researchers consider the KSA to be a role model for other states attempting to comply with TRIPS.<sup>223</sup> One of those researchers, Urban, tacitly acknowledges that economic factors have facilitated the

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<sup>216</sup> Saudi Customs, 'Annual Report of the General Customs Authority 2015 (Ninth Chapter)' (2015) <[https://eservices.zatca.gov.sa/sites/sc/ar/AnnualReport/AR2015/Documents/الفصل التاسع.pdf](https://eservices.zatca.gov.sa/sites/sc/ar/AnnualReport/AR2015/Documents/الفصل%20التاسع.pdf)> accessed 15 May 2022.

<sup>217</sup> GCC, 'Achievements: Intellectual Property Training Center for the Cooperation Council Countries' (*Cooperation Council for the Arab States of the Gulf*, 2022) <[www.gcc-sg.org/ar-sa/CooperationAndAchievements/Achievements/EconomicCooperation/CooperationintheFieldofPatents/Achievements/Pages/FourthIntellectualPropertyTrai.aspx](http://www.gcc-sg.org/ar-sa/CooperationAndAchievements/Achievements/EconomicCooperation/CooperationintheFieldofPatents/Achievements/Pages/FourthIntellectualPropertyTrai.aspx)> accessed 10 May 2022.

<sup>218</sup> BoE, 'Trademark Law of the States of the Cooperation Council for the Arab States of the Gulf' (*The Bureau of Experts at the Council of Ministers*, 2016) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/b2d0decd-a691-45b9-9af0-a9a700f1e86f/2>> accessed 3 April 2021.

<sup>219</sup> BoE, 'GCC Patent Law' (*The Bureau of Experts at the Council of Ministers*, 2001) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/f95138ff-0892-49b0-921c-a9a700f1c37f/2>> accessed 3 April 2021.

<sup>220</sup> BoE, 'Uniform GCC Customs Law' (*Bureau of Experts at the Council of Ministers*, 2003) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/b93d0275-775f-482a-9d52-a9a700f2ca15/2>> accessed 10 May 2022. For further details of the regulations and cooperation of the GCC States in relation to trademark enforcement through border measures, see, for example, Lolwa Naser Mohamed Alfadhel, 'Trademark Enforcement through Border Measures: The Case of the Gulf Cooperation Council States (GCC)' (PhD thesis, Queen Mary, University of London 2017).

<sup>221</sup> Jacobson and Weiss (n 14) 529–535.

<sup>222</sup> *ibid.*

<sup>223</sup> Jennifer Urban, 'The Struggle for Middle Eastern Nations to Join the World Trade Organization' (*Social Science Research Network*, 2016) 1 25–26 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2400765](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400765)> accessed 31 March 2021.

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implementation of TRIPS in the Kingdom; hence, less wealthy member states may find it more difficult to do so.<sup>224</sup> Likewise, Malkawi contends that, unlike numerous Arab states in which there has been little or no economic development, economic factors are unlikely to adversely affect the compliance of Gulf states with IPRs.<sup>225</sup> Moreover, as discussed in Chapter 1, compliance with TRIPS is becoming increasingly relevant for the success of the KSA's 'Vision 2030',<sup>226</sup> which primarily aims to diversify the Saudi economy, thereby reducing the Kingdom's dependence on oil as a source of revenue.<sup>227</sup> Official statements by the Saudi government have recently suggested that compliance with IPR is extremely important for raising non-oil revenues (NOR).<sup>228</sup>

Other scholars, however, have questioned the likelihood that many people in the Kingdom infringe copyright and related rights for economic reasons.<sup>229</sup> In his study of 'the reality of awareness of teachers and students at King Saud University of intellectual property rights related to the protection of computer programs', for example, Al Hadlaq found that 83% of teachers and 75.12% of students believe that buying counterfeit software provides knowledge at a cheaper rate.<sup>230</sup> Thus, while economic factors appear to have played an influential role in the implementation of TRIPS, and despite the Saudi government's stated position that compliance with TRIPS is economically essential, economic considerations are a factor in the decision of some people in the Kingdom to infringe IPR.

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<sup>224</sup> *ibid.*

<sup>225</sup> Bashar H Malkawi, 'The Alliance between Islamic Law and Intellectual Property: Structure and Practice' (2013) 10 *University of St Thomas Law Journal* 618, 643–644.

<sup>226</sup> For further details, see Saudi Vision 2030, 'Our Vision' <[www.vision2030.gov.sa/en/node](http://www.vision2030.gov.sa/en/node)> accessed 1 April 2021.

<sup>227</sup> Saudi Vision 2030, 'Thriving Economy' <[www.vision2030.gov.sa/en/themes/2](http://www.vision2030.gov.sa/en/themes/2)> accessed 1 April 2021; Saudi Vision 2030, 'National Transformation Program' <[www.vision2030.gov.sa/en/programs/NTP](http://www.vision2030.gov.sa/en/programs/NTP)> accessed 1 April 2021; Saudi Vision 2030, 'Vision Progress' <[www.vision2030.gov.sa/en/vision-progress](http://www.vision2030.gov.sa/en/vision-progress)> accessed 1 April 2021; Raja Almarzoqi and Assil El Mahmah, 'Non-Oil Revenue and Economic Growth on Major Net Oil Exporters? Evidence from Saudi Arabia' (2020) *Journal of Economic Structures* (under review) 1 <[www.researchsquare.com/article/rs-132808/v1](http://www.researchsquare.com/article/rs-132808/v1)> accessed 1 April 2021.

<sup>228</sup> See, for example, WIPO, 'Saudi Arabia Gears up on IP' (n 39); 'The Saudi Authority for Intellectual Property Organises an Introductory Meeting with Business Owners in the Council of Saudi Chambers' (n 39).

<sup>229</sup> Abdullah Abdulaziz Al Hadlaq, 'The Reality of Awareness of Teachers and Students of King Saud University of Intellectual Property Rights Related to the Protection of Computer Programs' (2013) 14 *Journal of College of Education at Port Said University* 348, 349 (in Arabic).

<sup>230</sup> *ibid* 386.

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The second subfactor is societal attitudes and values in the Kingdom.<sup>231</sup> To the best of the author's knowledge, Jacobson and Weiss's model did not provide a clear definition that can be used to differentiate between the history and culture of the KSA's discussed above and its views concerning IP.<sup>232</sup> Regardless, it seems likely that Saudi history and culture have helped to shape the Kingdom's current laws in general, whereas the attitudes and values of its people may have influenced current public opinion on IPR. Research findings on the level of public awareness in the KSA regarding IPRs are somewhat inconsistent,<sup>233</sup> and some studies that have found a high level of awareness have acknowledged that this has not prevented the continued infringement of IPRs. For example, research by the Saudi Consumer Empowerment Index has shown that 47.2% of consumers have bought an imitation product even though they knew the importance of IPRs.<sup>234</sup> The reasons for this behaviour are multifaceted and relevant to societal attitudes and values in the Kingdom. First, as discussed in Chapter 3, many people in Middle Eastern nations are not wholly convinced that Islam forbids the unauthorised use of IP, believing instead that laws that protect IP are merely an intrusion by Western powers whose aim is to constrain the economies of other states.<sup>235</sup> Second, some scholars, such as Al-Jarf and Al Hadlaq, have shown that while there is a degree of support in the Kingdom for the protection of IP, they do not accept certain definitions and boundaries of IPRs,<sup>236</sup> because in their view, the rights of the consumer are more important than those of the producer of a work.<sup>237</sup> Third, some scholars, such as Alabdulkarim, Malkawi and Elmahjub, have observed that societal attitudes and values in the Arab states are 'based on

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<sup>231</sup> Jacobson and Weiss (n 14) 529–535.

<sup>232</sup> Thomas also noted there is significant overlap between some of the subfactors included in Jacobson and Weiss's model. Thomas (n 35) 109.

<sup>233</sup> See, for example, Alabdulkarim, 'Intellectual Property Rights in the Kingdom of Saudi Arabia' (n 185); Al Hadlaq (n 229); Reima Al-Jarf, 'Intellectual Property and eLearning at Saudi Universities: Problems and Solutions' (2013) *Quality and Efficiency in eLearning: Proceedings of the 9<sup>th</sup> International Scientific Conference, eLearning and Software for Education*, Bucharest, 25-26 April 2013) vol 1, 243; Saudi Consumer Protection Association, 'Study of the "Saudi Consumer Empowerment Index"' (2019) 17 <<https://cpa.org.sa/page/70/>> (in Arabic) accessed 14 February 2022.

<sup>234</sup> Saudi Consumer Protection Association (n 233) 17.

<sup>235</sup> Timothy Brindley, 'Conflicting Values in International Intellectual Property Standards for Pharmaceuticals: Western Frameworks vs Islamic Traditions in the Middle East' (Master's dissertation, Georgetown University 2014) 22, 47–48; Silvia Beltrametti, 'The Legality of Intellectual Property Rights under Islamic Law' in T Mach and others (eds), *The Prague Yearbook of Comparative Law* (The Prague Centre for International and Comparative Law 2010) 55, 103–104.

<sup>236</sup> Al Hadlaq (n 229) 383; Al-Jarf (n 233) 5.

<sup>237</sup> Al Hadlaq (n 229) 383.

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principles of sharing and contribution'.<sup>238</sup> From this perspective, those who infringe IPRs do not intend to violate; rather, they believe that sharing IP is consistent with the spirit of generous cooperation 'that may earn them rewards from God in the afterlife'.<sup>239</sup> Hence, sharing copyright-protected works on the internet or with other people is considered both normal and acceptable.<sup>240</sup> In this sense, it can be argued that societal attitudes and values in the KSA discourage the state from compliance.

Political systems and institutional influences within a state are the third and final fundamental factor that can affect its implementation of and compliance with an international legal agreement.<sup>241</sup> According to Jacobson and Weiss's model, large nations, which have different levels of government, such as the federal system, face much greater challenges when implementing and complying with international legal obligations agreements than do smaller nations.<sup>242</sup> For example, 'sometimes the authority of the central government, which accepts international obligations, does not reach deeply into local areas'.<sup>243</sup> As previously noted, the KSA is governed by an absolute monarchy.<sup>244</sup> Hence, compared to the US, for example, where in some cases the president must receive approval to do so from the Senate before an international legal agreement can progress to ratification,<sup>245</sup> in the KSA, 'the King is the ultimate arbiter for [the state's] Authorities'.<sup>246</sup>

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<sup>238</sup> Alabdulkarim, 'Intellectual Property Rights in the Kingdom of Saudi Arabia' (n 185) 129–130; Malkawi (n 225) 643; Ezieddin Mustafa Elmahjub, 'Protection of Intellectual Property in Islamic Shari'a and the Development of the Libyan Intellectual Property System' (PhD thesis, Queensland University of Technology 2014) 64 <[https://eprints.qut.edu.au/76106/1/Ezieddin M. Jaballa\\_Elmahjub\\_Thesis.pdf](https://eprints.qut.edu.au/76106/1/Ezieddin_M._Jaballa_Elmahjub_Thesis.pdf)>.

<sup>239</sup> Alabdulkarim, 'Intellectual Property Rights in the Kingdom of Saudi Arabia' (n 185) 129–130; Elmahjub (n 238) 64.

<sup>240</sup> Alabdulkarim, 'Intellectual Property Rights in the Kingdom of Saudi Arabia' (n 185) 129–130.

<sup>241</sup> Jacobson and Weiss (n 14) 529–535.

<sup>242</sup> *ibid* 532. Federalism is defined as 'a system of government in which the same territory is controlled by two levels of government. Generally, an overarching national government is responsible for broader governance of larger territorial areas, while the smaller subdivisions, states, and cities govern the issues of local concern'. Legal Information Institute, 'Federalism' (*Cornell Law School*) <[www.law.cornell.edu/wex/federalism#:~:text=Federalism is a system of,the issues of local concern.](http://www.law.cornell.edu/wex/federalism#:~:text=Federalism is a system of,the issues of local concern.)> accessed 17 May 2022.

<sup>243</sup> Jacobson and Weiss (n 14) 532.

<sup>244</sup> BoE, 'Basic Law of Governance' (*Bureau of Experts at the Council of Ministers*, 1992) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/16b97fcb-4833-4f66-8531-a9a700f161b6/1>> accessed 28 March 2021.

<sup>245</sup> It is worth noting that in some cases the USA's implementation of and compliance with an international legal agreement has remained under consideration for a long time even after the president has signed it. United States Senate, 'About Treaties' <[www.senate.gov/about/powers-procedures/treaties.htm](http://www.senate.gov/about/powers-procedures/treaties.htm)> accessed 17 May 2022.

<sup>246</sup> BoE (n 244).

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According to Jacobson and Weiss's model, the task of complying with international legal agreements should therefore be less complicated in the KSA than in the US. However, if allegations concerning infringements of copyrights by the Saudi government prove to be true,<sup>247</sup> the hypothesis suggested by Jacobson and Weiss is debatable and even needs further investigation.

### 7.3.4 Proximate factors

According to Jacobson and Weiss's model, the third and final category of state-specific factor that potentially affect the KSA's compliance with TRIPS are the proximate factors.<sup>248</sup> As shown in Figure 7.1, four subfactors fall under this heading: (i) the Kingdom's administrative capacity; (ii) the role of NGOs in or in relation to the arena of IP; (iii) the attitude of the Saudi leadership towards IP; and (iv) knowledge and information about IP.<sup>249</sup>

Some of these subfactors have already been discussed under different headings; others overlap significantly and therefore can be combined. For example, the attitude of the leadership was discussed under the heading of political systems and institutional influences within a state. An important conclusion from that discussion, if allegations concerning infringements of copyright by the Saudi government prove to be true,<sup>250</sup> is that the attitude of the leadership in the KSA has simultaneously positive and negative effects on the state's implementation of and compliance with TRIPS.

It can be argued that the KSA's administrative capacity, knowledge and information in relation to IP, which can be grouped under a single heading, have improved dramatically since the Kingdom joined TRIPS in 2005, and particularly in the last five years. For example, in 2018, the Saudi government established the Saudi Authority for Intellectual Property (hereinafter "SAIP") as the only competent authority for IP in the Kingdom.<sup>251</sup> SAIP 'serves as a "one-stop shop" for all

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<sup>247</sup> See Chapter 1 (Subsection 1.3.6) and Chapter 6 (Section 6.7) for details.

<sup>248</sup> Jacobson and Weiss (n 14) 529–535.

<sup>249</sup> *ibid.*

<sup>250</sup> See Chapter 1 (Subsection 1.3.6) and Chapter 6 (Section 6.7) for details.

<sup>251</sup> WIPO, 'Saudi Arabia Gears up on IP' (n 39); BoE, 'Regulating the Saudi Authority for Intellectual Property' (*Bureau of Experts at the Council of Ministers*, 2018) <<https://laws.boe.gov.sa/BoeLaws/Laws/Viewer/3afb71af-27a0-4562-a6df-a9f600fd973b?lawId=6cf17f84-7a45-4ff1-a61a-a9f600fd90bd>> (in Arabic) accessed 21 May 2022.



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matters relating to the protection, regulation and enforcement of IP rights in Saudi Arabia'.<sup>252</sup> Prior to 2018, three different competent authorities had been responsible for IP the KSA, whose overlapping competencies led to administrative problems.<sup>253</sup> According to Jacobson and Weiss, 'A crucial factor contributing to the variance among the performance of countries is administrative capacity. Countries that have stronger administrative capacities can do a better job.'<sup>254</sup> Despite the recent improvement in the KSA's performance in this regard, however, it is perhaps still too early to conclude that these subfactors have played a crucial positive role in the Kingdom's compliance. This is evident from recent reports presenting details of SAIP's inspection and awareness campaigns, which have been conducted in a limited number of cities.<sup>255</sup>

### 7.3.5 Concluding remarks

In this section, various state-specific factors that have a potential impact on the KSA's compliance have been examined. The number, variety and complexity of these factors strongly suggests that the influence of Sharia and the KSA's Islamic identity on the Kingdom's compliance with TRIPS is less significant than has often been argued in the literature. Indeed, as is evident from the preceding discussion, the degree of compliance that any country achieves ultimately is influenced by a variety of complex factors. At the same time, the foregoing analysis reveals the contextual uniqueness of the Kingdom and the features and factors which distinguish it from some other member states in terms of its compliance with TRIPS.

Finally, the discussion has shown that although Jacobson and Weiss's model of the state-specific factors that affect the compliance of TRIPS member states is demonstrably capable of addressing the apparent inadequacies of the theories discussed in Chapters 5 and 6, it has some shortcomings. For example, it may not include other factors necessary to make it fit for purpose, such as the

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<sup>252</sup> WIPO, 'Saudi Arabia Gears up on IP' (n 39).

<sup>253</sup> These were [i] 'the Ministry of Commerce and Investment for trademarks and trade names, [ii] the Ministry of Culture and Information for copyright and related rights, and [iii] King Abdulaziz City for Science and Technology for patents'. Alabdulkarim, 'Intellectual Property Rights in the Kingdom of Saudi Arabia' (n 185) 113.

<sup>254</sup> Jacobson and Weiss (n 14) 530.

<sup>255</sup> See, for example, SAIP, '2020 Annual Report of Intellectual Property Enforcement' (2020) 1–4 <[https://static.saip.gov.sa/a/r/n/o/web/Respect\\_Report\\_2020.V16.pdf](https://static.saip.gov.sa/a/r/n/o/web/Respect_Report_2020.V16.pdf)> (in Arabic) accessed 11 February 2022; SAIP, '2019 Annual Report of Intellectual Property Respect Department' (2019) <[www.saip.gov.sa/wp-content/uploads/publications/2019\\_Intellectual\\_Property\\_Respect\\_Report.pdf](http://www.saip.gov.sa/wp-content/uploads/publications/2019_Intellectual_Property_Respect_Report.pdf)> (in Arabic) accessed 11 February 2022.

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reputational factor discussed in Section 6.7. Therefore, to achieve the aim of this thesis, which is to develop a more comprehensive understanding of the factors influencing states' compliance with the international legal obligations to which they have consented, it would be beneficial to include this subfactor in Jacobson and Weiss's model. Moreover, some of the hypotheses proposed by Jacobson and Weiss may not apply to the case of the Kingdom's compliance with TRIPS, such as those hypothesis concerning political systems and institutional influences discussed above. This, in turn, underscores the need for further investigation of the detailed factors included in this model.

### **7.4 Conclusion**

TRIPS was created to ensure international member states comply with a comprehensive set of obligations designed to promote and preserve a free market in a global economy and 'effective and adequate protection of IPRs', and to ensure that 'measures and procedures to enforce IPRs do not themselves become barriers to legitimate trade'.<sup>256</sup> While the IPR protections established by TRIPS are essential components of an international commitment to integrity, equally if not more important is the compliance of member states with that commitment.<sup>257</sup> Legal scholars have explained how compliance with international legal agreements, including the obligations set out by the WTO under TRIPS, is an essential feature of membership and thus countries should be willing to show their commitment to the compliance process.<sup>258</sup> However, as this chapter has demonstrated, compliance is not always a straightforward dynamic, and there are many complex factors that can complicate states' efforts to comply, regardless of their willingness to do so.

In the context of TRIPS, this chapter has investigated those non-state and state-related factors that can facilitate or obstruct compliance and therefore should be considered by legal scholars seeking to ascertain the level of compliance of a particular member state. For example, while a member may fully intend to comply upon entering an agreement, non-state factors may arise subsequently that adversely affect its ability to do so. Legal scholars would be wise to recognise the inherent

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<sup>256</sup> WTO, 'Uruguay Round Agreement: TRIPS, Preamble' <[www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_02\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_02_e.htm)> accessed 31 March 2021.

<sup>257</sup> Chiara Giorgetti, 'Why Should International Law Be Concerned about State Failure' (2010) 16 *ILSA Journal of International and Comparative Law* 469.

<sup>258</sup> *ibid.*

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complexity of compliance and examine the potential impact of these factors thoroughly before recommending further measures.

Because conflicts can emerge between state and non-state factors in terms of their influence on states' behaviour, it is also important to understand implementation of and compliance with international law in the local contexts in which it is applied. In the context of the KSA, the sliding scale model provides a valuable framework for understanding the role of Sharia governance on the Kingdom's compliance. There are several other works that offer more comprehensive models (e.g., hybrid or mixed models, which combine theories emerging from the legal academy with those emerging from the international relations academy) that postulate the reasons for states' compliance. Examples of these works include Risse, Ropp, and Sikkink's joint work, Goodman and Jinks' work, and Hillebrecht's work.<sup>259</sup> Like the compliance theories previously discussed, however, these works are incomplete or less comprehensive than Jacobson and Weiss's model, which, despite some shortcomings, remains the most appropriate approach to facilitate a better understanding of the factors that influence the KSA's compliance with TRIPS.

In critiquing a state's compliance with TRIPS, it is important to factor in the context-specific mitigating factors that influence its degree of compliance rather than paint every member with the same broad brush. In other words, compliance issues must be examined from a legal perspective on a case-by-case basis, with an awareness that comparisons between states may have limited value depending on which factors are at play. This chapter has advanced the argument that other factors should be considered in assessing a country's degree of compliance with TRIPS due to the plurality and diversity of potential influences on the ability of an individual state to comply with certain aspects of an international law, even after agreeing to do so. Further research would be helpful, particularly in relation to countries which have features similar to those of the KSA (i.e., other theocracies, states with Muslim majorities, and monarchies) to ascertain the extent to which the Kingdom is typical or anomalous.

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<sup>259</sup> For further discussion of these works, see, for example, Victor O Ayeni, 'Why States Comply with Decisions of International Human Rights Tribunals: A Review of the Principal Theories and Perspectives' (2019) 10 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 1; Elizabeth Stubbins Bates, 'Sophisticated Constructivism in Human Rights Compliance Theory' (2014) 25 European Journal of International Law 1169.

## **Chapter 8: Conclusion**

This study was based on the hypothesis that compliance is not a black or white phenomenon; in other words, it is not binary. States are not either compliant or non-compliant; rather, compliance is better conceived as a sliding scale, allowing researchers to account for a variety of complex factors that influence the degree to which a state is compliant. In the context of Saudi Arabia's implementation of and compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter "TRIPS"), looking beyond the Sharia lens allows a deeper understanding of a variety of complex factors that influence its degree of compliance. In recent decades, as a result of neoliberal globalisation, there have been profound changes in the way in which the nations of the world engage with each other economically, socially, culturally, and politically.<sup>1</sup> At the same time, the laws prescribing international relations have gone through extraordinary shifts, especially regarding the domain and scope of international legal institutions, thereby creating new legal considerations. Notably, international trade agreements, including those concerned with intellectual property (hereinafter "IP") protections and provisions, are a major contributing factor in this transformation. International trade law continues to develop and, crucially, compliance with new international agreements, not to mention acceptance of stated legal obligations by all signatories to them, are essential to substantiate the legitimacy of these treaties and the principle of the systemisation of rules and regulations internationally.<sup>2</sup>

Although the Kingdom of Saudi Arabia (hereinafter "the KSA" or "the Kingdom") is recognised as one of the world's largest oil producers and despite the fact that over 70% of its GDP is based on overseas trade, it is still labelled as a developing country.<sup>3</sup> Under the umbrella of the World

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<sup>1</sup> For further discussion of neoliberal economic globalisation, see, for example, Siri Gamage, 'Globalization, Neoliberal Reforms and Inequality: A Review of Conceptual Tools, Competing Discourses, Responses, and Alternatives' (2015) 31 *Journal of Developing Societies* 8.

<sup>2</sup> Chiara Giorgetti, 'Why Should International Law Be Concerned about State Failure' (2010) 16 *ILSA Journal of International and Comparative Law* 469.

<sup>3</sup> World Trade Organisation (WTO), 'Map of Negotiating Groups in the Doha Negotiations' <[www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_maps\\_e.htm?group\\_selected=GRP002b](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_maps_e.htm?group_selected=GRP002b)> accessed 27 February 2021; WTO, 'The Doha Round' <[www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm)> accessed 27 February 2021; Karen Elliott House, *On Saudi Arabia: Its People, Past, Religion, Fault Lines--and Future* (reprint edn, Alfred

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Trade Organisation (hereinafter “the WTO”), the KSA, after twelve years of complex negotiations over its application for WTO membership, has entered into various agreements, including TRIPS.<sup>4</sup> Under this agreement, the KSA must act in accordance with the international legal obligations set by the WTO.<sup>5</sup> However, because some of these obligations are inconsistent with the provisions of Sharia, which forms the basis of the Saudi legal system, the issue of the KSA’s compliance with its WTO obligations remains unresolved, despite the domestic and international benefits of compliance for the country.<sup>6</sup> As Hamzah observes:

The growing impact of international law rules had significantly encroached on the legislative independence of modern nation-states thereby weakening their presumed legislative sovereignty. The development of domestic legislations of modern Saudi Arabia typifies this encroachment.<sup>7</sup>

Central to this ongoing conflict between international trade law and Sharia is the KSA’s unwillingness to engage in economic activities (e.g., the production and sale of alcohol and pork-related products) and certain services in the banking and insurance sectors which are forbidden in Islam.<sup>8</sup> Other scholars, however, have noted the widespread praise the KSA has enjoyed in response to the measures it has taken to align other WTO obligations with its current domestic

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A Knopf 2013); Dabbeeru Neelakanteswar Rao, ‘Saudi Arabia’s Accession to WTO: Future Challenges’ (*Social Science Research Network*, 2007) 1 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=957589](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=957589)> accessed 27 March 2021.

<sup>4</sup> Rao (n 3) 1; WTO, ‘Member Information: Kingdom of Saudi Arabia and the WTO’ <[www.wto.org/english/thewto\\_e/countries\\_e/saudi\\_arabia\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm)> accessed 26 March 2021; Raj Bhala, ‘Saudi Arabia, the WTO, and American Trade Law and Policy’ (2004) 38 *International Lawyer (ABA)* 741; Ahmed bin Hamdan, ‘Increased Opportunities for Saudi Products and Services Access to International Markets: The Kingdom’s Accession to the World Trade Organization Is a Historic Step for the Saudi Economy Under the Reign of King Abdullah’ (*Al Riyadh Newspaper*, 22 July 2006) <[www.alriyadh.com/173639](http://www.alriyadh.com/173639)> (in Arabic) accessed 23 July 2021.

<sup>5</sup> For other examples of the obligations that coincided with the Kingdom’s accession to the WTO, see WTO, ‘Accessions: Saudi Arabia’ <[www.wto.org/english/thewto\\_e/acc\\_e/a1\\_arabie\\_saoudite\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_arabie_saoudite_e.htm)> accessed 26 March 2021.

<sup>6</sup> Bureau of Experts at the Council of Ministers, ‘Basic Law of Governance’ (*Bureau of Experts at the Council of Ministers*, 1992) <<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/16b97fcb-4833-4f66-8531-a9a700f161b6/1>> accessed 28 March 2021; Raj Bhala and Shannon B Keating, ‘Diversity within Unity: Import Laws of Islamic Countries on Haram (Forbidden) Products’ (2013) 47 *The International Lawyer* 343.

<sup>7</sup> Dawood Adesola Hamzah, *International Law and Muslim States: Saudi Arabia in Context* (Routledge 2021) 269.

<sup>8</sup> Bhala (n 4).

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legislation.<sup>9</sup> Some legal academics, such as Urban, have gone even further, viewing the Kingdom as a role model for other states attempting to comply with such obligations.<sup>10</sup> This divergence in scholarly opinion regarding the KSA's implementation of and compliance with international trade law raises key questions about the relationship between the two terms. One aim of this thesis, therefore, was to comprehensively explore how the KSA implements and complies with the global legal obligations set out under TRIPS. In addition to highlighting the implications of the numerous international standards set out in TRIPS, including the positive and negative aspects of compliance and their impact on the progress and retardation of agreements generally, this review served to identify areas of weakness or failure that can then be resolved. Employing a library-based qualitative analysis approach, it examined the following research question: What is the appropriate theoretical approach to facilitate a better understanding of the factors that influence the KSA's compliance with TRIPS?

To address the above research question, this thesis began by highlighting and discussing the conceptual problem that stems from the lack of consensus over the distinction between compliance and implementation. It also took the position that contemporary conceptualisations and theories of compliance in the field of international law do not offer a sufficiently comprehensive understanding of what motivates nations to obey or contravene the international legal obligations to which they have consented. It argued that current scholarship on compliance theory not only is Eurocentric in its epistemology, orientations, processes and operations, but also has long perpetuated the idea that compliance is binary – in other words, that countries are either compliant or they are not. Consequently, it continues to overlook the nuances, complexities and paradoxes

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<sup>9</sup> For example, see Christiane Bou Khater, 'Intellectual Property Rights in the Light of the Saudi Arabia's Vision 2030' (2018) 4 *International Journal of Law* 154; Jennifer Urban, 'The Struggle for Middle Eastern Nations to Join the World Trade Organization' (*Social Science Research Network*, 2016) 1 25–26 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2400765](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400765)> accessed 31 March 2021; Afida Mastura Muhammad Arif, 'An Analysis of Copyright Protection in Saudi Arabia' (2014) 56 *International Journal of Law and Management* 38; Nadia Shehzad, 'Developing Intellectual Property Regimes in the Gulf: Utilising Intellectual Property for Positive Economic Growth' (2012) 2 *World Journal of Social Sciences* 231; Malik R Dahlan and Hani Zedan, 'Saudi Arabia: Royal Succession Reforms, Judicial Reforms, SAGIA Economic Cities Initiative, and WTO Accession' (2008) 14 *Yearbook of Islamic and Middle Eastern Law* 339; Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (OUP 2018) 404; David Price, *The Development of Intellectual Property Regimes in the Arabian Gulf States: Infidels at the Gates* (Routledge 2012) xi.

<sup>10</sup> Urban (n 9) 26.

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related to patterns of compliance behaviour alongside the many historical, cultural, social, political, geographic, religious, and economic factors that inevitably contribute to that behaviour in any given nation.

To correct this critical scholarly omission, this thesis proposed that a sliding scale approach be adopted as the analytical framework for developing a more comprehensive understanding of the compliance behaviour of a given state. Towards this end, the KSA, an under-examined research site in international law, was used as a case study and potentially relevant factors that influence the KSA's implementation of and compliance with TRIPS were examined. Rather than merely analyse the factors and circumstances that influence the KSA's compliance with TRIPS, however, the thesis sought to contribute to the current debate on compliance theory and to promote new insights and directions in the scholarship of international law. Towards this end, it addressed the following questions: (i) How can the implementation of an international agreement by a state be distinguished from that state's compliance therewith? (ii) How and to what extent can existing theoretical approaches to the compliance of states with the legal obligations to which they have consented be developed? (iii) Is it possible to devise a suitable sliding scale model through which the degree of a state's compliance can be more precisely determined? and (iv) Under what circumstances is it reasonable for a state to delay compliance with its international legal agreements, and for how long?

On the evidence of the critical review of current investigations concerning states' compliance with international law presented in Part 1 (Chapters 2-4) of this thesis, compliance is not a concern for the KSA alone, nor does that concern relate solely to TRIPS. Rather, compliance is a global phenomenon that must be discussed seriously, unpacked, identified and further theorised. Specifically, the results of the critical review of compliance problems in different parts of the world, including Australia, the USA, Europe, Africa, Latin America and the Pacific, indicated that numerous factors affect the compliance of individual states with their international legal obligations. Among the states experiencing problems with compliance are Australia (in relation to the refugee convention), the European Union (in relation to the asylum system), the Côte d'Ivoire (in relation to the international criminal court), and the USA and Canada (in relation to

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environmental protection), to name a few. The findings from that review confirmed that the term *compliance* per se is problematic in the sense that nation-states define, enact, justify and contest compliance differently in different geopolitical locations.

The review also demonstrated that various interests, desires, calculations, agendas and expectations, which are themselves pushed and pulled by a range of socio-economic, cultural, religious, ideological, and political factors, drive individual states to sign an international legal agreement. It was also found that despite the wealth of legal studies investigating issues of compliance around the world, none of these works explains why the KSA is not fully compliant with TRIPS. Furthermore, these findings revealed that non-compliance occurred even in western countries where historically international law has been devised and subsequently universalised.<sup>11</sup> This suggests that the factors affecting compliance or non-compliance are context dependent and therefore are always culturally, socio-economically, religiously, geographically, and politically situated. Thus, factors such as the religion, culture, economy, politics and social structures of an individual state must be considered in order to gain a comprehensive understanding of the reasons why it is or is not compliant with a given international legal agreement. This should be investigated using an analytical framework based on a sliding scale model, as stated earlier.

Furthermore, through its analysis of the problems arising from membership in the WTO, with a particular focus on TRIPS, and how these problems are addressed in the literature (see Chapter 3 for details), this thesis has shown that only a few studies have utilised more inclusive models built on theoretical questions to conceptualise the factors contributing to states' compliance. Strikingly, with exception of Thomas's work on China's post-WTO IP system, none of these studies has been conducted in the context of the WTO,<sup>12</sup> though it should be acknowledged that some other studies, albeit with a narrow scope, have considered aspects of the issue of compliance with WTO

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<sup>11</sup> See, for example, Eric A Posner, 'Liberal Internationalism and the Populist Backlash' (2017) 49 *Arizona State Law Journal* 795; Mario Prost, 'Hierarchy and the Sources of International Law: A Critique' (2017) 39 *Houston Journal of International Law* 285; David S Law, 'Alternatives to Liberal Constitutional Democracy' 77 *Maryland Law Review* 223; Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503.

<sup>12</sup> Kristie Thomas, 'China's Post-WTO Intellectual Property System: Assessing Compliance with the TRIPS Agreement' (PhD thesis, University of Nottingham 2008). See also Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave Macmillan 2017).



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requirements. It is this paucity of research that led scholars such as Thomas to call for a more inclusive approach to this line of inquiry. This thesis responds to Thomas' call by proposing that a sliding scale be adopted as an analytical framework with the potential to examine degrees of compliance with international law in a more comprehensive manner.

Analysis of problems arising from membership in the WTO also revealed that intentionally ambiguous language has been used in international agreements. In the case of the Six-Point Agreement signed by Egypt and Israel in the 1970s, for instance, 'constructive ambiguity' (to use Henry Kissinger's expression) was used to establish a grey area through which different interests pursued by the parties involved could be coordinated and negotiated.<sup>13</sup> Paradoxically, given the good intentions of the drafters, these efforts have created challenges, tensions, complexities, subjectivities, internal contradictions, and other operational and practical problems the parties to such agreements. Critical examination of problems arising from membership in the WTO also showed the variation in compliance with the WTO and other international organisations among Member states, established the normative practices governing the degree of compliance by sovereign nation-states, and began to build the case as to why the binary approach to compliance should be challenged.

The critical dialogue with the literature conducted in this study revealed that the KSA's implementation of and compliance with international law have long been a focus of investigation by both local and international legal scholars. It also was found that although compliance can be influenced by many factors, both local and international scholars tend to explore the KSA's implementation of and compliance with international law through the lens of Sharia and Islamic identity. Justifications for the use of this lens include the Saudi legal system's basis in Sharia; the geographical location of the KSA; the *qibla* of Muslims around the world; the fact that the Organisation of Islamic Cooperation is located in the Kingdom, as are the two holy mosques; the fact that millions of pilgrims travel to the Kingdom every year to perform *Hajj*; and the fact that

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<sup>13</sup> See, for example, Minju Kim and Hyo-Young Lee, 'Looking beyond the DOHA Negotiations: A Possible Reform of the WTO Agricultural Subsidies Rules' (2017) 12 Asian Journal of WTO and International Health Law and Policy 171, 192; Drazen Pechar, 'Use of Ambiguities in Peace Agreements' in Jovan Kurbalija and Hannah Slavik (eds), *Language and Diplomacy* (DiploProjects 2001) 163, 178 <[www.diplomacy.edu/sites/default/files/Language\\_Diplomacy\\_Chapter11.PDF](http://www.diplomacy.edu/sites/default/files/Language_Diplomacy_Chapter11.PDF)>.

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the KSA is one of the world's largest oil producers and one of the top 20 states in terms of the size of its economy.<sup>14</sup>

While these are important features, ideological and political tensions between the Kingdom and some other Islamic countries, such as Iran, led to the conclusion that its importance for other Islamic and non-Islamic nations is debatable. Because Sharia is a broad concept, some degree of subjectivity is inevitable when its laws are applied and put into practise, yet legal researchers who view compliance solely through the lens of Sharia miss the opportunity to understand such differences and hence, fall into the fallacy of false analogy. To address this shortcoming in the current literature, further scholarly attention should be directed towards the tension between TRIPS and the principles of Sharia in relation to the four most famous Sunni schools of thought: the Hanafi school, the Maliki School, the Shafi'i School and the Hanbali School. Moreover, by placing Sharia on a sliding scale of influence would give legal researchers the opportunity to develop a better understanding not only of the KSA's implementation of and compliance with international law but of the nuances, complexities and contradictions associated with international legal agreements generally, and with TRIPS in particular.

Critical analysis of compliance theories and the disciplines from which they have emerged, the application of compliance theories to states' compliance, and the efforts to develop a more comprehensive analysis of compliance factors (Part II: Chapters 5-7) leads to the conclusion that Jacobson and Weiss's approach is more likely than others to facilitate an understanding of the factors that influence the Kingdom's compliance with the TRIPS Agreement. It was found that theorists are still grappling to find appropriate analytical tools with which to conceptualise why individual states do or do not comply with their international legal obligations. No one theory is capable of fully explaining the KSA's compliance with TRIPS. Moreover, current theories of compliance seem to focus on what could be labelled as more formal factors and they rarely engage with the historical specificity of countries such as the Kingdom. Equally importantly, because current theories of compliance have emerged from the disciplines of law and international relations, they reflect the major theoretical formulations of compliance each discipline has devised

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<sup>14</sup> See Section 4.2.

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and the type of data provided by each (see Chapter 4 for further details). It was found that although each discipline has contributed to an understanding of compliance theory, the ‘interdisciplinary cross-fertilization’ approach matters.

The unique context of the KSA has not yet been well researched by compliance theorists, nor have current theories of compliance been able to fully explain why the KSA does or does not comply with international legal agreements. These limitations arise from the Eurocentric nature of some compliance theories and the fact that Sharia was construed as an objective analytical tool with which to compare and contrast issues related to the implementation of and compliance with international legal agreements in Muslim countries. Whatever their limitations, however, it is important to acknowledge that current theories of compliance have made valuable contributions to the literature. They have also opened a space for exploring the historical, cultural, political, ideological, religious and economic factors associated with compliance.

The analysis presented in this thesis of the major theories of compliance with particular reference to the specific case study of the Kingdom and the TRIPS Agreement suggests that none is able to fully explain why individual states comply with some international legal agreements and breach others, nor do any provide a suitable analytical framework for understanding the unique characteristics of the KSA and how these contribute to its compliance behaviour. This observation underscores the need to devise a more comprehensive theory that enables examination of the unique characteristics of individual states and the factors that facilitate or obstruct their compliance with international legal agreements.

Towards this end, this thesis argued that Jacobson and Weiss’s approach has the potential both to complement current theories of compliance and to deepen the analysis of KSA’s implementation of and compliance with international legal agreements. In particular, Jacobson and Weiss’s approach acknowledges the plurality and diversity of the factors that can influence states’ compliance with particular international legal agreements. Furthermore, in the case of the Kingdom, the use of a sliding scale model highlights the many patterns of its compliance behaviour (see Figure 7.1). As previously noted, for example, non-state-specific factors can play a significant role in facilitating the implementation of and compliance with international legal agreements by

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individual member states. Moreover, they support the contention that compliance is not a linear process; rather, it is dynamic and dependent on numerous complex factors. Informed by these observations, this thesis makes the following recommendations.

Current epistemologies, theories and discourses of compliance have tended to be Eurocentric. They are infused with Western logic, culture, values and traditions, as shown in Chapters 1, 2 and 5. For these reasons, using such a framework to examine the phenomenon of a non-western country's (e.g., the KSA's) compliance or non-compliance with an international legal agreement is not conducive to the development of a comprehensive understanding of the realities on the ground. Legal scholars in the Muslim majority states must constantly challenge the Eurocentric elements in the documents issued by the WTO, including TRIPS. Third World approaches to international law (TWAIL) could be a good example of those influential approaches in this regard. Doing so would allow WTO members from the Global South and the Global North not only to establish a culture of shared vision and responsibility, but to rebalance the ways in which laws and regulations of the international legal agreements are formulated.

Sharia has long been the governing force maintaining the social fabric of the Kingdom. Considering the important role it plays in the Muslim world, the KSA could capitalise on its perceived economic, cultural, social, religious, symbolic and geographical significance and organise a series of conferences and meetings with members of the WTO and open a dialogue about differing interpretations among Muslim countries of their obligations in relation to the implementation of and compliance with WTO agreements such as TRIPS. Such proactivity could have positive outcomes for members of the WTO. The framework for these efforts should be based on three interactive parameters. First, a law should be sensitive to a particular state and its broader constitution (particularity); second, there should be a relationship between theories of compliance and the realities on the ground (praxis); and third, the framework should be socially just – in other words, it should acknowledge issues of power and dominance in different geographical locations and consider issues of social inequality. These three parameters are not mutually exclusive; instead, they work in harmony to produce a socially just international law.

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The impact of COVID-19 has been felt around the world. Among the profound changes brought about by the pandemic are diversity, new concepts, new logic systems, new values and a new culture. Consequently, some countries in the Global South, such as India and South Africa, have demanded a temporary waiver of some TRIPS obligations so as to gain enough time and space to recover from the pandemic and its devastating impact.<sup>15</sup> This suggests that temporality and flexibility should guide the theoretical framework applied to compliance.

In order to advance the sliding scale model developed in this thesis, it should be adopted by legal scholars to examine different domains and scopes of compliance in a wide range of research contexts and settings. This would enable them not only to assess the inner workings of the model, but also to validate its effectiveness in a given geographical location. Future scholars may also wish to revisit those compliance-related issues which remain open to debate in the legal academy. Among the questions that require further interrogation are the following: (i) what constitutes a reasonable delay in compliance; (ii) under what circumstances, if any, can non-compliance be justified or at least considered acceptable; (iii) in what other ways can implementation be distinguished from compliance; (iv) by what strategies can states' compliance be enhanced; (v) what other legal and regulatory mechanisms are needed to provide other concrete advice for developing international law or international agreements; and (vi) whether it is possible to devise a model through which the degree of a state's compliance can be more precisely determined.

Finally, it is important to reiterate some of the contributions of this thesis to the existing scholarship on compliance. For example, this thesis has shown that many scholars concerned with the KSA's implementation of and compliance with international agreements have failed to understand that Sharia is a broad concept which is interpreted differently in different Muslim countries. In this sense, an understanding of compliance that is based solely on religiously charged tensions between the KSA's Islamic law and the TRIPS Agreement seems inadequate at best, and perhaps even

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<sup>15</sup> WTO, 'Members Discuss Intellectual Property Response to the COVID-19 Pandemic' <[www.wto.org/english/news\\_e/news20\\_e/trip\\_20oct20\\_e.htm](http://www.wto.org/english/news_e/news20_e/trip_20oct20_e.htm)> accessed 11 March 2021; WTO, 'Members to Continue Discussion on Proposal for Temporary IP Waiver in Response to COVID-19' <[www.wto.org/english/news\\_e/news20\\_e/trip\\_10dec20\\_e.htm](http://www.wto.org/english/news_e/news20_e/trip_10dec20_e.htm)> accessed 11 March 2021; WTO, 'Members Discuss TRIPS Waiver Request, Exchange Views on IP Role amid a Pandemic' <[www.wto.org/english/news\\_e/news21\\_e/trip\\_23feb21\\_e.htm](http://www.wto.org/english/news_e/news21_e/trip_23feb21_e.htm)> accessed 11 March 2021.

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inappropriate. To remedy this critical scholarly gap, this thesis argued that the aforementioned differences in the analysis of the Kingdom's compliance with international agreements must be acknowledged and foregrounded.

Furthermore, in addition to distinguishing between implementation and compliance, this thesis distinguished between compliance with the WTO and compliance with other international organisations. Its analysis of differences between peace agreements and WTO agreements, for example, demonstrates how challenging it is for any legal scholar to accurately judge the degree of states' compliance with two different international legal agreements using the same standard or standards of measurement. It also demonstrated that the causes of disparities in compliance are unlikely to be perceived without a good understanding of the reasons why states fail to comply with the international legal obligations to which they have consented. This, in turn, led to a better understanding of the subjectivity that can inform one's understanding of compliance.

Finally, this thesis examined the phenomenon of compliance theory in an under-researched site. The findings of this study provide original insights into the KSA's compliance with international agreements. Additionally, the study unpacked the nuances, complexities, subjectivities, and internal contradictions of the current scholarship on compliance, thereby inviting a new dialogue regarding compliance theory. In particular, this thesis has not only challenged the current understanding of compliance theories in different geographic locations, but it also has offered an original analytical approach to the theory of compliance, dubbed the sliding scale model. It demonstrated that this analytical model should be conceptualised as dynamic and could be used to gain a comprehensive understanding of a country's ability to comply or its inability to comply with international legal agreements.

Today, the globalised economy has not only rendered the borders between nation-states porous, but it has also increased the number and variety of commercial interactions between Western and Saudi companies. As Hamza observes, 'this has added a complex dimension to the interpretation of commercial agreements and practices due to differences in custom, language, culture, and

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religion, leading to increased disputes and disagreements between commercial players'.<sup>16</sup> In this context, economic, political and security interests, as well as the prestige associated with joining international institutions such as the WTO, have required the Kingdom to strike a balance between its historical literalist conservative ideology and pragmatism in the context of international law. Although the concept of intellectual property is not rooted in either the Quran or the Sunnah, the two divine sources of Islamic law, as discussed in Chapters 1 and 4, both legal and religious scholars in the KSA have succeeded in validating this concept through the mechanism of *ijtihad* and a source of *maqasid al-Shari'ah*. Such efforts demonstrate the impacts of international legal norms on a nation's sovereignty.

In light of the findings from this study, it could be argued that one critical question deserves further scholarly attention, namely, can the degree to which international legal norms (in relation to TRIPS specifically) encroach and impact upon the KSA's domestic legislation be classified using the primary sources of Islamic law, the Quran and the Sunnah?

### **8.1 Recommendations**

Based on the findings of this thesis, the following recommendations are made in relation to the theory of compliance, Sharia law, and the KSA's implementation of and compliance with international law in general and the TRIPS Agreement in particular.

First, while current theories of compliance have proven themselves to be robust and scalable, they are also subject to criticism. Future researchers might reach more wide-ranging conclusions, and make more appropriate recommendations, by first recognising the value of those models of compliance that combine theories emerging from the legal academy with those emerging from the international relations academy, which enable a more comprehensive understanding of the factors that contribute to the compliance behaviour of individual states. One such example is the subfactor of 'Exceptional circumstances' resulting from the COVID-19 pandemic, which this study has explored. Although not included in Jacobson and Weiss's model, this subfactor has affected the compliance of some TRIPS member states, and as such demonstrates the importance of

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<sup>16</sup> Hamzah (n 7) 227.

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recognising and developing such comprehensive models. With this in mind, it is hoped that this thesis prompts a reconsideration of questions related to implementation and compliance, such as those raised above. Future researchers may also wish to set different aims, use other case studies, or employ other methods in order to more deeply investigate these issues and others that fall outside the scope of this study. They could, for example, apply one of the compliance theories discussed in this thesis to an individual state or a group of states and investigate its compliance with an international legal agreement. This would provide an opportunity for further criticism and deepen understanding of that theory, thereby allowing us to further assess the validity of the chosen theory.

Second, rather than concentrate on the doctrinal lens of Sharia as a decisive factor when exploring what makes the KSA alter its behaviour in relation to the commitments to which it has consented, this study has advocated a different approach. As discussed in Chapter 4, there are, for example, cases that could serve as landmark cases. It is therefore recommended that future studies not only reconsider the importance of Sharia but turn their attention to other factors and give them equal importance. In this way, the most critical factors can be identified, and the degree of influence that each exerts can be better understood.

Finally, the KSA has long been sensitive to external criticism of its legal systems. Fortunately, in March 2023, for the first time in the history of the KSA, the Saudi Ministry of Justice organised an international conference on ‘enhancing access to justice through the use of digital innovation’ attended by jurists and scholars from around the world, including North America, the United Kingdom, Singapore and Australia.<sup>17</sup> The two-day conference involved 15 sessions, 50

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<sup>17</sup> Saudi Press Agency (SPA), ‘Justice Minister Inaugurates International Justice Conference and the Justice Technologies Exhibition’ (*Saudi Press Agency*, 5 March 2023) <[www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2431581](http://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2431581)> accessed 24 March 2023; Saudi Arabian Ministry of Justice, ‘International Conference on Justice: About the Conference’ (*Saudi Arabian Ministry of Justice*, 2023) <[www.moj.gov.sa/english/MediaCenter/icj/Pages/default.aspx](http://www.moj.gov.sa/english/MediaCenter/icj/Pages/default.aspx)> accessed 24 March 2023; Al Jazirah, ‘The International Justice Conference Concludes Its Work with Broad International Participation: Countries of the World Exchanged Experiences of Judicial Techniques in Riyadh’ (*Al Jazirah*, 8 March 2023) <[www.al-jazirah.com/2023/20230308/fe4.htm](http://www.al-jazirah.com/2023/20230308/fe4.htm)> (in Arabic) accessed 24 March 2023.



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international speakers and experts, 30 participating countries and more than 4000 attendees.<sup>18</sup> The six themes of the conference were as follows:

1. The future of judicial technologies and digital transformation in the judicial field;
2. Investment prospects of artificial intelligence technologies in the development of judicial work;
3. The future of international cooperation in the field of justice;
4. International experiences in judicial cooperation and model conventions on judicial cooperation between countries;
5. Enforcement of foreign judgments and arbitration within judicial cooperation agreements and international law;
6. Alignment of internal legislations with judicial cooperation agreements and facilitation of judicial cooperation procedures.<sup>19</sup>

As these themes suggest, the KSA is making a considerable effort to domesticate international law while also maintaining its strong commitment to Islamic law. Theme 6, for example, points to the Kingdom's effort to realise an effective alignment between international legislation and judicial cooperation agreements. Thus, this conference constituted a unique opportunity to invite Muslim and non-Muslim jurists, experts and scholars to exchange ideas on timely aspects of international law, including the implementation of TRIPS in Muslim countries.

Although still a relatively underdeveloped phenomenon, IP rights in the context of Islamic law is a very rich, complex and emerging area of scholarly research. Local universities, through their law schools, should offer courses and degrees in IP rights. This is particularly important considering that the KSA is opening its market widely to regional and international/transnational companies.<sup>20</sup> On 5 March 2023, for example, for the first time in its history, as part of the Saudi Vision 2030 national transformation plan, the KSA granted three foreign law firms permission to

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<sup>18</sup> SPA (n 17); Al Jazirah (n 17) (in Arabic).

<sup>19</sup> Saudi Arabian Ministry of Justice (n 17).

<sup>20</sup> See, for example, SPA, 'Riyadh Unveils More than USD 6.4 Billion in Technology and Startup Investment at LEAP22' (*Saudi Press Agency*, 1 February 2022) <[www.spa.gov.sa/2325984](http://www.spa.gov.sa/2325984)> accessed 25 March 2023; Al Watan, '750 Emerging Gulf and Local Companies Display Their Experiences at Biban Forum 23' (*Al Watan*, 1 March 2023) <[www.alwatan.com.sa/article/1121797](http://www.alwatan.com.sa/article/1121797)> (in Arabic) accessed 25 March 2023.

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operate in the country.<sup>21</sup> Moreover, the Saudi government not only recently established the Saudi Authority for Intellectual Property (hereinafter “SAIP”) as the only competent authority for IP in the Kingdom, but it also launched a national intellectual property strategy which aims to establish an integrated IP ecosystem.<sup>22</sup> As part of this system, various ministries, agencies, and bodies have been enlisted to implement and support it; the SAIP is one of these.<sup>23</sup> Hence, a final recommendation is to strengthen and enhance the role of the SAIP to promote the KSA’s compliance with TRIPS. Not only is this recommendation consistent with the functions of the SAIP, but the SAIP also has the capabilities to accomplish this task.<sup>24</sup>

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<sup>21</sup> Hebshi Alshammari, ‘Three Foreign Law Firms Granted Licenses to Operate in Saudi Arabia’ *Arab News* (Riyadh, 6 March 2023) <[www.arabnews.com/node/2262971/saudi-arabia](http://www.arabnews.com/node/2262971/saudi-arabia)>; SPA, ‘Saudi Ministry of Justice Enables Licensing of Foreign Law Firms Service through Najiz Portal’ (*Saudi Press Agency*, 24 January 2023) <[www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2420027](http://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2420027)> accessed 24 March 2023. For more information about implementing regulation for regulating the licensing of foreign law firms, see Saudi Arabian Ministry of Justice, ‘Implementing Regulation for Regulating the Licensing of Foreign Law Firms, Minister of Justice Decision No (186), 25/1/1444 AH’ (*Saudi Arabian Ministry of Justice*, 2023) <[www.moj.gov.sa/Documents/Regulations/pdf/En/Implementing Regulation for Regulating the Licensing of Foreign Law Firms.pdf](http://www.moj.gov.sa/Documents/Regulations/pdf/En/Implementing%20Regulation%20for%20Regulating%20the%20Licensing%20of%20Foreign%20Law%20Firms.pdf)> accessed 24 March 2023.

<sup>22</sup> WIPO, ‘Saudi Arabia Gears up on IP’ (*World Intellectual Property Organisation*, 2020) <[www.wipo.int/wipo\\_magazine/en/2020/03/article\\_0008.html](http://www.wipo.int/wipo_magazine/en/2020/03/article_0008.html)> accessed 25 March 2023; BoE, ‘Regulating the Saudi Authority for Intellectual Property’ (*Bureau of Experts at the Council of Ministers*, 2018) <<https://laws.boe.gov.sa/BoeLaws/Laws/Viewer/3afb71af-27a0-4562-a6df-a9f600fd973b?lawId=6cf17f84-7a45-4ff1-a61a-a9f600fd90bd>> (in Arabic) accessed 25 March 2023; SPA, ‘HRH Crown Prince Launches National Intellectual Property Strategy’ (*Saudi Press Agency*, 22 December 2022) <[www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2411825](http://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2411825)> accessed 25 March 2023.

<sup>23</sup> Saudi Authority for Intellectual Property (SAIP), ‘National Intellectual Property Strategy 2022-1444’ (*Saudi Authority for Intellectual Property*) <[https://externalportal-backend-production.saip.gov.sa/sites/default/files/2022-12/الاستراتيجية\\_الوطنية\\_وثيقة\\_النهائية.pdf](https://externalportal-backend-production.saip.gov.sa/sites/default/files/2022-12/الاستراتيجية_الوطنية_وثيقة_النهائية.pdf)> accessed 25 March 2023; SAIP, ‘National Strategy: Why a National Strategy?’ (*Saudi Authority for Intellectual Property*) <[www.saip.gov.sa/en/national-strategy/](http://www.saip.gov.sa/en/national-strategy/)> accessed 25 March 2023.

<sup>24</sup> SAIP, ‘Brief About SAIP: Tasks & Functions’ (*Saudi Authority for Intellectual Property*) <[www.saip.gov.sa/en/about/](http://www.saip.gov.sa/en/about/)> accessed 25 March 2023.

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