International Organisation of Employers
Organisation Internationale des Employeurs
Organización Internacional de Empleadores
*The Global Voice of Business*

IOE Additional Analysis

# The United Nations' proposed Treaty imposing corporate liability for human rights violations and the potential economic implications associated with its ratification

October 2018

UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS

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## About the IOE

The International Organisation of Employers (IOE) is the largest private-sector network in the world, representing different types of businesses across social and labour policy fora such as the ILO, the UN and its various agencies, and the G7/G20. It has 153 member organisations from 143 countries and our membership represents more than 50 million companies, which directly employ hundreds of millions of workers.

The IOE attaches great importance to business and human rights and is actively engaged in endorsing, promoting, and disseminating the UN Guiding Principles on Business and Human Rights (UNGPs), as well as other Government-backed instruments on responsible business conduct, among our members and networks. We help businesses of all sizes to meet their responsibility to respect human rights in line with the UNGPs and to make a positive contribution to the Sustainable Development Goals (SDGs). Respecting and advancing human rights is a priority for the international business community and the IOE strongly argues for preserving the approach outlined by the UNGPs.

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## I. INTRODUCTION

The business community has long been a proponent of respect for human rights in their own operations and within their supply chains. Many companies are doing significant work to advance this agenda through efforts undertaken within the framework of the United Nations Guiding Principles on Business and Human Rights (the "UN Guiding Principles").

In 2014, in response to efforts by the Ecuador and South Africa delegations, the U.N. Human Rights Council established an Intergovernmental Working Group (IGWG) to elaborate "an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[1] It is known as the *Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, or "IGWG." The IGWG has conducted week-long annual meetings on the scope and substance of a potential binding human rights treaty for three successive years. In anticipation of the fourth IGWG meeting scheduled to take place on October 15–19, 2018, the chairperson of the IGWG published a "Zero Draft" of the proposed treaty in the summer of 2018, followed by an accompanying "Draft Optional Protocol."

The efforts by the IGWG to develop a multilateral treaty on business and human

[1] *Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx (last visited Oct. 8, 2018).

rights, however, have presented a misdirected and perhaps short-sighted attempt to address adverse human rights impacts. The proposed treaty reflects some fundamental policy failings that create the potential to threaten the economies of ratifying countries, particularly for those in developing regions. The Zero Draft Treaty and accompanying Draft Optional Protocol (collectively, the "Proposed Treaty") present unjustified legal risks to multinational corporations and their personnel that will discourage foreign direct investment ("FDI") in, and restrict the export markets of, ratifying countries. This has the potential to lead to negative socioeconomic effects.

A recent example of this potential arose from the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act that required corporations to certify that the four minerals sourced from the Democratic Republic of Congo ("DRC") were "conflict free," and that the profits earned were not being used to finance groups accused of committing human rights atrocities in the DRC. The reporting requirement set off a chain of events that many have resulted in significant hardships for the people of the DRC when multinationals opted to cease sourcing from the DRC. With no market for its minerals, the DRC experienced economic decline. Discussions around the potential for similar unintended consequences of the Proposed Treaty regrettably have been largely absent from the treaty dialogue.

This article recommends that the U.N. Intergovernmental Working Group tasked with elaborating the treaty halt its pursuit of a top-down, "one-size-fits-all" instrument. Instead, the working group and the international community should continue to support the implementation of the UN Guiding Principles by both States and businesses. The

UN Guiding Principles have already spurred the development of extensive and ongoing corporate efforts to voluntarily identify, prevent, mitigate, and remedy adverse human rights impacts in their operations. This good work should be permitted to continue and be encouraged. The Proposed Treaty, if permitted to proceed, would stifle the great strides that have been made under the UN Guiding Principles and present risks to the very people the Proposed Treaty seeks to protect.

## II. THE PROPOSED TREATY IN CONTEXT

### A. The UN Guiding Principles on Business and Human Rights

The UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights in 2011 following a thoughtful, collaborative and consultative drafting process.[2] Since then, businesses have taken a wide variety of effective measures to implement them.[3] The Proposed Treaty arrives at a critical

[2] UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011), [hereinafter UNGP DOCUMENT], https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; *see also* U.S. CHAMBER OF COMMERCE, ELIMINATING HUMAN TRAFFICKING: THE CASE FOR CORPORATE SELF-REGULATION 6–9 (2017), [hereinafter U.S. CHAMBER OF COMMERCE] https://www.uschamber.com/sites/default/files/eliminating_human_trafficking_-_a_case_for_corporate_self-regulation.pdf (last visited October 11, 2018) (explaining that companies have voluntarily embraced the UN Guiding Principles); Prof. John Ruggie, *'Guiding Principles' for the Business & Human Rights Treaty Negotiations: An Open Letter to the Intergovernmental Working Group*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE [hereinafter Ruggie, *Open Letter*], https://www.business-humanrights.org/sites/default/files/documents/Guiding%20Principles%20for%20Treaty%20Negotiations_Open%20Letter%20from%20Professor%20John%20Ruggie.pdf (last visited October 11, 2018) (noting that agreement by diverse countries and "broad support from key constituencies across business and civil society, and subsequent consensus across the Council's membership, help explain the widespread influence of the UNGPs.").

[3] For a survey of the various voluntary corporate efforts to comply with the UN Guiding Principles, *see* U.S. CHAMBER OF COMMERCE, *supra* note 2, at 6–8. *See also Modern Slavery Registry,* BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, https://www.modernslaveryregistry.org/?utm_source=Business+%26+human+rights+-+Weekly+Update&utm_campaign=ed3bec8908-

juncture. If the treaty is allowed to proceed as drafted, it will undermine the good work that has been done by business in furtherance of that framework.

The UN Guiding Principles are a set of non-binding principles that guide governments and business in their efforts to address human rights and adverse human rights impacts. They are not, by themselves, enforceable in a court of law.[4] However, they are a minimum global standard of expected conduct on all business enterprises, and in many States the responsibility to respect human rights is reflected – fully or partly – in domestic law or regulations on companies. The responsibility to respect may also be incorporated in binding contractual requirements between companies and their corporate and private clients and suppliers.[5]

The UN Guiding Principles were developed with an approach of "principled pragmatism," defined as "an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it related to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in

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EMAIL_CAMPAIGN_2017_05_09&utm_medium=email&utm_term=0_3a0b8cd0d0-ed3bec8908-174122865 (last visited October 8, 2018); Lavanga V. Wijekoon & Michael G. Congiu, *Imposing Liability on Employers Under the Shadow of the United Nations Guiding Principles on Business & Human Rights*, *in* EMPLOYMENT LAW UPDATE, 2017 EDITION 4-5 (2017) (describing the steps employers have taken to implement UN Guiding Principles).

[4] The UN has made clear that "[n]othing in these Guiding Principles should be read as creating new international law obligations . . . ." UNGP DOCUMENT, *supra* note 2, at 6. Accordingly, the Australian government, for example, has explicitly stated that the UN Guiding Principles "are not legally binding on Australia as a matter of international law." AUSTRALIAN GOV'T, ATTORNEY-GEN.'S DEP'T, MODERN SLAVERY IN SUPPLY CHAINS REPORTING REQUIREMENT – PUBLIC CONSULTATION PAPER AND REGULATION IMPACT STATEMENT (2017), https://www.homeaffairs.gov.au/consultations/Documents/modern-slavery/modern-slavery-supply-chains-reporting-requirement-public-consultation-paper.pdf.

[5] U.N. OFFICE OF THE HIGH COMMISSIONER, HUMAN RIGHTS, FREQUENTLY ASKED QUESTIONS ABOUT THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 9 (2014).

the daily lives of people."[6]

The UN Guiding Principles consist of three pillars:

- Pillar One – the State duty to protect human rights;
- Pillar Two – the State and business responsibility to respect human rights; and,
- Pillar Three – the States and business duty to provide effective access to remedy for adverse human rights impacts.[7]

The "human rights" protected under the UN Guiding Principles are "internationally recognized human rights" which have been embraced universally. They include the International Bill of Human Rights (consisting of the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), and the International Labor Organization's ("ILO") 1998 Declaration on Fundamental Principles and Rights at Work.[8]

Since their adoption, the UN Guiding Principles have gained significant momentum in the business community to help its members understand and address human rights impacts in a way that accounts for many variables confronted by business. Many companies have issued, or are in the process of developing, human

[6] Comm'n on Human Rights, Interim Rep. of the Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 81, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter Interim Report] https://undocs.org/E/CN.4/2006/97https://undocs.org/E/CN.4/2006/97.
[7] UNGP DOCUMENT, *supra* note 2, at 6.
[8] UNGP DOCUMENT, *supra* note 2, at 13–14 (Principle #13).

rights statements committing their leadership to respecting human rights, as well as carrying out due diligence and providing for or participating in effective remedy processes to identify and resolve adverse human rights impacts.[9] The UN Guiding Principles have been widely embraced by business.[10] This momentum signals that this framework comports with diverse stakeholders' unique challenges and varied mandates with respect to human rights. It should be allowed to continue its course toward further success.

## III. THE PROPOSED TREATY – STRUCTURE AND CONTENT

### A. Development of the Treaty Concept and its Evolution

In 2014, the U.N. Human Rights Council, led by Ecuador and South Africa, and supported by a plurality of the 47 member-States,[11] established the IGWG. The object was to develop an enforceable treaty to mitigate adverse human rights impacts by Multinational Corporations ("MNCs").[12] The IGWG held sessions in July 2015, October

[9] *See* U.S. CHAMBER OF COMMERCE, *supra* note 2, at 6–8.
[10] *See* WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., BUSINESS & HUMAN RIGHTS, FROM PRINCIPLES TO ACTION (2016), https://www.wbcsd.org/contentwbc/download/3000/38207 (noting that since the adoption of the UNGPs, "private sector resources are now being mobilized to tackle the prevention, mitigation, and remediation of adverse human rights impacts, shifting engagement in this field from being the reserve of a handful of front runner companies to an ever more mainstream business discussion").
[11] Ecuador, South Africa, Bolivia, Cuba and Venezuela were the original sponsors of the resolution. They were later followed by Algeria, Benin, Burkina Faso, China, Congo, Cote d'Ivoire, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, and Vietnam, who voted in favor of the resolution. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014); *see also* Doug Cassell, *At Last: A Draft UN Treaty on Business and Human Rights*, LETTERS BLOGATORY – THE BLOG OF INT'L JUDICIAL ASSISTANCE (AUG. 2, 2018) [hereinafter Cassell, *Comments on Zero Draft*], https://lettersblogatory.com/2018/08/02/at-last-a-draft-un-treaty-on-business-and-human-rights/.
[12] *Id.*

2016, and most recently in October 2017.[13] The fourth session is slated to take place in mid-October 2018.

During the previous three sessions, representatives of governments, human rights advocates, academics, practitioners, and a handful of business representatives discussed the potential function and content of a treaty. Much of the discussion surrounded the desire of some governments to focus the scope of the treaty exclusively on MNCs.[14] This focus sought to exclude purely domestic companies, small and medium-sized corporations, and State-owned enterprises. The effort to limit the treaty to MNCs was artificial, and directly conflicted with the UN Guiding Principles' exhortation that they were to apply "to *all* business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure."[15] As the delegation to the European Union stated, "[D]iscussion could not be limited to transnational corporations, as many abuses were committed by enterprises at the domestic level."[16] Another point of contention was that governments and companies had not had

[13] U.N. Human Rights Council, Rep. on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument, U.N. Doc. A/HRC/31/50 (Feb. 5, 2016) [hereinafter First Session Report]; U.N. Human Rights Council, Rep. on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/34/47 (Jan. 4, 2017) [hereinafter Second Session Report]; U.N. Human Rights Council, Rep. on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/37/67 (Jan. 24, 2018) [hereinafter Third Session Report].

[14] *See* First Session Report, *supra* note 13, ¶¶ 14, 16, 17, 22; Second Session Report, *supra* note 13, ¶¶ 11, 14; Third Session Report, *supra* note 13, ¶¶ 9, 11.; *see also* Cassell, *Comments on Zero Draft*, *supra* note 11 ("South Africa advocates a treaty only for transnational corporations. Ecuador proposes a compromise by which application of the treaty would turn, not on the transnational nature of the company, but on the transnational nature of the business activity at issue.").

[15] UNGP DOCUMENT, *supra* note 2, at 1 (emphasis added); Ruggie, *Open Letter*, *supra* note 2 (noting that the UN Guiding Principles "do not draw lines between companies that are part of global supply chains and those that are not" and that "[a]n effective treaty should do the same or risk creating yet another gap in human rights protection").

[16] First Session Report, *supra* note 13, ¶ 13.

sufficient time to fully implement the UN Guiding Principles, which were adopted only a few years earlier.[17] Any real gains made by implementation of the UN Guiding Principles would be undermined by the legal uncertainty and competing responsibilities created by a treaty.[18]

These two contentions split the IGWG member states, leading to heated disagreements, walk-outs, and boycotts of the entire process.[19] Indeed, the United States, Canada, and South Korea have not participated in any of the sessions, and the European Union walked out of part of the first. Japan has attended only one session, and Australia has attended two. Many countries, including EU Member states, Singapore, and Russia, while participating in the sessions, have voiced concerns about the process. These countries taken together are homes to many of the world's MNCs.[20]

On the other hand, Ecuador – whose permanent representative to the U.N. chairs the IGWG – and South Africa have led the charge in supporting a treaty that focuses on MNCs. These two "treaty proponent" States have been joined in support by

[17] Second Session Report, *supra* note 13, ¶ 108.
[18] *Id.*
[19] Cassell, *Comments on Zero Draft*, *supra* note 11 ("The process has been boycotted by the United States, rebuffed by Russia, and held at arm's length by even most potentially supportive states (including the European Union)."); *See* First Session Report, *supra* note 13, ¶¶ 6-7; Second Session Report, *supra* note 13, ¶ 5; Third Session Report, *supra* note 13, ¶ 6.
[20] *See, e.g.*, MCKINSEY GLOBAL INST., GROWTH AND COMPETITIVENESS IN THE UNITED STATES: THE ROLE OF ITS MULTINATIONAL COMPANIES (2010), https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Americas/Growth%20and%20competitiveness%20in%20US/MGI_Growth_and_competitiveness_US%20role_of_multinational_companies_full_report.ashx (observing that MNCs represented 23% of United States' private-sector GDP in 2007); Franklin B. Weinstein, *Multinational Corporations and the Third World: The Case of Japan and Southeast Asia*, 30 Int'l Org. 373, 373 (2009) (noting the rising influence of Japanese MNCs); Christoph Dorrenbacher & Michael Wortmann, *Multinational Companies in the EU and Eurpoean Works Councils*, 29 INTERECONOMICS 199, 200–06 (1994) (discussing role of MNCs in European Union); *Top 75 Companies in Singapore Revealed: Randstad Award 2016*, RANDSTAD WORLDWIDE, https://www.randstad.com.sg/about-us/news/top-75-companies-in-singapore-revealed-randstad-award-2016/ (last visited Oct. 8, 2018) (listing multinational companies doing business in Singapore).

Venezuela,[21] Bolivia,[22] Azerbaijan,[23] Pakistan,[24] Namibia,[25] Nicaragua,[26] Benin, Burkina Faso, Morocco,[27] and the Philippines.[28] Thus, broadly speaking, two sides have emerged in the debates at these sessions – the "treaty proponents," which are largely developing countries that host MNCs, and the "treaty opponents," which are largely developed countries that are home to MNCs.

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[21] *See* Human Rights Council Draft Res. 26/…, U.N. Doc. A/HRC/RES/26/9/Rev.1, at 1 (June 25, 2014) (listing Venezuela as an author of the draft resolution proposing working group for the creation of a binding legal instrument).

[22] *See* H.R.C. Draft Res. 26/…, at 1 (listing Bolivia as an author of the draft resolution); *see also* Statement by Bolivia to U.N. Human Rights Council Int'l Working Grp. 1st Sess., *Estado Plurinacional de Bolivia Grupo de Trabajo Intergubernamental sobre un Instrumento Legalmente Vinculante sobre Empresas Transnacionales y otras empresas con respecto a los derechos humanos Panel III – Cobertura del Instrumento, Empresas Transnacionales y otras Empresas: conceptos y naturaleza legal en el Derecho Internacional* (June 7, 2015), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel3/States/Bolivia_Plurinational_State_of.pdf (emphasizing need for a legally binding instrument to regulate the activities of multinational businesses); Statement by Bolivia to U.N. Human Rights Council Int'l Working Grp. 1st Sess., *Estado Plurinacional de Bolivia Grupo de Trabajo Intergubernamental sobre un Instrumento Legalmente Vinculante sobre Empresas Transnacionales y otras empresas con respecto a los derechos humanos Panel IV – Derechos Humanos a ser cubiertos bajo el Instrumento con respecto a las actividades de las Empresas Transnacionales y otras empresas* (July 7, 2015) (arguing for a broad application of the legal instrument to all human rights violations, large and small).

[23] *See* Written Statement of Azerbaijan to U.N. Human Rights Council Int'l Working Grp. 3d Sess., *Contribution from the Republic of Azerbaijan on the Draft Elements Document for the Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* (Feb. 28, 2018) (expressing support for a legally binding international regime to regulate the activities of corporations and other business enterprises).

[24] *See* Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9, at 2, 3 (June 25, 2014) (recording Pakistan's vote in favor of resolution for "an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, "whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises").

[25] *Id.* at 2, 3 (recording Nambia's vote in favor of resolution); *see also* Jens Peter Prothmann, Delegate of Namibia, Statement regarding OEIGWG on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (July 7, 2015) (advocating for universal application of binding legal instrument on "all companies").

[26] *Id.* at 2, 3 (recording Nambia's vote in favor of resolution); *see also* Kinda Mohamadieh & Daniel Uribe, *Business and Human Rights: Commencing Historic Discussions on a Legally Binding Instrument*, SOUTH CENTRE (23 Nov. 2015), https://www.southcentre.int/question/business-and-human-rights-commencing-historic-discussions-on-a-legally-binding-instrument/ (reporting statement by Philippines representatives in favor of mandate established by Resolution 26/9).

[27] *Id.* at 2, 3 (recording Benin's, Burkina Faso's, and Morocco's votes in favor of resolution).

[28] *See id.* at 2, 3 (recording the Philippines' votes in favor of resolution); *see also* Mohamadieh & Uribe, *supra* note 27 (reporting statement by Philippines representatives in favor of mandate established by Resolution 26/9).

While no draft treaty was produced in the first and second sessions, the third session's debates focused on an "Elements Paper" that the IGWG's Chair published only three weeks in advance of the session. The Elements Paper was the first attempt at drafting – albeit in a skeletal fashion – a potential treaty. The proposed instrument, which "largely reflected an NGO wish list,"[29] did nothing to quell the controversies emanating from the previous two sessions, and it raised additional issues, which were very briefly discussed and debated at the third session in October 2017.[30] Some of the main attributes of the Elements Paper appear in the Zero Draft and Protocol that the IGWG's Chair published in advance of the October 2018 session.

### B. The Zero Draft and Draft Optional Protocol

The IGWG's Chair from Ecuador published the Zero Draft[31] in July 2018, and a Draft Optional Protocol in September 2018.[32] The Zero Draft expands on the points asserted in the Elements Paper. Among other things, it requires ratifying States, through their domestic laws, to hold "natural and legal persons . . . criminally, civil, or administratively liable for violations of human rights undertaken in the context of business activities of transnational character" and ensure that "all persons with business activities of transnational character" undertake human rights due diligence "throughout

[29] Cassell, *Comments on Zero Draft, supra* note 11.
[30] *See generally* Third Session Report, *supra* note 13.
[31] U.N. HUMAN RIGHTS COUNCIL, LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES (2018) [hereinafter ZERO DRAFT], https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.
[32] U.N. HUMAN RIGHTS COUNCIL, DRAFT OPTIONAL PROTOCOL TO THE LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESSES (2018) [hereinafter DRAFT OPTIONAL PROTOCOL], https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.PDF

such business activities."[33]

The Draft Optional Protocol proposes to create a National Implementation Mechanism for ratifying States to implement the obligations in the Zero Draft.[34] Under the draft Protocol, ratifying States may empower their respective National Implementation Mechanism with the ability to receive and consider complaints, investigate companies' compliance with due diligence obligations, and recommend legislative and administrative measures to improve the States' implementation of the treaty.[35]

When viewed together, the two proposed instruments contain many provisions that were the focus of concerns in the debates during the previous three sessions. There are numerous components of the proposed documents that are deeply problematic and, if included in an international treaty, would present unjustified risks to businesses and their leadership that would lead certain companies to avoid transacting business in any ratifying jurisdiction. Key examples follow below:

### 1. MNCs Are The Exclusive Target.

The "Scope" of the Proposed Treaty covers "human rights violations in the context of any business activities of a transnational character."[36] "Business activities of a transnational character" is further defined as "any for-profit economic activity . . . undertaken by a natural or legal person . . . that take place or involve actions, persons

[33] ZERO DRAFT, *supra* note 31, arts. 9, 10.
[34] DRAFT OPTIONAL PROTOCOL, *supra* note 32.
[36] *Id.* arts. 3–6.
[36] ZERO DRAFT, *supra* note 31, art. 3.1.

or impact in two or more national jurisdictions."[37] This concept reflects an attempt to exclude from the treaty's scope small and medium enterprises ("SME"), purely domestic companies, and State-Owned Enterprises ("SOE"). By focusing on business activities that are "for-profit,"[38] the draft also contemplates exclusion of non-profit entities, leaving any transnational non-profit to operate with impunity. The proposed instrument also allows governments to "exempt certain small and medium-sized undertakings" – regardless of their transnational activities – from any obligation to conduct human rights due diligence.[39] The effect of these provisions is to exempt domestic companies, non-profits, SMEs, and SOEs from any human rights obligations at all.

The directive of the Proposed Treaty is in stark contrast to the UN Guiding Principles, which apply to all businesses. The focus on MNCs also disregards the reality that many human rights abuses are "committed by enterprises at the domestic level"[40] and by SOEs.[41] Indeed, some of the most pointed critiques of the Zero Draft come from the architect of the UN Guiding Principles, Prof. John Ruggie,[42] thus reflecting the

[37] *Id.* art. 4.2.
[38] *Id.*
[39] *Id.* art. 9.5.
[40] First Session Report, *supra* note 13, ¶ 13.
[41] For example, subsidiaries of the China Non-Ferrous Metals Mining Corporation, a state-owned enterprise, operated mines in Zambia that allegedly engaged in egregious labor abuses, including poor health and safety conditions, regular 12-hour and even 18-hour shifts involving arduous labor, and anti-union activities, all in violation of Zambian law. *"You'll Be Fired if You Refuse": Labor Abuses in Zambia's Chinese State-owned Copper Mines*, HUMAN RIGHTS WATCH (Nov. 4, 2011), https://www.hrw.org/report/2011/11/04/youll-be-fired-if-you-refuse/labor-abuses-zambias-chinese-state-owned-copper-mines. As another example, certain state-run orphanages in Ukraine were found to traffic children for forced labor and commercial sexual exploitation. INT'L BAR ASS'N, HUMAN TRAFFICKING AND PUBLIC CORRUPTION – A REPORT BY THE IBA'S PRESIDENTIAL TASK FORCE AGAINST HUMAN TRAFFICKING 22 (2016), https://www.ibanet.org/Document/Default.aspx?DocumentUid=E34FFA1D-8038-4AEC-A631-E0E2A7E0AD86.
[42] Prof. John Ruggie, *Comments on the "Zero Draft" Treaty on Business & Human Rights*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE [hereinafter Ruggie, *Comments on Zero Draft*], https://www.business-

conflict between the existing three-pillar framework and the treaty efforts. The focus on MNCs in the Proposed Treaty disregards the UN Guiding Principles' application "to *all* business enterprises, both transnational and others."[43] Human rights victims have no preference as to whether their perpetrators' operations are domestic or global, and the proposed language would lead to absurd results.[44] For example, where a SOE is in a joint venture with an MNC, and the joint venture results in human rights violations, only the MNC would be held accountable.[45]

### 2. MNCs Are Required to Conduct Due Diligence of, and Prohibit any Malfeasance by, Entities That Are Not Visible to the MNC or Under Their Control.

The Proposed Treaty would require States to impose as a matter of domestic law human rights due diligence requirements for MNCs.[46] These requirements would include monitoring human rights impacts; assessing human rights risks; preventing human rights violations; and conducting human rights impact assessments.[47] While some of these principles are contemplated by the UN Guiding Principles, what is not

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humanrights.org/en/comments-on-the-%E2%80%9Czero-draft%E2%80%9D-treaty-on-business-human-rights (last visited Oct., 2018) (addressing "critical issues related to scope, scale, and liability" of the Proposed Treaty); Ruggie, *Open Letter*, *supra* note 2 (noting that the UN Guiding Principles "do not draw lines between companies that are part of global supply chains and those that are not" and that "[a]n effective treaty should do the same or risk creating yet another gap in human rights protection.").

[43] UNGP DOCUMENT, *supra* note 2, at 1 (emphasis added).

[44] Ruggie, *Comments on Zero Draft*, *supra* note 42 (noting that the Proposed Treaty "narrows the scope … in the direction of a specific subset of actors: all we know for certain is that it would cover transnational private enterprises"); First Session Report, *supra* note 13, ¶ 13 (reporting the E.U.'s statement that "discussion could not be limited to transnational corporations, as many abuses were committed by enterprises at the domestic level").

[45] Ruggie, *Comments on Zero Draft*, *supra* note 42 (noting that the Proposed Treaty pays only scant attention to "states as economic actors").

[46] ZERO DRAFT, *supra* note 31, art. 9.1.

[47] *Id.* art. 9.2.

contemplated is the vast scope of this proposed requirement. The due diligence obligation would not only apply to the MNCs' own operations, but would also cover the operations of MNCs' "subsidiaries and . . . entities under [their] direct or indirect control."[48] Failure to comply with these broad due diligence requirements would "result in commensurate liability and compensation."[49]

The treaty as proposed would also require an MNC to patrol the activities of suppliers, vendors, and other business partners, who may be several levels removed from the MNC, may not be visible to the MNC, and may not even have a contractual or other relationship with the MNC. [50] Such business partners tend to be small, domestic entities, which would themselves not be subject to liability under the Proposed Treaty for even causing *direct* adverse human rights impacts. However, this language will hold MNCs liable for the *indirect* violation of failing to conduct due diligence on those domestic entities and to prevent human rights violations. [51]

As both Prof. Ruggie and Carlos Lopez of the International Commission of Jurists have recognized, "businesses and governments will find it hard to comply or monitor compliance respectively with [the Proposed Treaty's] far reaching and imperfectly defined obligations of due diligence."[52] Indeed, the Proposed Treaty will "inevitably

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[48] *Id*, art. 9.2.
[49] *Id.* art. 9.4.
[50] *Id.* art 9.2.
[51] *Id.* art 9.2.c.
[52] Ruggie, *Comments on Zero Draft*, *supra* note 42 (quoting Carlos Lopez, *Towards an International Convention on Business and Human Rights (Part I)*, OPINIO JURIS (JULY 23, 2018) [hereinafter Lopez, *Comments on Zero Draft – Part I*], http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/

hold parent and lead companies liable for any harm anywhere in their supply chains."[53] This broad scope of due diligence duty exceeds the most far-reaching national law on due diligence – the French *loi de vigilance*.[54]

For example, in the garment sector, it is nearly impossible to implement such onerous due diligence requirements "at every step in the production process, even when a company is genuine in its desire to do so."[55] One company featured in a recent report genuinely sought to eradicate forced labor from its supply chain through thoughtful policies regulating the actions of its suppliers.[56] However, despite these efforts, auditors were still able to find problems in facilities that supplied materials to one of the company's suppliers.[57] Unfortunately, this is a typical experience, where the most problems tend to lie with suppliers' suppliers. These entities often have no contractual or other relationship with MNCs, and are thus not within MNCs' scrutiny, influence, or control.[58] In addition, while some MNCs might have the capability to seek

[53] *Id.*; Cassell, *Comments on Zero Draft*, *supra* note 11 ("This language needs to be made more precise, and to make clear that the actionable act or omission must be that of the company itself, and not merely of its business partners, if the treaty is to avoid clashing with entrenched national law doctrines that limit piercing of the corporate veil.").
[54] *See generally* Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (Texte Adopté no. 924), http://www.assemblee-nationale.fr/14/ta/ta0924.asp (last visited Oct. 10, 2018). In 2017, France introduced this new due diligence measure requiring large French companies to create and implement a publicly accessible "vigilance plan" aimed at identifying and preventing potential human rights violations – including those associated with subsidiaries and suppliers. *Id.* *See also* Cassell *Comments on Zero Draft*, *supra* note 11 (arguing that the Proposed Treaty's preventive measures exceed the French due diligence law and the UK's business duty of care).
[55] Gillian B. White, *All Your Clothes are Made With Exploited Labor*, THE ATLANTIC (June 3, 2015), https://www.theatlantic.com/business/archive/2015/06/patagonia-labor-clothing-factory-exploitation/394658/.
[56] *Id.*
[57] *Id.*
[58] U.N. Human Rights Council, *Summary of Discussion of the Forum on Business and Human Rights*, ¶¶ 30, 70-80, at 7, 10, 11, U.N. Doc. A/HRC/FBHR/2012/4 (Jan. 23, 2013) (by John Ruggie) (acknowledging and recognizing companies' lack of full control over their global relationships and other challenges in implementing the business responsibility to respect human rights); Ruggie, *Open Letter*, *supra* note 2

additional compliance beyond its first-tier suppliers, such extensive policing of operations is often beyond the means of smaller MNCs. The proposed treaty disregards this reality, and instead, seeks to over-simplify this complex problem by requiring MNCs to police the actions of not only their first-tier suppliers, but also the suppliers of those suppliers, without any reasonable limitation.

### 3. Accepted Due Diligence Standards Are Rejected In Favor of "Outcome-Based" Standards.

In a significant departure from the UN Guiding Principles, the Proposed Treaty's due diligence process requires that MNCs actually *prevent* human rights abuses, or be held liable for them.[59] The UN Guiding Principles present human rights due diligence as a process in which companies take measures to learn about their human rights impacts and then to prevent, mitigate, and account for them.[60] Prof. Ruggie highlights the conflict between the principles and the Zero Draft in the following way:

> [T]he draft posits human rights due diligence as a standard of results: it requires business "to prevent" harm. This is an extremely tall order for any due diligence requirement, which typically is expressed as "seek to prevent," suggesting a standard of conduct. Moreover, "mitigating" the risk of harm generally is also called for, but is omitted from this text. It may be worth considering sticking with

(noting the "scale of global supply chains" and that how the Proposed Treaty will practically implement its prescriptions to these chains "is a mystery.").
[59] ZERO DRAFT, *supra* note 31, arts. 9.2.c, 9.4.
[60] UNGP DOCUMENT, *supra* note 2, at 15 (Principle #15).

the endorsed language of the [UN Guiding Principles].[61]

The Proposed Treaty seeks to transform due diligence from a process-based standard to an outcome-based standard. This standard is nearly impossible to satisfy.

### 4. The Burden of Addressing Human Rights Is Improperly Shifted From State Governments to MNCs.

Policing and prosecuting violators of human rights is the primary responsibility of governments.[62] However, the draft treaty expects MNCs, through due diligence and otherwise, to prevent human rights violations.[63] Beyond requiring ratifying States to create domestic legislation that impose duties on companies and hold them accountable for all human rights abuses that occur in their supply chain, the proposed treaty seeks to delegate to MNCs the State duty to protect and remedy human rights violations within their sovereign jurisdiction.[64]

The draft treaty disregards Pillar 1 of the UN Guiding Principles and, by extension, further disregards the universally-accepted notion that the *primary* responsibility to promote and protect human rights and fundamental freedoms lies with government[65] In drafting the UN Guiding Principles, the UN Special Representative

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[61] Ruggie *Comments on Zero Draft*, *supra* note 42.
[62] Interim Report, *supra* note 6, ¶ 68; *see also* UNGP DOCUMENT, *supra* note 2, at 7.
[63] ZERO DRAFT, *supra* note 31, arts. 9.2.c, 9.4.
[64] Lopez, *Comments on Zero Draft – Part 1*, *supra* note 52 ("Although the proposed treaty would create obligations only for States to take legislative and other measures to make business legally accountable and for victims to have access to remedy, the State role and the need of legal accountability and remedies also in the context of State commercial activity is generally overlooked.").
[65] UNGP DOCUMENT, *supra* note 2, at 7. UN Guiding Principles make specific recommendations to States on their general regulatory and policy functions, including:

warned against efforts to transfer the state duty to companies, stating that "corporations are not democratic public interest institutions and that making them, in effect, co-equal duty bearers for the broad spectrum of human rights . . . may undermine efforts to build indigenous social capacity and to make Governments more responsible to their own citizenry."[66] Indeed, "[t]he debate about business and human rights would be far less pressing if all Governments faithfully executed their own laws and fulfilled their international obligations."[67]

### 5. Liability Under the Proposed Treaty Extends to MNCs' Officers, Directors, and Shareholders.

The Proposed Treaty attempts to impose liability for human rights impacts on a broad and undefined group of individuals affiliated with MNCs. The draft does so by promoting legislation that would permit victims to seek a remedy for human rights abuses directly from corporate officials, directors and shareholders.[68] Specifically, the Zero Draft provides that States will ensure through their domestic laws that "natural and legal persons may be held criminally, civil or administratively liable for violations of human rights undertaken in the context of business activities of a transnational

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1. Enforcing laws that require business enterprises to respect human rights, and periodically assessing the adequacy of such laws and addressing gaps;
2. Ensuring that existing laws and policies that govern the creation and operations of business, such as corporate law, enable business respect for human rights;
3. Providing effective guidance to business on how to respect human rights throughout their operations; and,
4. Encouraging, and where appropriate requiring, companies to communicate how they address their human rights impacts. *Id.* 4–7.

[66] Interim Report, *supra* note 6, ¶ 68.
[67] *Id.* ¶ 79.
[68] ZERO DRAFT, *supra* note 31, art. 10.1.

character."[69] Perhaps more than any other, this section illustrates the risk of potential damage this Proposed Treaty will have on ratifying countries.

The proposed language opens the door for States to hold liable MNCs' directors, officers, employees, or even shareholders for adverse human rights impacts irrespective of the existence of the corporate form. As argued by business representatives at the IGWG's Third Session, piercing the corporate veil in this manner runs counter to the strong public policy reasons undergirding the principle behind the corporate veil, which is that it allows for entrepreneurs to take economic risks without the fear of being personally held liable.[70] The Proposed Treaty appears wedded to the view that creating personal liability is necessary to shock MNCs into better behavior. This view incorrectly presumes that MNCs (let alone their executives) have leverage over business partners and successive tiers of suppliers, into which the MNCs have little if any visibility and over which they have no control.

### 6. The Rights to be Protected Are Unclear.

The definition of the rights to be protected under the Proposed Treaty is muddled at best. The article on "Scope" states that "all international human rights and those rights recognized under domestic law" are covered.[71] As has already been

[69] *Id.* art. 10.1.
[70] Oral Comments of the Int'l Org. of Emps. to Chairperson Rapporteur re: Subject 5, Legal Liability, Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/IOE-Subject5.LegalLiability.PDF (last visited Oct. 10, 2018) (warning of "unintended consequences" of the proposed elements paper, including dampening investment flows to emerging economies).
[71] ZERO DRAFT, *supra* note 31, art. 3.

pointed out by other commentators, the first phrase "all international human rights" has "no legal pedigree" and requires clarification.[72] The second phrase, "rights recognized under domestic law," raises the question – unanswered by the proposed treaty – of how "possible tensions and contradictions between international and national standards are to be addressed."[73] As Mr. Lopez emphasized, "[I]t is extremely difficult to see how a State could implement a treaty with as open ended an [sic] prescription . . . ."[74]

If this confusion were not enough, in seemingly random sections, the draft instrument mentions "environmental rights,"[75] without explaining how such rights fall within the mandate of the IGWG or how they relate to the human rights referenced in the article on "Scope." Indeed, the UN Special Rapporteur on human rights and the environment acknowledged that many questions on the relationship between human rights and the environment "remain unresolved."[76]

### 7. Broad Extraterritorial Jurisdiction

The Proposed Treaty also incorporates a broad concept of extraterritorial jurisdiction. It would permit plaintiffs access to the courts of MNCs' home countries for

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[72] Ruggie *Comments on Zero Draft*, *supra* note 42; Lopez, *Comments on Zero Draft – Part 1*, *supra* note 52 (noting that the phrase " 'all international human rights and those rights recognized under domestic law,' flies in the face of the principle of legality").
[73] *Id.*
[74] Lopez, *Comments on Zero Draft – Part 1*, *supra* note 52.
[75] ZERO DRAFT, *supra* note 31, arts. 2.d, 2.e, 4.1, 8.1.b; Ruggie, *Open Letter*, *supra* note 2 (noting that judicial systems "could and would quickly become overwhelmed if they tried to address all types of impacts on human rights" and that therefore, the Proposed Treaty should focus on "the most severe human rights abuses, such as crimes against humanity, forced labor, sexual violence, and the worst forms of child labor.").
[76] *Special Rapporteur on Human Rights and the Environment (Former Independent Expert on Human Rights and the Environment)*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, https://www.ohchr.org/en/Issues/environment/SRenvironment/Pages/SRenvironmentIndex.aspx (last visited Oct. 10, 2018).

alleged harm that occurred elsewhere.[77] The draft would also allow courts to exercise jurisdiction over companies domiciled abroad where those companies allegedly committed abuses in the countries where those courts sit.[78] In this latter instance, the draft treaty would permit application of the law of the home government of the defendant MNC if requested by the alleged victim of the wrong and not the law of the government in which the court sits.[79] In other words, a court in the victim's country would be allowed to apply the law of another country – even though that court has no experience or expertise in interpreting that law or familiarity with that country's legal system.[80]

At the third session, this unrealistic concept of legal jurisdiction appeared in the Elements Paper. Setting aside a country's competence to effectively understand and interpret the laws of another country, a concern which cannot be understated, this proposal contradicted well-established norms of international law, including the doctrines of international comity,[81] political question,[82] *forum non conveniens*,[83] and exhaustion of local remedies.[84] Each of these doctrines supports a presumption against

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[77] ZERO DRAFT, *supra* note 31, art. 5.1.
[78] *Id.* art. 5.1.
[79] *Id.* art. 7.2.
[80] A.V. Lowe, *Public International Law and the Conflict of Laws: The European Response to the United States Export Administration Regulations*, 33 INT'L & COMPARATIVE L.Q. 515, 522 (1984) ("[P]ublic laws should, as a matter of principle, positively *not* be given effect by another State when the consequence of so doing is to distort the public order of that other State.").
[81] Jesner v. Arab Bank, 138 S. Ct. 1386, 1431 (2018) (Sotomayor, J., dissenting); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 133 (2013) (Breyer, J., concurring in judgment); Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).
[82] *See* sources cited in footnote 74, *supra.*
[83] *See* sources cited in footnote 74, *supra.*
[84] Sosa, 542 U.S. at 733 n.21 (noting argument of the European Commission that "basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have

extraterritorial jurisdiction, because "a state's obligation to respect human rights under the respective treaties is in principle confined to its territorial jurisdiction."[85] Indeed, as the UN Guiding Principles make clear, "States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction."[86] Indeed, none of the jurisdictional and choice-of-law provisions in the proposed treaty documents reflect a "general practice accepted as law," and are therefore not recognized under customary international law.[87]

Moreover, the contemplated grant of extraterritorial jurisdiction will, no doubt, generate considerable resistance from States because it is viewed as encroaching upon national sovereignty.[88] Such resistance has already been reflected in other settings where attempts have been made to apply domestic laws to actions that take place abroad. For example, numerous governments filed *amicus curiae* briefs in U.S. litigation arising under the Alien Tort Claims Act, in which they objected to the

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exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals").

[85] ILIAS BANTEKAS & LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 304–06 (2d ed. 2016) ("[T]he general rule in international law according to which jurisdiction refers primarily to state territory . . . ."); *Lowe*, *supra* note 80, at 522 ("[T]here is no general reason . . . requiring that public laws, which constitute the public order of a State, should be given effect in other States. . . . As rules of public order they must in principle be binding upon all people within the geographical boundaries which circumscribe that community – within the State; that is implicit in the very notion of public laws.").

[86] UNGP DOCUMENT, *supra* note 2, at 8.

[87] U.N. Statute of the Int'l Court of Justice art. 38(1)(b) (stating that "a general practice accepted as law" is the criterion of a rule of customary international law).

[88] "All peoples," says the Declaration on Principles of International Law, "have the right to freely to determine, without external interference, their political status and to pursue their economic, social and cultural development." G.A. Res. 2625(XXV) (Oct. 24, 1979).

extraterritorial application of that law.[89]

## IV. THE PROPOSED TREATY'S NEGATIVE UNINTENDED CONSEQUENCES

If a treaty containing even some of the terms outlined in the Zero Draft and Draft Optional Protocol comes into being, it could materially reduce sourcing and exports from and FDI in ratifying countries.

### A. The Legal Operation of a Treaty and How It Impacts National Law

To truly understand the adverse impact the Proposed Treaty would have on businesses and ratifying countries, one must first understand how such a treaty would be implemented. The process here is, at best, opaque.

It would appear that the Proposed Treaty will enter into force when an as-yet-

[89] Jesner, 138 S. Ct. at 1407 (noting that the Hashemite Kingdom of Jordan considered an ATCA suit brought against Arab Bank, a bank incorporated in Jordan, a "grave affront" to its sovereignty and that "[b]y exposing Arab Bank to massive liability, this suit thus threatens to destabilize Jordan's economy and undermine its cooperation with the United States"); *see also* Sosa, 542 U.S. at 733 n.21 (noting argument of the European Commission that "basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals"), *id.* (noting objections by South Africa to "several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid" on the basis that the cases "interfere[d] with the policy embodied by its Truth and Reconciliation Commission"); Brief for Federal Republic of Germany as Amicus Curiae, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (No. 10–1491), at 1 ("The Federal Republic of Germany has consistently maintained its opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury on foreign soil."); Brief for Government of the United Kingdom of Great Britain and Northern Ireland et al. as Amici Curiae, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (No. 10–1491), at 3 ("The Governments remain deeply concerned about . . . suits by foreign plaintiffs against foreign defendants for conduct that entirely took place in the territory of a foreign sovereign.").

undefined threshold number of States sign the instrument.[90] Once a State signs the instrument, it is then obligated to "take all necessary legislative, administrative or other action . . . to ensure effective implementation of this Convention."[91] Thus, the treaty allows individual States to pursue a variety of measures to implement the various State obligations. As with other international treaties, implementation of the proposed treaty on human rights will depend upon each States' laws.[92] As such, those components of the Proposed Treaty that have been identified *supra* as being harmful to business would ultimately become law in the countries that ratify it. Businesses that operate in such countries would be bound by that law, and thereby subject to all of the risks it creates. These risks would likely exceed what would otherwise be viewed as acceptable and may result in wholescale avoidance of ratifying countries. This would not be a new phenomenon.

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[90] ZERO DRAFT, *supra* note 31, art. 15.12. According to this article, States will sign the proposed treaty through "ratification or accession." *Id.* "Ratification" at the international level, which indicates to the international community a State's commitment to undertake the obligations under a treaty, should not be confused with ratification at the national level, which a State may be required to undertake in accordance with its own constitutional provisions before it expresses consent to be bound internationally. UNITED NATIONS, TREATY HANDBOOK § 3.3.2 (2013), https://www.un-ilibrary.org/international-law-and-justice/treaty-handbook_53afc703-en. "Accession" occurs when a State generally expresses its consent to be bound by a treaty by depositing an instrument of accession with the depositary (*see* article 15 of the Vienna Convention 1969). *Id.* § 3.3.4. Accession has the same legal effect as ratification. *Id.*

[91] ZERO DRAFT, *supra* note 31, art. 15.1; *see also id.* art. 9.1 ("State Parties shall ensure in their domestic legislation that all persons . . . shall undertake due diligence obligations . . . ."), art. 10.1 ("State Parties shall ensure through their domestic law that . . . persons may be held criminally, civil or administratively liable . . . .").

[92] For example, for "non-self-executing" treaties like this, the United States would require congressional action to implement the proposed treaty into domestic law. Similarly, in the United Kingdom, Parliamentary action would be required. On the other hand, the Netherlands directly incorporates treaties into domestic law without parliamentary approval. *See* Medellin v. Texas, 552 U.S. 491, 547 (2008) (J. Breyer, dissenting) (explaining that "domestic status-determining law differs markedly from one nation to another"); *see also* Sonja Neudorfer & Claudia Wernig, *Implementation of International Treaties into National Legal Orders: The Protection of the Rights of the Child within the Austrian Legal System*, 14 Max Planck Yearbook of United Nations L. 410, 413–14 (2010) (explaining the different approaches to incorporating international treaties into domestic law).

### B. Dodd-Frank and the Democratic Republic of Congo

Following the economic crisis of 2008, the U.S. Congress enacted legislation to address its perceived root causes through the Dodd-Frank Wall Street Reform and Consumer Protection Act.[93] In relevant part here, the U.S. Congress also attempted to right a social wrong that was taking place in the Democratic Republic of Congo ("DRC").[94] There, a raging conflict fraught with human rights abuses was being waged by militias who were profiting from the sale of four minerals that are prevalent in the country – tungsten, tin, tantalum and gold.[95] These four "conflict minerals" were critical to the technology sector that relies on them to manufacture cell phones and similar devices.[96]

Based on the premise that MNCs in the technology sector were inadvertently using these "conflict minerals" in their products, a short provision – Section 1502 – was

[93] Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o); Nik Stoop et al., *More Legislation, More Violence? The Impact of Dodd-Frank in the DRC*, 13 PUB. LIBRARY OF SCI. 1, 3–4 (2018), https://doi.org/10.1371/journal.pone.0201783 ("The lobbying efforts culminated in Dodd-Frank's Section 1502, which in the words of one of its promotors was aimed at 'reducing the size of the black market and intended to reduce the funding of violence while making progress on governance, peace, and security issues more possible.'" (internal citations omitted)).

[94] Jeroen Cuvelier et al., *Analyzing the Impact of the Dodd-Frank Act on Congolese Livelihoods*, SOCIAL SCI. RESEARCH COUNCIL – CONFLICT PREVENTION & PEACE FORUM 7–8 (2014) https://www.ssrc.org/publications/view/analyzing-the-impact-of-the-dodd-frank-act-on-congolese-livelihoods/ (explaining the lobbying efforts that led to Dodd-Frank's section on conflict minerals and noting that "[s]trikingly . . . several of its provisions seem unrelated to the daily activities of Wall Street bankers"); *see also* Melvin Ayogu & Zenia Lewis, *Conflict Minerals: An Assessment of the Dodd-Frank Act*, BROOKINGS INSTITUTION (October 3, 2011), https://www.brookings.edu/opinions/conflict-minerals-an-assessment-of-the-dodd-frank-act/ ("The presence of this provision in a bill on financial sector reform is, to say the least, unexpected.").

[95] Stoop et al., *supra* note 93, at 3–4 (noting that "[i]n 2010, the year in which the Dodd-Frank legislation passed, over a dozen armed groups were active in Eastern Congo, and approximately 1.7 million people remained displaced"); Cuvelier et al., *supra* note 94, at 7–8.

[96] Dominic P. Parker et al., *Unintended Consequences of Economic Sanctions for Human Rights: Conflict Minerals and Infant Mortality in the Democratic Republic of the Congo*, WIDER Working Paper 1 (United Nations Univ. World Inst. for Dev. Econ. Research, Working Paper No. 2016/124, 2016).

added to the bill. It required companies to disclose the presence of conflict minerals in their products.[97] Specifically, this law required companies registered with the U.S. Securities and Exchange Commission ("SEC") and using tantalum, tin, gold, or tungsten in their products, to publicly disclose that (1) their product was not obtained from the DRC and neighboring countries, where extraction of these minerals was tied to human rights violations committed by private and government militias; or (2) if such assurance cannot be given, the due diligence measures the company has taken regarding such minerals.[98]

Section 1502 did not prohibit companies from using conflict minerals. Instead, the law sought to use consumer and market pressures that resulted from the mandatory disclosure to encourage companies to cease sourcing minerals that were associated with the conflict.[99] Dodd-Frank's supporters argued that the requirements of

[97] Pub. L. 111-203, 124 Stat. 1376 (2010) (codified as 12 U.S.C. § 5301); *see also* Sudarsan Raghavan, *How a Well-Intentioned U.S. Law Left Congolese Miners Jobless*, WASH. POST (Nov. 30, 2014), https://www.washingtonpost.com/world/africa/how-a-well-intentioned-us-law-left-congolese-miners-jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2_story.html?utm_term=.0adef5d3f3ed; Lauren Wolfe, *How Dodd-Frank Is Failing Congo*, FOREIGN POLICY (Feb. 2, 2015), https://foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/.

[98] In relevant part, Section 1502 states that the SEC shall promulgate regulations requiring companies to "disclose annually, . . . whether conflict minerals . . . did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report that includes, . . . (i) a description of the measures taken . . . to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission . . . ; and (ii) a description of the products manufactured or contracted to be manufactured that are not DRC conflict free, the entity that conducted the independent private sector audit . . . , the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 11-203 § 1502, 124 Stat. 1376, 2213 (2010) (codified at 15 U.S.C. § 78m(p)); *see also* Ayogu & Lewis, *supra* note 94 (describing the corporate disclosure requirements under Section 1502).

[99] Ayogu & Lewis, *supra* note 94 (stating that "[p]rimarily, the Act uses the instrumentality of 'name and shame'").

the law would weaken the DRC's militias by cutting off their mining profits.[100]

Immediately, companies faced formidable financial and logistical challenges to satisfy the requirements of Section 1502. Figures from 2014 indicate that over 1,200 U.S. companies filed Dodd-Frank disclosures, at an estimated total compliance cost of $1 billion.[101] Compliance efforts included collecting data from smelters and processing centers halfway around the world and scrutinizing suppliers in "supply chains [that] are notoriously long and disjointed, including miners digging ore with their hands and vendors of recycled or scrap metal."[102] Suffice it to say, disclosures associated with the reporting requirements of Section 1501 were subject to the risk that they contained significant inaccuracies because of the complexity of the supply chain involved.

The Dodd-Frank requirements set off a chain of events that led to significant job losses and worsened the country's economy.[103] First, as an initial response to Dodd-Frank, the DRC government shut down the entire mining industry in three mining-heavy provinces[104] for nearly six months – even though only a "small number" of mines were actually controlled by or funded militias.[105] This shut-down had a drastic effect on the economic welfare of the country, where it is estimated that one sixth of the country's

[100] Raghavan, *supra* note 97; Cuvelier et al., *supra* note 94, at 7–8.
[101] Parker, *supra* note 96, at 1.
[102] Lynnley Browning, *Companies Struggle to Comply With Rules on Conflict Minerals*, N.Y. TIMES (Sept. 7, 2015), https://www.nytimes.com/2015/09/08/business/dealbook/companies-struggle-to-comply-with-conflict-minerals-rule.html.
[103] Stoop et al., *supra* note 93, at 2 (noting that the legislation led "to a de facto ban on artisanal mining that deprived hundreds of thousands of artisanal mining communities from their livelihoods").
[104] These provinces were South Kivu, North Kivu, and Maniema. It is unclear why the government targeted these particular provinces. Presumably, this was because much of the conflict minerals were "usually associated" with Eastern Congo, where these provinces are located. *See* Parker, *supra* note 96, at 4; *see also* Stoop et al., *supra* note 93, at 3.
[105] Raghavan, *supra* note 97; Wolfe, *supra* note 97; Parker, *supra* note 96, at 23.

population depends on mining for a living.[106] In 2012, as a result of the government shut-down of the mines, an estimated five to twelve million Congolese lost their livelihoods.[107]

After the shut-down ended, the government, along with international partners, launched a complicated process to certify the minerals as "conflict-free."[108] Accounts of the process revealed that it "unfold[ed] at a glacial pace, marred by a lack of political will, corruption and bureaucratic and logistical delays."[109] In the meantime, an alternative market for the minerals took hold. Tons of uncertified ore slipped out of the DRC and were laundered through other countries, thus obscuring their origin and bypassing the certification process.[110] Worse, the certification process also had the effect of furthering corruption by certain government officials who would award "conflict-free" certifications in exchange for bribes.[111]

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[106] Raghavan, *supra* note 97; Stoop et al., *supra* note 93, at 3; WORLD BANK, DEMOCRATIC REPUBLIC OF CONGO GROWTH WITH GOVERNANCE IN THE MINING SECTOR, REPORT NO. 43402-ZR 7 (2008), https://siteresources.worldbank.org/INTOGMC/Resources/336099-1156955107170/drcgrowthgovernanceenglish.pdf ("There are an estimated 10 million people, 16 percent of DRC's population, who either mine directly or are dependent on artisanal mining for their livelihood.").

[107] Wolfe, *supra* note 97; Stoop et al., *supra* note 93 (noting that "official export data reveal a large drop in exports of tin, coltan (tantalum), and wolframite (tungsten) during 2010-12, suggesting that the de facto ban indeed negatively impacted 3T mining activities" (internal citations omitted)).

[108] Cuvelier et al., *supra* note 94, at 15–16 (describing the evolution of the certification process post-Dodd-Frank).

[109] Raghavan, *supra* note 97; Cuvelier et al., *supra* note 94, at 2 (noting that "there is a widespread concern about the slowness with which these mining reform initiatives are being implemented" and that "[a]s a result, a situation has emerged in which the large majority of artisanal mines in eastern DRC continue to function in a grey zone between legality and illegality, making it very hard for local mining operators to get their minerals sold on the international market").

[110] Wolfe, *supra* note 97; *see also* Stoop et al., *supra* note 93, at 2, 6; Cuvelier et al., *supra* note 94, at 2.

[111] Wolfe, *supra* note 97; *see also* Stoop et al., *supra* note 93, at 2 (stating that "it has been argued that the DRC government used the `conflict minerals' narrative underlying the Dodd-Frank legislation to allow industrial mining companies to relocate artisanal miners and take control over their concessions"), 6 (noting that "the ban merely shifted the illicit control of mining sites from rebels or disloyal army units towards politico-military authorities more loyal to the Congolese government" (citing Sara Greenen*, A*

In addition to the challenges associated with corruption and the alternative market, the certification process faced substantial logistical barriers. Mines in the DRC are spread across vast regions where the government had very little control, and were only reachable by poor roads that did not allow easy access.[112] Not surprisingly, the challenges resulted in the certification of few mines. For example, in 2015, in the province of South Kivu, out of more than 900 mines, only 11 were able to certify minerals as "conflict-free."[113]

Faced with the realities that it was practically impossible to certify that minerals sourced from the DRC were "conflict free," many MNCs made the decision to avoid the risk altogether and stopped sourcing any minerals from the DRC.[114] This led to a "*de facto* boycott" of Congolese minerals.[115] In April 2011, what had been a *de facto* boycott became more formal when two global coalitions in the electronics industry announced that they stopped buying minerals from smelters that were unable to prove they did not source minerals that fund conflict in the DRC.[116]

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*Dangerous Bet: The Challenges of Formalizing Artisanal Mining in DRC*, 37 RESOURCES POLICY 322 (2012))).

[112] Raghavan, *supra* note 97; Ayogu & Lewis, *supra* note 94 ("DRC, however, maintains little authority in the eastern region of the country where this conflict is most pronounced and is, therefore, incapable of stabilizing the zone.").

[113] Raghavan, *supra* note 97. As another example, while the Congolese National Minister of Mines issued a decree in 2012 to grant a preliminary "green status" to eleven mine sites in the Rubaya mining area, it took almost two years (until February 2014) before received the required confirming visit from the certifiers. Cuvelier et al., *supra* note 94, at 16.

[114] Stoop et al., *supra* note 93, at 2–4 (noting that, as the government's "de jure" ban was ending, companies instituted a "de facto" ban). Indeed, even before its enactment, Congolese miners expressed apprehension that, as a result of Dodd-Frank, U.S. companies would simply boycott all conflict minerals from the DRC "as a matter of expediency." Ayogu & Lewis, *supra* note 94.

[115] Wolfe, *supra* note 97; Stoop et al., *supra* note 93, at 2; Cuvelier et al., *supra* note 94, at 20–21.

[116] These two coalitions were the Electronic Industry Citizenship Coalition and Global e-Sustainable Initiative. *See Responsible Minerals Initiative*, RESPONSIBLE BUSINESS ALLIANCE (FORMERLY ELECTRONIC

The effect of the decision by the industry to avoid sourcing minerals from the DRC altogether was devastating, directly affecting the livelihoods of miners.[117] The prices of minerals dropped. In 2010, before Dodd-Frank, miners were selling a kilogram of tin for $7.[118] In November 2014, after Dodd-Frank, the miners got only $4, even though the global market price averaged $22.[119] Miners were forced to find other ways to survive, including joining the very militias Dodd-Frank's proponents sought to defund.[120] In fact, the militias thrived.[121] For example, although they may have abandoned some mines extracting tin, tungsten, and tantalum, the militias continued to generate significant revenues from gold mines.[122] Warlords and militias also turned to looting civilians and fighting rival groups for the control of gold mines, as gold is much easier to smuggle than the other conflict minerals.[123] Militias also diversified their efforts, and switched to selling other commodities such as palm oil, charcoal, marijuana, cattle, and soap.[124]

Mining areas affected by Dodd-Frank "further witnessed a strong increase in

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INDUSTRY CITIZENSHIP COALITION), http://www.responsiblebusiness.org/initiatives/rmi/ (last visited October 10, 2018); *see also* Stoop et al., *supra* note 93, at 4–5; Parker, *supra* note 96, at 7.

[117] Stoop et al., *supra* note 93, at 1–2, 5 ("There is a general consensus that the slowdown of mining activities had an immediate negative effect on living conditions of artisanal miners and the interlinked local economy."); Cuvelier et al., *supra* note 94, at 2 (noting "strong indications" that Dodd-Frank led to dire socioeconomic consequences in the mining areas of eastern DRC).

[118] Raghavan, *supra* note 97.

[119] *Id.*

[120] *Id.*; Cuvelier et al., *supra* note 94, at 10.

[121] Raghavan, *supra* note 97; Cuvelier et al., *supra* note 94, at 10.

[122] Raghavan, *supra* note 97; Stoop et al., *supra* note 93, at 2 (noting that militias have now focused on gold mines, as gold is easier to smuggle than bulkier conflict minerals).

[123] Nik Stoop et al., *Trump Suspended the 'Conflict Minerals' Provision of Dodd-Frank. That's Probably Good for Congo*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/27/trump-canceled-the-conflict-minerals-provision-of-dodd-frank-thats-probably-good-for-the-congo/?utm_term=.d83bebb8a8b7.

[124] Raghavan, *supra* note 97; Stoop et al., *supra* note 93, at 2 (noting that, according to the UN, "after Dodd-Frank, some armed groups looked for alternative sources of income, including the trade in charcoal, cannabis and palm oil").

riots, which is a clear sign of social upheaval."[125] Some research shows the violence in eastern Congo actually *increased* after Dodd-Frank went into effect.[126] The miners were not the only ones whose livelihoods suffered an adverse impact as the result of Dodd-Frank. Those people who supported the mining industry, including "petty traders and transporters, women selling vegetables on the market and school teachers in and around the mining sites," also suffered.[127] In certain mining areas, malnutrition increased, as did the number of school drop-outs because parents and children were no longer able to pay school fees.[128] Residents stayed away from marketplaces, leading to a slowdown in regional economies.[129]

A particularly tragic indicator of Dodd-Frank's negative impact is the spike in infant mortality rates in mining families. Specifically, during the period between the advent of the Dodd-Frank induced shut-down through 2012, among children born in villages near the mines, deaths increased by a shocking 143%.[130] Research indicates that the declines in sourcing from the DRC triggered by Dodd-Frank led to decreased maternal access to, and ability to afford, infant health care, thereby increasing infant mortality.[131]

In light of the evidence of Dodd-Frank's harm on the DRC's economy and local

[125] Stoop et al., *supra* note 93, at 14.
[126] Wolfe, *supra* note 97; Parker, *supra* note 96, at 2; Stoop et al., *supra* note 93, at 5.
[127] Cuvelier et al., *supra* note 94, at 10–11.
[128] *Id.*
[129] *Id.*
[130] Parker, *supra* note 96, at 3.
[131] *Id.*

population,[132] there has been a building consensus that Section 1502 should be repealed. In September 2014, a diverse group of 70 academics, researchers, journalists, and advocates published an open letter to governments and other stakeholders criticizing Dodd-Frank as "contributing to, rather than alleviating, the very conflicts they set out to address."[133] In February 2017, U.S. President Donald Trump threatened to issue an executive order instructing the Securities and Exchange Commission ("SEC") to temporarily suspend the rules implementing Section 1502, on the grounds that there is "mounting evidence" that the due diligence obligations have "caused harm to some parties in the Democratic Republic of the Congo and have thereby contributed to instability in the region and threatened the national security interest of the United States."[134] In April 2017, SEC officials indicated that they would *not* recommend enforcement action to the agency if a company fails to make the required conflict minerals disclosures.[135] Then, in June 2017, the U.S. House of Representatives passed the "Financial CHOICE Act of 2017," which included a repeal of

[132] Cuvelier et al., *supra* note 94, at 26 ("[L]ittle real progress has been made on the ground. Living conditions of miners have not improved, the sector is still highly militarized, and a multitude of exploitative networks still control large parts of it.").
[133] An Open Letter from Aloys Tegara et al., Signatories, to Gov'ts, Non-Governmental Orgs., & Other Stakeholders Implicated in Efforts of Various Kinds Related to Conflict Minerals (on file with author), https://ethuin.files.wordpress.com/2014/09/09092014-open-letter-final-and-list.pdf (last visited Oct. 8, 2018); Stoop et al., *supra* note 93 (noting that findings of increased violence "offer empirical support for" the open letter).
[134] Pilkington, *Proposed Trump executive order would allow US firms to sell 'conflict minerals'*, GUARDIAN (Feb. 8, 2017), https://www.theguardian.com/us-news/2017/feb/08/trump-administration-order-conflict-mineral-regulations (linking to Memorandum from Donald J. Trump, President of the United States, to Securities and Exchange Commission on Suspension of the Conflict Minerals Rule (February 2017)).
[135] Public Statement, SEC Div. of Corp. Fin., Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule (April 7, 2017), https://www.sec.gov/news/public-statement/corpfin-updated-statement-court-decision-conflict-minerals-rule.

Section 1502.[136] The U.S. Senate is now considering this bill.[137]

### C. The Experience of Dodd-Frank Is Instructive With Respect to What Could Go Wrong with the Proposed Treaty.

The IGWG should take careful note of the problems created by Section 1502 of Dodd-Frank. The law offers an illustration of how overly simplistic efforts to address complex human rights issues can lead to unintended and adverse economic impacts. Ultimately, these adverse impacts end up harming the very vulnerable populations the laws were designed to protect. As one commentator put it, "Congolese miners . . . are paying to ease the consciences of Western consumers."[138]

The added risks presented by the Proposed Treaty will at least have a similar impact to that created by Section 1502, and will likely dissuade most MNCs from sourcing from countries that ratify it. First, the Proposed Treaty's requirements are more onerous than those imposed by Section 1502 and its scope is considerably broader. As described extensively above, the Proposed Treaty not only requires MNCs

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[136] Financial CHOICE Act of 2017, H.R., 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/10/actions.

[137] *See Oversight on the Monetary Policy to Congress Pursuant to the Full Employment and Balanced Growth Act of 1978: Hearing Before the Committee on Banking, Housing, and Urban Affairs*, 115th Cong. 108 (2017) (discussing the House Bill); *H.R. 10 – Financial Choice Act of 2017*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/10/all-actions?overview=closed#tabs (last visited Oct. 10, 2018) (stating that the House bill was received in the Senate on June 12, 2017, and referred to the Committee on Banking, Housing, and Urban Development on June 13, 2017). Moreover, Dodd-Frank has also been attacked on the grounds that it violates the First Amendment to the U.S. Constitution. On August 18, 2015, the U.S. Court of Appeals for the District of Columbia Circuit reaffirmed its prior holding that certain sections of Dodd-Frank "violate the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be "DRC conflict free."'" Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015). This matter has been remanded to the Commission for further rule-making. Nat'l Ass'n of Mfrs. v. SEC, No. 13-CF-000635, 2017 WL 3503370 (D.D.C. Apr. 3, 2017).

[138] Wolfe, *supra* note 97.

to conduct due diligence, but also to *prevent* entities from committing human rights violations. From a practical perspective, this undertaking would be extremely difficult, if not impossible to do. Worse, the Proposed Treaty also contemplates civil and criminal liability for MNCs and their personnel for human rights violations. By comparison, Section 1502 simply required company disclosures.

Second, the Proposed Treaty encompasses human rights violations related to all products and services sourced from ratifying countries. Section 1502 was limited to four minerals. Assuming personal risk for actions over which one has no control will only serve to cause MNCs and their personnel to avoid the risk entirely.

### D. Many of the Countries that Support the Proposed Treaty Rely on Exports and Foreign Direct Investment.

As mentioned above, certain States that favor creation of a treaty have emerged from the IGWG's Sessions. These States include Ecuador, South Africa, Namibia, Venezuela, Bolivia, Azerbaijan, Pakistan, Nicaragua, Benin, Burkina Faso, Morocco, and the Philippines.[139] Many of these countries rely heavily on exports and FDI to support their economies. As illustrated by the case of Dodd-Frank's negative effect on the DRC, many of these States risk similar impact if they ratify the Proposed Treaty.

Appendix A provides an illustration of the major industries for each of these

[139] At the time of publication, it is unclear to what extent these States support the currently proposed treaty. The designation of these States as "treaty proponents" is based on their votes in support of the resolution establishing the IGWG and/or their statements at the various IGWG Sessions in support of the treaty process. See *supra* notes 22–28 (citing to each State's vote or statement in support of the treaty process).

States and how dependent they are on FDI and export markets. As additional examples of this dependency, in Nicaragua, the FDI stock[140] as a percentage of GDP is as high as 76%; in Azerbaijan this figure is 71%; and in South Africa it is 46.5%. In some States, like Bolivia, Ecuador, and South Africa, FDI inflows have declined for some time, and, no doubt, those countries would like to reverse those trends.[141]

Although these countries may support the Proposed Treaty, and others are likely contemplating support, if such a treaty actually comes into being, it may have a substantial impact on the exports from those countries.

### E. The Proposed Treaty May Also Negatively Impact Human Rights.

The negative effects of domestic measures to implement the Proposed Treaty may not be limited to the financial health of a country. The loss of FDI in and closure of export markets from ratifying countries will also have adverse consequences on the protection of human rights in those countries. This concern was well articulated by Justice Anthony Kennedy of the U.S. Supreme Court in his recent opinion holding that the Alien Tort Claims Act ("ATCA")[142] does not and should not be a vehicle to haul

[140] FDI stock measures the total level of direct investment at a given point in time, usually the end of a quarter or of a year. *Foreign Direct Investment – Stocks*, EUROSTAT STATISTICS EXPLAINED, https://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_direct_investment_-_stocks (last visited Oct. 10, 2018); *OECD Data – FDI Stocks*, OECD, https://data.oecd.org/fdi/fdi-stocks.htm (last visited Oct. 10, 2018).

[141] Indeed, in general, MNCs' cross-border investments have steadily declined in the past decade, exacerbated partly by a global trend towards protectionist trade policies. *Canaries in the Coal Mine*, ECONOMIST, June 16–22, 2018, at 58. As an illustration, in 2017, cross-border takeovers and greenfield investments such as factories fell by twenty-three percent. *Id.*

[142] The ATCA enables aliens to sue in federal court for any violation of the "law of nations," or customary international law. The most recent U.S. Supreme Court case to analyze the ATCA is Jesner, 138 S. Ct. at 1406–07, in which the extraterritorial reach of the ATCA was substantially narrowed, but not completely foreclosed.

foreign companies into U.S. courts for violations that occur outside the United States, as it would set a precedent that allowed foreign courts to do the same to American companies:

> [Finding corporate liability under the ATCA] could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts, thereby "hinder[ing] global investment in developing economies, where it is most needed." In other words, allowing plaintiffs to sue foreign corporations under the ATCA could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the safeguards of United States courts. And, in consequence, that often might deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights.[143]

This defense of FDI recognizes that MNCs can be agents of change in countries in which they operate by encouraging host governments to adhere to the rule of law to provide for the stable, reliable conditions needed for business; as well as altering traditional value systems and social attitudes to provide greater opportunities for their

[143] Jesner, 138 S. Ct. at 1406.

populations.[144] Experts have found "systematic evidence" of an association between FDI and government respect for human rights.[145] Even Justice Sonia Sotomayor, who dissented from Justice Kennedy's opinion in the aforementioned ATCA case, conceded that MNCs "can be and often are a force for innovation and growth."[146]

Unfortunately, research indicates that countries in need of broader improvements in the protection of human rights may be inclined to support an instrument such as the Proposed Treaty. Such countries have been known to ratify human rights initiatives, not necessarily because they genuinely intend to change their human rights practices,[147] but partly because the act of ratification grants those countries certain

[144] David Richards & David Gelleny, *Money with a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries*, 45 INT'L STUDIES Q. 219, 222 (2001). Indeed, "[e]ven as rich countries seek to rid workplaces of subtle gender bias, in many developing ones discrimination remains overt." *Women and Work: Never Done*, ECONOMIST (May 26– Jun 1, 2018), https://www.economist.com/finance-and-economics/2018/05/26/labour-laws-in-104-countries-reserve-some-jobs-for-men-only. Certain countries explicitly ban women from certain occupations or even entire sectors. In Moldova, women may not drive buses with more than fourteen seats. *Id.* In Angola, women may not work in gas production. *Id.* In Argentina, women are barred from distilling or selling alcohol. *Id.* Russia deems 456 jobs too dangerous for women, including driving a train or steering a ship. *Id.* In four countries, women cannot register a business. *Id.* In eighteen, a husband can bar his wife from working. *Id.*

[145] Richards & Gelleny, *supra* note 144; COURTNEY HILLEBRECHT, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS 27 (2014).

[146] Jesner, 138 S. Ct. at 1436 (Sotomayor, J., dissenting).

[147] Experts debate other factors that could lead to non-compliance. Some argue that a country's leadership may genuinely aspire to improve their human rights practices, but compliance may be difficult because of a lack of institutional capacity. For example, leaders responsible for the ratification may find it difficult to effect change in the actions and decisions of those who actually engage in the violations, including police officers, members of the military, and other low-level state actors. Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2010 (2002). However, others argue that "[n]oncompliance in the area of human rights . . . can rarely be explained by bureaucratic failure." Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593, 598 (2005). In other words, this counter-argument goes, human rights violations are "by and large calculated acts taken by different actors that expect some form of gains from repression." *Id.*

"expressive" benefits from the international community.[148] When a country ratifies a human rights treaty, it serves as a public enunciation of a statement that it is committed to protect human rights, even if implementation of the terms of that treaty proves difficult or impossible.[149] Put another way, treaty ratification can become a "substitute, rather than a spur to, real improvement in human rights practices."[150] Allowing them to hide behind ratification of human rights treaties has dangerous and counter-productive effects.[151]

## V. CONCLUSION

The IGWG should recognize that the Proposed Treaty, if finalized and put into effect, may result in adverse socioeconomic impacts on the ratifying countries. The effect of Dodd-Frank on the DRC's economy provides a cautionary tale in this regard.

Instead of pursuing a "one-size-fits-all," top-down solution like the Proposed Treaty and its onerous and punitive requirements, the IGWG should recognize that MNCs have made strides in embracing and promoting the UN Guiding Principles since their advent seven years ago. Voluntary measures taken by MNCs in furtherance of their commitments to respect human rights consistent with the UN Guiding Principles are often filling the lacunae of human rights protections left by host countries' governments. Nonetheless, companies cannot be expected – both from a practical and

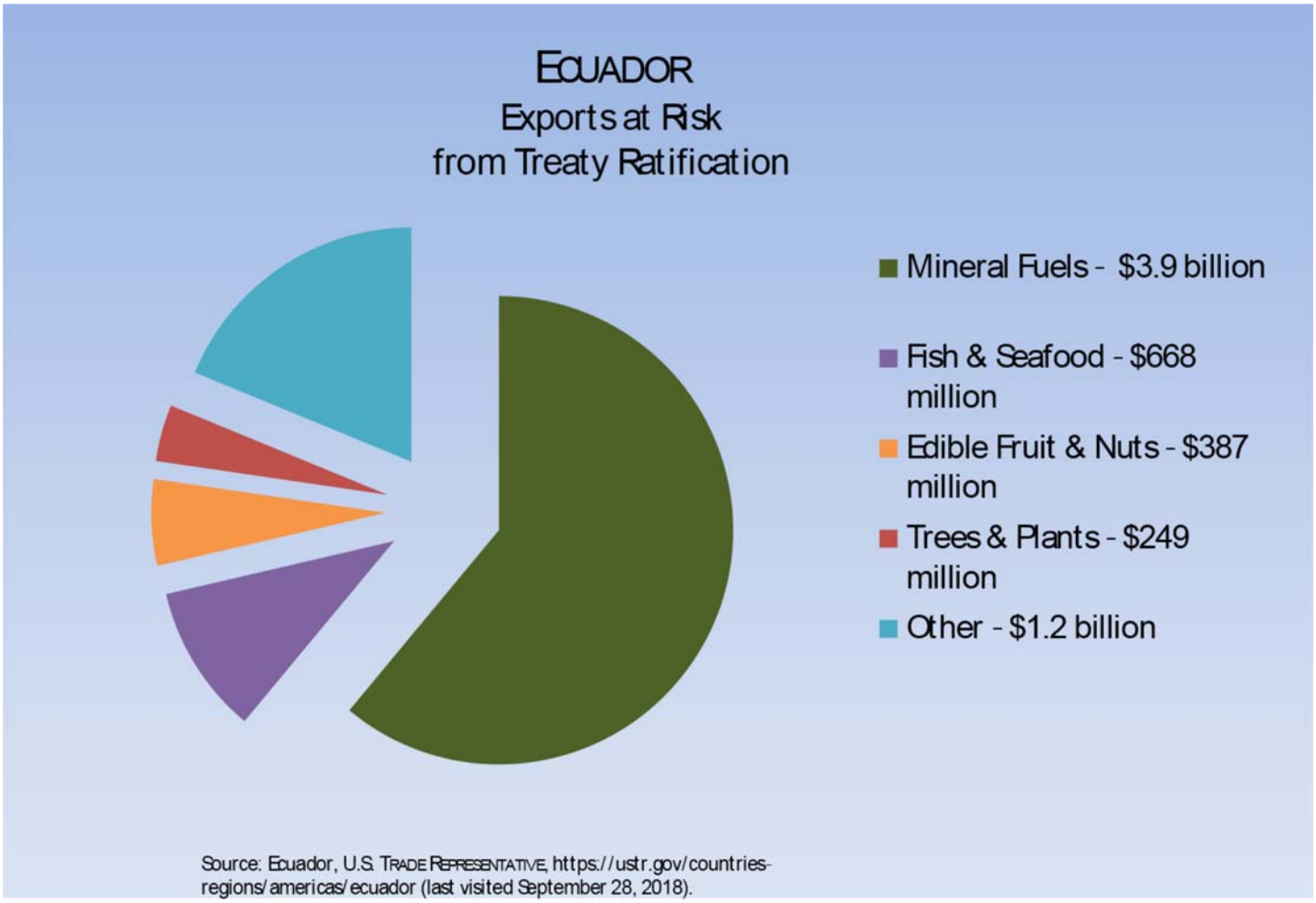
[148] Hathaway, *supra* note 157, at 2005–07; *see also* Jana von Stein, *Making Promises, Keeping Promises: Democracy, Ratification and Compliance in International Human Rights Law*, 46 BRITISH J. POLITICAL SCI. 655, 658–59 (2016).
[149] *Id.*
[150] Hathaway, *supra* note 147, at 2009.
[151] Hathaway, *supra* note 147, at 1940.

political standpoint – to displace States in their roles to protect human rights. Privatization of human rights protection is not the answer. Instead, the IGWG should support ongoing efforts to implement the UN Guiding Principles, which allow corporations to address adverse human rights impacts in their own operations, and States' efforts to enforce existing laws enacted to protect human rights.

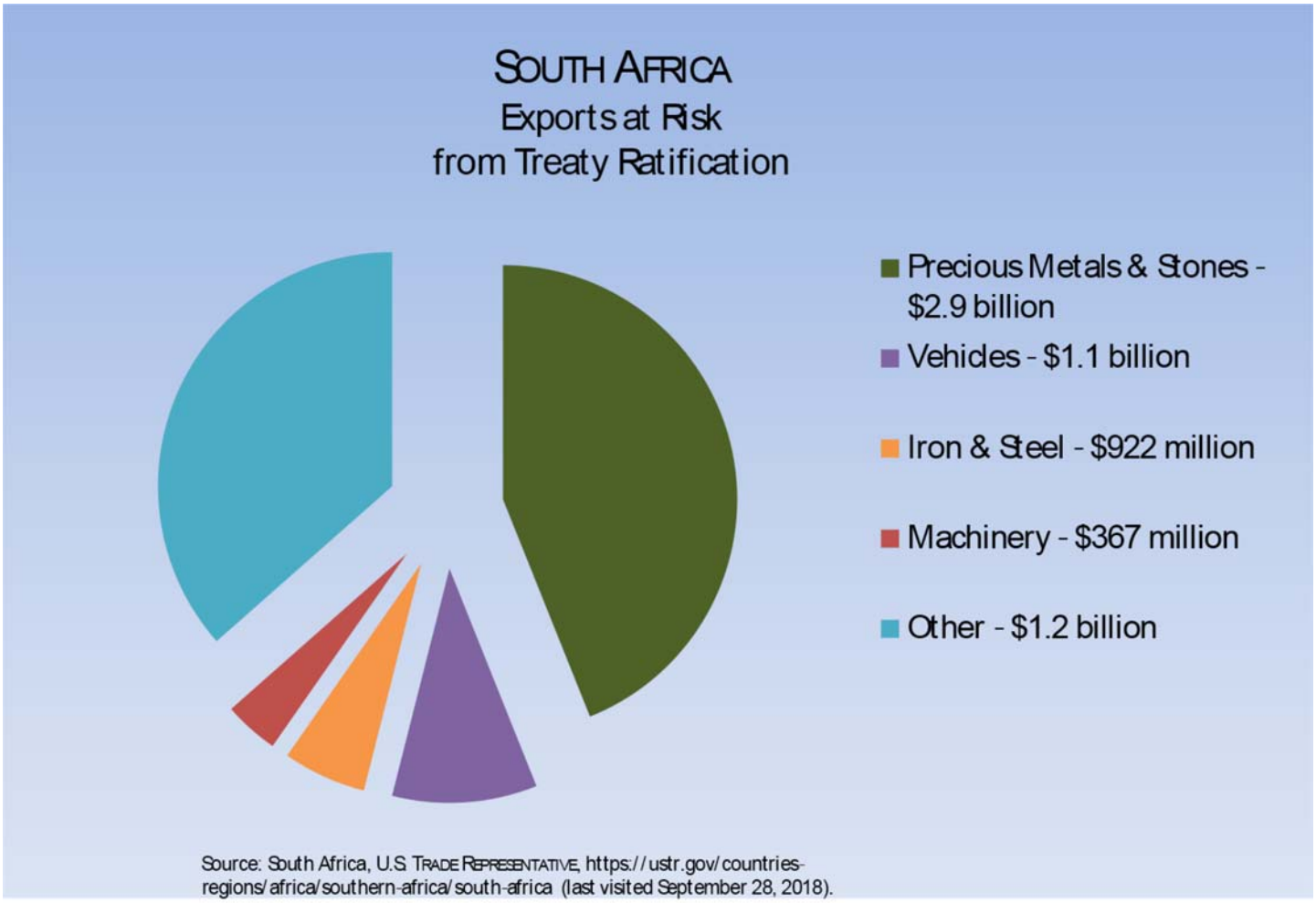
Top-down global solutions to local human rights problems – as Dodd Frank attempted and the Proposed Treaty contemplates – can and do have unintended adverse consequences. If finalized as drafted, the Proposed Treaty will create a punitive legal regime in ratifying states that is imprecise in its scope of liability and arbitrary in its enforcement. States that support this process should take note that they too risk significant adverse impacts if this treaty ever comes into being.

# Appendix A

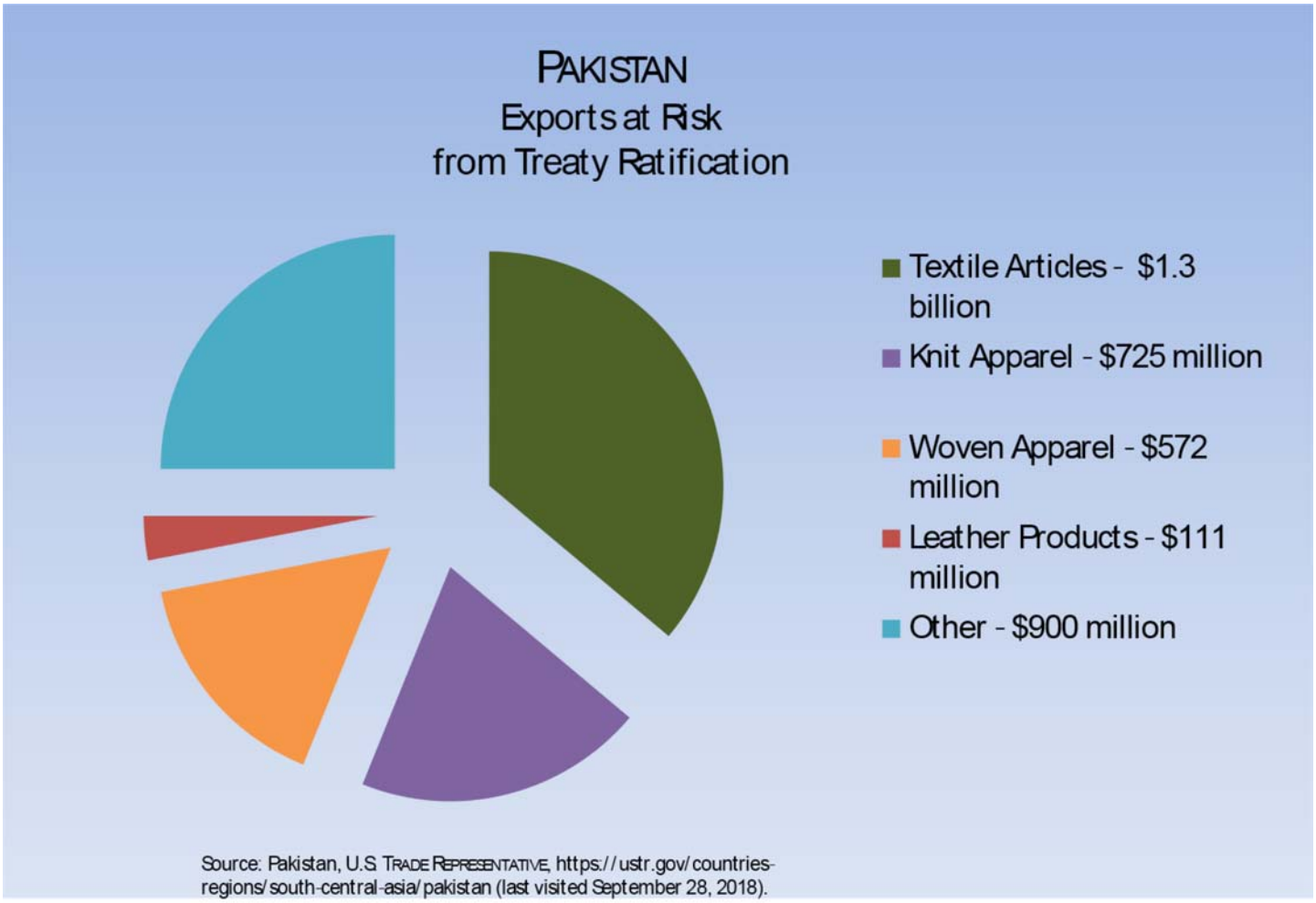
This Appendix illustrates the major exports of selected "Treaty Proponent" countries that may be placed at risk from treaty ratification. For all the countries except the Philippines and Azerbaijan, the exports displayed indicate the value of those exports (in USD) to the United States. For the Philippines and Azerbaijan, the exports are expressed as a percentage of their overall exports to all countries.



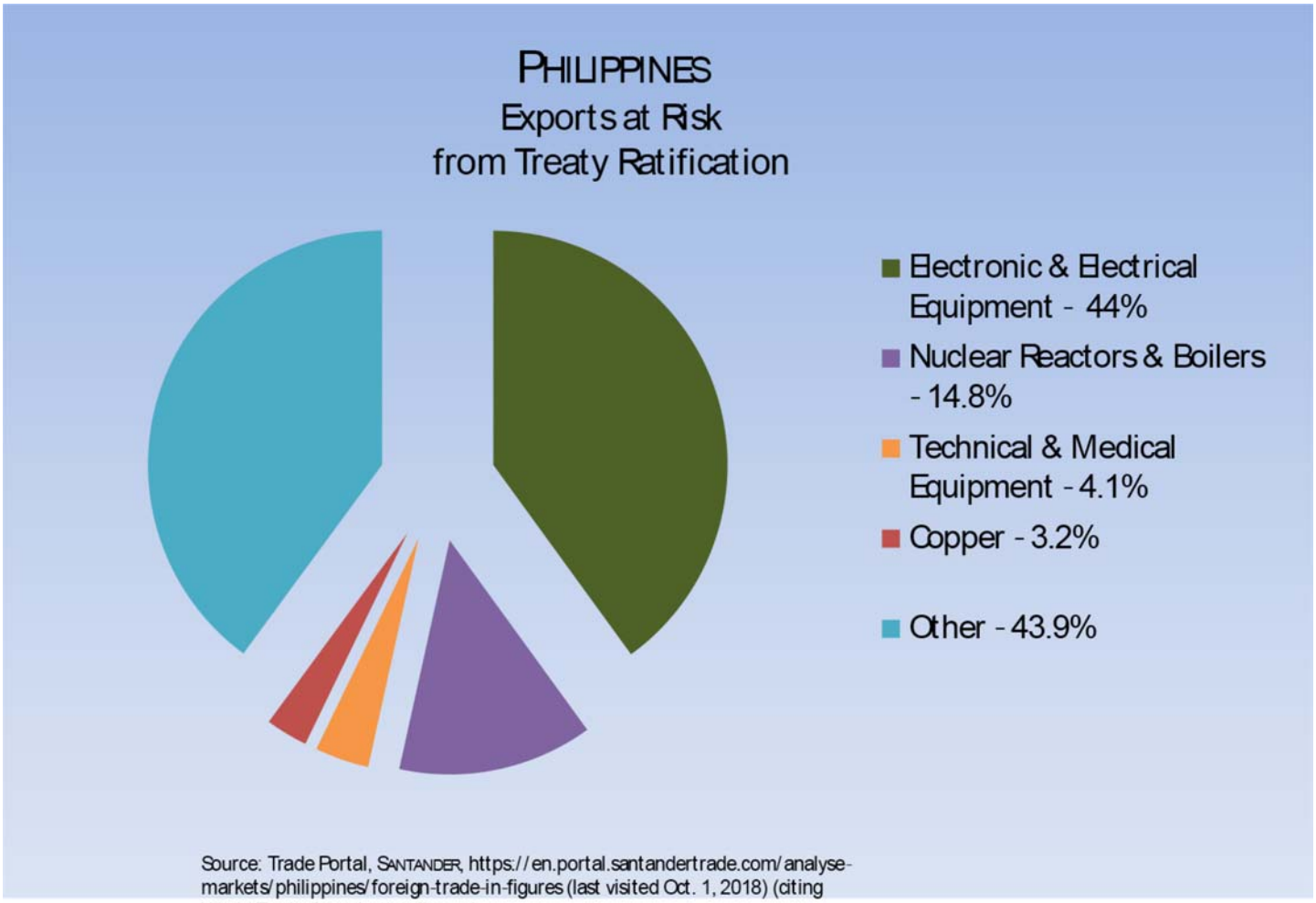

Source: Ecuador, U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/americas/ecuador (last visited September 28, 2018).



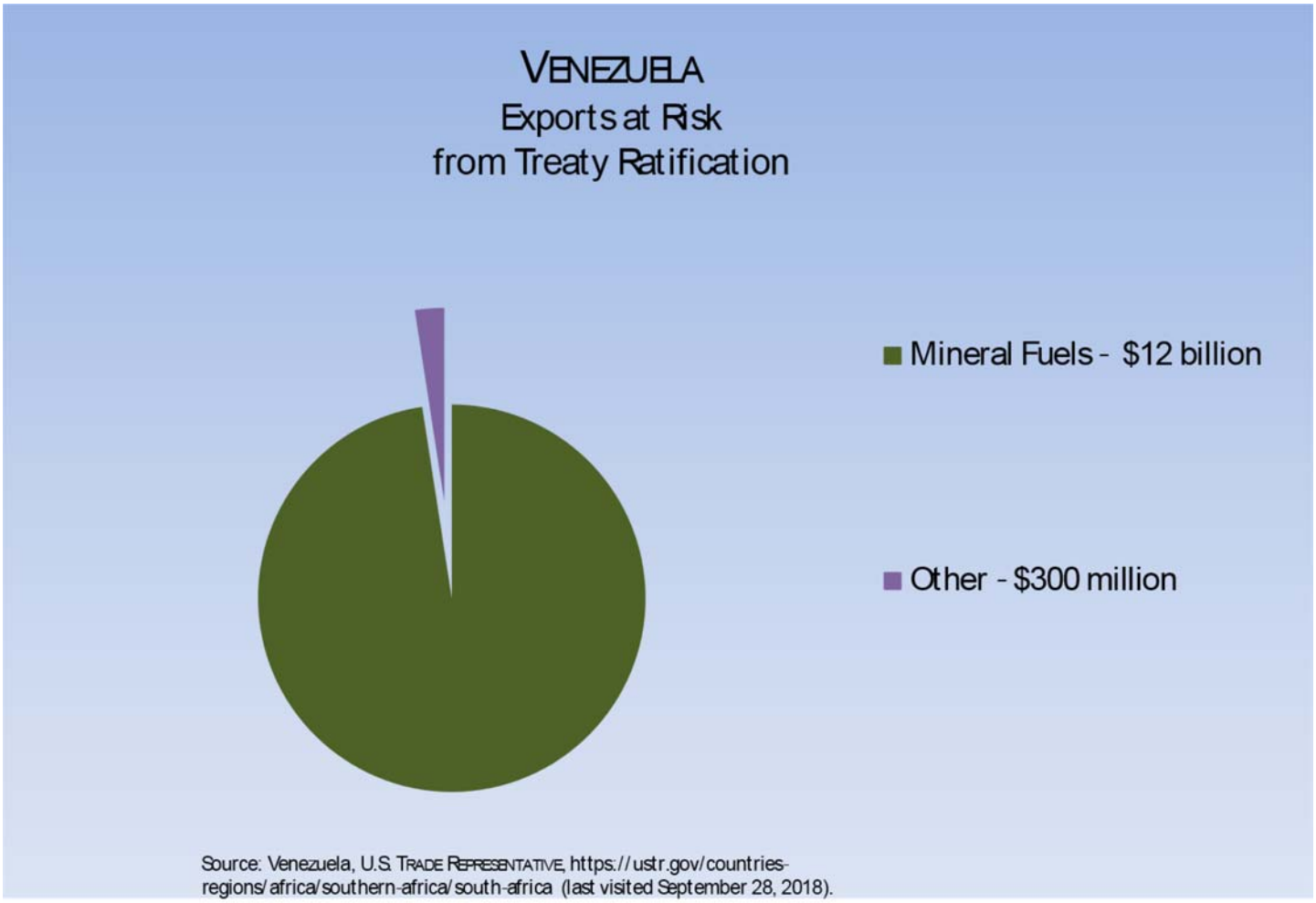

Source: South Africa, U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/africa/southern-africa/south-africa (last visited September 28, 2018).



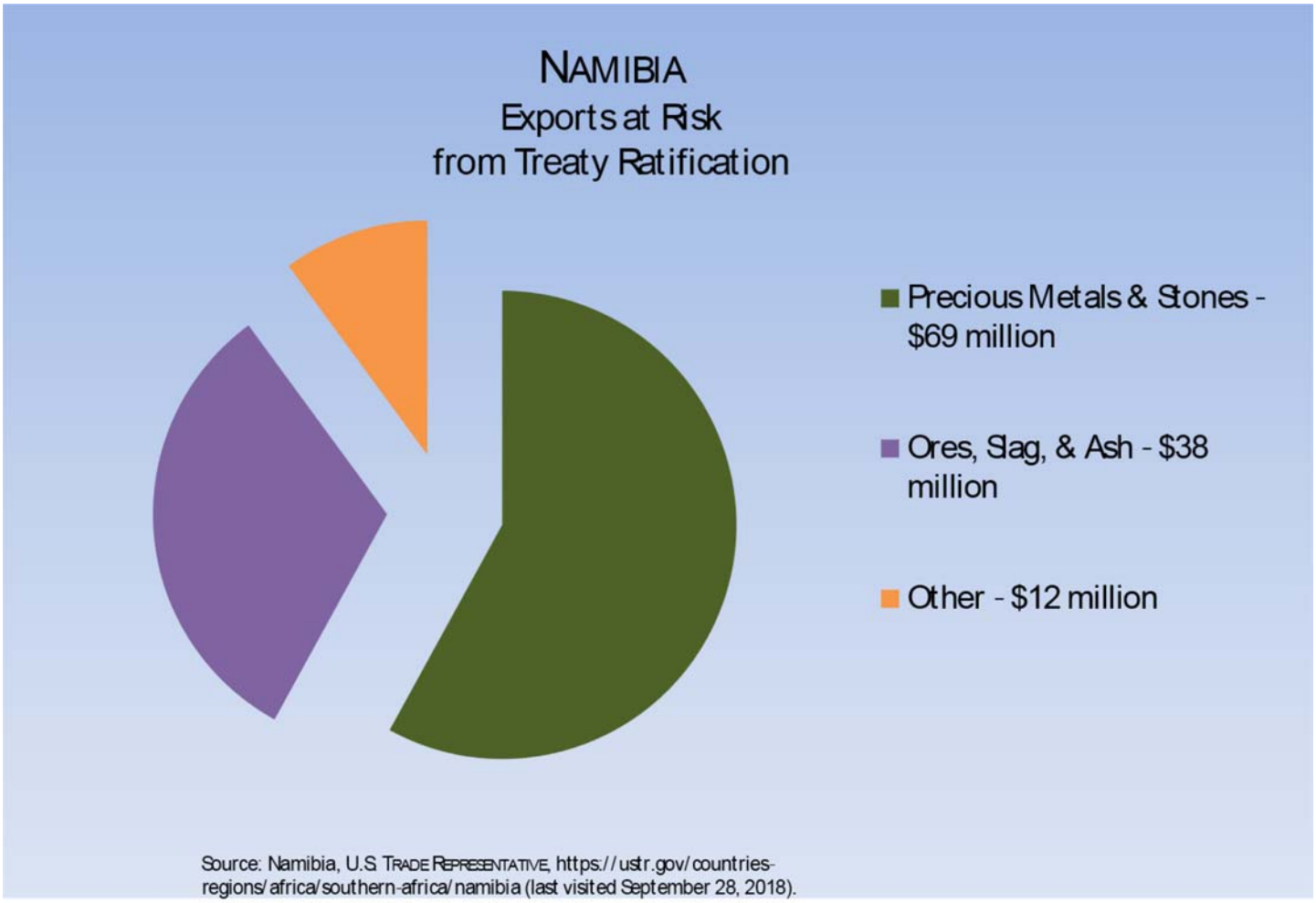

Source: Pakistan, U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/south-central-asia/pakistan (last visited September 28, 2018).



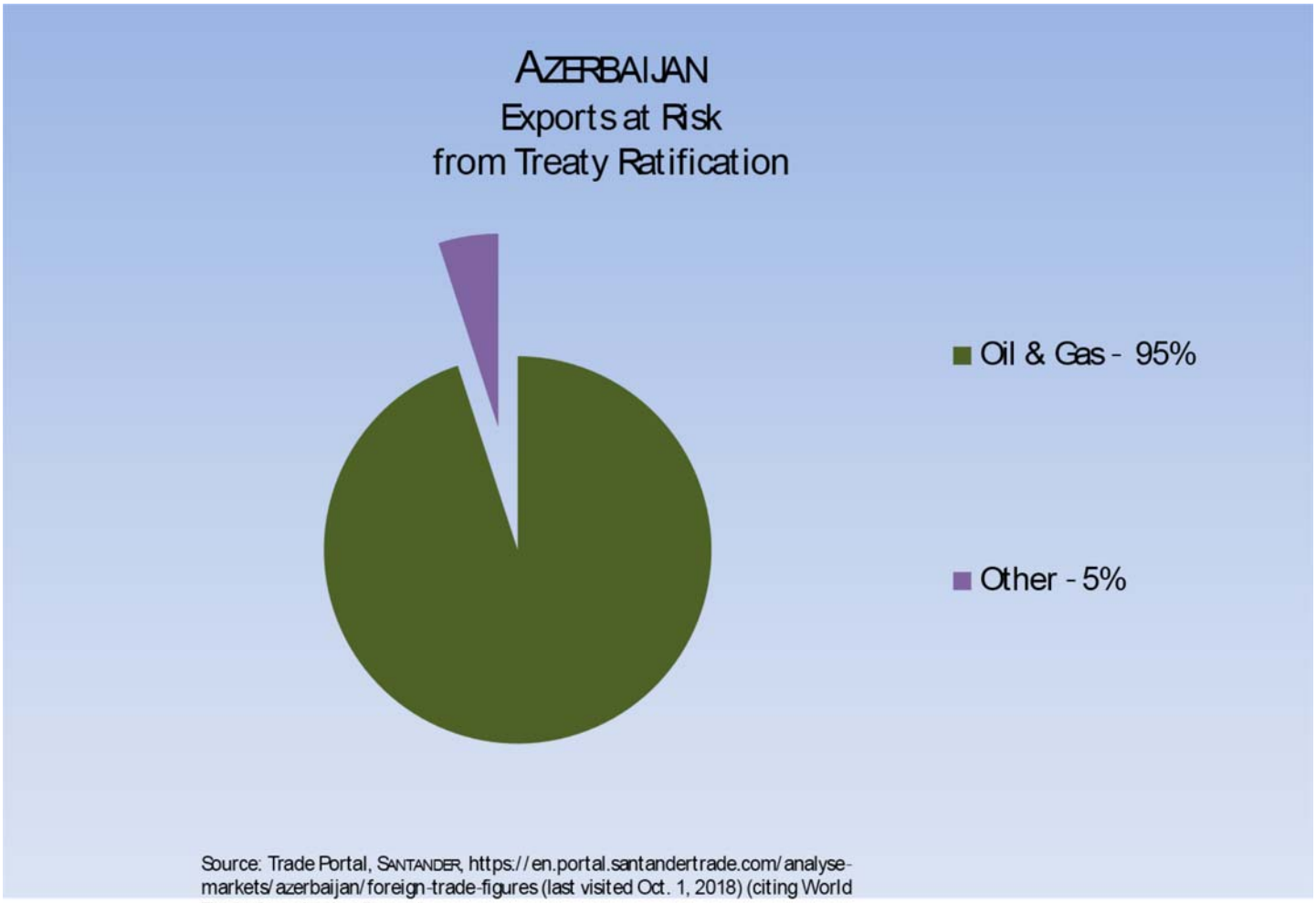

Source: Trade Portal, SANTANDER, https://en.portal.santandertrade.com/analyse-markets/philippines/foreign-trade-in-figures (last visited Oct. 1, 2018) (citing World Trade Organization figures).



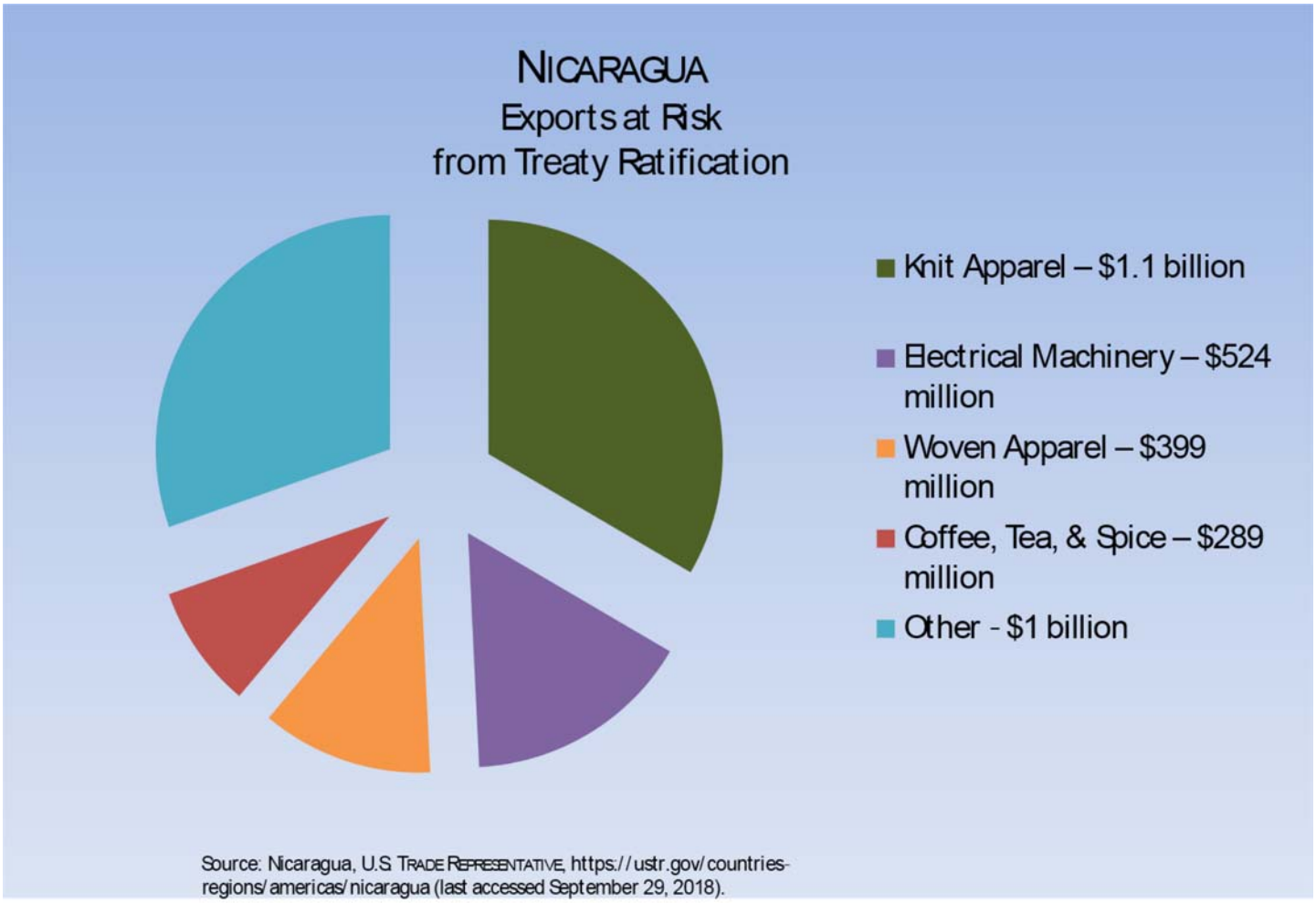

Source: Venezuela, U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/africa/southern-africa/south-africa (last visited September 28, 2018).



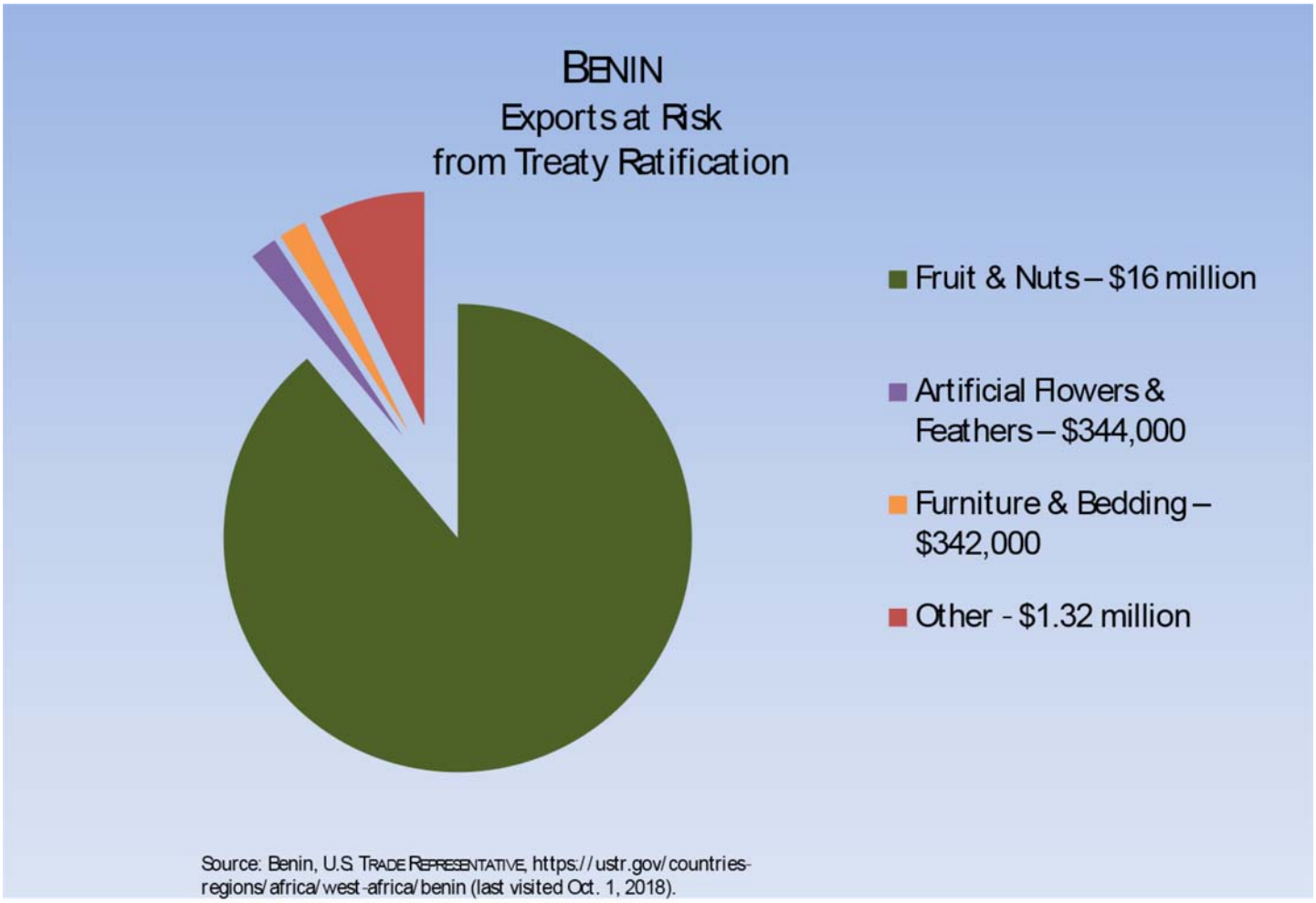

Source: Namibia, U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/africa/southern-africa/namibia (last visited September 28, 2018).



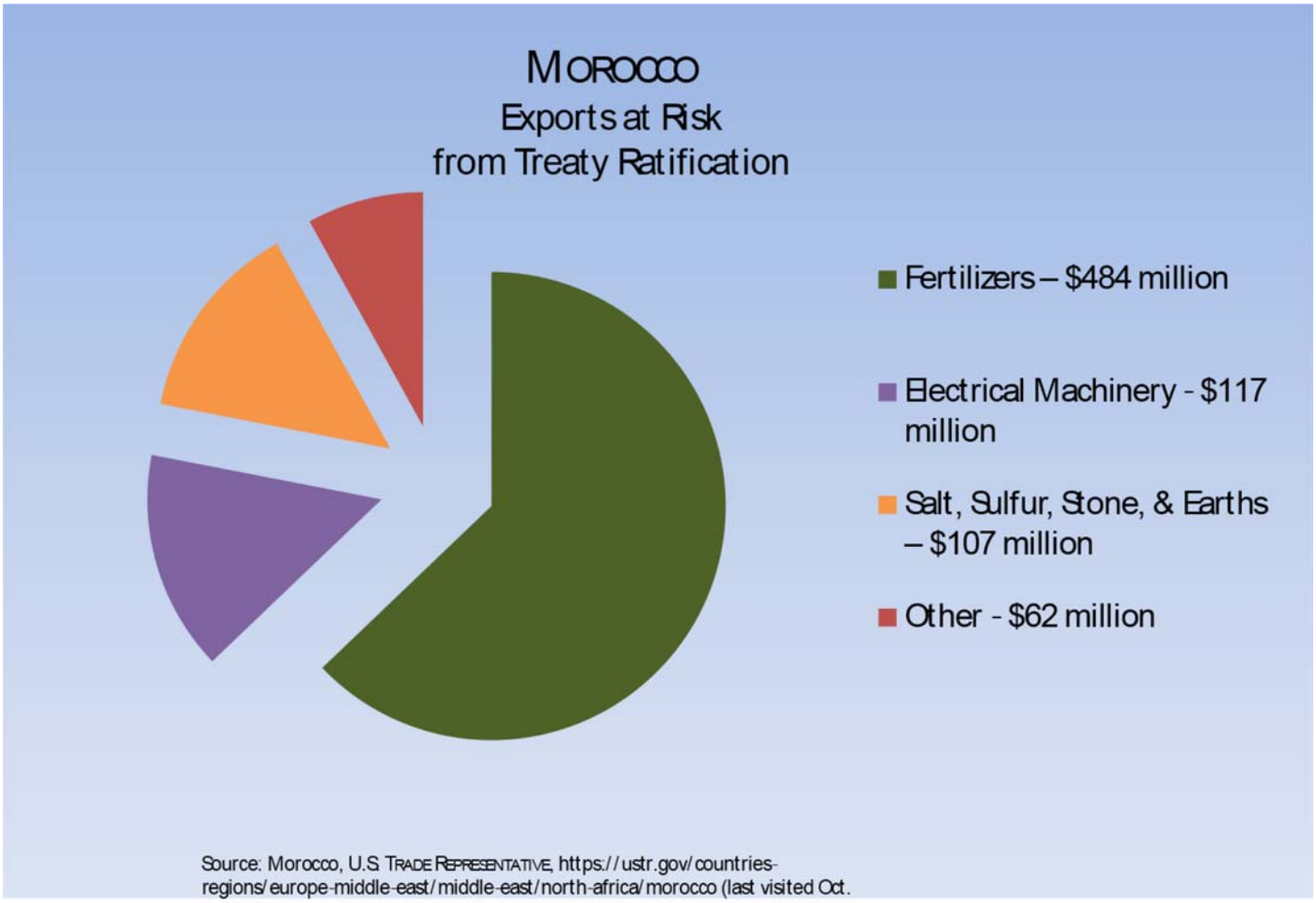

Source: Trade Portal, SANTANDER, https://en.portal.santandertrade.com/analyse-markets/azerbaijan/foreign-trade-figures (last visited Oct. 1, 2018) (citing World Trade Organization figures).



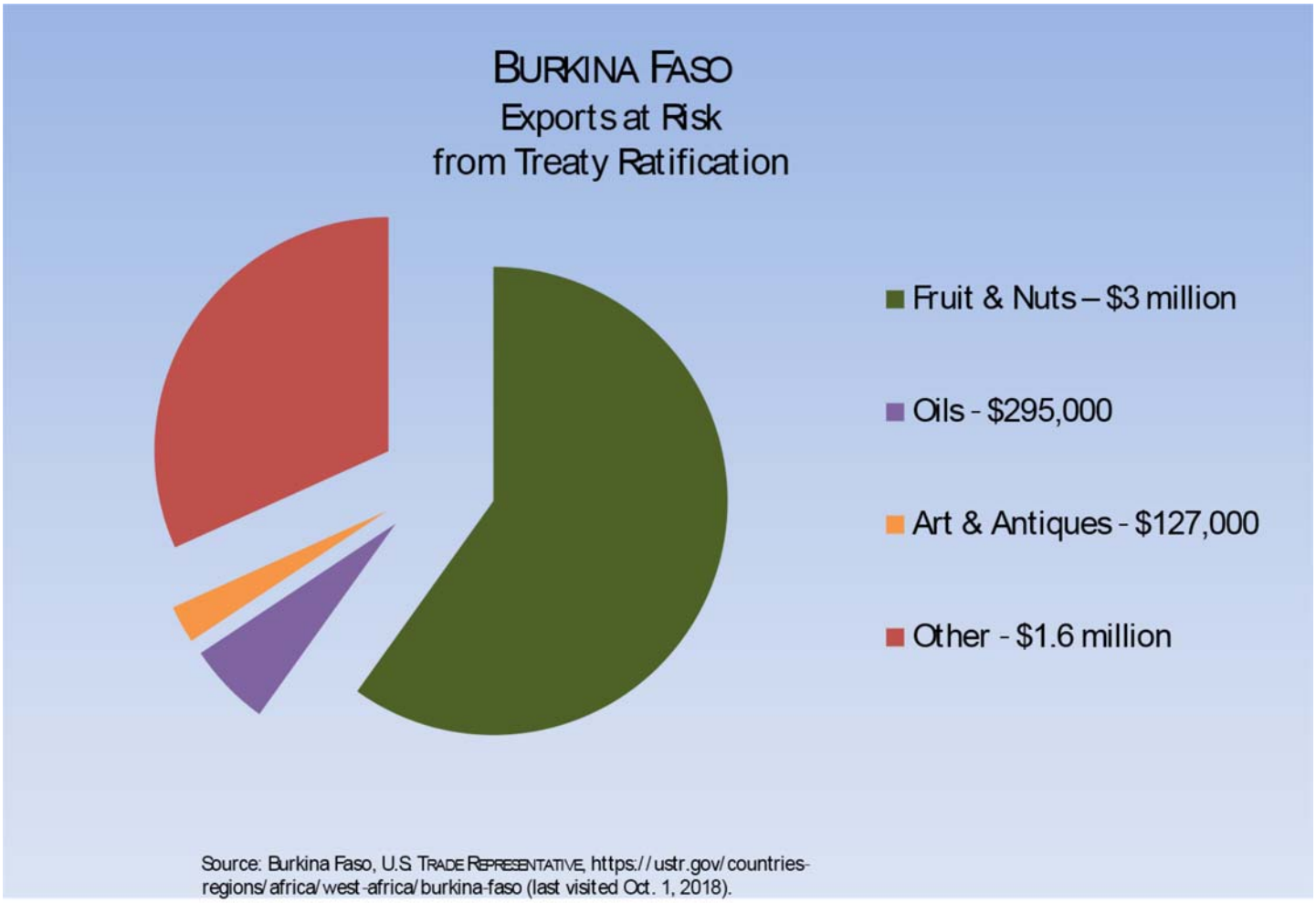

Source: Nicaragua, U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/americas/nicaragua (last accessed September 29, 2018).




Source: Benin, U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/africa/west-africa/benin (last visited Oct. 1, 2018).




Source: Morocco, U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/europe-middle-east/middle-east/north-africa/morocco (last visited Oct. 1, 2018).




Source: Burkina Faso, U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/africa/west-africa/burkina-faso (last visited Oct. 1, 2018).