

The Accountability Framework

Operational Guidance on the Relationship Between Voluntary Commitments and Applicable Law

DRAFT FOR WORKSHOPPING
December 2018

DECEMBER 2018 DRAFT FOR 'WORKSHOPPING' WITH STAKEHOLDERS

The Accountability Framework initiative (AFi) is developing a common framework to guide the setting, implementation, and monitoring of supply chain commitments. As part of the Accountability Framework, this draft document represents a working consensus of the AFi partners as well as input from prior consultations involving stakeholders from the private sector, civil society, and government. The partners are sharing this draft publicly and inviting feedback from all interested parties to further build and refine the Framework in a way that reflects the needs and perspectives of those working to bring about responsible supply chains and positive outcomes for people and nature. Based on this consultative process, version 1.0 of the Accountability Framework will be published in early 2019.

For more information, or to provide input during the present workshoping process, please visit <https://accountability-framework.org> or send an email to contact@accountability-framework.org

DISCLAIMER: This work product is intended to be advisory only and is not intended to serve as a legal opinion or legal advice on the matters treated. The reader is encouraged to engage counsel to the extent required.

PURPOSE & SUMMARY

The Accountability Framework provides guidance to companies on identification of potential environmental and social risks so that they can be avoided, mitigated, and addressed. AFI recognizes that such risks can arise from non-compliance with laws, as well as compliance with laws that are not properly enforced or lack the necessary provisions to fully comply with international law. [Core Principle C4](#) states that, in addition to their voluntary commitments, companies must comply with applicable law and respect internationally recognized human rights. A company's assessment of the applicable laws clarifies whether the legal framework within which it is working will facilitate or place at risk its fulfillment of voluntary commitments.

This document is a resource that companies can use to design procedures to identify and assess applicable law, or to review their existing procedures related to such assessment. Specifically, it provides guidance for upstream and downstream companies to identify and assess the full range of law that is applicable to company commitments related to human rights, deforestation, and ecosystem conversion.

The guidance is presented in two parts:

1. The main body of the guidance addresses the relationship between compliance with law and a company's voluntary commitments, including:
 - Determining the highest standard
 - What to do when laws are not implemented or enforcement
 - What to do when company voluntary commitments represent a higher standard than those affirmed by applicable laws
2. An annex provides detailed guidance on suggested procedures for applicable law assessments. This includes:
 - Context and timing for assessments
 - Processes for carrying out assessments including definition of scope, review of applicable laws, stakeholder consultations, and drafting of the assessment

Introduction

Company supply chain commitments, and the Accountability Framework guidance that informs them, overlay existing obligations based on applicable law.¹ Legal obligations may be created by any legal or policy instrument emanating from legislative, executive, administrative, judicial, or customary sources of authority. Many categories of law bear on company commitments, including but not limited to those governing land allocations and acquisition, land management, environment and conservation, tax and other revenue-related laws implicated by resource extraction, storage and processing of commodities, transport, export, legal personality, government-adopted lists of prohibited actors,² human rights (including workers' rights, indigenous peoples rights, and others), and remedy related to grievances and remediation of incurred harms. This document guides companies on how to fulfill their voluntary supply chain commitments in the context of legal obligations that may apply to the same or similar topics to those addressed by commitments.

¹ As specified in the Accountability Framework definitions, applicable law signifies "national and ratified international laws that apply in a given context or situation." National laws include the laws and regulations of all jurisdictions within a nation (e.g., local, regional, and national).

² For example, companies in Brazil must check the Rural Environmental Registry (CAR), the Soybean Working Group (GTS) database, and the list maintained by the Government of Brazil for actors that are embargoed due to illegal deforestation or slave labor.

1. Determining the highest standard

Assessment of applicable law is an important aspect of due diligence for companies working to implement ethical supply chain commitments. The first step for companies is to know what the law requires, and to ensure that both their own operations, and the commodities they produce, source, or finance, are legal. Companies should routinize the process of listing and reviewing applicable laws and conflicts between these laws, assessing legal obligations, monitoring changes to the law, displaying licenses and permits to operate, reviewing lists of embargoed actors, and ensuring staff capacity to perform these functions. For any company downstream of a producer in the supply chain, best practice also includes monitoring the capacity of its suppliers to review and assess applicable laws.

Risk assessments may be used to determine the contexts in a company's supply chain that pose the greatest risk of harms due to noncompliance with applicable law, where additional measures to ensure compliance may be necessary. Additional measures may include obtaining more detailed, accurate, and reliable information about where a commodity was produced, who produced it, who purchased it, how much volume the producer is capable of producing, the number and size of units harvested, nearby production units that could potentially be involved in laundering of illegally produced commodities,³ the existence of past and ongoing conflicts, and human rights claims (judicial, administrative, or otherwise) arising in the jurisdiction of concern.

It is best practice to obtain verification of legal compliance. Such verification may be performed in tandem with verification of the elements of the company's own commitments related to deforestation, ecosystem conversion, human rights, and other topics (see *Operational Guidance on Monitoring and Verification* for additional detail on credible verification).

Helpful tools: using certification to help demonstrate legal compliance

Many certification systems require compliance with law and require companies to adopt much of what is listed above as best practice. These systems include RSPO, FSC, PEFC, RSB, ISCC, Bonsucro, and RTRS. As a result of their requirements and auditing mechanisms, such certification systems may help provide some assurance of legal compliance.⁴

Legal compliance is necessary, but may not be sufficient to meet company supply chain commitments. Where legal requirements and company commitments (including to respect internationally recognized human rights as reflected in international human rights instruments) both apply to the same topic, the highest standard is the reference point for meeting commitments that fall under the scope of the Accountability Framework.

Specifically:

1. The highest standard is whichever standard is more likely, if properly implemented, to avoid adverse impacts to human rights and destruction or degradation of the environment.⁵

³ For example, beef cattle raised on illegal ranches may be transferred to legal ranches before being sold to a finishing facility or slaughterhouse. Similarly, timber illegally harvested from one forest unit may be claimed to have originated in a nearby unit that is properly permitted.

⁴ Due to limitations in auditing and other factors, certification schemes should not be considered as a guarantee that a certified company is in full compliance with applicable law.

⁵ For example, Brazil's Forest Code sets a minimum area of natural vegetation that private landowners are required to protect or for which they must provide compensation if the area is converted. To the extent that the Forest Code permits deforestation or conversion beyond what is permitted by a company commitment, legal compliance is not sufficient to meet the company's commitment. A national law may require that indigenous peoples receive title to a specific acreage of their ancestral lands based on community population. Internationally recognized human rights (reflected in international instruments) bases indigenous peoples property rights on historic use and occupation (not population statistics). The latter is the higher standard.

2. A company can determine whether applicable law or the company's commitment represents the highest standard on any given topic by conducting robust assessments of legal requirements (for additional details, see the the Annex to this guidance).

2. What to do when laws are not implemented or enforced

Where laws are not being effectively implemented or enforced, actions by a company or its suppliers that violate these laws are nonetheless illegal and contrary to Accountability Framework guidance. Failure to comply may expose companies to reputational risk even if unlikely to result in legal action. A company's options in such circumstances include:

1. Undertaking additional efforts to ensure its own compliance with the law, as well as requiring suppliers to comply with the law, monitoring and verifying compliance, and providing incentives for suppliers if needed;
2. Taking measures to encourage and facilitate implementation and/or enforcement by the government, such as by contributing technical or financial resources to support government implementation efforts;⁶ and
3. Assessing the risks of adverse impacts due to the ineffective implementation and/or enforcement of relevant laws in jurisdictions of concern. Where risk is identified and actions listed in bullets 1 and 2 do not sufficiently mitigate the risk:
 - a. If not currently operating in the risky jurisdiction, refraining from initiating operations there;
 - b. Ceasing operations if operations are already ongoing and avoidance of the adverse impacts is not possible.

3. What to do when voluntary commitments represent the highest standard and conflict with applicable law

If company commitments, informed by the Accountability Framework guidance, represent the highest standard but conflict with legal requirements,⁷ companies may consider several courses of action including the following:

1. Request administrative guidance from the government in question on options for complying with both the law and the company's commitments.
2. Where a company has not yet established business operations, request written waivers from the government in question to abstain from compliance with the concerning legal requirements as a condition of proceeding with business. If waivers are not granted, consider not pursuing business operations due to the risk and potential impact associated with such conflict. After a waiver has been granted:
 - a. Affirm in clear and express terms in all agreements with the government in question that operations will proceed subject to the waiver.
 - b. Require in clear and express terms in all contracts with suppliers that they obtain a similar waiver from the government if needed to ensure compliance with the company's commitments. Further, specify in the contract that noncompliance with the waived laws does not give rise to a breach of contract or a right to terminate.

⁶ Financial contributions in this context are specifically to support efforts by the government to implement existing laws; this guidance should not be construed to condone bribery.

⁷ For example, Indonesia's Plantation Law (18/2004) provides that a concession granted for establishing a plantation can be revoked if the holder fails to clear and/or develop a minimum area within a given period.

- c. Engage the relevant government entities to push for reforms that remove legal impediments to meeting the highest standard.⁸
3. Where a company has already established business operations without government waivers, or if waivers that were previously granted are rescinded, and where the risk of adverse impacts from continuing operations is significant, consider ceasing, temporarily suspending, or phasing out business operations unless and until waivers are granted or restored.
4. Where it is assessed that compliance with the concerning law by a supplier is likely to result in adverse impacts or violations of commitments, require the supplier to obtain a government waiver to compliance to enable fulfillment of the company's commitment as a condition of future engagement.
 - a. Where compliance with the concerning law by a supplier has already resulted in adverse impacts, make future engagement conditional on full and prompt remedy for past harms, and provide technical and/or financial support to the supplier to come into compliance where appropriate.

DRAFT

⁸ Compliance with laws that may negatively affect human rights or the environment exposes companies to risk due to market and investor demands, among others. If companies remain engaged in such contexts, pushing for legal reform can help mitigate this risk.

ANNEX: Applicable Law Assessments

1. Introduction

Assessment of applicable law is an important aspect of social and environmental due diligence, and therefore is a requirement and standard business practice for most companies when acquiring new interests in lands and resources, expanding company activities, conducting land use planning, and before entering into a supplier agreement, financing arrangement, or other legal agreement establishing business or supply chain relationships. When done properly and in a timely manner, it can help to identify risks and requirements, avoid harms to people and the environment, and minimize negative impacts on a company's operations, budgets, and reputation. Full understanding of applicable law can also help to fulfill voluntary commitments and several elements of the Accountability Framework, including those related to:

1. Complying with Law (Core Principles C4);
2. Eliminating deforestation and natural ecosystem conversion (Core Principles A1 and A2);
3. Respecting internationally recognized human rights, including the rights of workers and indigenous peoples and local communities (Core Principles B1 and B2);
4. Conducting business in an ethical and transparent manner (Core Principle 7); and
5. Conducting or supporting responsible practices in land acquisition, land use planning, and site development to respect human rights and protect the environment (Core Principle 4).

Companies with commitments related to deforestation, ecosystem conversion, and human rights have sought more specific guidance on how to identify the range of applicable laws, understand the ramifications of these laws for production and trade activities, and clarify how these laws relate to fulfillment of their voluntary commitments.

Definition of Applicable Law

The Accountability Framework defines *applicable law* as the national and ratified international laws that apply in a given context or situation. National laws include the laws and regulations of all jurisdictions within a nation (local, regional, and national).

Applicable law assessment is a process by which companies can:

- Identify and analyze the international, national, and indigenous peoples or local community laws and policies that apply in the context of their business
- Understand their obligations according to these laws and policies
- Analyze the relationship among applicable laws, including whether there are instances where compliance with one law or policy may result in violation of another
- Analyze the relationship between applicable law and voluntary commitments to determine when applicable law may provide a legal pathway for a company to meet its voluntary commitments as well as instances where applicable law may impede fulfillment of voluntary commitments

The findings of an applicable law assessment can be used to identify risk of adverse impacts to human rights and the environment; inform company action plans to avoid and mitigate such harms; establish suitable monitoring and verification systems to assess compliance and performance; and create systems to address and track company responses to matters of concern as they arise.

Applicable law assessments are relevant for all supply chain actors (from producers to retailers) and for those who finance agricultural and forestry production or trade. The assessment process is broadly similar in all

instances, although the assessment scope and other particulars will vary depending on context. The bulk of this Operational Guidance is therefore generally applicable, while some additional details and nuances based on the nature of the company and its operations are provided throughout.

2. Context and Timing for the Assessment

In relation to agricultural and forestry supply chains, applicable law assessments are usually carried out in the following four contexts:

- 1. Production context – site level:** Assessments should be conducted in relation to production and primary processing operations, such as plantations, mills, or timber harvesting operations.⁹ It is critical to conduct an applicable law assessment prior to any acquisition of new interests in lands or resources, or any major new development or expansion of operations. In this context, the assessment should be included in the overall due diligence, planning, and stakeholder engagement processes that precede the establishment or expansion of operations (see Core Principle 4). If appropriate, the assessment can be integrated into a broader social and environmental impact assessment included in this process. Where possible, to improve efficiency, site-level assessments can take advantage of other assessments of international and national law conducted by companies/groups (see #2 below) or downstream companies (see #3 below).

For production and primary processing sites that are already operational, applicable law assessments should be conducted (if they have not been already) and regularly updated to ensure that the operation is run based on a current understanding of the applicable law. If production or processing operations are acquired – or were planned and developed without adequate applicable law assessment at the time of establishment – then applicable law assessment, should be conducted retrospectively. This entails assessing any existing documentation, identifying gaps, updating assessments as necessary, and using the findings to help address any adverse impacts to human rights or the environment through action plans, monitoring and verification systems, and effective grievance mechanisms.
- 2. Production context – company or group level:** Companies that own or manage interests in many production or processing units across multiple legal contexts should conduct an applicable law assessment to inform company-wide decisions and policies, and to determine where additional action might be required to respect human rights and protect the environment based on the legal context. Assessments at the company or group level can complement site level assessments: the former can evaluate the international and national laws while the latter bring a greater focus on local laws applicable to specific sites, including laws of indigenous peoples and local communities, where present.
- 3. Sourcing context:** Companies that source from multiple producers, intermediaries, or manufacturers should conduct a broad applicable law assessment to help identify suppliers or sourcing origins that pose the greatest risk and may require further attention or improvement plans. Given the vast reach of some companies' sourcing base, risk-based prioritization may be warranted. Applicable law assessment by downstream companies requires assessing the extent to which suppliers have conducted adequate assessments of their own and are taking appropriate steps to act on the findings; this is part of an overall integrated supplier management processes (Core Principle 3). Where these steps are not being taken, the company should consider supporting its suppliers to assess and comply with applicable law as part of its supplier engagement process.¹⁰ In addition to broad applicable law assessment(s)

⁹ Assessments may be aggregated at an appropriate level based on the scale and capacity of the subject production operations. For instance, a primary processing operation (e.g., mill or slaughterhouse) may conduct the assessment to consider laws applicable to its suppliers, especially when these are small- or medium-sized producers that may lack the capacity to conduct a full assessment themselves. Likewise, local level assessments may cover a group of proximate sites that fall within a similar legal context.

¹⁰ See the Operational Guidance on Monitoring and Verification for additional detail on supplier action plans, improvement plans, and monitoring systems.

examining a company's supply base, companies should assess applicable law before entering into new supplier agreements or other legal agreements or supply chain relationships.

4. **Financing context:** Similar to the sourcing context, financial institutions should assess applicable law across the range of contexts where they invest in agricultural or forestry production or trade, and should determine the extent to which their current and prospective borrowers have conducted adequate assessments of their own and are taking appropriate steps to act on the findings. Focused assessments are also warranted when considering major new investments or investment in new locations.

Under all of the preceding scenarios, applicable law assessment should be conducted at the earliest stage possible so that the results can inform company decision-making. It is particularly essential to conduct assessments when considering (and prior to deciding on) new activities or business relationships, including the acquisition of new interests in lands and resources, expansion of company activities, and new supplier agreements, financing arrangements, or other business relationships.

3. Process of Conducting an Applicable Law Assessment

Consistent with other processes of legal due diligence already conducted by most companies (e.g., assessing applicable laws on taxation, customs, and royalties), the assessment discussed here should include both *the letter* of the applicable laws and policies and how these laws and policies are *applied in practice*. Through research and discussions with relevant authorities and other stakeholders, the assessment should evaluate how these laws and policies are implemented, interpreted, and enforced, and how they may affect fulfillment of the company's social and environmental commitments. Following is a seven-step process that explains how this may be done.

Where possible, to increase consistency and reduce cost, international and national level assessments could be conducted by downstream companies or at headquarters level and shared with suppliers and production operations. These broad assessments can be complemented at the site level by assessments focusing on relevant sub-national, local, and indigenous peoples and local community laws and other policies known best by those working in the given context. Regardless of how tasks are divided or delegated to different companies along the supply chain or within a company, the value of the assessment depends on sharing of findings so that each supply chain actor can understand the applicable law comprehensively and take commensurate measures.

3.1 Identify a Qualified Assessment Team

Applicable law assessments should be led by a qualified individual or team with relevant expertise in human rights law and practice; forest, agriculture, and land use law and practice; and related elements of corporate governance and ethical behavior law and practice. If the applicable law assessment is contracted to an external expert, it is usually helpful for the company's legal department to be involved in the assessment, as well.

For assessments conducted in the context of acquisition, development, or management of production units (e.g., farms, plantations, or timber harvest operations), the assessment team should also have specific knowledge of the indigenous peoples and local community laws that affect the production areas and vicinity, or, at a minimum, the capacity to secure these laws through responsible and culturally appropriate means.

For companies in the role of financing agricultural and forestry production and trade, the task of determining if adequate assessments have been completed by the company's borrowers should be performed by an assessor qualified to make such determinations.

3.2 Define the Scope of the Assessment

The company should work with the assessor to clearly define the scope of the assessment, including at least the locations and topics on which it will focus. Defining a sufficiently broad scope is critical because companies will be held responsible for identifying potential and actual harms, and avoiding and mitigating these across their entire operations. Companies may assume greater risk if they choose to perform a narrow assessment without a sufficient justification to do so.

3.2.1 Locations

Companies should start with an inventory of locations where they already have operations and/or significant business partners or suppliers, or where new acquisitions, investments, expansions, supply origins, or business relationships are being considered. For producers and primary processors, this will include the specific areas where they own, manage, or have interests in land or resources, or are considering acquiring these. For upstream companies (those that buy directly from producers), this will likely include the locations of the producers and primary processors from which they buy.

Understanding that companies may have limited resources and will make decisions based on risk, the Accountability Framework encourages companies with operations in more than one location to prioritize areas with the greatest potential severity¹¹ of adverse impact. This determination may be based, for instance, on prior knowledge or experiences related to the area, documented risks associated with a particular sector or supplier, or prior grievances against particular suppliers.

3.2.2 Topical scope

Companies should also clarify and prioritize the topical scope of the applicable law assessment. Companies are obliged to respect all internationally recognized human rights; the following box lists rights that are commonly implicated in agricultural and forestry supply chains. The applicable law assessment should generally consider laws that pertain to the protection of these rights. The assessment should also include laws on environmental issues that pertain to the scope of company commitments or the Accountability Framework (see box below). Additionally, the assessment should include laws related to corporate governance and ethical behavior, such as those addressing transparency, disclosure requirements, and the rights of stakeholders to participate in and influence decisions that may affect them. Where the circumstances warrant, given the nature and location company the operations, the assessment may need to cover additional topics such as the right to freedom of movement, or more generally the rights of migrants or refugees.

¹¹ As specified in the UN Guiding Principles on Business and Human Rights (Principle 14 and commentary), severity of impacts should be judged by their scale, scope and irremediable character.

Common elements to include in the scope of an applicable law assessment

Human rights

- right to property
- right to freedom from discrimination
- freedom from forced evictions
- right to equality before the law
- right to access to justice
- right to a healthy environment
- right to adequate housing
- right to food
- right to culture
- right to effective and meaningful participation
- freedom of expression and assembly
- rights to life and physical integrity
- rights to intellectual property and cultural heritage
- right to collective bargaining
- right equal pay for equal work
- freedom from forced or compulsory labor
- freedom from child labor
- freedom from forced eviction
- more generally, the rights of indigenous peoples, disabled persons, women, migrant workers, and minorities

Environmental issues

- deforestation
 - forest degradation
 - conversion of other natural ecosystems
- While other environmental issues are not core foci of the Accountability Framework, such issues are important to most companies and may be the focus of other aspects of their operations or commitments. In some cases, these issues (including the following) also relate directly to the Framework's core focus on deforestation, ecosystem conversion, and respect for human rights:
- soil health, erosion, and desertification
 - biodiversity (including threatened and endangered species)
 - water pollution
 - air pollution
 - contamination in general

3.3 Gather and Review All Relevant Laws

The applicable law assessment should identify and analyze national laws, international laws, and, where present, the relevant laws of indigenous peoples and local communities that may be affected by company operations or sourcing. These are each elaborated in the following sub-sections.

3.3.1 International Laws¹²

As indicated by the UN Guiding Principles on Business and Human Rights, a credible and useful human rights applicable law assessment will consider at least the three instruments making up the International Bill of Human Rights, namely, the Universal Declaration of Human Rights and the main instruments through which it has been codified (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) as well as the eight core conventions of the International Labour Organization (ILO) and the ILO Declaration on Fundamental Principles and Rights at Work.

The above instruments have been ratified by most countries. However, even where countries have not ratified the relevant instruments, they should still be included in the applicable law assessment since, ultimately, the company is responsible for respecting all internationally recognized human rights regardless of whether the host country has ratified the international laws affirming those rights.

¹² This sub-section focuses on international laws related to human rights.

The international laws gathered and reviewed should include those that address basic human rights, including the rights of workers, indigenous peoples and local communities, land tenure law, law related to land and resource planning and management, and law related to corporate governance and ethical behavior. In some cases, additional laws should be included to address the nature and location of the company's operations and the potential severity of adverse impacts associated with its production and trade activities. Additional law may include, for instance, other ILO Conventions, other international instruments relevant to specific issues (e.g., treaties addressing the rights of women, minorities, or migrant workers), or instruments pertaining to a specific region (e.g., the Americas). For instance, if dealing with operations in Ghana, consideration of the African Charter on Human and Peoples' Rights would be appropriate. If indigenous peoples and local communities are involved or potentially impacted by operations, companies should also consider the instruments listed in the box below. A useful (but non-exhaustive) list of human rights treaties affirming internationally recognized human rights can be found at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>. The full up-to date list of ILO Conventions and Recommendations can be found at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO>.

Examples of international instruments affirming the rights of indigenous peoples

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- International Covenant on Social, Economic and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Convention on the Rights of the Child
- Convention on the Elimination of Discrimination against Women
- Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169)
- Convention on Biological Diversity
- The American Convention on Human Rights
- The African Charter on Human and Peoples' Rights
- UN Declaration on the Rights of Indigenous Peoples.

3.3.2 National law

National laws include the laws and regulations of all jurisdictions within a nation, including those originating in the central government as well as those of sub-national governments and local jurisdictions (e.g., provinces, regions, districts, cantons, municipalities, or other units). The applicable law assessment should consider laws that directly or indirectly address the environmental and human rights issues within the assessment scope. Laws may be indirectly relevant in a variety of ways. For instance, a land law, mining law, law on local governance, or forestry law may not expressly mention the rights of indigenous peoples, but the way land is classified, concessioned, or otherwise controlled and managed may still affect indigenous peoples' rights to self-governance and to their ancestral lands, resources, and territories.

3.3.3 Indigenous Peoples and Local Community Law

Companies are obliged to respect the internationally recognized human right of indigenous peoples and local community to self-govern, which includes the right to define and administer their own institutions and laws. Consequently, the applicable law assessment should include the identification and analysis of potentially relevant laws of indigenous peoples and local communities that may pertain to company operations. This typically requires participatory engagement with these groups, especially when such laws are passed down orally and by tradition, but not documented in writing. Access to this information tends to be more readily

accessible to producers or primary processors operating in the vicinity of the groups in question, and should typically be included in site level applicable law assessments.

3.4 Draft the Assessment

The assessor should next analyze the assembled laws as well as information on their interpretation, implementation, and enforcement. This analysis should be documented in a draft assessment. Questions that should be considered during this stage include, at a minimum:

- To what extent do national laws fully protect the human rights, forests, and natural ecosystems most likely to be at risk due to the company's production and trading activities? Is compliance with these laws sufficient to fulfill the company's voluntary commitments and avoid adverse impacts to human rights and the environment, or are further actions needed?
- Do national laws sufficiently protect internationally recognized human rights? If not, where are the key gaps (which may require additional company action to ensure that companies fulfill their responsibility to respect such rights)?
- Are national laws internally consistent in terms of provisions relevant to human rights and the environment? If not, what inconsistencies exist and what risks or challenges do these pose for companies to adequately address adverse impacts to human rights and the environment? (For example, a country could have a decree on women's rights protecting them from discrimination and ensuring equality before the law, but another piece of legislation on land tenure that prohibits women from holding titles or participating in plantation outgrower schemes. As another example, a law stating that indigenous peoples have exclusive use of their traditional lands and resources may co-exist alongside another law allowing private parties to commercially exploit timber on their lands.)

Where others have already reviewed some or all of the relevant laws, their works can be used as helpful input to the applicable law assessment, but only to the extent this information has been verified and deemed accurate, credible, and sufficiently comprehensive. For instance, relying solely on a country's official assessment of their national laws as they relate to human rights and forest use and management would not be appropriate, absent an independent verification of the assessment's veracity and scope.

The assessor should also analyze how applicable laws have been interpreted, applied, implemented, and enforced. This part of the assessment could include information drawn from evaluations made by human rights monitoring bodies about applicable laws and the general human rights situation in the country or countries in question. These periodic reports, concluding observations, letters of concern, and other decisions of international complaint bodies, human rights special rapporteurs and other human rights mechanisms can offer quick insights into the human rights protections of the legal framework within which the company operates and should be considered essential input to the draft applicable law assessment.¹³

¹³ Company (or its consultant) can find international perspectives on human rights within each State at the following sites:

- See <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> and select "Human Rights by Country" and then type in the name of the country of interest (source: UN OHCHR)
- Inter-American Commission on Human Rights, Country Reports <http://www.oas.org/en/iachr/reports/country.asp>
- Decisions of the Organization of American States (OAS) Inter-American Commission on Human Rights and Inter-American Court of Human Rights Court decisions: http://www.oas.org/en/iachr/decisions/cases_reports.asp
- Indigenous Peoples and United Nations Human Rights Treaty Bodies - A Compilation of UN Treaty Body Jurisprudence and the Recommendations of the Human Rights Council (Volumes I thru VII) (search by country): http://www.forestpeoples.org/en/resources?Publications%5B0%5D=type%3Areport&Publications%5B1%5D=type%3Atraining&Publications%5B2%5D=type%3Aannual_report&Publications%5B3%5D=type%3Abriefing&Publications%5B4%5D=language%3Aen&Publications%5B5%5D=work_theme_and_topics_publication%3A2&search_api_fulltext=un+jurisprudence&sort_by=search_api_relevance&=Search

3.5 Consult with Stakeholders

Stakeholders and other parties with relevant knowledge should be consulted to confirm the adequacy of the draft applicable law assessment and, most importantly, to provide information on how the applicable laws and policies have been interpreted and applied, implemented in practice, and enforced. Where there is a division of labor for completing the applicable law assessment between upstream and downstream companies within the supply chain, accessibility to these stakeholders can determine who is best positioned to engage them and incorporate their inputs. Companies or assessors should consider consulting:

- Government officials
- Representatives of other companies with operations in the same areas
- Indigenous peoples and local communities and their representative institution(s)
- Civil society organizations focused on social and environmental issues
- Quasi-governmental agencies focused on international standards and trade
- Human Rights Ombudsman and human rights commissions of the nation in question
- Academics and jurists with expertise related to the scope of the assessment

Consultations should seek information about:

- Any treaties, conventions, and national laws are relevant to the company's operations but are missing from the draft assessment
- The views, intentions, and track record of the subject governments with respect to their duties and obligations under international human rights and environmental laws
- Whether national laws fulfill the State's human rights and environmental obligations under international law;
- Any problems or concerns with the State's implementation, interpretation, or enforcement of applicable laws (e.g., delays or discriminatory application) and the likely reasons for those problems
- Examples of judicial or administrative complaints or decisions that provide insight into the interpretation and application of the applicable law
- The likely impact on human rights or the environment of any (perceived) deficiencies in the terms, implementation, interpretation or enforcement of applicable laws
- Insights about what would need be changed to resolve any existing deficiencies in existing law and its interpretation or enforcement

3.6 Refine the Assessment Report

Based on input received from experts and stakeholders, the assessment should be refined and used to inform company- and site-level decision making processes.

-
- Publications of the Working Group on Indigenous Populations/Communities in Africa of the African Commission on Human and Peoples' Rights: the 2003 Report of the Working Group-the Overview Report on the Constitutional and Legislative Protection of Indigenous Peoples in 24 African Countries (2010), available at <http://www.achpr.org/mechanisms/indigenous-populations/report-international-labour-organisation/>
 - The Advisory Opinion of the Commission on UNDRIP (2007), available at <http://www.achpr.org/mechanisms/indigenous-populations/un-advisory-opinion/>
 - Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights (2015), available at <https://www.iwgia.org/images/documents/extractive-industries-africa-report.pdf>.

This report should, at a minimum:

1. Identify all applicable laws and policies examined and the individuals, groups, entities, and resources consulted (note: requests for anonymity of those consulted should be respected)
2. Demonstrate and explain the compatibility (or lack thereof) of the applicable law with the company's own human rights and environmental commitments
3. Identify where more than one applicable law may address a given matter and, if such laws are not consistent in their content or interpretation, which standard is higher¹⁴
4. Explain any perceived deficiencies, gaps, challenges, and other concerns about the applicable law, including the extent to which it addresses internationally recognized human rights that may be implicated by the company's production and trade activities (if the assessor's opinions differ from those of key stakeholders, these differences should be identified);
5. Advise as to whether full compliance with the assessed laws is likely to: a) avoid negative impacts to human rights and the environment; b) fulfill the company's social and environmental commitments; and c) facilitate enhanced respect for and enjoyment of human rights and environmental protection; and
6. Guided by Section 4 of the Operational Guidance to which this annex is attached, make recommendations about how the company might address, if feasible, any perceived deficiencies, gaps, challenges, or other concerns related to the applicable law to ensure that its social and environmental commitments can be met while pursuing production, procurement, financial, or other business in the given context(s)

The assessment report should become part of the information that supports information sharing with relevant stakeholders during stakeholder engagements, such as the information exchanges that take place with indigenous peoples and local communities involved in free, prior and informed consent (FPIC) processes.

3.7 Update the Assessment

Because laws can change, applicable law assessments should be revisited and updated regularly. The company should have a mechanism to ensure periodic reviews to account for changes in applicable laws. Good practice is to conduct routine updates at least every other year, with shorter intervals where operations pose greater risks. However, updating mechanisms should be flexible to react to new circumstances and enable unscheduled reviews where warranted. This does not necessarily mean that entirely new assessments must be conducted. However, as part of its risk management process, a company should establish a system for tracking any changes in applicable laws and policies over time. This includes amendments, repeals, new adoptions, new applications, court decisions that affect interpretations and implementation, and international decisions that require specific actions of States (e.g., an order from the African Court of Human and Peoples' Rights to return land to a community, reform a national law to better protect against child labor, or adopt regulations and enforcement mechanisms to stop illegal logging). The manner in which this ongoing tracking occurs may be risk-based and therefore should be scaled and located where it is most effective.

¹⁴ The Accountability Framework Core Principles state that, there are discrepancies between voluntary commitments, applicable law, and instruments related to internationally recognized human rights, the highest standard should be the reference point for fulfilling company obligations for responsible supply chains. The highest standard is whichever standard is more likely, if properly implemented, to avoid adverse impacts to human rights and the environment.

Invitation for input

The AFI partners welcome input on this draft, particularly to identify existing good practices and tools and to understand what further guidance might be helpful. The partners especially welcome ideas for making applicable law assessment processes more efficient, practical, collaborative, and effective across far-reaching supply chains. Please consider the following questions:

- **For companies:** How does your company currently assess applicable law related to environmental and human rights topics in a supply chain context? How is such assessment linked to due diligence and strategy for fulfilling voluntary commitments? How is information shared across the different supply chain stages to facilitate understanding and fulfillment of legal and voluntary obligations, especially by suppliers?
- **For all:** How can applicable law assessment be made more efficient and cost-effective, for instance by utilizing existing tools and resources or by sharing information among supply chain actors? Can you identify any examples of where such approaches are working well?
- **For all:** What further information would you like to see in the next version of this document to provide additional clarity and value for those working to implement responsible supply chains?

DRAFT