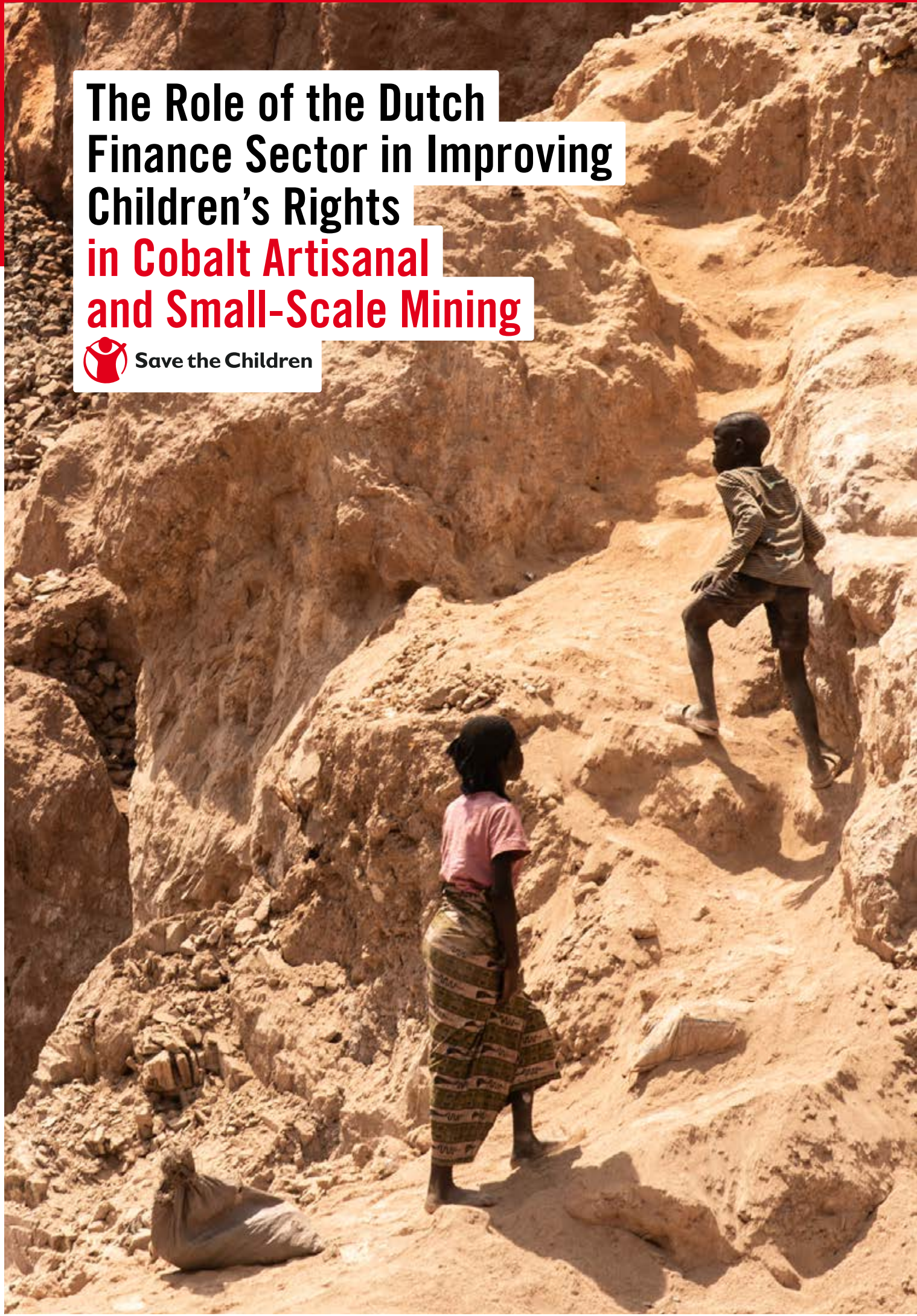


# The Role of the Dutch Finance Sector in Improving Children's Rights in Cobalt Artisanal and Small-Scale Mining



Save the Children







## List of Abbreviations

<b>3TGs</b>	Tin, Tungsten, Tantalum and Gold	<b>LSM</b>	Large Scale Mining
<b>ASM</b>	Artisanal and Small-Scale Mining	<b>mHREDD</b>	Mandatory Human Rights and Environmental Due Diligence
<b>AUM</b>	Assets Under Management	<b>NGO</b>	Non-Governmental Organisations
<b>BMW</b>	Bayerische Motoren Werke AG	<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>CHRB</b>	Corporate Human Rights Benchmark	<b>PAIs</b>	Principle Adverse Impacts
<b>DRC</b>	Democratic Republic of the Congo	<b>PRI</b>	Principles for Responsible Investment
<b>EC</b>	European Commission	<b>RBC</b>	Responsible Business Conduct
<b>ESG</b>	Environmental, Social and Governance	<b>SFDR</b>	Sustainable Finance Disclosure Regulation
<b>EU</b>	European Union	<b>UNGPs</b>	The UN Guiding Principles on Business and Human Rights
<b>EGC</b>	Entreprise Générale du Cobalt	<b>VBDO</b>	Vereniging van Beleggers voor Duurzame Ontwikkeling (Dutch Association of Investors for Sustainable Development)
<b>EU</b>	European Union	<b>WBA</b>	The World Benchmarking Alliance
<b>FCA</b>	Fair Cobalt Alliance		
<b>FI</b>	Financial Institutions		
<b>HP</b>	Hewlett-Packard Development Company, L.P.		
<b>ICT</b>	Information and communications technology		
<b>IRBC</b>	International Responsible Business Conduct		

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# Definitions

## Artisanal and Small-Scale Mining (ASM)

ASM refers to formal or informal mining operations with predominantly simplified forms of exploration, extraction, processing, and transportation. ASM is less capital intensive and more labour intensive compared to large-scale mining. (OECD 2019)

## ASM Formalisation

Formalisation is a process that seeks to integrate the Artisanal and Small-Scale Mining (ASM) Sector into the formal economy.

## Asset Owner

Institutions or individuals who own the underlying assets but entrust the management of those assets to an asset manager. Asset owners can include individuals (e.g. high-net-worth' investors and retail investors) and institutions (e.g. pension funds, insurance funds, Sovereign wealth funds, endowments, and foundations).

## Asset Manager

Asset managers manage funds for individuals or institutions. Asset management refers to the management of an investment portfolios. Asset managers oversee the assets contained within investment portfolios to mitigate risk while finding ways to increase their value.

## Downstream Actors/Players

In the cobalt supply chain, downstream actors/players include all those involved in the cobalt trade (metal traders, component producers, battery manufacturer, OEMs, brands) after the fine refiner through to consumer-facing companies. (OECD 2016)

## Upstream Actors/Players

In the cobalt supply chain, upstream actors/players are those involved in the sourcing and extraction of cobalt from mines to the refineries.

## Dutch Finance Sector

This study considers the role of institutional investors and corporate lenders in The Netherlands and their direct / indirect exposure to small scale and artisanal cobalt mining in DRC.

## Financial Institutions

In the context of this study, the term financial institutions includes pension funds, asset managers, insurers and banks.

## Institutional Investors

An institutional investor buys, sells, and manages stocks, bonds, and other investment securities on behalf of its clients, customers, members, or shareholders. There are six key types of institutional investors: endowment funds, commercial banks, mutual funds, hedge funds, pension funds, and insurance companies<sup>1</sup>.

## Project Finance

Project finance is the funding (financing) of long-term infrastructure, industrial projects, and public services using a non-recourse or limited recourse financial structure. The debt and equity used to finance the project are paid back from the cash flow generated by the project. Project financing can be in the form of a loan structure that relies primarily on the project's cash flow for repayment, with the project's assets, rights, and interests held as secondary collateral.

## Due Diligence

Due diligence is an on-going process through which companies identify, prevent, mitigate and account for how they address their actual and potential adverse impacts on human rights as an integral part of business decision-making and risk management systems.

## Child Labour

ILO defines "child labour" as work that "deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development", and which refers to:

- a. Children aged 5-11 years (or 12 where consistent with ILO and national laws) in all forms of economic activity
- b. Children aged 12-14 years (or 13-15 where consistent with ILO and national laws)

in all forms of economic activity except permissible "light" work

- c. Children aged 15-17 years in hazardous work. The specific types of employment or work constituting hazardous work are determined by national laws or regulations or by the competent authority. Hazardous work also includes children aged 15-17 working long hours, defined as more than 43 hours per week.
- d. Children aged 5-14 years performing household chores for at least 21 hours per week

## Hazardous Child Labour

ILO defines hazardous child labour or hazardous work as the work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children. It includes:

- Work which exposes children to physical, psychological or sexual abuse
- Work underground, under water, at dangerous heights or in confined spaces
- Work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads
- Work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health
- Work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer

## Worst forms of Child Labour

The ILO defines the worst forms of child labour as the work that involves children being enslaved, separated from their families, exposed to serious hazards and illnesses and/or left to fend for themselves on the streets of large cities – often at a very early age. It includes work which is likely to harm the health, safety or morals of children, such as work in a mine, where children risk death or injury from tunnel collapses, accidental explosions or rock falls.



School children work on an exercise during a focus group activity organized as part of the study.  
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<sup>1</sup> <https://www.investopedia.com/terms/i/institutionalinvestor.asp>

## Background and Goal of this Study

In 2021, Save the Children in Germany and The Centre for Child Rights and Business (The Centre) undertook a child rights assessment in cobalt supply chain of international consumer brands, with the results published in the report “Opportunities for Businesses to Promote Child Rights in Cobalt Artisanal and Small-Scale Mining”.

Realizing the importance of the finance sector in advancing child rights and pushing for more corporate responsibility to respect human rights and improve children rights, Save the Children Netherlands commissioned a follow-up to the initial study to examine how the Dutch finance sector can better support the advancement of child rights and reduction of child labour in the cobalt supply chain in the Democratic Republic of the Congo (DRC).

Numerous studies and news reports on the cobalt artisanal mining sector have drawn international attention to the prevalent human rights abuses in DRC. They have highlighted the precarious working conditions in the artisanal and small-scale mining (ASM) in DRC, the prevalence of the worst forms of child labour and indicated a lack of effective human rights due diligence in line with international standards (Amnesty International, 2016 & 2017).

In response to these controversies, some institutional investors joined forces and engaged with their investee companies to request information on how these companies are addressing human rights violations in their cobalt supply chain. For example, a group of investors participated in a collaborative engagement on responsible cobalt sourcing facilitated by the Principles for Responsible Investment (PRI) which ran between 2018 and 2020 with companies in the electronics and automotive sectors.

With a legal environment increasingly holding companies accountable for human rights abuses, including child rights, in their supply chains, and especially considering the Dutch national corporate due diligence legislation and the European Union's “mandatory human rights and environmental due diligence” (“mHREDD” hereafter) initiative, both companies and financial institutions face increased obligations to identify, address, monitor and provide remedy for human rights impacts, including child labour in their cobalt supply chains. A recent case against the oil company Shell to cut greenhouse gas emissions is one example of how European jurisdictions are holding corporates more accountable to follow The UN Guiding Principles on Business and Human Rights (UNGPs). “The [Shell] verdict shows the UNGPs are up to defining the standard of care to which companies must adhere. It also underlines the need for mandatory due diligence legislation that further defines the obligations of companies to prevent human rights violations and environmental damage and enables public regulators and judges to enforce such legislation”<sup>2</sup>. Additionally, The Dutch government presented a new approach to responsible business conduct on 16 October 2020 that includes a mix of measures with responsible business conduct (RBC) legislation at its core<sup>3</sup>. On 5 November 2021, the Dutch government presented the ‘building blocks’ for EU legislation that was sent to the EC<sup>4</sup>.

New regulations and stakeholder pressure also creates the need for investors to demonstrate their commitment to responsible investment approaches such as ESG stewardship and integration, voting and engagement, which take in to account corporate accountability and ESG performance as part of their efforts to achieve greater long-term value. In Europe, the Shareholder Rights Directive II requires transparency around strategies relating to voting and engagement and<sup>5</sup>, in North America, voting is considered part of investors’ fiduciary duty with engagement being a natural extension of voting proxies.

The initial child rights assessment focused on the cobalt supply chain of international consumer brands conducted by Save the Children Germany and The Centre, shed light on the current situation of children in ASM communities and the opportunities for companies to improve child rights. It found that the situation of children in cobalt ASM in DRC has likely further deteriorated in the past few years due to the wage shocks related to a cobalt price slump and also interrupted supply chains due to the COVID-19 pandemic. More children have left school in the past two years and started to work in cobalt ASM as their families are unable to pay for their education. The assessment further revealed that current on-the-ground efforts (pilot ASM formalisation projects) have shown some promising results for addressing the systemic issue of child labour and other child rights issues in cobalt ASM. However, due to the large scale of the ASM sector in DRC and the severity of the children’s situation there, current efforts are still insufficient in addressing the child rights issues at scale (Save the Children 2021).

Building on the results of the initial research, this supplementary study examines the role of the Dutch finance sector in respecting children’s rights in cobalt ASM. The study looks at the linkage between cobalt ASM and the financial sector in The Netherlands and examines what the human rights due diligence expectations from finance sector mean for the cobalt industry including gaps in identifying, monitoring and addressing human rights and child rights risks in cobalt. It concludes with a set of suggestions and recommendations for the finance sector to proactively respect children’s rights by leveraging their weight within the cobalt supply chain and with the companies they invest in and/or provide financial services to<sup>6</sup>.

The study draws on detailed desk research, supported by in-depth interviews with asset managers (AEGON, Boston Common Asset Management, GAM, Actiam), asset owner (Athora Netherlands), banks (ABN AMRO Bank N.V.) and other relevant stakeholders including PRI and the Responsible Sourcing Network. The asset owners / asset managers interviewed for this study represent a total of about 500 billion Euros assets under management (AUM)<sup>7</sup>. Additionally, four major Dutch banks answered a brief survey to provide further information on their responsible lending and investment approaches as related to risks associated with Children’s Rights in cobalt ASM. ABN Amro, Rabobank, ASN Bank (de Volksbank) and NIBC Bank completed the survey to help us understand their lending and investment policies and approaches to address child rights risks such as those related to Cobalt ASM in the DRC.

Initial results from this study were shared during a webinar workshop arranged by VBDO in September 2021, during which, financial institutions were invited to share feedback on initial findings, leading to follow-up interviews with some financial institutions. Feedback from the workshop and follow-up interviews was integrated into the study findings.

<sup>2</sup> <https://www.business-humanrights.org/en/blog/the-shell-climate-verdict-a-major-win-for-mandatory-due-diligence-and-corporate-accountability/>

<sup>3</sup> <https://www.rijksoverheid.nl/onderwerpen/internationaal-maatschappelijk-verantwoord-ondernemen-imvo/documenten/beleids-notas/2020/10/16/van-voorlichten-tot-verplichten-een-nieuwe-impuls-voor-internationaal-maatschappelijk-verantwoord-ondernemerschap>

<sup>4</sup> <https://www.rijksoverheid.nl/onderwerpen/internationaal-maatschappelijk-verantwoord-ondernemen-imvo/documenten/verga-derstukken/2021/11/05/non-paper-mandatory-due-diligence>

<sup>5</sup> <https://www.gov.uk/government/publications/workplace-pension-scheme-shareholder-rights-directive-ii-fact-sheet/shareholder-rights-directive-ii-fact-sheet>

<sup>6</sup> Throughout the Report, “company” refers to an entity that institutional investors invest in and/or provide financial services to.

<sup>7</sup> - Aegon Asset Management <https://www.aegonam.com>  
 - Athora <https://www.athora.com/organisation>  
 - ACTIAM <https://www.actiam.com/en/>  
 - Boston Common Asset Management <https://www.globenewswire.com/en/news-release/2021/02/01/2167702/0/en/AMG-Announces-Investment-in-Boston-Common-Asset-Management-A-Women-Owned-Leader-in-Sustainable-and-Impact-Investing.html>  
 - GAM <https://www.gam.com/en/our-company/about-us>





### Risks and Opportunities for Companies and Financial Institutions

Given these systemic child rights and related human rights issues, cobalt ASM presents risks and opportunities for both companies and financial institutions which invest in, or lend money, to these companies.

Upstream companies involved in the extraction or processing of cobalt, as well as downstream companies which utilise this mineral within their products, face several risks ranging from regulatory and reputational risks through to evolving customer expectations and potential disruption on material supply and availability.

At the same time, better management of cobalt supply chains can create opportunities for companies to strengthen compliance, protect reputation, increase competitive advantage and meet regulatory and sustainability commitments.

### How is the Dutch Finance Sector Linked with cobalt ASM?

Financial institutions in the Dutch Finance Sector comprise several actors including asset owners (pension funds, insurance funds, sovereign wealth funds, high net worth individuals, endowments, and foundations, etc), asset managers (including asset management companies) and banks (providing corporate lending or other financial services), each of which may be exposed to child labour and child rights risks in cobalt ASM in DRC through their investment and lending activities.

These financial institutions may be connected to cobalt ASM in DRC through corporate lending and/or investment in the companies' stocks and bonds, including (but not limited to):

1. Technology companies producing consumer brands such as computers and smartphones
2. Commodity trading firms
3. Lithium-ion battery manufacturers
4. Mining firms

5. Renewable energy companies
6. Transportation and automotive companies (including electric/hybrid vehicles, public transport and rail, etc)

There is some information available publicly to track the investment activities of financial institutions. However, for banks, there is generally less information available publicly on lending activities which can create challenges when seeking to establish a clear connection with a specific company or project which they finance. Where possible, we have examined how financial institutions including banks are linked with the ASM cobalt through their investment and lending activities. Where information is unavailable, we asked banks to complete a supplementary survey to further understand their lending approach and activities. Interviews were also used to gather further information on investment and lending activities.

#### a. Linkages through Investment Activities

To explore how the Dutch financial sector is linked to ASM cobalt, we first looked at the holdings of several of the largest Dutch asset owners such as insurance companies, pension funds and commercial banks in well-known consumer brands that are using cobalt in their products. We also looked at investments made by four large Dutch asset management firms in these companies.

In 2020, a Fair Insurance Guide report found that nine of the largest insurance companies active in the Netherlands<sup>9</sup> invested over **14 billion USD** in 23 of the largest manufacturing companies<sup>10</sup> in the world in the automotive, electronics and battery sectors that use cobalt in the products they manufacture (Fair Insurance Guide 2020). Further analysing the investments of the Dutch pension funds, we found that two of the largest pension funds in the Netherlands (ABP, PFZW) made their investments publicly available. Through the list of their investments, we found that between the two they invested over **18 billion Euros (over 21 billion USD)** in 15 consumer brands listed in Table 1, who use cobalt in their products. All these companies except BMW currently source cobalt from DRC.

<sup>9</sup> Achmea, Aegon, Allianz, ASR, CZ, Menzis, NN Group, VIVAT and VGZ

<sup>10</sup> The selected manufacturing companies are Apple, BMW, BYD, CATL, Daimler, Dell, Fiat Chrysler, General Motors, HP, Lenovo, LG Chem, Microsoft, Renault, Samsung Electronics, Samsung SDI, Sony, Tesla, Vodafone, Volkswagen and ZTE (Fair Insurance Guide 2020).



Children present their collaborative work in front of a group in a focus group activity organised as part of the study. © Hugh Kinsella Cunningham / Save the Children

Table 1: Investments of Biggest Dutch Pension Funds in Consumer Brands that Use Cobalt (in Million Euros)<sup>11</sup>

	Apple	BMW	Daimler	DELL	General Motors	HP	LG Chem	Microsoft	Panasonic	Renault	Samsung Electronics	Samsung SDI	Tesla	Toyota Motor	Volkswagen	Total
ABP <sup>12</sup>	3,837	162	150	83	215	50	237	3,945	28	11	2,422	229	797	110	153	12,429
PFZW <sup>13</sup>	2,358	42	70	211	39	21	27	2,259	19	4	251	23	349	188	27	5,888
<b>Total</b>	<b>6,195</b>	<b>204</b>	<b>220</b>	<b>294</b>	<b>254</b>	<b>71</b>	<b>264</b>	<b>6,204</b>	<b>47</b>	<b>15</b>	<b>2,673</b>	<b>252</b>	<b>1,146</b>	<b>298</b>	<b>180</b>	<b>18,317</b>

<sup>11</sup> Among the top pension funds, bpfBOUW invests institutional capital (from pension funds and insurers) in real estate. Published list of PME is not found.

<sup>12</sup> <https://www.abp.nl/images/listed-investments.pdf>

<sup>13</sup> <https://www.pfzw.nl/over-ons/zo-beleggen-we/waar-in-we-beleggen/overzicht-aandelen.html>



Additionally, we also looked at the US-based holdings<sup>14</sup> of the top Dutch asset managers according to the values of assets under management (AUM). Since five of them were already included in the Fair Insurance Guide as they belong to Dutch insurance groups<sup>15</sup>, we listed the holdings of the rest in Table 2 to demonstrate the amount of investment into a handful of technology and care companies. The four asset management firms in Netherlands invested over **11 billion USD** in six technology and car companies listed on Table 2.

**Table 2: US Based Holdings of Biggest Dutch Asset Management firms (in Million USD)**

	Apple	DELL	General Motors	HP	Microsoft	Tesla	Total
APG <sup>16</sup>	2,056	12	210	8	1,834	622	<b>4,742</b>
PGGM <sup>17</sup>	662	213	-	45	622	-	<b>1,542</b>
Robeco Institutional Asset Management B.V. <sup>18</sup>	1,890	58	21	227	1,898	178	<b>4,272</b>
MN Services Fondsenbeheer B.V. <sup>19</sup>	214	16	-	-	218	233	<b>681</b>
<b>Total</b>	<b>4,822</b>	<b>299</b>	<b>231</b>	<b>280</b>	<b>4,572</b>	<b>1,033</b>	<b>11,237</b>

As for the Dutch bank’s investment activities, we only found publicly available information for ING relating to their investment in the six US-based car and technology companies listed in Table 2, where ING has invested a total of 1.17 Billion USD in those companies.<sup>20</sup> Our survey with the four major Dutch banks<sup>21</sup> showed, however, that at least two Dutch banks invest in a company that uses cobalt in its products (e.g. including companies involved in automobile & transportation, telecommunications consumer electronics, information technology, etc).

With billions of euros invested in these large technology and car companies, the connection between Dutch financial institutions and ASM cobalt is strong. There is a clear and direct link between investors and their investee companies’ human rights and child rights impacts arising from cobalt ASM.

<sup>14</sup> The data is available for US-based companies’ stocks because the data from SEC Form 13f is publicly available. US Securities and Exchange Commission’s (SEC) Form 13F is a quarterly report that is required to be filed by all institutional investment managers with at least \$100 million in assets under management.  
<sup>15</sup> All asset management firms that belong to insurance companies/groups are excluded from this table as they are included in the Fair Insurance Guide (Fair Insurance Guide 2020). They are: Aegon Asset Management of Aegon Group, NN Investment Partners of NN Group, Achmea Investment Management of Achmea Insurance Group, ARS Asset Management of ASR Insurance Group and Actiam of Athora Netherlands.  
<sup>16</sup> <https://fintel.io/i/apg-asset-management>  
<sup>17</sup> <https://fintel.io/i/pggm-investments>  
<sup>18</sup> <https://fintel.io/i/robeco-institutional-asset-management> Robeco Institutional Asset Management B.V. is the institutional asset manager for some of Robeco’s investment institutions.  
<sup>19</sup> <https://fintel.io/i/mn-services-vermogensbeheer> Mn Services Fondsenbeheer B.V., trading manages the MN investment funds.  
<sup>20</sup> <https://fintel.io/i/ing-groep> (Apple 610m, General Motors 6.4 m, HP 1.5 m, Tesla 55 m)  
<sup>21</sup> ABN Amro, Rabobank, ASN Bank (de Volksbank) and NIBC Bank

**b. Linkages through Lending**

Dutch banks’ association with the cobalt sector through their lending activities is less visible because, many banks, including the largest Dutch banks (ING, Rabobank and ABN Amro)<sup>22</sup> do not publish the list of companies, or projects, they finance (discussed more in Chapter 3). However, the survey responses from four major Dutch banks helped us to understand how Dutch banks are linked with ASM cobalt through their corporate lending and/or project finance activities which are linked to the cobalt supply chain.

All but one bank currently provides either corporate lending or project finance to at least one actor in the cobalt supply chain (whether it is a mining company, a battery producer and/or a consumer brand). We were unable to establish the full extent of these banks’ lending to upstream and downstream players in the cobalt supply chain. However, the survey results do establish a direct between the Dutch banks and the cobalt supply chain in DRC one way or another.

“We know that if you’re active in DRC, there is a very high chance that you are linked to child labour, not paying living wages, significant health and safety issues, freedom of association issues etc. This is not a risk, this is a reality. The role of the investors is to ask companies, ‘what are you doing to address these realities? Show us what you’re doing.’”

- Kees Gootjes, Business and Human Rights Advisor, ABN AMRO

**Box 2: Adverse impact of cobalt and link to businesses**

If an enterprise sources cobalt mined using child labour which is then used in its products the enterprise can be **directly linked** to the adverse impact (i.e. child labour). In this case, the enterprise did not cause or contribute to the adverse impact itself, but nevertheless there still can be a direct link between the enterprise’s products and the adverse impact through its business relationships with the entities involved in its sourcing of the cobalt (i.e. with the smelter, minerals trader, and mining enterprise using child labour)

An enterprise’s relationship to adverse impact is not static. It may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring.- OECD Diligence Guidance for Responsible Business Conduct

<sup>22</sup> <https://www.statista.com/statistics/762148/leading-banks-in-the-netherlands-by-total-assets/>



## 2. Human Rights Due Diligence and Cobalt

In this Chapter, we introduce the international standards and legal framework related to human rights due diligence in cobalt. Many of these standards and regulations were developed specifically for conflict minerals, yet, applied to cobalt voluntarily even though cobalt is not considered to be a conflict mineral. This creates a gap in the regulatory framework for human rights due diligence in cobalt, leading to some companies and financial institutions giving less priority to cobalt than conflict minerals. However, with the increased recognition of the importance of cobalt, this regulatory gap is narrowing, especially with recent EU regulations such as the mandatory human rights and environmental due diligence (mHREDD) and other European and national level regulations that we will introduce in this chapter.

The UN “Protect, Respect and Remedy” Framework and its implementing principles, the UN Guiding Principles on Business and Human Rights<sup>23</sup> (“Guiding Principles” hereafter) provide a set of guidelines for states and companies to prevent, address and remedy human rights abuses committed in business operations. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, the Guiding Principles state that business enterprises should carry out human rights due diligence. The main purpose of human rights due diligence is the prevention of adverse impacts on people. Therefore, unlike traditional risk management due diligence, which primarily focuses on (financial) risks to business and concerns related to investment returns, human rights due diligence focuses on people and their rights.

### Financial Sector’s Responsibility in Human Rights Due Diligence

The direct legal responsibility of a financial institution in relation to human rights abuses may be limited, but public expectation (including governments, the views of NGOs, shareholders and the media) may lead to pressure for action.<sup>24</sup> The OECD has called on institutional investors to carry out their own due diligence to not only avoid financial risk, but also to prevent and mitigate adverse impacts on human and labour rights, the environment, and corruption in connection with their investment portfolios (OECD 2017). However, consistent with its voluntary nature, the OECD Due Diligence Guidance<sup>25</sup> does not establish consequences for noncompliance, neither does it generate legal obligations for companies (Martin-Ortega 2014). Regardless, Dutch government expects Dutch companies to commit to the UNGPs and OECD guidelines.

#### Box 3: Relevant International Standards for Financial Institutions Related to Cobalt and Human Rights

- UNGPs- UN Guiding Principles on Business and Human Rights
- OECD Guidelines- OECD Due Diligence Guidelines for Multinational Enterprises
- OECD Responsible business conduct for institutional investors
- OECD Guidelines for Multinational Enterprises
- OECD Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises
- OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas
- IAHR Investor Toolkit on Human Rights

*“As the financial sector we facilitate economic activities, in the same way we have a responsibility to also facilitate access to remedy when those economic activities have a negative impact on people”*

*- Kees Gootjes, Business and Human Rights Advisor, ABN AMRO Bank N.V.*

View of an illegal cobalt mining site, Kawama, Kolwezi.  
© Hugh Kinsella Cunningham / Save the Children

<sup>23</sup> [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf)

<sup>24</sup> UNEP, Human Rights Guidance Tool for The Financial Sector <https://www.unepfi.org/humanrightstoolkit/finance.php>

<sup>25</sup> OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition (2016)



The investor responsibility to respect human rights is becoming increasingly recognized by investors themselves. They also acknowledge that to practically conduct human rights due diligence as outlined in OECD Due Diligence Guidelines for Multinational Enterprises ("OECD Guidelines" hereafter), the companies they invest should undertake robust human rights due diligence, and voluntary risk assessment processes fail to warn investors of human rights risks (IAHR 2020). Thus, investors have explicitly supported several mandatory human rights due diligence developments. For example, on 21 April 2020, a group 105 investors representing over US\$5 trillion in assets under management joined forces to call on governments to introduce mandatory human rights due diligence regulation for companies.<sup>26</sup> The statement, coordinated by the Investor Alliance for Human Rights (IAHR), goes on to outline that this type of regulation is:

1. Materially good for business, investors, and the economy;
2. Essential in creating uniformity and efficiency as an increasing number of governments are already taking this step; and
3. A necessary component for investors to fulfil [their] own responsibility to respect human rights.<sup>27</sup>

*"We officially pushed for the introduction of mHREDD and we want to be a leading bank in EU in terms of human rights due diligence. It is our strategy to assist our clients in the shift towards more sustainable practices. We will discuss with our clients about how to adapt to this new legislative development. Our strategy is to apply HREDD in our own businesses and also to assist our clients do the same."*

*- Yuri Herder, Business & Human Rights Advisor, ABN AMRO Bank N.V.*

### Regulatory framework for human rights due diligence in cobalt

*"There is more pressure from investors on companies to clean up conflict minerals supply chains, but not so much focus on cobalt supply chains. This may be because cobalt mining is not covered by legal requirement unlike conflict minerals, so there is less incentive for investors to push companies for transparency in this sector."*

*- Raphael Deberdt, Minerals Program Associate, Responsible Sourcing Network.*

Cobalt is not classified as a conflict mineral in legislation like the U.S. Dodd-Frank Act, and therefore any regulations aimed at curbing the illegal flow of conflict minerals does not apply to cobalt. The EU's new Conflict Minerals Regulation<sup>28</sup> that came in effect as of 1 January 2021 mandates due diligence as defined in the OECD Due Diligence Guidance<sup>29</sup> (PRI 2021), but there is no specific mandatory framework for cobalt. All the international standards that are listed in Box 3 apply to cobalt only on a voluntary basis, and as such create a regulatory gap for due diligence in cobalt, making it a choice of companies, and those that invest in them, as to what degree they



*Children participate in the focus group.  
© Hugh Kinsella Cunningham / Save the Children*

want to apply the standards to their cobalt supply chains. However, many companies have voluntarily begun to adopt cobalt into responsible mineral programmes (PRI 2021). Some sources predict that cobalt is likely to be included in the EU's new Conflict Minerals Regulation.

### Box 4: Dodd-Frank Act and Conflict Minerals

"In 2010, the U.S. Congress passed the Dodd-Frank Act, which directs the U.S. Securities and Exchange Commission (SEC) to issue rules requiring certain companies to disclose their use of conflict minerals if those minerals are "necessary to the functionality or production of a product" manufactured by those companies. Under the Act, those minerals include tantalum, tin, gold or tungsten. Congress enacted Section 1502 of the Act because of concerns that the exploitation and trade of conflict minerals by armed groups is helping to finance conflict in the DRC region and is contributing to an emergency humanitarian crisis.<sup>30</sup>"

### Box 5: Why cobalt is not classified as a conflict mineral

- Cobalt is mined in the "Copperbelt", which is more than 1000 km away from what are considered to be the "conflict mines in the northern Kivu region.
- Cobalt is not handled, produced or sold for profit by the people who are creating the current conflict in the DRC.
- If authorities find cobalt in the DRC to be funding any sort of conflict, which is highly unlikely, then copper would have to undergo the exact same classification.<sup>31</sup>

We observe a clear tendency towards mandatory due diligence frameworks being imposed on companies around the world. The mHREDD and other recent laws and legislations related to human rights and child labour (see legislation 3 to 6 in table 3 below ) create mandatory's frameworks that require investors to implement a more robust human rights due diligence in the cobalt supply chains and in turn push their investee companies and clients to do so as well.

Financial institutions are therefore not only expected to thoroughly enhance their own human rights due diligence systems, but also strongly encouraged to support their client and investee companies to better identify, address and monitor human rights risks in their cobalt supply chains (see appendix 1)<sup>32</sup>. The list of initiatives and regulations for mHREDD presented in table 3 is not exhaustive but includes those which are of concern to Dutch financial institutions as well as others which are applicable for companies located outside of The Netherlands. These are included on the basis that Dutch financial institutions might be investing in and/or financing these companies.

<sup>26</sup> Additionally, in December 2018, more than 70 large Dutch pension funds with combined assets of almost €1.2 trillion signed a covenant with civil society organizations, trade unions, and the Dutch government committing to worldwide cooperation aimed at promoting sustainable investment based on respect for human and labour rights (

<sup>27</sup> BHRRC <https://www.business-humanrights.org/en/latest-news/investors-with-over-us42-trillion-call-on-govts-to-introduce-mandatory-human-rights-due-diligence-for-companies/>

<sup>28</sup> [https://trade.ec.europa.eu/doclib/docs/2017/march/tradoc\\_155423.pdf](https://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155423.pdf)

<sup>29</sup> <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>

<sup>30</sup> <https://www.sec.gov/opa/Article/2012-2012-163htm---related-materials.html>

<sup>31</sup> <https://agmetalmine.com/2011/06/06/why-cobalt-is-not-a-conflict-mineral/>

<sup>32</sup> For more information about recent laws and legislations related to human rights due diligence, please refer to appendix 1.



Table 3: Legislation and Initiatives Related to Human Rights Due Diligence in Cobalt

Legislations	Relevance to cobalt
1. <b>Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act</b>	US listed companies to submit “Conflict Minerals Report” describing the measures taken to exercise due diligence if they source tin, tungsten, tantalum and gold (3TGs) from DRC (OECD 2021). Cobalt is excluded, but companies voluntarily have begun to adopt cobalt into responsible mineral programmes (PRI 2021).
2. <b>The EU’s new Conflict Minerals Regulation</b>	Makes human rights due diligence mandatory 3TGs according to the “OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.” Cobalt is not included, but OECD’s five-step framework can be applied to cobalt. (Some sources predict that cobalt is likely to be added <sup>33</sup> ).
3. <b>European Union mandatory human rights and environmental due diligence (mHREDD)</b>	Likely to apply all EU-domiciled companies, as well as non-EU companies that do business in the single market. Includes all sectors including cobalt
4. <b>Dutch National Corporate Due Diligence Legislation</b>	Dutch Government will no longer tolerate abuses in global corporate value chains, such as the violation of trade union rights, environmental pollution and child labour.
5. <b>The EU Sustainable Finance Disclosures Regulation (“SFDR”)</b>	Much more emphasis will be placed on disclosure, including new rules that must identify any harmful impact made by the investee companies.
6. <b>The French Duty of Vigilance Law</b>	Asks companies to meet a defined set of requirements, establish a public vigilance plan, including measures to identify and prevent severe human rights violations. If human rights abuses were to be found in cobalt supply chains that satisfy the terms of the law, companies could be exposed to legal risks (PRI 2021).
7. <b>Dutch International Responsible Business Conduct agreements (IRBC)</b>	IRBC have a joint background: the necessity identified by the Dutch government to reduce human rights-related risks in thirteen sectors, of which 3 of them target financial institutions: banking, insurance and pension funds.
8. <b>Shareholder Rights Directive II</b>	Includes transparency obligations for European institutional investors – i.e. pension funds and insurers - as well as a European asset managers. institutional investors and Asset Managers are required to disclose on a ‘comply or explain’ basis how they monitor investee companies on relevant matters (e.g. including non-financial performance ESG); conducts dialogues with investee companies; exercises voting and any other shareholder rights; cooperates with other shareholders; communicates with relevant stakeholders. Also requires annual reporting on the policy’s implementation, including a general description of voting behaviour, votes cast, an explanation of the most significant votes and the use of proxy advisors.

33 <https://www.jdsupra.com/legalnews/eu-conflict-minerals-regulation-what-6214772/>

## 3. Good Practices and Gaps in Identifying and Addressing Human Rights and Child Rights Risks in Cobalt ASM

### 3.1 Approaches to identifying Human Rights Risks in Cobalt

#### 3.1.1. Methods to identify risks

Financial institutions use different methods to assess human rights risks related to a client or investee company, including 1) ESG Risk ratings and related services provided by ESG research organizations/ rating agencies. 2) in-house ESG scores based on in-house research and expertise 3) engagement/ dialogue with companies 4) multi-stakeholder engagement.

##### a. Third Party ESG Research Providers and Risk Ratings

A key development in financial markets is the integration of environmental, social and governance (ESG) information into investment and lending decisions. According to recent estimates, more than \$30 trillion in assets under management (AUM) are invested using sustainable strategies that apply ESG criteria in investment analysis and portfolio selection. Investor spending on ESG ratings from ESG rating agencies increased from \$200 million to \$500 million between 2014 and 2018 (Christensen et al. 2019). As for lending decisions, the companies with high ESG score can generally get capital at lower cost than those with low ESG score<sup>34</sup>.

ESG factors are increasingly incorporated into investment strategies, with a recent survey suggesting companies’ ESG performance has become a key consideration for investors globally, with 49 per cent, expressing willingness to divest from companies that aren’t taking sufficient action on ESG issues. More than half, 59 per cent, said a lack of action on ESG issues makes it likely they would vote against an executive pay agreement, while a further third say they have already taken this action<sup>35</sup>.

34 [https://www.business-standard.com/article/companies/esg-factors-now-part-of-lending-decision-by-top-banks-globally-crisil-ceo-121073000869\\_1.html](https://www.business-standard.com/article/companies/esg-factors-now-part-of-lending-decision-by-top-banks-globally-crisil-ceo-121073000869_1.html)

35 <https://www.institutionalassetmanager.co.uk/2021/10/28/308417/companies-failing-act-esg-issues-risk-losing-investors-says-new-pwc-survey>

36 <https://hbswk.hbs.edu/item/what-does-an-esg-score-really-say-about-a-company>

Third party ESG research providers collect and evaluate data on a company’s ESG practices. Using their own proprietary methodologies, research provider generally develops ESG profiles on thousands of companies, including ESG company rankings, ratings or scores. Further discussion on the limitations of ESG data providers is included in section 3.1.2.

ESG research firms often use a combination of publicly available information, data-intensive company questionnaires, and information sourced from NGOs and media campaigns to inform their ESG research and ratings on companies. Examples of ESG Research Firms and Risk Ratings providers include SCI, Sustainalytics, RepRisk, and Institutional Shareholder Services (ISS), MSCI — all of which are major players in the market<sup>36</sup>.

A further type of Third party ESG rating is the Corporate Human Rights Benchmark (CHRB). CHRB is part of the World Benchmarking Alliance (WBA) and has been assessing the human rights disclosures of some of the largest global companies since 2017. It is an open benchmark, and an investor and civil society-led initiative. CHRB rankings are published on the website yearly. For example, according to the key findings of CHRB 2020 found that the electric vehicle market in particular lacks supplier engagement, especially in the areas of forced labour and child labour in their mineral supply chains. The CHRB also found that only nine companies disclosed any information relevant to responsible mineral sourcing, such as working with smelters or refiners or identifying and managing risks within their supply chain (WBA 2020).

Banks, asset managers and asset owners are increasingly using ESG research and ratings to identify and track ESG investment risks, prioritise shareholder engagement on ESG issues, and integrate ESG considerations into investment and lending decisions.



**b. In-House ESG Research and Ratings**

Some asset managers are using ESG data but not external ESG ratings and have developed their own ESG capabilities to conduct ESG research, ratings and scores.

**Box 6: ABN AMRO: Developing a human rights risk register**

In 2020, ABN AMRO developed a Human Rights Risk Register to identify, manage and address the bank's human rights risks. The following steps were taken to determine the salient human rights risks related to the bank's investment services operations:

1. Conduct desk research using internal and external documentation (e.g., peer analysis, internal policy documents, trend reports) to determine a longlist of possible human rights issues related to the different roles of the bank, including ABN AMRO's investment services;
2. Engage with relevant internal and external stakeholders (e.g., NGOs, academics, sustainability consultants) by holding in-depth interviews and surveys to ensure the list is complete and accurate in terms of descriptions, contexts, triggers and consequences;
3. Prioritise issues within the Risk Register by looking at severity, likelihood and control, and the robustness of current and potential mitigating actions.
4. Validate results with relevant internal colleagues and present the results to the bank's Sustainability Advisory Committee.

Using the above steps, ABN AMRO identified four salient issues related to their investment services operations:

- Labour rights;
- Land-related rights;
- Right to life / right to health; and
- Right to privacy / freedom of expression<sup>37</sup>.

**c. Engagement**

**“At the beginning of the engagement, investors join and decide which company engagement they will lead and which they will support. Each company under engagement will have at least one lead investor that will set up meetings and core focus areas for engagement. Other supporting investors will participate in the meetings, provide feedback, and support the**

**research. Lead investors report to the PRI on the progress of engagement and provide information on progress towards focus areas they selected at the beginning. Some focus on supply chain traceability, and others on on-the-ground remediation.”**

*- Nabylah Abo Dehman, Head of Stewardship, Social Issues and Human Rights, PRI*

Some Dutch investors in public companies use shareholder engagement to leverage their position as shareholders to influence corporate decision-making and practice related to ESG issues. This includes voting on proposals related to business and ESG issues to create a catalyst to address relevant ESG risks.

**“At the Tesla's Annual General Meeting on September 22, the shareholder proposal on Human Rights Disclosure filed by the Sisters of the Good Shepherd, NY Province received 24.8% support overall. Excluding insider shares held by Elon Musk and other executive officers and directors, it received 41.5% support, which is a strong vote for a first year filing. Proxy advisors ISS and Glass Lewis both recommended voting in favour of the proposal, agreeing with proponents that increased disclosure on human rights governance, due diligence, and remedy was warranted at Tesla given the company's numerous human rights controversies”<sup>38</sup>.**

Others adopt a more collaborative approach, opening a dialogue with companies to raise and discuss ESG risks or concerns with companies. In this scenario when the ESG ratings or a controversy exposes a possible issue about a company's management of a risk, investors start a dialogue with the company to learn more about the systems in place to manage this risk or the gaps thereof.

One such example is the collaborative engagement effort coordinated by the UN PRI, a group of 46 investment organisations representing US \$ 3.8 trillion in assets. They issued a statement about investor expectations on the responsible sourcing of cobalt, which is described in box 13.

**“Risk rating measures exposure to risk and how well a company manages ESG risk based on available reporting. Engagement has deeper dialogue with the companies on certain topics, and it is dialogue driven. Engagement is interested in learning about management. The clients are often very involved in this process and participate in calls. This information can also be passed on to risk rating.”**

*- Sustainalytics*

School children work on an exercise.  
© Hugh Kinsella Cunningham / Save the Children



**“Most children here normally start school at the age of 8 instead of 6 and about 60 % can finish the primary school.”**

*School principal of a private primary school.*

<sup>37</sup> <https://www.unpri.org/human-rights-case-studies/abn-amro-developing-a-human-rights-risk-register/8787.article>

<sup>38</sup> <https://iasj.org/iasj-urges-tesla-shareholders-to-vote-for-human-rights-disclosure-proposal/>



#### d. Multi-stakeholder engagement

On sector wide issues as in the case of cobalt, some investors seek to gain a more in-depth understanding of the on-the-ground impacts through participating in multi-stakeholder engagements, which may include engagement with civil society organisations (CSOs) working on the ground who are familiar with how and where the adversaries are happening. Although not specific to cobalt sector, the Dutch International Responsible Business Conduct (IRBC) Agreements are an example where banking, insurance and pension funds respectively enter into agreements with the Dutch government and the civil society organizations to carry out effective assessment of the risks<sup>39</sup>.

As for the cobalt sector, there has been a noticeable growth in multi-stakeholder and industry initiatives that attempt to build leverage and to affect change throughout the cobalt value chain (PRI 2021). Such initiatives include Responsible Minerals Initiative, the Responsible Cobalt Initiative, the Global Battery Alliance and the Fair Cobalt Alliance. However only a few investors are included in such initiatives. One example is Netherlands-based insurer Ansvardéa, which has recently become a member of the Fair Cobalt Alliance (FCA), a multistakeholder action platform that is committed to developing responsible and fair supply of artisanal mined cobalt from the Democratic Republic of Congo (DRC)<sup>40</sup>.

#### Box 7: Dutch International Responsible Business Conduct Agreements (IRBC)

The International Responsible Business Conduct agreements have a joint background: the necessity identified by the Dutch government to reduce human rights-related risks in thirteen sectors, of which 3 of them target financial institutions: banking, insurance and pension funds.

The agreements have two main goals:

- To improve circumstances in several risk areas for example child labour, low wages, human rights violations and environmental pollution, within a period of three to five years after the agreement has been signed.
- To offer a collective solution to problems that businesses are unable to solve on their own.

IRBC agreements are voluntary, but they involve a firm commitment on the part of the partners consisting of the private sector, civil society organisations and the Dutch government.<sup>41</sup>

The Dutch Banking Sector Agreement was endorsed by almost all members of the Dutch Banking Association (NVB), who deal with project financing and corporate loans, and covers 90% of the market.<sup>42</sup> It has been implemented from 2017 to 2019.

The Insurance Sector Agreement covers 99% of the market and has been signed on behalf of the insurance sector by the Dutch Association of Insurers (VvV) and Zorgverzekeraars Nederland (the umbrella organisation of ten Dutch health insurers). Also, a statement of intent is signed by the holdings Achmea, Aegon and NN Group.<sup>43</sup>

The Pension Funds Agreement covers 93% of the market and is signed by 75 pension funds<sup>44</sup>.

<sup>39</sup> <https://www.imvoconvenanten.nl/en>

<sup>40</sup> <https://www.miningmagazine.com/supply-chain-management/news/1419928/dutch-insurer-ansvaridea-joins-fair-cobalt-alliance>

<sup>41</sup> <https://www.imvoconvenanten.nl/en/why>

<sup>42</sup> <https://www.imvoconvenanten.nl/en/banking/signatories> ABN AMRO, BNG Bank, De Volksbank, FMO, ING, NIBC Bank, NWB Bank, Rabobank, Triodos Bank, Van Lanschot

<sup>43</sup> <https://www.imvoconvenanten.nl/en/insurance/partijen>

<sup>44</sup> <https://www.imvoconvenanten.nl/nl/pensioenfondsen/pensioenfondsen>

### 3.1.2. Limitations in current approaches

#### a. Potential limitations of third party ESG risk ratings

Many mainstream third party ESG rating agencies rely heavily on corporate disclosure in their assessments of ESG performance. Since corporate disclosures are not formally regulated, the extent to which companies disclose ESG data can vary. Furthermore, differences exist in the assessments between different ESG rating agencies on how well a company is performing on ESG issues<sup>45</sup>.

ASM Cobalt in DRC has a severe human rights risk, and many financial institutions - including the Dutch finance sector – are linked to these risks through their investment and lending activities. However, these risks relating to cobalt ASM are missing from the sustainability reports of some top Dutch financial institutions. This could indicate that the current methods used by financial institutions in The Netherlands to identify salient human rights risks, included those related to cobalt, may have some limitations.

#### Box 8: Seven severe human rights risks and impacts in the cobalt sector by identified by the PRI

In its 2018 report “Drilling Down into the Cobalt Supply Chain”, the UNPRI identified and informed investors about seven particularly salient risks of serious, systemic human rights abuses associated with cobalt mining and encourages investors take action to address these adverse impacts. The risks are:

1. The exposure to toxic metals by miners and local communities near mines
2. Poor occupational health and safety conditions at mines
3. Poor community relations, including forced evictions around mines
4. Human rights abuses by private/public security personnel at mines
5. Child labour in mines
6. Unfair compensation of miners at mines
7. The legality of mines<sup>46</sup>

Many investors, including a selection of the Dutch investors which participated in the in-depth interviews for this study, use third party ESG research and ratings to track and monitor the allegations made against companies in the media, through NGO campaigns and other sources as described in section 3.1.1 above. A recent study by VBDO on incorporating child labour in responsible investment of the biggest Dutch pension funds, insurance companies and banks found that 93% of institutional investors rely exclusively on data provided by an external ESG research provider for their responsible investment policy (VBDO 2021). These services general use a broad framework of global conventions, such as the SDGs, UN Global Compact and other international conventions on human rights issues, to analyse how well companies are upholding widely supported principles and addressing the associated material environmental, social and governance (ESG) risks to their businesses.

These services are widely used to track companies' involvement in ESG-related issues and controversies, including those related to cobalt ASM in DRC. There are, however, some limitations with this approach:

- **Reactive in approach.** Breaches of international law and conventions issues may only be flagged to investors once a serious allegation has been raised or a significant event / breach has occurred.
- **Lack of engagement with broader issues / context.** In seeking to offer global coverage of many thousands of companies, some controversy led ESG rating approaches may miss the broader context or fail to recognise / link to issues on the ground, e.g. the role of formalization in addressing Cobalt ASM risks in DRC).
- **Can potentially be used as an exclusion criterion.** When breaches or controversies occur, some investors may opt to divest from companies linked to cobalt ASM in DRC instead of engaging with companies to tackle issues on the ground to strengthen child rights and, for example, push for formalisation of cobalt ASM in DRC. That said, some of the investors we interviewed use controversy services to inform and prioritise

<sup>45</sup> <https://hbswk.hbs.edu/item/what-does-an-esg-score-really-say-about-a-company>

<sup>46</sup> Summary from “Fair Insurance Guide” 2020



their engagement with companies to improve performance and will only divest as a last resort. The VBDO study also found that 82% of investors practice exclusion to address child labour (VBDO 2021).

- **Inaccurate or incomplete ESG ratings** resulting from a lack of available data, misreported or biased data, or inaccurate auditing by third party auditors (which is then integrated by data providers). Depending on the ESG ratings methodology, the data may merely capture a moment in time (instead of an ongoing monitoring of the situation). Other challenges can stem from a lack of data from high-risk areas for human rights and child rights, such as countries with authoritarian regimes which limit freedom of expression, no civil society, etc
- **Some ESG Ratings providers / financial institutions consider a company's ESG performance relative to its peers** and this can make poor performers look good if the company's peers perform even worse.
- **Some ratings providers / financial institutions focus on an overall rating or score** to reflect ESG performance. Whilst a company may score highly in most issues areas (resulting in a high average score) it may still score poorly in a few other child rights risks areas. Consequently, investors and lenders could potentially overlook some individual child rights risk areas and instead focus on overall ESG performance.

Given the issues highlighted above, financial institutions should supplement existing ESG research sources by broadening their assessment to include a more comprehensive and proactive approach to the assessment of risks in cobalt ASM in DRC through deeper engagement with stakeholders working on the ground (as described in further detail in the sections below). In reality, less than 27% Dutch investors use NGOs as a source of data for child labour (VBDO 2021).

**Institutional investors should “engage ESG reporting frameworks, benchmarks and data providers to ensure that the research methodologies, corporate performance data and advisory services used to assess investees are aligned with the UNGPs and reflect real-world outcomes for people. Where necessary, commit to supporting the development of new frameworks or better approaches to evaluating human rights performance.”**

*- Report by the UN Working Group on Business and Human Rights, June 2021<sup>47</sup>*

#### **b. Lack of focus on risks to child rights**

Children are too often overlooked in corporate human rights policy, due diligence and reporting, beyond a singular focus on child labour, and therefore, they are often left out of investors ESG and sustainability strategies. In undertaking their responsibility to respect human rights, investors can use their leverage<sup>48</sup> to improve the situation of children by influencing the practices of companies in which they invest.” (UNICEF 2021).

The usual channels for investors to identify salient human rights risks may overlook impacts on child rights and ignore the broader context of child rights risks. Child labour, especially the worst forms of child labour, is the most serious child rights risk in cobalt ASM. If investors understand how the risk of child labour relates to other child rights and human rights risks, such as education, investors will be able to identify risks on child labour better and earlier. For example, if a company or its business partners/suppliers operate in a location with low school enrolment/high school dropout rates, it is a good proxy that the child labour rates will be high.

A recent study by Save the Children found that the education crisis children face in cobalt ASM communities in DRC has been worsening in the past couple of years because of the income shocks to the families following the cobalt price slump and the COVID-19 pandemic. With this trend, the study



COMMUS copper mine in the midst of the town of Kolwezi.  
© Hugh Kinsella Cunningham / Save the Children

found that the child labour rates in ASM have also been increasing (Save the Children 2021). Child labour in cobalt ASM is a complex phenomenon that while driven by the contextual poverty, is interlinked with many structural issues in the mining sector. Lack of access to education, lack of decent work opportunities for youth and adults, mining families' vulnerability to economic shocks etc. all contribute

to increased child labour risks. Without effectively addressing this root cause by an ASM formalisation process that aims at increasing productivity, creating fair and transparent market for ASM etc., it is not sustainable to effectively address the issue of child labour (Save the Children 2021).

<sup>47</sup> <https://www.ohchr.org/Documents/Issues/Business/UNGPs10/Stocktaking-investor-implementation.pdf>

<sup>48</sup> Leverage under the OECD Guidelines has a different meaning than in the context of investment, where it can refer to the state of financing of a firm rather than the act of influencing or encouraging (IAHR 2020).



**c. Lack of understanding of on-the-ground impact**

“What’s missing is consistent, systematic monitoring of the situation on the ground. We might ask a company to share its supply chain policies, and these may be well written policies. But, at the end of the day, whilst policies are important there’s still the possibility of a controversy tomorrow.”

- Brunno Maradei, Global Head of Responsible Investment, Aegon Asset Management

Many of the investors we talked to are aware of the limited visibility they have in relation to understanding evolving risks on the ground. During our interviews industry representatives commented that understanding the policies of a company or management systems in place is not enough to identify how the adverse impact on the ground is linked with the company’s operations.

A VBDO study found that supply chain transparency and lack of information on child labour were the main obstacles preventing investors from explicitly including child labour in the responsible investment policy. NGOs and other civil society organizations can often provide investors with insights into how operations are run on the ground and alleged human rights and labour rights violations including child labour. However, very few Dutch investors use NGOs as a source of data for child labour (VBDO 2021).

“We’ve had some deep engagement with Microsoft. Through working with non-profit organization PACT on child labour issues, Microsoft were able to share some nuanced, local insights as to what’s happening on the ground. In other case the on the ground perspective was provided as part of investor education under the PRI.”

- Lauren Compere, Managing Director/ Director of Shareowner Engagement, Boston Common Asset Management

Stakeholder engagement is seen as one of the ways financial institutions can better understand the human rights risks in affected communities that are far away from the companies’ operations, as in the case of cobalt ASM. It is also used as a strategy to engage with companies to encourage improvements in their ESG performance. Stakeholder engagement is also one of the key features of the Guiding Principles, ranging from gauging human risks to providing or enabling remedies (UNGPs). OECD Guidance also states that “stakeholder engagement can be particularly helpful in the planning and decision-making concerning projects or other activities”. The financial institutions who are committed to these international standards should acknowledge the importance of engaging with organisations working on the ground to address ESG risks in cobalt ASM and increase their engagement with these stakeholders.

The PRI has identified weak spots in how companies are identifying salient issues in their supply chains related to human rights. Whilst some companies expressed their intention to expand their human rights risk assessments to connect with stakeholders in their supply chains to strengthen their engagement of salient risks, only one of the companies has made a public commitment to do so (PRI 2021). This is one area that investors can push forward, both by encouraging companies to engage other stakeholders (such as NGOs, local stakeholders and affected rightsholders) in their human rights risk assessments, and by engaging with those stakeholders themselves to increase their understanding of salient human rights issues as well as possible solutions and avenues for remedy. Even though many investors participate in high level dialogues (e.g. OECD), engaging various types of stakeholders linked with on-the-ground impact brings in deeper understanding of the complicated issues causing and/or contributing to adverse impacts.

“There is a growing desire from investors to understand the on the ground impact, especially during COVID. Some investors don’t really understand the unintended consequences of the shift towards renewables and clean energy and what this means for child rights and child labour.”

- Lauren Compere, Managing Director/ Director of Shareowner Engagement, Boston Common Asset Management

**d. Lack of transparency in lending due to client confidentiality**

Transparency on the various companies and projects which banks finance is important for allowing stronger human rights due diligence practices, including better communication with affected people and better reporting of steps taken to manage impacts. “Transparency and accountability” is also one of the six principles of the new draft “Principles for Responsible Banking”, endorsed by 49 banks around the world, of which six are based in Netherlands (Box 9). However, these principles do not require disclosure of corporate lending relationships. According to Banktrack (the international tracking, campaigning and CSO support organisation targeting private sector commercial banks and the activities they finance<sup>49</sup>), only smaller ‘ethical banks’ with a focus on lending to support sustainable or socially beneficial activities have pursued an approach of publishing full lists of their corporate customers. In Netherlands, Triodos Bank and ASN Bank publish the names of companies they finance. However, the largest three banks by assets, ING, Rabobank and ABN Amro<sup>50</sup> do not. According to Banktrack, the market practice by most banks is to use template contracts that set “far-reaching confidentiality obligations” which prevent disclosures about their relationships with a client without the client’s specific consent (BankTrack 2019).

**Box 9: Principles for Responsible Banking**

The Principles for Responsible Banking are a unique framework for ensuring that signatory banks’ strategy and practice align with the vision society has set out for its future in the Sustainable Development Goals and the Paris Climate Agreement.

The framework consists of 6 Principles designed to bring purpose, vision and ambition to sustainable finance and created in 2019 through a partnership between founding banks and the United Nations. Signatory banks commit to embedding these 6 principles across all business areas, at the strategic, portfolio and transactional levels.

A 3-step process guides signatories through implementing their commitment:

- 1 Impact Analysis: identifying the most significant impacts of products and services on the societies, economies and environments that the bank operates in.
- 2 Target Setting: setting and achieving measurable targets in a banks’ areas of most significant impact.
- 3 Reporting: publicly report on progress on implementing the Principles, being transparent about impacts and contributions.<sup>51</sup>

Among the 260 current signatories with total asset of US\$ 70trn, five banks are based in the Netherlands:

- 1 ABN AMRO BANK N.V.APG
- 2 Coöperatieve Rabobank U.A.
- 3 De Volksbank
- 4 ING
- 5 Netherlands Development Finance Company (FMO)
- 6 Triodos Bank NV<sup>52</sup>

<sup>49</sup> [https://www.banktrack.org/page/about\\_banktrack](https://www.banktrack.org/page/about_banktrack)

<sup>50</sup> <https://www.statista.com/statistics/762148/leading-banks-in-the-netherlands-by-total-assets/>

<sup>51</sup> <https://www.unepfi.org/banking/bankingprinciples/more-about-the-principles/>

<sup>52</sup> <https://www.unepfi.org/banking/bankingprinciples/prbsignatories/>



The Equator Principles are a risk management framework, created and adopted by financial institutions, for determining, assessing and managing environmental and social risks in financing projects. Currently, 118 Equator Principles Financial Institutions (EPFIs) in 37 countries worldwide have officially adopted the EPs, covering over 70 percent of international Project Finance debt in emerging markets. Since their introduction in 2003, the Principles have become the de facto standard for all banks and investors on how to deal with potential and environmental effects of large-scale projects to be financed. The most recent version of the EPs is EP4, which was agreed upon in November 2019 and came into effect on 1st October 2020. BankTrack has called for greater accountability under the EPs since the start of the initiative. In 2019 BankTrack joined a call from 79 civil society organisations and partners for the Equator Principles to develop a central accountability mechanism, and “were disappointed that the EPA did not take the opportunity to announce the development of such a mechanism as part of EP4”.<sup>53</sup>



The accountability triangle, adapted from Oxfam.

**Box 10: The Equator Principles (EP)**

“The Equator Principles (EP) are intended to serve as a common baseline and risk management framework for financial institutions to identify, assess and manage environmental and social risks when financing Projects. The Equator Principles (EP) have become the financial industry standard for environmental and social risk management in projects. Financial institutions adopt the EP to ensure that the projects they finance are developed in a socially responsible manner and reflect sound environmental management practices. By doing so, negative impacts on project-affected ecosystems and communities should be avoided where possible. If unavoidable, negative impacts should be reduced, mitigated and/or compensated for appropriately.”<sup>54</sup> Major Dutch banks, ABN AMRO, Coöperatieve Rabobank, De Volksbank, ING, FMO, NIBC Bank and NWB Bank are signatories of the EP.<sup>55</sup>

**Box 11: Good practice case: Individual client transparency**

The Netherlands-based Triodos Bank has a section on its website listing all the companies it finances. It is able to do this because it has made granting permission for publication of business details a condition for obtaining a loan, appearing in all loan agreements, since January 2009 (BankTrack 2019).

<https://www.triodos.com/know-where-your-money-goes>

Also in the Netherlands, ASN Bank publishes the names of companies, governments and other organisations and institutions the bank finances. (BankTrack 2019)

BankTrack also reports that client confidentiality presents obstacle for banks answering questions of external stakeholders, including affected communities, their representatives or other organisations with relevant expertise. Similarly, client confidentiality can hinder banks to collaborate with other banks or institutions to increase their leverage over clients to address human rights issues (BankTrack 2019). For the same reasons, it creates a challenge to monitor how the banks are addressing the human risks in the cobalt sector when they are exposed through their lending activities.

The parties to the Dutch Banking Sector Agreement on human rights (Box 6) contracted the law firm NautaDutilh in 2017 to produce a report considering the specific question of the extent to which banks are legally able to provide CSOs or the public with “individual client information regarding the outcome of a human rights due diligence investigation and any measures taken pursuant thereto within the framework of the Agreement” (NautaDutilh 2017). As shown in Box 10, individual client information can be made public with client consent. According to BankTrack, some banks go to significant lengths to secure client consent to make disclosures, while others simply don’t ask (BankTrack 2019). According to the survey we conducted with four major Dutch banks, two banks have sought client consent to publish individual information about a client when engaging them on issues related to human rights abuses. Among them, one bank representative said they have sought client consent five times in the past two years to publish their individual information when engaging them on issues related to human right abuses.

**Box 12: Key findings of NautaDutilh Legal Report on the Possibilities for Increased Transparency in light of the Adhering Banks’ Client Confidentiality Obligations**

- There is no statutory obligation to disclose individual cases regarding human rights violations.
- individual client information can be made public or shared with CSOs with client consent or pursuant to a statutory obligation”, except under specific circumstances relating to ‘inside information’ or unusual transaction reports;
- individual information in anonymous form can be shared or made public;
- aggregated anonymous information can be made available; and
- individual client information cannot be made public or shared with CSOs without
- client consent (NautaDutilh 2017).



Children take part in a focus group carried out on behalf of Save the Children, intended to understand the scale and scope of child's rights violations in mining communities. © Hugh Kinsella Cunningham / Save the Children

<sup>53</sup> [https://www.banktrack.org/campaign/tracking\\_the\\_equator\\_principles](https://www.banktrack.org/campaign/tracking_the_equator_principles)

<sup>54</sup> <https://equator-principles.com/about-the-equator-principles/>

<sup>55</sup> <https://equator-principles.com/members-reporting/>



## 3.2 Addressing Human Rights Risks in Cobalt

### 3.2.1. Commitment and Engagement

Through engagement investors can address human rights risks in the cobalt sector by clearly communicating their commitment and expectations to companies, and that if time bound expectations are not sufficiently met, other options could be explored such as collaborative engagement, drafting shareholder resolutions and potentially divestment. Some major Dutch investors have shown this commitment by signing the PRI coordinated statement “investor expectations on the responsible sourcing of cobalt” (Box 8). Others showed their commitment to human rights when they joined forces to call on governments to introduce mandatory human rights due diligence regulation for companies (chapter 2).

Despite the positive progress towards a stronger commitment, it is not universal for all financial institutions to engage in dialogue with their investees/clients on human rights issues in cobalt. According to the Fair Insurance Guide, three of the top nine insurers in Netherlands have not committed to the PRI Investor Expectations on Responsible Sourcing of Cobalt, some have not started any dialogue with their investees on human rights issues related to cobalt (Fair Insurance Guide 2020).

### Box 13: Good practice case: PRI-supported collaborative engagement

In 2018, coordinated by the UN PRI, a group of 46 investment organisations (nine of them Dutch-based) representing US \$ 3.8 trillion in assets issued a statement about investor expectations on the responsible sourcing of cobalt. The statement instated investors' position that “companies should implement the OECD Due Diligence Guidance and should manage cobalt supply chains related human rights risks and opportunities in alignment with relevant international standards”.

Following the statement, PRI initiated an engagement on responsible cobalt sourcing, which ran between 2018 and 2020 with 16 companies<sup>56</sup> in the electronics and automotive sector on their cobalt sourcing practices. The objective was to improve companies' performance and impact in three focus areas:

- human rights risk assessment and comprehensive due diligence efforts;
- impact monitoring and corrective action, including on-the-ground remediation; and
- collaboration on systemic issues (PRI 2021)

Among the Dutch investors who participated in the engagement, there were lead investors such as APG Asset Management, a.s.r. Asset Management, MN Asset Management and PGGM Pension Fund; and there were supporting investors, such as Kempen Capital Management and SPF Beheer Pension.

As a result of the engagement, the policy commitment of the investee companies increased significantly, there was a stronger collaboration on systemic issues by participating in multi-stakeholder initiative related to the responsible sourcing of cobalt. However, PRI's assessment found that even with increasing transparency in cobalt supply chain, there is still room for improvement in terms of human rights risk assessment, comprehensive due diligence efforts, impact monitoring and corrective action (PRI 2021).

### 3.2.2. On the Ground Impact- ASM

Most investors are aware that doing business in DRC comes with a high level of risks in terms of human rights and that for most businesses, turning away from DRC is not a realistic option due to the country having most of world's cobalt produce (70%). Investors show some understanding of the importance of ASM sector in cobalt, not only because of the serious human rights controversies and interlinkage with the more formal cobalt mining sector, but also because of the dependency of thousands of artisanal miners on this sector, and the fact that ASM will need to stay at least in the near future. What investors should acknowledge and emphasize in their communication with companies, however, is that there should be much more focus on what is happening on the ground, in terms of assessing the risks, taking measures to realise improvement for rights holders while monitoring the implementation of these measures, as well as providing (access to) remedy.

The cobalt supply chain is highly complex, and it is not easy for companies to see their connection with ASM cobalt. As described in chapter one 'ASM free' cobalt is highly unlikely and therefore child labour is a significant risk that financial institutions are required to address. In addition, from a human and child rights' perspective, and in line with the UNGPs and OECD guidelines, it's important to contribute to improving the situation on the ground. International companies - and those that invest in them or lend money to them - have a duty to improve children's rights in communities they are benefiting from, and financial institutions have a key role to play by helping to ensure that companies meet these responsibilities.

**“I haven't seen or heard of any investors taking a stand on whether or not companies should engage ASM. Their position is neutral.”-**

*-Raphael Deberdt, Minerals Program Associate, Responsible Sourcing Network.*

OECD Guidelines expect downstream companies to trace their supply chains until the fine refiners (“control point”) and they are only expected to carry out due diligence until this point. However, downstream actors (such as metal traders,

component producers, battery manufacturer, OEMs, brands) are responsible for reviewing the due diligence process of the smelters/refiners in their supply chain and assess whether they adhere to due diligence measures put forward in the OECD Guidance. From there, the upstream companies (from mines to the refineries ) are responsible for tracing the mineral back to the point of extraction, mapping the circumstances of its extraction, trade, handling and export (OECD 2016). In reality, upstream actors will struggle to effectively address the human rights and child rights risks in the cobalt ASM sector without the support and commitment from downstream companies. Unrealistic expectations without support could only encourage “de-risking” by excluding ASM cobalt as upstream actors would distance themselves from ASM instead of trying to changing the situation on the ground (Save the Children 2021).

In one of the ASM formalization projects, Huayou Cobalt's direct subsidiary CDM has established direct buying practice with the ASM cooperative and been investing in the ASM site to improve working conditions. The conditions at the ASM site may not have reached international standards (or the DRC mining code), the initial positive impact was identified, especially on reducing child labour. However, in 2020, Huayou Cobalt was pressured by its customers to stop buying artisanal cobalt, which is clearly as a result of prioritising reputational risk to companies instead of human rights risks. The implication and potential negative impact of such actions should be picked up by investors in their engagement and dialogue with companies. As pointed out by the OECD, ending a business relationship is a last resort after failed attempts at preventing or mitigating severe impacts; when adverse impacts are irremediable and if doing so, should include a credible assessments of potential adverse human rights impacts (OECD 2017).

Research from Save the Children has identified that the responsible way to address child rights risks in the cobalt ASM sector is through formalization of ASM combined with community-based initiatives to address the root causes of child labour (Save the Children 2021). Therefore, investors should take a stronger position in their engagement with companies to emphasize the risks of disengaging from ASM and encourage their investees to commit to formalization of the cobalt ASM sector.

<sup>56</sup> Apple, BMW, Daimler, General Motors, HP, Infineon, Johnson Matthey, LG Chem, Microsoft, Panasonic, Renault, Samsung SDI, TDK, Tesla, Toyota Motor and Volkswagen



### 3.2.3. Access to Remedy

Access to effective remedy is a core component of the UNGPs and OECD Guidelines. According to the OECD Guidelines, when investors are not causing or contributing to the adverse impact on human rights, but are directly linked to it through the investee companies (such in the case of cobalt ASM), they are not expected to provide remedy. However, they should use their leverage to influence the entity causing the adverse impact to prevent or mitigate the impact (OECD 2017). As for lending activities, according to UNGPs, banks have a responsibility to “establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted” by their operations (BankTrack 2019).

**“Institutional investors and other financial actors should set clear expectations that financial support and investment will only be made where investees have in place policies and human rights due diligence processes and grievance mechanisms aligned with the UNGPs, can demonstrate performance improvements over time and provide data to support effective investor monitoring.”**

**“Business enterprises should work with external stakeholders, including unions, representatives of affected communities (for example indigenous peoples’ organizations), and civil society organizations to ensure that the design and performance of grievance mechanisms meaningfully involves affected stakeholder groups.”**

**- UNGPs 10+ A ROADMAP FOR THE NEXT DECADE OF BUSINESS AND HUMAN RIGHTS**

UN Working Group on Business and Human Rights assessed investor implementation of UNGPs for its 10th anniversary and found that “the institutional investor community has yet to grapple with its responsibility to provide or enable remedy for victims as it relates to its investment activities”. In practice, very few firms have in place mechanisms that would enable victims or their representatives to raise grievances about portfolio

companies. Investors rarely engage portfolio companies on the effectiveness of company grievance mechanisms and thus, portfolio companies are rarely pressured by investors to provide remedy to people who have been harmed (UN Working Group on Business and Human Rights 2021-2). One example is, the Fair Insurance Guide 2020 found no evidence of the top 9 insurers in Netherlands using their leverage to encourage companies to enable remediation of adverse impacts related to cobalt or with regard to any of the seven salient issues (see Box 8). None of the insurers reported on tracking whether remedy has been provided in cases of adverse impacts related to cobalt and investee companies (Fair Insurance Guide 2020).

In BankTrack’s latest report in 2021, it is stated that “even the best performing banks are typically failing to demonstrate in their human rights reporting that they have played a role in remediating or addressing specific adverse human rights impacts” (BankTrack 2021). In 2019 BankTrack joined a call from 79 civil society organisations and partners for the Equator Principles (EP) to develop a central accountability mechanism and was “disappointed” when such mechanism was not included in the version 4 of the EP (which was effective since 2020)<sup>57</sup>. The BankTrack study from 2020 on a group of 37 projects financed ‘under Equator’ in high-risk sectors such as oil, gas, mining and hydropower, found that 65% of projects lacked stakeholder engagement process or project-level grievance mechanisms, and 43% had neither (BankTrack 2020-1).

According to our survey with the four major Dutch banks, two have human rights grievance mechanisms in place accessible for the victims of human rights abuses related to their clients and one bank is planning to launch their grievance mechanism this year. Two banks we have spoken to have taken actions to request/demand that their clients provide remedy to victims of human rights abuses. One bank commented “remedy is not widely applied yet, but wherever needed we take a role in engaging clients to contribute. Separately we are supporting the promotion of the establishment of remedy frameworks.” However, we did not identify financial institutions that require clients to provide remedy for human rights abuses in their cobalt supply chains

as a condition of lending or investing activities. That being said, some financial institutions, e.g. ABN ARMO Bank, did at least acknowledge the importance of supporting companies improving their grievance mechanism so that rights holders who are adversely affected could have access to remedy more (see the quote below).

**“There’s a misunderstanding. Some are afraid that if there’s access to remedy, rights holders will complain and raise grievances to investor levels, and we will be stuck with all kinds of lawsuits or lawyers’ costs facilitating these grievances. But that’s not true. There are 5, 6 or 7 steps until the grievances escalate to international media or investors, and this does not need to happen if companies solve the grievance at a lower level. But this is not happening at the moment, and we, as a financial sector have the responsibility and opportunity to ensure that rights holders are able to effectively access remedy, first and foremost at the operational level.”**

**- Kees Gootjes, Business and Human Rights Advisor, ABN AMRO Bank N.V.**

The Dutch Banking Agreement requires that banks allow for third-party complaints (which further explained in Box 14). The parties of the Agreement established a “Working Group on Enabling Remediation” to explore the responsibility of banks for enabling remedy for impacts they might be connected to through their client relationships, and to explore the roles that banks could play in meeting this responsibility more effectively in practice. The Working Group was aware of the reality that in many cases where severe negative impacts occur, remedy is often not available to individuals and groups suffering harm connected to business activities<sup>58</sup>. Through its discussions, the Working Group drew some recommendations for the banks to strengthen the focus on remedy, for example, to make effective remedy available for affected people, in all stages of its due diligence, by focusing on the role of a bank before an impact occurs and on the role of a bank after an impact occurs<sup>59</sup>.

#### Box 14: Expectations on Access to Remedy by the Dutch International Responsible Business Conduct (IRBC) Agreements

The Banking agreement requires the banks to develop their own grievance and whistle-blower mechanisms for employees. They should also establish a grievance mechanism which allows third-party complaints. Furthermore, adhering banks will require their clients in project finance to implement a grievance mechanism and will promote the implementation of such mechanisms in connection with corporate lending if severe human rights violations are known to the adhering bank. The Insurance and Pension Fund Agreements include a similar provision, although they are broader as they do not require the insurers or pension funds to have knowledge of human rights violations by investee companies.<sup>60</sup>

Only a handful of companies have invested to address the human rights issues including child labour through on-the-ground initiatives such as formalization efforts and other community-based projects. According to the initial research from Save the Children Germany and The Centre, the corporate-led formalization projects have shown potential to reduce child labour, improve the health and safety conditions at ASM sites, increase productivity and income of artisanal miners, promote women’s participation etc. However, as these pilot initiatives are limited in scale and more of an exception than a norm. Companies approached the issue from a “Corporate Social Responsibility” (CSR) and philanthropy perspective instead of strategically engaging ASM as part of their supply chain and as their responsibility to provide remedy (Save the Children 2021).

In summary, whilst some positive progress towards reducing negative human rights risks in the cobalt sector has been achieved, this has so far been insufficient in realising significant and lasting improvements for children and their families on the ground. Neither has it supported the provision of effective remedy to the communities affected by the adverse impacts.

<sup>57</sup> [https://www.banktrack.org/campaign/tracking\\_the\\_equator\\_principles](https://www.banktrack.org/campaign/tracking_the_equator_principles)

<sup>58</sup> <https://www.imvoconvenanten.nl/-/media/imvo/files/banking/paper-enabling-remediation.pdf?la=en&hash=4FB229CEBC0E8F-CA85E5363240C11687>

<sup>59</sup> <https://www.imvoconvenanten.nl/en/banking/about-this-agreement/-/media/86D34CE0BE3F4606A876FB86717C6B27.ashx>

<sup>60</sup> [http://www.erasmuslawreview.nl/tijdschrift/ELR/2019/4/ELR-D-19-00029#content\\_ELR-D-19-00029.ELR-D-19-00029-030](http://www.erasmuslawreview.nl/tijdschrift/ELR/2019/4/ELR-D-19-00029#content_ELR-D-19-00029.ELR-D-19-00029-030)



Children work in an ASM site, Kolwezi.  
© Hugh Kinsella Cunningham / Save the Children



## 4. Recommendations

Given the dire situation of children in Cobalt ASM communities, the clear linkages of the Dutch financial sector to ASM cobalt, and the evident gaps in the financial sector approach to addressing negative impacts and create positive impact in this area, we make the following recommendations for Dutch financial institutions to strengthen their approach to address child labour and related human rights risks in cobalt ASM in DRC.

### 1. Focus ESG engagement to drive improvements on the ground in cobalt ASM communities

Financial institutions in The Netherlands should focus their engagement strategies to address improvements on the ground, especially to address the root causes of child labour in cobalt ASM in DRC. While traceability and transparency in cobalt supply chains are improving and companies' policy commitment to respect human rights are strengthening, there is still a big gap between what's written in policies and the reality on the ground. Especially because children's rights are at greater risk in recent years with increasing child labour and school dropout rates in cobalt ASM communities.

Even though 65% of Dutch investors engage with companies on child labour issues, few investors currently have developed a specific policy on child labour. Engaging on child labour is done indirectly as part of discussing a general human rights risks with the companies (VBDO 2021).

Dutch financial institutions should, therefore, focus on what actions are being taken by their clients / investee companies to address risks on the ground in their value chains by:

- Increasing their knowledge on the presence of child labour and its contextual nature (e.g. root causes of child labour and other contextual factors) by improving their data and increase (local) stakeholder engagement.
- Advocate for extending the scope of EU's Conflict Minerals Regulation to include cobalt.
- Asking investee companies / clients if they have identified the prominent root causes of child labour in cobalt ASM and what are they doing to address it, by for example:
  - o Improving working conditions and access to fair and transparent markets for ASM
  - o Supporting local living wage initiatives
  - o Funding projects to improve access to education (this is especially applicable to LSM and/or commodity trading companies with closer ties with the local communities)



## 2. Push for formalisation of ASM

Financial Institutions should encourage investee companies / clients to push for formalisation of ASM. Financial institutions should also use their leverage to push for formalization of cobalt ASM in DRC through their engagement with other stakeholders.

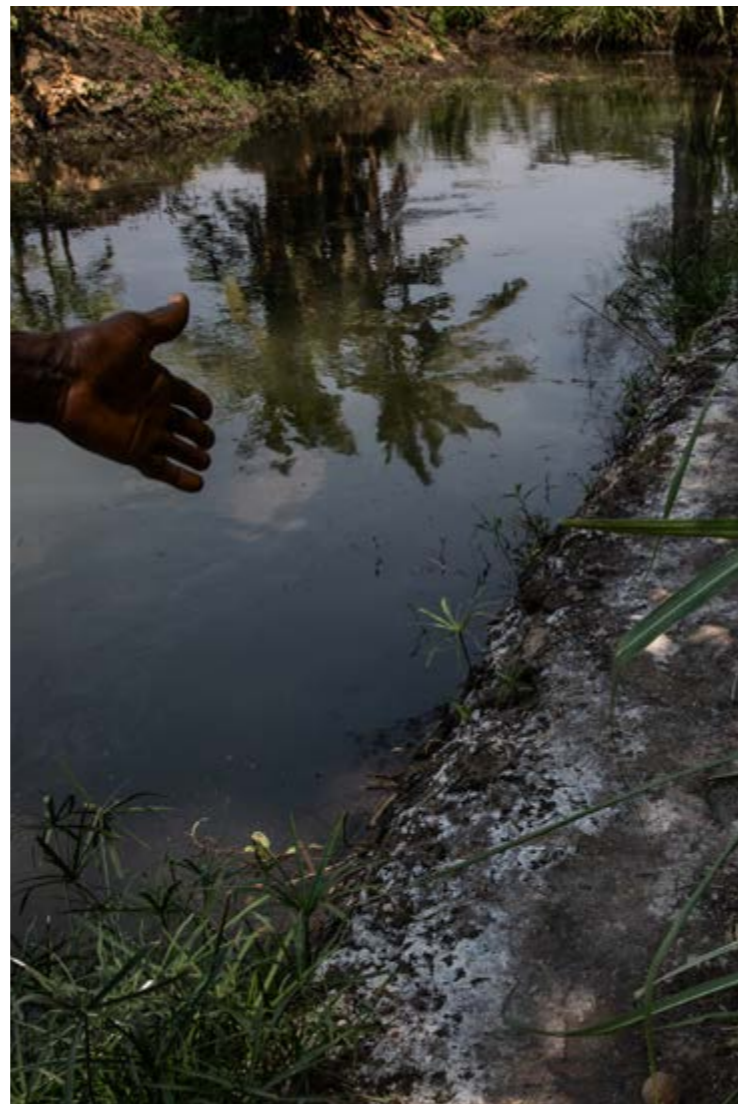
Formalising ASM enables better oversight and implementation of measures to ensure human rights are respected. There are new developments in the DRC in terms of formalizing the ASM sector. Entreprise Générale du Cobalt (EGC), a subsidiary of the state-owned mining company Gecamines, officially launched its activities in March 2021 to support the commercialisation of responsibly sourced artisanal cobalt.

EGC has also published its “Responsible Sourcing Standards” to define the operational principles that EGC will require to support the establishment of safe and strictly controlled artisanal cobalt mining zones (EGC 2021). Currently, this partnership is between EGC, the commodity trading company Trafigura and the international NGO Pact. It is a welcome development that the DRC government is leading the formalization of the ASM sector with support from stakeholder experienced in pilot formalization initiatives.

These are important developments, particularly as the DRC government is the most important player in granting ASM legal status. However, the urgency of the situation in ASM communities in terms of human rights and child rights needs faster and bigger changes on the ground, which requires significant investment and stronger commitment from all actors. Without this support, the DRC government will have limited resources to urgently address child rights and human rights issues. Therefore, there is an urgent need for investor engagement to focus on this topic and encourage companies on how they can support formalising the cobalt ASM, possibly through this project or similar projects. It is important to address the human rights and child rights risks in the cobalt supply chains, because the positive impact of formalization efforts can only be sustainable if ASM cobalt is integrated in the formal supply chains (Save the Children 2021).

“EGC [Entreprise Générale du Cobalt] right now does not have the resources, that's why they entered into an agreement with Trafigura and Pact. This is positive as it will provide support for EGC. But at the same time, it is risky because this is an agreement with only one company, one buyer. It is not an exclusive agreement, so technically other companies can also enter into an agreement with EGC. But as of now, no other companies have shown interest.”

- Raphael Deberdt, Minerals Program Associate, Responsible Sourcing Network.



White residue appears on soil in Mulumbu village, where communities complain of environmental devastation as a result of proximity to the Tenke Fungurume mine (perception of communities).  
© Hugh Kinsella Cunningham / Save the Children

## 3. Facilitate Access to Grievance and Remedy

Access to remedy is often not available to those who are harmed by business activities, which are often connected in some way to the lending and investment activities of financial institutions. Stakeholders, including not-for-profit consultancy SHIFT, cite several key reasons for this.

As is the case with ASM cobalt mining in the DRC, impacts are often remote and occur in the global operations of clients or portfolio companies directly and/or they occur deeper in the upstream section of the supply chain. In these circumstances it can be challenging for financial institutions or any business that is far away and ill-equipped to directly investigate allegations of impacts on the ground.

Also, the immediate responsibility for providing remedy often rests with the parties who caused or contributed to the harm upstream in the cobalt supply chain, rather than the financial institution itself. At the same time, businesses and financial institutions downstream in the cobalt supply chain may think that remedy is less relevant for them because they did not directly cause the harm.

Some financial institutions have sought to establish their own grievance mechanisms to address impacts they are connected to through their lending and investment activities. However, these mechanisms have face challenges in accessibility, as well as challenges related to remoteness. Whilst these mechanisms do have a role to play, they alone are unlikely to close the remedy gap in a meaningful way<sup>61</sup>. According to the results of PRI supported collaborative engagement for responsible sourcing of cobalt, only one company out of 16 target companies had engaged with affected stakeholders in response to all serious allegations made against the company. Only one company assessed publicly disclosed incidents and lessons learnt from those incidents. (PRI 2021).

Financial Institutions should therefore broaden their focus to also consider what role they can play in enabling remedy to address child labour rights risks in cobalt ASM in the DRC. SHIFT refers to a remedy ecosystem approach, whereby financial institutions use their leverage differently to enable remedy in practice.

A UN report recommends that investors should “proactively support preparedness for remedy before harm occurs by building and using leverage to communicate expectations on remedy to investees and engage investees on the effectiveness of their grievance mechanisms” (UN Working Group on Business and Human Rights 2021-2).

Given the critical child labour risk in cobalt ASM in the DRC, Dutch financial institutions should therefore consider how they can better assess the effectiveness of the existing grievance and remedy mechanisms that exist. They should play active role in strengthening those mechanisms, either through director support (including options of financial support or other types of support) by applying their leverage to strengthen mechanisms.

Financial Institutions also have a role to play in delivering remedy to address child labour cases in cobalt ASM in the DRC. For example, by addressing child labour issues in engagement with companies, participating in, or supporting investigations, providing support to support to enable delivery of remedy.

Financial institutions must send clearer signals to their clients/investees to improve their current systems and explore ways to enable access to and provide remedy, together with other stakeholders.

“Access to Remedy can be enabled in three ways. Firstly, by educating the financial sector about access to remedy, what it is and what our role is. This could be in the form of a platform with different financial sector players. Secondly, by helping investors better understand and apply leverage to encourage companies to establish and maintain access to remedy mechanisms (company/country grievance mechanisms). Thirdly, levelling the playing field and facilitating the rights holders to raise grievances. We are not here to take sides on an individual grievance, our role is to ensure that there are fair processes in place to handle grievances and provide remedy. One way is to empower local stakeholders in various ways”

- Kees Gootjes, Business and Human Rights Advisor, ABN AMRO Bank N.V.

<sup>61</sup> <https://shiftproject.org/rethinking-remedy-and-responsibility-in-the-financial-sector/>



#### 4. Take Collaborative Action and Participate in Multi-Stakeholder Initiatives

“Investors may not have the time, resources or capacity to keep track of everything that is happening on the ground. But if you engage collaboratively, you can spread this burden among the group and relieve that pressure”

-Nabylah Abo Dehman, Head of Stewardship, Social Issues and Human Rights, PRI

The 10th anniversary of the UNGPs highlighted that collective action is an essential part of the solution to address systemic challenges that are at the root of many business-related human rights impacts. (UN Working Group on Business and Human Rights 2021-1). The recent VBDO study on incorporating child labour in responsible investment also emphasized the importance of connecting and collaborating with civil society organization and other stakeholders on the ground to better incorporate child labour in responsible investment policies and tools (VBDO 2021). However, investor uptake of the stakeholder engagement aspect of human rights due diligence can be challenging based on the fact that financial actors often lack direct relationships with impacted rights holders (UN Working Group on Business and Human Rights 2021-2). Despite this challenge, there are various ways investors can join collaborative actions and multi-stakeholder initiatives to address the human rights and child rights issues in the cobalt ASM sector.

Investors shape their engagement with companies in the cobalt value chain in various ways, especially in relation to ASM cobalt. Some engagements are collaborative actions by various investors, for example, the PRI supported an engagement between 2018 and 2020 where investors assessed companies’ practices and progress regarding responsible cobalt sourcing at the beginning and the end of the engagement. It is a great example of a meaningful investor engagement with companies on specific issues such as cobalt. Investors can achieve greater leverage by establishing collaborative engagements with companies in a sector such as cobalt where a lot of issues are general to the sector and not specific to a single company.

As important it is for companies to work together on those general issues as part of a collaborative action, it is also effective and efficient for investors to work together on engagement with companies. One example of a multi-stakeholder initiative to push positive change in the cobalt sector is the relatively new Fair Cobalt Alliance, which aims to “transform the cobalt ASM industry to have a positive impact in the DRC by channelling demand for and increasing availability of responsible ASM cobalt, to systemically address the root causes of child labour and dangerous practices at artisanal cobalt mining sites, and to foster a just transition to a diversified economy to drive the sustainable development of the region”<sup>62</sup>.

Financial institutions should play a more active role in multi-stakeholder initiatives to assess the human rights risks more proactively, better monitor on-the-ground impacts, better educate themselves on solutions to address the most salient human rights and child rights issues in affected communities, and consequently, to have a more informed and effective engagement dialogue with their clients/investees to address those issues.

Women travel past the Tenke Fungurume mining site, Kolwezi.  
© Hugh Kinsella Cunningham / Save the Children



<sup>62</sup> <https://www.faircobaltalliance.org/about-us/about-us/>

#### 5. Engage Mining Companies on Issues Related to Cobalt ASM

LSM plays an important role in cobalt ASM communities. Not only because the vast majority (87%) of today’s ASM activities occur under LSM concessions without valid agreements, but also because the economic benefits of LSM to the local communities are mediated through government agencies, but the ‘trickle down’ effect is not always felt in mining communities even though they are in close proximity to LSM. LSM employs relatively few people, many of whom require specialist technical qualifications and are often recruited internationally. As a result LSM’s positive impact on the communities is still rather limited (Save the Children 2021). Financial institutions investing in and/or lending to LSM companies have the opportunity to carry out meaningful dialogues on how LSM is addressing the root causes of child labour in ASM communities by reducing the vulnerability of ASM communities to economic shocks caused by cobalt price changes, help diversifying the local economy that became homogeneous due to mining, help alleviate extreme poverty which has not been significantly improved with mining income etc.

#### 6. Strengthen monitoring of child labour risks related to Cobalt ASM

Financial institutions should supplement existing ESG research by broadening assessments to include a more comprehensive and proactive approach to the assessment of risks in cobalt ASM in DRC. This should be achieved through deeper engagement with groups working on the ground in cobalt mining communities, such as civil society organisations.

Clear opportunities exist for financial institutions to strengthen their monitoring of ESG risks (including those related to child rights) by connecting with NGOs and other organisations working on the ground to address child rights risks in cobalt ASM in DRC. Whilst grievance mechanisms play an important role in helping to identify key risks amongst investee companies and their supply chains, financial institutions should pursue opportunities to gather more nuanced, local insights as to what’s happening on the ground. For example, by connecting with those working on the ground to address issues, such as local non-profit organizations working on child labour issues.



## Appendix 1. Recent Laws and Legislations related to Human Rights Due Diligence

### Section 1502 of U.S. Dodd Frank Act

The Dodd–Frank Wall Street Reform and Consumer Protection Act is a United States federal law that was enacted on July 21, 2010<sup>63</sup>. “Section 1502 of U.S. Dodd Frank Act requires U.S. listed companies to disclose whether they use “conflict minerals” (tin, tungsten, tantalum and gold) and whether these minerals originate in the Democratic Republic of the Congo (DRC) or an adjoining country. In such a case, issuers must submit a “Conflict Minerals Report” describing the measures taken to exercise due diligence, the description of the products that are not DRC conflict free, 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” (OECD 2021).

### The EU's new Conflict Minerals Regulation

“On 1 January 2021 a new law came into full force across the EU – the Conflict Minerals Regulation. It aims to help stem the trade in four minerals – tin, tantalum, tungsten and gold – which sometimes finance armed conflict or are mined using forced labour. The new regulation ensures that EU importers of 3TG (tin, tungsten, tantalum and gold) meet international responsible sourcing standards, set by OECD; global and EU smelters and refiners of 3TG source responsibly; help break the link between conflict and the illegal exploitation of minerals; and help put an end to the exploitation and abuse of local communities, including mine workers, and support local development.”<sup>64</sup>

### European Union mandatory human rights and environmental due diligence (mHREDD)

On the 23 of February 2022 the European Commission presented the long-awaited proposal on Mandatory Human Rights and Environmental Due Diligence (mHREDD). It is a turning point in the battle to end corporate impunity. However, the critiques such as the European Coalition for Corporate Justice (ECCJ) warns in a press release of its flaws and exemptions. For example, the draft law has the limitation of company size ( employee number) and turnover, which means the draft legislation only applies to less than 0.2% of EU companies<sup>65</sup>.

“Under the new law, companies could be held liable for harms committed at home or abroad by their subsidiaries, contractors and suppliers, and their victims will have the opportunity to file lawsuits before EU courts. This is an important step that creates a right to remedy for people affected by corporate malpractice. However, a dangerous loophole risks making the law ineffective in preventing harm beyond the first tier of the supply chain – and impeding victims from holding companies liable.”<sup>66</sup>

### Dutch National Corporate Due Diligence Legislation

“The Dutch member of the European Coalition for Corporate Justice, the MVO Platform, welcomes the announcement by Foreign Trade and Development minister De Bruijn (D66) that the government will develop and introduce a national law on human rights and environmental due diligence. With this legislation, the Netherlands is taking a big step towards protecting human rights and the environment in global value chains. The decision to introduce Dutch legislation is in line with the government’s previous position to start the drafting process in the event of no or slow progress at the European level. The government coalition parties must now include this agreement on the introduction of the legislation into the coalition agreement by 2023”<sup>67</sup>.

### The EU's Sustainable Finance Disclosure Regulation (SFDR)

“ SFDR s part of the European Commission’s Action Plan on sustainable growth and came into effect on 10 March 2021. It applies to financial market participants across all asset classes. The regulation intends to make the sustainability profile of funds easier to understand, more comparable, and avoid greenwashing. It does this by placing funds into several specific categories and promotes

transparency by prescribing set ESG metrics to disclose principle adverse impacts (PAIs) on sustainability factors.”<sup>68</sup>

“Adverse impact statements will be introduced from June 2021. These require an asset manager to describe its due diligence policy on how it will take the principal adverse impacts which investee companies have on sustainability factors into account when making investment decisions.”<sup>69</sup>



<sup>63</sup> <https://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm>

<sup>64</sup> <https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/>

<sup>65</sup> <https://corporatejustice.org/news/dangerous-gaps-undermine-eu-commissions-new-legislation-on-sustainable-supply-chains/>

<sup>66</sup> <https://corporatejustice.org/news/dangerous-gaps-undermine-eu-commissions-new-legislation-on-sustainable-supply-chains/>

<sup>67</sup> <https://www.business-humanrights.org/en/latest-news/dutch-minister-announces-national-corporate-due-diligence-legislation/>

<sup>68</sup> <https://www.unpri.org/pri-blog/implementing-the-sfdr-for-private-markets-a-challenging-inception/7572.article>

<sup>69</sup> <https://www.robeco.com/en/key-strengths/sustainable-investing/glossary/eu-sustainable-finance-disclosure-regulation.html>



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Children playing in the town of Kolwezi.  
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