



## How TotalEnergies and Chevron Can Divest Responsibly from Myanmar

March 2022

On January 21, TotalEnergies and Chevron announced plans to exit from Myanmar, where their Yadana gas project is providing the Myanmar military junta with its largest source of foreign revenue.<sup>1</sup> For the first year of the coup, these companies ignored calls from Myanmar civil society and democracy leaders to divert revenues and continued to order monthly payments of tens of millions of dollars to a Myanmar government account that was known to have been seized by the junta. It is widely accepted that gas revenues are controlled by the junta and enhance its operational and financial capabilities.<sup>2</sup> In making and facilitating these payments, TotalEnergies and Chevron facilitated, and are thus complicit in, crimes against humanity and gross human rights violations being committed by the junta.<sup>3</sup>

While the announcement of TotalEnergies' and Chevron's exit was cautiously welcomed, details have since emerged that reveal the dangers in their approach. The companies appear to intend to continue funding the junta until they exit, and TotalEnergies' current exit plan may increase the amount of the monthly payments that the junta receives once it leaves. They also plan an unconditional handover of the project's operations to the Thai State-owned company, PTTEP, ensuring that the junta can continue to extract gas and access gas revenues for several more years.

On February 21, the EU placed sanctions on the Myanma Oil and Gas Enterprise (MOGE). Again this has been cautiously welcomed, but the sanctions contain exemptions that protect the interests of gas companies, which might be used to negate the effect of the sanctions and undermine their ability to stop revenues reaching the junta.

Pursuant to international human rights law, the U.N. Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines), TotalEnergies and Chevron have an obligation to divest responsibly, taking all reasonable steps to prevent revenues from reaching the junta so as to reduce their ongoing contributions to atrocity crimes and to mitigate any residual impacts. To do so, we urge TotalEnergies and Chevron to take the following measures:

- **Stop treating the military junta as if it is the government of Myanmar and a legitimate party to the Yadana contracts.**

The Yadana gas project is governed by contracts between TotalEnergies, Chevron, PTTEP, and the government of Myanmar (through MOGE, itself a government department). Although the military junta has seized control of MOGE's accounts, it has not been recognized as the legitimate government of Myanmar by the international community and is therefore not a legitimate counterparty to these contracts.<sup>4</sup> It faces competing claims from the National Unity

---

<sup>1</sup> Publish What You Pay, *Financing the Military in Myanmar: Analysis of Gas Revenues*, June 2021, <https://www.pwyp.org/pwyp-resources/financing-the-military-in-myanmar-analysis-of-gas-revenues>.

<sup>2</sup> See Council Decision (CFSP) 2022/243 of 21 February 2022, available at <https://eur-lex.europa.eu/eli/dec/2022/243/oj?eliuri=eli:dec:2022:243:oj>.

<sup>3</sup> See Annex for more details on complicity. It has been well documented by United Nations bodies that the junta has been committing crimes against humanity since 1 February 2021.

<sup>4</sup> This has manifested, for example, in the U.N. General Assembly rejected the junta's attempt to appoint an ambassador, retaining an appointee loyal to the National Unity Government. The International Labor



Government – composed of democratically elected leaders of Myanmar – to be the legitimate government and party to the Yadana contracts.

The Myanmar government is the legitimate party to the gas contracts. In continuing payments to junta-controlled accounts, gas companies are electing to treat the junta both as a party to their contracts and as the legitimate government. This is recklessly irresponsible given the international community’s position on the coup.

- **Rely on existing sanctions and contractual obligations to immediately begin diverting revenues from the junta as part of a planned exit.**

The EU sanctions on MOGE provide TotalEnergies with grounds to stop gas revenue payments from reaching the junta. They prohibit TotalEnergies from providing funds or economic resources to MOGE. While the EU sanctions include exemptions, these are related to decommissioning and allowing TotalEnergies to transfer its interests to exit Myanmar. TotalEnergies should not seek authorization from the French government to use these exemptions to continue making payments to the junta.

Irrespective of sanctions, if gas companies acknowledge that they face competing claims from parties claiming to be the government of Myanmar, and consider that they cannot determine which party is legitimate, then they cannot continue to direct funds into accounts controlled by one of the parties (i.e. the junta).<sup>5</sup> They must instead divert payments into a trust account for the benefit of the government of Myanmar until these competing claims can be resolved.

Gas companies must also receive approvals from the government of Myanmar to exit Myanmar, and the junta is unable to provide these approvals because it is not the recognized government. The exemptions to EU sanctions allowing certain transfers do not alter this fact. The companies have obligations to delay their exit until there is a recognized government and to continue diverting revenues in the meantime.

- **Respect demands from Myanmar stakeholders not to facilitate the entry of a new operator for the Yadana gas project.**

Given the uncertainty over who represents the government of Myanmar and the need for approvals from the government of Myanmar, gas companies have contractual grounds to refuse the appointment of a new operator. This includes any transfers of data, equipment, or supplies from TotalEnergies to a new operator, as well as any measures to contractually hand the project over to a new operator without measures to divert revenues. Failing to take these actions and instead increasing the share of revenues that the military can seize and providing a new operator the technical means and contractual right to help it seize them may itself be a form of complicity in human rights abuses.

---

Organization and World Health Organization have both refused to accredit the regime. This reflects both the junta’s lack of effective control over large parts of Myanmar and the trend towards legitimacy as an operative principle of international law in recognizing governments. See e.g., Marc Weller, “Is the ICJ at Risk of Providing Cover for the Alleged Genocide in Myanmar?,” *European Journal of International Law – Blog*, 11 Feb. 2022, [https://www.ejiltalk.org/is-the-icj-at-risk-of-providing-cover-for-the-alleged-genocide-in-myanmar/?utm\\_source=mailpoet&utm\\_medium=email&utm\\_campaign=ejil-talk-newsletter-post-title\\_2](https://www.ejiltalk.org/is-the-icj-at-risk-of-providing-cover-for-the-alleged-genocide-in-myanmar/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2).

<sup>5</sup> As set out below, all investors in Yadana have payment obligations to the government of Myanmar, and TotalEnergies has additional duties as a representative to the government of Myanmar.



The EU sanctions on MOGE likely prohibit TotalEnergies from providing technical assistance to a new operator unless it seeks authorization from the French government. This would be a distortion of the exemption, which is limited to decommissioning. The National Unity Government has stated that bringing in a new operator constitutes collusion with the junta. Responsible divestment in this context includes taking all reasonable steps to avoid bringing in a new operator that would enable the junta to continue accessing gas revenues. If Chevron remains as an investor after TotalEnergies withdraws as an investor, it has contractual rights to veto a change of operator.

- **Initiate international arbitration to facilitate these steps.**

TotalEnergies and Chevron should utilize the international arbitration clauses in their contracts to facilitate the contractual steps described above. The companies could proactively commence arbitration proceedings, requesting that a tribunal decide whether they should treat the military junta, the National Unity Government, or neither as their contractual counterparty. While arbitration proceedings are pending, the companies should require the gas buyer, PTT, to divert all revenue payments away from the junta into a trust account to be held for the benefit of the government of Myanmar (requesting the tribunal to issue an interim order to this effect).

- **Meaningfully engage with Myanmar civil society and the National Unity Government throughout this process.**

The companies' decisions on responsible divestment, particularly on whether to facilitate the entry of a new operator, should be determined through meaningful consultation with stakeholders from Myanmar, including civil society and the National Unity Government (which has a credible claim to be a party to TotalEnergies' and Chevron's contracts). So far, TotalEnergies and Chevron have consistently made decisions that contradict the demands of these stakeholders.

For further information, please contact:

Ben Hardman, Myanmar Policy and Legal Advisor  
EarthRights International  
Email: [benhardman@earthrights.org](mailto:benhardman@earthrights.org)



## **Annex: Background on TotalEnergies' and Chevron's Divestment from Myanmar**

### **1. The Yadana gas project: parties, takeover and exit**

Myanmar has four offshore gas projects known as Yadana, Yetagun, and Zawtika, which export gas to Thailand, and Shwe, which exports gas to China. Overall, around 20 percent of the gas from these projects is retained for domestic use. According to Myanmar government forecasts from before the 2021 coup, these projects will generate around 1.5 billion U.S. dollars in revenue to the government in 2021-22.<sup>6</sup>

#### *Current parties to the Yadana gas project*

There are four investors in the Yadana project, all of which are party to a Production Sharing Contract (PSC) with the Myanmar government, acting through its representative, the Myanmar Oil and Gas Enterprise (MOGE).<sup>7</sup> The PSC sets out each party's entitlement to revenues (i.e. its participatory interest). The investors are TotalEnergies, Chevron and Thai state-owned company PTTEP, as well as MOGE itself. This means that MOGE acts as both the revenue collector on one side of the PSC and a contractor/investor on the other side.

MOGE is known as a "state owned enterprise," but under Myanmar law, MOGE is not a company and is instead a government department that forms part of the Ministry of Electricity and Energy.<sup>8</sup>

Myanmar does not have a recognized government. Both the junta and National Unity Government have appointed Ministers of Electricity and Energy. The National Unity Government has specifically assigned the responsibilities for MOGE to its Deputy Minister of Electricity and Energy and contacted gas companies operating in Myanmar specifying new accounts for revenue payments.

TotalEnergies is the largest investor in the Yadana project and has entered contracts with the other investors to take on the role of "Operator."<sup>9</sup> It carries out the day-to-day operations, maintaining production, extracting gas, and transporting most of it by pipeline to Thailand (retaining up to 30% of Yadana's gas for domestic use).

---

<sup>6</sup> These government forecasts were based on assumed gas prices that are around a quarter less than current levels, so revenues may be notably higher. Russia's invasion of Ukraine will further increase Yadana gas prices.

<sup>7</sup> The Yadana project is governed by a complex set of contracts that were disclosed as part of a lawsuit against Unocal (acquired by Chevron in 2005) in the 2000s. They are available at EarthRights International, "Doe v. Unocal," <https://earthrights.org/case/doe-v-unocal>. It is possible that relevant clauses have since been varied.

<sup>8</sup> This contrasts with a small number of Myanmar state owned enterprises, such as Myanmar National Airlines, which have been registered as companies under the 1950 Special Companies Act, albeit with a government department as the sole shareholder.

<sup>9</sup> TotalEnergies is the Operator of both the upstream extraction and the pipeline transportation. Its role as Operator for the upstream extraction is set out in the Production Operation Agreement (POA). The Gas Pipeline Operating Agreement separately governs its role as Operator of the pipeline.



*PTTEP is the only realistic candidate for a takeover of the project*

PTTEP is the only realistic candidate to take on TotalEnergies' operator role, as MOGE does not have the capacity to do so. Yadana gas is forecast to be depleted by around 2025, so a new operator, especially one without PTTEP's knowledge of Myanmar's geology, would be at risk of not recovering the transaction costs of a takeover. PTTEP is a subsidiary<sup>10</sup> of the only potential gas buyer, PTT, and is already a party to the PSC with MOGE. It is this combination of factors that make PTTEP the only commercially viable option to take on the operator role, a fact that has now been acknowledged in the energy sector industry press.<sup>11</sup>

If TotalEnergies does not cooperate with a new operator (e.g. by restricting access for well drilling and by not sharing data and know-how), a takeover would be very challenging even for PTTEP, particularly in the six-month time frame proposed by TotalEnergies. Production could decline and there would be the risk of a "shut-in" where production stops. In a field like Yadana that is depleted, the low pressure in the gas reservoir means a restart would be technically challenging, costly and perhaps impossible without the support of TotalEnergies. So while TotalEnergies has suggested it could be forced out of Myanmar, with rumors of a Chinese or Russian takeover, there is no evidence to suggest that this is commercially viable. PTTEP is the only realistic candidate and is reliant on TotalEnergies' cooperation for a successful takeover. This gives TotalEnergies substantial leverage over the junta.

*What the contracts say about exiting the Yadana project*

The investors in the Yadana project, including MOGE with its 15 percent interest, have entered a Production Operating Agreement (POA). The POA sets out two main ways for the investors to relinquish their participatory interest in the PSC.<sup>12</sup> The POA refers to these as "withdrawal" and "transfer."<sup>13</sup>

TotalEnergies has stated that it will "withdraw." The POA requires TotalEnergies to give 60 to 180 days' notice to the other investors that it will withdraw. In line with withdrawal as set out in the POA, TotalEnergies has effectively stated it will gift its participatory interest under the PSC to the remaining investors.<sup>14</sup> The energy sector industry press has stated that "TotalEnergies is effectively washing its hands of Myanmar."<sup>15</sup>

Chevron has stated that it will be "exiting the country" and that "we have decided to leave the country by transferring our operations from the Yadana natural gas project."<sup>16</sup> Chevron is

---

<sup>10</sup> PTT is the majority shareholder in PTTEP. International investors in PTTEP must act in light of PTTEP's complicity in atrocity crimes and the likelihood that its contribution to these crimes will increase if it takes over TotalEnergies' shares and role as operator.

<sup>11</sup> Damon Evans, "Chevron eyes PTTEP for Myanmar stake valued at \$250m," Energy Voice, 14 Mar. 2022, <https://www.energyvoice.com/oilandgas/asia/395000/chevron-eyes-pttep-for-myanmar-stake-valued-at-250m>.

<sup>12</sup> TotalEnergies and Chevron both have the option to terminate the PSC (see section 25), but this would not be consistent with the POA and its requirement to assign the participatory interest under the PSC as part of a withdrawal or transfer.

<sup>13</sup> See sections 12 and 13 of the POA.

<sup>14</sup> TotalEnergies, Media Statement: "TotalEnergies withdraws from Myanmar," 21 Jan. 2022, <https://totalenergies.com/media/news/press-releases/totalenergies-withdraws-myanmar>.

<sup>15</sup> Damon Evans, "Chevron eyes PTTEP for Myanmar stake valued at \$250m," note 11.

<sup>16</sup> Chevron, Media Statement: "Chevron's Views on Myanmar," Jan. 2022, <https://www.chevron.com/stories/chevrons-view-on-myanmar>; Jubeda Chowdhury, "Pullout of foreign



reported to be seeking to sell (i.e. “transfer”) its participatory interest under the PSC to PTTEP for 250 million U.S. dollars.<sup>17</sup>

If TotalEnergies withdraws, its participatory interest and shares will be divided between remaining investors in proportion to their existing interests of 28.5 percent (Chevron or its successor), 25.5 percent (PTTEP) and 15 percent (MOGE). This would increase MOGE’s share as an investor to 22 percent PTTEP’s to 37 percent and Chevron’s to 41 percent This would increase MOGE’s overall share of the revenues, but most of its revenue comes from its role as state revenues collector, not from its role as an investor.

To complete either a withdrawal or a transfer, Chevron and TotalEnergies must assign their participatory interest under the PSC (either to the existing parties or a new investor). Assignment requires the approval of MOGE, as a representative of the government of Myanmar.<sup>18</sup>

In addition to relinquishing its participatory interest under the PSC, TotalEnergies intends to relinquish its role as the operator of the upstream gas extraction and gas pipeline. Under the POA, the operator can resign from the upstream gas extraction by giving at least 120 days’ notice to the other investors. Alternatively, once the operator’s participatory interest drops below 10 percent, the remaining investors, including MOGE, can decide to replace it. In either case, the resignation or removal only becomes effective once all government approvals have been given.<sup>19</sup>

## **2. The effect of EU sanctions on MOGE**

The EU subjected MOGE to “restrictive measures” on February 21, 2022, just over a month after TotalEnergies called for them publicly. These sanctions freeze the assets of MOGE and prevent entities from making funds or economic resources available to MOGE.<sup>20</sup> “Economic resources” has a broad meaning under EU law and can include intellectual property, technical assistance and contractual rights that can be used to obtain funds. This would likely prevent TotalEnergies from ordering the buyer to make payments to MOGE, transferring its interests or shares in the project to MOGE, or facilitating the entry of a new operator.

These sanctions do, however, contain exemptions that tailor directly to the interests of gas companies. Under EU law, if TotalEnergies wants to utilize an exemption to make funds or economic resources available to MOGE, it requires the authorization of the French government. The first exemption allows funds or economic resources to be released if they are necessary for the decommissioning of oil and gas wells in accordance with international

---

companies jeopardizes Myanmar economy,” Pakistan Today, 3 Feb. 2022, <https://www.pakistantoday.com.pk/2022/02/03/pullout-of-foreign-companies-jeopardizes-myanmar-economy>.

<sup>17</sup> See Damon Evans, “Chevron eyes PTTEP for Myanmar stake valued at \$250m,” note 11. If Chevron wanted to sell its interest to a new investor, once terms were agreed, it must first offer its participatory interest to all the existing Yadana investors, so MOGE and PTTEP, on the same terms.

<sup>18</sup> See section 17.2(g) of the PSC.

<sup>19</sup> Section 4.11(F) of the POA states that the resignation of an operator shall not become effective “prior to receipt of any necessary government approvals.”

<sup>20</sup> The jurisdiction of EU restrictive measures extends to situations where an EU national is involved or the parties partially act within the EU.



standards. The second allows for the transfer of “shares or interests necessary for the termination of contracts” with MOGE.

The wording of these exemptions does not appear intended to allow companies to continue ordering payments to MOGE, so TotalEnergies should immediately stop facilitating payments to MOGE each month.<sup>21</sup> The wording is, however, sufficiently vague for TotalEnergies to at least seek such authorization. Nor do these exemptions appear intended to allow an exiting gas company to facilitate another company taking over as the operator (enabling the junta to continue accessing revenues after the exit). The exemption does allow for the provision of technical assistance, but only in relation to decommissioning rather than the general operation of the upstream operation or pipeline. Again, however, TotalEnergies may seek authorization to provide technical assistance or intellectual property to a new operator.

The exemption for the transfer of “shares or interests” appears to allow TotalEnergies to seek authorization to transfer its shares in the company that operates the pipeline and its participatory interest in the production sharing contract. The exemption is silent on whether such transfers can be to MOGE (i.e. increasing the proportion of revenues it receives and undermining the very purpose of sanctions). The fact that the French government may authorize such a transfer under exemptions to EU sanctions does not negate the requirement for TotalEnergies to get the relevant authorizations from the government of Myanmar to exit its contracts.

### **3. Responsible divestment requirements**

#### *Complicity in crimes against humanity*

When the coup began in February 2021, the junta quickly seized control of MOGE’s accounts. Each month, TotalEnergies issues invoices on behalf of MOGE, obliging PTT to make payments of around 45 million U.S. dollars to MOGE’s accounts (with the exact amount varying according to the price and volume of gas sold). These payments include sums for gas sold to PTT by TotalEnergies and Chevron for which they owe cash payments to MOGE. During the first year of the coup, approximately 500 million U.S. dollars in revenues fell into the junta’s hands from this project alone.<sup>22</sup> Altogether, the revenue flowing from the four gas projects is the junta’s single largest and most dependable source of foreign revenue.<sup>23</sup> Because the Myanmar currency, the kyat, is not widely accepted on international markets, the junta depends on foreign currency to purchase the materials that it needs to continue the coup and commit atrocities against the population. This includes, for example, purchasing weapons, jet fuel, ammunition, and surveillance technologies. It also enables this military to maintain its vital patronage networks.

---

<sup>21</sup> Revenue payments do not appear necessary to allow decommissioning and in any case, the grounds listed include the payment of taxes and duties, but not payments that constitute contractual obligations (such as royalties and profit shares under the production sharing contract or dividends from the pipeline company).

<sup>22</sup> This excludes tax payments, and dividends from the pipeline company which have been suspended.

<sup>23</sup> Publish What You Pay, *Financing the Military in Myanmar: Analysis of Gas Revenues*, June 2021, note 1.



By facilitating these payments, TotalEnergies and Chevron are complicit in the human rights violations that have occurred since the coup began, which the U.N. suggested rise to the level of crimes against humanity.<sup>24</sup>

Both the U.N. Guiding Principles and the OECD Guidelines describe complicity in terms that clearly apply in this case. According to the Guiding Principles: “Questions of complicity may arise when a business enterprise contributes to or is seen as contributing to, adverse human rights impacts caused by other parties.”<sup>25</sup>

Professor John Ruggie, the architect of the U.N. Guiding Principles, identified several factors that can help to determine if a business is complicit in human rights abuses.<sup>26</sup> Firstly, almost any type of business activity can be a form of complicity, but it depends on the facts of each case. This potentially includes, for example, providing the perpetrators of human rights abuses with money, vehicles, weapons, or intelligence.

Tax payments can also be a form of complicity. For example, the International Commission of Jurists explained in a 2008 report that “if the tax revenue is a crucial contribution to the existence of a regime that systematically carries out gross human rights abuses, and without such tax the regime would fall, paying taxes or fees may lead to complicity for human rights abuses.”<sup>27</sup> The International Criminal Court has also noted the relevance of the “the sustained nature of the participation” in determining whether a contribution caused human rights abuses.<sup>28</sup>

Secondly, it matters how substantial the business’s contribution to the abuses is. A business can be found to be complicit if it makes any kind of contribution to human rights abuses. However, the more substantial the business’s contribution, the more likely it is to face consequences. It is unnecessary for the business to actually cause the harms itself – a company can still be complicit in violations that would have happened even without the company’s contribution.<sup>29</sup>

Thirdly, the business must generally know that its actions would contribute to abuses. It is unnecessary for the companies to know the precise abuses they are facilitating, provided that the company knows about some abuses and knows that their resources facilitate such crimes.<sup>30</sup> It is not a requirement that the company desires to cause harm.<sup>31</sup> In a recent decision, the French

---

<sup>24</sup> U.N. Office of the High Commissioner for Human Rights, Media Statement: “Special Rapporteur on the Situation of Human Rights in Myanmar to the Human Rights Council: there is a Compelling Case that the Military Junta in Myanmar is Committing Crimes against Humanity,” 22 Sept. 2021, <https://www.ohchr.org/en/press-releases/2018/11/experts-call-end-global-epidemic-femicide?LangID=E&NewsID=23924>.

<sup>25</sup> U.N. Guiding Principles on Business and Human Rights, Commentary on Guiding Principle 17.

<sup>26</sup> Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, “Clarifying the Concepts of ‘Sphere of Influence’ and ‘Complicity’,” 15 May 2008, U.N. Doc. A/HRC/8/16.

<sup>27</sup> Report of the International Commission of Jurists (ICJ) Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity & Legal Accountability: Volume 1* (2008), <https://www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf>.

<sup>28</sup> ICC, Pre-Trial Chamber, Prosecutor v. Callixte Mbarushimana, “Decision on the Confirmation of Charges,” 16 Dec. 2011, No. ICC-01/04-01/10, para 284.

<sup>29</sup> Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, note 27.

<sup>30</sup> Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, note 27.

<sup>31</sup> Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, note 27.





courts held that simply making payments of millions of dollars to an organization whose purpose is solely criminal constitutes complicity in its atrocities.<sup>32</sup>

According to the OECD Guidelines, an enterprise “contributes to” an impact if its activities, in combination with the activities of other entities cause the impact, or if the activities of the enterprise facilitate another entity to cause an adverse impact.<sup>33</sup> Similarly, the OECD Guidelines state that a company is “contributing” to an impact when its activity is a non-trivial contribution – activities include both actions and omissions. The three factors identified by the OECD to assess whether its activities are non-trivial include:

- The degree to which the activity increased the risk of the adverse impact taking place or continuing,
- The degree of foreseeability of the adverse impact,
- The degree to which the enterprise’s activities mitigated the adverse impact or decreased the risk of it occurring.

When these standards are applied to the actions of TotalEnergies and Chevron in Myanmar, the facilitation of gas revenue payments is a clear form of complicity:

- As the largest source of foreign exchange, the gas revenues are significant. The coup leader, General Min Aung Hlaing, has even made specific personal enquiries about revenues, asking “What do we do if they don’t pay?”<sup>34</sup>
- By facilitating payments to accounts known to be misappropriated by the Myanmar military junta, TotalEnergies and Chevron are knowingly enhancing the financial and operational capacity of the junta and contributing to its widely documented atrocities.<sup>35</sup> While there is not direct evidence that these funds are being used to purchase arms or related supplies, the junta’s patterns of behavior (e.g. steps to prevent the flight of foreign currency during the coup, ongoing purchases of arms and fuel, and historical misappropriation of gas revenues for military operations and to sustain patronage networks) create an extremely high risk that the funds are being used for this purpose.
- The U.S.<sup>36</sup> and U.K.<sup>37</sup> governments have stated that payments to state owned enterprises in the extractives sector fund the military and its atrocities and the EU has specifically stated that MOGE is “controlled by and generates revenue for the

---

<sup>32</sup> Sherpa, Media Statement: “Historic victory before French Supreme Court on the indictment of multinational Lafarge for complicity in crimes against humanity,” 7 Sept. 2021, <https://www.asso-sherpa.org/historic-victory-before-french-supreme-court-on-the-indictment-of-multinational-lafarge-for-complicity-in-crimes-against-humanity>.

<sup>33</sup> OECD, Due Diligence Guidance for Responsible Business Conduct (2018), p. 70,

<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

<sup>34</sup> Justice for Myanmar, “Leaked documents show Min Aung Hlaing personally concerned over oil and gas payments,” 16 Dec. 2021, <https://www.justiceformyanmar.org/stories/leaked-documents-show-min-aung-hlaing-personally-concerned-over-oil-and-gas-payments>.

<sup>35</sup> The companies’ roles in making or facilitating payments are set out in the section below on practical steps for responsible divestment.

<sup>36</sup> U.S. Department of the Treasury, Media Statement: “Treasury Sanctions Key Timber and Pearl Enterprises in Burma,” 25 Feb. 2021, <https://home.treasury.gov/news/press-releases/jy0138>.

<sup>37</sup> U.K. Foreign, Commonwealth & Development Office, Media Statement: “UK announces sanctions on gemstone company linked to the military regime in Myanmar,” 21 May 2021, <https://www.gov.uk/government/news/uk-announces-sanctions-on-gemstone-company-linked-to-the-military-regime-in-myanmar>.



Tatmadaw, therefore contributing to its capabilities,”<sup>38</sup> meeting the requirement of the foreseeability of the adverse impact. Multiple U.N. agencies and special procedures have reached the same conclusion.<sup>39</sup>

Accordingly, TotalEnergies and Chevron have an obligation to mitigate the adverse impacts of facilitating hundreds of millions of dollars to the military regime. The U.N. Guiding Principles recognize that where a business enterprise “contributes or may contribute to [an adverse human rights] impact, it should... take action to cease or prevent the impact.”<sup>40</sup> However, thus far TotalEnergies and Chevron have failed to take available practical steps to mitigate the adverse impact of the contributions they have made. These same practical steps, bolstered by the EU sanctions, provide a path for responsible divestment.

### *Responsible divestment*

On January 21, TotalEnergies and Chevron announced that they will divest from Myanmar, a process that will take about six months. Myanmar democracy leaders and civil society had not asked these companies to exit the country, but rather had asked them to act responsibly in taking all steps within their power to stop gas revenue flows from reaching the junta.

TotalEnergies’ and Chevron’s current exit plans appear to include continuing monthly revenue payments until they exit, meaning that at least six more months of gas revenue payments will continue while exit plans are being implemented. This would constitute continued complicity in the junta’s crimes against humanity. Altogether, this could provide more than 250 million U.S. dollars to the junta. This equates to over 2,000 military drones or 417 million rounds of ammunition.<sup>41</sup>

TotalEnergies and Chevron are not attempting to use all their leverage to stop the junta from seizing future gas revenue payments in their exit plans. TotalEnergies’ exit appears to ensure that the payments will not only continue, but that the proportion that the junta would misappropriate would increase. This would provide it with even more foreign exchange that could be used to purchase weapons and finance its oppression. The companies also appear to intend to bring in a new operator to ensure that the junta can continue to access the revenues. Thus, the present withdrawal process intentionally enables the continued access of the junta to increased revenues and may well constitute further complicity.

When companies divest or disengage from a business activity, they are required by the UNGPs and OECD Guidelines to do so responsibly.<sup>42</sup> According to these international standards, responsible divestment/disengagement involves several elements, including:

<sup>38</sup> EU Council Implementing Regulation implementing Regulation (EU) No 401/2013, <https://data.consilium.europa.eu/doc/document/ST-5702-2022-INIT/en/pdf>.

<sup>39</sup> Statement by Thomas H. Andrews, U.N. Special Rapporteur on the Situation of Human Rights in Myanmar United Nations Human Rights Council, 11 Mar, 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26884>.

<sup>40</sup> U.N. Guiding Principles on Business and Human Rights, Principle 19, [https://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf).

<sup>41</sup> ALTSEAN-Burma, Statement on Twitter, 14 Mar. 2022, <https://twitter.com/Altsean/status/1503304683565494274?s=20&t=SJTmGjBYq1cYpl9CDkgJRQ>.

<sup>42</sup> An analysis and overview of the specific requirements and principles in the UNGPs and OECD Guidelines is provided in two relevant publications by the Centre for Research on Multinational Corporations (SOMO): J. Wilde-Ramsing, SOMO, *Should I Stay or Should I Go? Exploring the role of disengagement in human rights*



- Remediating or contributing to the remediation of all adverse impacts the company caused or contributed to while it was operating.<sup>43</sup>
- Conducting human rights due diligence to identify any additional potential adverse impacts resulting from the divestment/disengagement itself.<sup>44</sup>
- Taking steps to address the identified risks of negative impacts by preventing them where possible. Where prevention is not possible, companies are required to take steps to mitigate and remediate the adverse impacts.<sup>45</sup>
- Meaningfully consulting stakeholders, and in particular impacted rights-holders, throughout the entire process.<sup>46</sup>

As recognized in the UNGPs and OECD Guidelines, TotalEnergies and Chevron are required to conduct human rights due diligence on the potential negative impacts of the decision to withdraw from Myanmar and the way in which the divestment is carried out.<sup>47</sup> TotalEnergies itself has publicly acknowledged the need to limit financial flows to MOGE,<sup>48</sup> yet any basic due diligence would show that the current divestment strategy is irresponsible since it would be providing increased funding to the very entity on which TotalEnergies has called for sanctions.<sup>49</sup>

Further, as the U.N. Working Group on Business and Human Rights advises, corporations in conflict settings need to carry out heightened due diligence, which requires integrating conflict approaches in its human rights due diligence. As the Working Group reports, “Businesses are not neutral actors... even if business does not take a side in the conflict, the impact of their operations will necessarily influence conflict dynamics.”<sup>50</sup> Businesses should seek to prevent or cease contributions to adverse human rights impacts within the context of the conflict dynamics that the businesses are operating in. This would entail being principled in their response to prevent and mitigate involvement with gross human rights violations, which may require taking a stance against one side of an issue. Although TotalEnergies and Chevron have recognized the gross human rights abuses taking place in Myanmar, their present proposed strategy to exit fails to utilize the leverage they have and would effectively provide more resources to the very regime that TotalEnergies and Chevron have acknowledged is committing these human rights abuses, thereby exacerbating the conflict.

---

*due diligence* (2016), <https://www.somo.nl/should-i-stay-or-should-i-go-2>; J. Wilde-Ramsing and K. Booth, SOMO, *Responsible disengagement from coal as part of a just transition* (2021), <https://www.somo.nl/responsible-disengagement-from-coal-as-part-of-a-just-transition>.

<sup>43</sup> U.N. Guiding Principles on Business and Human Rights, Principle 22.

<sup>44</sup> U.N. Guiding Principles on Business and Human Rights, Principle 17.

<sup>45</sup> U.N. Guiding Principles on Business and Human Rights, Principle 13.

<sup>46</sup> U.N. Guiding Principles on Business and Human Rights, Principle 17.

<sup>47</sup> OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018), p. 80, note 33.

<sup>48</sup> TotalEnergies, Media Statement: “TotalEnergies Withdraws From Myanmar,” 21 Jan. 2022, note 14.

<sup>49</sup> Human Rights Watch, “Myanmar: TotalEnergies Endorses Targeted Sanctions,” 20 Jan. 2022, <https://www.hrw.org/news/2022/01/20/myanmar-totalenergies-endorses-targeted-sanctions>.

<sup>50</sup> U.N. Working Group on Business and Human Rights, *Report on Business, human rights and conflict-affected regions: towards heightened action*, 21 July 2020, U.N. Doc. A/75/212.



The UNGPs and OECD Guidelines recognize that TotalEnergies and Chevron should meaningfully engage rights-holders and other stakeholders<sup>51</sup> in their decision-making process on divestment. In particular, TotalEnergies and Chevron “need to understand, as far as possible, the concerns of those who may be directly affected by their operations.”<sup>52</sup> Those directly impacted by TotalEnergies and Chevron’s withdrawal process, both through increased conflict and adverse human rights impacts include Myanmar communities, Myanmar civil society organizations, Myanmar democracy activists, and the National Unity Government. Thus, in addition to the international civil society groups that the companies have been consulting, they should also be meaningfully engaging with local stakeholders.

However, TotalEnergies and Chevron have repeatedly failed to address or even respond<sup>53</sup> to questions raised by these stakeholders. They have even failed to respond to correspondence from the National Unity Government. Following these failures, TotalEnergies and Chevron elected to divest irresponsibly, ignoring stakeholder demands to divert revenues. TotalEnergies has already announced that it will bring in a new operator even though the National Unity Government has asked it not to do so, suggesting that the company remains unconcerned about views from inside Myanmar, including from one of the parties that has valid claims as a party to the Yadana contracts.

#### **4. Practical steps for responsible divestment from Myanmar by TotalEnergies and Chevron**

The above sections have explained TotalEnergies and Chevron’s roles in contributing to adverse human rights impacts in Myanmar through funding the military regime and how its present divestment strategy does not cease or prevent the impacts but exacerbates them. The following section provides practical actions TotalEnergies and Chevron should take to cease or prevent the impacts.

*Gas companies should immediately start diverting revenue payments, rather than continuing to allow funds to be seized by the junta while they divest*

TotalEnergies, Chevron, and PTTEP own some, and arguably all, of the gas that passes through the Yadana pipeline into Thailand.<sup>54</sup> In return, they owe revenues to MOGE. PTT makes payment of these revenues to MOGE to meet the obligations of TotalEnergies, Chevron, and PTTEP to MOGE. They require PTT to do so despite knowing that MOGE accounts are controlled by the junta, which has not been recognized as the Myanmar government. They do

---

<sup>51</sup> U.N. Guiding Principles on Business and Human Rights, Principle 18. In addition, according to the OECD Guidelines, “stakeholders are persons or groups who have interests that are or could be impacted by an enterprise’s activities.”

<sup>52</sup> U.N. Guiding Principles on Business and Human Rights.

<sup>53</sup> This includes detailed questions sent by email to TotalEnergies by the Blood Money Campaign and by Burma Campaign UK.

<sup>54</sup> See the recitals of the Export Gas sales Agreement. At a minimum, gas companies must pay “Royalties” to the Myanmar government (see clause 9.3 of the PSC). The PSC expressly states that this comes from the investor’s gas sales and, in a response to a Publish What You Pay report, TotalEnergies acknowledged that PTT makes payments to MOGE to meet TotalEnergies’ cash liabilities to MOGE. Publish What You Pay, *Financing the Military in Myanmar: Analysis of Gas Revenues*, June 2021, note 1. In 2017-18, Royalty payments from Chevron and TotalEnergies constituted around 45 million US dollars. The contracts are unclear, but it can be asserted that all gas sales are made by the foreign investors in Yadana, leaving them liable to MOGE in cash (see clause 4(d) of the Memorandum of Understanding, available at EarthRights, “Doe v. Unocal,” note 7.



so despite having received notice from the National Unity Government, which has a credible claim to be a party to the Yadana contracts, that revenues should be paid into a National Unity Government account or, failing that, a trust account.

Gas companies would be in a different position if MOGE was a registered company – in that case, MOGE would have a legal identity separate from the Myanmar government and might be unaffected, contractually speaking, by the junta’s actions (i.e. because this would affect the identity of MOGE’s shareholders rather than of MOGE itself). Indeed, TotalEnergies and Chevron have both erroneously referred to MOGE as a “company” in their public statements. However, as their payments are due to the government of Myanmar, through its representative government department, MOGE, they have to resolve which of the two parties claiming to be MOGE, if either, is legitimate.

If TotalEnergies and Chevron cannot do so, their only option is to order PTT to make payments to trust accounts to be held on behalf of the government of Myanmar until a recognized government is in place. In order to comply with EU sanctions, this may have to be a trust account frozen in the EU. There may be concern with private corporations having a role determining the identity of the government of Myanmar, but as it is a party to the contracts, this must be resolved. In order to avoid taking on this role, Chevron and TotalEnergies could seek to rely on independent arbitration, as provided for their contracts (see below).

TotalEnergies has additional obligations, as the Yadana project operator, to take all available steps to divert payments. TotalEnergies is the “authorized representative” of each stakeholder, including MOGE, for almost all purposes under the sale contract with the gas buyer, PTT, including “for the giving and receiving of all notices and invoices to and from the Buyer.”<sup>55</sup> TotalEnergies calculates the net revenues due to each stakeholder.<sup>56</sup> Each month, TotalEnergies continues to issue statements “for and on behalf of MOGE,” obliging PTT to transfer these revenues to each stakeholder; PTT is entitled to treat these orders as if they were from MOGE.<sup>57</sup>

This leaves TotalEnergies with an even greater challenge than the gas companies face in relation to the revenues they owe to MOGE. While these revenues are a contractual debt, TotalEnergies’ contractual obligations as a representative appear to create fiduciary duties for TotalEnergies. TotalEnergies cannot fulfill its fiduciary duties to MOGE until it resolves which of two parties with credible claims to be MOGE it is actually representing.

While Chevron does not have the obligations of an operator, despite repeatedly highlighting that it has only a “non-operated” interest in the Yadana Project, Chevron’s approval is required

---

<sup>55</sup> See clause 24.1 of the Export Gas Sales Agreement, available at EarthRights, “Doe v. Unocal,” note 7. This clause appoints the Operator as MOGE’s representative for all purposes under the sale contract apart from actually receiving funds and arbitration proceedings.

<sup>56</sup> The stakeholders are: 1) each investor; 2) MOGE in its capacity as state revenue collector; and 3) the Moattamma Gas Pipeline Company (MGTC), the company that operates the pipeline and in which each of the investors is a shareholder.

<sup>57</sup> While the Yadana contracts are publicly available, they may have been varied since they were disclosed. The original contracts provide that TotalEnergies is a representative of MOGE for almost all purposes under the sale contract (see clause 24) and that it can designate accounts for payment (see clauses 12.6). As of 2021, TotalEnergies continues to issue documents “for and on behalf of MOGE.”



to amend the PSC or POA and together, Chevron's and TotalEnergies' participating interests allow them to make almost all operational decisions.<sup>58</sup>

TotalEnergies appears intent on ordering monthly payments (including payments from PTT for sums owed by Chevron to MOGE) until its withdrawal is complete, which will be up to six months following its announcement in January that it would withdraw, equating to around 250 million U.S. dollars in additional revenue that the junta can use to buy weapons and finance its oppression. The EU sanctions give very clear grounds to stop these payments and as noted above, the wording of the exemptions does not appear intended to allow continued payments. TotalEnergies and Chevron must seek to use these exemptions and contractual obligations to divert payments.

*TotalEnergies and Chevron should delay their exit to maximize the funds they can divert away from the military*

EU sanctions allow TotalEnergies to request the French government to grant an exemption, allowing it to transfer its shares and participatory interest in the Yadana project. This fundamentally contradicts the purpose of sanctions, sanctions that even TotalEnergies requested.<sup>59</sup> TotalEnergies should request, and the French government should only grant, an authorization if shares transferred to MOGE are held on trust and cannot be accessed by the junta.<sup>60</sup>

As described above, whether they exit by withdrawal or transfer, TotalEnergies and Chevron need the consent of MOGE, as a representative of the Myanmar government. The fact that exemptions to sanctions can allow a transfer does not negate the contractual need for consent of MOGE. They should acknowledge that as there is no recognized government at this time, this would require them to delay their exit<sup>61</sup> and continue to divert revenues until a legitimate government is identified.

TotalEnergies and Chevron should also continue to advocate for the international community to use targeted sanctions to prevent gas revenues from reaching the junta. TotalEnergies and Chevron should remain in Myanmar for as long as possible, continue pushing for sanctions, including in the U.S.,<sup>62</sup> and then comply with them rather than exiting and bringing in investors and an operator that may not comply with sanctions. This would contrast with Chevron's previous approach of lobbying against sanctions<sup>63</sup> and TotalEnergies' apparent intent to evade EU sanctions.

---

<sup>58</sup> See section 5.9 of the POA.

<sup>59</sup> TotalEnergies only supported sanctions after it had already decided to divest, rather than in the weeks or months after the coup began.

<sup>60</sup> Human Rights Watch, "Myanmar: EU Needs to Enforce New Sanctions on Junta," 24 Feb. 2022, <https://www.hrw.org/news/2022/02/24/myanmar-eu-needs-enforce-new-sanctions-junta>.

<sup>61</sup> Indeed, giving notice to the junta that they plan to withdraw would not even constitute giving notice to the government of Myanmar.

<sup>62</sup> TotalEnergies has suggested that EU "restrictive measures" are not flexible enough to stop payments and also allow production to continue. There is no debate that U.S. sanctions would allow this, and the fact Myanmar has no recognized government gives TotalEnergies grounds to direct funds into bank accounts in the EU to be held on trust for a legitimate government – such accounts could be frozen under EU restrictive measures.

<sup>63</sup> Kenneth P. Vogel and Lara Jakes, "Chevron Lobbies to Head Off New Sanctions on Myanmar," *New York Times*, 22 Apr. 2021, <https://www.nytimes.com/2021/04/22/us/politics/chevron-myanmar-sanctions.html>.



*TotalEnergies and Chevron should not take any steps that would allow a new operator to take over the project in circumstances that are opposed by Myanmar stakeholders*

TotalEnergies has stated that it will facilitate the handover to a new operator but doing so will allow the junta to continue misappropriating gas revenues. It would also appear to be a breach of EU sanctions, which contain an exemption for providing technical assistance that only applies when it is necessary for decommissioning. TotalEnergies should not request authorization to bring in a new operator and can use this leverage in its engagement with the junta.

As noted above, TotalEnergies does not have to relinquish the operator role when it withdraws from the PSC and it needs the consent of MOGE, as a representative of the Myanmar government, to bring in a new operator. A new operator, even PTTEP, will require the assistance of TotalEnergies, and Yadana may not be commercially viable without it. In addition, if Chevron remains as an investor, having received a share of TotalEnergies' participatory interest, it can veto a change of operator.<sup>64</sup>

While it appears that that TotalEnergies and Chevron have already approved PTTEP taking on the operator role,<sup>65</sup> they still possess significant leverage, as they can simply stop treating the junta as a legitimate government, acknowledging that it does not have the authority to approve PTTEP taking on the role of operator. This contractual and commercial leverage gives TotalEnergies and Chevron at least three options that are consistent with their responsibilities under the U.N. Guiding Principles on Business and Human Rights:

1. TotalEnergies remains as an operator, continuing to order funds into protected accounts or, failing that, producing enough gas for domestic use only rather than export.
2. TotalEnergies hands over its role to an operator that agrees to (continue) diverting funds into protected accounts and comply with sanctions.
3. TotalEnergies stops operating the project and refuses to facilitate a handover to a new operator, supported by Chevron's veto, if it will enable the junta to fund atrocity crimes.

Notably, these options may allow TotalEnergies and Chevron to reduce revenues to the military without compromising energy security. There are strong grounds to consider that the junta would not choose to shut down production of gas if revenues were diverted, TotalEnergies refused, or Chevron blocked the unconditional handover to a new operator.<sup>66</sup>

Rather than using its leverage or consulting with Myanmar stakeholders, TotalEnergies committed to bringing in a new operator as part of its withdrawal announcement. The National Unity Government has stated that in bringing in a new operator, TotalEnergies is colluding

---

<sup>64</sup> See clause 5.9 of the POA. All changes to the POA, which would include a change of operator, require unanimous approval of investors. If Chevron receives TotalEnergies' participatory interest it will also have more than a 40% share, which would allow it to block any decisions that are not required to be made in order to comply with "Minimum Work Obligations."

<sup>65</sup> PTTEP, Media Statement: "Statement 3: Change of operator in the Yadana project in Myanmar," 14 Mar. 2022,

<https://www.pttep.com/en/Newsandnmedia/Mediacorner/Pressreleases/Changeofoperatorintheyadanaprojectinmyanmar.aspx>.

<sup>66</sup> This includes not wanting to damage relationships with Thailand and China and its need to maintain electricity for the business sector (not least for crony and military companies).



with the junta. In line with this, there are strong indications that the Myanmar people, of which only around 50 percent have access to the national grid, also prefer the *possible* risk of an energy reduction to *certainty* of the harms of military rule. This is clear from an online survey of Yangon residents,<sup>67</sup> public demonstrations as part of the Civil Disobedience Movement, and a nationwide boycott of electricity bill payment.<sup>68</sup>

When assessing TotalEnergies' and Chevron's decision, there is the potential for policymakers to see maintaining the status quo as a neutral or less harmful stance. If the situation was one where a gas company was deciding whether or not to enter Myanmar to reduce a chronic energy capacity shortage, it would likely conclude that generating half a billion dollars annually for a junta committing crimes against humanity in order to do so was not responsible investment.

*TotalEnergies and Chevron should use arbitration as a core part of their responsible divestment strategy*

Attempting to divert payments, delaying exit, and refusing to bring in a new operator may all lead to disputes with the junta, PTT, or PTTEP. As is common in international oil and gas contracts, the Yadana contracts have international arbitration clauses for dispute resolution.<sup>69</sup> The arbitration clauses are broadly worded, allowing “controversies,” “questions,” and “differences” to be referred to arbitration.<sup>70</sup>

TotalEnergies or Chevron could proactively commence arbitration proceedings. The broad wording of the arbitration clauses, the fact that the Myanmar government is a party to the relevant contracts, and the controversy or question over which, if either, of two parties is the government give grounds to commence proceedings. TotalEnergies has particularly strong grounds as it is representing MOGE. Practically speaking, under the gas sales agreement, “controversies” must be resolved in arbitration in Singapore. The sellers of the gas appoint one arbitrator and PTT another. If PTT and TotalEnergies both considered that there was a controversy to be resolved, it could be expected that the arbitrators would accept jurisdiction over any controversy. If PTT asserts that arbitration is unnecessary (i.e. because the identity of MOGE is clear or does not need to be clear) this would in turn be a controversy that needs resolving. The arbitrators could immediately order PTT to transfer sums into a protected account as an interim measure (i.e. until a final decision was made).<sup>71</sup>

---

<sup>67</sup> Burmese news outlet, Khit Thit Media, recorded the views of 11,541 Burmese people on electricity—98% prioritized cutting regime access to gas revenues over electricity. See Justice for Myanmar statement, 28 May 2021, <https://twitter.com/JusticeMyanmar/status/1398247592719372288>.

<sup>68</sup> See e.g., Krisen Gelineau, Victoria Milko & Lori Hinnant, “Myanmar public urges gas sanctions to stop military funding,” AP News, 15 Dec. 2021, <https://apnews.com/article/myanmar-us-france-resist-oil-gas-sanctions-against-military-26960605aebc2ddb7b537a803f01f336>; Frontier Myanmar, “Unpaid power bills put junta finances on the line,” 15 May 2021, <https://www.frontiermyanmar.net/en/unpaid-power-bills-put-junta-finances-on-the-line>.

<sup>69</sup> Note that arbitration of a contractual dispute differs from Investor State Dispute Settlement (ISDS) provisions in trade agreements. ISDS provisions allow corporations to challenge government policies that advance human rights and the environment and are strongly discouraged.

<sup>70</sup> The arbitration clause in the Export Gas Sales Agreement (see cause 21) allows the parties to refer “any and all disputes, controversies or claims.” The PSC allows the parties to refer any “dispute, question or difference” (see clause 22.2).

<sup>71</sup> The Export Gas Sales Agreement specifies that UNCITRAL arbitration rules shall apply. These rules specifically provide for interim measures “necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person.” (See Article 26 of the 1976 UNCITRAL arbitration rules).





In an analogous situation, Deutsche Bank resorted to legal proceedings in the U.K. when two parties claimed to represent the Central Bank of Venezuela and demanded access to assets of the Central Bank held by Deutsche Bank. In contrast, TotalEnergies and Chevron, have instead chosen to recognize the junta and, rather than taking all steps to stop revenues reaching the junta, are contractually compelling PTT to make payments by issuing invoices.

An alternative would be for TotalEnergies, as MOGE's representative, to order PTT to pay funds into a trust account. Another option would be for the investors to order PTT to transfer sums they owe to MOGE for gas sales into a trust account.<sup>72</sup> TotalEnergies has claimed that an attempt to divert funds would see PPT issue and pay against its own invoices. While TotalEnergies' grounds for this assertion appear weak,<sup>73</sup> if PTT ignores payment orders, this itself would be a controversy to be resolved by arbitration, commenced by TotalEnergies or Chevron against PTT.

As noted above, TotalEnergies and Chevron could reduce their contribution to human rights abuses if they delayed their exit and diverted revenues or if TotalEnergies refused to bring in a new operator. If they did so, the junta may seek to commence arbitration proceedings and would have to show that it was the legitimate government. If the junta or National Unity Government wanted to allege that TotalEnergies was breaching its duties as MOGE's representative or that Chevron or TotalEnergies were not meeting their payment obligations, they could also seek to commence arbitration proceedings.<sup>74</sup> They may have to demonstrate to the arbitrators that they have a credible claim to be a party to the relevant contracts in order for the arbitrators to decide that they have jurisdiction. The junta might be reluctant to take this step, as it could oblige the operators of other gas projects to stop payments to the junta-controlled accounts.

The contracts for the Yadana project also contain *force majeure* clauses that allow parties to the contracts to suspend obligations under the contracts. "Political disturbance" is specifically included as a ground for declaring *force majeure* in the PSC. The situation in Myanmar is a political disturbance. TotalEnergies and Chevron could rely on this to assert specific obligations have been suspended (such as making payments to the accounts previously notified by MOGE or handing over to a new operator).

Arbitration and litigation are inherently uncertain, but after profiting from gross human rights violations in Myanmar for 30 years, TotalEnergies and Chevron must use all reasonable efforts to reduce revenue flows to the junta and end their complicity in the crimes of a military effectively on trial for genocide. Even if they are forced out of the country, they could assert that payment into protected accounts was, in the circumstances, not a breach of contract as there was no recognized government that could receive payments. At the very least, arbitration

---

<sup>72</sup> TotalEnergies, as the representative of each seller, should do so (see clause 24 of the Export Gas Sales Agreement).

<sup>73</sup> In response to a report by Publish What You Pay, TotalEnergies stated that PTT could issue its own invoices. To support this, TotalEnergies relies on clauses that appear designed to allow PTT to issue invoices only for sums due to PTT, not on behalf of MOGE. TotalEnergies also relies on clauses that only allow PTT 1) to issue an annual invoice and 2) to do so only if TotalEnergies has failed to issue invoices. Even if PTT could issue monthly invoices on behalf of MOGE, an ongoing arbitration could prohibit this. Publish What You Pay, *Financing the Military in Myanmar: Analysis of Gas Revenues*, June 2021, note 1.

<sup>74</sup> This could potentially be done under the PSC rather than the Export Gas Sales Agreement.



would likely lead to delays in the junta accessing vital funds and reductions in the funds they do receive,<sup>75</sup> at a time when the junta is waging civil war on the people of Myanmar in the face of resolute democratic resistance. It would also prevent private companies from taking on the role of recognizing and legitimizing the junta.

TotalEnergies and Chevron could also set a precedent for PTTEP (after TotalEnergies exits and PTTEP is likely the operator of Yadana) and for the operators of other gas projects (Petronas for Yetagun, PTTEP for Zawtika, and POSCO for Shwe) to order funds into protected accounts. This is particularly important for POSCO. It appears that for the Shwe gas pipeline, the buyer transfers all revenues into a single bank account and POSCO then orders the bank to transfer funds to each party entitled to revenues, including MOGE.<sup>76</sup> This suggests POSCO is actively ordering funds that are already held on trust for the government of Myanmar into accounts controlled by the junta.

### *TotalEnergies and Chevron should stop spreading disinformation related to Myanmar*

TotalEnergies and Chevron have consistently spread disinformation about their ability to divert revenues and the impacts of doing so.<sup>77</sup> Meaningful engagement is impossible unless they cease and rectify this. For example, TotalEnergies and Chevron have stated that Thailand is reliant on Myanmar gas for its energy security. In fact, Thailand could import LNG to replace not just Yadana gas, albeit at increased cost.<sup>78</sup> Yet TotalEnergies and Chevron are continuing to raise concerns over Thai energy security as they divest.

In contrast to its public statements of concern over Thailand's energy security, Chevron has forced a decline in Thailand's gas production as it exits from the country's largest gas field, the Erawan field, with a handover to a new operator, PTTEP, scheduled for 2022. Due to a dispute over decommissioning costs, Chevron has not cooperated with PTTEP, including by refusing access to PTTEP to drill wells to maintain production.<sup>79</sup> This has forced Thailand to import more LNG.

---

<sup>75</sup> For example, ConocoPhillips, a U.S. fossil fuel major, pursued remedies after PDVSA, the Venezuelan state oil company, expropriated its oil and gas assets. This led to arbitration proceedings and in 2018, the International Chamber of Commerce awarded ConocoPhillips \$US2 billion as compensation. ConocoPhillips was able to enforce this against PDVSA assets in other jurisdictions. Reuters, "ConocoPhillips seeks seizure of Citgo parent to collect on PDVSA award," 27 Nov. 2019, <https://www.reuters.com/article/us-conocophillips-venezuela-citgo-idUSKBN1Y02N4>.

<sup>76</sup> Based on confidential documents seen by EarthRights International.

<sup>77</sup> EarthRights, *Myanmar Fact Sheet: How Big Oil in Myanmar Uses the Language of Human Rights to Justify Complicity in Atrocity Crimes*, 30 Nov. 2021, <https://earthrights.org/publication/myanmar-fact-sheet>.

<sup>78</sup> EarthRights, *Analysis: Impacts of a Disruption of Myanmar Gas Imports on Thailand's Energy Security*, 22 Sept. 2021, <https://earthrights.org/publication/analysis-impacts-of-a-disruption-of-myanmar-gas-imports-on-thailands-energy-security>.

<sup>79</sup> See Damon Evans, "PTTEP 'losing hope' in battle with Chevron for access to Thai gas field," Energy Voice, 6 June 2021, <https://www.energyvoice.com/oilandgas/asia/333979/pttep-losing-hope-in-battle-with-chevron-for-access-to-thai-gas-field>.