



**Specific Instance Request to the National Contact Points of Canada and the United Kingdom under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises**

**National Contact Points**

Canada's National Contact Point Secretariat, Global Affairs Canada, 111 Sussex Drive, Ottawa Ontario, Canada, K1A 0G2

UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Department for International Trade, Old Admiralty Building, Admiralty Place, London, SW1A 2DY

**Complainants**

EarthRights International, 1612 K Street, NW, Suite 800, Washington, DC 20006, U.S.  
A Myanmar civil society organization – name and contact details withheld due to security concerns, but to be shared with the NCPs.

**Company**

MTI Energy Inc, 3051 84 Ave Nw., Edmonton, Alberta, Canada, T6P1K1

**Subject**

Non-compliance with the OECD Guidelines for Multinational Enterprises by MTI Energy in relation to its investment in the Yadana Gas project in Myanmar.

14 September 2023



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## 1. Executive Summary

A Myanmar civil society organization<sup>1</sup> and EarthRights International submit this specific instance (the “Complaint”) to the National Contact Points of Canada and the United Kingdom concerning the activities of Canadian oil company MTI Energy Inc (MTI Energy) in Myanmar (Burma), in accordance with the 2011 and 2023 versions of the OECD Guidelines for Multinational Enterprises. This Complaint relates to MTI Energy’s planned investment in the Yadana fossil gas project in Myanmar through its agreement to purchase Chevron Corporation’s stake in its joint venture with the Government of Myanmar.

MTI Energy is a multi-national enterprise registered in Canada. Its purchase will be through a subsidiary, Et Martem Holdings, registered in Bermuda, a British Overseas Territory. As such, the NCPs of Canada and the United Kingdom have jurisdiction over this Complaint.

In February 2021, the Myanmar military launched a military coup, preventing a democratically elected government from taking office and responding to protests with campaign of violence. In the last two years, the military junta has committed well-documented crimes against humanity, war crimes and other human rights abuses, but has been unable to seize control of Myanmar, dragging the country into humanitarian crisis and civil war. The military regime and its State Administration Council (SAC) remain widely unrecognized as the Government of Myanmar. The junta lacks both legitimacy and territorial control over large parts of the country. Ethnic revolutionary organizations (EROs) control substantial parts of the country and many are cooperating with Myanmar’s National Unity Government (NUG), which was set up by elected lawmakers shortly after the coup began and has a rival claim to be recognized as a government.

MTI Energy has agreed to acquire Chevron’s 41.1% share in the Yadana project, a joint venture with the Government of Myanmar, even though the Myanmar military junta is misappropriating revenues which are due to the Government of Myanmar and which the junta can use to fund its atrocities. These revenues flow through a government agency, the Myanma Oil and Gas Enterprise (MOGE). Because the joint venturers in the project have credited the military’s instructions regarding payment to MOGE, revenues from the Yadana project are being seized by the junta. In 2021, MOGE’s monthly revenues from Yadana from gas sales alone<sup>2</sup> reached over USD 60 million per month and were forecast to provide over 40% of Myanmar’s gas revenues in 2023-24. The junta can use these revenues, one of its few sources of foreign currency, to purchase

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<sup>1</sup> Name and contact details withheld due to security concerns, but to be shared with the NCPs.

<sup>2</sup> The Government of Myanmar, via MOGE’s shares in the company that operates the Yadana pipeline, also derives substantial income from pipeline fees both as dividends. The 2017-18 Myanmar EITI reported recorded an annual dividend of US\$40 million. This report also recorded annual tax payments of US\$100 million. The 2017-18 Myanmar EITI report is available at [https://myanmareiti.org/sites/myanmareiti.org/files/publication\\_docs/meiti\\_reconciliation\\_report\\_2017-2018\\_final\\_signed.pdf](https://myanmareiti.org/sites/myanmareiti.org/files/publication_docs/meiti_reconciliation_report_2017-2018_final_signed.pdf)



weapons and commit egregious human rights abuses, maintain patronage networks in Myanmar.

MTI Energy has breached OECD Guidelines in five main aspects:

1. MTI Energy has engaged in improper involvement in political activities in breach of the 2011 and 2023 Guidelines.
2. MTI has engaged in corrupt acts and breach of Myanmar law in breach of the 2011 and 2023 Guidelines. These breaches will become more serious if it completes its acquisition.
3. If MTI Energy completes its acquisition, it will be contributing to human rights abuses in breach of the 2023 Guidelines.
4. Even if MTI Energy does not complete its acquisition, likely contributing to and at the least directly linked to human rights impacts by its business relationships under the 2011 Guidelines. MTI Energy's relationship to these impacts is not static – the longer it maintains its relationships, fails to carry out due diligence or mitigate its acts, the more likely that it should already be seen as contributing to human rights impacts.
5. MTI Energy has breached the procedures and practices set out in the 2011 Guidelines that Multinational Enterprises (MNEs) should follow prior to making investment, particularly in a country affected by widespread armed conflict and in a sector that funds the perpetrator of well-documented human rights violations. MTI has either failed to carry out adequate enhanced due diligence or ignored the findings, has failed to carry out meaningful stakeholder engagement and has failed to meet requirements on transparency regarding decision-making to invest.

### **1. Improper involvement in political activities**

Gas companies can only enter Myanmar's offshore gas sector if they enter a joint venture with the Government of Myanmar, as represented by MOGE, a government agency. MTI Energy can only do so by electing to treat the junta as the Government of Myanmar, reaching agreements<sup>3</sup> with it and seeking its consent.

As set out by the U.N. Special Rapporteur on the Situation of Human Rights in Myanmar, however, Myanmar has no internationally recognized government and the junta has no

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<sup>3</sup> This includes the Production Sharing Contract to extract the gas and the Shareholders' Agreement relating to the company that operates the gas export pipeline (with MTI Energy replacing Chevron in contracts with MOGE and Thai company PTTEP on both agreements). It also includes the gas sales contract (with MTI Energy replacing Chevron in a contract with MOGE, PTTEP and the buyer, PTT, which is the parent company of PTTEP).



legitimate claim to be recognized as such.<sup>4</sup> In fact, the U.N. Special Rapporteur argues that the NUG, made up of elected lawmakers, has a better claim. The U.N. General Assembly has effectively rejected the junta's claim to be the Government of Myanmar, refusing to credit the junta's appointed ambassador to the U.N., and instead allowing the ambassador appointed by the pre-coup democratic government (who is loyal to the NUG) to remain in the post.<sup>5</sup>

Chapter II – General Principles A.15 of the 2011 Guidelines states that MNEs should “Abstain from any improper involvement in local political activities.” Deciding that the junta is the Government of Myanmar, ignoring the claim of the NUG and the decision of U.N. General Assembly, is clearly political, in violation of the Guidelines.

## **2. Corruption and breach of Myanmar law**

The OECD Guidelines prohibit participation in corruption. Chapter VII of the 2023 Guidelines specifically states that MNEs should not “engage in any act of corruption.” The 2011 Guidelines primarily focus on bribery, but Paragraph 74 of the commentary indicates that the Guidelines apply to both “bribery and corruption” more broadly, which are “damaging to democratic institutions,” and “in particular, the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social and environmental welfare.” While the 2011 and 2023 Guidelines do not define corruption, the World Bank describes defines corruption as “the abuse of public office for private gain,” which “covers a wide range of behavior, from bribery to theft of public funds.”<sup>6</sup> Thus, under the Guidelines, participation in any act of corruption, including theft of public funds, is prohibited.

Treating the junta as the government and entering negotiations and signing contracts with it to extract and sell gas and misappropriate revenues owed to the Government of Myanmar is an act of corruption in breach of the OECD Guidelines. If MTI completes its acquisition, it will be making or enabling monthly payments that are an act of corruption, assisting the junta in its abuse of public office for the theft of public funds. This is a breach of Chapter VII of the 2023 Guidelines. It is also a breach of Chapter 1.2 of the 2011 and 2023 Guidelines which state that “obeying domestic laws is the first obligation of enterprises.”

The fact that Myanmar's state-owned enterprises, including MOGE, have long been used to misappropriate state revenues means that MTI Energy would likely be engaging in an act of corruption even if the junta was recognized as the Government of Myanmar.

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<sup>4</sup> “Myanmar: UN expert's report highlights junta's fraudulent claim to legitimacy, urges States to denounce 2023 ‘sham’ elections,” UN Special Rapporteur on the situation of human rights in Myanmar, 31 January 2023. See: <https://www.ohchr.org/en/press-releases/2023/01/myanmar-un-experts-report-highlights-juntas-fraudulent-claim-legitimacy>

<sup>5</sup> “Myanmar will not address world leaders at U.N. General Assembly,” Al Jazeera, 25 September 2021. See: <https://www.aljazeera.com/news/2021/9/25/myanmar-will-not-address-world-leaders-at-u>

<sup>6</sup> “Anticorruption Fact Sheet,” The World Bank, 19 February 2020. See: <https://www.worldbank.org/en/news/factsheet/2020/02/19/anticorruption-fact-sheet>



### **3. MTI Energy will contribute to human rights abuses if it completes its acquisition**

If MTI Energy completes its purchase, it will be the largest investor in Yadana. Unless the Yadana contracts have been varied, its interest will give it substantial powers to challenge and veto decisions regarding the management of the project. Each month, MTI Energy will enable sums it owes to the Government of Myanmar to be paid to the junta, funding its human rights abuses. As the largest shareholder in Yadana, payments that will be due from MTI Energy to the Government of Myanmar are substantial, running into millions of dollars each month.

By providing the junta with revenues, MTI Energy substantially increases the risk of the human rights abuses continuing. This is very foreseeable, given that governments, U.N. bodies and civil society groups have been publicly stating for over two years that gas revenues, including those from Yadana, fund junta atrocities.

MTI Energy cannot mitigate these adverse impacts or decrease the risk of them occurring unless it can divert revenues away from the junta and exercises all practical means to do so. This means that MTI Energy will be contributing to human rights abuses, in breach of Chapter II (General Policies) and Chapter IV.2 (Human Rights) of the 2023 Guidelines.

### **4. MTI Energy is already contributing and directly linked to human rights abuses**

Even if it does not complete its acquisition, MTI Energy is already contributing to and directly linked to human rights abuses.

Entering negotiations gives support to the junta's claim to be the Government of Myanmar and provides reassurance that investors will ensure the junta can access Yadana revenues even as it commits atrocities. This foreseeably increase the risk of human rights abuses continuing with MTI Energy appearing to have taken no action to mitigate this (such as requiring the Chevron, PTTEP and PTT to refer the issues of whether the junta is the legitimate government to arbitration). Engaging with the junta in this manner makes it more likely that these human rights impacts will continue in breach of Chapter IV.3 (Human Rights) of the 2011 and now 2023 Guidelines. It also fails to respect the rights of people in Myanmar under Chapter II.2 (General Policies).

MTI Energy is also directly linked to human rights abuses by its business relationships. Since the coup began, the junta began misappropriating gas revenues and has relied upon them to fund its atrocities. Any company involved in Myanmar's gas sector that is treating the junta like a government, enabling its access to these revenues and failing to take all practical steps to avoid doing so, is contributing to these human rights abuses. This includes Chevron, PTTEP and PTT through their role in the Yadana project. In signing contracts with these gas companies to step into Chevron's shoes, MTI Energy is directly linking itself to human rights abuses in breach of Chapter IV.3 (Human Rights) of the 2011 Guidelines.



Overall, MTI Energy can only possibly justify its decision to enter Myanmar's gas sector if it considers that it has sufficient leverage to divert gas revenues and intends to use this leverage where Chevron has failed to do so. This could entail establishing, in cooperation with the international community, an escrow account to hold all payments until a legitimate government is in place.<sup>7</sup>

#### **5. MTI Energy has breached OECD guidelines on due diligence, stakeholder engagement and transparency**

Myanmar is experiencing widespread armed conflict and it has been widely documented that the military is committing widespread human rights abuses that include war crimes, crimes against humanity and, according to the Canadian government, genocide against the Rohingya beginning in 2017. Prior to entering agreements with Chevron, in accordance with 2011 Guidelines, MTI Energy should therefore have carried out enhanced due diligence as required by Chapter II.10 (General Policies) and Chapter IV.5 (Human Rights) of the 2011 Guidelines. If it had carried out enhanced due diligence it should have identified that in entering a joint venture with the junta, it would be both directly linked to and contributing to human rights abuses and corruption as set out in this Complaint. MTI Energy should have concluded that treating the junta as a recognized government and investing in the Myanmar's gas sector could not possibly be done in a manner that is responsible and should not have agreed to the acquisition. MTI Energy must therefore have either failed to carry out adequate enhanced due diligence in breach of Chapter II (General Policies) and Chapter IV.5 (Human Rights) of the 2011 Guidelines or ignored its findings.

Illustrating its inadequate due diligence, MTI Energy has, to our knowledge, not meaningfully engaged with relevant stakeholders. This includes community representatives in the project area or project area of influence; Myanmar-based civil society organizations; the Karen National Union (an ERO that controls territory in the vicinity of the Yadana project); or with democratically elected representatives at a national level, including Myanmar's NUG. Not only has MTI Energy not proactively consulted stakeholders – it has ignored them when approached. The Complainants are aware of at least one Myanmar CSO that has sought the views of the company by multiple letters and not received an acknowledgement or response. This is a clear breach of Chapter II.14 (General Policies) of the 2011 Guidelines which required MTI Energy to undertake meaningful stakeholder engagement.

Chapter III (Disclosure) of the 2011 Guidelines requires enterprises to “ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance.” MTI Energy has not done so and, instead, immediately after it was reported that MTI Energy

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<sup>7</sup> It is essential that MTI Energy focuses on outcomes, rather than solely on process. Relevant processes could include lobbying for sanctions on gas revenues, as TotalEnergies claims to have done in contrast with Chevron, which lobbied against them. It could also include supporting any arbitration proceedings commenced by the NUG to divert Yadana revenues away from the junta. These actions would not suffice if revenue continued to reach the junta.



was to purchase Chevron's stake, MTI Energy took its website offline.

### **Request for assessment**

We respectfully request the NCPs undertake an initial assessment and expedite it in light of the deteriorating human rights situation in the country and imminent completion of MTI Energy's acquisition.

If the NCPs consider that this Complaint merits further examination, we encourage the NCPs to offer their good offices immediately, with the aim of resolving the issues raised. If the good offices fail to produce a mutually acceptable solution, we request that the NCPs:

- Conduct their own fact-finding (potentially involving a third-party examination of the issues raised) and/or develop Terms of Reference for a fact-finding report in dialogue with Complainants.
- Reach a determination and make a public statement as to whether MTI Energy has acted in accordance with the OECD Guidelines in regard to the allegations of this Complaint and, where relevant, additional areas of non-compliance with the OECD Guidelines.
- Make recommendations to MTI Energy aimed at bringing its behavior into line with the OECD Guidelines and preventing it from contributing to atrocity crimes, including whether MTI Energy should follow TotalEnergies' lead in supporting sanctions that could prevent it from contributing to human rights atrocities.

If MTI Energy cannot demonstrate how it will divert revenues away from the junta and avoid contributing to atrocity crimes, the UK and Canadian NCPs should share a copy of their final statements with relevant government departments and ensure that such breach of the OECD Guidelines is taken into account in any decisions on whether or not to sanction MOGE, following the lead of the EU and as recommended by the U.N. Special Rapporteur on the Situation of Human Rights in Myanmar and Office of the United Nations High Commissioner for Human Rights.

Should MTI Energy not participate in the NCP process, or do so in bad faith, then the NCPs should also:

- Inform relevant government departments, including those responsible for sanctions policy, of any lack of good faith on the part of MTI Energy.
- Report publicly on MTI Energy's response to the outcomes of the process.

We also request the Canadian NCP apply its powers to inform the Canadian Export Development Agency (Export Development Canada/EDC). The Canadian NCP should communicate its findings on the specific instance to the EDC, share a copy of the final statement and ensure that the non-participation or lack of good faith participation is considered in any decisions by the EDC when considering granting export credit



benefits to MTI Energy or any other company in which its shareholders or directors are materially involved.

## 2. Background

### 2.1 Background on the situation Myanmar

This Complaint is made against the background of widespread armed conflict and humanitarian crisis that has engulfed Myanmar since the military began a coup in February 2021.

In the wake of a comprehensive electoral defeat in November 2020, on 1 February 2021, the military arbitrarily detained Myanmar's president, unlawfully declared a state of emergency and purported to transfer all executive, legislative and judicial authorities to the armed forces commander-in-chief Gen. Min Aung Hlaing. Min Aung Hlaing, who is widely known for his role in orchestrating genocide<sup>8</sup> against the Rohingya, then set up a military body known as State Administration Council (SAC) to administer his unlawfully seized powers.<sup>9</sup>

The Myanmar public responded with nationwide protests and a civil disobedience movement (CDM) with hundreds of thousands of public sector workers going on strike, many continuing to do so now. Myanmar's elected lawmakers then formed a parliamentary body, the Committee Representing Pyidaungsu Hluttaw (CRPH).<sup>10</sup> Following this, the CRPH collaborated with multiple Ethnic Revolutionary Organizations (EOs) opposing the junta to form a National Unity Consultative Council (NUCC)<sup>11</sup> with the aim of building a federal democracy.<sup>12</sup> This marked a previously unseen degree of unity between EOs, which have controlled parts of Myanmar and fought for varying degrees of autonomy since Myanmar's independence, and elected leaders. The NUCC in April 2021 approved a National Unity Government (NUG) that has engaged widely with the international community, seeking recognition as Myanmar's legitimate government.

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<sup>8</sup> Canada's Lower House of Parliament unanimously endorsed the findings of the U.N. Fact Finding Mission on Myanmar and recognized "that these crimes against the Rohingya constitute genocide." "Canada accuses Myanmar of genocide against Rohingya," The Guardian, 20 September 2018. See: <https://www.theguardian.com/world/2018/sep/21/canada-accuses-myanmar-of-genocide-against-rohingya>

<sup>9</sup> In August 2021, Min Aung Hlaing declared a "provisional government" and appointed himself as Prime Minister (see: State Administration Council – Order No. (152/2021): Formation of Provisional Government of the Republic of the Union of Myanmar). He remains the Chairman of the SAC, which is responsible for appointing Ministers to the Provisional Government.

<sup>10</sup> The CRPH website is available at <https://crphmyanmar.org/who-we-are>

<sup>11</sup> The NUCC includes human rights and civil society organizations, leaders of the CDM, activist networks, and ethnic minority political parties. "A New Myanmar Forum Aims to Unite Democratic Forces," United States Institute of Peace, 3 November 2021. See: <https://www.usip.org/publications/2021/11/new-myanmar-forum-aims-unite-democratic-forces>.

<sup>12</sup> See: "Announcement of the National Unity Consultative Council," NUCC, 16 November 2021. The NUCC also abolished the 2008 Myanmar Constitution and released a Federal Democracy Charter.



The United Nations estimates that since February 2021, more than 1.2 million have been displaced and 17.6 million people – nearly one third of the population – are in humanitarian need.<sup>13</sup> Reporting by the Assistance Association for Political Prisoners confirmed that by 4 August 2023, the military had killed at least 3,888 people and over 19,000 remain in detention.<sup>14</sup>

The situation continues to deteriorate. In 2022, Myanmar had more events of violence by state forces targeting civilians domestically than any other country.<sup>15</sup> According to a January 2023 statement by the United Nations High Commissioner for Human Rights, Volker Turk, “despite clear legal obligations for the military to protect civilians in the conduct of hostilities, there has been consistent disregard for the related rules of international law. Far from being spared, civilians have been the actual targets of attacks – victims of targeted and indiscriminate artillery barrages and air strikes, extrajudicial executions, the use of torture, and the burning of whole villages.”<sup>16</sup>

In January 2023, the U.N. Special Rapporteur on the human rights situation in Myanmar, Tom Andrews, released a report setting out “why, under international standards, the junta is not a legitimate government and must not be recognized or engaged with by the international community.”<sup>17</sup> The military’s limited control over parts of the country is decreasing and, following over two years of well-documented atrocity crimes, the last six months have seen the military increasingly target civilians with airstrikes.

## 2.2 Myanmar’s gas sector

Exports of natural gas, principally to Thailand, have long been one of the largest sources of revenue for the Government of Myanmar. Myanmar has four offshore gas projects, including the Yadana project in which MTI Energy is investing. According to June 2021 report by Publish What You Pay:

Companies wanting to engage in Myanmar’s gas sector must enter joint ventures with the MOGE, which is a state-owned enterprise that is effectively a department of the Ministry of Electricity and Energy (MOEE) and has no legal personality of its own. . . .

Each joint venture comprises two parts: the upstream operation

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<sup>13</sup> “Myanmar Humanitarian Update No. 26,” OCHA, 2 February 2023. See: <https://www.ohchr.org/en/press-releases/2023/01/two-years-after-coup-myanmar-faces-unimaginable-regression-says-un-human>

<sup>14</sup> See: Assistance Association for Political Prisoners website at <https://aappb.org/>

<sup>15</sup> “Myanmar: Continued Opposition to the Junta Amid Increasing Civilian Targeting by the Military,” ACLED, 8 February 2023. See: <https://acleddata.com/conflict-watchlist-2023/myanmar/>

<sup>16</sup> Myanmar Humanitarian Update No. 26.

<sup>17</sup> “Myanmar: UN expert’s report highlights junta’s fraudulent claim to legitimacy, urges States to denounce 2023 ‘sham’ elections,” UN Special Rapporteur on the situation of human rights in Myanmar, 31 January 2023. See: <https://www.ohchr.org/en/press-releases/2023/01/myanmar-un-experts-report-highlights-juntas-fraudulent-claim-legitimacy>



undertaken under a production sharing contract (PSC), and gas transportation carried out by an incorporated company with the investors and MOGE as shareholders. Approximately 80% of the gas is exported by pipeline to Thailand or China. Under the PSCs, MOGE acts as the revenue collector for the state's royalties, profit share, and bonuses. It also exercises a right to 15-25% participation in the joint ventures as a "contractor". MOGE and the investors are then shareholders in transport pipelines. MOGE's role in all offshore projects is non-operational.

"Financing the Military in Myanmar: Analysis of Gas Revenues"  
Publish What You Pay (June 2021)<sup>18</sup>

As revenue collector for the state, MOGE receives gas revenue payments on a monthly basis; since the first days of the coup, these revenue payments due to the Government of Myanmar have been seized by the military junta. The revenues were described by the U.N. Special Rapporteur as "the single largest source of revenue to the state."<sup>19</sup> The U.K., U.S. and EU have all stated that payments to Myanmar's state-owned enterprises (SOEs), including MOGE, fund the junta and enable its atrocities. Prior to the coup, the Government of Myanmar estimated that gas revenues would be around US\$1.5 billion per year. This was, however, based on estimates of gas prices prior to the global financial crisis. At the end of 2022, the sales prices published by the Thai government<sup>20</sup> showed that the prices it paid for Myanmar gas had doubled per unit of gas.

### 2.3 The Yadana project

When the coup began, Yadana had the largest output of Myanmar's four gas projects, and was one of, if not the single largest, sources of foreign revenue for the country. In late 2021, monthly Yadana project revenues due to the Government of Myanmar exceeded US\$60 million.<sup>21</sup> In the following months, the global energy crisis meant that the price of Yadana gas substantially increased, peaking in October 2022. As of June 2023, prices remain 45% above those in late 2021.<sup>22</sup>

Since early 2022, Yadana's output has begun an expected decline, but according to

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<sup>18</sup> "Financing the Military in Myanmar: Analysis of Gas Revenues," Publish What You Pay, 9 June 2021. See: <https://www.pwyp.org/pwyp-resources/financing-the-military-in-myanmar-analysis-of-gas-revenues/>

<sup>19</sup> "Report of the Special Rapporteur on the situation of human rights in Myanmar," Tom Andrews, 4 March 2021. See: [https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session46/Documents/A\\_HRC\\_46\\_56.pdf](https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session46/Documents/A_HRC_46_56.pdf)

<sup>20</sup> Data from the Energy Policy and Planning Office, Thai Ministry of Energy. See: <http://www.eppo.go.th/index.php/th/petroleum/gas/ng/price-pool>

<sup>21</sup> As per invoice from TotalEnergies issued "For and on behalf of MOGE, TOTAL, UMOL and PTTEP" seen by EarthRights International.

<sup>22</sup> Data from the Energy Policy and Planning Office, Thai Ministry of Energy. See: <https://www.eppo.go.th/index.php/th/petroleum/gas/ng/price-pool>



government forecasts Yadana is still expected to provide over 41% of Myanmar's output in 2023-24.<sup>23</sup> Historically, about 70-80% of the gas output has been exported to Thailand, with the remainder used domestically for power generation and other uses. Data published by the Thai government shows that monthly exports to Thailand remained constant in 2022, suggesting that as Yadana production volume declined, the junta was choosing to sacrifice domestic energy security in exchange for continued access to export revenues. Exports to Thailand then declined in 2023, with average daily volumes declining about 32% compared to 2022. The increase in price, however, appears to have more than offset the fall in production, suggesting that revenues due to the Government of Myanmar from Yadana remain above US\$60 million per month.

When the coup began, France's TotalEnergies was the largest investor in and operator of Yadana. The remaining investors were Chevron Corporation (registered in the U.S.), PTTEP and MOGE. The exported gas is sold to PTTEP's parent company, PTT, of which the Thai Ministry of Finance is the majority shareholder.

TotalEnergies announced in 2022<sup>24</sup> that it would exit the project and gift its stake to the remaining partners, leaving Chevron with a 41.1% share (held through its subsidiary Unocal Myanmar Offshore Co. Ltd., registered in Bermuda, a British Overseas Territory), PTTEP with 37.1% and MOGE with 21.8%.<sup>25</sup> Chevron also announced at this time that it planned to exit, and PTTEP took over as the operator.

A report by EarthRights International in March 2022<sup>26</sup> examined gas revenue flows and publicly disclosed contracts from the Yadana project<sup>27</sup> and applied the standards set out in the OECD Guidelines as well as the U.N. Guiding Principles on Business and Human Rights. It concluded that Chevron and TotalEnergies were:

- contributing to and complicit in the atrocity crimes of the junta, as defined by OECD and U.N. standards;
- failing to use their leverage to take practical steps that could have diverted revenues away from the junta; and

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<sup>23</sup> "Oil & gas section Budget Brief and Speech FY 2020/21," Government of Myanmar. Seen by EarthRights International.

<sup>24</sup> "TotalEnergies withdraws from Myanmar," TotalEnergies, 21 January 2021. See: <https://totalenergies.com/media/news/press-releases/totalenergies-withdraws-myanmar>

<sup>25</sup> "Thailand's PTTEP confirms takeover of Myanmar gas field," Offshore Technology, 15 March 2022. See: <https://www.offshore-technology.com/news/thailands-pttep-confirms-takeover-of-myanmar-gas-field/>

<sup>26</sup> "Briefer: How TotalEnergies and Chevron Can Divest Responsibly from Myanmar," EarthRights International, 21 March 2022. See: <https://earthrights.org/publication/briefer-how-totalenergies-and-chevron-can-divest-responsibly-from-myanmar/>

<sup>27</sup> These were disclosed in litigation in the U.S. courts against Unocal (later acquired by Chevron) for its role in human rights abuses against communities living along the Yadana pipeline committed by the Myanmar military.



- spreading disinformation about their ability to divert gas revenues and the impacts of doing so.<sup>28</sup>

#### 2.4 MTI Energy's expected role in the Yadana project

According to public reporting,<sup>29</sup> Chevron has agreed to sell its 41.1% stake in Yadana to Canada's MTI Energy through MTI Energy's subsidiary, Et Martem Holdings (registered in Bermuda). MTI Energy will become the largest shareholder in the Yadana gas project, with a 41.1% interest in the production of gas under the Production Sharing Contract and a 41.1% share in the Moattama Gas Pipeline Company (MGTC) which owns the gas export pipeline to Thailand. The value and terms of the deal have not been disclosed, but Chevron has stated that is expected "close in the second half of 2023."<sup>30</sup> As Yadana is a joint venture, MTI Energy will be entering agreements with Chevron, PTTEP and MOGE.<sup>31</sup> According to the Yadana contracts, Chevron can only transfer its rights and obligations to MTI Energy if it has first offered them to PTTEP and MOGE on the same terms as those offered to MTI Energy and with the consent of the Government of Myanmar.<sup>32</sup>

Assuming that MTI Energy takes on the rights and obligations of Chevron and that the relevant contractual terms have not been amended, it will have a substantial role overseeing the operation of both the unincorporated joint venture that operates the gas

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<sup>28</sup> "Myanmar Fact Sheet: How Big Oil in Myanmar Uses the Language of Human Rights to Justify Complicity in Atrocity Crimes", EarthRights International, 30 November 2021. See: <https://earthrights.org/publication/myanmar-fact-sheet>. This included asserting that they could not divert revenues away from the junta, with TotalEnergies describing it as "materially impossible," and that they were obliged to continue making or facilitating payments to accounts controlled by the military junta. They also misleadingly asserted that Thailand was reliant on Myanmar gas for its energy security. Additional information on this can be found "ANALYSIS: Impacts of a Disruption of Myanmar Gas Imports on Thailand's Energy Security," EarthRights International, January 2023. See: <https://earthrights.org/publication/minimal-impact-the-effects-on-thailands-energy-security-of-disrupting-myanmar-gas-imports/>.

<sup>29</sup> "Chevron (CVX) Sells Yadana's 41.1% Gas Stake to MTI in Myanmar," Nasdaq, 10 February 2023. See: <https://www.nasdaq.com/articles/chevron-cvx-sells-yadanas-41.1-gas-stake-to-mti-in-myanmar>

<sup>30</sup> "Energy companies got rid of their stakes in a Myanmar gas field accused of funding war crimes. So why did a Canadian-owned firm buy in?" Toronto Star, 12 May 2023. See: <https://www.thestar.com/news/investigations/2023/05/12/energy-companies-got-rid-of-their-stakes-in-a-myanmar-gas-field-accused-of-funding-war-crimes-so-why-did-a-canadian-owned-firm-buy-in.html>

<sup>31</sup> Documents disclosed as part of EarthRights litigation against Unocal, since acquired by Chevron, in relation to the Yadana project included many of the contracts that underpin the project. These include the Production Sharing Contract, Production Operating Agreement, Gas Pipeline Operating Agreement and the pipeline company Shareholders Agreement.

<sup>32</sup> TotalEnergies exited the Yadana project by "withdrawing" which is a process provided for at Section 13 of the Production Operating Agreement in which it gifts its shareholding to the other parties to the joint venture. Chevron is instead selling its stake which must be done accordance with Section 12 of the Production Operating Agreement. The Production Operating Agreement available at: <https://earthrights.org/case/doe-v-unocal/>



field and the incorporated company<sup>33</sup> that manages the export pipeline. PTTEP, as operator, will be responsible for the day-to-day operations, but MTI Energy, as the largest shareholder, will have substantial oversight powers.

MTI Energy will be on the Operating Committee which is responsible for the “overall supervision and direction of Joint Operations” to extract the gas.<sup>34</sup> Specific major decisions require the unanimous consent of all three members of the Operating Committee, with all other matters requiring the approval of an aggregate participating interest of 60%. MTI Energy will have a share of 41.1%, enabling it to veto many decisions.<sup>35</sup> Similar provisions apply to the agreement for the operation of the export pipeline<sup>36</sup> and all decisions made by the shareholders to MGTC.<sup>37</sup> This may include the overall volume of gas to be exported to Thailand and therefore the overall revenues.

An overview of how MOGE operates<sup>38</sup> and revenues flows it receives from gas projects, including Yadana, are set out in the most recent report of the Myanmar Extractive Industries Transparency Initiative (EITI):<sup>39</sup>

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<sup>33</sup> The pipeline is managed by the Moattama Gas Transportation Company (MGTC), whose shareholding in the Shareholders’ Contract Agreement is the same as the parties’ interests under the Production Sharing Contract, both available at: <https://earthrights.org/case/doe-v-unocal/>.

<sup>34</sup> See Article 5 of the Production Operating Agreement available at: <https://earthrights.org/case/doe-v-unocal/>.

<sup>35</sup> This is set out in Article 5.9 of the Production Operating Agreement which also allows the Operator to proceed with tasks to implement the Minimum Work Obligations without the approval of the Operating Committee.

<sup>36</sup> See Article 5 of the Gas Pipeline Operating Agreement available at: <https://earthrights.org/case/doe-v-unocal/#documentsff69-1a905f26-f4b6>

<sup>37</sup> See Article 9.3 of the 1995 Shareholders Contract Agreement available at: <https://earthrights.org/case/doe-v-unocal/>

<sup>38</sup> MOGE is responsible for the exploration/production and land transmission of oil and gas through an onshore transmission pipeline network and also for overseeing Production Sharing Contracts (PSCs) that have been entered into with private investors to explore, develop or exploit the oil and gas. In addition, the MOEE organizational chart includes the Oil and Gas Planning Department (OGPD) which is responsible for energy policy formulation, coordination and the discussion of Energy Development Programmes. OGPD is also responsible with MOGE for tendering oil and gas blocks (onshore, shallow water offshore, deep water offshore) and for managing contracts, exploration and production and sale of oil and gas. In this sense, MOGE and OGPD have both a regulator and an operator role.

<sup>39</sup> “Myanmar Extractive Industries Transparency Initiative Report – 2017-18,” BDO LLP, 2019. See: [https://myanmareiti.org/sites/myanmareiti.org/files/publication\\_docs/meiti\\_reconciliation\\_report\\_2017-2018\\_final\\_signed.pdf](https://myanmareiti.org/sites/myanmareiti.org/files/publication_docs/meiti_reconciliation_report_2017-2018_final_signed.pdf)





the parties to the Production Sharing Contract stating how much money the buyer, PTT, should pay and to whom. MTI Energy will ultimately be responsible for some of these payments once its acquisition completes. PTTEP will give these payment orders as MTI Energy's representative. PTT will be transferring sums it owes to MTI Energy instead to accounts controlled by the junta as ordered to by PTTEP on MTI Energy's behalf.<sup>44</sup> The sums paid to the junta should only be paid to a recognized and legitimate Government of Myanmar or its agent, MOGE.

PTT will also make payments, again on the orders of PTTEP acting as MTI Energy's representative, to MGTC for the pipeline fees it charges for exporting the gas to Thailand. MGTC can then make dividend payments to its shareholders, including MOGE. MTI Energy can stop all dividend payments (as these require the consent of all three shareholders in MGTC).<sup>45</sup> In 2017-18, these were in the region of US\$40 million.<sup>46</sup> TotalEnergies and Chevron refused consent for these payments following pressure from civil society.<sup>47</sup>

Other gas companies, including TotalEnergies and Chevron, are likely also in breach of OECD Guidelines. MTI Energy, however, is in a particularly egregious position. While these companies are exiting, MTI Energy is choosing to enter Myanmar's gas sector with knowledge that gas revenues fund the military junta and its atrocities. While MTI Energy will still have considerable leverage, if it completes its acquisition, it will have less than both TotalEnergies and Chevron. TotalEnergies had leverage as the operator of the project. Chevron and TotalEnergies, which originally entered the Yadana project through contracts with the recognized Government of Myanmar, both had the option to declare force majeure based on the coup, and also to withhold revenues from the military junta, which is not the government. While neither company used these forms of leverage, MTI Energy's options will be more limited. It is not the operator, and it may be more difficult for it to later assert that the junta is not the Government of Myanmar when it will be entering the project treating the junta as the government.

### **3. Criteria for making the initial assessment**

We respectfully submit that this Complaint raises bona fide issues of violations of the

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<sup>44</sup> In a response to the 2021 Publish What You Pay report, TotalEnergies sought to deflect responsibility for these payments by stating that they came from the buyer PTT, but TotalEnergies' response confirmed transfer from PTT to MOGE were of sums that PTT owed to Chevron and Total which they in turn owned to the Government of Myanmar.

<sup>45</sup> See sections 9.3 (b) and (c) of the 1995 Shareholders Contract Agreement available at: <https://earthrights.org/case/doe-v-unocal/>

<sup>46</sup> The 2017-18 Myanmar EITI report is available at [https://myanmareiti.org/sites/myanmareiti.org/files/publication\\_docs/meiti\\_reconciliation\\_report\\_2017-2018\\_final\\_signed.pdf](https://myanmareiti.org/sites/myanmareiti.org/files/publication_docs/meiti_reconciliation_report_2017-2018_final_signed.pdf)

<sup>47</sup> "Total and Chevron suspend gasfield dividends to Myanmar junta" Financial Times, 26 May 2021. See: <https://www.ft.com/content/3ccb846b-e0bd-4e7f-8055-971b930ee130>



OECD Guidelines. The following section addresses the criteria that NCPs are advised to consider when making an initial assessment, as specified in the commentary to the implementation procedures associated with the OECD Guidelines.<sup>48</sup>

### 3.1 The parties concerned and the Complainants' interest in the matter

#### 3.1.1 The Multinational Enterprise: MTI Energy Inc. and its subsidiary Et Martem Holdings

MTI Energy Inc. is an MNE with responsibilities under the OECD Guidelines. MTI Energy Inc., based in Edmonton, Alberta, is a subsidiary of oilfield equipment manufacturer Mitey Titan Industries and located at the same address. An Alberta registry search recorded that the company has four directors, including Toronto corporate lawyer with a history of fundraising for the Canadian Conservative party, Ralph Lean, and Adewale Olorunsola, who heads the Nigerian-Canadian merchant bank, Rein Capital.<sup>49</sup>

MTI Energy is purchasing Chevron's stake in Yadana through its subsidiary Et Martem Holdings, registered in Bermuda (British Overseas Territory).

Because of the links to both Canada and the UK (through British Overseas Territory), both the Canadian and the UK NCPs have jurisdiction.

#### 3.1.2 The Complainants

The details of the Myanmar CSO that is jointly submitting this Complaint will be shared with the NCPs on the condition that this information will be kept confidential.

EarthRights International is a nongovernmental, nonprofit organization headquartered in the United States that specializes in fact-finding, legal actions against perpetrators of environmental and human rights abuses, training of grassroots and community leaders, and advocacy campaigns. Through these strategies, EarthRights seeks to promote and protect human rights and the environment in the communities where we work. EarthRights has been working in Myanmar since its founding in 1995, investigating human rights abuses related to the Yadana pipeline. EarthRights has published multiple reports on the Yadana project beginning with "Total Denial" in 1996, and represented victims of human rights abuses on the project in the U.S. lawsuit *Doe v. Unocal Corp.*

### 3.2 The issues raised are material and substantiated

This Complaint asserts that MTI Energy is already likely contributing to and at least directly linked to adverse human rights impacts and, if it completes its acquisition, will

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<sup>48</sup> OECD Guidelines, II. Implementation Procedures of the OECD Guidelines, Commentary on the Procedural Guidance for NCPs, paragraph 25.

<sup>49</sup> Government of Alberta corporation search, 23 January 2023. See: [https://global-uploads.webflow.com/5e691d0b7de02f1fd6919876/63d8e40bba1878b29e8cd5c5\\_MTI\\_Energy\\_Inc\\_Search.pdf](https://global-uploads.webflow.com/5e691d0b7de02f1fd6919876/63d8e40bba1878b29e8cd5c5_MTI_Energy_Inc_Search.pdf)



be contributing to human rights impacts including crimes against humanity and war crimes. The Complaint also raises concerns over whether MTI Energy is improperly involved in political activity, participating in corruption, and has failed to conduct due diligence to identify, prevent and mitigate adverse impacts, carry out stakeholder engagement or act transparently as required by OECD Guidelines.

### 3.2.1 Improper involvement in political activities

Chapter II.A15 of the 2011 Guidelines state that MNEs should “Abstain from any improper involvement in local political activities.” The Guidelines have no substantial commentary on what constitutes improper involvement in political activities, with some limited commentary related to political contributions.<sup>50</sup> Nonetheless, it seems clear that any definition of improper political activities would encompass MTI’s actions here.

MTI’s actions as an MNE entering contracts with the junta to extract resources from a country in a state of civil war government is clearly an improper political act. MTI pre-empted the international community, including the governments of Canada and the U.K., neither of which has recognized the military junta or the SAC as the Government of Myanmar. Ignoring the current international consensus, MTI Energy is effectively engaging in its own foreign policy, deciding that the military junta had cemented the coup and met the standards for recognition as a government.

As set out above, MOGE is a participant in the Yadana gas project, both as the revenue collector for the government and as a joint venturer. Under Myanmar law, MOGE is not a company and is in fact a government agency within the Ministry of Energy and Electricity (MOEE). Early in the 2021 coup, the junta seized control of MOEE and of MOGE’s offices. In entering into contracts with MOGE after the coup, and crediting the junta’s control of the agency, MTI Energy is making a political decision to treat the junta as the Government of Myanmar and to reject the competing claims of the NUG, in breach of the OECD Guidelines.

The Yadana contractual documents also specifically require the consent of the Government of Myanmar to any transfer of Chevron’s interest, without which MTI will have no rights under the Production Sharing Contract.<sup>51</sup> MTI Energy appears to be treating consent by the SAC as consent of the Government of Myanmar, again improperly making the decision to recognize the junta as the government.

By signing contracts with officials appointed by the junta and its SAC to the MOEE and

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<sup>50</sup> The commentary on Chapter VII – Combating Bribery and Other Forms of Corruption requires MNEs to reform to “Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management.”

<sup>51</sup> See section 12.1(D) of the Production Operating Agreement available at: <https://earthrights.org/case/doe-v-unocal/>



MOGE<sup>52</sup> in order to enter a joint venture with MOGE, as representative of the Government of Myanmar, MTI Energy is treating the junta as the government. Notably, officials appointed by the junta have also been sanctioned by the U.S., including most members of the SAC and the managing director of MOGE.<sup>53</sup>

The U.N. Special Rapporteur has set out “why, under international standards, the junta is not a legitimate government and must not be recognized or engaged with by the international community.”<sup>54</sup> This report was launched with following an introduction from Ambassador Robert Rae, Permanent Representative of Canada to the United Nations and Chair of the Group of Friends of Myanmar. It sets out in detail why the SAC is not the Government of Myanmar. In summary, the U.N. Special Rapporteur found that the junta lacks constitutional legitimacy, democratic legitimacy, and effective control. The military failed to follow Myanmar’s 2008 Constitution when it declared a state of emergency and detained the president. Min Aung Hlaing, the Commander in Chief, has never run for public office, and the military’s proxy party, the USDP, won only 33 of the 476 contested seats in the Union Parliament while the ruling National League for Democracy won a landslide majority in an election widely reported a being largely free and fair.

In terms of effective control, the U.N. Special Rapporteur concluded that:

- The SAC lacks control over all or most of the territory of Myanmar.
- Peoples Defense Forces, many acting under NUG and EAOs, are effectively

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<sup>52</sup> Following the attempted coup on 1 February 2021, the State Administrative Council (SAC) – the illegal military junta’s governance vehicle – appointed U Aung Than Oo as the Minister in charge of MOEE. With the retirement U Aung Than Oo, the Ministry of Electricity and Energy was reorganized into the Ministry of Electric Power and the Ministry of Energy and U Thaung Han was jointly appointed as the Union Minister for both ministries. Since 5 August 2022, U Myo Myint Oo is the SAC-appointed Union Minister for Energy. Since 31 January 2023, U Myo Myint Oo has been sanctioned by the U.S. See: “SAC appoints U Myo Myint Oo as Union Minister for Energy,” Eleven Myanmar, 6 August 2022 at: <https://elevenmyanmar.com/news/sac-appoints-u-myo-myint-oo-as-union-minister-for-energy>

<sup>53</sup> According to the January 2023 US sanctions designations: “Since the 2021 coup, Burma’s military regime has continued to benefit from the substantial revenue provided by the production and export of oil and gas, which generates over US\$1 billion in revenue annually and is the single largest source of foreign currency revenue for the regime. Burma’s Ministry of Energy is controlled by the State Administration Council, which was designated on April 21, 2021, pursuant to E.O. 14014; manages the energy sector; and controls the SOEs involved in the production of oil and gas, including the Myanma Oil and Gas Enterprise (MOGE). Myo Myint Oo is the Union Minister of Energy. The Union Minister of Energy represents the Government of Burma in international and domestic energy sector engagements, while also managing the state-owned entities involved in the production and export of oil and gas. Aung Min is the Managing Director and Than Min is the Deputy Managing Director of MOGE. As managing director and deputy managing director, both individuals are directly involved in the day-to-day operations and management of the regime’s single largest revenue generating SOE. Myo Myint Oo, Aung Min, and Than Min are being designated pursuant to E.O. 14014 for being or having been leaders or officials of the Government of Burma on or after February 2, 2021.” “Treasury Sanctions Officials and Military-Affiliated Cronies in Burma Two Years after Military Coup,” U.S. Treasury, 31 January 2023 at: <https://home.treasury.gov/news/press-releases/jy1233>

<sup>54</sup> “Myanmar: UN expert’s report highlights junta’s fraudulent claim to legitimacy, urges States to denounce 2023 ‘sham’ elections,” UN Special Rapporteur on the situation of human rights in Myanmar.



challenging the Myanmar military and expanding control.

- The SAC has no claim to habitual obedience of the masses, evidenced by widespread armed resistance to its attempted rule, protests, strikes, and boycotts.
- The SAC's sustainability and its permanence are gravely in doubt, due to the widespread conflicts and failure to administer the country.
- The SAC has manifestly failed to abide by its international obligations.

The international community's non-recognition of the junta is exemplified by its refusal to allow the junta to appoint a representative to the U.N. General Assembly, instead allowing the current Ambassador, Kyaw Moe Tun, who now answers to the NUG, to remain in his post.<sup>55</sup>

The U.N. Special Rapporteur also noted that "Several critical legal and political ramifications flow from the formal recognition of a government, including . . . (3) the ability to enter into commercial contracts and treaty obligations on behalf of the State, and (4) the right to access and sell state property, including accessing foreign exchange reserves and natural resource leases and concessions."

The U.N. Special Rapporteur also concluded that "[t]he NUG provides the international community with a credible alternative to the SAC. Applying the same international standards of legitimacy used to examine the legitimacy claims of the SAC, this paper finds that the NUG has a far stronger claim to legitimacy."

In relation to MOGE and associated revenues, the NUG has taken numerous steps to assert its claim:

- On 5 March 2021, the CRPH wrote to gas companies operating in Myanmar demanding that gas revenues be diverted to escrow accounts that the junta could not access.
- On 1 December 2021, the NUG dismissed the SAC's Managing Director of MOGE, rescinding his power of representation of MOGE, and repeating that the NUG's Deputy Minister of the MOEE was now the Managing Director of MOGE.
- On 23 January 2022, the NUG issued a statement highlighting that the junta misappropriating gas revenues and requiring all payments to be made to accounts specified by the NUG's Deputy Minister of the MOEE.
- In March 2023, it was reported that the NUG had threatened to take PTTEP

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<sup>55</sup> "Myanmar will not address world leaders at UN General Assembly" Al Jazeera, 25 September 2021. See: <https://www.aljazeera.com/news/2021/9/25/myanmar-will-not-address-world-leaders-at-u>



to arbitration<sup>56</sup> if it continued to channel revenues to the junta.

Nonetheless, in proceeding with participation in the Yadana project, MTI Energy has not engaged with representatives of MOGE or MOEE appointed by the NUG. In crediting the SAC's representatives rather than the NUG's, MTI Energy is making an improper political decision contrary to the current international consensus.

MTI Energy's decision to treat the junta as a legitimate government is an improperly political act, especially when the NUG holds the position of Myanmar's Ambassador to the U.N. and when the U.N. Special Rapporteur considers the NUG to have a better claim to be the Government of Myanmar. Corporations should not determine who to recognize as a government. MTI Energy is, however, choosing to enter contracts where it must determine which of two parties, if either, is correctly asserting that it is the Government of Myanmar. The appropriate course of action in such a case is to resolve the dispute through legal proceedings, as other companies in similarly situations have done.<sup>57</sup> MTI Energy's approach violates the OECD Guidelines.

### 3.2.2. Engaging in corruption and breach of Myanmar law

Paragraph 74 of the commentary on Combating Bribery, Bribe Solicitation and Extortion of the 2011 Guidelines commentary states that:

Bribery and corruption are damaging to democratic institutions and the governance of corporations. They discourage investment and distort international competitive conditions. In particular, the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social and environmental welfare, and it impedes efforts to reduce poverty. Enterprises have an important role to play in combating these practices.

The 2023 Guidelines specifically state that MNEs should not "engage in any act of corruption." While the Guidelines do not define corruption, the World Bank defines corruption as "the abuse of public office for private gain," which "covers a wide range of behavior, from bribery to theft of public funds."<sup>58</sup>

As set out above, the junta is not the Government of Myanmar and entering a joint venture with it assists its misappropriation of Myanmar's state assets, which is a form

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<sup>56</sup> "NUG requests cooperation from Thai oil and gas company, warns of potential legal action," Myanmar Now, 22 March 2023. See: <https://myanmar-now.org/en/news/nug-requests-cooperation-from-thai-oil-and-gas-company-warns-of-potential-legal-action/>

<sup>57</sup> For example, Deutsche Bank resorted to legal proceedings in the U.K. when two parties (appointed by Juan Guaidó and Nicolas Maduro who both claimed to be the Head of State) claimed to represent the Central Bank of Venezuela and demanded access to assets of the Central Bank held by Deutsche Bank. See: "Battle for control of Venezuelan gold," DW, 8 April 2022 at: "<https://www.dw.com/en/venezuelas-gold-saga-set-to-continue-despite-london-ruling/a-62695909>

<sup>58</sup> "Anticorruption Fact Sheet," The World Bank.



of corruption in breach of Chapter VII of the 2011 Guidelines. MTI Energy's breach will become more severe if it completes its acquisition, both because it will be facilitating payments to the junta and because the 2023 Guidelines' provisions on Combating Bribery and Other Forms of Corruption appear broader.

Even if MTI Energy could justify its decision to treat the junta as a legitimate government, the Myanmar military has a long history of misappropriating revenues from MOGE and MTI Energy will be a collaborator in this corruption. From 2016 to 2020, the civilian-led, democratically elected government was starting to assert control over gas and other extractive revenues, so companies could claim that entering agreements with MOGE constituted responsible investment in line with OECD Guidelines. Following the coup, this is impossible and making payments to MOGE accounts controlled by the junta almost inevitably will result in corruption that breaches Chapter VII of the 2023 Guidelines.

MTI Energy is entering a joint venture with the junta, as noted above, by electing to treat it as the Government of Myanmar. MTI Energy has signed, or will sign, contracts with representatives that either are, or are overseen by, appointees of the junta. These contracts set out a joint venture in which MTI Energy, PTTEP and the Government of Myanmar will extract and sell Myanmar's state assets – assets that the junta will be stealing. As the largest shareholder, MTI Energy will have a substantial role in overseeing Yadana, authorizing decisions of the various operations committees and shareholders meetings over which, unless the contracts have been varied, it holds a veto power. MTI Energy will have cash liabilities to the Government of Myanmar. MTI Energy will meet these liabilities by allowing funds to be received by the junta, facilitating its theft of public funds.

The OECD Guidance states that paying a single bribe to a government official directly causes an adverse impact in breach of the OECD Guidelines.<sup>59</sup> MTI Energy is entering a scheme in which the junta is abusing public office for its own private gain. This is a scheme involving the illegal seizure of public offices and the misappropriation of public funds and resources, which constitutes corruption on a massive scale. MTI Energy is engaging in this despite warnings from the U.N. Special Rapporteur, who has specifically stated that the junta is not the government, which negates its ability to enter commercial contracts on behalf of the government. Even prior to completing its acquisition, negotiating and signing contracts for such a scheme appears to be a form of corruption under Chapter VII of the 2011 Guidelines. If MTI Energy starts enabling payments, this will be a breach of Chapter VII of the 2023 Guidelines.

MTI Energy is also in breach of Chapter 1.2 of both the 2011 and the 2023 Guidelines which states that "Obeying domestic laws is the first obligation of enterprises." Signing agreements with the junta and making these payments are both a breach of Myanmar law. In particular they are either committing or aiding and abetting:

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<sup>59</sup> OECD Due Diligence Guidance for Responsible Business Conduct, page 70.



- Breach of trust under Section 405 of the Myanmar Penal Code – which applies to anyone who “being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates . . . that property.”
- Misappropriation of property under Section 403 of the Myanmar Penal Code.
- Under Section 170 of the Myanmar Penal Code, “pretend[ing] to hold any particular office as a public servant . . . and in such assumed character do[ing] or attempt[ing] to do any act under color of such office.”
- Theft under Section 378 of the Myanmar Penal Code.
- Corruption under Section 3(a) of the Myanmar Anti-Corruption Law, which prohibits abusing a position to perform acts including giving benefits to any other person or organization, and also prohibits acts that cause “loss of, or damage to, State-owned finance or property” by violating rules “while managing State-owned finance in government departments.”

Even if MTI could justify its decision to treat the junta as the Government of Myanmar and its appointees as government servants, if MTI had conducted adequate risk-based due diligence as required by the OECD Guidelines, it should have identified that revenues due from MTI Energy to MOGE each month will be lost to corruption. Myanmar is recognized as a high-risk jurisdiction. In October 2022, Myanmar was added to the Financial Action Task Force’s “blacklist,” joining Iran and North Korea as countries with significant strategic deficiencies in their regimes to counter money laundering, terrorist financing, and financing of weapons proliferation.”<sup>60</sup>

The OECD has already recognized that state-owned enterprises create corruption risks, with its 2018 report “State-Owned Enterprises and Corruption – What Are the Risks and What Can Be Done?”<sup>61</sup> In an advisory dated 26 January 2022, the U.S. Treasury noted that “Burma’s SOEs [including MOGE] not only generate revenue for a military regime that is responsible for lethal attacks against the people of Burma, but many of them also are subject to allegations of corruption.”

The military has a history of using exchange rate manipulation to misappropriate gas revenues.<sup>62</sup> Since the coup began, the junta has again started manipulating exchange

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<sup>60</sup> “High-Risk Jurisdictions subject to a Call for Action – 21 October 2022,” Financial Action Task Force, 21 October 2022. See: <https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Call-for-action-october-2022.html>

<sup>61</sup> “State-Owned Enterprises and Corruption - What Are the Risks and What Can Be Done?” OECD, 27 Aug 2018. See: [https://www.oecd-ilibrary.org/governance/state-owned-enterprises-and-corruption/the-risk-of-corruption-in-and-around-state-owned-enterprises-what-do-we-know\\_9789264303058-5-en](https://www.oecd-ilibrary.org/governance/state-owned-enterprises-and-corruption/the-risk-of-corruption-in-and-around-state-owned-enterprises-what-do-we-know_9789264303058-5-en)

<sup>62</sup> “Total Impact: The Human Rights, Environmental, and Financial Impacts of Total and Chevron’s Yadana Gas Project in Military-Ruled Burma (Myanmar),” EarthRights International, 10 September 2009 at p. 43. See: <https://earthrights.org/publication/total-impact/>



rates.<sup>63</sup>

Myanmar's laws providing for SOEs were enacted by a military junta in 1989, and provide no mechanisms for SOE governance or oversight.<sup>64</sup> As of 31 March 2018, MOGE held US\$4.75 billion of funds in offshore accounts under the control of military appointees who refused to provide audited accounts to lawmakers. It is thought that these funds were used "to spread benefits to a network of private political patrons."<sup>65</sup> The NLD government sought to exercise control over these funds prior to the coup,<sup>66</sup> but the military has reversed many NLD reforms and can be expected to renew its misappropriation. In addition, Myanmar was suspended from the Myanmar from the Extractive Industries Transparency Initiative (EITI) in February 2021,<sup>67</sup> the only form of oversight and accountability in the Myanmar extractive sector.

Overall, there is no accountability for revenues paid by extractive companies operating in Myanmar and a long history of the Myanmar military engaging in corrupt practices and misappropriating public funds generated by this sector. MTI Energy is entering the Myanmar gas sector at a time when the rule of law and oversight of the sector has never been weaker and the military's need for foreign revenues has never been greater. It is inevitable that any gas revenues, which represent public funds, that MTI Energy allows to reach accounts controlled by the junta will be misappropriated and foreseeably used to contribute to significant acts of corruption. Basic due diligence would have made this clear suggesting that MTI Energy is likely knowingly engaging in an act of corruption to enable its own financial gain in breach of Chapter VII of the 2023 Guidelines.

### 3.2.3. Contributing to human rights abuses

Chapter IV (Human Rights) provides that MNEs should,

within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they

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<sup>63</sup> "Junta announces limited exemptions for foreign currency exchange order," Myanmar Now, 22 April 2022. See: <https://myanmar-now.org/en/news/junta-announces-limited-exemptions-for-foreign-currency-exchange-order/>

<sup>64</sup> Andrew Bauer, Arkar Hein, Khin Saw Htay, Matthew Hamilton, and Paul Shortell, "State-owned Economic Enterprise Reform in Myanmar: The Case of Natural Resource Enterprises," Natural Resource Governance Institute, 2018, p. 8. See: [https://resourcegovernance.org/sites/default/files/documents/state-owned-economic-enterprise-reform-in-myanmar\\_0.pdf](https://resourcegovernance.org/sites/default/files/documents/state-owned-economic-enterprise-reform-in-myanmar_0.pdf)

<sup>65</sup> Patrick R.P. Heller and Lorenzo Delesgues, "Gilded Gatekeepers: Myanmar's State-Owned Oil, Gas and Mining Enterprises," The National Resource Governance Institute, 2016, p. 2. See: [https://resourcegovernance.org/sites/default/files/documents/nrgi\\_myanmar-state-owned-enterprises\\_full-report.pdf](https://resourcegovernance.org/sites/default/files/documents/nrgi_myanmar-state-owned-enterprises_full-report.pdf)

<sup>66</sup> "Other Accounts' of Union Govt Ministries, Agencies to Be Scrapped," The Irrawaddy, 20 June 2019. See: <https://www.irrawaddy.com/news/accounts-union-govt-ministries-agencies-scrapped.html>

<sup>67</sup> "The EITI Board has temporarily suspended Myanmar," EITI Board, 21 February 2021. See: <https://eiti.org/board-decision/2021-05>



operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.

According to the 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>68</sup> Similarly, the 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.

MTI Energy is investing in a project in which, as the largest shareholder, it will approve decisions that enable the project to move forward and ensure that junta has access to revenues due to the Government of Myanmar. Each month, PTTEP will act as MTI Energy’s representative and order the gas buyer, PTT, to transfer millions of dollars owed by PTT to MTI Energy directly to the junta to meet MTI Energy’s cash liabilities to the Government of Myanmar. U.N. bodies, the U.S., EU and U.K. have all stated that these revenues enable the junta to fund its widely documented human rights abuses, including war crimes and crimes against humanity. If MTI Energy completes its acquisition, it will therefore be contributing to human rights abuses in breach of Chapter IV of the 2023 Guidelines.

If MTI Energy completes its acquisition, it will substantially increase the risk of adverse impacts continuing. Since the first days of the coup, monthly gas revenue payments due to the Government of Myanmar that flow through MOGE have been seized by the military junta. The revenues were described by the U.N. Special Rapporteur as “the single largest source of revenue to the state.”<sup>69</sup> The U.S.<sup>70</sup> and U.K.<sup>71</sup> governments have

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<sup>68</sup> OECD Due Diligence Guidance for Responsible Business Conduct, page 70.

<sup>69</sup> “Report of the Special Rapporteur on the situation of human rights in Myanmar,” Tom Andrews, 4 March 2021.

<sup>70</sup> “Treasury Sanctions Key Timber and Pearl Enterprises in Burma,” U.S. Department of the Treasury, Media Statement: 25 February 2021. See: <https://home.treasury.gov/news/press-releases/jy0138>

<sup>71</sup> “UK announces sanctions on gemstone company linked to the military regime in Myanmar,” U.K. Foreign, Commonwealth & Development Office, 21 May 2021. See:



stated that payments to state owned enterprises (such as MOGE) in the extractives sector fund the military and its atrocities. The EU has sanctioned MOGE and specifically stated that MOGE is “controlled by and generates revenue for the Tatmadaw [the Myanmar military], therefore contributing to its capabilities,”<sup>72</sup> and Canada has sanctioned three Myanmar SOEs, again acknowledging that revenues to SOEs such as MOGE fund the junta.<sup>73</sup> In January 2023, the U.S. sanctioned officials involved in the operation of MOGE<sup>74</sup> and affirmed that MOGE represents the military regime’s single largest revenue generating state-owned enterprise.

Yadana is the largest of Myanmar’s gas projects and, according to government forecasts was expected to provide over 41% of Myanmar’s output in 2023-24.<sup>75</sup> As set out above:

- Monthly revenues due from the Yadana project to the Government of Myanmar exceed US\$60 million per month in 2021, prior to gas prices under the Yadana contract substantially increasing.
- Some, if not all, of these revenues are cash liabilities from the investors to the Government of Myanmar.
- 41.1% of the revenues in cash will be due from MTI Energy.
- As the largest shareholder, MTI Energy has major decision-making power under various operating agreements and shareholders agreements that allow the project to keep operating.

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. Hard currency also enables the junta to maintain its vital patronage networks. Other foreign revenue streams have decreased, increasing the importance of gas revenues.<sup>76</sup>

The adverse impacts of the Yadana project are highly foreseeable, with clear statements from numerous governments, multiple U.N. agencies and special procedures and

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<https://www.gov.uk/government/news/uk-announces-sanctions-on-gemstone-company-linked-to-the-military-regime-in-myanmar>

<sup>72</sup> EU Council Implementing Regulation implementing Regulation (EU) No 401/2013. See: <https://data.consilium.europa.eu/doc/document/ST-5702-2022-INIT/en/pdf>

<sup>73</sup> These are SOEs that control the revenues from the pearl, timber and gems sectors. “Additional Myanmar sanctions” Global Affairs Canada, 15 May 2021. See: <https://www.canada.ca/en/global-affairs/news/2021/05/additional-myanmar-sanctions.html>

<sup>74</sup> “Treasury Sanctions Officials and Military-Affiliated Cronies in Burma Two Years after Military Coup” U.S. Department of the Treasury, 31 January 2023. See: <https://home.treasury.gov/news/press-releases/jy1233>

<sup>75</sup> “Oil & gas section Budget Brief and Speech FY 2020/21,” Government of Myanmar. Seen by EarthRights International.

<sup>76</sup> This includes massive falls in foreign investment, sanctions on other extractive revenues and huge falls in extractive outputs with, for example, exports of copper to China almost ceasing and nickel production stopping after PDFs targeted a major mines power supplies.



Myanmar civil society. The importance of these revenues is such that 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>77</sup>

It is unclear whether MTI Energy intends to take steps to mitigate these impacts. As paragraph 22 of the commentary to the OECD Guidelines makes clear:

Where an enterprise contributes or may contribute to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.

MTI Energy will only be able to mitigate the impacts if it can divert revenues away from the junta. As noted above, Chevron and TotalEnergies could have taken practical steps to mitigate the adverse impacts including diverting revenues to escrow accounts due to the uncertainty of their contractual counterparty (i.e., the uncertainty over the identity of the Government of Myanmar). Chevron’s own shareholders voted for a resolution calling for it to divert revenues, using arbitration where necessary.<sup>78</sup>

TotalEnergies has stated that it was “materially impossible” for it to divert revenues, even as the operator of the Yadana project. We consider TotalEnergies’ position to be incorrect,<sup>79</sup> but if MTI Energy agrees with this position, it has no way of avoiding contributing to severe human rights abuses. It will have less leverage than TotalEnergies and Chevron. The leverage of Chevron and TotalEnergies included that:

- TotalEnergies was the operator of the project, making it responsible for producing gas and transporting it to Thailand and for directing payments for and on behalf of the other investors, including MOGE.<sup>80</sup>
- Chevron and TotalEnergies had legal grounds to divert gas revenues by either declaring *force majeure* or due to the uncertainty over the identity of their business partner (i.e., the Government of Myanmar).

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<sup>77</sup> “Leaked documents show Min Aung Hlaing personally concerned over oil and gas payments,” Justice for Myanmar, 16 December. 2021. See: <https://www.justiceformyanmar.org/stories/leaked-documents-show-min-aung-hlaing-personally-concerned-over-oil-and-gas-payments>

<sup>78</sup> “2022 Proxy Memorandum, Item #8 – Report on business with conflict-complicit governments” proposed by The Dominican Sisters of Hope, Riverwater Partners, and the Unitarian Universalist Common Endowment Fund LLC, 2022. See: <https://www.sec.gov/Archives/edgar/data/93410/000121465922006189/o53224px14a6g.htm>

<sup>79</sup> As set out in the EarthRights Responsible Divestment Briefer.

<sup>80</sup> TotalEnergies acts a representative of the other investors, including MOGE, and appears to have fiduciary duties to MOGE (which is itself an agency of the Government of Myanmar). The other Yadana investors owe cash payments, at the very least the “Royalties” under clause 9 and 10 of the Production Sharing Contract, directly to MOGE and must therefore also concern themselves with the identity of the Government of Myanmar. See EarthRights Responsible Divestment Briefer for further analysis.



- Chevron and TotalEnergies are global fossil fuel majors with vast financial resources.
- Chevron and TotalEnergies have a long history of working with the support of their respective governments and influencing foreign policy matters, including sanctions policy of the two most influential sanctions regimes (EU and U.S.).
- PTTEP, the other investors in the Yadana gas field, had a least one major joint venture with TotalEnergies<sup>81</sup> and had business relationships with Chevron.<sup>82</sup>

As described above, MTI Energy will be the largest shareholder in Yadana and will accordingly have a substantial role in overseeing the project, authorizing decisions of the various operations committees and shareholders meetings over which it holds a veto power. It will be able to take practical steps to divert revenues for as long as the junta is unrecognized as the Government of Myanmar. MTI Energy is not, however, the operator of the project. It is not a global fossil fuel major; we are not aware of any business relationships between PTTEP and MTI Energy or MTI Energy having a history of influencing a major sanctions regime. Perhaps most importantly, by treating the junta as a legitimate government and entering contracts with it, efforts to divert gas revenues by asserting *force majeure* or due to the uncertainty over the identity of its business partner will be weaker. In other words, MTI's investment actively weakens the leverage of corporate actors and their ability to comply with OECD Guidelines and their human rights obligations.

If MTI Energy considers it is unable or unwilling to divert revenues, its investment in the Yadana project cannot comply with its responsibilities under the 2023 Guidelines and it will contribute to egregious human rights abuses. It will also be complicit in atrocity crimes according to the standards set by the U.N. Guiding Principles.<sup>83</sup> TotalEnergies' own shareholders recognized this, stating that "it is clear that TotalEnergies is indirectly helping finance crimes against humanity in Myanmar."<sup>84</sup> Even TotalEnergies, however, drew the line at increasing investment with the military junta, stating, "In the current situation, it goes without saying that we do not intend to invest further in the future."<sup>85</sup> It said that it faced a "human rights dilemma" over its continued participation in the Yadana project, but MTI Energy faces no similar dilemma – it is choosing to enter the Myanmar gas sector after the coup.

In any case, MTI Energy must continue the precedent set by Chevron and TotalEnergies

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<sup>81</sup> "Mozambique security improving, but TotalEnergies seeks more stability to restart LNG project," S&P Global Commodity Insights, 9 November 2021. See:

<https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/lng/110921-mozambique-security-improving-but-totalenergies-seeks-more-stability-to-restart-lng-project>

<sup>82</sup> "PTTEP warns Chevron handover at Erawan a key risk," Energy Voice, 6 February 2021. See: <https://www.energyvoice.com/oilandgas/asia/302926/pttep-warns-chevron-handover-at-erawan-a-key-risk/>

<sup>85</sup> "Total and the human rights crisis in Myanmar," TotalEnergies, 4 April 2021. See: <https://totalenergies.com/news/total-and-human-rights-crisis-myanmar>



and refuse to consent to the payment of dividends from MGTC to its shareholders, including MOGE. This will still leave most revenue flows untouched, but if MTI Energy fails to do so, its acquisition will increase the risk of adverse impacts even further.

#### 3.2.4. Directly linked and contributing to human rights abuses prior to completion

Even prior to completing its acquisition, MTI Energy is contributing to human rights impacts under Chapter II (General Policies) and Chapter IV (Human Rights) of the 2011 Guidelines.

MTI Energy's decision to treat the junta as a legitimate government assists the junta in its vital struggle for recognition. Legitimization of the junta is a key to its longevity, whether that be through sham elections or international business community engagement, which will enable it to continue committing atrocities. While businesses already operating in parts of Myanmar under the control of the junta face difficult decisions on how to interact with military authorities, MTI Energy is choosing to enter Myanmar in partnership with the junta to extract and sell gas that funds the junta's abuses and lends it legitimacy that helps it stay in partial control of Myanmar. MTI Energy's conduct also reassures the junta that it can continue committing atrocities and companies such as MTI Energy will invest money in a joint venture that may well be its largest single source of funding.

MTI Energy's decision increases the risk of adverse impacts continuing and warnings from civil society actors, the U.N Special Rapporteur and the NUG make this highly foreseeable. MTI Energy does not appear to have taken any action to mitigate this adverse impact or decrease the risk of it occurring.

OECD Guidance also provides that an enterprise's relationship to adverse impacts (i.e. whether the MNE is contributing or only directly linked) is not static, noting that "[i]t 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"<sup>86</sup> adding that "contribution can occur through a business relationship." The apparent failure of MTI Energy to undertake due diligence or take steps to decrease the risk of the impacts occurring therefore add to the likelihood that it is contributing to impacts even prior to completing its acquisition.

We consider that MTI Energy is also already directly linked to human rights impacts through its business relationships with Chevron, PTTEP and PTT. Chapter IV of the Guidelines provides that MNEs should:

Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute.

OECD Guidance explains that "Linkage" is "defined by the relationship between the

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<sup>86</sup> OECD Guidance for Responsible Business Conduct at page 71.



adverse impact and the enterprise's products, services or operations through another entity (i.e., business relationship).” Since the coup began, the junta began misappropriating gas revenues and has relied upon them to fund its atrocities. Any company involved in Myanmar's gas sector that is treating the junta like a government, enabling its access to these revenues and failing to take all practical steps to avoid doing so is contributing to these human rights abuses. This includes Chevron, PTTEP and PTT through their ongoing role in the Yadana project. In signing contracts with these gas companies to step into Chevron's shoes, MTI Energy is directly linking itself to human rights abuses.

PTTEP (as both an investor and operator) and Chevron (as the largest investor in the Yadana project with substantial management powers) have chosen to treat the junta as the Government of Myanmar and are contributing to human rights abuses in Myanmar by enabling payments and refusing to take practical steps to divert gas revenues away from the junta. They have also spread disinformation about their ability to divert revenues and the impacts of doing so. They are therefore contributing to human rights atrocities and MTI Energy is directly linked to this by commencing a process to acquire Chevron's investment and enter the Yadana joint venture with PTTEP.

PTT has chosen to treat the junta as the Government of Myanmar and maximize gas imports to Thailand as output from the Yadana gas field declined in 2022, therefore maximizing gas revenues to the junta. This ensured PTT could avoid importing liquid natural gas or fuel oil or diverting domestic gas production from industrial use to energy production to replace Myanmar gas, all of which would have reduced its profits.<sup>87</sup> PTT is therefore contributing to human rights atrocities and MTI Energy is directly linked to them by commencing a process to sell Yadana gas to PTT.

Paragraph 43 of the commentary on being directly linked to adverse impacts provides that:

Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity itself would have adverse human rights impacts.

The commentary adds that meeting the requirements to prevent or mitigate adverse human rights impacts that are directly linked to their business operations “would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact.”

As set out above, while MTI Energy will have less leverage than Chevron and is actively

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<sup>87</sup> “Three Reasons the U.S. Fails to Act as the Fossil Fuel Industry Bankrolls Mass Atrocities in Myanmar,” EarthRights International, 20 March 2023. See: <https://earthrights.org/blog/three-reasons-the-u-s-fails-to-act-as-the-fossil-fuel-industry-bankrolls-mass-atrocities-in-myanmar/>



reducing the leverage available to gas companies to divert revenues away from the junta, MTI Energy will still have substantial leverage. Further, if the companies acted “in co-operation with” each other and acknowledged that the junta was not recognized at the government they could more easily divert revenues. They could individually or jointly refer the matter to international arbitration as provided for in the Yadana contracts<sup>88</sup> and as the NUG has proposed.<sup>89</sup> MTI Energy could require this to take place prior to completing its acquisition rather than choosing to be directly linked to human rights abuses and to contribute to them in the future.

It should also be noted that the relationship is also not crucial to MTI Energy. Under the OECD Guidelines, a business relationship is crucial if it provides a product that is essential to the buyer’s business and there is no reasonable alternative. While there may be specific factors in Myanmar that make it advantageous for MTI Energy to invest and operate in, there is nothing about the Myanmar energy sector that makes it essential to MTI Energy. MTI Energy can access these factors and resources in other production regions. Terminating its relationship with the junta now would not have adverse impacts – the project would continue, with it instead being Chevron and PTTEP that were continuing to contribute to human rights impacts.

### 3.2.5. Failure to conduct adequate due diligence

In the context of the OECD Guidelines, “due diligence” is understood as the process through which enterprises identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed. Due diligence is an integral part of decision-making and risk management systems and is to be carried out throughout the entire life cycle of a project, including for any decisions to invest in, or disengage from, a project.

While the Guidelines make clear that all enterprises – regardless of their size and the nature of their operations – should conduct due diligence, they also highlight that the nature and extent of due diligence will depend on the severity of the risks of adverse impacts related to a particular situation. This means that the nature and extent of due diligence depend on the circumstances of a particular situation and that the higher the risk, the more extensive the due diligence should be.<sup>90</sup>

OECD Guidance also elaborates on the due diligence provisions of the OECD Guidelines. The OECD Guidance notes that some business operations, products or services are inherently risky because they are likely to cause, contribute to, or be directly linked to adverse impacts. As has been noted in the 2017 OECD Due Diligence Guidance for

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<sup>88</sup> The path to arbitration is set out in more detail in the EarthRights Responsible Divestment Briefer

<sup>89</sup> “NUG requests cooperation from Thai oil and gas company, warns of potential legal action,” Myanmar Now, 22 March 2023. See: <https://myanmar-now.org/en/news/nug-requests-cooperation-from-thai-oil-and-gas-company-warns-of-potential-legal-action/>

<sup>90</sup> OECD Guidelines, Chapter I. Concepts and Principles, paragraph 10 and Commentary to Chapter II. General Policies, paragraph 15. See also Chapter IV. Human Rights, paragraph 5.



Meaningful Stakeholder Engagement in the Extractive Sector<sup>91</sup> – highly relevant for the specific instance as it concerns the extractive sector in which MTI Energy operates – business operations in the oil and gas sector are typically considered high risk because they often have a significant social and environmental footprint, and are consequently at risk of causing or contributing to adverse impacts, such as human rights infringements, economic set-backs and environmental degradation. As such, MTI Energy should have conducted enhanced risk-based due diligence.

Furthermore, the OECD Guidance notes that in some contexts, business operations may not be inherently risky, but circumstances (such as rule of law issues, lack of enforcement of standards, behavior of business relationships) may result in risks of adverse impacts. Myanmar is a conflict-affected area that is experiencing a massive humanitarian crisis. This fact alone increases the risk that MTI Energy contributes to serious human rights abuses in the country. Operating in conflict-affected areas demands that enhanced or heightened due diligence is carried out in line with the UNGP and the OECD Guidelines.

As an MNE with responsibilities under the OECD Guidelines, MTI Energy should have conducted enhanced due diligence on its purchase of the stake in the Yadana project prior to signaling its intent to acquire it. Such due diligence should have sought to identify, prevent and mitigate actual and potential impacts of investing in the project. This would have included, at the very minimum, identifying and assessing the adverse human rights impacts that MTI Energy could cause or contribute to through its activities in Myanmar, to devise measures that could realistically prevent or mitigate the risks that harms materialize, and to address those harms when they occur. Specifically, it should have included identifying ways in which MTI Energy, alone or in co-operation with others could and should use its leverage to influence the entity causing the adverse impact – in this case MOGE – to prevent or mitigate that impact.

The Complainants are not aware of any due diligence that MTI Energy has conducted as part of its decision to invest in the Yadana gas pipeline. This Complaint sets out below specific concerns regarding MTI Energy's failure to comply with the 2011 Guidelines on stakeholder engagement, which is a key part of due diligence, and transparency. We consider that if MTI Energy had conducted enhanced due diligence in accordance with the OECD Guidelines, or even basic due diligence, it would have concluded its purchase would contribute to severe human rights impacts on the people of Myanmar. Its purchase of Chevron's stake requires it 1) to treat the junta as a legitimate government and 2) invest in a joint venture in collaboration with the junta that funds it and contributes in a significant way to its ongoing atrocities. MTI Energy should have concluded that this will result in the breaches of the OECD guidelines set out in this Complaint, including contributing to human rights impacts, namely war crimes and

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<sup>91</sup> "OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector," OECD, 2 February 2017. See: <https://www.oecd-ilibrary.org/docserver/9789264252462-en.pdf?expires=1677595268&id=id&accname=guest&checksum=FDAEC9F191D15DBE054286D908750BA5>



crimes against humanity.

The conduct of MTI Energy also ignores the Government of Canada's recommendations to companies seeking to invest or operate in Myanmar. In relation to Myanmar specifically, an official advisory note from Canada issued in September 2021<sup>92</sup> notes that the "Government of Canada considers that Canadian companies active in Myanmar may face heightened commercial and reputational risks and should take appropriate action to mitigate risks, particularly in cases that might have ties to Tatmadaw [military]-owned or -connected entities." The same advisory goes on to state that the Government of Canada recommends that Canadian companies "undertake thorough responsible business conduct due diligence, including closely examining their supply chains to determine whether their activities support military-owned conglomerates or their affiliates. When reviewing supply chains related to Myanmar, businesses should also closely examine potential indicators of illicit revenues or human right abuses."

### 3.2.6. Failure to meaningfully engage with relevant stakeholders

Chapter II of the 2011 Guidelines states that MNEs should:

Engage with relevant stakeholders in order to provide **meaningful opportunities** for their **views to be taken into account** in relation to planning and decision making for projects or other activities that may **significantly impact local communities**.

MTI Energy has not, to the Complainants' knowledge, consulted nor engaged with any community representatives in the project area or project area of influence. The Complainants have been in contact with CSOs operating in the project area and none have reported being contacted. The Complainants have been in contact with a CSO that has sent two letters to MTI Energy and which has received no response. Compounding this failure to engage, immediately after news came that MTI Energy was to purchase Chevron's stake, MTI Energy's website was taken down.

The Yadana pipeline also passes through territory governed by an ethnic revolutionary organization, the Karen National Union (KNU); the KNU's control of the territory makes it a relevant stakeholder. MTI Energy should have consulted the KNU to determine how its investment will affect this ongoing armed conflict. This should include impacts on communities in areas under the control or partial control of the KNU conflict as the military provides security for the pipeline despite committing well-documented human rights abuses. Consultation with the KNU should also include the impacts of funding the junta which can use these revenues to fund its frequent airstrikes on areas under the control of the KNU.

Other relevant stakeholders MTI should have consulted include the National Unity

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<sup>92</sup> "Global Affairs Canada advisory on doing business with Myanmar-related entities," Government of Canada, 9 April 2021. See: [https://www.tradecommissioner.gc.ca/countries-pays/myanmar/GAC\\_advisory\\_Myanmar-AMC\\_affaires\\_Myanmar.aspx?lang=eng](https://www.tradecommissioner.gc.ca/countries-pays/myanmar/GAC_advisory_Myanmar-AMC_affaires_Myanmar.aspx?lang=eng)



Government. As set out above, the NUG has a stronger claim to be recognized as the Government of Myanmar and the legitimate counterparty to contracts for the exploitation on Myanmar's natural resources, including Yadana gas.

MTI Energy has not provided meaningful opportunities for relevant stakeholders' views to be taken into consideration and appears to have actively avoiding doing so in breach of the 2011 Guidelines.

### 3.2.7. Lack of transparency regarding decision-making to invest

Chapter III of the 2011 Guidelines provides:

1. Enterprises should ensure that **timely and accurate information** is disclosed on **all material matters** regarding their **activities**, structure, financial situation, performance, ownership and governance. This information should be disclosed for the **enterprise as a whole**, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.
2. Disclosure policies of enterprises should include, but not be limited to, material information on . . . **foreseeable risk factors** . . . “

MTI Energy has not made any information about the company or investment public and instead MTI Energy's website has been taken down. While some information cannot be disclosed due to confidentiality requirements and issues such as insider trading, there is a total absence of disclosure and instead MTI Energy has deactivated its website. There is no information about the due diligence it has or will conduct, its human rights policies, its overall assessment of the foreseeable risks to which its investment will contribute, let alone how it will avoid impacts or seek to prevent or mitigate them. This is a clear breach of the 2011 Guidelines Chapter III (Disclosure)

### 3.3 Link between the enterprise's activities and the issue raised in the specific instance

The Complainants submit that there is a clear link between MTI Energy's purchase of Chevron's stake in the Yadana and the alleged contraventions of the OECD Guidelines (as outlined in preceding section of this Complaint).

### 3.4 The relevance of applicable law and procedures

The OECD Guidelines and U.N. Guiding Principles on Business and Human Rights are the most authoritative international standards on responsible business conduct, human rights due diligence and decisions on whether to invest or not, and to stay or not where the investment has already been made. The principles and standards contained in both



instruments are applicable to this specific instance. In addition, the OECD Minerals Guidance articulates the approach that companies should take when sourcing from conflict-affected areas so is also relevant.

The NCPs should also consider the guidance of U.N. human rights bodies, particularly their guidance relating to MOGE and gas revenues. This includes the reports and recommendations of:

- The U.N. Special Rapporteur on the situation of Human Rights in Myanmar (currently one of only 14 country mandates under the U.N. Special Procedures).
- The Office of the U.N. High Commissioner for Human Rights, which has reported to the Human Rights Council on the action taken following the Independent International Fact-Finding Mission on Myanmar's on the economic interests of the Myanmar military.

The Complainants note that while Myanmar law is relevant to the Complaint, there is no rule of law in Myanmar and the junta has co-opted all branches of the state, with Min Aung Hlaing illegally declaring a state of emergency and awarding himself full control of the executive, judiciary and legislature. It is therefore impossible to challenge in the Myanmar courts the legality of the junta's assertions that it is the government and that it, and its appointees in MOGE, can sign contracts with MTI Energy on behalf of the state.

We also note that both Canada and the U.K. have repeatedly condemned the military's attempted takeover and actions since and that neither have recognized the junta as a legitimate authority. Canada and the United Kingdom have announced regular sanctions packages targeting the military and its leadership, in coordination with the EU and the U.S.

### 3.5 How similar issues have been, or are being, treated

The Complainants are aware of three NCP proceedings related to Myanmar and to responsible disengagement specifically. These are set out below. While they have some similarities to the issues raised in the present specific instance, they do not require an NCP to evaluate whether a company – in this case MTI Energy – can remain in compliance with the OECD Guidelines if it:

- Signs contracts with and treats the junta as a legitimate government, notably in this case to enable them to take part in a joint venture with the junta to exploit Myanmar's national assets in direct conflict with the advice of the U.N. Special Rapporteur on the situation of human rights in Myanmar and the OHCHR.
- Enters Myanmar to do business with a military-controlled, sanctioned entity that the U.S., U.K. and EU all consider provides a major source of funding to the junta and enables its atrocities simply to replace another company that considered it should disengage, apparently due to the human rights impacts of the investment.



The existing specific instance proceeding in Myanmar comprise two specific instance proceedings handled by the Norwegian NCP and a third handled by the Australian NCP.

On 16 December 2019, the Committee Seeking Justice for Alethankyaw (CSJA) submitted a complaint to the Norwegian NCP. The complaint asserted that, among other things, that Telenor ASA failed to carry out appropriate human rights due diligence in its Myanmar business.<sup>40</sup> The NCP found that the issues raised in the complaint merited further consideration and decided to proceed with the complaint.<sup>41</sup> The Complainants did not wish to engage in dialogue and mediation, citing a lack of trust in the company. The NCP determined that Telenor in general sought to respect human rights and carry out due diligence in accordance with the OECD Guidelines, but also found room for improvement, recommending that Telenor to prioritize the most vulnerable groups in future stakeholder engagement.

On 27 July 2021, the Center for Research on Multinational Corporations (SOMO), on behalf of 474 civil society organizations, submitted a complaint to the Norwegian NCP. It alleged that Telenor ASA had not observed the General Policies (Chapter II), Disclosure (Chapter III), and Human Rights (Chapter IV) provisions of the Guidelines. The issues related to Telenor's disengagement from Myanmar and its decision to sell 100 per cent of Telenor Myanmar to M1 Group, a Lebanese investment holding company. The parties have been engaged in mediation since June 2022 and agreed an MoU with path forward for further mediation and other action.

On 14 September 2021, Publish What You Pay Australia, an NGO, on behalf of 245 Myanmar civil society organizations, submitted a specific instance to the Australian NCP alleging Myanmar Metals Limited had not observed the General Policies (Chapter II), Disclosure (Chapter III), and Human Rights (Chapter IV) provisions of the Guidelines. Specifically, issues relate to alleged irresponsible disengagement by Myanmar Metals Limited in relation to the proposed divestment of its majority interests in a joint venture to redevelop the Bawdwin mine in northern Shan State, Myanmar. It alleged that the company failed to observe the Guidelines in three ways: a lack of risk-based human rights due diligence, failure to prevent or mitigate human rights impacts, transparency in its decision to disengage. On 2 August 2023 the Australian NCP found that Myanmar Metals Limited was in breach of the Guidelines.<sup>93</sup>

### 3.6. Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines

A failure of the NCPs to consider a case where a multinational enterprise so egregiously breaches the OECD Guidelines, contradicting the recommendations of U.N. human rights bodies and undermining EU and U.S. sanctions targeting human rights abuses, by investing in a project that will contribute to atrocity crimes would gravely undermine the purpose and effectiveness of the OECD Guidelines.

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<sup>93</sup> "Final Statement," Australian Government, The Treasury, 2 August 2023. See: <https://ausncp.gov.au/complaints/track-complaints>



If the NCPs decide that the issues raised merit further examination and offer their good offices to the parties as a forum to discuss the issues raised in this Complaint, they should seek to align MTI Energy's conduct with the OECD Guidelines, noting that MTI Energy has so far failed to respond to correspondence from civil society groups. We believe that the following steps are necessary to align MTI Energy's conduct with the Guidelines:

1. Suspension of the purchase by MTI Energy of Chevron's stake in the Yadana gas pipeline until such time as MTI Energy conducts enhanced human rights due diligence in accordance with the OECD Guidelines and demonstrates that it can mitigate risks of contributing to human rights abuses and corruption. This includes putting measures in place to ensure that the junta is not able to receive revenue payments owed to the Government of Myanmar.
2. For MTI Energy to disclose information on human rights due diligence (if any) that it conducted in relation to the purchase. At the very least, this should include the process it undertook and its key findings.<sup>42</sup>
3. For MTI Energy to be transparent about its reasons for investing in Myanmar and what payments it intends to make to MOGE, including which payments it will divert or attempt to divert, if any.
4. For MTI Energy to conduct enhanced human rights due diligence on the purchase. This must include meaningful engagement with key stakeholders (including the NUG) and a transparent process that reports on inputs received and decisions made.
5. For MTI Energy to cooperate with sanctions authorities from the U.K., U.S. EU, and Canada in identifying, advocating for, and implementing solutions to prevent the junta from accessing revenues from the Yadana project.

#### **4. Conclusion**

The Complainants consider that MTI Energy has irresponsibly agreed to purchase Chevron's stake in the Yadana gas project in breach of the OECD Guidelines.

Amid the worsening human rights situation in Myanmar, MTI Energy has entered an agreement with Chevron, PTTEP and the junta for the transfer of a stake in an investment that will be one of the largest sources of funding for a military that the Canadian government considers committed genocide. This acquisition is likely to be completed in the coming weeks or months. Thus, the Complainants respectfully request for the Canadian and/or U.K. NCPs to expedite this Complaint and to swiftly conduct an initial assessment. If the NCPs determine that the issues raised merit further examination, then the NCPs are encouraged to promptly offer good offices to the parties with a view to the resolution of the issues raised in the Complaint.

If MTI Energy declines the offer of good offices, or alternatively if good offices between the parties fail to reach a mutually agreeable solution, the Complainants encourage the NCPs to:



- Conduct their own fact-finding (potentially involving a third-party examination of the issues raised) and/or develop Terms of Reference for a fact-finding report in dialogue with the parties to the Complaint.
- Reach a determination and make a public statement as to whether MTI Energy has acted in accordance with the OECD Guidelines in regard to the allegations of this Complaint and, where relevant, additional areas of non-compliance with the OECD Guidelines.
- Make recommendations to MTI Energy aimed at bringing its behavior into line with the OECD Guidelines and preventing it from contributing to atrocity crimes, including whether MTI Energy should follow TotalEnergies' lead in supporting sanctions that could prevent it from contributing to human rights atrocities.

If MTI Energy cannot demonstrate how it will divert revenues away from the junta and avoid contributing to atrocity crimes, the UK and Canadian NCPs should share a copy of their final statements with relevant government departments and ensure that such breach of the OECD Guidelines is taken into account in any decisions on whether or not to sanction MOGE, following the lead of the EU and as recommended by the U.N. Special Rapporteur on the Situation of Human Rights in Myanmar and Office of the United Nations High Commissioner for Human Rights.

Should MTI Energy not participate in the NCP process, or do so in bad faith, then the NCPs should also:

- Inform relevant government departments, including those responsible for sanctions policy, of any lack of good faith on the part of MTI Energy.
- Report publicly on MTI Energy's response to the outcomes of the process.

The severity of the breach, however, of the UNGP and OECD Guidelines by MTI Energy appears to be such that Canada and the U.K. can only ensure the integrity of the Guidelines they themselves have addressed to MNEs and comply with their own obligations to protect human rights by placing sanctions on gas revenues. We therefore consider that the NCPs should highlight the recommendations of the U.N. Special Rapporteur on the situation of Human Rights in Myanmar and the Office of the High Commissioner of Human Rights to their respective governments, including their recommendations of targeted sanctions on Myanmar gas revenues.