ISEAS YUSOF ISHAK INSTITUTE

ISSUE: 2024 No. 75

ISSN 2335-6677

PERSPECTIVE

RESEARCHERS AT ISEAS – YUSOF ISHAK INSTITUTE ANALYSE CURRENT EVENTS

Singapore | 26 September 2024

Towards a Dispute Resolution Mechanism for the ASEAN Power Grid: Best Practices from Europe and Africa

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Aerial photo taken on 20 December 2023 of the Thung Song-Songkhla 500kV Transmission Line in Phatthalung, Thailand. (Photo by Wang Teng/XINHUA/Xinhua via AFP).

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ISSUE: 2024 No. 75
ISSN 2335-6677

EXECUTIVE SUMMARY

- Dispute resolution mechanisms play an important role in energy integration.
- Southeast Asian countries are in urgent need of dispute resolution mechanisms if they are to ensure smooth operations in their cross-border energy interconnections.
- Dispute resolution of energy trade should be designed to address conflicts between and among corporations, countries and communities in Southeast Asia.
- International best practices in dispute resolution can be contextually applied to the political realities of energy integration in Southeast Asia.

INTRODUCTION

Energy transition is gaining increasing momentum in Southeast Asia. In fact, in 2020, more than 80 percent[1] of new additions to the national grids were from renewable sources. By 2022, the renewable share in ASEAN for capacity and generation was 33.5% and 29%, respectively;[2] this increase has opened up multiple opportunities for energy trade.

In 2022, the Lao PDR-Thailand-Malaysia-Singapore Power Integration Project (LTMS-PIP) was commissioned, which facilitated trade in hydroelectricity between Laos and Singapore through the Malaysian and Thai grids. This is the region's first multilateral power project and has provided a boost to the broader ASEAN Power Grid (APG) initiative. In 2024, the LTMS-PIP was extended to another two years and energy trade increased from 100MW to 200MW.

Currently, the region is undertaking feasibility studies on a second multilateral power project, called the Brunei-Indonesia-Malaysia-Philippines Power Integration Project (BIMP-PIP). In addition, several subsea projects are being considered, including those between Singapore and Batam, Indonesia; Cambodia and Singapore; and Peninsular Malaysia and Sumatra, Indonesia. In 2024, Singapore raised its target of importing low carbon electricity from 4 GW to 6 GW by 2035, further enhancing the prospects of regional energy trade.

The momentum towards energy integration in ASEAN provides enormous opportunities for utilising the region's renewable energy resources, which can meet two-thirds of collective energy demand. However, multilateral energy cooperation also comes with challenges, one of them being the potential for disputes between multiple categories of stakeholders. Developing a formal dispute resolution mechanism is therefore an important step to take in accelerating multilateral energy trade in ASEAN, as per a 2019 study by the International Energy Agency.[3] As yet, there is no overarching regional energy agreement in Southeast Asia on which a dispute resolution mechanism can potentially be built; in truth, policymakers prefer to rely on informal processes.

One of the key challenges hindering the development of a dispute resolution mechanism for the APG is that ASEAN is a policy-driven institution that relies on consultation and consensus to resolve conflicts, unlike European institutions, for example, which use legislation.[4] The 'ASEAN Way' of resolving conflicts through consensus building and informal agreements over direct confrontation,[5] Oishi[6] argues, has become a key challenge towards developing formal ways of resolving disputes between states. While Articles 24, 25 and 26 of the ASEAN Charter set out a Dispute Settlement Mechanism, this tool remains under-utilised due to a lack of clarity about terminologies, inadequate funding and legal support.[7] Regional countries have preferred instead to refer disputes to the World Trade Organization's Dispute Settlement Understandings or other third-party dispute settlement mechanisms.[8]

Despite the challenges posed by "The ASEAN Way", it is important to consider formal processes of dispute resolution under the aegis of existing institutions that support the APG. A formal dispute resolution mechanism will enhance trust between states and increase investor confidence.

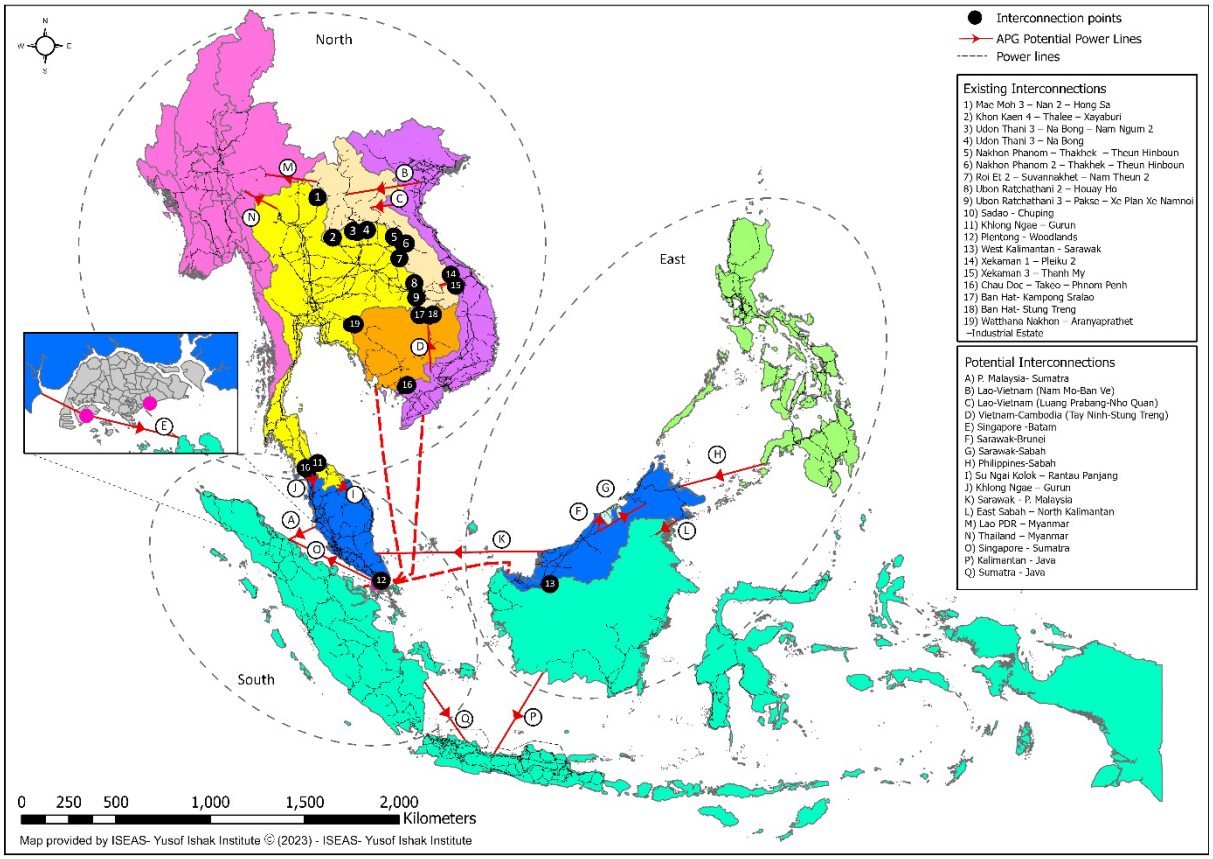
This paper provides an overview of existing dispute resolution mechanisms in other parts of the world to identify best practices that can be replicated with contextual adjustment in addressing energy-related international conflicts in Southeast Asia. This Perspective first highlights the need for a dispute resolution mechanism in the APG initiative before undertaking case studies on the dispute resolution mechanisms, first, in an international organisation (the Energy Community), then a regional power market (The West African Power Pool) and finally an international agreement (the Energy Charter Treaty). The case studies are followed by recommendations for Southeast Asian policymakers.

ADDRESSING THE LACK OF POLITICAL TRUST THROUGH DISPUTE RESOLUTION MECHANISMS

The APG was envisioned in the 1990s as a grand initiative for energy integration in three broad areas: interconnections between national energy systems; integration of markets and harmonisation of grid codes; and the development of regional energy institutions. As can be seen in Figure 1, the APG is divided into three geographic areas: North, South and East. To date, regional trade is mostly undertaken bilaterally and only 8 out of 18 key interconnection projects have been completed.

Current regional interconnection capacity is around 7,720 MW, which can be increased to as much as 21,769 MW in the future.[9]

Figure 1. The ASEAN Power Grid



Source: Huda et al. (2023), *Accelerating the ASEAN Power Grid 2.0: Lessons from the Lao PDR-Thailand-Malaysia-Singapore Power Integration Project (LTMS-PIP),* (ISEAS-Yusof Ishak Institute, Singapore

The APG is a key driver of energy transition in Southeast Asia. The completion of all 18 interconnection projects under the APG is critical for the region to achieve its aspirational target of having 23 percent renewable energy in its total primary energy supply by 2025.[10] The APG is also important for enhancing regional energy security, deepening integration, increasing the use of renewable energy and improving grid security. However, progress has been slow due to a number of political, technical and economic challenges. A study on the ASEAN Power grid done by ISEAS has found that among political challenges, the most crucial are a lack of regional trust, and discontinuity in energy policies.[11] The manifestation of these two challenges in energy trade are briefly explained below.

First, the lack of regional trust in the context of the APG means that stakeholders are not assured that energy contracts will be fulfilled as per agreements. There is a certain perception in Southeast Asia that depending on neighbouring countries for energy bears significant risks, and that political disputes can lead to deliberate disruptions of supply. Countries that rely on electricity exports for economic development are also vulnerable to disruptions in energy trade caused by tariff disputes and variances in energy demand. Second, frequent changes in government policies can lead to projects being shelved or abandoned. As cross-border

interconnections can take as long as 15 years to complete, the lack of sustained government support can undermine the confidence of investors.[12]

These two political challenges to the APG can potentially be addressed through the development of a formal dispute resolution mechanism. A study on the African Power Pool[13] demonstrates that a transparent and fair dispute resolution mechanism can enhance trust and is crucial for continuous energy trade operations. Dispute resolution mechanisms are thus important for addressing the political challenges to the acceleration of the APG.

However, in Southeast Asia there is a general preference for resolving disputes through informal processes of dialogues and negotiations. While this has been successful to date, as the region moves towards more complex multilateral energy projects, developing a regional mechanism for resolving disputes will become increasingly necessary. Currently, the ASEAN Power Grid Consultative Committee is developing a new memorandum of understanding on the APG, to replace the current agreement that expires in 2025. The upcoming MoU will be supported by several implementing protocols, one of which is likely to focus on dispute resolution.

A dispute resolution mechanism can be described as a structured process of resolving conflicts related to international energy projects. International energy trade disputes can arise at three key levels: 1) between states 2) between investor and state and 3) between private parties.[14] Dispute resolution mechanisms in the context of energy trade need to be impartial, efficient, and enforceable. However, developing dispute resolution mechanisms for cross-border trade is made complex by multiple jurisdictions, regulations and socio-economic conditions. Broadly, dispute resolution mechanisms can facilitate three methods of resolving disputes: 1) Negotiation between parties in conflict; 2) Mediation by a third party and 3) International arbitration. Each of these steps requires the setting up of formal procedures of engagement, but the most complex process is international arbitration, which involves agreement on three key issues:[15] 1) Determining the applicable law; 2) Selecting the forum for resolution and 3) Identifying the venue for arbitration.

As seen in Table 1, multilateral power pools around the world have implemented various dispute resolution mechanisms that involve one or more of the three steps outlined above. A broader overview of developing dispute resolution procedures is provided by the case studies below.

Table 1. Dispute Resolution Mechanism of Regional Grids

Regional Market	Year of Establishment	Total Capacity	Dispute Resolution Mechanism[16]
Eastern Africa Power Pool	2005	60.7 GW (2015)	IRB of EAPP
West African Power Pool	1999	14 GW (2023)	WAPP Dispute Resolution Panel
Greater Mekong Subregion	1995	118.9 GW (2012)	1. Negotiations by TSO 2. International arbitration under UNCITRAL
Central America Power Market	2013	16.5 GW (2016)	Offices of the CRIE
Southern African Power Pool	1995	62 GW	SAPP Coordination Centre
Nord Pool	1996	-	1. Negotiation 2. International arbitration under SCC
Pan-European Energy Market	2005	-	Energy Community Dispute Resolution and Negotiation Centre

Source: IRENA (2019), *Innovation Landscape Brief: Regional Markets*, International Renewable Energy Agency, Abu Dhabi; ADB (2020), *Harmonizing Power Systems in the Greater Mekong Subregion: Regulatory and Pricing Measures to Facilitate Trade*, Asian Development Bank, Manila.

THE ENERGY COMMUNITY

The Energy Community (EC) is an international organisation that oversees the governance of an integrated Pan-European energy market, and was established in 2005. Its signatories include the European Union as well as Albania, Bosnia and Herzegovina, Kosovo North Macedonia, Georgia, Moldova, Montenegro, Serbia and Ukraine. Armenia, Norway and Türkiye participate as Observers.[17] The main objectives of the EC are to establish regulatory and market frameworks that facilitate integration, enhance energy security, and improve environmental performance of the energy sector, among other things.

The EC Secretariat set up a Dispute Resolution and Negotiation Centre in 2016 to facilitate the resolution of disputes between private parties, between private parties and states and/or their national authorities, and between states and/or their national authorities.[18] The Centre is open towards receiving written requests for resolving energy-related disputes from governments, civil society representatives and investors.[19] Parties to the dispute appoint a mediator, which can be a staff member of the EC Secretariat, who then facilitates negotiations. The negotiations usually take place at the offices of the EC Secretariat in a closed-door, confidential setting. The EC Dispute Resolution process has three steps.

1. The first step is the presentation of an Opening Letter, which gives an opportunity to the party concerned to react to the allegation of non-compliance with Energy Community law, and enables the EC Secretariat to establish background of the case. The concerned party is provided a two-month period to voluntarily comply to EC law.[20]
2. The Reasoned Opinion is the second phase of the dispute resolution where the party is asked to address the issues of non-compliance within a two-month period.
3. The third step of the process is the Reasoned Request, where the Ministerial Council, the EC's highest decision-making body, decides on the party's failure to comply with EC law. A decision adopted by the Ministerial Council is legally binding.[21] If the party fails to take remedial measures as per the decision of the Ministerial Council, then it may have its voting rights suspended and be excluded from meetings or other procedures of the EC.[22]

The EC Dispute Resolution Centre actively engages on a number of critical issues related to energy disputes, such as facilitating cross-border dialogue on transboundary environmental impacts from hydropower projects in Republika Srpska, Bosnia and Herzegovina, and Montenegro, and facilitating negotiations between small hydropower producers and the Albanian government on the impact of a new balancing mechanism.[23]
The Ministerial Council has provided multiple decisions directing parties to comply with the EC Treaty, all of which are publicly available. For example, in 2023, Kosovo, Moldova and Bosnia and Herzegovina were directed by the Ministerial Council to address the environmental damages caused by their energy systems which violated multiple articles of the EC Treaty. In 2021, Ukraine was directed to rectify non-compliance with regulations on energy market transparency and integrity.[24]

THE WEST AFRICAN POWER POOL

The West African Power Pool (WAPP) is a cooperation agency that facilitates the integration of electricity systems in Western Africa. WAPP was formed in 1999 under the auspices of the Economic Community of West African States (ECOWAS). WAPP has 14 members: Burkina Faso, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mali, Niger, Nigeria, The Gambia, Togo, Senegal, Sierra Leone and Togo.[25] The main objective of WAPP is to develop a regional market for enhancing the supply of affordable energy in the Western African region. One of the most important initiatives by the WAPP is the North Core Project, which is a 900-kilometre long, 330 kV transmission involving Benin, Burkina Faso, Niger, Nigeria, and Togo due to be completed by 2025.[26]

The Articles of Agreement of WAPP set out detailed guidelines for dispute resolution between members and non-members, which is to be administered by a Dispute Resolution Panel. Similar to the EC, the dispute resolution mechanism in the WAPP requires the submission of a request to the Secretary General. The WAPP facilitates four pathways of dispute resolution:[27]

1. An informal advisory proceeding that consults each party on a separate and individual basis to resolve the dispute;

2. An informal mediation Proceeding that facilitates active participation in joint discussions and negotiations and provides specific recommendations on dispute resolution;
3. A formal non-binding proceeding to hear evidence and make recommendations on dispute resolution;
4. A binding proceeding to hear evidence and issue directives and awards for dispute resolution.

The WAPP's dispute resolution procedures provide a more flexible combination of formal and informal procedures than the EC's do. The WAPP has less experience in energy integration than EC, and there is a dearth of information on the application of its dispute resolution mechanism. However, one of the strengths of the WAPP is that it has also developed more detailed dispute resolution mechanisms for specific projects, which provide insights on how disputes involving communities can be resolved. For example, the Solar Development in Sub-Saharan Africa project has a detailed Grievance Mechanism that outlines two major pathways towards addressing impacts of energy projects on community members:

1. A Complaints Resolution Committee that is responsible for developing grievance procedures, conducting objective and timey investigations, adjudicating grievance and monitoring agreements
2. One Environmental Safeguard Officer and one Social Safeguard Officer who are responsible for sharing information about project implementation among community members, respond to grievances and monitor the implementation of socio-environmental policies.

THE TRANSIT PROTOCOL OF THE ENERGY CHARTER TREATY

The Energy Charter Treaty (ECT) is an international agreement that facilitates a multilateral framework for cross-border electricity trade. The ECT came into force in 1998 and has fifty-three Signatories and Contracting Parties.[28] The ECT focuses on promotion and protection of energy investments, and dispute resolution mechanisms. Similar to the EC, the ECT Secretariat can facilitate negotiation between parties in a conflict to reach an amicable settlement. The EC provides dispute resolution between countries under Article 27, and between investors and countries under Article 26.[29] One of the most important aspects of the ECT's dispute resolution mechanism is its focus on the critical issue of transit.

Article 7 of the ECT requires countries to facilitate transit of energy via fixed infrastructure such as pipelines and electricity grids on a non-discriminatory basis, which is consistent with the principle of freedom of transit in the General Agreement on Tariffs and Trade (GATT). In 1998, the ECT decided to develop the Transit Protocol,[30] a more specific set of rules on transit which aims to:

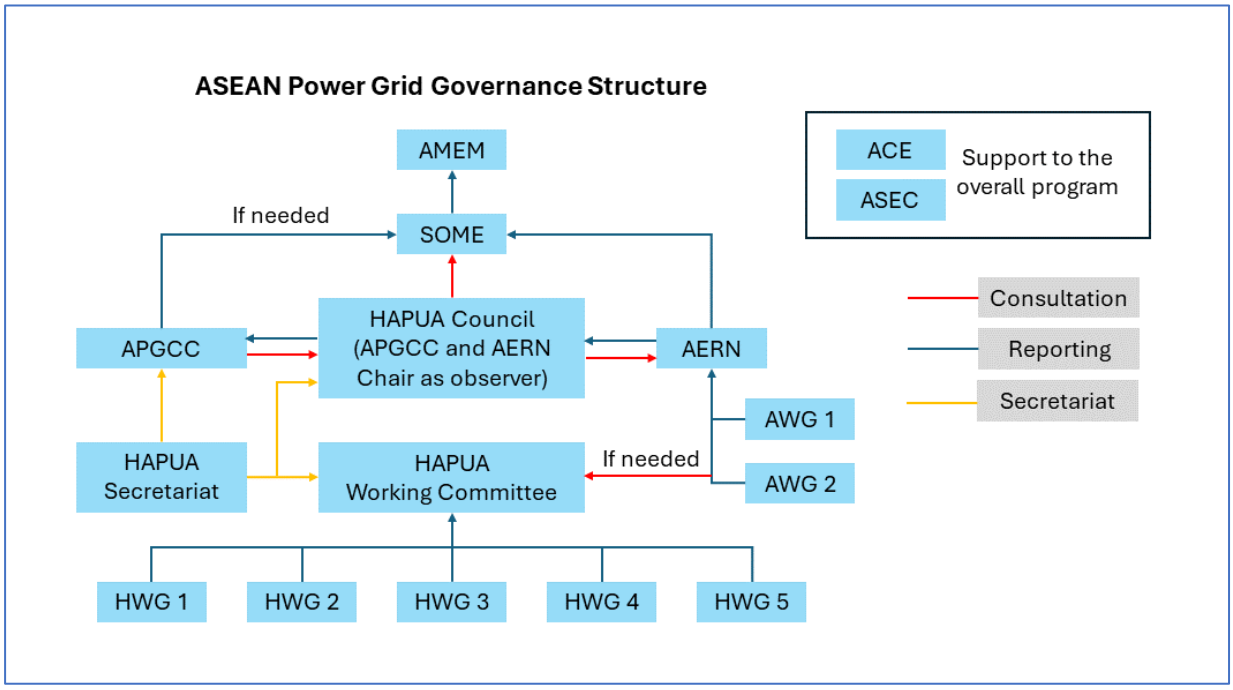
1. ensure secure, efficient, uninterrupted and unimpeded transit
2. promote more efficient use of transit infrastructure
3. facilitate the construction or modification of transit infrastructure[31]

The Transit Protocol has not been adopted as a legal agreement due to a number of political disputes, and the ECT itself has faced increasing challenges. However, the Transit Protocol is an important contribution towards addressing one of the key challenges of international energy trade: the fear that political conflicts can lead to deliberate disruption of energy supplies.

RECOMMENDATIONS FOR THE APG GOVERNANCE MECHANISM

The countries of the ASEAN have diverse political systems and varied levels of economic development. While there has been steady progress in integration, the countries of the region are guarded about national sovereignty, which makes the development of supranational institutions or implementing binding international agreements challenging. Despite this, it is important to engage in discussion towards the development of a binding treaty on the APG that governs generation, transmission, distribution and the crucial issue of dispute resolution. Such an agreement can be the basis for a law-driven approach to region-wide energy cooperation in Southeast Asia. A law-based approach will provide greater assurance and confidence to investors in cross-border APG infrastructures.

Figure 2. ASEAN Power Grid Governance Structure[32]



Source: ACE (2024), *Sectoral Bodies,* The ASEAN Centre for Energy, Jakarta, https://asean.org/our-communities/economic-community/asean-energy-cooperation/sectoral-bodies/

As shown in Figure 2, the APG Governance structure involves consultations and decision-making among a large number of organisations, committees and sub-committees, which are supported by the ASEAN Centre for Energy and the ASEAN Secretariat. A dispute resolution mechanism needs to be developed through the interactions between stakeholders of this governance structure. Some recommendations towards achieving this are given below:

1. Undertake detailed consultations with ASEAN Member States on the development of dispute resolution mechanisms that are suitable for the specific socio-economic and political realities of the energy industry in Southeast Asia.
2. Develop a Dispute Resolution Centre that will facilitate negotiations between and among governments, corporations and members of the public involved in conflicts over cross-border energy projects.
3. Set up protocols for receiving requests or complaints, communicating with disputative parties and facilitating negotiations.
4. Develop a structured and time-bound process for resolving disputes, which includes step-by-step guidelines on escalation of arbitration, feedback and monitoring.
5. Draft specific agreements and protocols on transit, focusing on uninterrupted supply, collaborative infrastructure development, maintenance and protection.
6. Draft guidelines on developing grievance mechanisms for cross-border energy projects, which facilitate the submission and timely resolution of complaints by community members.

ENDNOTES

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[12] Huda, Seah, and Qiu.
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[16] IRB - Independent Regulatory Board
EAPP - Eastern Africa Power Pool
WAPP - West Africa Power Pool
CRIE - Regional Electrical Interconnection Commission (Comisión Regional de Interconexión Eléctrica)
SAPP - Southern African Power Pool
TSO - Transmission System Operator
UNCITRAL - The United Nations Commission on International Trade Law
SCC – Stockholm Chamber of Commerce
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[32] AMEM - ASEAN Ministers on Energy Meeting
SOME - ASEAN Senior Officials Meeting on Energy
HAPUA - Heads of ASEAN Power/Authorities Council
HWG – HAPUA Working Group

APGCC - ASEAN Power Grid Consultative Committee
AERN - ASEAN Energy Regulators Network
AWG – AERN Working Group

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