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Study on the concretisation of the “fair and equitable treatment” clause in the field of energy investment within the Shanghai Cooperation Organisation

In the field of energy investment within the Shanghai Cooperation Organisation (SCO), the fair and equitable treatment (FET) clause is constrained by a dual set of impediments: its inherent abstraction and an interpretive tradition shaped by Western-centric premises. As a result, it has fallen into a triple predicament of dysfunction—fragmented rule articulation, a skewed normative orientation, and an adversarial dispute-settlement structure—thereby failing to effectively accommodate the core need of balancing host States’ legitimate regulatory authority with the protection of investors’ rights and interests in energy-investment contexts. To address these deficiencies, this study takes the Shanghai Spirit—mutual trust, mutual benefit, equality, consultation, respect for cultural diversity, and pursuit of common development—as its jurisprudential foundation, and proposes a pathway for constructing a more concretised FET clause. On the substantive plane, it advocates reconstructing the principal standards of application—such as legitimate expectations, dynamic stability, and a public-interest exception—through a closed-list technique of enumerated grounds. On the procedural plane, it proposes establishing a progressive dispute-settlement mechanism of consultation–mediation–arbitration, while strengthening functions of early-stage dispute prevention. The central objective of this jurisprudential reconstruction is to transform the FET clause from a rigid remedial instrument into a governance norm marked by both balance and flexibility. This approach aims to promote a shift in regional energy-investment governance from arbitration-centricity toward a model of consultative co-governance, ultimately offering Global South countries a development-right-oriented paradigm for international investment rule-making.

Keywords: Fair and Equitable Treatment, Shanghai Spirit, Shanghai Cooperation Organisation, Energy Investment.

Introduction

In international investment law, the fair and equitable treatment (FET) clause—owing to its inherent abstraction and interpretive elasticity—has frequently operated in arbitral practice as an “investor-centric” device. It has therefore struggled to strike an appropriate balance between, on the one hand, host States’ legitimate regulatory authority in the course of energy transition and, on the other hand, investors’ demands for investment stability. This Article advances the central proposition that the “Shanghai Spirit”—defined by the Shanghai Cooperation Organisation (SCO) as mutual trust, mutual benefit, equality, consultation, respect for cultural diversity, and the pursuit of common development—can serve as a distinctive normative foundation and rule paradigm for the jurisprudential reconstruction and concretisation of the FET clause. Systematically embedding the “Shanghai Spirit” into the FET clause is not a mere rhetorical affirmation of values; rather, it seeks to transform FET from an abstract standard rooted in a Western liberal tradition into a more inclusive, substantively balanced rule capable of reflecting the development concerns of Global South States.

A profound jurisprudential affinity and complementarity exists between the “Shanghai Spirit” and the FET clause. In arbitral practice, conventional understandings of FET have often been read as providing near-absolute protection for a “stable, transparent, and predictable legal framework”. Such interpretations are frequently decontextualised and insufficiently attentive to the particular needs of host States—especially developing countries—in relation to energy sovereignty, structural transformation, and regulation in the public interest. The “Shanghai Spirit”, with its principles of mutual trust and mutual benefit, equality through consultation, and respect for civilisational diversity, provides precisely the theoretical resources needed to correct this imbalance. It calls for international energy investment governance to abandon zero-sum logic and

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the unilateral imposition of standards, and to move instead toward a cooperation model driven by shared problem-solving. It further requires that interpretive practice fully account for member States' diversity in resource endowments, stages of development, and civilisational traditions [1]. In essence, embedding the "Shanghai Spirit" into FET translates the political wisdom of regional cooperation into operational legal language, thereby enabling a paradigmatic shift in the jurisprudence of investment protection from "formal equality" to "substantive fairness".

This theoretical reconstruction is reflected in three principal dimensions.

First, reconstructing FET's normative core by replacing "formal fairness" with "substantive fairness". In applying FET, investment tribunals often fall into doctrinal, even rigid, readings of elements such as "legitimate expectations" and "stability", while overlooking the distinct challenges and equity claims faced by Global South States in the energy transition [2]. In the wave of arbitration cases triggered by adjustments to renewable-energy subsidy regimes, tribunals have tended to treat investors' expectations of an "unchanged policy environment" as presumptively reasonable, without adequately evaluating host States' legitimacy in pursuing a just energy transition, alleviating fiscal burdens, or recalibrating industrial policy. The principles of "mutual benefit" and the "pursuit of common development" embedded in the Shanghai Spirit require that FET interpretation incorporate a development-rights perspective. Investors' "legitimate expectations" should not be premised on an assumption of immutable laws and policies; they should instead rest on clear and specific commitments by the host State and be subjected to dual scrutiny through tests of reasonableness and public-interest proportionality. At the level of concretising rules, one may draw on the "progressive and pragmatic" orientation of the investment chapter of the *Regional Comprehensive Economic Partnership* (RCEP) by introducing, within the FET clause, a non-discriminatory and proportionate regulatory carve-out for public interests such as climate governance and energy security, and by allowing longer transitional adjustment periods for developing-country members.

Second, expanding the protective ambit of FET through a "cooperative security" concept in response to the distinctive risks of energy investment. Energy investment—particularly in cross-border pipelines, power grids, and renewable-energy bases—features large scale, long cycles, and wide geographic dispersion. The relevant "security" concerns extend well beyond conventional property protection and are closely intertwined with regional geopolitical stability and supply-chain resilience [3]. Under traditional FET formulations, the standard of "full protection and security" is typically confined to physical protection in a public-order sense. The Shanghai Spirit's embedded "cooperative security" conception, however, calls for an expanded protective horizon that addresses, through regional cooperation, threats to energy assets and supply chains arising from terrorism, cyberattacks, and political instability [4]. This suggests that, in concretising FET, the host State's obligations might be clarified as including not only a negative duty to take reasonable measures to prevent physical harm to investments, but also—within cooperative arrangements involving investors and other member States—potential positive duties relating to information-sharing, risk alerts, and joint emergency response. Such design would enable the FET clause to better serve the SCO's broader agenda of regional energy connectivity and provide more comprehensive legal assurance for the long-term stable operation of major projects such as the China–Russia–Mongolia gas pipeline and the Central Asia–China oil and gas corridor [5].

Finally, reshaping the implementation mechanism of FET around "consultative consensus", thereby shifting from dispute settlement to dispute prevention. Contemporary dispute-settlement models—exemplified by arbitration under ICSID or the Energy Charter Treaty (ECT)—are markedly adversarial, costly, and outcome-uncertain, and arbitral awards are often ill-suited to reflect the SCO's particular culture of political trust and cooperative practice. The Shanghai Spirit's core principle of consultation offers a clear avenue for innovation. It requires that dialogue and consensus-seeking be prioritised over adversarial adjudication. At the rule-design level, this may be operationalised through the incorporation of mandatory consultation and mediation periods in investment treaties, and by treating the exhaustion of local administrative review procedures in the host State, or the pursuit of mediation through relevant SCO platforms, as preconditions to initiating international arbitration. At the institutional level, the SCO could explore establishing a Joint Committee on Energy Investment, tasked not only with facilitating policy dialogue and enhancing transparency, but also with issuing non-binding regional guidance on the application of the FET clause, or with providing advisory opinions on whether particular policy adjustments constitute a "fundamental frustration" of investor expectations. A "consultation-first" mechanism of this kind would allow potential legal conflicts to be defused through early-stage communication and joint assessment, aligning more closely with the SCO's practical logic of sustaining long-term cooperation through the Shanghai Spirit.

Embedding the “Shanghai Spirit” in the FET clause is therefore not a simple attachment of political slogans, but a profound jurisprudential reconstruction. It aims to transform FET from a potentially rigid and directional remedial instrument into a flexible, balanced governance norm capable of supporting the sustainable development of regional energy cooperation. This positioning provides a solid theoretical point of departure for the SCO to pursue rule innovation in energy investment that moves beyond Western-centric narratives and better aligns with the collective interests of Global South States. Subsequent work on concretisation should focus on translating the core principles of “substantive fairness”, “cooperative security”, and “consultation-first” into clear, operational treaty text and procedural arrangements.

Methods and materials

This article employs two analytical methods: comparative analysis and literature analysis.

Comparative analysis — this article compares problems existing at the levels of entities and procedures, and norms and reality, and points out the issues related to the principle of fairness at the practical level.

Literature analysis — this paper, through literature analysis, points out that the principle of fairness is subject to limitations at two levels, namely, the substantive and procedural limitations. Furthermore, through literature analysis, it identifies corresponding solutions.

Results

The evolution of the fair and equitable treatment (FET) clause in international investment law reflects a broader tendency to move from abstract principle toward more determinate, rule-based concretisation. In crafting an SCO energy-investment protection regime aligned with the Shanghai Spirit, it is necessary to examine existing regional practices through an instrumental lens and to draw, critically and selectively, on their methodological strengths and institutional wisdom. The ultimate objective is to serve the development of an “SCO approach” oriented toward common development.

1 The EU's ECT Modernisation: Concretisation Techniques and the Risk of Rigidity

As the most consequential multilateral investment agreement in the energy sector, the Energy Charter Treaty (ECT) offers both positive and cautionary lessons through its arbitral jurisprudence and ongoing reform trajectory with respect to FET.

On the positive side, a closed-list technique enhances legal certainty. A central contribution of the EU-driven ECT modernisation proposal lies in its adoption of a closed, enumerative approach that specifies FET obligations in terms of clearly identifiable elements, including due process, denial of justice, manifest arbitrariness or discriminatory conduct, transparency obligations, and the protection of legitimate expectations grounded in specific representations or commitments [6]. This technique directly responds to the longstanding problem that the semantic indeterminacy of traditional FET clauses enables tribunals to expand interpretive discretion. By strictly confining “legitimate expectations” to specific assurances given by the host State, the approach seeks to balance investor protection and regulatory autonomy, while reserving necessary space for policy adjustment [7]. The path of constraining adjudicatory discretion through legislative technique and thereby improving predictability is of direct relevance to the SCO when drafting model clauses.

The internal limitation, however, is insufficient flexibility and limited value-compatibility. The EU proposal, in substance, projects the high standards associated with the European Green Deal into a multilateral setting. Its one-size-fits-all, technocratic rules may be poorly adapted to the pronounced differences among SCO member States in energy structure, development level, and regulatory capacity. If the EU's protection standards for renewable-energy investments were transplanted without adaptation to members that remain heavily reliant on fossil fuels and are at an early stage of transition, they could unduly constrain context-sensitive policy experimentation and incremental adjustment—contrary to the Shanghai Spirit's principles of respecting diversity and pursuing common development. For the SCO, the most valuable lesson from the EU lies in the method of concretisation (closed enumeration), rather than the substantive content of the EU's specific standards; those standards must be reviewed and recalibrated through a development-rights lens.

2 ASEAN Investment Agreements: Institutional Wisdom of Flexibility and a Consultative Culture

In contrast to the EU's technocratic rationality, ASEAN regional investment instruments embody a distinctive wisdom of flexibility and inclusiveness. Their institutional design demonstrates a higher degree of conceptual affinity with the Shanghai Spirit.

With respect to flexibility in rule design, the ASEAN model provides development-oriented regulatory space through explicit exceptions. ASEAN investment agreements commonly incorporate flexible exception clauses that expressly permit member States to adopt necessary measures to protect essential security inter-

ests or public interests, such as energy security, public health, and environmental protection. This explicit recognition of host-State regulatory authority supplies developing countries with a crucial balancing tool between investment attraction and policy space preservation. The approach directly resonates with the Shanghai Spirit's respect for States' development paths grounded in domestic conditions. Any future SCO FET clause should incorporate similarly clear public-interest exceptions and may further incorporate regionally shared understandings—such as just energy transition and differentiated pathways to carbon neutrality—within the scope of such exceptions so as to safeguard members' rights to sustainable development.

At the level of dispute settlement, the ASEAN model reflects a prevention-first culture anchored in consultation. Its more distinctive reference value lies in its consultation-first approach to dispute resolution. ASEAN agreements often establish consultation and mediation as mandatory preconditions to arbitration and provide institutional support, such as an ASEAN investment dispute mediation centre [8]. This design aligns closely with the Shanghai Spirit's principle of equality through consultation and seeks to defuse confrontation through dialogue in order to sustain long-term cooperative relations. For the SCO, constructing a diversified framework of dispute prevention and resolution—comprising mandatory consultation periods, a standing policy-dialogue platform, and an expert mediation mechanism—is more urgent and better adapted than establishing a permanent arbitral institution modelled on ICSID. Such a framework would also allow the SCO to translate accumulated trust-building experience from joint exercises and cooperation in the security domain into the governance of energy investment.

3 A Critical Synthesis: Toward an “SCO Approach”

From the EU's ECT modernisation process, the key transferable instrument is the legislative technique of closed enumeration, which disaggregates FET obligations into concrete and identifiable sub-elements, thereby enhancing the determinacy of legal rules. The EU approach, however, carries an inherent deficiency of value one-dimensionality: the rigidity of specific standards risks neglecting developmental divergence among member States and thus requires the infusion of development-rights considerations when translated into the SCO context. In terms of fit, the EU experience suggests that the method is transferable, but the standards require adjustment. The SCO may adopt the technical pathway for improving clarity while recalibrating concrete sub-standards—such as the threshold for establishing legitimate expectations and the degree of transparency required—so that they embody principles of equality and respect for difference and permit differentiated institutional arrangements.

From ASEAN investment agreements, the core transferable instruments are twofold: (i) flexible exception clauses that provide an explicit legal basis for public-interest regulation, and (ii) a consultation-first dispute culture that institutionalises consultation and mediation and embodies a cooperative, win-win orientation. Their potential limitation lies in enforcement: soft consultative mechanisms require sufficient political will and institutional capacity to be operational. In terms of fit, the ASEAN approach displays strong conceptual compatibility and meaningful institutional reference value. Its development-friendly exceptions and consultative culture resonate with the Shanghai Spirit's principles of mutual benefit and consultation. The SCO may draw directly on this institutional architecture while localising mechanism innovation through existing bodies, such as committees on energy cooperation.

A future “SCO approach” should therefore be a form of creative synthesis: in the form of rules, it should absorb the EU's technocratic rationality of closed enumeration to improve clarity and predictability; in substance and procedure, it should rely more heavily on ASEAN's flexibility and consultative wisdom, while embedding the normative core of the Shanghai Spirit. The ultimate aim is to develop a new regional paradigm for energy-investment protection that integrates determinacy, flexibility, and development inclusiveness. This requires that, in negotiations, the SCO focus not only on drafting treaty text, but also on constructing a regional institutional ecosystem capable of supporting dynamic interpretation, sustained policy dialogue, and dispute resolution in a cooperative and non-adversarial manner.

Discussion

At the level of theory, the “Shanghai Spirit” offers an ideal jurisprudential compass for reconstructing and concretising the fair and equitable treatment (FET) clause. A review of the current practice of energy-investment protection within the Shanghai Cooperation Organisation (SCO), however, reveals pronounced dysfunctions along three dimensions—rules, values, and procedure. This state of affairs is incapable of sustaining the foregoing theoretical project and constitutes a practical obstacle to the concretisation of the clause.

1 Rules-Based Dysfunction: Fragmented Treaties and Abstract Clauses Undermine Legal Certainty

Within the SCO framework, there is presently no unified multilateral agreement on energy investment. Investment protection remains heavily dependent on a dense, intricate, and temporally uneven network of bilateral investment treaties (BITs) among member States [9]. This “labyrinth of rules” directly generates uncertainty as to applicable law and imposes high compliance costs. Investors must navigate, with difficulty, across divergent standards of protection, exception clauses, and dispute-settlement arrangements embedded in different treaties—producing a “spaghetti-bowl effect” in the regional legal environment.

The core of this rules-based dysfunction lies in the FET clause itself. In most BITs, FET is formulated merely as a principled affirmation that investments shall be accorded “fair and equitable treatment”, while remaining semantically abstract and devoid of articulated elements or operative criteria. This legislative vacuum effectively transfers interpretive authority—and, in practice, quasi-legislative power—to external arbitral tribunals. In the series of renewable-energy arbitrations against Spain, tribunals confronted similar host-State adjustments to subsidy policies yet reached sharply divergent determinations regarding the obligation to maintain a “stable legal framework” and the scope of investors’ “legitimate expectations”, producing mutually inconsistent awards [10]. Such “judge-made law” at the interpretive level and “different outcomes in like cases” at the results level severely erode predictability, leaving both investors and host States unable to form stable expectations as to the legal consequences of their conduct and fundamentally destabilising the normative foundations of investment protection.

2 Values-Based Dysfunction: The Absence of “Respect for Civilisational Diversity” Compresses Legitimate Regulatory Space

The prevailing regime exhibits a pronounced normative tilt. Its dominant interpretive paradigm for FET is deeply embedded in investor-centric premises and fails to internalise the Shanghai Spirit’s principles of “respect for cultural diversity” and “pursuit of common development”. This deficiency is most evident in the undue constriction of policy space for host States—particularly SCO members of the Global South—in formulating and implementing energy-transition measures.

Traditional arbitral practice tends to construe FET as providing near-absolute guarantees of “stability” in the legal and commercial environment. Where member States must adjust subsidies, taxes, or market rules in order to fulfil carbon-neutrality commitments, ensure energy security, or advance a just transition, such bona fide public-interest regulation is readily challenged by foreign investors through arbitration on the ground that “legitimate expectations” have been frustrated [11]. Measures such as the gradual removal of fossil-fuel subsidies to promote renewable energy, or revised grid-access standards accompanying grid upgrades, may thus trigger FET claims. This logic—placing investors’ commercial interests above host States’ sovereign prerogatives in sustainable development—effectively freezes necessary policy evolution [12]. It directly conflicts with the differentiated energy-transition pathways chosen by States in light of their distinct resource endowments and development stages, i.e., the very “civilisational diversity” that the Shanghai Spirit calls for respecting. The resultant imbalance in value orientation causes the FET clause to mutate from an investment-protection instrument into a “Sword of Damocles” hanging over host States’ exercise of energy sovereignty and their implementation of green policy agendas.

3 Mechanism-Based Dysfunction: Adversarial External Arbitration and a Fundamental Misalignment with the Principle of “Consultation”

At the level of dispute settlement, the existing architecture relies heavily on external arbitration—whether under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) or within the framework of the Energy Charter Treaty (ECT). This institutional choice is fundamentally misaligned with the Shanghai Spirit’s core principle of “consultation”.

External arbitration is inherently adversarial and ex post. It positions investors and host States as opposing parties and resolves disputes through a zero-sum adjudicatory process. Both the process and its outcomes often deepen relational fractures and undermine the mutual trust required for sustained cooperation—standing in stark contrast to the consultative culture advocated by the Shanghai Spirit, which prioritises equal dialogue and mutually beneficial solutions. Reliance on external mechanisms further entails the displacement of interpretive leadership and discursive authority over dispute resolution. Arbitral tribunals are frequently composed of senior Western practitioners or scholars; their reasoning is therefore unavoidably shaped by Euro-American legal traditions and normative commitments, and may be ill-equipped to understand or incorporate the SCO region’s distinctive cooperative security concept, development-rights concerns, and considerations of civilisational diversity. This “outsourcing” of procedure means that core controversies in regional energy cooperation are ultimately decided by external institutions lacking regional context or identifi-

cation, applying jurisprudential premises that may be in tension with regional priorities—thereby exposing a serious deficit in regional governance autonomy.

In sum, the SCO's energy-investment protection regime is caught in an interlocking triple predicament: fragmentation and abstraction at the rules level lead to disorder and uncertainty in the legal order; investor-centric value premises suppress legitimate and plural regulatory needs of host States; and adversarial external arbitration at the mechanism level erodes the foundations of consultative regional governance. Taken together, these dysfunctions demonstrate that a Shanghai Spirit-based concretisation of the FET clause is not a merely decorative theoretical enhancement, but an urgent necessity for resolving practical impasses and for constructing an investment-protection rule set genuinely adapted to the region's characteristics.

Conclusion

The vitality of the fair and equitable treatment (FET) clause in international investment law lies in the clarity and equilibrium of its concrete rules. Owing to its abstraction, the traditional FET clause has facilitated an over-expansion of arbitral discretion and produced a serious imbalance between investor protection and host-State regulatory authority. Reforming the FET clause for energy investment within the Shanghai Cooperation Organisation (SCO) must therefore take the Shanghai Spirit as its normative core and jurisprudential foundation, and promote a systemic shift from a vague principle to a refined set of rules. This is not a mere patchwork repair of Western investment-protection models. Rather, it aims to construct a new paradigm of investment governance that is responsive to the development concerns of the Global South, reflects the principle of common but differentiated responsibilities, and effectively serves a just regional energy transition. Its central task is to translate the ideas of mutual trust, mutual benefit, equality, consultation, respect for cultural diversity, and the pursuit of common development into identifiable, operational, and predictable substantive standards and procedural mechanisms under the FET clause.

1 Reconstructing Substantive Standards: From Abstract Principle to Concrete Elements

The primary task of FET concretisation is to infuse the value orientation of the Shanghai Spirit into its core sub-standards and, through a closed, enumerative technique, to delineate the boundaries of rights and obligations so as to constrain arbitrary interpretation by arbitral tribunals.

Legitimate expectations should be anchored in specific commitments and assessed through contextualised balancing. Traditional arbitral practice often equates investors' unilateral expectations of a stable legal framework with legitimate expectations and neglects the host State's right to development. Under the Shanghai Spirit, the identification of legitimate expectations must be subjected to a dual narrowing and contextual recalibration. Legitimate expectations should arise primarily from the host State's specific, clear, and reasonably relied-upon commitments or representations made in relation to the particular investment, rather than from general policy statements or the broader legal framework. Written assurances in an investment agreement concerning, for example, the duration of a feed-in tariff subsidy or the availability of tax incentives would constitute specific commitments, whereas macro-level objectives in a national *Renewable Energy Development Outline* would generally not. In assessing whether expectations are "legitimate", tribunals or joint interpretive bodies must take into account the host State's—especially developing members'—particular stage in energy-structure transformation, the special challenges it confronts, and its legitimate regulatory space [13]. A rational-investor due diligence requirement should be introduced, obliging investors to anticipate the reasonable possibility of policy adjustment undertaken by the host State to fulfil carbon-neutrality pledges, ensure energy security, or respond to economic crises. This approach embodies the principles of respect for diversity and pursuit of common development, while acknowledging differences in regulatory capacity among members at varying levels of development.

The stability obligation should be framed as "dynamic stability" and preserve host-State regulatory authority. Stability must not be misconstrued as a freezing of the legal environment. Consistent with mutual benefit and equality, a conception of dynamic stability should be adopted. It should be explicitly recognised that host States retain the right to adopt non-discriminatory regulatory measures to pursue legitimate public welfare objectives—such as environmental protection, public health, energy security, and financial stability. So long as such measures are not arbitrary, are non-discriminatory, and are adopted in good faith, they should not constitute a breach of FET even if they negatively affect the value of an investment. To strengthen mutual trust and procedural fairness, where a host State plans to adopt a regulatory measure that may produce a materially adverse impact on existing investments, it should bear a consultative transparency obligation. This includes: providing advance notice to affected investors within a reasonable period; stating the reasons and evidentiary basis for the policy change; establishing transitional or adaptive adjustment periods for

significantly affected investors; and, in appropriate circumstances, consulting on the fair allocation of losses. This design proceduralises the principle of consultation and seeks primarily to prevent disputes rather than merely to provide ex post remedies.

Transparency and non-discrimination standards should reinforce procedural safeguards and realise substantive fairness. The transparency obligation should be upgraded from passive disclosure to proactive, consultative transparency. For the formulation or revision of energy policies, laws, and regulations that materially affect foreign investors' significant interests, host States should establish standing consultation procedures to solicit investor views. Non-discrimination should move beyond formal national treatment or most-favoured-nation treatment and pursue substantive fairness. It should permit SCO members—taking into account differences in energy endowments, stages of development (including least-developed-country status), and specific sustainable development objectives (such as promoting renewable access in remote regions)—to adopt reasonable, time-limited differentiated incentives or adjustment measures in non-core interest areas, provided such measures do not constitute arbitrary or disguised protectionism.

2 Innovating Procedural Mechanisms: From Adversarial Arbitration to Consultative Governance

Reconstruction of substantive rules requires corresponding procedural mechanisms to ensure implementation. The Shanghai Spirit's principles of consultation and equality call for a hybrid governance system that prioritises dispute prevention, centres on consultation and mediation, and treats arbitration as a last-resort safeguard.

Dispute prevention should be institutionalised through an SCO energy-investment policy dialogue platform. Prevention is preferable to resolution. It is recommended that, within the framework of the SCO Energy Cooperation Committee, a standing Energy Investment Policy Dialogue Platform be established. Serving as a regular consultation mechanism among member-State governments, and between governments and major investor communities, the platform would enable periodic exchange of policy trends; impact-assessment briefings for major new or proposed regulatory measures; early-warning mechanisms for potential investment frictions; and informal consultations. It could issue non-binding yet highly persuasive soft-law instruments, such as an *SCO Energy Investment Policy Trends Report* and a *Joint Interpretive Guidance on the Application of the FET Clause*, thereby incrementally shaping regional consensus through soft law.

Dispute settlement should follow a tiered process: mandatory consultation–mediation first–arbitration as a fallback. To reduce overreliance on external arbitral mechanisms such as ICSID, an internal dispute-resolution procedure with SCO characteristics should be designed. Any investment dispute should be required to undergo a friendly-consultation period of no less than 90 days before it may be submitted to mediation or arbitration; during this period, parties may request good offices from the policy dialogue platform [14]. An SCO roster of energy-investment mediators should be established, and parties should be encouraged to prioritise mediation. Mediation—flexible, confidential, and conducive to preserving long-term commercial relationships—is a direct embodiment of the consultation principle. It may also be provided that an unjustified refusal to mediate may be taken into account in any subsequent arbitration for purposes of cost allocation. Only where mediation fails should arbitration be initiated. The SCO may explore establishing a permanent arbitral institution under its auspices or developing dedicated arbitration rules. In interpreting the FET clause, tribunals should be required to take into account the joint interpretive guidance issued by the policy dialogue platform and, in their awards, to explain how they have weighed the host State's Shanghai Spirit-based regulatory authority and public-interest claims, thereby ensuring that reasoning reflects regional value consensus.

Special rules should be added for green transition and security coordination. Rule-making should be forward-looking in order to address emerging challenges associated with a just energy transition and infrastructure security. A “green exception” or “legitimate transition” clause should be embedded in the FET provision, clarifying that good-faith, non-discriminatory measures adopted by host States to fulfil international environmental obligations (including those under the Paris Agreement) and to promote decarbonisation of the energy structure shall, in principle, not constitute breaches of FET. At the same time, investors should be encouraged to incorporate transition-support plans for local communities and workers into their investment programmes, with such efforts recognised as relevant factors for receiving a higher level of host-State protection or for equitable consideration in dispute settlement. The cooperative security concept should be extended to the investment-protection sphere. Under the “full protection and security” sub-standard of FET, host States should not only provide physical protection for investments but also promote inter-member cooperation on joint protection standards and coordinated emergency-response arrangements for cross-border energy infrastructure such as pipelines and power grids. Losses suffered by investors as a result of a host

State's failure to fulfil such cooperation-related obligations may be taken into account in the assessment of claims.

The Shanghai Spirit-guided concretisation of the FET clause constitutes a systematic jurisprudential reconstruction and a programme of rule innovation. The objective of reconstructing substantive standards is to overcome the abstraction and directional bias of traditional FET through closed enumeration and contextualised balancing; the objective of innovating procedural mechanisms is to replace adversarial arbitration with consultative governance and to resolve disputes at the earliest possible stage. This scheme not only provides clear and balanced legal rules for regional energy investment within the SCO, but also aims to contribute an "SCO paradigm"—centred on cooperation driven by shared problems—to the Global South's participation in international investment governance and to the formation of a more inclusive, equitable, and sustainable global energy-investment order. Its implementation will require political will and sustained technical legal cooperation among member States. China, given its pivotal role in the SCO and in green energy investment under the Belt and Road Initiative, is well positioned to proactively promote the drafting and piloting of relevant model clauses and, in practice, to lead the formation and evolution of these rules.

Anchored in the Shanghai Spirit as its normative core, this Article has systematically explored pathways for concretising the fair and equitable treatment (FET) clause in the field of energy investment within the Shanghai Cooperation Organisation (SCO). The analysis suggests that the abstraction of the traditional FET clause, coupled with its investor-centric tendencies, is ill-suited to the heterogeneous development stages and energy-transition needs of SCO member States and readily invites expansive tribunal interpretation. By injecting the principles of mutual trust, mutual benefit, equality, consultation, respect for cultural diversity, and the pursuit of common development into a jurisprudential reconstruction of the FET clause, this study seeks to offer Global South countries a regional governance paradigm that moves beyond Western-centric premises and better balances investor protection with host States' right to development.

1 Theoretical Contribution: A New FET Interpretive Paradigm with the "Shanghai Spirit" at Its Core

The central theoretical contribution of this study lies in its organic integration of general standards of international investment law with the normative logic of regional cooperation. Traditional FET practice relies on tribunals' case-by-case elaboration of abstract elements such as stability and legitimate expectations, often insufficiently attentive to the regulatory space that host States—particularly developing countries—require to advance a just energy transition. This Article contends that FET interpretation should shift from an absolute and static protection standard to a dynamic balancing standard grounded in the Shanghai Spirit. The identification of legitimate expectations should not rest solely on investors' unilateral assumptions, but should take into account, in a consolidated manner, the host State's specific commitments, investors' due diligence obligations, and shared policy orientations under the SCO framework—such as an SCO Declaration on Sustainable Energy Development. This reconstruction establishes a development-right-oriented interpretive logic and supplies a jurisprudential basis for host States to undertake bona fide public-interest regulation—such as measures aimed at energy security or carbon-neutrality objectives.

2 Practical Pathways: Incremental Rule-Making and Consultation-First Dispute Prevention

At the practical level, this study proposes a stepwise institutional roadmap that combines hard-law and soft-law instruments.

Short-term rule supply (1-2 years). Priority should be given to drafting *SCO Model Clauses on FET in Energy Investment*. These clauses may draw on the closed-list technique reflected in the EU's ECT modernisation efforts to enhance legal certainty, but must incorporate elements of the Shanghai Spirit. In enumerating circumstances that constitute violations of FET, the clauses should expressly exclude non-discriminatory, good-faith regulatory measures adopted to fulfil widely recognised international environmental obligations or to respond to acute energy-security emergencies. In parallel, an SCO Energy Investment Policy Filing-and-Dialogue Platform should be established to enhance policy transparency among member States and to prevent disputes arising from information asymmetries.

Medium- to long-term mechanism innovation (3–5 years). Building on the practice generated by model clauses, negotiations should be advanced toward an *SCO Multilateral Convention on Energy Investment Protection*. A key innovation would be to establish a standing SCO Energy Investment Advisory and Mediation Centre and to institutionalise the consultation-first principle. The Centre could provide mandatory consultation-period services and maintain a roster of experts conversant with civil-law and common-law traditions as well as member States' domestic laws, with a view to resolving disputes through mediation and complementing, rather than replicating, adversarial arbitration.

3 China's Role: A Pilot Jurisdiction for Rule Innovation and a Driver of Institutional Interoperability

As a core SCO member and a major global actor in energy investment, China should assume a leading role in regional rule-making. On the one hand, China can serve as a pilot jurisdiction for rule innovation—for example, by establishing, on a trial basis, an SCO-related energy dispute mediation centre in the Lingang area of the Shanghai Pilot Free Trade Zone, experimenting with online mediation and cross-border enforcement procedures, and providing operational experience for regional mechanisms. On the other hand, China should actively promote interoperability between the Belt and Road’s green investment principles and the SCO’s energy cooperation mechanisms. Leveraging its technological and standard-setting advantages in areas such as photovoltaics and ultra-high-voltage transmission, China can take the lead in advancing mutual recognition of regional green electricity certification and coordination of green project financing standards [15]. This would translate sustainable investment concepts developed in Belt and Road practice into hard-law and soft-law norms within the SCO, thereby enhancing the effectiveness of regional energy governance while substantively strengthening China’s institutional voice in international rule-making.

Global energy governance is undergoing profound transformation, and new policy instruments—such as the EU Carbon Border Adjustment Mechanism (CBAM)—pose fresh challenges for investment rules. Future research on the concretisation of the SCO’s FET clause should pay closer attention to frontier issues, including delimiting the boundaries of a “green FET” and developing protection standards for digitalised energy investment (e.g., cross-border data flows). By continuously advancing development-right-oriented rule innovation, the SCO is well positioned to contribute distinctive Eastern wisdom and an SCO approach to the construction of a more equitable, inclusive, and sustainable international energy-investment order.

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Сью Сценлэ, Ван Чифый, Ван Хэюнь

Шанхай ынтымақтастық ұйымы шеңберінде энергетикалық инвестициялар саласындағы «Әділ және тең құқықты қарым-қатынас туралы» Ережені нақтылау бойынша зерттеу

Шанхай Ынтымақтастық Ұйымы (ШЫҰ) шеңберіндегі энергетикалық секторға инвестициялар саласында «Әділ және тең құқықты қарым-қатынас туралы» Ереже (ӘТҚ) екі кедергіге ұшырайды: оған тән абстрактілік және батыстық идеялар қалыптастырған интерпретациялық дәстүр. Нәтижесінде ол үш түрлі жағдайға тап болды: ережелердің үзінді тұжырымы, бұрмаланған нормативтік бағдар және дауларды реттеудің қарсылас құрылымы. Осылайша ол қабылдаушы мемлекеттердің заңды реттеуші күші мен энергетикалық секторға инвестициялар контексінде инвесторлардың құқықтары мен мүдделерін қорғау арасындағы тепе-теңдіктің негізгі қажеттілігін тиімді қанағаттандыра алмайды. Осы кемшіліктерді жою үшін осы зерттеуде «Шанхай рухы» құқықтық негіз ретінде пайдаланылады, яғни: өзара сенім, өзара пайда, теңдік, кеңес беру, мәдени әртүрлілікті құрметтеу және жалпы дамуға ұмтылу. Сонымен қатар ӘТҚ туралы неғұрлым нақтыланған ережені қалыптастыру жолы ұсынылады. Мазмұны жағынан алғанда, ол заңды болжаулар, динамикалық тұрақтылық және қоғамдық мүддеге қатысты ерекшелік сияқты негізгі қолдану стандарттарын санамаланған негіздердің жабық тізім әдісі арқылы қайта құруды жақтайды. Процедуралық тұрғыдан алғанда, ол ерте сатыдағы даулардың алдын алу функцияларын күшейте отырып, кеңес беру, делдалдық және арбитраждық дауларды шешудің прогрессивті механизмін құруды ұсынады. Бұл құқықтық қайта құрудың басты мақсаты — дауларды шешудің қатаң құралынан «Әділ және тең құқықты қарым-қатынас туралы» Ережені теңгерімділікпен де, икемділікпен де ерекшеленетін басқару нормасына айналдыру, осылайша аймақтық энергетикалық инвестицияларды басқаруды арбитраждық орталықтан консультативтік бірлескен басқару моделіне ауыстыруға ықпал ету және сайып келгенде, Оңтүстік жаһандық елдеріне халықаралық инвестициялық ережелерді жасау үшін жаңа, даму құқықтарына бағытталған парадигманы ұсыну.

Кілт сөздер: әділ және тең құқықты қарым-қатынас, Шанхай рухы, Шанхай ынтымақтастық ұйымы, энергетикалық инвестициялар.

Сью Сценлэ, Ван Чифый, Ван Хэюнь

Исследование по конкретизации Положения о «справедливом и равноправном обращении» в сфере энергетических инвестиций в рамках Шанхайской организации сотрудничества

В сфере инвестиций в энергетический сектор в рамках Шанхайской организации сотрудничества (ШОС) положение о справедливом и равноправном обращении (СЭО) сталкивается с двумя препятствиями: присущей ему абстрактностью и интерпретационной традицией, сформированной западными представлениями. В результате оно оказалось в тройном затруднении: фрагментарная формулировка правил, искаженная нормативная ориентация и состязательная структура урегулирования споров. Таким образом, оно не может эффективно удовлетворить основную потребность в балансе между законной регулирующей властью принимающих государств и защитой прав и интересов инвесторов в контексте инвестиций в энергетический сектор. Для устранения этих недостатков в данном исследовании в качестве правовой основы используется «Шанхайский дух» — взаимное доверие, взаимная выгода, равенство, консультации, уважение к культурному многообразию и стремление к общему развитию — и предлагается путь для построения более конкретизированного положения о СЭО. На содержательном уровне предлагается пересмотреть основные стандарты применения — такие стандарты, как законные ожидания, динамическая стабильность и исключение в интересах общества — посредством закрытого списка перечисляемых оснований. На процедурном уровне предлагается создать прогрессивный механизм урегулирования споров, включающий консультации, посредничество и арбитраж, одновременно усиливая функции предотвращения споров на ранних стадиях. Цель предлагаемой правовой реконструкции заключается в трансформации положения о справедливом и равноправном обращении из жесткого инструмента разрешения споров в норму управления, сочетающую сбалансированность и гибкость. Тем самым создаются условия для перехода регионального управления инвестициями в энергетику от арбитражно-ориентированного подхода к консультативной модели совместного управления. В конечном итоге это позволяет предложить странам Глобального Юга новую, ориентированную на развитие парадигму нормотворчества в сфере международных инвестиций.

Ключевые слова: справедливое и равноправное обращение, Шанхайский дух, Шанхайская организация сотрудничества, энергетические инвестиции.

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