

# BRICS Investment Policies from PFI Perspective<sup>1</sup>

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## Abstract

*The Organisation for Economic Co-operation and Development (OECD) Policy Framework for Investment (PFI) contains recommendations and best practices in 12 investment-related policy areas, and is widely regarded as the world's most comprehensive and authoritative instrument on international investment regulation. The topicality of PFI recommendations for OECD members and other countries, including Russia, is dictated by competition in international investment markets. The instrument's implementation can significantly boost a national jurisdiction's attractiveness to investors and thus increase its economic competitiveness.*

*The experience of the BRICS countries as large developing economies involved in collaboration with the OECD could be of great value from the standpoint of PFI implementation in Russia.*

*This article examines investment policies of Brazil, India, China and South Africa from the perspective of PFI recommendations. The analysis is organized around four major themes: the general characteristics of investment regimes and investment stimuli, national investment regulation regimes, trade policies and overcoming structural limitations. The analysis forms the basis for recommendations to improve the investment policy regime in Russia.*

**Key words:** Policy Framework for Investment; OECD; BRICS; International trade and investment; infrastructure; Human resource development; green growth

For citation: Sakharov A. (2017) BRICS Investment Policies from PFI Perspective. *International Organisations Research Journal*, vol. 12, no 3, pp. 160–181 (in Russian and English). DOI: 10.17323/1996-7845-2017-03-160

## Introduction

Despite the postponement of activities related to the accession process of the Russian Federation to the Organisation for Economic Co-operation and Development (OECD) following the decision of the OECD governing council on 12 March 2014 [OECD, 2014b], accession remains one of the long-term priorities of Russia's foreign policy. According to the Initial Memorandum submitted to the OECD in June 2009,

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<sup>1</sup> The editorial board received the article in January 2017.

The research was carried out within the framework of the RANEPa research project “Comparative study of BRICS member countries and Indonesia approaches to OECD instruments implementation” (2017).

Russia made several commitments to implement the norms, standards and instruments of the Organisation across 16 policy areas.<sup>2</sup>

The OECD Policy Framework for Investment (PFI) is a compendium of recommendations and guiding principles on 12 investment-related issue areas, including investment regimes, finance, fiscal policy, trade, competition, human resource development, corporate governance and more. The primary objective of the PFI is to foster the creation of a favourable investment and business environment to provide appropriate conditions for private investment mobilization. PFI recommendations are designed to be implemented by government agencies domestically by fostering a favourable investment climate and business environment, and externally through participation in international investment agreements, development and implementation of international standards, as well as through interaction with other states on countering crime and corruption [OECD, 2015].

The relevance of the PFI for the OECD and other countries, including Russia, is primarily determined by competition in the global investment market. The implementation of PFI provisions, representing best practices in the field of investment policy, can boost the attractiveness of national jurisdictions for FDI thereby increasing the overall competitiveness of any country's economy. China set the adoption of a commonly accepted set of rules for global investment policy as one of the priorities for its G20 chairmanship. As a result, the G20 Guiding Principles for Global Investment Policymaking were approved at the 2016 Hangzhou summit. This document largely reflects the contents of the PFI's "horizontal practices" – the basic principles for implementing investment policy according to the OECD.

An important first stage of the practical implementation of OECD instruments is the analysis of the experience and best practices of other states. The experience of large non-OECD developing economies with implementation of the PFI provisions into their national legislations and law enforcement structures is of particular interest to the Russian Federation.

In order to identify best practices and develop recommendations for their application in Russia this article attempts to undertake a comparative analysis of the investment-related policies of the BRICS across four main issue areas: investment regimes and efforts to promote investment, national regulatory regimes, trade policy measures directly related to investment and BRICS countries' actions aimed at overcoming structural limitations to the investment climate such as inadequate infrastructure development, regional disparities and inequality.<sup>3</sup>

Given the long-term orientation of the PFI provisions and the occasional updates made to them, the implementation of this instrument should be assessed as an ongoing

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<sup>2</sup> Plan for the legislative work to bring Russian legal framework in line with the OECD standards.

<sup>3</sup> A short review in this article is based on the preliminary results of the "Comparative study of BRICS member countries and Indonesia approaches to OECD instruments implementation" study conducted by the RANPEA CIIR in 2017.

process. This article considers country actions that have influenced the evolution of national investment climates in their current state.

## PFI Implementation in the BRICS Countries

An independent review of investment policy based on the provisions of the PFI is the first stage of PFI implementation. These reviews represent some of the most comprehensive sources of data on countries' investment environments. Among the economies analyzed in this article, only China and India underwent the review process (in 2008 and 2009 respectively), while Brazil and South Africa have not yet done so. A review on Russia was released in 2008 [OECD, "OECD Investment Policy Reviews," 2009].

Since 2009, the OECD and the United Nations Conference on Trade and Development (UNCTAD) have been monitoring the investment measures of G20 countries. Further, UNCTAD conducts an independent analysis of investment policy in the framework of the Investment Policy Monitor ["Investment Policy Hub," s. a. ]. These studies are important sources of information on the investment measures of countries considered in this review. In addition, this study employs data from the BRICS countries' authorities, as well as from independent sources such as the media, business associations, consulting agencies and multinational corporations.

### **China**

In general, the investment policy of China is characterized by a high degree of flexibility, balancing the interests of domestic business and the objective of attracting foreign capital and technology to fuel economic growth.

In many sectors of the economy, persistent and significant restrictions are justified by considerations of national security. According to UNCTAD and OECD investment policy studies, during the monitoring period China adopted six measures directly aimed at ensuring national security. Chinese leadership considers the military industry, large machine and machine tool building, infrastructure and transportation, energy and mineral resources extraction, agriculture and high-tech industries to be the most sensitive, and prohibits any foreign activities in these industries [OECD, 2016].

State control, motivated by the interests of state security, is not weakening. On 1 July 2015, the National Security Law came into force. One of its provisions regulates the establishment of a state oversight mechanism with a mandate to verify the compliance of foreign companies and investors with the national security regulations of the PRC [China Law Translate, 2015].

Although China's investment regime is characterized by a large number of restrictions in comparison with the country's main trading partners, measures to gradually liberalize the investment environment are also being implemented. The monopoly power of state-owned companies is gradually declining as exclusive access to factors of production is being reduced through government efforts to increase effectiveness and transparency [U.S. Department of State, 2015].

On 19 November 2015, the Ministry of Industry and Information Technology of the People's Republic of China issued a decree removing restrictions on foreign ownership of information and communications technology (ICT) companies. On 3 September 2016, the National People's Congress abolished the requirement to obtain approval for the establishment of and changes to foreign invested enterprises by a nation-wide filing system. For investors, the need to obtain approval of the Ministry of Commerce or its regional bodies was lifted except for investment in enterprises from the "black list" [Ministry of Commerce of China, 2016].

In February 2014, the Chinese Ministry of Commerce issued a resolution altering the procedure for considering mergers and acquisitions in relation to enterprises with a relatively low aggregate market share. The implemented rules allow the country's anti-monopoly authorities to apply a simplified procedure for reviewing and resolving such cases [WTO, 2016a].

China's trade and investment policy is regulated within the framework of the five-year plans of the central government, sectoral and regional five-year plans, as well as catalogues of measures containing specific actions to achieve the government-set objectives. The Chinese leadership has repeatedly stated its readiness to continue liberalizing the trade regime in keeping with the principles of the multilateral trading system in the context of the transformation of the country's economy [WTO, 2016a].

Nevertheless, given the specific economic conditions of the PRC and the requirement to minimize structural risks to the country's economy, China retains a strict regulation policy regarding foreign trade and investment activities. Foreign investments are "channeled" by the government to those sectors that, in its opinion, need it the most.

China has been a member of the World Trade Organization (WTO) since 2001. The country cooperates with the WTO on a regular basis, providing notifications, as well as using the appropriate WTO tools to achieve its policy goals. Nevertheless, according to the WTO trade policy review, there were instances when China failed to properly notify the Organization of its actions, especially with respect to updating relevant laws and regulations, creating new regulatory bodies and introducing new procedures [WTO, 2016a].

According to WTO data, between June and October 2016, China did not introduce new protectionist measures [WTO, 2016a]. Nevertheless, the country supports an extensive list of goods subject to various kinds of import restrictions [MOFCOM GACC, 2015]. This catalog is issued annually by the Ministry of Commerce and the Main Customs Administration of China.

The PRC pursues policy aimed at simplifying trade procedures. In 2009, the government launched a pilot program of reforms in this area, which was extended in 2012 to the whole country. Within the framework of this program, enterprises engaged in foreign trade activities were classified into three groups according to the degree of their compliance with the customs regulations: "authorized enterprises," or Authorized Economic Operators (having access to a simplified procedure for customs control),

“enterprises of general integrity” and “dishonest” enterprises (to which strict procedures of customs control apply) [WTO, 2016a].

The goals of overcoming structural limitations, including in the areas of human capital development, infrastructure construction and green growth are the focus of China’s strategic documents on economic and social development. Actions in all these areas are provided for by the 13th Five-Year Plan for 2016–2020 [National Development and Reform Commission, nd]. The Plan provides for appropriate measures aimed at human capital development and “cultivation of talents” in the country. The government plans to take action across six main spheres, including attracting foreign personnel, improving the quality of education, strengthening the links between training of workers and the needs of the labour market.

The large-scale efforts of the Chinese government in the field of infrastructure development, improving both urban and transport and logistics infrastructure throughout the country, lie at the core of the country’s structural reforms policy. The goal of these efforts is, among other things, to overcome the gap in the level of economic development between the eastern and western regions of the country, thus creating more favourable conditions for attracting investment to the latter.

In addition, the 13th Five-Year Plan envisages measures to address the environmental problems facing the country. Specifically, the government aims to increase the rate of energy conservation, improve the quality of water resources, promote the efficient use of land resources and support the development of green technologies in the mining industry.

China pursues an extremely flexible policy in the field of regulating investment activities and achieving a balance between attracting foreign capital and ensuring the interests of domestic business. In addition, an important role is played by restrictions in securitized spheres, such as military security, energy and resource independence and influence on public opinion. In the medium and long term, as the Chinese economy becomes progressively more entangled within global value chains, a gradual and highly flexible liberalization of the country’s investment policy is likely to take place, with certain limitations imposed by the nature of the Chinese political system.

## ***India***

Since the early-1990s, India has made significant progress in improving its investment climate. During this period, restrictions on long-term and large-scale investments were substantially relaxed and many sectors of the economy were opened to private sector participation. The government shifted from a policy of import substitution and protectionism to a more liberal market-oriented approach, abandoning sectoral restrictions for foreign investors.

The IPR protection regime, antimonopoly legislation, the tax system, as well as norms and standards of corporate governance have been gradually improved. Combined with efforts to increase human capital, these reforms have a long term positive effect on

the trajectory of the development of the Indian economy. One of the results of the policy was the increase in foreign direct investment (FDI) flows in the pre-crisis period.

At the same time, the country retains structural limitations in the investment sphere, including infrastructure underdevelopment, relatively low capacities in the export industry, insufficient growth in employment rates and regional imbalances [OECD, 2009].

According to UNCTAD research, 61 investment measures have been adopted in India since the beginning of 2010, the largest number among BRICS countries [“Investment Policy Hub,” nd]. The investment regime in India is characterized by a high degree of state regulatory activity. The OECD FDI regulatory restrictiveness index for India is rather high at 0.24 (the OECD average is 0.07) [OECD, 2017a].

There are currently two possible mechanisms for foreign investors in the Indian economy. The first, an automatic route, implies the absence of licensing procedures, while the second, in force for a number of “sensitive” sectors of the economy, requires the approval of the government body – the Foreign Investment Promotion Board. Restrictions on the share of property for foreign investors apply to six areas of the 31 available within the automatic path [Make in India, “Foreign Direct Investment,” s. a.]. Thus, despite the existence of restrictions, the conditions that apply to foreign investors are fairly transparent and predictable.

Since May 2016 the new IPR legislation has been in force in India [Times of India, 2016]. Approved by the cabinet ministers on 13 May 2016, the law provides for full compliance of Indian legislation in this area with the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), as well as the expansion of the mandate and the acceleration of patent examination [The Hindu, 2016]. In 2015, a new bankruptcy law was adopted that will simplify and speed up the procedure for recognizing financial insolvency [Make in India, “New Initiatives,” s. a.].

Another notable initiative of the Indian government in the field of liberalization of its investment regime is a large-scale plan, adopted in June 2016, to review the policy of regulating foreign direct investment in a wide range of industries, including agriculture and livestock, firearms, telecommunications, civil aviation airports, private security organizations, retail trade and pharmaceuticals. All these sectors saw foreign participation quotas lifted or significantly increased [Government of India, 2016].

Competition policy in India is governed by the Competition Act 2002, further amended in 2007 and 2009. The main regulatory body is the Competition Commission of the Government of India. The Competition Act does not differentiate between private and public enterprises with respect to their rights and obligations in the market. Nevertheless, the Act contains certain exceptions to this rule regarding the exercise of sovereign functions by the state in the areas of national security, energy, currency regulation and space exploration. The Competition Act contains a provision on the mandatory confirmation of any merger and acquisition exceeding the threshold of 10 billion rupees of assets and 30 billion rupees of aggregate assets turnover values by the Competition Commission [2002].

The government of India continues the liberalization the country's trade regime. The WTO characterizes India's trade policy as aimed at ensuring supply in the domestic market, as well as achieving short-term objectives such as containing commodity price volatility. These factors have a negative impact on the predictability of the country's trade policy as they require constant adjustments [WTO, 2013c]. Nevertheless, every five years the Indian government issues a foreign trade policy document containing detailed descriptions of the goals and objectives in the field of trade policy, as well as ways to implement them [Indian Ministry of Commerce and Industry, 2015].

The 2015 edition of this document prioritizes trade facilitation activities. According to the text, the task of the government is to reduce transaction costs, primarily in the interest of increasing the competitiveness of Indian exporters. The main body responsible for the implementation of the country's trade policy is the General Directorate of Foreign Trade of the Ministry of Trade and Industry of India.

Since 2011, India has implemented a self-assessment procedure for customs clearance. About 97.6% of imports pass the procedure using risk management mechanisms [WTO, 2013c]. The results of this work are reflected in the country's rising positions in international rankings. According to the OECD study on trade facilitation indicators, India demonstrates one of the best average scores among the BRICS countries – 1.5. India's regulations on customs procedures simplification and advance rulings are on par with the best practices, according to the OECD. Since 2013, the efficiency of procedures automation has significantly increased, the disciplines on fees and charges has strengthened and positive developments regarding the involvement of the trade community in the decision-making process have taken shape [OECD 2017b].

India's foreign trade policy is also characterized by the existence of many free trade agreements with the country's regional and global partners. To date, India is party to 19 such agreements [Indian Ministry of Commerce and Industry, 2017].

Nevertheless, despite some progress in the field of trade facilitation the import regime remains excessively complicated, mainly due to a complex system for obtaining licenses and permits and an intricate tariff structure with exceptions and variations in rates on different goods. Tariff rates are announced annually in the budget, but individual tariff rates may change during the year [WTO, 2013c].

The government's "Make in India" initiative was launched in September 2014 to address structural limitations to the development of the country's investment environment. This initiative provides for measures across multiple investment-related areas including abolition of permits and restrictions to foreign participation in a number of sectors (including strategic ones), simplification of procedures related to business activities and infrastructure development through the construction of five large-scale "industrial corridors" [Make in India, "New Initiatives," s. a.].

Another group of limiting factors, tied to the insufficient level of human capital development, is especially relevant for India as a country with a population of more than 1.3 billion people. A dedicated Ministry for Human Capital Development exists in India, coordinating government policies primarily in the field of education.

The competence of the Ministry also includes the formulation of the national education policy and its implementation, the planning of the development strategy of the national educational institutions, the expansion of access to educational services especially for disadvantaged groups of citizens, the provision of financial support for education and international cooperation in the profile area [Ministry of Human Resource Development of India, “Overview,” s. a.].

The government of India issues five-year plans on social development. The 12th plan for 2012–2017 provides for a number of initiatives in the field of education aimed at enhancing the country’s scientific, technical and innovative potential. In particular, it was designed to support the development of 20 multidisciplinary research universities to increase their international competitiveness, primarily through strengthening control over their operations and audits of their performance [Ministry of Human Resource Development of India, “Twelfth Five Year Plan,” s. a.]. As a part of this plan’s implementation, the Law on Innovative Research Universities was approved by the government in May 2012 [Legislative Brief, 2013]. In addition, India plans to establish 20 centres of excellence within existing universities and 50 centres for training and research in the advanced fields of science and technology [Ministry of Human Resource Development of India, “Twelfth Five Year Plan,” s. a.].

The liberalization of investment legislation in India continues and is gaining momentum. At the same time, restrictions on foreign capital continue to be maintained in sensitive sectors of the economy, including agriculture, oil refining, commodity trading and insurance [Make in India, “Foreign Direct Investment,” s. a.]. The “Make in India” initiative, if successfully implemented, will significantly improve the country’s position in all investment-related policy areas.

### ***South Africa***

The foreign investment regime in South Africa has for a long time been regulated not by a single legislative instrument, but through specific industry regulations. According to the self-assessment report on the investment regime of South Africa issued in 2014 under the auspices of the OECD, the investment regime of the country is characterized as relatively open. The OECD FDI regulatory restrictiveness index for South Africa is the lowest among the BRICS countries and amounts to 0.06 (the average for OECD countries is 0.07) [UNCTAD, “FDI Index,” s. a.]. All sectors of the economy are open to foreign investors; authorization from state authorities is not required. Restrictions, related to the form of ownership or the volume of investment of foreign actors, are minimal. There are no restrictions in place on the ownership of land resources, nor are there requirements for the efficiency of foreign companies [OECD, 2014a].

Additionally, in accordance with WTO rules, South Africa does employ domestic content requirements. However, there is a practice of “non-mandatory” requirements in the country. These requirements create incentives for South African companies to purchase domestic products and are not enshrined in legislation [OECD, 2014a]. Nevertheless, these norms apply equally to both national and foreign investors.

In 2015, the Promotion and Protection of Investment Bill, developed by the Department of Trade and Industry of South Africa, was adopted. On 15 December 2015, the law was approved by the president of South Africa. The stated objectives of the Act are the protection of investments in accordance with the provisions of the constitution of the country while ensuring the balance of the interests of the state against the rights and obligations of investors and the confirmation of sovereign rights of South Africa regarding regulation of investments to ensure national interests [Government of South Africa, 2015].

In fact, the Investment Protection Act of 2015 established the right of the state to impose certain restrictions and expropriate the property of investors, if deemed necessary for reasons of national interest. Several representatives of the international business community, including members of the American Chamber of Commerce in South Africa, expressed the view that this legislative act will negatively affect the overall state of the investment climate in the country [Eyewitness News, 2016]. A similar opinion is held by the factions opposing the current leadership of the country in the parliament, in particular the Democratic Alliance [Eyewitness News, 2015].

Nevertheless, the law only confirmed the state's right to ensure regulation, a right that already existed in the South African legislative system according to the constitution. The Investment Protection Act also does not introduce distinctions between national and foreign investors, emphasizing the equality of these groups before the law in full compliance with international standards.

According to the research conducted by the OECD and UNCTAD since 2009 on G20 investment measures for the period from April 2009 to November 2016, South Africa introduced only nine investment policy measures. All of them were aimed at liberalizing the investment regime for foreign actors.

On 25 October 2011, it was announced that restrictions on foreign ownership of companies operating in the foreign exchange market were lifted. Measures to stimulate investment activity were also adopted in February 2013 within the "Gateway to Africa" program. Companies listed on the Johannesburg Stock Exchange acquired the right to establish an additional subsidiary company within the country without restrictions [South African Reserve Bank, 2011].

In May 2011, the Companies Act came into force. The act was aimed at improving and modernizing the company registration system, as well as assisting enterprises in distress [Government of South Africa, 2011].

Currently foreign investment in South Africa can be carried out without restrictions through companies registered in the country, as well as through the creation of a subsidiary structure. External investments are almost equal in all respects to internal ones. The most significant difference concerns borrowing from local sources – foreign investors are limited in the amount of borrowed funds. Loans to enterprises with more than 75% foreign ownership must pass the approval procedure in the Financial Surveillance Department [OECD, 2014a].

The competition policy of South Africa is regulated in accordance with the Competition Act of 1998 [Competition Commission of South Africa, s. a.]. The main govern-

ment bodies responsible for conducting antimonopoly policy are the Competition Commission, the Competition Tribunal and the Competition Appeal Court.

The provisions of the 1998 Competition Act apply to both private and public actors in all sectors of the economy. At the same time, the Competition Commission has the authority to make exceptions in a number of cases, including exports promotion, promotion of small and medium enterprises (SMEs), fostering development of historically disadvantaged social groups and regions of the country and “saving” certain industries or the ensuring their stability [WTO, 2013b]. In 2013 amendments to the law on competition entered into force, introducing criminal penalties for directors and managers involved in cartel collusion [South African Government, s. a.].

South Africa is a member of the South African Customs Union established in 1910. Currently in force is the 2002 Southern African Customs Union (SACU) Agreement (entered into force on 15 July 2004) [SACU, 2017]. According to the provisions of the agreement, the members of the Union (South Africa, Namibia, Botswana, Lesotho and Swaziland) pursue a common trade policy. Customs tariffs, duties and charges, deductions, procedures for determining customs value, rules of origin and trade protection measures are harmonized between all member states. There is a free trade zone within the Union with some reservations related to health and animal protection, the environment, objects of art, intellectual property rights, national security and exhaustible natural resources [SACU, 2012].

South Africa and the South African Customs Union as a whole are carrying out efforts to harmonize customs regulations and associated procedures and requirements. Each country of the Union, pursuant to the Article 22 of the 2002 Agreement, ensures the consistency of the relevant legislation and has brought their legislation in line with the Customs and Excise Act of South Africa.

In 2009, the effort to modernize customs administration was launched to harmonize and improve the efficiency of the customs policies of Union member countries in accordance with international requirements and standards. As a result, customs policy reform was implemented in the application of risk-management practices, trade partnerships, standardization of operational procedures, application of ICT and harmonization of legislation.

In 2011, the council of ministers of the Union approved the Regional Customs Policy Document which defined the common strategic objectives of the trade policy of the association: trade facilitation, protecting the interests of member countries in fiscal policy by obtaining accurate data on trade flows and ensuring the security of the member countries’ populations.

South Africa’s performance as measured by OECD trade facilitation indicators testifies to the high efficiency of measures implemented by the country’s leadership. The average score of South Africa is the highest among the BRICS countries – 1.7. On such indicators as international cooperation of customs agencies, governance and impartiality, information availability, efficiency of customs procedures, advance rulings and appeals procedures, the results of South Africa are on par with the best world practices and exceed the average result of the top quartile of countries [OECD 2017b].

The mere fact that South Africa has passed the procedure of self-assessment of the investment regime for compliance with the provisions of the OECD Liberalization Codes shows the country's willingness to improve its investment environment. South Africa was the only BRICS country that issued a self-assessment report.

In general, the legislation and law enforcement practices of South Africa are consistent with the provisions of the PFI.

### **Brazil**

Brazil's investment regime is characterized by relative openness to foreign capital. The OECD FDI regulatory *restrictiveness* index for Brazil amounts to 0.10 (the average for OECD countries is 0.07) [UNCTAD, "FDI Index," s. a.]. Among the countries reviewed in this article, it is second only to South Africa (0.06).

The relatively favourable conditions for attracting foreign capital in Brazil are determined by the country's need for foreign investment to strengthen its technological capacity and foster the development of the northern and north-eastern regions. In 2015, the government of Brazil announced the priority of attracting investments in infrastructure development. The ongoing development program for transport and logistics infrastructure aims to attract investments in roads, ports, airports, energy and urban infrastructure [U.S. Department of State, 2015]. All these sectors are open to the participation of foreign capital. However, Brazil experiences difficulty attracting investment due to the ongoing economic and political crisis.

Regional authorities provide foreign investors with tax credits and deductions. Regional initiatives in this area should be coordinated with the federal authorities, namely, the SUDAM and SUDENE agencies involved in regional development [PWC, 2013].

Despite the generally liberal stance of the government towards foreign investors, in recent years several measures have been adopted to strengthen state control over investment activities and impose certain restrictions on foreign capital. According to UNCTAD, between April 2009 and November 2016 Brazil adopted 21 investment measures. Four were aimed directly at the regulation of FDI while the remaining 16 dealt with other investment-related industries.

On 19 October 2009, Brazil introduced a 2% fee for short-term portfolio investments made by nonresidents. This measure, according to the minister of finance, was designed to reduce the uncontrolled influx of foreign capital which could lead to the emergence of price bubbles in the Brazilian economy [OECD, WTO and UNCTAD, 2010]. On 23 August 2010, a restriction on the sale of agricultural land to foreign investors and to any enterprises with a share of foreign participation of more than 50% came into effect [UNCTAD, 2010b].

In April 2011, the Brazilian government adopted a resolution introducing restrictions on foreign participation in companies providing secondary insurance services [The Economist Intelligence Unit, 2011]. This measure was negatively received by the international coalition of associations of reinsurers, who demanded its abolition [BNA, 2011]. There is also a restriction in place on the ownership of land in the 150-kilometer

border zone of the country. Foreign actors wishing to purchase land in this zone must receive a special permit from the National Security Council. Also, according to the set of rules adopted in August 2013, the territory owned by foreigners should not exceed 25% of the total area of the municipal district [U.S. Department of State, 2015].

During UNCTAD's monitoring period, Brazil carried out efforts to liberalize investment legislation. One such measure was the decision to raise the quota for foreign participation in the capital of the Bank of Brazil (the state bank) from 12.5% to 20% in September 2009 [UNCTAD, 2010a].

Since 2009, Brazil has conducted a nation-wide program to support investment – Programa de Sustentação do Investimento (PSI). The program is aimed at assisting investors, including foreign ones, in the development and implementation of innovative technologies in the country. Also, within the framework of this initiative there is a subprogram focused on stimulating small and medium enterprises [Finep, s. a.].

On 13 September 2011, a previously existing 49% restriction on foreign ownership in telecommunications and broadcasting enterprises was lifted. On 25 February 2014, a law was signed which gave the status of resident companies to enterprises with foreign participation that had purchased land plots in the country in 1994–2010 [U.S. Department of State, 2015].

On 1 March 2016, the Brazilian government issued Provisional Measure No. 714, easing restrictions on foreign capital in Brazilian airlines by raising the foreign participation quota from 20% to 49% [UNCTAD, 2016]. Nevertheless, on 25 June 2016 Brazilian President Michel Temer vetoed a law that could finally abolish all existing restrictions in this area.

On 13 September 2016, the government announced the Investment Partnership Program to expand and strengthen the links between public and private investment activities. The main goal was to create jobs and ensure the country's economic growth through new investments in infrastructure and large-scale privatization. This program was also designed to strengthen legal security, regulatory stability and enhanced management [Palácio do Planalto Presidência da República, 2016].

On 16 October 2016, at the BRICS Business Council, President Michel Temer urged members to invest in Brazil. In his speech, he listed the measures taken by the federal government to improve the business environment – reducing bureaucratic procedures and operating expenses, as well as ensuring predictability and legal certainty. According to Mr. Temer, the provisions of the Investment Partnership Program as approved by the senate create investment opportunities in 34 initial projects in such areas as seaports, airports, highways, railways, energy, oil and gas. Investment in these sectors will also create new jobs and increase economic growth [Palácio do Planalto Presidência da República, 2016].

On 4 November 2016, Secretary for Planning and Economic Affairs Marcos Ferrari stressed the importance of fiscal reform to overcoming the economic crisis. In his opinion, fiscal adjustment is bound to stabilize the macroeconomic environment, bringing it in line with investors' expectations thus restoring economic growth through

rejuvenated investment flows and the creation of jobs and income growth. Mr. Ferrari stressed the need for pension reform and the approval and implementation of a new tax regime which would create conditions for financial stabilization to attract investment [Portal Brasil, 2016].

The main legislative act regulating competition in Brazil is Law No. 12,529 of 30 November 2011, which came into force on 29 May 2012. This law determines the powers and structure of the state authorities responsible for governance in the antimonopoly sphere. According to the text of the law, the Administrative Council for Economic Protection (CADE) is engaged in the investigation of anticompetitive behaviour and has control over mergers and acquisitions and administrative decisions. In addition, CADE carries out educational activities on these issues [CADE, nd].

The Brazilian government retains control over a significant number of enterprises in such areas as electricity, hydrocarbon production, port services, financial services, transport and health. In 2010, according to the data provided by the government there were 122 enterprises under state control in the country [WTO, 2013a]. As of 1 March 2017, according to the Ministry of Planning, Budget and Administration, the list of state enterprises included 80 companies [Ministerio do planejamento Desenvolvimento e Gestao, 2017].

The public procurement system in Brazil is decentralized, significantly complicating information collection and government reporting on the aggregate volume of procurements. Monitoring of state procurement is carried out by the Ministry of Planning through the Integrated System for Administration of Public Services (SIASG). The main legislative act regulating the system of public procurement in the country is Law No. 8,666 of 1993 and its supplementary Law No. 12,349 of 2010. The procedure is carried out on a tender basis. The preferential treatment of all Brazilian enterprises was abolished by the Constitutional Amendment No. 6 in 1995 [WTO, 2013a].

In 2010, the Brazilian government strengthened the regime of preferences for national enterprises. National producers are given preferential incentives of up to 25% for tenders at the federal level. This step was pursuant to the goal of promoting the sustainable development of the Brazilian economy in accordance with Plano Brasil Maior. Further tightening of the regime of preferences of national enterprises in the field of ICT took place in 2014 [Global Trade Alert, 2015].

In 2011, Brazil underwent the assessment of government procurement practices according to the OECD Public Integrity Review. The OECD appreciated the progress made by the country in improving transparency and applying the risk-based approach. At the same time, it noted the need to increase the level of professionalism among employees of relevant government agencies, as well as the development of performance indicators [OECD, 2012]. Similar conclusions were made by the authors of the 2010 World Bank study of the Brazilian government procurement system, who noted shortcomings in the area of appeal mechanisms [World Bank, 2010].

According to the World Trade Organization report on Brazil's trade policy, the country's policy is consistent with the governing principles of the multilateral trading

system. Brazil actively uses the WTO dispute settlement mechanisms – in 2008–2012 the country initiated three complaints [WTO, 2013a]. One of the priority tasks of the country's foreign trade policy is the advancement of regional economic integration, including within the framework of MERCOSUR. In addition, the free trade agreement between MERCOSUR and the European Union is under negotiation. The EU is Brazil's largest trading partner, accounting for 19.6% of the country's total trade [European Commission, 2017].

In 2007–2012, the government took several steps to simplify trade procedures. Brazil's score in the OECD trade facilitation indicators study amounts to 1.5 (the average for the BRICS countries is 1.46). Brazil's performance comes closest to international best practices in the areas of border agencies cooperation, governance and impartiality and information availability. According to the study, in 2012–2015 Brazil enhanced its performance on automation of customs procedures and minimizing formal requirements. In 2016, the “single window” system was implemented. The government announced a goal to shorten the time for customs procedures from 17 to 10 days by 2017.

At the same time, the study showed lack of progress or even setbacks for several other indicators. In particular, Brazil's scores for appeal procedures, the availability of information and the number of required documents deteriorated compared to 2012 [OECD 2017b].

In 2016, Brazil made efforts to stimulate imports, especially in innovative sectors, and reduced import tariffs in information technologies and telecommunications sectors [WTO, 2016].

Brazil uses protectionist measures as a tool to protect the domestic market. In 2016 the government raised tariffs for a number of goods, including fatty acids (1 July 2016) and individual names of silicates (from 20 July 2016).

Despite somewhat uneven performance, Brazil's trade policy can be characterized as generally consistent with the principles of the WTO multilateral trading system and the recommendations of the PFI, as evidenced by the government's continued efforts to promote trade facilitation and liberalization of the trade regime.

The policy of the Brazilian government in the field of regulation of the investment environment can be assessed as liberal. Since 1995, a constitutional amendment stipulates the absence of fundamental legal differences between Brazilian and foreign companies. The remaining restrictions are primarily connected with the need to ensure state security and market stability, which is typical for many countries, including OECD members.

## Comparative Analysis of the BRICS Countries' Approaches to the Implementation of the PFI

The results of BRICS investment policy monitoring across four issue areas (investment regimes and efforts to promote investment, national regulatory regimes, trade policy measures directly related to investment, and overcoming structural constraints)

indicate the presence of several factors impeding the full implementation of PFI by the BRICS countries.

First, the need to protect emerging market economies necessitates the allotment of preferential advantages to national, including state-owned, companies and investors in domestic markets in all the examined countries.

The second factor is the strong influence of national security considerations, often cited as an argument in favour of maintaining the closed nature of strategically important sectors of the economy. It is worth noting that this is characteristic not only of the BRICS, but also of many other countries, including developed ones.

The third category of factors affecting the investment climate of national jurisdictions and the degree to which the PFI provisions are implemented are closely tied to structural limitations, such as the level of infrastructure development, the quality and quantity of human capital and environmental sustainability affected by PFI 2015 under the “Green Growth Investment Framework” [OECD, 2015].

Based on the results of the monitoring of the BRICS countries’ investment policies in 2009–2017, a number of conclusions regarding the compliance of the implemented policy with the provisions of the OECD Policy Framework for Investment can be made.

Given the long-term trends in the evolution of the investment environment, steady progress in each of the countries analyzed in this article can be observed. Compared to the first half of the 1990s, which served as the starting point for many studies and reviews of investment policy, the BRICS countries were able to both largely liberalize the legislative framework and ensure greater transparency and predictability of law enforcement practices in the field of investment. As the BRICS countries were integrated into the global economy they gradually shifted from protectionism to liberal market policies, abolishing sectoral restrictions to investors, including foreign ones.

The investment policies of South Africa and Brazil are to a large degree in line with the basic principles and recommendations of the PFI. The FDI regulatory restrictiveness index for these countries is on par with the average level of the OECD countries (0.07). These states ensure the equal status of foreign and national investors and enterprises. The existing restrictions are, as a rule, related to the need to ensure national security and, in the case of Brazil may be caused by economic crisis and political instability.

At the same time, the FDI regulatory restrictiveness index scores for India and China have significantly exceeded the average for OECD countries. Unpredictability and lack of transparency of regulatory requirements are some of the most serious obstacles to investment. Despite the significant progress achieved in this area by all the states under consideration, unfavourable conditions remain in a number of sectors in their economies. This trend may be partly related to the consequences of the global financial and economic crisis, as well as the adaptation of the BRICS countries to a new growth model and, as a consequence, the focus on supporting national enterprises and state companies to the detriment of foreign businesses.

In this regard, the important role of national security considerations and domestic political stability in the investment policy of the BRICS countries should be highlighted. This trend is particularly relevant for China, which has a much broader list of economic sectors closed to foreign capital compared to other countries under consideration, including military industry, energy, information and communication and the mass media.

Another important limitation for the investment environments of the BRICS countries is underdeveloped infrastructure. To some extent, this problem is typical for each of the states in question. The mobilization of private sector funds, including foreign investors, to modernize infrastructure seems to be the clearest response to this challenge. The policy of attracting investments in the development of the northern territories conducted by Brazil, as well as large-scale infrastructure projects implemented in India and China, are the most vivid examples of an approach to resolving infrastructure bottlenecks that take business interests into account.

Given the large number of investment-related aspects and policy areas, the BRICS states employ an integrated and complex approach to the implementation of public policy aimed at improving investment conditions. One example that clearly corresponds to PFI recommendations is the “Make in India” initiative, which involves the liberalization of industries such as defense, civil aviation, television broadcasting, banking, construction, pharmaceuticals, agriculture and others. Another example is a comprehensive policy aimed at increasing the attractiveness of the investment environment pursued by the South African Republic. The experience of South Africa in integrating measures to overcome the structural limitations of the national investment environment (development of education, combating inequality, ensuring green growth) in the country’s socioeconomic development plans, as well as close interaction with the business community and civil society (Green Economy Accord), fully reflects the recommendations of PFI to ensure that a wide range of interests are taken into account in areas related to investment activities in the framework of national concept papers and development programs.

The protection of intellectual property rights also holds a prominent place among the provisions of the OECD Policy Framework for Investment. The problems in this area mainly concern law enforcement practices. For example, there is an inconsistency in the sentencing of cases involving violations of intellectual property rights in China. In this regard, even measures such as the revision of relevant legislation in accordance with the requirements of TRIPS undertaken by India may not fully eliminate the existing shortcomings in law enforcement practices.

An important element of transparency and predictability of the investment environment is government activity aimed at informing foreign investors of the existing regulatory requirements and other features of the investment climate. In this context self-reporting, including through the use of the OECD mechanisms, is important. The only state that has undertaken a self-assessment of its investment regime for compliance with the provisions of OECD liberalization codes is South Africa.

Overall, despite significant progress in liberalizing investment regimes over the past 25 years, BRICS countries, especially India and China continue to lag behind some of the best practices reflected in the provisions of the PFI.

## Conclusion

As products of the analysis and selection of the best existing practices in the relevant issue areas, OECD mechanisms such as the PFI largely reflect current trends in the development of legislation and law enforcement practices. Thus, many PFI recommendations can, to varying degrees, be implemented regardless of participation in OECD initiatives to improve the quality of management and the business environment or to promote the competitiveness and investment attractiveness of economies. Based on the analysis of the investment policies of the BRICS countries, recommendations to improve national legislation and law enforcement practice in the Russian Federation can be made.

First, it is necessary to become involved in the OECD collaboration process to update the potential future edition of the PFI, whether through mechanisms provided for within the Organisation or through other multilateral institutions such as the G20. In this regard, it is also necessary to develop cooperation within BRICS in order to determine a common position on possible future changes to the PFI or other potential instruments in the investment field. It is possible to use the G20 platform to specify the provisions and elevate the status of the G20 Guiding Principles for Global Investment Policymaking, perhaps with the ultimate goal of its eventual convergence with the PFI. Preliminary work on this is already under way in Russia.

From the point of view of implementing the provisions of OECD instruments, including the PFI, at the national level, this analysis concludes with the following recommendations:

First, the practice of participating in OECD self-reporting mechanisms on national legislation and law enforcement compliance with the provisions of the PFI should be resumed. Second, the simplification of business and investment-related procedures, reduction of accompanying costs and minimization of formal requirements to investors, including foreign ones, should be continued. Third, awareness of the Russian and foreign business community about measures to liberalize the investment environment should be promoted. Fourth, the coherence of measures taken in various investment-related sectors from the development of human capital and the promotion of SMEs to trade and competition policies should be ensured.

A complex approach to implementing the provisions of the OECD Policy Framework for Investment, aligned with the interests of the business community and civil society and taking account of national circumstances, will allow Russia to increase the competitiveness of its economy and attractiveness of its jurisdiction to foreign investors. Ultimately, this will contribute to the stated goals of the Russia's economic and social development.

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# Инвестиционная политика стран БРИКС через призму Рамочной концепции в области инвестиций ОЭСР<sup>1</sup>

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*Рамочная концепция в области инвестиций (РКИ) ОЭСР, представляющая собой комплекс рекомендаций и наилучших практик в 12 направлениях государственной политики, влияющих на формирование инвестиционного климата в стране, на сегодняшний день является наиболее полным и авторитетным международным инструментом в сфере международных инвестиций. Актуальность положений РКИ для государств ОЭСР и других стран, в том числе и России, обусловлена нарастающей конкуренцией на мировом инвестиционном рынке. Реализация положений Концепции способна значительно повысить привлекательность национальной юрисдикции с точки зрения привлечения прямых иностранных инвестиций, повышая, таким образом, общий уровень конкурентоспособности экономики страны.*

*Опыт крупных развивающихся стран, партнеров России по БРИКС, не являющихся членами Организации, но находящихся с ней в тесном взаимодействии, в том числе через процессы выработки и согласования обновленной версии документа, представляет интерес с точки зрения работы по реализации положений РКИ в Российской Федерации.*

*В рамках настоящей статьи инвестиционная политика Бразилии, Индии, Китая и ЮАР рассматривается через призму положений Концепции, сгруппированных по четырем основным направлениям: общие характеристики инвестиционного режима и содействие инвестициям, национальный режим регулирования в области инвестиций, торговая политика, преодоление структурных ограничений. По итогам анализа предлагается ряд рекомендаций по совершенствованию инвестиционной среды в России.*

**Ключевые слова:** Рамочная концепция в области инвестиций; ОЭСР; БРИКС; международная торговля; инвестиции; инфраструктура; развитие человеческого капитала; «зеленый» рост

Для цитирования: Сахаров А.Г. Подходы стран БРИКС к реализации Рамочной концепции в области инвестиций ОЭСР // Вестник международных организаций. 2017. Т. 12. № 3. С. 160–181. DOI: 10.17323/1996-7845-2017-03-160

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<sup>1</sup> Статья поступила в редакцию в январе 2017 г.

Исследование выполнено в рамках научно-исследовательской работы государственного задания РАНХиГС «Сравнительный анализ подходов стран БРИКС и Индонезии к реализации инструментов ОЭСР» (2017 г.).

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