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## ARTICLE

# SYNERGIZING GOVERNMENT SERVICES WITH AN INVESTMENT GRIEVANCE MECHANISM

DONGWOOK CHUN\*

### I. INTRODUCTION

Recent research from the World Bank Group shows that in twenty years, approximately twenty-five percent of investors divested from developing countries because of irregular government conduct.<sup>1</sup> This divestment not only exposes host governments to investment and job loss, but it also causes reputational damage and poses tremendous litigation and arbitration costs.<sup>2</sup> Therefore, it is critical that governments provide a mechanism to identify and resolve investor grievances in the early stage before investors leave or their grievances escalate into legal disputes. This mechanism, often called Investment Grievance Mechanism (IGM)<sup>3</sup> by the World Bank Group, would not only help the government manage grievances in a timely manner, but also help investors continue and expand businesses by ensuring a more transparent and consistent investment climate.

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1. Roberto Echandi, Ivan Anton Nimac & Dongwook Chun, *Retention and Expansion of Foreign Direct Investment (Vol. 2): Political Risk and Policy Responses*, WORLD BANK GROUP, at IX (2019), <http://documents.worldbank.org/curated/en/387801576142339003/Political-Risk-and-Policy-Responses>.

2. The costs for an Investor-State Dispute Settlement (ISDS) is known to be an average of \$3 million in administrative costs and \$10.4 million in damages per arbitration case. Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 57–58 (2007).

3. It is also known as Systematic Investment Response Mechanism (SIRM) depending on the context.

The Office of the Korean Foreign Investment Ombudsman<sup>4</sup> (OFIO) is considered to have one of the best global practices of IGM to help current investors continue and expand their businesses.<sup>5</sup> The United Nations Conference on Trade and Development (UNCTAD) and the Asia-Pacific Economic Cooperation (APEC) reported that Korea's Foreign Investment Ombudsman system is an effective way to promote investor confidence.<sup>6</sup> Many countries, such as Russia, Kazakhstan, Brazil, and Vietnam, have shown interest in implementing systems similar to Korea's Foreign Investment Ombudsman system.<sup>7</sup> The purpose of this paper is to explore the institutional and structural management of the OFIO, and to draw lessons from the successful operation of the Korean model for resolving and preventing investor-state grievances.

## II. GRIEVANCE MECHANISM FOR CONFLICT MANAGEMENT

The concept of conflict management with respect to investor grievances can be conceptualized as existing on a "conflict continuum" between "problem" on one hand and a "legal dispute" on the other hand.<sup>8</sup> Beginning on the "problem" side of the conflict continuum, a problem between investors and public agencies can become a grievance if unattended, and can escalate into a "legal dispute," which is a focused disagreement framed in legal terms.<sup>9</sup> Given that most countries today have highly regulated environments for doing business, the number of problems that arise everyday between investors and public agencies can be significant.<sup>10</sup> However, not all problems become grievances, and not all grievances escalate into legal disputes.<sup>11</sup> Most minor problems can easily be resolved by direct interaction between investors and the respective governmental agencies, but other problems that remain unresolved can become grievances over time.<sup>12</sup> Depending on the persistence of the case and on the severity of the impact over businesses, such grievances, if they remain unattended, can escalate into full-blown legal disputes.<sup>13</sup>

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4. Ombudsman is an official or institution mandated to remain impartial while receiving complaints or questions and to make efforts to resolve conflicts between investors and the State at an early stage. United Nations Conference on Trade and Development (UNCTAD), *Investor-State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD SERIES ON INT'L INV. POL'YS FOR DEV., at xx (2010).

5. WORLD BANK GROUP, INVESTMENT PROTECTION TOOLKIT 125 (2016).

6. Invest Korea, *About the Office of the Foreign Investment Ombudsman (OFIO)*, <https://www.investkorea.org/ik-en/cntnts/i-447/web.do> (last visited July 28, 2020).

7. *Id.*

8. Roberto Echandi, *Investor-State Conflict Management: A Preliminary Sketch*, TRANS-NAT'L DISP. MGMT. J. 1, 7 (2014).

9. *Id.*

10. *Id.*

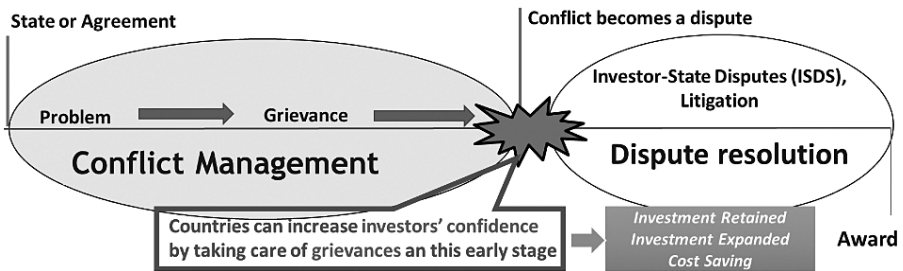
11. *Id.*

12. *Id.*

13. WORLD BANK GROUP, *supra* note 5, at 125.

The World Bank Group suggests a practical solution package called Investment Grievance Mechanism. IGM is designed to enable governments to manage conflicts by timely identifying, tracking, and resolving investor-state grievances that put investment projects at risk of divestment.<sup>14</sup> IGM requires the empowerment of a reform-oriented government agency and the establishment of an intergovernmental mechanism for addressing investor-state grievances arising from government conduct, which thereby reduces this type of risk at its source.<sup>15</sup> This mechanism also collects data on the source of government-generated risks affecting investments and quantifies investment that is retained, expanded, or lost as a consequence of addressing or failing to address such risks.<sup>16</sup> Figure 1 shows the concept of IGM on the Investment Conflict Continuum.

FIGURE 1: INVESTMENT CONFLICT CONTINUUM AND THE SCOPE OF IGM<sup>17</sup>



In a recent publication, the World Bank Group suggests several common elements from the implementation of pilot programs:<sup>18</sup>

- **Empowerment of a Lead Agency:** There should be a government agency that is responsible for implementing IGM. The Lead Agency should be empowered from the top political level and coordinate national, subnational, and sector-specific agencies that are more likely to be involved in investment grievances.<sup>19</sup>
- **Creation of an Early Alert and Monitoring Mechanism:** There should be an early alert mechanism that enables the Lead Agency to learn about the existence of grievances as early as possible before they become disputes. Once a grievance is identified, the Lead Agency should record the case profile, such as amount of investment, number of jobs, issues,

14. Priyanka Kher & Dongwook Chun, *Policy Options to Mitigate Political Risk and Attract FDI*, WORLD BANK GROUP, at 15 (2020), <https://openknowledge.worldbank.org/bitstream/handle/10986/34380/Policy-Options-to-Mitigate-Political-Risk-and-Attract-FDI.pdf>.

15. *Id.* at 17.

16. WORLD BANK GROUP, *supra* note 5, at 125.

17. Echandi et al., *supra* note 1, at 42.

18. *Id.* at 43.

19. *Id.* at 50.

and relevant agencies.<sup>20</sup> The Lead Agency should monitor its progress and when a given case is resolved, it should record the investment/jobs retained or expanded.<sup>21</sup>

- **Problem Solving Methods:** The Lead Agency should use different problem-solving methods to create solutions with the agencies involved in a problem with investors. These methods range from simple exchanges of information or direct negotiation to legal advisory opinions.<sup>22</sup>
- **Political Decision Making:** If the Lead Agency cannot resolve the case, often the Lead Agency should escalate the problem to a higher government authority. Once a decision is taken to a higher level of authority, the Lead Agency should monitor and track the resolution—positive or negative—and its impact on investments.<sup>23</sup>

### III. KOREAN MODEL AS AN EXAMPLE OF GOOD GLOBAL PRACTICE

The Korean Office of the Foreign Investment Ombudsman (OFIO), which was established in 1999, aims to resolve grievances of foreign-invested companies in Korea.<sup>24</sup> The OFIO has successfully operated based on a strong legal and institutional foundation from the Korea Trade-Investment Promotion Agency (KOTRA),<sup>25</sup> the Korean Investment Promotion Agency (IPA),<sup>26</sup> and governmental empowerment from the Ministry of Trade, Industry, and Energy (MOTIE).<sup>27</sup>

20. *Id.* at 51.

21. *Id.* at 56.

22. *Id.* at 43.

23. *Id.*

24. Invest Korea, *About the Office of the Foreign Investment Ombudsman (OFIO)*, <https://www.investkorea.org/ik-en/cntnts/i-447/web.do> (last visited July 28, 2020).

25. Korea Trade-Investment Promotion Agency Act, art. 10 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, [https://elaw.klri.re.kr/eng\\_mobile/ganadaDetail.do?hseq=42757&type=abc&key=KOREA%20TRADEINVESTMENT%20PROMOTION%20AGENCY%20ACT&param=K](https://elaw.klri.re.kr/eng_mobile/ganadaDetail.do?hseq=42757&type=abc&key=KOREA%20TRADEINVESTMENT%20PROMOTION%20AGENCY%20ACT&param=K) (“(1) In order to achieve the purposes referred to in Article 1, KOTRA shall conduct the following projects: . . . 6. Attraction of foreign investment (including exploitation of overseas resources and energy) and support for overseas investment by domestic enterprises.”).

26. Investment Promotion Agencies (IPAs) are often the public face of governments seeking to increase investment, promote economic and social development, and are generally instrumental in negotiating investment treaties and concluding investment contracts; they also manage investment relationships through aftercare services. *See* World Association of Investment Promotion Agency, *Overview of Investment Promotion: Report of the findings from the WAIPA Annual Survey of 2018*, at v (2019), <https://waipa.org/waipa-content/uploads/Overview-of-Investment-Promotion-2019.pdf>.

27. Korea Trade-Investment Promotion Agency Act, art. 14 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, [https://elaw.klri.re.kr/eng\\_mobile/ganadaDetail.do?hseq=42757&type=abc&key=KOREA%20TRADEINVESTMENT%20PROMOTION%20AGENCY%20ACT&param=K](https://elaw.klri.re.kr/eng_mobile/ganadaDetail.do?hseq=42757&type=abc&key=KOREA%20TRADEINVESTMENT%20PROMOTION%20AGENCY%20ACT&param=K) (“(1) The Minister of Trade, Industry and Energy shall guide and supervise matters referred to in the following subparagraphs among the business affairs of KOTRA and affairs related to such matters: . . . 1. Projects implemented by KOTRA pursuant to Article 10; 2. Projects entrusted by the Minister of Trade, Industry and Energy. (2) The Minister

### A. *Institutional Evolution*<sup>28</sup>

Since its establishment in 1991, the OFIO has expanded its organization and operation. At first, MOTIE established the Office of the Foreign Investment Consultation in June 1991.<sup>29</sup> This unit was restructured and renamed as the Office of the Foreign Investment Grievance Consultation under MOTIE in April 1996.<sup>30</sup> In July 1998, the function of the Office of the Foreign Investment Grievance Consultation was transferred to the newly established Investment Aftercare Team under KOTRA.<sup>31</sup> Also, the Korean government legally established the OFIO and the Minister of MOTIE appointed the Ombudsman, the head of the OFIO.<sup>32</sup> In March 2001, an important law was amended that supported the political underpinning of the OFIO by enabling the President of Korea to appoint the Ombudsman.<sup>33</sup> Afterwards, the OFIO strengthened its organization and capacity by merging with the Investment Aftercare Team in 2015.<sup>34</sup>

### B. *Legal Foundation*

As a result of this evolution, the current institutional setup has four core elements: the Ombudsman, Home Doctors, the Investment Consulting Center, and the Foreign Investment Committee. First, the Ombudsman is the head of the OFIO who is directly appointed by the President of the Republic of Korea.<sup>35</sup> Second, the OFIO operates Home Doctors that specialize in various fields—including finance, accounting, law, industrial sites, and taxation—to provide clients with one-on-one service by investigating and resolving a wide range of grievances.<sup>36</sup> Third, KOTRA has an Investment Consulting Center comprised of public officials serving as secondees from several ministries and municipal governments.<sup>37</sup> The Investment Consulting Center works with the OFIO to bring relevant griev-

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of Trade, Industry and Energy may have KOTRA submit reports and materials to the minimum extent necessary for the formulation of trading policies.”)

28. See Invest Korea, *supra* note 24.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Invest Korea, *supra* note 24.

35. Korea Foreign Investment Promotion Act, art. 15-2(2) (S. Kor.), *translated in* Korea Legislation Research Institute’s online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=44628&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=44628&lang=ENG); see also Annex 1.

36. Presidential Decree for Investment Promotion Act, art. 21-4(5) (S. Kor.), *translated in* Korea Legislation Research Institute’s online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=44628&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=44628&lang=ENG); see also Annex 1.

37. For example, there are secondees from Ministry of Trade, Industry, and Energy, Ministry of Strategy and Finance, Ministry of Government Legislation, Ministry of Employment and Labor, Ministry of Environment, Ministry of Land, Infrastructure, and Transport, Ministry of Justice, National Tax Service, local governments, and related organizations. See *Investment Consulting Center*, INVEST KOR., <http://www.investkorea.org/en/ik/icc.do>.

ance cases to various ministries and to coordinate possible resolutions.<sup>38</sup> Lastly, the OFIO works with the Foreign Investment Committee that serves as a platform for government officials to discuss policy issues or investor grievances in higher governmental levels.<sup>39</sup> The Foreign Investment Committee is chaired by the Minister of Trade, Industry and Energy, and is comprised of vice-minister-level officials from other ministries.<sup>40</sup>

These elements are reflected in two legal instruments: the Foreign Investment Promotion Act and the Presidential Decree for Investment Promotion Act.<sup>41</sup> Table 1 shows a brief structure of the legal instruments and Annex 1 describes a full structure of the laws.

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38. Choong Yong Ahn, *New Direction of Korea's Foreign Direct Investment Policy in the Multi-Track FTA Era: Inducement and Aftercare Services*, ORG. ECON. DEV. 2, 12 (2008), <https://www.oecd.org/investment/globalforum/40400795.pdf>.

39. Korea Foreign Investment Promotion Act, art. 15-2(6) (S. Kor.), *translated in* Korea Legislation Research Institute's online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=44628&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=44628&lang=ENG); *see also* Annex 1.

40. *See id.* art. 27(2).

41. Korea Foreign Investment Promotion Act was first introduced on January 21, 1999, with the purpose of promoting foreign investment in Korea by providing necessary support and benefit and contributing to the sound development of the nation's economy (Article 1). The Act regulates OFIO from Article 15 to Article 27.

TABLE 1: STRUCTURE OF LEGAL INSTRUMENT IN KOREA OMBUDSMAN<sup>42</sup>

Purpose	Component	Category	Sub-category	Law	Regulation
Institutional Setting	Lead Agency	Foreign Investment Ombudsman	Purpose	15-2(1)	21-3(1)
			Empowerment and Duties	15-2(2)	21-3(2)
	Technical Support Unit	Grievance Committee	Structure	15-2(10)	21-4(2)
			Workflow	N/A	21-4(5)
			Delegation	N/A	21-4(8)
	Escalation Institution	Foreign Investment Committee	Scope	27(1)	34(3)
			Structure	27(2)	34(7)
			Working Committee	27(3)	35(1)
	Problem-Solving	Cooperation	Request		15-2(3)
Coordination			15-2(3)	21-4(3)	
Recommendation		Contents		15-2(4)	21-3(4)
		Timeline		15-2(5)	21-3(5)
		Verification		N/A	21-6(6)
Escalation		Escalation		15-2(6)	N/A
Monitoring	Tracking	Analysis		N/A	21-4(7)
	Report	Annual report		15-2(7)	21-3(7)
Obligation	Confidentiality	Confidentiality		15-2(8), 24(3)	N/A
	Others	Others		15-2(9)	21-4(6)

### C. Grievance Resolution Process

The Foreign Investment Promotion Act and the Presidential Decree for Investment Promotion Act enable the OFIO to use many techniques to solve problems between investors and agencies, such as information sharing, direct negotiation, and recommendation.<sup>43</sup> When available, the OFIO can use

42. Korean Law Translation Center provides unofficial English translation of the Investment Promotion Act and Presidential Decree; translated version is available at [https://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=49546&lang=ENG](https://elaw.klri.re.kr/kor_service/lawView.do?hseq=49546&lang=ENG) (last visited July 28, 2020).

43. Korea Foreign Investment Promotion Act, art. 15-2(3)–(4) (S. Kor.), translated in Korea Legislation Research Institute's online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=44628&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=44628&lang=ENG); see also Annex 1.



the Foreign Investment Committee as an escalation body.<sup>44</sup> The former Ombudsman, Dr. Choong Yong Ahn, explained the resolution process as follows:

The resolution process takes many forms. Generally, senior consultants, better known as Home Doctors, play a major role in the decision-making process. In the first stage, senior consultants do intake and evaluation in order to determine how a case should be processed. Then, they consult with representatives from relevant government agencies. After a case is reviewed and opinions exchanged between the Home Doctors and the Ombudsman, senior consultants submit a grievance resolution proposal through official channels. In the event that a case is rejected, the matter can be brought before the Foreign Investment Working Committee, the Regulatory Reform Committee, and/or the Office for Government Policy Coordination.<sup>45</sup>

The OFIO categorizes grievance cases into three groups based on the grievance process: Home Doctor Resolution, Administrative Intervention, and Legislative Improvement. An OFIO Annual Report from 2018 describes these three groups as follows:

Home Doctor Resolution means problems solved internally by Home Doctors, often through consultations. On the other hand, Administrative Intervention means that government takes steps to make improvements within an existing legal framework. And, Legislative Improvement refers to regulatory reforms and/or change in laws.<sup>46</sup>

As can be seen in the data from Table 2, most of the cases registered to the OFIO are resolved by Home Doctors. Home Doctors are persons that directly contact investors and specialists in certain areas to review cases.<sup>47</sup> Home Doctors can address and resolve grievances through direct consultation or information sharing.<sup>48</sup> When they need to ask for more involvement by government bodies, they can work with government officials in the Investment Consulting Center, who are seconded from different central or local governments.<sup>49</sup> Administrative Intervention is the process by which a

44. *See id.* art. 15-2(6).

45. Ahn, *supra* note 38, at 12.

46. *Foreign Investment Ombudsman Annual Report 2018*, KOREA TRADE-INVESTMENT PROMOTION AGENCY (KOTRA) 1, 43 (Apr. 2019), [https://news.kotra.or.kr/user/reports/kotranews/2018/20180420/20180420\\_10545.do](https://news.kotra.or.kr/user/reports/kotranews/2018/20180420/20180420_10545.do).

47. Ahn, *supra* note 38, at 12; Korea Foreign Investment Promotion Act, art. 15-2(3) and Presidential Decree for Investment Promotion Act 21-3(3) (S. Kor.), *translated in* Korea Legislation Research Institute's online database, [https://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=49546&lang=ENG](https://elaw.klri.re.kr/kor_service/lawView.do?hseq=49546&lang=ENG); *see also* Annex 1.

48. Ahn, *supra* note 38, at 12; Korea Foreign Investment Promotion Act, art. 15-2(3) (Cooperation) and 15-2(4) (Recommendation) (S. Kor.), *translated in* Korea Legislation Research Institute's online database, [https://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=49546&lang=ENG](https://elaw.klri.re.kr/kor_service/lawView.do?hseq=49546&lang=ENG); *see also* Annex 1.

49. Ahn, *supra* note 38, at 12.

case is resolved through active involvement or coordination by the government agency, not necessarily by amending legal instruments or reform actions.<sup>50</sup> When grievances are caused by legal instruments, and government officials do not have discretion to resolve them, the OFIO seeks to amend the legal instruments, which is counted as Legislative Improvement.<sup>51</sup>

#### D. Cases

In 2018, the OFIO handled a total of 269 grievances from foreign-invested companies.<sup>52</sup> Table 2 provides the cases involving the OFIO from 2014 to 2018 and is organized according to resolution type.

TABLE 2 GRIEVANCE CASES BASED ON RESOLUTION TYPE<sup>53</sup>

Year	Legislative Improvement	Administrative Intervention	Home Doctor Resolution	Total
2014	9 (2.1%)	112 (25.6%)	316 (72.3%)	437 (100%)
2015	14 (3.0%)	112 (24.2%)	336 (72.7%)	462 (100%)
2016	16 (3.9%)	106 (25.9%)	287 (70.2%)	409 (100%)
2017	12 (4.2%)	90 (31.1%)	187 (64.7%)	289 (100%)
2018	6 (2.2%)	108 (40.1%)	155 (57.6%)	269 (100%)

In 2018, grievances related to labor/human resources were submitted to the OFIO the most, followed by visa/immigration, investment incentives, investment procedure, and standards/certification/inspection.<sup>54</sup> These five grievance areas accounted for almost fifty percent of all grievances. Grievances related to labor/human resources and investment incentives accounted for a large share due to an increase in the minimum wage and the abolition of tax exemptions in 2018.<sup>55</sup> Table 3 shows the number of cases by grievance areas that the OFIO managed in 2018.

50. *Foreign Investment Ombudsman Annual Report 2018*, *supra* note 46, at 43.

51. *Id.*

52. *Id.*

53. *Id.*

54. Other grievance types were not included in Table 3.

55. *Foreign Investment Ombudsman Annual Report 2018*, *supra* note 46, at 43.

TABLE 3: CASES BY GRIEVANCE AREA IN 2018<sup>56</sup>

Field	Case	Ratio (%)
Labor Relations	35	13.0
Visa/Immigration	34	12.6
Investment Incentives	25	9.3
Investment Procedures	20	7.4
Standards, Certification, and Inspection	20	7.4
Finance & Foreign Exchanges	19	7.1

### E. Impact

The OFIO uses reinvestment as a key impact indicator.<sup>57</sup> This is based on the notion that it is important to achieve development benefits by reaching existing investors that have already established a presence in the country,<sup>58</sup> as the OFIO's key mandate is to encourage investment expansion by ensuring investors' long and deep engagement in Korea.<sup>59</sup>

Methodology to calculate total reinvestment is very straightforward: it is defined as the investment by already-registered investors, or the follow-up investment after initial (first) investment.<sup>60</sup> The amount of reinvestment (notification basis)<sup>61</sup> in 2018 recorded \$14 billion and increased by 69.5 percent from the previous year.<sup>62</sup> As a result, the share of reinvestment ratio in 2018 increased to 52.1 percent from 36.1 percent in 2017. From 2001 to 2016, the amount of reinvestment has gradually increased.<sup>63</sup>

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56. *Id.*

57. According to the "Act on the Management of Public Institutions," OFIO and its mother organization, Korea Trade-Investment Promotion Agency (KOTRA), is required to set a target impact indicator and monitor the annual performance. Since 2014, they set the amount of Foreign Direct Investment (FDI) and reinvestment as their key performance index.

58. World Bank Group, *Investment Policy and Promotion Diagnostics and Tools: Maximizing the Potential Benefits of Foreign Direct Investment for Competitiveness and Development*, at 26 (July 13, 2017), <https://openknowledge.worldbank.org/handle/10986/28281>.

59. *Id.*

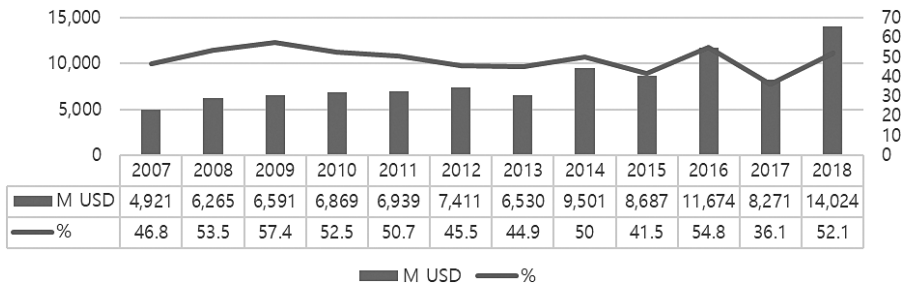
60. *Foreign Investment Ombudsman Annual Report 2018*, *supra* note 46, at 46.

61. The Korean Government uses two types of statistics based on notification basis and received basis. Notification basis is the amount that is calculated based on the investors' notification when they register in the process of investment, and received basis is the amount that is actually invested or implemented. *Invest Korea Annual Report 2015*, KOTRA 2, <https://news.kotra.or.kr/user/reports/kotranews/20/usrReportsView.do?reportsIdx=6612>.

62. *Foreign Investment Ombudsman Annual Report 2018*, *supra* note 46, at 46.

63. *Id.* at 47.

FIGURE 2: THE REINVESTMENT TREND IN KOREA<sup>64</sup>



IV. LESSONS FROM THE KOREAN MODEL

Since 1991, the institutional change and successful operation of the OFIO can be summarized as a path that synergizes various government services, including aftercare,<sup>65</sup> ombudsman, and Public-Private Dialogue (PPD).<sup>66</sup>

A. IGM + Aftercare

The successful operation of the OFIO shows the synergistic effect between IGM and aftercare function. According to the World Bank Group, a study on global best practices of IGM revealed two patterns.<sup>67</sup> The first pattern features the deployment of aftercare programs, and the second features the enactment of policies that address political risk that causes Investor-State Dispute Settlements (ISDS) rather than investment retention and expansion.<sup>68</sup> As the OFIO is part of an aftercare unit and its purpose is to promote or facilitate investment, Korea is a good example of the first model that operates IGM within a well-structured aftercare unit.

Aftercare function, usually a part of IPA, can be very helpful to implement or sometimes complement IGM. IPAs or aftercare may focus on attracting new investors, but it has been argued that aftercare helps establish long-term relationships with investors and thereby maximizes opportunities

64. *Id.*

65. The term “aftercare” can be defined here as the range of activities from post-establishment facilitation services to developmental support to retain investment, encourage follow-on investment, and achieve greater local economic impact. U.N. Conference on Trade and Development, *Aftercare: A Core Function in Investment Promotion*, U.N. Doc. UNCTAD/ITE/IPC/2007/1 (Sept. 2007).

66. PPD is an institutional arrangement that brings together a group of public and private sector actors with the objective of building trust and bridging gaps that contribute to a more conducive environment for private sector development. OECD, *Promoting Pro-Poor Growth: Policy Guidance for Donors*, DAC GUIDELINES AND REFERENCES SERIES 1, 122 (2007), <https://doi.org/10.1787/9789264024786-13-en>.

67. Echandi et al., *supra* note 1, at XI.

68. *Id.*

for investment, reinvestment, and diversification.<sup>69</sup> For example, IPAs may act as a possible reception window for filing grievances.<sup>70</sup> And, as part of their role to advocate for the improvement of the domestic investment climate, IPAs could collaborate with Lead Agencies to share and diffuse information and to advocate the IGM system.<sup>71</sup> Further, aftercare units could be a key institution in following up with investor-state grievances that do not entail any risk of Foreign Direct Investment (FDI) divestments.<sup>72</sup> The OFIO shows that aftercare units can be combined with IGM to support current investors and promote the retention and expansion of investment.<sup>73</sup>

### B. IGM + Ombudsman

The OFIO also uses the benefits of an Ombudsman to complement IGM. The word “ombudsman” is Swedish and literally means “representative.”<sup>74</sup> At the most fundamental level, an Ombudsman is one who assists individuals and groups in the resolution of conflicts or concerns.<sup>75</sup> The core value of an Ombudsman is to ensure neutrality, fairness, objectivity, impartiality, and even-handedness.<sup>76</sup>

In general, the purpose and implementation of IGM is different than that of an Ombudsman. Even in some countries where a Business Ombudsman (BO) is trusted to address grievances, the BO works outside of the government and performs its neutral roles detached from internal government dynamics.<sup>77</sup> On the other hand, IGM is by nature intra-governmental and enables a Lead Agency to use the existing government hierarchy to discipline another government agency’s grievance-generating behavior in a non-litigious way.<sup>78</sup>

Although IGM and an Ombudsman are not replaceable, the OFIO shows that an Ombudsman can strengthen the IGM mechanism. The OFIO uses the impartiality and independence of the Ombudsman to manage grievances and to advocate for improvements in investment policy, administrative procedures, and laws and regulations.<sup>79</sup> The Foreign Investment Promotion Act contains several legal provisions that ensure the impartiality

69. *Id.* at IX.

70. Echandi et al., *supra* note 1, at 61.

71. *Id.*

72. *Id.*

73. Armando Heilbron & Yago Aranda-Larrey, *Strengthening Service Delivery of Investment Promotion Agencies: The Comprehensive Investor Services Framework*, WORLD BANK GROUP (Mar. 17, 2020), <https://openknowledge.worldbank.org/handle/10986/33498>.

74. *What Is an Organizational Ombudsman?*, INT’L OMBUDSMAN ASSOC. (2020), <https://www.ombudsassociation.org/what-is-an-organizational-ombuds>.

75. *Id.*

76. FINRA, *Ombudsman Neutrality*, OFFICE OF THE OMBUDSMAN (2020), <https://www.finra.org/about/office-ombudsman/ombudsman-neutrality>.

77. Echandi et al., *supra* note 1, at 62.

78. *Id.* at 44.

79. *See id.* at 91.

and independence of an Ombudsman. For example, the Foreign Investment Ombudsman is commissioned from “among the persons of abundant learning and experience in foreign investment business,”<sup>80</sup> which implies that an Ombudsman should be an expert of business outside of government. And the same law says that an Ombudsman is defined as not being a public official or government employee except when he is charged with a criminal allegation.<sup>81</sup> The independence and neutrality of Ombudsmen have also been highlighted on several occasions in interviews, meetings, and press releases.<sup>82</sup>

### C. IGM + Public-Private Dialogue

Public-Private Dialogue (PPD) can be tailored to improve the operation of IGM and the investment climate of a country by addressing systemic grievances. PPD is an institutional arrangement that brings together a group of public and private sector actors to lay the foundation for a joint problem analysis and identification of policies and institutional reforms.<sup>83</sup> Over time, PPD can establish consistent and systemic communication between relevant stakeholders and the government, which can create trust and facilitate the resolution of systemic issues.<sup>84</sup> PPD can also play a preemptive role in resolving grievances as it can identify public bodies with which investors tend to encounter grievances.<sup>85</sup> As a result, IGM with PPD can unveil patterns of conduct across institutions, identify patterns of re-incidence by institutions or recurrent problems that place FDI at risk, and develop evidence-based systemic approaches to forge and discuss reform agendas with different investment stakeholders.<sup>86</sup> IGM and PPD can also help strengthen the capacity of the “offending” institutions to minimize recurrence of grievances and enable “offending” institutions to take defensive actions to prevent issues from arising.<sup>87</sup>

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80. Korea Foreign Investment Promotion Act, art. 12 (S. Kor.), *translated in* Korea Legislation Research Institute’s online database, [https://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=49546&lang=ENG](https://elaw.klri.re.kr/kor_service/lawView.do?hseq=49546&lang=ENG); *see also* Annex 1.

81. Korea Foreign Investment Promotion Act, art. 15(2)-9 (S. Kor.), *translated in* Korea Legislation Research Institute’s online database, [https://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=49546&lang=ENG](https://elaw.klri.re.kr/kor_service/lawView.do?hseq=49546&lang=ENG); *see also* Annex 1.

82. *See, e.g., Foreign Investment Ombudsman Annual Report 2016*, KOREA TRADE-INVESTMENT PROMOTION AGENCY (KOTRA) 1, 39 (Mar. 2017), [http://ombudsman.kotra.or.kr/common.FileDownload.do?jsessionid=ZXeODiAF0L9aTDxkGdYPYOPdsc5ADVRh4TxcA7P0tsmNh27L9Rh0y7MT95ewrf4f.S168\\_WAS\\_servlet\\_oio2015?file\\_id=FILE\\_000000000000369](http://ombudsman.kotra.or.kr/common.FileDownload.do?jsessionid=ZXeODiAF0L9aTDxkGdYPYOPdsc5ADVRh4TxcA7P0tsmNh27L9Rh0y7MT95ewrf4f.S168_WAS_servlet_oio2015?file_id=FILE_000000000000369) (“Both the Ombudsman and Home Doctors are building up mutual trust with foreign companies as a troubleshooter, a main channel of communication and a *fair* assistant” (emphasis added)).

83. OECD, *supra* note 66, at 122.

84. Echandi et al., *supra* note 1, at 44.

85. *Id.*

86. *Id.*

87. *Id.* at 43.

The OFIO relies on PPD for regulatory reform with the help of the MOTIE. The OFIO and MOTIE have many ad-hoc PPD platforms, such as the Regulatory Reform Committee chaired by the President, that discuss common investor grievances and resolve systemic issues.<sup>88</sup> For example, there were eleven foreign investors' grievances in 2016 about the Chemicals Control Act (CCA), which resulted in an Economic Ministerial meeting on a resolution to relieve the burden for registration and supervision that the CCA placed on companies.<sup>89</sup> And the Ombudsman is regularly invited to represent foreign investors and deliver investors' grievances as well as policy suggestions. For example, at the Third Ministerial Meetings for Deregulation in 2015, the Korean Government announced that foreign investors would have more involvement in the regulation making and reviewing process.<sup>90</sup> As a result, the OFIO also opened an internet portal for "Regulatory Information" in 2015 and started providing regulatory information to foreign investors in a transparent way.<sup>91</sup> On this website, foreign investors can access information in English about drafts submitted by the Korean National Assembly and government and can use an online petition channel to submit opinions on legislative drafts.<sup>92</sup>

## V. CONCLUSION

Conflict management is a very important function for governments to resolve investors' grievances in a timely manner. The World Bank Group proved that IGM can be a useful and low-cost policy to harness the long-term benefits of FDI.<sup>93</sup> As a good global practice, Korea's Ombudsman model has been effective in helping investors continue and expand their businesses. The OFIO has evolved and has been successfully maintained because of the strong foundation of KOTRA, with more than fifty years of experience, and because of governmental empowerment from MOTIE. The OFIO also shows the importance of creative customization of different government functions and provides lessons to other counties that may be interested in implementing conflict management and grievance mechanisms.

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88. *Foreign Investment Ombudsman Annual Report 2018*, *supra* note 46, at 52–62.

89. Korea Ministry of Strategy and Finance in Korea (MOSF) Press release, Feb. 12, 2014.

90. Korea Ministry of Strategy and Finance in Korea (MOSF) Press release, May 08, 2015.

91. *Regulatory Information Guide*, Foreign Investment Ombudsman, <http://ombudsman.kotra.or.kr/eng/leg/intro.do> (last visited July 28, 2020).

92. *Id.*

93. Echandi et al., *supra* note 1, at xi.

ANNEX 1. LEGAL STRUCTURE FOR FOREIGN INVESTMENT OMBUDSMAN

		Legal System in the Republic of Korea		
Purpose	Category	Sub-Category	Investment Promotion Act (Law)	Presidential Decree for Investment Promotion Act
Institutional Setting	Lead Agency	Foreign Investment Ombudsman	15-2(1) In order to resolve complaints from foreign investors and foreign-capital invested companies, an Ombudsman shall be commissioned from among persons with abundant knowledge and experience in foreign investment affairs.	21-3(1) The term of an Ombudsman shall be three years.
		Empowerment and Duties of Foreign Investment Ombudsman	15-2(2) An Ombudsman shall be commissioned by the President, recommended by the Minister of Trade, Industry and Energy.	21-3(2) An Ombudsman shall perform the following duties: 1. Investigation and handling of complaints of foreign investors and foreign-capital invested companies, 2. Preparation of policy measures for improving a foreign investment system and recommendation on the implementation to the relevant administrative agencies, and 3. Other necessary matters for handling complaints of foreign investors and foreign-capital invested companies.
	Technical Support Unit	Grievance Committee	15-2(10) A grievance committee shall be established within the Korea Trade-Investment Promotion Agency in order to support the duties of an Ombudsman.	21-4(2) An Ombudsman shall be the head of the grievance committee.
		Workflow	N/A	21-4(5) In order to efficiently settle the complaints of foreign investors and foreign-capital invested companies, the head of the grievance committee may designate the staff in exclusive charge of settling complaints for each region or foreign-capital invested company, and may administer such staff.
		Delegation	N/A	21-4(8) Except as otherwise expressly provided for in paragraphs (2), (3), (5), (6) and (7), matters necessary for the organization and operation of the grievance committee shall be determined by the president of the Korea Trade-Investment Promotion Agency following



				deliberation by the Foreign Investment Committee.
	Escalation Institution	Foreign Investment Committee	27(1) A Foreign Investment Committee shall be established under the Ministry of Trade, Industry and Energy to deliberate on the following: . . . 4. Matters concerning cooperation among, and coordination of different opinions of public institutions with respect to foreign investment.	34(3) The president of the Korea Trade-Investment Promotion Agency, the foreign investment Ombudsmen, and the project managers may attend the meetings of the Committee and state their opinions.
		Structure of Foreign Investment Committee	27(2) The Minister of Trade, Industry and Energy shall be the Chairperson of the Foreign Investment Committee.	34(7) A secretary shall be assigned to the Committee to handle its administrative affairs, and the secretary shall be appointed by the Minister of Trade, Industry and Energy from among public officials belonging to the Ministry of Trade, Industry and Energy.
		Working Committee	27(3) A Working Committee shall be established to review and coordinate matters to be deliberated upon by the Foreign Investment Committee, and to deliberate on matters entrusted by the Foreign Investment Committee, as prescribed by Presidential Decree.	35(1) Matters entrusted to a Working Committee by the Committee pursuant to Article 27(3) of the Act are as follows: . . . 4. Matters regarding the establishment and operation of the grievance committee.
Problem-Solving	Cooperation	Cooperation Request	15-2(3) An Ombudsman may request relevant administrative agency to render the following necessary cooperation. 1. Giving explanations and/or submitting data; 2. Stating opinions of related employees, and/or stakeholders; 3. Requesting cooperation for site visits.	21-3(3) Ombudsman can request cooperation when; 1. It is necessary for investigating whether a foreign investment-related system complies with international practices or standards; 2. It is necessary for tackling difficulties experienced by foreign-capital invested companies in their management or improving the related systems; 3. It is necessary for improving the living conditions of foreign investors and foreigners working for foreign-capital invested companies.
		Obligation / Timeline	15-2(3) The head of a relevant administrative agency in receipt of such a request of cooperation shall comply therewith, except in extenuating circumstances.	21-4(3) The agency upon receipt of a request for cooperation shall present the results of resolving complaints or its opinion on such matters within seven days after receipt of the request.

	Recommendation	Contents	15-2(4) An Ombudsman may recommend the heads of relevant administrative agencies to take corrective measures on related affairs.	21-3(4) "Recommendation for corrective measures" shall be made in a document specifying the following matters: 1. Current status and problems of related statutes, institutions, and policies; 2. Details of recommendation for corrective measures; 3. Matters recognized by an Ombudsman as being necessary, such as the reply deadline for related administrative agencies and public agencies.
		Timeline	15-2(5) Upon receipt of recommendations made under paragraph (4), the heads of relevant administrative agencies shall, in writing, notify the Ombudsman of handling results.	21-3(5) Relevant agencies shall, in writing, notify Ombudsmen within 30 days after receipt of a recommendation.
		Verification	N/A	21-6(6) An Ombudsman may verify and inspect the performance of the details of recommendations for corrective measures.
	Escalation	Escalation	15-2(6) Where relevant administrative agencies fail to implement recommendations made under paragraph (4), the Ombudsman may request them to submit matters concerning such recommendations to the Foreign Investment Committee as an agenda.	N/A
Monitoring	Tracking	Analysis	N/A	21-4(7) The head of the Grievance Committee shall analyze the results of settling complaints raised by foreign-capital invested companies on a quarterly basis and report them to the Minister of Trade, Industry and Energy within one month after expiration of each quarter.
	Report	Annual report	15-2(7) The Ombudsman shall prepare an annual report on reorganization activities, such as the current status of regulations and systems obstructing foreign investment, results of improvement thereof, etc., and submit the report to the Foreign Investment Committee.	21-3(7) An Ombudsman shall prepare an annual report and submit it to the Foreign Investment Committee by the end of February of the following year; 1. Current status of the regulations and systems raised as grievances by foreign investors and foreign-capital invested companies;

				2. Results of improvement of the regulations and systems by the Ombudsman in the previous year; 3. Other matters concerning supportive activities to tackle grievances of foreign investors and foreign-capital invested companies.
Obligation	Confidentiality	Confidentiality	15-2(8) No Ombudsman shall use data received from the heads of relevant administrative agencies, etc. pursuant to paragraph (3) or confidential information that they have become aware of in the course of performing duties for any purposes other than those prescribed by this Act, or divulge it to any third party.	N/A
			24(3) No public officials who collect and compile data and statistics on foreign investment pursuant to Article 24 (1) and (2) shall divulge any trade secret of the relevant companies.	N/A
	Others	Others	15-2(9) The Ombudsman shall be deemed a public official for the purposes of penal provisions under Articles 129 through 132 of the Criminal Act.	21-4(6) Where an employee belonging to the Grievance Committee hears opinions or visits a site under Article 15-2(3) of the Act to support the duties of the Ombudsman, he/she shall carry a certificate of identification indicating his/her authority and produce it to interested persons.