THE INTERPLAY OF STEWARDSHIP, SHAREHOLDER ACTIVISM, AND ESG: A FOCUS ON KOREA'S NATIONAL PENSION SERVICE

SANG YOP KANG*

ABSTRACT

This Article explains the interplay between three concepts—stewardship, shareholder activism, and ESG—in the context of the National Pension Service ("NPS") and the positive and negative impacts on Korean society. This Article explains that, largely due to the NPS's enormous influence on the domestic economy, stewardship and shareholder activism have emerged in Korea. Also, this Article shows that ESG-related policies implemented by the NPS and the government can be carried out through, and strengthened by, stewardship and shareholder activism. Based on the interconnection among ESG, stewardship, and shareholder activism in Korea pushed by the NPS, the government (through the NPS) can play in the domestic capital market as a regulator and a player. In addition, this Article examines three unwelcome, potential outcomes that the NPS's ESG-oriented policies may bring: (1) the government "governing the markets;" (2) ESG as an NPS's investment performance excuse; and (3) ESG-disguised agency problems. Regarding the first outcome, the ESG movement supported by the NPS can be used as a government tool to intervene in private companies. Regarding the second, the NPS can abuse the ESG movement as an excuse for its poor financial performance. Regarding the third, the ESG movement can give more leeway to corporate insiders, especially by controlling shareholders so that their agency problems can be aggravated.

* Professor of Law, Peking University School of Transnational Law; Research Member, ECGI (European Corporate Governance Institute); Attorney at Law; CFA (Chartered Financial Analyst); FRM (Financial Risk Manager); Arbitrator, SCIA (Shenzhen Court of International Arbitration). I presented this Article's core explanations and arguments in various conferences and symposiums such as University of Tokyo Symposium (August 5, 2019), Global Shareholder Stewardship Conference at King's College (September 23, 2019), Pearl River Delta Academy of International Trade and Investment Law (PRAIA) Conference (November 5, 2021), Seoul National University Seminar (November 18, 2021), and the Law & Society Stewardship Roundtable (July 13, 2022).

INTRODUCTION

In recent years, the notions of "stewardship"[1] and "environmental, social, and governance"[2] ("ESG") have significantly impacted corporate governance scholarship worldwide. This influence extends to Korea as well, where "stewardship" has been interpreted as functionally similar to "shareholder activism."[3] This Article seeks to investigate the dynamic interplay between stewardship (alongside shareholder activism) and ESG. In addition, this Article will highlight the beneficial aspects resulting from this interaction, while also addressing the potential risks it may entail. As a case study, this Article focuses on the National Pension Service ("NPS"), the largest institutional investor in Korea, which holds significant power as a buy-side player in the domestic capital market.[4] Given the NPS's quasi-governmental agency status,[5] strengthening its position in the domestic capital market highlights the government's ability to exert substantial influence, not only as a *regulator* but also as a *shareholder* through the NPS.[6]

Part I delves into the role of the NPS as a proponent of stewardship and ESG. ESG is usually defined as the movement that values all non-financial factors. Based on the foundation of non-financial aspects, so far ESG has helped improve welfare levels while resolving "market failures," such as

---

[1] For the further explanation and analysis of stewardship, see generally Dionysia Katelouzou & Dan W. Puchniak, *Global Shareholder Stewardship*, *in* GLOBAL SHAREHOLDER STEWARDSHIP 3 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022); *see also* Lucian A. Bebchuk & Scott Hirst, Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy 12 (Nat'l Bureau of Econ Rsch., Working Paper No. 26543, 2020), http://www.nber.org/papers/w26543 [https://perma.cc/K827-JAZS] (defining "stewardship" in the literature on institutional investors as "the actions that investment managers can take in order to enhance the value of the companies that they invest in on behalf of their own beneficial investors."); BLACKROCK, THE INVESTMENT STEWARDSHIP ECOSYSTEM 6 (2018), https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-investment-stewardship-ecosystem-july-2018.pdf [https://perma.cc/Y3AM-RME6] (defining "investment stewardship" as "engagement with public companies to promote governance practices that are consistent with encouraging long-term value creation for shareholders in the company."); Jeffrey N. Gordon, *Systematic Stewardship,* 47 J. CORP. L. 627, 641 (2022), explaining:

> "Stewardship," in its simplest form, calls on asset managers and other institutional investors to exercise their rights as shareholders, their voice, on a firm-by-firm basis, even when the strictly rational approach might be to minimize, even avoid altogether, the administrative costs of shareholder voting. At least on the Anglo-American model, stewardship can also be understood as an effort to use 'soft law' to take into account a broad set of governance and social concerns, to fulfill in some way the better governance-through-engagement aspiration associated with institutional ownership.

[2] For the further explanation of ESG, see, for example, Amir Amel-Zadeh & George Serafeim, *Why and How Investors Use ESG Information: Evidence from a Global Survey*, 74 FIN. ANALYSTS J. 87, 87 (2018) ("In the past 25 years, the world has seen exponential growth in the number of companies that measure and report environmental data (e.g., carbon emissions, water consumption, waste generation), social data (e.g., employee makeup, product information, customer-related information), and governance data (e.g., political lobbying, anticorruption programs, board diversity)—that is, ESG data."); Hao Liang & Luc Renneboog, Corporate Social Responsibility and Sustainable Finance: A Review of the Literature 2 (Eur. Corp. Governance Inst., Working Paper No. 701/2020, 2020), https://ssrn.com/abstract=3698631 [https://perma.cc/QJP7-MSQQ].

[3] *See infra* Part I.

[4] *See* Kyeong-eun Lee, *국민연금 수익 사상 최대 91조 . . . 3년치 연금액 벌었다* [*National Pension Profits Reach a Record High of 91 Trillion KRW . . . Earned 3 Years' Worth of Pension*], THE CHOSUN DAILY (last updated Mar. 8, 2022), https://www.chosun.com/economy/money/2022/03/05/KOVYSEZRFFAHJC66YVWIGC5MLY/ [https://perma.cc/5K7R-GS94] (S. Kor.).

[5] *See* Choi Jae-hyuk, *계약직 국민연금 운용역의 자괴감* [*Feelings of Self-Destruction Among Contract National Pension Managers*], E-TODAY (Apr. 25, 2017), https://www.etoday.co.kr/news/view/1484226 [https://perma.cc/8Z4X-SGR3] (S. Kor.).

[6] *See infra* Section II.A; *see also* Sang Yop Kang, Presentation at the Global Trends in Corporate Governance and M&A Symposium held at the University of Tokyo: Stewardship in Korea and Corporate Governance Implications (Aug. 5, 2019) (presentation material on file with the author).

externalities[7] (for example, pollution) and social issues. Specifically, Part I explores both (1) the potential factors that hindered the development of shareholder activism[8] in Korea in the past and (2) how the NPS-driven stewardship movement has spurred shareholder activism by mitigating the "collective action problem"[9] with which institutional investors often cope. Additionally, Part I explains that although the concept of "stewardship" may not have received extensive academic and practical discussion in the past few years, the NPS, through its shareholder activism (which aligns functionally with the concept of stewardship in the Korean context), encourages or demands investee companies to adopt ESG-oriented corporate policies. In essence, Part I acknowledges the positive impact that shareholder activism, stewardship, and ESG have had on the Korean capital market, while also emphasizing the crucial role played by the NPS in creating such positive effects.

Part II examines the potential problems that may arise from the NPS's ESG-oriented policies.[10] In particular, Part II introduces three unwelcome, potential outcomes associated with ESG that are influenced by shareholder activism (and stewardship): (1) the government's intervention in the market, known as "governing the market" (관치 or "guanchi" in Korean);[11] (2) ESG being used as an excuse for the NPS's poor investment performance;[12] and (3) ESG-disguised agency problems.[13] A more detailed explanation and analysis of these matters will be provided in Part II; however, the Introduction briefly presents the overview of these three issues.

First, in the name of ESG, the government—leveraging the NPS's influence on the capital market—has the potential to intervene in both the market and market players, commonly referred to as "governing the markets." Even before the concept of ESG gained popularity, the government's "governing the markets" had been a longstanding tradition in Korea. However, ESG now serves as an additional justification for government intervention. Since ESG is widely recognized as socially desirable, it is often politically justified as a goal that the government should pursue on behalf of society. Within this policy context, the government, using the NPS, could exploit ESG as a pretext to further rationalize its intervention in the private economy.[14]

Second, ESG is related to non-financial aspects of investment and is long-term oriented. Based on these characteristics, the NPS, by relying on

---

[7] For the further explanation of "externalities," see Donald J. Boundreaux & Roger Meiners, *Externality: Origins and Classifications*, 59 NAT. RES. J. 1, 3–20 (2019); Bryan Caplan, *Externalities*, ECONLIB, https://www.econlib.org/library/Enc/Externalities.html [https://perma.cc/76FY-Q398] (last visited Jan. 28, 2023).

[8] Regarding shareholder activism, *see generally* Michael P. Smith, *Shareholder Activism by Institutional Investors: Evidence from CalPERS*, 51 J. FIN. 227 (1996).

[9] As to the "collective action problem," *see infra* note 51 and accompanying text; *see infra* Sections I.B.2–3.

[10] For the initial critical analysis of the National Pension Service ("NPS")'s ESG-related investment, see Kang, *supra* note 6.

[11] *See infra* Section II.A.

[12] *See infra* Section II.B.

[13] *See infra* Section II.C.

[14] For an explanation of government intervention in the context of the NPS and ESG, see Kang, *supra* note 6; *see also id*. at 23 ("[In the context of the NPS], [s]hareholder 'stewardship'/ 'activism'/ 'engagement' could be a 'euphemism' of the government's intervention in privately-owned companies' management and business.").

the ESG investment strategies, can justify its poor investment performance in the sense that ESG investment may intrinsically generate low profitability. Also, the long-term investment horizon that is an inherent characteristic of ESG can give a broad range of flexibility, providing excuses to high-ranking executives and fund managers in the NPS.[15]

Third, when the government and the NPS push the ESG movement onto the NPS's investee companies, practically, the government and the NPS are unable to intervene in all management matters of the investee companies. Accordingly, in carrying out ESG-oriented corporate policies, these companies can usually find gaps and loopholes within the *macro*-level ESG policies that the government and the NPS set. The companies can exploit these gaps and loopholes to apply the ESG policies at the *micro* level to particularly advantage the investee companies' management (mainly, controlling shareholders).[16] In this light, from the investee companies' side, the NPS's ESG-oriented investment policies may foment what this Article calls the "ESG-disguised agency problem"[17]—namely, the phenomenon in which the decision-makers of the investee companies (mostly controlling shareholders in the Korean context[18]) abuse ESG as a useful instrument to enhance and justify their discretionary power over the corporations' business and management.

In essence, the core arguments of this Article are connected in two steps. First, as explained in Part I, stewardship in Korea has developed in the name of shareholder activism, largely due to the influence of the NPS. Subsequently, ESG-oriented policies have been fomented by the NPS in the name of shareholder activism. Accordingly, these three concepts—stewardship, shareholder activism, and ESG—have created a synergistic interaction, generating positive aspects in Korean society. Second, although ESG brings many positive effects to Korean society, ESG encouraged by the NPS and shareholder activism can generate various unwelcome, potential outcomes analyzed in Part II. In this light, the Article offers a well-balanced

---

[15] Regarding negative aspects of long-term approach, see *id.* at 17, explaining:

> ESG-related investment/engagement can be justified if shareholders' long-term interest increases. As discussed, however, the long-term interest could be merely wishful thinking without solid logical foundation. Indeed, on the ex-ante basis, it is difficult to expect that a specific corporate policy is in the long-term interest of shareholders. For this reason, it is possible that "shareholders' long-term interest" is often abused as a slogan without substance and accountability. In this respect, under certain circumstances, "long-termism" is also harmful to investors just as "short-termism" is.

[16] In this Article, "macro-level ESG policies" refers to the broadly and generally set ESG policies, while "micro-level ESG policies" refers to the ESG policies that are specifically defined in detail. For the further explanation and analysis of macro- and micro-level ESG policies, see *infra* Section II.C.

[17] The author often elsewhere explains the concept of "ESG-disguised agency problems," including in classes, lectures, and presentations. Regarding the conference or seminar presentation material on "ESG-disguised agency problems," see Kang, *supra* note 6, at 20 ("Due to ESG, in many cases, corporate insiders may enjoy discretion in exercising corporate policies. In other words, relying on ESG, corporate insiders can make excuses when they initiate corporate policies that shareholders might not like") (also explaining that ESG provides the government with the tool to regulate or intervene in privately-owned companies); Sang Yop Kang, Presentation at the Seoul National University School of Law, Asia-Pacific Law Institute: ESG: Implications and Limits 36 (Nov. 18, 2021) (presentation material on file with the author) [hereinafter Kang, Presentation at the SNU] ("A controlling shareholder can choose from a number of ESG-related agendas based on his/her personal interests, reputation, values, or vision."). Regarding "ESG-disguised agency problems," the author is currently conducting an in-depth independent research project.

[18] Most major corporations in Korea are affiliated companies of family-controlled corporate groups. Accordingly, the ultimate decision-makers of these corporations are controlling shareholders.

perspective on both the positive and negative aspects of shareholder activism and ESG encouraged by the NPS, adding academic value to the discourse.

Finally, it should be noted that this Article does not aim to strictly determine whether the costs of the NPS's ESG policies exceed the social benefits or vice versa. Such a study is beyond the scope of this Article. It is true that theoretically, under certain circumstances, the NPS's ESG, backed by shareholder activism (or stewardship), can improve social welfare and rectify the management's—in the Korean context, the controlling shareholder's—agency problems if the NPS's ESG and shareholder activism are well-managed and implemented. More quantitative analysis, preferably conducted by economists, is needed to resolve this question. Instead, this Article aims to *identify* and *analyze* three issues: (1) the NPS's role to foment shareholders and ESG investment; (2) the interplay between stewardship, shareholder activism, and ESG, particularly at the NPS's level; and (3) the problems associated with the NPS's ESG. So far, with respect to large institutional investors, these three issues have neither been well-identified nor analyzed by extant literature; thus, such identification and analysis are academically and practically worthwhile. Based on this Article's identification and analysis of the problems of the NPS's ESG and shareholder activism, this Article aspires to encourage scholars and policymakers to put forward solutions to resolve these problems.

I. THE NPS: STEWARDSHIP, SHAREHOLDER ACTIVISM, AND ESG

Section I.A provides a comprehensive overview of the NPS and its governance structure. Sections I.B and I.C examine stewardship and ESG practices within the NPS context. Specifically, Section I.B delves into the inception and development of stewardship principles and explores shareholder activism facilitated by the NPS. Furthermore, Section I.C provides a detailed exploration of the NPS's implementation of policies aligned with ESG considerations. Last, Section I.D critically examines the intricate interplay and dynamics between stewardship, shareholder activism, and ESG, with a specific emphasis on the NPS's operational framework.

A. THE NPS: OVERVIEW

1. The NPS as a Large Institutional Investor

The NPS is the third-largest public pension fund in the world[19] and the largest institutional investor in Korea.[20] It is a quasi-governmental agency since it is supervised by the Ministry of Health and Welfare.[21] As of May 2023, the NPS's total assets under management ("AUM") exceeded 973.9 trillion Korean won ("KRW").[22] In recent years, the KRW was sharply

[19] Sang Yop Kang & Kyung-Hoon Chun, *Korea's Stewardship Code and the Rise of Shareholder Activism: Agency Problems and Government Stewardship Revealed*, *in* GLOBAL SHAREHOLDER STEWARDSHIP 239, 239–40 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022).

[20] *Id.*

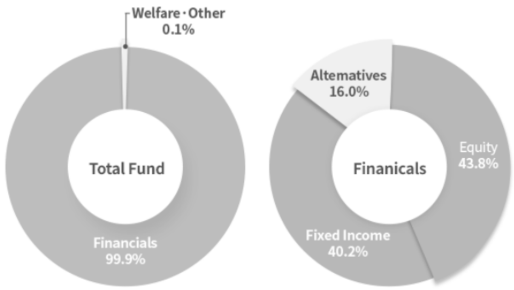
[21] *Id.* at 253–54. Also, according to the National Pension Act, the Minister of the Ministry of Health and Welfare manages and operates the National Pension funds. *See* 국민연금법 [National Pension Act] art. 102(1) (S. Kor.).

[22] *Portfolio Overview*, NPS INV. MGMT., https://fund.nps.or.kr/jsppage/fund/mcs_e/mcs_e_01.jsp [https://perma.cc/426X-QKLN] (last visited July 29, 2023).

weakened against the U.S. dollar ("USD") due to the U.S. Federal Reserve tightening its monetary policy and increasing its interest rates.[23] However, under normal circumstances (when the foreign exchange market is relatively stable), 973.9 trillion KRW would be equivalent to 900 billion USD.[24] Table 1 introduces the NPS's fund portfolio as of May 2023. Table 2 shows the NPS's portfolio changes from 2018 to 2023.

Table 1: Fund Portfolio of the NPS[25]

Fund Portfolio



* Including Short-term Assets

(in trillion won, as of end-May. 2023)

	Amount	Weight
Total	973.9	100%
Welfare Sector	0.2	0.0%
Financials*	972.7	99.9%
Domestic Equity	144.9	14.9%
Global Equity	281.0	28.9%
Domestic Fixed Income	319.1	32.8%
Global Fixed Income	70.5	7.2%
Alternatives	155.2	15.9%
Short-term Assets	2.0	0.2%
Others	1.0	0.1%

* The figures include tactical foreign exchange exposure, etc.

Note:

1. To help better understand the composition of its portfolio, the NPS publishes the latest asset mix at the end of each month.
2. The figures above are preliminary estimates.

[23] *See* Federal Open Market Committee, Board of Governors of the Federal Reserve System: Minutes of the Federal Open Market Committee 8 (Dec. 13–14, 2022), https://www.federalreserve.gov/monetarypolicy/fomcminutes20221214.htm [https://perma.cc/SUE9-N88T] ("[P]articipants stressed that the Committee's ongoing monetary policy tightening to achieve a stance that will be sufficiently restrictive to return inflation to 2 percent is essential for ensuring that longer-term expectations remain well anchored."); Jeff Cox, *Fed Raises Interest Rates Half a Point to Highest Level in 15 Years*, CNBC (Dec. 15, 2022, 2:27 PM), https://www.cnbc.com/2022/12/14/fed-rate-decision-december-2022.html [https://perma.cc/H39V-NW2M].

[24] For instance, from January 1, 2010, to December 31, 2019, the average exchange rate between KRW and USD is 1123.11 KRW/USD. *See Average Exchange Rate Inquiry by Period*, WOORI BANK, https://spot.wooribank.com/pot/Dream?withyou=FXXRT0016 [https://perma.cc/E9M2-KT8T] (last visited Jan. 24, 2023).

[25] *See* NPS INV. MGMT., *supra* note 22.

Table 2: NPS Portfolio Changes in Value from 2018 to 2023[26]

Portfolio Changes in Value

(in billion won, as of end-May. 2023)

	Current (preliminary)	2023 (preliminary)	2022	2021	2020	2019	2018
Total (market value)	973,934	973,934	890,466	948,719	833,728	736,654	638,781
Public Sector	-	-	-	-	-	-	-
Welfare Sector	209	209	204	201	180	166	145
Financials	972,690	972,690	889,835	948,106	833,138	736,079	638,217
Domestic Equity	144,893	144,893	125,373	165,808	176,696	132,261	108,914
Global Equity	281,033	281,033	240,894	256,625	192,752	166,528	112,961
Domestic Fixed Income	319,054	319,054	311,186	339,991	326,099	320,751	310,993
Global Fixed Income	70,478	70,478	63,288	63,896	44,883	30,462	26,587
Alternatives	155,239	155,239	146,232	119,305	90,660	84,295	76,620
Short-term Assets	1,970	1,970	2,017	2,481	2,049	1,782	2,143
Others	1,035	1,035	427	413	409	408	420

Note:

1. Until a fund management assessment is completed, preliminary estimates are provided.
2. The figures above might not add up due to rounding.
3. The figures in Financial Assets include tactical foregin exchange exposure, etc.

By 2041, the NPS is expected to amass AUM totaling 1778 trillion KRW,[27] establishing its position as the largest public pension fund on a global scale.[28] As of July 2022, the NPS had allocated approximately 15.2% of its AUM to the domestic stock market.[29] However, as of May 2023, in terms of AUM, the NPS's portion for the domestic stocks changed to 14.9%,[30] as seen in Table 1.[31] To further diversify asset classes, the NPS seems to try to reduce the portion of the domestic stocks in its portfolio. Notably, in 2019, the NPS's investment in domestic companies' equities represented an estimated 7.6% of the overall market capitalization of the

[26] *See id.*
[27] *See* Lee, *supra* note 4.
[28] *Id.*
[29] *Fund Portfolio*, NPS INV. MGMT., https://fund.nps.or.kr/jsppage/fund/mpc/mpc_03.jsp [https://perma.cc/FA2X-P6SS] (last visited Sept. 29, 2022) (S. Kor.).
[30] *Id.*
[31] *See supra* Table 1.

domestic stock market.[32] In this light, the NPS assumes a significant shareholder role in virtually all prominent companies within the domestic capital market.[33] In essence, in Korea, the NPS is a dominant capital market player and similar to a "universal owner."[34] As of the end of 2021, in the Korean domestic capital market, the NPS holds 5% or more of shareholding in 264 companies and it holds 10% or more than 10% of shareholding in forty-five companies.[35] Table 3 shows a comprehensive overview of the number of companies in which the NPS held stakes of 5% or more and 10% or more since 2019.

Table 3: Number of Companies in Which the NPS Holds 5%–10% or More[36]

Shareholding (%)	December 2019	June 2020	December 2021
10% or more than 10%	95	95	45
5%–10%	174	132	219
Total	269	227	264

2. Governance Structure of the NPS

Regarding the governance structure of the NPS, the Fund Management Committee ("FMC")[37] serves as the highest decision-making body

---

[32] EUN-YOUNG CHO, CHEOL-WON YANG & EOM-CHEOL TAE, NPS RSCH INST., 국민연금 기금운용과 국내주식 유동성 및 기업성과에 대한 연구, 국민연금연구원 [NATIONAL PENSION FUND MANAGEMENT, LIQUIDITY OF KOREAN STOCKS, AND CORPORATE PERFORMANCE] 1 (2020) (S. Kor.).

[33] *Id*.

[34] For the explanation of "universal owner," see Matthew J. Kiernan, *Universal Owners and ESG: Leaving Money on the Table?*, 15 CORP. GOVERNANCE 478, 478 (2007) ("[M]ajor institutional investors (notably pension funds, insurance companies, and some of the largest endowments and foundations) have now become so large and so broadly invested that they in essence now collectively 'own' the entire global economy."); UNEP FIN. INITIATIVE, UNIVERSAL OWNERSHIP: WHY ENVIRONMENTAL EXTERNALITIES MATTER TO INSTITUTIONAL INVESTORS 3 (2011), https://www.unepfi.org/publications/investment-publications/universal-ownership-why-environmental-externalities-matter-to-institutional-investors-2/ [https://perma.cc/2HJ3-FHQ2] ("Large institutional investors are, in effect, 'Universal Owners,' as they often have highly-diversified and long-term portfolios that are representative of global capital markets.").

[35] *See, e.g.*, Seul-gi Yoon, *[국민연금 개입논란] "사기업 부당개입 없을 것". . . 前장관 말 되새겨야*[*[National Pension Intervention Controversy] "There Will be No Unfair Intervention in Private Companies" . . . We Have to Reflect on the Former Minister's Words*], YONHAP INFOMAX (Jan. 5, 2023), https://news.einfomax.co.kr/news/articleView.html?idxno=4249365 [https://perma.cc/Q4B3-PP2A] (S. Kor.).

[36] Regarding the data for December 2021, see *id*. Regarding the data for December 2019 and June 2020, see *상반기에 국민연금 '지분 5% 이상' 종목 크게 줄였다* [*In the First Half of the Year, the National Pension Service Significantly Reduced Stocks with a Stake of 5% or More*], YONHAP NEWS (July 5, 2020), https://www.yna.co.kr/view/AKR20200704036400002 [https://perma.cc/L595-LCNN] (relying on Yonhap Infomax) (S. Kor.).

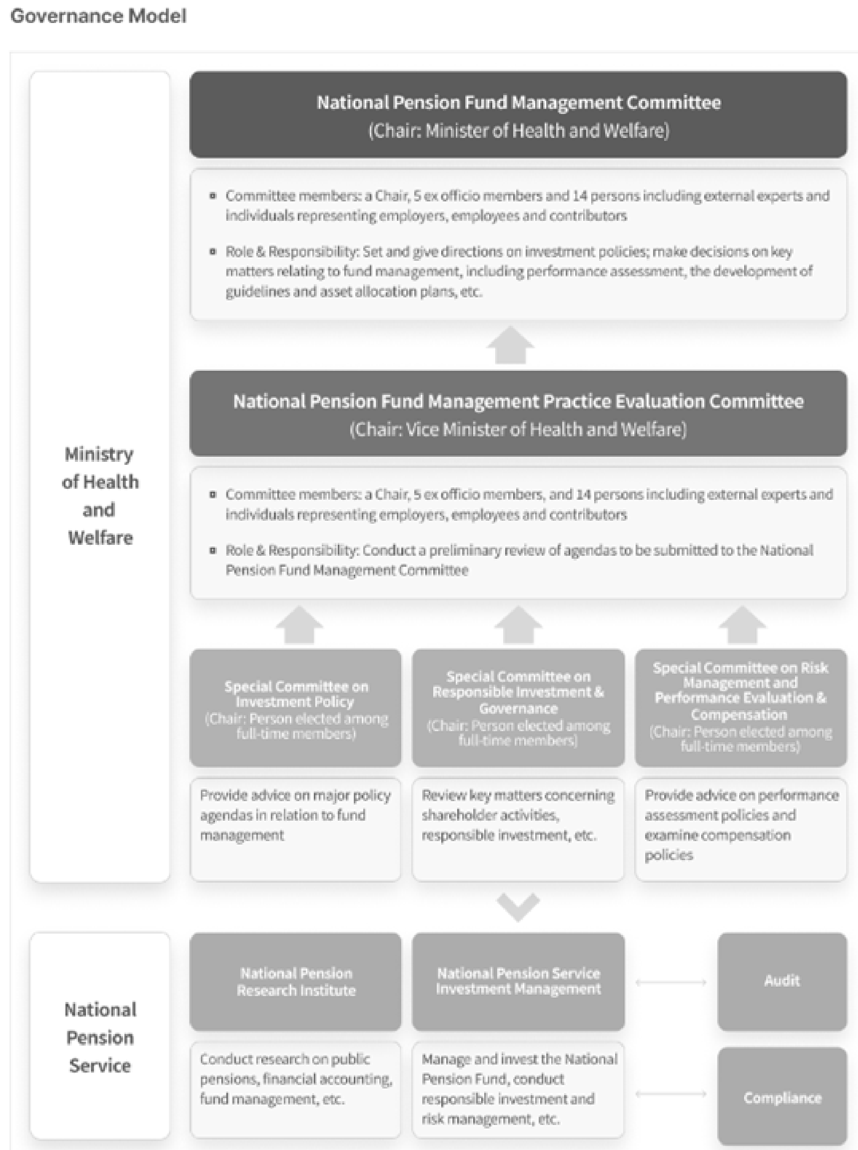
[37] The basis for the establishment of the FMC is Article 103 of the National Pension Act and Articles 77 to 79 of the Enforcement Decree of the National Pension Act. *See* 국민연금법 [National Pension Act] art. 103 (S. Kor.); 국민연금법 시행령 [National Pension Act Enforcement Decree] art. 77–79 (S. Kor.).

responsible for its operation and management.[38] In particular, the FMC engages in deliberation and decision-making processes concerning significant matters, including fund management guidelines (investment policy), annual management plans, and the evaluation of management outcomes.[39] The Minister of Health and Welfare chairs the FMC.[40] Other members of the FMC include (1) the four vice ministers (*ex officio* members) of the relevant government departments and the chairperson of the NPS (five members), (2) representatives from the employers' side (three members), (3) representatives from labor's side (three members), (4) representatives from the local NPS subscribers' side (six members), and (5) experts in related fields such as finance and law (two members).[41] In this context, the government can wield significant influence over the decision-making and investment strategies within the NPS. Figure 1 illustrates the governance model of the FMC.

---

[38] *Fund Management Committee*, NPS INV. MGMT., https://fund.nps.or.kr/jsppage/fund/ifm/committee.jsp [https://perma.cc/7325-WTEY] (last visited July 29, 2023) (S. Kor.).
[39] *Id.*
[40] *Id.*
[41] *Id.*

Figure 1: Governance Model of the FMC[42]



B. THE NPS-PROMOTED STEWARDSHIP AND SHAREHOLDER ACTIVISM

Section I.B explores how the past dormant shareholder activism in Korea has transformed into the emergence of shareholder activism, even if it is nascent. The NPS-led stewardship greatly influenced this meaningful change.

[42] *See Governance*, NPS INV. MGMT., https://fund.nps.or.kr/jsppage/fund/mpc_e/mpc_e_01.jsp [https://perma.cc/4CTU-MLRQ] (last visited July 29, 2023).

1. Traditional Trend in the Korean Capital Market: Lack of Shareholder Activism

In Korea, tunneling[43] represents a prominent concern within the realm of corporate governance. Tunneling is characterized by the practice in which controlling shareholders exploit corporate resources for personal gain, resulting in a detriment to public investors.[44] The Korean domestic economy has been dominated by *chaebols* (family-controlled corporate groups).[45] With tunneling and other corporate governance concerns surrounding chaebols, there has been an active "minority shareholder movement"[46] since the Asian financial crisis of the late 1990s.[47] Before the rise of this minority shareholder movement, there was scarcely any movement for investor protection in Korea. The minority shareholder movement has played a pivotal role in advancing the protection of shareholders' economic interests within the commercial law framework.[48]

However, it is important to note that this movement was spearheaded by nonprofit organizations and civic groups, specifically the People's Solidarity for Participatory Democracy ("PSPD"), which actively engaged in social movements.[49] Put another way, the minority shareholder movement led by these civic groups can be understood, to a certain extent, as a vehicle for instigating reforms in Korea's socioeconomic and political landscapes, rather than pure economic matters, even if the economic interest of investors was more emphasized and protected compared to before. In this context, up until recently, the minority shareholder movement was supported by civic groups with somewhat *politically* motivated agendas. Accordingly, given Korea's unique minority shareholder movement environment, the active involvement

---

[43] As to the analysis of tunneling, see generally Simon Johnson, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Tunneling*, 90 AM. ECON. REV. 22 (2000). For the theoretical analysis of so-called controlling shareholders' "generous tunneling" where controlling shareholders extract some, but not substantially all, corporate value, see generally Sang Yop Kang, *"Generous Thieves": The Puzzle of Controlling Shareholder Arrangements in Bad-Law Jurisdictions*, 21 STAN. J.L. BUS. & FIN. 57 (2015) [hereinafter Kang, *Generous Thieves*].

[44] Regarding controlling shareholders' tunneling, see Sang Yop Kang, *Re-envisioning the Controlling Shareholder Regime: Why Controlling Shareholders and Minority Shareholders Often Embrace*, 16 U. PA. J. BUS. L. 843, 881–84 (2013) [hereinafter Kang, Controlling Shareholder Regime] (explaining two types of controlling shareholders: (i) "roving controllers" who exploit all or substantial amount of corporate value at once and (ii) "stationary controllers" who exploit corporate value partially and periodically). For the further analysis of "roving controllers" and "stationary controllers," see generally Kang, Generous Thieves, *supra* note 43.

[45] For the further explanation of chaebols in Korea, see generally Heitor Almeida, Sang Yong Park, Marti G. Subrahmanyam & Daniel Wolfenzon, *The Structure and Formation of Business Groups: Evidence from Korean Chaebols*, 99 J. FIN. ECON. 447 (2011).

[46] Woon-Youl Choi & Sung Hoon Cho, *Shareholder Activism in Korea: An Analysis of PSPD's Activities*, 11 PAC.-BASIN FIN. J. 349, 351 (2003).

[47] For the further explanation of the Asian financial crisis at the end of 1990s, see Saleheen Khan, Faridul Islam & Syed Ahmed, *The Asian Crisis: An Economic Analysis of the Causes*, 39 J. DEVELOPING AREAS 169, 170 (2005); Lowell Dittmer, *Globalization and the Asian Financial Crisis*, 23 ASIAN PERSP. 45, 47–49 (1999). For the explanation of political aspects of the Asian financial crisis, see generally Bruce Cumings, *The Asian Crisis, Democracy, and the End of "Late" Development*, *in* THE POLITICS OF THE ASIAN ECONOMIC CRISIS (T. J. Pempel ed., 1999).

[48] In Korea, corporate law falls under the umbrella of commercial law.

[49] For a further explanation of investor-protection movements of nonprofit organizations in East Asia, see generally Curtis J. Milhaupt, *Nonprofit Organizations as Investor Protection: Economic Theory and Evidence from East Asia*, 29 YALE J. INT'L L. 169 (2004). For the further analysis of the PSPD's minority shareholder movement (or shareholder activism), see generally Jooyoung Kim & Joongi Kim, *Shareholder Activism in Korea: A Review of How PSPD Has Used Legal Measures to Strengthen Korean Corporate Governance*, 1 J. KOREAN L. 51 (2001).

of purely *financially* motivated public investors in Korea, specifically in addressing corporate governance issues, remained relatively limited.[50]

To simplify the explanation of this intricate phenomenon, the lack of an investor protection movement among investors driven purely by financial motives can be attributed to the presence of the "collective action problem."[51] This issue hinders investors' engagement with corporations, including litigation, even when they have a genuine interest in doing so.[52] When public investors actively participate in the affairs of a corporation they have invested in, they bear the costs associated with monitoring, dedicating time, and engaging directly. These costs are *private* costs of the public investors and are not shared with other shareholders. On the other hand, when the engagement of public investors generates positive effects on the corporation, it will lead to an enhancement in the corporation's value and, eventually, its stock price. Accordingly, all shareholders, regardless of their engagement with the corporation, stand to benefit from such involvement. In other words, the situation gives rise to free riding. Consequently, public investors—who are confronted with the collective action problem and the free-riding investors—lack a strong incentive to actively engage with investee companies, even when these companies experience corporate governance issues, such as tunneling.[53]

---

[50] In Korea, shareholder activism driven by purely financial incentives has been predominantly led by foreign institutional investors, particularly hedge funds. A notable example of this type of shareholder activism is the 2015 dispute between Elliott Management and the Samsung Group (in particular, Samsung C&T). Recently, some Korean institutional investors have also begun to actively engage in shareholder activism. Prominent instances include KCGI's participation in the control contest of Korean Air and Align Partners' challenge against SM Entertainment.

[51] For the further explanation of the "collective action problem," see Pamela E. Oliver, *Formal Models of Collective Action*, 19 ANN. REV. SOCIO. 271, 271 (1993) (explaining "formal theories and models of collective action"); Robb Willer, *Groups Reward Individual Sacrifice: The Status Solution to the Collective Action Problem*, 74 AM. SOCIO. REV. 23, 23–24 (2009). For the explanation of the collective action problem in corporate reorganization, see generally Eric A. Posner & E. Glen Weyl, A Solution to the Collective Action Problem in Corporate Reorganization (Coase-Sandor Inst. for L. & Econ., Working Paper No. 653, 2013), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1630&context=law_and_economics [https://perma.cc/A6PW-GZXK]. For an explanation of the collective action problem and the class action solution, see Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 74–77 (2007). Another challenge faced by public investors in Korea is the burdensome derivative suit system, making it difficult for them to initiate legal actions.

[52] The collective action problem can also take place in the double derivative suits. For the explanation of the more serious collective action problem in the double derivative suits, see Sang Yop Kang, Presentation at the Comparative Corporate Governance Conference 2018 held at the National University of Singapore: Comments on Professor Kyung-Hoon Chun's Article: Debates on Multiple Derivative Actions in Korea 6 (Jan. 13, 2018) (presentation material on file with the author) (explaining that "[the] collective action problem in double derivative suits is likely to be more serious than in simple derivative suits" since "benefits to a plaintiff shareholder are more partial and more indirect" and "costs are concentrated on a plaintiff shareholder of a parent company (even if a reasonable amount of costs can be reimbursed in case where the plaintiff shareholder of a parent ultimately wins).").

[53] As for litigation, in Korea, the standing requirement of shareholders' derivative suits is strict. In general, shareholders can bring a derivative suit only if they hold at least 1% of the corporation's shares. *See* 상법 [Commercial Act] art. 403(1) (S. Kor.), *translated in* Korean Legislation Research Institute's Korean Law Translation Center, https://elaw.klri.re.kr/kor_service/jomunPrint.do?hseq=15551&cseq=662668 [https://perma.cc/6WW7-ZZJP]. However, 1% shareholding is a difficult hurdle that non-controlling shareholders of a corporation can overcome. This hurdle is somewhat relaxed when it comes to large-listed companies. Regarding large-listed companies, when shareholders believe that their financial interest is damaged, they can bring a derivative suit if they hold at least 0.01% of the corporation's shares. *See* 상법 [Commercial Act] art. 542-6(6) (S. Kor.), *translated in* Korean Legislation Research Institute's Korean Law Translation Center, https://elaw.klri.re.kr/kor_service/jomunPrint.do?hseq=15551&cseq=662878 [https://perma.cc/2ZXU-EKNY] (however, in this case, the plaintiff shareholders should hold shares for 6 months). This relaxed standing requirement still poses a difficult hurdle due to the enormous size of the large-listed companies. Also, it is noteworthy that in the U.S., derivative suits are usually driven by lawyers who are interested in the handsome amount of legal fees.

2. Current Situation of Korea: Nascent Shareholder Activism Promoted by the NPS

In 2010, following the global financial crisis in 2008, the U.K. implemented the Stewardship Code,[54] which sparked a global trend towards stewardship. Numerous countries adopted similar codes in response to this phenomenon.[55] In line with this global trend, Korea also implemented its Stewardship Code in 2016,[56] drawing inspiration from the code established in the U.K.[57] Korea's Stewardship Code aims to primarily, if not exclusively, tackle the pervasive tunneling problem caused by controlling shareholders in chaebols.

The underlying idea is that if institutional investors unite under the umbrella of stewardship—representing the interests of their beneficiaries and actively engaging with their investee companies—it is possible to substantially rectify major corporate governance issues in Korea, including the prevalent problem of tunneling. Accordingly, in the context of Korea, "stewardship" is closely intertwined with "shareholder activism." From a functional perspective, "stewardship" entails institutional investors actively engaging with the companies they invest in, aiming to address corporate governance issues and maximize the (financial) benefits for their beneficiaries.

Indeed, until around 2020, "stewardship" was regarded as one of the most critical issues and topics in the Korean capital market, both by the government and market participants. However, interestingly, the term itself has become less frequently mentioned in Korean discussions about public policies and capital-market issues in recent years. Nonetheless, shareholder activism continues to be a topic of active discussion in the capital market, and it cannot be regarded independently from stewardship. In essence, although the term "stewardship" is less commonly used in official discussions within the Korean capital market, its influence persists in the evolved form of shareholder activism through its underlying principles and objectives.

As discussed, shareholder activism—involving activities of institutional investors such as monitoring, discussion with boards and management of

---

See Milhaupt, *supra* note 49, at 184. In Korea, however, in most cases, lawyers are unable to expect to earn a decent amount of legal fees from a derivative suit. Instead, from the standpoint of most lawyers, it is an unattractive business strategy if they challenge large family-controlled corporate groups, chaebols. This is because the economy of Korea is dominated by chaebols, and thus, lawyers who challenge controlling shareholders' tunneling are likely to lose business opportunities with chaebols regularly. In other words, in most cases, it is expected that the lawyer's benefits from a derivative suit are lesser than the costs of losing the business opportunity with chaebols, and thus, "rational" lawyers would not enthusiastically engage in the derivative suit in relation to chaebols' tunneling. Nonetheless, some lawyers are interested in, what this Article calls, "political reputation-based compensation," meaning that they are willing to challenge chaebols to establish and develop their reputation and career as pioneers of reforms in the capital market or politics, although such a challenge does not generate financial gains for them.

[54] FIN. REP. COUNCIL, THE UK STEWARDSHIP CODE (July 2010), www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf [https://perma.cc/88SE-K5MH].

[55] For a reference study on the global trend of adopting stewardship, see Katelouzou & Puchniak, *supra* note 1.

[56] KOREA STEWARDSHIP CODE COUNCIL, KOREAN STEWARDSHIP CODE, http://sc.cgs.or.kr/eng/about/sc.jsp [https://perma.cc/D8NB-JA3H] (last visited Oct. 18, 2023).

[57] As to the general similarity of the Korean Stewardship Code with the U.K. Stewardship Code, see Kang & Chun, *supra* note 19, at 239.

investee companies, and litigation—is inevitably subject to the collective action problem and free-riding.[58] For the reasons discussed below, however, the NPS significantly mitigates this collective action problem in the Korean capital market.[59]

3. The NPS as an Entity That Mitigates the Collective Action Problem

First, although the NPS's engagement and litigation are subject to the collective action problem, as of 2019, the NPS's shareholding in its investee companies—virtually all major listed companies in Korea—accounted for 7.6% of the entire Korean capital market.[60] So in any case in which the NPS's engagement and litigation effectively enhance the value of a corporation, a significant portion of the benefits from the engagement and litigation will accrue to the NPS.[61] Of course, one may argue that 7.6% is still insufficient to overcome the collective action problem. At least, however, 7.6% is a meaningful portion that could significantly mitigate, if not eliminate, the collective action problem associated with shareholder activism.

Second, 7.6% is the average percentage of the NPS's shareholding in comparison to the total market capitalization of the Korean capital market. Therefore, there are many investee companies in which NPS's shareholding exceeds 7.6%. For instance, as of 2019, the NPS held 10% or more of the shares in ninety-six companies in Korea.[62] In cases in which the NPS initiates shareholder activism with these investee companies, the collective action problem faced by the NPS is even further reduced, compared to those companies in which the NPS holds 7.6% or fewer shares.

Third, in Korea, when calculating a company's market capitalization, it is customary to include the company's treasury stock.[63] By contrast, the U.S. capital market does not employ this sort of custom and excludes a corporation's treasury stock when calculating the market capitalization of the company.[64] The implication of this practice in the Korean capital market is noteworthy. Due to the inclusion of treasury stock in a corporation's market capitalization, the market capitalization of the entire capital market is *overstated*. Thus, the NPS's 7.6% shareholding, which is calculated using the market capitalization of the entire capital market as a denominator, is *understated*. In other words, according to the practices of the U.S. capital market, the largest and most developed market in the world, the NPS's shareholding would be larger than 7.6%. Therefore, the NPS's "true" shareholding, measured according to the U.S. standard, wields greater

---

[58] *See supra* Section I.B.1.

[59] Kang & Chun also explain, to some extent, how the NPS mitigates the collective action problem. *See* Kang & Chun, *supra* note 19, at 257. This Article, however, provides a more in-depth analysis and further discussion in relation to the NPS and its mitigating of the collective action problem.

[60] *See* CHO ET AL., *supra* note 32, at 1.

[61] *See also* Kang & Chun, *supra* note 19, at 249–50 (explaining an institutional investor's large stake associated with the less serious collective action problem).

[62] Seung-hwan Jeong, *국민연금 지분 5% 이상 313 곳 ... 10% 넘는 곳도 100 개社 육박*[*313 Companies with More Than 5% Stake by the NPS . . . Nearly 100 Companies with More Than 10% Stake by the NPS*], MAEIL BUSINESS NEWS KOREA (Feb. 9, 2020), https://www.mk.co.kr/news/stock/9196629 [https://perma.cc/J3CW-8XFR] (S. Kor.).

[63] Woojin Kim, Jieun Lim, Youngsoo Choi, *자사주 포함 관행이 시가총액 및 주당지표에 미치는 영향* [*Effect of Including Treasury Shares in Market Capitalization, EPS, and PER: Evidence from Korea*], 49 J. KOREAN SECS. ASS'N 249, 251 (2020) (S. Kor.).

[64] *Id.*

influence than the estimated 7.6%. This fact further weakens the collective action problem.

Fourth, the NPS is a significant shareholder of most major listed companies in Korea.[65] Although tunneling practices may vary among different companies, common standard features can be identified through engagement and litigation. In this regard, if a single gigantic entity like the NPS has the potential to engage in stewardship and shareholder activism by interacting and litigating with nearly all major listed companies in Korea, the "economies of scale"[66] in stewardship and shareholder activism may occur. Consequently, the average costs associated with stewardship and shareholder activism would decrease for the NPS, leading to a further weakening of the collective action problem. Given that the NPS initiates shareholder activism, it serves as the primary (or even sole) cost-bearer when it comes to addressing the collective action problem, where other investors (even institutional investors) often act as "free-riders" in terms of shareholder activism. From the perspective of the cost-bearer, economies of scale are paramount as they can substantially decrease the expenses associated with shareholder activism.

Fifth, as explained, the NPS is a quasi-governmental entity that operates under the supervision of the Ministry of Health and Welfare.[67] In this context, when it comes to stewardship and shareholder activism, the government or the NPS may have different perspectives on the collective action problem than private institutional investors. The NPS is mandated to pursue the "public good." Thus, from this standpoint, even if the NPS's engagement and shareholder activism result in *net costs* due to the collective action problem, these costs could be perceived by the NPS and the government as "inevitable costs for the public," a term used by the author. This is because these costs can be considered necessary and even desirable when the government and the public entity (that is, the NPS) strive to provide "public good" and enhance the overall "social welfare" that private institutional investors do not consider.

Accordingly, the NPS may argue that it does not compare its costs with its "private benefits" from shareholder activism. Instead, the NPS and the government may find the costs associated with the collective action problem tolerable or justifiable for the public and society, as long as the "social benefits" (including financial and non-financial benefits for the Korean society that do not appear on the NPS's financial documents) outweigh the NPS's costs associated with shareholder activism.[68] Thus, even if

---

[65] Kang & Chun, *supra* note 19, at 257.

[66] "Economies of scale" is defined as "[r]eductions in the average cost of production, and hence in the unit costs, when output is increased." *Economies of Scale*, OXFORD REFERENCE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095741513 (last visited July 29, 2023).

[67] *Organization*, MINISTRY HEALTH & WELFARE, http://www.mohw.go.kr/eng/am/am0102.jsp [https://perma.cc/L3KH-FT9D] (last visited July 29, 2023).

[68] If the NPS aims to determine the optimal level of shareholder activism, this aim can be achieved by comparing the "social benefits" and the "costs borne by the NPS" associated with such activism. Theoretically, the NPS can assess the *marginal* social benefits derived from shareholder activism and compare them with the *marginal* costs incurred. Relying on a micro-economics type of optimization—where the optimization is achieved when marginal benefits equal marginal costs—this approach determines the ideal level of the NPS shareholder activism. On the other hand, for example, the NPS may determine the level of shareholder activism for its investee companies when the *total* social benefits from activism equal the *total* costs borne by NPS for such activism. Public institutions, unlike private

stewardship and shareholder activism result in net financial costs due to the collective action problem, the NPS and the government may perceive them as acceptable "public costs" to some extent. This suggests that from the perspective of the NPS, the collective action problem in shareholder activism is not as severe, compared to other institutional investors.

When explaining "social benefits" and "inevitable costs for the public" regarding the NPS's shareholder activism, this Article's intent is not to argue that the NPS and the government *should* endorse this policy standpoint. Instead, this Article explains that the NPS and the government have an incentive to *politically* justify the NPS's active involvement in the management of the investee companies, even if such shareholder activism lacks *financial* justification. Additionally, it is crucial to recognize that the analysis in the fifth point implies and considers both the negative and positive effects of the NPS's shareholder activism. On the one hand, it is natural and reasonable for the NPS, a quasi-government agency, to have a public interest in engaging in shareholder activism on behalf of Korean society, which is inherently *beneficial* (positive) to Korean society. On the other hand, there is a concern that the NPS, acting as a representative for all Korean citizens (or taxpayers), might misuse or overuse its power with shareholder activism. This could potentially create an agency problem that would be detrimental to Korean society.

Finally, the NPS plays a pivotal role in promoting stewardship and shareholder activism in Korea, which could potentially facilitate other institutional investors in aligning their actions with the NPS to engage or litigate against a specific investee company. To elaborate, consider a scenario in which four institutional investors each hold 4.5% shares of an investee company, resulting in a total combined shareholding of 18%,[69] while the NPS holds 9%. In such a situation, if the NPS initiates shareholder activism—such as engagement—against the investee company, then the collective action problem associated with shareholder activism is significantly weakened owing to the following circumstances.

In the capital market, the NPS's decision to engage in shareholder activism is perceived as a solid foundation for a successful engagement. From the perspective of other institutional investors interested in shareholder activism, the NPS's presence and involvement in shareholder activism against a specific investee company could alleviate the burdens and costs associated with shareholder activism. As a result, these institutional investors would believe that the success rate of shareholder activism increases when

---

companies, generally do not pursue the maximization of profits. Moreover, they sometimes do not seek to maximize social welfare as well; rather, due to the agency problems, in reality their goal may be to maximize their own interests, such as increasing their influence in society. If the NPS seeks to maximize its own interest through proactive intervention via shareholder activism, the NPS may prefer adopting the *total* benefits-costs approach over the *marginal* benefits-costs approach, since the former may result in more shareholder activism, which can enhance the influence of the NPS in the capital market and society. Certainly, the NPS may also decide on the level of shareholder activism at some point between the outcomes generated by these two approaches. An additional point to note is that calculating "social benefits" is highly challenging. It is difficult to reach a consensus on which shareholder activism is beneficial for society and, if deemed positive, how much value is added by a specific shareholder activism. In particular, when implementing shareholder activism, it is possible that the NPS may exaggerate the social benefits of shareholder activism. On the other hand, due to the complexities in government-business relations, socio-economic issues, and capital market matters, it is also possible that the NPS might reduce or abstain from exercising shareholder activism. For a more in-depth analysis of both approaches, I am currently working on another project.

[69] *4.5% x 4 = 18%.*

the NPS engages in such activities. As the perceived probability of success in shareholder activism rises, the severity of the collective action problem faced by the other four institutional investors diminishes.

Consequently, these institutional investors may be more inclined to participate in shareholder activism against the investee company when the NPS is involved compared with cases in which the NPS is not engaged. This process would operate as a positive feedback loop, encouraging the involvement of additional institutional investors in shareholder activism, thereby further mitigating the collective action problem. In other words, the NPS's participation in shareholder activism against the investee company would trigger, what the author refers to as, a "cascade effect of weakening the collective action problem." Ultimately, if all five institutional investors, including the NPS, participate in shareholder activism against the investee company, the total shareholding to support the engagement will reach 27%.[70]

Accordingly, the collective action problem arising from shareholder activism will dwindle further since a significant percentage of shareholding will bear the costs arising from the collective action problem, and a higher winning chance is expected. From the perspective of the investee company that faces shareholder activism, the 27% ownership stake held by the four institutional investors and the NPS poses a significant threat, potentially even influencing control issues of the investee company. A more significant concern would arise for the investee company when the opposing alliance, holding a 27% ownership stake, opens the possibility for additional institutional investors to participate in shareholder activism. Once again, the "cascade effect of weakening the collective action problem" might be reinforced.

C. THE NPS'S ESG-RELATED POLICIES AND INVESTMENT

ESG builds upon reflections on existing analytical frameworks that have traditionally focused solely on the financial performance of corporations, such as "return on equity"[71] ("ROE") and stock price. In essence, ESG represents a movement that considers all *non-financial* factors when evaluating corporate performance.[72] Presently, ESG has gained significant momentum among businesses and policymakers, solidifying its position as a global trend. Korean society also holds high expectations for ESG practices.

The NPS has recently placed increased emphasis on the ESG movement and actively engages in ESG activities with its investee companies.[73] As an

---

[70] *(4.5% x 4) + 9% = 27%.*

[71] Regarding ROE, see Coryanne Hicks, *What Is Return on Equity: The Ultimate Guide to ROE*, U.S. NEWS & WORLD REP. (Aug. 26, 2020), https://money.usnews.com/investing/articles/what-is-return-on-equity-the-ultimate-guide-to-roe [https://perma.cc/4ENQ-K7GU].

[72] Virginia Harper Ho, *From Public Policy to Materiality: Non-Financial Reporting, Shareholder Engagement, and Rule 14a-8's Ordinary Business Exception*, 76 WASH. & LEE L. REV. 1231, 1233 n.4 (2019) ("Although the term 'non-financial' properly refers to all information contained in corporate public filings outside of the financial statements, it includes, and is often used synonymously with, the term 'ESG.' ").

[73] Jun-Ki Hong, *장기투자자인 국민연금에 ESG 투자는 필수* [*"ESG Investments Are Essential for Long-Term Investors Like the National Pension Service" Yong-Jin Kim, Chairperson of the National Pension Service*], CHOSUN DAILY (July 9, 2021), https://www.chosun.com/economy/stock-finance/2021/07/09/MMKSTWPNPRBJPJ3PL4URDF6SZM/ [https://perma.cc/D9QW-4KLQ] (interviewing Yong-Jin Kim, the then-chairperson of the NPS, who stated that "ESG investments are no longer optional but imperative for long-term investors like the NPS.").

entity holding a significant portion of shares in nearly every prominent company in Korea, the NPS wields enormous influence in the domestic capital market through its ESG policies. Given its status as the largest institutional investor in Korea, the NPS plays a crucial role in advancing ESG initiatives.

According to the NPS Fund Management Guidelines, the NPS *can* consider ESG factors when making investments.[74] Additionally, under the NPS Act, the NPS has *discretion* regarding ESG investments.[75] To systematically analyze the non-financial factors (that is, the ESG factors) of investee companies, the NPS developed its own ESG evaluation system and conducts biannual evaluations of domestic listed company stocks and domestic bonds.[76] Moreover, in November 2019, the NPS adopted the "Responsible Investment Promotion Plan for the NPS" ("RIPP for the NPS"),[77] which establishes ESG as an important investment principle. Before establishing RIPP for the NPS, the NPS applied ESG investments in a limited and passive manner, without a comprehensive strategy, primarily to certain assets such as domestic stocks.[78]

Regarding the RIPP for the NPS, the NPS has adopted the "Principle of Responsible Investment" ("PRI").[79] According to the PRI,[80] the NPS generally employs a *negative* screening system, in which alcohol, tobacco, and gambling companies are excluded from its investment targets. Simultaneously, the NPS maintains a *positive* screening system, which establishes a benchmark that focuses on companies with exceptional ESG performance. Furthermore, based on the RIPP for the NPS, starting from 2021, investments through the active investment strategy in stocks with an ESG "D grade" rating should be limited to the suggested portion outlined by the benchmark.[81] Moreover, since 2021, the ESG integration strategy has

---

[74] *See* NPS, 국민연금기금운용지침 [THE NPS FUND MANAGEMENT GUIDELINES] art. 17, https://fund.nps.or.kr/jsppage/fund/mpc/mpc_08.jsp (last visited July 29, 2023) (S. Kor.).

[75] *See* 국민연금법 [National Pension Act] art. 102(4) (S. Kor.), *translated in* Ministry of Government Legislation Korean Law Information Center online database, https://law.go.kr/LSW/eng/engMain.do [https://perma.cc/LN35-FY5B] ("[The Minister of Health and Welfare] may take into account environmental, social, and governance factors related to investment targets, to achieve a long-term and stable revenue.") (S. Kor.).

[76] *See Responsible Investment*, NPS INV. MGMT., https://fund.nps.or.kr/jsppage/fund/mcs/mcs_06_01.jsp [https://perma.cc/H4ME-YBZJ] (last visited July 29, 2023) (S. Kor.).

[77] *See* NPS, NPS RESPONSIBLE INVESTMENT PROMOTION PLAN (2019), https://www.nps.or.kr/jsppage/fund/fundCms/view.jsp?seq=23610&cPage=1&cmsId=KD860&SK=&SW=. (S. Kor.).

[78] Jin-hyung Park, *국민연금 "ESG 투자, 내년 전체자산 절반으로 확대"* [*The NPS's ESG Investment Will Expand to Half of Total Assets Next Year*], YONHAP NEWS (May 19, 2021), https://www.yna.co.kr/view/AKR20210519005700002 [https://perma.cc/J5YK-JQ6Q] (S. Kor.).

[79] In January 2015, the PRI has already been stipulated in the National Pension Act. In addition, in the NPS fund management guidelines, the disclosure of the status of responsible investment and the PRI are reflected in August 2015 and April 2016, respectively. *See* NPS, *supra* note 77, at 6.

[80] For the general explanation of the PRI (not necessarily the NPS's PRI), see Neil Stuart Eccles, *UN Principles for Responsible Investment Signatories and the Anti-Apartheid SRI Movement: A Thought Experiment*, 95 J. BUS. ETHICS 415, 415 (2010) ("If subscription is anything to go by, the PRI is rapidly becoming a de facto standard for defining the 'character' of mainstream investment practices that integrate a consideration of environmental, social and governance (ESG) issues."); Soohun Kim & Aaron S. Yoon, *Analyzing Active Fund Managers' Commitment to ESG: Evidence from the United Nations Principles for Responsible Investment*, 69 MGMT. SCI. 741, 741 (2023) ("UN PRI was initiated by investors worldwide in 2006 and called for funds to incorporate ESG issues into their investment decisions and to actively engage in the companies in which they invest.").

[81] *See* NPS, *supra* note 77, at 10.

been extended to include domestic bonds and overseas stocks in addition to domestic stocks.[82]

Previously, the prevailing belief in Korea regarding corporations was that their purpose was to maximize profits and, consequently, increase share prices. This viewpoint, known as "shareholder primacy,"[83] was traditionally embraced by policymakers, capital-market participants, and scholars in economics and finance. However, with the growing popularity of the ESG concept, a recent challenge to shareholder primacy has also emerged. The ESG-based approach does not prioritize short-term financial gains as the investee company's primary objective since ESG inherently encompasses various non-financial aspects. Consequently, the ESG activities of the NPS's investee companies naturally deviate from the norm of shareholder primacy, which often focuses on maximizing share prices in the immediate term.[84] The issues related to the tension between the ESG movement and shareholder primacy will be further discussed in Section II.D.4.

D. Interplay Among Stewardship, Shareholder Activism, and ESG

1. The NPS and Shareholder Activism

In Korea, stewardship has developed shareholder activism. Compared with the past, shareholder activism is more vigorous. A compelling instance is Align Partners—an activist fund that engages in shareholder activism targeting SM Entertainment, the powerhouse of K-Pop, and its founder, Soo-man Lee, in 2022.[85] When Align Partners proposed a candidate as an auditor through a shareholder proposal, the NPS, which held 6.3% of SM Entertainment shares, supported Align Partners' recommendation.[86] Ultimately, Align Partners' auditor candidate was elected.[87]

Regarding the NPS's activism, a more notable example is the Korean Air case in 2019, in which Yang-Ho Cho—the controlling shareholder of Hanjin Group, which includes Korean Air as an affiliated company—failed to be reelected as a director of Korean Air.[88] Readers may wonder how a

---

[82] *See* NPS, NATIONAL PENSION FUND ANNUAL REPORT 2021 63 (2021).

[83] For the further analysis of "shareholder primacy," see, for example, David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1013 (2013) ("Shareholder primacy, a term familiar to all corporate law academics, is the idea that corporate management's primary responsibility is to promote the economic interests of shareholders."); Jeff Schwartz, *De Facto Shareholder Primacy*, 79 MD. L. REV. 652, 660 (2020) ("Implicit in all of this is a theory of corporate purpose and how the law relates to it: a corporation's purpose is to serve shareholders, in particular, to maximize their wealth, and corporate law is there to police obedience to this purpose.").

[84] Theoretically speaking, the long-term based shareholder primacy can be consistent with ESG which is in support of sustainable growth and development.

[85] For the further explanation of the shareholder-activism dispute between Align Partners and SM Entertainment, see Han-na Park, *Align Partners CEO Faces off Against SM Founder, Hybe*, KOREA HERALD (Feb 21, 2023, 4:14 PM), https://www.koreaherald.com/view.php?ud=20230221000694 [https://perma.cc/QY29-JQ3C].

[86] Lee Chung-hee & Lim Se-won, *얼라인, '이수만 SM 엔터 이사회' 물갈이 나선다* [*Align Partners Will Change the SM Entertainment Board of Directors*], SEDAILY, (Aug. 30, 2022, 4:26 PM), https://www.sedaily.com/NewsView/269ZZZVBAK [https://perma.cc/8PAN-VNGW] (S. Kor.).

[87] Ye-na Kim, *SM 주총서 소액주주 측 감사 선임 . . . '이수만 견제' 가능할까,* [*SM Shareholders' Meeting Appoints Auditor for Minority Shareholders' Side . . . Is It Possible to 'Keep Soo-man Lee in Check'?*], YONHAP NEWS (Mar. 31, 2022, 2:06 PM), https://www.yna.co.kr/view/AKR20220331093751005?site=mapping_related [https://perma.cc/8VKJ-YQWT] (S. Kor.).

[88] Bo-hyeong Kim, Ik-hwan Kim & Sang-yong Park, *대한항공 대표 갈아치운 국민연금. . .조양호 회장, 20 년만에 '강제퇴진'* [*Removal in Korean Air by the National Pension*

"controlling shareholder," who typically wields significant control over the corporation, can be ousted from the board of directors.

In this case, the corporation's articles of incorporation stated that a director must be elected by a *two-thirds* vote at a shareholder meeting, which is uncommon in Korea.[89] Although Cho held a substantial number of shares, both individually and through his alliances, he received 64.1% of the votes in the shareholder meeting, falling short of the two-thirds approval requirement.[90] As the second-largest shareholder with an 11.56% stake in Korean Air, the NPS's opposition played a significant role among the 35.9% of opposing votes.[91] It is reported that many foreign investors—including the Canada Pension Plan Investment Board ("CPPIB")—were also aligned with the NPS.[92] In summary, due to the unusual two-thirds vote requirement and the NPS's involvement in shareholder activism, Cho was removed from the directorship of Korean Air, a key affiliated company of Hanjin Group.

2. Interchangeable Relationship Between Shareholder Activism and Stewardship in the Context of Korea and the NPS

The Korean Air case illustrates that shareholder activism can ultimately succeed, even in a chaebol corporation. However, it is uncertain whether shareholder activism in Korea currently reaches a sufficient level and prevails. Over the past two or three years, few scholars, commentators, and policymakers in Korea have mentioned the concept of "stewardship." In other words, the term "stewardship" has quickly faded from discussions in the Korean capital market. Nevertheless, shareholder activism remains a crucial issue, particularly centered around the NPS. In the Korean context, the fundamental "function" of "stewardship" closely aligns with "shareholder activism." Although the term "stewardship" is not *officially* as prevalent as it was a few years ago when it reached its peak, the concept of stewardship *functionally* continues to operate and thrive in Korea. As discussed in Section I.B.2, the NPS mitigates the collective action problem and encourages "shareholder activism."[93] This indicates that the NPS remains the commanding player behind stewardship in the Korean capital market.

3. The NPS: An Institutional Investor Integrating Shareholder Activism, Stewardship, and ESG

Currently, ESG is a topic that is intensively raised in the capital market.[94] An essential feature of stewardship (or shareholder activism) is

Service . . . Chairman Yang-Ho Cho Is 'Forced to Resign' After 20 Years], KOREA ECON. DAILY (March 27, 2019, 5:45 PM), www.hankyung.com/economy/article/2019032725861 [https://perma.cc/4E6U-PW66] (S. Kor.).

[89] For the further explanation, see Kang & Chun, *supra* note 19, at 255.

[90] *See* Kim et al., *supra* note 88.

[91] *Id.*; *see also* Kang & Chun, *supra* note 19, at 255; Wan Lee & Jeong-soo Kwak, *국민연금, 조양호 회장 대한항공 사내이사 연임 '반대'* [*National Pension Service 'Opposes' Reappointment of Chairman Yang-Ho Cho as Inside Director of Korean Air*], HANKYOREH (March 27, 2019), https://www.hani.co.kr/arti/economy/economy_general/887518.html [https://perma.cc/PE8B-BLE5] (S. Kor.).

[92] *See* Kim et al., *supra* note 88.

[93] *See supra* Section I.B.2.

[94] Currently, ESG is a dominant theme in the capital markets. *See, e.g.*, *SEC Responds to Investor Demand by Bringing Together Agency Information About Climate and ESG Issues*, U.S. SEC. AND EXCH. COMM'N, (last visited Jan. 28, 2023) ("In response to increased investor demand for this information

engagement.[95] Through engagement, the NPS, as an institutional investor that should discharge stewardship for its beneficiaries, can *seemingly rightfully* (even if sometimes not in reality) induce or demand its investee companies to adopt ESG-related policies. As explained, under the legal system, when the NPS manages its pension funds, it *can* consider ESG-related content.[96] Consequently, the NPS may intervene in the management and business policies of investee companies, both in the context of stewardship (such as engagement with the NPS's investee companies) and ESG.[97] As such, the concepts of shareholder activism, stewardship, and ESG are intertwined in Korea, primarily due to the NPS's significant presence as the country's most influential institutional investor. Figure 2 visually represents the relationships and dynamics among three key concepts: (1) shareholder activism (or stewardship) stirs up or incites the ESG movement; (2) simultaneously, the ESG movement justifies and bolsters shareholder activism (or stewardship); (3) this interaction is cyclical and mutually reinforcing, creating a positive feedback loop.

Figure 2: Interplay Among ESG Movement, Stewardship or Shareholder Activism

---

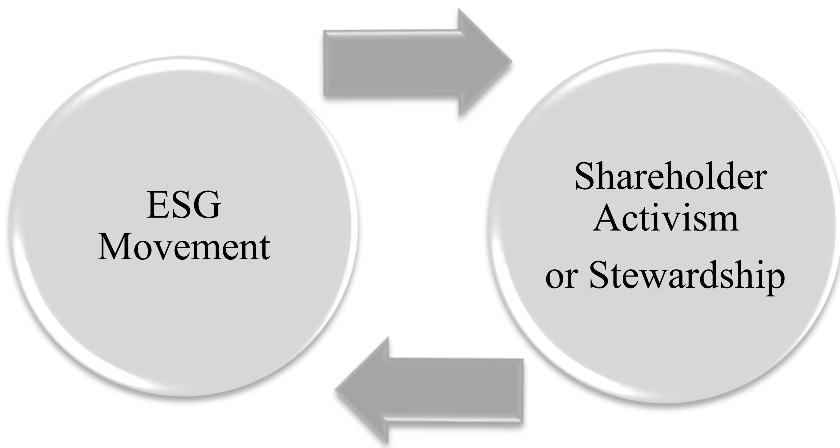
[about ESG investing], the page will appear on the front page of SEC.gov and will be updated as the agency continues to respond to investors."), https://www.sec.gov/news/press-release/2021-52 [https://perma.cc/C388-F3RP]; Alain Pietrancosta & Alexis Marraud des Grottes, ESG Trends—What the Boards of All Companies Should Know About ESG Regulatory Trends in Europe (Sept. 27, 2022), *in* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2022), https://corpgov.law.harvard.edu/2022/11/01/esg-trends-what-the-boards-of-all-companies-should-know-about-esg-regulatory-trends-in-europe/ [https://perma.cc/J4MU-88YU]; *ESG's Emerging Leading Role in Capital Markets,* MORGAN STANLEY (MAR. 12, 2021), https://www.morganstanley.com/ideas/corporate-esg-capital-markets [https://perma.cc/JH8T-9QU5], the author states:

> There's no denying that sustainability has permeated public consciousness, our economy and financial markets. Consumer choices keep underscoring that what's good for society and the environment can also be beneficial for business, while investors are increasingly searching for sustainable investing opportunities and analyzing corporations' environmental, social and governance (ESG) performance.

[95] Regarding engagement, see, for example, *Principles of Corporate Governance*, BUS. ROUNDTABLE, https://www.businessroundtable.org/policy-perspectives/corporate-governance/principles-of-corporate-governance [https://perma.cc/W2GM-3QHN] (last visited July 29, 2023); *The Principles*, INV. STEWARDSHIP GRP., https://isgframework.org/wp-content/uploads/2020/07/ISG_Stewardship_Principles.pdf [https://perma.cc/J5MF-6ZW7] (last visited July 29, 2023).

[96] *See supra* Section I.C.

[97] Stewardship (or shareholder activism) and ESG are closely related to each other. In the context of the NPS's investment, the concept of ESG appears to be more closely associated with the NPS's *specific engagement* in an investee company's policies than stewardship (or shareholder activism) does. These policies include, but are not limited to, issues related to climate change and human rights.



4. Tension Between Shareholder Activism (Stewardship) and ESG: The NPS's Perspective and Solution

Initially, when stewardship was introduced in Korea, it was generally interpreted to maximize investors' wealth and promote *shareholder* primacy. Similarly, "shareholder activism" has often been discussed as a way to achieve shareholder primacy and enhance share prices. On the other hand, ESG primarily focuses on the *non-financial* aspects of corporations and promotes *stakeholder* capitalism.[98] Consequently, there may exist a tension between stewardship and shareholder activism, on one hand, and ESG, on the other. From the NPS's perspective, however, combining these three concepts is feasible for the following reasons.

First, it seems that the NPS, at least *officially*, perceives that ESG policies provide the opportunity for "sustainable" development and profits to investee companies and the NPS if they are well-adopted by the investee companies. In other words, even if ESG is intrinsically nonfinancial, it seems that the NPS views ESG investment as, in the long run, financially worthwhile—although the validity of the viewpoint is another issue. In this respect, the NPS's investment can be understood since at least in terms of the NPS's belief or argument, there is no substantially large amount of intrinsic conflict between its ESG-related investment strategy and a profit-maximization investment strategy.

Second, the NPS's perception that ESG investment is, in the long run, financially worthwhile is still academically controversial. A substantial body of literature supports the notion that ESG does not contribute to an increase in the equity value of investee companies.[99] Nevertheless, there is also a

[98] *See, e.g.*, Kang, *supra* note 6, at 11–12. ESG, from the perspective of stakeholder capitalism, also aligns with legislative efforts, such as "other constituencies statute," aimed at protecting stakeholders other than shareholders, including creditors and employees. *Id*. at 16.

[99] *See, e.g.*, Gerhard Halbritter & Gregor Dorfleitner, *The Wages of Social Responsibility—Where Are They? A Critical Review of ESG Investing*, 26 REV. FIN. ECON. 25, 29 (2015); Cristiana Manescu, Stock Returns in Relation to Environmental, Social and Governance Performance: Mispricing or Compensation for Risk? 2 (Univ. of Gothenburg, Working Paper No. 376, 2010), https://gupea.ub.gu.se/handle/2077/20998 [https://perma.cc/KX8M-UB76].

considerable body of literature that supports the NPS's belief or argument that ESG-related investments can enhance the equity value of investee companies.[100] Drawing upon this body of literature, the NPS can justify its ESG investment strategy alongside stewardship and shareholder activism. For the NPS, it is not necessarily critical whether this body of literature, aligned with the NPS's view, represents a majority view. The NPS can maintain its belief or argument as long as a substantial number of scholars, policymakers, and practitioners endorse it, even if they do not constitute a majority.

Third, if the ESG policies recommended or required by the NPS are effectively implemented and managed by its investee companies, it can be argued that shareholder primacy, often associated with stewardship and shareholder activism, does not significantly differ from ESG. It is worth noting that the first point underscores the sustainable and long-term profitability of ESG investment. Conversely, the third point is not reliant on the concept of sustainable and long-term profitability; rather, it emphasizes the NPS's role as a universal owner within the domestic capital market. A hypothetical example can further illustrate this point.

Suppose the NPS engages in shareholder activism by recommending that an investee company ("Company A") implements a pollution-reduction facility as part of its ESG initiatives.[101] Such engagement, focused on ESG goals, would involve significant costs, resulting in a drop of $200 million in Company A's market capitalization. Consequently, as a shareholder, the NPS's investment from Company A is likely to be negatively affected. However, consider the scenario in which another investee company of the NPS ("Company B") benefits from Company A's pollution reduction efforts. If Company B produces canned food near Company A's factory, the improved air and water quality resulting from Company A's pollution reduction would enhance the quality of Company B's products and increase its sales. For instance, suppose Company B's market capitalization increases by $200 million. In this context, if the NPS holds 10% of shares in these two companies, the NPS's investment losses from Company A are $20 million and the NPS's investment profits from Company B are $20 million. Consequently, the NPS views the potential investment losses from Company A due to ESG policies as offset by the additional investment profits generated by Company B. Table 4 provides a summary of the explanation.[102]

---

[100] *See, e.g.*, Gregor Dorfleitner, Sebastian Utz & Maximilian Wimmer, Patience Pays Off—Financial Long-Term Benefits of Sustainable Management Decisions (Working Paper, Dec. 4, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533957 [https://perma.cc/Y3LN-TWJ3]; GORDON L. CLARK, ANDREAS FEINER & MICHAEL VIEHS, FROM THE STOCKHOLDER TO THE STAKEHOLDER: HOW SUSTAINABILITY CAN DRIVE FINANCIAL OUTPERFORMANCE (2015); Gunnar Friede, Timo Busch & Alexander Bassen, *ESG and Financial Performance: Aggregated Evidence from More Than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210, 226–27 (2015); Subodh Mishra, ESG Matters (Working Paper No. 432/2014, 2014), *in* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Jan. 14, 2020), https://corpgov.law.harvard.edu/2020/01/14/esg-matters/ [https://perma.cc/ADP9-266Z].

[101] For a similar explanation, *see* Kang, *supra* note 6, at 13.

[102] From the standpoint of social welfare, the outcome is better because of the pollution-reduction. *See id*. ("Suppose that the NPS holds a significant amount of shares in both corporations. In this situation, by recommending Corp. A to reduce the level of pollution, the NPS can make society better off. In this respect, the NPS's ESG-related engagement, at least in this example, is favorable to the NPS's 'beneficiaries' (citizens) in terms of Kaldor-Hicks standard.").

Table 4: The Impact of Company A's Installation of a Pollution-Reduction Facility on the NPS's Financial Profits: Case Demonstrating Zero Impact

	Company A	**Company B**
Financial outcome of implementing a pollution-reduction facility	− \$200 million	+ \$200 million
NPS's shareholding	10%	10%
Financial impact on the NPS's investment in the companies	− \$20 million	+ \$20 million
Financial impact of implementing a pollution-reduction facility on the NPS's portfolio (Company A + Company B)	− \$20 million + \$20 million = \$0	

Unlike the example provided in Table 4, it is possible that the implementation of a pollution-reduction facility could generate net financial profits for the NPS. For instance, if Company B's market capitalization increases by \$300 million rather than the predicted \$200 million, with all other factors remaining constant, the NPS could stand to gain \$10 million in financial profits from its portfolio of these two companies.[103] It implies that the NPS could still realize financial gains from its investment portfolio even if some investee companies incur costs due to the implementation of ESG emphasized policies. Table 5 outlines the explanation.

Table 5: The Impact of Company A's Installation of a Pollution Reduction Facility on the NPS's Financial Profits: Case Demonstrating Positive Impact

	Company A	**Company B**

[103] From the standpoint of the NPS, the payoff can be calculated as follows: *(-\$200 million x 10%) + (+\$300 million x 10%) = +\$10 million*.

Financial outcome of implementing a pollution-reduction facility	− $200 million	+ $300 million
NPS's shareholding	10%	10%
Financial impact on the NPS's investment in the companies	− $20 million	+ $30 million
Financial impact of implementing a pollution-reduction facility on the NPS's portfolio (Company A + Company B)	− $20 million + $30 million = + $10 million	

In addition, although the example is based on only Companies A and B, recall that the NPS—as a universal owner—is a major shareholder of virtually all main companies in Korea. Thus, the financial outcomes of the NPS's total portfolio, influenced by ESG investments such as pollution-reduction policies in its investee companies, are well diversified. This implies that idiosyncratic costs arising from ESG in individual investee companies can be effectively eliminated or reduced at the NPS's level. In other words, when considering the NPS's investment from the perspective of the "total portfolio" rather than investment in individual companies, it becomes clear that the NPS's ESG investment does not significantly undermine the concept of shareholder primacy.[104] As Table 5 indicates, ESG investments could generate net profits for the NPS's portfolio, potentially strengthening shareholder primacy for the NPS at its portfolio level.

Fourth, considering that the NPS's beneficiaries are all Korean citizens, there is another rationale that the NPS can utilize for ESG-related investment, which the author terms "intrinsic shareholder primacy." This term presupposes that the genuine concept of shareholder primacy should focus on promoting welfare and well-being, encompassing aspects such as quality of life, in addition to financial factors. In explaining the intrinsic shareholder primacy concept, it is better to consider the NPS's total portfolio rather than focusing solely on these two investee companies (Companies A and B). However, for illustrative purposes, this Article will use the simplified example based on Companies A and B.

Here, suppose Company A's market capitalization losses from the installation of the pollution-reduction facility are not $200 million but $300

[104] For the similar viewpoint, see Kang, *supra* note 6, at 13 (in particular, the sentence quoted in *supra* note 102).

million. Thus, the NPS's investment losses from Company A are $30 million and its investment profits from Company B are $20 million (note that the NPS holds a 10% stake in both companies). As a result, if financially measured, the NPS experiences net costs of $10 million from the investment in the two corporations. It indicates that under the financial evaluation, the NPS's ESG initiatives imposed on Companies A and B are not qualified as an investment suitable for shareholder primacy. However, as a quasi-government entity and public pension fund, the NPS's goal might be to maximize the *welfare* level of Korean society. In this respect, more broadly speaking, the NPS's "intrinsic shareholder primacy" does not have to be limited to *financial* performance. Instead, it can be argued that the NPS's "intrinsic shareholder primacy" should consider the *quality* of beneficiaries' lives. Thus, for example, if the improved quality of life of Korean citizens resulting from reduced pollution is, theoretically speaking, equivalent to $250 million, the NPS's total utility of ESG investment initiatives in Companies A and B is measured as a net benefit of $240 million instead of a net cost of $10 million. Table 6 provides a summary of the explanation.

Table 6: The Impact of Company A's Installation of a Pollution Reduction Facility on the Social Welfare

	Company A	**Company B**
Financial outcome of implementing a pollution-reduction facility	− $300 million	+ $200 million
NPS's shareholding	10%	10%
Financial impact on the NPS's investment in the companies	− $30 million	+ $20 million
Financial impact of implementing a pollution-reduction facility on the NPS's portfolio (Company A + Company B)	− $10 million	
Value of the Korean citizens' improved quality of life	+ $250 million	

NPS's beneficiaries' total benefits (including the improved welfare)	$-$ \$10 million + \$250 million = (+) \$240 million

This example illustrates that from a social utility perspective, there is a theoretical possibility that the overall enhanced social welfare experienced by the citizens of Korea outweighs the NPS's net financial loss resulting from investments in Companies A and B. In essence, this means that if the *qualitative* measure of social welfare rather than the *quantitative* measure of financial gains for the NPS is considered, ESG policies can align to maximize welfare for the NPS's beneficiaries.[105]

Fifth, it is noteworthy that Korean society generally advocates for egalitarianism. This means that politically and socially, Korean society tends to empathize with, if not entirely endorse, the principles of ESG and stakeholder capitalism.[106] Under these circumstances, as long as many Korean citizens believe that the NPS's ESG policies are beneficial to Korean society, public opinion rarely questions openly the compatibility of stewardship, shareholder activism, and ESG. Rather than challenging their congruity, Koreans typically attempt to harmonize these three concepts, even if robust theoretical backing for such an understanding is lacking.

II. UNWELCOME, POTENTIAL OUTCOMES OF THE NPS'S ESG-ORIENTED POLICIES

Part I explained the interplay between stewardship, shareholder activism, and ESG in the context of the NPS. Part II elaborates on the unwelcome, potential outcomes that the NPS's ESG-oriented policies may bring. These unwelcome, potential outcomes are new topics that the literature has not yet discussed in depth. These outcomes include the following three points. First, based on the NPS's ESG-oriented policies, government intervention, which is already active in Korea, could take place more frequently and to a larger extent in a more *seemingly justified* manner.[107] Second, the NPS's ESG-oriented policies can provide excuses for the NPS's disappointing performance with respect to its investments in the investee companies.[108] Third, the NPS's ESG-oriented policies may foment another type of agency problem in the NPS's investee companies.[109]

---

[105] However, it should be noted that social welfare, by its nature, cannot be easily measured by objective quantitative indicators since it is highly subjective. Given this, when evaluating social welfare in the case of Table 6, the NPS has an incentive to exaggerate the positive effects of its ESG policies to make the outcomes of its ESG investments appear more favorable. The author refers to this phenomenon as the NPS's "window dressing of ESG-related social welfare." Although this issue is worth further analysis, it is beyond the scope of this Article.

[106] Regarding stakeholder capitalism, see generally Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020). Regarding the NPS's stance of stakeholder capitalism, see Kang, *supra* note 6, at 12.

[107] *See infra* Section II.A.

[108] *See infra* Section II.B.

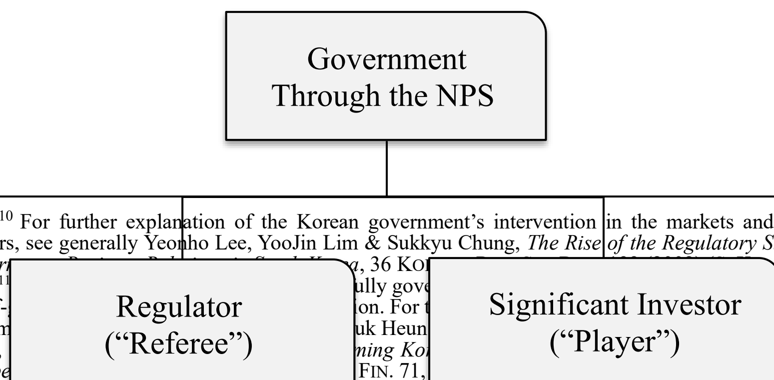
[109] *See infra* Section II.C.

A. THE GOVERNMENT'S GOVERNING OF THE MARKETS

Based on institutional investors' stewardship, the government has already established a toehold to justify intervention (that is, engagement) in the management and business policies of the NPS's investee companies. In addition, as discussed, in the name of ESG, the government can intervene and have an enormous influence on specific corporate policies of particular investee companies. In other words, when the NPS invests in and engages with its investee companies in the name of stewardship, the government could use ESG as a useful "public policy tool." Indeed, the government's intervention in various markets and their participants—also known as "governing the markets"—is a long-standing tradition in the Korean economy.[110] This tradition has consistently been criticized for the government's significant interference in the markets. However, the NPS's emphasis on ESG investment in its investee companies could work as a new, strong, and convincing excuse and justification for the government's intervention in the management and business policies of listed companies—most of which are private companies.

Traditionally, in the capital market, the Korean government, through the Financial Services Commission ("FSC") and the Financial Supervisory Service ("FSS"),[111] fulfilled the practice of governing the markets based on the *regulator*'s power over capital market transactions. Now, the Korean government, through the Ministry of Health and Welfare and the NPS, can govern the markets using its major *shareholder*'s power to engage with and encourage ESG in the NPS's investee companies since the NPS is a major shareholder in most listed companies.[112] Accordingly, a new phenomenon has arisen in the capital market in which the government can act both as a *regulator* (capital-market referee) and as a *significant investor* (capital-market player).[113] Figure 3 summarizes this phenomenon.

Figure 3: Government (Through the NPS) as a Regulator and Investor



[110] For further explanation of the Korean government's intervention in the markets and market players, see generally Yeonho Lee, YooJin Lim & Sukkyu Chung, *The Rise of the Regulatory State and Gover*[illegible]*a*, 36 KO[illegible]).

[111] [illegible]ully gove[illegible] that is a half-[illegible]ion. For t[illegible]ulatory system[illegible]uk Heun[illegible]ae Yeol Yang, [illegible]*ming Ko*[illegible]*rvisory Indepe*[illegible] FIN. 71, [illegible]

[112] *See supra* Section I.B.2.

[113] In this light, the NPS is similar—even if it is not precisely the same—to the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) in China. For a further explanation, see the initial draft of this Article, Sang Yop Kang, Interplay Between Stewardship and ESG: The Case of the National Pension Service in Korea (unpublished manuscript) (on file with the author); *see also* Kang, *supra* note 6, at 7 ("Although generally the NPS is not a controlling shareholder of its portfolio companies, it is at least a significant (government) investor. In this respect, the NPS is similar to, but also different from, the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) in China."). The SASAC is a controlling shareholder, rather than a merely significant shareholder, of many corporations.

This new phenomenon can also be seen as revisiting the old question of how much the government should intervene in the market. In that respect, if the NPS, the largest institutional investor in the domestic capital market, does its best to implement ESG-related policies as part of its stewardship policy, the NPS's investee companies are likely to lose some autonomy when deciding on business and management matters.

B. ESG AS AN EFFECTIVE EXCUSE FOR THE NPS'S POOR INVESTMENT PERFORMANCE

For a long time, compared to famous public pension funds in other countries, the NPS has been pressured by criticism of its mediocre investment returns. In this respect, ESG-oriented policies can be used as an effective "excuse" (or "defense" or rationalization) for the NPS's poor financial performance.

First, even if the returns from the NPS's investments are disappointing, the NPS may argue that ESG investment should intrinsically consider the investee companies' non-financial aspects, which are not fully captured by investment returns. In other words, the NPS may implicitly or expressly claim that even if the NPS's performance, in terms of financial return, is low, its ESG-based performance measured by "social welfare" is high.[114]

Of course, objectively measuring social welfare, which is inherently a qualitative indicator, is extremely difficult. Since it is impractical to quantify the level of social welfare, there is no confirmed, sole index that objectively evaluates how much NPS's investments have enhanced social welfare. Under these circumstances, the NPS can choose, among many indices, a social welfare index that interprets the NPS's ESG policies most favorably.

Second, the NPS may argue that ESG investment, as a sustainable development investment, requires a long-term horizon.[115] In general, however, "long-term" is not well defined. Also, the NPS does not officially clarify this issue. As Maynard Keynes famously stated, "In the long run, we are all dead."[116] Fund managers and executives of the NPS may maintain that their investment decisions will eventually be right when the long-term

[114] *See supra* Section I.D.4 and Table 6.

[115] However, long-term oriented approach can also be harmful to a corporation. *See, e.g.*, Kang, *supra* note 6, at 17 (" '[S]hareholders' long-term interest' is often abused as a slogan without substance and accountability.").

[116] For "long-term" as the NPS's excuse for its investment, I used John Maynard Keynes' statement in my presentation. *Id.*; *see also id.* (criticizing "long-termism" since "the long-term interest could be merely wishful thinking without solid logical foundation.").

investment horizon is "properly" considered; in the case of poor performance, they may argue that the "long-term" has not been reached yet.[117] In addition, in the NPS, fund managers and high-ranking executives often have short tenure.[118] Given this short tenure and frequent turnover, it is challenging to identify whether a specific ESG policy, which should have a long-term effect, was the decision of any particular executive or fund manager.

When ESG-oriented policies act as an effective excuse for the NPS's poor investment performance, as explained below, the NPS's ESG-oriented investment may generate *distorted* outcomes in at least three ways.

First, in the form of stewardship and shareholder activism, the NPS and its executives and fund managers have a solid incentive to *excessively* recommend ESG-oriented investment policies (that is, beyond the optimal level). This incentive exists because any investment labeled as "ESG" can serve as a defense, at least to some extent, for the NPS's executives and fund managers against criticism of poor investment performance. Under these circumstances, even if the NPS and its executives and fund managers pursue only the "genuine ESG" (in contrast to the "washed ESG"[119] addressed below), too much ESG-related investment could be generated.

Second, it is noteworthy that the concept of ESG is difficult to define. If ESG provides excuses (or defenses) for the NPS's executives and fund managers and thus extends a sort of safe harbor for them, they will likely redefine "ESG investment" broadly, or even create a new concept of "ESG investment" to favor them. In other words, just as greenness is washed (that is, "greenwashing"),[120] the notion of ESG itself can be washed (that is, "ESG-washing"). Thus, it is possible that even intrinsically non-ESG investment could be categorized as ESG investment. In this case, ESG would be less meaningful, like merely a naming exercise, which would make the ESG movement less trustworthy—not only in the NPS but also in society.

Third, by utilizing ESG criteria as a lever, the government can benefit from governing the market, and the NPS can exercise significant influence on investee companies, which are mostly privately owned companies. For example, the NPS determines the ESG rating or score of a specific investee company with broad discretion. Moreover, the NPS's ESG investment

---

[117] Kang & Chun, *supra* note 19, at 258.

[118] Fund managers at the NPS frequently left the NPS. There are two main reasons. First, it is because the NPS moved from Seoul to Jeonju in 2017. In Korea, people, including fund managers at the NPS, generally want their workplace to be in Seoul for the reasons such as cultural life and children's education. Second, the level of the financial compensation, including salaries and bonuses, fund managers at the NPS receive are still low compared to those paid by private financial companies. *See* Taeho Lee, *계속되는 국민연금 인재 유출* [*Continued Outflow of Talent from the NPS*], HANKYUNG (May 26, 2022), https://www.hankyung.com/economy/article/2022052517451 [https://perma.cc/SA2Z-WYRF] (S. Kor.).

[119] Regarding washed ESG or ESG-washing, see, for example, Ebbe Rogge & Lara Ohnesorge, *The Role of ESG Rating Agencies and Market Efficiency in Europe's Climate Policy*, 28 HASTINGS ENV'T L.J. 113, 143 (2022). Regarding greenwashing, see Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273, 296 (2022); Ryan Clements, *Why Comparability Is a Greater Problem than Greenwashing in ESG ETFs*, 13 WM. & MARY BUS. L. REV. 441, 456–57 (2022).

[120] Greenwashing is also an important topic in economies like China. Regarding ESG-washing, particularly in China, see, for example, Allison Goh, *Sustainable Green Finance Towards a Green Belt and Road*, 11 ASIAN J. INT'L L. 245, 245 (2021). Greenwashing is crucial to issues on green bonds. Regarding green bonds particularly in China, see Tao Huang & Qingyue Yue, *How the Game Changer Was Generated? An Analysis on the Legal Rules and Development of China's Green Bond Market*, 20 INT'L ENV'T AGREEMENTS: POL. L. & ECON. 85, 86–88 (2020).

strategy is not something that can be appealed by the investee company. Under these circumstances, the NPS and its executives and fund managers, theoretically speaking, can demand investee companies reflect the NPS's preferred policies in the name of ESG.

In sum, an agency problem may arise favoring the agents—the NPS, NPS executives and fund managers, and the government—at the expense of the NPS's beneficiaries—the principals. Of course, as discussed in the hypothetical example,[121] even if reduced pollution does not financially benefit the Korean citizens, the NPS's ESG-related investments can make Korean society better off. This positive aspect of the NPS's ESG-related investments exists. However, it is also probable that the negative aspects of the NPS's ESG-related investments would take place. These negative aspects, so far, have neither been well-discussed nor examined, but their impacts could be significant, and thus worth analyzing further. Furthermore, there is a possibility that the NPS, in an effort to justify its ESG policies or even policies based on ESG-washing, might overstate the degree of improved welfare these policies could bring.

C. ESG-Disguised Agency Problems

When the NPS encourages or demands its investee companies to adopt ESG-oriented policies, agency problems among corporate decision-makers in these companies can be more serious. The author refers to these problems as "ESG-disguised agency problems."[122] In general, "corporate decision-makers" generally refers to controlling shareholders and high-ranking executives. However, in Korea, where the domestic economy is dominated by the controlling family shareholders of chaebols, the agency problems discussed here predominantly relate to controlling shareholder agency problems.[123] Regarding ESG-disguised agency problems, several points are worth analyzing.

First, the NPS enforces ESG policies in the NPS's investee companies through, for example, conversations with the management or the board of directors, a form of stewardship (or shareholder activism). In other words, stewardship currently works as the NPS's tool to carry out ESG policies in its investee companies. However, these ESG policies are broadly guided by the NPS at the *macro* level. When an ESG policy set by the NPS is being implemented, typically the NPS does not engage the investee companies in the details of the ESG policy. Even if the NPS wishes to *micro*-manage ESG issues in its investee companies, it does not have enough workforce and resources to check each investee company on how specifically an ESG policy should be carried out, and even whether an ESG policy has been implemented.[124] Considering the NPS's investee companies include most

---

[121] *See* the hypothetical example of Companies A and B *supra* Section I.D.4 and Table 6.

[122] Regarding ESG-disguised agency problems, see *supra* note 17; *see also* Sang Yop Kang, Presentation at the Korean Securities Association: Rethinking ESG and Stakeholder Capitalism: Implications and Limits 31 (July 19, 2022) (presentation material on file with the author) (explaining ESG-disguised controlling shareholder agency problem).

[123] It should be noted, however, that, in some instances, ESG-disguised agency problems may also apply to high-ranking executives in Korea, particularly in the case of companies with dispersed shareholding.

[124] For the further explanation of lack of workforce within the NPS, see, for example, Jun-beom Jeon, *"핵심인력 이탈 그만"…국민연금, 실·팀장급 운용역 급여에 성과급 기본반영* [*"Stop Key*

listed companies in Korea, comprehensive coverage and supervision of their particular ESG-related policies would be an immense burden for the NPS. As a result, the NPS's capacity to oversee ESG-related policies in investee companies is limited.

In other words, the devil is in the details. Even if the NPS and Korean government require the NPS's investee companies to adopt a specific ESG policy, the decision-makers in the NPS's investee companies can carry out the ESG policy very differently than what the NPS and the government intended. In this respect, at least some ESG policies pushed by the government and the NPS, which are usually considered government intervention, ironically give a high level of discretion to the decision-makers of investee companies when carrying out the ESG policies.

Second, in implementing ESG, controlling shareholders' "cherry-picking" is significant.[125] Suppose there are one hundred ESG-related policies that look "socially desirable" from the viewpoint of the media and ordinary individuals who are not ESG experts. Under the strict shareholder primacy—which dictates the maximization of share price—perhaps these ESG-related policies would not have been considered, since they could generate costs to the corporations. In the current ESG-focused zeitgeist, however, corporations can adopt these ESG-related policies even if they are detrimental in terms of shareholder primacy (or even stakeholder capitalism, considering various stakeholder groups' interests).

As the ultimate decision-maker in the corporation, suppose the controlling shareholder, based on personal preference, selects ten ESG-related policies out of the one hundred.[126] Then, the corporation's ESG performance score will increase compared to the past, even if the other unadopted ninety ESG-related policies are also "socially desirable," or even "more socially desirable." It is highly plausible that these ten cherry-picked ESG-related policies will be financially or non-financially beneficial to the controlling shareholder. Nonetheless, the presence of these pecuniary or non-pecuniary benefits for the controlling shareholder can be obscured by the positive image associated with ESG when taking ten ESG-related policies.

Personnel Departures"... NPS to Include Performance Bonuses in Basic Pay for Senior and Team Leader Fund Managers], CHOSUN BIZ (Feb. 28, 2017), https://biz.chosun.com/site/data/html_dir/2017/02/28/2017022800382.html [https://perma.cc/9HLW-BS5X] (S. Kor.), the author explains:

> As of January 1st this year, the official count of National Pension Service fund management employees totaled 223. This falls short by 51 positions from the authorized quota. This shortage is attributed to the departure of 30 employees in just the past year. Additionally, it has been reported that since January, over 10 fund managers have either expressed their intention to resign or have already left their positions.

See also Lee, *supra* note 118.

[125] For an explanation of controlling shareholders' "cherry picking," *see* Kang, *supra* note 17 ("'Cherry-Picking' and Pretext: Any corporate policy can be justified for the ESG grounds. Thus, corporate leaders may choose corporate policies that they personally like although these corporate policies are inefficient to corporations.").

[126] ESG policies may work to the advantage of decision-makers in companies, including controlling shareholders and top executives. *See* Kang, *supra* note 6, at 20 ("ESG can be used in *favor* of corporate insiders in cases where ESG can justify corporate policies that deviate from shareholder wealth maximization. Due to ESG, in many cases, corporate insiders may enjoy discretion in exercising corporate policies. In other words, relying on ESG, corporate insiders can make excuses when they initiate corporate policies that shareholders might not like.").

Third, it is also noteworthy that in many cases, a chaebol controlling shareholder's percentage of shareholding is low, like 1–2%.[127] Such an ownership structure is referred to as a "controlling minority structure" ("CMS").[128] Under these circumstances, shareholder primacy, which is designed to maximize the share price, is not always the most essential matter to the controlling shareholder. Even if a business strategy backed by ESG is not expected to enhance the share price, the opportunity cost of taking the business strategy will be borne almost entirely by non-controlling shareholders, holding the remaining 98–99% of shares.[129] Nonetheless, business strategies that do *not* maximize the share price can still be rational for the controlling shareholder, as long as the personal benefits—either pecuniary or non-pecuniary—derived from the strategy outweigh the losses incurred from adopting it.

While adopting a suboptimal business strategy might be undesirable for a corporation, it becomes the controlling shareholders' *rational* choice when considering only their *personal* interest. Also, such a strategy is ethically incorrect and potentially subject to legal liability. However, if controlling shareholders hide their intent to maximize their benefits—including non-pecuniary benefits such as fame, image-making, and even the increased chance of pardon or reduced prison term—then ESG can serve as a convenient rationale for pursuing their preferred business strategies.

For instance, when controlling shareholders are criminally charged for tunneling, they can expect that the social contribution of the corporation, that is, ESG activities such as donations and labor-friendly corporate policies, could be a mitigating factor in the resulting criminal punishment. As the controlling shareholders exercising decision-making power, they can guide ESG activities within the corporation. Regarding the costs associated with the ESG activities, particularly in the CMS situation, the controlling shareholders can *externalize* most costs of donations and labor-friendly corporate policies, since the eventual cost-bearers are mostly non-controlling shareholders and the corporation's other stakeholders. For instance, when the controlling shareholder holds merely 2% of shares in the corporation (which is not uncommon in Korean chaebols[130]), the personal costs that the controlling shareholder should bear for donations and labor-friendly corporate policies are also 2%.

In this case, based on the costs that the non-controlling shareholders holding 98% of shares bear, the controlling shareholder can utilize most of the benefits from the ESG activities (donations and labor-friendly corporate

---

[127] In 2022, among the top ten *chaebols* (in terms of the asset size), the average share ownership of the controlling shareholders and their families were merely 0.8% and 2.4%, respectively. *See* KOREA FAIR TRADE COMM'N, 2022 년 공시대상기업집단 주식소유현황 분석•공개 [ANALYSIS AND DISCLOSURE OF THE STOCK OWNERSHIP STATUS OF CORPORATE GROUPS IN 2022] (2022) (S. Kor.).

[128] For further analysis of the CMS, see Lucian A. Bebchuk, Reinier Kraakman & George Triantis, *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, *in* CONCENTRATED CORPORATE OWNERSHIP 295 (Randall K. Morck ed., 2000). For the analysis of the controlling shareholders' personal costs arising from corporations, see Kang, *Controlling Shareholder Regime*, *supra* note 44, at 848 (analyzing the impact of the CMS when it comes to controlling shareholders' personal costs in corporations).

[129] *See also* Sang Yop Kang, *Tension Between Shareholder Primacy and (Quasi) Monopoly: A Theoretical Analysis of Controlling Shareholder Economies and China*, 11 U. PA. ASIAN L. REV. 128, 134–35 (2015).

[130] *See* KOREA FAIR TRADE COMM'N, *supra* note 127.

policies) in the form of mitigated criminal liability. When a controlling shareholder is depicted as making significant contributions to society or engaging in "meaningful work" for the community, it can sway public opinion in their favor. In reality, in Korea, when controlling shareholders are implicated in wrongdoing, it becomes challenging for either the prosecution or the courts to entirely dismiss the increasingly favorable sentiment towards them. From this perspective, it can be argued that the corporation's ESG activities can be manipulated to serve the personal interests of the controlling shareholder, as these activities supported by the *corporation's* funds—rather than the *controlling shareholder's* funds—may potentially reduce the probability or severity of criminal punishment against the controlling shareholder.

Fourth, in family-controlled chaebols, as time goes by, inheritance is inevitable. In Korea, however, the inheritance and gift tax rates, particularly for chaebol families, are substantially high, compared to other major economies. For example, the next-generation controlling shareholder who inherits from the previous-generation controlling shareholder should usually pay a 60% inheritance tax.[131] A chaebol family's base of taxable wealth, which includes shares, is calculated in a specific period with respect to inheritance and gifts.

To pay less inheritance tax, the chaebol family is incentivized to *reduce* share prices of corporations that they control, as higher share prices would result in a larger taxable wealth base. It is worth noting that the family often does not sell its shares for cash, as retaining a sufficient amount of shares for control is crucial to exercise authority over a corporation or a corporate group as a whole. Consequently, a corporation's lower share price does not directly harm the family's interests in the corporation or the corporate group. In this light, even if the controlling shareholder selectively adopts personally favored ESG-related corporate policies that result in a *reduced* share price for the company the controlling shareholder controls, it can ironically present a *financial advantage* to the chaebol family preparing for inheritance or gift tax, as they would ultimately pay *less* in taxes.

Fifth, the "business judgment rule" ("BJR")[132] has systematically protected the discretionary power or personal vision of controlling

[131] The inheritance tax rate that applies to most *chaebol* families is 60% (50% basic inheritance tax plus 10% premium in the case of a majority shareholder's inheritance). *See 한국 상속세 부담 OECD 최고 수준, 과세체계 합리화 시급* [*Korea's Inheritance Tax Burden, the Highest Level of the OECD, Urgent Need for Rationalization of Taxation System*], KOREA ECON. RSCH. INST. (June 17, 2022), https://www.keri.org/en/forum/press-release/2022-06-17-hangug-sangsogse-budam-oecd-coego-sujun-gwasecegye-habrihwa-sigeub [https://perma.cc/J7N5-TTK8] (S. Kor.). Due to the high inheritance tax rate in Korea, as time goes by, controlling family shareholders of privately-owned companies will likely face the weakened ownership, which will likely strengthen the role of the NPS and the government in the future in the capital market. *See* Kang, *supra* note 6, at 22, the author explains:

> Currently, however, it is impractical to imagine that the next generation of corporate groups' controlling family shareholders will evade the high inheritance tax and avoid legal enforcement. Accordingly, controlling family shareholders' shareholding will be significantly diluted over time after a series of the intra-family inheritance. In other words, other things being equal, as time goes by, the NPS's (or the government's) influence as a 'significant shareholder' will become more adamant.

[132] For the further explanation of the business judgment rule, see, for example, Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 87 (2004); Douglas M. Branson, *The Rule That Isn't a Rule - The Business Judgment Rule*, 36 VAL. U.L. REV. 631, 632–33 (2001); Samuel S. Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 97–100 (1979).

shareholders in Korea before the notion of ESG emerged.[133] With the popularization of ESG and the acceptance of ESG-related policies in the NPS's investee companies, both through government initiatives and regulations as well as stewardship and shareholder activism, the managerial discretion of controlling shareholders is further protected.[134] This applies whether the controlling shareholders directly exercise discretion or whether their managers indirectly exercise discretion on their behalf.

In sum, controlling shareholders are likely to be more insulated from liability because of what the author refers to as the "two layers of armor": (1) BJR and (2) ESG.[135] From the controlling shareholders' standpoint, the combination of BJR and ESG likely leads to *more* discretion and a *lower* chance of legal liability. Accordingly, the two layers of armor are likely to generate more severe agency problems. If combined with ESG, NPS-led stewardship (shareholder activism) can create and foment ESG-disguised agency problems under certain circumstances.

CONCLUSION

This Article analyzes the interplay between stewardship, shareholder activism, and ESG in the context of the NPS in Korea. The NPS is unique because it is a quasi-governmental agency and the largest institutional investor in the Korean capital market. Largely due to the enormous influence of the NPS on the domestic economy, stewardship and shareholder activism have emerged in Korea. ESG is a core agenda that the NPS focuses on with respect to the NPS's investment in its investee companies. In addition, ESG-related policies pushed by the NPS and the government can be carried out through and strengthened by stewardship and shareholder activism. Moreover, this Article examines three unwelcome, potential outcomes that the NPS's ESG-oriented policies may bring: (1) the government's "governing the markets;" (2) ESG as an excuse for the NPS's poor investment performance; and (3) ESG-disguised agency problems. Based on this research identifying these three unwelcome, potential outcomes that the NPS's ESG-oriented policies may generate, this Article aims to encourage future research by scholars and policymakers to wisely uncover the solutions to these problems and improve the social welfare system in Korea.

---

[133] Kang, Presentation at the SNU, *supra* note 17, at 36. *See also* Kang, *supra* note 6, at 16 (explaining the business judgment rule and breach of trust in Korea).

[134] *Id*. ("ESG is usually in favor of creditors, employees, suppliers, consumers, and the community in general." In this light, "ESG is functionally similar to 'other constituency statute'," awarding more "discretion to corporate insiders.").

[135] *Id.*; Kang, Presentation at the SNU, *supra* note 17, at 36.