

Chapter 2

What Is *Corporate Social Responsibility (CSR)*?

Understanding the concept of *corporate social responsibility (CSR)* would be the first step towards developing a deeper theoretical foundation of *CSR* and its more effective legislative implementation. To clarify why *CSR* matters so much, this chapter presents problems stemming from the influence of corporate power in society by examining recent corporate scandals in Korea and the United States. It then introduces dynamic conceptions of *CSR* and finally seeks to articulate the legal issues pertaining to *CSR* in corporate law by providing an overview of the first modern US debate centering on the topic.

2.1 Corporate Influence in Modern Society

2.1.1 *Samsung Corruption Scandal in Korea*

In 2007, the ex-head of Samsung's legal division accused Samsung Group chair Kun Hee Lee of overseeing a multimillion-dollar slush fund to regularly bribe Korean "politicians, government officials, tax collectors, prosecutors, judges, journalists and scholars."¹ Indeed, the resultant list of accusations hinted at a systematic effort by a powerful corporation to influence the government, judiciary, media, and ultimately, the entire nation. In the end, however, prosecutors dropped the charges for the lack of evidence.² In a separate case in 2009, the Korean Supreme Court acquitted Lee of the criminal charges of issuing illegal convertible bonds (CBs) of Everland below the market price and manipulating evidence and testimony.³ Ever-

¹ Sang-Hun Choe, *Corruption Scandal Snowballs at South Korea's Samsung Group*, N.Y.TIMES, November 6, 2007.

² Sang-Hun Choe, *Samsung Chairman Faces Tax Charges*, N.Y.TIMES, April 18, 2008.

³ Supreme Court [S.Ct.], 2007 Do 4949, May 29, 2009 (S. Kor.) [Hereinafter *Everland case*].

land was actually a holding firm of Samsung Group.⁴ The CBs deal, critics alleged, sought to illegally transfer group control from Lee to his son, and the court's ruling essentially legalized the move.⁵ Civic groups condemned the decision, expressing their "serious regret and anger over the Supreme Court's decision to forgive Samsung Group's criminal activities."⁶ Samsung, the nation's largest conglomerate, and the outsized influence it wields over Korean society have long been controversial topics in Korea. Fueling this public debate was the fact that all powers of the group were centralized in Lee, the President of the "Samsung Republic."⁷

With the *Everland* case in mind, this section examines corporate influence in Korean society through the consequences of the 2009 Samsung scandal. Ultimately, this will facilitate defining corporate nature and identifying the entities and interests to which corporations are actually beholden in Korea.

This section also explores the corporate structure of large-scale Korean corporations alongside its problematic aspects. It reviews the facts and background of the *Everland* case and the pertinent decisions of the lower courts and the Supreme Court. Based on the factual background and the Supreme Court's decision, this section then considers the implications of the Court's ruling, which can be interpreted as being symptomatic of the problems and challenges involving large corporations vis-à-vis the *Everland* case in particular, but also Korean corporate law in general.

2.1.1.1 Chaebol Ownership Structure and Related Problems

Most of the largest Korean corporations are controlled by chaebols—family-controlled business conglomerate groups.⁸ The chaebol has been the primary driver of the nation's economic growth over the past half-century, and remains the dominant large business form in Korea. In fact, "the top thirty chaebols currently account for roughly forty-five percent of total corporate assets, forty percent of total sales, and twenty percent of total employment in Korea."⁹ The Korean economy has devel-

⁴ *Id.*

⁵ *Id.*

⁶ Ser, *supra* note 6 in Chap. 1.

⁷ The Samsung group is sometimes called the "Samsung Republic" because of its dominance over the nation's economy and its internal power structure in Korea. See Song Baek Seok, "Samsung Republic Phenomenon" and the limits of the Capitalist State, 41-1 KOREAN POL. SCI. REV. 57 (2007) (in Korean).

⁸ See OK-Rial Song, *The Legacy of Controlling Minority Structure: A Kaleidoscope of Corporate Governance Reform in Korean Chaebol*, 34 LAW & POL'Y INT'L BUS. 183, 184 (2002). In general, chaebol refers to a family-controlled conglomerate; chaebols account for a substantial proportion of the national economy. JEONG-PYO CHOI, THE THEORY AND THE REALITY OF THE KOREAN CHAEBOL 6-7 (2004). "More critically, 'chaebol' refers to Korea's sprawling conglomerates in which [the] founding families exercise almost unchecked control despite small shareholdings." Tae-gyu Kim, *Judgment Day Approaching for Chaebol*, KOREA TIMES, April 27, 2009.

⁹ Christopher Hale, *Addressing the Incentive for Expropriation Within Business Groups: The Case of the Korean Chaebol*, 30 FORDHAM INT'L L. J. 1, 26 (2006).

oped within “a chaebol-driven or chaebol-centered system”; arguably, therefore, “the efficiency and soundness of the Korean economy as a whole depends primarily on the efficiency and soundness of the current chaebol system.”¹⁰

Among these chaebols, the Samsung Group is the largest. As of 2012, the Group accounted for more than 28 % of all South Korean exports.¹¹ The Samsung Group has undeniably contributed to the growth of Korean industry, maintaining numerous subsidiaries across a multitude of business sectors. Samsung affiliates range from Samsung Electronics, the world’s largest electronics company, and Samsung Heavy Industries, the world’s second-largest shipbuilder, to Samsung Life Insurance, the predominant financial company in Korea.¹² Among its dozens of affiliated companies, Samsung Electronics ranked as the world’s 13th-largest company with annual revenue in 2013 of USD 209 billion.¹³

In contrast to Samsung’s significant contributions to the Korean national economy, corruption scandals reveal the serious problems generally afflicting or spawned by the chaebols, such as “economic concentration, market dominance, authoritarian leadership, corruption, and threats to democracy.”¹⁴ Most of these problems are rooted in the typical corporate governance structure of chaebols, i.e., a family-dominated and circular ownership system, which is a typical feature of emerging economies.¹⁵ Incredible as it may seem, a handful of individuals and families do indeed control nearly all of the major Korean corporations via the form of the chaebol.¹⁶

How is it possible for giant publically held corporations to be dominated by a few families? Typically, chaebols wield control over their corporate empires while holding less than a 5 % stake in their respective groups.¹⁷ This is made possible by the circular ownership of affiliated companies under the control of the same group within a pyramidal system.¹⁸ Professor Ok-Rial Song has explained the complex

¹⁰ Song, *supra* note 8, at 184–85.

¹¹ See Chico Harlan, *In S. Korea, the Republic of Samsung*, THE WASHINGTON POST, December 9, 2012.

¹² See www.samsung.com/us/aboutsamsung/samsung_group/affiliated_companies/ (last visited November 18, 2014)

¹³ See www.forbes.com/powerful-brands/list/ (last visited November 18, 2014)

¹⁴ Jeong Seo, *Who Will Control Frankenstein? The Korean Chaebol’s Corporate Governance*, 14 CARDOZO J. INT’L & COMP. L. 21, 25 (2006) (“Indeed, the reckless management of the chaebols is regarded as a primary contributor to the financial crisis. When Korea requested a bailout from the International Monetary Fund and the World Bank, both institutions required that Korea improve its corporate governance structure in order to receive loans.”).

¹⁵ Kenneth Scott, *Institutions of Corporate Governance: Implications of Korea*, in AN AGENDA FOR ECONOMIC REFORM IN KOREA 187, 197 (Kenneth L. Judd & Young-Ki Lee eds., 2000).

¹⁶ Young-Ki Lee & Young-Jae Lim, *In Search of Korea’s New Corporate Governance System*, in AN AGENDA FOR ECONOMIC REFORM IN KOREA 155, 174 (Kenneth L. Judd & Young-Ki Lee eds., 2000).

¹⁷ Haksoo Ko, *Korea’s Newly Enacted Unified Bankruptcy Act: The Role of the New Act in Facilitating (Or Discouraging) the Transfer of Corporate Control*, 24 UCLA PAC. BASIN L.J. 201, 213 (2007).

¹⁸ *Id.*

workings of the circular-shareholding structure with the hypothetical example below:

...suppose that the [S chaebol] Group comprises companies A, B, and C, and the controlling family owns 10 percent of the shares of each company (in other words, 10 percent of the shares of the [S chaebol] Group). Furthermore, suppose that company A holds 30 percent of the shares of company B. In this case, company B may not cross-hold the shares of company A under the Korean antitrust law. Moreover, even if this law may, in fact, be hard to enforce, the voting rights attached to the cross-held shares may be removed by corporate law. Therefore, even if company B holds 30 percent of the shares of company A, such shares are of no use in terms of corporate control. In this case, however, the purpose of cross-shareholding can be achieved by company B's holding 30 percent of the shares of company C and company C's holding 30 percent of the shares of company A, instead of company B's holding 30 percent of the shares of company A directly. Technically, such arrangements do not violate corporate... or antitrust law, and no shares are deprived of their voting rights. As a result, the family owns 40 percent of voting rights over company A, B, and C.¹⁹

This circular ownership has allowed Korean chaebols to control affiliated corporations, despite owning only a small fraction of the total cash flow rights (10% in the hypothetical example above).²⁰ The headquarters of the chaebol group control each affiliated corporation (which is legally independent) as “a large single firm with multiple divisions spread across a variety of industries.”²¹

Indeed, this convoluted structure of chaebol ownership causes particular social problems in regard to the incentives of controlling shareholders in Korea. The dominant controlling person or family of a chaebol has “great incentive for value diversion at the expense of non-controlling shareholders.”²² In this sense, chaebol families (as well as the general Korean public) are used to viewing those chaebol groups and their affiliated corporations as “the personal property of a certain controlling family.”²³

Among the many problems caused by the unique ownership structure of chaebols, “tunneling” is one of the most serious troubles spawned by the abovementioned recognition of corporations as the property of a controlling family.²⁴ The term is used to describe the transfer of assets and profits out of companies for the benefit of the controllers.²⁵ Indeed, the controlling family of a chaebol controls the headquarters of its group, which in turn controls the boards of affiliated corporations, since “appointments of board members are almost entirely at the hands of

¹⁹ Song, *supra* note 8, at 201.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 185.

²⁴ East Asian corporations are notorious for tunneling. See Stijn Claessens et al., *Expropriation of Minority Shareholders: Evidence from East Asia*, in POL'Y RES. DISSEMINATION CTR., WORKING PAPER No. 2088 (1999); Mara Faccio et al., *Dividends and Expropriation*, 91 AM. ECON. REV. 54, 54–55 (2001).

²⁵ See Simon Johnson et al., *Tunneling*, 90 AM. ECON. REV. 22 (2000).

the families in control of the groups.”²⁶ Thus, a controlling family holds a virtually “imperial” or “dictatorial” prerogative to make arbitrary business decisions affecting all affiliated corporations.²⁷ Additionally, tunneling is more likely to occur in the chaebol system than in other business structures because chaebol families hold only a small proportion of shares and have less interest in maximizing the value of their affiliated corporations.²⁸

However, noncontrolling shareholders cannot effectively protect themselves due to the circular ownership structure of the chaebol.²⁹ Despite this all-encompassing control of the family over the entire business group, Korean corporate law contains no explicit provisions addressing chaebols’ responsibility for management abuses.³⁰ Thus, chaebol families have aggressively attempted to channel corporate wealth into their own pockets via self-dealing transactions. “As the chaebol continued to grow, the families felt comfortable accessing the burgeoning equity markets as long as their control over these firms was guaranteed—easily done, of course, through the use of pyramid structures and circular shareholdings.”³¹ In the face of the overwhelming power of the controlling family, the board of directors is severely limited in its ability to protect noncontrolling minority shareholders.³² The fallout from this phenomenon is further exacerbated in that chaebol tunneling has expropriated vast stores of the wealth of noncontrolling minority shareholders, who actually comprise the majority investors in chaebols.³³

2.1.1.2 Tunneling in the *Everland* Case

Tunneling has proven to be the most exploited tactic for transferring the control of chaebol groups to chaebol offspring. The *Everland* case represents perhaps the most significant jurisprudential consideration of this shadowy process of corporate inheritance. Because Samsung Everland Inc. (Everland), which operated a theme park, golf course, and clothing firm, was the de facto holding company for the Samsung Group, controlling it meant controlling the entire group.³⁴ To facilitate

²⁶ Song, *supra* note 8, at 208.

²⁷ Seo, *supra* note 14, at 57–58.

²⁸ See *id.* at 57.

²⁹ *Id.*

³⁰ Song, *supra* note 8, at 203.

³¹ Hale, *supra* note 9, at 35.

³² See Hwa-Jin Kim, *Living with the IMF: A New Approach to Corporate Governance and Regulation of Financial Institutions in Korea*, 17 BERKELEY J. INT’L L. 61, 67 (1999) (“In most cases, Korean corporate boards are nominal organizations under direct control of these controlling shareholders.”).

³³ See Hale, *supra* note 9, at 35–36.

³⁴ See Rahn Kim, *Chairman Faces Indictment Without Physical Detention*, KOREA TIMES, April 16, 2008; See also Keith Collins and Chandra Illick, *The Amusement Park That Controls Samsung*, BLOOMBERG BUSINESSWEEK, June 19, 2014.

this expropriation, Samsung chairman Lee did not list Everland on the Korea Stock Exchange.³⁵ Instead, Lee allegedly held sway over all 26 shareholders of Everland.

a. The Facts

On October 30, 1996, Everland directors Tae-hak Her and No-bin Park held a meeting of the board of directors to issue CBs. The CBs deal was allegedly aimed at allowing Jae-yong Lee, the Samsung chairman's son, to acquire control over Everland and the Samsung Group at a small cost. Everland had over USD 670 million in assets, but at that time, it was capitalized at a mere fraction of that amount—nearly USD 3 million.³⁶ As a result, obtaining controlling shares of the company was relatively easy.

At the time of the meeting, Her and Park were, respectively, the former and incumbent heads of Everland. Under the Korean Commercial Act,³⁷ as directors³⁸ of Everland, the two men were obliged to properly conduct procedures in board meetings. The Act also stipulates that board resolutions could only be adopted by a quorum of a majority of directors and a majority of votes.³⁹ Only 8 of 17 directors attended the October meeting, but Her and Park nevertheless allowed the adoption of a resolution⁴⁰ that issued Everland CBs to shareholders for a mere USD 7 per share. The real value per share at that time was over USD 223.⁴¹ If Everland shareholders did not subscribe to the bonds, any third party could acquire those bonds for USD 7 a share by an additional resolution of the board.

Although the CBs were incredibly cheaper than the market price, only 1 of 26 shareholders subscribed for the bonds.⁴² As a result, Her and Park declared that an additional board resolution would allow outside third persons to acquire the remain-

³⁵ But See “Samsung Group, is planning to list [Samsung Everland] by the first quarter of 2015, in a move widely Seen as key to a transfer of power within Samsung’s founding Lee family.” Min-Jeong Lee, *Samsung’s Holding Company to Go Public, Easing Succession Process: Samsung Everland’s IPO Is Seen as Key to Power Transfer Within Conglomerate’s Founding Lee Family*, THE WALL STREET JOURNAL, June 2, 2014.

³⁶ The figure refers to the amount of assets and capital based on the currency exchange rate on October 15, 2009. Samsung Everland controls the group through a web of ownership that includes a 19% controlling stake in Samsung Life Insurance. Samsung Life has a 7% stake in Samsung Electronics, which in turn owns 35% of Samsung Card, which has a 25% stake in Samsung Everland. See Sang-uk Kim, *Ten-years Debates: What is the Everland CBs Case*, EDAILY, May 29, 2009 (in Korean).

³⁷ Sangbeob [Commercial Act], Act. No. 1000, Jan. 20, 1962, *newly inserted by* Act No. 5591, December 28, 1998, art. 382–3 (S. Kor.) (“Directors shall perform their duties faithfully for the good of the company in accordance with Acts, subordinate statutes, and the articles of incorporation.”).

³⁸ *Id.* art. 389 (“A company shall appoint, by the resolution of the board of directors, a director who shall represent the company.”).

³⁹ *Id.* art. 391 (1) (“A resolution of the board of directors shall be adopted by the presence of a majority of directors in office and the affirmative votes of a majority of directors present at the meeting.”).

⁴⁰ Seoul High Court [Seoul High Ct.], 2005 No 2371, May 29, 2007 (S. Kor.).

⁴¹ *Id.*

⁴² *Id.*

ing CBs.⁴³ On December 3, 1996, without achieving the required quorum, Her and Park convened the board meeting to issue CBs to a third person, Samsung heir apparent Jae-yong Lee.⁴⁴ Subsequently, the board adopted a resolution to issue CBs to the younger Lee at the rate of USD 7 per share,⁴⁵ rendering him the controlling shareholder in Everland with 64 % of shares.⁴⁶

b. Decade-Long Procedural History

Surprisingly, perhaps, nobody publicly questioned the hereditary succession of control at the Samsung Group from Lee to his son until 43 law professors from leading law schools leveled public accusations against the chairman and the directors of Everland in 2000.⁴⁷ Despite those accusations, another 3 years would pass before indictments were issued.

In September 2003, just before the statute of limitations expired, prosecutors indicted Her and Park for breach of trust by violating their duty as directors.⁴⁸ In 2005, the Seoul Central District Court found them guilty of approving the 1996 sale of Everland CBs to Jay-yong Lee at a huge discount based on invalid board decisions.⁴⁹ It handed down prison sentences of 3 years for Her and 2 years for Park, who both appealed the decision.⁵⁰

In 2007, the Seoul High Court upheld the lower court's decision to nullify the Everland board resolution to sell CBs below market price, as the resolution had been approved without the participation of a majority of board members.⁵¹ The appellate court found that Everland had sold nearly a hundred million dollars worth of CBs to Jay-yong, which gave him the right to buy the corporation's common stock for USD 7 per share.⁵² The court held that Everland suffered damages to the extent of the difference between the market value of shares and the cost of the bonds issued due to the directors' violation of their duty.⁵³ It added that the resolution of the board was invalid and that the board's action was a clear breach of trust.⁵⁴ The illicit deal was estimated by the court to have cost Everland roughly USD 89 million in losses.⁵⁵ Everland did not need an additional fund, and there was evidence of con-

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *Criticism on the control succession of Samsung Group*, NEWSIS, August 27, 2009 (in Korean).

⁴⁸ See *id.*; see also Seoul Central District Court [Dist. Ct.], 2003 Gohab 1300, October 4, 2005 (S. Kor.).

⁴⁹ Seoul Central District Court [Dist. Ct.], 2003 Gohab 1300, October 4, 2005 (S. Kor.).

⁵⁰ *Id.*

⁵¹ Seoul High Court [Seoul High Ct.], 2005 No 2371, May 29, 2007 (S. Kor.).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

spiracy between directors and Lee to allow him to acquire the controlling shares.⁵⁶ The court found that the men had pressured the shareholders not to subscribe for the CBs.⁵⁷ At the time, it appeared that securities dealing could no longer be used as a tactic for backroom transfers of control within the chaebols. Subsequently, Her and Park again appealed the decision.

Five months after the appellate court judgment, the press convened for a surprise news conference. Whistleblower Yong-chul Kim, the former top officer of Samsung's legal department, alleged that group leader Lee had employed a slush fund and that Kim had bribed prosecutors on Lee's instructions.⁵⁸ According to Kim's disclosure, government officials kept silent on the murky Everland deal in exchange for bribes.⁵⁹ These new allegations led to an investigation of Samsung by a special prosecutor.⁶⁰ On April 17, 2008, Lee was charged of evading capital gains taxes stemming from the proceeds of covert stock trading using "borrowed-name" bank accounts and from the issuance of the Everland CBs.⁶¹ Five days after the indictment, Lee issued a public apology and resigned from his post in the Samsung Group.⁶² Meanwhile, the special prosecutor found a list of 1200 false-name accounts related to the Samsung scandal,⁶³ and sought a 7-year prison term and a USD 350 million fine for Lee on charges of tax evasion and breach of trust.⁶⁴ The prosecution, however, concluded that there was insufficient evidence to pursue a charge of bribery.⁶⁵ Even though the appellate court decided that the board resolution for the CBs deal was invalid and sentenced Her and Park to prison for breach of trust, the ruling did not directly affect Lee. It was the special prosecutor who went after the group chair and brought him to court for the CBs deal. It seemed to herald a major step toward stricter regulation of the chaebol in Korea.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Tong-hyung Kim, *Samsung Heaves a Sigh of Relief*, KOREA TIMES, August 14, 2009.

⁵⁹ *Id.*

⁶⁰ In 1999, the Korean Parliament was determined to introduce a Special Prosecutor Act aimed at identifying governmental abuses of power and restoring public confidence. The special prosecutor can independently investigate allegations of any misconduct. Seven special prosecutor Acts have been enacted and eight special prosecutors appointed under such Acts since 1999. The most recently enacted Act (2007) concerned an investigation of President-elect Lee Myung-bak over his alleged involvement in a financial fraud case. See Wansik Hong, *A Study on Special Prosecutor Acts in Korea*, 4 J. LEGIS. STUD. 33 (2007) (in Korean).

⁶¹ See Choe Sang-Hun, *Samsung Group Chairman Indicted on Tax-Evasion Charge*, N.Y. TIMES, April 17, 2008.

⁶² See Jason Lim, *Samsung's Leadership on Edge*, KOREA TIMES, April 28, 2008.

⁶³ Around 10 financial companies, many of which were securities companies, were involved in these accounts. See Ja-young Yoon, *FSS to Inspect Samsung's False Name Accounts*, KOREA TIMES, April 30, 2008.

⁶⁴ See Si-soo Park, *Prosecution Seeks 7-Year Jail Term for Lee Kun-hee*, KOREA TIMES, July 10, 2008.

⁶⁵ See Si-soo Park, *Ex-Samsung Chief Gets Suspended Jail Term*, KOREA TIMES, July 16, 2008.

Chaebol corruption scandals represent serious social problems in Korea, yet the courts have only exacerbated matters with their consistent hesitation to punish corporate crime. Following Lee's indictment, several prominent figures, including former US president George H. W. Bush and ex-International Olympic Committee president Juan Antonio Samaranch, sent petitions to the Seoul Central District Court calling for leniency for Lee.⁶⁶ "According to the court, [Bush] said Lee had dedicated himself to developing the global economy and has become a role model to many business leaders around the world."⁶⁷ In July 2008, the Seoul Central District Court cleared Lee of the charges related to the CBs deal that would have transferred control of the nation's top conglomerate from father to son.⁶⁸ The court sentenced Lee to 3 years in prison for tax evasion, suspended for 5 years, thus allowing him to remain a free man as long as he avoided further legal missteps.⁶⁹

On October 10, 2008, the Seoul High Court upheld the decision of the lower court and reaffirmed the guilty verdict, the suspended prison sentence, and the finding that Lee was not guilty for the issuing of the Everland CBs.⁷⁰ The special prosecutor appealed the decision.

c. The Supreme Court's Decision

In May 2009, the Supreme Court rendered two separate decisions for the cases against Everland's former directors Her and Park and against Lee. In particular, the Supreme Court committee sent the case of Her and Park to an En Banc rehearing.⁷¹ The Supreme Court En Banc decided that Her and Park had not violated their duty, even though Everland suffered damages due to the issuing of the CBs.⁷² The court reversed the judgment of the appellate court and remanded the case. The rationales of the En Banc decision were as follows:

⁶⁶ Park, *Prosecution Seeks 7-Year Jail Term for Lee Kun-hee*, *supra* note 64.

⁶⁷ *Id.* ("Samaranch and other key decision makers in international sports also called for moderate punishment, citing Lee's contribution to promoting the international sports community.").

⁶⁸ Seoul Central District Court [Dist. Ct.], 2008 GoHab 366, July 16, 2008 (S. Kor.).

⁶⁹ *Id.*; *Court Upholds Guilty Verdict for Ex-Samsung Chief*, INT'L HERALD TRIB., October 10, 2008.

⁷⁰ Seoul High Court [Seoul High Ct.], 2008 No 1841, October 10, 2008 (S. Kor.).

⁷¹ The Supreme Court used the terms "En Banc," "Full Bench," and "Grand Bench" interchangeably in the English translation. "The jurisdiction of the Supreme Court is exercised at the Grand Bench or the Petty Bench. The grand bench is convened with more than two-thirds of all the Justices with the Chief Justice presiding. A Petty bench is convened with four Justices. Currently, there are three petty benches. All judgments rendered by the petty bench must be made unanimously. As for the cases deliberated by the grand bench, the decisions are made on a majority basis. If the members of the Grand Bench are unable to reach a majority opinion, then the Supreme Court cannot reverse the judgment of the lower court." http://eng.scourt.go.kr/eng/judiciary/court_sc.jsp (last visited November 19, 2014) "The judgment authority of the Supreme Court shall be exercised by the collegiate panel composed of not less than two-thirds of all the Justices of the Supreme Court with the Chief Justice of the Supreme Court presiding." Beobwonjojikbeob [Court Organization Act], Act. No. 3992, December 4, 1987, *amended by* Act. No. 4765, July 27, 1994, art. 7 (S. Kor.).

⁷² Supreme Court [S.Ct.], 2007 Do 4949, May 29, 2009 (S. Kor.).

First, in general, the issuance of shares, including bonds for raising corporate funds, is under the protection of the “business judgment rule.”⁷³ Second, a transfer of controlling shares to an outside third party does not undermine the profit of shareholders when they agree to the transfer.⁷⁴ In this case, 25 shareholders agreed to the transfer of control to Jae-yong Lee.⁷⁵ The difference between the market value per share and the price of the bond issued was the damage that shareholders had already agreed to.⁷⁶ Third, a corporation is a mere object of control, which control is exerted by those who own shares of the corporation.⁷⁷ Therefore, a transfer of control over itself does not damage a corporation.⁷⁸ Fourth, a director of a corporation is an agent who is engaged in business on behalf of a corporation, but not on behalf of shareholders directly.⁷⁹

At the same time, the Supreme Court affirmed the appellate court’s decision that Lee was not guilty of breach of trust in the Everland CBs deal.⁸⁰ The court’s decision concerning Lee was influenced by the En Banc decision on Her and Park. In the end, on August 27, 2009, the decade-long cases in the Everland CBs deal were concluded by the ruling of the Seoul High Court.⁸¹ The court cleared Her and Park of the charges, based on the Supreme Court En Banc decision.⁸²

2.1.1.3 Judicial Leniency Toward Chaebol Tycoons

The *Everland* case reveals how the ownership structure of chaebols generates serious social problems by allowing the controlling person or family to manipulate the structure of the chaebol group to the disadvantage of outside noncontrolling minority shareholders—the actual majority investors. Andrei Shleifer and Robert W. Vishny, in their comprehensive and influential surveys of corporate governance, have characterized the Korean chaebol structure as the least investor-protective system in the world by pointing out that it significantly dilutes the wealth of a large number of minority shareholders.⁸³ Korean legislative means, however, have been

⁷³ Korean courts generally apply the “business judgment rule” of US corporate law in the Korean corporate law system. See *infra* Sect. 6.1.2; for information on the rule of US corporate law, See *infra* Sect. 4.1.2.

⁷⁴ Supreme Court [S.Ct.], 2007 Do 4949, May 29, 2009 (S. Kor.)

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* (citing Supreme Court En Banc Decision Supreme Court [S.Ct.], 2003 Do 7645, June 17, 2004 (S. Kor.)).

⁸⁰ Supreme Court [S.Ct.], 2007 Do 4949, May 29, 2009 (S. Kor.)

⁸¹ Seoul High Court [Seoul High Ct.], 2009 No 1421, August 27, 2009 (S. Kor.).

⁸² *Id.*

⁸³ See Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 742 (1997).

“ineffective in aligning the interests of dominant shareholders with those of outside shareholders.”⁸⁴ In particular, they are “not sufficient to effectively respond to the controlling shareholder’s tunneling in the chaebol.”⁸⁵ Indeed, the Supreme Court decision in *Everland* actually exacerbated this problem by sanctioning an act of chaebol tunneling that entailed a vast dilution of public shareholder wealth.

The Supreme Court decided that the transfer of control through the CBs deal did not damage Everland, and that there was no breach of trust by way of a violation of fiduciary duties by the directors.⁸⁶ Then who shoulders the USD 89 million loss from the *Everland* scandal? The rationale of the court was based on the assumption that a corporation is a mere asset of its shareholders. This recognition subscribes to the supposed norm concerning the traditional relationship between shareholders and managers in the United States.⁸⁷ However, this traditional view is arguably not a norm, even in American corporate law.⁸⁸

It is possible that the court’s equating of a corporation’s nature with that of a mere asset of shareholders might be based on some consideration to protect particular corporations or managers. “Korean judges have repeatedly shown leniency in high-profile corporate cases, refusing to send tycoons to prison for fears of the effect it would have on the country’s economy.”⁸⁹ The presiding judge of the appellate court in the case against Lee said that “while it would be impossible to legally punish the company, such acts are prone to public criticism, which is why this court calls on Lee to devote himself to the nation.”⁹⁰ Can the public truly be expected to support corporations when the nation’s economic situation is faltering, even if, for the sake of argument, corporations are mere assets of shareholders?

Such jurisprudential thinking might pave the way for other tycoons to illegally bequeath their wealth to their children.⁹¹ Everland could not claim for any damages in the CBs deal because the court decided that any loss from a Board decision consented to by shareholders is not a loss protected under corporate law. All Korean laws related to this claim require a loss to the corporation because the director is an agent for the corporation.⁹² Therefore, the Supreme Court effectively rendered it impossible to seek corporate liability for losses due to managerial decisions such as the CBs deal. Professor Nohyun Gwack admonished the court ruling, saying it had “killed Korean corporate law.”⁹³ Samsung now had the proverbial green light for

⁸⁴ Seo, *supra* note 14, at 59.

⁸⁵ *Id.* at 77.

⁸⁶ Supreme Court [S.Ct.], 2007 Do 4949, May 29, 2009 (S. Kor.)

⁸⁷ *See infra* Sect. 5.1.2.

⁸⁸ *See infra* Chap. 3.

⁸⁹ *Court Upholds Guilty Verdict for Ex-Samsung Chief*, *supra* note 69.

⁹⁰ Nohyun Gwack, *The Worst Decision in Korean History*, PRESSIAN, October 13, 2008.

⁹¹ *Appeals Court Spares Jail Term for Samsung Group Ex-Chairman Lee Kun-Hee*, SEOUL TIMES, <http://theseoultimes.com/ST/?url=/ST/db/read.php?idx=7392> (last visited November 18, 2014).

⁹² *See* Sangbeob [Commercial Act], Act. No. 1000, Jan. 20, 1962, *newly inserted by* Act. No. 5591, December 28, 1998, art. 401 (S. Kor.).

⁹³ Gwack, *supra* note 90.

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