

# B.2 The Condition of Law: Essays

## **The Private Law of Public Law: Brief Observations on Recent Decisions from the Norwegian Pension Fund Global**

**Coalition for Peace & Ethics**

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It is always comforting when institutions act true to form. It is even more comforting when that form remains both coherent and consistent over the years. One can be grateful to the Norwegian Pension Fund Global and its institutionalized leadership structure for that. But more likely one can thank the solidarity among its elites with respect to general principles and outlooks that reflect an elite Euro-Norwegian sensibility that these peoples seek to project onto the world. And that, of course, is both their right, and their duty as they see it, as heirs to an earlier expression of these elite values and sensibilities that produced the world that collapsed between 1914 and 1945.

To that end the apparatus of the Norwegian Pension Fund Global institutions continue to serve as a remarkable, and for its structure and resources, quite successful instrument of the project of Euro-Norwegian internationalism about which I have written before.<sup>2</sup> It does so by quite

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<sup>2</sup> See Larry Catá Backer, 'Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets,' (2013) 29(1) American University International Law Review 1-122; Larry Catá

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strategic and targeted interventions at the center of the global elite's engagement with the challenges that threaten its (discursive and normative) hegemony. This short essay considers the governmentalization of the financial sector—the deployment of a private law of public law, through the institutions, norms, and interventions of the Norges Bank and its Council on Ethics in the management of Norway's sovereign wealth fund, its Pension Fund Global. The essay starts with a consideration of the mechanisms of private oversight by public bodies—the administration of economic enterprises through share ownership and access to capital. It then considers the deployment of private law as public politics. Lastly, it considers the way that the Pension Fund Global seeks to manage cultural practices abroad through an application of environmental protection principles.

***A. The Mechanics of private Oversight.***

On 3 March 2021 the Council on Ethics of the Norwegian Pension Fund Global<sup>3</sup> released news of three actions taken over the last several months. In two cases the Ethics Council recommended the offending company be placed under observation.<sup>4</sup> The Norges Bank agreed with one recommendation but not the other.

With respect to the *European* company Thyssenkrupp AG, Norges Bank concluded that a plan of active shareholding would be sufficient. And observation unnecessary.<sup>5</sup> With respect to the *Asian* company Kirin

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Backer, 'Sovereign Wealth Funds, Capacity Building, Development, and Governance,' (2017) 52(4) Wake Forest Law Review 735-780.

<sup>3</sup> "The Council on Ethics was established by Royal Decree 19 November 2004. The Council on Ethics provides an evaluation of whether investments in specified companies are inconsistent with the ethical guidelines." Government of Norway, The Government Pension Fund, Responsible Investing, The Council on Ethics (last updated 26 June 2013); accessible <<https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/responsible-management/the-council-on-ethics-for-the-government/id447010/>>

<sup>4</sup> For background on the work and organization of the Norwegian Pension Fund Global, see, Larry Catá Backer, 'Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets,' (2013) 29(1) American University International Law Review 1-122.

<sup>5</sup> As summarized on the Pension Fund Global's website:

"On 14 December 2020, the Council on Ethics recommended that Thyssenkrupp AG be placed under observation due to an unacceptable risk that the company is contributing to or is itself responsible for gross corruption. . . Today, Norges Bank announced its decision to ask NBIM to follow up on the risk of corruption in its ownership dialogue with the company. Thyssenkrupp is therefore not included on the Fund's observation list."

Government of Norway, Ethics Council, Pension Fund Global, ThyssenKrupp AG (3 March 2021) <<https://etikkradet.no/thyssenkrupp-ag-2/>>. The Ethics Council's recommendation may be accessed at <

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Holdings Co Ltd, the Norges Bank accepted the observation recommendation.<sup>6</sup> The third determination revoked a prior exclusion determination imposed against a *European* company, Atal, S.A., because the offending state had eventually conformed to later in time EU law repatriating North Korean workers in Poland.<sup>7</sup>

These decisions are interesting for several reasons.

1. With respect to corruption, the divergence between administrative-regulatory measures and markets-control measures appears to be growing. The Ethics Council, like any other state or public apparatus is to some extent a prisoner of the logic of the institutions within which it is embedded. In this case that is the apparatus of the state, of public law, of legalized regulatory management, with its discursive forms of accusation-judgment-enforcement-punishment (or reward). It is, as one has noted, a slow lugubrious process that more often than not tends to lag significantly behind any real effect at the time it is needed most.

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<https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/275/files/2021/03/Rec-Thyssnkrupp-AG-observation-ENG.pdf>

<sup>6</sup> As summarized on the Pension Fund Global's website:

In June 2020, the Council on Ethics recommended that Kirin Holdings Co Ltd be placed under observation pursuant to the provision in the Guidelines for Observation and Exclusion from the Government Pension Fund Global relating to serious violations of the rights of individuals in situations of war or conflict. . . Norges Bank published its decision to place the company under observation 3 March 2021.

Government of Norway, Ethics Council, Pension Fund Global, Kirin Holdings Co Ltd (3 March 2021) <<https://etikkradet.no/kirin-holdings-co-ltd-2/>>. The Ethics Council's recommendation may be accessed at <<https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/275/files/2021/03/Rec-Kirin-Observation-ENG.pdf>>

<sup>7</sup> As summarized on the Pension Fund Global's website:

On 25 November 2020, The Council on Ethics recommends that the exclusion of Atal SA/Poland (Atal) from investment by the Government Pension Fund Global (GPF) be revoked.

On 25 August 2017, the Council on Ethics recommended that Atal be excluded from the GPF due to an unacceptable risk that the company contributed to serious human rights violations, including forced labour, through employing a subcontractor which used North Korean workers at Atal's construction sites. In 2018, the EU transposed into EU law a UN Security Council resolution demanding that all workers from North Korea be repatriated. In December 2019, Poland reported to the Security Council that there were no North Korean workers in Poland. The Council on Ethics thus finds that there are no longer grounds for maintaining the 2017 recommendation.

Government of Norway, Ethics Council, Pension Fund Global, Atal SA (3 March 2021) <<https://etikkradet.no/atal-sa-4/>>. The Ethics Council's recommendation may be accessed here <<https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/275/files/2021/03/Rec-Atal-Revoke-ENG.pdf>>.

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Norges Bank and to some extent NBIM are creatures of markets and commercial ordering--more in any case than purely public institutions. At the same time they tend to be risk avoiders (the logic of the cultures of banks) and administratively aligned--the essence of bureaucracy in large organizations. Active shareholding tends to be a more dynamic and flexible process better aligned to the cultures of those organs. But it lacks the one thing that is the brightest spot of the administrative-regulatory approach--a consensus based system of accountability (even if in practice it is not as effective or timely or consistent as it should be). Corruption, as a creature of markets, might, at least at its edges, be best managed through those mechanisms that produce market consequences.

2. With respect to the convergence of public policy and economic activity, on the other hand, it appears that a more active projection of regulatory authority is still in order. That is certainly the case with easy examples--especially developing states that have caught the attention of the media-elite complex of influence drivers in the developed liberal democratic west. Myanmar's one such example, but one that poses an interesting case of conflicting desire for liberal democratic state actors. On the one hand, the democratically elected government has for years been criticized for what might be characterized as ethnic based displacement policies against a religious minority group.

On the other hand, the idea of anti-democratic action by the military of a developed state appears to offend liberal democracies more than the actions of a democratically elected governmental apparatus. And what better way to deal with this than to choose a Japanese company as the exemplar of how liberal democratic public policy may be projected indirectly through the creation of disincentives deployed against economic actors with the power to disrupt Myanmar's economic policy. Even the announcement was enough to produce the desired result: "Kirin has already announced it intends to end its business cooperation in Myanmar, and the wealth fund said it will follow up on that with the company."<sup>8</sup>

3. With respect to European housekeeping, the traditional rules apply. Here Europe had to deal with its North Korean exporting workers issue. Here public sector coordination was essential, and it was useful for the Ethics Council to signal some sort of policy alignment, especially one that also made it more likely to advance a convergence of European and US interests. More to the point, it produced a secondary value--the advancement of efforts (at the margin, and here the margin is the control

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<sup>8</sup> See, Stephen Treloar, 'Norway's Wealth Fund Puts Kirin on Watch for Myanmar Ties,' Bloomberg (4 March 2021) accessed <[https://www.bloomberg.com/news/articles/2021-03-04/norway-s-1-3-trillion-fund-puts-kirin-on-watch-for-myanmar-ties?utm\\_source=google&utm\\_medium=bd&cmpId=google#xj4y7vzkg](https://www.bloomberg.com/news/articles/2021-03-04/norway-s-1-3-trillion-fund-puts-kirin-on-watch-for-myanmar-ties?utm_source=google&utm_medium=bd&cmpId=google#xj4y7vzkg)>.

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of cheap labor from distasteful foreign state organs) of reducing the stress on labor markets through better curation of labor migration into Europe. The consequence was to use private enterprises as proxies for pressure on European (and European national ) institutions. Once successful, there was no longer a need to pressure states through pressure on their enterprises.

***B. Private Law as Public Politics.***

In the wake of another round in the generations long and periodic eruption of armed conflict between the Hamas organization and the State of Israel, and in the shadow of military intervention in the governance of Myanmar Norges Bank announced its decision to exclude three companies from the Fund following these recommendations by the Council on Ethics:

*1. The Council on Ethics' recommendation that Mivne Real Estate KD Ltd be excluded from investment by the Government Pension Fund Global due to an unacceptable risk that the company is contributing to serious violations of the rights of individuals in situations of war or conflict.* The Council on Ethics' recommendation rests on the fact that the company engages in letting of industrial real estate linked to Israeli settlements in the West Bank.

This case is not about a company's construction activities, but its letting of already existing buildings. In the Council's assessment, there is no reason in this case to differentiate between the two forms of operation. The company's letting of buildings constructed in violation of international law contributes to the continuation of an illegal state that their construction once initiated. This form of contribution to international law violations constitutes, in the Council's view, grounds for exclusion of companies from the GPFG.<sup>9</sup>

The legal basis of the decision is grounded in the application of the "unacceptable risk" standard. In this case its application rested on the Council's already well established jurisprudence that any facilitation of Israeli settlement in disputed territories triggered the application of the standard. At its core is a determination to implement "the broad consensus that the Israeli settlements in the West Bank violate international law."<sup>10</sup> It follows that any involvement might be deemed to be complicity—if not in law in its strict sense, then in the 'law' of the social sphere; and certainly its politics.

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<sup>9</sup> Ethics Council Recommendation to exclude Mivne Real Estate KD Ltd from the Government Pension Fund Global (17 December 2020) available <<https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/275/files/2021/05/Mivne-Real-Estate-KD-rec-ENG.pdf>>; pp- 5-6.

<sup>10</sup> Ibid., p. 5.

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2. *The Council on Ethics' recommendation Shapir Engineering and Industry Ltd be excluded from investment by the Government Pension Fund Global due to an unacceptable risk that the company is contributing to serious violations of the rights of individuals in situations of war or conflict.* The Council on Ethics' position is that the Israeli settlements in the West Bank have been built in violation of international law and that their existence and constant expansion causes significant harm and disadvantage to the area's Palestinian population.

The Council considers that a company that engages in the physical construction of settlements in the West Bank is closely associated with the violation of international law and contributes directly to it, and that this constitutes grounds for recommending that the company be excluded from investment by the GPF.<sup>11</sup>

The most interesting part of the recommendation was neither its jurisprudence nor its application of settled private rules. Rather it was the role of information. As the Ethics Council noted, though the company did not cooperate very much, "<sup>12</sup> Where public law is applied through private markets, the nature of communications acquires a public and private-juridical quality. It made perfect sense for Shapir to announce its achievements. But that also made it easier for others to harvest that information for other purposes. Here private modalities of public policy are operationalized through data gathering. And data gathering is made easier because of the nature of the weaving of public and private systems.

3. *The Council on Ethics' recommendation that Honeys Holdings Co Ltd be excluded from investment by the Government Pension Fund Global due to an unacceptable risk that the company is responsible for systematic human rights abuses.* The Council on Ethics here applied a version of its political risk principles to the situation in Myanmar. Here the application is analyzed through the lens of popular political consensus on the legitimacy of the political situation in Myanmar. The investigation involved a Japanese company doing business in Myanmar (Burma).

The company owns two garment factories in Myanmar. Investigations into working conditions at these factories identified numerous labour rights violations, including harassment of workers and serious violations of fire safety and health and safety regulations."<sup>13</sup>

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<sup>11</sup> Ethics Council Recommendation to exclude Shapir Engineering and Industry Ltd from the Government Pension Fund Global (2 November 2020); available <<https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/275/files/2021/05/Shapir-rec-ENG.pdf>>; p. 4.

<sup>12</sup> Ibid., p. 5.

<sup>13</sup> Ethics Council, Announcement Press Release Honeys Holding Co (19 May 2021); available <<https://etikkradet.no/honeys-holding-co/>>.

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The company denied the allegations but was unable to prove substantial rectification after inspection. The determination then, turned not so much on the violation as on the absence of any robust internal system of rules and control to ensure compliance. Systemicity, then, requires a system. And the violations, even though they might be cured, because they are capable of repetition, do not have substantial effect on the decision. In effect, what the Ethics Council underscores is the application of an important trend in the operation of economic collectives—the legal consequences of failures to governmentalize private operation through systems of rules administered internally.<sup>14</sup> The risk is in the absence of a system, and an administrative architecture to apply it. Where the state is weaker, the less legitimate in the eyes of outsiders, that principle becomes stronger.<sup>15</sup>

None of the cases add much to the existing jurisprudence of the regulatory scheme of the Pension Fund Global. It is the timing of the announcement that suggests its politics, and the effort by the Norwegian state apparatus to have some sort of projectable authoritative voice in the global discussion around issues of Myanmar's disordered state (and the openings for human rights abuses that might make easier),<sup>16</sup> and of course, the disciplining of the Jewish presence outside of the confines of that political territorial space conceded to it by the realities of power and ambiguous UN pronouncements, at least as long as they can hold it. None of this will change things in and of themselves.

Nonetheless, the act of solidarity with Euro-Norwegian elites is an important function--and an affirmation of fidelity to its perspectives and prejudices (in the sense of normatively supported prejudgment) is a key element of its continuing influence within the spheres in which it operates.<sup>17</sup> The last point is likely the most important element that comes

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<sup>14</sup> Ibid. ("In the Council's opinion, this shows a pattern of behaviour indicating that the norm violations are systematic, and that the company, in practice, does not have a system capable of preventing, uncovering and rectifying labour rights abuses in its operations.").

<sup>15</sup> See KLP, Decision to Exclude Honeys Holdings Co. Ltd. (June 2021); available <<https://www.klp.no/en/corporate-responsibility-and-responsible-investments/exclusion-and-dialogue/Decision%20to%20exclude%20Honeys%20Holdings%20Co%20Ltd.pdf>>

<sup>16</sup> Norwegian elites might have been more sensitive since it was chided for its connections to the Myanmar military. See, Mathias Julius Falkengaard, 'Norwegian Oil Fund Tied to Military Regime in Myanmar,' Energy Watch (6 April 2021); available <[https://energywatch.com/EnergyNews/Oil\\_Gas/article12881265.ece](https://energywatch.com/EnergyNews/Oil_Gas/article12881265.ece)>.

<sup>17</sup> Gwladys Fouche, 'Nordic fund KLP divests from Adani Ports over links to Myanmar military,' Reuters (22 June 2021); available <<https://www.reuters.com/business/nordic-fund-klp-divests-adani-ports-over-links-myanmar-military-2021-06-22/>> ("A military coup in Myanmar on Feb. 1 and an ensuing crackdown on mass protests in which hundreds have been

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out of these decisions. It is one that is easily transposable to the conduct of other non-state actors seeking an influential role within the OECD sphere of influence. And it marks one aspect of the European project of normative empire building in the shadow of the construction of the Chinese and American post global imperium. Its power and lasting effect, however, remains unknown.

***C. The Environmental Expectations of Tradition in the Era of Sustainability: The Norway Pension Fund Global and Chinese Traditional Medicine.***

How does one leverage normative power--that is a power to effectively influence the norms, behaviors and expectations of markets actors, including producers, consumers, regulators, and financiers--where one is vested with a substantial amount of money but an administrative apparatus that is minuscule at best. That has been the existential problem of the construction of the disciplinary organs of the Norwegian Pension Fund Global.

The answer that the administrative apparatus of the Norwegian Pension Fund Global--and its administrative apparatus--is to engage in the business of judging in ways that provide compact and highly concentrated direction in specific areas of engagement. What that apparatus cannot do--precisely because of the limits of its capacity (and perhaps both its funding and its location within the Norwegian state organs system) is to serve as an all-around quasi-judicial and quasi-accountability organs respecting the entirety of the investment universe, or the potential investment universe, with which the Pension Fund Global engages. The framework of the ethics principles provides the structure that makes this easier. The direction of Norwegian sensibilities around the hierarchy of rights and the importance of selected conduct provides another.

This, certainly, is one way to understand the periodic stories that are released (in the form of Ethics Council Recommendations and the moral to be drawn from them (in the form of the actions accepted by Norges Bank). And the baseline for the development of these stories is both the Ethics Guidelines, and the Norwegian view of the principles embedded in international human rights as received by and valued through a Norwegian (and in a more general sense a European) lens. Thus the concentrated bursts of stories about the evils of munitions, of nuclear energy, of corruption, of human trafficking and labor undertaken

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killed has drawn international condemnation and sanctions on military figures and military-controlled entities. "Adani's operations in Myanmar and its business partnership with that country's armed forces constitutes an unacceptable risk of contributing to the violation of KLP's guidelines for responsible investment," KLP said in a statement to Reuters." Ibid.). See discussion Part A above, and Government of Norway, Ethics Council, Pension Fund Global, Kirin Holdings Co Ltd (3 March 2022), *supra*.

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with the indicia of slavery or coerced servitude. Thus the selective interventions in interstate relations with human rights elements from occupation (with a focus on the Jewish-Muslim wars around the Jordan Valley), to coerced population movements in southeast Asia (with a focus on Myanmar), and the like.

Now, the Norwegian human rights apparatus challenges the practices of traditional medicine when it bumps against the realities of environmental irreparable harm. The Norwegians were careful. They did not go after indigenous practices with environmentally destructive effects (that remains too sensitive and touches on issues of balancing indigenous versus environmental and bio-diversity rights in ways that may be too challenging for them). But China is an easy target. China is a first world state. It is powerful. It is modern. It increasingly seeks an important place at the internationalist human rights table. It is only natural that having entered this space it might be judged not on its own terms but on the terms of the rest of the people in the room.

One case falls neatly within the jurisprudence of the Pension Fund Global. Norges Bank announced its decision to revoke the exclusion of Hanwha Corp from the Fund. This was based on a recommendation by the Council on Ethics.<sup>18</sup> The case involved exclusion based on a connection between the company and the manufacture of cluster bombs. The revocation of exclusion was based on divestment. It reapplied the principle that with respect to certain activities, the only possible approach to conformity with the Pension Fund's rules requires divestment—in this case by sale to a company with no formal relationship to Hanwha.

Much more interesting was a cluster of decisions announced by Norges Bank to exclude the following companies due to an unacceptable risk of contributing to severe environmental damage: (1) China Traditional Chinese Medicine Holdings Co Ltd;<sup>19</sup> (2) Beijing Tong Ren Tang Chinese Medicine Co Ltd;<sup>20</sup> (3) Tong Ren Tang Technologies Co

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<sup>18</sup> Ethics Council, Pension Fund Global, Recommendation to revoke the exclusion of Hanwha Corp from the Government Pension Fund Global (27 May 2021); available < <https://files.nettsteder.regjeringen.no/wpuploads01/sites/275/2021/09/Rec-Hanwha-revoke-ENG-14050.pdf>>.

<sup>19</sup> Ethics Council, Pension Fund Global, China Traditional Medicine Holdings Co Ltd (29 September 2021); available < <https://etikkradet.no/china-traditional-medicine-holdings-co-ltd-2/>>.

<sup>20</sup> Ethics Council, Pension Fund Global, Tong Ren Tang Technologies Co Ltd and Beijing Tong Ren Tang Chinese Medicine Co Ltd and Traditional Medicine Holdings Co Ltd (29 September 2021); available < <https://etikkradet.no/tong-ren-tang-technologies-co-ltd-og-beijing-tong-ren-tang-chinese-medicine-co-ltd-2/>>.

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Ltd;<sup>21</sup> (3) China Grand Pharmaceutical and Healthcare Holdings Ltd.<sup>22</sup> As was stated in the Press Release announcing these actions:

[These are pharmaceutical companies] that manufacture and market Traditional Chinese Medicine (TCM). The companies' products contain body parts from globally threatened species such as horns from saiga antelope, leopard bones, pangolin scales and musk from musk deer. The use of threatened animal species in TCM products may contribute to illegal wildlife trade and increases the risk to of these species becoming extinct. There is no information concerning the quantity of parts of threatened species that the companies use, where the animal parts originate from, what stockpiles exist and how these are replenished. When such data is not made available, the Council on Ethics concludes that the companies contribute to severe environmental damage. The company has not disclosed any specific plans to replace the ingredients based on threatened species with other ingredients.<sup>23</sup>

The recommendations are quite interesting both for the way on which the Ethics Council has approached the issue of balancing and for its choice of target--the supply chains of Chinese traditional medicine. Yet the real target may neither be the Chinese (except indirectly--the Pension Fund Global has relatively little effective power to affect the economic calculus of those businesses)--nor states. As a sidenote the cases are important as a signal that enterprises cannot hide behind what had once been substantial language barriers and that one of the consequences of Chinese internationalism is that Chinese language communication is no longer preemptively opaque outside of China. Rather by using China to build a narrative baseline, it may be expected that other high value targets--targets that are infinitely more sensitive--including the practices if indigenous peoples) may be more readily made the subject of discussion in the financial and human rights sectors. Critical in these assessments is the value of the defense that was asserted by these companies--that they fully complied with all legal requirements imposed under Chinese law.

The difficulty here, of course, is that an assertion to that effect is not its proof, and the failure to suggest in more detail how that statement might be supported in fact is one step still to be undertaken, The second, and more sensitive step--but one already well developed within liberal

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<sup>21</sup> Ibid.

<sup>22</sup> Ethics Council, Pension Fund Global, China Grand Pharmaceutical and Healthcare Holdings Ltd (29 September 2021); available < <https://etikkradet.no/china-grand-pharmaceutical-and-healthcare-holdings-ltd-2/>>.

<sup>23</sup> Ethics Council, Pension Fund Global, Tong Ren Tang Technologies Co Ltd and Beijing Tong Ren Tang Chinese Medicine Co Ltd and Traditional Medicine Holdings Co Ltd (29 September 2021), *supra*. The description for the other excluded companies are substantially the same.

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democratic systems is that, at the transnational level, and with respect to international law/norms--compliance with national legal measures. For states like China, that provides not the end but the start of hard conversations about the nature and limits of sovereignty in transnational polycentric governance spaces. is largely irrelevant.

More interesting still is the willingness to begin thinking through the issue of contributions to environmental harm and contributions to degradation of bio-diversity, through quantitative measures. That aligns with recent cases, especially out of Germany, and likely elsewhere, that suggests a joint and several liability approach as well as the privileging of bio-diversity over cultural rights and practices--at least of developed states. Lastly, the Ethics Council continues to seek the cooperation of companies that are the subject to its scrutiny. That continues to be an issue and the Council continues to weigh that in its assessment--not unreasonably to be sure. Nonetheless, the imbalance of information and the sometimes ambiguously laconic responses from enterprises suggest not merely the difficulties of thorough assessment but also the extent of the influence of this body in certain sectors of economic production.



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