INTRODUCTION

Traditionally, commercial lawyers focus on the laws and regulatory regime directly related to the establishment and operation of business relations. The practice of commercial law cannot, however, be conducted without reference to the risks presented by activities that may incur criminal liability. In many jurisdictions, breaches of the relevant company law and securities laws regimes involve the possibility of criminal liability. In China, rapid economic growth has coincided with an increase in prosecutions for financial crimes and the creation of new offences.\(^1\) White

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2 According to the 2010 Report by the Supreme People’s Court, there were 27,751 cases of embezzlement, bribery and malfeasance, an increase of 7.1% over the previous year, and sentenced 28,652 persons, an increase of 9.25%. \textit{Highlights of the Supreme People’s Court Report}, \textit{China Daily}, Mar. 11, 2011,
collar crimes, which include securities offences, fraud, false bankruptcy, stealing state secrets, stealing business secrets, bribery and numerous other possible criminal acts, may be subject to punitive criminal penalties, particularly when they involve corruption and the payment or receipt of bribes. Several well-publicized cases in China involving the prosecution and conviction of foreign nationals on charges relating to their business activities have highlighted the risk of criminal prosecution. The purpose of this article is to examine the legal handling of a number of recent criminal cases involving foreign businesses and businessmen. It will then consider what, if any, conclusions can be drawn in relation to the interactions between foreign business, politics and the judicial system in China.4


4 For this article, I have had to rely mainly on foreign press reports in relation to the cases discussed, although I have had the advantage of a detailed judgment issued by the Shanghai First Intermediate People’s Court in the Stern Hu case, reproduced in Chinese (with an English translation). See Michael Sainsbury, ‘Conflict of interest’ in focus in trial of Rio Tinto’s Stern Hu, THE AUSTRALIAN, Apr. 19, 2010, http://www.theaustralian.com.au/business/mining-energy/conflict-of-interest-in-focus-in-trial-of-rio-tintos-stern-hu/story-e6fg9df-12258555615105. I have indicated in the text or footnotes places where reports are contradictory or otherwise unsubstantiated.
I. FOREIGN BUSINESS AND THE CHINESE LEGAL SYSTEM

Chinese law accords differential treatment to foreign businesses and investors in a number of significant respects. Some of this treatment was originally designed to attract foreign investors and has been very much to the advantage of foreign companies, as well as to China, continues to attract immense amounts of foreign investment.\(^5\) As time has passed, many of these special benefits have disappeared, but the separate structure for foreign participation in the Chinese economy remains.

First, the Chinese regulatory system handles both the establishment and the on-going operations of foreign companies and foreign-invested operations in China differently to companies that are purely Chinese owned. Foreign investment must go through a separate verification and/or approval process (and now, potentially, a national security review)\(^6\) in order to be admitted into China. Foreign investors must generally make their investments through specially designated foreign investment entities, which are subject to their own legal regime.\(^7\) The Chinese government regulates the types of industry into which investment may be made, and actively encourages some forms of investment and restricts and prohibits others. Investment in industries that are not categorised is considered to be permitted. In addition, there are restrictions placed on the right of foreign investors to hold a controlling interest in particular types of investments or on the amount of interest that foreign companies may hold.\(^8\) Once established, foreign investment companies are subject to ongoing monitoring by virtue of their foreign investment status.\(^9\) In

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\(^8\) See Wai shang tou zi qi ye mu lü [Foreign Investment Industry Catalog] (promulgated by the National Development and Reform Commission and Ministry of Commerce, Oct. 31, 2007) (includes requirements and limitations on structure and ownership levels in relation to foreign investment in certain industries).

\(^9\) See, e.g., Guan yu kai zhan 2011 nian wai shang tou zi qi ye lian he nian jian
essence, this system attempts to maintain the separate regime for foreign participation in the economy that was originally established in 1979 when foreign investment was first permitted. It is questionable, however, whether such a separation is still necessary, in view of the increasing sophistication of Chinese businesses and the rapid development of Chinese business law. For example, the Chinese government has developed a detailed corporate and securities regime in response to the growth of a strong private sector in China, rationalised the corporate income tax regime by standardising the taxation of foreign, foreign-investment and Chinese companies. In the course of these reforms, most of the principles relating to Chinese private companies regulation and governance have been extended to the foreign investment sector.

Differences in treatment also extend to dispute resolution. It has been clear from the early days of foreign investment that foreign-related civil and commercial disputes can bypass the Chinese court system and be referred to arbitration either inside or outside China. Most foreign-related civil and commercial cases, as well as criminal cases involving foreign nationals, will initially be heard by an Intermediate People’s Court rather than a Basic level court. Similarly, the financial levels at which

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10 Zhonghua Renmin Gongheguo zhong wai he zi jing ying qi ye fa [Chinese-foreign Equity Joint Venture of the PRC] (promulgated by the Nat’l People’s Cong., July 9, 1979, as amended) provided for the creation of a separate joint venture entity, which was to have limited liability (Article Four). Pursuant to Article Two of the Zhonghua Renmin Gongheguo zhong wai he zi jing ying qi ye fa shi shi tiao li [Chinese-foreign Equity Joint Venture Implementing Regulations] (promulgated by the State Council, Sept. 20, 1983, as amended), an equity joint venture was considered to be a Chinese legal person. New forms of foreign investment enterprise were subsequently created by Zhonghua Renmin gongheguo zhong wai he zuo he tian ying qi ye fa [Chinese-foreign Cooperative Joint Venture Law] (promulgated by the Nat’l People’s Cong., Apr. 13, 1988, as amended) and Zhongguo Renmin Gongheguo Wai Zi Qiye Fa [Wholly Foreign-Owned Enterprise Law of the P.R.C.] (promulgated by the Nat’l People’s Cong., Apr. 14, 1986, as amended).


13 See Company Law, supra note 11, Art. 218.


15 See Civil Procedure Law, supra note 14, at Art. 19. It provides that intermediate people’s courts shall have jurisdiction over major cases involving foreign
foreign-related civil cases will be elevated to a hearing before a higher court are lower than those applicable to purely Chinese disputes. The intention behind this is presumably to ensure a higher level of judicial attention and competence for foreign-related cases. Chinese statistics are rather imprecise, but annual reports of the Supreme People’s Court suggest that the overall number of cases before the courts involving foreigners is relatively small, although the number of international arbitration cases appears to be increasing. It is not clear how many criminal cases in China involve foreigners. The Australian Department of Foreign Affairs and Trade stated that, in June 2011, there were twenty-five Australian citizens serving prison sentences in China, including Stern Hu and James Sun (convicted for spying for Taiwan), and ten Australian citizens in detention.

The Chinese state plays a major role in all aspects of foreign-owned business operations in China. Different parts of government may fill any one or more the following roles: the approving authority for investments and projects, the regulator, the supervising entity or the land owning authority. Different levels of government – central, provincial, municipal or local – may play a role in the business sphere, directly

See also Guanyu Tiaozheng Gaoji Renmin Fayuan He Zongji Renmin Fayuan Guanxia Diyi Shenmin Shangshi Anjian Biaozhun De Tongzhi [Notice on Adjustments of Jurisdiction Standards of High People's Courts and Intermediate People's Courts over Civil and Commercial Cases of First Instance] (promulgated by the Sup. People’s Ct., Feb. 3, 2008) (providing for cases involving foreigners or persons from Taiwan, Hong Kong or Macao to be held at a higher level than purely Chinese cases involving equivalent amounts of money). See also Article 20(3) of the Zhongguo Renmin Gongheguo Xingshi Susong Fa [Criminal Procedure Law of the People’s Republic of China] (promulgated by the Nat'l People’s Cong., July 1, 1979 as amended) (providing that the Intermediate People’s Court should have jurisdiction when the defendant is a foreigner).

Id.


through ownership and operation of state-owned enterprises, or indirectly as a result of strong links between a local enterprise and local government officials or part of a local government. 20 A part of government may therefore operate as a business partner or owner of a partner or as a competitor or owner of a competitor or as a strong supporter. In addition, there is a constant stress in the Chinese system between the different levels of government. This is manifested in the courts, the procuratorate, and the police, which, although theoretically subject to supervision and control at a vertical level, are generally funded by, and subject to supervision exercised at, the local government level. 21 For the courts and the procuratorate in particular, this double and sometimes conflicting system of supervision and control is incorporated in the Constitution, 22 which requires the Supreme People’s Court and the Supreme People’s Procuratorate (which deals with prosecution of crimes) to supervise the administration of justice and the work of procuratorates at the lower levels, respectively, but gives power to the people’s congresses at the same level as the lower level courts and procurators to appoint, remove and oversee the work of those courts and procurators. An additional element in criminal cases is the role of the Communist Party Commission for Discipline Inspection. The Commission plays an active role in investigating acts of corruption and disciplinary breaches by Communist Party members. For this purpose it employs harsh powers of detention and investigation based on internal Party regulations rather than on law. 23 The role of the Committee has been highlighted in the Matthew Ng case, where foreign reports have claimed that the Chinese co-defendants were both subjected to the shuanggui (双规) system of Party detention and investigation before the trial. 24

Under Chinese law, there are a number of offences specially related to business for which both foreign individuals and foreign or foreign investment enterprises and Chinese businessmen and companies

20 See generally Randall Peerenboom, CHINA’S LONG MARCH TOWARD RULE OF LAW 188-238 (Cambridge University Press, 2002).


22 XIANFA art. 102, 103, 127, 123 (1982).


24 See infra, note 38. Pursuant to the shuanggui system, the Party can detain and interrogate persons who may be guilty of corruption before, or even instead of, investigation by the police or the Procuratorate pursuant to the Criminal Procedure Law. Since the Party follows its own regulations rather than the procedural restraints in the law, the shuanggui process is essentially extra-judicial, which poses obvious risks for persons subjected to it.
can be prosecuted. These are offences of general application, rather than offences specifically directed at foreigners. Zimmerman outlines a number of areas of potential concern for foreign businesses, including director and officer liability for offences relating to company (foreign investment enterprise) registration, industrial accidents, insider trading, market manipulation and so on; intellectual property offences; environmental pollution; bribery and corruption. An important point which was of particular relevance in the Stern Hu case, is the fact that Chinese law imposes personal liability on individuals who are considered to be responsible for corporate acts – as the legal representative, the responsible person or person in charge. Article Thirty of the Criminal Law provides that any company, enterprise, institution, State organ or organisation which commits an act that may endanger society and which is prescribed by law as a unit crime will bear criminal responsibility. In that case, the unit is subject to a fine under Article Thirty-One and the persons directly in charge, or who are directly responsible for the crime, will be given criminal punishment. As a result, commentators have highlighted to foreign businesspeople operating in China the possibility that they may be subject to personal liability for actions taken in the course of their business activities. A related issue for concern is the fact that where a case has been or will be brought against a company, the relevant Chinese court is both able and often willing to issue orders preventing foreign the legal representative or foreign corporate officers from leaving China.

There have been a number of high-profile cases involving the prosecution of foreign defendants over the last thirty years. In this article, I examine four recent cases that have received extensive coverage in the international press – three involving Australian citizens and one involving a United States citizen. All of these three defendants were born in China and subsequently obtained foreign citizenship.

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25 While a number of articles of the Criminal Law refer to foreigners, the relevant offences are targeted at Chinese nationals: Art 102 (collusion with a foreign state to endanger the sovereignty, territorial integrity and security of the PRC); Art 325 (unlawfully giving or selling cultural artifacts to foreigners); Art 394 (government functionaries accepting gifts from foreigners and failing to declare them).


II. CASES

In mid-2009, Aluminium Corporation of China (Chinalco) withdrew its bid to buy a substantial stake in Rio Tinto. This followed and the acrimonious collapse of the annual iron ore negotiations between Chinese buyers and the major international sellers. In early July 2009, Stern Hu (Hu Shitai), an Australian citizen, and three fellow employees of Rio Tinto, an Australian-based mining multinational company, Liu Caikui, Ge Minqiang and Wang Yong (all Chinese citizens), were detained in Shanghai. They were formally arrested on August 11, 2009 and the acrimonious collapse of the annual iron ore negotiations between Chinese buyers and the major international sellers.

In late August 2009, Hu and his colleagues were charged with infringing on commercial or business secrets and engaging in “non-State-owned enterprise” bribery by accepting payments from Chinese enterprises and persons. Rio Tinto was not charged at any stage.

All defendants were found guilty on the charges of accepting bribes (Article 163 of the Criminal Law) and the charges of stealing business secrets (Articles 219 and 220). The cumulative sentences (after deduction of concessions for some of the defendants for pleading guilty) ranged from seven years to fourteen years. Stern Hu himself received a sentence of ten years – seven years for the business secrets charge and five years for the bribery charge, with a reduction of two years for admitting his guilt on the bribery charge, as well as substantial fines on both charges.

The other defendants received large fines and prison terms of


33 Michael Sainsbury, Questions remain after Rio Tinto executive sentenced says
fourteen years (Wang Yong), eight years (Ge Minqiang) and seven years (Liu Caikui).

Xue Feng, a citizen of the United States who was born in China, was convicted and sentenced in 2010 to eight years imprisonment for the theft of state secrets, in his case, a database relating to the Chinese oil industry. His appeal to the Beijing People’s High Court was rejected in early 2011.

Matthew Ng, an Australian citizen of Chinese background, went on trial on August 9, 2011 in the Guangzhou People’s Intermediate Court after nine months in detention along with a Chinese director of NG’s company, Et-China, Zheng Hong, and the finance officer, Kitty Yang. Ng was accused of embezzlement, bribery and falsifying documents (relating to registered capital of the companies in the group). Ng was Chief Executive Office of Et-China International Holdings Ltd, a company working in the Chinese travel industry that had been listed on the AIM Market in London (a listing which has now been cancelled). Both Ng’s lawyer and Ng’s wife have claimed that the litigation was instituted by a local company, Guangzhou Lingnan International Enterprise Group, backed by local government, which is attempting to obtain the transfer of Et-China’s majority interest, Guangzhou GZL International Travel Services. The trial finished on August 11, 2011, with a forceful plea by Ng’s high-profile lawyer, Chen Youxi.

**Notes:**


Charlotte Chou, an Australian citizen of Chinese background, was detained on June 24, 2008, and subsequently convicted of and imprisoned for bribery. Upon her release in December 2009, she was immediately detained again. Her trial on embezzlement charges commenced in Guangzhou on August 30, 2011 and lasted for two days.

Why are these cases worthy of a more detailed review? These cases have received a great deal of publicity, due to the fact that the defendants are foreign, the facts of the cases are disputed and the prosecution and court process has been strongly criticized by the press coverage. Clearly, four cases in a system which deals with almost 800,000 criminal cases each year does not constitute evidence of general Chinese judicial practice. They do, however, provide some interesting perspectives on the prosecution of criminal cases and court process for a number of reasons. First, the cases – particularly the Stern Hu case – involve foreign citizens and can be expected to be subject to scrutiny both by the Australian and United States governments and by the foreign media. Secondly, the cases have been or are being conducted in three of China’s major cities. Beijing, Shanghai and Guangzhou are all rich and highly developed areas of China, where the courts are better resourced and can reasonably be expected to be of a higher standard than elsewhere in

Matthew Ng case: a total of thirteen years imprisonment (commuted from 14.5 years) for misappropriation of company funds (two years), false registration of company capital (2.5 years), work unit bribery (two years) and embezzlement (two years). His co-defendants were also found guilty of bribery and embezzlement and given sentences of 4.5 years commuted 3.5 years (Kitty Chan) and seventeen years commuted to sixteen years (Zheng Hong). John Garnaut, Shock verdict: China jails Aussie for 13 years, THE AGE, Dec. 6, 2011, http://www.theage.com.au/national/shock-verdict-china-jails-aussie-for-13-years-20111206-1ogiv.html. The defendants have indicated that they will appeal. Reports in the Chinese press indicate that the focus of the verdict was on the conduct of Zheng Hong in relation to the transfer of ownership of GZL Travel. Attention was also given to the “unlawful” manner in which Ng obtained control of this entity, although none of the charges (with the possible exception of the charge relating to falsification of the registered capital) appear to relate directly to the transfer of control. See http://People.com.cn, Guang zhi lu yuan dongshichang Zheng Hong yi shen bei pan 16 nian, aozhou jie dongshi bei pan 13 nian 广之旅原董事长郑烘一审被判 16 年 澳洲籍董事被判 13 年 Guangzhou Travel original Chairman, Zheng Hong, sentenced to 16 years; Australian director sentenced to 13 years], Dec. 6, 2011, http://legal.people.com.cn/GB/188502/16519213.html.


2010 Supreme People’s Court Report, supra note 2.
Thirdly, the cases involve businessmen and women operating in China and demonstrate very clearly that foreign citizenship does not grant immunity from criminal action.

III. PROCESS

The cases raise a number of important questions about judicial process. The Criminal Procedure Law sets out in some detail the time limits and procedures that should be followed in relation to detention, arrest, and trial. It also allocates responsibilities in relation to criminal matters between the various branches of government – generally the police (under the Ministry of Public Security), the procuratorate (in charge of prosecution) and the judiciary. Elizabeth Lynch comments that in the Stern Hu case the Chinese authorities appeared to follow the letter of the Criminal Procedure Law. Regular visits by the Australian consul were allowed, as was access to lawyers. Time limits were apparently observed, although it appears that the investigating authorities sought and obtained all available extensions of time. The trial date was announced less than a week before the trial was due to commence, however, and the entire trial lasted only three days. Remarkably, a sixty-eight page judgment was

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43 See Xin He, supra note 22 (differences in funding levels between the Shanghai courts and rural courts). Xin He’s research also indicate that the enforcement of commercial judgments and the working of the courts is noticeably better in developed urban areas of China than in rural areas. Xin He, Rule of Law in China: Chinese Law and Business, The Enforcement of Commercial Judgments in China, THE FOUNDATION FOR LAW, JUSTICE AND SOCIETY (undated), http://www.fljs.org/uploads/documents/Xin%20He%231%23.pdf.


45 The Criminal Procedure Law sets out a number of time limits with which the investigating and arresting bodies must comply and the permitted extensions of time. For detention prior to formal arrest: three days, plus an extension of four days, with a possible extension up to thirty days in very limited circumstances (Article Sixty-Nine) and seven days for the procuratorate to decide whether to approve the arrest (Article Sixty-Nine); for the investigation period: two months, plus one month extension with approval from the next highest level of the procuratorate (Article 124), or an extension of two months plus another two months for very severe cases, with approval from the provincial level procuratorate) (Articles 126 and 127). An indefinite extension may be obtained for particularly grave and complex cases with the approval of Supreme People’s Procuratorate (Article 125). When the police have recommended prosecution, the procuratorate has one month to decide whether to proceed to trial plus one half-month extension (Article 138). Pursuant to Article 150, the court will accept the case if the bill of prosecution contains clear facts of the crime, together with lists of witnesses, and copies of the evidence.

46 AAP, supra note 32.

47 AAP, Stern Hu trial ends without verdict, ADELAIDE NOW, Mar. 24, 2010,
produced on March 29, 2010 – a week after the first day of the trial – which provides rare insights into the trial process and detailed reasons for the decision.48

However, according to reports, the Ministry of State Security (which is responsible for cases involving endangerment of state security) instigated the initial investigation, rather than the police or the Procuratorate (which deals with corruption cases).49 A statement attributed to the National Administration for the Protection of State Secrets accused Rio Tinto of causing massive damage to China’s economic interests by buying and otherwise obtaining intelligence about the Chinese steel sector.50 By the time of the formal arrest, the Shanghai police were in charge of the case and the accusations relating to paying bribes to obtain state secrets had become charges that the defendants had unlawfully obtained business secrets and accepted (rather than paid) bribes.51 These changes were significant. Stealing State secrets for a foreign power is a major offence under the Criminal Law, with penalties ranging up to life imprisonment in a particularly serious case,52 and the defendant’s rights in the investigation and the court case are significantly abridged.53 Infringing on commercial secrets and engaging in commercial bribery are much less serious offences, although they may (and in fact did) result in a significant gaol sentence.54 The downgrading of the charges after the


52 See Criminal Law, infra note 2, Art. 111.

53 See Criminal Law, infra note 2, Article Ninety-Six (a defendant in a case that involves state secrets must obtain approval from the investigation organ to appoint a lawyer and subsequently to meet with his lawyer. Under Article 152 of the Criminal Procedure Law, a state secrets case is not heard in open court).

54 See Criminal Law, infra note 2, Article 219 (providing for a penalty of up to seven years imprisonment in a particularly serious case. This concept is elaborated on by Article Seven of Guanyu Banli Qinfan Zhishan Shanqu Xingshi Anjian Juti Yingyong Falü Ruogan Wenti De Jieshi [Interpretation on Certain Issues Concerning the Application of Law in Handling Criminal Cases Involving Infringement of Intellectual
widespread publicity relating to the case has not been explained, although it seems likely that Chinese authorities at a higher level became concerned about the implications of the case for China’s long-term relations with Australia, which is an important trading partner. Certainly the Australian government was actively involved in making representations to the Chinese government in relation to the case, which became a major public issue in Australia.\footnote{See comments by Vivienne Bath quoted in Elizabeth Lynch, A Response to Rio Tinto – A Different Opinion from Australia, CHINA LAW AND POLICY, Apr. 20, 2010, http://chinalawandpolicy.com/tag/stern-hu/; Vivienne Bath, The Chinese Legal System and the Stern Hu Case, EAST ASIA FORUM, Mar. 28, 2010, http://www.eastasiaforum.org/2010/03/28/the-chinese-legal-system-and-the-stern-hu-case/.
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In Matthew Ng’s case, it is not clear whether the process followed the formalities in the Criminal Procedure Law relating to detention, although the period of detention suggests that it may have. Ng was detained in November 2010, formally arrested and charged two weeks later, in December 2010, and his trial commenced in August 2011.\footnote{The period of detention for Ng suggests that either a number of extensions were granted or the period for detention was exceeded. See infra note 47.} Ng has had access to consular assistance and a lawyer.\footnote{John Garnaut, Top Australian entrepreneur jailed in China over 'embezzlement', THE SYDNEY MORNING HERALD, Nov. 26, 2010, http://www.smh.com.au/business/top-australian-entrepreneur-jailed-in-china-over-embezzlement-20101125-1892z.html#ixzz1V GhSUbZP.}

In contrast, newspaper reports state that prior to her trial in late August 2011, Charlotte Chou was held in detention for approximately twenty-one months, a period which is well in excess of the periods set out in the Criminal Procedure Law, even if all available extensions were granted.\footnote{See infra note 53 (sets out the requirements of the Criminal Procedure Law on periods of detention). Another Australian, James Sun, is currently serving a life sentence (commuted from a suspended death sentence) for spying for Taiwan. According to the newspaper reports, he was detained and interrogated for twenty-two months prior to trial. Ann Davies, The interrogation and conviction of an Australian businessman is a chilling story, THE SYDNEY MORNING HERALD, Feb. 2, 2011, http://www.smh.com.au/world/plea-for-husband-swallowed-by-chinese-system-20110201-1ach5.html.
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} She was finally given access to a lawyer, Chen Youxi, although reports indicate that when she was
originally arrested prior to her conviction for bribery, she was denied access to a lawyer for six weeks.\[60\]

In the Xue Feng case, according to reports, there was a gap of more than three years between the date on which Xue was detained and his ultimate conviction, during which all of the applicable time limits under the Criminal Procedure for detention, arrest and trial were exceeded.\[61\] The United States Embassy was not given of his detention in a timely fashion and Xue Feng also claimed that he had been tortured during detention.\[62\] He was permitted to retain legal counsel, although only after a significant delay (one year after he was first detained).\[63\]

The practice of detaining defendants for lengthy periods is not confined to foreign defendants.\[64\] Indeed, in 2010, the State Compensation Law was amended to make clear that defendants are entitled to compensation if they are wrongfully detained, or detained for periods in excess of the legally permitted time period, where the case is subsequently withdrawn or the defendant is found innocent.\[65\] For defendants who are not found innocent, there appears to be no redress other than the deduction of time spent in detention from their sentences.\[66\]

In none of these cases were any of the defendants granted bail, although that this is not unusual in the Chinese system.\[67\] In addition, during the period of their detention, neither Stern Hu nor Matthew Ng was


\[62\] Id.

\[63\] Id.


\[66\] See infra note 32 (each of the defendants was given credit for their time in detention).

permitted to have visits from their wives or families. It should also be noted that the relatively short periods from the announcement of the date of the trial to the commencement of the hearing comply with Article 150 of the Criminal Procedure Law, which provides that the court should deliver a copy of the bill of prosecution to the defendant no later than ten days before the opening of the court and inform the defendant that he may appoint a defender if he has not already done so. These time periods are, however, very short if the case is complex and the defendant is not aware of the case that the prosecution proposes to bring.

The Criminal Procedure Law and the Lawyers Law grant a person the right to retain a lawyer after the date on which he is interrogated by an investigatory organ for the first time, or after compulsory measures (强制措施) are adopted in relation to the person. However, the Criminal Procedure Law (Article Ninety-Six) also provides that in a case “involving” state secrets, the approval of the investigation organ is required both for the appointment of a lawyer and for meetings with the lawyer. Article Ninety-Six also gives the investigation organ the right to be present at meetings between a lawyer and his client, which can make it difficult for the defendant properly to prepare his defence. Indeed, in the Ng case,

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69 See infra note 80.

70 Criminal Procedure Law, Article 96; Zhonghua Renmin Gongheguo Lüshi Fa [Law on Lawyers of the People’s Republic of China] (promulgated by the Stand. Comm. Nat’l People’s Cong., May 15, 1996, as amended) (Article 33) (P.R.C.). Compulsory measures are covered in Chapter Six of the Criminal Procedure Law, Article Fifty which provides that the police or Procuratorate may issue a warrant to compel the appearance of a criminal suspect or defendant, order him to obtain a guarantor or subject him to residential surveillance. Draft proposed amendments to the Criminal Procedure Law, Zhonghua Renmin Gongheguo Xing Shi Su Song Fa Xui Zheng An (Cao An) [Amendment to the Criminal Procedure Law of the People’s Republic of China (Draft)] (issued by the Nat. People’s Cong., Aug. 30, 2011) (Articles 3 and 7) would require that a suspect or defendant be notified of his right to a lawyer or defender, and gives increased rights to the suspect or defendant to meet with the defender.

71 See Sida Liu & Terence C. Halliday, Dancing Handcuffed in the Minefield: Survival Strategies of Defense Lawyers in China’s Criminal Justice System, CENTER ON LAW AND GLOBALIZATION RESEARCH PAPER NO. 08-04, May 14, 2008, http://ssrn.com/abstract=1269536 (an interesting account of the extreme difficulties experienced by defense lawyers in relation to meetings and obtaining evidence). The draft amendments referred to above provide that meetings with defense lawyers may not be monitored, although the lawyer would have to obtain permission from the investigative organ to meet with his client in the case of “crimes endangering the State security, of terrorism or joint crimes involving grave bribery.” See infra note 80, Article
the defence lawyers complained that they were given only two working days to read substantial amounts of evidence.72 Charlotte Chou's representative claimed that although there were bank records and documents which could prove that the amounts she was accused of embezzling constituted repayment of personal loans, she was not given access to them for the purposes of her defence.73

IV. COURT PROCESS AND EVIDENCE

The Criminal Procedure Law provides that trials should be held in an open court except in limited circumstances,74 and recent interpretations by the Supreme People’s Court support the principle of openness in the administration of justice and the requirement to provide an open court.75 China also has consular agreements with both the United States and Australia that guarantee consular access at the trials of nationals. Article 152 of the Criminal Procedure Law, however, provides that cases involving state secrets will not be heard in public. In the Xue Feng case, which related to the unlawful acquisition of state secrets, the court was closed, including to the United States consular representative.76 The court disregarded claims from the United States government that the refusal to allow consular representation in court breached the Consular Agreement between China and the United States and past practice.77 The Stern Hu case involved business secrets. Article 152 of the Criminal Procedure Law requires a closed court for cases involving state secrets and private affairs of individuals, but the court closed the part of the hearing that related to business secrets nonetheless.78 It also refused to allow the Australian consular representative to attend this part of the trial, again arguably in

7, proposed Article 37.

72 See infra note 60.
73 See infra note 44.
74 See infra note 53, Article 152.
75 E.g., Article Two of Guanyu Sifa Gongkai De Liu Xiang Guiding [Six Provisions on Judicial Transparency] (promulgated by the Supreme People’s Court, Dec. 8, 2009) (“The people's courts shall formulate and improve upon rules for the observation and reporting of trials in an orderly, open and effective manner, thereby eliminating the relevant barriers and enabling the public and news media to have proper access to the relevant information and exercise their right to monitoring.”).
76 See Cohen, infra note 70.
77 See Consular Convention, infra note 70, Art 35(5).
contravention of the Australia-China Consular Agreement. Protests by the Australian government were ineffective to change this decision. The Australian Consul-General was present at the part of the trial that related to the bribery charges. Representatives of the Australian media were not permitted to attend any part of the hearing (other than the handing down of the verdict). The then Australian Prime Minister, Kevin Rudd, criticised China for its lack of transparency in holding part of the trial in secret.

In the Ng case, the court was open in accordance with Chinese rules. However, reports indicate that the court moved the trial to a courtroom that was too small for the potential audience, despite assurances to the Prime Minister of Australia, Julia Gillard, by Premier Wen Jiabao that the court would be open. This was presumably in order to ensure that the foreign media would be unable to attend the trial. Interestingly, the Supreme People’s Court has taken several steps to require openness and transparency in the courts and in 2010 instituted a program to encourage judicial transparency pursuant to which certain “demonstrative” courts for the purpose of judicial transparency were nominated as demonstrative courts and awarded points for satisfying certain requirements. These include admitting close relatives, the public and the media to trials, and ensuring that a courtroom of a suitable size is made available for high-profile cases.

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83 See infra note 61.


85 See infra note 85.

86 Guanyu Queding Sifa Gongkai Shifan Fayuan De Jueding [Decision on Determining Demonstrative Courts for Judicial Transparency] and Sifa Gongkai Shifan Biaoyuan Biaozhun (Standards for Demonstrative Courts for Judicial Transparency), (both issued by the Sup. People’s Ct, Oct. 15, 2010).
People’s court is not one of the demonstrative courts but it is of course subject to the requirements relating to transparency set out in the law and in the Supreme People’s Court interpretation on judicial transparency.\(^{87}\) After a stream of complaints and representations to the central government, representatives of the Australian and the Chinese media were allowed into the courtroom.\(^{88}\) As a consequence, the western press has published detailed reports on the conduct of the trial.

The response of the courts in these cases raises a number of issues. First, consular representation is an important protection both for foreign citizens in China and Chinese citizens abroad. The refusal by the courts in the Xue Feng and Stern Hu cases to admit the consular representative to the trial means that the foreign government concerned cannot monitor the conduct of the trial or confirm that it is fair and complies with Chinese or international standards. It also appears that the Chinese government is establishing a pattern of refusing to allow consular representatives to be present in “sensitive” cases. Reports on the trial of Australian citizen, James Sun, who was convicted of spying, also indicate that the Australian consular representative was not permitted to attend the hearing, reportedly on the grounds of “national security.”\(^{89}\) Second, the reluctance of the courts to allow the press or the public into the courtroom to hear the proceedings is certainly counter-productive, even where it is lawful. Among other things, it gives the impression to the world at large that Chinese legal requirements and the recent Supreme Court Interpretation relating to judicial transparency are not being taken seriously within the Chinese court system. It is encouraging, however, that close relatives, the Australian consul and ultimately the press were permitted to attend and to report on the Matthew Ng trial, despite the case being moved to a smaller courtroom and despite attempts by Guangzhou Lingnan International Enterprise Group (which is allegedly behind the charges being brought) to fill all of the available seats.\(^{90}\)

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\(^{87}\) See infra note 96.


\(^{89}\) See infra note 56.

V. CONDUCT OF THE TRIAL

In all cases, the duration of the trials was quite short and the court decided the facts essentially on the basis of the written documents. Article Forty-Seven of the Criminal Procedure Law, however, refers to witnesses being made available for cross-examination. Similarly, Article Two of the Six Provisions of the Supreme People's Court on Openness in Judicial System issued in 2009 states that unless laws or an Interpretation provides that a witness need not appear in court, the court should summon witnesses and expert witnesses to appear in court. 91 However, in accordance with what appears to be standard practice in China, 92 witnesses did not appear in person at the Stern Hu trial. 93 Indeed, the devastating claim by one witness, Du Shuanghua, that he had paid one of the defendants RMB seventy million as a bribe was given in writing (although, according to reports, defendant Wang Yong indignantly asked in court that Du appear in person so that he could be cross-examined). 94

In the Matthew Ng case, both of Ng’s co-defendants had been subjected to the shuanggui process, which involves detention and investigation by the local Communist Party Committee for Discipline and Inspection without the benefit of the protections set out in the Criminal Procedure Law, 95 even although, according to reports, Yang was not a Party member. 96 Clearly, it was potentially disadvantageous for Ng to

91 See infra note 61. See also Liu and Halliday, infra note 81.

92 Article Forty-Seven provides as follows: “The testimony of a witness may be used as a basis in deciding a case only after the witness has been questioned and cross-examined in the courtroom by both sides.” See also Ye Doudou, How China Justifies Empty Witness Chairs, CAIJING.COM.CN, June 21, 2009, http://english.caijing.com.cn/2009-06-26/110189954.html; in Chinese, Zui gai chu ting de ren zai na li?, http://magazine.caijing.com.cn/2009-06-21/110187313.html. In the notorious attempt to put lawyer Li Zhuang on trial for a second time, the court apparently responded in relation to challenges to the evidence and its acceptance of written witness testimony that “court notices failed to reach the witnesses and the rest of witnesses were either unwilling or unable to testify on trial.” He Xin, Prosecutors Withdraw Charges against Li Zhuang, CAIXIN ONLINE, Apr. 22, 2011, http://english.caing.com/2011-04-22/100251500.html.

93 The judgment sets out the evidence presented by the prosecution, which consisted of written testimony, emails, reports, confessions and other documents. See infra note 56, 8 (page numbers refer to the Chinese judgment).


have the confessions allegedly made by the other two defendants in the course of their time under the *shuanggui* process\(^97\) presented as evidence against him, since his ability to challenge the circumstances under which they were made was limited. However, in the Ng case, having all of the defendants’ cases heard at once may have been advantageous to Ng, since Zheng Hong reportedly challenged the accuracy of part of his “confession” himself in the course of the trial.\(^98\) In the Xue Feng case, similarly, the defence could not call witnesses or challenge written statements by prosecution witnesses.

The judgment in the Stern Hu trial relies several times on “judicial expert position papers,” and reports provided to the court to prove not only that the information in question was not known to the public at large on a particular date, but also that the documents had been kept in confidence, the information was of practical use, the documents were illegally obtained and disclosure would cause loss to the owner of the information.\(^100\) All of these elements are crucial to the determination whether an offence had been committed and would appear to be matters to which the court itself should direct its mind.\(^101\)

This raises the question of who within the court is responsible for making the final decision on sensitive cases. Although Article 147 of the Criminal Procedure Law generally provides for a collegiate panel of three judges (which may include lay assessors), pursuant to Article 149 of the Criminal Procedure Law, each court has a judicial or adjudicatory committee (*shen pan wei yuan hui*, 审判委员会), to which difficult, complex or major cases may be referred if the collegiate panel cannot make a decision. The committee consists of the president and vice president of the people's court and the chief judges of the divisions of the people's court as well as “several experienced judges who do not hold leading posts, and have good political quality, rich experience in trial and

\(^97\) See infra note 18.

\(^98\) See infra note 38.

\(^99\) See infra note 35.

\(^100\) See infra note 56 (for example, 38, (Shanghai Hengping Judicial Authentication Center on the disclosure of information); 39 (Beijing Guoke Intellectual Property Rights Centre on practical use); and 57 (Assets Appraisal Report of China United Assets Appraisal Co. Ltd. on the illegality of the measures taken by the defendants and loss)).

adjudication, with a higher theoretical level of law and diploma of higher education in law.” 102 The judicial committee has both supporters and detractors. Some commentators see it as a form of quality assurance, since senior and more experienced judges review all difficult cases. Others see it as an opening for interference by the Party or an avenue for corruption. 103 If a case is referred to the committee, the final decision in the case may not be made by the judges who actually heard it. In this case, of course, oral evidence by witnesses will play a considerably reduced role. It is not necessarily clear in a particular case whether it has been referred to the judicial committee, although in sensitive cases such as the ones discussed in this article, it is likely that the committee would be convened. 104

VI. LEGAL REASONING

The Shanghai First Intermediate People’s Court presented a very comprehensive and detailed judgment in the Stern Hu case that provides an unusual opportunity to review the court’s findings on the evidence and the reasons given for the final judgment. In particular, the judgment contains comprehensive material on the payments that were allegedly made to the defendants, which, when combined with admissions by various of the defendants, constitutes very persuasive evidence of bribery. In fact, after the trial, Rio Tinto dismissed the employees for taking bribes, on the basis that this contravened Rio’s “strong ethical culture.” 105 The provision of such a detailed judgment is in marked contrast to Xue Feng’s case, where information on the court’s reasoning is very limited. In

102 Article Six, Guanyu Gaige He Wanshan Renmin Fayuan Shenpan Weiyuanhui Zhidu De Shishi Yijian [Implementing Opinions on the Reform and Improvement of the Judicial Committee System], issued by the Sup. People’s Ct, Jan. 11, 2010. The Opinions reiterate the importance of the judicial committee but aim to ensure the quality of its members and clarify its functions.

103 Randall Peerenboom, China’s Long March toward Rule of Law, 323-25 (Cambridge University Press, 2002).

104 It should also be noted that it is often not clear in China whether a judicial decision is made within the court, or whether it is made, for example, by the Communist Party legal-judicial committee or by some other influential person or body. See comments by Jerome Cohen in Rowen Callick, New China deal to aid understanding: A-G, THE AUSTRALIAN, Sept. 11, 2011, http://www.theaustralian.com.au/business/legal-affairs/new-china-deal-to-aid-understanding-a-g/story-e6frg97x-1226127645131.

105 Rio Tinto, 2010 Annual Report, Chief Executive’s Statement, http://www.riotinto.com/annualreport2010/overview/ceo_statement.html (last visited Aug. 25, 2011): “In March 2010, four employees based in Shanghai were convicted of receiving bribes and obtaining commercial secrets. This disappointing and unacceptable behaviour violated the Group’s strong ethical culture as well as Chinese law, hence their employment was terminated.”
particular, reports indicate that the court dismissed what would appear to be a strong defence claim that Xue Feng was not guilty of the theft of state secrets because the database was officially declared to constitute a state secret only after it was acquired (and after Xue Feng was detained). 106

Under Article 219 of the Criminal Law, it is necessary to prove a number of elements to make out the charge of infringing on business secrets. First, the information must be technological or business information that is unknown to the public, can bring about economic benefits to the rights owner, is of practical use[,] and is information with regard to which the owner has taken measures to maintain confidentiality. Second, it must be shown that the defendant has infringed on the business secrets by, in this case, obtaining an obligee’s business secrets by stealing, luring, coercion or any other illegitimate means. Third, this infringement must have caused severe loss to the owner. The determination of the court as to penalty if all of these facts are made out is based on the severity of the consequences.

The bribery charges against Stern Hu and his co-defendants were simplified by the production by the prosecution of large amounts of documentary evidence relating to the transfer of funds and by the confessions of the defendants. The business secrets charges, however, caused the court more difficulty, and the analysis in the judgment has a number of significant weaknesses. Although the lengthy judgment is a little vague on exactly which articles of the Criminal Law were relied upon to convict the defendants, it appears that the defendants were charged under Article 220 of the Criminal Law, the provision that criminalises theft of business secrets under Article 219 by a unit and persons “directly in charge” or otherwise directly responsible. 107 Indeed, defendant Wang Yong claimed that since he worked for a different company to Stern Hu, and the unit for which he worked had not been identified as having committed theft of business secrets, it was unlawful to charge him under Article 220. 108 The court held, however, that all of the defendants were guilty. Stern Hu was convicted in his capacity as the unit’s directly responsible person in charge, and the other three as persons directly responsible. 109 The court aggregated the actions of the defendants in order to make a determination on both infringement and loss.

Once the court had found that the relevant information did constitute business information, had been kept confidential[,] and was of practical use, the court also needed to find that it had been unlawfully obtained. However, it appears that no evidence was presented to the court

106 See infra note 35.
107 See infra note 56, at 66.
108 See infra note 32, at 11.
109 See infra note 32, at 66.
to show that payments were made for the information. The court therefore held that Stern Hu and his colleagues had acquired confidential information “by bribery and other illegal means” because “Rio Tinto . . . mostly occupied the advantageous position in the trade of iron ore with China, so the [relevant] persons of the Chinese steel enterprise would satisfy their demands as possible when the plaintiffs inquired about the information involved in the case.”\(^{110}\) This suggests, however, that any request by an employee of a major company for information from a customer or other business contact effectively constitutes coercion and could attempt to unlawful conduct.

The next required step in proving liability is to show that heavy losses were caused “to the obligee” – that is, the owner of the business secrets. A significant problem in the case is that the link between the ownership of the business secrets and [the] losses sustained by each of the owners is never made clear. Finally, the determination that the damage caused by the theft of business secrets was “huge” was significant both in order to determine liability and in relation to sentencing. For theft of business secrets[,\(]\) the range of penalties is three to seven years imprisonment only if the “consequences are particularly serious.”\(^{111}\) Pursuant to Article Seven of the 2004 Supreme People’s Court Interpretation, consequences are particularly serious if the losses caused to the owner of the business secrets exceed RMB 2,500,000.\(^{112}\) The imposition of a five-year sentence for Stern Hu in relation to the business secrets was reportedly based on the conclusion of the court that:

The above acts of the defendants Hu Shitai, Wang Yong, Ge Minqiang, and Liu Caikui have seriously affected and damaged the competitive interests of the relevant iron and steel enterprises of China, put them into a disadvantageous position in iron ore import negotiations, and resulted in the abrupt suspension of the iron ore price negotiation between Chinese iron and steel enterprises and Rio Tinto Company, causing enormous economic losses to relevant iron and steel enterprises of China. In relation to this, more than 20 work units, including Shougang International Trade and Engineering and Laiwu Steel International Trade and Engineering Company and so on paid extra advances amounting to RMB 1.018 billion, and the interest losses of the second half of 2009 alone reached more than RMB

\(^{110}\) See infra note 32, at 64.

\(^{111}\) Criminal Law, Art. 219.

\(^{112}\) See infra note 53.
11.7030 million.”

Support for the proposition that the acts of the four defendants caused the collapse of the iron ore talks appears to come mainly from an Assets Appraisal Report submitted by an entity called China United Assets Appraisal Ltd. There were of course many possible reasons for the collapse of the iron ore talks between China and the suppliers, including the widely reported agreement by the Japanese buyers to accept a higher price than the China Iron and Steel Association was seeking, the incoherent nature of the Chinese market[,] and many other factors. In view of the long and acrimonious history of the negotiations, a determination that the negotiations collapsed because of the acquisition of secret commercial information by the four Rio employees, thus resulting in a quantifiable loss to the Chinese state-owned buyers, is overreaching. This finding of the court bears a strong resemblance to reported claims when Hu was first detained that “Mr. Hu bribed steel companies on such a scale that he caused huge losses to China’s national economic interests.” The court’s conclusions thus provide fodder for the view that the trials constituted a form of retribution for the collapse of the iron ore negotiations in mid-2009.

VII. WHO IS ON TRIAL?

It is noteworthy that apart from the initial outburst referred to above in relation to state secrets, Rio Tinto has not been implicated or involved in any of the criminal investigations, although Hu and his colleagues are employed by Rio and, one would assume, any state secrets or commercial secrets obtained by them in China would have been acquired and used for the benefit of Rio. Article 220 of the Criminal Law states that where a unit commits a crime under Article 219, it shall be fined and the person directly in charge and the other persons directly responsible shall be punished under Article 219. However, the unit – Rio Tinto – was not charged, convicted or fined, although the judgment

113 See infra note 32, at 57.
114 See infra note 32, at 57.
certainly indicates that the court was satisfied that through the action of its employees it was guilty of theft of business secrets and hence responsible for the substantial losses attributed to the disclosure of the business secrets.

Interestingly, those who paid bribes or traded business secrets were, on a whole, not put on trial. In particular, Du Shuanghua was not put on trial for paying such a substantial bribe, although paying bribes to officers of a corporation is also an offence under Article 164 of the Criminal Law and subject to a penalty of up to ten years. According to a report in the Chinese press, the court decided that Du did not bear legal responsibility – presumably under Article 164(3), which allows for a mitigated punishment or exemption from punishment where a person voluntarily confesses to bribery prior to prosecution. However, two Chinese executives, Wang Hong Jiu and Tan Yixin, were prosecuted in a closed trial held concurrently with that of Stern Hu and his colleagues. They were convicted for leaking business secrets and sentenced to three and a half and four years imprisonment respectively.

VIII. THE ROLE OF AUSTRALIA-U.S. GOVERNMENTS

The role played by the Australian and United States governments is particularly interesting. Both countries were active in providing consular representative, attending the trials (when permitted to do so), and making representations to the Chinese government at different levels. Clearly, the role of the home government can only be to ensure that their citizens are accorded rights under the relevant Consular agreements and that they are accorded a fair trial under Chinese law. However, as discussed above, the Australian and U.S. governments had difficulty even in enforcing their rights under their consular agreements with China.

Similarly, the ability of the Australian and United States governments to have any impact on the political forces in the Chinese government driving the cases appears to have been very limited. As noted above, the Australian press reported that the Prime Minister, Julia Gillard, had received an assurance from Premier Wen Jiabao himself that the trial of Matthew Ng would be fair and open. This did not stop the Guangzhou


119 Id.
court from attempting to restrict access to the trial. Similarly, complaints by the Australian government that Chou has been held without trial for an excessive period of time have been disregarded.\textsuperscript{120}

In addition, statements made by the Chinese official spokesman on the cases were clearly provocative and hardly designed to promote international comity. On March 18, 2010, for example, Qin Gang, a spokesman for the Chinese Foreign Ministry reportedly said that the Stern Hu case should not be politicized or negatively impact Australia-China relations.\textsuperscript{121} There were, he said, “all kinds of voices” coming out to “disturb the judicial system.”\textsuperscript{122} The case was just an “individual business case.” The same Qin Gang remarked in relation to the Xue Feng case that “[t]he case is China’s internal affair. Other countries cannot interfere with it and China’s judicial sovereignty.”\textsuperscript{123}

IX. COMMENT

In the thirty years since the inception of the “Open Door” policy, the Chinese government has put considerable time and effort into the development of its legal system. Indeed, the government claims in a recent white paper published by the Information Office of the State Council that by the end of 2010, China had put in place a socialist system of law.\textsuperscript{124} During the last thirty years, the government has established a full court system, opened law schools, trained thousands of lawyers and judges and promulgated, revised, and amended a full system of laws – including a comprehensive system of criminal law and criminal procedure. The Criminal Law was substantially revised in 1997 and subsequently to acknowledge a number of important principle; in particular, the basic principle set out in Article 3, that no one can be punished for a crime which is not created by law. Similarly, the Criminal Procedure Law was revised in 1997 to set out relatively clear principles relating to detention, arrest, and prosecution, although there has been considerable criticism of the way in which these principles have been implemented.\textsuperscript{125} The

\textsuperscript{120} See infra note 45.


\textsuperscript{122} Id.

\textsuperscript{123} Id.


\textsuperscript{125} See infra note 62.
Supreme People’s Court has also played an active role in the development of the legal system.

The cases discussed in this article, however, raise a number of significant issues. The first is the decision by Chinese authorities to prosecute these particular cases. Statistics issued by the Supreme People’s Court make clear that white collar and financial crime is an issue in China. Articles 163 and 164 of the Criminal Law criminalise the payment or receipt of bribes by employees of a company, enterprise or other unit (commercial bribery). The Supreme People’s Court and the Supreme People’s Procuratorate have issued interpretations that attempt to clarify and strengthen definitions of bribery. The Criminal Law was recently extended to add the offence of bribing foreign officials. Reported cases in China relating to bribery generally involve the acceptance of bribes by government officials, such as Xu Maiyong and Jiang Renjie, former vice-mayors of Hangzhou and Suzhou respectively, who were executed for taking huge amounts of bribes and abusing their official powers. They also include the acceptance of bribes by heads of statutory corporations, such as the head of the Beijing Capital Airport Corporation, Li Peiying, who was executed for taking approximately sixteen million U.S. dollars in bribes.

A number of these cases appear to involve foreigners – and, in fact, a report much-cited by the Chinese press issued by the Chinese research center, Anbound Group, in 2009 claimed that, “China has investigated at
least 500,000 corruption cases over the past decade, sixty-four percent of which involved international trade and foreign businesses.”

However, much of the investigation and prosecution of major multinational companies for paying substantial bribes appears to have been carried out mainly by foreign governments which have signed up to the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions. Article 1(1) of the Convention requires the parties to ensure that it is an offence for a citizen or corporation of that country to pay or offer bribes to foreign officials (including officers of international organisations) for the purpose of obtaining a business or other improper advantage. The United States is particularly active in pursuing cases under the Foreign Corrupt Practices Act (“FCPA”), which increasingly relate to bribery within China, although Germany, Hungary, Italy, Korea and Japan have also undertaken a significant number of cases under the Convention. Australia has been slower to initiate prosecutions under its legislation, although it has recently prosecuted two Australian companies and six individuals for alleged bribery of foreign officials in Indonesia, Malaysia and Vietnam under Division Seventy of the federal Criminal Code, which incorporates the provisions of the OECD Convention into Australian law.

Prosecutions (and settlements) by the United States Justice Department under the FCPA relating to China include settlements with UTStarcom Inc. (provision of travel and other things of value to Chinese officials), Rockwell Automation Inc (payment of bribes to state-owned

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138 Department of Justice, UTStarcom Inc. Agrees to Pay $1.5 Million Penalty
and Siemens AG (bribes to foreign government officials to obtain business in various jurisdictions, including China). The Siemens bribery cases have also resulted in the conviction and sentencing of a number of Chinese former senior executives of state-owned enterprises in China. Shi Wanzhong received a suspended death penalty in June 2011 and Zhang Chunjiang, former party secretary of China Mobile received the suspended death penalty in July 2011 for taking bribes. According to Chinese reports, information on Chinese personnel involved in bribery in the Siemens case was sent to China by diplomatic channels.

In view of these issues, it would be logical to expect a substantial increase in well-publicised investigations and cases involving foreign-invested companies and their employees in China to deal with the issue of bribery. Indeed there have been some cases of this kind. Toyota Motor Finance (China) was reportedly fined in China in 2010 for bribing dealers. A 2009 article in the China Daily Online enumerates a number of bribery cases involving foreign companies – most of which were prosecuted outside China. Indeed an opinion piece in China.org.cn (which describes itself as “the authorized government portal site to China”) comments favourably on the FCPA and laments that in China

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144 Toyota faces charges of corporate bribery in China, PEOPLE’S DAILY ONLINE, Sept. 21, 2010, http://english.peopledaily.com.cn/90001/90778/90860/7147437.html. Interestingly, the commentary suggested that there was a connection with the standoff between China and Japan in relation to the East China Sea.


“there are no laws concerning domestic business corruption and bribery. What we have are only some relative items or regulations in Anti-unfair Competition Law and Criminal Law.”

China undoubtedly has the right to prosecute offences committed, whether by Chinese or foreigners within its territory and to prosecute foreigners in some cases for a crime committed outside China against China or Chinese citizens (provided that it is also an offence in the place where committed). According to one report, the Australians currently in gaol, or on trial, in China are being held for “a broad range of offences, including fraud, drug crimes, embezzlement, murder and espionage.” The American Embassy website indicates that “[S]everal Americans currently incarcerated in China have been implicated in financial fraud schemes involving falsified bank or business documents, tax evasion schemes and assisting alien smuggling, including selling passports to provide aliens with travel documents.”

The cases involving foreign defendants discussed in this article, however, reflect different concerns, as well as the involvement of different parts of the Chinese government and the business community. The cases on state and business secrets reflect a heightened government emphasis on the secrecy of sensitive information. The fact that Stern Hu and his colleagues were originally investigated for theft of state secrets indicates that where state-owned enterprises and important international business transactions are involved, the difference between state secrets and business secrets is a fine one. Indeed, following the Stern Hu trial, the State-owned Assets Supervision and Administration Commission issued new regulations on the business secrets of state-owned enterprises that essentially conflated business secrets of state-owned enterprises with state secrets. At a minimum, both the Stern Hu case and the Xue Feng case...

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147 Hua Xiao, China should respond to foreign company’s bribery (translated by Li Shen), CHINA.ORG.CN, Jan. 6, 2010, http://www.china.org.cn/opinion/2010-01/06/content_19190732.htm.
148 Criminal Law, Art. 6.
149 Criminal Law, Art. 8.
highlight the difficulty of operating in the Chinese environment, where state-owned enterprises dominate large sectors of the economy (pursuant to government policy) and accurate information can be difficult to come by.

Second despite the comments of the Chinese government spokesman, the cases of Stern Hu, Matthew Ng and Charlotte Chou suggest that different parts of the Chinese government are actively involved in the judicial process. In the Stern Hu case, it is clear from the judgment of the court that the case was closely related to the failure of the iron ore negotiations in 2009. The targeting of Rio’s employees while Rio Tinto itself was not convicted or fined is also suggestive. If the reports relating to the Ng case are correct, the main aim of the Communist Party was to force Ng to transfer back to his business partner the assets that his company had originally acquired. Yet the acquisition of state-owned assets is strictly regulated by law, which requires a valuation and various government approvals. A legal challenge could be brought if the acquisition were unlawful. If the assets were owned by the Communist Party itself, as has been suggested, use of the Party’s internal disciplinary process and court action to regain control of them is a most improper use of the judicial system. It should of course be noted here that the Australian press has quite strongly presented Matthew Ng’s defence. It is not clear what evidence the prosecution has presented in relation to the bribery and other charges. The Chou case is also allegedly related to a business dispute.

The conduct of these trials also raises a number of questions. These questions include witnesses not being available for cross-examination, claims in Ng’s case that important evidence was produced at the last minute, and above all, the lack of an open trial. The refusal to allow consular representation in the Xue Feng case and part of the Stern Hu case was particularly questionable. In both the Xue Feng case and the Charlotte Chou case, it seems clear that the defendants were detained for periods well in excess of the periods permitted by law, despite the frequent protests of their governments.

Third these cases have received widespread publicity, at least in the home jurisdictions of the persons tried and convicted. The reporting of each case has the effect of subjecting the Chinese criminal system to international scrutiny and the conclusions have not been favorable. The

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154 Id.

Economist commented that “[l]ocal employees of multinationals are likely to draw the chilling conclusion that unpleasant consequences will follow if ever they fall afoul of China’s interests.”  

The Washington Post described the Xue Feng case as a “case that underscored how the Chinese government will use the legal system to protect the business interests and competitive edge of its state-run firms.” In the Matthew Ng case, the emphasis is rather different, but equally critical: “Beijing should demonstrate its supposedly growing political maturity by intervening in this process, rather than allowing the bullying of local cadres to dissuade international investment and undermine its relationship with Australia. So far we have seen little more than a case of state-sponsored extortion.”

Another issue that comes out of the cases is the fact that all of the defendants in these and many other cases are ethnic Chinese, generally foreign nationals who were born in China. There are a variety of possible reasons for this. Ethnic Chinese speak Chinese, understand Chinese business culture and are often better able to make contacts to acquire information. The need to maintain the relationships that support their businesses may mean that ethnic Chinese are more subject to requests for bribes or to pressure to engage in questionable activities. It is also possible that Chinese government agencies feel free to target ethnic Chinese because they regard them as Chinese, and because they believe that the relevant foreign governments are not concerned about the fate of ethnic Chinese in China.

The Chinese press also appears to have drawn a range of lessons from the Stern Hu trial. Some commentators have concluded that China’s laws on bribery relating to multinationals are insufficient. Others support the official line that the cases are purely a matter for the Chinese justice system and criticise the approach of the Australian government, while a third group takes a more critical approach by discussing the


159 Jake Stratton, see infra note 27.


161 See infra note 111.
Chinese court system and commenting on the mismanagement of the Chinese steel industry.\textsuperscript{162}

Western commentators have also used the cases as a basis for criticising both the Australian and the United States governments for their approach to China. Bernstein takes the Xue Feng case as evidence that the United States’ “quiet diplomacy” in dealing with China is ineffective.\textsuperscript{163} Greg Sheridan, a conservative Australian commentator, takes the view that “the contempt with which Beijing is treating the Rudd government is evident in the continued process of the Stern Hu trial . . . . Every serious observer knows that there is no integrity in the Chinese legal system and that the charges against Hu are entirely politically driven.”\textsuperscript{164} Jerome Cohen, perhaps a more thoughtful observer of the Chinese legal system, comments that “[t]he prosecution of naturalized American citizen Xue Feng, which concluded on February 18, is a vivid reminder that China’s abuses of criminal justice can reach even those who steer clear of politics and human rights.”\textsuperscript{165} Ann Kent takes the view that the Stern Hu case, among other things, represents an attempt by the Chinese government to punish Rio Tinto and issue a warning about corruption not just to foreign companies but to the Chinese domestic steel industry.\textsuperscript{166}

The assumption underlying all of these comments is that a variety of political and business-related factors drive both the decision to prosecute a foreign national in China and the result of the case.

CONCLUSION

As noted above, these cases do not represent an indicative sampling of the Chinese justice system. China has a right, and indeed a responsibility, to prosecute crimes that take place in China, whether committed by Chinese nationals or by foreigners. Indeed, it can be argued that China has been quite reticent in prosecuting foreign companies that


bribe Chinese officials. It generally satisfies itself with prosecuting the Chinese officials and allows the United States and other countries to pursue the persons paying the bribes. It should also be acknowledged that China has made significant progress both in developing and improving its criminal law and criminal procedure law and in establishing and staffing an extensive system of courts in China. The fact that the court in the Ng case was finally opened to the public and that Ng and Chou have both had access to a prominent Chinese lawyer with an acknowledged ability to conduct a spirited defence are also promising developments.

However, as these cases involved foreign nationals and two quite significant companies, it could be expected that the cases would attract significant publicity. It is therefore of concern that the Australian and United States governments were not able to obtain access to the trials in the Stern Hu and Xue Feng cases. Combined with the major procedural issues in the trials despite international publicity, particularly the alleged mistreatment of Xue Feng, indicate either that the Chinese government is indifferent to the international impact of these cases, or that the central government is not able or is not willing to stop government agencies or state-owned enterprises from using the courts for their own political or business purposes. They also suggest that the higher level courts, procuratorates, and public security agencies are similarly unwilling or unable to ensure that the requirements of the Criminal Procedure Law are followed at the lower level.

For foreigners attempting to operate in the Chinese system, the message is mixed. None of these cases provides any useful guidance (other than the need to exercise extreme care) on how a foreign business can ensure that it avoids the application of the criminal law when it is offered or seeks to obtain the business information that is necessary to operate in the opaque Chinese business world. The Ng case gives the unhelpful message that the Party and well-connected local companies can utilize a variety of means, including the court system, to win business disputes. The cases suggest that Chinese citizens and foreign citizens of Chinese ethnic origin may be at risk in China, but since the ability to speak Chinese and understand the Chinese business environment is an important job qualification, this is hardly helpful. Perhaps a more significant message is that a side effect of the creation of a formalised court system is the use of the courts by the powerful and well connected as an extra weapon in a business dispute.

Regrettably, the circumstances surrounding these cases confirm the view that despite the tremendous advances that have been made in

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constructing a legislative system, improving the police and the judicial bodies and raising the calibre of judges and procurators, the Party and government as a whole are not fully committed to the implementation of a legal and judicial system that operates in accordance with the laws and rules that were approved by the Party and promulgated by the government. The cases represent a lost opportunity for the Chinese government to showcase the socialist legal system. The Chinese system of justice and the many talented and highly qualified people who work in it also suffer from the unfavourable publicity that the cases attract. As Chen Youxi remarked in his closing statement in the Ng trial:

If you lose, you admit it. If you don't want others to buy more shares of the company, then you offer a higher price. But why arrest people? You are severely damaging the image of China in front of the world, violating China's commitments at the World Trade Organisation, as well as Chinese and international law. \[168\]