

Remarks of General Counsel Kelly R. Welsh

Beijing American Center, Beijing, China

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[Introduction by Steve Kwok, Legal Attaché, U.S. Department of Justice]

Thanks, Steve, for that kind introduction. And thank you to the Beijing American Center for hosting me here today. This is a wonderful venue, and I'm pleased to be here.

I am in China this week to speak to the public, academics, legal professionals, the media, Chinese government officials, and U.S. businesses about how the United States and China can work together to promote commercial rule of law.

This is an important time to be in Beijing talking about the rule of law. The Fourth Plenum recently concluded, setting forth China's plans for legal reform.

Many of the themes and principles set forth in the Fourth Plenum are the same as those that the United States emphasizes in our commercial rule of law engagement with China and with countries around the world. We therefore see this is an important moment to enhance our engagement with China on legal reform and build on our joint desire to enhance rule of law.

President Obama has repeatedly emphasized the importance of rule of law both in the United States and internationally. Likewise, Secretary of Commerce Penny Pritzker has consistently said that a strong commercial rule of law and a commitment to anti-corruption are fundamental to economic development and growth. Last May, while on an international trade mission, she said:

“...companies want to do business in countries that follow the rule of law, maintain ethical standards, abide by workplace safety, encourage workforce training, and protect intellectual property. These are the conditions that will increase trust and confidence among international and local business leaders and encourage further investment. At the same time, laws only operate on behalf of business and the people when they are enforced predictably and reliably. Businesses seeking to invest...must have the conditions to operate free from unnecessary regulation, government interference and corruption.”

And just last month, on anticorruption day, she said:

“Businesses considering investments abroad look for environments that are transparent and governed by the rule of law.”

As the General Counsel of the U.S. Department of Commerce, I help lead the U.S. Government's efforts to

promote the commercial rule of law not just in China, but globally.

When I talk about commercial rule of law, I mean creating a legal framework that helps businesses operate through transparent and clear rules that are administered in a predictable, fair, and non-corrupt way.

During my experience as a senior executive and general counsel for U.S. companies, I saw the link between a strong commercial rule of law and economic growth first hand. When deciding which countries to invest in, or to market our services in, the strength of a country's rule of law was always a critical factor in our company's decision-making.

Pervasive corruption or the lack of a commitment to commercial rule of law was a deterrent—and sometimes a disqualifier—for doing business in a country. This is something that the boards of directors of global companies based in the United States talk about on a consistent basis.

The United States has had a long commitment to promoting the rule of law throughout the world, including in China.

When U.S. and Chinese leaders met in China in 1972, the United States and China expressed hope for improved relations including through the facilitation of

trade on the basis of “equality and mutual benefit”. In 1979, the two countries established diplomatic relations and in the same year signed an Agreement on Trade Relations. From the start, commerce and trade were at the heart of the U.S.-China relationship.

The Department of Commerce has been working with Chinese counterparts since the beginning of the relationship. In 1979, the U.S. Patent and Trademark Office, which is part of the Department of Commerce, hosted its first Chinese delegation, which wanted to learn about the U.S. patent system. At that time, China was formulating its first laws governing intellectual property.

Last year, we celebrated the 35th year of that intellectual property cooperation, which continues now through our Cooperative Framework Agreement, in which we have pledged to support outreach and capacity building on intellectual property matters. As part of that Agreement, we regularly host study tours and other Chinese delegations at our Patent and Trademark Office.

In 1983, the U.S.-China Joint Commission on Commerce and Trade was established as a forum for high-level consideration of bilateral trade and investment issues and to promote commercial relations. The 25th meeting of this Commission took place last month in my hometown of Chicago, hosted by Secretary Pritzker and

U.S. Trade Representative Froman, who met with – among others – Vice Premier Wang Yang, China’s International Trade Representative and Vice Minister of Commerce Zhong Shan, and Deputy Secretary General of the State Council Bi Jinquan. U.S. and Chinese business leaders also attended.

Recognizing the importance of commercial law to our economic relations, back in 1983 the JCCT leaders decided to initiate a series of exchanges to foster mutual understanding of the legal systems governing trade and investment in both countries.

Those exchanges continue today as the U.S.-China Legal Exchange, which is part of the reason I am in China this week. This year is the 19th Legal Exchange. Both here in Beijing at Tsinghua University and then in Wuhan, I will lead a U.S. delegation made up of senior officials from the U.S. Environmental Protection Agency, the U.S. National Institute of Standards and Technology and the Federal Trade Commission. They will share U.S. experiences regulating air pollution and promoting commercial data protection with a public audience to enhance understanding in China of the U.S. commercial legal system and to promote bilateral understanding and trade. Next year, Chinese experts will come to the United States to share their expertise with a U.S. audience.

Commerce and trade are at the core of U.S.-China relations, and in turn commercial law has always been central to the U.S.-China commercial relationship. The U.S.-China commercial relationship is not just important to our two countries – it is important to the world. As Secretary Pritzker stated at last month’s Joint Commission on Commerce and Trade meeting,

“The success of the U.S.-China commercial relationship is critical to global economic growth and stability. Our two markets are the largest on the planet – we account for nearly 35 percent of global GDP. And combined U.S. and China trade in goods and services add up to about one-fifth of all international trade.”

The commercial law engagement between Chinese officials and the Department of Commerce continues both through public outreach—the U.S.-China Legal Exchange—and direct government-to-government dialogues on issues like transparency, accountability, administrative law, and bribery of foreign government officials. These dialogues are with officials from China’s Ministry of Commerce and the State Council Legislative Affairs Office, as well as officials at the Ministry of Supervision and other agencies.

But of course, not all engagement comes through governments. Our academic communities are engaged in

hundreds of robust exchanges designed to support commerce and rule of law. U.S. law students are studying here and Chinese students are studying in U.S. schools. Major U.S. law schools, like Harvard, Yale, Columbia, and University of Michigan, have programs focused on Chinese law. Peking University opened a School of Transnational Law in 2008 with a curriculum modeled on a U.S. law degree program.

But most fundamentally, the efforts to develop a commercial rule of law are driven by the amount of commercial activity between our two countries. Businesses are doing what businesses do—importing and exporting goods, investing in new projects, seeking administrative approval for new activities and initiatives—all of which drives the need for predictable, transparent, and non-discriminatory laws and regulations, and a strong commitment to the rule of law.

The commercial rule of law work of the Department of Commerce is not confined to China: we seek to promote commercial rule of law in the United States and around the world. In the United States, we continue to build our rule of law by finding new ways to make our system more predictable, more transparent, and more fair. We see this progress as key to keeping our economy growing and maintaining public confidence in our government.

Personally, I oversee a division of the Office of the General Counsel that provides technical assistance focused on commercial law development around the world. That division, the Commercial Law Development Program (CLDP), has worked with more than 50 countries around the globe.

CLDP's work helps all businesses that operate internationally, since all international businesses benefit from markets that have transparent legal systems and fair regulations. CLDP also serves as a resource to help countries modernize their laws and regulations to provide the foundation for a commercial law environment that will lead to economic growth and opportunity for their people. CLDP is in the Department of Commerce because we see a strong link between strengthening the commercial rule of law and expanding global commerce: fair and predictable commercial laws attract trade and investment.

In October, China's leadership issued its Fourth Plenum Decision, which addressed directly the question about how to move legal reform forward in China. Last year's Plenum was the first to focus exclusively on legal reform, and shows the centrality of legal reform to China's reform agenda.

I see this moment as an opportunity to enhance the United States-China engagement and make progress in

achieving our shared goal of enhancing government accountability and commercial rule of law.

Several themes from the Fourth Plenum Decision are particularly noteworthy in that they are also elements of our commercial law engagement with China.

The Fourth Plenum calls for equality in the face of the law. In our commercial engagement with China, both countries insist that their companies, and their goods and services, not be discriminated against, and that they be treated equally before the law. When China joined the World Trade Organization, this became a bedrock principle of our economic relationship, and it continues to be the foundation of our economic engagement.

Rule of law in China could be strengthened by a continued focus on treating all companies, whether they are foreign or domestic, state-owned or privately held, in the same manner, both in laws and regulations and in their application.

The Fourth Plenum calls for open solicitation of opinions on draft laws, regulations, and rules. Under the Transparency Dialogue, we have been engaging with Chinese officials about how our countries provide an opportunity for public comments on draft laws and regulations, as well as how we can increase use of electronic means for obtaining public input.

Commercial rule of law could be strengthened by requiring the publication of all laws, administrative regulations, departmental rules, and normative documents in draft in a single location before they are promulgated, and by allowing for a time period—say 30 days—for the public to comment on these drafts. China is currently revising its Law on Legislation, creating an opportunity for China to enhance regulatory and legislative transparency. Mandatory transparency rules in these revisions could make a real difference to the business environment in China, particularly if the revisions reach all measures impacting businesses and provide an adequate opportunity for public comment. Such requirements would enhance predictability and transparency, two key elements of an effective commercial rule of law.

The Fourth Plenum calls for acceleration of China's work against corruption. In many venues, both bilateral and multilateral, we work with our Chinese counterparts to fight international corruption. I have been active in our engagement with China on the serious issue of bribery in international business transactions – bribery of foreign government officials. Corruption hampers business and throttles economic growth. As the world's two largest trading economies, China and the United States should be leaders in policing our own companies as they do business abroad.

Commercial rule of law would be strengthened if China moved forward on its enforcement of its foreign bribery law. In 2011, China took a key step, enacting legislation that criminalizes paying bribes to foreign government officials. The United States enacted our own law banning such bribery in 1977, and we have been working since then to encourage other countries to adopt their own laws outlawing such bribery. Given China's major and growing role in international commerce, enacting the new legislation was an extremely positive step.

Indeed, once China begins to prosecute Chinese companies and executives who bribe foreign officials outside of China, something China has not yet done, all companies will take notice. Enforcement of China's new law would send a strong message that China is assuming a position of global leadership consistent with both its commitment to rule of law and its stature as the second largest economy in the world. Such a message would also encourage companies to take steps on their own to prevent foreign bribery.

The United States and China are already engaged, both bilaterally and multilaterally, in the Asia-Pacific Economic Cooperation forum and other forums, in the effort to fight corruption. In fact, we worked together to develop guidance for APEC companies on corporate

compliance programs, which was recently endorsed by APEC Leaders at the APEC Summit here in November. But these efforts should be deepened and extended to other venues, including, for example, through full participation by China in the OECD Working Group on Bribery.

The Fourth Plenum calls for the development of China's legal services industry, including developing the foreign-oriented legal services sector. In the JCCT last month, we agreed to enhance our cooperation on China's opening up of its legal services market, reform that we believe will help both U.S. firms doing business in China and Chinese lawyers seeking to learn about international legal practice.

Rule of law would be strengthened if we were able to increase our engagement on legal services, to ensure both that China's legal services market is providing the high quality legal services that Chinese businesses need and so that global law firms have an opportunity to help provide those services, for example, by allowing global law firms doing business in China to hire Chinese-licensed lawyers.

Rule of law also would be enhanced by allowing foreign lawyers to attend administrative proceedings, not in order to practice Chinese law, but to advise on

international law and practice and provide information on the impact of the Chinese legal environment.

The Fourth Plenum calls for fair competition, and for fairness in the administration of China's law. At last month's Joint Commission on Commerce and Trade session, U.S. and Chinese leaders discussed in depth fairness in the administration of competition law, and we reached agreement on several steps to improve implementation of China's Anti-Monopoly Law to ensure that all companies, both Chinese and U.S., are treated fairly.

Rule of law in China and the reputation of China's legal system in the world business community will be enhanced by implementation of these commitments, including:

- Treating all enterprises equally in competition law proceedings;
- Imposing enforcement measures only to address harm to competition, not to promote Chinese companies;
- Providing procedural fairness to all companies, including by providing the parties the right to state their case and to defend themselves;

- Providing transparency by making decisions public and providing the party with the facts, reasons, and evidence on which the decision is based;
- Allowing Chinese practicing lawyers to attend and participate in meetings with any of the three antimonopoly law enforcement agencies;
- Allowing, as normal practice, representatives of foreign law firms established in China to attend such meetings and advise on international law and practice and provide information on the impact of the Chinese legal environment, and foreign legal counsel practicing in other legal jurisdictions to attend such meetings and provide information on the subject transaction or conduct, and information on the laws or international practices of the legal jurisdiction where they practice.

The Fourth Plenum calls for creation of an intellectual property system that encourages innovation. The Commerce Department includes the U.S. Patent and Trademark Office, reflecting the crucial relationship between commerce and intellectual property in the U.S. and in the global commercial economy.

China is now undertaking experiments in specialized intellectual property courts that can have important implications for legal reform more generally. Rule of law would be strengthened if these courts provide a fair,

transparent forum for companies to resolve intellectual property rights disputes. We hope to continue our long history of intellectual property cooperation, consistent with our joint desire to create innovative societies.

The Fourth Plenum called for strengthening China's administrative legal system, making it more effective and responsive to the needs of the people.

The United States and China have worked together on administrative licensing and administrative law reform to ensure that U.S. and Chinese companies have the benefit of a fair and transparent administrative process. China is working hard to reform its administrative law and administrative licensing system, including revising its administrative litigation law, a massive and important undertaking.

The rule of law would be strengthened by continuing to expand the use of administrative litigation as a means to hold government agencies accountable for their decisions, and in our experience, such litigation is a key way to ensure that government decisions are predictable and transparent and ultimately more effective.

We see enhanced commercial legal cooperation, in which both countries learn from the other's experience, as an important way that we can move forward on the reforms called for in the Fourth Plenum.

I think the size of this audience testifies to the importance of the U.S.-China dialogue, and the desire and commitment of the people of both our countries to a strong rule of law.

I hope my remarks today are the beginning of a dialogue about how we can enhance our engagement, and make both our societies places where commercial dealings are governed by clear, fair, and predictable rules that will promote business investment and economic growth and benefit the peoples of both our countries.

Thank you for listening.