



## **Introduction to the TianTong Law Firm – Cleary Gottlieb China Initiative**

This is the second client briefing in a series to be prepared by leading Chinese law firm TianTong Law Firm and international law firm Cleary Gottlieb Steen & Hamilton LLP following developments relevant to Chinese companies doing business in the United States and U.S. companies working in China. The initiative aims to comprehensively follow developments with perspectives from leading lawyers in the U.S. and China, providing timely and integrated advice to our respective clients. Cleary Gottlieb litigators based in New York and Washington have partnered with TianTong lawyers based in Beijing in this joint initiative.

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### **Representing Individuals in Cross-Border Disputes: The Huawei Case Study**

*Canada's Extradition Act may require Canada to turn over Meng Wanzhou, Huawei's CFO, to U.S. authorities who have charged her with bank and wire fraud.*

Political tensions between the United States and China have brought Chinese companies and even the executives of those companies increasingly into the focus of U.S. authorities. Since U.S. President Donald Trump imposed tariffs on China in 2018 for allegedly unfair trade practices, the two countries have been engaged in intensive trade talks. While those discussions are ongoing, some believe that the U.S.'s attempt to extradite Meng from Canada so that she may stand trial in the U.S. may be rooted in broader political concerns, particularly in light of comments by Trump linking Meng's charges and the trade discussions. Below, we discuss the mechanisms that the U.S. legal authorities may employ to reach individuals outside the U.S.

### **Background**

Huawei Technologies, China's telecom giant, has been charged by the U.S. Department of Justice (DOJ) with violating sanctions against Iran and committing bank and wire fraud. Its Chief Financial Officer, Meng Wanzhou, is now caught in the crossfire. On December 1, 2018, while en-route from Hong Kong to Mexico, Meng was stopped in Canada by border agents at Vancouver International Airport and subsequently arrested at the request of the U.S., pursuant to an extradition treaty between the two countries.

The U.S. DOJ has alleged that Huawei operated another company, Skycom, as its unofficial subsidiary to conduct business with Iran while concealing its alleged link to Skycom and Iran from the U.S. government and various financial institutions. With respect to Meng, the U.S. DOJ alleged that she conspired to commit bank and wire fraud on various financial institutions (including HSBC) by purportedly misrepresenting Huawei's ties to Skycom and whether Huawei's business dealings in Iran complied with United Nations, U.S., and European Union ("E.U.") regulations and sanctions against Iran.

Following her December 1, 2018 arrest, Meng was released on a \$10 million bail and is currently under house arrest in Vancouver. On January 28, 2019, the U.S. DOJ formally requested that Canada extradite Meng to the U.S., and the Canada DOJ issued an "Authority to Proceed" on March 1, 2019 which formally commenced the extradition process in Meng's case. In order to move forward with the extradition, the

Canadian prosecutor must show that the conditions of “double criminality” are met, meaning that the crimes for which Meng is accused in the U.S. would have independently been crimes in Canada. The parties presented their respective arguments before Canadian Justice Heather Holmes. Justice Holmes has not yet ruled whether the extradition can proceed, but the ruling may come before the next hearing in April 2020.

The Huawei case raises several important considerations for corporate executives that have been charged with crimes outside their home country. Namely, how can a Chinese national be detained in Canada for purportedly violating U.S. law, and what are the precautions that executives can take when travelling after an arrest warrant has been issued?

## **The Extradition Process**

**Overview of Extradition.** An extradition treaty between or among states allows one state to seek the extradition, or the deportation, of an individual accused or convicted of a crime, from another state. While the terms of these treaties will vary, extradition treaties typically require dual criminality to be present, meaning that the alleged conduct in question must be recognized as criminal in both the state holding the sought individual and the state seeking extradition.

The U.S. has extradition treaties with over 100 countries.<sup>1</sup> It is also party to two multilateral extradition agreements, including one with the E.U. which came into force in 2010 and is implemented via bilateral treaties with each E.U. member state.

### **Countries With Extradition Treaties With the United States**

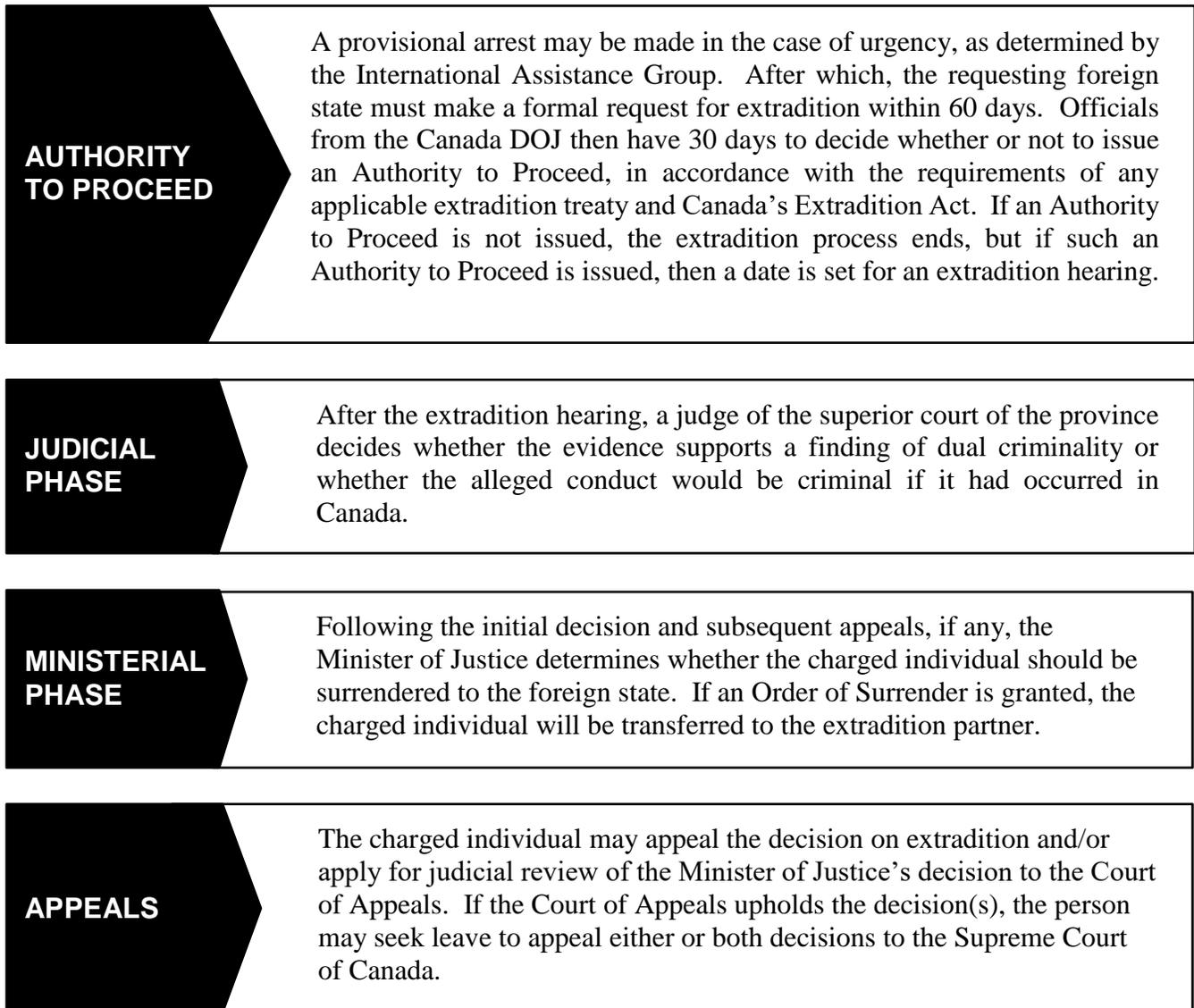


Due to variations in reporting protocol and political sensitivities, accurate extradition data is not readily available. However, it is estimated that the U.S. extradites between 350 and 600 individuals annually.

<sup>1</sup> <https://www.state.gov/wp-content/uploads/2019/06/2019-TIF-Bilaterals-6.13.2019-web-version.pdf>.

Between 2008 and 2018, Canada received 798 extradition requests from the U.S. and surrendered 552 of those individuals.<sup>2</sup>

**The Extradition Process.** As mentioned above, the legal proceedings against Meng implicate Canada’s extradition process, which is further described below. While each state has its own unique extradition process, Canada’s process provides helpful insight into what an individual at risk of extradition may expect. Extradition cases may take months or even years depending on the particular circumstances of each case and the number of issues to be determined during the judicial phase or on appeal. The average length of an extradition involving the U.S. takes a year from request to surrender.



**Judicial Phase of Meng’s Case.** Currently, Meng is in the judicial phase of the extradition proceedings. In January 2020, her counsel argued that the extradition process should cease and Meng should be released, because the crimes alleged by the U.S. DOJ that involve violations of the U.S.’s sanctions against Iran, would not be considered crimes in Canada, which does not impose such sanctions on Iran. As such,

<sup>2</sup> <https://www.justice.gc.ca/eng/cj-jp/empla-eej/stat.html>.

the elements of dual criminality cannot be met based on the U.S.'s charges. Canada's attorney general, however, argued that the more general allegations of fraudulent conduct would constitute fraud in Canada, and thus, the extradition should proceed. To date, the parties are still awaiting the judge's decision on the matter of dual criminality.

## **Key Takeaways**

With the increasing globalization of major corporations and the expanding reach of sovereign governments abroad, it is important to understand the implications of cross-border treaties and to take the necessary precautions when travelling internationally. In the case of Huawei, a number of lessons emerge:

- **Understand legal liability in foreign jurisdictions.** As discussed above, certain countries have friendly extradition agreements with foreign states. Individuals should consult with local counsel in those jurisdictions where they plan to travel and should consider avoiding travelling to countries with favorable extradition treaties with a foreign state that has either issued criminal charges or an arrest warrant against them.
- **Engage local counsel.** It is important to engage local counsel in each of the jurisdictions in which charged individuals plan to travel to ensure that they have representation in such jurisdictions if necessary. If the charged individual suspects or realizes that they will be detained by border agents for questioning, the individual should try to immediately text or call their attorney. The charged individual should also make clear to the border agents that they wish to contact their attorney and that they would like their attorney present for questioning.
- **Reach out to Interpol.** After charges are issued by a foreign state, the charged individual should submit letters to Interpol to confirm whether or not that state (or anyone else) has requested that Interpol issue a red notice. A red notice is issued by Interpol for fugitives wanted for prosecution or to serve a sentence. Once issued, the red notice will alert police in Interpol's member countries<sup>3</sup> about internationally wanted fugitives and could potentially be used to support extradition proceedings. To mitigate the risk associated with red notices, the charged individuals can request that Interpol notify them if such a request is made and afford the individual an opportunity to contest the red notice.
- **Electronics and media.** It is important to be mindful of local customs and border protection policies relating to electronic devices. For example, the U.S. Customs and Border Protection policy permits U.S. customs agents to review any information that physically resides on any traveller's electronic devices if there is reasonable suspicion that the device contains evidence of illegal activity. If national security concerns are at issue, then border agents may conduct such a search even without reasonable suspicion. U.S. customs agents may also demand disclosure of social media and email account passwords or seize the devices pending an inspection. A non-U.S. citizen or green card holder's refusal to comply with these demands could result in detention for questioning or denial of entry into the U.S. Prior to landing in a foreign country, travellers should consider disabling face and fingerprint I.D. on their electronic devices and logging out of email, messaging applications, social media, and other accounts to limit access to personal data. Travellers should also consider using encryption services, turning off their devices, and most

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<sup>3</sup> <https://www.interpol.int/Who-we-are/Member-countries>.

conservatively, travelling with burner phones or laptops. If your device is seized, then you should obtain a receipt for your property.

- **Be prepared if detained.** A non-U.S. citizen who is detained for questioning when entering the U.S. has the right to remain silent and request to speak with their consulate. However, non-U.S. citizens do not have a right to enter the U.S., and therefore refusal to cooperate with questioning or to provide access to electronic devices may result in delayed entry or denial of entry altogether. If a foreign citizen who is entering the U.S. believes they have been detained for too long, or are informed by a customs officer or border agent that they are under arrest, then they should immediately request to speak with their consulate or lawyer.

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## TianTong Commentaries

### **Risk Prevention Measures for Chinese Corporate Executives**

An increasing number of executives of Chinese state-owned and large private companies are concerned about the risks involved in overseas travelling. If Chinese corporate executives are entangled in a dilemma similar to that encountered by Ms. Wanzhou Meng, what precautionary measures could they take to manage and mitigate such risks? We propose the measures as follows.

**First, Chinese corporate executives should consider avoiding travel to the “Five Eyes (FVEY)” states.** The “Five Eyes (FVEY)” is an intelligence alliance formed under the multilateral UKUSA Agreement, a treaty for joint cooperation in signals intelligence. Members of the “Five Eyes (FVEY)” include Australia, Canada, New Zealand, the United Kingdom and the U.S. In the instant case, it is Canada that detained Ms. Wanzhou Meng. The five states are generally considered to have close alliances which involve active sharing of information and intelligence with each other. Consequently, some large Chinese state-owned companies have issued internal policies advising their executives against travelling to these states.

**Second, Chinese companies should establish an “internal information sharing mechanism” to record information on sensitive overseas transactions and the executives involved therein.** Large state-owned and private corporate groups usually have many subsidiaries, and the parent companies may not be able to fully grasp the extent of their subsidiaries’ overseas transactions and the legal risks associated with them. Competent large companies should establish and refine an “internal information sharing mechanism for overseas transactions” at the parent company level and require their subsidiaries at all levels to record information on overseas transactions, as well as the executives involved in them, in the parent company’s database. Having such a database will make it more convenient for the parent company to analyze and evaluate the legal risks involved in overseas transactions in relation to the overseas travels of corporate executives. Corporate executives engaging in potentially sensitive overseas transactions should then be advised against traveling overseas. Other personnel who must travel overseas should check whether the electronic devices (e.g. laptop, mobile phone, iPad, USB drive) and hardcopy documents they carry contain relevant sensitive information.

**Third, Chinese corporate executives may fall back on Chinese consular protection.** The Guide for Chinese Consular Protection and Assistance (2018)<sup>4</sup> provides the following tips:

Circumstances	Recommended Actions
<p>When encountering law enforcement actions by local police and related enforcement agencies during overseas travels...</p>	<ul style="list-style-type: none"> <li>• Keep calm and cooperate with the law enforcement agents to avoid disputes or extreme actions that may cause misunderstandings.</li> <li>• Know that you have the right to ask the law enforcement agents to produce their credentials, to refuse to sign documents that you do not understand, and to contact a lawyer and protect your legitimate rights and interests through legal means.</li> <li>• If the law enforcement agents have violated laws and regulations during the law enforcement process, you may voice your objection depending on the situation (however, direct confrontations should be avoided). If your objection is ignored, please preserve the relevant evidence carefully so that you may file a complaint with the competent local authorities later.</li> </ul>
<p>When encountering violent law enforcement actions or having your passport seized by local police, customs or immigration officers...</p>	<ul style="list-style-type: none"> <li>• You may ask the law enforcement agents to produce their credentials and relevant legal documents; you should also note down the agents' names, ID numbers, and the names and numbers of the legal documents presented; carefully collect and preserve the evidence indicating the agents' violations of laws and regulations so that you may file a complaint with the competent authorities later.</li> <li>• You may also contact the local Chinese embassy or consulate to provide relevant evidence. The embassy or consulate will verify the information and express their concerns to relevant local departments accordingly.</li> </ul>
<p>When detained by local authorities abroad or when your personal freedom is restrained...</p>	<ul style="list-style-type: none"> <li>• Know that you have the right to know the reasons for your detainment, to receive treatment no less than that of local citizens, and to ask the local law enforcement agencies to provide a lawyer or</li> </ul>

<sup>4</sup> <http://cs.mfa.gov.cn/lsbhzn/P020181207363467982595.pdf>.

	<p>contact your own lawyer, and to contact the local Chinese embassy or consulate.</p> <ul style="list-style-type: none"> <li>• The embassy or consulate will contact and urge the law enforcement agencies to handle cases according to the law, protect the legitimate rights and interests of Chinese executives, and report the progress of the case in a timely manner. The embassy or consulate may also request the arrangement of a consular meeting between the person detained and an officer of the embassy or consulate, help the detainees contact their relatives in China, and provide a list of available lawyers. However, the embassy or consulate cannot interfere with the local legal procedures, nor can it ask the law enforcement department to give more lenient punishments for illegal acts of such detainees or litigate on behalf of them. The detainees will need to pay the expenses incurred for hiring lawyers on their own.</li> </ul>
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**Fourth, Chinese companies should prepare a list of available lawyers in advance.** If corporate executives of Chinese companies encounter a situation like that of Ms. Wanzhou Meng, they should immediately engage local counsel to protect their legitimate rights and interests and take part in subsequent litigation on their behalf. In order to ensure that their corporate executives can immediately obtain representation when faced with overseas litigation, Chinese companies should prepare in advance a list of available lawyers. Companies may consider the following approaches:

- 1) The general counsel and the legal department of Chinese companies can directly engage trustworthy Chinese lawyers or law firms to contact foreign lawyers on their behalf;
- 2) The legal department of Chinese companies may choose on their own or through the Chinese firms or lawyers they have designated the local law firms or lawyers in jurisdictions where the companies’ executives travel the most often;
- 3) Taking the U.S. as an example, Chinese companies may choose large law firms which have branches across the U.S., or competent lawyers with extensive experience in dealing with U.S. government enforcement and criminal indictments (as many U.S. lawyers specializing in criminal defense do not necessarily work at large law firms).

Executives of Chinese companies should obtain such a list of available lawyers and their contact information from the legal department of their companies before traveling overseas. If they encounter an unexpected detainment abroad, they may contact the lawyers on the list.

### **Potential Commercial Disputes Faced by Chinese Companies**

As discussed above, the U.S. Department of Justice (“DOJ”) not only charged Ms. Wanzhou Meng, but also charged Huawei with bank and wire fraud and violations of U.S. sanctions against Iran. Not only

does Huawei need to cope with U.S. government investigations and criminal charges, it may also encounter a series of cross-border commercial disputes, leading to disruptions in its global supply chain. Huawei's experience has sounded a wake-up call for Chinese companies that happen to be competitors of U.S. companies. Following U.S. government enforcement and criminal charges, Chinese companies may face the following three types of cross-border commercial disputes.

## 1. U.S. Civil Litigation

The DOJ has frequently filed criminal charges against Chinese companies for stealing intellectual property from U.S. companies. With such criminal charges filed, U.S. companies may also bring private lawsuits based on IP infringement against Chinese companies to protect their own rights. This type of lawsuit is often subject to the jurisdiction of U.S. courts, governed by U.S. law, and is perceived as civil litigation. This means that Chinese companies will encounter "parallel proceedings" – on the one hand, they face criminal charges by the DOJ, and on the other hand, they must deal with such civil litigation.

In these "parallel proceedings," U.S. companies may obtain evidence available to the public at large from the criminal cases to support their civil cases. In addition, if in these civil cases, the involved executives from Chinese companies invoked their privilege against self-incrimination under the Fifth Amendment to the U.S. Constitution to refuse answering questions in deposition, such refusal may be interpreted by a U.S. judge or the jury as these executives deliberately concealing significant facts, thereby drawing adverse inferences against them or even against the Chinese company for which they work.

## 2. International Commercial Arbitration

Once the charges filed by the DOJ against a Chinese company are disclosed, there may be effects on the performance of commercial contracts signed by the company with U.S. companies (or other foreign companies), subsequently triggering international commercial arbitrations.

**Scenario 1:** Suppose the DOJ has filed criminal charges against a Chinese company, and the accused Chinese company had signed a purchase agreement with a U.S. supplier concerning key equipment. After major media reported that the Chinese company was criminally charged, the supplier sent a letter to the Chinese company to terminate the equipment purchase agreement. Failing negotiations, the Chinese company submitted the dispute to an international arbitral institution (e.g. the Arbitration Court of the International Chamber of Commerce, Singapore International Arbitration Centre, etc.) pursuant to the arbitration clause in the purchase agreement.

In this kind of case, the Chinese company, as the claimant, may claim that the U.S. supplier's wrongful termination of the contract constitutes a material breach of the contract and claim losses covering damages, lost interest, and arbitration costs. The U.S. supplier, as the respondent, may contend that given the wide range of criminal charges faced by the Chinese company, continuous performance of the contract may result in legal liabilities against itself and its executives under U.S. law. As such, the U.S. supplier's inability to continue performing the contract as constrained by U.S. law could arguably constitute a "*force majeure*" event, and thus its termination of the contract does not constitute a contractual breach.

**Scenario 2:** Suppose that in an international sale of goods contract, a Chinese company (as the seller) made an express indemnity to the U.S. company (as the buyer) that the goods provided by the seller would not lead to the detainment of the goods or the buyer being sued by a third party due to intellectual property issues; otherwise, the seller promised to compensate all losses incurred by the buyer (including but not limited to legal costs of the U.S. buyer participating in relevant lawsuits and compensation claimed by the third party).

In this case, the U.S. company may commence an international commercial arbitration against the Chinese company pursuant to the arbitration clause in the contract.

### **3. Cross-Border Litigation Involving Demand Guarantees**

When signing an international sale of goods contract, the buyer usually pays the seller an advance, and the seller in turn applies to a bank it usually works with for issuing a demand guarantee which designates the buyer as the beneficiary. Once a dispute in connection with the contract arises, the buyer may ask the seller to return the advance payment. If the seller refuses to return the advance payment, the buyer may ask the bank to pay the amount under the demand guarantee.

When a Chinese company is subject to criminal charges by the DOJ, commercial disputes between Chinese companies and foreign companies arising from international sales contracts might be triggered (international commercial arbitration is usually used as the dispute resolution method). Meanwhile, disputes involving demand guarantees may also be triggered and are usually resolved through litigation.

In Scenario 1, when the U.S. company refuses to continue performing the purchase agreement to supply the equipment to a Chinese company, the Chinese company may issue a “Guarantee Claim” to the issuing bank. Assuming the bank is located in Paris, France, the U.S. company may then apply for a temporary restraining order (“TRO”) from the Paris Commercial Court, pursuant to the choice of court clause set forth in the guarantee.

After a TRO is issued by the court, the Chinese company, the U.S. company and the issuing bank would all be involved in the lawsuit before the Paris court. If the Chinese company can convince the Paris court to lift the TRO, the bank will have to pay the Chinese company the amount under the guarantee and interests accrued therefrom.

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This client briefing is the result of a collaboration between TianTong Law Firm (<http://www.tiantonglaw.com>) and Cleary Gottlieb Steen & Hamilton LLP ([www.clearygottlieb.com](http://www.clearygottlieb.com)) to monitor and address legal developments that may be of interest to our clients in China, the United States and around the world.

Cleary Gottlieb is a leading international law firm with 16 offices in the U.S., Latin America, Europe and Asia. The firm is consistently ranked as one of the leading international firms for government investigations, white collar criminal defense, litigation, and a variety of related fields. The team includes nine former federal prosecutors, including two recent Acting U.S. Attorneys for the Southern District of New York; several former senior officials of the U.S. Securities and Exchange Commission, including its most recent Chief Litigation Counsel of the Enforcement Division; and several former senior officials from the Federal Trade Commission and the Department of Justice’s Antitrust Division, including its most recent Deputy Assistant Attorney General for Litigation and Assistant Chief of the International Section. Cleary Gottlieb is routinely instructed with respect to many of the highest-profile cross-border matters in the financial services, technology, anti-corruption, antitrust and competition, and related fields.

For more information, please contact:

TianTong Law Firm  
Yard 3 Nanwanzi, Nanheyan Avenue  
Dongcheng District, Beijing

CLEARY GOTTLIEB STEEN & HAMILTON LLP

100006, PRC  
+86 10 51669666  
[tchinainitiative.list@tiantonglaw.com](mailto:tchinainitiative.list@tiantonglaw.com)

One Liberty Plaza  
New York, New York 10006  
+1.212.225.2000

2112 Pennsylvania Avenue NW  
Washington, D.C. 20037  
+1.202.974.1752

[cgshchinainitiative@cgsh.com](mailto:cgshchinainitiative@cgsh.com)