Anti-monopoly laws that maintains the order of market competition are regarded as the constitution of market economy. In our global economy, where products or services are routinely provided around the world, controversies have been seen in the enforcement of anti-monopoly laws against anticompetitive conducts of foreign entities or individuals that affects competition of domestic market. In the beginning years of enforcement of the Chinese Anti-monopoly Law ("AML"), the AML was once considered an anti-foreign enterprise law since some high-profile anti-monopoly cases had targeted against foreign enterprises or foreign-invested enterprises, which leads to a false impression that the Chinese anti-monopoly agency (i.e. State Administration for Market Regulation, “SAMR”) tends to “selectively” enforce the AML. In fact, other major antitrust jurisdictions have a long history and tradition of enforcing the anti-monopoly laws against foreign companies and individuals who engage in anticompetitive conducts that have effects in the domestic market, which is usually understood as extraterritorial application of anti-monopoly laws. In light of the potential severe liabilities, it is critical that companies engaging in global business understand the extent to which foreign anti-monopoly laws can be applied to conduct that takes place outside that foreign country.

1. Definition of “Extraterritorial Application of Anti-monopoly Law”
Generally, the extraterritorial application of the anti-monopoly law means that anti-monopoly laws can apply to the monopolistic or anticompetitive conducts that takes place outside a sovereign state. Some have raised doubt to certain antitrust cases in which the enterprises in punishment have never set up any subsidiary or other business entity in a country, but their conducts are still regulated by such country’s anti-monopoly law. In such cases, the anti-monopoly law of that country has the effect of extraterritorial application and therefore the relevant regulatory authorities have the power to the anti-monopoly law to foreign entities.

The system of extraterritorial application of the anti-monopoly law was first established by the United States (the “U.S.”) in 1945, and then subsequently became a general trend of anti-monopoly law-making around the world. At present, more than 50 countries
and regions have established the system of extraterritorial application of the anti-monopoly law.

2. Restrictions of the Extraterritorial Application and International Rules

The extraterritorial reach of anti-monopoly law is limited. Extraterritorial application may cause conflict of laws of different jurisdictions, and may violate the principle of state sovereignty in international law due to interference in internal affairs of a country. At present, for the above reasons, the international community generally believes that the extraterritorial application of anti-monopoly law shall meet certain conditions, i.e., that the anticompetitive conduct outside the territory of a country shall “cause a significant, direct and reasonably foreseeable effect on such country.”

In the development of the rules of extraterritorial application of the anti-monopoly law, there have been several legal theories that support and explain extraterritorial application of anti-monopoly laws:

- **Implementation Doctrine:** supporters of this doctrine believe that the anticompetitive conduct can be divided as two stages of “consensus” and “implementation.” They hold the view that a country’s anti-monopoly law can be extraterritorially applied only if at least one of the above two stages of the anticompetitive conduct was carried out within the enforcing country.

- **Single Economic Entity Doctrine:** supporters of this doctrine tend to treat the subsidiary companies and parent companies in different countries as one legal entity. Once a subsidiary engages anti-competitive conduct at the direction of its parent company, then such conducts of the subsidiary shall be deemed as the parent company’s conduct, and the anti-monopoly agency of the country where the subsidiary locates can enforce the domestic antimonopoly law against the foreign parent company based on the doctrine of single economic entity.

- **Effect Doctrine:** initially, the Effect Doctrine means, regardless of the nationality of the perpetrator of the anti-competitive conduct and the place where the anticompetitive conduct took place, as long as the anti-competitive conduct has anti-competitive effect on the market of a country, then such country has jurisdiction over it. As the practice of such doctrine may lead to overextension of jurisdiction, the Reasonable Jurisdiction Doctrine was created to supplement and modify the Effect Doctrine. Under the Reasonable Jurisdiction Doctrine, a country’s regulatory agency can extraterritorially apply the anti-monopoly law to an anti-competitive conduct only if the conduct have significant, direct and reasonably foreseeable effect to the market of such country.
International Comity Doctrine: this doctrine is the basic doctrine of the choice-of-law, under which the interest of other sovereignty should be taken into account in the extraterritorial application of anti-monopoly law, especially when the relevant anti-competitive conduct is a sovereign act of a foreign country or a specific measure taken by a foreign country, then the domestic anti-monopoly law should not be applied.

The abovementioned doctrines are still in use in different jurisdictions’ anti-monopoly law enforcement. In China, Article 2 of the AML provides that “this Law shall apply to the monopolistic conducts in economic activities within the territory of the People's Republic of China; this Law shall apply to the monopolistic conducts outside the territory of the People's Republic of China that has the effect of eliminating or restricting competition on the domestic market of China.” This article shows that the extraterritorial application of Chinese Anti-monopoly Law is based on the Effect Doctrine, but it does not directly show the Reasonable Jurisdiction Doctrine.

3. Governable Matter of the Extraterritorial Application and International Rules

All conducts regulated by the anti-monopoly law, usually including concentration of undertakings, abuse of dominant market position and monopoly agreements, can be subject to the extraterritorial application of anti-monopoly law. For example, both the U.S. and the European Union (“EU”) have already issued judgments or administrative decisions based on extraterritorial application of the anti-monopoly law for the "export cartel" — a kind of horizontal monopoly agreements, such as in the “Chinese Vitamin C Price-Fixing Case.”

In 2001, some Chinese enterprises producing vitamin C held an industry meeting under the guidance of China Chamber of Commerce for Import and Export of Medicines and Health Products. The enterprises formed the Sub-chamber of Vitamin C Products, and announced the conclusion of a self-discipline agreement by them on the Sub-chamber’s official website. The substance of such self-discipline agreement was mainly about voluntary control of export quantity and progress to prevent other countries from anti-dumping investigations.

In 2005, Animal Science Products, Inc., an American animal feed production enterprise who is in the downstream industry of vitamin C, initiated a legal proceeding with other enterprises in the same industry. They accused CSPC Weisheng Pharmaceutical Co., Ltd., Northeast Pharmaceutical Group Co., Ltd, North China Pharmaceutical Co., Ltd and other Chinese enterprises of jointly controlling sales price and quantity of the vitamin C products exported to the U.S. and resulting in the downstream U.S. enterprises being forced to pay high price, which may violate the U.S. Sherman
Antitrust Act.

As the defendants of this case have no business entity in the U.S. and the monopoly agreement was reached and implemented in the territory of China, the U.S. court cannot hear this case and apply the U.S. anti-monopoly law on the basis of personal jurisdiction or territorial jurisdiction; however, the plaintiffs proved that the defendants’ export cartel conduct caused a significant, direct and reasonably foreseeable effect to the U.S. vitamin market, therefore the U.S. court can hear this case and apply the U.S. anti-monopoly law on the basis of the extraterritorial application of anti-monopoly law.

In the field of merger control, each jurisdiction stipulated the extraterritorial application system of the anti-monopoly law. In China, if the worldwide turnover of all the business operators involved in the concentration exceeds CNY 10 billion in the last accounting year, and the turnover in China of at least two business operators among them exceeds CNY 400 million separately in the last accounting year, then the concentration shall be filed to SAMR, no matter whether the business operators has commercial presence within the territory of China or not.

Many high-profile global deals have been notified to SAMR and the former Chinese anti-monopoly agency. It is worth mentioning the case “a potential establishment of a Network Center by Maersk, Mediterranean Shipping Company and CMA-CGM”. This case’s relevant markets are the international container liner shipping service market in Asia–Europe ship routes, transpacific ship routes and transatlantic ship routes. The relevant transaction was concluded outside China, and the transatlantic ship routes do not cover Chinese port; both Asia–Europe ship routes and transpacific ship routes cover main ports in China.

After the review, the agency held a view that the related undertakings will form a tight joint venture through this transaction, which will significantly strengthen their dominance in the relevant market by substantially increasing the degree of concentration in the relevant markets, strengthening the related undertakings’ bargain power to the ports. Mainly considering that the transaction may have the effect of eliminating or restricting competition to the Chinese ports in the involved industrial chain, the agency prohibited this foreign deal.

In the U.S., under the Hart–Scott–Rodino Antitrust Improvements Act, once the acquiring party or the being acquired party of a transaction is engaged in business or activities that can affect the business in the U.S., and the transaction reaches the turnover thresholds for premerger notification, then the transaction must be notified before closing. The EU Commission also stipulates rules to regulate transactions “with EU-wide influence” (which means each of at least two undertakings of such transaction have EU-wide turnover over the certain threshold).
Including Chinese enterprises, many foreign enterprises have filed notifications of concentration of undertakings to the U.S. or EU anti-monopoly law enforcement agencies because of the extraterritorial application of the anti-monopoly law, such as the case that acquiring McDonalds’ business in China by CITIC Capital Holdings Limited, CITIC Group and the Carlyle Group was filed to the EU Commission.

4. Unwise Conduct of an Enterprise: Assuming the Purpose of Setting Extraterritorial Application of Anti-monopoly Law is to Selectively Punish Foreign Enterprises and Circumventing of Regulation

The influence of economic activities on market competition tends to be cross-national. To maintain the economic order, the extraterritorial application of anti-monopoly law is generally adopted by countries. Enterprises should abide by the anti-monopoly laws and regulations both of the country they based and other countries; especially when conducting multinational business, enterprises shall attach importance to anti-monopoly compliance in each territory to avoid unnecessary trouble. It is not a wise conduct of an enterprise that assuming the purpose of setting extraterritorial application of anti-monopoly law is to selectively punish foreign enterprises and then circumventing of regulation, and such conduct will not benefit to the success of a multinational business operation.