

A REPORT BY
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Applicability of Chinese National Intelligence Law to Chinese and non-Chinese Entities



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Executive summary

The Chinese National Intelligence Law (“NIL”) entered into force in June 2017 and was updated in April 2018.² The following report examines a defined question; i.e. whether NIL applies differently to companies owned by a Chinese parent company compared to companies owned by a non-Chinese parent company. The substantive requirements under NIL are outside of the scope of this report.

In sum, this report concludes the following.

1. NIL applies globally to Chinese Groups, whereby all subsidiaries, even those outside China could be subject to NIL. Because the Chinese parent company is subject to NIL, NIL could, from a public international law perspective, also have jurisdiction over the group’s foreign subsidiaries. In addition, the Chinese parent has governance powers over foreign subsidiaries, which could enforce their compliance with NIL.
2. NIL applies to all *organizations* in China, a term which appears to include all types of companies established in China, regardless of ownership, i.e. private and public Chinese shareholders as well as foreign shareholders.
3. NIL would only apply to the Chinese subsidiaries of a non-Chinese Group. A parent company outside China would not be subject to Chinese jurisdiction under public international law. The fact that a Chinese subsidiary is subject to NIL does not transpose Chinese jurisdiction to the parent or to other companies in the group that are outside of China.
4. NIL applies to all Chinese *citizens*, and because NIL does not appear to have an explicit geographical limitation, it could be construed to apply to all Chinese citizens even when residing outside of China.

**THIS REPORT IS NOT
CONSTRUED TO INTERPRET
NIL UNDER THE CHINESE
DOMESTIC LEGAL SYSTEM.
INSTEAD, THIS REPORT
EXAMINES NIL’S APPLICA-
BILITY TO MULTINATIONAL
COMPANIES BASED ON
A LITERAL READING OF
CERTAIN PROVISIONS OF
NIL AND INTERPRETING
THOSE PROVISIONS BASED
ON PRINCIPLES OF PUBLIC
INTERNATIONAL LAW.¹**

² National Intelligence Law of the People’s Republic of China (Ch. 中华人民共和国国家情报法)
(Effective 27 June 2017) (Revised 27 April 2018).

¹ This report is based on an objective reading of an English version of NIL.

Introduction

The first section below provides general observations of NIL's scope of application. Section two explains why NIL could be seen to have broad jurisdiction and apply to all companies in a multinational group that has a parent company in China ("Chinese Group"). Conversely, for a multinational group with a parent company outside of China ("Non-Chinese Group"), only Chinese-based companies within the group would be subject to NIL, not the entire group, the parent or other subsidiaries located outside of China.

General observations

GEOGRAPHICAL SCOPE OF NIL IS UNDEFINED

According to public transcripts, NIL came into effect in June 2017, following a series of recent legislative updates aiming at strengthening national security. These updates included the National Security Law³ and the Cyber Security Law.⁴

Based on a literal reading of NIL, it appears to have an unusually broad scope of application. Article 7 NIL, as cited below, applies to "*all organizations and citizens*" and obliges them to cooperate with the Chinese state in relation to intelligence work.

"All organizations and citizens shall, according to the law, provide support and assistance to and cooperate with the State intelligence work, and keep secret the State intelligence work that they know."

By comparison, the wording in Article 7 is noticeably broader than the comparable provision under the National Security Law, which uses the phrase "*Citizens of the People's Republic of China*" instead of "*all citizens*."⁵

This could further be contrasted with the Cyber Security Law, which has an explicit limitation in scope. Article 2 of that law states that "*the Law shall apply... within the territory of the People's republic of China*."⁶

It appears that NIL does not contain language comparable to that of the National Security Law or the Cyber Security Law, which delimits the application of the law **geographically**, for example, to apply to citizens residing in the territory of China, companies established in China or activities performed on Chinese territory.

INTERPRETATION OF "CITIZEN" AND "ORGANIZATION"

In absence of any explicit geographical limitations in the law, a reasonable approach to determine NIL's scope of application would be to review the regular meaning of the terms citizen and organization.

The term citizen commonly relates to a physical person

³ National Security Law of the People's Republic of China (Ch. 中华人民共和国国家安全法) (Effective 1 July 2015)

⁴ Cyber Security Law of the People's Republic of China (Ch. 中华人民共和国网络安全法) (Effective 1 June 2017)

⁵ Article 11 of National Security Law: "*Citizens of the People's Republic of China, all state organs and armed forces, all political parties and mass organizations, enterprises, institutions and other social organizations shall have duties and obligations to safeguard state security.*"

⁶ Article 2 of Cyber Security Law: "*the Law shall apply to the construction, operation, maintenance and use of the network as well as the supervision and administration of the cyber security within the territory of the People's Republic of China.*"





that is entitled to protection from a particular state. Based on a literal and objective reading of the Chinese constitution, all people, having the nationality of China, are also citizens of China.⁷ Thus, **citizenship under Chinese law would normally be contingent on a person's nationality and therefore be independent of where in the world the person is residing.** This would imply that, without an explicit geographical limitation, NIL applies also to Chinese citizens living outside of China.⁸

The term “organization” does not appear to be defined in NIL nor any other related or comparable legislation. However, based on a comparison of the initial draft version of NIL, it appears the legislator opted for a broad catch-all expression. The original version of the provision was more specific, listing the types of entities to be covered by the law, i.e. “*all state organs, armed forces, political parties, social organizations, enterprises, public institutions and citizens.*”⁹

This would appear to indicate that **the term organization shall be applied broadly.** It is conceivable that the term organization could refer to an individual company incorporated in China, as well as several companies forming a **group, covering both the Chinese headquartered parent company as well as the parent's foreign subsidia-**

ries. Other Chinese legislation would appear to confirm such an application. For example, the wording of the Administrative Measures of Counterespionage Law, the term “*overseas organization*” covers foreign branches, even those incorporated in China.¹⁰

It appears that customary international law would allow such an interpretation. Normally, a nation state's right to regulate is limited to natural and legal persons on its territory, i.e. to a parent company established on its territory but not foreign subsidiaries outside the nation state's territory. However, in certain restricted cases, **a nation state may exercise extraterritorial jurisdiction** of its laws, applying them to foreign subsidiaries of a parent company that is established on its territory. For legal persons (e.g. companies), nationality is grounded primarily on the location of corporate headquarters or the place where the primary economic and legal operations occur (Fr. *siège social*).¹¹ Thus, under this principle, it could be argued that the nation state where the “organization” is headquartered may apply extraterritorial jurisdiction over that organization's foreign subsidiaries. This implies that without any explicit geographical limitation, **nothing in the wording of NIL prevents it from applying to entire Chinese Groups, i.e. also to subsidiaries outside China which are controlled by a Chinese headquartered parent company.**

7 Article 33 of the Constitution of the People's Republic of China: “*All persons having the nationality of the People's Republic of China are citizens of the People's Republic of China.*”

8 Under customary international law, a nation state may exercise prescriptive jurisdiction by extending the reach of its domestic laws to encompass the conduct of its nationals abroad, see *the Tallin Manual 2.0 in the international law applicable to cyber operations*, second edition, Cambridge University Press 2017, page 61, which refers to several authors confirming this principle.

9 Article 6 of National Intelligence Law (16 May 2017 Draft for Comments) read: “*All state organs, armed forces, political parties, social organizations, enterprises, public institutions and citizens shall provide support and assistance to and cooperate with the State intelligence work, and keep secret the State intelligence work that they know.*”

10 Article 3 of the Administrative Measures of Counterespionage Law of the People's Republic of China (Ch. 中华人民共和国反间谍法实施细则) provides that an overseas organization shall be deemed to include its branches and representative organizations in China.

11 See for example, *the Tallin Manual 2.0 in the international law applicable to cyber operations*, second edition, Cambridge University Press 2017, page 62, which explains states' right to exercise extraterritorial jurisdiction with regard to cyber activities.

THE PURPOSE OF ARTICLE II NIL

Article 11 of NIL specifies **that Chinese intelligence agencies may collect and process information about activities of any “overseas entities or individuals”** which jeopardize the national security and interests of China.¹²

It is conceivable that the legislator **refrained** from geographically limiting the scope of application of Article 7, in order to be able to claim jurisdiction overseas, i.e. that NIL applies to Chinese citizens living or working outside of China, as well as to Chinese “organizations” and their foreign subsidiaries, and that they are as a group, legally subject to NIL and required to cooperate with the intelligence agencies.

APPLICATION TO OTHER PERSONS AND ORGANIZATIONS OUTSIDE CHINA?

Despite the broad language, NIL would not normally, based on a literal interpretation of the law, be interpreted to mean that it applies to any organization or citizen in the world.

As per above, the word “citizen” has by definition a connection to a particular state, in this case China and should thus not apply to citizens of other countries. The term “organization”, does not in itself imply a connection to a particular nation state. As stated above, a nation state is usually limited to regulating actions on its territory and natural and legal persons with nationality of that state. This is based on principles of customary international law (e.g. principle of sovereignty). In other words, a nation state is permitted to regulate its own nationals, including legal persons and in exception cases, e.g. because of ownership, also their subsidiaries abroad. However, **those powers do not normally extend to a general right to regulate nationals (citizens or legal entities) of other nations states.**¹³ Thus, from an international law perspective, NIL should reasonably not be applicable to non-Chinese citizens or non-Chinese groups (i.e. with no connection to China).

12 Article 11 of National Intelligence Law: *“Agencies for State intelligence work shall legally collect and process the relevant information about activities jeopardizing the national security and interests of the People’s Republic of China that are conducted by any overseas agency, organization or individual itself, or by any other party under the instruction or assistance of such overseas agency, organization or individual, or by any domestic or overseas agency, organization or individual in collusion with one another, in order to provide intelligence information as a reference or basis to prevent, curb and punish such activity.”*

13 Extraterritorial application of this kind, whereby a non-Chinese entity, without headquarters in China (i.e. no Chinese nationality of the legal persons, as explained on page 3) would become required to cooperate with Chinese intelligence agencies, would fall outside what is considered acceptable extraterritorial jurisdiction. For example, US secondary sanctions are criticised for their extraterritorial application. US secondary sanctions apply to “any person” (as opposed to “US persons” in other sanctions programs) and are therefore criticized for having unacceptable extraterritorial application.

A completely different situation is when extraterritorial jurisdiction is acceptable because a foreign entity engages in activities which undermine essential state interest. See Tallinn Manual 2.0, pages 63–64.

Difference in application of NIL depending on group headquarters

Based on a plain reading of NIL, all entities and companies incorporated and established in China, regardless of whether they are owned by a Chinese parent or by a non-Chinese parent, are subject to NIL.

ENTITIES IN CHINA

Entities in China with headquarters in China

Entities established in China would be covered by NIL, **regardless of whether the entity is privately or publicly owned.**

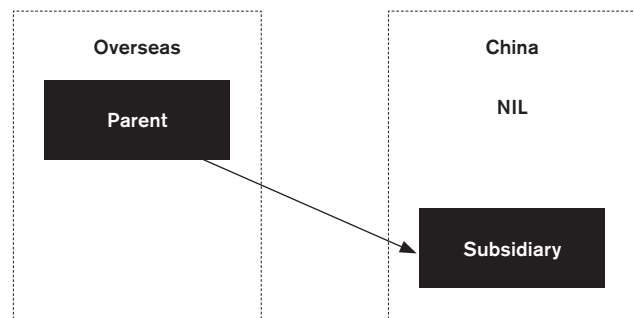
In addition, any physical persons, e.g. board members, directors, managers or employees or other, engaged by such entities, who are Chinese citizens, would be caught by NIL because of their Chinese citizenship.

Entities in China with foreign headquarters

Even if the entity in China has foreign ownership, it would be covered by NIL.

However, that **entity’s foreign parent company, established outside of China, should not be covered by NIL.**

This is based on the reasoning, as set out in the Tallinn Manual 2.0, that the nationality of an entity would be that of the corporate headquarters.¹⁴ By that reasoning, the parent company, having its headquarters in another country, does not have Chinese nationality and is thus not covered by NIL.



Furthermore, **as a Chinese subsidiary normally does not hold any corporate governance powers over its non-Chinese parent, neither the subsidiary nor its management could reasonably pressure the overseas parent into complying with NIL.**

14 See sources cited in Tallinn Manual 2.0, footnote 11, above.

ENTITIES OUTSIDE CHINA

Non-Chinese companies outside of China

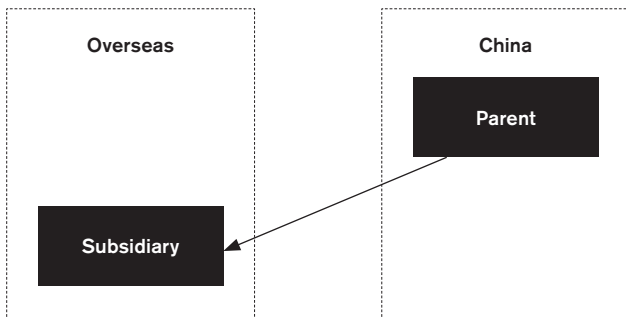
Entities established outside of China and which are owned by non-Chinese companies should in principle not be subject to NIL. As discussed above, despite NIL’s broad wording, under international public law, NIL would not be recognized as applicable in such cases.¹⁵



However, based on the wording of NIL, Chinese citizens working for companies outside of China would technically be subject to NIL. Many times however, complying with NIL by cooperating with the Chinese intelligence services could result in breaches of local laws.

Overseas subsidiaries with Chinese headquarters

Chinese overseas subsidiaries, with Chinese headquarters, *i.e.* controlled by a parent company established in China, could be subject to NIL or made to comply with NIL, based on three independent factors.



First, as set out on pages 2–3, nothing in NIL appears to prevent an interpretation that the law applies to entities that have a Chinese parent or Chinese headquarters, even if they are established outside of China (extraterritorial application). Thus, it is conceivable that a Chinese authority could claim jurisdiction over such overseas entities.

Second, any physical persons, *e.g.* board members, directors, managers or employees or other, engaged by such overseas entities, who are Chinese citizens, would also be caught by NIL because of their Chinese citizenship. This could include Chinese citizens in leadership positions (*e.g.* directors), persons in security functions or other sensitive positions.

Third, the Chinese parent company, having a controlling interest, would in most jurisdictions have legal corporate governance powers to dictate the actions of the overseas subsidiary, including the powers to appoint or dismiss key positions such as the board, the directors and indirectly, key personnel. Thus, for example, the **Chinese parent company, which is subject to NIL, could conceivably be asked by the Chinese intelligence agencies to instruct its overseas subsidiary to cooperate in an investigation by Chinese authorities, or to facilitate compliance with NIL by for instance replacing the management or other personnel to persons with Chinese citizenship.** Such citizens would then be required to cooperate with the Chinese authorities.

¹⁵ For example, US secondary sanctions are criticised for their extra-territorial application. US sanctions legislation distinguishes between sanctions that apply to “US Persons” and sanctions that have extra-territorial effect, which apply to “any person”.

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