

# THE U.S.-CHINA NUCLEAR AGREEMENT: A FAILURE OF EXECUTIVE POLICYMAKING AND CONGRESSIONAL OVERSIGHT

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*The agreement for nuclear cooperation signed by the United States and China in July 1985 is a watershed for U.S. policy on preventing the spread of nuclear weapons. It provides an important barometer of the current commitment in Washington to the requirements of U.S. nonproliferation law and sets a precedent for future U.S. nuclear agreements. The results, conclude Daniel Horner and Paul Leventhal, are not encouraging. In negotiating the agreement, the Executive Branch allowed China to avoid key requirements of U.S. law. Congress had ample opportunity to remedy these defects but chose simply to paper them over. Mr. Horner and Mr. Leventhal describe and comment upon the process by which the U.S.-China agreement was negotiated and reviewed and consider the implications of this flawed agreement.*

## INTRODUCTION

On July 23, 1985, the United States cosigned a bilateral agreement allowing American companies to bid on the construction of nuclear power plants in China. The agreement, which came into force after five months of congressional review, reveals a failure by both the Reagan administration and Congress to uphold crucial provisions of a U.S. law intended to help limit the spread of nuclear weapons. Indeed, the negotiating practices of the Executive Branch serve as an example of how not to produce a nuclear agreement, and Congress's consideration and approval of the agreement raise troubling questions about congressional will and ability to engage in effective oversight of nuclear-export policies and law.

Under the law, the Nuclear Non-Proliferation Act, the United States established requirements that countries must meet to purchase American

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nuclear technology, equipment, and materials. Since Congress passed the act in 1978, the United States has applied these strict standards with little apparent departure from the law to 12 new or renegotiated nuclear agreements. However, in the pact with China, the Reagan administration failed to obtain agreement from the Chinese to accept requirements for inspections and audits known as "safeguards" and for clear-cut U.S. controls over separation of weapons-usable plutonium from spent nuclear fuel. Congress failed to hold the administration to these requirements, which represent the heart of the Non-Proliferation Act.

History demonstrates that a loosely worded nuclear agreement does not raise a merely hypothetical danger. In 1974, India set off a nuclear explosion using plutonium that had been produced in a research reactor through the use of heavy water (a material required for reactors that use natural uranium) supplied by the United States under a 1956 agreement that contained a "peaceful use requirement" and little else. India insisted that its device, although indistinguishable from an atomic bomb, was used for a "peaceful nuclear explosion"; the U.S. government, having in hand only a vague agreement that did not define "peaceful use" or specify inspections or other controls, chose not to press its objections to the test. Congress, however, took a different view of the matter. When Capitol Hill finally learned of the crucial role of U.S.-supplied heavy water more than two years after the Indian blast — an embarrassment that originally had been concealed by the Executive Branch<sup>1</sup> — Congress began work on legislation, culminating in the 1978 Nuclear Non-Proliferation Act, to prevent further misuse of U.S. exports.

The Indian case of a decade ago is somewhat different from the situation with China today. Even with the benefit of its nuclear test, India has not deployed a nuclear arsenal and has not declared itself a nuclear-weapon state. China has openly declared its possession of atomic and hydrogen bombs since its first test in 1964. Yet the nagging question remains: should the United States sell nuclear supplies to any country in the absence of strong guarantees that the transferred items will not contribute to a nuclear-weapons program in the receiving country or to the spread of nuclear weapons to other countries?

The relaxation of requirements in the agreement with China sets a dangerous precedent. A nuclear agreement now being renegotiated with Japan will test whether the U.S. government can, or wants to, return to a strict interpretation

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1. See Statement of Senator Abraham Ribicoff, "India's Nuclear Explosion and the Export Reorganization Act," 16 June 1976, *Congressional Record*, 94th Cong., 2nd sess., p. S9632-9637.

of the act in the wake of the China accord. Important issues common to the nuclear programs of Japan and China are the status of the plutonium produced through the use of U.S.-supplied reactors and fuel, the adequacy of safeguards applied to domestic facilities containing large amounts of plutonium in weapons-usable form, and the adequacy of U.S. controls over U.S.-origin items eventually re-exported to other countries. An agreement in principle has been reached between U.S. and Japanese negotiators, and President Reagan is expected to present the renegotiated agreement to Congress in early 1987. The serious deficiencies of the U.S.-China agreement establish precedents that Japan is likely to be able to exploit.

The agreement with China is so rife with loopholes that Congress finally approved it with a resolution that waives the requirements of the Non-Proliferation Act. Moreover, a number of important questions about China's nuclear export practices — particularly its alleged assistance to Pakistan's nuclear weapons program — were not satisfactorily answered during the 20 months of review and renegotiation that took place between the initialing of the agreement and its approval by Congress. It is important to analyze the process that produced a defective agreement and to consider ways to improve the process.

#### CHINA'S QUESTIONABLE COMMITMENT TO NUCLEAR NONPROLIFERATION

At least until 1978, China publicly advocated proliferation for socialist countries as a means of undermining the hegemony of the United States and the Soviet Union. A 1963 statement in the *Peking Review* said,

Whether or not nuclear weapons help peace depends on who possesses them. It is detrimental to peace if it [sic] is in the hands of the imperialist countries. It helps peace if they are in the hands of socialist countries. . . . So long as the imperialists refuse to ban nuclear weapons, the greater the number of socialist countries possessing them, the better the guarantee of world peace.<sup>2</sup>

In 1965 *The Peking Review* said, "China hopes that Afro-Asian countries will be able to make atom bombs themselves,"<sup>3</sup> and in 1966, Premier Zhou

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2. *Peking Review*, 16 August 1963, cited in Statement of Senator William Proxmire to the Senate Committee on Foreign Relations, 9 October 1985.

3. *Ibid.*

En-lai asserted, "nuclear weapons cannot be monopolized."<sup>4</sup> In 1978, two years after Mao Zedong's death, Foreign Minister Huang Hua said nonweapon states should not be compelled "to abandon their right of possessing nuclear strength for self-defense."<sup>5</sup>

China explicitly abandoned its public advocacy of proliferation on Jan. 1, 1984 when it joined the International Atomic Energy Agency (IAEA), the U.N.-related organization that seeks to promote nonproliferation by inspecting and auditing nuclear power facilities to confirm they are not being used for military purposes. Ten days later, Chinese Premier Zhao Ziyang said in a toast at a White House dinner, "We do not advocate or encourage nuclear proliferation. We do not do it ourselves, nor do we help other countries to do it." In an address to the IAEA in September 1984, the Chinese delegate promised that his country's nuclear imports would be used for peaceful purposes and that China would request recipients of its exports to make the same pledge. Vice Premier Li Peng in January 1985 told the Chinese news agency Xinhua, "China has no intention, either at the present or in the future, to help non-nuclear countries develop nuclear weapons,"<sup>6</sup> a particularly significant statement because, for the first time, reference was made to China's nonproliferation commitment "in the future." And in September 1985, China announced its intention to allow limited inspections and audits by the IAEA of selected civilian nuclear facilities. Although such safeguards are voluntary, they are accepted by all nuclear-weapon states.

Despite these statements, China may be exporting, without safeguards, materials with potential for nuclear weapons applications. The *Washington Post* in 1981 cited CIA sources as saying that China was shipping enriched uranium to South Africa,<sup>7</sup> and the *New York Times* in 1982 quoted U.S. officials saying they believed China also had sold heavy water to Argentina and possibly India.<sup>8</sup> The reports said the unrecorded shipments were probably made without safeguards.

In 1984, the *New York Times* quoted unnamed U.S. officials as saying that China was assisting Pakistan's nuclear weapons program in part by developing

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4. Ibid.

5. Statement of Senator John Glenn, 9 December 1985, *Congressional Record*, 99th Cong., 1st sess., p. S17147.

6. "Top Officials Discuss National Nuclear Policies," *Xinhua*, 18 January 1985, translated in Foreign Broadcast and Information Service, "Nuclear Development and Proliferation," 26 February 1985, JPRS-TND-85-004, p. 11.

7. Jack Anderson, "CIA Says China Has Sent A-Fuel to South Africa," *Washington Post*, 23 July 1981.

8. Judith Miller, "U.S. Is Holding Up Peking Atom Talks," *New York Times*, 19 September 1982, p. 11.

its uranium enrichment facility at Kahuta, possibly in exchange for access to enrichment technology.<sup>9</sup> The alleged presence of Chinese technicians at Kahuta was one of the main stumbling blocks to the formal signing of the U.S.-China nuclear cooperation agreement after it had been initialed by President Reagan and Premier Zhao at the start of negotiations. Newspaper reports in 1984 said Chinese technicians remained at Kahuta and that China continued unsafeguarded exports to fulfill previously-signed contracts.<sup>10</sup>

Most seriously, the *Washington Post* on Jan. 23, 1983, reported that China passed bomb-design information to Pakistan.<sup>11</sup> The *New York Times* later reported that the design corresponded to a low-yield device, the fourth tested by China in 1965.<sup>12</sup> And on Nov. 4, 1985, columnist Jack Anderson, citing anonymous CIA officials, reported that China conducted a nuclear test of a low-yield device for Pakistan in May 1983.<sup>13</sup>

Despite China's questionable commitment to nonproliferation and the volatility of its policies, the United States signed the agreement allowing American companies to sell China nuclear technology without insisting on the inspection of facilities and the control over reprocessing stipulated in a provision of the 1978 Non-Proliferation Act.

#### U.S. NONPROLIFERATION LEGISLATION

To understand the potential impact of the China agreement on U.S. non-proliferation policy, it is useful to review the history of nuclear export legislation in the United States.

Congress established the framework for U.S. nuclear exports in the Atomic Energy Act of 1954. This act, which imposed few specific conditions on exports, governed U.S. nuclear commerce for over two decades. In 1978, four years after India exploded a nuclear device derived from material supplied by the United States, Congress moved to tighten and standardize the export rules by passing the Nuclear Non-Proliferation Act.

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9. Leslie H. Gelb, "Pakistan Link Perils U.S.-China Nuclear Pact," *New York Times*, 22 June 1984, p. 1, and "Peking Said to Balk at Nuclear Pledges," *New York Times*, 23 June 1984, p. 3.

10. Statement of Senator Alan Cranston, 21 October 1985, *Congressional Record*, 99th Cong., 1st sess., p. S13624-13625.

11. Milton R. Benjamin, "China Aids Pakistan on A-Weapons," *Washington Post*, 28 January 1983.

12. Gelb, "Pakistan Link" and "Peking Said to Balk."

13. Jack Anderson and Dale Van Atta, "U.S. Nuclear Deal with China Could be a Dangerous Move," *Seattle Times*, 4 November 1985.

Under the Non-Proliferation Act, which consists of additions to and revisions of the Atomic Energy Act of 1954, the United States in effect acknowledges its responsibility for the end use of its nuclear exports. One of the major revisions of the act, Section 123, requires that export recipients agree to inspections and audits of nuclear facilities to ensure that they are not used for military purposes. Section 123 also stipulates that the United States must grant consent before the export recipient can reprocess the U.S.-supplied fuel or other fuel used in U.S.-supplied reactors, or can use plutonium obtained by reprocessing spent fuel. This provision is essential for the United States' efforts to control proliferation because the plutonium, once separated from spent fuel, can be used in nuclear weapons as well as in power reactors. Section 123 also mandates that the United States must give permission before any American-made items or materials and their by-products can be transferred to a third country. Another provision, Section 129, requires the United States to stop nuclear trade with a country found to be helping a third country acquire nuclear weapons.

The Non-Proliferation Act affected the legislative process by allowing Congress to veto, with a simple majority in both houses, nuclear agreements that are found not to meet the requirements of the act. However, this veto power was invalidated by the Supreme Court five years after the act was passed. In this landmark case, *Immigration and Naturalization Service v. Chadha* 103 S. Ct. 2764 (1983), the Court ruled that the simple majority mechanism for legislative veto violated the Constitution, which calls for a two-thirds majority.

An export act, passed by Congress a month before the China agreement was signed, created new procedures for review of Executive Branch decisions. Under the Proxmire Amendment to the Export Administration Amendments Act, passed in June 1985, the president must submit a nuclear-cooperation agreement to Congress either with or without a "waiver" of the requirements of the Non-Proliferation Act. If the president finds the agreement conforms to the act, he submits it with such a finding to Congress for ratification. The House Foreign Affairs Committee or the Senate Foreign Relations Committee then has a 30-day consultation period to determine whether the agreement does indeed conform to the act. If either committee finds violations of the Non-Proliferation Act, the Proxmire Amendment says the president is "expected" to either renegotiate the agreement or resubmit it with a waiver of the violated legal requirements.

When the president submits an agreement with a waiver of legal requirements, either initially or in response to a committee request, it cannot become

law unless Congress takes affirmative action — that is, both houses pass a resolution of approval — within 60 working days. A far easier test applies to an agreement that is submitted by the president with a finding that it is in conformity with the law (and that is not challenged as unlawful by either committee). In that case, the agreement automatically takes effect unless both houses pass a resolution of disapproval within 90 working days. Since the president would be virtually certain to veto a disapproval resolution, each house would have to muster a two-thirds majority to override a veto — a very difficult task. Thus, an agreement submitted without a waiver is very likely to succeed, while an agreement submitted with a waiver of statutory requirements would be relatively easy to block.

#### DEFECTS OF THE AGREEMENT

The China agreement was the first test of the Proxmire Amendment and it gave Congress an opportunity to serve notice that it would vigorously exercise its oversight function for new or renegotiated nuclear agreements. As the agreement also was the first with a nuclear-weapon state since Congress passed the Non-Proliferation Act in 1978, it promised to indicate the degree to which Congress and the president would adhere to a strict interpretation of that act.

Despite the government's insistence on the legality of the China agreement, the pact fails to satisfy fundamental requirements of the Atomic Energy Act as amended by the Non-Proliferation Act.<sup>14</sup>

Section 123 of the Atomic Energy Act spells out provisions requiring IAEA safeguards on all U.S. nuclear exports to states that do not possess nuclear weapons. For exports to states possessing nuclear weapons, the section explicitly requires "safeguards," though not necessarily those administered by the IAEA.

However, the U.S.-China agreement makes no provisions for "safeguards." It provides for "exchanges of information" and "visits," but not for audits and inspections — which constitute safeguards in the generally accepted meaning of the term — to verify civilian use of nuclear material.<sup>15</sup> How the exchanges

14. For a legal analysis of the agreement, see Eldon Greenberg, "Legal Deficiencies of the U.S.-China Agreement for Nuclear Cooperation and the Need for Enhanced Congressional Review," unpublished paper for the Nuclear Control Institute, Washington, D.C., 9 September 1985.

15. See *ibid.*, p. 4: "'Safeguards' is a term of art which is ordinarily understood to mean the application of materials accounting procedures and techniques, together with appropriate monitoring devices, and the

and visits are to be carried out is not explained in the agreement, which simply states, "the parties will use diplomatic channels to establish mutually acceptable arrangements" for consultations.

By contrast, China went along with safeguards arrangements in nuclear agreements with Brazil, Argentina, and Japan. In these agreements, signed a year before the pact with the United States, China consented to IAEA safeguards. Moreover, nuclear agreements between the United States and other nuclear-weapon states all have safeguards provisions to verify peaceful uses.

A second provision of Section 123 of the Atomic Energy Act clearly empowers the United States to decide whether a country can reprocess spent nuclear fuel made from U.S.-supplied uranium or from any uranium used in a U.S.-supplied reactor. This spent fuel can yield plutonium, the explosive material in some nuclear weapons. U.S. discretion over reprocessing was intended by the House authors of Section 123, as demonstrated in the legislative history of the act. The House Foreign Affairs Committee report on the Non-Proliferation Act stipulated that U.S. consent rights were to be "unqualified and set forth in the agreement unambiguously" so that the U.S. has the right to reject plans for any "subsequent arrangements" for spent fuel.<sup>16</sup> The China agreement falls short of that standard in several respects.<sup>17</sup> Under its terms, the United States is required to "favorably" consider Chinese requests for reprocessing, and if no arrangements are worked out the two countries are to "promptly consult" so that China can proceed on an interim basis. Moreover, the two countries "agree to refrain from actions which either party believes would prejudice the long-term arrangements for undertaking [reprocessing] or adversely affect cooperation under this agreement." Thus, the House committee report's insistence on the "unqualified" U.S. right to prevent reprocessing of fuel from the United States is severely curtailed, if not negated altogether, in the agreement.

A third weak spot in the China agreement is a section of the agreement that may severely restrict the ability of Congress to apply any future nuclear export legislation to China. Article 2 contains a standard recital of sovereign rights: "Each party shall implement this agreement in accordance with its respective applicable treaties, national laws, regulations and license require-

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conduct of periodic inspections, to ensure that equipment and materials are not diverted to non-peaceful purposes." Greenberg notes that every reference to safeguards in the legislative history of the Non-Proliferation Act is in this sense of the term.

16. House Report No. 95-587, 95th Cong., 1st sess., 13-14 (1977).

17. See Greenberg, "Legal Deficiencies."



ments concerning the use of nuclear energy for peaceful purposes." However, this is followed by a sentence that states, "The parties recognize, with respect to the observance of this agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This sentence, added at China's request,<sup>18</sup> could pose obstacles to invoking the Non-Proliferation Act or future legislation affecting the implementation of the China agreement.

Finally, the sudden and sweeping changes in China's stated attitudes toward nuclear proliferation and exports would seem to warrant a formal nonproliferation pledge in the agreement or through diplomatic correspondence. However, the Reagan administration did not seek one, and none has been forthcoming. The State Department is satisfied that sufficient assurances are contained in a classified memorandum. However, this crucial memorandum consists only of the State Department's interpretation of oral Chinese assurances<sup>19</sup> — and even supporters of the agreement have said that China might not agree with the U.S. interpretation of the Chinese position on the meaning of ambiguous aspects of the agreement.<sup>20</sup>

#### CONGRESSIONAL ACTION

Congress failed to take advantage of numerous opportunities to improve the agreement in the form submitted by the president. With estimates of the potential windfall from the Chinese nuclear program as high as \$7 billion,<sup>21</sup> representatives of the U.S. nuclear industry lobbied Congress heavily for the agreement. Westinghouse's principal lobbyist Stuart Eizenstat, formerly President Carter's domestic affairs adviser, was engaged in intensive personal lobbying.<sup>22</sup> This lobbying pressure capitalized on a popular desire for a con-

18. Personal communication with State Department official.

19. This is the document referred to in the statement of Senator John Glenn to the Senate Committee on Foreign Relations, 9 October 1985: "Despite this history [of China's nuclear assistance to other countries], we are asked to accept, as a definitive description of Chinese nonproliferation policies, a summary of discussions on the subject prepared by U.S. negotiators, and not signed by the Chinese."

20. See the testimony of Alan T. Crane, director, Energy Technology Transfer to China Project, Office of Technology Assessment, to the House Special Subcommittee on U.S. Pacific Rim Trade, Committee on Energy and Commerce, 12 September 1985.

21. Testimony of James R. Phillips, Deputy Assistant Secretary for Capital Goods and International Construction, U.S. Department of Commerce, to the House Special Subcommittee on U.S. Pacific Rim Trade, Committee on Energy and Commerce, 12 September 1985.

22. This information is based on the personal observation of one of the authors and interviews with members of Congress and their staffs. This lobbying was not improper, but the vigor with which it was pursued demonstrates the importance the nuclear industry attached to the agreement.

tinued improvement in U.S. relations with China. Industry lobbying had helped set the stage for initialing of the agreement during President Reagan's trip to Peking in April 1984, and it was instrumental in winning final approval by Congress 20 months later.

The China agreement's unorthodox language generated considerable controversy. Congressional supporters of the agreement claimed it met the requirements of U.S. non proliferation law. Yet other analysts speculated that the Chinese were using the agreement with the United States principally as a lever with which to obtain price concessions and sweeteners, such as technology transfers, from other suppliers.<sup>23</sup>

Disagreements as to the economic value of the agreement were clearly expressed in congressional hearings. Some observers maintained that the agreement constituted a potential economic windfall for the moribund U.S. nuclear industry. One administration official estimated that each Chinese nuclear plant could reduce the trade deficit by roughly \$1 billion during the construction phase and another \$1 billion after that. Congressional opponents of the agreement, meanwhile, argued the agreement's nonproliferation guarantees fell short of the legal requirements and that China's nonproliferation record should disqualify it from U.S. nuclear assistance. Some members of Congress opposed the agreement on ideological grounds, saying the United States should not conduct nuclear trade with Communist China.

Opponents of the agreement sought first to exercise the review authority provided by the Proxmire amendment. A letter and legal memorandum from four public interest organizations to the House and Senate foreign affairs committee chairmen urged them to exercise this authority.<sup>24</sup>

On September 20, 1985, Rep. Edward Markey (D-Mass.) introduced a resolution with over 30 cosponsors calling on the president to acknowledge the agreement's defects and resubmit it to Congress with a waiver of statutory requirements.<sup>25</sup> The Markey resolution was referred to the House Foreign Affairs Committee, where it died without a hearing. The Senate Foreign Relations Committee prepared a memorandum examining grounds for a pres-

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23. See Colina MacDougall, "The Long Haul to Self-Sufficiency," *Financial Times*, 30 September 1985, p. 10-11. U.S. Congress, Office of Technology Assessment, *Energy Transfer to China — A Memorandum*, OTA-TM-ISC-30 (Washington, D.C.: U.S. Government Printing Office, September 1985); and "Chinese Program in Disarray," *Nuclear Engineering International*, December 1985, p. 6-7.

24. The letter, dated 10 September 1985, was signed by Nuclear Control Institute, Union of Concerned Scientists, Sierra Club, and Natural Resources Defense Council.

25. H. Res. 269, 20 September 1985, *Congressional Record*, 99th Cong., 1st sess., H11765.

idential waiver request, but the memorandum made no recommendations and the Foreign Relations Committee took no further action. By not exercising its right to challenge the president at this critical early stage of the process, Congress forfeited its most potent means of leverage.

The two committees subsequently held hearings on the agreement, as required by the Proxmire amendment, as did the Special Subcommittee on U.S.-Pacific Rim Trade of the House Energy and Commerce Committee. In these public hearings, administration officials, members of Congress, and other witnesses addressed the merits and shortcomings of the agreement. The committees also held closed briefings on U.S. intelligence information suggesting a 1983 Chinese test of a nuclear device built by Pakistan and designed by China and on reports of unsafeguarded Chinese nuclear exports and ongoing Chinese nuclear discussions with Iran. Moreover, the administration refused to declassify the State Department memorandum interpreting oral nonproliferation assurances that the Chinese gave to U.S. negotiators.

Congress was slow in responding to these reports. Neither committee chairman objected when the CIA at first refused to appear at the closed briefings, forcing committee members to rely upon the secondhand intelligence of State Department officials. The committees did not demand the CIA testify until Senator Alan Cranston (D-Calif.), at the October 9 hearing of the Foreign Relations Committee, suggested that intelligence reporting might have become politicized and demanded that knowledgeable intelligence agency officials testify on the reports of Chinese activities. Shortly thereafter, both foreign affairs committees held CIA briefings for all their members.

Concerns about these allegations and the agreement's ambiguous language led Senators John Glenn (D-Ohio) and William Roth (R-Del.) of the Governmental Affairs Committee to introduce a bill spelling out specific conditions on nuclear exports to China: peaceful-use verification equivalent to IAEA safeguards; Chinese acknowledgment that the United States was not predisposed to approve requests to reprocess U.S.-origin spent fuel; a "public, written, detailed statement of [China's] nuclear nonproliferation policies"; and Chinese acknowledgment that all exports under the agreement would be subject to U.S. law at the time of the export.<sup>26</sup> An identical bill was introduced in the House by Congressmen Edward Feighan (D-Ohio) and Howard Wolpe (D-Mich.).<sup>27</sup>

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26. S. 1754, 9 October 1985.

27. H. 3537, 9 October 1985.

The administration opposed the bill, arguing that the Chinese would not accept the conditions. But the Foreign Relations Committee, principally through the efforts of Senator Cranston, came up with a compromise incorporating some elements of the Glenn approach into the joint resolution of approval.<sup>28</sup>

With respect to safeguards, the resolution's language was not as strong as Glenn's; it avoided the term "safeguards" and called only for "arrangements . . . designed effectively to ensure" peaceful use of U.S. nuclear exports. The resolution also reduced Glenn's requirement for a written Chinese nonproliferation statement to "additional information on its nuclear nonproliferation policies." However, it essentially left intact Glenn's other two provisions that affirmed the agreement did not impose restrictions on U.S. nuclear law or predispose the United States to approve Chinese reprocessing requests.

Further, the compromise resolution approved the agreement "notwithstanding the requirements of Section 123 of the Atomic Energy Act," and added the statement, "Nothing in this Agreement or this resolution may be construed as providing a precedent or other basis for the negotiation or renegotiation of any other agreement for nuclear cooperation." Thus Congress — and not the president, as required by the Non-Proliferation Act — waived the statutory requirements on nuclear safeguards and consent rights. The language of this resolution makes clear Congress's awareness of the agreement's legal defects and congressional eagerness to approve the agreement in spite of those defects.

Once the Senate Foreign Relations Committee had approved the resolution in this form, supporters of a more rigorous agreement on the House Foreign Affairs Committee, which was marking up the resolution at the same time, were placed in a difficult tactical position. The agreement would go into effect automatically after 90 days of continuous session, even if Congress did not formally approve it. Therefore, if the House and Senate produced differing versions and failed promptly to resolve the differences, the agreement would go into force without *any* conditions.

The alternative to the Senate version was a resolution offered by Congressmen Don Bonker (D-Wash.) and Stephen Solarz (D-N.Y.) that contained numerous hortatory "whereas" clauses but no legally binding language other than the core language of a resolution of approval as specified in the Non-Proliferation Act.<sup>29</sup> Faced with this situation, House members with misgivings about the agreement had no choice but to support a resolution identical to

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28. S.J. Res. 238, 11 December 1985.

29. Foreign Affairs Committee Amendment to H.J. Res. 404, 12 November 1985.

the one reported by the Senate committee. The resolution was approved by the Foreign Affairs Committee and sent to the House floor.

On November 21, the Senate approved the resolution by voice vote after the leadership brought it to the floor without giving the customary notice to Glenn and other opponents in the Senate. There was no accompanying report by the Foreign Relations Committee and no floor debate — a startling omission in light of the resolution's disavowal of Section 123 and of the agreement itself as a precedent for future agreements. In a committee report, the Senate could have addressed some of the issues that had been shunted aside to expedite approval of the agreement, the first with a nuclear-weapon state since enactment of the 1978 Non-Proliferation Act and the first test of the Proxmire amendment procedures. The failure to include a report, the first such omission since the days of the Joint Committee on Atomic Energy, betrayed the Senate's lack of commitment to overseeing U.S. nuclear agreements.

The House debated for three hours on December 11 before approving a resolution identical to the Senate's by a vote of 307-112. As in the Senate, there was no report by the committee of jurisdiction, House Foreign Affairs, to accompany the resolution.

In an earlier procedural vote, 158 members voted against the rule under which the resolution was brought to the floor as a way of registering their opposition to the agreement and to the rule barring amendments on the floor. Congressman Wolpe labeled the administration's approach to the agreement "a prescription for ultimate disaster" and offered the following approach to safeguards:

In view of the voluntary offer [made to the IAEA] by the Chinese Government [to accept some IAEA inspections] and of a similar undertaking already implemented by the U.S. Government with the IAEA, one can hope that the reciprocal arrangements negotiated to ensure the peaceful use of all exported items will be no less stringent than those applied on civilian nuclear facilities in the United States. Such safeguards are at least equivalent to the materials accounting and inspection standards normally applied by the IAEA in accordance with its document INFCIRC-66-Rev. 2, entitled "The Agency's Safeguards System (1965, as provisionally extended in 1966 and 1968).<sup>30</sup>

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30. 11 December 1985, *Congressional Record*, 99th Cong., 1st sess., p. H11765.

Congressman Solarz brushed aside concerns about China, saying:

[O]ur committee held a very high-level, top secret executive session briefing with representatives of the intelligence community, and we went over every one of the allegations with them, and the responses we got were that either the allegations were flatly untrue or the allegations, while true, could be understood in a much more benign context and did not have the implications which the critics suggested they had or, to the extent they were true, they were no longer true.<sup>31</sup>

The Senate made a last attempt to address the deficiencies of the agreement when it voted 59-28 to attach Senator Glenn's original language to the Senate's omnibus spending bill.<sup>32</sup> However, the end of the legislative session was near, the administration was threatening to veto the bill if it included the Glenn amendment, and the Congressional leadership was pressing to keep the bill free of amendments that did not relate directly to spending. The Glenn amendment was dropped by the House-Senate conference committee.

#### CONCLUSIONS: A BETTER WAY TO DO NUCLEAR BUSINESS

The U.S.-China nuclear agreement and the process by which it was negotiated, signed, and approved is cause for serious concern. Supporters of the agreement claim it will increase U.S. influence over Chinese nonproliferation policies, pointing out that Section 129 of the Non-Proliferation Act requires the United States to cut off nuclear exports to China if the country is found to be assisting another in acquiring a nuclear weapon. However, the agreement's provision calling into question the applicability of U.S. law that conflicts with the agreement allows China a wide range of interpretation and maneuver, especially in view of the inadequate safeguards and consent-rights provisions of the agreement.

In addition, by agreeing to "reciprocal arrangements" rather than IAEA safeguards or their equivalent, the United States may have done considerable damage to the international non proliferation regime. As Senator Glenn noted,

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31. *Ibid.*, p. H11768.

32. Amendment 1347 to H.J. Res. 465, 9 December 1985, *Congressional Record*, 99th Cong., 1st sess., p. S17141.

If the reciprocal arrangements which are negotiated between the United States and China do not provide for the equivalent of international safeguards, and yet the President ends up certifying that the arrangements are effective in ensuring peaceful uses [as he will have to for any exports to take place], then the message we will be sending to the entire world is that the IAEA system of safeguarding is more intrusive than it needs to be. . . .<sup>33</sup>

Once the president makes such a certification, other recipients of nuclear exports may question why they must accept IAEA safeguards if lesser measures have been certified to be "effective."

Moreover, the administration does not seem intent on abiding by the terms of even these minimal measures. Although an Executive Branch spokesman pledged, "until [the information-exchange and visit arrangements] are in place, we will not export to China,"<sup>34</sup> the State Department gave the Energy Department permission to issue pending authorizations for nuclear technology transfers to China prior to the negotiation of the arrangements.<sup>35</sup>

The administration undermined the nonproliferation law by refusing to submit the agreement to Congress with a waiver acknowledging that the agreement failed to fulfill the requirements of Section 123 of the Atomic Energy Act. It would have been more difficult to win approval of the agreement if it had been submitted with a waiver because the agreement could not have taken effect unless Congress passed a joint resolution of approval within 90 days. On the other hand, support for making special arrangements with China was strong enough virtually to guarantee approval even with a waiver. The administration thereby could have had its agreement without making a mockery of existing nonproliferation law. The political opposition stirred up by flaunting the law may have more than outweighed the tactical advantage gained by avoiding a vote on a joint resolution of approval. And by arguing that there were no defects in the agreement rather than acknowledging them and explaining why exceptions should be made in the case of China, the administration made the defects all the more obvious.

Congress was in a position to call the administration's bluff by requesting resubmission of the agreement with a waiver. But both foreign affairs committees chose not to exercise their wide authority under the Non-Proliferation

33. 21 November 1985, *Congressional Record*, 99th Cong., 1st sess., p. S16071.

34. Lewis A. Dunn, "A Pact That Can Be Verified," *Washington Post*, 31 December 1985, p. A17.

35. "China," *Nucleonics Week*, 9 January 1986, p. 15.

Act to influence and reject nuclear agreements. Congress ended up exercising this authority in the most cursory fashion; it caved in to the Executive Branch as much as the Executive Branch caved in to China.

Neither foreign affairs committee held hearings within the initial 30-day consultation period although analysts in and out of Congress suggested, contrary to the State Department's legal analysis, that the agreement did not follow the law. The disagreement on this issue should have been reason enough for the committees promptly to hold hearings during this crucial early period.

Even if the foreign affairs committees were not prepared to pursue the waiver issue, they could have used their authority under the Proxmire Amendment to explore the need for resubmission with a waiver as a means of increasing their leverage as they demanded explicit nonproliferation guarantees. They could have demanded that the administration obtain such guarantees from China or, failing that, have received a commitment from the administration not to lobby against legislation that added more stringent requirements. But by showing it had no interest in pursuing the waiver question, Congress threw away its trump card.

Part of the problem was that Congress simply was not inclined to give the agreement close scrutiny because of the strong sentiment for improving relations with China. A number of members, including some in key committee positions, represented regions of the country that stood to gain from the agreement or were swayed by the lobbying of Westinghouse and the other nuclear vendors.

It made no political sense for these members to oppose the agreement or even look at it very closely; they were not about to make a fuss over what they saw as legal technicalities. After all, they argued, the Non-Proliferation Act was designed to control the spread of weapons-usable material and technology to non-weapon states. Therefore, since China already is a weapon state, there is no need to press for adherence to the requirements of the act.

As for China's dubious record on nuclear exports, most of Congress was willing to follow the administration's lead, presumably in the greater interest of economic gain and improved relations with China. There was little vigorous pursuit of reports of continuing Chinese assistance to the Pakistani weapons program.

This tendency to look the other way may yet prove short-sighted. The agreement eventually could harm rather than help U.S.-China relations. As one observer noted, "[t]he case of [the Tarapur agreement with] India is disquietingly relevant. There, too, controversial safeguards and reprocessing



issues were settled by an agreement to disagree, with the hope that the dispute would remain hypothetical and that cooperation would help move India toward more responsible nuclear policies.<sup>36</sup> Events proved that optimism to be misguided; India used U.S.-origin material in producing the plutonium for its 1974 test explosion, and the nuclear agreement became a major irritant to U.S.-India relations.

In light of this precedent, it is particularly troubling that there were no committee reports and few floor statements to provide a legislative history that might help avert future disputes. At the minimum, the joint resolution and the committee reports accompanying it could have put in writing China's publicly stated nonproliferation assurances so these assurances could not easily be discarded by a future regime that comes to power.

In view of Congress's lack of timely and effective oversight, the Proxmire amendment should be revised to *require* a hearing and a report by each of the foreign affairs committees within the initial 30 days to determine whether an agreement conforms to the requirements of the Non-Proliferation Act and whether a request for renegotiation or resubmission with a waiver of statutory requirements would be appropriate. Such a change in law would not necessarily solve the problem of lack of Congressional willingness to pursue the issue or the tendency of Congress to consider nonproliferation concerns to be a lower priority than the economic and diplomatic gains with which they often come into conflict. But it would ensure formal consideration of whether new nuclear agreements meet the requirements of law.

It is difficult for Congress to grant high priority to nonproliferation issues in the absence of any immediately perceived proliferation risks. If China lives up to its most recent nonproliferation statements and its private assurances, then Congress will feel justified in continuing to grant the Executive Branch wide latitude to negotiate nuclear agreements. This attitude probably will continue until the nonproliferation regime is shocked as it was by India's 1974 nuclear explosion.

The loose wording of the China agreement does not bode well for future U.S. nuclear agreements. The United States cannot hope to persuade Japan and European countries with whom it is currently renegotiating nuclear cooperation agreements to accept the statutory requirements on safeguards and reprocessing when such language was not required of China, a country whose non proliferation record is tarnished. Moreover, the United States cannot

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36. Peter A. Clausen, "A Porous Nuclear Pact," *New York Times*, 5 October 1985, p. 23.

expect other nuclear suppliers to press rigorously for the highest safeguards standards on their nuclear exports when it has not done so itself.

#### POSTSCRIPT

The anticipated economic bonanza of the agreement has failed to materialize. Not only did China scale down its nuclear plans from six reactors to two, but it awarded the contract in September 1986 to the French reactor supplier Framatome.<sup>37</sup>

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37. Robert Thompson, "China Signs \$4 bn N-Plant Deal," *Financial Times*, 9 September 1986, p. 1.