

**Statement Submitted to the Senate Foreign Relations Committee**  
**Hearing on “Section 123 Civilian Nuclear Cooperation Agreements”**

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**By**

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**Introduction**

As a former member of your professional staff, I offer my gratitude that the Committee has decided to hold this hearing. The United States Congress was the prime mover in creating our foreign policy on the nonproliferation of nuclear weapons. Every major international rule regarding trade in nuclear material, equipment and technology, including both binding and non-binding rules on sovereign states, can usually be traced to proposals made in Congress and eventually enacted into U.S. law.

**The Authority and Role of this Committee**

Since the abolition of the Joint Committee on Atomic Energy (JCAE) in 1977<sup>1</sup> this Committee has had the power to be “fully and currently informed” on all matters related to the negotiation, approval, disapproval, execution and re-approval of agreements for peaceful nuclear cooperation under section 123 of the Atomic Energy Act of 1954, as amended by the Nuclear Nonproliferation Act of 1978 (Public Law 95-242), in particular. This formulation, of *full and concurrent* knowledge with the Executive branch, endows this Committee, among others, with power to compel information at its demand in discharging its role to make recommendations to the full Senate on these agreements.

On paper, this Committee and others would appear to have all the authority needed to render judgments related to 123 agreements. But it was my experience that the Committee was rarely fully and currently informed. A sole exception might have been the U.S.-India agreement, but even then, it was not so, uniformly. Some parts of the interagency would prefer that these agreements be treated as they presently are: as somewhat special forms of normal trade or a special form of reward—in effect, a nuclear olive branch. But they are not. The international community long ago agreed that trade in fissionable materials is not normal trade, and falls under a strong security exception in the WTO talks.<sup>2</sup>

Congress has reiterated its requirement to be kept fully and currently informed many times, including in its approval of the India 123 agreement in 2008 and more recently in extending the 1974 U.S.-South Korea agreement. Senator Corker is to be commended for his efforts, in this regard, but such efforts would be unnecessary if the statute regarding 123 agreements was not such a complex and poorly phrased law. Cloudy law allows foggy decisions. While diplomacy may like silence, as the Russian Foreign Minister recently observed,<sup>3</sup> so does nuclear proliferation.

Congress plays no formal role in these matters after it provides its assent to a 123 agreement, beyond a few notifications, even though when it does approve a new agreement, it often does not have a complete picture of the relevant country's nuclear infrastructure. Re-approval of expiring pacts is one very important way in which Congress could get current knowledge, as you are attempting to get here today with respect to Taiwan, Vietnam and South Korea. But Congress, and more particularly this Committee, is certainly neither fully nor currently informed, and it is increasingly the case, as I and others have pointed out, that once approved by Congressional silence or action, 123 agreements as currently being negotiated and submitted may not necessarily come back to Congress, ever, for review and extension.<sup>4</sup>

## **123 Agreements in a Strategic Context**

This year, you will consider, at a minimum, the renewed U.S. 123 agreement with Taiwan (submitted by President Obama on January 7) and a new agreement with Vietnam. In the next 48 months, you may also have to reconsider the 1985 agreement with the People's Republic of China, at a time of increasing tension between the United States and Beijing, and Beijing with our allies in Asia. While the number of nuclear weapons in the United States might continue to decline, it is in Asia, broadly defined, where we can see apparent and increasing numbers of nuclear weapons, as well as new means of deployment at sea and on land—in China, in India, in Pakistan, and in North Korea. And it is in Asia that Russia likely deploys many non-strategic nuclear weapons unregulated by any treaty. Before the end of the current Administration, you may as well consider 123 agreements with Jordan and Saudi Arabia, even while the Iranian nuclear-weapons program remains unresolved.

Such trends are not unrelated to the prospects for increasing civilian nuclear fuel-making on the territory of U.S. allies that could provide a fissile hedge against uncertainty related both to U.S. extended deterrence and our stance on civil nuclear trade with other countries in their regions. Even if our allies and friends do not intend this image—of a civilian fissile material hedge that could be converted to a military one in crisis—our adversaries (and theirs) do interpret them as such a

signal. For example, even while China pursues reckless nuclear trade with Pakistan<sup>5</sup> that smacks of selfish lucre with no responsible luster, both it and Pakistan can point to the U.S.-India deal as a precedent, while China has run over the Nuclear Suppliers Group (NSG) to continue this trade. It does so while it makes nuclear threats against the United States and its allies, and the United States continues to embrace a deep-reductions policy for its strategic and theater nuclear forces, refusing to consider the return of the latter to allies in Northeast Asia.<sup>6</sup>

It is the task of the United States, not its allies, to remain the essential nuclear nation, and so it must be extremely cautious and innately conservative in Asia. Countries, as opposed to their bureaucracies, look at the strategic picture as a whole, not in separate pieces. The nuclear pieces of U.S. foreign policy in Asia, as the bipartisan leadership of this Committee have argued with respect to Iran, are increasingly inconsistent.

### **123 Standards for Enrichment and Reprocessing**

Some of our allies' motivations in seeking to engage in new nuclear fuel-making activities run deep. They are often measures of domestic political and technical success. To the extent that they do so under agreement with Washington, that does allow the United States to dictate some terms and to make nonproliferation choices in truly unique ways that go beyond any current international treaty. The United States, through at least two 123 agreements in force, has prevented new enrichment and reprocessing (Egypt and the United Arab Emirates). Apart from these agreements, in all such agreements, when any U.S.-obligated nuclear material under any agreement moves throughout an ally's nuclear-energy infrastructure, the United States does have some ability to have better certainty, primarily based on International Atomic Energy Agency (IAEA) safeguards and a few bilateral measures in Nuclear Weapon States and India, to assure itself and reassure the world that foreign activities under section 123 are exclusively peaceful.

However, within the last decade, one nation with whom the United States has a 123 agreement in force has begun to enrich uranium. While not for the first time in its history, Argentina's decision to restart uranium enrichment received almost no attention in the United States, let alone, in Congress in 2010.<sup>7</sup> Argentina, as well, has not brought into force an additional protocol to its existing safeguards agreement with the IAEA.<sup>8</sup> The Obama Administration has made a priority in current negotiations that cooperating nations have or will have an additional protocol with the IAEA before or quickly after a new 123 agreement enters into force. But it has not made progress with Argentina, nor has it made progress with Brazil, even while both nations now have working enrichment plants.

Reportedly, the new U.S. agreement with Vietnam will not contain a legally binding obligation that it not possess sensitive nuclear facilities, a term further

defined in my testimony. While I have not seen the Vietnam text, it is legitimate for Members to ask why it could not contain the same language that Taiwan has included in its agreement on new enrichment and reprocessing facilities, in particular given that it is highly unlikely that any legitimate commercial vendor of enrichment or reprocessing services would carry out these activities in Vietnam under any conditions that would permit the transfer of sensitive nuclear technology. The Administration argues that this should reduce concern about the lack of any such binding commitment. But this is, indeed, a sword that cuts both ways: While it is true that U.S. nuclear cooperation has always been case-by-case, country-by-country, and even while it is true that some allies are permitted to do things that others are not, in the main, it has always been U.S. policy, if not law, to deny any new enrichment and reprocessing in any new country. At a minimum, Congress ought to ask, and it is, why the Gold Standard is not being uniformly applied. Current law does not ask for any formal statement from the President, in this regard.

The original Gold Standard was embodied in the text of the 2009 U.S.-United Arab Emirates (UAE) 123 agreement. As President Obama stated in his Message to Congress transmitting the agreement:

The United States and the UAE are entering into it in the context of a stated intention by the UAE to rely on existing international markets for nuclear fuel services as an alternative to the pursuit of enrichment and reprocessing. Article 7 will transform this UAE policy into a legally binding obligation from the UAE to the United States upon entry into force of the Agreement. Article 13 provides, inter alia, that if the UAE at any time following entry into force of the Agreement materially violates Article 7, the United States will have a right to cease further cooperation under the Agreement, require the return of items subject to the Agreement, and terminate the Agreement by giving 90 days written notice. In view of these and other nonproliferation features, the Agreement has the potential to serve as a model for other countries in the region that wish to pursue responsible nuclear energy development.<sup>9</sup>

It is, of course, an open question whether any other new, potential cooperating nation or ally, apart from the UAE and now Taiwan, would strike a 123 forbidding it to have any sensitive nuclear facilities. UAE's choice was made easier by its own domestic law, which rules out sensitive nuclear facilities. Why it is not U.S. policy to convince more cooperating nations to do the same is, as well, an open question. There is no Non-Nuclear Weapon State right in the Treaty on the Nonproliferation of Nuclear Weapons (NPT) to possess sensitive nuclear facilities, even though many claim there is. This failure of caution stems from an intentional misreading of the treaty's text. The NPT appears to presume that it is not a per se violation of Article II to have sensitive nuclear facilities as long as they are subject to IAEA safeguards.<sup>10</sup> But it does not clearly say that any state has a right to enrichment or reprocessing facilities. This interpretation would appear to provide greater latitude for U.S. 123 agreements than not.

## Questions Regarding Any 123 Agreement

The primary determination that ought to inform consideration of each new and renewed 123 agreement is whether or not it sits on firm nonproliferation ground. And, directly related to that determination, are six simple questions:

- (1) Whether the agreement permits the transfer of sensitive nuclear technology<sup>11</sup>—broadly, technology that is related to the design, operation and maintenance of facilities for the enrichment of uranium, the reprocessing of spent fuel and the production of heavy water;
- (2) Whether the agreement contains a binding commitment from a cooperating party not to possess sensitive nuclear facilities—broadly, those facilities related to the foregoing definition of sensitive nuclear technology;
- (3) Whether, and where appropriate, the agreement permits on a case-by-case basis the alteration in form and content of U.S.-obligated nuclear material, or whether it permits broad “programmatically” consent to alter in form and content these U.S. materials, or whether the agreement obligates the United States to negotiate a future “subsequent arrangement” that could provide programmatic consent, as did the U.S.-India 123 agreement;<sup>12</sup>
- (4) Whether the agreement renews cooperation, and where appropriate, when and under what circumstances the United States made use of its rights under sections 123 a.(1)-(9) of the Atomic Energy Act, or any other relevant law or regulation, in the past, including cases in which it denied consent to any activities, with a cooperating party;
- (5) Whether the agreement is with a nation in a region of instability or proliferation concern; and
- (6) Whether the agreement is of finite or unspecific duration, and the rights of Congress that attach to its future re-approval.

These questions, in the main, relate to any U.S. civil nuclear cooperation agreement with a Non-Nuclear Weapon State. For a country like China, which is a Nuclear Weapon State, additional scrutiny should also apply to its commitments to the United States and the NSG, and its overall poor nonproliferation record over the past 30 years.

## **The U.S.-TECRO 123 Agreement**

Applying the questions above to the text of the agreement with Taiwan submitted on January 7, it is my conclusion that the Committee should provide a favorable recommendation to the full Senate and that Congress should approve this agreement. Under current law, however, this means you must do nothing, other than wait for the statutory review period to expire during 90 legislative days of continuous session from January 7, 2014, after which it will enter into force when each side exchanges notes saying it has. This Committee, or more specifically the Chairman and its Ranking Member, could still, under delegation from Senate Leadership, draft a resolution of approval and have the Committee work its will on that resolution under existing law, to include reporting it to the full Senate for a vote.

However, since such a resolution of approval is wholly unnecessary under the current statutory framework, it has generally been the case that this Committee has held no hearing, nor authored a resolution of approval in the past, nor has it made use of this process, even in cases such as Turkey's 123 agreement. This was to the detriment of Congress as a whole and the Committee in particular, because it gave precedent to a process of neglect. I would be happy to brief Members and staff on particular cases in which this occurred and provide far more detail regarding the views held by previous Congresses, Members and staff on the law as it stands and on particular 123 agreements.

The Taiwan agreement does not permit exports of sensitive nuclear technology to Taiwan, nor does it allow for Taiwan to have sensitive nuclear facilities, thus it does not permit alterations in form and content of U.S.-obligated nuclear material on the island related to any of the foregoing activities or facilities, save for routine matters such as post-irradiation evaluations.

I would strongly urge that the Committee's review of the Taiwan agreement include full discussion of the classified material regarding this country's nuclear past. After the enactment of the Nuclear Nonproliferation Act of 1978, the original 1972 Taiwan agreement was not renegotiated, despite the plain command in the 1978 law that it should have been, until 40 years later. Nor was South Korea's agreement ever renegotiated, and it now must be extended for two years as it expires in weeks. Taiwan has something else in common with South Korea besides old agreements—neither nation's program ever had a Nuclear Proliferation Assessment Statement (NPAS) submitted to Congress regarding its nuclear programs. Now that Taiwan's NPAS is with you, it will need to include the complex history of Taiwan's nuclear weapons effort. Congress would do well to take a long look at the declassified and classified record regarding this matter.<sup>13</sup>

Taiwan does sit in a region of instability. While it has pursued better relations with China, China's regional ambitions continue to include nuclear threats

to U.S. allies. Taiwan remains a key U.S. ally and partner in the region, and United States foreign policy toward China is not inconsistent with Taiwan's policy with respect to Beijing, for the time being. However, the agreement does contain language that is vague with regard to whether or not Congress will ever review it again. Article 15.3 of the Taiwan agreement states:

This Agreement shall remain in force indefinitely unless terminated by either Party on one year's written notice to the other Party. Prior to termination of this Agreement, the Parties shall review this Agreement in accordance with the provisions of Article 12.2.

This formulation appears to suggest that, notwithstanding the larger strategic changes that may occur in Asia, Congress would only review our 123 agreement with Taiwan once—as was the case for our agreement with Japan. Thus, Congress will only ever have one NPAS for Taiwan and one agreement that met section 123, as amended, to review. While Congress can always revisit this agreement in any new law in the future, it would be wise to probe why the Administration was willing to support this duration language now and why, as a whole, our agreements in Asia are trending in the direction of a lower Congressional profile regarding re-approval of future cooperation. The Committee will want to deal with this question well in advance of the conclusion of any negotiations with the People's Republic of China on extension of its 123 agreement with the United States.

Likewise, given the tremendous degree of flux apparent in Hanoi's nuclear-energy decisions, even if the new agreement does not contain a Gold Standard but does contain, as the Chairman called it, a "Silver Standard," it is even less clear why it would have indefinite duration. In both cases, Taiwan and Vietnam, I suspect that neither nation is overly concerned with having agreements that, if renewed, never come back before Congress and this Committee. It is far more likely that this is a State Department position. If this is truly so, then the Committee can easily remedy this, either in its approval process for both pacts and/or by amending existing law to make it the case that agreements have set durations and that when they expire new agreements should be negotiated to replace them and should then be submitted for Congressional review. After all, we are talking about durations of 15 to 30 years.

It ought not to upset either an ally or the Administration that Congress and several experts have questioned these provisions on duration. We cannot now know the circumstances in which our nuclear material in the world, let alone in Taiwan, will be found in the future.

Thank, you. I respectfully submit this statement.

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<sup>1</sup>Concurrent Resolutions in Enrolled Bill S. 1153, September 7, 1977, House Concurrent Resolution 342, (91 Stat. 1682), text available at <http://www.gpo.gov/fdsys/pkg/STATUTE-91/pdf/STATUTE-91-Pg1682.pdf>, last accessed on January 30, 2014.

<sup>2</sup> GATT XVI(b)(i).

<sup>3</sup> Michael R. Gordon and Steven Lee Myers, "Kerry Insists That Syria Quickly Give Data on Arms," *The New York Times*, September 12, 2013, at <http://www.nytimes.com/2013/09/13/world/middleeast/united-states-and-russia-far-apart-as-kerry-arrives-in-geneva-for-syria-talks.html>, last accessed on January 30, 2014.

<sup>4</sup> Members and staff would also do well to take note of the fact that the report required under section 601 of the Nuclear Nonproliferation Act of 1978 was eliminated in a previous Congress, and without the knowledge of the Senate Foreign Relations Committee. This report, which itself was modeled on reports required to be provided to the JCAE was one, very important way in which a fully and currently informed Committee was possible.

<sup>5</sup> Farhan Bokhari, "China Strengthens Pakistan Ties with \$6.5bn Loan for Nuclear Power," *The Financial Times*, January 1, 2014, at <http://www.ft.com/cms/s/0/4407fcee-72e9-11e3-b05b-00144feabdc0.html#axzz2rtXxLQzP>, last accessed on January 30, 2014.

<sup>6</sup> Miles Yu, "Inside China: Nuclear Submarines Capable of Widespread Attack on US," *The Washington Times*, October 31, 2013, at <http://www.washingtontimes.com/news/2013/oct/31/inside-china-nuclear-submarines-capable-of-widespr/>, last accessed on January 30, 2014. See also, David Santoro, "Will America's Allies Go Nuclear?" *The National Interest Online*, January 30, 2014, available at <http://nationalinterest.org/commentary/will-americas-asian-allies-go-nuclear-9794>, last accessed on January 30, 2014.

<sup>7</sup> "Argentina Celebrates Enrichment Plant Reactivation," *World Nuclear News*, October 26, 2010, available at [http://www.world-nuclear-news.org/ENF-Argentina\\_celebrates\\_enrichment\\_plant\\_reactivation-2610107.html](http://www.world-nuclear-news.org/ENF-Argentina_celebrates_enrichment_plant_reactivation-2610107.html), last accessed on January 30, 2014.

<sup>8</sup> *Status List, Conclusion of Safeguards Agreements, and Additional Protocols and Small Quantities Protocols*, the International Atomic Energy Agency, current as of December 31, 2013, available at [http://www.iaea.org/safeguards/documents/sir\\_table.pdf](http://www.iaea.org/safeguards/documents/sir_table.pdf), last accessed on January 30, 2014.

<sup>9</sup> "Message from the President of the United States Transmitting the Text of a Proposed Agreement for Cooperation Between the United States of America and the Government of the United Arab Emirates Concerning Peaceful Uses of Nuclear Energy, Pursuant to 42 U.S.C. 2153(b), (d)," House Document 111-43, May 21, 2009, p. 1.

<sup>10</sup> See the "Written Extension of Remarks by Mr. Foster in Response to Question Regarding Nuclear Explosive Devices," in *Hearings Before the Committee on Foreign Relations on the Nonproliferation Treaty*, 90<sup>th</sup> Congress, 2<sup>d</sup> Session, July 10, 1968, p. 39.

<sup>11</sup> Sensitive nuclear technology is defined at 22 U.S.C. 3203 (5) as "any information (including information incorporated in a production or utilization facility or important component part thereof) which is not available to the public and which is important to the design, construction, fabrication, operation or maintenance of a uranium enrichment or nuclear fuel reprocessing facility or a facility for the production of heavy water, but shall not include Restricted Data controlled pursuant to chapter 12 of the 1954 Act [42 U.S.C. 2161 et seq.]"

<sup>12</sup> Clause iii of paragraph 6 of Article 6.

<sup>13</sup> The National Security Archive's "Nuclear Vault" contains extensive, on-line access to these documents, at <http://www2.gwu.edu/~nsarchiv/nukevault/ebb221/index.htm>, last accessed on January 30, 2014.