THE REGULATORY FAIR WARNING ACT

HON. GEORGE W. GEKAS

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, June 11, 1998

Mr. GEKAS. Mr. Speaker, today I am introducing the Regulatory Fair Warning Act along with fourteen cosponsors. This legislation codifies principles of due process, fair warning, and common sense that were always intended to be required by the Administrative Procedure Act (APA). The bill would require that an agency give the regulated community adequate notice of its interpretation of an ambiguous rule. Agencies and courts would be barred from imposing penalties based on rules or policies that are not clearly known to the regulated community. They would consequently be encouraged to make known what is required or prohibited by their rules.

Specifically, the Regulatory Fair Warning Act would prohibit a civil or criminal sanction from being imposed by an agency or court if: a rule or regulation is not available to the public or known to the regulated community; a rule or regulation does not give fair warning of what is prohibited or required; or officials have been misleading about what a rule prohibits or requires.

I am pleased to introduce this simple, yet necessary measure. Without its fundamental protections, individuals and businesses must live in an atmosphere of uncertainty as to whether they are in compliance with an agency's most recent interpretation or reinterpretation of its regulations. If and when the day arrives that an agency chooses to enforce a new interpretation against a regulated party, that party has two alternatives: (1) roll the dice on expensive, protracted administrative processes and litigation, or (2) pay the penalty, regardless of culpability.

Nothing in this measure is intended to weaken the enforcement powers of federal agencies. In fact, by requiring rules to be clear, the Regulatory Fair Warning Act would promote compliance and make violators easier to catch, because the lines dividing right and wrong would be more clear. This moderate measure would provide a minimum of security and predictability to regulated individuals and businesses. It would surely improve the relationship between federal agencies and the American public.

I originally introduced a version of this legislation in the 104th Congress as H.R. 3307. That bill had strong, bipartisan support and it was favorably reported by the Judiciary Committee. Many of the same Members who cosponsored that bill are cosponsors of this one, and I thank them for their support and their work on ensuring fairness in the regulatory process.

There is wide consensus that the government and all its agencies should provide citizens with fair warning of what the law and regulations require. Likewise, citizens should be able to rely on information received from the government and its agencies. Though these principles are embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution, legislation to codify and enforce them in the regulatory context would help ensure that members of the public—in addition to having due process rights—are actually treated fairly.

INDIA CONSIDERS SANCTIONS A BLESSING—INDIAN VILLAGERS REPORT SIDE-EFFECTS FROM NUCLEAR TESTS

HON. DAN BURTON

OF INDIANA

IN THE HOUSE OF REPRESENTATIVES

Thursday, June 11, 1998

Mr. BURTON of Indiana. Mr. Speaker, I want to commend two recent news articles for all Members' immediate personal review, and I want to thank the President of the Council of Khalistan, Dr. Gurmit Singh Aulakh, for bringing them to my attention. The first article is from the May 30, 1998 edition of the India Tribune in which it actually says that U.S. economic sanctions on India could prove to be a blessing in disguise, and that India should ''push ahead with determination'' in developing its nuclear arsenal. The second article was a report by the Reuters news service on May 17, 1998, in which residents of a village near where the Indian government conducted its recent nuclear tests have been complaining about ''nose bleeds, skin and eye irritation, vomiting and loose bowels.''

These developments should be very disturbing to any Member who wants peace between India and Pakistan, and in the entire South Asian region. The fact that India is willing to subject its own citizens to nuclear fallout in the name of developing its nuclear arsenal speaks volumes about their real warring intentions. Indeed, the India Tribune encourages its country to not ''panic in the face of international furor but stay firm and continue to build up its nuclear weapons capability.''

Can there be any further doubt that India will have the capability of raining nuclear missiles down upon Pakistan soon? I think if my colleagues read these recent articles carefully, they will reach the same conclusion. India will soon have, if they do not have it already, that very capability even at the expense of harming its own citizens.

Mr. Speaker, we must be very diligent that this region does not become the epicenter of a World War III-type nuclear conflict. The stakes could not be higher.

I would like to enter the India Tribune and Reuters articles into the CONGRESSIONAL RECORD, and I strongly urge my colleagues to read them with the utmost gravity they deserve. Especially in light of the Rand Corporation's recent prediction that within a few years there will be a war between India and Pakistan. If so, that war could now include nuclear weapons.

[From the India Tribune, May 30, 1998]

BETWEEN THE LINES—INDIA SHOULD PUSH AHEAD WITH DETERMINATION

(By Brahma Chellaney)

The 24th Anniversary of the first nuclear test at Pokhran would have been another occasion to reflect on India's nuclear indecision. But exactly one week before the anniversary, the country shed its chronic ambivalence and consummated its long-held nuclear option. India unleashed its action with a vengeance, carrying out five nuclear tests in two days, unequivocally demonstrating its capability to manufacture the most modern nuclear weapons—thermonuclear, boosted fission and low-yield types. The nation has shown it has compact missile-deliverable nuclear warheads.

Jawaharlal Nehru laid the foundation of India's nuclear programme. The Nehru Government set up the Atomic Energy Commission in 1948 to produce ''all the basic materials'' because of nuclear power's ''strategic nature''. Nehru had said even before assuming office that as long as the world was constituted on nuclear might, ''every country will have to develop and use the latest scientific devices for its protection''. By the mid-1950s, India had built Asia's first atomic research reactor, Apsara, and set in motion a broad-based nuclear programme.

After the Cirus reactor started up in 1960, Nehru declared, ''We are approaching a stage when it is possible for us . . . to make atomic weapons.'' That stage was reached unquestionably in 1964, when India completed a facility at Trombay to reprocess the Cirus spent fuel, making it the fifth country to be able to produce plutonium. When the Chinese conducted their first nuclear test in 1964—four months after Nehru's death—Homi Bhabba declared that India, if it decided, could build a nuclear bomb within 18 months.

China's first nuclear test, barely two years after its invading forces inflicted a crushing defeat on India, sharply heightened this country's insecurity. The following year, Pakistan, taking advantage of India's security travails, infiltrated its men into Jammu and Kashmir, triggering a full-scale war.

It was Lal Bahadur Shastri who initiated the Indian nuclear explosives programme in 1965. But a series of events put a brake on that programme. These included the passing away of Shastri, Bhabba's own death in a mysterious plane crash in Europe, and the political instability triggered by an initially weak government under Indira Gandhi.

When India eventually conducted a nuclear detonation in 1974, it astounded the world. U.S. intelligence was caught unawares, even though Indira Gandhi had told Parliament in 1972 that her Government was ''studying situations under which peaceful nuclear explosions carried out underground can be of economic benefit to India without causing environmental hazards''. Earlier in 1970, India had rejected a U.S. demarche against conducting any nuclear explosion.

By conducting the 1974 test, Indira Gandhi gave India a tangible nuclear option. The country broke no legal commitment and had the sovereign right to continue the testing programme. As Henry Kissinger told U.S. Congress after the Pokhran test, ''We objected strongly, but since there was no violation of U.S. agreements involved, we had no specific leverage on which to bring our objections to bear''. The test shook the 1968-designed NPT regime to its very foundation.

Had India continued to test, this regime probably would have disintegrated or been seriously damaged. Instead, the U.S.-led regime emerged stronger and with fangs because India, to the great surprise of the rest of the world and its own public, did not go beyond that one single test. It will remain a riddle of history why Indira Gandhi did not carry out another test.

One key constraint on India going overtly nuclear was its lack of missile capability. Indira Gandhi sought to remedy this by formally instituting a programme in 1983 to develop ballistic missiles. The essence of deterrence is the ability to retaliate with devastating might after surviving a first strike by an aggressor. Any nuclear deterrent force thus is centered on missiles, not bomber-aircraft, which in India's case cannot reach even the heartland of its leading security concern, China.

India's nuclear option really opened up in an operational sense only after the Agni was flight-tested in February 1994, completing its triumphant three-test developmental phase.

The first Agni test in 1989 was carried out despite, in the words of Rajiv Gandhi, ''ambassadors of certain foreign powers'' threatening punitive sanctions. ''I told them clearly that India would carry out the launch and we would not change our decision under pressure'', the then Prime Minister said.

All three generations of Nehrus who served as Prime Ministers played an important role in building a concrete nuclear option. India's security planning, however, entered its darkest phase under P.V. Narasimha Rao, whose government slashed defence spending, squeezed strategic programmes, deviated from the traditional disarmament policy and delayed the flight-tests of even the short-range Prithvi missile. Rao showed that India did not need any enemy—it could be its own worst enemy.

Rao declined to take follow-up action on the Agni, putting the programme in deep hibernation. As Dr. A.P.J. Abdul Kalam said in 1994, the Agni needs no further experimental flight-tests but only ''random batch tests'' once its production begins. With the advance of simulation technology, longer-range missiles are entering production after one to four flight-tests. The Agni comprises two stages, each tested many times; Its solid-fuelled first stage is the SLV–3 space launcher, while its liquid-fuelled second stage is the Prithvi.

Agni-type missiles make strategic sense only if they carry a nuclear weapon. While India had demonstrated its delivery capability, it had not demonstrated its ability to build a nuclear warhead for the Agni. A reliable warhead could never have emerged without testing. In fact, without the testing option, India would have had no nuclear option worth the name.

As the only nuclear-threshold state not to receive tested warhead designs from external sources, India had to forcefully oppose the CTBT and safeguard its testing right.

Through its nuclear indecision, India had also been undermining its international role, severely cramping its diplomacy and literally inviting the imposition of additional technology controls on it. While the threat of sanctions was being cleverly employed to rein in India, the country had over the years fallen victim to increasing technology sanctions for merely retaining an open nuclear option. Every cost-benefit analysis was showing that India was bleeding its interests, incurring the liabilities of maintaining an open option but not making the security gains.

India's turning point came when an openly pro-nuclear government took office in March 1998. The new coalition elected to power pledged, in the words of A.B. Vajpayee, to ''exercise all options, including the nuclear option''. No prime minister has assumed office with such a categorical commitment.

The Vajpayee government was determined not to miss India's closing opportunity to break out of its self-created constraints. The Indian nuclear option had come under increasing siege in the 1990s with the five declared nuclear powers joining hands for the first time to enforce nonproliferation as a global norm. After legitimising their nuclear hegemony through the NPT's permanent extensions, these powers had begun targeting Indian through the CTBT and the proposed FMCT.

It was this pressure that prompted two previous Indian governments to order a nuclear test, although they retreated from their plan at the eleventh hour. The first test decision was taken by Narasimha Rao in late 1995, but the pusillanimous Rao scrapped the plan after the US government began breathing down his neck. US officials also leaked the test plan to an American newspaper. The newspaper report cited satellite reconnaissance as showing the Indians preparing to test, but since there was no drilling or other activity at Pokhran that a satellite could pick up, the tipoff to Washington most likely came from a high-level source in the Rao government.

The second test move was initiated by Vajpayee immediately after taking over as Prime Minister in May 1996. The plan, however, had to be aborted as his government ran out of time after the Lok Sabba secretariat advanced the vote of confidence by two days. The H.D. Deve Gowda and I.K. Gujral governments also seriously considered nuclear testing, but did not order any detonation in the absence of support from their Leftist constituents.

When Vajpayee became Prime Minister for the second time, he knew that continued inaction would bring India under stepped-up pressure from next year, with the 1999 CTBT entry-into-force conference to be followed by the NPT review conference in 2000. He also realised that any testing plan would get leaked to the Americans unless it was confined to a handful of decision-makers. That is the reason why even the Defence Minister George Fernandes was not in the loop from the beginning, but was brought into the picture later before the first series of three detonations. Had Fernandes known the plan from the outset, he would not have gone around saying that a nuclear decision would have to await a strategic posture review.

So when Vajpayee announced that India had conducted three nuclear tests within minutes of each other, he stunned the world and exposed one of America's biggest intelligence failures. The intelligence bungle was compounded by the subsequent Indian tests of two highly sophisticated devices with yields less than one kiloton. Those two blasts showed India can do advanced hydronuclear tests, which are limited to subcritical or slightly supercritical neutron multiplication and release negligible amounts of fission energy.

It was inevitable that India would come under tremendous pressure once it resumed nuclear testing after a gap of almost a quarter century. But the decisionmakers recognised that the costs of inaction outweighed the costs of action. India had been paying a heavy price for its 1974 test as that step was not linked to a nuclear-deterrent blueprint. The rising tide of technology sanctions since 1974 sought to damn India whether it restrained itself or exercised the nuclear option. The nation decided ultimately to adopt the latter course and get out of a self-injurious situation.

Having taken the toughest and boldest step necessary to embark on a nuclear-weapons programme, India has to determinedly push ahead without resting on its oars. Any vacillation will bring it under greater external pressure. The more determination it shows, the greater its leverage and ability to beat back sanctions. It cannot panic in the face of the international furore but stay firm and continue to build up its nuclear-weapons capability. When the world sees a resolute India pushing ahead, the present reaction will begin to taper off.

[From the India Tribune,—May 30, 1998]

SANCTIONS—A BLESSING

(By J.V. Lakshmana Rao)

Sanctions are not new to India. When former Prime Minister Indira Gandhi conducted the first nuclear test in 1974, the country came under the grip of a wrath from the US and other countries.

The supply to nuclear fuel from the US and other countries to India was stopped. At that time, many thought that India's nuclear power projects—of course they were not many—would be crippled by the non-availability of the much-needed fuel.

But India's nuclear scientists quickly responded and came to the rescue of the country. While they developed their own technique to reprocess spent fuel, they also started indigenous production of nuclear fuel. The Indian government strengthened the nuclear fuel complex in Hyderabad, the uranium mill at Jaduguda in Bihar, uranium mines in Jaduguda and Bhatim in Bihar, the rare earth facilities in Manavalakurchi in Tamil Nadu, Chavara in Kerala and Chbattarpur in Orissa. The working of heavy water plants in Baroda in Gujarat, Talcher in Orissa, Tuticorin in Tamil Nadu, and Thai in Maharashtra were strengthened to boost production. A few more research and development wings were added to the Bhabba Atomic Research Center in Trombay and other institutions in the country. Though the power generation in nuclear power plants suffered briefly, they quickly recovered.

India also had to face some sort of sanctions because of its missile-development programmes, like Agni and Prithvi. Every successful test at Chandipur-on-Sea sent shock waves in the US. The US refused to supply the super-computer to India. The US feared that India might use the super-computer for defence purposes. The latest indications are that Indian electronics engineers have developed a more sophisticated super-computer system than the one now available in the US.

Even the present nuclear technology, with which the five nuclear tests were conducted at Pokhran, is fully indigenous.

As the adage goes that ''necessity is the mother of invention,'' only under pressure, does India develop its resources. Therefore, the present sanctions from the US and other nations should prove to be a ''blessing in disguise'' for India.

As it is, the US aid to India amounts only a few million dollars out of the grant of about $3 billion annually. The sanctions will surely slow down investments by the multinationals, some of which have taken up huge projects in India. Definitely these multinationals will persuade the US to relax some of the restrictive provisions, so that their interest do not suffer. To make things clear to the world, Prime Minister Atal Behari Vajpayee has announced that India would not slow down the economic reforms.

Though India's foreign reserves position is comfortable, sanctions, can deplete them. There are several ways India can overcome the problem. As as retaliatory measure, India should restrict imports from countries that have imposed sanctions. India should review its import policy and ensure that it imports only very essential items.

The Non-Resident Indians (NRIs), who have overwhelmingly supported Prime Minister Atal Behari Vajpayee's coalition government for the nuclear tests, must show their support in action by investing substantially in India. They should act immediately before their enthusiasm dies down.

There is a lot of misreporting in the US newspapers about India. The country is projected as a ''sinner.'' A Chicago-based mainstream newspaper calls India a ''defiant'' country and publishes a picture, whose caption says that ''Hindus'' burn the flag of a neighboring country. India is a secular country, and it is not understandable how the newspaper could identify the crowd as only Hindus. It has become fashionable for some newspapers to describe the Vajpayee government as the ''Hindu fundamentalist.''

The usage of words like ''defiant'' and ''Hindus'' is highly objectionable and provocative. The local Indian Consulate turns a blind eye to it, but calls for a press conference of journalists of Indian ethnic newspapers to ''brief'' them on India's nuclear

tests. Instead, the Indian Consulate will do well to address a press conference of mainstream newspapers, and let them know that India is ruled by a secular democratic government, and the Indian Constitution has not been amended to call its people only ''Hindus.''

Indian Consul General in Chicago J.C. Sharma did a commendable job as a participant of a panel discussion on Channel 11 last week.

[From the Reuters News Service, May 17, 1998]

INDIAN VILLAGERS CLAIM N–TEST SIDE EFFECTS

NEW DELHI, INDIA.—Several residents of a village near India's nuclear-testing site have complained of nose-bleeds, skin and eye irritation, vomiting and loose bowels since last week's underground blasts, a report said on Sunday.

The government has said that no radioactivity was released into the atmosphere over the Thar desert, in the western state of Rajasthan, as a result of its five tests.

But The Sunday Statesman said that more than a dozen people from the village of Khetolai experienced symptoms of contamination by radiation immediately after the last two of the five devices were exploded on Wednesday.

''The residents approached us, gave a list of affected persons,'' the paper quoted a district official as saying. ''Most of them have complained of nose-bleeding, loss of appetite, irritation in skin and eyes.''

''We will soon send a team of doctors to examine the affected villagers. Only then can we come to a conclusion. It could also be due to the rise in temperature,'' he said.

The paper said the people of Khetolai were convinced that the complaints were due to radiation exposure and quoted one man as saying he was suffering nose-bleeds for the first time in his life.

Another man was worried about his 12-year-old daughter. ''She has been vomiting, bleeding through the nose and feeling restless for two days after the second explosion,'' the paper quoted the girl's father as saying. ''First we ignored it but when the number of victims rose we brought it to the notice of district and army officers.''

Khetolai is one of seven villages dotted around the Alpha Firing range of the area called Pokhran.