

# Banco Delta Asia, North Korea's Frozen Funds & US Undermining of the Six-Party Talks: Obstacles to a Solution. Part III

John McGlynn

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John McGlynn

*This is the third article by John McGlynn in a series that meticulously dissects US charges of North Korean criminality, notably the forgery of US currency and money laundering, the significance of the legal instruments it has imposed on North Korea through Banco Delta Asia, and the significance of US actions for the resolution of the interrelated issues of North Korean nuclear weapons and the normalization of US-North Korean relations.*

The other articles in this series are

North Korean Criminality Examined: the US Case (http://japanfocus.org/products/details/2423) Part I

Financial Sanctions and North Korea: In Search of the Evidence of Currency Counterfeiting and Money Laundering (http://japanfocus.org/products/details/2463)Part II

The standard US government position on Banco Delta Asia (BDA), explained almost daily by the US State Department's spokesperson, is that "the whole issue related to BDA [is] a lot more complicated than anybody could have possibly anticipated. The rules, regulations and traditional behaviors in the international financial system make this sort of resolution very complicated." Ultimately, the matter "is one between North Korea and its bankers." [1]



Banco Delta Asia

This is incorrect in two respects. First, until the US stepped in, the DPRK (North Korea) had no apparent trouble with its bankers. Second, now that trouble exists, BDA has been willing for quite some time to transmit DPRK-related funds to any other bank willing to accept them. But any bank accepting those funds risks incurring Washington's wrath. Thus, the last portion of the above statement should more accurately say: "It is a matter between the US government and banks willing but too afraid to do business with North Korea."

The BDA affair is essentially a political matter that concerns the DPRK and the United States (and perhaps China). It is not a question of one bad bank. Banks, however, are conservative, risk-averse bodies. Washington turned these qualities to its advantage to meet the political objective of isolating the DPRK from the international financial community. In December 2005, long before Washington officially decided to blacklist BDA, the US Treasury Department explained what kind of risk averse behavior it expected from the world's banks with respect to the DPRK: the taking of "reasonable steps to guard against the abuse of their financial services by North Korea."<sup>[2]</sup>

BDA is "complicated" for the State Department for the reason that it does not have the legal power to end the bank's blacklisting. The Treasury Department has that power. The blacklisting of BDA came about through Treasury's imposition of a regulation following a period of public notice and comment that set the table for an 18-month US government investigation of the Macau bank, whose results remain secret. If that regulation were lifted, DPRK funds on deposit at BDA or any other bank could once again circulate freely through the global banking system. More importantly, the Six Party process that has ground to a halt over the BDA issue could resume and contribute toward the easing of tensions in Northeast Asia. Treasury, however, remains unwilling to withdraw the regulation.

The State Department is clearly eager to end the BDA imbroglio, but without support from Treasury, it is powerless to do so. Consequently, Christopher Hill, State's lead official on the BDA matter and the DPRK, has been forced to shuttle back and forth between Washington, Seoul, Beijing and other capital cities, begging for some government or bank to come to his rescue with a backdoor solution. But as a sympathetic onlooker working with the US Peace Institute observes, "[f]requent reports of an imminent solution over the past month have not materialized."<sup>[3]</sup> He adds: "After failed attempts to have Chinese, Russian and Italian banks process the transfer,

Wachovia, a U.S. bank, was recently approached by the State Department." But Wachovia has already stated that it will do nothing without Treasury's approval. Moreover, the DPRK has repeatedly rejected any solution that does not restore its normal everyday global banking privileges.



Christopher Hill

The leadership in Pyongyang has forced the Bush administration to recognize that resolution of BDA and the resumption of diplomacy with the DPRK are part of a package deal. In seeking to tackle this problem package, Washington appears to have had three objectives in mind: the freezing (and eventual elimination) of the DPRK's nuclear weapons development program under the aegis of the Six Party process; the securing of the US financial system against money laundering, currency counterfeiting and terrorist funding; and the application of pressure to compel the DPRK to terminate its alleged criminal activities (money laundering, counterfeiting, drug trafficking).

The agreements reached through the Six Party process prepared the way toward meeting the first objective, but Washington's inability to

resolve BDA is blocking any headway. As for the second objective, a plausible argument can be made that it has already been achieved. Macau officials and BDA's owners have introduced a number of anti-money laundering measures that appear to satisfy international crime prevention standards and many of the specific concerns raised by Treasury. Also, according to legal petitions filed with Treasury, the counsel representing BDA and its owners have given Treasury virtual carte blanche to dictate any further remedial actions it feels are needed. Only when Treasury was closing its book on BDA last March, following an 18-month investigation, did it reveal that its real worry was that BDA's owners exhibited the "potential for recidivism," whatever that might mean. It appears, however, that Treasury's interest has been, and remains, blocking North Korea's access to funds regardless of the consequences for the Six Party process and North Korea's nuclear capacity.



Six Party Talks, Beijing, March 2007

As for the third objective, only the DPRK's alleged money laundering and currency counterfeiting are addressed here, because these are the official concerns Treasury can raise under Patriot Act Section 311, the law that gives it the

power to punish a bank or jurisdiction (a region or country) designated a "primary money laundering concern". It seems that, at least for now, these concerns can be discounted because immediately after BDA was formally blacklisted both Treasury and State approved release of the allegedly criminal funds on deposit at BDA to DPRK-related account holders. Why Treasury agreed to do this is unknown, but what is known is that despite an 18-month investigation said to have involved 300,000 pages of BDA documents not one piece of incriminating evidence against the DPRK has been publicly released. Moreover, the US Congress has apparently never held Treasury to account by demanding, either in an open or closed session of one of its oversight committees, to see the evidence. Given what is at stake in the Six Party process, that is puzzling.

If the Bush administration truly wants to end the BDA matter and resume implementation of the Korean peninsula denuclearization and bilateral normalization processes agreed at the Six Party talks, the quickest way is for Treasury to rescind its Patriot Act Section 311 censure of BDA.

Treasury, however, perhaps with support in the highest echelons of the administration, remains disinclined to act to resolve BDA. The remainder of this essay will examine how it could act and suggest some reasons why it has not.

### 1. Is there a precedent for revoking the

### particular Treasury Section 311 action?

No. A bank or jurisdiction (a region or country) designated by Treasury as a "primary money laundering concern" can be made the subject of one or more of five Patriot Act Section 311 "special measures," the fifth of which was imposed on BDA. Special measures one through four can be applied and rescinded at will by Treasury. The fifth special measure, however, can only be imposed by regulation following a required period of public notice and comment and a 30-day period for US banks to come into compliance. Under the fifth special measure, US financial institutions are prohibited from having accounts in the US with the designated bank or jurisdiction and are required to guard against indirect use of US accounts by the designated bank or jurisdiction through other overseas banks. Prior to BDA only four other banks and one jurisdiction had been the subject of the fifth special measure: Myanmar Mayflower Bank and Asia Wealth Bank (Burma), Burma (the entire country), Commercial Bank of Syria and VEF Banka (Latvia). In these four cases the fifth special measure remains in place.[4]



US Department of the Treasury

If the fifth special measure is only proposed (but not implemented), it can be rescinded at any time. This was done in the case of Multibanka, a Latvia bank on which Treasury proposed imposing the fifth special measure in April 2005 (the proposal was later rescinded in July 2006). In the case of BDA, however, the fifth special measure was proposed in September 2005 and imposed in March 2007.

## 2. How can the fifth special measure against BDA be rescinded?

The fifth special measure against BDA is a Final Rule, or US federal regulation. There is no precedent in the history of Section 311 for withdrawing a Final Rule. Nevertheless there is a process, a Treasury spokesperson explains, which would consist of publication of a notice to rescind in the Federal Register, the official US publication for announcing proposed or final changes to federal regulations, that would include the reasons for withdrawal. Such withdrawal would "take effect immediately, unlike the imposition of a final rule," said the spokesperson.[5] There would be no period for public comment and no 30-day compliance period for US banks.

Contrary to the State Department's view, ending the BDA matter is therefore technically quite simple. At the moment, however, Treasury appears to have no plans to withdraw the Final

Rule.

## 3. Is BDA taking legal action against the US Treasury Department?

In court, no, or at least not yet. However, Heller Ehrman, legal counsel for BDA, submitted a petition to Treasury on April 13, 2007, calling Treasury's decision to "implement the Final Rule against BDA . . . arbitrary and capricious" and demanding that it be "rescinded immediately". On May 3, 2007 Jones Day, legal counsel for Delta Asia Group (DAG), the holding company for BDA, and Stanley Au, the principle owner of BDA as the largest shareholder in DAG, submitted a petition that also demands immediate withdrawal of the Final Rule and states that senior Treasury officials "have admitted" that Treasury's "decision to impose the fifth special measure 'is not about [BDA].' It represents, rather, a political decision to send a signal to others in the international banking community that commercial dealings with North Korean-related entities are henceforth to be avoided."



Stanley Au

According to a Treasury spokesperson, the petitions are under review. Also, acknowledgements of receipt have been sent to the two law firms, but the public can only access these acknowledgements through filing a Freedom of Information Act request.[6]

If the petitions fail to bring about a resolution, the lawyers for BDA and its owners can file suit in a US federal court. The suit would probably be based mainly or in part on claims that Treasury's decision to impose the Final Rule was "arbitrary and capricious". Also, whether Treasury had "reasonable grounds" under Patriot Act additions to the 1970 US Bank Secrecy Act[7] to conclude that BDA was a "primary money laundering concern" might become an issue at court.

Even if the BDA matter lands in court, BDA's counsel may never get an opportunity to see, much less contest, the US government's evidentiary findings. The reason is that much of the government's investigation of BDA rests on evidence gathered by classified sources. According to footnote 5 in the Final Rule, "[c]lassified information used in support of a section 311 finding of primary money laundering concern and imposition of special measure(s) may be submitted by Treasury to a reviewing court ex parte and in camera."

Ex parte means that the US government could present classified evidence against BDA in court

in BDA's absence. In camera means the court can review evidence behind closed doors, excluding the public and the press. In short, not only is the public denied access to the evidence, but BDA may similarly be denied access.

A federal judge could conduct his own in camera or private review of the classified information. But according to federal circuit judge Richard Posner, "federal judges do not have security clearances and, more to the point, have no expertise in national security matters. Moreover, the criminal justice system is designed for dealing with ordinary crimes, not today's global terrorism" or, perhaps equally likely, national security concerns about the DPRK mixed up with money laundering concerns. Meredith Fuchs, a lawyer with the National Security Archive, has written that for cases that fall in the national security realm the appointment of a "special master" might be able to provide a court with "a time-saving alternative to in camera review of voluminous or highly technical classified materials." Whatever the merits of the special master idea, however, Fuchs notes that the common practice appears to be for courts to "simply defer to the litany of potential harms asserted in the government's briefs and deny access to the disputed records." [8]

Few are likely to dispute that the US government has a right and an obligation to protect the safety and confidentiality of its sources. But in the case



of BDA, in which law shades into the politics of war and peace in Northeast Asia, government prerogative should be balanced against a legitimate public interest in knowing whether US accusations of criminal behavior by the DPRK have any basis in fact.

#### **4. Has the US Treasury Department indicated how BDA can be resolved?**

Yes.

Since shortly after Treasury designated BDA a "primary money laundering concern" in September 2005 an outside Administrative Committee (AC) appointed by Macau authorities has been in control of the bank's management. Stanley Au, BDA's primary shareholder, has declared in writing to Treasury (signed "under penalty of perjury" under US law) his willingness to "provide enforceable assurances" to terminate "any part or all of our North Korean business", block employment of anyone at the management level objected to by Treasury or the Macau regulatory authority and permanently hire AC-management officials.[9]

Au made his declaration in response to Treasury's concern, stated when Treasury made its formal decision to blacklist BDA in March 2007, that BDA might be "returned to the control of its former management and primary shareholder," who have a "potential for

recidivism." What Treasury wants of BDA is clear: regime change in management (or perhaps a buyout or permanent closure). But in light of the management changes made and promised, it appears that the only real regime change target left at BDA is Au himself-- and perhaps some family members who sit on the board of directors.

Au appears ready to be in this fight for the long term and will not easily surrender his ownership position. BDA and its owners, including Au, have hired two major international law firms, Heller Ehrman (4th on The American Lawyer's 2006 ranking of the top 20 law firms) and Jones Day (named International Law Firm of the Year by the Asian Legal Business China Law Awards in 2005), to fight Treasury's blacklisting both on substantive and legal grounds. There appear to be no signs of officials in Beijing or in Macau trying to force Au out.

Treasury seems not to have surrendered its "recidivism" concerns. A possible buyout by another Chinese bank has been rumored, as has intervention from Beijing or unspecified resignations by "bank executives", but nothing has been substantiated.

As long as Treasury remains unmoved, the BDA deadlock is likely to continue. It is impossible to know what China's leadership might eventually decide to do, but a little history offers some clue.

From the early 1800s when British merchants began selling opium to Chinese addicts until 1949 when Mao and the communist movement emerged victorious, China's history was one of foreign exploitation and domination. Surely the last thing China wants now is to allow Washington to dictate who can and cannot run one of China's banks.

**5. Macau has 27 banks. Was BDA the only accessory bank to the financial crimes allegedly committed by the DPRK?**

Although the Patriot Act Section 311 allows Treasury to designate a jurisdiction as a "primary money laundering concern", it did not do so with respect to the Macau territory. This is surprising given these statements by Treasury: "Money laundering has been identified as a significant problem in the Macau Special Administrative Region" and "banks in Macau have allowed [government agencies and front companies of the DPRK] to launder counterfeit currency and the proceeds from government-sponsored illegal drug transactions." [10]



Macau

In their public pronouncements US officials have accused the DPRK of using criminal profits laundered through Macau to fund development of nuclear weapons. This raises legitimate national security concerns. However, the US has not made clear how its blacklisting of BDA alone will do anything to stop other banks in Macau from funneling allegedly illicit funds to the DPRK, especially as the DPRK has been charged with paying fees to obtain "financial access to the banking system with little oversight or control." True, Macau authorities have subsequently enacted stronger anti-money laundering measures. But if US national security concerns about the DPRK are to be taken seriously, officials in Washington, including members of the US Congress, need to provide public explanations of whether Macau's newly upgraded anti-money laundering system is any more effective at lessening the nuclear weapons threat.

Macau has 27 banks. The September 2005 proposed Rule notes "the presence of approximately ten larger banks" that can fill in for the blacklisted BDA to "alleviate the burden on legitimate business activities" in Macau. This seems to suggest that Treasury believes these 10 banks are above suspicion and can continue their banking relationships with US banks. But if Treasury's fears that Macau banks are in cahoots with the DPRK are correct, lurking among the 16 banks remaining in the second tier of smaller



Macau banks is one or more potential BDAs. Why BDA itself represents a greater danger or is more of a willing pawn in criminal activity than any one of these 16 is unknown. If, as Treasury says, multiple Macau banks look suspicious, then why has not the whole territory, or multiple banks, been declared a "primary money laundering concern"?

David Asher, once the State Department's point man on North Korea (now with the Heritage Foundation), has made the revealing admission that BDA "had never been the main offender in Macao." Despite "voluminous" evidence of money laundering at other Macau banks, BDA was blacklisted because it was "an easy target in the sense that it was not so large that its failure would bring down the financial system." He stated that "Banco Delta may be a sacrificial lamb in some people's minds, but it is not about Banco Delta." The real target, Asher said, was several larger Chinese banks committing financial crimes in collusion with the DPRK.[11]

Asher's view is not fringe hard-line nor is it the anti-China position in Washington. It was largely corroborated by Daniel Glaser, a senior anti-money laundering official at Treasury, who told a joint Congressional committee last April that the action against BDA was a "shot heard round the world for national bankers who cut off relations with North Korea, fearing that something like what happened to [BDA] could

happen to them." [12]

As for what may have been the real target, larger Chinese banks, perhaps Washington has legitimate concerns. But what are those concerns? Have they been raised with the bigger banks in question, or with government officials in Beijing? What evidence of wrongdoing exists? Has that evidence ever been presented to banking or government officials in China and what was their response? If in fact these questions have not been asked or there's no public record of them, all that is known for sure is that a small bank in Macau was blacklisted by the US government as much for a demonstration effect as for any possible wrongdoing. And because the DPRK has been declared a member of the "axis of evil" and a "rising China" is upsetting some US global strategists, the BDA affair begins to look more like an exercise in raw power to shape a political outcome in Northeast Asia using access to the US financial market as the weapon rather than an attempt to protect the integrity of the US financial system. Traditional policing procedures – alleging a specific crime, presenting and examining evidence in an adversarial setting, determining guilt or innocence based on the facts, and, if necessary, formulating a punishment that fits the crime – are all but ignored.

**6. If Treasury won't act, are there any alternative technical solutions to the BDA problem?**

Yes, but any alternative that doesn't address the central concerns of the DPRK, and possibly those of China as well, seems doomed to fail.

One alternative, a proposal for recourse to a "market mechanism," was recently described by John S. Park, Coordinator of the Korea Working Group at the U.S. Institute of Peace.[13]

Park writes that investment bankers in Hong Kong have proposed declaring BDA a "distressed bank."

First, the Monetary Authority of Macau (MAM) would carve out the contentious \$25 million in North Korean accounts and put the funds in a special purpose vehicle. Second, the MAM would then inject fresh capital into the bank and put an auction process in place like the one utilized by the Korea Asset Management Corporation (KAMCO), which was launched to deal primarily with ailing Korean banks following the Asian financial crisis. The MAM would invite potential buyers to bid on the newly-capitalized bank.

A "bridge loan would be made to the North Koreans for a sum equivalent to the funds in their accounts at BDA." The bridge loan would be recouped through the sale of a license for the "newly capitalized bank." Ultimately, MAM "would be drawing on a different source of funds for the bridge loan that has no legacy related to the Treasury rulings" and then "a wire transfer

[of the DPRK's \$25 million] "to a bank of [the DPRK's] choosing could be completed in a manner that is in full compliance with international banking standards." In this way the "toxic nature" of the funds at BDA is circumvented.

But this proposal appears to have four flaws:

First, it does not clear a path for the DPRK's return to the global financial system, a demand Pyongyang long ago made clear. As a result of Treasury's actions the global financial system now considers all DPRK funds "toxic." Little is accomplished if the \$25 million on deposit at BDA received through some indirect means cannot be used in transactions with banks outside the DPRK.

Second, it does not cancel the blacklisting of BDA. Treasury has ruled against BDA, not against the \$25 million the DPRK has on deposit. Even if BDA's books could be wiped clean of the "toxic" \$25 million, Treasury has formally concluded that BDA's owners have the "potential for recidivism." BDA would remain ostracized.

Third, because the Section 311 blacklisting would not be formally lifted, BDA and the rest of the Macau banking community will remain under a cloud. This would certainly displease the government of China. In April, the Chinese government called for BDA to be resolved in a

way that was "conducive to both Macau's financial and social stability and the proceeding of the Six Party Talks." It also urged that "the legitimate and reasonable concerns and interest of all parties, including those of China's Central and Macau SAR Government, . . . be taken into consideration." [14]

Also troubling for China is that classified "sources" are secretly channeling information that potentially distorts the workings of China's financial system in the eyes of US authorities. Of no less concern is that Treasury has produced no public evidence to back its allegations against BDA.

Fourth, the DPRK remains guilty of financial crimes until proven innocent. At one point Treasury dispatched representatives to meet with Chinese and DPRK officials to explain the evidence. Later, these officials reportedly complained that they were shown little or nothing of substance.

The issues unaddressed by this proposal that are likely of far more importance to the DPRK and China are, for the DPRK, the sovereign right to engage in transactions with the international financial system and, for China, sovereign control over the management of its domestic banks.

**7. Finally, if resolving BDA is technically simple, why doesn't Treasury act?**

The US media seems reluctant to pose this simple question to US officials. With the apparent single exception of Kevin Hall of McClatchy Newspapers (and a blogger who calls himself "China Hand"), the

media has not done its homework on Patriot Act Section 311. Thus, at one of the State Department's recent daily press briefings, a reporter asked: "Can we then conclude that using this 311 section of the Patriot Act is like a far more powerful tool than anybody imagined?" Section 311 is not some creature of the US regulatory patchwork run amuck. All that is required to stop a Section 311 action is a few instructions published in the US Federal Register.

So why doesn't Treasury act? In the absence of any other explanation, the main reasons appear to be particular US foreign policy objectives and the power that Patriot Act Section 311 gives Washington to almost instantly punish or sanction any country (or country's bank) of its choosing.

Currently, US foreign policy makers are preoccupied with the Middle East, in particular Iraq but also Iran and Syria. Thus far Treasury has blacklisted only one bank in the region, The Commercial Bank of Syria (CBS). Like BDA, secret intelligence was gathered on CBS. Treasury reported that the "the U.S. Government has information through classified sources that CBS may have been used by terrorists and/or

persons associated with terrorist organizations" (underline added). Again, like BDA, suspicion resulted in conviction: "Because the crime of money laundering includes the use of financial institutions to promote the carrying on of terrorist activity, the use of CBS by terrorists demonstrates that it is being used to promote money laundering."

Washington also does not like the fact that Syria's government may be using CBS to "provide material support to Lebanese Hizballah and Palestinian terrorist groups." [15]

In the case of Iran, that country's banks are prevented by US law from dealing directly with US banks. But it is still possible for indirect transactions routed through non-Iranian banks to reach the US. Thus far, no Iranian bank has been subject to a Section 311 fifth special measure, which would terminate indirect access. Through use of presidential executive orders, other US laws and United Nations sanctions, however, Treasury has managed to completely cut off two large Iranian state-owned financial institutions from the US financial system, Bank Sepah and Bank Saderat Iran.

For Treasury to rescind its ruling against BDA risks exposing Section 311 to a level of scrutiny it has so far managed to evade. Any decision to rescind has to be accompanied by Treasury's formal explanation of the reasons. The more

reasons provided, the more opportunity exists for US courts and concerned members of Congress and the public to examine whether Treasury had "reasonable grounds" in the first place to label BDA a "primary money laundering concern" and terminate its access to US banks. If, as BDA's lawyers contend, Treasury acted in an "arbitrary and capricious" manner, perhaps it acted in the same manner with respect to the Syrian bank CBS and other banks around the world, especially if Treasury cannot produce any evidence of wrongdoing. At that point Patriot Act Section 311 would risk becoming a house of cards. Its collapse would deprive the US government of a powerful political and financial tool to be used against Syria or against Iran or any other country in the Middle East or elsewhere that Washington has its eyes on.

In the particular case of the Commercial Bank of Syria, Treasury may have reason to worry about the credibility of its evidence. Cliff Knuckey, the former head of Scotland Yard's Anti-Money Laundering Unit, has stated that during his period of police service "at no time . . . did Syria ever appear on our 'radar screen' as being involved in money laundering." He also notes that Syria's sponsorship of terrorism "has manifested itself in a political form" that "does not support terrorism but does support resistance to foreign occupation. The allies during the Second World War relied heavily upon the activities of resistance movements." [16]

It is also possible, as David Asher has suggested, that China, or some of its biggest banks, are being targeted.

Significant portions of the Patriot Act have come under attack from the US Congress, the courts and civil and legal rights organizations. One of the Congressional authors of the Patriot Act believes another US government agency, the Justice Department, has "something seriously wrong with [its] internal management" of the Patriot Act, which "better be fixed, because if it isn't, the support for the internal part of our war against terrorism is going to evaporate rapidly." [17] Meanwhile, Treasury's application of Patriot Act Section 311 has faced almost no official or journalistic scrutiny. Its use against some of the more defenseless members of the international community, such as Myanmar, Syria and Latvia, in large part explains why.

Washington hardliners and those who believe the US should have maximum leeway to take extraterritorial political and financial actions probably worry that a variety of unfavorable precedents could be set if the Final Rule against BDA were to be withdrawn or withdrawn too hastily. A decision by Treasury to give in to those at the State Department who want to move past BDA to restart diplomacy with the DPRK might constitute such a precedent. The fifth special measure against BDA has only been in force for three months. Any giving of ground to the State

Department with regard to revocation has to be delayed as long as possible; otherwise, Section 311 might risk being tagged as a blunt political instrument of US power rather than as a law and order device the world should respect.

The written justification Treasury legally has to provide for any withdrawal of the BDA Final Rule might also become a precedent that opponents of future Section 311 actions could cite. If Treasury looks "arbitrary and capricious" in both imposing and rescinding a Final Rule, the courts, Congress or the State Department might begin to ask what credibility Section 311 has as an enforceable legal instrument. By this reasoning Treasury can look less "arbitrary and capricious" by doing nothing to resolve BDA, no matter how damaging its inaction might be to, for example, attempts by the State Department to achieve a denuclearized and peaceful Korean Peninsula.

Finally, the US and Iran are currently eyeball to eyeball over Iran's freedom of political action in the Middle East and its right under the Nuclear Non-Proliferation Treaty to develop a domestic nuclear energy program. Treasury has a role in Washington's foreign policy toward Iran. Recently, Stuart Levey, the Treasury Department top anti-terrorism official, declared that the "world's top financial institutions and corporations are re-evaluating their business with Iran because they are worried about the risk

and their reputations." Levey has warned multinational companies to "be especially cautious when it comes to doing business with Iran." According to Reuters, "French bank Societe General got the message and has pulled the plug on financing for a \$5 billion project to develop part of Iran's massive South Pars gas field." [18]



Stuart Levey

Ever since the US Congress passed the Iran and Libya Sanctions Act of 1996, which threatens US sanctions against countries making certain investments in Iran, Washington has been using every political and legal tool at its disposal to isolate Iran from the international financial community. Perhaps some in Washington are waiting for an opportunity now to use Section 311. Two large state-owned Iranian banks have already been cut off from the US financial system under different laws, but political fallout from the BDA affair, which has undermined US diplomatic initiatives in Northeast Asia, may thus far have saved Iran from Section 311. With the war of nerves with Iran likely to continue for some time, Washington hardliners may want Treasury to hold its ground on BDA. If that does not happen, those who want to use Section 311 against Iran may first be forced to address

uncomfortable questions about the law's utility, consistent application and even fairness. Such questions may encourage multinationals, large global banks and the world's major trading nations to ignore a Section 311 action against Iran, a country with a large presence in international commerce.

### Conclusion

If Washington decides to revoke its blacklisting of BDA, the Six Party process in support of a peaceful and denuclearized Korean Peninsula will probably resume immediately. If Washington does not make that decision, the process might still move forward if action is taken in another area, such as removing the DPRK from the State Department's list of state sponsors of terror. [19] The only thing known for sure is that the DPRK rejects its isolation from a global financial system that has been manipulated by Washington into rejecting DPRK funds as "toxic."

In the middle of all this sits the US Treasury Department, which has yet to produce any public evidence of BDA or DPRK involvement in illicit financial activities. And a gentlemen's agreement to resolve BDA reached earlier this year between a US State Department negotiator and his counterpart from Pyongyang, which the latter has interpreted to mean full restoration of global banking privileges and the former doesn't



disagree with. Something has got to give. Where that giving has to take place seems clear.

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1. Sean McCormack (spokesperson), (<http://www.delta-asia.com/eng/index.asp>) Daily Press Briefing (<http://www.state.gov/r/pa/prs/dpb/2007/jun/85955.htm>), US State Department, Washington, DC, June 4, 2007.
2. US Treasury Department, Advisory from the Financial Crimes Enforcement Network (FinCEN), Guidance to Financial Institutions on the Provision of Banking Services to North Korean Government Agencies and Associated Front Companies Engaged in Illicit Activities (<http://www.fincen.gov/advisory.html>), December 13, 2005.
3. See footnote 13.
4. An overview of the Section 311 ([http://www.fincen.gov/reg\\_section311.html](http://www.fincen.gov/reg_section311.html)) special measures is available at FinCEN, a unit within the US Treasury Department.

5. Email received June 7, 2007 from Molly Millerwise, US Treasury Department spokesperson.

6. Regarding Treasury's review, *ibid*. Freedom of Information Act (FOIA) access to the acknowledgments was explained in a May 31, 2007 email received from Anne Marie Kelly, Senior Public Affairs Specialist, Financial Crimes Enforcement Network (FinCEN), US Department of the Treasury.

7. Based on language added under the Patriot Act to expand the scope of intelligence and counterintelligence activities to protect the US against international terrorism, the Director of FinCEN is authorized "to issue regulations to require all financial institutions . . . to maintain or file certain reports or records that have been determined to have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism, and to implement anti-money laundering programs and compliance procedures." See the Final Rule against BDA available at the US Treasury Department's website ([http://www.fincen.gov/reg\\_section311.html](http://www.fincen.gov/reg_section311.html)).

8. Richard Posner, "The Constitution vs. Counterterrorism," and Meredith Fuchs & G. Gregg Webb, "Greasing the Wheels of Justice: Independent Experts in National Security Cases," American Bar Association National Security Law Report, Volume 28, Number 4, Standing

Committee on Law and National Security, November 2006.

9. In the Matter of the Imposition of Special Measure Five Against Banco Delta Asia S.A.R.L, Petition of Mr. Stanley Au and Delta Asia Group (Holdings) Ltd. to Rescind Final Rule, May 3, 2007.

10. See the US Treasury Department's Finding and Final Rule related to BDA.

11. Donald Greenlees & David Lange, "The Money Trail That Linked North Korea to Macao ([http://www.nytimes.com/2007/04/11/world/asia/11cnd-macao.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/04/11/world/asia/11cnd-macao.html?_r=1&oref=slogin))," New York Times, April 11, 2007 and Testimony of David Asher ([http://www.uscc.gov/hearings/2006hearings/transcripts/sept\\_14/06\\_09\\_14\\_trans.pdf](http://www.uscc.gov/hearings/2006hearings/transcripts/sept_14/06_09_14_trans.pdf)), Hearing Before the US-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, 109th Congress, second session, Sept. 14, 2006.

12. Testimony of Daniel Glaser, Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, Office of Terrorism and Financial Intelligence, US Treasury Department, Isolating, Proliferators and Sponsors of Terror: The Use of Sanctions and the International Financial System to Change Regime Behavior, Joint Hearing of the Terrorism, Nonproliferation & Trade Subcommittee of the House Foreign Affairs Committee & the Domestic and International Monetary Policy, Trade & Technology Subcommittee of the House Financial Services Committee, 110th Congress, April 18, 2007.

13. See John S. Park's proposal at the ArmsControlWonk.com blog. Scroll to the June 4, 2007 blog entry titled "Sell Banco Delta Asia (<http://www.armscontrolwonk.com/>)".

14. Qin Gang, Foreign Ministry Spokesman, Regular Press Conference (<http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t310954.htm>), China Ministry of Foreign Affairs, April 12, 2007.

15. For more on the alleged on connections to terrorism see the US Treasury Department's Final Rule on the Commercial Bank of Syria ([http://www.fincen.gov/reg\\_section311.html](http://www.fincen.gov/reg_section311.html)).

16. Cliff Knuckey, Managing Director, RISC Management Limited, UK, Syrian Banking & Financial Services Conference Speeches, Panel Session 5: How will US Sanctions Affect Economic Growth (<http://www.syrianbankingconference.org/speeches/CliffKnuckey.htm>)?

17. Online NewsHour, Justice Department Audit Reveals FBI Misused Patriot Act, an interview ([http://www.pbs.org/newshour/bb/government\\_programs/jan-june07/patriotact\\_03-09.html](http://www.pbs.org/newshour/bb/government_programs/jan-june07/patriotact_03-09.html))with Democratic Party Congressman Jerrold Nadler and Republican Party Congressman James Sensenbrenner, March 9, 2007 (transcript).

18. Peg Mackey and Simon Webb, "U.S. pressures energy firms, banks away from Iran, (<http://www.reuters.com/article/fundsFundsNews/idUSL2824362420070528>)" Reuters, May 28, 2007.

19. Removal from the US State Department's list of terrorist states would lift some of the roughly 30 sanctions now in place against the DPRK. That would allow, for example, the DPRK to receive development loans from international and regional lending institutions.