Response to “How A Mock Trial Could Turn Victory into Defeat on North Korea’s Nuclear Arms”

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I. Introduction

The following are comments on the editorial "How A Mock Trial Could Turn Victory into Defeat on North Korea's Nuclear Arms" by Leon V. Sigal. James L. Schoff is the Associate Director of Asia-

Pacific Studies at the Institute for Foreign Policy Analysis and co-author of *Nuclear Matters in North Korea*. Leon V. Sigal is the Director of the Northeast Asia Cooperative Security Project in New York and author of *Disarming Strangers: Nuclear Diplomacy with North Korea*.

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II. Comments by James L. Schoff on "How A Mock Trial Could Turn Victory into Defeat on North Korea's Nuclear Arms"

Allow me to offer a slightly different interpretation of the circumstances and issues raised in Mr. Sigal's recent Policy Forum piece "How a Mock Trial Could Turn Victory into Defeat on North Korea's Nuclear Arms":

The metaphor of a "trial" in the context of the six-party talks and North Korean denuclearization is highly relevant. The various six-party agreements and implementation plans are not treaties or legal documents, and no international judge is going decide who bears responsibility for perceived failures…but there is a jury, made up of the other four parties (South Korea, China, Japan, and Russia). Ultimately, this jury will significantly influence the outcome of the six-party talks, by passing judgment (however passively and incrementally) on what constitutes an appropriate compromise between the Washington and Pyongyang on the basic parameters of denuclearization and their near-term bilateral relationship.

The role of this "jury" was evident during negotiations over the September 2005 Joint Statement that included reference to the possible future provision of a light-water reactor to North Korea, as well as the eventual lifting of de facto sanctions against the BDA bank in Macau (in both cases, the US compromised when the consensus of the "jury" was against it). It was also this way following North Korea's nuclear test in 2006 when UN sanctions were imposed and the hardened positions of the five versus North Korea helped pave the way for an initial implementation agreement in February 2007. There have been other instances of the "jury's" pivotal role.

Under the "action-for-action" principle that guides these talks, actions are valuable currency in this process…but they are a poorly defined currency. What is a "whole" action? When has one party short-changed the other? North Korea submitted a nuclear declaration to the six-party chair and it expects the removal of certain sanctions in return. But isn't verification of that declaration actually an integral part of North Korea's promised action in the first place? Isn't Washington justified to ask for "internationally standard" procedures for verification in return for completing its action? How will we decide what is fair, who is right, and what's an acceptable level of risk and ambiguity in this process? Ultimately, the "jury" will decide, and consequently each party tries to make its case.

As we discussed in our Institute's recent book *Nuclear Matters in North Korea*, the six-party talks by themselves are not a true forum for negotiating the terms of North Korean denuclearization. It is the concept of the six-party talks that gives shape and purpose to all of the shuttle diplomacy that takes place (especially the U.S.-North Korea bilateral component), and the talks serve as a valuable point of reference to which the parties keep trying to return. Moreover, the six-party framework exists beyond the actual plenary meetings. The potential for a five-versus-one dynamic is always there, if one country isolates itself too much within this process, and the mere knowledge of this possibility can act as a deterrent to such self-imposed isolation. In this way, we might consider the six-party talks as a "functioning concept" of multilateral dialogue, negotiation, and mediation, if not an actual forum. In this way, bilateral, trilateral, and even five-party meetings can be a productive component of the six-party talks. Within this jury, the opinions of the Republic of Korea and China

are particularly important.

It is true that the six-party process has failed to prevent escalation when the talks break down or go into recess, though they are somewhat effective at moderating the reaction when the middle players balance against the escalating state if it is deemed to be going too far. An offended party expects that egregious moves by another will be countered by the other four parties, reducing the need for it to take unilateral action, which would only further inflame the situation. Similarly, the framework has been more reassuring to U.S. allies than a strictly bilateral (U.S.-NK) format. There might come a time when either the United States or North Korea will decide that the six-party talks no longer serve its interests and that it is better off outside of the process rather than inside, but to date the prospect of five-versus-one pressure in that scenario has been enough to support modest achievements.

Mr. Sigal is correct to point out that progress has been made in these talks, but I don't think that the United States should stop pressing its case with the six-party jury. Washington has a right to expect the application of international verification standards in North Korea as part of the nuclear declaration "action." Let there be arguments and compromises on the margins regarding the details, but remember that denuclearization has to have solid credibility if it is to lead to diplomatic normalization and constructive peace regime development in Korea. America and its allies in the region will demand it, and I think that the rest of the jury understands this. We just have to find this common ground…issue by issue…point by point…action for action…

III. Response by Leon V. Sigal on "How A Mock Trial Could Turn Victory into Defeat on North Korea's Nuclear Arms"

Jim Schoff would like us to believe that the trial metaphor is an appropriate way to describe the six-party process, but a negotiation is not a trial: there is no prosecutor, no defendant and no jury. The essence of a jury is that it is disinterested and impartial: the other four other parties are neither. The crime-and-punishment approach is worse than irrelevant; it has been a recurring source of trouble in the U.S. approach to negotiations.

The notion that "the jury of four" stopped the U.S. from pursuing the financial measures against BDA is at odds with the facts. The Chinese were outraged at the U.S. Treasury's actions against BDA and said so in no uncertain terms starting in September 2005. The South Koreans were never persuaded of the merits of the U.S. case and said so. Russia expressed its doubts, as well. Their views were evident by January 2006. Yet the U.S. did not move to have the BDA funds returned to North Korea. It did not do that until after the North had conducted its missile and nuclear tests in July and October 2007 in retaliation for what it contended was this latest example of U.S. "hostile policy." Those actions made it evident that the U.S. strategy of coercive diplomacy, attacking its overseas hard currency accounts, had provoked Pyongyang rather than making it more pliable. The U.S. opted to negotiate in earnest for a change.

The actions for actions are those the parties agreed on. The United States agreed to delist once the North turned over its declaration. That agreement was embodied in the October 3, 2007 statement on Second-Phase Actions for the Implementation of the Joint Statement, which says, "The DPRK agreed to provide a complete and correct declaration of all its nuclear programs in accordance with the February 13 agreement by 31 December 2007." In return, it says, "Recalling the commitments to begin the process of removing the designation of the DPRK as a state sponsor of terrorism and advance the process of terminating the application of the Trading with the Enemy Act with respect to the DPRK, the United States will fulfill its commitments to the DPRK in parallel with the DPRK's actions based on consensus reached at the meetings of the Working Group on Normalization of DPRK-U.S. Relations."

Of course, it is essential to verify that declaration - and to convince the other parties of the need to do so. The issue is when. The October 3, 2007 statement says nothing about verification in the Second Phase, suggesting that is a subject for the Third Phase. In any case, it does not make delisting contingent on verification. And verification of the declaration on plutonium is one thing; verification of the side agreement on enrichment and proliferation quite another - and not as urgent. The action for action principle has nothing to do with Schoff's post hoc definition of a "whole action."

It would be desirable if North Korea agreed on verification procedures as soon as possible, but U.S. reneging on its commitment to delist, far from persuading Pyongyang to do so, is likely, unfortunately, to provoke it once again.

If, as Schoff asserts, "an offended party expects that egregious moves by another will be countered by the other four parties," who does he now think is the offended party and what does he think the others will do about it?

IV. Nautilus invites your responses

The Northeast Asia Peace and Security Network invites your responses to this essay. Please send responses to: napsnet-reply@nautilus.org . Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.

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