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SLEIGHT OF HAND: ISRAEL, SETTLEMENTS, AND UNAUTHORIZED OUTPOSTS

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Every U.S. administration since 1967 has opposed Israeli settlement activity, and nearly every Israeli government since 1967 has supported the building and expansion of settlements in occupied territory. Despite continued U.S. objections, Israel continues to flout international law and the commitments it has made to the United States regarding its settlements expansion. Aside from harsh rhetoric, the United States has taken nearly no action against settlements. As a result, the next administration will face the same settlements problem its predecessors have faced, and will need to find a way to balance its support for Israel's security and its opposition to expanding settlements, which continue to obstruct a path to peace.

KEY POINTS

- ◆ Defying the Elon Moreh Israeli Supreme Court ruling, Israeli settlers have, with government knowledge and support, continued to build settlements on private Palestinian land
- ◆ President Barack Obama has taken a tougher stance on settlements, heightening his already tense relationship with Prime Minister Benjamin Netanyahu
- ◆ The next administration could support a U.N. Security Council resolution criticizing settlement construction
- ◆ The next administration could consider a reduction in aid if Israel does not adhere to its commitment to remove all outposts since 2001
- ◆ The next administration could also follow in the footsteps of the E.U. by excluding Israeli goods and services produced in occupied territories from the benefits of our bilateral free trade agreement

INTRODUCTION

Israel's settlements policy continues to exacerbate the situation on the ground, and Israel's bilateral relationship with the United States and other countries. On the heels of signing a ten-year, \$38 billion aid agreement with the United States, Israel announced its intention to build a substantial number of new housing units in the middle of the West Bank, far outside any settlement bloc. This announcement evinced an extremely harsh reaction from American policy spokesmen. Israel is also continuing efforts to retroactively legalize settlement outposts as an alternative to dismantling them.

Israeli government spokesmen, including Prime Minister Benjamin Netanyahu, have dismissed the criticisms and defended settlement activity, including the actions taken regarding outposts, as Israel's right. The settlements and outpost issues are fraught and the subject of tremendous rancor: opponents argue that settlements contravene international law; supporters argue that Israel has a legitimate claim to the West Bank and thus Israelis have the right to settle there. It is important to understand what is at stake and how these issues have played out over time.

Settlements critics focus on three arguments: (1) settlements are seen as impeding progress toward a two-state solution of the Palestinian-Israeli conflict; (2) they are a unilateral Israeli effort to change the demography on the ground, and (3) most importantly, they are widely considered to be



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illegal under international law. The Fourth Geneva Convention prohibits an occupying power from transferring citizens from its own territory into the occupied territory. The Hague Regulations prohibit an occupying power from undertaking permanent changes in the occupied area unless they are related to military needs or undertaken for the benefit of the local population. According to this argument, there may have been cases where the military or security needs of Israel dictated such "permanent changes," but these have been few and far between and, in any case, the settling of Israeli citizens in the occupied territories has never been undertaken "for the benefit of the local population." The position of every Israeli government since 1967 has reflected, in a way, the conundrum posed by the question of the applicability of international law to Israel's occupation: every government has decided not to annex the territory, while almost every government has also supported the building and expansion of settlements in the occupied territory.

ISRAELI SETTLEMENTS: A COMPLICATED HISTORY

The history of the settlements movement is complex, and it is that complexity that often stymies settlements opponents from marshaling political support against Israeli policy. Settlement activity began almost immediately after the June 1967 war and has been advanced by Israeli governments of the left and the right. A major turning point occurred in 1979, when the Israeli Supreme Court handed down a landmark decision in the Elon Moreh case. The court

“Within ten years there were 104 such unauthorized outposts, all of them illegal under Israeli law.”

ruled that settlers needed to evacuate a settlement because there was no security justification for the expropriation of private Arab land for settlement purposes. In effect, the court ruling served notice that settlements could not be established on land that was privately owned.

In response, the Israeli justice ministry began a survey of the West Bank and Gaza to determine which land was private and which was “state land,” that is, land under the control of the ruling authority. In subsequent years, Israeli justice ministry officials—particularly those who favored

settlement, such as the late Plia Albeck—liberally declared about 16 percent of the West Bank as “state land” and allocated more than 14 percent for settlements.

Over time, the Israeli government established procedures for approving settlements that involved multiple layers of decisions. In 1992, the government headed by Prime Minister Yitzhak Rabin strengthened these procedures by deciding there would be no settlements permitted unless approved by the Israeli cabinet. As a result of this decision, virtually no new settlements were approved, and many construction projects

were stopped. Four years later, after the election of Benjamin Netanyahu as prime minister, the government turned a blind eye when settlers began acting unilaterally to establish “outposts,” that is, a collection of trailers and other temporary buildings

on lands they claimed. Soon after the establishment of these outposts, which were not authorized by the government and thus were illegal under Israeli law, government agencies connected these outposts to electricity and water lines and the Israeli army provided security and other services normally provided to authorized settlements. Within ten years, there were 104 such unauthorized outposts, all of them illegal under Israeli law.

THE MITCHELL REPORT AND NEW ISRAELI COMMITMENTS

In 2001, a report was issued by the Sharm el-Sheikh Fact-Finding Committee (also known as the Mitchell report) that had been commissioned to examine the causes for the outbreak of the Palestinian intifada the previous year. Among other issues, the Mitchell report recommended a freeze on Israeli settlement activity, including natural growth. The Israeli government responded to the report in a letter stating : “...Israel appreciates the efforts of the Committee and considers that its Report provides a constructive and positive attempt to break the cycle of violence and facilitate a resumption of direct bilateral negotiations for peace on the basis of reciprocity.” Reacting to Mitchell’s demand regarding “natural growth,” the Israeli government stated: “...it must be recalled that it is already part of the policy of the Government of Israel not to establish new settlements. At the same time, the current and everyday needs of the development of such communities must be taken into account.” Israel’s response was understood at the time as essentially endorsing the Mitchell report, with some reservations regarding building

to accommodate “natural growth,” for example, the expansion of families.

In June 2002, in a major policy speech on the peace process, President George W. Bush endorsed the Mitchell recommendation on settlements, saying: “...consistent with the recommendations of the Mitchell Committee, Israeli settlement activity in the occupied territories must stop.” In 2003, Bush advanced the “Roadmap for Peace,” a proposal for resolving the Israeli-Palestinian conflict in phases. The Israeli government voted to accept the roadmap, but put forward 14 reservations, one of which in-

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dedicated that the issue of settlements should be deferred until negotiations took place on final status. However, the reservations specified that the issue of “illegal settlements” was not part of Israel’s reservations.

Around the same time, Bush’s deputy national security advisor, Stephen Hadley met with Prime Minister Ariel Sharon to try to reach understandings that would limit Israeli settlement activity. They agreed on four draft principles that were similar to policies adopted earlier by Rabin, but without any reference to natural growth: (1) no new settlements would be built; (2) no Pal-

“The State of Israel is governed by law, and the issue of outposts is no exception.”

estinian land would be expropriated or otherwise seized for the purpose of settlement; (3) construction within the settlements would be confined to the “existing construction line” (not further identified); and (4) public funds would not be earmarked for encouraging settlements. National Security Advisor Condoleezza Rice asked Sharon to make these understandings public, and Sharon did so in a speech he delivered at the Herzliya conference in December 2003, the same speech in which he introduced the idea of disengagement from Gaza:

“Israel will meet all its obligations with regard to construction in the settlements. There will be no construction beyond the existing construction line, no expropriation of land for construction, no special economic incentives and no construction of new settlements.”

Sharon went further, committing to the removal of unauthorized or illegal outposts. He said: “Israel will fulfill the commitments taken upon itself. I have committed to the President of the United States that Israel will dismantle unauthorized outposts. It is my intention to implement this commitment. The State of Israel is governed by law, and the issue of the outposts is no exception.” Sharon told the administration at the time that his commitment referred to 24 outposts set up during his time as prime minister; he said he was not responsible for

the outposts established previously.

In furtherance of these commitments, Dov Weissglas, Sharon’s chief of staff and most senior advisor, sent a letter to the Israeli attorney general that reported the four settlements principles. Sharon also appointed Talia Sasson, a recently-retired justice ministry senior official, to undertake a study of the complicated legal structure related to outposts and land ownership in the occupied territories, where a combination of Ottoman, British Mandatory, Jordanian and Israeli laws applied. Sasson’s appointment was greeted with significant, angry opposition from settler leaders, but Sharon stuck with her as a sign of seriousness in fulfilling his commitments.

Sasson’s report was a scathing indictment of the settlements enterprise and the Israeli government, which, she detailed, was complicit in circumventing and violating the law in order to build settlements. For example:

“...It seems that violation of the law became institutionalized. We face not a felon or a group of felons violating the law. The big picture is a bold violation of laws done by certain State authorities, public authorities, regional councils in Judea, Samaria and Gaza and settlers, while falsely presenting an organized legal system. This sends a message to the I.D.F. (Israeli Defense Forces), its soldiers and commanders, the Israeli police and police officers, the settler community and the public. And the message is that settling in unauthorized outposts, although illegal, is a

Zionist deed. Therefore the overlook, the “wink,” the double standard becomes it. This message has a very bad influence—both on the I.D.F. and on the Israeli police. The establishment of unauthorized outposts violates standard procedure, good governing rules, and is especially an ongoing bold violation of law.”

Although he had commissioned the Sasson report, Sharon became preoccupied with the preparations for Gaza disengagement, and the Sasson report was shelved, with no action taken on its elements. In fact, the politics surrounding disengagement worsened for Sharon, and he turned to the United States for support. Sharon and Bush met in Washington in April 2004, after which Bush addressed a letter to Sharon that contained language that Sharon believed would help him deal with opponents of the disengagement:

“As part of a final peace settlement, Israel must have secure and recognized borders, which should emerge from negotiations between the parties in accordance with UNSC Resolutions 242 and 338. In light of new realities on the ground, including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949, and all previous efforts to negotiate a two-state solution have reached the same conclusion. It is realistic to expect that any final status agreement will only be achieved on

the basis of mutually agreed changes that reflect these realities.”

This paragraph was worded in careful diplomatic nuance. It took note of densely-populated Israeli settlements (“Israeli population centers”) and expressed support for the inclusion of the “major” settlement centers in Israel in a final agreement provided that this reflected “mutually agreed changes.” The letter did not specify which population centers it was referring to, and the letter did not convey to Israel the right to make such a determination unilaterally. In other words, the Bush administration said what it would support in a future peace agreement—if the provisions were agreed by both sides—but the administration did not define what settlements would be acceptable and did not give Israel the right unilaterally to continue building.

The letter also did not refer to the outposts and did not define a key element that had been left ambiguous in the draft settlement principles discussed between Sharon and Hadley, namely, the so-called construction line within settlements beyond which Israel would not build. To remedy these lacuna, Weissglas delivered a letter to Rice that

“The [Bush] administration did not define what settlements would be acceptable and did not give Israel the right unilaterally to continue building.”

recommended a process for resolving these issues:

“...Removal of unauthorized outposts: the prime minister and the minister of defense, jointly, will prepare a list of unauthorized outposts with indicative dates of their removal; the Israeli Defense Forces and/or the Israeli Police will take continuous action to remove those outposts in the targeted dates. The said list will be presented to Ambassador Kurtzer within 30 days.

“Restrictions on settlement growth: Within the agreed principles of settlement activities [i.e., the secret 2003 draft principles], an effort will be made in the next few days to have a better definition of the construction line of settlements in Judea & Samaria. An Israeli team, in conjunction with Ambassador Kurtzer, will review aerial photos of settlements and jointly define the construction line of each of the settlements.”

ISRAEL'S FAILURE TO HONOR COMMITMENTS

As the American ambassador at this time, I met with Weissglas and retired I.D.F. Brigadier General Baruch Spiegel often during the following months to discuss both issues—the outposts list and the timetable for their removal; and the definition of the construction line of settlements. No prog-

ress was made in either set of talks. The Israelis never handed over a list of outposts to be dismantled; and Spiegel maintained he was trying to gather the necessary data on which to base a discussion of the construction line, but no data were forthcoming. Within a few months, the discussions ended. The Bush administration did not complain at the time about Israel's failure to fulfill its commitments, because by that time the planning for disengagement was in high gear.

Despite the Bush-Sharon letter, political tensions in Israel intensified. According to Weissglas, as the date for disengagement grew near, the government sought a way to minimize settler protests and understood that some settler leaders were equally interested in avoiding a confrontation. In discussions with settlements leaders, the government indicated it would allow building to continue in the major settlement blocs, and the settler leaders indicated they would try to restrain their followers. Weissglas contacted Rice and reached what he termed a “kind of understanding” that would support disengagement: settlement activity in the blocs would continue but would be limited to demands of the market, not promoted by the government. After conveying this to settler leaders, they upheld their side of the agreement and most settlers living in the

major blocs did not join protests on the ground against the Gaza pull-out. In conveying this information, Weissglas stressed that this “kind

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of understanding” applied only to the specific time and purpose of assuring that Gaza disengagement would take place peacefully. In fact, Weissglas later told Netanyahu that this informal understanding could not be expected to apply outside of the specific context in which it was reached.

During the following years, some mysteries surrounding settlements and outposts were solved. In 2007, Peace Now issued a report indicating that 32 percent of the land in all the Israeli settlements in the West Bank is privately owned by Palestinians; 131 settlements are completely or partially situated on private land; and only 31 settlements do not sit on private land. Data received by Peace Now from the Israeli Civil Administration confirmed these numbers. In other words, notwithstanding the Israeli Supreme Court decision in the Elon Moreh case, Israeli settlers, with the knowledge and support of the government, continued to build settlements on private Palestinian land. In fact, the amount of private land in several of the largest settlements—presumably those that Israel believes constitute the major population centers noted in the 2004 Bush letter to Sharon—is astounding: 31 percent of Ariel; 49.6 percent of Givat Zeev; 47.5 percent of Modiin Illit; and 59 percent of Kiryat Arba have been built on private Palestinian land.

In January 2009, the Israeli daily Haaretz published excerpts from the data that Brigadier General Spiegel had tried to collect in

order to define the construction line within settlements. The data showed the systematic flouting of Israeli law by Israeli government officials and settler leaders: zoning laws not respected, building permits not obtained, construction beyond the outer boundaries of settlements. This reflected systematic and systemic state-sanctioned legal abuse—which Spiegel, as a conscientious and honest public servant—was embarrassed to share with the American government at the time.

In the decade after Sharon’s commitment to evacuate unauthorized outposts, each time the Israeli government announced its intention to evacuate an outpost the case became embroiled in legal maneuvers involving Israel’s Supreme Court. To deal with these legal challenges, in March 2011, Netanyahu announced a new policy: Israel would demolish outposts built on private land, but would also seek to “legalize” retroactively all the other outposts. In taking this decision, Netanyahu not only turned his back on the commitments included in Sharon’s Herzliya speech and Weissglas’ letter to Rice, but more importantly, as Weissglas notes, he disregarded the 2003 Israeli government acceptance of the Road Map.

The retroactive legalization process supported by the Netanyahu government has proceeded apace:

- ◆ At least 33 outposts have either already been “legalized” or are in the process of being “legalized”.
- ◆ There is planning underway in various government councils to begin the “legalization” process in at least 11 outposts.
- ◆ It can be inferred from government announcements of settlement expansion that some outposts will simply be integrated into nearby settlements as those settlements expand. One place to watch is the area between Tekoah

“At least 33 outposts have already been ‘legalized’ or are in the process of being ‘legalized.’”

and Nokdim, where Defense Minister Avigdor Lieberman lives. The two settlements have been expanding gradually toward each other in what is a transparent strategy to create a ‘bloc’ that would be harder for the government to remove in a future peace accord.

Very few outposts have actually been removed. Some outposts that were removed were not permanently inhabited and did not contain real structures. Some were removed and immediately rebuilt by settlers. And some were used as bargaining chips with the government: settlers agreed to evacuate a tiny outpost in return for the

government’s commitment to build a substantial number of houses in nearby settlements. For example, in 2008 Mevo Horon North, an outpost consisting of eight trailers, was evacuated as part of a deal in which the residents moved to the nearby settlement of Mevo Horon and the government agreed to grant permits for 100 new homes in the settlement. Then, there’s the case of Migron. When Weissglas and I started our discussions on outposts in 2004, I recall telling him that if the government showed its determination by removing only Migron, I would stop pressing for further outpost removals until the completion of the Gaza disengagement. As it turned out, in 2012—eight years after Israel’s commitment to dismantle illegal outposts—and following a protracted legal process, the Migron settlers were moved to another settlement.

To be sure, several outposts were removed entirely, apparently without any quids pro quo—Maoz Esther, home to about four families, in 2009; Yatir West, four trailer homes (housing a handful of youngsters) was removed in return for the approval of a plan to expand the nearby settlement of Yatir; and Ofra East, which consisted of a couple of empty trailers, in 2008. In Amona, nine houses (not yet inhabited) were demolished in 2006 following a court order; this action led to strong clashes between settlers and the police. Currently, there is a struggle over Amona, where the Supreme

Court ordered its eviction by the end of December 2016.

OBAMA'S TOUGHER LINE ON SETTLEMENTS

This complex history of settlements and outposts and of formal and informal U.S.-Israeli understandings may help explain the particularly harsh exchanges between the Netanyahu government and the Obama administration since 2009. Every U.S. administration since 1967 has opposed Israeli settlement activity, with objections ranging from their being an obstacle to peace to terming them illegal or illegitimate. In 2009, Obama asked for a complete settlements freeze, including natural growth, harking back to the demand made in the Mitchell report and echoed by President Bush in 2002.

Notwithstanding the continued construction in settlements and establishment of outposts, Netanyahu demanded that Obama reaffirm the 2004 Bush letter. He also tried to get the administration to reaffirm the informal understanding that had been reached between the government and the settlers—and blessed informally by Rice—at the time of disengagement that helped minimize settler protests by allowing some construction to continue in the major blocs. Obama would not agree. One can speculate that the administration took this position for several reasons. First, Obama may have believed the Bush letter

went too far in providing a one-sided undertaking in the peace process, and did not believe the letter constituted a formal commitment. Obama was probably also aware that Israel had unilaterally interpreted the 2004 letter far more liberally than Bush had intended, and settlement activity and the establishment of illegal outposts had continued actively after 2004. Third, most important, Obama saw no reason to reaffirm the informal understanding reached between Weissglas and Rice at the time of disengagement; in this respect, his position was supported by Rice who reportedly concurred that Netanyahu's interpretation of the understanding was wrong. Then-Secretary of State Hillary Clinton emailed her aides in June 2009 to say: "Condi Rice called to tell me I was on strong ground saying what I did about there being no agreement btw the Bush Admin and Israel." Clinton later told reporters "there were no informal or oral enforceable agreements" permitting Israel to build settlements, adding that this "has been verified by the official record of the Administration and by the personnel in the positions of responsibility."

The bottom line in this saga is that Israeli settlements—including those built on private Palestinian land and those outside the blocs—continue to expand and that Israel has not fulfilled its commitment to the United States to remove all the outposts set up after 2001. The settlements issue continues to confound the search for peace, and it is equally problematical from the standpoint of Israel's commitment to the rule of

law and to the enforcement of rulings of its own Supreme Court. The excuse of Gaza disengagement was enough for the Bush administration to allow Israel to delay fulfillment of the commitment to dismantle the outposts. But what is the excuse now? In fact, we are watching the sleight of hand called retroactive legalization, making legal what was illegal as a means of satisfying the settlers and undermining completely the government's promise to the United States. Israel expects—correctly—the United States to honor its commitments to Israel; the reverse also applies.

WHAT CAN BE DONE?

The next administration will face the same settlements problem that all of its predecessors have faced since 1967, namely, how to oppose Israel's settlements practices and promote Israeli-Palestinian peace. American rhetoric has traditionally been tough on settlements, but there has been almost no action. The next administration may, therefore, wish to consider three actions that would add important emphasis to the longstanding U.S. policy on settlements.

First, the administration could decide to support a U.N. Security Council resolution that criticizes settlement activity. In 2011, the Obama administration vetoed such a resolution even though much of its language had been drawn from U.S. statements. A Security Council resolution carries no immediate consequences per se, but it would put the United States on record in opposition to Israel's policy.

Second, the administration could quantify how much Israel spends on settlements—through direct budgetary support, tax and other incentives, and the like—and deduct this amount from the assistance provided to Israel by the United States. To be sure, Israel has legitimate security requirements that American aid is designed to support. But this aid should not be used as a means to free up Israel's own resources to conduct a policy that Washington opposes. Israel can decide to spend its own resources as it sees fit, but there is no reason for the American taxpayer to subsidize the Israeli budget when Israeli outlays are used for settlements purposes.

Third, the administration could align its policies with those of the E.U., which has been developing an approach to exclude goods and services produced by Israeli firms in the occupied territories from the benefits of our bilateral free trade agreement. The United States is, and should remain, committed to supporting activities that enhance Israel's economic well-being, but this need not include U.S. benefits extended to firms that operate in the occupied territories.

All of these options will be difficult to pursue politically in Washington. Strong bipartisan support for Israel has tended to drown out debate about how the United States should deal with Israeli policies that both Republican and Democrat administrations have seen as diminishing the chances for peace. Our support for Israel must continue, but the debate over Israel's settlements actions should yield stronger U.S. policy and actions in support of Middle East peace.

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