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# The Little Market That Could: Facilitating Cross Listing through Unilateral Regulatory Recognition

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## Abstract

This chapter advances an in-depth account of the Israeli dual-listing arrangement ("DLA") project. In the landscape of cross listing in securities markets around the world, the Israeli DLA provides a unique example of a regulatory regime that is premised on a strategy of unilateral recognition - namely, a wholesale acceptance by one country of another country's regulatory choices as sufficient for discharging the former country's regulatory requirements. Israeli law makers have gone to great lengths to implement this strategy. Nevertheless, their work proved incomplete despite its utmost importance for the local market, such that the Israeli DLA remains an unfinished business. Both the positive and the negative features of the DLA thus should be of interest to policy makers who wish to imitate the Israeli model or otherwise innovate in regulating capital markets.

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Keywords: cross listing, securities regulation, corporate governance

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# The Little Market That Could:

# Facilitating Cross Listing through Unilateral Regulatory Recognition

Amir N. Licht*

A chapter for RESEARCH HANDBOOK ON GLOBAL CAPITAL MARKETS LAW (Iris H. Chiu & Iain MacNeil, eds., Edward Elgar, forthcoming)

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# The Little Market That Could:

# Facilitating Cross Listing through Unilateral Regulatory Recognition

## 1. Introduction

Many years ago, in the twentieth century, before people knew what "Google" means,[1] there was a little stock market at the eastern shores of the Mediterranean. The little market operated in the Tel Aviv Stock Exchange ("TASE") and supplied virtually all of the equity capital needs of Israeli firms. The little market did experience some crises in the past but overall, it enjoyed a quite and secluded life. Then two things happened that threatened the little market's lifestyle. First, Israeli entrepreneurs have discovered that they could tap overseas capital markets by listing on major stock exchanges, primarily in the United States, without ever listing on the TASE. Second, stock markets around the world at that time were undergoing a frenzied wave of international consolidation, and some of them have been eying the Israeli outsized hi-tech sector as a promising source of listings.

The little market was afraid. It feared that without the income generated by listing and trading fees it will dwindle and die. And the government shared the little market's fears. So together they devised a novel dual listing regime that would allow foreign listed firms to cross list on the TASE while bearing virtually no additional costs, especially not in the form of extra regulatory burden. A legislative amendment was proposed after thorough deliberation but the little market was not content with it. The bill was therefore hastily redrafted to allay the market's fears and was thus enacted in 2000. Dozens of firms, including some non-Israeli ones, have taken advantage of the Dual Listing Arrangement ("DLA"), as it came to be called, and saved the TASE from drying up. The market was happy. So was its regulator, the

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[1] Google was founded by Larry Page and Sergey Brin on September 4, 1998.

Israel Securities Authority ("ISA"), which per the DLA has practically given up on (or away) its regulatory responsibilities over firms dual-listed under the DLA. The DLA has proved so successful that its regulatory regime was extended beyond U.S. markets to markets in the United Kingdom, Canada, and Hong Kong, among others.

Within a few years, however, it transpired that civil liability for breach of disclosure duties under the DLA is a major source of legal difficulties. Courts were repeatedly asked to decide whether Israeli or U.S. law applies to civil liability. By failing to take a resolute action, both the ISA and Supreme Court have contributed to the uncertainty that has shrouded this point. Although it is virtually certain that the foreign (non-Israeli) law applies, more needs to be done to finally resolve this point. That this issue could possibly be discussed at the time of this writing, more than twenty years after the enactment of the DLA, casts a shadow over the DLA. More importantly, it provides a vivid demonstration of the need to design such regimes with a comprehensive approach from the outset.

This chapter advances an in-depth account of the Israeli DLA project.[2] As we shall see, the Israeli setting is somewhat unusual in terms of the context in which cross listing is commonly discussed. In most cases, companies first go public on their home-market stock exchange; next, they go international on a foreign market. The Israeli DLA, however, was designed firstly to attract Israeli companies that had skipped the TASE and went global without first going public locally. More importantly, from the vantage point of issuers (i.e., public companies), cross listing is a major strategic move. Such a move is motivated and affected by a complex set of factors that is dominated by business considerations – in particular, facilitating access to capital (not necessarily through public issuances, however), increasing visibility for

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[2] This chapter therefore shies away from any attempt to survey the vast literature on cross listing in securities markets. In this volume, *see* [cross-references to this volume].

marketing purposes, etc.[3] Affecting the company's corporate governance by exposing it and its insiders to the foreign market's legal regime is but one out of several such considerations. In theory, a company and its insiders would want to improve its corporate governance, and thus hopefully lower its cost of capital, by cross-listing on a market with a better corporate governance environment – a.k.a. the "legal bonding hypothesis". Although this hypothesis remains hotly debated and empirically contested, many have assumed that U.S. securities markets provide such a higher-quality environment that non-U.S. issuers could thus utilize.[4] In contrast, the Israeli DLA project was premised on the observation that between the two markets, the opposite is true. A different vantage point is that of national level policy makers and regulators. These actors may need to strike a balance between the quality of corporate governance and the health of the national market.[5] Specifically, improving corporate governance, especially through more demanding disclosure duties, could deter foreign issuers and thus harm the market's competitive position in the global arena. This deterrent effect has proved to be the dominant factor in the DLA. Market protection took preference over investor protection.

In the landscape of cross listing in securities markets around the world, the Israeli DLA provides a unique example of a regulatory regime that is premised on a strategy of unilateral recognition - namely, a wholesale acceptance by one country of another country's regulatory choices as sufficient for discharging the former country's regulatory requirements. Israeli law makers have gone to great lengths to implement this strategy. Nevertheless, their work proved incomplete despite its utmost importance for the local market, such that the Israeli DLA remains an unfinished

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[3] *See* Licht (2003); Guseva (2013).

[4] *See*, generally, Karolyi (2012); Licht *et al.* (2018).

[5] *See*, e.g., Doidge, Karolyi, & Stulz (2009); Licht (2001b).

business. Both the positive and the negative features of the DLA thus should be of interest to policy makers who wish to imitate the Israeli model or otherwise innovate in regulating capital markets.

This chapter proceeds as follows. The following part reviews the motivations for the creation of the DLA, the severe constraints that have affected its design, and the policy choices made to meet those constraints. The next part summarizes the legal framework and the current structure of trading in stocks that dual-listed under the DLA. The subsequent part analyses the civil liability morass, its sources in the original policy choices and further complications due to unforeseen development in the U.S. legal regime. The following part offers some general lessons one could draw from this unique episode.

## 2. Motivations and constraints in designing the DLA[6]

### *2.1 The Israeli corporate governance environment*

Israeli law has common law origins thanks to the heritage of the British Mandate in Palestine that was in force until 1948. Applicable law thus consists of an amalgam of statutory provisions and case law that adheres to the *stare decisis* principle. Israeli law of corporate governance rests on three main pillars: the Companies Law, 5759-1999, the Securities Law, 5728-1968, and courts' decision law. All three have been informed by doctrines and concepts that prevail in English and, to a growing degree, American laws.

In terms of market structure, the Israeli market has been and remains a typical non-U.S./U.K. small market, akin to markets in Europe and Asia. Table 1 provides some comparative statistics on major world stock markets and the TASE. By any

[6] This part draws on Licht (2001). I had the opportunity to serve as consultant to the ISA at the later stages of the DLA project and to the Israeli Ministry of Justice on certain aspects relating to foreign listed Israeli companies. Some of the details in the text thus reflect personal impression from the events.

measure, the former have always dwarfed the latter. During the relevant period in the 1990s, the vast majority of issuers listed on the TASE have had a controlling shareholder. To date, most of the companies listed on the TASE still exhibit controlling shareholders, although a small contingency of companies lacking a controller has emerged recently.[7]

[Table 1 around here]

***A small national market under threat***

A growing number of Israeli firms during the 1990s were making various moves of shifting their corporate presence from Israel to the United States.[8] The critical trend, which eventually led to the DLA, was the migration of Israeli firms to the major U.S. securities markets especially from the fast-growing sector that was unable to tap the TASE for the funds it needed. With the U.S. just coming out of a recession, the timing was perfect and with Silicon Valley VC fund managers on their boards, the road to Nasdaq was the natural one to take.

Table 2 provides a breakdown of the 127 known Israeli foreign and dual listings by destination markets in June 2000.[9] The most alarming point in that trend was that unlike the common pattern of cross listing in most countries, dozens of Israeli firms have opted to go directly to the foreign market while altogether skipping their home market.[10] The TASE was no match for the large U.S. securities markets, which in addition to capital on better terms, provided a number of strategic business advantages such as visibility, reputation, and access to non-public funding.

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[7] *See* Gur Gershgoren *et al*. (2019).

[8] For a detailed account *see* Rock (2001).

[9] Israeli issuers list both stocks directly and American Depository Receipts (“ADRs “). The data in Table 2 were hand-collected by the TASE research department from various sources.

[10] In addition, during the late 1990s, Israeli entrepreneurs began incorporating in the United States under Delaware law. *See* Scheinin & Hollander (2000); Levin (2001).

[Table 2 around here]

In the mid-1990s, TASE officials started floating the idea of a fast-track dual listing of U.S.-listed Israeli companies– what later came to be called "automatic dual listing". The dual-listed firms were supposed to jump start the local market and provide the necessary volume for maintaining the local financial sector alive. In 1998, a new ISA Chairwoman appointed an expert committee headed by David Brodett, a prominent businessperson and a former public servant, (the "Brodett Committee") to examine whether exemptions should be given to dual listing of securities that are already listed overseas. The Committee narrowed down its analysis to the national U.S. markets in light of their dominance as destination for Israeli foreign listings. It compared in detail the legal and accounting regimes under Israeli law with those applicable to foreign issuers under U.S. federal securities law and markets' listing rules, and also surveyed managers of U.S.-listed Israeli firms.

The Brodett Committee opined that the situation was anomalous, unacceptable, and likely to lead to irreversible harm to Israel's high-tech sector and capital market.[11] The Committee further expressed hope that bringing "higher league" players to the local market would improve market discipline. The Committee rejected the TASE's automatic dual listing idea, however. It found that the integrated (i.e., legal and accounting) regime applicable to American issuers—based primarily on Form 10-K periodical disclosure under the U.S. Exchange Act— is substantially equivalent to the Israeli one in terms of the investor protection it provides, and therefore can be relied on for regulating the dual-listed securities. In contrast, the U.S. regime applicable to foreign issuers—based primarily on Form 20-F—is inferior to the Israeli regime and the 10-K one. The Committee thus opined U.S.-listed Israeli

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[11] *See* Israel Securities Authority (1998) ("Brodett Report").

firms should be allowed to list on the TASE on condition that they comply with the 10-K-based standard, which was deemed suitable for investor protection in Israel and would prevent discrimination against local issuers but did not entail double reporting in two languages under two different national regimes.

***From qualitative equivalence to the lowest common denominator***

Soon after the Brodett Report was released, pressures began to mount for watering down its recommendations. On the internal front, the ISA came under growing attacks from the TASE, speaking on behalf of the financial sector, and from the Public Companies Association ("PCA"), formally representing the issuers, while practically reflecting the interests of corporate insiders - managers and controlling shareholders. Anything short of automatic dual listing, they argued, will render the project stillborn. Their main grievance, which was underscored already in the Brodett Report, was about the additional disclosure duties dealing with interested and controlling parties, related party transactions, and private placements of securities.[12]

On the external front, the TASE during 1998-2000 was facing intensifying competition for listings of Israeli hi-tech firms that were coveted by foreign securities markets. In addition to the competition from the NYSE and Nasdaq, the Belgium-based Easdaq market, in November 1999, announced that it would launch facilities for dual listing and trading of European, Israeli, and U.S.[13] Listing was to be free of charge. Easdaq's move was backed by a legislative amendment, in which the Belgian parliament authorized the market authority to exempt foreign issuers from the duty to file a prospectus with the Belgian authority, provided that the Belgian market confirmed that the issuer is subject to equivalent disclosure duties where its stocks are

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[12] *See*, respectively, Israel Securities Authority (1998), Appendix C; Licht (2001a: 698-699) (collecting media reports). These sources also provide analyses of the particular differences between the two regimes that have given rise to the differences in investor protection with regard to these issues.

[13] For a review and analysis of the Belgian project *see* Licht (2001b).

currently listed. In early 2000, moreover, during a visit of the Chairman of Nasdaq to Israel, it was announced that Nasdaq intends to open an extension in Tel Aviv.

The turning point came in February 2000, when the Minister of Finance requested "maximum relaxation" in drafting the dual listing law. Mr. Brodett reversed his position and sided with the TASE and the PCA's demand for automatic dual listing. The ISA read the writing on the wall and backed up from its original requirement of 10-K-like periodical reporting. The ISA in a rearguard action accepted 20-F-based reporting yet insisted on disclosure regarding interested parties, but continuing pressure from the TASE and prominent business persons forced it to cave in also in this respect. In July 2000, the Knesset adopted an agreed amendment, which allows Israeli issuers listed on national U.S. markets to list their stocks on the TASE based entirely on disclosures they make overseas under U.S. law or voluntarily.

***Assessing unilateral recognition***

When the Brodett Report was released in 1998, its recommendations were pioneering in terms of the regulatory paradigm they reflected - namely, the unilateral recognition of a foreign securities regulation regime.[14] In this paradigm, regulators allow their regulatees to comply with their regulatory regime by fulfilling duties under a foreign regime. In doing so, these regulators unilaterally recognize the latter regime as sufficiently equivalent to their national regime. They do not request permission from the foreign regulators to do so nor do they expect them to respond in kind or to commit to collaborate with them or even consider doing so.[15] Being relatively small and in competition with the foreign market, they cannot reasonably expect the foreign regulators to negotiate with them a mutual recognition agreement.

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[14] *See* Licht (2001b).

[15] *See*, generally, Karmel & Kelly (2009).

Unilateral recognition could thus be the means of the weak for surviving in competitive securities markets. Bernard Black has used the "piggybacking" metaphor to describe how firms located in countries with a weak corporate governance system may utilize foreign countries' regulatory infrastructure by cross listing there to improve their own corporate governance.[16] Using the same metaphor, regulatory unilateral recognition - and the Israeli DLA in particular - may be described as "piggybacking writ large", as it takes place at the national market/country level.

In the DLA, however, the motivation and the main design principle of the legal amendment were not to upgrade national-level Israeli corporate governance. Rather, it was quite the opposite. Israeli policy- and law-makers were keenly aware of the differences in quality between their local and foreign systems in terms of investor protection, where the Israeli regime was deemed superior to the U.S. regime applicable to foreign private issuers. They nonetheless caved in to pressures and had to settle for the lower-quality regime. This radical design choice is reflected in a key provision of the legislative amendment that implemented the DLA, which authorizes the Minister of Finance to extend the DLA to foreign markets if he concludes that the overall legal regime that applies to Israeli issuers listed on those markets "sufficiently protect[s] the interests of the investing public in Israel."[17] The Minister is similarly authorized to exclude foreign markets from the purview of the DLA "if he concluded that, because of a substantive change … the interests of the investing public in Israel are no longer sufficiently protected."[18]

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[16] *See* Black (2001). This idea later developed into the "legal bonding" hypothesis that is mentioned briefly in the Introduction.

[17] Section 35R of the Israeli Securities Law.

[18] Section 35S.

This is a stark example indeed of a regulatory race for the bottom. The compromise embodied in the "sufficiently protects" phrase cannot be clearer. The foreign disclosure regime has to be sufficient - not more than good enough, with full awareness that "sufficient" here means lower quality than "equivalent". The authority granted to the Minister to add requirements beyond those promulgated under the foreign regime are similarly intended to bring such an enhanced regime to this level of "good enough".[19] The Securities Law provides no criteria for assessing this sufficiency, such that the Minister – effectively, the ISA – is given very broad discretion to make a holistic evaluation of investor protection in the foreign market, limited only by the lenient boundaries of administrative law on executive discretion.

The relatively lower-quality investor protection provided by the DLA manifested itself primary through the less transparent disclosure regime on related party transactions and executive remuneration. In due course, it transpired that insiders in firms that came under the DLA took advantage of the laxer disclosure duties it endorses and ceased to disclose information on top executive remuneration that they had been disclosing prior to that, thus actively making their firms less transparent.[20]

In a similar vein, non-disclosure-related conditions for firms to utilize the DLA were also watered down. In the original version of the DLA, regulations under the Securities Law set a threshold of $500 million market capitalization on the assumption that such firm size is likely to ensure analyst coverage and market discipline, which were supposed to bolster formal regulatory monitoring. The burst of the dot.com bubble in 2001, shortly after the DLA was enacted, caused many firms previously eligible to use the DLA to go below that number. The ISA responded by

[19] Sections 35S and 35T.

[20] *See* Hannes & Kamar (2018); *see* also Licht (2004).

lowering that threshold to $350 million. While both figures could be defended and market discipline is a nebulous concept anyway, the trend is clear and so is the primary priority for the DLA - namely, to attract firms to list on the TASE - and if some corners need to be cut then so be it. Likewise, the markets originally included in the DLA were the large national U.S. markets of the NYSE, NASDAQ, and NYSE MKT (formerly Amex). Among other things, that was on the assumption that those markets are regulated by the SEC, which is widely perceived as a powerful regulator. In 2018, the main markets in Hong Kong, Singapore, and Toronto were added to the DLA after ISA officials met with their regulators.[21] Assuming that those regulators are comparable to the SEC, their experience with handling Israeli firms is nonetheless lower than the SEC's. It is sufficient, apparently, and that is good enough.[22]

Finally, another major difference between the Israeli and U.S. regimes has to do with the standard of liability for securities fraud. Under Israeli law, such liability is strict: in case of misstatement, the issuer and certain insiders are presumed to be responsible for damage caused by it to investors unless the latter show a basis for relieving them from liability, e.g., because they acted with due diligence.[23] In contrast, claiming securities fraud under U.S. law requires pleading, with particularity, and proving of scienter – clearly a much higher hurdle.[24] This point was not discussed at the stages leading up to the enactment of the DLA. It was raised later in the literature[25] and became a major bone of contention when litigation started to be filed in subsequent years.

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[21] For the full list of markets *see* below note 38.

[22] *See* Israel Securities Authority (2016), at 61; Israel Securities Authority (2020), at 81.

[23] Sections 52K-52M of the Securities Law.

[24] 15 U.S.C. § 78u-4(b), introduced by the Private Securities Litigation Reform Act, 1995.

[25] Licht (2002).

Implementing a unilateral recognition strategy brings to the fore a dilemma that at least some securities regulators may prefer to downplay - namely, the need to strike a balance between investor protection and market protection. As detailed above, this need was the animating force in the design of the DLA. Yet this motivation is neither unique to small market regulators. In the "What We Do" statement posted on its website, the SEC declares: "For more than 85 years ..., we have stayed true to our mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation."[26] While investor protection is front and center in this statement, market protection is hidden in the subtext of capital formation. Yet securities regulators never shied away from relaxing disclosure duties that insiders in foreign issuers found inconvenient or implementing a "hands off" approach with regard to enforcement of applicable duties when such steps were conducive to attracting issuers. The SEC, for example, manifested its attentiveness to the needs of the NYSE in the 1990s with regard to regulating foreign issuers;[27] several studies have also documented its lackluster approach in enforcement against them.[28]

Another facet of regulatory unilateral recognition has to do with the allocation of resources. This could encompass any or all of the activities necessary for exercising jurisdiction to prescribe (including both legislation and regulatory rule making), jurisdiction to enforce (including monitoring), and jurisdiction to adjudicate. Such reliance on the larger market may be economically efficient, in fact. At first glance, such reliance might appear as free-riding by the smaller market. Indeed, in the seminal 2021 decision in *Teva*, in which the District Court of Connecticut asserted

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[26] *See* SEC (2022).

[27] *See*, e.g., Cochrane (1994); Cochrane et al. (1996) (the authors were, at the time of publication, staff members of the New York Stock Exchange); *see*, generally, Licht (1999).

[28] *See,* e.g., Siegel (2005); Yehezkel (2006); Shnitser (2010); compare Silvers (2016).

supplement jurisdiction over civil claims by a class of TASE traders, Judge Underhill noted that "Israel has apparently, as a matter of governmental policy and judicial authority, linked its securities laws to ours. Thus, […] there may be a geo-political issue regarding whether Israel's doing so was appropriate."[29]

At least from an economic perspective, however, there is no room for concern. In a dual listing setting, promulgation of law and its enforcement have qualities of a public good such that there is no rivalry in "consuming" them by the smaller market and its participants. To the contrary, similar to regulatory regimes of mutual recognition, unilateral recognition is conducive to cost saving by the issuers, who can avoid complying with multiple and potentially incompatible regimes, as well as enforcement costs by regulators, as exemplified in the *Teva* litigation. Instead of conducting two parallel costly and potentially incompatible litigations, a single proceeding handles the consolidated class of investors in both markets.

At a higher level of abstraction, unilateral recognition could raise questions about national sovereignty - specifically, whether the small market's piggybacking might be perceived as somehow encroaching on the larger market's sovereignty. This point is echoed in Judge Underhill's reference to geo-political propriety. In truth, however, by exercising unilateral recognition the smaller market shows deference to - indeed, respect for - the larger market's regulatory infrastructure without exerting any negative externality. Unilateral recognition is thus the opposite of exercising extraterritorial jurisdiction, which could raise issues of international comity. In the wake of the U.S. Supreme Court's landmark decision in *Morrison*,[30] the SEC conducted a study mandated by the Dodd-Frank Wall Street Reform and Consumer

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[29] In re Teva Securities Litigation, 512 F. Supp. 3d 321, 360 (D. Conn. 2021). Judge Underhill nonetheless noted immediately afterward that "there is no latent concern that the Israeli Law Plaintiffs' lawyers are acting selfishly or improperly by attempting to bring their claims here." *Id.*

[30] Morrison v. National Australia Bank, Ltd., 561 U.S. 247 (2010).

Protection Act of 2010, to which the ISA filed its comments. In it, the ISA recognized American courts as *forum conveniens* and rejected the idea that adjudicating claims dealing with securities subject to the DLA would be inimical to international comity.[31]

Inasmuch as unilateral recognition does raise an issue about sovereignty it relates to the smaller market's one. Thus, in promulgating the DLA, Israel has relinquished at least part of *its* sovereignty with regard to firms dual-listed under the DLA.[32] In addition to the general deference to the foreign disclosure duties, the DLA also reflects self-restraint in regulatory enforcement. Under it, the ISA may request additional information from the issuer or from the foreign regulatory authority in charge of it abroad.[33] However, during the 2000 discussions over the design of the DLA, ISA officials clarified that this authority shall be reserved for rare cases, in which the ISA suspects some illegality, etc.

### 3. Legal framework and current structure

This Part reviews the current state of affairs with regard to the working of the DLA. It provides for an streamlined process for companies listed on designated non-Israeli markets to list their securities on the TASE, essentially without bearing any regulatory burden with regard to that listing, despite the fact that it is a public offering in Israel, and nearly without any additional regulatory burden with regard to on-going disclosure duties. In this respect, the Israeli DLA provides a model that other markets and regulators may find interesting and perhaps worthy of imitating.

#### ***Statutory framework and its elaboration***

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[31] Israel Securities Authority (2011).

[32] *See* Licht (2002).

[33] Section 35X of the Securities Law.

The DLA comprises a chapter (Chapter E3) added to the Securities Law as well as regulations under the Securities Law and the Companies Law. The law enables issuers listed on certain foreign markets to list their securities on the TASE based solely on disclosures they make abroad. Given the legislative history, the ISA and the Ministry of Justice made every effort to avoid or minimize any "friction" between dual-listed issuers and the Israeli legal system as a whole and to rely as much as possible on the U.S. legal system and on U.S. markets.

This strategic policy decision has proved highly successful. As of 2020, some 56 dual-listed companies constituted about 40-60% of the TASE's capitalization. The TASE was thus saved, yet it remains dependent on dual-listed firms. This has led the ISA to adhere to a "strategy to develop the capital market and expand its dual-listing arrangements as a key growth engine for the [Tel Aviv] stock exchange."[34] The ISA reaffirmed its commitment to this policy, when it stated a few years ago that it "intends to explore means to encourage [certain prominent hi-tech -A.L.] companies to list their shares in Israel, too, through steps that will guarantee that they are subject to as similar an ecosystem in Israel as they are in the United States or the UK."[35]

Eligible issuers under the DLA may list on the TASE without filing and approval of a prospectus by the ISA. A DLA-eligible company should only submit an application to the TASE and receive its approval for listing. The TASE does not charge listing fees to dual-listing firms. This application includes a simple registration document according to the Securities Law and regulations thereunder, which is to be filed with the ISA, the Companies Registrar, and the TASE. The registration document includes only basic information (the company's name and address, contact details, types of securities, etc.) and recent disclosures. For example,

[34] Israel Securities Authority (2020), at 80.

[35] Israel Securities Authority (2017), at 6.

a U.S.-listed company should enclose its latest annual report (F-20 or 10-K) and any prospectus published in the United States in the year prior to the year of the annual report, any prospectus filed in the United States in the year prior to or following the latest year covered by the annual report, interim reports or other announcements for immediate release that it has disseminated since its annual report or most recent prospectus.[36] Listing for trading and trading in the dual-listed securities may begin after three days following the filing of the registration document.[37]

Eligible issuers include Israeli companies listed on the major markets of the U.S., U.K., Canada, Hong Kong, and Singapore.[38] In addition, the ISA may approve non-Israeli companies as eligible under the dual listing regime.[39] The ISA has exercised this authority regularly, including in the cases of U.S.-listed firms that listed their stocks on the TASE in connection with M&A transactions of Israeli firm, where those stocks were used as M&A currency.

The DLA's spirit of providing dual-listed firms an "as similar an ecosystem" is exemplified by the case of the takeover battle between Perrigo, Inc. and Mylan N.V. In April 2015, Mylan reported its intention to make a tender offer bid for Perrigo, a company dual-listed in the U.S. and Israel (following a previous purchase of an Israeli pharmaceutical company), which would involve a dual listing of Mylan stocks on the TASE. In light of Mylan's complex voting structure, an issue arose

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[36] Sections 35T and 35V of the Securities Law; Securities Regulations (Details, Structure, and Form of a Registration Document), 2000.

[37] Section 35W of the Securities Law.

[38] Specifically, Schedules 2 and 3 of the Israeli Securities Law list the following markets and segments: New York Stock Exchange (NYSE), NYSE American, National Association of Securities Dealers Automated Quotation Global Select Market (NASDAQ), NASDAQ Global Market, NASDAQ Capital Market, London Stock Exchange's Main Market (Official U.K. Listing Authority), Premium Listing, London Stock Exchange's Main Market, High Growth Segment, The Stock Exchange of Hong Kong (HKEX) Limited Mainboard, Primary Listing, Singapore Exchange Mainboard (SGX), Primary Listing, Toronto Stock Exchange (TSX), Primary Listing. This list has developed gradually over the years.

[39] Sections 35CC-35DD of the Securities Law.

with regard to whether Mylan's listing complied with section 46B of the Israeli Securities Law, which implements a strict One-Share-One-Vote regime. The Tel Aviv District Court approved the ISA's position, that the Israeli legal standard should yield in the case of a dual-listed company to the legal standards of the country of principal listing.[40]

Finally, delisting from the foreign stock exchange within a year of the TASE dual listing will lead to automatic delisting from the TASE, unless the issuer publicizes within a two-month time an ISA-approved prospectus as in a standard public offering.[41] A dual-listed company may also delist from the TASE after giving the latter a three-month notice.[42]

As noted above, as long as an issuer is dual-listed under the DLA, it may discharge its reporting duties under Israeli law by disclosing the information it has to disclosure under the "foreign law" and information that it disclosed voluntarily. "Foreign law" is defined as "the law applying to a foreign corporation because its securities are listed for trade on a foreign stock exchange, including the rules of that foreign stock exchange".[43] This provision thus implements most extensively a unilateral recognition of the foreign disclosure regime.

In one context, however, the ISA found it necessary to stray from this pure model of unilateral recognition. As a lesson learnt from the Financial Crisis of 2008, Israeli issuers of debt securities must publicize an "anticipated cash flows report" in certain circumstances of financial distress. This disclosure obligation has no clear

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[40] *See*, respectively, Israel Securities Authority (2016), at 61; Civil Action (Tel Aviv) 40274-09-15 Mylan N.V. v. Perrigo Company Plc (28 Oct. 2015)

[41] Section 35AA of the Securities Law.

[42] Section 35BB of the Securities Law.

[43] Sections 35EE and 1 of the Securities Law; Securities Regulations (Periodic and Immediate Reports of a Foreign Body Corporate), 2000.

parallel under the U.S. disclosure regime. A number of U.S. firms dual-listed their stock on the TASE under the DLA without raising equity capital in Israel but then issued bonds only in Israel, which enabled them to avoid the duty of publicizing an anticipated cash flows report. Having determined that such reports are crucial for investor protection, the ISA extended that reporting duty also to dual-listed firms under the DLA.[44] This disclosure regime is entitled the "hybrid disclosure model", as it intertwines reporting duties from both the foreign and Israeli laws. This model demonstrates that purity (or elegance) of the DLA in terms of its reliance solely on foreign disclosure duties, which reflects market protection goals, need not be upheld at all costs in terms of investor protection.

Trading in dual-listed stocks is completely seamless. The TASE Clearing House maintains an account and an electronic link with The Depository Trust Company (DTC). This link simplifies cross-border settlement for stocks and ADRs or ADSs listed on the TASE and the U.S. stock exchanges. Dual-listed securities thus can be purchased on one market and sold on the other to take advantage of trading hours or arbitrage opportunities.

## 4. The civil liability morass

### *4.1 Sin of omission*

In contrast with the relatively elegant regime that the DLA established for disclosure duties, the legislative amendment that implemented it failed completely to provide a coherent regime for liability, either public or private. Strikingly, although this problem was pointed out long ago, and shortly after the enactment of the DLA,[45] no attempt has been made since then to legislate coherent liability rules, or, more

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[44] *See* Israel Securities Authority (2018).

[45] *See* Licht (2002).

accurately, conflict of law rules that clearly designate the applicable law of liability. The courts were left to their own devices to devise such rules by way of interpretation of cryptic, unstable, and often confused statutory text. They have answered the key question - namely, whether Israeli law or the foreign (in particular, U.S.) law of liability applies to breaches of disclosure duties - by pointing to the latter option, but the process has been unnecessarily protracted. For the present purposes it would be counter-productive to review this subject in detail. Instead, this Part provides a general overview of the liability challenge that the DLA has been facing and how the courts addressed it.[46]

***An unfinished business***

To my knowledge, the issue of the law of civil liability for the DLA had been discussed in the ISA at a preliminary stage but not publicly. As such there is a dearth of information on the design principles that would determine the question beyond the fundamental goal of "minimum friction" between DLA issuers and Israeli regulation. The working assumption in the ISA was that U.S. courts will handle all private litigation, likely brought as class actions, according to U.S. law, which at the time, was applied extra-territorially. A provision was thus included in the DLA to authorize Israeli courts to stay proceedings brought in Israel when parallel litigation takes place in the U.S., in addition to the general law on *lis alibi pendens*.[47]

When the DLA was enacted in 2000, the amending legislation included a section providing for civil liability of issuers and certain insiders that looked similar to parallel provisions on regular (i.e., non-DLA) issuers and insiders,[48] as well as a provision preserving criminal liability. That provision was repealed in 2004 as part of

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[46] This author has advised or provided expert opinions in a number of the cases mentioned in this Part.

[47] Section 35Z of the Securities Law.

[48] Section 35Y of Securities Law (repealed).

a massive reform that introduced a system of continuous reporting into Israeli securities regulation law. A different general provision on civil liability was introduced into the Law, which could bear on the DLA as well.[49] Neither of these provisions, when read in context and in light of the legislative history and purpose, unequivocally determines whether the Israeli or the foreign law applies to civil liability. To complicate things further, it was questioned whether foreign law could apply to criminal liability, since applying foreign law to the latter is, well, foreign to the concept of public liability.[50] In addition, the U.S. Supreme Court's watershed decision in *Morrison* has caused tectonic shifts in U.S. law, when it promulgated a territorial test for private causes of action under the Securities Acts.

In a bold move of interpretation, a district court decision in 2008 severed the link between private and public liability and applied the foreign (U.S.) law to the former, in light of the *raison d'être* and underlying logic of the DLA.[51] The same court in 2011 decided that *Morrison* does not affect that ruling, reasoning that *Morrison* addresses U.S. law, whereas the application of U.S. civil liability in the DLA is by dint of Israeli law.[52] Several subsequent cases have reiterated and elaborated this principle, with the ISA filing *amicus* briefs in support of this interpretation.[53] For the sake of consistency with these rulings on the liability of issuers and insiders, the district court also applied the foreign U.S. law to the liability of issuers' accountants, (although the latter's liability under federal securities law is

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[49] Section 38C of the Securities Law.

[50] *See* Licht (2002).

[51] Class Action 3912-01-08 Verifone Holdings, Inc. v. Stern (11 Sep. 2008), cited with approval by the Supreme Court in L.C.A. 5653/16 Ceragon Networks Ltd. v. Hazan (13 Oct. 2016).

[52] Class Action 3912-01-08 *Stern v. Verifone Holdings, Inc.* (25 Aug. 2011).

[53] Class Action 28811-02-16 Damti v. Mannkind Corporation (12 Oct. 2017); Class Action 44775-02-16 Cohen v. Tower Semiconductor Ltd. (7 Nov. 2017); *see* also Israel Securities Authority (2011).

questionable at best).[54] Another technical issue, regarding the mode of distribution of damages awards, was also largely resolved during that period.[55]

Only in 2018 did the question of applicable law reach the Supreme Court, which confirmed the interpretation given by the district courts yet failed to hand down a formal appeal decision, likely out of consideration of the parties' convenience.[56] Although the point had been virtually settled at that stage, that it was not formally decided enabled another district court in 2021 to rule that Israeli law applies to liability,[57] only to be overturned by a rehearing panel in 2022.[58] During most of this prolonged period, the ISA preferred to let the courts deal with the question. Only recently did it draft a clarifying bill that has not been enacted as of this writing, however.[59] Separately, the ISA has opined that criminal liability, e.g., for insider trading, is subject to Israeli law but this point has not yet been addressed by the courts.

In tandem, U.S. courts have been moving quickly up the learning curve. They have come to acknowledge the unique features of the DLA and have asserted supplemental jurisdiction over TASE trades in dual-listed securities notwithstanding *Morrison*.[60] The upshot is that consolidated class actions can be brought in the U.S.

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[54] Class Action 44775-02-16 Cohen v. Tower Semiconductor Ltd. (20 Feb. 2018). On accountant liability *see* Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A, 511 U.S. 164 (1994).

[55] In the U.S., distribution of damages awards is based on filing an application by class members in a designated website, whereas in Israel, such distribution is done automatically through TASE clearing facilities. For a critical review *see* Klement (2022). Klement's critique has become virtually moot in light of Class Action 22300-05-15 Hayt v. Verifone Systems Inc. (14 May 2018), which conditioned an approval of settlement on providing automatic distribution to TASE traders.

[56] Civil Appeal Petition 8737/17 Damti v. Mannkind Corporation (4 Oct. 2018); Civil Appeal Petition 8737/17 Damti v. Mannkind Corporation (16 Oct. 2018).

[57] Class Action 7363-01-15 Hazan v. Ceragon Networks Ltd. (27 May 2021).

[58] Civil Case 16214-09-21 Ceragon Networks Ltd. v. Hazan (27 Jan. 2022).

[59] Israel Securities Authority (2021).

[60] The pivotal ruling is Teva Securities Litigation 512 F. Supp. 3d 321 (D. Conn. 2021). For earlier decisions, discussed in *Teva*, *see* Costas v. Ormat Techs, Inc. 2019 WL 6700199 (D. Nev. Dec. 6,

for adjudicating all claims regarding DLA securities in an efficient fashion, as was originally envisioned for the DLA. Investors who traded DLA-listed securities on the TASE could thus enjoy the same protection afforded to U.S. investors who traded in these securities in the U.S. While investors in many markets around the would likely covet such protection, Israeli investor can argue credibly that the DLA derogates from the protection they would have had without it.[61]

### *4.2 The aftermath*

Even this abridged description of the *Via Dolorosa* that civil liability in the DLA has had to go through, and which has not ended yet, is sufficient for comprehending the major setback that the DLA project has suffered as a result of the original drafting failure. The upshot was a continuing state of uncertainty that has been prolonging for over twenty years with regard to a fundamental feature of the DLA regime. The implications of such uncertainty are particularly severe because applying Israeli law to liability in Israeli civil litigation would entail that *two* laws of liability would apply - one for each country in which litigation is brought. Worse, the courts of each foreign market would need to go through the same learning process that U.S. went through, and there is no guarantee that the same result would be achieved, especially in light of the fact that class/group litigation is regulated differently in different countries. Even today, it remains unclear how courts would handle disclosure breaches in connection with the hybrid disclosure regime or criminal liability.

## 5. Conclusion

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2019); Roofer's Pension Fund v. Papa 2018 WL 3601229 (D.N.J. July 27, 2018); In re VeriFone Holdings, Inc. Securities Litigation 2014 WL 12646027 (N.D. Cal. Feb. 18, 2014).

[61] In making this claim I abstract from the quality and effectiveness of U.S. courts dealing with securities litigation. With all due respect, the latter clearly dominate Israeli courts in this regard.

On the whole, the story of the Israeli DLA is a story of a major success. It is about a small capital market whose captains and regulators faced a genuine challenge to its very existence and addressed it in an innovative manner that successfully fended off that danger. In order to achieve this goal, they created a unilateral-recognition-based cross-listing regime purporting to rely entirely on high-quality foreign markets that local issuers have been preferring over the local market. Metaphorically, the DLA sought to create a “legal bubble” of foreign law within the domestic legal system. As it turned out, however, creating such a legal bubble entailed a certain sacrifice of investor protection - a price that probably was, and remains, worth paying. In tandem, the design of that legal bubble has proven incomplete in that the liability regime of the DLA remains an unfinished business and as such - an equally important lesson to other markets and regulators.

**Tables**

Table 1. Stock Exchange Comparative Statistics

| | 2020 | | | 1999 | | |
|---|---|---|---|---|---|---|
| Stock Exchange | Listed Companies Domestic | Listed Companies Foreign | Market Capitalization (US$M) | Listed Companies Domestic | Listed Companies Foreign | Market Capitalization (US$M) |
| NYSE | ~2,285* | ~510* | 26,232,740 | 2,619 | 406 | 11, 437,597 |
| Nasdaq | 2,408 | 525 | 19,060,372 | 4,400 | 429 | 5, 204,620 |
| LSE | 2,026 | 384 | 4,045,597 | 1,826 | 448 | 2,855,351 |
| TASE | 426 | 29 | 262,061 | 653 | 1 | 63,472 |

Source, respectively: International Federation of Stock Exchanges, 1999 Annual Statistics, Tables 1.1, 1.3 (2000); World Federation of Exchanges (WFE), 2020 Annual Statistics Guide, Tables 1.1, 1.3 (2021).

* Starting in 2019, the WFE statistics have ceased to report the number of listed companies on the NYSE. For 2018, the WFE reported that there were 2,285 domestic companies and 510 foreign companies listed on the NYSE.

Table 2. Destination Markets of Israeli Foreign Listing Companies, 2000[a]

| **Country/Region** | **Market** | **Foreign Listings[b]** | **Dual Listings** |
|---|---|---|---|
| United States | NYSE | 5 | 2 |
| | Nasdaq[c] | 83 | 16 |
| | OTC | 11 | - |
| United Kingdom | LSE | 8 | 4 |
| European Union | Euro NM[d] | 16 | - |
| | Easdaq | 2 | - |
| Canada | CDNX[e] | 2 | - |
| Total | | 127 | 22 |

Source: Data provided to Author by TASE Research Department, 2000.
a. Table 2 does not include companies active in Israel but incorporated abroad.
b. Including dual listings.
c. Including former AMEX stocks.
d. Including Switzerland. Euro NM consists of several markets.
e. Canadian Venture Exchange, formed in end-1999 by the merger of Vancouver and Alberta exchanges.

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