ISRAEL SECURITIES AUTHORITY
Department of International Affairs

Yael Almog
Senior Adviser to the Chairman and
Director of International Affairs Dept.
Israel Securities Authority

February 18th 2011

The Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
USA

Re: **Study on Extraterritorial Private Rights of Action – SEC Request for Comments** (Release No. 34-63174; File No. 4-617)

The Israel Security Authority (ISA) welcomes this opportunity to express its position in relation to extraterritorial private rights of actions following the Supreme Court's decision in *Morrison v. National Australia Bank*.

In our comments we have limited ourselves to *Morrison's* impact in relation to dual listed securities.

Throughout our comments, the term dual listed securities refers to an arrangement whereby securities are (i) listed on both a domestic US securities exchange and an exchange outside the US and (ii) the requirements of the US regulation applicable to the listing (e.g. disclosure requirements) have been adopted or recognized as equivalent, in the non-US market.

This matter is of direct relevance to the Israeli and US securities market since there are currently forty seven companies (both US and Israeli) that have dual listed their securities on both a domestic US securities exchange and the Tel Aviv Stock Exchange (TASE).

However, the arguments set out below apply equally to any similar arrangement in other jurisdictions around the world whether such arrangement is unilateral, as in Israel, or is based on a mutual recognition agreement between the SEC and a non-US regulatory authority.

In our opinion, claimants who believe they have a valid claim under section 10(b) of the Securities Exchange Act against an issuer that has dual listed its shares and the US regulation applies in the non-US market, should have a private right of action in the US irrespective of whether they purchased the relevant securities on the US domestic exchange or on the non-US exchange.

Brief overview of the Israeli dual listing regime

The dual listing arrangement was created by primary legislation in 2000. The basic concept is that an issuer that has listed its securities on certain US exchanges and is therefore subject to SEC disclosure requirements may carry out a secondary listing on TASE.

For the purpose of meeting Israeli disclosure requirements, the Israeli Securities Law permits such an issuer to file with the ISA the prospectus and subsequent periodic and immediate reports that are required under SEC regulation. Thus the issuer is subject to a single set of disclosure requirements which satisfy the regulation in both markets.

The day to day functioning of the dual listing mechanism may be said to have two key characteristics. These are:

a) The same securities are traded on the US domestic exchange and the Israeli exchange and indeed may be transferred freely between exchanges; and

b) The US disclosure requirements apply in both markets.

The operational mechanism by which dual listed securities may pass between US and Israeli exchanges is centered upon a securities account maintained with the DTCC by the Tel Aviv Stock Exchange Clearing House (SECH). Once securities are transferred to this SECH account at the DTCC it acts as the cross over point by which the same dual listed shares may pass freely between the US and Israeli exchange.

The dual listing arrangement is applicable to both US incorporated companies as well as to Israeli companies[1]. It enables those issuers to enjoy the advantages of having two listings based on a single set of disclosure regulation. These advantages, which are equally enjoyed by US and Israeli issuers and investors and consequently by their respective markets, are discussed further below.

However, a basic feature of dual listing which is extremely important to the discussion surrounding *Morrison* should be mentioned at this point. The Knesset, the Israeli legislature, applied US disclosure regulation for these companies. Therefore the concerns surrounding international comity do not apply in relation to dual listing.

[1] "Foreign corporation" is a defined term in the law. It means "a corporation incorporated in Israel whose securities are listed for trade on a foreign stock exchange".

Whilst the definition refers to *Israeli* companies listed abroad, the ISA is empowered (under section 35DD of the Law) to apply the dual listing rules to a non-Israeli company listed on a foreign stock exchange and indeed companies incorporated in both the US and Israel have used the arrangement.

The term "foreign stock exchange" is also a defined term and refers specifically to certain recognized exchanges listed in the Schedules to the Law. The US exchanges so listed are NYSE, AMEX and NASDAQ's Global Select Market, Global Market and Capital Market.

International comity

As clearly shown by the way dual listing is legally structured, international comity is not a concern in the Israeli case. The Knesset together with the ISA and the Israeli Government departments involved in drafting and sponsoring the dual listing law, took the decision (i) to import US law and regulation concerning the disclosure requirements and (ii) to recognize the resulting role of the US courts[2].

Furthermore, the ISA submits that as a general rule international comity should not be an issue in relation to any similar dual listing arrangement in other non-US jurisdictions. In any circumstance in which a non-US legal system has recognized the adequacy of US disclosure for its own domestic regulatory requirements the right to bring a private action before the US courts does not undermine international comity.

Since issuers have chosen to reap the benefits of dual listing and investors have relied, at least indirectly, on US regulatory standards, any argument that hearing a claim in the US constitutes unreasonable interference with foreign sovereignty ignores both the essence and the practical consequences of the dual listing arrangement.

Moreover, whilst choice of law principles and the doctrine of *forum non conveniens* were used in support of *Morrison* by foreign governments in the amicus briefs filed with the Supreme Court, we would suggest that not only do these arguments not apply to dual listed securities as defined above but in fact they are exactly reversed when considered in the context of dual listed securities.

A situation in which US law and regulation has been accepted in the non-US market, supports the contention that investors who purchase in the non-US market should at least have the option to bring an action in the US.

In the section of the *Morrison* judgment dealing with the need to respect the regulation and policy of other countries, the Supreme Court stated

> "The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application "it would have addressed the subject of conflicts with foreign laws and procedures""

This is a strong argument when used in the context of two different systems of law. However, such incompatibility is eliminated when the applicable law in the other country is US law.

The Supreme Court went on to say:

---

[2] Regarding the centrality of the US courts, see in particular section 35Z of the Securities Law:

"**Stay of proceedings in Israel**. At the request of any litigant in a suit brought in an Israeli court for a cause of action arising in connection with the securities of a foreign corporation* *[i.e. a dual listed corporation]*, the court may stay the proceedings if it is satisfied that a suit has been brought in a foreign court regarding the same or a similar cause of action, until a final ruling – which is not subject to appeal – has been rendered in that suit;"

> "And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters."

In this reasoning the Supreme Court did not consider the case of a country in which disclosure requirements are actually imported from the US.

In Verifone Holdings, Inc. v. David Stern[3], the Israeli court stated that in relation to claims concerning dual listed securities, the issues raised should be decided in accordance with the US law and that the proper judicial forum for such claims is the US courts.

The shares of a Delaware corporation, Verifone Holdings, Inc. were at the relevant time dual listed on the New York Stock Exchange and TASE. Following the filing of what shareholders claimed were misleading items in its financial statements, Israeli investors petitioned the Israeli courts to approve a class action against Verifone. Similar petitions regarding the same alleged misleading items were submitted to the US courts by investors who had purchased their shares in New York. Verifone petitioned the Israeli court to dismiss the request. The parties agreed that before proceeding the Israeli court would consider which law (US or Israeli) applied.

The District Court made two precedent setting decisions.

a) The claim should be considered under US law; and
b) All proceedings should be heard together in a single judicial forum, the US courts.

A number of key statements may be quoted from the Verifone decision:

> "Both law and regulation… express that it is the foreign law that applies, both from a technical perspective in relation to the requirement to disclose and from a substantive perspective in relation to the liability of the companies to investors."
>
> Dual listing is intended, inter alia, "to bring together all legal proceedings in a single place under a single law, namely US law."
>
> "To apply Israeli law in this case, would be to apply two different legal regimes where it is appropriate that one forum should consider [the claim]."

[3] Verifone Holdings, Inc. v. David Stern (file no. 3912-01-08) 16.11.2008

The *Verifone* decision was appealed to the Israeli Supreme Court and whilst the appeal was pending the decision in *Morrison* came in. As a result of *Morrison* both sides have submitted further arguments to the Court.

In light of the primary Israeli law and the wider application of the US legal context to claims involving dual listed shares, we believe that the concerns stemming from international comity do not arise in the case of dual listed securities where the US law applies in the non-US market.

Single law, single forum

The above arguments not only remove any concerns that international comity might constitute a barrier to the bringing of private rights of action in dual listing cases, they also provide compelling reasons why such private actions should indeed be permitted.

Whether an investor is based in the US, Israel or any other country, when it purchases a dual listed security on the Tel Aviv Stock Exchange it has literally purchased a US domestically traded security. The securities are freely tradable in the US market and the disclosure regime under which the issuer reports is that applicable to US issuers.

As a result of the application of US regulation within Israel and the free transferability of securities between the two markets there is no meaningful difference between purchasing dual listed securities on a US domestic exchange or in Tel Aviv.

Under such circumstances the test suggested by the court in *Morrison*, which focuses on domestic transactions (if the securities are not listed on domestic exchanges), results in an irrational outcome. Such limited test creates a situation in which a US related matter is characterized as "extraterritorial" despite the fact that most if not all of its characteristics are US related. Even in a case in which the company is an American company, the fraud occurred entirely in the US, the investor is a US citizen, and the same securities are listed in the US, an American investor will lose his right of action, because he made the purchase in Tel Aviv. Such an irrational outcome is a result of a too narrow and arbitrary test of the place where the securities were purchased.

This is also an irrational result for Israeli investors. This basic reality has been recognized by the Israeli courts. The *Verifone* decision provides a timely illustration of the great extent to which the decision in *Morrison* is unsuitable for claims involving dual listed securities.

As a result of *Morrison*, an investor that purchased Verifone shares on TASE is barred from bringing an action in the US despite the fact that (1) this is a claim against a US company; (2) the relevant shares are traded on a US domestic exchange; (3) the claim involves a breach of US regulation; and (4) such breach allegedly occurred in the US.

The ISA believes that the approach adopted by the court in Verifone that such claims must be heard before US courts, is both practical and legally coherent. The US court is the natural forum for such a claim and the right to bring a private action there

should be available to all investors irrespective of whether the shares were purchased in New York or Tel Aviv.

Benefits of the dual listing arrangement

Dual listing is a progressive, simple and effective arrangement that brings benefits to investors, issuers and markets alike. The future of such arrangements involving the US market could be undermined by the *Morrison* decision.

The first clear advantage for issuers is the ability to access two markets based on a single set of disclosures, and by that save costs of raising capital in two parallel listings.

Moreover, studies carried out by the Economics Department of the ISA as well as TASE indicate that dual listing brings with it other benefits to the issuers who choose to take this path[4] [5].

The experience of dual listed companies during the recent financial crisis reinforces these observation..

A study carried out prior to the crisis in 2007 revealed the following:

- Trading volumes increased on average by 123% following dual listing;
- This increased liquidity pushed up the share price in the period immediately following dual listing by an average of 9%;
- Trading volumes in Israel represented on average 42% of the total trading on the US and Israeli exchanges and this without there being a significant impact on the volumes traded in the US.
- The US exchange remained the market with the dominant effect on share price of dual listed shares.

Improved liquidity is of course a benefit not only for issuers but also for investors and the market generally.

During the crisis, the behavior of dual listed shares in comparison to other comparable non-dual listed, US listed shares also indicated clear benefits. When trading turnover on the US exchanges was suffering serious declines, the trading in Tel Aviv provided a buffer against the worst effects, rising to 50% of total trading on the US and Israeli exchanges between January and September 2008[6]. This trend towards Tel Aviv continued through the first half of 2009 and tended to stabilize these securities, primarily by providing liquidity.

[4] Investigation of the Share Benefit of Dual listing on Nasdaq and TASE, Shmuel Hauser and Rita Yankilovitch, June 2007 (Hebrew). http://www.isa.gov.il/Download/IsaFile_1893.pdf

[5] TASE: The Home Market for Dual Listed Securities During the Crisis, Dorit Dror, April 2009 (Hebrew). http://www.tase.co.il/NR/rdonlyres/2D5BFB2A-D229-49FD-B26B-A31FE0B7EC55/0/Research_2009_04_143658.pdf

[6] Not including trading in Teva Pharmaceutical Industries Ltd.

There are other less tangible benefits of dual listing that should have a positive effect on the value of the issuer. The ISA believes that the increased exposure of dual listed companies to other markets and greater numbers of investors results, amongst other things, in an ability to raise capital at relatively cheaper capital costs.

From the perspective of Israeli institutional investors, the reduced costs that result from trading in the home market make dual listed securities more attractive than the same investment in the US. As pointed out above, the benefit of this increased volume feeds through to the issuer and the markets in both countries.

Morrison tends to undermine the dual listing arrangement and therefore runs counter to these benefits.

The *Morrison* decision might deter investors from purchasing dual listed shares in Tel Aviv (or in any other territory) since by doing so they will lose access to the US courts. This will have negative effect on investors and issuers and also on the markets involved.

In the case of Israeli investors - there is no reason to believe that if institutional investors stop trading on Tel Aviv as a result of *Morrison* they will simply transfer the same transactions to New York. One explanation of this is the higher cost of trading directly in a foreign market. The consequence of that will be less trading and less liquidity for the issuer.

US investors might tend to limit their trading to US exchanges in order to maintain a right of action in the US. The consequence of that will also affect liquidity since American investors will not be interested to trade anywhere but in the domestic market.

Both groups of investors will lose the benefit of price arbitrage which is a feature of dual listed shares, and the advantage of diversifying their portfolios.

As the figures quoted above illustrate, dual listing raises the overall trading turnover. However the increased liquidity enjoyed by dual listed companies as a result of the trading that takes place in Tel Aviv will be reduced to the detriment of all market participants.

Less dual listings could mean less companies in the US market, and loss of business for its market participants. It could also mean less listings in TASE, to the detriment of the Israeli localmarket.

It is therefore clear that the loss of a right of action in the US might result in less companies carrying out a dual listing. Investors will either buy the same securities only in the US or they will invest in other securities in the secondary market. Investors, issuers and the markets as a whole will lose the advantages that were contributed by the dual listed arrangement.

Inefficiencies and Legal inconsistencies created by *Morrison*

The legal and economic reasons cited above for allowing private rights of action in relation to dual listed shares are strengthened by consideration of the practical results of the *Morrison* decision.

For issuers, the inefficiencies center upon the need following *Morrison* to defend the same action in two different forums with all the duplication of legal costs and legal risk.

Legal inconsistencies may also occur between the potentially conflicting outcomes of what are essentially the same claims in different jurisdictions. Following *Morrison*, the Israeli courts will need to hear such claims whilst a parallel and largely identical claim proceeds in the US. Non-compliance with US disclosure regulation will remain the basis of most such claims whether heard in the US or Israel.

The ISA believes that such inefficiencies and inconsistencies would be regrettable and would reflect the failure of the legal environment to recognize and reflect the underlying legal and practical reality of dual listing.

Hearing these cases in the US is also justified in terms of these claims being a legitimate use of US court resources. In economic terms, the dual listing arrangement is of benefit to US investors and issuers and US market professionals who provide services to dual listed companies therefore, unlike the facts in *Morrison* case there is an economic justification for permitting these claims to be heard in the US.

Not only issuers but also investors will be affected by inconsistencies and inefficiencies if the position post-*Morrison* prevails. Investors who purchase in Tel Aviv will need to argue points of US law before an Israeli court. This at the very least will result in substantially higher legal fees as US counsel will be needed in addition to the Israeli counsel running the claim.

Conclusion

We submit that the effect of *Morrison* on the regulation and orderly trading of dual listed securities is entirely negative and will lead to inequitable and irrational results.

In addition it will undermine the proper working of the dual listing arrangement and reduce the economic benefits that have flowed to US and Israeli issuers and to the US and Israeli markets as a result of its implementation.

The above is true not only in relation to Israel but also any other existing or future dual listing arrangement.

The additional costs to issuers and investors and the increased legal uncertainty surrounding claims involving dual listed securities should be firmly avoided.

We further submit, that whilst one of the important considerations behind the *Morrison* decision was the question of international comity, such concerns do not apply in Israel or in any jurisdiction that has accepted US regulation in relation to those matters covered by Section 10(b)

In short, we see no reason in law, market practice or international relations that justifies maintaining the Morrison position in relation to dual listed securities.

The ISA therefore strongly submits that Congress should preserve the right of investors to bring private actions in the US for claims relating to dual listed securities where the US law applies in the non-US market. This right should exist irrespective of whether the securities were purchased on the US domestic exchange or on the non-US exchange.

Sincerely

Yael Almog
Senior adviser to the Chairman & Director, International affairs Department
Israel Securities Authority