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COMMENTS

A Divided Country in Foreign Courts—Recent Litigation Involving Germany's Legal Status and the Zeiss Stiftung

The partition of countries in the wake of the second World War accounts for two Asian battlefields: Korea and Viet Nam. In Europe, where a dividing line was drawn through Germany, military hostilities have been avoided thus far. Instead, the controversies originating from that line are fought out at the conference table, through public and private media of communication, and in the courthouses.

I. Carl Zeiss Stiftung

Many of the fighting issues are reflected and squarely presented in the countless cases relating to a single enterprise: the Zeiss Stiftung.[1] Although the issues in each of these cases are necessarily varied, the gist of all of them is identical and can be easily stated in a few words: who is entitled to use the name "Zeiss" or "Carl Zeiss" as a business name or trade-mark? Two groups of persons, one East German, the other West German, are in violent conflict over this right, each claiming to represent the Carl Zeiss Stiftung. Originally, that organization had its legal domicile in Jena where it was established in 1889, with its charter being ratified in 1896. At the end of World War II, Thuringia, the province in which Jena is situated, was occupied by American forces. However, shortly thereafter, pursuant to agreements with the Soviet Union, the Americans withdrew and Jena became part of East Germany.[2] The leading officers of the Zeiss Stiftung as well as several of its employees went to West Germany when the Americans left, taking with them im-

1. Under German law, a Stiftung (foundation) is a legal entity administering a conglomeration of assets. After establishment, it is treated as a legal person owning the property under its administration; but unlike a corporation it has no shareholders or any kind of members. See 1 Manual of German Law 38 (Foreign Office ed. 1950). The Zeiss Stiftung is unusual in that it owns sizeable economic enterprises, whereas ordinarily a Stiftung is either used for purposes of family settlement or for charitable or scientific purposes. On the history, the legal nature of the Zeiss Stiftung, and the philosophy on which it rests, see David, Die Carl-Zeiss-Stiftung, ihre Vergangenheit und ihre gegenwaertige rechtliche Lage (1954); Mayer, *The Zeiss Foundation*, 10 J. Pub. L. 384 (1961).

2. This action conformed to the Protocol on Zones of Occupation and Administration of the "Greater Berlin" Area, Sept. 12, 1944, adopted by the European Advisory Commission. See Documents on Germany 1944-1961, at 1 (United States Senate, Committee on Foreign Relations ed. 1961). See also excerpts from the correspondence between President Truman and Marshal Stalin on the withdrawal of western troops and their movement into Berlin in Documents on Berlin 1943-1963, at 23-24 (Heidelmeyer & Hindrichs eds. 1963).

portant documents, such as patents, drawings, and files.[3] With the aid of those documents, and by making use of the Stiftung's interests in West German enterprises, these persons began to conduct a business in West Germany and, after a short period, they began to use the name "Zeiss" for their products and their enterprise. They purported to modify the basic instrument governing the Stiftung, the so-called Stiftungsstatut (Charter), so as to make the West German city of Heidenheim the domicile of the Stiftung.[4]

Meanwhile, the authorities exercising power in East Germany appointed new officers for the Stiftung. In 1948, two enterprises situated in Jena and owned by the Stiftung were confiscated and became so-called "People's Owned Enterprises." The Stiftung, however, was not dissolved or nationalized. On the contrary, the East German authorities purported to keep it alive and issued a statement to the effect that the nationalized enterprises would have certain rights and obligations *vis-à-vis* the Stiftung which would be determined by a revised Stiftungsstatut.[5]

II. Litigation Over the Use of the Name "Zeiss"

The stage was thus set for the world-wide controversy between two rival organizations over the legitimate use of the five letters forming the profit-boosting name "Zeiss." In this country, an action involving the Stiftung has been pending for many years, but it appears to be still in the pre-trial stage.[6] In Great Britain, a case was brought more than 10 years ago, yet it was not until May of 1966 that the House of Lords decided the preliminary issue of whether the East German plaintiff could authorize an action in a British court despite the British government's non-recognition of the German Democratic Republic (the East German state).[7] In Switzerland, a suit was started in 1962 and decided by the Bundesgericht, the highest court of that country, in 1965.[8] Germany itself is, of course, the country with the greatest incidence of "Zeiss" litigation. The

3. For details, see Mayer, *supra* note 1, at 400.

4. Actually this flies in the face of the charter which provides in article 3 that Jena shall be the Stiftung's domicile and in article 121 that this rule (and others) may not, under any circumstances, be changed. For arguments in support of the change of domicile despite the language of those provisions, see Nipperdey, *Die Rechtslage der Carl-Zeiss-Stiftung und der Firma Carl Zeiss seit 1945*, in Festschrift Walter Schmidt-Rimpler 41, 53-61 (1957).

5. For more detailed statements of facts, see cases cited notes 7-10 *infra*.

6. Letter From Isaac Shapiro of Milbank, Tweed, Hadly & McCloy, New York, to the author, Sept. 28, 1966. The action was commenced in the United States District Court for the Southern District of New York in February 1962, and discovery has been in progress ever since.

7. Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1966] 3 Weekly L.R. 125 (H.L.) [hereinafter referred to as the *Zeiss* case or the English *Zeiss* case].

8. VEB Carl Zeiss Jena v. Firma Carl Zeiss Heidenheim, Bundesgericht, March 30, 1965, 91 II Entscheidungen des Schweizerischen Bundesgerichtes 117 (Switz.).

decisions rendered by West German courts are innumerable;[9] for East Germany, the matter was settled by a decision of its highest court in 1961.[10] Several other countries have had their share of "Zeiss" litigation.

A. *The English Court of Appeal and the Doctrine of Recognition*

As the brief narrative above indicates, these controversies inevitably present courts with one or more of the intricate questions relating to Germany's post-war status as a defeated and occupied country which, after 20 years of gradual transformation, is still only semi-independent and divided.[11] The most extensive, and in some respects the most startling, discussion of these questions is to be found in the opinions rendered in the English *Zeiss* case.[12] That case was brought by persons in East Germany purporting to act for the Stiftung itself, not for the nationalized enterprises which formerly belonged to the Stiftung. The plaintiff prayed for an injunction against the use of the name "Zeiss" by the West German group and its two English retailers. The defendants raised an objection on the ground that the action was begun and maintained without the authority of the Stiftung. While the trial judge overruled this objection, the Court of Appeal accepted it after receiving a certificate from the Foreign Secretary to the effect that "Her Majesty's Government have not granted any recognition *de jure* or *de facto* to (a) the 'German Democratic Republic' or (b) its Government."[13] In view

9. The most important cases are: Judgment of July 24, 1957, Bundesgerichtshof, 1954-57 Sammlung der deutschen Entscheidungen zum interzonalen Privatrecht [hereinafter cited as IzRspr.] No. 222 (Ger. Fed. Rep.); Judgment of Jan. 28, 1958, Bundesgerichtshof, 1958-59 IzRspr. No. 60 (Ger. Fed. Rep.); Judgment of Nov. 15, 1960, Bundesgerichtshof, 1960-61 IzRspr. No. 52 (Ger. Fed. Rep.); Judgment of June 30, 1961, Bundesgerichtshof, 1960-61 IzRspr. No. 136 (Ger. Fed. Rep.).

10. Carl Zeiss Stiftung v. Firma Carl Zeiss in Oberkochen/Wuerttemberg, Oberstes Gericht der Deutschen Demokratischen Republik, March 23, 1961, 8 Entscheidungen des Obersten Gerichts der Deutschen Demokratischen Republik in Zivilsachen 208 (Ger. Dem. Rep.).

11. The United States, Britain, and France recognized West Germany as having "the full authority of a sovereign State." See Convention on Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952, art. 1(2), 6 U.S.T. & O.I.A. 4251, T.I.A.S. No. 3425, as amended by the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. & O.I.A. 4121, T.I.A.S. No. 3425. However, under article 2 of the Convention, as amended, the three former occupation powers "retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole." For an analysis, see Blumenwitz, Die Grundlagen eines Friedensvertrages mit Deutschland 108-12 (1966); Bishop, *The "Contractual Agreements" with the Federal Republic of Germany*, 49 Am. J. Int'l L. 125 (1955). With respect to East Germany, similarly contradictory declarations have been made by the Soviet Union. See Blumenwitz, *op. cit. supra* at 112-15.

12. Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1966] 3 Weekly L.R. 125 (H.L.).

13. Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1965] 1 Ch. 596, 637 (C.A. 1964).

of this certificate, the appellate court held that it could not give effect to the acts which authorized plaintiff's solicitors to bring the action.[14]

Why was the recognition point relevant to a disposition of the case? Supposedly, since the *City of Berne v. Bank of England*,[15] the English courts have adhered to the doctrine that they cannot take notice of a state or a government which is not recognized by their own government and that they must ignore all acts of whatever nature emanating from such state or government. Yet in this case the action was brought neither by an unrecognized government nor by a legal entity created under the laws of such a government. Rather, the plaintiff Stiftung had been incorporated long before Germany was divided into two states.[16] Consequently, the theory espoused by the defendants and accepted by the Court of Appeal is not that the existence of the Stiftung must be disregarded altogether. Rather, it rests on two provisions of the Stiftungsstatut which link in a peculiar way the management of the Stiftung to the political authorities governing Thuringia. These provisions are to a large extent the nub of the case and account for the fact that it presents so many of Germany's politico-legal problems in a nutshell. In order to fully understand these crucial provisions, it must be kept in mind that at the time they were drafted, Jena belonged to the Grand Duchy of Saxe-Weimar which became a part of the "Land" of Thuringia when that body was created in 1918. In article 5 of the Zeiss Stiftungsstatut, it is provided that that department of the Grand Duchy which supervises the University of Jena should function, under the name of "Stiftungsverwaltung," as the governing board of the Stiftung.[17] In addition, article 5 authorizes the Stiftungsverwaltung to appoint a person to act as its permanent agent (the "Stiftungskommissar") who must be chosen from among the high state officials of the Grand Duchy. Due to some remarkable foresight, article 113 of the Stiftungsstatut provided for the contingency that political changes rendering article 5 unworkable might occur. It states that, if there is a department in Thuringia controlling the University of Jena, it will act as Stiftungsverwaltung; otherwise this function will be exercised by "the highest administrative authority in Thuringia."[18] Quite obviously, the plaintiff had to invoke article 113 in order to establish valid authorization of its solicitors since the Grand Duchy of Saxe-Weimar is a matter of fairy-tale past. Plaintiff's

14. *Id.* at 651, 662.

15. 9 Ves. 347, 32 Eng. Rep. 636 (Ch. 1804).

16. See p. 924 *supra*.

17. For a translation of article 5 of the Stiftungsstatut, see Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1965] 1 Ch. 596, 601 (C.A. 1964). Since the Court of Appeal felt that the translation is rather inadequate, *id.* at 639, the reader may want to check the German original which is reproduced in Nipperdey, *supra* note 4, at 42.

18. See Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1965] 1 Ch. 596, 602 (C.A. 1964), for a translation of article 113 of the Stiftungsstatut, the German text of which is reproduced in Nipperdey, *supra* note 4, at 42.

position would have been much easier, if, at least, the Land Thuringia were still in existence, but in 1952 the government of the German Democratic Republic abolished the Land and replaced it by three smaller units (Bezirke) each headed by a council (Rat).[19] Thus, there is no "highest administrative authority" having power over all of Thuringia. The only body to which plaintiff could point as Stiftungsverwaltung, and which in fact exercises that function, is the Council of Gera.[20] The Council governs that part of Thuringia in which Jena lies and may therefore be said to meet the description in article 113, although it is a creature of the German Democratic Republic—a state which is not recognized by the British government. This last consideration prompted the Court of Appeal to refuse to take cognizance of the Council's existence and of the act by which it had authorized the bringing of an action in England. Hence the importance of the recognition issue.

B. *The House of Lords and East Germany as an Agent of the Soviet Union*

Whether the Court of Appeal's approach to the issue is sound seems questionable. As one commentator said, the decision is singularly devoid of policy arguments.[21] But it has, at least, the merit of being straight-forward in its adherence to a supposedly settled, albeit doubtful, doctrine.[22] The House of Lords, on the other hand, while paying lip-service to the doctrine, tried to avoid its consequences in a rather circuitous and hardly convincing fashion. The hard core of the holding by the House of Lords is that the existence of the Council of Gera and its functioning as Stiftungsverwaltung can and

19. This reorganization took place on the basis of a "Law Relating to the Further Democratization of the Organization and the Working Method of Public Authorities in the Laender of the German Democratic Republic," passed on July 23, 1952 (1952 GESETZBLATT DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK 613).

20. Pursuant to § 4(a) of the statute referred to in the preceding note, the functions previously exercised by the Laender were transferred to the authorities of the Bezirke.

21. Note, *The Laws of Unrecognized Governments in the English Courts: The Carl Zeiss Stiftung Case*, 6 VA. J. INT'L L. 311, 319 (1966).

22. Counsel for plaintiff in the English *Zeiss* case argued, *inter alia*, that American courts have not applied the doctrine as rigidly as the English courts purport to do. See Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1966] 3 Weekly L.R. 125, 138 (H.L.). The most recent comprehensive discussion of the American attitude will be found in Lubman, *The Unrecognized Government in American Courts: Upright v. Mercury Business Machines*, 62 COLUM. L. REV. 275 (1962). In England, a more flexible approach, along the lines taken by American courts, has been advocated by Greig, *The Carl-Zeiss Case and the Position of an Unrecognized Government in English Law*, 83 L.Q. REV. 96, 128-38 (1967); and Lipstein, *Recognition of Governments and the Application of Foreign Laws*, 35 THE GROTIUS SOCIETY: TRANSACTIONS FOR THE YEAR 1949, 157, 183-87 (1950). The Greig article questions rather persuasively whether the authorities prior to Luther v. Sagor, [1921] 1 K.B. 456, really stand for the proposition that English courts will not give any effect to the acts of an unrecognized government. See *id.* at 105-11.

must be given effect in an English forum. This holding, however, is not based on the theory that a legally significant situation in a foreign country must sometimes be taken into account, even though it was created by a non-recognized regime. Rather, it rests on the assumption that the acts of the German Democratic Republic are acts by an agent of the Soviet Union—a recognized state. To be sure, at one point in his opinion, Lord Reid endeavors to express frankly his dissatisfaction with the implication of the approach taken by the Court of Appeal.[23] But suddenly, he seems to become horrified by the prospect of being compelled to re-examine the venerable doctrine and takes refuge by adopting a theory which supposedly saves the court from this task. In his view, the judges of the lower court misunderstood the true import of the information they received from the Foreign Secretary.[24] In a second certificate, the Secretary had stated that the British government has recognized, from the end of the war to the date of the certificate (November 6, 1964), the state and government of the Soviet Union as *de jure* entitled to exercise governing authority with respect to the zone allocated to it by agreements with the Western allies. After emphasizing the joint authority of the four powers in matters affecting Germany as a whole, which authority was exercised for a period of time by the Control Council for Germany, the certificate asserted: "Her Majesty's Government have not recognized either *de jure* or *de facto* any other authority purporting to exercise governing authority in or in respect of the zone."[25] The Court of Appeal, far from disregarding this part of the information, had discussed it at great length. It had found that the certificate did not prevent it from taking notice of the *fact* that the Soviet Union, which was entitled to exercise governing authority in its zone, had in effect ceased to do so by setting up the German Democratic Republic and eventually recognizing it as a sovereign state.[26] The House of Lords considered this conclusion impermissible. Lord Reid opines the certificate precluded any finding that the German Democratic Republic is a sovereign state; therefore he thinks it must be treated as an organization subordinate to the Soviet Union, whose acts are valid as acts of an agent of the Soviet Union.[27] Three other members of the court concur without adding any further arguments. The fifth judge, Lord Wilberforce, also con-

23. Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1966] 3 Weekly L.R. 125, 137-38 (H.L.). Lord Wilberforce also voiced misgivings about the "legal vacuum" which, according to the Court of Appeal, exists in the territory of East Germany. See *id.* at 177.

24. *Id.* at 135.

25. Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1965] 1 Ch. 596, 637-38 (C.A. 1964).

26. *Id.* at 651.

27. Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1966] 3 Weekly L.R. 125, 136 (H.L.).

curring, refers to Brierly's *The Law of Nations*,[28] where it is said that a recognizing state is not concerned with the question whether the state of affairs which it is recognizing is legal by the national law of another state. In his Lordship's view, this principle would be violated if the English courts were to take account of the fact that the Soviet Union considers the government of the German Democratic Republic as independent.[29] Lord Wilberforce also discusses the fact that the second certificate fails to state that the Soviet Union is *de facto* exercising governing authority in East Germany. This, he says, must not be interpreted as allowing an inference that there is some other body with *de facto* authority independent of the Soviet Union, since the certificate expressly negates recognition of any other authority, *de facto* or *de jure*, by the British Government.[30]

III. The Recognized Regime and Loss of Actual Control

With due respect, the logic of neither of the opinions rendered by Lord Reid and Lord Wilberforce is exactly what one might call compelling. For one thing, both judges fail to appreciate fully the peculiar legal situation of an occupation regime. Neglecting this aspect for the moment, their reasoning seems to be questionable even if it were applied to a non-occupied country. It is generally accepted that a government recognized by the forum as a *de jure* government over a certain territory can lose actual control over part or all of it by a revolution or by intervention from outside. In such a situation, acts emanating from the revolutionary forces or the intervenor will certainly not be recognized by a foreign government as acts of the *de jure* government unless the *de jure* government gives them effect after regaining control or it reaches an agreement with the intervenor.[31]

Whether such acts can be recognized at all depends on the attitude a court takes when it is confronted with acts of a non-recognized authority. If it looks to its own executive for guidance, as the English courts profess to do, it will treat them as nullities as long as its government has not given at least *de facto* recognition to the new regime. Conceding this to be the settled practice, both Lord Reid and Lord Wilberforce distinguish the present case on the ground that the German Democratic Republic was set up with the consent of the Soviet Union rather than by revolution.[32] One need not go so

28. Brierly, The Law of Nations 147 (6th ed. 1963).

29. Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1966] 3 Weekly L.R. 125, 180 (H.L.).

30. *Ibid.*

31. 1 O'Connell, International Law 202 (1965); Restatement (Second), Foreign Relations Law of the United States § 111 (1965).

32. Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1966] 3 Weekly L.R. 125, 135-37, 178-79 (H.L.).

far as to call this a distinction without a difference and still be at a loss to understand why the distinction was required or even suggested by the Foreign Secretary's certificate, as the House of Lords appears to assume. The certificate only states that the British government has not recognized, either *de jure* or *de facto*, any authority in East Germany other than the Soviet Union (and for some purposes, the Control Council).[33] This statement is a far cry from saying, as the House of Lords did say, that every governmental act carried out in that territory must be attributed to the authority of the Soviet Union. In the revolution and intervention situations, exactly the opposite would follow: only acts which are in fact acts of the *de jure* government would be given effect in an English court. Why should an authority, previously recognized as the *de jure* power over a certain territory, be held to be the author of acts performed by a successor authority when the succession occurred peacefully but not when it occurred by force? The many instances, after World War II, in which European countries have terminated their colonial regimes in Asia and Africa seem to suggest that peaceful consensual creation of an independent regime is frequently motivated by the desire to avoid a revolution which would have brought about such independence. Thus there is a functional proximity, if not identity, of the two occurrences which obviously militates against a different treatment as to their legal consequences in a foreign court. This approach supports the position of the Court of Appeal which believed that it was entitled to take notice of the termination of actual control over a certain territory by a government recognized by the forum as the *de jure* authority in that territory, regardless of whether termination is due to a revolution against, or to consent by, the former sovereign.

Is it true, as Lord Wilberforce alleges, that the view taken by the Court of Appeal in cases where authority over some territory is terminated by consent violates the principle expressed by Brierly? Careful reading of Brierly's exposition reveals that the reference to his book is beside the point. He discusses the question whether recognition *de jure* requires that the recognized state of affairs be *legally* created. In this context, he dismisses the proposition that legality under the *national* law of another state is necessary,[34] thereby taking a generally accepted position which, however, has nothing to do with the problem at hand. Lord Wilberforce should not even have cited Brierly's statement as authority for the principle that a recognizing state can treat as irrelevant the view taken by another state as to the legal or factual situation in any territory. Given the decentralized nature of the recognition process under current international law, that principle can hardly be debated. Yet, again, it is a

33. See note 25 *supra* and accompanying text.
34. BRIERLY, *op. cit. supra* note 28, at 147.

different matter from the problem with which Brierly is concerned. Moreover, the principle that recognition by one state of another is *res inter alios acta* for a third state would hardly argue against the position of the Court of Appeal. It is not correct to say that the Court of Appeal treated an authority that has been recognized by the Soviet Union as recognized by Britain; such an attitude, or one closely approximating it, would clearly conflict with the Foreign Secretary's certificate. The Court of Appeal merely viewed recognition by the Soviet Union of the German Democratic Republic as a *fact* showing loss of actual control over the latter's territory and thus equivalent to the breaking away of a territory from a *de jure* government's control by revolution.[35]

How does this approach square with the language of the certificate? Defendants went so far as to allege that the Court of Appeal's conclusion was in fact suggested by the deliberate and significant abstention in the certificate from any positive assertion to the effect that the Soviet Union was *de facto* exercising governing authority or control in the Eastern Zone. Rejecting this argument, Lord Wilberforce correctly pointed out that *de jure* recognition is generally the fullest recognition which can be given,[36] and that therefore it is erroneous to attach any weight to the absence of a statement in the certificate confirming *de facto* recognition of Soviet authority in East Germany. While it is appropriate to say that a certain regime has not been recognized, either *de facto* or *de jure*, a statement that a regime has been recognized *de jure* as well as *de facto* is redundant. The defendants were obviously misled by the term "de facto recognition," which is notorious for its confusing quality. Used accurately, it means only recognition of a limited character. The qualifications to which it is subject depend upon the circumstances and the intention of the recognizing state, but most frequently it is limited in terms of finality in that it is provisional rather than definitive.[37]

35. While the Foreign Secretary's certificate would not seem to preclude this finding, see p. 933 *infra*, it is at least questionable whether the Soviet Union's declarations warrant the far-reaching conclusion drawn by the Court of Appeal. Loss of actual control is a question of fact, not a matter of mere declarations. In 1954, the allied representatives in West Germany found that the actual situation in East Germany had not been altered by the Soviet statement of March 25, 1954, purporting to grant sovereignty to the German Democratic Republic. See Joint Declaration by the Allied High Commission, on the Status of East Germany, April 8, 1954, DOCUMENTS ON GERMANY 1944-1961, *supra* note 2, at 154. In support of the Court of Appeal, it might be argued that the East German situation in 1964, when the court decided the case, was probably different from what it was ten years before. However, there is seemingly no evidence on which such a finding could be based. Furthermore, the East German statute whose effect is at issue in the *Zeiss* case was enacted in 1952. See note 19 *supra* and accompanying text. Thus, conceivably, the factual situation in 1952 may be deemed controlling.

36. Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1966] 3 Weekly L.R. 125 180 (H.L.).

37. BRIERLY, *op. cit. supra* note 28, at 147; 1 OPPENHEIM, INTERNATIONAL LAW § 74,

Since recognition cannot be at the same time limited and complete, it is of no avail to point to the absence of *de facto* recognition once *de jure* recognition has been given. On the other hand, recognition of a state as well as of a government is generally held to require a certain effectiveness and stability of the new regime; an act of recognition where these requirements are not met is considered an international wrong.[38] Thus, a court can safely entertain a presumption of actual control over a certain territory by a new regime to which the forum's government has granted *de jure* recognition unless this act has been superseded by subsequent *de jure* or *de facto* recognition of another regime in the same territory or in any part of it.

However, the situation in the *Zeiss* case is one in which the forum's government certified that it had recognized *de jure* an authority established some fifteen years ago and had not given recognition to any other state or government respecting the same territory: does the language of this certificate exclude the possibility of finding that the *de jure* authority lost *actual control* over that territory? Plainly not, since even though actual control can be presumed to have existed at the time recognition was first granted, it need not have continued to the present time. A new regime which is not even recognized *de facto* may in *fact* have replaced the one still recognized by the forum. It is suggested that an English court would not be unfaithful to precedent if it were to take notice of this state of affairs by disregarding the acts of the new, unrecognized regime, rather than by entertaining the fiction of attributing such acts to the recognized authority.[39] If the policy underlying the English precedents is to avoid embarrassment for the executive and also not to defeat the purposes for which the course of non-recognition is pursued, the attitude of the Court of Appeal seems to effectuate this policy much better than does that of the House of Lords. In this context, it must

at 136 (8th ed. Lauterpacht 1955); RESTATEMENT (SECOND), *supra* note 31, § 96, Reporters' Note 2(a) (1965). See also the statement by the British Foreign Secretary in the House of Commons on March 21, 1951, outlining the British practice; it is reproduced in BRIERLY, *op. cit. supra* note 28, at 148 n.2.

38. 1 O'CONNELL, *op. cit. supra* note 31, at 143, 148; TEUSCHER, DIE VORZEITIGE ANERKENNUNG IM VOELKERRECHT 61 (1959); RESTATEMENT (SECOND), *supra* note 31, § 99(2).

39. In effect, this would seem to be a logical extension of the position taken in Bank of Ethiopia v. National Bank of Egypt and Liguori, [1937] 1 Ch. 513, and in Banco de Bilbao v. Sancha, [1938] 2 K.B. 176 (C.A. 1938). In both cases, it was held that acts carried out by a recognized *de facto* government in the territory under its control prevail over conflicting acts of the government still recognized *de jure* with respect to the same territory. The Foreign Office certificate received by the court in the *Banco de Bilbao* case seems to have been somewhat ambiguous in that it stated only that General Franco's Nationalist regime was recognized as exercising effective administrative control in parts of Spain. The court, however, interpreted this to imply recognition of Franco's regime as a (de facto) *government*. For a comment, see 1 O'CONNELL, *op. cit. supra* note 31, at 174, 198-99, 203. Thus, the situation borders on the one discussed in the text.

be kept in mind that withdrawal of *de jure* recognition unaccompanied by recognition of a new regime has a very doubtful standing in international law.[40] The prevailing opinion appears to deny this type of revocability, although "pure" revocation has occasionally occurred in actual state practice.[41] In a situation where a government is not prepared to recognize a new regime that has in fact replaced the previously recognized authority in part or all of its territory, the government can hardly certify to a court the actual state of affairs in that territory because to do so might imperil its non-recognition attitude. At any rate, in the *Zeiss* case, the Foreign Office was not requested to express its views about the real situation in East Germany; it was merely consulted about its own acts of recognition. Under these circumstances, the alleged conflict between the Court of Appeal's attitude and the language of the certificate, far from being obvious, is more likely to be a chimera.

IV. Germany Under Allied Occupation

Turning now to the special problems of the occupation regime in Germany, it must be noted at the outset that the analysis advanced by the House of Lords has a striking resemblance to a theory developed by the late John Foster Dulles in his capacity as Secretary of State at an historic news conference some eight years ago. At that time, the Soviet Union had launched the second major Berlin crisis and was in fact denouncing certain obligations and the corresponding rights of the Western allies which are stated in agreements between the four powers, entered into at the conclusion of World War II.[42] In response to questions relating to the possible reaction of the United States in case the Soviets should turn over to the German Democratic Republic the control of traffic to and from Berlin, Mr. Dulles indicated that the East German authorities might be dealt with as agents of the Soviet Union but that they would not be accepted as a substitute for the Soviet Union in discharging the latter's obligations.[43] Despite their kinship there is of course an important difference between Mr. Dulles' theory of agency and the position of the House of Lords which views the German Democratic Republic as an organization subordinate to the Soviet Union. While Mr. Dulles was concerned with the vindication of Western rights of access to and egress from Berlin and thus with very specific and narrowly defined issues, the House of Lords deals with the general

40. 1 O'Connell, *op. cit. supra* note 31, at 173-77; 1 Oppenheim, *op. cit. supra* note 37, § 75g, at 150-52; Restatement (Second), *op. cit. supra* note 31, § 96.

41. 1 O'Connell, *op. cit. supra* note 31, at 173 n.10.

42. See Note From the Soviet Foreign Ministry to the American Ambassador at Moscow, Nov. 27, 1958, in Documents on Germany 1944-1961, *supra* note 2, at 348.

43. See Documents on Germany 1944-1961, *supra* note 2, at 343-45.

legal status of East Germany. Assuming without inquiry that the Western allies have certain rights with respect to Berlin and that the Soviet Union owes corresponding obligations, it is obvious that in the absence of consent by the West, those rights cannot be terminated nor the obligations transferred to the German Democratic Republic.[44] Hence the doctrine of agency: the actual replacement of Soviet Union officials exercising control over traffic to and from Berlin by East German officials would not be allowed to operate as a substitution of a new obligor; rather, the Soviet Union would continue to be held responsible, with the German Democratic Republic functionaries acting as its agents. This makes reasonably good sense once the premise is accepted that, under international law as well as under domestic law, an obligor cannot escape his duties by virtue of transactions with a third party to which the obligee has not agreed. The House of Lords, however, appears to have gone much further than that. Having determined that because the British government has not recognized the German Democratic Republic, he is precluded from viewing it as a *sovereign* state, Lord Reid concluded that the East German regime must necessarily be exercising power derived from, and therefore attributable to, the Soviet Union.[45] It is submitted that this conclusion is not well-founded in that it takes the dichotomy of wholly independent power ("sovereign state") and wholly derivative power ("subordinate organization") to be all-inclusive. This somewhat crude approach probably does not fit any occupation regime and is certainly inapplicable to the one established in Germany after World War II.

Under the general law of warfare, an occupant has power to legislate and to take certain other actions in the territory under its control, which means, of course, that the occupied country lacks complete self-determination and is thus not absolutely independent. On the other hand, the occupant's power is generally held to be limited.[46] Consequently, all acts emanating from the domestic authorities of the occupied country and relating to matters beyond the reach of the occupant, are home-grown acts so to speak, since by hypothesis they cannot be attributed to the occupant's power. The German situation is complicated primarily by two factors. First, although Germany's occupation was the result of wartime military actions, it has considerably outlasted the cessation of active

44. To the same effect is the Statement by the Department of State on Legal Aspects of the Berlin Situation, Dec. 20, 1958, DOCUMENTS ON GERMANY 1944-1961, *supra* note 2, at 367, 373.

45. See note 27 *supra* and accompanying text.

46. See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 43, 36 Stat. 2277, T.S. No. 403. For a discussion and reference to further material, see MCDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 744-71 (1961).

hostilities and is therefore more than an ordinary *occupatio bellica.* Second, from the inception of their occupation regime, the allied forces have claimed to possess, and have in fact exercised, larger powers in Germany than would have been granted them under the general rules of warfare.[47] In a declaration issued June 5, 1945, less than a month after the unconditional surrender of the German forces, the Allies stated that no central government existed in Germany and that the governments of the United States, the Soviet Union, Britain, and France therefore assumed supreme authority with respect to Germany, including the powers possessed by the German government and any state, municipal, or local government or authority.[48] The assumption of said authority and powers, however, was not to be construed to effect the annexation of Germany.[49] The same day, the Allied Statement on Control Machinery in Germany promulgated the rule that during the period in which Germany was carrying out the basic requirements of unconditional surrender, supreme authority in Germany would be exercised by the Commanders-in-Chief, each in his zone of occupation, and jointly through the Control Council in matters affecting Germany as a whole.[50] In actual practice, the military governments in the four zones of occupation were never complete in the sense of a machinery which could wholly replace the domestic German authorities. Rather, German municipal and local governments more or less continued to function and were merely placed under allied supervision which sought to ensure that active Nazi personnel were removed and that the occupation laws and the orders of occupation authorities were given effect. Gradually, even at the higher levels of state and regional government, German authorities were set up again, and at all levels the scope of activities within which German authorities were allowed to function was constantly, albeit slowly, extended.[51] The practice thus pursued in all four zones was consistent with the "Political Principles" accepted by the heads of government of the United States, the Soviet Union, and Britain at their Berlin (Potsdam) Conference in 1945 and set forth in the protocol of the meeting.[52] Only that part of the "Principles" which provided for the establishment of certain essential central German administrative

47. See McDOUGAL & FELICIANO, *supra* note 46, at 768-70; 2 OPPENHEIM, INTERNATIONAL LAW § 265a (7th ed. Lauterpacht 1952).

48. See DOCUMENTS ON GERMANY 1944-1961, *supra* note 2, at 12.

49. Preamble, para. 5, last sentence of the Declaration of June 5, 1945, DOCUMENTS ON GERMANY 1944-1961, *supra* note 2, at 13.

50. DOCUMENTS ON GERMANY 1944-1961, *supra* note 2, at 19.

51. For details, see FRIEDMANN, THE ALLIED MILITARY GOVERNMENT OF GERMANY 58-61, 70-88, 100-09 (1947).

52. Protocol of the Proceedings of the Berlin Conference, Aug. 2, 1945, Part II A9, DOCUMENTS ON GERMANY 1944-1961, at 29 (United States Senate, Committee on Foreign Relations ed. 1961).

departments was not carried out.[53] In direct proportion to the growing tension between East and West, both sides created separate central organizations, each of which began to act as a German state, eventually to be recognized as being "sovereign" in its territory by different parts of the international community.[54] However, while the Federal Republic of Germany received recognition by the Soviet Union as well as by the Western nations, the German Democratic Republic is not recognized by any but the Communist countries.

V. Inadequacy of the House of Lords Rationale

The foregoing brief outline of the German post-war development in conjunction with the above considerations regarding an occupation regime in general should suffice to make it clear that the House of Lords in the *Zeiss* case was rather rash in concluding that Britain's recognition of the Soviet Union as *de jure* authority in East Germany required the British courts to treat acts of the German Democratic Republic as acts of an agent of the Soviet Union and therefore valid. First, the court should have examined more closely the precise meaning of Britain's "recognition" of the Soviet Union's *de jure* authority with respect to East Germany. As mentioned above, the four powers which formed the occupation regime in Germany expressly disclaimed an annexation.[55] Consequently, the Soviet zone of Germany was never recognized as a part of the Soviet Union's own territory. Furthermore, one would surmise that recognition of the Soviet authority in East Germany did not mean recognition of a new state since the manner in which the control machinery in Germany was set up (with the Control Council in charge of all "matters affecting Germany as a whole") expresses an intention to preserve Germany as a political unit, just as the Potsdam Protocol clearly states an intention to treat it as an economic unit.[56] The only remaining, and indeed the most likely, possibility is that the Soviet Union was merely recognized as the occupying power in its zone of occupation.

Assuming this is the correct interpretation of the Soviet Union's *de jure* authority in East Germany, the House of Lords should then have inquired into the status of the German authorities in that zone before and after the creation of the German Democratic Republic. Although a full discussion of this problem would be beyond the proper scope of this Comment, it is not unrealistic to suppose that the situation in East Germany before the establishment of a central

53. *Id.*, Part II A9(iv), at 29.
54. See note 11 *supra.*
55. See note 49 *supra.*
56. Protocol of the Proceedings of the Berlin Conference, Aug. 2, 1945, Part II B14, Documents on Germany 1944-1961, *op. cit. supra* note 52, at 33.

state was probably not radically different from that prevailing in the Western zones. The Soviet authorities have interfered more drastically and more frequently with Germany's political life but, on the administrative side, they too seem to have allowed the continued and gradually expanded functioning of domestic German authorities.[57] With respect to the Western zones, it is the generally accepted view of German courts and writers that acts of German authorities even before the creation of a central state are not to be treated as acts of the occupation authorities unless they were done pursuant to a direct, specific order of the latter.[58] Do we have to deal differently with acts of East German authorities because in the course of time they became increasingly Communist-dominated and thus brought into line with the Soviet occupation power? It is not easy to assess the legal significance that is to be attached to the indubitable political conformity which the Soviets imposed on the German territory under their control. In West Germany, acts of the East German authorities before as well as after the creation of the German Democratic Republic have always been considered as acts of German rather than Russian bodies.[59] Neither the fact that basic political freedoms have been denied the people in East Germany nor the fact that the German Democratic Republic is not recognized by the West German government has precluded this conclusion. To be sure, it would not have been altogether unreasonable to argue that the German Communists representing the East German regime are in such a state of political subordination that even in legal terms they must be viewed as simply the long arm of the Soviet Union. It might be difficult though, once this argument is accepted, to avoid the consequence of treating on an equal basis all those East European countries which had been allied with Germany during World War II. This, however, has never been done in the post-war period, during which time such nations were clearly relegated to the status of more or less dependent satellites of the Soviet Union. It must be remembered that, at least prior to the Paris peace treaties of 1947,[60] these countries were Soviet-occupied territory and that consequently the Communist regimes in such countries as Rumania or Hungary emerged from essentially the same conditions of Soviet occupation as did the East German regime. Nonetheless, in the international community, these countries have never been treated as agents of the Soviet Union. The

57. See FRIEDMANN, *op. cit. supra* note 51, at 60-61, 76-80, 101, 104-06.

58. See Muench, *Entscheidungen nationaler Gerichte in voelkerrechtlichen Fragen: Deutsche Rechtsprechung 1951-1957*, 21 ZEITSCHRIFT FUER AUSLAENDISCHES OEFFENTLICHES RECHT UND VOELKERRECHT 510, 535-41 (1961); 22 *id.* 729, 766-69, 774-79 (1962).

59. See 21 *id.* at 510, 567-75.

60. Peace Treaty with Rumania, Feb. 10, 1947, 61(2) Stat. 1757, T.I.A.S. No. 1649; Peace Treaty with Bulgaria, Feb. 10, 1947, 61(2) Stat. 1915, T.I.A.S. No. 1650; Peace Treaty with Hungary, Feb. 10, 1947, 61(2) Stat. 2065, T.I.A.S. No. 1651.

case for distinguishing East Germany from them is not an easy one, although conceivably a distinction could be based on the argument that, unlike the East European countries, East Germany comprises only part of a nation which was separated from the rest of that nation against its will and in violation of international agreement as expressed in the Potsdam Protocol.[61]

At any rate, it is at least regrettable that the House of Lords did not find it necessary to discuss the exact meaning of "recognition" of the Soviet Union as a *de jure* authority in East Germany in view of the specific circumstances of Germany's status under allied occupation. Its failure to do so accounts for another serious shortcoming of the opinions. Nowhere do the judges discuss the consequences (other than proper authority of plaintiff's solicitors) which may flow from their view of the East German situation. Since they do not even hint at possible differences between the "recognition" at hand and the more common recognition of a new state or a change in government or territory, one is left wondering whether all of the activity in East Germany will now be treated in English courts exactly as if it had happened in the Soviet Union's own territory. More particularly, does the act-of-state doctrine apply to acts of expropriation effected by the East German regime on the theory that these acts must be considered as having been done by an agent of the Soviet Union, the recognized *de jure* authority? As formulated by American courts, the act-of-state doctrine is inapplicable to acts of unrecognized states as well as to extra-territorial acts.[62] Therefore, if the German Democratic Republic were viewed realistically, that is, as a German state which is not recognized by the West, it probably could not benefit from the doctrine. However, if the theory of the House of Lords is followed, it seems hard indeed to avoid its application.[63] This consequence is of particular significance in the *Zeiss* case itself now that it has been sent back to the trial court for litigation on the merits.

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61. See VON MUENCH, DAS VOELKERRECHTLICHE DELIKT IN DER MODERNEN ENTWICKLUNG DER VOELKERRECHTSGEMEINSCHAFT 89-90, 98-102 (1963).

62. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). Subsequent to the decision of the Supreme Court in *Sabbatino*, the operation of the act-of-state doctrine in this country has of course been further limited by the Hickenlooper Amendment. See Foreign Assistance Act of 1964, § 301(d)(4), 78 Stat. 1009, 22 U.S.C. § 2161 (1964).

63. Conceivably, one could argue that acts of the authorities in East Germany, even though the House of Lords attributes them to the Soviet Union for purposes of recognition, are, for purposes of the act-of-state doctrine, still to be distinguished from acts performed by the Soviet Union on its own territory, simply because the Soviet Union is not the actual sovereign in East Germany but merely an occupation power. The fact that neither the Western allies nor the Soviet Union have allowed the Hague Regulations to govern their occupation regime in Germany, see note 47 *supra*, cannot mean that they claimed to be the German sovereign. Were it otherwise, the disclaimer of annexation, see note 49 *supra*, would make no sense.

VI. The Dilemma Posed by the *Zeiss* Controversy

Undeniably, the *Zeiss* controversy poses a serious dilemma to the courts in a common-law country. For a long time they have been committed to the doctrine that no effect can be given to acts of a government which the forum refuses to recognize. Supposedly, this doctrine is designed to avoid embarrassment of the forum's executive branch of government which bears the primary responsibility for the conduct of a nation's foreign affairs. One may wonder, however, why the courts in civil-law countries have never felt the need for such a sweeping doctrine; when they refuse to enforce acts of an unrecognized government, this is usually done on the basis of public policy considerations as applied to the circumstances of the particular case. The Swiss *Zeiss* decision illustrates this approach rather well.[64] The Swiss Bundesgericht points out that non-recognition of the German Democratic Republic does not prevent it from applying East German law. In the first place, the court argues, giving effect to that law could never be taken as recognition in the international law sense because a judge has no power to grant such recognition. Second, conflict of laws rules must be understood to refer to the law which is actually enforced in the foreign territory to which they point.[65] Then, turning to a consideration of the merits of the case, the court engages in a process of frankly weighing the equities between the two rival organizations. Although the decision in favor of the East German party has been criticized, such criticism is not based on the fact that the German Democratic Republic is not recognized by Switzerland, but rather because it was felt that the court had not taken into account all of the relevant considerations in assessing the competing claims of the parties.[66]

Is the attitude exemplified by the Swiss *Zeiss* case liable to produce better results than the traditional position of the English courts with respect to unrecognized governments? To a large extent, the answer seems to depend on how realistic the recognition policy of the forum's executive is. If the forum government is willing to recognize a new regime once it has gained effective control over most of a state's territory and this control is likely to continue,[67] little harm will follow from the English doctrine. On the contrary,

64. See VEB Carl Zeiss Jena v. Firma Carl Zeiss Heidenheim, Bundesgericht, March 30, 1965, 91 II Entscheidungen des Schweizerischen Bundesgerichtes 117 (Switz.).

65. *Id.* at 126-27.

66. See Schaumann, *Entschaedigungslose Konfiskationen vor dem Schweizerischen Bundesgericht: Eine Aenderung der Rechtsprechung*, 62 Schweizerische Juristen-Zeitung 33 (1966).

67. These factors were officially stated to be the test which determines the British recognition practice. See Statement by the Foreign Secretary in the House of Commons, March 21, 1951, *supra* note 37. But it has been flatly stated that "reality does not bear out the theory of British practice." Greig, *supra* note 22, at 128.

it may have the advantage of concentrating the difficult and delicate fact-finding process concerning the political situation in a foreign country by entrusting it to the Foreign Office which supposedly has relatively easy access to all the relevant information and possesses the expertise necessary for an informed judgment. However, it is no secret that in current state practice recognition of a new regime is often delayed for many years even though the regime may be firmly established.[68] Where such a discrepancy exists between the facts which allegedly determine recognition and the actual recognition practice, a court may find it embarrassing to follow strictly the English doctrine. Thus, American courts have seen fit to deviate from that doctrine, but the cases are not entirely consistent.[69] Civil law courts, on the other hand, untrammeled by any broad rule relating to unrecognized regimes, will encounter no serious difficulty in dealing with this situation. They can enforce acts of the unrecognized regime when they feel that by doing so substantial justice will be done, regardless of the political nature of the foreign regime; and, on the other hand, they can refuse enforcement of an act which is politically tainted or, for any other reason, contrary to a strong public policy of the forum.

Reading the *Zeiss* opinions of the House of Lords and of the Court of Appeal, one cannot help feeling that neither court faced up to reality. Paraphrasing in part the words of Lord Wilberforce,[70] it might be said that the Court of Appeal treats East Germany as a legal vacuum whereas the House of Lords fills this vacuum with a fiction. Undoubtedly, legal fictions can serve useful purposes, but they should be used sparingly, if only because they have a tendency to mislead the unwary and the less sophisticated. Before a judge resorts to this device, he should ask himself whether the situation can be dealt with in more realistic terms. More specifically, the House of Lords should have analyzed the East German situation with a view to the interests underlying the Western policy of nonrecognition of the German Democratic Republic. It could have easily discovered that this policy is primarily designed to achieve two interrelated objectives. First, it supports the West German government's claim to be the only freely constituted representative of the German people.[71] Second, it buttresses the position that the Soviet Union has continuing responsibilities with respect to Ger-

68. BRIERLY, *supra* note 28, at 140; 1 O'CONNELL, *supra* note 31, at 175.

69. See note 22 *supra*.

70. See note 23 *supra*.

71. The Foreign Secretary's second certificate, see note 25 *supra*, incorporated an earlier communiqué by the three Western Foreign Ministers to the effect that "the three governments consider the government of the Federal German Republic as the only German government freely and legitimately constituted and, therefore, entitled to speak for Germany as the representative of the German people in international affairs."

many as a result of the joint military occupation and the various agreements with the Western allies.[72] The court then should have considered the adverse effects which each of the alternative holdings might have on the pursuit of these objectives. In view of the fact that West German courts enforce East German legislative, judicial, and administrative acts as long as their substance is not repugnant to the forum's public policy, it is hard to see why similar treatment by an English court would undermine the Western position that only the West German Government is entitled to speak for Germany. The same is true *mutatis mutandis* with respect to the second objective of the Western non-recognition policy: giving effect to East German acts that are unrelated to Soviet responsibilities in Germany is quite consistent with the view that such responsibilities still exist. If this is correct, the result reached by the House of Lords can be justified without taking refuge behind the highly artificial fiction on which the court relies.

The crucial question of course is whether this result is more in keeping with our notions of justice and fairness than the decision of the Court of Appeal. It must be kept in mind that we are merely dealing with the preliminary issue of whether the plaintiff has duly authorized its solicitors. Since the Court of Appeal disregards East German legislation in its totality, the plaintiff, functioning under such legislation as it does,[73] could not be heard in an English court if the Court of Appeal had been affirmed. Clearly, the House of Lords regarded this as an undesirable outcome. The court's effort to give plaintiff a chance to be heard on the merits seems quite understandable and may win it applause. However, in West Germany, the decision has already been termed "a bitter pill for Bonn,"[74] and this it might turn out to be if, but only if, the reasoning of the House of Lords should have the consequence of making the act-of-state doctrine applicable in all its rigor.[75] Considerations which make it appropriate to allow the plaintiff a hearing on the merits, call for an equal treatment of the defendants which would hardly be satisfied if the act-of-state doctrine is applied as a consequence of the House of Lords' holding in the *Zeiss* case.[76] It is sub-

72. For a discussion of the theory of agency developed by Secretary of State Dulles, see notes 42-44 *supra* and accompanying text.

73. See notes 19 & 20 *supra* and accompanying text.

74. See Bull, "*Bittere Pille fuer Bonn,*" in Die Zeit, July 19, 1966, p. 15. A similar disposition was inflected in East Germany by Feige & Reichrath, *Das Zeiss-Urteil des House of Lords—eine eindeutige Ablehnung der westdeutschen Ausschliesslichkeitsanmassung*, 20 NEUE JUSTIZ 549 (1966). But while it may be a bitter pill for Bonn to learn that East German legislation is enforced in an English court, it might not be pure candy for the East German communists to be told that this is done merely because their state is a subordinate agency of the Soviet Union. Significantly, the article by Feige & Reichrath, *supra*, does not mention this reasoning at all.

75. See note 63 *supra* and accompanying text.

76. The effect of applying the act-of-state doctrine would be to prevent the court

mitted that the most desirable result would be that both parties have an unrestricted opportunity to present their case on the merits, and surely that could not be a disaster for anyone.

Herbert L. Bernstein

from examining without restrictions those acts of expropriation, which in view of the *Zeiss* litigation in other countries, see notes 8 & 9 *supra*, appear to be crucial to the defendants' case.