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THE EASEMENT AS A CONSERVATION TECHNIQUE

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CHAPTER 1

INTRODUCTION

How can one ensure that open spaces remain undeveloped, and that attractive views remain unobstructed and available for public enjoyment? What means are available to prevent development or destruction of wetlands and wildlands keeping them in their natural state for the preservation of nature? Can private organizations devoted to conservation, environmental, and recreational causes take effective steps to accomplish these goals without purchasing full title to the affected property? At the heart of these and similar questions now being considered by both public and private environmental agencies is the perennial problem of how to make the best possible use of limited available funds.

IUCN has seen a need to acquaint Europeans who are concerned with these questions with the literature of one technique now in use in the United States: purchase and, in the case of governmental agencies, expropriation of less-than-fee interests in property, known as scenic and conservation easements. It should not, of course, be assumed that a legal device such as the conservation easement can simply be transplanted from one legal system to another or, indeed, that the needs of various countries for new legal approaches will be identical. Some nations have a much more keenly developed sense than the United States of the public duties inhering in private ownership of land, and governmental powers of noncompensable regulation are accordingly more extensive; but even here there may be a need to enable or facilitate private organizations to supplement government's conservation efforts. Elsewhere regulatory powers are more limited, and a technique resembling conservation easements may be useful to both public and private agencies.

This paper is designed for those who may be unfamiliar with the easement technique as an introduction to what has been written about and accomplished with conservation easements in the United States. (The most significant American literature on the subject has been collected by the library of the IUCN Environmental Law Documentation Centre in Bonn.) We shall here review generally the contours of this device, some legal problems in the American system which gave rise to its adoption and others which promise to impede its usefulness unless cured by appropriate legislation, and some of the more prominently noted advantages and disadvantages. We also undertake to explain briefly analogues to the easement device in the French and German legal systems. In view of the influence of Roman Law on the French, German and American legal systems (although with great variation in each case), it is not surprising to

find that each system has one or more legal devices resembling the Roman praedial servitude. Praedial servitudes required both a dominant and a servient tenement (known as master and slave estates); in character they could be either negative, requiring the owner to refrain from doing something on his land, or positive, permitting the holder of the dominant tenement to use the burdened land, but affirmative duties could not, for the most part, be placed on the servient-tenement holder.[1] Similar limitations, as we shall note, will pose difficulties, although perhaps not insurmountable, to adapting the American easement, the French servitude, and the German Dienstbarkeit to conservation purposes.