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Private Lands Conservation in the Dominican Republic

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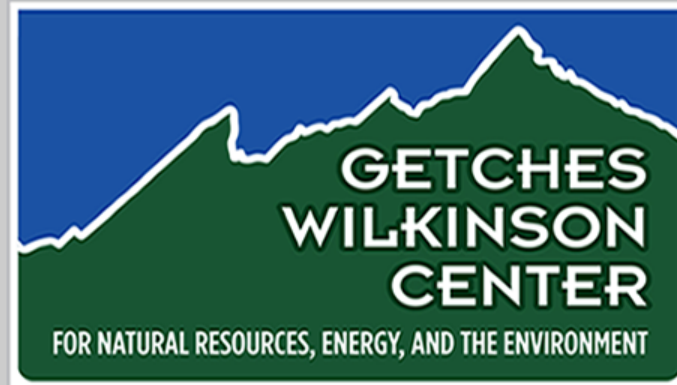
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PRIVATE LANDS CONSERVATION IN THE DOMINICAN REPUBLIC

**A Country Report by the Natural Resources Law Center,
University of Colorado School of Law**

September 2004

Sponsored by The Nature Conservancy

Primary Author: Julie Truelsen, NRLC Research Assistant
nrlc@colorado.edu

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A Report by the Natural Resources Law Center
University of Colorado School of Law

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Primary Author: Julie Truelsen, NRLC Research Assistant
E-mail: nrlc@colorado.edu

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BRIEF QUESTIONS

1. What legal tools are in place for the purpose of achieving private lands conservation?

Although the Dominican Republic has numerous parks and reserves for conservation, no information was found as to whether or not any of these areas are private reserves. Additionally, as little mention of conservation easements was found in statutory or other materials, it is unclear whether this legal tool could be used in the Dominican Republic; and if so, whether or not it would withstand judicial scrutiny.

One promising piece of information is the fact that a “National System of Protected Areas” is currently established in the Dominican Republic. This system of forests, wildlife refuges, and beaches is subject to the control of the Natural Resources Department, and the State is authorized to create agreements for the co-management and/or the management of protected areas with interested entities as long as the interests of conservation are paramount. Thus, it appears that a conservation NGO could possibly broker agreements with the State to set aside conservation areas—and that these lands could potentially be private lands that are shielded from laws that adversely impact the goal of conservation (although there is currently no private lands conservation occurring in the Dominican Republic). Moreover, the Natural Resources Department is allowed to create incentives surrounding conservation. Thus, there may be potential for conservationists to endorse the use of incentives in the arena of private lands conservation.

2. What legal tools are recognized by the legal system and capable of being used for private lands conservation?

From the wording of the statutes contained in the French Civil Code, it appears that negative servitudes (also known as easements) are recognized in the Dominican Republic. Thus, it is at least possible that negative appurtenant easements could be created for private lands conservation in the Dominican Republic. However, it is unclear to what extent negative easements in gross, restrictive covenants, or equitable servitudes could be used for conservation purposes. While foreigners can hold leases, it is also unknown whether leases and lease-leaseback agreements could be employed as legal tools for conservation in the Dominican Republic. Likewise, a profit à prendre may or may not be a viable tool for private lands conservation. More research is needed in this area in particular as much pertinent legislation, such as the Land Registration Law, were either unavailable or only available in Spanish.

3. Given the legal authorities governing land tenure, what novel legal tools could be introduced to achieve the goal of private lands conservation?

Conservationists should explore whether the legislature in the Dominican Republic would be receptive to conservation legislation specifically enacting conservation easements, as the United States has done. The legislature seems to be willing to promote conservation, and so it could enact a statute that expressly allows conservation easements. This enactment may prove to be particularly useful, given the laws on the books that can take away “excessive” or “idle” land from private landowners. Although the country is concerned with agrarian reform, agricultural needs, and redistributing land to “peasants” without land, it also recognizes its conservation problems and needs.

INTRODUCTION

This report seeks to provide the reader with a basic understanding of the legal instruments, processes and institutions within the Dominican Republic that are relevant to private lands conservation; and to evaluate the legal feasibility of introducing conservation easements and other legal instruments into the Dominican Republic legal system for the purpose of achieving private lands conservation. Section I of the report provides relevant background information on the history, culture, economy and governmental structure of the Dominican Republic. Section II of the report seeks to clarify the legal system of the Dominican Republic and provide an overview of the legal authority pertaining to real property rights and uses. Section III outlines the historical and contemporary trends in the Dominican Republic system of land tenure. Section IV discusses the institutions, laws, and procedures in the Dominican Republic associated with land tenure, land transfer, and interests in land. Section V explains the concept of a conservation easement and evaluates the possibility of using this and other legal tools within the Dominican Republic legal system. Section VI explores the feasibility of introducing these legal tools to the Dominican Republic, and discusses recommendations for the introduction and use of these various legal tools into the Dominican Republic's legal system, as well as general policy recommendations for private lands conservation in this country.

I. RELEVANT BACKGROUND

A. Relevant History

The Dominican Republic is part of the island of Santo Domingo, formerly known as Hispaniola. The Republic of Haiti shares the rest of the island. The Dominican Republic consists of the eastern two-thirds of the island, which was discovered by Columbus in 1492 and

colonized by the Spanish after Columbus founded the capital city Santo Domingo in 1496. Spanish domination lasted until 1535, at which time the Spaniards began to ignore the island, allowing it to enter a 200-year period of decline.¹ The native Indians, who were exploited by the Spanish as workers in the gold mines, became extinct during this period. African slaves replaced the Indians as the major labor source, and sugar replaced gold as the major export on the island.²

France obtained power over the area now known as Haiti in 1655. Following this colonization, the slave trade in the Dominican Republic increased dramatically. Toussaint L'Ouverture led a slave revolt in Haiti, freeing the slaves and invading the Dominican Republic. He united the island in 1801 under his power. Soon thereafter, the Spanish left the Dominican Republic. In 1802 Napoleon Bonaparte, leader of France, sent armed forces to Santo Domingo, and successfully pushed back L'Ouverture and his followers to the Haitian border. The Spanish regained power of the Dominican Republic in 1809, but conditions on the island did not improve.³ Haiti occupied the entire island once again from 1822 to 1844. During this time, “tyranny of the reign paralyzed the economy, agriculture was neglected, the large estates were in ruin, and generally chaos prevailed.”⁴

The Dominican Republic gained independence on February 27, 1844. However, the country remained in turmoil, with a series of dictators and civil wars, until 1916 when World War I caused the United States to occupy the Dominican Republic.⁵ The United States Marines

¹ Thomas Reynolds & Arturo Flores, FOREIGN LAW: CURRENT SOURCES OF CODES AND LEGISLATION IN JURISDICTIONS OF THE WORLD (WESTERN HEMISPHERE) Vol. 1 (William S. Hein & Co., Inc. Buffalo, NY 2003) (hereinafter Reynolds & Flores). This neglect resulted from the fact that all the gold present on the island had been discovered and exploited by the Spanish.

² CARRIE A. MEYER, LAND REFORM IN LATIN AMERICA: THE DOMINICAN CASE 26 (Praeger Publishers 1989) (hereinafter MEYER).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

ruled the country by martial law.⁶ This occupation lasted from 1916 to 1924, during which time conditions improved with the rise in prices of such exports as sugar, tobacco, cocoa and coffee. Relative economic success and stability ensued. However, this economic wealth corresponded to an increase in foreign sugar plantations. Thus, small domestic agricultural holdings disappeared.⁷

Rafael Trujillo, who led the Policia Nacional Dominicana during the United States' occupation, installed himself as the dictator of the Dominican Republic in 1930. Trujillo's seizure of power lasted 31 years, and perhaps surprisingly brought more economic wealth and stability to the country.⁸ Throughout this period, "[p]ublic works were initiated and highways expanded." Nonetheless, as Trujillo gained a personal monopoly on sugar and other exports, "distortions of the rural economy that have been very difficult to correct" occurred as a result of Trujillo's domination.⁹

Trujillo was assassinated in 1961. In 1962 democracy was restored and Juan Bosch was elected president.¹⁰ During his presidency, Bosch drafted a new constitution that was similar to the United States Constitution, with provisions for the separation of church and state and civil rights.¹¹ Bosch also championed land reform,¹² but was overthrown by a military coup a mere seven months into his presidency.¹³ The United States eventually intervened, causing Joaquin Balaguer to be elected president in 1966. Several different elected presidents followed

⁶ Amos Jenkins Peaslee, IV CONSTITUTIONS OF NATIONS, Dominican Republic 424 (Martinus Nijhoff, The Hague, Netherlands 1970) (hereinafter DR Constitution).

⁷ MEYER at 26.

⁸ See *id.* at 27.

⁹ *Id.*

¹⁰ See *id.*

¹¹ *Dominican Republic The System of Government*, Country Studies, available at www.country-studies/dominican-republic/the-system-of-government.html (hereinafter *Dominican Republic The System of Government*).

¹² MEYER at 27.

¹³ *Id.* at 28.

Balaguer.¹⁴ Following recent elections in 2004, Leonel Fernandez became the president of the Dominican Republic. He had served a previous term from 1996-2000.¹⁵

The land area of the Dominican Republic encompasses 19,386 square miles, and comprises the eastern two-thirds of the island.¹⁶ About 80 percent of the country is mountainous.¹⁷ The country has four east-west mountain ranges and several valleys. The most fertile valley is the Cibao, where most of the food for domestic consumption is grown—including rice, corn, beans, and cattle; as well as such exports as cocoa, bananas, tobacco, and coffee. Other fertile valleys include the Neiba and San Juan Valley. Today, sugar is the major export. The majority of the country receives sufficient rainfall, which allows a large irrigation system to provide water to an otherwise non-arable land for farming from the three major rivers in the Dominican Republic.¹⁸ Approximately 21 percent of the land in the Dominican Republic is arable, pastures make up about 43 percent of the land, and 12 percent of the land contains forests and woodlands.¹⁹ In 2001, the population of the Dominican Republic was about 8.6 million people. The GDP was 48.3 billion in 2000, and per capita income was \$5,700 USD. The Dominican Republic is considered to have achieved medium levels of human development; an example of another country that resides at this level is Cuba.²⁰

¹⁴ *Id.*

¹⁵ ISABEL ZAKRZEWSKI BROWN, *CULTURE AND CUSTOMS OF THE DOMINICAN REPUBLIC* 1 (Greenwood Press 1999) (hereinafter BROWN).

¹⁶ MEYER at 28.

¹⁷ Matthew M. McPherson, *Peasants Under Siege: Political Economy of Conservation and State Control in the Cordillera Centra, Dominican Republic* 25 (unpublished Ph.D. dissertation, University of Florida (on file with University of Florida Library) (hereinafter McPherson)).

¹⁸ MEYER at 28.

¹⁹ *CARIBBEAN ECONOMIES IN THE TWENTY-FIRST CENTURY* 47 (Irma T. Alonso ed., University Press of Florida 2002) (hereinafter *CARIBBEAN ECONOMIES*).

²⁰ *Id.* at 48.

B. Government

The Dominican Republic is a single republic divided into twenty-six provinces and a federal district. The government consists of a president, a bicameral legislature, and a system of provincial and municipal administration.²¹ The Dominican Republic has a representative government with tripartite power; there is an executive, legislative, and judicial branch. The executive power is vested in the president. Presidential elections are held separately from legislative and municipal elections.²² The president must obtain a majority vote, and cannot be elected to more than one consecutive term. The term of office is four years.²³ There is also a vice president, who is elected with the president for an equal and concurrent period of time. The president is “the Head of the Public Administration and the Supreme Commander of all the Armed Forces of the Republic and of the police corps.”²⁴ The legislature is a bicameral Congress comprised of a Senate and a Chamber of Deputies. There are 30 senators and 145 deputies. Both senators and deputies are also elected for four-year terms. The judiciary is largely based on the French judicial system,²⁵ and is exercised by the Supreme Court of Justice and by other courts created by the Constitution and laws of the Dominican Republic.²⁶

C. Legal Authority

The law of the Dominican Republic is primarily based on the Napoleonic Codes. The judicial system, mandated by the Constitution of the Dominican Republic, contains the following courts: the Peace Courts, the Courts of First Instance, land courts, the Appeals Courts, and the

²¹ Reynolds & Flores.

²² *The Dominican Republic: From Columbus to the 1990's*, A Lawyer's Guide to the Dominican Republic, available at www.dominicanrepublic.com/business/laws_legal.html (hereinafter *The Dominican Republic: From Columbus to the 1900's*).

²³ *Id.*

²⁴ *Judicial Branch*, Presidency of the Dominican Republic, available at www.presidencia.gov.do/ingles/estructura/judicial/judicial.htm (hereinafter *Judicial Branch*).

²⁵ *The Dominican Republic: From Columbus to the 1900's*.

²⁶ *Judicial Branch*.

Supreme Court of Justice.²⁷ The Constitution of the Dominican Republic, the Civil Code, the Code of Civil Procedure, the Commercial Code, the Criminal Code, the Code of Criminal Procedure, and judicial holdings comprise the major legal authorities of the Dominican Republic.²⁸

II. OVERVIEW OF LEGAL CONTEXT

The legal system in the Dominican Republic is that of French Civil Law and not common law, meaning that judges hear and decide cases, and not juries. The judiciary was reformed in 1994 with the passage of the Constitutional Reform Act. This Act created an independent judiciary, designed to negate the effects that corruption and unorganized government had inflicted on the Dominican Republic and its citizens in previous decades.²⁹ The judiciary is headed by the Supreme Court of Justice, whose members are designated by the National Magistrate Council. The president normally runs this body, and members typically include senators, Supreme Court justices, and other political leaders. The Supreme Court is the highest court in the Dominican Republic with jurisdiction over the entire country.³⁰ The Supreme Court of Justice consists of a sixteen-judge panel. This Court can only hear cases in which the interpretation of the law is in doubt in lower courts.³¹

The Appeals Courts are comprised of five judge panels, and they hear cases that were decided by the Court of First Instance. This panel must render a judgment collectively.³² The Courts of First Instance are more specialized and “are broken down into chambers according to

²⁷ *The Dominican Republic: From Columbus to the 1900's*; DR Constitution, at 426.

²⁸ See Reynolds & Flores.

²⁹ See Ingrid Suarez, *A Change for the Better: An Inside Look to the Judicial Reform of the Dominican Republic*, 9 ILSA J. INT'L & COMP. L. 541, 542 (2003) (hereinafter Suarez).

³⁰ *Id.* at 547.

³¹ *Civil Law Legal System & Courts The Dominican Republic*, The Dominican Republic.Net, available at www.thedominicanrepublic.net/legal_system.htm (hereinafter *Civil Law Legal System*).

³² *Id.*

the nature of the case being heard.” Examples would include courts for civil matters, courts for criminal matters, and courts for commercial matters.³³ These courts also have one judge presiding over each issue.³⁴ The lowest courts are the Peace Courts, which are small, generalized civil courts. These courts hear minor cases, which are presented in front of one judge. Each district has a peace court, which is essentially the first court to hear local matters.³⁵

With respect to the law of the Dominican Republic, one commentator has noted that:

[D]ominican law properly so-called, does not exist, except in those rare cases not covered by the French law and which cannot be traced to another foreign nationality. There is nothing or almost nothing that we have created; we have not elaborated nor transformed intelligently any foreign institution to adapt it to our national temperament.³⁶

Thus, the majority of property law appears to come directly from the French Civil Code. The provisions that concern this report are discussed in greater detail in Section V. One source of law, other than the French Civil Code, that discusses property rights in the Dominican Republic is the Constitution. In general, the Dominican Republic has acknowledged the property rights of its people since its first taste of independence in the nineteenth century. The Constitution of 1844 recognized property rights as inherent to all people, and mandated that no land should be confiscated unless taken for public interest reasons and with just compensation provided.³⁷ The

³³ *Id.*

³⁴ *Id.* According to this source, these courts typically preside over disputes concerning legal land title. However, other sources state that land disputes are heard before judges of original jurisdiction and the Superior Land Court. See generally Gil, *infra* note 37, at 43-47.

³⁵ *Civil Law Legal System.*

³⁶ Reynolds & Flores.

³⁷ F. Margarita Gil, *Security of Land Ownership in the Dominican Republic A Legal and Historical Analysis* Security 38 (unpublished Ph.D. dissertation, University of Wisconsin, Madison (1999) (on file with University of Wisconsin, Madison Library) (hereinafter Gil). This dissertation is heavily relied upon in this report for its description of land tenure and registration practices in the Dominican Republic.

newest Constitution of the Dominican Republic incorporates this earlier principle as well as a provision concerning land reform.³⁸ It states in full:

- a. The application of land to useful purposes and the gradual elimination of large holdings (*latifundios*) are declared to be of social interest. Lands belonging to the state or which the state acquires by degrees or by expropriation, in the manner prescribed by this Constitution, and which the state does not devote or will not devote to other purposes of general interest, are to be used in agrarian reform plans. Encouragement and co-operation in an effective integration of the rural population into the national life, through an improvement in methods of farm production and the cultural and technical training of rural men, is likewise declared to be a main objective of the social policy of the state.
- b. The state may convert its enterprises into properties of co-operation or co-operative economy.³⁹

Thus, in addition to Civil Code provisions and other pertinent legislation, some components of property law, in relation to individual and social rights, derive from these constitutional principles.⁴⁰ More specifically, the French derived Civil Code, together with the American derived Land Registration Law, regulates property issues such as servitudes, ownership rights, determination of heirs, validity of contracts of registered rights, encumbrances, and transfers.⁴¹

Special courts administer and enforce the Torrens System of land registration.⁴² The Land Registration Law created the procedures surrounding the clearance of title to unregistered land and the adjudication of correct ownership of land. Land disputes are handled by the Land Court, which has jurisdiction over “(a) procedures for clearing and registering title land,

³⁸ See DR Constitution, at 431. One caveat to this right is contained in the Transitional Provisions at the end of the Constitution. Art. 124 states that “[t]he effects of laws and judgments that ordered a general confiscation of property by virtue of constitutional provisions in force at the time, shall not be affected by the provision of Article 8 (13) of this Constitution. This also applies to cases pending in the courts in conformity with those former provisions, which shall be decided in accordance therewith.” DR Constitution, at 455. Article 8 (13) covers an individual's general right to own property, unless there is a justified reason, such as land taken for the public benefit or for some other social interest, with just compensation allotted. *Id.* at 431.

³⁹ *Id.* at 431.

⁴⁰ Gil at 38.

⁴¹ *Id.* at 38-39.

⁴² *Id.* at 42. This system will be more fully explored and explained in later sections.

improvements and other real property interests; (b) surveys, establishment of boundaries and partition of adjoining land; (c) clarification of deeds and interests in land.”⁴³

III. RIGHTS AND RESTRICTIONS PERTAINING TO LAND TENURE

A. History and Current Overview of Land Tenure

The history of known land tenure practices begins with the Indians prior to the discovery of the Dominican Republic by Columbus. These indigenous people shared the land as a group under a system known as *cacicazgos*.⁴⁴ After the Spanish occupation, Columbus distributed the land to Spaniards living in the Dominican Republic through the system of *repartimiento*. These land parcels were accompanied by Indians to work the land. Although the Indians were not technically slaves, they could be forced to work—their status was essentially that of a “free” vassal.⁴⁵ In 1503 this system was substituted by the *encomienda* system through the implementation of the Instructions of 1503. Under this more formal system, each family was allotted an individual plot for its own survival. By 1513, Indians were governed under a communal land tenure system.⁴⁶ As gold mining declined and Spaniards left the country, numerous farms were abandoned. The Spaniards still living on the island seized this farm land, leaving much of it to neglect.

During the great increase in the slave trade during the second half of the eighteenth century, the Toussaint L’Ouverture rebellion significantly changed land tenure practices:

Toussaint’s rule over Santo Domingo was brief, but in a period of about a year and a half he issued a number of decrees, two of which were to affect the ownership of land in Santo Domingo for generations. He abolished slavery and

⁴³ 7 MODERN LEGAL SYSTEMS CYCLOPEDIA, The Legal System of the Dominican Republic, at 7.140.25, § 1.1(D) (3) (Prof. Kenneth Robert Redden ed., William S. Hein & Co., 1989) (hereinafter MODERN LEGAL SYSTEMS CYCLOPEDIA).

⁴⁴ Gil at 3.

⁴⁵ Meyer at 28.

⁴⁶ *Id.* at 30.

ordered all property of Spaniards in exile to be confiscated and turned over to his government. These two actions brought agricultural activity to a standstill and upset the traditional norms of ownership. Land records were lost or destroyed during the confiscatory process as the old Spanish colonial administrative structure was dismantled.⁴⁷

Additionally, during the colonial era communal land was generally given to the Spanish, but the boundaries between state lands and these communal lands remained unknown. Haitian rule in 1845 enacted a law to partition the communal lands; and later in 1911, another law along the same lines was introduced. However, in practice neither law was obeyed.⁴⁸

The Dominican Republic generally relies on the Torrens System of land registration, which was established during the United States' military occupation in 1920 as the Land Registration Law.⁴⁹ At this time, it solved some of the problems surrounding land ownership as it mandated the partitioning of communal land.⁵⁰ However, the communal landholders and squatters without title to their land lost it as commercial and large plantations added property to their landholdings.⁵¹ Moreover, Trujillo accumulated vast quantities of land during his dictatorship, and it is estimated that he and his family owned about one-third of all cultivable

⁴⁷ *Id.* (quoting Clausner 1973: 75-76).

⁴⁸ *Id.*

⁴⁹ Gil at 3-6. The justification for the law was laid out in the preamble, which stated "Whereas: it is a matter of public knowledge that land titles in Santo Domingo are in general so confused and uncertain as to handicap the development of the country, foster fraud and blackmail on a wholesale scale, and result in unjust deprivation of rightful owners of their land, thus provoking disorder and breaches of the peace, and tending to loss of confidence in the State; and Whereas: to remedy this condition and restore confidence in property rights and peace to the State, a vigorous measure is necessary which will determine the true ownership of land compel its public registration by a scientific method; and, Whereas: the Courts now established have their dockets crowded with criminal and civil matters, and a separate tribunal dealing exclusively with the present problem of land titles is essential to its proper solution; Now Therefore: by virtue of the powers vested in the Military Government, and the duty and power of every Government to remove obstacles to development, preserve property, restore tranquility and keep the peace, the following Order providing for the Registration of Lands and the Demarcation, Survey and Partition of *Terrenos Comuneros* is hereby dictated and promulgated." *Id.* at 6-7 (quoting Executive Order No. 511, July 1, 1920. Thomas Snowden.). Additionally, the Torrens system has not been completely adopted in the United States, and exists only partially in four states (Massachusetts, Hawaii, Illinois, and Minnesota). *Id.* at 11.

⁵⁰ MEYER at 30.

⁵¹ *Id.* at 30-31.

land. However, these lands were passed to the State after his death with agrarian reform in mind.⁵²

With the death of Rafael Trujillo came the Charter of the Punta del Este under President Bosch, which set up the Instituto Agrario Dominicana (IAD) to administer agrarian reform under the Alliance for Progress law. This institute has benefited about 72,509 families and approximately 14 percent of the agricultural land.⁵³ The IAD set up the redistribution of state and privately owned land to the rural poor and created credit programs and other beneficial services. Under the IAD program, beneficiaries only receive usufructuary rights and provisional titles. These small farmers may not sell their parcel, and any abandoned parcels revert to the state.⁵⁴

The legal status of IAD is described as—

a semi-autonomous agency with the power to contract its own financial obligations, subject to the approval of the Executive Power. It is supposed to be governed by a Board of Directors of nine members including the Secretaries of Agriculture, Labor, Public Works, and Education; the President of the Industrial Development Corporation and the General Manager of the Agricultural Bank. . . . The Board is encharged by law with establishing the policy, administrative organization, and functions of the Institute within the limits set by law.⁵⁵

In practice, however, the director usually wielded total control over a passive board.

The agrarian reform movement continued, and President Balaguer, elected in 1966, ordered the purchase of private properties for redistribution under IAD.⁵⁶ Legislation in 1972 allocated lands defined as latifundios (extremely large farms) and baldios (lands not in

⁵² *Id.* at 31.

⁵³ *Id.* at 21.

⁵⁴ *Id.* While the peasants had the provisional title and the right to the usufruct of the land, they could not sell or transfer the land. Isabel A. de Ceara, LAND TENURE AND AGROFORESTRY IN THE DOMINICAN REPUBLIC 305 (Instituto Superior de Agricultura La Herradura, Santiago, Republica Dominicana) (hereinafter Ceara).

⁵⁵ MEYER at 43 (*quoting* Joseph R. Thome, Thome 1967 pages 26-27).

⁵⁶ *Id.* at 44.

production) as subject to expropriation, thus increasing the amount of land for redistribution.⁵⁷ Additionally, the collective form of agrarian reform gained prominence at this time; beneficiaries were no longer working individual parcels, but were rather working together in groups and dividing profits equally. Moreover, upon the beneficiary's death or abandonment of the land, the family was able to inherit the right to the usufruct.⁵⁸ From 1962 to 1985 approximately 53,054 hectares of land were turned over to the IAD for their reform efforts.⁵⁹

In general, the Dominican Agrarian Reform had four basic goals, which include: (1) to decrease or eliminate the encroachment of Haitians into border lands; (2) to serve as a vehicle of support for political reasons; (3) to quiet "social unrest" in rural areas due to the large amount of peasants without land; and (4) to serve as an instrument to ensure self-sufficiency in rice growth without an increase in the price of rice.⁶⁰

The types of land tenure that exist in the Dominican Republic include not only private and public (state) ownership, but also occupants (squatters), sharecroppers, usufructuaries, and rentals.⁶¹ Squatting is most typical on public land or large private holdings.⁶² Amazingly, there are at least 36 types of land ownership in the Dominican Republic with a wide spectrum of security in title.⁶³ Today, there is a general consensus that the practices surrounding land tenure are frequently fraudulent and corrupt, with incidences of false title, mortgages, and transfers.⁶⁴ More than 40 percent of small farmers do not have title to their land.⁶⁵ Additionally,

⁵⁷ *Id.* at 45.

⁵⁸ Ceara, at 305. At first, collective settlements were only applicable to rice lands, but after 1979 this type of agrarian reform applied to all programs under the IAD. *Id.*

⁵⁹ MEYER at 46.

⁶⁰ Ceara, at 305.

⁶¹ *Id.* at 301,303.

⁶² *Id.* at 302.

⁶³ Email from Carlos M. García, Executive Director, Fundación Moscoso Puella (FMP), received August 12, 2004 (hereinafter García).

⁶⁴ Gil at 7.

⁶⁵ *Id.* at 31.

approximately 40 percent of land in the Dominican Republic is not even registered.⁶⁶ Thus, land title is not always a reliable indicator of land ownership.⁶⁷ A source from 1990 estimated that one-third of arable land was privately owned, with registered title and the ability to be transferred freely. Another third was owned by the state. Squatters, however, occupied the remaining third, without title to the land.⁶⁸ In terms of total land, approximately 71 percent of all land is under title, possessed either by the State or private owners. The state rents about 3 percent of the land, and 26 percent is either undocumented or occupied illegally.⁶⁹ According to another source published over 20 years ago, between 10 and 15 percent of forest is privately owned in the Dominican Republic.⁷⁰ However, it is unclear whether this figure has changed over the past decades.

Deforestation appears to be a huge problem in the Dominican Republic. For example, in 1947 it was estimated that 60 percent of the land area of the Dominican Republic was covered in forest. However, by the end of the 1970s only 26 percent of the country was thought to contain forestry. Overproduction of timber, firewood, and charcoal has destroyed the majority of the forestland in the Dominican Republic, and during the same time period, approximately 300 species became threatened with extinction. Soil erosion, dry rivers, and migrant agriculture are also threats to conservation.⁷¹

Moreover, since 1920 there have been two land registration systems in the Dominican Republic in force; in addition to the Torrens System, which governs registered land, there is the

⁶⁶ *Id.* at 8.

⁶⁷ *Id.*

⁶⁸ John Strasma, *A Profile of Rural Land markets in the Dominican Republic*, LAND TENURE CENTER, Feb. 16, 1990, at abstract (hereinafter Strasma).

⁶⁹ *Id.* at 13.

⁷⁰ Ceara, at 306.

⁷¹ *Id.* at 306, 308. In addition, sometimes the migrant agriculture takes the form of “slash and burn” agriculture, which can be devastating to the environment. *See id.* at 308. One caveat to the deforestation issue is that because the source discussing the issue was published over 20 years ago, it is unknown to what extent the situation has improved, stabilized, or worsened.

Ministerial System, the French method which governs unregistered land.⁷² These two systems have differing procedures and administrative practices, which will be discussed more fully in Section IV(C).⁷³ In 1920, with the U.S. imposed Executive Order No. 511 in place, the Dominican Republic began to officially govern land tenure through the Torrens System in order to “facilitate land transfer; to convert real estate in capital guaranteed by the government; to solve confusion, and to avoid land conflicts.”⁷⁴ This law was replaced by Law No. 1542 (The Land Registry Law) in 1947, which is still in force today.

B. General Restrictions on Land Use

Foreigners can own real estate in the Dominican Republic. There are no added restrictions.⁷⁵ Non-residents pay local property taxes annually at a rate of .25 percent of the assessed value of the property.⁷⁶ Foreigners can also lease real estate without restrictions.⁷⁷ In addition, the government has been known to lease land to private individuals.⁷⁸

However, it appears that certain residency requirements must be met in order to own real estate. The Dominican Republic department of immigration requires letters of good conduct from local police departments and a local medical exam to determine that the applicant does not have certain diseases and drug dependencies. The applicant must also have economic solvency; this requirement demands an investment inside the Dominican Republic of about \$31,000 USD.

⁷² Gil at 8. The Ministerial System was started during the Haitian occupation in the 19th Century. *Id.* The Registration and Custody of Mortgages Ley de Registro y Conservacion de Hipotecas law, taken directly from French legislation, was enacted in June 21.1890, sustaining the Ministerial System in the Dominican Republic. The goal of this law was to register properties and provide a registration record of mortgages, acting as a source of information and security to those interested. *Id.* at 39.

⁷³ *Id.* at 8.

⁷⁴ *Id.* at 34.

⁷⁵ John Schroder, *No Snow, No Taxes, No Problem: Living a Better Life in the Dominican Republic*, available at www.escapeartist.com/efam/44/Dominican_Republic.html (hereinafter Schroder).

⁷⁶ *Questions & Answers, The Dominican Republic*, available at <http://www.capcana.com/overview/faq.html> (hereinafter Questions & Answers).

⁷⁷ *Real Estate Purchase by Foreigners in the Dominican Republic*, available at <http://www.islandpro.com/amer/drinfo.htm> (hereinafter Real Estate Purchase by Foreigners).

⁷⁸ See Strasma at 31.

This last requirement can be shown through proof of local bank accounts or business investments, among other things.⁷⁹

One roadblock that a conservation NGO might encounter with respect to ownership of land in the Dominican Republic is Law 214. According to one source, published in 1990, this law allows expropriation by the state. It sets a maximum amount of land that any one individual may own, and allows excessive holdings to be taken by the government with compensation allotted.⁸⁰ Although this law is infrequently enforced, at least one source has asserted that it could:

potentially be used to affect even registered, titled privately held land. This is most likely to happen if persons claiming to be landless, needy campesinos move onto it. Such “invasions” of privately owned land (and of state-owned land as well) occur from time to time; the most publicized cases appear to be led by priests in some cases and politicians in others.⁸¹

Indeed, these invaders often claim that the owners were not using their lands “productively,”⁸² which could prove to be an issue for private owners who agree to conserve their land in conjunction with a conservation NGO.

Another restriction that could “cloud” registered title in the Dominican Republic is the cuota parte, a state-run irrigation project that requires a 25 percent fee.⁸³ This law provides that for land supplied with state irrigation, the owner of such land must give 25 percent of their newly irrigated land as payment for the increased value of their total holdings. Many owners refuse to transfer their land, and because the state is sometimes lax in their enforcement of this transfer (which is then supposed to be given to those without land), many titles become unclear. As a

⁷⁹ *Id.*

⁸⁰ Strasma at 4.

⁸¹ *Id.* at 5.

⁸² *Id.*

⁸³ *Id.*

result of this breakdown in the system, the owners, the state, and potential new owners do not have clear title.⁸⁴

The Idle Lands Law may serve as a potential roadblock to private lands conservation as well. In the past, law 282 (La Ley de Baldías), was used by the IAD to take idle land away from private owners. The law was created due to the “widespread belief that large landowners held vast amounts of land idle out of slothfulness or because they were fully occupied with their core holdings of farm land.”⁸⁵ In fact, 147,311 hectares were taken by the IAD for the state under this land by 1978, but only 1,853 hectares were parceled out through land reform projects. The small percentage given out as farmland shows that the land was not productive without “substantial investments” such as roads and irrigation that IAD was unwilling to make.⁸⁶ This law may prove a hindrance to conservation projects for private landowners if the land is seen as idle land that could be put to better use—such as for small farmers without their own land. Additionally, this unproductive land that the IAD owns is not usually available for sale or rental as the institute is usually reluctant to turn their land over to others.⁸⁷

IV. LAND ADMINISTRATION IN THE DOMINICAN REPUBLIC

A. Institutional Framework

Land jurisdiction and administration is governed by Executive Order No. 520. The institutions under this order are all organized under the Land Court. These institutions mainly register territory under the Torrens System.⁸⁸ The Land Court (Tribunal de Tierras) consists of the following players: the Superior Land Court, the Land Judges of Original Jurisdiction, the

⁸⁴ *Id.* at 6.

⁸⁵ *Id.* at 10.

⁸⁶ *Id.*

⁸⁷ Strasma at 10.

⁸⁸ Gil at 55.

Government (State) Attorney, the General Direction of Land Survey and Mapping, the Register of Titles, and the Court Secretariat.⁸⁹ The State Attorney represents the state in the Land Court due to the Torrens designation of the state as the originator of all land.⁹⁰ The General Direction of Land Survey records the identification codes of real property and regulates the procedures of performing surveys.⁹¹ The Register of Titles employs officers who register rights to real estate property, issue title certificates, and maintain original certificates and the books.⁹² The Secretary of the Court controls court proceedings and court files of the Land Court.⁹³

Under Articles 13 to 15 of the Land Registration Law, the Superior Land Court has national jurisdiction and is the standard court for determinations under the Land Registration Law. This court “reviews and approves all orders, decisions and rulings pronounced by the land judges of original jurisdiction, except when provided by the law. It also hears public appeals against those decisions, as well as appeals against the decisions of the same court after the execution of the judgment.”⁹⁴

B. Land Transfer

Real estate transactions are also governed by the Land Registry Law 1947 amendments. Ownership of property is documented by “Certificates of Title” issued by the Title Registry. The buyer and seller have to sign a “contract of sale” before a Notary (who is required to have a law degree). The contract has the legal description of the price and other conditions of sale. The contract then goes to the Internal Revenue Office for payment of appropriate taxes. The contract

⁸⁹ *Id.* at 42-43.

⁹⁰ *Id.* at 44. The State lawyer, as a representative of the Executive Power, also defends legal owners with legal titles from squatters or other illegal occupants in order to protect the integrity of private land. *See* García.

⁹¹ *Id.* at 44.

⁹² *Id.* at 44-45.

⁹³ *Id.* at 35.

⁹⁴ *Id.* at 43.

of sale and the Certificate of Title of the seller are deposited at the Title Registry Office in the jurisdiction of the recorded sale and location of property. The Title Registry Office issues a new Certificate of Title in the name of the buyer and cancels the one previously issued to the seller. Before purchasing property, it is recommended that the buyer obtain an attorney to perform due diligence. To do this process, the following items are needed:

- copy of the Certificate of Title
- copy of the survey to the property
- copy of the seller's identification card or Passport
- copy of the receipt showing the last property tax payment⁹⁵

If the seller is a corporation, the following items are needed to perform due diligence:

- copy of corporate documentation, including the bylaws and resolution approving the sale
- certification from the Internal Revenue Office proving the corporation has filed income taxes

The government provides title insurance in the Dominican Republic. The Land Registry Law contains a provision that allots an indemnity fund for those who are erroneously deprived of their property. However, this fund remains insufficient, and as result, landowners lack protection. Two American companies now offer title insurance to purchasers in the Dominican Republic, and obtaining title insurance through them may be necessary in order to be compensated for any defects discovered after the purchase of land.⁹⁶

⁹⁵ The Dominican Republic Law Firm: Guzman Ariza, Attorneys at Law, *Buying Real Estate in the Dominican Republic: An Overview*, www.drlawyer.com/txt/articles/purchasingreal.html (hereinafter *Buying Real Estate in the Dominican Republic: An Overview*).

⁹⁶ The Dominican Republic Law Firm: Guzman Ariza, Attorneys at Law, *Buying Real Estate in the Dominican Republic: Title Insurance*, available at <http://www.drlawyer.com/txt/articles/titleinsurance.html> (hereinafter *Buying Real Estate in the Dominican Republic: Title Insurance*). The two companies offering title insurance in the United States are First American Title Insurance Company and Stewart Title. The insurance they offer covers "title invested on another person; title defect, lien, charge, privilege, mortgage or encumbrance; forgery, fraud, undue influence, duress, incompetency, incapacity or impersonation in the conveyance; lack of right of access to and from the property;

C. Land Registration

Generally, in the European tradition there are three main practices for land registration: (1) the private conveyancing; (2) the registering of deeds; and (3) the registration of titles. Under the private conveyancing system, the seller brings his rights to the buyer in the form of documents, and the buyer keeps these documents as proof of his true ownership. In the registration of deeds, “the object of registration is the act, deed, or right of the transferor or owner or any other individual claiming land interest.” This system is used in French, German and Spanish systems. The object in registration of titles method is the title and future property transactions.⁹⁷ The third system is known as the Torrens system, and is used in places such as Australia, Kenya, Jamaica, and the Dominican Republic.⁹⁸ The difference between the Torrens System and the French System is that:

[t]he Torrens System concentrates on providing security to the juridical proceeding through the Certificate of Title [to] show ownership rights over a recognizable land parcel. In addition, the recognized right has the guarantee of the state and compensation in case of mistake or fraud. In the French System, called the “Ministerial” or “Transcription” System, the main objective is to have publicity about the registered acts, in order to oppose them to third parties. Consequently, under this system the registration does not have the function of legitimating any act or its contents, because the register does not provide any evidence of land rights.”⁹⁹

The French System is based on the Civil Code of 1804, and all subsequent reforms. Under this system, the seller and purchaser only have to agree to the terms in order to transfer ownership. Registration is compulsory, but if the deed is unregistered, it still has force between

easement or right of way on the title; invalidity of any document upon which the title is based because it was not properly executed, sealed, acknowledged, notarized, delivered or recorded; invalidity of any document upon which the title is based because it was executed under a falsified, expired or otherwise invalid power of attorney; erroneous or inadequate legal description of the land.” *Id.*

⁹⁷ Gil at 21.

⁹⁸ *Id.*

⁹⁹ *Id.*

the parties who signed it, so long as it does not prejudice third parties. Additionally, registration does not validate the document.¹⁰⁰ Most importantly, the French System is not designed to increase the security of land tenure, but to only act as proof when third parties oppose ownership. Therefore, a third party cannot claim ignorance of anything registered.¹⁰¹

The Torrens system is in place “to simplify titles to land and to facilitate the land title process, as well as to secure the title for all registered proprietors.”¹⁰² The foundation of this system is the Certificate of Title. Common attributes and requirements of the Torrens system include the following: (1) the plot must be identified with a certified survey with the registration of rights; (2) the Certificate of Title comes with “absolute legal value and the guarantee of the state”; (3) the Certificate of Title is in place for simple land transactions and transfers; (4) all those interested can easily access the registration information; (5) printed forms are available and simplified for transfer and mortgage; and (6) the unusual provision that allots special funds as compensation for defects in the character of title.¹⁰³

Specifically, the procedure for the first registration to obtain a Certificate of Title starts when the interested party, through the State Attorney or solicitor, puts forward a request to the Superior Land Court for a priority concession.¹⁰⁴ This application must contain the following: a contract for the land surveying, payment receipts for official gazette publications and newspapers, for property requested by prescription documents showing support of the petition or

¹⁰⁰ *Id.* at 23.

¹⁰¹ *Id.* Only the names of adjoining owners are included when a land office identification of the land in question is absent. *Id.* at 24.

¹⁰² *Id.* at 24. This system is named after its primary creator, Robert Torrens, who created the system in Australia in the 19th Century.

¹⁰³ *Id.* at 25. The nine supposed benefits of the Torrens system are that “(1) information from the registrar allows anyone to know what are the legal rights to over the land and who owes them. (2) The processes related to land ownership are secure and not expensive. (3) The owner can use the title as a guaranty for loans. (4) Litigation over land rights is less frequent. (5) There is no prescription of registered land rights through squatting. (6) Access to land by small owners is easier. (7) All land rights, including rights of way, are protected. (8) The rights of creditors are protected and guaranteed. (9) Public services can base their actions on secure information and maps.” *Id.* at 26.

¹⁰⁴ *Id.* at 47.

certifications of ownership, and the inventory for these documents.¹⁰⁵ The land survey is then published and notifications are sent to affected neighbors and parties.¹⁰⁶ The State Attorney receives a copy of the survey after the General Surveyor's Office has reviewed and approved it. The State Attorney then submits a subpoena to the Superior Land Court "against the people claiming, possessing, occupying, or having any interest in the pertinent land, stating that the property titles for the land must be free and clear and awarded in consideration of the public interest."¹⁰⁷ The Judge of Original Jurisdiction then hears the case and makes a ruling.¹⁰⁸

Following the ruling, aggrieved parties have one month to appeal. After the expiration of this time period, the Superior Land Court reviews the decision of the Judge of Original Jurisdiction within ten days of the expiration of the one-month period. However, when cases are appealed the court has 60 days to hand down its ruling.¹⁰⁹ Within 60 days of the ruling of the Superior Land Court, the land surveyor employed during the lawsuit submits the real estate map and technical description of land to the General Direction of Land Survey.¹¹⁰ The General Direction of Land Survey then reviews and approves the map, and returns it to the Superior Land Court for it to issue the Decree of Registration.¹¹¹ The Title Registry keeps a copy of the Decree and "two copies of the definitive real estate drawing with the description of the property's appraisal resolution for the reinsurance fund and for the memorandum on liens, if there are any."¹¹² The Title Certificate is guaranteed by the State, does not expire, and is irrevocable.¹¹³

¹⁰⁵ *Id.* at 48.

¹⁰⁶ *Id.* at 49.

¹⁰⁷ *Id.* at 50.

¹⁰⁸ *Id.* at 51-52.

¹⁰⁹ *Id.* at 52. Notification of the ruling of the Superior Land Court goes to the interested parties, the land surveyor, and the General Surveyor's Office.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 53.

¹¹² *Id.*

¹¹³ *Id.* The Title Certificate is revocable in one exception. In cases of fraud, the case is appealable within one year from the transcription of the Decree of Registration by the registrar of title. *Id.*

While the systems for registration of title and adjudication of land issues seems relatively straight-forward and navigable, a general consensus among knowledgeable Dominican Republicans (such as real estate attorneys) is that there is corruption and a lack of organizational support with respect to all Dominican courts, especially within the Superior Land Court and Land Registries.¹¹⁴

In 1997 a program was started in the Dominican Republic to modernize the real property adjudication and registration system—possibly in response to the problems associated with its system.¹¹⁵ The main goals of this program are to consolidate the legal and institutional systems that are necessary to run the real property adjudication and registration system (JT) “efficiently and transparently,” to modernize the technology of the system, to improve the infrastructure, equipment, and systems, and to fortify the human resources in order to increase their efficiency.¹¹⁶ During the program’s implementation, the Land Registration Act and any other laws pertaining to this act are to be reformed. Title clearance and registration processes are also to be reformed. In addition, a legal cadastral-information system is to be created, along with a computerized system for the technical data of the Superior Land Tribunal.¹¹⁷ In 1997, it was reported that the Supreme Court of Justice would implement the program over a four-year period.¹¹⁸ The benefits of the program include the simplification of procedures with a reduction in time, improved case management, and increased security in land tenure for both investors and

¹¹⁴ The Dominican Republic Law Firm: Guzman Ariza, Attorneys at Law, *Buying Property in the Dominican Republic: Title Searches*, available at <http://www.drlawyer.com/txt/articles/titlesearch.html> (hereinafter *Buying Property in the Dominican Republic: Title Searches*); Fabio J. Guzman, *Buying Property in the Dominican Republic Title Searches: A Good lawyer will come up with strategies and methods to neutralize disorder in the system*, available at <http://www.popreport.com/Guzmanlandtitles.html> (hereinafter Guzman). Interestingly enough, one newspaper article in the Dominican Republic documented an incident at the Superior Land Court in which the pipes were clogged due to someone who had stuffed files down the toilets. *Buying Real Estate in the Dominican Republic: An Overview*.

¹¹⁵ Document of the Inter-American Development Bank, *Program to Modernize the Real Property Adjudication and Registration System*, Dec. 17, 1997, at executive summary (hereinafter *Program to Modernize the Real Property*).

¹¹⁶ *Id.* at executive summary, 1-2.

¹¹⁷ *Id.* at executive summary, 2.

¹¹⁸ *Id.*

landowners.¹¹⁹ However, it is not clear whether this program actually began in 1997; and so it is unknown whether the program's goals have been met or whether the program was finished in the allotted time.

D. Establishing Clear Title and Settling Disputes

Under the French system, transactions are private and there is no per se judicial intervention as there is under the Torrens System.¹²⁰ Thus, in order to establish clear title for registered land, before any sale of land is final, the party purchasing the land should obtain a certification from the Title Registry Office in order to determine whether any liens or encumbrances are attached to the land. A survey should also be completed in order to ensure that the survey in possession of the seller corresponds to the property in question. Because there are numerous legal restrictions in place for certain lands, the purchaser should also search for any permits or other restrictions that affect the use of the land.¹²¹ Additionally, the buyer should make sure that no other third-party is in possession of the land in question. For example, squatters may have some rights relating to the land they occupy. Tenants also have rights regarding the property on which they reside.¹²²

The Registrar of Titles (Title Registry Office), upon receipt of the correct parcel and cadastral district numbers of the land in question, is supposed to issue a certification describing the land's status after performing a title search for any liens and charges upon the property.¹²³ In practice, however, those employed in the Registrar of Titles are often overworked and underpaid.

¹¹⁹ *Id.* at executive summary, 3. Indirect benefits include a potential “increase in the mobilization of financing for productive purposes and spur the development of the real estate market by improving guarantees for mortgage loans; and (ii) foster the introduction of technologies that improve agricultural productivity.” *Id.*

¹²⁰ Gil at 27.

¹²¹ *Buying Real Estate in the Dominican Republic: An Overview*. For example, law 304 of 1968 created a 60-meter maritime zone that follows the entire Dominican Republic Coast, converting this area into public land.

¹²² *Id.*

¹²³ Guzman.

Therefore, many certificates stating that the land is free and clear of any encumbrances are often erroneous. While the purchaser of property remains in “good faith,” he will still need to go to court in order to litigate the issue. Although Registrars are legally responsible for mistakes made during title searches, they often escape paying for their mistakes because they are insolvent. Due to this potential gamble concerning title searches, it is recommended that any person or entity buying land in the Dominican Republic employ an experienced attorney to do the title search.¹²⁴

The Land Registration Law sets forth three procedures for clearing title to real property.¹²⁵ First, a land survey is needed that describes the property; this survey is “the basis upon which the judge will evaluate [the] case, which ends with a ruling awarding ownership.”¹²⁶ Second, the Judges of Original Jurisdictions, who have national jurisdiction, typically hear the lawsuits concerning the Land Registration Law and the clearance of titles, due to a designation through a ruling by the Superior Land Court.¹²⁷ Under Articles 16 to 21 of the Land Registration Law, lawsuits concerning the clearance of title are heard by Judges of Original Jurisdiction.¹²⁸ Finally, concerning common land and the clearance of title,

[The judge of original jurisdiction] hears the case of the pesos shares on a specific part of a real property, and establishes the degree of ownership which the shareholder has. Once the shares are cleared, the survey and other process to free and clear the land are performed, and if no other land tenant exists, the property right is awarded to the owner(s) of those shares or pesos titles.¹²⁹

The decisions of these judges are reviewed and approved by the Superior Land Court.¹³⁰

Once title is decided, there is a one-year period in which fraud in the process can be proved. Once this period ends, the title becomes “bombproof,” meaning that all other claims,

¹²⁴ *Id.*

¹²⁵ Gil at 45.

¹²⁶ *Id.*

¹²⁷ *Id.* at 43.

¹²⁸ *Id.*

¹²⁹ *Id.* at 47.

¹³⁰ *Id.* at 43.

including valid claims, are extinguished. Those with valid claims can only receive compensation from the government, and not from the titleholder.¹³¹

V. LEGAL TOOLS IN PLACE FOR PRIVATE LANDS CONSERVATION

To understand the legal tools that might effectively be used for private lands conservation in the Dominican Republic, it is helpful to examine some of the common law and statutory tools used in other jurisdictions for this purpose.

In addition to statutorily authorized interests in land, the American common law recognizes a number of interests in land that have the potential to facilitate the goal of private lands conservation—just as the Dominican Republic does. Among these interests are real covenants, equitable servitudes, easements and profits. It is important to note, however, that while the common law recognizes these interests, it has traditionally imposed requirements that—in many instances—render their use problematic for conservation purposes. The Restatement (Third) of Property, part of the legal authority of the United States, has simplified the law governing real covenants, equitable servitudes, easements and profits by combining the rules governing these interests into a single doctrine—that of the Servitude. This modernized law of servitudes has also largely eliminated the common law impediments to the use of these interests for conservation purposes. While the United States has modified the law of servitudes, it is unlikely that the Dominican Republic laws closely track the following explanations of these legal instruments. However, these changes could also be implemented in the Dominican Republic through new legislation.

A. Real Covenants

¹³¹ Strasma at 16.

A real covenant is a promise concerning the use of land that (1) benefits and burdens both the original parties to the promise and their successors and (2) is enforceable in an action for damages.¹³² A real covenant gives rise to personal liability only. It is also enforceable only by an award of money damages, which is collectible out of the general assets of the defendant.¹³³ If the promisee sues the promisor for breach of the covenant, the law of contracts is applicable. If, however, a person who buys the promisee's land is suing, or a person who buys the promisor's land is being sued, then the law of property is applicable.¹³⁴ The rules of property law thus determine when a successor owner can sue or be sued on an agreement to which he or she was not a party. Two points are essential to understanding the function of these rules. First, property law distinguishes between the original parties to the covenant and their successors. Second, each real covenant has two "sides"—the burden (the promisor's duty to perform the promise) and the benefit (the promisee's right to enforce the promise).

In order for the successor to the original promisor to be obligated to perform the promise—that is, for the *burden* to run—the common law traditionally required that six elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to bind their successors; (3) the burden of the covenant must "touch and concern" land;¹³⁵ (4) horizontal privity must exist;¹³⁶ (5) vertical privity must exist;¹³⁷ and (6) the successor must have notice of the covenant. In contrast, the common law traditionally

¹³² Promises that restrict permissible uses of land are referred to as negative or restrictive covenants.

¹³³ This historic remedy for breach of a real covenant is damages, measured by the difference between the fair market value of the benefited property before and after the defendant's breach.

¹³⁴ English courts never extended the concept of real covenants outside the landlord-tenant context. American courts, however, extended it to promises between fee simple owners or neighbors.

¹³⁵ For the covenant to "touch and concern land," it must relate to the direct use or enjoyment of the land. A covenant that restricts the development on a parcel meets this requirement.

¹³⁶ The common law traditionally requires that the original parties have a special relationship in order for the burden to run, called horizontal privity. In some U.S. states, horizontal privity exists between the promisor and the promisee who have mutual, simultaneous interests in the same land (e.g., landlord and tenant). Other U.S. states also extend horizontal privity to the grantor-grantee relationship.

¹³⁷ Vertical privity concerns the relationship between an original party and his or her successors. Vertical privity exists only if the successor succeeds to the entire estate in land held by the original party.

required only four elements for the *benefit* of a real covenant to run to successors: (1) the covenant must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to benefit their successors; (3) the benefit of the covenant must touch and concern land; and (4) vertical privity must exist.

The Restatement (Third) of Property (Servitudes) has eliminated a number of these traditional common law requirements. The horizontal privity requirement and the prohibition on third party beneficiaries have been entirely eliminated. Also, the prohibition on covenant benefits in gross, the touch and concern requirement, and the vertical privity doctrine have been replaced with doctrines designed to more effectively accomplish their respective purposes. Pursuant to the Restatement's approach, a covenant is a servitude if either the benefit or the burden runs with the land. The *benefit or burden* of a real covenant runs with the land where (1) the parties so intend; (2) the covenant complies with the Statute of Frauds; and (3) the covenant is not otherwise illegal or violative of public policy.¹³⁸

While real covenants are recognized in the United States as a means by which to accomplish private lands conservation (although it is not the most ideal method), it is unclear whether such instrument could be used in the Dominican Republic for conservation purposes. Covenants, and particularly restrictive covenants, were not explicitly mentioned or detailed in any of the sources explored during the research process for this report.

¹³⁸ Restatement (Third) of Property (Servitudes) §§ 1.3, 1.4 (2000). Under the Restatement, a covenant burden or benefit that does not run with land is held "in gross." A covenant burden held in gross is simply a contractual obligation that is a servitude because the benefit passes automatically to successors to the benefited property. A covenant benefit held in gross is a servitude if the burden passes automatically to successors to the land burdened by the covenant obligation.

B. Equitable Servitudes

The primary modern tool for enforcing private land use restrictions is the equitable servitude.¹³⁹ An equitable servitude is a promise concerning the use of land that (1) benefits and burdens the original parties to the promise and their successors and (2) is enforceable by injunction. The usual remedy for violation of an equitable servitude is an injunction, which often provides more effective relief for conservation purposes than compensatory damages.

Under traditional common law rules,¹⁴⁰ for the *burden* of an equitable servitude to bind the original promisor's successors four elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds or implied from a common plan;¹⁴¹ (2) the original parties must intend to burden successors; (3) the promise must "touch and concern" land; and (4) the successor must have notice of the promise. In contrast, the traditional common law only required three elements to be met for the *benefit* to run to successors: (1) the promise must be in writing or implied from a common plan; (2) the original parties must intend to benefit successors; and (3) the promise must "touch and concern" land.

Under the law of servitudes set forth by the Restatement (Third) of Property (Servitudes), there are eight basic rules that govern expressly created servitudes:¹⁴² (1) a servitude is created by a contract or conveyance intended to create rights or obligations that run with the land if the servitude complies with the Statute of Frauds; (2) the beneficiaries of a servitude are those

¹³⁹ There is some doctrinal confusion regarding the difference—if any—between an equitable servitude and a conservation easement. However, under the approach adopted by the Restatement (Third) of Property, easements, profits, covenants—including equitable servitudes, are governed by a single body of law. See Susan F. French, *Highlights of the new Restatement (Third) of Property: Servitudes*, Real Property, Probate and Trust Journal 226, 227 (2000).

¹⁴⁰ Traditional common law rules are being distinguished here from the modernized law of servitudes set forth by the Restatement (Third) of Property.

¹⁴¹ If a developer manifests a common plan or common scheme to impose uniform restrictions on a subdivision, the majority of U.S. courts conclude that an equitable servitude will be implied in equity, even though the Statute of Frauds is not satisfied. The common plan is seen as an implied promise by the developer to impose the same restrictions on all of his or her retained lots.

¹⁴² As noted above, under the "integrated approach" adopted by the Restatement (Third), easements, real covenants, profits and equitable servitudes are all categorized as servitudes

intended by the parties; (3) servitude benefits held in gross are assignable unless contrary to the intent of the parties;¹⁴³ (4) a servitude is valid if it is not otherwise illegal or against public policy; (5) a servitude is interpreted to carry out the intent or legitimate expectations of the parties, without any presumption in favor of free use of land; (6) servitude benefits and burdens run to all subsequent possessors of the burdened or benefited property;¹⁴⁴ (7) servitudes may be enforced by any servitude beneficiary who has a legitimate interest in enforcement, whether or not the beneficiary owns land that would benefit from enforcement; and (8) servitudes that have not been terminated may be enforced by any appropriate legal and equitable remedies.

Similar to the problem encountered with researching covenants in the Dominican Republic, equitable servitudes were also not expressly mentioned in any documents. However, the French Civil Code has numerous provisions concerning servitudes in general. These provisions are explored later in this section, and it seems plausible or at least more likely than other legal instruments employed in the United States, that equitable servitudes in place for private lands conservation could withstand judicial scrutiny.

¹⁴³ Restatement (Third) of Property (Servitudes) § 2.6 (1)–(2) (2000). Early law prohibited the creation of servitude benefits in gross and the creation of servitude benefits in persons who were not immediate parties to the transaction. However, under the Restatement (Third) of Property (Servitudes), the benefit of a servitude may be created to be held in gross, or as an appurtenance to another interest in property. Also, the benefit of a servitude may be granted to a person who is not a party to the transaction that creates the servitude.

Homeowner associations are entitled to enforce covenants despite owning the fact that they do not own land. See, e.g., *Streams Sports Club, Ltd. v. Richmond*, 109 Ill.App.3d 689, 440 N.E.2d 1264 (1982), *aff'd*, 99 Ill.2d 182, 457 N.E.2d 1226 (1983); *Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill.App.2d 186, 136 N.E.2d 556 (1956); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

Courts have also held that developers are entitled to enforce covenants after selling all their lots if intended to have the power to do so. See, e.g., *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 95 N.E. 216 (1911); *Christiansen v. Casey*, 613 S.W.2d 906 (Mo.Ct.App.1981).

Even where a conservation easement is not authorized by statute, courts have recognized the benefit in gross as a valid and enforceable interest. See e.g., *Bennett v. Commissioner of Food and Agriculture*, 576 N.E.2d 1365 (Mass.1991) (where beneficiary of a restriction is the public and restriction reinforces a legislatively stated public purpose, old common law rules barring creation and enforcement of easements in gross have no continuing force; question is whether bargain contravened public policy when made and whether enforcement is consistent with public policy and reasonable).

¹⁴⁴ Special rules govern servitude benefits and burdens that run to life tenants, lessees, and persons in adverse possession who have not yet acquired title.

C. Conservation Easements

1. *What is a Conservation Easement?*

Easements have been recognized as legitimate interests in land for centuries. An easement is a limited right, granted by an owner of real property, to use all or part of his or her property for specific purposes.¹⁴⁵ Where this purpose is to achieve the goal of conservation, the easement is frequently referred to as a conservation easement.¹⁴⁶ A conservation easement is thus a voluntary, legally enforceable agreement in which a landowner agrees (usually with a governmental entity or NGO) to limit the type and amount of development that may occur on his or her property in order to achieve the goal of conservation. They are legally recorded deed restrictions that “run with the land” and can be obtained voluntarily through donation or purchase from the landowner.

Traditionally, an easement was “affirmative” (carrying rights to specified actions) and “appurtenant” (attached to a neighboring parcel of land). For example, one landowner might hold an easement in the land of a neighbor, allowing him or her to cross the neighbor’s property or draw water from the neighbor’s well. In contrast to conventional easements, conservation easements are generally “negative” (prohibiting specified actions) and “in gross” (that is, they may be held by someone other than the owner of a neighboring property). While a conventional easement involves the conveyance of certain affirmative rights to the easement holder, an easement for conservation purposes involves the relinquishment of some of these rights and a conferral of power in the new holder of the rights to enforce the restrictions on the use of the property. This is a critical distinction—the landowner relinquishes the right to develop the land, but that right is not conveyed to the easement holder. That particular right (to develop the land)

¹⁴⁵ Black’s Law Dictionary, Seventh Edition (Bryan A. Garner ed. 1999).

¹⁴⁶ Depending on the type of resource they protect, easements are frequently referred to by different names—e.g., historic preservation easements, agricultural preservation easements, scenic easements, and so on.

is extinguished.¹⁴⁷ What the easement holder does acquire is the right to enforce the land-use restrictions.

To understand the concept of an easement, it is helpful to think of owning land as holding a bundle of rights—a bundle that includes the right to occupy, lease, sell, develop, construct buildings, farm, restrict access or harvest timber, and so forth. A landowner may give away or sell the entire bundle, or just one or two of those rights. For instance, a landowner may give up the right to construct additional buildings while retaining the right to grow crops. In ceding a right, the landowner “eases” it to another entity, such as a land trust. However, in granting an easement over the land, a landowner does not give away the entire bundle of ownership rights—but rather forgoes only those rights that are specified in the easement document.¹⁴⁸

2. *Appurtenant Conservation Easements*

In legal terms, conservation easements generally fall into one of two categories: (1) **appurtenant easements**; and (2) **easements in gross**. An appurtenant easement is an easement created to benefit a particular parcel of land; the rights affected by the easement are thus appurtenant or incidental to the benefited land. Put differently, if an easement is held incident to ownership of some land, it is an appurtenant easement. The land subject to the appurtenant easement is called the servient estate, while the land benefited is called the dominant estate. Unless the grant of an appurtenant easement provides otherwise, the benefit of the easement is

¹⁴⁷ Conservation easements generally extinguish development rights. However, with certain types of agreements—such as those involving *purchased development rights* (PDRs)—the development rights are not necessarily extinguished, but instead become the property of the easement holder. PDRs are generally classified as easements in gross. For a more extensive discussion of PDRs, please refer to Part I § A.6.

¹⁴⁸ The grantor of a conservation easement remains the titleholder, the nominal owner of the land. The landowner conveys only a part of his or her total interest in the land—specifically, the right to develop the land. However, the landowner retains the right to possess, the right to use (in ways consistent with the easement), and the right to exclude others. Daniel Cole, *Pollution and Property* 17 (2002).

automatically transferred with the dominant estate—meaning that it “runs with the land.”¹⁴⁹ Under the majority U.S. common law authorities, an appurtenant easement does not require the dominant and servient estates to be adjacent to one another—an easement may be appurtenant to noncontiguous property if both estates are clearly defined and if it was the parties’ intent that the easement be appurtenant.¹⁵⁰ There are some jurisdictions, however, that require the estates affected by an appurtenant easement to be adjacent.¹⁵¹ In such jurisdictions, there are a number of ways to meet—or potentially relax—the adjacency requirement while furthering the goal of private lands conservation. The following list is a brief sample of such methods:

a. Purchase by NGOs of land that can serve as adjacent estates¹⁵²

One method for meeting an adjacent lands requirement is for an NGO to acquire—by purchase or donation—land adjacent to the property to be subject to the easement. This allows the NGO’s property to be the dominant estate, and the NGO to hold the easement over adjoining lands. However, with respect to the Dominican Republic, it is unknown whether a conservation NGO could buy land in this manner for the purpose of creating a conservation easement with adjacent, private property.

¹⁴⁹ Roger Bernhardt and Ann Burkhart, *Real Property in a Nutshell* 191, 214 (4th ed. 2000). An interest “runs with the land” when a subsequent owner of the land has the burden or benefit of that interest. An appurtenant easement runs with the land since the servient estate remains subject to it after being transferred, and the dominant estate retains the benefit after being transferred. With an easement in gross, the benefit cannot run with the land as there is no dominant estate—however, provided certain requirements are met, the burden can run with the land.

¹⁵⁰ *Verzeano v. Carpenter*, 108 Or.App. 258, 815 P.2d 1275 (1991) (“[W]e agree with the majority view that an easement may be appurtenant to noncontiguous property if both tenements are clearly defined and it was the parties’ intent that it be appurtenant.”) (citing 7 *Thompson on Real Property* § 60.02(f)(4)); see also *Day v. McEwen*, 385 A.2d 790, 791 (Me.1978) (enforcing reserved “right of an unobstructed view” over servient tenement where dominant tenement was on the other side of a public road); *Private Road’s Case*, 1 Ashm. 417 (Pa.1826) (holding that a circumstance in which a navigable river intervenes between a meadow and an island is no legal reason why a way across the former should not be appurtenant to the latter); *Saunders Point Assn., Inc. v. Cannon*, 177 Conn. 413, 415, 418 A.2d 70 (1979) (holding that while an easement appurtenant must be of benefit to the dominant estate, the servient estate need not be adjacent to the dominant estate); *Woodlawn Trustees, Inc. v. Michel*, 211 A.2d 454, 456 (1965) (holding that in cases of noncontiguous parcels, the easement over the land of the servient tenement is valid and enforceable if, by means of a right of way of some sort which traverses land of another, the servient tenement benefits the dominant tenement).

¹⁵¹ Environmental Law Institute, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* 23 (2003).

¹⁵² The information in Part I § A.2 (a)–(e) is taken primarily from Environmental Law Institute, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* 23–24 (2003).

b. Creative “nexus” arguments for non-adjacent lands

Another potential method for creating a valid appurtenant easement between non-adjacent properties is to establish (e.g., by successfully arguing its existence in a court of law) an adequate nexus between the properties in question. In Costa Rica, the Center for Environmental Law and Natural Resources (CEDARENA) created an appurtenant easement between a parcel of private land and a nearby state reserve that shared the same birds.

c. Reciprocal easements

Reciprocal easements enable adjacent landowners to limit their respective land uses through easements granted to each other—a method that provides protection for both properties.¹⁵³ Working with private landowners, conservation groups in Latin America have used reciprocal easements that grant a third-party NGO the right to enforce the easement—with express authority to enter the property, monitor compliance, and seek judicial enforcement of the rights and obligations derived from the easement. Thus, the use of reciprocal easements can potentially provide a conservation NGO with enforceable rights over land, without the need for the NGO to own adjacent land.

d. Use of public lands as the dominant estate to hold an easement

In several Latin American countries, easements over private land have been created using adjacent or nearby public lands as the dominant estate. In some instances, the easements have also provided a third-party NGO with the right to enforce its terms. It is unclear whether this method of creating easements could be employed in the Dominican Republic.

e. Legal Limitations and Uncertainties to Third-Party Enforcement

¹⁵³ In order to take advantage of federal and state tax incentives, U.S. landowners must grant the conservation easement to either a governmental entity or an authorized NGO. Thus, while the use of reciprocal easements between private landowners is potentially an effective method for achieving private lands conservation, conservation incentives provided under U.S. federal and state law would not be available for this type of arrangement.

The common law—or civil code—of some jurisdictions only recognizes the right of an easement’s holder to enforce its terms. Thus, depending on the jurisdiction in question, the practice of granting a third-party NGO the right to enforce the easement may or may not survive legal scrutiny. Additionally, the relevant legal authority is often unclear as to whether the grant to an NGO of the right to monitor and enforce an easement is a real property right that runs with the land, or a personal right enforceable only against the original maker of the easement.

Under the common law adhered to in the U.S., third party enforcement of a conservation easement would be invalidated in court due to a basic principle of contract law which mandates only the parties to the contract may enforce its terms. However, many U.S. states have laws authorizing the assignment of this specific power to non-profit organizations—provided the assignment is written into the conservation easement.

3. *Conservation Easements in Gross*

Unlike an appurtenant easement, an easement in gross is not created for the benefit of any land owned by the owner of the easement, but instead attaches personally to the easement owner—regardless of whether the owner of the easement owns any land.¹⁵⁴ At common law an easement in gross could not be transferred. Today, however, there are many jurisdictions where legislation and more modern trends in the relevant common law have authorized the transferability of easements in gross.¹⁵⁵

As noted above, both an appurtenant conservation easement and a conservation easement in gross meet the legal criteria for what is known as a negative easement—an easement that prohibits the owner of the servient-estate from doing something. Conservation easements are

¹⁵⁴ Examples of typical easements in gross include the right of a non-owner to harvest timber, mine minerals, extract water or other items from the owner’s land.

¹⁵⁵ Restatement (Third) of Property, Servitudes, §4.6 (T.D. No. 4, 1994), provides that all easements in gross are assignable unless contrary to the intent of the parties. It eliminates the restriction of the first Restatement that only commercial easements in gross are assignable.

negative in character because they prevent the owner of the burdened estate from developing the land, typically in any way that would alter its existing natural, open, scenic, or ecological condition. However, while the common law has generally recognized and enforced certain limited types of negative easements, it has generally refused to enforce negative easements in gross. Due to doubts over the validity and transferability of negative easements in gross at common law, statutes have been enacted in most U.S. states authorizing conservation easements—both in gross and appurtenant.¹⁵⁶ Servitudes in the French Civil Code, part of the legal authority of the Dominican Republic, do not specify whether or not a third party, other than the servitude (easement) holder, can enforce its requirements. Servitudes are mainly discussed within the context of adjacent parcels of land. However, the French Civil Code also goes into great detail on usufructs, a concept that is foreign to English common law traditions, but seems similar to other property definitions, such as easements in gross and particularly profits.¹⁵⁷ Perhaps usufructs could involve conservation requirements in the Dominican Republic, and serve as a functional equivalent to easements in gross or profits, in which a third party is somehow in charge of or given the use of a private individual's parcel of land.

4. *Tax Incentives for Conservation Easements*

What incentive does a private landowner have to convey valuable development rights to either a public or private trustee? In the U.S., along with the desire of landowners to preserve undeveloped land, the answer is often money—received in the form of tax benefits (e.g., income, property, gift and estate taxes) or cash payments. For instance, U.S. landowners who donate conservation easements that satisfy requirements of the Internal Revenue (IRS) Code can take

¹⁵⁶ Jesse Dukeminier and James E. Krier, *Property* 856 (4th ed. 1998). Traditionally, courts have disfavored interests conveyed “in gross” and negative easements because they can cloud title and may raise recordation problems—the difficulty being notice to future landholders. However, in the U.S. legislation with proper recordation requirements and limitations upon those who may hold these kinds of interests have largely overcome these objections.

advantage of federal income and estate tax benefits. To satisfy the relevant section of the Internal Revenue Code, a conservation easement must be granted—

- a. to a governmental entity or charitable organization that meets certain public support tests; and
- b. exclusively for conservation purposes, which include (1) the preservation of open space for scenic enjoyment pursuant to a clearly delineated governmental conservation policy; (2) the preservation of land for outdoor recreation; (3) the protection of the natural habitat of wildlife or plants; and (4) the preservation of historically important land or a certified historic structure.¹⁵⁸

If a conservation easement satisfies these requirements, the grantor may then receive a charitable deduction for the difference in property's value before the easement was granted compared to the property's value after the granting of the conservation easement. This is often referred to as the “before and after” test.¹⁵⁹ In addition to federal tax incentives, U.S. landowners can frequently take advantage of a variety of state tax incentives.

Relating to the feasibility of employing tax incentives in the Dominican Republic, according to one source from 1990, there is no annual land tax in the Dominican Republic. However, land transfers are assessed a 4 percent tax.¹⁶⁰ In addition to this tax, there is a high transaction cost associated with clearing title in the Dominican Republic for unregistered land.¹⁶¹ In fact, “the situation on the ground frequently does not match the legal status of the parcel, often

¹⁵⁸ IRS Code § 170(h).

¹⁵⁹ For federal income tax purposes, this difference in value is a charitable deduction which can be used for a period of up to 5 years to reduce the income tax of the grantor of the easement. The maximum deduction in any year is 30 percent of the grantor's adjusted gross income. For federal estate tax purposes, the grant of the easement results in a lower valuation of the property—and thus, a lower valuation of the estate to which the federal estate tax will be applied. Under the Farm and Ranch Protection Act (1997), IRS Code § 2031.c, landowners can receive an exclusion from federal estate taxes for up to 40 percent of the value of their land under a conservation easement. Only easements granted in perpetuity are eligible for federal tax benefits.

¹⁶⁰ Strasma at abstract.

¹⁶¹ *Id.* at 7.

because the present holder does not know how to regularize his status, or cannot afford the significant transactions costs involved.”¹⁶²

Other taxes, such as income taxes, exist in the Dominican Republic. It is conceivable that taxes could be used as incentives for private lands conservation in the form of tax breaks as the Natural Resources Department may use incentives for conservation purposes.¹⁶³ However, it seems that statutory authorization would be needed for conservation easements to contain incentives. The Congress in the Dominican Republic is primarily concerned with fiscal reform at the moment as it is experiencing an income shortage.¹⁶⁴ Therefore, it seems unlikely that it would be willing to pass legislation providing tax incentives for private landowners to donate or sell land for conservation. Moreover, the Dominican Republic already has in place tax exemptions for NGOs that buy land, especially those organizations with conservation in mind. Rural areas are usually tax-exempt from the General Tax Direction as well, and so private landowners in these places would probably not benefit from a tax incentive for conservation in the first place.

One avenue that would probably not require specific legislation would be for a conservation NGO to offer, as incentive, the payment of registration of title as the high transaction cost frequently stops people in the Dominican Republic from securing their land.

5. *The Uniform Conservation Easement Act*

In order to facilitate the development of state statutes authorizing landowners to create and convey conservation easements and government agencies and nonprofits to hold such easements, in 1981 the National Conference of Commissioners on Uniform State Laws drafted

¹⁶² *Id.* at 16.

¹⁶³ *The Dominican Republic: From Columbus to the 1900's; Environmental Law.*

¹⁶⁴ García. Mr. García also mentioned that FMP is also interested in implementing the first private lands conservation program in the Dominican Republic.

the Uniform Conservation Easement Act (UCEA). The Act's primary objective is to enable "private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments."¹⁶⁵

The UCEA defines "conservation easement" as "[a] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include: (1) retaining or protecting natural, scenic, or open-space values of real property; (2) assuring its availability for agricultural, forest, recreational, or open space use; (3) protecting natural resources; (4) maintaining or enhancing air or water quality; or (5) preserving the historical, architectural, archeological, or cultural aspects of real property."¹⁶⁶

The UCEA has made conservation easements more certain devices by eliminating several common law impediments. Specifically, the UCEA provides that a conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is no privity of estate or of contract.¹⁶⁷

A unique feature of the Act is the "third-party enforcement right." Under the Act, an easement may empower an entity other than an immediate holder to enforce its terms. The third-party must be a charitable organization or governmental body eligible to be a holder.

¹⁶⁵ UCEA, Prefatory Note, 12 U.L.A. 166 (1996). An online copy of the UCEA is available at the following address: <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.htm>.

¹⁶⁶ UCEA, §1(1)—Definitions.

¹⁶⁷ § 4, 12 U.L.A. 179.

Additionally, one organization may own the easement, but delegate enforcement to another, provided the terms of the easement allow it.

6. *Purchased Development Rights*

In the U.S., purchased development rights (PDR) are voluntary legal agreements that allow owners of land meeting certain criteria to sell the right to develop their property to local governmental agencies, a state government, or to a nonprofit organization. A conservation easement is then placed on the land. This agreement is recorded on the title to permanently limit the future use of the land. A PDR is thus an interest in real property that is nonpossessory and entitles its holder to enforce certain land use restrictions or to enforce certain rights to public use or access upon the holder of the possessory interest.¹⁶⁸

Under a PDR agreement, the landowner retains all other ownership rights attached to the land. The buyer essentially purchases the right to develop the land and retires that right permanently, thereby assuring that development will not occur on that particular property. Used strategically, a PDR program can be an effective tool to help maximize a community's conservation efforts. Financial support for PDR programs can be raised through a variety of mechanisms—including bond initiatives, private grants and various taxation options. It is not clear whether PDR programs would be feasible in the Dominican Republic.

D. Leases, “Leaseback” Agreements, and Reserved Life Interests

Long-term lease agreements between a private landowner and a conservation NGO or governmental agency are another potential method for achieving the goal of private lands

¹⁶⁸ At common law PDRs closely resemble negative easements in gross. With the exception of commercial easements in gross, easements in gross were not transferable and expired with the holder. These common law and statutory impediments to the use of PDRs have been addressed in those states that have enacted the UCEA. In addition to providing protection against being extinguishment, for PDRs drafted as conservation easements under its provisions, the UCEA provides the basis for claiming both federal and state income and estate tax benefits. See Maureen Rudolph and Adrian M. Gosch, Comment, A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications, 4 GREAT PLAINS NAT. RESOURCES J. 143, 146 (2000).

conservation. A lease agreement can enable a conservation NGO to temporarily possess the property in exchange for rent payments. Conservation objectives can be met by including land use limitations in the lease agreement.¹⁶⁹

A “leaseback” agreement allows a landowner to donate or sell land in fee simple and immediately lease it back for an agreed use and period. In this case a landowner transfers title to the land to a conservation NGO or governmental agency. As part of the agreement, the conservation NGO leases the land back to the owner using a long-term lease, subject to conditions designed to ensure conservation of the land. Breach of the lease could enable the conservation NGO to terminate the lease and take possession of the land.

A landowner could also transfer fee simple title to the land to a conservation NGO (by donation or sale), but reserve a life interest in the land. This method would enable the landowner to remain undisturbed on the land for life. The landowner also has the assurance that without further legal action the conservation NGO will assume control of the land upon his or her death.

While foreigners can hold leases, it is unclear whether leases and lease-leaseback agreements could be employed as legal tools for conservation in the Dominican Republic. However, this option, while not ideal, appears to be a possibility worth further research and exploration.

E. Profits à Prendre

A profit à prendre is a common law interest in land that gives a right to enter and take part of the land or something from the land.¹⁷⁰ Although it is not commonly used for

¹⁶⁹ Environmental Law Institute, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* 30 (2003). In addition to stipulating detailed use-limitations, the lease could include a base-line ecological inventory of the land, using written descriptions, data, photographs, graphs, maps, etc. Breach of the use-conditions would normally entitle the landowner (or his or her heirs) to terminate the lease. This arrangement would provide the landowner with ongoing control over land use while providing some security of tenure to the conservation NGO.

conservation purposes, a profits à prendre have the potential to facilitate the conservation of private lands. For instance, a landowner that wishes to protect the timber on his or her property could grant a profit à prendre to a conservation group with respect to that timber.¹⁷¹ The conservation organization would have the exclusive right to decide whether and what trees to cut. By granting such a right to a conservation group, the landowner would prevent future owners of the land from harvesting the trees, since that right has been given away. Under the common law, a landowner can grant a profit à prendre to anyone—there is no requirement that the holder of a profit à prendre own adjacent property.¹⁷²

A landowner creates a profit à prendre by granting it in writing to the profit à prendre holder. The landowner specifies precisely what the holder is allowed to enter the land to take. Once the landowner has granted a profit à prendre, he or she must respect its terms. The profit à prendre holder can sue if the owner deals with the land in a way that detracts from the rights of the profit à prendre holder. The holder of a profit à prendre can also sue anyone who interferes with the profit à prendre.¹⁷³

A profit à prendre document is designed to outlive the landowner—and perhaps even the profit à prendre holder. In creating a profit à prendre, it is thus essential to consider potential conflicts between a landowner and a profit à prendre holder and describe exactly what the parties

¹⁷⁰ See 28A C.J.S. Easements § 9 (noting that a “right to profits à prendre is a right to take a part of the soil or product of the land of another. It is distinguishable from a pure easement.” Historically, there were five types of profits à prendre depending on the subject matter of the profit: (1) rights of pasture—where the taking is done by the mouths of the grazing animals; (2) rights of piscary—to harvest the fish; (3) rights of turbary—to cut turf or peat as fuel; (4) rights of estover—to take wood necessary for furniture for a house; and (5) a miscellaneous group referring to the taking and using of sand, gravel, stone, etc. A profit à prendre cannot generally be used to take minerals.

¹⁷¹ To help ensure its legal validity, a profit à prendre designed to facilitate conservation should be used only where the protected interest is something that can be taken from the land—e.g., timber, fish, pasture, or something similar. Otherwise, it is possible a court would construe the document as an easement and thus apply the far much more restrictive rules governing easements. However, despite this limitation it may nonetheless be possible to use a profit à prendre to protect things that are not included in these categories of removable items. For instance, a landowner could protect spotted owls by granting a profit à prendre to a conservation organization for the harvest of timber.

¹⁷² Profits à prendre of this kind are called *profits en gross*.

¹⁷³ Conversely, the profit à prendre holder must respect the rights of the landowner. The landowner can sue the profit à prendre holder if the holder interferes with the landowner’s rights.

intend in the document itself. To protect the profit à prendre holder if the land is subsequently sold, the profit à prendre should be registered in the appropriate land title office. The profit holder can lease, sell, give away or bequeath the profit à prendre to someone else. The holder can also terminate a profit à prendre by giving a written release to the landowner, which would then be registered in the land title office.

As discussed above in the conservation easements in gross section, it seems logical that a profit à prendre-like instrument, such as usufructs, could be employed in the Dominican Republic as a means for private lands conservation. However, profits à prendre were not specifically mentioned in property provisions of the French Civil Code, and so it is not known to what extent usufructs could resemble these legal instruments or to what extent profits à prendre could be created in the Dominican Republic.

F. The French Civil Code & Conservation Easements in the Dominican Republic

The Civil Code of the Dominican Republic (Codigo Civil de la Republica Dominicana) is largely based on the French Civil Code. Indeed, many parts are lifted directly from the French version and incorporated into Dominican Republic law. The sections of the Civil Code of the Dominican Republic that outline property law, although in Spanish, appears to correspond directly to the French Civil Code as both documents use the same Title, Chapter, Article numbers, and subject matters in the same order. In fact, the only significant changes seem to be instances in which the word France or French is replaced by the words Dominican Republic in the Dominican Republic Civil Code. Moreover, because Dominican Republic lawyers worked on the translations from French to Spanish of the French Civil Code, beginning in 1855, and the translations do not always include the correct nuances of legal meaning, there is a presumption in

Dominican Republican law that the French Civil Code trumps the Dominican Republic Code whenever there is a conflict in meaning.¹⁷⁴ Therefore, this memo will rely on a 1994 edition of the translated French Civil Code as though it were Dominican Republic law. The French Civil Code discusses property and various ownerships, defining property as “real or personal (immovable or moveable).”¹⁷⁵ Some of the more pertinent provisions of the French Civil Code are briefly outlined below:

Property and Ownership

- Real property includes land and buildings.¹⁷⁶
- Servitudes are realty.¹⁷⁷
- Persons generally have free disposition of their property, unless certain limitations established by law are applicable.¹⁷⁸
- All unclaimed property belongs to the state, including property of people who die intestate, or abandoned property of successions.¹⁷⁹
- Rights of ownership or rights of enjoyment or land services may be had in property.¹⁸⁰
- Ownership is absolute, with the exception that it can be yielded for public purposes and with just compensation.¹⁸¹

Acquiring Property

- Ownership of land is acquired and transferred by succession, by inter vivos or testamentary gift, and as the result of obligations.¹⁸²
- Ownership can also be acquired by accession or incorporation, and prescription.¹⁸³

¹⁷⁴ MODERN LEGAL SYSTEMS CYCLOPEDIA, at 7.140.18, § 1.1(C) (2).

¹⁷⁵ THE FRENCH CIVIL CODE, art. 516 (Fr.).

¹⁷⁶ *Id.* at art. 518.

¹⁷⁷ *Id.* at art. 526.

¹⁷⁸ *Id.* at art. 537.

¹⁷⁹ *Id.* at art. 539.

¹⁸⁰ *Id.* at art. 543.

¹⁸¹ *Id.* at art. 544-545.

¹⁸² *Id.* at art. 711.

¹⁸³ *Id.* at art. 712.

- Property lacking masters is owned by the State¹⁸⁴

The above two sections of the French Civil Code seem similar to most English and American common law country property laws. Most importantly, the French Civil Code appears to recognize “fee simple absolutes” and servitudes on land. Thus, it seems likely that statutory authority for conservation easements or other legal instruments similar to servitudes employed for private lands conservation would withstand judicial scrutiny, and it is at least plausible that legal instruments created without legislative permission could stand the test of Dominican Republic courts.

Usufructs

- Usufruct is the right to enjoy things of another, but with the responsibility of conserving it.¹⁸⁵
- Usufructs are created by law or by the will of man.¹⁸⁶
- Usufructs can be established unconditionally, or until a certain time, or on some condition.¹⁸⁷
- Usufructs can be established on any personal or real property.¹⁸⁸
- A usufructuary has the right to enjoy any kind of fruits, including natural, cultivated or lawful ones.¹⁸⁹
- Natural fruits are defined as the spontaneous produce of the earth.¹⁹⁰
- In cases in which the usufruct rights are not defined relating to tree extraction, the usufructuary may only use trees uprooted or broken by accident in order to make obligated repairs; he may fell them if it is necessary, but only with the acknowledgement and permission of the owner that it is necessary.¹⁹¹

¹⁸⁴ *Id.* at art. 713.

¹⁸⁵ *Id.* at art 578.

¹⁸⁶ *Id.* at art 579.

¹⁸⁷ *Id.* at art 580.

¹⁸⁸ *Id.* at art 581.

¹⁸⁹ *Id.* at art. 582.

¹⁹⁰ *Id.* at art. 583.

¹⁹¹ *See id.* at art. 592.

- A usufructuary may also lease, sell, or gratuitously grant his right.¹⁹²
- An owner cannot harm the rights of a usufructuary.¹⁹³
- A usufruct is extinguished through the natural death of the usufructuary, the expiration of the grant, the joining in the same person of the capacities of usufructuary and owner, non-use of the right for thirty years, or the total loss of the thing.¹⁹⁴

It is possible to imagine a situation in which a conservation NGO could become a usufructuary—for example, enjoying the right to trees of a private landowner. This scenario seems similar to situations in which profits à prendre are used for private lands conservation. However, it is unknown whether or not this could be implemented in practice. More research is needed in this area, and it would be helpful to consult a local attorney of the Dominican Republic to learn whether or not these provisions are followed as they are in other countries following French Civil Law. Additionally, it would be helpful to understand how narrowly or broadly usufructs are construed under French Civil Law traditions, especially in the Dominican Republic.

Use and Habitation

- Special laws regulate the use of woods and forests.¹⁹⁵

Servitudes

- A servitude is defined as “a charge imposed on land for the use and utility of land belonging to another owner.”¹⁹⁶
- Servitudes do not establish “pre-eminence” of one land parcel over the other land parcel.¹⁹⁷
- Servitudes are derived from the natural situation, or by law, or from agreements between the owners.¹⁹⁸

¹⁹² *Id.* at art. 595. There are other restrictions and rights related to leases listed in the French Civil Code, but it would be necessary to consult local attorneys in the Dominican Republic in order to confirm that regulations and laws concerning the lease of a usufruct are being followed.

¹⁹³ *Id.* at art. 599.

¹⁹⁴ *Id.* at art. 617.

¹⁹⁵ *Id.* at art. 636.

¹⁹⁶ *Id.* at art. 637.

¹⁹⁷ *See id.* at art. 638.

- Servitudes established by law are in place for individual, public or communal utility.¹⁹⁹
- Servitudes for public or communal utility “have as their subject footpaths along navigable or floatable streams and construction or repairs of roads and other public or communal works.”²⁰⁰
- Owners are allowed to establish servitudes on their properties, or in favor of their properties, in any fashion that they choose so long as the servitudes do not contravene public policy. Additionally, servitudes are regulated by the instrument creating them; without an instrument, by rules contained in the French Civil Code.²⁰¹
- Servitudes are apparent or non-apparent. Non-apparent servitudes do not have an external sign of their existence.²⁰²
- Continuous non-apparent servitudes, apparent or non-apparent discontinuous servitudes, are established only by deeds.²⁰³
- A servitude ends if it is not used for 30 years.²⁰⁴

This section of the French Civil Code, dealing with servitudes, is highly instructive for a conservation NGO if these provisions are replicated and adhered to in the Dominican Republic. It appears that negative easements, or non-apparent easements, are recognized if they are appurtenant. Perhaps a conservation easement could be recorded in deeds in the Dominican Republic if the intent of the contracting parties was explicit. The language of the statutes does not provide any insight into whether or not conservation easements in gross, or negative easements in gross, could be used in the Dominican Republic. However, The Nature

¹⁹⁸ *Id.* at art. 639.

¹⁹⁹ *Id.* at art. 649.

²⁰⁰ *Id.* at art. 650.

²⁰¹ *Id.* at art. 686.

²⁰² *Id.* at art. 689.

²⁰³ *Id.* at art. 691.

²⁰⁴ *Id.* at art. 706

Conservancy is apparently working on applying conservation easements in the Madre de las Aguas Conservation Area.²⁰⁵

G. Other Tools / Methods in Place

Concerning the Dominican Republic and conservation, it has been noted that:

The absolute land rights guarantee under the Torrens System has led to problems with legal actions oriented toward protecting the public interest. Environmental planning and social issues have continued to alter private property rights. Although the legal basis of the system is still the same as the one introduced in 1920, during the period from 1920 to 1997 the principle of the social function of property has been introduced in the constitution and in special legislation, which has established limits to property rights in response to the needs of agrarian reform, natural resources, forest land conservation, water management, and expropriation.²⁰⁶

The following are legally protected areas in the Dominican Republic as of 2003: Nalga de Maco National Park, Armando Bermúdez National Park, José del Carmen Ramirez National Park, Juan B. Perez Rancier National Park, and the Ebano Verde Scientific Reserve.²⁰⁷ The most important of these areas are the Armando Bermúdez National Park and the Juan B. Perez Rancier National Park as they cover about 25 percent²⁰⁸ of the most important mountain range in the Dominican Republic, the Cordillera Central, one of the three mountain ranges in the country.²⁰⁹ In general, the parks protect natural species, forests, and the watersheds of the Dominican Republic's major river systems.²¹⁰

In the 1970s, the Dominican Republic began a trend of enacting conservation legislation. For example, law 627 of 1977 pronounced:

²⁰⁵ *Madre de las Aguas Conservation Area*, available at <http://nature.org/wherewework/Caribbean/dominicanrepublic/work/art8531.html> (hereinafter *Madre*).

²⁰⁶ Gil at 37.

²⁰⁷ McPherson at 43, fn 2.

²⁰⁸ *Id.* at 26.

²⁰⁹ *Id.* at 25.

²¹⁰ *Id.* at 37.

[It is of] national interest for the State to use, protect, and acquire lands in all mountainous areas of the country, including the Cordillera Central, the Sierra de Bahoruco, the Sierra de Neyba, the Sierra de Martín García, the Sierra de el Seybo, and the Cordillera Septentrional.²¹¹

This entire region was placed under a special protective jurisdiction to be managed by FORESTA and the National Institute of Hydraulic Resources (INDHRI), the institution responsible for the country's dams. With the implementation of the National Parks Directorate (Dirección Nacional de Parques), numerous protected areas were formed in the past two decades. The Dominican Republic government has set aside at least 61 national parks, scientific reserves, and ecological buffer zones. Recent data indicates that 16 percent of the land and 12 percent of the territorial waters in the Dominican Republic are protected.²¹²

The National Congress of the Dominican Republic also passed new environmental laws creating a Department of Environment and Natural Resources, which defines environmentally-related terms, creates the Natural Resources Department as the governing body, and establishes five divisions of the Natural Resources Department, one of which is responsible for protected areas and biodiversity. Other government entities that are now subject to the control of the Natural Resources Department include the National Directorate of Parks, the Environmental Department of the National Planning Office, the National Institute of Forestry Resources, the national Institute of Environmental Protection, and the Office for the Protection of the Earth's Crust of the Department of State of Public Works. The methods that the Natural Resources Department may use to manage the Dominican environment and its natural resources include incentives.

Also, a "National System of Protected Areas," including forests, wildlife refugees, and beaches are subject to the control of the Natural Resources Department; and the State is

²¹¹ *Id.* at 153.

²¹² *Id.* at 154.

authorized to create agreements for the co-management and/or the management of protected areas with interested entities as long as the interests of conservation are paramount.²¹³

One source of information noted that “[t]here are no legal means that could prevent or protect private land for development” and that “[t]he only mechanisms available would be the authorizations and permits required by the Secretary of State of Environment and other municipal regulations required prior to start any kind of development project.”²¹⁴ The Ministry of Environment is then in charge of enforcing any regulations.

Countervailing interests to conservation include the increase of interest among urban developers and real estate investors in the farms located in close proximity to urban areas. Yet, one promising piece of information discloses the fact that easements were considered in the environmental law of the Dominican Republic from August 2000. However, not much is currently occurring concerning conservation easements on the ground in the Dominican Republic today. The only known instance concerning these issues comes from the *Instituto Nacional de Recursos Hidraulicos* (INDRHI) National Institute of Hydraulics Resources, which is contemplating environmental (conservation) easements concerning the use and payment of water. Nonetheless, this area has many unresolved issues and it appears that many in the Dominican Republic are not currently interested in implementing conservation easements.

VI. FEASIBILITY OF INTRODUCING NEW TOOLS AND RECOMMENDATIONS

While it is clear that the Dominican Republic is accomplishing conservation, the extent to which private lands conservation is being achieved or could be achieved remains unclear.

²¹³ *Environmental Law Streamlines Development Process and Protects Natural Resources*, available at www.natlaw.com/pubs/spdren1.htm (hereinafter *Environmental Law*).

²¹⁴ García.

Unfortunately, this report is based primarily on secondary sources; and most citations to primary law are through other writers' interpretations. Additionally, it is difficult to know how interests and encumbrances in land are governed in the Dominican Republic because the sources relied on for this report did not address how easements, servitudes, and covenants are adjudicated. It is certain that the Dominican Republic does have some law regarding these legal instruments because they are mentioned briefly in the secondary sources explored, and with more detail in The French Civil Code. It also seems possible that these instruments are similar to the ones employed in the United States because the majority of land law comes from the Land Registration Law, which is somewhat based on United States land law. Additionally, from the wording of the statutes contained in The French Civil Code, it is clear that at least some forms of negative servitudes (also known as easements) are recognized in the Dominican Republic. Thus, it is at least probable that negative appurtenant easements could be created for private lands conservation in the Dominican Republic. However, it is unknown whether negative easements in gross, restrictive covenants, or equitable servitudes could be used. While foreigners can hold leases, it is also unknown whether leases and leasebacks could be employed as legal tools for conservation in the Dominican Republic. Likewise, profits à prendre may or may not be feasible for private lands conservation. More research is needed in this area in particular, as many pertinent pieces of legislation, such as the Land Registration Law, were either unavailable or only available in Spanish.

As little mention of conservation easements was found (other than a brief reference on the TNC website), and numerous land registration problems exist, the best recommendation would be for conservation NGOs to work in conjunction with the Dominican Republic in establishing agreements to implement private lands conservation (assuming that this is not

already being accomplished) with the use of incentives, such as land transfer tax breaks. Another recommendation would be for TNC to explore whether the legislature in the Dominican Republic is receptive to conservation legislation specifically enacting conservation easements, as many states in the United States have done. The legislature seems to be receptive to promoting conservation, and so it may be willing to enact a statute that expressly allows conservation easements. This enactment may prove to be particularly useful, given the laws on the books that can take away “excessive” or “idle” land from private landowners. Although the country is concerned with agrarian reform, agricultural needs, and redistributing land to “peasants” without land, it also seems to recognize its conservation problems and needs.

VII. QUESTIONS UNANSWERED

1. If conservation easements were valid in the Dominican Republic, exactly how would these legal instruments be created? Are they negative easements in gross or appurtenant? Are equitable servitudes and restrictive covenants possible?
2. What other legal instruments could be available for private lands conservation in the Dominican Republic?
3. To what extent does the Land Registry Law enumerate the rules governing interests in and encumbrances upon land?
4. To what extent would restrictions on land, such as the Idle Lands Law, affect conservation areas?

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** These materials are available in hard copy form in bound appendix.*