Technical Report: Land management to preserve biodiversity: Mediterranean case studies, with a focus on Real Environmental Obligations in France

This study was carried out between September 2022 and September 2023 by Arthur Vaugeois, a Master's student studying Environment, Territory and Landscape at the University of Tours, as part of a work-study contract at Plan Bleu/RAC (UNEP/MAP).

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Table of contents

Table des illustrations

BOXES

FIGURES

List of Acronyms

CRF:	Common Regional Framework
DIR:	French Interdepartmental Road Directorate (*Direction interdépartementale des routes*)
DREAL:	French Regional Directorate for Environment, Development and Housing (*Direction régionale de l'environnement, de l'aménagement et du logement*)
EPCI:	Public inter-municipal cooperation body (*Établissement public de coopération intercommunale*)
FCEN:	Federation of natural space conservatories (*Fédération des conservatoires d'espaces naturels*)
ICZM:	Integrated Coastal Zone Management
IUCN:	International Union for Conservation of Nature
LPO:	French League for the Protection of Birds (*Ligue pour la protection des oiseaux*)
OECM:	Other Effective area-based Conservation Measures
ORE:	Real Environmental Obligation (*Obligation réelle environnementale*)
PLU:	French local urban development plan (*Plan local d'urbanisme*)
RTE:	French power transmission network (*Réseau du transport d'électricité*)
SNB:	French National biodiversity strategy (*Stratégie nationale pour la biodiversité*)
SNCF:	French national railway company (*Société nationale des chemins de fer*)

I. The need for a tool that addresses the obstacles posed by land management in environmental protection

This study was carried out by Plan Bleu to develop the use of legal tools to better achieve the objectives of the Barcelona Convention, adopted in 1976. The Convention was signed by 22 Contracting Parties, with the aim to "prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area"[1] and to "protect and enhance the marine environment in that Area so as to contribute towards its sustainable development"[2]. As a Regional Activity Centre of the UNEP/Mediterranean Action Plan, Plan Bleu is a body that informs and assists States in implementing the Convention.

These legal tools, and in particular those related to land management, are particularly important at a time when good governance of territories is more necessary than ever in the face of climate challenges and environmental degradation. More specifically, this publication is based on the groundwork already laid out by the United Nations Decade on Ecosystem Restoration 2021-2030, which "aims to halt the degradation of ecosystems, and restore them to achieve global goals."[3] and "positions restoration as a major nature-based solution towards meeting a wide range of global development goals and national priorities [...]"[4].

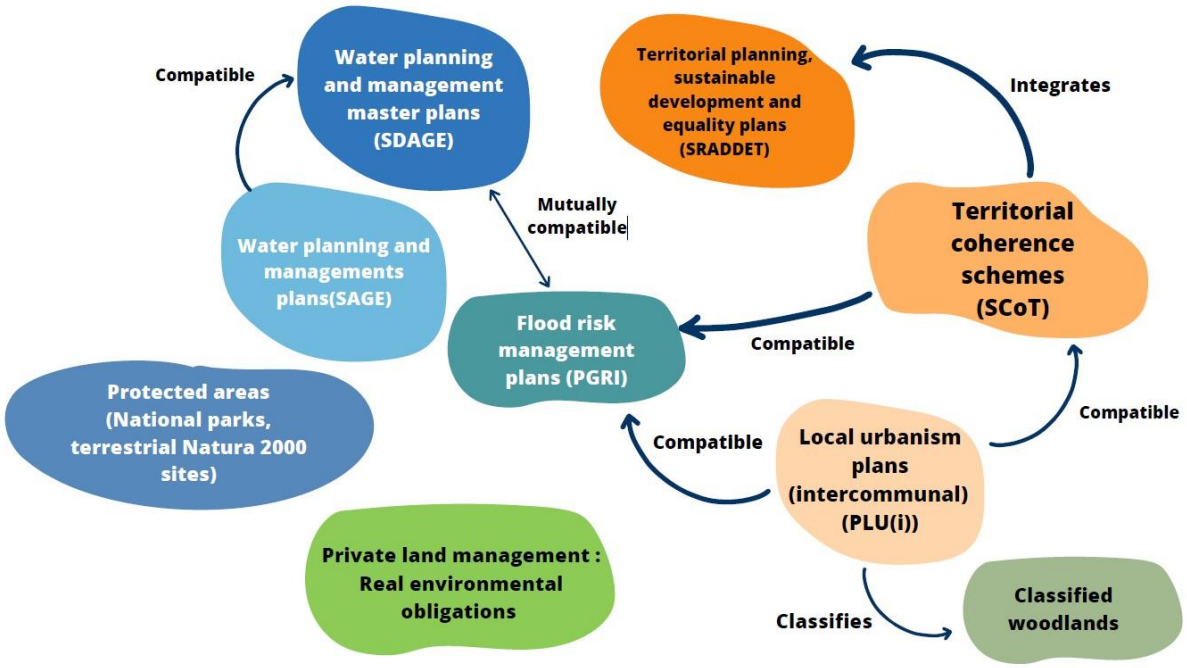
In France, as elsewhere, environmental issues are now pervasive, causing us to question every aspect of our daily lives. Everyone, everywhere, is witnessing their daily lives turned upside down by climate issues and the questions raised by the current situation. To meet these challenges, land needs to be effectively managed according to sound ecological standards and to ensure that it meets the environmental objectives set by governments, such as those set out in the Paris Agreement.

French public environmental action has been working on this task for several decades, especially since the "clean river" scheme of the 1970s, which led to the emergence of branch, river and urban area contracts; then with the application of European directives, which are important factors in the diversity of French environmental tools, such as European Directive 91/271/EEC concerning urban waste water treatment, the "Habitats" Directive (European Directive no. 92/43/EEC on the conservation of natural habitats and of wild fauna and flora), and the "Birds" Directive (European Directive no. 2009/147/EC on the conservation of wild birds). In 2007, the *Grenelle de l'environnement* brought France in line with the European Union's environmental law, as part of a process of "institutional progressivism" (Lacroix, V. & Zaccai, E., 2010).

However, the responses put forward by governments, and to a certain extent by France itself, encounter a variety of problems. Environmental management of territories can be at odds with land management issues. The same is true of coastal zone management, in which the Integrated Coastal Zone Management (ICZM)[5] tool plays a role. When it comes to land use planning, several binding legal documents enable public bodies (including the national government, local authorities and public inter-municipal cooperation bodies) to manage land and land use. Zoning is used to identify areas to be protected from urban development, particularly within local urban development plans. The *Schémas de cohérence territoriale* (territorial coherence plans) set out sustainable development guidelines and can now be used as territorial climate, air and energy plans, etc.

[1] United Nations Environment Programme (2022). The Barcelona Convention and its Protocols Available at: https://www.unep.org/unepmap/who-we-are/barcelona-convention-and-protocols. (Accessed on 22 November 2022).
[2] Id.
[3] United Nations Decade on Ecosystem Restoration (2022) About the United Nations Decade. Available at: https://www.decadeonrestoration.org/about-un-decade. (Accessed on 22 November 2022).
[4] UNESCO (2022). United Nations Decade on Ecosystem Restoration. Available at: https://www.unesco.org/en/ecosystems-restoration-decade. (Accessed on 23 November 2022).
[5] Integrated Coastal Zone Management is defined in the Barcelona Convention Protocol on Integrated Coastal Zone Management (ICZM) in the Mediterranean as "a dynamic process for the sustainable management and use of coastal zones, taking into account at the same time the fragility of coastal ecosystems and landscapes, the diversity of activities and uses, their interactions, the maritime orientation of certain activities and uses and their impact on both the marine and land parts." The Protocol is available online at: https://www.unep.org/unepmap/who-we-are/contracting-parties/iczm-protocol.

Figure 1. The contribution of various development plans to ICZM in France



Source: Author

When it comes to actions that focus on specific plots of land, several options are available to actors involved in biodiversity protection and land management. Beyond the purchase of land, which is often difficult, at least four tools can be identified:

- The right of pre-emption, which gives its beneficiary priority in the purchase of land when its owner disposes of it. For example, French *départements* have a right of pre-emption over sensitive natural areas.
- Expropriation, which needs to be associated with a declaration of public interest, and is difficult to obtain.
- Contractual tools:
  - The emphyteutic lease, with a maximum term of 99 years, which gives the non-owner co-contractor rights to the land that are basically identical to those of the owner.
  - The rural lease with environmental clauses, whereby an owner gives farmers permission to use their land, provided they commit to adopting an ecological approach to farming.

However, even if there are many objectives and the actors have good intentions, land management and use will always be hampered and limited by property rights.

In *Regulating coastal zones: international perspectives on land-management instruments*, Rachelle Alterman and Cygal Pellach provide a cross-national comparative analysis of coastal zone management (Alterman, R., & Pellach, C., 2021). Their findings include the problem of private property as an obstacle to the extension of the public domain in coastal areas, which could ultimately lead to imbalances in coastal management. The solutions cited as examples in the book are fairly limited in scope, and primarily include expropriation, like in **Italy**, which remains a lengthy process that can be challenged on appeal, as mentioned above, or a ban on concession contracts on coastlines that are part of the public domain, particularly in the case of seaside resorts[6].

On the other hand, the private use of coastal zones for recreational purposes, such as hotels or seaside resorts (Alterman, R., & Pellach, C., 2021), or for personal use, may fall outside the scope of state action and result in

[6] *Disciplina della tutela e dell'uso della costa* (2010), ART0012. Available at: https://www.edizionieuropee.it/LAW/HTML/135/pu6_04_010.html#. (Accessed on 2 February 2023).

unsustainable management. In this respect, **in Malta**, a Court of Appeal decision[7] implied that a landowner could dispense with any rules of proper management of their coastal land, unless, as in the case of the decision, the deed of transfer which proved ownership of the property imposed management conditions (in the Maltese case, the deed of ownership/transfer is absolutely necessary as the legislator issues a simple presumption, reversible by this deed, stipulating that coastal zones belong to the public domain). Also, in **Malta**, another technique used to manage private property (in addition to expropriation, which the Maltese government can also use[8]) is to refrain from extending the public domain, but to ensure the proper upkeep of private plots by means of general but legally binding regulations. In this sense, the Public Domain Act[9] of 2016 states that "the principal obligation, which burdens an owner of a thing in the public domain, whether owned by the Government or by a voluntary organisation or by a private interest, is to preserve its substance with regard both to matter and to form." Performance indicators will be needed to assess the application and impact of this act. In **Spain,** protests and conflicts arose as a result of the 1988 Coastal Law, which automatically transferred previously privately-owned plots into the public domain in an effort to redefine the coastline. Despite an amendment to the law by the Spanish Parliament in 2013, legal uncertainty persists on the issue.

The observation that private property is a hindrance is therefore neither new, nor specific to France, and while there are various techniques for dealing with the potential hurdles it may pose to sustainable land management, these are often cumbersome procedures, or highly contested decisions.

In France, in response to this problem, an instrument needed to be created that would enable actors responsible for environmental protection to manage land without necessarily having to acquire ownership of a property, which could then represent a sustainable solution. A local authority can have a private domain that it decides to manage sustainably, just as an approved environmental protection association can own land and manage it in the same way. The French legislator's concrete response to this need for an alternative was the Real Environmental Obligation (ORE - *Obligation réelle environnementale*).

[7] Malta Court of Appeal, Emmanuele Luigi Galizia v. Emmanuele Scicluna, 30 April 1886.
[8] See Alterman, R. & Pellach, C. (2021) and Raymond Vella and v. Kumissarju ta' l-Artijiet, 2004.
[9] Republic of Malta (2016). *Public Domain Act.* Available at https://www.parlament.mt/media/37330/act-xxv-civil-code-amendment-no-3-act.pdf (Accessed on 3 February 2023).

II. Overview of the Real Environmental Obligation

A. ORIGINS OF THE ORE AND SIMILAR APPROACHES

The Real Environmental Obligation is a relatively new tool in French law. It emanates from Act no. 2016-1087 of 8 August 2016 for the restoration of biodiversity, nature, and landscapes. With this law, the legislator decided to address a number of key environmental objectives: the protection of biodiversity, the preservation of sensitive species and areas, and the transformation of society in this respect. To meet these objectives, the law confirmed and put in place a number of principles and tools, such as the principle of non-regression, which was discussed in legal circles long before the law was enacted, with legal experts and associations calling for it to be added to the principles of the Rio Declaration (1992) in 2011.

However, it is not an entirely innovative instrument. In fact, the environmental obligation is the result of a lengthy discussion that began in 1997 within the legal community, which was aware of tools beyond France's borders that enable governments to better manage their land. Conservation easements[10] have been in use for a long time in the United States. Their operating procedures were harmonised between US states in 2001. Like the French ORE, the American conservation easement is an agreement between a property owner and a government agency or an approved environmental protection association for the purpose of conserving biodiversity. The easement is also attached to the property and is therefore transferred between successive owners.

Generally speaking, conservation easements have played a key role in environmental protection in the United States, Canada and Australia.

Because they devalue property, the Uniform Conservation Easement Act made it possible to set up programmes that opened the door to attractive tax compensation for owners who sign a conservation easement, resulting in a significant increase in the number of such agreements after it came into force.

Box 1. Practices similar to the Real Environmental Obligation in North and South America[11]

United States:

The conservation easement: an agreement between a landowner and a government entity/biodiversity conservation organisation. Through this agreement, the owner chooses which uses they wish to keep on their land and those that they agree to restrict or eliminate. The co-contracting party has regular access to the land to check that it is in good condition and that the owners are complying with their commitments. This system is governed by the Uniform Conservation Easement Act.

Chile:

In Rem Right of Conservation: an agreement between an owner and a natural or legal person. The owner has the right to use the property, and the holder of the "in rem right" (the natural or legal person) obtains the right to conserve the property. In this case, the owner is not responsible for conservation (Denizot, A., 2016).

[10] National Conference Of Commissioners On Uniform State Laws Uniform Conservation Easement Act (Amended in 2007): Uniform Conservation Easement Act (Last Revised or Amended in 2007). Available at: https://uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=3c195455-5f21-0b82-f2b7-693545f86c94&forceDialog=0. (Accessed on 10 January 2023).

[11] *Conservation Easement* Act - *Uniform Law Commission*. (s. d.). Home - Uniform Law Commission. Available at: https://www.uniformlaws.org/committees/community-home?CommunityKey=4297dc67-1a90-4e43-b704-7b277c4a11bd#:~:text=The%20Uniform%20Conservation%20Easement%20Act,conservation%20easements%20are%20legally%20enforceable (Accessed on 10 January 2023). *Custodia del Territorio | La Plataforma*. (s. d.). Custodia del Territorio. Available at: https://www.custodia-territorio.es/la-plataforma (Accessed on 15 January 2023).

Box 2. On the European continent, tools similar to the Real Environmental Obligation[12]

Spain:

The *Custodia del Territorio* (land stewardship agreement) refers to strategies and instruments involving owners and public or private organisations aimed at conserving and better managing natural, cultural and landscape resources on a given property. Created by Act 42/2007 on natural heritage and biodiversity, stewardship agreements are voluntary procedures between a landowner and a custodian entity for better management and conservation of an area. This agreement may be verbal or written. Written agreements can be official (with legal wording) or informal, based on mutual trust between the parties.

The first initiative to formulate the concept of land stewardship in Spain was the Montesquieu Declaration of 2000, signed by public organisations and institutions in Catalonia and the Balearic Islands.

Act 42/2007 encourages stewardship agreements as a supplementary conservation mechanism, with certain provisions encouraging public organisations to promote this tool, particularly through tax incentives.

The major difference with the ORE is that the Spanish stewardship agreement does not necessarily designate an instrument producing real rights (applied to the land). Spanish law gives owners a great deal of freedom when it comes to setting up a stewardship agreement. Therefore, to establish a real right, the intention must be expressed in a stewardship agreement. By 2021, there were a total of 3,100 land stewardship agreements (Barreira, A. et al., 2010; Collado Urietra H., (2014); Prada Campaña, O., 2019).

United Kingdom:

Created by the Environment Act 2021, Conservation Covenants are private agreements, signed on a voluntary basis by the owner with a "responsible body", which may be a local authority (in the administrative sense of the term), a conservation non-profit or a for-profit organisation. These covenants fall under real law, which means that, like the ORE, they apply to the thing and not to the person, unlike personal law. As with the ORE, the effects of these covenants are passed onto successive owners of the property. The main reason for setting up a conservation covenant is altruism, the desire to protect the environment and ensure that future owners will do the same. For now, UK legislation does not provide for tax incentives like the American and French laws.

In this sense, Project Neptune is a National Trust initiative that aims to secure large sections of the UK coastline, not only through acquisition but also through conservation covenants. This practice is similar to the work of the Conservatoire du Littoral in France, whose primary aim is to acquire land, but which also enters into ORE agreements. The National Trust currently protects around 1,255 kilometres of coastline across the UK. (Broadbent, R.; 2023).

B. SIMILARITIES WITH EASEMENTS, A LEGAL TOOL WIDELY USED IN FRANCE AND ABROAD

In France:

If the ORE seems similar to French easements, it is because it was directly inspired by the tools seen above, and in particular the conservation easement in English-speaking countries. However, the easement was not chosen to create a similar tool.

Easements in French law fall into two categories: conventional easements and legal easements, both private and public. Easements are defined in Article 637 of the French Civil Code as a "responsibility imposed on an inheritance for the use and convenience of an inheritance belonging to another owner" (an inheritance representing private property under early French law). The legal easement of private convenience exists between a property A and B whose situation requires that Owner A (dominant land) has a right over Property B (servient land) for some purpose given by the

[12] National Trust (n.d) *50 years of fundraising for the coast*. Available at: https://www.nationaltrust.org.uk/our-cause/nature-climate/nature-conservation/five-decades-of-the-neptune-coastline-campaign (Accessed on 15 February 2023); *The Law Commission*. (2014). *Conservation covenants*. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/322592/41070_HC_322_PRINT_READY.pdf (Accessed on 15 February 2023)

legislator[13]. For example, Article 682 of the French Civil Code, which is of public order, recognises the right of the owner of a hemmed in property to obtain sufficient right of way from their neighbours to provide full access to their own land.

Legal easements of public convenience are governed by various codes, particularly the French Environment Code and the French Urban Planning Code. They constitute responsibilities which exist as of right on all the buildings concerned, and place administrative limitations on the right of ownership and land use, instituted by the public authority for a public interest purpose[14]. Although they were not ultimately modified in this way, legal easements could have been used to meet environmental objectives, insofar as the legislator is the only one able to assess whether it is worthwhile to create a new easement[15], and that this creation does not deprive people of their freedoms as described by Article 17 of the Declaration of Human Rights[16].

Contractual easements, on the other hand, are the result of an agreement between neighbouring owners A and B. For example, if property A is not hemmed in but is simply difficult to access, a right-of-way easement will need to be agreed. Arguments were made in their favour during the debates on the Grenelle laws (Grenelle Law 1 of 3 August 2009[17] and Grenelle Law II of 12 July 2010[18]) by the "green and blue framework" operational committee, which sought to amend Article 637 of the French Civil Code to broaden the nature of the easement and give it a potential environmental protection purpose (Noguellou, R. 2015). This was not adopted either, although the legal technique of creating conservation easements was already used by notaries, who artificially created a dominant and a servient land on the area to be protected (Martin, G., 2021).

There are several reasons why French law has refused to use easements as a contractual instrument to protect the environment: firstly, easements under French law require the existence of two distinct properties, and therefore two owners. This characteristic eliminates the possibility of benefiting from the advantages of the US conservation easement, which allows environmental obligations to be developed with, and at the initiative of, a single owner. The ORE solves this problem. Other reasons for this rejection are more political, including the association of the easement with passive obligations (laisser faire, do not hinder, etc.), which certainly was an obstacle to creating an effective instrument, although not insurmountable, and the rather untouchable character of easements in French law, which held back certain parties to the debate, etc. (Noguellou, R. 2015). For these reasons, the decision was made to create a new instrument, distinct from easements.

In the Mediterranean:

It is also worth noting that easements exist in Mediterranean countries such as Croatia, Spain and Slovenia, which can act as "conservation" easements, although this is not their primary purpose. Although they have similar weaknesses as French easements, their use for purposes similar to those of the ORE could be considered.

In Croatia, easements, referred to as servitudes *(služnosti*), are divided into 2 categories: real servitudes and personal servitudes. They can be used for environmental protection purposes, but only if their content as recorded remains general, and therefore without imposing any specific obligations or restrictions. The necessary provisions can be included in the title deed, particularly if obligations or restrictions are required. In Croatia, easements pose a legal problem in that they imply the existence of a dominant land and a servient land. The use of personal servitudes is accepted for conservation easements only if the strict conditions for the creation of personal servitudes set out by Croatian law are met: personal servitudes may only be easements involving usufruct, right of use and right of habitation between the servient land and the dominant land. Considering that conservation objectives can be achieved with usufruct and right of use easements, a personal servitude could act as a conservation easement. However, this would only be possible between the two pieces of land, not with a third party. It should also be noted that real servitudes can be used to protect/preserve biodiversity, as they are very flexible: Croatian law authorises real servitudes of all types,

[13] Dominant and servient land refers to neighbouring properties and everything on them.
[14] Government services in the Loiret (n.d.) Public convenience easement (PUE). Available at: https://www.loiret.gouv.fr/Actions-de-l-Etat/Amenagement-du-territoire-construction-logement/Planification-territoriale-et-urbanisme/Servitude-d-utilite-publique-SUP#:~:text=Les%20servitudes%20d'utilité%20publique,au%20profit%20de%20la%20collectivité (Accessed on 19 April 2023).
[15] Constitutional Council, 13 December 1985, no. 85-198.
[16] Id.
[17] French Republic (2009). Law no. 2009-967 of 3 August 2009 that programmes the implementation of Grenelle Environment (1) Available at: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000020949548. (Accessed on 20 April 2023).
[18] French Republic (2010). Law no. 2010-788 of 12 July 2010 detailing the national commitment to the environment (1). Available at: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000022470434. (Accessed on 20 April 2023).

as long as they do not violate pre-existing standards. However, they are still conditional on the existence of two properties.

Figure 2. Croatian easements and reference texts

Croatian easements	
Reference text	*Act on Ownership and Other Real Rights* (1997)
Real servitudes	Article 186
Personal servitudes	Article 199

In Spain, for reasons of legal culture, personal easements *(servidumbres personales*) are still very rare, despite the legal possibility of creating them (Article 531 of the Spanish Civil Code). This possibility is also found in the laws of the independent communities of Aragon, Navarre and Catalonia. Catalan law explicitly allows for the creation of land rights to designate a property for nature conservation[19].

Similar to Croatian and French law, the Spanish Civil Code allows for the creation of personal easements (servient land and dominant land) for any purpose, with the requirement of two separate pieces of land. Once again, these easements need to be very general in order to be legally registered, although it is possible to specify their purpose and add obligations and restrictions to the title deed. However, while this may seem difficult to envisage in Croatia, in Spain, it is possible to create easements between an owner and a third party (i.e. not the neighbour) for conservation purposes under legislation derived from the Spanish Civil Code, Catalan law, Aragonese law and Navarrese law.

Figure 3. Spanish easements and their reference texts

Spanish easements	
State-level reference text	
Personal easements	Article 531 of the Spanish Civil Code
Legal texts of the autonomous communities	
Aragon	
Personal easements	Legislative Decree no. 1/2011 of 22 March 2022 of the Government of Aragon approving the Consolidated Text of the Civil Laws of Aragon under the name of Code of Traditional Charters of Aragon)
Catalonia	
Personal easements	Law no. 5/2006 of 10 May 2006, Book Five of the Civil Code of Catalonia on property law
Navarre	
Personal easements	Law no. 1/1973 of 1 March 1973 approving the compilation of the Civil Law of Navarre

In Slovenia, easements also exist in law, but suffer from a lack of use for conservation purposes. While there is nothing to prevent them from being used to benefit biodiversity on the land in question, this has never been the case.

[19] Article 563.1 of the Catalan Civil Code on partial rights of use. Available at: https://www.iberley.es/temas/derechos-aprovechamiento-parcial-cataluna-60408 (Accessed on 25 April 2023).

However, there are mechanisms in place in Slovenia in the form of conservation agreements, similar to contractual easements (Račinska, I. & Vahtrus, S., 2018).

The first stems from Article 47 of the Slovenian Nature Conservation Act *(Zakon o ohranjanju narave*), and comes in the form of a contract that a private owner can sign with the Ministry of the Environment and Spatial Planning to protect property with "natural assets". The law[20] uses the terms "exceptional" and "rare, precious or well-known phenomenon", which may bring to mind elements of "remarkable biodiversity", terminology that is regularly found in France. While this is an interesting tool, it is also important to note the importance of protecting "ordinary" biodiversity, which is not expressly covered by Slovenian law here.

In addition, Goričko Nature Park has begun to establish voluntary agreements with local farmers to protect endangered species on their land. This Slovenian public body has taken a very interesting initiative in combining environmental protection with agriculture, as two areas which are intrinsically linked and which should become even more so in the future.

Figure 4. Slovenian easements and their reference texts

Slovenian easements	
Real easements	Articles 213 to 226 of the Property Rights Act
Personal easements	Articles 227 to 248 of the Property Rights Act

Conservation easements are not explicitly provided for in Croatian, Spanish or Slovenian legislation. They could be implemented by using the law to meet a biodiversity conservation objective. This observation raises certain questions:

- Can an easement as envisaged in Croatia or Spain contain a restoration obligation, to be specified in the title deed?
- Could some form of incentive be implemented for such an easement?
- How can a strong project be set up and supported by competent organisations if the legislator does not allow conservation easements with a third party, as in the case of Croatia?

Therefore, while there are possibilities for establishing conservation-related obligations or restrictions through existing easements in various Mediterranean legal systems, the potentialities seem rather limited when compared with those of a specific contractual tool such as the ORE. As the legal community seemed to suggest during debates on whether or not to use French easements for environmental purposes, these limitations can perhaps be overcome by legal circumventions, or by slight modifications on the part of legislators.

[20] Pravno-informacijski sistem Republike Slovenije (s.d.) *Zakon o ohranjanju narave* (ZON), Available at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1600# (Accessed on 5 April 2023).

III. The ORE under French law

A. ORE IN THE FRENCH ENVIRONMENT CODE

Box 3. Article L. 132-3 of the French Environment Code

"Owners of real estate may enter into a contract with a public authority, a public institution or a private legal entity acting for the protection of the environment, with a view to incurring on their part, and on the part of subsequent owners of the property, the real obligations they see fit, provided that the purpose of such obligations is the preservation, conservation, management or restoration of elements of biodiversity or ecological functions.

These obligations may be used for compensation purposes.

The contract must specify the duration of the obligations, the mutual commitments and the possibilities for revision and termination. The term of the contract may not exceed ninety-nine years.

Drawn up in authenticated form, the contract giving rise to the real obligation is not subject to registration duties and does not give rise to the collection of the land registration tax provided for in Articles 662 and 663 of the French General Tax Code. Nor does it give rise to payment of the contribution provided for in Article 879 of the same code.

A landowner who has granted a rural lease on his/her land may not, under penalty of absolute nullity, implement a Real Environmental Obligation without the prior agreement of the lessee and subject to the rights of third parties. Failure to respond to a request for agreement within a two-month period constitutes acceptance. Reasons must be given for any refusal. The implementation of a Real Environmental Obligation can in no way call into question either hunting-related rights, or those relating to hunting reserves."

In law, a real obligation is characterised by an obligation that is linked to a thing; it does not weigh on a debtor[21] personally (De Fontette, F., 1994), but on the owner of the thing as such (Cornu, G., 2004). Because the real obligation is applied to the thing that is owned, when an owner releases themselves from ownership, they also release themselves from the obligation associated with it.

The Real *Environmental* Obligation is an agreement, a contract applied to a thing whose ecological purpose is continued, even in the event of a change of owner, by the fulfilment of the obligations of the contract. This tool is governed by the French Environment Code. While the legislator has left considerable freedom in defining the obligations between the parties, a minimum set of requirements is set out in Article L. 132-3 of the French Environment Code. An ORE must therefore meet both substantive and formal requirements, is contracted between two distinct parties, and offers certain tax advantages, wherein lies its true potential.

1. Substantive and formal requirements:

Substantive requirements:

Article L. 132-3 of the French Environment Code specifies the substantive requirements that must be met by the ORE, and four points are worth noting.

- To begin with, it is important to note the purpose of the ORE contract as set out in the French Environment Code, namely "**the preservation, conservation, management or restoration of elements of biodiversity or ecological functions**".
- Secondly, for the ORE contract to be valid, it is necessary for there to be **mutual commitments** between the parties to the contract, the nature of whose obligations must be specified.
- Thirdly, with regard to the term of the ORE contract, the French Environment Code specifies that OREs may last **up to 99 years.** This corresponds to the maximum duration of emphyteutic leases under French law.

[21] Debtor: The person who must perform a service for another person (creditor), by virtue of an obligation to give, do or not do something.

- Finally, the ORE contract must provide for the possibility of revision and termination (for breach of obligations, discovery of endemic species to be protected, etc.).

With regard to obligations, some observations can be made. First of all, they need to be consistent with the purpose of the OREs, i.e. the preservation, conservation, management or restoration of elements of biodiversity or ecological functions. It is then necessary to ensure that the obligations under the ORE contract are not incompatible with other rights previously established for third parties on the property in question. It will also be important to ensure that the obligations can be reconciled with rules other than those specific to OREs (such as those relating to urban planning documents or any easements), and with the nuances introduced by the French Biodiversity Act. Finally, it is interesting to note the nuances introduced by the legislator at the end of Article L. 132-3 of the French Environment Code, which states that "*the implementation of a Real Environmental Obligation may in no way call into question either hunting-related rights, or those relating to hunting reserves*". Therefore, while landowners may prohibit hunting on their land using certain tools, they will not be able to do so using an ORE (this specificity stems from debates on the creation of the ORE).

In terms of form, the ORE contract must be authenticated. It must be a deed executed before a notary or public officer, and registered with the land registry, in accordance with Article 710-1 of the French Civil Code and Article 4 of the Decree of 4 January 1955 reforming the land registry system. It should be noted that local authorities and their groupings, public institutions and the State have the option of using the administrative procedure for real property deeds (on property they own) under Article L. 1212-1 of the French General Code of Public Ownership (a generally less costly and less restrictive procedure).

2. Parties to the Real Environmental Obligation contract

Figure 5. Étang de Saint-Paul.

Photo: Copyright Giovanni PAYET - GIP RNNESP

The Étang de Saint-Paul (Reunion Island) Real Environmental Obligation: on 5 January 2023, a 10-year wetlands ORE contract was signed between a private landowner and the Régie de la Réserve Naturelle Nationale de l'Étang de Saint-Paul, **at the owner's request**, covering wetlands, marshes and floodplains. The obligations have yet to be defined.The objectives of this ORE are twofold: environmental and social. First, the parties are encouraging the development of endemic native plants without human intervention other than scientific intervention on part of this plot, and second, food production from the trees (mangoes) is donated to schools and non-profits.

The owner of the property:

Like all contracts, the ORE is entered into between two or more parties. In principle, the ORE contract is entered into between a property owner and a public or private co-contractor acting to protect the environment.

The owner may be a natural or legal person. They can be public or private. For example, they may be mixed syndicates, parks (regional or national nature parks), associations or local authorities acting on their private property.

Owners can place all or part of their land under an ORE. They can initiate the ORE and request the participation of a stakeholder within the framework provided by the French Environment Code. The ORE can also be applied to urban buildings: there is no limitation to natural spaces.

If the property is divided between a bare owner and a usufructuary, both must consent to the Real Environmental Obligation deed, as one “cannot, without prejudicing the interest of the other, undertake such heavy burdens”.

In the case of a rural lease, i.e. “leasing a property for agricultural use at a fee, with a view to using it to carry out an agricultural activity” (Article L. 411-1 of the French Rural and Maritime Fisheries Code), the lessee must give prior consent for the implementation of an ORE.

The co-contractor:

As for the co-contractor, the French Environment Code clearly states that it must be a public authority, a public institution or a private legal entity acting for the protection of the environment.

It is also possible to imagine third parties as parties to the contract, if, for example, the co-contractors decide to entrust them with management of the land, or implementation of the measures provided for in the contract, etc.

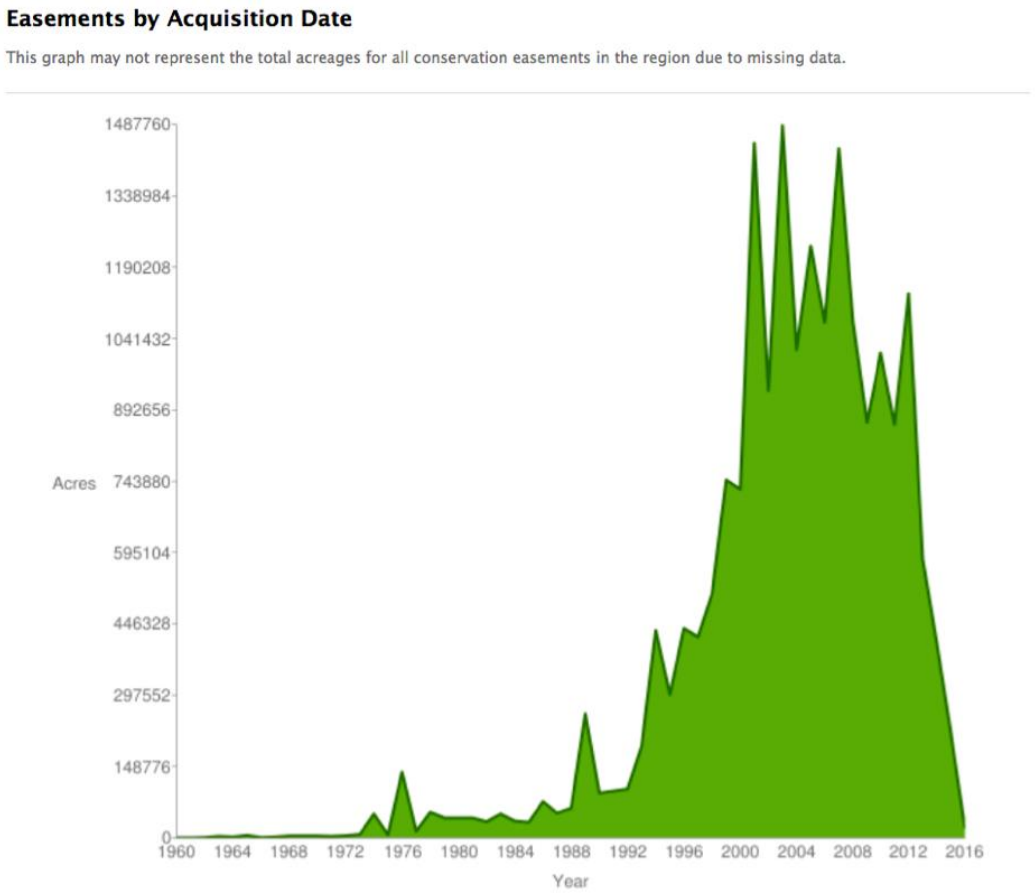
The question arises quite specifically in the case of project owners required to take offsetting measures. The Environment Code says nothing on this. However, this would be a useful, if not strategic, system: under Article L. 163-1 of the French Environment Code, offsetting obligations must be “effective throughout the duration of the damage”. The offsetting ORE should therefore be maintained for at least this duration.

The co-contractor can also initiate the ORE by approaching landowners who are interested in being subject to a Real Environmental Obligation, although the final decision remains in the hands of the landowner.

IV. Attractiveness of the ORE - lessons from law in English-speaking countries and conservation easements

In the United States, in order to encourage the various players to adopt conservation easements, the legislator has opted for tax incentive solutions. In the Uniform Conservation Easement Act Study Committee Background Report, Nancy McLaughlin explains that **tax incentives were one of the keys to the success of conservation easements in the United States** (Mclaughlin, N., 2018). After the Uniform Conservation Easement Act came into force in 1981, states stepped up their tax incentive programmes, resulting in an exponential increase in conservation easements introduced by owners. The graph below[22] shows this increase before and after the Uniform Conservation Easement Act.

Figure 6. Easements by date of acquisition in the United States[23]



Source: McLaughlin, N. 2019

[22] *All States and All Easements* (n.d.). *National Conservation Easement Database*. Available at: https://www.conservationeasement.us (Accessed on 28 November 2022).
[23] Text translated by the author: easements by date of acquisition - this graph may not show the total area of all conservation easements in the region due to missing data. 1 acre = 0.404686 hectares.

A. EXAMPLES OF TAX INCENTIVES IN ENGLISH-SPEAKING COUNTRIES

In the United States, there are several types of tax incentives, including the ability to deduct all or part of the value of the conservation easement from income tax, and to a certain extent from inheritance tax[24].

14 American states have additional schemes: tax credits and tax exemptions on undeveloped land. Private individuals can benefit from these incentives, but so can businesses, which can also set up conservation easements. Some states also allow the transfer of tax credits: if the value of the credit exceeds the amount of tax owed, the recipient of the credit can sell part of it to "another taxpayer in the same state with a higher tax burden"[25].

Other English-speaking countries subject to the common law legal system, have distinguished themselves by providing effective tax incentives for the implementation of conservation easements. This report gives a non-exhaustive overview. For example, Australia allows the value of a conservation easement donation to be deducted from taxable income if it exceeds AUD 5000. Others are quite specific, as in Canada. If an individual donates a conservation easement to an NGO or a government, they can claim a tax credit of 15% of the value of the donation if it is between CAD 0 and CAD 200, and 29% if it is CAD 200 or more.

B. SO, WHAT ABOUT FRANCE?

The assessment of tax incentives in France in relation to OREs today is rather mixed.

Originally, the French Environment Code only established that the ORE contract would be exempt from registration duties and land registration tax.

Article 1394 D of the French General Tax Code, which codifies Article 72 of the Law of 8 August 2016 for the restoration of biodiversity, nature and landscapes[26], allows municipalities to exempt owners who have entered into an ORE from property tax on undeveloped land. In addition, since the 2021 French Finance Act, two tax measures have been introduced to supplement those introduced by the Biodiversity Act: public inter-municipal cooperation bodies (EPCIs) with their own tax status are also authorised to do so, within the scope of their powers and for the share for which they are responsible, and the legislator now also provides for exemption from property security tax for the same owners.

However, are these mechanisms sufficient? In its Report to Parliament on the implementation of the ORE scheme and on ways of making it more attractive, the French government draws attention to the fact that "the possibility for municipalities to exempt owners who have signed an ORE contract from property tax on undeveloped land is very little used at present". The reason for this is probably the loss of tax revenue that they would suffer if they set up such a scheme, which would not be offset by the state.

In terms of figures, it is difficult to know how many ORE contracts have been set up, as the French government is not involved in this type of agreement, and their registration with the land registry falls within the scope of miscellaneous real publications for which no precise registration accounts are produced due to the small volume of territories concerned. For example, in 2019, the Ministry of Ecological Transition and Territorial Cohesion only counted 16 ORE contracts after a survey of "its decentralised departments (DREAL, DIR) and public establishments (water agencies, SNCF Réseau, public development institutions)" published in January 2021. The survey also included "key partners likely to have signed or be aware of the existence of OREs [...] (FCEN, motorway companies, RTE)."[27] The survey provides the following information on the OREs recorded: date signed, location, land area, type of owner, term, co-contractor, environment (wetlands, calcareous grasslands, etc.) and the main mutual commitments of the parties. The commitments recorded show that the majority of OREs recorded in the report are aimed at conservation or offsetting (OREs are especially used by project owners as part of the French sequence known as ERC - Avoid, Reduce, Offset). Only a minority of these OREs (3) are implemented for environmental restoration purposes.

[24] Foundation for Biodiversity Research (*Fondation pour la recherche sur la biodiversité*). How can Real Environmental Obligations (ORE) be developed in France?. (2021). Available at: https://www.fondationbiodiversite.fr/wp-content/uploads/2021/03/FRB-ORE-2021.pdf (Accessed on 25 November 2022).
[25] Id.
[26] French Republic (2022), Law of 8 August 2016 no. 2016-1087, Article 72. Available at: https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000033016419. (Accessed on 28 November 2022).
[27] French Republic (2021) Government Report to Parliament on the implementation of the Real Environmental Obligation scheme and ways to make them more attractive. Available at: https://medias.vie-publique.fr/data_storage_s3/rapport/pdf/279397.pdf. (Accessed on 28 November 2022).

It should also be noted that the *Conservatoires d'espaces naturels* also have an inventory of OREs, which can be consulted on the Federation's website, with 46 OREs identified.[28]

Lastly, the French position on tax incentives remains contradictory concerning its potential and to studies carried out on the link between these incentives and the success of schemes similar to the ORE. The French Ministry of Ecological Transition and Territorial Cohesion has raised the possibility of introducing a form of tax incentive in this area, but whose aim should not be to support OREs, in order to "prevent possible misuse of the scheme and avoid 'windfall effects'". In this sense, all amendments to the 2020 Finance Bill aimed at exempting real estate managed through an ORE from transfer duties were rejected (Billet, P. and Dufal, R., 2021).[29] However, a report by senior civil servants in November 2022 on financing the National Biodiversity Strategy (SNB) for 2030, published on 10 January 2023 and prepared by the Inspectorate General of Finance and the Inspectorate General of the Environment and Sustainable Development, proposes the introduction of an experimental scheme consisting of a total exemption from property tax for owners within the framework of OREs, accompanied by "ambitious specifications calling for the implementation of actions that promote biodiversity".[30]

[28] Federation of natural space conservatories (Fédération des conservatoires d'espaces naturels). (n. d.). Land. Available at: https://reseau-cen.org/aires-espaces-proteges/foncier/ (Accessed on 27 November 2022).
[29] See also: Senate of the French Republic (2020), Response to written question no. 12318, "Publication of the report provided for in Article 73 of the Law for the restoration of biodiversity", Senate Official Journal, Q, 27 February 2020, p. 1057. Available at: https://www.senat.fr/questions/base/2019/qSEQ190912318.html. Accessed on 22 November 2022).
[30] French Republic (2023). Report by the Inspectorate General of Finance and the Inspectorate General of the Environment and Sustainable Development on Financing the National Biodiversity Strategy (SNB) for 2030. Available at: https://www.vie-publique.fr/sites/default/files/rapport/pdf/287780.pdf. Accessed on 10 February 2023.

V. Considerations about the ORE

A. GENERAL CONSIDERATIONS

There are a number of persistent considerations within the legal and environmental professional communities:

1. With regards to the term length of ORE contracts, an ORE contract cannot exceed 99 years. How relevant is this date to the reality of certain restoration and conservation measures? If it is renewable, the ORE contract runs the risk of being terminated at the end of its contractual term if the owner so wishes. Indeed, one may ask to what extent the legislator wished to innovate - although the ORE was granted the potential term of an emphyteutic lease, it was not developed any further in order to take these environmental realities into account.
2. While this is not the case for contractual obligations, French law does recognise perpetual obligations, particularly in the context of easements within the meaning of Article 637 of the French Civil Code; and while the ORE is, in essence, a contract, its hybrid nature also links it to real obligations relating to property (and not to persons, even if its creation stems from a personal right to enter into a contract). This is why it seems possible to consider a potential perpetual term length for the ORE.

Another concern falls under a line of thought that is already well established in France: the ORE contract adds to administrative overlap, and may appear to be an additional, non-mandatory constraint. A very concrete example is the combination of a rural lease with an ORE contract. The legislator now allows owners of land on which there are rural leases to add an environmental clause to their contracts with tenants (farmers): what then is the point of entering into an ORE contract?

B. LEGAL CONSIDERATIONS

The relative novelty of the ORE tool and the lack of case law also raise certain legal concerns.

Firstly, with regards to the mutual obligations between the parties: an easily imaginable configuration for an ORE contract is an agreement between a local authority and an approved environmental protection association entrusted with the environmental management of the local authority's private domain. To what extent would the local authority compensate the association with a mutual obligation, required under the French Environment Code? It is difficult to imagine a contract between a public owner and a private co-contractor that would enable the latter to obtain financial compensation, given that public procurement contracts can only concern the performance of works, the provision of services or the supply of products or goods.

Another legal question is whether an ORE contract can be described as administrative. Reading the Code, it is hard to imagine an ORE contract governed by administrative law, insofar as its purpose would have to be a public service mission[31] and this is sometimes difficult to achieve in the field of environmental protection. Environmental law is more of a right to police. Reforestation[32], for example, and the management of and public access to sensitive natural areas[33], are considered public service missions.

In view of the foregoing, why favour the ORE over the implementation of other conservation measures?

Two key ideas seem important. Firstly, the ORE is not necessarily a better tool than others already in use in the country, but instead a supplementary one. The ORE has furthered the State's objective of protecting land from an environmental perspective, no longer by simply establishing more or less restrictive frameworks for defined areas, but by negotiating with landowners on the concrete use of their property. It is important to bear in mind that most of today's environmental tools cannot interfere with property rights, or only with difficulty.

Secondly, and in keeping with the idea that the ORE supplements tools already in use, the ORE can be seen as a tool whose innovative aspect lies in its ability to protect areas overlooked by the law. The buffer zones of sensitive natural areas, which are not necessarily protected or preserved by any form of legal protection, but whose environmental management is nonetheless essential, are a case in point (if the management of the sensitive natural area in question is to be effective and coherent).

[31] Public service mission: "A concept that emerged from the case law of the Conseil d'Etat in the first half of the twentieth century, but of much more recent appellation, whose manifestations can be found in public works, civil service, administrative contracts or unilateral deeds. This qualification is awarded in a praetorian way by the judge to activities of public interest, undertaken even by private organisations or individuals." (Guinchard, S. & Debart, T., 2022).
[32] On reforestation: Administrative Court of Marseille, 6 January 1971; Court of Conflicts, 9 June 1986, Municipality of Kurtzheim, 02428.
[33] On the management of and public access to sensitive natural areas, as public service missions: Law no. 85-729 of 18 July 1985.

VI. Use of OREs in France

Several observations can be made concerning the use of OREs in France today.

Firstly, in terms of the types of environments to which ORE contracts apply, wetlands are particularly prevalent. For example, of the 16 ORE contracts listed on 31/12/2019 by the French Ministry of Ecological Transition and Territorial Cohesion, and included in the Government Report, 8 of them concern official wetlands. In May 2018, the first ORE contract in France was signed for a wetland between the municipality of Yenne (owner) and the *Conservatoire d'espaces naturels* (CEN) in Savoie, to carry out the ecological management of the Lagneux marsh and the preservation of its biodiversity for a period of 30 years. Also, of the 46 ORE contracts listed by the network of *Conservatoires d'espaces naturels*, over a third (16) are aimed at protecting wetlands.

So, what about its use in wetlands? "The Real Environmental Obligation (ORE) is particularly well-suited to the preservation of wetlands. The ORE must have a land base, i.e. one or more plots of land and/or water, whether built-up or not. It is the result of the convergence of two intentions: that of an owner to protect a specific asset against damage and that of another person, who may or may not be an owner, to support the person who has accepted the obligation" (Tuffnell, F. and Bignon, J., 2019).

Box 4. Why are wetlands important?

Wetlands are plots of land filled with water and hygrophilous plants, including "areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres." (Ramsar Convention, Article 1). In particular, they contribute to achieving the Sustainable Development Goals (SDGs, Agenda 30), thanks to their numerous ecosystem services. These include:

SDG 2 (Zero Hunger): A large proportion of the world's food comes from wetlands.

SDG 3 (Good Health & Well-Being): they play an important role in everyday leisure activities.

SDG 6 (Clean Water and Sanitation): Wetlands supply groundwater. They contribute to the world's drinking water supply. The water that comes out is also better than the water that goes in: wetlands act as filters, retaining water pollution.

SDG 11 (Sustainable Cities and Communities): Wetlands provide natural protection against flooding by absorbing water, and against the impacts of droughts, hurricanes, storms, tsunamis, etc.

SDG 13 (Climate Action): Wetlands contain 30% of the world's soil carbon stocks, but release significant quantities of this carbon when they are drained or destroyed.

SDG 14 & 15 (Life Below Water and Life on Land): 40% of all the world's plant species live and/or reproduce in wetlands. They are an appropriate natural habitat for amphibians (frogs, salamanders, etc.) and insects. What's more, 50% of bird species depend on these environments.

Sources:

French Biodiversity Agency, (n.d.). Interests | Wetlands - Interests, Available at: http://zones-humides.org/interets (Accessed on 16 January 2023).

CNRS-INSU (2021). Threatened wetlands! (Menace sur les zones humides !) Available at: https://www.insu.cnrs.fr/fr/cnrsinfo/menace-sur-les-zones-humides. (Accessed on 16 January 2023).

United Nations (n.d.). Revive and restore degraded wetlands, World Wetlands Day. Available at: https://www.un.org/en/observances/world-wetlands-day. (Accessed on 16 January 2023).

Ramsar Convention on wetlands. (2018). Scaling up wetland conservation, wise use and restoration to achieve the Sustainable Development Goals. Available at: Https://www.ramsar.org/sites/default/files/documents/library/wetlands_sdgs_e.pdf (Accessed on 15 January 2023).

Secondly, it is interesting to note certain specificities regarding the types of obligations found in ORE contracts. Most obligations relate to ecological management/conservation of the land: no urbanisation of the plot, no use of plant protection products, no weeding or tilling the land, etc. However, there is a distinct lack of ecological restoration measures.

Secondly, it is worth noting that some OREs are signed with businesses. To this end, the *Conservatoire d'Espaces Naturels de Haute-Savoie* has signed an ORE contract with Clarins to preserve habitats of community interest over a 99-year period. Similarly, the *Conservatoire d'Espaces Naturels d'Occitanie* has signed an ORE contract with Nestlé Waters in the municipality of Vergèze to preserve forests, wooded scrublands and areas with traditional agrosystems, over a 10-year period. Some ORE contracts are also signed with farmers and equestrian facilities.

Finally, the duration of the contracts should be examined. Of the 16 contracts listed in the government report, only 7 were entered into for a term of over 50 years. Of the 46 OREs listed by the network of *Conservatoires d'espaces naturels*, 25 were entered into for a duration of over 50 years. This raises the legitimate question of whether it is worth taking conservation/preservation measures in the medium/short term. For example, a short-term preservation and restoration strategy will focus on reintroducing species into the protected area, while a long-term strategy will study their relationships and connections, which sometimes no longer exist or are complicated below a certain number of individuals in the species populations. These phenomena need to be studied over the long term to understand the equilibrium of a restored ecosystem. To a different extent, the ecological potential of a contract with a maximum term of 99 years also needs to be examined. For example, studies show that it can take centuries, even millennia, to restore the adaptive potential of species, which largely depends on their genetic diversity (which is lost when biodiversity is degraded). In most cases, restoring the full complexity of an ecosystem would be a century-long phenomenon (Moreno-Mateos, D. et al., 2020). While the aim is not to call into question the political choices that led to setting the maximum term of a contract under French law at 99 years, it is nonetheless important to note a certain discrepancy between the decisions taken and environmental needs, if the law is to play a role in protecting and restoring biodiversity.

To illustrate this chapter, four ORE contracts are presented: by the Avesnois Regional Nature Park on a wetland, with restoration obligations for 6 years (Dhuiege, G. & Tremblay, C., 2019), by the LPO in Isère on a 17-hectare lake to be restored to protect wetlands, by the *Conservatoire du Littoral* on a 53.2-hectare site on the Saint-Tropez peninsula, and again by the *Conservatoire du Littoral* for a 186-hectare site located in a Natura 2000 area in the Camargue.

Figure 7. The Avesnois Regional Nature Park ORE plot

Source: Avesnois Regional Nature Park.

A. AVESNOIS REGIONAL NATURE PARK ORE

The contract is designed so that the private owner of the land in question is subject to obligations concerning their practices and maintenance on the property. In return, the co-contracting party, represented by the Regional Nature Park, undertakes to produce an initial inventory (fauna, flora and phytocoenosis), a management plan for the plot and an assessment of the results. In addition, the Park is committed to carrying out experimental actions with the aim of ecologically restoring the land.

In this sense, it is also worth noting that OREs for restoration purposes remain rare: of the 16 ORE contracts listed by the French Ministry of Ecological Transition and Territorial Cohesion included in the Government Report, only 3 mention the notion of restoration. In fact, there are many more uses of OREs for conservation and offsetting purposes. However, restoration efforts seem to be gradually increasing.

B. LEAGUE FOR THE PROTECTION OF BIRDS (LPO - *LIGUE POUR LA PROTECTION DES OISEAUX*) ORE

Figure 8. Le Grand-Albert before and after works.

Photo on the left: JB DECOTTE, LPO.

Photo on the right: Philippe GRATTEAU.

Due to a lack of maintenance, the Grand-Albert dike gave way, and the Grand Albert Lake emptied in 2008. The owners of the lake then joined forces to form a non-trading property company, the "Réserve du Grand Albert", and contacted the LPO. The aim of the project is to restore a stream and the Grand Albert Lake. Restoration of the site has also enabled the development of animal species, such as beavers and three rare species of dragonfly[34]. It should be noted that the project's feasibility depended to a large extent on the "biodiversity" envelope of the September 2020 stimulus package, which was originally designed to mitigate the impacts of the Covid-19 pandemic (60% of the budget)[35].

[34] League for the Protection of Birds (*Ligue pour la protection des oiseaux*) (2023). Presentation file on the completion of work to fill and restore the Grand-Albert lake. Available at: https://auvergne-rhone-alpes.lpo.fr/wp-content/uploads/Dossier-de-presentation-Grand-Albert-2-fevrier-2023.pdf. (Accessed on 3 March 2023).

[35] La Relève et la Peste (2023). *Isère: la LPO restaure un étang de 17 hectares pour sauver les zones humides* Available at: https://lareleveetlapeste.fr/isere-la-lpo-restaure-un-etang-de-17-hectares-pour-sauver-les-zones-humides/. (Accessed on 03 March 2023).

C. LA MOUTTE ORE

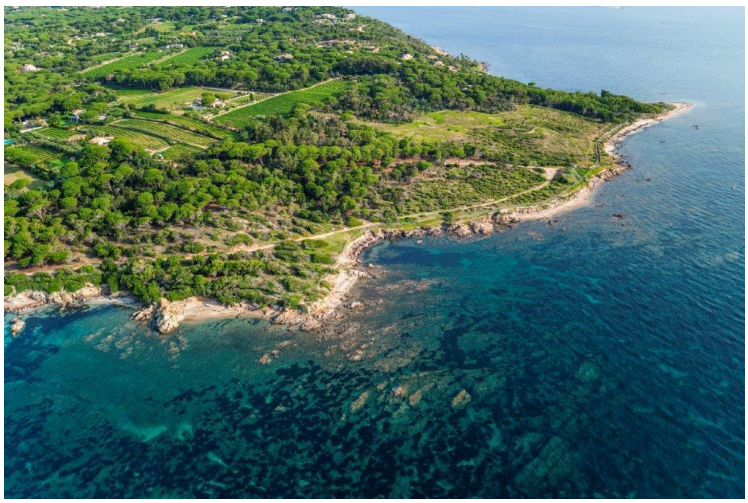
Figure 9. La Moutte sector, Bay of Saint-Tropez

Photo: *Conservatoire du littoral* - Frédéric Larrey.

In 2019, the *Conservatoire du littoral* signed an ORE with a private owner of La Moutte (Saint-Tropez peninsula) to restore and provide conservation management of the land, following a fire in 2017. "The temporary installation of split-stake fences along the shoreline will encourage the natural recolonisation of woody vegetation (reconstituted littoral scrub) near the fences, with a view to their eventual removal."[36]. This policy of using property tools other than acquisition, such as the ORE, is implemented by the *Conservatoire du Littoral*, which uses them to supplement its primary mission of acquisition, as advised by the Cour des Comptes in reports on the subject, the first of which dates back to 1995. In addition to OREs, the *Conservatoire* uses tools such as *non aedificandi* easements (prohibiting further construction on a plot of land), preferential rights in the event of sale, and usage agreements (hunting, farming, etc.) with very detailed specifications.

It is also worth noting that the Saint-Tropez ORE is the only one of its kind on the French Mediterranean coast. In a context of environmental crisis, and crisis in coastal zone management, the establishment of other OREs in these areas would help their protection, potentially over the long term.

Figure 10. La Moutte sector, Bay of Saint-Tropez



Photography: *Conservatoire du littoral* - Frédéric Larrey.

[36] *Conservatoire botanique national méditerranéen de Porquerolles* (2020). Regional action plan for the Romulea arnaudii 2021-2030. Available at: https://invmed.fr/_DATA/RES/Initiatives/%5BCBNMed%202020%5D%20PRA%20Romulea%20arnaudii%202021-2030.pdf. (Accessed on 15 February 2023).

D. THE CONSERVATOIRE DU LITTORAL ORE IN THE CAMARGUE

Figure 11. The *Conservatoire du Littoral* ORE in the Camargue

Photo: Conservatoire du Littoral

In June 2023, the *Conservatoire du Littoral* signed an ORE on a wetland located in the Camargue in the municipality of Arles, covering an area of 186 ha. With a 50-year term, it includes a preferential right in the event of resale. It counts woods, grazed wet meadows and a marsh of high environmental quality, located in a Natura 2000 area adjacent to the Vigueirat National Nature Reserve. The objectives of the ORE are as follows:

- Preserve the natural habitats and species in this natural area and maintain their functionalities, in accordance with the Targets Document (DOCOB) of the Natura 2000 sites “Marais de la vallée des Baux et Marais d’Arles” under the “Habitats” Directiven and “Marais entre Crau et Grand Rhône” under the “Birds” Directive.
- Recommend agricultural (extensive grazing, no chemical inputs), hydraulic and hunting management measures that are favourable to the site’s specific flora and fauna, particularly protected species and species of Community interest.
- Strictly limit land artificialisation.
- Prepare and implement a mutually agreed management plan. This management plan defines shared management guidelines and specifies the objectives around which an area is restored, developed and managed.
- Improve monitoring of hunting activities through pressure to control hunting.

VII. The ORE, a tool that can be used in the context of the Barcelona Convention

The ORE is a tool that can be used to address problems associated with land acquisition for environmental protection reasons, in a way that complements other existing tools, in particular to protect buffer zones or areas where the law is without effect. Inspired by the tools explored above in the English-speaking world, the ORE gives an owner the possibility to place an obligation on their land that will last for the term stipulated in the contract. Despite the aforementioned concerns and criticisms, it remains an instrument that could inspire the Contracting Parties to the Barcelona Convention in their own legislative contexts, notably to achieve the objectives of protecting the Mediterranean. This includes preserving and restoring environments, supporting the ecosystem services they provide, combating pollution and mitigating and adapting to climate change. This is especially the case when it comes to Mediterranean wetlands, which have a major role to play for the region and the planet.

A. THE ORE IN THE CONTEXT OF INTEGRATED COASTAL ZONE MANAGEMENT (ICZM) - DEVELOPING THE COMMON REGIONAL FRAMEWORK FOR ICZM

By adopting the Common Regional Framework (CRF) for Integrated Coastal Zone Management (UNEP/MAP/PAP, 2019) in 2009, and the Action Plan for the implementation of the ICZM Protocol in the Mediterranean in 2012, the Contracting Parties to the Barcelona Convention committed to adhering to the said Protocol. Article 20 stipulates that, for the purposes of "promoting integrated coastal zone management, reducing economic pressures, maintaining open areas and allowing public access to the sea and along the shore, Parties shall adopt appropriate land policy instruments and measures, including the process of planning." and that to this end, and "in order to ensure the sustainable management of public and private land of the coastal zones, Parties may *inter alia* adopt mechanisms for the acquisition, cession, donation or transfer of land to the public domain and institute easements on properties."[37]

However, these mechanisms present significant difficulties, as they require complex implementation. For example, land acquisition for purely environmental management purposes is only feasible to a limited extent and presents major legal and economic obstacles[38]. In this sense, the ORE (or other similar tools such as conservation easements in English-speaking countries or Chilean in rem conservation rights, depending on national cultural and legal affinities) is a flexible conventional instrument that can be put in place more quickly and simply for those involved in biodiversity preservation: by replacing the mechanisms of acquisition, cession, donation or transfer of property to the public domain, and the easement tool, the ORE enables ICZM criteria and objectives to be met effectively.

If recognised as such, the ORE would also need to be related to Article 21 of the Protocol, which stipulates that "For the implementation of national coastal strategies and coastal plans and programmes, Parties may take appropriate measures to adopt relevant economic, financial and/or fiscal instruments intended to support local, regional and national initiatives for the integrated management of coastal zones."

As it currently stands, the CRF mainly provides for public action involving the transfer of ownership or management from a private owner to a local authority or decentralised government department, or agreements between management bodies and owners on the basis of land stewardship. The CRF does not offer a long-term option, nor an option that would legally apply to a piece of land rather than a person. In this sense, and on the model of the ORE, the CRF could change by adding conventional land management approaches to the list of tools used, and by adding the use of private players for contractual purposes to its recommendations, in the "Land policy" section.

[37] Barcelona Convention (2008). Protocol on Integrated Coastal Zone Management (ICZM) in the Mediterranean. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/35671/08IG18_Final_Act_iczm_eng.pdf (Accessed on 14 February 2023).

[38] The right of pre-emption, i.e. the right of first option to buy in the event of a land sale, is a land acquisition tool that is regularly used, but it is highly restricted and is only available to certain players and certain areas (for example, French *départements* with sensitive natural areas). Expropriation for public interest is very time-consuming and cumbersome, and is therefore rarely used.

B. THE ORE WITHIN THE FRAMEWORK OF CONSERVATION INSTRUMENTS UNDER INTERNATIONAL LAW: CONSIDERING TRANSPOSITION THROUGH OTHER EFFECTIVE AREA-BASED CONSERVATION MEASURES (OECM)

The ORE is also a different management model that can be useful for preserving biodiversity and combating climate change. Indeed, international governance players can benefit from greater diversity of management and from the experience of contracts between various parties over a predefined area.

An OECM is a "a geographically defined area other than a Protected Area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the in-situ conservation of biodiversity, with associated ecosystem functions and services and where applicable, cultural, spiritual, socio-economic, and other locally relevant values". The work of the International Union for the Conservation of Nature (IUCN) uses criteria to define what may or may not be considered an OECM (IUCN, 2020). They must be geographically defined areas other than protected areas, be regulated (broad assessment), be managed in some way or another, and produce positive and sustainable long-term results for *in situ* biodiversity conservation.

This conservation can be achieved through protecting the ecosystem services of an area, or through cultural, spiritual, socio-economic or other locally relevant practices and values. The IUCN gives as examples of OECMs private conserved areas, which are managed with a specific conservation objective but not recognised as protected areas under national legislation, such as Ecosystem Restoration Areas in Indonesia (Utomo, A. & Walsh, T., 2018) or "areas successfully restored from degraded or threatened ecosystems, to provide important ecosystem services but which also contribute to effective biodiversity conservation, such as freshwater and coastal wetlands restored for flood protection".

Several positive points have emerged from this reflection on transposing this type of legal tool to international law instruments that are used to protect of marine areas, such as OECMs. They have been identified by the IUCN (French Committee of the IUCN, 2022). This would make it possible to adopt a networked approach with protected areas (Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean[39]), enable recognition of this management model for areas whose biodiversity needs to be preserved, and encourage the execution of diagnostic studies while ensuring potential support (e.g. financial, administrative, legal). More generally, this approach could be part of a global conservation system and contribute to a new vision of the relationship between humans and the biosphere. The IUCN points out that the recognition of diverse management models would increase pride, accountability and awareness, making the conservation network all the more resilient and connected to the network of protected areas. In the long term, this would contribute to the diversification of management and governance models mentioned in the foreword to this section.

However, these considerations need to be taken in the context of French law: during an exchange between the IUCN and Vanessa Kurukgy, in charge of the ORE project at the *Fédération des Conservatoires d'Espaces naturels*, it was explained why classifying OREs as OECMs is not necessarily the best thing: "*The main motivation of ORE owners is to protect, but not necessarily to be recognised (as a protected area or otherwise), although you would have to check with the people concerned. What's more, there's already a lot of material out there, a whole range of tools, which are not necessarily fully understood. Linking exclusion with protected areas would lead to explanations about how some can be "OREs and OECMs", others "ORE but not OECM", "ORE and PA" or "ORE but not PA", which could weaken the system and make discussions difficult*." (V. Kurukgy, quoted in IUCN French Committee, 2022). (Dudley, N., 2008).

Box 5. IUCN[40]

The IUCN has also developed the concept of Privately Protected Area (PPA*).* Spaces covered by an ORE could correspond to this concept, as long as they comply with the IUCN definition of a protected area: "a clearly defined geographical space, recognised, dedicated and managed, through effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values." In its report on PPAs, the IUCN considers that tools such as contracts, conventions, agreements and other legal instruments are effective legal means for creating private protected areas. The report specifies that the contract must contain certain important clauses, such as a long-term management clause, i.e. at least 99 years (the maximum term for an ORE) (Dudley, N. (ed.), 2008; Stolton, S., Redford, K. & Dudley, N., 2014)

[39] Barcelona Convention (1995). Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean. Available at: https://www.rac-spa.org/sites/default/files/protocole_aspdb/protocol_eng.pdf. (Accessed on 18 January 2023).

[40] Privately protected areas are defined as protected areas (i.e., a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values) under private governance." (Mitchell et al., 2018)

C. ORE CONTRACTS: MULTI-SCALE, MULTI-PURPOSE LEGAL TOOLS FOR THE IMPLEMENTATION OF TOOLS SUCH AS ENVIRONMENTAL CONTRACTS

The ORE can also be considered as a tool for translating external conventions and contracts into national law. One of the activities of the WETNET[41] and TUNE UP[42] projects under the INTERREG MED programme was to test the introduction of voluntary environmental contracts into French law[43], a form of contract designed to contribute to the commitments linked to the implementation of marine protected areas or to protect unprotected areas (e.g. certain wetlands), and more generally to improve the implementation of the ICZM Protocol. As the voluntary environmental contract has no legal basis as such, the countries and stakeholders participating in the INTERREG MED programme had to find an equivalent contract in their own law.

In France, the choice made by those involved in the INTERREG MED WETNET programme, and in particular the Tour du Valat in the Camargue, was to focus on environmental contracts, created in 1981, and which are currently implemented mainly on the basis of the circular of 30 January 2004 relating to river and bay contracts. A river contract is an agreement between stakeholders in the river basin, such as the prefect, water agencies and local authorities, with the aim of managing water resources. In principle, a river contract must implement the objectives of the SDAGEs and SAGEs, which are intrinsically linked to the implementation of ICZM in some areas. However, it is a contract with limited legal scope. In this respect, the Bordeaux Administrative Court indicated in ruling no. 0301268, "Association of landowners and local farmers along the Dordogne and others", dated 7 November 2006, that the river contract "does not in itself entail any direct impacts as to the effective implementation of the actions or operations it provides for, as its objectives can only be achieved in compliance with the regulations applicable to the actions through which they are implemented [...]". The Administrative Court even added that the river contract "does not in itself produce any legal effect sufficient to justify that the decision to sign it could be subject to an appeal for excess of power." It should also be added that the river contract is based on a circular, which has no legal effect on third parties and only conveys guidelines to government departments. Nonetheless, this is a highly flexible system, making it easy to adapt external concepts to French law.

However, translating and formulating standard examples of contracts in some local laws can raise significant legal and administrative problems. Some legal systems are better suited than others to producing contracts based on the voluntary environmental contract model.

In the same way, the ORE is also a flexible tool to implement that is open to a range of actors involved at different scales. On the other hand, unlike the river contract, the obligations are not only applied to the land in question, regardless of any changes in ownership, but also have significant legal effects. Under certain rare conditions, failure to comply with the ORE could result in the owner of the land being held liable in tort. Generally speaking, failure to comply with the ORE could result in the owner being put on formal notice and possibly in breach of contract, which would mean the end of the mutual commitments in their favour, as well as the tax benefits associated with the contract (which is why an effective tax incentive policy is so important).

It therefore seems appropriate to argue in favour of a mix of legislation and regulations that would improve coverage of the area to be preserved, with a range of actors, scales and tools used to achieve the objectives that have been defined (e.g.: Regional plan for planning, sustainable development and territorial equality (SRADDET) + Territorial coherence plan (SCoT) +Inter-municipal local urban development plan (PLUi) + Master plan for water management and planning (SDAGE)/Plan for water management and planning (SAGE) + river contract + rural lease with environmental clauses + ORE).

D. THE ORE AS A VEHICLE FOR MOBILISING LOCAL PLAYERS

As part of an event on adapting coasts to climate change held on 15-17 June 2022 under the aegis of the French Presidency of the Council of the European Union, the *Conservatoire du Littoral* and[44] co-wrote a document aimed at providing policymakers with food for thought and guidelines for developing a better coastal adaptation strategy (*Conservatoire du littoral*, 2022). In this publication, the authors stress the importance of involving local communities

[41] INTERREG MED WETNET project website: https://wetnet.interreg-med.eu/. (Accessed on 15 February 2023).
[42] INTERREG MED TUNE UP project website: https://tune-up.interreg-med.eu/. (Accessed on 15 February 2023).
[43] Palazzo, A. L., Muccitelli, S., D'Ascanio, R., Pozzi, C., and Magaudda, S. (eds), (2021). Environmental Contracts in Marine Protected Areas: methodology and pilot cases from TUNE UP, le Note di U3, n. 3, ISSN 1973-9702, Available at: https://issuu.com/urbanisticatre/docs/nu3_03_tuneup_issuu. (Accessed on 23 February 2023).
[44] The Ocean-Climate Platform (OCP), Eurosite – the European Land Conservation Network, the Conference of Peripheral Maritime Regions (CPMR), the Seas, Rivers, Islands and Coastal Areas Intergroup (SEARICA) and the Overseas Countries and Territories Association (OCTA).

in the process of conserving biodiversity and fighting climate change "in order to achieve shared long-term commitments". When implementing local versions of the environmental contracts under the INTERREG MED TUNE UP project, bringing together both various public and private/local players was a decisive factor in achieving mutual commitments. A real multi-scale approach was adopted, with the presence of large-scale public organisations, as well as private players with a special relationship with nature (fishermen, hunters, etc.)[45]. Similarly, when national authorities were reluctant to implement environmental contracts, it was local players who took the initiative to put them in place (better acceptance at local than national level).

Box 6. Interview with Lisa Ernoul, Tour du Valat

"Participatory approaches involving a variety of stakeholders are encouraged in order to sustainably manage marine and coastal natural resources, to integrate the environment into socio-economic development and to protect cultural and natural heritage. One governance method that has been tested in a number of European countries in the Mediterranean region is Environmental Contracts. These tools have been developed to provide a basis for voluntary commitments. The process begins by bringing together both private and public stakeholders to share knowledge and ideas, leading to a shared vision and an action plan for the site in question. Environmental contracts have been adapted to a range of wetlands (including river basins, lagoons and marine protected areas) and successfully implemented. However, these processes need to be integrated at the scale of national regulations."

Source: Lisa ERNOUL, Researcher - Coordinator of the Management and Restoration of Natural and Agricultural Ecosystems at Tour du Valat

The ORE is a tool that can be used to encourage this multi-scale approach to projects, by convening private owners and public or private organisations active in environmental protection around common interests over the long term.

Box 7. Preparing Coastal Plans in Morocco and Montenegro

The use of contractual land management tools such as the ORE can benefit other Mediterranean countries with ICZM strategies through pilot projects for the participatory development of coastal plans. Morocco and Montenegro are both facing the issue of resilience in the face of climate change, and for these two countries, an in-depth assessment combining coastal management and climate adaptation is currently being conducted by PAP/RAC (implementation of the ICZM Protocol of the Barcelona Convention) and Plan Bleu/RAC (Climagine participatory methodology).

In **Montenegro**, recent efforts have been made to improve ICZM by drawing up a Coastal Plan for the Bay of Kotor to address its vulnerability to the impacts of climate change (storms, droughts, etc.) while increasing its adaptability to climate change.

In **Morocco,** similar work has been undertaken, notably for the Regional Coastal Plan for the Tangier-Tetouan-Al Hoceima Region, which, like the rest of the country, is experiencing an increase in average temperatures and less rainfall, making it more vulnerable to phenomena such as drought and forest fires. As the approaches used for coastal management plans are geared towards participatory and inclusive actions, setting up contractual private tools that can be binding over the long term and used by local stakeholders could be a new way forward in addition to Montenegrin and Moroccan public actions.

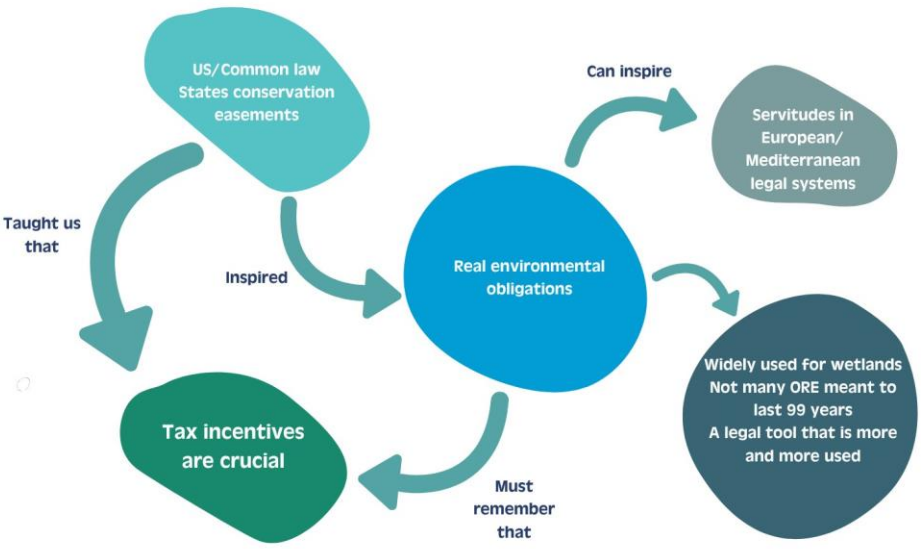
[45] Interview with Lisa Ernoul, Researcher and Coordinator of the Management and Restoration of Natural and Agricultural Ecosystems theme at Tour du Valat. (https://tourduvalat.org/).

Conclusion

The ORE, introduced by the French Law for the Restoration of Biodiversity, Nature and Landscapes of 8 August 2016, is an interesting and innovative tool due to its flexibility and significant ecological potential. It can be used to implement strategies and action programmes to protect an area from climate change, restore it, and make it more adaptable. If there is one lesson to be drawn from the American experience, it is that tax incentives are crucial to introducing these types of schemes. The Uniform Conservation Easements Act, the tax incentive programme in the United States, is the reason why American conservation easements have really taken off. Until recently, the French government has not been inclined to adopt an incentive tax strategy to encourage the adoption of OREs in order to avoid "windfall effects". However, reports on the subject do argue in favour of such a strategy, which gives reason to hope for positive developments in this area.

As the ORE is a tool specific to France and French law, and therefore not directly applicable to other countries, we have attempted to draw on various experiences of similar tools used in other countries, as well as the use of contractual tools in the Mediterranean, to demonstrate the potential of this type of scheme on a Mediterranean scale. In France and elsewhere, private property has a major influence on territorial decision-making, so including private property owners in an environmental protection or land restoration strategy allows for comprehensive regional planning that does not stop at the public domain. What's more, integrating local private stakeholders into this type of planning is in line with the multi-scale, inclusive and participatory approach adopted by the Global Environment Facility's MedProgramme implemented by UNEP/Mediterranean Action Plan.

Figure 12. ORE summary diagram.



Source: Author.

Recommendations:

A. FOR BETTER AND MORE EXTENSIVE USE OF THE ORE IN FRANCE

- Conduct regular impact studies and set up systems to monitor and assess commitments made by the parties to the ORE contract.
  - Although not mandatory, it would be useful for all OREs to include KPIs for monitoring commitments and outcomes. In environmental planning, monitoring is always necessary, and this should also apply to OREs.
- Establish a clear list of ORE contracts to supplement the opaque registration within the land registry. OREs are currently registered under the category of miscellaneous real publications, which does not show the various documents registered under this heading separately, due to the small volume of territories concerned. Ideally, the land registry should create a separate category for OREs, failing which, departments associated with the purpose of OREs, such as the DREALs, could carry out this monitoring, but centralising this data could be difficult. The French Biodiversity Agency (OFB) could also consider taking on this task.
- Argue in favour of a mix of legislation/regulations that would improve coverage of the area to be protected, with a range of players, scales and tools used to achieve the objectives that have been defined.
  - In this sense, this work has allowed for reflection on combinations such as: Regional plan for planning, sustainable development and territorial equality (SRADDET) + Territorial coherence plan (SCoT) + Inter-municipal local urban development plan (PLUi) + Master plan for water management and planning (SDAGE) / Plan for water management and planning (SAGE) + river contract + rural lease with environmental clauses + ORE).
  - Develop OREs in such a way that they supplement or even connect existing protected areas. Connecting spaces enables species to move and migrate, as illustrated by the concept of ecological continuity. It highlights the importance of connecting environments for long-term preservation and, above all, resilience to climate change.
- Promote long-term OREs: French law allows these obligations to last 99 years, and taking advantage of this possibility would support the sustainable management of the site in question. However, 99 years is still not long enough to restore certain ecosystem functions and the adaptive capacity of species.
- Develop urban OREs (particularly through green corridors).
  - Urban greening produces short-term effects, whereas integrating schemes such as green corridors produces long-term effects, particularly in terms of climate change adaptation (Bertrand, F. & Simonet, G., 2012). Developing OREs that would enable long-term management (99 years) of these spaces would benefit urban populations that are set to increase.
- Develop OREs in coastal zones, particularly on the Mediterranean coast.
- Develop tax incentives to encourage the implementation of agreements such as OREs.
  - While the French government has avoided developing tax incentives, at least until recently, the American experience shows the value of this type of scheme for developing private agreements such as OREs. A total exemption from property tax for owners signing an ORE seems to be a good way of developing the scheme[46].
  - Other avenues need to be explored by looking at international experiences:
    - Income tax exemption: for example, a total or partial exemption could be possible if the creation of the ORE results in a loss of income.
    - Tax credits.
  - In addition to tax incentives, public financial support may prove essential for implementing ORE commitments, as demonstrated by the Grand Albert ORE.
- Use robust scientific data to create OREs.

[46] French Republic (2022), Report by the Inspectorate General of Finance and the Inspectorate General of the Environment and Sustainable Development on Financing the National Biodiversity Strategy (SNB) for 2030. Available at: (https://www.vie-publique.fr/sites/default/files/rapport/pdf/287780.pdf. (Accessed on 21 March 2023).

B. TO CREATE SIMILAR SCHEMES IN MEDITERRANEAN COUNTRIES AND BEYOND

- Adopt sustainable land management agreement/contract systems based on the ORE model, American conservation easements, Chilean in rem conservation rights, etc.
- Identify commonly used ORE models for countries wanting to test the private environmental agreement system.
  - Example: inventory of flora/fauna by the non-owning party, establishment of mutual commitments aimed at preserving the species identified, potentially by focusing on endemic species (and establishing monitoring indicators).
- Develop a local law perspective on the types of land management agreements that would enable private owners to protect their property in a sustainable way, without necessarily using the ORE or conservation easement model. An agreement adapted to local practices and the law of the country may be more relevant than copying previous schemes.
- Encourage the introduction of private conservation/environmental management/restoration contracts similar to OREs, through regulations and legislation.
  - Identify the private or public organisations capable of co-signing this type of contract and monitoring mutual obligations.
  - Implement tools to encourage these contracts, such as effective tax incentives.
  - In this sense, introducing a clear and exhaustive inventory system would also identify which territories to target for a land management strategy using contracts, and which organisations should approach private owners.

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