



# **An Open Field: Emerging Opportunities for a Global Private Land Conservation Movement**

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## **Abstract**

This paper explores the history of the land trust movement in the US, looks at specific examples of the growing private land conservation movement around the globe, and proposes a model that includes a framework of legal, financial and organizational elements that are needed to grow and sustain private land conservation activity regardless of geography.

Currently there are approximately 1,700 land trusts in the US, which have protected 47 million acres of land for purposes including biodiversity, natural habitat, agriculture, forests, recreation, wetlands, urban parks, historic, scenic and cultural values. The important overarching issue of how private land conservation serves the public interest and provides public benefits has been present since the beginning of land trusts in the late 19<sup>th</sup> century. Since the early 1980's, private land conservation has benefited from the legal recognition and enforcement of conveyances of "partial" interests in land known as conservation easements or restrictions, and from federal tax incentives for those gifts. This combination of legal and financial support has enabled state and local land trusts in the US to accelerate acres protected primarily by using conservation easements.

Even as land conservationists in the United States continue to expand their impact, conservationists outside the United States are adapting existing tools and developing new practices to work on opportunities and challenges elsewhere around the world. In more than 70 countries across the globe, nongovernmental organizations (NGOs) involved in the protection of private forestland, farmland and natural habitats are now active.

Private land conservation is on the rise in countries around the world. The framework and analysis for private land conservation provided in this paper is intended to be useful in developing the needed elements that will allow private land conservation to flourish.

### **About the Author(s)**

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# **An Open Field: Emerging Opportunities for a Global Private Land Conservation Movement**

## **Introduction**

Some time in the early part of the 20<sup>th</sup> century, American humorist Will Rogers famously said, “Buy land. They ain’t making any more of the stuff.” Although there is no known connection between Will Rogers and the US land trust movement, he could certainly have been summarizing the strategic purpose of the movement as it developed in the latter part of the 20<sup>th</sup> century.

Currently there are approximately 1,700 land trusts in the US, which have protected 47 million acres of land for purposes including biodiversity, natural habitat, agriculture, forests, recreation, wetlands, urban parks, historic, scenic and cultural values and related purposes (Land Trust Alliance, 2010 National Land Trust Census Report, 2010). The important overarching issue of how private land conservation serves the public interest and provides public benefits has been present since the beginning of land trusts in the late 19<sup>th</sup> century. Since the early 1980’s, private land conservation has benefited from the legal recognition and enforcement of conveyances of “partial” interests in land known as conservation easements or restrictions, and from federal tax incentives for those gifts. This combination of legal and financial support has enabled state and local land trusts in the US to accelerate acres protected primarily by using conservation easements.

Even as land conservationists in the United States continue to expand their impact, conservationists outside the United States are adapting existing tools and developing new practices to work on opportunities and challenges elsewhere around the world. In more than 70 countries across the globe, nongovernmental organizations (NGOs) involved in the protection of private forestland, farmland and natural habitats are now active. (Stein, 2014, 1) They use a broad array of mechanisms to secure control over the future uses and current management of privately owned land. In addition, these NGOs are working to develop practical tools that respond to the needs and conservation goals of *private* landowners, complementing—and sometimes in contrast to—the range of strategies pursued by other NGOs and governmental entities aimed at creating *public* protected areas.

This paper explores the history of the land trust movement in the US, looks at specific examples of the growing private land conservation movement around the globe, and proposes a model that includes a framework of legal, financial and organizational elements that are needed to grow and sustain private land conservation activity regardless of geography.

## The Land Trust Movement in the US

### The Early Years

The history of the land trust movement in the US is well documented in Richard Brewer's book *Conservancy: The Land Trust Movement in America*, and in materials developed by the Land Trust Alliance. Brewer asserts that, "land conservation, like jazz, is an American invention." (Brewer, 2003, 13) He defines a land trust as "a private, nonprofit organization for which the acquisition and protection of land by direct action form its primary or sole mission" (Brewer, 2003, 13). The Land Trust Alliance (the Alliance) has a slightly broader definition as follows:

A land trust is a nonprofit organization that, as all or part of its mission, actively works to conserve land by undertaking or assisting in land or conservation easement acquisition, or by its stewardship of such land or easements.

Land trusts work with landowners and the community to conserve land by accepting donations of land, purchasing land, negotiating private, voluntary conservation agreements on land, and stewarding conserved land through the generations to come.

Most land trusts are community based and deeply connected to local needs, so they are well equipped to identify land that offers critical natural habitat as well as land offering recreational, agricultural and other conservation value.

(Source: "Land Trusts," Land Trust Alliance website)

Brewer emphasizes some elements of the definition as being essential to the land trust movement: land trusts are private, voluntary, and are not advocacy organizations. For many in the land trust movement, it has been crucially important to emphasize these attributes. In the early days of The Nature Conservancy, staff often described TNC as "we save land the old fashioned way—we buy it". Land trusts were distinguished from environmental advocacy organizations such as the Sierra Club or Greenpeace. Except for action limited to lobbying/advocacy for funding (for acquisition or management), the land trust community in its early days avoided any perception that they were associated with government regulation or powers. The concept of **private** land conservation activity was deeply imbedded in the culture of the land trust movement in the US from the outset.

However, private land conservation practices as pursued by land trusts have typically been positioned in the context of public benefit. Take the beginning of regional land trusts in the US—generally accepted to be the formation of The Trustees of Reservations (TTOR) in Massachusetts in 1891.<sup>1</sup> It is interesting to read what Charles Eliot—the visionary founder of TTOR—was thinking when he first proposed the creation of such an organization.

Eliot enlisted a distinguished group of citizens to support his proposal. In a circular called "The Preservation of Beautiful and Historical Places," the group laid down the special

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<sup>1</sup> While the creation of the Trustees is generally accepted as the first land trust, a few other organizations did come before it. For example, the Mount Vernon Ladies Association in the 1850s was formed to protect George Washington's estate at Mount Vernon, effectively acting as a one-site land trust, focused largely on historic preservation, and still exists today.

reasons why “places of historical interest or remarkable beauty should be withdrawn from private ownership, preserved from harm, and opened to the public.” They asserted that:

- “the existing means of securing and preserving public reservations are not sufficiently effective,”
- “lovers of nature will rally to endow the Trustees with the care of their favorite scenes, precisely as the lovers of Art have so liberally endowed the Art Museums,”
- the organization “will be able to act for the benefit of the whole people, and without regard to the principal cause of the ineffectiveness of present methods, namely the local jealousies felt by townships and the parts of townships towards each other,” and
- the Commonwealth “can no longer afford to refrain from applying to the preservation of her remarkable places every method which experience in other fields has approved.”

In the spring of 1891, the legislature voted to establish The Trustees of (Public\*) Reservations “for the purposes of acquiring, holding, maintaining and opening to the public...beautiful and historic places...within the Commonwealth.”

\*The word “Public” was dropped from our legal name in 1954 to avoid confusion with publicly (e.g. government) owned land.

(Source: “Trustees History,” The Trustees of Reservations website)

Thus the land trust movement began with the understanding that—although using the tools of the private market—the intention of setting aside the resources was to create a public benefit. The beginning of the land trust movement was also primarily a non-advocacy strategy—land trusts were instead based on a strategy of direct action in the real estate market place. As Brewer states, “in retrospect, it’s clear that The Trustees of Reservations and the Sierra Club exemplify the two models of private land protection, the land trust and the land advocacy organization” (Brewer, 2003, 24).

After its promising beginning, the growth of land trusts in the ensuing decades was very slow. Based on his analysis of records from the Land Trust Alliance, Brewer estimates that there were fewer than 20 land trusts active at the beginning of World War II, and perhaps around 50 in existence by 1950 (Brewer, 2003, 32). Brewer makes sense in citing several factors to explain the slow growth of the private land conservation movement, including the hard economic times of the 1920’s and 30’s, and the post war industry and construction booms (Brewer, 2003, 31). Interestingly Brewer also points to how much was being done in the public land context at this time—21 national parks were established between 1910 and 1950.

A very important element of the land trust movement was the creation of land-saving organizations that operated at a national scale. The best known of these is The Nature Conservancy (TNC), which came into being first as the Ecologists Union in the 1940s and

became The Nature Conservancy in 1951. The Trust for Public Land (TPL), which came into being in 1972, is another prominent national organization in the US that has a mission of protecting land in the public interest.<sup>2</sup>

The Audubon movement has been an additional important element in the development of the private land conservation movement in the U.S. Started in 1896 by two wealthy Boston women, the first Audubon Society in Massachusetts (today the oldest operating Audubon Society in the world) was initially created as an advocacy organization to fight for stricter regulation on bird hunting and habitat destruction. This organization—now known as Mass Audubon—also began in the 1920’s to acquire land. Mass Audubon now includes a very active land protection program as part of its mission, thus functioning as both a land trust as well as an advocacy and education organization. The National Audubon Society and its hundreds of local chapters, as well as other “bird clubs” around the country, also own land although they do not function primarily as land trusts.

## **The Growth Years**

The 1980’s were key to the development of the modern land trust movement. The slow increase in the number of land trusts began to accelerate, from the mid 1980’s to the mid 1990’s, as new land trusts were formed at the rate of one or more per week (Brewer, 2003, 32). In fact Brewer states, “the real beginning of the land trust movement was 1981” (Brewer, 2003, 36). He estimates that there were about 370 land trusts in 1981—there are approximately 1700 today.

Why were the early 1980’s such a tipping point for the land trust movement in the US? Brewer points to several essential influences:

- There was beginning to be a critical mass of analysis, thinking, writing and convening around the concept and key tools of land trusts. Most important was the work and influence of Kingsbury Browne and the founding of the Land Trust Exchange, which later became the Land Trust Alliance (Stein, 2014)
- With the election of Ronald Reagan and his appointment of James Watt as Secretary of the Interior, the federal government gutted environmental programs and abandoned land conservation. The Reagan administration's hostility towards environmental issues catalyzed growth in the environmental movement—including the increase in local citizens taking action through the creation of local land trusts
- The increasing use and acceptance of conservation easements culminating in 1981 with the creation of the Uniform Conservation Easement Act, which was rapidly adopted by states—by 1984, 29 states had enabling statutes (for a thorough discussion see Bray, 2005, 129). Further extending the reach and utility of conservation easements was the recognition of significant tax benefits by the IRS for a gift of a conservation easement to a qualified organization.

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<sup>2</sup> Unlike The Nature Conservancy or a typical land trust, The Trust for Public Land does not retain conservation land in its ownership, instead transferring it to public agencies or other nonprofits for protection. TPL’s focus on urban and suburban parks and open space also historically set it apart from The Nature Conservancy and other national conservation groups.

The overwhelming importance of conservation easements is explained by Bray “the growth of private land trusts in the last four decades of the 20<sup>th</sup> century is best understood by reference to the growth of conservation easements...the growth rate was at its highest, about 16%, from 1985–1988—a period coincident with the early expansion of the federal tax deduction” (Bray, 2005, 129). The availability of the federal tax deduction existed but was somewhat uncertain in its applicability to private land trusts, “until in 1980 Congress enacted I.R.C. s. 170 (h), which allowed deductions for donations of conservation easements, provided that they were granted in perpetuity to qualified charitable organizations for one or more specific conservation purposes” (Bray, 2005, 131).

**Figure 1: Total Acres Conserved by Land Trusts in the US**

Total Acres Conserved			
	2000	2005	2010
Acres owned by state and local land trusts	1,123,689	1,527,656	2,144,709
Acres under easement by state and local land trusts	2,316,064	6,007,906	8,833,368
Acres acquired and reconveyed and acres conserved by other means by state and local land trusts*	2,031,062	3,370,772	5,097,783
Total acres conserved by state and local land trusts	5,470,815	10,906,334	16,075,860
Total acres conserved by national land trusts	18,388,023	25,964,032	30,945,639
Total acres conserved by all land trusts	23,858,838	36,870,366	47,021,499

Source: Land Trust Alliance, 2010 National Land Trust Census Report, 5

As this chart from the 2010 National Land Trust Census report shows, conservation easements have continued to be the dominant tool for land protection by state and local land trusts in the US (Figure 1). Between 2000 and 2010, land trusts protected approximately 1 million acres in fee title interest (that is through outright ownership), while putting more than 6 million acres under conservation easements.

The importance of conservation easements in the US cannot be overstated, as “the development of conservation easements... accounts for the extraordinary success of the land trust movement in the United States.” (Tepper and Alonso, 2009, 57). As stated by Korngold, “for the past thirty years, nonprofit organizations have revolutionized open space and habitat conservation in the United States through the use of conservation easements” (Korngold, 2011, 587). It has become increasingly clear that, “...in the last two decades conservation easements held by private land trusts have transformed contemporary American land use in a dramatic fashion” (Bray, 2005,125).

Use of conservation easements has become such an integral part of the land conservation “toolkit” that it is easy to forget that the widespread use and utility of this tool is of relatively recent origin. Prior to the Uniform Conservation Easement Act in 1981 and its enactment (in

some form) in almost all states, conservation easements had to conform to the requirements of other kinds of property restrictions under common law traditions of the US. Most importantly, they could not be held “in gross”, meaning that the easement holder (most often a land trust or a unit of government) had to hold a fee interest in an adjacent property that received the “benefit” of the restrictions on the appurtenant property.<sup>3</sup> There were other requirements under common law that kept conservation easements in the background as a tool for land protection (Bray, 2005, 127). Korngold notes that “much of the pioneering of conservation easements in the United States came by parties operating under the common law ground rules that provide that courts have the power to legitimize newly developing property interests by extending, manipulating, and sometimes overruling existing doctrines” (Korngold, 2011, 624). However, even under the favorable evolution of the common law described by Korngold, it took the widespread enactment by states of the Uniform Conservation Easement Act in 1981 to remove perceived legal impediments and open the door to the use of easements as a land protection tool.

The growth of conservation easements was initially seen as an almost entirely positive development for multiple reasons—it increased acres protected at a fraction of the cost of acquiring land in fee. Easements allow for much more flexible use of land, by better balancing conservation needs with working landscapes, or simply by allowing landowners to protect their land without having to give up ownership. But as the results of years of easement acquisitions have become clearer, concerns have emerged. These concerns can be classified in relation to the two important guiding principles of private land conservation as developed in the US—that the protected land provides a public benefit and that the protected status of the land is permanent.

With regard to public benefit, conservation easements do not necessarily require public access to the eased land. The lack of consistency regarding public access in conservation easements has in some cases heightened the concern that easements are primarily useful tools reserved for wealthy people to protect their land with large tax deductions, and do not contain sufficient requirements for promoting public benefit. A related concern is that easements can be too easily manipulated to increase land values for the purpose of inflating deductions. These concerns have been at least partially addressed through more targeted regulations and scrutiny of transactions.

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<sup>3</sup> Korngold, 2011, 591. “A definition of a private conservation easement in gross is essential to understand these interests as well as the variables that can be adjusted when creating alternate conservation restrictions. The features of private conservation easements in gross are:

- A private interest, i.e., held by a nonprofit organization rather than a governmental entity
- Restricts the owner of the servient (i.e., burdened) land from altering the environmental features of the property, and is enforceable by the nonprofit organization
- A “less-than-fee” interest (i.e., a limited, nonpossessory, enforcement right), with the servient owner otherwise retaining fee ownership of and rights to the land
- “in gross” i.e., the nonprofit owner of the easement does not need to own land near the servient property in order to enforce the easement and the nonprofit can be located far away from the servient land (i.e., no appurtenancy requirement)
- perpetual, or at least capable of perpetual ownership
- a property interest in the holder, i.e., assertable *in rem* against the land itself and not merely a contractual obligation of the servient (aka burdened) owner
- binding on successor owners of the servient property
- assignable as a property right to other nonprofits or governmental entities
- created voluntarily by the parties, not by governmental compulsion”

A thornier set of issues has arisen around the permanence of easements. Permanence is certainly one of the most important aspects of a conservation easement and a primary basis on which favorable tax treatment rests. As many easements pass several decades and multiple landowners, there is rising pressure to amend easements—or to better enforce easement terms after violations have occurred. The question of permanence and enforcement has sparked a contentious debate in the conservation and legal communities around the process for amending/modifying easements. Interestingly, even as it is usually a successor landowner who sparks a modification action, some conservation organizations are beginning to suggest that changing conservation circumstances—perhaps especially in the context of climate change—may compel easement modification, or even extinguishment. Exploring these issues is beyond the scope of this paper and much has been written about them already.<sup>4</sup> What is relevant is how we might take into consideration some of the issues associated with conservation easements in the US as we consider the scope and development of private land conservation in other parts of the world.

### **The “Modern” Land Conservation Movement**

In addition to the role played by conservation easements and favorable tax treatment in sparking the modern era of private land conservation in the US, several other elements must be mentioned. The first of these is the growth in philanthropic resources available to land conservation. Although exact numbers are hard to track down, there is no doubt that there has been substantial growth over the past several decades in philanthropic funds made available to land conservation organizations to protect land. In addition, operating budgets and employees of major conservation organizations have increased by orders of magnitude over the years. For example the annual budget of The Nature Conservancy, the largest non-profit land conservation organization in the world, now exceeds \$700 million dollars, and its endowment is close to \$1 billion. It employs approximately 3,700 staff around the globe.<sup>5</sup> For state and local land trusts, average operating budgets have increased 36% in the 5-year period between 2005 and 2010 (Land Trust Alliance, 2010 Land Trust Alliance Census, 2010, 12). This kind of philanthropic support for private land conservation does not appear to exist outside the US. Thus, a major source of the growth and sustainability of private land conservation in the United States is not present in other parts of the world.

A corollary to the availability of private philanthropy has been the cooperation between private land trusts and public agencies at the federal, state and local level. Many conservation projects in the US are completed with a combination of public and private funding. The public funding may be in the form of grant programs to land trusts such as the North American Wetlands Conservation Act (NAWCA). Initially created by Congress in 1989 NAWCA provides matching grants to organizations for the acquisition, restoration, and enhancement of wetland ecosystems for the benefit of wetlands-associated migratory birds and other wildlife. Administered by the

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<sup>4</sup> Schwing, Ann Taylor. 2013. Perpetuity is Forever, Almost Always: Why it is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements. *Harvard Environmental Law Review*. 37: 217-246; Jay, Jessica E. 2012. When Perpetual is Not Forever: The Challenge of Changing Conditions, Amendmend, and Termination of Perpetual Conservation Easements. *Harvard Environmental Law Review*. 36: 1-78; McLaughlin, Nancy A. 2005. Rethinking the Perpetual Nature of Conservation Easements. *Harvard Environmental Law Review*. 29: 1-103.

<sup>5</sup> Internal Revenue Service. 2013. Federal Tax Return Form 990: The Nature Conservancy Annual Revenue and Expenses for Fiscal Year 2011-2012. Washington, DC.

U.S. Fish and Wildlife Service and the North American Wetlands Conservation Council, the program has awarded \$1.3 billion to 2,400 projects that protect and restore more than 27 million acres in the US, Mexico and Canada.<sup>6</sup>

Public funds are also made available through state and local programs. A significant example is Great Outdoors Colorado, a state grant program created in 1992 when Colorado voters approved the creation of the Great Outdoors Colorado (GOCO) Trust Fund, to be funded by proceeds from the Colorado lottery. Private land conservation organizations are specifically eligible to apply for grants in order to protect land through fee acquisition or conservation easements. Since inception (through FY2013) GOCO has made nearly \$220 million in competitive grant awards for open space acquisition projects.<sup>7</sup>

Another equally important element fueling land conservation is the development of strong and stable land trust organizations. The organizational strength of individual land trusts, and of the land trust movement, are essential to private land conservation success—and cannot be taken for granted. Protecting land is a resource intensive effort that represents a commitment by organizations for the long term—by accepting land and conservation easements, land trusts are making a “promise of perpetuity”. It seems unlikely that the public grant programs described above would exist if there were not a stable and reliable land trust community that is viewed as potential partners for the appropriate expenditure of public funds. And of course private philanthropy investment requires similar levels of trust and confidence. Accordingly, the past several decades have seen the land trust community focus on training and developing staff and expertise, increasing resources for stewardship, developing leadership potential within the community, and initiating self-imposed standards of operations (Land Trust Standards and Practices) and a system of voluntary accreditation. Most of the effort to strengthen the capacity, sophistication and stability of land trusts has come from the work of the Land Trust Alliance, whose mission is to strengthen land conservation across America—“by building highly effective and well-governed land trusts that protect lands with the highest values to their communities and ensure their protection in perpetuity, we can preserve healthy human and natural communities, clean air and water, beautiful vistas, recreation areas and working lands” (Land Trust Alliance, 2010 Land Trust Alliance Census, 2010, 1).

## **The Global Picture**

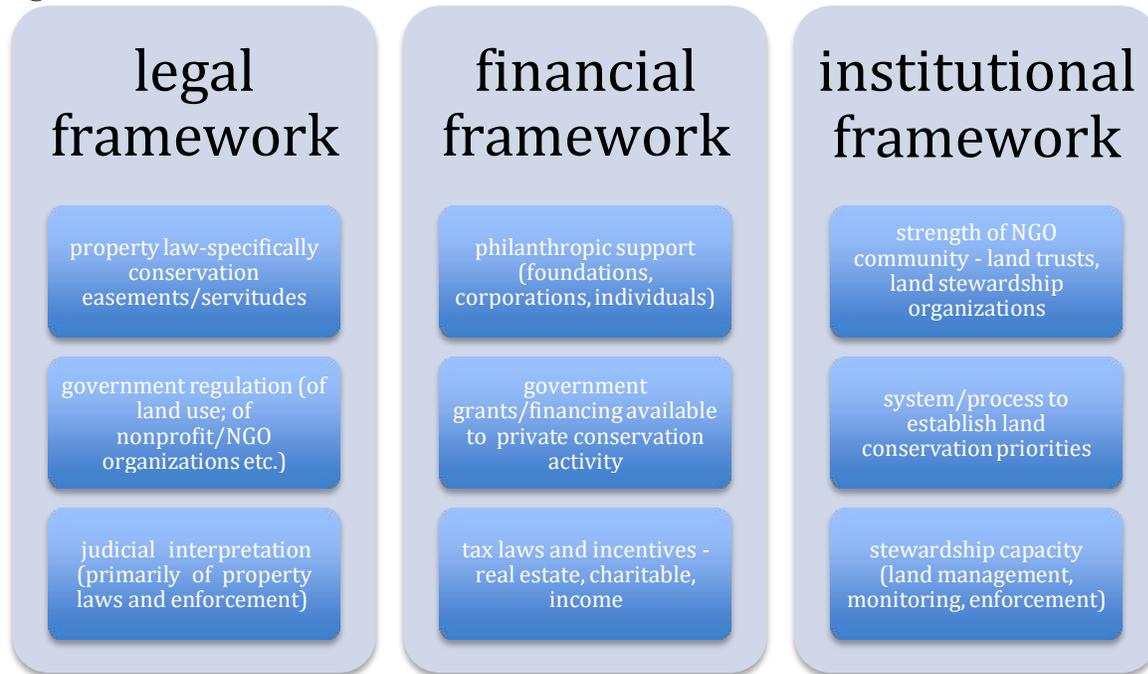
In looking at private land conservation whether in a mature context such as the US or as a developing concept as in Chile, an analysis of the important elements that apply regardless of geography is useful in considering what is happening around the world. This model of private land conservation presumes that there are basic elements of a civil society in place—stable government, a dependable and accurate land tenure system, a legal system and the rule of law. Thus a framework to evaluate private land conservation would consist of the following elements:

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<sup>6</sup> U.S Fish & Wildlife Service, North American Wetlands Conservation Act; Protecting, Restoring, and Enhancing Habitat for Migratory Birds. Division of Bird Habitat Conservation: Arlington, Virginia. [www.fws.gov/birdhabitat/grants/NAWCA](http://www.fws.gov/birdhabitat/grants/NAWCA)

<sup>7</sup> State Board of the Great Outdoors Colorado Trust Fund. 2013. Financial and Compliance Audit for the Years June 30, 2013 and 2012. Denver, Colorado: Great Outdoors Colorado.

**Figure 2: Evaluation Framework for Private Land Conservation**



The elements of the framework are not linear—one element does not necessarily have to happen before the other. But the elements are clearly inter-related and influence each other. For example, strong NGOs can increase confidence in long-term conservation outcomes and might therefore increase government grants/financing as well as private philanthropy. The US example also suggests that none of these elements is ever safely “checked off”—for example, favorable tax treatment may be in place now but is always at risk as political forces and policy changes dictate.

The following section will look at the general private land conservation picture in four contexts around the world, and consider them in the framework of the private land conservation model (Figure 2).

### **A Growing International Interest in Private Land Conservation**

Outside of the US, land conservation has, throughout the twentieth century and in the early years of the twenty-first century, largely been the domain of the public sector. However, awareness is arising around the globe that resource protection cannot rely primarily on public sector solutions. Examples of this evolution in thinking about private land conservation are appearing in Europe<sup>8</sup>, Latin America<sup>9</sup> and Australia<sup>10</sup>.

<sup>8</sup> “While many stewardship agreements might not meet the IUCN definition of a protected area, **the understanding that conservation cannot be solely the responsibility of governments is widening.** Prior to the last World Parks Congress (South Africa, 2003), conservationists focused attention primarily on management objectives of protected areas, assuming that ownership of protected areas would largely be state or regional governments, so there was little attention paid to governance. But the number and extent of private protected areas has grown exponentially, many government designated sites are managed by nongovernmental partners, and recognition has increased of the role community and indigenous groups have long played in protected land for conservation. **In short, we are learning that nature conservation is too big and important a challenge for**

As this paper explores the various faces of private land conservation, agreement about definitions becomes important. According to materials from the European Commission, the terms should be understood as follows:

**Private conservation:** As opposed to public conservation, private lands conservation is led by the private sector, be it local groups, landowners, communities, cooperatives or businesses. Some of the main tools used to achieve these goals include land trusts, conservation easements, private reserves and incentives.

**Private Protected Area:** A term internationally recognised (e.g. by IUCN) to include the management of a private land with the main aim to protect its natural values, independently of its legal status or level of protection .... Usually, this is done by a nature conservation organisation (NGO, Foundation, Trust, etc), but can be done also by a private owner who cares about his/her land.

(Source: Basora et. al, 2013.)

An important characteristic to notice in these definitions is how expansive they are, encompassing the efforts of private landowners managing land for conservation purposes whether or not there is a legal status associated with carrying out that purpose. (for additional detailed discussion of various forms of private land conservation, see Kamal et. al, 2014)

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**governments to address alone.** The growing number of land stewardship organisations and voluntary stewardship arrangements is another reflection of that fact.” (emphasis added)

Source: CARING TOGETHER FOR NATURE, Manual on Land Stewardship as a Tool to Promote Social Involvement with the Natural Environment in Europe

LIFE Nature, DG Environment, European Commission, 2013.

<sup>9</sup> “Who We Are

Our members are property owners large and small; families, foundations, universities, indigenous and rural communities; tourism and real estate companies, and people that -without owning land- want to support our efforts. In spite of our differences, we are united by the desire to create protected areas within our territory. Together we created Así Conserva Chile: the Association of Conservation Initiatives on Private and Indigenous Lands.

Our objective is to promote the protection of our territory, bringing together the strength of people and organizations interested in working together for sustainable development in its environmental, economic, and social facets.

Together we seek the support, legal framework, and social recognition that will make this vision come true. Together we protect our land for future generations and support each other in the difficult task we have joyfully taken upon ourselves.”

Source: ASI Conserva Chile website

<sup>10</sup> “Much of the decline of Australian biodiversity has occurred on private lands, where many of the major threats to biodiversity such as agricultural practices, grazing and clearing take place. With this unprecedented and continuing decline in biodiversity, **it is no longer sufficient to rely on public protected areas alone for biodiversity conservation.** As private landholders manage 77% of Australia’s land area, including some of Australia’s most important ecological areas, it is widely recognised that private land conservation is a crucial part of protecting Australia’s environmental assets.” (emphasis added)

Source: Website of Australian Land Conservation Alliance

## Chile: Developing Private Land Conservation

A 2012 survey of private land conservation initiatives in Chile noted the following<sup>11</sup>:

- 308 initiatives identified (33 of indigenous communities) totaling 1,651,916 hectares (4,081,973 acres)
- More than 60% are properties less than 200 hectares
- 5 properties represent more than 60% of the total acreage of all protected areas
- 80% private landowners; 6% foundations and NGOs; 5% companies/LLCs; 3% communities
- Only 28% have identified conservation objectives and have designed and implemented management plans
- There is no framework or capacity to provide technical assistance to landowners
- There are no specific state funding mechanisms

What is remarkable to note from this survey is that Chile has had so much private land protected in a relatively short time. Chile has only had a stable democracy since 1990, having emerged at that time from military dictatorship. In 1991 American businessman Doug Tompkins (and later his wife Kris) established Pumalin Park. The Tompkins' efforts to protect and restore more than a million acres of wild lands in Chile and Argentina have continued to this day, not without controversy<sup>12</sup>. They have recently announced the intention to give much of the land to the Chilean government to create national parks.<sup>13</sup>

The first local (that is, non-international) land trust was established in Chile in 2009 with the creation of Corporacion Bosques de Zapallar. In contrast to the Tompkins, Zapallar was a local effort that led to the creation of El Bordo Park, approximately 173 acres (70 hectares) of private land given by individuals to be owned and managed by the land trust.

With both the Tompkins and Zapallar efforts underway, a unique combination of public, private and NGO individuals and organizations in Chile established the Private Lands Conservation Initiative. The reach of the effort was ambitious: “the goal was nothing less than changing the enabling conditions for conservation of an entire country” (Tepper and Alonso, 2009, 61). It is also very interesting to note the extent to which the private land conservation movement in Chile has mirrored the US—but not surprising given that the Private Lands Initiative was sparked in

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<sup>11</sup> De La Maza, Cristobal, Flores, Diego, and Rovira, Jaime. Chilean Ministry of the Environment. 2013. Public and Private Conservation. Santiago, Chile: Government of Chile.

<sup>12</sup> Wieners, Brad. 2014. Patagonia Dreaming: Kris Tompkins works to build the best national park. *BloombergBusinessWeek* [www.businessweek.com/articles](http://www.businessweek.com/articles)

<sup>13</sup> Carlsen, Paul. 2014. Controversial billionaire to gift Patagonia reserve to government. *The Santiago Times*. [www.santiagotimes.cl](http://www.santiagotimes.cl)

part by The Nature Conservancy. Henry Tepper and Victoria Alonso, two of the key players and both TNC employees at the time, have described the strategy of the Chilean movement “as a practical, results oriented program based on three strategies adapted from the launching of the private land trust movement in the United States” (Tepper and Alonso, 2009, 55). These strategies included 1) creating financial incentives, 2) developing conservation easements (or their equivalent), and then 3) using these tools to protect land. While there has been significant activity in Chile to advance these strategies, results to date have been mixed.

Perhaps most importantly, with regard to the second strategy, legislation was filed in 2008 to create the Derecho Real de Conservación (a real right of conservation) which would amend the Chilean Civil Code to create a new category of conservation land, playing a role similar to that of conservation easements in the US. The importance of this strategy can only be understood in the overall context of the legal posture of conservation easements, and the difference between common law and civil code as the basis for developing and enforcing laws especially relating to property rights. Much has already been written on this topic in the context of conservation easements (see Environmental Law Institute. 2003, 21–25; Jacobs, 2014; Korngold, 2011).

Property restrictions in civil code countries are looked upon with significant disfavor by the law. As Korngold noted, “there are various reasons why traditional civil law systems do not provide fertile ground for the adoption and use of conservation easements. These include the prohibition of in gross interests, rejection of affirmative obligations, and the *numerus clausus* principle” (Korngold, 2011, 619). Korngold describes these impediments in civil code countries in detail, leading to the conclusion that the adoption of a legal interest akin to conservation easements in civil code countries would likely require an amendment to a country’s civil code, which is a significant undertaking.

Against this background, the boldness of the Chilean Private Lands Working Group can be better appreciated—as Tepper and Alonso note, “amending Chile’s Civil Code is no casual matter” (Tepper and Alonso, 2009, 58). Indeed, time has proven this observation to be true—as of July 2014 when this paper was written, the Derecho Real de Conservación (DRC) was making slow progress in the Chilean Senate, but with continuing hope that it will be acted upon favorably sometime soon. However, even without the DRC, conservationists in Chile are adapting the concept of a conservation easement to create a *servidumbre*, which will incorporate the common law concept of a benefitted and burdened parcel (i.e. a land trust must own land that is proximate to the eased property). There are concerns about the efficacy of this approach, but land conservationists in Chile are committed to pushing the boundaries of the tools available as they seek to protect the very significant natural resources and beauty of their country.

In addition to specific legal tools, the Chilean private land NGO sector is developing; notably land trusts are being established in Chile—again as noted by Tepper and Alonso, “[the] creation of an NGO that can work with landowners and take gifts of conservation land or development ownership instruments [in Chile] will be vitally important” (Tepper and Alonso, 2009, 61). One such organization called Asi Conserva Chile came into being formally in 2010, with a mission to help develop and support private protected areas across Chile.

In addition, another land trust, Fundacion de Conservacion Tierra Austral, was started in 2012 and currently holds a *servidumbre* on Valle California. Valle California is located in Patagonia and owned by the private real estate development company Patagonia Sur. Patagonia Sur describes the project on its website as follows:

Valle California is permanently protected through an innovative and practical new Chilean legal agreement, the *Servidumbre Voluntaria*, a form of voluntary easement with conservation purpose. The *Servidumbre* agreement enables Patagonia Sur, and the people who purchase property from us, to simultaneously ensure the permanent conservation of Valle California and Patagonia Sur's other holdings, while accommodating a variety of income-producing sustainable land uses, including ecotourism, native reforestation, sustainable agriculture and forestry, and limited residential real estate development.

Source: Patagonia Sur website

The Nature Conservancy is also very active in Chile, and has already made landmark efforts for land conservation, protecting the 150,000-acre Valdivian Coastal Reserve in southern Chile in 2003 (Smith, 2014). One of the world's last temperate rainforests, this very ecologically important, ambitious and expensive project has stretched the Conservancy in developing new models of ecological restoration, local partnerships, and financing. Recently, TNC announced an agreement with BHP Billiton in which the company will invest \$20 million to secure the protection and management of the Valdivian Coastal Reserve (Smith, 2014). In addition TNC agreed to convey a *servidumbre* agreement (an easement for conservation purposes) to the Fundacion de Conservacion (FORECOS), another new land trust in Chile, covering almost all the acreage of the Valdivian Coastal Reserve. (Contreras, 2014)

Summary: The development of private land conservation in Chile has been and will continue to be of great interest to other countries looking to enable private land conservation. The challenges in Chile are substantial when measured against the private land conservation model, notably: the legal tools are just developing; there is limited but growing NGO capacity, and there is very modest capacity for private philanthropy.

### **European Union: An Emphasis on Stewardship, Not Permanence**

This paper will focus on only one major aspect and program of the European Union and its member countries: the activities of land stewardship organizations and the work of the LIFE Nature Unit of the Environment Directorate General, European Commission. The LIFE Nature program was established to assist with the implementation of EU nature conservation and biodiversity policy and, in particular, the establishment, protection and management of the Natura 2000 network. From 1992–2012, the EU has supported 1,424 LIFE Nature projects at a total budget of €2.75 billion Euros (European Commission and Life Nature, 2014, 3). To the extent that the EU has a private land conservation approach, it is embodied through the work of LIFE Nature and its support of land stewardship organizations and projects. As defined by LIFE Nature, “land stewardship is a strategy to involve landowners and users in the conservation of nature and landscape, with support from and inputs by a wide range of civil society groups. Through voluntary agreements between landowners/users and land stewardship organizations,

nature, biodiversity, ecological integrity and landscape values will be maintained and restored” (Sabate et al., 2013, 9).

It is important to acknowledge that in many EU member countries, comprehensive land use regulation significantly restrains development of private land—thus diminishing the imperative to own land outright for conservation purposes. In the context of a highly regulated land use environment, the need to develop landowning strategies for conservation NGOs is diminished. Nonetheless, the focus on land stewardship, land stewardship organizations and land stewardship agreements is an explicit acknowledgement that the long tradition of primarily governmental action to create and manage protected areas is not sufficient to achieve the environmental goals of the European Union. “Protected areas designated by public authorities will always play a fundamental role in biodiversity conservation and landscape management. However it is increasingly clear that governments cannot do the job on their own.” (Basora et. al, 2013, 17).

Even with an increased focus on private land conservation actions, there remains an essential contrast between the EU and US approaches. In the US, the preferred outcome of private land conservation activity is permanent legal conservation status that protects the key elements that defined the project initially (e.g. biodiversity, farmland, scenic or cultural significance). Such an outcome in the US almost always means an ownership interest in the land—in fee or through a conservation easement. In many (or even most) of the LIFE Nature projects, the outcome is a land stewardship agreement for a term of years (as short as 3 or as long as 30 or more) that specifies activity that the landowner will do—or not do—and what the land stewardship organization will provide as well. Usually some kind of payment is involved. In addition, the agreements are personal to the landowner and do not run with the property so they are usually extinguished if the landowner dies or sells the property. Easements are very seldom used as most EU countries are civil code countries and have the same impediments to use of conservation easements as have been previously described.

The EU experience enfold a wider range of organizations, agreements and activities than has traditionally been considered part of the land conservation community in the US. Americans consider meaningful private land conservation as primarily the purview of 501(c)(3) organizations with land conservation as an explicit purpose (i.e. land trusts). In the LIFE Nature approach, land stewardship organizations “can range from major foundations to small associations of nature conservation, schools or groups of volunteers, even municipalities and county or regional administrations provided that one of their goals is land conservation and they use land stewardship tools” (Basora et. al, 2013, 35).

How success is measured is an important difference between the US and the EU private land conservation communities. For many years, the mantra of US conservation was “bucks and acres”. This was a short hand of assessing success solely as measured by the acres protected and the money raised (many credit—or blame—The Nature Conservancy with having instilled this phrase into the land conservation worldview). Certainly within the last decade, the approach of the US land conservation community to measuring success has begun to evolve, to take into account more nuanced metrics than “bucks and acres”.<sup>14</sup> But the idea that project success—and

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<sup>14</sup> for example see the work of the Center for Whole Communities in developing a new framework to evaluate success which is called Whole Measures [http://www.wholecommunities.org/whole\\_measures/](http://www.wholecommunities.org/whole_measures/)

long term impacts—must become more balanced and inclusive is still relatively new for many land trusts.

In a recent study on the long-term impact of LIFE Nature projects, the following were elements to be considered:

- Knowledge—learning about the special habitats and species of the Natura 2000 area
- Skills—developing good practice techniques
- Awareness—local stakeholders becoming aware of the importance of local nature
- Attitude—local stakeholders changing from hostility to benign indifference to positive support for nature conservation
- Motivation—landowners being inspired to carry out conservation work

Source: European Commission and Life Nature, 2014, 9.

Because LIFE Nature projects do not typically involve ownership interests being acquired by a land stewardship organization, it is not surprising that the measures of project success are more broadly defined:

“...LIFE is much more than simply a co-financing instrument. LIFE projects have been used to meet urgent threats to habitats and species, to develop the capacity of NGOs and field staff, to act as a catalyst for conservation action, to communicate with local communities, to gain acceptance for nature conservation and as a means to develop best practice guidance.

Successful LIFE Nature projects engage people, raise awareness about European nature values and form partnerships built on trust between different sectors.”

Source: European Commission and Life Nature, 2014, 8

Summary: When considered against the private land conservation model, land stewardship projects in the EU have considerable strength. The investment in conservation priorities throughout EU member countries is notable as is the emphasis on creating NGO capacity and broader public support and understanding of conservation outcomes. Nonetheless, the LIFE Nature program lacks an ability to produce long-term conservation outcomes with any certainty, and the legal limitations of the civil code constrain the use of less-than-fee tools like easements to protect working lands while promoting ecological outcomes. Frequently LIFE Nature is the sole funder, thus missing opportunities to leverage private philanthropy or to use tax or other financial incentives to produce longer-term conservation results.

### **Australia: Expanding a Successful Base**

Living in one of the places with highest measures of biodiversity on earth, Australian land conservationists have recognized that the pace and scale of land conservation must increase, and that private land conservation has an important role to play in the process. In addition, the role and involvement of indigenous people is crucial to the future of land conservation in Australia.

There has been a decades long history of private land activity in Australia, including major land trusts in each state and country-wide land conservation work by The Nature Conservancy, which has operated in Australia since the 1990's. Land conservation organizations in Australia function much like US organizations. Also a common law country, Australian land conservation NGOs have relied on specific authorizing legislation for each state (with the exception of the Northern Territory) that allows designated land conservation organizations to hold conservation restrictions (known as "covenants" in all but South Australia where they are "heritage agreements"). The first covenant was completed by the Trust for Nature in the Australian State of Victoria in the early 1980s. As an indication of growth and demand, consider that the Trust for Nature now holds more than 1,000 covenants across the state (Trust for Nature, 2014). Covenants are permanent on the title of land and will bind successors in interest.

There are a number of smaller land conservation organizations in Australia, but they are not specifically authorized to hold covenants. One strategy to help accelerate Australian private land conservation would be to more widely enable the use of covenants, and to make the laws governing covenants more consistent. In this way, the situation in Australia is somewhat like the US in the early 1980s when use of conservation easements began to accelerate and significant amounts of land came under protection by a very wide range of land trusts. Partly in recognition of the need for accelerating private land conservation, seven major land conservation organizations joined together in 2011 to create the Australian Land Conservation Alliance and described the purposes of that coalition as follows:

Recognizing that private land conservation efforts in Australia appear fragmented across states and lack synergy, a key driver behind ALCA's formation was to bring together key participants in private land conservation in order to develop a consistency of approach, and promote, explain and execute conservation programs on private lands.

In its role as a national voice for private land conservation, ALCA's mission is to ensure that private land conservation makes the greatest possible contribution to the achievement of national and state level conservation goals.

Source: Australian Land Conservation Alliance website

Another similarity between Australia and the US private land conservation movements is the role of tax incentives. Prior to 2002, tax deductions under Australian federal tax law were only available for outright donations of land, not for gifts of covenants. Partly due to the work of a Nature Conservancy tax expert, the tax law was changed to allow "tax concessions" to "landowners who enter into conservation covenants to protect areas of high conservation value" (Australian Taxation Office website). Much like US tax law, the covenants must be perpetual and granted to a qualified recipient.

Summary: While there are many strengths in the Australian conservation community, there is currently a lack of significant private philanthropy that would help leverage conservation efforts. As was indicated by the initial creation of the ALCA, there is also a need for greater coordination, sharing of practices and accelerating use of tools—like easements—to protect more land. Partnerships with indigenous people are key to the success of biodiversity conservation in

Australia, and offer opportunities and challenges that traditional US tools have not typically addressed.

### **Canada: A Mature and Successful Private Land Conservation Movement**

Private land conservation in Canada is largely the story of The Nature Conservancy of Canada (NCC), which is not an affiliate of the US-based Nature Conservancy. Started in 1962, NCC now protects more than 2.6 million acres coast to coast. NCC uses sophisticated conservation planning to target the most important natural areas in Canada for protection. In addition to the broad reach and success of NCC, private land conservation in Canada is notable for an expanding land trust community, strong public and government support, and a range of legal tools available for land protection.<sup>15</sup> In addition, there are several provincial land trust alliances that support land trusts in a similar fashion as the US Land Trust Alliance does. In 2003, the Canadian Land Trust Alliance was created (however the ongoing activities of that organization were suspended about a decade later). Working with the US Land Trust Alliance, in 2005 the Canadian Land Trust Alliance produced the Canadian *Land Trust Standards and Practices* for land conservation groups operating in Canada.

With regard to public investment, private land conservation in Canada has received tremendous support from the federal government. As described on NCC's website:

In 2007, the Government of Canada launched the Natural Areas Conservation Program with a vision of investing in direct, on-the-ground action to conserve important natural habitat in communities across southern Canada....The Natural Areas Conservation Program was launched with an initial investment of \$225 million over five years. Of that, \$185 million was directly invested in NCC's conservation efforts; \$40 million was invested in other qualified organizations (OQO), including \$25 million to Ducks Unlimited Canada. In March 2013, the Government of Canada announced its continued commitment to this program, with an additional \$20 million in funding. This has been the largest investment by any Canadian government towards private land conservation.

The Government of Canada's investment has been matched by Canadians, the private sector and other governments, resulting in more than \$600 million in conservation activity through funding contributions and land donations.

Under this program, the Government of Canada has set an ambitious goal of conserving 345,000 acres (218,000 hectares) of ecologically significant land across southern Canada.

With these investments, more than 959,000 acres (388,000 hectares) have been conserved as of February 28, 2014, providing habitat for 164 species at risk — an area almost twice the size of the goal set under the Natural Areas Conservation Program.

Source: The Nature Conservancy of Canada website

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<sup>15</sup> for a thorough discussion of conservation easements and servitudes in Canada, see Atkins, Judy, Ann Hillyer, and Arlene Kwasniak. 2004. Conservation Easements, Covenants and Servitudes in Canada: A Legal Review. Report No. 04-1, North American Wetlands Conservation Council (Canada)

In addition to this extraordinary investment by the government of Canada, private land conservation is supported with favorable tax treatment through the Ecological Gifts Program. Initiated in 1995, hundreds of Canadians have made qualified gifts valued in total at more than \$550 million (Environment Canada, 2010). The program offers significant tax benefits to property owners who donate land, or an eligible interest or right in land, to a qualified recipient. The key elements of the program include: a certification that the land is ecologically sensitive according to specific national and provincial criteria; the gift be made to an eligible recipient (one that has been approved by the Minister of the Environment); and that the gift value is certified in advance of the gift's completion. While the Eco-gifts program has many similarities to US tax law, there are notable differences. Most important is the requirement that the ecological significance of the gift and its value must be determined in advance. If a donor does not agree with the government's decision on the gift value, the donor can appeal for a redetermination or simply withdraw the application and decide not to proceed with the gift. (Environment Canada, 2010). Given the disputes that US taxpayer sometimes have with the IRS over the value claimed for a gift, the Canadian system appears to make a great deal of sense in saving time, legal fees, uncertainty and possible penalties.

Any discussion of private land conservation in Canada must recognize that the laws of Quebec differ significantly from those of the other provinces. Quebec law is based on civil code while the rest of Canada is common law. Therefore land trusts are legally different in Quebec, and often do not own but only manage land under agreements of varying lengths. Conservation easements in Quebec are "real servitudes" and must be carefully drafted to ensure enforceability. There must be a benefited (dominant) and burdened (servient) estate. A qualified conservation organization must own the dominant estate—it can be a small parcel, but there must be an ecological link that connects the two parcels. According to NCC, there are approximately 50 conservation servitudes in Quebec that are registered and run with title to the land (Marie-Michèle Rousseau-Clair, Private Interview, Nature Conservancy of Canada). Although there are a more complicated set of requirements under the civil code, crafting projects that meet those requirements may continue to be easier than seeking to amend the civil code of Quebec. Quebec also allows the designation of "nature reserves," which involves an agreement between the government and a private landowner, usually for a term of 25 years, which has essentially the effect of a term easement (Environment Canada, 2010). However achieving nature reserve status can be cumbersome and is not currently widely used. (Rousseau-Clair, private interview)

Another aspect of land conservation in Canada has been the creation of the American Friends of Canadian Land Trusts (AFOCLT) an innovative organizational model that was developed in 2005 to "protect, and to promote the protection of, the ecological integrity and other conservation values of the natural areas of Canada through securement of fee title and less than fee interests in land. In addition we back stewardship, public outreach and education, and the conservation activities of Canadian land conservation entities and organizations." (AFOCLT website) The AFOCLT model may be useful in other places where there are US-based land ownership interests, because the AFOCLT is able to facilitate donations of land and funding from US taxpayers to Canadian conservation organizations.

Summary: Private land conservation in Canada benefits from the leadership provided by The Nature Conservancy of Canada. However in spite of its significant land protection work, NCC

cannot also function as an “alliance”, providing support and building capacity for all land trusts in Canada. In order to continue the development of a professional and sustainable land trust movement in Canada, additional resources—such as those provided to US land trusts by the Land Trust Alliance—may be needed. Also worth noting is whether additional forms of private investment/working capital and private philanthropy will develop in Canada if/when public money diminishes. In addition, civil code countries might look to the experience of Quebec in considering how to use servitudes to optimal effect.

### Conclusion

The land trust movement in the US has become a powerful force to protect land and natural resources, and to involve citizens in making long-term choices about their communities. Private land conservation as it has developed in the US is, not surprisingly, well-matched to a country that places an emphasis on land ownership and that significantly constrains government power to regulate land use activity. Against this cultural backdrop, the growth of land trusts has been propelled by a number of factors, most notably in the past 30 years, the legal status of conservation easements and associated tax benefits, and the availability of significant public and private financial resources.

But the success of the land trust movement in the US is not the only story to be told. Figure 3 measures how the examples looked at in this paper relate to the key elements of the private land conservation framework (see Figure 2).

**Figure 3: Applying the Private Land Conservation Framework**

	Chile	EU	Australia	Canada
<b>Legal</b>				
Property law: easements/ servitudes				
Government regulation: land use; nonprofit/NGOs				
Judicial interpretation of property laws & enforcement				
<b>Financial</b>				
Philanthropic support				
Government grants/financing				
Tax laws & incentives				
<b>Institutional</b>				
Strength of NGO community				

<b>Systems/processes for land conservation priorities</b>				
<b>Stewardship Capacity</b>				

There can be multiple paths forward in building an effective capacity to accomplish durable private land conservation. Just as the Land Trust Alliance has provided leadership to develop the land trust movement in the US, now may well be the time to create a formal network of private land conservation organizations and practitioners from around the world. Sharing best practices, case studies, legal precedent, educational tools, specialized expertise, training and professional development are just a few of the needs identified as potential areas of impact for an international private land conservation network.

There is no doubt that private land conservation is on the rise in countries around the world (Stein, 2014). Regardless of scale (local, state, region, national) assessing progress against the elements of the model will provide a meaningful tool for land conservationists to use when deciding on strategies to build capacity, reach and effectiveness. Successful private land conservation will help achieve our shared goals for the protection of biodiversity, agricultural lands, wetlands and waterways, forests, and recreational, historic, scenic and cultural resources. The framework and analysis proposed in this paper will prove useful in developing the needed elements that will allow private land conservation to flourish.

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