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John C. Martin

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BRINGING DEAD CAPITAL TO LIFE: INTERNATIONAL MANDATES FOR LAND TITLING IN BRAZIL

JOHN C. MARTIN*

Abstract: Economist Hernando de Soto urges land re-titling programs in developing countries so that squatting farmers and businesspeople may be integrated into a lawful economy. Re-titling programs, however, can go awry, fueling class and racial backlash, and undermining economic stability and trust in property titles. This Note explores the risks and challenges Brazil faces in expropriating and re-titling land occupied by squatters. It addresses the legality of expropriation under international law, draws comparisons with land reform in the United States and Zimbabwe, and addresses the specific hurdles Brazil faces concerning its Constitution, civil code, and judicial system. This Note proposes a legal solution resembling the U.S. Homestead Act. It would involve expropriating land for less than fair market value in order to facilitate a more equal distribution of land and to temper the risk of racial backlash.

INTRODUCTION

On February 12, 2005, Sister Dorothy Stang, a Catholic nun and native of Dayton, Ohio, was shot four times in the chest and head by a pair of gunmen at a rural encampment in Pará, Brazil.¹ Since the 1970s, Sister Dorothy, backed by the Pastoral Land Commission of the Roman Catholic Church, had championed land tenure for Brazilian landless peasants.² The investigation following Stang's murder found that two land-owning ranchers had hired the gunmen, apparently in retaliation for her years of opposition to their economic and political domination of land interests in Brazil.³

The facts surrounding Sister Dorothy's murder illustrate the intractable positions of these opposing forces and the inevitable esca-

* John C. Martin is the Executive Articles Editor of the *Boston College International & Comparative Law Review*.

¹ See Larry Rohter, *Brazil Promises Crackdown After Nun's Shooting Death*, N.Y. TIMES, Feb. 14, 2005, at A3.

² See *id.*

³ See *Supporters of Slain American Nun Vow to Pursue Planners of Killing*, N.Y. TIMES, Dec. 12, 2005, at A13.

tion of their conflict.⁴ Sister Dorothy committed years of her life to the cause of impoverished landless peasants, and finally gave up her life for it.⁵ The Brazilian landowners resorted to the cold-hearted murder of an aged nun—and risked prison and personal ruin for themselves—in their quest to silence all resistance to their powerful monopoly of land use.⁶ For now, the landowners retain their position of control and dominance.⁷ Yet, community organizations in Brazil have organized themselves, lobbied governments, and successfully opposed landowners, demonstrating that a “backlash” against the dominant landowning minority in Brazil is on the rise.⁸

Amy Chua, in *World on Fire*, warned that an explosive backlash might occur in democracies like Brazil, where dominant minorities hold a majority of the country’s wealth, and where politicians might benefit politically from supporting the marginalized majority.⁹ Chua shows how a dramatic, swift, and violent backlash occurred in Zimbabwe against the white landowning elite.¹⁰ The same could be Brazil’s fate, Chua suggests, if free elections continue and the poor successfully pressure the government to expropriate private property.¹¹

Hernando de Soto offers an alternative to Chua’s scenario in *The Mystery of Capital*.¹² In a variation of land reform, De Soto recommends land titling schemes as a solution for poverty in developing countries like Brazil and Zimbabwe.¹³

This Note will summarize Chua’s predictions of backlash in countries like Brazil, and demonstrate how de Soto’s proposals on land titling may serve as a plausible solution. After an examination of international rights to property and standards on expropriation, this Note will explain how Brazil presents a unique challenge for domestic reformers. In Brazil, as in Zimbabwe five years ago, land distribution is so unequal—and past land reform has been so unsuccessful—a violent class and racial backlash to force land redistribution could be just around the corner. The best solution for Brazil, beyond allowing the market to dictate the cost of expropriations, may be to permit expropriation for

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

⁸ See AMY CHUA, *WORLD ON FIRE* 74 (2003).

⁹ See *id.* at 6–10.

¹⁰ See *id.* at 127–31.

¹¹ See *id.* at 160–62.

¹² See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 5–7 (2000).

¹³ See *id.*

just, but not fair market prices, and to clarify the laws on when land may be expropriated and re-titled to landless squatters.

I. BACKGROUND

A. *Chua and de Soto*

Chua warns that when the majority of a state's population feels disenfranchised vis-à-vis a "market dominant minority," backlash often results.¹⁴ Backlash occurred in Zimbabwe with invasions of whites' farms.¹⁵ Majority rule voting, Chua observes, may empower strongmen like Robert Mugabe, President of Zimbabwe.¹⁶ These strongmen rely on widespread hatred of a powerful, but minority sub-group as the basis of their political power.¹⁷

De Soto proposes that backlash, among other problems, would best be confronted by land titling programs.¹⁸ De Soto notes that landowners in the West can easily "tap" their property, because individuals, banks, and courts of law recognize land titles.¹⁹ Large tracts of property in the developing world are used productively by squatters, but officially belong to large landholders.²⁰ Thus this property cannot be "tapped" as collateral for loans and a fuel for savings and investment.²¹ Conversely, land titling programs would unlock more capital than can be given in foreign aid, empower the poor, and reinforce democratic participation.²²

As evidence for his claims, de Soto cites the history of land titling in the United States.²³ The U.S. Homestead Act allowed settlers to buy land for practically nothing, as long as they agreed to settle and cultivate it.²⁴ Although it sacrificed strict adherence to property rights, the

¹⁴ See CHUA, *supra* note 8, at 6.

¹⁵ See *id.* at 127–31.

¹⁶ See *id.*

¹⁷ See *id.* at 259–64.

¹⁸ See DE SOTO, *supra* note 12, at 5–7.

¹⁹ See *id.*

²⁰ See *id.* at 40.

²¹ See *id.*

²² See *id.* at 226–27.

²³ See DE SOTO, *supra* note 12, at 107.

²⁴ See *id.* at 107–08; see also Amy Callard, *Southern Ute Indian Tribe v. Amoco Production Company: A Conflict over What Killed the Canary?*, 33 TULSA L.J. 909, 915–16 (1998) (comparing economic effects of Homestead Act with Coal Lands Act).

Act encouraged the development of land on the American frontier and empowered individuals with a sense of ownership and identity.²⁵

De Soto suggests that land titling in Brazil might similarly empower Brazilians with a sense of personal ownership, and of membership in a democratic system.²⁶ Like the Homestead Act, land titling could help to stem backlash and reinforce democratic institutions.²⁷

B. *Land Reform and Expropriation as a Matter of International Law*

The United Nations (U.N.) Declaration of Human Rights declares a universal right to housing,²⁸ and numerous theorists and international forums have agreed that there should be a universal right to property.²⁹ John Locke went as far as saying that defending property rights is the central role and purpose of governments.³⁰

Expropriation means a governmental taking or modification of individual property rights, particularly by eminent domain.³¹ Expropriation is distinct from redistribution.³² Although a government may expropriate land, say, to save a rain forest from de-forestation, it may choose not to redistribute land by re-titling it to individuals or groups.³³

There are many benefits of expropriating land for re-titling.³⁴ It may lead to increased investment and growth when land is tapped as collateral, increased state tax revenues, a sense of ownership among the people, increased individual participation in the democratic process, and the development of additional rights.³⁵ It may lead to increased

²⁵ See Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 VAND. J. TRANSNAT'L L. 435, 469–70 (2006).

²⁶ See DE SOTO, *supra* note 12, at 218–21; see also Carol M. Rose, *Privatization—The Road to Democracy?* 50 ST. LOUIS U. L.J. 691, 702 (2006) (noting that land titling increases local control over politics).

²⁷ See CHUA, *supra* note 8, at 267–68.

²⁸ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR].

²⁹ See Jonathan Shirley, Note, *The Role of International Human Rights and the Law of Diplomatic Protection in Resolving Zimbabwe's Land Crisis*, 27 B.C. INT'L & COMP. L. REV. 163, 168 (2004); see also Kevin E. Colby, *Brazil and the MST: Land Reform and Human Rights*, 16 N.Y. INT'L L. REV. 1, 14–17 (2003) (discussing several international instruments that provide for right to property).

³⁰ See Rose, *supra* note 26, at 701–02.

³¹ BLACK'S LAW DICTIONARY 265 (2d ed. 2001).

³² See Colby, *supra* note 29, at 2–3.

³³ See, e.g., *Brazil Carves out 2 Vast Preserves in the Amazon Rain Forest*, N.Y. TIMES, Feb. 18, 2005, at A5.

³⁴ See DE SOTO, *supra* note 12, at 63–64.

³⁵ See Rose, *supra* note 26, at 704 (discussing creation of agents of democracy through land titling).

productivity of land by removing absent landlords.³⁶ Finally, it may help to empower agents of democracy when the people pressure governments for land re-titling.³⁷

International customary law allows expropriation that is: (1) for a public purpose; (2) nondiscriminatory; and (3) justly compensated.³⁸ Conflicts in international cases and arbitration usually center on whether compensation satisfies the third criterion.³⁹

C. Land Reform in Brazil

As early as 1964, during a period of dictatorship in Brazil, the government recognized the need for land reform and passed the Land Statute.⁴⁰ The Land Statute provides that the government may expropriate “latifundia,” large landholdings with their roots in colonial grants of land.⁴¹ The statute requires three elements to be satisfied for a lawful expropriation: (1) the land must be unproductive; (2) the expropriation must be in the public interest; (3) the expropriation must be for compensation.⁴²

The 1988 Constitution, which followed the overthrow of military dictatorship, further validated government expropriations.⁴³ Article 184 reads: “[i]t is within the power of the Union to expropriate on account of social interest, for purposes of land reform, the rural property which is not performing its social function.”⁴⁴ Article 183 also creates a flexible adverse possession law in urban properties, requiring only five years of adverse possession for title to transfer.⁴⁵ Another important post-

³⁶ Thomas Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL. L.J. 69, 112 (2006).

³⁷ See Rose, *supra* note 26, at 704.

³⁸ See *Iran-United States Claims Tribunal: Interlocutory Award in Case Concerning Sedco, Inc., and Nat'l Iranian Oil Co. and Iran*, 25 INT'L LEGAL MATERIALS 629, 631 (1986) [hereinafter *Iran-United States Claims*].

³⁹ See Kristen Mitchell, *Market-Assisted Land Reform in Brazil: A New Approach to Address an Old Problem*, 22 N.Y.L. SCH. J. INT'L & COMP. L. 557, 582 (2003).

⁴⁰ See Pindell, *supra* note 25, at 451.

⁴¹ See *id.*

⁴² See Bradley S. Romig, *Agriculture in Brazil and the Landless Movement: A Government's Attempt to Balance Agricultural Success and Collateral Damage*, 11 DRAKE J. AGRIC. L. 81, 94 (2006).

⁴³ See Pindell, *supra* note 25, at 453.

⁴⁴ See CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 184 (1988), available at <http://www.v-brazil.com/government/laws/titleVII.html> (Braz.) (last visited Jan. 23, 2008).

⁴⁵ See *id.* art. 183; see also Pindell, *supra* note 25, at 456 (discussing effects of flexible adverse possession law on *favela* property market).

Revolution measure, the City Statute, allows for ownership rights in the *favela* to shift after brief periods of squatting.⁴⁶

Complicating matters, the Brazilian Civil Code, which has remained unchanged since 1916, guarantees property rights and treats any infringement on property rights as a compensable taking of property.⁴⁷ Brazilian courts have relied on the strong defense of private property in Civil Code when adjudicating land disputes, requiring that expropriation be met with fair market compensation.⁴⁸ This makes expropriations exceedingly expensive, preventing widespread land reform and rendering the Constitution's plea for expropriations practically meaningless.⁴⁹

Nevertheless, grassroots organizations have resorted to self-help to enforce the Constitution.⁵⁰ The Movimento Sem Terra (MST), or Landless Worker's Movement, is the most organized and disciplined manifestation of a land reform movement.⁵¹ The MST routinely makes threats of prolonged land invasions, so-called "red months," to pressure President Luiz Inácio Lula da Silva (Lula), and the Brazilian government, to step up land reform measures.⁵² Its stated goal is to pressure the National Institute for Colonization and Agrarian Reform (INCRA) to use its authority under the Constitution to expropriate the land and re-title it to squatting peasants.⁵³

When the MST invades land and sets up squatting communities, INCRA often responds by expropriating more land. The INCRA helped 37,000 families get land in 2003.⁵⁴ Nevertheless, this falls well below the Lula and Cardoso governments' stated goals of expropriation and re-titling.⁵⁵

The landowners have retaliated by challenging INCRA expropriations in court, and by engaging in self-help.⁵⁶ Violent reprisals against MST land invasions have resulted in arrests, and thousands of alleged "assassinations" of MST activists.⁵⁷ The MST website reports 969 assassi-

⁴⁶ See Pindell, *supra* note 25, at 452–54.

⁴⁷ Law No. 3,071 of Jan. 1, 1916, Book II, tit. I, chs. II, III, & V, Código Civil [C.C.] [Civil Code] (Braz.).

⁴⁸ See Mitchell, *supra* note 39, at 570.

⁴⁹ See *id.*

⁵⁰ See Colby, *supra* note 29, at 3.

⁵¹ See *id.* at 19.

⁵² See Romig, *supra* note 42, at 96.

⁵³ See Mitchell, *supra* note 39, at 569–70.

⁵⁴ See Romig, *supra* note 42, at 98.

⁵⁵ See *id.* (noting that State's goal was 530,000 families resettled by end of Lula's term).

⁵⁶ See *id.* at 94–95.

⁵⁷ See *id.*

nations of rural workers and MST activists between 1985 and 1996.⁵⁸ On April 17, 1996, the Brazilian police shot into a crowd of peaceful MST protesters, killing 19 and injuring 51.⁵⁹ The police shooting and other acts of violence show the bloody side of MST confrontations over land titling policies.⁶⁰

D. Note on Structural Differences Between Zimbabwe and Brazil

Brazilian rule of law, politics, and society differ substantially from Zimbabwe's, making direct comparisons over-simplistic.⁶¹ Chua calls Mugabe a strongman, who has taken advantage of popular backlash against whites and the weak rule of law to gain power.⁶² By defending the rights of a black majority against a white landowning minority, Mugabe wins popular elections and consolidates political power.⁶³

Zimbabwe's judicial branch is weak: the Supreme Court's declaration that Mugabe's land grabs were illegal went unheeded.⁶⁴ Furthermore, although Mugabe's modifications of Zimbabwe's Constitution provided a veneer of legality to expropriations without compensation, the modifications ignore customary international law on expropriation.⁶⁵

In contrast, Brazil's democratic institutions are energized by more than majority voting.⁶⁶ Most Brazilians express faith in the judicial system and the rule of law.⁶⁷ Participation in elections is high, and grassroots organizations maintain an effective dialogue with the govern-

⁵⁸ Mark S. Langevin & Peter Rosset, *Land Reform from Below: The Landless Workers Movement in Brazil*, <http://www.mstbrazil.org/rosset.html>.

⁵⁹ See Alessandra Bastos, *Brazil's Landless Back to Highway Where They Were Massacred 10 Years Ago*, BRAZZIL MAG., Apr. 17, 2006, available at <http://www.brazzilmag.com/content/view/6113/53>.

⁶⁰ See Marc Margolis, *A Plot on Their Own*, NEWSWEEK INT'L, Jan. 21, 2002, at 22.

⁶¹ See Colby, *supra* note 29, at 23–25.

⁶² See CHUA, *supra* note 8, at 128–30.

⁶³ See *id.*

⁶⁴ See Shirley, *supra* note 29, at 164–65.

⁶⁵ See Craig J. Richardson, *The Loss of Property Rights and the Collapse of Zimbabwe*, 25 CATO J. 541, 541–43 (2005); David Shriver, *Rectifying Land Ownership Disparities Through Expropriation: Why Recent Land Reform Measures in Namibia are Unconstitutional and Unnecessary*, 15 TRANSNAT'L L. & CONTEMP. PROB. 419, 433–34 (2005).

⁶⁶ See CHUA, *supra* note 8, at 259–60.

⁶⁷ See Mauricio Garcia-Villegas, *Law as Hope: Constitutions, Courts, and Social Change in Latin America*, 16 FLA. J. INT'L L. 133, 136–37 (2004) (describing role of Latin American constitutions on political processes); Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT'L & COMP. L. 715, 718, 812 (2004) (noting that just 28.8% of Brazilians have no confidence in legal system).

ment.⁶⁸ Furthermore, Brazilian domestic rule on expropriation provides greater protection for property rights than the international rule of expropriation requires.⁶⁹

II. DISCUSSION

A. *The Failure of a Constitution to Implement Standards in International Human Rights*

The failure of Brazil's government to expropriate and re-title land effectively may have led to the systematic denial of personal rights granted under international law to landless Brazilians.⁷⁰ International human rights standards ensure the right to housing, food, and a decent living, which are implicitly denied when governmental policies reinforce the concentration of land in the hands of a few.⁷¹ Although land ownership is less unequal today than in the past, it remains that one half of Brazil's fertile land is owned by only one percent of the nation's farmers.⁷² Similarly, the Gini coefficient for Brazil, measuring overall inequality, has been increasing in Brazil over the last few decades (*i.e.* inequality in income has increased).⁷³ These numbers suggest that international human rights are being denied to landless Brazilians.⁷⁴

The Constitution implicitly recognizes international human rights to housing, food, and a living by providing that the government has a right to expropriate land if it is not put to "productive use."⁷⁵ Yet Brazilian courts have held that landowners can establish "productive use" by clearing the land for cattle grazing.⁷⁶ This rule has resulted in decreased opportunities for expropriation, as well as increased deforestation.⁷⁷ Critics of these decisions point out that they reflect a land

⁶⁸ See Romig, *supra* note 42, at 96–98.

⁶⁹ See Mitchell, *supra* note 39, at 559, 569.

⁷⁰ See Colby, *supra* note 29, at 15.

⁷¹ See UDHR, *supra* note 28, art. 25; Colby, *supra* note 29, at 15.

⁷² See Mitchell, *supra* note 39, at 564 (largest two percent of landholdings occupy 57 percent of agricultural land, usually along race lines, while smallest 30 percent of farms occupy one percent of agricultural land).

⁷³ See Brazilian Gov't, *Agrarian Reform: Brazil's Commitment*, http://www.planalto.gov.br/publi_04/COLECAO/AGRAIN3.HTM (last visited Jan. 26, 2008) [hereinafter *Agrarian Reform*].

⁷⁴ See Ankerson & Ruppert, *supra* note 36, at 70, 88, 102.

⁷⁵ See Colby, *supra* note 29, at 12–13.

⁷⁶ See Romig, *supra* note 42, at 94.

⁷⁷ See *id.*

reform policy focused more on resettlement and colonization of the Amazon region, than on the redistribution of large land holdings.⁷⁸

Furthermore, since Brazilian courts uphold the 1916 Civil Code's protections of existing property rights, insisting on providing only fair market value compensation to large landowners, expropriation actions by INCRA have become prohibitively expensive.⁷⁹ Thus, the Constitution's promise to expropriate any land not put to productive use has been rendered effectively meaningless.⁸⁰

B. *Land Cannot Be Tapped as Collateral for Loans, Investment, and Growth*

The Brazilian government's failure to engage in effective land titling programs has left vast tracts of property "untapped" for use as collateral for loans.⁸¹ Currently, there are more than one million squatters in Brazil, the majority of which are small farmers.⁸² In de Soto's terms, the houses on these plots, the parcels of land being worked, and the merchandise being bought and sold by the squatters cannot be put into economic motion.⁸³ If recognized under legal title, these units of value could be used as collateral for loans, leading to a multiplying effect through added investment, growth in relative value, increased tax revenue, and increased funding for infrastructure.⁸⁴ Because the squatters' land cannot be used as collateral for loans, there is no multiplying effect, and thus the land remains "dead capital."⁸⁵

C. *Improper Land Reform Policies Can Be Counterproductive*

Land reform policy, when poorly conceived, can defeat the very economic and philosophical goals it hopes to achieve.⁸⁶ This was the case in Zimbabwe, where the economy plummeted due to a lack of confidence in the security of property titles.⁸⁷ The transition from commercial to communal farming caused increased land erosion, de-

⁷⁸ See Mitchell, *supra* note 29, at 572.

⁷⁹ *Id.* Land reform has cost between \$8000 and \$57,000 per beneficiary depending on the region. *See id.*

⁸⁰ See Colby, *supra* note 29, at 12–13.

⁸¹ See DE SOTO, *supra* note 12, at 40.

⁸² See *Agrarian Reform*, *supra* note 73.

⁸³ See DE SOTO, *supra* note 12, at 40.

⁸⁴ *See id.* at 40–42.

⁸⁵ *See id.*

⁸⁶ In Zimbabwe, agricultural production between 2000 and 2003 declined from between fifty and ninety percent as a result of the departure of skilled farmers and an increase in unused land. *See* Richardson, *supra* note 65, at 548–54.

⁸⁷ *See id.*

creased production, and forced Zimbabweans into a “subsistence form of living.”⁸⁸ This raises concerns that the same might occur in Brazil.⁸⁹

There are several reasons to question the wisdom of redistributing land into the hands of the MST.⁹⁰ The landless often settle on poor quality land that requires expensive technology to develop.⁹¹ Lacking funds, the recently-settled often experience widespread farm failures.⁹² Large scale farming operations generally possess the technology, skills, and equipment needed to improve poor quality land, while small farmers usually do not.⁹³

In addition, undermining private property rights may defeat the chief purposes for which governments are held to exist, to protect private property.⁹⁴ Under command economies, which arose under the doctrines of communism and authoritarianism, property, and hence power, was concentrated in the hands of a few.⁹⁵ Concentration of power led to oppression, and eventually many of these regimes failed or were overthrown.⁹⁶ By contrast, a democratic system with property rights allows land, and hence power, to be dispersed.⁹⁷ This limits the opportunities for elites to oppress individual property owners, and reinforces the legitimacy of the regime.⁹⁸

The hope of any titling program is that it will lead to increases in savings, investment, and land use efficiency.⁹⁹ If improperly applied, these very programs may lead to the opposite result.¹⁰⁰ Where private property rights have been the most fluid, the Brazilian *favela*, investors and property owners alike have lost confidence in land titles, becoming resigned to the presence of squatters.¹⁰¹ There, year requirements for adverse possession have been eased under the City Statute, and confidence in land titles has been undermined.¹⁰² As a result, *favela* land-

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See* Mitchell, *supra* note 39, at 572.

⁹² *See id.*

⁹³ *See* Richardson, *supra* note 65, at 551–53.

⁹⁴ *See* Ankensen & Ruppert, *supra* note 36, at 93.

⁹⁵ *See* Rose, *supra* note 26, at 705.

⁹⁶ *See id.* at 691–92.

⁹⁷ *See id.* at 705–06.

⁹⁸ *See id.* at 702.

⁹⁹ *See* Richardson, *supra* note 65, at 543–45.

¹⁰⁰ *See id.* at 548.

¹⁰¹ *See* Pindell, *supra* note 25, at 456.

¹⁰² *See id.* at 454.

owners are unlikely to receive loans on their properties.¹⁰³ The purposes of a land titling program would certainly not be achieved if property rights were rendered as fluid as those in the Brazilian *favela*.¹⁰⁴

Furthermore, the political and social pressures land groups apply on the government raise significant questions about the role of grass-roots organizations in the democratic process.¹⁰⁵ The MST relies alternatively on lawful mechanisms and self-help.¹⁰⁶ Commentators suggest that the MST's stated goal of enforcing the government's policies should not be viewed as social disobedience.¹⁰⁷ Yet, should one overlook the MST's threats of violence, its lawlessness, and its increasing resort to land invasions?¹⁰⁸ Critics hold that in resorting to self-help, the MST violates property rights and human rights.¹⁰⁹

D. *The Emerging Backlash*

The race and class backlash against the dominant market minority in Brazil is becoming more pronounced.¹¹⁰ Brazil has a burgeoning Black Power movement that could fuel racial backlash.¹¹¹ Although Brazilians still claim that their "racial democracy" implies the absence of racial distinctions, income inequality between races is increasing.¹¹²

Will the tension between the landless and the landowners lead to a repeat of the violence that was observed in Zimbabwe in the decades leading up to Mugabe's land grabs?¹¹³ Like Zimbabweans, Brazilians perceive that white European settlers received broad tracts of land while dark-skinned settlers received nothing.¹¹⁴ There, resentment against white landowners continued to grow until the situation exploded and widespread land invasions, violence, and evictions oc-

¹⁰³ See *id.* at 456.

¹⁰⁴ See *id.*

¹⁰⁵ See Romig, *supra* note 42, at 94.

¹⁰⁶ See Colby, *supra* note 29, at 23–25.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*; see also Margolis, *supra* note 60 (describing violence during April 17, 1996 shootings).

¹¹⁰ See CHUA, *supra* note 8, at 160–62.

¹¹¹ See *id.* at 74–75 (describing Brazil's first-ever Black-only political party and emergence of Black power organizations).

¹¹² See Larry J. Obhof, *Why Globalization? A Look at Global Capitalism and its Effects*, 15 U. FLA. J. L. & PUB. POL'Y 91, 103 (2003).

¹¹³ See CHUA, *supra* note 8, at 127.

¹¹⁴ See Colby, *supra* note 29, at 27 n.132.

curred.¹¹⁵ This type of racial backlash has not yet occurred in Brazil, but it might if resentful minorities are not soon appeased.¹¹⁶

Will the MST devolve into a proponent of racial backlash?¹¹⁷ On the surface, race does not appear to be a motivating factor for land invasions in Brazil.¹¹⁸ Centuries of inter-marriage have blurred racial distinctions, making “Black versus White” backlash less likely.¹¹⁹ Nevertheless, race-based groups champion the same causes as the MST, and together engage in acts of social disobedience to pressure the government to expropriate and redistribute land.¹²⁰

Most importantly for the prospects of backlash, majority sentiment can shape elections in Brazil, just as it did in Zimbabwe.¹²¹ The MST officially backed Lula as its candidate for land reform during the October 2006 runoff election, and vows to hold him accountable by staging land invasions.¹²² Lula, himself from a very poor family, embodies the class backlash against the rich landowning elite.¹²³

III. ANALYSIS

A. *Implementing International Law in Brazil*

This Note proposes two changes to Brazilian law that are reasoned to facilitate effective land re-titling and the safeguarding of international human rights standards without undermining the rule of law and faith in property titles. In order for the courts to implement these reforms, the Brazilian legislature would have to revise the Civil Code or clarify how articles 183 and 184 of the Constitution should be interpreted.¹²⁴ First, as environmental and legal scholars have insisted, the rule developed by Brazilian land courts that allows “productive use” to be made out by clear-cutting land should be eliminated.¹²⁵ Squatters

¹¹⁵ See CHUA, *supra* note 8, at 127 (noting that Mugabe stated, “Our party [the Zanu-PF] must continue to strike fear in the heart of the white man—our real enemy. The white man is not indigenous to Africa.”).

¹¹⁶ See *id.*

¹¹⁷ See Colby, *supra* note 29, at 23–25.

¹¹⁸ See CHUA, *supra* note 8, at 75.

¹¹⁹ See *id.* at 70–71.

¹²⁰ See Colby, *supra* note 29, at 23–25.

¹²¹ See Timothy L. Fort & Cindy A. Schipani, *Ecology and Violence: The Environmental Dimensions of War*, 29 COLUM. J. ENVTL. L. 243, 265 (2004) (discussing how concentration of wealth in Brazil will spark backlash, made possible by democratic voting).

¹²² See Romig, note 42, at 96–97; Langevin & Rosset, *supra* note 58.

¹²³ See Romig, *supra* note 42, at 81–82.

¹²⁴ See Mitchell, *supra* note 29, at 582.

¹²⁵ See *id.* at 572.

should not be precluded from claiming title to land merely because the land has been hastily cleared by a landowner.¹²⁶ Allowing the productive use requirement to be satisfied by clearing land not only keeps land in the hands of a few, but provides an incentive for landowners to deforest land.¹²⁷

Second, Brazilian legislature should require that expropriations by INCRA be upheld as long as compensation is “just.”¹²⁸ The vast inequalities in land ownership,¹²⁹ the risk of class and racial backlash, as well as the potential to stimulate savings, investment, and business growth, demand a land re-titling program that the state can realistically pursue.¹³⁰ At the same time, a flexible standard for determining “just” compensation must also be developed: such a standard would enable the lawful redistribution of unproductive, unused landholdings, while discouraging unlawful land invasions.¹³¹

Just compensation might be determined by considering the factors that de Soto deems to justify re-titling in the first place: the degree to which squatters use the land productively; the economic value that would be produced by legitimizing title to land; the concentration of landownership relative to the number of squatters; and the fairness of compensation to the particular landowner given the history of *latifundia* land grants.¹³² Such a factor-based standard would admittedly allow for subjective determinations of compensation, and should therefore be replaced with an objective standard as landownership becomes less concentrated and more in line with international human rights standards.¹³³ A court might also consider whether re-titling the land would legitimate violent land reprisals, and refuse to re-title land cheaply when it would have the effect of encouraging unlawful seizures.¹³⁴

Allowing for expropriations to be upheld as long as compensation is “just” would be justified in Brazil even if it would not be in the United States: In Brazil, land is more unequally distributed, the risk of backlash is more pronounced, and the Brazilian Constitution actually

¹²⁶ See *id.* at 567.

¹²⁷ See *id.*

¹²⁸ See *id.* at 559 (discussing successful land reforms for less than full market value in Japan, Taiwan, South Korea, Mexico, and India).

¹²⁹ See Pindell, *supra* note 25, at 444–45.

¹³⁰ See DE SOTO, *supra* note 12, at 49–62 (listing effects of recognizing title to land).

¹³¹ See Mitchell, *supra* note 39, at 578–80 (discussing problems that arise from lack of clear standard for establishing level of appropriate compensation to Brazilian landowners).

¹³² See DE SOTO, *supra* note 12, at 11–12, 30–37, 218–20.

¹³³ See Mitchell, *supra* note 39, at 578–80.

¹³⁴ See Romig, *supra* note 42, at 95–96.

provides for the redistribution of land.¹³⁵ Moreover, many developed countries have had successful land reform policies with less than fair market value compensation for expropriated land.¹³⁶ Allowing for “just” compensation would in fact provide for higher compensation than the U.S. Homestead Act, which in many cases allowed settlers to assume title to land without *any* monetary compensation.¹³⁷

B. *Avoiding the Backlash*

Redistributing land will decrease the chances for conflict between landowners and dark-skinned landless poor.¹³⁸ Diffusing property titles will spread power and ownership among many individuals, making concentration of power and oppression less likely.¹³⁹ Because land gives rights, and with it power, Brazilians would not be as vulnerable to landowner reprisals if they actually owned unquestioned title to land.¹⁴⁰ Having title to land would also legitimize democratic government by increasing faith in election outcomes and giving a sense of ownership in the country.¹⁴¹ Creating Brazilian “agents of democracy,” land titling would liberate the “orphaned” class of landless from their misery by giving them the means to support themselves and their families.¹⁴² Concurrently, international human rights to a decent living, food, and housing, would be secured.¹⁴³

Conversely, if Brazil fails to implement effective re-titling programs, it risks racial backlash.¹⁴⁴ Without land titling, the landless’ viewpoints are less likely to be heard, indigent populations have little buffer between themselves and the State, and little incentive exists to aspire for greater liberties.¹⁴⁵

The MST is emerging as a powerful voice of backlash.¹⁴⁶ Although they do not cite race as a motivating factor for their land inva-

¹³⁵ See Mitchell, *supra* note 39, at 559; CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] arts. 183, 184 (1988), *supra* note 44.

¹³⁶ See Mitchell, *supra* note 39, at 559.

¹³⁷ See DE SOTO, *supra* note 12, at 107–08.

¹³⁸ See Rose, *supra* note 26, at 765.

¹³⁹ See *id.*

¹⁴⁰ See Bernadette Atuahene, *Land Titling: A Mode of Privatization with the Potential to Deepen Democracy*, 50 ST. LOUIS U. L.J. 761, 773–74 (2006) (discussing Zimbabwean evictions of squatters and how land titling would have given squatters power vis-à-vis the State).

¹⁴¹ See CHUA, *supra* note 8, at 268; Rose, *supra* note 26, at 714.

¹⁴² See Margolis, *supra* note 60.

¹⁴³ See Colby, *supra* note 29, at 14–18.

¹⁴⁴ See CHUA, *supra* note e, at 127–30.

¹⁴⁵ See Atuahene, *supra* note 140, at 761–62.

¹⁴⁶ See Romig, *supra* note 42, at 95–96.

sions, Black power organizations champion the same causes as the MST.¹⁴⁷ The intersection of causes supported by race-based and class-based groups indicates that they share the same grievances, and that ‘class’ and ‘race’ divisions are readily interchangeable.¹⁴⁸ The MST could develop into a mass resistance movement against landowners.¹⁴⁹

Comfortingly, a relatively strong judiciary and the majority’s respect for the rule of law prevent the rapid rise of a strongman like Mugabe.¹⁵⁰ Nevertheless, as racial conflict increases, legal changes to the property titling system and a loosening of the rule of expropriation would help prevent the backlash that looms.¹⁵¹

C. *Expect Resistance from Landowners*

Since land reform began with the Land Statute of 1964, landowners have exerted political pressure to prevent reforms from being effective.¹⁵² Landowners continue to refute the MST’s interpretation of the Constitution, emphasizing the Constitution’s protection of private property rights.¹⁵³ Guided by these arguments, landowners have challenged ninety-five percent of INCRA expropriations.¹⁵⁴ Yet, if Brazil’s law-makers took strong action to clarify the laws on expropriation and productive use requirements, these costly legal battles could be avoided, and valid expropriations under the Constitution could proceed in spite of landowner resistance.¹⁵⁵

D. *Encouraging Economic Growth*

By re-titling land, Brazil can avoid the failures of Zimbabwe and achieve the increase in economic growth and investment de Soto predicted.¹⁵⁶ In Zimbabwe, investors lost confidence in Mugabe’s government after it disregarded the Supreme Court’s declaration of the

¹⁴⁷ See Solidarity Letter from the MST, Feb. 3, 2006, <http://www.mstbrazil.org/?q=solidarityletter>.

¹⁴⁸ See *id.*

¹⁴⁹ See Eduardo Sales de Lima, *Lula Reelection*, BRASIL DE FATO, Oct. 4, 2006, available at <http://www.mstbrazil.org/?q=round2lulareelection> (emphasizing class struggle in Lula’s second round election).

¹⁵⁰ See CHUA, *supra* note 8, at 274.

¹⁵¹ See *id.*

¹⁵² See Mitchell, *supra* note 39, at 566–67.

¹⁵³ See, e.g., Open Letter from Syngentia to Supporters of Via Campesina, Sept. 30, 2006, available at <http://www.mstbrazil.org/?q=syngentaupdateoct1>.

¹⁵⁴ See Mitchell, *supra* note 39, at 570.

¹⁵⁵ See *id.*

¹⁵⁶ See CHUA, *supra* note 8, at 268–69; DE SOTO, *supra* note e, at 213.

illegality of land seizures.¹⁵⁷ Yet in Brazil, the judicial branch is widely respected.¹⁵⁸ In addition, because Zimbabweans were not given title to the land, but instead forced to lease the land from the government, they could not use the land as collateral for loans and investment.¹⁵⁹ In contrast, direct land titling programs, if properly applied, would give title to individuals, thereby avoiding the problems that doomed the Zimbabwean effort.¹⁶⁰

CONCLUSION

Currently, the specter of ethnic conflict in Brazil is testing the State's devotion to international law, which calls for the implementation of universal norms and procedures. Brazil has hosted international conferences before to establish the political and civil rights of its indigent people, but these discussions, although well-meaning, have not gone far enough. Brazil must now take steps to carry out the promises made in its Constitution to expropriate and re-title land, only then will the mandate of international human rights be satisfied.

¹⁵⁷ See Richardson, *supra* note 65, at 549.

¹⁵⁸ See Kossick, *supra* note 65, at 718. *But see* Paul H. Brietzke, *Globalization, Nationalism, & Human Rights*, 17 FLA. J. INT'L L. 633, 657-58 (2005) (cautioning that the judiciary and democracy in Brazil require time to develop).

¹⁵⁹ See Richardson, *supra* note 65, at 551.

¹⁶⁰ See DE SOTO, *supra* note 12, at 213-14, 216.