

# The Right to Be Left Alone? Protecting “Uncontacted” Tribes of India and Brazil

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## I. INTRODUCTION

In modern society, connected by technology and social media, the world remains mystified by the lifestyles of “uncontacted” peoples and tribes.<sup>1</sup> Uncontacted tribes are “indigenous communities that, for whatever reason, have managed to exist almost entirely outside the purview of the nation-states in which they technically live.”<sup>2</sup> A constant debate begs the question: is it more ethical to leave the tribes alone or to intervene in their lives by providing them with modern supplies, medicine, and protection?<sup>3</sup> As the natural world grows smaller through industrialization, deforestation,

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Due to the particularized nature of uncontacted tribal rights, certain sections of this Comment will describe measures taken by both governments to protect indigenous rights as a whole, with the understanding that these actions affect uncontacted tribes, as well.

1. Tom Acres, *The Mystery of the World’s Uncontacted Tribes*, SKY NEWS (July 20, 2018), <https://news.sky.com/story/the-mystery-of-the-worlds-uncontacted-tribes-11443131>.

2. Ishaan Tharoor, *Do the World’s ‘Uncontacted’ Tribes Deserve to Be Left Alone?*, WASH. POST (July 23, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/07/23/do-the-worlds-uncontacted-tribes-deserve-to-be-left-alone/?utm\\_term=.6a9982da697e](https://www.washingtonpost.com/news/worldviews/wp/2015/07/23/do-the-worlds-uncontacted-tribes-deserve-to-be-left-alone/?utm_term=.6a9982da697e).

3. Jeffrey Kluger, *Is It Ethical to Leave Uncontacted Tribes Alone?*, TIME (June 4, 2015), <http://time.com/3909470/tribes-uncontacted-ethics/>.

and widespread tourism, uncontacted tribes not only face threats to their natural habitat, but also to their health and safety.<sup>4</sup> While outsiders have expressed curiosity about the lifestyles of uncontacted tribes, a surprising trend has emerged in which the isolated tribes have chosen to emerge from isolation, sometimes to their peril.<sup>5</sup> However, other isolated tribes wish to avoid all interactions with the outside world, which has historically caused tension between curious outsiders and these self-protective tribal peoples.<sup>6</sup>

A tragic event that occurred in November 2018 has reinvigorated the ethical debate about the rights of uncontacted tribes and has thrust India's government into the forefront of a human rights debate.<sup>7</sup> On November 15, 2018, a young Christian missionary, John Allen Chau, paid local fishermen from the Andaman Islands to take him close to North Sentinel, a remote island in the Bay of Bengal.<sup>8</sup> Dwelling on North Sentinel is a hunter-gatherer tribe, the Sentinelese, who are particularly isolated and extremely mistrusting of outsiders.<sup>9</sup> Throughout the years, and because of conflicts with intruders, the Sentinelese gained the reputation of fearsome archers and "staunch defenders of their homeland."<sup>10</sup> In the process of defending their homeland, the Sentinelese have wounded and killed several people that have come too close over the years, and Chau faced the same fate.<sup>11</sup> Chau's death brought mixed reactions, but mainly activists and citizens expressed anger with the Indian government for not enforcing its constitutional protection of the tribe.<sup>12</sup> Others focused their anger on Chau's decision to travel to the island, perhaps exposing the tribe to

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4. Gethin Chamberlain, *'They're Killing Us': World's Most Endangered Tribe Cries for Help*, GUARDIAN (Apr. 21, 2012), <https://www.theguardian.com/world/2012/apr/22/brazil-rainforest-tribe-endangered-tribe>.

5. Kluger, *supra* note 3; Scott Wallace, *Some Isolated Tribes in the Amazon Are Initiating Contact*, NAT'L GEOGRAPHIC (Aug. 13, 2015), <https://news.nationalgeographic.com/2015/08/15/0813-uncontacted-amazon-tribes-peru-brazil/>.

6. Kiona N. Smith, *Everything We Know About the Isolated Sentinelese People of North Sentinel Island*, FORBES (Nov. 30, 2018), <https://www.forbes.com/sites/kionasmith/2018/11/30/everything-we-know-about-the-isolated-sentinelese-people-of-north-sentinel-island/#2c2cc19435a0>.

7. Rajat Ghai, *Tribal Rights in India Are a Grey Picture: Experts*, DOWNTOEARTH (Nov. 24, 2018), <https://www.downtoearth.org.in/news/environment/tribal-rights-in-india-are-a-grey-picture-experts-62230>.

8. Scott Wallace, *Death of American Missionary Could Put This Indigenous Tribe's Survival at Risk*, NAT'L GEOGRAPHIC (Nov. 28, 2018), <https://www.nationalgeographic.com/culture/2018/11/andaman-islands-tribes/>.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Sentinelese Incident Shines Spotlight on India's 'Fragmented and Contradictory' Indigenous Protections*, ABC NEWS (Nov. 27, 2018), <https://www.abc.net.au/news/2018-11-28/calls-for-more-indigenous-land-rights-protection-after-sentinel/10560600>.

illnesses that they have no immune system to combat, in what some describe as “an act of extreme violence.”<sup>13</sup> Still, others praise Chau for sacrificing himself to spread the Christian word and believe Chau’s death might attract attention to Christianity.<sup>14</sup> Despite the variance of opinion, Chau’s death symbolizes the ultimate struggle between whether these tribes should be left alone or whether missionaries and other humanitarians should help integrate them into modern society and offer protection against external threats.<sup>15</sup>

Uncontacted tribes face extreme adversity around the world, which has suggested to Survival International, a leading organization for protecting tribal and indigenous rights, that these isolated tribes are “the most vulnerable peoples on earth.”<sup>16</sup> In particular, Brazil is home to over 100 uncontacted tribes that face possible cultural eradication because of similar conflicting interests, such as industrialization and a lack of sufficient protection by the Brazilian government.<sup>17</sup> Unlike the Sentinelese, who face less interference by outsiders simply because they live on a secluded island, tribes in Brazil have a much more difficult time avoiding the outside world because of “pressures from mining, logging, narcotrafficking and other external threats” that exist near and around their tribal lands.<sup>18</sup> Similarly, the election of Jair Bolsonaro as Brazil’s President in October 2018 forebodes potential devastation for indigenous peoples because of his campaign promise to take away all previously demarcated indigenous lands.<sup>19</sup>

The United Nations promulgated the Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, which gave indigenous peoples basic human rights including freedom of expression and self-governance,

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13. Jonathan Mazower, *Why Uncontacted Tribes Should Be Left Alone*, TIME (Nov. 30, 2018), <http://time.com/5466416/survival-international-india-sentinelese-john-allen-chau/>.

14. Eliza Griswold, *John Chau’s Death on North Sentinel Island Roils the Missionary World*, NEW YORKER (Dec. 8, 2018), <https://www.newyorker.com/news/on-religion/john-chaus-death-roils-the-missionary-world>.

15. See Kluger, *supra* note 3.

16. *Uncontacted Tribes: The Threats*, SURVIVAL INT’L, <https://www.survivalinternational.org/articles/3106-uncontacted-tribes-the-threats> (last visited Oct. 3, 2019).

17. Chris Arsenault, *Brazil’s Most Isolated Indigenous Tribes Face ‘Annihilation’: Campaigners*, REUTERS (Apr. 19, 2016), <https://www.reuters.com/article/us-brazil-landrights-idUSKCN0XG2A0>.

18. Rachel Nuwer, *Anthropology: The Sad Truth About Uncontacted Tribes*, BBC (Aug. 4, 2014), <http://www.bbc.com/future/story/20140804-sad-truth-of-uncontacted-tribes>.

19. Fiona Watson, *Bolsonaro’s Election Is Catastrophic News for Brazil’s Indigenous Tribes*, GUARDIAN (Oct. 31, 2018), <https://www.theguardian.com/commentisfree/2018/oct/31/jair-bolsonaro-brazil-indigenous-tribes-mining-logging>.

among other fundamental freedoms.<sup>20</sup> Within the resolution, the United Nations provided for the “minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”<sup>21</sup> The minimum standards include the right not to be forced to assimilate with others or be subjected to cultural destruction.<sup>22</sup> Both India and Brazil voted in favor of this declaration.<sup>23</sup> While the document is legally nonbinding, Victoria Tauli-Corpuz, the Chair of the United Nations Permanent Forum on Indigenous Issues, stated that the goal of the resolution was that it should act as a “living document” wherein signatory states would be pushed to better protect their indigenous populations.<sup>24</sup> Regardless of UNDRIP’s nonbinding nature, India and Brazil both previously promulgated provisions in their constitutions to better protect their indigenous populations.<sup>25</sup> Despite these safeguards, recent troubling developments and threats towards uncontacted tribes have thrust activist groups into a more active role.<sup>26</sup>

This Comment compares how the governments of India and Brazil have historically attempted to protect their respective tribal populations, as well as the shortcomings of such protections. Part II focuses on India’s policies in particular, followed by Brazil’s in Part III. Indigenous groups face unique challenges in both countries due to either unsympathetic or apathetic leadership.<sup>27</sup> In particular, commercial enterprises pose a major challenge for tribal groups around the world.<sup>28</sup> Both India and Brazil have recently stimulated growth of their industries and economies, and this has seemingly taken precedence in state policy objectives over efforts to protect indigenous lands.<sup>29</sup> Environmental concerns also threaten

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20. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

21. *Id.* art. 43.

22. *Id.* art. 8.

23. Voting Record of United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/61/L.67, add. 1 (Sept. 13, 2007).

24. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007).

25. INDIA CONST. pt. IV, art. 46; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231 (Braz.).

26. See *Uncontacted Tribes: The Threats*, *supra* note 16.

27. See Watson, *supra* note 19; see Ghai, *supra* note 7.

28. See *Uncontacted Tribes: The Threats*, *supra* note 16.

29. See Watson, *supra* note 19; see Mari Marcel Thekaekara, *A Huge Land Grab Is Threatening India’s Tribal People. They Need Global Help.*, GUARDIAN (Feb. 25, 2019), <https://www.theguardian.com/commentisfree/2019/feb/25/land-grab-tribal-people-india-ativasi>.

indigenous rights due to disputes over land rights.<sup>30</sup> Because economic growth, indigenous rights, and environmental concerns are all competing objectives, leadership should focus its attention on coming to more realistic compromises.<sup>31</sup> Part IV of this Comment compares and contrasts the policies of both countries and offers potential solutions to effectively promote all relevant interests.

## II. INDIA'S PROTECTION OF INDIGENOUS PEOPLES

### A. *Constitutional and Judicial Protection*

The 1949 India Constitution included Article 46, which specifically provides for the protection of the social welfare of predetermined castes and tribes.<sup>32</sup> The provision exists within the Directive Principles of State Policy section (Part IV) of the Constitution, a section that cannot be enforced by a court, but deemed as “nevertheless fundamental.”<sup>33</sup> In 1947, when members of the Sub-Committee on Fundamental Rights met to discuss adding this nonjusticiable section, some members suggested it would be ineffective.<sup>34</sup> The Committee eventually agreed that these “declarations of social and economic policies” would not fit within the Fundamental Rights section (Part III), and would be better off in the care of the State rather than the courts.<sup>35</sup> The Sub-Committee ultimately added Part IV to the Constitution, but due to its unenforceable nature, courts largely ignored this section in decision-making for many years.<sup>36</sup>

However, in a 1973 landmark decision, the Supreme Court of India determined that its Constitution did not contemplate a “disharmony” between Part III and Part IV and further described these collective sections as the “conscience of the Constitution.”<sup>37</sup> The Supreme Court held that any

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30. See *id.*; see Mariana Nozela Prado, *Traditional Populations, Land Rights, and Environmental Justice: The Challenges of the Amazon*, WILSON CTR. (Sept. 27, 2018), <https://www.wilsoncenter.org/blog-post/traditional-populations-land-rights-and-environmental-justice-the-challenges-the-amazon>.

31. Niha Masih, *India Orders ‘Staggering’ Eviction of 1 Million Indigenous People. Some Environmentalists Are Cheering*, WASH. POST (Feb. 22, 2019), [https://www.washingtonpost.com/world/2019/02/22/india-orders-staggering-eviction-million-indigenous-people-some-environmentalists-are-cheering/?utm\\_term=.63a0acb3f036](https://www.washingtonpost.com/world/2019/02/22/india-orders-staggering-eviction-million-indigenous-people-some-environmentalists-are-cheering/?utm_term=.63a0acb3f036).

32. INDIA CONST. pt. IV, art. 46.

33. *Id.* art. 37.

34. B. SHIVA RAO, *THE FRAMING OF INDIA'S CONSTITUTION: A STUDY* 321 (1968).

35. *Id.* at 322.

36. Satya Prakash, *Directive Principles of State Policy: Conscience of the Constitution*, HINDUSTAN TIMES (Nov. 26, 2015), <https://www.hindustantimes.com/india/directive-principles-of-state-policy-conscience-of-the-constitution/story-1B67mrmVaSSJhV5NSC1WbO.html>.

37. *Kesavananda Bharati v. State of Kerala & Anr.*, (1973) 4 SCC 225, §§ 634, 672 (India).

amendment affecting the “basic structure” of the Constitution could be subjected to judicial review, but not otherwise.<sup>38</sup> In 1980, the Supreme Court acknowledged that the balance between Part III and Part IV was an “essential feature of the *basic structure* of the Constitution.”<sup>39</sup> This decision enabled the Supreme Court to review issues regarding the directive principles, which include tribal rights.<sup>40</sup> However, despite the Supreme Court’s enablement to review Part IV, some believe “Parliament and state legislatures are not concerned about giving effect to the direct principles.”<sup>41</sup>

### B. Legislative Protection

In 1956, India’s President promulgated a regulation specifically geared towards protecting “the interests of socially and economically backward aboriginal tribes in the Andaman and Nicobar Islands.”<sup>42</sup> This was the first time the President had exercised powers conferred under Article 243 of the Constitution, which provides for localized governments.<sup>43</sup> The Protection of Aboriginal Tribes Regulation extended to all “aboriginal tribes” including the Andamanese, Jarawas, Onges, Sentinelese, Nicobarese, and Shom Pens.<sup>44</sup> The regulation prohibited anyone besides the aboriginal people from owning land occupied by the aforementioned people, and it also specifically excluded anyone from entering the land without a pass.<sup>45</sup> A year later, the Office of the Chief Commissioner introduced a series of rules for acquiring such a pass and license.<sup>46</sup>

In 1976, the Ministry of Law, Justice, and Company Affairs<sup>47</sup> released the Scheduled Castes and Scheduled Tribes Orders (Amendment)

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38. *Id.* § 1476.

39. *Minerva Mills Ltd. v. Union of India*, (1980) SC 206, 208 (1980) (India) (emphasis added).

40. Prakash, *supra* note 36.

41. *Id.*

42. Andaman and Nicobar Islands (Protection of Aboriginal Tribes) Regulation, No. 3 of 1956, Andaman & Nicobar Gazette (1956), [http://www.and.nic.in/archives/C\\_Charter/Dir\\_tw/2012/PAT1956.pdf](http://www.and.nic.in/archives/C_Charter/Dir_tw/2012/PAT1956.pdf).

43. INDIA CONST. part IX, art. 243 (defining “Panchayat” as an institution of self-government constituted under article 243B, for the rural areas).

44. Andaman and Nicobar Islands (Protection of Aboriginal Tribes) Regulation § 2(a).

45. *Id.* § 6(1), (7).

46. Andaman and Nicobar Islands (Protection of Aboriginal Tribes) Rules, 1957, Andaman & Nicobar Gazette (India).

47. *About the Ministry*, MINISTRY L. & JUST., <http://lawmin.gov.in/about-us/about-the-ministry> (last visited Oct. 3, 2019) (“Ministry of Law, Justice, . . . comprises of the Legislative

Act, which specifically listed the Sentinelese as a tribe afforded protection of human and fundamental rights under the Constitution.<sup>48</sup> Similarly, in 1996, the Government of India passed the Panchayats (Extension to Scheduled Areas) Act (PESA), which purported to give tribes even more power and protection over their cultural identity and the resources located on their lands.<sup>49</sup> Specifically, PESA aimed to protect tribes against industrialization by giving indigenous peoples the power of self-governance, including mandatory consultation in land acquisition, management of minor water bodies, and ownership of minor forest produce.<sup>50</sup>

PESA sought to give “radical governance powers to the tribal communities,” including rights over natural resources located therein.<sup>51</sup> However, some critics argue that PESA “has become a myth.”<sup>52</sup> Enforcement of PESA has proven difficult because, despite ownership and management rights given to the village councils, they do not have true power to act without going through governmental officers above them.<sup>53</sup> Currently, “PESA is not truly implemented in schedule V areas,”<sup>54</sup> and “traditional leaders of the villages are ignored.”<sup>55</sup> Despite acts promulgated by the government, very little has been done to protect tribal communities’ rights, and land disputes often settle against them.<sup>56</sup> Journalists question why the government refuses to abide by an Act that it has issued itself, with some theorizing that depriving the village councils may lead to

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Department and the Department of Legal Affairs . . . [and] the Legislative Department is concerned with drafting of principal legislation for the [Indian] Government).

48. Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976, No. 108, Acts of Parliament, 1976 (India).

49. Panchayats (Extension to Scheduled Areas) Act (PESA), 1996, No. 40, Acts of Parliament, 1996 (India); Abhijit Mohanty, *Armed with a Toothless Law, the Plight of the Adivasi Worsens*, WIRE (Apr. 12, 2017), <https://thewire.in/politics/pesa-tribal-ativasi-rights>.

50. PESA, § 4(i), 4(j), 4(m).

51. Mohanty, *supra* note 49.

52. *Id.*

53. *Id.*

54. INDIA CONST. Fifth Schedule, art. 244(1); *Declaration of 5th Schedule*, MINISTRY TRIBAL AFF., <https://tribal.nic.in/declarationof5thSchedule.aspx> (last visited Oct. 11, 2019) (noting that under the Fifth Schedule of the Constitution of India, the President may declare certain areas as “Scheduled Areas,” and these areas are subject to certain protections by the Government); Mohanty, *supra* note 49.

55. Mohanty, *supra* note 49.

56. *Id.*

political favor in elections.<sup>57</sup> Others have deemed PESA as “dead and defunct.”<sup>58</sup>

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act (FRA) in 2006 also sought to provide indigenous peoples with ownership over forest rights.<sup>59</sup> The FRA faced strong opposition by conservationists and the forest department because they believed it would lead to deforestation and loss of the forest’s wildlife resources.<sup>60</sup> However, before this Act, the forest was regulated by the forest department, and it had “unlimited power and control over [the] forest,” leading to “drastic curtailment of the rights and privileges that tribes had hitherto enjoyed over the forest.”<sup>61</sup> While the FRA seemed beneficial to forest-dwelling tribes on paper, its enforcement has lacked in part because of extreme resistance to it by many groups.<sup>62</sup>

### C. Recent Troubling Developments

Despite multiple outlets of protection for indigenous people, tribal experts do not see tribal rights in India as a clear-cut and well-settled matter.<sup>63</sup> Survival International has been particularly outspoken in its criticism of India’s government because of a lack of enforcement to protect the Sentinelese.<sup>64</sup> For many years, India had a strict policy against traveling to the Sentinel and Nicobar Islands.<sup>65</sup> However, in August 2018, the Ministry of Home Affairs (MHA) excluded many islands from the Restricted Area Permit (RAP) regime under the Foreigners (Restricted Areas) Order of 1963.<sup>66</sup> Because the MHA lifted the RAP requirements on

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57. Debmalya Nandy, *An Attack on Grassroots Democracy?*, DOWNTOEARTH (May 22, 2018), <https://www.downtoearth.org.in/blog/governance/an-attack-on-democracy-itself--60623>.

58. Mohanty, *supra* note 49.

59. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act (FRA), No. 2 of 2007, Gazette of India (2007), [https://tribal.nic.in/FRA/data/FRA\\_RulesBook.pdf](https://tribal.nic.in/FRA/data/FRA_RulesBook.pdf).

60. Virginius Xaxa, *The Global Indigenous Peoples Movement: It’s Stirring in India*, 2 J. L. PROP. & SOC’Y 141, 156 (2016).

61. *Id.* at 156-57.

62. *Id.* at 158.

63. Ghai, *supra* note 7.

64. *Id.*

65. See Geetika Mantri, *John Chau’s Death in Andaman: Are Foreigners Allowed to Enter North Sentinel Island?*, NEWS MINUTE (Nov. 22, 2018), <https://www.thenewsminute.com/article/john-chaus-death-andaman-are-foreigners-allowed-enter-north-sentinel-island-92050>.

66. See Foreigners (Restricted Areas) Order, 1963, Gazette of India, pt. II, (Jan. 14, 1963); Sahana Ghosh & Mayank Aggarwal, *Sentinelese in Shadows: A Lesson in Letting Live*, MONGABAY (Nov. 30, 2018), <https://india.mongabay.com/2018/11/sentinelese-in-shadows-a-lesson-in-letting-live/>; Mantri, *supra* note 65.



North Sentinel Island a few months before Chau's death, Survival International describes the relaxation of the RAP regime as contributing to the tragic event.<sup>67</sup> The MHA claims that despite removing the RAP requirement, there are still laws in place to protect North Sentinel and the Sentinelese.<sup>68</sup> The MHA still requires an individual wishing to travel to North Sentinel to first inform the local Foreigners Regional Registration office and obtain approval from both the Ministry of Tribal Affairs and the Ministry of Environment, Forest, and Climate Change.<sup>69</sup> In addition to these requirements, the MHA has noted that since this area is a protected tribal reserve, only those intending to do anthropological work are eligible, hinting that widespread tourism is still not allowed.<sup>70</sup>

Despite MHA's assurances, Survival International asserted that the "relaxation of the RAP regime broadcasted a dangerous message" in which foreigners would believe North Sentinel was open for tourism.<sup>71</sup> Some analogized this sequence of events to a similar effort to contact the Jarawa, an Andaman tribe that faced possible cultural destruction because of tourism.<sup>72</sup> For many years, tourists could travel down a road that cut through the Jarawa's forest, allowing them to interact with the tribe.<sup>73</sup> The tour companies promoted these encounters as "human safaris," which was illegal on the islands but had not been enforced despite the United Nations, India's Minister for Tribal Affairs, and members of the European Parliament denouncing this practice.<sup>74</sup> In 2013, the Supreme Court of India finally banned tourism for five kilometers around the Andaman Nicobar Trunk Road.<sup>75</sup>

However, even with one crisis mended, other indigenous issues continue to emerge, including a February 2019 Supreme Court decision to evict one million people from their homes, many of whom are members

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67. *Survival International Statement on Killing of American Man John Allen Chau by Sentinelese Tribe, Andaman Islands*, SURVIVAL INT'L (Nov. 21, 2018), <https://www.survivalinternational.org/news/12031>.

68. Mantri, *supra* note 65.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Outrage as Tour Operators Sell "Human Safaris" to Andaman Islands*, SURVIVAL INT'L (Oct. 17, 2017), <https://www.survivalinternational.org/news/11839>.

74. *Id.*

75. *LG. Andaman & Nicobar Islands v. Bare Foot Inns & Leisure Pvt. Ltd.*, 12125/2010 (2013) SCR 346, 350 (India); J. Venkatesan, *Supreme Court Bans Tourists from Taking Trunk Road Passing Through Jarawa Area in Andamans*, HINDU (Jan. 21, 2013), <https://www.thehindu.com/news/national/supreme-court-bans-tourists-from-taking-trunk-road-passing-through-jarawa-area-in-andamans/article4329360.ece>.

of indigenous tribes.<sup>76</sup> Surprisingly, environmental groups led the push for this particular decision because they believe “granting ‘wide-ranging’ rights to people on forest land leads to fragmentation of forests.”<sup>77</sup> The Indian government failed to weigh-in on the case, and thus, it is unclear how the Government will react to the Court’s ruling.<sup>78</sup>

### III. BRAZIL’S PROTECTION OF INDIGENOUS PEOPLES

#### A. *Constitutional Protection*

Just as in India, Brazil instituted specific protections for tribal and indigenous groups in its 1988 Constitution.<sup>79</sup> Specifically, under Chapter VIII, Article 231, the Constitution enables “Indians” to have their culture and traditions recognized, and they are given the right to the lands they occupy on a permanent basis, including the resources therein.<sup>80</sup> The Constitution further calls upon Brazil to protect these interests and “ensure respect for all of their property.”<sup>81</sup> Even before the Constitution was enacted, Congress decreed, and the Brazilian President sanctioned, what is referred to as the “Indian Statute.”<sup>82</sup> One of the main purposes of the Indian Statute was to preserve the indigenous communities.<sup>83</sup> However, another purpose was to integrate the communities into modern society and improve their quality of life.<sup>84</sup> Article 2 of the Statute guaranteed that the indigenous communities would have “permanent possession” of their native lands and all resources included within it, yet the statute simultaneously sought to provide tools and programs intended to promote progress and ingenuity.<sup>85</sup>

Fundação Nacional do Índio (FUNAI) is a government body tasked with carrying out policies aimed at protecting indigenous peoples.<sup>86</sup> Specifically, FUNAI enforces both the constitutional protections and protections under the Indian Statute.<sup>87</sup> The General Coordination Unit of

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76. Masih, *supra* note 31.

77. *Id.*

78. *Id.*

79. C.F. art. 231 (Braz.).

80. *Id.*

81. *Id.*

82. Lei No. 6.001, de 19 de Dezembro de 1973, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 21.12.1973 (Braz.).

83. *Id.*

84. *Id.*

85. *Id.*

86. FUNAI—National Indian Foundation (Brazil), SURVIVAL INT’L, <https://www.survivalinternational.org/about/funai> (last visited Oct. 3, 2019).

87. *Id.*

Uncontacted Indians (CGII), a subsection of FUNAI, focuses primarily on uncontacted tribes, which is the only such department of its kind in the world.<sup>88</sup> Efforts by CGII have resulted in protection of fourteen million hectares of uncontacted Indians' territory as well as policies geared towards allowing the tribes to remain in isolation, if they so choose.<sup>89</sup>

*B. Protection by the Courts*

Brazil's Supreme Court has taken further action to protect indigenous and other marginalized peoples.<sup>90</sup> In 2018, Brazil's Supreme Court rejected a legal action by a right-wing political group advocating to declare President Lula's decree on the rights of *quilombolas* invalid.<sup>91</sup> If the legal action had been granted, the government could have possibly disassembled the *quilombolas*—communities for former slaves and their families.<sup>92</sup> Because the rights of *quilombolas* are comparable to the rights of indigenous peoples, some believe that if the ruling had gone the other way, indigenous territories and the forest would have suffered the same fate.<sup>93</sup>

Similarly, in 2017, Brazil's Supreme Court ruled in favor of two tribes against the state of Mato Grosso do Sul, declaring that the authorities should “respect the demarcation of land.”<sup>94</sup> Before this decision, indigenous rights activists were concerned that the judges would accept a recommendation by the attorney general's office that “any tribe not occupying its ancestral land when Brazil's new constitution came into force on 5 October 1988 would lose its right to live there,” which is “a time limit that had been called the worst blow to indigenous rights since the military dictatorship ended in 1985.”<sup>95</sup> Survival International suggested that if the judges had accepted the time frame proposal, “it would have set

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88. *Id.*

89. *Id.*

90. Sue Branford & Maurício Torres, *Brazilian Supreme Court Ruling Protects Quilombola Land Rights for Now*, MONGABAY (Feb. 13, 2018), <https://news.mongabay.com/2018/02/brazilian-supreme-court-ruling-protects-quilombola-land-rights-for-now/>.

91. Decreto No. 4.887 art. 3, de 20 de Novembro de 2003, D.O.U. de 21.11.2003 (Braz.).

92. Branford & Torres, *supra* note 90.

93. *Id.*

94. S.T.F. No. 43.877, Relator: Min. Marco Aurélio, 16.8.2017, S.T.F.J, 24.8.2017, <http://portal.stf.jus.br/processos/detalhe.asp?incidente=1468777> (Braz.); Jo Griffin, *Brazilian Supreme Court Upholds Land Rights of Indigenous People*, GUARDIAN (Aug. 17, 2017), <https://www.theguardian.com/global-development/2017/aug/17/brazilian-supreme-court-upholds-land-rights-indigenous-people-mato-grosso-do-sul>.

95. Griffin, *supra* note 94.

indigenous rights in the country back decades.”<sup>96</sup> During this ruling in 2017 and continuing today, rural land disputes threaten peace as thirty-seven homicides occurred from January to May of 2017—more than the same period in 2016.<sup>97</sup> Central to these disputes are the *ruralistas*, agricultural activists and lobbyists, who contribute to campaigns against protecting indigenous land.<sup>98</sup>

Besides Brazil’s Supreme Court, others have stepped in to provide extra protection to the country’s indigenous peoples.<sup>99</sup> The Inter-American Court of Human Rights (IACHR) ruled in 2018 that the Brazilian state was accountable for violation of rights against the Xukuru people, which included “failure to demarcate traditional territories, offer legal protection, and ensure legal proceedings with swiftness.”<sup>100</sup> In part of its ruling, the federal government was ordered to ensure proper removal of ranchers from the property owned by the Xukuru people.<sup>101</sup> A lawyer for the Missionary Indigenous Council described this decision as “historic” because it is “the first time the Brazilian state has been condemned in connection with indigenous rights.”<sup>102</sup>

### C. *Recent Troubling Developments*

Despite Brazil’s constitutional protection of its tribes, the country’s government has faced consistent criticism by activists over the last few years for not adequately protecting its tribes from unfavorable government action.<sup>103</sup> According to Fiona Watson, a director of Survival International, indigenous tribes face two major threats—the first being drug smugglers and loggers, and the second being “thousands of miles away in [Brazil’s] congress.”<sup>104</sup> In particular, some members of Congress revived a constitutional amendment that would affect indigenous peoples’ land

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96. *Brazil: Campaigners Welcome Court Rulings in Favor of Indigenous Land Rights*, SURVIVAL INT’L (Aug. 17, 2017), <https://www.survivalinternational.org/news/11777>.

97. Griffin, *supra* note 94.

98. *Id.*

99. See Jonas Valente, *Inter-American Court Condemns Brazil for Violating Indigenous Rights*, AGÊNCIA BRASIL (Mar. 16, 2018), <http://agenciabrasil.ebc.com.br/en/direitos-humanos/noticia/2018-03/inter-american-court-condemns-brazil-violating-indigenous-rights>.

100. *Id.*

101. *Id.*

102. *Id.*

103. See Adam Vaughan, *Brazil Budget Cuts Put Uncontacted Amazon Tribe at Risk, Say Activists*, GUARDIAN (Dec. 23, 2016), <https://www.theguardian.com/world/2016/dec/23/brazil-budget-uncontacted-amazon-tribe-risk-indigenous>.

104. *Id.*

rights as part of its budget cut plan.<sup>105</sup> The constitutional amendment at issue, Proposal of Constitutional Amendment 215 (PEC 215), was initially proposed in 2012, and it would have transferred the power to “demarcate indigenous peoples’ land, conservation units, and *quilombola* territories from FUNAI, Brazil’s indigenous affairs department, to Congress.”<sup>106</sup> However, in 2014, protests caused Congress to abandon PEC 215, which was a huge win for indigenous populations.<sup>107</sup> Even with this small victory, there was lingering fear that PEC 215 would be revitalized, which occurred in 2015.<sup>108</sup> In April 2015, indigenous people marched to the capital of Brazil and camped outside of Congress to protest PEC 215, which resulted in forty-eight senators signing a statement against the amendment, suggesting that “if the proposal to amend the constitution reached the Senate, there is a good chance it would be rejected.”<sup>109</sup>

In 2013, advocates for indigenous rights believed Brazil’s tribes were again facing a threat comparable to a dark period from the 1940s to the 1960s in which the Figueiredo Report documented heinous crimes against Brazil’s tribal communities.<sup>110</sup> During these “dark days” of the 1940s to 1960s, Brazil was ruled by military dictatorship, and its leaders believed that tribal lands took up space that could otherwise be occupied by industry and development.<sup>111</sup> Because of the crimes against Brazilian tribes during this period, Survival International formed in 1969 to further combat government takings of indigenous lands and lives.<sup>112</sup> Despite the fall of dictatorship in Brazil in 1985, some worried that former President Dilma Rousseff’s ideas about using the Amazon to promote the economy would displace tribes.<sup>113</sup> Activists believed President Rousseff held particularly damaging views about indigenous peoples because, while in leadership, she was “the only president since the fall of the dictatorship in 1985 who ha[d] not met with indigenous people.”<sup>114</sup> In 2016, President Rousseff was

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105. *Id.*

106. Chris Lang & REDD Monitor, *Não a PEC 215! No to Brazil’s Plan to Open Indigenous Lands to Industrial Exploitation!*, ECOLOGIST (July 15, 2015), <https://theecologist.org/2015/jul/15/nao-pec-215-no-brazils-plan-open-indigenous-lands-industrial-exploitation>.

107. *Id.*

108. *Id.*

109. *Id.*

110. Fiona Watson, *Brazil’s Treatment of Its Indigenous People Violates Their Rights*, GUARDIAN (May 29, 2013), <https://www.theguardian.com/commentisfree/2013/may/29/brazil-indigenous-people-violates-rights>.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

impeached, yet the circumstances still did not prove favorable for tribal rights because Brazil fell into a recession, causing some to worry that agribusiness interests would prevail over indigenous interests in efforts to promote its economy.<sup>115</sup>

Five years later, Brazil faced an even greater threat due to its election of Jair Bolsonaro in October 2018, a far-right nationalist whose campaign focused heavily on the notion that commercial interests trump indigenous interests.<sup>116</sup> In a prior statement, President Bolsonaro purportedly lamented that the Brazilian cavalry “wasn’t as efficient as the Americans, who exterminated their Indians,” and has targeted indigenous people with what some describe as “vitriolic hostility.”<sup>117</sup> Within hours after his inauguration, President Bolsonaro issued an executive order that gave the Ministry of Agriculture responsibility for indigenous lands, as he believes these lands should be open to commercial activities instead.<sup>118</sup> A direct effect of transferring these powers to the Ministry of Agriculture was that he stripped FUNAI of these responsibilities, so it will no longer have any say in creating boundaries of indigenous lands.<sup>119</sup> With this new power, Bolsonaro can effectively deny all claims to land by indigenous tribes and instead give grants to commercial miners and farmers.<sup>120</sup>

For uncontacted tribes, Bolsonaro’s election is particularly bleak. Around 100 uncontacted tribes live in the forest, and they rely on protections against outsiders because contact could mean potential devastation due to contact with viruses.<sup>121</sup> Bolsonaro’s platform focused heavily on promoting agribusiness and relaxing regulations on mining and farming, which comes at the expense of indigenous peoples, as demonstrated by his stripping FUNAI of its major functions.<sup>122</sup>

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115. Arsenaault, *supra* note 17.

116. Watson, *supra* note 19.

117. *Id.*

118. Jasmine Andersson, *Jair Bolsonaro: Brazil’s New Far-Right President Rolls Back Tribal Protections as He’s Inaugurated*, MSN, <https://news.co.uk/news/world/jair-bolsonaro-inauguration-brazil-new-president-far-right-tribal-protections-180560> (last updated Sept. 6, 2019).

119. *Bolsonaro’s First Order of Business: Strip FUNAI Agency of Right to Decide Brazil’s Native Lands*, JAPAN TIMES (Jan. 3, 2019), [https://www.japantimes.co.jp/news/2019/01/03/world/politics-diplomacy-world/bolsonaros-first-order-business-strip-funai-agency-right-decide-brazils-native-lands/#.XliKQC3Mw\\_U](https://www.japantimes.co.jp/news/2019/01/03/world/politics-diplomacy-world/bolsonaros-first-order-business-strip-funai-agency-right-decide-brazils-native-lands/#.XliKQC3Mw_U).

120. Andersson, *supra* note 118.

121. *Id.*

122. *Bolsonaro’s First Order of Business: Strip FUNAI Agency of Right to Decide Brazil’s Native Lands*, *supra* note 119.

## IV. ANALYSIS

Uncontacted tribes in Brazil and India ultimately face the same threats.<sup>123</sup> Professor Xaxa from Tezpur University believes India's tribal people face two major threats, "movement of people from outside into their habitat on one hand and development and infrastructure projects of the state on the other."<sup>124</sup> Fiona Watson of Survival International suggests the same threats face Brazil's indigenous populations.<sup>125</sup> Since tribal lands have dwindled due to industrialization and deforestation over the past few years, it is unsurprising that some uncontacted tribes have emerged from isolation.<sup>126</sup> Because of competing state concerns, some worry that Survival International is the only group dedicated to combating the unique issues that uncontacted tribes face in India and Brazil.<sup>127</sup>

Commentators have described India's response to tribal and indigenous rights issues as a "web of indifference."<sup>128</sup> In India, the major concerns seem to be "legal loopholes, poor enforcement of existing safeguards, bureaucratic apathy and corporate neglect of human rights."<sup>129</sup> Though India's PESA has faced criticism, its origin story suggests that India is open to change because PESA was the "result of social mobilization in which indigenous peoples, their organizations and civil society organization . . . played a critical role."<sup>130</sup> Those gunning for PESA's enactment came from several organizations geared towards protecting tribal rights, and they took an activist approach through the use of marches and protests.<sup>131</sup> However, PESA's enactment led to more challenges, one being that other laws already in effect contradict PESA's mandate, making it largely unworkable unless the other laws are amended.<sup>132</sup> Another challenge is that because India initially had a colonial rule, the government "has been unable to accept this radical change"

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123. See *Uncontacted Tribes: The Threats*, *supra* note 16.

124. Xaxa, *supra* note 60, at 146.

125. See Vaughan, *supra* note 103.

126. Wallace, *supra* note 5.

127. Gillian Anderson, *Gillian Anderson: The World's Few Remaining Uncontacted Tribes Need Our Help to Survive*, INEWS (May 24, 2017), <https://inews.co.uk/opinion/comment/gillian-anderson-survival-international-uncontacted-tribes-campaign/>.

128. Karnika Bahuguna, *Indigenous People in India and the Web of Indifference*, DOWNTOEARTH (Aug. 10, 2016), <https://www.downtoearth.org.in/coverage/governance/indigenous-people-in-india-and-the-web-of-indifference-55223>.

129. *Id.*

130. Xaxa, *supra* note 60, at 152.

131. *Id.*

132. *Id.* at 155.

because it does not believe local councils can adequately govern themselves.<sup>133</sup>

India's FRA faces the same problems as PESA because there are "conflict[s] between the national or state agenda of development that [seek] to exploit or divert mineral and forest resources and the recognition of right under the FRA."<sup>134</sup> Professor Xaxa argues that PESA and FRA offer indigenous peoples the most hope for change because they "aim to provide for renewed space for indigenous/tribal peoples."<sup>135</sup> On the other hand, PESA and FRA face large stumbling blocks to enforcement because India continues to show major growth in the global economy.<sup>136</sup> Further, the government has set aside 5400 miles of forest for industrial projects over the last thirty years.<sup>137</sup> Similarly, environmentalists argue that the indigenous people "continue to occupy a huge area of forestland," indicating that the threat might not be as looming as feared.<sup>138</sup>

Because the environment is also a competing interest in India, it appears that the country must draw a delicate balance between the three large areas of concern: indigenous rights, environmental activism, and industrial development.<sup>139</sup> A suggested solution might be to "enact a biodiversity law to empower rural communities in their role as guardians of traditional knowledge and partners with the environment."<sup>140</sup> Acting as "sword and a shield,"<sup>141</sup> this law would "balance the lucrative commercial opportunities for developing indigenous knowledge with the preservation of traditional lifestyles."<sup>142</sup> Enacted in 1993, and signed by India and Brazil in 1994, the United Nations Convention on Biological Diversity sought to provide such an agreement to simultaneously promote commercial endeavors while also protecting indigenous cultures and the environment.<sup>143</sup> Because all three competing interests are fundamental to

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133. *Id.*

134. *Id.* at 158.

135. *Id.* at 159.

136. *India's Robust Economic Growth to Continue in 2019: CII*, BUS. TODAY (Dec. 30, 2018), <https://www.businesstoday.in/current/economy-politics/india-robust-economic-growth-to-continue-in-2019-cii/story/305389.html>.

137. Masih, *supra* note 31.

138. *Id.*

139. See Thekackara, *supra* note 29.

140. Rekha Ramani, *Market Realities v. Indigenous Equities*, 26 BROOK. J. INT'L L. 1147, 1147 (2001).

141. *Id.* (quoting Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229, 240 (1998)).

142. Ramani, *supra* note 140, at 1149.

143. United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 69; Ramani, *supra* note 140, at 1149.



making India a thriving and diverse country, linking these interests could be the compromise the country needs.<sup>144</sup> However, due to the isolated nature of uncontacted tribes, collaboration with others may not be preferred.<sup>145</sup> Despite most rallying for no contact with uncontacted tribes, some argue that the “no contact policy is too blunt to protect them from disappearance.”<sup>146</sup> In order to protect these people, while simultaneously advocating for commercial and environmental interests, the government must decide between communicating with the tribes, which puts them at risk—or not contacting them, which also puts them at risk.<sup>147</sup>

Brazil’s uncontacted tribes face a unique threat because of their new president’s open advocacy for limiting indigenous land rights and exploiting the rainforest.<sup>148</sup> In contrast to India’s environmental groups rallying against indigenous groups to promote forest diversity, Brazil’s indigenous rights groups and environmental groups have seemingly banded together to protect the Amazon.<sup>149</sup> Though President Bolsonaro’s rhetoric suggests devastation for both groups, a professor at the Universidade de Brasília has stated that some of Bolsonaro’s campaign promises, including pulling Brazil out of the Paris Accords, would be “practically impossible.”<sup>150</sup> Because of this, the impact of his presidency could end up more moderate, though it is unlikely that he will comply with mandates to decrease deforestation.<sup>151</sup> Still, due to international pressure, the rate of deforestation will likely not grow higher since Brazilian exporters “understand that a negative image of Brazil in regards to the Amazon and climate change will hurt Brazilian exports.”<sup>152</sup>

Because it is very early in his presidency, many of these questions regarding Bolsonaro’s policies remain unanswered.<sup>153</sup> However, based on events that have already occurred since his election, it is clear that he

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144. See Masih, *supra* note 31.

145. See Smith, *supra* note 6.

146. Karolina Follis, *North Sentinel Island: Uncontacted Tribes’ ‘Right to Be Left Alone’ Doesn’t Gel with Broader Human Rights*, CONVERSATION (Dec. 6, 2018), <https://theconversation.com/north-sentinel-island-uncontacted-tribes-right-to-be-left-alone-doesnt-gel-with-broader-human-rights-108313>.

147. See *id.*

148. Scott Wallace, *Brazil’s New Leader Promised to Exploit the Amazon—But Can He?*, NAT’L GEOGRAPHIC (Oct. 31, 2018), <https://www.nationalgeographic.com/environment/2018/10/brazil-president-jair-bolsonaro-promises-exploit-amazon-rain-forest/>.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. See *id.*

intends to fulfill his campaign promises in any way he can.<sup>154</sup> Besides Bolsonaro automatically stripping FUNAI of its power, invasions on indigenous land have increased by 150% since his election.<sup>155</sup> Supporters of Bolsonaro's policies have invaded tribal lands and marked the trees as if to suggest they were marking plots for commercial purposes, while also inflicting damage to signs and threatening the tribes.<sup>156</sup> However, the fear instilled in Brazilian exporters to project a positive image to the world might play a large role since Brazil has "recently adopted an active trade policy."<sup>157</sup> The Secretary for Trade at the Ministry of Development, Industry, and Foreign Trade in Brazil noted that to become truly competitive in industrial development and international trade, Brazil must be able to access raw materials while also restructuring its infrastructure schemes.<sup>158</sup> Although the World Trade Organization (WTO) is not geared towards enforcing environmental concerns, its provisions on nondiscrimination in trade do not conflict with environmental trade measures.<sup>159</sup> To avoid an action against it by environmental groups, it would be prudent for Brazil's trade prospects to abide by the environmental treaties it has signed.<sup>160</sup>

Apart from international pressures, hope for Brazil's uncontacted tribes largely remains with its Supreme Court, which has protected indigenous land rights in the past.<sup>161</sup> On January 31, the Brazilian Socialist Party filed a petition in the Supreme Court challenging Bolsonaro's order to replace FUNAI's authority over indigenous land with the Agriculture Ministry.<sup>162</sup> The Supreme Court has not yet ruled on this issue, but due to its focus on constitutional demarcation of land under the 1988 Constitution, it follows that the Court could rule similarly to the *Mato Grosso do Sul* case in 2017.<sup>163</sup>

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154. Anthony Boadle, *Emboldened by Bolsonaro, Armed Invaders Encroach on Brazil's Tribal Lands*, REUTERS (Mar. 3, 2019), <https://www.reuters.com/article/us-brazil-indigenous-insight-idUSKCN1QK0BG>.

155. *Id.*

156. *Id.*

157. See Wallace, *supra* note 148; Daniel Godinho, *Why Trade Is Key to Brazil's Economic Recovery*, AM. Q. (2016), <https://www.americasquarterly.org/content/brazil-should-open-trade>.

158. Godinho, *supra* note 157.

159. *The Environment: A Specific Concern*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm) (last visited Oct. 3, 2019).

160. *See id.*

161. See Branford & Torres, *supra* note 90; Griffin, *supra* note 94.

162. Boadle, *supra* note 154.

163. See S.T.F. No. 43.877, Relator: Min. Marco Aurélio, 16.8.2017, S.T.F.J, 24.8.2017, <http://portal.stf.jus.br/processos/detalhe.asp?incidente=1468777> (Braz.).

## V. CONCLUSION

Tribal interests around the world have reached a boiling point in the past few years. Though Chau's decision to visit North Sentinel sparked heated debate, it also brought attention to uncontacted tribes.

Because the world has sharply focused on environmental issues in the past decade, it is likely that this added pressure will make a difference in the area of tribal rights.<sup>164</sup> India's tribal population does not have the same support from environmental groups as in Brazil, and so its indigenous rights groups must fight against both competing interests.<sup>165</sup> Yet, India still faces outside environmental pressure because of its own environmental issues, so appearances projected to the rest of the world should be major concern for both countries.

While the fate of uncontacted tribes remains unknown due to changing circumstances in both countries, discourse about possible compromises must be pursued in order to ensure that environmental, commercial, and indigenous groups are all receiving the care and attention they need for India and Brazil to thrive.

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164. See Wallace, *supra* note 148.

165. See Thekaekara, *supra* note 29.