Greenland Minerals v. Greenland & Denmark: The Use of Third-Party Funding in Investor-State Dispute Settlements and the Ramifications on the Fight Against Climate Change

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ABSTRACT

The climate crisis poses a very real danger to the world economy as well as international human rights; however, a significant barrier to State action is investor-state dispute settlement. These claims for arbitration are increasingly filed by fossil fuel investors in response to State efforts to regulate and improve the environment. Unfortunately, the governments facing the largest number of these proceedings are smaller developing States and States with a significant Indigenous population, as reflected in Greenland Minerals v. Greenland and Denmark. In cases like Greenland Minerals's, the proceedings heavily favor the more powerful investor with deeper pockets, but the inequalities between the parties increase further as more and more investors are engaging in third-party financers to ensure the proceedings go as smoothly as possible and apply additional pressure on the respondent State. This Essay argues that third-party funding should be scrutinized in investor-state arbitration to ensure the funding is not coercive. In tandem, it also argues that States should be allowed to respond to public concern with regulations, and the requirement to obtain a social license should fall on the investor, not the government.

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I. INTRODUCTION

Third parties have funded international arbitration for years, but the presence of third-party funding through investor-state arbitration has only become prevalent over the last decade or so.[1] In those cases, "foreign investors sue[d] governments before ad-hoc panels of arbitrators," rather than relying on suits against foreign corporations or businesses.[2] The problem is not that investors are filing claims against governments, but rather the *types* of cases these companies file using unnecessary third-party funds. Some fossil fuel or mining companies have filed claims in response to a government's attempts to move away from fossil fuels and regulate the environment.[3] The situation gets worse when investors file suits against smaller governments or developing States that are especially vulnerable to the environmental impact of investment agreements with mining or fossil fuel companies.[4]

Many third-party funders in arbitration are corporations whose primary objective is to secure the most favorable settlement possible, as they recover nothing if the funded party loses. This means that, rather than considering the environmental or human costs of these agreements, third-party funders focus primarily on the economic costs to the corporations retaining their services. The ongoing dispute in *Greenland Minerals v. Greenland and Denmark* illustrates

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[1] *See* Katie Surma & Nicholas Kusnetz, *How to Buy a Piece of a Lawsuit and Impoverish a Country*, INSIDE CLIMATE NEWS (Dec. 8, 2024), https://insideclimatenews.org/news/08122024/investors-buying-claims-against-developing-nation-governments [https://perma.cc/SCS5-2223].

[2] *Id.*

[3] *See, e.g.*, Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Award, ¶¶ 200–04, 218 (Nov. 30, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf [https://perma.cc/67AS-WMA2].

[4] *See, e.g.*, *id.* at 738. After the tribunal found in favor of the corporation, Peru was responsible for over twenty-one million dollars in costs before taking into account the 5% interest. *Id.* Peru's GDP at the time of this decision was 211.01 billion dollars. *GDP (Current US$) - Peru*, WORLD BANK GROUP, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=PEP [https://perma.cc/SJW6-7GDL]. Peru is extremely vulnerable to the impacts of climate change and has already felt the effects of the climate crisis on its economic growth and efficiency. Organisation for Economic Co-operation and Development, *OECD Economic Surveys: Peru 2025* 98–99 (2025), https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/09/oecd-economic-surveys-peru-2025_d9bfa904/76f6eb73-en.pdf [https://perma.cc/JF9N-L9UP] ("[Climate change impacts] would further reduce Peru's already low GDP growth by 0.5-0.7 percentage points each year, without accounting for the cost of reconstruction and other contingent fiscal liabilities such as emergency assistance."). Peru was facing two bad choices: losing an arbitration suit that could serve as a debt for years to come or reducing its economic growth and increasing risks to its people from adverse environmental impacts.

this principle and provides a framework to analyze the problems associated with third-party funding in investor-state dispute settlements, as well as potential solutions.

II. THE CURRENT LANDSCAPE OF THIRD-PARTY FUNDING IN INVESTOR-STATE DISPUTE SETTLEMENT

Third-party financing ("TPF"), also known as professional litigation funding, is an agreement in which "a party involved in a dispute seeks funding from an outside entity for its legal representation."[5] The outside entity or third party finances the proceedings with an intent to make a profit.[6] This funding is typically offered through a contract based on winning the claim. If the claimant does not win their claim, the funder does not recover what it put into the litigation or arbitration.[7]

In the 1990s, Australia was the first country to allow TPF,[8] but more jurisdictions have followed suit over time.[9] TPF has become especially prevalent in the United States,[10] which is home to many of the biggest litigation funders.[11] In the United States alone, forty-seven litigation funders reported 12.4 billion dollars in assets.[12] TPF presents as a lucrative market for investors. Along with this increased popularity, TPF has also seen a rise in controversy, namely the use of TPF in investor-state dispute settlements ("ISDS").[13] To properly understand the impact of TPF on ISDS, TPF and ISDS need to be examined. This Part first explains TPF and traces its development into a tool for major corporations and financial institutions. It then highlights the regulation of TPF and the bodies responsible for overseeing it. Next, it explains ISDS and its recent

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[5] Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 390 (2016); *see* EUR. L. INST., PRINCIPLES GOVERNING THE THIRD PARTY FUNDING OF LITIGATION 12 (2024), https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf [https://perma.cc/4GT2-T57C].

[6] Sahani, *supra* note 5, at 392.

[7] *Id.*

[8] EUR. L. INST., *supra* note 5, at 2.

[9] Sahani, *supra* note 5, at 392.

[10] JOHN BEISNER, JESSICA MILLER & GARY RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES 2 (2009), https://instituteforlegalreform.com/wp-content/uploads/media/thirdpartylitigationfinancing.pdf [https://perma.cc/2LL2-TVSM].

[11] *See, e.g.*, Bethany Burns, *Litigation Funding – The UK and US Rankings 2024*, LEGAL500, https://www.legal500.com/practice-areas/litigation-funding-the-uk-and-us-rankings-2024 [https://perma.cc/3RVP-W24A] (last visited Jan. 29, 2026, at 17:20 CT).

[12] U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS 12 (Dec. 20, 2022), https://www.gao.gov/assets/gao-23-105210.pdf [https://perma.cc/63C2-HRSC].

[13] *Infra* Section I.B; *see also* Tara Santosuosso & Randall Scarlett, *Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance*, 60 B.C. L. REV. ELEC. SUPP., Feb. 26, 2019, at I.-8, I.-12 (discussing how the use of TPF in investment disputes has strayed from the original access to justice intent behind TPF).

regulations. Finally, this Part examines *Greenland Minerals v. Greenland and Denmark*.

A. *Third Party Financing*

Historically, TPF has been used in a variety of ways, including increasing access to justice[14] for claimants without the resources to litigate on their own.[15] As time passed, corporate funders began offering funds, and were eventually joined by hedge funds backing commercial litigation.[16] These corporate litigation financers saw a potential market and became involved in funding litigation, using it as a sort of investment.[17] With this strategy, litigation funders are essentially able to place a bet on a claim, allowing the funded party to move forward with their case. If the bet pays off, the third-party funder can win big. If the funded party loses, the funder does not recover any of their investment. It is a possibility of high reward with little legal risk due to the funder's status as a third-party. TPF has been a very lucrative investment space, with a 2023 report estimating the market was worth 15.8 billion dollars in 2022 and is expected to grow to 24.3 billion dollars by 2028.[18]

TPF has been used for decades in a variety of capacities,[19] but its more recent development in international investment disputes is more jurisdiction

[14] This namely occurs through "litigation loans," small loans given to plaintiffs or claimants and repaid through the amount awarded at the end of the proceedings. *See* Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMP. L. 343, 356–57 (2011).

[15] INT'L COUNCIL COMM. ARB., REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 20 (2018), https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf [https://perma.cc/YT24-WF3H].

[16] Mark Behrens, *Third-Party Litigation Funding: A Call for Disclosure and Other Reforms to Address the Stealthy Financial Product That Is Transforming the Civil Justice System*, 34 CORNELL J.L. & PUB. POL'Y 1, 2–6 (2025).

[17] *Id.* at 4 n.8 ("[a] litigation claim is an asset. It may seem strange to think of litigation in that way, but if one strips away the drama and the collateral dynamics associated with the litigation process, a litigation claim is nothing more than an effort to get money to change hands. In other words, a litigation claim is just like any other receivable."); INT'L COUNCIL COM. ARB., *supra* note 15, at 20 (noting that "[h]istorically, third-party funding was considered as being primarily a mechanism by which financially distressed claimants could obtain access to justice."); William W. Park & Catherine A. Rogers, *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force,* 2014 AUSTRIAN YB INT'L ARB., FORTHCOMING, BOS. U. SCH. L., PUB. L. RSCH. PAPER NO. 14-67, PENN. ST. [DICK.] L. RSCH. PAPER NO. 42-2014, 4–5 (describing how third-party funders can become involved in a claim through a variety of mechanisms).

[18] Rationalstat LLC, *Global Litigation Funding Investment Market is Poised to Touch US$ 24.3 Billion by the End of 2028, Driven by Increasing Awareness About Litigation Financing,* GLOBENEWSWIRE (Aug. 9, 2023, at 09:00 ET), https://www.globenewswire.com/en/news-release/2023/08/09/2721731/0/en/Global-Litigation-Funding-Investment-Market-is-poised-to-touch-US-24-3-billion-by-the-end-2028-driven-by-increasing-awareness-about-litigation-financing.html# [https://perma.cc/FB57-ZS3J].

[19] *See A Brief History of Litigation Finance: The Cases of Australia and the United Kingdom*, PRACTICE MAGAZINE HARV. L. SCH. (Oct. 2019), https://clp.law.harvard.edu/knowledge-hub/magazine/issues/litigation-finance/a-brief-history-of-litigation-finance [https://perma.cc/2QGU-H9WY] (TPF has been used in Australia for domestic class action lawsuits, while the U.K. allowed litigation financing so long as it was not in violation of public policy).

dependent. For example, in the United States, courts typically leave the regulation of third-party funding to state legislatures,[20] while funding agreements in Australia are monitored by the Australian Securities and Investments Commission.[21] The presence of TPF is growing in other countries—Germany, Scotland, the Netherlands, South Africa, and Brazil[22]—and with this growth comes an increased interest in regulation.

TPF is a "*legal gamble*"[23] for corporate litigation funders, thus various entities, both domestic and international, have proposed regulations and reforms to ensure the system operates efficiently and without misconduct. TPF can be regulated domestically,[24] but it is also regulated through the rules of arbitral bodies. For example, in 2021, the International Chamber of Commerce ("ICC")[25] incorporated TPF into its rules.[26] The 2021 Rules were intended to "mark a further step towards greater efficiency, flexibility, and transparency . . . , making ICC Arbitration even more attractive."[27] In order to achieve these goals, Article 11(7) requires parties to inform the tribunal and other parties if a non-party provides funding for the claim or the defense.[28] The ICC rules demand parties make this disclosure.[29] Requiring the disclosure of TPF is part of an

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[20] EUR. L. INST., *supra* note 5, at 58 n.158.

[21] Joseph J. Stroble & Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, 87 DEF. COUNS. J. 1, 3 (2020).

[22] *Id.* at 8–9.

[23] U.S. CHAMBER INST. FOR LEGAL REFORM, THIRD PARTY FINANCING: ETHICAL & LEGAL RAMIFICATIONS IN COLLECTIVE ACTIONS 5 (2009), https://instituteforlegalreform.com/wp-content/uploads/2020/10/Third_Party_Financing.pdf [https://perma.cc/VLG6-D3SN]. "In a typical case[,] a hedge fund, acting on behalf of already wealthy investors, will seek to accumulate yet more money—not by investing in business enterprise or wealth creation—but by gambling on the outcome of a legal action for damages. They have no interest in the justice or otherwise of the case—only in the chances of success—as they will demand a share of the damages awarded in return for putting up the stake money." *Id.* (quoting John Jones, a director at a risk management firm).

[24] *See, e.g.*, Arbitration and Mediation Legislation Ordinance, (2017) Ord. No. 6/2017 (H.K.) (describing regulations of TPF in Hong Kong); Civil Law (Amendment) Act, (2017 No. 8) Act no. 668/2017 (Sing.) (same for Singapore).

[25] The ICC Rules are "the gold standard of arbitral institutional rules." Jonathan Barnett, Lucas Macedo & Jacob Henze, *Third-Party Funding Finds its Place in the New ICC Rules*, KLUWER ARB. BLOG (Jan. 5, 2021), https://arbitrationblog.kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules [https://perma.cc/4Q8X-HX9L]; *ICC Unveils Revised Rules of Arbitration*, INT'L CHAMBER COM. (Oct. 8, 2020), https://iccwbo.org/news-publications/news/icc-unveils-revised-rules-of-arbitration [https://perma.cc/3J7G-W8K3].

[26] *See* Barnett, Macedo & Henze, *supra* note 25.

[27] *See ICC Unveils Revised Rules of Arbitration*, *supra* note 25.

[28] *2021 Arbitration Rules*, INT'L CHAMBER COM., Art.11(7), (Jan. 1, 2021), https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-2 [https://perma.cc/Y2LX-A9AH] [hereinafter *2021 Arbitration Rules*].

[29] *See* Barnett, Macedo & Henze, *supra* note 25.

industry focus on ensuring there are no conflicts of interest between the tribunal and the parties,[30] but the disclosure still has its limitations.[31]

The ICC's 2021 Rules were intended to increase transparency and build confidence in international arbitration.[32] The 2021 Rules are just one body's efforts in the larger trend towards transparency and reform in international arbitration. In 2022, the International Centre for Settlement of Investment Disputes ("ICSID"),[33] the body responsible for administering over 60 percent of treaty-based ISDS disputes,[34] saw the culmination of a five-year effort to reform its arbitration procedures.[35] As a part of these reforms to "modernize, simplify, and streamline the rules," Member States also approved amendments to TPF procedures.[36]

One of the most important reforms to arise out of the 2022 rules was the creation of Rule 14. Rule 14(1) requires a party to disclose "any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding . . . ."[37] Rule 14 also offers a broad definition of TPF[38] and extends the requirement to disclose beyond just party representatives.[39] Under Rule 14(4), the tribunal has the authority to "order disclosure of further information."[40] Although tribunals have this authority, the language of the rule only says that tribunals "may order disclosure," so the power discretionary rather than mandatory.[41]

Whether TPF is present in arbitration tribunals before the ICC or the ICSID, both bodies have acknowledged that some level of disclosure of non-party funders is necessary. This disclosure is a step in the right direction, but the

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[30] *Id.*

[31] *Id.* (stating parties are not required to disclose anything beyond the "existence and identity of any [funder].").

[32] *2021 Arbitration Rules*, INT'L CHAMBER COM., Art. 11(7) (Jan. 1, 2021), https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-2 [https://perma.cc/Y2LX-A9AH].

[33] The role ICSID and the ICSID Convention play in investor-state dispute settlement will be discussed further in Section I.B.2.

[34] FACTS AND FIGURES ON INVESTOR-STATE DISPUTE SETTLEMENT CASES, U.N. TRADE & DEV. 9 (2024), https://unctad.org/system/files/official-document/diaepcbinf2024d5_en.pdf [https://perma.cc/D9PK-323Q] [hereinafter UNCTAD]; *infra* Section I.B.1.

[35] Alberto Favro, *New ICSID Arbitration Rules: A Further Step in the Regulation of Third-Party Funding*, KLUWER ARB. BLOG (June 3, 2022), https://arbitrationblog.kluwerarbitration.com/2022/06/03/new-icsid-arbitration-rules-a-further-step-in-the-regulation-of-third-party-funding [https://perma.cc/Q7KQ-253E].

[36] *Id.*

[37] ICSID, ICSID ARBITRATION RULES 98 (2022) https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf [https://perma.cc/DX3K-SPG2].

[38] *Id.*

[39] *See id.* (requiring disclosure of "any non-party").

[40] *Id.*

[41] *See* Favro, *supra* note 35.

situation quickly becomes murky again when engaging in investor-state dispute settlement.

B. *The Role of Investor-State Dispute Settlement*

Investor-State Dispute Settlement or investor-state arbitration is a mechanism that allows foreign investors to bring a claim against a state for interference with their investment in some capacity.[42] It differs from other forms of commercial arbitration in a few key ways: the parties are a foreign investor and a respondent instead of two private parties; the claims typically arise under a bilateral investment treaty or multilateral treaty instead of a contractual claim; most ISDS claims occur through "a specialized legal regime" that is separate from national law; and only the investor can bring a claim in investor-state arbitration, as opposed to normal commercial arbitration which allows both parties to file claims.[43]

To engage ISDS procedures, the investor must bring its claim under a treaty that allows ISDS.[44] Most commonly, these are the ICSID Convention, multilateral regional treaties, multilateral sectoral treaties, and bilateral investment treaties of which the Respondent is a party.[45] Most tribunals in ISDS cases occur under the ICSID Arbitration Rules ("Convention"),[46] but the Convention only provides a mechanism for dispute resolution, not additional protections.[47] If an ISDS claim is filed under a bilateral investment treaty or multilateral treaty, that treaty's dispute resolution provisions govern, and they typically contain extra protections for investors.[48] While there are more than three thousand bilateral or multilateral treaties that can serve as a mechanism for ISDS, whether these treaties allow for ISDS claims is often up to the interpretation of the tribunal.[49]

ISDS is not completely unregulated, but its regulation is a recent development. The most recent reform efforts have occurred through the United Nations Commission on International Trade Law ("UNCITRAL"), which created an Investor-State Dispute Settlement Reform Work Group ("Working Group

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[42] GARY B. BORN, INTERNATIONAL ARBITRATION: LAW & PRACTICE 43–44 (2016).

[43] *Id.* at 423–25.

[44] *Climate Change and Investor-State Dispute Settlement*, JONES DAY (Feb. 2022), https://www.jonesday.com/en/insights/2022/02/climate-change-and-investorstate-dispute-settlement [https://perma.cc/8Y6Q-AJCQ].

[45] BORN, *supra* note 42, at 423–25.

[46] UNCTAD, *supra* note 34, at 4.

[47] BORN, *supra* note 40, at 423–25. To submit to ICSID arbitration, there needs to be separate consent either from an arbitration clause within an investment contract or consent from some foreign investment tool or treaty. *Id.* at 419.

[48] *Id.* at 424–25.

[49] For example, this piece discusses ISDS in response to environmental regulations, and many of the treaties investors use for ISDS were created before the climate crisis was as prevalent or understood as it is today. Therefore, investors are ensuring that ISDS is available through the trade treaty when negotiating with the State. *Id.*

III") in 2017.[50] Since 2017, Working Group III has been exploring various mechanisms to reform ISDS and engaging with States and other entities for feedback on the proposals.[51] In 2024, Working Group III proposed a draft statute establishing "The Advisory Centre on International Investment Dispute Resolution."[52] It also drafted a multilateral instrument on ISDS reform that would allow States to make internal amendments to existing investment treaties.[53] These proposals reflect the changing landscape of ISDS.

C. Greenland Minerals v. Greenland and Denmark

TPF and ISDS have become prevalent in cases involving environmental impact from some sort of investment agreement, as is reflected in *Greenland Minerals v. Greenland and Denmark*. In 2022, Greenland Minerals ("GM"), an Australian mining company, filed a request for arbitration against Greenland and Denmark[54] because Greenland's parliament revoked the company's mining permit[55] after the country banned uranium extraction.[56] The relationship between Greenland and GM began back in 2007 when the nation gave the mining company an exploration license allowing it to search for rare earth metals like uranium.[57] When GM first began operations in Greenland, the small country had a ban on uranium mining.[58] GM lobbied heavily to repeal that ban and worked closely with the Greenlandic government[59] to move forward with its

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[50] *Working Group III: Investor-State Dispute Settlement Reform*, U.N. COMM'N ON INT'L TRADE L. (2025), https://uncitral.un.org/en/working_groups/3/investor-state [https://perma.cc/V7GN-P943].

[51] *See, e.g.*, *id.* (compiling comments on the 50th Session's proposals involving procedural and cross-cutting issues).

[52] Anna Chiara Amato, *The Advisory Centre on International Investment Dispute Resolution, ICSID and PCA: Advisable Co-Existence or Risky Fragmentation*, KLUWER ARB. BLOG (July 8, 2024), https://arbitrationblog.kluwerarbitration.com/2024/07/08/the-advisory-centre-on-international-investment-dispute-resolution-icsid-and-pca-advisable-co-existence-or-risky-fragmentation [https://perma.cc/Q9ED-22BK]; Rep. of the U.N. Comm'n on Int'l Trade L., at 1, U.N. Doc. A/79/17 (2024).

[53] Rep. of the U.N. Comm'n on Int'l Trade L., Forty Ninth Session, at 9, U.N. Doc. A/CN.9/WG.III/WP.246 (Sep. 23–27, 2024).

[54] Denmark is a named party because the Minerals Authority that handled the initial stages of GM's mining exploration project was a part of the Danish government at the time, and Denmark provides financial support to Greenland each year. Louise Voller, *Mining Company Gives Greenland an Ultimatum: Green Light for Controversial Mine or Pay 15 Billion DKK in Compensation*, DANWATCH (May 10, 2023), https://danwatch.dk/en/mining-company-gives-greenland-an-ultimatum-green-light-for-controversial-mine-or-pay-15-billion-dkk-in-compensation [https://perma.cc/6XFP-GPWW].

[55] Surma & Kusnetz, *supra* note 1.

[56] Jacques Hartmann, Ana E. Bastida & Ana Maria Daza-Clark, *Transition Minerals: A Cautionary Tale from Greenland*, EJIL: TALK! (Jan. 29, 2024), https://www.ejiltalk.org/transition-minerals-a-cautionary-tale-from-greenland [https://perma.cc/QE8M-FZ9T].

[57] *Id.*

[58] *Id.*

[59] This involved appointing Lars-Emil Johansen, Greenland's former Prime Minister from 1991–1997, as Chairman of GM's board. Roderick McIllree, *Former Greenlandic Prime Minister Appointed Chairman of Greenland Subsidiary*, GREENLAND MINS. & ENERGY LTD (July 8, 2009),

mining operation.[60] These efforts proved successful in 2013 when Greenland repealed its ban on uranium mining,[61] despite its devastating effects on Indigenous populations.[62]

The potential for devastating effects on Indigenous populations was not well publicized when GM first began lobbying the government, hiding the potential harm on the horizon. One person affected by uranium mining is Mariane Paviasen, a resident of Narsaq, a town in Southern Greenland about ten kilometers from Kvanefjeld.[63] Narsaq is home to about 1,400 residents, most of whom are Inuit whose economy relies on fishing, hunting, and sheepherding.[64] When GM came in with its proposals, both GM and Greenland failed to give locals information about the projects.[65] In response, Paviasen began researching the health and environmental impacts of uranium mining on Indigenous communities.[66] What she found was catastrophic;[67] Paviasen's research informed her about the devastating impacts on Indigenous populations around the world, and she wanted to prevent similar events from happening in her home.[68] She tried to discuss the impacts of the project at the company's meetings, but her concerns—given through an interpreter—were brushed off.[69]

With the governmental barriers gone and Indigenous voices ignored, GM was ready to move forward with operations. The company's permit specifically applied to Kvanefjeld, an area in southern Greenland with a significant number of "critical materials" like rare earth metals.[70] Over the decade, GM spent more than $100 million developing its mining site, but that development—and profitability hopes—stopped when the governing party of Greenland changed.[71]

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https://announcements.asx.com.au/asxpdf/20090708/pdf/31jh09hmh0nhb0.pdf [https://perma.cc/HC9V-TP3G].

[60] Surma & Kusnetz, *supra* note 1.

[61] *Id.*

[62] *Id.* (describing how many Inuit rely on fishing, hunting, and sheepherding for income and the environmental impacts of uranium mining would threaten such pursuits).

[63] *Id.*

[64] *Id.*

[65] Surma & Kusnetz, *supra* note 1

[66] *Id.*

[67] *See, e.g.*, Mary F. Calvert, *Toxic Legacy of Uranium Mines on Navajo Nation Confronts Interior Nominee Deb Haaland,* PULITZER CTR. (Feb. 23, 2021), https://pulitzercenter.org/stories/toxic-legacy-uranium-mines-navajo-nation-confronts-interior-nominee-deb-haaland [https://perma.cc/J4TM-RNAD]. In the United States, Navajo neuropathy, a disorder linked to uranium contamination, has struck many Navajo children and many Navajo associated with uranium miner suffered and/or died from lung cancer, tuberculosis, thyroid disease, kidney disease, and other diseases due to their uranium exposure. Surma & Kusnetz, *supra* note 1.

[68] Surma & Kusnetz, *supra* note 1.

[69] *Id.*

[70] *Id.*; Jeffrey Gettleman, Maya Tekeli & Chris Buckley, *For Greenland's Minerals, the Harsh Reality Behind the Glittering Promise*, N.Y. TIMES (Mar. 3, 2025), https://www.nytimes.com/2025/03/03/world/europe/greenland-minerals-trump.html [https://perma.cc/6YHC-4EUK].

[71] Gettleman, Tekeli & Buckley, *supra* note 70.

The Inuit Ataqatigiit had run on a platform opposing GM's venture in Kvanefjeld, and generally invasive rare earth mining.[72] Under this platform the party won 36.6 percent of the vote in the 2021 election.[73] The driving force behind Inuit Ataqatigiit's success was its focus on the environmental impact of the Kvanefjeld mine,[74] so it was no real surprise when the new government passed the "Uranium Act," banning uranium prospecting, exploration, and exploitation,[75] shortly after the election.[76]

After the new administration passed the Uranium Act, GM was unable to move forward with its operations, and in response filed a claim with a panel of arbitrators in 2022.[77] GM's request to the panel was to force Greenland to allow the company to continue its mining operations, or force Greenland to provide 11.5 billion dollars[78] if GM were prohibited from additional mining.[79] 11.5 billion dollars is roughly six times greater than Greenland's government spent in the entirety of 2024,[80] and an order to pay such an amount would likely bankrupt

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[72] Eilís Quinn, *Political Upheaval in Greenland — What Does Inuit Ataqatigiit Do Now?*, EYE ARCTIC (June 21, 2021, at 10:32 CT), https://www.rcinet.ca/eye-on-the-arctic/2021/04/08/political-upheaval-in-greenland-what-does-inuit-ataqatigiit-do-now [https://perma.cc/N4YD-T86Y].

[73] *Id.*

[74] *Id.* ("[A] majority in Greenland said 'No Thanks,' we will not tolerate the risks the environmental risks that this mine represents. We don't care if [the company] can submit themselves to environmental regulations and is possibly able to operate in the legal boundaries of our environmental laws. We don't want it.").

[75] Greenland Parliament Act No. 20 of 1 December 2021 to Ban Uranium Prospecting Exploration and Exploitation, etc., *available at* https://govmin.gl/wp-content/uploads/2022/01/Uranlov-ENG.pdf [https://perma.cc/3458-V3W4].

[76] Hartmann, Bastida & Daza-Clark, *supra* note 56. On March 13, 2025, the Demokraatit party, a pro-business party, won Greenland's parliamentary election ahead of Inuit Ataqatigiit and Naleraq, two left-leaning parties. Danica Kirka, *Greenland's Election Winners Push Back Against Trump's Wish to Take Control of the Island*, AP (March 13, 2025, at 13:45 CT) https://apnews.com/article/greenland-election-demokraatit-trump-arctic-13c295cbc716db2c8011be5819e11fef [https://perma.cc/9XS5-VBJT].

[77] Surma & Kusnetz, *supra* note 1.

[78] Although GM is seeking 11.5 billion dollars, only 7.5 billion dollars are for damages. The other four billion dollars are "in pre-reward interest." Hartmann, Bastida & Daza-Clark, *supra* note 56.

[79] Surma & Kusnetz, *supra* note 1.

[80] *Id.* These requests for significant amounts in damages is concerning due to the potential for chilling democratic action impacting the fight against climate change and human rights violations. *See* Press Release, Office of the High Commissioner, *Investor-State Dispute Settlements Have Catastrophic Consequences for the Environment and Human Rights: UN Expert*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Oct. 20, 2023), https://www.ohchr.org/en/press-releases/2023/10/investor-state-dispute-settlements-have-catastrophic-consequences [https://perma.cc/PV3Y-LAJV] ("Foreign investors use the dispute settlement process to seek exorbitant compensation from States that strengthen environment protection . . . with industries already winning over $100 billion in awards . . . . Such cases create regulatory chill."); *infra* Section II.C. Why would smaller states with less financial resources like Greenland risk the significant payout when they could never put up a fight in the first place or, if they do, negotiate for a much smaller settlement? If they lost, their taxpayers would be on the hook for an amount that could take generations to pay off, especially if the investor sought damages with interest. *See* Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, ¶ 863 (Sep. 22, 2014) (ordering a post-award interest rate of LIBOR plus two percent compounded annually on the base amount of 713,032,000 dollars); Flemingo v.

the country, especially if interest were added. The basis for the number was compensation for GM's lost investments and projected future earnings.[81] GM's financial claim was fairly standard in that it was an exorbitant amount.[82] However, its efforts to achieve a successful arbitration decision were different than a standard ISDS case.

Typically, ISDS has been a mechanism to bring forth a claim for a claimant who lacks the capital to do so,[83] but that is not what is happening in *Greenland Minerals*. Although GM is a subsidiary corporation of Energy Transition Materials ("ETM") with assets of over $100 million[84], GM still chose to seek third-party funding to allow the dispute "to proceed as quickly and efficiently as possible."[85] The third-party corporation footing GM's legal bills is Burford Capital, the world's largest litigation financier.[86] Burford's funding has allowed GM to dedicate a significant amount of legal power to the dispute[87] and increase the number of minor issues like what language emails should be written in, leading to delays and dragging out the dispute even further.[88] Greenland's lead attorney worried that his three-person team could strain the nation's budget, a fear that only increased as GM continued to draw out the timeline.[89] The financial cost of Greenland's loss before the arbitration panel would be devastating for the small nation; however, the cost of reinstating GM's

Poland, UNCITRAL, Award, ¶ 976 (Aug. 12, 2016) (awarding interest on 17,902,790 Euros with a standard interest rate that would increase by two percent every six months until paid in full); Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award, ¶ 1081 (Aug. 22, 2017) (ordering Pakistan to pay 149,802,431 dollars with a twelve percent interest rate compounded annually until the full amount was paid). While awards can be negotiated after they are ordered, there is still significant risk to smaller or developing states put in this situation.

[81] Martin Breum, *Chinese-Linked Australian Mining Company Sues Greenland for $11bn Over Lost Revenue*, ARCTICTODAY (Oct. 11, 2023), https://www.arctictoday.com/chinese-linked-australian-mining-company-sues-greenland-for-billions-of-usd-over-lost-revenue [https://perma.cc/VSK3-US8Y]. GM's claims were largely based on breach of contract theories and actions taken by Greenland's previous government to benefit from mining operations. *See* ENERGY TRANSITION MINERALS LTD., OVERVIEW OF STATEMENT OF CLAIM: GMAS V. GOVERNMENT OF GREENLAND & GOVERNMENT OF DENMARK 4–7 (2023).

[82] *Id.*

[83] Santosuosso & Scarlett, *supra* note 13, at I.-12.

[84] *See* GREENLAND MINERALS LTD., 2020 ANNUAL REPORT 18 (2021), https://www.listcorp.com/asx/etm/energy-transition-minerals-ltd/news/annual-report-to-shareholders-2525453.html [https://perma.cc/LUF6-DMLR] ("[t]he net assets of the Consolidated Group were $124,771,456 as at 31 December 2020 . . . .").

[85] Surma & Kusnetz, *supra* note 1.

[86] *Id.*; Patrick Greenfield & Phoebe Weston, *Revealed: How Wall Street is Making Millions Betting Against Green Laws*, GUARDIAN-UK (Mar. 5, 2025, at 04:00 CT), https://www.inkl.com/news/revealed-how-wall-street-is-making-millions-betting-against-green-laws [https://perma.cc/KEX9-RRC2].

[87] When Greenland's lead lawyer arrived at the first hearing, he and his three-person team were met with twelve attorneys from two separate law firms. Surma & Kusnetz, *supra* note 1 ("[The attorney] fretted that his own three-person team, now greatly outmatched, might strain the budget of Greenland . . . .").

[88] *Id.*

[89] *Id.*

exploratory license may be even more costly.[90] This will be discussed further in Part II.B.2.

ETM filed a request for an arbitral tribunal to reinstate GM's exploitation license.[91] Within this request, ETM made three claims:

1. A claim for an order that the Respondents shall acknowledge that Greenland Minerals had an 'automatic right to transition from exploration to exploitation' licence as at 1 December 2021;
2. A claim for an order that the Respondents shall acknowledge that the Uranium Act is not applicable to Greenland Minerals's exploration licence or exploitation licence application;
3. A claim for an order that the Respondents shall acknowledge that they have jointly, or the Greenland Government has individually, breached Greenland Minerals rights and legitimate expectations.[92]

GM's case is currently pending, but it offers a high-profile example of what TPF can look like in ISDS and highlights the issues within the system. TPF was created to allow parties to have increased access to funds and to bring claims. Ultimately, the introduction of corporate financers into private litigation funds has shifted the intended accessibility underlying the initial purpose of TPF. Instead, investors have moved towards TPF because it minimizes their own financial risk, speeds up the process through easy access to funds, and shifts the scales in investors' favor. This can lead to significant problems within investor-state disputes involving smaller or developing States and the fight against climate change.

III. INEQUALITIES AND LIMITATIONS

Third-party financing of ISDS claims can create disastrous environmental effects for any country, but especially for smaller developing countries with significant Indigenous populations. As of 2025, investors have been awarded almost 115 billion dollars through ISDS, and a significant number

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[90] Businesses are hesitant to open in Narsaq with the potential mine looming over the village, and the town's population has dropped by about three hundred people (almost 1/6 of the town's total population). Sebastian Skov Andersen, *Greenland is Being Held Ransom*, NEW INTERNATIONALIST (Jan. 1, 2024), https://newint.org/mining/2025/greenland-being-held-ransom [https://perma.cc/366P-MB75]. Locals are also worried about impacts to their health because GM has plans to store radioactive waste in a nearby mountaintop lake, and the only containment is two forty-five-meter-tall dams. *Id.* That waste and other products of uranium mining have a high likelihood of impacting Greenland's fishing waters, which is responsible for ninety-three percent of Greenland's exports and about five percent of employment. *Id.* Fishing is also extremely culturally significant to the local Inuit. *Id.*

[91] Hartmann, Bastida & Daza-Clark, *supra* note 56.

[92] *Id.* These claims were filed under the Danish Arbitration Act, which is not Denmark's bilateral investment treaty (the only such treaty is with China); however, both parties have invoked ISDS principles and presented a desire to move out of domestic courts.

of cases have involved fossil fuels and environmental protections.[93] Importantly, tribunals have decided in favor of investors in 20.6 percent of cases (280 cases) while the State prevailed in 24.7 percent of cases (337 cases).[94] While this seems like a minor difference, this data does not include the 13.2 percent of cases that have been settled and the 31.6 percent of cases that remain pending.[95] The problem is not necessarily the number of disputes and who wins how often, but the amount that foreign investors can obtain through these awards.[96] These companies have a strategy for asking for exorbitant amounts in damages and legal fees so that their potential recovery is still a significant amount.[97] When these significant dollar amounts are at stake, smaller or less developed nations have very real fears of what losing could mean for their nation.[98] These fears are only exacerbated when wealthy investors are backed by litigation finance

[93] Transnational Institute, *Global ISDS Tracker Database*, GLOB. ISDS TRACKER, https://www.globalisdstracker.org/database [https://perma.cc/AU92-3DS8] (last updated Dec. 2023). In an analysis of over 1,400 cases, it was found that States have paid eighty-four billion dollars to fossil fuel companies. Phoebe Weston & Patrick Greenfield, *Why Fear of Billion-Dollar Lawsuits Stops Countries Passing Green Laws,* GUARDIAN (Mar. 6, 2025, at 05:00 ET), https://www.theguardian.com/environment/2025/mar/06/isds-fear-of-billion-dollar-lawsuits-stops-countries-phasing-out-fossil-fuels-aoe [https://perma.cc/6MJ4-DZVG].

[94] Transnational Institute, *supra* note 93. The remaining 54.7 percent of cases include 31.6 percent (430 cases) still pending, 13.2 percent (180 cases) that were settled, and 9.1 percent (124 cases) that were discontinued. *Id.* .8 percent (11 cases) have unavailable data. Importantly, this data only includes known ISDS arbitrations and has not been updated since 2023.

[95] *Id.*

[96] It is difficult to determine much about the frequency with which either party wins their claim or how much they are awarded due to the privacy inherent to arbitration and the lack of any sort of central data repository that updates the data consistently.

[97] *See id.* As of 2025, investors have claimed 856.74 billion dollars in these disputes, making even the significant 113.87 billion dollars that have been awarded seem minor in comparison.

[98] *See infra* Section II.A.1. For example, Costa Rica faced a claim from Infinito Gold Ltd., a Canadian mining company, for closing the company's gold mining project that used open-pit mining. *Costa Rica Wins Arbitration Against Canadian Miner Infinito Gold*, TICO TIMES (July 16, 2024), https://ticotimes.net/2024/07/16/costa-rica-wins-arbitration-against-canadian-miner-infinito-gold [https://perma.cc/8U6A-2ADW]. Costa Rica had closed the company's gold mining project after the Costa Rican Congress prohibited open-pit mining due to the harm it could case on the environment and the population. *Id.* In response to Costa Rica's actions, Infinito Gold filed an ICSID arbitration and requested nearly 400 million dollars in compensation from the State, which has an annual GDP of 95.35 billion dollars. *GDP (current US$) – Costa Rica*, WORLD BANK GRP., https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CR [https://perma.cc/58Q4-YBQS]. When combined with the possibility of interest, Costa Rica was looking at a severe debt for attempting to protect its environment and its people. Fortunately, the ICSID tribunal rejected the corporation's 400 million dollar claim and eventually withdrew its attempt to annul the damages decision. Arnold & Porter Secures Fifth Consecutive Victory for Costa Rica in US$400 Million Investment Arbitration, ARNOLD & PORTER (July 17, 2024) https://www.arnoldporter.com/en/perspectives/news/2024/07/arnold-porter-secures-fifth-consecutive-victory-for-costa-rica-in-us$400-million [https://perma.cc/Q8SL-3G98]. While Costa Rica was ultimately successful, if it was not, the State would be facing a debt that would take generations to pay off, especially when compounded with interest and the possibility of other ISDS claims. The arbitration between Costa Rica and Infinito Gold is just one example of this risk. *See* Weston & Greenfield, *supra* note 93 ("Some cases cost countries a significant portion of their total annual budget. For example, in 2015 Occidental Petroleum received a $1.1bn payout from the Ecuadorian government. The country's budget was $29.8bn in 2016. Honduras faces 11 claims, with one seeking damages equal to 30 percent of the country's GDP.).

corporations who are seeking out financial compensation, not justice.[99] ISDS is an investor-friendly system by default [100] and the presence of third-party funders leads to even more inequalities and governments are unable to listen to their people for fear of financial liability.

This next Part explains the problems with TPF in ISDS, first by illustrating the financial and other direct costs that States face when implementing climate regulations or revoking licenses that impact investor projects. Then, this Part discusses the hidden and harder to measure costs like environmental and human rights impacts that arise when States are forced to choose between action on behalf of their citizens' interests or inaction to avoid financial risk. This Part also includes how difficult it is to obtain data on TPF in ISDS agreements and their true impact on the environment and human rights. Finally, it notes the chilling effect that can occur—and has occurred—because of TPF in ISDS.

A. *Costs of Fighting the Climate Crisis*

Unfortunately, Greenland is not unique in facing a claim for a significant amount of damages, nor is it unique in its concerns about bearing the costs of such a dispute. These concerns have led to a significant number of problems for responding States, further limiting a State's ability to listen to its people and respond to the climate crisis. First, this Section discusses the case of *Bear Creek Mining v. Peru*, and the role the Indigenous population's social unrest played throughout the dispute. Next, it highlights the rise in States bowing to investor interests over the interests of the people, even when the public interest arises through the democratic process. Finally, this Section discusses the role indirect expropriation plays in allowing investors to obtain favorable decisions.

1. *Bear Creek Mining Corp. v. Peru*: "Agro Sí, Mina No"[101]

The problem of excessive costs in ISDS occurred in Peru in the early 2000s when the Peruvian government gave a Canadian mining company, Bear Creek Mining Corporation, a license for an exploratory project.[102] The project was taking place in Puno, a region with a primarily Indigenous population,[103] and

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[99] *See* Santosuosso & Scarlett, *supra* note 13, at I.-13–I.-15 (explaining how TPF in ISDS actually conflicts with traditional access to justice goals).

[100] BORN, *supra* note 42, at 423–25.

[101] "Agro sí, mina no" was a rallying chant for the protests the Aymara and other groups used throughout the protests. The phrase means "agriculture yes, mining no." Michael Barkman, *Peruvians Protest Silver Mining Project, May–June 2011*, GLOB. NONVIOLENT ACTION DATABASE (Oct. 22, 2013), https://nvdatabase.swarthmore.edu/content/peruvians-protest-silver-mining-project-may-june-2011 [https://perma.cc/A58Y-3ABK].

[102] Katie Surma & Nicholas Kusnetz, *The International System that Pits Foreign Investors Against Indigenous Communities*, INSIDE CLIMATE NEWS (June 7, 2024), https://insideclimatenews.org/news/07062024/international-system-pits-foreign-investors-against-indigenous-communities [https://perma.cc/8B7G-MS9E].

[103] Barkman, *supra* note 101.

there were significant concerns about the project's impact on the environment.[104] The two cultures that make up Puno's population are Indigenous Quechua and Aymara,[105] and it was the Aymara who began expressing worry about the project's location in Puno because the environment is key to their culture and livelihood.[106] Bear Creek was unable to even engage with Aymara people because the company used Spanish instead of the native Aymara language.[107] Additionally, the company required any concerns about the project to be submitted in writing, a problem considering Aymara is a primarily spoken language, not written.[108]

Locals began a nonviolent resistance against Bear Creek's mine construction in March of 2011.[109] Villagers closest to the proposed mining site began a strike to protest the mine's construction, and this strike was led by organizations largely made up of Indigenous Aymara.[110] The protestors also established a roadblock at one of Peru's important border crossings.[111] This roadblock spanned kilometers and was made up of multiple checkpoints preventing vehicles from getting into and out of the city of Puno.[112] By May, this roadblock had brought Puno to a standstill, and the strike had grown by thousands of people.[113] Some of the strikers in Puno held marches that led to violent clashes with police, resulting in five dead and hundreds injured.[114]

On June 24, 2011, just over a month after the protests began, President Alan Garcia, the outgoing president of Peru, revoked Bear Creek's mining license, announced a ban on mining concessions in the Puno region for three years, and promised to take local considerations to future negotiations.[115] In response to Peru's revocation of the mining license, Bear Creek filed an ISDS arbitration

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[104] Surma & Kusnetz, *supra* note 102 ("The project divided communities, with some worrying about potentially devastating impacts on the ecosystems they relied on for sustenance and with which their culture was entwined."). Other similar mining projects in Peru have had significant environmental impacts, with heavy metal build-up in water, soil, and wildlife, dust and air pollution, and ecosystems significantly damaged. Roberth Orihuela, *U.S. Mining Companies Leave Lasting Trail of Contamination Across Peru*, MONGABAY (Jan. 10, 2024), https://news.mongabay.com/2024/01/u-s-mining-companies-leave-lasting-trail-of-contamination-across-peru [https://perma.cc/ZL7V-D7JG].

[105] Barkman, *supra* note 101.

[106] *Id.*

[107] Surma & Kusnetz, *supra* note 1.

[108] *Id.*

[109] Barkman, *supra* note 101.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] Surma & Kusnetz, *supra* note 1.

[115] Barkman, *supra* note 101.

against Peru's government in 2014.[116] Bear Creek filed the claim under the Canada-Peru Free Trade Agreement ("FTA") and requested $522 million in damages and coverage of its legal costs.[117]

Six years after the mining license was revoked and three years after filing, the tribunal found in favor of Bear Creek, awarding 18.2 million dollars.[118] The tribunal ruled in favor of Bear Creek because it found Peru had committed an indirect expropriation under the FTA by revoking the mining license.[119] The tribunal disregarded many of the arguments Peru made against such a conclusion.[120] Peru pointed to Bear Creek's lack of engagement with the community and failure "to obtain a social license"; however, the tribunal found "that Claimant could take it for granted to have complied with all legal requirements with regard to its outreach to the local communities"[121] because Peru's previous government had not raised such concerns.[122] It also noted that Bear Creek's conduct could not be responsible for Peru's social unrest because Peru's government repeatedly endorsed Bear Creek's actions.[123] Although Peru

[116] Stefanie Schacherer, *Bear Creek v. Peru*, INV. TREATY NEWS, INT'L INST. FOR SUSTAINABLE DEV. (Oct. 18, 2018), https://www.iisd.org/itn/2018/10/18/bear-creek-v-peru [https://perma.cc/7SB8-YTZY]. Canada argued that the revocation of the mining license violated the FTA by expropriating the investment, failing to treat Bear Creek fairly and equitably, failing to grant the investment full protection and security, and implementing unreasonably and discriminatory measures. Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Award, (Nov. 30, 2017). Chapter 21 of the FTA establishes the Dispute Settlement framework, which includes allowing dispute settlement when one of the parties is not carrying out their obligations, nullifying benefits of the other party, or is proposing or implementing measures inconsistent with the FTA's obligations. Canada-Peru Free Trade Agreement ch. 21, art. 2102, May 28, 2009, GOV'T. CANADA, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/21.aspx?lang=eng [https://perma.cc/FL5W-9G9B].

[117] Schacherer, *supra* note 116.

[118] Schacherer, *supra* note 116; Daniela Páez-Salgado, *Four Key Takeaways of the Decision in Bear Creek Mining Corp v. Republic of Peru*, KLUWER ARB. BLOG (Dec. 16, 2017), https://legalblogs.wolterskluwer.com/arbitration-blog/four-key-takeaways-of-the-decision-in-bear-creek-mining-corp-v-republic-of-peru [https://perma.cc/C8Y9-R46E].

[119] An indirect expropriation is "when a state takes effective control of, or otherwise interferes with the use, enjoyment or benefit of, an investment, strongly depreciating its economic value, *even without a direct taking of property*." *A Sustainability Toolkit for Trade Negotiators: Trade and Investment as Vehicles for Achieving the 2030 Sustainable Development Agenda,* INT'L INST. FOR SUSTAINABLE DEV. (2023), https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-4-safeguarding-policy-space/5-4-4-indirect-expropriation-regulatory-taking [https://perma.cc/7HLW-M93M]. This definition is usually heavily reliant on the language of the respective treaty. *Id.*

[120] Schacherer, *supra* note 116.

[121] Jean-Michel Marcoux & Andrew Newcombe, *Bear Creek Mining Corporation v. Republic of Peru: Two Sides of a 'Social License' to Operate*, 33 ICSID REV. 653, 657 (2018). Bear Creek argued that "no Peruvian law provided any standard by which a social license could be granted to a mining project at the time . . . and no international instrument imposed direct obligations on private companies." *Id.* at 656.

[122] Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Award, ¶ 412 (Nov. 30, 2017) ("Respondent, after its continuous approval and support of Claimant's conduct, cannot in hindsight claim that this conduct was contrary to the ILO Convention 169 or was insufficient, and caused or contributed to the social unrest in the region.").

[123] Páez-Salgado, *supra* note 118.

attempted to make additional arguments, the tribunal's narrow reading of the language of the FTA foreclosed many of them.[124]

One of the three arbitrators, Arbitrator Sands, partially dissented, concluding that Bear Creek contributed to the social unrest that led to the revocation of the permit.[125] This opinion relied heavily on International Labour Organization Convention no. 169 Concerning Indigenous and Tribal People.[126] Although Arbitrator Sands acknowledged that the Convention does not impose direct obligations, it was relevant to the tribunal's analysis of the FTA because the FTA contained a provision referring to "applicable rules of international law."[127] Arbitrator Sands argued that Convention 169 could be used to determine whether Bear Creek had properly consulted with Indigenous communities and fulfilled its obligations to obtain a social license.[128] The majority disagreed with Arbitrator Sands, finding that Convention 169 only imposed direct obligations on States and "[t]he [I]ndigenous communities . . . are not respondent party in this arbitration. Rather, the State of Peru and its Government are Respondent and it is their conduct which the Tribunal has to decide upon."[129]

Bear Creek Mining Corp. v. Peru is a cautionary tale, raising significant concerns for other environmental cases. It permits investors to avoid engaging with the local population that will be directly impacted by the environmental effects of the project by instead relying on government acceptance. Additionally, it does not matter if the State's government changes its mind or listens to the ignored population because that initial government acceptance will carry the day. *Bear Creek* sets a precedent that allows corporations to shield any misconduct impacting the local population behind government approval. The unrest in Peru was a response to Bear Creek's mining operations, but the tribunal in *Bear Creek* did not see it as the cause because the corporation's conduct was supported by Peru. This avoidance from corporations and shielding of misconduct demonstrates the risks average citizens face when foreign investors create agreements with governments that will impact the environment. These are the problems that ISDS creates for governments facing significant environmental effects. Peru's case with Bear Creek Mining Corporation reflects the inherent inequality present in ISDS, but the situation becomes even more problematic when litigation finance and TPF become involved.

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[124] Schacherer, *supra* note 116. For example, the tribunal found that the FTA did not explicitly require for investments to comply with domestic law, which prevented many jurisdictional requirements regarding the legality of the original agreement between Bear Creek and the Peruvian government. *Id.*

[125] Joshua Paine, *Bear Creek Mining Corporation v. Republic of Peru: Judging the Social License of Foreign Investments and Applying New Style Investment Treaties*, 33 ICSID REV. 340, 343 (2018).

[126] *Bear Creek Mining Corp.*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Philippe Sands, ¶ 7.

[127] *Id.* ¶¶ 11–12 (quoting Canada-Peru Free Trade Agreement, Can.-Peru, May 29, 2008, U.N.T.S. I-58205).

[128] *Id.* ¶¶ 7–15.

[129] *Bear Creek Mining Corp.*, ICSID Case No. ARB/14/21, Award, ¶ 666.

2. Investor Interests Over People: Indirect Expropriation

As demonstrated in *Bear Creek*, ISDS limits a State's ability to engage in the democratic process and listen to the voices of individuals and public interest. Even if a State tries to fight the ISDS claim, TPF stacks the deck in favor of the investor even further. With TPF, the investor does not have to worry about sacrificing capital or resources to support the legal costs of their claims. The case can take however long and however much money it needs to for the investor (and its financer) to win. States do not have that same luxury. It should be noted that ISDS can be extremely expensive, with costs of ISDS cases averaging over eight million dollars in 2012.[130] This number is likely even higher today.[131] With the popularity of ISDS rising alongside TPF, countries facing claims must grapple with the immediate cost of defending against such a claim *and* prepare for the eventual possibility of losing the claim. When the defending government is a developing or smaller State, it is especially at risk.

Funded parties engage in the opposite analysis. One legal scholar described third-party funding as "a gold-weighted thumb on the scale in favor of funded parties" because the funders are so risk-averse that the claims are often pre-screened.[132] And investors do not face the same risks as responding governments. While ISDS began as "a shield against the government's potential arbitrariness," that shield "has transformed into a veritable sword that foreign investors hold over the host states' governments to challenge regulations."[133] If the State attempts to regulate strip mining and a mining corporation thinks their interest is even implicated, they can turn to ISDS and ask for exorbitant damages, as in *Greenland Minerals*. The use of ISDS as a weapon instead of a defense is reflected in who can even bring a claim. ISDS is used when investors' interests are impacted by government regulation, but governments cannot use ISDS to regulate investor behaviors.[134] Instead, governments must rely on their own powers to regulate the environment, trade agreements, and other aspects

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[130] David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 71 (OECD Working Papers on Int'l Inv. No. 2012/03, 2012).

[131] While it is impossible to know the exact cost due to some cases never reaching the public, one study found that the average costs of all decisions up to May of 2020 averaged 6.4 million dollars for investors and 4.7 million for States. MATTHEW HODGSON, YARIK KRYVOI & DANIEL HRCKA, 2021 EMPIRICAL STUDY: COSTS, DAMAGES, AND DURATION IN INVESTOR-STATE ARBITRATION 9 (2021), https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf [https://perma.cc/75U9-NZJZ]. This study focused on costs, not necessarily the amount awarded, so an investor could sink five million dollars into a dispute but win and have costs awarded, so the State is then responsible for that cost. One of the cheapest arbitrations for a responding State has been *Belenergia S.A. v. Italian Republic*. *Id.* In that case, Italy only incurred about four hundred thousand dollars in costs over the four years of proceedings. Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award, (Aug. 28, 2019).

[132] Victoria Shannon Sahani, *Rethinking the Impact of Third-Party Funding on Access to Civil Justice*, 69 DEPAUL L. REV. 611, 613 (2020).

[133] JOSEF OSTŘANSKÝ, FLORENCIA SARMIENTO & SUZY NIKIEMA, WHY IS INVESTMENT TREATY AND INVESTOR-STATE DISPUTE SETTLEMENT REFORM NEEDED?: QUESTIONS AND ANSWERS 12–13 (2025), https://www.iisd.org/system/files/2025-03/investment-treaty-and-isds-reform-questions-answers.pdf [https://perma.cc/N4XM-HZU4].

[134] *Id.*

that fall within normal government control.[135] Unfortunately, using those rightful powers—which governments may have international obligations to exercise—can lead the government right back to ISDS and defending against the very misconduct that it was trying to stop.[136] ISDS and treaties allowing ISDS protect investors and impose obligations on governments,[137] rather than on investors whose conduct may amount to environmental degradation or human rights violations.[138]

The impact of TPF on the asymmetrical structure of ISDS is not the only way respondent governments are at a disadvantage. They are also disadvantaged by tribunals' inconsistent and unpredictable findings,[139] namely findings of indirect expropriation that are reliant on tribunal discretion.[140] Indirect expropriation does not have a set definition, but it has been defined by numerous tribunals.[141] Generally, it is understood to occur when the investor will be deprived of the economic use of their investment.[142] What constitutes an indirect expropriation largely depends on the language of the treaty under which the investors file their claim and how the tribunal interprets it.[143] For example, Bear Creek filed its claim under the FTA, which contained an annex with a

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135 Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VANDERBILT J. TRANSNAT'L L. 355, 373–74 (2017).

136 *Id.*; Christian Riffel, *Indirect Expropriation and the Protection of Public Interests*, 71 INT'L & COMPAR. L.Q. 945, 945 (2022).

137 Rachel Thrasher, *FAQs: What is Investor-State Dispute Settlement and What Does it Mean for Climate Action?*, B.U. GLOB. DEV. POL'Y CTR. (Dec. 12, 2022), https://www.bu.edu/gdp/2022/12/12/faq-what-is-investor-state-dispute-settlement-and-what-does-it-mean-for-climate-action [https://perma.cc/ZR7W-DVW4].

138 In 2022, the U.N. General Assembly passed a resolution creating a "right to a clean, healthy and sustainable environment." G.A. Res. 76/300 (Aug. 1, 2022). Denmark was a co-sponsor of the resolution, and Peru and Canada both voted in favor of such a resolution. U.N. GAOR, 76th Sess., 97th plen. mtg. at 10, U.N. Doc. A/766/PV.97 (July 28, 2022).

139 OSTŘANSKÝ, SARMIENTO & NIKIEMA, *supra* note 133, at 13.

140 Peter D. Isakoff, *Defining the Scope of Indirect Expropriation for International Investments*, 3 GLOBAL BUS. L. REV. 189, 196 (2013).

141 *See, e.g.*, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 116 (May 29, 2003) ("[I]t is understood that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that . . . [, for example,] the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed."); Compañiadel Desarrollode Santa Elena v. Costa Rica, ICSID Case No. ARB/96/1, Award, ¶ 72 (Feb. 17, 2000); ("[W]here property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.").

142 Csernus Máté, *Indirect Expropriation,* JUS MUNDI (Sep. 11, 2025), https://jusmundi.com/en/document/publication/en-indirect-expropriation [https://perma.cc/8X3D-NKHS]. Indirect expropriation is a much different standard than direct expropriation. To find direct expropriation, there must be "forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action." LG&E Energy Corp. v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 187 (Oct. 3, 2006).

143 Isakoff, *supra* note 140, at 196.

three-factor test[144] to determine if an indirect expropriation occurred.[145] Based on the treaty's factors, the tribunal found that Peru's revocation "had an economic impact on the investment, that it violated the Investor's reasonable expectations and that the measure was not legally justifiable."[146]

While the analysis in *Bear Creek* depended on the language of a specific trade agreement, the interpretation of terms allowing ISDS and indirect expropriation gives tribunals a significant amount of discretion. The FTA's factors to determine when government action constitutes an indirect expropriation were fairly limited and clear, but tribunals in other cases have an almost unlimited number of factors to consider.[147] The role of the tribunal's significant discretion in these cases makes it difficult for governments to weigh their chances when defending a claim.[148]

Indirect expropriation itself also undercuts the fairness of ISDS because any attempted regulation that will impact the investor's interests may rise to some

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[144] Canada-Peru Free Trade Agreement, Can.-Peru, May 29, 2008, U.N.T.S. I-58205. The Parties confirm their shared understanding that:

a. Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;

b. The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact based inquiry that considers, among other factors:

   i. the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,

   ii. the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations, and

   iii. the character of the measure or series of measures

c. Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation. *Id.*

[145] Páez-Salgado, *supra* note 118; Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21, Award, ¶¶ 374–77 (Nov. 30, 2017).

[146] Páez-Salgado, *supra* note 118; *Bear Creek Mining Corp.*, ICSID Case No. ARB/14/21, Award, ¶ 415.

[147] *See, e.g.*, Riffel, *supra* note 136, at 946–47 (describing the various factors that tribunals can consider when determining expropriation, including the economic impact, the measure's character, and the extent of the government's interference). Along with these factors, three competing doctrines have emerged from tribunals' identification of indirect expropriation: the sole effect doctrine, the police powers doctrine, and the principle of proportionality. Maryam Malakotipour, *The Chilling Effect of Indirect Expropriation Clauses on Host States' Public Policies: A Call for a Legislative Response*, 22 INT'L COMM. L. REV. 235, 239–42 (2020).

[148] *See* Ostřanský, Sarmiento & Nikiema, *supra* note 133, at 11–14.

level of expropriation.[149] Expropriation is not necessarily unlawful and may actually be required under some other international obligation.[150] Some have recognized this concept and proposed language to equalize the proceedings.[151] Despite these attempts, determining whether or not an indirect expropriation—a regulation for which compensation is owed—occurred is still largely up to the tribunal in investor-friendly ISDS proceedings.

For some, just the threat of ISDS (even without indirect expropriation) is enough for the government to bow to investor demands. For example, in *Greenland Minerals*, the mining corporation is seeking more than Greenland spends in an entire year.[152] The government attorneys are also facing a team of lawyers more than four times the size of their own, with a budget that reflects that stark difference.[153] Greenland's government is considering settling Greenland Minerals' claim by either providing some monetary damages or reinstating the mining permit,[154] despite the potential harm to the environment and its citizens, due to the significant costs associated with losing. Between 2013 and 2018, the typical amount awarded in ISDS claims rose from ten million to forty million dollars.[155] Now, in 2025, that number is likely much higher and much more difficult for countries like Greenland to entertain.

B. *The Hidden Costs*

The biggest problems with TPF in ISDS have to do with the cost of such agreements and arbitrations. This Essay has already discussed the significant dollar amounts that third-party financers sink into cases and get out of ISDS claims, but those are just the tip of the iceberg. The actual prevalence of TPF in ISDS is not known, and knowing when TPF is used only comes on a case-by-case basis.[156] TPF's true impact can only be estimated, but even those financial estimates are significant amounts.[157] The astronomical amount associated with TPF and ISDS is not the only cost facing respondent States. There are hidden

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[149] UNCTAD, *Taking of Property: UNCTAD Series on Issues in International investment Agreements* 6 (2006) ("[A]lmost any governmental measure could be construed as an act of interference in the business of a foreign investor. The difficulty lies in distinguishing between regulatory measures that have to be compensated and measures that do not carry with them, under international law, the obligation to pay compensation.")

[150] For example, it is generally accepted that expropriation can occur if the expropriation occurs for "public purpose" or "public necessity." EXPROPRIATION, UNITED NATIONS CONF. ON TRADE & DEV. 27–32 (2012).

[151] *See, e.g.*, Riffel, *supra* note 136, at 956–59 (discussing a variety of proposals to equalize the expropriation analysis).

[152] Surma & Kusnetz, *supra* note 1.

[153] *Id.*

[154] *Id.*

[155] Katie Surma & Nicholas Kusnetz, *Should Companies Get Paid When Governments Phase Out Fossil Fuels? They Already Are,* INSIDE CLIMATE NEWS (July 28, 2024), https://insideclimatenews.org/news/28072024/cashing-out-fossil-fuel-industry-forces-payouts-from-governments [https://perma.cc/9PNW-SZNB].

[156] *See, e.g.*, Surma & Kusnetz, *supra* note 1.

[157] Rationalstat LLC, *supra* note 18.

costs for allowing TPF in ISDS, namely on the environment and human rights. This Section first highlights the environmental impact of ISDS, a growing tool in the pocket of fossil fuel companies and mining corporations. It also explains how this can be especially problematic for smaller and developing countries, including those recovering from colonialization. Then, this Section concludes by discussing ISDS's impact on human rights and the unequal burden it poses on different populations.

1. Environmental Impact of ISDS

As one U.N. expert put it, "[a]s ISDS arbitration tribunals routinely prioritise foreign investment and corporate interests above environmental and human rights considerations, ISDS claims have devastating consequences for a wide range of human rights, exacerbating the disproportionate harms suffered by vulnerable and marginalised populations."[158] The costs to human rights and marginalized communities are more difficult to quantify. For example, in *Bear Creek*, a significant portion of the Aymara's concerns about the mining operation arose out of their reliance on the environment.[159] The lands and rivers that would be affected by Bear Creek's mining operations were responsible for the local population's agricultural production, drinking water, food security, and their livelihoods.[160] If Bear Creek continued its mining efforts, there would be a real risk to the life of the Aymara and other members of the rural population. This risk is reflected around the world.[161]

The climate crisis cost the world nearly 1.5 trillion dollars and almost 200,000 lives between 2010 and 2019.[162] These numbers are based on the data that has been reported, so the real figures could be much higher.[163] These high costs reflect the high need to mitigate the impact of the climate crisis, but TPF and ISDS cut against that need by actively hindering the fight against climate change. More and more TPF of ISDS is occurring in the environmental sphere as various governments phase out fossil fuels or limit the exploitation of the

[158] Press Release, Office of the High Commissioner, *supra* note 80.

[159] Barkman, *supra* note 101.

[160] Sian Cowman & Aldo Orellana López, *Harsh Sentencing of Aymara Leader Reveals the Politics of Criminalization in Peru*, INTERCONTINENTAL CRY (Apr. 10, 2025), https://icmagazine.org/politics-criminalization-peru [https://perma.cc/AQ89-W53C].

[161] Xiuwu Zhang et al., *Impacts of Lead/Zinc Mining and Smelting on the Environment and Human Health in China*, 184 Environ. Monitoring & Assessment 2261, 2267–68 (2012) (discussing how heavy metal mining and smelting have polluted the environment, causing kidney damage, high blood lead levels, cancer, and even death); Sneha Gautam et al., *Particulate Matter Pollution in Opencast Coal Mining Areas: A Threat to Human Health and Environment*, INT'L J. MINING, RECLAMATION & ENV'T. 1, 12–13 (2016) (explaining how coal mining operations can cause harm to coal workers through conditions like chronic obstructive pulmonary disease, as well as conditions like respiratory disease and heart disease in those living near mining operations who are being exposed to pollution).

[162] Emma Charlton, *This Is What the Climate Crisis is Costing Economies Around the World*, WORLD ECON. F. (Nov. 29, 2023), https://www.weforum.org/stories/2023/11/climate-crisis-cost-global-economies [https://perma.cc/9J5X-LJVS].

[163] *Id.*

environment.[164] In fact, the fossil fuel industry and mining companies are responsible for more ISDS claims than any other industry.[165] This is especially problematic considering the amount of potential damages these ISDS proceedings generate, which totals more than global funds spent to fight climate change.[166]

2. ISDS's Human Cost

The risk of environmental degradation and financial liability through ISDS is also applied unequally. Most claims from fossil fuel and mining companies come from the Global North, while the governments facing the claims are typically from the Global South.[167] This means countries in the Global South bear two-thirds of the financial risk of potential ISDS claims.[168] The most common respondents to investment treaty claims are Argentina with sixty-five cases and Venezuela with sixty-four cases, while the most common home States of Claimants are the United States (232 cases) and the Netherlands (132 cases).[169]

Many of the countries that bear an increased risk of ISDS are also recovering from colonization[170] and are home to significant Indigenous populations.[171] These Indigenous populations rely heavily on the environment for food and water, their livelihoods, and their culture,[172] and their strong reliance on a quality environment can have a direct impact on their health. In fact, a survey of ISDS cases found that "disputes over environmental protection constantly occurred between foreign investors and local Indigenous communities of the host state."[173] That same survey found that when ISDS proceedings began, the involvement of the Indigenous community in the proceedings "was neither easy nor active."[174] In many proceedings, it was easier for nongovernmental

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164 Surma & Kusnetz, *supra* note 1.

165 *Id.*

166 Kyla Tienhaara et al., *Investor-State Disputes Threaten the Global Green Energy Transition*, 376 SCI. 701, 703 (2022).

167 Press Release, Office of the High Commissioner, *supra* note 80; Kyla Tienhaara, Harro van Asselt & Peter Newell, *Radical Reform of the International Investment Regime: A Role for Climate Clubs*, 16 GLOBAL POL'Y 798, 804 (2025) (estimating that "[m]ore than 60% of the potential ISDS claims over fossil fuel assets identified . . . would be directed at low- and middle-income countries.")

168 Thrasher, *supra* note 137.

169 FACTS AND FIGURES ON INVESTOR-STATE DISPUTE SETTLEMENT CASES, *supra* note 34, at 6. Rounding out the remaining top ten are Spain, Mexico, Egypt, Czechia, Poland, Canada, Peru, and Ukraine. *Id.* These ten States faced 35 percent of ISDS cases between 1987 and 2023. *Id.*

170 George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, 33 MICHIGAN J. INT'L L. 627, 637–38 (2012).

171 Chao Wang, Jing Ning & Xiaohan Zhang, *International Investment and Indigenous Peoples' Environment: A Survey of ISDS Cases from 2000 to 2020*, INT'L J. ENV'T RSCH. & PUB. HEALTH, Aug. 2021, at 1–2.

172 *See* Foster, *supra* note 170, at 638.

173 Wang, Ning & Zhang, *supra* note 171, at 4.

174 *Id.* at 4–5 (providing a table noting the participation of Indigenous Peoples in ISDS proceedings).

organizations ("NGOs") to be heard than the Indigenous tribe from the affected region.[175] Even when Indigenous voices were heard through the arbitration proceedings, they were rarely listened to and were not accounted for in the final award.[176] Despite facing real health and safety repercussions from foreign investors' economic developments, Indigenous people are ignored throughout ISDS.

Both *Bear Creek Mining Corporation v. Peru* and *Greenland Minerals v. Greenland and Denmark* illustrate the difficulty Indigenous people face when attempting to use their voices or collective action to fight against a threat. In the case of ISDS, that fight becomes a war against investors rather than a fight against the direct threat to their health, homes, and livelihoods.

C. *Chilling Effect*

Considering the high costs of ISDS for small or developing States, there is a very real threat of ISDS chilling the fight against the climate crisis. This chilling effect can begin at the very start of the investment negotiation when a foreign investor approaches a government with an investment opportunity. After the rise of ISDS, law firms advise their clients to ensure that these negotiations guarantee access to ISDS and its investor-friendly structure.[177] By negotiating access to ISDS, investors have a tool to bring out when they feel a State's regulations are infringing upon their investments. And with the associated costs, this threat could be enough to change that regulation. Law firms have identified how ISDS does not prevent States' abilities to regulate or protect the environment and noted that "[m]odern investment treaties expressly protect a State's right to engage in legitimate environmental regulation."[178] The same law firms advises fossil fuel, mining, and other companies with environmental impacts "to ensure that they are protected by an investment treaty" with access to ISDS to avoid "any adverse climate-related government measures."[179] The problem remains because what constitutes a "legitimate environmental regulation" depends on the tribunal's analysis of the respective treaty, and as noted in *Bear Creek*, that reading can be very narrow and very investor-friendly.[180]

The chilling effect continues with the costs associated with ISDS. As discussed previously, ISDS can be very expensive for both the investor and the government.[181] One survey found that the estimated ceiling to government

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[175] *Id.* at 5.

[176] *Id.* at 5–6.

[177] *Climate Change and Investor-State Dispute Settlement*, *supra* note 44; *Investor-State Dispute Settlement (ISDS)*, WOODS LAFORTUNE LLP, https://www.wl-tradelaw.com/practice-areas/investor-state-dispute-settlement-isds [https://perma.cc/RJ2C-RHES] (last visited Apr. 11, 2026, at 16:17 CT)
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[178] Bradfield et al., *supra* note 44.

[179] *Id.*

[180] *Supra* Section II.A.1.

[181] *Supra* Section II.A.1.

liability in ISDS cases was more than the entire amount of public climate finance provided in 2020.[182] Considering the threat of liability for significant costs and even just the costs of defending such a claim, States may be less inclined to take action on the climate crisis. Why would a smaller or developing State risk financial liability by revoking a mining permit even though the mining operations would do irreparable damage to its waterways? With the presence of TPF in ISDS, States may not see the point in putting up a fight.

The investors using TPF do not have to deal with this concern because their fee agreement is based on obtaining either a settlement or an award. Investors do not have to weigh the risks of defending against a claim that could bankrupt them regardless of if they win or lose. Investors can draw out disputes and ensure the proceedings take as long as possible because someone else is footing the bill. Smaller governments like Greenland or developing countries like Peru[183] do not have that security. Even larger countries like the United States are threatened by ISDS in response to environmental regulations. For example, in 2020, President Biden revoked the Keystone XL oil pipeline permit shortly after taking office.[184] In response, TC Energy, the Canadian developer of the pipeline, brought a fifteen-billion-dollar claim.[185] The claim was ultimately dismissed on a technicality in 2024,[186] but damages even close to that amount would be harmful to the United States and devastating to a smaller government. Many States would be unable to even entertain the idea of defending such a claim out of fear of losing and having to pay excessive damages.

From a full cost-analysis standpoint, States subject to ISDS through trade treaties are incentivized to bow to investor claims and disregard grassroots or nationwide efforts to fight the climate crisis. To these governments, the investors

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[182] Tienhaara et al., *supra* note 166, at 703. The survey estimated the height of government liability to be $340 billion while the public climate finance provided was only $321 billion. *Id.*

[183] Due to Peru's slowing economy and its minimal expansion, Peru is considered a developing country. *Peru*, WORLD BANK GRP. (Oct. 23, 2024), https://www.worldbank.org/en/country/peru/overview [https://perma.cc/NYP2-RVK5].

[184] Surma & Kusnetz, *supra* note 155.

[185] Kyla Tienhaara, *Keystone XL: The Verdict Against TC Energy Shows the Importance of Protecting Climate Policies*, CONVERSATION (Aug. 8, 2024, at 16:40 ET), https://theconversation.com/keystone-xl-the-verdict-against-tc-energy-shows-the-importance-of-protecting-climate-policies-234996 [https://perma.cc/Z8A6-LK2L]. After being denied twice under the Obama Administration, the Trump Administration issued the Keystone Pipeline permit in 2017 and reissued it in 2019. TC Energy Corporation & TransCanada Pipelines Limited v. United States, ICSID Case No. ARB/21/63, Award, ¶¶ 69–75 (July 12, 2024). When Biden revoked the permit, the claimants filed with the ICSID under the North American Free Trade Agreement ("NAFTA"), which allows for such arbitration under Chapter 11. *Id.* at ¶ 99. The issue was that NAFTA was replaced by the United States-Mexico-Canada Agreement ("USMCA") in 2020, so the investors had a "legacy investment". *Id.* at ¶ 76. The USMCA allows claims alleging a breach of Chapter 11 of NAFTA for three years after the day the USMCA replaced NAFTA. relied on the provision of the USMCA that allows *Id.* at ¶ 99.

[186] Surma & Kusnetz, *supra* note 155. The tribunal found that the three-year legacy period did not apply to government decisions that were taken after the USMCA was enacted on June 30, 2020. Tienhaara, *supra* note 185. Since the legacy provision did not apply, the case could not be brought under Chapter 11 of NAFTA and was instead brought under the USMCA, which does not contain ISDS provisions between the United States and Canada. *Id.*

are a bigger and more present danger than the eventual costs of climate degradation.

IV. MODIFYING RULES AND AMPLIFYING VOICES

The developing situation in *Greenland Minerals* illustrates the difficulties that arise when a smaller or developing state is facing TPF in ISDS, and how a solution is needed. While other papers focusing on ISDS's role in fighting climate change have proposed sweeping solutions like prohibiting ISDS or terminating investment treaties,[187] the world economy is not suited to deal with such sweeping changes, nor are they necessary. Instead, a targeted approach would alleviate some of the burden smaller or more Indigenous States face from ISDS claims and allow those States to properly regulate their environment. This Part proposes two solutions: limiting the ability of fossil fuel companies to use TPF in ISDS and requiring investors to make a good faith effort to obtain a social license.

First, this Part discusses limiting TPF in ISDS, including modifying current arbitration rules to minimize inequality in the proceedings. Modifying current procedural structures and building upon previous reforms would allow for helpful change without disrupting the current system. It also discusses how a way to disincentivize TPF in ISDS is through limiting the amount investors can claim as damages. Next, this Part explains how investors should be required to make a good-faith effort to work with the local population facing the environmental impacts of the investment, requiring that work to amount to a good faith attempt to obtain a social license from the locals, especially local Indigenous populations. There is no single solution to the problems arising out of TPF in investor-state arbitration; however, two solutions working in tandem may be able to alleviate some of the issues identified in this article.

A. *Limiting Third-Party Funding in Investor-State Arbitration*

Limiting TPF and limiting ISDS has been discussed in a variety of academic articles;[188] however, the trend of investors using TPF in ISDS is relatively new, so a novel solution is needed. When engaging in ISDS, TPF should not be available to investors, specifically fossil fuel and mining companies who do not necessarily need the funds.[189] When a government attempts to impose legitimate regulations based on public interests, it raises the risk of engaging in indirect

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[187] *See, e.g.*, Kyla Tienhaara et al., *Investor-State Dispute Settlement: Obstructing a Just Energy Transition*, 23 CLIMATE POL'Y 1197, 1199 (2023); Joshua Paine & Elizabeth Sheargold, *A Climate Change Carve-Out for Investment Treaties*, 26 J. INT'L ECON. L. 285, 291 (2023) (advocating for "provisions that remove certain sectors or measures from the scope of coverage of the [treaty], or which prevent ISDS claims in relation to certain sectors or measures.").

[188] *See, e.g.*, Brooke Guven & Lise Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement* (Colum. Ctr. on Sustainable Inv., Working Paper, 2019); Frank J. Garcia, *Third Party Funding as Exploitation of the Investment Treaty System*, 59 B.C. L. REV. 2911 (2019); Valentina Frignati, *Ethical Implications of Third-Party Funding in International Arbitration*, 32 ARB. INT'L 505 (2016).

[189] Surma & Kusnetz, *supra* note 1 (describing how the founder of an oil drilling company used TPF because it "didn't want to spend what money it had on the claim.").

expropriation (or its conduct being perceived as indirect expropriation) or some other activity that restricts investors' interests. ISDS is already a very investor-friendly system, so third-party litigation should be limited to instances where businesses *need* the capital from the funding source to ensure that the contract is followed, or their interests are not unjustly harmed. This Subsection first focuses on limiting TPF in ISDS proceedings through the modification and supplementation of current arbitration rules. The next Subsection concludes by discussing how disincentivizing excessive claims can lead to less TPF in proceedings.

1. Modifying Arbitration Rules

In *Greenland Minerals v. Denmark & Greenland*, GM is engaging in arbitration against a small nation of about sixty thousand people, almost 90 percent of whom are Inuit.[190] The damages the company is seeking vastly outnumber the amount Greenland spends in a single year.[191] GM is using finances from Burford Capital to support its legal bills, but this is not a situation involving a small investor seeking recovery against a massive government where the investor needs Burford Capital to even bring a claim. Instead, this is a situation where a corporation with a significant number of assets engaged with a litigation funder to move the claim forward "as quickly and efficiently as possible."[192] This use of TPF is unjust and coercive against States like Greenland.

ISDS is already a very investor-friendly process, even without TPF. Therefore, TPF in ISDS claims from fossil fuel or mining corporations should not be allowed when the respondent State is a smaller or developing nation and especially if the nation has a significant Indigenous population. To allow cases like *Greenland Minerals* to move forward with the aid of TPF does not give Greenland a fair chance to properly defend itself against the massive might of GM and Burford Capital. This limitation on TPF is best suited to come through a change in the ICSID Rules and the UNCITRAL Arbitration Rules.[193]

As previously discussed, ICSID recently changed its Arbitration Rules in 2022, and these reforms included requiring TPF disclosure.[194] Rule 14 of the ICSID Arbitration Rules is a good step in the right direction because the more respondent parties know about the funding claimants have, the better they can respond and plan accordingly. That being said, to truly be effective, the language

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[190] Nauja Bianco, *The Indigenous World 2024: Kalaallit Nunaat (Greenland)*, INT'L WORK GRP. INDIGENOUS AFF. (Mar. 25, 2024), https://iwgia.org/en/kalaallit-nunaat-greenland/5393-iw-2024-kalaallit-nunaat.html [https://perma.cc/2YXQ-3PKF].

[191] Surma & Kusnetz, *supra* note 1.

[192] *Id.*

[193] The limitation of TPF through ISDS arbitration is focused on these two bodies because they hear a significant portion of ISDS cases. FACTS AND FIGURES ON INVESTOR-STATE DISPUTE SETTLEMENT CASES, *supra* note 34, at 9 (describing how "[a]bout 60 per cent of all known treaty-based ISDS cases have been filed under the ICSID Arbitration Rules" with UNCITRAL's Arbitration Rules being the second-most used).

[194] *Supra* Section I.A.2.

of Rule 14(4) needs to be modified. Currently Rule 14(4) states that "[t]he Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3)."[195] Tribunals are given the discretion to request further information if it deems further disclosure necessary, but tribunals are not required to do so. This discretion should be modified to include stronger, mandatory language to guide tribunals in required disclosures. Instead, Rule 14(4) should say "[t]he Tribunal *shall* order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3) *when in the interest of equality between the parties*." This language would ensure tribunals are 1) examining the respective resources and strengths of the parties in proceedings, 2) scrutinizing the third-party funds for misconduct, and 3) mitigating the asymmetry inherent in ISDS proceedings.

If ICSID wanted to go a step further, it could institute an arbitration rule against TPF in ISDS proceedings where there is inherent inequality between the parties and the additional capital from the TPF is unnecessary. GM's use of TPF is a prime example of this, and Rule 14 provides a mechanism to combat those problems. ICSID could add an additional part to Rule 14 requiring tribunals to examine the third-party funding to ensure it is not coercive and its presence is in the best interest of fair proceedings. This is unlikely to actually occur, but it offers a potential solution through the body that handles 60 percent of all ISDS proceedings.[196] Regardless, the goals of the 2022 reforms were to "modernize, simplify, and streamline" ICSID's procedures, and refusing to allow TPF or requiring additional information about funding sources would do just that. Modern TPF is most commonly coming through claims from large corporate investors instead of smaller investors, and the rules need to reflect that difference.

The other way to limit TPF in ISDS arbitration is through a change in UNCITRAL Arbitration Rules. Working Group III has been exploring the possibility of additional regulation and even prohibition of TPF in ISDS for years, but it has yet to implement any of those proposals in its ISDS reforms.[197] Working Group III needs to pass its proposed regulation of TPF in ISDS. In Working Group III's report on its forty-ninth session, the body acknowledged suggestions

> that third-party funding created an asymmetry as the respondent State was not able to enforce an award against the third-party funder, whereas the claimant could enforce against the respondent State to the benefit of the third-party funder. It was said that the sources of third-party funding as well as the

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[195] *ICSID Arbitration Rules*, INT'L CTR. SETTLEMENT OF INV. DISP. Rule 14(4) https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf [https://perma.cc/YH6W-BKUH] (last visited Jan. 29, 2026, at 18:30 CT). Rule 36(3) speaks to the general principles of evidence and allows the tribunal to "call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding." *Id.* at Rule 36(3).

[196] FACTS AND FIGURES ON INVESTOR-STATE DISPUTE SETTLEMENT CASES, *supra* note 34, at 9.

[197] *Working Group III: Investor-State Dispute Settlement Reform*, *supra* note 50.

> utilization of any returns required scrutiny due to possible corruption and potential money-laundering concerns.[198]

Working Group III knew of the concerns surrounding TPF in ISDS, and this was reflected in the group's further considerations.[199] More specifically, Working Group III noted the suggestion that "broad discretion should be given to the tribunal to restrict third-party funding which it found to be abusive and to provide objective standards in doing so."[200] Working Group III must draft a proposal reflecting this language that can then be implemented under UNCITRAL's Arbitration Rules.

Whether it be in proceedings under UNCITRAL's Arbitration Rules or ICSID's, limiting the impact of TPF in ISDS cases would allow respondent States to take back their power in disputes and exercise their powers to protect and listen to their people, specifically when it comes to the fight against the climate crisis. The key is to ensure that the rules protect smaller developing nations or nations with a significant Indigenous population from the coercive powers of TPF.

2. Disincentivizing Excessive Claims

Working within the existing rules structures is one way to mitigate TPF's role in ISDS, but it is not the only way. Another method is to disincentivize ISDS claims for corporate financers by limiting the amount that can be claimed in damages. The average investor claim in ISDS proceedings between 2014 and 2023 was 1.1 billion dollars, and tribunals have steadily continued to award about 40 percent of the damages originally claimed.[201] If that forty percent holds steady, investors will continue to be incentivized to ask for massive amounts, and the massive claims are what attract the third parties serving as financers.

Some treaties have implemented limits to awards as one way to disincentivize investors from asking for these increasingly exorbitant amounts that are unrelated to the actual value of the investment. For example, in a recent bilateral investment treaty between Colombia and Spain, the two nations included a provision limiting a tribunal's award of compensation.[202] If the amount the tribunal awards is less than 50 percent of what the investor claimed,

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[198] Rep. of Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of its Forty-Ninth Session, U.N. Doc. A/CN.9/1194, at 14 (2024).

[199] *Id.* (considering development of a code of ethics, situations where a party provides false information, and the potential incentive to avoid settlement under TPF, among other concerns).

[200] *Id.*

[201] Dafina Atanasova, Vincent Beyer & Josef Ostransky, *Compensation and Damages in Investor-State Dispute Settlement: Options for Reform,* INT'L INST. SUSTAINABLE DEV. 12 (2024), https://www.iisd.org/system/files/2024-09/compensation-damages-isds-reform.pdf [https://perma.cc/X893-T356]. For example, if an investor claims the average 1.1 billion dollars, they would be awarded 440 million if the tribunal found in their favor.

[202] Agreement Between the Kingdom of Spain and the Republic of Colombia for the Reciprocal Promotion and Protection of Investments, Spain-Colom., Mar. 31, 2005.

then the amount is further reduced.[203] By including these reductions in treaties themselves, corporate financers may be disincentivized from contributing to even the most successful ISDS proceedings because the amount they could get back might not be worth the capital put in.

Although this disincentivizing would occur through individual treaties, it would still be a possible solution because it would lead to a functional limitation on cases with excessive claims for damages, many of which are related to the fossil fuel and mining companies. Creating a change in the arbitration rules or placing limits on damages awards, respective to the amounts claimed, would mitigate the unfair impact TPF can have on ISDS proceedings between vulnerable countries and large corporations.

B. *Social License to Operate*

While amending various rules of arbitration and disincentivizing massive claims for damages would help with many of the problems mentioned in this Essay, those options only get halfway to a solution. ISDS proceedings still have a significant problem ensuring that traditionally marginalized and underrepresented voices are heard, but ensuring investors work to obtain a social license may be the solution. A social license or social license to operate was first developed in the late 1990s in the social sciences and corporate world as a way to manage corporations' rising political risks by investing in community relations.[204] It took about ten years for the idea to slowly gain traction, especially in the human rights context.[205] As time has gone on, "possessing [a social license] becomes a highly valued currency for corporate actors" and the concept of a social license impacting investments has now reached arbitration tribunals.[206]

Although it has reached international tribunals, a social license is not a term with a set definition within international law, which requires tribunals to exercise their discretion when interpreting the facts.[207] Within the context of

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[203] *Id.* ("The arbitral tribunal may not award compensation greater than the amount requested by the Investor in its claim, unless such increase reflects the damages or interest caused since the time the dispute was submitted to arbitration. In the event that the compensation awarded is less than 50 percent (50%) of the compensation requested by the Investor in its claim, the arbitral tribunal shall reduce the amount awarded by 2 percent (2%) of the difference between the amount requested and the amount awarded, to the extent of the compensation awarded.").

[204] Kalowatie Deonandan et al., *Social License to Operate (SLO): Private Governance and Barriers to Community Engagement*, 17 EXTRACTIVE INDUS. & SOC'Y 1, 2–3 (2024).

[205] *Id.*

[206] Raúl F. Zúñiga Peralta, *The Judicialisation of the Social License to Operate: Criteria for International Investment Law*, 22 J. WORLD INV. & TRADE 92, 94 (2021). Many of these cases involve Indigenous communities and the relationship between their rights the rights of the investors. *See, e.g.*, Bear Creek Mining Corp. v. Republic of Perú, ICSID Case No. ARB/14/21 (Nov. 30, 2017); Álvarez y Marín Corporación S.A. v. Republic of Panama, ICSID Case No. ARB/15/14 (Sep. 20, 2018); South American Silver Limited v. Bolivia, PCA Case No. 2013-15 (Nov. 22, 2018).

[207] Deonandan et al., *supra* note 204, at 3. A definition that aligns more with the concept's traditional social science background defines a social license as "a community's perceptions of the acceptability of a company and its local operations." ROBERT G. BOUTILLIER & IAN THOMSON, MODELLING AND MEASURING THE SOCIAL LICENSE TO OPERATE: FRUITS OF A DIALOGUE BETWEEN THEORY AND

mining and other environmentally impactful industries, a social license is generally understood to mean community approval of the company's project.[208] With the intent to obtain acceptance and approval of the investment, a social license would align better with interests that are often left out of the negotiating table and lead to more stability for both the government and the investor.[209] To obtain a social license from the local community, investors would have to engage with those populations rather than focus solely on negotiations with the government. For example, in situations like *Greenland Minerals v. Greenland and Denmark*, a social license would allow Indigenous voices like Mariane Paviasen to be heard would ensure that 1) their concerns about the impact of investment projects are properly heard and 2) the arbitral tribunal understands and listens to the local and Indigenous populations.

When an investor negotiates with a government for a mining license, their interactions are typically focused on the government, but that does not mean the local population goes completely ignored. For example, the Aymara in *Bear Creek* were largely unable to engage with the investors' representatives,[210] so the tribunal had to determine "what actions were legally required of Claimant in seeking to obtain a Social License, and did the Claimant take these actions?"[211] The majority found that a social license was Peru's obligation to monitor Bear Creek's outreach attempts to the Aymara and other locals and raise any potential concerns.[212] In that case, this Essay argues that Arbitrator Sands's view of social license was the correct approach.[213] According to Arbitrator Sands, "the Project collapsed because of the investor's inability to obtain a "social license", the necessary understanding between the Project's proponents and those living in the communities most likely to be affected by it, whether directly or indirectly."[214] When the discontent due to the lack of

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PRACTICE 2 (2011), https://socialicense.com/publications/Modelling%20and%20Measuring%20the%20SLO.pdf [https://perma.cc/H94F-WY4D].

[208] Zúñiga Peralta, *supra* note 206, at 92.

[209] This could mean holding town halls, manning a phone line for questions and comments, and other forms of engagement that would allow voices to be heard and considered as a part of the investment process. By encountering—and ideally resolving—community concerns, investors can mitigate the likelihood of protests and political action that can lead to ISDS.

[210] The attempted meetings occurred in Spanish, not the primary language of the Aymara, and the meetings required the advance submission of written comments. The Aymara language is primarily oral, not written. Surma & Kusnetz, *supra* note 1.

[211] *Bear Creek Mining Corp.*, ICSID Case No. ARB/14/21, Award, ¶ 402.

[212] Marcoux & Newcombe, *supra* note 121, at 657.

[213] Arbitrator Sands agreed with the decision to find for the Claimant; however, the social license analysis would have decreased the amount of damages if the panel had agreed with his interpretation of the social license requirement. *Bear Creek Mining Corp.*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Philippe Sands, ¶ 3.

[214] *Id.* ¶ 6.

transparency and bad acts by the investor is foreseeable[215], the State cannot be held wholly responsible for its citizens expressions of such sentiments.

Other tribunals have engaged in similar analyses and have concluded that human rights operate with "an obligation on all parts, public and private parties, not to engage in activities aimed at destroying such rights."[216] It seems proper that the responsibility of obtaining a social license falls on the investor and a failure to do so should be considered by the tribunal because the investor is in the best position to respond to the concerns of the Indigenous people. They are the ones conducting the site surveys, determining locations, and pushing the entire project. The investors have the information needed to assuage any fears or answer questions, and they should be expected to engage with Indigenous populations and other local communities and provide that information. Similarly, if the investor does not respond to concerns that the government later acts on, the government should not be punished for listening to its people and their concerns. This approach also helps the government if there is investor misconduct because—since ISDS is unavailable for States as claimants—an investor's failure to obtain a social license and engage with Indigenous people would provide the government with a defense for its actions if the investor files an ISDS claim. This shifting of responsibility to investors rather than respondent States would allow more Indigenous concerns to be heard earlier in the process and decrease the likelihood that they will be disregarded.

V. CONCLUSION

Every day, the risks associated with climate change increase, and so does the cost of fighting it. By 2049, climate change is estimated to cost the world about thirty-eight trillion dollars a year, and the poorest countries will be hit the hardest.[217] The international community needs to be doing everything it can to mitigate these costs early, but that is not possible with current investment trends. Fossil fuel investors are fighting against these efforts through investor-state dispute settlement because environmental regulations harm their bottom line. As States attempt to regulate the environment, they run the risk of being punished for the very actions designed to protect the environment and the people for which they are responsible. Investors filing claims against smaller

[215] *Id.* (describing how Bear Creek obtained permits in the name of one of its Peruvian employees even though "it, as a foreign corporation, was not at the time authorised or lawfully entitled to obtain" such a permit).

[216] Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶ 1199 (Dec. 8, 2016); *see also* Hesham Talaat M Al-Warraq v. Republic of Indonesia, UNCITRAL, Final Award, ¶ 663 (Dec. 15, 2014) (finding that an international investment agreement "imposes a positive obligation on investors to respect the law of the Host State, as well as public order and morals. An investor of course has a general obligation to obey the law of the host state, but [the treaty] raises this obligation from the plane of domestic law (and jurisdiction of domestic tribunals) to a treaty obligation binding on the investor in an investor state arbitration").

[217] Seth Borenstein, *New Study Calculates Climate Change's Economic Bite Will Hit About $38 Trillion a Year by 2049*, ASSOC. PRESS (Apr. 17, 2024, at 10:00 CT), https://apnews.com/article/climate-change-damage-economy-income-costly-3e21addee3fe328f38b771645e237ff9 [https://perma.cc/7SZT-HQL4] ("The world's poorest countries will suffer 61% bigger income loss than the richest ones . . . .").

developing or largely Indigenous States use the asymmetrical power dynamic within ISDS to obtain significant damages and, ideally, access to the financial interest that the government was attempting to regulate. And if the proceedings were not already skewed in favor of the investor, many have turned to using third-party funds because it allows the process to be smoother and easier. These investors do not necessarily need TPF to successfully obtain damages through ISDS, and the overall effect is one of coercion.

This dilemma is occurring in real time in Greenland. While Greenland has been in the global spotlight recently due to the actions of the Trump administration,[218] what is happening behind closed doors is even more concerning. Greenland is a responding party in an ISDS case that could either bankrupt the nation or irreparably harm the health of its land and its people. When the government made the decision to revoke GM's permit, it did so in response to the people of Greenland engaging in the democratic process and voting for their interests. Indigenous voices that were previously ignored were heard, but none of that matters. Rather than allowing Greenland to govern, GM filed a claim requesting ISDS and turned to TPF to ensure its success. Despite the validity of its decision, Greenland has no real options other than to go through the proceedings and make a case or settle.

To protect the environment from further irreparable harm and mitigate the inequalities currently present in ISDS, something needs to be done. TPF should be limited to situations where the funds are genuinely necessary, and tribunals must be able to examine whether the use of TPF in proceedings is in the best interests of the parties rather than a coercive tactic designed to further an existing imbalance. Additionally, tribunals should be encouraged to consider the human rights impact of ISDS claims on historically marginalized populations like Indigenous people and the investor's efforts—or lack thereof—to obtain a social license. Together, these solutions are a solid start to mitigating the environmental impact of third-party funded investor-state arbitrations.

[218] *See, e.g.*, Tiffany Wertheimer, *Greenland's Politicians Unite Against Trump*, BBC (Mar. 14, 2025), https://www.bbc.com/news/articles/c2ljrjeqzq4o [https://perma.cc/S4H8-UVDM]; Divya Rajagopal, *Investor Interest in Greenland's Mining has Increased Since Trump's Threats, Mining Minister Says,* REUTERS (Mar. 2, 2026, at 14:14 CT), https://www.reuters.com/world/investor-interest-greenlands-mining-has-increased-since-trumps-threats-mining-2026-03-02 [https://perma.cc/Y2YJ-SQSK]; David Charter & George Grylls, *Why Does Trump Want Greenland?*, TIMES (Mar. 17, 2026, at 23:17 GMT), https://www.thetimes.com/us/news-today/article/why-does-trump-want-greenland-buy-take-over-03lbsmt9s?gaa_at=eafs&gaa_n=AWEtsqdwotm9czG-UUPjqqiZY8CdmrmsepmMe3iG3jmmuHtu_0PpuMeaYv-GvduErus%3D&gaa_ts=69c0a5f5&gaa_sig=ZIOHC87toqNeHGf1H2wL_4-xnU8q0bWsglOMOEkARu_McbVmRymP-XHOkBK0L5ypBSiJ1OWV_67bT-wWRp15xg%3D%3D [https://perma.cc/4KPY-DRWL].