



# Is investor-state arbitration biased against development?

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# Outline

1. Provide introduction to investment treaties and investor-state arbitration;
2. Justify my approach in light of literature;
3. Offer preliminary answers to my question: what concepts of the state do arbitrators generate?

# Introduction

- Investment treaties date to 1950s
- Spaghetti bowl of 3,000 bilateral/regional treaties
- Mostly North-South, although changing
- Unlike resource/procurement contracts: treaties are negotiated by states for investors
- Not WTO: only investors have standing to launch
- 'Investor' = registration plus expected profits
- Third party funding
- 500 cases
- Treaties short/similar; awards long/inconsistent

# Data and Methodology

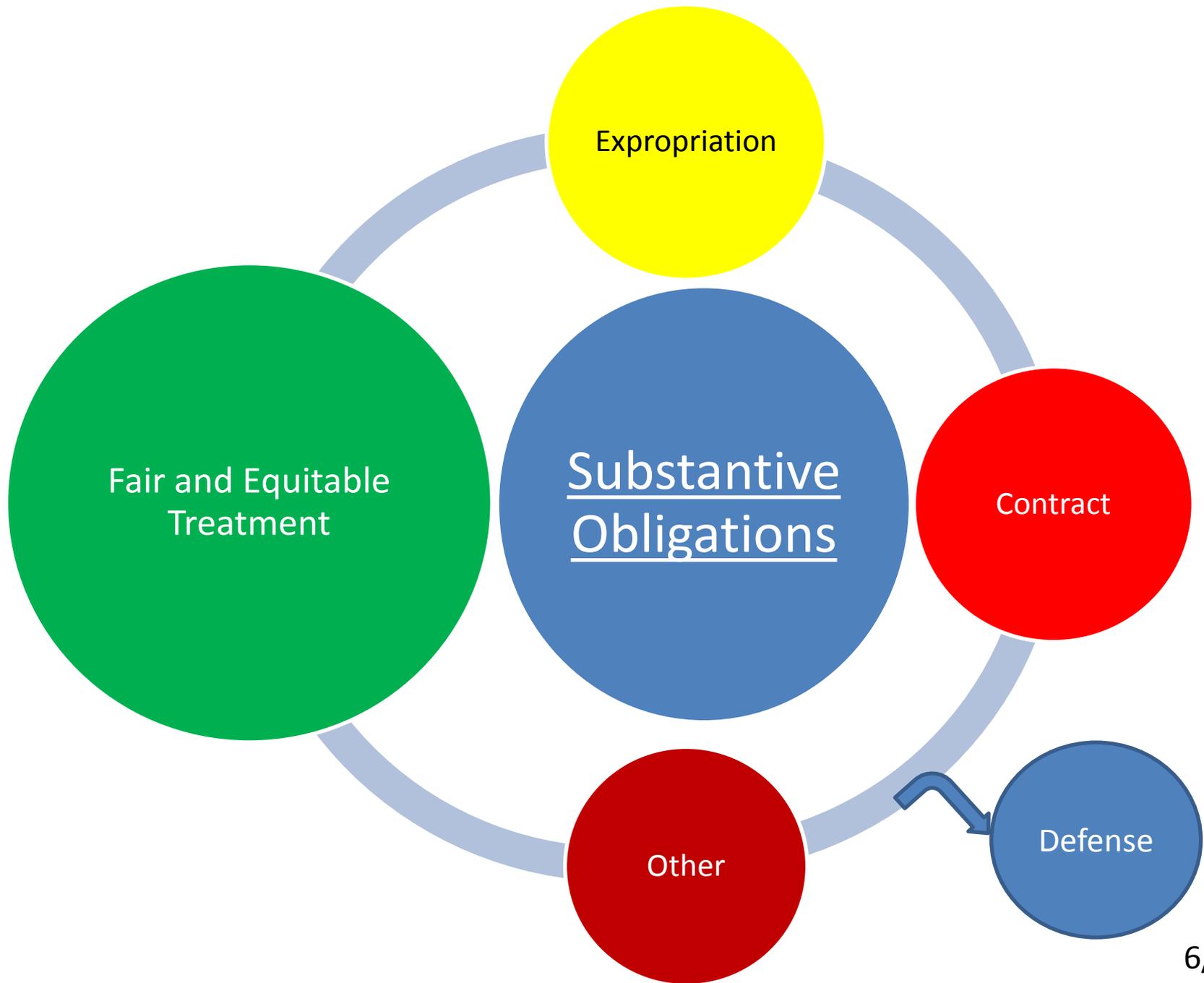
- Interdisciplinary approach
- Population: 132 merits cases, 50,000 strings
- Qualitative content analysis
- Sample: 5 cases, 1,832 strings
- More later
- Future/ongoing work
  - Automated text-data analysis
  - Interviews

# Arbitrator Selection

*Two to tango;  
but three on  
the dance floor*



- Top 15 arbitrators in 55% cases
- Revolving door
- Few conflict of interest rules <sup>5/16</sup>



# Bias against developing *countries*?

Possible approach	Finding	Pitfalls
Relative win-loss ratios	Loss rate: 65% - AE v. Non-AE: 36% v. 72%	Sensitive to country grouping, jurisdictional wins, US courts for US disputes(?), German nukes
Arbitrator nationality	81% of president from AE, but vote against home region	Neoliberal Chileans, panel conformity
Losses/costs	Liability: \$36 m Costs: \$4 m	High dollar natural resource contracts, 95% discount of initial claims, Argentina effect
Regulatory chill/change	A few case studies	Remedy is payment not policy change, causality or scapegoating, governments already sued in national courts, differing cost-benefit, Ecuador effect

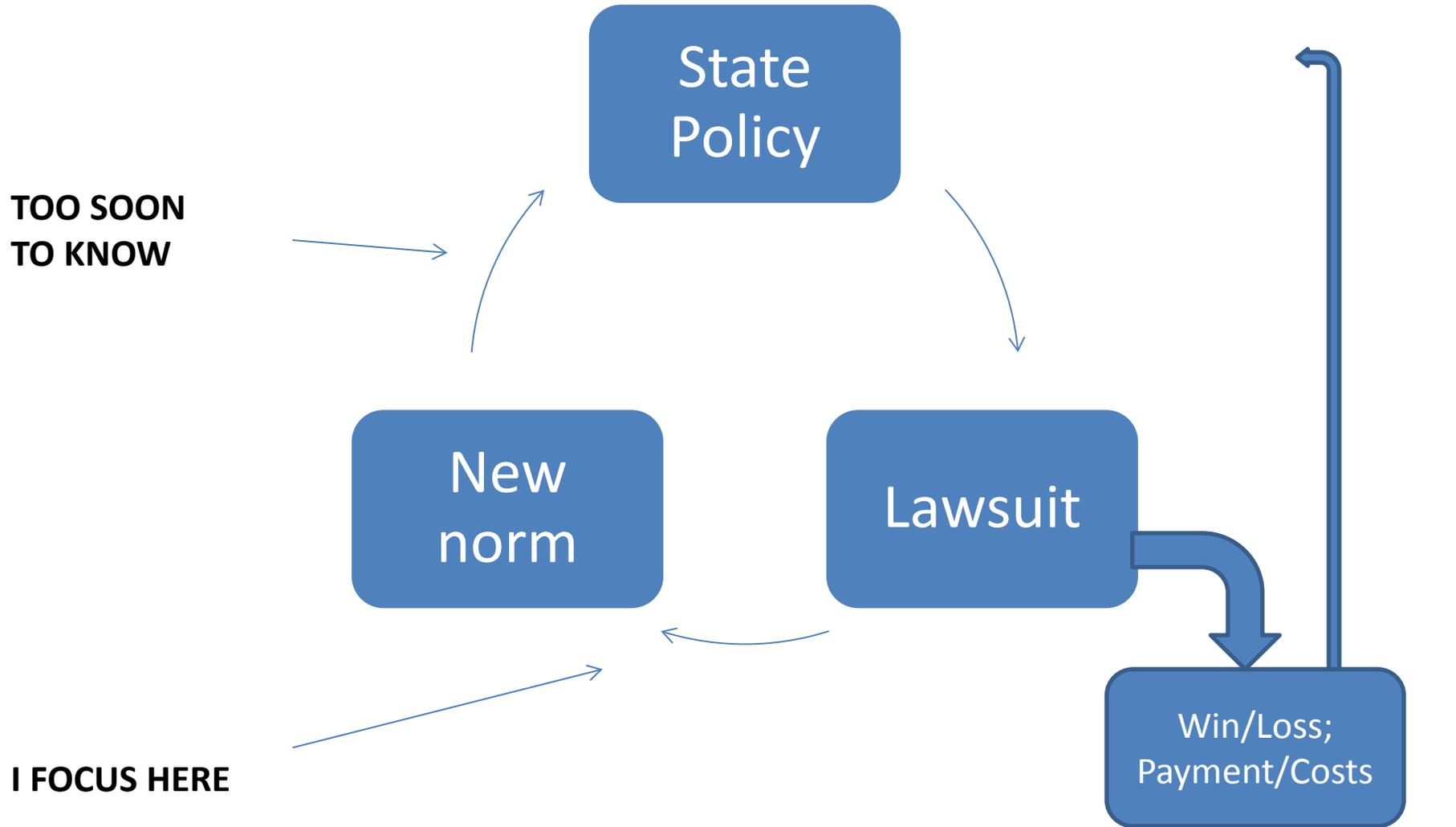
# Political science on courts doesn't help

Arbitrators...	Pitfalls
Impose ideological preferences	Difficult to operationalize unlike US court studies, dissent= no reappointment
Play bureaucratic games	Limited appeal, automatic enforcement, AE courts are main audience, repeat players don't do better
Apply law	Provisions vague, case-law contradictory, use of gut
Complete contracts, help countries credibly commit	Signings = photo ops, de facto multilateral regime, Hotel California problem, risk premiums spike on back end

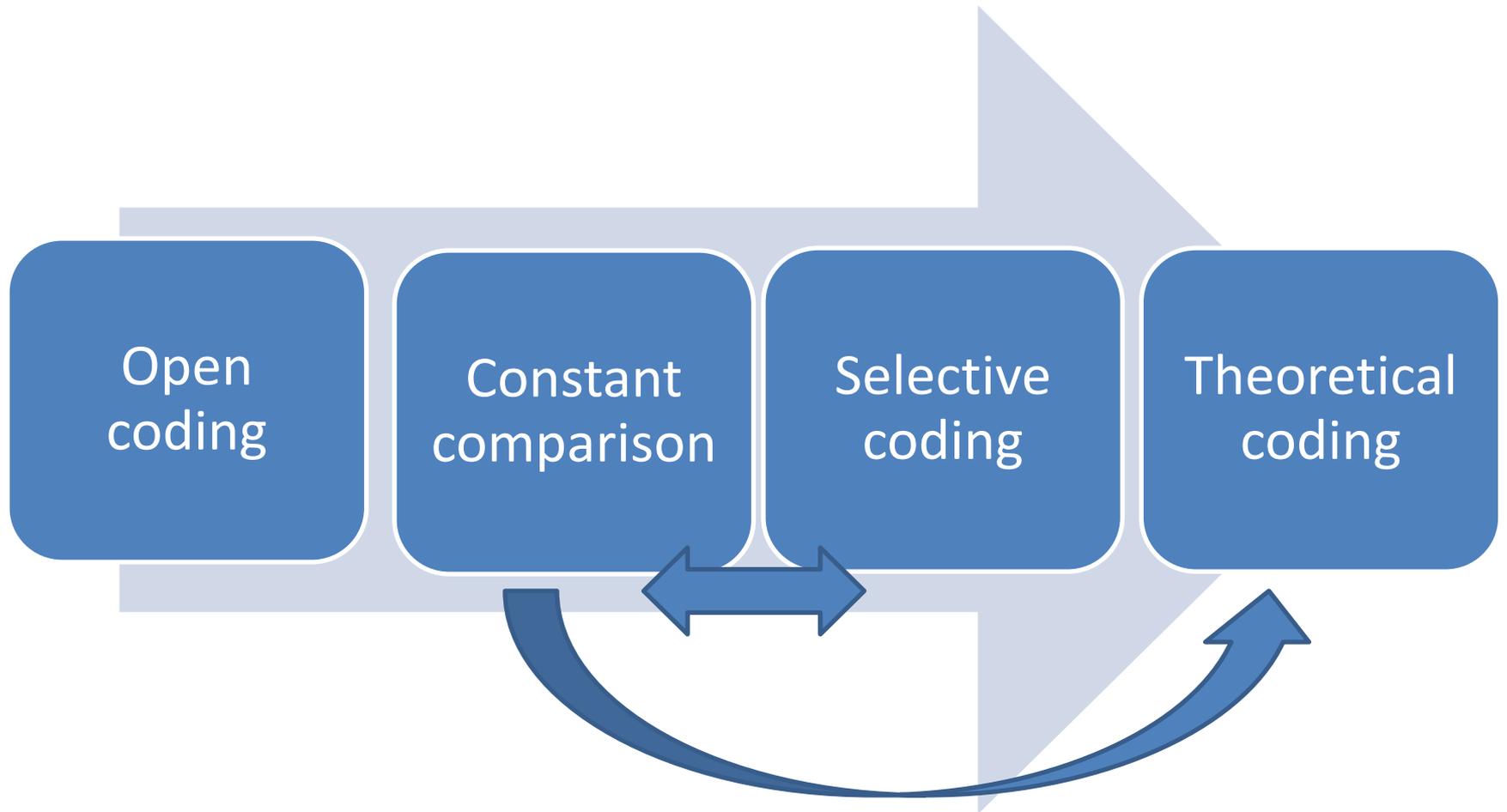
# State concept: another channel of development impact

- Bias against developing countries or against development processes?
- Signings in low growth; cases in economic change; mostly against middle income countries
- Arbitrators take swipes at state policy space even when siding with the state
- This 'dicta' then cited in subsequent cases
- Given repeat arbitrator appointments, are these individuals playing a long (anti-state) game?
- **States may 'lose when they win'**
- Easiest aspect of development to infer

# Model of Development Impact



# Generation of grounded theory



# Disciplining concepts

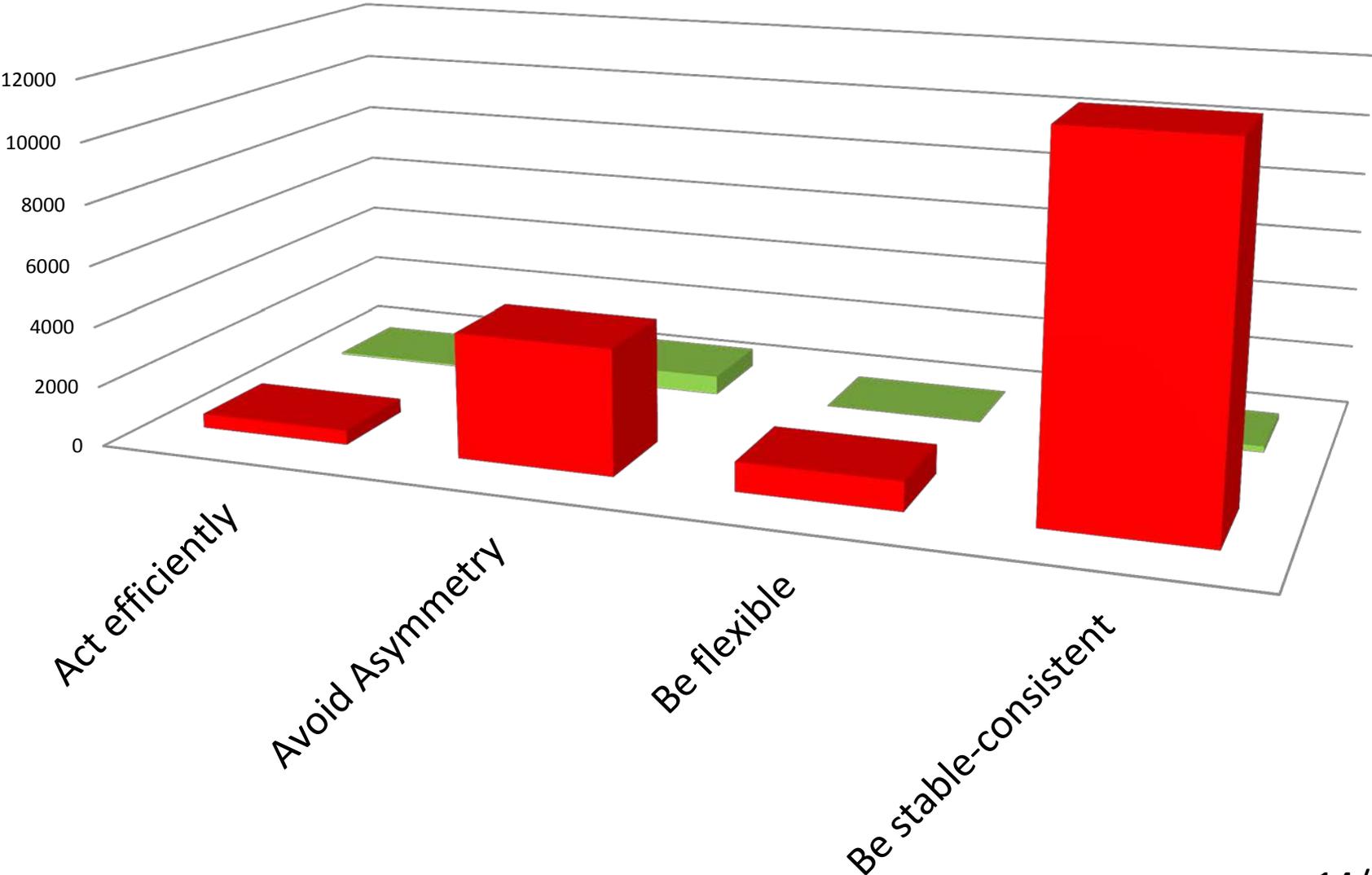
State concept/norm	Example	Corollary in theory
Act efficiently	Argentina can't use necessity defense if its inefficient policies contributed to own crisis	Vulgar, neoclassical law and economics (without uncertainty)
Avoid asymmetry	Latvian executive must preempt other branches; Argentina can't (forcefully) renegotiate	Predatory state: Douglass North, Mancur Olson, Hayek
Be Stable-Consistent	1990s privatizations generated expectations	Weber's 'modern state' ideal type, elite statist
Be Flexible	Exogenous shocks trigger need for renegotiation of contracts	Comprador state capitalism

# Affirming concepts

State concept/norm	Example	Corollary in theory
Regulates	Pakistani officials can monitor project implicating Turkish ties	Westphalian norms, welfare economics
Diverse-changing	Pakistani internal deliberations	Pluralism
Business-like	Ecuador doesn't guarantee profits; Pakistan can 'poach' subcontractors	State capitalism, managerialism

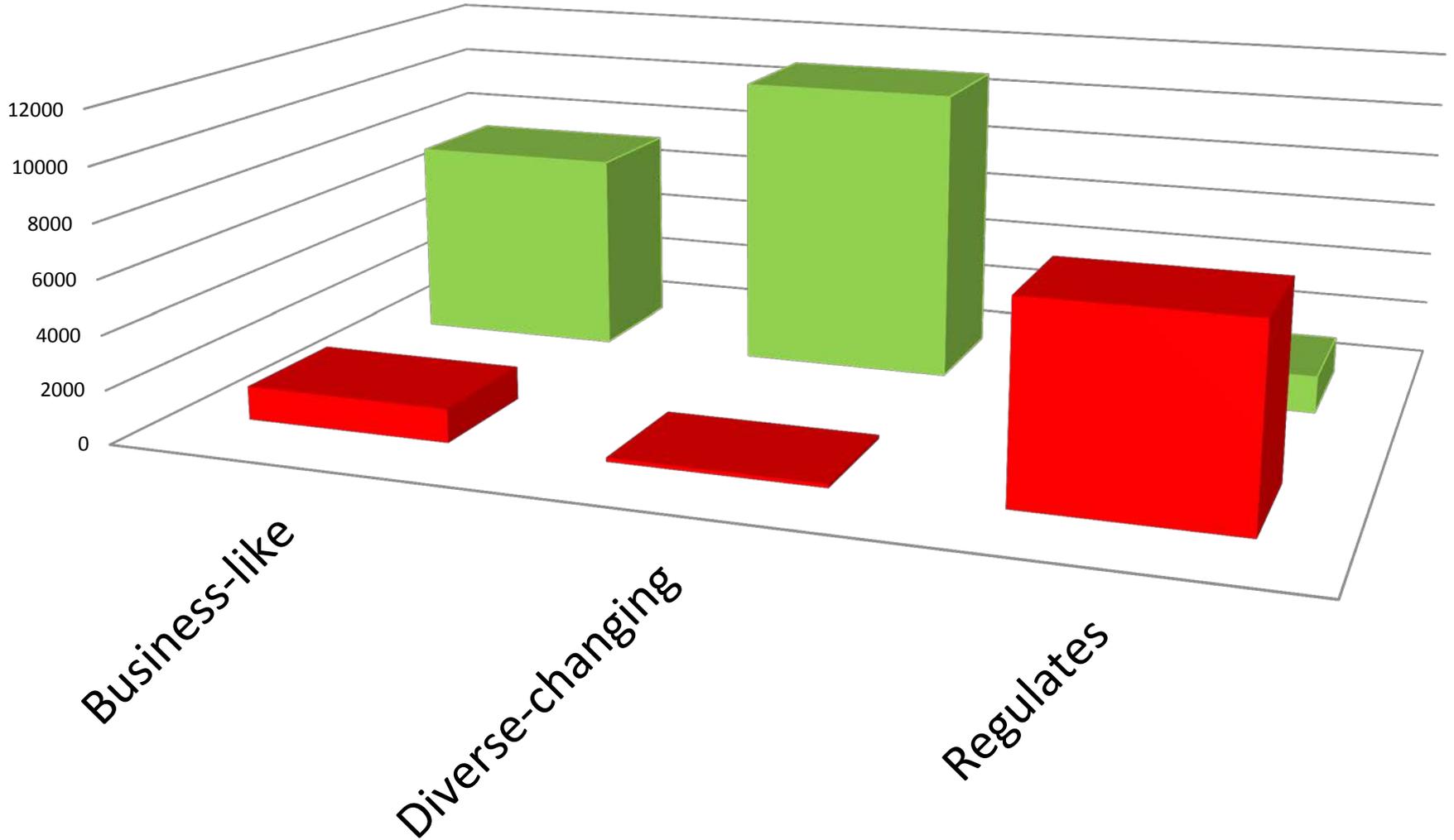
# Disciplining Concepts and Outcomes

■ State loses ■ State wins



# Affirming Concepts and Outcomes

■ State loses ■ State wins



# Conclusions

- Present here: contracts and predatory/ pluralist/ capitalist/monocratic state
  - Investor- v. state-favoring: alternative contract present, so *losing while winning*
- Missing concepts key to development: state capacity (Mann), embedded autonomy (Evans), optimal rent management (Khan)
- Take home: Empower lawyers as policy entrepreneurs = dominance of contractual thinking inappropriate to many state functions
- Lawyers historically leading edge of power building

# Thanks for your attention!

*For more information, see...*

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# Situation in literature

