

PRESENTATION ON ICSID REVIEW ARTICLE

Conciliation and Mediation in ISDS Provisions: A Quantitative and Qualitative Analysis

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Conciliation and Mediation IIA Provisions

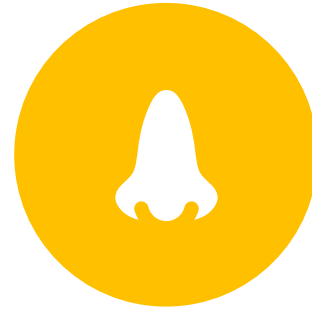
1. What's in the treaties?
2. Are they being used?
3. Why are they not used?
4. How can this be changed?



**WHAT'S IN THE
TREATIES?**



**ARE THEY BEING
USED?**



**WHY ARE THEY
NOT USED?**

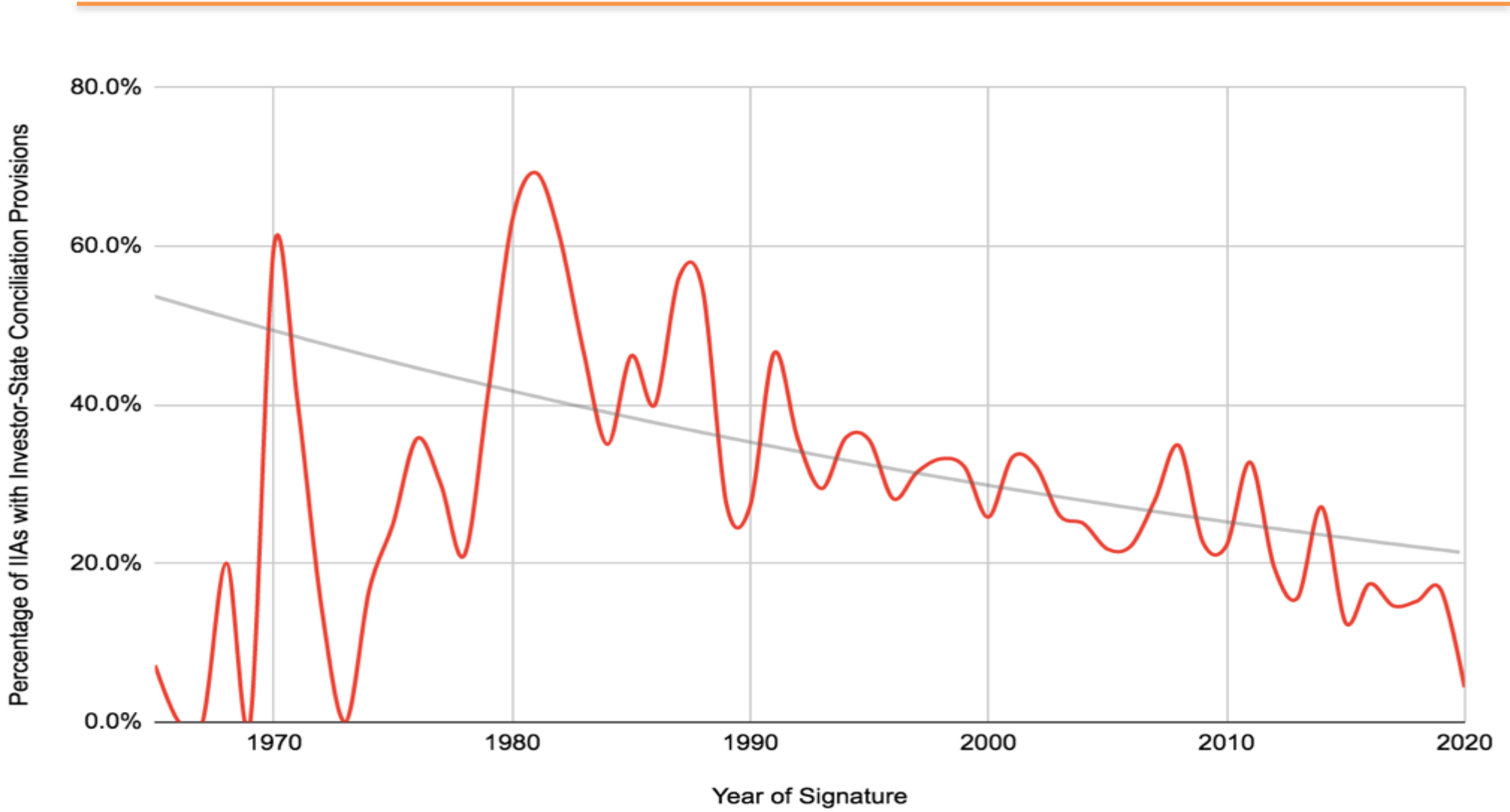


**HOW CAN THIS BE
CHANGED?**

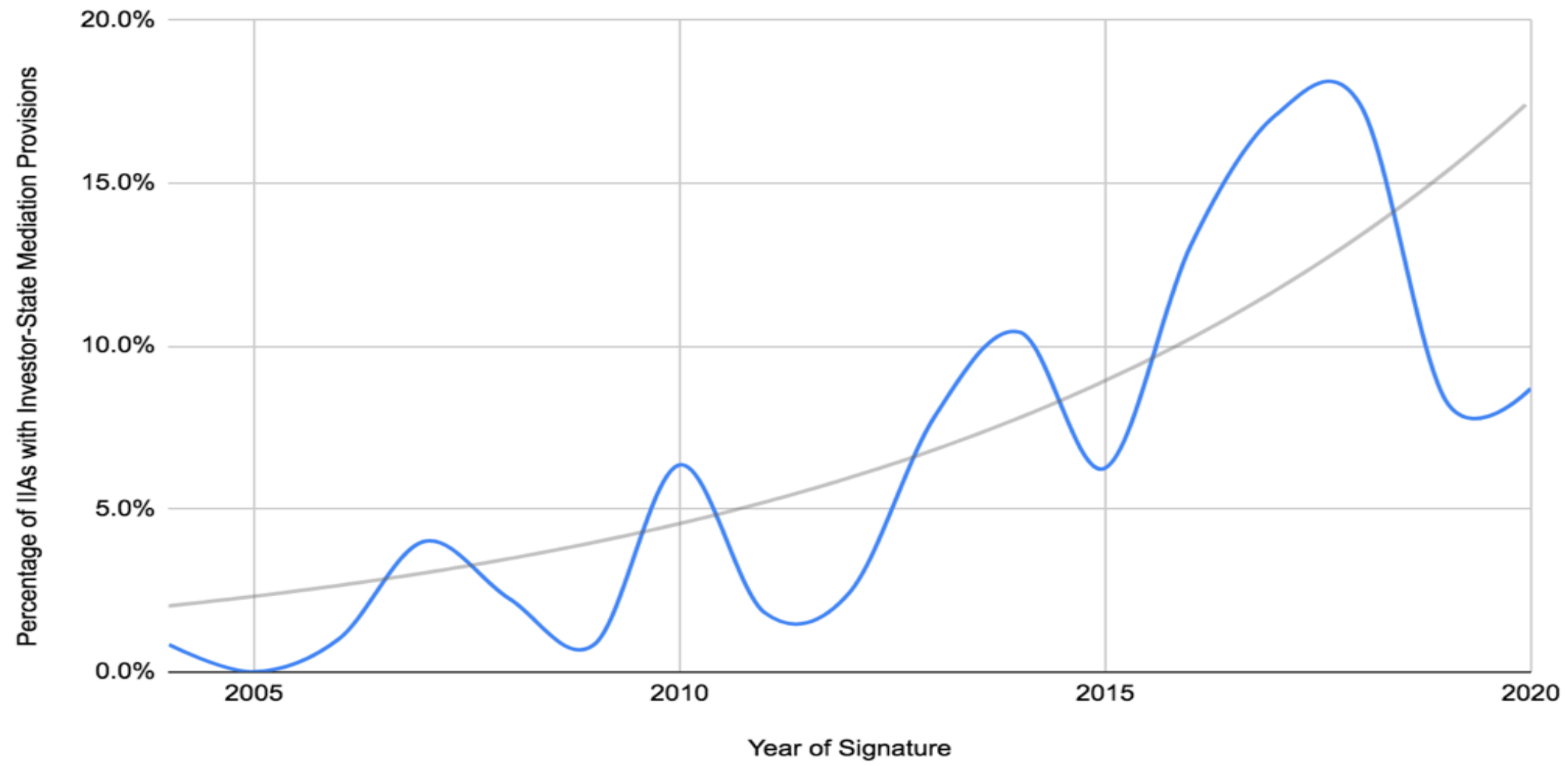
Key Findings on Conciliation and Mediation in ISDS

1. We conducted keyword searches of 3815 international investment agreements (IIAs) for “conciliation” and “mediation” (search conducted in April 2021)
2. 2674 IIAs (or 70%) did not refer to “conciliation” or “mediation” in ISDS provisions
3. Total of 1141 IIAs referred to conciliation and/or mediation in ISDS provisions
 - 1125 IIAs (or 30% of all IIAs) referred to “conciliation” in ISDS provisions
 - 53 IIAs (or 1.4% of all IIAs) referred to “mediation” in ISDS provisions

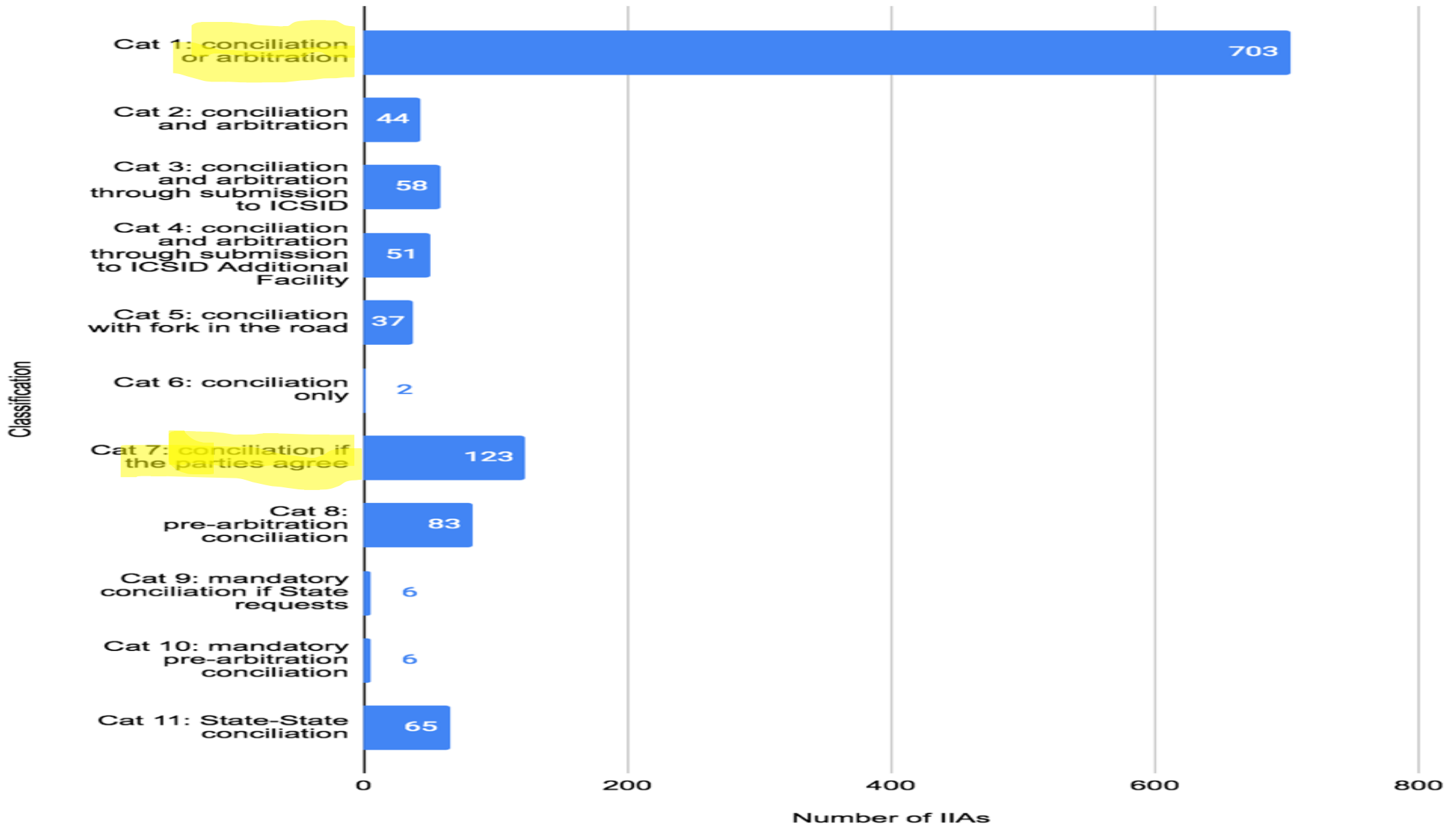
Percentage of IIAs with Investor-State Conciliation Provisions by Year of Signature



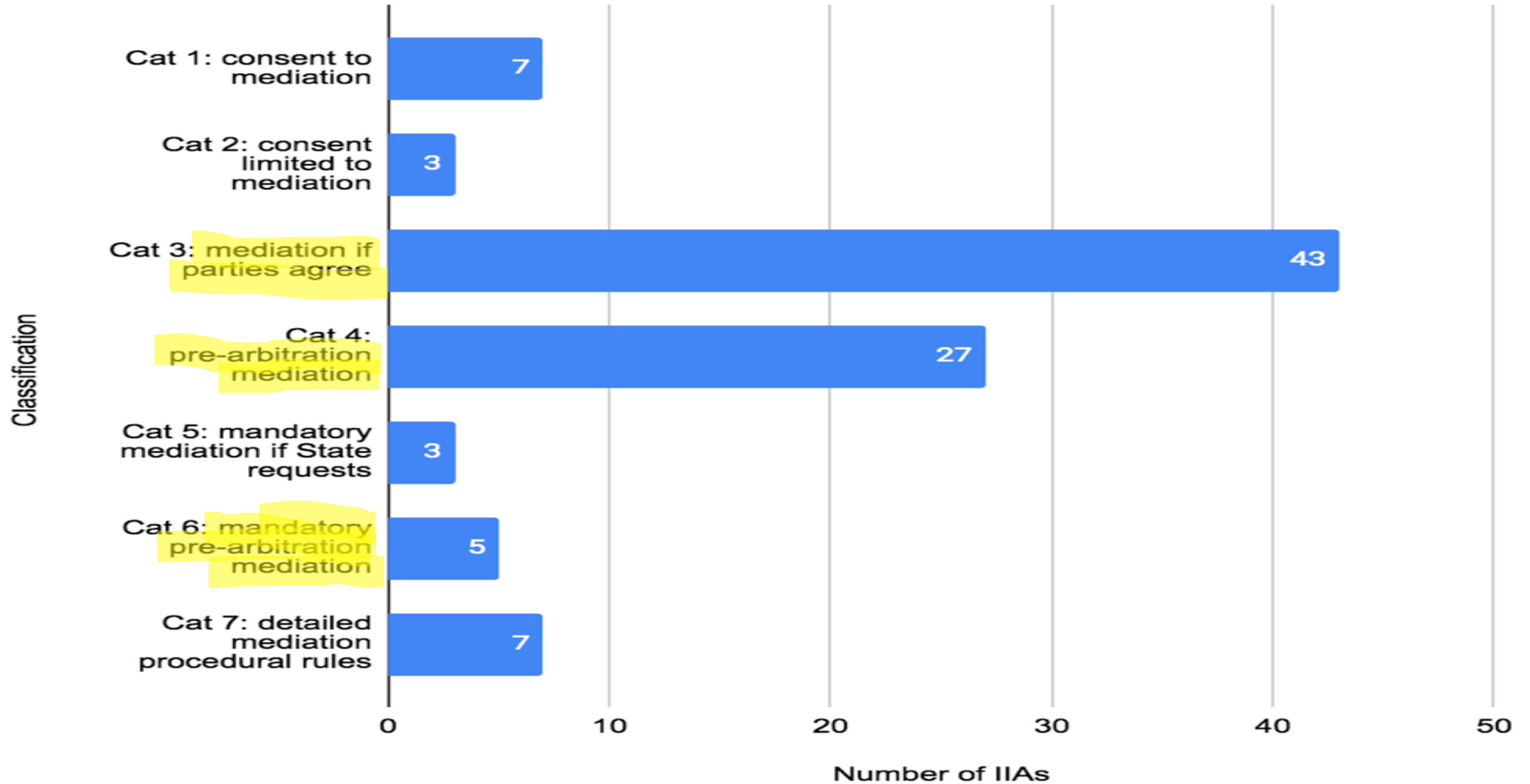
Percentage of IIAs with Investor-State Mediation Provisions by Year of Signature



Types of Conciliation Provisions



Types of Mediation Provisions

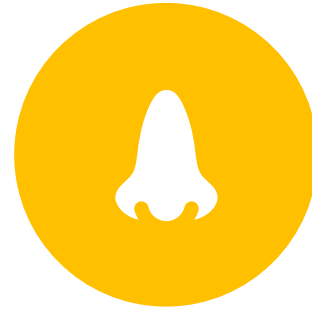




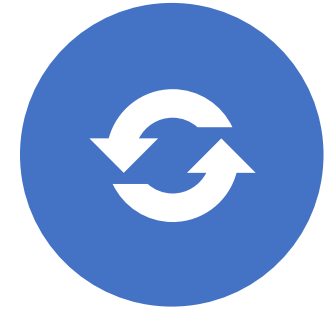
WHAT'S IN THE
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ARE THEY BEING
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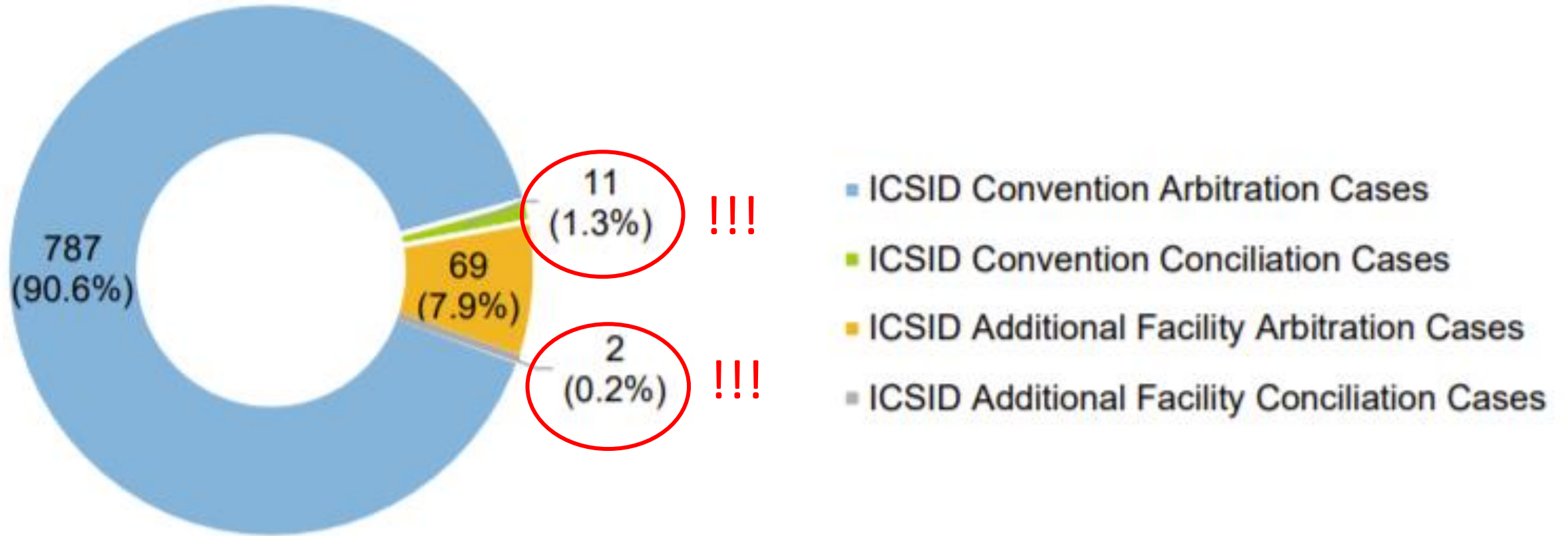


WHY ARE THEY
NOT USED?



HOW CAN THIS BE
CHANGED?

Very rarely!



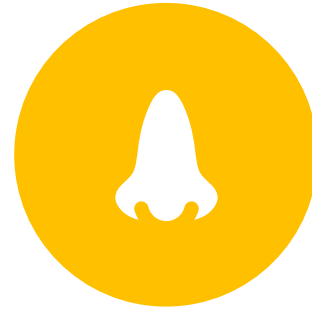
- Source: ICSID Caseload Statistics 2022



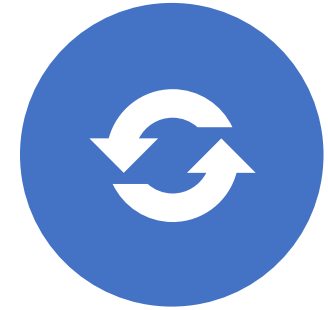
WHAT'S IN THE
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WHY ARE THEY
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HOW CAN THIS BE
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Reasons for non-use

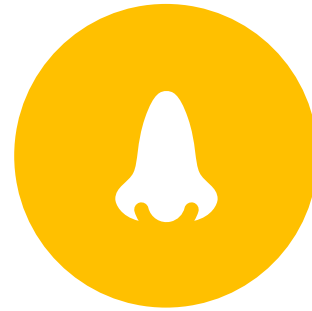
1. 70 % of IIAs do not refer to conciliation or mediation
2. The “fork” fear (in “conciliation or arbitration”)
3. Lack of familiarity by government officials or local obstacles



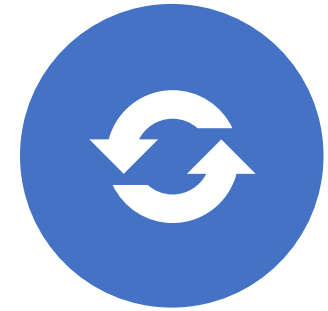
WHAT'S IN THE
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WHY ARE THEY
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HOW CAN THIS BE
CHANGED?

Implementing Change

1. Increase quantity of provisions
2. Improve quality of provisions

Improve Quality

1. Provide advance consent to conciliation and/or mediation
2. Clarify that the choice of conciliation/mediation or arbitration does not trigger a “fork-in-the-road”
3. Encourage conciliation or mediation during the pre-arbitration consultation phase
 - consider making it a mandatory condition prior to arbitration?

Improve Quality

4. Provide more detailed guidance on how meditation will operate, and highlight the efficiencies to be gained

5. Empower tribunal to propose to the parties (in a non-binding manner) that certain issues may benefit from a separate conciliation or mediation procedure
 - Risk: prejudgment of issues by tribunal?

Thank you.