

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

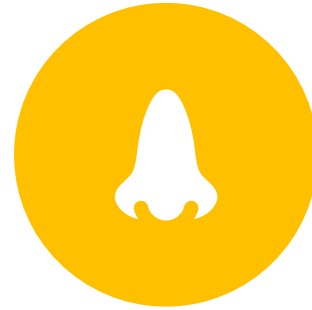
1. What's in the treaties?
2. Are they being used?
3. Why are they not being used?
4. How can this be changed?



**WHAT'S IN THE
TREATIES?**



**ARE THEY BEING
USED?**



**WHY ARE THEY
NOT BEING USED?**

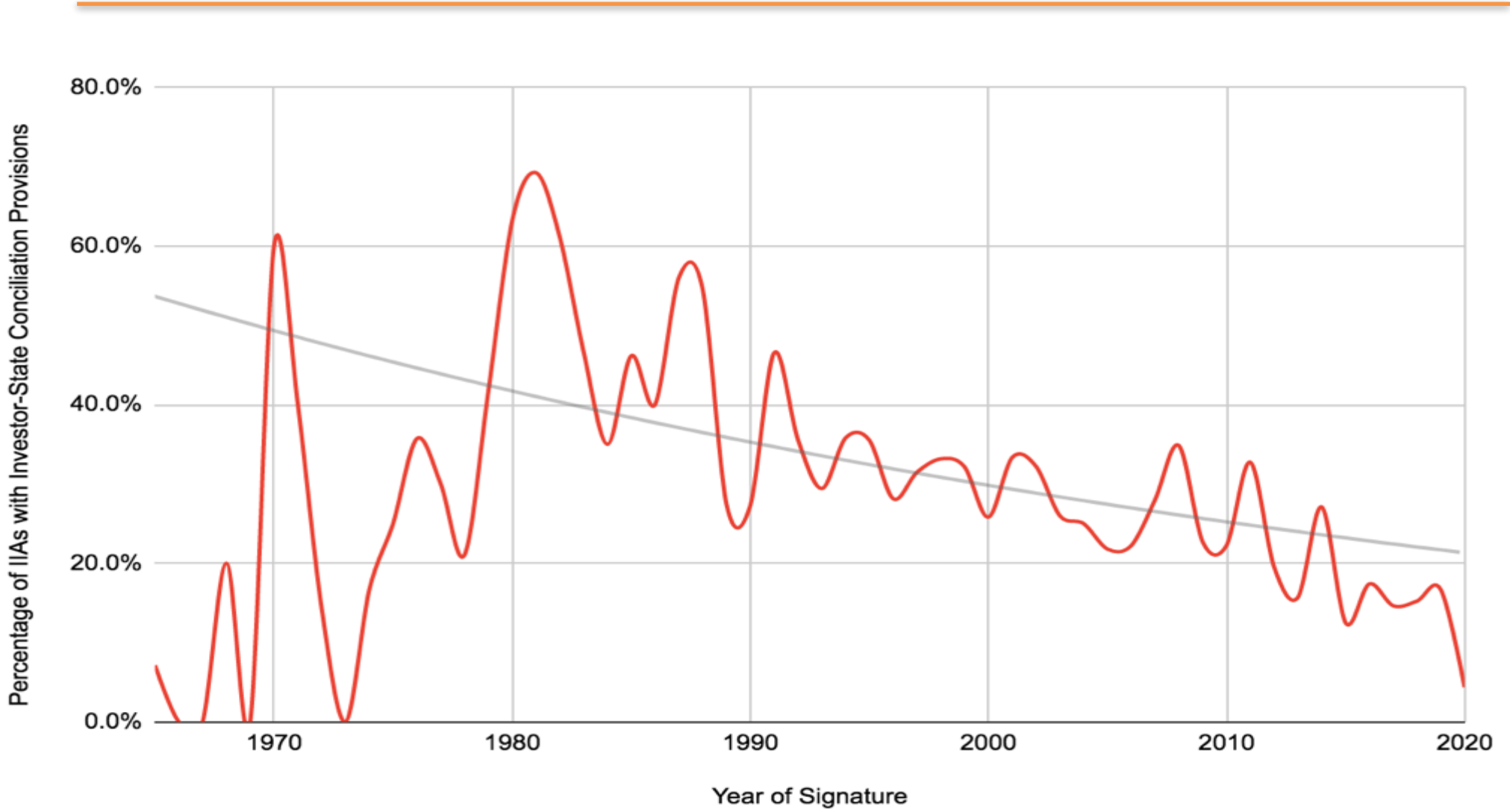


**HOW CAN THIS BE
CHANGED?**

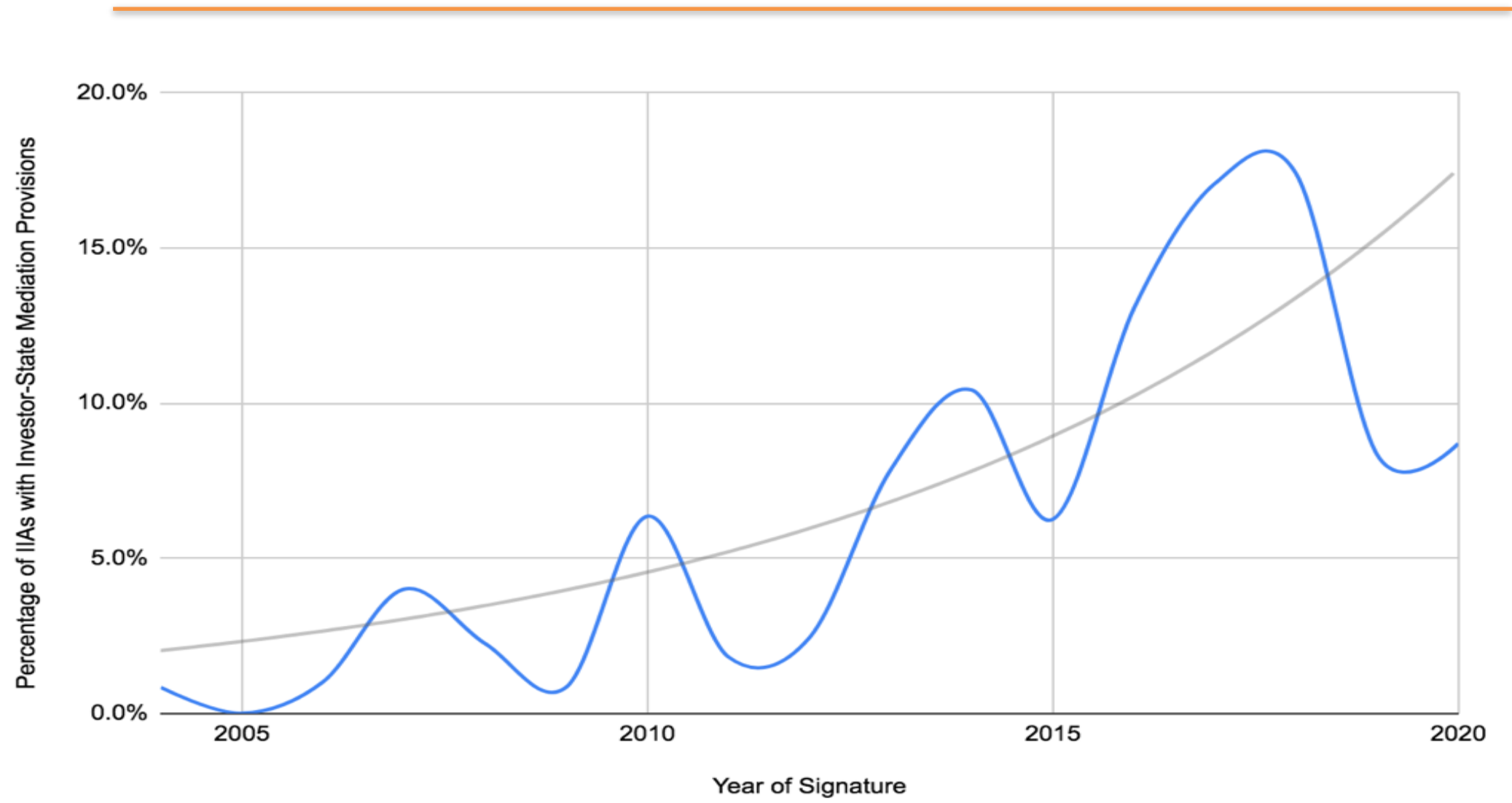
Key Findings on Conciliation and Mediation in ISDS

1. We conducted keyword searches of 3815 international investment agreements (IIAs) for “conciliation” and “mediation”
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%) referred to “conciliation” in ISDS provisions
 - 53 IIAs (or 1.4%) referred to “mediation” in ISDS provisions

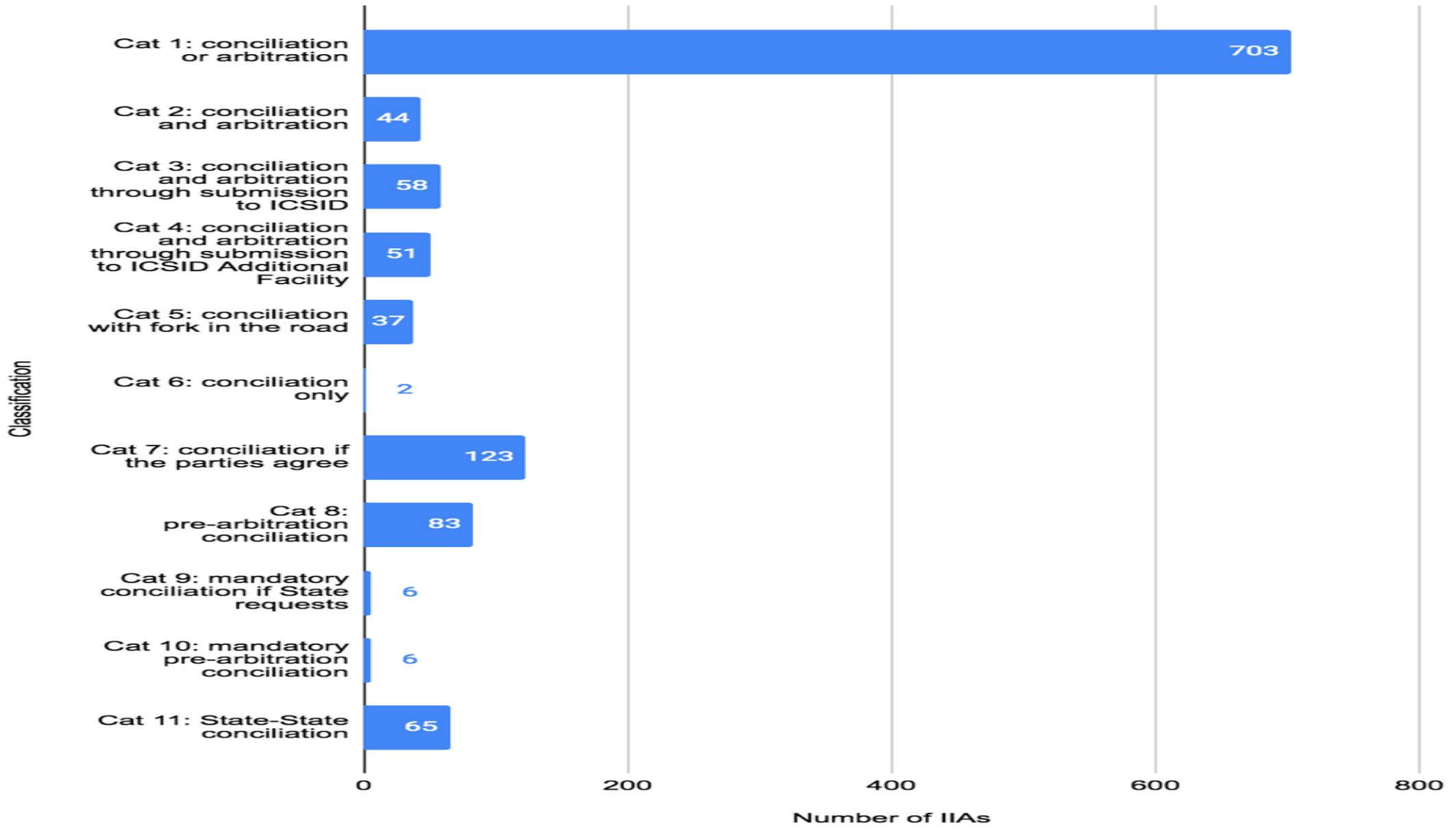
Percentage of IIAs with Investor-State Conciliation Provisions by Year of Signature



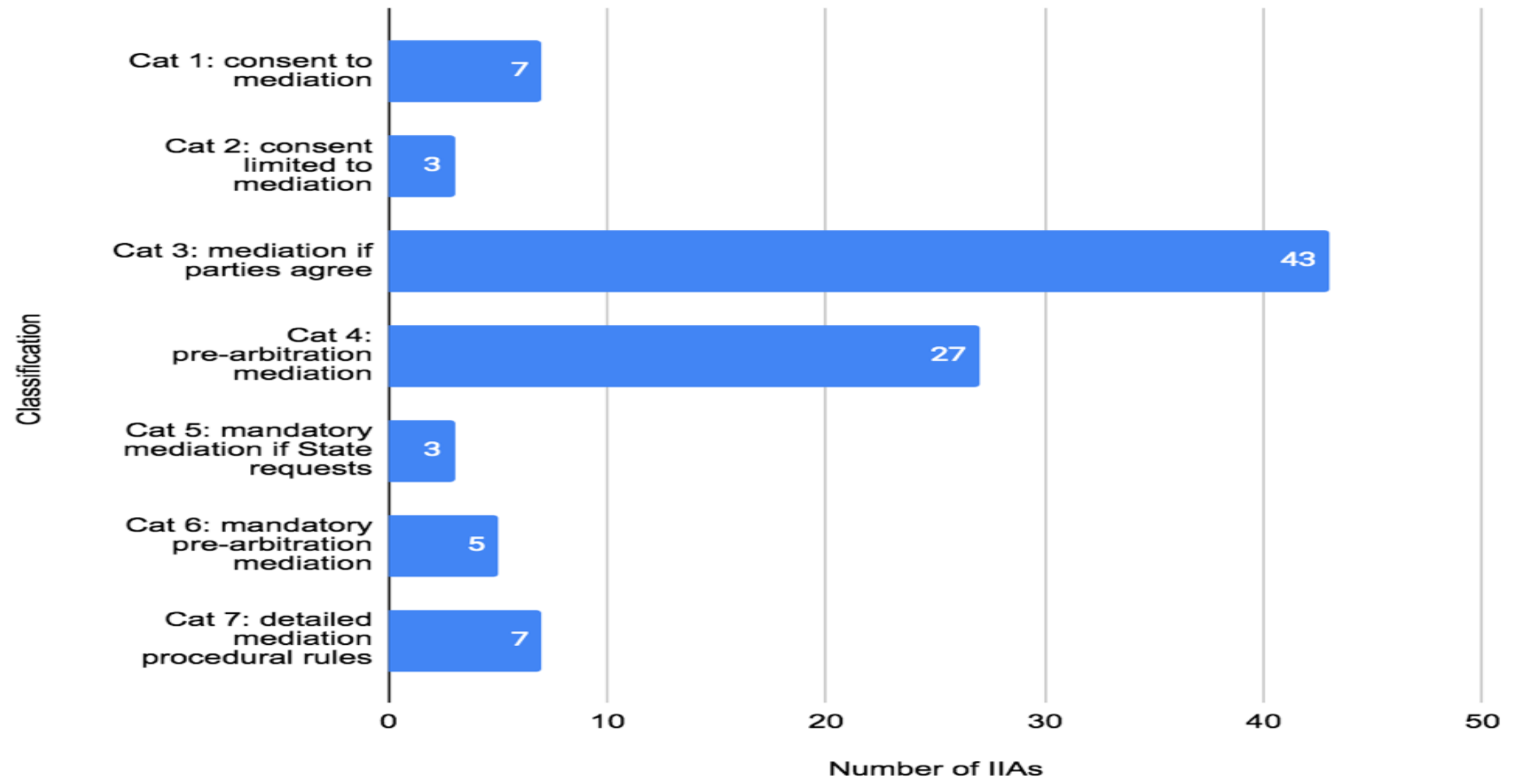
Percentage of IIAs with Investor-State Mediation Provisions by Year of Signature



Types of Conciliation Provisions



Types of Mediation Provisions

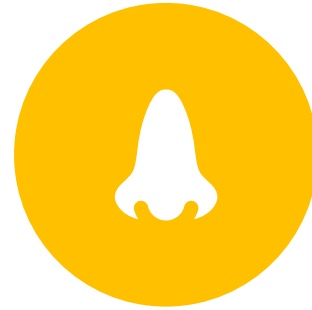




WHAT'S IN THE
TREATIES?



ARE THEY BEING
USED?

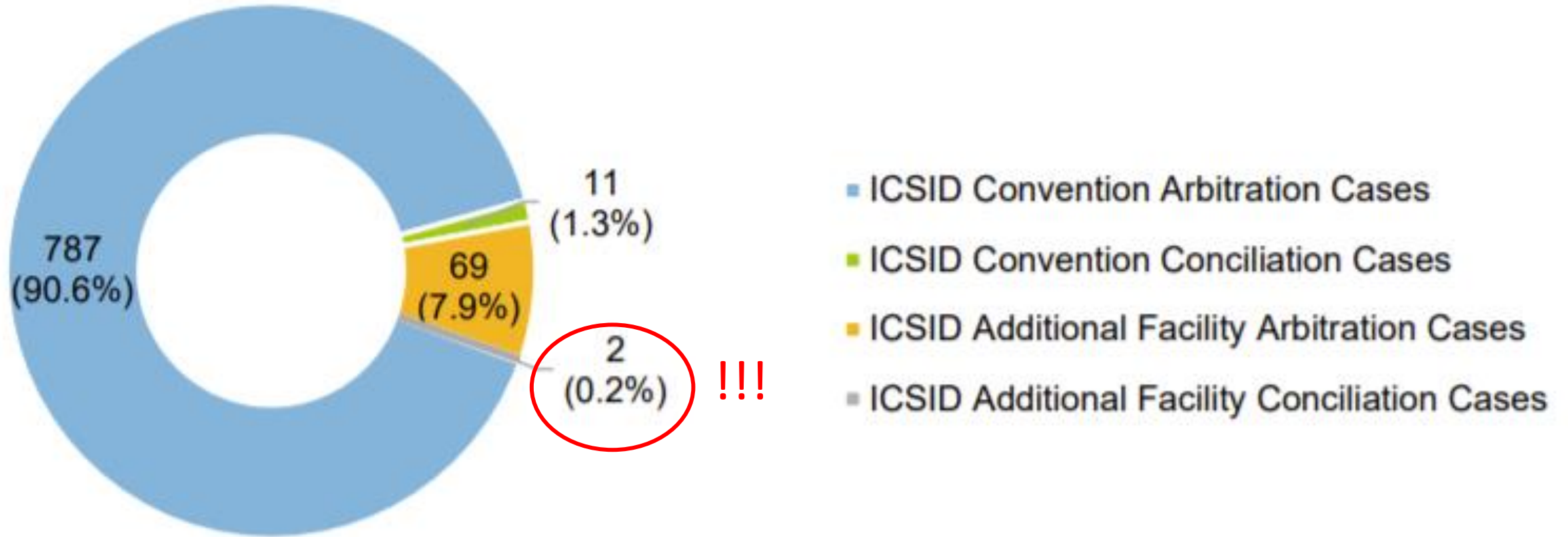


WHY ARE THEY
NOT BEING USED?



HOW CAN THIS BE
CHANGED?

Very rarely!



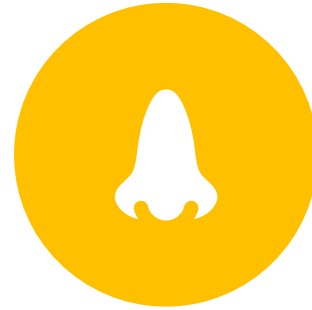
- Source: ICSID Caseload Statistics 2022



WHAT'S IN THE
TREATIES?



ARE THEY BEING
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WHY ARE THEY
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HOW CAN THIS BE
CHANGED?

Reasons for non-use

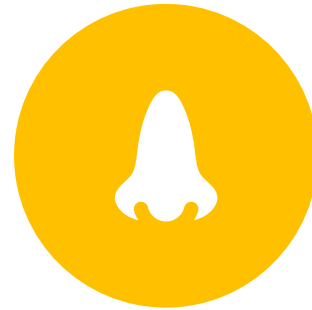
1. 70 % of IIAs do not refer to conciliation or mediation
2. The “fork” fear (in “conciliation or arbitration”)
3. Lack of familiarity by government officials or local obstacles



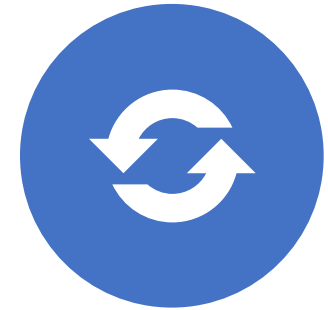
WHAT'S IN THE
TREATIES?



ARE THEY BEING
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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
 - shorten cooling off period if parties attempt conciliation/mediation (Prof Dorcas Quek proposal)

Improve Quality

4. Provide more detailed guidance on how mediation will function, stating the efficiencies to be gained
5. Consider making conciliation or mediation a mandatory pre-condition to arbitration
 - Only 7 treaties require this at present (e.g. Costa Rica-UAE BIT (2017))
6. 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

The Future?

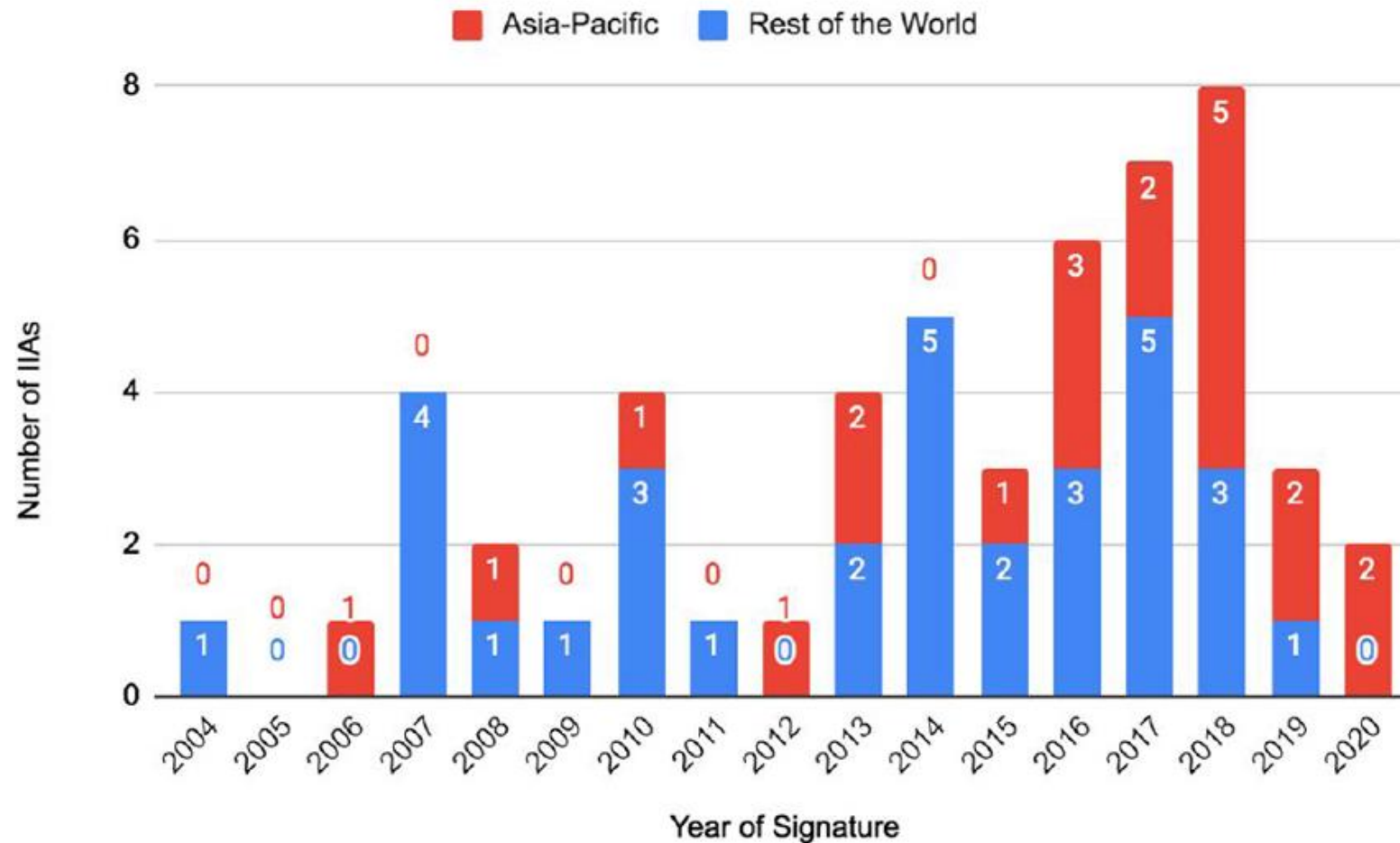


Figure 9. Signed IIAs referring to investor-State mediation by geographic origin

Thank you.