A STUDY ON THE JURISDICTION OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES PURSUANT TO ARTICLE 25 OF THE CENTRE

BY

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A dissertation submitted in fulfilment of the requirement for the degree of Master of Comparative Laws

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APRIL 2017

ABSTRACT

This study aims to determine the scope of Jurisdiction of the International Centre in the light of the provisions of the Washington Convention, in particular examine the jurisdiction of the International Centre for the settlement of investment disputes pursuant to Article 25 of the Centre, and some decisions of arbitral tribunals of the Centre. Article 25 of the Washington Convention 1965 has defined the scope of Jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) and set the outer limits of the concept of investors and investments that are protected under the Convention. The ICSID Convention's applicability is dependent upon satisfaction of the jurisdictional criteria incorporated in its Article 25, namely that: (a) the dispute arose directly out of an investment in the host state; (b) the disputing parties are ICSID Contracting States and nationals of another ICSID Contracting State; and (c) both parties consent in writing for submission of the dispute to an arbitration tribunal under the ICSID Convention. These are objective jurisdictional requirements that cannot be waived by parties' agreement, and ICSID arbitration tribunals must ensure all three requirements are satisfied before moving on to the merits of the case. However, the arbitral tribunals are still struggling to define their jurisdiction. There are several decisions of arbitral tribunals of the Centre creating doubts on its interpretation of the convention.

ملخص البحث

تهدف هذه الدراسة إلى تحديد نطاق اختصاص المركز في ضوء أحكام اتفاقية واشنطن، وعلى وجه الخصوص "دراسة عن اختصاص المركز الدولي لتسوية منازعات الاستثمار عملا بالمادة ٢٥ للمركز" ، وبعض قرارات محاكم التحكيم التابعة للمركز. وقد حددت المادة ٢٥ من اتفاقية واشنطن لعام ١٩٦٥ نطاق اختصاص المركز الدولي لتسوية منازعات الاستثمار، وحددت الحدود الخارجية لمفهوم المستثمرين والاستثمارات المحمية بموجب اتفاقية المركز. ويتوقف تطبيق اتفاقية تسوية منازعات الاستثمار على الوفاء بمعايير الاختصاص المنصوص عليها في المادة ٢٥ منها، وهي: (أ) أن النزاع نشأ مباشرة من استثمار في الدولة المضيفة؛ (ب) الأطراف المتنازعة هي دول متعاقدة مع المركز الدولي لتسوية منازعات الاستثمار ومواطني دولة متعاقدة أخرى مع المركز؛ و (ج) يوافق الطرفان كتابة على تقديم النزاع إلى محكمة تحكيم بموجب اتفاقية تسوية منازعات الاستثمار. وهذه متطلبات قضائية موضوعية لا يمكن التنازل عنها بموجب اتفاق الأطراف، ويجب على محاكم التحكيم التابعة لمركز تسوية منازعات الاستثمار أن تكفل استيفاء جميع الشروط الثلاثة قبل الانتقال إلى الأسس الموضوعية للقضية. ومع ذلك، لا تزال محاكم التحكيم تعاني في تحديد اختصاصاتها القضائية .وهناك عدة قرارات لمحاكم التحكيم التابعة للمركز تثير شكوكا بشأن تفسير المركز للاتفاقية.

APPROVAL PAGE

I certify that I have supervised and read this study and in my opinion, it confirms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

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Dean, Ahmed Ibrahim Kuliyyah of Laws

DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Sherwan Saleem Qader

Signature …… Date ……

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Affirmed by Sherwan Saleem Qader

…… ……

Signature Date

ACKNOWLEDGEMENTS

All praises to Allah (s.w.t) the Most Gracias and Most Merciful, by whose grace and blessing I am able to complete this dissertation as the requirement for my Master in Law programme.

I am deeply indebted to my supervisor, Assistant Professor Dr. Nurah Sabahiah Mohamed, whom this dissertation could not been written without her supervision. I am very thankful to her for her stimulated suggestions and encouragement that helped me in all the time of writing this dissertation.

This dissertation is dedicated to the pure spirit of my father Arif Saleem, Allah's mercy be upon him. And to my beloved Mother whom I admire her patience for missing me for a long time during this study. And also to my brothers and sisters whom I enjoyed their encourage toward my Education. I ask the Almighty Allah to reward them all in this life and in the hereafter.

Afterwards, I am appreciative of the efforts of the lectures and staff of Ahmad Ibrahim Kulliyyah of Laws International Islamic University Malaysia, for giving me permission to commence this dissertation in the first instance, to do the necessary research work and to utilise from the University facilities. I am also very grateful to the staff of library IIUM.

Last but not least, I would like to record my appreciation and indebtedness to all those who have helped me in one way or another for the completion of this study.

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CHAPTER ONE

INTRODUCTION

1.1. BACKGROUND OF STUDY

Most countries need foreign investment to achieve an active role in the development process. Foreign investment helps a host state, and particularly developing countries, contribution to the infrastructure development, training, operation of local labour, the development of local industries of the foreign investment of capital, technology, skills, experience and so on.

Countries are working to modernise investment legislation to conclude of bilateral, regional and international conventions. Furthermore, governments of developing countries are working to conclude many investment contracts with foreign investors. Despite all the guarantees provided by the state to foreign investors through their contracts or treaties with other states, or sometimes through the domestic legislation of investment, it is not enough to reassure investors and encourage them to invest; there must be a means to protect those rights in the case of a breach. Regardless of the cooperation between the host state and investors to identify those rights and obligations, a conflict might arise between the two parties. Many disputes still arise between foreign investors and host states. So, investors are seeking to get a neutral and efficient means for the settlement of investment disputes, and despite the multiplicity of means that could be used by the parties in the investment contracts for the settlement of disputes, arbitration, however, is an acceptable way for this purpose. It is an effective way to resolve investment disputes where it became natural justice in this area because the procedural guarantee for investors to resolve their disputes with

the state attractive for investment. So, arbitration has become the alternative jurisdiction for the domestic court which is instituted by the state to apply and select all the types of conflict. Also, arbitration is the means determined by both the party (the investor and host state) in preference to internal judicature.[1]

Nevertheless, resorting to the domestic court in the state to resolve the disputes is not satisfactory to the investor for fear of judicature bias for the state's interests. There is no doubt that resorting to arbitration is a useful mechanism, but many object to its effectiveness for procedural and operational difficulties because of the existence of the state as a party to the arbitration. These gaps and others pushed the "International Bank for Reconstruction and Development" (The World Bank), which is the most important international institution concerned with economic development, to forming the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) on March 18, 1965. The Convention created the International Centre for Settlement of Investment Disputes (ICSID), which has jurisdiction over legal disputes arising from investments between a contracting state and a national of another contracting state and came into force on October 14, 1966.[2] The number of signatory states to the Convention has reached 160 countries.[3]

From the outset, it should be noted that ICSID proceedings are specialised in so far as they are limited to investment disputes. The ICSID convention intentionally

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[1] Gautami S. Tondapu, "International Institutions and Dispute Settlement : The Case of ICSID," *Bond Law Review*, Vol. 22, no. 1 (2010): 81–95.
[2] Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965. United Nations Treaty Series (1966), Vol. 575, p 160.
[3] International Centre for Settlement of Investment Disputes, <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx> (Accessed 30 November, 2015)

refrains from defining the term "investment", in order to preserve flexibility. Nevertheless, ICSID's purpose is not to compete with other arbitral institutions, and it is clear that certain purely commercial disputes fall outside of ICSID's competence. It has become increasingly difficult to distinguish investment disputes from commercial disputes because the meaning of "investment" is no longer limited to the contribution of capital, but has come to include other operations such as the performance of services and the transfer of technology or know-how.[4]

The ICSID provides for the parties two different methods for the settlement of arising disputes; the parties can choose between conciliation and arbitration. Despite that, prevalence is for arbitration because the parties have the desire to reach a binding rule.

As noted, the main aim of the establishment of the ICSID is to provide a special judicial guarantee to foreign investors to promote investment in developing countries. To achieve this purpose, the convention is trying to get an equilibrium between the interests of the investor through the opportunity to resort to arbitration and to dispel fears of obeying for judicature in an ordinary state. Resorting to arbitration centres represents the best way to protect the rights of the investor against the host state and vice-versa.

Article 25 of ICSID sets forth the substantive requirements for ICSID's jurisdiction. Under Article 25:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated by the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the

[4] Georges R. Delaume, "ICSID Arbitration Proceedings", *Berkeley Journal of International Law*, Vol. 4, no. 2 (1986): 218–29, doi:10.15779/Z38T06S.

> Centre. When the parties have given their consent, no party may withdraw its consent unilaterally".[5]

In summary, the requirements for ICSID's jurisdiction are (1) a legal dispute; (2) an investment; (3) a Contracting State; (4) a national of another Contracting State; and (5) written consent. While ICSID jurisdiction extends only to disputes between Contracting States and "nationals of other Contracting States", there is one exception. If on the date of consent to jurisdiction and because of "foreign control", the parties have "agreed" to treat a local entity as a national of another Contracting State, then jurisdiction is proper.[6]

Besides express consent through an investment contract, advance consents by governments to submit disputes to ICSID are included in roughly twenty (20) the laws of investment, and ICSID is one of the major mechanisms for the settlement of investment disputes.[7]

1.2. STATEMENT OF THE PROBLEM

This research raises the problem of patterns related to resorting to the arbitration centre (The International Centre for Settlement of Investment Disputes); touching on the conditions and scope, in particular, the issues stated in Article 25 of the institutional convention of the centre. Undoubtedly, the legislator had not defined those patterns and conditions clearly in the article; therefore, the applications and interpretations by arbitral tribunals were not often in line. They sometimes expanded the Centre's jurisdiction and restricted it at other times. This comes as a result of

[5] International Centre for Settlement of Investment Disputes (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 160 (ICSID), Art 25(1).
[6] Mary L. Moreland, "Foreign Control and Agreement under ICSID Article 25 (2)(B): Standards for Claims Brought by Locally Organized Subsidiaries against Host States." Currents: Int'l Trade LJ 9 (2000): 18
[7] Ibid

inaccurate interpretations of the concepts by the arbitral tribunals in general, and two concepts in particular "legal dispute" and "investment" as they are called (jurisdiction subject matter); whether that relates to interpretations of the laws of investment or its agreements. On the other hand, topics related to personal jurisdiction have generated various and different interpretations, particularly in regard to the competence of the Centre itself. This is nothing new; the time of objections to the jurisdiction of the centre goes back to the beginning of arbitration and resorting to the centre. Rarely the arbitration is processed without exposure to appeals against the Centre's jurisdiction. The presence of objections to the sentences handed down by the arbitration bodies of the Centre is not limited, on the one hand; on the other, it adversely affects the confidence of states in the arbitration of the Centre; especially, the countries that joined the agreement on referring to it or of those willing to join.

This study examines the jurisdiction of the Centre and its scope in the light of the texts of the Convention, specifically Article 25. In addition, it addresses some of the provisions of the arbitration issued by the arbitration bodies of the Centre related to the scope of the pleas against the Centre's jurisdiction.

1.3. OBJECTIVES AND AIMS OF THE STUDY

This study seeks to determine the scope of jurisdiction of the Centre in light of the provisions of the Washington Convention, and in particular, Article 25, and some decisions of the Arbitral Tribunals of the Centre upon the jurisdiction. Specifically, the study is conducted to fulfil the following objectives:

1. To examine the meaning of jurisdiction of the ICSID, and the elements which are requirements of the jurisdiction of ICSID according to Article 25 of the Convention.

2. To clarify the requirements of jurisdiction on the subject matter which are the "legal dispute" and "investment", in accordance with investment laws of some countries.
3. To identify the meaning of Contracting State (or any constituent subdivision or agency of a Contracting State) and a national of another Contracting State (natural person and juridical person), according to the ICSID.
4. To explain the significance of consent to jurisdiction for ICSID's jurisdiction, such as a study of what is an effective role in dispute settlement, and to study the different forms in which consent to jurisdiction may be given step by step according to the rules of the Centre or according to the agreement between the parties mentioned in the contract.

1.4. THE RESEARCH QUESTIONS

1. What is the meaning of jurisdiction of ICSID? What are the requirements does a tribunal have to analyse in order to accomplish the jurisdiction of the Centre over a particular dispute according to Article 25 of the Convention?
2. What are the requirements of the jurisdiction *ratione materiae* in the ICSID Convention? Does the convention define the terms legal dispute and investment which are essential in the Convention?
3. What is the requirement of the personal jurisdiction according to Article 25 of the ICSID Convention? Do the parties of the dispute determine in the Convention what is related to Article 25?
4. What type of consent must be submitted to the Centre by the parties to the dispute? Does one of the parties have the right to withdraw the consent unilaterally?

1.5. HYPOTHESES

This research will analyse the underlying idea of the jurisdiction of the ICSID by discussing the following hypotheses:

1. The Convention does not define the terms “legal dispute” and “investment”; it left these definitions for the parties so that the Centre can expand its scope.
2. The ICSID Convention imposes limitations on the nature of the dispute parties. Article 25(1) requires that one of the parties must be a contracting state and a non-contracting state could not be a party to proceedings before ICSID.
3. The parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
4. Bilateral investment treaties (BITs) impact on the jurisdiction of ICSID and encourage the parties to resort to this Centre with regards to the settlement of investment disputes.

1.6. LITERATURE REVIEW

This study relates primarily to the jurisdiction of ICSID, specifically the application of Article 25 of the ICSID Convention. These include the literature on the mechanism of settlement disputes according to rules of this centre.

Numerous resources regarding international arbitration, international commercial arbitration and arbitration in Islamic law has been written, but many of their discussions include only some aspects of arbitration. Only a few references analyse the jurisdiction of ICSID, which is the main focus of the present study.

Limited literature exists concerning the jurisdiction of ICSID under the Article 25 of the Convention. These discussions are non-comprehensive because many of them concentrate on one aspect of arbitration.

Some of the indispensable and available literature on the subject is described as follows:

In closely related literature on the ICSID Convention and a more comprehensive book is entitled "the ICSID Convention: a commentary" written by Schreuer, where he examined all aspects of the ICSID convention over widely. The author explained the Convention article-by-article. Also, this book covers the preparatory working to the Convention. It consists of ten chapters. Although those chapters are meant to be descriptive in nature, they are analytic especially the second chapter which is relevant to this study. It also examines various collections of regulations and rules implemented by the Centre's Administration Council, model clauses publicised by the Centre, national legislation relevant to the Convention and treaty practice. Therefore, this book is one of the main references for this research.[8]

Another related literature on the ICSID Convention is written by Dr K. V. S. K. Nathan, in his important work, the law of the "International Centre for Settlement of Investment Disputes". This book focuses thoroughly on the workings of the International Centre for The Settlement of Investment Disputes (ICSID). ICSID was established by the World Bank through the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States also known as the Washington Convention (the "ICSID Convention"). As a reference, this book is relevant to exploring and providing valuable information on international arbitration

[8] Christoph H. Schreuer, *The ICSID Convention: a commentary*, (United States of America, Cambridge University Press, 2011).

of investment disputes. By inspecting the various issues explored in the book, it will enable us to identify problems encountered in international arbitration, i.e. "investment disputes between states and nationals of other states".

Notably, the author of the book recognised that international arbitration proceedings not only enables Western legal and judicial values into the jurisprudence of the developing countries but they also provide the developing countries with the opportunities to participate in the development of rules of international economic law which will inevitably shape their political and economic futures. This book tries to portray a role for ICSID in this venture. It can be safely deduced that the book is more of an exposition of the role played by ICSID. In contrast, this dissertation looks at the jurisdiction of ICSID and their problems according to the rules of the ICSID Convention.[9]

Another reference regarding this research is "ICSID Convention, Regulations and Rules" by the International Centre for Settlement of Investment Disputes. This book elaborated on financial regulations and the administrative; rules of procedure for conciliation proceedings (conciliation rules); rules of procedure for the institution of conciliation and arbitration proceeding (institution rules); and rules of procedure for arbitration proceedings (arbitration rules). On 29 September, 2002, the administrative council of the Centre approved amendments to the ICSID rules and regulations. on January 1, 2003, these amendments came into influence. The reference included both regulations all contents and rules that related of the components in this centre. this book which only discussed the establishment of the rules without addressing the details of the rules in regulating the jurisdiction of ICSID, which is the primary emphasis of the present study. However, this study will benefit from the regulation of

[9] Nathan, *ICSID Convention: The Law of the International Centre for Settlement of Investment Disputes*.

the rules of the centre and the process of working step by step that may be discussed in the research.[10]

John Collier, and Vaughan Lowe's book entitled "The Settlement of Disputes in International Law Institutions and Procedures" provides an analysis of the ways to settle disputes in international law and describing some conflicts, disputes and the law. To achieve this aim, the book explores both the fields of arbitration and public international law. In this respect, the book consists of two parts. The first part highlights the methods of settlement of disputes such as negotiation, mediation, conciliation and arbitration. Also, it explains institutions like International Commercial Arbitration, ICSID...etc. The second part contains procedures such as the arbitral process. The first part of this book is related to our study because our research is focused on the jurisdiction of the ICSID and requirements as well as some problems that arise between the parties concerning jurisdiction. Therefore, this book may be a useful reference for this study.[11]

Campbell MacLachlan, Laurence Shore, and Matthew Weiniger's book titled "International Investment Arbitration Substantive Principle" provides an analysis of common features of multilateral and bilateral investment treaties which may form the legal basis of an arbitration claim in the light of reported jurisprudence. To achieve this aim, the book explores both the fields of arbitration and public international law. In this respect, the book has three parts. The first part highlights the basic features of investment treaties, and an insightful appraisal of four fundamental issues in the settlement of investment disputes via arbitration, i.e. dispute settlement provisions, transparency, the legal nature of the rights at issue, and interpretation of BITs. The

[10] International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules* (International Centre for Settlement of Investment Disputes, 2006).
[11] John Collier, and Vaughan Lowe, titled "*The Settlement of Disputes in International Law*" *Institutions and Procedures*,(United States: Oxford University Press, 1999)

second part is the ambit of protection which addresses three main theoretical and practical problems: parallel proceedings, the nationality condition, and the notion of investment. The third part is substantive rights, i.e. treatment of investors, expropriation and compensation.[12]

Akyuz, A. Sule, in his article entitled "The Jurisdiction of ICSID: The Application of the Article 25 of Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" focuses on the jurisdiction of ICSID. Furthermore, the author indicated the term of consent and some cases relating to jurisdiction. The author discusses not only the consent of the parties to choose the ICSID to resolve their disputes but also focuses on Jurisdiction Ratione Materiae and Jurisdiction Ratione Personae. While the author described aspects of jurisdiction, he did not enter into much detail.[13]

Another article related to this study is "Foreign Control and Agreement under ICSID Article 25(2)(B): Standards for Claims Brought by Locally Organised Subsidiaries Against Host States" by Mary L. Moreland, who discussed the ICSID'S jurisdictional requirements and Article 25(2)(b)'s exception to diversity of citizenship.

Besides express consent through an investment contract, advance consents by governments to submit disputes to ICSID are included in roughly twenty (20) investment laws, and ICSID is one of the master mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties, namely (1) the Energy Charter; (2) the North American Free Trade Agreement; (3) the Colonia Investment Protocol of Mercosur; and (4) the Cartagena Free Trade Agreement. With the advent of free trade and the destruction of barriers to foreign

[12]MacLachlan, Shore, and Weiniger, *International Investment Arbitration: Substantive Principles*.
[13] A. Sule Akyuz, "the Jurisdiction of ICSID: The Application of the Article 25 of Convention on the Settlement of Investment Disputes Between States and Nationals of Other States." (2003).

investment, the resolution of investment disputes under ICSID will become more common. The current study differs from this article in some aspects because our study concentrates on the jurisdiction of ICSID, and international investment treaties.[14]

Further, "ICSID'S Emerging Jurisprudence: The Scope of ICSID'S Jurisdiction" by William Rand, Robert N. Horick, and Paul Friedland explores three criteria for determining ICSID's jurisdiction over disputes between a contracting state and a foreign investor: 1) that the case must be a legal dispute arising out of an investment, 2) that the parties to the dispute must be a Contracting State or its designated constituent or agent and a national of another Contracting State, and 3) that the parties must have consented to ICSID arbitration in writing. ICSID tribunals have interpreted all three criteria broadly and flexibly. ICSID's jurisdiction has been liberally asserted in questions regarding all three areas on the conviction that expanded ICSID arbitration benefits host countries and investors by providing a neutral forum, free of the laws of either party, to reliably adjudicate international investment disputes.[15]

Furthermore, Julian Davis Mortenson, in his article "The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law" presents background about the meaning of investment. He discussed and suggested three reasons for tribunals respect a state's decision to extend ICSID protection to a given category of the enterprise. First, the historical approach retains policy flexibility in a pluralist world occupied by diverse state actors with shifting policy preferences. Second, it delegates economic decisions to political entities that generally have a

[14] Mary L. Moreland, "Foreign Control and Agreement under ICSID Article 25 (2)(B): Standards for Claims Brought by Locally Organized Subsidiaries against Host States" Currents: Int'l Trade LJ 9 (2000): 18.

[15] William Rand, Robert N. Horick, and Paul Friedland, "ICSID'S EMERGING JURISPRUDENCE: THE SCOPE OF ICSID'S JURISDICTION", *New York University Journal of International Law and Politics*, vol. 19, no. 1 (1986): 33.

comparative advantage in both expertise and legitimacy. Third, it recognises that the operative legal term is meant to facilitate state action, not to restrain state autonomy. This article, therefore, argues that international tribunals should respect the ICSID framework as it was originally established. The current study differs from this article in the content because our study emphasises on the jurisdiction of ICSID, but the article focused on some points that have been mentioned above.[16]

In conclusion, even though the study on arbitration and dispute resolution has mushroomed during the past years, there has been a little study in the field of investment. Therefore, building on earlier research, this research studies the need for sustainable mechanisms for dispute resolution in investment in the framework of the ICSID, with particular reference to explain and elaborate some aspects that relate to the jurisdiction of ICSID. This research seeks to investigate this process that becomes the settlement of disputes between the foreign investors and host states through the Jurisdiction of the Centre.

1.7. SCOPE AND LIMITATIONS OF THE STUDY

This work will attempt to examine the Jurisdiction of ICSID: Application of Article 25 of the Convention. This research analyses all aspects under the Jurisdiction of ICSID as well as all terms and conditions that are required. The study will be based on only Article 25 that handles the substantive questions of jurisdiction. Article 25 contains requirements associated with the type of the dispute "ratione materiae" and to the parties "ratione personae". In addition, the parties will need to have given their consent. The requirements associated with the type of the dispute are which it must

[16] Julian Davis Mortenson, "The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law'(2010)." Harvard International Law Journal 51: 257.

arise directly from an investment which it must be of any legal nature. Those associated with the parties identify that one part must be considered a Contracting State and the other a national of another Contracting State. Also, this study will concentrate on the issue of the jurisdiction of ICSID for dispute settlement.

The study will mainly consider the problems that affect the legal framework of Jurisdiction of ICSID within Article 25. Furthermore, this work is not limited by the certain country or particular territory, but it is a discussion on that matter generally.

After all, Articles 28(3) and 36(3) are regulated proceedings for the limitation of the jurisdiction of Centre, the activities and relationships with Secretary-General power, and in Articles 32 and 41 which make the arbitral tribunal the judges of their own competence or the conciliation commission, do not necessarily fall within the scope of this dissertation. Nevertheless, ICSID's purpose is not to compete with other arbitral institutions, and it is clear that certain purely commercial disputes fall outside of ICSID’s competence.

1.8. RESEARCH METHODOLOGY

In conducting this study, a doctrinal legal research is adopted. It is essentially a library-based study, which means that the materials needed by a researcher may be available in libraries, archives and other databases.

This legal study analysis usually relies on qualitative research methods that involve the utilisation of study materials, which may be the primary sources in the form of information are basically acquired from laws that are relevant for this study as well as the case law, and the secondary sources in the form of textbooks, research papers, journals, encyclopaedias and online based materials. Thus, this study greatly depends on primary and secondary literature. Finally, so as to complete the present

study, the researcher will be using the library facilities, including print and online materials.