الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
يونيرسيتي إسلام انتارابغسا ملايسيا

# THE EXCLUSIVE ECONOMIC ZONE OF MALAYSIA: A LEGAL ANALYSIS

BY

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

Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia

APRIL 2008

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2008

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# ABSTRACT

The international law of the sea is a huge branch of public international law. The last century has brought about many developments in the law of the sea, in particular the adoption of the United Nations Conventions on the Law of the Sea 1982 (UNCLOS). The Exclusive Economic Zone is a new legal regime created by the Convention. It is a maritime zone having a maximum limit of 200 nautical miles where the coastal state has sovereign rights and jurisdiction over its natural resources. This study attempts to analyze how the EEZ regime of Malaysia is regulated and how the laws are being enforced. The main legal issues are whether the EEZ legislation of Malaysia is in compliance with the principles of the UNCLOS 1982 and how marine pollution is being tackled by the Malaysian government. The main strategy used by Malaysia in combating marine pollution is by adopting international conventions aimed to control marine pollution in the EEZ. This study evaluates the legislation of Malaysia relating to her EEZ. It also examines the efficiency and effectiveness of current maritime enforcement agencies of Malaysia. It is expected that the present study assist in facilitating improvement of the legal regime of the EEZ and the enforcement of laws for the better future of the EEZ of Malaysia.

# ملخص البحث

يشكل قانون البحار جزءا كبيرا من القانون الدولي وقد جلب القرن المنصرم تغيرات وتطورات كثيرة في هذا القانون وخصوصا اعتماد قرارات اجتماع الأمم المتحدة عن قانون البحار لعام 1982. وتعد المنطقة الاقتصادية الحصرية نظاما قانونيا جديدا أوجده هذا الاجتماع. ولهذه المنطقة البحرية حدود قصوى تبلغ مئتي ميل بحري حيث تتمتع الدولة الساحلية بحقوق وصلاحيات سيادية على الموارد الطبيعية. تحاول هذه الدراسة تحليل كيفية تنظيم المنطقة الاقتصادية الحصرية وكيفية تنفيذ قوانينها في ماليزيا مع التركيز على دراسة مدى توافق هذه القوانين مع مقررات مؤتمر الأمم المتحدة لعام 1982 ومع التركيز على كيفية تعامل الحكومة الماليزية مع التلوث البحري. كما تقيم هذه الدراسة التشريعات الماليزية المتعلقة بمنطقتها الحصرية وتتفحص كفاءة وفعالية الهيئات البحرية التنفيذية الحالية في ماليزيا. ومن المتوقع أن تفيد هذه الدراسة في تمهيد الطريق لتحسين التشريعات وتطبيقها حول هذه المنطقة الاقتصادية مما يعد بمستقبل أفضل لهذه المنطقة في ماليزيا.

# APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms 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.

……
Abdul Ghafur Hamid
Supervisor

I certify that I have read this study and that in my opinion it conforms 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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This dissertation was submitted to the Department of Private Law, Ahmad Ibrahim Kulliyyah of Laws and is accepted as a partial fulfillment of the requirements for the degree of Master of Comparative Laws.

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……
Zaleha Kamaruddin
Dean,
Ahmad Ibrahim Kulliyyah 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.

Norazlina Haji Abdul Jami

Signature …….. Date …….

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Signature Date

# ACKNOWLEDGEMENTS

I thank Allah S.W.T. for His Blessings and Mercy.

I am deeply grateful to my supervisor, Assoc. Prof. Dr. Abdul Ghafur Hamid, who graciously accorded me in his continuous guidance and invaluable assistance in the writing of this dissertation. This work would never have been accomplished without his advice and support.

I thank the entire staff of the IIUM Library, the UM Law Library and the MIMA Library for their help. I also would like to thank all the Malaysian government officers and staff for their assistance and cooperation.

I wish to express my thanks to the entire AIKOL postgraduate unit officers and staff.

I am also indebted to Jabatan Pengajian Islam Brunei and the High Commission of Brunei Darussalam in Kuala Lumpur, for their financial assistance and moral support in the course of my study in the IIUM.

Finally, my deepest appreciation and indebtedness go to my beloved mother who has a strong belief in me and gives me her unconditional love and support. The same goes to all my family and my love. May Allah bless all of them, Ameen.

# LIST OF CASES

# LIST OF STATUTES

Continental Shelf Act 1966 (Act 83) (Revised 1972)
Emergency (Essential Powers) Ordinance, No.7 1969
Environmental Quality Act 1994 (Act 127)
Exclusive Economic Zone Act 1984 (Act 311)
Fisheries Act 1985 (Act 317) (Amendment 1993)
Maritime Enforcement Agency Act 2004 (Act 633)
Merchant Shipping (Oil Pollution) Act 1994 (Act 515) (Amendment 2005)
Merchant Shipping Ordinance 1952 (Federation of Malaya Ordinance No.70 of 1952)
Petroleum Mining Act 1966 (Act 95)
Statute of the International Court of Justice

# LIST OF INTERNATIONAL CONVENTIONS

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989.
Geneva Conventions on the Continental Shelf 1958.
Geneva Conventions on the Fishing and the Conservation of Living Resources of the Geneva Conventions on the High Seas and 1958.
Geneva Conventions on the Territorial Sea and Contiguous Zone 1958.
International Convention on Civil Liability of Oil Pollution Damage 1992.
International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992.
International Convention for the Prevention of Pollution from Ships 1973 (MARPOL 73/78).
International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 1990.
United Nations Conventions on the Law of the Sea 1982.

# CHAPTER ONE

# INTRODUCTION

## 1.1 INTRODUCTION

The first chapter is intended to give a brief introduction on the concept of the international law of the sea. The seas which comprise about seventy percent of the Earth's surface, are the largest and most prominent feature on Earth. Since pre-historic times, the seas have been widely used as a means of transportation, navigation, trade, security and a vital source of food. The increased significance of the uses of the sea has somewhat created an enormous evolution in the development of the law of the sea. This branch of law has brought huge impact on the expansion of modern customary international law, from the fifteenth century until the post-World War II.

The evolution of the law of the sea began with the classical concept of the freedom of the seas, and proceeded with the emergence of the European powers which have been so aggressive in expanding their maritime territories. After the World War II, most of the coastal states of the world attained their political independence, and thus sought for their own sovereignty over the maritime space. Since then, many new areas of concern in the maritime space have been established, such as the continental shelf, the contiguous zone, the exclusive fishery zone and the exclusive economic zone (EEZ).

In the present century, the United Nations has played a great role in enhancing its progress, after many consecutive and prolonged conferences and discussions amongst the nations of the world, by eventually establishing a single and

comprehensive convention, known as the United Nations Convention on the Laws of the Sea 1982 (the UNCLOS). Many of the provisions of the Convention are a reflection of the State practice, which have crystallized into customary international law. It provides an ideal forum for all the participating States in which the concepts of recent origin of the EEZ and other maritime zones have been so much developed ever since.

## 1.2 HISTORICAL DEVELOPMENT OF THE LAW OF THE SEA

### 1.2.1 Freedom of the Seas Doctrine

History of the law of the sea is, to a large extent, the story of the development of the freedom of the seas doctrine and the vicissitudes through which it has passed through the centuries.[1] During the Middle Ages, freedom of navigation on the high seas was curtailed by maritime powers that asserted territorial sovereignty over various bodies of water. Challenges by other countries to such claims increased markedly during the sixteenth and seventeenth centuries, largely because of the growth in world trade following the discovery, exploration, and colonization of new lands.

The doctrine of the freedom of the seas means that seas are open to all; and are not subjected to sovereignty of any State. This concept is believed to have its first legal basis in international law by Hugo Grotius, a Dutch jurist, when he wrote *Mare Liberum* (free seas) published in 1609.[2] His work earned him the title of 'the founder or the father of international law'.[3] In making his doctrine as a Dutch advocate, in essence, he was actually serving the interest of his client, the Dutch East India

[1] Anand R. P., "Freedom of the Seas: Past, Present and Future", in Caminos, H, (ed.), *Law of the Sea* (Aldershot, England; Burlington, VT: Ashgate/Dartmouth Publishing Company, 2001) at 215.
[2] Caminos, H., *Law of the Sea*, (Aldershot, England; Burlington, VT: Dartmouth Publishing Company, 2001) at xiii.
[3] Ibid.

Company, and defending his country's right against the commercial and political monopolies led by the Spanish and the Portuguese.[4] On the basis of Roman legal principle of *res nullius*, Grotius contended that the seas could not constitute property as they could not be occupied like that of land and that they are therefore free to all nations and subject to none. This principle applied to virtually all parts of the sea, namely the high seas, and that beyond the narrow belt of water along the coastlines, called the territorial sea, which was under the sovereignty of the coastal State. This legal structure responded to the interests of the great maritime nations at that time (such as the Great Britain) in traditional uses of the sea-navigation and fishing. This particular principle was clearly accepted under the Roman law and had been reduced to a legal formula according to which the sea is "*commune omnium*", that is, common property of all.[5]

In the view of the great maritime European powers, the freedom of the seas meant essentially non-regulation and *laissez-faire* which was their utmost interests especially in commercial prosperity and free trade.[6] The concept was obviously used by them to threaten small States particularly the African and Asian States[7] and to get benefits from them or to subjugate them.[8] It was therefore more useful for them to have open and free seas in order to exploit the vast unexplored areas of the world which no one nation could reach alone.

In the seventeenth century a debate ensued between those advocating freedom of navigation and the right to trade and those who favoured coastal State jurisdiction

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[4] Brown, E.D., *The International Law of the Sea: Introductory Manual*, (Aldershot, England: Dartmouth Publishing Company, 1994) vol. 1, 7.
[5] Anand, n.1, 262.
[6] Ibid.
[7] It is believed that the Asian countries had long traditions of free navigation and trade in the Indian Ocean from Roman times and even earlier. They maintained the freedom of the seas for centuries for peaceful commercial relations and adapted to the use of the sea as a means of communications. Unfortunately this was ignored by the Western legal writers.
[8] Anand, n.1, 262.

over sea areas adjacent to its coast.[9] These contending positions are exemplified by that of Hugo Grotius' famous chapter *Mare Liberum* and the English John Selden's *Mare Clausum* ('closed sea') published in 1635.[10] The consequence of this debate was the eventual emergence of two key principles in the law of the sea that are, the state sovereignty over the territorial sea and freedom of navigation on the high seas.

Until the beginning of the nineteenth century, the concept of freedom of the seas was firmly established as a fundamental principle of international law. The two most important freedoms were the freedom of fishing and freedom of navigation. It came to be revived under the patronage of Great Britain, which became the greatest maritime power.[11]

### 1.2.2 The Concept of the Territorial Sea

The idea that a coastal State could exercise some authority beyond its land territory in the adjacent seas is thought to pre-date the concept of freedom of the seas. According to some authors, this idea took root around the fourteenth century, and when the classical Roman law indicated the growth of belief that the Emperor or the King possessed some kind of inchoate property rights in the sea adjacent to the territories of the same. In 1493, an early division of the oceans was agreed upon between Spain and Portugal. According to the *Papal Bull,* all the oceans to the east of Meridian of longitude drawn through Brazil were Portuguese and those to the west remained Spanish.[12] Similarly early efforts to assert national sovereignty over offshore areas included the England's proclamation on 1 March 1604 of the 'King's Chambers'

[9] Ibid.
[10] Ibid.
[11] Anand, n.1 at 267.
[12] Furness, S., (ed.), *Developments in the Technical Determination of Maritime space: Charts, Datums, Baselines, Maritime Zones and Limits,* (England: International Boundaries Research Unit, Department of Geography, University of Durham, 2001) vol. III no.3, at 1.

which enclosed the coastal waters of England between some 27 headlands and the claim of Gustavus Adolphus of Sweden to tolls for non-Baltic State vessels to trade within the Baltic.[13]

In a work published in 1702, the Dutch jurist Cornelius Van Bynkershoek propounded the doctrine in his maxim, '*potestatem terrae finiri*'[14] that the power of the territorial sovereign extended to vessels within the range of cannon mounted on the shore. Since then, the principle applied was that waters adjoining the shores of a country was not under the term 'high seas', but under the territorial sovereignty of the contiguous state. Thus, the canon-shot rule emerged, a belt over which cannon could range if they were placed along the whole seaboard. In terms of distance in numbers, the figure of one marine league or three nautical miles[15] is generally associated with that rule.[16] At the later part of eighteenth century, the canon-shot rule and the three-mile limit were generally regarded as synonymous in the practice of states supporting a three-mile rule, and it became generally accepted to be the width of the territorial sea.

Then after the Second World War, the world events set the stage for decolonization of most European colonies. In this period, most States from Asian and African continents as well as from the Latin American States- the so-called 'Third World'- had achieved their political independence, sought numerous claims to extend

[13] Ibid.
[14] Ngantcha, F, *The Right of Innocent Passage and the Evolution of the International Law of the Sea the Current Regime of 'Free Navigation' in Coastal Waters of Third States*, (London: Pinter Publishers, 1990) at 15.
[15] The nautical mile was developed during the age of sailing and became the international system for measuring the ocean (nautical) distances. It is defined as one minute (1`) of latitude or 1.15 miles (a degree of latitude is approximately 69 miles; a minute of latitude is 1/60th of that). That makes a nautical mile about 1,852 metres (6,076 feet) in length or 18% longer than a statute mile, the measurement commonly used in the English metric system (5,280 feet or 1,609 metres). See http://www.geography.about.com/library/misc/ucees.htm
[16] Ngantcha, n.14.

their authority for a number of purposes, particularly resources control over vast marine areas off their coasts.

### 1.2.3 Divergent Claims over the Seas

When European powers collapsed after World War II, there emerged numerous independent Asian and African States. Due to the more complex interests they got over the seas adjacent to their coasts, these States stood up seeking greater claims over their maritime space. The traditional three-mile rule for the territorial sea was then gradually abandoned as the world viewed more significant uses of the sea.[17]

The Latin American States were among the first nations to claim unwarranted maritime territories.[18] They prompted the excessive and extensive claims over parts of the sea adjacent to their coasts. They had a great interest in the seabed areas where sea farming could be undertaken and natural resources such as crude oil, natural gas were abundant.[19] Certainly these resources could bring them huge economic value before the technologically advanced States preceded them in utilizing the resources for their own national interests and without their consent. Thus these Latin American States thought that there was a need to re-structure the 'Grotian' concept of freedom of the seas.

The first Latin American State that brought such an action was Peru in 1917,[20] then Colombia in 1919,[21] and in 1923.[22] In 1930, the Council of the League of Nations

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[17] Parkinson, F, "The Latin American Contribution to the Law of the Sea", in Butler, W.E. (ed.), *The Law of the Sea and International shipping, Anglo-Soviet Post-UNCLOS Perspective* (New York: Oceana Publications Inc., 1985) 139.
[18] Ibid.
[19] See Osieke, E., "The Contribution of State from the Third World to the Development of the Law on the Continental Shelf and the Concept of the Economic Zone", [1975] IJIL vol.15, 311.
[20] Peru's delegate presented a memorandum to the Pan-American Union seeking the right to take steps to prevent belligerent acts off their coasts.
[21] It passed a law concerning deposits of hydrocarbons, claiming the right to exploit deposits situated under the waters of her territorial seas

convened the Hague Codification Conference on the progressive codification of international law, but 42 nations represented reached no agreement on a standard limit of the territorial sea and contiguous zone.[23] The effort to provide a treaty basis for this particular significant aspect of the law of the sea was unsuccessful as the conference was unable to reach agreement on a binding instrument. Then no fewer than five Latin American States expressed themselves in favour of a minimum of a six-mile territorial sea, to be applied globally. In the years between 1932 and 1942, the six-mile territorial limits were declared by Uruguay, Colombia, Iran, Cuba, Chile, Brazil, Greece and Italy. A nine-mile limit was declared by Mexico in 1944 and twelve-mile limits were proclaimed by Guatemala in 1940 and by Venezuela in 1941.[24]

Territorial sea limits were then agreed to six miles by Yugoslavia in 1948, and extended to twelve miles by Ecuador in 1950, and to 200 miles by El Salvador, also in 1950. Five years later, the Santiago Declaration of 1952[25] issued by Chile, Ecuador and Peru was to discuss the maritime resources of the South Pacific in which it proclaimed the possession of sole sovereignty and jurisdiction over the sea adjacent to the coast of each of the country and extending not less than 200 nautical miles from the said coast.[26]

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[22] It passed a law by which it intended to extend the territorial se from three to twelve nautical miles for the purposes of exploiting both hydrocarbons and off-shore fisheries

[23] Degenhardt, H.W., Day, A.J. (gen. ed.), *Maritime Affairs: A World Handbook. A Reference Guide to Maritime Organizations, Conventions and Disputes and to the International Politics of the Sea* (England: Keesing's Reference Publication, 1985) 2.

[24] Parkinson, n.17, 141. "The Declaration of Panama", adopted in 1939 but abandoned a year later, provided for the establishment of a protective belt encircling the American continent, up to between 300 and 1,500 miles from the coast to cover the waters adjacent to the American countries.

[25]"Declaration of the Maritime Zone" (New York: United Nations Legislative Series, United Nations, 1957) 723-4.

[26]Nandan, S. N., "The Exclusive Economic Zone: A Historical Perspective", (http://www.fao.org/docrep/s5280T/s5280t0p.htm viewed on 6 February 2006). The Santiago Declaration reflects the main driving force behind it which was the desire of those states to develop the resources of their coastal waters.

Then, in 1970, the Montevideo[27] and Lima[28] Declarations were held declaring sovereignty over waters within a 200-mile limit by nine Latin American States: Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru and Uruguay. By 1971, a majority of Latin American States had accepted a generally defined concept of resource jurisdiction over a huge extended coastal area.

The Latin American States, by and large, tended to take the view that the traditional principle of the freedom of the seas was inequitable because it would be unfair to enable the technologically advanced countries to dominate the ocean and to benefit from unimpeded access to offshore areas. They went even further by laying their claims on the seas adjacent to the coasts up to a distance of 200 nautical miles.[29]

It is geographically disadvantageous to North America that the Pacific coast of Latin America drops abruptly into the ocean, depriving countries with such coastlines as Chile and Peru of all features but a very narrow shelf, while the Atlantic and Caribbean coast countries are endowed with a broad shelf. [30] This irregular geographical relief was also contributed to such different claims made by the Latin American States.

Now it can be seen that most claims that the Latin Americans made were over maritime waters. Earlier, for the United States of America, the "Truman Proclamations" were made in 1945 by President Truman of the United States, concerning mainly on the continental shelf and the utilization and conservation of natural resources over the shelf.[31] Several Arab States and Emirates also made a

[27] The Montevideo Declaration on the Law of the Sea of 8 May 1970.
[28] The Declaration of Latin American States on the Law of the Sea (The Lima Declarations) of 8 August 1970.
[29] Parkinson, n.17, 144.
[30] Ibid.
[31] See Nandan, n.26.

succession of unilateral declarations in 1949.[32] These declarations proclaimed sovereignty and jurisdiction particularly over the petroleum resources on the continental shelf.

As far as the European maritime claims are concerned, they were not as extensive as those in Latin America. However, there were various attempts claiming jurisdiction over living resources beyond the 3 nautical-mile territorial sea.[33] In 1948, the Iceland passed its law to extend its 'fishery jurisdiction' over the continental shelf areas.[34] In 1952, it proclaimed Fishery Regulations which provided for a four nautical-mile fishery zone and prohibited all foreign fishing therein. Norway also made a method for delimiting its fishery zone and the baselines based on the Baseline Decree of 1935, which was contested by the United Kingdom in the *Fisheries Case*.[35]

A Korean Proclamation of 18 January 1952 took a similar approach with the Latin American claim.[36] In this proclamation, the Korean Government claimed sovereignty over the shelf and the seas adjacent to the coasts in order to protect, preserve and utilize their natural resources.

It seems obvious that, rooted in economic interests, the claim of national sovereignty and exclusive jurisdiction over the submarine areas and the superjacent waters was a matter of increasing concern amongst the coastal States. By the time just before the UNCLOS I came into existence, many of them have established successfully their standard maritime claims of 200 nautical miles.

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[32] Ibid. Those Arab States and Emirates are: Saudi Arabia, Bahrain, Qatar, Abu Dhabi, Kuwait, Dubai, Sharjah, Ras al Khaimah, Umm al-Qaiwan, and Ajman.
[33] Attard, D., *The Exclusive Economic Zone in International Law* (London: Oxford University Press, 1990) 10.
[34] Ibid.
[35] See *Fisheries Case (UK v. Norway)* (1951) ICJ Rep. 116
[36] The U.N. Legislative Series, ST/LEG/SER.B/6,1956, 30-1.

## 1.3 THE UNITED NATIONS CONVENTIONS ON THE LAW OF THE SEA

### 1.3.1 The Four Geneva Conventions

The International Law Commission[37] (the ILC) was assumed responsibility and tasks for preparing the draft articles for the law of the sea. At the first United Nations Conference on the Law of the Sea (UNCLOS 1), these draft Articles were split into their main subject areas, resulting in the adoption in 1958 of four separate multilateral conventions covering various aspects of the law of the sea. Those Conventions are: the 1958 Geneva Conventions on the Territorial Sea and Contiguous Zone, on the Continental Shelf, on the High Seas and on the Fishing and Conservation of Living Resources of the High Seas, as well as an Optional Protocol on the Compulsory Settlement of Disputes.

The Convention on the Territorial Sea and Contiguous Zone 1958 in large part codified the pre-existing rules of customary international law, but in clarifying some of the more uncertain of them, introduced a degree of precision previously lacking and incorporated a measure of novel development.[38] It established precise rules for establishing baselines enclosing internal waters and a regime for a territorial sea under the sovereignty of the coastal State. It adopted a twelve nautical-mile contiguous zone and the same applied to the territorial sea and the fishery zone. This was found to be unacceptable and thus was never adopted.

The Convention on the Continental Shelf 1958[39] attempted to formulate an agreed legal definition of the continental shelf, and adopted the following in Article 1 as:

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[37] The ILC is an independent body of experts in international law set up by the General Assembly of the United Nations.
[38] Brown, n.4, 9.
[39] In accordance with Article 11(1), the Convention came into force on 10 June 1964.

> "for the purpose of these Articles, the term 'continental shelf' is used as referring … to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas…".

This definition contained the criteria of adjacency to the coast and of 'exploitability', which were soon questioned in view of their impreciseness and open-ended nature.

Perhaps this Convention is the most significant one; reflecting technological advances in submarine oil exploration and exploitation, and responding to the need for a legal regime to govern such activities. It gave the coastal State sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources.[40] However, this right does not affect the legal status of superjacent waters as high seas, or that of the airspace above those waters.[41]

The Convention on the High Seas 1958 was generally declaratory of established principles of international law. It defined the high seas as 'all parts of the sea that are not included in the territorial sea or the internal waters of a state'[42], thus making it clear that, subject to certain limited rights over contiguous zones and the continental shelf, the coastal State had no powers of restricting the freedom of the seas which included 'both for coastal and non-coastal States, freedom of navigation and fishing.[43]

The third convention drew up in the first UNCLOS was the Convention on the Fishing and Conservation of Living Resources of the High Seas 1958. Due to the emergence of a growing need to control and manage fishing stocks, this convention called for all States for the necessary measures to conserve the living resources of the

[40] The Convention on the Continental Shelf 1958, Article 2(1).
[41] Ibid, Article 3.
[42] The Convention on the High Seas 1958, Article 1.
[43] Ibid, Article 2.