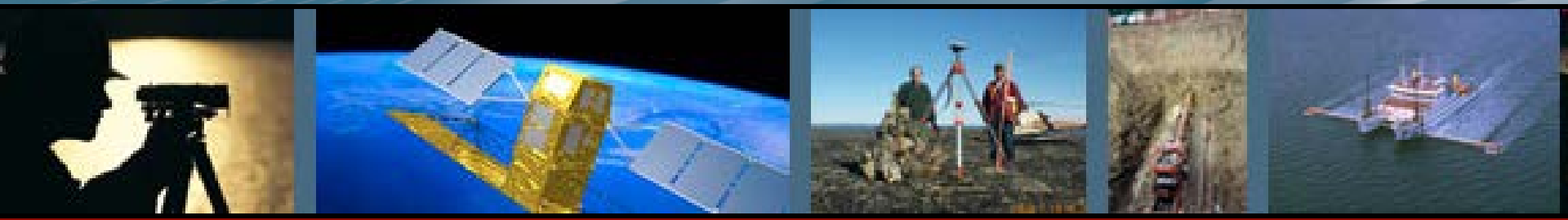
ACLS·AATC
Association of Canada Lands Surveyors

Offshore Property Rights Seminar

Session 1- Maritime International Law Pre-UNCLOS



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Session Objectives

- Provide a background to international law of the sea.
- Connect significant milestones in the development of international maritime law and their significance to the principles which have come to define UNCLOS.
- Revisit these past events before and post 1945 as a way to better understand why this convention was established.
- Provide a starting point for the various legal regimes identified in the treaty.

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Background to International Law of the Sea

- Public versus Private Law
- Sources of public international law
- Treaties
- Customary international law
- Court and arbitration decisions

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Public versus Private Law

- Public laws are intended to benefit or protect society as a whole.
- Private laws create and define legal rights and obligations between private individuals including entities such as Trusts and Corporations.
- The international law of the sea is public international law and defines the rights and obligations of nations between each other.
- In the offshore, certain rights are granted by a government on the basis of that country's existing public law.

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Sources of public international law

- In general there are two sources of public international law:
  - treaty law; and
  - customary international law.
- Treaty law is the most predominant source. Treaties can also be called conventions and protocols.
- Customary international law evolves over time from usage, custom or the accepted practice of States. To be recognised by the international community such customary laws have to be quite widespread.

Treaties

- Treaties are contractual in nature since only States that are parties to a particular treaty or convention are bound by its terms.
- A State may become a party to a convention or treaty by ratification or accession.
- A treaty or convention is said to be bilateral when there are only two parties to it and multilateral when several States are party to it.
- International treaties and conventions are created through extensive political and diplomatic negotiations eg. Geneva Convention, UNCLOS

Customary international law

- In the field of international ocean law, the general adoption of a custom by the major maritime nations is considered sufficient for the custom to attain the status of customary law.

- In contrast to treaty or conventions, customary international law binds all States rather than the States which are party to a specific treaty or convention pertaining to the specific interests of the States concerned.

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Court and arbitration decisions

- Court and arbitration decisions contribute to another source of international law.
- For example the decisions of the Admiralty courts in England have contributed to precedence influencing the law of the sea.
- As seen in much of the historical development of the law of the sea prior to 1945, the writings of many legal authors throughout the ages have provided a body of knowledge serving the development of public international law.

Before Treaties or Convention…

- Rights and Jurisdiction over sea space were determined by a nation's sea-going ability and ultimately their supremacy over other's competing interests at sea;
- Resolution of boundary disputes was not achieved by peaceful means and consequently the measure of a nation's share of the ocean was largely determined by unilateral proclamation enforced by weaponry and naval might;
- Maritime Trade and freedom to travel over the sea were subject to harassment by competing states; and
- Nations without access to the sea were excluded from any benefit of sea.

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Milestones and Key People

- 1493 Pope Alexander VI, *Inter caetera*
- 1565 “line of sight” doctrine
- 1605 Hugo Grotius and *Mare Liberum*
- 1635 John Seldon, *Mare Clausum*
- 1794 United States Territorial Sea
- 1930 Hague Codification Conference
- 1945 Truman Proclamation
- 1947 United Nations, 1st General Assembly
- 1958 Geneva Conventions (UNCLOS I)
- 1960 UNCLOS II
- 1967 Ambassador Arvid Pardo
- 1982 UNLCLOS III

1493 Pope Alexander VI, *Inter caetera*

- A doctor of law, during the time of Christopher Columbus' exploits, Pope Alexander was asked by the monarchy to confirm Spain's ownership of the "New World" as a means towards settling relations between Spain and Portugal who were then the major sea powers of the time.

- May 4, 1493, Alexander issued a Papal Bull called *Inter caetera* which granted Spain the rights to lands west of a meridian defined as 100 leagues west of Cape Verde Islands (Portugal). The Pole to Pole line crossed through what is now the North Eastern Region of Brazil while respecting Portugal's prior claim to Brazil.

- Subsequently the 1494 Treaty of Tordesillas between Spain and Portugal moved the line 370 leagues west (just west of present day Rio) giving to Portugal all lands east of the line.

Treaty of Tordesillas

Cantino Planis Showing Tordesillas Line

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1493 Pope Alexander VI, *Inter caetera*

- Alexander's *Inter caetera* and subsequent Treaty of Torsedillas were the earliest declarations made in an attempt to document rights and jurisdiction to lands and the resources therein. These works also constituted the first ever maritime delimitation.

- While the Treaty of Torsedillas addressing the "New World" in the western hemisphere and later the 1529 Treaty of Saragossa for the Spice Trade in the eastern hemisphere served to carve up the world in the immediate interests of Spain and Portugal, these agreements were legally ineffective to any other nation.

- Other emerging sea powers, Holland, England and France were to subsequently challenge the bilateral lines established by these Treaties.

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1565 “line of sight” doctrine

- In public international law, the concept of sovereignty over territory is one that is related to the so-called doctrine of effective control.

- In the context of ocean law, this doctrine was applied to asserting sovereignty and control over one’s territorial sea, the belt of sea adjacent to one’s coast.

- The first application of this doctrine as a means of establishing a territorial sea area was by Spain. Here the extent of the claim was determined by the range of human sight.

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1605 Hugo Grotius and *Mare Liberum*

- As a means to defend the 1604 seizure of a Portugese Galleon by the Dutch East Indies Company, the Company requested a juridicial treatise from Dutch lawyer Hugo Grotius.

- A commentary on the Law of Prize and Booty, chapter 12 of the treatise was later published in 1609 under the title *Mare Liberum* (The Free Sea).

- The chapter argued that Spain and Portugal were endeavouring to deprive the Dutch of trading rights in the East Indies and thus justified vessel seizure as a means to counteract apparent restrictions to trade.

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1605 Hugo Grotius and *Mare Liberum*

- Significant to this work was Grotius' defense of free access to the oceans for all nations and the creation of the doctrine of "the freedom of the seas".

- Subsequently this doctrine remained the cornerstone of public international law of the sea.

- The key points of *Mare Liberum* are:
  - The sea is common to all humanity;
  - The sea can neither be seized or enclosed; and
  - None can claim exclusive use to the sea.

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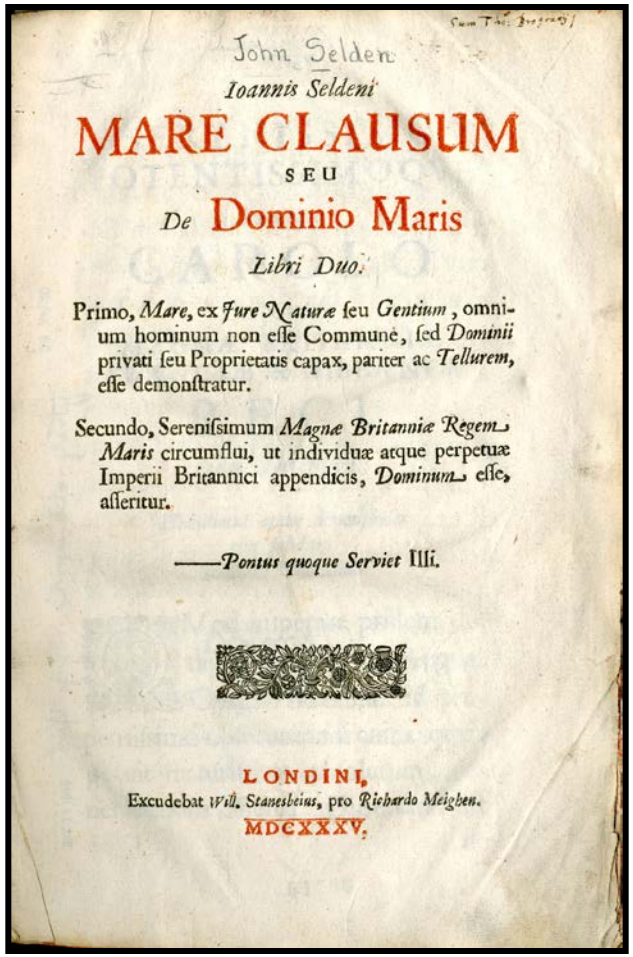
1635 John Selden and *Mare Clausum*

- Grotius' ideas for the freedom of the high seas were strongly opposed by England whereby under the patronage of the English monarchy, in defense of the English seizure of Dutch ships returning from Greenland, the writer John Selden was commissioned to prepare *Mare Clausum* (Closed Sea).

- Selden advocated that the sea was capable of being bounded and enclosed and denied the sea was inexhaustible.


John Selden
Ioannis Seldeni
MARE CLAUSUM
SEU
De Dominio Maris
Libri Duo.
Primo, *Mare*, ex *Jure Naturæ* seu *Gentium*, omnium hominum non esse Commune, sed *Dominii* privati seu Proprietatis capax, pariter ac *Tellurem*, esse demonstratur.
Secundo, Serenissimum *Magnæ Britanniæ Regem Maris* circumfluì, ut individuæ atque perpetuæ Imperii Britannici appendicis, *Dominum* esse, asseritur.
——*Pontus quoque Servit Illi.*
LONDINI,
Excudebat *Will. Stanesbeius*, pro *Richardo Meighen*.
MDCXXXV.

Source: tarlton.law.utexas.edu

1794 United States' Territorial Sea

- In addition to the "line of sight" doctrine for establishing the seaward extent of the territorial sea, both the "cannon-shot rule" and use of fixed distance were accepted methods which by the late 18th Century led to a growing international acceptance of a 3 nautical mile territorial sea.

- While the "cannon-shot rule" had its practical applications, different cannons with different ranges introduced inconsistent results in determining a measurable breadth of the territorial sea.

- In 1794 the United States was the first country to legislate a fixed distance of 3 nautical miles for the breadth of its territorial sea.

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1930 Hague Codification Conference

- 100 years following the United States' territorial sea claim, Canada's position on a 3-mile limit was formed as a result of our close links to Great Britain. In 1878, Great Britain's *Territorial Water Jurisdiction Act* also defined Canada's territorial sea as one marine league or 3 nautical miles in breadth.

- The first attempt to codify existing practices into an international ocean regime was the 1930 Hague Codification Conference held under the League of Nations.

- Here the use of an equidistant line was proposed as a method to delimit overlapping territorial sea claims however various delegations could not agree upon the proposed draft Articles.

1930 Hague Codification Conference

- While the conference failed to produce any definitive or conclusive results on territorial sea delimitation it did repudiate the argument that the 3-mile limit was the existing rule of international law.

- Despite the inability of the conference to conclude any technical results for territorial waters, there was acceptance of a coastal state's sovereignty of its territorial sea, the existence of a general right to innocent passage within a coastal sea and a right to "hot pursuit" beyond its territorial sea.

- Shortly after the conference Sweden and Denmark and then Norway and Denmark delimited their overlapping territorial seas using the proposed equidistant line.

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1945 Truman Proclamation

- In the wake of World War II, on Sept 28, 1945, US President Harry Truman issued a proclamation which was to lead other maritime nations into declaring jurisdiction over their adjacent continental shelf areas.

- The Truman proclamation declared the continental shelf adjacent to the United States for the purposes of conservation and the use of the “natural resources of the subsoil and seabed”.

- While the US claim did not define the shelf limits, a subsequent press release defined the shelf as that submerged contiguous land covered by no more than 100 fathoms (183m) of water.

- The US claim represented the first major impingement upon the age-old doctrine of “freedom of the seas”. Subsequently several States followed suit with their own unilateral claims.

1945 Truman Proclamation

Post-World War II Continental Shelf Claims of Selected States (Table 2.1- Canada's Offshore text)[1]

Year	State	Claimed Seaward Limit
1945	Mexico	Similar to United States
1946	Argentina	100 to 300 miles
1946	Panama	5 to 80 miles
1947	Chile	5 to 40 miles
1947	Peru	15 to 60 miles
1949	Costa Rica	5 to 35 miles
1950	Nicaragua	30 to 45 miles
1950	El Salvador	30 to 50 miles
1952	South Korea	5 to 200 miles
1952	Chile, Ecuador and Peru	200 miles
1957	Cambodia	140 miles
1964	Guinea	130 miles

[1] Swarztrauber, *The Three-Mile Limit of Territorial Seas* (Annapolis: Naval Institute, 1972), pages 162 to 169. Figures for width of shelf are approximate and in statute miles (1 statute mile equals 1609.35 metres).

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1947 United Nations, International Law Commission

- Save for enacting its own *Coastal Fisheries Protection Act*, in 1953, the Act which Canada claimed a 3 nautical mile territorial sea, both this and Canada's 1964 *Territorial Sea and Fishing Zones Act* remained silent about Canada's continental shelf.

- In 1945, the same year of the US declaration, the United Nations Organisation (UN) was formed and in 1947 the UN established the International Law Commission (ILC).

- The ILC was tasked with reviewing various aspects of international law with the aim of selecting topics considered suitable for codification.

- Law of the sea was the focus for much of the commission's work and by 1956 a report containing 73 draft articles was submitted to the UN General Assembly. This formed the basis for the first UN Conference on the Law of the Sea which convened in Geneva in 1958.

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1958 Geneva Conventions (UNCLOS I)

- The conference was attended by 86 delegations, produced four Conventions and one Protocol but failed to codify the breadth of the territorial sea and the extent of fisheries authority beyond the territorial sea.

- One month after UNCLOS I had failed to agree upon the issue, a fisheries conflict known as the ‘Cod War’ erupted between Iceland and Britain.

- Iceland having proclaimed a 12 nautical mile fishing zone gave 3 months notice to British trawlers to leave however the trawlers did not take heed of the notice and when two of the vessels were arrested by Icelandic gun boats the British navy in turn sent a frigate and destroyer to obtain their release.

1958 Geneva Convention, UNCLOS I

1958 Geneva Conventions (Table 2.2 – Canada's Offshore text)[1]

Convention or Protocol	In force	Canada
Convention on the Continental Shelf, 1958	10 June 1964	Ratified on 6 February 1970, with entry into force for Canada on 8 March 1970
Convention on the Territorial Sea and the Contiguous Zone, 1958	10 September 1964	Not a Party
Convention on the High Seas, 1958	30 September 1962	Not a Party
Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958	20 March 1966	Not a Party
Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958	30 September 1962	Not a Party

[1] Text of these Conventions and Protocol online at United Nations, International Law, International Law Commission, Conventions and Other Text, bullet 11. Law of the Sea at: http://www.un.org/law/ilc/convents.htm (last accessed: 31 December 2004).

1960 UNCLOS II

- Recognising the failure of the Geneva Conventions to resolve the important issues of the breadth of the territorial sea and fisheries limits, the first conference recommended to the UN General Assembly that a second conference convene to deal with these unresolved issues.

- The second UN Conference on the Law of the Sea (UNCLOS II) convened in 1960. Here a Canada/US joint (compromise) proposal for a 6 nautical mile territorial sea and a further 6 nautical mile fisheries zone was defeated by a single vote.

- This second conference failed again to produce any conclusive results and in the years following this conference the rapid advancement of ocean technologies coupled with the impact of divergent and often conflicting uses of the seas continued to focus the need for a comprehensive world ocean regime.

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1967 Ambassador Arvid Pardo

- In the years following UNCLOS I and II, the emergence of a number of newly independent States which felt subjugated by the rules and conventions formulated without their consent lead to a comprehensive review of the whole of the law of the sea.

- By 1966 the UN's attention was on the development of natural resources and the economic benefit of their exploitation for developing countries. At this time the General Assembly (GA) launched the Decade of Ocean Exploration, the main emphasis on research and education.

- In 1967 Ambassador Arvid Pardo of Malta presented to the GA the notion that the seabed and ocean floor beyond the limits of national jurisdiction not be subject to national appropriation and that their use be reserved for peaceful purposes.

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1967 Ambassador Arvid Pardo

- Pardo also asserted that the financial benefits realised from the exploitation of this area be used to promote the advancement of less developed countries.
- Pardo's speech led to the "Pardo Resolution" which established an Ad Hoc Committee to Study the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction.
- This led to a 1970 UN GA Resolution which declared that the seabed and subsoil beyond the limits of national jurisdiction and the resources therein were to the be the "common heritage of mankind".
- The concept of "common heritage of mankind" served to focus the efforts in development of future law of the sea.

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1982 UNCLOS III

- Between the years 1967 and 1972, this Ad Hoc committee also known as the Seabed Committee, became the Preparatory Committee for the 3rd UN Conference on the Law of the Sea (UNCLOS III).

- The first session of UNCLOS III convened in Venezuela in 1973 and concluded in 1982.

- The work was carried out by three main committees:
  - Committee 1: Deep sea mining, the regime of the common heritage area and the constitution of the seabed authority
  - Committee 2: Territorial sea, contiguous zone, straits, exclusive economic zone, archipelagos, the regime of islands, the high seas and the continental shelf.
  - Committee 3: matters related to the preservation of the marine environment and scientific research.

1982 UNCLOS III

- Notably, the Articles of the treaty included the long sought after means to codify territorial sea boundaries through to the outer limits of a State's jurisdictional control over the seabed.

- Canada played a significant role in the development of UNCLOS III and was a signatory upon its conclusion. However despite many signatories it took 12 years before the Convention came into legal force through ratification.

- The slowness of the ratification process was largely due to reluctance on the part of major industrial powers to accept the provisions dealing with the exploitation of resources in "The Area" of common heritage.

- Opposition was overcome in 1994 through revision of the elements which were found to be objectionable by the industrial States.

1982 UNCLOS III

- The effect of the 1994 Agreement was to ensure the International Seabed Authority (ISA), which was established to manage the resources of the deep ocean floor, was to ensure the ISA would not become a giant and expensive operation to maintain.

- Canada eventually ratified the UNCLOS III in November, 2003.

Questions?

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Sources

The content within this presentation is attributed to the following sources:

- Canada's Offshore, Jurisdiction Rights and Management, 3rd Edition, Calderbank, Macleod, McDorman and Gray.
- A Guide to Maritime Boundary Delimitation, Kapoor and Kerr.
- University of Texas, Tarlton Law Library (online).