

# Brazilian Law Of The Sea \*.

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## Introduction.

Brazil occupies almost one half of the whole South American continent and is the fourth largest country in the world in terms of non-interrupted land surface.<sup>1</sup> The Brazilian coastline is commensurate with this: for every 1.3 kilometers of land frontier there is one kilometer of sea. The coastline has a length of 9.200 kilometers divided into five regions going from north to south as follows: (1) Amazonian or Equatorial coast, from the mouth of the Oiapoque River to the Eastern Maranhão; (2) the Northeast coast, sometimes known as the barrier coast, as far as Bahia; (3) the Eastern coast to south of Espírito Santo; (4) the Southeast coast, also known as the Crystal Clear Cliffs, as far

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1. The country has an extension of 8.513.844 square kilometers of non-interrupted lands. For an introduction to the human and physical characteristics of Brazil, PIERRE DEFFONTAINES, *Geografia Humana do Brasil. Second Edition*. Rio, 1952. C. DELGADO DE CARVALHO, *Geografia do Brasil*. Ninth Edition, Rio, Francisco Alves, 1938; AROLDO DE AZEVEDO, *O Continente Brasileiro*, In: *O Brasil, a terra e o homem*, vol. I. São Paulo, Companhia Editora Nacional, 1964.

2. If bays and gulfs are not taken into account, the coast has approximately 7.198 kilometers in length. MOACIR M. F. DA SILVA, *Geografia dos Transportes no Brasil*. IBGE Biblioteca Geografia Brasileira, 1949. pg. 5.

as Laguna; (5) the Southern or subtropical coast as far as Chui Creek<sup>3</sup>.

The navigability of the coastal waters facilitated the settlement of the coastal regions. Beginning in the 16th century settlements were established on the coast but rarely, if ever, inland. They were, as one writer has described them, “fixed like crabs to the sand”. Brazilian territory was overwhelmed by the sea and opening up of the interior — a complex and not always successful process of penetration — has continued right up to the present time<sup>4</sup>.

Because of the high incidence of coastal settlement which took advantage of the economic, environmental and sociological conditions provided by the sea, Brazil was quite correctly designated a peripheral country.

An understanding of the Brazilian nation is only possible if the Atlantic Ocean is taken into account. The Atlantic is the “great designer of the coastline of the country; the Brazilian islands are located in it; and most of the rivers of the country flow into it.”<sup>5</sup> It may be said that Brazil’s present characteristics and unity have been achieved thanks to the advantages provided by the sea as a natural waterway; otherwise it would hardly have survived. “For a long time the country was a kind of archipelago in which a few islands organized around the main centers of population and production lived in total isolation from one another because of the immense and impenetrable deserts, forests and other geographical obstacles. The voyage from Rio de Janeiro to Bahia, Pernambuco or the far north was only possible by

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3. JOÃO DIAS DA SILVEIRA: *Morfologia do Litoral* In: *O Brasil, a terra e o homem*, cit. pg. 271 et seq.

4. See PASQUALE PETRONE, *Povoamento e Colonização*. In: *O Brasil, a terra e o homem*. Cit. Vol. II, 1970, pg. 127 et seq.

5. ANTÔNIO ROCHA PENTEADO: *O Atlântico Sul*. In: *O Brasil, a terra e o homem*. Cit. Vol. I, pgs. 307-309.

sea... although today it might seem incredible, the voyage to the Mato Grosso could only be done up the River Plate via Buenos Aires.”<sup>6</sup> This explains why “the centers of population, overwhelmed by the sea, communicated with one another more by sea than by land until only a few years ago.”<sup>7</sup>

It was gradually realized that the sea was not only a vital element for the transportation of persons and goods but was also a source of natural wealth. The concept of the adjacent sea as an integral element of the Brazilian patrimony and its role with regard to the basic needs of the country, has been emphasized as one of the values prevailing in the current legislation and has acquired special significance in the public eye due to such things as lobster fishing by foreign vessels on the Brazilian continental shelf, trawling by these vessels which destroys both lobsters and shrimps, exploration of mineral nodules lying on the shelf, the depletion of fish stocks and the employment of sophisticated techniques by foreign vessels which create unfair competition for the poor and rudimentary vessels of the coastal population.

## II. The breadth of the territorial sea in historical perspective.

The ever moving nature of the sea seems to be also reflected in the rules which govern it.

The changing Law of the Sea is particularly uncertain with regard to the delimitation of the boundary between territorial and international waters. Keeping this in mind

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6. Senador VASCONCELOS TORRES, *Address in the Senate*. In: *Mar territorial*. Vol. II. Ministry of the Navy, 1972, pg. 689. Ney Rodriguez Innocencio expresses that “With regard to the conditions of transit along the coast, only the *Abrolhos* and *Canal de San Roque* can be considered geographical accidents capable of representing some problem”. In: *Atlas Nacional do Brasil*. IBGE 1965, pg. 27.

7. ANTÔNIO ROCHA PENTEADO, *O Homem Brasileiro e o Meio*. In: *O Brasil, a terra e o homem. Cit.* Vol. II, pg. 22.

it is possible, therefore, to understand the successive criteria that Brazilian legislation has adopted in this matter, which to a certain extent has been influenced by the transformations taking place in customary international law and in the legislation of other countries, particularly those of Latin America.

The examination of the rules on the delimitation of adjacent maritime areas enacted in Brazilian laws reveals five successive periods since the political independence of the country.

The earliest period corresponds to the Portuguese legislation in force at the time of the independence of Brazil. This is the period of the cannon-shot rule, enacted in Lisbon by means of a Decree-law of March 4, 1805<sup>8</sup>. Thus, Brazil acceded to independence with a rule different from that in force in other American countries which had gained independence from Spain or England and for whom the rule of six or three nautical miles prevailed, at least since independence.

The cannon-shot rule was mentioned in Instruction No. 92 of July 31, 1850, addressed by the Brazilian Ministry of War to the Presidents of the maritime provinces. In 1876, when the rule was still in force, a law enacted which authorized the captains of vessels of customs police to visit and arrest those ships suspected of smuggling, up to a distance of twelve miles from the coast<sup>9</sup>. This was the same year which Great Britain abrogated the *Hovering Acts*, enacted in the early XVIII century.

The second period corresponds to the three-mile rule, which was first provided for by Instruction No. 43 of the

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8. EDUARDO H. SERRA BRANDÃO, *Agua jurisdictionais Portugueses*. In: *Estudios de Derecho Internacional Maritimo*. Madrid, 1968, pg. 79.

9. HILDEBRANDO ACCIOLY, *La zone contigue et le Droit de Pour-site eu Haute Mer*. In: *Melanges Gidel*, 1961, pg. 7.

Ministry of Foreign Affairs of August 25, 1914. The rule was first enacted for the purposes of neutrality in the First World War. It remained in force however, for over thirty-six years, although not always strictly interpreted. The instructions given to the Brazilian delegation to the Codification Conference of 1930 advocated the enlargement of the territorial sea so that the needs of administrative law would coincide with the provisions of international law, thereby ensuring that the limits of the jurisdiction of the State over its sea and territories be identical "whether it is a case of international relations or of the application of administrative regulations". As a result of these instructions, the delegation of Brazil moved in favor of a six-mile territorial sea and against the institution of the contiguous zone. Notwithstanding this position, two years later the government established a contiguous zone of twelve miles measured from the coast which was also applied to fishing. (*Fishing Code* approved by Decree No. 23.672 of January 2, 1934, and confirmed by Decree-law No. 794 of October 19, 1938, which amended the Code.) In 1941 the Second Meeting of Consultation of Ministers of Foreign Affairs established a twelve-mile security zone. This was strongly supported by Brazil.

When the Second World War came to an end, and the process of revision of the rules of the Law of the Sea started, the government of Brazil declared that its continental shelf was an integral part of the national territory. This was provided for in Decree No. 26.840 of November 8, 1950, which followed similar declarations by the United States, Mexico, Chile, Argentina and Peru. In accordance with this Decree, the incorporation of the shelf was not intended to imply an enlargement of the territorial sea, which continued to be governed by the three-mile formula.

The three-mile rule was gradually undermined by principles which Brazilian lawyers supported in international meetings. The Principles of Mexico on the legal regime of

the sea, approved in 1956 by the Inter-American Council of Jurists, not only declared that three miles was insufficient as the limit of the territorial sea and that it was no longer a general rule of international law, but also supported the right of each State to fix the breadth of its territorial sea within reasonable limits. In the Geneva Conferences on the Law of the Sea, the joint United States-Canadian proposal was supported. Finally, the Inter-American Juridical Committee recommended in 1965, with the support of its President Raul Fernandes, that every American State "has the right to fix the breadth of its territorial sea up to a limit of twelve nautical miles measured from the applicable baseline".

A year later with enactment of Decree-law No. 44 of November 18, 1966, the period of a six-mile territorial sea was inaugurated. This Decree also established an additional contiguous zone of six miles, for the purposes of customs, fiscal, sanitary and immigration matters, but over which Brazil had "the same rights of fishing and exploration of the living resources of the sea" enjoyed in the territorial sea.

This period did not last long for Decree-law No. 553 of April 25, 1969, enlarged the territorial sea "to a belt of twelve nautical miles breadth, measured from the low water line".

The twelve-mile period was even shorter. Less than a year later Decree-law No. 1.098 of March 25, 1970 approved by Congress by means of legislative Decree No. 31 of May 27, 1970, proclaimed a two-hundred mile territorial sea. Brazil thus ceased to be the only country south of the equator which had not enacted a two-hundred mile maritime jurisdiction. This distance had been used three decades earlier by the Declaration of Panama with regard to hemispheric security, and twenty years earlier by the proclamations of Chile and Peru. Argentina, in 1967, and Uruguay, in 1969, had also adopted this limit.

### III. The breadth of the Territorial Sea and the Geneva Conventions.

The recent evolution of Brazilian legislation on the territorial sea can only be properly understood if the Brazilian position with regard to the 1958 Geneva Conventions is taken into account.

In an article written shortly after the Geneva Conference, HILDEBRANDO ACCIOLY, who at that time served as legal consultant to the Ministry of Foreign Affairs, expressed surprise at the fact that some States had advocated an enlargement of the territorial sea beyond twelve miles, "because the ordinary limit of that maritime belt is still fixed at three miles in a majority of cases"<sup>10</sup>. At that time, the three-mile rule was still in force in Brazil and the government was willing to maintain it; it was not until 1966 that it was replaced by a six-mile rule. In a book which we published in 1964, that is, when the three-mile rule was still in force in the country, we argued that, according to Geneva Conventions of 1958, it was lawful for a State to fix the breadth of its territorial sea within the limits of three and twelve miles.

We wrote then: "Therefore it also follows that if a State adopts a breadth short of twelve miles, it is lawful for it to establish a contiguous zone up to that limit, not necessarily restricted *rationae materiae* to Article 24 of the Convention on the Territorial Sea and the Contiguous Zone but also including other matters which are the result of the exercise of sovereignty, including those related to fishing"<sup>11</sup>. Our purpose was to explain the compatibility which in our opinion existed between the contiguous zone established

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10. Ibid, pg. 1.

11. VICENTE MAROTTA RANGEL, *Natureza Jurídica e Delimitação do Mar Territorial*. São Paulo, Editora Revista dos Tribunais, Second edition, 1970, pgs. 227-228.

in Brazilian legislation, and that established by the Convention.

A fundamental issue of the Brazilian position on the law of the sea, was the decision whether or not to be bound by the Geneva Conventions, particularly on the Territorial Sea and the Contiguous Zone.

In 1968, two years after the Brazilian Legislation had established a six-mile territorial sea and a contiguous zone of six additional miles, the Executive introduced in Congress the four Geneva Conventions. The draft legislative-decree then prepared, authorized the President of the Republic to order the accession of the government to those conventions, but with the following reservation: "The accession to the Convention on the Territorial Sea and the Contiguous Zone may only be ordered after a law will have extended the territorial sea of Brazil to twelve miles, eliminating the contiguous zone". As a matter of fact this limit was adopted shortly after, by means of Decree-law No. 553 of April 25, 1969.

Notwithstanding this authorization, the Brazilian government, taking into account the opinion of congressmen, officials and others<sup>12</sup>, decided not to accede to the Geneva Conventions and adopted in 1970, the two-hundred mile territorial sea. The latter decision was legally feasible since the government was not bound by any treaty or international customary law establishing an obligation to restrict its mari-

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12. Among the draft laws introduced in favor of the two-hundred mile rule, the following may be mentioned: Draft No. 527 of 1967, by Representative Aroldo de Carvalho, and Draft No. 96 of 1968 by Senator Lino de Matos. In Draft No. 560 of 1967, introduced by Representative Flores Soares, a one-hundred mile territorial sea and a contiguous zone one hundred miles, were proposed. Brazilian Democratic Movement, the minority party, constantly came out in favor of a two-hundred mile territorial sea. See NELSON CARNEIRO: *Parecer do Relator da Comissão de Constituição e Justiça*, in *Mar Territorial*. Cit. vol. II, pg. 801 et seq.



time territory to a shorter distance. Furthermore, a satisfactory legal base was being crystallized in order to allow the adoption of a new system by developing countries, taking into account the influence of several factors, particularly geographical, economic, political and biological.

#### IV. The bases of the legislation in force.

One of the criteria of Decree-law No. 1098 of March 25, 1970 reiterates section A-12 of Resolution XII of the Third Meeting of the Inter-American Council of Jurists, held in Mexico in 1956, which declares that "Each State is competent to establish its territorial waters within reasonable limits, taking into account geographical, geological, and biological factors, as well as the economic needs of its population, and its security and defense". Another criterion further states that "the special interest of the coastal state in the preservation of the productivity of the living resources of the maritime areas adjacent to its coast, is recognized by international law". The concern for productivity was a basic reason in the decision which established a two-hundred mile territorial sea.

The need to protect the natural resources of the adjacent sea — a fact which was constantly emphasized — came to be of great importance as a result of the increasing exploitation of these resources by foreign vessels and the discrepancy existing between their technology and the elementary of Brazilian vessels. The case of the many factory ships which fished twenty miles offshore, depleting the large stocks of the South Atlantic, is well known. As PAULO IRINEU ROXO DE FREITAS<sup>13</sup> puts it, "The devastation provoked by foreign fishing fleets in certain regions of the coast of

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13. PAULO IRINEU ROXO DE FREITAS, *Estudos sobre a Ampliação do Mar Territorial para Duzentas Milhas*. In: *Mar Territorial*. cit., vol. II, pg. 524.

Africa has already caused the extinction of ichthyological species, similiary to what had happened on the coasts of Peru and Ecuador and to what still happens on the coasts of Brazil. The shrimp of the southern and northern coasts, the lobsters (already notoriously decreased), the haddock and tuna of the coasts of the Northeast and East, the sardine, cod, anchovy, and other species of the southern coast, will certainly disappear as fish of industrial utilization if the intensive fishing of foreign fleets continues for some years, particulary in view of the hundreds of ships employed, the kind of fishing and nets used with no control and the activity of factory ships which process and can their catch to have it directly transported to their countries of origin”.

The government understood that a twelve-mile territorial sea, even if supplemented by fishing agreements, “could hardly lead to the modification of this negative outlook”<sup>14</sup>.

Another reason which influenced the acceptance of the two-hundred mile policy, was the need to avoid a situation of Brazil with regard to its neighbors of the South Atlantic, with which it would have been difficult to negotiate on a reciprocal basis certain relevant problems such as those of fishing. It was also considered necessary to strengthen the link regional solidarity with other Lath American countries. In this connection it was also argued that there should be no differences with the breadth fixed by Uruguay and Argentina so as to avoid problems: “with the former, in fixing the lateral maritime limit, and with the latter in ratifying the agreement on fisheries which had been provisionally signed at the time that Argentina enlarged its territorial sea”<sup>15</sup>.

The decision to adopt a two-hundred mile territorial sea was influenced by strategic considerations, naturally

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14. CARLOS CALERO RODRIGUEZ, *O Problema do Mar Territorial*, in *Mar Territorial*, cit., pg. 576.

15. PAULO IRINEU ROXO DE FREITAS, *loc. cit.*, pg. 528.

related to the enlargement of the territorial ambit needed for the exercise of national security. From this point of view, the fact that both Declaration of Panama of 1939 and the Inter-American Treaty of Reciprocal Assistance established a security zone which to a certain extent corresponds to a two-hundred mile breadth, was duly taken into account.

Lastly, the importance of protecting the continental shelf and its natural resources was also taken into consideration.

In accordance with Decree-law No. 1098, national sovereignty is exercised over the territorial sea, the seabed and subsoil thereof and the airspace above it. Ships of all nations enjoy the right of innocent passage through the territorial sea. Innocent passage is defined as “the mere transit through the territorial sea, without exercising any activity unrelated to navigation and not stopping for purposes other than the needs of such navigation”. In the territorial sea “all ships must observe the Brazilian regulations enacted to guarantee peace, public order and security and to avoid the pollution of waters and damage to the resources of the sea”. This Decree also provides for the preparation of by-laws on security matters, to be observed by foreign ships of war and other State ships. A prior Decree of June 28, 1965, approved “the rules for the visit of foreign warships to the ports and territorial waters of Brazil in time of peace”; these visits can be official, no-official and operational, each one having particular rules.

The fact that the two-hundred mile zone established by Decree No. 1098 properly constitutes a territorial sea is beyond doubt, not only because it is expressly provided but also because the nature of the powers exercised by the coastal State over it correspond to that of the territorial sea as generally understood.

## V. Landward and lateral delimitation of the territorial sea.

Decree-law No. 1098 provides that the territorial sea is measured “from the low water line of the Brazilian continental and insular coasts which is adopted as reference in the Brazilian nautical charts”. However, straight baselines shall be drawn “in those locations where the coastline is deeply cut into or where there is a fringe of islands along the coast and in its immediate vicinity” (Article 1, sole paragraph).

Both methods have been adopted by Brazilian legislation for many years, the former being the general rule. The regulations of the Department of Fishing and Coastal Sanitation, approved by Decree No. 16.183 of October 25, 1923, provided that the three-mile distance would be measured “seaward from the straight baselines that join the coastal points not more than ten miles distant from one another”. (Article 2, sole paragraph). Section one of Article 17 of the Regulations on Maritime Transit, approved by Decree No. 5.798 of June 11, 1940, also provided that: “In those locations in which the coast, including the coasts of islands, is deeply cut into bays, shelters, etc., the three-mile belt of territorial waters shall be measured from the line joining the closest opposite points of the coast indenture which is twelve miles or less in distance”. Decree-law No. 553, which enlarged the territorial sea to twelve miles, changed the distance mentioned for that of “twenty-four miles or less”, but this provision has been abrogated. The new law does not mention any particular distance to this effect.

With regard to the lateral limit between the territorial seas of Brazil and Uruguay, the joint declaration issued in Rio de Janeiro on May 10, 1969, refers to “the median line, every point of which is equidistant to the closest points of the baseline, and which beginning at the point where the boundary between both countries reaches the Atlantic Ocean, extends toward the zones of the adjacent sea”.

## VI. The Continental Shelf.

Referring to the Continental Shelf in the South Atlantic, ANTONIO ROCHA PENTEADO comments that its extension is “far shorter than the general average of the oceans (90 kilometers); it is very narrow in the African Coasts, and in the South American region its broadest extension is to be found on the Northern coast, between the Surinã and Maranhão rivers, and in the zone which extends South of Bahia to Patagonia. In the latter region it has an increasing extension following a Northwest direction in the area known as Golfo de Santos or Santa Catarina, reaching its widest area on the Argentinian coast between Bahia Blanca and Tierra del Fuego”<sup>16</sup>.

JOÃO DIAS DA SILVEIRA comments that the Brazilian Continental Shelf is variable: “The continental shelf has a significant breadth in the equatorial region (at Cape Orange it reaches a breadth of 208 kilometers); between Cape North and Punta de Mangoari it is still broader, extending more than three hundred kilometers. From there the shelf decreases towards the West; in the delta of the Parnaiba River it is 170 kilometers, in the coast of Ceara it is 50 kilometers or less, and in Cape San Roque it is very narrow. From there to the South of Bahia the Shelf is positively narrow, not exceeding 30 kilometers. To the South of Bahia and on the coast of Espírito Santo the Shelf again has a significant breadth, although it also has irregularities. Off Caravelas and São Mateus is more than two hundred kilometers wide. After new irregularities and decreasing in the *fluminense* coast, it again broadens: 103 kilometers at Itapemirim, 100 kilometers at Santo Tomé, 129 kilometers in the region of Isla Grande, 120 kilometers at Ubatuba, 132 kilometers at Ponta do Boi, 163 kilometers at the mouth of the Icaparra River, 105 at Laguna, 84 kilometers at Cape Santa Marta,

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16. ANTONIO ROCHA PENTEADO, *loc. cit.*, Note 5 above, pg. 315.

180 kilometers at the mouth of Rio Grande and 160 at the mouth of Chui Creek”<sup>17</sup>.

Decree No. 28.840 of November 8, 1950, contained the first provisions on the Brazilian Continental Shelf. This Decree followed similar proclamations by the United States, Mexico, Chile, Argentina and Peru. As provided by this Decree, the Continental Shelf of Brazilian continental and insular territory was “integrated to this territory, under the exclusive jurisdiction and dominium of the Federal Union”. The Federal Constitution of January 24, 1967, also provided that the Continental Shelf be included in the property of the Union.

In accordance with this Decree, “the exploration and exploitation of the natural wealth and resources” found in the Continental Shelf, is subject to the authorization or concession by the federal Executive. “The rules on navigation through the waters overlying the shelf . . ., without prejudice to those which are enacted, particularly with regard to fishing in the region”, remained in force. Although the Decree was in harmony with the Truman Proclamation of 1945, the latter provision on fishing implies — as Barry B. L. AUGUSTE observes<sup>18</sup> — “a connection or relationship between the Shelf and the superjacent waters”. As a matter of fact, this relationship later came to be one of the prevailing reasons which led to the enlargement of the Brazilian territorial sea to two hundred miles.

The fact that the Decree was enacted eight years before the Geneva Convention on the Continental Shelf meant that the studies and reports subsequently carried out by the United Nations had no influence on it<sup>19</sup>. The interest of

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17. JOÃO DIAS DA SILVEIRA, *loc. cit.* Note 3 above, pg. 257.

18. BARRY B. L. AUGUSTE, *The Continental Shelf*, Geneva, 1960, pg. 111.

19. RAYMUNDO NONNATO L. DE CASTRO, *Aspectos Fundamentais da Doutrina Brasileira sobre a Plataforma Continental*. In *Boletim da Sociedade Brasileira de Direito Internacional*, 1968, n.º 47-48 pgs. 43-66.

the government and of public opinion was concentrated on the need to preserve the natural resources of the shelf and to reserve its exploitation by the coastal country. It is estimated that the potential oil area is about four million square kilometers in size, some wells already being exploited, as in Guaricema, Dourados, Carmópolis and Caioba, It is also estimated that between 1971 and 1974, 132 wells of maritime exploitation will be drilled<sup>20</sup>. Of 800.000 square kilometers of shelf, some 100.000 square kilometers constitute an area of oil deposits of the highets yield<sup>21</sup>.

Since the whole of the Brazilian Shelf is comprised within the two-hundred mile territorial sea, the country has no continental shelf in the legal meaning given to it by the Geneva Convention because this definition is only applicable to the submarine area outside the territorial sea.

#### VII. The fishing zones in the Brazilian Territorial Sea.

Decree No. 1098 provided that the government would regulate fishing for three purposes: a) the rational exploitation of the living resources of the sea: b) the conservation of those resources; and c) promotion of research and exploration. This Decree establishes two zones in the territorial sea, according to whether or not they are exclusively reserved to Brazilian vessels. The outer zone is open to fishing by national and foreign vessels; however, the latter can only

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ALSO CELSO DE ALBUQUERQUE MELLO: *Plataforma Continental*, Rio, Livraria Freitas Bastos, 1965; RAFAEL VALENTINO SOBRINHO, *A Plataforma Continental*, in *Revista Brasileira de Política Internacional*, n.º 23, 1963; GILDA M.C.M. RUSSOMANO, *O Mar e o Direito*. In *Boletim do Clube Naval*, n.º 183, 1965; VICENTE MAROTTA RANGEL, *A quem pertence o Fundo do Mar*. In *Problemas Brasileiros*, n.º 44, november, 1966, pgs. 11-22.

20. CARLOS CALERO RODRIGUEZ, *loc. cit.* Note 14 above, pgs. 582-583.

21. MARCOS MACIEL, *Mar de Duzentas Milhas e o Desenvolvimento Nacional*. In *Mar Territorial*, cit., vol. II, pg. 787.

carry on their activities if they are duly registered and authorized, and always on condition that they observe the respective regulations.

Such regulations were established by Decree No. 68.459 of April 1, 1971, which among other objectives delimited with a greater precision the fishing zones of the territorial sea. The first zone comprises an area of one hundred nautical miles, measured “from the low water line of the Brazilian Continental and insular coasts, adopted as a reference in the Brazilian nautical charts”. The second zone extends beyond this limit to the two-hundred mile line. Fishing in the first zone is reserved, in general, to national vessels; foreign vessels can only fish in it when they have been leased to Brazilian legal entities. In the second zone, both national and foreign vessels can undertake fishing activities.

Notwithstanding this, the regulations provide for what could be called a third zone, in which the participation of vessels is prohibited. This zone is not related to the waters of the sea but to the seabed of the Territorial Sea: “the exploitation of crustaceous and other living resources, which have a close relationship of dependency with the floor underlying the Brazilian territorial sea” is reserved to national fishing vessels, as provided by Article 1 No. 3 of these regulations.

#### VIII. Concept and nationality of fishing vessels.

One basic concern of these regulations was to establish the concept of a fishing vessel. This has been defined as a vessel which is “exclusively and permanently dedicated to the catch, transformation or research of the animal or vegetable beings which have in the waters or in the bed of the sea their natural or most frequent living environment”. The definition is not only related to the activity of ships but also to the fact that they are “registered and authorized”



in the manner provided by the legislation in force (Regulations of April 1, 1971, Article 2).

For the application of the Decree regulating the two-hundred mile area, it is important to ask what are the conditions required by a fishing vessel to be considered Brazilian.

The Federal Constitution of 1946 provided that those vessels of which the owners, shippers, captains and also two thirds of its crew were Brazilian born, would be considered Brazilian vessels. The transportation of goods within Brazil was reserved to Brazilian ships, except in the case of public necessity (Article 155). An identical provision was contained in Article 15 of the Federal Constitution of January 24, 1967.

However, the Constitution in force introduced a new criterion in this matter — original Brazilian nationality no longer being required for national fishing vessels, subject to the regulations of Federal Law (Article 173, No. 2). Therefore, to be considered a Brazilian fishing vessel it is not necessary to meet the same conditions required for other kinds of ships. Decree-law No. 221 of February 28, 1967, provides that “the registration of ownership of fishing vessels shall be granted by the Maritime Tribunal only to Brazilians by birth or naturalization or to corporations registered in the country” (Article 8). This provision conflicted with the Constitution of 1967, as admitted by the General Consultant of the Republic, ADROALDO MESQUITA DA COSTA<sup>22</sup>; it was also subject to congressional criticism, from an economic and political point of view, as witnessed by the declarations of Senator VASCONCELOS TORRES in the Senate session of March 21, 1968<sup>23</sup>. However, the reasons underlying this provision have been recognized as valid therefore, the

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22. *Oficial Gazette*, June 24, 1968.

23. *Mar Territorial e Marinha de Guerra*, Brasilia, 1970, pgs. 219-222.

regulations on the territorial sea refer to it expressly and it is compatible with the Constitution in force.

In accordance with the fishing regulations of April 1, 1971, foreign fishing vessels are considered national vessels, when leased to Brazilian legal entities with headquarters in the country. Leasing authorizations are granted by the Ministry of Agriculture for a period of up to one year, which can be extended. The situation and needs of the national construction of fishing vessels must be taken into account when granting an extension of leases. If an extension is not granted, the foreign vessel can only operate if it changes its registry to a Brazilian registration. However, vessels which are more than five years old, as shown by the date of their registration, are not allowed to have their nationality changed.

Foreign vessels not leased to Brazilian legal entities can only operate in the outer zone of the territorial sea. The pertinent permits are granted by the Ministry of Agriculture, in consultation with the Ministry of the Navy. The applications must be presented through a Brazilian legal entity which undertakes the legal and financial responsibility for the activities of the foreign vessel. Once the authorization has been granted, a registration fee of five hundred dollars and an operational fee of twenty dollars per constant liquid ton of registry, must be paid.

The captains of foreign vessels must know and observe the Brazilian laws and regulations, particularly those relating to fishing and the prevention of marine pollution. They are also under the obligation to notify the Ministry of the Navy about the date and hour of entry and exit of the Brazilian territorial sea. Official charts must be utilized and observed.

To transfer fish from one vessel to another in the territorial sea, and to disembark the catch of foreign ships in national ports, is subject to prior authorization by the Brazilian government.

Examining the fishing regulations, DORIVAL TEIXEIRA VIEIRA comments: "the fact that foreign vessels equipped with the most recent technological developments, including factory ships, operated near the Brazilian coast, and made fantastic catches of fish, contributed to a possible depletion of stocks. The registration and operational fees charged to foreign ships are not intended to provide the treasury with a higher income, but only that a part of the costs of supervision which are indispensable for the proper observance of the laws, be borne by the foreign fishermen. Furthermore, the registration of ships compels the captains and shippers to get acquainted with the laws and regulations related to their activities". Among the short and long term objectives of the new law, the following is emphasized: "to permit the conservation of the natural resources and the maintenance of the indispensable ecological balance of the maritime flora and fauna".

If foreign vessel exploits the living resources of the territorial sea without the authorization of the government, or in violation of the conditions of the authorization, authorities may order its attachment, as well as that of its equipment and cargo. The captain will also be responsible for infringement of the penal legislation in force (Article 11. No. 5).

### IX. International Agreements.

Brazilian law has been supplemented by several treaties on the law of the sea. In particular, the following deserve mentioning: the Convention for the protection of submarine cables of 1884, the Convention for the unification of certain rules on the immunity of State ships of 1936, the Convention for the regulation of whale fishing of 1950 and the nuclear test ban treaty of 1963.

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24. DORIVAL TEIXEIRA VIEIRA, *Aspectos Econômicos do Mar de 200 Milhas*, in *Problemas Brasileiros*, n.º 92, April 1971, pgs. 17-18.

As was explained further above, Brazil has not signed or acceded to any of the 1958 Geneva Conventions on the Law of the Sea.

Decree-law No. 1098 of 1970 provides that by means of international agreements, special regimes of fishing, research and exploration in the Brazilian territorial sea may be defined. In application of this provision, bilateral fishing agreements were concluded on August 4, 1971 with Trinidad and Tobago, and on August 19, 1971 with the Netherlands<sup>25</sup>. Other agreements were signed the United States on May 9, 1972<sup>26</sup>, and again with Trinidad and Tobago on May 19, 1972; these agreements will be in force until January 1, 1974.

Among other matters, these agreements regulate the ichthyological species which may be fished; the number, capacity and identification of vessels; the amounts due to the Brazilian government as economic compensation and other reasons; the delimitation of the zones of the Territorial Sea covered by the agreements; and the period during which fishing may be undertaken. This is significant proof of how it is possible for governments to reconcile their interests in basic matters related to the exploitation of the biological resources of the sea, in spite of their different approaches to the question of the breadth of their maritime areas.

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25. *Texts of the agreements in Mar Territorial*, cit., vol. I, pgs. 337-343.

26. See Agreement on the conservation of shrimp between Brazil and the United States. *International Legal Materials*, May 1972, pgs. 453-467.