The Trail Smelter case was an arbitration case involving a dispute between Canada and the United States, which went on for many years, ending in a ruling that a state could not so use its own territory as to damage the territory of another state. A big smelter in Trail, B.C., was sending fumes across the border and damaging trees and agriculture, etc., in the United States. Canada accepted state responsibility for the damage.

Canada had a very strong position on the Partial Test Ban Treaty (an environmental as well as an arms-control measure), on the Non-Proliferation Treaty (another arms-control measure with environmental implications), and on the seabed Arms Control Treaty (which also has environmental aspects).

A second reason why the pollution-control problem is so complex is that coastal states, in attempting to protect their environment, must necessarily pass measures that affect not only commercial vessels or fishing vessels or naval vessels or private yachts but all of these. Thus all normal means of navigation are at one and the same time subjected to controls by coastal states. However minimal the interference with freedom of navigation, these steps raise for major maritime powers basic questions concerning their conception of the freedom of the high seas.

What is the particular policy being pursued by Canada on the many unresolved Law of the Sea issues? The idea basic to a Canadian approach — unilateral, bilateral and multilateral — to all of the issues mentioned is "functionalism". The Canadian approach is not a doctrinaire one based on preconceived notions of traditional international law nor is it a radical or anarchistic approach careless of contributing further to the already chaotic state of the Law of the Sea. The Canadian position has been to analyze the problem and attempt to determine the specific measures needed to resolve the issues. On the multilateral plane, Canada, at both the 1958 and 1960 Law of the Sea Conferences, pioneered the functional approach (which was once embodied in the Law of the Sea) whereby states assert over various kinds of "contiguous zones" only that amount and that kind of jurisdiction necessary to meet the particular problem in question. When Canada has acted unilaterally, it has refrained as much as possible from asserting total sovereignty and instead has asserted just that jurisdiction necessary to fulfil the particular functions required.

Sovereignty comprises a whole bundle of jurisdictions — that is to say, everything from criminal law, customs law, fishing regulations, shipping regulations and anti-pollution control to security measures. A state will exercise its sovereignty, for example, in the territorial sea subject only to a right of innocent passage. States also exercise their sovereignty over their internal waters (subject to no qualifications.)

Canada suggested at the 1958 and 1960 Law of the Sea Conferences that a 12-mile territorial sea may or may not have been required at that time, but what was essential was to accord to coastal states fisheries jurisdiction out to 12 miles. This was the origin of the well-known Canadian "six-plus-six" formula (i.e. a six-mile territorial sea and a further six-mile exclusive fishing zone). The proposal failed by a fraction of a vote to become accepted at the 1960 conference as a rule of international law.

Fraction of vote blocked adoption of 'six-plus-six' coastal formula

Classic example

Canada's Arctic Waters Pollution Prevention Act provides a classic example of the functional approach. Only that degree of jurisdiction was asserted that was essential to meet the real (as distinct from the psychological) needs, as has been made clear by a number of statements by the Prime Minister and the Secretary of State for External Affairs. The same can be said of Canada's amendments to its Territorial Sea and Fishing Zone Act. Where total sovereignty was needed (as in the case of Barrow Strait, for example), it was asserted and, for this as well as other rea sons, Canada established a 12-mile territorial sea, replacing the 1964 Canadian legislation, which had established a 9-mile exclusive fishing zone adjacent to Canada's pre-existing 3-mile territorial sea and laid down the basis for determining it from straight baselines.

In the same 1970 amendments to the Territorial Sea and Fishing Zone Act, Canada laid down the legislative basis for proclaiming exclusive fishing zones "adjacent" to its coast. Subsequently, by Order-in-Council, the special bodies of water on the east and west coasts mentioned earlier were established as Canadian fishing zones. A little later, pursuant to amendments to the Canada Shipping Act, pollution control was established over those zones. (Canada did not legislate to implement its long-standing claims that certain bodies of water, such as, for example, the Bay of Fundy on the east coast and Hecate Strait and Dixon Entrance on the west coast, are Canadian internal waters. Canada simply asserted the kind of jurisdiction necessary to extend fisheries and pollution-control jurisdiction.)

The ways in which Canada has applied