Speech by Mr L. Dolliver M. Nelson,
President of the International Tribunal for the Law of the Sea,
on the occasion of the visit by
Dr Joe Borg
Commissioner for Fisheries and Maritime Affairs of the European Union
2 September 2005

Dr Joe Borg,
Ladies and Gentlemen,

The International Tribunal for the Law of the Sea is greatly honoured today to receive at its seat Dr Joe Borg, Commissioner for Fisheries and Maritime Affairs of the European Union. On behalf of the Tribunal I extend a warm welcome to you and to all the distinguished participants at this meeting.

We are particularly pleased to welcome Dr Borg, since the European Community is not only a party to the United Nations Convention on the Law of the Sea, but is also, to date, the only international organization which is party to the Convention. The fact that the Convention is open to international organizations underlines the important role played by these institutions in matters relating to the law of the sea. The Rules of the Tribunal allow an international organization to be a party to a dispute before the Tribunal and many of these rules are designed to serve that end.

At the outset, I would like to give a brief overview of the dispute settlement system set out in the Convention before providing you with some information on the jurisdiction of the Tribunal and the environmental cases dealt with by the Tribunal.

Dispute settlement system

The Tribunal is a judicial institution which was created by the United Nations Convention on the Law of the Sea. It forms an essential part of a

comprehensive system for the settlement of disputes that might arise with respect to the interpretation or application of the Convention.

The system for the settlement of disputes, which is contained in Part XV of the Convention, is based upon the fundamental principle that parties to a dispute must settle their differences peacefully. Under section 1 of Part XV the parties to a dispute concerning the interpretation and application of the Convention are in the first place enjoined to settle their disputes by the peaceful means indicated in the Charter of the United Nations.

If the parties to a dispute fail to reach a settlement under this section, they are obliged to resort to "compulsory dispute settlement procedures entailing binding decisions", subject to the limitations and exceptions contained in the Convention. The International Tribunal for the Law of the Sea is one of the four procedures for the settlement of disputes that entail binding decisions provided for in the Convention (in article 287). The other three alternative means are:

- the International Court of Justice;
- an arbitral tribunal; and
- a special arbitral tribunal for certain categories of disputes.

Article 287 of the Convention provides that when signing, ratifying or acceding to the Convention or at any time thereafter, a State Party to the Convention is free to choose one or more of these four means for the settlement of disputes by a written declaration to be submitted to the Secretary-General of the United Nations. In this respect it is important to mention that the expression "States Parties" also includes international organizations which are parties to the Convention, as provided for in article 1, paragraph 2 (2) of the Convention. Out of the current 148 States Parties[1] (i.e., 147 States and the European Community), 35 States have made declarations under article 287 of the Convention and 21 States have made declarations choosing the Tribunal as the means or one of the means for the settlement of disputes concerning the Convention.

[1] Estonia acceded to the Convention on 26 August 2005.

This flexible mechanism – the so-called Montreux formula – is a distinctive feature of the dispute settlement system in the Convention. When the parties to a dispute have accepted the same dispute settlement procedure, it may be submitted only to that procedure. If the parties have not selected the same procedure, the dispute may only be submitted to arbitration, save where otherwise agreed by the parties. In the absence of declarations, parties are deemed to have accepted arbitration. This is why it is important for States to consider making declarations under article 287 of the Convention with regard to their choice of procedure for settling disputes, as recommended by the General Assembly.

Jurisdiction of the Tribunal

The core competence of the Tribunal is to deal with disputes concerning the interpretation or application of the Convention. It is important to note that States may also confer jurisdiction on the Tribunal through international agreements. There are currently seven international agreements which contain provisions stipulating that disputes arising out of the interpretation or application of these agreements could be submitted to the Tribunal.

A prominent example is the Straddling Fish Stocks Agreement of 1994[2], which entered into force in 2001 and to which the European Community itself is a party. It provides that any dispute between States parties to that agreement concerning the interpretation or application of the agreement is subject to the settlement of disputes mechanism set out in Part XV of the Convention, whether or not they are also parties to the Convention on the Law of the Sea (article 30 of the Agreement). The Straddling Fish Stocks Agreement makes this mechanism also applicable to disputes concerning subregional, regional or global fisheries agreements relating to straddling fish stocks or highly migratory fish stocks – a very significant development.

[2] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

The Tribunal is open to States and international organizations which are parties to the Convention. Here, I may point out that Chile and the European Community are parties to the pending dispute before the Tribunal concerning the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean (Case No. 7).

Environmental cases

The Tribunal has had to deal with some important environmental cases within the framework of proceedings concerning provisional measures.

The Tribunal has a residual compulsory jurisdiction with respect to the prescription of provisional measures "[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted". This procedure has already been invoked in the *Southern Bluefin Tuna Cases*, the *MOX Plant Case*, and the land reclamation case.

In 1999, New Zealand and Australia requested from the Tribunal the prescription of provisional measures pending the constitution of an arbitral tribunal in the dispute with Japan concerning southern bluefin tuna. New Zealand and Australia claimed that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by undertaking unilateral experimental fishing for southern bluefin tuna.

In its Order of 27 August 1999, the Tribunal stated that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment" (paragraph 70). It also noted that "there is no disagreement between the parties that the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern" (paragraph 71). An important finding in the Tribunal's decision was that "the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna" (paragraph 77). Although the

Tribunal could not conclusively assess the scientific evidence presented by the parties, it considered that measures must be taken “as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock” (paragraph 80).

In both the *MOX Plant* and the land reclamation cases, the Tribunal laid emphasis on the duty to cooperate in the protection and preservation of the marine environment, a duty which constitutes a fundamental principle under Part XII of the Convention and general international law. In both cases, the Tribunal also relied on the notion of “prudence and caution” to require the parties to the dispute to cooperate in exchanging information concerning the risks or effects of the activities concerned.

In the land reclamation case, the Tribunal ordered that the parties set up a joint expert commission with the clear mandate of assessing the potential harmful effects of the reclamation activities. This proved to be successful and recently, in May 2005, the parties agreed to settle their dispute and signed an agreement to this effect. On this occasion, it was publicly stated that the provisional measures ordered by the Tribunal were instrumental in bringing the parties together and promoting a successful diplomatic solution.

This brings me to the end of my brief presentation. In conclusion, I wish to thank you, Commissioner Borg, for your presence at the seat of the Tribunal and for giving us what I am certain will be a most stimulating address:

“Oceans and the Law of the Sea: Towards new horizons”.