

Camino sinuoso



- En 1840 los alemanes tomaron posesión y le llamaron África del Sudoeste Alemana
- En la IWW 1915 las fuerzas de la Unión Sudafricana derrotaron a los colonos alemanes
- Por el tratado de Versalles Alemania (art. 119) pierde Sudáfrica
- La Sociedad de las Naciones dio a Sudáfrica el mandato de Namibia

International status of South-West Africa 1950 ICJ

- La GA preguntó: “¿Cuál es el estatus internacional del territorio de Sudafrica del Oeste?”
- ‘The mandate was created in the interest of the inhabitants of the territory and of the humanity in general, as an international institution with and international object – a sacred trust of civilisation. It is therefore **not possible to draw any conclusion by analogy** from the notion of mandate in national law or any other conception of that law’

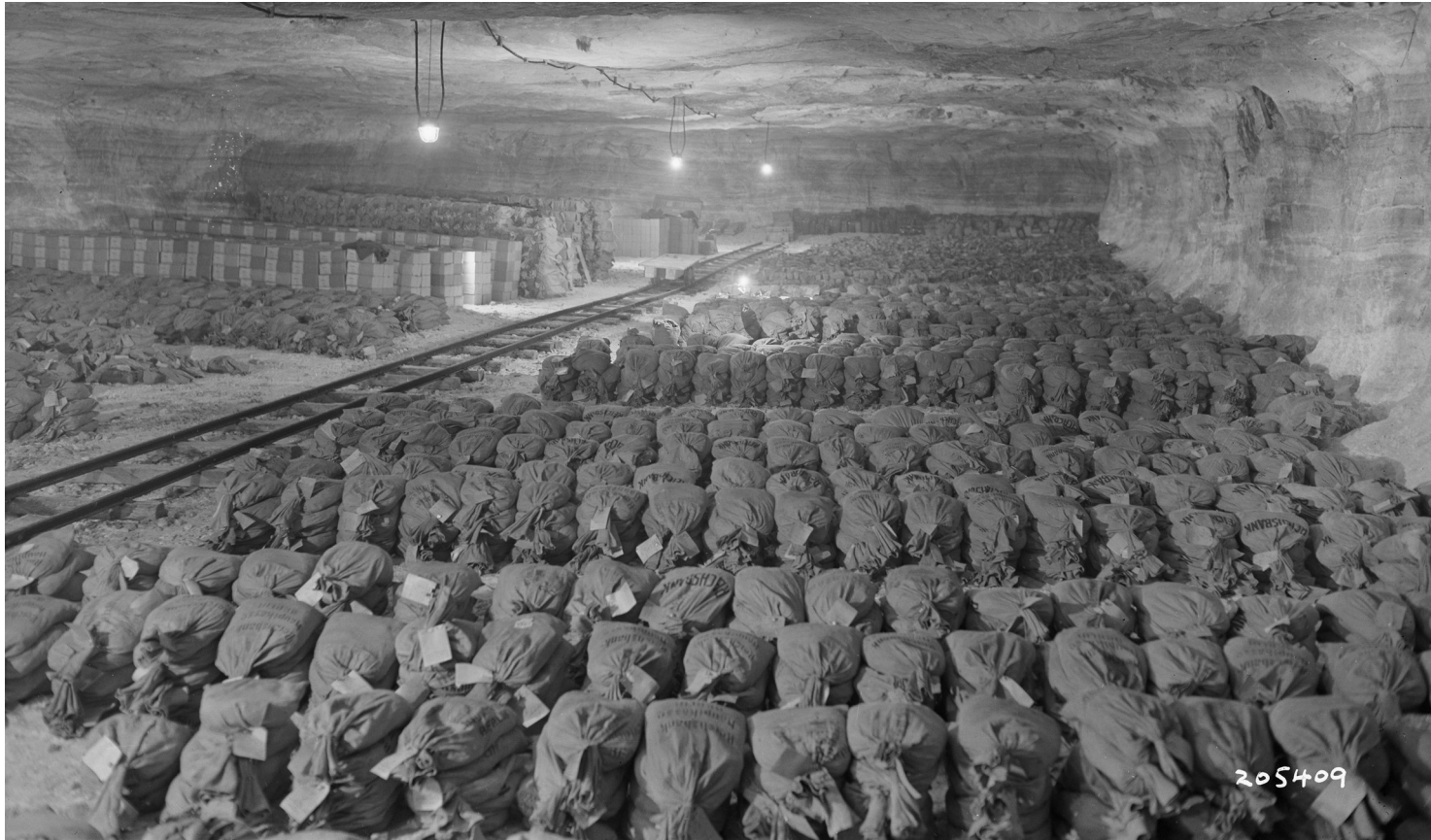
International status of South-West Africa 1950 ICJ

The international obligations assumed by South Africa were of two kinds:

1. Directly related to the administration and corresponded to the sacred trust of civilization.
2. Related to the machinery for implementation, and linked to the supervision and control of the League. It corresponded to the securities for the performance of this trust.

The 1st group (raison d'être and object) remain since their fulfilment does not depend of the existence of the League.

The 2nd group has not disappeared merely because the supervision organ ceased to exist when the UN had another organ performing similar functions



Case of the Monetary Gold
removed from Rome in 1943,
Italy v. France, UK, USA, ICJ, 1954

- En 1943, 2,338 kg de oro fueron confiscados por los alemanes en Roma. Al final de la guerra, Italia y Albania lo reclamaban.
- Una “Comisión tripartita” se formó para decidir los reclamos sobre el Oro Nazi.
- oro encontrado en las minas de sal Merkers, Alemania.

Case of the Monetary Gold removed from Rome in 1943, Italy v. France, UK, USA, ICJ, 1954

- En 1950 la Comisión (Francia, UK y EEUU) sostuvo que no podía resolver la cuestión y solicitó a la ICJ que nombrara un árbitro, el cual concluyó en 1953 que el oro pertenecía a Albania
- UK e Italia siguieron reclamando el oro: UK como compensación por el incidente en el Canal de Corfú e Italia porque decía que el oro era originalmente italiano, confiscado por el gobierno de Albania cuando nacionalizó el Banco Nacional de Albania (siendo Italia el principal accionista)
- Italia pidió a la ICJ determinara cuánto del oro le correspondía y señalar que su derecho sobre el oro debía prevalecer sobre el Inglés
- Enseguida, Italia cuestionó la jurisdicción de la ICJ

Case of the Monetary Gold removed from Rome in 1943, Italy v. France, UK, USA, ICJ, 1954

- La ICJ no sólo es llamada para decidir si el oro debe ser entregado a Italia o al UK, sino a determinar primero una cuestión legal sobre la cual depende la solución
- Para determinar si Italia tiene el derecho de recibir el oro, es necesario determinar si Albania ha cometido un hecho ilícito contra Italia y por ello tiene la obligación de compensarle
- Para resolver el fondo del asunto sería necesario decidir una disputa entre Italia y Albania, sin el consentimiento de Albania. El interés legal de Albania es la materia de fondo de la decisión
- ICJ no tiene jurisdicción

South West Africa Cases 1962, ICJ
Primera fase
Ethiopia v SA; Liberia v SA;
Preliminary Objections

- ICJ joined proceedings in the two cases
- The case related to the continued existence of the Mandate for South West Africa and the duties and performance of South Africa as Mandatory.

South West Africa Cases 1962, ICJ, Primera fase Ethiopia v SA Liberia v SA, Preliminary Objections

Preliminary objections to the ICJ jurisdiction

1. The mandate, including art 7 submission to the PCIJ, is no longer a treaty in force within the meaning of art 37 (treaties under PCIJ/LN) of ICJ
Art 7 mandate “the mandatory agrees ... any dispute whatever should arise between the mandatory and another member of the LN relating to the interpretation or application of the provisions of the mandate, such dispute ... shall be submitted to PCIJ”
2. Since all members of LN lost their membership when it ceased to exist, there is no ‘another member of the LN’
3. The dispute brought before the court was not a dispute under art 7 Mandate.
4. If a dispute existed it was one that could be settled by negotiation with the applicants and there had been no such negotiations with a view to its settlement

South West Africa Cases 1962, ICJ, Primera fase Ethiopia v SA Liberia v SA, Preliminary Objections

- Existence of a dispute: it was not sufficient for one party to contentious case to assert that a dispute existed with the other party ...Nor is it adequate to show that the interest of the two parties so such a case are in conflict. It must be shown that the **claim of one party is positively opposed by the other**. A dispute existed in the present case since it was clearly constituted by the opposing attitudes of the parties relating the performance of the obligations of the Mandate by the respondent as Mandatory.

South West Africa Cases 1962, ICJ, Primera fase

Ethiopia v SA Liberia v SA, Preliminary Objections

- The essential principle of the Mandate system consisted in the **recognition of certain rights of the peoples of the underdeveloped territories**
- Advisory Opinion, 1950, the obligation of SA to submit to international supervision were crystal clear.
- LN ceased to exist April 1946, UN entered into force October 1945, the three parties to the proceedings ratified UN November 1945.
- By UN art 92 (SICJ part of UNCh) 93 (UN member = SICJ member) and 37 ICJ (treaties under PCIJ/LN) respondent bound itself by ratifying the UN while LN was still alive.
- Mandate was in full force to accept compulsory jurisdiction of PCIJ (ICJ)

South West Africa Cases 1962, ICJ, Primera fase

Ethiopia v SA Liberia v SA Preliminary Objections

- **Judicial protection** of the sacred trust in each mandate was **essential feature of the Mandate system**.
- Neither the council nor the LN were entitled to appear before the court, so that was the reason **other members could bring a dispute before ICJ**
- the scope and purport of the provision 'any dispute whatever' indicated that the members of LN were understood to have a legal right or interest in the observance by the Mandatory of its obligations both (substantive) towards the inhabitants of the territory and (procedural) obligation to submit to supervision to the LN and its members
- A deadlock had been reached in the collective negotiation in the past, no reasonable probability existed that further negotiations would lead to a settlement. What mattered was not the form of negotiation as the attitude of the parties.
- The **court was competent** to hear the dispute on the merits

South West Africa Cases 1966 ICJ

Segunda fase

Ethiopia v SA Liberia v SA

Merits

- While the 1962 judgment decided that the applicants were **entitled to invoke the jurisdictional clause** of the mandate, it remained for them, on the merits, to establish that **they had** such a right or **interest**.
- Any question on **admissibility** has to be decided on merits (Nottebohm case)
- There is no contradiction between a decision that the applicants had the capacity to invoke the jurisdictional clause and a decision that the applicants had not established the **legal basis of their claim** on the merits
- A distinction must be made between the right to activate the court and the plaintiff's legal right in respect of the subject matter of its claim.

South West Africa Cases 1966 ICJ

Segunda fase

Ethiopia v SA Liberia v SA, Merits

- Jurisdictional clauses were **adjectival** not substantive in their nature and effect, they did not determine whether the parties had **substantive rights**, but only whether, if they had them, they could vindicate them by recourse to a tribunal.
- The '**necessity**' argument amounted to a plea that the court should allow the equivalent of an ***action popularis***, or right resident in any member of a community to take legal action in vindication of a public interest. But IL does not know such a right as it stood at present. The duty of the court was to apply the law as it found it, not to make it.

South West Africa Cases 1966 ICJ

Segunda fase

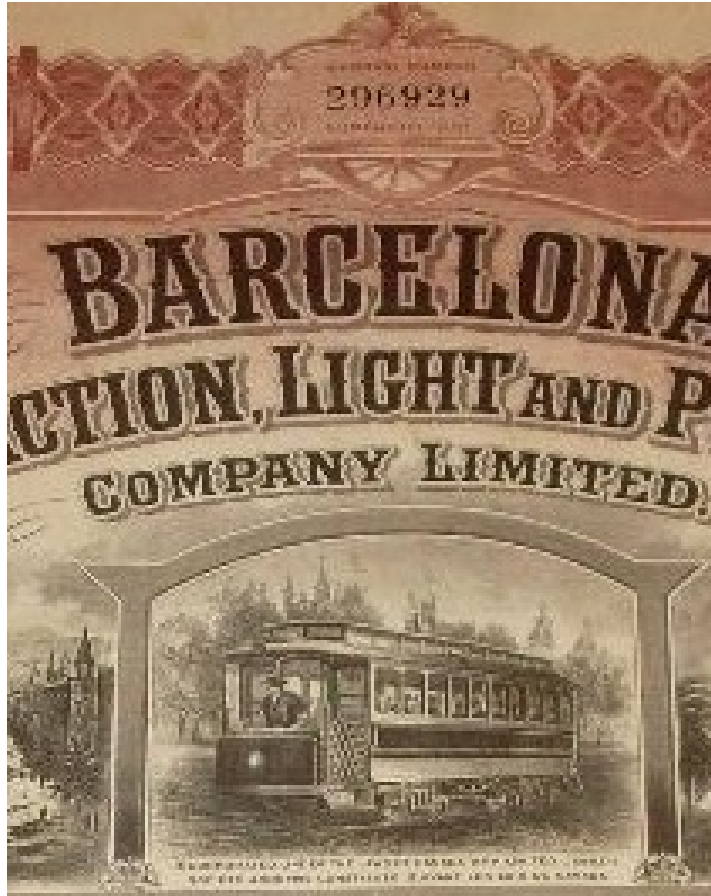
Ethiopia v SA Liberia v SA, Merits

Since the LN had no means to impose its views on the mandatory, the mandate could have been flouted at will, so it was essential as an ultimate safeguard that each member should be deemed to have a legal right or interest in the matter to take direct action relative to it

7/6, by casting vote:

Applicant states could not be considered to have established any legal right or **interest** in the **subject matter** of their claims

Barcelona Traction, Light and Power Case, Belgium v. Spain, ICJ, 1970



- Barcelona Traction era una compañía creada bajo las leyes de Canadá, que operaba en Barcelona
- El gobierno español generó dificultades para operar a las empresas extranjeras, lo cual hizo perder dinero a los accionistas de la compañía (belgas)
- 1948 un tribunal español la declaró en quiebra

Barcelona Traction, Light and Power Case, Belgium v. Spain, ICJ, 1970

- (33) When a State admits into its territory foreign investments ... it is bound to extend to them the protection of the law ... an essential distinction should be drawn between the obligations of a State **towards the international community as a whole**, and those arising **vis-à-vis** another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the **importance of the rights involved, all States** can be held to have a **legal interest in their protection**; they are obligations **erga omnes**.

Western Sahara Case, Advisory Opinion, ICJ 1975

- En 1976 España dejó el Sahara Occidental
- La Asamblea General preguntó:
- ¿El Sahara Occidental era *Terra nullius* cuando España lo colonizó?
- ¿Cuál es el vínculo legal entre el Sahara Occidental y Marruecos / Mauritania?



Western Sahara Case, Advisory Opinion, ICJ 1975

Territories inhabited by tribes of peoples having social and political organization were not regarded as *terra nullius* in 1884.

It was not established any tie of territorial





NOMADIC TRIBES OF THE SAHARA

Western Sahara Case, Advisory Opinion, ICJ 1975

that affect the application of res 1514 XV, in the decolonisation of WS, in particular self-determination principle through the free and genuine expression of the will of the peoples of the territory

- Self determination is part of *corpus iuris gentium*

(derecho de un “pueblo” a decidir su forma de gobierno, perseguir su desarrollo económico, social y cultural, y estructurarse libremente, sin injerencias externas y de acuerdo con el principio

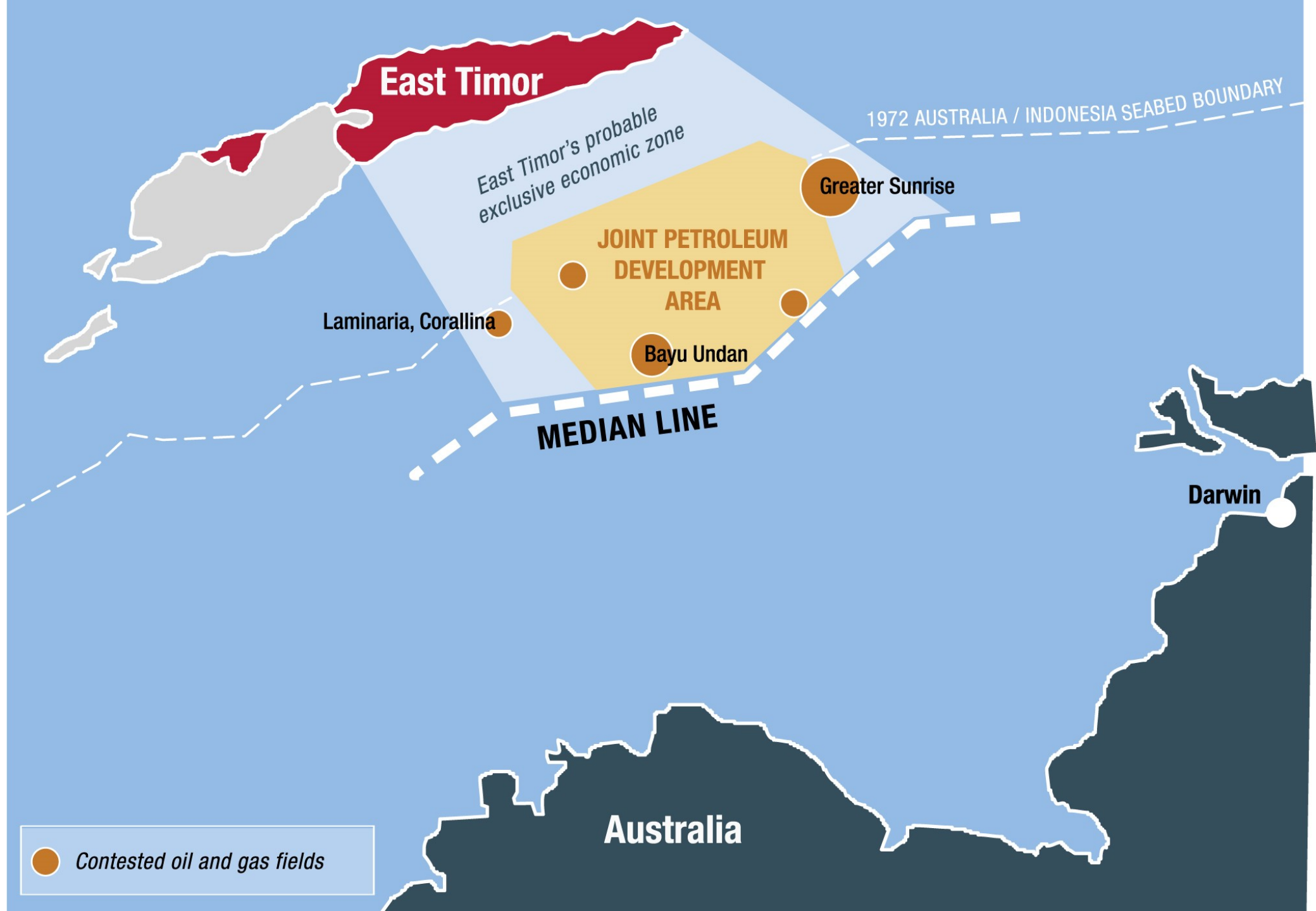
Timor oriental

- Declaró su independencia en 1975, es invadido por Indonesia
- Mayo 2002 alcanza su independencia



Case concerning East Timor Portugal v. Australia, 1995, ICJ

- According to the application Australia had failed to observe the obligation to respect the duties and powers of Portugal as the administrator power of East Timor and the right of East Timor to self-determination, by entering into a 1989 treaty with Indonesia, which had occupied by force and illegally claimed title to East Timor. The treaty delimited continental shelf
- Australia objected that there was in reality no dispute between itself and Portugal, that the 'real dispute' and the true respondent is Indonesia



Case concerning East Timor Portugal v. Australia, 1995, ICJ

- Portugal and Australia had accepted compulsory jurisdiction 36.2, but Indonesia not. Australia objected that Portugal's application would require the Court to determine the rights and obligations of Indonesia.
- Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully conclude the 1989 Treaty. The very subject matter of the decision would be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired power to enter into treaties on behalf East Timor relating resources of its continental shelf. The court could not make such determination in the absence of Indonesia.

Case concerning East Timor Portugal v. Australia, 1995, ICJ

- Portugal's assertion that the right of peoples to self determination ... has an *erga omnes* character ... is irreproachable. The principle of self determination ... is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of *consent to jurisdiction* are two different things.



La segunda guerra del Congo (1998 - 2003)



Armed activities on the Congo (New application) Congo v. Rwanda, Provisional measures, ICJ, 2002

Las medidas provisionales consistían en detener los ataques

69. Whereas both the Congo and Rwanda are parties to the Genocide Convention... however Rwanda's instrument of accession ... includes a **reservation** worded as follows: "The Rwandese Republic does not consider itself as bound by article IX of the Convention" [**dispute settlement provision**]

70. Whereas in the present proceedings the Congo has challenged the **validity of that reservation**

Whereas however, as the Court has already had occasion to point out, "*erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (East Timor, ICJ, Reports 1995, p. 102, para 29.)

Armed activities on the Congo (New application) Congo v. Rwanda, Provisional measures, ICJ, 2002

72. Whereas the Genocide Convention does not prohibit reservations; whereas the Congo did not object to Rwanda's reservation when it was made; whereas that reservation does not bear on the substance of the law, but only on the Court's jurisdiction; ... whereas it is immaterial that different solutions have been adopted for courts of a different character

89. Whereas it follows from the preceding considerations taken together that the **Court does not** in the present case **have *prima facie* jurisdiction** necessary to indicate those provisional measures requested by the Congo