

Personalidad III

El ser humano como persona internacional

- Lopez Ostra v Spain 1993 ECHR
- Lithgow v UK 1986 ECHR
- Gallardo v Mexico 1996 Inter-Am CHR, OEA
- Metalclad v Mexico ICSID 2000

Lopez Ostra v Spain 1993 ECHR

- En 1990, Gregoria López Ostra presentó un caso ante la Comisión Europea de Derechos Humanos. López Ostra alegó falla del Estado Español para tomar medidas contra el olor, ruido y humo contaminante originado en estado sólido y líquido por una planta de tratamiento a unos metros de su casa (había acudido a las cortes españolas, apelado y a la corte suprema quejándose de que las autoridades no tomaban cartas en el asunto)
- Alegó violación a su derecho de integridad física por trato degradante (Art. 3 de la Convención Europea de Derechos Humanos) y el respeto a su casa y su vida privada (art. 8)

Lopez Ostra v Spain 1993 ECHR

- El caso muestra la interdependencia entre los derechos civiles y políticos, por un lado, y los derechos culturales, sociales y económicos por el otro.
- Al proteger los derechos civiles, tales como la propiedad y la vida familiar así como el respecto al hogar, se protegen también derechos culturales, económicos y sociales, tales como el derecho a un medio ambiente saludable así como el mismo derecho a la salud.

Lopez Ostra v Spain 1993 ECHR

- “Contaminación severa puede afectar los derechos individuales del bienestar y evitar el goce de los hogares de tal manera que se afecte la privacidad y la vida familiar de forma adversa, aun cuando no haya riesgos a la salud”
- La Corte sostuvo que estas consideraciones eran de mayor peso que el interés en el desarrollo económico del Estado
- Se violó el artículo 8 pero no el 3

Lithgow v UK 1986 ECHR

- Los demandantes alegaron que la compensación que siguió a la nacionalización de sus industrias de aviación y naviera había sido muy inadecuada y discriminatoria
- Se tomó un “valor base” que era el promedio de las cotizaciones semanales en el London Stock Exchange durante seis meses anteriores a la nacionalización y en el cual no había perspectiva de dicho evento
- Artículo 1, protocolo adicional ECHR. Toda persona física o jurídica tiene derecho al respeto de sus bienes. Nadie podrá ser privado de su propiedad sino por causa de utilidad pública **y en las condiciones previstas por la ley y los principios generales del Derecho Internacional**

Lithgow v UK 1986 ECHR

- La frase “condiciones previstas por la ley” requiere la existencia y el cumplimiento de acceso adecuado a la justicia y normas legales nacionales suficientemente precisas.
- En la relación entre los medios empleados y el fin buscado se requiere proporcionalidad razonable
- Un balance entre el interés general de la comunidad y la protección de los derechos individuales fundamentales.
- La toma de propiedad sin compensación razonable normalmente constituye una interferencia desproporcionada
- En el caso no quedó demostrado que el estándar de compensación razonable no existiera

Gallardo v Mexico 1996 Inter-Am CHR, OEA

- Fue preso político de 1993 al 7 de febrero de 2002.
- “La Necesidad de un Ombudsman Militar en México”.
- El general Gallardo alego ser victima de amenazas, acoso e intimidación por parte de los altos mandos del ejército. Fue sujeto de procesos judiciales injustos y una campaña de difamación y descrédito. (15 averiguación previas y nueve juicios de los que nunca fue culpable)
- México alegó que el caso era inadmisibile podía atenderse por no haber agotado los procedimientos nacionales. (non exhaustion of local remedies)

Gallardo v Mexico 1996 Inter-Am CHR, OEA

- 33. The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding
- 34. However, the right of the state to remedy through its own means an alleged human rights violation within its jurisdiction entail the obligation to provide such remedies in accordance with the generally recognised principles of international law [Article 46 of the Convention]
- 40. Adequate domestic remedies are those which are suitable to address an infringement of a legal right

Gallardo v Mexico 1996 Inter-Am CHR, OEA

- 41. The fact that an extensive series of investigations and criminal cases have been instituted; that there have been successive trials following a declaration of innocence; that these acts target the same person; that the person has been acquitted in each of the cases tried to date; and that the person in question is now being held in custody, lead ... to presume that General Gallardo's right to be presumed innocent has been violated

Gallardo v Mexico 1996 Inter-Am CHR, OEA

- 114. An agent of the administration commits an **abuse of power** when, in performing an act within its competence and respecting the forms imposed by legislation, he makes use of his power in cases, for motives and to purposes other than those for which this power was conferred upon him. The **abuse of power** is an abuse of mandate, an abuse of law... Mexican justice authorities, whether regular or military, ... have used the public power ... for purposes other than those established in Mexican legislation, and in so doing have abuse that power

Metalclad Corporation v United Mexican States ARB (AF)/97/1

- El gobierno federal mexicano autorizó a COTERIM, empresa Mexicana, contruir una estación para el desecho de residuos peligrosos en San Luis Potosí
- Metalclad, una empresa de Delaware hizo un contrato opción para comprar COTERIM
- En 1994, el Municipio suspendió la obra por falta de un permiso de construcción
- Cuando comenzaba el arbitraje en 1997, el gobernadora de SLP emitió un decreto ecológico sobre el terreno de COTERIM

Metalclad Corporation v United Mexican States ARB (AF)/97/1

- METALCLAD (US Corporation) como inversor presentó una reclamación a nombre de COTERIM (empresa mexicana) 1117 NAFTA.
- 1105(1) NAFTA 'investors of another party treatment in accordance with IL'
- 1110 NAFTA 'no party shall directly or indirectly expropriate an investment... or take a measure tantamount to ... expropriation'
- 201 (1) measure is defined as 'any law, regulation, procedure, requirement or practice'
- A tribunal established pursuant to NAFTA Chapter Eleven, Section B must decide the issues in dispute in accordance with NAFTA and applicable rules of international law... In addition NAFTA Article 102(2) provides that the Agreement must be interpreted and applied in the light of its stated objectives and in accordance with applicable rules of International Law. These objectives specifically include transparency and the substantial increase in investment opportunities of the Parties 102(1)(c)

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Metalclad Corporation v United Mexican States ARB (AF)/97/1

- (74) ... the Tribunal finds that Metalclad's investment was not accorded fair and equitable treatment in accordance with international law and that Mexico has violated NAFTA article 1105 (76) ...Prominent in the statement of principles and rules that introduces the Agreement is the reference to transparency (NAFTA Article (102)1) The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party.

Metalclad Corporation v United Mexican States ARB (AF)/97/1

- (103)... expropriation under NAFTA includes....
Incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property, even if not necessarily to the obvious
- (107) These measures, taken together with the representations of the Mexican Federal government, on which Metalclad relied and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit amount to an indirect expropriation benefit of the host State

Autodeterminación

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 de igualdad Western Sahara Case, AO, ICJ, 1975

- International Status of South-West Africa 1950 ICJ
- South West Africa Cases 1962, 1966 ICJ
- Barcelona Traction Case ICJ 1970
- East Timor Case ICJ 1995



- 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

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

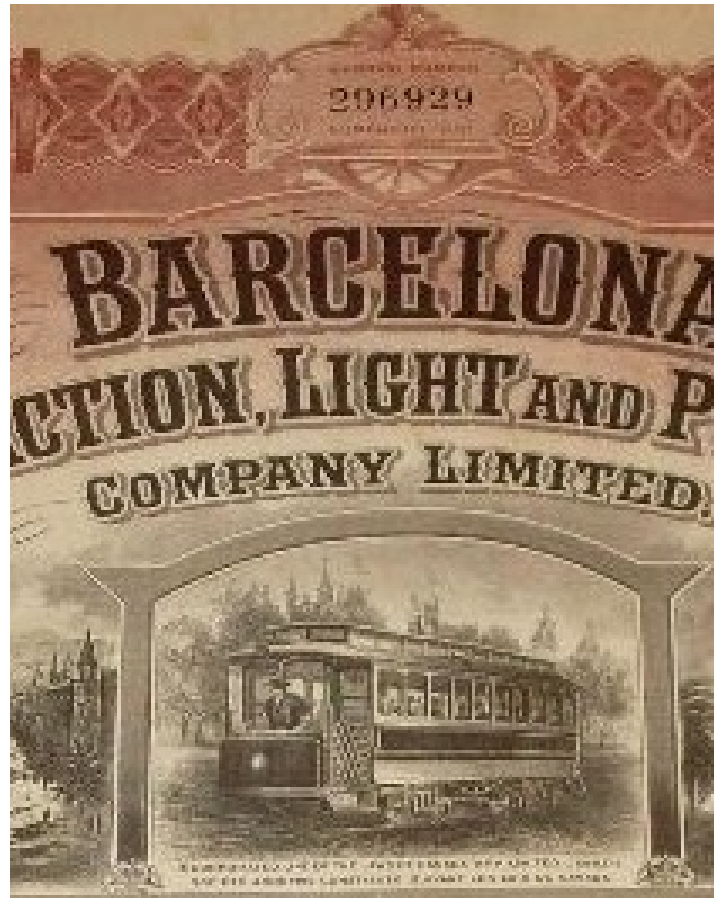
Ethiopia v SA Liberia v SA, Merits

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**.

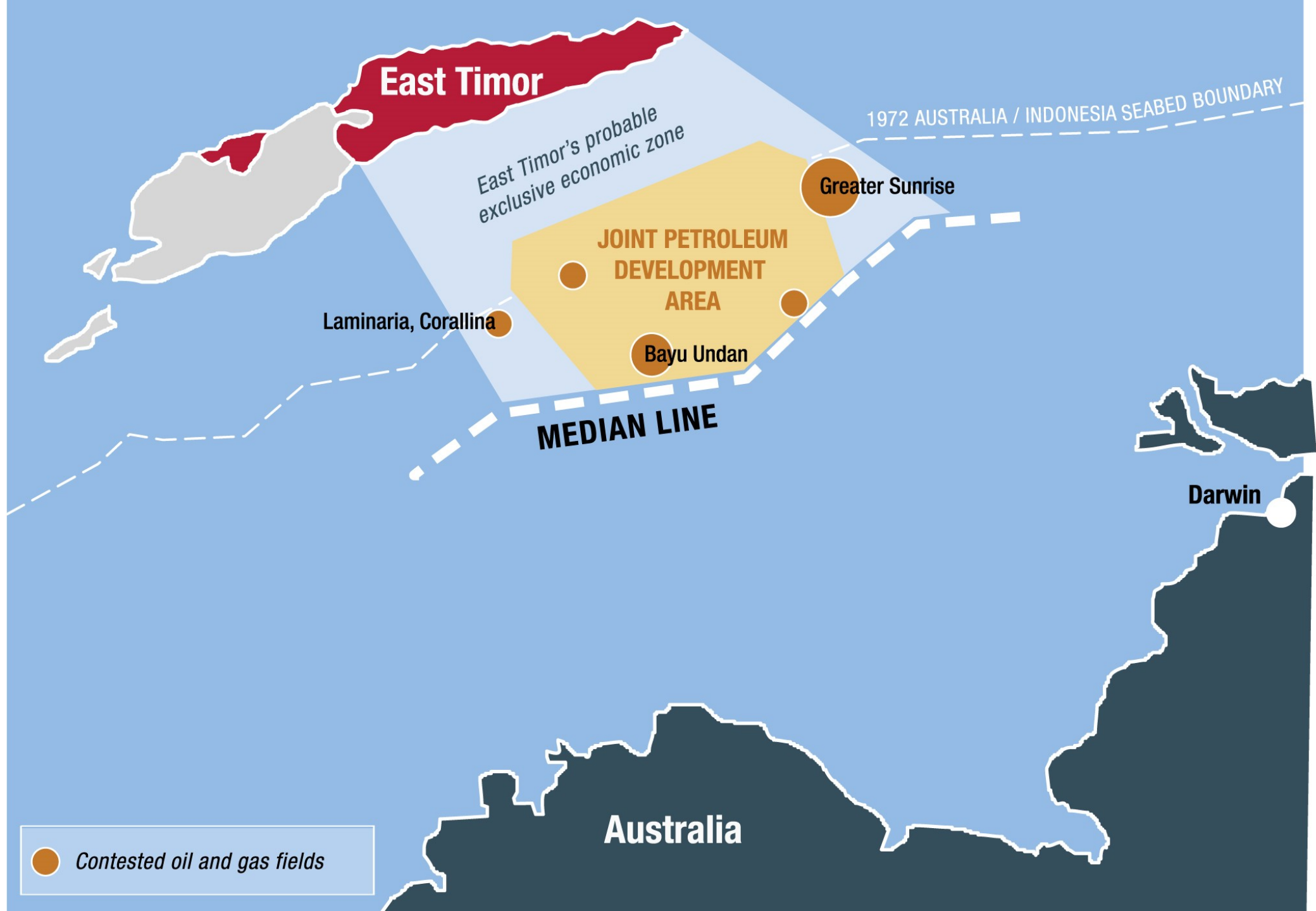
Timor oriental

- 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.