

SEPARATE OPINION OF JUDGE ODA

1. I concur in the Judgment's finding in paragraph 69 A that Tunisia's application for revision relating to the first sector must be declared inadmissible. Yet, as a dissenting Judge in the original case who in 1982 could not support the delimitation line which the Court had proposed, I feel bound to explain why in my view also Tunisia's application is not well-founded. With regard to subparagraphs B and D of the operative part, concerning Tunisia's requests for interpretation relating to both the first and second sectors, I hold the view that the requests should have been found inadmissible for the reasons stated below in paragraphs 11 and 16-18 respectively. However, as the question of admissibility in both cases was put to the vote together with the contents of the respective requests, and as I agree at any rate with the findings reached by the Court that the respective requests cannot be upheld, I have voted in favour.

I. THE FIRST SECTOR OF THE SUGGESTED DELIMITATION LINE

A. The Court's Account in 1982 of the Concessions previously Granted by the Parties

2. It has become evident through the present proceedings that in giving judgment in 1982 the Court had no exact idea of the boundaries of the concessions granted by the respective Parties prior to the signing of the Special Agreement. Had this not been so, Tunisia would have had little ground for submitting its application for revision or its request for interpretation with regard to the first sector of the suggested delimitation line. In the present Judgment the Court appears to be reluctant to recognize this point which, in my view, should have been clearly spelled out.

3. The boundaries of the respective concessions relevant to our consideration, which have become thoroughly known only through the present proceedings, had the following characteristics :

- (i) The southeastern boundary of the Tunisian "Permis complémentaire offshore du Golfe de Gabès" of 21 October 1966, in the form of a zig-zag or "stepped" line, did not extend eastwards beyond the point $11^{\circ} 59' 53''.66$ E, and the southeastern corner of the step furthest from the shoreline was at $33^{\circ} 50' 17''.19$ N on this longitude (turning-point No. 5); the southeastern corner of the step nearest to the coastline was at $33^{\circ} 11' 20''.89$ N, $11^{\circ} 34' 53''.44$ E (turning-point

- No. 41), and the line connecting each of the southeastern corners of the 17 steps joined by these two extreme points did *not* form a single straight line (see No. 9 of the dossier supplied by Tunisia to the Court during the oral proceedings).
- (ii) The northwestern boundary of Libyan concession No. 137 of 30 April 1968 was a line connecting the point $33^{\circ} 55' N, 12^{\circ} E$, in mid-ocean, with the point $33^{\circ} 10' N, 11^{\circ} 35' E$, which lies about one mile to the *east* of the land frontier point at Ras Ajdir on the mainland (see Tunisian Application, Ann. II). In other words the line, if prolonged, would *not* pass through the land frontier point but would intersect the coastline at a point east of the frontier. (The later Libyan concession – NC 76 of 17 February 1979 – did not alter that boundary.)
 - (iii) Thus Tunisia's "stepped" line and Libya's straight line clearly did not match, and in fact some overlapping and conflict occurred in the concession areas.

4. Notwithstanding these clear facts concerning the boundaries of the Tunisian and Libyan concessions, of which the Court could and should have been aware in 1982, the mistaken descriptions (which constituted a cause of the present case) were incorporated in the operative part concerning the first sector of the delimitation line in the Court's 1982 Judgment, which stated :

"the starting point for the line of delimitation is the point where the outer limit of the territorial sea of the Parties is intersected by a *straight line* drawn from the land frontier point of Ras Ajdir through the point $33^{\circ} 55' N, 12^{\circ} E$, *which line* runs at a bearing of approximately 26° east of north, *corresponding to the angle followed by the north-western boundary of Libyan petroleum concessions numbers NC 76, 137, NC 41 and NC 53, which was aligned on the south-eastern boundary of Tunisian petroleum concession 'Permis complémentaire offshore du Golfe de Gabès' (21 October 1966)* ; from the intersection point so determined, the line of delimitation between the two continental shelves is to run north-east through the point $33^{\circ} 55' N, 12^{\circ} E$, thus on that same bearing, to the point . . ." (*I.C.J. Reports 1982*, pp. 93-94, para. 133 C (2), emphasis added).

The mistaken descriptions in the above quotation are underlined. The Court erred in its belief that the northwestern boundary of the Libyan concession lay on this bearing of 26° east of north and was aligned on the southeastern boundary of the Tunisian concession.

5. It is now clear that the bearing of 26° east of north was that of a line connecting point $33^{\circ} 55' N, 12^{\circ} E$, to Ras Ajdir, but *not* to the south-western corner of the Libyan concession. Furthermore, in spite of the explanations given in the present Judgment to the effect that :

"It is evident that the Court did not mean by 'aligned' that the boundaries of the relevant concessions formed a perfect match in the

sense that there was neither any overlap of the concessions nor any sea-bed areas left open between the two boundaries” (para. 36),

it is *more* evident from the erroneous descriptions in the reasonings quoted below that in 1982 the Court suggested the delimitation line on the basis of its incorrect or inaccurate understanding of the Tunisian and Libyan concessions and of the relationship between them :

“[In 1974] Libya granted a concession the western boundary of which was (consistently with a previous concession) a line drawn from Ras Ajdir at some 26° to the meridian.” (*I.C.J. Reports 1982*, p. 37, para. 21.)

“Ras Ajdir is also the point of departure . . . of the line of 26° north-east which had been followed by the two Parties in the granting of concessions for the exploration and exploitation of mineral resources during the period 1964-1972.” (*Ibid.*, p. 66, para. 86.)

“[T]he Court could not fail to note the existence of a *de facto* line from Ras Ajdir at an angle of some 26° east of north, which was the result of the manner in which both Parties initially granted concessions for offshore exploration and exploitation of oil and gas. This line of adjoining concessions . . . was tacitly respected for a number of years.” (*Ibid.*, p. 71, para. 96.)

“A Tunisian enlarged concession of 21 October 1966 was bounded on the east by a ‘stepped’ line (a form apparently dictated by the grid/block system for grant of concessions) the eastern angles of which lay on a straight line at a bearing of approximately 26° to the meridian. In 1968 Libya granted a concession (No. 137) ‘lying to the eastward of a line running south/southwest from the point $33^{\circ} 55' N$, $12^{\circ} E$ to a point about one nautical mile offshore’ the angle thereof viewed from Ras Ajdir being 26° ; the western boundaries of subsequent Libyan concessions followed the same line, which, Libya has explained, ‘followed the direction of the Tunisian concessions’. The result was the appearance on the map of a *de facto* line dividing concession areas which were the subject of active claims, in the sense that exploration activities were authorized by one Party, without interference, or (until 1976) protests, by the other.” (*Ibid.*, pp. 83-84, para. 117.)

“a line drawn from the terminal point of the land frontier through the point $33^{\circ} 55' N$, $12^{\circ} E$, thus at an angle to the meridian corresponding to the angle of the western boundary of Libyan Petroleum Concessions Nos. NC 76, 137, NC 41 and NC 53, which was aligned with the eastern points of the zig-zag south-eastern boundary of the Tunisian concession ‘Permis complémentaire offshore du Golfe de Gabès’ (21 October 1966)” (*ibid.*, p. 85, para. 121).

6. First, the Court's incorrect understanding of the Libyan boundaries would seem to be due to its not possessing precise information respecting the Libyan concessions. And in fact, during the written and oral proceedings in the original case, the exact co-ordinates of the Libyan boundaries were not furnished to the Court. The Court never asked for them, but neither is there any evidence that Libya deliberately concealed them. Tunisia, for its part, did not ask the Court to have Libya give details of its concessions, even during the oral proceedings in the original case. A description of the co-ordinates of the Libyan 1968 concession has been supplied to the Court only in the present proceedings (Tunisian Application of 27 July 1984, Ann. II).

7. Secondly, the inaccurate statements in the 1982 Judgment respecting the Tunisian concession were due to the fact that, although the details were imparted to the Court by Tunisia in the original proceedings, the text of the concession (Tunisian Memorial, Ann. 1) gave these details only in terms of "numéro des repères" (reference numbers) of each "sommet" (traverse-point) of the southeastern boundary; the Court never understood the Tunisian boundary in terms of exact co-ordinates, and did not attempt to seek any further clarification of the details of the Tunisian concession. The exact co-ordinates corresponding to the "repères miniers", that is, "numéro des repères" in the original text, have been made explicit to the Court only in the present proceedings (No. 9 of the dossier supplied by Tunisia to the Court on 13 June 1985 during the oral proceedings). Yet in 1982 the Court was fully aware that the southeastern boundary of the Tunisian concession was not straight but "stepped", as this clearly emerges from the statements in its reasoning (see *I.C.J. Reports 1982*, p. 83, para. 117). This notwithstanding, the Court treated this boundary in the operative part of the Judgment as if it were a straight line (*ibid.*, p. 93, para. 133 C (2)).

8. Judging by the pleadings and arguments of the original case the simple fact is that neither of the Parties assumed that the boundary of these concessions would constitute an important or even relevant factor in the Court's decision. But it is *not* crucial whether Tunisia's unawareness of the precise co-ordinates of the Libyan concession was due to its negligence or whether Tunisia exercised normal diligence, because the validity of the respective concessions of the Parties was not at issue. Thus neither Tunisia nor Libya can fairly be blamed for what now might in retrospect appear to be omissions. Solely the Court, which in 1982 by its own initiative lent great significance to the concessions previously granted by the Parties, was at fault in an omission, namely, of referring to the Tunisian and Libyan concessions without adequate knowledge and without any verification of their respective positions. This is an essential point which the Court in the present Judgment should have more candidly recognized. If the Court rather than the Parties had been more cautious in 1982, the present case would probably not have been presented.

*B. The Immateriality of the Fact “Discovered” to the Court’s
Selection of Point 33° 55’ N, 12° E*

9. Despite this background, the delimitation line for the first sector was suggested by the Court in the operative part of the 1982 Judgment as follows (and as already quoted above) :

“the starting point for the line of delimitation is the point where the outer limit of the territorial sea of the Parties is intersected by a straight line drawn from the land frontier point of Ras Ajdir through the point 33° 55’ N, 12° E which line runs at a bearing of approximately 26° east of north, corresponding to the angle followed by the north-western boundary of Libyan petroleum concessions numbers NC 76, 137, NC 41 and NC 53, which was aligned on the south-eastern boundary of Tunisian petroleum concession ‘Permis complémentaire offshore du Golfe de Gabès’ (21 October 1966) ; from the intersection point so determined, *the line of delimitation between the two continental shelves is to run north-east through the point 33° 55’ N, 12° E, thus on that same bearing, to the point . . .*” (*ibid.*, p. 93, para. 133 C (2), emphasis added).

In the above quotation the passages showing what the Court was really suggesting for the purpose of delimitation have been underlined, i.e., to join the point 33° 55’ N, 12° E, to the land frontier point of Ras Ajdir, as recognized in the present Judgment (para. 33). The significance of the co-ordinates 33° 55’ N, 12° E, had been made known to the Court by Libya as those of a point relevant to its own concession. While it did not make clear all the co-ordinates of its concession, the Libyan Memorial did specify this particular point in the following passage :

“The area covered by this Concession [No. 137] was 6,846 square kilometres, lying to the eastward of a line running south/southwest from the point 33° 55’ N, 12° E to a point about one nautical mile offshore. The point of origin viewed from Ras Ajdir is at an angle of 26 degrees.” (Para. 36.)

It should, however, also be noted (though it is overlooked by the Court also in the present Judgment) that the co-ordinates of 33° 55’ N, 12° E, as the 1982 Judgment proposed, were those which had been one-sidedly borrowed from the Libyan, but *not* from the Tunisian concession in spite of repeated references to “alignment” of the two in the original and the present Judgment.

10. Why did the Court opt for the point 33° 55’ N, 12° E, which was on the boundary line of the Libyan concession but had no significance so far as the Tunisian boundaries were concerned? Why did the Court not choose some point indicated by Tunisia as one of the relevant points in its own concession ? Or, more fundamentally, why, even if the two concessions could once – more than ten years ago – have been “aligned” as interpreted in the present Judgment (para. 36), did the Court find this fact to be a

decisive factor in establishing the delimitation ? The Court in 1982 did not provide any clear answers to these questions. Yet these decisions of the Court are not of a nature to be affected by “the discovery of some fact of such a nature as to be a decisive factor”. The 1982 Judgment may well be open to criticism, and I may add that I found matters very difficult, being aware that the Court had decided on the line of the first sector without adequate grounds. But however forcefully that Judgment may be criticized, the cause and motive underlying the Court’s Judgment, which is final, are not matters subject to revision under Article 61 of the Statute. In other words, if any case could be made for contemplating a revision of the 1982 Judgment, it would rather be on the basis of a criticism of its reasoning than on that of any “facts” newly drawn to the Court’s attention. However, the Statute makes no provision for revising a Judgment of the Court on such grounds.

C. Clarity in the Meaning and Scope of the Judgment in the Selection of Two Unequivocal Points

11. As properly stated in the present Judgment, “[the 1982] Judgment laid down a single precise criterion for the drawing of the line, namely that it is to be a straight line drawn through two specifically defined points” (para. 50). The wording of the operative part of the 1982 Judgment may well be criticized in places for having caused confusion through incorporating some redundant and not wholly accurate explanations. Yet there cannot be any ambiguity in the drawing of a straight line connecting these two unequivocal points, that is, the land frontier at Ras Ajdir and the mid-ocean point 33° 55’ N, 12° E. In its present submissions, Tunisia, relying on the co-ordinates 33° 50’ 17” N, 11° 59’ 53” E, of a point on its own 1966 concession boundary, has proposed new methods which are entirely different from what the Court had in mind, and has thus made its request for interpretation of the 1982 Judgment *in fact* a plea for revision of the Judgment.

II. THE SECOND SECTOR OF THE SUGGESTED DELIMITATION LINE

A. The Court’s Reference in 1982 to “the Most Westerly Point” of the Tunisian Coast for the Location of the Veering-Point of the Delimitation Line

12. The Court considered in 1982 that the delimitation line drawn from the land frontier point of Ras Ajdir through the point 33° 55’ N, 12° E, must veer at a certain point because of the general shape of the Gulf of Gabes. In this connection, the Court took it as legally significant that :

“While the initial part of the Tunisian coast, westwards from Ras Ajdir, runs for some distance in approximately the same direction as

the Libyan coast, the most marked characteristic of the coast . . . is that it subsequently changes direction, so as to run roughly southwest-northeast . . . The change in direction may be said to modify the situation of lateral adjacency of the two States, even though it clearly does not go so far as to place them in a position of legally opposite States.” (*I.C.J. Reports 1982*, p. 63, para. 78.)

The Court also stated that “[t]he change in direction of the coast is . . . a fact which must be taken into account” (*ibid.*, p. 87, para. 124). Well might this assertion have been correct. Yet I could not see why the Court suggested in 1982 that the veering-point of the delimitation line should be on the same latitude as the turning-point of the Gulf’s coast. A latitude is simply a plane of the earth’s rotation and, from the viewpoint of cartography, merely offers a convenient artifice for drawing a map. Assuming, however, that the configuration as such is what really counts, and that one were accordingly to examine a relief map of the region without paying any attention to lines of latitude or longitude or to the conventional “set” of a map, no logical indication could be found for the Court’s choosing the veering-point of the delimitation line, in association with the point where the Gulf’s coast changes direction, in terms of their location on the same latitude (see my dissenting opinion in the original case (*ibid.*, p. 268)).

13. The 1982 Judgment picked “an appropriate point on the coast to be employed as a reference-point for reflecting [the] change in the delimitation” in stating that “the Court considers that an appropriate point on the coast . . . is the most westerly point of the Tunisian coastline . . .” (*ibid.*, p. 87, para. 124). Even if the connection of the veering-point of the delimitation line with the turning-point of the coast by their respective locations on the same latitude had been underlain by sound reasoning (which I doubt, as I stated in the preceding paragraph), there would not have been any legal ground for suggesting that the “change in direction” of the coast of the Gulf of Gabes must necessarily occur at the most westerly point of the Gulf. It would in fact have been difficult to locate the turning-point in the general direction of the coast, particularly in a geographical situation such as the Gulf of Gabes, where the coast curves gradually half-way round without showing any distinct characteristics. It seems to me that any point roughly between 33° 55’ N and 34° 20’ N could have been designated as the turning-point in the general direction of the coast, greatly depending on one’s view of the general configurations of the neighbouring coastlines. It could not in principle have been of any significance whether this turning-point should or should not be located at the most westerly point of the Gulf.

14. At any rate, how and where the general direction changes is not open to precise determination, as the Court properly stated in 1982 :

“The Court does not consider that [the question of the point at

which the change in direction of the Tunisian coastline may properly be said to occur] is a question it is called upon to decide ; the examination of the matter by the Parties seems to the Court rather to demonstrate that the point . . . cannot be objectively determined as a matter of fact.” (*I.C.J. Reports 1982*, p. 87, para. 123.)

The Court, “discharg[ing] its duty to indicate the practical method of delimitation in such a way as to enable the experts to effect the delimitation ‘without any difficulties’”, chose this particular point on the Tunisian coastline as “an appropriate point” “which has the advantage of being susceptible of objective determination as a matter of geography” (*ibid.*, paras. 123-124). The simple fact is that, in choosing what it believed to be the most accurately determinable feature of the coast as the practical turning-point for the general direction, the Court in 1982 hit upon “a small nick” on a small-scale map, or according to Tunisia the mouth of a wadi, near latitude 34° 10' 30" N. How fortunate it was for the Court that the line drawn from that point to the Kerkennah Islands ran “along the seaward coast of the actual islands” (see *ibid.*, p. 89, para. 128) ! To define this particular point which must be “susceptible of objective determination as a matter of geography”, the Court found, as another happy coincidence, that in its own interpretation it could be “the most westerly point” of the Gulf of Gabes. Defining this particular turning-point of the coastline as “the most westerly point”, the Court did not mention the possible relevance of whether this would be on a *baseline* in terms of the 1958 Convention on the Territorial Sea and the Contiguous Zone or the 1982 United Nations Convention on the Law of the Sea. Although that particular point, which happened to be “the most westerly point” of the Gulf in the Court’s interpretation of these words, was chosen empirically within a range of physical possibilities and not necessarily based on legal grounds, there cannot be any room for further interpretation of that Court’s decision. How “the most westerly point” may otherwise be interpreted by either lawyers or geographers becomes irrelevant for this reason.

15. The precise location near latitude 34° 10' 30" N of what the Court picked upon as decisive, inasmuch as a turning-point in the general direction of the coast, and what Tunisia calls a “wadi” could be fixed by the experts, as the 1982 Judgment proposed, but the function of the experts of both Parties would be limited to finding the exact latitude of that point on an authoritative map to the degree of some seconds (one second is roughly 30 metres and so tiny a margin should not materially affect the angulation between the general direction of the coastline and the line drawn to and along the eastern shore of the Kerkennahs) ; it could not be extended to finding what else they might interpret *in legal or topographical terms* to be “the most westerly point of the Tunisian coastline . . . , that is to say, the most westerly point on the shoreline (low-water mark) of the Gulf of Gabes”, or “the most westerly point of the Gulf of Gabes”.

B. Clear Designation by the Court of a Turning-point on the Coast

16. A problem has been raised by Tunisia in connection with the second sector of the delimitation line, inasmuch as the Court suggested in the operative part of the 1982 Judgment that

“the line of delimitation [of the first sector] . . . is to run north-east through the point 33° 55' N, 12° E . . . to the point of intersection with the parallel passing through the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir, that is to say, the most westerly point on the shoreline (low-water mark) of the Gulf of Gabes” (*I.C.J. Reports 1982*, pp. 93-94, para. 133 C (2)),

and that

“in the second sector, namely in the area which extends seawards beyond the parallel of the most westerly point of the Gulf of Gabes, the line of delimitation . . . is to veer to the east . . .” (*ibid.*, p. 94, para. 133 C (3)),

while it had stated in its reasoning that

“it appears to the Court that [the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir, that is to say, the most westerly point on the shoreline (low-water mark) of the Gulf of Gabes] will be approximately 34° 10' 30" north” (*ibid.*, p. 87, para. 124).

Tunisia has submitted its request for interpretation because, in its view, a westward indentation at the approximate latitude of 34° 10' 30" N does not lie on “the shoreline (low-water mark)” of the Gulf of Gabes, but merely in the mouth of a wadi, and the actual most westerly point on the shoreline (low-water mark) of the Gulf of Gabes must lie on latitude 34° 05' 20" N (Carthage), which is well to the south of this wadi.

17. The ostensible problem raised by Tunisia is to reconcile that “wadi”, as constituting “the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir”, with the expression by which the Court specifies its meaning: “that is to say, the most westerly point on the shoreline (low-water mark) of the Gulf of Gabes”. I call it an ostensible problem, because, as I stated above, it was quite irrelevant in the Court’s considerations how a wadi should be regarded in terms of a *baseline* under the 1958 Geneva Convention or the 1982 Montego Bay Convention. It is an undeniable fact also for Tunisia that the mouth of a wadi constitutes part of the “Tunisian coastline” or “the shoreline (low-water mark) of the Gulf of Gabes” *in a topographical sense*; Tunisia does not seem to deny that a significant feature, capable of serving as a turning-point, is located near latitude 34° 10' 30" N.

18. In spite of the phraseology of its request in relation to the second

sector, Tunisia, being aware that the Court has chosen that particular point on the coast near $34^{\circ} 10' 30''$ N, seems in fact to be seeking a statement from the Court that the Judgment was erroneous because, in principle, a wadi is not located on the *baseline* in terms of the relevant provisions of either the 1958 Geneva Convention or the 1982 Montego Bay Convention, and that therefore this wadi should not be treated as constituting the most westerly point of the Gulf of Gabes. The Judgment may arguably not have been drafted in an unequivocal manner so as to avoid any misinterpretation. However, what Tunisia is in fact seeking appears to me to be quite different from what a Party may request by way of the interpretation of a judgment. Tunisia is *not* seeking interpretation of the Judgment, but is attempting to *replace* the concrete indication given by the Judgment by its own interpretation as to the location of the most westerly point of the Gulf of Gabes at $34^{\circ} 05' 20''$ N, on the ground that the reasoning which led the Court to suggest latitude $34^{\circ} 10' 30''$ N as a reference for the veering of the delimitation line in the second sector was not quite appropriate.

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19. In sum, the Court in 1982 made a firm suggestion for a practical method of defining the line of delimitation, though I personally could not support it. First, the determination by the Court in the first sector of the delimitation was not of a nature to be so affected by any newly discovered fact as to cause the Court to reconsider it. Secondly, though the Court's description of the suggested delimitation line in its first and second sectors may not, on its face, be so uncomplicated as to need no interpretation, the Court's intention was clear ; it appears to me that Tunisia's requests for interpretation of the Judgment are simply disguised requests for revision.

(Signed) Shigeru ODA.