1. Need for Exceptional Title: Views of Commentators

Most commentators accept that an historic claim to waters must be exceptional.¹ Blum, in his leading work *Historic Titles in International Law*, repeatedly states that an historic claim must be in the nature of an ‘exceptional’ one (*i.e.*, contrary to international law); but he also describes this “derogation” in the context of “normally applicable rules of international law”,² so implying, perhaps, that at some historical stage such

¹ See, e.g., Gidel, *Droit international public de la mer*, vol. III (1934), pp. 621–623; and the UN *Juridical Regime*, at p. 8, para. 45.

² *Op. cit., supra* p. 18, at p. 261 (emphasis added). See also the UK contention in the *Fisheries* case that historic title “goes beyond what is accepted under general customary law” (*Pleadings*, vol. II, at p. 303) (emphasis added); and its statement in the same case to the effect that Norway was entitled to claim as “internal waters on historic grounds” all fjords and sunds which “fall within the conception of a bay…whether or not the proper closing line of the indentation is more or less than ten…miles long” (emphasis added). This statement tends to water down the many more categorical British assertions in that case that a historic title is based on an exceptional claim alone. See also the vagueness of Jessup’s statements
emphasised ‘normality’ requirements (as for example for juridical bays) might not have clearly pertained. He also stressed here the rationale for the ‘derogation’ viewpoint; namely that of encroachment of rights which would “normally accrue to the entire international community”. Other authorities make similar descriptions.

The ‘exceptional regime’ requirement was quite extensively discussed in the UN Juridical Regime, where it was seen to be more than a mere “academic” question. This was because of the “rigorous proof” necessary for such a claim (see below, section 5); and the “basis of title” having here to be “exceptionally strong”, most especially because it normally involves a derogation of the freedom of the high seas relative to other States. This UN study also saw a “connexion” between the requirement of acquiescence (discussed below in Chapter 14) and the opinion that historic title is based on an exception to the general rules of international law. This is because as a title to historic waters is, generally-speaking, based on one that is initially unclear or illegal, it follows that other States are not bound to accept such a claim at the appropriate time for a needed response, even if all the traditional requirements of international law for its acceptance qua historic waters are present.

1.2 Judge Oda’s views in El Salvador/Honduras

Judge Oda appears, in his Dissenting Opinion in the El Salvador/Honduras case, to support the view that there is no ‘exceptional’ title behind an ‘historic’ claim; nor need there to be. Having doubted that there ever was an historic waters doctrine in international law, he there stated that the “legal concept” of a bay only developed “in parallel” with the ‘cannon shot’ theory as an exception to the one marine league rule, and that there would not have been a problem where the opposite headlands at the mouth of a geographical bay were less than two marine leagues apart; except that “some slightly wider distances” were proposed at that time, with the “10-mile rule” only being confirmed (but not even then being “established”) as late as 1910 in the North Atlantic Fisheries Case.

(op. cit., at pp. 363 and 382) (such a claim “may be established over bays of great extent”). Jessup, however, as an influential American publicist writing in 1927, seems clearly to have thought that any bay even then more than 6 miles wide would have to be claimed on historic grounds to be “territorial”.

3 Id., at 248.
5 Supra p. 2, at para. 40. p. 7. See also para. 42.
6 Id., at p. 7.
7 See Gidel, op. cit., at pp. 621–3.
8 Supra n. 4, at p. 16, para. 106.
9 See, e.g., Scovazzi, op. cit., supra, p. 8, at p. 326, who opines that whatever justifications a claimant State gives, these have to be evaluated by other States who can then accept or reject them.
10 Supra p. 2, at pp. 735/6, para. 8, and at p. 736, para. 9. He in fact cited (inter alia) in this context some of the earlier US claims to historic bays (Delaware and Chesapeake) where the mouths were more than 10 miles wide: id., at p. 737, para. 10. But compare his later statement (id., at p. 749, para. 30) to the effect that, regarding the Gulf of Fonseca, the three claimant