The Migingo Island Dispute Between Kenya and Uganda

Christopher R. Rossi
THE MIGINGO ISLAND DISPUTE BETWEEN KENYA AND UGANDA

Christopher R. Rossi*

“[Africa’s] great hydrographic basins . . . tend to become new areas of conflict. Around these basins not only economic activities but also serious contradictions have emerged. The noncoincidence of the borders of states and natural borders has opened the way to disputes over sovereignty.”

INTRODUCTION ................................................................. 659
I. MIGINGO’S FATE IN CONTEXT ........................................... 671
   A. The Scramble for Africa .............................................. 671
   B. Imperial Line Drawing ............................................... 676
II. CARTOGRAPHIC SHORTCUTS AND A FUTURE PROBLEM FOR INTERNATIONAL LAW .................................................. 680
   A. The 1926 British Order in Council ................................. 681
III. UTI POSSIDETIS, LES EFFECTIVITÉS, AND AFRICAN ELITES ................................................................. 685
   A. Historical Confusion, Uti Possidetis, and the Value of Effectivités .................................................. 688
CONCLUSION ........................................................................... 690

INTRODUCTION

Migingo is one of three closely situated islands in the eastern waters of Lake Victoria,² approximately fifteen kilometers from the nearest Kenyan mainland port in the western

---

* Adjunct faculty member, University of Iowa College of Law. The author thanks S.J.D. student Dan Ngabirano, Prof. Busingye Kabumba, Prof. Julie MacArthur, and Iowa law librarian, Don Ford for comments or assistance.


2. The two other islands are Ugingo (Usingo) and Pyramid Island. Ugingo is two hundred meters (660 feet) east of Migingo; Pyramid Island is two kilometers (1.2 miles) south of Migingo. The lake has many names. On the Tanzanian side, it is referred to as Lake Ukerewe. It is also known as Nalubaale,
Migori district, and two hundred kilometers from the nearest mainland port in Uganda. It measures about one half acre in size, or two thousand square meters (twenty-two thousand square feet). For most of its history, it remained an uninhabited outcropping, a dot on the second largest fresh water lake in the world. Beginning in 2000, climate changes to the hydrological cycle of the Lake Victoria Basin, a basin long regarded as susceptible to significant water table fluctuations, resulted in alarming diminutions to the water table of Africa’s largest lake.

Sango, and Lolwe in other parts of East Africa. The Bantu word for the lake is Nyanza. In 1858, Richard Burton and John Speke “discovered” and named Lake Victoria in pursuit of the source of the Nile River. Many people of East Africa still refer to it by its colonial name, as it will be referenced in this article. Calls to Africanize its name, however, present some difficulty, given the many peoples of East Africa. See, e.g., Mbomek Munyaga, Change the Name ‘Lake Victoria’, ARUSHA TIMES, http://www.arushatimes.co.tz/2011/7/Society_6.htm.


7. Joseph L. Awange et al., GRACE Application to the Receding Lake Victoria Water Level and Australian Drought, in OBSERVING OUR CHANGING EARTH 387, 387 (Michael G. Sideris ed., 2008) (noting significant lake-level fluctuations in the early 1960s and stating that, by 2006, the lake’s level dropped more than 1.1 meters below its ten-year average).

Despite dire long-term implications,⁹ the receding water presented an economic opportunity for a small number of enterprising fishermen, who began using Migingo’s newly exposed craggy shore as a port in 2001.¹⁰ Reports soon circulated that its surroundings earned fishermen three to four times in a day what shore-based counterparts earned in a month.¹¹ Migingo’s reputation as a rich fishing ground swelled its population to more than one thousand inhabitants,¹² quickly turning the islet into a microslum. But, its position in the lake makes the half-acre island a strategic offshore weigh station and encampment for commercial export of Nile perch (mbuta),¹³ attracting as epiphenomena pirates,¹⁴ smugglers,¹⁵ and contested claims of sovereignty.

Ecologists have long puzzled over the appearance of Nile perch in Lake Victoria’s waters. Some evidence suggests Uganda’s

---

⁹. See Awange et al., supra note 7, at 387 (signaling disastrous challenges ahead for the thirty million people whose livelihood depends on Lake Victoria’s health).


¹². Emmanuel Kisiangani, Dispute Over Migingo Escalates, INST. FOR SECURITY STUD. (Aug. 17, 2011), https://www.issafrika.org/iss-today/dispute-over-migingo-escalates. 80 percent of Migingo’s inhabitants are Kenyans, the remainder is split between Ugandans and Tanzanians. Id.


Game and Fisheries Department secretly introduced the nonnative species in the 1950s to bolster sport fishing.\textsuperscript{16} By the 1980s, its population had exploded, coinciding with a fivefold increase in its commercial value as a restaurant item in Europe.\textsuperscript{17} The fish also is a devastating piscivore, “one of the best-studied invasive species in history.”\textsuperscript{18} It threatens half of Lake Victoria’s five hundred species of endemic cichlid fish with extinction, upsets the ecological balance of the world’s largest tropical lake,\textsuperscript{19} and is turning this diverse multispecies Great Lake into an anthropogenic adulteration, mostly sustaining three fish species.\textsuperscript{20} The acute financial and resource dispute over the Nile perch catch, which may ultimately self-regulate through overfishing, overshadows a coming ecological disaster that would affect the livelihood of thirty million people around Lake Victoria’s shore.\textsuperscript{21}

\begin{thebibliography}{9}
\bibitem{17}Id. \textit{See also Uganda Fish Processors and Exporters Association}, http://www.ufpea.co.ug/ (last visited July 21, 2017) (identifying the European Union as the largest market for Nile perch).
\bibitem{18}Pringle, supra note 16, at 780.
\bibitem{20}See Pringle, supra note 16, at 780 (listing the Nile perch, the nonindigenous Nile tilapia, and the diminutive \textit{R. argentea} as the three remaining species of fish).
But, rich harvests of Nile perch currently generate $250 million USD in yearly trade for the East African economies of Kenya, Uganda, and Tanzania. Migingo’s proximity to the Kenyan shore decisively controls the economics of this industry, and the majority of its inhabitants are ethnic Luos from Kenya. Kenya owns 6 percent of Lake Victoria, but its processors harvest 180,000 metric tons of fish for export; Uganda, however, owns 43 percent of the lake but exports only seventy thousand metric tons through its processing plants. The perceived imbalance in the Nile perch trade, compounded by the discovery of


22. See Mkumbo & Marshall, supra note 21, at 56 (noting that, despite indications of decline, the Nile perch accounts for 60 percent of the total landed value of fish from Lake Victoria).

23. The nearest Ugandan land port is approximately one hundred kilometers from Migingo; the nearest Kenyan land port is ten kilometers away. See Peter Wafuła Wekesa, Old Issues and New Challenges: The Migingo Island Controversy and the Kenya-Uganda Borderland, 4 J. E. Afr. Stud. 331, 335 (2010).

24. Id. at 331.

25. See Ugandan Perspective on Migingo Island Border Issue (Hoover), U.S. Dep’t of State Cable No. 09KAMPALA482_a, WIKILEAKS (May 8, 2009), https://wikileaks.org/plusd/cables/09KAMPALA482_a.html (unclassified cable from the U.S. Embassy in Kampala to [U.S.] Secretary of State, Intergovernmental Authority on Development (IGAD), Rwanda).
commercially viable oil deposits across the East African Rift System in 2006,\(^\text{26}\) possibly including deposits under Lake Victoria,\(^\text{27}\) weigh heavily in the emergence of a major East African dispute.\(^\text{28}\)

Kenya and Uganda dispute ownership of Migingo, which has led to multiple confrontations, war talk,\(^\text{29}\) mediated bilateral and multilateral discussions,\(^\text{30}\) and debates in the East African Legislative Assembly and the Pan African Parliament.\(^\text{31}\) Even if Migingo were indisputably in Kenya’s sovereign waters, as

---


28. See The Migingo Island Dispute Which Way for Kenya and Uganda, NATIVE E. AFR. (Mar. 24, 2016), http://native-eastafrica.org/the-migingo-island-dispute-which-way-for-kenya-and-uganda/ (noting that the delayed development of Uganda’s fishing industry following years of misrule and neglect is a major cause of the dispute).


30. For instance, at the Lusaka African Union Summit (2009); the Kampala Bilateral Ministerial Meeting (2009); the Kisumu Technical Officers’ Meeting (2009); and the Kenya-Uganda joint meeting on the resumption of the joint boundary summit (2011).

Uganda’s President Yoweri Museveni may have suggested,\textsuperscript{32} much of the catch allegedly derives from fishing activity in Ugandan waters, giving rise to unyielding Ugandan claims of Kenyans’ poaching and tax evasion and Ugandan police and military presence in the disputed area.\textsuperscript{33} Kenyan fishermen insist, however, with some scientific support, that the Nile perch breed off Kenya’s swampy lakeshore and migrate into deeper water around Migingo, thus entitling the country to take the fish wherever caught.\textsuperscript{34} The argument lacks legal support today but highlights a codependency condition that one day may facilitate resolution. The argument stirs proprietary assertions over lakes and seas reminiscent of sixteenth century European debates: the seas must be “kept” (chiefly) for fishing.\textsuperscript{35} It also highlights the

\begin{enumerate}
\item During a 2009 lecture in Dar es Salaam, Tanzania, the president of Uganda was quoted as saying: “The island is in Kenya, the water is in Uganda.” Eric Shimoli, \textit{Museveni: You Got Me Wrong On Migingo}, DAILY NATION (May, 15, 2009), http://www.nation.co.ke/News/-/1056/598508/-/u69sfj/-/index.html Uganda authorities later claimed the president’s statement was misconstrued as applying to Migingo and insisted was actually referring to Suba Island. \textit{See id.; see also Museveni Complicates Kenya-Uganda Island Dispute, supra note 3 (affirming Museveni’s statement that the island is in Kenya).}
\item \textit{See Eric Shimoli & Patrick May oyo, Revealed: Hidden Players in Migingo, DAILY NATION} (May 15, 2009), http://www.nation.co.ke/News/-/1056/598728/-/u69u28/-/index.html (noting claims that Migingo is a haven for tax evasion and of military advantage to Uganda).
\item William Welwood (1578–1622) made a similar argument in a rejoinder to Hugo Grotius’ argument relating to the inexhaustibility of living resources of the sea in \textit{Mare Liberum} (1609). According to Welwood:
\begin{quote}
If the uses of the seas may be in any respect forbidden and stayed it should be chiefly for the fishing. . . . For whereas aforesetime the white fishes daily abounded even into all the shores of the eastern coast of Scotland, . . . the shoals of fishes are so broken and so far scattered away from our shores and coasts that no fish can now be found worth of any pains and travails, to the impoverishing of all . . . our home fishers and to the great damage of the nation.
\end{quote}
fluid and subjective conception of African interstitial space, which involves complex religious, commercial, and historical networks of activity that simultaneously established and blurred temporal pluralities at the edges of African borderland. One such plurality involves the porous Lake Victoria catchment, which overlaps and interlaces historical forms of identity, movement, and cultural practice. Problems of colonialism, development, African state-building, national unity, and political consolidation provide context but cannot mask the concentration on emerging resources, such as the Nile perch and oil prospects, as key elements driving this conflict.

In 2004, this dispute took a problematic turn. In that year, reports surfaced of Ugandan interlopers (settlers) appearing on Mizingo, vexing Ugandan-Kenyan relations. By 2006, Ugandan customs officers arrived and began assessing levies on Kenyan fish harvests. Uganda’s Fisheries Ministry organized a Mizingo Beach Management Unit to oversee the collection of administration fees. Between 2008 and 2009, tensions between the two countries elevated when the Ugandan Marines occupied the islet and expelled Kenyan fishermen for failing to pay licensing fees and for not using Ugandan processors for all fish caught within Ugandan territorial waters. At this time, a

Salute A 29 (2005) [111]. In Mare Liberum, Hugo Grotius conceded that, unlike seas, lakes could be owned because lakes did not have the same fluid character as seas—they “wash against the land on all sides.” Hugo Grotius, Mare Liberum 1609–2009, 81 (Robert Feenstra ed., 2009).


37. See Wekesa, supra note 23.


40. Id.


42. See National Assembly Official Report, supra note 41 (recording a Kenyan parliamentary debate on pursuing a high-level diplomatic resolution to the
Ugandan flag also appeared over the islet.\textsuperscript{43} In response, twelve Kenyan police dispatched to reassert sovereignty over Migingo, prompting the arrival of sixty Ugandan marines one day later.\textsuperscript{44} The occupation provoked Kenyan rioters to uproot landlocked Uganda’s vital rail link to the Kenyan port of Mombasa, through which 80 percent of Ugandan imports arrive.\textsuperscript{45} Consequently, Uganda and Kenya stood at the brink of Africa’s smallest war.

High-level diplomatic discussions produced a fragile arrangement, allowing fishermen from both countries to continue business as usual under joint police supervision until a Joint Technical Committee of experts evaluated the disputed border.\textsuperscript{46} Matters of criminal jurisdiction were to be referred to the courts of the suspect’s nationality.\textsuperscript{47} Surveying work, however, stalled when the joint verification team disagreed on methodology,\textsuperscript{48} and a new row erupted in early 2016, when the Ugandan-controlled Beach Management Unit shut down a Kenyan electoral occupation of the island by Ugandan forces and the posting of the country’s flag.

\textsuperscript{43} See Howden, supra note 13 (reporting that Uganda’s national flag was hoisted over the island along with another flag bearing the colors of the Ugandan police authority).

\textsuperscript{44} See id.


\textsuperscript{47} See Kasasira, supra note 46.

\textsuperscript{48} See Kisiangani, supra note 12 (discussing technicalities besetting the 2009 joint East African cooperative initiative to demarcate the disputed border on Lake Victoria). The Uganda team returned to Kampala after disputing the erection of a new boundary pillar demarcating the westernmost point within the meaning of the 1926 British Order in Council. The Kenyan surveyors unofficially completed the survey, claiming Migingo Island was 510 meters (1,670 feet) east of the Kenya-Uganda border. Id.
commission’s attempt to register islanders. A joint communiqué issued by the Kenya-Uganda Joint Border Commission urged expedited resolution of the marine boundary issue and resolved to constitute a joint committee to end the dispute. Were it only so easy.

The Migingo Island dispute intertwines latent intramural and international issues of ethnicity, nationality, and politics around the temptations of competing sovereign claims over newly emergent resources. If Migingo is Africa’s smallest war in waiting, its elusive resolution presents problems for bilateral relations and for East African cooperative initiatives of economic and political integration. The dispute directly challenges efforts of the African Union Border Program to solve border conflicts in Africa and in cross-border areas involving strategic resources. Migingo represents another example of one of the enduring problems of postcolonial Africa: the lingering effects of uti possidetis (as you possess, so you may possess), which accommodated postcolonial line drawing rather than the human geography affected by its


51. Wekesa, supra note 23, at 336, 338 (concluding that the Migingo issue exposes the underlying fragility of East African regionalism efforts and mechanisms).

arbitrary application. Interestingly, the course of dealing charted by the fishermen, and more informally by the pirates and smugglers who ply the waters, suggests that a condominium or shared sovereignty arrangement provides a solution, if only Uganda and Kenya would acknowledge this second-best outcome for Africa’s most recent conflagration stemming from nineteenth century colonial rule.

This article will assess the prospects for a peaceful resolution to the Migingo Island dispute, suggesting the relevance of a constructivist perspective. Constructivism emphasizes a world of social facts that inform and are informed by human interaction. The basic structures of international relations, for instance the state system and sovereignty, are intersubjective rather than material creations; and the international norms making up these structures not only regulate behavior but also shape and are shaped by behavior, ultimately communicating shared understandings, intentionally or unwittingly. A constructivist approach does not explain how the world changes or what people do; it is not a theory, understood as such. It is an approach to understanding problems and evolving solutions that recognizes the social construction of reality and the dynamism of international law and relations’ tools—institutions, norms, rules, and language, emphasized, as is the case here, by historical context. An appreciation of historical context sheds necessary light


on concrete problems of world politics and avoids abstract seductions of theory, while acknowledging the possibility of fragmentation of understandings, interests, and the malleable norms and rules that create opportunities for change or conflict.

The relatively small size and scale of the Migingo Island dispute reflects greater historical tendencies; Migingo’s problems retell conflicts of international law that afflict international relations large and small. But, changing circumstances caused by technology, discovery, or, in this case, by changes to the Great Lake in the Anthropocene age, have awakened dormant territorial disputes that stem from deep historical divisions, exacerbated in an African context by complications rooted in colonialism and the Hobson’s Choice taken by African elites to accept conditions of historical fait accompli by accepting border demarcations that often make no sense except to sustain raison d’etat. Modalities for a condominium or shared sovereignty arrangement develop notwithstanding appearances of impasse but encounter the state tendency to territorialize resources when interests and abilities align. This territorializing tendency acts as a drag on negotiated solutions to the problem. Although criticized as a workable legal solution, the international legal construct of condominium may, as metaphor, pick the lock held by Uganda and provide the key held by Kenya to end this dispute; but, if accomplished, it must also account for the repository vault of territorial temptation.

In addition to this introduction, this article will proceed as follows. First, Part I will situate Migingo’s problem in historical context. It will focus on the partitioning of Africa by European powers in the late nineteenth century that unintentionally, but nevertheless, directly conditioned Migingo’s fate. Part II will

57. See Alexander Wendt, Social Theory of International Politics 4 (Steve Smith et. al. eds., 1999) (noting the ultimate test of any method’s worth is its ability to address concrete problems).


then highlight the additional cartographic shortcuts that produced the border demarcation now in dispute and the constitutive legal document that the disputants acknowledge as controlling—the 1926 British Order in Council. Part III will identify the reason why the parties accept this document as controlling—their support of the principle of *uti possidetis*. Here, however, it is argued that the rhetorical acceptance of the principle of *uti possidetis* contrasts with its dysfunctional application, which creates an impasse and feeds through its dysfunction the territorializing temptations of Uganda and Kenya over resources at the heart of the dispute. Countering these developments are the evolving instrumentalities and agencies of shared sovereignty arrangements, which offer prospects for a condominium agreement negotiated between the disputants or through structures created by regional or continental integration organizations. This article will conclude with a discussion of all of these prospects through historical examination, underscoring an awareness that constructivism presents multiple pathways and outcomes, liberal and illiberal, that await the world of Migingo’s making.

I. MIGINGO’S FATE IN CONTEXT

The dispute over Migingo transplants problems of boundary demarcation that have menaced continental Africa to an islet in the world’s largest tropical lake. The topical significance of the problem belies a deep and troubled history of line drawing that overlaps the Euclidean precision of Western cartographic thinking with the interstitial and experiential spatial dynamics of African cultures.

A. The Scramble for Africa

Migingo’s fate began with the “Scramble for Africa” in the late nineteenth century, an acceleration of imperial activity in sub-Saharan Africa first initiated by Portugal almost six centuries ago.60 This phrase dates back to the International Association of

---

the Congo, a Belgian expeditionary commission that concluded 450 treaties and contracts with chiefdoms of the Upper Congo between 1882 and 1884.61 The agreements allowed King Leopold II of Belgium to lay personal claim over the Congo River Basin, stimulating a climate of competitive annexation that threatened war among European powers.62 By this time, however, France had already penetrated Algeria and Tunis, Spain kept a “watchful eye” over Morocco’s sultan, and Italy had designs on Abyssinia and treaty rights over Somaliland.63 By 1875, Britain had negotiated a majority stake over control of the Suez Canal and, more alarmingly, expanded its supervisory role in Egypt following its defeat of nationalist forces during the Urabi rebellion of 1882.65 In the Middle East generally, and in the Maghreb and Arab Africa regions specifically, colonies often existed before colonialism,66 the protogenesis of a trading-post economy Europeans established on continental coasts.67 To “obviate misunderstanding and disputes” over “new acts of occupation” in sub-Saharan Africa, German Chancellor Otto von Bismark, following diplomatic exchanges of entente with the


63. See Elizabeth Wormeley Latimer, Europe in Africa in the XIX Century 189–90 (1896).


67. Mbembe, supra note 36, at 265.
French foreign ministry,68 convened fifteen states for the Berlin West Africa Conference of 1884–1885.69 The resulting General Act remains a centerpiece of international law’s close nineteenth-century association with imperialism.70 Although focused on navigation possibilities of the Congo and Niger watersheds, by 1900, the conference established the informal ground rules for European continental conquest that partitioned Africa along lines that looked much as they would in 1960, when seventeen African nations achieved independence, or even later.71 The conference, through its amalgam of ancillary discussions, also served as a template for the regulation of another kind of tributary system—the divisible sovereignty system that subcontracted colonial government to private contractors or joint-stock companies and colonial chiefs, creating a comprador class of imperial functionaries—Western spatial *imaginaires*—who reimagined space and territory along linear boundaries and put them to a European use as they spread across Africa’s Great

---

68. See Craven, *supra* note 65, at 36.

69. See generally No. 128—Preamble, General Act of the Conference of Berlin, relative to the Development of Trade and Civilization in Africa, the free Navigation of the Rivers Congo, Niger, &c., the Suppression of the Slave Trade by Sea and Land, the occupation of Territory on the African Coasts, &c. Signed at Berlin 26th February 1885, in II E. HERTSLET, *THE MAP OF AFRICA BY TREATY* 468, 468 (3rd ed. 1967) [HERTSLET, *THE MAP OF AFRICA BY TREATY*]. Other stated purposes of the conference included regulating trade development, free navigation on Africa’s chief rivers flowing into the Atlantic Ocean, and furthering the moral and material well-being of native populations. *Id*. Attendees included the United States, Turkey, Great Britain, Germany, Austria, Belgium, Denmark, Spain, France, Italy, the Netherlands, Luxembourg, Portugal, Russia, and the then-united Sweden and Norway. *Id*.


Lakes region. These auxiliaries served as indirect agents of imperial power, penetrating deeper into Africa’s interior through the conclusion of treaties and concords neither allowed nor thought possible in Europe. The Dutch East India Company established this model in its seventeenth-century rise to prominence in Asia. The Dutch East India Company’s charter from the United Provinces granted it free reign to serve the state’s security interests on the cheap. It could raise and maintain armies and navies, pursue war or sue for peace, and divert a portion of the receipts of its commercial monopoly to strengthen its military to claim more ground and expand the interests of its state suitor. The formula worked well, both in terms of destroying the Spanish trading empire in the Mediterranean and the Portuguese Fidalgos’ (noblemen) colonial control over Asia (theEstado da Índia) and delivering colonial rewards to the United Provinces as overseer of the commercial markets once ruled by the great sultanates of Indonesia and the Malay peninsula.

In the late nineteenth century, Africa, Germany, and Britain again took up this territorializing model. A competition between German and British trading companies produced sphere-

---

72. See, e.g., Anthony Kirk-Greene, Britain’s Imperial Administrators 1858–1966 (2000); L.H. Gann & P. Duignan, The Rulers of British Africa 1870–1914 (1978). See also Mbembe, supra note 36, at 265–66 (noting the devices of discipline and command modeled on chiefdoms that extended the administrative and social power of the colonial state), 283 (“Western spatial imaginaires”) (footnote omitted), and 260 (discussing the domestication of world time and putting it to a different use).

73. See Curtin, supra note 62, at 426.


76. See, e.g., Victor Lieberman, Strange Parallels, Vol. 2: Mainland Mirrors: Europe, Japan, China, South Asia, and the Islands (Michael Adas, Patrick Manning, and Philip Curtin, eds. 2009).

77. See generally Israel, supra note 74; and C.R. Boxer, Fidalgos in the Far East 1550–1770 (1978).

of-influence agreements in 1886\textsuperscript{79} and 1890.\textsuperscript{80} The 1890 agreement delimited the northern boundary of the German sphere of influence as “the point on the eastern side of Lake Victoria Nyanza [as it was then called] which is intersected by the 1\textsuperscript{st} parallel of south latitude; thence, crossing the lake on that parallel . . . to the frontier of the Congo Free State, where it terminates.”\textsuperscript{81} A regional partition resulted, spreading westward across East Africa from Dar es Salaam and the Sultanate of Zanzibar on the Indian Ocean. The German East Africa Company took full control over Tanganyikan territories on the southern littoral of Lake Victoria,\textsuperscript{82} while an Imperial British East Africa Company formed (and later failed) and occupied Kenya, Uganda, and the great kingdoms of the Luo, Suba, Samia, Kisii, Luhya, Busoga, and Buganda, which border the northern and northeastern tiers of the lake.\textsuperscript{83} By 1895, German and British spheres became more defined, with Germany ceding influence north of the present Kenya-Tanzania border to the British Crown, which took over the commercial monopoly previously granted to the bankrupt Imperial British East Africa Company, and declared an East African protectorate over what is now Kenya.\textsuperscript{84} A series of agreements stemming from the Imperial British East Africa

\textsuperscript{79} See Agreement between the British and German Governments, respecting the Sultanate of Zanzibar and the opposite East African Mainland, and their Spheres of Influence, Gr. Brit.-Ger., Oct 29-Nov. 1 1886, in III HERTSLET, THE MAP OF AFRICA BY TREATY 882–86 (1909) [Agreement between the British and German Governments].

\textsuperscript{80} See Agreement between the British and German Governments, supra note 79, at 899–906

\textsuperscript{81} Id. at art. 1(1); McEwen, supra note 62, at 99.

\textsuperscript{82} See Curtin, supra note 62, at 426.

\textsuperscript{83} See M.F. HILL, PERMANENT WAY: THE STORY OF THE KENYA AND UGANDA RAILWAY, BEING THE OFFICIAL HISTORY OF THE DEVELOPMENT OF THE TRANSPORT SYSTEM IN KENYA AND UGANDA 12 (1949) (discussing the development of Anglo-German spheres of influence north and south of Lake Victoria (Victoria Nyanza)). For a breakdown of the early settlements, population, and demographic features of the Lake Victoria basin, see AWANGE & ONG’ANG’A, supra note 5, at 11–15 (2006); and Wekesa, supra note 23, at 334 (noting that the Kenya-Uganda border division also divided the Iteso, Saboat, and Pokot peoples).

\textsuperscript{84} See Agreement between the British and German Governments, supra note 79, at 383 (declaring the official East Africa Protectorate following an agreement between Great Britain and Zanzibar respecting the possessions of the Sultan of Zanzibar on the Mainland, signed at Zanzibar on December 12, 1895, id. at 382). See also James Thuo Gathii, Imperialism, Colonialism, and International Law 54 BUFFALO L.R. 1013, 1019 (2007).
Company’s 1892 withdrawal from Uganda created the Uganda Protectorate under the control of the British Crown by 1894–1895.\(^{85}\) Protectorates developed as a recurring, yet equivocating, form of imperial rule in the mid-to-late nineteenth century.\(^{86}\) They avoided the financial costs of full incorporation, a matter of public debate and concern to the British Exchequer at this time, but allowed the colonial power to maintain influence. In 1920, Kenya became fully incorporated as a colony, while Uganda remained under protectorate status until its independence in 1962, but distinctions between the two blurred with the British practice of governing protectorates as if they were colonies.\(^{87}\)

**B. Imperial Line Drawing**

Imperial line drawing, in addition to splitting the Lake Victoria region into northern and southern spheres of great power influence,\(^{88}\) bisected lineages, kinships, kingdoms, ethnicities, and human histories, making the natural geography a recurring human subject of dispute for Uganda, Kenya, and their neighbors.\(^{89}\)

---


87. See Gathii, *supra* note 84, at 1033.


89. See Shaw, *supra* note 86, at 50 (noting that ethnic considerations were generally ignored in the process of European colonization of Africa). Julie MacArthur also notes that “long histories of migration, intermarriage, and inter-ethnic exchange complicated bureaucratic efforts to align people into neatly ordered columns of sanctified and unchanging tribal groupings.” Julie MacArthur, *Cartography and the Political Imagination: Mapping Community in Colonial Kenya* 3 (2016).
In addition to the Migingo controversy with Kenya, Uganda disputes the Moyo, Adjumani, and Yumbe district boundaries with its northern neighbor, South Sudan, and before that, Sudan, and warred with Tanzania over the Kagera region. The colonial administrative partitioning created diasporic pockets of ethnicity among Nilotic peoples of Kenya’s Great Rift Valley, exacerbating historic tensions between large ethnic groups, such as the Luo and Kikuyu, which erupted in near genocidal carnage between 2007 and 2008. Indeed, border disputes throughout East Africa continue to pose security threats.

After the Belgians determined that the major central African Atlantic deltas led to navigable interiors, spurring French and German incursions into the region, the British eventually settled on an additional counterbalance to protect established Greater East African interests and to expand control. Subsequently, Britain’s Royal Geographical Society underwrote Richard Burton’s and John Hanning Speke’s 1857–1859 search for the source of the Nile River. Building on the knowledge of that

93. ODUNTAN, supra note 46, at 157.
94. Id. (quoting Wafula Okomu).
geography, Britain undertook construction (using imported Indian labor) of the misnamed Ugandan Railway, an engineering masterpiece connecting Mombasa on the Indian Ocean to the northeast corner of Lake Victoria, with Kisumu as the terminus.\(^97\) Winston Churchill noted that its construction accommodated the sole political concern of securing British predominance over the Upper Nile, which included an emerging scramble for Uganda following the expulsion of the Kabaka of Buganda, Mwanga II, in 1897.\(^98\) In 1907, Churchill rode the six-hundred-mile railway and called it “a slender thread of scientific civilization . . . drawn across the primeval chaos of the world,”\(^99\) but he saw nothing of Uganda. On completion of the railway in April 1902, Sir Clement Hill, the Foreign Office’s Superintendent of African Protectorates, declared the railroad a part of Kenya; he placed East Africa up to the eastern shore of Lake Victoria under one chiefdom, leaving all territory west to another chief. Hill’s decision to relocate the Eastern Province of the Uganda Protectorate to the East African Protectorate removed the huge portion of the Rift Valley stretching to the Kedong River near Naivasha from the traditional control of Ugandan kingdoms, gifting it to what would become Kenya.\(^100\) Mindful, but unmoved by the objection that “the transfer of Uganda’s Eastern Province would

---


\(^98\) See D. Anthony Low & R. Cranford Pratt, *Buganda and British Overrule: 1900–1955, Two Studies* 8 (1960) (noting the importance of Uganda (Buganda) as the key to the interior following Mwanga’s expulsion).


involve the severance of the tribes . . . from their natural focus in Uganda.” Hill intended to keep the entire railway line under one local colonial administration. Shrinking the kingdom of Buganda and dividing other peoples’ historical territories ceded eventual problems of East Africa’s White Highlands to Kenya, causing the latter much future conflict; it also fixed Uganda’s relation to Kenya along a divide in Lake Victoria that

101. Kenneth Ingham, Uganda’s Old Eastern Province: The Transfer to East Africa Protectorate in 1902, 21 UGANDA J. 41, 44 (1957). Steamer service connected Entebbe (Port Alice) to Kisumu’s Port Florence. Id. at 47. The British had to undertake “punitive expeditions against refractory tribes” displaced along the railway line and throughout the territory who were transferred from Uganda’s Eastern Province to the East African Protectorate, including expeditions against the Nandi in 1900, 1903, and between 1905 and 1906, and the Ogaden Somalis in 1901 (after the assassination of a subcommissioner, the Sotik, in 1906, the occupation of Marakwet in 1911, and Northern Jubaland in 1912 and 1914, among the Giriama in 1914, two campaigns in Turkana in 1915 and 1917, and punitive measures again in Jubaland in 1916 and 1917). See REPORT ON THE COLONY AND PROTECTORATE OF KENYA FOR THE YEAR 1927, No. 1425, 14–15 (1929), http://libsysdigi.library.illinois.edu/ilharvest/aficana/Books2011-05/5530244/5530244_1927/5530244_1927_opt.pdf.


103. In addition to consolidating the administration of the Uganda Railway in the East Africa Protectorate, the British deemed the territory suitable for a white man’s country. The term “White Highlands” is derived from that policy of setting aside these agricultural lands in Kenya for settlers of European origin. See generally W.T.W. Morgan, The ‘White Highlands’ of Kenya, 129 GEOGRAPHICAL J. 140–55 (1963). The promotion of European settlement was deemed necessary to prevent the railway from turning into a serious financial liability. See LOW & PRATT, supra note 97, at 180. To accommodate the nearly one hundred European settlers in the region in April 1903, pastoralist territories of the Masai, on both sides of the Uganda Railway in the Rift Valley, were taken over, and the Masai were removed to reserves sixty miles to the north and toward German East Africa in the south. The Nandi, Lumbwa, and Kavirondo nations were repositioned as part of the East Africa Protectorate. See REPORT ON THE COLONY AND PROTECTORATE OF KENYA FOR THE YEAR 1927, No. 1425, supra note 101, at 13. The 1929 Hilton Young Commission, which formed to investigate closer ties among British territories, concluded that this decision cut the Masai nation into two “with no more concern . . . than the scythe has for a blade of grass.” McEWEN, supra note 62, at 147 (quoting the Hilton Young Commission).
eventually would involve Migingo, stirring ethnic tensions involving Uganda’s Bantu-speaking peoples and Migingo’s principal future inhabitants, the Luo.104

II. CARTOGRAPHIC SHORTCUTS AND A FUTURE PROBLEM FOR INTERNATIONAL LAW

The Scramble for Africa resulted in cartographic shortcuts. Many border demarcations were approximated or artificially determined.105 They were not made in reference to linguistics or ethnicity but in reference to particular geographical features, which presented problems of their own. Malcolm Shaw noted: “[A] number of African boundaries were not demarcated for reasons of expense or lack of trained personnel, while in the case of boundaries between two colonies (or two parts of one colony) belonging to the same State, demarcation was often deemed unnecessary.”106 International Court of Justice (ICJ) judge, Bola Ajibola, took notice of the imperial mindset involving Africa’s arbitrary partition, quoting Lord Salisbury’s 1890 statement in the Territorial Dispute case (Libya/Chad, 1994): “We have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were.”107 Lord Curzon, who partitioned Bengal for administrative reasons in 1904, and attempted to do the same with Poland,108 famously encapsulated the “unsurprising” dangers of imperial line drawing,


105. See CHARLES DE VISSCHER, PROBLÈMES DE CONFINES EN DROIT INTERNATIONAL PUBLIC 17 (1969) (noting “L’Afrique est celui de tous les continents qui, du fait de ses vastes regions désertiques ou inexplorées, de la faible densité des populations, de l’absence ou de l’ignorance de leur passé historique, s’est prêté le mieux aux delimitations dites artificielles.”).


108. See II DAVID DILKES, CURZON IN INDIA 204 (1969); PRAMILA SHARMA, CURZON-NAMA: AUTOCRAT CURZON, UNCONQUERABLE INDIA 133–41 (1999); See
stating: “Frontiers are indeed the razor’s edge on which hang suspended the modern issues of war or peace, of life or death to nations.”109 And yet, imprecision involving European treaty making in Africa often reduced it to a level of routine—the British East Africa Company equipped its agents with “parcels of blank pro forma, which only required the inscription of the name of the relevant chief, the place, the date, the chief’s mark, and—a point on which the British Foreign Office insisted—the signature of two witnesses.”110 Former ad hoc judge of the ICJ, Georges Abi-Saab, objected to the Chamber’s “excessively detailed analysis of French colonial law” in the Frontier Dispute case between the two former French colonies, Burkina Faso and Mali, finding it not “fitting . . . for an international court and . . . largely superfluous.”111 He negated the legal crossover or continuum juris effect in his separate opinion,112 animating Gbenga Oduntan’s observation that it “is becoming generally clear, especially to non-Western judges, that precautions ought to be taken in judgments when considering colonial law.”113 Aspects of the Migingo Island dispute reflect that imperial insouciance.

A. The 1926 British Order in Council

A 1926 British Order in Council, an administrative measure of governance stemming from Royal prerogative, rather than parliamentary approval,114 grouped the entire 580 mile (933 kilometer) interterritorial boundary “schedule” between the boundaries of modern Africa constituted so much of a “European superimposition” that the legal nomenclature and instruments (such as Orders in Council) for dealing with them have remained exactly the same. Anthony I.
Uganda/Kenya protectorates into essentially three sectors from north to south: from the northern tripoint with Sudan (Mount Zulia) to Mount Elgon; from Mount Elgon to the Mouth of the Sio River on Lake Victoria’s northern littoral; and from the thalweg of the Sio River to the tripoint border with Tanzania, located on the first parallel south (1° south) latitude at “approximately” 33°56’ east longitude. This latter segment, “with minor variations,” aligns Pyramid, Ilemba, Kiringit, Mageta, and Sumba islands along a meridian, situating the southern tripoint boundary (demarcating Uganda, Kenya, and Tanzania) in Lake Victoria. The line segment derived from the 1890 latitudinal bilateral agreement between the German and British trading companies. It connected longitudinally with a boundary line drawn due south of the westernmost point of Pyramid Island in 1926, part of the three islands making up the sometimes called “Migingo Islands,” and extended from Pyramid Island due north “to the most westerly point of Ilemba [Remba] Island.” When connected to the northern segments dividing Uganda and


116. A thalweg is the line of deepest soundings along the course of a river; it is the main navigable channel as opposed to the middle of a river. See Charles Cheney Hyde, Notes on Rivers as Boundaries, 6 Am. J. Int’l L. 901, 902–03 (1912) (discussing thalwegs).


119. See Brownlie, supra note 117, at 924–25 (reprinting the 1890 agreement).

120. Id. at 944 (reprinting the Order in Council, Schedule (1)).
Kenya, it appears this 86 mile (138 kilometer) border segment skirts Migingo’s western shoals by a few hundred meters, placing Migingo wholly within Kenya’s borders.\textsuperscript{121} Problematically, as Brownlie’s \textit{African Boundaries} encyclopedia records, the alignment produced by the 1926 British Order in Council—despite mentioning markers, pillars, and coordinates—was described in terms which to some extent lacked precise definition.”\textsuperscript{122} The reference to geographical features cannot produce great precision when “some of those features lack clear definition.”\textsuperscript{123} The use of thalwegs, island chains, and straight line methods of demarcation had administrative and cartographic appeal in a colonial age (and today), but factual evidence in support of \textit{effectivités}, retrospectively applied to cover geospatial regimes not precisely delineated at the time (which subsequently have gained an economic value), also created problems. As the Tribunal of the Permanent Court of Arbitration has noted, such evidence may be voluminous in quantity yet sparse in useful content.\textsuperscript{124} Rivers and thalwegs change course,\textsuperscript{125} as has the navigable channel of the Sio River, one of the physical features used in

\begin{itemize}
\item\textsuperscript{121} See Gettleman, \textit{supra} note 32 (quoting Durham University’s International Border Research Unit’s geographer John Donaldson’s conclusion on review of the 1926 British Order in Council). \textit{See also Boundary News: Kenya, Uganda Border Survey and Demarcation in Lake Victoria Will Continue After Difficult Start} (Boundary News), IBRU: CENTRE FOR BORDERS RESEARCH (May 5, 2009), \url{https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=7923&rehref=%2Fibru (“[I]t is likely that the joint survey will find Migingo positioned on the Kenyan side of the boundary.”)).
\item\textsuperscript{122} BROWNLIE, \textit{supra} note 117, at 953.
\item\textsuperscript{123} \textit{Id.} (noting as well that subsequent demarcations took place in phases in 1927, 1933, and between 1959 and 1960; that uncertainties with regard to alignment at the time of publication (1979) did not pertain to the Migingo area; and that since independence, both countries “have recognized the alignment in principle”). \textit{See also} Wafula Okumu, \textit{Resources and Border Disputes in Eastern Africa}, 4 J. E. AFR. STUD. 279, 284 (2010) (discussing limitations of colonial boundary making).
\item\textsuperscript{124} Award of the Arbitral Tribunal in the First Stage of Proceedings (Territorial Sovereignty and Scope of the Dispute) (Eri./Yemen) 71 (Perm. Ct. Arb. 1998).
\item\textsuperscript{125} \textit{See} STEPHEN B. JONES, \textit{BOUNDARY-MAKING: A HANDBOOK FOR STATESMEN, TREATY EDITORS AND BOUNDARY COMMISSIONERS} 117 (1971) (discussing surveying problems relating to rivers and thalwegs).
\end{itemize}
the 1926 British Order in Council to demarcate the southern border.\textsuperscript{126} Some evidence suggests that Migingo was the generic name of the undifferentiated island chain, which only later more specifically differentiated the two other islands as Ugingo and Pyramid Island.\textsuperscript{127} Ugandan surveyors claim, however, that Ugingo, which lies east of Migingo, is actually Pyramid Island, as referenced in the 1926 British Order in Council, because it is shaped like a pyramid.\textsuperscript{128} This claim has led Ugandan and Kenyan surveyors to dispute which of the three islands referred to in the colonial boundary documents is Pyramid Island.\textsuperscript{129} Both countries disputed ownership before independence in the early 1960s,\textsuperscript{130} but Ugandan dictator Idi Amin Dada’s period of misrule (1971–1979) has served as an explanation for Uganda’s inability to sustain its claim. The delicate diplomatic border dispute involving Migingo sits atop abundant fishing stock but also atop broader revanchist sentiments espoused by Amin in 1976,\textsuperscript{131} and later hinted at by President Museveni, who dis-

\textsuperscript{126} See Warui David Njoka, The East African Community and Dispute Settlement (A Case of Migingo Island) 78–79 (May 2013) (unpublished M.A. thesis, University of Nairobi Institute of Diplomacy and International Studies), http://erepository.uonbi.ac.ke/handle/11295/52603?show=full (noting that the Sio River has changed its course a number of times, producing different surveying interpretations as to fixing the thalweg’s location).

\textsuperscript{127} See Boundary News, supra note 121 (noting but discounting the possible problem concerning the islands having multiple names).


\textsuperscript{129} Paragraph 6 of the Joint Communiqué reads: “In determining the location of Migingo Island, the survey team is informed by arguments from both sides on which of the two islands next to Migingo constitute the Pyramid Island. In this regard, straight lines shall be drawn from Rmeba (Ilemba) Island to the two islands.” See Samwel Kumba, Why Migingo Survey Stalled, DAILY NATION (Aug. 7, 2009), http://www.nation.co.ke/news/-/1056/636292/-/4fjlcrz/-/index.html. Another sticking point involves Ugandan surveyors’ insistence that that buoys be placed as permanent border markers in the lake. See Bichachi, supra note 128.

\textsuperscript{130} See Shaka, supra note 41, at 35.

cussed the restoration of Greater Uganda by extending the territory to near Naivasha.\textsuperscript{132} Shifting one border, even by a matter of meters, to accommodate Migingo’s fate, however, tempts a domino effect of border transformations between the two countries that neither disputant can countenance.

III. \textit{Uti Possidetis}, \textit{Les Effectivités}, and \textit{African Elites}

The arbitrary effects of boundary drawing by retreating colonial powers has been well studied in the Americas, Africa, and Asia.\textsuperscript{133} The justifications for the doctrine emphasized convenience and expediency,\textsuperscript{134} the desire to quiet title and prevent controversy over postcolonial boundary contours, and the avoidance of competing territorial claims based on \textit{terra nullius} (land belonging to no one).\textsuperscript{135} Presumptively, states emerging from decolonization were to inherit the colonial borders held at the time of independence.\textsuperscript{136} \textit{Uti possidetis} served to freeze territorial title based on colonial maps, however imprecise, or actual territorial possession, “no matter how arbitrary those boundaries may have

\textsuperscript{132} MUSEVENI: Uganda territory extends up to Nakuru, Mzee Kenyatta Grabbed Our Land, POLITICA (Jan. 7, 2016), http://www.politics.co.ke/global/museveni-uganda-territory-extends-nakuru-mzee-kenyatta-grabbed-land/ (quoting Ugandan President Museveni’s claim that “[t]he original world maps of 1924 shows clearly Uganda extends to almost Naivasha”).


\textsuperscript{134} A.O. CUKWURAH, \textit{THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW} 113 (1967).


\textsuperscript{136} See Ratner, supra note 133, at 590.
been drawn.” Despite its lack of precision and coercive elements, *uti possidetis* became, and remains, a major building block of the international legal system. The ICJ validated it as “a general principle,” and its application expands beyond the postcolonial settings that gave birth to its application. Like the emergence of sovereignty’s double sword of imperial and papal power in the early modern European age, *uti possidetis* transmuted to accommodate the interests of African elites, informing the Charter of the Organization of African Unity (“OAU”), appearing in Article 4(b) of the African Union’s Constitutive Act, taking its place in the 1964 OAU Cairo Declaration, and shifting subsequent African border discussions

137. See Klabbers & Lefeber, supra note 133, at 37.
139. See Touval, supra note 133, at 17 (noting that an element of coercion is almost universally involved in *uti possidetis*’ application).
140. See Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. 554, 567 (Dec. 22).
141. Id. at 565. See also Case Concerning the Territorial Dispute (Libya/Chad), 1994 I.C.J. 6, 89 (sep. op. J. Ajibola).
144. See Mbembe, *supra* note 36, at 261–62 (summarizing a prevailing idea that African elites adopted distortions of colonial boundaries, adhered to the dogma of their intangibility, and granted them a kind of legitimacy).
away from questions of colonial illegitimacy toward the management domestic needs.\footnote{See, e.g., \textit{Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa (CSSDCA), OAU ASSEMBLY OF HEADS OF STATE AND GOVERNMENT} (July 2002) Decision Cm/Dec.666 (LXXVI) (providing for the delineation and demarcation of African boundaries by 2012, where such an exercise has not yet taken place); \textit{Declaration on the African Union Border Programme and its Implementation Modalities as Adopted by the Conference of African Ministers in Charge of Border Issues held in Addis Ababa} (June 7, 2007), http://www.peaceau.org/uploads/border-issues.pdf (noting that the parties were guided by respect of borders existing on achievement of national independence); \textit{Declaration on the African Union Border Programme and the Modalities for the Pursuit and Acceleration of its Implementation, Addis Ababa} (Mar. 25, 2010), http://www.peaceau.org/uploads/aubp-dec-e.pdf (recalling the principle of respect of borders existing on achievement of national independence).} African critics of the principle nevertheless acknowledge its grip over boundary alignments of the continent, which are far more maintained than in Spanish America, Europe, or Asia.\footnote{See \textit{Kalu N. Kalu, State Power, Autarchy, and Political Conquest in Nigerian Federalism} 12 (2008) (discussing the analytical framework for African state formation).} Explanations focus on political consolidation and state-building efforts of newly independent African states, where centralizing state authority and codifying national identity and unity outweighed the focus on secondary issues, like borderland integrity.\footnote{Wekesa, \textit{supra} note 23, at 334.} Postcolonial African statecraft presented the inward-looking project of crafting imagined political community, while porous and peripheral borders and commitments to Pan-African ideals “only mattered in contexts where they did not conflict with national interest.” Application of \textit{uti possidetis} compels Uganda and Kenya to accept the 1926 British Order in Council and the schedules to the 1995 Ugandan Con-
stitution and the 1963 Kenyan Constitution as the primary documents dealing with the dispute. Other legislative, geographic, and constitutional sources confirmed the schedule demarcation of the 1926 British Order in Council. The rule is not in dispute. Rather, the countries dispute the facts pertaining to the exact location of the westernmost point of any given island as described by the 1926 British Order in Council.

A. Historical Confusion, Uti Possidetis, and the Value of Effectivité

When historical confusion obscures the establishment of definitive legal title, international law processes the application of uti possidetis through international courts and tribunals, which seek out two elements in establishing sovereign authority: the intention to act as sovereign, and some actual exercise or display of such authority. Together, they establish a discernable expression of sovereign authority—à titre de souverain. When à

---


153. See The Kenya Independence Order in Council, No. 1968 (1963) KENYA GAZETTE SUPPLEMENT No. 105; International Boundary Study Kenya-Uganda Boundary, supra note 117; CONSTITUTION art. 5, 174, 187 (1995) (Uganda); reaffirming CONSTITUTION, Schedule 1, The Boundary of Uganda, art. 2(2), 83, 90–91 (1967) (Uganda) (“[T]hence following a straight line southerly to the most westerly point of Ilemba [Remba] Island; thence following a straight line southerly to the westernmost point of Pyramid island; thence following a straight line due south to a point on latitude 0100’S.”); and the Kenya Colony and Protectorate (Boundaries) Order in Council 1926; Brownlie cites as additional confirmations the IX Laws of Uganda, Rev. 31 (1964); CONSTITUTION, Schedule 1 (1967) (Uganda), XI Laws of Kenya, Rev. group 2, at 7 (1962); and Kenyan Legal Notices Nos. 386 (1961) and 193 and 207 (1963), in addition to Kenya Legal Notice No. 718, supra. See BROWNLIE, supra note 117, at 945.

154. Id. at 2.


titre de souverain is established, international law will not accommodate additional arguments to upset the status quo. Establishment of an animus occupandi—an actual intent and ability to exercise power and authority—exercised through immemorial usage or uncontested demonstrable claim—has been deemed a relevant indicator of good title. But, where the status quo remains in dispute, decisionmakers will seek out precolonial or postcolonial factual circumstances—effectivités—as supplementary means of ascertaining sovereignty.

Charles De Visscher devoted a monograph to the subject of effectivité, noting its dynamic aspects (en action), as contrasted to its structural forms (d’effectivités menées à terme), and its functions of promoting practicality, stability, security, continuity, and finality to disputes. De Visscher cautioned against expansive applications or errors likely to result from the full pursuit of its application. Similarly, Jean Touscoz argued against expansive extrapolations of its meaning, emphasizing its identity as a concrete supplement to conditions that exist. Recourse to the principle of effectivité cannot create sovereignty; it can only confirm or validate sovereignty. But, proof of effectivité often creates cottage industries revolving around proof of competing historical narratives. Disputes over effectivités following Spain’s 1810 retreat from the New World involved deciphering the imprecisions of colonial maps charted in the sixteenth

160. See De Visscher, supra note 159, at 13–24.
161. See id. at 153–58.
162. See id. at 151–52 (“Il convient toutefois de se mettre en garde dès l’abord contre une erreur assez fréquente qui conduit à confondre la recherche de l’effectivité, qui n’est autre ici que celle de la pleine réalisation du droit, avec l’interprétation extensive. L’effectivité du droit judiciairement applicable tend non pas à donner à la règle son maximum d’effet intellectuellement conceivable, mais seulement à lui assurer, compte tenu des textes, des circonstances de fait et de milieu, toute la place que lui assigne la source de droit don’t elle procède.”).
163. Jean Touscoz, Le Principe d’Effectivité dans l’Ordre International 2 (1964) (“L’effectivité est la nature de ce qui existe en fait, de ce qui existe concrètement, réellement; elle s’oppose à ce qui est fictive, imaginaire ou purement verbal.”).
164. Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. 587.
Arguments involving border disputes in Europe, for instance, in the ongoing dispute over Nagorno-Karabakh, generate entitlement claims that stretch back more than a millennium. China’s assertion of historic rights over the South China Sea stem from “a long course of history,” which the tribunal in the South China Sea Arbitration could not understand due to China’s ambiguity on the issue; although China was absent from the proceedings, the tribunal nevertheless noted a more recent date when China’s “nine-dash line” first appeared on an official Chinese map: 1948. Without a doubt, effectivités are meaningful when they are not contrived, as they sometimes may be used to instantiate a historical narrative over who was the first finder; but, they lack probative meaning with regard to Migingo. A requisite animus occupandi was never at issue until changes to the lake’s hydrological water table made it a suitable port for harvesting Nile perch hardly more than one decade ago. Both countries embrace an animus occupandi, but circumstances forestall either country’s territorializing objective.

CONCLUSION

Ugandan and Kenyan leaders find themselves in a double bind over Migingo: rhetorical respect for uti possidetis informs their political identity and motivates them to adhere to a postcolonial principle of boundary demarcation to which they cannot completely abide, while they search for supporting effectivités that do not historically exist in order to claim better title to an islet that had no significance until it was accessed to hunt a valuable nonnative resource that is devastating the biology of the lake. The countries seek to establish better title from constitutive documents to a border demarcation imprecisely devised from a colonial decision to administer a railway under a single jurisdiction more than one century ago, an act which itself dislodged populations and hinged partly on a previous decision by German and British trading companies to cleave Lake Victoria into sov-

165. Lalonde, supra note 100, at 31 (noting the vague and imprecise border demarcations of Iberian monarchs in the New World).
166. See Tim Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia: A Legal Appraisal 1 (2001) (noting historical conquests and disputed territorial claims dating to the early eighth century).
ereign halves. When the search for les effectivités hinges on historical obscurities or uncertainties and is marked by an epoch of imperial line drawing that preferred administrative economy over human geography, the purported formalism of international law, as measured by rational outcomes supporting certainty and finality, appears less rational and functional. Beneath the legal formalism of uti possidetis, complex modalities of engagement and practice are at work. These modalities seek to enhance territorializing interests but, failing that, present prospects for cooperation and condominium (or stasis). Despite the territorializing temptation that hampers condominium solutions, markers suggest that the principals are content to continue with the indeterminate course of dealing that supports nonresolution of the border dispute, perhaps until the workings of a shared solution present themselves in the form of answers to the much more serious economic, social, and political issues suggested by sweeping degradations to Lake Victoria’s environmental basin. Evidence of an intersubjective will to forestall a solution appears from a tally of circumstantial complaints. The dispute is more than ten years old, with little momentum trending toward a solution. At least three technical survey teams have formed since 2009, and each has failed to carry out its mission. The disputants agree on the constitutive documents demarcating the border question, a point often in dispute and fatal to other negotiated border settlements. Rhetorical statements from leaders express a willingness to negotiate a diplomatic solution. Officials from both countries have proposed removing the dispute to an international tribunal for settlement, but no formal efforts have been made, and the suggestion engenders complaints about bypassing the principle of subsidiarity, which preferences African regional dispute mechanisms over broader fora. An important corollary to constructivist approaches, as informed by historical context, is that constructivism need not result in a new form of idealism, as many enthusiasts hope. The intersubjective structures of international relations create


norms that produce their own dynamics, but there is no implied progressivity or beneficial outcome. The Migingo Island dispute serves as a case in point.

The Migingo Island dispute also presents challenges to East African regionalization efforts. An array of intersubjective and cooperative East African institutions support prospects for cooperation. The East African Community Treaty emphasizes sustainable utilization and protection of natural resources, with specific reference to the management of Lake Victoria. The Lake Victoria Basin Commission and Lake Victoria Fisheries Organization maintain responsibility over maritime security and fisheries on the lake. The East African Community Strategy for Regional Peace and Security promotes policy direction on peace and security. Both Kenya and Uganda are members of regional multilateral organizations, including the Common Market for Eastern and Southern Africa, the Intergovernmental Authority on Development, and the International Conference on the Great Lakes Region. In 1999, the Nile Basin Initiative, a regional intergovernmental partnership involving ten countries, launched to promote cooperation and dialogue and achieve sustainable socioeconomic development among riparian stakeholders. Institutional supports for a negotiated solution exist, providing agencies for the realization of intersubjective goals. Wekesa has noted achievements of African regional integration, including the structures and shared discursive subjectiv-

172. Id. art. 114(2)(b)(vi) (agreeing to “the establishment of a body for the management of Lake Victoria”).
175. See Wekesa, supra note 23, at 332.
177. Wekesa, supra note 23, at 337.
ities that may yield a negotiated condominium solution. But, enthusiasm wanes as this dispute lingers,\textsuperscript{178} giving rise to concerns that Migingo’s fate is more conditioned by overarching territorializing solutions rather than the condominium arrangements that ultimately provide the broader safeguards needed to stave off a coming crisis for this Great Lake and its catchment.

\textsuperscript{178} See id. (noting the Migingo crisis does not bode well for the future of the East African Community).