

# A STITCH IN TIME: PREVENTIVE DIPLOMACY AND THE LAKE MALAWI DISPUTE

ADITI LALBAHADUR

## EXECUTIVE SUMMARY

A low-intensity dispute between Malawi and Tanzania threatens regional peace as the two countries contest the demarcation of their national boundaries at Lake Malawi. This long-standing dispute became more urgent when in 2011 the Malawian government issued licences for oil prospecting beneath the lake's northern shoreline. Although tensions have waxed and waned in accordance with the respective countries' election cycles, both seek a speedy resolution of this dispute. Potential oil revenues are a significant game changer for these two highly indebted poor countries<sup>1</sup> – but perhaps more so for Malawi, which is less endowed with natural resources. In the absence of a functioning SADC Tribunal to mediate the dispute, the task has been assigned to the Forum for Former African Heads of State and Government, but there are also other regional mechanisms that could assist with the task. In particular, it falls within the purview of the many early-warning mechanisms in SADC and the AU that already exist and whose *raison d'être* is to prevent the escalation of disputes. This paper explores the failures and challenges that plague Africa's preventive diplomacy institutions and advocates that the region would do well to empower these institutions. This would foster stronger and more legitimate regional institutions that would be better able to act decisively on dispute settlement.

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## INTRODUCTION

A long-standing border dispute between Malawi and Tanzania changed in intensity in September 2012, when potential oil reserves were discovered along the northern border of Lake Malawi. Although there have been violent skirmishes between authorities and communities along the lakeshore, these have been isolated and followed swiftly by diplomatic interventions by both governments to de-escalate tensions. Despite a clear commitment to containing the violence, the governments of Tanzania and Malawi have not yet been able to definitively resolve their dispute, thereby prolonging the threat of instability in the region. Rather than becoming embroiled in the legal arguments of either side, this paper will expand on the political dimensions that influence a resolution. It will filter this through the range of preventive diplomacy tools available in the region that function to create legally binding solutions based on a solid foundation of political will.

At the heart of the issue is a contest over territory that was demarcated by the Anglo-German Agreement of 1890, when Germany exchanged territory in East Africa with the UK for the strategically important island of Heligoland.<sup>2</sup> In SADC, the now-defunct SADC Tribunal would have been the most appropriate mechanism to definitively address the issue. In the wake of its de facto disbandment, the issue has been referred to the Forum for Former African Heads of State and Government (commonly known as the Africa Forum), headed by former Mozambican president Joaquim Chissano and supported by former South African president Thabo Mbeki.<sup>3</sup> Apart from the SADC Tribunal and Africa Forum, there are other mechanisms in Southern Africa and on the continent that are tasked with taking preventive action in addressing conflict. For instance, in Southern Africa the ‘Mediation, Conflict Prevention and Preventive Diplomacy’ architecture, although newly formed, is uniquely positioned to assist with the resolution of the dispute. At the level of the AU, there are a number of relevant mechanisms falling under the Continental and Early Warning System (CEWS) that include the offices of the AU Commissioner, the Panel of the Wise and the AU Border Programme (AUBP). As this paper will show, some of these mechanisms are already acquainted with the border dispute, but remain unable to intervene because of the highly political nature of the issue.

## THE DISPUTE: OIL AS A GAME CHANGER

Although the dispute over the boundary at Lake Malawi (known as Lake Nyasa in Mozambique and Tanzania) has been a protracted one (the first record can be traced back to May 1967)<sup>4</sup> it has also been one that has fallen prey to the vagaries of electoral cycles in both countries. Simply put, the issue was never of significant strategic concern to either party to motivate a resolution, and successive presidents from both countries deferred the issue to their successors.<sup>5</sup> However, the prospect of oil reserves existing beneath the northern shoreline of Lake Malawi/Nyasa has proved to be a significant game changer, spurring the need for a resolution.

In 2012, when the Malawian government awarded prospecting rights to a British oil company, tensions between the two countries escalated to boiling point. To show its objection to a move that it considered unilateral and illegal, Tanzania responded by escalating military patrols along the lake and deploying more troops.<sup>6</sup> Although the violence that ensued was sporadic and geographically contained to

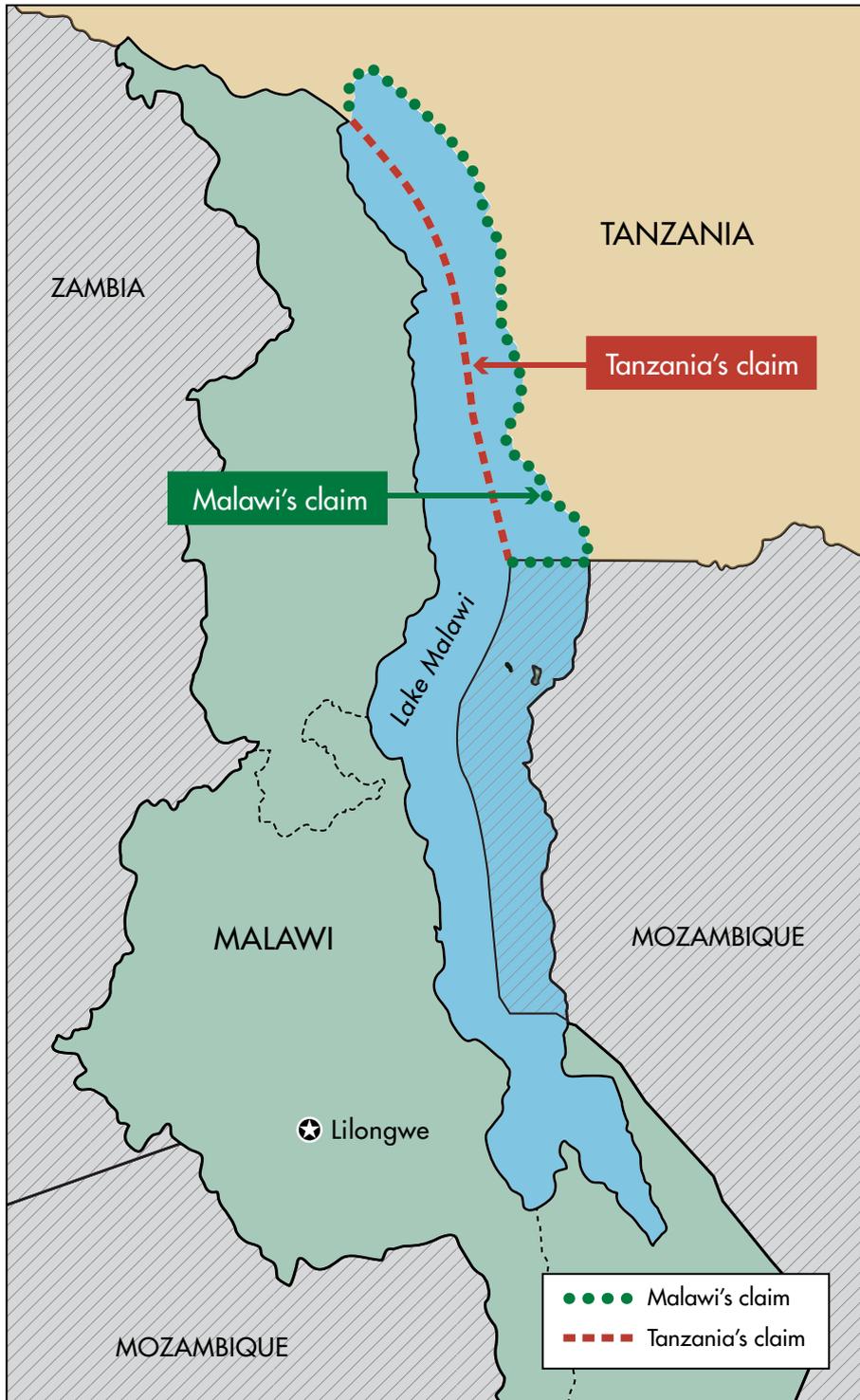
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lakeshore communities, both sides accused each other of harassing civilians, which only served to fuel the distrust – particularly at grassroots level.

**FIGURE 1** MAP OF TANZANIA AND THE NORTHERN REGION OF MALAWI



Source: Composite using Google Maps

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Tensions were especially heightened around then president Joyce Banda's campaign for re-election in the national general elections held in May 2014. The lake issue featured prominently in her election campaign as she fought to stay in power.<sup>7</sup> Ultimately, she lost the election to Peter Mutharika, who is the brother of her predecessor. This had the effect of de-escalating the lake issue as a source of tension for a while, as Tanzanians perceived Mutharika to be a friendlier party. This presumption on the part of the Tanzanians was derived from the fact that he had personal connections with Tanzania (he once taught at the University of Dar es Salaam).<sup>8</sup> More recent events, however, seem to suggest that this may have been a miscalculation.

Just a few days before President John Magafuli's inauguration in Tanzania on 5 November 2015, Mutharika announced that he would not attend, as a cost-saving measure. This is in stark contrast with his attendance at Mozambican President Filipe Nyusi's inauguration earlier that year.<sup>9</sup> Matters have become increasingly complicated since Mutharika's announcement in mid-December 2015 that he would sanction the start of oil exploration on the lake in January 2016. Tanzania expressed its dissatisfaction soon after when it printed a new map showing the border as running through the centre of the lake.<sup>10</sup> Not only does this further strain relations between the two countries but it also bodes ill for prospects of peacefully resolving the dispute.

The ambiguity of the border demarcation stems from the 1890 Anglo-German Agreement, otherwise known as the Heligoland Treaty. This agreement states that the border lies on the Tanzanian shoreline of the lake. This is an anomaly in international law, which has as an established convention that in the case of transboundary fresh water the border lies in the middle of that body. Matters are further complicated by the fact that this agreement demarcates territories beyond Lake Malawi/Nyasa, extending to the Mbeya region, which forms part of northern Malawi and southern Tanzania. Any wholesale abrogation of this treaty threatens to open a veritable Pandora's box over Malawi and Tanzania's borders. Since the Organization of African Unity (OAU) came into being on 25 May 1963, the integrity of colonial borders has remained sacrosanct because of the threat of instability that non-adherence would cause.<sup>11</sup> The SADC region too would be wary of such a consequence and fear of this kind of outcome is arguably a strong motivating factor for the region's involvement.

The possibility of oil reserves existing beneath Lake Malawi/Nyasa is perhaps the most compelling game changer in this dispute. Both Malawi and Tanzania are classified as least developed countries<sup>12</sup> and therefore have to address considerable socio-economic challenges such as poverty, illiteracy, access to health care and skills development. Both economies are highly dependent on agriculture. For instance, Malawi still relies primarily on exports of tobacco and rice.<sup>13</sup> In Malawi in particular, the prospect of oil reserves is seen as a panacea to overcome these developmental challenges.<sup>14</sup> Ironically, although the two countries began mediation efforts more earnestly in 2012, there is as yet no indication of the level of the oil reserves in question. The moratorium on oil prospecting was only lifted by Mutharika in December 2015, and at the time of writing not even preliminary results were available. If these efforts are allowed to proceed without interference, this could provide a tangible impetus to propel negotiations forward.

One aspect of the discussion that has remained largely absent from the discourse is that of the potential environmental impact of drilling along the lake. Not only does the shoreline provide a home to 2 million largely indigent inhabitants who depend on the lake for food but the biodiversity of the lake surrounds also makes it a recognised UNESCO World Heritage Site.<sup>15</sup> These considerations are markedly absent from the existing discourse, although understandably so, given that the main issues regarding the border demarcation and the quantity of oil reserves are yet to be determined.

## **PREVENTIVE DIPLOMACY: BRIDGING THE POLITICAL–LEGAL NEXUS**

Although the Africa Forum is an informal network of former African heads of state, it was formulated with the intention of ‘support[ing] the implementation of the broad objectives of the AU and its New Partnership for Africa’s Development initiative, at national, sub-regional and regional levels’.<sup>16</sup> It forms an important part of a number of organisations and institutions that play a preventive diplomacy role.

In the literature on conflict resolution and mediation, the terms ‘preventive diplomacy’, ‘conflict prevention’ and ‘preventive action’ are used interchangeably to refer to mechanisms that are drawn upon by the international community to avert a descent into war or widespread conflict. The idea that it is more cost-effective to prevent the outbreak of violence, rather than to manage or contain it, first started to gain traction in the 1960s when it was articulated by then UN secretary-general Dag Hammarskjöld.<sup>17</sup> Since then, the concept has snowballed in policymaking circles. In his seminal report, ‘An Agenda for Peace’, then UN secretary-general Boutros Boutros-Ghali attempted one of the earliest definitions of ‘preventive diplomacy’ in policymaking circles.<sup>18</sup> However, there is still very little uniformity in how these concepts are distinguished. It is commonly understood that ‘preventive diplomacy’ refers to ‘the use of mediation and resolution ... Conflict prevention is a broader concept referring to the monitoring, containment and reduction of risk factors that shape war onset, intensification and spread’.<sup>19</sup>

Rather than being conceptual in orientation, it is apparent that these definitions tend to group particular activities and actions. According to the UN, preventive diplomacy refers to facilitation, conciliation, arbitration, adjudication and the use of good offices.<sup>20</sup> At the time of the transformation of the OAU into the AU, as well as the reformulation of SADC in the early 2000s, the idea of preventive diplomacy was an entrenched notion. This resulted in preventive diplomacy institutions being built into both the AU and SADC frameworks.

## **PREVENTIVE DIPLOMACY AT SADC**

One such instrument is the SADC Tribunal, which, according to Article 15 of the SADC Tribunal Protocol of 2000, awards it jurisdiction ‘over disputes between states’.<sup>21</sup> In 2010, however, the SADC Heads of State and Government Summit placed a moratorium on its operations. This followed a referral by the government of Zimbabwe, which called for a review of the tribunal’s mandate that allowed individuals to bring cases against governments.<sup>22</sup> Zimbabwe argued that it gave the tribunal the power to intervene in the domestic policies of SADC states, effectively

eroding state sovereignty. In 2014, the summit reinstated the tribunal with renewed and reduced powers. Although its jurisdiction over inter-state disputes still stands, reinstatement of the tribunal now relies on SADC countries' ratifying the new protocol – a process that takes many years.<sup>23</sup> Adding to these complications is the fact that the revisions are being protested by civil society, which accuse SADC of depriving its citizens of the right to hold their leaders to account at a regional level.<sup>24</sup>

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In international relations, 'political will' is the bedrock upon which progress can be measured. When countries display sufficient political will, they are more likely to mobilise the necessary resources to ensure a successful outcome. Sometimes all that qualifies as 'necessary resources' is a commitment to be bound by international agreements. This is especially pertinent for the case at hand, as there is a plethora of international examples that show how legal adjudication over boundary disputes means little without the commitment from the countries concerned to adhere to them.<sup>25</sup> Arguably, the SADC Tribunal was the perfect forum to adjudicate the dispute as not only would it have provided the legal solution Malawi seeks but the dispute would also have been adjudicated through the values of the region – thereby giving any decision the political legitimacy necessary to ensure compliance by both parties.

In the absence of the tribunal, Malawi called for the matter to be taken to the International Court of Justice, which has presided over similar decisions in the past.<sup>26</sup> However, the prohibitive costs associated with this course of action and the fact that each country can ill afford to bear them have swayed both governments to accept a SADC-driven initiative in the form of the Africa Forum. Malawian officials also indicated that they came under significant pressure from the AU and SADC to accept a regionally driven process, which raises concerns around the legitimacy of the process. One senior official in Malawi's negotiating team indicated that the team did not feel confident that an African-derived outcome would be in Malawi's favour.<sup>27</sup> This perception has to do with an acknowledgement of the historical position that these two countries occupy vis-a-vis each other and the rest of the region.

While Tanzania was a strong supporter of liberation movements in Southern Africa, providing a haven for the training of armed resistance movements, Malawi pursued the controversial strategy of aligning with the region's antagonists. Not only was it closely aligned with the apartheid government, but Malawi also actively supported Renamo (Resistência Nacional Moçambicana). These differences loom large in post-liberation Southern Africa, which places a premium on the bonds of solidarity that were forged during these times. These concerns have been assuaged to some degree by the election of Mutharika in 2014. However, with the resurgence of the aforementioned 'tit-for-tat' tactics in late December 2015, tensions between the two countries have been revived, exposing once again the Achilles' heel of this process – that any compromise to perceptions of the legitimacy of the process will erode the political will necessary to enforce a resolution.

In addition to the tribunal, SADC has mandated the establishment of a Mediation, Conflict Prevention and Preventive Diplomacy architecture that includes the establishment of three structures:

- a panel of elders to provide leadership in mediation missions;
- a mediation reference group to deliver expertise in conflict resolution; and
- a mediation support unit to provide logistical support.<sup>28</sup>

Both the reference group and the panel of elders are supposed to include nominees from SADC countries. Despite the existence of this framework, however, the establishment of these entities has moved slowly. The constitutive meeting of the mediation reference group was only held on 7 May 2015. The delay in implementation is indicative of two pervading challenges for SADC – lagging political will to empower institutions and, consequently, an inability to fund such endeavours.

In the absence of these mechanisms, and in the absence of a fully functioning tribunal, the border dispute was referred to the Africa Forum. In effect, this uses the ‘good offices’ of former heads of state made available through this network. This regional process is being led by Chissano and Mbeki and suffered the initial setback of not being adequately resourced to handle the process.<sup>29</sup> Progress has been slow and, presumably due to the sensitive nature of the topic, very little information is publicly available about the process.

These sub-regional mechanisms are augmented by parallel AU institutions. In the African Peace and Security Architecture, it is the Panel of the Wise (PoW) and the CEWS that have a specific preventive diplomacy mandate.

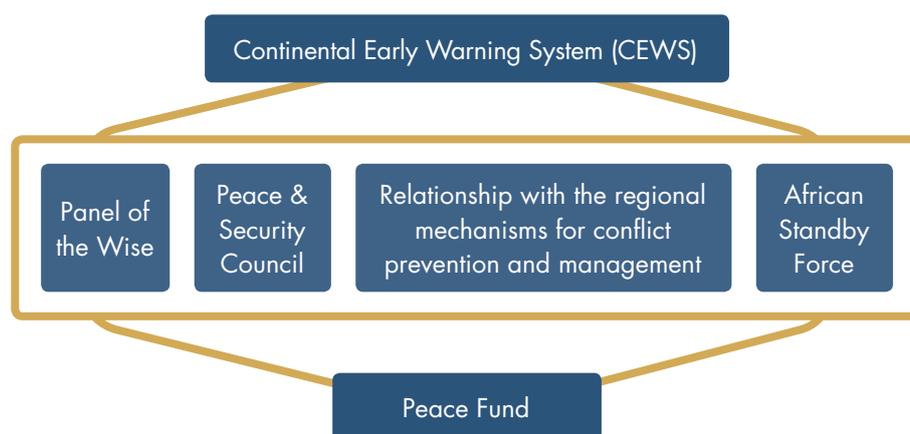
## PREVENTIVE DIPLOMACY AT THE AU

In contrast to SADC, the AU’s Peace and Security Architecture is much more established and functional. Although the PoW deploys on the basis of its own good offices, it can also intervene at the behest of the AU chair. It is analogous to the Panel of Elders at SADC. Given the multitude of crises facing the African continent, however, it is often deployed for more pressing threats than the one posed by this border dispute.

The CEWS, on the other hand, has a much broader mandate. The AUBP, which is responsible for overseeing the demarcation of borders across the continent, is located within the CEWS. Although the AU is the principal implementing agency, the programme is also funded by the German development agency GIZ, and as such it provides considerable support and co-ordination, as well as technical assistance.

The AUBP aims to reduce border-related disputes and promote regional and continental integration by undertaking the extensive process of demarcating and delimiting borders throughout the continent.<sup>30</sup> This is no easy task, as colonial borders were often drawn on arbitrary landmarks that no longer exist. There are also a surprising number of border disputes to deal with. South Africa alone faces claims from Botswana, Namibia, Swaziland and Lesotho.<sup>31</sup> Unfortunately, the unit is not capacitated to deal with instances where there are conflicts over demarcation. For this reason, the issue of the Lake Malawi/Nyasa demarcation has remained off its agenda. By all accounts, there is an awareness of the need to resolve the dispute, but a politically charged issue such as this, it is believed, requires a political solution between governments, and therefore lies outside the purview of institutions such as the AUBP.<sup>32</sup>

**FIGURE 2** AFRICAN PEACE AND SECURITY ARCHITECTURE



Source: *African Peace and Security Architecture (APSA)* promotional material from the African Court on Human and Peoples' Rights, Arusha, 2015

## THE WAY FORWARD

The border demarcation dispute between Malawi and Tanzania illustrates several key lessons when considering conflict prevention in Africa. The first is that despite a commitment to preventing the spread of violence, the ability of regional organisations to intervene when required is severely hampered by logistical and administrative problems.

In the absence of a legitimate authority such as the tribunal it also becomes apparent that inter-state disputes are highly political in nature. To address them adequately it is imperative that interventions build trust between the two parties as a means to garner the political will to address the dispute. The Africa Forum's silence on the matter may be interpreted as its effort to cultivate this trust and build legitimacy. However, it is also apparent that this is a stopgap measure and not sustainable in the longer term. The nascent SADC framework, which only began to be operationalised in May 2015, demonstrates that the best of intentions mean nothing if there is no capacity or funding to breathe life into these institutions.

The second, and perhaps most important, lesson is that the dispute in question has been one of the biggest victims of the disbanding of the SADC Tribunal. While the region has displayed a level of resilience in employing the good offices of the Africa Forum in filling the void, its slow progress is indicative of the fact that something more substantial is required. Disputes involving sovereign states require institutions that enjoy legitimacy in order for them to be able to effect decisions that are binding. In SADC's manoeuvrings to limit the power of the tribunal, it has lost a powerful institution.

Linked to this is the question of the power of institutions in Africa more generally. It is apparent from this paper that there are a number of bodies that are concerned

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with the resolution of disputes such as the one posed by the Lake Malawi/Nyasa dispute. Although these institutions are aware of the problem to varying degrees, there is little to suggest that they are able to co-ordinate efforts among themselves, or in the service of the governments in question. Arguably, the fortification of these institutions at regional and sub-regional levels would depoliticise much of the process and inch the continent towards stronger, more transparent and democratic outcomes.

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