Proceedings Chapter

International land investments or the environment put up for auction: the case of Niger Basin

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Abstract

During the last decade, international farmland investments have increasingly grown in developing countries. This contribution aims to highlight the environmental implications of these investments on freshwater resources within the Niger River Basin. In particular, international farmland investments put a dilemma between the sovereign right of States to use their lands and the obligation to protect transboundary aquatic environment. The article will emphasize these environmental implications and suggest the minimum standards needed to guarantee an environmental friendly agro-investment. Such standards will be drawn from the Niger River Basin innovative legal framework which makes of the protection of environment a cornerstone of the management of the River Basin.

Reference

CHAPTER 9

International Land Investments or the Environment Put up for Auction: The Case of the Niger Basin

Komlan Sangbana

Introduction

International land investments in developing countries is one of the major phenomena of recent decade. The increasing demand for food, animal feed, biofuels, minerals and timber, as well as water scarcity in some regions of the world have motivated a number of countries and private investors to invest heavily in the acquisition of land in areas deemed suitable for agricultural production, particularly those located near water resources. It is estimated that since 2006, 15 to 20 million hectares of farmlands in developing countries have been subjected to transactions or negotiations with foreign investors. Sub-Saharan Africa is generally cited as the first destination of these investments. However, the acquisition of these lands generally results in the setting up of systems of intensive farming that pose serious threats to aquatic ecosystems in place. This situation is further exacerbated when the aquatic ecosystem is shared by several States. This contribution aims at clarifying the implications of international land investments on the shared freshwater in terms of the international regime of environmental protection. To do this we will pinpoint these implications and suggest measures aiming at ensuring

4 Ibid.
sound management of the environment. In this regard, we will use as area of illustration the Niger basin area.

2 Niger Basin Area

2.1 Geographical Background
The Niger River Basin is located in Western Africa and covers 7.5% of the continent. The basin spreads over Benin, Burkina Faso, Cameroon, Chad, Guinea, Ivory Coast, Mali, Niger, and Nigeria totalling up nine different countries that make up the area of the basin. The Niger River has a total length of 4200 km, and is the third longest river in Africa (9th in the world), behind the Nile and the Congo Rivers.

FIGURE 9.1 Red: Country limit, Yellow: Niger Endoreic Basin, Blue: Niger Active Basin
CREDIT: NIGER BASIN AUTHORITY, 2014

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The basin is home to an estimated 107 million people who live mostly on agriculture, livestock farming and fishing as well as a few other activities that are directly or indirectly related to the water resource. The Niger River encompasses six different hydrographic regions, each of which is distinguished by unique drainage and topographic characteristics. The Upper Niger River Basin's headwaters are in the Fouta Djallon Massif, Guinea. From there the river then flows northeast, traversing the Inland Delta, a vast spreading floodplain which averages 50,000 km² in size and that dissipates a large portion of the potential hydraulics through evaporation and absorption. When it reaches the edges of the Sahara Desert, the Niger River turns back, forming a great bend and flowing southeast as the Middle Niger River section. Then it becomes the Lower Niger as it flows to the Niger Delta at the Gulf of Guinea, which it reaches after being joined by its largest tributary, the Benue River. The diverse climatic and geographic characteristics of the Niger River Basin play a very important role in the availability of water resources, which then affects a range of water resource related activities. With an active part covering an area of nearly 2.2 millions of square km² including 1.5 million square km² of an active hydrological basin, the Niger Basin has significant potential irrigable lands which rouses growing interest among investors. If information regarding these transactions is generally almost non-existent due to the opacity surrounding transfer agreement, it was however estimated in 2009 that about 16,200 ha of land have been disposed of within the inner delta of the Niger in Mali. It is likely that similar estimates are envisaged in other segments of the basin considering their potential. Therefore, the impact of these investments can be questioned under the principles of International Environmental Law.

2.2 Legal Background

The protection of the Niger Basin is currently under an innovative legal framework, which raises the protection of environment as a cornerstone of the management of the river Basin. Firstly, we will mention the Niger Basin Water
Charter (hereinafter Water Charter) adopted in 30 April 2008. The Water Charter reflects the values that must guide post-modern water resources management in Africa.\textsuperscript{11} It puts water resources at the heart of the law of the African international watercourses contrary to the classics instruments of regulation of international rivers and lakes which are limited to cooperation in the use of a river basin.\textsuperscript{12} In 2011, an Appendix related to the protection of environment (hereinafter Appendix to Water Charter) was added to the Water Charter. The Appendix aims to ensure adequate protection of the environment of the basin on the basis of sustainable, collaborative and participatory management of the environment in accordance with the goals of sustainable development (art. 3). The Appendix was divided in 23 chapters that cover all aspects of aquatic environments. The first three chapters provide general principles and tools related to the management and protection of the resources of the basin. It reaffirms general principles such as the no-harm principle, the precautionary principle, the principle of cooperation, the polluter-pays principle, public participation or the obligation to assess the environment impact. Other chapters provide a specific framework for classic issues like the fight against water pollution and the fight against degradation of land (Chapters 4–6), or suggest a set of rules to deal with new issues that challenge the management of the area like desertification, climate change or genetically modified organisms (Chapters 7 to 11). It deals also with the right of people regarding environmental issues (Chapter 16) and makes an original provision for dispute settlement (Chapters 19–20).\textsuperscript{13} In this respect, the Appendix to the Niger Basin Water Charter appears as a rare instrument on shared water courses which takes into account all the sectors of environment and all natural resources of a shared basin in a holistic view. Despite this innovative approach, it must be underlined that this issue of land acquisition largely remains a matter of internal policy of States. Art. 3 of the Appendix to the Water Charter makes it clear that land issues are excluded from the scope of the Annex:

\begin{itemize}
  \item \textsuperscript{12} Ibid.
  \item \textsuperscript{13} In addition to classic dispute settlement mechanisms, the Appendix provides a mechanism that involves traditional authorities in the conflict resolution related to the environment at local level (art. 216). This provision take account the specificity of dispute around African shared watercourses that involves most of time local communities which living near the watercourses.
\end{itemize}
This Appendix applies to all sectors of environment and all natural resources of the basin. Notwithstanding the preceding paragraph, are excluded from the scope of this Appendix, land issues and protection of marine environment. The protection of these environmental sectors excluded from the scope of this Appendix, is under the jurisdiction of the States Parties and shall remain governed by national laws and international conventions binding on States Parties.

However, we must distinguish between the regulations on land acquisition \textit{per se} and the consequences of the exercise of this sovereign right of States over shared natural resources. This distinction is also followed in the Appendix to Water Charter through the consecration of a general obligation to fight against pollution. According to art. 51: “The Authority and the Member States undertake to cooperate together to prevent and reduce pollution in the Niger basin.”

Art. 52 provides that the aspects of cooperation against pollution concern inter alia: a) Protection of biodiversity including flora, fauna, fish resources and associated ecosystems; b) Protection of natural resources including soil and water resources through monitoring of physicochemical parameters of water; c) Protection of the environment against hazardous substances including waste, pesticides, residues of fertilizers and other harmful and/or dangerous chemicals; d) Protection against agro-pastoral malpractice.

According to this provision, it appears that the protection of the basin aquatic environment takes into account the fight against the impact of the land uses activities. The Article underlines the holistic view that must guide the environmental protection issues. Therefore, to understand the scope of environmental implications of international farmland investment, it would be appropriate to apprehend the integrated nature of the various elements of the environment. The Appendix to Water Charter adopts the definition of multilateral environment instruments\textsuperscript{14} and highlights the character of interdependency in defining biodiversity as being “the variability among living organisms from all sources, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part ( ...)” (art. 1, para. 1). By ‘ecosystem’ is meant a “dynamic complex formed of communities of plants, animals and microorganisms and their non-alive environment which, by their interaction, form a functional unit” (art. 1, para. 11). Consequently, the observation of environmental implications of land investments is framed in an ecosystemic approach that includes the management of land, forests and the use of water.

\textsuperscript{14} See notably Convention on Biological Diversity (1992), arts. 2 para. 2 and 8.
3 The Environmental Implication of the International Land Investments

The principle of sustainable development is the cornerstone of the legal regime related to the protection of the Niger Basin. In the preamble of the Appendix to Water Charter, the Parties justify their will to adopt the Appendix in their determination to promote and protect the basin’s environment, to ensure its sustainable development. Solemnly declared in the *Rio Declaration on Environment and Development*,15 the principle of sustainable development underpins the idea according to which the right to economic development cannot be claimed at the expense of obligations to protect the environment. The goals of economic development and those of environmental protection must be addressed in an integrated manner.16 In a transboundary context, the implementation of the principle of sustainable development entails compliance with the duty to prevent harmful effects in the environment and natural resources of other States.17 Set forth in Principle 21 of the *Stockholm Declaration* and resumed in Principle 2 of the *Rio Declaration*, the no harm rule requires that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national.

Under the Niger basin legal regime, the no harm principle is enshrined in art. 5 of the Water Charter and art. 4 (p) of Appendix to Water Charter. Generally, the principle implies the duty to maintain the quantity and quality of the water in order to protect the water and its ecosystem.18 Large-scale land investment in the Niger basin raises the problem of adequacy with this duty.

Concerning the threat on the quantity of water, international investors are interested in farmland with access to water. Thus, efforts to serve the interest of international investors comprise general allowance of water and the construction

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15 See notably Principles 3 and 4.
of additional facilities to increase the capacity of water withdrawal for irrigation. The example of the leasing of irrigable lands in the inner Niger Delta is quite illustrative. For example, in 2008, in the context of the national ‘Rice Initiative’ to stabilize food prices and restore self-sufficiency in the country, Mali leased 100,000 ha in the Office du Niger to Malibya, a subsidiary of Libya Africa Investment Portfolio as part of a larger project that includes the construction of one of the largest canals in Africa and the production of hybrid rice. 19 Malibya plans to access water from the Niger River through a 40 km irrigation canal. However, it is argued that the agreement did not provide any restriction on the amount of water being extracted. 20 It only provided that, from to January to May, when the river is low, the project should cultivate less water-intensive crops. From June to December, Malibya can use all the water it needs ‘without restriction.’ But these provisions remain unclear in a region where the level of river flow is flawed. 21 In this perspective an uncontrolled water withdrawal could adversely affect the floodplain downstream, which besides providing rice, fish and pasture for millions of people, is also the habitat of a large number of birds and other species. 22 Note, in addition, that the inner Niger Delta is classified as a Ramsar site. 23

In the Niger basin, the large-scale land investments pose also the problem of water quality. As we mentioned, the acquisition of land goes with the setting up of systems of intensive farming. To increase land productivity, investors generally support the massive use of fertilizers and introduce new

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20 Ibid., 27.

21 The basin crosses successively several distinct pluvio-climatic areas which provide a specific and complex dynamics, that is to say: the Sudan Guinean to Sudan Sahelian area (upper basin) with annual rainfalls varying from upstream to downstream between 1500–1600 mm and 600 mm, the Sudan and Sahelian to the Saharan sub desert area (Inner Delta, Niger Loop and Middle Niger) with a pluviometry varying from 600 mm to less than 100 mm in an arid area. In the Sahelian and Sudan-Saharan areas where the project is located, the rainfalls are above all characterized by their low level, their irregularity in time and space. See Niger Basin Authority, *Atlas Niger Basin* op. cit., 12–17.


farming techniques. However, the use of irrelevant techniques and approaches and the uncontrolled and growing use of chemical and mineral fertilisers are among the mains factors of degradation of the Niger basin resources. In this perspective an increase of cultivated lands raise concern about the impact of these activities on the quality of the Niger River and its ecosystem. This incertitude was exacerbated by the fact that few evidences showed that measures were taken to ensure that the activities deployed were environmentally viable. For example, given the probable risk posed by the agricultural system established in the purchased lands, the authorization process of these activities should include environmental impact assessment to determine the effects of the project of intensive farming on the ecosystem in place. However, the opacity surrounding these transactions, which are often denounced, casts doubt on the use of authorization schemes to prevent damage to the environment. Besides, the basic structure of the state governments in the Niger Basin, some of which are weakened by internal conflicts, can hamper effective monitoring of authorized activities under large-scale investments.

It appears that the exercise of a sovereign right to use its lands can affect the rights of others tributaries and ecosystems per se, when this use implies a connection with a transboundary basin area.

4 Measures to Ensure Sound Management of the Environment

4.1 Environmental Impact Assessment

Environmental impact assessment is the preliminary procedure which “permits to the State to determine the extent and the nature of the risk of an activity and, therefore, the kind of preventive measures it must take.” The principle that States must proceed to the environmental impact assessment of projects threatening to cause a significant transboundary damage was recognized as a part of general international law. This is especially apparent in the Pulp Mills

25 See for example uncertainty on the realisation of environmental impact assessment in Malibya project, The Oakland Institute, Understanding Land Investment Deals in Africa op. cit., 27.
27 ICJ, Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, ICJ Reports, 2010, 14, para. 204; Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS), Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory opinion of 1 February 2011, ITLOS
Case. Giving a ruling on the content of the obligation to prevent pollution according to art. 41 of River Uruguay Statute, the International Court of Justice declared that:

the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.28

The environmental and social impact assessment is therefore within the logic that “in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.”29 This principle thus allows the integration of environmental requirements right from the design phase of the project and ensures that these are taken into account during the design, preparation and execution phases. The environmental impact assessment is laid down in art. 15 of the Appendix to the Water Charter:

Projects, programmes and activities likely to have a significant negative impact on the environment, water resources and human health in the basin are subject to environmental and social impact assessment, designed to identify potential negative impacts to adopt measures to prevent or mitigate them.


28 ICJ, Pulp Mills cit., para. 204.
Art. 19 requires this environmental impact assessment at the transboundary level:

States Parties shall ensure that any project, programme and actively undertaken in their territory and likely to have a significant negative impact on the environment of other States Parties be subject to a trans-border study of the environmental and social impact. The transborder environmental and social impact assessment states, precisely, the risks that the proposed activity poses to the environment and human health in other States Parties.

The dispositions provided by Economic Community Of West African States Supplementary Act A-SA.3/12/08, which adopt the Community Rules on Investment and the modalities of their application are also relevant. Art. 12 of this Act requires that:

(1) Investors and Investments shall conduct an environmental and social impact assessment of the potential investment. Investors or the investments shall comply with environmental assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host Member State for such an investment or the laws of the home State for such an investment. The investor shall comply with the minimum standards on environmental and socio-cultural impact assessment and screening that the Member States shall adopt at the first meeting of the Parties, to the extent that these are applicable to the investment in question.

(2) Investors or the investment shall make the environmental and social impact assessments accessible in the local community and to affected interests in the host State where the investment is intended to be made prior to the completion of the host State measures prescribing the formalities for establishing such investment.

(3) Investors, their investments and host State authorities shall apply the precautionary principle to their environmental and social impact assessment. The application of the precautionary principle by investors and investments shall be described in the environmental and social impact assessment they undertake.

These provisions are relevant because they directly oblige investors to conduct an environmental impact assessment. It enshrined also increasing inclusion of environmental provisions in the investments treaties.

However, environmental impact assessment content stays in the practice a controversial subject. While accepting the preventive nature of environmental impact assessment in its judgment in the Case concerning Pulp Mills on the River Uruguay, The International Court of Justice considered that:

it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. 

However, the Appendix to the Water Charter provides some indications on the content of an environmental impact assessment. Art. 16 requires that a study should include at least a description of the proposed activity and its purpose, a description of alternative solutions if needed, a description of the environment in which the proposed activity may have an impact, a description of the impact and the estimation of its importance, a description of the corrective measures and of monitoring and management programs, as well as possible plans for post-project analysis. The assessment must therefore take into account in an integrated manner the impacts that the activity could have on people and property as well as on the environment of other States. Consequently, to be objective, the study implies a wide involvement of all concerned and interested parties in the accomplishment of the planned activity.

The suitability of the impact assessment also needs widespread involvement of all parties concerned and interested in the completion of the planned activity. Public participation is, in this regard, one of the core aspects to take into account when realizing the impact assessment. The Appendix to Water Charter includes the “public participation through any appropriate form of such participation as public consultation, public hearing or public inquiry” in the main steps of the procedure for the environmental and social impacts assessment (art. 17(e)). It remains to be seen if only nationals of States that plan activities with transboundary impacts are involved in this public participation or if the local population of riparian States living in other countries participates as well. The legal regime of the Niger Basin does not provide specific
answers to this question. However, considering that the public participation concerns ‘potential affected persons,’ the nationals of riparian States that will be affected must be consulted. This should be done in collaboration with the concerned States.

Regarding its preventive significance, the risk assessment of an activity should establish the relationship between the risk and the damage it could lead to. Therefore it must be as complete and objective as possible.

4.2 Public Participation

In addition to being a required procedure in the study of impact assessment, public participation is an autonomous principle in the preservation of the environment.32 In effect, public participation is recognized as an essential component of the principle of sustainable development. The Principle was solemnly declared by principle 10 of the Rio Declaration. Under this principle, the process of leasing land must give the opportunity to potentially affected communities and individuals to express their view concerning the uses of those lands. Traditionally, public participation is understood through the following trilogy: public access to information, public participation in the decision-making process and access to justice.33 In the legal framework of the Niger Basin, these three aspects are grasped in an integrated manner, with an emphasis on public participation in the decision-making process. In fact, public information and access to justice seem to be considered in order to assure genuine public participation in the decision-making process. The analysis regarding access to information is confirmed in art. 4 (g) of the Appendix. It provides that:

the protection of the environment of the basin is ensured according to the fundamental following principles : g) The information and participation principle, pursuant to which a right to access to the information detained by the authorities on the basin environment, is granted to the public in order to take part effectively to the decision-making process.34


34 See art. 203 para. 4 of Appendix to Water Charter: “The right to information, to reach its goal of ensuring effective participation in decision making process should be designed as
Access to justice is mentioned at the art. 204 para. 3, specifically regarding public participation in the decision-making process.

The emphasis on public participation in the decision-making process underlines the importance of associating local communities and individuals with the development and authorisation of the activities that have impacts on their lifestyle. It creates a sense of ‘ownership’ in the decision itself. 35 Involving people at an early stage of the decision-making process creates greater trust in the process and decreases the possibility of later conflicts. 36 By involving them, the public will be guaranteeing the preservation of their basic rights. This point of view was underlined by the African Commission on Human and Peoples' Rights (ACHPR). In the view of the Commission, the respect of the right to health 37 and the right to a general satisfactory environment 38 include inter alia “providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.” 39 It emerges that public consultation in the process of land leasing for farming has a great importance as it creates conditions for secured international land investments.

Taking into account the integrated nature of the three aspects of public participation, we may argue that the legal framework of public participation in the decision-making process of the Niger basin requires at least adequate public information and wise public consultation procedure.

According to art. 203 para. 3 of the Appendix to Water Charter “The right of public access to information covers both all information on activities being implemented and planned measures which have or may have a negative impact on the environment or human health in the Basin.” Nevertheless, the Annex to the Charter provides a number of exceptions to the information obligation. Thus, in application of art. 203 para. 7,
a request for information on environmental issues may be refused if (i) the public authority to which the request is addressed does not hold the information [...] (ii) the application of information is manifestly unreasonable or formulated in too general terms to be met, (iii) the request relates to documents that are being developed or concerns internal communications of public authorities where such an exemption is provided for by national law, given the interest that the disclosure of the information requested would present to the public.

Are excluded from the scope of the disclosure requirement, inter alia the information that is likely to have negative impacts on

(ii) international relations, national defense or public security (iii) the course of justice; iv) trade secrets and industrial information, where such confidentiality is protected by law; (v) intellectual property rights; (vi) confidentiality of data and / or files relating to a physical person etc.

The extent of these exceptions is likely to dilute the essence of the right including when issues are sensitive like international land investments. They should be submitted to a strict interpretation regime. We could regret that the Annex did not mention expressly this requirement like the Aarhus Convention regarding access to information, public participation in the decision-making process and access to justice in environmental issues upon which it is based concerning its content. The art. 4 para. 4 in fine of the Convention requires indeed that these grounds for refusal should be interpreted “restrictively given the interest of the release of information for the public and depending on whether these information are related or not to emissions into environment.”

Concerning the participation in decision-making process itself, art. 204 para. 3 of the Appendix to Water Charter provides that the participation includes inter alia : i) participation in decision-making process on specific activities that may affect the public; ii) participation in the design, development and implementation of policies, plans and programs relating to the environment, iii) participation in the development of policy documents and strategies as well as laws and regulations on environmental issues iv) participation in appropriate mechanisms for public consultation including a public hearing or public inquiry at which people can submit any comments, information, analysis or opinions, suggestions, proposals, cons-proposals which they consider relevant to the proposed activity. According to those provisions, the public must be taken into account from the beginning of the process to the end. In addition to ensuring that the participation is effective, “it must begin
early in the process, at a time when all options are open” (art. 204 para. 2). At the end, the public must be guaranteed that this view was taken into account in the final decision. In this regard, the State parties must guarantee to the public an effective access to administrative and judicial remedies.

4.3 The Accountability of Investors

The accountability of investors constitutes a main point to ensure a sound management of the environment. Generally, the corporate accountability is envisaged as a voluntary process of business to integrate the three dimensions of sustainable development: the economy, the environment and the society.40 There is no particular way of implementing corporate accountability. However, in order to support investors in taking on responsibility, a number of organisations have developed and introduced standards and initiatives that demonstrate best practices.41 Concerning large scale agricultural investments, the FAO, IFAD, the United Nations Conference on Trade and Development (UNCTAD) and the World Bank have agreed on seven principles for ‘responsible agro-investments,’ which state that investments should be undertaken in line with the following principles: Principle 1: Existing rights to land and associated natural resources are recognised and respected; Principle 2: Investments do not jeopardise food security but rather strengthen it; Principle 3: Processes for accessing land and other resources and then making associated investments are transparent, monitored, and ensure accountability by all stakeholders, within a proper business, legal, and regulatory environment; Principle 4: All those materially affected are consulted, and agreements from consultations are recorded and enforced; Principle 5: Investors ensure that projects respect the rule of law, reflect industry best practice, are economically viable, and result in durable shared value; Principle 6: Investments generate desirable social and distributional impacts, and do not increase vulnerability; Principle 7: Environmental impacts due to a project are quantified and measures are taken to encourage sustainable resource use while minimising the risk/magnitude of


41 See for example H. Mirza et al., The Practice of Responsible Investment Principles in Larger-Scales Agricultural Investments. Implications for Corporate Performance and Impact on Local Communities (World Bank, 2014).
negative impacts and mitigating them.\textsuperscript{42} Despite the fact that water is not explicitly mentioned in the principles, we can consider that water issues are taken into account. However, it could be useful if water were also recognised in the international principles for responsible agro-investments.\textsuperscript{43} As a voluntary process, corporate responsibility remains in principle attached to the willingness of investors in implementing the recommended principle. This situation could affect the efficiency and reduce its capacity to prevent the degradation of environment.

In some case accountability could be a binding process for the investors. This is the case when accountability is required by national legislation. It could consist of an obligation to inform for the investors. The obligation can take the form of annual environmental reporting requirements, which should mention the impact of its activities and remedies adopted in that purpose. Obligations can also be imposed on investors making public their environmental policies.\textsuperscript{44} This obligation to inform enhances the transparency around their activities. Another tool providing by Appendix to Water Charter for this purpose is the implementation of environmental audits. Art. 21 of the Appendix to Water Charter provides that “States Parties shall undertake to conduct regular environmental audits for all activities that constitute a source of pollution, nuisance or environmental degradation, whether these activities have been or not object of environmental and social impact assessment.” The aims of this audit is to ensure the environmental performance of the institution in accordance with its environmental policy and environmental management system (art. 21 para. 4). Institutions that have been audited have the duty to implement their findings. It must develop and implement necessary corrective actions to address deficiencies identified during the audit, initiate or begin the process of continuous improvement of its activities and establish the means for continuous improvement of its environmental performance. By environmental audit national authorities can ensure that the activities carried on their territories do not cause degradation to the Niger basin and its environment.

The obligation of States to ensure the accountability of investors was underlined by the Court of Justice of the Economic Community of West African States in the \textit{CERAP v. Federal Republic of Nigeria}. In this case, the plaintiff argued that Nigeria failed to protect the natural resources upon which people

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\item[43] Jāgerskog et al., \textit{Land Acquisitions} op. cit., 24–25.
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depend or are fed in the Niger Delta by allowing private oil companies to destroy food sources. Nigeria in its pleadings rejected these arguments by listing a series of measures taken to respond to the environmental situation including *inter alia* the adoption of numerous laws passed to regulate the extractive oil and gas industry and safeguard their effects on the environment, and the creation of agencies to ensure the implementation of the legislation. However, the Court pointed out the insufficiency of these measures to prevent the continued environmental degradation of the region:

However, compelling circumstances of this case lead the Court to recognise that all of these measures did not prevent the continued environmental degradation of the region, as evidenced by the facts abundantly proven in this case and admitted by the very same Federal Republic of Nigeria.

This means that the adoption of the legislation, no matter how advanced it may be, or the creation of agencies inspired by the world’s best models, as well as the allocation of financial resources in equitable amounts, may still fall short of compliance with international obligations in matters of environmental protection if these measures just remain on paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered.45

And the Court adds that:

It is significant to note that despite all the laws it has adopted and all the agencies it has created, the Federal Republic of Nigeria was not able to point out in its pleadings a single action that has been taken in recent years to seriously and diligently hold accountable any of the perpetrators of the many acts of environmental degradation which occurred in the Niger Delta Region.

And it is precisely this omission to act, to prevent damage to the environment and to make accountable the offenders, who feel free to carry on their harmful activities, with clear expectation of impunity that characterises the violation by the Federal Republic of Nigeria of its international obligations [...].46

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46 Ibid., paras. 110–111.
Under these provisions it appears that the lack of accountability of investors favours the degradation of the environment.

5 Conclusion

Appreciation of the impacts of large-scale agricultural investments on transboundary water remains a complex issue. Within the Niger Basin context, it poses a dilemma between the sovereign right to the use of their lands and protection of the transboundary aquatic environment. There is no question of denying the sovereign character of land leasing issues. However in a context of shared resources between several states, it is important to stay within the dynamics of community of rights and interests as enshrined in international law. This community of rights implies for the States the obligation to ensure that activities within the limits of their jurisdiction or under their control do not cause damage to the environment of other States. Under this principle, States shall take measures to prevent degradation of the aquatic environment. Among these measures, environmental impact assessment, public participation and accountability of investors could be considered as minimum standards needed to guarantee an environmental agro-investment. But the remaining challenge is the capacity and competence of state regulatory bodies in regulating and monitoring large scale agricultural investments. To address this issue cooperation between States could be a good way to proceed. In this regard the Niger Basin Authority (NBA) constitutes an efficient tool of cooperation. Despite the fact that the NBA is currently not competent in coordinating land investments, it can support States in shaping harmonized legislation and management policies which will take into account the impacts of increasing cultivation of lands. In the face of important challenges such as protection of water, joint actions are unique responses.

47 On the contribution of Basin Organizations to the protection of freshwater resources, see L. Boisson De Chazournes, *Fresh Water in International Law* (Oxford University Press, 2013) 176–185.