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# TREE AND LAND TENURE NEXUS IN CÔTE D'IVOIRE

## OVERVIEW OF TENURE ISSUES WITH FORESTS AND COCOA

Côte d'Ivoire's forests have decreased from 16 million hectares in 1900 to 7.8 million hectares in 1990 and to 3.4 million hectares in 2015 (GoCI, 2018). Today 11 percent of the country's surface area is forested. Of the remaining forests, 39 percent are located in protected areas, 25 percent in gazetted areas (*forêts classées*) and 36 percent in rural areas (GoCI, 2019b). From 1990 to 2000, rural areas lost the most forest at an annual rate of 7 percent, whereas between 2000 and 2015, gazetted forests were lost the fastest at 4 percent per year (GoCI, 2019b). Today there are 387 forest logging permits covering rural and gazetted lands, though historically logging has been concentrated in rural areas (GoCI, 2019b).

Agriculture – especially cocoa – has been the primary driver of deforestation in Côte d'Ivoire in recent decades (World Bank, 2019). There are an estimated 3.5 million hectares of cocoa plantations – more than remaining forests – of which 750,000 hectares are located in gazetted areas (GoCI, 2019b). Farms are all smallholder and produce on average 40 percent of the world's cocoa supply, with annual exports exceeding two million tons in 2018 (World Bank, 2019). A fifth of the population depends on cocoa for a living. As land availability in rural areas has diminished, farmers have moved into gazetted forests and protected areas, which today account for a quarter of national production (RFI, 2019).

Two important features differentiate Côte d'Ivoire's tenure arrangements for cocoa compared to Ghana. First, Côte d'Ivoire's farms have a different settlement history, with the vast majority established during migrations to forest zones by outsider ethnic groups, mainly the baoulé ethnic group as well as foreigners, mainly from Burkina Faso (OFPRA, 2017). These migrations picked up in the 1940s as part of colonial policy and administrative strategies to attract labor (USAID, 2016) but they intensified after independence to a point where migrants outnumbered locals in many areas (Ruf, 2020).

Migration in the 1970s was driven by President Houphouët Boigny's slogan "the land is owned by whoever puts it to use" (*"la terre appartient à celui qui la met en valeur"*). Clearing forest helped secure access to land (Bymolt et al., 2018), and along with a government policy favoring full-sun cocoa varieties (Schulte et al., 2020), migrants had a strong incentive to clear natural forests. Customary arrangements varied and evolved, with most initially governed by the *tutorat* system of integrating outsiders through sharing of production and gifts with a representative of the land-owning family (Chauveau, 2007).

These arrangements became more monetized as land pressure increased (Chauveau, 2007) and in some instances transitioned to outright land sales from the 1950s (Wily, 2015) but especially the 1970s and 1980s (Chauveau, 2007). In the 1990s and 2000s, new tenure arrangements called *planter-partager* (plant and share) took hold whereby outsiders would clear forests and build a farm and then half of the farm would revert to the landowner upon crop maturity. The new paradigm could be explained by land-owning groups becoming more aware of the value of holding onto land while "financing" the labor needed to establish a viable plantation (Colin & Ruf, 2011). Specific tenure agreements are diverse, with as many as 15 typologies (Wily, 2015). While some of these arrangements resemble those found in Ghana, Côte d'Ivoire differs in the preponderance of migrant farmers and also the violence and politicization of cocoa belt land disputes in the 1990s and 2000s (Chauveau, 2000).

A second distinguishing feature of Côte d'Ivoire is the history of centralized state-driven approaches to land and forest management in disregard of customary practices. This has led to legal pluralism (Lamarche, 2019) and a schism between laws and what is done in practice (OFPPA, 2017). While Ghana has similar features, there is no equivalent of recognized "stool lands" in Côte d'Ivoire despite the existence of parallel customary systems. Instead the rural land law recognizes customary rights only as a temporary stepping stone towards a national titling system controlled by the central government (GoCI, 2017; OFPPA, 2017). This leads to considerable challenges in securing land tenure despite over US\$100 million in donor support in recent years (Dagrou & Loroux, 2017; Wily, 2015).

Against this backdrop, the issue of tree tenure has gained increasing attention from several fronts. First, difficulties implementing tree cover and tree planting requirements under standards like the Rainforest Alliance's Cocoa Certification Program drew attention to misaligned tenure incentives (Ruf & Varlet, 2017). Meanwhile the current government has embraced the concept of "zero-deforestation cocoa" as part of its broader commitment to increasing the country's forest cover from 11 percent to 20 percent by 2030 (GoCI, 2018). The new forest code of 2019 explicitly addresses tree tenure for the first time and gives primacy to the underlying landowner (GoCI, 2019a). The logic underlying such reforms is as follows: just as secure land tenure is a key predictor of higher cocoa productivity (Schulte et al., 2020), secure tree tenure can incentivize agroforestry. However, as discussed below, Côte d'Ivoire shows that this is not straightforward in practice.

## TREE OWNERSHIP LEGAL AND POLICY FRAMEWORK

Côte d'Ivoire's first post-independence forest code of 1965 enshrined state management of forests. While Article 26 allowed individuals to own a forest if they had a land title, they still needed permission to cut trees. While some argued that this was in contradiction with the civil code's article 547 on the rights of the "fruits" of the earth (Kobo & Assemien, 2009; Wily, 2015), state ownership was the guiding principle in practice through the ensuing decades. In 1978, for example, a decree solidified state management over gazetted *forêts classées* (*décret N° 78- 231 du 15 mars 1978*) and the government issued *permis temporaire d'exploitation* (PTE) in both gazetted and rural lands. In 1994 these permits were renamed *permètres d'exploitation forestière* (PEF) valid for 10 to 20 years and 25,000 hectares.

Today's institutional framework for forests can also be traced to this time, with the *Office ivoirien des parcs et réserves* (OIPR) established in 2002 to manage protected areas, while the state-owned enterprise *Société de Développement des Forêts* (SODEFOR) created in 1966 was in charge of managing

gazetted forests. Forests in rural lands were managed by agents of the *Ministère des Eaux et Forêts* (MINEF). Customary owners had no state-recognized rights over forests until the adoption of the 1998 rural land law, which in theory gave them temporary control to the underlying land (if they obtained a land certificate) but not necessarily the trees (Kobo & Assemien, 2009).

The majority of Côte d'Ivoire's post-independence period was therefore marked by state control of forests with unfettered logging and agricultural expansion. Cocoa farmers had every incentive to clear forests as quickly as possible since the government undermined customary authority and moreover could at any point claim natural trees for logging companies. To avoid problems or damage to new plantations, farmers had every interest to clear natural trees.

A new forest code adopted in 2014 (*loi N°2014-427 du 14 Juillet 2014*) made a number of reforms in the definition of rights and tenure. First, the 2014 code classified forests by different property rights regimes. There were government forests governed by public law (*domaine public de l'Etat*) which included protected areas. Then there were government forests governed by private law (*domaine privé de l'Etat*) which included all gazetted forests (*forêts classées*) and forests on non-titled rural land or land deemed ownerless (*terres sans maître*). Indeed, the latter colonial era concept of default state ownership of land was a principle retained in the 1998 rural land law, which stipulated that if customary land was not registered and titled within 10 years, it would revert to the state by virtue of being “ownerless.”

The 2014 forest code implicitly recognized customary land rights but only if registered per the 1998 rural land law. The code also asserted the link between land rights and tree rights, with the latter deriving from the former, while noting that the state was a type of “private” owner for certain categories of forests. The 2014 code also allowed local government (*collectivités territoriales*) to have public or private ownership of forests, and also explicitly created a category of private ownership of forests, which included trees in a village or forests on duly registered rural land per the 1998 rural land law. The 2014 code was criticized for setting the bar quite high for individual ownership of trees in practice (Wily, 2015) and for ambiguity around customary ownership (Client Earth, 2020).

The current 2019 forest law (*loi N°2019-675 du 23 Juillet 2019*) retains the basic ownership classifications (state-owned public, state-owned private, and fully private) but adds “agro-forests” as a new sub-category of the state-owned private domain. Per implementing regulations, agro-forests can be up to 20 percent plantations, but they are still owned by the government. As such, none of the plantation owners can claim ownership over natural or even planted trees. The new code also replaced the PEF permit system with a concession model for logging. Concessions can also be accorded for agro-forests, which opens the possibility of managing an agro-forest by a private sector entity or association.

Importantly, the rationale for creating the agro-forest category was not necessarily to incentivize agro-forestry per se but to deal with the fact that so many gazetted forests have been encroached upon by cocoa planters. Instead of degazetting these areas to become rural land, the government aims to “normalize” the conversion to agriculture while retaining state ownership (GoCI, 2019b). The aim is also to allow the other 80 percent to regenerate and thereby increase forest cover.

The 2019 forest code makes more explicit the private ownership of trees, including by customary owners, in the case of rural land. Article 25 notes that both natural forests and plantations can be included in the private domain, including those owned under customary control. This gives customary owners in rural areas the status of private owners. In addition, Article 27 explicitly states that the property of a natural forest or natural tree belongs to the landowner, and the property of a planted forest or a planted tree belongs to the landowner or the planter if the landowner agrees in writing to cede those rights. Therefore, any tree located on rural land, whether cocoa or another species, belongs to the underlying landowner or the migrant farmer if authorized by the underlying landowner.

Article 27 is a key innovation as it explicitly ties underlying land rights to the tree rights, including planted trees of all types, potentially creating an incentive for cocoa farmers with secure rights to plant and preserve shade trees. The code also reduces the bar to prove private ownership, as one has only to prove customary ownership, defined as continuous and peaceful occupation of the land, rather than show a land certificate. However, there is still the caveat that per the 1998 land law, unregistered land can become state property if not registered by 2023, at least theoretically (IDEF, 2020).

There are also concerns about how to apply Article 27 in practice, as none of the implementing regulations have clarified its implementation. For example, customary arrangements often dissociate natural trees and cocoa trees, so irrespective of what the law states, the farmer will refer to his or her understanding of rights in that socio-cultural context. More generally, customary tree tenure arrangements are complex and many are marked by conflicts between the multi-generational tenant farmers and the original owning family (Kouame, 2016). Article 27 does not itself address issues of underlying land tenure and if poorly implemented could exacerbate conflicts by giving the “upper hand” to the original customary owner.

Moreover, the way logging has been practiced since independence will not change overnight, and many farmers will be skeptical that their planted trees or remaining natural trees will be automatically protected, especially if the loggers skip the tenant farmer and pay a local chief representing the original customary owner. In other words, the new code will not in and of itself “sort out” the conflicts, paradigms and ambiguities that exist in practice – a range of additional efforts such as targeted awareness raising and dispute resolution will also be needed. Finally, because the 1998 rural land law defines the rules of rural land ownership, and rural land ownership per the 2019 forest code is the key to determining tree tenure, the numerous problems with the 1998 law could spill over and further muddy the waters.

## LAND CERTIFICATION UNDER 1998 LAND LAW

Côte d'Ivoire's rural land law (*loi N° 98-750 du 23 décembre 1998*) was adopted in a decade of rising tensions around land that were instrumentalized in the succession battle after President Houphouët Boigny's death in 1993. The nativist discourse around *ivoirieté* (Ivoirian-ness) contributed to the law's limiting of rural land to Ivoirians and recognizing first and foremost the rights of original customary owners (OFPRA, 2017) over the rights of migrant farmers.

Indeed, on the surface the law was path-breaking in its recognition of customary rights for the first time since a pre-independence 1955 decree afforded limited recognition (Wily, 2015). Since independence, the tendency had been towards suppressing customary systems. For example, a decree introduced on March 20, 1963 laid down the principle that the state was the owner of all non-registered land, mirroring the colonial principle from a 1935 decree. When the 1963 decree was withdrawn due to resistance from customary chiefs, the president launched the dictum that land belongs to whoever puts it to use, creating the conditions for migration and expansion of cocoa into forested areas (OFPRA, 2017).

The 1998 law was the first recognition that customary landowners had rights. However, the law also asserted that those rights were transitory. The central feature of the rural land law – the issuance of *certificats fonciers* to customary owners – was less a formalization of those rights but the first step towards their elimination. This is because the law requires conversion of those certificates to land titles within three years, after which customary systems would no longer have any control. In other words, the 1998 land law recognized customary rights in order to extinguish them – and aimed to do that nationally within 10 years (USAID, 2016). Indeed, the law stated that after 10 years all unregistered land would revert to the state who could lease it out at will, a deadline that was extended in 2013 to 2023.

Implementing the rural land law has been beset by enormous difficulties to the point that the rural land governance system is hardly operational (Kouame, 2016). First, the registration procedures are complex and the costs high, estimated at US\$421 per parcel when done as part of a systematic process and US\$1,370 per parcel for on-demand certification (World Bank, 2018b). Of the 23 million hectares in the residual category of rural land, representing 70 percent of the country's land, less than four percent is registered (OFBRA, 2017). As of 2017, only 4,000 certificates out of an estimated target of 1,000,000 were issued (Dagrou & Loroux, 2017; World Bank, 2018a). To achieve this, donors had invested over US\$100 million, mainly funded by France and the European Union (Dagrou & Loroux, 2017).

Despite these challenges, attempts to implement the law continue, with some notable updates. The 2016 Constitution in Article 12 reaffirmed the principle that only Ivoirians can own rural land, in addition to national and local government. The government created a rural land agency (*Agence Foncière Rurale – AFOR*) in 2016 aimed at streamlining the registration process. A new rural land policy was adopted in 2017, recommending that the three-year deadline to convert a certificate to a title be extended to 10 years.

However, the basic schema remains the same. Villages are to be demarcated and management committees established. The committees validate requests for individual or collective land certificates, which must be converted to *individual* land titles within 10 years. In theory, these certificates can be issued to foreigners, whereas titles can only be issued to Ivoirians. Foreigners must convert their certificates to 99-year government leases. Indeed, while some have called for the certificates to be the final document, the issue of limiting land to Ivoirian nationals is one explanation for the two-step process. After 2023, unless the deadline is extended again, all unregistered land – including tree rights – reverts to the state. In the meantime, certificate holders must technically start paying land taxes.

New initiatives aim at making the certification process more efficient and flexible. The \$50-million World Bank loan for the PAMOFOR project (*Projet d'Amélioration et de Mise en Œuvre de la Politique Foncière Rurale*) which began in 2018 adopts a “four-in-one” approach which combines boundary demarcation, clarification, certification, and contract formalization. The inclusion of rights clarification activities and contract formalization is a key innovation. While the government held that contracts are invalid unless there is an approved certificate, they are now open to clarifying contracts before certification, justified in part by the civil code which authorizes land contracts (Audace Institut Afrique, 2019). The inclusion of clarification activities is based in part on experiences from the United States Agency for International Development's (USAID's) Property Rights and Artisanal Diamond Development (PRADD II) project and its policy recommendations (USAID, 2018).

Private-public partnerships are also evolving to support certification, such as the Côte d'Ivoire Land Partnership led by Meridia and including Hershey, Unilever, Barry Callebaut Cocoa Horizons Foundation, and German Cocoa and Chocolate Foundation. The effort is approved by rural land agency AFOR and aims to test a model to deliver certificates following the official process but at a lower cost. A feasibility study was completed in 2019 and a field pilot began in 2020. Other public-private partnerships are also in the planning stages. However, given that the underlying framework has not changed, land certification will not be a panacea, and many agrobusiness actors are hesitant to invest too many resources given the social and political complexities.

For example, in some areas migrant farmers are able to obtain land certificates, even if they are of foreign origin, because of their longevity in the locality, local cultural or political dominance or previous purchase of land from customary landowners. In other cases, however, land certification requests are used by customary owners to reassert control over “their foreigners.” In addition, a single contestation can block the entire certification process, which can lead to disputes holding up or halting the official process. Moreover, the village boundary demarcation necessary for certification is highly contested especially for villages composed entirely of migrant farmers who see an opportunity to assert their

“independence” from the original landowners (USAID, 2018). The key point is that even though the new forest code clearly ascribes tree ownership to the landowner, establishing that underlying land ownership is often a complex and fraught exercise.

## TREE AND PLANTATION REGISTRATION

### TREE REGISTRATION

Faced with a lack of implementing regulations regarding Article 27 and challenges with rural land certification, at least one academic paper (Ruf & Varlet, 2017) and an international non-government organization (NGO) consortium (see below) have suggested parallel tree registration. The rationale for separate documentation for trees is that certifying land is not always possible due to conflict and bureaucratic challenges, and because loggers may not respect landowner rights even if certified. The prospect of certifying the trees instead of the land or the plantation has also been advanced as a way to address shortcomings in cocoa certification programs (Ruf & Varlet, 2017). Tree registration could also be used to secure tree rights in the case of farms located in the government’s private domain, such as agro-forests, where land certification by farmers is prohibited because the land belongs to the government.

There is only one recent example of a tree registry pilot in Côte d’Ivoire run by the NGO Impactum in collaboration with Meridia, World Cocoa Foundation, GIZ, and the Rainforest Alliance. The pilot involved 100 farmers in the Cavally region and tested three methods of registration: by estimation, by counting, and by direct measurement. Impactum was motivated initially by the fact that the number of shade trees per hectare required by certification programs was not respected. The objective was to provide material proof of ownership of natural trees which can be complementary to land certification and contract formalization. Impactum is set to present preliminary results by the end of 2020.

While tree registration in Côte d’Ivoire is being piloted in a different context of land tenure insecurity, tree registration in Côte d’Ivoire will likely face similar challenges as tree registration in Ghana., i.e. tree registration efforts will be costly to implement and maintain over time as trees die and ownership of land or trees change, and it will be difficult and costly to establish and maintain a functioning tree registry, especially in the absence of a land registry (see O’Sullivan *et al.*, 2021). Additionally, tree registration in Côte d’Ivoire will not address underlying land tenure issues, and it is possible that efforts to implement parallel (and potentially conflicting) tenure registration systems may lead to more confusion and conflicts rather than less.

Policy discussions are also underway on how to implement Article 27 and harmonize the land and forest codes, including some consultations and a planned workshop (IDEF, 2020). One idea under debate is to add tree tenure clarification as a part of the 10 official contract models proposed by rural land agency AFOR. Another proposal by Impactum is to allow a tree certificate as an addendum to land certificates or contracts. The latter would be coherent with the forest code which allows tenant farmers to own planted trees of any type (including shade trees) with the written permission of the landowner.

### FARM CERTIFICATES

Another instrument practiced in Côte d’Ivoire relevant to tree tenure is the *attestation de plantation* or farm certificate. These are documents issued by regional officers from the Ministry of Agriculture containing the name, location, the type of crops, and sometimes the number of trees. The certificates are used to prove ownership if there are land disputes (though they generally do not contain coordinates or maps). In addition, cooperatives may encourage members to formalize their farms with the *attestations* in order to obtain fertilizers and supplies on credit. The farm certificates therefore serve similar functions to land certificates.

Indeed, the existence of these farm certificates in parallel to land certificates demonstrates how the land registration framework does not easily respond to the needs of the country's 1.2 million smallholder plantations (OFFRA, 2017). While farm certificates do not carry the same legal weight as land certificates, they can and are used by courts in resolving land disputes (Dagrou, 2013). In addition, in communities where customary owners refuse to allow migrant farmers – even multi-generational ones – to obtain land certificates, farm certificates are a more palatable alternative to formalize foreign-owned farms without ceding control of the land, and without the need for an official contract (AIP, 2016).

From the government's perspective, farm certificates can be justified as stepping stones towards a certificate, generating information and clarifying tenure arrangements prior to a certification campaign (AIP, 2015). From this standpoint, they are also similar to the databases generated by cooperatives, the government and agrobusiness companies involved in traceability schemes. While they are not in themselves land or tree certificates, they can be useful tools for clarifying and strengthening both land and tree tenure.

The USAID PRADD II program supported a farm certificate pilot for cashew farmers in Tortiya in 2018 by facilitating the issuance of 111 certificates that included information on land tenure, agreements on plot boundaries, and GPS coordinates at a cost of US\$127 per parcel. Cooperative members were fully involved in the mapping and information collection (USAID, 2018). In addition, the NGO ABEB-CI launched a campaign to issue farm certificates to its members in 2015 (AIP, 2015). Though slightly different, the Ivorian think tank Audace Institut Afrique also implemented a pilot village land registry (Audace Institut Afrique, 2019). Should farm certificates continue to be issued, they could include information on natural and planted shade trees, which would help implement Article 27 in the new forest code. However, official government land policy does not recognize farm certificates as land tenure tools and calls for all farmers to get a rural land certificate or sign a contract with a certificate-holder.

## CONCLUSION

The case of Côte d'Ivoire illustrates a long transition from state ownership of forests and to the attribution of tree tenure rights to landowners. The new 2019 forest code went a long way from the 1965 state-owned system by giving a full place to individual landowners alongside the government. However, by vesting both planted and natural trees with the landowner, tree tenure clarification efforts are inevitably tied to the risks, challenges and conflicts around rural land certification. This entails deep and complex issues around national identity and politics which in recent decades have been marked by violent conflicts. Moreover, the large number of plantations on government-owned land, which individuals cannot own, remain a challenge despite the new category of "agro-forest."

In addition, enforcing tree tenure provisions of the 2019 forest code will be challenging unless communities, farmers and timber companies become aware of landowner rights and respect them. Indeed, the case of Côte d'Ivoire shows the dangers of a disconnect between official laws and realities on the ground. This gap has led over the years to complementary instruments that are constantly evolving, such as cooperative databases, tree registries and farm certificates. The key lesson is therefore the imperative of designing the land and tree tenure governance framework around the needs and motivations of end users. Because these end users and their needs are diverse, the framework needs to be flexible enough to respond to most of them, all while satisfying different government, industry and community priorities. This is no easy task but is the only way for tenure security to bring about its promised positive impact on the cocoa sector and contribute more broadly to sustainable development.

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**Contact:** Caleb Stevens, USAID Activity Manager, E3/Land and Urban Office, [cstevens@usaid.gov](mailto:cstevens@usaid.gov)

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