

Formalization of the collective rights of native communities in Peru

The perspective of implementing officials

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Key messages

- Regional governments have a central role in the formalization process as they are in the most direct contact with native communities. Nonetheless, incomplete decentralization has led to inadequate budget and trained personnel.
- The Ministry of Economy and Finance should incorporate allocations for community titling procedures in the national budget.
- There are incongruities between the expectations of native communities and the scope of the regulations that formalize collective rights – especially those related to rights to resources, the implications of usufruct contracts and the differences in rights granted over lands classified as forest versus agriculture.
- The results show that investing in coordination and collaboration mechanisms has the potential to increase the effectiveness of implementation. This requires assigning budgets and promoting measures supporting information exchange and formal agreements to implement joint actions.

Introduction

Over the past 40 years, more than 1,300 native communities in Peru's Amazon have been titled. Nonetheless, important challenges remain to close the gap in the formalization of areas still being claimed by indigenous peoples¹ (Monterroso et al., 2018b). The process of formalizing these rights has been subject to many changes in regulations, procedures and the institutions responsible (Monterroso

et al. 2017)². This publication forms part of CIFOR's global comparative study on the design and implementation of tenure reforms in forest lands.³ It seeks to contribute to understanding the barriers, limitations and needs facing officials involved in the formalization of collective rights, in order to improve the process.

¹ According to SIGNA-IBC (2016) data, more than 600 native communities (some 5.5 million hectares) remain to be titled. According to the Asociación Intétnica para el Desarrollo de la Amazona Peruana (AIDSESEP 2016), claims exist on 20 million hectares of land and forest.

² The process of formalizing the lands of a native community in Peru refers to the physical and legal clearance or regularization (*saneamiento*) of the native community's territory. The process entails implementing all actions necessary to hand over an unencumbered land or territory. In turn, the "physical-legal clearance" concludes with the provision to the community of a title duly recorded in the public registries and the issuance of the corresponding use contract (for forest areas). During the process, errors and problems of concurrent rights that have been detected must be resolved, such as overlaps (on paper or in practice), problems of borders or of demarcation, etc. (Pilar Camero, personal communication). See also Monterroso et al. 2019.

³ See: <https://www.cifor.org/gcs-tenure/>

This Infobrief presents the results of interviews and discussions with government officials involved in implementing the formalization regulations. The objective was to learn their perspectives on titling native communities, on procedures and challenges, and on the types of measures that should be promoted to streamline the process. After presenting the methods, the discussion is organized into four sections. The first analyzes the activities implemented and their limitations within the framework of existing regulations. The second discusses the responsible institutions and mechanisms for coordination. The third considers incongruities associated with the regulations and challenges facing officials. Finally, the fourth details these officials' perspectives on the social, political and economic factors that limit and facilitate formalization. The conclusions propose measures to improve the process.

Methods

The methodology consisted of reviewing existing laws, regulations and guidelines, as well as other available studies (IBC, 2014; 2016; Baldovino, 2016; Soria, 2017; Monterroso et al., 2017) to identify both the government institutions involved and the specific steps associated with implementation. Next, procedural manuals at the institutional level⁴ for the key authorities were analyzed. Based on the mapping of the implementation process, a survey was conducted with the government officials in charge of each of the different steps. In total, 32 surveys were done (13 at the national level, 7 in Madre de Dios and 12 in Loreto) between July and September 2016. In addition, structured interviews were conducted with representatives of nongovernmental organizations, indigenous organizations and international cooperation entities that do not have a legal role but have been deeply involved in promoting titling. In total, 23 such interviews were conducted (8 at the national level, 6 in Loreto and 9 in Madre de Dios).

In a second phase, the analysis was complemented by the review of 25 titling files⁵ and 14 semi-structured interviews (8 in San Martín, 2 in Loreto and 4 in Lima) to gather detailed information about procedures. These interviews were done between April and July 2017. The majority of the government officials identified and surveyed were men (72%), compared to 28% women. Similarly, of the interviews with NGO representatives, 66% were men and 34% were women. The majority of the government officials (64%) were working at the regional level and 36% at the national level. As for the NGOs, 66% were working at the regional level and 34% at the national level.

4 The review of the procedural instruments and manuals included TUPAs (Unitary Text of Administrative Procedures), MOFs (Organization and Operations Manuals) and ROFs (Regulations for Organization and Operations) of the identified authorities.

5 In total 25 files of native communities were analyzed: 13 in Loreto, 10 in Madre de Dios, 1 in San Martín and 1 in Ucayali.

Activities and limitations: perspectives on effectiveness and implementation

The government officials surveyed have many years of experience in formalization processes, with an average of 10 years working on the issue (11 of the officials have over 15 years and the most experienced reported 30 years in the public sector). The level of professionalization is also notable: 29 of the 32 officials surveyed indicated having a university education. Of those interviewed, 55% have competencies related to implementation of Native Communities Law No. 22175, and 45% to application of Forestry and Wildlife Law No. 29763. Most report that indigenous groups are the main sector with which they work (76%), while 14% said they work specifically with women and 10% with youth and older adults. The regional officials work more directly with communal leaders (78%) than national officials (54%).

With respect to the situation of native communities, their main problems are related to boundary conflicts, illegal logging, overlapping rights and inefficient management of their natural resources, according to 27 responses from governmental officials (Table 1). Over 40% of respondents perceive that the problems have increased over time, with more central government officials considering this to be the case (50%).

Table 1. Tenure problems faced by native communities

Classification	Principal obstacles	Score
1	Many boundary conflicts between communities	1.63
2	Illegal logging	1.25
3	Overlapping extraction rights	0.97
4	Inefficient resource management	0.84

Note: Classification done using the Borda ranking system⁶

Regarding their main sphere of work, 46% of the officials surveyed nationally and regionally named recognition of rights as the primary focus. The survey asked respondents what kinds of activities and measures implemented by government institutions are related to protecting

6 The Borda counting system is a method used in social selection theory to identify preferences in line with responses, similar to voting systems. It is based on weighting the responses obtained, taking the ranges into account and ranking them according to the preferences of those surveyed.

and ensuring communities' rights. The three activities mentioned most were: activities linked to forest tenure and rights recognition (13%), training and capacity development (13%) and intersectoral coordination (10%). The measures implemented (Figure 1) are related to these activities, including providing training and information to communities about their legal rights (33%), demarcation of communal areas (13%) and coordination with other sectors to minimize threats to native community lands (13%).

The government officials' opinions regarding the effectiveness of the activities they implement, both individually and institutionally, were positive, with 46% of those surveyed perceiving the activities as effective or more or less effective (38%) in ensuring community rights. The perception tends to be more favorable among officials who work in Lima compared to those in the regions. They were also asked their perspective on the results of implementation, to which 75% responded that regulations were implemented partially.⁷ The results show that implementation agents at a national level associate

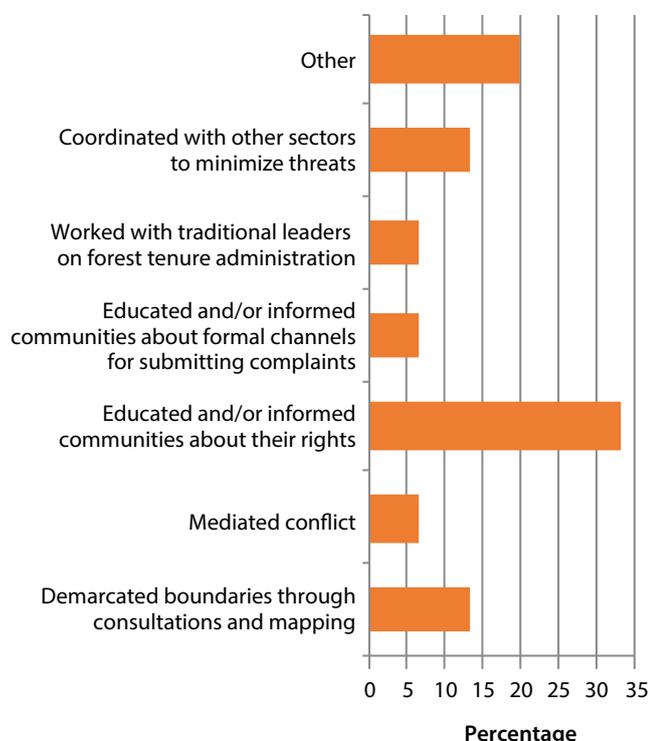


Figure 1. Measures implemented by government officials to guarantee rights to communities

⁷ The officials had the following options: 01 = Not being implemented; 02 = Partly implemented; 03 = Many parts of the policy are being implemented; 04 = Overall, implementation is proceeding very well.

the objectives of formalization with assuring tenure rights (for example, titling) for communities and forests. By comparison, government officials at the regional level associate the objectives of formalization of collective rights with promoting communities' access to land and forest, as well as fostering forest management and use. The difference between these responses is statistically significant.⁸

According to the study, the main limitations public officials face in carrying out their work are inadequate budgets (37%). A similar percentage of NGO respondents recognize this limitation as the main obstacle government institutions face in being able to implement activities that promote native communities' rights (36%). Other limitations are associated with availability of information, education and awareness-building about community problems (18%), lack of personnel (12%) and low political will (11%). Of a total of 30 responses by government officials, the most important obstacles to implementation include inadequate budgets, followed by deficient planning/communication, political interference and an onerous process that requires years to fulfill the established procedures, with important differences in the scores obtained (Table 2).

Table 2. Principal limitations to implementation of tenure reforms in Peru

Classification	Principal Limitations	Score
1	Inadequate budgets	2.21
2	Inefficient planning/communication	0.72
3	Political interference	0.62
4	Onerous processes that take years	0.59

Note: Classification with Borda ranking system

On the institutions responsible and coordination mechanisms

The study found that legislation on native community titling in Peru defines a minimum of 7 government offices⁹ with competency in the process. In practice, however, the process can end up including more than 12 different offices, as seen in cases in which overlapping rights need to be

⁸ Pearson χ^2 ($p < .05$).

⁹ To define the number of agencies involved, the dependencies/offices within a single entity were taken into account. For example, at the regional government level, the Regional Department of Physical and Legal Regularization of Rural Property and the Legal Office, both within the Regional Agrarian Directorate, are considered as different entities.

resolved (Notess et al., 2018). Despite the large number of institutions involved, our analysis found that more than 90% of the process is the responsibility of the regional governments' agrarian offices. The regional governments' role become central after Peru's decentralization process, which began in early 2000 (Monterroso et al., 2018a). This underscores the need to strengthen coordination capacities between the regional and national levels to resolve possible conflicts and incongruities in the titling and demarcation process (Monterroso et al., 2018b).

Of the officials surveyed, 53% said some kind of formal agreement exists for coordinating among diverse institutions. According to the analysis, there is a statistically significant difference regarding officials who consider the implementation of the regulations to be effective, between those who point out that the institutions they work with have formal coordination agreements and those who do not ($p < 0.1$).¹⁰ This coordination is mainly done between regional government institutions and national authorities (22%) and between regional governments and NGOs (27%). Of the responses, 36% indicate that the coordination assures good results, permits fulfillment of the objectives (22%) and forms part of the institutional mandate of certain organizations (19%). According to the analysis, the effectiveness of the coordination mechanisms used — conventions, letters of understanding or agreements — is seen relatively favorably, given that 32% of implementers consider them effective and 44% more or less effective.

From the viewpoint of the stakeholders, the main limitations to collaborating with other institutions have to do with the time these efforts require (24%, the most important issue for regional government officials), the differences between sectoral perspectives and institutional priorities (24%) and budgetary limitations (12%). These stakeholders suggest assigning budgets with specific coordination activities (33%), promoting the exchange of information (26%) and encouraging formal agreements for collaborating in the implementation of joint actions (15%) as measures that can help improve collaboration schemes among authorities involved in implementation.

The procedure, costs and time required for titling

A recent legal interpretation of the processes for recognizing and titling native communities identified

14 steps grouped into 9 stages defined by law¹¹ (Camero and Gonzáles, 2018). In practice, however, our study identifies a total of 22 steps (Notess et al., 2018).¹² These results are consistent with other analyses that underscore the complexity of the legal process communities must follow to formalize their collective rights (Defensoría del Pueblo, 2014; IBC, 2014; 2016; Baldovino, 2016). They also show the difficulty in defining the costs in both time and money required to complete the titling process due to regulatory changes in the competencies and functions of the institutions involved (Monterroso et al., 2017; Monterroso et al., 2018b).

According to law, the communities are exempt from any kind of administrative payment for the pertinent paperwork.¹³ Nonetheless, the titling process requires the mobilization of a technical team for several days. Information available from various institutions estimates expenses of up to USD 13,000 (according to AIDSESEP data), of USD 8,990 (information from a native community in Madre de Dios) and of USD 1,200 (for a community in Ucayali).¹⁴ The cost variations are also a result of community-specific characteristics (for example, ease of access, number of hectares and type of terrain), the existence of relevant information and the presence of conflicts (e.g. boundary overlaps). The highest costs are usually associated with the demarcation process and agro-ecological evaluation.¹⁵

Our analysis indicates that communities may need an average of eight years to complete their formalization process. One of the most complete files found in Loreto shows that the community obtained legal recognition in 2007 but was only able to register its title and

11 According to Camero and Gonzales (2018), although their text in Cartilla No. 3 mentions some situations of overlaps, no specific steps are developed to address them, given that it would involve more steps than those already identified. Nonetheless, it does include some elements for addressing the most frequent overlaps from a normative interpretation in questions 44, 52 and 58.

12 These 22 steps do not include the recognition process (which must occur prior to titling) or conflicts over overlapping rights and other complications that make the formalization process even more difficult (see Monterroso et al., 2018b).

13 In January 2018, MINAGRI issued D.S. No. 2002-2018-MINAGRI, which, in Art. 1, exonerates Regional Governments from the payment of fees to executive branch entities for the execution of the physical legal assessment for rural property titling; nonetheless, it was not possible to analyze the degree of implementation to date.

14 In a public event, the MDE Saweto project estimated a cost of USD 2 per hectare to be titled, when the average extension of the community is around 7,000 hectares (using IBC-SICNA data, based on 2,167 communities titled as of 2016).

15 It is important to mention that due to the approval of new guidelines for executing the agro-ecological evaluation and classification by use capacity for titling purposes (RM No. 0194-2017-MINAGRI), the costs of the process have decreased.

10 According to analyses using the Kruskal-Wallis H. test.

receive its use contract as recently as 2017. Delays are often related to the need to ensure financing for field activities, which is consistent with the limitations public officials mentioned regarding inadequate budgets. The differences in the time each step takes have to do with the coordination period between different government entities and the collection of information needed to be able to respond to the request.

Implementation incongruities, disagreements and challenges

The survey asked about the existence of disagreements and incongruities between the regulations promoting the formalization of collective rights and the expectations of native communities regarding their acquired rights. Of the government officials surveyed, 72% responded that such disagreements and incongruities exist. With the inclusion of responses by the nongovernmental sector, this perception rose to 78% of the total interviewed. Half of the officials who answered the question affirmatively referred to the Forest and Wildlife Law and to the requirements defined in new regulations regarding the use of forest resources in native community territories; they alleged that these have not been widely shared, hence people have little information. These incongruities also refer to the interpretation of the legal framework that differentiates mechanisms for formalizing communal lands, establishing distinct procedures for lands classified for agrarian use and for forest use. Moreover, according to these officials, the communities have different expectations regarding the formalizing of their rights, given that they do not understand the difference in the type of instrument and its implications. Finally, government respondents also mentioned discord between indigenous communities' perception of their territory as a single holistic entity, and the separate mechanisms the government uses for formalizing these rights. The NGO technicians refer in their responses to the lack of information and discussion of the norms governing the titling processes and the mechanisms of access to and management of forest resources. A recurring concern relates to the implications of the distinction of the areas given in use contracts (lands classified as forestland and for protection) and the management of and access to the natural resources in them.

According to the officials, the main challenges for resolving these disagreements and incongruities have to do with the difficulties in winning the trust of the actors involved in conflicts (34% of those surveyed), organizing meetings with other government offices involved (18%), achieving consensus (13%) and finding neutral platforms

to be able to debate options (13%). Figure 2 shows the differences in the perceptions of government relative to NGO respondents.

The officials were also asked their opinion about the need for training, and what kind of training could improve their work. The most-mentioned topics include communication and extension for working in native communities (12%), participatory planning (12%), facilitation and negotiation with diverse actors (9%) and tools for participatory mapping, including geographical information systems (9%).

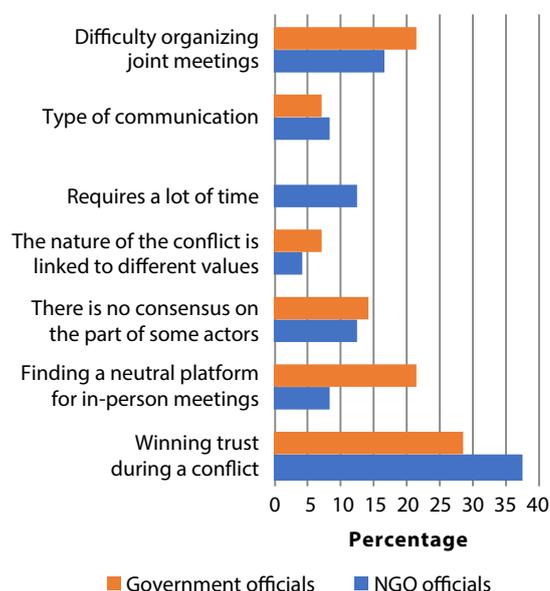


Figure 2. What are the most important challenges faced to resolve these disagreements and incongruities?

Main political, social and economic factors affecting the titling process

This section summarizes the results of a series of questions that seek to analyze the perspective of governmental officials about the social, political and economic factors that facilitate or limit the formalization of rights. The results obtained from interviews with the nongovernmental actors are also included for comparison. According to the responses, the main *social factors* affecting the implementation process include ethnicity (33% of government officials) and cultural norms (29%), mentioned also by the NGO representatives interviewed (23% and 27%, respectively). These results point to the need to work with officials involved in titling on an intercultural approach to discussing methods and tools that respond to the needs of the native populations with whom they work.

Figure 3 also shows differences between interview groups. For example, topics such as little knowledge of reality (12%), norms or practices on gender (8%) and religious practices (8%) were mentioned only by the NGO officials. The government officials stressed other aspects such as community organization and the representativeness of these organizations.

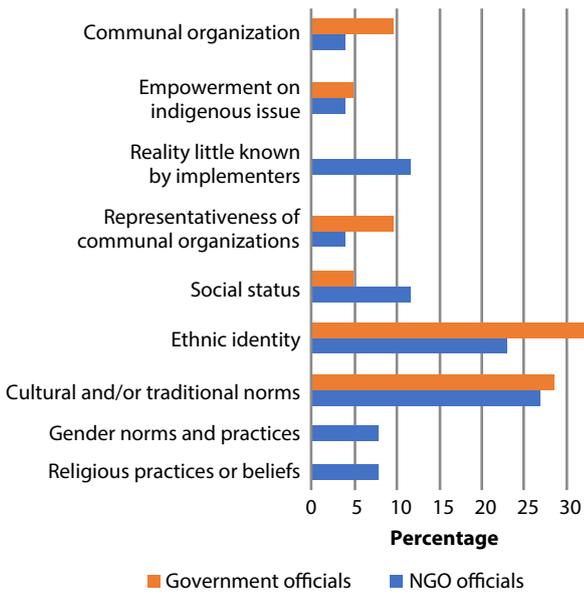


Figure 3. Social factors that facilitate or limit implementation capacity

The *political factors* most mentioned that limit implementation are: changes of government (25%), different priorities in the national and regional spheres (19%) and an incomplete decentralization process (16%). Another factor was the type of relation between central and regional officials (9%). The differences between the responses of the government and NGO officials are shown in Figure 4. It is worth stressing that aspects such as lack of coordination policies and labor instability¹⁶ were only mentioned by government officials. Despite these differences, there are more similarities between the two groups regarding this issue.

With respect to *economic factors*, the main issues mentioned were the unequal distribution of budget between national and regional governments for the implementation of formalization activities (41%) and the national economic priorities related to prioritizing

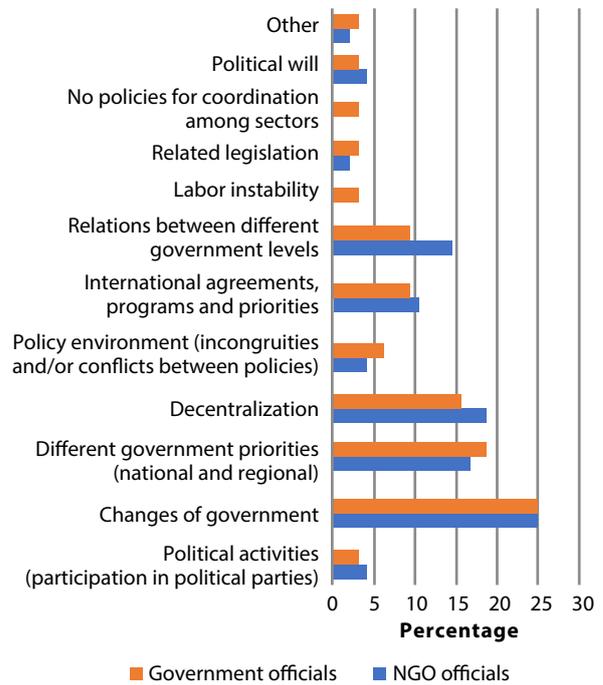


Figure 4. Political factors that facilitate or limit implementation capacity

certain sectors, including mining and hydrocarbon extraction (30%). The differences between the responses of government and NGO officials are shown in Figure 5. The responses from the two regions studied point to other differences not reflected in the graph. For example, internal migration was a factor mentioned only in the region of Madre de Dios.

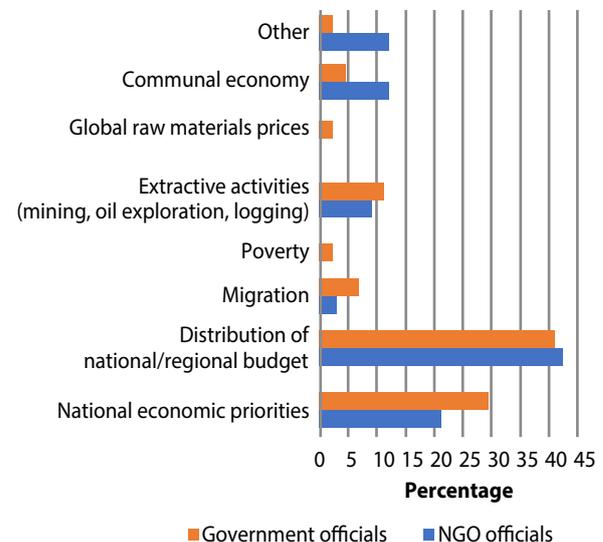


Figure 5. Economic factors that facilitate or limit implementation capacity

¹⁶ In the Peruvian context, the election of regional and local governments occurs every four years, and these political changes generate labor instability.

Conclusions and recommendations

The results of this document highlight the important role of regional government officials due to their direct contact with native communities and their responsibility for the greatest number of steps in the formalization process. It is necessary to strengthen their technical capacities, including tools for communication, facilitation and extension that incorporate an intercultural approach in their work. These officials' perspective on the importance of ethnic themes as the main social factors affecting the process also stresses the need to ensure that they have the tools and knowledge required to work with indigenous populations.

The main obstacles the officials face are associated with inadequate budgets to implement formalization processes that are long and costly for both the communities and the government officials in charge of implementation. Although these costs are linked to the region and context of each community, the analysis of the number of steps still required in practice shows that the recent regulatory changes (for example, agro-ecological evaluation) are not enough. It also underscores the need to see the implementation process as a whole, i.e. even if 90% of the regional government offices fulfill their obligations, the title is not expedited until the other 10% fulfill theirs. This emphasizes the importance of encouraging the Ministry of Economy and Finances to establish forms of public financing and not to depend solely on the financing of cooperation projects.

The government officials suggest measures that would enable challenges to be addressed, including the need to promote arenas for discussion and coordination to search for consensus and analyze options for improving the effectiveness of the activities being implemented in native communities. In this regard, the results reveal the need to review coordination mechanisms and their potential to increase effectiveness. These findings suggest that better coordination mechanisms could reduce the implementation costs of procedures by promoting intersectoral decision-making arenas, assuring crucial information for streamlining processes and promoting more effective measures in practice. They also refer to the need to assign budgets and recognize the time required to coordinate joint actions.

The results stress the underlying problems in the process. They validate the existence of disagreements between community expectations and the scope of the rights formalized through existing regulations, which can generate conflicts in implementation. This means ensuring that the involved officials have conflict resolution tools. These differences in perspectives also show up in the visions of officials at different levels regarding the formalization process and the way the formalization objectives are perceived. The fact that the objective at the central level is focused on titling, while at the regional level it is

focused on resource access, shows a need for coordinated management between government levels in order to address both priorities.

Finally, although consensus exists on the need for financing as one of the largest obstacles, the discussion of the social, political and economic factors makes reference to deeper problems, such as the need for building awareness about ethnic issues, the lack of political will, and the influence of political frameworks for economic development that have very different priorities than indigenous peoples.

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