

Executive Summary:

Baseline study of the legal framework of land rights and ancestral knowledge of indigenous peoples and local communities in Peru

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This study examines the recognition of the land rights and ancestral knowledge of indigenous peoples and local communities in Peru. It systematically analyses the relevant national and sub-national legal framework, judicial and administrative decisions, relevant public policies and interviews with representatives of indigenous peoples' organisations.

Policies and frameworks to protect indigenous peoples are weak

The study found that both issues are subject to fragmented regulatory governance, which lacks both a unifying public policy and leadership from the sectoral authorities involved. Moreover, these legal frameworks establish weak standards on the protection of indigenous peoples' rights.

Territorial rights are impacted by a number of challenges, such as

- lease agreements,
- weak implementation of the principle of free, prior and informed consent,
- administrative barriers to obtaining land titles,
- and territorial rights that overlap with conservation areas, and mining and oil concessions.

Effective protection of indigenous knowledge is hampered by

- weak participatory mechanisms – hindering the incorporation of this knowledge into climate policy design,
- the fact that indigenous peoples' rights over this knowledge are not recognised in relation to agriculture,
- the absence of clear channels that would make paying for the use of this knowledge feasible in practice,
- and reactive protection based on public registration.

Understanding land rights and ancestral knowledge is key to create effective policies

The study starts from the premise that territorial rights and ancestral knowledge have social, political, cultural and spiritual dimensions. In the case of territorial rights, these dimensions are expressed in the concepts of land, territory and collective ownership. From a socio-ecological perspective, land is the physical entity in relation to which indigenous peoples have legal rights and obligations. From a legal perspective, collective ownership is the legal arrangement that governs these legal relationships. From a political perspective, territory is the geopolitical area over which indigenous peoples exercise their self-determination.

Both territorial rights and ancestral knowledge are characterised by three fundamental features: **anteriority** (pre-existing the state), **a special bond** (social, cultural or political) and **integrity** (territorial scope), all of which are recognised by international instruments and international human rights jurisprudence.

These features have profound practical implications. For example, **anteriority** implies that any title obtained is declarative and does not itself establish any rights. The **special bond** establishes territorial rights as an enabling condition for the enjoyment of other rights (for example, prior consultation, enjoyment of the economic benefits of exploiting the territory, compensation, recognition as an indigenous people, etc.). **Integrity** means that there should be exclusive legal protection over the entire area of the indigenous territory.

Current legal instruments have limited recognition of land rights

The study analyses normative instruments under the jurisdiction of different sectoral authorities, including those for the Environment, Culture, Transport and Communications, Energy and Mining, Agriculture, Justice (Public Registries) and the Presidency of the Council of Ministers (Territorial Boundaries).

The study found that **territorial rights are recognised both directly and indirectly in instruments** with the following objectives:

- Granting land titles as a way to promote social inclusion and local economic development; and as a means of protecting forest areas;
- Implementing the right to participate in the approval of policies and the development of extractive and infrastructure projects;
- Upholding commitments such as the earlier agreement to develop economic initiatives;
- Protecting the cultural integrity of peoples in voluntary isolation and initial contact.

The achievement of these objectives has, however, been very limited. There is a significant shortfall in the number of land titles granted to communities. The special bond is not respected when implementing participatory mechanisms, which are treated as box ticking exercises rather than a way to safeguard the right to indigenous self-determination. Territorial integrity is left unprotected by a legal framework that does not recognise territorial rights over natural resources.

A lack of overarching policy regarding ancestral knowledge

As regards ancestral knowledge, the study shows that, despite the 1993 Political Constitution not expressly recognising indigenous peoples' rights in relation to this knowledge, these rights are indirectly recognised in the right to cultural identity. Moreover, the obligation to protect indigenous knowledge is recognised in several international instruments signed by Peru. These instruments include the Convention on Biological Diversity (1992), the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), the International Treaty on Plant Genetic Resources for Food and Agriculture (2001) and the Nagoya Protocol on Access and Benefit Sharing (2010).

When it comes to sectoral regulation, ancestral knowledge is treated as a cross-cutting issue, though the focus and spheres of protection differ by sector. At this level, sectoral authorities often recognise ancestral knowledge only indirectly or by implication and there is no overarching policy.

To illustrate, indigenous peoples' rights are well recognised in relation to their knowledge of forests, which gives rise to the requirement to obtain their free, prior and informed consent to use forest resources. In the areas of linguistic rights, intercultural education and intercultural health care, ancestral knowledge is recognised as having inherent value, giving rise to rights as an aspect of the fundamental right to respect for cultural identity.

In other areas, it is protected in connection with its role in participatory processes, such as prior consultation, which must involve intercultural dialogue. It also plays an important role in efforts to address climate change and in the conservation of protected natural areas. Indeed, various bodies have set up participatory mechanisms working from the assumption that ancestral knowledge can make a substantial contribution to environmental policies. In practice, however, these mechanisms are weak and have little impact.

The framing of ancestral knowledge as a question of intellectual property is another issue. The national competition and intellectual property institute, INDECOPI¹, has set up two registers – one public and one private – to enable indigenous peoples to protect their knowledge and benefit from its use. While an increasing volume of knowledge has been registered, the governing regulations only recognise rights over collective knowledge once that knowledge has been registered. Before it is registered, knowledge is considered to be in the public domain and devoid of legal protection. Ancestral knowledge in the agricultural sector, for example, concerns organic farming, family farming and seeds, but it is not explicitly protected. Instead, the regulatory framework prioritises productivity, technical training and assimilation into the free market.

Indigenous organisations don't feel supported by the state, as legal frameworks aren't effective enough

In short, the regulatory frameworks governing territorial rights and ancestral knowledge tend to cut across sectors, but are, nevertheless, highly fragmented. This means that there is no overarching policy approach. Nor are there any multisectoral or even sectoral plans that set specific targets in these two areas.

Even the constitution only indirectly recognises territorial rights and ancestral knowledge, while international human rights standards fail to give rise to robust legal recognition in connection with the right to indigenous self-determination. Indigenous and local organisations do not trust that the regulatory frameworks governing either area will be effective nor that the relevant authorities will enforce them.

When it comes to territorial recognition, the indigenous organisations consulted agree that the current procedure for obtaining land titles is bureaucratic and expensive, to the detriment of communities. They also agree that public authorities show little interest in meeting the needs of indigenous peoples with respect to their territorial rights and that instead these authorities seek to fragment indigenous territories and circumvent the requirement to obtain free, prior and informed consent.

Proposals to approach territorial issues

There are various proposals concerning how to address these problems.

- One includes building capacity in the public sector in collaboration with indigenous peoples. Doing so would require higher budget allocations and more technical resources to enable regional governments to process applications for land titles more quickly and efficiently. This would in turn require administrative procedures to be simplified and information to be disseminated more widely to help communities submit the necessary paperwork without relying on external legal advisors.
- Territorial governance could also be improved via ad hoc reforms. Such reforms could establish public registers to recognise the legal personality of autonomous territorial governments. Indigenous territories would then have to conform to the legal arrangements for collective property, following the corresponding administrative rules on registration.
- A more ambitious approach would be to substantially reform territorial governance in the country. In this scenario, the indigenous nation would be established as an additional level of government within the organisational structure of the state. The corresponding territorial unit and its borders would be recognised in law, rather than as a matter of public registration. As such, territorial rights would no longer be understood as property rights under the geographic jurisdiction of local and provincial governments, but rather as rights attached to a territory within the territorial jurisdiction of these governments.

¹ Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual

Proposals to approach ancestral knowledge issues

As regards indigenous knowledge, the organisations consulted agree that people are largely unaware of the existing legislative framework, which has not been effectively disseminated to communities. They also agree that the existing platforms for participation are weak. On this point, the study makes a number of proposals.

- Firstly, legislators should reconsider the protection of this knowledge as intellectual property, given that it is an ancestral right. If companies or individuals use this knowledge without consent, the peoples whose knowledge is being exploited would therefore have the right to demand compensation and that the activity be stopped, whether or not they have registered the knowledge. Such an approach would make it possible to demand the protection of all ancestral knowledge.
 - With regard to family and agroecological farming, there are participatory mechanisms (such as the Participatory Guarantee System) that enable communities to certify of their agroecological produce. However, small producers are demanding the adoption of a specific regulation on certification.
 - Regarding the participation of indigenous organisations in discussion forums and platforms on climate change, it will be necessary to strengthen representative organisations by establishing clear guidelines on who can participate and how. Finally, instead of creating multiple commissions on the different aspects of ancestral knowledge, which often fail to achieve concrete results, the sectoral authorities responsible for culture should push for the adoption of a multisectoral policy on indigenous knowledge.
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