Structural Causes of Local Conflicts

Imperfect governance systems that preclude participatory mechanisms or prevent revenues from being fairly distributed are the source of many oil-related local conflicts. Also contributing to these disputes are malfunctioning legal systems or a weak presence of the state in hydrocarbons producing areas. These flaws are structural in nature because they are usually embedded in the core of the democratic machinery and are difficult to modify.

Latin American countries have gone a long way in adopting and consolidating democratic government systems. Since the end of the 1980s, democracies, defined in 1942 by the minimalist economist Joseph Schumpeter as based on the transfer of power through free, fair, and regular elections, have been the rule rather than the exception (1962). The region has been part of a global trend that Samuel Huntington (1992, 23) called “the third wave of democracy” to describe the spread of democratic governments throughout the world in the 1970s and 1990s. With the arrival of democracy came the possibility to freely express discontent or different political views. With a few exceptions, Latin Americans can generally express their points of view today without fear of state repression or persecution of the kind the region suffered during past decades of military governments.

However, structural flaws still prevail and constitute a major obstacle to good governance. Institutions in Latin America have yet to strengthen the democratic system to prevent the use of violence as a way of expressing grievances. Building stronger democracies calls for the consolidation of political movements throughout the region, the development of popular trust in that process, and the strengthening of constitutional norms (Linz and Stepan 1996, 3–66). Furthermore, the region has yet to acquire systems of effective government accountability and, in particular, what has been defined as horizontal accountability: mechanisms by which one government entity holds another accountable (O’Donnell 1998).
Structural flaws have usually been in place for extended periods of time and are firmly established in the overall system of governance in Latin American democracies. Because a large percentage of the population has learned to live with them, and in some cases to benefit from them, very often there is perverse interest in keeping the flaws unchanged rather than solving them. Structural flaws end up configuring an atmosphere of institutional, legal, political, and social mismanagement that eventually creates a climate of conflict, challenging the very essence of democratic values.

Research has shown that democracies put up fewer barriers to participation than other, more repressive, government systems, and in that context minorities often tend to resort to protests, and not rebellion, to express discontent (Gurr 2000b). When people can express disapproval of the system through peaceful channels provided by the democratic institutions—such as voting, social protests, strikes, marches, or public dialogue—or when the institutional framework allows for their expression of discontent, they will be normally less inclined to resort to violence as a mechanism of last resort to communicate their problems. But in the presence of structural flaws that set limitations to open participation or to the promotion of public self-expression and accountability of the authorities, violence is bound to occur at some point. Probably the most obvious recent example of the extremes this process may reach is the succession of uprisings that swept the Middle East throughout 2011 (Economist 2011).

In the case of conflicts in Latin American oil- and gas-producing countries, the strong presence of a minority Indigenous population adds another dimension to an already complex scenario. The global trend toward democratization experienced in the 1990s contributed to improving the status of minority groups around the world and therefore to reducing tensions between them and the rest of the population (Gurr 2000a). A participatory democracy usually provides early warnings of potential tensions that, if properly and promptly addressed, may serve to prevent later explosions. But even when populations do have access to peaceful mechanisms for solving differences, violence can still erupt, particularly when governance weaknesses prevent democratic channels from responding to the needs of the population. When government institutions at local or national levels fail to operate in a transparent way or are seen as not representing the interests of the population, there is high potential for violent conflicts. Violence in this case becomes a tool for expressing dissatisfaction and a means for forcing government institutions to fulfill their obligations.

The following pages address some of the institutional and legal flaws that di-
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rectly or indirectly contribute to the development of local conflicts in the presence of oil or gas reserves. Particular attention is given to the interplay between structural flaws, Indigenous groups, and the increasing trend to develop oil and gas in Indigenous territories, and to how all these elements may contribute to conflicts. Our research identified two major structural flaws that have a direct impact on local conflicts related to oil and gas projects: poor subnational governance and gaps within legal frameworks. The following sections focus on the mechanisms that lead to conflict in the presence of these two major structural imperfections. The analysis also looks at how the presence of domestic structural flaws has indirectly contributed to the development of an increasingly solid Inter-American legal framework to address hydrocarbons conflicts.

POOR SUBNATIONAL GOVERNANCE

Improving institutional performance and governance is essential for breaking the cycle of conflicts related to natural resources, particularly when the upgrading leads to a better distribution of revenues and provides a sense of security and justice. It would not be totally accurate to associate Latin America's oil-related conflicts solely to an inequality gap caused by an uneven distribution of education, income, land, and political participation. The action, or inaction, of the state, certain political decisions, and misspending also contribute to the building up of resentment (Reid 2007, 124–58).

Very often, oil conflicts occur as a result of governance imperfections at the local level that affect the redistribution of oil revenues and the choice and subsequent implementation of local investment projects to benefit local communities. Poor procurement procedures, for example, ultimately jeopardize the use of oil revenues that should be available for sustainable community-development projects. This, in turn, results in conflict and discontent when the local population fails to enjoy the benefits of the oil projects being developed in their territories.

Governance inefficiencies in Latin America may be linked to the fact that democracies are still young and that the institutional improvements necessary for the democratic system to work effectively are, with a few exceptions, at an early stage of development. According to the well-known journalist Michael Reid, who specializes on Latin America,

Latin America has made much progress in the past few decades. A sense of perspective is important: two generations ago a majority of Latin Americans
lived in semi-feudal conditions in the countryside; little more than a generation ago, many were being murdered because of their political beliefs. . . . The relatively disappointing record of many of Latin America’s democratic governments should be judged realistically against the scale of the problems that they have had to face. . . . Progress has started to get the upper hand. Consolidating it requires incremental reform. . . . It also requires patience, hard though that is to muster in the face of poverty. (2007, 310–15)

The fiscal decentralization process the three countries under study engaged in was aimed at surmounting the obstacles that prevent an equitable distribution of oil revenues among regional and local governments. Instead, the decentralization attempts often served either to highlight governance problems present at local or regional government levels or to transfer inefficiencies from the central government to the regions or localities where the oil or gas projects were taking place. In the end, these structural flaws got in the way of a successful fiscal decentralization.

Decentralizing Inefficiencies

With democratization came decentralization, as many new democracies tried to leave behind the highly centralized government policies of the past. Colombia was the first to adopt revenue decentralization in 1986, followed by Ecuador in 1997 and Peru in 2002. The process has been most successful in Peru, although the system still needs much improvement. In the case of Ecuador, when President Rafael Correa took office in 2007, he retracted some of the fiscal decentralization policies of the past to allow for more control of oil revenues by the central government.

The following analysis of fiscal decentralization focuses on the Peruvian case, but most of the findings are common to the other two countries and to most other Latin American scenarios, for that matter. In Peru, subnational governance flaws prevented effective fiscal decentralization and eventually resulted in conflict. Lima has been exemplary in redistributing natural resource revenues to the producing regions as part of the revenue distribution policies introduced by the Canon Law passed in 2002.¹ In spite of that, the distribution of oil and gas revenues to the producing regions remains incomplete and is the source of many conflicts. The Canon Law stipulates the transfer of a percentage of the oil and gas revenues from the central government to the local and re-
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regional governments of the producing regions. The transfer varies from region to region and is calculated as a percentage of production volumes and prices. As Peru established itself as a natural gas producer and exporter, revenue flows to the producing regional and local governments increased significantly in the past decade. Between January and June 2010, Canon transfers to producing states went up by 65.2 percent, compared with the same period in 2009 (Ministry of Economy 2013).

Graph 10 shows revenue flows to Peru’s five main producing departments between 2004 and 2010. Cusco, home to the Camisea giant natural gas deposits, experienced the most significant revenue increases: from 89,000 to 1,140,000 million Peruvian soles. Cusco normally gets 58 percent of total hydrocarbons revenues.

Oil and gas revenues are normally aimed at financing local social and economic development projects in producing regions. The Canon redistribution is also a way of compensating producing areas for the negative externalities caused by oil and gas development. An analysis of subnational government accounts shows that Peru has generally succeeded in materializing the actual transfer of oil and gas revenues to the regional and local governments of producing states. This is an important achievement in Latin America, a region historically characterized by strong central government control of natural resource revenues.

Graph 10   Peru: Oil and gas revenue distribution by producing region

Source: Compiled by the author with data from Perupetro (2004–10).
However, once the oil and gas moneys are transferred to the regions in Peru, there are usually two possible scenarios that ensue. One scenario is a confrontation among producing regions, which start to compete for the funds. The second scenario is characterized by inefficient allocation of the new oil and gas resources once they arrive at the local or regional government levels. In both cases, there is bound to be conflict. Under the first scenario, the distribution of oil and gas revenues determined by the Canon Law is often asymmetrical and creates competition among producing regions for access to the new funds. By way of example, in 2008 the regional government of the department of Loreto, home to Peru’s number one oil-producing field—from Blocks 1AB/8—received 51 percent of the Canon oil revenues (S$181 million soles), and the local producing regions of Loreto received 40 percent (PS$140 million). By comparison, that same year the regional government of another oil-producing department, Piura, received only 20 percent of the Canon revenues (PS$75 million), but the local governments there got the largest proportional share of all: 70 percent (PS$286 million) of the total (Perupetro 2010a). So in Loreto, where most of the country’s oil is produced, populations living close to the fields received less revenue than those living close to oil-producing areas in Piura, where crude production is seven times lower. This uneven oil revenue allocation between regions and communities is a consequence of the way the Canon Law is designed. Local Indigenous populations living close to Loreto’s Block 1AB/8 frequently occupied oil installations to protest this imbalance, which they considered unfair.

Another, perhaps more obvious, example of regional revenue imbalance that resulted in conflict is with regard to natural gas. In 2010 Peru became Latin America’s first liquefied natural gas exporter with great fanfare, creating major expectations for the country to become a regional gas hub. But the excitement failed to reach the population of the district of Echarate, located in the province of La Convención, a few kilometers from the Camisea gas reserves. To the contrary, people in La Convención took to the streets for weeks in opposition to the liquefied natural gas exports, for fear the country’s ample gas reserves would be exported without their reaping much in the way of benefits (Peru 2002). The population of La Convención had reason to be skeptical. In spite of living next to the huge Camisea gas reserves in the Cusco region, they could not afford to buy gas and they had to use wood for cooking (La República 2011). The pipeline for bringing gas at competitive prices from the nearby giant Camisea gas field to La Convención was still not installed because the attention had been focused on building the more profitable export infrastructure first. The daily
reality of the inhabitants of La Convención contrasted with a much-publicized economic bonanza for neighboring Cusco, which received almost 60 percent of the total gas Canon transfers.

After two weeks of violent street demonstrations that left around twenty people injured, protesters in La Convención asked to talk to the country’s prime minister himself and presented him with a laundry list of demands that went beyond mere access to the new gas reserves (El Comercio.pe 2010b). What emerged from their demands were old grievances that had not been properly attended to and, most important, a feeling of injustice among the local population who felt they would be the last ones to enjoy the promised bonanza of the Camisea gas, if indeed they received it at all.

Revenue data for Camisea shows that gas production and subsequent exports have contributed to Peru’s impressive economic growth of the past decade (Gestión.pe 2011). Between January and October 2010, total oil and gas revenue transfers from Peru’s central government to the regions were up by 47.43 percent (to PS$1.3 billion) from the same period in 2009. The fact that people living close to the country’s—and one of Latin America’s—largest natural gas reserves could not enjoy its benefits became a symbol of the difficulties in allocating natural resource revenues at the local level and opened up questions about the process of decentralization.

The second scenario of flawed fiscal decentralization is characterized by the presence of obstacles that get in the way of an equitable distribution of new oil or gas funds among the local or regional population. We have identified at least three such obstacles at the subnational level: the incapacity to locally administer increasing natural resource revenues, corruption and clientelism, and arbitrary political decisions due to lack of accountability of the local authorities.

The Ministry of Finance of Peru has gone a long way in trying to establish a system to select locally designed development projects to be funded by hydrocarbons revenues. But rigidities within the selection mechanism itself often result in the mismanagement of hydrocarbons revenues by local or regional governments. Locally designed development projects must be presented for approval to the National System of Public Investment (SNIP), where they are examined according to a set of preestablished criteria and requirements. Project approval by SNIP has been gradually decentralized, and since 2007 the evaluation of investment projects has almost entirely been done by regional and local governments. But the project criteria and its approval process remain highly demanding and intricate, which presents a major initial challenge, because
local and regional governments often lack the know-how to successfully meet those high demands. The result is that many projects remain in the subnational SNIP pipeline without ever being implemented.

Efforts to solve these subnational rigidities have been generally unsuccessful for various reasons. One, reported by the Peruvian Office of the Ombudsman, is the existence of legal barriers to the transfer of human technical resources from the central to regional governments, due to the incompatibility of labor laws at both these levels or for lack of the necessary regulations for making the transfer effective (Office of the Ombudsman 2009b).

The other side of the coin is that a relatively demanding mechanism for the approval of investment projects, such as Peru’s SNIP, may help to prevent corruption. The system calls for the involvement of technical experts to perform the required economic and social impact analyses of investment projects funded with natural resource revenues. This makes the process more transparent, as more people are involved. But, most important, a system thus conceived helps to spread the responsibility for deciding how to spend public funds beyond the realm of corruptible politicians.

However, this mechanism does not offer a total shield against a second type of assault that prevents the correct handling of oil resources by local and subnational governments: the presence of populist and clientelistic political dynamics. This behavior, particularly obvious in rural areas, prevents oil and gas funds from being properly and fairly invested and may lead to improper behavior. Given the highly demanding system for approval of investment projects under SNIP, and in light of poor accountability mechanisms, local authorities may be tempted to circumvent the official approval process and make arbitrary project decisions in an effort to achieve personal benefits or support political allies.

Corrupt or clientelistic actions may go hand in hand with a third hurdle preventing the sound allocation of hydrocarbons resources: arbitrary or politically influenced decisions to choose one investment project over another. Many investment projects presented by natural resource–producing regions aimed at nonproductive activities, such as embellishing public areas or building sports facilities, tend to pass the demanding SNIP requirements relatively easily, while other more pressing ones seem to get trapped in the system.

Clearly, political discretion functions in deciding which projects get funded and executed and which do not. The oil-rich regional government of Loreto, in Peru, was accused by the opposition in 2010 of failing to fulfill its promises in terms of investments that directly improved the livelihood of the population
Most of the funds available had been earmarked for infrastructure projects, mainly road improvements and construction, which were seen as a priority for improving communications in this remote department. But at the same time, less than 40 percent of the population of Loreto had daily access to drinking water, 30 percent of children younger than five suffered from malnutrition, and only 45 percent of the population seventeen to twenty-four years old finished high school or a higher level of education (El Comercio.pe 2010a). Infrastructure projects are no doubt necessary, but at the end of the day, it is health, education, and access to basic needs that people take into account when judging their general living standards. The Loreto example shows a trend in Peru, where subnational governments of hydrocarbons-producing departments normally fail to apply participatory and transparent methods for designing development programs. The Loreto case also opened up questions about the accountability mechanisms in place for regional and local authorities with regard to investment decisions.

The seemingly arbitrary selection of projects with regard to their impact on the concerned communities indicates that there is more to the inefficient allocation of hydrocarbons resources than lack of know-how or capacity at the local or regional levels. At this stage the problem is one of political will and alliances, which becomes more obvious when certain flashy development projects are funded in lieu of other, more subtle ones that could nonetheless benefit a larger or more needy portion of the population but that lack political backing.

Corruption, nepotism, and clientelism in project investment decisions at local and regional government levels are some of the most common complaints among local communities coexisting with oil or gas projects. The more remote the communities, the less likely they will benefit from a clientelistic system, because they have limited connections to the minority who monopolize local power and gain from glitches in the system. People who perceive this reality experience a feeling of unfairness and frustration that often leads to conflict. A study of complaints received from local populations in fifty-six municipalities, conducted by the Peruvian Office of the Ombudsman, concluded that people blamed the municipal government to a much larger extent than they did the central government for governance irregularities and corruption (Office of the Ombudsman, 2008b). Among the main irregularities the research found were unauthorized municipal fees for the installation of drinking water networks, for parking, and for the opening of commercial outlets.

At the local level, corruption, nonresolved grievances, and lack of transpar-
ency in the management of oil revenues can easily ignite discontent. Indigenous communities in Ecuador’s northeastern Sucumbios and Orellana departments occupied oil installations in 2002 to protest news that municipal representatives had received bribes for approving the construction of the oil-receiving Amazonas Terminal in their territory (Barthelemy 2003). This terminal is the starting point of the Oleoducto de Crudos Pesados that carries crude from the Amazon to a maritime terminal located in the province of Esmeraldas, on the Pacific coast. After weeks of protests that resulted in several dead and wounded, the government managed to reduce the level of the conflict by finally attending to some of the long-standing basic demands of the local communities. Construction of the oil terminal proceeded as planned.

Sometimes, illegal armed groups may try to capitalize on discontent in remote production areas. There are reports in Peru that the illegal armed group Shining Path, which was practically dissolved in the 1990s, is showing some isolated activity (SDPnoticias.com 2009). In 2003 the Shining Path kidnapped seventy-one workers from a firm building the Camisea natural gas pipeline in the Amazon jungle. Then in 2010, when farming and Indigenous communities called for street demonstrations to protest government plans to export gas from Camisea, the government said the demonstrators had been infiltrated by the Shining Path.

Much as in Peru, Colombia’s fiscal decentralization failed to achieve an equitable distribution of oil resources and was tainted by very similar flaws, including the lack of regional and local capacity for making an intelligent allocation of the new resources. Most important, what hindered the success of Colombia’s revenue decentralization was the ingrained corruption and clientelism that, as in Peru, continues to dominate the subnational government scenario, where the exchange of political loyalties for favors remains strong.

Colombia’s oil revenue distribution system, set up by titles 11 and 12 in the 1991 National Constitution, had mixed results. The intent of the constitution in establishing the royalty transfer system was that the new funds would improve the capacity of subnational governments to invest in local development programs. Local and departmental governments followed that constitutional mandate and started to direct substantial new spending to education and health (Partow 2002). Interestingly though, none of the three main oil-producing departments, which received the bulk of the oil royalties, managed to meet the minimum goals set by law of reducing child mortality and expanding health, education, and drinking water coverage. In 2010 Colombia was debating a con-
A controversial new royalty bill aimed at a more equitable distribution of oil royalties among producing and nonproducing states. The proposal stirred much opposition, as many in producing departments felt their share of oil revenues would be unfairly reduced with the new law (El Espectador 2010).

The decentralization process in Colombia did succeed somewhat in improving the accountability of local and regional governments for the use of hydrocarbons revenues and in developing participation mechanisms outside of the capital cities. But continued interventions by the central government in subnational investment decision making became a stumbling block in the process. The corruption of local politicians usually results in a misallocation of government moneys, and it is one of the main arguments used by the central authorities to keep tighter controls on subnational expenses. But the ongoing violence in Colombia, which prevents the development of good governance practices at subnational government levels, has made local and regional allocation of oil resources there uniquely difficult to implement (Velázquez 2003, 127–75). Many political leaders have been assassinated for trying to modify the old style political clientelistic behavior. Furthermore, fiscal decentralization in Colombia clashed with efforts by the central government to increase its presence in the provinces to improve its control over the country’s long-lasting illegal armed groups.

In the case of Ecuador, starting midyear in 2000 the country has engaged in a process of recentralization, by which the distribution of oil resources has increasingly been placed back under the control of the government. The Organic Law for the Recovery of the Use of Oil Resources That Belong to the State, and Administrative Rationalization of the Debt Processes (no. 308), passed in 2008, cancelled two of three existing oil funds that previously distributed hydrocarbons revenues among producing provinces. Two years later article 94 of a new Hydrocarbons Law (no. 244) introduced a centrally managed distribution mechanism for oil revenue profits, by which 3 percent went to oil workers and 12 percent to the state. The funds were to be equally distributed among subnational producing regions for the funding of health and education projects. Unused funds would be reallocated for development projects in areas of the Amazon without oil. In addition, the two state oil companies (Petroamazonas and Petroecuador) would invest another 12 percent of profits in social and sustainable development projects throughout the country, and more specifically in poor oil-producing areas of the Amazon inhabited by Indigenous populations. There, the government planned to build new health centers, sport fa-
facilities, drinking water networks, and other infrastructure projects. The government announced in 2011 an initial distribution of US$350 million among Amazon populations living in oil-producing regions (Ministry of Nonrenewable Resources 2011a).

Fiscal decentralization was initially aimed at a more just distribution of hydrocarbons resources by allowing funds to make their way back to the producing regions. But in so doing, the process transferred to the local level some of the hydrocarbons revenue dependency and governance problems that usually plague the central governments of producing countries.

In the cases analyzed here, institutional weaknesses are present at the subnational government levels of the producing areas, which experience similar problems as central governments in handling oil revenues. The decentralization process thus transfers to subnational government levels not only oil revenues but also the flaws of the central government in managing them. Describing a similar relocation of governance flaws from a weak central state to even weaker regional and local governments in the case of mining, some authors have referred to the process as a new form of Resource Curse (Arellano-Yanguas 2008).

The concentration of income tends to reduce transparency and increase corruption because the new moneys are usually managed by a specific government agency or individual. In Peru that dependency is increasingly present at the regional and local levels, as the Canon revenue becomes the main source of income for most of the producing regions. In many cases the increasing role of the private oil or gas company as generator of social welfare without alternative sustainable economic development activities for the local population creates another level of dependency, in this case on the company.

It is at the subnational levels where oil dependency, weak governance, clientelism, corruption, and lack of know-how can be fundamental engines for advancing most of the local conflicts that characterize Latin America’s oil and gas scenario today. Another key factor in that respect is the lack of strong state presence at the local level and weak communication between the central government and subnational authorities.

Weak Local State Presence and Imperfect Government Communications

In the Peruvian context communications between the central, regional, and local governments often tend to be poor and rather conflictive. It is not un-
common for the local government of the area where the hydrocarbons developments will take place to be unaware that the central government has granted a license to develop oil locally. Most oil and gas projects are signed off on by the central government, with little information provided to the region, municipality, or community prior to signing the contract. But when company activities start on the ground, the central government is usually absent, with the exception of limited mandatory consultation processes. This government void helps to undermine any sense of citizenship for the local population.

Local governors sometimes take the side of communities in opposing specific hydrocarbons projects, sometimes in reaction to grudges born from miscommunication with the central government, but often for political reasons. Confictive or insufficient communications between the central government and its local agencies serve to create confusion about the role and responsibilities of each government agency and cast doubt on the legitimacy of the central government in its relationship with the population.

One of the main complaints of local communities affected by hydrocarbons projects is the lack of state presence in their territories, which are usually remote or neglected areas far from the capital city, where most decisions are made. The absence of the state in remote areas means that oil companies often adopt the responsibilities of the government as providers of basic services, particularly when there are no local development plans in place. In exchange for becoming the main provider of goods and services, the oil company demands community consent to carry out its operations in their territory. A direct relationship is established between the company and the community throughout the duration of the license, which can be for twenty-five or thirty years. Companies and communities set up a permanent negotiating process that generates a sort of bargaining momentum by which the community makes demands and the company responds with counteroffers. The whole process has very little government involvement. This modus operandi between private entities, devoid of a legal framework and with the absence of the state, often ends in conflict.

Often, the government—be it federal, regional, or local—takes a secondary role, as facilitator of the negotiations between the communities and the companies. This hands-off approach by the government is partly the result of laws that normally leave the responsibility for the design of community relations plans to companies. In the eyes of local communities, the government is relinquishing its responsibilities as provider of basic services and infrastructure. As an outsider, it is common to hear local Indigenous communities complaining about
the fact that the state fails to protect their cultural and other interests from the oil company. In fact, they usually say the state is “on the side of the company.” This opinion is reinforced by the fact that after years of neglect, the central government makes an appearance in their territory only prior to the development of the new oil project, but hardly ever before that. At that point, government officials organize formal consultations with Indigenous communities, as mandated by the law, and they are often accompanied by company officials. When there is a conflict with the company, local communities almost invariably demand that the government mediate as the only guarantor of agreements. The lack of effective and active central government presence at the local level is usually a major structural factor that contributes to conflict. Added to that, Indigenous Peoples feel they have a right to own the lands they have inhabited for centuries, with little or no government attention, at least not until oil or gas was found.

GAPS WITHIN THE LEGAL FRAMEWORK

Oil and gas legislation in Latin America tends to be diffuse and overlapping. There is an overabundance of laws that are not always applied harmoniously to solve specific problems, and often the problems are overlooked for political reasons. In many cases, various laws apply to a single matter and may differ on the extent of their application and on the rights they grant.

The lack of well-crafted, long-term national hydrocarbons policies aimed at setting priorities and parameters for the development of oil and gas in Latin America is a major source of inefficiencies. These priorities and parameters should preferably be within the existing legal framework and in accordance with national, regional, and local development and territorial plans. Well-planned hydrocarbons policies are usually not spelled out because, generally, they simply do not exist. Elements of hydrocarbon policies can be found in bits and pieces in various documents, but they do not constitute efficient guiding principles for the various stakeholders. In Peru and Colombia, governments have been focused mainly on attracting investments to the oil and gas industries in the past decade, seemingly as an end in itself rather than a means to achieve larger goals determined by the countries’ development needs and priorities. In Ecuador the prevailing hydrocarbons policy during the decade was more focused on increasing the control of the state in oil operations, again as an end in itself, rather than a means toward larger goals for the society as a whole.
In this context the laws are not structured around specific goals stated as hydrocarbons development objectives, and they are rather a collection of independent, largely unconnected rules. Important constitutional premises are put to the test in the presence of oil-related conflicts. Some of the most controversial ones are the notion of “national interest” and the definition of ownership of subsoil resources. Often, the resolution of hydrocarbons conflicts gets delayed when the constitutional concepts are challenged in court, giving way to a myriad of legal interpretations and actions.

Very often the resolution of oil and gas conflicts lies in the hands of international tribunals, when affected populations who cannot find answers at home seek legal resolution to their grievances abroad. This has led to the development of international jurisprudence that frequently goes beyond the reach of domestic laws and sometimes forces their evolution. In the particular case of Colombia, even the existence of a uniquely well-developed body of law, relative to its neighbors, did not necessarily contribute to protecting the rights of Indigenous groups that were affected by oil and gas projects.

Exceptions to the legislation, confusion as to which laws apply when, and a loose interpretation of the law to accommodate oil blocks are some of the causes of constant conflict. The paradoxical situation of allowing oil projects in legally protected natural reserves or in Indigenous territories triggers great resistance from the environmental and the Indigenous movements. Ecuador and Colombia are the most striking examples of what Guillaume Fontaine (2007a) calls “State schizophrenia,” a confusing policy that calls for environmental protection of specific areas while at the same time allowing for the expansion of the oil frontier within those zones. Ecuador’s Yasuni National Park is a perfect example of this back-and-forth around the legislation on natural resource management, because throughout the years its borders were often expanded and then reduced again to accommodate oil projects. Seven oil blocks are within the borders of Yasuni Park (Blocks 14, 15, 16, and 17), plus the Ishpingo, Tiputini, and Tambococha area, which is thought to hold Ecuador’s largest, still undeveloped hydrocarbons reserves (around 1.2 billion barrels of heavy crude). In the 1990s the size of Yasuni Park was reduced to leave Blocks 16 and 17 outside of its boundaries. At the same time, the territory of the Huaorani Indigenous groups living within the park was expanded, and land titles were granted.

In Colombia an attempt at establishing more comprehensive protection of natural reserves resulted in the creation of a dual system of national parks in the 1960s and of Indigenous protected areas (resguardos in Spanish) in the 1990s,
particularly in the Amazon. However, territorial conflicts erupted when the limits of the newly created protected areas were constantly redesigned to accommodate hydrocarbons projects, particularly in lands inhabited by Indigenous communities. The longest and best-known such conflict is with the U’wa Indigenous Peoples, in the Samore Block (later renamed Siriri and Catleya), located on the border between the departments of Norte de Santander and Boyaca. The long history of the conflict in U’wa territory is marked by a constant renegotiation of the limits of the Indigenous protected area and reserve to allow for oil development. Much of the dispute was in relation to the area where the Gibraltar 1 well was located, which the U’wa claimed was within their protected area.

In the case of Peru, by some accounts, more than twenty oil blocks are located inside some of the sixty natural reserves that spread throughout Peruvian territory (Calle Valladares and Brehaut 2007, 16–21). Some forty oil blocks were superimposed on the territories of Indigenous communities between 2003 and 2008, with four (Blocks 88, 110, 113, and 138) located in areas inhabited by Indigenous Peoples in voluntary isolation (Gamboa, 2009). This situation exists in spite of specific legislation that gives certain rights to voluntarily isolated Indigenous groups.

The source of these constant legal changes and confusing interpretations of the law may be found in two premises that characterize the legal systems of Latin American countries. One is related to the definition of “national interest,” and the other is the concept of ownership of subsoil resources as an indisputable prerogative of the state.

WHICH LAW APPLIES?

When confronted with the option of preserving a protected area or developing an oil or gas project, Latin American governments may opt for the concept of “national interest,” defined as the interest of the majority of the population. When an area is labeled as being of “national interest,” then all other laws or regulations pertaining to the protection or special status of the area become void. Surface owners may be liable to compensation, but they can hardly contest the subsoil in their land being exploited, if the state so decides. Examples of this situation abound.

In Ecuador’s national parks, oil operations have been historically carried out under the veil of article 6 of the country’s 1999 Environmental Law (no. 37 ro/245), which allows for the exceptional development of nonrenewable natu-
ral resources in fragile ecosystems or protected areas in response to a “national interest.” The legislation calls for a prior economic feasibility study and an environmental impact assessment. Critics argue that article 6 is contrary to international treaties signed by Ecuador, which do not admit exceptions to the general rule of forbidding oil operations in protected areas (Crespo Plaza 2007).

In Peru the government declared oil and gas exploration in Block 67 to be of national interest in May 2009, in spite of an ongoing dispute about the existence in the area of Indigenous populations living in voluntary isolation, reflected in the passage in 2006 of the Law for the Protection of Peoples in Voluntary Isolation or in Initial Contact (no. 28736). In response, local Indigenous communities took over the installations of the oil company, Perenco. Then President Alan García and Perenco denied the existence of uncontacted peoples, based on findings by an Environmental Impact Assessment research team. However, individual anthropologists from the team contradicted the assessment and confirmed that they did believe this population existed. The Indigenous organization Asociación Interétnica de Desarrollo de la Selva Peruana (AIDESEP) filed a lawsuit at the country’s Constitutional Tribunal, which was dismissed in June 2010.

The idea of “national interest” often clashes with the concept of minority rights or rights of Indigenous Peoples, which has been incorporated into the constitutions of the three countries. The imposition of the general concept of national interest to support the development of natural resource projects in biodiversity-rich areas or in Indigenous territories invariably leads to conflict. The concept of national interest reinforces the antagonism between the majority population and the population of Indian descent, as it puts forward the notion of “us the majority,” mostly understood as encompassing people of Spanish descent, against the minority Indigenous population. The affected minority populations often join forces with combative environmental NGOs to get their arguments across.

To resolve these conflicts, legal systems throughout the region have often become creative and come up with new arguments to make a case for preventing the development of hydrocarbons. One such legal avenue was the creation of intangible zones inside already protected areas. No industrial developments are allowed in the intangible zones, to isolate and protect either biodiversity or Indigenous communities. On February 2, 1999, two intangible zones were created in Ecuador by Executive Decree 552: one in Yasuni Park, for the protection of the Tagaeri-Taromenane Indigenous groups living in isolation, and another one in the Cuyabeno Reserve. The measure was only partially effective, because
the borders of the newly declared intangible areas were subsequently changed several times. Both these protected areas have been the center of an ethnic-environmental alliance, as local Indigenous groups joined forces with some of the most radical environmental NGOs to oppose oil developments.

To find a more permanent solution to the controversies created by having to choose between hydrocarbons and protected areas, in 2007 Ecuador came up with an innovative idea for harmonizing conservation and hydrocarbons development. President Correa proposed delaying exploration in the oil-rich Ishpingo, Tiputini, and Tambococha fields within Yasuni Park. In exchange, he demanded an annual payment of US$350 million from the international community for keeping the oil under the ground. In 2012 the proposal had yet to attract significant international interest.

Our research found ample evidence of conflict related to hydrocarbons and changes to legally defined borders. Disputes of this kind were particularly common in Peru and Ecuador, where most of the hydrocarbons developments are located in environmentally and socially protected areas of the Amazon region. Of the total number of case studies analyzed for this book in the three countries, more than half included disputes related to unclear or constantly modified legally defined territorial borders.

THE OWNER OF THE SUBSOIL

While the prerogative of the state to declare an oil or gas activity to be of national interest can be controversial, another, even stronger government privilege is at the heart of a large number of hydrocarbons-related conflicts in Latin America: the right of the state to administer and exploit the resources that lie in the subsoil, regardless of who owns the surface land. This constitutional provision differs markedly from that of the United States, where whoever owns the surface land also has rights over subsoil resources and is entitled to develop them for a profit.

The granting of ownership of the subsoil to the state is one of Latin America’s most complex conundrums and the underlying source of most conflicts related to natural resources. The constitutions of Ecuador, Peru, and Colombia are no exception to those of the rest of the region in that they establish that the state is the only one with rights to develop underground natural resources. Subsoil resources are a component of state assets that must be developed in the name of public interest, according to the constitutions of these three countries.

The concept of subsoil ownership by the state creates inevitable conflict with
individuals or groups, such as Indigenous or farming communities, who claim to have ownership rights over whatever is on the surface of hydrocarbons-rich areas. The exploration and exploitation of the oil or gas in the subsoil will inevitably affect those who hold rights to the surface.

The constitutional view of natural resources is irreconcilable with the concept of territory for Indigenous communities, for whom the geographical space where they live constitutes part of their identity. When Indigenous Peoples demand rights to their land, they are not just referring to the delimitation of the borders of a piece of property; they are talking about the habitat that characterizes that space. For them, a land title protects not only a piece of property but also their identity, insomuch as it encapsulates the territorial elements they themselves identify with. In other words, the identity of a specific Indigenous population is determined to a large extent by the territory it inhabits so that a territorial title is not just that—it is also an “identity title”:

Trees are human, fish are human, water is human . . . so if you pull down our trees, kill our fish or contaminate our water, you are killing human beings for us.  

When talking about the ownership of subsoil oil deposits, the atypical case of the Cusiana oil field, located in Colombia’s Llanos foothills, inevitably comes
to mind. Until a few years ago, several families living in the area were receiving a small share of the profits from the oil exploration. Their right to subsoil compensation, most unusual in Latin America, came as a result of land titles given to these families during colonial times. Once Cusiana reached its full potential in the 1990s and proved to be one of Colombia’s largest oil fields, the issue of subsoil rights claimed by these families became contentious and was the object of several lawsuits that reached the highest tribunals in the country.

Following Cusiana, and as Colombia discovered large oil reserves that turned the country into an important regional oil producer, legislation was adopted to prevent future property claims by individuals. In 1969 Congress passed Law 20 (later made effective by Law 93 in 1993), which gave unquestionable ownership of subsoil reserves to the state. The law made an exception to this rule in the case of land titles granted before 1969 over land holding already discovered oil fields. But Cusiana was discovered much later, at the end of the 1970s, so the legal exception did not apply in that case, and private ownership of the area was rejected in 1994 by Colombia’s Council of State (Nullvalue 1994). In fact, Colombia’s large oil deposits were all found after Cusiana, so the ownership exception was never applied at all.

There have been various attempts at solving the dichotomy between property of the territory and of the subsoil through compensation agreements. In Peru, for example, the 1997 Law of Private Investment (no. 26505; modified by no. 26570) stipulates that the oil company must negotiate an agreement with the owners of the surface property that must be subsequently approved by the state. The owners of the surface property are entitled to financial compensation (servidumbre) for the development of subsoil natural resources in their land. This mechanism also leads to conflict, however, because there is much disagreement about the amount of compensation. In Ecuador the consortium that built the Oleoducto de Crudos Pesados (ocp) had to negotiate a right of way with each of the communities and individuals living along the five-hundred-kilometer length of the line. Differences over the amount of the compensation and environmental concerns raised by the ocp’s route across the Mindo-Nambillo forest resulted in serious popular unrest and led to a strike in the departments of Sucumbios and Orellana in 2002. The government had to declare a state of emergency and threatened to expropriate the land along the ocp route if the parties involved in the dispute failed to reach compensation agreements. The authorities argued the ocp was of national public interest, which would justify the expropriations, as contemplated by articles 4 and 91 of Ecuador’s Hydrocar-
bons Law, passed on July 27, 2010. In the end, only 1 percent of the land crossed by the OCP had to be expropriated for lack of compensation agreements, according to OCP representatives.6

The arbitrary interpretation of the law, its weak implementation, and the fact that it can be easily modified to accommodate specific needs has led affected populations over the years to seek alternatives abroad to solve their conflicts. This reality contributed to the development of an increasingly dynamic Inter-American legal system that for the past two decades has become ever more active in conflicts related to extractive industries. Inter-American courts have steadily become an increasingly influential instrument for shaping the domestic legal systems of Latin American countries, particularly when Indigenous Peoples are involved.

INTERNATIONALIZATION OF LOCAL CONFLICTS

Besides legal contradictions and overlapping legislation, there is sometimes poor capacity or simply a lack of willingness on the part of national judicial systems, particularly local courts, to resolve certain hydrocarbons-related conflicts. When the domestic legal and institutional framework is too slow, fails to provide answers to demands, or is corrupted, the population affected by an oil or gas project may resort to the courts in the home country of the foreign oil companies involved or to international tribunals. In the first case, legal cases filed in the oil company’s home country follow legal provisions that allow for foreign nationals to sue companies that commit abuses overseas. In the United States, for example, the Alien Tort Statute (28 USC § 1350) allows U.S. courts to hear civil actions by foreigners for abuses committed by U.S. companies abroad (Drimmier 2010).

One of the best-known legal cases against a foreign oil company operating in Latin America, and the main topic of the award-winning Joe Berlinger documentary Crude: The Real Price of Oil, is the class action suit against Texaco for allegations of environmental damage in Ecuador. The lawsuit, which set a trend for multimillion-dollar legal actions against corporations for alleged social and environmental abuses, challenged the courts in both the United States and Ecuador. It was initially presented in a court in New York in 1993, where Texaco had its headquarters, but was relocated to Ecuador in 2003. The plaintiffs in the 1993 lawsuit alleged that Texaco dumped 18.5 billion gallons of toxic water in unlined, open-air waste pits that emptied into local rivers and streams. They
claimed the toxins had negative effects on the surrounding ecosystem and on the health of the local population, mainly Indigenous Peoples. The twenty-year-old lawsuit, which had not yet been resolved in 2012, has attracted a great deal of attention through the years mainly due to the potential US$27 billion liability suit and the numerous allegations of corruption, government interference, illegal lobbying, and other such anomalies.

It is also common for oil-related lawsuits to be presented at international courts, such as the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights, both independent tribunals created by the Organization of American States to defend human rights in the Americas. Historically, human rights were understood in the context of individual political or civil rights. But today, with the rapid development of the concept of cultural rights and of a specific body of rights that protects Indigenous populations, the definition of human rights has expanded to question government development policies inasmuch as these may constitute a threat to the physical and cultural existence of Indigenous Peoples.

This broader concept of human rights touches on the controversial issue of self-determination in the case of Indigenous populations affected by hydrocarbons. Self-determination, the right of citizens to control their own destiny, has been adopted by the United Nations Charter as one of its fundamental principles. Governments have been generally reluctant to fully recognize the extent of this principle for fear it would be understood as a right of populations to form independent, alternative, and autonomous states (Anaya 2005, 149–73).

The majority of the cases presented at the IACHR, which are analyzed in this book in the three countries under review, were primarily related to the rights of Indigenous groups to continue to live in isolation despite the discovery of hydrocarbons in their territories. The plaintiffs were Indigenous organizations or NGOs representing Indigenous groups living in isolation. There were three such cases in Peru, Blocks 39, 67, and 107, and two in Ecuador, Blocks 14 and 17. The discovery of oil or gas in areas thought to be inhabited by communities in isolation could put their livelihoods at risk. In the particular case of Block 39, the Supreme Tribunal of the department of Loreto, where the oil deposits are located, had ruled in favor of the oil company, stating that there was no evidence of the presence of uncontacted people in the area where oil and gas would be developed. This prompted the Indigenous organization AIDESEP to take the case to the IACHR. Similarly, the case of the U’wa Indigenous communities in Colom-
bia, mentioned earlier, was presented at the IACHR when local courts failed to solve their grievances.

As the concept of human rights has become broader, the Inter-American system for the protection of these rights has adopted a more dynamic interpretation. Rulings by the Inter-American legal system in cases involving hydrocarbons and Indigenous populations are gradually becoming instrumental in shaping opinions and ultimately in influencing domestic law in Latin American countries. Probably the most innovative approach the IACHR has incorporated is related to the adoption of the rights of a group as a collective, as opposed to limiting rights to the individual, as has been traditionally the case. Of all the lawsuits presented at the IACHR in relation to Indigenous Peoples affected by extractive industries, three have reached the highest tribunal, the Inter-American Court, which handed down judgments that set important precedents.

The first case, *Comunidad Mayagna (Sumo) U’was Tingni v. Nicaragua*, involved the Awas Tingni Indigenous community of Nicaragua. On February 1, 2000, the Inter-American Court of Human Rights ruled that the state violated the right to property, granted by article 21 of the American Convention on Human Rights, to the detriment of the members of the Awas Tingni community. In an unprecedented ruling, the court stipulated that the state must take the necessary steps to delimit property and give titles to Indigenous communities based on their uses and customs. It was the first time an international tribunal with legally binding authority recognized that the right to Indigenous collective property had been violated when the state issued a logging concession.

The second emblematic case, *Comunidad Saramaka v. Suriname*, on November 28, 2007, involved a lawsuit by the Saramaka tribal community against the government of Suriname for failing to recognize their right to use and enjoy the natural resources within their traditionally owned territory. They argued this was necessary for their survival. The ruling was similar to that of the Awas Tingni in that it emphasized the right to collective land ownership on the part of the Saramaka. But the court went further by invoking the need for the state to engage in consultations and get the free, prior, and informed consent of the Saramaka for industrial development projects that could have major impacts on the population. The court ruling stipulated that the state must grant the Saramaka a collective title over their territory and must share with the local community the benefits derived from development projects. It also ruled that the Saramaka’s right to land titles might be restricted by handing out extractive
industry licenses in the area where they live, but only insofar as that restriction did not challenge the survival of the Saramaka as a tribal people.

In the third case, Pueblo Indígena Kichwa de Sarayaku v. Ecuador, the Inter-American Court issued a decision on July 25, 2012, in favor of the Kichwa Indigenous community of Sarayaku, located in Ecuador’s Amazonian province of Pastaza (IACHR 2012). The Sarayaku Indigenous community had been opposed to oil operations in their territory since the arrival of the oil company Compañía General de Combustible in 1996. After a long series of legal rulings, the IACHR had given the Ecuadorean state until April 2010 to abide by its previous recommendations, which included the disposal of explosives left buried underground after seismic tests performed in 2002. The state did not comply with the commission’s rulings, so the case reached the Inter-American Court.

The court ruling highlighted the importance of the process of free, prior, and informed consent in relation to natural resource projects with potentially negative effects on the local population. The Sarayaku ruling spelled out the elements of a successful consultation process by stressing the need for it to involve the local population from the very early stages of the conception of the extractive project rather than perform mere bureaucratic informative actions. The court ruling made the state responsible for the lack of a proper consultation process, which in turn resulted in violating the rights of the Sarayaku in favor of oil developments in their territory:

The State is responsible for the violation of the right to consultation, to Indigenous communal property and to cultural identity, as granted by Article 21 of the American Convention, in relation to articles 1.2 and 2 of the said Convention, to the detriment of the members of the Kichwa Indigenous Peoples of Sarayaku.

The State is responsible for having put gravely at risk the rights to life and to personal integrity, as recognized by articles 4.1 and 5.1 of the American Convention, in relation to the obligation to guarantee the right to communal property, as stated by articles 1.1 and 21 of the said Convention, to the detriment of the members of the Kichwa Indigenous Peoples of Sarayaku, in line with paragraphs 244 to 249 and 265 to 271 of this Sentence.

The State is responsible for the violation of the rights to judicial guarantees and to judicial protection, recognized by articles 8.1 and 25 of the American Convention, in relation to article 1.1 of the said Convention, to the detri-
ment of the Kichwa Indigenous Peoples of Sarayaku, as stated by paragraphs 272 to 278 of this Sentence.7

The Court went even further by linking the lack of consultation with the loss of identity among the Sarayaku:

The Court considers that the lack of consultation with the Sarayaku Peoples affected their cultural identity, because there is no doubt that the intervention and destruction of their cultural heritage implies a deep lack of due respect to their social and cultural identity, their customs, traditions, cosmovisión, and their life style, which naturally causes much worry, sadness and suffering among them.8

The Sarayaku ruling spelled out the obligation of governments to establish an early consultation process with local, affected populations, and it particularly stressed the need to respect the cultural and identity characteristics of the local populations. However, the court came short of granting the Sarayaku the right to ban oil developments in their territories, in line with the ILO Convention 169 right to consultation, which does not grant veto power to local communities. The ruling also served to reestablish the role of the regional justice system at a time when the Inter-American Human Rights Commission (IACHR), which presents cases at the court, was being challenged by its member states (Economist 2011).

The fact that the Inter-American Court focused its attention on three cases involving natural resource conflicts where Indigenous populations were affected shows the increasing significance this issue has within the Inter-American legal community. The IACHR stressed further the importance of this topic in a special report it published at the end of the 2010 session. In the report, the commission expressed concerns about the impact of natural resource developments on the livelihood of Indigenous groups, particularly in Peru and the other Andean countries:

In its hearings and working meetings, the IACHR received very troubling information about some of the structural human rights problems that persist in the region, having to do with respect for the right to life and humane treatment, guarantees of due process and judicial protection, and the exercise of economic, social, and cultural rights. The IACHR is concerned about information it received regarding a number of issues, including . . . ongoing structural obstacles that hinder the effective enjoyment of Indigenous peoples’
right to their lands, territories, and natural resources, as well as the impact of energy and extractive industries that have been installed in their territories. . . . Moreover, in hearings on energy and extractive industry policies in Peru, and on the human rights of Indigenous communities affected by the mining industry’s activities in the Andean region, information was presented on the existence of a broad development policy for extractive industries in the region, with no existing legal or institutional framework to protect the territorial rights and the participation of Indigenous peoples. (IACHR 2010)

The internationalization of legal proceedings has been one of the major weapons used by international NGOs and Indigenous federations for pressing their cases against indiscriminate oil and gas developments in Latin America. Having their cases presented at legal tribunals of Western nations or in Inter-American courts offered an international window to local conflicts and increased outside pressure on Latin American governments to respect Indigenous rights. This, in turn, contributed to the search for solutions to some of the conflicts involving Indigenous Peoples and helped to push large extractive industries to consider the adoption of more stringent safeguards.

But international attention also highlighted internal contradictions within the Latin American legal framework for dealing with natural resource conflicts. This is especially obvious when contrasting the strong “nationalist” legal code developed in the first part of the twentieth century to reinforce the prerogative of the central government as the unique representative of the nation, and the rapid evolution of laws in the past decade to protect minority rights, and promote decentralization and participation. In 2012 the role of the Inter-American legal system in solving cases of collective rights with regard to natural resources was being seriously challenged by its member states, which rejected numerous rulings by the IACHR in favor of Indigenous Peoples (Picq 2012).

LOCAL CONFLICTS AS GENERATORS OF DOMESTIC LEGAL TRANSFORMATIONS

Sometimes, hydrocarbons conflicts serve to accelerate the adoption of long-delayed legislation, usually after popular dissent succeeds in getting the attention of the authorities, or of society, to the grievances of a minority group. Often in such cases, passing new legislation to support the demands of the Indigenous population is a measure of last resort in response to violence.
The cases analyzed in this book are full of examples of bargaining mechanisms that eventually produce much-awaited legal changes. The fact that important legislation follows violent and sometimes deadly actions shows the limitations of democratic institutions to provide avenues for dissent and a general lack of attention to the conditions of Indigenous populations. After three years of grueling national debates on the issue, and with the Bagua confrontations still fresh in people’s memories, in August 2011 Peru’s Congress passed the Law of Previous Consultation that Indigenous Peoples had demanded for decades in relation to natural resources, particularly to hydrocarbons (El Comercio.pe 2011). Their demands existed in the framework of the ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples, which stipulate that Indigenous Peoples must be consulted before developing natural resources in their territories. It was not until the deadly events of Bagua, which resulted in dozens of dead in 2009, that a consultation bill was finally sent to Congress (Kozak and Moffett 2009, A6). Until then, the right to consultation had been regulated in very general terms by the 2005 General Environmental Law (no. 28611).

Similarly laborious had been Peru’s decision in 2006 to enact a nationwide legal requirement to treat waste water from oil operations by reinjecting it back into the reservoir. Passed by Supreme Decree 015-2006-EM, Regulations for Environmental Protection related to Hydrocarbons Activities also prohibits the dumping of contaminated production waters into ocean, rivers, and lakes. This requirement was passed only after decades of sometimes violent protests and the occupation of oil installations by Indigenous populations affected by oil projects in the Corrientes River in northern Amazon.

In Ecuador the legendary 1989 Sarayaku Agreements, signed with groups affected by oil operations in Block 10, located in the province of Pastaza, were instrumental in achieving legal recognition of territorial rights for these groups. The accords helped to reduce the intensity of the conflict, but only after years of resistance and sometimes violence. At first the government had rejected Indigenous demands for land rights, stated in a proposal presented by OPIP in 1990—the Agreement on the Territorial Right of the Quichua, Shiwiar, and Achuar Peoples of the Pastaza Province, to Be Signed with the Ecuadoran State. But later the authorities yielded, following an Indigenous revolt in June 1990 and a huge march in 1992—March for the Territory. The march covered almost four hundred miles, from Puyo, the capital of the oil province of Pastaza, to Quito, under the motto “For Earth, for Life: Let’s revolt” (López 2004, 157).

The development of the conflict in Block 10 was unique. It resulted in the
granting of long-awaited legally recognized territorial rights to Indigenous populations after decades of demands. As in Peru, the Sarayaku Agreements paved the way for the adoption of several nationwide laws: the Environmental Law of 1999, the Environmental Rules for Hydrocarbons Operations adopted in 2001, and the 2002 Rules for Consultation and Participation in Hydrocarbons Activities. For the Indigenous movement, passage of these national laws following Indigenous revolts may be seen as a victory. However, this process may have the unwelcome effect of serving to establish a perverse mechanism: the institutionalization of violent action as a way of achieving changes in policies or laws, particularly given the lack of well-established and functioning institutions to deal with popular dissent.

The Sarayaku Agreements themselves were reached as a result of negotiations for the liberation of a community-relations representative from the oil company ARCO. In exchange for his release, the Sarayaku Agreements called for the suspension of oil activities for a period of fifteen years in Indigenous territories. The moratorium was aimed at allowing time to develop a legal framework to address similar hydrocarbons-related conflicts in Indigenous territories. The agreements also called for the suspension of the process of granting new oil licenses in Indigenous territories, as well as immediate compensation for environmental damages caused during the exploration period. Once again, protest and coercion was the effective method used for forcing legislation regarding oil operations in environmentally and socially sensitive areas.

Similarly, oil conflicts forced the resolution of historical territorial claims by the Matses Indigenous community living in the Loreto region of Peru’s northern Amazon. This group fervently opposed oil exploration in their territory beginning in 2007, when the government, ignoring their opposition, granted oil licenses to Pacific Stratus for Blocks 135 and 137 (El Comercio.pe 2008). The community was especially upset by the fact that the oil licenses had been issued in a matter of months, while their claim for the expansion of their territorial boundaries had existed more than a decade and still remained unresolved.

The Matses live in a national reserve, which under the Peruvian Law of Protected Areas (no. 26837), passed in 2007, allows for the commercial development of natural resources, provided a detailed management plan for the area is developed in advance. Around 3,000 community members live in the Matses National Reserve, of which some 1,700 are native Matses and 1,300 are newer groups, organized in farming communities. There are no roads to access the
territory, and the only way of getting there is by plane or an hour-long boat ride from the town of Angamos. Blocks 135 and 137 are within the reserve, and they are said to be superimposed to the Reserved Zone Sierra del Divisor and the Isconahua Territorial Reserve (Martel 2010). Indigenous People in voluntary isolation are thought to inhabit the area, and to protect them organizations representing the Amazonian Indigenous Peoples have requested the creation of additional reserved areas—such as Yavari, Tapiche, and Kapanhua. The Matses argued that the state had failed to consult with them before giving the license to Pacific, so they refused to allow oil exploration in their territories. They opposed any kind of contact with either the government or the company and claimed that Blocks 135 and 137 were within a territory known as Tapiche Blanco, which they had unsuccessfully requested for years be elevated to the category of protected area.

Notwithstanding their opposition, plans for oil development in the Matses territory went ahead. The company tried to establish dialogue with the community, but with no success. The intervention of the office of the Peruvian ombudsman at the beginning of 2009 was key for bringing representatives from the Matses Peoples and the state-run oil company Petroperu, as well as officials from the regional and national governments, to a negotiating table. At the meeting, the Matses expressed their grievances and linked them to the lack of a strong government presence in their territories. They invited government officials to visit their lands and witness their living conditions. The official visit finally took place, and it was followed by much attention from the central government to the grievances of the Matses community, who specifically demanded better schooling for their children. The regional government committed itself to undertaking a study of the problems that affected the Matses community, with the idea of creating a development plan for the area.

By August 2009 the Matses Reserve, which originally extended to roughly 450 thousand hectares, was enlarged by another 420 thousand hectares and upgraded to the Matses National Reserve through Supreme Decree 014-2009. The territorial expansion came after fourteen years of futile requests by the Matses community, who had finally managed to turn the government’s keenness in developing oil in their territories to their advantage.

For the Matses in Peru and the Sarayaku in Ecuador, who live far from their countries’ decision-making capitals, external oil interest in their territory was the first opportunity they had to attract official attention to their grievances.
Renewed government interest allowed them to win historical territorial claims and to find resolution for some of their main difficulties. For Indigenous and environmental communities as a whole, hydrocarbons conflicts may Ironically become useful tools for the materialization of long-awaited demands. These dangerous dynamics could result in the adoption of permanent conflictive situations as a means to an otherwise unobtainable end. In fact, some conflicts show elements that could lead us to conclude that Indigenous leaders, and some NGOs that defend their rights, have frequently engaged in this type of maneuvering. In these situations, conflict may become a permanent source of income for a few who engage in the protection of the rights of communities affected by oil or gas projects.

DEFINING WHO IS INDIGENOUS

Because the territory they live in is a defining element of the identity of Indigenous Peoples, land issues have always been at the top of their demands. The territorial rights of Indigenous communities have been gradually curtailed in Latin America over the centuries, particularly in relation to land use and ownership. This historical fact underlies all conflicts related to hydrocarbons developments and has become a recurrent complaint and a major source of grievance among Indigenous populations. A deeper examination of how Peru has historically treated land rights in relation to its Indigenous population offers some insights for understanding the growing number of natural resource conflicts in that country in the past decade.

The bloody Bagua confrontations of 2009 in the Peruvian Amazon were in reaction to government decrees passed that year that the Indigenous Peoples considered to be detrimental to their land rights. But in reality, the violence in Bagua could be understood as an expression of historical territorial grievances that date back to both Latin America’s land reforms of the 1960s and Peru’s constitutional amendments of 1993. During the Bagua events, protestors put forward two demands. One was for the restoration of land rights they lost in 1993. The second was related to the process of consultation and is analyzed more in depth in chapter 4. With regard to the first demand, Peru’s 1993 constitutional reform canceled two land rights that Indigenous Peoples had historically enjoyed: the right to avert their lands from being sold (inalienable) and the right to prevent them from being used as a guarantee for credits (not
seizeable). A third privilege historically enjoyed by Indigenous communities, which prevented others from putting a claim on Indigenous land, was partially reduced by the 1993 Constitution, which introduced the possibility for a third party or the state to claim territories that lie idle. The curbing of these three territorial rights had negative repercussions in Peru and beyond. In 1999 the United Nations Committee for the Elimination of Racial Discrimination expressed concern about the restrictions introduced by the 1993 Peruvian Constitution (United Nations International Convention 1999).

Added to the frustrations among Indigenous groups generated by the curtailment of their land rights was the lack of efficient territorial planning. None of the three countries analyzed in this book showed serious policies for demarcating the areas apt for industrial development and those that should be preserved due to their social or environmental characteristics. Land planning seemed to be more a function of the number of natural resource licenses they received, and not the other way around.

The restrictions to Indigenous land tenure introduced by Peru’s 1993 constitutional reforms were not a new idea. Long before, Indigenous Peoples in Peru had been directly affected by the land reforms that spread throughout Latin America in previous decades. In the three countries under study in this book, land reforms created agrarian communities and gave peasants (campesinos in Spanish) access to land. This created an incentive for Indigenous Peoples in the highlands to register as campesinos to receive land (Yashar 1999). Within these agrarian communities, Indian ethnic origins were replaced with class affiliations and the word campesino replaced Indian (indio in Spanish) in the highlands. The word indio was used to refer solely to the Indigenous Peoples of the Amazon, who managed to keep their customs, beliefs, and access to land relatively intact because the large land and economic reforms of the past century impacted them less, due to their remote location.

Fear of being forced to assimilate like their highland ancestors is one of the main forces fueling hydrocarbons conflicts today among Indigenous Amazon populations. In Peru, where Indigenous groups are hardly recognized as such, that fear is even greater and may explain why that country shows the fastest growing number of hydrocarbons-related conflicts involving Indigenous Peoples. After the 2009 Bagua events, the International Labor Organization Committee of Experts on the Application of Conventions and Recommendations released an Individual Observation that echoed a similar document on
Peru it had produced in 1998. Both times, the committee emphasized an un-
resolved matter it considered to be key regarding conflicts in Peru: the lack of
a unified definition of Indigenous People (CEACR 2010, par. 4). Chapter 6 of
Peru’s National Constitution recognizes only native and farming communities
(comunidades nativas y campesinas) but does not expressly mention Indigenous
Peoples. Other laws in Peru, however, do refer specifically to original peoples
(pueblos originarios) or Indigenous Peoples.

This lack of legal clarity and the quasi-denial of the existence of a distinc-
tive cultural group may lead to confusion and frustration, as well as to potential
xenophobic reactions from radical groups within the population. Having vari-
ous interpretations about who is, and who is not, Indigenous makes it difficult
to determine the extent of Indigenous legal rights and creates conflictive situ-
ations. This confusion was clearly illustrated in the arguments used by the Pe-
ruvian government as part of a collective lawsuit filed by five thousand people
in 2009 at the Constitutional Court. The plaintiffs alleged that they were not
consulted prior to the approval of one of the government decrees that led to the
Bagua events. In its defense, the state argued that the ILO Convention 169 did
not apply in the Bagua case because the Peruvian population is predominantly
mixed (mestiza) and thus no longer Indigenous. The state’s line of reasoning ar-
gued that farming communities that were originally Indigenous became mes-
tizas with the development of civilization and, for that reason, granting them
the condition of Indigenous Peoples would be inappropriate (Gonzalo 2010).

The local Indigenous population understood the government’s position in
the Bagua case as a denial of their identity and a continuation of the integra-
tion policies of the colonial period. The position of the authorities in this case
seemed to overlook the evolution of the Indigenous movement in the Peruvian
Amazon. There, the Indigenous movement has been strongly assertive of In-
digenous identity in past decades and in so doing succeeded in differentiating
Indigenous Peoples from the historical assimilation process that characterized
the Andes. Acceptance of the existence of a differentiated ethnic group, in this
case Indigenous Peoples, would be the obvious starting point for granting legal
rights and obligations. Without that recognition, and without understanding
the relationship that minority group has with the land, conflicts regarding hy-
drocarbons in the territories Indigenous Peoples inhabit are bound to continue.

It is no surprise, then, that in the two countries in our study with the largest
Indigenous populations, Peru and Ecuador, most of the hydrocarbons-related
conflicts have involved Indigenous land disputes: sixteen out of twenty in Peru,
and nineteen out of twenty-three in Ecuador. In Colombia seven out of twelve conflicts analyzed involved Indigenous land claims.

**EXEMPLARY CONSTITUTION, IMPERFECT SCENARIO**

Colombia is quite the opposite of Peru with regard to recognizing ethnicity. As far back as 1991, Colombia reformed its constitution to bring in a new legal system aimed at addressing the country’s deep inequalities and discrimination against minority groups. The reforms introduced a progressive constitutional legal system and a body of jurisprudence unparalleled in the region (United Nations 2010, 7). Some of the most innovative rulings contained in the new constitution concern the rights of Indigenous Peoples. Particularly revolutionary were the incorporation of customary law into the new constitution and the articulation of Indigenous laws in the legal system. The object was to make Colombia into a more pluralistic society and to set the country among the most advanced in terms of legislation to protect the rights of minority groups. Constitutional reform tried to achieve that aim from the start by including two Indigenous representatives from the country’s largest Indigenous organizations at the Constituent Assembly that amended the constitution in 1991. This move was charged with strong symbolic meaning, as it meant the inclusion and acceptance by society of the most marginalized groups (Van Cott 2000).

The 1991 Constitution, through the introduction of the figure of *tutela*, allowed individuals to seek protection of their fundamental rights by an institution especially created to serve that purpose: the Constitutional Court. The process for presenting claims at the Constitutional Court is easily accessible by ordinary citizens, and so far it has produced relatively quick answers. Any individual may present a written or verbal claim in defense of his or her fundamental rights, through a simple process and without needing a lawyer (Delaney 2008, 50–59). The Constitutional Court then has ten days to rule on a *tutela* claim. This flexibility and ease of access allows the court to make quick rulings to defend the fundamental rights of the population, which in turn is key in reinforcing the legitimacy of the court among ordinary Colombians. The *tutela* has become very popular among Colombians, as demonstrated by the impressive increase in the number of cases presented at the Constitutional Court: in 1992 a total of 8,000 *tutela* judicial cases reached the court, and by 2005 there were more than 221,000 (Cepeda Espinosa 2006).
The government in Colombia generally respects the prerogatives of the judiciary, a rare circumstance in Latin America’s largely clientelistic legal system. Also unusual is the fact that the highest courts of the country enjoy considerable standing and respect among the population, particularly the Supreme Court, the public prosecutor, and the Council of State, an advisory body of distinguished jurists. The Constitutional Court has the prerogative to challenge the legality of executive and legislative measures, and it often does. For example, in 2008 it declared unconstitutional a forestry law that had been passed by Congress in 2006, arguing that the new law had failed to conduct a prior consultation with affected communities, as required by the ILO Convention 169.

Many of Colombia’s efforts have centered on the development of an exemplary constitutional system and ample jurisprudence to attend to social inequalities and to address the armed conflict that has plagued the country for four decades. In addition to the constitutional reforms, the government introduced numerous programs to protect vulnerable populations, such as farming or Indigenous groups, who live close to oil developments and are constantly harassed by illegal armed groups. A variety of government departments is involved in these programs, and there are also numerous special plans for attending to the needs of the internally displaced, for fostering respect for human rights among state armed forces, and for developing understanding of the specificities that characterize Indigenous cultures, among other minority groups.

Yet these programs, policies, and efforts have failed to effectively protect the U’wa Indigenous People that live in the department of Nariño from constant attacks by various armed groups. Despite a special government program geared at protecting the U’wa, following a 2009 visit by the special UN rapporteur, twelve U’was were killed, including women and children, and four hundred members of that ethnic group were displaced. The U’wa are particularly at risk because they live close to the Trasandino pipeline, which takes crude for export from the Amazonian department of Putumayo to the Colombian port of Tumaco by the Pacific Ocean. The Trasandino is the second most attacked oil infrastructure in the country after Caño Limón. Incidents of oil theft and illegal refineries along the length of the pipeline are permanently being reported by armed forces patrolling the area (El Tiempo 2011a). Farming and Indigenous communities living there, such as the U’wa, are regular victims of the armed conflict. They sometimes become human shields, or their local schools are turned into barracks by the fighters during armed confrontations.

An abundance of laws and policies is not necessarily enough to solve dis-
putes related to vulnerable groups, as is obvious from the situation of the U’wa in Nariño. An observation by the Constitutional Court on government actions with regard to the forced displacement of Indigenous Peoples affected by the armed conflict asserts that reality:

The answer of the government authorities to the critical situation that has been documented [in relation to the forced displacement of Indigenous Peoples affected by the armed conflict] has mainly been through the passage of norms, policies and formal documents, which in spite of their value, have had precarious practical effects. (Protección 2009)

In spite of Colombia’s efforts to build well-respected judicial institutions and a body of laws to address the country’s problems, serious institutional flaws and weak governance have prevented the system from excelling. A major problem is corruption, particularly within low-ranking judicial courts. Even the most influential figures have been accused of unlawful deals. In 2001 the prosecutor general, a political appointee, was charged with interfering with human rights investigations (Human Rights Watch 2002).

Laws can be difficult to enforce in areas where violence dictates the development of events and illegal armed groups seem to rule, such as in Nariño. The problem is even worse when institutions do not work effectively, or when they are corrupted to benefit a few. In this sense Colombia is an exception, where despite a very progressive legal framework and many government programs in favor of the Indigenous population, a lack of government control over its territory, plus armed violence and abuse, characterize the development of hydrocarbons and result in large losses of lands by Indigenous communities.

SUMMARY

This chapter examines some structural flaws that have been historically part of Latin America’s institutional system and that often create the context for the development of oil and gas conflicts. Imperfections in Peru’s fiscal decentralization process provide an example of major governance weaknesses that prevent oil revenues from reaching the local population and result in conflict. Another structural flaw common to the three countries studied in this book is related to unclear, overlapping, overlooked, or constantly modified laws. Weaknesses in the legal system are frequently a source of conflict in relation to natural resources, and particularly to oil and gas. This chapter provides various examples
of laws that are constantly being modified to accommodate oil projects, leading to disputes.

Structural flaws in governance affect not only hydrocarbons but also mining and other natural resource sectors that have been the engine of Latin America’s economic growth for the past two decades. Government resistance to finding lasting solutions to these structural flaws usually comes from a reluctance to accept that the multicultural nature of their societies creates differentiated visions of development, and that these need to be accommodated to avoid conflict. That reluctance is political in nature and exemplifies the fact that solving local oil conflicts calls for political decisions that go beyond the specific causes of the disputes. When addressing local hydrocarbons conflicts, it is important to keep in mind the sociopolitical and economic reality in which they occur, rather than treating them as isolated events.