7

COMMUNITY PROTOCOLS AS TOOLS FOR COLLECTIVE ACTION BEYOND LEGAL PLURALISM – THE CASE OF TRACKS IN THE SALT

Pía Marchegiani and Louisa Parks[1]

Introduction

This chapter explores the Kachi Yupi community protocol as a case study that provides a good basis for a discussion of these tools within a broad frame of local activism. In this case, a community protocol was used to underpin local community action for the stewardship of the earth, and this reveals how a community protocol can be linked to other forms of collective action in a longer timeframe. It also allows us to reflect on when and why community protocols might lead to legal change, foster dialogue with various institutional actors, or lead to other forms of collective action. The Kachi Yupi community protocol was produced by Kolla and Atacama communities in the Salinas Grandes and Laguna de Guayatayoc area of northwest Argentina. For these communities, drafting, publishing and following up on this community protocol constituted one form of collective action within a wider campaign to protect their lands, waters and livelihoods. The chapter draws on legal scholarship and seeks to place community protocols in the perspective of literature on collective action, drawing in particular on political and legal opportunity structure approaches to explain community action choices of different types.

We explore the case as follows. First, in the remainder of this introduction, we describe the political and legal contexts that preceded and framed the decision to draft the community protocol. We then give the reader an overview of early community actions as well as the process of drafting the community protocol, its aims and content. The discussion of the protocol then begins by considering the effects and impacts it had following its publication, before a reflection on why it did not become a tool for legal pluralism, but did become a key basis for other, including more contentious, forms of action. The latter reflection provides ideas about what conditions are needed for legal change to follow from community

DOI: 10.4324/9781003172642-9

protocols, as well as how protocols can contribute to activism of other types, which may also help communities to achieve their aims.

The Kachi Yupi/Tracks in the Salt community protocol was drafted by 33 communities from the Salinas Grandes and Laguna de Guayatayoc area: a shared watershed that straddles the two provinces of Salta and Jujuy in the northeast of Argentina. It was published in December 2015. To better interpret the protocol, it is useful to first place it against the backdrop of the political and legal contexts surrounding lithium mining and environmental regulation in Argentina. Lithium mining has been underway since 1997 in the country, but mining increased markedly from around 2010. The reasons for this are rooted in the increase in global demand and interest in the mineral that have accompanied the global push to move away from a fossil fuel-based global economy. Lithium, indeed, is the key component of li-ion batteries. These are used in key modern technologies like laptop computers and mobile devices and, crucially, in electric cars. Lithium thus plays a key role in current visions of the path away from fossil fuels. It is a metal that is technically challenging to extract, however, and one of the most important accessible sources is the "lithium triangle", a cluster of salt flats located high in the Andes where the borders of Argentina, Bolivia and Chile meet. Argentina is the only of these three countries in which lithium extraction can be freely licenced and has received much attention from international investors, seen, in turn, as opportunities for development by local authorities. Together, these reasons explain Argentina's push to grow its lithium sector and why the country became the fastest growing provider of lithium in 2016, when its global share in the market grew from 11% to 16%. Both before and after this increase, the government in Argentina actively pursued lithium mining projects and sought to boost the sector, creating public companies for battery production, and axing federal taxes on mineral exports, for example (see Marchegiani et al., 2018 for a full discussion).

The push for the "white gold" of lithium translated into the granting of exploratory and mining permits in the Argentinian area of the triangle, including the Salinas Grandes and Guayatayoc area discussed here. These permits raised questions of how local communities could effectively make their voices and concerns heard in procedures surrounding the granting of eventual permits. Thus, the legal situation surrounding mining permits and environmental impacts is another necessary piece of the puzzle for a more complete interpretation of the local community actions undertaken in this vein.

Argentina is a federal state and as such has distributed power between the central state and its autonomous provinces. The federal state retains all powers not specifically delegated in the provinces. Moreover, with the 1994 Constitutional reform, the country conferred supremacy to international human rights within its domestic legal framework. As such, Argentina has ratified international instruments relevant to the inclusion of local points of view in mining permit decisions. It ratified ILO Convention 169,[2] which recognizes indigenous and tribal peoples' right to participate in the use, management and conservation of

natural resources pertaining to their lands, in 2000, and this has helped to underpin the case law of the Inter-American Court of Human Rights filed by communities in Salinas Grandes[3] (Marchegiani et al., 2020). In 2007, it signed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which also contains legal provisions on consultation and consent.

In the same 1994 Constitutional reform, Argentina introduced two other changes with significant impacts on questions of local community involvement and mining decisions. First, the Constitutional reform introduced the right to a healthy environment,[4] which, in turn, opened the way for minimum standards for environmental protection to be set. Following the federal organization of the State, the Constitution gives power to the central State to set minimum standards of environmental protection for all citizens in the country. Provinces may regulate beyond these, increasing protection standards, but may not limit or regulate to standards lower than them.

Second, the reform recognized the ethnic and cultural pre-existence of indigenous peoples and community rights over lands traditionally occupied by them.[5] This opened the way for provincial governments to transfer communal land rights to indigenous communities. Although these transfers have not transpired in full for a host of reasons, including a lack of information about indigenous communities, a lack of State capacity, budget and political will, the reform remains important for the case in hand. This is because, as noted by former UN Special Rapporteur on the rights of indigenous peoples, James Anaya, the Argentinean Mining Code "requires the permission of the land 'owners' to explore for minerals" (Anaya, 2012, para. 45).[6] Although the Mining Code does not contain any other requirement for consultation, this gap is arguably filled by the existing environmental framework which calls for participation (Marchegiani et al., 2020).

The 2002 General Environmental Protection Law sets these minimum standards. This law introduced environmental policy principles to be mainstreamed across all policy areas, and a slew of tools for environmental management, including the environmental impact assessment (EIA) processes applied in the case of lithium mining in the Salinas Grandes and Laguna de Guayatayoc area discussed here. The new EIA tools were accompanied by minimum standards to be followed in their implementation in the provinces. EIAs are obligatory, and a report on their outcomes must be published before any activity with significant impacts on the environment or on local populations' quality of life (or both) begins.[7] The process itself must comprise a participatory phase allowing citizens to debate the proposed activity and its implications. Other minimum standards concern access to information. EIAs must include a statement from the proponent explaining the activity and its environmental impacts, and they must include a report identifying impacts and mitigation measures. Information must be provided in a timely fashion for the participatory phase. Finally, a public authority must make a decision about the proposed activity.

These minimum standards are then fleshed out in more detail at the provincial level. Here, however, we find lags in the implementation of both national and

international laws. The province of Jujuy, the power in question for this chapter, named its Environmental Management Unit as the relevant decision-making body for mining activities and set up a procedure for an EIA (with provincial decree 5722-2010). The Unit comprises members from a range of provincial agencies (such as human rights, environmental management and industry) and stakeholders (such as geologists and indigenous communities). A specific procedure was decided for lithium mining in 2011, when this resource was declared a strategic natural resource for the province in line with federal government policy. An additional layer of review by an expert committee was to apply for proposed lithium mining projects. However, this additional review was abrogated in 2019.

This complex legal patchwork is also affected by significant implementation gaps. Local indigenous communities in the Salinas Grandes and Laguna de Guayatayoc have contested the correct application of EIA procedures, as access to information was not granted when different companies sought permits to explore in the area, and a consultation process in line with existing regulation was not devised and/or implemented. The government of Jujuy later claimed that as there was no specific provincial law to implement consultation as required in Convention 169 ILO and other international instruments, there were no clear provisions about how to consult communities to be followed or disregarded.

The next section discusses the actions taken to address these perceived shortcomings, with particular emphasis on the community protocol the indigenous communities drafted with a view to outlining rules for consultation.

Action on Lithium Mining – from Courts to the Community Protocol

Around 2010, mining companies began exploration activities for lithium in the Salinas Grandes and Laguna de Guayatayoc area, and the wheels of EIA processes were to be set in motion. However, as mentioned, this was done without providing enough information to communities and without opening proper consultation processes. As exploration activities began, community members began to organize with the aim of obtaining information on these activities. At an early stage, they formed a Roundtable of the Indigenous Peoples of Salinas Grandes and Laguna de Guayatayoc (the Roundtable) comprising representatives from 33 communities in the area (Comunidades indígenas de las Salinas Grandes y Laguna de Guayatayoc de Jujuy y Salta, 2015; Parks, 2020). The Roundtable was created as a main forum for community members to share information and organize collective action. Lithium was a prominent issue, but the Roundtable was created to discuss any matter that could pose a threat to the defence of their territory.

One of the main concerns expressed by community members about lithium mining centred on the possible water use and its effects. The communities had not received information about water use and impacts on local supplies at the exploration stage. Many of these communities depend on water for their livelihoods as

well as normal use – for their artisanal salt extraction activities, but also for their small-scale agriculture and livestock. Fresh water is a resource in short supply in the area, which is one of the most arid on the planet. A central claim was thus for information about how much water would be used in mining, and about risks that saltwater could be introduced into fresh water sources.

From the beginning, then, the actions of the communities did not focus necessarily against mining, but rather against the failure to consult and inform them as rights-holders on their lands. The communities' main demand centred on their recognition as rights-holders. Although communities in the area hold legal status as indigenous communities, and as such have the right to the land in which they live, community land rights titles have not officially been granted and hence, a struggle for recognition was undertaken.

The recognition of communities as such, and especially the right to be consulted as rights-holders over their land, formed the basis of their first legal action. With the assistance of community lawyers based in the province, the communities filed complaints before Argentina's Supreme Court of Justice in 2010 (Ferradás Abalo et al., 2016). The case was rejected in a sentence that argued that there was no "case" due to the lack of factual evidence and enough proof provided by the communities on the existence of mining permits on their land that would enable the development of an FPIC process. The government of Jujuy had denied in the audience called by the Supreme Court on the 28th of March 2012 the existence of any permit granted by its mining authorities, and suggested that any company intervention in the area was not officially authorized.[8]

When the case was rejected, the communities filed another complaint, this time before the Inter-American Commission on Human Rights. In late 2011, the group also made presentations to the UN Economic Social and Cultural Rights Committee and to the UN Special Rapporteur Anaya, who visited the country at this time (Ibid).

After the rejection of the national case, and based on the fact that the government of Jujuy claimed there was no specific provincial or national regulation that would specify how consultation should be implemented, and how it should be done in the context of EIA process, which was true, the communities decided to proactively devise a way forward that would call for a substantial dialogue in a way that would support their legal claims.

This, combined with the experiences of other local communities in the area and exchanges with other external organizations, underpinned the decision to draft a community protocol. The communities were aware of similar processes that had unfolded at other salt flats, including the relatively nearby Olaroz flat. There, a small group of concerned community members had tried to express their concerns via EIA processes, but were frustrated with how these had been carried out – more as information meetings rather than opportunities for dialogue, but without the provision of accessible information before local meetings, which were also accompanied with various promises tied to community consent (for a full discussion, see Marchegiani et al., 2020).

In this context, the Roundtable decided to take steps to provide specific instructions on how to conduct a consultation process. The choice to address the gap in provincial law around specific provisions was clearly linked to the rejection of the case they had brought at the national level. Yet, the communities also wanted to move beyond this more bureaucratic view, and felt that consultations should respect their culture. Working once more with locally based lawyers as well as a national NGO, the Foundation for the Environment and Natural Resources (FARN) based in Buenos Aires, the communities began to consider a community protocol as a possible way forward that would allow them to frame a specific consultation process, linking it with their rights and culture and underpinning their claims with reference to different levels of law, including international sources.

As for the decision to engage in drafting a community protocol, this was not taken quickly, nor was it without controversy. Some representatives felt that outlining a process for engaging with external actors could be construed as an indication that communities would end up giving their consent – that consent would become the foregone conclusion of any dialogue in the eyes of authorities and those wishing to access their lands and resources. Nevertheless, the decision was made to begin the process. The intention for the protocol was an emerging strategy in the context of a lack of implementation of consultation rights as discussed. Communities decided to address the consultation conundrum by laying foundations for dialogue: by providing information about the communities and their worldview, underlining their knowledge of their rights and outlining a clear and detailed process – including the point that consent was by no means a foregone conclusion of consultation – that all external actors should respect and follow.

These decisions about the content of the protocol were developed in participatory ways. Before drafting the protocol, a series of workshops were carried out in each of the communities with legal experts who first explained the legal provisions on consultations to every community member interested, then collected their initial ideas about what a proper consultation process that respected their views would look like. After these initial workshops, a small group of around 15 community members was selected to drive the drafting process for the protocol on a consensus decision-making basis involving all of the communities. The group divided into teams formed to work on specific parts of the text, but the group as a whole answered to the Roundtable, and the process was also discussed with broader sections of the community on regular occasions. The process of drafting the protocol took nearly two years, from early 2014 to its publication in late 2015, and also included meetings between the small drafting group, local lawyers, FARN and other external organizations, general meetings and gatherings in the Roundtable space, training sessions on community protocols (led by the South African-based NGO Natural Justice), thematic workshops, workshops on the text of the draft protocol and the final consensus-based approval process.

Kachi Yupi in Detail

The resulting protocol is divided into an introduction and three distinct chapters (Comunidades indígenas de las Salinas Grandes y Laguna de Guayatayoc de Jujuy y Salta, 2015). The first chapter places consultation and participation processes in the context of local history. It describes Argentina as a State run by descendants of colonial power-holders. Those in power are described as responsible for the continued trend of exploitation of indigenous peoples through taxes and other means, and to understand this, the history of struggle of the communities must be recalled. The document thus describes the history of community struggles against colonial powers, including battles, the forced migration that occurred with the construction of a railway line in the area, and mining activities that obliged many to abandon traditional livelihoods. This history of oppression underlies the fundamental aim of the 33 communities to be recognized and allowed to enjoy their rights, including through proper consultation and FPIC. In this vein, as mentioned, the communities are recognized as indigenous and as pre-dating the existing State. However, the implementation of their rights deriving from this, ranging from the allocation of their communal land titles to the right to participate in decision-making, is still at an early stage. The historical context serves to substantiate the need for the State to ensure a heightened level of protection in the context of an FPIC process. In addition, the protocol calls upon the State to ensure both the transparency of the consultation process and genuine participation by indigenous communities, as well as necessary support to them.

The second chapter then recalls the rights recognized to indigenous peoples, placing these firmly in the context of the specific historical experience of the local communities. In other words, it ties national and international laws that alone appear technical, abstract and oblivious to local reality, to the communities' history. In particular, this chapter serves the purpose of articulating the communities' views of an ideal consultation and participation process clearly and in such a way as to assert their rights as recognized in Argentina's Constitution as well as international human rights treaties, declarations and conventions, particularly ILO Convention 169 and the UNDRIP. The third chapter then outlines the procedure of consultation and FPIC agreed by the communities. Importantly, this chapter describes this procedure in a comparison with the natural cycle of salt formation – once again, the more abstract procedure is firmly tied to the land, history and culture of the communities. A key point in the procedure described is that salt is not an economic or nutritional good alone, but a living thing. Thus, the protocol underlines that consultation is (or should be) a living, dynamic process. It also makes it clear that the basis for any consent is the compatibility of a project with *Buen Vivir*, which is "the process of full communal life on our land. It is being one and the same with the communities from its very roots. To achieve *Buen Vivir* means knowing how to live and thus how to live with others" (Comunidades indígenas de las Salinas Grandes y Laguna de

Guayatayoc de Jujuy y Salta, 2015). Consultation processes should respect this full view of community, and be based on unbiased information, good faith and genuine consultation where external actors are ready to listen and change. The processes should also respect communities' wishes as to their timing and, as such, leave sufficient time whenever needed for communities to discuss and define their views and positions without external interference or pressure.

Overall, the document defines a clear process for consultation in the context of the communities' culture, describing the history of the communities from their own point of view, their expectations regarding consultation and consent on the basis of international, national and provincial laws, and advice on how such procedures should unfold. Beyond consultation, the protocol is part of a wider struggle for the recognition of indigenous rights, expressed in the text through the retelling of a history of oppression (Flores, 2017). The name of the protocol, Kachi Yupi (Tracks in the Salt), is significant on all these fronts:

> Why did we think of tracks in the salt? Because this document is rooted in the essence of our identity, in the heritage of our grandparents, in the tracks left by their struggle for our territory, in the marks left by their feet, in the signs left by history, in the remains of their teachings and wisdom; in the deep and lasting impression of their culture.
>
> At the same time, a track represents a path to follow, a guide for the passage of people and animals, a furrow that we must follow. This document then, hopes to serve as a track, as a community conduit to channel our rights to participation, consultation and Free, Prior and Informed Consent and thus continue the legacy of our ancestors of the defence of the land and territories with which we are intimately connected.
>
> *(Comunidades indígenas de las Salinas Grandes y Laguna de Guayatayoc de Jujuy y Salta, 2015, p. 6)*

The path outlined in the Kachi Yupi community protocol can thus be thought of as stretching not only outwards, describing modes of respectful communication, but also from the past to the future, and from the local to the global. The change inherent to tracks drawn in salt that leave deep marks, as well as the space to carve new ways, also speaks to the intention of the communities.

After the Protocol – From Dialogue to Contention

The Kachi Yupi community protocol's publication and launch in December 2015 was timed to coincide with elections in Argentina, in a bid to attract attention from authorities. The elections were won by the opposition, and heralded a new governing coalition under the name Cambiemos at the federal level, led by new President Mauricio Macri's liberal *Propuesta Republicana* party (PRO). An ally from the same coalition (*Unión Cívica Radical* – UCR) won elections and took up government in Jujuy province. This provincial government had

run a campaign that included attention to indigenous matters, including the community protocol. As it had promised before the elections, the new provincial government discussed the community protocol. In addition, permits stopped moving forward in the Salinas Grandes and Laguna de Guayatayoc area and lithium mining practically came to a halt, though it should be noted that this coincided not only with the community protocol but with a slackening in the pace of investments. A dialogue between the community members and the provincial government began, with various meetings and discussions in the following years, focusing for the most part on a draft provincial decree that would legally recognize the protocol, and make adherence to its terms compulsory. During the same period, the protocol was recognized publicly at the national level by the National Ombudsman. The National Ombudsman's office had intervened in an attempt to act as a neutral broker between communities and different external actors in a variety of cases in the country in previous years, and had taken an interest in the community protocol and the issues surrounding EIAs and consultation and consent before its public launch. When the protocol was published, the office praised it as a useful source for guiding consultation procedures, and recommended its application to all government authorities (both at the provincial and national levels) where any decision that would affect communities in the Salinas Grandes area was to be made.

Despite all these positive signs of an opening towards the claims of the communities for fairer and better specified rules about consultation procedures, it is worth recalling that economic reforms aimed at benefiting the extractives sector were brought in following Macri's election. Further moves in this direction were also introduced in 2016, when export duties were cut for the sector, and the geographical reach of mining projects extended. As the dialogue between the provincial government and the communities continued, the communities thus also engaged in other strategies. They sought to gather independent expertise about the potential impacts on water sources from the proposed mining projects, and met with other communities in the lithium triangle to exchange information. This is in line with the aims of the protocol, which underlines the need for independent expert information, given that in Argentina, and indeed many other countries, those applying for permits to mine also commission and supply expert information since local authorities lack the necessary resources. Understandably, this raises suspicions among community members about the independent nature of the information where it is produced by experts hired by mining companies (Marchegiani et al., 2020; Parks, 2020).

Concerns in the communities about the genuineness of the dialogue with the provincial government were also growing, and came to a culmination at the end of 2017, when new permits were granted ending the de facto pause that had commenced after the elections. In early 2018, with no legal decree forthcoming, the accumulation of authorities' actions in favour of mining at both local and federal levels and the recommencement of exploration work on their lands by mining companies, the communities began to question whether it made sense

to continue their action through dialogue. As the year unfolded, a decision to change their approach was also driven by the complete lack of willingness among extractives companies now active on their lands to pay any attention to or respect any of the terms of the community protocol. For example, the protocol includes the condition that all communities in the area be consulted together, since the projects take place on a watershed that forms a single, connected ecosystem. Yet, companies have instead approached communities individually, providing information and promises in a manner similar to the aforementioned Olaroz case (Ibid). This meant that although communities had formed their own process of organizing internally, the Roundtable was not recognized by external actors, who continued to see individual community representatives as the correct contact point for dialogue. This demonstrates the communities' claims about being ignored by authorities.

In early 2019, the communities discovered another new bidding process involving studies to exploit lithium on their land about which they had not been consulted in any way. At this point, the group decided to change their course of action.[9] They mounted a peaceful demonstration, blocking the main highway that runs through their lands and distributing pamphlets to inform those passing through their lands and from other communities about their predicament. They sought a meeting with the governor of the province, and were invited to meet with him at his offices in the provincial capital of San Salvador de Jujuy, some 130 kilometres away. The community members, having engaged in dialogue and meetings for years at this point, refused the meeting, inviting the governor to visit their demonstration site instead. Rather than travelling to the communities' land, the governor now ordered the police to clear the mobilization site. Following this turn of events, community members held an emergency meeting and decided to change their position. While the community protocol and their previous work had been about proper consultation rather than against mining per se, they now decided that simply asking for consultation was no longer enough, and that a flat no and blanket opposition to mining was the better strategic choice. They thus stopped calling for consultation rights and the respect of the process outlined in Kachi Yupi, and adopted a "no to lithium" position. This could be interpreted as a new way of framing the cause after lack of progress in their original strategy.

The effects and impacts of the Kachi Yupi community protocol thus went well beyond the question of legal pluralism and can be read in a number of community and authority actions and reactions. In the short term, the protocol led to dialogue, opening an opportunity to discuss the protocol and future possible ways of engaging in dialogues on subjects beyond that of lithium too. The recognition conferred by the national ombudsman and the provincial government suggested that bridges were being built for a broader political cooperation agenda, constructing trust between the parties. This opportunity did not transpire however. The dialogue came to be viewed as fruitless in light of concrete moves to recommence and boost mining projects without any regard to consultation processes

as described by communities themselves in the protocol, which led them to lose any trust that had been built. They thus moved into a more contentious stage of mobilization. At the time of writing, mobilization has become more difficult with the problems posed by the global pandemic. Communities remain firm in their new position against lithium.

Conclusions: Reflecting on Community Protocols and Their Role in Local Community Collective Action

One of the purposes of this volume is to reflect on how community protocols can lead to more legal pluralism. In this chapter, we have focused on different collective actions by the communities of Salinas Grandes and Laguna de Guayatayoc: complaints brought before national and subsequently international courts, the processes around a community protocol and other collective action to acquire information, build alliances and finally protest. These different modes of collective action, we argued, could be understood as strategic reactions to contexts. In the latest moves to protest, the communities have reacted, among other things, to a failed dialogue with the provincial government and the complete lack of respect for the community protocol among extractives companies. In a perspective of a formal reading of legal pluralism linking "[…] the local and the international legal levels, according to standards set out in customary, national and international law […]" (Morgera et al., 2014, p. 157), the case was not successful. If we consider a more elastic perspective, however, the case does demonstrate some important aspects. First, the community protocol itself is a clear expression of legal pluralism in its elaboration of a process for consultation and consent that links national and international laws to a procedure rooted in the communities' worldview. Even if not formally recognized as expected (i.e. for the dialogue involving decisions affecting Salinas Grandes´ communities), the protocol remains a tool for legal pluralism, and has been introduced and acknowledged by different authorities with different scopes. It was recognized by the National Ombudsman as well as the provincial government initially. Moreover, it was recently mentioned as a precedent by the Instituto Nacional de Asuntos Indígenas (INAI) the National authority for indigenous matters, in a resolution that created – within the structure of the mentioned authority – a specific area to strengthen consultation rights.[10]

Reflecting on the case as a tool for collective action in a broader view can inform an understanding as to why it stopped short of a more formal recognition of legal pluralism. This can provide some ideas about what conditions might be needed for formal legal pluralism to come about, as well as revealing in more detail how the community protocol fed into logical decisions about which other types of collective action to pursue in light of their understanding of the legal and political context they found themselves within. To guide this reflection, we draw on a framework commonly used in the political sociological literature on collective action and social movements. Given the inherent political nature of

introducing legal pluralism in its more and less formal dimensions, some of these approaches may prove useful to legal and socio-legal scholars, and we therefore use some space to give an overview of them here.

The first useful point taken from the literature on collective action is Tilly's concept of the action repertoire or, in the case of social movements, the repertoire of contention (della Porta and Diani, 2005; McAdam et al., 2001). This term is used to recognize that collective action takes many forms, and that those forms are linked to time, place and other considerations. There is thus a sort of menu of actions available to collective actors – like the local communities that drafted the Kachi Yupi community protocol discussed here – depending on what is feasible and deemed appropriate in light of circumstances. In this view, we can understand the decision to draft a community protocol as one available action in the repertoire available to these local communities. At the same time, the concept of the action repertoire also underlines that all collective action choices must be interpreted within specific contexts (Tarrow, 1998). To better reflect on the collective action choices of different types in the case described in this chapter, social movement studies supply another useful approach – political process or political opportunity (ibid). Although this approach began with attention to political contexts (a consequence of the clearly political aims and engagement of many social movements that have attracted scholarly attention), it was later integrated with attention to legal (and discursive) contexts too. The political opportunity approach is based on the observation that collective action choices are logical, and that to understand this logic, proper attention needs to be paid to context. It was first developed in scholarship on social movements to understand why and how social movements mobilize, and then used in the study of influence and outcomes (Meyer, 2004). It generally concerns opportunities and threats stemming from structural conditions determining how "open" or "closed" a polity is to different types of collective action, as well as describing various aspects that help researchers to identify more time-dependent or dynamic factors in political contexts that similarly facilitate or hinder certain actions, and thus ultimately shape outcomes (see, e.g., Giorgi, 2018).

The approach has expanded over time in response to critiques that other types of contextual factors are equally important to explain collective action. One such expansion is the legal opportunity approach, which aims to account more specifically for action in courts. Existing work focuses on the structural features of legal stock (the body of law applicable in a particular context), rules on legal standing (access to courts) and rules about legal costs (Vanhala, 2018). Community protocols would require further specification of the legal opportunity structure to accommodate the aim of achieving, or at least demonstrating the possibility of, legal pluralism. The approach as it is currently used focuses mainly on the decision to litigate, whereas community protocols challenge legal structures on the basis of customary and international laws. Essentially, they can be thought of as tools that seek to push the boundaries of legal systems and demonstrate where they can be more "convivial" (Bavikatte et al., 2015) and overcome the

contradictions and difficulties where international law meets regional, national and customary laws (Bavikatte, 2014; Jonas et al., 2010; Tobin, 2013).

Bringing these observations together, thinking of collective action choices as many and varied, and logically chosen in the light of specific political and legal contexts, can help us to interpret the Kachi Yupi case from the initial complaints brought by the communities onwards, as well as point to what these choices suggest for community protocols elsewhere. The initial choice to bring complaints before courts can be interpreted using the legal opportunity approach. After the legal recognition of communities' cultural pre-existence and rights in the Constitutional reform of 1994, communities had for the first time in a long while a clear source to support their various and broader previous demands in their quest for recognition. Moreover, the legal element was central not only for the mobilization of demands and the organization of the communities but as a basis for any legal complaint. The lack of implementation of environmental standards, particularly where indigenous consultation and FPIC rights were concerned, in the context of lithium mining presented itself as a concrete opportunity for the communities to gain acknowledgement of their claims from a more progressive court compared to their conservative provincial counterparts. The decision to bring a case complaining about a lack of proper consultation to the Supreme Court of Justice thus appears all the more logical as well as a strategic move to draw attention to broader claims for recognition and rights.

In turn, the decision to draft a community protocol in such a way as to help move implementation forward[11] appears equally logical following the judgements that underlined the lack of provincial government rules as the reason for not implementing consultations. In addition, a lull in the immediacy of threats from mining exploration at the same time afforded the communities the possibility to pursue this lengthier type of action available in the repertoire. The process of drafting the community protocol following consensus-based decision-making can also be understood as an outcome of collective action. The in-depth discussions and debates about the protocol helped strengthen communities' ties to one another in preparation for a time when pressure from outside actors for their consent would be more present.

The outcomes of the community protocol itself in terms of legal pluralism can perhaps be more fully explained with reference to the changing political opportunities described. As mentioned, while the protocol did not lead to formal recognition and legal pluralism, its content, its recognition by the National Ombudsman, and the initial recognition given by the provincial government, or the recent acknowledgement in INAI's resolution, does underline some informal legal pluralism. To unpack these outcomes, the literature on political opportunity draws particular attention to elections as moments where collective action can extract promises for change from actors vying for power. Having a new elected government take office, with a campaign that integrated indigenous demands, could be argued as an opportunity for a new way forward in the relationships between communities and local authorities – the decision to launch

the community protocol publicly during the peak of the election campaign was linked to this possibility, even if remote. In the event, the new government did at least appear to make concessions after taking office, by opening a dialogue on the protocol's recognition. This can be understood as an outcome of a more informal type of legal pluralism. The changes in circumstances as time wore on suggest that this concession was not as meaningful as hoped for in that it did not lead to the promised step to formal legal pluralism in the form of a provincial decree on the protocol. A stronger commitment was made to lithium as a strategic resource in line with the policies pursued by the new federal administration, and a lack of understanding about how to use the community protocol became clear (the provincial government wanted to make it applicable for all communities in the province and not only to communities in Salinas Grandes area). These changes also help to explain why these initial concessions failed to culminate in a decree. The provincial government was biased in favour of lithium exploitation and extraction, and this prevented them from seeing the opportunity to pursue that aim alongside communities in a path of cooperation.

This showed that the local authorities were not ready to engage in multicultural dialogues and advance to make clearer commitments to listen to and understand demands from communities at the local level. The unwillingness to keep the conversation going also speaks to the lack of understanding of the nature and scope of the protocol. Communities in Salinas Grandes and Laguna de Guayatayoc area did not seek to devise a tool to be applied to each and every community in the province of Jujuy; rather they were stating conditions for dialogues with them (33 communities) and thus, proactively paving a way for a multicultural dialogue with authorities and companies that wanted to engage with them. In a deeper perspective, the efforts made to "translate" *Buen Vivir* to external actors (de Sousa Santos, 2014) seem to have come up against a discursive barrier here. To the extent that dominant discourses based on a nature/culture divide, where the planet is essentially understood as separate from human communities, shape governance the world over (Uggla, 2010), communicating worldviews that do not separate the planet from human communities is challenging (Vermeylen, 2017). In this vein, some have called for a move beyond multiculturalism towards multinaturalism (Viveiros de Castro, 2004).

This failure to advance the dialogue around the decree on one side, while moving forward with decisions that would advance explorations for mining in the area, on the other, then ate away at what little trust had developed until then between communities and provincial government. The communities had, with their protocol, taken constructive steps to open a dialogue and build a space for understanding with provincial authorities and extractive companies who failed to recognize the opportunity this presented for advancing with projects in mutually beneficial ways. Ultimately, this failure to engage increases the costs for the provincial government, and potentially for extractive companies should protests persist. Instead of using this opportunity for dialogue with communities mobilized around a controversial issue, the government failed to listen, and the communities

moved to more contentious action choices. This choice included a move in the communities' position from one of asking for dialogue to one of rejecting mining outright, which also signals a move away from the steps taken towards legal pluralism in the sense of shutting down channels of communication.

The choice of some of the communities to follow a different and more contentious path of action also makes logical sense with regard to other aspects of available political and legal opportunities. In terms of legal opportunities, the communities had now exhausted the path of litigation. They had then taken the much debated decision to accept the frame of "free, prior and informed consent" and sought to inject that framework with their own interpretation, based on a particular worldview. They later invested significant time and effort in a dialogue with the provincial government. Their political opportunities were proving empty however – as discussed, though dialogue continued, the provincial government continued to make choices that favoured extractives industries. At the same time, extractive companies were ignoring the protocol too, following their established and contested habits where consultation and consent processes were concerned. Where opportunities for dialogue and more conventional engagement with authorities close down, opportunities for more contentious actions open up. Opting for contentious forms of action when other paths are closed down is generally seen as clear and logical in the literature. The reasoning is that where advocacy types of actions are not, or are no longer, plausible, choosing a more disruptive path of action allows a group without formal power to apply pressure on authorities by attracting the support of public opinion, often via media coverage of the action in question. Contentious action also serves the purpose of directly disseminating information about the group's position (in this case by distributing pamphlets) and recruiting new supporters to the cause, with numbers being another important factor in wooing public opinion and pressuring authorities (Tarrow, 1998).

Another way of understanding this move to contentious action is to reflect on the resources created by the communities in drafting their protocol. It could be argued that the process of drafting the community protocol gave momentum for the communities to bolster their internal organization, strengthen their internal understanding, and become a more unified collective actor able to undertake a peaceful road block relatively quickly and easily. Considering the geographical spread of the single communities and the various challenges in meeting and communicating lends this view some credence, as does the fact that after the police intervention the communities were able to convene an emergency meeting and decide a change in their fundamental position. In that sense, community protocols can also be seen as more than collective action tools in a repertoire. They can also be seen as important opportunities for the development or reconstitution of communities as collective actors through the formation of different networks. In this case, the Roundtable can be understood as a mode of organizing the communities into such a network, allowing the different communities to come together to form a single collective actor that pursued a range of different modes of collective action around the lithium mining issue.

In a broader view, these reflections on how the Kachi Yupi community protocol unfolded and took its place in a longer chain of collective action suggest some ideas. First, it suggests some scope conditions that might be needed for community protocols to effectively translate into formal legal pluralism. These are mainly political. The case suggests that a community protocol is pitted against pre-existing and dominant discourses of commitment to an agenda that clashes with its aims, legal pluralism will be harder to achieve. The commitment to lithium, and its construction as a key part of moving away from fossil-fuelled economies, forms such a dominant discourse in this case, and dominant discourses have been argued to be particularly difficult to challenge where economically valuable resources are concerned (Nelson, 2010). It also suggests that both subnational and national politics need to be aligned in favour of legal pluralism, or at least one of these levels needs to be so. The only pressure from the national level in this case came from the independent office of the National Ombudsman, while the provincial and federal governments were politically aligned and saw no need to engage in cooperation with the communities. When the provincial government engaged in dialogue, it could not (or would not) commit to it in a real sense. These political scope conditions would seem helpful, if not crucial, for the success of legal pluralism (in addition to a conducive legal context of course). Second, the case is helpful for understanding community protocols both as tools in action repertoires and as bases for building on those repertoires. Community protocols may not be the only actions that communities undertake. By considering them as one action in a longer-term view, their drawbacks and any failures to achieve their aims appear in perspective. But they are also very peculiar types of collective action: the processes that are undertaken to draft protocols can strengthen communities' action repertoires by bolstering their standing as collective actors. In other words, community protocols can help build communities that are better placed to act together in a wider range of ways and with a better understanding of the legal and political contexts they are in, and of the claims they hold most dear.

Notes

1 The authors thank community members for the fruitful exchanges that drive the reflections of this contribution. *All URLs retrieved on 1 September 2021.

2 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169) (1989).

3 Communities in the area have been recognized by Argentinean law as indigenous communities and hold legal status as such.

4 National Constitution of Argentina, rev. 1994 (Constitución de la Nacion Argentina, *Boletín Oficial* [BO], Jan, 3, 1995), Art. 41:

> All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it […].

English translation from http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf, accessed 18 June 2021.

5 National Constitution of Argentina, Art. 75, point 17: "To recognize the ethnic and cultural pre-existence of indigenous peoples of Argentina". English translation from http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf, accessed 18 June 2021.
6 While the indigenous conception of land ownership involves soil and subsoil, the Mining Code distinguishes between the ownership of minerals generally found in the subsoil, which belong to the State that then grants concession contracts to private actors, and the ownership of the soil, which follows the private conception of land ownership. The Salinas Grandes communities' land ownership involves both soil and subsoil.
7 Artt. 11–13 of the 2002 General Environmental Protection Law ("*Ley General del Ambiente*" Ley N.° 25.675, B.O. del 28/11/2002).
8 Corte Suprema de Justicia de la Nación, *Comunidad Aborigen de Santuario Tres Pozos y otros c/ Provincia de Jujuy y otros s/ amparo*, Expte. C.1196.XLVI, 18/12/2012. To see the text of the Supreme Court Decision, access:https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verUnicoDocumentoLink.html?idAnalisis=698081&cache=1621430473022
9 Over time, the initial group of communities that drafted the community protocol took different paths, and the decision to undertake protest concerned a smaller group concentrated in the province of Jujuy. As we do not have detailed data about these changes, we do not advance any discussion of this here, but simply remark that the literature on collective action has long noted the different paths that groups take, into different types of activism or indeed the exit from activism, over time (Tarrow, 1998).
10 For more details, see Instituto Nacional de Asuntos Índigenas, Resolución 30/2021 from the 5th of April 2021. Available at https://www.boletinoficial.gob.ar/detalleAviso/primera/243738/20210429
11 Since international human rights standards are operative (non-programmatical) in Argentina's legal system, they do not need specific legislation in order to be applied. Legal scholars have thus found those laws designed to help implementation in a context where indigenous rights are not well understood.

References

Anaya, J. (2012a). *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. Addendum. The Situation of Indigenous Peoples in Argentina* (A/HRC/21/47/Add.2). United Nations General Assembly, Human Rights Council, Twenty-fourth session, Agenda item 3, 2 September 2013.

Anaya, J. (2012b). *Report of the Special Rapporteur on the Rights of Indigenous Peoples, Progress Report on Extractive Industries*. United Nations General Assembly, Human Rights Council, Twenty-fourth session, Agenda item 3, 1 July 2013.

Bavikatte, K. (2014). *Stewarding the Earth. Rethinking Property and the Emergence of Biocultural Rights*. New Delhi, India: Oxford University Press.

Bavikatte, K., Robinson, D. F., and Oliva, M. J. (2015). Biocultural Community Protocols: Dialogues on the space within. *Ik: Other Ways Knowing*, 1(2), 1–31.

Comunidades indígenas de las Salinas Grandes y Laguna de Guayatayoc de Jujuy y Salta (2015). *Kachi Yupi/Huellas de la Sal: Procedimiento de Consulta y Consentimiento Previo, Libre e Informado para las Comunidades Indígenas de la Cuenca de Salinas Grandes y Laguna de Guayatayoc*.

Ferradás Abalo, E., Lobo, A. L., and Lucero, M. J. (2016). *Conflicto socioambiental en Salinas Grandes: neoextractivismo, resistencias y nociones de desarrollo en el nuevo escenario político regional*. Villa María.

Flores, C. (2017). Entre el Litio y la Vida: Comunidades Originarias y la Lucha por la Conservación del gua y de su Cultura. In FARN (Ed.), *Informe Ambiental Anual 2017*. Buenos Aires: FARN.

Giorgi, A. (2018). *Religioni di Minoranza tra Europa e Laicità Locale*. Milano: Mimesis Edizioni.

Jonas, H., Bavikatte, K., and Shrumm, H. (2010). Community Protocols and Access and Benefit Sharing. *Asian Biotechnology and Development Review*, 12(3), 49–77.

Marchegiani, P., Hoglund Hellgren, J., and Gomez, L. (2018). *Lithium Extraction in Argentina: a Case Study on its Social and Environmental Impacts*. Buenos Aires: Fundacion Ambiente y Recursos Naturales (FARN).

Marchegiani, P., Morgera, E., and Parks, L. (2020). Indigenous Peoples' Rights to Natural Resources in Argentina: The Challenges of Impact Assessment, Consent and Fair and Equitable Benefit-Sharing in Cases of Lithium Mining. *The International Journal of Human Rights*, 24(2–3), 224–240.

McAdam, D., Tarrow, S., and Tilly, C. (2001). *Dynamics of Contention*. Leiden: Cambridge University Press.

Meyer, D. S. (2004). Protest and Political Opportunities. *Annual Review of Sociology*, 30, 124–145.

Morgera, E., Tsioumani, E., and Buck, M. (2014). *Unraveling the Nagoya Protocol*. Leiden: Brill | Nijhoff.

Nelson, F. (2010). Democratizing Natural Resource Governance: Searching for Institutional Change. In F. Nelson (Ed.), *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa*. London: Earthscan, 310–333.

Parks, L. (2020). *Benefit-Sharing in Environmental Governance Local Experiences of a Global Concept*. Abingdon: Routledge.

della Porta, D., and Diani, M. (2005). *Social Movements: An Introduction*. Second ed. Oxford: Wiley-Blackwell.

de Sousa Santos, B. (2014). *Epistemologies of the South: Justice Against Epistemicide*. London: Paradigm Publishers.

Tarrow, S. (1998). *Power in Movement*. Cambridge: Cambridge University Press.

Tobin, B. (2013). Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resource and Knowledge Rights. *Law, Environment and Development Journal*, 9(13), 142–162.

Uggla, Y. (2010). What Is this Thing called 'natural'? The Nature-Culture Divide in Climate Change and Biodiversity Policy. *Journal of Political Ecology*, 17(1), 79–91.

Vanhala, L. (2018). Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy. *Comparative Political Studies*, 51(3), 380–412.

Vermeylen, S. (2017). Materiality and the Ontological Turn in the Anthropocene: Establishing a Dialogue Between Law, Anthropology and Eco-philosophy. In L. Kotzé (Ed.), *Law and Governance for the Anthropocene*. Oxford: Hart Publishing.

Viveiros de Castro, E. (2004). Perspectival Anthropology and the Method of Controlled Equivocation. *Tipití: Journal of the Society for the Anthropology of Lowland South America*, 2(1), 3–22.