Article 3. Scope

This Protocol shall apply to genetic resources within the scope of Article 15 of the Convention and to the benefits arising from the utilization of such resources. This Protocol shall also apply to traditional knowledge associated with genetic resources within the scope of the Convention and to the benefits arising from the utilization of such knowledge.

1 Overview

This short provision\(^1\) aims to clarify the ambit of application of the Protocol: it, however, only addresses its subject-matter scope and it does so in a rather obscure manner. Several other scope-related issues, notably the temporal and spatial scope of the Protocol, were heavily debated during the negotiations but were eventually not explicitly addressed in its final text.

Article 3 at least implicitly clarifies that\(^2\) the Protocol applies not only to access to and benefit-sharing from the utilization of genetic resources, but also to traditional knowledge associated with genetic resources. And the Article appears to draw a distinction between the scope of application related to genetic resources and to traditional knowledge.

The following sections will discuss the ambiguity in the delineation of the subject-matter scope of the Protocol and analyze outstanding questions related to its temporal and spatial scope. It should also be noted that other Articles in the Protocol contribute to defining its scope.\(^3\)

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1 The text reproduces the final compromise proposal of the Japanese COP10 Presidency, which closely follows the text of draft article 3 in the Cali Draft. The only modification was the insertion of an explicit reference to the ‘scope of Article 15’ of the Convention in relation to genetic resources.

2 As opposed to what can be inferred from the title of the Protocol and its Article 1: see this commentary on Article 1, section 3.

3 See, e.g., this commentary on Articles 2, 4 and 8.
Subject-matter Scope

Article 3 appears to distinguish between the scope of the Protocol in relation to genetic resources, which is delimited by a specific reference to Article 15 of the Convention, and the scope in relation to traditional knowledge, which refers to the general scope of Convention.

With regards to traditional knowledge, however, it is difficult to understand what the Nagoya Protocol intends by making a general reference to the Convention, as its text is silent on ‘traditional knowledge associated with genetic resources’. With regards to genetic resources, the specific reference to CBD Article 15 is equally puzzling, as that Article does not address questions related to subject-matter scope, but simply reaffirms Parties' rights to regulate access to genetic resources under their national jurisdiction through national law. The only possible explanation for the obscure drafting of Article 3 can be traced back to the negotiators’ intention to de-link the spatial scope of the Nagoya Protocol in relation to genetic resources from the CBD provision on jurisdictional scope. The latter states that the Convention applies to processes and activities under Parties’ jurisdiction or control also in areas beyond the limits of national jurisdiction. Basically, the Protocol drafters' main concern was to implicitly exclude bioprospecting activities on marine genetic resources in areas beyond national jurisdiction from the scope of the Protocol, as discussed below.

As the overall usefulness of Article 3 of the Protocol is questionable, it will fall on the Protocol's governing body to clarify any questions on subject-matter scope that may arise in the future.

2.1 Human Genetic Resources

Although the text of the Convention is silent about human genetic resources, CBD Parties adopted Decision 2/11 stating that human genetic resources are not included within the framework of the Convention. Negotiators debated