Bangladesh Society of International Law

A PUBLICATION OF BSIL

Bangladesh Blog of International Law

Connecting Bangladesh to International Law

ARTICLE

The BBNJ Objection Loophole: Ensuring Article 23 Protects the High Seas, Not the Exploiters

11 May 2026 | By **Miraj Hosen**

After more than fifteen years of discussions and five years of formal negotiations, the BBNJ Agreement—the Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction—entered into force on 17 January 2026, becoming only the third implementing agreement to UNCLOS. Yet Article 23's objection clause opens a real gap. Any Party may opt out of a Conference of the Parties (COP) decision—including a Marine Protected Area (MPA) designation—by claiming it "cannot practicably comply… after making all reasonable efforts to do so." The article argues that COP-1 must adopt a three-part practicability test and a three-step equivalence standard as binding guidance to prevent Article 23 from becoming a structural loophole for powerful fishing States.

Article 23: Structure of the Objection Clause

The BBNJ Agreement introduces a significant shift from consensus-based fisheries governance: for Area-Based Management Tool (ABMT) decisions, a three-fourths majority of Parties present and voting can adopt a measure, but only after a two-thirds majority first agrees that all efforts at consensus have been exhausted. As the price of that voting power, Article 23(5) gives any Party the right to object on three grounds: (a) the decision conflicts with the Agreement or UNCLOS; (b) it discriminates unfairly against that Party; or (c) the Party cannot practicably comply after all reasonable efforts. The first two grounds are legal and testable. The third is factual and open-ended—that is where the danger lies. The treaty does include safeguards: objections must be in writing, state their grounds, be reported to successive COPs, renewed every three years, and made public. Under Article 23(6), an objecting State must still adopt measures "equivalent in effect." Without binding standards for what "impracticability" and "equivalence" require in practice, those safeguards remain aspirational.

© 2026 Bangladesh Society of International Law (BSIL). All rights reserved.

The IOTC Precedent: What an Unrestrained Opt-Out Produces

The Indian Ocean Tuna Commission (IOTC) shows what happens when opt-outs carry no real conditions. Under Article IX(5) of the IOTC Agreement, any member can exempt itself from a conservation measure within 120 days—no justification required, no alternative measures needed. Under Article IX(6), if objections exceed one third of all members, the measure ceases to be binding on any member at all. In 2023, the EU objected to IOTC Resolution 23/02, a 72-day ban on drifting Fish Aggregating Devices (dFADs) passed by a two-thirds majority to reduce juvenile tuna depletion. Eleven contracting parties ultimately objected—crossing the one-third threshold and rendering Resolution 23/02 non-binding for all members. The Global Tuna Alliance warned the design lets countries "simply opt out of management measures they don't like without providing any rationale or alternative." The IOTC's own Scientific Committee declared yellowfin tuna overfished in 2015; it remained in that status for nearly a decade while objections blocked corrective measures. That history was on record when BBNJ negotiators wrote Article 23.

A TWAIL Reading: The Opt-Out as Structural Inequality

As James Gathii and other Third World Approaches to International Law (TWAIL) scholars have argued, international law often locks in structural inequality by building asymmetric advantages into rules that look neutral on paper. Article 23's impracticability ground does exactly this. States with large distant-water fleets—most likely to resist high-seas MPAs—also have the legal and diplomatic resources to dress commercial objections as genuine capacity problems. Developing coastal States, whose fishing communities depend on the very stocks those MPAs protect, can do neither. Beyond the equity concern, a commercially motivated objection also violates *pacta sunt servanda*—the duty under VCLT Article 26 to perform treaty obligations in good faith—and conflicts with VCLT Article 31's requirement to interpret treaty terms in light of their object and purpose: "the conservation and sustainable use of marine biological diversity."

Bangladesh's Blue Economy and the Stakes of the Loophole

For Bangladesh, the loophole has direct ecological consequences. The Bay of Bengal Large Marine Ecosystem —estimated by BOBLME project data to produce over 7% of global marine fisheries catch—underpins a blue economy contributing approximately 2.5% of GDP (Department of Fisheries, FY 2023–24). Many livelihoods depend on transboundary stocks: hilsa (*Tenualosa ilisha*), the Bay of Bengal's largest single-species fishery, migrates across national EEZs within the region. High-seas protection supports the broader Indian Ocean ecosystem on which these stocks depend. Crucially, Bangladesh's IOTC National Report (2025) confirms that

"industrial tuna fishing has not yet commenced," meaning Bangladesh has no commercial interest in objecting to high-seas conservation measures. When Bangladesh cites impracticability—say, a lack of satellite monitoring infrastructure for MPA enforcement—that is a genuine capacity gap. Under Article 41, parties must cooperate on capacity-building as "essential elements" of the treaty. Genuine incapacity should trigger support, not a permanent exemption.

Operationalising "Impracticability": A Three-Part Test

The proposals advanced here are intended for COP-1 to adopt as binding guidance. Some may argue that binding objection standards themselves require consensus at COP-1, which powerful fishing States could resist—but that concern reinforces rather than undermines the case: developing States need a prepared and coordinated position before they enter that room. Without fixed standards, "impracticability" can mean almost anything. The following three-part test, taken together with the equivalence standard below, forms what the authors call the Minimum Guidance Package—a framework to separate real incapacity from strategic avoidance.

First, concrete and objective barriers must be identified — The objecting State must name, in writing, the exact measure it cannot perform and explain why—technically or legally—it cannot do so under current conditions. Economic hardship or domestic political difficulty do not qualify. The question is whether compliance is genuinely impossible, not merely costly.

Second, demonstrated reasonable efforts must be on record — Article 23 already requires "all reasonable efforts" before an objection is valid. A valid objection must document what help was sought, what reforms were attempted, and whether capacity-building support was formally requested through the Capacity-Building and Transfer of Marine Technology (CBTMT) Committee under Article 41. A State that never asked for help cannot claim the problem is insoluble.

Third, proportionality and temporariness must be enforced — An objection must be limited to the specific barrier, not used to escape an entire MPA. Since capacity can be built over time, the Scientific and Technical Body (STB) should review each active objection at every three-year renewal and certify whether the barrier still exists. If it does not, the objection ends. The opt-out becomes a pause, not a permanent exit.

The Equivalence Standard: A Three-Step Method

Even a valid objection does not free a State from responsibility. Article 23(6) requires alternative measures "equivalent in effect." Without a method for measuring equivalence, that obligation stays hollow. Three steps

give it real content.

First, the STB must record the specific benchmark conservation outcome — If a measure closes a shipping lane to protect whales, the benchmark is a measurable reduction in ship-strike risk. Without a clear benchmark, equivalence cannot be assessed.

Second, the objecting State must prove comparable protection — It must show, with specific evidence, that its alternative reaches the same conservation result along the same ecological risk pathway—as verified by the STB. Broad claims of spirit-compliance are not sufficient.

Third, monitoring triggers must be built in from the outset — The STB checks results annually against agreed indicators. Where the conservation threshold is not met, the Implementation and Compliance Committee (ICC) flags the objection for mandatory revision at the next COP. This creates a real accountability chain, not just a paper promise.

Institutional Enforcement: STB, ICC, and CBTMT as Gatekeepers

The BBNJ Agreement establishes three bodies whose modalities, once adopted at COP-1, can police Article 23. The Scientific and Technical Body (STB) under Article 49 assesses whether objections hold up technically and identifies where technology transfer can resolve barriers. The Implementation and Compliance Committee under Article 55—non-punitive and facilitative by design—can flag commercial-interest objections and build a formal record; while it cannot sanction, that record shapes future COP deliberations and renewal reviews. The Capacity-Building and Transfer of Marine Technology Committee under Article 46 closes genuine capacity gaps over successive renewal periods, making sustained impracticability claims progressively harder to maintain.

Conclusion

Under Article 47 of the Agreement, the first COP must be convened within one year of entry into force—no later than 17 January 2027; the exact date remains unconfirmed but is expected in late 2026 or early 2027. Bangladesh's diplomats should enter that negotiation with a clear mandate: adopt the Minimum Guidance Package—the three-part practicability test and the three-step equivalence standard—as binding COP guidance. Bangladesh has every ecological reason to strengthen high-seas conservation rules and no commercial reason to weaken them. By pushing for Article 23 to function as a strictly governed safety valve—one that activates support rather than conferring permanent exemptions—Bangladesh can stand as a credible voice for the coastal developing world and help ensure the High Seas Treaty delivers what its negotiators promised.