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Regulating the Sea from the Shore: The Silent Clash between Indonesia's Government Regulation No. 26 of 2023 and UNCLOS

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Abstract : *This article critically repositions the precautionary principle and due diligence obligations as foundational norms in the international law of the sea that should have been operationalized in Government Regulation No. 26 of 2023, enacted as an implementing instrument of Article 56 of Law No. 32 of 2014 on Maritime Affairs. It interrogates the regulation's underlying that whether the Government Regulation No. 26 of 2023 can be normatively harmonized with UNCLOS to ensure compliance with the precautionary principle and due diligence obligations in regulating coastal and marine spaces? In light of the legal policy of it, which reflects a utilitarian–economic rationality that legitimizes marine sediment exploitation through administrative licensing, this study argues against this such approach, primarily such regulatory logic departs from the normative architecture of UNCLOS 1982, which embeds precaution and environmental stewardship as core constraints on the exercise of sovereign rights over maritime areas. The analysis demonstrates that Government Regulation No. 26 of 2023 represents a substantive normative shift, distancing Indonesia's coastal governance framework from both its domestic maritime legislation and its international legal commitments. This article advances the argument that a structural realignment of the regulation's substantive content is imperative to reintegrate precaution and due diligence as binding regulatory standards. Normative harmonization is thus essential to prevent systemic incoherence between national regulatory practice and the international law of the sea.*

Keywords : *Precautionary Principle, Due Diligence Obligations, National Legislations, UNCLOS*

Abstrak : Penelitian ini bertujuan untuk mendudukan kembali prinsip hukum penting dalam hukum laut internasional yaitu precautionary principle dan Due Diligence Obligations yang seharusnya diatur secara teknis dalam PP No. 26 tahun 2023 sebagai aturan turunan dari Pasal 56 UU nomor 32 tahun 2014 tentang kelautan. Masalah utama yang diteliti adalah apakah PP No. 26 Tahun 2023 dapat diselaraskan secara normatif

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dengan UNCLOS untuk memastikan kepatuhan atas precautionary principle dan due diligence principle dalam mengatur ruang pesisir dan laut? Dengan berangkat dari politik hukum PP a quo yang berorientasi pada utilitarian – ekonomik sehingga membolehkan setiap eksploitasi sedimentasi laut sepanjang terdapat izin administratif, penelitian ini menolak pendekatan semacam ini karena bertentangan dengan semangat UNCLOS yang lebih mengedepankan prinsip kehati-hatian dan perlindungan atas laut agar tidak terjadi kerusakan akibat eksploitasi. Hasil penelitian menunjukan bahwa PP No. 26 tahun 2023 secara substantif telah bergeser jauh dari materi muatan di UU Kelautan, sekaligus terhadap UNCLOS. Dengan demikian, tulisan ini mengemukakan suatu tesis bahwa, perlu dilakukan penyesuaian secara menyeluruh atas materi muatan PP no. 26 tahun 2023 agar dapat kembali selaras dengan UU Kelautan dan UNCLOS, terutama terkait precautionary principle dan Due Diligence Obligations sebagai dua prinsip hukum penting dalam mengatur dan mengendalikan pemanfaatan wilayah laut. Harmonisasi ini penting agar tidak menimbulkan konflik antar norma yang terdapat dalam hukum nasional dan hukum internasional.

Kata kunci : Precautionary Principle, Due Diligence Obligations, Legislasi Nasional, UNCLOS.

Introduction

It is important to open this article by invoking Sutrisno's view that "the key to the successful implementation of international law in Indonesia lies in collective commitment and the awareness that the integration of global legal norms is not merely a formal obligation, but a strategic necessity for strengthening national legal governance".[1] This view indicates that the interaction between national law and international law should not be regarded as problematic, either theoretically or practically, given the unity of law as a systemic whole. Such unity of law constitutes the point of departure for building a sustained commitment to a more harmonious integration of national and international legal orders.

The dialectic between monism and dualism[2] in international law may indeed be understood as a sui generis manifestation of legal scholarship; however, at a more fundamental level of legal understanding, these theoretical divergences do not signify a substantive separation between national and international law. Both constitute law, differing primarily in their locus of operation, yet remaining interconnected within a single systemic framework and mutually reinforcing one another.[3]

One illustration of the foregoing problem in Indonesia is Government Regulation No. 26 of 2023 on the Management of Marine Sediment Products, which operationalises Article 56 of Law No. 32 of 2014 on Maritime Affairs.

[1] Andri Sutrisno, 'Penerapan Hukum Internasional Dalam Sistem Hukum Nasional Indonesia: Tantangan Teoritis Dan Praktis', 5.2 (2025), 79–90.
[2] J.G. Starke, *An Introduction to International Law*, *London*, 7th edn (London: Butterworths, 1972) <https://doi.org/10.1163/9789004216815>.
[3] Sefriani, Hukum Internasional Suatu Pengantar, PT Raja Grafindo Persada, Jakarta, 2010, hlm. 98.

While the regulation appears, at first glance, to constitute a routine implementing instrument governing sediment management, closer examination reveals significant practical and conceptual challenges arising from its regulatory design and implications.

The practical problem concerns the very legal basis of Government Regulation No. 26 of 2023 as an implementing regulation purportedly mandated by Article 56 of the Maritime Law. Article 56, however, does not expressly delegate regulatory authority over the management of marine sediment products; rather, it imposes obligations on the government to ensure marine protection and conservation. The absence of a clear delegated norm in Article 56 renders the regulatory foundation of Government Regulation No. 26 of 2023 legally defective, as no explicit delegation to adopt such an implementing regulation can be inferred.[4] The Supreme Court subsequently addressed this legal deficiency through judicial review, which annulled several provisions of the Regulation, namely Articles 10(2), (3), and (4), governing the management and licensing of marine sand as a sediment product. The Court held that these provisions were inconsistent with Article 56 of the Maritime Law and therefore lacked general binding force.[5]

Notwithstanding the partial annulment of several provisions by the Supreme Court for exceeding the scope of their enabling legislation, Government Regulation No. 26 of 2023 remains conceptually problematic because it remains *silent on its clash* with both the Maritime Law and UNCLOS. The regulatory policy underpinning the Regulation adopts a predominantly utilitarian–economic approach[6], which departs from the legal policy embedded in the Maritime Law and UNCLOS that prioritises precautionary and protective approaches to marine environmental governance. This normative divergence results in an overall regulatory orientation that privileges short-term utility and resource exploitation through licensing schemes, with insufficient regard for the sustainability of marine resources. By contrast, both the Maritime Law and UNCLOS foreground preventive and protective obligations as expressions of the general duty to protect and preserve the marine environment.

The foregoing conceptual problems necessitate a strategic response by Indonesia, namely the harmonisation of national and international legal norms governing maritime affairs. Such harmonisation is essential as a concrete manifestation of Indonesia's determination to uphold its commitments to the protection and conservation of the marine environment.

Based on the foregoing harmonisation framework, its concretisation should not be pursued merely through substantive normative adjustments driven by economic considerations. Still, it must instead remain anchored in two

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[4] This concept is closely associated with a doctrine in legislative theory which requires that regulatory authority be delegated by the legislature for a regulation to be validly enacted by the executive. This principle is known as the delegation doctrine and is also embodied in Article 12 of Law Number 12 of 2011. See also Jonathan H. Adler, 'The Delegation Doctrine', *Harvard Journal of Law & Public Policy: Per Curiam*, Summer 202.12 (2024), 1–17.
[5] Mahkamah Agung Republik Indonesia, Putusan Mahkamah Agung No. 5 P/HUM/2025, 2023, Government Regulation No. 26 of 2023. 90–91.
[6] Hendra Gunawan Andi Darma Taufik, Fitri Wahyuni, 'Analisis Sejarah Dan Perkembangan Teori Utilitarianisme Terhadap Hukum Indonesia', *Yurisprudentia*, 10.3 (2024), 88–102.

foundational pillars of the international law of the sea, namely the precautionary principle and due diligence obligations.

The first foundational pillar is the precautionary principle, as reflected in Article 56 of the Maritime Law and Article 192 of UNCLOS, which impose mandatory obligations on States to protect and preserve the marine environment. Legally, Indonesia must ensure that this principle is adequately translated into technical regulations to secure effective implementation. Although the Supreme Court has annulled several provisions of Government Regulation No. 26 of 2023, the comprehensive internalisation of the precautionary principle remains weak, as it is not positioned as a controlling norm. Consequently, the utilisation and management of marine sedimentation continue to be permitted subject to licensing, without adequate risk management of potential environmental harm. This regulatory orientation departs from the logic of the international law of the sea, which requires that precaution prevail and, where necessary, the restraint or suspension of exploitative activities, even in the absence of complete scientific certainty.

The second foundational pillar is the due diligence obligation, which, under international law of the sea, requires States to take all reasonable and proportionate measures to prevent harm to the marine environment. A central deficiency in Government Regulation No. 26 of 2023 lies in the absence of clearly articulated, determinate, and stringent standards of care. This weakness is reflected in the lack of robust regulatory parameters, including defined environmental harm thresholds, cumulative impact assessment, and binding long-term monitoring obligations, none of which are formulated with sufficient rigour in the Regulation.

The foregoing analysis demonstrates the existence of a serious *silent clash* of norms between Indonesia's maritime legal regime and UNCLOS. Accordingly, the central legal issue addressed in this article is how Indonesia's Government Regulation No. 26 of 2023 can be normatively harmonised with UNCLOS to ensure compliance with the precautionary principle and due diligence obligations in the regulation of coastal and marine spaces.

To address this legal issue, this article proceeds in three main parts. First, it examines the *Precautionary Principle and Due Diligence as Controlling Norms under the Law of the Sea*, elaborating these principles as mandatory norms that provide the normative foundation for harmonising Indonesia's maritime regulatory framework, given that they constitute the core normative spirit of both the Maritime Law and UNCLOS. Second, it analyses *the Silent Normative Clash between Government Regulation No. 26 of 2023 and UNCLOS*, focusing on identifying normative misalignment without alleging an explicit violation. Third, it advances *Normative Harmonisation: Re-Aligning Government Regulation No. 26 of 2023 with Precautionary and Due Diligence Obligations* as a framework for recalibrating regulation.

Methods

Legal scholarship, as a *sui generis* discipline, possesses distinct characteristics in addressing emerging legal issues. In this context, *sui generis* denotes that the resolution of legal problems employs methodological approaches commonly

practised in legal scholarship, as articulated by Hutchinson, namely "*arguments are derived from authoritative sources, such as existing rules, principles, precedents and scholarly publications*".[7] In a similar vein, Peter Mahmud Marzuki likewise observes that: "*Legal research is a structured and methodical inquiry undertaken to ascertain relevant legal rules and doctrines for the purpose of responding to specific legal issues*".[8]

Accordingly, this study employs a doctrinal legal research method that operationalises analysis through three stages: interpretation of legal norms, normative evaluation, and systemic harmonisation. The research begins by formulating a central thesis, which is substantiated through authoritative legal sources, including legislation, judicial decisions, and legal scholarship.

The conceptual approach is used to interpret and apply key principles, particularly the precautionary principle and due diligence obligations under the international law of the sea, as evaluative standards. The statute approach systematically examines relevant legal instruments, including the Maritime Law, UNCLOS 1982, and Government Regulation No. 26 of 2023, to identify inconsistencies and normative gaps. The case approach analyses ITLOS and ICJ jurisprudence to extract authoritative interpretations and assess how these principles are applied in practice. Through this method, legal principles are operationalised as analytical tools to interpret, evaluate, and harmonise the relevant legal framework.

Result And Discussion

Precautionary Principle and Due Diligence as Controlling Norms under the Law of the Sea

The first section positions the precautionary principle and due diligence obligations as controlling norms, rather than mere policy considerations, in setting standards for the protection and preservation of the marine environment within Indonesia's maritime legal regime. Its ultimate objective is to affirm that the international normative standards adopted by Indonesia must guide domestic law, including technical regulation, to ensure normative coherence and effective implementation. Accordingly, this section addresses two core aspects.

First, it conceptualises the precautionary principle as an interpretative principle, functioning not as an autonomous rule but as a framework for construing and applying State obligations under UNCLOS. In functional terms, this interpretative role serves to lower evidentiary thresholds of environmental harm, broaden the scope of due diligence, and constrain the assessment of national regulatory policies. The precautionary principle initially evolved as a norm of customary law[9] originating from environmental

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[7] Umbu Rauta and Titon Slamet Kurnia, 'Pengaturan Larangan Plastik Sekali Pakai: Kritik Terhadap Putusan Mahkamah Agung Nomor 29 P/Hum/2019 Dari Perspektif Teori Dan Hukum Perundang-Undangan', *Jurnal Hukum Ius Quia Iustum*, 28.3 (2021), 527–49 <https://doi.org/10.20885/iustum.vol28.iss3.art4>.
[8] Peter Mahmud Marzuki, Penelitian Hukum, Kencana, Jakarta, 2005, hlm. 35.
[9] Et.al. Patricia Birnie, *International Law & The Environment*, Third (Oxford: Oxford University Press, 2009).

policy principles aimed at addressing scientific uncertainty in environmental risk management. Within the development of international environmental law and the international law of the sea, it has undergone a normative transformation from a merely policy-oriented guideline into an interpretative principle that shapes the construction, application, and evaluation of State obligations under international legal instruments, including UNCLOS.

This normative status is reflected in Principle 15 of the 1992 Rio Declaration, which provides that: "*To protect the environment, the precautionary principle shall be widely applied by States according to their capabilities*". Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The principle thus affirms environmental protection as a state obligation. It precludes reliance on scientific uncertainty to defer preventive action against serious or irreversible harm, particularly in relation to marine exploitation. In this vein, Gullett and Craik observe that "*the precautionary principle provides direction to project proponents and decision-makers on how scientific uncertainty ought to be addressed*",[10] reinforcing its function as a normative guide for actors engaged in activities at sea.

Accordingly, as an interpretative principle, the precautionary principle does not operate as a self-standing rule that expressly generates new obligations, but rather as a normative lens through which existing obligations are construed. In methodological terms, it shapes the standard of care in determining when and how States must discharge their duties to protect the marine environment. Wollensack, for instance, underscores the salience of the precautionary approach in interpreting Article 290(1) UNCLOS, noting that although not expressly codified, it has been recognised and applied in ITLOS practice in adjudicating disputes under the law of the sea. This interpretative orientation is consistent with Article 31 of the 1969 Vienna Convention on the Law of Treaties, which requires treaties to be interpreted in light of their object and purpose, including the protection and preservation of the marine environment that constitutes the core of Part XII of UNCLOS.[11]

In the context of the law of the sea, both under UNCLOS and Indonesia's Maritime Law, the precautionary principle ensures that the obligation to protect the marine environment is not reduced to a merely reactive duty triggered only after harm has occurred, but operates as an active, forward-looking preventive obligation. This function is particularly salient given the vulnerability, complexity, and scientific uncertainty that characterise marine ecosystems.[12] A central contribution of the precautionary principle as an interpretative norm is to lower the evidentiary threshold for activating environmental protection duties: States are not entitled to await actual, demonstrable, and scientifically verified harm; the existence of a reasonable risk or the potential for serious or irreversible damage suffices to trigger

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[10] Warwick Gullett and Neil Craik, 'Precautionary Environmental Impact Assessments under the BBNJ Agreement: More than a Minor or Transitory Effect on the Marine Environment?', *Ocean Development and International Law,* 57.1 (2025), 1–29 <https://doi.org/10.1080/00908320.2025.2563269>.

[11] United Nations, *Vienna Convention on the Law of Treaties, United Nations, Treaty Series., United Nations, Treaty Series*, 1969, MCLV, 331 <http://www.refworld.org/docid/3ae6b3a10.html>.

[12] Patricia Birnie.,al.

regulatory action.[13] This approach has direct implications for the interpretation of Article 192 UNCLOS, which establishes the general obligation to protect and preserve the marine environment.[14] Read narrowly, the provision would entail a reactive obligation arising only *ex post*; read through a precautionary lens, however, Article 192 must be understood as imposing preventive obligations operative from the planning and decision-making stages.

Likewise, Article 194 UNCLOS, which obliges States to prevent, reduce, and control marine pollution, cannot be construed merely in a literal and technical sense as a duty to regulate already identified pollution. Read through the lens of the precautionary principle, the term “to prevent” acquires a broader normative meaning, namely an obligation to act before the materialisation of harm, even where causal links between activities and environmental impacts have not been fully established scientifically. As a norm of customary international law applied in the adjudication of international law of the sea disputes, this precautionary approach is reflected in international judicial practice, notably in the *Southern Bluefin Tuna Cases* (Provisional Measures), in which the International Tribunal for the Law of the Sea (ITLOS) underscored the need for caution in the face of scientific uncertainty concerning fish stocks and the risk of irreversible harm.[15]

The precautionary principle also enriches and expands the scope of due diligence obligations under international law of the sea.[16] Absent a precautionary perspective, due diligence risks being reduced to minimal procedural compliance, such as conducting environmental assessments or adhering to formal administrative standards. Read together with the precautionary principle, however, due diligence assumes a substantive character, requiring proactive, risk-based, and conservative regulatory conduct. In this framework, compliance is assessed not merely by formal adherence to procedures, but by the quality and intensity of State efforts to anticipate environmental risks, integrate the best available scientific evidence, apply appropriate standards of care, and continuously adjust policies and regulations in light of evolving scientific knowledge of marine environmental harm.

In international practice, international courts and tribunals have affirmed the dynamic character of these obligations. In the *MOX Plant* case, ITLOS emphasised the duties of cooperation, information exchange, and precaution[17] in addressing the risk of transboundary marine pollution. Furthermore, in its 2011 Advisory Opinion concerning activities in the Area sponsored by States, ITLOS affirmed that obligations relating to the protection of the marine

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[13] Benedicte Sage-Fuller, *The Precautionary Principle in US Environmental Law, Routledge*, 1st edn (New York: Taylor & Francis Group, 2013) <https://doi.org/10.4324/9781315070490-24>.

[14] United Nations, *United Nations Convention on the Law of the Sea, United Nations, Treaty Series*, 1982 <https://doi.org/10.1163/157180893X00396>.

[15] Southern Bluefin Tuna and The Tribunal, Press Release, 1999, pp. 27–29.

[16] David and Ellen Hey Freestone, *The Precautionary Principle and International Law - The Challenge of Implementation*, ed. by David Freestone and Ellen Hey (London: Kluwer Law International, 1996).

[17] International Tribunal For The Law of The Sea, The MOX Plant Case (Ireland v . United Kingdom), *International Law Reports*, 2001, X <https://doi.org/10.1017/cbo9781316152584.005>.

environment are evolving[18] in nature and must adapt to developments in scientific knowledge, technological capacity, and the level of environmental risk confronted.

From the foregoing, the precautionary principle operates as a normative bridge between due diligence obligations and the realities of scientific uncertainty, while preventing States from relying on minimal procedural standards to evade substantive environmental responsibilities.

As an interpretative principle, the precautionary principle also constrains State discretion in the formulation and implementation of national policies. It affirms that policies concerning the use of maritime space cannot be construed in isolation from States' international obligations under UNCLOS.[19] In this perspective, the precautionary principle rejects development-centred approaches that relegate environmental protection to a secondary consideration and instead requires that all marine spatial policies be designed within a preventive, sustainable framework for marine environmental protection.

In this study, a precautionary-based interpretative approach is crucial for assessing Government Regulation No. 26 of 2023 on Marine Spatial Planning. When measured against Indonesia's UNCLOS obligations, the Regulation reveals significant normative tension. It prioritises the allocation of marine space for economic uses and infrastructure, while treating environmental protection as ancillary. From a precautionary perspective, zoning should be based on risk assumptions rather than presumptions of safety, requiring prior identification of potential impacts and scientific uncertainty. The dominance of utilisation-oriented zoning risks reducing preventive obligations to mere ex post mitigation.

A key concern is the reduction of environmental impact assessments (AMDAL) to procedural formalities. Where assessments merely legitimise pre-set zoning decisions, the precautionary function is diluted. Properly construed, precaution requires environmental assessment to operate as the primary normative basis for decision-making, not as ex post justification. The absence of an explicit precautionary logic in Government Regulation No. 26 of 2023 therefore risks a normative "silent clash" with Indonesia's UNCLOS obligations.

In international law of the sea, due diligence has evolved into a central component of States' obligations to protect and preserve the marine environment, including as a key operational corollary of the precautionary principle. Although UNCLOS does not consistently employ the term "due diligence", scholarly consensus and judicial practice recognise that Articles 192 and 194 embody a standard of due diligence as an obligation of conduct, requiring preventive, continuous, and risk-based measures to avert

[18] International Tribunal For The Law of The Sea, International Tribunal for the Law of the Sea : Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area 2011, *ITLOS*, 2011.
[19] D. Rothwell & T. Stephens, *The International Law of the Sea* (3rd edn). Hart: Bloomsbury, 2023, h. 60-90.

environmental harm.[20] Article 192—"States have the obligation to protect and preserve the marine environment"—is widely understood as reflecting this standard, imposing proactive regulatory and policy duties even in conditions of scientific uncertainty.[21]

Article 194 UNCLOS obliges States to "take all measures necessary to prevent, reduce and control pollution of the marine environment" from all sources. This provision is best understood not as an obligation of result, but as an obligation of conduct requiring States to design, implement, monitor, and adjust regulatory measures in light of the best available science and evolving environmental risks.[22] In its climate change Advisory Opinion, ITLOS confirmed that such coordinated preventive action—including with respect to anthropogenic greenhouse gas emissions—constitutes due diligence, and characterised the standard under Article 194 as "stringent due diligence" given the serious and irreversible risks to the marine environment, while recognising differentiated State capacities.[23] Accordingly, Articles 192 and 194 UNCLOS establish binding due diligence obligations of conduct, requiring all reasonable and effective preventive measures without guaranteeing specific environmental outcomes.[24]

Due diligence entails a duty on States to establish adequate domestic regulatory frameworks to protect the marine environment, as implied by Articles 192 and 194 of UNCLOS and by the general principle of due diligence. The 2024 ITLOS Climate Change Advisory Opinion affirms that Article 194 requires States to "put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question".[25] Accordingly, domestic regulation is not a matter of policy discretion but an expression of international responsibility; failure to adopt adequate national measures may constitute a breach of the due diligence standard under international law.

While implementation is institutionally and politically demanding, legal certainty in domestic incorporation substantially advances global cooperation for the protection and preservation of the marine environment. In this regard, Chen observes that "the implementation of these domestic laws not only strengthens each state's internal environmental accountability but also provides a legal foundation and operational framework for the international community in addressing increasingly severe global environmental challenges".[26] Accordingly, domestic legislation and regulation incorporating

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[20] Heike Peters, Anne Krieger and Leonhard Kreuzer, *Due Diligence in the International Legal Order*, *Oxford University Press* (Oxford: Oxford University Press, 2020) <https://doi.org/10.1093/oso/9780198869900.001.0001>.

[21] Jiangtao Qian, 'Interpretation and AGovernment Regulation No. 26 of 2023lication of General International Law in the Protection and Preservation of Marine Environment', *Frontiers in Marine Science*, 12.November (2025), 1–16 <https://doi.org/10.3389/fmars.2025.1683136>.

[22] International Tribunal For The Law of The Sea, Advisory Opinion Submitted by The Commission of Small Islands States on Climate Change and International Law, *International Tribunal For The Law Of The Sea*, 2024 <https://doi.org/10.1163/9789004252486_004>.

[23] ITLOS, Advisory Opinion on Climate Change: A Landmark Decision, 27 March 2025.

[24] Zonghua Chen, 'Due Diligence Obligations Under UNCLOS: Navigating the Conduct-Resault Dichotomy in the Context of Ocean Climate Change', *Maritime Safety and Security Law Journal*, 2025, 1–23.

[25] Sea.

[26] Chen.

due diligence functions not merely serve as manifestations of state obligations but also as normative building blocks of the global governance architecture aimed at marine environmental protection and conservation.

Given the contextual and dynamic nature of due diligence, effective national regulatory frameworks must be continuously updated to reflect advances in scientific knowledge and lessons from international best practices. This entails, inter alia: (i) adjusting standards to emerging risks (e.g., ocean acidification and microplastic pollution); (ii) integrating the latest scientific data; and (iii) establishing transparent mechanisms for periodic regulatory review. With respect to microplastics, Xin Yang et al. underscore the critical importance of adequate regulation to ensure effective responses, noting that regulatory insufficiency remains a key impediment.[27] More broadly, the systematic integration of up-to-date scientific evidence into national policy[28] is essential to ensure that due diligence obligations are implemented rigorously and responsively.

National regulatory frameworks robustly anchored in due diligence are ultimately directed toward preventing harm to the marine environment—the clearest expression of due diligence in the law of the sea. While Article 192 UNCLOS provides the overarching normative framework, Article 194 operationalises concrete preventive obligations. ITLOS, in its 2024 Advisory Opinion and earlier jurisprudence, affirms that due diligence requires States to adopt preventive measures before the occurrence of harm, even in the absence of full scientific certainty, in line with the precautionary principle. Environmental impact assessments (EIAs) for activities with potentially significant marine impacts constitute a core component of this due diligence framework[29], operating as preventive tools to identify risks ex ante and calibrate appropriate safeguards. ITLOS has further recognised that procedural obligations, such as EIAs, may be of equal or even greater significance than substantive standards in international law.[30]

The State's duty of prevention extends to ensuring that non-State actors, including private corporations under its jurisdiction or control, do not contribute to marine environmental degradation.[31] ITLOS, in its 2024 Advisory Opinion, affirmed that States must secure compliance by non-State actors with necessary preventive measures as an integral dimension of due diligence. Prevention is thus operational, requiring risk identification, reliance on best

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[27] Xin Yang and others, 'International Law and Regulation of Marine Microplastics: Current Situation, Problems, and Development', *Sustainability (Switzerland)*, 16.21 (2024), 1–17 <https://doi.org/10.3390/su16219337>.

[28] Shiqi Liang, 'Reflections on the Interpretation and Application of the Due Diligence Obligation in International Climate Litigation: A Comparative Study of Daniel Billy et Al. v. Australia and the COSIS Advisory Opinion', *Frontiers in Marine Science*, 11.December (2024), 1–14 <https://doi.org/10.3389/fmars.2024.1483677>.

[29] Kemmala Dewi, 'Peran Analisis Mengenai Dampak Lingkungan Dalam Pembangunan Berkelanjutan: Tinjauan Perspektif Hukum', *Law Studies and Justice Journal*, 1.2 (2024), 51–61.

[30] Julio Alberto Tilloy, 'The ITLOS Jurisprudence Regarding the Procedural Obligation to Conduct an Environmental Impact Assessment and Its Significance for Deep Seabed Mining', *The Italian Review of International and Comparative Law*, 3.2 (2023), 325–47 <https://doi.org/10.1163/27725650-03020009>.

[31] Wanping Zeng and Guihua Wang, 'On the Obligations of States to Respond to Climate Change and China's Legal Consequences: Based on the Advisory Opinion in Case No. 31 of the International Tribunal for the Law of the Sea', *Frontiers in Marine Science*, 11.January (2024), 1–13 <https://doi.org/10.3389/fmars.2024.1468210>.

available scientific evidence, and the adoption of mitigation measures ex ante. Authorizing high-risk activities without adequate risk assessment or relevant scientific inquiry may therefore constitute a breach of the international due diligence standard.

Another core component of due diligence is the State's duty of continuous monitoring and oversight of the marine environment and activities affecting its ecological integrity. This obligation does not end with the adoption of regulations or preventive measures; States must ensure their effectiveness through systematic monitoring, including regular scientific observation, data collection and trend analysis, and transparent reporting to inform policymaking. ITLOS has affirmed that due diligence is dynamic and risk-sensitive: the higher the potential risk, the stricter the required standards of supervision and control, particularly for transboundary harms (e.g., greenhouse gas–related pollution), which entail heightened oversight commensurate with their broader global impacts on the marine environment.[32]

Continuous monitoring also entails corrective action where indicators show that initial preventive measures are inadequate. States are thus required not only to monitor but to adapt and update policies and measures to ensure that due diligence remains responsive to evolving environmental conditions and risks. As Foster argues, due diligence requires States to consider impacts on others, including future generations, and to recalibrate action in light of changing factual circumstances and risk profiles.[33]

In modern international law of the sea, due diligence operates as a critical regulatory norm mediating the relationship between the precautionary principle and States' obligations under UNCLOS. Read through Articles 192 and 194, it requires States to establish adequate regulatory frameworks, adopt preventive measures ex ante, and ensure continuous oversight of their effectiveness. As affirmed by ITLOS, including in its 2024 Advisory Opinion, due diligence constitutes a dynamic, contextual, and stringent obligation of conduct, operationalising the precautionary principle within the UNCLOS regime for the protection and preservation of the marine environment.

The Silent Normative Clash between Government Regulation No. 26 of 2023 and UNCLOS

This section examines the normative misalignment between Government Regulation No. 26 of 2023 and UNCLOS. The primary objective is to map the regulatory gaps between national law and UNCLOS, particularly in Government Regulation No. 26 of 2023, highlighting underlying issues without asserting explicit violations. The analysis begins by characterizing Government Regulation No. 26 of 2023 in terms of its 'permit-based approach' and 'broad administrative discretion.' It then considers the shift from a preventive to a proceduralized framework. Subsequently, philosophical weaknesses regarding the precautionary principle and risk management

[32] Liang.

[33] Caroline E. Foster, 'Due Regard for Future Generations? The No Harm Rule and Sovereignty in the Advisory Opinions on Climate Change', *Transnational Environmental Law*, 13.3 (2024), 588–609 <https://doi.org/10.1017/S2047102524000207>.

mechanisms are discussed. The section concludes with an examination of 'silent clash' as a form of normative misalignment rather than overt conflict.

The relationship between Government Regulation No. 26 of 2023 and UNCLOS reveals a normative tension manifested not as an open legal conflict but as a silent normative clash. This tension does not stem from a direct textual contradiction between national and international norms, but from differing regulatory paradigms and normative priorities in managing marine environmental risks. As Kojima observes, although UNCLOS incorporates general principles of international environmental law, its integration into domestic frameworks generates normative challenges and potential regulatory gaps that must be addressed to respond effectively to contemporary environmental challenges.[34]

UNCLOS establishes the protection and preservation of the marine environment as a primary international legal obligation, operationalized through due diligence standards and a prevention-oriented approach.[35] In contrast, Government Regulation No. 26 of 2023 implements marine environmental protection primarily via spatial planning, zoning, and administrative permitting mechanisms. Planning is exemplified in Chapter II of the regulation, which governs the management of marine sedimentation with an economic-oriented focus. Administrative permitting, as set out in Articles 15(3) – (4), 16, and 30, provides the legal basis for legitimizing sediment management operations. This divergence in regulatory orientation produces normative misalignment between the two legal regimes without implying an explicit breach of international obligations.

Government Regulation No. 26 of 2023 structures marine spatial governance through zoning and permitting, legitimizing economic activities such as ports, reclamation, and strategic projects. Zoning compliance provides initial legitimacy, while environmental safeguards are addressed via administrative permits (AMDAL). The regulation grants wide central government discretion to adjust zones for national priorities, reflecting a development-oriented governance model where marine environmental protection is negotiable rather than an absolute normative constraint.[36]

This approach fundamentally contrasts with UNCLOS Article 192, which imposes a general obligation on States to protect and preserve the marine environment independently of development priorities or domestic permitting regimes. The ITLOS Advisory Opinion on the responsibility of sponsoring States emphasizes that the duty under Article 192 is comprehensive and continuous, applying to all marine activities regardless of national regulatory techniques.[37] While Government Regulation No. 26 of 2023 does not negate

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[34] Chie Kojima, *Integration of General Principles of International Environmental Law into the Law of the Sea: Assessment and Challenges*, Marine Policy 149 (2023): 1-9.
[35] Wenxian Qiu, Bingqing Wu, and Tsung Han Tai, 'Judicialization and Legal Implications of International Maritime Governance in the Context of Climate Change: Insights from ITLOS Advisory Opinion No. 31', *Frontiers in Marine Science*, 12.31 (2025), 1–16 <https://doi.org/10.3389/fmars.2025.1640148>.
[36] K. Madarcos and others, 'Doing Marine Spatial Zoning in Coastal Marine Tropics: Palawan's Environmental Critical Areas Network (ECAN)', *Marine Policy*, 145.November (2022), 1–9 <https://doi.org/10.1016/j.marpol.2022.105207>.
[37] International Tribunal For The Law of The Sea.

environmental obligations, its operationalization through administrative discretion may diminish the normative intensity of these duties in practice.

Regarding the shift from a prevention-oriented logic to risk proceduralization, UNCLOS fundamentally adopts a preventive approach as the basis for marine environmental protection. Article 194(1) obliges States to take 'all measures necessary' to prevent, reduce, and control marine pollution, while paragraph (2) prohibits transferring pollution impacts to other areas. These provisions are understood as anticipatory, risk-based due diligence obligations rather than reactive measures.[38]

Article 206 of UNCLOS requires States to conduct an Environmental Impact Assessment (EIA) when an activity may significantly harm the marine environment. In the MOX Plant case, ITLOS emphasized EIA as a substantive international legal obligation, not a mere administrative formality.[39] In contrast, Government Regulation No. 26 of 2023 integrates EIA into the national permitting system (AMDAL) after zoning compliance, treating environmental risks as an administrative management tool rather than a substantive legal constraint.

This shift clearly reflects a transformation from a prevention-oriented approach to the proceduralization of environmental obligations, wherein environmental protection is reduced to administrative compliance within the permitting process. International environmental law literature observes that such proceduralization may undermine the preventive function of environmental law, as the focus shifts from risk avoidance to managing risks that have already been legally sanctioned.[40]

Regarding the limited precautionary logic and risk management mechanisms in Government Regulation No. 26 of 2023, another dimension of the silent normative clash is evident in its weak articulation of precaution. Although UNCLOS does not explicitly mention the precautionary principle, ITLOS interprets marine environmental obligations to encompass a precautionary approach. In the Southern Bluefin Tuna case, ITLOS held that scientific uncertainty cannot justify delaying protective measures.[41] Government Regulation No. 26 of 2023, however, lacks provisions mandating the suspension or restriction of activities solely due to scientific uncertainty, emphasizing zoning compliance and administrative requirements over strict risk thresholds, as exemplified in reclamation regulations.

Furthermore, risk management mechanisms under Government Regulation No. 26 of 2023 are predominantly ex post, relying on administrative monitoring and evaluation after permits are issued. This approach contrasts with the due diligence standards developed in ITLOS jurisprudence, which

[38] Yoshifumi Tanaka, *The International Law of the Sea*, *Cambridge University Press*, 2023.
[39] ITLOS, MOX Plant Cases.
[40] Philippe Sands and others, *Principles of International Environmental Law, Fourth Edition*, *Cambridge University Press*, 2018 <https://doi.org/10.1017/9781108355728>.
[41] ITLOS, Southern Bluefin Tuna and Tribunal.

emphasize the necessity of ex ante preventive measures, particularly for activities posing high risks to the marine environment.[42]

Based on the foregoing, the relationship between Government Regulation No. 26 of 2023 and UNCLOS is best characterized as normative misalignment rather than an open legal conflict. While Government Regulation No. 26 of 2023 does not explicitly contravene UNCLOS's marine environmental obligations, its implementation reflects a normative shift from substantive protection to administrative governance. This aligns with the concept of regulatory gaps in international law, where broadly binding international duties are operationalized through domestic mechanisms with distinct regulatory logic. To illustrate, subsequent tables map the silent clash between UNCLOS norms and Government Regulation No. 26 of 2023.

Table 1. Precautionary Principle and Due Diligence

Principle/Norms in UNCLOS	Norms in Government Regulation No. 26 of 2023	Normative Gap / Silent Clash
Article 192 UNCLOS: Obligation to protect and preserve the marine environment.	Government Regulation treats the utilization of sediment as an object of management and economic exploitation.	The UNCLOS paradigm positions environmental protection as a primary norm, whereas Government Regulation adopts a utilization-oriented logic, rendering protection secondary.
Articles 194(1) – (2) of UNCLOS impose due diligence obligations to prevent, reduce, and control marine pollution.	Government Regulation regulates permitting and sediment management without explicitly formulating the precautionary principle.	The precautionary principle is not explicitly internalized as a governing norm, resulting in regulatory dilution.
Article 206 of UNCLOS imposes an obligation to conduct an Environmental Impact Assessment (EIA) when significant risk exists.	Government Regulation refers to the national AMDAL system without linking it to the significant risk threshold under international obligations.	The UNCLOS 'significant harm' threshold does not function as a binding trigger for national norms.

[42] S. W.K. van den Burg and others, 'Monitoring and Evaluation of Maritime Spatial Planning – A Review of Accumulated Practices and Guidance for Future Action', *Marine Policy*, 150.January (2023), 1–11 <https://doi.org/10.1016/j.marpol.2023.105529>.

Table 2. No Harm Rule & Transboundary Impacts

Principle/Norms in UNCLOS	Norms in Government Regulation No. 26 of 2023	Normative Gap / Silent Clash
Article 194 (2) of UNCLOS stipulates that States shall ensure their activities do not cause harm to other States.	Government Regulation focuses on national jurisdiction without specific provisions addressing transboundary impacts.	An inward-looking approach creates the potential to neglect transboundary harm.
Article 123 of UNCLOS: the obligation for regional cooperation in enclosed or semi-enclosed seas.	Government Regulation does not include obligations for regional cooperation.	UNCLOS cooperation obligations are not operationalized in national law.
General principles of international law require notification and consultation when potential transboundary impacts arise.	Government Regulation does not establish mechanisms for international notification or consultation.	Procedural gap between international obligations and the domestic permitting regime.

Table 3. Continuous monitoring & the interests of future generations

Principle/Norms in UNCLOS	Norms in Government Regulation No. 26 of 2023	Normative Gap / Silent Clash
Articles 204–205 of UNCLOS: continuous monitoring and reporting obligations.	Government Regulation provides for administrative oversight without linking it to international responsibility.	Monitoring is framed as an administrative obligation rather than as continuous international due diligence.
ITLOS interpretation: adaptive obligation in response to new scientific findings.	Government Regulation does not include provisions for science-based policy adaptation.	UNCLOS is dynamic, whereas Government Regulation tends to be static → creating a policy lag.
The principle of the interests of future generations (emerging principle).	Government Regulation is oriented toward short-term economic utilization.	Intergenerational equity gap in national law.

A normative comparison between UNCLOS 1982 and Government Regulation No. 26 of 2023 reveals a silent clash rather than a textual conflict, reflecting a regulatory gap in domestic internalization of international law of the sea principles. UNCLOS prioritizes marine environmental protection through the precautionary principle, continuous due diligence, transboundary harm prevention, and cooperation obligations. Government Regulation No. 26 of 2023, in contrast, frames marine sediment management within an administrative–economic approach, with environmental protection implicit and sectoral. This gap risks weakening precaution, obscuring transboundary responsibility, and limiting adaptive, science-based policy and intergenerational equity. Normative harmonization is therefore imperative through progressive interpretation or strengthened derivative norms.

Normative Harmonization: Re-Aligning Government Regulation No. 26 of 2023 with Precautionary and Due Diligence Obligations

After examining the precautionary principle, due diligence, and the silent clash between Government Regulation No. 26 of 2023 and UNCLOS, the next issue concerns Indonesia's measures to address these legal gaps. This focuses on normatively harmonizing Government Regulation No. 26 of 2023 with UNCLOS to ensure compliance with precautionary obligations and marine spatial management duties. This section aims to propose normative harmonization strategies that strengthen alignment with international law without awaiting formal legislative amendments, offering practical avenues to reconcile domestic regulatory frameworks with UNCLOS obligations.

The systemic interpretation approach (systemic integration) requires that national legal norms be read and applied coherently with States' international obligations, particularly when domestic regulations address areas long governed by international legal regimes. Practically, Rachovista observes that systemic interpretation is employed by international courts to ensure the proper application of international law. He further notes that careful, systemic interpretation can substantially mitigate interpretative difficulties.[43] More specifically, Wibawa et al. argue that interpreting international principles coherently with domestic law offers a practical means to operationalize international norms without enacting specific domestic legislation for each norm.[44]

In the context of marine spatial management, Indonesia, as a State Party to UNCLOS, is bound by substantive and procedural obligations reflecting the precautionary principle and due diligence standards.[45] This obliges Indonesia to comply with these principles irrespective of expected outcomes. Consequently, Government Regulation No. 26 of 2023 cannot be interpreted

[43] Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law', *International and Comparative Law Quarterly*, 66.3 (2017), 557–88 <https://doi.org/10.1017/S0020589317000185>.
[44] Dadang Satria Wibawa Dwi Imroatus Sholikah, 'Integrasi Hukum Internasional Ke Dalam Sistem Hukum Nasional', *Jurnal Ilmu Hukum Prioris*, 6.1 (2026), 19–25.
[45] Al. Nele Matz-Luck, et., *Due Diligence Obligations and the Protection of the Marine Environment*, *L' Observateur Des Nations Unies*, 2017, XLII.

in isolation but must be read within a systemic framework that positions UNCLOS as an interpretative reference for domestic implementation.

UNCLOS provides key normative references, including States' obligations to protect and preserve the marine environment (Art. 192), to take all necessary measures to prevent and control marine pollution (Art. 194), and to cooperate and conduct environmental impact assessments for activities posing significant risk. Interpreted through international jurisprudence, these provisions establish a dynamic, risk-based due diligence standard, requiring proactive and adaptive action in response to scientific uncertainty.[46]

Treating UNCLOS as an interpretative reference does not undermine national policy autonomy but ensures regulatory discretion aligns with Indonesia's international obligations. This aproach can reduce the 'silent clash' between Government Regulation No. 26 of 2023 and international duties by harmonizing domestic norms with environmental risk prevention and due diligence standards. Systemic normative harmonization thus serves as a bridge between national regulatory sovereignty and international responsibility in sustainable marine governance.

Normative harmonization between Government Regulation No. 26 of 2023 and Indonesia's UNCLOS obligations requires limiting administrative discretion through due diligence standards. Obligations to protect and preserve the marine environment (Art. 192) and to prevent, reduce, and control pollution (Art. 194) are interpreted as dynamic, context-sensitive duties. Permitting discretion under Government Regulation No. 26 of 2023 must therefore be operationalized within due diligence parameters, including risk assessment, preventive standards, continuous monitoring, and corrective mechanisms,[47] to avoid regulatory gaps between international commitments and domestic implementation.[48]

The integration of the precautionary principle must be explicitly embedded in marine spatial planning and permitting regimes. In permitting, precaution requires a risk-based approach, adaptive conditions, and periodic review mechanisms when scientific uncertainty exists regarding potentially serious or irreversible impacts.[49] In spatial planning, it necessitates ecosystem-sensitive zoning and the integration of environmental impact assessments into plans and programs, consistent with the EIA obligations under UNCLOS Article 206.[50]

Thus, harmonization is not merely a policy preference but a legal consequence of the State's international obligations. International jurisprudence underscores that fulfilling marine environmental protection duties requires an

[46] Yen Chiang Chang and Muhammad Saqib, 'International Legal Systems in Tackling the Marine Plastic Pollution: A Critical Analysis of UNCLOS and MARPOL', *Water (Switzerland)*, 17.10 (2025), 1–29 <https://doi.org/10.3390/w17101547>.
[47] International Tribunal For The Law of The Sea.
[48] Peters, Anne Krieger and Kreuzer.
[49] Runyu Wang, 'The Precautionary Principle in Maritime Affairs', *WMU Journal of Maritime Affairs*, 10.2 (2011), 143–65 <https://doi.org/10.1007/s13437-011-0009-7>.
[50] International Court of Justice, *INTERNATIONAL COURT OF JUSTICE: Pulp Mills on the River Uruguay (Argentina v Uruguay)*, 2010 <https://www.icj-cij.org/home> [accessed 3 September 2024].

effective national regulatory framework that is adaptive to scientific developments.[51]

Conclusion

This article has argued that the precautionary principle and due diligence constitute binding controlling norms within the UNCLOS regime, as reflected in the jurisprudence of ITLOS, the ICJ, and arbitral tribunals. These obligations require States to move beyond procedural compliance and to establish regulatory frameworks that are risk-based, effective, and adaptive to environmental uncertainty.

Within this framework, Indonesia's Government Regulation No. 26 of 2023 reveals a "silent normative clash" with international standards. Although not in direct violation of UNCLOS, the regulation prioritizes a permitting-based approach marked by broad administrative discretion and limited integration of substantive environmental safeguards. This creates a regulatory gap, particularly in relation to precautionary risk management and anticipatory environmental protection.

Theoretically, this article contributes to the International Law of the Sea by conceptualizing due diligence and precaution as structural limits on domestic regulatory discretion. These norms shape not only outcomes but also the design of national legal frameworks.

Accordingly, Indonesia should pursue systemic harmonization with UNCLOS, limit administrative discretion through enforceable due diligence standards, and integrate precaution into permitting and marine spatial planning. Future research should explore comparable dynamics in other coastal States.

Recommendation

Government Regulation No. 26 of 2023 should be operationalized within a due diligence and precautionary framework, serving as controlling norms for administrative discretion through systemic interpretation grounded in UNCLOS. Practically, harmonization requires standardized risk assessments, adaptive permitting with periodic review, integration of precaution into marine spatial zoning, and strengthened oversight and accountability to close the regulatory gap between international commitments and domestic implementation.

[51] International Court of Justice, *International Court of Justice: Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua), International Court of Justice*, 2018, XV <https://doi.org/10.1093/oso/9780197752265.003.0015>.

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