



## COMPARISON OF CRIMINAL PROVISIONS IN NATIONAL LEGISLATION OF DEEP SEABED MINING SPONSORING STATES

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### ABSTRACT

National legislation is the requirement established by the International Seabed Authority (ISA) for each country sponsoring Deep-seabed Mining (DSM) and criminal provisions and sanctions are an inseparable part of it. A total of 38 states are listed as sponsoring states, while Indonesia, with its potential as a maritime country and member of UNCLOS 1982, has not participated in DSM activities. This article aims to explore and compare the criminal provisions in the national legislation of sponsoring states that have been approved by the ISA so that the formulation of sanctions in Indonesian national legislation can be illustrated in order to prepare Indonesia's contribution as a sponsoring state for DSM activities in the International Seabed Area. The research method used is normative juridical with a statute and comparative approach. The research results show that the majority of sponsoring states in their criminal provisions stipulate criminal sanctions in the form of fines as well as the possibility of imprisonment and several administrative sanctions. Based on the results of this comparative study, it can be concluded that the formulation of sanctions that can be regulated in Indonesian national legislation is a maximum fine of more than 100 billion Rupiah and a maximum prison sentence of not less than 5 years, as well as additional criminal penalties and administrative sanctions in the form of termination or revocation of DSM activity permits, confiscation of profits resulting from illegal DSM acquisition, and compensation for environmental damage caused by DSM activities.

**Keywords :** Deep-Seabed Mining, Criminal Provisions, National Legislation, Sponsoring States.

### 1. INTRODUCTION

The deepest sea is one of the living environments with the most biodiversity and animal origin. The International Seabed Area is designated for the reservation of Natural Resources for peace purposes.<sup>1</sup> In this case, cooperation between countries through special authorities is required, namely the *International Seabed Authority* (ISA) which is under the auspices of the United Nations (UN)<sup>2</sup>. Article 140 UNCLOS 1982 regulates that “*The Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis*”. Therefore, the ISA as an authorized institution must also be able to determine a fair distribution of the benefits obtained through activities in the International Seabed Area.

ISA Council's decision<sup>3</sup> in ISBA/17/C/20 No. 3 insists that Deep Seabed Mining (DSM) sponsoring states provide relevant national laws, regulations and administrative measures to the ISA Secretariat. This decision was based on Article 154 paragraph 4 and Annex III Article 4 paragraph 4 of UNCLOS 1982, which was then decided by the ISA Council that there was a need for national legislation issued by the sponsoring states. Then as additional provisions, ISA has issued various regulations related to exploration<sup>4</sup> as well as

1 Pasal 88 United Nations Convention on the Law of the Sea 1982.

2 Heryandi, “Kerja Sama Internasional Pengelolaan Sea Bed Area Dan Implikasinya Bagi Negara Pantai,” *Jurnal Dinamika Hukum* 13, no. 3 (2013): 355, <https://doi.org/10.20884/1.jdh.2013.13.3.242>.

3 International Seabed Authority, “Decision of the Council of the International Seabed Authority (ISBA/17/C/20)” (2011).

4 International Seabed Authority, “The Mining Code: Exploration Regulations,” International Seabed Authority, 2019, <https://www.isa.org.jm/the-mining-code/exploration-regulations/>.

draft regulations related to exploitation<sup>5</sup>. This national legislation will later regulate the arrangements and procedures related to the DSM sponsorship implementation process more specifically.

Indonesia is currently not a sponsoring state and does not yet have national legislation, even though several factors indicate the need for DSM national legislation to be formed. The *First* is the convention membership factor. Indonesia has the right to be part of the sponsoring state, with its status as a member state of the Convention<sup>6</sup> which was marked by the ratification of UNCLOS 1982 through Law No. 17 of 1985. The *Second* is the legal vacuum factor. The national legal instrument regarding mining in Indonesia currently exists in Law No. 4 of 2009 concerning Mineral and Coal Mining and its amendments, namely Law No. 3 of 2020. Neither of them regulates the exploration and exploitation of DSM in marine waters, both nationally and internationally. The *Third* is the offer of cooperation factor. Indonesia has received an offer of cooperation to explore and exploit DSM in the International Seabed Area, one of which is Poland<sup>7</sup>. However, this cooperation cannot be realized, for one reason, Indonesia does not yet have a legal instrument.

These three factors should be sufficient reasons for Indonesia to issue its national legislation. Indonesia can use the national legislation of other sponsoring states as an example in its design, considering that there are 38 sponsoring states registered in DSM. For example, the regulation of sanctions can be used as reference material in designing criminal provisions in Indonesian national legislation, because these provisions will later become guidelines in all activities taking place in DSM within the International Seabed Area.

This research aims to explore and compare criminal provisions and sanctions in the national legislation of sponsoring states that have been approved by the ISA so that the formulation of sanctions for Indonesian national legislation can be illustrated in order to prepare Indonesia's contribution as a sponsoring state for DSM activities in the International Seabed Area. Through this research, problems related to how sanctions are compared in the national legislation of DSM sponsoring states at the International Seabed Authority and how sanctions are formulated in Indonesian national legislation as a sponsoring state for DSM activities in the International Seabed Area will be answered.

In contrast to previous research with similar discussion topics, Xiangxin Xu and Guifang (Julia) Xue's (2021) research discussed the contribution of sponsoring states and their national legislation to the DSM regime in the International Seabed Area based on UNCLOS 1982.<sup>8</sup> Then research by Marsudi Triatmodo, Agustina Merdekawati, and Nugroho Adhi Pratama (2021) placed more emphasis on the urgency and direction of regulating the seabed mineral act to provide legal certainty for activities in the International Seabed Area and the form of due diligence obligations of UNCLOS 1982.<sup>9</sup> Lastly, research by M Ilham F Putuhena (2019) discussed the urgency of regulating mining in the International Seabed Area in general, where the discussion produces the overall form and scope of regulations that need to be created as a basis and mechanism for Indonesia if it becomes a sponsoring state.<sup>10</sup> In contrast to previous studies, this research aims to explore and compare the criminal provisions in the national legislation of sponsoring states that have been approved by the ISA in carrying out DSM exploration activities in the International Seabed Area. Previous research did not focus on criminal provisions or sanctions in the national legislation of DSM-sponsoring states. Therefore, it is expected that this research can provide updates and innovations that can fill the gaps in these four studies.

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5 International Seabed Authority, "Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/25/C/WP.1)" (2019).

6 The convention referred to in this article is UNCLOS 1982.

7 M. Ilham F. Putuhena, "Urgensi Pengaturan Mengenai Eksplorasi Dan Eksploitasi Pertambangan Di Area Dasar Laut Internasional (International Sea Bed Area)," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 8, no. 2 (2019): 167–83, <https://doi.org/10.33331/rechtsvinding.v8i2.316>.

8 Xiangxin Xu and Guifang (Julia) Xue, "Potential Contribution of Sponsoring State and Its National Legislation to the Deep Seabed Mining Regime," *Sustainability* 13, no. 10784 (2021): 1–12, <https://doi.org/10.3390/su131910784>.

9 Marsudi Triatmodo, Agustina Merdekawati, and Nugroho Adhi Pratama, "Indonesia Seabed Mineral Act : Urgensi Dan Arah Pengaturan," *Jurnal Hubungan Luar Negeri* 6, no. 2 (2021): 63–90, [https://www.kemlu.go.id/portal/id/page/101/jurnal\\_hubungan\\_luar\\_negeri](https://www.kemlu.go.id/portal/id/page/101/jurnal_hubungan_luar_negeri).

10 Putuhena, "Urgensi Pengaturan Mengenai Eksplorasi Dan Eksploitasi Pertambangan Di Area Dasar Laut Internasional (International Sea Bed Area)."

As explained above, to obtain accurate research results, a discussion analysis was carried out regarding the principles of DSM management in the International Seabed Area to determine the basic principles and the roles of the parties involved in its management and utilization. Next, there will be a discussion regarding the comparison of criminal provisions in the national legislation of DSM-sponsoring states. The national legislation used for comparison comes from 12 states taking into account their status as developed and developing countries. Then in the final discussion, the formulation of sanctions for Indonesian national legislation as a sponsoring state for DSM activities in the International Seabed Area is explained which can later be used as reference material in preparing Indonesia's future contribution as a sponsoring state.

## 2. RESEARCH METHOD

The research method used is normative juridical with a statute and a comparative approach<sup>11</sup>. The statute approach is carried out by examining various international and national legal rules that apply and relate to the subject matter. The comparative approach is a comparative study of more than one object of legal study, which in this research is a comparison of the national legislation of sponsoring states for DSM exploration and mining regulations in Indonesia.<sup>12</sup>

## 3. DISCUSSION

### 3.1 Principles of Management of Deep Seabed Mining in International Seabed Areas

In the International Seabed Area, states do not have the freedom to utilize the natural wealth contained therein because the natural wealth in the International Seabed Area is based on the principle of the common heritage of mankind (CHM)<sup>13</sup>. Under UNCLOS, regulatory powers over the extraction of deep-sea minerals outside national jurisdiction are the responsibility of the International Seabed Authority, an institution under the auspices of the United Nations which was founded in 1994.<sup>14</sup> Article 136 of UNCLOS 1982 states that the seabed and the land beneath it as well as all its natural resources which are beyond the limits of national jurisdiction are the heritage of all mankind.<sup>15</sup>

The shared heritage of humanity from the DSM can be interpreted as a shared ownership because it is located in the International Seabed Area which is one part of the high seas area (*Global Common*)<sup>16</sup>. McDougall and Cocca argue that as a global common there are 3 (three) possible aspects of related regulatory law, namely:<sup>17</sup>

- 1) *Res Communis Omnium*, in which the common natural wealth as the common heritage of mankind is regulated and reserved for all nations;
- 2) *Res Extra Commercium*, in which common natural wealth as the common heritage of mankind is regulated by international organizations such as the United Nations (UN), etc.; or
- 3) *Res Communis Humanitatis*, in which common natural wealth as the common heritage of mankind is not owned by one nation but from it all nations can benefit.

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11 Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2005).

12 Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum Empiris & Normatif* (Yogyakarta: Pustaka Pelajar, 2013).

13 Aryuni Yuliatiningsih, "Penerapan Asas Pacta Tertius Nec Nocent Nec Prosunt Berkaitan Dengan Status Hukum Daerah Dasar Laut Samudera Dalam (Sea Bed)," *Jurnal Dinamika Hukum* 10, no. 1 (2010): 31, <https://doi.org/10.20884/1.jdh.2010.10.1.135>.

14 Anna Zalik, "World-Making and The Deep Seabed (Mining The Area Beyond National Jurisdiction)," in *The Routledge Handbook of Critical Resource Geography* (New York: Routledge, 2021).

15 United Nations, United Nations Convention on the Law of the Sea 1982.

16 Karin Mickelson, "Common Heritage of Mankind as a Limit to Exploitation of the Global Commons," *European Journal of International Law* 30, no. 2 (2019): 635–663, <https://doi.org/10.1093/ejil/chz023>.

17 Mardians, "Status Hukum Sumber Daya Alam Di Luar Yurisdiksi Nasional Dan Posisi Negara Maju Di Bidang Keantariksaan," *Padjajaran Jurnal Ilmu Hukum (Journal of Law)* 3, no. 3 (2016): 565–86, <https://doi.org/10.22304/pjih.v3.n3.a7>.

The CHM principle exists as a result of the evolution of the *res communis* concept with the aim of creating equitable access and redistribution of natural resource results. This principle was born from dissatisfaction with the principle of *res communis*, the use of which depends on the capabilities of each country, so there is a risk of giving rise to opportunities for monopoly by developed countries. Res communis is a conception that states that the sea is the common property of all world communities.<sup>18</sup> The presence of the CHM principle is the basis for avoiding the use of the International Seabed Area from the use of only groups of developed countries.

Shared ownership of the International Seabed Area is based on CHM principles. In simple terms, shared ownership requires that no one state owns the area, but its use and management must be aimed at the public interest. This principle is a promise of global equity both in procedures and benefits so as not to fall prey to personal interests and hegemony.<sup>19</sup>

In order to utilize this, exploration and exploitation activities carried out in the International Seabed Area must involve the *International Seabed Authority* (ISA)<sup>20</sup> which in its implementation is assisted by the sponsoring states which are the members of the International Convention on the Law of the Sea and the contractor company which has collaborated with the sponsoring states.<sup>21</sup>

*International Seabed Authority* (ISA) is the authority that has the power to regulate and control all activities in the International Seabed Area, while the sponsoring state is a party to the Convention which can submit a certificate of sponsorship to the applicant so that the company that is the contractor receives permission to carry out DSM exploration in the International Seabed Area. The sponsoring state also has a responsibility to ensure the compliance of its sponsored contractors with the provisions of UNCLOS and assists the ISA in ensuring such compliance by adopting laws and regulations and taking administrative action regarding the DSM within its national legal framework. This is confirmed through the ISA website<sup>22</sup> which states that: “UNCLOS, Article 153(4) provides that the obligation of the sponsoring States under UNCLOS, Article 139 entails “taking all measures necessary to ensure” compliance by the sponsored contractor” dan “UNCLOS, Annex III, Article 4(4) makes it clear that such sponsoring States’ “responsibility to ensure” applies “within their legal systems,” and therefore requires the sponsoring States to adopt “laws and regulations” and to take “administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction”.

### **3.2 Comparison of Criminal Provisions in National Legislation of Sponsoring States of Deep Seabed Mining at the International Seabed Authority**

Comparative law is an effort to compare several legal systems or compare legal institutions from another legal system.<sup>23</sup> Soerjono Soekanto divides comparative law into three scopes, namely:<sup>24</sup> *descriptive comparative law*, *comparative history of law*, and *comparative legislation*. Of the three scopes of comparative law, this research is included in the scope of *comparative legislation* by involving the national legislation of the sponsoring states for the DSM exploration with the focus point of comparison being the criminal provisions regulated therein.

In the Great Dictionary of the Indonesian Language<sup>25</sup>, provision is something that is certain or has been determined; decision. In this research, ‘criminal’ is interpreted as ‘sanction/punishment’.<sup>26</sup> This refers to Adami

18 Nurfaika Ishak, Meica Prameswari, and Ade Darmawan B, “Regulation of Cabotage Principle to Guarantee Coastal State Sovereignty,” *Jurnal Hukum Replik* 9, no. 2 (October 2, 2021): 125, <https://doi.org/10.31000/jhr.v9i2.4546>.

19 Oscar Schmidt and Manuel Rivera, “No People, No Problem – Narrativity, Conflict, and Justice in Debates on Deep-Seabed Mining,” *Geographica Helvetica* 75, no. 2 (2020): 139–150, <https://doi.org/10.5194/gh-75-139-2020>.

20 Pasal 153 Paragraf 1 United Nations Convention on the Law of the Sea 1982

21 Pasal 153 Paragraf 2 United Nations Convention on the Law of the Sea 1982.

22 International Seabed Authority, “National Legislation Database,” International Seabed Authority, n.d., <https://www.isa.org.jm/national-legislation-database/>.

23 Andi Hamzah, *Perbandingan Hukum Pidana Beberapa Negara* (Jakarta: Sinar Grafika, 2008).

24 Soerjono Soekanto, *Perbandingan Hukum* (Bandung: Alumni, 1979).

25 Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia* (Jakarta: Gramedia Pustaka Utama, 2008).

26 Muhammad Ali and Farhana, “Perlindungan Hukum Hak Asasi Manusia Terhadap Korban Unlawful Killing Dalam Sistem Peradilan Pidana Di Indonesia,” *Reformasi Hukum* 27, no. 1 (2023): 59–70, <https://doi.org/10.46257/jrh.v27i1.601>.

Chazawi’s opinion that punishment is suffering that is deliberately imposed by the state on a legal subject as a legal consequence (sanction) for him or her for actions that have violated criminal law prohibitions.<sup>27</sup> Then the definition of sanctions in Black’s Law Dictionary Seventh Edition is a punishment or coercive action given because the person concerned fails to comply with the law, rules, or orders.<sup>28</sup>

Regulation No.3 *Decision of the Council of the International Seabed Authority (ISBA/17/C/20)* states that: “... for this purpose, sponsoring States and other members of the Authority, as appropriate, to provide information on, or texts of, relevant national laws, regulations and administrative measures to the secretariat.”<sup>29</sup> Based on this provision, what is meant by ‘National Legislation’ is relevant national laws, regulations, and administrative acts. The content of the national legislation of the sponsoring states is largely concerned with the affairs of a sovereign state, although in the context of its international legal responsibilities based on the Convention, in particular under Article 139, and as stipulated by *Seabed Disputes Chamber of the International Tribunal on the Law of the Sea*<sup>30</sup>.

Based on ISBA/26/C/19<sup>31</sup> as of 20 May 2020, 33 countries have been registered<sup>32</sup> as sponsoring states with their national legislation which can be accessed via the official ISA website. Meanwhile, on the International Seabed Authority website in 2023, 38 states have been listed, which means that since 2020 there has been the addition of 5 new states, namely: Bangladesh, Bein, Ecuador, Egypt, and Kenya. Of the 38 states listed on the ISA website, in this research, only national legislation from 12 states was used with specifications for 6 developed countries and 6 developing countries. The classification of developed and developing countries is based on aspects of the country’s capabilities which are of course different in terms of economic, technology, and human resource capabilities. The following 12 sponsoring states’ national legislation sampled in the comparison are:

**Table 1. National Legislation of Sponsoring States**

State’s Status	No	Sponsoring State	National Legislation
Developed Countries	1	England (UK)	Deep Sea Mining (Temporary Provisions) Act 1981 (amended by the Deep Sea Mining Act 2014)
	2	Germany	Seabed Mining Act of 6 June 1995(Amended by article 74 of the Act of 8 December 2010)
	3	Japan	Law on Interim Measures for Deep Seabed Mining, 1982
	4	Czech Republic	Act No. 158/2000 of 18 May 2000 on Prospecting, Exploration for and Exploitation of Mineral Resources from the Seabed beyond the Limits of National Jurisdiction
	5	New Zealand	United Nations Convention on the Law of the Sea Act (1996)
	6	Singapore	Deep Seabed Mining Act (2015)

27 Adami Chazawi, *Pelajaran Hukum Pidana Bagian I* (Jakarta: Raja Grafindo Persada, 2019), 24.

28 Bryan A. Garner, *Black’s Law Dictionary Seventh Edition* (New York: West Publishing Company, College & School Division, 1958).

29 International Seabed Authority, *Decision of the Council of the International Seabed Authority (ISBA/17/C/20)*, 1–2.

30 International Seabed Authority, “Comparative Study of the Existing National Legislation on Deep Seabed Mining,” 2021, 26, <https://www.isa.org.jm/national-legislation-database/>.

31 International Seabed Authority, “Laws, Regulations and Administrative Measures Adopted by Sponsoring States and Other Members of the International Seabed Authority with Respect to the Activities in the Area, and Related Matters, Including a Comparative (ISBA/26/C/19)” (2020).

32 Belgia, Brasil, Tiongkok, Kepulauan Cook, Kuba, Republik Ceko, Republik Dominika, Fiji, Prancis, Georgia, Jerman, Guyana, India, Jepang, Kiribati, Meksiko, Federasi Mikronesia, Montenegro, Nauru, Belanda, Selandia Baru, Nigeria, Niue, Oman, Republik Korea, Federasi Rusia, Singapura, Sudan, Tonga, Tuvalu, Kerajaan Inggris Raya dan Irlandia Utara, Amerika Serikat, dan Zambia.

<b>Developing Countries</b>	<b>7</b>	<b>Fiji</b>	International Seabed Mineral Management Decree (Decree No. 21, 12.07.2013).
	<b>8</b>	<b>Federated States of Micronesia</b>	Congressional Act No. 20-91 otherwise known as the Seabed Resources Act of 2014
	<b>9</b>	<b>Kiribati</b>	Seabed Minerals Act (2017)
	<b>10</b>	<b>Nauru</b>	International Seabed Minerals Act (Act No. 26 of 2015)
	<b>11</b>	<b>Tonga</b>	Tonga Seabed Minerals Act (2014)
	<b>12</b>	<b>Tuvalu</b>	Tuvalu Seabed Minerals Act (2014)

*Source: <https://www.isa.org.jm/national-legislation-database/>, 18 July 2023*

Each sponsoring state has the authority to carry out actions which ISA cannot, including regulations regarding violation norms and sanctions in its national legislation.<sup>33</sup> In the 12 national legislations of DSM-sponsoring states in Table 1 above, the following violation norms are found:

- 1) Carrying out the prospecting and/or seabed mineral activities without notification or permission/license from the State; (Germany [Article 11 paragraph (1) number 1], Japan [Article 44 paragraph (1)], Czech Republic [Article 18], New Zealand [Article 8], Singapore [Articles 4 and 5], Tuvalu [Article 111]).
- 2) Carrying out activities related to the acquisition of seabed minerals without entering into a contract with the Authority; (Germany [Article 11 paragraph (1) number 3], Czech Republic [Article 18]).
- 3) Carrying out activities that violate the terms of the license; (Germany [Article 11 paragraph (1) number 4], Singapore [Articles 4 and 5]).
- 4) Violation of contractual obligations and/or provisions of Conventions, the Agreement, and the rules, regulations, and procedures of the Authority; (Germany [Article 11 paragraph (1) number 5]).
- 5) Obtaining a license through fraud or other illegal means; (Japan [Article 44 paragraph (3)]).
- 6) Failure to provide required information/reports or provide false or misleading information; (Federated States of Micronesia [Article 710 letter g], Germany [Article 11 paragraph (1) number 8], Japan [Article 47], Kiribati [Article 96 (1) letter i], Nauru [Article 39 paragraph (1) letter i], Tonga [Article 16], and Tuvalu [Article 17]).
- 7) Failure to comply with an enforcement order (requiring corrective action) or directive or regulation; (Germany [Article 11], Fiji [Article 35 paragraph (4)], Japan [Article 46], Kiribati [Article 24], Nauru [Article 31 paragraph (4)], Singapore [Article 16 paragraph (5)], Tonga [Article 23 paragraph (3)], and Tuvalu [Article 24 paragraph (4)]).
- 8) Refusing to cooperate or intentionally obstruct supervision, inspection, or monitoring; (Germany [Article 11 paragraph (1) number 6], Fiji [Article 35], Japan [Article 47], Nauru [Article 31], Tonga [Article 22 paragraph (4)], and Tuvalu [Article 23]).
- 9) Interference with seabed mining activities; (Federated States of Micronesia [Article 1015 paragraph (2)], United Kingdom (UK) [Article 4], Kiribati [Article 124], Nauru [Article 50], Tonga [Article 114] and Tuvalu [Article 119]).
- 10) Too disruptive to other marine users; (Kiribati [Article 118], Nauru [Article 48], Tonga [Article 79 paragraph (2) letter d and Article 109], and Tuvalu [Article 89 paragraph (2) and Article 113]).
- 11) Disclosure of confidential information; (Fiji [Article 37 letter c], England (UK) [Article 13], Kiribati [Article 16], Tonga [Article 15 paragraph (2)] and Tuvalu [Article 16 paragraph (2)]).
- 12) Failure to meet ship standards; (Kiribati [Article 109], Tonga [Article 39], and Tuvalu [Article 104]).
- 13) The vessel entering or remaining in a “safe zone” in contravention of the relative rules, which are established to protect installations, infrastructure facilities, or vessels used for seabed imitation activities; (Federated States of Micronesia [Article 1014], Kiribati [Article 123], Tonga [Article 113] and Tuvalu [Article 118]).

<sup>33</sup> International Seabed Authority, “Comparative Study of the Existing National Legislation on Deep Seabed Mining.”

- 14) Public service employees obtaining or retaining any rights or interests or shareholdings without consent or fail to disclose such interests; (Fiji [Article 52], Kiribati [Article 126], Nauru [Article 51], Tonga [Article 116], and Tuvalu [Article 121]).

For these violations, most sponsoring states provide for possible criminal sanctions in the form of imprisonment and fines (it can be seen in Table 2 below). Regarding prison sentences, a maximum number of years is regulated for certain offenses (mostly in cases of willful violation of one's obligations). The states of Kiribati, Nauru, Tonga, and Tuvalu impose the strictest penalties, with possible sanctions of up to 10 years in prison.

**Table 2. Comparison of Fines and Imprisonment Sanctions Arrangements in National Legislation of Sponsoring States**

State Status	No	Sponsoring States	Fine	Imprisonment
Developed countries	1	England (UK)	£ 1,000 or other amounts according to the decision	max. 2 years
	2	Germany	max. € 50,000	max. 5 years
	3	Japan	max. ¥ 1,000,000	1 to 5 years
	4	Czech Republic	1 million to 100 million CZK	-
	5	New Zealand	\$ 200,000 + max. 3 times the value of commercial profits	Potential
	6	Singapore	max. \$ 500,000	max. 3 months
Developing countries	7	Fiji	max. \$ 10,000	5 years
	8	Federated States of Micronesia	max. \$ 500,000	max. 5 years
	9	Kiribati	\$50,000 to 1,000,000	max. 10 years
	10	Nauru	\$ 5000 to 100,000	max. 10 years
	11	Tonga	\$ 100,000 to 1,000,000	max. 10 years
	12	Tuvalu	max. \$ 250,000	max. 10 years

Source: [https://www.isa.org.jm/wp-content/uploads/2022/04/Comparative\\_Study\\_NL.pdf](https://www.isa.org.jm/wp-content/uploads/2022/04/Comparative_Study_NL.pdf), 18 July 2023

Information on fines and imprisonment for 12 National Legislations in Table 2 above is as follows:

- 1) England (UK). The threat of fine and imprisonment in England's national legislation can be seen in Article 13 Paragraph (2) "Any person who discloses any information in contravention of subsection (1) above shall be guilty of an offence and liable— (a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or both; (b) on summary conviction, to a fine not exceeding the statutory maximum". The threat of criminal fines with the same provisions as Article 13 can also be found in Article 1 paragraph (3) "Prohibition of unlicensed deep-sea mining", Article 4 paragraph (2) "Prevention of interference with licensed operations", Article 13 paragraph (2) "Disclosure of information".
- 2) Germany. The provision for criminal fines is specifically regulated in Article 11 concerning Fines, "... the administrative offence may be punished by a fine of up to € 5,000, and in the cases of (1) Nos. 1, 3, 4, 5 and 7, by a fine of up to € 50,000." Then the criminal provisions are specifically regulated in Article 12 concerning Criminal Provisions, "(1) Anyone who deliberately commits an act described in Section 11 (1) Nos. 1, 3, 4 or 5 and thereby endangers the life or health of another, stocks of living resources and marine life, or third party assets of significant value, shall be liable to imprisonment of up to five years or to a fine. (2) Anyone who 1. causes the danger by negligence or 2. acts recklessly and causes the danger by negligence shall be liable to imprisonment of up to two years or a fine."
- 3) Japan specifically regulates criminal provisions in Chapter 6 concerning Criminal Provisions. The criminal acts in Article 44 (1) and Article 45 are threatened with "Imprisonment of not more than five years or a fine of not more than 1,000,000 yen or shall be subject to cumulative imposition thereof"; Article 44 (2) carries a fine of not more than 500,000 yen; Article 46 carries a maximum prison sentence of 1 year and a fine of not more than 200,000 yen; Article 47 carries a fine of not more than 100,000 yen.



- 4) The Czech Republic only regulates provisions regarding criminal fines in Article 18 with the following provisions: “§ 18 Fines — For a violation of the obligations stipulated herein the Ministry shall levy a fine of up to— (a) CZK 100 million on a person engaged in activities in the Area without contract concluded with the Authority under § 9 section 1; (b) CZK 10 million on a person engaged in prospecting without an appointed Statutory Representative under § 7, section 1, and § 22, section 1, unless the person himself is authorized to prospect; (c) CZK 10 million on a person identified in § 22, section 2, that has failed to adapt its legal status to the provisions hereof within the prescribed period; (d) CZK 1 million on a person that has violated any of its other obligations hereunder.”
- 5) New Zealand in its national legislation provides for the threat of fines and potential imprisonment. The heaviest fines are regulated in Article 8 Paragraph (4) “8. Offence to carry out activities without a licence – (2) Every person who commits an offence against this section is liable on summary conviction to a fine not exceeding \$200,000”. Potential application of imprisonment based on Article 9 concerning the Application of criminal and civil law.
- 6) Singapore. Provisions for fines and imprisonment can be found in Article 4 Paragraph (2) “a person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction – (a) in any case where the person is an individual – (i) to a fine not exceeding \$300,000 or to imprisonment for a term not exceeding 3 months or to both; and (ii) in the case of a continuing offence, to a further fine not exceeding \$50,000 for every day or part thereof during which the offence continues after conviction, but not exceeding \$500,000 in total: or (b) in any other case – (i) to a fine not exceeding \$300,000; and (ii) in the case of a continuing offence, to a further fine not exceeding \$50,000 for every day or part thereof during which the offence continues after conviction, but not exceeding \$500,000 in total”.
- 7) Fiji provides the threat of fines and/or imprisonment in several articles, namely Article 11 Paragraph (4) “... shall be guilty of an offence and liable upon conviction to a fine of \$5,000 or a term of imprisonment of 2 years, or both”; Article 14 Paragraph (4) “... shall be liable upon conviction to a fine not exceeding \$10,000 and to imprisonment of 5 years, or both”; Article 35 Paragraph (1) “... shall be liable upon conviction to a fine of \$10,000 or a term of imprisonment of 5 years or both”; Article 52 Paragraph (3) “... shall be liable upon conviction to a fine not less than \$2,000 or to a term of imprisonment of 5 years, or both”.
- 8) The Federated States of Micronesia provides the threat of fines and imprisonment in several articles. The article with the threat of the heaviest fines and penalties is in Article 401 Paragraph (2). “... shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred thousand dollars 6 (\$500,000) or imprisonment for a period not exceeding 7 five years or both.”
- 9) Kiribati. Several articles carry the threat of fines and imprisonment. The article with the heaviest threat of fines can be seen in Article 43 Paragraph (2) “... shall be guilty of an offence and liable on conviction to a fine not exceeding \$1,000,000 ...”. Meanwhile, the article with the threat of the longest prison sentence can be seen in Article 124 Paragraph (4) “... shall be liable to a fine not exceeding \$300,000 or to a prison term not exceeding 10 years or both”.
- 10) Nauru. There are 5 articles with the threat of fines and/or imprisonment, namely Article 13 Paragraph (4), Article 16 Paragraph (4), Article 31 Paragraph (4), Article 50 Paragraph (1), and Article 51 Paragraph (3). The longest fines and imprisonment are found in Article 31 Paragraph (4) “... liable upon conviction to a fine of \$100,000 or imprisonment for 10 years or both”; and Article 50 Paragraph (1) “... liable upon conviction to a fine of \$100,000 or imprisonment for 10 years or both ...”
- 11) Tonga in its national legislation provides for the threat of fines and/or imprisonment in several articles. The threat of the heaviest criminal fine is contained in Article 37 Paragraph (3) “... shall be liable upon conviction to a fine not exceeding \$1,000,000 ...”. The longest possible prison sentence is a maximum of 10 years, this threat is in Article 114 Paragraph (4) “Interference with Seabed Mineral Activities”; Article 116 Paragraph (4) “Public Officials prohibited from acquiring Title Rights”; Article 119 Paragraph (7) “Information-handling – (a) disclosing Seabed Minerals Data, or (b) causing the loss of confidentiality of Seabed Minerals Data through reckless act or omission”.



- 12) Tuvalu in its national legislation provides 2 criminal threats, namely fine and/or imprisonment. The threat of the heaviest fine is a maximum of \$1,000,000 contained in Article 43 Paragraph (3) “... shall be guilty of an offence and liable on conviction to a fine not exceeding \$1,000,000 ...”. The threat of the longest prison sentence, namely 10 years, is in Article 104 Paragraph (2) “... shall be liable to a fine not exceeding \$100,000 or to a prison term not exceeding 10 years or both”, and Article 121 Paragraph (4) “... shall be liable to a fine not exceeding \$100,000 or to a prison term not exceeding 10 years or both”.

Based on Table 2, it can be seen that there are differences between sanctions regulated in the national legislation of developed countries and developing countries. In terms of fines, the regulations in the national legislation of developed countries are more severe than those regulated by developing countries. Meanwhile, in terms of prison sanctions, the regulations in national legislation in developing countries take longer than in developed countries. Table 2 also shows that the amount of fines can vary depending on the type of violation, and the severity of sanctions varies from state to state. This variation can be seen in the Czech Republic’s policy which sanctions actions against activities in the International Seabed Area carried out without sponsorship or a contract with a fine of more than 4 million USD, while the fines set by Tonga and Kiribati for equivalent violations are only imposed up to 1 million USD. While New Zealand has a policy of increasing fines not exceeding \$200,000 on summary convictions, even amounts up to three times the value of any associated commercial profits *deep seabed mining*.

**Table 3. Arrangements for Suspension and Damage Mitigation Compensation in National Legislation**

State Status	No	Sponsoring State	Suspension	Damage Mitigation Compensation
Developed countries	1	England (UK)	√	-
	2	Germany	√	√
	3	Japan	√	√
	4	Czech Republic	√	-
	5	New Zealand	√	Potential
	6	Singapore	√	√
Developing countries	7	Fiji	√	√
	8	Federated States of Micronesia	-	-
	9	Kiribati	√	√
	10	Nauru	√	√
	11	Tonga	√	√
	12	Tuvalu	√	√

Source: <https://www.isa.org/jm/national-legislation-database/>, 18 July 2023

Based on Table 3, it can be seen that all national legislation of sponsoring states, which are developed or developing countries, basically apart from regulating sanctions in the form of imprisonment and fines, also regulates the suspension or revocation of sponsor licenses if the contractor does not comply with its obligations (except the Federated States of Micronesia). In fact, some states (for example Tonga) also regulate the authority to confiscate proceeds, profits, and products obtained from illegal mining activities. Taking administrative action including issuing a written warning, making a written agreement regarding corrective action, issuing a written notification requiring the sponsored party to take/or not take the specified, occurs if there is a serious risk of materiality and there is a violation of the Authority’s rules.

### 3.3 Formulation of Sanctions for National Legislation for Indonesia as a Sponsoring State for *Deep Seabed Mining* Activities in the *International Seabed Area*

Referring to UNCLOS 1982, in the context of exploration and exploitation activities in the International Seabed Area, a company that is a contractor must be sponsored by a member of the convention (member state) to obtain a contract *International Seabed Authority* as a permit to carry out exploration and exploitation activities. This is also emphasized in Regulation no. 21 (1) ISBA/25/C/WP.1 that: “Each Contractor shall ensure that it is sponsored by a State or States, as the case may be, throughout the period of the exploitation contract in accordance with regulation 6, and to the extent necessary that it complies with regulations 6 (1)

and (2)”. With more and more states, state entities and private investors participating in exploration activities deep-seabed mining under ISA licensing in the UNCLOS regime, then ISA states that: “the ISA Secretary-General anticipates that deep seabed mining beyond national jurisdiction is ‘well within reach’ and ‘attainable in the foreseeable future’”.<sup>34</sup>

Referring to *National Capacity-Building Workshop Increases Understanding of Environmental Components of the Legal Framework Governing Activities Carried out in the Area*<sup>35</sup> which was carried out by Indonesia together with ISA on 15 October 2021 regarding increasing understanding of the environmental components of the legal framework governing activities carried out in the International Seabed Area, then Indonesia is in a position as a state that can be requested as a sponsoring state in DSM exploration activities in International Seabed Area. Through this workshop, it can be assumed that Indonesia is currently drafting national legislation related to activities carried out in the International Seabed Area.

The basis for the need to create regulations for new activities to be implemented by a country is as follows:

1) Preventive Legal Protection Theory

Phillipus M. Hadjon in his book states that legal protection for the people is a preventive and repressive government action.<sup>36</sup> Legal protection is an effort to protect legal subjects through applicable laws and regulations and their implementation is enforced with sanctions. The protection provided by the government with the aim of preventing violations before they occur is preventive legal protection.

Preventive legal protection is a supporting theory for the need to compare criminal provisions in national legislation. This criminal provision functions as a signpost to prevent the occurrence of a violation or crime, which means that the existence of criminal provisions or sanctions in the national legislation of the DSM sponsoring states is created as a preventive legal protection effort from the sponsoring country state various possible violations or crimes resulting from DSM activities in the International Seabed Area.

2) Precautionary Principle

*The precautionary principle* is a principle that emphasizes how to prevent environmental quality from decreasing due to pollution. Furthermore, this principle also regulates prevention so that environmental damage does not occur.<sup>37</sup>

The 1992 Rio Declaration produced in *The United Nations Conference on Environment and Development* (UNCED) in Rio de Janeiro – Brazil, stated that: “To protect the environment, the precautionary principle must be widely applied by States according to their capabilities. If there is a threat of serious or irreversible damage, lack of scientific certainty should not be used as a reason to delay cost-effective measures to prevent environmental degradation”.<sup>38</sup> Then explicitly the report from the *United Nations Economic and Social Commission for Asia and the Pacific* (UN ESCAP) stated that: “Believe that to achieve sustainable development, policies must be based on the precautionary principle”<sup>39</sup>.

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34 International Seabed Authority, “Press Release (N105),”; Joanna Dingwall, “Commercial Mining Activities in the Deep Seabed beyond National Jurisdiction: The International Legal Framework,” in *The Law of Seabed (Access, Uses, and Protection of Seabed Resources)* (Leiden Boston: Brill Nijhoff, 2020).

35 International Seabed Authority, “ISA-Indonesia National Capacity-Building Workshop Increases Understanding of Environmental Components of the Legal Framework Governing Activities Carried out in the Area,” International Seabed Authority, 2021, <https://www.isa.org.jm/news/isa-indonesia-national-capacity-building-workshop-increases-understanding-environmental/>.

36 Phillipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Indonesia* (Surabaya: Peradaban, 2007), 29.

37 M.R.A.G. Wibisana, “Law and Economic Analysis of the Precautionary Principle” (Maastricht University, 2008), 214.

38 David Freestone and Ellen Hey, *Origins and Development of the Precautionary Principle, Dalam The Precautionary Principle and International Law, The Challenge of Implementation* (Hague: Kluwer Law International, 1996), 193–218.

39 United Nation Economic and Social Commission for Asia and the Pacific, “Report of the United Nation Economic and Social Commission for Asia and the Pacific (UN ESCAP) Ministerial Meeting in the Environment,.” 1990, 8.

The two statements above show that the precautionary principle needs to be implemented by the states in making their policies. This principle emphasizes that activities that have the potential to cause serious and irreversible impacts must be prevented. The application of the precautionary principle is closely related to a potential loss (a loss that has not yet occurred).<sup>40</sup> The various problems that could potentially arise as a result of DSM activities are of realistic proportions because the potential and environmental impacts are very significant.

The two bases mentioned above show that preventive legal protection and the precautionary principle are closely related to DSM which is an activity that has the potential to cause serious and even irreversible impacts if a failure occurs in practice which can cause major losses to the environment and surrounding living creatures. Therefore, a policy is needed to prevent losses that could potentially arise from the DSM activities. Prevention is not meant to prohibit the implementation of activities, but as a guideline in its implementation so that potential losses that have been predicted can be prevented.

DSM exploration in the International Seabed Area requires serious commitment and effort from all involved, including governments, stakeholders, researchers, legal and technical experts who must sit together to develop a strategy for establishing a good system in starting DSM exploration. In starting exploration, the sponsoring state must present legal and technical experts in handling exploration.<sup>41</sup> For its implementation, it is necessary to carry out routine inspections of mining operations by an expert (qualified inspector) to ensure full compliance with the law. A “qualified” inspector is one certified by an authority with appropriate certification as having sufficient training and expertise to identify violations of contractual provisions and performance standards relating to mining activities.<sup>42</sup>

Indonesia has not provided national legislation or a set of policies, regulations, or laws relating to deep seabed mining in accordance with UNCLOS requirements to become a sponsoring state. Referring to the Mining Law<sup>43</sup> currently in force in Indonesia, there are several sanctions in force, namely criminal sanctions and administrative sanctions. The criminal provisions stipulated are as follows:

**Table 4. Arrangement of Criminal Provisions in the Indonesian Mining Law**

Type of Crime	Provision
<b>Prison</b>	Max. 5 years in prison
<b>Fine</b>	Max. 100 billion rupiah
<b>Additional Penalty</b>	a) Confiscation of proceeds used in the commission of a criminal act.
	b) Confiscation of profits resulting from criminal acts.
	c) The obligation to pay losses arises as a result of a criminal act.

Source: <https://peraturan.bpk.go.id/Home/Details/138909/uu-no-3-tahun-2020>, 18 July 2023

In addition to the criminal sanctions provisions mentioned above, the Mining Law regulates administrative sanctions, which are in the form of written warnings, suspension or temporary suspension of all exploration or mining activities, and revocation of mining activity permits.

Referring to the provisions of the Mining Law currently in force in Indonesia, in the formulation of National Deep Seabed Mining Legislation in the future, criminal provisions must be regulated with a maximum prison sentence of no less than 5 years in prison and a maximum fine of more than 100 billion rupiah, then accompanied by additional criminal and administrative sanctions in the form of termination or revocation of permits for DSM activities, confiscation of profits obtained from illegal DSM, and compensation for

40 Liza Farihah and Femi Angraini, “Prinsip Kehati-Hatian Dan Kerugian Potensial Dalam Perkara Tata Usaha Negara Terkait Lingkungan Hidup (Kajian Putusan Nomor 71/G.TUN/2001/PTUN-JKT),” *Jurnal Komisi Yudisial* 5, no. 3 (2012): 246, <https://doi.org/10.29123/jy.v5i3.123>.

41 Nik Munirah Nik Fuad, Wan Izatul Asma Wan Talaat, and Mohd Hazmi Mohd Rusli, “Mining the Deep Seabed: Is Malaysia Ready?,” *Asian Social Science* 13, no. 2 (2017): 107–15, <https://doi.org/10.5539/ass.v13n2p107>.

42 Mark Squillace, “Best Regulatory Practices for Deep Seabed Mining: Lessons Learned from the U.S. Surface Mining Control and Reclamation Act,” *Marine Policy* 125, no. 104327 (2021): 1–12, <https://doi.org/10.1016/j.marpol.2020.104327>.

43 Undang-Undang No.3 Tahun 2020 tentang Perubahan Atas Undang-Undang No.4 Tahun 2009 tentang Pertambangan Mineral dan Batubara

environmental damage caused by DSM activities. The convention states that the sponsoring state needs to adopt statutory regulations in its legal system to take administrative action which has two different functions namely to ensure the contractor's compliance with its obligations and to relieve the sponsoring state of responsibility.

In relation to the contractors it sponsors, the sponsoring state also acts as a regulator.<sup>44</sup> *Seabed Disputes Chamber (SDC)* in '*first Advisory Opinion regarding responsibility and liability of the sponsoring state*' concludes that: "*The inclusion of sponsorship serves to achieve the goal of ensuring entities' compliance with the obligations set out in the UNCLOS and related instruments by way of transferring them from international convention to states parties' national legislation*" (paragraph 75).<sup>45</sup> Regarding the regulatory aspects that sponsoring states should focus on, the SDC Advisory Opinion provides several references. The reference provided by SDC lies in the answer to the third question in '*first Advisory Opinion regarding responsibility and liability of the sponsoring state*' namely regarding the necessary and appropriate actions that must be taken by the sponsoring state. The reference for the action in question is<sup>46</sup> (1) financial viability and technical capacity of the sponsored contractor; (2) conditions for issuing sponsorship certificates; and (3) sanctions for non-compliance carried out by the contractor. It may also include the establishment of enforcement mechanisms for active oversight of sponsored contractor activities and coordination between sponsor state activities and ISA activities.

In essence, in terms of regulatory aspects, Indonesia as a sponsoring state must focus on helping ISA to play a role in correcting the shortcomings of international organizations, namely monitoring and enforcement. Therefore, in national legislation it is necessary to regulate elements related to the requirements for issuing a sponsor certificate; monitoring; corrective measures and sanctions for non-compliance; enforcement of decisions of international courts and tribunals; and access to domestic courts. Thus, the sponsoring state's national legislation has an important function in monitoring and sanctioning contractor non-compliance which can then complement UNCLOS provisions, procedures, and ISA regulations. With good and comprehensive legislation, sponsoring states can contribute to environmental sustainability in the DSM industry.

#### 4. CONCLUSION

Criminal provisions in the national legislation of the sponsoring states, namely England (UK), Germany, Japan, Czech Republic, New Zealand, Singapore, Fiji, Federated States of Micronesia, Kiribati, Nauru, Tonga, and Tuvalu regulate criminal sanctions of fines and imprisonment with different minimum and maximum amounts. Apart from criminal penalties, administrative sanctions include suspension and revocation of mining activity permits. Some states also regulate the provision of compensation costs in connection with damage that could potentially arise if bad scenarios such as pollution or other events occur as a result of seabed mineral activities. As for the similarities, along with the criminal provisions that are regulated, the national legislation of the sponsoring states regulates the norms for violations and crimes that have the potential to occur while DSM activities are carried out. The forms of sanctions that can be regulated in the formulation of criminal provisions in Indonesian national legislation are fines and imprisonment which can be imposed on norm violators, as well as administrative sanctions for several violations.

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44 Xu and Xue, "Potential Contribution of Sponsoring State and Its National Legislation to the Deep Seabed Mining Regime."

45 Seabed Disputes Chamber of International Tribunal for the Law of the Sea, "Responsibilities and Obligations of States with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), List of Cases: No.17, Advisory Opinion of 1 February 2011," International Tribunal for the Law of the Sea, 2011.

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