

Japan's Global Health Strategy in the Post-Covid-19 Era

VOL. 8

Global Health Administration and Maritime Transport: Port State Authority and the Issue of Crew Change for Vessels in Port

Kentaro Nishimoto

Professor, Graduate School of Law, Tohoku University

In February 2020, the outbreak of COVID-19 infections on the Diamond Princess cruise ship drew a great deal of attention in Japan at a time when the disease was beginning to show signs of becoming a global pandemic. This case illustrated the difficulty of responding to an outbreak of infectious disease on board a cruise ship carrying a large number of passengers, and it highlighted the challenges of international coordination in dealing with an outbreak on board a foreign ship in port. Moreover, the spread of COVID-19 has created problems for the operation of ocean-going cargo ships, which support international logistics, in terms of preventing infections among the crew and ensuring that crew changes can take place during an infectious disease outbreak.

In building a global health administration regime during and after COVID-19, there is a need for a discussion on how to create a better international system for maritime traffic based on the experiences gained in responding to COVID-19. As a country that has an interest in ensuring reliable maritime transport, Japan is expected to actively participate in the coming international discussions. While the issue of ships being denied entry into ports is attracting more attention,¹ Japan could provide valuable input to future international discussions based on its experience and awareness of the issues gained from responding to the *Diamond Princess* in the port of Yokohama.

Infectious Disease Countermeasures by Port States for Ships in Port

Under international law, when a ship is in port, both the state of nationality of the ship (the “flag state”) and the state in which the port is located (the “port state”) have authority over that ship. It is one of the fundamental principles of the law of the sea that the flag state of a ship has authority over the ship regardless of where the ship is located (the principle of flag state jurisdiction). In addition, although there is some disagreement as to the scope of authority that a port state may exercise over the internal matters of a foreign vessel in port, there is no dispute that it has authority over matters that have an effect on their port. However, there are no established rules for coordination between concurrent authorities. This also applies to the obligation to prevent the spread of infectious diseases. The flag state is obliged to effectively exercise its jurisdiction over and regulate its vessels (Article 94 of the United Nations Convention on the Law of the Sea), while the port state has certain obligations as a territorial state with respect to vessels located in its ports, including those under human rights treaties. As the government of Japan indicated in a debate in the Diet,² neither of the two states is uniquely obligated to take preventive measures under international law.

In such a situation, the exercise of authority may need to be coordinated among the states involved: the flag state, the port state, and possibly the country of nationality of the ship’s operator. Fortunately, no significant jurisdictional obstacles were encountered in responding to the *Diamond Princess*. However, since states involved could adopt different policies, which may take time to coordinate, it is advisable to establish new international rules to clarify the allocation of authority among the states concerned for countermeasures against serious infectious diseases. The review of the International Health Regulations (IHR) conducted by the World Health Organization (WHO) also suggests that consideration should be given to clearly defining the responsibilities of party states with regard to various measures, including isolation and quarantine.³

Existing literature on this issue points out that, among the states concerned, the role of the port state should be emphasized.⁴ As a practical matter, only the port state in which the vessel is located has the capacity to take concrete measures against the vessel in port. Therefore, one of the most promising directions for coordination among nations is to stipulate that the port state has the primary authority, and to require each concerned state to ensure that private persons and businesses under its jurisdiction comply with the measures adopted by the port state. Specifically, this can be best accomplished by clarifying the measures to be taken by the port states and other relevant states in the form of legally binding rules, through means such as amending the IHR. However, if this is difficult to achieve, practical guidelines could be established by formulating standard procedures that are not legally binding. With regard to practical responses to COVID-19, the International Maritime Organization (IMO) has issued a number of guidelines,⁵ including recommendations to coastal and port states on the provision of medical care to infected crew members⁶ that can serve as reference.

Strengthening Infectious Disease Countermeasures by Flag States

While any serious outbreak of an infectious disease on board a ship will inevitably have to be dealt with at a port, it will also be necessary for flag states, which have overall responsibility for ship operations, to strengthen their infectious disease control measures in the post-COVID era. This is particularly important for cruise ships with large numbers of passengers, but it is also true for other types of vessels. Under existing international law, there seems to be no problem with infectious disease countermeasures being included in the obligations of flag states, at least in the abstract. However, in order to ensure the effectiveness of measures by flag states in normal times, specific standards and mechanisms to ensure their implementation are necessary.

In Japan, the Enforcement Regulations of the Maritime Transportation Act were amended in November 2020 to add to infectious disease prevention measures to the list of items to be included in the “Safety Management Regulations” that must be submitted under the Maritime Transportation Act, making it mandatory for cruise ship operators to formulate and submit a manual on measures to prevent infectious diseases.⁷ In addition, each of Japan’s ocean-going cruise ship companies are receiving third-party certification from the Nippon Kaiji Kyokai (ClassNK) for the manuals they have prepared and the measures they have taken. Since infectious disease countermeasures are not something that can be ensured by simply requiring compliance with certain rules, it is reasonable to require the establishment of a system to address infectious disease risks, through the preparation of a manual tailored to real-world conditions, the effectiveness of which is to be ensured by third-party certification.

Such measures can be applied to the international regulatory framework for maritime transport and are also a viable option to strengthen international measures to combat infectious diseases by flag states. Under the Safety of Life at Sea Convention (SOLAS Convention), the International Safety Management (ISM) Code has been adopted (1994 amendments to the SOLAS Convention, chapter IX) to address the safety of ships against human elements, mandating those in charge of ship operations to develop and implement a safety management system and prepare a safety operation manual. Infectious disease countermeasures can already be considered a matter concerning the safe operation of ships, but if explicit provisions on required measures could be incorporated into the existing treaty framework, it would strengthen the requirements for infectious disease response as a part of the international rules and standards to be implemented by ship operators.

Crew Changes during a Pandemic

The spread of COVID-19 has also caused problems concerning the treatment of crew, including crew changes. The Maritime Labour Convention stipulates that the maximum period of service at sea for seafarers is less than 12 months, with the right to be repatriated at the end of the contract period. However, the spread of COVID-19 has led to situations such as restrictions on disembarking for crew changes at ports of call, forcing the crew to remain on duty for long periods of time. This situation is problematic in terms of the crews’ working

conditions and human rights, and various international forums have called for action, including UN General Assembly Resolution 75/17, which called on countries to designate crew and other maritime workers as “key workers” and to allow for their safe change and movement. Moreover, relevant international organizations such as the IMO and the International Labour Organization (ILO) have responded by providing various guidelines, including practical guidance⁸ on managing the risk of infection related to the change and movement of crews.

This issue is related to the larger, long-standing question of securing crew rights under the Maritime Labour Convention. However, if the discussion is limited to issues regarding each country’s infectious disease countermeasures, the question is how to address the restrictions imposed by states owing to the public health risks posed by the disembarkation and entry into the port state of crew members so that they can return to their home nations. Under international law, it is generally up to the discretion of the state whether or not to allow foreign nationals to enter a country. The Maritime Labour Convention also provides for the repatriation and change of crew on ships calling at a state’s port, but falls short of establishing a right of entry for this purpose, merely providing an obligation to “facilitate” repatriation and change (Standard A2.5, paragraph 7). The IHR, which aims to “avoid unnecessary interference with international traffic and trade” and to respond to the international spread of disease in ways that are commensurate with public health risks (Article 2), is limited to treating the disembarkation of crew members as part of the *free pratique* granted to a vessel, including disembarkation from a vessel. It does not envisage the occurrence of problems peculiar to crew members, such as preventing the disembarkation of crew members from a vessel in port or preventing the entry of replacement crew. Amendments to the Maritime Labour Convention have been proposed in the ILO.⁹ However, due to the nature of the convention, they are more concerned with the treatment of crew, such as ensuring access to medical care and providing clarity on limitations on the length of service. If the IHR is to be amended, it will be necessary to consider the scope of health measures regarding crew changes, based on the premise that international shipping cannot take place by simply permitting ships to come and go.

Conclusion

International traffic at sea is, by its very nature, an activity that can be significantly affected by measures taken by countries to prevent the spread of infectious diseases. The IHR, the main existing international legal framework relating to shipping and infectious diseases, sets out rules concerning restrictions on international traffic, including maritime traffic, which are to be commensurate with public health risks to “avoid[ing] unnecessary interference with international traffic and trade.” In the area of maritime transport, the issue of denial of entry into port is a major problem related to the balance between the realization of international traffic and infectious disease control under the IHR, but the problem is not limited to that issue. As discussed in this paper, it has become clear that there are a number of issues that have not been adequately addressed under the IHR or related international conventions. Further discussion on each of these points is required as we work toward an international agreement.

Additional References

- Kanehara, Atsuko. 2021. “The Law of the Sea in the ‘International Law of Pandemics’: Port State Measures on the Diamond Princess.” *Kokusai Mondai* [International Affairs], no. 699: 5–16 (in Japanese).
- Kawano, Mariko. 2021. “Protection and Regulation of the Rights and Interests of ‘Persons’ in the International Law of the Sea: Certain Reflections on the Protection of Seafarers during the COVID-19 Pandemic.” *Kokusaiho Gaiko Zasshi* [Journal of International Law and Diplomacy] 120, no. 1/2: 212–23 (in Japanese).
- Nishimura, Yumi. 2021. “Toward Safe Operations of Vessels under the COVID-19 Pandemic: The Role of Flag States.” *Kokusaiho Gaiko Zasshi* [Journal of International Law and Diplomacy] 120, no. 1/2: 110–19 (in Japanese).
- Higuchi, Eka. 2021. “The Problem of Seafarer Replacement Arising from the COVID-19 Pandemic and Japan’s Response: From the Perspective of the 2006 Maritime Labour Convention.” *OPRI Perspectives*, no. 19. <https://www.spf.org/opri-intl/global-data/report/perspectives/20210827133007789.pdf>.

This policy brief series is the product of [a joint research project](#) conducted by the Japan Center for International Exchange (JCIE) and the Tokyo University Institute for Future Initiatives (IFI) to provide analyses on global and regional health governance systems and structures and to offer concrete recommendations about the role Japan should play in the field of global health.

-
- ¹ See Yurika Ishii, “Global Health Administration and Maritime Transport: The Significance and Limitations of the World Health Organization System,” *Policy Brief: Japan’s Global Health Strategy in the Post COVID-19 Era*, vol. 9.
- ² The 201st Session of the Japan House of Representatives, Budget Committee, 3rd Division, Meeting Minutes #1, 37 ([Statement by Masataka Okano, Director-General, International Legal Affairs Bureau, Ministry of Foreign Affairs](#), February 25, 2020).
- ³ Report of the Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 response, [Doc. A74/9 Add.1](#), para. 98.
- ⁴ International Academic Forum, “[Toward Safe and Healthy Trans-border Cruises: International Challenges for Building Resilient and Trusted Ships and Ports](#),” 18–19; Makoto Seta, “Coastal State Responses against Foreign Cruise Ships in Internal Waters during the Pandemic: Towards a New System,” *Kokusaiho Gaiko Zasshi* [Journal of International Law and Diplomacy] 120, no. 1/2 (2021): 126–27 (in Japanese).
- ⁵ IMO, Advice via Circular Letter for IMO Member States, Seafarers and Shipping, <https://www.imo.org/en/MediaCentre/HotTopics/Pages/C19CLs.aspx>.
- ⁶ IMO, Coronavirus (COVID-19)—Recommendations for Port and Coastal States on the Prompt Disembarkation of Seafarers for Medical Care Ashore during the COVID-19 Pandemic, [Circular Letter No.4204/Add.23](#).
- ⁷ Ministry of Land, Infrastructure, Transport and Tourism, “Safety Measures for Resumption of Cruises,” https://www.mlit.go.jp/maritime/maritime_tk2_000017.html (in Japanese).
- ⁸ IMO, Industry Recommended Framework of Protocols for Ensuring Safe Ship Crew Changes and Travel during the Coronavirus (COVID-19) Pandemic, [Doc. MSC.1/Circ.1636/Rev.1](#).
- ⁹ ILO, Fourth Meeting of the Special Tripartite Committee of the MLC, 2006, as amended—Part II, Proposals for amendment to the Code of the Maritime Labour Convention, 2006, as amended in accordance with Article XV, https://www.ilo.org/global/standards/maritime-labour-convention/special-tripartite-committee/WCMS_827572/lang--en/index.htm.