

Cruising through Contagion: The Need to Collectively Address Pandemic Concerns

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I. INTRODUCTION

Since the dawn of civilization, humans have structured time into distinct periods, each with their own defining events. These epochs lend themselves to shaping our adaptations for survival. An example of one such transformation can be found in the plague that led to the decline of the Roman Empire and her last great emperor, Justinian.² One year and twenty-five million deaths later,³ this disease may be branded as the first known pandemic in history.⁴ Anton van Leeuwenhoek later determined the cause to be a result of a seemingly harmless “rod-shaped [creature]”⁵ identified in modern medicine as *Yersinia pestis* — the cause of the bubonic plague.⁶ These “creatures” attached themselves to vermin found within foreign grain sent to various port cities of the Empire.⁷ As eloquently rendered by author William Rosen: “It began, as it always began, at the docks.”⁸ This calamity of death was fueled by the revitalization efforts made by Justinian to restore his Empire’s legacy.⁹ The Romans’ use of captured civilizations to ship their grain tax throughout the Empire was the perfect conduit for the spread of disease.¹⁰

Today, humanity is again dealing with the same dilemma that Justinian’s Empire faced centuries ago. With the 2019 outbreak of SARS-CoV-2, more commonly known as the COVID-19 virus, humanity is being summoned to adapt. COVID-19 is a “highly transmittable and pathogenic viral infection that has spread around the world.”¹¹ While it is not the first documented

² Justinian I was emperor of the Byzantine Empire from 527-565, and he is mostly known for his ambitious expansion and restoration of the Roman Empire to its former glory. WILLIAM ROSEN, PLAGUE, EMPIRE, AND THE BIRTH OF EUROPE JUSTINIAN’S FLEA 168 (2007).

³ ROSEN, *supra* note 2, at 3; “The plague arrived in Constantinople in 542 CE, almost a year after the disease first made its appearance in the outer provinces of the Empire. The outbreak continued to sweep throughout the Mediterranean world for another 225 years, finally disappearing in 750 CE.” John Horgan, *Justinian’s Plague (541-542 CE)*, WORLD HISTORY ENCYCLOPEDIA (Dec. 26, 2014), <https://www.worldhistory.org/article/782/justinians-plague-541-542-ce/>.

⁴ ROSEN, *supra* note 2, at 168; John Horgan, *Justinian’s Plague (541-542 CE)*, WORLD HISTORY ENCYCLOPEDIA (Dec. 26, 2014), <https://www.worldhistory.org/article/782/justinians-plague-541-542-ce/>.

⁵ ROSEN, *supra* note 2, at 175.

⁶ *Id.* at 175, 208-09.

⁷ Marjolein Schat, *Justinian’s Foreign Policy and the Plague: Did Justinian Create the First Pandemic?*, MONTANA STATE UNIVERSITY (2005), <https://www.montana.edu/historybug/yersiniaessays/schat.html>.

⁸ ROSEN, *supra* note 2, at 210 (referencing the work of Procopius, a sixth century Byzantine historian who was known to record this incident in his works which chronicled the reign of the Byzantine Emperor Justinian I).

⁹ ROSEN, *supra* note 2, at 219-20 (mapping the path the disease took amongst the Roman Empire’s port cities and rendering Evagrius Scholasticus’s report that the plague left no person “unvisited by the disease” and cities depopulated).

¹⁰ Schat, *supra* note 7.

¹¹ Muhammed Adnan Shereen et al., *COVID-19 infection: Origin, transmission, and characteristics of human coronaviruses*, NIH NATIONAL LIBRARY OF MEDICINE (Mar. 16, 2020), <https://pubmed.ncbi.nlm.nih.gov/32257431/>.

pandemic in the United States, the virus's ability to rapidly spread through the air¹² and continuously evolve in the human population¹³ makes the disease novel. Within two months of discovery, the virus that originated in mainland China had already spread to twenty-six other countries.¹⁴ The governments in China and other affected countries quickly imposed travel restrictions and other various control methods to help mitigate the spread, but their efforts would fail.¹⁵ By January 20, 2020, the Centers for Disease Control and Prevention (CDC) confirmed the first case within the United States' borders.¹⁶ From there, the world seemed to change overnight. China and other countries like Italy were experiencing "COVID hotspots" so intense that they were issuing emergency lockdowns, effectively shutting themselves off from the rest of the world.¹⁷

COVID-19 shutdowns, like those in China and Italy, would eventually lead to a "collapse in international travel."¹⁸ This worldwide panic caused many countries and governments to close their borders to their citizens and travelers abroad to prevent further exposure.¹⁹ In addition, much of the world took a "quarantinism approach" to prevent the ever-increasing infection rate by "[exercising] forceful controls over the bodies and lives of their subjects, locking down communities, neighborhoods, and cities and imposing broad quarantine orders."²⁰ While this approach seemed necessary at the time, it resulted in a loss of billions to trillions of dollars in the tourism economy, including the cruise industry.²¹

On March 14, 2020, the CDC director issued a "No Sail Order and Suspension of Further Embarkation."²² Passengers, crew members, and cruise-lines scrambled to decide what to do next. The United States' order responded to all cruise lines still conducting cruises, despite the deadly outbreaks seen on numerous cruise ships, such as the highly publicized outbreaks aboard the

¹² BILL GATES, *HOW TO PREVENT THE NEXT PANDEMIC* 4 (2022).

¹³ *Id.*

¹⁴ Chad R. Wells et al., *Impact of international travel and border control measures on the global spread of the novel 2019 coronavirus outbreak*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES (Mar. 13, 2020), <https://www.pnas.org/doi/full/10.1073/pnas.2002616117>.

¹⁵ *Id.*

¹⁶ *CDC Museum Covid-19 Timeline*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/museum/timeline/covid19.html> (last visited Mar. 31, 2023).

¹⁷ *Id.*

¹⁸ Gian Maria Milesi-Ferretti, *The Covid-19 travel shock hit tourism-dependent economies hard*, BROOKINGS INSTITUTION (Aug. 12, 2021), <https://www.brookings.edu/research/the-covid-19-travel-shock-hit-tourism-dependent-economies-hard/>.

¹⁹ Erika Fry, *'I literally was locked up abroad': The diary of a cruise director during the coronavirus pandemic*, FORTUNE MAG. (May 31, 2020, 8:00 AM), <https://fortune.com/2020/05/31/i-literally-was-locked-up-abroad-the-diary-of-a-cruise-director-during-the-coronavirus-pandemic/>.

²⁰ JOHN FAVIAN WITT, *AMERICAN CONTAGIONS* 8 (2020).

²¹ *Secretary-General's Policy Brief on Tourism and COVID-19*, THE WORLD TOURISM ORGANIZATION, <https://www.unwto.org/tourism-and-covid-19-unprecedented-economic-impacts> (last visited on Mar. 31, 2023).

²² No Sail Order and Suspension of Further Embarkation Notice, 85 Fed. Reg. 16628 (Mar. 24, 2020).

DIAMOND PRINCESS and the GRAND PRINCESS.²³ Those sailing were left adrift, like the Netherland-flagged vessel the MS ZAANDAM, which became a COVID-19 hotspot after setting sail on March 7, 2020.²⁴ As COVID-19 hysteria increased worldwide, the ship was denied entry into port by country after country.²⁵ Later labeled the “Pariah Ship,” MS ZAANDAM would become one of the many examples of cruise industry leaders’ failure to mitigate the unprecedented dangers to their passengers, crews, and the world during this crisis.²⁶ Among the passengers of these foreign-flagged vessels, like MS ZAANDAM, were Americans who, despite early news coverage and government warnings about the cruise and aviation industry, continued their travels abroad at the onset of the COVID-19 pandemic.²⁷ These Americans would later blame their poor decision to continue with their vacation plans on the novelty of this virus and the world leaders’ failure to take swift actions to prevent its spread.²⁸

Three years after the beginning of the United States’ awareness of this pandemic, many still wonder whether global failure like this will happen again. The public, especially those who travel internationally via cruise ships and planes, is looking to world leaders for a plan. Due to jurisdictional limitations faced by the United States, the answer will not be a straightforward enforcement of federal or state law. Most of the cargo and passenger cruise vessels are foreign-owned and operated like numerous airlines which engage in foreign transit of passengers and cargo. Because of this, most cargo and passenger cruise vessels adhere to the laws of their owner’s country²⁹ rather than being subject to the strict maritime and aviation laws found in United States territories.³⁰ As countries like the United States deal with their lack of authority over these foreign-owned vehicles of transportation,³¹ these vehicles, their owners, and their host countries’ laws continue to pose a threat.³²

2023 trends suggest the tourism market is heading towards a comeback.³³ The Cruise Line International Association anticipates the embarkation of over thirty million passengers in 2023 alone.³⁴ Contemporaneously, the Official Airline Guide (OAG) is reporting an overall increase in

²³ *Id.*; CDC’s role in helping cruise ship travelers during the COVID-19 pandemic, CENTERS FOR DISEASE CONTROL AND PREVENTION (last updated Nov. 23, 2020), <https://public4.pagefreezer.com/browse/CDC%20Covid%20Pages/11-05-2022T12:30/https://www.cdc.gov/coronavirus/2019-ncov/travelers/cruise-ship/what-cdc-is-doing.html>.

²⁴ Michael Smith et al., *The Pariah Ship*, BLOOMBERG (June 11, 2020, 4:00 AM), <https://www.bloomberg.com/features/2020-zaandam-pariah-ship/#xj4y7vzkg>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Nathaniel Kunkle, *The International Affairs Rule and the Applicability of U.S. Law to Visiting Foreign Ships*, 32 BROOK. J. INT’L L. 635, 635 (2007).

³⁰ *Id.*

³¹ Avery E. Autin, *The ADA aboard Foreign-Flag Cruise Ships: Addressing the Questions Left Unanswered by Spector v. Norwegian Cruise Line Ltd.*, 96 TUL. L. REV. 531, 534 (2022).

³² *Id.*

³³ Simone Shah, *The Cruise Industry Is Back —and Breaking Pre-Pandemic Travel Records*, TIME (Mar. 16, 2023, 6:00 AM), <https://time.com/6263225/cruise-covid-19-protocols/>.

³⁴ *Id.*

global airline capacities.³⁵ While these increases have not yet reached the same level that the aviation industry saw in 2019, the gap is progressively closing. This forecasts a full recovery by 2025.³⁶ While cruises were cast in a very negative light during the pandemic, companies like Royal Caribbean are capitalizing on recovery projections by introducing new vessels, such as the ICON OF THE SEAS.³⁷ A ship which boasted of being the world's largest cruise ship with a capacity to hold over five thousand guests upon its first sail.³⁸ The world must address its lack of uniform rules dealing with communicable diseases in international travel, especially on cruise vessels, before its rebound from COVID-19 is complete. Failure to take prompt action will only reverse the progress made thus far. Consequently, a proactive approach is warranted to prevent the negative repercussions of inaction seen in the past.

This comment examines the United States' management of communicable diseases and jurisdictional limitations that hinder its ability to govern such scenarios. Part II provides an overview of juridical and legislative approaches taken by the United States to prevent the spread of communicable diseases within its borders, regarding COVID-19 and other communicable diseases. Part III examines the jurisdictional limitations faced in the United States' regulation of foreign-flagged vessels during emergencies such as COVID-19. Finally, the fourth part of this commentary sets forth recommendations to improve global health emergency governance while grappling with the complexities posed by the "flags of convenience" system and proposing strategies for working within its limitations.

II. BACKGROUND ON UNITED STATES' APPROACH TO HANDLING COMMUNICABLE DISEASES

Throughout American history, transmissible diseases catalyzed much of society's approach to common, everyday activities. Infectious diseases like smallpox, yellow fever, polio, HIV, and influenza play a defining role in shaping humanity's approach to addressing health and safety matters and water cleanliness standards. They have influenced people, even in their most intimate moments.³⁹ This modern understanding of the effects of infectious disease embodies years of trial and error and is the brainchild of pioneers of healthcare and societal reform.⁴⁰ With the current COVID-19 pandemic, humanity is again on a precipice. Therefore, areas that can be improved deserve examination and analysis. Time has proven that travel is a common vehicle for spreading

³⁵ The Official Aviation Guide of the Airways or "OAG" is a global provider of digital flight information and data solutions to the aviation industry. OAG's service includes real-time flight status updates and a database of airline schedules, routes, flight planning and aviation analytics. OAG has been providing flight information since 1929 and is considered one of the most trusted sources of aviation data in the world. *See* John Grant, *New Year, New Hope, Despite Challenges Ahead in 2023*, OFFICIAL AVIATION GUIDE OF THE AIRWAYS (Jan. 3, 20223), <https://www.oag.com/blog/new-year-new-hope-despite-challenges-ahead>.

³⁶ *Id.*

³⁷ *See* Marielle Descalsota, *Take a look at the 8 biggest new cruise ships set to make their debut this year*, INSIDER (Jan. 29, 2023, 12:01 PM), <https://www.insider.com/biggest-new-cruise-ships-royal-caribbean-carnival-norwegian-2023-1>.

³⁸ *Id.*

³⁹ JOHN FAVIAN WITT, AMERICAN CONTAGIONS 1 (2020).

⁴⁰ GATES, *supra* note 12, at 7.

disease.⁴¹ Because the world is more accessible today, it is necessary to examine travel avenues for potential improvements, such as the cruise industry. Americans and the world should consider past maritime regulation precedent to help guide these adjustments.

A. The Creation and Implementation of Legal Precedent

Conveniently, *Compagnie Francaise de Navigation a Vapeur v. Board of Health*, maritime litigation from the late 1800s, provides modern-day cruise line industry officials with precedent on the United States' stance on the right to travel during a "contagion."⁴² In 1897, during the height of the yellow fever outbreak⁴³, the BRITANNIA, a foreign-owned passenger steamship, arrived at the Port of New Orleans and was denied disembarkation of its foreign and American passengers by port officials due to the epidemic occurring in the New Orleans area and neighboring cities.⁴⁴ The vessel's French owners later sued the state board of health for damages incurred by the delayed delivery of their passengers and goods caused by the Louisiana health regulation.⁴⁵ The Supreme Court of the United States ultimately adjudicated the case.⁴⁶ Justice White justified the state's quarantine restrictions and found that Louisiana had a legitimate interest in protecting its citizens' health and preventing the spread of disease.⁴⁷ The Court further held that the contested regulations were reasonable and did not unduly burden interstate commerce.⁴⁸ Because Louisiana's laws were motivated by preventing the spread of contagion to both its residents and disembarking passengers, the Court determined that Louisiana's regulations were proper "to protect its citizens' health and safety."⁴⁹

⁴¹ ROSEN, *supra* note 2, at 11; MICHAEL SMITH AND JONATHAN FRANKLIN, *CABIN FEVER* (2022).

⁴² John W. Bagby et al., *Medical Martial Law: Towards a More Effective Pandemic Policy*, 47 S. ILL. U. L.J. 1, 2 (2022); *Compagnie Francaise de Navigation a Vapeur v. Board of Health*, 186 U.S. 380 (1902); *see also* Allison M. Whelan, *That's My Baby: Why the State's Interest in Promoting Public Health Does Not Justify Residual Newborn Blood Spot Research Without Parental Consent*, 98 MINN. L. REV. 419, 424 (2013) (discussing the *Compagnie Francaise* case).

⁴³ Yellow fever is a viral disease transmitted by mosquitoes. The disease caused devastating outbreaks in New Orleans in the 1800's. These outbreaks played a significant role in shaping public health policies and practices in the United States. *See* Emily Perkins and John Magill, *In the late 1800s, devastating yellow fever epidemics forced New Orleans to confront its sanitation problem*, THE HISTORIC NEW ORLEANS COLLECTION (May 12, 2020), <https://www.hnoc.org/publications/first-draft/late-1800s-devastating-yellow-fever-epidemics-forced-new-orleans-confront>.

⁴⁴ John W. Bagby et al., *Medical Martial Law: Towards a More Effective Pandemic Policy*, 47 S. ILL. U. L.J. 1, 2 (2022).

⁴⁵ *Id.* at 23-24; *see also* Allison M. Whelan, *That's My Baby: Why the State's Interest in Promoting Public Health Does Not Justify Residual Newborn Blood Spot Research Without Parental Consent*, 98 MINN. L. REV. 419, 424 (2013) (discussing the *Compagnie Francaise* case).

⁴⁶ *Compagnie*, 186 U.S. at 394.

⁴⁷ *Id.* at 397.

⁴⁸ *Id.*

⁴⁹ Allison M. Whelan, *That's My Baby: Why the State's Interest in Promoting Public Health Does Not Justify Residual Newborn Blood Spot Research Without Parental Consent*, 98 MINN. L.

A more recent appreciation of the *Compagnie Francaise* decision arises in a 2016 case, *Hickox v. Christie*. This case involved a nurse's controversial eighty-hour forced quarantine⁵⁰ after she arrived at Newark Airport from areas heavily-impacted by Ebola.⁵¹ A New Jersey federal court upheld a quarantine mandate by Governor Christie's and other New Jersey Health Department officials, which was implemented as a "prophylactic effort" to prevent the spread of Ebola.⁵² Because Ms. Hickox was recently exposed to the virus in her duties as a volunteer in an infected region, the court found that her forced quarantine was reasonable, similar to the quarantine in New Orleans during the 1800s.⁵³ To date, the Supreme Court's decision in *Compagnie Francaise* has never been "revisited, reconsidered, or modified."⁵⁴

B. Governmental and Non-Governmental Regulation Guidance

The United States government has used means other than quarantine to ensure the safety of both citizens and travelers. The cruise industry is subject to several federal laws and agency regulations while operating in the United States territories and waters.⁵⁵ Additionally, associations like the Cruise Lines International Association (CLIA) located in Washington, D.C. (which boasts of providing a unified voice and authority to their participants in the global cruise community) have also adopted a pre-boarding health screening for all of its participating members.⁵⁶ On the other hand, international organizations such as the International Maritime Organization do not address health concerns, despite being known for its involvement in setting cruise ship standards. Instead, the IMO is more focused on fire prevention, navigation safety, training, and contingency for the safe evacuations of passengers.⁵⁷

REV. 419, 424 (2013) (discussing the *Compagnie Francaise* case) (discussing page 387 of the *Compagnie Francaise* opinion).

⁵⁰ Kaci Hickox, known as the "Ebola nurse" was quarantined in 2014 upon returning to the United States from Sierra Leone, where she had been treating Ebola patients as a volunteer nurse. See Lisa Chedekel, *Recalling the Public Panic in Famous Ebola Court Case*, BU TODAY (Mar. 21, 2017), <https://www.bu.edu/articles/2017/kaci-hickox-ebola-nurse/>.

⁵¹ *Hickox v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016).

⁵² *Id.* at 584.

⁵³ See Lisa Chedekel, *Recalling the Public Panic in Famous Ebola Court Case*, BU TODAY (Mar. 21, 2017), <https://www.bu.edu/articles/2017/kaci-hickox-ebola-nurse/>.

⁵⁴ Bagby et al., *supra* note 42, at 24.

⁵⁵ *Cruise Industry Regulation*, CRUISE LINES INTERNATIONAL ASSOCIATION, <https://cruising.org/en/about-the-industry/policy-priorities/Cruise%20Industry%20Regulation> (last visited Feb. 1, 2023).

⁵⁶ See *id.* CLIA is a non-profit association that is the world's largest cruise industry trade association representing 95% of the world's ocean-going cruise capacity and 54,000 travel agents.

⁵⁷ *Passenger Ships*, INTERNATIONAL MARITIME ORGANIZATION, <https://www.imo.org/en/OurWork/Safety/Pages/PassengerShips.aspx> (last visited on Mar. 31, 2023).

Before the COVID-19 pandemic, health regulations on vessels mainly reverted to the nation where the vessels were flagged or the port States with which the vessels were visiting.⁵⁸ In the United States, the Center for Disease Control and Prevention (CDC) exercises authority over ships that carry thirteen or more passengers and have a foreign itinerary with United States ports.⁵⁹ By the 1970s, the CDC joined the cruise ship industry and helped create the Vessel Sanitation Program (VSP).⁶⁰ The goal was to “prevent and control the introduction, transmission, and spread of gastrointestinal illnesses on cruise ships.”⁶¹ This authority was granted to the CDC through the Public Health Service Act under Title 42 of the United States Code, 42 U.S.C. § 264.⁶²

However, VSP only regulates ships that enter United States ports; accordingly, this program does not affect vessels that carry American passengers abroad from other foreign ports.⁶³ In addition, the fees related to complying with VSP’s inspection are expensive.⁶⁴

Federal Register :: Fees for Sanitation Inspection of Cruise Ships

Fee Schedule for Each Vessel Size—Operations Inspections and Reinspections

| Vessel size (GRT ¹) | Inspection fee (US\$) |
|----------------------------------|-----------------------|
| Extra Small (<3,000 GRT) | 1,495 |
| Small (3,001-15,000 GRT) | 2,990 |
| Medium (15,001-30,000 GRT) | 5,980 |
| Large (30,001-60,000 GRT) | 8,970 |
| Extra Large (60,001-120,000 GRT) | 11,960 |
| Mega (120,001-140,000 GRT) | 17,940 |
| Super Mega (>140,001 GRT) | 23,920 |

¹ Gross register tonnage in cubic feet, as shown in Lloyd’s Register of Shipping.

Some critics of costly compliance programs, like the VSP, believe that such programs create an incentive for companies to register their vessels under foreign-flag nations.⁶⁵ Consequently, such

⁵⁸ *Cruise Industry Regulation*, CRUISE LINES INTERNATIONAL ASSOCIATION, <https://cruising.org/en/about-the-industry/policy-priorities/Cruise%20Industry%20Regulation> (last visited Feb. 1, 2023).

⁵⁹ *CDC and Cruise Ship Sanitation: Protecting the Public’s Health*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nceh/vsp/pub/cdc-vsp-cruise-ship-sanitation-508.pdf> (last visited Mar. 31, 2023).

⁶⁰ *Traveler’s Health Guide to Covid-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html> (last visited Mar. 31, 2023).

⁶¹ *Id.*

⁶² *See generally*, 42 U.S.C. § 264 (2002).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ J. Jonas Anderson, *Hiding Behind Nationality: The Temporary Presence Exception and Patent Infringement Avoidance*, 15 MICH. TELECOMM. & TECH. L. REV. 1, 33 (2008); Tony Alderton & Nik Winchester, *Regulation, Representation and the Flag Market*, 1469-1957 J. MAR. RES. 89,99 (2011); Autin, *supra* note 31.

programs create an environment that results in less monitoring of the cruise line industry. Further, these programs also make the industry more prone to inadequate responses to the spread of infectious disease on vessels.

Similarly, before the outbreak of COVID-19, the aviation industry also experienced emerging regulations like those of the cruise industry.⁶⁶ For example, studies conducted in 2015 by the United States Government Accountability Office (GAO) focused on air travel and communicable diseases.⁶⁷ Specifically, the study examined the growth of international air travel in this “highly mobile and interconnected world,” as well as the world’s lack of preparedness during other recent epidemic threats such as the 2003 SARS epidemic.⁶⁸ As a result, the World Health Organization, in collaboration with various countries, set forth regulations that proposed a response protocol for flights threatened with communicable diseases.⁶⁹ These regulations address before, during, and after-flight responsibilities of airline personnel and their respective regulatory agencies.⁷⁰ For example, if a passenger poses a sufficient risk, an airline can either delay travel, isolate a passenger, restrict further travel, or work with the federal, state, or local government to isolate or quarantine passengers.⁷¹

One similarity of both industries is the CDC’s mandatory reporting of any on-board deaths or illnesses indicative of a communicable disease. Under 42 C.F.R. § 71.1, the CDC requires the staff of an international aircraft destined for the United States to report any onboard occurrences of death or illness among passengers or crew prior to landing.⁷² Correspondingly, Title 42 regulations also require vessels entering a United States port to report any occurrence of illness, death, or illness related disembarkation or removal from the ship before the vessel’s arrival.⁷³ Both aviation and cruise personnel have distinct requirements on reporting these occurrences.⁷⁴

While these regulations aimed to protect aircraft and vessel passengers, they failed to help in situations such as the COVID-19 pandemic. By January 30, 2020, international organizations, including the World Health Organization (WHO), began taking proactive measures to alert the world to the presence of this novel disease.⁷⁵ First, the WHO declared a “Public Health Emergency of International Concern under International Health Regulations.”⁷⁶ The following day, United

⁶⁶ Shah, *supra* note 33.

⁶⁷ U.S. GOV’T ACCOUNTABILITY OFF. GAO-16-127, Air Travel and Communicable Diseases: Comprehensive Federal Plan Needed for U.S. Aviation System’s Preparedness 1 (2015).

⁶⁸ *Id.* at 4-5.

⁶⁹ *Id.* at 5.

⁷⁰ *Id.* at 10-13.

⁷¹ *Id.* at 10-13.

⁷² GAO-16-127, *supra* note 68, at 11; CDC regulations require that commander of an aircraft immediately report to the airport any death or illness on board. 42 C.F.R. § 71.21(b) (2015).

⁷³ *Federal Regulations for Reporting Death or Illness on Ships Destined for the United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION (last reviewed Mar. 21, 2017), <https://www.cdc.gov/quarantine/maritime/federal-regulations-reporting-illness-death-ships-destined-united-states.html>.

⁷⁴ *Id.*; GAO-16-127, *supra* note 68.

⁷⁵ No Sail Order and Suspension of Further Embarkation Notice, 85 Fed. Reg. 16628 (Mar. 24, 2020).

⁷⁶ *Id.*

States officials deemed COVID-19 a public health emergency.⁷⁷ This declaration prompted the CDC to offer guidance discouraging the travel of those with underlying medical conditions, and issued warnings for Americans to avoid taking cruises and traveling to COVID-19 hotspot areas.⁷⁸ At the same time, the government issued travel bans to those coming into the United States from areas with high infection rates.⁷⁹ Yet, it was too little, too late. By March 14, 2020, the CDC issued a “No Sail Order and Suspension of Further Embarkation” in response to the global pandemic.⁸⁰

The order suspended the operation of vessels capable of carrying at least two hundred and fifty passengers.⁸¹ As the CDC expressed, cruise ships did not have the ability to social distance passengers and crews due to the ship’s “close-contact environments.”⁸² Additionally, the CDC and other international governments and agencies were concerned that this form of travel was counterintuitive to preventing the spread. These groups concluded that ships were disembarking in various ports of call and, typically had passengers flying to and from multiple areas of the world.⁸³ Furthermore, the CDC remarked that many of the most severe epicenters came from cruise vessels.⁸⁴

Entities like the Cruise Line International Association (CLIA) and other cruise lines voluntarily halted operations from United States ports in an effort to prevent the spread of COVID-19.⁸⁵ The CDC, in its announcement, commended these volunteers and “the commitment they demonstrate[d] to protecting the health of both cruise ship passengers and the public at large.”⁸⁶ Again, the United States utilized the Public Health Service Act, attempting to mitigate the COVID-19 pandemic.⁸⁷

At present, the regulations for mitigation of COVID-19 on vessels such as cruise ships are outlined in detail by the CDC.⁸⁸ In contrast to the mandatory voluntary plea seen at the beginning of the pandemic, these regulatory guidelines are not mandatory.⁸⁹ Instead, the CDC details everything from infection prevention prior to setting sail to the procedures a vessel should adhere to when passengers are embarking and disembarking.⁹⁰ For example, the guidelines aim to control

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ No Sail Order and Suspension of Further Embarkation Notice, 85 Fed. Reg. 16628 (Mar. 24, 2020).

⁸¹ *Id.* at 16628-29.

⁸² *Id.* at 16629.

⁸³ *Id.* at 16630.

⁸⁴ *Id.*

⁸⁵ No Sail Order and Suspension of Further Embarkation Notice, 85 Fed. Reg. 16628, 16631 (Mar. 24, 2020).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Guidance for Maritime Vessels on the Mitigation and Management of COVID-19*, CENTER FOR DISEASE CONTROL (last reviewed Apr. 27, 2023), <https://www.cdc.gov/quarantine/maritime/covid-19-ship-guidance.html#discontinuation-isolation>.

⁸⁹ *Id.*

⁹⁰ *Id.*

the spread of infection through routine disinfection and cleaning processes, along with increased ventilation throughout a vessel.⁹¹

Beyond basic sanitation, COVID-19 vaccines are recommended for all crew and travelers to help alleviate stress on cruise ships' medical centers.⁹² The guidelines further detail operational suggestions for cruise dining, public restrooms, shore excursions, and a plethora of other cruise-related activities.⁹³ But ultimately, this guidance is simply a helpful tool for the development of procedural plans and is not mandatory.⁹⁴ The CDC only demands on-board death and illness reporting.⁹⁵ Whether a ship is sailing from a United States port or a foreign port, the CDC requires that all ships report any death or "illness"⁹⁶ to the CDC Quarantine Station within the destination port's jurisdiction.⁹⁷

C. Recent Litigation focused on the Governance of COVID-19

Three years later, courts throughout the United States are still faced with parties seeking a ruling on whether government restrictions appropriately address the challenges posed by the ongoing COVID-19 pandemic.⁹⁸ As the United States moves further away from the early days and months of this pandemic, courts have permitted regulations that genuinely show that they are narrowly tailored to achieve a compelling government interest in preventing the spread of COVID-19.⁹⁹ Rulings like that of *Florida v. Becerra* play a role in shaping the future governance of the United States' policies on communicable diseases.¹⁰⁰ In this case, Florida sued the CDC and asserted that the CDC's conditional sailing order and vessel guidelines were unlawful.¹⁰¹ The District Court held that the CDC's order was arbitrary and capricious; and therefore, the court ordered an injunction that enjoined the CDC from "enforcing against [cruise ships] arriving in, within, or departing from a port in Florida the conditional sailing order and the later measures."¹⁰²

Another highly publicized ruling that has impacted future communicable disease governance is the *Norwegian Cruise Line Holdings Ltd. v. Florida Dep't of Health* case. In this case, Governor DeSantis signed an executive order banning businesses from requiring proof of

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Guidance for Maritime Vessels, supra*, note 89.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See Definitions of Signs, Symptoms, and Conditions of Ill Travelers*, CENTER FOR DISEASE CONTROL (last reviewed Mar. 21, 2017), <https://www.cdc.gov/quarantine/maritime/definitions-signs-symptoms-conditions-ill-travelers.html#print>. This website indicates that the CDC defines what constitutes an "ill person."

⁹⁷ *Guidance for Maritime Vessels, supra*, note 89.

⁹⁸ *See, e.g.*, *Bridges v. Houston Methodist Hospital*, 543 F. Supp. 3d 525 (S. D. Tex. 2021); *Jones v. Cuomo*, 542 F. Supp. 3d 207 (S.D.N.Y. 2021).

⁹⁹ *Jones*, 542 F. Supp. 3d at 207.

¹⁰⁰ *Florida v. Becerra*, 544 F. Supp. 3d 1241, 1246-47 (M.D. Fla. 2021).

¹⁰¹ *Id.*; *Norwegian Cruise Line Holdings Ltd. v. Florida Dep't of Health*, 50 F.4th 1126 (11th Cir. 2022).

¹⁰² *Becerra*, 544 F. Supp. 3d at 1246.

vaccinations in Florida, including cruise lines that operated out of Florida ports.¹⁰³ Norwegian Cruise Lines sued the state over the ban on vaccine mandates, as the law directly conflicted with the CDC's guidelines for operation.¹⁰⁴ The case resulted in the court lifting an injunction against Florida's order. However, with the CDC's relaxation of vessel guidelines, Norwegian's conflict with Florida's order became moot.¹⁰⁵ This case highlighted two important tensions: (1) public health concerns versus individual freedoms, and (2) the balance between state and federal authorities in regulating public health measures during a global pandemic.

III. APPLYING UNITED STATES LAW TO FOREIGN FLAGGED VESSELS

As previously discussed, the United States has enacted numerous provisions to protect against the spreading of communicable diseases by vessels entering its borders. Now, this comment shifts its focus to the country's external strategies for governing vessels sailing into port or international waters. Unfortunately, due to the vast and intricate nature of the global legal framework governing cruise ships' safety and security it is impossible to provide a complete discussion on this topic. However, this comment focuses on several key laws and regulations that have shaped the current governance of the cruise industry. The discussion first highlights the historical approach to the governance of the sea. Next, the discussion focuses on the United Nations Convention on the Law of the Sea and other relevant conventions and organizations. Finally, this section explores the limitations on port states' rights over foreign-flagged vessels.

A. Navigational Freedoms

Oceans have been important to human survival for centuries.¹⁰⁶ Today, transportation, tourism, energy production, scientific research, and environmental conservation all highlight the significant contributions of oceans to the global economy and their essential role in supporting human life. The various uses of the oceans are both fostered and hindered by the international principle of freedom of the high seas.¹⁰⁷ High seas are defined as the "area beyond national appropriation and not subject to state sovereignty."¹⁰⁸ Under this customary principle of freedom, all have the right to certain freedoms, including navigation of the world's oceans.¹⁰⁹

¹⁰³ *Norwegian Cruise*, 50 F.4th at 1133; see Jim Saunders, *The cruise line challenge to Florida's ban on vaccine passports is near an end*, NEWS SERVICE OF FLORIDA (Oct. 6, 2022, 10:02 AM), <https://wusfnews.wusf.usf.edu/economy-business/2022-10-06/the-cruise-line-challenge-to-floridas-ban-on-vaccine-passports-is-near-an-end>.

¹⁰⁴ *Norwegian Cruise*, 50 F.4th at 1131.

¹⁰⁵ *Norwegian Cruise*, 50 F.4th at 1133; see Jim Saunders, *The cruise line challenge to Florida's ban on vaccine passports is near an end*, NEWS SERVICE OF FLORIDA (Oct. 6, 2022, 10:02 AM), <https://wusfnews.wusf.usf.edu/economy-business/2022-10-06/the-cruise-line-challenge-to-floridas-ban-on-vaccine-passports-is-near-an-end>.

¹⁰⁶ See DONALD R. ROTHWELL & TIM STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* 2-3 (1st ed. 2010).

¹⁰⁷ *Id.* at 146.

¹⁰⁸ *Id.*

¹⁰⁹ See *id.* at 155 ("For the same reasons the sea is common to all, because it is so limitless that it cannot become a possession of anyone, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.").

The cruise industry has capitalized on the principle of freedom of the high seas by bringing tourists to exotic locations. While cruise lines have generally enjoyed considerable freedom under this principle, recent trends indicate greater regulation from international treaty laws over their operations' safety, security, and environmental impact.¹¹⁰ This leaves the entire cruise industry in limbo over various issues like sanitation regulations.¹¹¹

B. Conventions which have helped in the creation of the Law of the Sea

Governance of the high seas finds origins as far back as the seventeenth century,¹¹² and this customary regulatory system has since been codified through various conventions.¹¹³ In 1930, countries gathered for the Hague Conference for Codification of International Law to discuss a state's rights and breath over its territorial seas.¹¹⁴ Later, in 1958, countries gathered for the first United Nations Conference on the Law of the Sea (UNCLOS) in Geneva, Switzerland to discuss territorial limitations and governing laws.¹¹⁵ Despite having yet another United Nations Convention on the Law of the Sea (UNCLOS II) in 1960,¹¹⁶ serious challenges regarding the regulation of offshore resources, protection of the marine environment, and ever-changing international community required reevaluation of the Convention's articles.¹¹⁷

From 1973 to 1982, these challenges were addressed in the most significant conference of the United Nations Convention on the Law of the Sea (UNCLOS III). While the United States and other nations voted against the articles for various reasons,¹¹⁸ the resulting articles from UNCLOS III are still globally recognized.¹¹⁹ In fact, the articles were created by the collaboration of more than one hundred and fifty countries. The Convention's full text comprises three hundred and twenty articles and nine annexes "governing all aspects of ocean space."¹²⁰ One of the most significant parts of UNCLOS III was the clarification of international laws regarding jurisdictional rights over different marine zones, including the high seas.¹²¹ Specifically, the areas addressed were broken down into two main zones – marine spaces under national jurisdiction and marine spaces beyond national jurisdiction.¹²²

Article 86, which falls within the "marine spaces beyond national jurisdiction" zone, defines high seas as "extend[ing] to 'all parts of the sea' that are not included within the EEZ: territorial sea, internal waters of a coastal state, or the archipelagic waters of an archipelagic

¹¹⁰ YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 46-47 (CAMBRIDGE UNIV. PRESS 3rd ed. 2019).

¹¹¹ *Id.* at 22-26.

¹¹² ROTHWELL & STEPHENS, *supra* note 107, at 148.

¹¹³ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 243 (hereinafter UNCLOS III).

¹¹⁴ TANAKA, *supra* note 111, at 26-27.

¹¹⁵ *Id.* at 26-28.

¹¹⁶ *Id.* at 31.

¹¹⁷ *Id.* at 32.

¹¹⁸ *Id.* at 37. The United States signed UNCLOS III, but the U.S. Senate never ratified it.

¹¹⁹ TANAKA, *supra* note 111, at 36-37.

¹²⁰ UNCLOS III, *supra* note 114.

¹²¹ TANAKA, *supra* note 111, at 53.

¹²² *Id.* at 94, 145, 186.

state.”¹²³ With this definition, UNCLOS III effectively discarded the “cannon-shot rule,” which was a custom stating that the start of the territorial sea was beyond the “range of a cannon shot from shore.”¹²⁴ Instead, the new measurement demarcates the start of the high seas at twelve nautical miles from the baseline.¹²⁵ UNCLOS III also contains a collection of provisions establishing the status of vessels and the obligations of vessels when in this zone.¹²⁶ Specifically, Article 87 lists the benefits of the high seas,¹²⁷ including freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom of fishing, freedom to construct artificial islands and other installations, and freedom of scientific research.¹²⁸

The provisions, subject to certain limitations, in UNCLOS III also address marine zones under national jurisdiction utilized by the cruise industry today. Those maritime zones can be organized into territorial seas, contiguous zones, and the exclusive economic zone.¹²⁹ Baselines are essential in determining the seaward limits of each jurisdictional zone, as they form the “line from which the outer limits of marine spaces under the national jurisdiction of coastal state are measured.”¹³⁰ These lines are considered the boundary between internal waters and the territorial sea.¹³¹ For this reason, baseline measurements have been very controversial,¹³² which is why there is more than one type of baseline. Adding to potential controversy is the fact that baselines can be normal, straight, and archipelagic.¹³³

A normal baseline depends on the low-water line along a nation’s coast.¹³⁴ Furthermore, the coastal state must officially recognize this baseline on large-scale charts.¹³⁵ However, coastal configurations, such as deep indentations or coastlines with scattered islands, can cause complications in defining a baseline.¹³⁶ In these situations, straight baselines are “determined by means of a geometrical construction.”¹³⁷ The drawing of these lines should not “depart . . . from the general direction of the coast, and the sea areas lying within the lines must be sufficiently

¹²³ ROTHWELL & STEPHENS, *supra* note 107, at 154-55.

¹²⁴ TANAKA, *supra* note 111, at 27.

¹²⁵ *Id.* at 102; UNCLOS III, *supra* note 113, at art. 3.

¹²⁶ ROTHWELL & STEPHENS, *supra* note 107, at 158.

¹²⁷ *Id.* at 155.

¹²⁸ *Id.* at 155-58.

¹²⁹ TANAKA, *supra* note 111, at 166.

¹³⁰ *Id.* at 53.

¹³¹ *Id.*

¹³² ROTHWELL & STEPHENS, *supra* note 108, at 33-34. The Anglo-Norwegian Fisheries Case is referenced to discuss a 1951 dispute between Norway and the United Kingdom where the UK claimed that Norwegian fisheries zone and territorial sea claim were not in adherence to international law. There the court found that Norway’s method for the delimitation of its zones and its reliance upon straight baselines drawn around the skjaergaard was acceptable.

¹³³ TANAKA, *supra* note 111, at 54.

¹³⁴ *Id.*

¹³⁵ UNCLOS III, *supra* note 113, at art. 5; TANAKA, *supra* note 111, at 54.

¹³⁶ UNCLOS III, *supra* note 113, at art. 7.

¹³⁷ TANAKA, *supra* note 111, at 58.

closely linked” to the coastal State.¹³⁸ Alternatively, baselines can be measured from a straight line across the mouth of a river¹³⁹ which can create clear lines along coastal states.¹⁴⁰

Because baselines define the boundary between international waters and the territorial sea, baselines dictate relevant legal framework and jurisdictional rights in these areas.¹⁴¹ Territorial seas extend twelve nautical miles from the baselines.¹⁴² Internal waters, discussed in Article 8, are “waters on the landward side of the baseline of the territorial sea.”¹⁴³ Coastal states have sovereignty over the air space above and sovereignty over the seabed and subsoil in their territorial seas.¹⁴⁴

Sovereignty does not mean the coastal state can prevent all activities within its territorial seas. For example, Article 17 of UNCLOS III provides that all ships enjoy the right of innocent passage through the territorial sea.¹⁴⁵ But, the coastal state has the power to enact some laws to regulate its waters.¹⁴⁶ For instance, coastal states can impose requirements on foreign ships for the safety and security of their citizens as long as these requirements do not discriminate against ships of any state.¹⁴⁷ One coastal state allowance is in Article 21 of the Convention¹⁴⁸ which provides that laws and regulations, in conformity with the provisions of the Convention and international law, can be created to prevent “the infringement of customs, fiscal, immigration or sanitary laws and regulations of the coastal State.”¹⁴⁹

The contiguous zone falls beyond the territorial seas and expands a coastal state’s reach twenty-four nautical miles from the baseline.¹⁵⁰ This zone is not automatically attributable to the coastal state, but it must be claimed or treated as part of the high seas by the coastal state.¹⁵¹ In the additional twelve nautical miles past the territorial seas, coastal states are allowed some of the same privileges enjoyed in their territorial waters,¹⁵² specifically the right to implement sanitary laws and regulations.

If a state claims an area beyond twenty-four nautical miles from its baseline, that area will also be considered part of its Exclusive Economic Zone (EEZ).¹⁵³ Thus, the coastal state’s jurisdiction will extend to two hundred nautical miles from the baselines of the territorial sea.¹⁵⁴

¹³⁸ *Id.* at 59.

¹³⁹ *Id.* at 71.

¹⁴⁰ *Id.* at 72.

¹⁴¹ TANAKA, *supra* note 111, at 53.

¹⁴² UNCLOS III, *supra* note 113, at art. 3.

¹⁴³ *Id.* at art. 8.

¹⁴⁴ *Id.* at art. 2, part II.

¹⁴⁵ *Id.* at art. 17.

¹⁴⁶ *Id.*

¹⁴⁷ UNCLOS III, *supra* note 113, at art. 24-25.

¹⁴⁸ *Id.* at art. 21.

¹⁴⁹ *Id.*

¹⁵⁰ TANAKA, *supra* note 111, at 166.

¹⁵¹ *Id.*; TANAKA *supra* note 111, at 146.

¹⁵² TANAKA, *supra* note 111, at 147.

¹⁵³ *Id.* at 151, 166.

¹⁵⁴ *Id.*

Most states that adhere to UNCLOS have claimed their EEZ zones, thus extending their jurisdiction another one hundred eighty-eight nautical miles.¹⁵⁵

The EEZ zone is unlike other maritime zones. In it, a coastal state's power is greater than the general or residual jurisdictional rights seen in some of the other maritime zones.¹⁵⁶ Most of the rights recognized in the EEZ zone surround conserving, managing, exploring, and exploiting the living and non-living natural resources of the zone's waters.¹⁵⁷ Foreign states operating in another state's EEZ zone have limited freedom of navigation and overflight, and have restrictions on where they can lay pipelines and cables.¹⁵⁸ Coastal states still have "jurisdictional and enforcement rights in relation to customs, fiscal, immigration and sanitary matters provided under the Contiguous Zone regime that overlaps with the first twelve nautical miles of the EEZ."¹⁵⁹

UNCLOS III's establishment of jurisdictional zones demarcating where states have sovereignty or jurisdiction is consistent with existing jurisprudence and statutory regulations within the United States.¹⁶⁰ The cruise line industry must be well-versed in these jurisdictional zones. Jurisprudence indicates that the law of territorial sovereigns, such as the United States, governs any vessels within its territorial domain.¹⁶¹ While foreign-flag vessels, including most cruise vessels, are entitled to the protections of U.S. laws,¹⁶² their obedience to these laws and how far they reach is often challenged. The concept of a flag state will be examined in greater detail in the next section.

C. Regulation by Flag of Registry and Conflicts with Port States

The issue of a ship's nationality is extensively detailed in Part VII of the United Nations Convention on the Law of the Sea, beginning with Article 91.¹⁶³ The nationality of a vessel is determined by the flag flown by the vessel.¹⁶⁴ These flag states, in turn, have exclusive jurisdiction over vessels flying their flags.¹⁶⁵ Exclusive jurisdiction grants the flag states both legislative and enforcement privileges to the extent provided by international law,¹⁶⁶ which makes flagged vessels comparable to floating extensions of their flag state territories.¹⁶⁷

Flag states have various responsibilities for their flagged vessels.¹⁶⁸ Article 94 of the Law of the Sea Convention details certain obligations required, such as each state's obligation to claim

¹⁵⁵ *Id.* at 151.

¹⁵⁶ ROTHWELL & STEPHENS, *supra* note 107, at 90.

¹⁵⁷ UNCLOS III, *supra* note 113, at art. 56; ROTHWELL & STEPHENS, *supra* note 107, at 88-89.

¹⁵⁸ UNCLOS III, *supra* note 113, at art. 58.

¹⁵⁹ ROTHWELL & STEPHENS, *supra* note 108, at 90.

¹⁶⁰ 43 U.S.C. § 1333.

¹⁶¹ UNCLOS III, *supra* note 113, at art. 21.

¹⁶² *See* *Cunard S.S. Co. v. Melon*, 262 U.S. 100, 124 (1923) (holding that foreign-flag vessels were protected by U.S. laws while also being "bound to yield obedience to them" in order to prevent foreign-flagged vessels from circumventing prohibition laws).

¹⁶³ UNCLOS III, *supra* note 113, at art. 91, part VII.

¹⁶⁴ *Id.*

¹⁶⁵ TANAKA, *supra* note 111, at 189.

¹⁶⁶ UNCLOS III, *supra* note 113, at art. 92(1); TANAKA, *supra* note 111, at 189.

¹⁶⁷ TANAKA, *supra* note 111, at 191.

¹⁶⁸ UNCLOS III, *supra* note 113, at art. 94.

jurisdiction over each ship, crew, master, and officer under its flag.¹⁶⁹ This requirement, along with various other duties listed under Article 94 require flag states to apply particular maritime standards in areas such as shipping, criminal, and civil laws.¹⁷⁰ These measures encourage flag states to govern their flagged vessels under generally accepted international regulations¹⁷¹ but often fall short of ensuring the broad uniform adoption of standards.¹⁷²

As previously stated, vessels historically flew the flag of the vessel owner's ship.¹⁷³ However, following World War II, there was an increase in competition over the governance of the international shipping market.¹⁷⁴ This competition led to the birth of the phenomenon known as the "flag of convenience."¹⁷⁵ "Flags of convenience," or what some scholars have termed vessel owner's "race-to-the-bottom," affects more than half of all merchant ships in the world, including around ninety percent of commercial marine vessels operating within United States ports.¹⁷⁶ The International Transport Workers' Federation (ITF)¹⁷⁷ has identified over forty "flags of convenience" countries.¹⁷⁸ One potential reason that vessel owners choose a flag of convenience probably relates to the country's monetary benefits associated with the laws and regulations.

As an illustration of how flag state registration practices can impact vessel operational costs, consider the case of Norwegian Cruise Lines. Although headquartered in Miami, Florida, this Malaysian-based company operates a fleet of ships primarily flagged under the countries of Panama and the Bahamas.¹⁷⁹ This arrangement indicates the company's incorporation in these countries and its adherence to their maritime laws and regulations.¹⁸⁰ However, Norwegian Cruise Lines does have one cruise ship, the PRIDE OF AMERICA, registered under the United States

¹⁶⁹ *Id.*

¹⁷⁰ ROTHWELL & STEPHENS, *supra* note 107, at 160.

¹⁷¹ *Id.*; TANAKA, *supra* note 111, at 191.

¹⁷² *Id.* at 159.

¹⁷³ Vincent Iwunze, *Has the Exception Become the Rule? - Examining the Growing Dominance of Flags of Convenience in International Shipping*, 3 IJOCLLEP 15, 16 (2021).

¹⁷⁴ *Id.*

¹⁷⁵ ROTHWELL & STEPHENS, *supra* note 108, at 159. See *Cruise Ship Registry, Flag State Control, Flag of Convenience*, CRUISE MAPPER (NOV. 26, 2015), <https://www.cruisemapper.com/wiki/758-cruise-ship-registry-flags-of-convenience-flag-state-control>; <https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience>.

¹⁷⁶ *Id.*

¹⁷⁷ The International Transport Workers Federation is a world-wide recognized transport authority whose mission is to improve working lives for millions of people across the world. See *About Us*, INTERNATIONAL TRANSPORT WORKERS' FEDERATION, <https://www.itfglobal.org/en/about-us/who-we-are> (last visited Mar. 3, 2023).

¹⁷⁸ See *Flags of Convenience*, INTERNATIONAL TRANSPORT WORKERS' FEDERATION, <https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience> (last visited Mar. 3, 2023).

¹⁷⁹ Bill McGee, *Why are cruise ships registered in foreign countries?*, USA TODAY (Mar. 23, 2023), <https://www.usatoday.com/story/travel/cruises/2012/12/11/why-are-cruise-ships-registered-in-foreign-countries/1760759/>.

¹⁸⁰ Ashley Kosciolik, *Where Is My Cruise Line Based?*, CRUISE CRITIC (Mar. 23, 2023), <https://www.cruise critic.com/articles.cfm?ID=5305>.

flag.¹⁸¹ The American-flagged vessel benefits from the Jones Act, which allows the vessel to cruise between United States ports.¹⁸²

Nevertheless, this exclusive advantage does not outweigh the costs of flying the United States flag because corporations like Norwegian must adhere to the relatively strict and complex requirements for vessel registration found in 46 U.S.C.A. § 21103.¹⁸³ Additionally Norwegian “must hire American crews, pay American wages and taxes, and follow American environmental regulations” should the corporation choose to fly the U.S. flag.¹⁸⁴ These requirements significantly increase operational costs.¹⁸⁵ For its non-U.S. flagged vessels, Norwegian operational costs are minimized because of the access to foreign employment regulations, reduced tax burdens, and greater flexibility in terms of where and how they can operate.¹⁸⁶

Most cruise lines, like Norwegian, choose to capitalize on the flag of convenience business model.¹⁸⁷ This forces a port state to choose whether to acknowledge the sovereignty of the foreign flagged vessel or reject it in favor of port tranquility.¹⁸⁸ A state port can exercise jurisdiction over a foreign flagged vessel through a principle called “territoriality”.¹⁸⁹ The Supreme Court has further acknowledged that the United States can protect its ports and citizens on foreign-flagged vessels as long as the issue does not involve the vessels’ internal affairs.¹⁹⁰

¹⁸¹ McGee, *supra* note 182.

¹⁸² Leslie Wayne, *Political Savvy Gets U.S. Flags On Foreign Ship*, USA TODAY (Mar. 1, 2023), <https://www.nytimes.com/2003/12/14/us/political-savvy-gets-us-flags-on-foreign-ship.html> (discussing the PRIDE OF AMERICA’s ability to cruise amongst the Hawaiian islands exclusively compared to its counterparts who are required to stop in a foreign port either in Mexico or Canada thousands of miles and days away from the Hawaiian Islands); *see also* 46 U.S.C. § 55102(b).

¹⁸³ 46 U.S.C. § 12103.

¹⁸⁴ Wayne, *supra* note 185.

¹⁸⁵ McGee, *supra* note 182.

¹⁸⁶ *See Flags of Convenience*, INTERNATIONAL TRANSPORT WORKERS’ FEDERATION, <https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience> (last visited Mar. 3, 2023).

¹⁸⁷ Kosciolk, *supra* note 183.

¹⁸⁸ *Jurisdiction Over Vessels*, NOAA <https://www.noaa.gov/jurisdiction-over-vessels> (last visited on Mar. 23, 2023); *Cunard S.S. Co.*, 262 U.S. at 124 (prohibiting a foreign-flagged ship during Prohibition from manufacturing, transporting, or selling liquor in U.S. waters. This case established that territorial laws trump vessel flag states but that the territorial sovereign, in this case the United States, may choose not to apply its laws to a visiting foreign-flagged vessel).

¹⁸⁹ *Jurisdiction Over Vessels*, NOAA <https://www.noaa.gov/jurisdiction-over-vessels> (last visited on Mar. 23, 2023); UNCLOS III Art 25, 218, 219, and 220.

¹⁹⁰ *See, e.g., Spector v. Norwegian Cruise Lines Ltd.*, 545 U.S. 119, 130-31 (2005) (holding in a five-to-four decision that Title III of the Americans with Disabilities Act (ADA) does apply to foreign-flagged cruise ships in U.S. waters, thus indicating that foreign-flagged cruise ships operating in U.S. waters must comply with the ADA’s nondiscrimination provisions and that these provisions were not considered as part of the ship’s internal affairs); Autin, *supra* note 31 (defining when the Court will not find a situation to be deemed internal affairs as: “while in U.S. waters, if Americans are affected, courts will often find the U.S. law applicable.”).

Ultimately in a situation where a vessel is infected or possibly infected with a communicable disease, the question of whether taking control of the ship involves the United States' intrusion into an internal affair will most likely be irrelevant. Quarantine laws of the port and the rules that apply to ships in distress at sea will take effect to determine jurisdiction.¹⁹¹ Like most port states, the United States' interest will converge with the flag state's interest in preventing the loss of life or the spread of mass illness. More than likely, this interest will be shared by the vessel and its owner.¹⁹² Furthermore, despite a flag state having exclusive jurisdiction over cruise ships on the high seas, most flag states will rely on the nearest port states to allow their vessels admittance to mitigate dangerous situations for the ship, environment, crew, and passengers.¹⁹³

IV. OVERCOMING JURISDICTIONAL LIMITATIONS TO PREVENT THE SPREAD OF COMMUNICABLE DISEASE

Finding solutions to maritime jurisdictional challenges to curb the spread of communicable diseases that have plagued humanity for centuries seems insurmountable.¹⁹⁴ The devastation seen during COVID-19 and how fast an infectious disease can spread due to the world's unpreparedness and lack of foresight should never happen again. This section first addresses the lack of international governance over foreign-flagged vessels' response to communicable diseases. Finally, the section explains why nations need to stop excusing their inability to govern on the "flags of convenience" system and use the legal tools already discovered to handle foreign registration for financial benefit schemes.

A. Call for a Collective Approach

In early 2020, the cruise industry quickly became the "unattractive face of [COVID-19]."¹⁹⁵ As the pandemic eased, the industry's pre-pandemic success reemerged.¹⁹⁶ So the question has remains: how do we prevent the world from reverting to its pre-pandemic mindset? With the travel and tourism industries gaining popularity again, the world must take steps to prepare for future public-health emergencies while there is still momentum to enact change,¹⁹⁷ but, this

¹⁹¹ TANAKA, *supra* note 111, at 98-102; *Compagnie*, 186 U.S. at 391; *See generally*, 42 U.S.C. § 264.

¹⁹² *Compagnie*, 186 U.S. at 394; MICHAEL SMITH & JONATHAN FRANKLIN, CABIN FEVER (2022) (recalling the start of the COVID-19 Pandemic when the United States allowed the foreign-flagged MS ZAANDAM into a Florida port); *See generally*, 42 U.S.C. § 264.

¹⁹³ TANAKA, *supra* note 111, at 98-102.

¹⁹⁴ *See* Ruria Iteraera, *Infectious Diseases and Maritime Law* (U.N. – Nippon Foundation Fellowship Programme 2009-2010, Oceans and Law of the Sea - Division for Ocean Affairs and the Law of the Sea), https://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/iteraera_0910_kiribati.pdf (discussing several historical infectious diseases starting from the Black Death).

¹⁹⁵ Simone Shah, *The Cruise Industry Is Back —and Breaking Pre-Pandemic Travel Records*, TIME (Mar. 16, 2023), <https://time.com/6263225/cruise-covid-19-protocols/>.

¹⁹⁶ *Id.*

¹⁹⁷ GATES, *supra* note 12, at 10-11 (referring to the speed in which an infectious disease can spread. Gates presents a simple math problem where "if 100 people have an infectious disease on Day 1, and if the number of cases double every day, the entire population of the earth will be infected by Day 27.").

reaction by world leaders should not be limited to maritime endeavors. It should be directed to any form of travel from areas threatened by infectious diseases.

The world's pandemic response can be summed up perfectly in the following metaphor: "the world is one big building fitted with smoke detectors that aren't especially sensitive and have trouble communicating with one another."¹⁹⁸ For those working within the maritime industry, this issue is even more exasperated by the lack of uniformity in regulating vessels traversing the world's waterways.¹⁹⁹ With confined atmospheres and many passengers, cruise vessels can become Petri dishes of disease that travel from one port to another, spreading infectious diseases to communities that are sometimes ill-equipped to deal with the contagion.²⁰⁰

Because governments are responsible for the safety of their citizens, they should be called upon to structure a response.²⁰¹ Specifically, the world needs an international collective whose priority and foremost objective is to help the world prevent future pandemics.²⁰² The World Health Organization can play this role so that world leaders do not have to reinvent the wheel but rather utilize an existing organization.²⁰³

Within the United Nations (UN), the World Health Organization (WHO) is a specialized agency whose mission is to "direct and coordinate authority for international health within the UN system."²⁰⁴ The WHO's Constitution states that the organizations overall objective is "the attainment by all peoples of the highest possible level of health."²⁰⁵ The WHO was born from necessity in 1948, after World War II, when weakened governments feared the prospect of another pandemic like that following the conclusion of World War I, which decimated war-torn countries trying to rebuild.²⁰⁶ The WHO is limited in several ways, including underfunding, understaffing, and inability to make any global mandates.²⁰⁷ However, with the knowledge gained from the most recent pandemic, world leaders should come together to build the organization into an authority that can adequately address global pandemic prevention needs.

There are numerous reasons why the WHO is the most attractive option as a global authority to prevent future pandemics. First, the organization has already begun formulating regulations for infectious disease handling, including regulations for maritime vessels. These rules, adopted in 2005, are known as the International Health Regulations (IHR).²⁰⁸ All United Nation

¹⁹⁸ *Id.* at 11.

¹⁹⁹ *See* Iteraera, *supra* note 197.

²⁰⁰ *Id.*

²⁰¹ GATES, *supra* note 12, at 40.

²⁰² *Id.* at 43.

²⁰³ *See* Iteraera, *supra* note 197.

²⁰⁴ *Id.* at 32.

²⁰⁵ *Id.* at 34.

²⁰⁶ *Id.* at 32.

²⁰⁷ *Id.*; GATES, *supra* note 12, at 45.

²⁰⁸ International Health Regulations is a legally binding instrument of international law that aims to prevent, protect against, control, and respond to the international spread of diseases in ways that are commensurate with public health risks, and which avoid unnecessary interference.

Countries are tasked with developing core public health programs in these regulations.²⁰⁹ Each country's program should be able to conduct disease surveillance, risk communication, and report certain diseases and public health events to the WHO to facilitate international cooperation and coordination in the event of a public health emergency that could become an international concern.²¹⁰ Second, the WHO already works closely in collaboration with subsidiaries of the United Nations, like the Global Outbreak and Response Network (GOARN).²¹¹ GOARN, a voluntary collaboration bringing inter-governmental organizations, non-governmental organizations, and experts from around the world together to respond to major outbreaks, is one of the best-known organizations working to prevent outbreaks of infectious diseases.²¹² Third, the WHO is already established and trusted. World leaders will not have to waste time and money forming regulations or a body to oversee their implementation.

It is essential for world leaders to come together and support a unified implementation of regulations to combat communicable diseases in all forms of travel. The WHO already represents a collective world approach to healthcare.²¹³ Leaders now need to tailor the WHO's future mission to prevent the spread of communicable diseases. In addition, they need to give the organization the authority and funding to make this goal achievable. As of January 2022, the International Monetary Fund estimated that by 2024, the COVID-19 pandemic would cost the global economy over twelve trillion dollars.²¹⁴ Establishing a prevention authority to regulate and mitigate future threats is not just humane, but it is also financially responsible. Furthermore, world leaders can reduce confusion and lack of collaboration by mandating one central organization for governance over infectious disease prevention.²¹⁵

B. Attributing Fault to the Flag of Convenience System is Useless

The primary concern towards communicable diseases in the maritime industry often revolves around the difficulties posed by jurisdictional limitations that port states face in safeguarding themselves against misconduct by foreign-flagged vessels. While this matter is relevant in areas such as taxation, wages, and environmental hazards, health issues are unique. When communicable diseases are an issue, governments can utilize internationally and historically recognized practices including embargoes, travel advisories, and quarantines.²¹⁶ Notably, foreign-

²⁰⁹ *International Health Regulations*, WORLD HEALTH ORGANIZATION, https://www.who.int/health-topics/international-health-regulations#tab=tab_2 (last visited Mar. 15, 2023).

²¹⁰ *Id.*

²¹¹ *About GOARN*, GLOBAL OUTBREAK ALERT AND RESPONSE NETWORK, <https://goarn.who.int/> (last visited Mar. 15, 2023); *See* Iteraera, *supra* note 197.

²¹² Iteraera, *supra* note 197.

²¹³ *Id.*

²¹⁴ Andrea Shalal, *IMF sees cost of COVID pandemic rising beyond \$12.5 trillion estimate*, REUTERS (Jan. 20, 2022), <https://www.reuters.com/business/imf-sees-cost-covid-pandemic-rising-beyond-125-trillion-estimate-2022-01-20/#:~:text=IMF%20sees%20cost%20of%20COVID%20pandemic%20rising%20beyond%20%2412.5%20trillion%20estimate%20%7C%20Reuters.>

²¹⁵ *See* Iteraera, *supra* note 197 (referencing the IMO's lack of collaboration with the WHO and the difficulties this presents).

²¹⁶ Iteraera, *supra* note 197.

flagged cruise vessels cannot claim that a communicable disease outbreak on their vessels is an internal affair, especially if passengers on the vessel are citizens of the port state seeking to intervene.²¹⁷

What occurred during the COVID-19 pandemic is another reason why world leaders will fail to prove their claim that the flag of convenience system is the main hindrance to creating an international governance of communicable diseases on cruise ships. During the COVID-19 outbreak, most cruise lines voluntarily suspended cruise ship operations²¹⁸ demonstrating that during a dangerous health crisis, the cruise industry will protect the health of cruise ship passengers, its crew, and the public.²¹⁹ Furthermore, it follows that those in the cruise industry are mindful not to risk the safety of their patrons as the industry depends on those patrons for its success.

Even without considering the desire to prevent loss of life, exposure to liability, and a public relations nightmare, countries should remain mindful that cruise vessels are not equipped with endless resources to be self-sufficient on the high seas if an outbreak occurs. Clearly, the relationship between the cruise industry and port states is interdependent. This point was made abundantly clear during the COVID-19 pandemic when the United States government was sought out for aid by vessels being denied port access.²²⁰ As financially lucrative as the flag states are, they did not have the means to aid their registered vessels during the pandemic.²²¹

Some advocates are calling for governments to require cruise companies to register their vessels and follow the laws of the state where their company is headquartered or operating.²²² However, this approach may be futile. Profits primarily drive cruise companies, and they will likely choose to circumvent paying higher costs by moving their headquarters. Therefore, the only result would be a weakening of the jurisdiction of powerful port states, such as the United States, and ultimately, a further reduction of their ability to enforce laws and regulations on cruise companies.

Instead of further limiting its jurisdictional power, powerful port states should consider offering incentives to companies that register within their state's registries. This registration would

²¹⁷ See Autin, *supra* note 31 (reasoning that internal affairs are not clearly defined, but the Court has consistently found that territorial laws will likely trump those of flag states when the matter does not involve foreign ships' internal affairs).

²¹⁸ The Centers for Disease Control and Prevention, *No Sail Order and Suspension of Further Embarkation*, FED. REG. (Mar. 24, 2020), <https://www.federalregister.gov/documents/2020/03/24/2020-06166/no-sail-order-and-suspension-of-further-embarkation>.

²¹⁹ *Id.*

²²⁰ See MICHAEL SMITH & JONATHAN FRANKLIN, CABIN FEVER 170 (2022) (explaining how the *Zaandam*, a Panamanian ship, was denied access to ports along the South American coastline).

²²¹ Stuart Slade, *Could COVID-19 End Flags of Convenience?*, FORECAST INT'L (Apr. 9, 2020), <https://dsm.forecastinternational.com/wordpress/2020/04/09/could-covid-19-end-flags-of-convenience/> (explaining that countries known to provide flag of convenience registries make a large profit from vessel registrations, but that they did not aid registrants during COVID-19).

²²² Suzanne Schultz, *The Buffet Doesn't Stop until COVID-19 Walks In: How the Hands-off Approach of Flag States Exposed Legal Nightmares Onboard Cruise Ships During a Global Pandemic and Why Changes Must be Made*, 13 GEO. MASON INT'L L.J. 132 (2022).

encourage companies to voluntarily comply with local laws and regulations and strengthen the state's jurisdiction over them. In addition to offering incentives to vessel owners, port states should be granted the ability to recoup losses from "convenience" states that neglect or fail to aid the vessels registered to them. For example, a port state could refuse aid to vessels flagged by "convenience" states without indemnification by the "convenience" states for any losses incurred by the port state. This exposure of greater liability to "convenience" states could ultimately equalize the market and potentially end today's monopoly system. In simple economics, as the liability of the "convenience" state increases, the demand for ships flagged under them is likely to decrease.

V. LOOKING FORWARD AND USING THE PAST AS A LESSON

The current lack of uniform governance of cruise ships on the high seas must be addressed. The cruise industry and all other forms of international travel must have guidelines and legal recourse for cruise lines' lack of compliance with communicable disease protocols. Furthermore, the world's leaders should refrain from using the flags of convenience system as an excuse to take no action. Ultimately, this system will persist until the cruise industry realizes the real financial risks associated with placing their company's safety in the hands of ill-equipped governments who are unlikely to aid them in times of crisis. Until then, port states, like the United States, should utilize existing policy to control the introduction of communicable diseases through international travel.

In the words of Dr. Larry Brilliant: "Outbreaks are inevitable, but pandemics are optional."²²³ The world still has the momentum necessary to enact change, and it should capitalize on this drive to proactively respond to threats by communicable diseases. The appropriate approach to regulating the cruise industry and other forms of international travel sparks great debate, much like the discussion surrounding the response to COVID-19. However, inaction is simply too unconscionable to consider.

²²³ GATES, *supra* note 12, at 18.