

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

## VOL. 5

# The Scope and Limitations of a Pandemic Treaty—The Roles of the IHR, Proposed Framework Convention, and Other International Mechanisms

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Hideaki Shiroyama

*Professor, The University of Tokyo Graduate School of Public Policy; Director, Institute for Future Initiatives*

In light of the issues that have become clear in the process of responding to COVID-19, the World Health Organization (WHO) is now examining the necessity and challenges of a pandemic treaty. The deliberations are focused particularly on the possibility of adopting a convention or other mechanism based on Article 19 of the WHO Constitution, taking as model the WHO Framework Convention on Tobacco Control. On the other hand, there is a firmly entrenched argument, especially in the United States, that rather than creating a new convention or other mechanism, the matter is best handled by revision of the existing International Health Regulations (IHR). In this brief, I would like to consider a wide range of options for international frameworks, from IHR revision to the adoption of a convention or other mechanism based on Article 19 of the WHO Constitution, or other multinational conventions or mechanisms.

## Status of Deliberations on International Frameworks

In order to determine whether or not to adopt a pandemic treaty and what kind of international framework should be used, one basic approach would be to start by identifying specific issues that have arisen in dealing with COVID-19 to date, and to narrow down to an appropriate international framework for addressing those issues. As will be explained below, there are issues involving coordination and governance, and many of the issues cut across multiple

sectors. Accordingly, coordination is necessary with the World Trade Organization (WTO) regarding overseas travel restrictions, and with organizations such as the World Organization for Animal Health and the Food and Agriculture Organization regarding One Health. Since addressing these cross-sectoral issues goes beyond the jurisdictional scope of the WHO alone, it can rationally be argued that the matter should not be limited to conventions or mechanisms based on Article 19 of the WHO Constitution but should extend to the United Nations or other organizations and mechanisms. Meanwhile, as part of the actual policymaking process, the WHO has established a Working Group on Strengthening WHO Preparedness and Response to Health Emergencies (WGPR), which is discussing concrete options focused on strengthening the WHO's response. Against this backdrop, a strategic analysis is also needed from the standpoint of what kind of elements Japan would like to see included in any feasible new legal framework.

Currently, deliberations are being held by the G20 on a coordination framework. The G20 High Level Independent Panel on Financing the Global Commons for Pandemic Preparedness and Response (G20 HLIP) recognized the necessity of a mechanism for integrating key actors and recommended the establishment of a Global Health Threats Board (GHTB) to carry out systematic financial monitoring and to coordinate across health and financial fields.<sup>1</sup> However, at the third Joint G20 Finance and Health Ministers Meeting held in Rome in late October 2021, they only went so far as to agree to set up a joint Finance-Health Task Force, chiefly to strengthen coordination among finance and health officials. In the United Nations as well, although it is possible that some elements of this issue could be incorporated into the annual resolutions on global health and foreign policy that are issued each December, at the time of this writing, there is no sign of any specific movements along those lines. In response to the West African Ebola virus outbreak, the UN Secretary-General appointed a High-Level Panel on the Global Response to Health Crises in 2015, which subsequently submitted a final report. As for the current pandemic, however, it seems that people are waiting to see what the WHO will do.

## **Options among International Frameworks**

In choosing among international frameworks, there would appear to be no strong need to limit the choice to a convention or mechanism based on Article 19 of the WHO Constitution. Certainly, going with such a treaty would have some advantages, including having the WHO as the centralized hub organization, and if a framework convention is established that is modeled on the tobacco control convention, then combining that with protocols would allow a degree of flexibility in the response. The extent to which this approach would be effective regarding matters that go beyond WHO jurisdiction, however, would still be an issue. A UN-based treaty, on the other hand, while able to cover a wider range of domains, would require coordination across more entities, so the process of drawing up a treaty could become protracted. Another possibility would be to conclude an independent multilateral treaty. Furthermore, in the studies by the G20 HLIP, the Financial Stability Board (FSB), which was

created to respond to international financial crises, was taken as one model. If the FSB were to be used as a model, the question then is whether it is even necessary to adopt the treaty format, raising the possibility of launching an organization on the basis of a “soft law” approach. The FSB was set up in the form of a charter, but the signatories of this charter were finance ministry or central bank representatives rather than government leaders.

Current deliberations appear to be proceeding in the direction of choosing IHR revision for matters that can be dealt with by IHR revisions and going with a pandemic treaty for matters IHR revision cannot cover. In a recent opinion piece, US Secretary of State Antony Blinken argues that it would be possible to pursue both IHR revision and a treaty, but in the short term, it is IHR revision that would be possible. He recommends targeted amendments to the IHR to address four areas, namely, early warning triggers for action and health alerts; rapid sharing of information; strengthening implementation of the IHR; and bolstering of rapid assessments and responses.<sup>2</sup> While the United States claims that IHR revision can be accomplished in a short time, this claim is disputed by Professor Ilona Kickbusch, who is involved in German policymaking.<sup>3</sup> As of the end of August 2021, however, the EU also expressed openness to the idea that some things can be done within the IHR. The EU then listed five areas that the IHR cannot adequately cover: equitable access to countermeasures, data and sample sharing, access to outbreak areas, global assistance to outbreak areas, and travel and trade measures.<sup>4</sup> In the draft report of the WGPR for the special session of the World Health Assembly (November 12, 2021) as well, the working group indicated a “both sides” stance in its recommendations, calling for the establishment of an intergovernmental negotiating body in charge of developing a WHO convention, agreement, or other international mechanisms equivalent to a pandemic treaty, while also asking that the working group be allowed to continue further developing proposals to strengthen the IHR.<sup>5</sup> Although there has been insufficient debate on the contents of a WHO treaty so far, it appears that, going forward, such an agreement will be given meaningful content.

## **Appropriateness of a Pandemic Treaty**

As noted earlier, there is room for argument as to the appropriateness in the first place of a pandemic treaty under the WHO for issues that cannot be handled by a single sector, such as One Health or travel restrictions. But compared to IHR revision, a pandemic treaty should result in a smoother process, given that it is comprised only of the signatory countries and the contents can readily be decided by a certain number of these member countries. In addition, regarding the question of whether, for example, a framework convention based on the WHO Constitution can only work within areas where the WHO has jurisdiction, it is not outside the realm of possibility to think that it could be applied to other related sectors to a certain extent as well. Looking, for example, at the WHO Framework Convention on Tobacco Control, it mentions distribution, sales, import and export, and taxation, and a protocol on contraband trade has been concluded. Following this example, it is possible to have a wide range of agencies participate by adopting a WHO framework convention while establishing separate

protocols or the like for related provisions. As to whether a convention or mechanism based on the WHO Constitution would be suitable in such a case, that likely depends on whether, as with the WHO Framework Convention on Tobacco Control, the various elements in the framework are tied to control of health effects, which is a matter of WHO jurisdiction. In the present case as well, it should be possible to incorporate related provisions under the framework so long as they are ultimately tied to control of health effects. It should be noted, however, that when an all-hazards approach was introduced in the IHR revision of 2005, the inclusion of security-related contagions is said to have created difficulties for coordination with related agencies (i.e., International Atomic Energy Agency, Organisation for the Prohibition of Chemical Weapons). Such difficulties in coordination with related agencies can be expected in a WHO Constitution–based pandemic framework as well.

There are things a convention or mechanism based on the WHO Constitution can do, but there are also areas it cannot cover. Regarding coordination, for example, discussions on a WHO Constitution-based convention have not concretely dealt with the Global Health Threats Council proposed by the Independent Panel for Pandemic Preparedness and Response. If this idea is to be engaged with seriously, it may be unavoidable to work within a UN framework. What is more, it would seem to be quite difficult to directly link the GHTB comprising G20 Finance and Health Ministers as proposed by the G20 HLIP to a WHO Constitution–based convention or mechanism, and it would require a great deal of ingenuity. At the present time, a certain amount of coordination is going on among the IMF, World Bank, WHO, and WTO, and an arrangement like that will need to be continued separately.

## **Conclusion: The Importance of Substantive Discussions on Contents**

Discussions up to now have focused on the choice of international frameworks. But whether aiming for IHR revision or for a new pandemic convention or mechanism such as one based on the WHO Constitution, the question of what elements should be incorporated from Japan’s standpoint is an important theme requiring substantive consideration going forward. Incorporating monitoring indicators related to universal health coverage (UHC) or new aspects of UHC, such as the strengthening of community, will be important elements for prevention and preparedness. Moreover, while likely to be outside the framework of a pandemic treaty, it would seem meaningful to pursue the GHTB proposed by the HLIP from the perspective of the institutionalization of the G20 Joint Finance and Health Ministers’ Meetings that Japan helped launch in 2019. Up to now, one aspect is that in the discussions that have taken place, led by Europe, the establishment of a pandemic treaty has become a goal in and of itself. Under such circumstances, it will be necessary to give the process greater transparency, and to patiently build a space where proper discussions can be carried out on what specifically to incorporate in the treaty.

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<sup>1</sup> G20 HLIP, *A Global Deal for Our Pandemic Age: Report of the G20 High Level Independent Panel on Financing the Global Commons for Pandemic Preparedness and Response* (June 2021), <https://pandemic-financing.org/report/foreword>.

<sup>2</sup> Antony J. Blinken and Xavier Becerra, “Strengthening Global Health Security and Reforming the International Health Regulations: Making the World Safer from Future Pandemics,” *JAMA* 326, no. 3 (October 5, 2021; released August 31), <https://jamanetwork.com/journals/jama/fullarticle/2783866>.

<sup>3</sup> Kerry Cullinan, “Pandemic Treaty: US Proposes Amending Existing International Health Rules First; Germany Presses for Sanctions,” *Health Policy Watch* (September 3, 2021), <https://healthpolicy-watch.news/pandemic-treaty-us-proposes-amending-international-health-regulations-and-civil-society-excluded-from-negotiations>.

<sup>4</sup> EU External Action, “EUMS’s Initial Views on a Possible Structure & Content of a Pandemic Treaty” (2021), [https://eeas.europa.eu/sites/default/files/eu\\_member\\_states\\_initial\\_views\\_on\\_structure\\_content\\_of\\_a\\_pandemic\\_treaty\\_31\\_august\\_2021\\_0.pdf](https://eeas.europa.eu/sites/default/files/eu_member_states_initial_views_on_structure_content_of_a_pandemic_treaty_31_august_2021_0.pdf).

<sup>5</sup> WHO, “Draft Report of the Member States Working Group on Strengthening WHO Preparedness and Response to Health Emergencies to the special session of the World Health Assembly” (A/WGPR/5/2, 12 November 2021), [https://apps.who.int/gb/wgpr/pdf\\_files/wgpr5/A\\_WGPR5\\_2-en.pdf](https://apps.who.int/gb/wgpr/pdf_files/wgpr5/A_WGPR5_2-en.pdf).