

Bases of Port State Jurisdiction over Vessel-Source Pollution

— Analyzing the Recent Practices by the U.S. and EU —

Seta Makoto

Recently, the United States(U.S.) and the European Union(EU) have unilaterally exercised Port State Jurisdiction(PSJ) over vessel-source pollution(VSP) committed on the high seas. For example, the U.S. punishes the perpetrators of VSP on the high seas as well as within its waters. Similarly, the EU intended to exercise PSJ over CO₂ emissions from vessels by introducing the Shipping EU Emissions Trading Scheme(EU-ETS) which imposes a kind of tax on those emissions, including the emissions on the high seas. As far as PSJ is exercised over the matters that occur within the waters of the coastal States, those exercises would be justified in accordance with the international law of the sea. However, if PSJ is exercised over the high seas, those exercises would infringe the freedom of the high seas.

According to this freedom, non-flag States are generally prohibited from exercising their jurisdiction over matters that occur on the high seas, even when ships call at their ports. However, on the basis of the territorial principle, States have the discretion to impose port entry conditions, which may have an extraterritorial impact. For example, due to the difficulty vessels would have in changing construction, design, equipment and manning elements during their voyage, the conditions concerning those elements would have an extraterritorial impact. Moreover, States may exercise extraterritorial jurisdiction on some bases such as the personality principle. Against this background, this paper elucidates the bases of PSJ over VSP on the high

seas by analyzing the recent practices by the U.S. and EU.

In general, a measure taken as an exercise of PSJ can rely on the territorial principle only when that measure is regarded as imposing a port entry condition. Moreover, when determining whether a condition is related to port entry or not, both the targeted object of the measure and the action taken should be considered. From this point of view, it is difficult to argue the practices by the U.S. and EU are based on the territorial principle. Therefore, those practices must be justified as an extraterritorial exercise of PSJ. On this point, some observers argue that those practices can be based on the effective theory or universality principle. However, they cannot be grounds for those practices, because of the inappropriateness to apply the effective theory in the context of the environmental law and the lack of special rules on universal jurisdiction for the practices. As a result, it seems difficult to justify the recent unilateral exercises of PSJ by the U.S. and EU in accordance with the existing international law.