PROTECTING THE ENVIRONMENT IN PORT CITIES. BRIEF ANALYSIS OF THE PORTUGUESE FRAMEWORK*

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Nota curricular

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Portugal has been, since the XV century, known as a country of sailors. Much of the European history of the discoveries has its origins in Portuguese ports, from where the caravels departed in search of new countries and new people. The endless Portuguese sea ("o mar sem fim é português"), in the words of Fernando Pessoa, began in Lisbon and mixed with the Atlantic and the Indic Ocean, its greatness reflecting the wealth of the country until the XVII, when other sea conquerors surged.

A portrait of Lisbon in 1535 was made by Garcia de Resende and is worth quoting:

(...) E desta maneira digo que V.M. está na melhor e mais viçosa cidade que há no mundo, onde é dos mais principais, e nela tem as melhores e mais polidas e atiladas casas e assí a melhor quinta que há em todo seu termo. Aí tem mui honradas e avisadas pessoas para conversar, muitos e devotos mosteiros para visitar, e prudentes, honestos e virtuosos religiosos com quem falar e ouvir suas pregações... E, para passear e ver, a graciosa Ribeira com o labirinto de diversas vendedéiras e as grandes ruas novas com tão grandes mercadores e tantos oficiais e tantas mulheres formosas e tanta gente estrangeira. O muito nobre Rocio com os sumptuosos edificios do Carmo, do Sprital S. Domingos e os Estaús; as hortas de Santo Antão, de Santos, de Enxobregas, a Boavista e Alvalade, seus viços e rouxinóis. E sem V. M. sair de casa, dos vossos graciosos eirados e muito boas janelas se vê tão formosa vista que não que melhorar a grandeza e fermosura desse rio, de tantas e nobres vilas e honradas e nobres quintas que ao longo dele estão, as muitas naus ancoradas, e as que entram e saem, e o gran tráfego de tudo, que não há olhos que se fartem de ver as diversidades de cousas, nem orelhas de ouvir novas de todas as partes do mundo...[1].

In those times, port cities had to deal mainly with social and urban planning problems, due to the continuous transit of people and goods[2]. Nowadays, plane transportation diminished the social impact of ports, but its integration in cities’ urban tissue still asks for particular solutions. Apart from the commercial aspects, urban planning and environmental protection are, today, the main concerns of jurists regarding ports[3]. We will go through some aspects of environmental

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[2] In the mid-sixties, Lisbon counted around 100 thousand inhabitants, coming from all over the country and the world. A french monk, who visited the city in 1532, has quite a different image of the city, contrasting from the idilic description quoted in the text: “cidade populosa, receptáculo de judeus, albergue de uma multidão de índios, cadeia de agarenos, armazém de mercadores, forno de usuários, estábulo de luxúria, caos da avareza, montanha de orgulho, refúgio de homziados” — apud. Joaquim VERÍSSIMO SERRÃO, História..., cit., p. 225, nota 50.

[3] One should bear in mind that, due to global warming and to the consequent rise of sea-level, port
protection in Portuguese port cities, having Lisbon as a reference.

According to the Portuguese legal framework - which is, essentially, the European framework that sustains our environmental legislation -, the construction of ports, as well as any alterations they may suffer along their existence, have to be submitted to an analysis of their environmental impacts, in general (I.). A reference must be made to a new type of plan, recently created by Decree-Law 129/2008, of the 21st July, that will apply to four Portuguese estuaries, among which Tagus river’s estuary (§1).

Besides that, and particularizing, we can identify two major areas where ports and environment intersect (II.):

§1. Nature conservation;
§2. Waste management.

Ports’ areas have specific needs, both in water and in land. Their administration is trusted to port authorities, which have special jurisdiction over all the port’s area, regarding every aspects that deal directly or indirectly with shipping — fishing, cargo or cruise ships. Taking Lisbon as an example, we can observe that due to the existence of an authority without specific environmental skills — the Administration of the Port of Lisbon, S.A. — managing problems with environmental dimension may raise some doubts about the efficacy of its action in this particular field (III.).

I. Human actions inevitably harm the environment. And within the context of today’s highly sophisticated civilization, it is unthinkable to act harmlessly. But one must not forget that environmental protection is a State’s task and a common responsibility (see articles 9/e) and 66/2 of the Portuguese Constitution = PC); so even if they cannot prevent every damage, still public authorities are obliged to impose means of minimizing risks. The process of environmental impact assessment (=EIA), regulated in Decree-Law 69/2000, of the 3rd May, applies to a broad group of situations involving ports.

According to article 1/3/a), all projects listed in Annex I must go through an EIA. Annex I, point 8, a) and b), includes the construction of ports with capacity to welcome ships with tonnage superior to 4000. Annex I contemplates the projects which provoke the greater impact, but others are also aimed by the EIA legal framework. Article 1/3/b) forwards to Annex II, point 10/e) — meaning all ports with capacity for ships with tonnage superior to 1500, in general; if they are situated in sensitive coastal areas (natural reserves; near houses or monuments that constitute cultural heritage), regardless of the ships’ tonnage, all must be submitted to EIA — and point 12/b), last item — marines, ports and docks in

cities (and coastal cities, in general) are under serious threat. OECD commanded a Report to a group of scientists on this issue, which was presented in UN’s climate change Bali summit of December 2007. The Report urges coastal States’ Governments to start building major flood defense barriers to avoid major destruction and loss of lives. This Report can be accessed in:
http://www.guardian.co.uk/environment/2007/dec/04/flooding.climate.change

64 Lusíada. Direito e Ambiente / Número Especial
Protecting the environment in port cities. Brief analysis of the Portuguese framework

costal areas with capacity to receive more than 300 ships with at least 12 meters length, in general; if they are situated in sensitive coastal areas (natural reserves; near houses or monuments that constitute cultural heritage), regardless of the number of ships or their length, all must be submitted to EIA.

Let us say it clearly: the mere fulfillment of the EIA process isn’t enough to grant environmental protection. The project must be positively evaluated, and this approval corresponds to a favorable (or conditionally favorable) Environmental Impact Declaration (=EID) issued by the Minister for the Environment (article 18/1). The favorable EID is an essential condition for the project coming to life, because if the following authorizations and licenses aren’t issued according to it, they are null and void (article 20/1). Also, if the project’s owner (whether a private or a public body) doesn’t comply with the prescriptions contained in the EID, he can be sanctioned (see articles 37 and 38 of Decree-Law 69/2000, and articles 21 and ff. of Law 50/2006, of the 29th August).

§1. The environmental importance of some Portuguese estuaries led the Government to approve Decree-Law 129/2008, of the 21st July, designing a new category of special territory planning plans: the plans of the estuaries (=PE). According to article 4, these plans aim the protection of the waters and the ecosystems around them, as well as the social, economic and cultural valuation of the estuary. When the area is already covered by a special plan for the protection of nature, the PE will only apply on the aspects concerning the safeguard of water’s quality (article 4/3). And if the PE emerges in a port area, its objectives will also comprehend the development of port activities and the guarantee of terrestrial and maritime accessibilities (article 4/4).

Four estuaries are supposed to have PEs: Douro, Vouga, Mondego and Tagus (in the margins of Oporto, Aveiro, Coimbra and Lisbon, respectively). Besides these, which are already identified as environmentally significant, others may exceptionally be submitted to PEs (article 3/6). These plans are considered special plans by Decree-Law 380/1999, of the 22nd September, with the alterations introduced by Decree-Law 316/2007, of the 19th September (Legal framework of the instruments of territorial planning). They are elaborated by a commission where representatives of all interests at stake take place — among which there must be a representative of the port authority, if there’s a port in the estuary —, are necessarily submitted to public hearings (at least during 30 days) and are finally approved by the Council of Ministers (articles 47, 48 and 49).

Previous to the elaboration of the plan, a process of Strategic Environmental Evaluation must occur, as stated in Decree-Law 232/2007, of the 15th July, unless it is of so little territorial importance that it can be exempted (see articles 3/1/a) and 4/1). This process — that also comprehends public hearings — aims to

4 See also point 13 of Annex II, stating that EIA is mandatory to all alterations and enlargements of projects listed in Annexes I and II.

5 Port activities are, in accordance with article 4/5, all activities directly and indirectly related to a port, namely commercial, touristic and sportive navigation; fishing; and logistic management of the coastal and urban area.
produce an Environmental Report (in charge of the Ministry for the Environment, more precisely of the Portuguese Agency for the Environment = PAE) which will integrate the future plan (article 6). Once the plan — in our case, the PE — is approved by the Council of Ministers, this entity sends a copy to the PAE, accompanied by one Environmental Declaration assuring that all observations produced were considered, that all reasonable alternatives were pondered, and that the measures for minimizing impacts were included in the plan’s regulations (article 10).

II. The geographic situation of ports may imply that besides commercial and touristy navigation, fishing and recreation, other interests arise, namely environmental. For instance, the coastal area where the port of Lisbon is located shelters various protected species, which require special measures of preservation. Adding to those, one should consider the need to minimize the pollution caused by ships, both to the water and to the air.

§1. Ports’ areas may coincide, partially or totally, with natural reserves or other sort of protected sites. Lisbon port’s coast includes three protected areas: the Tagus’ estuary natural reserve, to which Decree-Law 142/2008, of the 24th July applies (Legal framework of the conservation of Nature); the special protection zone (ZEC = zona de protecção especial) of Tagus’ estuary, integrated in Natura 2000 Net, whose regime lies in Decree-Law 140/1999, of the 24th April (altered and republished by Decree-Law 49/2005, of the 24th February); and it is also considered a wet zone of international relevance according to the list of sites annexed to Ramsar Convention. They all integrate the Protected Areas National Net (Rede Nacional de Áreas Protegidas), whose regulation is to be found in Decree-Law 142/2008, above mentioned, as well as in the international instruments that support them (if it’s the case).

This classification usually means a whole of restrictions to owners and users, on behalf of the protected species’ preservation. Activities like building, fishing, practicing motor-sports, are generally forbidden or submitted to very restrictive authorizations.

§2. The other and inescapable field where environment and ports cross their ways is ships’ waste management. Preventing the throwing of waste in sea depends on the functioning of adequate recovery systems by port authorities, who charge taxes for the service. The Convention for the prevention of marine pollution (known by Marpol Convention, adopted in 1973 and altered by a Protocol of 1978) constitutes Europe first international framework on the subject, and deals both with marine and atmospheric pollution caused by ships (this last one was included in the Convention’s range in 1997 by a Protocol in force

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66 Lusíada. Direito e Ambiente / Número Especial

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6. See articles 11/2/c), 18 and 23/2.
7 Approved to ratification by Portugal through Decree 101/80, of the 9th October.
8 Approved to ratification by Portugal through Decree 25/87, of the 10th July.
Protecting the environment in port cities. Brief analysis of the Portuguese framework since 2005. The European Union, within the context of its environmental policy, has also approved a directive concerning the reception of ships’ remainders by Member States’ ports (directive 2000/59/EC, of the European Parliament and the Council, of the 27th November, altered by directive 2002/84/EC, of the European Parliament and the Council, of the 5th November).

Portugal transposed the directive 2000/59/EC through Decree-Law 165/2003, of the 24th July (altered by Decree-Law 197/2004, of the 17th August). Decree-Law 165/2003 applies to all ships calling or operating in Portuguese ports (with the exceptions of war vessels and ships developing tasks of general interest without lucrative purpose)\textsuperscript{9}, and to all Portuguese ports (article 3). According to this legal framework, port authorities are entitled to elaborate and enforce waste reception and management plans, after conducting public hearings of the port users (article 5/1). These plans have to be ratified by the Ports and Maritime Transportation Institute and are valid for three years, unless significant changes concerning the port’s functioning occur (article 5/2).

In order to accomplish the obligations prescribed in Decree-Law 165/2003, all ships’\textsuperscript{10} captains must fill a formulary (Annex II) informing of their arrival at least 24 hours prior to it (article 6). When calling the port, they must deliver all the waste carried in their ships to port authorities before leaving (article 7/1).\textsuperscript{11} If they refuse to do it, port authorities should comply them to do so, whenever there’s a threat of disposal to the sea — because the next port is unknown or because there’s a strong suspicion of its structures’ inadequacy to receive the waste (article 7/3). To fulfill these objectives, port authorities are entitled to inspect the ships, and even to stop the ship from leaving until the remainders are delivered (article 9/1 and 5). This decision is taken by the port’s captain, based on the port services technical opinion, and can be reviewed by maritime courts (article 9/5 and 6).

As mentioned above, the services of waste recovery provided by port authorities are paid (article 13/2). The most significant alteration introduced in Decree-Law 165/2003 by Decree-Law 197/2004 concerns taxes. On the one hand, a tax reduction is allowed to environmentally friendly ships (which cause minimal waste). Here we must pinpoint the fact that Lisbon port wan, in 2007, the Green Award Port, a quality prize that distinguishes ports which give special incentives to environmentally friendly ships\textsuperscript{13}. On the other hand, according to

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\textsuperscript{9} Nevertheless, port authorities should adopt all required measures in order to grant that the excluded ships actually deliver their waste to them (article 3/2).

\textsuperscript{10} Except for fishing boats and excursion boats with maximum capacity for 12 people (article 6/1), for which port authorities should establish control procedures in order to accomplish the obligations prescribed in Decree-Law 165/2003.

\textsuperscript{11} In 2007, Lisbon port Administration performed more than 2,200 waste management operations to 1,792 ships — an average of six operations/day (font: http://www.portodelisboa.pt/portal/page/portal).

\textsuperscript{12} Besides this prohibition, port authorities can apply administrative sanctions (coimas) to the ship’s owner, translated in pecuniary amounts (see article 16 — from 22,200,00 to 44,890,00).

\textsuperscript{13} The Lisbon Port Administration practices a reduction of 5% on the port’s use tariff towards oil cargo ships which prove their environmental standards are higher than the majority.
the polluter-pays principle, all ships must significantly contribute to support the port waste management system, even if they don’t use the service (see article 13/1 and 5, with the redaction given by Decree-Law 197/2004).

A last reference must be made to the control of atmospheric pollution by port authorities. It is not yet contemplated in Decree-Law 165/2003, but the Protocol of 1997 to the Marpol Convention establishes obligations of emissions’ reduction for ships with tonnage superior to 400. All ships carrying a flag from a State part must receive an international certificate of atmospheric pollution prevention, valid for 5 years at the utmost (articles 6 and 9 of Annex VI to Marpol Convention). Port authorities are entitled to inspect the ship to verify if its functioning concerning atmospheric emissions complies with the certificate, whenever they have serious suspicion that it doesn’t. They also have the power to forbid the departure until the problem is solved (article 10 of Annex VI to Marpol Convention). Portugal ratified this Protocol through Decree 1/2008, of the 9th January, which explains its regulation has not yet been absorbed by national legislation — but doesn’t, in our opinion, exempt Portuguese port authorities from its full enforcement.

III. Ports have specific objectives and needs. That’s why ports’ areas management is usually trusted to authorities different from Governments or municipalities. The economic magnitude of the activities developed in ports justified the organic change suffered by the Port of Lisbon’s Administration in 1998, when it was transformed in a public enterprise - Administração do Porto de Lisboa, S.A.. The new juridical form helps to increase competitiveness and celerity of action.

This is not the place to examine the juridical and economic questions attached to this change. Our purpose is merely to identify Port of Lisbon’s Administration’s (=PLA) powers regarding the protection of the environment, namely in what concerns the use of water resources and the conservation of nature in coastal areas. The fact that Decree-Law 336/1998, of the 3rd November, attributes exclusive jurisdiction to port’s authorities within a determined geographic area (see article 7) apparently excludes direct managing of these environmental sectors by specialized structures. Does reality match appearances?

Not really — at least, not entirely. To begin with, we must underline that the concession of powers operated by Decree-Law 336/1998 to PLA is strictly functional. In other words, port activities (the ones that justify the existence of a specific authority) are the activities directly associated to a port’s functioning, namely to all types of navigation taking place in its waters, to fishing, to recreation uses of coastal areas, and to the logistic of equipments and buildings that serve the port. In the (generous) words of Decree-Law 336/1998, the regular functioning of Lisbon’s port comprehends multiple aspects, “of economic, financial and property nature, management of human resources, and also the complementary, subsidiary or accessory activities” to the ones mentioned (article 3/1).

So, port authorities may have the final word in allowing a sport boats race in Tagus estuary, but they wouldn’t decide the local where a new bridge above the Tagus river will be built — even if both ends are situated in its area.
of jurisdiction. The exclusive jurisdiction is not of a territorial nature — as it happens with municipalities — but of a functional nature, which means there may be several entities operating in the same area, but only one (PLA) managing the port’s issues.

Having in mind the above mentioned, a norm like article 4/1 of Decree-Law 336/1998 is understandable. It reads as follows: “Within its jurisdiction, only APL S.A. is competent to license buildings directly connected to its activities and charge the taxes inherent to such licenses”. Rules like these raise, of course, a whole lot of interpretative questions, because they create conflicts (and reduce earnings) with the municipalities, which are normally competent to license construction works.

Anyway, in what concerns the environment, Decree-Law 336/1998 doesn’t go without saying that whenever the projected buildings may cause any kind of pollution, environmental authorities will have to be consulted (article 6/1). We already mentioned the need for certain works and buildings to go through an environmental impact assessment prior to the concession of the license — which means PLA must obtain a favorable EID before authorizing the construction of any building serving the port, mainly if it’s situated in a protected area. Besides that, and in what relates to waste management, special licenses must be obtained, as states article 24 of Decree-Law 172/2008, of 26th August (see also point 5 of Annex I). Finally, if the case isn’t covered by none of these regulations, still, as article 6/1 establishes, environmental authorities have to be consulted. Unfortunately, this norm omits the nature of the consultation, namely if the opinion is binding to port authorities. This silence leads to the appliance of the general rule prescribed in article 98/2 of the Code of Administrative Procedure, stating that, if nothing different is referred in special laws, the opinions are obligatory but not binding.

But when we said that PLA jurisdiction doesn’t entirely superimpose to authorities entitled with special powers to manage environmental aspects, we had in mind, overall, managing water resources. Both article 7/6 of Decree-Law 336/1998 and article 12 of Decree-Law 226-A/2007, of the 31st May (Legal framework for the use of hydro resources) commit to water management authorities the power to attribute permits (to the Administração da Região Hidrográfica) and to supervise water quality (to the Instituto Nacional da Água). The only powers left to port authorities are, according to articles 12/3 and 63/2 of Decree-Law 226-A/2007, licensing floating devices, huts, sun-blinds, beach umbrellas and the performance of nautical sports. Thankfully, the legislator had the environmental interest in mind, for article 63/5 states that: first, these devices and activities cannot be licensed against special environmental protection plans’ regulations in areas where they apply; second, in unclassified areas, still port authorities must consider the safeguard of ecosystems and the biophysical integrity of the natural resources there found.

Summing up: PLA is legally constrained when dealing with licensing activities that may cause significant adverse impact on the environment. Either because of the obligation to get a favorable EID prior to licensing new buildings or
introducing major alterations in the port’s area; either for the need to get a special license for installations performing waste management operations’; or for the need to consult environmental authorities or to comply with special protection plans before licensing coastal devices and nautical activities, in all these cases we detect environmental concerns, even if, in relation to the last group, the means to force port authorities to respect those values could be improved.