LEGAL OPINION

Summary: *Ecological Reserve. Non-characterization of Specially-Protected Territorial Area according to the laws in force. Presumption of Lawfulness of the Environmental Licenses.*

Client: Alunorte Alumina do Norte do Brasil S.A.

Consultant: Édis Milaré

2018

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QUESTION

We are consulted by ALUNORTE ALUMINA DO NORTE DO BRASIL S.A. ("ALUNORTE"), hereinafter referred to simply as Client, so as to check the regularity of the installation of the undertaking in a Property object of the purchase agreement entered into by and among COMPANHIA DE ADMINISTRAÇÃO E DESENVOLVIMENTO DE ÁREAS E DISTRITOS INDUSTRIAIS DO PARÁ- CDI, the Client and ALBRAS - ALUMÍNIO BRASILEIRO S.A., in 1982, considering that its Deed of Transfer included a requirement that the area was destined to an Ecological Reserve.

For this, we are requested to examine the following questions according to the Environmental Law: *(i) Destination of the area as Ecological Reserve and its qualification in view of the environmental law; (ii) Environmental law evolution and the possibility of requirement of Ecological Reserve currently; and (iii) Presumption of lawfulness of the environmental licenses of the DRS1 and DRS2 and the possibility of development of activity in the area.*

This is what we will analyze below.

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THE LEGAL OPINION

I. BACKGROUND

1. State Law 4,686, of Dec 17, 1976 created Companhia de Administração e Desenvolvimento de Áreas e Distritos Industriais do Pará- CDI/Pará, which had as purpose to design, implement and manage, directly or indirectly, industrial areas or districts, their services and support activities, defining priorities in the implementation of new industries, according to the criteria established by the state management, and promoting, if applicable, the transfer of industries unduly or inappropriately installed, indicating places and areas appropriate for their operation.

2. Subsequently, State Decree No. 10,064 was published on Apr 25, 1977, declaring the public interest, for the purposes of expropriation, of the real estate and improvements located in the area destined to the implementation of the Port and Industrial Complex of Ponta Grossa, in the Cities of Barcarena and Abaetetuba, which constituted the priority project of CDI Pará. Said Decree highlighted further that the execution of the project was a public service of the great interest for the development of the State.

3. Said Decree, in its article 1, expressly *declares of Public Interest, for the purposes of expropriation, according to article 2, Federal Decree Law 3,365, of Dec 24, 1941 and according to article 8 of the already mentioned State Law No. 4,686/1976, the real estate and the improvements of private property located in the polygon formed by Road PA-151, from the hole of Cafezal and the intersection point with Road PA-403; from this intersection point up to the city of Beja; Rio Pará, Furo do Arrozal*. And, sole paragraph of article 1 provides for that *the area inside that polygon mentioned in article 1 has as destination the implementation of the physical and social infrastructure and the industrial areas of the*

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Port and Industrial Complex of Ponta Grossa, which would be made also by the sale of lots to companies interested in the installation of new industries and support activities or in the transfer of already existent industries, provided that the infrastructure services deemed indispensable for the start of the works and its operation are available.

4. Said area declared as having Public Interest was registered under No. 7442, created on Jun 11, 1982, and its owner is CDI Pará (former designation of the current CODEC). In the same date, an annotation was made (Av-1- 7442), by means of which CDI Pará sold, to ALBRAS, a lot of 92 hectares of the Property object of said registration. Thus, a new registration was made for the area sold, which is registration No. 7443.

5. Also on Jun 11, 1982 an area of 1,354ha 64a 97ca (one thousand, three hundred and fifty-four hectares, sixty-four ares and ninety-seven centiares) was sold to ALUNORTE, separated from registration No. 7442, originating the new registration No. 7444.

6. Both registrations of the areas separated from the original registration No. 7442, included as destination the specifically industrial use.

7. On Jun 16, 1982, the remaining area of registration No. 7442 was sold jointly to ALUNORTE and ALBRAS, originating, thus, registration No. 7456. According to the Certificate of Deed of Sale, **2,497ha47a48ca (two thousand, four hundred and ninety-seven hectares, forty-seven ares and forty-eight centiares) of this remaining area would be destined to an Ecological Reserve and 536 ha (five hundred and thirty-six hectares) to agricultural activities.** Said document set forth further that *"[...] after the lapse of twenty-four (24) months from the execution of this deed, in the case the grantees purchasers had not officially and formally initiated the commitments undertaken above, in the area of 2,497ha and 48 ha, at the discretion of the grantor seller, this latter will reserve the right to retake the area sold for this purpose, reimbursing the price of sale plus the expenses and improvements made by the grantees purchasers [...]".*

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8. Well. Currently, ALUNORTE, here Client, is a Defendant in lawsuits that basically allege that the Property registered under number 7456, in which are installed its deposits of solid residues DSR1 and DSR2, is a *Specially-Protected Territorial Area*. These lawsuits add further that the Property includes a Preservation Area belonging to the State, and that this area could only be unburdened by means of a state law, according to the 1988 Federal Constitution.

9. In view of these facts, we start to analyze the Brazilian legal system for answering the questions submitted by the Client.

II. THE BRAZILIAN LEGAL SYSTEM AND THE PRESERVATION AREAS

II.1. Areas subject to nature protection prior to the 1988 Federal Constitution

10. Despite the importance of the biologic preservation given to the areas whose nature was intended to be protected, the original reason for the protection of natural areas was the tourism. Said spirit followed the guidelines for the creation of areas protected in the United States, which are, the protection of scenic beauties and public use. This animus may be found in the Decree creating the Park of Itatiaia, in 1937, when, as regards its localization, mentions that *"[...] aims, at the same time, the protection to nature, reserve to natural sciences, increase to tourism and reserve, for the future generations, of the existing forests. [...]"*.[1]

11.
The Brazilian legal system, since the Forest Code of 1934 (Federal Decree 23,793, of Jan 23, 1934), wanted to grant

[1] Federal Decree 1,713, of Jun 14, 1937.

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protection to areas with relevant natural characteristics, even casuistically and with no right direction, always administered with few resources and lacking a defined environmental policy action. Obviously, said imprecise context made very hard to reach the purpose then intended for these places.

12. Federal Law 7,804, of Jul 18, 1989, amending the Brazilian Environmental Law (created by Federal Law 6,938, of Aug 31, 1981), created in the Brazilian legal system the expression specially-protected territorial areas, but the notion of system and the general idea of *Specially-Protected Territorial Area* originates from the 1988 Constitution and from the enactment of Federal Law 9,985, of Jun 18, 2000, which created the Brazilian National System of Preservation Areas - SNUC, as we will see the details below. Before the Constitution, the protected areas were treated on an isolated basis, without a clear separation between full protection, sustainable use and touristic purpose [2].

13. Corroborating what is asserted here, it is worthy to mention the regulation creating the already closed Brazilian Institute of Forest Development - IBDF – Decree Law 289, of Feb 28, 1967 –, which proves the jurisdiction of said agency to create some specific modalities of protected areas, even without the notion of a system, as well as article 5 of the original version of Federal Law 4771, of Sep 15, 1965, which makes crystal-clear the jurisdiction of the Public Authorities to create said areas. Let us see:

> "Decree Law 289, of Feb 28,
> 1967 [...]
> Article 5. It is the IBDF
> responsibility, further: [...]
> VIII – to manage the *Jardim Botânico (Botanic Garden)* of Rio de Janeiro, the National Parks, the National Forests, the Biological Reserves and the Federal Hunting Parks.

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[2] The idea of establishing a *system* for Preservation Areas had as embryo the Brazilian National System of Preservation Areas Plan, launched in 1979, with a second stage completed in 1982. The idea was reinforced in 1988 with the preparation of a bill for the Fundação Pró Natureza (FUNATURA), hired by IBDF for preparing a bill, delivered in 1989, forwarded to the Brazilian Congress in 1992. The first rule mentioning the expression "Preservation Areas" would be the already revoked Federal Decree 78 of Apr 5, 1991, which defined the attributions of IBAMA.

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[...]
Article 7. Whenever required for the Brazilian forest policy, according to this decree law, the Institute may promote the creation, the installation and maintenance of new national parks, national forests and biological reserves, natural monuments and federal hunting parks. [...]"
[...]
"Law
4,771/1965 [...]
Article 5. The Public Authorities will create:
a) National, State and City Parks and Biological Reserves, having as purpose to protect exceptional nature attributes, conciliating the full protection of flora, fauna and natural beauties with use for educational, recreational and scientific purposes;
b) National, State and City Forests, having economical, technical or social purposes, including reserving areas not yet reforested and intended for this purpose. [...]" (underlined)

14. As this regard, despite not being a normative document, the Brazilian National Development Plan - PND II (1975-1979)[3], in its chapter dedicated to the Industrial Pollution and Environment Preservation, it is clear its focus on a single modality of protected area, making clear that its creation should be preceded by a technical study. To wit:

> "[...] Preservation of natural areas representing the main ecosystems found in the several regions, to be reached through the establishment, in the Brazilian territory, of a network of Ecological Stations in selected areas, according to studies to be made by the Special Environmental Department **- SEMA**[4] [...]" (underlined)

15. The Brazilian National Environmental Policy Law (Federal Law 6,938/1981) established among its principles the protection of ecosystems, with preservation of significant areas [5], listing, among its objectives, the definition of priority areas of governmental action related to quality and ecological balance, according to the interests of the Union, the States, the Federal District, the Territories and the Cities[6].

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[3] http://www.planalto.gov.br/ccivil_03/leis/1970-1979/anexo/ANL6151-74.PDF. Accessed on Jun 20, 2018
[4] The Special Environmental Department - SEMA was created by Federal Decree 73,030, of Oct 30, 1973, guided by the preservation of the environment, the rational use of natural resources.
[5] Article 1, subparagraph IV.
[6] Article 4, subparagraph II.

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16. Thus, since that time, the Public Authorities had always the responsibility of creating the environmentally protected areas, as we can verify, as an example, in the documents that created some of the areas between years 1981 and 1987. Let us see:

1. ESEC Aracuri-Esmeralda, created by Decree 86,061, of Jun 2, 1981, with an area of 272 hectares;
2. ESEC Iquê, created by Decree 86,061, of Jun 2, 1981, with an area of 200,000 hectares;
3. ESEC Maracá, created by Decree 86,061, of Jun 2, 1981, with an area of 101,312 hectares;
4. Maracá-Jipioca, created by Decree 86,061, of Jun 2, 1981, with an area of 72,000 hectares;
5. ESEC Rio Acre, created by Decree 86,061, of Jun 2, 1981, with an area of 77,500 hectares;
6. ESEC Taiamã, created by Decree 86,061, of Jun 2, 1981, with an area of 11,200 hectares;
7. ESEC Uruçuí-Uma, created by Decree 86,061, of Jun 2, 1981, with an area of 135,000 hectares;
8. ESEC Caracaraí, created by Decree 87,222, of May 31, 1982, with an area of 80,560 hectares;
9. ESEC Jari, created by Decree 87,092, of Apr 12, 1982, with an area of 227,126 hectares;
10. ESEC Seridó, created by Decree 87,222, of May 31, 1982, with an area of 1,166 hectares;
11. ESEC Serra das Araras, created by Decree 87,222, of May 31, 1982, with an area of 28,700 hectares;
12. ESEC Jutaí-Solimões, created in 1983, with an area of 284,285 hectares;
13. ESEC Raso da Catarina, created by Decree 89,268, of Jan 3, 1984, with an area of 99,772;
14. ESEC Niquiá, created by Decree 91,306, of Jun 3, 1985, with an area of 286,600 hectares;
15. ESEC Taim, created by Decree 92,963, of July 21, 1986, with an area of 10,764 hectares;
16. ESEC Tupiniquins, created by Decree 92,964, of Jul 21, 1986, with an area of 43 hectares;
17. ESEC Tupinambás, created by Decree 94,656, of July 20, 1987, with an area of 28 hectares;
18. ESEC Carijós, created by Decree 94,656, of Jul 20, 1987, with an area of 712 hectares;
19. ESEC Pirapitinga, created by Decree 94,656, of Jul 20, 1987, with an area of 1,090 hectares;
20. ARIE Javari-Buriti, created by Decree 91,886, of Nov 5, 1985, with an area of 15,000 hectares;
21. ESEC Capetinga-Taquara, created by Decree 92,202, of Jun 3, 1985, with an area of 2,100 hectares;
22. ARIE Manguezais da Foz do Rio Mamanguape, created by Decree No. 91,890, of Nov 5, 1985, with an area of 5,721 hectares;
23. ARIE Mata de Santa Genebra, created by Decree 91,885, of Nov 5, 1985, with an area of 252 hectares;

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24. ARIE Matão de Cosmópolis, created by Decree 90,791, of Jan 9, 1985, with an area of 173 hectares;
25. APA Petrópolis, created by Decree 87,561, of Sep 13, 1982, with an area of 59,049 hectares;
26. APA Mananciais da Bacia Hidrográfica do Rio Paraíba do Sul, created by Decree 87,561, of Sep 13, 1982, with an area of 292,597;
27. APA Serra da Mantiqueira, created by Decree 91,304, of Jun 3, 1985, with an area of 422,873 hectares;
28. APA Piaçabuçu, created by Decree 88,421, of Jun 21, 1983, with an area of 9,143 hectares;
29. APA Bacia do Rio Descoberto, created by Decree No. 88,940, of Nov 7, 1983, with an area of 32,100 hectares;
30. APA Bacia do Rio São Bartolomeu, created by Decree No. 88,940, of Nov 7, 1983, with an area of 84,100 hectares;
31. APA Cairuçu, created by Decree 89,242, of Dec 27, 1983, with an area of 33,800 hectares; and
32. APA Cananéia - Iguape Peruíbe, created by Decree 90,347, of Oct 23, 1984 with an area of 202,832 hectares.

17. Therefore, it is necessary to mention that at that time there was no criteria for selection of modality of protected area, which were intimately related to the categories of management intended to be implemented. Among the protected areas, previously to the 1988 Constitution and the Law creating the Brazilian National System of Preservation Areas, we mention: *(i)* National Parks[7], *(ii)* National Forests;[8] *(iii)* Ecological Stations[9]; *(iv)* Natural Monuments[10]; *(v)* Environmental

[7] The National Parks were the most ancient and popular modality of Preservation Areas. The first National Park in the world was the Yellowstone Park, in the United States, created in 1872. In Brazil, the first initiative for creating a protected area took place in 1876, inspired in Yellowstone, when Engineer André Rebouças proposed the creation of two national parks: one in Sete Quedas and another in Ilha do Bananal. However, the first Brazilian National Park was Itatiaia National Park. Subsequently, the National Parks found their legal groundings in article 5 of the Forest Code of 1965, which provided for their creation in the three government levels, in public domain lands, and they were regulated by Decree 84,017, of Sep 21, 1979.

[8] The National Forests were created by article 5, *b*, of the 1965 Forest Code (former Forest Code). Subsequently, Decree 1,298, of Oct 27, 1994, defined them as *public domain areas*, with native or planted vegetal cover, intended to the *generation* of forest products and subproducts (article 1). The National Forest was the first modality of Preservation Area dealing with the permanence of traditional populations that previously lived in the area. The fact of being intended to "production" entailed the cultivation of forests from the point of view of the forest advancement.

[9] The Ecological Stations were provided for in the Brazilian legal system since the decade of 70, when Law 6,513, of Dec 20, 1977 considered them as areas of relevant touristic interest. In 1981, the Ecological Stations left this touristic nature and were defined by Law 6,902, of Apr 27, 1981, as *areas representing Brazilian ecosystems*, destined to realization of basic and applied researches of Ecology, protection of the natural environment and development of preservationist education. Said Law determined the destination of at least 90% of each station, on a permanent basis, to full preservation of the biota. The remaining area could be used for performing researches that could entail changes to its natural environment, provided that the zoning plan was approved. Another objective of the station was research, aiming to allow for comparative studies with the areas of the same region occupied and modified by the men, so as to obtain information useful for the regional planning and the rational use of natural resources. Besides that, it prevented the presence of herds and the exploitation of natural resources.

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Protection Areas[11]; *(vi)* Areas of Relevant Ecological Interest[12]; *(vii)* Extraction Reserves[13]; *(viii)* Ecological Reserves; *(ix)* Botanic Gardens[14] *(x)* Zoos[15] and *(xi)* Forest Gardens[16].

18. This Legal Opinion starts to analyze in details the modality of protected area called Ecological Reserve.

II.1.1. Ecological Reserves.

19. The term "Ecological Reserve" was introduced in the Brazilian legal systems by Federal Law 6,513, of Dec 20, 1977, having as purpose to indicate "*areas of relevant touristic interest*"[17].

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[10] The natural monuments were defined by the Convention for the Protection of Flora, Fauna and Natural Scenic Beauties of Latin American Countries, promulgated by Brazil through Decree 58,054, of Mar 23, 1966, but only regulated by Law of SNUC.

[11] The Environmental Protection Areas - APAs were created by Law 6,902, of Apr 27, 1981, and also considered by Law 6,938, of Aug 31, 1981, by Decree 99,274, of Jun 6, 1990, and by CONAMA Resolution 10, of Dec 14, 1988.

[12] The Areas of Relevant Ecological Interest were initially established by Law 6,938/1981 (as amended by Law 7,804/1989) and defined in Decree 89,336, of Jan 31, 1984, and in CONAMA Resolution 12, of Sep 14, 1989.

[13] The Extractive Reserve was created for trying to solve the matter of rubber latex gathering activities in Amazonia. Law 7,804, of Jul 18, 1989, when giving a new wording to subparagraph VI of article 9, Law 6,938/1981, provided for the possibility of creation, by the Public Authorities, of Extractive Reserves. Subsequently, Decree 98,897, of Jan 30, 1990, defined them as territorial areas intended to self-sustainable exploitation and preservation of renewable natural resources by extractive populations. This is a curious figure from the legal and scientific point of view, but with a social and economical meaning.

[14] The Botanic Gardens have great tradition in Brazil – in 1808, the Prince Regent D. João VI created, through a decree, the Real Garden – currently called Botanic Garden – of Rio de Janeiro. Besides the purpose of leisure and recreation, the Botanic Gardens currently operate as genetic bank for degraded areas and for avoiding extinction of species.

[15] The Zoos were regulated by Law 7,173, of Dec 14, 1983, which defined them as a collection of wild animals maintained alive captive or with semi-freedom and exposed to public visitation. They may be public or private property, but the animals integrating its collection are state-owned.

[16] Decree 4,439, of Jul 26, 1939, which governed the Forest Gardens, was revoked by Decree 99,999, of Jan 11, 1991, and this, on its turn, was revoked by Decree without number, of Sep 5, 1991.

[17] Article 1. The Special Areas and the Places established according to this law are considered of touristic interests, as well as the assets of cultural and natural value, protected by specific law and, in special:
I. Assets with historic, artistic, archeological or pre-historical value; II. The ecological reserves and stations; III – The areas destined to protection of renewable natural resources; IV. The cultural or ethnologic manifestations and the places where they occur; V. The notable landscapes; VI. the places and natural accidents appropriate for resting and practice of recreational, sports or leisure activities; VII. The usable mineral springs; VIII. The cities having special climate conditions; IX. Others to be defined, as provided for in this law.

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20. Some years later, Federal Law 6,938/1981, in its original version, listed among the instruments of the Brazilian Environmental Policy, the *"[...] creation of ecological reserves and stations, areas of environmental protection and those of relevant ecological interest, by the Federal, State and City Public Authorities. [...]"*[18].

21. Subsequently, Federal Decree 89,336 was enacted, on Jan 31, 1984, expressly providing for that *"[...] the Permanent Preservation Areas mentioned in article 18 of Law 6,938, of Aug 31, 1981, are considered Ecological Reserves, as well as those established by the Public Authorities [...]"*. In this sense, article 5 provided for that the Ecological Reserves could be declared as such by the States and Cities[19].

22. In one word, for the Ecological Reserves to be were grounded in the already revoked provisions of Law 6,938/1981, with the regulation brought by Decree 89,336/1984, they had to be created by an action by the Public Authorities.

23. As a complement, it is worthy to highlight that said modality of protected area was excluded from article 9 of Law 6,938/1981, by Federal Law 7804/1989, having been permanently excluded by the environmental legal system, as an area for protection of nature, as we will see below, through the express revocation of article 18 of the Brazilian Environmental Policy, by means of Law 9,985/2000[20].

24. To be accurate, the Preservation Areas itself were regulated later by the Brazilian System of Preservation Areas Law.

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[18] Article 9, IV.
[19] Article 5. In the Ecological Reserves and in the Areas of Relevant Ecological Interest declared by States and Cities, complementary rules and criteria may be established besides those ordered by the Brazilian Environmental Agency - CONAMA, which shall be considered as minimum requirements.
[20] It is worthy to highlight that not even the Brazilian National System of Preservation Areas Plan, both in the version of 1979, and in the 1982, mentioned any Ecological Reserve, that is to say, it was a modality absolutely unused of protection area.

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25. The Preservation Areas, as we will see below, have legal rules dated of 2000, which imposed a series of requirements to be observed for them to be created and implemented.

26. Thus, we infer the *first premise* relevant for this Legal Opinion: the Ecological Reserves according to Law 6,938/1981 had to be declared as such by the Public Authorities. Otherwise, they could not be considered as such, according to the legal system.

II.1.2. The Ecological Reserve mentioned in registration No. 7456

27. As already narrated in item "I. Background" of this Legal Opinion, the remaining area of registration No. 7442 was sold, jointly, to ALUNORTE and ALBRAS, creating thus registration No. 7456.

28. From this remaining area, the Certificate of Deed of Sale sets forth that *"[...] 2.497ha47a48ca (two thousand, four hundred and ninety-seven hectares, forty-seven ares and forty-eight centiares) are destined, solely and exclusively, to an ecological reserve (environmental protection) with the purpose of enrichment of the degraded forests, reforesting of native species and eventually exotic species, researches, forestation, phenology, studies of management and, mainly, protection against the admissible atmospheric pollution originated from industries, as well as the surveillance of the area [...]".*

29. Furthermore, the document sets forth that: *"[...] after the lapse of twenty-four (24) months from the execution of this deed, in the case the grantees purchasers had not officially and formally initiated the commitments undertaken above, in the area of 2,497ha and 48 ha, at the discretion of the grantor seller, this latter will reserve the right to retake the area sold for this purpose, reimbursing the price of sale plus the expenses and improvements made by the grantees purchasers [...]".*

30. It was agreed further that from the described area of 2,497ha47a48ca, *"[...] 5% (five percent) could be destined to other non-industrial purposes, of interest of the purchasers, provided that they are compatible to the guidelines set forth through the City Planning of Barcarena, upon prior approval by CDI PA, and, further any work eventually carried out in noncompliance with the provisions*

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above, it is agreed the embargo and demolition, notwithstanding other admissible administrative and court proceedings. [...]".

31. Well. From the reading of the Certificate of the Deed it is possible to infer that the purposes of the provision were: *"[...] the enrichment of the degraded forests, reforesting of native species and eventually exotic species, researches, forestation, phenology, studies of management and, mainly, protection against the admissible atmospheric pollution originated from industries, as well as the surveillance of the area [...]".*

32. From our point of view, said Deed intended to establish a modality of measure that could be destined to mitigate eventual impacts[21], with the establishment of an area that could help to minimize eventual negative effects arising from the industrial activities to be installed in the place. That is to say: this is only an area that CDI suggested to be used for mitigating eventual impacts. Said measure would be related further to the attribution of CDI Pará, as provided for in article 3 Law 4,686/1976, of only *"[...] indicate measures appropriate to control the environmental pollution caused by the industries. [...]"*. Logically, said measures could or not be considered at the time of the environmental licensing of such industrial activities.

33. At this point, it is worthy to remind that in the construction of the declaration of will, according to article 112 of the Brazilian Civil Code, we must seek the sense and the intention more than the express wording[22].

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[21] The mitigating measures have as goal to make smoother an invasive, modifying or impacting activity or procedure, that is indispensable, so as to make compatible the environmental change to the capacity of support of the environment and allow for the regeneration of what was affected or, at least, prevent the evil to spread, aggravate or perpetuate. For the cases in which it is not possible to avoid the intervention in the environment given the relevance of the activity, it is possible to impose required measures for attenuating its negative impacts. These are the mitigating measures brought as concrete actions taken in a licensing proceeding able to smooth or mitigate any impact and, further, appear as effect of the actions taken for the protection of the environment.

[22] "Article 112. In the statements of will, the intention of the parties contained in them will have more attention than the literal sense of the wording.

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34. Article 4 of the Brazilian Tax Code follows the same line, when setting forth *"[...] that the specific legal nature of the tax is determined by the taxable event of the respective obligation, being irrelevant for qualifying it: I - the name and other formal characteristics adopted by the law and II – the legal destination of the product of its collection […]".*

35. As it is known, *"to construe is determine the sense and the scope of the legal words"*[23], and, in this case, the sense sought with said accessory agreement to the Sale transaction was to suggest an eventual mitigating action that could or not be considered in the context of an environmental licensing of the industrial activities and not the creation of an Ecological Reserve according to Federal Law 6,938/1981.

36. Corroborating this understanding, the assertion that the ecological reserve claimed in registration number 7456 would be destined also to recovery of degraded forests, to the development of the activities of foresting and surveillance.

37. Well, areas with degraded forests, subject to occupation with activities of foresting and surveillance activities, for sure, were not able to be transformed into Ecological Reserves, according to the law.

38. Thus, we infer that the ecological reserve provided for in the Certificate of Deed:

38.1. *First,* it would not comply with the purposes intended for the Ecological Reserves, according to Laws 6,938/1981 and 6,513/1977, neither the definition given to them after 1984, with enactment of Decree 89,336/1984.

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[23] MAXIMILIANO, Carlos. Hermenêutica e aplicação do Direito.19th edition. Rio de Janeiro: Forense 2006, page 1.

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38.2. *Second*, it was not created further because there was no action by the Public Authorities in the sense of creating a protection area, according to the provisions of article 9, Law 6,938/1981.

38.3. *Third*, based on the Technical Note contained in **SCHEDULE I** of this Legal Opinion, the ecological reserve set forth in the above mentioned Certificate of Deed of Sale of the Property has never been instituted and said legal transaction (Purchase and Sale) was not characterized as an *administrative act*.

(a) *First,* CDI Pará, according to State Law 4,686/1976 is a government-controlled company, linked to the State Department of Planning and General Coordination - SEPLAN, and is governed by the rules applicable to private company, being therefore, private and not public, the actions practiced by it, as provided for in article 27 of Decree Law 200 of Feb 25, 1967[24]. Its main purpose, at the time, was to execute the industrialization policy of the State, as regards physical and social infrastructure incentives, by means of Protection Districts and Areas.

(b) *Second,* it expressly mentioned that the area would be destined to an ecological reserve, and made clear that it would depend on a future public action, whether for instituting it as a protected area, or for accepting it as a mitigating measure in the context of the environmental licensing, what did not take place.

(c) *Third,* CDI Pará had not, according to Law 4,686/1976, jurisdiction to issue administrative actions for the creation of protected area.

(d) *Fourth,* the Decree expropriating the Property related to the Certificate of Deed under discussion is grounded did not include any reference, not even an indirect one,

[24] "Article 27. Guaranteed the ministry supervision, the Executive Branch will grant to the Federal Administration entities the executive authority required for the efficient performance of its legal or regulatory responsibility. Sole Paragraph. The public companies and the government-controlled companies will be guaranteed operation conditions equal to the ones of the private sector and these entities will be responsible for adapting themselves to the general plan of the Government, under ministry supervision."

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to the constitution of an ecological reserve. This destination was merely a contractual provision set forth between CDI Pará and the Client, including in disagreement to the provisions of State Decree 10,064/1977 (Decree of Expropriation).

39. At this point, still based on the Technical Note in **SCHEDULE I** of this Legal Opinion, it is important to record that the obligation of instituting the ecological reserve, in this case, is not confused to an obligation of public order, resulting from the collective right to the environment ecologically balanced, characterizing as an accessory agreement to a Sale Agreement between companies and subject to the rules of the Private Law.

40. This was a contractual obligation, valid between the parties, of destination of a protected area with the function of serving as a measure mitigating eventual environmental impacts (pollution) that could result from the industrial activities that would be installed in the place, ordered by State Decree 10,064/1977, that expropriated this and other areas for granting them *only* an industrial destination.

41. In this sense, we cannot assert here that the destination of the Property destined to an ecological reserve could not be changed, because: *(i)* this was a secondary private obligation between the parties (CDI Pará, ALUNORTE/ALBRAS) subject to the condition provided for in the agreement, which is, the possibility of retake of the Property within two years, what never occurred; and *(ii)* was in disagreement to the purpose of State Decree 10,064/1977, which expropriated the full area for destine it exclusively to industrial activities.

42. For this reason, the provision in registration number 7456 has never constituted an area of protection of nature and let alone could include the area under discussion in the system of *Specially-Protected Territorial Area*, only introduced in the Brazilian legal system by the 1988 Constitution.

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43. As a complement, it is worthy to highlight that, since it is a private legal transaction, the right of CDI Pará to retake the Property, since the accessory agreement of the destination to ecological reserve was not complied with, was subject to preemption.

44. As it is known, preemption is the extinguishment of the right as a result of its non-exercise during a specific term granted by the legal system or agreed between the parties, when it is called agreed preemption. Preemption produces, consequently, the strongest effect of revocation of a right as a result of the inertia or non-use.

45. In this sense, we have further that after more than thirty-five years after the two years the Deed granted to CDI Pará for claiming the Property back, right non-exercised, we could not allege, not even in theory, the possibility of claiming the compliance with the accessory agreement of destination to ecological reserve as a result of application of peremption.

46. In view of the above, we have that:

46.1. Previously to the 1988 Constitution, there was no system of *Specially-Protected Territorial Area*, but only isolated modalities of protected areas.

46.2. According to both the environmental laws in force at the time and the current environmental laws, any protected area had to and must be preceded by an action by the Public Authorities.

46.3. Since registration number 7456 mentions that the area under discussion was degraded and could be destined to the activities of foresting and surveillance, we infer that this was a form of eventual mitigating action, tending to the purpose of minimizing possible impacts to the industrial activities to be installed in the region, which logically could or not be considered by the environmental body at the time of licensing of the industrial activities.

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46.4. Furthermore, State Decree 10,064/1977 itself provided for that the whole area was destined to an industrial project that, according to its own terms, was a *"public service" of greatest interest of the state of Pará*.

47. After clarified the matters related to the protection areas before the 1988 Constitution, we will examine now the system created by the new constitutional order in force.

II.2. The Specially-Protected Territorial Area after the 1988 Constitution

48. Within a short term of historical evolution of the protected areas in Brazil - from 1937 to our days –, the 1988 Federal Constitution has the role of an actual watershed, since, when launching the challenge of a regulation for what it named *Specially-Protected Territorial Areas*, it entailed the birth of Law 9,985/2000, which created the *Brazilian National System for Nature Preservation Areas - SNUC*, which regulated paragraph 1, subparagraphs I, II, III and VII, of article 225 of the Constitution.

49. As it is known, article 225 of the Constitution provided for as instrument of effectiveness of the right to an ecologically balance environment the definition of the *Specially-Protected Territorial Area* and its components to be specially protected.

50. As taught by Paulo Afonso Leme Machado, "*the Constitution profoundly innovates in the protection of the territorial areas, such as, for instance, preservation areas, Permanent Preservation Areas - APPS and forest legal reserves. These areas can be created by a law, a decree, or a resolution. The constitutional protection is not limited to names or legal regimes of each territorial area, because any area is included in article 225, § 1, III, provided that it is recognized that it must be specially protected*"[25].

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[25] MACHADO, Paulo Affonso Leme. *Direito Ambiental Brasileiro*. 15th edition. São Paulo: Malheiros, 2007, page 137.

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51. The 1988 Federal Constitution, therefore, innovated when established mechanisms for guaranteeing the legal and ecological conservation of a system of "territorial areas and its specially protected components", when giving to the public authorities (article 225, § 1, subparagraph III, of the Federal Constitution) the duty to define them, in all the states of the federation, providing for further that its amendment and revocation could only be allowed by means of a law, guaranteeing, thus, the effectiveness of the right to an ecologically balanced environment.

52. Up to enactment of the SNUC Law, the Brazilian legal system had no provision setting forth, with the required accuracy, the *concept* of Preservation Area, and this absence of definition harmed the protection these areas claimed for. According to article 2 of Law 9,985/2000, Preservation Area is the "*territorial area and its natural resources*, including the waters, with relevant natural characteristics, legally created by the Public Authorities, aiming the preservation and defined limits, under a special regime of administration, to which appropriate guarantees of protection apply".

53. The regulation of the SNUC Law was partially made by Decree 4,340, of Aug 22, 2002, which sought to better detail the legal aspects related to the creation of Preservation Areas, the management shared with Civil Society Organizations of Public Interest - OSCIPs, the exploitation of goods and services, the compensation for any significant environmental impact, the reestablishment of traditional populations, the reassessment of categories of areas not provided and, finally, the management of biosphere reserves.

54. Therefore, for the legal and ecological configuration of an Preservation Area, it is required the existence of: *(i)* natural relevance; *(ii)* official nature; *(iii)* territorial boundaries; *(iv)* preservation purpose; and *(v)* the special regime of protection and administration.

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55. The goals of the SNUC, defined in article 4 of Law 9,985/2000, include : *(i)* to contribute for the maintenance of the biological diversity and the genetic resources in the Brazilian territory and jurisdictional waters; *(ii)* to protect the species threaten of extinguishment in the regional and national levels; *(iii)* to contribute for the preservation and restoration of diversity of natural ecosystems; *(iv)* to promote the sustainable development with the natural resources; *(v)* to promote the use of principles and practices of preservation of the nature in the development process;
(vi) to protect natural and little changed landscapes of remarkable scenic beauty; *(vii)* to protect the relevant characteristics of geological, geomorphologic, speleological, archeological, paleontological and cultural nature; *(viii)* to protect and recover hydric and soil resources; *(ix)* recover or restore degraded ecosystems; *(x)* to provide means and incentives for scientific research activities, studies and environmental monitoring;
(xi) to economically and socially appreciate the biological diversity; *(xii)* to favor conditions and promote the education and environmental interpretation, the recreation in contact with nature and ecological tourism; and *(xiii)* to protect the natural resources required for the subsistence of traditional populations, respecting and valuing their knowledge and their culture and promoting them, both socially and economically.

56. These goals, jointly, transcend the most superficial aspects contained in the current concept of Preservation Areas. Two considerations seem to be relevant in the list of purposes: first, its *rich ecological content*, which exceeds the view of vegetal cover and biodiversity inherent to an area, for highlighting first, elements of hydrosphere and lithosphere; second, the focus on *sustainable development*, of economical and social nature, process in which we see the possibility of uniting the interests of the local populations and the integrity of the natural environmental estate.

57. Anyway, the most relevant criterion is the sustainability of the natural area itself, that is to say, the perpetuation of living systems, the structure and the functions of the ecosystems located in those areas, so as to keep the celebrated ecological balance.

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58. On its turn, article 5 of Law 9,985/2000, in its subparagraphs I to XIII, asserts that the SNUC will be governed by guidelines that will: *(i)* guarantee that, in all the Preservation Areas, are represented significant samples, ecologically feasible of the different populations, habitats and ecosystems of the Brazilian territory and the jurisdictional waters, preserving the existing biological heritage; *(ii)* guarantee the mechanisms and proceedings required for the involvement of the society in the establishment and review of the Brazilian policy for Preservation Areas; *(iii)* guarantee the effective participation of the local populations in the creation, implementation and management of the Preservation Areas; *(iv)* seek the support and coordination of non-governmental organizations, private organizations and individuals for the development of studies, scientific researches, practices of environmental education, leisure and ecological tourism activities, monitoring, maintenance and other managerial activities of the Preservation Areas; *(v)* promote the local populations and private organizations to establish and manage Preservation Areas within the Brazilian system; *(vi)* guarantee, when possible, the economic sustainability of the Preservation Areas; *(vii)* allow for the use of the Preservation Areas for preservation *in situ* of populations of the wild genetic varieties of domesticated animals and plants, as well as the wild genetic resources; *(viii)* guarantee the process of creation and management of the Preservation Areas take place on an way integrated to the policies of management of surrounding lands and waters, considering the local social and economical conditions and needs;
(ix) consider the conditions and the needs of the local populations in the development and adaptation of methods and techniques of sustainable use of natural resources; *(x)* guarantee to the traditional populations – the subsistence of which depends on the use of the natural resources existing inside the Preservation Areas – alternative subsistence means or the fair indemnification for the resources used; *(xi)* guarantee an appropriate allocation of the required financial resources so that, after created, the Preservation Areas may be managed on an efficacious way and comply with its goals, with no financial problems; *(xii)* seek to grant to the Preservation Areas, when possible and according to the requirements of management, administrative and financial autonomy; and *(xiii)* seek to protect great areas by

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means of an integrated system of Preservation Areas of different categories, close or continued, and their respective damping zones and ecological corridors, integrating the different activities of preservation of nature, sustainable use of natural resources and the restoration and recovery of the ecosystems.

59. The guidelines for the constitution and operation of the Preservation Areas are primarily intended to guarantee the *identity of the most significant Brazilian ecosystem*. Obviously, this is an ecosystem identity, characteristic of the respective land and water environments, as they are today.

60. For complying with the goals of the Law, the Preservation Areas integrating the SNUC are divided into two great groups, with specific characteristics:[26] *Full Protection Areas* and *Sustainable Use Areas*.

61. Within these two groups, twelve (12) categories of Preservation Areas were identified and characterized. Each modality of protected area highlights, more or less, one or several purposes defined in the Law, respecting the primacy of the preservation purpose, as explicit in the definition of Preservation Area itself.

62. The list is strict, since only on exceptional basis, and upon authorization by CONAMA, other Preservation Areas may be included in the system.[27] On the other side, the Preservation Areas created based on the law prior to the SNUC Law, and that are not included in the categories set forth therein, must be

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[26] According to article 7, subparagraphs I and II, of the SNUC Law.
[27] According to sole paragraph of article 6, on an exceptional basis, and at the discretion of CONAMA, the new state and city preservation areas may be included in the SNUC provided that they *(i)* have been conceived for attending regional or local peculiarities; *(ii)* have purposes of management that cannot be satisfactorily attended by any category set forth in the SNUC Law; and *(iii)* have characteristics that allow a clear distinction of those categories included in the SNUC.

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reassessed, in full or in part, for defining their destination based on the category and function for which they have been created.[28]

63. The *Full Protection Preservation Areas* are those that have as basic purpose to *preserve the nature*, exempting if, if possible, from human interference. As a rule, therein *only the indirect use of its resources is admitted*, that is to say, the use that does not involve consumption, collection, damage or destruction of natural resources, except for the cases set forth in the SNUC Law itself.[29] They include, according to the wording of article 8, the following categories: *a)* Ecological Station; *b)* Biological Reserve; *c)* National Park; *d)* Natural Monument; and *e)* Refuge of Wild Life.

64. Otherwise, the *Sustainable Use Preservation Areas* are those the basic purpose of which is *to make compatible the preservation of nature with the sustainable use of part of its natural resources*. More explicitly, they aim to conciliate the exploitation of the environment to the guarantee of preservation of renewable environmental resources and the ecological processes, maintaining the biodiversity and the other ecological attributes, on a socially fair and economically feasible basis.[30] According to article 14 of the SNUC Law, this group includes the following categories of Preservation Area: *a)* Environmental Protection Area; *b)* Area of Relevant Ecological Interest; *c)* National Forest; d) Extractive Reserve; *e)* Fauna Reserve; *f)* Sustainable Development Reserve; and *g)* Private Reserve of Natural Heritage.

65. As we infer from the two last paragraphs above, in the context of the *Specially-Protected Territorial Areas* provided for in the 1988 Federal Constitution and in the Law that created the Brazilian National System of Preservation Areas, the Ecological Reserve was not included, a modality of protected area that was excluded from the Brazilian legal system, as we will see below.

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[28] Article 55 of Law 9,985/2000.
[29] Article 7, first sentence, subparagraph I, and § 1.
[30] Article 7, first sentence, II, and § 2 and article 2, XI, of Law 9,985/2000.

II.3. The Revocation of the provision of the Brazilian National Environmental Policy which established the Ecological Reserve

66. Law 9,985/2000 only considers as Preservation Areas those listed in the two groups mentioned in articles 8 and 14, because *"the preservation areas and protected areas created based on prior laws and that are not included in the categories set forth in this Law will be reassessed, in full or in part, within two (2) years, for defining their destination based on the category and function for which they have been created"*.[31] Decree 4,340/2002, on its turn, sets forth that said reassessment must be proposed by the responsible entity and made upon normative action by the same hierarchical level that created it.

67. Specifically as regards the Ecological Reserve, the SNUC expressly revoked the provision that included it in the Brazilian National Environmental Policy, more specifically article 18 of Law 6,938/1981.[32]

68. At this point, it is worthy to remind that the revocation has the effect of exclusion of the institute from the Brazilian legal system, being not possible to allege it anymore.

69. Tercio Sampaio Ferraz teaches that *"[...] revoke means to take the validity by another rule. The revoked rule has no validity anymore, is not part of the system. Since it is not part of the system, it is not effective anymore. Therefore, revoking is to cease, permanently interrupting its effectiveness [...]"*[33].

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[31] Article 55 of Law 9,985/2000.

[32] See article 60 of Law 9,985/2000. Article 18 of Law 6,938/81 read as follows: "The forests and other forms of natural vegetation of permanent conservation listed in article 2 of Law 4,771, of Sep 15, 1965 – Forest Code, and the areas for birds reproduction protected by agreements or treaties executed by Brazil with other countries are transformed into Ecological Reserve or Stations, under the responsibility of SEMA. Sole paragraph. The individuals or legal entities that, in any way, degrade Ecological Reserves or Stations, as well as other areas declared as having relevant ecological interest, are subject to the penalties provided for in article 14 of this Law".

[33] JUNIOR, Tercio Sampaio Ferraz. *Introdução ao Estudo do Direito*. 4th edition. São Paulo: Editora Atlas S.A., 2003, page 204.

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70. In the same sense, the Botanic Gardens, Zoos and Forest Gardens, listed as Preservation Areas in CONAMA Resolution No. 11, of Dec 3, 1987, do not have this qualification anymore, as a result of the tacit revocation of said resolution. Other categories, although easily included in the definition of Preservation Area provided for in subparagraph I of article 2 of the law, were not taken into consideration by the lawmaker.

71. Finally, it is worthy to remind some categories that, although legally created, remained unused up to its final disregard by the SNUC Law. This is the case of the Areas of Relevant Touristic Interest (created by Law 6,513/1977, regulated by Decree 86,176, of Jul 6, 1981), of the Reserves of Virgin Regions and National Reserves (defined by the Convention for the Protection of Flora, Fauna and Natural Scenic Beauties of the America Countries, promulgated in Brazil by Decree 58,054, of Mar 23, 1966)[34]. Although they have lost the *status* of Preservation Areas, said areas did not become simply unprotected by the legal system, as could seem at first sight. We cannot forget that they were created with the purpose to protect the environment, and for this reason they are considered as *Specially-Protected Territorial Area*; its amendment and suppression being permitted only through a law, being prevented any use that compromises the integrity of its attributes justifying the protection, according to the Constitution (article 225, § 1, III, of the Brazilian Federal Constitution).

72. Therefore, we cannot mention the possibility of alleging or intending to create an ecological reserve, considering that said modality of protected area was excluded from the Brazilian legal system.

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[34] RODRIGUES, José Eduardo Ramos. Aspectos jurídicos das unidades de conservação. In *Revista de direito ambiental*. São Paulo: Revista dos Tribunais, 1996, volume 1, page 139 and 140.

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II.4. The creation, increase and disregard of Preservation Areas, after the 1988 Constitution

II.4.1. The creation and increase

73. As mentioned above, the Constitution sets forth that it is the responsibility of the Public Authorities to define[35], in all the states, territorial areas and its components to be specially protected. They may be public or private areas, but must be defined by the Public Authority.[36]

74. However, the term "define" included in the Constitution does not mean the creation of the Preservation Area itself.

75. At this point, the lesson of Paulo Affonso Leme Machado is crystal-clear: "the Constitution sets forth that it is the responsibility of the Public Authorities to define, in all the states, territorial areas and its components to be specially protected. To define the territorial areas include locate them. And then starts the constitutional protection, not waiting the accessories to be implemented, as fences or guards houses"[37].

76. In the same sense, José Afonso da Silva when asserting that "the Constitution imposes to the Public Authority the duty to define, in all the states, *Territorial Areas and its components to be specially protected*, being the

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[35] According to the Dictionary Aurélio of the Portuguese Language (5th edition Curitiba: Editora Positivo, 2010), *define* means: "1. Determine the scope or the limits of; limit, demarcate: *define an area*. 2. Enunciate the essential and specific attributes of (one thing), so as to make it unmistakable with another: *define a lozenge*. 3. Explain the meaning of; indicating the actual sense of: *define a term, an expression*. 4. Make know on an accurate way; accurately expose; explain: *define an idea; define a situation*. 5. Declare with accuracy; clarify: *define a position*. 6. Demarcate, fix, establish: *define the authority*; "The Treaty of 1750 defines more or less the geographic configuration of Brazil today." (Viscount of Carnaxide, D. João V e o Brasil, page 45).
7. Decide, decree: *Vatican defined the dogma of Trinity*. 8. Adjust the sense or the purpose of; interpret: *It is hard to me to define your visit*. 9. Make known; reveal: *Behavior defines the character*. P. 10. Say what you think as regards something; declare himself, express, explain. 11. Take a resolution or a party; assume a position; decide."

[36] PEREIRA, Polyana Faria; SCARDUA, Fernando Paiva. Espaços territoriais especialmente protegidos: conceito e implicações jurídicas. In *Ambiente e Sociedade*. Campinas: ANPPAS, 2008, volume 11, No. 1, Page 90.

[37] MACHADO, Paulo Affonso Leme. *Direito Ambiental Brasileiro*. 15th edition. São Paulo: Malheiros, 2007, page 138.

amendment and suppression allowed only through a law, prevented any use that compromises the integrity of its attributes justifying its protection (article 225, § 1, III). What the constitution wants is to delimitate, in each State and in the Federal District, Areas of Ecological Relevance"[38].

77. At this point, we have clear that the expression *definition* contained in subparagraph III of § 1, article 225 of the Constitution is not equal to the *creation* itself of the *Specially-Protected Territorial Area*.

78. The legal basis for the creation, increase and management of the Preservation Areas is, today, provided for in the already mentioned Law 9,985/2000, which created the Brazilian National System for Nature Preservation Areas - SNUC.

79. Indeed, article 22 of this law set forth, in agreement to the provisions of the Federal Constitution, that the Preservation Areas must be created by an action of the Public Authority, after performing technical studies and a public consultation that allow to identify the place, size and boundaries more appropriate to the Area. To wit:

> "[...] Article 22. The preservation areas are created by an action by the Public Authority. [...]
> § 2. The creation of a preservation area must be preceded by technical studies and public consultation that allow identifying the place, size and boundaries more appropriate for the area, as provided for in a regulation.
> § 3. In the consultation proceeding mentioned in § 2, the Public Authority has the obligation to provide appropriate and understandable information to the local population and the other interested parties." [...]"

80. In this sense and with more details, Decree 4,340/2002 sets forth as follows:

> "[...] Article 4. It is the responsibility of the body proposing the new preservation area to prepare the preliminary technical studies and carry out, when required, the public consultation and the other administrative proceedings required for creating the area.

[38] SILVA, José Afonso. *Direito Ambiental Constitucional*. 4th edition. São Paulo: Malheiros, 2003, page 228.

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> Article 5. The public consultation for the creation of the preservation area has as purpose to subsidize the definition of location, size and boundaries more appropriate for the area.
> § 1. The consultation consists in public meetings or, at the discretion of the environmental body with jurisdiction, other ways to hear the local population and other interested parties.
> § 2. In the public consultation proceeding, the body with jurisdiction must indicate, on a clear basis and with accessible wording, the implications for the population residing inside the area proposed and in the neighborhood [...]".

81. Thus, the creation of a Preservation Area must be preceded, in summary, by the following stages*: (i) request of creation; (ii) preparation of technical studies; and (iii) performance of public consultation.*

82. Thus, the realization of technical, social, economical and environmental analyses is an *indispensable requirement* for the creation and *increase* of any category of Preservation Area.

83. With more reason and according to the provisions of article 22 of the SNUC Law, the realization of technical studies is justified for avoiding abuses and arbitrariness that may result from the Executive Branch, considering the possibility of creation of Preservation Areas by means of a mere administrative action.

84. After fulfilling these requirements, the Preservation Area may then be instituted and/or increased, by means of a Decree, according to what is set forth in the articles of the SNUC Law.

85. Therefore, the creation of the Preservation Areas must be *reasoned* and *grounded*, in compliance with the public interest and the need to protect the ecologically balanced environment, being mandatory to submit to the affected population the restrictions that will be imposed to them.

86. By the way, this is the spirit of article 50 of Law 9,784, of Jan 29, 1999, which regulates the federal administrative proceedings. To wit:

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"[...] Article 50. The administrative actions must be reasoned, indicating the facts and the legal grounds, when:
I – they deny, limit or affect rights or interests; [...]"

87. Therefore, considering that the creation of the Preservation Areas cannot dispense with the prior realization of technical studies and public consultation, under penalty of nullity, we will start to examine in details each of these requirements.

a) The Public Consultation

88. The legal requirement of the realization of public consultations in the proceedings for creation of Preservation Areas has as grounds the constitutional principles of community participation and publicity, as well as the fundamental right to information.

89. In this context, when dealing with the guidelines of the SNUC, article 5 of Law 9,985/2000 sets forth that *the participation of the local populations has to be guaranteed,* ensuring that the *process of creation and management is made considering the local social and economical conditions.* Let us see:

"Article 5. The SNUC shall be governed by
guidelines that: [...];
III - guarantee the effective participation of the local populations in the creation, implementation and management of the preservation areas;
[...];
VIII - guarantee the process of creation and management of the Preservation Areas take place on an way integrated to the policies of management of surrounding lands and waters, considering the local social and economical conditions and needs;
IX - consider the conditions and needs of the local populations in the development and adaptation of methods and techniques of sustainable use of natural resources."

90. Besides the already transcribed article 22 of the SNUC Law, the regulating Decree 4,340/2002 presents the list of procedural items referring to the creation and increase of a Preservation Area, which includes the active participation of the civil society by means of a public consultation, clearly indicating some of the purposes aimed by it, to wit:

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> "[...] Article 5. The public consultation for the creation of the preservation area has as purpose to subsidize the definition of location, size and boundaries more appropriate for the area.
> [...]
> Paragraph 2. In the public consultation proceeding, the body with jurisdiction must indicate, on a clear basis and with accessible wording, the implications for the population residing inside the area proposed and in the neighborhood. [...]"

91. In this context, the Instituto Chico Mendes para Proteção da Biodiversidade - ICMBio issued Normative Instruction 5, dated May 15, 2008, which, in its article 8, expressly sets forth that, "the proceeding of public consultation must indicate, on a clear way and with accessible wording, the implications of the creation of the Preservation Area for the population residing inside the area proposed and in the neighborhood".

92. In the same sense, the Ministry of Environment prepared the *Guide of Public Consultations for Preservation Areas*, which indicates as "key institutions" in the realization of public consultations: Ministry of Environment; IBAMA; state governments and its environmental bodies; FUNAI; INCRA; State and Federal Prosecutors Office; City Administrations and House of City Representatives of the cities involved; local communities; community associations; cooperatives; trade unions; fishers' communities; Non-Governmental Organizations for the environment; teaching and research institutions, among others.

93. Finally, as regards the proceedings to be observed for realization of public consultations for creation and increase of Preservation Areas, it is worthy to mention the words of Paulo de Bessa Antunes, to wit:

> "In the public consultation proceeding, the body with jurisdiction must indicate, on a clear basis and with accessible wording, the implications for the population residing inside the area proposed and in the neighborhood. The rules defined in the articles mentioned above are a subjective right of the population and, in special, of the individuals that have properties in the areas to be incorporated in the future preservation areas. In this sense, the reader must be warned for the fact that both the Superior Court of Justice and the Supreme Federal Court already stated their position that

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the Public Consultation is mandatory and in the case it is not made, the proceeding will be null"[39]

b) Technical Studies

94. As already mentioned, the technical studies are essential in the proceedings of creation and increase of Preservation Areas, exactly for the fact that said actions drastically change the dynamics of the places involved. Indeed, besides allowing for the limitation of the Area, they assess the social and economical aspects of the affected region, as well as the existence or not of relevant biodiversity justifying the implementation of one or another modality of Preservation Area.

95. Normative Instruction ICMBio 05/2008 defines the administrative proceedings for realization of the technical studies, establishing that they must be based on technical and scientific data available on the area where a Preservation Area is intended to be created.

96. As this regard, said Normative Instruction sets forth further that the technical studies must contain: *(i) characterization of the different vegetal formations and its associated fauna; (ii) characterization of the use of soil within the limits proposed; (iii) characterization of the residing population, containing the number and average size of the properties and standard of occupation of the area; (iv) assessment of the main social and economical indicators of the cities affected; (v) characterization of the traditional population beneficiary, in the case of the Extractive Reserves and the Reserves for Sustainable Development; and (vi) characterization of the residing traditional population, when applicable, in the case of the National Forests.*

97. The Ministry of Environment makes available, in its website, a *"Basic Guide for Creation of Preservation Areas"*, which includes, among other essential measures, the *need of preparation of technical studies*, which must have as basis some required actions, such as *(i) inspection of the area, which must contemplate*

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[39] ANTUNES, Paulo de Bessa. *Direito Ambiental*. 9th edition. Rio de Janeiro: Lumen Juris, 2006, page 564 and 565.

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survey of the planimetric and geographical data; and report on the biotic and abiotic factors of the area; (ii) the social and economical survey, approaching: the verification of the existence of Indian and traditional communities, and the diagnosis of the anthropic actions, such as forms of use of the soil and further (iii) the preparation of the cartographic basis including political boundaries, phytophysiognomy, hydrography, use of soil, altimetry, etc.[40] Furthermore, in the case of creation or increase of Preservation Areas for full protection, the technical studies must contain a land diagnosis of the property to be included in the Area to be created or increased. Said diagnosis, according to the *Guidance for Creation of the Preservation Areas* must contemplate: *(i) survey of the successor chain of the properties; (ii) identification of the public and private domain areas; and (iii) appraisal of the market value of 1 ha of land in the area.*

98. Therefore, currently, we cannot talk about creation of any modality of Preservation Area, without previously considering all the stages set forth in the regulations mentioned above, among which the need to prove that the area has natural attributes to justify it.

III.2.1. The suppression

99. The Federal Constitution, in its article 225, §1, subparagraph III, provided for that the amendment or suppression of the *Specially-Protected Territorial Areas* will only be possible through the issuance of a law.

100. In the same reasoning line, Law 9,985/2000 provided for, in its article 22, §7, that it is possible to suppress or reduce the limits of a part of Preservation Area. However, this will only be possible through enactment of specific law.

101. According to De Plácido e Silva, suppression "*is the word used for expressing the act through which the public authorities removes the condition of public thing, for allowing it to be appropriated*"[41].

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[40] Available at: www.mma.gov.br. Access on Jun 20, 2018.
[41] SILVA, De Plácido e. *Vocabulário Jurídico*. 15th edition. Rio de Janeiro: Forense, 1999, page 255.

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102. Floriano de Azevedo Marques Neto understands that "*if the destination of an asset is its attribution to a certain purpose, the suppression is the removal of said predisposition, making the public asset subject to re-destination to other uses to other uses or even making possible to remove it from public domain*"[42]. Further, Odete Medauar exposes that the suppression "*is the change of the destination of the asset. As a rule, the suppression aims to include assets of common use of the people or assets of special use in the category of domain assets for making possible their sale*"[43].

103. Thus, the suppression or reduction of a Preservation Area may only be made through a specific law. It is worthy to mention again that the creation of the Preservation Area, as well as its suppression or amendment, in compliance with the legal requirements, must be reasoned and grounded, respecting the public interest and the need to protect the ecologically balanced environment.

104. For this reason, according to the purposes established by the Constitution and the Law governing the Brazilian National System of Preservation Areas, may only be reduced or suppressed the areas environmentally protected created by means of a law. With this determination, the constitutional lawmaker reserved to the law, in strict sense, the possibility of suppressing, partially or in full, the existing environmentally protected areas.

105. Article 225, § 1 and its subparagraph III, is crystal-clear when establishing that the Public Authority has the obligation to create, in all the states of the Federation, *Specially-Protected Territorial Areas* and its components to be specially protected, being the amendment and suppression only permitted by means of the Law.

106. Therefore, we infer that the regulation for suppressing the *Specially-Protected Territorial Areas* was only brought to the Brazilian legal system by the 1988 Constitution and, logically, it may only be subject to suppression the

[42] NETO, Floriano de Azevedo Marques. Regime Jurídico e Utilização dos Bens Públicos. In DALLARI, Adilson Abreu; NASCIMENTO, Carlos Valder do; MARTINS, Ives Gandra da Silva (coordinator) *Tratado de Direito Administrativo – Volume 2*. São Paulo: Saraiva, 2013, volume 2, page 415.
[43] MEDAUAR, Odete. *Direito Administrativo Moderno*. 18th edition. São Paulo: Revista dos Tribunais, 2014, page 284.

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Preservation Area that has been duly created and confirmed by the Constitution, as provided for in article 55, Law 9,985/2000.

107. At this point it is worthy to remind that, in this case, we cannot allege the existence of a Preservation Area in the area of registration number 7,456, neither that it would apply to its eventual extinguishment a reserve of the Law related to the *Specially-Protected Territorial Areas* contemplated or confirmed by the 1988 Constitution and by the SNUC Law.

108. Thus, it is not possible to think, in this case, on reduction, suppression or unburdening of a protected area, let alone by means of a reserve of the Law, simply because there was no creation or constitution of said area, by the State, or the City or the Federal Union.

III. GOOD STANDING OF THE ENVIRONMENTAL LICENSES

109. According to article 225 of the Federal Constitution, the environment is an asset of common use by the people, essential to the healthful quality of life. Since it is an asset of everyone and nobody in particular, there is no subjective right to its use, which, as a result thereof, can only be legitimate through a direct action by its guardian, which is the Public Authority.

110. For this, the Brazilian National Environmental Policy set forth instruments for prior control, among which we highlight the *licensing for installation of potentially polluting works or activities*[44].

111. CONAMA Resolution 237, of Dec 19, 1997, and, more recently, Complementary Law 140, of Dec 8, 2011, were enacted for regulating the matter which defined the environmental licensing as being the "*administrative proceeding intended to*

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[44] article 9, subparagraph IV.

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license the activities or undertakings using environmental resources, effectively or potentially polluting or able to cause, in any way, environmental degradation"[45].

112. After analyzing the technical studies, the licenses are issued, split *in general, but not mandatorily,* in the three following ones, as provided for in article 8 of CONAMA Resolution 237/1997.

> "[...] I – Previous License (LP) – granted at the preliminary stage of the planning of the undertaking or activity approving its localization and conception, certifying the environmental feasibility and establishing the basic conditioning requirements to be complied with in the next stages of its implementation;
> II - Installation License (LI) – authorizes the installation of the undertaking or activity according to the specifications contained in the plans, programs and projects approved, including the measures of environmental control and other conditions, which constitute a determining reason;
> III - Operating License (LO) – authorizes the operation of the activity or undertaking, after verification of the effective compliance with the contents of the previous licenses, with the measures of the environmental control and determining conditions for the operation. [...]"

113. In this case, it is worthy to say that the undertaking installed in the area object of this analysis – included in the areas named DRS1 and DRS2 – has its activities authorized by the following environmental licenses issued by the relevant environmental agency:

113.1. *DRS1 in operation*: Operating License No. 10423/2017, issued by the State Department of Environment and Sustainability - SEMAS.

113.2. *DRS2 under installation and commissioning:* Installation License No. 2667/2016, issued by the State Department of Environment and Sustainability - SEMAS.

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[45] article 2, subparagraph I.

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114. At this point, it is proven that said environmental licenses were issued by the governmental entities with relevant authority and from them resulted a right for the Client.

115. In this sense, the environmental license must prevail and other authorizations, under penalty of serious legal uncertainty. It must be stressed that in similar terms has already stated its opinion the Superior Court of Justice:

> "ADMINISTRATIVE. SPECIAL APPEAL. PUBLIC CIVIL ACTION. LICENSING OF REAL ESTATE UNDERTAKING. GRANTED ACCORDING TO THE APPLICABLE LAW. VIOLATION TO ARTICLE 10, LAW NO. 6,938/81 OCCURRED. LEGAL REASSESSMENT OF THE FACTS DESCRIBED IN THE ORIGIN. POSSIBILITY. VIOLATION TO ARTICLE 535 OF THE CODE OF CIVIL PROCEDURE. NON-OCCURRENCE.
> 1. This is a public civil action alleging the occurrence of harm caused to the environment as a result of the implementation of a real estate development located in the beach of Mocóca, in the city of Caraguatatuba, state of São Paulo, under the allegation of the environmental licenses granted by the public authorities contrary to the environment protective legal rules.
> 2. The judgment dismissed the lawsuit, for understanding that "in view of all the legal opinions and briefs by the environmental agencies entered into the records, we clearly perceive that the defendant Endicot appeared before the environmental agencies, providing the adaptation of its project to the requirements mentioned, being successful, at the end, in the approval or its project according to the legal rules" (page 1556). [...]
> **9. The case law of the First Panel established the guideline that after passed and licensed, the project for the construction of the undertaking by the relevant Public Authority, in compliance with the relevant law and the applicable technical rules, the license then granted will bring the presupposition of lawfulness and permanent status, and can only be: a) nullified when it is proven that the project violates the limits and the terms of the legal system in which it was approved; b) revoked, upon the occurrence of a relevant public interest, in which case the City will have the obligation to indemnify the losses originated by the interruption and demolition of the work; or c) annulled, in the case it is found that the project was approved in violation to the building rules in force. (Special Appeal No. 1,011.581/RS, Judge-Rapporteur Justice Teori Albino Zavascki, First Panel, Electronic Judiciary Gazette of Aug 20, 2008).**
> **10. According to this reasoning, the Judiciary cannot, under penalty of violating article 10 of Law No. 6,938/81, determine the interruption of the work, and, therefore, annul the administrative actions that granted the building permit, approved according to all legal requirements, even more when the expert evidence made in court found that, as regards the licensing processing, "there was no signs that the DEPRN would have based on false premises for deciding on the issuance and contents of the environmental license" (page**

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1.551). Precedents: Interlocutory Appeal in Mandamus 14,855/MG, Judge-Rapporteur Justice Mauro Campbell Marques, second panel, Electronic Judiciary Gazette Nov 4, 2009; Special Appeal 763,377/RJ, first panel, Judge-Rapporteur Justice Francisco Falcão, Electronic Judiciary Gazette Mar 20, 2007; Special Appeal 114.549/PR, first panel, Judge-Rapporteur Justice Humberto Gomes de Barros, Electronic Judiciary Gazette Oct 2, 1997. (the bolding is ours). [Superior Court of Justice - Special Appeal 1227328/SP, first panel, Judge-Rapporteur Justice BENEDITO GONÇALVES, judged on May 5, 2011, Electronic Judiciary Gazette May 20, 2011]

116. The conclusion reached is that it is crystal-clear the protection to the vested right of the Client and its guarantees cannot be taken.

117. As regards the vested right resulting from the administrative authorization for construction, fully ratifying the conclusions of the Client, it is worthy to highlight the teachings of Caio Tácito[46]:

> "[...] After the legal or regulatory requirements are complied with, the Administration has the duty to authorize the use of the property, removing the obstacle opposed to the full exercise of the preexisting domain. The right is already pre-constituted, although on a latent basis. **The authorization, freeing it, removes the administrative restriction to its efficacy, originating a permanent legal situation: the virtually existing right, becoming efficacious, corresponds, for the purposes of legal protection, to a vested right.** [...]" (underlined).

118. Subsequently, the jurist concluded[47]:

> "[...] The building permits, with fees paid and other permits issued, represented legitimate administrative authorizations, the effects of which – as indicated – entail the removal of the obstacle to the efficacy of the property right, that is to say, the authorization to build the owner has, according to the limits of the administrative regulations, from which it has been freed by the license.
> The vested right, to wit, the full efficacy of the property right, strengthens even more upon start of the execution of the works, with the investment already made of a huge amount and the contractual obligation of an even greater amount. [...]" (underlined).

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[46] TÁCITO, Caio. Licença de construção - Natureza jurídica - Efeitos em relação à administração e a terceiros - Eficácia do registro dos memorias de incorporação - Ato administrativo - Revogação. In *Revista de Direito Administrativo*. Rio de Janeiro: Editora FGV and Editora Fórum, 1973, volume 114, page 468 and 469.

[47] Idem, page 471

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119. The administrative acts remain valid for the cases of activities that prolong in time. In these cases, the environmental laws imposes, for instance, the renovation of the license for potentially and effectively polluting activities, exactly for allowing for the technological update of pollution control.

120. It is worthy to allege, finally, the principle of legal certainty, without which the human condition would be unbearable, as well taught by Vicente Ráo:

> "The inviolability of the past is a principle that finds its grounds in the nature of the human being itself, because, according to the wise words of Portalis, the man, who does not occupy but a point in time and space, would be the unhappiest being if he could not find himself safe not even as regards his past life."[48]

121. In this sense, we quote Caio Mário da Silva Pereira, to wit:

> "[...] On the other side is the principle of certainty and social security, requiring the respect of the lawmaker for the validly created legal relationships. And there is the conflict [...] to accept that the current law simply disregards the previous law and all its influences, as if the life of the law and the existence of all social relationships had started on the day in which started the effectiveness of the modifying law, is to offend the security of civil life itself and institute the regime of the most franc uncertainty, enunciating the social stability as legislative rule".[49]

122. Therefore, in the construction of the law, the exegete cannot disregard these past facts, since the use and the occupation of environment took place from a legal reality that produced its legal effects. In this context, the State must be a buttress of security and cannot, in anyway, be every time asserting and denying, allowing and forbidding favors and benefits, under penalty of violating the principle of stability of legal relationships.

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[48] RAO, Vicente Paulo Francisco. *O direito e a vida dos direitos*. 5th edition. São Paulo: Revista dos Tribunais, 1999, volume 1, page 428.
[49] PEREIRA, Caio Mário da Silva. *Instituições de direito civil. volume* 4th edition. Rio de Janeiro: Forense, 1995, page 88.

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IV. CONCLUSIONS

123. In view of the above, considering the information submitted to our analysis, as well as the laws and the theory applicable to the matter, we conclude that:

123.1. State Decree No. 10,064/1977 declared the public interest, for the purposes of expropriation, of the real estate and improvements located in the area destined to the implementation of the Port and Industrial Complex of Ponta Grossa, in the Cities of Barcarena and Abaetetuba, which constituted a priority project of the State of Pará. Said Decree highlighted that the execution of the project constituted a public service of greatest interest for the development of said state, and mentioned nothing related to the destination of one or another area for ecological reserve. Otherwise, it guided the expropriation exclusively for the industrial purpose.

123.2. The Certificate of Deed of Sale of the area registered under number 7546, entered into by and among the Client, ALBRAS and CDI Pará is a juridical act of private nature, since CDI Pará, according to State Law 4,686/1976, is a government-controlled company, linked to the State Department of Planning and General Coordination - SEPLAN, which is governed by the rules applicable to private companies, according to the provisions of Decree Law 200/1967.

123.3. Registration No. 7546, object of this analysis, mentioned that an area of 2,497ha47a48ca (two thousand, four hundred and ninety-seven hectares, forty-seven ares and forty-eight centiares) would be destined to an ecological reserve, and provided for further that, if said accessory covenant was not complied with, CDI Pará could retake the Property within a term of two (2) years, through the termination of the sale, what has never happened, and said right has expired.

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123.4. The ecological reserve mentioned in the Certificate of Deed had as purpose "the enrichment of the degraded forests, reforesting of native species and eventually exotic species, researches, forestation, phenology, studies of management and, mainly, protection against the admissible atmospheric pollution originated from industries, as well as the surveillance of the area", purposes incompatible to those attributed to the Ecological Reserves grounded on the laws in force at the time.

123.5. What said Certificate of Deed intended was to establish an eventual modality of measure that could be destined to mitigate eventual impacts, with the establishment of an area that could help to minimize eventual negative effects arising from the industrial activities to be installed in the place. That is to say: this is an area that CDI indicated for an alleged control of impacts, which logically could or not be considered by the licensing agency at the time of licensing. Said measure would be related further to the attribution of CDI Pará, as provided for in article 3 Law 4,686/1976, of only *"[...] indicate measures appropriate to control the environmental pollution caused by the industries. [...]"*.

123.6. According to the Technical Note contained in **SCHEDULE I** of this Legal Opinion, the obligation to create an ecological reserve is not confused to an obligation of public nature, resulting from the collective right to an ecologically balanced environment. This is an accessory contractual obligation subject to the rules of Private Law, which has already been reached by peremption.

123.7. Law 7804/1989, which amended the Brazilian Environmental Policy, included, for the first time in the Brazilian legal system the expression specially-protected territorial areas, but the notion of system and general idea of the *Specially-Protected Territorial Areas* results from the 1988 Constitution and the enactment of Law 9,985/2000, which created the Brazilian National System of Preservation Areas- SNUC. It is important to highlight that said rule has also suppressed the

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references to the Ecological Reserve previously provided for in article 9, of the Law of the Brazilian Environmental Policy.

123.8. The expression *definition* contained in subparagraph III, § 1, article 225 of the Constitution is not equal to the *creation* itself of the *Specially-Protected Territorial Area*. The legal basis for the creation, increase and management of the Preservation Areas is, today, provided for in Law 9,985/2000, which created the Brazilian National System for Nature Preservation Areas - SNUC. Indeed, article 22 of this law set forth, in agreement to the provisions of the Federal Constitution, that the Preservation Areas must be created by an action of the Public Authority, after performing technical studies and a public consultation to allow the identification of the place, size and boundaries more appropriate to the Area.

123.9. The rule for suppression of a *Specially-Protected Territorial Area* was only brought to the Brazilian legal system by the 1988 Constitution and, logically, it will only be subject to suppression, in such condition, the Preservation Area that has been duly created and/or confirmed by the Constitution, as provided for in article 55 of Law 9,985/2000, what did not occur in this case.

123.10. Law 9,985/2000 only considers as Preservation Areas those listed in the two groups mentioned in articles 8 and 14, because *"the preservation areas and protected areas created based on prior laws and that are not included in the categories set forth in this Law will be reassessed, in full or in part, within two (2) years, for defining their destination based on the category and function for which they have been created*". The ecological reserve previously provided for in article 18 of Lei 6,938/1981 was expressly revoked by article 60 of Law 9,985/2000. Therefore, since the Ecological Reserves were excluded from the Brazilian legal system, it is not possible to request its creation today, based on the environmental legal system in force.

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123.11. The Environmental Licenses issued for the Industrial Complex and the DRS1, as well as those related to the DRS2 are supposed as legal and represent a vested right as regards the activities instituted and grounded therein.

This is, with all due respect, our Legal Opinion.

São Paulo, July 1, 2018.

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