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Environmental Licensing

Licensing Authority I. Federal Decree No. 8,437, enacted on April 22, 2015 establishes the types of undertakings and activities that are subject to the environmental **licensing authority of the Federal Administration**, through the Brazilian Institute of the Environment and Renewable Natural Resources (the *Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis*, or "IBAMA").

Pursuant to the Decree, the licensing of the following undertakings shall be conducted by IBAMA: (i) **federal highways, railways and waterways**; (ii) **organized harbours** (except for port facilities that operate a load volume below 450,000 TEU/year or below 15,000,000 ton/year), **private use terminals** and **port facilities** that operate a load volume above 450,000 TEU/year or above 15,000,000 ton/year; (iii) **exploitation and production of oil, natural gas and other fluid hydrocarbons** (including the evaluation of fields – seismic –, drilling of wells and installation of production and distribution systems, when performed in the marine environment and in a land-sea transition zone – offshore – and the **non-conventional production of oil and natural gas** performed either offshore or onshore); and (iv) **electric energy generation and transmission** (for hydropower and thermal power plants with 300 MW or more installed capacity and wind mills located offshore or in land-sea transition zone).

The Decree also establishes **transition rules** for on-going licensing procedures, when the aforementioned undertakings and activities are involved. ■

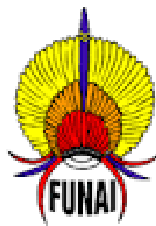
Licensing Authority II. Legislative Decree Bill No. 54/2015, under discussion at the Chamber of Deputies, neutralizes the effects of Federal Decree No. 8,437/2015, which establishes the types of undertakings and activities that are subject to the environmental licensing authority of the Federal Administration.

In general terms, the Bill is justified by the understanding that the licensing authority of the States, Municipalities and Federal District was usurped by the Federal Administration through the enactment of Federal Decree No. 8,437/2015. Pursuant to such Decree, the Federal Administration has the exclusive authority to conduct the environmental licensing of specified undertakings or activities, violating the cooperation rule established by the Federal Constitution.

In the specific case of **non-conventional gas exploitation**, the rapporteur of the Bill, Deputy Luiz Carlos Hauly (PSDB/PR), also mentions, as justification, the fact that the winners of the auction of the exploitation areas under the 12th Bidding Round have already signed agreements with the National Oil Agency (the *Agência Nacional do Petróleo*, or "ANP") and that the projects would already be under environmental assessment and licensing process. Therefore, pursuant to his opinion, the transfer of the licensing to the Federal Administration will jeopardize the economic and financial planning of such projects in national and international scale. ■

Interference of Other Public Entities. The Ministries of the Environment, Justice, Culture and Health jointly enacted Inter-Ministerial Rule No. 60, of March 24, 2015, which addresses the role of the National Foundation of Indigenous People (the *Fundação Nacional do Índio*, or "FUNAI"), the Palmares Cultural Foundation (the *Fundação Cultural Palmares*, or "FCP"), the Institute of the National Historical and Artistic Heritage (the ➲

➲*Instituto do Patrimônio Histórico e Artístico Nacional,* or "IPHAN") and the Ministry of Health in the environmental licensing procedures that are conducted by IBAMA. Pursuant to the Rule, at the beginning of the environmental licensing procedure, when the Activity Characterization Form ("FCA") is filled in, in addition to the elements that characterize the activity or undertaking, the entrepreneur must also provide information about possible interventions in **indigenous land**, in **traditional afro-descendent community land**, in **protected cultural assets** and in **areas or regions with malaria risk or endemism**. Based on such information and after having heard the other competent agencies and entities of federal public administration, IBAMA will issue the respective Term of Reference ("TR") for the preparation of the environmental studies that are required for the licensing, which shall contemplate the content of the Specific Terms of Reference ("TRE") that are issued by such other agencies and entities involved in the licensing procedure. After the environmental studies are presented by the entrepreneur, observing the term established pursuant to the Rule, IBAMA will request to the other agencies and entities involved to manifest themselves about those studies on a conclusive basis. Pursuant to the Rule, the delivery of such manifestations to IBAMA shall also be performed observing the specified term. The terms and procedures established under the Rule are also applicable to the licensing procedures involving TRs that were issued by IBAMA as from October 28, 2011. In the case of licensing procedures in which the respective studies were not filed with IBAMA, yet, the entrepreneur can request the enforcement of the procedures and criteria established pursuant to the Rule. With the new regulation, Inter-Ministerial Rule No. 419/2011 was revoked. ■



FUNAI, FCP and IPHAN. On March 27, 2015 FUNAI issued Instruction Rule No. 02, establishing administrative procedures to be observed by FUNAI itself, when it is required manifest itself in federal, state and municipal environmental licensing procedures, due to the existence of **socio-environmental and cultural impacts to indigenous people and land** arising from the activity or undertaking that is being subject to the licensing procedure. FUNAI will manifest itself in the environmental licensing procedures when formally requested by the licensing environmental agency. The terms and procedures established pursuant to the Rule are applicable to on-going environmental licensing procedures, regardless of their respective phase on the publication date of such Rule. Likewise, on March 3, 2015 both FCP and IPHAN had already adopted their respective regulation on this matter (each one designated as Instruction Rule No. 1). ■

Federal Technical Registry. Pursuant to Implementation Rule No. 5, of January 22, 2015 IBAMA established a complementary procedure for the ***ex officio* enrolment** with the Federal Technical Registry of Potentially Polluting Activities and Activities that Use Environmental Resources ("CTF/APP", in Portuguese), for individuals or legal entities that were notified due to the lack of enrolment with the Registry. The enrolment with the CTF/APP is mandatory for those that perform the activities described on Annex VIII of Federal Law No. 6,938/1981 or activities that, pursuant to specific regulations, are subject to environmental control and inspection (IBAMA Instruction Rule No. 06/2013).

The *ex officio* enrolment will be performed by the Registration Divisions ("SECAD") of IBAMA's Superintendencies in the Federal States and, on a supplemental basis, by the Coordination of Environmental Quality Evaluation and Prognosis ("COAQP"), in IBAMA's headquarters, in Brasília, Federal District. Once the enrolment becomes effective, IBAMA will automatically start to bill the respective Environmental Control and Inspection Tax ("TCFA"). ■

State of Rio Grande do Sul. In order to facilitate the renewal procedure in connection with environmental licenses, on May 7, 2015 the Henrique Luis Roessler State Environmental Foundation for Environmental Protection ("FEPAM") approved its Rule No. 46, authorizing the **automatic renewal of environmental licenses** for the requests filed as from January 1, 2011. With the automatic renewal, FEPAM aims to concentrate its focus in the issuance of new licences (there are currently more than 11 thousand licensing requests awaiting a decision from the environmental agency, of which 10% are related to the renewal of licenses) and in the environmental control. The automatic renewal, however, will only be authorized when no pending amounts to be paid are verified in connection with renewal procedure and provided that the request was filed during the validity period of the respective license to be renewed. In addition, licenses that were suspended due to administrative or judicial decision will not be subject to automatic renewal. The renewed license will have the same requirements and validity terms established for the original license. ■

Specially Protected Areas

Rural Environmental Registry. Pursuant to Rule No. 100, of May 4, 2015 and based on the delegation of powers formalized by Federal Decree No. 8,439, of April 20, 2015, the Ministry of the Environment postponed to May 5, 2016 the deadline for the **registration of rural properties** in the Rural Environmental Registry (the *Cadastro Ambiental Rural*, or "CAR") that was established pursuant to Federal Law No. 12,651/2012.

According to data obtained from the homepage of the Ministry of the Environment (www.mma.gov.br), until June 30, 2015 (almost two months after the initial registration deadline), just 57.27% of the rural properties in Brazil were registered in the CAR. ■

State of São Paulo. State Law No. 15,684, of January 14, 2015 essentially regulated, in the State of São Paulo, the **Environmental Regularization Program** (the *Programa de Regularização Ambiental*, or "PRA") that was established pursuant to Federal Law No. 12,651/2012.

Two aspects of such Law shall be highlighted: (i) the possible interpretations for the provision that addresses the cases in which there is a release from the obligation to perform the recovery, compensation or regeneration of the **legal reserve**, observing the percentages required under ➲

Water Resources

State of Pará. On May 15, 2015 the State Secretariat of the Environment and Sustainability (the *Secretaria de Estado de Meio Ambiente e Sustentabilidade*, or "SEMAS") issued Instruction Rule No. 01, which establishes procedures for the enrolment with the **State Registration for the Control, Follow-up and Monitoring of Water Resource Exploitation and Use Activities** in Pará ("CERH/PA", in Portuguese), as well as for the Declaration of the Use of Water Resources and payment of the respective Control, Follow-up and Monitoring Tax (the "TFRH/PA", in Portuguese), both created pursuant to State Law No. 8,091/2014, which was regulated by State Decree No. 1,227/2015. All **individuals and legal entities that use a water resource** as an **input to a production process** or with **economic exploitation or use purpose** are obliged to enrol themselves with the CERH/PA. On a monthly basis, those who are enrolled with the CERH/PA are required to present a Water Resource Use Declaration ("DCRH", in Portuguese) and to pay the respective a TFRH/PA, which must be demonstrated to SEMAS. The non-compliance with such obligations will subject the violator to the payment of a fine. ■

➲Federal Law No. 12,651/2012, as far as the ***Cerrado*** **(Brazilian Savanna) biome** is concerned and considering the legislation that was enforced when the vegetation suppression has occurred and (ii) the rules for the **alternative use of the soil** in the areas of consolidated anthropogenic occupation in urban zones.

With regard to the first aspect, one of the possible interpretations is that the *Cerrado* biome was not under legal protection before 1989. As a matter of fact, the reference to the legal reserve achieving the *Cerrado* biome has just been inserted in the legal framework with the promulgation of Federal Law No. 7,803/1989, which amended the original wording of a provision of Federal Law No. 4,771/1965 (Forestry Code), as if there were no protection to the aforementioned biome for the purpose of constituting the legal reserve. Such understanding adopts a literal interpretation of the Law.

Another possible interpretation for the matter assumes the existence of a larger concept of forestry protection and the protection of other types of native vegetation, also observing the principle of non-regression in environmental matters. Under such context, since the enforcement of Federal Decree No. 23,793/1934, there was already a legal provision on the necessity to protect ¼ of the "woods" that existed in the properties. Under such concept of "woods", adopting an interpretation that is more protective to the environment, the *Cerrado* biome would also be contemplated.

As far as the alternative use of the soil is concerned, the State Law adopted the time criteria for the purpose of authorizing such use in specified areas. Such use will be possible provided that the permanent preservation areas established pursuant to the legislation that was enforced "when the undertaking was installed". With regard to the plots that were originated from the development of a duly registered real estate, the right to build will be guaranteed, provided that the constructor respects the permanent preservation areas defined under the legislation that was enforced "on the date of the environmental licensing and registration of the real estate development for urban purposes". The issue shall generate controversies, yet. ■

Biodiversity

Mangroves. On January 29, 2015 the Chico Mendes Institute for Biodiversity Conservation (the *Instituto Chico Mendes de Conservação da Biodiversidade*, or "ICMBio") enacted its Rule No. 9, approving the National Action Plan for the Conservation of Endangered and Socioeconomically Important Species of the Mangrove Ecossystem, also known as "PAN Manguezal".

The PAN Manguezal shall be concluded in 2020 and its general purpose is to conserve Brazilian mangroves, also preserving its traditional uses. It will be implemented in three macro-regions: (i) North Coast; (ii) North-East and Espírito Santo; and (iii) South-East and South. The PAN Manguezal will be coordinated by National Center for Research and Conservation of the Sociobiodiversity Associated to Traditional Folks and Communities ("CNTP"), under the supervision of the General Coordination of Conservation Management ("CGESP") and of the Biodiversity Research, Evaluation and Monitoring Division ("DIBIO"), contemplating the establishment of conservation actions for 74 species, of which 20 are endangered at national level (including, for instance, the Marine manatee, *Trichechus manatus*), 9 are endangered at regional level only (for instance, the Scarlet Ibis, *Eudocimus ruber*) and 45 have socioeconomic importance and are not endangered (including the Seven-bearded Shrimp, *Xiphopenaeus kroyeri*). ■

Fauna Protection

Fauna Management in Airports. Resolution No. 466 of the National Council for the Environment (the *Conselho Nacional do Meio Ambiente*, or "CONAMA"), which was published on February 6, 2015, establishes guidelines and procedures for the preparation and authorization of the Fauna Management Plan for Airports ("PMFA"). Pursuant to Federal Law No. 12,725/2012, the PMFA is a technical document that specifies in detail the interventions that are deemed necessary in the environment – either natural or artificial – of an airport facility or directly in populations of fauna species, aiming the **reduction of collision risks involving airplanes**. The PMFA may include, among other aspects, the capture and relocation, the collection and destruction of eggs and nests and the slaughtering of animals, encompassing a series of phases, starting with a diagnosis of the area of the airport facility and its surroundings.

The management alternative that involves the capture and relocation of individuals of problematic species shall observe the use of adequate fauna management techniques and the impacts resulting from the transfer for other areas. The PMFA will be authorized for up to a 5-year term of validity, but such term might be renewed. ■

Genetic Resources

New Legal Framework. Federal Law No. 13,123, enacted on May 20, 2015 has substantially changed the legal framework adopted in Brazil in connection with the **access to genetic resources and to associated traditional knowledge**, revoking Provisional Measure No. 2,186-16/2001 and seeking a significant reduction of bureaucracy and the facilitation of the administrative procedures to be adopted in this field.

The *access* was defined as the **research and technological development** on a sample of a national genetic resource and/or on associated traditional knowledge, so that the mere collection of a sample is not characterized as *access* anymore.

Pursuant to the new Law, *genetic resource* means the **information of genetic nature** about vegetal, animal, microbial or other species, including substances originated from the metabolism of such living creatures. The *genetic resource* is characterized as an **asset that is subject to common use by the people**, either under *in situ* or *ex situ* conditions, including domesticated species and spontaneous populations, when found under *in situ* conditions in the Brazilian territory, in the continental shelf, in the territorial sea or in the exclusive economic zone.

As opposed to the requirements under the original legal framework, the **prior access** authorization with the Council for the Management of Genetic Resources (the *Conselho de Gestão do Patrimônio Genético*, or "CGEN") will continue to be required just in the case of access in an area that is deemed indispensable to national security, in Brazilian jurisdictional waters, in the continental shelf and in the exclusive economic zone. In the remaining cases, it will be enough to perform a prior **registration** of the activity with CGEN, pursuant to a regulation that is still to be approved.

The access to traditional knowledge of identifiable origin continues to be subject to the obtainment of the **prior informed consent** from the respective indigenous community, traditional community or traditional farmer.

The new Law also addresses the **sharing of benefits arising** ➲

➲ **from the economic exploitation** of a product or reproductive material that was developed from the access. Pursuant to the new Law, the economic exploitation of a finished product or reproductive material that was developed from the access depends on the prior presentation of a **notification** to CGEN. The sharing of benefits will be required just in connection with the **finished product and reproductive material** and provided that the component of the genetic resource or associated traditional knowledge is one of the main elements for value aggregation. The amount of the benefit sharing, under the monetary modality, will be 1% on the annual net income obtained with the economic exploitation, except for the reduction of up to 0,1%, in the case of the execution of a sectoral agreement.

CGEN's authority has been enlarged, allowing it to act not just as decision- and rule-making agency, but also as a consulting and appellate entity. Its composition has also been changed: before, comprised only by representatives of the Public Power, with the new Law, CGEN will be formed by representatives from agencies and entities of the federal public administration (maximum of 60%) and by representatives of the civil society (minimum of 40%), where a parity must be observed among (i) the entrepreneurial sector, (ii) the academic sector and (iii) indigenous populations, local communities and traditional farmers.

In the case of non-compliance with the new Law, administrative penalties can be imposed. Such penalties include warnings, fines and other sanctions, in addition to the liability of the violator in the civil and criminal spheres. On the other hand, a **regularization procedure** has been expressly established for activities that were performed in non-compliance with the former legislation (up to the entrance of the new Law into force), by means of a Consent Decree executed no later than one year as from the date when the registry is made available by CGEN.

The new Law will enter into force on November 11, 2015. ■

Urban Environment

Municipality of São Paulo, SP. On June 2, 2015, Bill No. 272/2015 was sent to the City Council. Such Bill addresses **land parcelling, use and occupation** in the Municipality of São Paulo and was consolidated based on a participation process coordinated by the Executive Branch. The purpose of the initiative is to revise and enhance the content of Municipal Law No. 13,885/2004, which establishes complementary rules to the Strategic Territorial Plan of the Municipality (Municipal Law No. 16,050/2014), with the adoption of a new strategy of territorial structuring. One of the innovations brought by the Bill is the creation of the ***Environmental Quota***, as one of the parameters for land occupation, contemplating incentives to the environmental qualification of constructions and renovations, based on an index that takes **vegetation coverage** and **drainage** indicators into consideration. ■

Solid Waste

State of São Paulo. On June 24, 2015 the State Secretariat of the Environment (the *Secretaria de Estado do Meio Ambiente*, or "SMA") published its Resolution No. 45, which defines guidelines to the improvement, implementation and enforcement of the **post-consumption liability** in the State of São Paulo.

Pursuant to such Resolution, certain products and packaging that are commercialized in the State of São Paulo are initially subject to reverse logistics systems, as ➲

follows: (i) products that, after consumption, result in **wastes that are deemed to cause significant environmental impact** (used and contaminated lubricant oil; eatable oil; automotive lubricant oil filter; automotive batteries; portable cells and batteries; electro-electronic products and its components; fluorescent, sodium/mercury-vapour and mixed-light lamps; unusable tires; expired or obsolete homecare medicines); (ii) **packaging** of products that form the dry fraction of urban solid waste or equivalent one, except for those that are characterized as hazardous under Brazilian legislation, such as the packaging of food, beverages, personal hygiene, perfumes and cosmetics, cleaning products and similar ones and other consumption tools and goods, as specified by SMA or by the state environmental agency (the *Companhia Ambiental do Estado de São Paulo*, or "CETESB"); and (iii) packaging that, after the consumption of the product, are characterized as wastes that cause significant environmental impact, such as pesticide and automotive lubricant oil packaging.

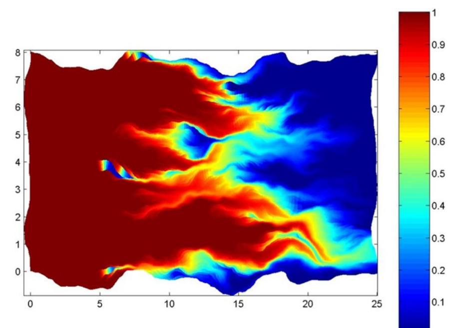
As already contemplated in the regulations on the national and state solid waste policies, the implementation of reverse logistics systems can be subject to Consent Decrees to be signed by the entities responsible for its implementation, SMA and CETESB. The existing Consent Decrees that were signed with SMA before the enactment of the SMA Resolution No. 45/2015 must necessarily be renewed, pursuant to the standard form that will be made available by SMA and by CETESB.

CETESB will demand the compliance with SMA Resolution No. 45/2015 as a **requirement to the issuance or renewal of the operating environmental license**. In order to enforce such requirement, by six months after the publication of the Resolution, CETESB will define the guidelines and progressive structuring and quantitative goals for reverse logistics systems.

The compliance with the obligations established pursuant to SMA Resolution No. 45/2015 was expressly characterized as an **obligation of significant environmental interest** in the context of Federal Law No. 9,605/1998 (Law of Environmental Crimes), which means to say that, in addition to the potential liability at the administrative and civil spheres, the non-compliance with the Resolution may also be deemed as an **environmental crime**, with penalties that include 1-3 years of detention and a fine, in the case of the intentional modality, and 3-12 months of detention and a fine, in the case of a non-intentional crime (article 68 of the Law of Environmental Crimes). ■

Contaminated Sites

Thorough Recovery. On May 18, 2015 Judge Anna Paula Dias da Costa, of the 44th Civil Court of the Central Forum of São Paulo, adopted a ruling in a Public Civil Action (Process No. 1032789-75.2013.8.26.0100) that was filed by the São Paulo State District Attorney's Office against a company formed to incorporate a **vertical condominium**, due to the **contamination of groundwater** under the property, caused by activities that were locally performed in the past by a gas station. The contaminated site was already subject to a management procedure that was investigated by the District Attorney's Office and controlled by the environmental agency of the State of São Paulo (the *Companhia Ambiental do Estado de São Paulo*, or "CETESB").



Despite of the provisions of the associated federal and state legislation (respectively, Resolution No. 420/2009 of the Brazilian

➲Council of the Environment – the *Conselho Nacional do Meio Ambiente*, or "CONAMA" – and State Law No. 13,577/2009, regulated by State Decree No. 59,264/2013), which establishes the **mandatory recovery of the damage to a level that is compatible with the intended uses** of the area (***tolerable risk***), and the technical manifestations of CETESB that were included in the files of the lawsuit, highlighting the lack of natural environments to be protected in the location and that the contaminant concentrations verified would not offer a risk to human health, provided that no ingestion of groundwater occurs (a polygon has been established for the restriction of the impoundment of water for consumption), the judge decided that the thesis argued by the District Attorney's Office should be adopted, recognizing the necessity of giving back the ***ecological equilibrium*** to the contaminated groundwater. This was ruled so, although the judge did not incidentally declare the unconstitutionality of the above-referred legislation, based on the characterization of the constitutional right to a balanced environment, as a ***fundamental, unalienable and intergenerational right***.

Pursuant to the ruling, the company was condemned (i) to present new environmental studies and a new intervention plan to CETESB, adopting a risk analysis that takes not the human health in to consideration, but also the environment (***ecotoxicological risk***), with the establishment of quality reference standards and goals to be achieved; (ii) to implement the new intervention plan, in order to obtain the thorough recovery of the environment; and (iii) to provide an environmental compensation for the environmental damages that are deemed irreversible and for the ***interim environmental damages***. The lawsuit awaits the ruling on the appeal that was filed by the defendant before the Court of Justice of the State of São Paulo. ■

Climate Change

Sustainability Forum. In the afternoon of May 12, 2015 the city of São Paulo hosted the VII Sustainability Forum, organized by the France-Brazil Chamber of Commerce, which counted on the participation of the partner Fernando Tabet as moderator of the main panel of debates. Climate change was central theme of the event this year, anticipating the topics that will be discussed during the **21st Conference of the Parties to the UN Framework Convention on Climate Change** ("COP 21"), to be held from November 30 to December 11, 2015 in the city of Paris, France (it is expected that, during COP 21, a possible **new international treaty** will be adopted, establishing a new legal regime for the reduction of greenhouse gases emissions). On the same occasion occurred the ceremony of the XIV LIF Awards, which purpose is to congratulate companies and other organizations that have implemented top projects in the socio-environmental field. ■

Administrative Environmental Liability

Legal Regime. In the first half of 2015, the First Panel of the Superior Court of Justice discussed about the nature of the administrative environmental liability – if subject to the **strict regime** (regardless of culpability) or not (based on culpability) – in two occasions, ruling differently in both cases.

In the first case, on March 17, 2015, by majority of votes, after analysing Special Appeal No. 1.318.051-RJ (2012/0070152-3), the First Panel decided that administrative environmental liability adopts the strict regime. Pursuant to the ruling, such regime was expressly inserted in the Brazilian legal framework➲

➲ with the promulgation of Federal Law No. 6,938/1981 (National Environmental Policy Law), since the first paragraph of article 14 of such Law establishes that the polluter is obliged to indemnify or recover the damages caused to the environment or affected third parties, without the exclusion of the applicable penalties, regardless of the existence of culpability. As a precedent in the same direction, Special Appeal No. 467.212-RJ has been mentioned.

In the second case, involving Interlocutory Appeal No. 62.584-RJ (2011/0240437-3), the ruling was adopted on June 18, 2015. Pursuant to the ruling, as per a dissent raised by Minister Regina Helena Costa, the same First Panel, by majority of votes, decided to change its understanding about the matter, giving reason to the legal thesis that the **administrative environmental liability is not subject to the strict regime**. The ruling associated to such case had not been published when the present Summary was issued. ■

Global Environment

Green Encyclical. The Encyclical Letter "*Laudato Si: on care for our common home*", written by Pope Francis, has been officially published on June 18, 2015. Pursuant to such document, after rescuing the thought of other pontiffs on the environmental issue and presenting a summary of various aspects that delineate the current *ecological crisis*, its symptoms and most profound causes, the Pope invites each inhabitant of the planet to seek a sustainable and thorough human development and to collaborate in the construction of *our common home*, with emphasis in the search for **other forms of understanding the economy and progress**, in the intrinsic value of each creature and in the human sense of ecology. Also highlights the serious responsibility of international and local politics, in addition to the problems caused by the culture of disposal, proposing the adoption of a new style of life. The whole document can be accessed through the following link: http://bit.ly/1Gi1BTu. ■

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The purpose of this Summary is to inform the clients of this Firm about the main changes in the Brazilian legislation and relevant news in the environmental field. For any further clarifications, the collaborating attorneys remain at your entire disposal.