



Title	Tax System and Environmental Taxes in Brazil : the case of the electric vehicles in a comparative perspective with Japan.
Author(s)	Domingues, José Marcos
Citation	Osaka University Law Review. 2012, 59, p. 37-56
Version Type	VoR
URL	https://hdl.handle.net/11094/9576
rights	
Note	

The University of Osaka Institutional Knowledge Archive : OUKA

<https://ir.library.osaka-u.ac.jp/>

The University of Osaka

Tax System and Environmental Taxes in Brazil: the case of the electric vehicles in a comparative perspective with Japan.

*José Marcos DOMINGUES**

1. Introduction

Brazilian Tax Law has received a fundamental contribution from German Law¹⁾ and Italian Law²⁾ in general. Spanish Law³⁾ has been of great influence also, especially more recently, in relation to a new branch of Tax Law which is Environmental Taxation⁴⁾.

The Brazilian Tax Code of 1966, still in force, **rejected** the idea of taxes being an **exceptional** and **odious** governmental take on citizens, sometimes even seen as a **criminal punishment**, therefore pacifying doctrine and jurisprudence as to the prevalence of **tax law interpretation according to the general principles of Law**; it also acknowledged the ordinary coincidence of **legal form and economic substance**.

The promulgation of the 1988 Brazilian Constitution, in which the contemporary ideology of the Democratic Rule of Law⁵⁾ and the protection of fundamental rights based on human dignity⁶⁾ are clearly established, threw new lights on taxation in

* Professor of Public Finance Law and Tax Law, Rio de Janeiro State University (Brazil-Japan Law Exchange Coordinator); Associate Professor of Tax Law, Catholic University of Petrópolis (Rio de Janeiro); Visiting Professor, Osaka University (Fall, 2010). The author wishes to thank Doctor Setsuo TANIGUCHI, Professor of Tax Law, Dean of Osaka University Law School, for all the attention dedicated, and kind and meaningful help extended to him during his stay at Osaka University, inasmuch as this Institution being the author's Japanese "alma mater" where he studied as a Research Student (1978-80) under the honorable guidance of late Professor Doctor Kohgoro YAMAGUCHI, a man of science, a man of good. The author also thanks Professor Yoshimitsu NAKAO, Professor Yutaka TAKENAKA and Professor Ken'ichi YOSHIMOTO for the invitation to visit Osaka University.

1) Mayer, Becker, Hensel, Nawiasky, Blumenstein.

2) Berliri, A.D. Giannini, Griziotti, Ingrosso, Vanoni.

3) Amorós, Fenech, Rossy, Sáinz de Bujanda

4) Borrero Moro, Guervós Maíllo, Herrera Molina, López Díaz.

5) Art. 1st., *caput*.

6) Art. 1st, III.

relation to the protection of the environment (which is held as a fundamental right), making taxes a positive environmental tool, where until years before such use had been deemed as a merely implicit possibility. Likewise, the 1946 Japanese Constitution⁷⁾ has established that “The fundamental human rights by this Constitution (...) are conferred upon this and future generations in trust” in which wise and farsighted principiology one can easily comprehend environmental protection today.

The foregoing words are intended to justify the subject of this essay, in which a general picture of the Brazilian environmental taxation shall be presented, as well as its development possibilities, whenever possible making reference to the Japanese situation, thereby trying to contribute to academic reflection, since the fundamental mission of the University seems to be the development of intellectual criticism. It goes without saying that Brazil and Japan are friendly countries with a high level of human and commercial exchange, and a comparative analysis of their tax systems may also respond to a concrete academic demand.

2. THE BRAZILIAN FEDERATION.

The Federative Republic of Brazil, today the eighth biggest economy in the world, basically follows the American model, that is, a republic whose head of State and of Government is a 4-year long elected President.

The Brazilian Federation received an Iberian influence of political centralization, which is more or less a general pattern in Latin America. In addition, Brazil succeeds a former unitary empire which was transformed into a Federation where centralism was even more justifiable in order to fight separatist movements. This development is quite different from the American federalist pattern, where there was founded a Federation by aggregation of independent States that retained the maximum possible amount of political power; in Brazil, the federation was formed by transformation of the preceding Empire⁸⁾ with maximum possible retention of power in the hands of the central (federal) government.

This historic fact seems crucial for understanding why environmental taxation

7) Art. 97. Also, according to article 11: “The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights”.

8) The Federative Republic of Brazil is a federation instituted in 1889 which substituted for the Empire of Brazil as the country had been known since its declaration of independence from the Kingdom of Portugal in 1822.

initiatives are concentrated in the Brazilian federal government. For different constitutional reasons, this also seems to be the case of Japan, where all legislative power is originally entrusted to the National Diet⁹⁾. In fact, the Ministry of the Environment's document "Tax incentive program for the introduction of low emission vehicles (2010)¹⁰⁾ shows five initiatives of the National Government concerning *green tax* incentives, which include local taxes, such as the provincial automobile acquisition (excise) tax ("jidousha shutokou zei") and automobile tax ("jidousha zei"), and the municipal fixed assets tax ("kotei shisan zei"). They are all local taxes governed by a national statute ("chi hou zei hou" – Local Tax Act – Law n. 226, of July 31st, 1950, as recently amended by Law n. 129, of April 28, 2010¹¹⁾).

Uniquely, the Brazilian federation is a *tridimensional* federation consisting of the indissoluble Union of States, Municipalities¹²⁾ and the Federal District (which has a Member State status) according to article 1st of the Constitution; the inclusion of Municipalities, **with respective Legislative Power**, is a very important data for mitigating the aforementioned centralism of Brazilian federalism. Differently from the case of Japan and other unitary countries, in Brazil States and Municipalities do not exercise their taxing powers by delegation or assignment from the central political entity (the Union), but by their own right or competence directly received by the country's Constitution¹³⁾, except in the case of the *rural land tax* which, upon the Municipalities' option, can be managed and collected thereby, in which case they shall be entitled the respective total revenue¹⁴⁾.

On the other hand, even though providing for the equality principle (art. 14) and

9) The Constitution of Japan's article 41 ("The Diet shall be the highest organ of the state power, and shall be the sole law-making organ of the State").

10) <http://www.env.go.jp/air/car/mado/gaiyo.pdf>

11) Automobile tax: section 145~177; Automobile acquisition tax : section 113~143; municipal light vehicle tax ("kei-jidousha zei"): section 442~463; municipal fixed assets tax: section 341~441.

12) Due to a Portuguese tradition of recognizing strong voice to City Councils, Brazilian Municipalities have become a party to the Federation.

13) The Constitution guarantees local respective autonomies. The State or Municipal autonomy depends on the respective category. States enjoy a different autonomy than the Municipalities' autonomy, for example: the States have Judicial Power and public forces, the Municipalities do not. But States and Municipalities have their own Parliaments (Legislative Assemblies and Municipal Chambers, respectively, and they organize and render public services themselves as provided for in the Constitution, being granted the corresponding revenues so as to finance the same (art. 25, art. 29 and art. 30; art. 155, art. 156).

14) Possibility introduced by Constitutional Amendment n. 42, of 2003.

specifically for tax legality (art. 84), the Japanese Constitution has no provision as to Japan's tax system, being incumbent upon the Diet the exercise of all primary financial power (art. 83) without any explicit conditions. Thus, the Diet may delegate some taxing powers to provinces ("tou-dou-fu-ken") or municipalities ("shi"), to be exercised within the framework of the respective delegation.

In principle, what is a national tax and what is a provincial or municipal tax it is up to the Diet to decide¹⁵⁾. Even art. 94 of the Japanese Constitution providing for local public entities' right to manage their property, affairs and administration "and to enact their own *regulations* within law" (what has been construed as a constitutional residual legislative field), this does not mean that they may enact *statutes*. And a gap-filling statute enacted by the Diet may supersede any local regulations. So, although having respectively Governors and Mayors, and local assemblies¹⁶⁾, elected by their citizens, Japanese provinces and cities may not be regarded as *autonomous* entities in the sense that Brazilian States and Municipalities are federatively understood.

The Brazilian fiscal federalism has been conceived not only to distribute the **taxing power** among the three federative levels¹⁷⁾ so as they can meet their constitutional tasks¹⁸⁾, but also as a system providing for the **redistribution of the national wealth** through State and Municipal *sharing-in funds* ("fundos de participação"¹⁹⁾) related to federal and state main imposts, in a solidary way intended to reduce regional inequalities. Japan has a similar system of distribution of national revenues in the case of the consumption tax, which is charged at a general rate of 5% on the price of goods; 1% of the respective revenues are shared with Provinces and Municipalities²⁰⁾ according to population and consumption

15) Not even the Japanese National Tax Code ("Kokuzei tsuusoku hou" – Law n. 66, of April 2nd, 1962") does so, since it only provides for tax liability, tax payment and collection, tax refund and tax delinquency, and tax administrative procedural law and related matters. Neither the Japanese National Tax Code provides for the distinction among taxes, such as imposts, fees and contributions, which distinction one finds, directly or indirectly, in other countries' National Tax Codes, such as the German "abgabenordnung", the Spanish "ley general tributaria", and in the legislation of major Latin American countries, like Brazil ("Código Tributario Nacional"). In Japan it is up to the legal doctrine to establish the differences among the three categories above.

16) Provincial assemblies ("toudoufukun gikai") and Municipal assemblies ("shi gikai").

17) arts. 145, 148, 149, 153, 154, 155 and 156.

18) States' powers (art. 25). Municipalities' powers (article 30).

19) arts. 157, 157 and 158.

20) 4% National Consumption Tax is provided for in section 29 of "shouhizei-hou" (Law n. 360, of December 30th, 1988, as recently amended by Law n. 71, of March 31, 2010). 1% Local

criteria²¹⁾.

3. COMPETENCES AND TRIBUTES

The Brazilian tax system is a *rigid* one with no concurrent competences as it happens in the *flexible* systems for example of the United States, where there are federal and state income taxes, and of Spain, where it is possible for the central government to establish a tax in relation to taxable events already taxed by the country's *Autonomous Communities*²²⁾.

The Brazilian Tax System consists of three basic types of tributes²³⁾ or “kouka”, in Japanese: “impostos”²⁴⁾ or “zeikin”, which are taxes on general expressions of wealth; ‘taxas’²⁵⁾ or “shiyouryou”, which are fees charged by virtue of the exercise of police power (some being similar to the Japanese “ninka kachou kin”) or for the actual or potential use of specific and divisible public services rendered to taxpayers or made available to them; and “contribuições de melhoria”²⁶⁾ or “kaihatsu futankin”), which are betterment assessments charged on the appreciation of private real estate property due to public works.

Since the 18th Constitutional Amendment of December 1st, 1965²⁷⁾, Brazilian tributes have been statutorily classified in the foregoing three basic categories²⁸⁾ according to their respective “fatos geradores” or taxable events (in German,

Consumption Tax is provided for in section 72~83 of “chihouzei-hou” (Local Tax Act).

21) Based on sections n. 72~114 and 72~115 of “chihouzei-hou-kyo-dan-tai-hou” (Local Taxes Act).

22) See Ley Orgánica 8/1980, de 22 de septiembre, de Financiación de las Comunidades Autónomas (LOFCA) – art. 6.2; art. 12.

23) “Tributo” is the general word used in Portuguese in the same sense as “*abgabe*” is German.

24) “Imposto” (imposts as “taxes, duties or impositions levied for divers reasons” – see *Black’s Law Dictionary*. St. Paul, Minn: West Publishing Co., 6th ed., 1990, p. 756) is the specific Portuguese word for the German “steuer”.

25) “Taxa”, which corresponds to the German “gebühre”, may not have assessment basis reserved for “impostos” (art. 145, § 2, of the Constitution).

26) “Contribuição de melhoria” roughly corresponds to the German “erschliessungsbeitrag”; however its amount may not exceed the amount of the property value appreciation derived from the public works concerned. They are similar to the American *special assessment*, or the British betterment tax, or the Spanish “contribución de mejoras” or the Italian “contributi di migliona”.

27) Before this date, Decree-Law n. 2.416, of July 17, 1940, had defined “imposto” or impost as “the tribute the purpose of which is to attend general needs of the Public Administration”, and “taxa” or fee as “the tribute collected in payment for specific public services rendered to the taxpayer or made available thereto, or the contribution the purpose of which is to fund special (public) actions arising from the public interest or from given groups of individuals”.

28) Art. 145 of the Brazilian Constitution.

“steuertatbestand” and, in Japanese, “kazei taishou”). The National Tax Code²⁹⁾ specifies that the taxable event of an “imposto” (impost) is a situation not connected to any state action referred to the taxpayer (art. 16), and that the taxable event of a “taxa” (fee) is the exercise of administrative police power or the actual or potential use of specific public services rendered to the taxpayer or put at the disposal of the same (art. 77). Finally, the taxable event of a betterment assessment is the appreciation of real estate property value due to public works in its vicinage (art. 81).

Besides, the Brazilian Constitution also provides (art. 148) that the Federal Union may institute “empréstimos compulsórios”³⁰⁾ which are compulsory loans (“kyousei kari-ire”) to defray extraordinary expenses resulting from public calamity, foreign war or imminence thereof and in the event of a public investment that is urgent or of relevant national interest.

The Union may also institute “contribuições parafiscais”³¹⁾ (or “futankin” in Japanese³²⁾). According to their respective goal or destination (“mokuteki”) they are specifically designated *social contributions, contributions regarding intervention in the economic domain, and contributions in the interest of professional or economic categories*³³⁾. Legal doctrine and case law have asserted the tax legal nature of all

29) The “Código Tributário Nacional” (Law nº 5.172, of October 25th, 1966) provides for the following matters: definitions of tributes and their kinds; legislative taxing power and administrative tax enforcement authority; limits of the taxing power, including tax immunities; compulsory loans and war taxes; characteristics (taxable events and assessment basis) of tributes; “imposto”, “taxa” and “contribuição de melhoria”); tax law general rules, covering matters such as the meaning of tax legislation (including tax treaties and their efficacy), characteristics of the tax legality principle, limits of administrative regulation, guidance and interpretation of tax law; tax obligation; taxable event; creditor and debtor to a tax obligation; tax liability of taxpayers and of third parties; tax assessment; payment and refund of taxes; statute of limitation and laches; tax exemption and tax amnesty; guarantees and privileges of tax rights; and tax administration.

30) “Empréstimo compulsório” is the Portuguese equivalent to the French “emprunts forcés”, or the German “zwangsanleihe”.

31) “Contribuição parafiscal” is the Portuguese equivalent to the French “contribution parafiscal” and the German “parafiskalischebeitr ag”.

32) As in Japan (Masao Kanbe and Hanya Ito), also in Brazil these contributions have been traditionally treated as *quasi-public finance* (“jun zaisei”) revenues falling within the general category of “compulsory take economy” (KANBE, ITO, *Essays in Public Finance*. Tokyo: Science Council of Japan, 1954, *apud* BALEEIRO, Aliomar. *Uma Introdu o   Ci ncia das Finan as*. Rio de Janeiro: Ed. Forense, 2nd. edition, 1958, v. II, p. 40, 447).

33) Nowadays, Brazilian authors agree that said contributions ought to be considered “tributo” (“kouka”). Their taxable events are basically those of “impostos” and “taxas” (in fact they become earmarked “mokuteki ze” imposts or fees). The Federal Government has

these contributions, including social security contributions (art. 195 of the Federal Constitution)³⁴).

According to art. 149 (1st paragraph), the States, the Federal District, and the Municipalities may institute a social contribution payable by their respective public servants to fund social assistance and security systems to their benefit, a sort of “shakai hoken” in Japan.

3.1. Federal imposts

Article 153 provides for the exclusive federal³⁵) competence to impose taxes “impostos”) on:

- imports of foreign products;
- exports to other countries of national or nationalized products;
- income and earnings of any nature;
- industrialized products (a VAT limited to industry);
- transactions of credit, foreign exchange and insurance, or transactions with instruments and securities;
- rural land property;
- large assets.

3.2. State imposts.

Article 155 provides for the exclusive competence of the States and of the

enormously increased the number of these contributions charged on the basis of companies' gross revenue, what has been toughly criticized by legal doctrine on account of their unfairness and disruptive effect on the tax system.

34) See recurso extraordinario-RE n° 146.733 tried on June 29th, 1992, in <http://redir.stf.jus.br/paginador/paginador.jsp?docTP=AC&docID=210152>. In Japan it had been disputed whether social security contributions may have either a tax nature or a public price nature. According to a Supreme Court precedent, it was held acceptable that a local government establishes such contributions with the latter nature (see (“Saikosaibansho-Minji-Hanreishu, v. 60, n. 2, p. 587~, dated March 1st, 2006).

35) Also, article 154 provides for the exclusive federal competence to establish extraordinary *war taxes* upon the imminence or in the case of foreign war whether or not included in its taxing power, and to establish taxes not listed in article 153, provided they are non-cumulative and have a specific taxable event or assessment basis other than those specified in the Constitution (that is to say, not falling within the respective exclusive taxing competences of States, the Federal District and Municipalities). In the case of these latter so-called *residual imposts*, 20% of the respective revenue must be assigned to the States (art. 154, I, and art. 157, II).

Federal District to impose “impostos” on:

- inheritance and gifts;
- transactions relating to the circulation of goods and to the rendering of interstate and inter-municipal transportation services and communication services (a general VAT);
- ownership of automotive vehicles.

3.3. Municipal imposts.

And article 156 provides for the exclusive competence of Municipalities to impose “impostos” on:

- urban real estate property;
- transfer of real estate propriety rights on any account and for consideration;
- rendition of services other than those mentioned in article 155 (in some cases, a local VAT).

Municipalities may also charge contributions to fund public illumination (art. 149-A).

4. CONSTITUTIONAL PRINCIPLES.

As to constitutional principles of taxation, let us make brief comments on those which more closely relate to environmental taxation.

4.1. The tax legality principle is provided for in article 150, section I, which prohibits to “impose or increase a tribute without a law to establish it”. The contents of said principle are detailed in art. 97 of the National Tax Code³⁶⁾.

Tax legality comprehends the sub-principle of typicality (“tenkei-sei”) requiring

36) “Art. 97 – The following may only be set forth by law: I - imposition of tributes, or abolishment thereof; II - increase of tributes or reduction thereof (...); III - definition of taxable events of main tax obligations (...) as well as the definition of the relevant debtor; IV - establishment of the tax rate and its assessment basis (...); V - imposition of penalties for actions or omissions contrary to law provisions or other violations defined therein; VI - cases in which the tax credit may be excluded, suspended and extinguished, cases for dismissal or reduction of the penalties. § 1º Any change in the tax assessment basis to the effect of increasing its amount is held equivalent to the increase of the tax. § 2º For the purposes of the provisions of item II of this article, the monetary adjustment of the value of relevant assessment basis does not constitute increase of the tax.

that the essential elements of taxes are rigorously described in a statute.

Now, what is a rigorous description of such elements is a controversial matter in legal doctrine and in case law – the more traditional scholars believe that *closed types* guarantee the liberty and the patrimony of taxpayers by means of a total *clarity* of statutory language (the reality that is not cut or portrayed there is free of taxation).

Others believe that the tax type is an *open type*, opened by *undetermined juridical concepts* as a legitimate form of Legislature expression leaving to interpreter or law enforcer a margin of technical discretion nailing down or specifying tax norms according to the evolution of times and of the technology, subject to judicial control of proportionality.

Let us take the case of a fee for services of control of potentially polluting activities, and let us ask ¿what is a *polluting activity*?; and, more, ¿what would be *potentially* polluting activity?, expression used by the Brazilian Constitution in its chapter on the Environment in order to require environmental impact assessment studies – and, *a fortiori*, control.

These concepts demand an interpretation which are incompatible with the linguistic stratification of closed types; thus coinciding with KARL ENGISCH³⁷⁾, for various reasons, legal terminology remains and shall always remain using *undetermined juridical concepts* to describe a varied and and quickly changing reality.

It is regrettable that Brazilian case law still centers around *closed typification* as in the case of the federal environmental control fee, when the Supreme Court³⁸⁾ has only held as valid the categorization of polluting activities based on absolute and *clear* presumptions, although unchangeable and unfair in certain cases.

4.2. As to material principles, the **ability to pay taxes** (“tanzei ryoku gensoku”), which is a tax principle derived from the general principle of equality, it has been embedded in article 145, paragraph 1st of the Constitution.

Notwithstanding the wording of the Constitution, which refers to the application of the ability to pay principle only to *imposts*, the best doctrine and case law hold that the principle is substantially equality, thus applicable to all the tax system, including fees, which are not based on the principle but may or should be fairly graduated according to it. Obviously, betterment assessments are based on specific

37) *Introdução ao Pensamento Jurídico*. Lisboa: 7th ed. of the Portuguese translation of the 3rd German edition of 1983, Gulbenkian Foundation, 1996, p. 206.

38) Extraordinary Appeal (RE) n. 416.601, Full Bench, tried on August 10th, 2005.

indices of tax ability which is the appreciation of real estates generated by public works (the individual advantage deriving from the public service). The prohibition of confiscatory taxes is expressly provided for in art. 150, IV.

With reference to indirect taxes on production and consumption of goods, besides non-cumulativity, the Constitution requires the application of the the subprinciple of *selectivity*, there is to say, such taxes must be graded according to their essentiality to life, which in the case of environmental taxation means *environmental selectivity*.

4.2.1. Tax abilities and non-fiscal taxation is a subject always present in epistemological debates of tax law and this is also the case of environmental taxation, since according to the Spanish professor CAZORLA PRIETO³⁹⁾, “environmental taxation represents the most developed kind of non-fiscal taxation”, which is regulatory taxation, “taxes d’orientation” or “Marktordnungsabgaben”, because, in the words of XAVIER OBERSON, as “zwecksteuern” (or “mokutekizei” in Japanese) they are “money having the goal of affecting taxpayers’ attitudes”⁴⁰⁾.

The terminology starts with GÜNTHER SCHMÖLDERS⁴¹⁾ when speaking of imposts having *fiscal* goals (revenue raising or “finanzsteuer”) and of imposts having non-fiscal or *extrafiscal* goals (not revenue raising).

In fact, taxes were originally conceived as an instrument to transfer private resources to the treasury to cope with public expenditures. But taxes may exercise a great influence over economic activity, for they are one of the main costs of businesses. Taxes may be used as an indirect *regulatory* or *guiding* or *steering* tool (“ordnungsteuer” or “lenkungsteuer”). For example, an activity or product that is highly taxed may be discontinued in favor of activities subject to lower tax rates. Taxes have so served to political, economic or sanitary goals of governments since Imperial Rome, passing by Mercantilism and Liberalism, up to present days, said to be *post-keynesian times*, as it has been well seen in fighting the 2008 global crisis. Well, one of the foregoing goals of non-fiscal taxation is environmental protection.

39) “Los principios constitucional-financieros en la tributación medioambiental”, in BECKER, CAZORLA, MARTÍNEZ-SIMANCAS (dirs.). *Tratado de Tributación Medioambiental*. Pamplona: Ed. Aranzadi, 2008, v. I, p. 53.

40) OBERSON, Xavier. *Les Taxes d’Orientation*. Bâle et Francfort-sur-le-Main: Helbing & Lichtenhanhn, Faculté de Droit de Genève, 1991.

41) Cf. SCHMÖLDERS, Günter. *Teoría General del Impuesto*. Madrid: Ed. Derecho Financiero, 1962, p. 57-63. Also, H. W. KRUSE. *Derecho Tributario: Parte General*. Madrid: Ed. Derecho Reunidas, Spanish translation, 1978, p. 68-69.

Non-fiscal taxation gives an option to taxpayers who may choose between a less expensive tax or no tax at all depending on the respective activity being developed according to tax statutory criteria; its goal is not to impede a lawful tolerated activity⁴²⁾ (inasmuch as it is unlawful activities which ought to be prohibited), but to condition of conform the freedom of choice of the economic agent through modulation of the tax burden, for example, using environmental criteria. Stimulating non-polluting conducts (non-fiscal environmental taxation) finds solid legal fundaments in HANS KELSEN's⁴³⁾ *premiat sanction* doctrine, based on the retributive principle ("Vergeltung"), whereby the State acknowledges the individual's effort to comply with the law rather than limiting itself to punishing the breach of the law through repressive sanctions. This doctrine embeds fiscal incentives in general which otherwise should be deemed as unlawful privileges vis-à-vis the equality principle.

In Japan the above terminology is also applied by legal doctrine with "zaisei mokutekizei" referring to fiscal taxation and "yuudouzei" or "kyoudouzei", meaning non-fiscal taxation (which essentially aims at achieving other goals than raising funds to finance public expenditure, in short: to change behavior.

The purest example of non-fiscal taxation would be that of a tax intended not to be collected⁴⁴⁾; it should suffice the tax to stay as a *Damocles sword* over taxpayers' heads as a password for them to change their behavior. As a very expensive tariff barrier already used by the Gauls thousands of years ago to hamper imports of Roman goods, seducing even more Julius Cesar to conquer the Gallia... Or a less old Swiss tax imposed on the aircraft noise aiming at reducing the same to bearable levels, which tax, according to XAVIER OBERSON⁴⁵⁾, experienced a revenue reduction, as intended, as technology improved.

So, environmental policy is a way of using tax potentialities intimately related to

42) DOMINGUES, José Marcos. *Direito Tributário e Meio Ambiente*. Rio de Janeiro: 3ª ed., Forense, 2007, p. 51-52.

43) H. KELSEN, *Reine Rechtslehre (Teoria Pura do Direito)*. Coimbra: A. Amado (Ed), 5th edn, 1979, p. 48-49 (Portuguese translation of the German 4th edition).

44) To VARONA ALABERN it seems important "...to distinguish tributes (...) containing extrafiscal elements apart fiscal goals (...), from those which in their fundament and structure are conceived so as that an extrafiscal goal is intended to be achieved. In fact, only the latter may be qualified as extrafiscal tributes in the proper sense". He quotes Gerloff and Neumark who had distinguished between 'ordinary imposts' included within the fiscal imposts and the 'pure ordinary imposts' (*Extrafiscalidad y dogmática tributaria*. Madrid: M. Pons., 2009, p. 24).

45) *Les Taxes d'Orientation*. Bâle et Francfort-sur-le-Main: Helbing & Lichtenhanhn, Faculté de Droit de Genève, 1991, p. 130.

economic power subjacent to individual, professional or entrepreneurial activity, reinforced by sustainable development logics⁴⁶⁾. Therefore, it is important to harmonize the ability-to-pay principle with non-fiscal taxation. Through the identification of taxable events which at the same time indicate, by means of the apprehension or development of natural resources, indices of wealth which trigger taxation and justify the fair participation of economic agents in sharing-in the State expenditure.

Let us consider an environmental tax established in such a way so as to charge more vigorously emissions or effluents in relation to what they represent an *absorption* or greater *appropriation* or *capitalization* of the Environment (environmental resources – air, hydro bodies) specific indices of ability to pay taxes, thereby conciliated with non-fiscal taxation. This seems to be the reasoning of Spanish Professor VARONA ALABERN⁴⁷⁾ to whom “by doing so the State collects more taxes from those who generate more public expenditure and gain more profits by ignoring the extrafiscal goal” (...) “from those who profit out of polluting activities” (...) “from those who take more advantage due to undertaking an economic activity detrimental to the environment”.

5. ENVIRONMENTAL TAXES IN BRAZIL

The idea that the environment is something *balanced* and worth of being protected, may seem new, but in fact it is very old in Western culture and may be seen in the Bible where it is written that the world “was very good”⁴⁸⁾. Now, if one includes the right to enjoy the environment as one of the **fundamental human rights**, it must be held as implicit in the Japanese Constitution of 1947, which already then intended to protect it also in favor of future generations⁴⁹⁾, and in the

46) LÓPEZ DÍAZ, Antonio: “Las modalidades de la fiscalidad ambiental”, en *Estudos em Homenagem a Geraldo Ataliba, I – Direito Tributário* (Celso A. B. Mello, Coord.), Malheiros, São Paulo, 1997, p. 21.

47) VARONA ALABERN, Juan Enrique. *Extrafiscalidad y dogmática tributaria*, Marcial Pons, Madrid, 2009, p. 142-144.

48) Genesis 1.31- “And God saw everything that he had made, and behold, it was very good”.

49) Article 11: The people shall not be prevented from enjoying any of the **fundamental human rights**. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of **this and future generations** as eternal and inviolate rights. Article 97: The **fundamental human rights** by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon **this and future generations** in trust, to be held for all time inviolate.

United Nations' Universal Declaration of Human Rights (1948)⁵⁰⁾. As an explicit right it will be found in the UN Conference on the Environment (Stockholm, 1972) in relation to 21 duties required for the respective preservation.

Very similar terms are provided for in the Portuguese⁵¹⁾ and Spanish⁵²⁾ Constitutions, in which definitely the Brazilian Constitution inspired itself. The Brazilian Constitution states that

“**Article 225.** All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations”. (...) “Paragraph 3 - Procedures and activities considered as harmful to the environment shall subject the violators, be they individuals or legal entities, to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused”.

As in Japan, the **concept of environment** is not found in the Constitution of Brazil. Notwithstanding, in Brazil, before the promulgation of the 1988 Constitution, the Environmental National Policy Act (Law 6,938, of 1981), defined the environment as “the group of conditions, principles, influences and interactions of a physical, chemical and biological nature that enables, shelters and rules all forms of life⁵³⁾”.

The Brazilian Constitution has not picked up the same words used in article 66.2, ‘h’, of the Portuguese Constitution (It is the duty of the State to guarantee that

50) Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in **fundamental human rights**, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom, (...) Art. 27 (1) Everyone has the **right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.**

51) “Article 66 (1) Everyone has the right to a healthy and ecologically balanced human environment and the duty to defend it”.

52) “Article 45 (1) Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it. (2) The public authorities shall watch over a rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on an indispensable collective solidarity. (3) For those who break the provisions contained in the foregoing paragraph, criminal or, where applicable, administrative sanctions shall be imposed, under the terms established by the law, and they shall be obliged to repair the damage caused.

53) Article 3rd, n. I.

fiscal policy conciliates the development with environmental protection”, but, besides being possible to consider this as an implicit idea⁵⁴⁾, including in Spain⁵⁵⁾, the 42nd Amendment to the Brazilian Constitution, dated 2003, has clarified that, as a principle of the economic order, environmental protection shall operate “including by means of different treatments in accordance to the environmental impact of products and services and their respective production and rendering”. Also, the 1989 Constitution of Rio de Janeiro State calls for the adoption of “tax policy which implements the polluter-pays principle⁵⁶⁾”.

Environmental taxes are a typical non-fiscal or *extrafiscal* instrument and this specific *extrafiscality*, this goal of influencing the conduct of polluting agents is based on the polluter-pays principle⁵⁷⁾”. Now, when applied to Tax Law, this principle has a very clear **selective meaning**⁵⁸⁾: to induce taxpayer behavior (and here is the preferential area for the true environmental impost). Notwithstanding, the polluter-pays principle has also an **impositive meaning**⁵⁹⁾ which is more adequate to legitimate fees and betterment assessments, mainly in their **fiscal** function. In theory, environmental tax revenue should be also a secondary and undesirable reality, for it frustrates its own goal: the change in behavior, the influence in taxpayers’ choices, and in the consumer of respective products and services.

In Brazil the concept of an **environmental tax** is not developed in statutes but legal doctrine has accepted the pioneer lesson of Spanish Professor MARTÍN MATEO⁶⁰⁾ who refers to environmental taxes as those tending to disincentive polluting behaviors and setting down “favorable fiscal treatments”.

As for me, it seems that environmental tax, the green tax, may be defined in two

54) DOMINGUES, José Marcos. *Direito Tributário e Meio Ambiente*. Rio de Janeiro: 3^a ed., Forense, 2007, p. 106-107 *passim*.

55) AMATUCCI, Andrea. “La intervención de la norma financiera en la economía: perfiles constitucionales - *Seis Estudios sobre Derecho Constitucional y internacional Tributario*. AMATUCCI, GONZÁLES, LEJEUNE, SCHICK, UCKMAR, WERALSKI. Madrid: Editorial de Derecho Financiero, 1980, p. 45-46.

56) Art. 261, § 1º, XVIII.

57) *Verursacherprinzip* (“causing principle”) – cf. HERRERA MOLINA, Pedro Manuel. *Derecho Tributario Ambiental*. Madrid: M. Pons, 2000, p. 96.

58) DOMINGUES, José Marcos. *Direito Tributário e Meio Ambiente*. Rio de Janeiro: 3^a ed., Forense, 2007, p. 11, 32-33.

59) *Ibidem*.

60) *Derecho Ambiental*. Madrid: Instituto de Estudios de Administración Local, 1977, p. 100-103.

meanings: in a *broad* or *improper*⁶¹⁾ sense and in a *strict* or *proper* sense⁶²⁾: the former is a traditional or ordinary tax adapted so as to benefit environmental protection efforts; the latter is a new, a separate tax charged on the use of the environment by economic actors – its taxable event is “the fact of polluting”.

I think that the foregoing distinction should be reserved to imposts. In fact, fees and contributions, being counterparts to specific State environmental actions, even though adjustable by environmental criteria⁶³⁾, they are not structured to tax pollution or environmental degradation as a taxpayer’s act. Well, *to pollute* is not a fact of the Administration, but a taxpayer’s fact, therefore a typical taxable event for imposts⁶⁴⁾. The environmental tax *strictu sensu*, the true environmental impost, is imposed on polluting activities or consumptions⁶⁵⁾.

Brazil has much to learn from more developed countries when it comes to establishing strict-sense environmental imposts. So far, there has been no such specific tax on carbon, or on emissions or on effluents. Like Japan’s national government, what the Brazilian authorities mostly do in this area is to apply **command and control** mechanisms, in other words, increasingly demanding licensing and environmental patterns, as in the case of progressive addition of ethanol to gasoline up to 25%, and of biodiesel addition to diesel oil up to 5% under the Automotive Vehicle Air Pollution Control Program – Proconve/Ibama⁶⁶⁾ (a federal program which controls vehicle consumption and emission indices), State Programs⁶⁷⁾, and also *Behavior Adjustments* promoted by the Prosecutors Office

61) NABAIS, José Casalta. *Estudos de Direito Fiscal*. Coimbra: Almedina, 2005, p. 343.

62) *Ibidem*.

63) Type of trash, kind of facilities or land to be inspected, kind of equipment to be deployed in environmental inspections, etc.

64) Article 16 of the Brazilian Tax Code.

65) BORRERO MORO, Cristóbal J. *La materia imponible en los tributos extrafiscales. ¿Presupuesto de realización de la autonomía financiera?* Madrid: Aranzadi, 2004, p. 139-140. I think that fees and contributions shall always be broad-sense environmental taxes when applied to environmental purposes; and imposts may be classified as broad-sense or strict-sense environmental taxes according to their respective taxable events.

66) <http://www.ibama.gov.br/2009/12/mma-anuncia-ranking-de-emissoes-de-carros-fabricados-em-2009>.

67) An important precedent is that of Río de Janeiro where an agreement was reached with Petrobras Co. and the Transport Federation so as to reduce and neutralize greenhouse gas emissions by 790,000 tons of CO₂ in five years as of 2008 (see DOMINGUES, José Marcos. “Biofuels, megacities, and green taxes: the whys and wherefores of non-fiscal fuel taxation. Brazil in world context”, in *Critical Issues in Environmental Taxation*. LYE, MILNE, ASHIABOR, KREISER, DEKETELAERE (editors). New York: Oxford University Press, v. VII, p 284.

(“Ministério Público⁶⁸⁾”), statutorily provided for since 1985⁶⁹⁾ before the 1988 Constitution promulgation.

Besides, in terms of **broad-sense environmental taxation**, the **IPI**-impost on industrialized products (the federal VAT) has been traditionally modulated between 0% up to 25% so as to charge more on the sale price of automobiles with stronger motor power, the highest rate being reserved to cars fueled by diesel oil; also, the ordinary rate for gasoline cars ranges from 13% to 25%, whereas for ethanol fueled cars the tax rate is between 11% and 18%.

Anachronistically enough, the federal **IPI** tax is charged on electric cars at a rate of 25%⁷⁰⁾ (the same applied to the most powerful and polluting fuel-run cars – electric motorcycles are taxed at 35%!), plus additional federal social contributions of 11.6%; on top of which tax burden there is a State value added tax (“**ICMS**”) of between 18% and 19%.

Brazil has no special impost on motor vehicle tonnage like Japan’s⁷¹⁾. And differently from the Japanese automobile tax, which charges fixed amounts per private-use passenger cars per year (on *cc* progressive basis)⁷²⁾, in Brazil there is an annual impost on the value of the property of any self-propelled vehicles (the “**IPVA**”), in favor of Member States, which have selectively modulated it in many cases in relation to the respective fuel (from 0%~1% for electric vehicles, 2%~3% for ethanol-run cars, up to 4% for gasoline-run cars, and even up to 6% for diesel cars – such rates vary in time and from State to State). Such a high tax burden is a clear disincentive for domestic consumption of electric vehicles, as it has been criticized by scholars⁷³⁾.

Electricity and other forms of energy are not taxed in Brazil aiming at environmental goals: federal and state imposts have preferred fiscal taxation criteria

68) From the French institutional tradition of “Ministère Public”).

69) Federal Law n. 7,347, of July 24th, 1985.

70) Probably intended to tax golf cars used by wealthy consumers.

71) National motor vehicle tonnage tax (“*jidousha juuryou zei*”) which charges fixed amounts per ton per year. See “*jidousha juuryou zei*” Law n. 89, of May 31st, 1971, as recently amended by Law n. 10, of March 31, 2006).

72) Provincial automobile tax (“*jidousha zei*”). See “*chihozeihou*” (Local Tax Act - Law n. 226, of July 31st, 1950, section 145~177, as recently amended by Law n. 10, of March 31, 2006). Municipal light vehicles are less taxed. (section 442~463).

73) DOMINGUES, Jose’ Marcos & PERES, Luiz Artur Pecorelli. “Veículo elétrico, políticas públicas e impostos”, in <http://monitormercantil.com.br/mostranoticia.php?id=73694> – dated January 22, 2010; and DOMINGUES, Jose’ Marcos. “O Japão e o veículo elétrico: menos impostos”, in <http://monitormercantil.com.br/mostranoticia.php?id=86600>, dated October 21, 2010.

aiming at final price equalization related to energy-source supply security in general. As an important note, federal and state VATs (“**ICMS**”) have exempted industrialized products connected to eolic and solar energy conversion (in force since 1997⁷⁴). And there are other environmental fiscal incentives for indirect taxation. In Rio de Janeiro, for example, Law n. 2.055/93 reduced the **ICMS** from 18% down to 12% on the amount of state-domestic sales of equipment and vehicles for industrial expansion and modernization and which aim at environmental protection. These are all cases of application of *extrafiscal* or non-fiscal selectivity with an environmental dimension.

As to the **federal impost on rural lands** (“**ITR**”⁷⁵), forestry reserves are tax free (like it happens in Japan⁷⁶) as to municipal fixed assets tax); and more, *de lege ferenda* it has been demanded a fiscal credit for environmental services, specially vis-à-vis tree planting and maintenance; besides, the **municipal** impost on urban property (“**IPTU**”) may contemplate (and in fact it does so in Rio de Janeiro in relation to lots of 1-ha or more in size) tax exemptions for maintenance of forest-covered areas; also, land and buildings of ecological interest or which are relevant to scenic or environmental preservation are tax exempt; and also those governmental designated areas as forestry reserves are tax free⁷⁷).

As to **strict-sense environmental imposts**, that is, taxes on pollution, the Brazilian situation is not so different than that of Japan. In Brazil, due to its rigid tax system, it must be stressed that only the Federal Union may establish a residual impost or not yet conceived by the Constitution, “provided that they are non-cumulative and not founded on a taxable event or an assessment basis reserved for the taxes specified in this Constitution; (art. 154, I). In short, we may say that, when it comes to such environmental taxes, Brazil resembles a unitary country; it will all depend on a central government legislative initiative.

Until today, the Union has not declared to have established a strict-sense environmental impost⁷⁸). The fact is that in year 2000 Federal Law n. 9.985⁷⁹)

74) Convenio ICMS n° 101/97. See DOMINGUES, Jose Marcos. *Direito Tributário e Meio Ambiente*, cit., p. 75.

75) Article 153, VI, of the Constitution and Law n. 9,393/1996.

76) Section n. 348-2, n. 7, 7-2 of “chihouzei hou” (Local Taxes Act).

77) Law n. 691/84 – Municipal Tax Code.

78) However, several Provinces like Hyogo, Kanagawa and Mie have established strict-sense environmental taxes on a variety of goods and services aiming at environmental protection, such as waste disposal imposts earmarked to recycling programs and industrial waste reduction. The trend was led by Mie Province in April 2002. Other Provinces such KANAGAWA have established imposts on bottled water aiming at forestry preservation and

determined that in cases of environmental licensing of businesses causing a significant environmental impact, based on environmental impact studies, the entrepreneur is obliged to “**support**” the implementation and maintenance of a full-protection conservation unit; according to § 1st “the amount of **funds** must not be inferior to **0,5% of the total costs** foreseen as required for the implementation of the business”, the percentage being fixed by the licensing environmental agency, according to the degree of the environmental impact caused by the business.

Aside issues of legality, concentration of powers and reasonableness, all already submitted to constitutionality control before the Federal Supreme Court⁸⁰), I think that the juridical nature of such fiscal institute is clearly connected with the subject of this article. The Brazilian Constitutional Court stated the partial unconstitutionality of the statute, providing for a reduction of its text; it has decided that the law created “a sharing-in compensation as to the cost of measures for the specific prevention in face of businesses causing significant environmental impacts” (...) which amount “is to be fixed in proportion to the environmental impact, after a study during which process the adversary system and full defense is guaranteed”. The decision of the Tribunal, dated April 9th, 2008, has been suspended by motions of clarification opposed to the ruling by both parties, the National Confederation of Industry and the President of the Republic, not yet tried.

Even if not so decided by the Court, maybe because the parties limited themselves to debate on the alleged nature of indemnification of the institute [not paying attention to the motion filed by the *amicus curiae* (an NGO, the Brazilian Institute for Oil and Gas)] who supported the tax nature of the statutorily established obligation.

I believe this is the first attempt to establish a strict sense environmental tax in Brazil, especially after the decision (though provisory) of the Supreme Court which determined the necessary connection⁸¹) between the obligation to pay and the amount of the environmental impact, or contamination or degradation or environmental loss, because the environmental tax basis rests in the relation between the tax and the environmental damage⁸²), relation which requires that the

thus providing for future access to hydric resources.

79) The Act was implemented by Decree n. 4,340/2002, amended by Decrees n. 5,566/2005 and n. 6,848/2009.

80) Unconstitutionality direct action-ADI n. 3,378-DF (*in* www.stf.jus.br).

81) See HERRERA MOLINA Pedro M. “Elementos cuantitativos”, *in* A. Yábar Sterling (dir.). *La protección fiscal del medio ambiente. Aspectos Económicos y Jurídicos*, Madrid: M. Pons, 2002, p. 264-265.

82) BOKOBO MOICHE, Suzana. *Gravámenes e Incentivos Fiscales Ambientales*. Madrid:

taxable basis be not of a monetary character, but strict sense parameters integrated by units of polluting products or products able to provoke environmental degradation⁸³).

In any case, in 2009 the Federal Government, as an additional instrument for fighting the global financial crisis, stimulated the production and consumption of some goods reducing the respective VAT on a series of products like automobiles and construction materials, including the so-called *white line* (fridges, stoves, laundry machines) – for this line of goods the tax reduction was modulated in proportion to the respective energy consumption (more efficient products became less taxed). At present, the Government studies a similar tax policy towards automobiles, under which electric vehicles would be exempted of federal VAT, and cars in general would be taxed not only on the basis of their value and power, but also according to the respective emissions. This is a very important data, for it demonstrates the intention of progressively valuing environmental-tax potentiality and the commitment of the country with environmental protection, which is a common good of all.

Here, an interesting comparison can be made with the Japanese situation: according to the Ministry of Economy, Trade and Industry, between April 2009 and September 2010 Japan implemented **subsidies** for purchasing **environmentally friendly** vehicles to stimulate the domestic economy hit by the global crisis; as in the case of Brazil, Japan took such fiscal policy measures on the basis of energy efficiency and lower emission standards. A similar pattern was followed by **temporary tax cut policy** vis-à-vis the motor vehicle tonnage tax between 2009 and 2012. In short, **public policies** aiming at the same time **stimulating** the economy coupled with **protecting** the environment. Clearly, this kind of public policy implements a double dividend: it creates or maintains jobs, transferring revenues from the government back to the private sector, besides implementing environmental protection. In a world context, acting locally through appropriate public policies meets the universal goal of protecting the Environment on a global scale.

Civitas, 2000, p. 93.

83) HERRERA MOLINA, Pedro M. *Derecho Tributario Ambiental*. Madrid: M. Pons, 2000, p. 166. Also see MENÉNDEZ MORENO, Alejandro. Comentario – jurisprudencia constitucional financiera, *Revista Española de Derecho Financiero*. Sevilla: Civitas, v. 132 (oct.-dec. 2006), p. 897-900, especially p. 898.

6. Final remarks

Watching the future ahead, our environmental tax research group in Rio de Janeiro State University is proposing that Brazil concretely establishes a *strictu sensu* environmental tax system fundamentally based on emissions, be it at the federal level, be it at State and Municipal levels (according to international criteria). Implementing zero tax policy on electric cars is an important step to induce initial production and consumption of EVs. And a fuel and energy tax according to the respective sources seems absolutely necessary, since a clean energy matrix ought to be stimulated and the dirty one must be changed.

The Japanese Home Affairs Ministry is presently considering a September 2010 expert report on a thorough review of the present taxation system on automobiles (“jidousha kankei zeisei nikansuru kenkyukai houkokusho”) proposing among other items that cars be taxed not only according to their value (ability to pay principle) but also according to their emission level (polluter-pays principle).

For this purpose, I appreciate that my stay at Osaka University has been very fruitful, including for the opportunity of exchanging views on the subject of this essay and also for enhancing a true academic exchange allowing for my taking to Brazil fresh environmental news from Japan, a country who has striven to produce environmental friendly technology and goods, especially hybrid and plug-in electric cars, which Brazil is yet to develop in large scale.