Index

ability-to-pay principle 277
absolute advantage theory (Smith) normative comparative advantage vs. 90–91
revised theory and environmental BTAs 85–86, 88–89, 97
traditional BTAs and 14, 31, 44–47
adjustment concept in environmental BTA tax design 122–124
in traditional BTA tax design 102–103
Agreement on Subsidies and Countervailing Measures (ASCM) 165, 177, 192–195, 222
Annex I, footnote 58 179, 195–196, 229
Annex I, footnote 61 203–204
Article 3.1(a) 177, 178–180, 197
Article 8 246
direct vs. indirect taxes 179
exemptions from national regulations 234
indirect taxes, definition 195–196
aim-and-effect test 214–215
anti-dumping measures 97, 98, 120, 153, 177–178
Australia carbon pricing mechanism 85
Clean Energy Act (2011) 83, 84–85
Customs Tariff Act (1995) 124
tax system and environmental BTAs 83–85, 129
averaging, in tax rates 32, 73, 80–81, 194, 206, 236–238, 252
aviation sector 78–80, 125, 262–263, 267–268
Belgium carbon equalisation mechanism 77
energy taxes 128
BEPS (Base Erosion and Profit Shifting) project (OECD) 20, 284
bilateral/double tax agreement/convention 1, 279
border carbon adjustment, use of term 49–50, 121–122
border concept in environmental BTA tax design 119–120
in traditional BTA tax design 101–102
border tax adjustments (BTAs) overview 1–5
definition 23–25
neutrality of 28–29, 33–34
tax models and 181–183
British thermal unit (BTU) energy tax, proposed 72–73
Canada carbon taxes 128
disposal fees and BTAs 56–57
carbon equalisation mechanism 76–79, 148
carbon/pollution leakage 2, 50–51, 66, 68, 76, 82, 145, 247, 254
carbon taxes 64, 75, 91–92, 127–129
model based on environmental excise duty 133–137
carbon-added tax (CAT) 137–146
carbon value vs. purchase price 139–142
comparison to VAT system 139–142
critique of 144–146
environmental BTAs and 236–238
324   Environmental border tax adjustments and international trade law

green-added tax and 142–143
corporate income taxes 190–191
dearth carbon tax (RCT) and
countervailing measures 49–50,
147–148
97–98, 120
see also Agreement on Subsidies
and Countervailing Measures
(ASCM)
customs duties 24–25, 97, 98,
carbon-related BTAs 68–69
102–103, 110, 120, 153
cascade taxes 32, 41–42, 106–107, customs value 139–142, 151, 166–167
206
certification systems 150, 153–154,
common but Differentiated
237–238
Responsibilities (CBDR)
principle 268–274
comparative advantage theory
(Ricardo) 184
general vs. specific taxes 25–26
destination principle 23–24, 33,
in the efficiency-relevant sense
Howse) 91
39–43, 74, 80–81, 108, 115,
normative comparative advantage
184–188
vs. 91
OECD report citation of 59
development countries 268–271
revised theory and environmental
BTAs 85–88, 97, 189–190
tax neutrality 15–16, 28
destination-based corporate taxes (de
carbon taxes 127–128
traditional BTAs and 12–17, 30–31,
energy taxes 127
customs duties 24–25, 97, 98,
44, 45, 103
discriminatory taxes 34, 41, 80–81,
competitiveness argument 2, 66
direct vs. indirect taxes 13, 26–32,
absolute advantage theory (Smith)
46
directly competitive or substitutable
(DBS) products 218–222
double dividend hypothesis and 156
discriminatory taxes 34, 41, 80–81,
direct taxation concept 222
destination-based X tax (Bradford)
direct taxation concept 59, 109–111,
developing countries 268–271
average 179, 188
direct taxation concept 59, 109–111,
see also legitimate absolute
directly competitive or substitutable
advantage theory
directly competitive or substitutable
conflict diamonds 154, 244–245
dissimilar taxation concept 222
discrimination of market equilibrium
costs 218–222
discount rate 218–222
destiny principle 23–24, 33,
discrimination of market equilibrium
countervailing measures 49–50,
Index

electricity (taxes on electricity) 65, 72–73, 80–82, 127–128
energy taxes 83, 127–128
environmental border tax adjustments (BTAs)
overview 1–5, 287–288
background of 56–57
call to political actors/stakeholders 286–288
Critical Legal Studies approach to 4–5, 282–284
definition 58
economic foundation of 49–53
summary conclusions 282–288
environmental border taxes 50–53
environmental BTA history, and GATT-WTO/OECD 48–98
background of 56–57
definition 58
direct/indirect and production/product taxes as eligible for adjustments 60–63
economic foundation of environmental border taxes 49–53
EU views on 74–82
externalities to be internalised 91, 95–96, 97
externality costs 92–94
GATT/WTO Notes (1997) overview 57–58
interactions between traditional/environmental BTAs foundations 96–98
Japanese reports on 82
legitimate absolute advantage theory 60, 85–86, 89–92, 95, 97, 285
OECD Note (1994) overview 57–58
other international developments 66–69
rationales for 58–60
reception of OECD/GATT reports 65–66
revised absolute advantage theory 85–86, 88–89, 97
revised comparative advantage theory 85–88, 97
role of GATT in tax matters 55
role of OECD in tax matters 54
summary conclusions 98
Swiss proposals for 82–83
taxes on inputs as eligible for adjustments 63–65
US views on 70–74
environmental law principles, and environmental BTAs 265–276
environmental tariffs 50
see also countervailing measures
environmental taxes
with cross-border character 278–280
distinguished from traditional taxes 224–225
fiscal nature of 122
market-based measures vs. 121–122
on producers 148
regulations vs. 3, 231–235
revenue from 155–158
environmental value of products 149–151
environmental VAT model 143–144, 146–147
equalisation taxes see border tax adjustments (BTAs)
European Coal and Steel Community (ECSC)
Community of Experts, Tinbergen report 39–42
European Court of Justice (ECJ)
on compatibility with domestic electricity duty with EU law 80–81
on inclusion of aviation sector into EU ETS 262–263, 267–268
on polluter-pays principle 272
see also Table of Cases
European Economic Community (EEC)
tax harmonisation working group
European Union (EU)
Aviation Directive 78–80, 125, 262–263, 267–268
carbon equalisation mechanism 76–79
Directive on energy products and electricity 81
emission-trading scheme (ETS) 76–78, 121, 125, 148, 232, 234
excise taxes 43–44, 112–114
release for consumption, definition 112–113
views on environmental BTAs 74–82
views on traditional BTAs 38–44, 78
excise taxes
competitiveness argument and 127–128, 226–227
during 1960s 106–107
in EU 43–44, 112–114
as models for environmental BTAs 125–129, 229–230
ODC taxes and 129–137, 236
see also individual types
exhaustible natural resources 253–255
externalities, definitions 92–94
externality costs 90, 92–96, 146
extraterritoriality 258–263, 278
fair international trade concept 90
Finland, electricity taxes 80–81
fiscal sovereignty principle 278
fixed exchange rates 30
France
carbon equalisation mechanism 77
TVA taxes 26, 106–107
free-rider issues, and MEAs 78
General Agreement on Tariffs and Trade (GATT) (1947) 11
in traditional BTA tax design 103–106
green economy concept 248
green labelling 3, 152
green VAT (De Camillis and Goralezyk) 143–144, 235
grey emissions taxes 82–83
hazardous chemicals 70–71, 75, 135–136, 156–157
see also Superfund taxes, in US
human, animal or plant life or health, protection of 250–253
inputs, taxes on 63–65, 135–136
internalisation policies 95–96, 150–151
International Civil Aviation Organisation (ICAO) 78, 267
International Court of Justice (ICJ) exclusion of soft law disputes 269–270
request for advisory opinion on climate change by small island states 264
International Maritime Organization 267
international public law, and environmental BTAs 257–265
ISO 14067 150
Japan
‘Utilization of Economic Instruments in Environmental Policies – Taxes and Charges’ (1996) 82
views on environmental BTAs 82
Kimberley Process Certification Scheme 154
Rough Diamonds 154, 244–245
legal framework, of environmental BTAs 224–281
environmental law principles 265–276
MEA limits on BTA adoption 266–274
MEA support for BTA adoption 274–276
GATT Article XX provisions 242–257, 274–276
ASCM/TBT/SPS 245–246
conditions of applicability 246–257
GATT/GATS exceptions provisions 243–245
general GATT provisions 242–243
XX, chapeau provisions 255–257
XX(a), protection of public morals 247–250, 252
XX(b), protection of human, animal or plant life or health 250–253
XX(g), conservation of exhaustible natural resources 253–255
international public law 257–265
state exceptions and countermeasures 263–265
unilateral and extraterritorial measures 258–263, 278
summary conclusions 280–281
tax law principles 276–280
domestic tax laws 276–278
environmental taxes with cross-border character 278–280
WTO law and rules 225–240
consumption vs. production taxes 225–228
direct vs. indirect taxes 228–230
environmental taxes vs. regulations 231–235
MFN 238–240
national treatment (NT) principle 235–238
taxes occultes 230–231
see also individual provisions
legal framework, of traditional BTAs 165–223
general GATT provisions
border charges vs. internal charges 170–177
directly competitive or substitutable (DCS) products 218–222
dissimilar taxation concept 222
legal consequences 174–177
like products concept 208–217
most-favoured nation principle 166
national treatment (NT) principle 166, 167, 206–222
taxes in excess concept 217–218
valuations rule 166–167
OECD 1968 report
BTA history 19–34
BTA practices 106–107
definition of destination principle 184–188
WTO law and rules 167–180
arguments over eligibility of direct taxes on imports 183–193
arguments over ineligibility of direct taxes on exports 194–198
BTAs on exports 177–180
BTAs on imports 167–177
eligibility of taxes occultes 198–206
national treatment (NT) principle 206–222
practical consequences of eligibility of direct taxes 193–194
tax models and BTAs 181–183
see also individual provisions
legality principle, and domestic taxes 276–277
legitimate absolute advantage theory 60, 85–86, 89–92, 95, 97, 285
life-cycle assessment (LCA) 94, 142, 150, 235
like products concept 208–217
Marrakesh Agreement Establishing the World Trade Organization (1994) 55
Article IX (waivers) 243–245
see also World Trade Organisation (WTO)
Mill, John Stuart 10, 190, 228
Montreal Protocol on Substances that Deplete the Ozone Layer (1987) 71, 83, 239, 267, 275
most-favoured nation principle (MFN) 11, 166, 238–240, 243, 245, 256–257, 268–269, 271, 280
multilateral environmental agreements (MEAs) 51–52
Common but Differentiated Responsibilities (CBDR) principle 268–274
free-rider issues 78
as limitation to adoption of environmental BTAs 265–274
sic utere tuo principle and 263–264
as supportive of environmental BTA adoption 274–276
third countries and 60
unilaterality and 258
Multilateral Fund for the Implementation of the Montreal Protocol 160
national treatment (NT) principle
CBDR principle and 268–269
directly competitive or substitutable (DCS) products 218–222
dissimilar taxation concept 222
environmental BTAs and 235–238
like products concept 208–217
taxes in excess concept 217–218
traditional BTAs and 166, 167, 206–222
necessity test 248–252, 254, 264–265, 281
negative externalities (Pigou) 92
neutrality of BTAs 28–29, 33–34
non-retroactivity principle 277
normative comparative advantage (Regan) 90–91
Organisation for Economic Co-operation and Development (OECD)
BEPS (Base Erosion and Profit Shifting) project 20, 284
BTA concept, definition 1–2
Centre for Tax Policy and Administration 19
Committee on Fiscal Affairs 19, 54, 56
Environment Policy Committee 54, 56
'Environmental Taxes and Border Tax Adjustments' (1994) 48
Joint Session on Taxation and Environment 54
role in tax matters 19–20
see also environmental BTA history, and GATT-WTO/OECD;
traditional BTA history, and GATT/OECD
Organisation for European Economic Co-operation (OEEC) (1948) 19
origin principle 33, 39–43, 186–187
ozone-depleting chemicals (ODC) taxes
environmental excise duty models based on 129–137, 236, 285
exemption regime of 239
imported taxable products, definition 129
similarity to Australian taxes 83–85
Paris Agreement (2015) 286
physical incorporation test 204
Pigou, Arthur C. 91, 92, 95
Pigouvian theory 95
polluter-pays principle 75, 93–94, 126, 272–274, 277
process and production methods (PPMs)
adoption of BTAs and 278
assessment of environmental value and 149–153, 237–238
like products concept and 208, 212–213, 216
necessity test and 248–250
political arguments over 252–254, 283
tax design and 256
producers, environmental tax design and 148
product taxes vs. general taxes 189
product vs. production/process taxes 60–63
public morals, protection of 247–250
relationship requirement see necessity test
release for consumption, in EU 112–113
residence principle 187–188
retail carbon tax (RCT) 147–148
Ricardo, David 10, 11
On the Principles of Political Economy and Taxation 16
On Protection to Agriculture 12–13
see also comparative advantage theory (Ricardo)
Rio Declaration 272
sales taxes
adoption of BTAs and 229–230
during 1960s 106–107
sic utere tuo principle 263–264
single tax principle (Avi-Yonah) 279–280
Smith, Adam 10, 14
see also absolute advantage theory (Smith)
soft law principles 257, 269–270
source principle 187–188
sovereignty principle 257–263, 278
Subsidies Code (WTO) 177, 192–193, 202–203, 206
Superfund taxes, in US
allocation of revenue from 156–157
as double adjustment 226
environmental excise duty models
based on 70–71, 129–133, 236
as form of revenue generation 88
product list 130
taxes occultes and 231
Sweden
questions on BTAs 60, 65
requests GATT Note on BTAs (1993) 56, 57–58
Switzerland
proposals for BTAs 82–83
views on environmental BTAs 82–83
synthetic greenhouse gases (SGG) taxes 83–85, 129
tax concept in environmental BTA tax design 120–121
in traditional BTA tax design 102
tax design, of traditional BTAs 119–161
adjustment concept and 122–124
allocation of environmental BTA revenue 158–161
allocation of revenue 155
anti-abuse measures 153–155
border concept and 119–120
carbon tax model 133–137
carbon-added tax (CAT) 137–146, 236–238
environmental taxes on producers 148
environmental VAT model 143–144, 146–147
fiscal nature of environmental taxes 122
goods and services and 124–125
models based on retail sales tax 147–148
model based on US Superfund and ODC taxes 129–133
revenue from environmental taxes 155–158
summary conclusions 161
tax concept and 120–121
tax evasion and 151–155
taxes vs. other market-based instruments 102, 121–122
traditional excise duty model 125–129
valuation and environmental proxies 149–151
VAT-based models 137–147
tax design, of traditional BTAs 101–118
adjustment concept and 102–103
border concept and 101–102
export/import practices during 1960s 106–107
general consumption taxes, EU VAT 107–112
goods and services and 103–106
retail sales taxes, US 114–116
specific consumption taxes, EU excise duties 112–114
summary conclusions 116–118
tax concept and 102
tax evasion 151–155
tax law principles, and environmental BTAs 276–280
tax neutrality (Ricardo) 15–16, 28
tax shifting 30–33
tax sovereignty 46, 65, 87, 198
taxes in excess concept 217–218
taxes occultes concept
averaging of tax rates and 32, 206
environmental taxes on producers and 148
lack of clarity in reports 27–28
legal grounds for 175–177
OECD report definition 27–28, 199
Superfund and ODC taxes vs. 131–132
taxes on inputs and 63–65, 135–136
taxes on services and 104
WTO and environmental BTA eligibility 198–206
WTO law and traditional BTA eligibility 230–231
territorial sovereignty 257–263
Index

theory of absolute advantage see absolute advantage theory (Smith)
to of comparative advantage see comparative advantage theory (Ricardo)
third territories, under TFEU 109, 110, 112
Tinbergen report (ECSC) 39–42
traditional BTA history, and GATT/OECD 9–47
absolute advantage theory (Smith) 14, 31, 44–47
background of reports 20–23
comparative advantage theory (Ricardo) 12–17, 30–31, 44, 45–46
definition of BTAs 23–25
EU views on 35–44, 78
first use of BTAs 18
fiscal vs. non-fiscal factors 33
GATT on developing countries 33–34
history of tariffs and 10–12
interim conclusions 47
rationales for/against BTA adoption 28–30
role of GATT in tax matters 20
role of OECD in tax matters 19–20
tax shifting as basis for BTAs 30–33
taxes eligible for BTAs 25–28
Treaty on the Functioning of the European Union (TFEU) 80, 109, 272
turnover taxes
ECSC study on 39–42
in Germany 20–21, 26
TVA taxes, in France 26, 106–107
UN Conference on Environment and Development, Agenda 21 266
UN Conference on Trade and Development (UNCTAD) 69, 233
UN Conference on Trade and Employment, Preparatory Committee (1947) 199–200
UN Convention on the Law of the Sea (UNCLOS) 267
UN Convention to Combat Desertification 274
UN Environment Programme (UNEP) 160
WTO/UNEP Report, Trade and Climate Change (2009) 68
UN Framework Convention on Climate Change (UNFCCC) 83, 94, 230–231, 274
see also Kyoto Protocol (1997)
UN Stockholm Conference on Human Environment (1972) 55
United States (US)
Border Tax Equity Act, proposed 38
British thermal unit (BTU) energy tax, proposed 72–73
extension of BTA system to direct taxes and export companies, proposed 35–36
Fair Tax Act, proposed 37
proposed amendments to Internal Revenue Code 74
proposed climate action bills 73–74
retail sales taxes 36, 106–108, 114–116
Superfund taxes 70–71, 88, 129–133, 156–157, 226, 231, 236
upstream carbon tax proposal 127
views on environmental BTAs 70–74
views on traditional BTAs 21, 29, 198
Whiskey Act excise tax (1791) 18
upstream carbon taxes 127, 133–137, 144–145
US Council for International Business 203–204

UN Conference on Environment and Development, Preparatory Committee (1947) 199–200
US Customs 116
valuations rule 149–151, 166–167
VAT systems
in EU 35, 41–43, 105, 107–112,
172, 198, 229–230, 237
national treatment (NT) principle
and 236–238
proposed for US 36–37
VAT-based models, for environmental
BTAs 137–147
carbon-added tax (CAT) 137–146
environmental VAT 143–144,
146–147
Vienna Convention 276
welfare factor 52
World Customs Organization
Authorized Economic Operator
Programmes 153–154
World Trade Organisation (WTO) 12
Agreement on Agriculture, the
Agreement on Technical
Barriers to Trade (TBT)
240–241, 245–246
Agreement on the Application of
Sanitary and Phytosanitary
Measures (SPS) 240, 245–246
anti-tax evasion abuse measures
153–155
binding of tariffs 11
carbon-related BTAs 68
Critical Legal Studies approach to
282–284
Customs Valuation Agreement 152
Dispute Settlement Bodies 269–270
product vs. production/process taxes
62–63
as successor to GATT (1995) 20
‘Taxes and Charges for
Environmental Purposes –
Border Tax Adjustment’ (1997)
58
Tokyo Round Subsidies Code 177,
192–193, 202–203, 206
Uruguay Round 57–58, 177, 202
WTO/UNEP Report, Trade and
Climate Change (2009) 68
see also Agreement on Subsidies
and Countervailing Measures
(ASCM); environmental BTA
history, and
GATT-WTO/OECD; legal
framework, of environmental
BTAs; legal framework, of
traditional BTAs;
most-favoured nation principle
(MFN); Table of Cases