

# Tax Treaties

## Professor Georg Kofler

### Spring 2019 — Course Overview

**Course Code:** LAW-LW.10976.002.

**Number of credits:** 4 (together with Prof. Rosenbloom's portion on US law and policy).

**Course contents:** The course is taught in two separate portions. One portion of the course, taught by Professor H. David Rosenbloom, is focused on US law and policy. The other portion, taught by me, deals with non-US matters, focusing on the OECD and the UN Models. The objective of the latter portion is to study the policy, history and provisions of the Model Tax Convention on Income and on Capital (as explained in the accompanying Commentaries) developed by the Organisation for Economic Co-operation and Development (OECD) (OECD Model) and the United Nations Model Double Taxation Convention between Developed and Developing Countries (UN Model) as a principal source of law governing the tax treatment of cross-border flows of goods, services, and capital. In particular students should gain an in-depth knowledge of the international tax materials produced by the OECD and UN. This outline and syllabus refer solely to the second portion of the course.

**Course materials:** The course will be accompanied by a detailed set of slides that should lead you through all the materials covered; I will generally post the slides one or two weeks in advance of each session. The main documents that will be used throughout the course are the

- OECD Model Convention and Commentaries (2017), available [here](#).
- UN Model Convention and Commentaries (2017), available [here](#).

These documents, especially the OECD MC Commentaries, are the main reading material for the course, and I will provide you with more details in our first session of this course. Additionally, the syllabus below hyperlinks other international documents and court decisions that you should familiarize yourself before each class. I have largely refrained from assigning a single textbook or specific scholarly work. However, if you feel more comfortable with a condensed introduction you might consider the textbook by M. Lang, *Introduction to the Law of Double Taxation Conventions* (Linde, 2<sup>nd</sup> ed, 2013). To gain a deeper understanding of the nuances and scholarly discussion it is also recommend that you consult the corresponding chapters in E. Reimer/A. Rust (eds.), *Klaus Vogel on Double Taxation Conventions* (Kluwer Law International, 4<sup>th</sup> ed, 2015), which is placed on course reserve at the NYU library and might also available online via the [library](#) (even though this could substantially increase the workload).

In any event, useful "official" resources are the treaty related webpages of the OECD (available [here](#)) and the UN (available [here](#)), the OECD's information on BEPS (available [here](#)) and the database on the history of the OECD Model (available [here](#)). To access many of the studies and reports by the OECD on treaties in the last 30 years the best way is to download the Full Version of the 2014 OECD Model Tax Convention (Volume II contains the studies and reports, available [here](#)).

**Objectives and Workload:** This course will allow students to study model income tax treaties and their interpretation and application, both through a review of convention texts, international material and court decisions regarding international tax treaty application and through practical problem solving in active class discussion. Students should expect to spend, on average, approximately two hours preparing for every hour of class.

**Attendance:** Regular and punctual attendance at classes and active participation is required. Please e-mail me at [georg.kofler@nyu.edu](mailto:georg.kofler@nyu.edu) to request an excused absence.

#	Date	Day, Time, Room	Topics
1	Jan. 22	Tu., 9-10.50 a.m. FH 210	<p><b>Course Overview and Introduction (History, Policy, Context, BEPS)</b></p> <ul style="list-style-type: none"> <li>▪ OECD MC 2017 Introduction (paras 1-16.2 and 17-41) and UN MC 2017 Introduction (paras 1-24).</li> <li>▪ OECD Work on Taxation 2018/2019, available <a href="#">here</a>.</li> <li>▪ J. F. Avery Jones, <i>Are Tax Treaties Necessary</i>, 53 Tax L. Rev. 1 (1999).</li> <li>▪ M. J. Graetz, <i>Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies</i>, 54 Tax L. Rev. 261 (2001).</li> </ul>
2	Jan. 29	Tu., 9-10.50 a.m. FH 210	<p><b>“Rules” of Application, Interpretation and Implementation, “Treaty Overrides”</b></p> <ul style="list-style-type: none"> <li>▪ OECD MC 2017 Commentary on Article 3 (paras 11-13.2)</li> <li>▪ Articles 2, 26, 31, 32 and 34 of the Vienna Convention on the Law of Treaties (VCLT, text available <a href="#">here</a> and draft articles with commentaries available <a href="#">here</a>)</li> <li>▪ Cases: <i>R v. Melford Developments Inc.</i>, [1982] 2 SCR 504 (available <a href="#">here</a>); <i>Crown Forest Industries Ltd v. Canada</i>, [1995] 2 SCR 802 (available <a href="#">here</a>); <i>Merrins v. The Queen</i>, [2002] 4 CTC 2085 (TCC) (available <a href="#">here</a>, upheld by [2003] 4 CTC 259); <i>Canada v. Prévost Car Inc.</i>, 2009 FCA 57 (available <a href="#">here</a>); <i>Trevor Smallwood Trust v. Revenue &amp; Customs</i>, [2008] UKSPC SPC00669 (available <a href="#">here</a>).</li> </ul>
3	Feb. 5	Tu., 9-10.50 a.m. FH 210	<p><b>Scope of Application: Taxpayers, Taxes, Residence, Place and Time (Articles 1(1), (3), 2 and 4, 30, 31 and 31 OECD MC)</b></p> <ul style="list-style-type: none"> <li>▪ OECD MC 2017 Commentary on Article 1 and on Articles 2, 4, 30, 31 and 32</li> <li>▪ OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (2015), pp.72-75 and 86-89, available <a href="#">here</a>.</li> <li>▪ OECD, Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project (2018), pp. 181-183, available <a href="#">here</a>.</li> <li>▪ Cases: <i>Crown Forest Industries Ltd v. Canada</i>, [1995] 2 SCR 802 (available <a href="#">here</a>); <i>Edwards v. Canada</i>, 2003 FCA 378 (available <a href="#">here</a>); <i>Undershaft (No 1) Limited v. Commissioner of Taxation</i>, [2009] FCA 41 (available <a href="#">here</a>); <i>Lynette Dawn Yates v. Revenue &amp; Customs</i>, [2012] UKFTT 568 (TC) (available <a href="#">here</a>).</li> </ul>

4	Feb. 12	Tu., 9-10.50 a.m. FH 210	<b>Permanent Establishments and Business Profits (Articles 5, 7, 13(2) OECD MC, Articles 5(3), 7 and 12A UN MC) and Excursus on Associated Enterprises (Article 9 OECD MC)</b>
5	Feb. 19	Tu., 9-10.50 a.m. FH 210	<ul style="list-style-type: none"> <li>▪ OECD MC 2017 Commentary on Article 5, Article 7 (more details in the 2010 OECD AOA Report, available <a href="#">here</a>) and Article 13(2) (paras 22-27.2), UN MC Commentary on Article 5 (paras 7-15) and Article 12A</li> <li>▪ OECD, Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (2015), available <a href="#">here</a>.</li> <li>▪ OECD, Additional Guidance on the Attribution of Profits to Permanent Establishments (2018), available <a href="#">here</a>.</li> <li>▪ OECD, Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (2015), pp. 97-118, available <a href="#">here</a>, and OECD, Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project (2018), pp. 165-176, available <a href="#">here</a>.</li> <li>▪ Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018)147, available <a href="#">here</a>.</li> <li>▪ Cases: <i>Dudney v. The Queen</i>, [2000] CTC 56 (FCA) (available <a href="#">here</a>); <i>Knights of Columbus v. The Queen</i>, 2008 TCC 307 (available <a href="#">here</a>); <i>Dell Products v. The State</i>, HR-2011-02245-A (information available <a href="#">here</a>); <i>Fowler v. HM Revenue and Customs</i>, [2018] EWCA Civ 2544, (available <a href="#">here</a>); <i>A/S Bevola and Jens W. Trock ApS v. Skatteministeriet</i> (C-650/16), EU:C:2018:424 (available <a href="#">here</a>).</li> </ul>
6	Feb. 26	Tu., 9-10.50 a.m. FH 210	<b>Immovable Property, International Transport (Articles 6, 8 and 13(1) and (3) OECD MC)</b> <ul style="list-style-type: none"> <li>▪ OECD MC 2017 Commentary on Articles 3 (paras 5-6.4), 6, 8 and 13 (paras 22-23 and 28-28.1)</li> </ul>

7	Mar. 5	Tu., 9-10.50 a.m. FH 210	<b>Investment Income: Dividends, Interest, Royalties and Capital Gains (Articles 10, 11, 12 and 13 OECD MC)</b>
8	Mar. 12	Tu., 9-10.50 a.m. FH 210	<ul style="list-style-type: none"> <li>▪ OECD MC 2017 Commentary on Articles 10, 11, 12 and 13, UN MC Commentary on Articles 12 and 13</li> <li>▪ OECD, Treaty Characterisation Issues Arising from E-Commerce (2001), available <a href="#">here</a>.</li> <li>▪ Platform for Collaboration on Tax, Taxation of Offshore Indirect Transfers of Assets (2018), available <a href="#">here</a>.</li> <li>▪ OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (2015), pp. 69-71, 71-72 and 89-90, available <a href="#">here</a>.</li> <li>▪ Cases (Articles 10-12): <i>Indofood International Finance Ltd v. JP Morgan Chase Bank N.A. London Branch</i>, [2006] EWCA Civ 158 (available <a href="#">here</a>); <i>Canada v. Prévost Car Inc.</i>, 2008 TCC 231 (available <a href="#">here</a>, affirmed by 2009 FCA 57, available <a href="#">here</a>); <i>Velcro Canada Inc. v. Her Majesty the Queen</i>, 2012 TCC 57 (available <a href="#">here</a>); <i>Tech Mahindra Limited v. Commissioner of Taxation</i>, [2015] FCA 1082 (available <a href="#">here</a>).</li> <li>▪ Cases (Article 13): <i>MIL (Investments) S A v. The Queen</i>, 2006 TCC 460 (available <a href="#">here</a>, affirmed by 2007 FCA 236, available <a href="#">here</a>); <i>Sommerer v. The Queen</i>, 2011 TCC 212 (available <a href="#">here</a>, affirmed by 2012 FCA 207, available <a href="#">here</a>); <i>Commissioner for the South African Revenue Service v Tradehold Ltd</i>, [2012] ZASCA 61 (available <a href="#">here</a>).</li> </ul>
—	Mar. 19	No class. – Spring recess.	—
9	Mar. 26	Tu., 9-10.50 a.m. FH 210	<b>Employment, Directors’ Fees and Pensions (Articles 15, 16 and 18 OECD MC)</b> <ul style="list-style-type: none"> <li>▪ OECD MC 2017 Commentary on Articles 15, 16 and 18</li> <li>▪ Cases: <i>Wolf v. The Queen</i>, [2000] 1 CTC 2172 (TCC) (available <a href="#">here</a>); <i>Fowler v. HM Revenue and Customs</i>, [2018] EWCA Civ 2544 (available <a href="#">here</a>).</li> </ul>
10	Apr. 2	Tu., 9-10.50 a.m. FH 210	<b>Methods for the Elimination of Double Taxation (Article 23A and 23B OECD MC)</b> <ul style="list-style-type: none"> <li>▪ OECD MC 2017 Commentary on Article 4 (paras 1-7), Article 21 (para 1) and Article 23</li> <li>▪ Cases: <i>Manfred Beker and Christa Beker v. Finanzamt Heilbronn</i> (C-168/11), EU:C:2013:117 (available <a href="#">here</a>); <i>Anson v. Revenue and Customs</i>, [2015] UKSC 44 (available <a href="#">here</a>); <i>Société générale valeurs mobilières inc. v. The Queen</i>, 2016 TCC 131 (available <a href="#">here</a>, affirmed by 2017 FCA 3, available <a href="#">here</a>).</li> </ul>
11	Apr. 9	Tu., 9-10.50 a.m. FH 210	<b>“Special Provisions”: Non-Discrimination, Mutual Agreement, Exchange of Information and Assistance in the Collection of Taxes (Articles 24, 25, 26 and 27 OECD MC)</b> <ul style="list-style-type: none"> <li>▪ OECD MC 2017 Commentary on Articles 24, 25, 26 and 27</li> <li>▪ Case: <i>UBS AG v. Revenue and Customs</i>, [2005] UKSPC SPC00480 (available <a href="#">here</a>), [2006] EWHC 117 (Ch) (available <a href="#">here</a>) and [2007] EWCA Civ 119 (available <a href="#">here</a>).</li> </ul>

12	Apr. 16	Tu., 9-10.50 a.m. FH 210	<p><b>Treaty Shopping and Tax Avoidance (Article 29 OECD MC)</b></p> <ul style="list-style-type: none"> <li>▪ OECD MC 2017 Commentary on Article 1 and on Article 29</li> <li>▪ OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (2015), available <a href="#">here</a>.</li> <li>▪ Case: <i>MIL (Investments) S A v. The Queen</i>, 2006 TCC 460 (available <a href="#">here</a>, affirmed by 2007 FCA 236, available <a href="#">here</a>).</li> </ul>
13	Apr. 23	Tu., 9-10.50 a.m. FH 210	<p><b>Conflicts of Qualification and Attribution (Articles 1(2), 3(2) and 23 OECD MC)</b></p> <ul style="list-style-type: none"> <li>▪ OECD MC Commentary on Article 1 and on Article 23 (paras 32.1-32.7 and 56.1-56.3)</li> <li>▪ OECD, The Application of the OECD Model Tax Convention to Partnerships (2009), available <a href="#">here</a>.</li> <li>▪ OECD, Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (2015), pp. 139-149, available <a href="#">here</a>.</li> <li>▪ Case: <i>TD Securities (USA) LLC v. The Queen</i>, 2010 TCC 186 (available <a href="#">here</a>).</li> </ul>
14	Apr. 30	Tu., 9-10.50 a.m. FH 210	<p><b>Multilateral Instrument (MLI)</b></p> <ul style="list-style-type: none"> <li>▪ Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (2017), available <a href="#">here</a>.</li> <li>▪ OECD/G20 Inclusive Framework on BEPS: Progress Report July 2017-June 2018, available <a href="#">here</a>.</li> </ul>