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Summary

This policy brief makes the following key points:

- The Mutual Agreement Procedure (**MAP**) is the standard mechanism for resolving international tax disputes under tax treaties. A taxpayer can initiate the MAP where there is potential double taxation not in accordance with the tax treaty.
- The resolution of MAP cases requires cooperation of the Competent Authority from each of the states party to the tax treaty, usually the Commissioner of Taxation or their delegate in each country. The MAP is a confidential process between the Competent Authorities which involves little or no taxpayer participation after it is initiated.
- The G20/OECD Base Erosion and Profit Shifting (**BEPS**) project acknowledged that the BEPS Actions may lead to more double taxation and international tax disputes between governments, for example by applying transfer pricing rules differently. Dispute resolution procedure by MAP needs improvement to ensure disputes between states are fully resolved in a timely manner.
- The BEPS Action 14 report recommended minimum standards and best practices for member countries in the Inclusive Framework to improve the MAP system and facilitate the timely resolution of treaty-related double taxation disputes.
- Member countries of the Inclusive Framework agreed to participate in a two-stage peer review and reporting process so that government compliance with Action 14 can be monitored and evaluated. To assist in the peer review, the OECD agreed to report more detailed aggregate statistics on MAP disputes.
- The Action 14 stage 1 review was completed for 84 jurisdictions in February 2021 and stage 2 is currently underway. The review shows that take-up of the Action 14 recommendations has varied around the globe.
- Australia has adopted up most of the Action 14 recommendations about MAP and is actively trying to meet the minimum standard.
- To encourage timely dispute resolution, mandatory binding arbitration is proposed by the OECD and it is gradually being adopted in more countries around the world (see Policy Brief 12/2021).
- The future design and operation of the international tax system will require effective dispute resolution to ensure certainty and prevent double taxation, especially for the Inclusive Framework Two-Pillar Solution. This calls for increased cooperation amongst governments in international taxation.

Introduction

This policy brief discusses the G20/OECD Base Erosion and Profit Shifting (**BEPS**) Action 14 on the Mutual Agreement Procedure (**MAP**). Action 14 is a minimum standard for the Inclusive Framework member states, as part of the 15-point Action plan of the BEPS Project released in 2015. The MAP is a dispute resolution mechanism to resolve treaty-related double taxation disputes between governments, that is established under bilateral tax treaties and in the OECD Model Tax Convention on Income and Capital (2017), Article 25.

This policy brief explains the problem of double taxation that may arise when governments interpret or apply a tax treaty in a different manner and discusses the problems that arise when treaty-related double taxation disputes are not resolved in a timely manner. The Action 14 recommendations for how Inclusive Framework member states should achieve the minimum standard are set out. The Action 14 report also proposes that countries may adopt mandatory binding arbitration to ensure a resolution of double taxation cases; this is discussed in Policy Brief 12/2021.

This policy brief then discusses how Action 14 has been implemented among Inclusive Framework member states globally and in Australia. It assesses the impact since 2015 of take-up of the BEPS Action 14 recommendations on the timely resolution of MAP cases. The successful implementation of Action 14 depends, to a large extent, upon cooperation between contracting states to a tax treaty, rather than on unilateral action by states. It then examines the next steps for dispute resolution and the MAP, including recommendations proposed by the OECD for further improvements.

1 What is BEPS?

The G20 declared the era of bank secrecy over in 2009 and later called for action to strengthen international taxation standards. The OECD responded with a 15-point Action Plan to address taxation issues with digitalisation (Action 1); and reform the international tax system to bring cohesion (Actions 2-5), restore substance (Actions 6-10), improve transparency (Actions 11-14), and develop a multilateral instrument (Action 15). This launched the international project to prevent Base Erosion (or double non-taxation) and Profit Shifting from jurisdictions where profitable activities take place: the BEPS Project.

OECD working groups developed technical policy proposals (released October 2015), recommending updates to the model tax convention, OECD-issued guidance, and domestic policy. From November 2016, the Multilateral Instrument would update more than half of the world's bilateral tax agreements.

OECD/G20 BEPS project participation is now almost global with the launch of multiple global forums and the Inclusive Framework (now 141 jurisdictions), membership of which requires commitment to the BEPS four 'minimum standards'. Having broadly addressed its mandate to implement the proposed package, the Inclusive Framework delivered in October 2021 Pillar-One (on a new nexus approach) and Pillar-Two (on a minimum global tax) as consensus proposals to tackle the digitalising global economy.

2 Action 14: Making Dispute Resolution Mechanisms More Effective

What is the issue?

There are more than 3,000 bilateral tax treaties between countries around the world. Most of these tax treaties contain an article that establishes a Mutual Agreement Procedure (**MAP**) to enable resolution of disputes between the signatories to these treaties. The language of MAP articles in most bilateral tax treaties is based on Article 25 of the OECD Model Tax Convention (2017). The first MAP article in the Model Tax Convention dates to 1979 and the latest version is 2017. The United Nations Model Double Tax Convention also contains Article 25 on MAP (with some variations).

The MAP allows a designated body from the government of each jurisdiction, known as the Competent Authority, to resolve treaty-related double taxation issues through mutually agreed interpretation of the applicable tax treaty. Usually, the Competent Authority is the Commissioner of Taxation, or delegate, in the tax authority of each country.

The MAP is initiated where a taxpayer presents a case to the Competent Authority of either contracting state party to the tax treaty, that the actions of one or both of the contracting states parties to the tax treaty result in taxation not in accordance with the treaty. Often, this will cause either juridical or economic double taxation. Juridical double taxation occurs where the same taxpayer is taxed in two jurisdictions on the same income. Economic double taxation occurs primarily in transfer pricing situations where two taxpayers (which are related entities) are taxed on the same profit in two separate jurisdictions.

Greater mobility of capital and labour across jurisdictions especially by multinational enterprises (**MNEs**) brings an increasing likelihood of double taxation, and raises the challenge for eliminating double taxation and ensuring the certainty of the international tax environment. It has been suggested that double taxation, or taxation not in accordance with tax treaties between jurisdictions, can have detrimental economic effects on the exchange of goods and services between jurisdictions and the movement of capital and technology. In 2016, a global survey conducted by Deloitte on BEPS revealed that out of the 600 respondents (with roles such as Tax Directors or CFOs of MNEs), 80% agreed or strongly agreed that double taxation will occur as a result of tax law changes by governments responding to BEPS.

The BEPS Action 14 Final Report (2015) states that ensuring effective dispute resolution is an integral part of the BEPS project. Improving dispute resolution mechanisms is established as a minimum standard for the Inclusive Framework on BEPS. Specifically, Action 14 aims to address the deficiencies of the current MAP system to ensure the timely resolution of treaty related double taxation disputes. These deficiencies are set out below.

Resolution of MAP cases

Currently, the Competent Authorities of states are not obliged to resolve disputes submitted for the MAP. This is because most tax treaties use the language of Article 25(2) of the OECD Model Tax Convention which states that the Competent Authorities of Contracting States shall 'endeavour' to resolve the case by mutual agreement (if the case appears justified and it cannot be resolved

unilaterally). Competent Authorities are also only required to 'endeavour' to resolve any difficulties or doubts in the interpretation of the tax treaty.

This is a problemat as taxpayers are potentially unable to obtain any relief for their issue, which may disappear into a 'black box' (Markham, 2015:13). Little incentive (apart from the general goal to achieve comity or cooperative relations between states parties to a treaty) exists for Competent Authorities to ensure a timely resolution is achieved (Coronado and van Staden, 2016).

Limited taxpayer involvement

In the current system, taxpayers have little engagement in or control over the dispute resolution process for MAP cases. After initiating the MAP procedure, taxpayers have no right to a hearing or to present evidence or argument to support their case, although they must provide information if states request it. Due to the limited involvement of taxpayers, some have expressed that MAP feels more like a 'joint audit' (Burnett, 2007: 179), where the Competent Authorities may leverage the promise of resolution to elicit more information from the taxpayer, rather than a dispute resolution mechanism.

How the Competent Authorities execute the MAP rules 'will be a big determination on how much pain taxpayers face'. The MAP may be seen by taxpayers as a 'creature' of the Competent Authorities which have the power to preside over the proceedings and decide on an outcome. The relationship between Competent Authorities of governments may not always be characterised as friendly camaraderie, and consequently treaty-related double taxation disputes often cannot be resolved by 'just talking it through' (Burnett, 2007: 180).

Timely resolution

Another concern raised about the MAP system is the timeliness of resolving disputes. The problems identified above of a lack of a mandate to resolve MAP cases and their resolution depending largely on cooperation between governments both contribute to the failure to resolve many MAP disputes in a timely fashion. This has led to a back-log of MAP disputes. At the start of the BEPS Action plan in 2013, the OECD identified 4566 open MAP cases, which was a 12.1% increase from the previous year and a 94.1% increase from 2006. It is a goal of the BEPS project, and participating states, to end the back-log and achieve timely processes and resolution of MAP disputes in future.

What does the OECD recommend?

The Action 14 Final Report sets out minimum standards and best practices for members of the Inclusive Framework to improve MAP and ensure efficient and timely resolution of treaty related double taxation disputes, preventing unintended double taxation. There are four terms of reference for the Action 14 minimum standard to which members of the Inclusive Framework are committed. These may be summarised as follows:

1. Address potential disputes by including a MAP provision in bilateral tax treaties (if not already included) and by implementing bilateral Advanced Pricing Arrangements to help prevent future disputes, especially concerning transfer pricing.
2. Improve availability and access to MAP in transfer pricing cases and publish guidance on how taxpayers may access and initiate MAP.
3. Aim to resolve MAP cases within an average timeframe of 24 months.
4. Implementation of agreements reached in MAP cases by the states parties to the relevant tax treaty on a timely basis.

The Action 14 recommendations may be implemented in part by countries adopting the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the Multilateral Instrument, or **MLI**) (see Policy Brief 15/2021).

The effectiveness of the MAP system depends upon a high degree of cooperation and transparency between the Competent Authorities of respective jurisdictions. Consequently, Action 14 aims to facilitate better co-ordination between domestic tax rules and international tax administration (Cooper, 2017). The minimum standards would be implemented on the basis of three principles to be adopted by member states.

First, treaty obligations relating to MAP should be carried out in good faith and MAP cases should be resolved in a timely manner. The Action 14 report recommended that member states commit to resolve MAP cases within an average time frame of 24 months. Taxpayers have a period of three years from the date when there is an action giving rise to taxation not in accordance with the applicable treaty to initiate a MAP request.

Second, administrative processes should promote the prevention of and timely resolution of treaty-related disputes. The Action 14 report recommends that the Competent Authority for MAP dispute resolution should be independent from the general tax administration. It also proposes that the Competent Authority should publish guidelines on how taxpayers can access the MAP system. The performance of resolution of MAP disputes should be measured by each Competent Authority collecting and supplying statistics about the time it takes to resolve MAP cases, the number of cases resolved and the consistency between MAP cases that involve similar facts and specific treaties.

The Action 14 report recommends that governments aim to enhance Competent Authority relationships by becoming members of the Forum on Tax Administration MAP forum. Currently, this forum consists of Tax Commissioners from 46 countries. The forum aims to ensure that each country can actively participate and collectively devise strategies that affect MAP for all countries. Participation in the MAP forum may provide a useful opportunity for discussion between countries with different tax policies and administrative styles, as Burnett (2007) has suggested.

Third, states should seek to improve accessibility of MAP for eligible taxpayers. This could include permitting a taxpayer to present their MAP case to the Competent Authority of either contracting state for a tax treaty, or to seek to implement a bilateral consultation process for cases where the Competent Authority of one state has refused the taxpayer's claim. In 2017, the OECD modified Article 25 of the Model Tax Convention to allow a taxpayer to present their case to the Competent Authority of either contracting state; this change may be gradually adopted by states as they update their bilateral tax treaties following the model. However, no further changes to the MAP process have been recommended in Action 14. Taxpayers still have a very limited role to play in the MAP other than providing information when requested by the Competent Authority.

Peer review and best practices for MAP

To progress BEPS Action 14, the OECD released a Public Discussion Draft on Action 14. There are two main points of difference between the recommendations in the Final Report and those suggested in the Discussion Draft, mainly in relation to enforcement of MAP improvements and binding dispute resolution processes. Some recommendations aimed at improving MAP were presented in the Final Report as best practices as opposed to minimum standards.

However, to improve enforcement, the Final Report recommended that members of the BEPS Inclusive Framework agree to a peer review process where their compliance with the standard is evaluated, and to report each jurisdiction's MAP statistics under the MAPS Statistics Reporting Framework annually. Given the 'soft law' nature of the minimum standard (Markham, 2015: 7), the addition of this peer review process and reporting framework serves the purpose of assessing compliance of jurisdictions against an objective set of criteria, and encourages compliance through creating peer pressure.

3 How has the Action Been Implemented Globally?

The BEPS Action 14 Final Report envisages an outcome where tax treaty disputes are resolved in a timely manner. By presenting some recommendations as best practices, the OECD is balancing the competing aims of sovereignty and cooperation, leaving the appropriateness of adopting the best practices to the Inclusive Framework member countries with different interests and values and degrees of power (Markham, 2015).

Nonetheless, he successful implementation of Action 14 depends largely upon cooperation between the Contracting States of bilateral tax treaties. The only obligation recommended by the Action 14 report that is capable of unilateral implementation is for states to include the updated version of Article 25(1)-(3) of the Model Tax Convention (2017) in their bilateral treaties. The proposed new language in the MLI for updating Article 25 states that the Competent Authorities of Contracting States 'shall endeavour to resolve by mutual agreement any doubts or difficulties arising as to the interpretation or application' of the applicable treaty.

Compliance measured through peer review and MAP statistics

The effectiveness of implementation of Action 14 is indicated in the results of the Inclusive Framework peer reviews and MAP reporting statistics collected by the OECD. Since 2015, all 141 members of the Inclusive Framework agreed to have their compliance with the Action 14 minimum standard reviewed and monitored through the peer review process and to report their MAP statistics under the MAPS Statistics Reporting Framework annually.

There are two stages to the peer review process. Stage 1 reports on a jurisdiction's framework on MAP and the implementation of the minimum standards, identifies strengths and any shortcomings and makes recommendations on how the shortcomings can be addressed. The review is done in batches and the first batch (which included Australia, among other countries) commenced in December 2016.

A first trance of the stage 1 Action 14 peer review concluded in February 2021 having examined 82 jurisdictions. It made more than 1750 recommendations to improve MAP for different countries. About two thirds of recommendations related to tax treaties that do not fully conform to Article 25 in the OECD Model Tax Convention. The review of the remaining 48 countries was deferred due to the COVID-19 pandemic and there is currently no schedule from the OECD to indicate when those countries will be reviewed.

In respect of the MAP system, several positive findings emerged from the stage 1 peer review. The OECD reported that there had been a significant increase in the number of MAP cases being closed.

The number of country MAP profiles published on the OECD website continues to increase and now covers more than 100 jurisdictions. Finally, an increasing number of jurisdictions have introduced or updated MAP guidance to provide taxpayers with clearer guidelines on MAP.

Stage 2 of the MAP peer review process will examine whether countries have adopted the recommendations identified in the stage 1 reports. This process is currently underway. Progress has been reported in several areas, including ratification of the MLI (which brings jurisdictions' bilateral tax treaties in line with the minimum standard) by 64 jurisdictions as of April 2021.

Arbitration and time periods for MAP

The Action 14 Discussion Draft had proposed that countries should ensure cases are resolved once they are in the MAP and proposed the adoption of mandatory binding arbitration (with limited scope). However, this proposal was watered down in in the Final Report, so that mandatory binding arbitration for MAP cases is listed as a best practice in the Final Report. This is because many governments continue to oppose arbitration in tax matters. Article 25(5) of the Model Tax Convention (2017) recognises the importance of tax sovereignty in the context of countries with different national laws, policies and administrative considerations.

Mandatory binding arbitration has been adopted in several bilateral tax treaties since the report was released in 2015. The United States has entered into or modified seven tax treaties with Belgium, Canada, France, Germany, Japan, Spain and Switzerland to include provisions on mandatory binding arbitration. The United Kingdom has also incorporated mandatory binding arbitration in several of its tax treaties.

The US and UK newly agreed MAP provisions provide a timeframe of 3 years for MAP resolution by the Competent Authorities, which is longer than the 2-year timeframe recommended by the Action 4 report. If a MAP dispute under these treaties is not resolved within three years, mandatory binding arbitration will commence. This suggests that it is the wish of the respective governments to encourage treaty-related double taxation dispute resolution through MAP where the Competent Authorities have more control, before arbitration is mandated.

4 How has Australia Implemented the Action?

Australia ratified the MLI in September 2018 and has included 43 out of 45 bilateral tax treaties as Covered Tax Agreements, which can be modified in line with the Action 14 minimum standards. The new Australian tax treaties with Israel (2019) and Germany (2015) were not included as Covered Tax Agreements for the MLI as they meet the Action 14 minimum standard without the need for modification.

Modification of a tax treaty by the MLI will depend upon both jurisdictions signing the MLI and including the relevant tax treaty. To date, some of Australia's treaty partners have not become signatories to the MLI (including the United States), and some have not listed their tax treaty with Australia as a covered tax agreement, including Austria, Switzerland and Sweden. As of November 2021, 10 of Australia's tax treaties (excluding Germany and Israel) will not be modified by the MLI based on current MLI positions and those jurisdictions not being a signatory to the MLI.

In terms of availability and access to MAP, Australia has opted in the MLI to modify all of its Covered Tax Agreements to reflect the updated language of the first sentence of Article 25(1) of the OECD

Model Tax Convention, which will allow taxpayers to present their MAP request to the Competent Authorities of either contracting state, rather than only to the Competent Authority of Australia. In terms of preventing disputes, 12 of Australia's tax treaties do not currently reflect the new language of Article 25(3) of OECD the Model Tax Convention.

The Australian Taxation Office (**ATO**) has updated its administrative guidance on MAP, following the Action 14 recommendations and has withdrawn former Tax Ruling TR 2000/16. The new guidance provides details about how taxpayers may access the MAP system and It also states that MAP cases will be justified when the likelihood of taxation not being in accordance with a tax treaty is 'probable' and not merely possible. The new guidance is available on the ATO website and addresses the issues with accessibility on MAP guidance identified through the peer review reports.

One important issue concerning MAP for disputes relating to Australia's tax treaties is that Australia excludes the operation of its General Anti-Avoidance Rule (**GAAR**) in Part IVA of the *Income Tax Assessment Act 1936* from the MAP dispute resolution process. The GAAR includes specific international anti-avoidance rules for BEPS activities of large multinational enterprises, the Multinational Anti-Avoidance Law (**MAAL**) and the Diverted Profits Tax (**DPT**). The GAAR prevails over the terms of tax treaties, as a matter of law (under s 4(2) of the *International Tax Agreements Act*).

The new ATO MAP guidance states that taxpayers may request MAP for tax that results from the application of the GAAR, including the MAAL and DPT. However, it observes that the GAAR 'prevails regardless of whether the resultant tax is contrary to the provisions of a treaty. As a result, we cannot resolve a case under MAP to the extent that it involves the application of Part IVA.' This means that tax assessments that result from application of the GAAR are not amenable to the MAP dispute resolution system.

Australia has worked to ensure timely resolution of most MAP disputes. It reports that between 2016 and 2018, there was an average timeframe of just over 16 months for the resolution of MAP cases, well within the 24-month timeframe recommended by the OECD. Australia is working to ensure that all agreements reached under MAP will be implemented on a timely basis as recommended under the Action 14 minimum standard through bilaterial negotiations or modifications through the MLI For 11 of its tax treaties.

5 Impact

While MAP resolutions have increased, reported data shows that the number of MAP cases being opened still outnumber MAP cases that are closed. At the beginning of 2019, the MAP inventory had 3721 open cases from 105 jurisdictions. In that year, 2690 MAP cases were received by the Competent Authorities of those jurisdictions and 1887 cases were closed. Of the 1887 cases that were closed, 57% were resolved by agreement to fully eliminate double taxation or fully resolve taxation not in accordance with the applicable tax treaty. In 15% of those cases, unilateral relief was granted. Six per cent of cases were found to not be justified, and a further 6% of cases were closed due to being denied MAP access, while 2% of total cases resulted in no agreement (including agreement to disagree).

As time passes, more governments have signed and ratified the MLI, leading to modification of the MAP Article 25, including in some instances establishment of arbitration. This is incrementally strengthening the MAP process in countries around the world.

In November 2020, the OECD invited comments from stakeholders around the world for input on the experience and effectiveness of MAP following the Action 14 report. The OECD also invited stakeholders to comment on what should be added to the minimum standards, and what should be elevated from best practices to minimum standards. The consultation received 33 responses from a range of stakeholders, including MNEs, accounting and law firms around the world. The submissions reveal that experience of taxpayers with MAP has varied between jurisdictions.

Some submissions express concern about a reluctance to engage in the MAP between the Competent Authorities of some jurisdictions. Submissions also commented that they would welcome more taxpayer participation during the fact finding and negotiation phase of the MAP. This concern reflects the position of the current MAP system where taxpayers have little input or control over the outcome of their case.

There was a consensus amongst respondent taxpayers that the publication of resolutions to MAP cases (on an anonymous basis) would be useful to create guidance to inform tax authorities and taxpayers on accepted interpretations of tax treaties, and thereby improve certainty. It was suggestd that thismay also reduce the number of MAP cases being opened. Alternatively, it was suggested that Competent Authorities could develop agreed benchmark principles within regional groupings based on an analysis of past settled cases. It was noted that this approach has worked successfully between the US and Canada.

Respondents generally expressed a preference for the use of mandatory binding arbitration in MAP cases in order to improve certainty. It was noted that there is limited public information available on the experience of arbitration, one intended effect of the adoption of mandatory binding arbitration for cases that are not resolved through MAP is to enforce timeliness of dispute resolution, as a deterrence measure (Rosenbloom, 2016). The arbitration provision acts as an incentive for governments to resolve MAP cases preventing the need for external intervention through arbitration.

6 What comes next?

The Inclusive Framework of 141 countries and the OECD continue to work on improving the mechanisms for resolving international tax disputes. The United Nations has also provided guidance on MAP and is seeking to encourage training and engagement in MAP for governments adopting the UN Model Convention.

In its 2020 public consultation document about Action 14, the OECD outlined several proposals that it seeks to implement to further improve the MAP. The proposals include, among others, the introduction of mandatory training for the tax authorities of member states on international tax matters to reduce the number of cases that enter MAP, and a legal framework to ensure implementation of all MAP agreements, notwithstanding domestic time limits.

The OECD proposes to improve the MAP statistical reporting framework, which would require member states to report additional data on pending or closed MAP cases. This will enable reporting of the time taken to close specific types of cases, and statistics on other relevant matters that impact MAP, such as Advanced Pricing Arrangements.

The number of treaty-related double taxation disputes where Competent Authorities are unable to reach agreement may continue to increase (Markham, 2015). Although compliance with Action 14 is encouraged through peer pressure imposed through the review process, there are no concrete consequences for a lack of compliance. Achievement of timely resolution of treaty-related double

taxation disputes relies on cooperation between jurisdictions in updating tax treaties, ratifying the MLI and engaging in good faith communication between Competent Authorities to resolve disputes. The Action 14 minimum standards are a 'modest, incremental step towards the ultimate incorporation of mandatory binding arbitration' (Christians, 2016: 1638) or other dispute resolution process.

The future design of the international tax system will require effective dispute resolution to prevent double taxation, including for the Inclusive Framework Two-Pillar Solution. This requires greater cooperation amongst governments in international taxation. It is likely that mandatory binding arbitration or another form of binding dispute resolution system will become a more concrete minimum standard in the future.

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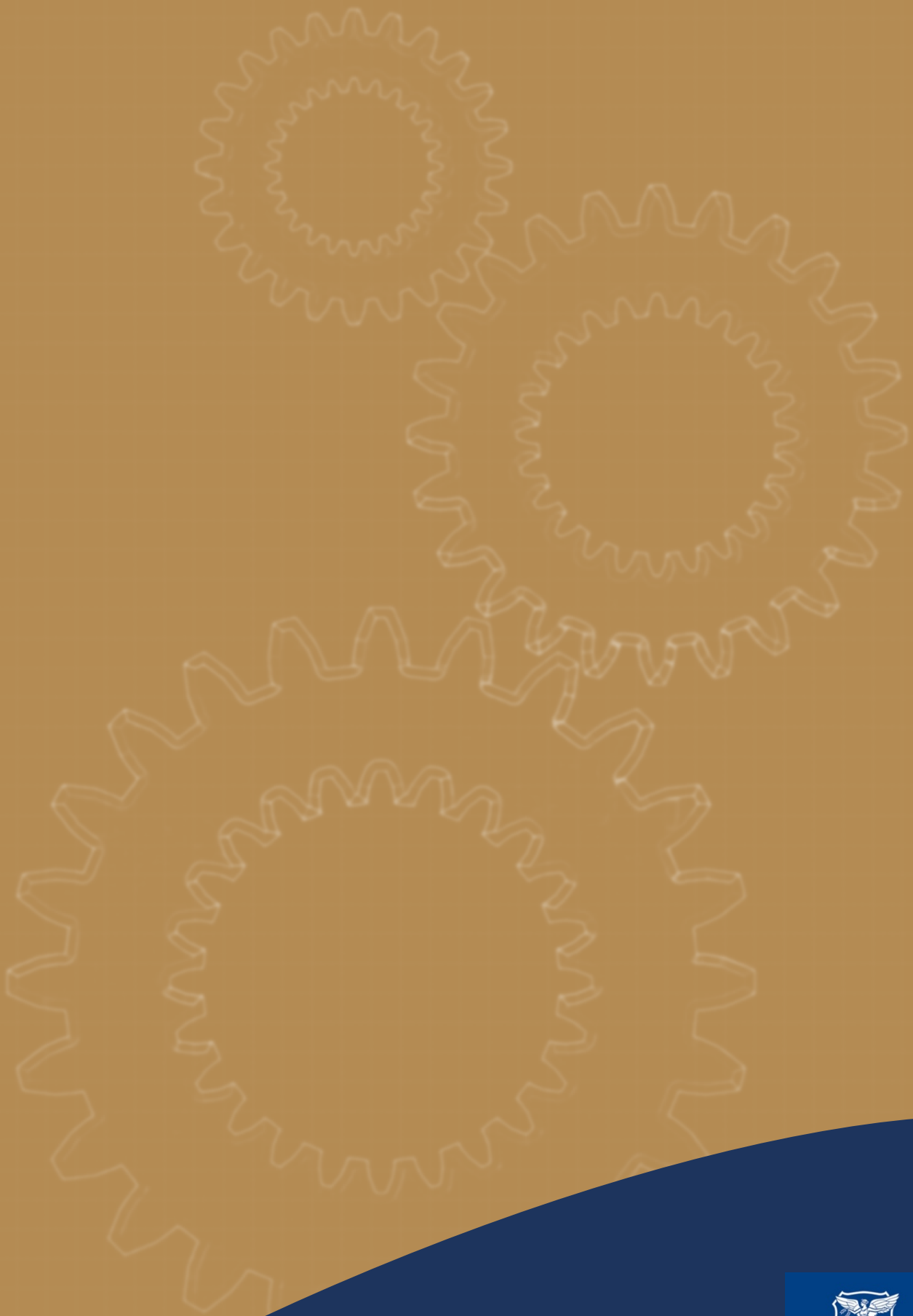

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