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Summary

This policy brief makes the following key points:

- The G20/OECD Base Erosion and Profit Shifting (**BEPS**) Project is an international initiative intended to strengthen the international tax system through the adoption of a 15 point plan, and the 2021 Pillar One and Pillar Two consensus proposals.
- BEPS Action 14 recommends mandatory binding arbitration as best practice under the Action 14 of the G20/OECD Base Erosion and Profit Shifting (BEPS) project, to supplement the Mutual Agreement Procedure (MAP) as a dispute resolution mechanism for treaty-related double tax disputes (see Policy Brief 11/2021 on MAP).
- The Multilateral Instrument (MLI) established under Action 15 of the BEPS Action Plan includes optional articles for mandatory binding arbitration for states that adopt the MLI for their tax treaties (see Policy Brief 13/2021 on the MLI).
- Jurisdictions may choose to adopt mandatory binding arbitration either through opting-in to the relevant articles under the MLI or through negotiating and modifying bilateral treaties.
- Jurisdictions that adopt mandatory binding arbitration may choose to adopt either baseball arbitration where there is little taxpayer involvement, or independent opinion arbitration where taxpayers may be able to participate in the determination by giving evidence.
- The intended effect of including mandatory binding arbitration in bilateral tax treaties is to provide an incentive for prompt resolution of MAP cases, when the Competent Authorities of each jurisdiction have the power to agree a resolution, before the case is referred to arbitration.
- Mandatory binding arbitration has become more widely adopted by states for their tax treaties around the world, but is still far from globally accepted. It is required for all European Union (EU) member states and is adopted by a majority of OECD member states but has not been adopted in many other countries globally.
- Mandatory binding arbitration may become part of the minimum standard in the future in order to ensure the timely resolution of treaty-related double taxation disputes.

Introduction

The G20/OECD Base Erosion and Profit Shifting (**BEPS**) Project is an initiative intended to strengthen the international tax system through the adoption of a 15 point plan, and the 2021 Pillar One and Pillar Two consensus proposals. This policy brief discusses mandatory binding arbitration, which is one aspect of BEPS Action 14 concerning the Mutual Agreement Procedure (**MAP**) for treaty-related taxation disputes between countries. BEPS Action 14 recommends mandatory binding arbitration to accompany improved mutual agreement procedures, to help to ensure certainty and minimise disputes in a post-BEPS world. The MAP process and Action 14 recommendations are discussed in Policy Brief 11/2021.

This policy brief explains mandatory binding arbitration and the different arbitration methods recommended by the Action 14 report. It then discusses how countries may implement arbitration in their bilateral tax treaties. The brief then examines the approach to arbitration of different jurisdictions, specifically the United States (**US**), member states of the European Union (**EU**), Australia, Japan and India, and considers whether there has been any impact of the introduction of arbitration for taxpayers. Finally, this brief suggests that mandatory binding arbitration may form part of a BEPS minimum standard under Action 14 in future.

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 139 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: Mandatory Binding Arbitration

What is the issue?

Disputes may arise under bilateral tax treaties between two jurisdictions, where a taxpayer argues that double taxation has resulted from the two jurisdictions as a result of applying their domestic tax law and treaty provisions to a transaction. One issue with MAP, as explained in Policy Brief 11/2021, is that some disputes are not resolved in a timely manner.

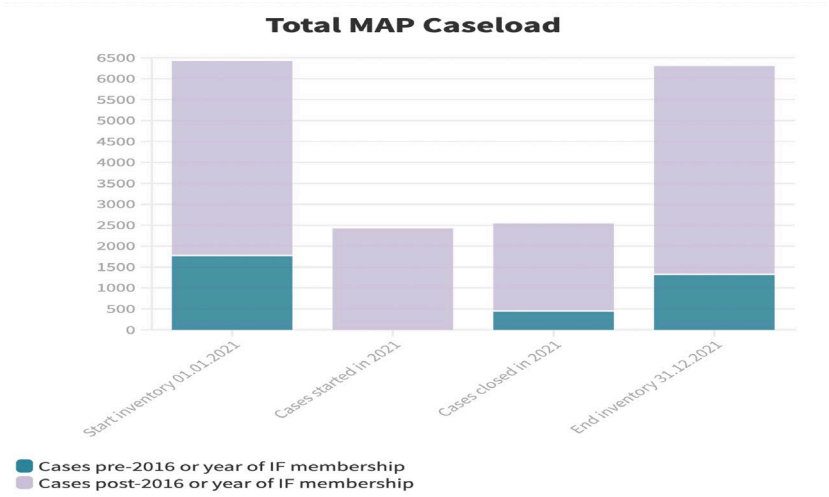
Dispute resolution under the MAP requires designated bodies from the respective jurisdictions to a double taxation dispute, known as the Competent Authorities, to negotiate to resolve the application and interpretation of the relevant tax treaty. The BEPS Action 14 Final Report recommends mandatory binding arbitration as a best practice to supplement the MAP, which is the main dispute process for tax treaty-related disputes.

BEPS Action 14 recommends improvements to MAP as a BEPS minimum standard for countries that are members of the Inclusive Framework, or signatories to the Multilateral Instrument (MLI). It is not compulsory for members of the Inclusive Framework to adopt mandatory binding arbitration. The intended effect of arbitration is not to replace MAP, but to supplement MAP and provide an incentive for the prompt resolution of treaty-related double taxation disputes, with a referral to arbitration being a last resort for unresolved MAP cases.

As explained in Policy Brief 11/2021, a common issue with MAP is that cases raised by taxpayers may not be resolved in a timely manner, or at all. The contributing factors for this issue are, among other things, that the Competent Authorities of each jurisdiction are not obliged under the tax treaty to come to a resolution. The BEPS Action 14 Final Report made recommendations to address the timely resolution of treaty-related double taxation disputes including establishing minimum standards for the MAP. Members of the BEPS Inclusive Framework are required to commit to Action 14 and to have their compliance with improved MAP processes measured through a peer monitoring system.

At the end of 2021, over 6000 MAP cases remained unresolved globally, including a substantial backlog from prior years. There are some indications that MAP performance is improving; the total number of unresolved cases at the end of 2021 decreased by 120 as a result of 2543 cases being closed in 2021.

Figure 1



Source: OECD, MAP Statistics for 2021, Figure 1

What does the OECD Recommend?

Bilateral tax treaties around the world are based on either the OECD Model Tax Convention or the United Nations (**UN**) Model Tax Convention. In 2008, the OECD inserted a new clause into its Model Tax Convention, Article 25(5), addressing arbitration for cases that are not resolved through MAP. OECD Model Article 25(5) provides that where the competent authorities of the contracting states are unable to reach an agreement to resolve a MAP case:

> "within two years from the presentation of the case to the competent authority of the other Contracting State, any unresolved issues arising from the case shall be submitted to arbitration if the person so requests."

Under this provision, the taxpayer is permitted not to accept the arbitration decision but would, presumably, thereby have to accept the double taxation under the treaty, as Article 25(5) continued:

> "Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States."

This Model Article provides a dispute resolution mechanism, with the aim of ensuring timely resolution of double taxation disputes; consequently arbitration acts as 'a supplement' (Nowland, 2014, 190) where the MAP fails.

Countries may choose whether to incorporate this provision into their tax treaties, on a discretionary basis (Markham, 2014). This reflects a general recognition that tax sovereignty is crucial for government operations (Nowland, 2014). This position is evident in the BEPS Action 14 Final Report.

Since the BEPS project, states may also choose to adopt arbitration in their bilateral tax treaty networks through ratifying the Multilateral Instrument (**MLI**) which implements tax treaty reforms arising out of the BEPS project. More detail on the MLI is in Policy Brief 13/2021.

Specifically, Part VI (Articles 18-26) of the MLI are the optional Articles of the MLI about arbitration. Jurisdictions may choose to opt-in to Part VI and may nominate which of their existing tax treaties are to be updated to include Part VI. Arbitration will only become operational between two jurisdictions where both have either adopted the Article 25(5) Model provision in their tax treaty, or both have ratified the MLI including Part VI, and the same type of arbitration, and have designated the bilateral tax treaty between those jurisdictions to be a covered agreement.

Two types of mandatory binding arbitration

The MLI proposes two alternative types of arbitration that countries may adopt under Article 23, being either:

1. Baseball or Final Offer arbitration, or
2. Independent Opinion Arbitration.

Where jurisdictions choose to nominate certain tax treaties under the MLI and opt-in to the relevant arbitration provisions, they can also make reservations and reserve certain issues from arbitration, as in the case of Australia, discussed below.

Under Baseball, or Final Offer, arbitration, an arbitrator, or arbitration panel, is appointed. The respective Competent Authorities to a MAP case are each required to submit a proposed resolution

for all outstanding issues in the dispute to the arbitrator. Each proposal will also include the expected monetary amount of tax owed and the maximum rate of tax to be charged under the tax treaty dispute. Once each Competent Authority has submitted its proposal, the appointed arbitration panel will consider and select between the two proposal its preferred outcome for each unresolved issue relating to the MAP case.

In contrast, under Independent Opinion arbitration, each Competent Authority will provide all of the relevant information about the matter to the appointed arbitration panel for consideration. The arbitration panel will then make a final decision by majority which is binding on both states.

Where countries choose to adopt mandatory binding arbitration in their bilateral tax treaties or through selecting a relevant treaty as a Covered Tax Agreement (**CTA**) under the MLI, the effect is twofold. First, the legal obligation for cases to be referred to arbitration provides an incentive for the Competent Authorities to reach a mutually agreed outcome within the time period specified in the tax treaty (usually 2 years) while the jurisdictions still retain their decision-making power. Second, the availability of arbitration at the request of the taxpayer ensures affected taxpayers receive a certain outcome within a certain timeframe (Nowland, 2014).

Part VI of the MLI provides only a 'skeleton' of each method for the arbitration process. It is expected that governments which adopt mandatory binding arbitration will jointly formulate a memorandum of understanding (**MoU**) that sets out detailed rules and procedures for the arbitration process.

There is little involvement of affected taxpayers during the baseball arbitration process. However, taxpayers will typically 'side' with one of the Competent Authorities, whose proposal they favour over the other (Burnett, 2007). There may be more involvement of taxpayers in Independent Opinion Arbitration and the MoU may set out any additional procedural rules for taxpayer involvement. For example, the MoU may outline rules about whether taxpayers will be able to participate to make formal submissions or whether examination-in-chief and cross-examination will be permitted.

3 How has the Action Been Implemented Globally?

The choice to incorporate mandatory binding arbitration, and the type of arbitration, is at the discretion of each state, so implementation varies globally. This part briefly outlines the approach to arbitration of different jurisdictions, including the US, the EU, Australia, Japan and India.

United States

Traditionally, the US Senate and academics voiced concerns about arbitration, stating that the process effectively delegates the determination of taxpayer liability to the arbitration panel, which may be an 'erosion of sovereign power' (Rosenbloom, 2014). The US is not a party to the MLI and the published US Model Tax Convention does not contain an equivalent provision to OECD Model Article 25(5) on arbitration.

However, a combination of support from the business community, consideration of arbitration experience in other countries and the experience of arbitration in US in other areas of law led to a change in this position. Since 2007, the US has negotiated and entered into bilateral tax treaties that provide for mandatory binding arbitration including with Germany, Belgium, France, Canada and Switzerland. The US also has adopted bilateral tax treaties that provide for voluntary, non-compulsory arbitration such as the treaty with Mexico, where a matter may only be referred to arbitration subject to consent from the taxpayer and both competent authorities. In these treaties, the US has adopted the baseball arbitration process, which means there is little taxpayer involvement in the process.

The arbitration article adopted in US tax treaties permits arbitration for cases where the competent authorities 'have endeavoured but are unable to reach a *complete* agreement in a case', whereas the OECD Model Tax Convention uses the language of 'unresolved issues.' (Pit, 2014). Hence, under US bilateral tax treaties that adopt arbitration, cases can be referred to arbitration even if the competent authorities have come to a partial agreement on some issues.

European Union

Since 1990, the EU has adopted some form of binding arbitration on tax disputes. In its first iteration, the EU Arbitration Convention was mandatory for all member states for cases that are unresolved through MAP processes under their bilateral tax treaties, with a specific focus on transfer pricing and permanent establishment issues. It appears that double taxation issues in the EU were relatively uncommon due to 'economic integration of the European Union' (Nowland, 2014).

Since the BEPS project, to further improve dispute resolution, all member states of the EU have now adopted the EU Council Directive on Tax Dispute Resolution Mechanisms in the European Union (2017). The Council Directive supplements the EU Arbitration Convention and applies to all intra-EU tax treaty related disputes (Schwartz 2017). The Directive sets a uniform rule for all disputes involving the application and interpretation of bilateral tax treaties for double taxation disputes, and expressly contemplating disputes that involve multiple states. It sets a timeframe of 18 months for the arbitration and follows the independent opinion arbitration process. Consequently, the provisions on arbitration in the MLI are not relevant for intra-EU tax disputes, but may still be important for tax treaties between EU member states and other countries around the world.

Japan

An example of a state that has adopted mandatory binding arbitration under the MLI for some of its tax treaties is Japan. Japan has ratified the MLI and has selected its bilateral tax treaty with Australia as a CTA under the MLI. Australia has done the same, and both Japan and Australia have opted into the MLI arbitration provisions.

However, mandatory binding arbitration is still not available under the Australia-Japan tax treaty as modified by the MLI. This is because Japan has selected the Independent Opinion process for arbitration, whereas Australia has selected baseball arbitration (see discussion below). There is thus a mismatch between the process selected by Australia for its tax treaty with Japan. A similar issue arises for the Australia-Malta bilateral tax treaty.

India

India is an example of a jurisdiction that does not adopt arbitration, despite its large international trading and investment economy and wide treaty network. India has more than 100 bilateral tax treaties and almost all of its treaties contain an article for dispute resolution by the MAP (Goel, 2017).

At the G20 meeting in Cairns, Australia in September 2014, India's Minister of Finance for Stated reiterated their position and stated that mandatory binding arbitration 'not only impinges on the sovereign rights of developing countries in taxation, but will also limit the ability of the developing countries to apply their domestic laws for taxing non-residents and foreign companies.' It is not clear whether India would ever change its approach to mandatory binding arbitration. In future, the non-compulsory approach of arbitration recommended by OECD may lessen sovereignty concerns.

4 How has Australia Implemented the Action?

Australia's response to mandatory binding arbitration was traditionally 'lukewarm' (Cooper 2017). Australia has previously rejected an arbitration clause even in tax treaties with state that have significant investment ties in Australia including the US (2003), the United Kingdom (2003), and Japan (2008). This pattern continued after the update of the OECD Model Convention. Arbitration was excluded from tax treaty negotiations (or renegotiations) with Singapore (2010), Malaysia (2011), Chile (2013), India (2013), Turkey (2013) and Belgium (2014).

However, during the BEPS project and especially following the release of the Action 14 Final Report, the Australian Government has changed its position. The change in approach is reflected in Australia's tax treaty with Germany (signed in 2015 and entered into force in December 2016) and its adoption of Part IV of the MLI. The Australia-Germany tax treaty includes arbitration for 'any unresolved issues' following the MAP and provides that the decision from arbitration will be binding on both Contracting States unless the taxpayer disagrees.

The Australian Treasury has stated that Part IV of the MLI is consistent with Australia's commitment to implementing arbitration in its bilateral tax treaties. By 2019, 22 of Australia's Covered Tax Agreements nominated under the MLI include mandatory binding arbitration. It is expected that this number will increase over time as Australia's treaty partner countries undergo domestic law changes to ratify the MLI. In all cases, Australia has chosen to adopt the 'baseball' or 'final offer' arbitration process as the default process to apply to its tax treaties that provide for mandatory binding arbitration. This means that arbitration will not be possible under tax treaties with a jurisdiction that preferred the Independent Opinion process, as is the case with Japan (discussed above).

Cooper (2017) has suggested that this new approach may become 'standard treaty policy' for Australia. However, in practice this will be determined on a case by case basis, and depends on the position of the other state for a treaty negotiation. The tax treaty with Israel signed in March 2019 (entered into force January 2020) did not include the same mandatory binding arbitration provisions within the MAP article. However, the Australia-Iceland tax treaty signed on 12 October 2022 includes mandatory binding arbitration provisions for any issues that remain unresolved from MAP.

In 2022, Australia's treaty partners who have ratified the MLI but have not opted in to mandatory binding arbitration include China, Malaysia, Romania and South Africa. The most recent tax treaties to be modified by the MLI to provide mandatory binding arbitration are the Australia-Hungary and Australia-Spain treaties.

Finally, Australia has opted into the MLI articles that reserve some MAP issues from the reach of arbitration. Most controversially, Australia reserves the right to apply its domestic General Anti-Avoidance Rule in Part IVA of the *Income Tax Assessment Act 1936 (Cth)*, including anti-BEPS rules the Multinational Anti-Avoidance Law and Diverted Profits Tax, without mandatory binding arbitration. Arbitration is also not available where the dispute is subject to a decision by a court or tribunal, where arbitration would otherwise cause an existing arbitration process to terminate, or where taxpayers or their advisors breach confidentiality.

5 Impact

Mandatory binding arbitration for unresolved MAP cases is intended to benefit the taxpayer to ensure that there is resolution of double taxation by a neutral and independent panel of arbitrators (Salehifar, 2020). For states, the inclusion of arbitration in DTAs is intended to reduce administrative and legal costs and bring states to the table to resolve MAP disputes and prevent lengthy delays. This may also assist to ensure that tax administrators from politically or economically weaker countries are not at a disadvantage (Salehifar, 2020).

There is little empirical information available about the process of arbitration as it is intended to be confidential, and in any event, it appears to be rarely used. Nonetheless, it seems to be achieving the intended effect to provide an incentive for competent authorities to reach a decision within a 2-year period. For example, it has been observed in relation to the US where mandatory binding arbitration was introduced over 13 years ago, that some complex MAP cases which have lasted several years were resolved without having to be referred to arbitration once mandatory binding arbitration provisions became effective (Rosenbloom, 2014).

6 What comes next?

As international tax rules change pursuant to the BEPS project, the number of treaty-related double taxation disputes where competent authorities are unable to reach an agreement seems likely to increase (Markham, 2015). The achievement of timely resolution of such disputes relies not only on unilateral change by states, but on cooperation between jurisdictions in ratifying the MLI and good faith exchanges between competent authorities .

Compliance with BEPS Action 14, including adoption of arbitration, is encouraged through peer pressure imposed through the review process but there are no concrete consequences for a lack of compliance. The current minimum standard may therefore be only a modest, incremental step toward mandatory binding arbitration forming part of the minimum standard in the future (Christians 2016).

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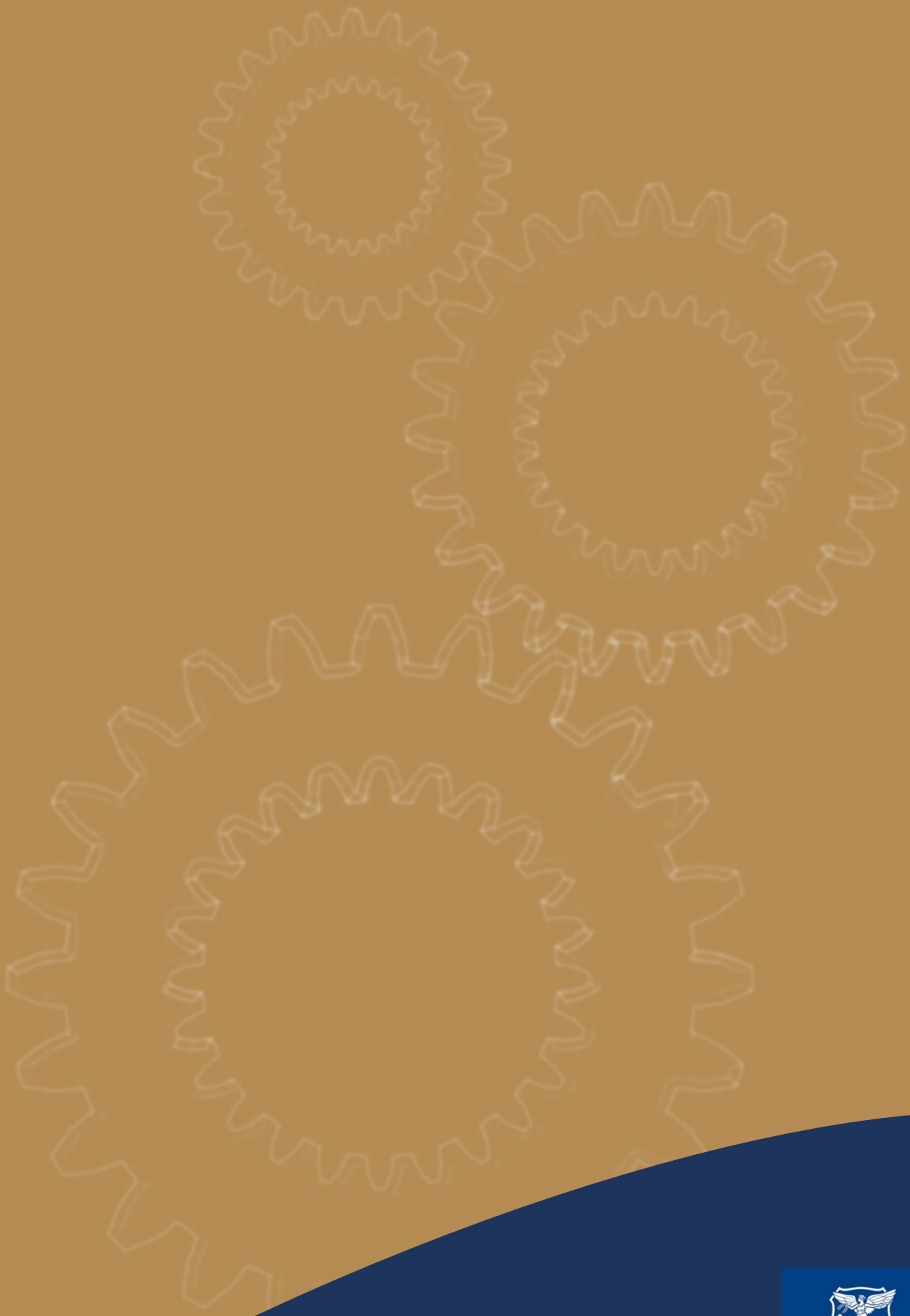

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