

Samsung Electronics Co., Ltd. v. United States  
Court No. 13-00099, Slip Op. 14-39 (April 11, 2014)  
**FINAL RESULTS OF REDETERMINATION**  
**PURSUANT TO COURT ORDER**

**I. SUMMARY**

The U.S. Department of Commerce (the Department) prepared these final results of redetermination (Final Remand Results) pursuant to the remand order of the U.S. Court of International Trade (the “Court” or “CIT”) in *Samsung*.<sup>1</sup> This remand pertains to one issue in the countervailing duty investigation of large residential washers (LRWs) from the Republic of Korea (Korea).<sup>2</sup>

In *Samsung*, the Court remanded one issue concerning the Department’s determination that income tax credits received under Article 10(1)(3) of the Restriction of Special Taxation Act (RSTA) constituted a countervailable subsidy because they were, *inter alia*, specific within the meaning of section 771(5A)(D)(iii)(III) of the Tariff Act of 1930, as amended (the Act). The Court ordered the Department to reconsider its determination that Samsung Electronics Co., Ltd. (Samsung) received a disproportionately large benefit in light of the facts of this case. For these Final Remand Results, the Department further explained why Samsung’s share of benefits under RSTA Article 10(1)(3) is disproportionate when compared to other users of the program.

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<sup>1</sup> See *Samsung Electronics Co., Ltd. v. United States*, 973 F. Supp. 2d 1321 (CIT 2014) (*Samsung*).

<sup>2</sup> See *Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 75975 (December 26, 2012) (*Final Determination*).

## II. REMANDED ISSUE

### A. Background

In the *Final Determination*, the Department found that RSTA Article 10(1)(3) was specific within the meaning of section 771(5A)(D)(iii)(III) of the Act because Samsung received a disproportionately large percentage (*i.e.*, [ ] percent) of the total tax credits granted to over 11,000 beneficiaries under the program, while the average recipient received only [ ] percent.<sup>3</sup>

Following the Court's remand order, the Department issued three questionnaires to the Government of Korea (GOK) requesting additional information regarding the beneficiaries and the provision of benefits under RSTA Article 10(1)(3).<sup>4</sup> The GOK submitted timely responses on May 30, June 13, and July 1, 2014 (the GOK's First Remand Response, Second Remand Response, and Third Remand Response, respectively). While the GOK did not provide an adequate response to all of the questions, it did provide certain information with respect to the aggregate amount of benefits received by the 100 largest recipients, including Samsung, under RSTA Article 10(1)(3).

On July 22, 2014, the Department provided a draft redetermination to the parties in which it continued to find that Samsung received a disproportionate amount of the subsidy under RSTA Article 10(1)(3). The parties provided comments on July 29, 2014.<sup>5</sup> In response to these

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<sup>3</sup> See *Final Determination*, and accompanying Issues and Decision Memorandum (IDM) at 12 and 34-37; see also Memorandum to the File from Justin M. Neuman re: Calculations for Samsung Electronics Co., Ltd., dated December 18, 2012 (Samsung Final Calc Memo) at n.3 and Attachment 7. The Department relied on tax returns filed in 2010 for tax year 2009 because data for returns filed in 2011 were not available. *Final Determination*, and accompanying IDM at 12.

<sup>4</sup> See the Department's letters to the GOK dated May 16, June 9, and June 24, 2014.

<sup>5</sup> See Letter from Samsung Electronics Co., Ltd. (Samsung) to the Honorable Penny S. Pritzker, "Re: Samsung's Comments on the Department's July 23, 2014 Draft Remand Results," dated July 29, 2014; see also Letter from Whirlpool Corporation (Whirlpool) to the Honorable Penny S. Pritzker, "Re: Large Residential Washers from Korea: Comments on the Draft Results of Redetermination Pursuant to Court Order, *Samsung Electronics Co., Ltd. v. United States*, Court No. 13-00099, Slip Op. 14-39 (April 11, 2014)," dated July 29, 2014.

comments and as described below, the Department continues to find that RSTA Article 10(1)(3) is specific pursuant to section 771(5A)(D)(iii)(III) of the Act.

## **B. Analysis**

Pursuant to the remand order, the Department reconsidered its determination with respect to the specificity of RSTA Article 10(1)(3). Accordingly, the Department is (1) clarifying its findings with respect to the statutory structure and formulas that determine the amount of a beneficiary's tax credit under RSTA Article 10(1)(3); (2) analyzing Samsung's share of benefits under Article 10(1)(3) relative to the amount received by the other 99 largest recipients of benefits under the program; and (3) analyzing Samsung's tax savings under RSTA Article 10(1)(3) relative to the tax savings that the other 99 largest recipients received in relation to their total tax liability. Based on each of these considerations, we continue to find that Samsung received a disproportionate share of benefits under RSTA Article 10(1)(3).

### **1. The RSTA 10(1)(3) Program**

In its decision, the Court found that the *Final Determination* did not adequately account for the fact that the GOK did not exercise discretion in awarding tax credits under RSTA Article 10(1)(3), but instead conferred the benefit according to a "standard pricing mechanism."<sup>6</sup> Accordingly, we revisit our findings with respect to how companies qualify for the tax program and how their ultimate tax credit amount is calculated.

As previously explained by the GOK, RSTA Article 10(1)(3) aims to facilitate Korean corporations' investment in their research and development activities, and thus boost the general national economic activities in all sectors.<sup>7</sup> The GOK also stated that all Korean corporations are eligible to utilize this program as long as they satisfy the requirements set forth in the

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<sup>6</sup> See *Samsung*, 973 F. Supp. 2d at 1326.

<sup>7</sup> See the GOK's April 9, 2012, Questionnaire Response (QR) at App. Vol. 108.

statute.<sup>8</sup> According to the GOK, over 11,000 Korean corporations received this tax credit in 2010.<sup>9</sup> Furthermore, the record indicates that Korea, as a member of the G-20, is one of the twenty major economies in the world.<sup>10</sup>

With these facts in mind, *i.e.*, that the tax credit is available to all Korean corporations in one of the world's largest economies, and that over 11,000 companies used the credit, the Department determined (and continues to find) that a single company receiving [ ] percent of all the program's total credits, compared to the average of [ ] percent, has received a disproportionately large amount of those credits within the meaning of section 771(5A)(D)(iii)(III) of the Act.<sup>11</sup> As stated in the *Preamble* to the CVD Regulations,

The {Statement of Administrative Action (SAA)} clearly indicates that the Department does not need to find "targeting" or "purposeful government action" to conclude that a domestic subsidy is specific." *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act {URAA}, H.R. DOC. 103-316, VOL. 8, at 932 (1994), ("{E}vidence of government intent to target or otherwise limit benefits would be irrelevant in *de facto* specificity analysis"). Thus, for example, the fact that users may be limited due to the inherent characteristics of what is being offered would not be a basis for finding the subsidy non-specific. *Id.*; S. REP. NO. 103-412 at 94 (1994).<sup>12</sup>

Therefore, under the statute, whether Samsung received [ ] percent of the total tax credits under this program because it is a large company or a company which heavily invests in research and

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<sup>8</sup> *See id.*

<sup>9</sup> *See id.* at App. Vol. 116.

<sup>10</sup> *See id.* at Ex. Gen-2 (*Korea's Fiscal Policy*, published by the Ministry of Strategy and Finance, Minister's Forward).

<sup>11</sup> During this remand proceeding, the GOK submitted information regarding the total number of corporate tax returns that was not previously on the record of this investigation. According to Section 8-3-2 of the *2011 Statistical Yearbook of National Tax*, which reflects the information for 2010, 11,764 companies used this tax credit. *See* the GOK's Third Remand Response at R-1. According to Section 8-1-1 of the *2011 Statistical Yearbook of National Tax*, there were 440,023 corporate tax returns filed for 2010. *See* the GOK's Third Remand Response at R-1. Because this information indicates that only 2.7 percent of corporate taxpayers used this subsidy program, the subsidy may be *de facto* specific within the meaning of section 771(5A)(D)(iii)(I) of the Act (concerning a limited number of users). However, because we are continuing to find that the program is *de facto* specific based on disproportionate use, we need not reach this question.

<sup>12</sup> *See Countervailing Duties*, 63 FR 65348, 65359 (November 25, 1998) (*Preamble*).

development is irrelevant to the Department's *de facto* specificity analysis, and our findings regarding Samsung's disproportionate receipt of benefits remains unchanged.

With respect to the role of discretion exercised by the GOK in granting RSTA Article 10(1)(3) tax credits, the Department considered this aspect of the program to the extent necessary under sections 771(5A)(D)(ii) and (iii)(IV) of the Act. Under section 771(5A)(D)(ii), a subsidy is not specific as a matter of law (*i.e.*, *de jure* specific), if: (1) eligibility for the subsidy is automatic; (2) the criteria or conditions for eligibility are strictly followed; and (3) the criteria or conditions are clearly set forth in the relevant statute, regulation, or other official document so as to be capable of verification. The criteria or conditions must be neutral and must not favor one enterprise or industry over others. If these criteria are met, then the subsidy program is not *de jure* specific. These criteria all relate to the exercise of discretion by the granting authority. However, these criteria are only relevant with respect to a *de jure* specificity analysis,<sup>13</sup> and the statute provides that a program that is not *de jure* specific may still be specific under a *de facto* analysis pursuant to section 771(5A)(D)(iii) of the Act.

Under section 771(5A)(D)(iii) of the Act, a program may be *de facto* specific if "one or more" of four factors exist, including if the granting authority's exercise of discretion in granting the subsidy "indicates that an enterprise or industry is favored over others."<sup>14</sup> However, the question of whether a granting authority exercises discretion at all is not necessarily determinative in the context of a *de facto* specificity analysis; in fact, the SAA states that the Department is to accord the least significance to the factor regarding the exercise of discretion.<sup>15</sup>

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<sup>13</sup> The SAA explicitly states that sections 771(5A)(D)(i) and (ii) cover *de jure* specificity, and that clause (ii) is a corollary of the *de jure* test. SAA at 930.

<sup>14</sup> See section 771(5A)(D)(iii)(IV) of the Act.

<sup>15</sup> SAA at 931.

The SAA also makes clear that the Department shall find *de facto* specificity if one or more of the factors exist.<sup>16</sup> Therefore, because the Department found the tax program *de facto* specific on the basis of disproportionate use pursuant to section 771(5A)(D)(iii)(III) of the Act, it was not necessary to address whether the GOK did or did not exercise discretion in granting benefits under this subsidy program.<sup>17</sup>

In addition to considering how the GOK's lack of discretion in granting RSTA Article 10(1)(3) tax credits impacts the specificity analysis, the Department also reconsidered how companies calculate the amount of the tax credit they claim under RSTA Article 10(1)(3), and how those calculations impact our understanding of the distribution of the program's benefits.

As recognized by the Court in its opinion, companies may claim an RSTA Article 10(1)(3) tax credit using one of two formulas: as a percentage of the difference between qualifying research and development expenses in the current tax year and the average of qualifying expenditures from the previous four years, or using a maximum percentage of total qualifying research and development expenses for the current tax year.<sup>18</sup> However, the Department does not consider these formulas to constitute a "standard pricing mechanism" as we have used the term in other countervailing duty cases.<sup>19</sup> Nevertheless, Samsung's previous statements that the program confers the same proportional or relative benefits on all recipients

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<sup>16</sup> *See id.*

<sup>17</sup> *See id.*; *see also* 19 CFR 351.502(a) and *Preamble*, 63 FR at 65355-56 ("{T}he Department may find a domestic subsidy to be specific based on the presence of a single *de facto* specificity factor. . . {O}ur analysis of the issue will stop if we determine that a single factor justifies a finding of specificity.").

<sup>18</sup> *See Samsung*, 973 F. Supp. 2d at 1324; *see also* the GOK's April 9, 2012 QR at App. Vol. 110.

<sup>19</sup> The concept of a "standard pricing mechanism" was developed with respect to the analysis of variable rates provided under an electricity program in the *Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada*, 57 FR 30946 (July 13, 1992). In *Magnesium*, the Department stated that "the first step the Department takes in analyzing the potential preferential provision of electricity – assuming a finding of specificity – is to compare the price charged with the applicable rate on the power company's non-specific rate schedule. If the amount of electricity purchased by a company is so great that the rate schedule is not applicable, we will examine whether the price charged is consistent with the power company's standard pricing mechanism applicable to such companies. If the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other industries which purchase comparable amounts of electricity, we would probably not find a countervailable subsidy."

are factually incorrect, and tax credits under RSTA Article 10(1)(3) are not, in fact, determined strictly on the basis of a company's qualifying investments in a given tax year.

At the outset, we clarify that the Department only considers “standard pricing mechanisms” to be relevant when analyzing programs involving the provision of a utility such as electricity—not for other subsidies involving other forms of government financial contributions. The concept of a standard pricing mechanism is important in analyzing a potential electricity program because we found, based on our long-standing experience with electricity programs, that it is the standard commercial practice of utility companies to set different prices based on the type and amount of consumption of electricity, and we have not countervailed utility rates solely because the rates are provided to large consumers.<sup>20</sup> This practice was addressed in *Bethlehem Steel* and is reflected in the Department's countervailing duty regulations.<sup>21</sup> Thus, to the extent that we have found that standard pricing mechanisms do not result in disproportionate distributions of a subsidy, this concept is not applicable here. Indeed, we do not consider the concept of “pricing” to be relevant to a tax credit subsidy, which does not involve the setting of prices.

With respect to variations in the calculation of the tax credit itself, the GOK reported that RSTA Article 10(1)(3) establishes different rates for small- and medium-sized enterprises (SMEs) versus larger companies. That is, under the first formula, SMEs may claim up to 50 percent, while larger corporations may claim only 40 percent; under the second formula, SMEs

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<sup>20</sup> See *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate From the Republic of Korea*, 64 FR 73176 (December 29, 1999) and accompanying IDM at Comment 11.

<sup>21</sup> See *Bethlehem Steel Corp. v. United States*, 140 F. Supp. 2d 1354, 1368-70 (CIT 2001); *Preamble*, 63 FR at 65378. It is clear from *Bethlehem* that the Court's reference to a “standard pricing mechanism” is with respect to the Department's established analysis of an electricity program. In fact, the Court specifically referenced *Magnesium from Canada*. The Preamble only discusses this practice with respect to the provision of goods or services for less than adequate remuneration and states that this type of analysis may be necessary for such goods or services as electricity, land leases, or water citing to *Magnesium from Canada*.

may claim up to 25 percent, while larger corporations are limited to a maximum of six percent.<sup>22</sup>

Thus, different types of companies receive different levels of tax credits under the program.

Furthermore, the calculation of the tax credit is based upon the increase in eligible investment in the current year from the average amount of eligible investments in the prior four years.

Therefore, companies making the identical amount of eligible investments would most likely receive different amounts of Article 10(1)(3) tax credits. (*See* Department's Position to Comment C, below, for further details on the calculation of these tax credits.)

Additionally, the GOK restricts the amount of the tax credit that a company may claim under the RSTA with the Minimum Tax Scheme. The purpose of this scheme is to limit the amount of tax reductions that a company may enjoy under the provisions of the RSTA to a certain ceiling.<sup>23</sup> If the total of the tax reductions for which a company applies under the RSTA exceeds the minimum tax rates established under the Minimum Tax Scheme, then the company cannot use any additional RSTA tax credits exceeding that limit.<sup>24</sup> During the years 2010 and 2011, the minimum tax rates set by the GOK ranged from seven to 14 percent based on whether a company was an SME, which had the lowest minimum tax rate, and on the amount of taxable income generated by a company.<sup>25</sup> Therefore, the implementation of the Minimum Tax Scheme also impacts the amount of benefit a company receives under the tax program. In Samsung's case, this meant applying only [ ] percent of the RSTA Article 10(1)(3) credit earned in 2010 to its tax liability while deferring the remainder, and at the same time using a significant RSTA

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<sup>22</sup> *See* the GOK's April 9, 2012 QR at App. Vol. 110.

<sup>23</sup> *See* the GOK's First Remand Response at 2-3.

<sup>24</sup> *See id.* at 3.

<sup>25</sup> *See id.*

Article 10(1)(3) credit carryover earned in the prior year.<sup>26</sup> Thus, the amount of the RSTA Article 10(1)(3) credit claimed by Samsung on its 2011 tax returns does *not* correspond directly to its share of all eligible spending on research and development in 2010, and there is no reason to assume that its RSTA Article 10(1)(3) credits from any tax year reflected the proportionality alleged by Samsung.

In short, although the structure of RSTA Article 10(1)(3) provides companies with standard formulas for calculating their tax credits, those formulas vary depending on the size of the company, and the resulting figures are potentially subject to further adjustment pursuant to the Minimum Tax Scheme. Thus, it is not accurate to characterize companies' shares of the total credits granted under RSTA Article 10(1)(3) as proportionate to their investment spending, because each of those shares will vary depending on the formula used, average amount of prior years' eligible investments, and the applicability of the Minimum Tax Scheme. Accordingly, we continue to find that it is appropriate to compare Samsung's share of that total to the average share of other program users, and we affirm our determination that Samsung received a disproportionately large amount of RSTA Article 10(1)(3) tax credits.

## **2. RSTA 10(1)(3) Benefits for the Largest 100 Recipients**

In addition to the above findings, the Department also considered the information submitted by the GOK concerning the largest 100 recipients, by taxable income, of RSTA Article

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<sup>26</sup> Samsung generated a credit in the amount of KRW [ ] under RTSA Article 10(1)(3) during the 2010 tax year but ultimately used KRW [ ] to reduce the amount of taxes paid. *See* Memorandum to the File from Justin Neuman and Myrna Lobo, "Verification of the Questionnaire Responses Submitted by Samsung Electronics Co., Ltd. (Samsung), Samsung Electronics Logistics (SEL), and Samsung Electronics Service (SES)," dated October 22, 2012 (Verification Report) at p. 15. Specifically, Samsung applied KRW [ ] of the credit earned in 2010 to its calculated tax liability for 2010 and the remainder of the generated tax credit was carried forward. *Id.* In addition, an amount of KRW [ ] in RSTA Article 10(1)(3) tax credits that were earned in a previous year was carried forward and applied to Samsung's 2010 tax liability. *Id.*

10(1)(3) tax credits. In *Samsung*, the Court noted its concern with the Department’s comparison of Samsung’s share of total RSTA Article 10(1)(3) credits to the average share.<sup>27</sup>

On remand, the Court stated that the Department is not barred from making that comparison, but that it must explain why such a comparison is indicative of disproportionality, given the structure of the tax program.<sup>28</sup> Accordingly, the Department requested the GOK to provide information on the amount of RSTA Article 10(1)(3) tax credits received by the 100 largest beneficiaries,<sup>29</sup> which allowed it to limit its comparison of the amount of the subsidy that Samsung received to only the largest program beneficiaries (as determined by taxable income). This analysis eliminates potential distortions arising from including *every* recipient in the comparison, regardless of size, by removing the vast majority of program recipients from the analysis and focusing on recipients in an economic position more similar to Samsung.<sup>30</sup>

The GOK reported that the aggregate amount of tax credits claimed under RSTA Article 10<sup>31</sup> by the largest 100 corporations was KRW [ ] in 2010 (covering tax year 2009), and KRW [ ] in 2011 (covering tax year 2010).<sup>32</sup> Samsung received KRW [ ] of that total in 2011.<sup>33</sup> The remaining total for the other 99 largest program recipients amounted to KRW [ ]. Thus, by itself, Samsung accounted for approximately [ ] percent of RSTA Article 10 tax credits granted to the top 100 recipients, and

<sup>27</sup> *Samsung*, 973 F. Supp. 2d at 1326.

<sup>28</sup> See *id.*, at 1328.

<sup>29</sup> See the GOK’s First Remand Response at 5-6.

<sup>30</sup> While the Department respectfully believes that this type of analysis is not required under the statute, we developed this methodology in order to ensure compliance with the Court’s remand instructions.

<sup>31</sup> In its response, the GOK explained that it could not segregate tax credits received under the three subsections of RSTA Article 10. Accordingly, the figures include aggregate amounts for RSTA Article 10(1)(1) (Research, Supply, or Workforce Development Investment Tax Deductions for “New Growth Engines”) and RSTA Article 10(1)(2) (Research, Supply, or Workforce Development Expenses Tax Deductions for “Core Technologies”) in addition to RSTA Article 10(1)(3). See the GOK’s First Remand Response at 6 and Second Remand Response at 1-2.

<sup>32</sup> See the GOK’s First Remand Response at 6.

<sup>33</sup> See the GOK April 9, 2012 QR at App. Vol. 109. The GOK did not provide information on Samsung’s use of tax credits for 2010 (covering tax year 2009) during the investigation. Therefore, our analysis is necessarily restricted to 2011.

its credit was equal to [ ] percent of the credits received by the other 99 largest recipients.<sup>34</sup>

Therefore, after conducting an analysis of disproportionality limited to only the largest 100 subsidy recipients, the Department continues to find that Samsung received a disproportionately large amount of the tax credit subsidies provided under RSTA Article 10(1)(3), within the meaning of section 771(5A)(D)(iii)(III) of the Act.

### **3. RSTA 10(1)(3) Tax Savings for the Largest 100 Recipients**

The Department also analyzed the record in a manner that measures Samsung's use of RSTA Article 10(1)(3) tax credits while adjusting for size. Pursuant to 19 CFR 351.509(a)(1), the Department considers that a benefit from an income tax credit only exists to the extent that the tax paid by a firm as a result of the tax credit is less than the tax the firm would have paid absent the tax credit. As such, the *benefit* under the RSTA Article 10(1)(3) tax credit is not the amount of the tax credit claimed but the amount of taxes not paid through the use of the tax credit. If a company had a net loss for the tax year, then it receives *no* benefit under the program, because it had zero taxes due in the first place. Therefore, even if that company qualified for the tax credit and calculated an amount of the tax credit, there would be no benefit because this company had a net loss and no taxable income. The Department used this understanding of a tax benefit to analyze Samsung's RSTA Article 10(1)(3) benefit as a percentage of its total tax liability and compared that rate of tax savings to the average savings of the remaining 99 largest program recipients.

The information provided in tax returns filed by corporations with the GOK includes the amount of taxable income and the calculated tax amount, along with the RSTA Article 10 tax credit that is used to reduce the calculated tax amount, *i.e.*, the benefit conferred under the

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<sup>34</sup> The Department notes that this percentage actually understates the overwhelming disproportionate use of the program by Samsung because, as stated above, the aggregate amount of the other 99 largest subsidy recipients includes the tax credits received under RSTA Article 10(1)(1) and 10(1)(2) in addition to 10(1)(3).

program. According to the tax return filed during the POI by Samsung, its taxable income was KRW [ ]; its calculated tax amount was KRW [ ]; and Samsung reduced that calculated tax amount with KRW [ ] in RSTA Article 10(1)(3) tax credits.<sup>35</sup> Therefore, the amount of the RSTA Article 10(1)(3) tax credits applied to the calculated tax amount reduced Samsung's taxes due by [ ] percent.

Because this methodology calculates the amount of benefit on a percentage basis of the tax reduction provided under the program, this methodology accounts for the size of a recipient. If, as Samsung argued, the amount of tax credits earned under RSTA Article 10(1)(3) is reflective of the size of a company, a smaller company would also have a relatively smaller amount of taxable income and calculated tax amount. By comparing the amount of tax savings from the RSTA Article 10 tax credit to the calculated tax, the size variable of program recipients is negated. For example, if one were to take the taxable income, calculated tax amount, and RSTA Article 10 tax credits used by Samsung during the POI and divided each by 10, 100, or 1,000, the applied methodology would still result in a benefit calculation of [ ] percent.

The Department requested that the GOK provide the aggregated taxable income and calculated tax amount for corporate tax filers that used the RSTA Article 10(1)(3) credit with the established size of revenue and size of asset categories that are listed in tables 8-2-1 and 8-2-2 of the *Statistical Yearbook of National Tax*. In the event that the GOK could not provide this information, the Department also requested that for the largest 100 corporations in which the RSTA Article 10(1)(3) tax credit was claimed, that the GOK provide the taxable income and calculated tax amount listed in each company's tax return, as well as the amount of the tax credit.

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<sup>35</sup> The amounts for Taxable Income and Calculated Tax Amount are from Samsung's Report on Corporation Taxable Income and Tax Amount at line items 32 and 33. See Samsung's April 9, 2012 QR at Ex. 5. The amount for Samsung's claimed RSTA Article 10(1)(3) tax credits is listed in the Verification Report at page 15.

In response to the Department's request, the GOK stated that it could not provide the tax information in the manner requested with respect to the credits claimed by corporations based on the size of revenue and size of total assets categories.<sup>36</sup> The GOK also stated that it could not provide the individual information on the largest 100 corporations due to confidentiality requirements within the tax law.<sup>37</sup> Instead, the GOK stated that it could provide the Department with the aggregate amount of the tax reductions under RSTA Article 10 claimed by the 100 largest corporate tax returns from 2008 to 2011.<sup>38</sup> Because the GOK was able to provide the aggregate amount for the largest 100 tax returns that claimed the RSTA Article 10 tax credits, we then requested that the GOK provide the aggregated taxable income and calculated tax amount for those program recipients. The GOK declined to provide this information, stating that it does not compile the information on the aggregate amount of taxable income and calculated tax amount with regard to individual tax returns.<sup>39</sup> However, following our second request for this information, the GOK did submit the aggregated RSTA Article 10 tax credits, taxable income and calculated tax amounts for the largest 100 companies selected on the basis of taxable incomes for 2010 and 2011.<sup>40</sup>

As noted above, the amount of tax savings provided to Samsung through the use of its RSTA Article 10(1)(3) tax credits reduced its taxes by [ ] percent in 2011.<sup>41</sup> According to the GOK's Third Remand Response, the top 100 companies using RSTA Article 10 tax credits in 2011 had an aggregated calculated tax amount of KRW [ ], and their aggregated

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<sup>36</sup> See the GOK's First Remand Response at 4-5.

<sup>37</sup> See *id.* at 5-6.

<sup>38</sup> See *id.* at 6.

<sup>39</sup> See the GOK's Second Remand Response.

<sup>40</sup> See the GOK's Third Remand Response at 3-4.

<sup>41</sup> See Samsung's April 9, 2012 QR at Ex. 5 and Verification Report at page 15.

RSTA Article 10 tax credits were KRW [                      ].<sup>42</sup> After removing Samsung's data from the aggregated tax credits and calculated tax amount for the largest 100 companies, we found that the remaining 99 companies applied KRW [                      ] in RSTA Article 10 tax credits to their calculated tax amount of KRW [                      ]. Thus, the tax reductions provided under this program to the other largest 99 companies combined, KRW [                      ], was *less than* the tax reduction provided solely to Samsung under this program (KRW [                      ]). The amount of taxes saved through the use of this tax credit by the other 99 largest companies resulted in a tax reduction of [     ] percent.<sup>43</sup> In contrast, Samsung reduced its tax liability by [     ] percent through the use of its RSTA Article 10(1)(3) tax credits, meaning that the tax benefit provided under this program to Samsung was over [     ] times greater than the combined tax benefit received by the other 99 largest companies under this program. Therefore, in conducting an analysis of disproportionality using this methodology limited to only the largest 100 subsidy recipients, we continue to find that Samsung received a disproportionately large amount of the tax credit subsidies provided under RSTA Article 10(1)(3), within the meaning of section 771(5A)(D)(iii)(III) of the Act.

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<sup>42</sup> The KRW [                      ] RSTA Article 10 tax credits reported in the GOK's Third Remand Response is different from the KRW [                      ] amount reported in the GOK's First Remand Response because the July 1 response is based on the top 100 companies selected on the basis of their taxable incomes, while the amount reported in the May 30 responses was determined by the top 100 companies selected on the basis of the amount of tax credits received.

<sup>43</sup> That is, the calculated tax reduction of KRW [                      ] divided by the calculated tax amount of KRW [                      ]. As with our analysis in the previous section, we note that this percentage actually understates the overwhelming disproportionate use of the program by Samsung because, while the tax credits used by Samsung in this analysis pertain only to the tax credits received under RSTA Article 10(1)(3), the aggregate amount of the other 99 largest subsidy recipients includes the tax credits received under all three subsections of RSTA Article 10. *See* the GOK's Second Remand Response at 2.

### **III. INTERESTED PARTY COMMENTS**

#### **A. Whether the GOK Provided Adequate Responses to the Department's Supplemental Questionnaires**

##### *Samsung Comments*

Samsung maintains that, in claiming that the GOK did not provide an adequate response to all of the questions that the Department issued in its three questionnaires, the Department did not identify which responses were inadequate or explain why they were inadequate. Thus, there is no basis for the Department's finding that Samsung received a disproportionately large amount of the tax credit based on the GOK's alleged failure to provide adequate responses.

##### *Whirlpool Comments*

Whirlpool maintains that the Department should clarify that the GOK failed to provide information that the Department requested regarding individual tax payers and any subset of tax payers. In response to the Court's concern that the Department did not request information about individual beneficiaries other than the mandatory respondents, by which the Court suggests that Department's original analysis was inadequate, Whirlpool urges the Department to highlight the GOK's refusal to provide additional relevant data to permit the type of comparison that may have put to rest any claim that Samsung did not receive a disproportionate share of the benefits. For example, Whirlpool suggests, the GOK did not provide information on the tax credits claimed by corporations based on revenue and type of enterprise—information which Samsung itself argued to the Court would have been appropriate for an analysis of disproportionate use. The Department's analysis is necessarily limited, Whirlpool notes, by the data that the GOK is willing to provide. In this instance, the GOK did not provide information that would permit additional analysis. Whirlpool argues that the Department cannot be prohibited from finding disproportionality on the basis of other indicative evidence.

*Department's Position:* In following the Court's instructions to reconsider our finding that tax benefits under Article 10(1)(3) were *de facto* specific because Samsung received a disproportionate share of the benefits, the Department solicited additional information from the GOK. Specifically, in the May 16, 2014, questionnaire, the Department made the following requests of the GOK:

- Using the breakdown of corporate tax returns by total industry by size of revenue that is set forth in Section 8-2-1 of the *Statistical Yearbook of National Tax*, “provide the aggregated taxable income and calculated tax amount for every corporate tax return that used the Article 10(1)(3) tax credit” within the GOK’s established size of revenue categories;<sup>44</sup>
- Using the breakdown of corporate tax returns by total industry by size of total assets that is set forth in Section 8-2-2 of the *Statistical Yearbook of National Tax*, “provide the aggregated taxable income and calculated tax amount for every corporate tax return that used the Article 10(1)(3) tax credit” based upon the GOK’s established size of total assets categories;<sup>45</sup> and
- For the largest 100 corporate tax returns (by taxable income) in which the Article 10(1)(3) tax credit was claimed or used, provide the taxable income, calculated tax amount listed in the tax return, and the amount of Article 10(1)(3) tax credits claimed.<sup>46</sup>

In response to these questions, the GOK provided only the *aggregate* amount of RSTA Article 10 tax credits claimed by the 100 largest corporate tax returns (as defined by the amount of tax credit received).<sup>47</sup> The GOK justified the lack of requested information by citing (1) its inability to track specific tax reduction programs such as RSTA Article 10(1)(3) using the requested size categories, (2) the fact that companies do not report the amount of total revenue or total value of assets as part of the tax form, and (3) the potential violation of Korea’s

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<sup>44</sup> See the GOK’s First Remand Response at 4. The *Statistical Yearbook of National Tax* divides size of revenue by strata of 300 million won or less, 500 million won or less, 1 billion won or less, etc.

<sup>45</sup> See *id.* The *Statistical Yearbook of National Tax* divides size of total assets using the same strata defined above.

<sup>46</sup> See *id.* at 5-6.

<sup>47</sup> See *id.* at 6. The GOK clarified the basis for selecting those tax returns in its Third Remand Response at 4.

confidentiality law.<sup>48</sup> However, the GOK regularly uses the “size of revenue” and “size of total assets” categories in its *Statistical Yearbook of National Tax* and reports other data using those categories in sections 8-2-1 and 8-2-2 of the Yearbook.<sup>49</sup> Accordingly, because the GOK was able to provide aggregated RSTA Article 10 information for the 100 largest credit recipients, it should have been able, at a minimum, to provide the same aggregated data for the corporate tax returns based on the previously-established size of revenue and size of total assets categories. By withholding that information, the GOK did not comply fully with the Department’s request.

When the GOK chose to provide only the aggregated amount of Article 10 tax credits claimed by the 100 largest recipients, we requested the aggregated taxable income and the aggregated calculated tax amounts for those companies.<sup>50</sup> Although the GOK claimed that it did not compile that information,<sup>51</sup> it provided the requested information for the 100 largest companies as defined by taxable income following our second request.<sup>52</sup> Therefore, we used the information that the GOK did choose to submit to conduct additional analyses of disproportionality as instructed by the Court.

The Department, did not, as claimed by Samsung, find that the tax benefits provided to Samsung under Article 10(1)(3) were disproportionately large based on the GOK’s alleged failure to provide adequate responses to our request for information. Instead, we have used the limited information that was provided by the GOK to confirm our original determination that Samsung received a disproportionately large amount of the tax credits under the investigated tax program.

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<sup>48</sup> *See id.* at 4-6.

<sup>49</sup> *See, e.g.*, the GOK’s First Remand Response at Ex. R-1 pp. 498-502 (surveying corporate tax returns “by Industry and by Size of Total Revenue,” and pp. 503-507 (surveying corporate tax returns “by Industry and by Size of Total Assets”).

<sup>50</sup> *See* the GOK’s Second Remand Response at 3.

<sup>51</sup> *See id.*

<sup>52</sup> *See* the GOK’s Third Remand Response at 3-4. We note that the GOK refused our first request for this information citing its confidentiality laws. *See* the GOK’s First Remand Response at 5-6.

However, although the Department agrees with Whirlpool that a respondent cannot benefit from its failure to provide requested information, in this instance, the information provided by the GOK was dispositive of Samsung's disproportionate use of the Article 10(1)(3) program. Regardless of Whirlpool's concern that the GOK did not provide all of the information the Department requested, Samsung did not benefit from the GOK's inability to provide certain information (*i.e.*, did not receive a better result of the Department's analysis). Rather, as we have explained, the information the GOK did provide continued to demonstrate that Article 10(1)(3) was *de facto* specific to Samsung.

## **B. Whether the SAA Supports the Department's Analyses**

### *Samsung Comments*

According to Samsung, the SAA does not support the Department's position because "the SAA's statement that evidence of government intent to target or otherwise limit benefits is irrelevant when evaluating whether a subsidy is *de facto* specific is equally irrelevant to the determination of whether Samsung received a disproportionately large amount of the Article 10(1)(3) tax credit."<sup>53</sup> Furthermore, the Department has not claimed that the GOK intended to target, or to limit benefits to, Samsung or any particular industry.

*Department Position:* Samsung is correct that the Department has not claimed that the GOK intended to target Samsung for benefits under the Article 10(1)(3). We have not made this claim because it is not a requirement under the statute. As previously noted, the SAA states that "evidence of government intent to target or otherwise limit benefits would be irrelevant in a *de facto* specificity analysis."<sup>54</sup> The URAA provides that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of

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<sup>53</sup> See Samsung's Comments at 4.

<sup>54</sup> SAA at 932.

{the URAA} in any judicial proceeding in which a question arises concerning such interpretation or application.”<sup>55</sup>

Thus, it is clear that under the statute, evidence of government intent to target or otherwise limit benefits is not a requirement for finding *de facto* specificity. Therefore, under the explicit language of the SAA, if the Department finds that a program has a limited number of actual recipients, an enterprise is a predominant user of a subsidy, or an enterprise receives a disproportionately large amount of the subsidy, that is sufficient for finding *de facto* specificity under section 771(5A)(D)(iii) of the Act. The Department is not further required to find that the *de facto* specificity is the result of the government’s intent to target that enterprise or industry for these subsidy benefits.<sup>56</sup>

For example, if there were only 20 actual subsidy recipients, the SAA clarifies that the statute does not require the Department to explain why there are only 20 subsidy recipients or that it was the government’s intent to target or otherwise limit benefits to those 20 companies. Similarly, if one recipient out of more than 11,000 recipients received approximately [

] of the subsidies under a program, the statute does not require the Department to explain why that recipient received [ ] percent of the amount of subsidies provided under the program. Whether or not the GOK intended to target benefits to Samsung is irrelevant under the statute and SAA. The analysis of *de facto* specificity, as noted by the term “*de facto*,” is based solely on the facts with respect to the distribution of subsidies to recipients under the investigated subsidy program.

Therefore, when the Department found that Samsung received a disproportionately large share of the benefits of the Article 10(1)(3) program, according to the SAA, there was no reason

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<sup>55</sup> See Uruguay Round Agreements Act, P.L. 103-465, Title I, Subtitle A, 102(d), 108 Stat. 4815, 4819 (1994) (codified at 19 USC 3512(d)).

<sup>56</sup> See *Preamble*, 63 FR at 65359.

to examine why Samsung received a disproportionate share because it does not matter if the GOK intended to target Samsung for benefits under this program. Because this is a *de facto* specificity finding, the statute and SAA require only an examination of the facts regarding the distribution of benefits under the program, which, as we have explained, indicate that Samsung received a disproportionate share.

### **C. Whether RSTA Article 10(1)(3) Constitutes a Standard Pricing Mechanism**

#### *Samsung's Comments*

Samsung argues that the Department's effort to distinguish the term "standard pricing mechanism" from the RSTA Article 10(1)(3) tax credit "formulas" is undermined by the Department's acknowledgement that a "standard pricing mechanism" for electricity rates can involve "different prices based on the type and amount of consumption of electricity."<sup>57</sup> The rate differences do not render the program *de facto* specific despite the fact that different electricity consumers pay different rates. According to Samsung, the same is true for RSTA Article 10(1)(3) because the two tax credit formulas and the different benefits available to SMEs and to other types of companies similarly constitute a "standard {tax credit} mechanism."<sup>58</sup> All Korean companies can take advantage of these benefits, just as all electricity consumers can take advantage of the rate mechanism. In light of the Department's finding that RSTA Article 10(1)(3) is not *de jure* specific, and in the absence of a claim by the Department that the GOK exercised discretion in awarding benefits, Samsung contends that the Department's effort to distinguish RSTA Article 10(1)(3) from the electricity programs discussed in *Bethlehem Steel* and *Pure Magnesium and Alloy Magnesium from Canada* is unpersuasive and irrelevant.

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<sup>57</sup> See Samsung's Comments at 5.

<sup>58</sup> See *id.*

Furthermore, Samsung contends that the Department's conclusion that "tax credits are not, in fact, determined strictly on the basis of a company's qualifying investments in a given tax year," is unpersuasive because the amount of the tax credit that a company earns depends solely on the amount of the investment that it makes and the formula that it applies to quantify the amount of the credit. The credit that a taxpayer claims on a particular tax return may not be the same as the amount of credit that it has earned. Moreover, according to Samsung, the claimed amount depends on each company's individual facts and circumstances related to income, expenses, and unrelated tax credits; there is no evidence that a Korean company cannot claim the entire tax credit it earns in a particular year. Tax credits may be limited by the minimum tax law, or carried forward to future years. Samsung argues that there is no question that the amount of the credit *when calculated* (versus when claimed), is proportionally identical for all taxpayers, because the rules for calculating the credit are prescribed by law, and they do not detract from the "standard" nature of the program. Each company's individual tax planning strategy has nothing to do with whether it received a proportionate or disproportionate benefit.

*Department's Position:* The Court stated in its remand that, "{a}ccording to Samsung, the Article 10(1)(3) tax credits were based on a standard mechanism as each participant received the same benefit relative to its eligible investments."<sup>59</sup> Samsung continues to make that claim in this remand proceeding. However, as we have explained, Samsung's statements are simply not true. There are different formulas for calculating the tax credit and, within each of these formulas, different categories of companies are eligible to claim different percentages of their eligible investments as a tax credit. For example, SMEs can claim a higher percentage of their investment than can non-SME companies.

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<sup>59</sup> *Samsung*, 973 F. Supp. 2d at 1326.

Furthermore, the amount of calculated tax credits will vary depending on the increase in qualifying investments from the previous period. Therefore, two companies can have the same amount of investment for tax year A (*e.g.*, KRW 100 million), but the amount of the resulting calculated tax credit would depend upon the increase in investment during tax year A from the previous year or years. Thus, if one company had an investment of KRW 200 million in the prior tax period, it would receive no calculated tax credits under RSTA Article 10(1)(3) during tax year A because KRW 100 million does not represent an increase in investment for tax year A. If the other company had an investment level of KRW 75 million in the prior tax period, then it would be able to receive a calculated tax credit under this program in tax year A based on the increase in investment (*i.e.*, KRW 25 million) from the prior tax period. Therefore, companies making the same amount in investments may not get the same amount in calculated tax credits under Article 10(1)(3). No matter how one defines the term “standard pricing mechanism,” or how one determines the relevance of “standard pricing mechanism” as it relates to a government tax program, all companies making the same amount of investment in the POI do not necessarily receive the same amount of Article 10(1)(3) tax credits, whether measured in relation to the amount of their qualifying investments, to the amount of their taxable income, or to the amount of tax otherwise due.

Thus, the very premise behind Samsung’s statement that all companies are treated identically and receive the same Article 10(1)(3) tax credits based on their investments is simply incorrect.<sup>60</sup> Moreover, regardless of the tax credit for which any company is eligible or earns during a particular period, the company might not apply its total tax credit to the taxes payable in

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<sup>60</sup> As we discuss below, Samsung’s continued assertions to this effect are apparently based on its new position that the appropriate focus of discussion is tax credits *earned* rather than tax credits *claimed*, although Samsung has consistently made the same assertions when discussing tax credits claimed. We address this inconsistency and our disagreement with Samsung’s revised position below.

that year, due to external requirements (Korea's minimum tax) and/or internal circumstances (*i.e.*, a company in a tax loss position, prior year credits carried forward, or numerous other factors related to company tax strategies).

Samsung's arguments that RSTA Article 10(1)(3) constitutes a "standard pricing mechanism" *despite* these inherent calculation variations misunderstand the concept of a "standard pricing mechanism." First, Samsung does not understand the relevance of the Department's reference to *Magnesium from Canada*. As is clear in *Bethlehem Steel*, the Court was examining the Department's practice with respect to an electricity rate charged that is consistent with a "standard pricing mechanism," with a specific reference to *Magnesium from Canada*. The Department's reference to *Magnesium from Canada* in footnote 19 was to provide a clear definition of the concept "standard pricing mechanism" as used by the Department and reviewed by the Court in *Bethlehem Steel*.

Second, Samsung erroneously relies on a concept that, while relevant to the provision of a good or service, is not applicable to a financial contribution provided in the form of a tax credit. Section 771(5)(E)(iv) of the Act is clear: "in the case where goods and services are provided, a benefit is conferred if the good or service is provided for less than adequate remuneration{.}" The statute further states that "the adequacy of remuneration shall be determined in relation to prevailing market conditions for that good or service including price, quality, availability, marketability, transportation, and other conditions of purchase or sale."<sup>61</sup> Thus, it is clear from the statute that the consideration of market conditions, which resulted in the concept of a "standard pricing mechanism" for the analysis of a provision of good or service such as electricity, cannot be relevant for an examination of the provision of tax incentives by a government. The provision of tax incentives does not involve the setting of prices.

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<sup>61</sup> See Section 771(5)(E) of the Act.

The Court in *Bethlehem Steel* explicitly referenced the Department's understanding that electricity rates are generally based upon the type and amount of consumption of electricity and that typically utility rates will not be found countervailable solely because lower rates are provided to larger consumers.<sup>62</sup> Under the statute, in determining whether a program providing a good or service such as electricity is countervailable, the Department is required to analyze the prevailing market conditions for that good or service.<sup>63</sup> Because commercial utility companies determine the tariff rates based on factors such as volume of consumption,<sup>64</sup> the Department is statutorily required to take this into account when analyzing whether the provision of electricity is for less than adequate remuneration. Neither the statute nor the regulations indicate that this concept is applicable to the evaluation of a tax program.

Therefore, in examining the difference in tariff rates between those applicable to large industrial consumers of electricity and those applicable to industrial customers that consume lower amounts of electricity, the Department must examine whether the different tariff rates are consistent with the prevailing market conditions for the provision of electricity. Therefore, if the utility company uses a "standard pricing mechanism" to establish each of its industrial tariff rates, and that standard pricing mechanism is applied in a consistent, uniform manner, the Department will not find that a lower rate provided to a large consumer is dispositive of specificity. This is because, although there may be different tariff rates, each consumer is paying a rate that reflects the commercial market rate for its level of electricity consumption, *e.g.*, cost of generation, transportation and delivery of electricity plus profit.

Samsung's argument that the different tax credit formulas and different benefits for SMEs in comparison to other companies constitute a "standard tax credit mechanism" is simply

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<sup>62</sup> See *Bethlehem Steel*, 140 F. Supp. 2d at 1369.

<sup>63</sup> See section 771(5)(E)(iv) of the Act.

<sup>64</sup> See *Bethlehem Steel*, 140 F. Supp. 2d at 1369.

illogical, even assuming that the standard for examining specificity for the provision of a good or service is applicable for examining specificity from a tax program. First, as we have explained above, there is no concept of a “standard tax credit mechanism” within the CVD law. Second, formulas and eligibility criteria that produce *different levels of benefits* do not constitute a “standard pricing mechanism,” no matter the relevance or the definition of the term “standard pricing mechanism.”

#### **D. Whether the Department’s Analysis Is Consistent With the Court’s Opinion**

##### *Samsung’s Comments*

According to Samsung, the Department’s approach in examining the 100 Korean companies with the largest corporate tax returns is functionally identical to the Department’s original methodology, and therefore it is equally faulty. Samsung cites three alleged flaws in the Department’s analyses. First, Samsung claims that the Department’s focus on “recipients in an economic position more similar to Samsung,” has no factual basis because taxable income is unrelated to “economic position.” Second, Samsung states that the Department relied erroneously on the amount of the credit claimed on companies’ tax returns, not the amount earned based on qualifying investments. This approach overlooks the fact that credits claimed in one year may have been earned in prior years, and that credits earned in the current year may be carried forward to future years. According to Samsung, the amount claimed on the return does not reflect the amount of the benefit received, regardless of when it is claimed.

Finally, Samsung argues that the Department tried to generate a finding of disproportionality by comparing the tax savings of various companies despite the discretionary nature as to when the benefit will be claimed. Moreover, companies with larger investments that generate larger tax credits are going to generate larger tax savings as a percentage of taxes owed

prior to the reduction of taxes owed through credits. This is not a function of company size; rather, it is a function of the nature of investment decisions and corporate strategy. According to Samsung, equating taxable income with a company's size is arbitrary and unreasonable since taxable income is a function of many things other than company size, regardless of how size is measured. As a result, the Department's effort to compare the ratio of Samsung's Article 10(1)(3) tax credits to its calculated tax amount to the same ratio for the other 99 companies does not adjust for size. Thus, combining both in a ratio yields an irrelevant comparison, albeit one that supports the Department's desired outcome.

*Whirlpool's Comments*

Whirlpool argues that the GOK's submissions invalidate Samsung's argument that its tax credits reflect proportionality in the distribution of benefits. According to Whirlpool, the structure of RSTA Article 10(1)(3), in the context of Korean tax law, should neutralize large differences in tax credits conferred on companies of different sizes and companies making different levels of qualifying investments, contrary to Samsung's arguments. Thus, the comparison of Samsung's share of the total tax credits to the share received by the average beneficiary is sufficient to find that Samsung received a disproportionately large share of benefits under this program. Whirlpool contends that the Department's expanded analysis is far more than was required to show disproportionality under the statute.

Whirlpool warns that the statute does not limit the analysis of disproportionate use to the same framework that is applied to calculate the "benefit." Whirlpool supports the Department's efforts to find other approaches, particularly in light of the Department's recognition that the ability to carry forward tax credits claimed under Article 10(1)(3) may make the snapshot of one year's tax returns an inadequate representation of use of the program. Whirlpool concludes that

a disproportionate use finding would be adequately supported by an analysis of the expectations of use as a consequence of the structure of the program, combined with an analysis of the tax credits received.

*Department Position:* We disagree with Samsung and find that the two analytical approaches discussed in this remand redetermination are fully consistent with the Court's opinion and order. Samsung's argument does not account for the Court's remand instructions, which stated, "Commerce is not barred from comparing Samsung's share of the total benefits to the share an average beneficiary received, but it must explain, with specific reference to the facts of this case, why such a comparison is indicative of disproportionality."<sup>65</sup> The Court specifically noted that the tax credits were based on usage and were granted pursuant to a standard pricing mechanism, and noted that the GOK did not exercise discretion in awarding Samsung's tax credit, but simply conferred the benefit relative to the eligible expenditures.<sup>66</sup> The Department addressed both the issue of discretion and the contention that all companies receive the same amount of tax credits based upon an identical percentage of investments above, and we believe that this additional analysis clarifies why RSTA Article 10(1)(3) is specific whether we consider all recipients or limit our analysis to the 100 recipients with the largest taxable income.

However, the Court also referenced *AK Steel* in noting its concern that a benefit conferred on a large company might be disproportionate merely because of the size of the company.<sup>67</sup> We solicited additional information from the GOK specifically to address this concern, and sought information about the use of the RSTA Article 10(1)(3) tax credits based upon the size of companies as defined by the GOK in its official tax statistics (*i.e.*, the amount of revenue and value of assets). As previously discussed, the GOK did not provide the requested information.

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<sup>65</sup> See *Samsung*, 973 F. Supp. 2d at 1328.

<sup>66</sup> See *id.* at 1326.

<sup>67</sup> See *id.* at 1327, citing *AK Steel Corp. v. United States*, 192 F.3d 1367, 1385 (Fed. Cir. 1999).

Thus, we also requested information about the largest 100 corporate tax returns by taxable income because the *Statistical Yearbook of National Tax* indicated that the GOK maintained this information, and because we were investigating a tax credit that is applied against taxable income. Limiting our analysis in this way removed the vast majority of the more than 11,000 tax credit recipients from the averages we compared to Samsung's tax credit, thereby mitigating the differences in company size to the extent possible given the data limitations—an analysis specifically contemplated by the Court.

We disagree with Samsung's argument that taxable income is unrelated to a company's "economic position," and that it is irrelevant to the issue of disproportionality.<sup>68</sup> As we have explained, we sought to analyze RSTA Article 10(1)(3) usage data in a manner that neutralizes the effect of a company's size, and our initial attempt to do so by comparing Samsung's benefit to the benefit of other recipients based upon the size of assets and amount of revenue was not possible given the data limitations of this record. Taxable income is a suitable alternative to the GOK's revenue and assets classifications because, under 19 CFR 351.509(a), the benefit from a tax credit only exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program. Therefore, the only manner in which to compare the relative benefits conferred by the RSTA Article 10(1)(3) tax credit is to determine the amount of tax savings that was provided by the tax credit; to do this, the amount of taxable income and calculated tax amount are required. Notably, at no point in this remand proceeding has Samsung suggested an alternative methodology that would allow us to analyze

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<sup>68</sup> See Samsung's Comments at 11.

disproportionality in a manner that accounts for company size beyond its assertion that all tax credits calculated under the program must be proportional.<sup>69</sup>

We also disagree with Samsung that it was inappropriate to analyze the amount of credits *claimed* under the tax program rather than those *calculated* or *earned*. Under the countervailing duty statute and regulations, a tax program is *de facto* specific if an enterprise or industry receives a disproportionately large amount of the subsidy, and the amount of the subsidy conferred is the amount of tax savings provided through the use the tax program.<sup>70</sup> In the case of the RSTA Article 10(1)(3) tax credit, this subsidy amount is determined by identifying the amount of the tax credit *actually* claimed and applied against taxable income in the company's tax return. Thus, a tax program such as the investigated tax credit can only be a subsidy when the credit is claimed on the tax return, and the Department's analysis of the tax credit *actually* claimed in the company's tax return is the only appropriate methodology under the CVD statute and regulations. Additionally, the amount of aggregate tax credits *claimed* (*i.e.*, not simply calculated based on a company's investments) is the amount reported in the GOK's *Statistical Yearbook of National Tax*, and the GOK only has reported RSTA Article 10(1)(3) tax credits to the Department on that basis. It is therefore appropriate to rely on both the credits *claimed* and taxable income in our analysis.

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<sup>69</sup> With respect to Samsung's assertion that equating taxable income with a company's size is arbitrary, we note that Samsung does not rely on any record evidence when making this assertion; furthermore, Samsung's assertion is demonstrably untrue based on a review of the evidence on the record. Exhibit R-1 to the May 30, 2014 Questionnaire Response of the GOK provides a copy of the *Statistical Yearbook of National Tax*; Sections 8-2-1 and 8-2-2 of the *Yearbook* provide corporate tax returns by total industry and by size of total revenue and by size of total assets. There are 12 categories based on size of total revenue ranging from a low of 300 million won or less, to a high of over 500 billion won; and there are 10 categories based on size of total assets ranging from 500 million won or less, to over 500 billion won. For each of these size of total revenue and size of total assets categories, the *Yearbook* provides the total number of tax returns and the total taxable income. A review of this data demonstrates that, on both a revenue and on an asset basis, per capita taxable income increases with each higher asset or revenue category. Therefore, information on the record shows that in Korea, taxable income increases with increases in company size whether measured on a revenue basis or on an asset basis.

<sup>70</sup> See section 771(5A)(D)(iii)(III) of the Act and 19 CFR 351.509(a).

We note that Samsung's arguments on this point reflect a change in the position that it previously presented to the Court, and, in fact, directly contradict Samsung's prior arguments. In prior submissions to the Court, Samsung repeatedly equated its tax credit benefit to the amount claimed on its tax return, compared it to the total amount claimed on other companies' tax returns, and described the amount of the tax credit claimed as proportional to its investments.<sup>71</sup> Similarly, in its reply brief to the Court, Samsung referenced *AK Steel* and argued that, “[i]f it is ‘untenable’ to find disproportionality merely because a large steel company has a greater amount of assets that it revalued, then it is equally ‘untenable’ for the Department to find disproportionality when a large electronics company like Samsung spends a relatively greater amount of its money on eligible R&D activities.”<sup>72</sup> Samsung also noted its concern that “it has been penalized for its size and the relative size of the R&D investments.”<sup>73</sup> In short, Samsung has always discussed benefits under RSTA Article 10(1)(3) in terms of tax credits *claimed*, not in terms of the tax credits calculated (the total credit to which Samsung is entitled under the RSTA), and has repeatedly taken the position that those claimed tax credits were proportional under the terms of the RSTA statute given its large size and large R&D investments.

In contrast, Samsung now defines the amount of an RSTA Article 10(1)(3) tax credit as the “calculated” or “earned” credit, and argues (1) that it is the “earned” tax credit that is

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<sup>71</sup> See Samsung's August 5, 2013 Rule 56.2 Motion at 3 (recognizing that the RSTA Article 10(1)(3) tax credit “*benefit received* equaled the amount of the tax credits that Samsung *claimed* on the tax return that it filed in 2011{.}”) (emphasis added), 7 (arguing that the program “provided Samsung with exactly the same ‘proportionate’ tax credit *benefit* as all of the other 11,000 Korean companies received,” (emphasis added) and describing the benefit as “‘proportionately’ large{.}”), 9 (stating, “There is no question that Samsung received a ‘large’ proportion of the total amount of Article 10(1)(3) tax credits that over 11,000 Korean companies *claimed* on their tax returns{,}” and arguing that “it also received a ‘proportionate’ amount *of those credits*{.}”) (emphases added), and 10 (“there is no dispute that Samsung received the exact same proportionate credit that all other companies received{.}”).

<sup>72</sup> See Samsung's January 10, 2014 Reply Brief at 2, quoting *AK Steel*, 192 F.3d at 1385.

<sup>73</sup> See *id.* at 3.

proportional,<sup>74</sup> (2) that the tax credit claimed “does not reflect the amount of the benefit that the company received, regardless of when it is claimed{,}” and (3) that the tax savings resulting from the *claimed* tax credit are “a function of the nature of investment decisions and corporate strategy” rather than “a function of company size{.}”<sup>75</sup>

This reversal in position reveals a misunderstanding of the countervailing duty statute which states that disproportionality must be examined on the basis of the amount of the subsidy received, which, under 19 CFR 351.509(a), is the amount of the tax savings received by the subsidy recipient, *i.e.*, the amount of tax credits claimed in the recipient’s tax return. More importantly, Samsung’s new position confirms the validity of the Department’s original findings, even as it fails to undermine our findings in these Final Remand Results. Previously, Samsung argued that our finding of disproportionality was flawed because it punished large companies for making large investments and receiving a larger amount of tax credits under the Article 10(1)(3) program.<sup>76</sup> Now, Samsung is arguing that the benefit (*i.e.*, claimed credit) from the Article 10(1)(3) tax credits is not a function of a company’s size and will not necessarily reflect the “proportional” earned credit.<sup>77</sup> As Samsung has now acknowledged that the benefit from this tax credit subsidy is *not* dependent on the size of a company, or even directly dependent on the amount of R&D investment in a given year, Samsung implicitly acknowledged the validity of the Department’s *Final Determination* with respect to the Article 10(1)(3) program. However, as explained above, Samsung’s new focus on the earned or calculated credit rather than companies’

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<sup>74</sup> See Samsung’s Comments at 6-7 and 10.

<sup>75</sup> See *id.* at 10-11.

<sup>76</sup> See Samsung’s January 10, 2014 Reply Brief at 3 (quoting the Department’s concern “that a tax benefit conferred on a large company might be disproportionate merely because of the size of the company” as its own concern that it “has been penalized for its size and the related size of the R&D investments.”).

<sup>77</sup> See Samsung’s Comments at 10-11.

claimed tax credits is inapposite given the statutory and regulatory framework for evaluating disproportionality.

Regarding Samsung's third argument with respect to its relative tax savings, we have already explained the premise for our approach above. If, as Samsung previously argued, the amount of tax credits *earned* under RSTA Article 10(1)(3) is reflective of the size of a company and its relative R&D investments, a smaller company would also have a relatively smaller amount of calculated taxable income and calculated tax amount. By comparing the ratio of tax savings from the RSTA Article 10 tax credit to the calculated tax, we have removed the size variable.<sup>78</sup>

The purpose of this methodology is to examine the amount of Article 10(1)(3) benefit for recipients of this program by measuring their tax savings as a percentage of their taxes otherwise due. As explained above, relying on those tax savings is consistent with 19 CFR 351.509(a). An examination of the percentage of tax savings of a recipient, *i.e.*, the amount of Article 10 tax credits divided by the calculated tax amount, neutralizes potential distortions resulting from a company's size. At a minimum, Samsung appears to agree with this principle when it argues that taxable income is not a proxy for a company's size because taxable income is a function of many things other than size, although we disagree with Samsung's subsequent assertion that relying on taxable income to identify tax savings fails to neutralize the effects of a company's size with respect to the distribution of the subsidy's benefits. As previously explained, the ratio at issue is the percentage of tax savings garnered through the use of the Article 10(1)(3) tax credit. Because this ratio is derived from a company's calculated taxable amount and its claimed

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<sup>78</sup> As discussed, we understand that Samsung is no longer advancing the statements that it made before the Court and now argues that the generation of large tax credits is not a function of a company's size; however, this methodology was developed to respond to the Court's remand instructions, which explicitly invoked *AK Steel* and concerns about the effect of a company's size on benefit distribution. *Samsung*, 973 F. Supp. 2d at 1327, citing *AK Steel*, 192 F.3d 1385.



Third Remand Response in July 2014. Instead, our analyses were designed to further explore the relationship between Samsung's subsidy amount and the amounts received by other companies to the extent possible given the data limitations. At no time prior to Samsung's July 29, 2014, comments did Samsung raise any concerns about the information that the Department was soliciting, nor did Samsung make any suggestions regarding the appropriate methodology that should be implemented to address the Court's concern. Indeed, despite Samsung's disagreement with our methodologies, Samsung makes no suggestions regarding the methodological analysis the Department should undertake for purposes of examining whether Samsung received a disproportionately large amount of the RSTA Article 10(1)(3) subsidy.

With respect to Whirlpools comments, we note that we developed our comparison of Samsung's tax savings under RSTA Article 10(1)(3) to the average tax savings of the 100 largest recipients in direct response to the Court's directive that we further consider the level of benefits granted under this program. We respectfully submit that our original determination of disproportionality is fully consistent with the statute and the SAA, and we believe that our clarification of the nature of the RSTA Article 10(1)(3) program within this redetermination sufficiently addresses the Court's concerns with respect to the element of discretion and Samsung's argument that all program recipients received the same benefit relative to their eligible investments. Furthermore, we also share the concern raised by Whirlpool with respect to a specificity analysis for a tax program that appears to apply the same framework as a determination of whether a benefit has been conferred. We agree that the analysis and determination of specificity and benefit are two separate determinations, with different statutory parameters. As we have already noted, it is our opinion that our *Final Determination* was consistent with the statute and the SAA. However, out of an abundance of caution, we

developed this alternative methodology to ensure compliance with the Court's remand instructions.

### **E. Ministerial Errors**

#### *Samsung's Comments*

Samsung contends that Department's calculations include a ministerial error in identifying Samsung's tax savings as KRW [ ], rather than using the correct figure of KRW [ ]. According to Samsung, this error invalidates the Department's effort to adjust for company size by examining Samsung's tax savings as a percent of taxes it paid and comparing that percentage to that of the other 99 large companies. Samsung also notes that Samsung's tax savings were [ ] percent, not [ ] percent.

#### *Whirlpool's Comments*

Whirlpool identifies two minor errors. The first, a mathematical error, is in the Department's calculation of Samsung's tax savings as a percent of taxes paid. The Department erroneously reported this percentage as [ ] percent, when the correct value is [ ] percent. The second error is an error in the placement of the decimal points in both the numerator and the denominator used in identifying the tax credits as a percentage of the calculated tax liability of the top 99 companies. However, as this error resulted in the inflation of both the numerator and the denominator by the same factor, the resulting ratio, [ ] percent, is not incorrect.

*Department's Position:* We agree with both Samsung and Whirlpool that the Department made a ministerial error in the placement of the decimals when discussing the amount of RSTA Article 10(1)(3) tax reductions on page 13 of the Draft Remand Results. However, we disagree with Samsung that this undermines our analysis, and instead agree with Whirlpool that the errors had no practical effect because the errors affected the numerator and the denominator to the same degree, resulting in the same ratio.

In the Draft Remand Results, we erroneously stated that the aggregate calculated tax amount for the top 100 RSTA Article 10 recipients was KRW [ ], and that the aggregated RSTA Article 10 tax credits were KRW [ ]. This was a transcription error from the GOK's Third Remand Response, which reported those figures on the basis of "100 million KRW" as [ ] and [ ], respectively.<sup>83</sup> Our Draft Remand Results inflated both figures by a factor of ten. Accordingly, the correct aggregate calculated tax amount is KRW [ ], while the correct aggregated RSTA Article 10 tax credits are KRW [ ].

With respect to Samsung's Article 10(1)(3) benefit, the Department also mistakenly inflated the figure by a factor of ten when discussing its relative tax savings.<sup>84</sup> The proper figure, as reported by Samsung, is KRW [ ], or KRW [ ].<sup>85</sup> The error did not affect our calculation of Samsung's tax savings.<sup>86</sup>

We have adjusted these figures as appropriate in these Final Remand Results. As previously stated, because we overstated both the aggregate figures and Samsung's tax credit by the same degree, the error does not affect our conclusions.

Furthermore, as both Samsung and Whirlpool have noted, the correct percentage of Samsung's RSTA Article 10(1)(3) savings is [ ] percent, not [ ] percent. We have incorporated this correction into our Final Remand Results as discussed above.

#### **IV. FINAL RESULTS OF REDETERMINATION**

<sup>83</sup> See the GOK's Third Remand Response at 4.

<sup>84</sup> See Draft Remand Results at 13 (listing Samsung's RSTA Article 10(1)(3) credit as KRW [ ]).

<sup>85</sup> See Verification Report at 15.

<sup>86</sup> As previously explained, we divided Samsung's tax credit of KRW [ ] by its calculated tax amount of KRW [ ].

In accordance with the Court's remand instructions, the Department reconsidered the facts of this case with respect to Samsung's use of RSTA Article 10(1)(3) tax credits and, based upon those facts, continues to find that Samsung received a disproportionate amount of those tax credits. As a result, we continue to find that RSTA Article 10(1)(3) is specific within the meaning of section 771(5A)(D)(iii)(III) of the Act, and we have not revised our calculation of Samsung's *ad valorem* subsidy rate.

  
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Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

8 AUGUST 2014  
Date