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Section 129 Proceeding
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MEMORANDUM TO: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Large Residential Washers from the Republic of Korea: Final
Section 129 Determination Regarding the Countervailing Duty
Investigation

I. SUMMARY

Consistent with section 129 of the Uruguay Round Agreements Act (URAA), which governs the actions of the U.S. Department of Commerce (Commerce) following adverse World Trade Organization (WTO) dispute settlement findings, and pursuant to a request from the Office of the U.S. Trade Representative (USTR),¹ Commerce is revising certain aspects of its final determination in the countervailing duty (CVD) investigation examined in *United States – Anti-dumping and Countervailing Measures on Large Residential Washers from Korea* (WT/DS464). Specifically, in accordance with findings outlined in the reports published by the WTO Dispute Resolution Panel (Panel) and the Appellate Body (AB),² as adopted by the WTO Dispute Settlement Body (DSB),³ we are revising the analysis underlying the final CVD determination as it pertains to certain tax credit programs.

¹ See Commerce Memorandum, “Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea: Request for Initiation of Section 129 Proceeding,” December 18, 2017.

² See *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R (March 11, 2016) (Panel Report); see also *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R (September 7, 2016) (AB Report).

³ See *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/12 (September 27, 2016).

Commerce received comments on the Preliminary Section 129 Determination from Samsung Electronics Co., Ltd. (Samsung), a company respondent in the underlying CVD investigation, and Samsung Electronics America (collectively, Samsung Group), as well as Whirlpool Corporation, the petitioner in the CVD investigation.⁴ We examined these comments and, for the reasons discussed in the “Discussion of the Issues” section of this memorandum, recommend making no changes to the preliminary analysis. Therefore, we continue to find that no changes to the countervailable subsidy rates calculated in the CVD investigation of large residential washers (washing machines) from the Republic of Korea (Korea) are warranted. In accordance with section 129(b)(4) of the URAA, USTR may, after consulting with Commerce and Congress, direct Commerce to implement this final section 129 determination, in whole or in part.

II. BACKGROUND

On April 4, 2018, Commerce issued the Preliminary Section 129 Determination, which provides a complete history of this section 129 proceeding, as well as the underlying CVD investigation and relevant DSB actions.⁵ In the Preliminary Section 129 Determination, Commerce revised its analysis regarding (1) whether tax credits provided by the Government of Korea (GOK) for research and development (R&D) expenditures and facilities investments under Article 10(1)(3) and Article 26 of the Restriction of Special Taxation Act (RSTA), respectively, should be tied to particular products; (2) whether tax credits received under RSTA Article 10(1)(3) should be attributed to sales of washing machines produced outside Korea; and (3) whether the RSTA Article 10(1)(3) tax credit program is “specific” within the meaning of section 771(5A)(D)(iii) of the Tariff Act of 1930, as amended (the Act), and Articles 1.2 and 2.1(c) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The Samsung Group subsequently submitted comments on the Preliminary Section 129 Determination.⁶ The petitioner filed rebuttal comments.⁷

III. DISCUSSION OF THE ISSUES

Comment 1: “Tying” Analysis for RSTA Article 10(1)(3) and RSTA Article 26 Tax Credit Program Benefits

Samsung Group’s Comments

- Benefits received under the RSTA Article 10(1)(3) and RSTA Article 26 tax credit programs are tied to specific products, so Commerce should revise its calculations to include only tax credits and sales associated with the home appliance division.⁸

⁴ See Commerce Memorandum, “Large Residential Washers from the Republic of Korea: Preliminary Section 129 Determination Regarding the Countervailing Duty Investigation,” April 4, 2018 (Preliminary Section 129 Determination); see also Letter from Samsung Group, “Large Residential Washers from Korea; Section 129 Proceeding: Comments on the Department’s Preliminary Section 129 Determination,” April 12, 2018 (Samsung Group Case Brief); See Letter from the petitioner, “Large Residential Washers from Korea: Rebuttal Comments on Behalf of Whirlpool Corporation,” April 19, 2018 (Petitioner Rebuttal Brief).

⁵ See Preliminary Section 129 Determination at 1-3.

⁶ See Samsung Group Case Brief.

⁷ See Petitioner Rebuttal Brief.

⁸ See Samsung Group Case Brief at 2.

- The preliminary analysis does not apply the complete tying standard established by the AB,⁹ which requires Commerce to consider “whether the subsidy operates in a manner that can be expected to foster or incentivize the production or sale of the product concerned.”¹⁰
- The AB found that Commerce “disregarded” certain evidence that could be relevant to this issue.¹¹ In the preliminary analysis, however, Commerce did not examine such evidence or modify its associated analysis.¹² Rather, Commerce preliminarily stated that the evidence, which accounts for Samsung’s R&D expenditures by business unit, is not relevant to the design, structure, and operation of the program.¹³
- According to Commerce, the nature of a company’s operations and the specific facts surrounding a company’s application for and receipt of tax credits is not relevant to whether the tax credits are tied to specific products.¹⁴ The only factor Commerce considers relevant is whether the government authority knew in advance how the tax credits would be attributed.¹⁵
- Record evidence confirms that Samsung’s R&D expenditures and facilities investments are tied to specific products and, as such, that the resulting tax credits are tied to specific products.¹⁶
- In finding that the tax credits offset Samsung’s overall tax liability and, as such, are not tied to a specific product, Commerce sets an unreasonably high threshold for tax credits to be tied to specific products.¹⁷ The GOK could have easily provided the subsidies in the form of grants for R&D activities and facilities investments.¹⁸
- Regarding the preliminary conclusion that the record does not contain sufficient information to calculate business-unit specific countervailable subsidy rates, Commerce never requested the relevant information.¹⁹ Furthermore, the profitability of a particular business unit is not relevant.²⁰
- The R&D activities undertaken at the General R&D Centers can be allocated to the individual business units.²¹
- Samsung did not use any self-produced LCD panels in the production of washing machines.²²
- Although Samsung used some self-produced semiconductors in its washing machines, any benefits flowing to the home appliance unit from other business units is “minimal” and there is no evidence that tax credits received for Samsung’s semiconductor R&D activities “fostered and incentivized” the production or sale of washing machines.²³

⁹ *Id.*

¹⁰ *Id.* at 3 (citing AB Report at para. 5.270).

¹¹ *Id.* at 3-4 (citing AB Report at para. 5.281).

¹² *Id.* at 4.

¹³ *Id.* at 5.

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ *Id.* at 7.

¹⁸ *Id.*

¹⁹ *Id.* at 7-8.

²⁰ *Id.* at 8-9.

²¹ *Id.* at 9.

²² *Id.*

²³ *Id.* at 10.

- The equipment used in washing machines “is not the type of advanced technology that requires advanced R&D.”²⁴ Therefore, consistent with *Korean Bottom Mount Refrigerators*, R&D costs related to semiconductors should not be included in R&D costs for washing machines.²⁵
- The Preliminary Section 129 Determination does not directly address how the RSTA Article 26 tax credits are not tied to specific products.²⁶

Petitioner’s Rebuttal Comments

- Adverse WTO decisions are not binding U.S. law until adopted under the statutory scheme established in the URAA.²⁷ Therefore, Commerce must continue to adhere to U.S. law and support this decision with substantial evidence.²⁸ The Samsung Group has not cited to record evidence that overcomes Commerce’s reasonable findings under U.S. law.²⁹
- The “foster or incentivize” standard articulated by the Samsung Group is not the appropriate test for tying.³⁰ Commerce applied the test actually articulated by the AB (*i.e.*, the design, structure, and operation of the subsidy).³¹
- The AB instructed Commerce to reexamine the information contained in KOR-72, “so as to weigh {its} probative value.”³² The AB did not mandate a specific outcome of such an examination, and Commerce properly considered KOR-72 in the context of the AB’s findings.³³
- Commerce has not applied an “unreasonably high threshold” by considering the “design, structure, and operation” of the tax programs.³⁴ Rather, Commerce has applied the standard articulated by the AB.³⁵
- Based on its examination of how the GOK operates its tax programs, Commerce reasonably concluded that the tax programs operated to reduce Samsung’s overall tax liability rather than the income of any specific business unit.³⁶ The GOK did not dispute this conclusion and the Samsung Group confirmed it in a supplemental questionnaire response.³⁷

²⁴ *Id.*

²⁵ *Id.* at 10-11 (citing *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17413 (March 26, 2012) (*Korean Bottom Mount Refrigerators*), and accompanying Issues and Decision Memorandum (Korean Bottom Mount Refrigerators IDM) at Comment 39).

²⁶ *Id.* at 11.

²⁷ See Petitioner Rebuttal Brief at 4.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 4-5.

³¹ *Id.* at 5-6.

³² *Id.* at 7.

³³ *Id.* at 7-8.

³⁴ *Id.* at 8.

³⁵ *Id.*

³⁶ *Id.* at 9.

³⁷ *Id.* at 9-10.

- Statements in the Samsung Group’s own supplemental questionnaire responses undermine the company’s claim that the benefits of investing in R&D do not flow across business units.³⁸
- The record of this proceeding is distinguishable from *Korean Bottom Mount Refrigerators*.³⁹ First, the tying analysis conducted in a CVD proceeding is different from the attribution of costs in an antidumping duty investigation.⁴⁰ In addition, Samsung admitted to R&D benefiting multiple business units in this case.⁴¹

Commerce’s Position

Commerce continues to find that the RSTA Article 10(1)(3) and RSTA Article 26 tax credits are not “tied” to the production of any specific product or group of products because, based on all available information submitted by the GOK and the Samsung Group, the subsidy programs were not designed, structured, or operated to subsidize any specific product or group of products. Rather, they are untied subsidies, meaning that they benefit all of Samsung’s domestic production.

In its report, the AB stated:

{W}e consider that a subsidy is “tied” to a particular product if the bestowal of that subsidy is connected to, or conditioned upon, the production or sale of the product concerned. An assessment of whether this connection or conditional relationship exists will inevitably depend on the specific circumstances of each case. In conducting such an assessment, an investigating authority *must* examine the design, structure, and operation of the measure granting the subsidy at issue and take into account all of the relevant facts surrounding the granting of that subsidy. In certain cases, an assessment of such factors may reveal that a subsidy is indeed connected to, or conditioned upon, the production or sale of a specific product. A proper assessment of the existence of a product-specific tie is not necessarily based on whether the subsidy *actually* results in increased production or sale of the product in question, but rather on whether the subsidy operates in a manner that can be *expected* to foster or incentivize the production or sale of the product concerned.⁴²

Commerce’s preliminary analysis did not conflict with this standard, nor did it create an “unreasonably high threshold” for finding a tax program to be tied to a specific product. The Preliminary Section 129 Determination merely applied the test articulated by the AB, which explicitly required Commerce to consider the “design, structure, and operation” of the programs at issue in order to determine whether the bestowal of subsidies under those programs is connected to, or conditioned upon, the production or sale of certain products.⁴³ In its comments,

³⁸ *Id.* at 11.

³⁹ *Id.* at 12-13.

⁴⁰ *Id.*

⁴¹ *Id.* at 13.

⁴² See AB Report at para. 5.270 (emphasis added).

⁴³ See Preliminary Section 129 Determination at 6-14. Contrary to the Samsung Group’s arguments, Commerce’s preliminary analysis of this issue focused on the “design, structure, and operation” of the programs, rather than

the Samsung Group highlights additional language, regarding whether the programs “can be *expected* to foster or incentivize the production or sale of” subject merchandise.⁴⁴ This language, however, is simply the AB’s elaboration of the earlier-articulated standard; it is not the standard itself. Nevertheless, information provided by the GOK indicates that the RSTA Article 10(1)(3) and RSTA Article 26 tax credit programs are not operated in a manner that can be expected to foster and incentivize R&D and facilities investments pertaining to any particular product or category of products (*e.g.*, washing machines or home appliances). Rather, the GOK has consistently stated that the programs allow for tax deductions for R&D and facilities investments associated with *any* product,⁴⁵ indicating that, based on their governing laws and regulations, the RSTA Article 10(1)(3) and RSTA Article 26 tax credit programs could not be expected to foster or incentivize the production of washing machines or any other specific product. The Samsung Group further posits that, had the GOK provided grants for R&D and facilities investments, rather than tax credits, we would have found that the benefits were tied to specific products or business units.⁴⁶ However, as noted by the AB, a proper tying analysis “will inevitably depend on the specific circumstances of each case,”⁴⁷ and the programs at issue in *this* case are not grant programs. Therefore, although it is possible that, in a different proceeding under a different set of circumstances, Commerce might find other R&D and facilities investment subsidies to be tied to a particular product, the circumstances in this proceeding support the conclusion that the RSTA Article 10(1)(3) and RSTA Article 26 tax credits are not tied to specific products.

Moreover, the Samsung Group’s statement that, instead of providing tax credits to offset Samsung’s overall tax liability, the GOK could have created a grant program to support individual R&D programs further supports the conclusion that the two tax programs at issue here (*i.e.*, the RSTA Article 10(1)(3) and RSTA Article 26 tax credit programs) are untied subsidies. As acknowledged by the Samsung Group, the GOK has an array of options to choose from when creating a subsidy program to support and foster the development of Korean industry.⁴⁸ The Samsung Group states that the GOK could have created a program that provides grants for R&D tied to specific products.⁴⁹ However, in the two GOK subsidies at issue here, the GOK did not take that route. Instead, the GOK made the explicit decision, through its laws and regulations, to design and structure subsidy programs that are not tied to specific products or divisions within a company; in contrast, the programs were created in a manner benefiting all products or divisions within a company.

The Samsung Group incorrectly asserts that, in the Preliminary Section 129 Determination, Commerce faulted it for not providing business unit-specific profit and loss data.⁵⁰ However, the availability of such data was not pertinent to Commerce’s substantive analysis. In considering

whether the GOK had advanced knowledge of how the tax credits would be attributed to Samsung’s business units. *See* Samsung Group Case Brief at 5; *see also* Preliminary Section 129 Determination at 6-14.

⁴⁴ *See* Samsung Group Case Brief at 3 (citing AB Report at para. 5.270).

⁴⁵ *See* Letter from the GOK, “Countervailing Duty Order on Large Residential Washers from Korea; Proceeding Under Section 129 of the Uruguay Round Agreements Act (URAA): GOK’s Response to the Department’s Supplemental Questionnaire for Government of the Republic of Korea,” January 16, 2018 (GOK January 16, 2018 QR), at 4-5.

⁴⁶ *See* Samsung Group Case Brief at 7.

⁴⁷ *See* AB Report at para. 5.270.

⁴⁸ *See* Samsung Group Case Brief at 7.

⁴⁹ *Id.*

⁵⁰ *Id.* at 15-16.

the R&D expenditure data for each of Samsung's individual business units (*i.e.*, KOR-72), we explained that an itemization of the R&D expenses incurred by each business unit is not directly relevant to the proportion of RSTA Article 10(1)(3) tax credits theoretically earned by each business unit, since the tax program benefit is, by definition, contingent on profitability.⁵¹ The fact that *all* eligible R&D expenditures, regardless of which business unit incurred them and whether that business unit contributed to taxable income for the relevant period, are claimed against Samsung's overall tax liability illustrates that the tax credits are not tied to a specific business unit or product. This reasoning is equally applicable to facilities investment tax credits claimed under RSTA Article 26. The GOK did not dispute this analysis, and it is not necessary for Commerce to request business unit-specific profit information to reach the same conclusion. Furthermore, the Samsung Group itself stated that the profitability of a particular business unit is not relevant.⁵²

Regarding the RSTA Article 10(1)(3) tax credit program, substantial record evidence supports the finding that the benefits from Samsung's R&D activities flow across the company's various business units (*e.g.*, the home appliance business unit may benefit, in some form, from R&D projects conducted by the general R&D centers and the semiconductor business unit).⁵³ The Samsung Group argues that this conclusion is inconsistent with Commerce's findings in *Korean Bottom Mount Refrigerators*.⁵⁴ We note, however, that the current record is distinguishable from *Korean Bottom Mount Refrigerators* for several reasons. As an initial matter, the *Korean Bottom Mount Refrigerators* determination pertains to an antidumping duty (AD) proceeding, in which

⁵¹ See Preliminary Section 129 Determination at 10-11. The AB found that Commerce improperly "disregarded" KOR-72 in the underlying investigation. See AB Report at para. 5.281. The Samsung Group alleges that Commerce continued to disregard KOR-72 in this section 129 proceeding. See Samsung Group Case Brief at 3-4. Commerce, however, examined and conducted a thorough analysis of KOR-72 in its Preliminary Section 129 Determination, concluding that the information contained in KOR-72 is not relevant to the design, structure, and operation of the program. See Preliminary Section 129 Determination at 8-11. The relevant analysis is unchanged for this final section 129 determination.

⁵² See Samsung Group Case Brief at 8.

⁵³ See, *e.g.*, Letter from the Samsung Group, "Large Residential Washers from Korea; Proceeding Under Section 129 of the Uruguay Round Agreements Act (URAA): Samsung's Response to the Department's December 21, 2017 Supplemental Questionnaire," January 24, 2018 (Samsung Group January 24, 2018 QR), at 9 (stating that Samsung "does not have procedures in place actively to block improvements and developments related to R&D undertaken in one Business Unit from impacting another"); Letter from the Samsung Group, "Large Residential Washers from the Republic of Korea Section 129 Proceeding: Samsung's Response to the Department's February 9, 2018 Supplemental Questionnaire," February 26, 2018 (Samsung Group February 26, 2018 QR), at 1-3 and 5 (reiterating that "Samsung does not have procedures to actively isolate or prevent technological developments from one business unit from benefiting the products produced in the home appliance business unit" and conceding that R&D projects conducted in other business units, such as the semiconductor business unit, may have tangential benefits for the home appliance business unit); Letter from the Samsung Group, "Large Residential Washers from Korea Section 129 Proceeding: Samsung's Additional R&D Project Lists in Response to Question 9 of the Department's February 9, 2018 Supplemental Questionnaire," March 2, 2018, at Attachments 4 and 5 (indicating that R&D projects conducted by Samsung's general R&D centers benefit specific business units); Commerce Memorandum, "Large Residential Washers from the Republic of Korea: Analysis of Business Proprietary Information Pertaining to the Preliminary Section 129 Determination Regarding the Countervailing Duty Investigation," April 4, 2018 (Preliminary Analysis Memorandum), at 1-2 (discussing the business proprietary information on the record that supports Commerce's conclusion that the benefits of Samsung's R&D projects are not isolated to the specific business units that conduct them).

⁵⁴ See Samsung Group Case Brief at 10-11 (citing *Korean Bottom Mount Refrigerators*).

Commerce considered how to attribute R&D costs across Samsung's business units.⁵⁵ The attribution of costs in an AD proceeding and the tying of subsidy benefits in a CVD proceeding are two distinct issues. Furthermore, unlike the *Korean Bottom Mount Refrigerators* record, which contained "no compelling evidence that technology advances in {other business units}...directly impacted the company's refrigerator developments,"⁵⁶ the record of this section 129 proceeding expressly indicates that Samsung's R&D activities benefited multiple business units.⁵⁷ For example, as noted in the Preliminary Section 129 Determination, information provided by the Samsung Group demonstrates that several projects conducted by Samsung's general R&D centers directly benefit the company's individual, product line-specific business units, including Samsung's home appliance business unit.⁵⁸ Moreover, in its case brief, the Samsung Group indirectly concedes that, because Samsung-produced semiconductors were used in Samsung's washing machines during the period of investigation (POI), the home appliance business unit benefits, to some degree, from R&D conducted by the semiconductor business unit.⁵⁹

The Samsung Group's arguments regarding the RSTA Article 10(1)(3) tax credit program suggest that the financial contribution provided by the GOK, as well as the benefits conferred to Samsung, relate to the performance of R&D.⁶⁰ However, the financial contribution and benefit at issue relate to forgoing government revenue that is otherwise due.⁶¹ The proper tying analysis for a subsidy in the form of forgone revenue is whether the forgone revenue, and the subsequent tax savings realized by the recipient, is tied to a particular product. The tax credits provided under RSTA Article 10(1)(3) are used to offset Samsung's overall domestic income taxes, not income taxes from any particular product or business division of Samsung. This is because the tax credits are not "earned" with respect to any one particular product; rather, they can be and are earned with respect to a multitude of products.⁶² In other words, the tax credits are not

⁵⁵ See *Korean Bottom Mount Refrigerators* IDM at Comment 39.

⁵⁶ *Id.*

⁵⁷ See, e.g., Samsung Group February 26, 2018 QR at 1-3 and 5 (conceding that R&D projects conducted in other business units, such as the semiconductor business unit, may have tangential benefits for the home appliance business unit); Samsung Group Case Brief at 10 (conceding that the home appliance business unit benefits, albeit minimally, from R&D conducted by other business units).

⁵⁸ See Preliminary Section 129 Determination at 12-13; see also Preliminary Analysis Memorandum at 1-2.

⁵⁹ See Samsung Group Case Brief at 10. This acknowledgement undermines the Samsung Group's own arguments that the semiconductors used in Samsung's washing machines are not "advanced" enough to benefit from the company's R&D projects. Presumably, because Samsung's washing machines incorporate semiconductor and LCD panel components, any developments benefiting Samsung's semiconductor and LCD panel production will eventually benefit Samsung's washing machine production if/when such components are incorporated in Samsung's washing machines. As such, the fact that Samsung did not use any self-produced LCD panels in its washing machines during the POI is not entirely relevant to Commerce's tying analysis. Expenditures for semiconductor and LCD panel R&D made during the POI may benefit Samsung's home appliance unit in the long-term.

⁶⁰ See, e.g., Samsung Group Case Brief at 7-8.

⁶¹ See section 771(5)(D)(ii) of the Act; see also Article 1.1 of the SCM Agreement.

⁶² This decision is not based on the fact that the qualifying activity (*i.e.*, the R&D) occurred before the financial contribution and the benefit. The timing is not determinative of the design, structure, and operation of the subsidy; nor is it determinative as to whether the subsidy is connected to, or conditioned on, certain products. If a subsidy was designed, structured, and operated such that the qualifying activity related to only a certain product, the relevant analysis and determinations would be different, but those are clearly not the facts in this case.

“connected to, or conditioned upon,” the production or sale of any particular product,⁶³ as they are connected to Samsung’s domestic production of *all* products (*i.e.*, they are untied).

For the reasons discussed above, as well as those discussed in the preliminary analysis,⁶⁴ Commerce continues to find that the RSTA Article 10(1)(3) and RSTA Articles 26 programs are not tied to any particular product or products. Rather, the programs provide untied subsidies that benefit all domestic production. Accordingly, the subsidy rates calculated for the RSTA Article 10(1)(3) and RSTA Article 26 tax credit programs remain unchanged.

Comment 2: Attribution of RSTA Article 10(1)(3) Tax Credit Program Benefits

Samsung Group’s Comments

- Commerce’s preliminary tying and attribution decisions are internally inconsistent.⁶⁵
- Any R&D project pertaining to a particular product has the potential to benefit Samsung’s global production of that product.⁶⁶ As such, benefits from Samsung’s Korean R&D operations benefit Samsung’s overseas production operations.⁶⁷
- The issue is whether Commerce should include Samsung’s sales of products produced in third countries by affiliates and recorded as income by Samsung in Samsung’s sales denominator.⁶⁸
- Samsung’s Korean taxable income includes income earned from the sale of merchandise produced in a third country by Samsung’s overseas affiliates.⁶⁹ Therefore, in order to match tax credits (*i.e.*, the numerator) to income (*i.e.*, the denominator), Commerce must include the income from washing machines produced outside of Korea because it is included in Samsung’s taxable income.⁷⁰
- Commerce improperly conflates whether eligible R&D activities must be performed in Korea and whether eligible R&D activities must be incurred by a Korean corporation.⁷¹ Eligible R&D activities do not need to take place in Korea, as expenses incurred overseas by a Korean national are deductible, as well as expenses incurred by an overseas affiliate and reimbursed by a Korean parent company.⁷²
- The Samsung Group is not arguing for inclusion of the income of all overseas subsidiaries.⁷³ Rather, it is arguing for inclusion of Samsung’s income attributable to sales of foreign-produced merchandise, as recorded in Samsung’s financial statements and subject to Korean taxes.⁷⁴

⁶³ See AB Report at para. 5.270.

⁶⁴ See Preliminary Section 129 Determination at 6-14.

⁶⁵ See Samsung Group Case Brief at 12.

⁶⁶ *Id.*

⁶⁷ *Id.* at 13.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 14.

⁷¹ *Id.* at 15.

⁷² *Id.* at 16.

⁷³ *Id.*

⁷⁴ *Id.*

- Commerce is only investigating subsidies provided by the GOK.⁷⁵

Petitioner’s Rebuttal Comments

- Evidence pertaining to the “design, structure, and operation” of the RSTA Article 10(1)(3) tax credit program does not support the Samsung Group’s argument that the subsidy should be attributed to sales of merchandise produced by the company’s overseas affiliates.⁷⁶
- Regarding the design, structure, and operation of the program, eligible R&D expenditures must be incurred by Korean companies for the benefit of Korean companies’ activities.⁷⁷ Accordingly, Samsung earned these benefits based on the structure and location of its production operations in Korea.⁷⁸
- For purposes of the CVD investigation, Samsung’s production was centered in Korea, as all of its washing machine producer operations were performed at Samsung’s facility in Gwangju, Korea.⁷⁹
- Evidence that Samsung’s overseas affiliates paid royalties to Samsung for use of its R&D supports the finding that Samsung does not attribute a benefit to its overseas affiliates.⁸⁰

Commerce’s Position

Commerce continues to find that benefits received from the RSTA Article 10(1)(3) tax credit program should not be attributed to sales of washing machines produced outside of Korea. Regarding attribution of subsidy benefits, the AB stated:

In calculating the amount of *ad valorem* subsidization, an investigating authority has the task of identifying the specific products for whose “manufacture, production or export” a given subsidy has been “granted.” This examination should be conducted on a case-by-case basis, based on the arguments and evidence submitted by interested parties and the specific facts surrounding the bestowal of that subsidy. Those facts may include the text, design, structure, and operation of the measure under which the subsidy is granted, as well as the structure and location of the recipient’s production operations.⁸¹

In the Preliminary Section 129 Determination, we applied the attribution standard articulated by the AB.⁸² Specifically, we examined the “design, structure, and operation” of the program, as well as the “structure and location” of Samsung’s facilities, and determined, based on information gathered during the underlying CVD investigation and this section 129 proceeding,⁸³

⁷⁵ *Id.*

⁷⁶ *See* Petitioner Rebuttal Brief at 13.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 14.

⁸⁰ *Id.* at 15.

⁸¹ *See* AB Report at para. 5.298. The AB also emphasized that an investigating authority’s task is to identify the “subsidized product.” *Id.* at paras. 5.297 and 5.299.

⁸² *See* Preliminary Section 129 Determination at 15-18.

⁸³ *See, e.g.,* Samsung Group February 26, 2018 QR at Exhibit 4 (identifying Samsung as a “domestic” corporation located and registered in Korea); Letter from the petitioner, “Large Residential Washers from Korea: Proceeding

that the GOK did not design, structure, or operate the RSTA Article 10(1)(3) tax credit program to subsidize Samsung's overseas production.⁸⁴ We also found that the "subsidized product" is Samsung's domestic production.⁸⁵

The Samsung Group alleges that this conclusion is inconsistent with the determination that the RSTA Article 10(1)(3) and RSTA Article 26 tax credits are not tied to individual business units,⁸⁶ but the company fails to explain how Commerce's determination is inconsistent with the standard articulated by the AB. Record evidence indicates that the RSTA Article 10(1)(3) tax credit program was designed, structured, and operated to benefit Korean companies with production operations in Korea, as eligible R&D expenses must be incurred by and for "the work of the domestic corporation" in order to be claimed as a deduction.⁸⁷ Therefore, Samsung received tax credits by virtue of, and for the benefit of, its production facilities in Korea, *not* production facilities located outside of Korea and owned by overseas affiliates. The Samsung Group presents a hypothetical scenario in which Samsung's overseas affiliates incur R&D expenses and are reimbursed by Samsung, thereby qualifying such expenses for the RSTA Article 10(1)(3) tax credit.⁸⁸ However, these are not the facts in the current proceeding, and such speculation is not relevant to the issue of attribution. In fact, as noted in the Preliminary Section 129 Determination, Samsung's overseas affiliates paid royalties to Samsung for the general benefits of Samsung's R&D activities.⁸⁹ This transactional relationship further demonstrates that the results of R&D projects undertaken by Samsung, regardless of location, do not flow freely to the company's overseas subsidiaries.

The Samsung Group also asserts that Samsung's taxable income includes sales of products manufactured by the company's overseas affiliates and, therefore, Commerce must include such sales in the denominator of its subsidy rate calculations for this program.⁹⁰ The Samsung Group, however, did not provide evidence or explanation to support this claim,⁹¹ nor did the company

Under Section 129 of the Uruguay Round Agreements Act; Submission of Rebuttal Factual Information," February 5, 2018 (Petitioner Rebuttal Factual Information), at Attachment 18 (indicating that eligible R&D expenses must be incurred by Korean companies for the benefit of Korean companies); Samsung Group January 24, 2018 QR at Exhibit 2 (mapping the locations of Samsung's facilities).

⁸⁴ See Preliminary Section 129 Determination at 16-17.

⁸⁵ *Id.* at 16.

⁸⁶ See Samsung Group Case Brief at 12.

⁸⁷ See Petitioner Rebuttal Factual Information at Attachment 18. Contrary to the Samsung Group's arguments, we do not dispute that eligible R&D expenses may be incurred outside of Korea. See Samsung Group Case Brief at 15-16; see also GOK January 16, 2018 QR at 3-4 (noting that there is no explicit restriction on where eligible R&D activities can be incurred).

⁸⁸ See Samsung Group Case Brief at 15.

⁸⁹ See Preliminary Section 129 Determination at 17-18 (citing Samsung Group January 24, 2018 QR at 10 and Samsung February 26, 2018 QR at 10-11).

⁹⁰ See Samsung Group Case Brief at 13-14.

⁹¹ *Id.* at 13, n. 28 (citing Letter from the Samsung Group, "Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea: Supplemental Questionnaire Response," August 30, 2012, at 2 and Exhibit 3, placed on the record of this section 129 proceeding as an attachment to Commerce Memorandum, "Section 12 Proceeding Regarding the Countervailing Duty Order on Large Residential Washers from the Republic of Korea: Placing Document on the Official Administrative Record," April 26, 2018). We noted that the cited supplemental questionnaire response does not support Samsung's statement that "Samsung's Korean taxable income *includes* the income earned on the sale of foreign-produced merchandise where the products are produced by Samsung's overseas affiliates, sold to {Samsung}, and then re-sold by {Samsung} to the overseas sales affiliates." *Id.* at 13.

make such a statement in prior submissions on the record of this section 129 proceeding or during the underlying CVD investigation. Indeed, this is a new argument with no factual basis in the information provided by the Samsung Group and, accordingly, does not undermine Commerce's prior determination that Samsung is a *domestic* Korean corporation, located and registered in Korea, earning income from the company's production of, *inter alia*, washing machines in Korea.⁹²

Finally, we agree with the Samsung Group's statement that only subsidies provide by the GOK are at issue in this proceeding.⁹³ Therefore, as explained in the Preliminary Section 129 Determination, including sales of merchandise produced *outside* of Korea and, as such, potentially benefiting from foreign subsidies would create an imbalance between the numerator and the denominator in the subsidy rate calculations for this program.⁹⁴ For example, washing machines produced in Mexico potentially benefited from subsidies provided by the Government of Mexico. Therefore, it would be improper to include sales of washing machines produced in Mexico in the denominator without first identifying such subsidies, determining the value of any benefits received, and including that value in the numerator. In this proceeding, as acknowledged by the Samsung Group, we are not investigating subsidies provided by any government other than the GOK,⁹⁵ and, in order to calculate an accurate countervailable subsidy rate for tax credits received from the GOK under RSTA Article 10(1)(3), it is necessary to remove sales of merchandise produced outside of Korea from Samsung's denominator. Merchandise produced outside of Korea is not part of the "subsidized product" under the design, structure, and operation of the RSTA Article 10(1)(3) tax credit program.

For the reasons discussed above, as well as those discussed in the preliminary analysis of this issue,⁹⁶ Commerce continues to find that the RSTA Article 10(1)(3) subsidies are attributable to Samsung's domestic production. Accordingly, the subsidy rate calculated for the RSTA Article 10(1)(3) tax credit program remains unchanged.

Comment 3: *De Facto* Specificity of the RSTA Article 10(1)(3) Tax Credit Program

Samsung Group's Comments

- Commerce should conclude that the RSTA Article 10(1)(3) tax credit program is not *de facto* specific.⁹⁷
- Commerce incorrectly found 11,764 to be a "limited number," whereas the fact that 11,764 companies benefited from the RSTA Article 10(1)(3) tax credit program indicates that the program was broadly available and that the number of recipients was not limited.⁹⁸

⁹² See Preliminary Section 129 Determination at 16.

⁹³ See Samsung Group Case Brief at 16 (stating: "{T}he Department is not investigating alleged subsidies provided by other governments. At issue are subsidies provided by the Korean government.").

⁹⁴ See Preliminary Section 129 Determination at 18.

⁹⁵ See Samsung Group Case Brief at 16.

⁹⁶ See Preliminary Section 129 Determination at 15-18.

⁹⁷ See Samsung Group Case Brief at 19.

⁹⁸ *Id.* at 17.

- The taxpayer statistics provided by the GOK confirm that many corporate taxpayers likely would not qualify for the RSTA Article 10(1)(3) tax credits because their businesses do not conduct R&D.⁹⁹
- Commerce’s analysis cannot rely only on the number of corporate taxpayers participating in the program.¹⁰⁰ Rather, Commerce can only find specificity where there is evidence of a “systematic series of actions” designed to confer benefits to an industry or certain enterprises.¹⁰¹
- Per Commerce’s own analysis, the tax credits are general and not specific to any particular industry.¹⁰² There is no systematic series of actions in this case.¹⁰³

Petitioner’s Comments

- Commerce reasonably concluded that the RSTA Article 10(1)(3) tax credit program is *de facto* specific based on both quantitative and qualitative analysis.¹⁰⁴
- The preliminary finding that 11,764 companies is a limited number, as it is only 2.7 percent of the 440,023 total corporate taxpayers in 2011, is consistent with Commerce’s prior determinations.¹⁰⁵
- There is no evidence to support the Samsung Group’s speculative claim that many of the corporate taxpayers in Korea do not conduct R&D and, therefore, do not qualify for the program.¹⁰⁶
- The Samsung Group disregards Commerce’s consideration of the diversification of the Korean economy and the length of time the program has been in place, which are both relevant factors under the SCM Agreement and U.S. law.¹⁰⁷

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 18.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See Petitioner Rebuttal Brief at 17.

¹⁰⁵ *Id.* at 15-16 (citing *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Preliminary Negative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 81 FR 63168 (September 14, 2016), and accompanying Preliminary Decision Memorandum (Korean CTL Plate PDM) at 19, unchanged in *Certain Carbon and Alloy Steel Cut-to-length Plate from the Republic of Korea: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 82 FR 16341 (April 4, 2017) (*Korean CTL Plate*); *Non-Oriented Electrical Steel from the Republic of Korea: Final Negative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 79 FR 61605 (October 14, 2014) (*Korean NOES*), and accompanying Issues and Decision Memorandum (Korean NOES IDM); *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017), and accompanying Issues and Decision Memorandum at Comment 50 (finding that “{t}he number of enterprises that received the federal tax credit is limited to 19,490 enterprises out of about 1,940,000, or about 1 percent of the potential corporate tax filers”); and *Supercalendered Paper from Canada: Final Results of Countervailing Duty Expedited Review: Final Results of Countervailing Duty Expedited Review*, 82 FR 18896 (April 24, 2017)).

¹⁰⁶ *Id.* at 16.

¹⁰⁷ *Id.* at 16-17.

Commerce's Position

Commerce continues to find that the RSTA Article 10(1)(3) tax credit program is *de facto* specific pursuant to section 771(5A)(D)(iii)(I) of the Act because the actual number of subsidy recipients is limited in number. The Samsung Group argues that the number of companies that received the RSTA Article 10(1)(3) tax credit during the POI (*i.e.*, 11,764) does not constitute a “limited number” of recipients.¹⁰⁸ However, 11,764 is only 2.7 percent of the 440,023 total Korean corporate taxpayers during the POI.¹⁰⁹ Therefore, in the context of this proceeding, 11,764 constitutes a limited number of companies. This finding is consistent with Commerce’s prior determinations. For example, in *Korean NOES*, we found that the 13,884 users of the RSTA Article 10(1)(3) tax credit program constituted a limited number of companies because it equated to only 3.01 percent of corporate tax filers during the relevant year.¹¹⁰ Similarly, in *Korean CTL Plate*, we found *de facto* specificity under section 771(5A)(D)(iii)(I) of the Act when only 0.24 percent of all corporate taxpayers claimed RSTA Article 10(1)(3) tax credits.¹¹¹

The test for specificity is whether the subsidy is, in fact, broadly available and widely used throughout an economy.¹¹² This concept for specificity includes both *de jure* specificity (*i.e.*, whether the program is “broadly available”), as referenced in section 771(5A)(D)(i) of the Act and Article 2.1(a) of the SCM Agreement, and *de facto* specificity (*i.e.*, whether the program is “widely used”), as referenced in section 771(5A)(D)(iii) of the Act and Article 2.1(c) of the SCM. Therefore, a subsidy that is only used by 2.7 percent of corporate tax payers, such as the tax credits provided under RSTA Article 10(1)(3), is not widely used throughout an economy; rather, it is used by only a “limited number” of enterprises.

The Samsung Group contends that, because certain corporate tax filers (*e.g.*, companies in the “Wholesale industry” and the “Services industry”) are not likely to engage in R&D activities, Commerce’s limited number analysis is skewed.¹¹³ However, R&D activities are not, by definition, limited to traditionally technology- or manufacturing-focused industries. Certain companies in the service industry, for example, might engage in market research pertaining to branding and advertising. Indeed, the Samsung Group failed to provide, or point to, any record evidence supporting its implications that entire industrial classifications are precluded from investing in R&D.

Moreover, the Samsung Group’s argument is inconsistent with the concept of specificity set forth within the SAA, section 771(5A)(D)(iii) of the Act, and Article 2.1(c) of the SCM Agreement. In essence, the Samsung Group is stating that, because the subsidy program created by the GOK is inherently limited to activities that are not used by the vast majority of enterprises or industries within the economy, the analysis of specificity should be limited only to those enterprises or industries that could potentially use the subsidy program.¹¹⁴ The Samsung Group has provided

¹⁰⁸ See Samsung Group Case Brief at 17.

¹⁰⁹ See GOK January 16, 2018 QR at Exhibit SYNT-1; see also Petitioner Rebuttal Brief at 15-16.

¹¹⁰ See, *e.g.*, Korean NOES IDM at 12-13.

¹¹¹ See Korean CTL Plate PDM at 19.

¹¹² See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc 103-316, vol. 1 (1994) (SAA) at 929.

¹¹³ See Samsung Group Case Brief at 17.

¹¹⁴ *Id.* at 17-18.

no support for such a proposition. Under the rationale of the specificity analysis put forth by the Samsung Group, if the GOK created a tax credit for companies that use iron ore in their manufacturing process, then, in analyzing the specificity of such a program, the administering authority would restrict its analysis to whether a limited number of companies that use iron ore used this program, not to whether this tax credit was broadly available and widely used throughout the Korean economy. This concept of specificity (*i.e.*, an analysis based on the limitation of a subsidy due to the inherent characteristics of the subsidy) has no support under the Act or SCM Agreement and has been explicitly rejected by the SAA and at the WTO.¹¹⁵

Finally, the Samsung Group argues that we have not satisfied the AB's standard for *de facto* specificity.¹¹⁶ In particular, the Samsung Group states that Commerce "can only find specificity where there is evidence of a *systematic series of actions* designed to confer benefits to an industry or certain enterprises."¹¹⁷ In *United States – Countervailing Duty Measures on Certain Products from China* (WT/DS437), the AB stated:

That the *de facto* specificity of a subsidy is to be assessed in an even broader analytical framework is borne out in the first factor listed in Article 2.1(c) – "use of a subsidy programme by a limited number of certain enterprises". ...Evidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms, for instance, in the form of a law or regulation, or other official document or act setting out criteria or conditions governing the eligibility for a subsidy. A subsidy scheme or plan may also be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises.¹¹⁸

Accordingly, evidence of a "systematic series of actions" is not required to find *de facto* specificity; rather, it is only one means of determining the "nature and scope" of a subsidy program.¹¹⁹ The AB explicitly identifies "a law or regulation" as an alternative form of evidence that may demonstrate the existence of, as well as the nature and scope of, a subsidy program.¹²⁰ In the current case, the GOK implemented the RSTA Article 10(1)(3) tax credit program through

¹¹⁵ See SAA at 932; see also *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/DS257/R (August 29, 2003) (*Softwood Lumber*), at para. 7.116 (stating: "[W]e see no basis in the text of Article 2, and 2.1 (c) SCM Agreement in particular, for Canada's argument that if the inherent characteristics of the good provided limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is limited to a sub-set of this industry, i.e. to certain enterprises within the potential users of the subsidy engaged in the manufacture of similar products. Article 2 speaks of the use by a limited number of certain enterprises or the predominant use by certain enterprises, not of the use by a limited number of certain eligible enterprises. In the case of a good that is provided by the government – and not just money, which is fungible – and that has utility only for certain enterprises (because of its inherent characteristics), it is all the more likely that a subsidy conferred via the provision of that good is specifically provided to certain enterprises only.").

¹¹⁶ See Samsung Group Case Brief at 17-18 (citing *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R (December 18, 2014), at para. 4.143).

¹¹⁷ *Id.* at 18.

¹¹⁸ See *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R (December 18, 2014), at para. 4.141 (citations omitted).

¹¹⁹ *Id.*

¹²⁰ *Id.*

a series of written laws and regulations.¹²¹ There is clearly a subsidy “program” in the form of the RSTA Article 10(1)(3) laws and regulations. Therefore, there is no need to find also a systematic series of actions. As such, the Samsung Group’s arguments are misplaced. Furthermore, the specificity analysis in the Preliminary Section 129 Determination satisfies all aspects of Article 2.1 of the SCM Agreement.¹²² In addition to the proportion of total Korean corporate taxpayers benefiting from the RSTA Article 10(1)(3) tax credit program, we considered Korea’s economic diversification and how long the program has been in operation.¹²³ Based on this analysis, we determined that there is no lack of diversification within the Korean economy and that the RSTA Article 10(1)(3) tax credit program has not been in operation “for a limited period of time only.”¹²⁴ Therefore, as discussed in detail in the Preliminary Section 129 Determination, neither factor changes Commerce’s determination that the program is *de facto* specific.¹²⁵

For the reasons discussed above, as well as those discussed in the preliminary analysis of this issue,¹²⁶ we continue to find that the RSTA Article 10(1)(3) tax credit program is *de facto* specific because it is used by a limited number of enterprises. Accordingly, the subsidy rate calculated for the RSTA Article 10(1)(3) tax credit program remains unchanged.

IV. FINAL DETERMINATION

As noted in the Preliminary Section 129 Determination, Commerce finds that no changes to the countervailable subsidy rates calculated in the CVD investigation of washing machines from Korea are warranted. In accordance with section 129(b)(4) and 129(c)(1)(B) of the URAA, if USTR, after consulting with Commerce and Congress, directs Commerce to implement, in whole or in part, this final determination, we will direct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all imports of washing machines from Korea that are entered, or withdrawn from warehouse, for consumption on or after the date of such implementation. CBP shall continue to require a cash deposit equal to the following countervailable subsidy rates, which were calculated in the CVD investigation,¹²⁷ unless superseded by an intervening administrative review.

Company	Countervailable Subsidy Rate
Daewoo Electronics Corporation	72.30 percent
LG Electronics Inc.	0.01 percent
Samsung Electronics Co., Ltd.	1.85 percent
All-Others	1.85 percent

¹²¹ See GOK January 16, 2018 QR at Exhibit RSTA-1.

¹²² See Preliminary Section 129 Determination at 19-23.

¹²³ *Id.*

¹²⁴ *Id.* at 22-23.

¹²⁵ *Id.* at 19-23.

¹²⁶ *Id.* at 15-18.

¹²⁷ See *Large Residential Washers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 75975, 75977 (December 26, 2012).

V. RECOMMENDATION

In light of the conclusions described in the Panel Report and AB Report, and based on Commerce’s analysis, we recommend adopting the above positions, which will render Commerce’s determination not inconsistent with the findings adopted by the DSB.

Agree

Disagree

6/4/2018

X



Signed by: GARY TAVERMAN

Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance