Final Results of Remand Redetermination

TMB 440AE, Inc. (formerly known as Advance Engineering Corporation), v. United States

I. Summary

The Department of Commerce has prepared these final results of redetermination pursuant to the remand order of the United States Court of International Trade (CIT) in *TMB 440AE, Inc. (formerly known as Advance Engineering Corporation), v. United States*, Court No. 18-00095, Slip Op. 19-109 (CIT August 13, 2019) (*Remand Order*).[1] The *Remand Order* concerns Commerce's Final Scope Rulings regarding the antidumping duty (AD) and countervailing duty (CVD) orders[2] on certain seamless carbon and steel alloy standard, line, and pressure pipe from the People's Republic of China.[3] The CIT remanded this matter to Commerce to conduct an analysis that considers the sources listed in 19 CFR 351.225(k)(1) (the (k)(1) sources) in assessing whether the seamless pipe produced by Advance Engineering Corporation (AEC) falls within the scope of the *Orders*.

[1] *See TMB 440AE, Inc. (formerly known as Advance Engineering Corporation), v. United States*, Court No. 18-00095, Slip Op. 19-109 (CIT August 13, 2019) (*Remand Order*).
[2] *See Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 FR 69050 (November 10, 2010); *see also Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China: Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order*, 75 FR 69052 (November 10, 2010) (collectively, *Orders*).
[3] *See* Memorandum "Antidumping and Countervailing Duty Orders on Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China: Final Scope Ruling for Advance Engineering; Specialized Seamless Pipe," dated March 29, 2018; *see also* Memorandum, "Antidumping and Countervailing Duty Orders on Certain Seamless Carbon and Alloy Steel standard, Line and Pressure Pipe from the People's Republic of China: Final Scope Ruling for Advance Engineering; Specialized Seamless Pipe," dated March 29, 2018 (Final Scope Rulings).

As set forth below in this final remand redetermination, pursuant to the *Remand Order*, Commerce has conducted an analysis that considers the (k)(1) sources to assess whether AEC pipe falls within the scope of the *Orders*. Below we explain why, in light of our (k)(1) analysis, we have determined that AEC pipe is within the scope of the *Orders*. In analyzing the (k)(1) sources, we found that AEC pipe does not comport with "aerospace specifications" at the time of importation or thereafter, and, in addition, AEC pipe does not meet the chemical composition requirements specified in the standard for A-335 pipe, and therefore does not meet the exclusion from the scope which is defined by A-335 pipe.

II. Scope of the *Orders*

The merchandise covered by the *Orders* consists of certain seamless carbon and alloy steel (other than stainless steel) pipes and redraw hollows, less than or equal to 16 inches (406.4 mm) in outside diameter, regardless of wall-thickness, manufacturing process (*e.g.*, hot-finished or cold-drawn), end finish (*e.g.*, plain end, beveled end, upset end, threaded or threaded and coupled), or surface finish (*e.g.*, bare, lacquered or coated). Redraw hollows are any unfinished carbon or alloy steel (other than stainless steel) pipe or "hollow profiles" suitable for cold finishing operations, such as cold drawing, to meet the American Society for Testing and Materials ("ASTM") or American Petroleum Institute ("API") specifications referenced below, or comparable specifications. Specifically included within the scope are seamless carbon and alloy steel (other than stainless steel) standard, line, and pressure pipes produced to the ASTM A-53, ASTM A-106, ASTM A-333, ASTM A-334, ASTM A-589, ASTM A-795, ASTM A-1024, and the API 5L specifications or comparable specifications, and meeting the physical

parameters described above, regardless of application, with the exception of the exclusion discussed below.

Specifically excluded from the scope of the *Orders* are: (1) all pipes meeting aerospace, hydraulic, and bearing tubing specifications; (2) all pipes meeting the chemical requirements of ASTM A-335, whether finished or unfinished; and (3) unattached couplings. Also excluded from the scope of the *Orders* are all mechanical, boiler, condenser and heat exchange tubing, except when such products conform to the dimensional requirements, i.e., outside diameter and wall thickness of ASTM A-53, ASTM A-106 or API 5L specifications.

The merchandise covered by the *Orders* is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7304.19.1020, 7304.19.1030, 7304.19.1045, 7304.19.1060, 7304.19.5020, 7304.19.5050, 7304.31.6050, 7304.39.0016, 7304.39.0020, 7304.39.0024, 7304.39.0028, 7304.39.0032, 7304.39.0036, 7304.39.0040, 7304.39.0044, 7304.39.0048, 7304.39.0052, 7304.39.0056, 7304.39.0062, 7304.39.0068, 7304.39.0072,7304.51.5005, 7304.51.5060, 7304.59.6000, 7304.59.8010, 7304.59.8015, 7304.59.8020,7304.59.8025, 7304.59.8030, 7304.59.8035, 7304.59.8040, 7304.59.8045, 7304.59.8050,7304.59.8055, 7304.59.8060, 7304.59.8065, and 7304.59.8070.

III. Background

On October 20, 2017, AEC requested that Commerce issue a scope ruling finding that AEC pipe products are outside the scope of the *Orders*.[4] Commerce concluded that the information provided by AEC was insufficient to allow Commerce to reach a determination and

[4] *See* AEC's Letter, "Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China: Advance Engineering Scope Request: Specialized Seamless Pipe," dated October 20, 2017 (Scope Request).

requested additional information from AEC on January 26, 2018.[5] AEC provided additional information on February 2, 2018.[6] On March 29, 2018, Commerce determined in the Final Scope Rulings that the seamless pipe products imported by AEC were within the scope of the *Orders* based on the plain language of the *Orders*.

IV. CIT's Remand

AEC challenged Commerce's Final Scope Rulings before the CIT, and, on August 13, 2019, the CIT remanded the matter to Commerce to conduct an analysis of the (k)(1) sources. On September 16, 2019, pursuant to the *Remand Order*, Commerce supplemented the record of the remand with additional documents.[7] On September 27, 2019, AEC provided additional factual information and comments in response to Commerce's supplementation of the record.[8] In its filing, AEC challenged Commerce's determination in the Final Scope Rulings that the language of the *Orders* is unambiguous and argued that Commerce erred by failing to consider the (k)(1) sources. In the Final Scope Rulings, Commerce determined that, at the time of importation, AEC pipe is within the written description of the *Orders* and that such analysis is dispositive without an examination of the (k)(1) sources, because the scope language is unambiguous.[9] The CIT disagreed with this determination and held that Commerce "was not free to ignore" the (k)(1) sources because "{w}hether the order is ambiguous or not,

[5] *See* Commerce's Letter, "Scope Ruling Request: Supplemental Questionnaire," dated January 26. 2018.
[6] *See* AEC's Letter, "Supplemental Questionnaire Response of Advance Engineering, Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China: Scope Ruling Request from AEC; Specialized Seamless Pipe," dated February 2, 2018.
[7] *See* Memorandum, "TMB 440AE, Inc. (Formerly known as Advance Engineering Corporation) v. United States, Court No. 18-00095; Transmission of Documents to the Record of the remand Pursuant to Slip. Op. 19-109 (Aug. 13, 2019)," dated September 16, 2019.
[8] *See* AEC's Letter , "Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Comments and Rebuttal Information Responding to Documents Transmitted on the Record Pursuant to Slip Op. 19-109," dated September 27, 2019.
[9] *See* Final Scope Rulings at 7.

Commerce's regulations are unambiguous-it '*will* take into account' the (k)(1) criteria in conducting a scope determination."[10] Furthermore, the CIT held that Commerce had erred in its finding that the scope language's reference to "aerospace specifications" was unambiguous.[11] As a result of Commerce not defining "aerospace specifications" before concluding its analysis of the AEC pipe, the CIT found that Commerce must consider the (k)(1) sources to define the "aerospace specifications" exclusion prior to rendering its decision.[12] The CIT, thus, remanded the matter to Commerce to consider the (k)(1) sources and, should that analysis not prove dispositive, proceed with a formal scope inquiry under 19 CFR 351.225(k)(2).[13] On October 23, 2019, Commerce provided to the interested parties, and invited comment on, the Draft.[14] AEC requested an extension to provide comments on October 23, 2019,[15] which Commerce granted on October 25, 2019.[16] On November 4, 2019, AEC provided comments on the Draft Results.[17]

V. Discussion

In accordance with the *Remand Order*, Commerce has reconsidered its determination in the Final Scope Rulings, and we continue to conclude that AEC pipe is within the scope of the *Orders* on the basis of the (k)(1) sources. With regard to the CIT's direction to first consider the meaning of "aerospace specifications," for purposes of this final redetermination, we find that

[10] *See Remand Order* at 9 (emphasis in original).
[11] *Id.* at 9-11.
[12] *Id.*
[13] *See Remand Order* at 12-13.
[14] *See* "Draft Results of Remand Redetermination TMB 440AE, Inc. (formerly known as Advance Engineering Corporation), v. United States," filed October 23, 2019 (Draft Results).
[15] *See* AEC's Letter, "Request for Extension of Time to File Comments on Draft Remand: Antidumping and Countervailing Duty Orders on Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China," dated October 23, 2019.
[16] *See* Commerce's Letter, "Request for Extension of Time to File Comments on Draft Remand: Antidumping and Countervailing Duty Orders on Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China," dated October 25, 2019.
[17] *See* AEC's Letter, "Comments on Draft Remand: Antidumping and Countervailing Duty Orders on Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China," dated November 4, 2019 (Comments on Draft Results).

the (k)(1) sources provide a clear explanation of the intended meaning of "aerospace specifications" for purposes of meeting the exclusion. In *United Steel & Fasteners, Inc. v. United States*, the CIT explained that "the (k)(1) sources are afforded primacy in the scope analysis . . . because the interpretation of the language used in the orders must be based on the meaning given to that language during the underlying investigations."[18] Based on our review of the initial investigations and Commerce's determinations, which show specific, identifiable standards for "aerospace specifications," the technical requirements by which those standards are met, and a distinction between the seamless pipe that is intended to be covered by the scope of the *Orders* and the mechanical tubing that is intended to be excluded from the *Orders*, we conclude that the meaning given to the language in the exception for "aerospace specifications" was intended to describe a specific and distinct type of tubing from the AEC pipe at issue. We recognize that AEC produces a custom product; however, at the time of importation, AEC pipe is in all respects within the description of the *Orders*; further analysis of the (k)(1) sources does not demonstrate that these pipe products meet the description of pipe products meeting "aerospace specifications," or of pipe products meeting the other relevant standard, *i.e.*, A-335, both of which are specifically excluded from the *Orders*.

A. Review of the (k)(1) Sources for "Aerospace Specifications"

i. The Petition: "Aerospace Specifications"

The scope of the investigations as articulated in the Petition initially provided an exclusion for certain types of boiler and mechanical tubing without referencing the "aerospace

[18] *See United Steel & Fasteners, Inc. v. United States*, 203 F. Supp. 3d 1235, 1244 n.9 (CIT 2017) (quoting *Fedmet Resources Corp. v. United States*, 755 F.3d 912, 921 (Fed. Cir. 2014)).

specifications."[19] The Petition does not reference commodity or customized production as defining the scope, or the exclusions from the scope. Rather, the Petition states that "standard, line, and pressure applications . . . are defining characteristics of the scope of the investigations. Therefore, seamless pipes meeting the physical description above, but not produced to the ASTM A-53, ASTM A-106 . . . specifications shall be covered if used in a standard, line, or pressure application."[20] Thus, the Petition directed that, should the product not meet the exact definitions of the standard pipe but share its overall application, it must be included in the scope. The Petition recognized that there are variants from the standards in the production of certain pipes but continued to include such pipe within the scope. Even in the case of tubing, the exception was narrowed so that the pipe meeting the dimensions of conventional Nominal Pipe Size (NPS) pipes such as A-53 or A-106 and usable in standard, line, or pressure pipe applications would not be excluded, and would be covered by the scope of the *Orders*.[21]

ii. The Initial Investigations: "Aerospace Specifications"

As the investigations progressed, the scope modification providing the exclusion for pipe meeting "aerospace specifications" developed from Commerce's consideration of comments provided by Salem Steel North America LLC (Salem Steel). In its initial letter dated May 24, 2010, Salem Steel made the first reference to "aerospace specifications" by highlighting, and recommending an exclusion for, aviation tubing in addition to Salem Steel's own A-519 Cold-Drawn Mechanical Tubing (CD Mechanical Tubing), "Aviation Tubing produced to

[19] *See* Petitioners' Letter, "Petition for the Imposition of Antidumping and Countervailing Duties: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China," (Petition) dated September 16, 2009, at 5-6.
[20] *Id.* at 6.
[21] *Id.* at 7.

specification AMS-T-6736 for the aviation industry and now used in high speed vehicles."[22] Salem Steel argued that "to prevent circumvention, the importers…{should be required to} submit to random testing. If the CD Mechanical Tubing is not produced to the strict tolerance of . . . Aviation Tubing . . . the shipment could be put on hold."[23] Thus, the "aerospace specifications" exception originated, not only with a particular specification in mind, but also with a consideration of the need and method to prevent the circumvention of potential, eventual orders that would exclude pipe meeting that specific standard.

In response to Commerce's invitation to all interested parties to comment on proposed scope language, in a second letter dated June 30, 2010, Salem Steel expanded upon its prior concerns, and provided the investigations' first reference to "aerospace." "Aviation, or *aerospace* material, seamless tubing is a type of mechanical tubing. All aviation tubing must conform to certain Aerospace Material Specifications. Aviation tubing **is** seamless alloy tubing made to the AMS-T-6736A standard . . . This AMS-T-6736A standard requires the use of one of two specific alloys – either 4130 chromium molybdenum steel alloy or 8630 alloy."[24] Salem Steel provided a second, specific standard with which CD mechanical tubing must comply in order to meet aerospace specifications, AMS 2253E, that defines dimensional tolerances for mechanical tubing.[25]

In addition, the "aerospace specifications" exception was used and applied only to CD mechanical tubing. This is inherent to the language of the exclusion: "pipes meeting aerospace,

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[22] *See* Salem Steel's Letter, "Certain Seamless Carbon and Alloy Steel, Standard, Line, and Pressure Pipe from the People's Republic of China: Request for Change in Scope Language to Exclude Mechanical Tubing," dated May 24, 2010 (Salem May 24th Letter) at 7.
[23] *Id.* at 8.
[24] *See* Salem Steel's Letter, "Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Response to Commerce Department's June 23 Proposal to Change Scope Language to Exclude Mechanical Tubing," dated June 30, 2010 (Salem June 30th Letter) at 6-7 (emphasis added).
[25] *Id.*

hydraulic and bearing tubing specifications."[26] As indicated by Salem Steel, "CD mechanical tubing are products made to specific order and strict engineering specifications, not standard pipe sizes."[27] In arguing for a distinction between mechanical tubing and seamless pipe, Salem Steel's May 24th letter observed that Commerce differentiated the products in *Circular Welded Non-Alloy Steel Pipe from Mexico*, requiring that it must be custom sized: "{m}echanical tubing is excluded from the Order unless it is manufactured with standard pipe characteristics . . . The Department does not consider tubing which has the identical wall thickness, diameter and length characteristics as either ASTM A-53 or fence tubing to be mechanical pipe because it is not in custom-designed sizes."[28] Indeed, Salem Steel's own product, A-519 CD mechanical tubing, was specifically described as *not* being made to industry standard Nominal Pipe Size NPS sizes.[29]

Salem Steel made no differentiation between the standards in regard to their relative validity. In addition to noting that hydraulic tubing "must conform with the SAE J524 standard" and that bearing tubing "must conform with the AMS 6440 standard," Salem Steel argued that "aviation, or aerospace material seamless tubing … must conform to certain Aerospace Material Specifications. Of particular concern . . . is seamless alloy tubing made to the AMS-T-6736 standard."[30] Salem Steel's concern was not to differentiate the standards between aerospace *vis-à-vis* hydraulic and bearing but to highlight the specific standards that must be followed. Indeed, Salem Steel's concern, and proposed remedy, for circumvention standards lists all of them in the

[26] *See Orders*.
[27] *See* Salem May 24th Letter at 2.
[28] *See* Salem May 24th Letter at 3-4; *see also* Second Redetermination on Circular Welded No-Alloy Steel Pipe from Mexico: Scope Determination-Galvak Secretariat File No. USA-Mex-98-1904-05 (NAFTA Panel Decision, May 16, 2002) at 1, 3.
[29] *See* Salem May 24th Letter at Appendix A-2, page 18.
[30] *See* Salem Steel's Letter, "Salem Steel North America LLC; Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China," dated July 14, 2010 (Salem July 14th Letter), at 17-19.

same group. Commerce accepted Salem Steel's proposal for exclusions of "aerospace specifications" tubing without further comment to Salem Steel's description of the "aerospace specifications." In the absence of any further comment by Commerce and the acceptance of Salem Steel's proposal by the interested parties (barring a notation by the Petitioners that the exclusion be implemented in a fashion to avoid circumvention),[31] the record of the investigations indicates that Commerce implicitly accepted Salem Steel's description of those specifications.

iii. The Determination of the Secretary: "Aerospace Specifications"

The *Final Determinations*, issued September 21, 2010, first implemented the "aerospace specifications" exclusion.[32] In considering other forms of tubing for mechanical, boiler, condenser and heat exchange tubing, the *Final Determinations* explicitly included in the scope products that conform to the dimensional requirements of ASTM A-53, ASTM A-106 or API 5L specifications. In contrast, the scope explicitly excludes all tubing, regardless of dimensions, that is made to "aerospace specifications" because the "tight specifications of these products sufficiently distinguish them from subject merchandise."[33] Thus, Commerce determined that the specific standards of the "aerospace specifications" would distinguish those forms of mechanical tubing from the seamless pipe otherwise covered by the scope. While Commerce did not name

[31] *See* Toyota Tsusho America, Inc.'s Letter, "Countervailing Duty Investigation: Certain Seamless Standard, Line, and Pressure Pipe from the People's Republic of China: Case Brief," dated August 25, 2010 (TAI's Letter) at 6; *see also* U.S. Steel's Letter, "Certain Seamless Standard, Line, and Pressure Pipe from the People's Republic of China," dated September 1, 2010 (U.S. Steel's Letter) at 102-105.

[32] *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 75 FR 57444 (September 21, 2010) (*CVD Final Determination*); *see also Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances, in Part*, 75 FR 57449 (September 21, 2010) (*AD Final Determination*) (collectively, *Final Determinations*).

[33] *See* Memorandum, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe ("Seamless Pipe") from the People's Republic of China," dated September 10, 2010 (CVD IDM) at 58; *see also* Memorandum, "Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Issues and Decision Memorandum for the Final Determination," dated September 10, 2010 (AD IDM) at 7.

these standards explicitly, considering that Commerce implicitly accepted Salem Steel's description of aerospace standards and cited the tight specifications as distinguishing as discussed above, those standards were AMS-T-6736 and AMS2253. In addition, Commerce applied the exception solely to the tubing: "{m}oreover, the tight dimensional requirements of aerospace . . . specifications . . . make it unnecessary to limit the exclusion of these products to only those products that do not conform to the dimensional requirements, *i.e.*, outside diameter and wall thickness of ASTM A-53, ASTM A-106 or API 5L specifications."[34] Commerce used the "tight dimensional requirements" *of the tubing*, as shown by the indication of outside diameter and wall thickness, as the differentiating factor in allowing the "aerospace specifications" standard. Thus, the exclusion for "aerospace specifications" applies to tubing itself.

iv. Determination of the Commission: "Aerospace Specifications"

The International Trade Commission did not consider aerospace specifications, aviation tubing or any of the relevant standards beyond its references to Commerce's investigations and *Final Determinations*. The Commission did, however, note that "seamless mechanical tubing is typically a custom-designed product."[35]

v. Summary of Review for "Aerospace Specifications"

In sum, based on our examination of the (k)(1) sources, the "aerospace specifications" are standards introduced by Salem Steel and accepted by Commerce. The two standards are for mechanical tubing: AMS-T6736A, which defines chemical requirements; and AMS2253E, which defines dimensional requirements. Commerce determined that the "specifications of these

[34] *See* CVD IDM at 58; *see also* AD IDM at 7.
[35] *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China Investigation Nos. 701-TA-469 and 731-TA-1168 (Final)* (ITC report) at 10.

products sufficiently distinguish them from the subject merchandise"; as such, only products that could meet those specific standards and not just variants from conventional pipe production, such as A-53 or A-106, would satisfy the criteria for exclusion from the scope.[36]

B. Analysis of AEC Pipe for "Aerospace Specifications"

i. The Petition: "Aerospace Specifications"

As provided in AEC's production directions, AEC Pipe conforms to the [

].[37] While AEC pipe requires tighter tolerances in variation for the dimensions, at the time of importation, it meets the definitions presented in the scope language, as indicated by a review of the (k)(1) sources, because it is [ ].

ii. The Initial Investigations: "Aerospace Specifications"

AEC pipe meets neither standard for "aerospace specifications" because it does not contain the required quantities of alloying elements [ ] and [ ] for [ ] and it does not [ ].[38] The AMS-T-3736A standard requires 0.15-.025 percent molybdenum and 0.8-1.10 percent chromium;[39] AEC pipe contains [

].[40] The AMS 2253 standard allows outside diameter to vary no more than 0.004 inches at pipe size less than 0.5 inches, and 0.005 inches at pipe size between 0.5 inches to 1.5

[36] *See* CVD IDM at 58; *see also* AD IDM at 7.
[37] *See* Scope Request at Exhibit 3, pages 1-2.
[38] *See* AEC's Letter, "Supplemental Questionnaire Response of Advance Engineering, Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China; Scope Ruling Request from AEC; Specialized Seamless Pipe," dated February 2, 2018 at 2 (AEC SQR).
[39] *See* May 24th Letter at Appendix A-3.
[40] *See* AEC SQR at 2.

inches.[41] AEC pipe [

].[42] Commerce determined that the "tight dimensional requirements of aerospace . . . specifications . . . distinguish these products from the subject merchandise."[43] AEC pipe does not meet the tight dimensional requirements suggested by the interested parties [

].

In addition, AEC pipe is seamless pipe;[44] it is not a specific form of CD mechanical tubing as described in the initial investigations. We acknowledge that AEC pipe is made to tighter dimensional tolerances than the seamless pipe as described in the scope of the *Orders*; however, it is made to [

]. Considering that AEC does not even describe its own pipe as tubing,[45] it cannot meet the exclusion for "aerospace specifications" in the context in which that exclusion was originally developed.

iii. The Determination of the Secretary: "Aerospace Specifications"

AEC's claim that its pipe is excluded because it meets the aerospace standard is unavailing: its pipe does not meet this standard at the time of importation, and the standard itself does not apply to the pipe, but only to the threading. According to the SAE AS71051B standard submitted by AEC, the standard applies to "pipe threads, gages, and gaging methods…of aeronautical taper pipe threads."[46] Those threads and gages "are intended for use *on* pipe, plugs, fittings and similar devices."[47] This standard does not apply to the pipe itself but to the

[41] *See* May 24th Letter at Appendix A-3.
[42] *See* AEC SQR at 2.
[43] *See* CVD IDM at 58; *see also* AD IDM at 7.
[44] *See* Scope Request at 3.
[45] *Id.*
[46] *See* Scope Request at Exhibit A, page 1.
[47] *Id.* (emphasis added).

threading. Commerce used the "tight dimensional requirements" *of the tubing* as a differentiating factor in allowing the exclusion based on the "aerospace specifications" standard. That the pipe has been configured to accept the threading does not change the fact that the pipe itself, in its chemical composition and dimensions, does not meet "aerospace specifications." As a result, the SAE AS71051B standard cannot define a seamless pipe as meeting the exclusion. If Commerce interpreted this exclusion as applying not only to the seamless pipe (although it should solely apply to mechanical tubing), but to other components, fixtures and add-ons, Commerce would be unable to prevent circumvention of the *Orders*.

Even if the standards presented in the context of the Initial Investigations and *Final Determinations* were not considered as definitive of "aerospace specifications," and even if – for the sake of argument – a pipe satisfying the SAE AS71051B standard could be considered to be manufactured to "aerospace specifications" within the meaning of the *Orders*' scope, AEC pipe would still be outside the intended meaning of "aerospace specifications" in the context of the (k)(1) sources because it does not meet AEC's proposed standard, SAE AS71051B, at the time of importation.[48] The threading necessary to meet the SAE AS71051B standard is applied by AEC *after* the AEC pipe is imported.[49] Unlike the exclusion for A-335 pipe, which explicitly includes both "finished and unfinished" pipes, the exclusion for "aerospace specifications" includes no wording related to the finishing.[50] Thus, the AEC pipe should be judged within the context of its description at the time of importation. At that time, it does not meet "aerospace specifications" because it is only after importation that "AEC adds the threading and certifies

[48] *See Stein Indus. v. United States*, 365 F. Supp. 3d 1364, 1371 (CIT 2019) (explaining that the correct question for Commerce to consider was whether the product, as imported, met the description of the scope).
[49] *See* Scope Request at page 9.
[50] *See CVD Final Determination* 75 FR 57444, 57446; *see also AD Final Determination* 75 FR 57449, 57452.

that the product meets the Aerospace Threading Standard."[51] Regardless, the pipe itself does not meet the requirements of the exclusion because it does not meet the chemical composition or the dimension requirements of "aerospace specifications," before or after importation.

iv. Determination of the Commission: Aerospace Specifications

The Commission stated that "seamless mechanical tubing is typically a custom-designed product."[52] While the AEC pipe does present modifications from the [ ] standard, it is not a custom-designed product in the sense that mechanical tubing is and it must be in order to meet the exclusion from the scope.

v. Summary of Analysis for Aerospace Specifications

In the case of AEC pipe, on the basis of the product applications and the product description for "aerospace specifications," Commerce finds that it was intended to be included in the scope of the *Orders*. In terms of the Petition, AEC pipe, [

], matches the description [ ] the petitioners explicitly intended to include.[53] AEC pipe, which is not a form of mechanical tubing to which the exclusion was intended to apply, meets neither the AMS-T-6736 chemical standard nor AMS2253 dimensional standard envisioned in the initial investigations and implemented in the *Final Determinations* for "aerospace specifications." Finally, AEC's proposed standard, SAE AS71051B, applies to the threading, not to the pipe itself, and such threading is added only after importation. As a result, even if Commerce interpreted the "aerospace specifications" exclusion broadly (despite the context provided by the (k)(1) sources that indicates otherwise), AEC pipe would not meet the requirements.

[51] *See* Scope Request at 9.
[52] *See* ITC report at 10.
[53] *See* Scope Request at Exhibit 3, pages 1-2.

C. ASTM A-335: Background

The ASTM A-335 exclusion was created solely for A-335 pipe, which further informs the context in which the exclusions should be interpreted. Initially, A-335 seamless pipe was explicitly included in the Petition and the exclusion did not develop until the investigations were ongoing.[54] Wyman-Gordon Inc. (Wyman-Gordon) commented upon the *Initiation Notice* on October 27, 2009, and argued that A-335 pipe is an inherently different product from seamless pipe due to requirements related to the inclusion of alloying elements and its manufacturing process.[55] While the petitioners initially opposed the exclusion, on July 2, 2010, the petitioners submitted a request to exclude A-335 pipe.[56] The ITC discussed the differences between A-335 pipe and non A-335 pipe extensively, noting its high level of specification *vis-à-vis* A-53 and A-106 pipes.[57] The ITC did not, however, assess other forms of seamless pipe [

].[58] The ITC considered only A-335 pipe.

The exclusion for A-335 pipe was implemented in the *Final Determinations*. The *Final Determinations* defined the exclusion for A-335 pipe on the "chemical requirements," and, as a result, it should be narrowly applied based on those chemical requirements.[59] It is these chemical requirements that separate A-53 and A-106 pipe from A-335 pipe. As previously noted, the description of the scope included in the Petition explicitly included [

]. The exclusion for A-335 pipe should be understood in that context: the A-335 seamless pipe exclusion applies solely to A-335. Consequently, Wyman-Gordon's exclusion request and the petitioners' acceptance during the investigations should not

[54] *See* Petition at 6.
[55] *See* ITC Report at 20.
[56] *See CVD Final Determination* 75 FR 57444, 57446; *see also AD Final Determination* 75 FR 57449, 57451.
[57] *See* ITC Report at 20-22.
[58] *Id.*
[59] *See CVD Final Determination* 75 FR 75444, 75446; *see also AD Final Determination* 75 FR 57449, 57452.

be read as appropriate for general application to any pipe with customized chemical requirements; it should be read narrowly as applying solely to A-335 pipe.

D. Analysis of AEC Pipe for ASTM A-335

AEC argued that its pipe meets the majority of A-335 pipe specifications and is "precisely the type of pipe that the ITC recognized to be excluded from the scope."[60] However, AEC pipe is not A-335 pipe; it is [ ], which is not excluded. AEC pipe also does not meet the A-106 standard, the level above A-53 pipe that is included in the scope. The distinguishing factor between A-335 pipe and A-53 or A-106 pipe is that A-53 and A-106 cannot be used in high temperature service.[61] Pipe meeting the A-106 standard, which AEC pipe does not meet [ ],[62] is approved for use up to 1,000 degrees Fahrenheit. At higher temperatures, A-335 pipe must be used, because the additional alloying elements of chromium and molybdenum allow it to withstand higher temperatures.[63] [ ], does not include molybdenum in sufficient quantity to meet any A-335 grade or [ ].[64] The same element that prevents AEC pipe from meeting the A-335 pipe standard, molybdenum, is what defines the difference between a product included in the scope, A-106 pipe, and the excluded product, A-335 pipe.

AEC pipe does not meet the chemical requirements for A-335 and [ ]. Thus, AEC pipe meets the definition of pipe *included* in the scope as written and does not

[60] *See* AEC Letter to Commerce at 3-4.
[61] *See* ITC Report at 20.
[62] *See* Scope Request at Exhibit B, page 1, 1st table.
[63] *See* ITC Report at 27, n.32.
[64] *See* Scope Request at Exhibit B, page 1, 1st table.

meet the definitions of the pipe products to be excluded from the scope. The exclusion for A-335 pipe applies solely to A-335 pipe.

V. Discussion of Issues

Comment 1: Whether AEC Pipe is Excluded from the *Orders* Considering an Analysis of the (k)(1) Sources

AEC's Argument

- Commerce has erroneously attempted to create a new definition of "aerospace specifications" by applying standards for aviation tubing cited by Salem Steel. "Aerospace specifications" were not defined by the (k)(1) materials, and the descriptions of aviation tubing are separate from the undefined meaning of "aerospace specifications," which is not recognized by the industry. Commerce had the opportunity to clarify and list within the *Orders* the exact standards by which it would it define "aerospace specifications" and chose not to, implicitly rejecting the standards proposed by Salem Steel. Commerce cannot now choose to define the term retroactively.[65]
- AEC pipe meets the definition of tubing cited by Salem Steel as it is manufactured to tight dimensional tolerances for wall thickness, is customized in its chemical and mechanical properties, and is not designed for use with standard pipe couplings.[66]
- The record does not support the finding that all pipes made to A-53 standard dimensions are included within the *Orders*. The exclusions for "aerospace specifications" and A-335 pipe are inclusive of pipes made to A-53 standard dimensions.[67]

[65] *See* Comments on Draft Results at 2-4.
[66] *Id.* at 5.
[67] *Id.* at 5-6.

- Meeting the Aerospace Threading Standard would not qualify AEC pipe for the "aerospace specifications" exclusion because there is no affirmative definition for "aerospace specifications." Rather, because AEC pipe is produced to a high-level of specification so that it can meet the Aerospace Threading Standard in its final form, AEC pipe falls within the broad wording of undefined "aerospace specifications."[68]
- AEC is not arguing that AEC pipe should be excluded on the basis of the A-335 exclusion. Rather, the A-335 and mechanical tubing exclusions are illustrative of the intention to exclude specialized pipes because the *Orders* were intended to cover only commodity pipe. The record shows that pipes made to tight specifications were not intended to be included. The record shows that the *Orders* were intended to cover only commodity products. The petitioners and interested parties agreed that certain highly specialized products should not be included within the scope. Furthermore, the Court of Appeals for the Federal Circuit (Federal Circuit) has repeatedly held that Commerce must consider the (k)(1) sources in the context of the products that were intended to be covered. The record shows that AEC pipe was not an intended pipe as it is not commodity pipe.[69]
- A review of the (k)(1) sources compels the conclusion that subjecting AEC pipe to the *Orders* runs afoul of the requirement that there be a material injury or threat of material injury to the domestic industry prior to imposition of such duties, a concern specifically expressed by the CIT in its *Remand Order*. Because there is no indication in the ITC record that the domestic like product included custom made AEC pipe, including it within the class or kind of merchandise subject to the *Orders* would be contrary to law.[70]

[68] *Id.* at 5.
[69] *Id.* at 6-12.
[70] *Id.* at 11 and n.8.

Commerce's Position: We continue to conclude that AEC pipe is within the scope of the *Orders* on the basis of the (k)(1) sources. Contrary to AEC's arguments, Commerce finds that the (k)(1) sources provide a clear definition and explanation for the "aerospace specifications" exclusion, and, furthermore, that AEC's description of the exclusion as generally applying to specialized pipes that meet "aerospace specifications" is inaccurate. Both the *Orders* and the (k)(1) sources are clear: there is a limited exclusion for products meeting "aerospace . . . *tubing* specifications," and "aerospace . . . *tubing* specifications," which are discussed and clearly defined in the Salem Steel submissions, and which are the (k)(1) sources from the initial investigations that directly affected Commerce's *Orders*.[71]

AEC is correct that there is limited reference to "aerospace" in the (k)(1) sources, but the sole context in which "aerospace" appears is as a synonym for "aviation."[72] Throughout the development of the "aerospace . . . tubing specifications" exclusion, aviation tubing is discussed as a specific form of mechanical tubing alongside hydraulic and bearing tubing in that specific order and with reference to the same, recognized standards cited by Salem Steel. That the *Orders* use the synonym, "aerospace," instead of "aviation" alongside "hydraulic" and "bearing" merely shows a preference in terms for the language used in the standards cited by Salem Steel, Aerospace Material *Specifications* or AMS, [73] because at no point did Commerce or any other party differentiate "aviation" and "aerospace." Commerce neither presented a position contrary to Salem Steel's definition of aerospace (or aviation) tubing nor separated aerospace tubing from hydraulic and bearing tubing in the language. Instead, Commerce included the exclusion for aerospace, hydraulic and bearing tubing in the *Orders*, maintained their order and grouping in the

[71] *See Orders*.
[72] *See* Salem June 30th Letter at 7 ("aviation, or aerospace material, seamless tubing").
[73] *Id.* at Appendix A-3.

exclusion language, and referenced their specifications, which were clearly meant to be AMS-T-6736 and AMS 2253 for aerospace, SAE J524 for hydraulic, and ASTM-A295, AMS 6440 and AMS 2253 for bearing.[74] Indeed, the only substantive difference between the language proposed by Salem Steel and the language of the *Orders*, is that aviation has been replaced by a synonym, aerospace, and, rather than listing all six standards individually, the standards have been consolidated in the word "specifications."[75] The (k)(1) sources are abundantly clear with regard to mechanical tubing made to "aerospace specifications" being "aviation tubing," and, as AEC has recognized, the (k)(1) sources provide a clear definition of aviation tubing. Commerce is not defining "aerospace specifications"; we are using the definition provided by the (k)(1) sources.

In addition, Commerce sees no evidence that "aerospace . . . tubing specifications" would not be recognized by the industry, and AEC has cited no evidence in the record, other than its own statements, to show that mechanical tubing made to "aerospace specifications" would be unrecognized. The standards cited by Salem Steel in its definition of aviation tubing are expressly for "aerospace material specifications," and none of the interested parties opposed those specifications.[76] Rather, Toyota Tsusho America, Inc. (TAI) confirmed Salem Steel's submitted language from June 30th, which contained "aerospace material" as a synonym for aviation tubing, by arguing that aviation tubing was a "subclass of mechanical tubing" that should be excluded.[77] The record is clear that aviation tubing is recognized by the industry, that aerospace is used as a synonym for aviation by the industry, and that the only language modifications proposed by the industry were, as previously noted, to avoid circumvention.[78]

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[74] *See* Salem June 30th Letter at 9; *see also Orders*.
[75] *See* Salem June 30th Letter at 9 ("We suggest the following language be included . . . : In addition, seamless aviation tubing conforming to AMS-T-6736A and AMS2253E, seamless hydraulic tubing conforming to SAEJ524, and seamless bearing tubing conforming to ASTM A295, AMS 6440 and AMS 2253E are excluded.").
[76] *See* Salem June 30th Letter at Appendix A-3; *see also* TAI's Letter at 6; *see also* U.S. Steel's Letter at 102-105.
[77] *See* TAI's Letter at 6.
[78] *See* U.S. Steel's Letter at 102-105.

With regard to whether AEC pipe is the same type of tubing identified by Salem Steel and for which the "aerospace . . . tubing specifications" exclusion exists, Commerce finds AEC's argument unavailing. As previously stated, and shown on the record, the exclusion for aerospace, hydraulic and bearing tubing applies to specific types of mechanical tubing made to certain, distinct specifications. When prompted by Commerce to add to and define the scope language for aviation tubing, Salem Steel defined aviation or aerospace tubing as a specific type of mechanical tubing with exacting standards that is custom in its dimensions.[79] "{T}he end-user always specifies the length and either the outside diameter or the inside diameter of the tubing they require."[80] Thus, aerospace tubing is inherently custom in its dimensions and it is not made to standard sizes. Commerce, once again, acknowledges that AEC pipe is made to tight dimensional tolerances, but it is made to [ ] and is not tailored to each customer's request in its dimensions for outside diameter or inside diameter.[81] Instead, AEC pipe is customized only after importation by [

].[82]

Commerce also acknowledges that the exclusion for mechanical tubing made to "aerospace specifications" is not limited to solely custom dimensional products. The reason for this is clear: the exacting requirements of "aerospace . . . tubing specifications," AMS-T-6736 and AMS 2253, "distinguish these products from the subject merchandise and make it unnecessary."[83] Even if AEC pipe were customized in its dimensions by client request in order to be considered a type of mechanical tubing (which it is not), AEC pipe would not meet the

[79] *See* Salem June 30th Letter at 6.
[80] *Id.* at 5.
[81] *See* Scope Request at Exhibit 3, pages 1-2.
[82] *See* Scope Request at 11-12.
[83] *See* CVD IDM at 58; *see also* AD IDM at 7.

exacting specifications of aerospace tubing, as previously discussed. The same logic regarding standard dimensions applies to A-335 pipe, which is typically produced in NPS sizes: AEC pipe does not meet the chemical requirements. Far from indicating broadness in either, however, the lack of limitation on sizes in either exclusion shows the exacting requirements of both A-335 pipe and aerospace tubing because their specifications are sufficient to distinguish the products and prevent circumvention of the *Orders*, as was the petitioners' priority.[84] As previously explained, the A-335 exclusion applies solely to pipes that meet the chemical requirements of the A-335 standard and the aerospace tubing exclusion applies solely to mechanical tubing meeting the AMS-T-6736 and AMS 2253 specifications.

Regarding the Aerospace Threading Standard, Commerce continues to find AEC's arguments unconvincing. As previously discussed, there is a specific definition of mechanical tubing made to "aerospace specifications," which is synonymous with the definition of aviation tubing and necessitates meeting narrow, exacting requirements, AMS-T-6736 and AMS 2253, that distinguish the product. Furthermore, Commerce does not find the Aerospace Threading Standard sufficient to meet the exclusion for "aerospace specifications" because, unlike the AMS standards, there is no reference to it in the (k)(1) sources; the standard applies not to pipes but to threading, and the acceptance of specifications for components or add-ons added after importation would preclude Commerce from preventing circumvention of the *Orders*. AEC has itself recognized that meeting the Aerospace Threading Standard is irrelevant to qualifying for the exclusion: "AEC does not contend that it meets the exclusion for 'aerospace specifications' due to the final product meeting this standard."[85]

[84] *See* U.S. Steel's Letter at 102-105.
[85] *See* Comments on Draft Results at 5.

Furthermore, Commerce finds that the record does not indicate an attempt, in any of the (k)(1) sources, to exclude "specialized" pipe as a broad category. Rather, the (k)(1) sources indicate an intention to exclude the specific products that eventually became excluded, including mechanical tubing made to "aerospace specifications" (*i.e.*, AMS-T-6736 and AMS 2253), and A-335 pipe. As previously noted, the petitioners intended to include variants of standard, commodity pipe and supported the exclusion of mechanical tubing and A-335 pipe only if the exclusion could be developed in such a way as to avoid circumvention.[86] Various types of products that are specialized to meet certain needs beyond standard A-53 usage, including specializations that AEC pipe does not meet, are included in the *Orders*: A-333 and A-334 for low-temperature service, A-106 for high-temperature service, A-795 for fire protection.[87]

AEC highlighted, in its Comments on Draft Results, multiple passages from the (k)(1) sources that, according to AEC, show an intention to exclude "specialized pipe" and to include only "commodity pipe" within the scope of the *Orders*. However, the passages highlighted by AEC regarding the Petition and the ITC Post-Hearing brief of V&M Star, TMK IPSCO, and USW (Domestic Industry Post-Hearing Brief), do not address the issue of specialization or exclusions related to specialization. As previously noted, the Petition does not reference commodity or specialization; it describes the relevant products and the intent to include chemical variants.[88] The Domestic Industry Post-Hearing Brief notes that the U.S. industry was not injured by an importation of a particular product, but makes no comment regarding a broad-encompassing exclusion for specialized and non-commodity products or an intention to exclude

[86] *See* Petition at 5-6; *see also* U.S. Steel's Letter at 102-105.
[87] *See Orders*.
[88] *See* Petition at 5-6; *see also* U.S. Steel's Letter at 102-105

specialized and non-commodity products.[89] Furthermore, AEC pipe does not match the description of the product, "heavy-walled," identified in the Domestic Industry Post-Hearing Brief.[90]

Moreover, the ITC found that the domestic like product consisted "of all seamless SLP pipe less than or equal to 16 inches in outside diameter that is co-extensive with Commerce's scope."[91] As previously mentioned, the petitioners included a variety of pipes in the scope and agreed to exclusions only for A-335 pipe and certain types of mechanical tubing, which are explicitly included in the scope language. More broadly, the ITC found that products described in Commerce's scope threatened to injure the U.S. domestic industry;[92] and the ITC did not consider "specialized" pipe beyond, as previously mentioned, its discussion of A-335, for which there is an explicit exclusion.[93] As such, we find that AEC pipe's inclusion under the scope of the *Orders* does not undercut the notion that there be a material injury or threat of material injury to the domestic industry prior to imposition of such duties.

All of the other passages highlighted by AEC in its comments on the Draft Results directly relate to products that were explicitly excluded from the *Orders*. The remaining (k)(1) sources, the CVD IDM,[94] AD IDM,[95] Scope Memorandum,[96] Salem Steel submissions,[97] and

[89] *See* V&M Star, TMK IPSCO and USW's Letter, "Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from China, Inv. Nos. 701-TA-469 and 731-TA-1168 (Final)," dated September 22, 2010 at 1 (Domestic Industry Post-Hearing Brief) ("Large amounts of the non-subject imports were heavy-walled special-purpose products not made by the U.S. industry, so their importation could not have contributed to its injury.").
[90] *Id*.
[91] *See* ITC Report at 7.
[92] *Id.* at 1.
[93] *Id.* at I-21.
[94] *See* CVD IDM at 58.
[95] *See* AD IDM at 6.
[96] *See* Memorandum "U.S. Customs and Border Protection's Inquiry Regarding Mechanical Tubing," dated June 24, 2010 ("{W}e generally do not consider mechanical tubing specifications (*e.g.*, ASTM 519) to be 'comparable' to specifications for only standard, line and/or pressure pipe.").
[97] *See* Salem Steel's Letter "Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China; Request for Change in Scope Language to Exclude Mechanical, Boiler, Aviation,

TAI submission,[98] all deal directly with mechanical tubing that was explicitly excluded, while Wyman-Gordon's submission[99] and the ITC report[100] deal directly with A-335 pipe that was explicitly excluded. As a result of analyzing the (k)(1) sources, Commerce recognizes that the exclusions were designed for certain specialized, non-commodity pipes and mechanical tubing. However, those pipes and types of mechanical tubing are explicitly named in the (k)(1) sources and received explicit exclusions. With regard to the decisions of the Federal Circuit cited by AEC, Commerce is following its explicit directions to consider the (k)(1) sources in the context in which they were envisioned and discussed. That context leads to defined, identifiable products, and AEC pipe is not one of the products that fits the exclusions.

Comment 2: Whether Commerce Should Proceed to an Analysis of the (k)(2) Sources

AEC's Argument

- At the very least, Commerce needed to proceed to the (k)(2) sources because the record is not dispositive. The (k)(2) sources show that AEC pipe is excluded from the *Orders*.[101]

Commerce's Position: On the basis of the above analysis, we have reconsidered AEC's Scope Request in light of the (k)(1) factors. We continue to find, for purposes of this redetermination pursuant to remand, that AEC Pipe is covered by the scope of the *Orders*. Based on our determination that the (k)(1) factors are dispositive, sufficient for conducting the analysis required by the CIT, and sufficient for reaching a determination, we find that there is no need for

Hydraulic, Bearing, Condenser and Heat Exchange Tubing," dated June 4, 2010 (Salem June 4th Letter); *see also* Salem May 24th Letter; *see also* Salem June 30th Letter; *see also* Salem July 14th Letter.

[98] *See* TAI's Letter at 5-6.

[99] *See* Wyman-Gordon Letter "Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from China (Inv. Nos. 701-TA-469 and 731-TA-1168 (Final)," dated September 7, 2010.

[100] *See* ITC Report at 20-22.

[101] *See* Comments on Draft Results at 12-15.

Commerce to proceed to a formal scope inquiry or to consider the factors specified in 19 CFR 351.225(k)(2).[102]

Comment 3: Whether Commerce Can Retroactively Assess Duties on AEC Pipe

AEC's Argument

- Commerce cannot retroactively assess duties on AEC pipe. Even if Commerce merely "clarifies" the scope of an order that has an unclear scope, the suspension of liquidation and imposition of AD or CVD cash deposits may not be retroactive but can only take effect "on or after the date of initiation of the scope inquiry."[103] Here, Commerce has gone beyond "clarifying" and has adopted two standards into its scope that were not intended for that purpose with no notice to the industry of their inclusion.[104]
- It appears that AEC, the domestic industry, and U.S. Customs and Border Protection (CBP) were all under the impression that AEC pipe was not covered by the scope of the *Orders* until October 3, 2016, when AEC received the Notice of Action from CBP informing AEC that its product was subject to the *Orders*. Furthermore, AEC was not informed that AEC pipe would be subject to the *Orders* during the initial investigation and was not invited to participate in the investigations and, as a result, was unable to provide comments that could have affected the eventual scope. Thus, AEC should not be charged retroactive duties.[105] The facts of this case mirror the facts before the Federal Circuit in *AMS*, and *Sunpreme Inc. v. United States*, 924 F.3d 1198 (Fed. Cir. 2019), and

[102] *See* 19 CFR 351.225(k)(2) (explaining that Commerce "will further consider" the (k)(2) factors "{w}hen the above criteria" in 19 CFR 351.225(k)(1) "are not dispositive").
[103] *See* Comments on Draft Results at 15-16 (quoting *AMS Assocs. Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013) (*AMS*)).
[104] *See* Comments on Draft Results at 16.
[105] *Id.* at 15-16.

the CIT's decision in *United Steel & Fasteners v. United States*, 222 F. Supp. 3d 1229 (CIT 2018). That is: AD or CVD duties should never be assessed retroactively against a product if Commerce requires a full study of the investigatory record (or beyond) to determine whether the product was intended to be within the scope of an order.[106]

- The (k)(1) sources were not readily available to AEC as the documents were not on ACCESS, and the record is incomplete. While Commerce had ready access to the (k)(1) sources because its offices contain the physical records, it is unreasonable to expect AEC to have had similar capabilities. The available online record does not discuss the aerospace exclusion, and there is nothing to indicate that there are documents elsewhere covering this topic.[107]
- AEC and other importers have a right to advance notice if their products will be subject to AD/CVD duties. Considering that Commerce is redefining the *Orders*, the lack of advance notice prohibits Commerce from retroactively assessing duties. Assuming that Commerce could substantively change the scope, which is prohibited by judicial precedent, at a minimum it may only do so prospectively. The CIT recently made this precise finding when invalidating Commerce's effort to retroactively assess AD or CVD liability before providing sufficient notice.[108]

Commerce's Position: The cases cited by AEC such as *United Steel & Fasteners v. United States*, 222 F. Supp. 3d 1229 (CIT 2018), and *AMS Assocs. Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013), are inapplicable because in those cases, Commerce initiated, respectively, a formal scope inquiry and anticircumvention inquiry, and CBP had not yet begun

[106] *Id.* at 16-17.
[107] *Id.* at 17.
[108] *Id.* at 17-18 (citing *Tai-Ao Aluminum (Taishan) Co. v. United States*, 391 F. Supp. 3d 1301, 1313-15 (CIT 2019)).

suspension when Commerce issued customs instructions. Commerce's regulations provide that, when Commerce issues a final scope ruling that a product is within the scope of an order, "any suspension of liquidation . . . will continue."[109] As such, Commerce may continue suspension of liquidation.[110] Moreover, in *Quiedan Co. v. United States*, 927 F.3d 1328, 1333 (Fed. Cir. 2019), the Federal Circuit has found that when an order has clear meaning, within the context of the (k)(1) sources, continued suspension of liquidation is proper unlike cases such as *Sunpreme Inc. v. United States*, 924 F.3d 1198 (Fed. Cir. 2019), in which the scope was found to be ambiguous.[111]

Here, as explained above, the (k)(1) analysis makes clear that the AEC pipe is within the plain language of the scope of the *Orders*, and Commerce does not need to initiate a formal scope inquiry. Because we have not initiated a formal inquiry, pursuant to 19 CFR 351.225(l)(1), there is no basis under Commerce's regulations to liquidate already suspended entries of merchandise without regard to duties when merchandise is found within the scope of an order. Merely because CBP did not suspend entries of AEC's pipe, collect cash deposits or assess final duties for six years does not mean that AEC's pipe is not covered by the *Orders*. In addition, AEC acknowledges that CBP has taken action and informed AEC that its product was subject to the *Orders* prior to the scope ruling request.[112] As such, Commerce can continue any suspension of liquidation.

Moreover, AEC's argument that it was not aware that its product is covered by the *Orders* and it was deprived of notice due to the absence of immediate, electronic availability

[109] *See* 19 CFR 351.225(l)(3).
[110] *See Quiedan Co. v. United States*, 927 F.3d 1328, 1333 (Fed. Cir. 2019).
[111] *See Quiedan* at 1333 (finding that Quiedan's stakes were "clearly within the language of the ADD Order, considering the factors specified in § 351.225(k)(1)" and thus determined that continued suspension of liquidation was proper).
[112] *See* Comments on Draft Results at 16.

through the ACCESS system to the record of the investigation is unavailing. Commerce is required to maintain an administrative record, including a public record that is "available to the public for inspection and copying in the Central Records Unit."[113] Prior to the implementation of the electronic filing system and the electronic availability of case information and records (*i.e.*, ACCESS), Commerce maintained public records of all of its proceedings, including the (k)(1) sources of this case.[114] These public records were maintained to be and remain available to the public.[115] Furthermore, when it filed its scope ruling request, AEC cited to and discussed the (k)(1) sources in its request, which indicates it had access to the relevant information.[116]

The statute and regulations require Commerce to notify the public about antidumping and countervailing duty investigations via the *Federal Register* from initiation until the implementation of the *Orders*,[117] and Commerce provided the required public notice in those investigations. For both the antidumping and countervailing duty investigations, initiation notices were published in the *Federal Register* to inform the public and interested parties, such as AEC, about the investigation.[118] AEC could have participated to make arguments about

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[113] *See* 19 CFR 351.104(b).

[114] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 75 FR 44163, 44164 (July 28, 2010) ("Section 351.104(b) currently provides that the Secretary will maintain in the CRU a public record of each proceeding. The Department proposes amending the regulations to indicate that the public record will also be accessible online at http://www.trade.gov/ia."); *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 FR 39263, 39264 (July 6, 2011) ("The CRU will continue to maintain the public record in paper form for those documents that were filed prior to implementation of IA ACCESS."); *see also Orders*, 75 FR at 69054 ("Interested parties may contact the Department's Central Records Unit, Room 7043 of the main Commerce building, for copies of an updated list of antidumping duty orders currently in effect"); *see also Orders* 75 FR at 69052.

[115] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 FR 39263, 39264 (July 6, 2011). ."); *see also Orders*, 75 FR at 69054 ("Interested parties may contact the Department's Central Records Unit, Room 7043 of the main Commerce building, for copies of an updated list of antidumping duty orders currently in effect"); *see also Orders* 75 FR at 69052.

[116] *See* Scope Request at 19-29.

[117] *See* section 703(f); 705(d); 706(a); 733(f); 735(d); 736(a); *see also* 19 CFR 351.203(c); 19 CFR 351.205(c); 19 CFR 351.210(c); 19 CFR 351.211(b).

[118] *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Initiation of Countervailing Duty Investigation,* 74 FR 52945 (October 15, 2009); *see also Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 74 FR 52744 (October 14, 2009).

whether its products should have been included in the scope. However, AEC did not. When the *Orders* were put into place in 2010, Commerce published a notice in the *Federal Register* to notify the public as well.[119] Consequently, AEC was given sufficient notice of the antidumping and countervailing duty investigations and orders.

11/25/2019

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

[119] *See Orders.*