

**Final Results of Second Remand Redetermination**  
***TMB 440AE, Inc. (formerly known as Advance Engineering Corporation) v. United States***

**I. Summary**

The Department of Commerce 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. 20-44 (CIT April 6, 2020) (*Second Remand Order*).<sup>1</sup> The *Second Remand Order* concerns Commerce’s Final Scope Rulings<sup>2</sup> and First Remand Redetermination,<sup>3</sup> which analyzed whether TMB 440AE, Inc. (AEC) seamless pipe (AEC pipe) is covered by the scope of the antidumping duty (AD) and countervailing duty (CVD) orders<sup>4</sup> on certain seamless carbon and steel alloy standard, line, and pressure pipe from the People’s Republic of China. The CIT remanded this matter to Commerce to conduct an analysis that considers the sources listed in 19

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<sup>1</sup> See *TMB 440AE, Inc. (formerly known as Advance Engineering Corporation) v. United States*, Court No. 18-00095, Slip Op. 20-44 (CIT April 6, 2020) (*Second Remand Order*).

<sup>2</sup> 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).

<sup>3</sup> See “Final Results of Remand Redetermination TMB 440AE, Inc. (formerly known as Advance Engineering Corporation), v. United States,” filed November 26, 2019 (First Remand Redetermination).

<sup>4</sup> 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, the *Orders*).

CFR 351.225(k)(1) (the (k)(1) sources) in assessing whether AEC pipe falls within the scope of the *Orders*.

As set forth below in this remand redetermination, pursuant to the *Second Remand Order*, Commerce conducted an analysis that considers the (k)(1) sources in assessing whether AEC pipe falls within the scope of the *Orders*. Below we explain why, in light of our analysis of the (k)(1) sources, we continue to determine that AEC pipe is within the scope of the *Orders*. In analyzing the (k)(1) sources, we find that the *Orders* did not intend to extend broadly the exclusion articulated for a particular type of specialized pipes as compared to “commodity” pipe; that the exclusion for A-335 pipe was granted specifically because the petitioners did not object to that exclusion; and that the A-335 pipe standard is demonstrably both superior and non-comparable in specification when compared to the product covered by the *Orders*. Furthermore, we find both that AEC pipe does not meet the same level of specification as A-335 pipe to warrant an exclusion and that AEC pipe, in description and application, meets the written description provided in the scope of the *Orders*.

## **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*.<sup>5</sup> On March 29, 2018, Commerce determined in the Final Scope Rulings that AEC pipe was within the scope of the *Orders* based on the plain language of the *Orders*. 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.<sup>6</sup> On November 26, 2020, Commerce determined in its First Remand Redetermination that AEC pipe was included in the scope of the *Orders* because it did not meet the “aerospace specifications” exclusion or any other exclusion articulated in the scope language.<sup>7</sup>

### **IV. CIT Second Remand**

AEC challenged Commerce’s First Remand Redetermination and, on April 6, 2020, the CIT remanded the matter to Commerce to conduct further analysis of the (k)(1) sources.<sup>8</sup> The CIT sustained Commerce’s determination regarding the “aerospace specifications” exclusion but found that Commerce had not considered the totality of the circumstances for the exclusions and whether the “reasons for excluding some specialized pipe applies equally to AEC’s pipe.”<sup>9</sup> The CIT noted several specific considerations that Commerce had failed to discuss or ignored in the First Remand Redetermination: the standard, line and pressure applications of the subject

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<sup>5</sup> 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 (AEC Scope Request).

<sup>6</sup> 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) (*First Remand Order*).

<sup>7</sup> See First Remand Redetermination.

<sup>8</sup> See *Second Remand Order*.

<sup>9</sup> *Id.* at 10.

merchandise,<sup>10</sup> comparable specifications,<sup>11</sup> end-use applications,<sup>12</sup> and whether the *Orders* intend to cover “commodity pipe,” to the exclusion of any types of pipe considered to be “specialty pipe.”<sup>13</sup> The CIT thus remanded the issue, directing Commerce to “move beyond the words of the particular exclusions found in the *Orders* and complete a (k)(1) analysis.”<sup>14</sup> Furthermore, the CIT instructed Commerce to proceed with a formal scope inquiry under 19 CFR 351.225(k)(2) should the (k)(1) sources not prove dispositive.<sup>15</sup> On June 3, 2020, Commerce issued its Draft Results of Second Remand Redetermination.<sup>16</sup> On June 8, 2020, Commerce provided a limited extension of time for AEC to provide comments on the Draft Results of Second Remand Redetermination.<sup>17</sup> On June 9, 2020, the CIT extended the deadline for Commerce to submit its Final Results of Second Remand Redetermination,<sup>18</sup> and Commerce provided a full extension of time for AEC to provide comments on the Draft Results of Second Remand Redetermination.<sup>19</sup> On June 24, 2020, AEC provided comments on the Draft Results of Second Remand Redetermination.<sup>20</sup>

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<sup>10</sup> *Id.* at 11-12.

<sup>11</sup> *Id.* at 12.

<sup>12</sup> *Id.* at 13-14.

<sup>13</sup> *Id.* at 14-15

<sup>14</sup> *Id.* at 15.

<sup>15</sup> *Id.*

<sup>16</sup> See Memorandum, “Draft Results of Second Remand Redetermination *TMB440AE, Inc. (Formerly Known as Advance Engineering Corporation v. United States,*” dated June 3, 2020; see also Memorandum, ““Draft Results of Second Remand Redetermination *TMB440AE, Inc. (Formerly Known as Advance Engineering Corporation v. United States,*” dated June 3, 2020 (collectively, Draft Results of Second Remand Redetermination).

<sup>17</sup> See Commerce’s Letter, “Certain Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Request to Extend the Deadline for Comments on Draft Results of Remand Redetermination,” dated June 8, 2020.

<sup>18</sup> See *TMB 440AE, Inc. (formerly known as Advance Engineering Corporation) v. United States*, Court No. 18-00095, Document 56 (CIT June 9, 2020)

<sup>19</sup> See Commerce’s Letter, “Certain Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Request to Extend the Deadline for Comments on Draft Results of Remand Redetermination,” dated June 9, 2020.

<sup>20</sup> See AEC’s Letter, “Comments on Draft Second 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 June 24, 2020; see also AEC’s Letter, “Comments on Draft Second Remand: Antidumping and Countervailing Duty Orders on Certain Seamless Carbon and Alloy Steel Standard Line, and Pressure Pipe from the

## V. Review of (k)(1) Sources

Commerce has reviewed the (k)(1) sources as required by the *Second Remand Order* and has considered the full circumstances under which the exclusions articulated in the scope language were developed during the investigation. Individual summaries are provided below with interpretation for certain documents that are relevant to consideration of AEC pipe and the scope exclusions. Commerce omitted summaries of some (k)(1) source documents that either relate to the mechanical tubing exclusion discussed at length in the First Remand Redetermination, contain no pertinent information, reiterate prior arguments, or are summarized by further responses or follow the granting of the exclusion.

### A) Petition and Initiation Documents

#### The Petition

##### *General Issues*

The Petition describes the subject merchandise but does not, at the outset, include the A-335 exclusion, which was developed through the course of the investigation, during the normal process of soliciting and evaluating parties' comments and arguments regarding the products described by the scope language.<sup>21</sup> Instead, the Petition notes that pipe products used in standard, line and pressure applications (SLP), "regardless of specification," are covered by the scope, the first reference to what would become language including in the scope pipes that are

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People's Republic of China," dated June 24, 2020 (collectively, AEC Comments on Draft Second Remand Redetermination).

<sup>21</sup> 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," dated September 16, 2009 (Petition). The petitioners consisted of United States Steel Corporation (U.S. Steel) and V&M Star LP (V&M Star); see also 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 (AEC Rebuttal Information) at Exhibit 1 (replicating Petition in full).

made to “comparable specifications.”<sup>22</sup> The only exclusion articulated in the scope language included in the Petition is for mechanical tubing, and the term “commodity” is used once but not in a relevant context.<sup>23</sup>

#### *SLP Applications/End-Use Applications*

At this stage, the scope language in the Petition presented a much more expansive scope than the scope that would later be initiated on, because it included extensive descriptions of the “Specifications, Characteristics and Uses,”<sup>24</sup> of the pipes, including a discussion of the typical meanings and end-uses of standard, line and pressure applications.<sup>25</sup> To start, “{s}eamless pressure pipes are intended for the conveyance of water, steam, petrochemicals, chemicals, oil products, natural gas, and other liquids and gasses in industrial piping systems.”<sup>26</sup> The Petition further notes that pressure pipe is typically produced to the A-106 specification and, in conjunction with multi-stenciled pipes, pressure pipes are for: “(1) use in oil and gas distribution lines for commercial applications; (2) use in pressure piping systems by refineries: petrochemical plants, and chemical plants; (3) use in power generation plants (electrical-fossil fuel or nuclear) and (4) use in some oil field uses (on shore and off shore) such as for separator lines, gathering lines, and metering runs.” Thus, the petitioners define the pressure application in explicitly industrial terms.

Standard pipe is used for the low pressure and temperature conveyance of “water, steam, natural gas, air and other liquids and gasses in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses.”<sup>27</sup> The Petition explains that standard

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<sup>22</sup> See Petition at 5-6.

<sup>23</sup> “Natural gas has missed out on the recent commodity rally.” *Id.* at 30.

<sup>24</sup> *Id.* at 5-6.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

application pipes are typically made to the A-53 specification, but the Petition further describes variances for extreme temperatures, indicating that the application is broadly defined by its use in conveyance rather than by the specific standard.<sup>28</sup> The Petition also describes the uses of two kinds of pipe used for the conveyance of water, A-589 water well pipe and A-795 galvanized pipe for fire protection, without referencing which application would be considered relevant for their description (*e.g.*, standard, line, or pressure).<sup>29</sup> Considering that the standard application explicitly references conveyance of water, Commerce infers that the A-589 and A-795 specifications are likely standard in application, which further indicates that the standard application is not defined by specification but instead it is defined by a pipe's use in the conveyance of certain fluids such as water and natural gas. The petitioners describe neither standard pipe applications nor water conveyance pipe based on an explicitly commercial purpose, as they do with pressure pipe. Thus, considering that water wells, plumbing and heating systems, and air conditioning units are common in non-industrial settings, Commerce inferred in the First Remand Redetermination and continues to infer here that standard application pipe may have residential uses.<sup>30</sup>

The Petition briefly describes line applications as “the conveyance of oil and natural gas or other fluids in pipe lines,” and indicates that line pipes are produced to the API 5L specification.<sup>31</sup> Use in “pipe lines,” which are for conveyance over long-distance, indicates an intention to cover only commercial end-users. In addition, the Petition notes that the pipes covered by the scope are often stenciled to multiple specifications, including API 5L and A-53.<sup>32</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See First Remand Redetermination at 24 (discussing the *Orders* explicit coverage of multiple specifications beyond standard A-53 use).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

## First Supplement

### *Comparable Specifications*

In response to Commerce’s review of the Petition documents and supplemental questionnaire, the petitioners revised the scope language in their First Supplement.<sup>33</sup> The petitioners noted their intention that the scope covers any pipe “(1) used in standard, line, or pressure applications *or* (2) made to one of the listed specifications – so long as the pipe does not fall into a specific exclusion.”<sup>34</sup> Thus, it does not appear the petitioners intended to exclude pipes made to similar specifications if they were used in one of the three applications, and intended to exclude only the pipes that were explicitly listed. At the recommendation of Commerce, the petitioners also added explicit language to the scope that covered “comparable domestic and foreign specifications.”<sup>35</sup>

### *End-Use Applications*

Commerce also requested that the petitioners remove all language related to end-use. The petitioners declined to do so because they believed it might allow Chinese producers to circumvent the *Orders* by adding unnecessary stenciling or using an alternative stencil and because the language matched other AD and CVD orders.<sup>36</sup> In the First Supplement, the petitioners did not defend the end-use language on the grounds that the industrial or commercial use of the pipe was itself defining as a description of the covered pipe. Instead, the petitioners

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<sup>33</sup> See Petitioners’ Letter, “Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People’s Republic of China: Response to the Department’s Questionnaire Regarding Volume I of the Petitions for the Imposition of Antidumping and Countervailing Duties,” dated September 25, 2009 (First Supplement); *see also* AEC Rebuttal Information at Exhibit 3 (replicating First Supplement in full).

<sup>34</sup> See First Supplement at 5 (emphasis in original).

<sup>35</sup> *Id.* at 6, 8.

<sup>36</sup> *Id.* at 6-7.

argued that by including language that further explains the possible end-uses, the *Orders* would prevent circumvention.<sup>37</sup>

## **Commerce's Second Supplemental Questionnaire**

### *End-Use Applications*

Commerce responded to the petitioners' First Supplement by proposing scope language.<sup>38</sup> Commerce disagreed with the petitioners' decision not to remove the end-use language as Commerce had requested the petitioners to do, and Commerce proposed a version that removed all language related to the specifications, characteristics, and uses.<sup>39</sup> Commerce believed that the pipes covered by the scope should be defined by their physical description. The scope retained the language of "standard, line and pressure" seamless pipe but lost the extensive analysis defining those applications, which also required removing the inconsistent description of some applications as commercial or industrial.

### *Comparable Specifications*

Commerce also removed the exclusion language related to boiler tubing, mechanical tubing, and oil country tubular goods that would later result in extensive discussion on the record with Salem Steel and Sumitomo.<sup>40</sup> Commerce indicated that the description of the seamless pipe was sufficient and "no exclusionary language is needed to exclude these products."<sup>41</sup> Thus, Commerce viewed mechanical tubing not as a specialized form of seamless pipe, which might otherwise be covered by the scope, but as a separate type of product.

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<sup>37</sup> *Id.* at 6-7.

<sup>38</sup> See Commerce's Letter, "Petition for the Imposition of Antidumping and Countervailing Duties on Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China," dated September 25, 2009 (Commerce's Second Supplemental Questionnaire); see also AEC Rebuttal Information at Exhibit 4 (replicating Commerce's Second Supplemental Questionnaire in full).

<sup>39</sup> See Commerce's Second Supplemental Questionnaire.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

## Second Supplement

### *End-Use Applications*

The petitioners accepted the revised scope in their Second Supplement.<sup>42</sup> However, the petitioners also noted their continued belief that the end-use language should be retained specifically in order to avoid circumvention.<sup>43</sup> The petitioners explained that they “are concerned that Chinese producers and exporters could circumvent such an order by: (1) certifying that their seamless pipe meets other specifications not covered by the scope or (2) stenciling their seamless pipe with the relevant specifications only after it had been accepted for importation into the United States.” Thus, the inclusion of descriptions of end-use in the scope language was not intended to prevent certain industries (*i.e.*, residential or non-commercial) from being affected by the *Orders* but, rather, was intended to prevent Chinese seamless pipe producers from circumventing the *Orders* simply by altering the stenciling of their pipe.

### Additional Documents

#### *General Issues*

Commerce and the petitioners exchanged a further round of discussion regarding the scope, particularly regarding the removal of the end-use language.<sup>44</sup> However, the ultimate alterations in the scope language for initiation purposes were minor and the scope language

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<sup>42</sup> See Petitioners’ Letter, “Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Petitions for the Imposition of Antidumping and Countervailing Duties,” dated September 29, 2009 (Second Supplement); *see also* AEC Rebuttal Information at Exhibit 5 (replicating Second Supplement in full).

<sup>43</sup> *See* Second Supplement.

<sup>44</sup> *See* Commerce’s Letter, “Petitions for the Imposition of Antidumping and Countervailing Duties on Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China,” dated September 30, 2009 (Commerce’s September 30 Letter); *see also* AEC Rebuttal Information at Exhibit 6 (replicating Commerce’s September 30 Letter in full); Memorandum, “Memorandum of Phone Conversation,” dated October 5, 2009 (October 5 Memorandum); and AEC Rebuttal Information at Exhibit 7 (replicating October 5 Memorandum in full).

broadly reflected the language proposed by Commerce in the Second Supplemental Questionnaire.

## **B) Commerce Investigation**

### **Wyman-Gordon's First Letter**

#### *A-335 Exclusion*

On October 27, 2009, Wyman-Gordon Forgings, Inc. (Wyman-Gordon) first submitted information that would develop into the A-335 exclusion.<sup>45</sup> Wyman-Gordon proposed the exclusion on the grounds that none of the petitioners produced A-335 pipe.<sup>46</sup> In addition, Wyman-Gordon noted that “pipe manufactured to the ASTM-335 specification customarily has high temperature and pressure applications which cannot be met by substituting pipe produced to another ASTM specification.”<sup>47</sup> Thus, Wyman-Gordon acknowledged that A-335 pipe matched the scope in description and application but argued that A-335 pipe is demonstrably superior to the rest of the subject merchandise, based on recognized standards. Wyman-Gordon also requested two further exclusions for “seamless steel pipe with a nominal wall-thickness greater than 1.594 inches and less than or equal to 16 inches in outside diameter” and pipe produced with “inside diameter control.”<sup>48</sup> However, neither pipe would be identified in the scope language as being excluded from the investigation, which demonstrates Commerce’s effort to ensure that the A-335 exclusion was narrowly defined.

### **U.S. Steel's Response to Wyman-Gordon**

#### *A-335 Exclusion*

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<sup>45</sup> See Wyman-Gordon’s Letter, “Certain Seamless Steel Pipe from China,” dated October 27, 2009 (Wyman-Gordon’s First Letter); see also AEC Rebuttal Information at Exhibit 8 (replicating Wyman-Gordon’s First Letter in full).

<sup>46</sup> See Wyman-Gordon’s First Letter at 1.

<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.*

U.S. Steel, one of the petitioners, opposed all three exclusion requests by Wyman-Gordon and argued that there were more producers of the pipes requested for exclusion than just Wyman-Gordon.<sup>49</sup> U.S. Steel further noted that Commerce does not require the petitioners to produce all pipes encompassed by the scope but rather that the scope language cover the same like product.<sup>50</sup> In particular, U.S. Steel noted that Wyman-Gordon's requests could pose a risk of circumvention because "Chinese seamless steel pipe that is manufactured to a specific inside diameter control could be used in applications for which such stringent control is not necessary – e.g., standard line pipe applications." U.S. Steel expressed concern with broader exclusions where the pipe had been modified or made to slightly stricter standards because such pipe may still be used in "standard line" applications. Due at least in part to their opposition, Commerce did not include in the scope language an exclusion based on inside diameter control; this is another indication that Commerce intended the A-335 exclusion to be narrowly defined.

### **V&M Star's Response to Sumitomo**

#### *Comparable Specifications*

As previously noted, Commerce removed the explicit exclusion for mechanical tubing in Commerce's Second Supplemental Questionnaire, which resulted in extensive discussion of mechanical tubing by various parties; Commerce previously analyzed these discussions in the First Remand Redetermination. However, V&M Star's Response to Sumitomo contains an argument of general relevance: "Sumitomo's product may not be excluded from the scope of the current investigation simply because that product was produced in a manner that it is capable of being certified to a specification which is other than a specification specifically listed in the

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<sup>49</sup> See U.S. Steel's Letter, "Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China," dated November 9, 2009 (U.S. Steel's Response to Wyman-Gordon); see also AEC Rebuttal Information at Exhibit 9 (replicating U.S. Steel's Response to Wyman-Gordon in full).

<sup>50</sup> See U.S. Steel's Response to Wyman-Gordon at Exhibit 9.

scope of the current investigation. Rather, in order to exclude the product it must be produced in a manner that it is incapable of being certified to the listed, or comparable, specifications.”<sup>51</sup> From the standpoint of level of specification, pipe that is a variant of a listed standard does not, in and of itself, warrant exclusion.

V&M Star’s Response to Sumitomo informs the consideration of products that are “incapable of being certified” with the explicitly included products in order to receive an exclusion, including the mechanical tubing that V&M Star argued should not be excluded. As discussed in the First Remand Redetermination, the mechanical tubing would eventually be considered incomparable because mechanical tubing is produced to custom dimensions.<sup>52</sup> However, the exclusion for mechanical tubing was limited to products that were definably different in their dimensions, or produced to the aerospace, hydraulic or bearing standards.<sup>53</sup> Similarly, while A-335 pipe could theoretically be stenciled to a lower standard such as A-53, A-335 pipe is not a variant itself of a listed specification. Rather, A-335 is its own standard that is internationally recognized, codified by ASTM, and demonstrably superior to the A-106 and A-53 standards, which are explicitly included in the scope.

## **AD Preliminary Determination**

### *A-335 Exclusion*

Commerce discussed the arguments of Wyman-Gordon and U.S. Steel in its *AD Preliminary Determination*.<sup>54</sup> Commerce did not discuss the merits of A-335 pipe at this stage

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<sup>51</sup> See V&M Star’s Letter, “Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People’s Republic of China,” dated April 5, 2010 (V&M Star’s April 5 Letter); see also AEC Rebuttal Information at Exhibit 12 (replicating V&M Star’s April 5 Letter in full).

<sup>52</sup> See First Remand Redetermination at 8-9.

<sup>53</sup> See *Orders*.

<sup>54</sup> See *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the People’s Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances, in Part, and Postponement of Final Determination*, 75 FR 22372 (April 28, 2010) (*AD*

and instead considered Wyman-Gordon's exclusion request solely from the standpoint of whether the Petition was filed on behalf of the domestic industry.<sup>55</sup> Commerce determined, as the petitioners had argued, that the petitioners need not produce all products listed in the scope.<sup>56</sup> Thus, when the exclusionary scope language was included, the sole consideration facing the petitioners and Commerce at that time would have been the specifications of the pipe because Commerce had already determined that Wyman-Gordon's other argument was invalid.

### **Salem Steel Mechanical Tubing Documents**

#### *Commodity*

Salem Steel's request that certain types of mechanical tubing be excluded from the scope of the investigations was discussed extensively in the First Remand Redetermination. However, Salem Steel's May 24 Letter was the first place in the Commerce investigation where the term "commodity" was used in reference to a certain class of products rather than as a reference to the general trading market.<sup>57</sup> Salem Steel explained that seamless pipes "are very different animals from CD Mechanical Tubing. Seamless Pipes are **commodity** products made to standard pipe sizes having a nominal outside diameter."<sup>58</sup> Thus, the use of the term "commodity" was as a comparison to mechanical tubing, specifically pipe sizes. All uses of the word "commodity" in Salem Steel's May 24 Letter are in comparison to mechanical tubing, and, while some comparisons are to other standards such as dimensional tolerance, which Commerce addressed in

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*Preliminary Determination*). Wyman-Gordon and U.S. Steel did not file their scope comments on the CVD investigation record. Thus, Commerce did not discuss the scope comments on the CVD Preliminary Determination.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 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 Steel's May 24 Letter); see also AEC Rebuttal Information at Exhibit 13 (replicating Salem Steel's May 24 Letter in full).

<sup>58</sup> See Salem Steel's May 24 Letter (emphasis added).

its First Remand Redetermination, the use of the term “commodity” is generally intended to mean as compared to an individually customized product in its sizing.<sup>59</sup>

All further references on the record of the Commerce investigation to the term “commodity,” including Commerce’s use in its Letter to CBP, the use by MC Tubular, and the further uses by Salem Steel, present “commodity” as a comparison to mechanical tubing meant to differentiate a product customized in its sizing from seamless pipes made to standard Nominal Pipe Size (NPS) sizes.<sup>60</sup> Thus, the term “commodity” was used not to include solely “commodity” products or to exclude seamless pipes made to advanced specifications, but to differentiate mechanical tubing as a separate class of product that would be excluded. Commerce does not infer that its or the interested parties’ use of “commodity” in describing seamless pipes is definitive of the seamless pipes that would be included in the *Orders*. Indeed, A-335 pipe, which would have been covered by the *Orders* throughout the discussion of mechanical tubing, was not analyzed despite Commerce’s language stating that seamless pipes are generally commodity products.

### **Exclusion of A-335 Pipe Documents**

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<sup>59</sup> *Id.*

<sup>60</sup> See Memorandum, “U.S. Customs and Border Protection’s Inquiry Regarding Mechanical Tubing,” dated June 24, 2010 (Letter to CBP). “Generally, the seamless standard, line and pressure pipes are commodity products made to standard pipe sizes (outside diameters and wall thicknesses) whereas mechanical tubing is custom designed to meet a customer’s needs and is generally not produced with the standard pipe diameters and wall thicknesses found in seamless standard, line, and pressure pipes;” see also AEC Scope Request at Exhibit J (replicating Letter to CBP in full); MC Tubular’s Letter, “Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People’s Republic of China: Comments on Department’s June 23, 2010 Proposed Scope Modification,” dated June 30, 2010 (MC Tubular’s June 30 Letter); AEC Rebuttal Information at Exhibit 18 (replicating MC Tubular’s June 30 Letter in full); 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, 2020 (Salem Steel’s June 30 Letter); 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 (Transmission of Documents) at Attachment 3 (replicating Salem Steel’s June 30 Letter in full); 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 Steel’s Case Brief); and AEC Scope Request at Exhibit I (replicating Salem Steel’s Case Brief in full).

### *A-335 Exclusion*

On July 2, 2010, the petitioners requested that A-335 pipe be excluded from the scope of the investigation but provided no specific reason for the request.<sup>61</sup> As a result of the request, Commerce did not evaluate A-335 pipe on its merits for exclusion. While there was some further discussion of A-335 pipe, the substance was procedural and related to Commerce's decision to wait until the *Final Determinations* to exclude A-335 pipe.<sup>62</sup>

## **C) Determinations of the Secretary**

### **Final Determinations**

#### *A-335 Exclusion*

In the AD IDM and the CVD IDM, Commerce's stated reasons for excluding A-335 pipe were "based on Petitioners' request."<sup>63</sup> Thus, the most explicit reason provided by Commerce for granting the exclusion was that the petitioners requested it, indicating their agreement to the change in the scope. Because Commerce granted the exclusion on the basis of the petitioners' request, Commerce did not weigh the merits of A-335 pipe itself. By contrast, Commerce did provide extensive reasoning for the mechanical tubing exclusions that were granted for aerospace, hydraulic, and bearing tubing.<sup>64</sup> Thus, in preparing this redetermination, Commerce infers from these different approaches that the exclusion for A-335 is narrow because it applies

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<sup>61</sup> See Petitioners' 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," dated July 2, 2010 (Petitioners Request to Exclude A-335); see also Transmission of Documents at Attachment 4.(replicating Petitioners Request to Exclude A-335 in full).

<sup>62</sup> See Memorandum, "Ex Parte Communications with Office of Representative Blumenauer," dated August 20, 2010 (August 20 Memorandum); see also AEC Rebuttal Information at Exhibit 21 (replicating August 20 Memorandum in full).

<sup>63</sup> See *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 75 FR 57444 (September 21, 2010), and accompanying IDM (CVD IDM); 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), and accompanying IDM (AD IDM).

<sup>64</sup> See CVD IDM and AD IDM.

only to products that a party requested an exclusion for and for which the petitioners explicitly approved the exclusion.

#### **D) ITC Investigation**

##### **ITC Preliminary Conference**

###### *Commodity*

On October 7, 2009, the ITC held its preliminary conference on seamless pipe.<sup>65</sup> Prior to Wyman-Gordon's exclusion request, Mr. Roger Schagrin, counsel for V&M Star, in discussing imports from China noted that “they make products that in this category, you couldn't find a more commodity or fungible product than . . . all the imports from China, and all the domestic products are stenciled to the same four specifications.”<sup>66</sup> Thus, when discussing the term “commodity” in the ITC investigation, “commodity” refers to the mass-manufactured pipes that make up the majority of the imports and that are stenciled to four specifications (“quad-stenciled”): ASTM A-106, ASTM A-53, API 5L-B, and AP15L-X42.<sup>67</sup> However, as noted in the Petition and other initiation documents, the petitioners also explicitly included within the scope a variety of other seamless pipe specifications that are not typically quad-stenciled as well as products made to comparable specifications.<sup>68</sup> If the scope was limited to “commodity” products as described by counsel for V&M Star, the predominant user of the term, to be just the four expressly listed quad-stencil products, most of the scope would be invalidated. Rather, for purposes of this remand redetermination, Commerce interprets the use of “commodity” to be

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<sup>65</sup> See Conference Transcript, “Certain Seamless Carbon and Alloy Steel Standard Line and Pressure Pipe from China,” Investigation Nos: 701-TA-469 and 731-TA-1168 (preliminary) Revised and Corrected Copy,” dated October 7, 2009 (ITC Preliminary Conference); see also AEC Rebuttal Information at Exhibit 23 (replicating ITC Preliminary Conference in full).

<sup>66</sup> See ITC Preliminary Conference at 113.

<sup>67</sup> See Petition at 5-6.

<sup>68</sup> *Id.*

somewhat rhetorical and meant to discuss the predominant (but not sole) focus of the petitioners' concern.

### *End-Use Applications*

Regarding the end-use applications of seamless pipe, most discussion throughout the conference was related to size differences as the ITC considered products over and under 4.5 inches.<sup>69</sup> The discussion of application was industrial in nature and meant to integrate or differentiate pressure and line applications. For example, Mr. Brady Mills, counsel for Hengyang Valin Steel Tube Co., Ltd., stated, “small-diameter seamless pipe is primarily used in industrial applications, such as refineries and chemical plants, to carry small amounts of liquids or gases under pressure. In contrast, large-diameter seamless pipe is primarily used in pipeline applications to convey large volumes of oil or gas over longer distances.”<sup>70</sup> However, once again, there is no discussion of residential or non-industrial applications to differentiate those from industrial applications or analysis that would indicate that standard applications could not be non-industrial. While pressure and line applications are discussed in the context of their markets (*e.g.*, Mr. Mills' comment), standard pipe is not.<sup>71</sup>

### **V&M Star Post-Conference Brief**

#### *Commodity*

In the V&M Star Post-Conference Brief, V&M Star repeatedly used the term “commodity.”<sup>72</sup> All uses of “commodity” referred to the type of products or market but did not describe “commodity” in greater detail beyond Mr. Schagrín's comments in the ITC Preliminary

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<sup>69</sup> See ITC Preliminary Conference at 55-59, 133-134.

<sup>70</sup> *Id.* at 133-134.

<sup>71</sup> *Id.* at 11, 29, 62, 147 (discussion of “standard pipe” without reference to its end-use applications or market).

<sup>72</sup> See V&M Star, TMK IPSCO and the United Steelworkers' Letter, “Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China, Inv. Nos. 701-TA-469 and 731-TA-1168 (Preliminary),” dated October 14, 2009 (V&M Star Post-Conference Brief); see also AEC Rebuttal Information at Exhibit 25 (replicating V&M Star Post-Conference Brief in full).

Conference. As previously discussed, “commodity” had been used to describe the majority of incoming product from China that was quad-stenciled, and V&M Star used this term in its brief. For this redetermination pursuant to remand, Commerce infers that the same description is relevant here and that the use here is not indicative that the scope was meant to cover only those four quad-stenciled products. With the exception of one comment in the Final Hearing, all of V&M Star or Mr. Schagrín’s uses of “commodity” conform to this pattern.<sup>73</sup>

## **ITC Preliminary Report**

### *Commodity*

The ITC Preliminary Report did not consider A-335 pipe in particular or seek to define the scope on the grounds of commodity products.<sup>74</sup> The ITC discusses “commodity” products in terms of legal standards for price competitive non-subject imports but not in terms of what could be considered a “commodity” seamless pipe or whether the scope is exclusive to “commodity” products.<sup>75</sup>

### *End-Use Applications*

The ITC Preliminary Report expands the list of end-use applications beyond those the petitioners provided in the Petition. “Seamless SLP pipe is used for the transmission of oil and natural gas; in chemical, petrochemical, and refinery facilities; and **in mechanical applications for general construction.**”<sup>76</sup> General construction, while undefined by the ITC, would presumably cover residential construction and, thus, residential applications for seamless pipe.

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<sup>73</sup> See Hearing Transcript, “Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China. Investigation Nos: 701-TA-469 and 731-TA-1168 (Final) Revised and Corrected Copy,” dated September 14, 2010 (ITC Final Hearing) at 91, 93, 133 (demonstrating Mr. Schagrín’s use of “commodity” in the same context); *see also* AEC Rebuttal Information at Exhibit 36 (replicating ITC Final Hearing in full).

<sup>74</sup> See *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China, Investigation Nos. 701-TA-469 and 731-TA-1168 (Preliminary)*,” dated November 2009 (ITC Preliminary Report); *see also* AEC Rebuttal Information at Exhibit 27 (replicating ITC Preliminary Report in full).

<sup>75</sup> See ITC Preliminary Report at 12.

<sup>76</sup> *Id.* at 6 (emphasis added).

The petitioners identified explicitly industrial purposes only in some situations (namely, pressure and line applications), and, considering that the ITC includes general construction among the standard end-uses, for the purposes of this remand redetermination Commerce infers from the description that the scope of the *Orders* rationally includes more pipes than those used in just industrial or commercial piping systems.

### **ITC Prehearing Report**

#### *A-335 Exclusion*

The ITC Prehearing Report, released on August 30, 2010, was the first document to analyze A-335 pipe in comparison with other forms of seamless pipe but it followed the Petitioners Request to Exclude A-335 in the Commerce investigation, which was filed with Commerce on July 2, 2010.<sup>77</sup> As compared to the “commodity” quad-stencil pipes, as previously described, the ITC noted that A-335 pipe was “not dual, triple, or quadruple certified with ASTM A-53, ASTM A-106, and API 5L X-42 or grade B because of the inclusion of higher levels of alloying elements such as nickel, chromium, and molybdenum, and higher requirements for minimum tensile and yield strengths that exceed those of ASTM A-53, ASTM A-106, and API 5L X-42 or grade B.”<sup>78</sup> In other words, A-335 is recognized as a superior pipe on a performance and chemical basis to all of the products described as commodity. Considering the comments in V&M Star’s Response to Sumitomo in the Commerce investigation, A-335 pipe, like mechanical tubing, is a non-comparable product that is not stenciled to the same standards as the products covered by the scope. Thus, the standard for receiving an exclusion would include, at the very least, being a demonstrably superior pipe to the quad-stenciled commodity pipes.

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<sup>77</sup> See *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China, Prehearing Report to the Commission on Investigation Nos. 701-TA-469 and 731-TA-1168 (Final)*, dated August 30, 2010 (ITC Prehearing Report); see also AEC Rebuttal Information at Exhibit 30 (replicating ITC Prehearing Report in full).

<sup>78</sup> See ITC Prehearing Report at I-14 n.25.

Furthermore, the ITC Prehearing Report states that “U.S. producers reported a degree of interchangeability in which A-335 pipe could be used in certain applications, most specifically pressure applications requiring A-106 pipe. However, such substitution was not deemed economical and was not possible in reverse. U.S. purchasers were largely unable to address the question, but those that did indicated that any interchangeability would be unusual, one-way, and costly.”<sup>79</sup> In comparing A-335 pipe to the products explicitly included within the scope, the ITC analyzed A-106 pipe and found them non-interchangeable. Thus, Commerce infers that, in considering pipes for an exclusion derived from similar reasons as the exclusion provided for A-335, exceeding the A-106 standard is specifically important.

#### *End-Use Applications*

The ITC also revised its language regarding end-use applications in the ITC Prehearing Report. It explicitly separated general construction and industrial applications: “in mechanical applications for general construction and in industrial applications.”<sup>80</sup> Thus, following further evaluation, the ITC concluded that general construction was a separate category from industrial and that seamless pipe could be used in both applications.

### **U.S. Steel Pre-Hearing Brief**

#### *A-335 Exclusion*

U.S. Steel briefly described the petitioners’ reasoning for agreeing to the exclusion in the U.S. Steel Pre-Hearing Brief.<sup>81</sup> However, no specific reason was provided: “Petitioners have agreed to exclude pipe meeting the ASTM A-335 specification from the scope of the

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<sup>79</sup> *Id.* at I-28.

<sup>80</sup> *Id.* at II-1.

<sup>81</sup> See U.S. Steel’s Letter, “Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China, Inv. Nos. 701-TA-469 and 731-TA-1168 (Final),” dated September 7, 2010 (U.S. Steel Pre-Hearing Brief); see also AEC Rebuttal Information at Exhibit 31 (replicating U.S. Steel Pre-Hearing Brief in full).

investigation. Given the record in these cases, U. S. Steel does not believe that ASTM A-335 is part of the same domestic like product as other seamless SLP pipe in these investigations.”<sup>82</sup> Thus, the record for an exclusion request comparable to the exclusion granted for A-335 should demonstrate that the requested pipe is a separate class of product. Even then, the logic behind providing an exclusion would differ from that of A-335 because Commerce accepted the exclusion explicitly due to the petitioners’ request as previously discussed in the Commerce investigation.

### **ITC Final Hearing**

#### *Commodity*

While the A-335 exclusion had at this point been largely resolved, there are two noteworthy references to “commodity” in the ITC Final Hearing. Mr. George Thompson, General Manager for Commercial Tubular Products with U.S. Steel, references “commodity” in describing the views of customers: “More and more customers use seamless SLP pipe as a commodity product sold on the basis of price.”<sup>83</sup> Outside of V&M Star or their counsel, Mr. Schagrín’s uses, and the ITC in discussing legal standards, this is the only reference in the ITC investigation to seamless pipe imports being “commodity.” However, Mr. Thompson does not define the scope by commodity products or commodity products themselves. Indeed, that “more and more” use it in a commodity sense implies that others have not, and that seamless pipe is not itself defined just by commodity. Second, Mr. Schagrín describes “commodity-sized grades.”<sup>84</sup> As discussed in the Commerce investigation, “commodity-sized” generally refers to NPS, which

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<sup>82</sup> See ITC Final Hearing at 12.

<sup>83</sup> *Id.* at 68.

<sup>84</sup> *Id.* at 148.

would have included A-335 pipes. A-335 pipes were excluded by this point, which implies that products are not inherently excluded by being “commodity” (*i.e.*, commodity-sized).

### **E) Summary of (k)(1) Sources**

#### *SLP Applications/End-Use Applications*

In reviewing the (k)(1) sources, Commerce finds that the petitioners did not intend to exclude pipes designed for non-industrial purposes and, furthermore, that the ITC explicitly widened its definition to include pipes produced for non-industrial purposes (*e.g.*, general construction). Furthermore, Commerce infers from the scope language that the exact standards to which a pipe is produced do not define the application of the pipe. The application is instead defined by its use in conveyance of certain products (*e.g.*, natural gas or other fluids) under certain conditions (*e.g.*, low temperature and pressure, over distance as in pipelines, or high pressure). Finally, the petitioners’ concern in retaining the end-use application language was to avoid circumvention by manufacturers stenciling their products to a non-listed standard.

#### *Commodity*

Considering both the Commerce and ITC investigations, Commerce does not consider the term “commodity” to define the scope to the exclusion of certain specialty pipes. “Commodity” is used consistently in two fashions that are separate from each other to discuss a comparison to an explicitly excluded product (mechanical tubing) and a *subsection* of explicitly included pipes (quad-stenciled pipes) among other also explicitly covered pipes.

#### *Comparable Specifications*

Pipes made to comparable specifications are those that are capable of being normally stenciled to an explicitly listed standard. A non-comparable specification is for a product, such as mechanical tubing, that surpasses or exceeds the products normally intended to be covered by

the *Orders*, such as the quad-stenciled pipes. Furthermore, as discussed in the end-use applications sections, the petitioners repeatedly expressed their concerns regarding circumvention by manufacturers producing products to similar but not identical standards. Thus, “comparable specification” was meant as a broad term.

#### *A-335 Exclusion*

A-335 pipe is a demonstrably superior pipe to the quad-stencil products, which cannot be certified to its standard and, consequently, are not stenciled with A-335 specification. While A-335 pipe was excluded from the scope of the *Orders*, two other products requested by Wyman-Gordon were not excluded, indicating that the exclusion is to be applied narrowly. Finally, Commerce’s stated reason for excluding A-335 pipe was that the petitioners requested it.

## **VI. Analysis of AEC Pipe**

### **A) Petition and Initiation Documents**

#### *SLP Applications/End-Use Applications*

AEC describes its pipe, in application, as designed to [ ] for the “conveyance of natural gas or liquified natural gas.”<sup>85</sup> As explicitly outlined in the scope of the Petition, a pipe for the conveyance of natural gas under low-temperature and pressure would conform to the standard application.<sup>86</sup> As noted in the review of the Petition, standard pipe is not defined by the explicit specification, but rather is defined by the use. Even though AEC pipe is [ ], its application is the same: conveying natural gas under standard conditions. If anything, that AEC pipe is [ ] rather than a different, recognized standard, further indicates its standard use.

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<sup>85</sup> See AEC Scope Request at 11.

<sup>86</sup> See Petition at 5-6.

In relation to AEC pipe's [ ], this consideration is not discussed in the scope language and is not a condition by which the petitioners described any qualifying criteria for exclusion. Indeed, as the petitioners stated in the First Supplement, "the scope covers any pipe meeting the physical characteristics indicated by the scope which is (1) used in standard, line or pressure applications."<sup>87</sup>

Regarding end-use applications, AEC has described the *Orders* as intending to cover the use of "commodity pipe to construct long, continuous stretches of pipeline" while AEC pipe is used in a "niche market . . . for the gas utility industry for residential use."<sup>88</sup> AEC's argument is erroneous and unavailing. Only one of the three types of SLP pipe is meant for pipeline usage (line pipe) and, as demonstrated by the review of the Petition, only the pressure and line applications are described in explicitly commercial or industrial terms (*i.e.*, pressure pipe is used in "industrial piping systems").<sup>89</sup> By contrast, the scope language does not differentiate commercial *vis-à-vis* non-commercial uses for standard pipe. Indeed, standard pipe is described as being used in "plumbing and heating systems,"<sup>90</sup> which are common in residential settings and likely the same use as a residential meter set. AEC also describes its products as being used in "Gate Station fabrications" and the "dairy, food, agriculture, medical, and aerospace industries," which are likely commercial applications.<sup>91</sup> Thus, even if the scope did differentiate commercial and non-commercial applications for standard use, AEC pipe would still meet a commercial qualification.

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<sup>87</sup> See First Supplement at 5.

<sup>88</sup> See AEC Scope Request at 3.

<sup>89</sup> See Petition at 5-6.

<sup>90</sup> *Id.*

<sup>91</sup> See AEC Scope Request at 1.

Finally, the petitioners' stated reason for opposing the removal of the SLP application and end-use language was to prevent circumvention. As previously noted, the petitioners did not oppose the alteration because they were concerned that certain industries or end-uses that might otherwise conform to the scope of the *Orders* would be affected.<sup>92</sup> Rather, the petitioners opposed the change because they were concerned that Chinese manufacturers would simply stencil their pipe to a non-covered specification.<sup>93</sup> AEC pipe appears similar to the kinds of products that the petitioners expressed concern about: pipes matching the end-use description of standard pipe but marked with a [

].<sup>94</sup> Reaching a conclusion that AEC pipe is not covered by the scope of the *Orders* could create the broad circumvention issues about which the petitioners were specifically concerned.

#### *Comparable Specifications*

AEC pipe is produced to a [ ]<sup>95</sup> The stencil [ ] as outlined in the record. AEC pipe is designed to be a [ ] is not a characteristic that was considered in the record of the investigation. Thus, the scope does not incorporate an exclusion based on that characteristic. Furthermore, Commerce notes that the standard pipe application includes multiple specifications that are improvements on A-53 pipe, the most basic of standard pipes. The standard pipe application explicitly covers low-temperature use pipes, A-333 and A-334, and, as explained above, likely

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<sup>92</sup> See First Supplement; see also Second Supplement.

<sup>93</sup> See First Supplement at 5.

<sup>94</sup> See AEC Scope Request at Exhibit C.

<sup>95</sup> *Id.*

also covers pipes for water conveyance.<sup>96</sup> Those pipes, unlike AEC pipe, are recognized by ASTM as improvements upon A-53 *and yet* they are still included within the scope of the *Orders*. Thus, for purposes of this redetermination, Commerce considers that AEC pipe is made to a “comparable specification” to the subject merchandise. Indeed, were Commerce to accept that the [ ] was a qualifying criterion for exclusion, it would be extremely difficult to prevent circumvention of the *Orders* because any producer could simply create a [ ]].

## **B) Commerce Investigation**

### *A-335 Exclusion*

Commerce continues to conclude, for this redetermination, that the exclusion of A-335 pipe, in keeping with extensive case precedent and Commerce procedure, applies narrowly and therefore only to pipes meeting the chemical specifications outlined by ASTM. As Commerce has previously argued, AEC pipe does not meet those chemical specifications (or the specifications related to certain types of mechanical tubing) and it should not be excluded from the *Orders*.<sup>97</sup> As the Court of Appeals for the Federal Circuit (CAFC) has held, “{a}lthough the scope of a final order may be clarified, it can not be changed in a way contrary to its terms,”<sup>98</sup> and “the language of a scope is the ‘cornerstone’ of any scope determination.”<sup>99</sup> “{J}ust as orders cannot be extended to *include* merchandise that is not within the scope of the order as reasonably interpreted, merchandise facially covered by an order may not be *excluded* from the

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<sup>96</sup> See Petition at 5-6.

<sup>97</sup> See First Remand Redetermination at 15, 17.

<sup>98</sup> See *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990).

<sup>99</sup> See *Shenyang Yuanda Aluminum Industry Engineering Co. v. United States*, 776 F. 3d 1351, 1353 (Fed. Cir. 2015) (*Yuanda*) (quoting *Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1357 (Fed. Cir. 2010) and *Duferco Steel Inc. v. United States*, 296 F.3d, 1087, 1097 (Fed. Cir. 2002) (*Duferco*)).

scope of the order unless the order can reasonably be interpreted so as to exclude it.”<sup>100</sup>

However, with further consideration of the record history described above, Commerce likewise continues to conclude that there are substantial differences between A-335 pipe and AEC pipe that are important in considering their merits for exclusion.

The petitioners acceded to an exclusion for only one of the three types of pipe that Wyman-Gordon requested. While A-335 pipe was discussed in the ITC investigation, Wyman-Gordon’s pipes produced to specific inside diameter control and certain wall thicknesses (*i.e.*, tight dimensional controls) received little further discussion beyond the petitioners’ note that they oppose their exclusion. Indeed, they received no exclusion in the *Orders*. Thus, even in considering a category of product that is made to “tight dimensional controls” as AEC has argued,<sup>101</sup> no exclusion should apply because one was not granted to Wyman-Gordon under similar circumstances even though they received the A-335 exclusion. Far from indicating an intent to exclude a broad category of specialized pipe, the record demonstrates that the exclusion for A-335 pipe is narrow and should be applied only to A-335 pipe.

The logic behind the A-335 exclusion is also different from the logic that AEC puts forth for arguing that its pipe is not subject to the scope of the *Orders*. A-335 pipe is recognized by ASTM as directly superior to A-106 pipe in that it can be used at even higher temperatures, but A-335 pipe is still used in the same industry as A-106 pipe: Wyman-Gordon’s First Letter notes that it is used in pressure applications.<sup>102</sup> Thus, the exclusion was granted on the merits of the pipe rather than based on its end-use applications. AEC has argued that its pipe is not covered by the scope of the *Orders* on the grounds that the petitioners intended to cover commodity pipes

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<sup>100</sup> See *Mid Continent Nail Corp v. United States*, 725 F.3d 1295, 1301 (Fed. Cir. 2013) (emphasis in original).

<sup>101</sup> See AEC’s Letter, “Plaintiff’s Comments on Final Remand Redetermination,” dated January 9, 2020 at 16-17 (Comments on Final Remand).

<sup>102</sup> See Wyman-Gordon’s First Letter at 1.

for commercial use, and that the specific end-use was not considered in excluding the A-335 pipe from the scope, and, even if it were, AEC pipe fits the standard pipe applications as previously discussed.<sup>103</sup> Finally, Commerce notes again that AEC pipe cannot [

].<sup>104</sup> Thus, while AEC may be an improved [

], it could not reach the standards of [ ].

While A-335 pipe surpasses all of the listed standards, AEC pipe surpasses only some of the listed standards.

### *Commodity*

In considering whether the *Orders* are meant to cover only “commodity” products and to exclude specialized ones, Commerce finds that the Commerce investigation used the term “commodity” solely as a comparison to explicitly excluded forms of mechanical tubing and that “commodity” is not dispositive in defining the scope. As a comparison, mechanical tubing is customized in its dimensions for each tube and customer, while AEC pipe is made [

].<sup>105</sup> Thus, in the context of the Commerce investigation, the term

“commodity” is irrelevant to the A-335 exclusion because A-335 pipe, which is made to NPS sizes, would be considered a “commodity” product, and, in the case of mechanical tubing, “commodity” products being covered by the scope would actively weigh against AEC pipe being excluded from the scope because it is made in [ ]. Furthermore, AEC pipe is *not* customized to accommodate each customer until after importation [

].<sup>106</sup> While AEC has argued that its product is customized because it is

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<sup>103</sup> See AEC Scope Request at 3-4.

<sup>104</sup> *Id.* at Exhibit B.

<sup>105</sup> *Id.* at Exhibit C.

<sup>106</sup> *Id.* at 11.

made to its specified stencil,<sup>107</sup> this is not customization in the context provided by the Commerce investigation of custom sizing.

### **C) Determinations of the Secretary**

#### *A-335 Exclusion*

Commerce explained in the AD IDM and CVD IDM that it added the A-335 exclusion “based on Petitioners’ request.”<sup>108</sup> In considering whether the reasons for excluding A-335 pipe apply equally to AEC pipe, Commerce notes that the petitioners have not provided a request supporting the exclusion of pipe made to AEC’s specifications and, consequently, similar circumstances between AEC pipe and A-335 pipe have not been created. The petitioners did not participate in the scope proceeding, and Commerce cannot presume their position. Even if Commerce considered AEC pipe comparable to A-335 pipe for other reasons (which Commerce does not), the specific logic behind the granting of the exclusion by Commerce in the *Final Determinations* would not be replicated.

Considering that the petitioners requested the A-335 exclusion, that the Petition and investigation highlighted circumvention concerns,<sup>109</sup> and that, as previously discussed, Commerce views all of the exclusions narrowly, Commerce does not interpret the A-335 exclusion more broadly than its face. Although AEC has attempted to persuade Commerce to recognize a broader interpretation of the exclusion, Commerce cannot apply the broader interpretation that AEC seeks. AEC does not contend that AEC pipe is A-335 pipe. In addition, Commerce discussed at length in the First Remand Redetermination that AEC pipe does not qualify for any of the other enumerated exclusions. In considering the merits of AEC pipe as

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<sup>107</sup> See Comments on Final Remand at 141

<sup>108</sup> See AD IDM and CVD IDM.

<sup>109</sup> See First Supplement; see also Second Supplement; and U.S. Steel’s Response to Wyman-Gordon.

compared to A-335 pipe, Commerce does not have the authority or the discretion to change the language of the scope once the order has been issued and cannot conclude that the petitioners and Commerce would have similarly agreed to exclude AEC pipe from the scope of the *Orders* AEC had filed such a request at the appropriate time, *i.e.*, during the investigation.

#### **D) ITC Investigation**

##### *Commodity*

In reviewing the ITC investigation, Commerce found that the term “commodity” appeared to primarily indicate multi-stenciled products that make up the majority of imports from China but that the scope was meant to be broader than just products stenciled to A-53, A-106, API 5L X-42 or grade B because it explicitly included multiple other specifications. While “commodity” is used infrequently, most references are rhetorical, do not seek to define the scope, or are discussing legal standards related to the ITC’s considerations. As a comparison to AEC pipe, for purposes of this redetermination, Commerce finds that, even were the scope limited to pipe meeting those four standards and the comparable specifications, AEC pipe would still likely be covered. As discussed at length, AEC pipe is a [

].<sup>110</sup> Like A-335 pipe, AEC pipe is not stenciled to the [

]. However, the reasoning runs in the opposite direction. While A-335 pipe exceeds *all* of the quad-stencil standards and is not stenciled with them as a result, AEC pipe [

]. AEC’s pipe

specification would thus be considered a comparable specification to the commodity pipe. While Commerce does not contend that “commodity” defines the scope of the *Orders*, we do continue

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<sup>110</sup> See AEC Scope Request at Exhibit C.

to find, for purposes of this redetermination, that AEC pipe is covered because it is made to comparable specifications.

#### *End-Use Applications*

Commerce finds that AEC pipe meets the criteria for end-use as described by the ITC and, consequently, that AEC pipe is not for a market distinct from that considered by the ITC. As previously discussed, the mechanical applications for the general construction industry would include meter kits for residential use. Furthermore, the ITC investigation did not differentiate commercial and non-commercial applications for standard pipe as it did with line and pressure. While the discussion focused primarily on industrial markets that are not AEC's focus, there is no implication that the petitioners, interested parties, or the ITC meant the scope to exclude residential uses, and the ITC *added* general construction to the uses beyond those described in the Petition. Thus, AEC pipe should not be excluded from the scope of the *Orders* on those grounds.

#### **E) Summary of Analysis of AEC Pipe**

In total, Commerce finds that AEC pipe has a standard application and that the end-use applications of general construction or non-commercial as described in the (k)(1) sources likewise describe AEC pipe. Commerce does not view the scope of pipes included within the *Orders* to be defined by "commodity," to the exclusion of any broad category of A-335 pipes, and, even if the scope was defined as such, that AEC pipe would be covered as a comparable specification of the commodity pipes. Thus, in comparison to the standards of *A.L. Patterson, Inc. v United States*, which the CIT references in its opinion, AEC pipe is neither distinct in application nor physically distinguished in specification beyond that of the covered pipes.<sup>111</sup> By

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<sup>111</sup> See *Second Remand Order* at 11-13 (citing *A.L. Patterson, Inc. v. United States*, 585 F. App'x 778 (Fed. Cir. 2014)).

contrast, Commerce notes that A-335 pipe received an explicit exclusion request from the petitioners and is a demonstrably superior product to the quad-stenciled pipe. Finally, Commerce views the exclusions for the *Orders* narrowly, applying solely to the products described by the exclusions, and AEC pipe is not one of the excluded products.

## VII. Comments

### A) Whether AEC Pipe Is Covered by the Scope as Described in the (k)(1) Sources

#### *AEC's Arguments*

- The petitioners did not intend to include specialized pipes such as AEC pipe within the scope of the *Orders* because they did not name AEC as an importer or its supplier as a producer of subject merchandise.<sup>112</sup> The lack of participation by the petitioners indicates that they do not believe AEC pipe is covered by the *Orders*.<sup>113</sup>
- AEC pipe is analogous to excluded A-335 pipe, which it exceeds in some respects, and other custom pipes that were not intended to be covered by the *Orders*.<sup>114</sup> Like A-335 pipe, AEC pipe is superior to and not interchangeable with A-53 pipe because A-53 pipe cannot replace AEC pipe with its lack of malleability<sup>115</sup> and it would be uneconomical to replace AEC pipe for A-53 pipe.<sup>116</sup> AEC pipe's further specifications, which have led AEC to use a different stencil, are thus necessary for its purpose.<sup>117</sup> AEC pipe is custom-designed for a single function to be more malleable.
- Mechanical tubing producers, which Commerce has ignored, described the products intended to be covered by the *Orders* as different from custom products in their tolerances, chemistry,

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<sup>112</sup> See AEC Comments on Draft Second Remand Redetermination at 2-3.

<sup>113</sup> *Id.* at 3.

<sup>114</sup> *Id.* at 3-4.

<sup>115</sup> *Id.* at 4-5.

<sup>116</sup> *Id.* at 5.

<sup>117</sup> *Id.* at 4.

sizing and straightness, all of which apply to AEC pipe.<sup>118</sup> Neither mechanical tubing nor AEC pipe is made to comparable specifications as a result.<sup>119</sup>

- The *Orders* were intended to cover only commodity pipe, namely that produced to the quad-stencil specifications.<sup>120</sup> Commerce’s representation of the term “commodity” on the record is inaccurate. The term was broadly used to describe a standard or ordinary product in contrast to specialized or custom product.<sup>121</sup> Across the (k)(1) sources, the record is consistent that commodity product meant products easily interchangeable for various purposes. AEC pipe is a uniquely customized product at the time of importation, including in its sizing.
- AEC pipe is not interchangeable with the pipes covered by *Orders* because it is a custom-made product designed to be more malleable.<sup>122</sup> Consequently, AEC pipe’s end-use application is defined by that malleability and a niche market as opposed to an industrial, residential or “general construction” end-use.<sup>123</sup> Including AEC pipe within the scope endangers the requirement that the subject merchandise contribute to injury.<sup>124</sup>

#### *Commerce’s Position*

AEC’s arguments are unavailing regarding the position of the petitioners. While the Petition attempts to name all producers and importers of subject merchandise, the petitioners explicitly stated that the data and lists of companies may not be exhaustive: “{w}hile these data represent the best information reasonably available to Petitioners, they believe that there may be a number of importers of seamless pipe from China that are unknown to Petitioners at this

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<sup>118</sup> *Id.* at 6-7.

<sup>119</sup> *Id.* at 7.

<sup>120</sup> *Id.* at 6.

<sup>121</sup> *Id.* at 8-9.

<sup>122</sup> *Id.* at 11.

<sup>123</sup> *Id.* at 11-12.

<sup>124</sup> *Id.* at 13.

time.”<sup>125</sup> The exclusion of AEC’s producer is similarly irrelevant because the lists are identified as including information reasonably available to the petitioners, as required by the statute, not as presenting all possible information.<sup>126</sup> Commerce cannot presume the petitioners’ acquiescence or opposition to AEC’s request based on the absence of AEC’s name, or its producer’s name, in the Petition,<sup>127</sup> and Commerce’s analysis of the (k)(1) sources does not support a conclusion that AEC pipe would have been excluded from the scope of the *Orders* had AEC participated during the investigation. Furthermore, Commerce’s argument related to the stance of the petitioners does not need to presume their position. Commerce simply notes that, pursuant to the request of the CIT “to consider whether the reasons for excluding some specialized pipe applies equally to AEC’s pipe,”<sup>128</sup> the logic for excluding A-335 pipe was not replicated to Commerce in its conduct of this inquiry because the petitioners have not here requested the exclusion of AEC pipe from the scope of the investigation or the resulting *Orders*, which was the basis for Commerce’s decision in the investigation.<sup>129</sup> Rather, AEC presumes what record evidence does not show: that the petitioners’ silence is tantamount to agreement with AEC’s position.<sup>130</sup>

AEC pipe is neither analogous to A-335 pipe nor demonstrably superior to the pipes explicitly covered by the scope of the *Orders*. The ITC noted that “ASTM A-335 covers 12 different alloy steel grades containing varying levels of chromium and molybdenum, and other alloying elements,”<sup>131</sup> and that “{c}hromium partly increases tensile strength and hardness, and .

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<sup>125</sup> See Petition at 11-12.

<sup>126</sup> *Id.* at 11; see also section 702(b)(1) of the Act; and section 732(b)(1) of the Act.

<sup>127</sup> See *PT Pindo Deli Pulp & Paper Mills v. United States*, 825 F. Supp. 2d 1310, 1320 (CIT 2012) (“Similarly, the failure to name foreign producers, of which Petitioners was not aware, does not demonstrate an intent to exclude those producers from the investigation”).

<sup>128</sup> See *Second Remand Order* at 10.

<sup>129</sup> See CVD IDM and AD IDM

<sup>130</sup> See AEC Comments on Draft Second Remand Redetermination at 3.

<sup>131</sup> See ITC Preliminary Report at I-12.

.. {m}olybdenum primarily increases tensile strength and hardness.”<sup>132</sup> [

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while AEC states that its pipe meets the A-335 standard in all but one element, the very elements that it lacks are what defines the superiority of A-335 pipe. Indeed, the language of the scope of the *Orders* does not specify that the exclusion for A-335 pipe would be defined by its suitability for “bending, flanging (vanstoning), and similar forming operations, and for fusion welding”<sup>134</sup> but by its “meeting the chemical requirements.”<sup>135</sup> The similarities of AEC’s pipe to A-335 pipe in these other facets are irrelevant because Commerce neither relied on these characteristics to define the exclusion nor differentiated A-335 pipe from the explicitly included pipe by them. While Commerce continues to find that the exclusions within the scope of the *Orders* apply only to the products defined by those exclusions, AEC’s claims that its pipe’s similarity to A-335 should qualify it for a similar exclusion are lacking.

The interchangeability with the products explicitly included within the *Orders* and whether a pipe could be considered demonstrably superior to those products is not defined by a pipe’s qualities relative to A-53 pipe, the most basic of pipes. A malleable pipe, which can bend in tight spaces, that is used in a standard application (*i.e.*, the conveyance of fluids under low levels of heat or pressure)<sup>136</sup> is still a standard application pipe. As Commerce has previously

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<sup>132</sup> *Id.*

<sup>133</sup> See AEC Scope Request at Exhibits B and D; see also 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 (AEC SQR) at Exhibit 3.

<sup>134</sup> See AEC Comments on Draft Second Remand Redetermination at fn. 10 (quoting from the A-335 standard); see also AEC SQR at Exhibit 3.

<sup>135</sup> See *Orders*.

<sup>136</sup> See Petition at 5-6.

noted, there are numerous pipes that exceed the A-53 standard in one way or another that are explicitly included in the scope while also not being standard quad-stencil pipes: A-333 and A-334 for cold temperature service, A-589 for water well pipe, and A-795 for galvanized pipe used for fire protection.<sup>137</sup> That AEC pipe is more malleable than A-53 pipe is irrelevant because malleability is not addressed by the (k)(1) sources, and, consequently, malleability is not a factor that would, in and of itself, define a product as separate and not a comparable specification.

Furthermore, Commerce once again notes that, according to AEC's own production documents, AEC pipe is made to [

\_\_\_\_\_].<sup>138</sup> AEC pipe's [ \_\_\_\_\_ ] is, for all intents and purposes, meaningless because it is a self-described specification that is not externally recognized beyond [ \_\_\_\_\_ ]. AEC could revert its product's chemical specifications to varying in only one element from the [ \_\_\_\_\_ ] standard and still import it with the same [

\_\_\_\_\_]. AEC's argument that Commerce accept its self-defined standard could lead to easy circumvention because it would establish a standard by which an importer could arbitrarily choose one aspect to improve on the simplest of pipes, A-53; configure it to that purpose but to no further recognized standards; and import the product under an unlisted stencil. The petitioners opposed the removal of certain scope language for this specific reason.<sup>139</sup>

AEC's arguments regarding the interchangeability of A-335 pipe with standard application pipes<sup>140</sup> and the economic viability of doing so are similarly misleading. A-335 pipe, unlike AEC pipe, *is not used in standard applications* because it is used for high-temperature

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<sup>137</sup> *Id.*

<sup>138</sup> *See* AEC Scope Request at Exhibit C.

<sup>139</sup> *See, e.g.,* First Supplement at 6.

<sup>140</sup> *See* AEC Comments on Draft Second Remand Redetermination at 5.

service beyond the capacity of A-106 pipe, and the ITC did not consider it versus standard application pipes but rather in comparison with pressure pipes such as A-106.<sup>141</sup> A-335 pipe is a direct and demonstrably superior product to A-106 and all of the other quad-stencil pipes made to a recognized standard that attests to its capacity for high-temperature service. By contrast, AEC pipe is a more flexible variant of [ ] that cannot be interchanged with the other pipes explicitly included within the *Orders* because AEC pipe does not meet the requirements of pressure pipe. Thus, an interchange between AEC pipe and the other explicitly included pipes as considered by the ITC would not be similarly “one-way” and “costly,”<sup>142</sup> as with A-335, because no interchange would be possible.

Commerce has not “intentionally omitted” discussion of mechanical tubing<sup>143</sup> and, in fact, devoted multiple pages of analysis to the relative importance of mechanical tubing in understanding the exclusions.<sup>144</sup> Commerce continues to believe that the development of the mechanical tubing exclusion is illustrative in showing that AEC pipe should be considered a comparable specification and that the term “commodity” is not definitive of the scope of the *Orders*. To begin, mechanical tubing is a separate class of product defined by its own standards, which Commerce addressed extensively in the First Remand Redetermination. In general, the definitive element is that mechanical tubing is produced in made-to-order sizing,<sup>145</sup> which Salem Steel noted that Commerce had previously found as decisive in separating mechanical tubing as a class of product.<sup>146</sup> Indeed, as Commerce explained in the Draft Results of Second Remand

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<sup>141</sup> See Petition at 5-6 (defining standard applicatio; see also ITC Preliminary Report at I-10.

<sup>142</sup> See ITC Prehearing Report at I-28.

<sup>143</sup> See AEC Comments on Draft Second Remand Redetermination at 6.

<sup>144</sup> See Draft Results of Second Remand Redetermination at, e.g., 10, 13-16, and 30.

<sup>145</sup> See Salem Steel June 30 Letter at 4; see also Salem Steel May 24 Letter at Appendix A-2.

<sup>146</sup> See Salem Steel May 24 Letter at 3 (referencing Second Redetermination on Remand Circular Welded Non-Alloy Steel Pipe from Mexico: Scope Determination -Galvak).

Redetermination,<sup>147</sup> the Petition initially excluded mechanical tubing,<sup>148</sup> and the exclusions were returned with the qualifications that mechanical tubing would be excluded only if it was not made in NPS sizes or if it met certain strict chemical standards.<sup>149</sup> Thus, there is a high threshold for the exclusion of these forms of mechanical tubing.

While AEC states that AEC pipe is similar to mechanical tubing in various qualities, a close analysis of AEC's production documents and the standards of mechanical tubing shows notable differences in quality. AEC claims that its product is customized, "including its size," without support: the listed citations refer to an ITC discussion of "commodity," which discusses the term with a very different context, and to Commerce's prior analysis.<sup>150</sup> However, AEC's production documents clearly demonstrate that AEC pipe is made in [ ] and is not customized by order [ ].<sup>151</sup> As Commerce has previously found, AEC pipe also does not meet the same qualities of tolerance (AMS 2253)<sup>152</sup> or chemistry (e.g., AMS-T-3736A).<sup>153</sup> On the record of this inquiry, AEC has presented only two industry recognized standards that AEC pipe meets beyond the [ ] specification: the aerospace threading specification AS71051B, which applies not to the pipe itself but to its threading, and the boiler welding standard API 1104, which AEC has not discussed over the course of this proceeding and would not merit an exclusion because the exclusion for boiler tubing applies explicitly to pipes with customized sizing.<sup>154</sup> Otherwise, its claims of specialization are unsupported, beyond AEC's assurances that its own, self-defined [ ] represents a

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<sup>147</sup> See Draft Results of Second Remand Redetermination at 10 and 13.

<sup>148</sup> See Petition at 5.

<sup>149</sup> See *Orders*.

<sup>150</sup> See AEC Comments on Draft Second Remand Redetermination at 9.

<sup>151</sup> See AEC Scope Request at 12 and at Exhibit C.

<sup>152</sup> See First Remand Redetermination at 12.

<sup>153</sup> *Id.*

<sup>154</sup> See AEC Scope Request at Exhibits A and N.

non-comparative specification. Commerce notes again that the exclusions from the *Orders* apply only to the products listed within the exclusions, but, pursuant to the CIT's request to consider the logic of the exclusions,<sup>155</sup> Commerce notes that AEC pipe is not comparable to mechanical tubing, which has specifically listed standards (that AEC pipe does not meet) and which Commerce had previously found to be a separate class of product.

“Commodity” was not definitive of the scope of the *Orders*, and AEC has misunderstood Commerce's argument because Commerce does not attempt to “narrowly define” the term.<sup>156</sup> Rather, as Commerce has previously stated, we note that the term was used heterogeneously between the Commerce investigation and ITC investigation, usually for rhetorical effect and with internal inconsistencies regarding products referenced.<sup>157</sup> Thus, there are multiple, contrasting definitions and, consequently, there was no intention to cover solely “commodity” products, to the exclusion of any broad category of specialized pipes. A-335 pipe, which was later excluded from the *Orders*, would be included within the definition of “commodity” provided by mechanical tubing providers<sup>158</sup> and there are multiple non-quad-stencil pipes explicitly included within the *Orders*,<sup>159</sup> despite the ITC investigation use of “commodity” focusing on quad-stencil

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<sup>155</sup> See *Second Remand Order* at 10.

<sup>156</sup> See AEC Comments on Draft Second Remand Redetermination at 8.

<sup>157</sup> See e.g., Salem Steel's May 24 Letter at 2 (using “commodity” to refer to pipes made in NPS sizes as opposed to mechanical tubing) and at Appendix A-2 (incorrectly listed as Appendix S-1 in text, describing that “A519 is produced in made to order sizes. not NPS sizes.”); see also ITC Preliminary Conference at 113 (using “commodity” to discuss quad-stencil pipes). Commerce notes that the transcript of the ITC Preliminary Conference at 113 contains a grammatical error or an omission: “{t}hey make products that in this category, you couldn't find a more commodity or fungible product *than a product all the imports from China* and all the domestic product are stenciled to the same four specifications. Why are their prices so low?” (emphasis added). Commerce interprets this to broadly describe the category as “commodity” and that the “commodity” category, on which Chinese and domestic producers are competing (“all the imports from China and all the domestic product are stenciled to the same four specifications. Why are their prices so low?”), is defined primarily by quad-stenciling.

<sup>158</sup> See e.g., Salem Steel's May 24 Letter at 2.

<sup>159</sup> See *Orders*.

pipes.<sup>160</sup> Thus, while the term “commodity” is used to contrast with standard or ordinary, the use is not definitive to the point of excluding any broad category of specialized pipe. Furthermore, as previously noted, AEC pipe would not be considered a specialized pipe by the multiple standards of commodity presented.

As a comparison to AEC pipe, A-333 is also a pipe designed for a “specialized” purpose, cold temperature usage, which is a standard application; it is not one of the typical quad-stencil pipes; and is still explicitly included within the scope.<sup>161</sup> Replace cold temperature with malleability, which was likewise not a considered factor within the (k)(1) sources as a reason for exclusion, and the same logic applies equally to AEC pipe.<sup>162</sup>

In terms of applications, AEC attempts to redefine what the (k)(1) sources make quite clear: there are three applications of standard, line and pressure pipes<sup>163</sup> and there are end-uses that are both for general construction and industrial application.<sup>164</sup> The malleability of the pipe does not change either of these aspects. Regardless of its malleability, AEC pipe is still used for a standard application: the low-pressure and low-temperature conveyance of natural gas and other fluids.<sup>165</sup> In terms of end-use, a pipe designed to be malleable for uses ranging from residential to Gate Station fabrication<sup>166</sup> is still a pipe being used for general construction and industrial application. As Commerce has repeatedly noted, there are multiple pipes explicitly

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<sup>160</sup> See e.g., ITC Preliminary Conference at 59 (“I think every producer around this room and all the Chinese producers, everyone makes quad or even four-five stencil products”) and 103 (“The predominance, the quad-stencil, the stuff we’re talking about here does not require a heat treat product”). In total, these quotes indicate to Commerce that the ITC was focused primarily, but not exclusively, on quad-stencil pipes: the *Orders* explicitly include other pipes that are not typically quad-stenciled.

<sup>161</sup> See Petition at 5-6; see also *Orders*.

<sup>162</sup> For the purposes of argument (Commerce does not believe either pipe should be excluded), if there is any difference in the logic for excluding A-333 pipe and AEC pipe, Commerce would more likely favor A-333 because it is at least made to a recognized standard that is not a self-defined, from which Commerce could attest to its level of specification.

<sup>163</sup> See Petition at 5-6.

<sup>164</sup> See ITC Prehearing Report at II-1.

<sup>165</sup> See AEC Scope Request at 3.

<sup>166</sup> *Id.*

included within the *Orders* that have certain further specifications beyond that of basic A-53 pipe,<sup>167</sup> but that changes neither their standard, line or pressure application nor their end-use. AEC cannot redefine the meaning of end-use in the (k)(1) sources to fit its own particular purpose.

Furthermore, the ITC did not differentiate its determination on injury by end-use or application; the ITC determined that “an industry in the United States is threatened with material injury by reason of imports from China of certain seamless carbon and alloy steel standard, line, and pressure pipe,” without qualification to the scope.<sup>168</sup> Thus, the ITC has already determined that products within the scope of the *Orders*, such as AEC pipe, which meets the criteria in substance and application, are injurious to the domestic industry. As Commerce has noted, AEC cannot presume the silence of the petitioners to mean otherwise.

#### **B) Whether AEC Pipe Is Covered by the Scope as Described in the (k)(2) Sources**

##### *AEC’s Arguments*

- 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*.<sup>169</sup>

##### *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

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<sup>167</sup> See *Orders*; see also Petition at 5-6.

<sup>168</sup> See *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China Investigation Nos. 701-TA-469 and 731-TA-1168 (Final)*,” dated November 2010 (ITC Final Report) at 1; see also AEC Rebuttal Information at Exhibit 39 (replicating ITC Final Report in full).

<sup>169</sup> See AEC Comments on Draft Second Remand Redetermination at 15-19.

sufficient for reaching a determination, we find that there is no need for Commerce to proceed to a formal scope inquiry or to consider the factors specified in 19 CFR 351.225(k)(2).<sup>170</sup>

### **C) Whether Commerce Requires Customs to Assess Duties on Entries of AEC Pipe Prior to the Date of the Final Scope Ruling**

#### *AEC's Argument*

- Commerce cannot retroactively assess duties on AEC pipe. Even if Commerce 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.”<sup>171</sup> The facts of this case mirror the facts before the CAFC in *United Steel & Fasteners v. United States*, 947 F. 3d 794, 801 (Fed. Cir. 2020) (*United Steel*). 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.<sup>172</sup>
- 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*.<sup>173</sup> 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.<sup>174</sup> The (k)(1) sources were not readily available to AEC as the documents were not on ACCESS but in Commerce’s reading room, but industry

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<sup>170</sup> 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”).

<sup>171</sup> See AEC Comments on Draft Second Remand Redetermination at 20.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 21.

<sup>174</sup> *Id.*

members had no reason to believe that the record on ACCESS was incomplete.<sup>175</sup> Thus, the industry did not receive adequate notice of the discussion before Commerce, and AEC should not be charged retroactive duties.<sup>176</sup>

- Commerce has defined the exclusions to the *Orders* by two standards that were not readily available and, it is fundamentally unfair to enforce AD/CVD duties on AEC considering it could not have known the “aerospace specifications” exclusion would apply so narrowly.<sup>177</sup>

### *Commerce’s Position*

AEC is incorrect in asserting that the CIT has already concluded that *Orders*’ scope language is “facially ambiguous.”<sup>178</sup> Neither the CIT’s first remand order nor the second remand order conclude that the *Orders* were ambiguous. The CIT held that Commerce erred in failing to consider the (k)(1) sources because Commerce is required to evaluate those sources to determine “whether the order is ambiguous or not.”<sup>179</sup> As discussed above, the (k)(1) sources confirm Commerce’s initial conclusion that AEC pipe was within scope. Thus, the CIT’s instructions ordering further analysis did not render the scope unclear.<sup>180</sup>

Moreover, *Sunpreme* confirms Commerce’s ability to continue the suspension of liquidation even when the scope of the order is ambiguous.<sup>181</sup> The CAFC held that CBP possesses the authority to suspend entries for ambiguous orders, and that Commerce possesses the authority to continue to suspend because, without such authority, 19 CFR 351.225(l) would

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 22.

<sup>178</sup> See AEC Comments on Draft Second Remand Redetermination at 20.

<sup>179</sup> See *First Remand Order* at 9.

<sup>180</sup> See, e.g., *Quiedan Co. v. United States*, 927 F.3d 1328, 1333 (Fed. Cir. 2019) (*Quiedan*) (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).

<sup>181</sup> See *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1317-22 (Fed. Cir. 2020) (*en banc*) (*Sunpreme*).

be unnecessary.<sup>182</sup> Also, the CAFC stated that retroactivity concerns were not raised because no new suspension occurred when a suspension that predates the scope inquiry already exists.<sup>183</sup> Here, no formal scope inquiry was initiated, and AEC acknowledges that CBP had informed AEC that its product was subject to the *Orders* prior to the scope ruling request.<sup>184</sup> Thus, Commerce acted within its authority when it continued the suspension of liquidation for AEC pipe.<sup>185</sup>

Further, AEC's reliance on *United Steel* is misplaced.<sup>186</sup> In *United Steel*, the CAFC concluded that there was a "genuine issue as to whether . . . {the product} was within scope."<sup>187</sup> However, as demonstrated above, here, there is no such "genuine issue."<sup>188</sup> The plain language of the *Orders*, even when read in conjunction with the (k)(1) sources, demonstrates that AEC's pipe falls within the *Orders*' scope. Also, *United Steel* does not overrule *Quiedan*, in which CBP had suspended liquidation and required cash deposits prior to the scope ruling.<sup>189</sup> In *Quiedan*, the CAFC concluded that *Quiedan*'s stakes were "clearly within the language of the ADD Order, considering the factors specified in 351.225(k)(1)," and the CAFC thus determined that continued suspension of liquidation was proper.<sup>190</sup>

In addition, Commerce's instructions were not an abuse of its discretion because there is no evidence that CBP did not suspend prior to the scope ruling. The CAFC in both *Sunpreme* and *United Steel* expressed concern with preventing gamesmanship by importers.<sup>191</sup> In *United*

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See AEC Comments on Draft Second Remand Redetermination at 21.

<sup>185</sup> 19 CFR 351.225(l)

<sup>186</sup> See AEC Comments on Draft Second Remand Redetermination at 20; see also *United Steel*, 947 F.3d at 801.

<sup>187</sup> See *United Steel*, 947 F.3d at 803.

<sup>188</sup> *Id.*

<sup>189</sup> *Quiedan*, 927 F.3d at 1330.

<sup>190</sup> *Id.* at 1333.

<sup>191</sup> See *Sunpreme*, 946 F.3d at 1317; see also *United Steel*, 947 F.3d at 803.

*Steel*, the CAFC concluded that the plaintiff did not unduly delay requesting a scope ruling.<sup>192</sup> Here, by contrast, AEC received a Notice of Action from CBP on October 3, 2016, but then waited more than a year later, until October 20, 2017, to request a scope ruling.<sup>193</sup> As explained in *Sunpreme*, “contrary to the remedial and revenue-driven policy of the statute,” allowing a company to receive a refund for the time period between suspension and initiation of a scope inquiry even though its products were within the scope of the orders creates “perverse incentives.”<sup>194</sup>

Further, there is no merit to AEC’s claim that there was a lack of notice that its pipe was covered by the *Orders*.<sup>195</sup> AEC could have, but did not, participate in the proceeding and raise arguments about whether its product was in-scope. This is because Commerce properly followed the statute and regulation and notified the public about the antidumping and countervailing duty investigation. Specifically, for both the antidumping and countervailing duty investigations, Commerce published initiation notices in the *Federal Register* to inform the public and interested parties, such as AEC, about the investigation.<sup>196</sup> In addition, Commerce promptly published the *Orders* in the *Federal Register*.<sup>197</sup> Thus, AEC received sufficient notice of the proceedings and that its product was potentially subject to the *Orders*.<sup>198</sup>

Finally, the (k)(1) sources were accessible by AEC. Commerce is required to maintain a

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<sup>192</sup> See *United Steel* at 803.

<sup>193</sup> See AEC Comments on Draft Second Remand Redetermination at 21; see also AEC Scope Request.

<sup>194</sup> See *Sunpreme* at 1321-1322.

<sup>195</sup> See AEC Comments on Draft Second Remand Redetermination at 21-22.

<sup>196</sup> 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).

<sup>197</sup> See *Orders*.

<sup>198</sup> See *Suntec Indus. Co. v. United States*, 857 F.3d 1363, 1369 (Fed. Cir. 2017) (“The question therefore comes down to whether the Federal Register notice constituted effective notice as a matter of law, to be treated as indistinguishable from actual notice. Like the Court of International Trade, we conclude that Federal Register notice did constitute notice as a matter of law”).

public record that is “available to the public for inspection and copying in the Central Records Unit.”<sup>199</sup> Prior to implementing its current electronic filing system, Commerce maintained public records of all of its proceedings, including the (k)(1) sources of this case, and these public records were maintained to be and remain available to the public.<sup>200</sup> Accordingly, despite its claims to the contrary, AEC had access to all of the relevant information.

## VIII. Conclusion

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 final 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 sufficient for conducting the analysis required by the CIT and reaching a determination, we find that there is no need for Commerce to proceed to a formal scope inquiry or to consider the factors specified in 19 CFR 351.225(k)(2).

Dated: July 17, 2020

7/17/2020

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Signed by: JEFFREY KESSLER

Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance

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<sup>199</sup> See 19 CFR 341.104(b).

<sup>200</sup> See *Antidumping and Countervailing Duty Proceedings*, 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*, 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* 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”).