

No Reservations: A Proposal To Streamline Calendar Practice in the United States Court of International Trade

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The Reserve Calendar of the United States Court of International Trade has long been the bane of litigants and the court alike. At best, it burdens the bar to draft, the government to review, the clerk to grant, and the plaintiffs to fund motion practice that does nothing more than to perpetuate a status quo that, but for the calendar deadlines, would remain undisturbed; at worst, plaintiffs and the government may engage in extended briefing and argument before the court concerning relatively banal issues, an effort that distracts from the substance of the case, drags out resolution of the dispute, and needlessly increases litigation costs and expends judicial resources. In many ways, the current Reserve Calendar is anathema to Rule 1 of the court, which explains that the rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹

But there is one simple cure for the Reserve Calendar: to eliminate it. The historical reasons for the Reserve Calendar no longer exist, and time has shown that the Reserve Calendar is more trouble than it is worth. To accomplish this reform, this Article proposes amendments to the court’s rules guiding the entire calendar system by consolidating the Reserve, Suspension, and Suspension Disposition Calendars into a single calendar governing all affected actions.

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I. INTRODUCTION

The United States Court of International Trade (CIT) is a unique animal within American law. Descended from the United States Customs Court, the CIT today remains the only Article III trial court²

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1. CT. INT’L TRADE R. 1.

2. 28 U.S.C. § 251(a) (2012) (“[The CIT] is a court established under article III of the Constitution of the United States.”); *id.* § 451 (“The term ‘court of the United States’ includes . . . district courts constituted by chapter 5 of this title, including the Court of International Trade . . .”). Article III of the Constitution “vest[s] in one Supreme Court” the “judicial power of the United States,” which “extend[s] to all cases, in law and equity, arising under this Constitution

defined by subject matter rather than geographic jurisdiction.³ Although Congress has decreed that the CIT “shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States,”⁴ the court, like its predecessors, in practice operates as a hybrid judicial forum and administrative tribunal. Its jurisdiction broadly extends over matters concerning U.S. trade law, but the most unusual features derive from the court’s legacy role: customs cases. These cases, today defined at 28 U.S.C. § 1581(a)⁵ and (b),⁶ permit challenges by private parties to certain decisions of customs officials. For any import transaction, under subsection (a) an importer, consignee, or surety,⁷ and under subsection (b) a domestic “interested party,”⁸ may challenge, among other things, an adverse appraisal, tariff classification, or duty assessment⁹ on the merchandise. Any such challenge requires the

[and] the laws of the United States.” U.S. CONST. art. III. In addition to the CIT, the Article III constitutional courts consist of the United States Supreme Court, courts of appeals, and district courts. The United States Court of Appeals for the Federal Circuit, an appellate court, is today the only other Article III court of specialized jurisdiction; all of the district courts are, of course, trial courts of generalized jurisdiction. Many other courts of specialized jurisdiction exist but are established as Article I legislative courts, such as the United States Court of Federal Claims and the United States Tax Court. 26 U.S.C. § 7441 (2012); 28 U.S.C. § 171(a). However, only Article III judges, protected by life tenure and a prohibition on the diminution of their salary, may render a “judicial determination.” *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 274-75 (1856). See generally Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581 (1985).

3. The jurisdiction of the CIT is outlined at 28 U.S.C. §§ 1581-1584. Section 1581 describes actions brought against the United States, its agencies, or its officers by private parties; subsections (a) through (h) list discrete actions authorized by statute—whether the Tariff Act of 1930, Trade Act of 1974, or Trade Agreements Act of 1979—or for preimportation review of a customs ruling, while subsection (i) provides residual jurisdiction over an action that “arises out of” various customs or trade laws. 28 U.S.C. § 1581. Sections 1582 and 1584, respectively, describe certain actions brought by the United States that “arise[] out of an import transaction” or seek to enforce certain administrative actions under the North American Free Trade Agreement (NAFTA). *Id.* §§ 1582, 1584. Section 1583 confers limited counterclaim jurisdiction. *Id.* § 1583. Each grant of jurisdiction upon the CIT is “exclusive” thereto and is limited to civil actions. *Id.* §§ 1581-1584.

4. *Id.* § 1585.

5. Section § 1581(a) grants the CIT “exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.” *Id.* § 1581(a). Section 515 requires a customs officer to review “a protest . . . filed in accordance with section 1514 of this title,” to “allow or deny such protest in whole or in part” and to “inform[] the protesting party of his right to file a civil action contesting the denial of a protest under section 1514 of this title.” Tariff Act of 1930, Pub. L. No. 71-361, § 515, 46 Stat. 590, 734 (codified as amended at 19 U.S.C. § 1515(a) (2012)).

6. Section 1581(b) grants the CIT “exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.” 28 U.S.C. § 1581(b).

7. 19 U.S.C. § 1514(c).

8. *Id.* § 1516(a)(2).

9. *Id.* §§ 1514(a)(1)-(2), 1516(a)(1).

importing or interested party, respectively, first to lodge a protest¹⁰ or to file a petition¹¹ with customs officials and then to seek review from any denial thereof. While these cases are judicially reviewed *de novo*,¹² they in essence are appeals from administrative determinations.¹³

Unlike any other action brought before a federal court, those invoking § 1581(a) or (b) may be commenced by the filing of a summons alone, rather than a summons and complaint.¹⁴ The summons itself serves as the initial pleading,¹⁵ fulfilling all of the appropriate jurisdictional requirements by listing information about the protest or petition that the action concerns.¹⁶ The action then may linger on the court's docket without a complaint, perhaps indefinitely if permitted and not otherwise acted upon.¹⁷ This cache is known as the Reserve Calendar.¹⁸ Under this scheme, currently outlined at Rule 83, any customs case, upon filing of the summons, is by default placed in a reserve status for an initial eighteen months, which may be extended by motion.¹⁹ Before this time expires, the plaintiff must file either a

10. *Id.* § 1514(a).

11. *Id.* § 1516(a).

12. 28 U.S.C. § 2640(a)(1)-(2) (2012).

13. See Kevin C. Kennedy, *A Proposal to Abolish the U.S. Court of International Trade*, 4 DICK. J. INT'L L. 13, 36 (1985) ("Moreover, with few exceptions nearly all of the district court's [sic] docket is composed of de novo proceedings. A large percentage of a district court judge's working time is thus spent on the bench empanelling juries, hearing trials, and preparing findings of fact and conclusions of law in bench trials. By marked contrast, the CIT functions more like an appellate court. Only a small fraction of the CIT's work involves de novo proceedings" (footnotes omitted)).

14. 28 U.S.C. § 2632(b); CT. INT'L TRADE R. 3(a)(1); see *Rubberset Co. v. United States*, 68 Cust. Ct. 370, 371-73 (1972). Certain § 1581(c) cases allow thirty days following the summons to file a complaint; all other federal cases require concurrent filing. 19 U.S.C. § 1516(a)(2)(A); 28 U.S.C. § 2632(c); CT. INT'L TRADE R. 3(a)(2).

15. *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006).

16. *Id.* at 1317.

17. See CT. INT'L TRADE R. 83(d).

18. *Id.* R. 83 (Reserve Calendar).

19. *Id.*

(a) *Reserve Calendar.* A case commenced under 28 U.S.C. § 1581(a) or (b) will be placed on a Reserve Calendar at the time of the filing of the summons. A case may remain on the Reserve Calendar for an 18-month period. The applicable 18-month period will run from the last day of the month in which the case is commenced until the last day of the 18th month thereafter.

(b) *Removal.* A case may be removed from the Reserve Calendar on: (1) assignment; (2) filing of a complaint; (3) granting of a motion for consolidation pursuant to Rule 42; (4) granting of a motion for suspension under a test case pursuant to Rule 84; or (5) filing of a stipulation for judgment on agreed statement of facts pursuant to Rule 58.1.

(c) *Dismissal for Lack of Prosecution.* A case not removed from the Reserve Calendar within the 18-month period will be dismissed for lack of prosecution and the clerk will enter an order of dismissal without further direction from the

complaint, a motion for consolidation with or suspension under a pending case in active status, or a stipulation for judgment, lest the case be automatically dismissed for lack of prosecution.²⁰ Or, rather than allow a pending customs case without a complaint to sit in reserve, the case may be stayed on the Suspension Calendar pursuant to Rule 84 if it involves “the same significant question of law or fact” as another case for which a complaint has been filed;²¹ once such a designated “test case”

court unless a motion is pending. If a pending motion is denied and less than 14 days remain in which the case may remain on the Reserve Calendar, the case will remain on the Reserve Calendar for 14 days from the date of entry of the order denying the motion.

- (d) *Extension of Time.* The court may grant an extension of time for the case to remain on the Reserve Calendar for good cause. A motion for an extension of time must be made at least 30 days prior to the expiration of the 18-month period.

Id.

20. *Id.* R. 83(b).

21. *Id.* R. 84 (Suspension Calendar).

- (a) *Test Case Defined.* A test case is an action, selected from a number of other pending actions involving the same significant question of law or fact, that is intended to proceed first to final determination and serve as a test of the right to recovery in the other actions. A test case may be so designated by order of the court on a motion for test case designation after issue is joined.
- (b) *Motion for Test Case Designation.* A party who intends that an action be designated a test case must: (1) consult with all other parties to the action in accordance with Rule 7(b); and (2) file with the court a motion requesting such designation and serve it on the other parties. The motion for test case designation must include a statement that the party: (1) intends to actively prosecute the test case once designated; and (2) has other actions pending before the court that involve the same significant question of law or fact as is involved in the test case and that it will promptly suspend under the test case. In any instance in which the consent of all other parties has not been obtained, a non-consenting party must serve and file its response within 14 days after service of the motion for test case designation, setting forth its reasons for opposing.
- (c) *Suspension Criteria.* An action may be suspended under a test case if both involve the same significant question of law or fact.
- (d) *Suspension Calendar.* By order of the court, pending the final determination of a test case, a Suspension Calendar is established on which a case described in 28 U.S.C. §§ 1581(a) and (b) may be suspended.
- (e) *Motion for Suspension.* A motion for suspension must include, in addition to the requirements of Rule 7: (1) the title and court number of the action for which suspension is requested; (2) the title and court number of the test case; and (3) a statement of the significant question of law or fact alleged to be the same in both actions.
- (f) *Time.* A motion for suspension may be made at any time, and may be joined with a motion for designation of a test case as prescribed by subdivision (b) of this rule.
- (g) *Effect of Suspension.* An order suspending a case stays all further proceedings and filing of papers in the suspended case unless the court otherwise directs.

has been resolved, Rule 85 transfers any case suspended thereunder to a Suspension Disposition Calendar for further processing in light of the test decision.²²

II. HISTORY OF THE COURT AND THE CALENDAR SYSTEM

Over the history of the prosecution of customs cases, venue has swung like a pendulum between judicial and administrative bodies, while jurisdiction has been progressively streamlined. Originally, any challenge to an excessive duty collection was brought in *assumpsit* against the customs collector, in his or her individual capacity, in the port's local district court.²³ In 1890, to address congestion on the dockets

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- (h) *Removal from Suspension.* A suspended case may be removed from the Suspension Calendar only on a motion for removal. A motion for removal may be granted solely for the purpose of moving the case toward final disposition. An order granting a motion for removal will specify the terms, conditions and period of time within which the case will be finally disposed.

Id.

22. *Id.* R. 85 (Suspension Disposition Calendar).
- (a) *Suspension Disposition Calendar.* After a test case is finally determined, dismissed or discontinued, any case that was suspended under that test case will be placed on a Suspension Disposition Calendar.
- (b) *Time—Notice.* The court will notify the parties when a test case has finally been determined, dismissed or discontinued. After consultation with the parties, the court will then enter an order providing for a period of time for the removal of a case from the Suspension Disposition Calendar.
- (c) *Removal.* A case may be removed from the Suspension Disposition Calendar on: (1) filing of a complaint; (2) filing of a demand for an answer when a complaint previously was filed; (3) granting of a motion for consolidation pursuant to Rule 42; (4) granting of a motion for suspension under another test case pursuant to Rule 84; (5) filing of a stipulation for judgment on an agreed statement of facts pursuant to Rule 58.1; (6) granting of a dispositive motion; (7) filing of a request for trial; or (8) granting of a motion for removal.
- (d) *Dismissal for Lack of Prosecution.* A case not removed from the Suspension Disposition Calendar within the established period will be dismissed for lack of prosecution, and the clerk will enter an order of dismissal without further direction of the court, unless a motion is pending. If a pending motion is denied and less than 14 days remain in which the case may remain on the Suspension Disposition Calendar, the case will remain on the Suspension Disposition Calendar for 14 days from the date of entry of the order denying the motion.
- (e) *Extension of Time.* The court may grant an extension of time for the case to remain on the Suspension Disposition Calendar for good cause. A motion for an extension of time must be made at least 30 days prior to the expiration of the established period.

Id.

23. *United States v. Stone & Downer Co.*, 274 U.S. 225, 232 (1927); *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 154-55 (1836); GILES RICH, A BRIEF HISTORY OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS 6 (1980). Of course, the collector might seek indemnity from the government for any judgment rendered. *See, e.g., Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80,

and “a wide variance in the decisions on the multiple questions of law arising in the field of customs jurisprudence,”²⁴ the United States Congress removed jurisdiction from the district courts and created the Board of General Appraisers (Board) within the United States Department of the Treasury.²⁵ The first independent body charged exclusively with handling controversies over import matters,²⁶ the divisions of the Board, which would sit at concerned ports of entry, “constituted in a sense administrative courts of appeals to pass on questions of classification and the imposition of duties.”²⁷ Appeals from the Board could be taken through the circuit courts system until 1909, when Congress composed a special appellate court, the United States Court of Customs Appeals,²⁸ solely to review the Board’s decisions, in lieu of the regional circuits.²⁹ The 1909 act “contemplate[d] an easy method of obtaining a desired review [in this court] that is not especially technical, and [was] designed to speedily get before this court a case upon its merits, to the end that an early decision may be obtained which may serve as a guide in cases of like importations.”³⁰

The perceived necessity of a reserve and suspension calendar system dates back to the creation of the Court of Customs Appeals. For five years, until 1914, a decision of that court was final even as to the United States Supreme Court, which only later was given oversight by limited writ of certiorari.³¹ The same act that created this appellate body, and at first foreclosed review thereof, authorized it “to establish all rules [and] regulations for the conduct of the business of the court and as may be needful for the uniformity of decisions within its jurisdiction as

98-99 (1836). See generally Charlotte Crane, *Protests, Refunds, and the Power of the Federal Courts*, TAX NOTES, July 19, 1999, at 434-39 (discussing the role of protests in duty refund litigation throughout the nineteenth century). In 1845, Congress codified this common law right of recovery. Paul P. Rao, *A Primer on Customs Court Practice*, 40 BROOK. L. REV. 581, 585 (1974).

24. Jed Johnson, *The United States Customs Court—Its History, Jurisdiction, and Procedure*, 7 OKLA. L. REV. 393, 394 (1954); see JOSEPH E. LOMBARDI, *THE UNITED STATES CUSTOMS COURT: A HISTORY OF ITS ORIGINS AND EVOLUTION* 20 (1976).

25. Act of June 10, 1890, ch. 407, §§ 12-18, 26 Stat. 131, 136-39; see Kennedy, *supra* note 13, at 14.

26. Peter W. Rodino, Jr., *The Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 459, 459 (1981).

27. *Stone & Downer*, 274 U.S. at 232.

28. Act of Aug. 5, 1909, Pub. L. No. 61-5, § 29, 36 Stat. 11, 105.

29. *Stone & Downer*, 274 U.S. at 232.

30. *Meyer & Lange v. United States*, 4 Ct. Cust. 422, 426 (1913).

31. Act of Aug. 22, 1914, Pub. L. No. 63-180, 38 Stat. 703; see *Stone & Downer*, 274 U.S. at 232-33. Although it appears that the constitutionality of disallowing any Supreme Court review was never determined, a challenge would likely have failed, for the Constitution recognizes no right to international trade. *Buttfield v. Stranahan*, 192 U.S. 470, 492-94 (1904).

conferred by law.”³² The appeals court was thus forced, without Supreme Court input, to determine the effect that its decisions would have on later cases; as a result, it “established the practice that the finding of fact and the construction of the [tariff] statute and classification thereunder as against an importer was not *res judicata* in respect of a subsequent importation involving the same issue of fact and the same question of law.”³³ The Board’s rules adopted and formalized this practice,³⁴ and the Supreme Court in 1927 sanctioned it. In *United States v. Stone & Downer Co.*, the Court observed, “There of course should be an end of litigation as well in customs matters as in other tax cases, but circumstances justify limiting the finality of the conclusion in customs controversies to the identical importation.”³⁵ Two importers could be bound to two different conclusions on two similar importations, said the Court, which would create inequality in the administration of the customs laws and unjust advantage among competitors.³⁶ Although the Court held the practice both permissible and “wise,” it did not suggest that *res judicata* principles never, as a matter of law, could apply.³⁷

These customs courts soon morphed again, but only nominally.³⁸ In 1926, the Board’s jurisdiction and functions shifted to the new Customs Court,³⁹ a legislative court established under Article I of the Constitution;⁴⁰ in 1929, the Court of Customs Appeals became the United

32. Act of Aug. 5, 1909, §§ 29, 105; *Stone & Downer*, 274 U.S. at 233.

33. *Stone & Downer*, 274 U.S. at 233-34.

34. Rule 22 of the court stated:

Where a question of the classification of imported merchandise is under consideration for decision by any one of the boards and the decision has been previously made involving the classification of goods of substantially the same character, the record and testimony taken in the latter case may, within the discretion of the board, be admitted as evidence in the pending case on motion of either the government or the importer or on the board’s own order: Provided, that either party may have any one or more of the witnesses who testified in such case summoned for reexamination or cross-examination, as the case may be. The rule shall, furthermore, apply to the printed records which may have been acted on by the courts in the case of appeals taken from the decisions of the board.

Id. at 235 (quoting Bd. of Gen. Appraisers R. 22, T.D. 37772, 35 Treas. Dec. Cust. 113 (1918)).

35. *Id.*

36. *Id.* at 236.

37. *Id.* The Court was also persuaded that the fact that “objection to the practice has never been made before in the history of this court or in history of the Court of Customs Appeals in 18 years of its life is strong evidence, not only of the wisdom of the practice, but of general acquiescence in its validity.” *Id.* at 237.

38. Michael C. Dypski, *Standard of Judicial Review for Administrative Decisions of the United States Customs Service: Past, Present, and Future*, 28 N.C. J. INT’L L. & COM. REG. 103, 105-06 (2002); Johnson, *supra* note 24.

39. Act of May 28, 1926, Pub. L. No. 69-304, 44 Stat. 669.

40. *See Ex parte Bakelite Corp.*, 279 U.S. 438, 460 (1929).

States Court of Customs and Patent Appeals (CCPA), to which trademark and patent appeals were also taken.⁴¹ These courts continued to apply this policy of limited *res judicata*, and as a result, multiple cases initiated by the government or the importer regarding substantially the same import transaction would accrue on the courts' dockets.⁴² This scenario was managed by "suspending" all but one of the cases.⁴³

When an issue is selected to be tried, cases involving the same question of law or the same merchandise are suspended. . . . Such suspended cases, on the application of the importers or their attorneys, are set aside by the court to the mutual economy and convenience of the parties to the litigation.⁴⁴

The Customs Court continued a slow integration into the federal court system, concluding in 1956 when Congress declared the Customs Court to be a court established under Article III.⁴⁵

An increased volume and complexity of customs litigation combined with the development of U.S. trade laws and agreements forced fundamental changes in the Customs Court during the next two decades, first procedurally through the Customs Courts Act of 1970⁴⁶ and then substantively through the Customs Courts Act of 1980⁴⁷—after which it became known as the U.S. Court of International Trade.⁴⁸ In addition to the multiplicity of cases involving the same question of law or fact, the docket was being bloated due to a statute that referred denied protests to the Customs Court without further action by the protestant.⁴⁹ Thus, in the 1970 Act:

One of the major changes accomplished was the abolition of *automatic* referral of all [denied] protests Many such protests had never been intended to go beyond administrative review; others had been filed merely to protect a position while the importer and his attorneys investigated the issue, and were often abandoned.⁵⁰

41. Act of Mar. 2, 1929, Pub. L. No. 70-914, 45 Stat. 1475. In 1982, the CCPA would merge with the United States Court of Claims, becoming today's Federal Circuit. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

42. Johnson, *supra* note 24, at 396-97.

43. *Id.* at 396.

44. *Id.* at 396-97.

45. Act of July 14, 1956, Pub. L. No. 84-703, 70 Stat. 532.

46. Pub. L. No. 91-271, 84 Stat. 274.

47. Pub. L. No. 96-417, 94 Stat. 1727.

48. *Id.* § 102.

49. See *Michelin Tire Corp. v. United States*, 82 Cust. Ct. 308, 312-13 (1979).

50. Rao, *supra* note 23, at 595-96; see also Rodino, *supra* note 26, at 460 n.8.

When new Customs Court rules designed to implement the 1970 Act took effect on October 1 of that year, there were 460,777 cases on the docket.⁵¹

Therefore, in the new Customs Court rules was established the predecessor of today's Reserve Calendar, then known as the "Reserve File," which tackled the glut and alleviated the manual filing burden that arose after the automatic referral provisions were abandoned.⁵² New Rule 14.6 directed that upon commencement a case was, by default, to be placed in the file identified by the month and year, until the filing of a complaint, motion for consolidation or suspension, or draft stipulated judgment; if a case remained in the file after the expiration of two years without a request to extend, it would be dismissed for lack of prosecution.⁵³ New Rule 14.9(c)(1) of the Customs Court directed that all unsuspended pending "actions in which trials have not commenced prior to October 1, 1970 shall, as of that date [be transferred to] a reserve file in accordance with Rule 14.6, and be deemed to have commenced on October 1, 1970."⁵⁴ Upon the effective date of the new rules, the "October 1970 Reserve File," as it was called, comprised a total of more than 176,000 cases, any of which would be dismissed for lack of prosecution pursuant to Rule 14.6(c) unless acted upon no later than October 31, 1972.⁵⁵

Also established was a "Suspension File" at new Rule 14.7, parties still being "apt to make a test case of the question and suspend all other suits until the test case is decided."⁵⁶ Depending on the outcome of the selected "test case," the government would usually settle upon an agreed statement of facts in the suspended cases or the importer would abandon them, but neither action was mandatory and the suspended cases could be litigated anew.⁵⁷ Either way, when a test case was resolved, the

51. Andrew P. Vance & Joseph I. Liebman, "Customs"—*Not a Tradition but a New Era for an Important and Rewarding Area of Law*, 27 BUS. LAW. 311, 316 (1971).

52. Interestingly, the Tax Court had used a reserve calendar system "upon which cases necessarily postponed for consideration are placed," but this was, "for example, . . . to await the decision of a *court* in a pending case," whereas the Customs Court had full Article III power. *Estate of Forsberg v. District of Columbia*, 220 F.2d 197, 198 (D.C. Cir. 1955) (emphasis added) (quoting D.C. T.C. R. 19(c) (1951)).

53. CUST. CT. R. 14.6 (1970).

54. *Id.* R. 14.9(c)(1).

55. *Applied Research Labs. v. United States*, 70 Cust. Ct. 321, 325, *reh'g denied*, 70 Cust. Ct. 345 (1973).

56. Rao, *supra* note 23, at 599.

57. *Id.* at 599-600. "When there are actions filed in relation to numerous importations of essentially the same product, one action is selected as a 'test case' and tried, and the others are placed on the 'suspension disposition calendar.' The court is normally thereafter not involved

suspended cases would be transferred to the "Suspension Disposition File" governed by new Rule 14.8.⁵⁸ Rules 14.6 through 14.8 of the Customs Court, respectively, would grow into Rules 83 through 85 of the CIT with little substantive change.

III. PROBLEMS WITH THE RESERVE CALENDAR

The problems began immediately upon the inception of the Reserve File; plaintiffs were booted out of court left and right for lack of prosecution. Failure to file complaints resulted in the dismissal of two actions.⁵⁹ Counsel for another plaintiff was mistakenly "under the impression that a proposed stipulation sent to the Department of Justice in 1967 had been signed and filed with the court."⁶⁰ And another sixty among hundreds of related cases were dismissed, despite the fact that the parties had exchanged and agreed to stipulated judgments on agreed statements of fact but failed to submit some timely.⁶¹ In each of these instances, the appeals court regretfully noted the "equities" favoring the plaintiffs but was unable to vacate the dismissals once the statutory time for retrial or rehearing had passed.⁶² In an extreme example, one law firm appearing for clients nationwide in "over 10,000 cases" in the October 1970 Reserve File had trouble even identifying all of those cases for the purpose of avoiding their dismissal, unsuccessfully moving for a "blanket" extension of time.⁶³

Earlier this year, the problem took on an exegetical dimension. In *Rockwell Automation, Inc. v. United States (Rockwell II)*, eleven related cases, which challenged the denial of plaintiff-importer Rockwell's protests against the tariff classification of certain electronic relays, had fallen off of the Reserve Calendar but, fortuitously, had not yet been

with the 'suspended' actions." *Rhone Poulenc, Inc. v. United States*, 880 F.2d 401, 403-04 (Fed. Cir. 1989).

58. CUST. CT. R. 14.8.

59. *Quigley & Manard, Inc. v. United States*, 496 F.2d 1214, 1216 (C.C.P.A. 1974).

60. *United States v. Torch Mfg. Co.*, 509 F.2d 1187, 1189 (C.C.P.A. 1975).

61. *Consol. Merch. Co. v. United States*, 527 F.2d 640, 641 (C.C.P.A. 1976), *rev'g* 72 Cust. Ct. 308 (1974).

62. *Id.*; *Torch Mfg. Co.*, 509 F.2d at 1192; *Quigley*, 496 F.2d at 1216; *cf.* 28 U.S.C. § 2646 (2012) ("After the Court of International Trade has rendered a judgment or order, the court may, upon the motion of a party or upon its own motion, grant a retrial or rehearing, as the case may be. A motion of a party or the court shall be made not later than thirty days after the date of entry of the judgment or order.").

63. *Applied Research Labs. v. United States*, 70 Cust. Ct. 321, 325 (1973). Many of the plaintiffs were able to retry their luck in further litigation, but were denied in six consolidated appeals. *Reynolds Trading Corp. v. United States*, 496 F.2d 1228, 1229 (C.C.P.A. 1974).

dismissed by the clerk for lack of prosecution.⁶⁴ These eleven were among twenty related cases in total, filed between 2003 and 2013, the earliest of which, *Rockwell I*, had in 2007 been litigated to decision and judgment on the merits, in Rockwell's favor,⁶⁵ and the latest of which remained on the Reserve Calendar within its original eighteen-month period.⁶⁶ Another seven had in 2012 been resolved by stipulated judgment on the basis of *Rockwell I*, and Rockwell had been working to stipulate the twelve outstanding cases, many of which were filed long after the merits decision was issued, but the complicated nature and the high volume of the merchandise made swift resolution difficult, as they so often do.⁶⁷

With the government's consent, Rockwell moved to restore the cases to the Reserve Calendar and for leave to file, untimely, to extend the time for the cases to remain thereon as the parties continued to assess the entries involved.⁶⁸ The motions were at most the twenty-third and at least the fifth, always on consent, to extend the Reserve Calendar deadline for the cases in question, none of which had ever been removed from the Reserve Calendar. Like the previous motions, these were *pro forma* and scant on detail, the parties assuming that the clerk would summarily grant the requested relief once more. This time, however, was not business as usual. The motion judge issued lengthy orders to show cause why the motions should not be denied and the cases dismissed,⁶⁹

64. 7 F. Supp. 3d 1278 (Ct. Int'l Trade 2014). Neville Peterson LLP is and was counsel of record for plaintiff Rockwell in all cases herein described. *Id.* at 1281.

65. Rockwell Automation, Inc. v. United States (*Rockwell I*), 31 Ct. Int'l Trade 692 (2007).

66. Memorandum in Support of Plaintiff's Amended Consent Motion for Leave To File Out of Time, and To Extend Time To Remain on Reserve Calendar at 2-3, Rockwell Automation, Inc. v. United States (*Rockwell III*), 24 F. Supp. 3d 1333 (Ct. Int'l Trade 2014) (Nos. 05-00269, 05-00582, 06-00054, 06-00348, 07-00100, 07-00294, 10-00230, 10-00245, 10-00018, 11-00250, 12-00001), Doc. No. 56-2 [hereinafter Memorandum in Support of Plaintiff's Amended Consent Motion].

67. *Id.*

68. Defendant's Response to Plaintiff's Amended Consent Motion for Leave To File Out of Time, and To Extend Time To Remain on Reserve Calendar, *Rockwell III*, 24 F. Supp. 3d 1333 (Nos. 05-00269, 05-00582, 06-00054, 06-00348, 07-00100, 07-00294, 10-00230, 10-00245, 10-00018, 11-00250, 12-00001), Doc. No. 60 [hereinafter Defendant's Response to Plaintiff's Amended Consent Motion].

69. Counsel for Rockwell would subsequently learn of similar orders issued in at least ten other pending § 1581(a) cases for different plaintiffs, including three in which they were counsel of record. See Order, MC Int'l LLC v. United States, No. 13-00051 (Ct. Int'l Trade Nov. 25, 2014); Order, Roadtrek Motorhomes Inc. v. United States, No. 11-00249 (Ct. Int'l Trade Dec. 3, 2014); Order, ADC Int'l OUS, Inc. v. United States, No. 11-00534 (Ct. Int'l Trade Jan. 8, 2015); Great West Van Conversions, Inc. v. United States, No. 11-00248 (Ct. Int'l Trade filed Mar. 6, 2013); Order, Toyobo Kureha Am. Co. v. United States, Nos. 03-00081, 03-00859, 04-00060, 04-

admonishing Rockwell that its motions failed to comply with Rules 6⁷⁰ and 83 and a duty of candor to the court; among other things, the motions did not make a showing of good cause or excusable neglect and were not “made *at least 30 days prior to the expiration* of the 18-month period [or later, as that period may be extended pursuant to USCIT Rule 83(d)].”⁷¹ As directed, Rockwell submitted a supplemental brief, in which it addressed the four *Pioneer*⁷² factors to determine excusable neglect: prejudice to the opposing party, impact on the court, reason for the delay, and good faith.⁷³

Graciously, the court granted the motions, “qualified by several significant reservations and understandings.”⁷⁴ But in its lengthy opinion addressing the four factors, the court, perhaps inadvertently, highlighted the absurdity of the Reserve Calendar system. First, after noting the lack of prejudice to the government,⁷⁵ Rockwell observed that granting the motions would “reduce the need to expend judicial resources, whether they be to prosecute these cases, or to appeal or move to reconsider a dismissal of the cases for failure to prosecute.”⁷⁶ The court responded that “any claim by Rockwell that judicial resources are being conserved”

00144, 04-00403, 04-00547, 05-00202, 06-00347, 07-00176, 07-00339, 08-00182, 08-00433, 09-00238, 09-00548 (Ct. Int'l Trade July 31, 2014).

70. See CT. INT'L TRADE R. 6(b)(1)(B) (“When an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect or circumstances beyond the control of the party.”); *id.* R. 6(c)(1) (“The motion for extension of time must set forth: (A) the specific number of additional days requested; (B) the date to which the extension is to run; (C) the extent to which the time for the performance of the particular act has been previously extended; and (D) the reason or reasons on which the motion is based.”).

71. Order To Show Cause, *Rockwell III*, 24 F. Supp. 3d 1333 (Nos. 05-00269, 05-00582, 06-00054, 06-00348, 07-00100, 07-00294, 10-00230, 10-00245, 10-00018, 11-00250, 12-00001), Doc. No. 55.

72. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 397-99 (1993).

73. *Rockwell II*, 7 F. Supp. 3d at 1289-91 (quoting *Pioneer*, 507 U.S. at 395).

74. *Id.* at 1282.

75. The government's reply to the show cause order agreed that its consent implied a lack of prejudice. Defendant's Response to Plaintiff's Amended Consent Motion, *supra* note 68. Although “the Government's representations as to lack of prejudice [were] accepted at face value,” the court was suspicious, warning that “no party should assume that the Government will not be expected to detail the basis for its position in similar cases in the future, particularly if the Government contends that granting an out-of-time extension of time will not prejudice the public fisc . . .” *Rockwell II*, 7 F. Supp. 3d at 1291 n.11.

76. *Rockwell II*, 7 F. Supp. 3d at 1293. Because Rule 83(c) prevents the court from dismissing an action for lack of prosecution until fourteen days after any pending motion is denied, Rockwell would have had the right to remove the cases from the Reserve Calendar, and thus save them from dismissal, by filing a complaint according to Rule 83(b)(2).

by maintaining the cases on the Reserve Calendar⁷⁷ “must be weighed carefully against other considerations, including, *inter alia*, the judicial and other court resources consumed” by a history of untimely extension motions.⁷⁸ Either way, judicial and attorney resources are misspent by Reserve Calendar practice. Next, Rockwell addressed the reason for the delay and good faith, explaining that Reserve Calendar practice is done largely, if not entirely, with the clerk, without the oversight of a judge; and, as noted, the clerk’s office is customarily lenient in administration and enforcement, often, as here, “even issu[ing] a reminder to counsel that the Reserve Calendar deadline had passed, and invit[ing] counsel to move out of time to extend the deadline before it . . . dismissed the case for failure to prosecute.”⁷⁹ The court balked, but the confusion that ensued was laid bare. In sum, the counsel’s Reserve Calendar practice “place[d] judges and the clerk’s office staff in the position of either outright denying relief to Rockwell . . . or, alternatively, swallowing hard, holding their collective noses, and joining Rockwell in diminishing and debasing the rule of law (as the court does here) by granting the requested relief.”⁸⁰

The above is just a sampling of the unproductive and wasteful exercises undergone in the name of the Reserve Calendar. After so many

77. The government also stated, “[K]eeping the subject cases on the reserve calendar would provide the parties with an efficient means to dispense of these actions without further litigation, as long as the merchandise and issues presented in these cases are substantially the same as those covered by [*Rockwell I*].” Defendant’s Response to Plaintiff’s Amended Consent Motion, *supra* note 68, at 1.

78. *Rockwell II*, 7 F. Supp. 3d at 1294.

79. *Id.* at 1295 (citation omitted). Because a case on the Reserve Calendar is by definition unassigned per Rule 83(b)(1), the clerk may act upon a consent motion, whether timely or not, to extend the Reserve Calendar deadline without a judge’s imprimatur. CT. INT’L TRADE R. 82(b)(1). *Applied Research Laboratories v. United States*, 70 Cust. Ct. 321, 326 (1973), mentions similar efforts by the clerk of the Customs Court to monitor the Reserve File.

80. *Rockwell II*, 7 F. Supp. 3d at 1303. The *Rockwell* saga did not end there. A month later, Rockwell filed an application for clarification on the operation of Rule 83. *See Rockwell III*, 24 F. Supp. 3d 1333, 1333 (Ct. Int’l Trade 2014). Although Rule 83(d) requires that a motion to extend the Reserve Calendar deadline “be made at least 30 days prior to the expiration of the 18-month period,” the court in *Rockwell II* had appended, in brackets, “or later, if the 18-month period has been extended pursuant to USCIT Rule 83(d).” 7 F. Supp. 3d at 1282. Rockwell instead contended that by its plain language Rule 83(d) “appl[ies] only to motions to extend the initial 18-month Reserve Calendar period, but not to subsequent extensions.” *Rockwell III*, 24 F. Supp. 3d at 1335 (emphasis omitted) (quoting Plaintiff’s Application for Clarification of Court Order Granting Motion To Extend Time, *Rockwell III*, 24 F. Supp. 3d 1333 (No. 05-00269), Doc. 69). Although finding no explicit support for Rockwell’s position, the court recognized “the potential need for clarification of Rule 83(d)” and referred the matter to the court’s advisory committee, *id.* at 1336, where to the author’s knowledge it is currently pending. Most significantly, the court observed that “[Reserve Calendar] practice at the court has not been consistent over the years and may have sown confusion in the ranks of the bar.” *Id.*

years, the customs and trade bar needs to rethink the calendar system in the CIT. This Article agrees that the Reserve Calendar causes “an untenable situation, and one that cannot continue.”⁸¹

IV. RECOMMENDATIONS

The best way to reform the Reserve Calendar is to abandon it entirely. It serves little use, and any important benefit it does provide can be accommodated in the Suspension Calendar. Simple amendments to the court’s rules, within the authority of the court to make unilaterally,⁸² could do the trick. The changes are relatively straightforward. Upon filing a summons in a customs case, a plaintiff could be required to certify whether the protest or petition at issue “involve[s] the same significant question of law or fact,” to borrow the language of the suspension criterion in Rule 84(c),⁸³ as a case already pending before the court. If the plaintiff answers in the negative, a complaint must be filed therewith; if the plaintiff answers in the affirmative, the case will be suspended under the pending case.

The current three-calendar system, including the Suspension Disposition Calendar, would collapse into a singular suspension calendar, to be renamed the Customs Calendar. The effect is to make every novel case—the significant question of law or fact for which is not in pending litigation—a test case and to suspend every repeat case, all by default. The plaintiff must “actively prosecute” the test case, as it already must per Rule 84(b),⁸⁴ while the suspended cases can in the meantime be cast aside, unable to distract from the test case whether due to motion requirements or a plucky plaintiff who decides to try to litigate the same question in parallel.⁸⁵ While “[m]ere allegations of sameness or that the

81. *Rockwell II*, 7 F. Supp. 3d at 1304.

82. 28 U.S.C. § 2633(b) (2012) (granting the court authority to prescribe rules).

83. CT. INT’L TRADE R. 84(c).

84. *Id.* R. 84(b).

85. Although 28 U.S.C. § 2632(b) states that a customs action is commenced “by filing with the clerk of the court a summons,” rather than “by filing concurrently with the clerk of the court a summons and a complaint,” *id.* § 2632(a), such a demand is within the court’s inherent power to manage and supervise its docket, *see Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), as well as its authority to “prescribe rules governing the summons, *pleadings*, and other papers, for their amendment, service, and filing, for consolidations, severances, suspensions of cases, and for other procedural matters,” *id.* § 2633(b) (emphasis added). A rule that a complaint be filed under threat of dismissal for lack of prosecution does not equate to an additional nonstatutory commencement requirement; no jurisdictional deficiency would ensue from such a failure, and a party can move to vacate such a dismissal. In fact, under current Rule 83, a party unprepared to stipulate a case on the Reserve Calendar will, in the absence of court permission otherwise, necessarily be dismissed for lack of prosecution once the reserve period expires unless it files a complaint.

actions are related will not suffice” under the current system,⁸⁶ this reform would indeed rely on such a representation and presume it correct unless the government objects.⁸⁷ This is highly beneficial to both the court and plaintiffs. But for delaying the filing of a complaint, the Suspension Calendar—the purpose of which is to “facilitate the disposition of actions, eliminating the necessity of trying the same issue over and over again, and dispensing with the filing of complaints and answers in actions which in all likelihood will never be tried”⁸⁸—serves largely the same purposes as the Reserve Calendar, but without the spectre of dismissal always overhead.⁸⁹

Moreover, the government should have no serious objection to this system. The same statutory deadlines and limitation periods apply.⁹⁰ A protesting party must still pay all appropriate liquidated duties, charges, and exactions before commencement,⁹¹ and the method by which interest is calculated would not change.⁹² The suspension would constitute a concession neither of subject-matter jurisdiction nor to the plaintiff’s allegation that a suspended case involves the same significant question of law or fact as its test case. In fact, due to the usual cordiality of government counsel, which almost always consents to a motion to suspend (with the two understandings above) or to extend the Reserve Calendar deadline, there would be little practical change.

The Reserve Calendar exists in part to enable a party, for a nominal filing fee, to invoke the court’s jurisdiction and to preserve its right to

86. *Generra Sportswear, Inc. v. United States*, 16 Ct. Int’l Trade 313, 315 (1992) (comparing suspension under Rule 84 and consolidation under Rule 42).

87. Because this certification would be made upon the summons, the plaintiff would be bound by Rule 11 to do due diligence.

88. *H.H. Elder & Co. v. United States*, 69 Cust. Ct. 344, 345 (1972); *see also* *Marubeni Am. Corp. v. United States*, 77 Cust. Ct. 186, 188 (1976) (“The concept of ‘suspending’ cases under a ‘test case’ is a constructive tool which is unique to the [customs courts]. Since many cases commonly appear on the court’s dockets involving the same issue of law or fact, it is readily apparent that there must be available some procedural vehicle whereby litigants may be permitted to appropriately delay further proceedings until the final disposition of the test case.”).

89. That a particular action may sit on the Reserve Calendar without movement does not mean that the litigants are not working hard to advance the substantive issue framed by the case. After that nuclear issue is resolved in an active case, there might be a tail of reserved cases, as in the *Rockwell* cases, which could take years to resolve through a cumbersome process for entry of judgment on stipulated facts. There is no benefit to the perhaps negligible but nonetheless consistent judicial supervision that the Reserve Calendar requires but the Suspension Calendar does not.

90. *E.g.*, 28 U.S.C. § 2636 (2012).

91. *Id.* § 2637(a).

92. *Id.* § 2644.

potential duty refunds despite the relatively short statutes of limitations⁹³ while assessing the costs and benefits of litigating. The Suspension Calendar would preserve jurisdiction over the suspended cases just the same, but the test case would, of course, demand immediate prosecution absent compelling circumstances. This is entirely realistic and desirable. Since the Reserve Calendar was first created in 1970, helpful changes in customs administration have taken place. In 1993, under the authority of the Customs Modernization Act,⁹⁴ the United States Customs Service—today United States Customs and Border Protection (CBP)—implemented a robust expansion of its preimportation rulings program, which allowed an importer to seek binding guidance on issues including, *inter alia*, classification and valuation for prospective transactions.⁹⁵ As part of its broader initiative to promote “shared responsibility” and “informed compliance,”⁹⁶ new safeguards were instituted against the rescission of a ruling; this provided greater certainty and protection to importers, which encourages engagement with customs authorities in advance of importation.⁹⁷ Thus, more now than ever, importers can and do anticipate with confidence the consequences of making entry and, as a result, the position they will be required to take upon liquidation. This position will, of course, be reflected in any protest filed, and the conversion in form from protest memorandum to complaint is not such a distant leap. In other words, the costs and benefits of litigation are much better known than they were when the Reserve Calendar was established.

We can look to our trade partner to the north to see the merit in this approach. The Canadian incarnation of the CIT is the Canadian International Trade Tribunal (CITT), “an autonomous and quasi-judicial administrative tribunal [that] has, as regards evidence and the enforcement of its orders, all the powers of a superior court of record” in

93. *Id.* § 2636(a) (stating that a § 1581(a) case must be filed within 180 days of denial of the protest); *id.* § 2636(b) (stating that a § 1581(b) case must be filed within thirty days of denial of the petition).

94. Pub. L. No. 103-182, tit. VI, 107 Stat. 2170 (1993).

95. See 19 C.F.R. pt. 177 (2015). CBP’s regulations explain, “It is in the interest of the sound administration of the Customs and related laws that persons engaging in any transaction affected by those laws fully understand the consequences of that transaction *prior to its consummation.*” *Id.* § 177.1(a) (2014) (emphasis added).

96. *Customs Modernization and Informed Compliance Act: Hearing on H.R. 3935 Before the Subcomm. on Trade of the H. Comm. on Ways and Means*, 102d Cong. 89 (1992) (statement of Carol B. Hallett, Comm’r, U.S. Customs Serv.).

97. See, e.g., *Int’l Custom Prods., Inc. v. United States*, 748 F.3d 1182, 1187 (Fed. Cir. 2014). During the year ending June 30, 1999, roughly five years after the Customs Modernization Act was passed, the Customs Service issued some 12,557 rulings. John M. Peterson & John P. Donohue, *Streamlining and Expanding the Court of International Trade’s Jurisdiction: Some Modest Proposals*, 18 ST JOHN’S J. LEGAL COMMENT. 75, 80 n.23 (2003).

Canada, also a common law system.⁹⁸ Like the CIT, the CITT “has a diverse mandate that includes dumping and subsidy investigations and related appeals, procurement complaints, customs and excise tax appeals, requests for tariff relief and safeguards investigations.”⁹⁹ In most cases, including classification and appraisal, an appellant has sixty days after lodging an appeal from a Canada Border Services Agency (CBSA) decision to file its merits brief, and the government has sixty days thereafter to respond.¹⁰⁰

Another purpose of the Reserve Calendar is to preserve jurisdiction while an importer amasses enough similar importations to defray the expense of litigation beyond the initial summons.¹⁰¹ Goods, of course, are usually not imported by a single transaction but through a continuing stream of importation. However, trade is much more rapid today than ever before, goods are rendered obsolete more quickly, and market access is ever more urgent. Therefore, importers generally have a good idea as to their import needs on a particular product for many months in the future and can easily estimate whether going to court will be justified by the potential recovery. Other improvements in the court’s rules, such as to mediation¹⁰² and discovery,¹⁰³ can increase the cost-efficiency of proceeding to court on fewer protests.

Reforms in CBP can cooperate with this change, and indeed the structure of CBP is changing in a way as to accommodate such a development. For instance, CBP will often refrain, albeit with little consistency, from acting upon a protest that involves the same question of law or fact as a pending action;¹⁰⁴ however, the distribution of similar

98. GREGORY W. BOWMAN ET AL., *TRADE REMEDIES IN NORTH AMERICA* 190 (2010).

99. *Guidelines: Tips for Effective Advocacy Before the Canadian International Trade Tribunal*, CAN. INT’L TRADE TRIBUNAL 1 (May 29, 2014), http://www.citt.gc.ca/sites/default/files/tips_effective_advocacy_e.pdf.

100. Can. Int’l Trade Tribunal R. 34, 35, SOR/1991-499. Moreover, the CITT does not use formal discovery in classification and valuation matters and leaves the implementation of its judgments to the administrative agencies. *See id.*

101. Lawrence M. Friedman, *Reservations about the Reserve Calendar*, CUSTOMS L. BLOG (Aug. 28, 2014, 10:38 AM), <http://customslaw.blogspot.com/2014/08/reservations-about-reserve-calendar.html>.

102. *See generally* William C. Sjoberg, *Ten Years of Mediation at the U.S. Court of International Trade: Perspectives of a Private Practitioner*, 23 TUL. J. INT’L & COMP. L. 451 (2015).

103. *See generally* Beverly A. Farrell, *Streamlining Discovery: Does the Nature of the Practice Before the U.S. Court of International Trade Provide Suggestions for How to Accomplish It?*, 23 TUL. J. INT’L & COMP. L. 325 (2015).

104. During hearings on the 1909 Act, the customs chief, arguing to implement a modest, refundable filing fee, stated that many recent protests before the Board were overruled for lack of prosecution when not followed up by the importers, who admitted they were without merit. Still, the filing of these protests

merchandise at the various ports of entry around the country makes tracking all of these protests difficult, especially when different importers are concerned. It is no exaggeration to say that many importers who decide to litigate a customs issue in court will set up a small cottage industry merely to monitor liquidations.

Recently, CBP has begun, on an experimental basis, to shift responsibility for protest evaluation from the individual ports of entry to so-called Centers for Excellence and Expertise (CEEs).¹⁰⁵ Under this program, as protests are filed at the port of entry where the decision was rendered, they will be referred to these centers, based in a region that houses the relevant industry, to be evaluated by an import specialist with industry knowledge and according to the nature of the merchandise involved, rather than by a local port director.¹⁰⁶

CBP's goal is to incrementally transition the operational trade functions that traditionally reside with the ports of entry until they reside entirely with the CEEs. By focusing on industry-specific issues and providing tailored support for the participating importers, CBP is seeking to facilitate trade, to reduce transaction costs, increase compliance with applicable import laws, and to achieve uniformity of treatment at the ports of entry for the identified industries.¹⁰⁷

Consolidating in the CEEs all protests of similar merchandise, and thus that likely involve the same question of law or fact, will help CBP to

not only delay[ed] a specific case but pave[d] the way for others to follow. The proper classification of that particular kind of merchandise is held in abeyance pending the decision of the courts, and the trial case is made up and the balance of the protests are [sic] placed on file, each day adding to their number.

The Customs Administrative Laws Including Classification: Hearing Before a Subcomm. of the S. Comm. on Fin., 60th Cong. 49 (1908) (statement of Charles P. Montgomery, Chief, Div. of Customs).

105. *E.g.*, Announcement of Test Providing Centralized Decision-Making Authority for Four CBP Centers of Excellence and Expertise, 77 Fed. Reg. 52,048 (Aug. 28, 2012).

106. For instance, the first two centers established are the Electronics CEE in Long Beach, California, which specializes in merchandise related to information technology, integrated circuits, automated data processing equipment, and consumer electronics, and the Pharmaceuticals, Health, and Chemicals CEE in New York City, which specializes in merchandise related to pharmaceuticals, health-related equipment, and products of the chemical and allied industries. Automotive matters are based in Detroit and oil and gas matters in Houston. *Id.*

107. *Id.* Of note are the regimes with which both the customs agencies and courts comparatively have experimented. Just as the CIT now sits in New York City after its predecessors met for years at various individual ports (with the authority to travel, if necessary), CBP is likewise now consolidating its protest review offices from the ports to centralized locations. But, on the other hand, whereas the early customs courts endeavored to assign cases to a particular arbiter based on his or her familiarity with the industry involved, today the judges' knowledge is more generalized, and the agency is now purposefully referring protests to product experts.

identify protests to suspend until a judgment is issued on any that may be before the courts. Based on that decision, CBP, in consultation with the importer, can evaluate just how similar the merchandise is and can decide whether to grant or to deny the protests. This would keep the bulk of administrative functions within the agency and leave judicial functions to the courts; customs issues could be resolved among customs officials and importers, where they belong, and out of the hands of litigators and the Department of Justice. The importer, of course, would then still have the right to challenge a denial based on perceived differences between the merchandise in court, if necessary. As the CEE program grows, and presumably is adopted by regulation in the future, CBP should formalize the option to hold protests in abeyance during the pendency of similar litigation.¹⁰⁸

Critics might be concerned that any trouble wrought by the Reserve Calendar results not from the calendar system itself, but from the abuse or neglect thereof, and that to eliminate it altogether would throw out the baby with the bathwater. That argument ignores the government's usual benevolence to consent to the vast majority of motions to extend the calendar deadline, which allows the clerk to grant the motions without deliberation. Were the government one day to refuse to consent to any extension, the court would immediately find itself inundated with gratuitous motion practice, and the exception would quickly become the rule that opponents of the proposed change fear it would swallow.

V. CONCLUSION

The CIT, like any other court, has an obligation to manage its caseload and to ensure that cases are moved forward with appropriate alacrity. However, customs cases present many unique concerns. Due to the ability to commence a case by filing a summons alone and the lack of precedential effect among cases, a plaintiff may be required to file dozens, possibly hundreds, of discrete actions, even in cases it never intends to litigate in order to preserve its right to relief. Parties and the

108. Instead of relying on CBP, the court could exercise its underutilized remand power under 28 U.S.C. § 2643(c)(1) (2012) to improve stipulated judgment practice. In contrast to the CIT, trade tribunals in other countries often only involve themselves in deciding precedential legal issues, leaving the implementation of their decisions to be worked out at the agency level, rather than requiring every resolved protest to become the subject of a judgment. The CIT can, however, direct suspended cases back to CBP for stipulation, subject to the continuing jurisdiction of the court. To ease the expense of filing many separate summonses, the court could allow more liberal amendment to a summons, whereby a plaintiff could simply append more protest numbers once they are denied, or reduce the summons filing fee to the statutory minimum of five dollars, *id.* § 2633(a), and offset it with a higher complaint fee.

court then might endure extended motion practice to maintain that status, wrestling not with “substantive law, but only the ministerial, housekeeping, docket-managing function of the trial court.”¹⁰⁹ By tightening the triplicative calendar system used to manage these cases, much of the hassle prompted by their unusual nature can be avoided. The proposed rule change would be a modest action, entirely within the court’s authority, which the court and its rules committee are humbly invited to explore.

109. Rhone Poulenc, Inc. v. United States, 880 F.2d 401, 403 (Fed. Cir. 1989).

APPENDIX
PROPOSED RULE CHANGES

Rule 83. ~~Reserve Calendar.~~ [Reserved.]

Rule 84. ~~Suspension Calendar.~~ Customs Cases.

(a) ~~Test Case Defined.~~ A test case is ~~an a pending action, selected from a number of other pending actions involving the same a significant question of law or fact not otherwise in an action already pending before the Court, that is intended to proceed first to final determination and may serve as a test of the right to recovery in the other later actions involving the same question.~~ A test case may be so designated by order of the court on a motion for test case designation after issue is joined.

(b) ~~Motion for Test Case Designation.~~ A party who intends that an action be designated a test case must: (1) consult with all other parties to the action in accordance with Rule 7(b); and (2) file with the court a motion requesting such designation and serve it on the other parties. The motion for test case designation must include a statement that the party: (1) intends to actively prosecute the test case once designated; and (2) has other actions pending before the court that involve the same significant question of law or fact as is involved in the test case and that it will promptly suspend under the test case. In any instance in which the consent of all other parties has not been obtained, a non-consenting party must serve and file its response within 14 days after service of the motion for test case designation, setting forth its reasons for opposing.

(c) ~~Suspension Criteria.~~ ~~(b) Dismissal for Lack of Prosecution.~~ An action may be suspended under a test case if both—Upon commencement of an action described in 28 U.S.C. § 1581(a) or (b), the plaintiff shall file with the clerk of the court either (1) a complaint; or (2) a certification that the action involves the same significant question of law or fact as a test case, which shall include the title and court number of the test case. A case in which the plaintiff does not meet these conditions shall be dismissed for lack of prosecution unless by motion good cause is shown.

Former Rules
3(a), 83(c)–(d),
84(b), (e)–(f),
85(d)–(e).

(d) ~~(c) Suspension—Customs Calendar.~~ By order of the court, pending the final determination of a test case, a ~~Suspension—Customs~~ Calendar is established on which a case

Former Rules
83(a), 85(a).

described in 28 U.S.C. § 1581(a) ~~and or (b) may that involves~~ the same significant question of law or fact as the test case shall be suspended.

~~(e) Motion for Suspension.~~ A motion for suspension must include, in addition to the requirements of Rule 7: (1) the title and court number of the action for which suspension is requested; (2) the title and court number of the test case; and (3) a statement of the significant question of law or fact alleged to be the same in both actions.

~~(f) Time.~~ A motion for suspension may be made at any time, and may be joined with a motion for designation of a test case as prescribed by subdivision (b) of this rule.

~~(g)(d) Effect of Suspension.~~ An order suspending Suspension of a case stays all further proceedings and filing of papers in the suspended case unless the court otherwise directs.

~~(h)(e) Removal from Suspension.~~ A suspended case may be removed from the Suspension-Customs Calendar only on (1) granting of a motion for removal; (2) granting of a motion for consolidation pursuant to Rule 42; (3) filing of a stipulation for judgment on agreed statement of facts pursuant to Rule 58.1; or (4) by the court upon the terms of an order issued under Rule 84(f). A motion for removal must demonstrate that the suspended case does not involve the same significant question of law or fact as a test case, and may be granted solely for the purpose of moving the case toward final disposition. An order granting a motion for removal will specify the terms, conditions and period of time within which the case will be finally disposed. A plaintiff whose case has been removed from the Customs Calendar shall have 30 days to comply with the requirements of Rule 84(c).

Former Rules
13(h), 83(b),
85(c).

(f) Resolution of Test Case. The court shall notify parties to a suspended case when the test case under which it is suspended has finally been determined, dismissed or discontinued. After consultation with the parties, the court will then enter an order providing for a period of time for the removal of a case from the Customs Calendar.

Former Rule
85(b).

Rule 85. ~~Suspension Disposition Calendar.~~ [Reserved.]