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Barbara M. Epstein*

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Abstract

By virtue of the Customs Courts Act of 1980 (the "1980 Act"),' the U.S. Court of International Trade (the "CIT") was granted new and exclusive jurisdiction over certain actions commenced by the United States, including actions "'to recover upon a bond relating to the importation of merchandise." As a result of the 1980 legislation, the CIT became the new forum for suits instituted by the United States to collect liquidated damages which had been assessed by the U.S. Customs Service ("Customs") against, an importer and/or its surety for breach of the terms of an importation bond. This Article shall concentrate upon five of the claims and defenses considered by the CIT and the U.S. Court of Appeals for the Federal Circuit, and will include a discussion of several of the related unresolved issues that have recently emerged. The specific issues that will be focused upon are: 1. Whether the assessment of liquidated damages is a protestable decision within the meaning of 19 U.S.C. §1514(a), and if so, whether the failure to protest within ninety days of the demand for damages precludes the challenging of the assessment of those damages as a defense to a collection suit by the U.S. government. 2. Whether the event that commences the running of the statute of limitations in suits to recover liquidated damages for breach of the bond is the date of the actual breach, or the date of the mailing of the demand for payment of the liquidated damages . 3. Whether liquidation of an entry affects the bond obligations of an importer and surety in a suit based upon failure to timely redeliver, export or destroy foodstuffs and/or motor vehicles. Whether liquidated damages assessed for breach of a bond function as a penalty for purposes of the statute of limita- tions and/or the awarding of prejudgment interest. 5. Whether prejudgment interest should ordinarily run from the date of the first demand for payment of the liquidated damages.

THE LAND OF LIQUIDATED DAMAGES: RECENT JUDICIAL DECISIONS AND UNRESOLVED ISSUES†

*Barbara M. Epstein**

It is the year 1980. Picture if you will, a fairly barren landscape, littered with only a few rocks and potholes.
Enter a score of litigious travellers, tripping and stumbling into and over the obstacles, and followed by a few judicious persons, attempting to repair, shape, and recondition the land.
Welcome to the "land of liquidated damages."

INTRODUCTION

By virtue of the Customs Courts Act of 1980 (the "1980 Act"),[1] the U.S. Court of International Trade (the "CIT") was granted new and exclusive jurisdiction over certain actions commenced by the United States,[2] including actions "to recover upon a bond relating to the importation of merchandise."[3] As a result of the 1980 legislation, the CIT became the new forum for suits instituted by the United States to collect liquidated damages which had been assessed by the U.S. Customs Service ("Customs") against an importer and/or its surety for breach of the terms of an importation bond.[4]

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* Trial Attorney, International Trade Field Office, Civil Division, Commercial Litigation Branch, U.S. Department of Justice. The views expressed in this Article are solely those of the Author and do not necessarily represent the views of the U.S. Department of Justice.

1. Codified at scattered sections of 28 U.S.C. (1988) [hereinafter the 1980 Act].

2. 28 U.S.C. § 1582 (providing that CIT "shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States").

3. *Id.* § 1582(2). The CIT has "jurisdiction . . . to hear collection cases, i.e., recoveries on a bond." H.R. REP. No. 1235, 96th Cong., 2d Sess. 49 (1979).

4. When merchandise arrives in the United States, a bond, executed by the importer and a surety, is usually required by the U.S. Customs Service ("Customs") in order for the merchandise to be released from Customs' custody. The notice of final rule revised the Customs bond structure and indicates that the importation bond is

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The specific issues that will be focused upon are:

1. Whether the assessment of liquidated damages is a protestable decision within the meaning of 19 U.S.C. § 1514(a), and if so, whether the failure to protest within ninety days of the demand for damages precludes the challenging of the assessment of those damages as a defense to a collection suit by the U.S. government.[5]

2. Whether the event that commences the running of the statute of limitations in suits to recover liquidated damages for breach of the bond is the date of the actual breach, or the date of the mailing of the demand for payment of the liquidated damages.[6]

3. Whether liquidation of an entry affects the bond obligations of an importer and surety in a suit based upon failure to timely redeliver, export or destroy foodstuffs and/or motor vehicles.[7]

4. Whether liquidated damages assessed for breach of a bond function as a penalty for purposes of the statute of limitations and/or the awarding of prejudgment interest.[8]

5. Whether prejudgment interest should ordinarily run from the date of the first demand for payment of the liquidated

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intended to promote compliance with several requirements, including the timely entry of documentation; the payment of estimated duties when due; the payment of any additional duties and taxes subsequently found to be due; and the timely redelivery of merchandise to Customs' custody if found not to comply with applicable laws and regulations, including those requiring that the merchandise be properly marked, labeled, cleaned, fumigated, destroyed, or exported. T.D. 84-213, 49 Fed. Reg. 41,152 (1984). In the event merchandise is not timely redelivered to Customs' custody, liquidated damages are assessed.

5. *See infra* notes 29-55 and accompanying text (discussing protestable decision issue).

6. *See infra* notes 56-78 and accompanying text (analyzing event which triggers statute of limitations).

7. *See infra* notes 79-90 and accompanying text (discussing effect of liquidation on bond liability).

8. *See infra* notes 91-104 and accompanying text (analyzing distinction between damages and penalties).

damages.[9]

TYPICAL CIT SCENARIOS

Although liquidated damages are assessed by Customs in various contexts,[10] two scenarios have been most frequently encountered by the CIT in suits involving the collection of liquidated damages for breach of a bond.

Scenario (1)

A motor vehicle is entered into the United States that does not meet the U.S. Environmental Protection Agency's (the "EPA") emission standards[11] and/or the U.S. Department of Transportation's (the "DOT") safety standards.[12] The vehicle is released to the importer, conditioned upon the importer's declaration that the vehicle will be brought into conformity within a given amount of time.[13] The importer submits an Im-

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9. *See infra* notes 105-21 and accompanying text (discussing prejudgment interest issue).

10. An example, in addition to the assessment of liquidated damages for breach of an importation bond, is the assessment of damages for breach of a performance bond by a bonded carrier and/or bonded cartage or lighterage operator.

11. Customs regulations provide that certain motor vehicles offered for importation into the United States are subject to emission standards prescribed by the U.S. Environmental Protection Agency (the "EPA") or the U.S. Department of Health and Human Services under section 202 of the Clean Air Act. 19 C.F.R. § 12.73 (1990).

12. Customs regulations provide that motor vehicles and motor vehicle equipment manufactured on or after January 1, 1968 and offered for importation into the United States are subject to federal motor vehicle safety standards prescribed by the Secretary of Transportation under sections 103 and 119 of the National Traffic and Motor Vehicle Safety Act of 1966. 15 U.S.C. §§ 1392 & 1407 (1988); 19 C.F.R. § 12.80(a) (1990).

13. Customs regulations provide in essence that a vehicle offered for importation into the United States shall be denied entry unless the importer or consignee files with the entry a declaration stating that the vehicle conforms to all applicable emission and safety standards or that it does not meet all applicable emission and safety standards, but that it will be brought into conformity with the EPA emission standards within ninety days of entry and with the DOT safety standards within 120 days (or up to 180 days, if authorized by the Administrator of the National Highway Traffic Safety Administration (the "NHTSA")). 19 C.F.R. §§ 12.73 & 12.80 (1990).

With respect to the EPA emission standards, a declaration must be provided to the district director of Customs within ninety days of entry (or longer, if extended by Customs), stating that the vehicle is in conformity. If the declaration is not timely provided, the vehicle must be redelivered to Customs within a given time. With respect to the DOT safety standards, the importer must submit proof of conformity to the Administrator of the NHTSA, and state that the vehicle will not be sold until the NHTSA issues an approval letter to the district director of Customs, stating that the

mediate Delivery and Consumption Entry Bond (the "Bond"),[14] under which the importer and surety jointly and severally promise to pay liquidated damages to Customs (1) after a proper demand for redelivery has been made by Customs, and (2) upon demand for payment if the principal does not timely redeliver the imported merchandise to Customs' custody.[15]

The vehicle is not timely brought into conformity, and Customs, in its role of enforcing the EPA and DOT laws, issues a notice of redelivery to the importer, ordering the importer to redeliver the non-complying merchandise to Customs' custody within a certain number of days. The importer fails to timely redeliver the merchandise and, pursuant to the terms of the bond[16] and Customs regulations,[17] Customs assesses liquidated damages against the importer and its surety.[18] A notice and demand for liquidated damages is sent to the importer, with a copy to the surety.[19] The importer fails to comply with the demand for payment, and a formal demand for liquidated damages is subsequently sent to the surety.

Neither the importer nor surety pays the liquidated damages, and after mitigation proceedings are exhausted by the importer and/or surety and administrative collection proceedings are completed by Customs, the case is referred to the U.S.

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vehicle has been brought into conformity. Customs cancels the bond when it receives the approval letter from the NHTSA. *Id.* § 12.80(e)(1). If the approval letter is not received by Customs within 180 days after entry, the district director issues a notice of redelivery, requiring the merchandise to be redelivered to Customs' custody. *Id.* §§ 12.80(e)(2) & 141.113. If the vehicle is not timely redelivered to Customs, liquidated damages are assessed and a notice for demand payment is issued. *Id.* §§ 12.80(e) & 141.113(g).

14. Customs Form 7553 [hereinafter Bond].

15. *Id.* ¶ 8.

16. *Id.* ¶ 4. Paragraph 4 provides in relevant part:

> [I]n default of redelivery after a proper demand on him, the above-bounden principal shall pay to the said district director such amounts as liquidated damages as may be demanded by him in accordance with the laws and regulations not exceeding the amount of this obligation, for any breach or breaches thereof . . . .

Id.

17. 19 C.F.R. §§ 12.73(c), 12.80(e)(2), & 141.113 (1990).

18. The amount of liquidated damages assessed in the cases discussed in this Article is comprised of the sum of the amount of the value of the merchandise plus estimated duties.

19. 19 C.F.R. §§ 141.113(g) & 172.1 (1990). The notice and demand for liquidated damages is issued on Customs Form 5955A.

Department of Justice with a request that a suit be instituted to collect the unpaid liquidated damages.[20]

Scenario (2)

Foodstuffs that are imported into the United States are subject to regulation by both Customs and the U.S. Food and Drug Administration (the "FDA"). Pursuant to the Food, Drug and Cosmetic Act (the "FDCA"), food may be released to an importer under an immediate delivery and consumption bond pending a decision by the FDA regarding its admissibility.[21] If the FDA determines that the food is not admissible, it so advises Customs, which then sends a notice of refusal of admission ("notice of refusal") to the importer.[22] The notice of refusal states that the food is in violation of the FDCA, and orders that the merchandise be exported or destroyed under Customs' supervision within ninety days unless an extension of time is granted. Customs regulations direct Customs to sus-

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20. Several cases in the CIT have involved the collection of liquidated damages for failure to redeliver a motor vehicle. *See, e.g.*, Di Giorgio v. United States, 8 CIT 192 (1984); United States v. Atkinson, 575 F. Supp. 791 (Ct. Int'l Trade 1983); United States v. Bavarian Motors, Inc., 4 CIT 83 (1982).

21. 21 U.S.C. § 381 (1988). Section 381(b) provides:

> Pending decision as to the admission of an article being imported or offered for import, the Secretary of the Treasury may authorize delivery of such article to the owner or consignee upon the execution by him of a good and sufficient bond providing for the payment of such liquidated damages in the event of default as may be required pursuant to regulations of the Secretary of the Treasury.

Id. § 381(b).

22. When foodstuffs are imported into the United States, the importer or its customhouse broker generally advises the U.S. Food and Drug Administration (the "FDA") of the entry before the merchandise arrives in port. The FDA then determines whether it is necessary to examine the imported merchandise. If the FDA determines that examination of the food is unnecessary, it issues the importer a "may proceed notice," which is filed with Customs and which alerts Customs that the FDA has released the merchandise. If, on the other hand, the FDA determines, based upon physical examination or past history of imports of a particular product, that the merchandise may be violative of the Food Drug and Cosmetic Act (the "FDCA"), it issues a notice of sampling to the importer, requiring the importer to hold the merchandise pending analysis of the sample and release by the FDA. If the food appears contaminated, the importer is then sent a notice of detention and hearing by the FDA, in which the importer is advised that its merchandise appears to be contaminated and should continue to be held intact pending final decision as to whether it shall be admitted or refused admission. If the FDA determines the food is not admissible, Customs issues a notice of refusal of admission ("notice of refusal") to the importer.

pend liquidation of the entry until a final determination as to admissibility has been made.[23]

In this scenario, however, which has been the subject of a number of cases considered by the CIT and the U.S. Court of Appeals for the Federal Circuit,[24] Customs liquidates the entry, thereby fixing the amount of duty, prior to the issuance of the notice of refusal.[25] If the merchandise is not exported or destroyed within ninety days of the notice of refusal, Customs assesses damages against the importer and surety on the ground that paragraph 7 of the Bond[26] is breached.[27] A notice

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23. 19 C.F.R. § 159.55 (1990). Section 159.55 provides, in part, as follows:

> Possible prohibited food, drugs, or other articles.
>
> (a) Suspension of liquidation. The liquidation . . . shall be suspended until it is determined whether admission of the merchandise into the United States is permitted under the law.

Id. § 159.55(a).

24. *See, e.g.*, United States v. Toshoku Am., Inc., 670 F. Supp. 1006 (Ct. Int'l Trade 1987), *rev'd*, 879 F.2d 815 (Fed. Cir. 1989); United States v. Utex Int'l, Inc., 659 F. Supp. 250 (Ct. Int'l Trade 1987), *rev'd*, 857 F.2d 1408 (Fed. Cir. 1988); United States v. Angelakos, 688 F. Supp. 636 (Ct. Int'l Trade 1988), *dismissed on remand* (Ct. Int'l Trade Nov. 15, 1990); United States v. Lun May Co., 680 F. Supp. 1573 (Ct. Int'l Trade 1988), *dismissed on remand* (Ct. Int'l Trade Feb. 28, 1990); United States v. Continental Seafoods, Inc., 672 F. Supp. 1481 (Ct. Int'l Trade 1987), *vacated and dismissed per stipulation on remand* (Ct. Int'l Trade Nov. 30, 1988); United States v. American Motorists Ins. Co., 680 F. Supp. 1569 (Ct. Int'l Trade 1987), *appeal dismissed* (Fed. Cir. 1988).

25. Liquidation constitutes the final computation or ascertainment of the duties or drawback accruing on an entry. 19 C.F.R. § 159.1 (1990); *see* Ambassador Div. of Florsheim Shoe v. United States, 748 F.2d 1560, 1562 (Fed. Cir. 1984).

A failure to suspend liquidation permits the importer and others authorized to file protests under 19 U.S.C. § 1514 to file a timely protest seeking to invalidate the liquidation. *See* United States v. A. N. Deringer, Inc., 593 F.2d 1015 (C.C.P.A. 1979). No corresponding right to protest exists for the U.S. government. Thus, if the importer does not file a protest, the liquidation becomes final. Arguably, the importer waives any right to complain about the premature liquidation with respect to liquidated damages.

26. Paragraph 7 of the Bond provides as follows:

> And if in the case of any and all merchandise found not to comply with the law and regulations governing its admission into the commerce of the United States, the above-bounden principal after proper notice shall mark, label, clean, fumigate, destroy, export, and do any and all other things in relation to said merchandise that may be lawfully required, and shall hold the said merchandise for inspection and examination . . . ; or in default thereof, shall pay to the district director of customs as liquidated damages an amount equal to the value of the merchandise with respect to which there has been a default, as set forth in the entry, plus the estimated duties thereon, as determined at the time of entry.

Bond, *supra* note 14, ¶ 7.

and demand for liquidated damages is sent to the importer and surety, and subsequent to unsuccessful mitigation and collection proceedings, suit is instituted by the U.S. government to collect the liquidated damages.[28]

The two scenarios described above have provided a fertile field for the growth of numerous controversial claims and defenses relating to the assessment of liquidated damages.

I. *THE RIGHT TO PROTEST THE ASSESSMENT OF LIQUIDATED DAMAGES*

Pursuant to the statutory scheme governing judicial review of Customs decisions, a Customs decision, order or finding that is encompassed by section 1514(a) must be protested within ninety days of that decision or the decision is final and conclusive for purposes of obtaining judicial review.[29] Assum-

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27. While scenario 2 is representative of the fact pattern involved in many of the cases discussed in this Article, the appellate court in *Toshoku* recently held that a suit based upon the failure to export or destroy in compliance with a notice of refusal is governed by paragraph 4 of the Bond, not paragraph 7. *Toshoku*, 879 F.2d at 819-20; *see supra* note 16 (setting forth text of paragraph 4 of Bond); *supra* note 26 (containing text of paragraph 7 of Bond). Inasmuch as paragraph 4 provides that liquidated damages be assessed if the importer fails to comply with a demand for redelivery (as opposed to a notice of refusal), it appears that *Toshoku* requires, absent circumstances not discussed here, that a demand for redelivery be sent to the importer as a condition precedent to a suit to collect damages for the failure to comply with the notice of refusal. *See generally Toshoku*, 879 F.2d 815. Thus, it appears that under *Toshoku*, scenario 2 would be changed to the extent that subsequent to the failure to export or destroy the merchandise within the ninety days permitted by the notice of refusal, a demand for redelivery to Customs' custody would also be issued. Liquidated damages would not be assessed until the time expired to comply with the demand for redelivery.

28. Several cases instituted under 28 U.S.C. § 1582(2) have involved the failure to redeliver and/or export or to destroy foodstuffs. *See, e.g.*, *Toshoku*, 670 F. Supp. 1006; *Utex*, 659 F. Supp. 250; *Imperial Food*, 660 F. Supp. 958; *Angelakos*, 688 F. Supp. 636; *Lun May*, 680 F. Supp. 1573; *Continental Seafoods*, 672 F. Supp. 1481; *American Motorists*, 680 F. Supp. 1569; United States v. India Food and Gourmet, 9 CIT 171 (1985).

29. 19 U.S.C. § 1514(a) (1988). Section 1514(a) provides as follows:

> [D]ecisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to
> (1) the appraised value of merchandise;
> (2) the classification and rate and amount of duties chargeable;
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;

ing a timely protest is filed and denied,[30] judicial review of a protestable decision may be obtained by payment of all liquidated duties, charges or exactions, and commencement of a civil action within 180 days of the mailing of the notice of the denial of the protest.[31]

It is well settled that challenges to the legality of a protestable decision, such as the assessment of import duties, may not be raised either affirmatively or as a defense in an enforcement action by the U.S. government to collect the import duties unless a timely protest has been filed.[32] Thus, in answering the

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(5) the liquidation or reliquidation of an entry, or any modification thereof;
(6) the refusal to pay a claim for drawback; and
(7) the refusal to reliquidate an entry under section 1520(c) of this title, shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part is commenced in the United States Court of International Trade in accordance with chapter 169 of title 28 within the time prescribed by section 2636 of that title [within 180 days of the mailing of the notice of the denial of the protest].

Id.; *see* 28 U.S.C. § 2636 (1988).

Furthermore, section 1514(c)(2) provides that

[a] protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before-
(A) notice of liquidation or reliquidation, or
(B) in circumstances where subparagraph (a) is inapplicable, the date of the decision as to which protest is made.
A protest by a surety which has an unsatisfied legal claim under its bond may be filed within 90 days from the date of mailing of notice of demand for payment against its bond . . . .

19 U.S.C. § 1514(c)(2) (1988). Thus, pursuant to this subsection, a surety may also file a protest within ninety days of the date of the mailing of the notice of the first formal demand for payment against its bond, as well as within ninety days of the initial notice of liquidated damages which was issued to the importer, with a copy to the surety. *Id.*

30. Recently a question was raised, albeit informally, by an attorney for an importer, concerning the event which starts the protest clock running if the importer wants to protest the decision to assess the liquidated damages. In light of the language of section 1514(c)(2), it was argued that the decision to assess damages may be protested by the importer and surety within ninety days of the first notice of demand for payment that is sent to the importer (with a copy to the surety), and that the surety has the additional right of protesting within ninety days of the first formal demand for payment sent directly to the surety. It is this second notice that advises the surety that the importer has not paid. 19 U.S.C. § 1514(c)(2) (1988). For the text of section 1514(c)(2), see *supra* note 29.

31. 28 U.S.C. §§ 2636 & 2637(a) (1988); *see* 19 C.F.R. §§ 174.1-174.32 (1990).

32. *See* Westray v. United States, 85 U.S. 322 (1873); United States v. Desiree Int'l U.S.A., Ltd., 497 F. Supp. 264 (S.D.N.Y. 1980); United States v. Earnshaw, 12 F.

issue of whether the assessment is encompassed in section 1514(a), one must first determine whether the assessment of liquidated damages must be timely protested in order to obtain judicial review of the legality of that decision.

Based upon fifty years of judicial decisions suggesting that the assessment of liquidated damages is a charge or exaction within the meaning of section 1514(a)(3),[33] the U.S. government has taken the position in a number of the collection cases instituted under section 1582(2) that the assessment of liquidated damages is a protestable decision, and therefore cannot be challenged affirmatively or defensively absent the filing of a timely protest. In other words, absent the filing of a timely protest, the right to dispute the legality of the assessment of the liquidated damages expires with the passage of the protest period. This contention that the filing of a timely protest is a prerequisite to raising any substantive defenses in a collection suit by the U.S. government with respect to assessment of liquidated damages drew, at best, a "lukewarm" response from the CIT which declined to take a definitive stand on the issue.[34]

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283 (S.D.N.Y. 1882); Watt v. United States, 29 F. Cas. 441 (S.D.N.Y. 1878) (No. 17,292); United States v. Cousinery, 25 F. Cas. 677 (S.D.N.Y. 1874) (No. 14,878).

33. *See, e.g.*, United States v. Bavarian Motors, Inc., 4 CIT 83, 85 (1982) (stating that "demand against a surety for payment [of liquidated damages] against its bond gives rise to a right to protest that decision"); St. Paul Fire and Marine Ins. Co. v. United States, 1 CIT 283 (1981) (citing Alberta Gas Chems., Inc. v. Blumenthal, 467 F. Supp. 1245, 1249-50 (Cust. Ct. 1979)) (stating that "terms 'charges or exactions' have been applied to actual assessments of specific sums of money (other than ordinary customs duties) on imported merchandise"); Schieffelin & Co. v. United States, 294 F. Supp. 53 (Cust. Ct. 1968); Huber v. United States, 29 Cust. Ct. 92 (1952), *rev'd on other grounds*, 41 C.C.P.A. 69 (1953); United States v. Frank F. Smith & Co., T.D. 49,267, 25 C.C.P.A. 163 (1937); Bush & Co. v. United States, 71 Treas. Dec. 852, T.D. 48,992 (1937) (noting that demand for liquidated damages for failure to export, where damages demanded were sum of value of merchandise plus duty, is exaction, protestable within then exclusive jurisdiction of Customs Court); *see also* United States v. Uniroyal, Inc., 687 F.2d 467, 470 n.9 (C.C.P.A. 1982) (recognizing various ways to obtain judicial review of Customs' "marking" decision, including protesting assessment of liquidated damages); Carlingswitch, Inc. v. United States, 500 F. Supp. 223 (Cust. Ct. 1980), *aff'd*, 651 F.2d 768 (C.C.P.A. 1981) (stating that under section 1514(a)(3), charge or exaction applies to actual assessments on imported merchandise and not Customs' refusal voluntarily to refund tendered money).

34. *See, e.g.*, United States v. Angelakos, 688 F. Supp. 636, 638 (Ct. Int'l Trade 1988) (declining to resolve protest issue on ground that it is "complicated issue involving seemingly conflicting precedents"), *dismissed on remand* (Ct. Int'l Trade Nov. 15, 1990); United States v. Continental Seafoods, Inc., 672 F. Supp. 1481, 1484 (Ct. Int'l Trade 1987) (stating that "while § 1514(a) operates to prevent specified parties from invoking the Court's jurisdiction, as an initial matter, to contest decisions not

Then came the Federal Circuit's decision in *United States v. Utex International, Inc.*,[35] which partially resolved the issue.

A. *The Filing of a Timely Protest Is Not a Prerequisite to Defending Against a Claim by the U.S. Government*

Utex involved a fact pattern similar to that in scenario 2.[36] A default judgment had been issued against the importer and summary judgment had been granted by the trial court in favor of the United States against the surety on the bond.[37] The surety's primary defense was that its bond liability, which had been incurred as a result of the importer's failure to export or destroy contaminated shrimp, had terminated because the entry had been liquidated by Customs prior to the issuance of a notice of refusal by the FDA and Customs.[38]

The U.S. Court of Appeals for the Federal Circuit reversed the CIT's judgment and held that the prior liquidation did, indeed, terminate the surety's obligation.[39] The Federal Circuit also addressed the issue of whether the surety's failure to protest the assessment or demand for the liquidated damages precluded it from defensively contesting the U.S. government's demand for those damages in a collection suit. The *Utex* court, per Judge Newman, held that

> [i]n a suit for damages brought by the government, it appears clear that historically the surety was not required to file a protest and pay the full demanded damages in advance, in order to preserve its right to defend on the issue of liability.
>
> We conclude that the 1980 legislative enactments did not change the right of the surety to defend against a claim for liquidated damages. Under the circumstances that here

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timely protested, it is less obvious that the statute acts as a prophylactic against the attempt to raise issues defensively"), *vacated and dismissed per stipulation on remand* (Ct. Int'l Trade Nov. 30, 1988); United States v. American Motorists Ins. Co., 680 F. Supp. 1569, 1571 (Ct. Int'l Trade 1987) (declining to resolve protest issue), *appeal dismissed* (Fed. Cir. 1988); United States v. Utex Int'l, Inc., 659 F. Supp. 250, 253 (Ct. Int'l Trade 1987) (stating, in dicta, that surety had "right to protest the demand for liquidated damages"), *rev'd*, 857 F.2d 1408 (Fed. Cir. 1988).

35. 857 F.2d 1408 (Fed. Cir. 1988).

36. *See supra* notes 21-28 and accompanying text (outlining typical events of scenario 2).

37. *Utex*, 659 F. Supp. at 251 n.1.

38. *Id.* at 252.

39. *Utex*, 857 F.2d 1408.

> prevail the surety was not required to file an administrative protest and pay the damages assessed, as prerequisites to defending against the charge.[40]

The court acknowledged that decisions that are listed under section 1514(a), such as the assessment of a duty, may not be affirmatively or defensively challenged absent the filing of a timely protest.[41]

The court then addressed the U.S. government's argument that the assessment of liquidated damages is a charge or exaction, listed under section 1514(a), and is therefore a protestable decision that may not be challenged defensively in court unless the prerequisites to judicial review, such as the filing of a timely protest, have been met. The *Utex* court rejected this argument, reasoning that all the decisions listed under section 1514(a) related solely to liquidation, and the decisions, orders or findings subsumed in the liquidation,[42] and that, since damages for breach do not relate to liquidation, they cannot be within the meaning of section 1514(a).[43] One of the grounds, therefore, for the *Utex* court's decision that the surety in that case was not precluded from raising substantive defenses despite its failing to have filed a timely protest ap-

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40. *Id.* at 1414.

41. *Id.* at 1409.

42. *Id.* The court failed to note that liquidation is a separately listed category under section 1514(a)(5), and that the other six categories are separately and independently protestable decisions. *See, e.g.*, United States v. Uniroyal, Inc., 687 F.2d 467, 469-70 (C.C.P.A. 1982) (reaffirming that demand for redelivery under section 1514(a)(4) is separately protestable decision). Moreover, as recognized by the appellate court in *Uniroyal*, in the context of determining who was the "ultimate purchaser" in a "marking" case, it is possible to obtain judicial review of a Customs determination regarding "marking" by protesting the demand for redelivery *or* protesting the assessment of liquidated damages in the event the merchandise is not redelivered and damages are assessed. *Id.* at 470 n.9.

43. In *Utex*, the Federal Circuit noted the surety's contention that "the charges and exactions comprehended in section 1514(a)(3) are the payments required to be made in implementation of § 1514(a), but do not extend to damages for breach." United States v. Utex Int'l, Inc., 857 F.2d 1408, 1413 (Fed. Cir. 1988). The Federal Circuit then stated that support for this position was found in 28 U.S.C. § 2637(a), which provides that a prerequisite to obtaining judicial review for a denial of a protest is the payment of "liquidated duties, [denial] charges, or exactions" prior to the commencement of the action, but does not expressly state that all liquidated damages must be paid. *Id.* The court's reasoning on this point appears somewhat circuitous, however, because if the assessment of liquidated damages is, in fact, a charge or exaction, then such assessment is named in section 2637. *See* 28 U.S.C. § 2637 (1988).

pears to be that the assessment of liquidated damages is not a charge or exaction and thus not a protestable decision within the meaning of section 1514(a).

A second and perhaps more significant basis for the court's decision, however, is its finding that the pre-1980 collection cases brought by the U.S. government to collect liquidated damages in the district courts did not establish that sureties had to file a protest in order to defend against a suit for damages.[44] Inasmuch as section 1582(2) was not intended to change the right of the surety to defend against a claim for liquidated damages, the court concluded that a surety was not required to file a protest and pay the full demanded damages in advance in order to preserve its right to defend on the issue of liability.[45]

The *Utex* court's conclusion was reaffirmed by the Federal Circuit in *United States v. Toshoku America, Inc.*,[46] which also rejected the contention that the importer and surety had waived their right to challenge the legality of the demand for liquidated damages because they had not filed a timely protest against the assessment of the damages.[47] The *Toshoku* court said that

> [i]n [*Utex*], this court recently held, *inter alia*, that an assessment of liquidated damages is not a 'charge or exaction' that must be challenged by protest under 19 U.S.C. § 1514 (1982). Proof that the importer has complied with the conditions of the bond has traditionally been and still remains a complete defense to a collection suit brought on the bond.[48]

Thus, the court affirmed the proposition that a Customs decision which is listed under section 1514(a) and which is indisputably a protestable decision (such as liquidation) cannot be challenged in court affirmatively or defensively absent the filing of a timely protest and compliance with the other statuto-

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44. *Utex*, 857 F.2d at 1414. The Federal Circuit also held that "[i]t is not characteristic of either the law of surety or the law of contracts that a defendant must routinely pay the amount demanded prior to judicial determination of contractual liability. Absent statutory directive or clear Congressional intent to the contrary, we do not impose it." *Id.*

45. *Id.*

46. 879 F.2d 815 (Fed. Cir. 1989).

47. *Id.* at 816 n.3.

48. *Id.* at 818.

rily mandated prerequisites for obtaining judicial review. *Utex* and *Toshoku* have also determined that, even absent a timely protest and compliance with the other prerequisites for judicial review, the assessment and/or demand for liquidated damages may be defensively challenged in a collection suit brought by the U.S. government to recover those damages.[49]

B. *The Unresolved Protest Issue: Do the Importer and Surety Have the Option of Obtaining Judicial Review of the Assessment of Liquidated Damages?*

A significant related issue not directly involved in *Utex* and *Toshoku* is whether an importer or surety has the option of protesting the assessment and/or demand for liquidated damages in the event it elects to commence a suit in the CIT in order to obtain judicial review of the legality of the decision to assess the damages. In practice, when the importer and/or surety receive a notice and demand for liquidated damages, they clearly have at least two methods of challenging the assessment, neither of which requires payment of the damages in advance. They may administratively petition for cancellation or mitigation of the damages,[50] or they may wait to be sued by the U.S. government.

There may be reasons, however, why the importer and/or surety might want expeditious judicial review of their legal claims if they are not satisfied with the results of mitigation proceedings. For example, there are procedures available to Customs whereby sanctions may be brought against sureties

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49. In *Utex* and *Toshoku*, no protest was filed against the assessment and/or demand for liquidated damages. *See generally* United States v. Toshoku Am., Inc., 670 F. Supp. 1006 (Ct. Int'l Trade 1987), *rev'd*, 879 F.2d 815 (Fed. Cir. 1989); United States v. Utex Int'l, Inc., 659 F. Supp. 250 (Ct. Int'l Trade 1987), *rev'd*, 857 F.2d 1408 (Fed. Cir. 1988). An interesting question recently raised by an attorney for a surety during informal discussions is whether the *Utex* and *Toshoku* holding applies to the situation where a timely protest is filed and denied, but no civil action is commenced within 180 days of that denial. In such a situation, have the importer and surety waived their rights to challenge defensively the legality of the assessment? Should such a situation actually arise, the court will be faced with a subtle, but legally distinguishable, variation of the protest question addressed by *Utex* and *Toshoku*. *See supra* note 25 (discussing liquidation, penalties, and failure to suspend liquidation).

50. 19 U.S.C. § 1618 (1988); *see* 19 C.F.R. §§ 162.31 & 171 (1990). If, however, a supplemental petition for mitigation is denied and a second supplemental petition for mitigation is filed, it must be accompanied by payment of the damages. *Id.* § 171.33(c)(1).

who have significant outstanding claims.[51] Rather than accumulating significant debts under its bonds, therefore, a surety might prefer to protest, pay the damages, and commence an action for a refund in order to obtain rapid judicial review. An importer and/or surety might also wish to secure speedy judicial resolution of their claims in order to avoid the accrual of pre-judgment interest in the event they fail to prevail in a collection case brought by the U.S. government.[52]

The *Utex* and *Toshoku* decisions apparently resolved the question of whether an importer and/or surety is barred from defensively challenging the assessment of liquidated damages absent a timely protest. Those decisions did not, however, involve the issue of whether an importer and/or surety has the option of protesting the assessment and/or demand for liquidated damages in the event they elect affirmatively to commence a suit in the CIT in order to obtain judicial review of claims relating to the assessment.

Notwithstanding the apparent conclusion in *Utex* and *Toshoku* that the assessment of liquidated damages is not a charge or exaction for purposes of section 1514(a)(3) and therefore not a protestable decision within the meaning of section 1514(a), *Utex* also cites with approval the finding in *Huber v. United States*,[53] that an importer has the right to elect to protest, pay the liquidated damages, and sue in the U.S. Customs Court for a refund, or wait to be sued in the district court.[54]

Thus, despite the holding in *Utex*, the assessment of liquidated damages may still be considered a charge or exaction for

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51. *See, e.g.*, 19 C.F.R. § 113.38 (1990); American Motorists Ins. Co. v. Villanueva, 706 F. Supp. 923 (Ct. Int'l Trade), *aff'd*, 880 F.2d 409 (Fed. Cir. 1989).

52. *See, e.g.*, United States v. Monza Automobili, 683 F. Supp. 818 (Ct. Int'l Trade 1988); United States v. Imperial Food Imports, 660 F. Supp. 958 (Ct. Int'l Trade), *aff'd*, 834 F.2d 1013 (Fed. Cir. 1987).

53. 29 Cust. Ct. 92 (1952), *rev'd on other grounds*, 41 C.C.P.A. 69 (1953).

54. United States v. Utex Int'l, Inc., 857 F.2d 1408, 1414 (Fed. Cir. 1988). In *Huber*, the U.S. Customs Court found that liquidated damages assessed for breach of a bond when the importer failed to redeliver merchandise pursuant to a demand for redelivery was a protestable charge or exaction within the meaning of section 1514. *Huber*, 29 Cust. Ct. at 100-02. The Customs Court held that a suit by the U.S. government for breach of a bond could, at that time, only be brought in the district court. *Id.* The court noted, however, that the importer could bring its suit for a refund of the liquidated damages in the Customs Court because (1) it was not suing for breach of a bond, and (2) a charge or exaction was an expressly named protestable decision under section 1514. *Id.* at 103.

purposes of affirmatively obtaining judicial review of the legality of the assessment. A determination that the assessment of liquidated damages is a protestable decision for purposes of obtaining affirmative judicial review of the denial of the protest in the CIT would appear to have certain beneficial effects for the U.S. government, the importer, and the surety.

The United States would benefit by having the claims paid quickly and being spared the burden of collection and litigation proceedings. The importer and/or surety, while still having the option of petitioning administratively for mitigation of their claims or waiting to be sued, could also protest,[55] thereby preserving their right to expeditious judicial review in the event their claims are not mitigated to their satisfaction. Thus, in the interest of having claims paid as promptly as possible and obtaining expeditious judicial review, the importer and surety should be permitted the option of electing to protest the assessment of liquidated damages and, if denied, the option of paying the liquidated damages and commencing a suit in the CIT for a refund, as well as merely waiting to be sued by the U.S. government.

II. *WHICH EVENT TRIGGERS THE RUNNING OF THE STATUTE OF LIMITATIONS GOVERNING SUITS COMMENCED PURSUANT TO 28 U.S.C. § 1582(2)?*

It is well settled that the statute of limitations governing actions brought by the United States to recover liquidated damages on a bond "shall be barred unless the complaint is filed within six years after the right of action accrues."[56] An

55. Seeking mitigation or relief does not preclude an importer or surety from concurrently pursuing the protest route to judicial review in the event they do not obtain satisfactory administrative relief. *But cf.* Farrell Lines, Inc. v. United States, 657 F.2d 1214, 1218 (C.C.P.A. 1981), *as modified by denial of reh'g*, 667 F.2d 1017 (C.C.P.A. 1982). Thus, the "mitigation" route and the protest route are not mutually exclusive.

56. 28 U.S.C. § 2415(a) (1988); *see* United States v. Reul, slip op. 90-92 (Ct. Int'l Trade Sept. 12, 1990), *petition for reh'g pending*; United States v. Peerless Ins. Co., 703 F. Supp. 955, 956 (Ct. Int'l Trade 1988); United States v. Angelakos, 688 F. Supp. 636, 637 (Ct. Int'l Trade 1988), *dismissed on remand* (Ct. Int'l Trade Nov. 15, 1990); United States v. Continental Seafoods, Inc., 672 F. Supp. 1481, 1483 (Ct. Int'l Trade 1987), *vacated and dismissed per stipulation on remand* (Ct. Int'l Trade Nov. 30, 1988); Di Giorgio v. United States, 8 CIT 192, 197 n.9 (1984); United States v. Atkinson, 575

unsettled issue, however, is the event from which the six-year statute runs.

The CIT has indicated that the actual breach of the bond upon which the suit is predicated is the event which triggers the statute. In *United States v. Reul*,[57] *United States v. Peerless Insurance Company*,[58] and *United States v. Atkinson*,[59] where suits by the U.S. government were based upon an importer's failure to timely redeliver merchandise to Customs pursuant to a demand for redelivery, the CIT held that the statute commenced when the time expired for the importer to redeliver the merchandise.[60] In *United States v. Angelakos*[61] and *United States v. Continental Seafoods, Inc.*,[62] where the suits were premised on the importer's failure to timely comply with a notice of refusal issued by the FDA and Customs, the CIT held that the statute ran from the date on which the time to comply with that notice expired.[63]

The determination that the statute runs from the date of the breach appears to be based upon the statement in *Atkinson* that "[i]t is a general rule that 'the statute of limitations begins to run on the date that a cause of action for breach accrues,

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F. Supp. 791, 794 (Ct. Int'l Trade 1983); United States v. Bavarian Motors, Inc., 4 CIT 83, 87 (1982).

57. Slip op. 90-92 (Ct. Int'l Trade Sept. 12, 1990), *petition for reh'g pending*.

58. 703 F. Supp. 955 (Ct. Int'l Trade 1988).

59. 575 F. Supp. 791 (Ct. Int'l Trade 1983).

60. In *Atkinson*, the notice of redelivery provided that the importer was required to redeliver the merchandise within five days of the mailing of the notice. *Id.* at 793. The court held that the bond was, therefore, breached when the merchandise was not redelivered within five days of the mailing of the demand. *Id.* In *Peerless*, a later case, the CIT made essentially the same determination, but took notice of the U.S. government's contention that the bond was actually breached on the sixth day after the demand, when the time to redeliver had expired. *Peerless*, 703 F. Supp. at 958. In many of the current cases involving notices of redelivery, the importer is given thirty days to redeliver, as opposed to five. *See, e.g.*, *Reul*, slip op. 90-92 (Ct. Int'l Trade); United States v. Monza Automobili, 683 F. Supp. 818 (Ct. Int'l Trade 1988). Thus, it appears that under the reasoning of *Atkinson* and *Peerless*, the statute of limitations in a suit based upon the failure to timely redeliver merchandise would commence running on the thirtieth or thirty-first day after the mailing of the demand for redelivery.

61. 688 F. Supp. 636 (Ct. Int'l Trade 1988), *dismissed on remand* (Ct. Int'l Trade Nov. 15, 1990).

62. 672 F. Supp. 1481 (Ct. Int'l Trade 1987).

63. *Angelakos*, 688 F. Supp. at 637; *Continental Seafoods*, 672 F. Supp. at 1483. In *Angelakos*, the CIT noted that since the notice of refusal provided that the importer had ninety days to comply, the breach did not occur until the ninety-first day. Since suit was brought within six years of the ninety-first day, the CIT held that the suit was not barred by the statute of limitations. *Angelakos*, 688 F. Supp. at 637.

which is ordinarily the time of the breach of the agreement.' "[64] Inasmuch as it was not an issue in that case, however, the *Atkinson* court overlooked the precise wording of section 2415(a),[65] which does not state that the statute runs from the accrual of the breach or the accrual of the "cause of action," but rather from the accrual of the "right of action."[66]

Although the terms "right of action" and "cause of action" are often used interchangeably by the courts, in actuality the terms have different meanings.[67] Generally, a "cause of action" is defined as the facts or events that entitle a party to bring and maintain an action or, in other words, the "wrong" that is sued upon.[68] A "right of action" is the right to institute a suit or enforce a claim.[69] Thus, a "right of action" accrues when all conditions precedent to suit have been met,[70] which may occur at the same time or a later time than the wrong, or breach, itself.[71]

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64. United States v. Atkinson, 575 F. Supp. 791, 794 (Ct. Int'l Trade 1983).

65. 28 U.S.C. § 2415(a) (1988).

66. *Id.*

67. *See* 1A C.J.S. *Actions* § 21, at 365-68 (1987).

68. BALLENTINE'S LAW DICTIONARY 182-83 (3d ed. 1969). A "cause of action" is defined as "[t]he fact or facts which establish or give rise to a right of action, in other words, give to a person a right to judicial relief." *Id.*

69. *Id.* at 1119. A "right of action" is defined as

> [t]he right to bring suit in a particular case. A present right to commence and maintain an action at law to enforce the payment or collection of a debt or demand . . . . Precisely, the right of the plaintiff to sue, the essentials of which are (1) a good cause of action; (2) the performance of all conditions precedent; and (3) the existence of the right to maintain the action in the plaintiff unaffected by circumstances which will constitute in law a bar to the maintenance of the suit.

Id. "A cause of action is to be distinguished from right of action. A right of action is the right to enforce presently a cause of action, that is, a remedial right; a cause of action, on the other hand, is the operative fact or facts which give rise to a right of action." *Id.* at 182-83.

70. 28 U.S.C. § 2632(a) (1988). Section 2632(a) provides that

> [e]xcept for civil actions specified in subsections (b) and (c) of this section, a civil action in the Court of International Trade shall be commenced by filing concurrently with the clerk of the court a summons and complaint, with the content and in the form, manner, and style prescribed by the rules of the court.

Id.; *see* Border Brokerage Co. v. United States, 372 F. Supp. 1389, 1390 (Cust. Ct. 1974) (holding that in context of section 2632(a), "denial of protest, in whole or in part, creates a 'right of action' ").

71. *See generally* A. STEARNS, THE LAW OF SURETYSHIP § 8.23 at 280-89 (5th ed. 1972). In discussing the applicable statute of limitations to suretyship law, the author states that

To comply with the terms of the ordinary Customs importation bond, a demand for payment of liquidated damages must be properly made prior to collection of the damages.[72] Thus, a condition precedent to a suit to collect liquidated damages for breach of a bond is the mailing of a notice of demand for liquidated damages, and the "right of action" (or right to sue) does not accrue until the demand for the liquidated damages is mailed. In accordance with the precise wording of the statute of limitations, therefore, which provides that the statute commences when the "right of action" accrues, the statute would not start running until a demand for the payment of liquidated damages is mailed to the importer and/or surety.

The proposition that the statute is not triggered until the demand for payment has been made has been advanced before the CIT in *Peerless* and *Angelakos*. Inasmuch, however, as both cases were commenced within six years of the actual breach, which breach was caused by the failure to timely redeliver the merchandise to Customs, neither case reached the issue of whether the statute actually started running at the later date on which the demand for payment of the liquidated damages was mailed.

The CIT in *Angelakos* did raise, however, an interesting question of whether, assuming the mailing of the notice of liquidated damages triggered the statute, Customs could indefinitely delay the running of the statute of limitations by not sending a notice of liquidated damages.[73] A similar issue was raised in *Continental Seafoods*, in which the argument was made

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> [t]he usual form of the statute [of limitations] is that the action must be brought within the period of limitation after the 'cause of action accrues.' The statutes do not undertake to define when the cause of action accrues, and judicial construction of this important right has not been uniform in this country. *For the most part, it is assumed that the limitation commences to run from the date the obligor is liable to suit.*

Id. (emphasis added).

72. 19 C.F.R. § 172.1(a) (1990).

73. United States v. Angelakos, 688 F. Supp. 636, 637 (Ct. Int'l Trade 1988), *dismissed on remand* (Ct. Int'l Trade Nov. 15, 1990). This same possibility arises if the statute runs from the date the notice of redelivery is issued, since the issuance of that notice is also within the control of Customs. The *Angelakos* court, however, in finding that the statute ran from the expiration of the time to comply with a notice of redelivery, apparently found no difficulty with the statute running from that event, notwithstanding the fact that the issuance of the notice of redelivery was also within the control of Customs. *Id.* at 638.

by defendants that the failure to comply with a notice of refusal could not start the statute of limitations running because the U.S. government could thereby arbitrarily delay the running of the statute by not sending the notice. There, the CIT rejected that argument, stating that

> [i]f the government fails to issue the requisite notice, then a cause of action for failure to export under Customs' supervision will not lie. Additionally, the Court, contrary to defendants' intimations, does not presume that the government will deliberately withhold the notice of refusal of admission (assuming the goods do not qualify for admission) once notice of detention has been given.[74]

Moreover, the event precipitating the running of a statute of limitations is frequently one that is provided for in the contract, in addition to events under the control of the creditor such as notice and/or demand for redelivery, performance, and payment.[75] Events under the creditor's control have often been held to trigger the statute of limitations, notwithstanding the fact that the creditor is capable of delaying the statute by failing to perform the triggering event.[76]

Furthermore, it has generally been held that where a demand is necessary to the bringing of an action, that demand must be made within a "reasonable" amount of time.[77] While a "reasonable" amount of time has been held to depend upon the particular circumstances of each case as it arises, the judiciary has often held a "reasonable" time to be, "by analogy, the

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74. United States v. Continental Seafoods, Inc., 672 F. Supp. 1481, 1484 n.3 (Ct. Int'l Trade 1987), *vacated and dismissed per stipulation on remand* (Ct. Int'l Trade Nov. 30, 1988).

75. 54 C.J.S. *Limitations of Actions*, §§ 95 & 131, at 134-38, 175 (1987) (citing relevant cases).

76. *See, e.g.*, United States v. Reul, slip op. 90-92 (Ct. Int'l Trade Sept. 12, 1990), *petition for reh'g pending*; United States v. Peerless Ins. Co., 703 F. Supp. 955 (Ct. Int'l Trade 1988); United States v. Angelakos, 688 F. Supp. 636 (Ct. Int'l Trade 1988), *dismissed on remand* (Ct. Int'l Trade Nov. 15, 1990); United States v. Lun May Co., 680 F. Supp. 1573 (Ct. Int'l Trade 1988), *dismissed on remand* (Ct. Int'l Trade Feb. 28, 1990); United States v. Continental Seafoods, Inc., 672 F. Supp. 1481 (Ct. Int'l Trade 1987), *vacated and dismissed per stipulation on remand* (Ct. Int'l Trade Nov. 30, 1988); Di Giorgio v. United States, 8 CIT 192 (1984); United States v. Atkinson, 575 F. Supp. 791 (Ct. Int'l Trade 1983); United States v. Bavarian Motors, Inc., 4 CIT 83 (1982).

77. *See, e.g., Reul*, slip op. 90-92; *Peerless*, 703 F. Supp. 955; *Angelakos*, 688 F. Supp. 636; *Lun May*, 680 F. Supp. 1573; *Continental Seafoods*, 672 F. Supp. 1481; *Di Giorgio*, 8 CIT 192; *Atkinson*, 575 F. Supp. 791; *Bavarian Motors*, 4 CIT 83.

period fixed by the statute of limitations for the commencement of the particular action involved."[78]

To date, the decided cases in the CIT have not been faced with a fact pattern in which suit was *not* instituted within six years of the actual breach. Therefore, there has been no decision rendered regarding the possibility of later events triggering the statute. When such a fact pattern arises, however, the CIT may have to squarely confront the issue of whether the statute is actually triggered by the breach of the bond or by the demand for payment.

III. *THE EFFECT OF LIQUIDATION ON BOND LIABILITY FOR LIQUIDATED DAMAGES*

A number of cases instituted in the CIT involved a fact pattern similar to that in scenario 2, in which imported foodstuffs were released conditionally to the importer under a bond, the entry was liquidated by Customs, the FDA subsequently determined that the merchandise was inadmissible, and a notice of refusal was issued to the importer by Customs and the FDA. Upon the failure to redeliver and/or export or destroy the merchandise in accordance with the FDA determination that the merchandise was inadmissible, Customs determined that the bond was breached and assessed liquidated damages.[79]

A defense urged in many of the cases instituted to collect liquidated damages under section 1582(2) was that the liquidation constituted the final determination regarding the admissibility of merchandise, that once the entry was liquidated, it was deemed admissible, and that Customs, by liquidating the entry, forfeited its right to enforce a subsequent decision to refuse

78. 54 C.J.S. *Limitations of Actions* § 95, at 136; *see* A. STEARNS, *supra* note 71, § 9.33 at 349 (stating that prevailing rule is that demand be made within reasonable amount of time and "where no demand is made, the law generally presumes a demand after a lapse of time equal to the statutory limitation").

79. *See, e.g.*, United States v. Utex Int'l, Inc., 659 F. Supp. 250 (Ct. Int'l Trade 1987), *rev'd*, 857 F.2d 1408 (Fed. Cir. 1988); United States v. Angelakos, 688 F. Supp. 636 (Ct. Int'l Trade 1988); United States v. Lun May Co., 680 F. Supp. 1573, 1575 (Ct. Int'l Trade 1988); United States v. Continental Seafoods, Inc., 672 F. Supp. 1481 (Ct. Int'l Trade 1987); United States v. American Motorists Ins. Co., 680 F. Supp. 1569 (Ct. Int'l Trade 1987).

admission.[80] Under that reasoning, the Bond was not breached, and liability was discharged.

The U.S. government pointed out that liquidation, as defined in the Customs law, involves only the final computation of duties or drawback accruing on an entry,[81] and does not affect another agency's determination with respect to the admissibility of merchandise. The decision regarding whether food is admissible is thus within the statutory power of the FDA, not Customs, and Customs cannot, by liquidating an entry, affect the admissibility of contaminated food.

The CIT, in a series of cases starting with *Utex*, agreed with the U.S. government's position.[82] The Federal Circuit, however, reversed the trial court's judgment in *Utex*.[83]

A. *The Resolved Issue: The Effect of Liquidation on Bond Liability When Liquidation Occurs Prior to the Issuance of a Notice of Refusal or Notice of Redelivery*

The appellate court in *Utex* agreed that the determination of admissibility of foodstuffs was within the discretion of the FDA, not Customs, but found that Customs, as the enforcement arm of the FDA, had the duty of suspending the liquidation of the entry until the decision on admissibility was made.[84] Based upon the determination that liquidation affects all aspects of an entry including admissibility, the court held that since the liquidation occurred prior to a notice of refusal (or, by analogy, prior to a demand for redelivery),[85] the merchan-

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80. *See, e.g.*, United States v. Toshoku Am. Inc., 670 F. Supp. 1006 (Ct. Int'l Trade 1987), *rev'd*, 879 F.2d 815 (Fed. Cir. 1989); *Utex*, 659 F. Supp. 250.

81. 19 C.F.R. § 159.1 (1990); *see supra* note 25 (discussing liquidation, penalties, and failure to suspend liquidation).

82. *Toshoku*, 670 F. Supp. 1006; *Utex*, 659 F. Supp. 250; *Angelakos*, 688 F. Supp. 636; *Lun May*, 680 F. Supp. 1573; *Continental Seafoods*, 672 F. Supp. 1481; *American Motorists*, 680 F. Supp. 1569.

83. United States v. Utex Int'l Inc., 857 F.2d 1408 (Fed. Cir. 1988).

84. *Utex*, 857 F.2d at 1411 (reversing 659 F. Supp. 250 (Ct. Int'l Trade 1987)); *see supra* note 23 (containing text of 19 C.F.R. § 159.55(a)). In *Utex*, the U.S. government had acknowledged that, in light of the regulation, liquidation prior to the admissibility decision was premature, but posited that the legal consequence of a premature liquidation by Customs was not to void the determination by another agency that the merchandise was inadmissible. *Utex*, 857 F.2d at 1412.

85. *Utex*, 857 F.2d at 1412; *see* 19 C.F.R. § 141.113(f) (1990) (providing that "demand for the return of merchandise to Customs' custody shall not be made after the liquidation of the entry covering such merchandise has become final").

dise was deemed admissible, and liability for the failure to export, destroy, and/or redeliver the merchandise was terminated.[86]

B. *The Unresolved Issue*

The effect of liquidation on bond liability when the liquidation occurs *subsequent* to the issuance of a notice of refusal or demand for redelivery, but prior to the expiration of the time to comply, remains unresolved. This significant issue was raised in *Utex* but left open by the court. The precise situation was at issue in *Toshoku*,[87] which was pending in the Federal Circuit at the time *Utex* was decided.[88] Inasmuch as "liquidation" was not central to the case, the appellate court did not fully address the issue and *Toshoku* was ultimately decided on other grounds. The *Toshoku* court did, however, state that

> [t]he parties have not argued that the finality of liquidation, *see United States v. Utex Int'l, Inc.*, 857 F.2d 1408 (Fed. Cir. 1988), is applicable in this case. Here the [n]otice of [r]efusal . . . was issued prior to the erroneous liquidation of the entry by Customs. *See Utex* at 1409 (obligations vested prior to liquidation are not comparable to post-liquidation obligations (distinguishing *United States v. American Motorists Ins. Co.*, 10 CIT 19, 1986 WL 8339 (1986))).[89]

In light of this statement, it appears that the *Toshoku* court determined that a liquidation occurring *subsequent* to a notice of refusal (or a notice of redelivery) does not discharge bond liability for failure to comply with the notice, notwithstanding that the liquidation occurred prior to the importer's compliance with the notice.[90]

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86. *Utex*, 857 F.2d at 1414.

87. United States v. Toshoku Am., Inc., 670 F. Supp. 1006 (Ct. Int'l Trade 1987), *rev'd*, 879 F.2d 815 (Fed. Cir. 1989). In *Toshoku*, the entry was liquidated seventeen days after the notice of refusal was sent, and prior to the date the notice and demand for liquidated damages was issued. *Id.* at 1007.

88. Oral argument in *Toshoku* was heard subsequent to the *Utex* decision, and the liquidation issue, in light of the *Utex* decision, was addressed in the argument.

89. United States v. Toshoku Am., Inc., 879 F.2d 815, 816 n.3 (Fed. Cir. 1989).

90. Support for this position is also found in a Customs regulation which provides that suspension of liquidation is required only until the decision is made with respect to admissibility. 19 C.F.R. § 159.55(a) (1990). It does not require any further suspension of liquidation. *Id*; *see supra* note 23 (containing text of 19 C.F.R. § 159.55(a)).

A number of cases are currently pending administratively with Customs in which the entry was liquidated shortly after the issuance of a notice of refusal or notice for redelivery. The CIT, therefore, may be faced with the issue in the near future.

IV. *THE DISTINCTION BETWEEN LIQUIDATED DAMAGES AND PENALTIES*

Liquidated damages are assessed when a condition of a bond is breached. Thus, the assessment of the damages is intended to serve as a deterrent to non-compliance.[91] Because of this deterrent effect, importers and/or sureties have urged that liquidated damages are actually a penalty, and that, accordingly, the statute of limitations for penalties should govern suits instituted under 28 U.S.C. § 1582(2).[92] Additionally, they argue that prejudgment interest should not be assessed, inasmuch as prejudgment interest is not assessed upon punitive damages. Both contentions have been rejected by the federal courts.

A. *Liquidated Damages Are Not Considered Penalties for Purposes of the Statute of Limitations*

It has been judicially determined that 28 U.S.C. § 2415(a), the six-year statute of limitations for money damages founded upon a contract, is the statute of limitations governing cases commenced pursuant to section 1582(2) to collect liquidated damages.[93] It has also been argued, however, that the governing statute of limitations should be the five-year statute for penalties.[94] This contention was expressly considered and re-

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91. United States v. American Motorists Ins. Co., 680 F. Supp. 1569, 1573 (Ct. Int'l Trade 1987).

92. *See* Di Giorgio v. United States, 8 CIT 192, 196-97 (1984).

93. United States v. Reul, slip op. 90-92 (Ct. Int'l Trade Sept. 12, 1990), *petition for reh'g pending*; United States v. Peerless Ins. Co., 703 F. Supp. 955, 957 (Ct. Int'l Trade 1988); United States v. Bavarian Motors, Inc., 4 CIT 83, 87 (1982).

94. 19 U.S.C. § 1621 (1988). Section 1621 provides:

> No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: *Provided*, That in the case of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed: *Provided further*, That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of

jected by the CIT in *Di Giorgio v. United States*,[95] in which the CIT held that "[s]ection 1621 relates to penalty-type proceedings, such as those pursued by the United States under 19 U.S.C. § 1592 (1982),"[96] but that actions involving a claim or counterclaim by the United States for liquidated damages for breach of a bond are founded upon contract, and thus are governed by the statute applicable to actions for money damages by the United States.[97]

B. *Liquidated Damages Are Not Considered Penalties for Purposes of Awarding Prejudgment Interest*

The second context in which it has been urged that liquidated damages function as a penalty has been in the area of prejudgment interest. This argument was unequivocally rejected by the U.S. Court of Appeals for the Federal Circuit in *United States v. Imperial Food Imports*,[98] which held that liquidated damages assessed for breach of a bond did not function as a penalty for purposes of awarding prejudgment interest.[99] *Imperial* acknowledged that prejudgment interest may not be awarded on punitive damages, but held that liquidated damages are not punitive "if they are reasonable and the exact amount of the damages sustained would be difficult to prove."[100]

The court then addressed the liquidated damages at issue:

> The liquidated damages assessed in this case were reasonable. Customs assessed US$220,749.00 in liquidated dam-

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any concealment or absence of the property, shall not be reckoned within this period of limitation.

Id. (emphasis in original).

95. 8 CIT 192 (1984).

96. *Id.* at 197.

97. *Id.* The *Di Giorgio* court stated that it is "settled that section 2415(a) applies when the United States, as plaintiff, seeks recovery for liquidated damages arising from the breach of an importation bond." *Id.* at 197 n.9 (citing United States v. Bavarian Motors, Inc., 4 CIT 83, 87 (1982)). In *Bavarian Motors*, the CIT had rejected the contention that the action was governed by the three-year statute of limitations for claims founded in tort, 28 U.S.C. § 2415(b) (1978), on the ground that the action arose out of the breach of a surety bond by the importer, and that suretyship arises in contract, not tort. *Bavarian Motors*, 4 CIT at 87.

98. 834 F.2d 1013 (Fed. Cir. 1987).

99. *Id.* at 1016. In *Imperial*, a bond was breached by the failure of an importer to redeliver contaminated foodstuffs to Customs. *Id.* at 1015.

100. *Id.* at 1016.

> ages, representing the value of the merchandise plus estimated duties, after the importer failed to destroy or export the non-admitted goods. Moreover, the exact amount of damage sustained by the importer's failure to remove foodstuffs that in most instances were adulterated by the presence of insect and rodent filth would be difficult to prove. Therefore, we conclude that the liquidated damages awarded in this case were not punitive.[101]

The CIT emphasized that the prejudgment interest was intended to compensate for the delay in payment and not to punish.[102] The court relied on the reasoning of its earlier case in *United States v. Goodman*,[103] in which it held that because the U.S. government had lost the use of the funds to which it was entitled, the failure to award prejudgment interest would, in effect, amount to an interest-free loan to the defendant.[104] One issue in the "land of liquidated damages" thus appears settled, that liquidated damages assessed for breach of an importation bond are distinguishable from "penalties."

V. *THE UNRESOLVED "INTEREST" ISSUE: FOR WHICH EVENT SHOULD DISCRETIONARY PREJUDGMENT INTEREST BE AWARDED?*

The CIT and the U.S. Court of Appeals for the Federal Circuit have recognized that there is no statutory authorization for an award of prejudgment interest to the U.S. government in actions brought under section 1582(2),[105] and that such an award therefore lies within the discretion of the CIT as part of its equitable powers.[106] The courts have also held that where

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101. *Id.* (citation omitted).

102. *Id.*

103. 572 F. Supp. 1284 (Ct. Int'l Trade 1983).

104. *Id.* at 1289; *see* United States v. Imperial Food Imports, 834 F.2d 1013, 1016 (Fed. Cir. 1987).

105. There is, however, statutory authorization for prejudgment interest in suits to recover import duties. 19 U.S.C. § 580 (1988). Section 580 provides that "[u]pon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due." *Id.* The court, however, in its discretion, may award additional prejudgment interest in appropriate cases, even where interest under section 580 is available. *Cf. Imperial*, 834 F.2d at 1016; *Goodman*, 572 F. Supp. at 1289.

106. *Imperial*, 834 F.2d at 1016; *Goodman*, 572 F. Supp. at 1289-90. The *Goodman* court also held that "it appears equitable that prejudgment interest should be calcu-

prejudgment interest is compensatory, it should ordinarily be awarded absent some specific justification for withholding it.[107] In light of the recent affirmation in *Imperial* that liquidated damage awards in section 1582(2) cases are compensatory in nature, it is clear that prejudgment interest is appropriate to compensate the United States for its lost use of funds. Generally, where the U.S. government has prevailed in actions based upon section 1582(2), the CIT has awarded discretionary prejudgment interest.[108]

More controversial than the issue of whether prejudgment interest should be awarded at all, however, is the determination of the event from which the prejudgment interest should run. The CIT has selected various events from which to award prejudgment interest,[109] including the date the payment of estimated duties was first due;[110] the date of the breach, *i.e.*, the expiration of the time for the importer to timely redeliver mer-

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lated on the basis of the *rate* provided in 28 U.S.C. § 2644 (in accordance with 26 U.S.C. § 6621), since that is the rate which Congress determined would adequately compensate an importer for the loss of use of its money where duties are erroneously assessed." *Goodman*, 572 F. Supp. at 1290. That rate has been generally followed by the court where prejudgment interest has been granted. Postjudgment interest has generally been calculated in accordance with 28 U.S.C. § 1961. *See, e.g., Imperial*, 834 F.2d at 1016.

107. *See, e.g.*, United States v. Reul, slip op. 90-92 (Ct. Int'l Trade Sept. 12, 1990), *petition for reh'g pending*; General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983); United States v. Imperial Food Imports, 660 F. Supp. 958 (Ct. Int'l Trade), *aff'd*, 834 F.2d 1013, 1016 (Fed. Cir. 1987); Bio-Rad Laboratories, Inc. v. Nicolet Instrument Corp., 807 F.2d 964 (Fed. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); Leinoff v. Louis Milona & Sons, Inc., 726 F.2d 734, 743 (Fed. Cir. 1984); United States v. Monza Automobili, 683 F. Supp. 818 (Ct. Int'l Trade 1988).

108. *See, e.g., Imperial Food*, 660 F. Supp. 958; *Monza Automobili*, 683 F. Supp. 818; United States v. Toshoku Am., Inc., 670 F. Supp. 1006 (Ct. Int'l Trade 1987), *rev'd*, 879 F.2d 815 (Fed. Cir. 1989); United States v. Utex Int'l, Inc., 659 F. Supp. 250 (Ct. Int'l Trade 1987), *rev'd*, 857 F.2d 1408 (Fed. Cir. 1988); United States v. Angelakos, 688 F. Supp. 636 (Ct. Int'l Trade 1988), *dismissed on remand* (Ct. Int'l Trade Nov. 15, 1990); United States v. Lun May Co., Inc., 680 F. Supp. 1573, 1575 (Ct. Int'l Trade 1988), *dismissed on remand* (Ct. Int'l Trade Feb. 28, 1990); United States v. American Motorists Ins. Co., 680 F. Supp. 1569 (Ct. Int'l Trade 1987), *appeal dismissed* (Fed. Cir. 1988); United States v. B.B.S. Elec. Int'l Inc., 622 F. Supp. 1089 (1985).

109. Many of these cases were ultimately reversed, vacated, or settled in light of the Federal Circuit's substantive decisions in *Utex* and *Toshoku*. The appellate court, however, did not reach the issue of interest or the findings in the CIT with respect to prejudgment interest. Therefore, the event from which the interest should run, provides guidance on the issue of whether prejudgment interest should be awarded.

110. *See* United States v. Goodman, 572 F. Supp. 1284 (Ct. Int'l Trade 1983).

chandise pursuant to a notice of redelivery;[111] the date the defendant's administrative petition for mitigation or relief was denied;[112] the date the demand for payment was made upon the surety subsequent to denial of the mitigation petition;[113] the date the final demand upon the surety was made, subsequent to mitigation proceedings being completed;[114] the date mitigation proceedings were completed and the defendants had received several demands for payment;[115] the date the final administrative demand for payment was made;[116] and, at the farthest end of the scale, the date the suit was instituted.[117]

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111. United States v. Reul, slip op. 90-92 (Ct. Int'l Trade Sept. 12, 1990), *petition for reh'g pending.*

112. *See* United States v. Utex Int'l, Inc., 659 F. Supp. 250 (Ct. Int'l Trade 1987), *rev'd*, 857 F.2d 1408 (Fed. Cir. 1988); *Angelakos*, 688 F. Supp. 636.

113. *See* United States v. Monza Automobili, 683 F. Supp. 818 (Ct. Int'l Trade 1988).

114. *See* United States v. Toshoku Am., Inc., 670 F. Supp. 1006 (Ct. Int'l Trade 1987), *rev'd*, 879 F.2d 815 (Fed. Cir. 1989).

115. *See* United States v. Continental Seafoods, Inc., 672 F. Supp. 1481 (Ct. Int'l Trade 1987), *vacated and dismissed per stipulation on remand* (Ct. Int'l Trade Nov. 30, 1988).

116. *See* United States v. Imperial Food Imports, 660 F. Supp. 958 (Ct. Int'l Trade), *aff'd*, 834 F.2d 1013 (Fed. Cir. 1987). The U.S. government did not file a cross-appeal in *Imperial*, and absent a cross-appeal, the U.S. government could not ask for a better judgment than it obtained in the CIT. Thus, there was no issue before the Federal Circuit with respect to whether the CIT erred in not awarding prejudgment interest from an *earlier* date. The Federal Circuit merely held that the CIT did not abuse its discretion in awarding interest from the date it had selected. *Imperial*, 834 F.2d at 960.

117. *See* United States v. Lun May Co., Inc., 680 F. Supp. 1573, 1575 (Ct. Int'l Trade 1988), *dismissed on remand* (Ct. Int'l Trade Feb. 28, 1990); United States v. American Motorists Ins. Co., 680 F. Supp. 1569 (Ct. Int'l Trade 1987), *appeal dismissed* (Fed. Cir. 1988). In certain cases, the CIT determined that the lapse of time between a formal demand for damages and the institution of suit was a factor to be considered in selecting the date from which prejudgment interest should run. Those cases failed to address the fact, however, that exhaustive mitigation and collection proceedings typically occur between those dates. Thus, a failure to award prejudgment interest prior to institution of suit in effect punishes the U.S. government for taking the time to consider petitions for mitigation and/or relief to make extensive collection efforts administratively, rather than proceeding immediately to court to negotiate a possible settlement with the defendants prior to commencing suit.

In *Monza*, in which the sole issue was prejudgment interest, the CIT did apparently take cognizance of these factors in that it held that a "two year period after the final demand date does not constitute excessive delay on the part of the [U.S.] government in instituting this proceeding," and that if it were to deny prejudgment interest for those two years, the defendant would have had an interest-free loan of the money during that time, which clearly would be an inequitable result. *Monza*, 683 F. Supp. at 820; *see* United States v. Reul, slip op. 90-92 at 6 (Ct. Int'l Trade Sept. 12,

Notwithstanding the wide range of events from which the CIT has awarded discretionary prejudgment interest, however, *Imperial*'s affirmation that the interest is compensatory in nature suggests that the purpose of awarding the interest would be best effectuated by granting it from the date the liquidated damages first became due, since the U.S. government lost the use of the money from that date.[118]

Inasmuch as a demand for payment of liquidated damages is a condition precedent under the Bond for obtaining payment, the interest should run, for purposes of making the U.S. government whole, at least from the mailing of that first demand for payment,[119] which also happens to be the event that commences the time for filing a protest against the assessment of the damages.[120] As one scholar states:

> Interest normally commences to run against the principal from the date that he violates his obligation and, since the surety is liable for the principal's entire debt, he will be liable also for such interest on the debt. *Where demand is neces-*

1990) (holding that Customs did not erroneously delay in bringing suit six years after breach occurred), *petition for reh'g pending*.

118. Thus, under the reasoning of *Imperial*, it appears that, although the selection of the event from which prejudgment interest runs is discretionary, the primary factor for the court to take into consideration in exercising that discretion is the compensatory nature of the award. Based upon *Imperial*'s holding that prejudgment interest is intended to compensate, not function as a penalty, the *Monza* court found that, while the complexities of the substantive issues and defenses might be relevant to liability on the merits, those factors were not relevant to liability for prejudgment interest. By contrast, the CIT in *American Motorists* apparently found that the complexity of the case and the defendants' possible "good faith" miscalculations regarding their liability were factors to be weighed in determining the date from which prejudgment interest should run. *See American Motorists*, 680 F. Supp. at 1573. It is urged that, while the complexity of issues and "good faith" beliefs of defendants might be relevant if the liquidated damages functioned as a penalty, they are not relevant where interest is merely intended to make the U.S. government whole.

119. Moreover, since the importer and/or surety have been obtaining interest on the liquidated damages since the demand for the liquidated damages, the granting of prejudgment interest to the U.S. government from that date does not damage the importer or surety. It merely prevents them from becoming unjustly enriched.

120. *See supra* notes 29-55 and accompanying text (discussing right to protest assessment of liquidated damages). In several cases, the court has awarded prejudgment interest from the date of the last demand, rather than the first formal demand. The demands subsequent to the first formal demand, however, merely represent follow-up collection efforts, and the fact that they may be characterized as final does not alter the formality and protestability of the first demand. The finality expressed in the subsequent collection efforts merely represents the persistence of the U.S. government's collection official.

> *sary, a surety upon a bond is liable for interest upon the damages ascertained from the date of the demand.*[121]

In light of the compensatory nature of prejudgment interest to be paid upon liquidated damages, fairness and equity demand that the interest should run at least from the date the first notice and demand for payment was mailed, since it is from that date that the U.S. government lost the use of the funds it was owed.

CONCLUSION

For the moment we leave the "land of liquidated damages." Some of the initial debris of unresolved legal issues has been removed or repaired; some has been merely relocated; while other impediments, previously unforeseen or unnoticed, have suddenly appeared.

This Article has discussed only five of the issues that have been the subject of litigation in the CIT in suits by the U.S. government to recover liquidated damages for breach of a bond. In light of the many unresolved issues, however, and the myriad and sometimes creative defenses urged by importers and sureties, it is clear that the "land of liquidated damages" will continue to be a source of prolific and significant litigation in the CIT in the future.

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121. A. STEARNS, *supra* note 71, § 8.19 at 283 (emphasis added).