UNITED STATES – ANTI-DUMPING ADMINISTRATIVE REVIEWS AND OTHER MEASURES RELATED TO IMPORTS OF CERTAIN ORANGE JUICE FROM BRAZIL

WT/DS382

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

October 12, 2010

Mr. Chairperson, members of the Panel:

1. On behalf of the U.S. delegation, I would like once again to thank you for agreeing to serve on the Panel. We welcome the opportunity to meet with the Panel again to discuss the issues in this dispute.

2. In our statement today, we would like to focus on rebutting arguments made by Brazil in its second written submission and in response to the Panel's questions. We hope that our oral statement will clarify our views as Brazil's opening statement did not present them accurately. We first will highlight that interpreting the terms "dumping" and "margin of dumping" to have meaning in relation to individual transactions is a permissible and perfectly coherent interpretation of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement"). Brazil's proposed interpretation, in contrast, has no textual basis. In addition, Brazil's interpretation is inconsistent with the very concept of a prospective normal value system, both as provided for in the text and as such systems are actually used. Indeed, as we show in the exhibits submitted with this oral statement, and contrary to Brazil's representations, Brazil's own use of prospective normal value is inconsistent with Brazil's insistence that the Antidumping Agreement prohibits a transaction-specific definition of dumping.

3. We will then respond to four other lines of argument in this dispute: First, with respect to mathematical equivalence, as we demonstrated empirically in our response to the Panel's questions, Brazil's proposed interpretation of the Antidumping Agreement would render the second sentence of Article 2.4.2 meaningless. Second, with respect to "fair comparison" under Article 2.4, Brazil's interpretation invites a subjective examination that is not based on the text. Third, Brazil's arguments regarding cash deposits are similarly not based on the text of the Antidumping Agreement, which plainly allows Members to collect a cash deposit as security for payment of antidumping duties. Finally, with respect to its assertion that the "use" of "zeroing" is inconsistent with the covered agreements regardless of whether any duties were collected or whether there even were any negative comparison results to "zero", Brazil's interpretation is completely inconsistent with the text. Brazil has failed to demonstrate any basis for finding an inconsistent "continued use" measure, even were such a measure within the Panel's terms of

reference.

I. A Transaction-Specific Interpretation of "Dumping" and "Margin of Dumping" Is Permissible

4. The text and context of the covered agreements, interpreted in accordance with the customary rules of interpretation of public international law, make clear that the terms "dumping" and "margin of dumping" may have meaning for individual transactions. Brazil's interpretation, in contrast, is not consistent with either the text, or with how prospective normal value systems operate.

A. Standard of Review

5. As we have noted previously, in a dispute involving the Antidumping Agreement, the relevant standard of review includes that set forth in Article 17.6(ii) with respect to various permissible interpretations of a provision of the Agreement.

6. The question under Article 17.6(ii) is whether an investigating authority's action rests upon a permissible interpretation of the Antidumping Agreement. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority's action rests upon one such interpretation, a panel is to find the action consistent with the Agreement.[1]

7. The United States has argued – and multiple previous panels have agreed – that an interpretation of the Antidumping Agreement that does not require offsets is permissible. This interpretation is permissible because the text and context of the Antidumping Agreement, interpreted in accordance with customary rules of interpretation of public international law, make clear that the terms "dumping" and "margin of dumping" may have meaning for individual transactions. The mere fact that this interpretation differs from another interpretation is not a basis for finding it impermissible.

8. An interpretation of the provisions of the Antidumping Agreement and the GATT 1994 that not only is consistent with the text, but also reflects how business is conducted, how trade in goods occurs, and the point at which duties are imposed – that is, in individual transactions – is hardly, as Brazil alleges, "incoherent". Multiple previous panels, applying the customary rules of interpretation of international law, have confirmed that this interpretation is permissible.

9. The interpretation by previous panels does not allow a Member to define dumping any which way it wants. As noted earlier, there is a definition of "dumping" in Article 2.1 of the

[1] *See Argentina – Poultry*, para. 7.341 and n. 223.

Antidumping Agreement. The question is whether this definition, "the difference between normal value and export price", can apply at the level of individual transactions or must be applied to "the product as a whole", a term that does not even appear in the text. Brazil argues that the term "dumping margin" must relate, solely and exclusively, to the "product as a whole" regardless of the text and context of the provision in which the term is used. The United States argues – and previous panels have confirmed – that "dumping margin" may be understood as relating to the "product" that is the subject of an individual transaction, in accordance with the ordinary meaning of the word "product", and permits the text and context of the relevant provisions to inform the appropriate interpretation of the term as it is used.

B. There Is No Textual Basis for the Obligation That Brazil Proposes

10. To require, as Brazil asserts, that a Member calculate a "margin of dumping" only for the "product as a whole" does not reflect a "harmonious" interpretation of the Antidumping Agreement. There is no textual basis for such an obligation in either the Antidumping Agreement or the GATT 1994. Not surprisingly, then, in arguing that an investigating authority must calculate a margin of dumping for the "product as a whole" in assessment proceedings, Brazil does not rely on the text of the GATT 1994 or the Antidumping Agreement.

11. To accept Brazil's argument would mean that the major users of dumping remedies, which were not granting offsets at the time the WTO Agreements were negotiated, agreed to an obligation to provide offsets without including an express provision for such an obligation in the Antidumping Agreement and the GATT 1994. In fact, there were negotiating proposals to restrict "zeroing", but these proposals were not adopted. The major users of dumping remedies continued to use "zeroing" after the agreements came into effect. If the negotiators of the Uruguay Round agreements intended to make such a fundamental change in the meaning of "margin of dumping" as to require offsets, they would have been clear about it. As we noted in our first written submission, in settling disputes among Members, panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."[2]

12. A panel should not build an interpretation on terms that do not appear in the covered agreements, such as "product as a whole." Prior panels have found that there is no textual basis in the Antidumping Agreement for the obligation that Brazil proposes today. All these panels made an objective assessment of the matter before them and came to the same conclusion that no offsets are required in assessment proceedings. We respectfully request that this Panel reach the same conclusion in this proceeding.

C. Brazil's Arguments Are Inconsistent with Both the Concept of, and Its Own Application of, a Prospective Normal Value System

[2] Article 19.2 of the Dispute Settlement Understanding.

13. The United States has demonstrated that the obligation that Brazil seeks to impose on Members is contrary to the very concept of a prospective normal value system provided for in Article 9 of the Antidumping Agreement. Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. For example, an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payments of antidumping duties. The converse is also true. A liability for a dumped sale would be determined by comparing the price of an individual export transaction with a prospective normal value and the prices of other transactions have no relevance to this determination. As the panel in *US – Zeroing (Japan)* found, "there is no textual support in Article 9 for the proposition that export prices in other transactions are of any relevance."[3]

14. The United States has provided evidence that demonstrates how prospective normal value systems operate and that the refund mechanism under a prospective normal value system normally addresses specific individual transactions. In contrast, there is no evidence to support the assertions that a refund mechanism must recalculate a margin of dumping based on an aggregation of all comparisons. Indeed, Brazil acknowledged that it has never granted a single refund when collecting antidumping duties on the basis of a prospective normal value.

15. Brazil nonetheless argues that an obligation to calculate the margin of dumping with respect to "product as a whole" is consistent with prospective normal value systems. In its answers to the Panel's Questions, Brazil asserts that when it has applied prospective normal value, "the collection of the duty was limited to a dumping margin determined in accordance with Article 2 of the *Anti-Dumping Agreement*".[4] A review of the facts, however, raises questions about how this assessment comports with Brazil's proposed interpretation of the Antidumping Agreement.

16. Brazil has used prospective normal value to collect antidumping duties on products from at least seven countries: the United States, Mexico, Romania, Germany, France, Spain, and the United Kingdom.[5] In each case, Brazil calculated the antidumping duty as the absolute difference between the normal value (or reference price) and the adjusted export price of a specific transaction.[6] Brazil assessed the antidumping duty in instances where the price of the

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[3] *US – Zeroing (Japan) (Panel)*, para. 7.201.

[4] Brazil's Answers to the Panel's Questions, para. 56.

[5] *See* Exhibits US-9 through US-12.

[6] *See* Exhibit US-9 (Ministry of Development, Industry, and Foreign Trade, Office of the Secretary of Foreign Trade, Circular No.12, of March 7, 2008, para. 3); Exhibit US-10 (Ministry of Development, Industry, and Foreign Trade, Office of the Secretary of Foreign Trade, Office of the Secretary of Foreign Trade, Circular No. 47 of

imported product (an entry) was lower than the established normal value.[7] However, Brazil assessed no duty if the result of the comparison was less than or equal to zero.[8] And, Brazil has never provided a refund or an offset based on non-dumped transactions.

17. The way that Brazil has collected duties on imports of polyvinylchloride from the United States and Mexico, for example, does not appear consistent with the arguments that Brazil made in this dispute. In that case, Brazil assessed duties on a transaction-specific basis without providing any offsets for non-dumped transactions. In addition, Brazil's Official Gazette specifically states that the antidumping duty is calculated on a transaction-specific basis:

> The anti-dumping duty is calculated on the basis of the absolute difference between the reference price and the *price at which the transaction by which the product is imported from the USA or Mexico is executed,* as the case may be. The anti-dumping duty will be charged only in a case in which the price of the imported product is lower than the proposed reference price.[9]

18. There is no reason why liability for payment of antidumping duties in the retrospective system applied by the United States may not be similarly assessed on the basis of transaction-specific export prices. Accepting the interpretation that a Member must aggregate the results of *"all"* comparisons on an exporter-specific basis would require that retrospective reviews be conducted even in a prospective normal value system. This result is contrary to the very concept of a prospective normal value system.

19. Despite its arguments that Members have an affirmative and fundamental obligation to determine the antidumping liability for the "product as a whole" regardless of the context, Brazil has never conducted a review under Article 9.3.2. Brazil suggests this is because no importer has ever asked for a review or a refund. As we explained previously, however, it is difficult to see why an importer would request such a review when the importer does not have information for the "product as a whole" and as such does not know if the importer's liability could actually increase. And, when importers do not request refunds, no offsets are provided.

20. It should be noted that Brazil's arguments in this respect are entirely inconsistent with its arguments regarding cash deposits. Under Brazil's argument, the supposed obligation to

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September 2, 2009, para 3).

[7] *See* Exhibit US-9, para. 3; Exhibit US-11 (Office of the Secretary of Foreign Trade, Circular No. 16, of May 6, 2010, at para. 3); Exhibit US-12 (Council of Ministers of Chamber of Foreign Trade, Decision No. 19 of June 29, 2005, arts. 1, 10); Exhibit US-10, para 3.

[8] *See* Exhibit US- 9, para. 3; Exhibit US-11, para. 3; Exhibit US-12, arts. 1 and 10; Exhibit US-10, para 3.

[9] *See* Exhibit US-9, para. 3.

calculate a margin for the "product as a whole" in a prospective normal value system is apparently only triggered when someone requests a refund. In the meantime, duties are collected on a transaction-specific basis without providing offsets for non-dumped transactions. Of course, in a retrospective system such as that operated by the United States, cash deposits are expressly not a final assessment of duties. Cash deposits are only a security pending the final assessment of duties, which occurs later in a review initiated upon a request. Yet according to Brazil, cash deposits that similarly do not reflect offsets for non-dumped transactions are themselves WTO-inconsistent.

21. Before moving on, we would like to make one final but important point on the topic of prospective normal value systems: It is implausible to think that the negotiators of the Antidumping Agreement would provide explicitly for a prospective normal value system and at the same time, without making any textual provision whatsoever, require that such systems conduct retrospective assessment proceedings that aggregate all the transactions occurring over some unspecified period of time. Articles 9.3, 9.3.1, and 9.3.2 are silent as to the period of review for any such proceeding. These articles include no requirements with respect to whether an assessment proceeding must cover a time period of a certain length or even that assessment proceeding coverage be time-based at all.

22. In its responses to the Panel's questions, Brazil suggested that the period of review for refund proceedings is specified in footnote 4 to Article 2.2.1. Article 2.2.1 specifies certain conditions under which a Member may choose to disregard sales at prices below the per unit cost of production in the domestic market of the home country or a third country if "such sales are made within an extended period of time in substantial quantities and at prices which do not provide for the recovery of all costs." Footnote 4 specifies that "extended period of time" is "normally one year but shall in no case be less than six months." Contrary to Brazil's suggestion, footnote 4 specifies what constitutes an "*extended period of time*." It does not specify the length of a "period of review" or "refund proceeding." Moreover, Article 2.2.1 and footnote 4 only apply in specific circumstances, when a Member decides to disregard certain below-cost sales. They do not apply in any other context.

23. If the drafters of the Antidumping Agreement had intended to adopt an obligation to provide an "offset" for non-dumped transactions, one would have expected the drafters also to agree on an obligation for assessment proceedings to cover some established time period over which transactions must be aggregated. Otherwise a Member's obligations might have differed in a significant, substantive fashion depending solely upon whether it elects to cover more or fewer entries, or more or less time, in conducting its assessment proceedings. Thus, Brazil's assertion that the Antidumping Agreement imposes, with no textual basis, an obligation to grant offsets for non-dumped transactions implies that the drafters neglected to provide for an essential element of the obligation, namely, the time period over which such an offset would be granted. Such an interpretation should not be adopted by the Panel.

II. Brazil's Interpretation Renders the Second Sentence of Article 2.4.2 of the Antidumping Agreement a Nullity

24. The United States would recall that it has demonstrated that Brazil's interpretation of the Antidumping Agreement does not fit with the text of Article 2.4.2 of the Antidumping Agreement.[10] This is because the exceptional methodology provided for in the second sentence of Article 2.4.2 mathematically must yield the same result as an average-to-average comparison as provided for in the first sentence of Article 2.4.2 if, in both cases, non-dumped comparisons are required to offset dumped comparisons. Accordingly, Brazil's interpretation would be disfavored under a key tenet of customary rules of treaty interpretation, namely that an "interpretation must give meaning and effect to all the terms of the treaty."[11]

25. The United States demonstrated the mathematical equivalency empirically in its response to the Panel's questions. Brazil's only response to the mathematical equivalency argument is to cite certain Appellate Body reports. These reports are not persuasive because their reasoning is not based upon the text of the Antidumping Agreement and does not adequately resolve the problem of mathematical equivalency. Panels have specifically addressed all of the situations under which it was argued that there would not be mathematical equivalence and found these situations did not represent methodologies consistent with the Antidumping Agreement. The United States has demonstrated that if *all* export transactions are taken into account, and "zeroing" is prohibited, average-to-average and average-to-transaction comparisons produce the *same result*.

III. Brazil's Broad Interpretation of Article 2.4 of the Antidumping Agreement Should Be Rejected

26. As the United States has explained, Brazil's arguments under Article 2.4 of the Antidumping Agreement – like its other interpretations of the Antidumping Agreement – require reading into the text of the Agreement words that are not there and were never agreed.[12] There is no obligation in Article 2.4 to offset any negative differences between normal value and export price. The United States cannot be found to have violated an obligation that does not exist. Moreover, if Article 2.4 required offsets, there would be no need for such a requirement in Article 2.4.2 (which was the basis for the Appellate Body's finding in *US – Softwood Lumber Dumping*).

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[10] U.S. Answers to the Panel's Questions in Connection With the First Substantive Meeting, paras. 28-32; U.S. Second Written Submission, paras. 74-79; U.S. First Written Submission, paras. 93-98.

[11] *US – Gasoline*, (AB), p. 23.

[12] U.S. Second Written Submission, paras. 4-22.

27. Brazil's proposed interpretation that Article 2.4 applies to the *results* of comparisons between export price and normal value is erroneous. As the Appellate Body stated in *US – Hot-Rolled Steel*, "an examination of whether USDOC acted consistently with Article 2.4 of the *Anti-Dumping Agreement* must focus on . . . whether there were 'differences', relevant under Article 2.4, which affected the comparability of export price and normal value."[13] Contrary to Brazil's assertions, because the "fair comparison" obligation in Article 2.4 refers to the required price adjustments, it does not create an obligation with respect to how the *results* of those comparisons are treated. Assessment of antidumping duties in the amount by which the normal value exceeded the export price on a transaction-specific basis does reflect a "fair comparison" made for each export transaction. The phrase "fair comparison" in Article 2.4 simply has nothing to do with the aggregation of comparison results, and Brazil has not explained how an offset to the dumping found on one export transaction as a result of a distinct export transaction having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under Article 2.4.

28. Instead, Brazil would have the Panel use Article 2.4 to examine any and all antidumping calculations to determine whether they are "impartial, even-handed, or unbiased." However, such an open-ended approach would result in disputes that are nearly impossible to resolve in any principled, text-based way. The Panel should reject an expansive interpretation of a "fair comparison" requirement that requires a subjective evaluation of what is "fair" or "unfair".

IV. Cash Deposits Are a Security, Not Duties

29. The United States explained in its First Written Submission and in its responses to Panel questions that cash deposits are not duties covered by Article 9 of the Antidumping Agreement, but rather a security governed by separate provisions of the GATT 1994. The Ad Note to paragraphs 2 and 3 of GATT Article VI expressly provides that a Member may collect a "reasonable security (bond or cash deposit) for the payment of anti-dumping duty . . . pending final determination of the facts." In the retrospective system used by the United States, cash deposits are held as a security pending determination of the antidumping duty to ensure that funds are available to pay the duties. None of the cash deposit rates at issue in this dispute were applied as assessment rates.

30. In response to the U.S. showing that cash deposits are a security, Brazil relies on the Appellate Body report in the *United States – Shrimp Bonding* dispute. That report, however, is inapposite to the issue in this dispute regarding cash deposits. In *Shrimp Bonding*, the Appellate Body analyzed the WTO-consistency, including the "reasonableness," of an extra bonding requirement that applied above cash deposits. The purpose of this extra requirement was to secure potential additional liability that might arise if the margin of dumping was determined to

[13] *US – Hot-Rolled Steel (AB)*, para. 179.

be greater than the cash deposit – that is, to address defaults on that portion of the duties that exceed the amount of cash deposited as a security. That is not an issue in this dispute, nor is it the standard for whether or not cash deposits are in fact a security.

V. Brazil's Arguments Regarding the "Use" of Zeroing Have No Basis in the Text

31. In the last meeting with the Panel, and in its second written submission, Brazil insists that the "use" of "zeroing" violates various provisions of the Antidumping Agreement and the GATT 1994, regardless of whether any duties were collected, and regardless of whether any transaction-specific comparisons were in fact "zeroed." To be clear, we have a defense to all of Brazil's claims as there is no basis in the text of the agreements for the obligations Brazil seeks to impose. However, in response to Brazil's claims on this point we would like to explain further how these assertions with respect to the "use" of "zeroing" are inconsistent with the text of the relevant provisions.

32. In this dispute, Brazil's allegations of WTO-inconsistency based on its "zeroing" theories extend to certain instances in which the United States in fact assessed no antidumping duties. As the United States has explained, where no antidumping duties have been assessed, there can be no breach of Article 9.3 of the Antidumping Agreement or Article VI:2 of the GATT.

33. In its second written submission, Brazil asserts that Article 9.3 and Article VI:2 – both of which expressly refer to the amount of the antidumping duty – can be violated "irrespective of the amount of duties that is ultimately collected." The United States fails to see how, as Brazil argues, it makes sense to find a violation of an obligation not to collect duties, when no duties are collected. Article VI:2 allows a Member to "levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping . . . ." Article 9.3 directs that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Finding a violation of these provisions where no antidumping duties are levied and the antidumping duty is zero would render meaningless the provisions' references to "levy . . . an anti-dumping duty" and "[t]he amount of the anti-dumping duty".

34. Brazil's meaning of the term "use" is different from what was at issue in prior panel and Appellate Body reports. Brazil claims that "use" refers to the line in the computer program. Prior reports refer to the final duties assessed.[14] Consequently, those earlier reports do not support Brazil.

35. Brazil does not address the fact that these provisions specifically address the amount of the duty. Instead, Brazil's only support for its argument that there could be a violation even when no duties are assessed is (i) a cite to the Appellate Body report in *Continued Zeroing* and

[14] *US – Continued Zeroing (EC) (AB)*, paras. 314-315; *US – Stainless Steel (AB)*, para. 133; *US – Zeroing (Japan) (AB)*, para. 155; *US – Zeroing (EC) (AB)*, para. 131.

(ii) an argument that the *chapeau* of Article 9.3 refers to Article 2.

36. With regard to the *Continued Zeroing* report, it is not pertinent to the issue in this dispute. In particular, it does not address the argument in this case that there can be no violation of Article 9.3 or GATT Article VI:2 where a Member assesses no duties. That dispute involved the issue of whether alleged "continued use" was outside of the terms of reference because it purported to capture future measures. However, the argument in this case is not only about what might happen in the future. In this dispute, Brazil's own evidence demonstrates that zeroing had no effect in certain of the proceedings at issue.

37. Brazil's argument as to the *chapeau* is based solely upon the fact that the *chapeau* mentions Article 2. However, Brazil fails to cite the actual text of the *chapeau*, which states that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." The text is clear that the obligation is based upon "the amount of duty" not *exceeding* the margin of dumping. Where the United States has applied an assessment rate of zero, "the amount of duty" is zero, which cannot exceed the margin of dumping.

38. The United States fails to see how there can be a violation of an alleged obligation to provide offsets for non-dumped transactions when there are no non-dumped transactions. As just noted, unlike in the *Continued Zeroing* dispute, in this dispute we are not just presented with a request to find an inconsistency with respect to measures that do not exist even though we do not know whether there will be any non-dumped transactions. We are also presented with a request to base a finding of future inconsistency on a proceeding in which the evidence shows there actually were no non-dumped transactions. Zeroing is not and cannot be "used" in such circumstances. It is mathematically impossible. In such circumstances, the comparisons made, and the amount of duties collected, are exactly the same as they would have been if there were no "zeroing" line in the computer program. Brazil's own evidence indicates the United States calculated the dumping margins in the orange juice investigation on the basis of *all* comparable transactions.

VI. Aside from the Fact That It Is Outside the Terms of Reference, Brazil's Claims with Respect to the "Continued Use" Measure Fail

39. Even if Brazil's "continued use" claim were properly before this Panel, it must fail because there is no evidence that zeroing affected any margin in the investigation, nor certain rates in the assessment proceedings at issue. Brazil has relied heavily upon the Appellate Body's report in *Continued Zeroing*, and the United States has explained why that reliance is misplaced. We have demonstrated that the Appellate Body's analysis in *Continued Zeroing* does not apply here. In that dispute, the Appellate Body found an inconsistency only in circumstances that included zeroing in the initial less than fair value investigation, zeroing in four successive administrative reviews, and reliance in a sunset review upon rates determined using the zeroing methodology.

40. In response to the U.S. arguments, Brazil attempts to distinguish the circumstances in the current dispute from the cases in which the Appellate Body declined to find a violation in *Continued Zeroing* by arguing that the evidence of zeroing was "fragmented" in those cases. However, in this dispute, Brazil's own evidence shows that there was no zeroing in the investigation, zeroing had no effect on certain rates in the assessment proceedings, and there has been no sunset review. This is not a case where "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time."[15] Moreover, as explained earlier, there is no textual basis for finding a violation where no duties are collected, or where there were no non-dumped transactions. Individual proceedings that are not inconsistent cannot be the basis of a finding of "ongoing" inconsistency stretching indefinitely into the future.

41. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be happy to respond to any questions you might have.

[15] *US – Continued Zeroing (EC)*, para. 191.