injurious effects of other factors. The ITC initially resisted any effort to deepen its analysis in this respect, contending that it was incompatible with governing U.S. law, but decisions issued in the post-2000 period show an increasingly focused effort to adhere to the non-attribution principle. In this regard, Stainless Steel Angle from Japan, Korea and Spain, Inv. Nos. 731-TA-888-890 (final) (May 2001); Certain Color Television Receivers from China, Inv. No. 731-TA-1034 (final) (May 2004) at 7-17 and Sichuan Changhong Electric Co., Ltd. v. United States, Slip Op. 06-168 (CIT 2006) at 17-25; and Certain Orange Juice from Brazil, Inv. No. 731-TA-1089 (final) (March 2006) at 27-28 are offered as examples.

As part of the Softwood Lumber IV litigation, an initial ITC threat of injury determination—held upon WTO review to have insufficiently documented adherence to the non-attribution requirement—was revised in a Section 129 proceeding (without changing the bottom-line threat of injury finding) in a way that proved satisfactory to an Art. 21.5 Panel, although that Panel's analysis was later sharply criticized and reversed by the Appellate Body.

(b) Requirement that domestic producers be positioned to benefit. Another trend in ITC decision making is the struggle to give effect to a court decision requiring analysis of whether domestic producers, or third-country suppliers not under investigation, would likely benefit from imposition of an AD measure. In Bratsk Aluminum Smelter v. United States, Slip Op. No. 05-1213 (Fed. Cir. 2006), the United States Court of Appeals for the Federal Circuit (CAFC) addressed the requirement in U.S. law that AD measures be based on a finding of material injury occurring "by reason of" subject imports. The court held that in cases involving commodity products, "when ... fairly traded, price competitive, non-subject imports are in the market, the Commission must explain why the elimination of subject imports would benefit the domestic industry instead of resulting in the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers." While the ITC's initial reaction was to resist the Bratsk requirement, there are signs of tentative efforts to meet it while finding workable limits on its scope. In any event, subsequent court decisions have made clear that the CAFC and the U.S. Court of International Trade (CIT) treat the Bratsk requirement seriously, and will oblige the ITC to follow it where it applies.

(c) Negative determinations. The ITC has been a consistently demanding forum for claimants for import relief during the post-2000 period. In the sunset review context, it has displayed a greater tendency to issue negative decisions in contested cases where petitioners actively seek to maintain relief. The 2006 determinations involving carbon flat steel products, which found that removing numerous orders posed no likelihood of continuation or recurrence of injury, are a good example.

6. Reviews and Assessment

(a) Administrative reviews with cost investigations. In 2005, DOC issued a policy bulletin addressing decisions about "automatically" opening investigations into sales below cost within administrative reviews. DOC's Policy Bulletin 05.2 excludes significant and