EXECUTIVE SUMMARY

One of Canada's principal objectives during the FTA and NAFTA negotiations was to secure a rule-based mechanism to resolve trade disputes with the United States. The massive wave of American protectionism had hurt Canadian exporters too many times during the 1980s. American producers and policy-makers rallied under the banner of "fair trade," and relied extensively on domestic trade remedy laws to shield themselves from foreign competition. Canadians looked to the free trade negotiations as a source of help. How could "we" fight against "them" in the administration of antidumping and countervailing duty laws?

The solution was found in Chapter 19 of the FTA and later Chapter 19 of the NAFTA. Chapter 19 allowed binational panels to review final AD/CVD determinations in lieu of domestic courts. Canadians have generally praised Chapter 19 as a faster, fairer system that has provided consistency and predictability for North American traders. Many Americans, on the other hand, have criticized Chapter 19 for disregarding American jurisprudence, domestic trade remedy laws, the U.S. Constitution, and for being subject to conflicts of interest.

A trend in favour of rule-based trade has emerged in Canadian foreign policy-making circles. Conventional wisdom holds that a smaller country requires rules and institutions to counter the economic and political power of a larger country in a free trade agreement. Placed into the context of Chapter 19, Canada needs the binational panel process to fight against the biased, unilateral American trade remedy regime. Promoting Chapter 19 can only be done if it is indeed a good system. The purpose of this paper is to allow Canadians to evaluate the merits of the system of binational panel review in Chapter 19 of the FTA and NAFTA. Seeing that Chapter 19's critics are most often American and proponents tend to be Canadian, the paper has been framed in an "us versus them" context. Were their critiques wrong, or were our hopes for Chapter 19 right? Has Chapter 19 worked to improve the ways that Canadian and American trade remedy laws have been administered? Is it worth having in place?

The paper will review the arguments for and against Chapter 19. It will then use decisions of Chapter 19 panels and domestic review courts to evaluate the legitimacy of the arguments. It will conclude that the Chapter 19 system of binational panel review is a good one for Canada. "We" were right about its strengths. "Their" fears and critiques have proven to be false. Chapter 19 panels have adhered to the Canadian and American standards of review and domestic trade remedy laws. A second body of trade law, constitutional infirmities, and conflicts of interest have not emerged from panel decisions. More importantly, the panels have offered timely, well-reasoned, consistent decisions that have placed more predictability and confidence into North American trade.