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Matthew K. Grashoff

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BUILDING FENCES TOGETHER: THE EU’S LESSONS FOR THE U.S.-CANADA PERIMETER SECURITY PLAN

Note

By: Matthew K. Grashoff

ABSTRACT

After the events of September 11, 2001, the United States and Canada enacted policies aimed at increasing the effectiveness of joint security measures between the two countries. The latest joint security policy, calling for unprecedented integration of U.S. and Canadian security apparatuses, is known as the “perimeter security” plan. On December 7, 2011, the U.S. and Canadian governments released a Joint Action Plan plotting a path toward this further integration of the two countries’ national security policies. However, there are a number of concerns regarding the various facets of the plan. Is it advisable to integrate national security functions? What do the countries stand to gain by integrating? Most importantly, can integration work?

The example of the European Union’s common foreign and security policy indicates that regional security partnerships can indeed work. Analysis of the development of the European Union’s policy identifies the crucial areas where security partners must collaborate. Application of the lessons learned from the European Union’s experience will enable the United States and Canada to adroitly navigate the complications of integrating their security policies. The analysis and application of these lessons should lead to a strong and stable security perimeter that will serve the interests of both countries.

“Love your neighbor as yourself; but don’t take down the fence.”
- Carl Sandburg

Matthew K. Grashoff anticipates receiving his J.D. from Case Western Reserve University School of Law in May 2013.

Fences are coming down around the world. Since the end of World War II, a tide of globalization has led to the creation of a multitude of supranational bodies, such as the United Nations. In the progressively more interconnected world of the end of the 20th century and the beginning of the 21st, countries increasingly realize that international problems halfway around the world can quickly become domestic problems. In recent years, a new movement toward “glocalization” resulted in an increase in more regional integration of legal and economic procedures and organizations around the world. In addition, countries have begun recognizing the utility of regional integration as more than just a means for economic cooperation.

The North American continent is no different from the rest of the world in this regard. Most North American efforts at regional integration to this point were focused on purely economic cooperation, but the recently proposed United States–Canada “perimeter security” initiative is one of the first concrete steps taken toward a regional security partnership. Critics in both countries warn against the consequences of ceding some measure of national autonomy in order to enhance collective security. In order to analyze these concerns, it may be helpful to examine a similar regional security partnership that has been in place for some years in the European Union (“EU”).

2. Juan Pablo Pampillo Baniño, The Legal Integration of the American Continent: An Invitation to Legal Science to Build a New Ius Commune, 17 ILSA J. INT’L & COMP. L. 517, 541-42 (2011) (“the double process known as ‘glocalization’ (globalization + localization)... [Is the integration processes (resulting from the simultaneous action of the centrifugal forces of globalization and the centripetal forces of localization)...”).

3. Id. at 541-42 (“The present economic, political, social and cultural processes of globalization have been promoting... a growing regional rapprochement through continental blocks.”).


Analysis of this analogous arrangement indicates that while the road to beneficial regional integration is difficult, it is by no means impassable.

Part II of this Note provides an overview of the theories and motivations behind the modern trend toward regional integration. Part III provides a summary of the relationship between the United States and Canada, describing why the two countries currently find themselves moving closer toward a regional security partnership. Part IV is a case study of one example of such a regional security integration: the EU’s common foreign and security policy. Part V analyzes how the lessons learned from the EU’s example could be beneficially applied to the United States-Canada security partnership. Part VI concludes that while the work required to form a workable security partnership will be difficult, the benefits make the effort worthwhile.

II. THE TREND TOWARD REGIONAL INTEGRATION

In international law a “region” is roughly defined as a small number of states linked by geography and mutual dependence. This linkage leads to common goals and interests, most often economic in nature, which further leads to cooperation and interconnectedness. This process is known as “regionalization” or regional integration.

Regional integration has been a major force in international law since the Cold War, and especially since the late 1980s. Regional integration agreements are in effect in almost every major region of
the world, from the Organisation of African Unity to the Association of Southeast Asian Nations.\textsuperscript{11} Russia is attempting to form a “Eurasian Union”\textsuperscript{12} and the United States has expressed interest in the creation of a Pacific Rim partnership.\textsuperscript{13}

Why do states seek to create these regional partnerships? The benefits are often a matter of scale: global alliances and agreements can prove unwieldy or unpopular, while smaller regional partnerships are more manageable and are capable of quickly responding and adjusting to members’ concerns.\textsuperscript{14} Additionally, as a practical matter it is easier to conclude the complicated diplomatic agreements necessary for regional integration among a small number of regional partners rather than a geographically disparate group of allies around the world.\textsuperscript{15} The mutual interests of the regional partners also make negotiations simpler.\textsuperscript{16} However, there is no universal reason behind every regional integration.\textsuperscript{17} Each region, and each country, has its own interests and own reasons for participating (or not) in integration.

Many theories and examples of regional integration reflect the fight between two of the foremost theories of political philosophy:

11. \textit{See, e.g.}, \textsc{Walter Mattli}, \textsc{The Logic of Regional Integration: Europe and Beyond} 2–9 (1999) (listing a number of regional partnerships from around the world).


14. \textit{See Elzbieta Stadmüllner}, \textsc{Regional Dimensions of Security, in Global Politics of Regionalism: Theory and Practice} 104, 109 (Mary Farrell et al. eds., 2005) (noting that the use of regional integrations in international security reflects the fact that “universal organizations are as yet unable to create a system that would be really effective in ending current conflicts, and at the same time, acceptable to the whole global community”).

15. \textit{See Kembayev, supra note 7, at 10 (“[P]olitical, economic, and social integration is more easily attained among a lesser number of states within a limited geographic area than on a global basis.”).}

16. \textit{Miles Kahler}, \textsc{International Institutions and the Political Economy of Integration} 7 (1995) (describing a “demand-side theory of international regimes” that reasons regionalization is a means of reducing transaction costs between frequent business partners).

17. \textit{See Mattli, supra note 11, at 3 (1999) (“Regional integration is a product of many and varied forces.”)}.  

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realism and neofunctionalism.\textsuperscript{18} Realism, one of the most influential theories of international relations, posits that sovereign states are the supreme actors on the geopolitical stage.\textsuperscript{19} Accordingly, they should not cede power to supranational organizations and should act only in their own state interest.\textsuperscript{20} Intergovernmentalism is a theory of integration tied to the realist school.\textsuperscript{21} Intergovernmentalism highlights the importance of actors, often heads of government, who undertake joint projects only when circumstances are such that the projects are in their own national interest.\textsuperscript{22} The EU's common foreign and security policy, discussed in Part IV below, is an example of intergovernmentalism: groups of actors, the European Council and the Council of Foreign Ministers, enact policies as necessary when the interests of the Union and Member States are aligned.\textsuperscript{23} Intergovernmentalism's main weakness is that it discounts the importance and ability of non-state actors and outside interests to influence decisions\textsuperscript{24} and the possibility of enhanced efficiency created by ceding authority to centralized bodies.\textsuperscript{25}

18. See Ben Rosamond, Theories of European Integration 2 (2000) (describing the "conversation" between realists and neofunctionalists as the "main ongoing schism in the integration theory literature since the mid-1960s").

19. See Jack Donnelly, Realism and International Relations 9 (2000) ("Realism emphasizes the constraints on politics imposed by human nature and the absence of international government.") (emphasis added).

20. See id. at 10-11 ("Ethical considerations and objectives, realists typically argue, must be subordinated to 'reason of state' (raison d'état).”).

21. See Mattli, supra note 11, at 30 (referring to the "intergovernmental/realist tradition").

22. See Rosamond, supra note 18, at 2 ("In terms of identifying key actors, intergovernmentalists emphasize the centrality of national executives . . . .").


24. See Mattli, supra note 11, at 29-30 (noting that intergovernmentalism focuses only on “episodes of interstate bargaining” rather than “defining events” that precede or follow those episodes).

25. See Majone, supra note 23, at 162-63 (comparing the “Community method,” involving “delegation of powers by the member states to supranational institutions,” with intergovernmentalism).
Neofunctionalism addresses this weakness. Neofunctionalism posits that states will undertake limited integrations in areas of common concern, and these small projects will produce a “spill-over” effect that leads to further integration in other areas. Neofunctionalism further argues that economic integration is the best guarantee of global peace and prosperity, and is a necessary precursor to further political integration. In this manner, neofunctionalism does not rely on realism or intergovernmentalism’s focus on individual actors driving integration forward: areas of acknowledged common import, such as trade or security, cry out for cooperation and the process then gathers momentum from there. Neofunctionalism makes some key assumptions, however. The theory assumes that supranational decision-making will be more efficient, but as will be discussed in Part IV-B, supranational decision-making can be more complicated than decision-making by sole actors.

Regional integrations take a number of different forms, depending on which theory of international relations its members subscribe to. By far the most common are integrations based on the “intergovernmental” form, where the regional partners each designate representatives to argue for their interests in the meetings of the partnership. These partnerships operate on the basis of consensus and sovereign equality, preventing any single partner from dominating the partnership’s policies. The other form of regional integration is

26. See ROSAMOND, supra note 18, at 51–52 (listing seven-step process that, according to neofunctionalists, would lead to regional integrations); MAJONE, supra note 23, at 42.

27. KEMBAYEV, supra note 7, at 12–13 (“Economic integration is the guarantor of a stable and peaceful international system and may ultimately lead to political unification.”).

28. See ROSAMOND, supra note 18, at 2 (“In terms of identifying key actors, . . . neofunctionalists point to supranational institutions . . . as well as national and transnational interest organizations.”).

29. See MATTLI, supra note 11, at 28 (“N]eofunctionalism leaves several important questions about integration unanswered, including: why is decision-making at the supranational level more efficient?”). The “demand-side theory” referenced in KAHLER, supra note 16, may be one answer to this question.

30. See Mary Farrell, The Global Politics of Regionalism: An Introduction, in GLOBAL POLITICS OF REGIONALISM: THEORY AND PRACTICE 1, 2 (Mary Farrell et al., eds., 2005) (“T]here are many models of regionalism around the world, with no dominant paradigm to which all countries and regions subscribe . . . ”).

31. See MATTLI, supra note 11, at 28; MAJONE, supra note 23, at 163.

32. See ROSAMOND, supra note 18, at 14 (“[International organizations] are traditionally thought of as intergovernmental bodies designed in the explicit context of converging state preferences or common interests.”).
the “supranational” form, of which the EU is the major example. In supranational integrations, the partners actually cede some measure of decision-making authority to an autonomous body outside their direct control that can bind the parties. Intergovernmental forms are often sufficient for less complex regional integration agreements; however, as integrations become more complex, supranational forms become more useful due to the ability to exercise greater autonomy from member states. Supranational forms may also suffer from “democratic deficit,” a feeling of detachment or disconnect that results when supranational bodies lose touch with (or ignore altogether) the constituents whose interests they supposedly represent. During the EU’s ongoing financial crisis, this deficit has been on display, and it is difficult to foresee what the consequences will be in the future.

Economic regional integration often leads to security integration as well. Particularly since September 11, 2001, countries recognize that the new global infrastructure enables problems around the world to quickly be transported to their own doorstep. Regional partners


34. KEMBAYEV, supra note 7, at 15.

35. See Hurrell, supra note 8, at 47 (reasoning that supranational institutions beneficially affect “cost-benefit calculations,” reduce international “transaction costs,” provide “information and transparency,” and facilitate enforcement).

36. See MIHAIL MILEV, A DEMOCRATIC DEFICIT IN THE EUROPEAN UNION? 9 (2004), available at http://www.ie-ei.eu/bibliotheque/memoires/MILEV.pdf (referencing the European Union as an example, where the European Commission and the Council “are not accountable to the national parliaments and take their decisions secretly and very often without referring to the wishes and interests of European citizens”).

37. See, e.g., John R. Bolton, EU’s Democratic Deficit, WASH. TIMES (Nov. 26, 2011), http://www.washingtontimes.com/news/2011/nov/26/eu-democratic-deficit/ (“Even if the EU-wide remedies and the requirements imposed on countries such as Greece and Italy ultimately prove to be correct financially, they come with an enormous, corrosive cost to basic concepts of representative government throughout the EU. Whether this widening of the democratic deficit ultimately will weaken the EU itself remains uncertain, but there is no doubt populist resentment is smoldering in many EU countries.”).

band together for enhanced domestic security and to protect shared interests, such as trade. Contemporary regional security groups are linked by economics and geography rather than cultural ties; this prevents groups from becoming “exclusive and culturally monistic,” which could lead to rivalry and conflict.

It is also important to note that not all regional integrations are completely successful. Enmeshing the policies or practices of a number of countries can expose some member states to the ill effects of other member states’ decisions or domestic politics. For example, in the EU there has been controversy over the open-borders program created by the Schengen Agreement as well as the aforementioned crisis over the financial status of euro zone countries such as Greece and Italy. These problems are often products of the scope of the integration itself and can be remedied or prevented altogether by careful drafting of integration agreements.

Each theory of integration has strengths and weaknesses. These strengths and weaknesses are not relevant to this study as pros and cons, necessarily; countries do not cite a particular theory or philosophy when they choose to take a particular course of action. The theories are relevant in that they provide a theoretical weapons that can cross national frontiers almost as readily as can capital or technology. . . . Rapidly evolving transportation and communication patterns are producing new security priorities.

39. See, e.g., ROSAMOND, supra note 18, at 132 (“Rational states realize [that their survival is always in question], and so seek to maximize the possibilities for their survival. . . . The emergence of alliances and forms of cooperation is a well-established rational means to the end of survival . . .”).


42. See id. (describing Denmark's fight to reinstate domestic border security due to crime, illegal immigration, and drug trafficking resulting from the lack of border checks).

43. See 'Historic Opportunity': Greece Pulls Off Debt Restructuring Deal, SPIEGEL ONLINE (Mar. 9, 2012), http://www.spiegel.de/international/europe/0,1518,820343,00.html (summarizing Greek efforts to resolve the domestic debt crisis before it significantly impacts the euro zone).

background of the area, and point to potential issues that could arise in the future. The United States-Canada paradigm offers its own unique set of policy problems and considerations for a regional security partnership, and application of any variety of theories or forms of regional integration may be appropriate. Discerning those unique problems requires a closer look at the history of the relationship between the two North American powers.

III. THE U.S.-CANADIAN RELATIONSHIP

A. Pre-9/11

If "geography is destiny," as the common saying goes, then the United States and Canada are meant for each other. The United States and Canada maintain a special, mutually beneficial relationship, and continue prosperous bi-lateral trade. The two countries maintain the longest land border between two countries in the world. Historically, the border gradually extended as the two countries expanded westward, and was clarified by a number of treaties and agreements.


46. The two countries are each other's largest foreign investor, and currently $1.6 billion of trade occurs between them per day. Canada-U.S. Perimeter Security Deal Will Benefit Both Countries, VANCOUVER SUN, June 8, 2011, http://www.canada.com/story_print.html?id=6518c41d-cc16-45df-8fec-4c975ca5046&sponsor.

47. See, e.g., Russell C. Gray, Note, Run From the Border: The United States Re-Evaluation of its Northern Boundary, 27 SUFFOLK TRANSNAT'L L. REV. 77, 77 (2003) ("Five thousand, five hundred, and twenty five miles divide the two nations, occupying nearly an entire continent.").


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As part of the special US-Canadian relationship, the two countries frequently cooperate in matters of mutual concern. These matters have often been economic in nature, owing to the prominence of each country in the other's foreign trade.\(^ {49}\) Since Canada gained control of its foreign relations and military policy the United Kingdom in the years between World War I and World War II,\(^ {50}\) the two countries have coordinated defense policies in a few instances. Prior to the United States' entry into World War II, many Canadians were concerned that Germany would overrun Great Britain and that Canada would be left without protection.\(^ {51}\) In August 1940, American President Franklin Delano Roosevelt and Canadian Prime Minister William Lyon Mackenzie King met in Ogdensburg, New York to discuss what became known as the Ogdensburg Agreement\(^ {52}\). The main result of the Agreement was the creation of the Permanent Joint Board on Defence, a group charged with managing the common defense of the two countries.\(^ {53}\)

Even then, many Canadians were concerned with the implications of ceding sovereignty. Critics asserted that the King government effectively ceded Canadian sovereignty to the Americans by giving too much operational control of Canadian forces to their American

\(^{49}\) See Gray, supra note 47, at 77 ("It is estimated by U.S. and Canadian officials that [the countries engage in] trade of more than one billion dollars per day and $475 billion annually.").


counterparts. The Agreement was soon redrafted to address these concerns. In the revised agreement, Canadian authorities reasserted control over their forces from American defense commands.

After World War II ended, the Permanent Joint Board on Defence continued its operations. The United States and Canada further enhanced mutual security by becoming members of the North Atlantic Treaty Organization (NATO). Founded in 1949, NATO was meant to act as a counterweight to the influence of the Soviet bloc. The United States and Canada remained strategic partners throughout the Cold War, further enmeshing armed forces through an agreement to operate the North American Air Defense Command (later the North American Aerospace Defense Command, and now commonly referred to as NORAD) in 1957. NORAD is structured as a bi-national command, involving both American and Canadian officers in command positions.

B. Post-9/11 – The Current System

The events of September 11, 2001 had a large impact on the United States-Canada border. Before 9/11 the northern border had relatively low security; however, after 9/11 the United States enacted various reforms aimed at “thickening” the border. The United States

54. See J.L. Granatstein, The Conservative Party and the Ogdensburg Agreement, 22 INT’L J. 73, 76 (1966) (“To the Conservative Party, then, Ogdensburg was just another Liberal attempt to abandon the [British] Empire in preference to the United States. . . . [N]o situation, however serious, could justify an American alliance.”).

55. See English, supra note 52, at 165–66 (discussing Canadian refusal to cede authority over Canadian forces and the resulting coordination of U.S.-Canada military efforts by “mutual cooperation”).


and Canada collectively enacted the “Smart Border Initiative,” a 30-point plan for strengthening security at the border. Of note, five of the points involve ensuring “secure flow of goods” while maintaining effective security. There are currently a number of United States-Canada trade and security agreements aimed at addressing the issue of border security, including Partners in Protection (PIP), Customs-Trade Partnership Against Terrorism (C-TPAT), Advance Commercial Information (ACI), Free and Secure Trade (FAST), and Customs Self Assessment (CSA).

An unintended consequence of these actions was that Canadian companies that previously relied on fast and efficient border crossings began losing money. In addition, partisan political conflicts in the United States led to the introduction of “Buy American” provisions in legislation, further damaging Canadian interests. American political bickering has also resulted in the indefinite postponement of the Keystone XL project, a $7 billion pipeline that would connect Canadian oil sands to U.S. refineries on the Gulf of Mexico. The Canadian government has lobbied hard in favor of Keystone XL, subtly hinting to American authorities that if the pipeline is not built to the Gulf of Mexico, it will be built to Canada’s west coast where the oil can be shipped to China.

cable-border-thickening/ (discussing leaked U.S. diplomatic cable indicating that “the border in most places runs smoothly”).


62. Id. (points 14–18).


Some Canadian sources advocated pursuing common security policies even before 9/11, but after 9/11 Canadians realized that trade with the United States would be jeopardized by enhanced American security at the northern border. A common security plan could allay American fears and result in easing security along the border itself, leading to an easing of trade flow. For the United States’ part, even with the enhanced security and “thickening” of the northern border, a December 2010 report indicated that only 32 miles of the 4,000-mile border were guarded by an “acceptable level of security.” This is because the northern border can be crossed on foot almost anywhere, making “effective control” difficult; however, the outer perimeter is only accessible via seaports and airports, where “effective control” is much easier to achieve.

To address these concerns, the United States and Canada proposed a “perimeter security” plan to enhance cooperation and create further cohesion between domestic security policies. Some critics (mainly, but not exclusively, Canadian) express concern about...
the perimeter security plan. They worry that Canada will cede too much of its sovereignty in a joint security plan with the United States and that the United States will impose enhanced Patriot Act–like security measures that will erode Canadian civil liberties.73 These critics tend to follow the common tendency of Canadians to assert their cultural identity in the negative: as not American.74 However, a Canadian willingness to adopt a “North American” as opposed to a not-American or “European” philosophy could lead to benefits for Canada.

The chief American concern is losing any control over homeland security policies during the war on terror.75 These concerns reflect the idea that control over national security and foreign policy is traditionally regarded as a paramount aspect of a country’s sovereignty.76 Given the substantial economic and security benefits that regional partnerships can create, however, it is possible that the


75. RESNICK, supra note 74, at 76 (“Being North American can open the door to a more capacious sense of self, to a future-oriented mentality, to a greater willingness to champion technological and scientific experimentation and individual endeavour.”).

76. See Edward Alden, U.S.-Canada Security Perimeter in 2011, SECURITY DEBRIEF (Dec. 13, 2010), http://securitydebrief.com/2010/12/13/us-canada-perimeter-security-in-2011 (“While the initiative as outlined makes tremendous sense on both sides of the border, it will face significant opposition . . . in the United States from those who favor unilateral approaches to securing the borders.”).


(“[T]here can be little doubt that foreign policy, and in particular defense policy, pinpoints even more centrally the core of a nation’s concept of control.”); RODRIGO TAVARES, REGIONAL SECURITY: THE CAPACITY OF INTERNATIONAL ORGANIZATIONS 131 (2009) (“[D]efense was considered a fundamental part of national sovereignty and few countries were prepared to give it up.”).
time has come for the United States to reevaluate the approach of preserving sole control of its security policy.78

While the United States and Canada have identified areas of common need and interest, a key step on the way to integration and cooperation,79 the critics' concerns must be answered before any serious perimeter security plan can move forward. One productive way of answering the critics' concerns is to show a successful example of similar security integration and cooperation, and then show how the U.S.–Canadian partnership might emulate that pattern. The experience of the EU since its formation in 1999 is such an example.

IV. THE EU PARADIGM

The long process of European integration began in the years following World War II. The ultimate goal of European policymakers was to prevent future conflicts by economically enmeshing the countries of Europe.80 The nascent EU system developed via Member States willingly ceding aspects of sovereignty to central supranational organizations.81 In the 1950s, these cessions were most often economic in nature; however, as predicted by the neofunctionalist theory described in Part II, these economic cessions eventually spilled over into calls for unified European foreign and security policy.82

Ceding domestic control over areas of foreign policy and security is especially significant, since these areas are traditionally among the most sacrosanct areas of a country's sovereignty.83 While some states

78. See Stadtmüller, supra note 14, at 118 ("[I]solation from [regional partnerships] is unrealistic for any state. In the long term, regional cooperation can be helpful in providing economic stabilisation and multidimensional security.").

79. See Baliño, supra note 3, at 541 ("If we can take advantage of European lessons, it will be necessary, within our own region, to identify goods and resources that may promote a pooling of interests similar to the one that coal and steel generated in Europe.").

80. See, e.g., Tavares, supra note 77, at 131 (referencing the Schuman Declaration of 1950, aimed at creating a "de facto solidarity that would ultimately make war between France and Germany materially impossible") (internal quotations omitted).

81. See Baliño, supra note 2, at 525-26.

82. See Tavares, supra note 77, at 131 ("The foreign policy of Europe was born of what was felt to be a need on the part of the member states of the European Economic Community to consult each other more effectively on foreign policy issues.").

83. See, e.g., Duquette, supra note 77, at 170 ("[T]here can be little doubt that foreign policy, and in particular defense policy, pinpoints even more centrally the core of a nation's concept of control."); Tavares, supra...
have expressed concern over the integration of European foreign policy, the process nevertheless continues today. The EU has even gone so far as to create the Schengen area, a large territory without internal border checks—perhaps the ultimate embrace of perimeter security.

A. The Evolution of the European Union's Common Foreign and Security Policy (CFSP)

The EU's roots trace back to the tumultuous years after World War II, when Western Europe sought to prevent a recurrence of World War II and to revitalize itself in order to face the Soviet bloc to the east. Following the common model of most regional integrations, the EU began due to a desire for economic collaboration. In 1950, France proposed the creation of an organization dedicated to enhancing European cooperation in coal and steel production. This group, the European Coal and Steel note 77, at 131 (“[D]efense was considered a fundamental part of national sovereignty and few countries were prepared to give it up.”).

84. See, e.g., Ben Tonra & Thomas Christiansen, The Study of EU Foreign Policy: Between International Relations and European Studies, in RETHINKING EUROPEAN UNION FOREIGN POLICY 1 (Ben Tonra & Thomas Christiansen eds., 2004) (“[T]he reluctance of member states to submit their diplomacy to the strait-jacket of EU decision-making has remained.”).


86. See STEVE MARSH & HANS MACKENSTEIN, THE INTERNATIONAL RELATIONS OF THE EUROPEAN UNION 5 (2005) (“The US had little to fear in 1947 from the USSR's military threat, but West European nations were much less secure.”).

87. See KEMBAYEV, supra note 7, at 11 (“As Haas has argued, economic integration ‘may be based on political motives and frequently begets political consequences.’”) (citing ERNST B. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES 1950-1957, at 12 (1958)).

88. Of course, this economic collaboration would also effectively prevent European states from going to war against each other. See, e.g., TAVARES, supra note 77, at 131 (referencing the Schuman Declaration of 1950, aimed at creating a “de facto solidarity that would ultimately make war between France and Germany materially impossible”) (internal quotations omitted).

89. See, e.g., MARSH & MACKENSTEIN, supra note 86, at 7 (noting that besides the economic benefits of the Community, coal and steel were
Community, survived to become one of the founding Communities of the EU.\textsuperscript{90}

The Coal and Steel Community, like other Communities of the fledgling European integration, was not focused on security or foreign policy cooperation. Gradually, European countries began to recognize the beneficial possibilities of pursuing common foreign and security policy (CFSP).\textsuperscript{91} The idea for CFSP and further European political integration was first proposed at The Hague in 1969 and was further discussed and reinforced in subsequent meetings.\textsuperscript{92} The Single European Act (SEA), which came into effect in 1987, contained the first treaty codification of CFSP.\textsuperscript{93}

In 1992, the EU was formally created by the signing of the Treaty of European Union (TEU).\textsuperscript{94} Title V of the TEU further expanded the CFSP, designating it as one of the three "pillars" of the EU.\textsuperscript{95} In less than a decade, the CFSP developed from an idea in the SEA to a central part of the nascent EU.\textsuperscript{96} Despite its prominent role in the governing scheme codified by the TEU, however, the CFSP was ineffective at best; one writer described it as a "paper tiger with teething problems."\textsuperscript{97}
The members of the EU signed the Amsterdam Treaty (AT) in 1997 and it came into effect on May 1, 1999. Rather than enhancing the effectiveness of the CFSP, the AT scaled back the ambitious CFSP language in the TEU. One of the major CFSP reforms introduced in the AT was the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy. The High Representative was charged with overall coordination of the CFSP. However, the AT did not give the High Representative much real power to carry out this mission: the High Representative could only make “proposals” to the Council for CFSP actions. Much of the Representative’s effectiveness depended on the staff work of the Representative’s officers and the Representative’s own personal persuasive abilities. Interestingly, the AT does add an objective to the CFSP: guarding the territorial integrity of the EU in accordance with United Nations principles. The reference to the integrity of the Union as a whole, rather than Member States in particular, is a curious semantic indicator of perimeter security-like thinking. This language indicates a desire to instill a “territorial security identity” for the Union.

EU members recognized that reforms were still needed, however. The Treaty of Lisbon, signed in late 2007 and entered into force on December 1, 2009, was primarily a reform treaty. The main purpose

98. Bindi, supra note 94, at 34.
99. See Murphy, supra note 96, at 899 (“If anything, the AT takes a step backwards in stating the overall aim of the CFSP”).
103. See id. at 45 (“The High Representative’s success will depend on the ability to . . . relate with the other commissioners and the member states.”); ROTHACHER, supra note 93, at 187.
104. Duquette, supra note 77, at 180.
106. See Jacob Schall Holberg, The Treaty of Lisbon—Towards an Ever Closer Union, with a Formal Withdrawal Procedure, 17 COLUM. J. EUR.
of the TOL was to adapt the earlier EU treaties to the increased size and complexity of the Union. One of the key areas of evolution and adaptation was in the area of CFSP decision-making, to be discussed below.

The TOL added responsibilities to the High Representative position, in effect creating a "double-hatted" High Representative to act as a CFSP executive. The TOL also created the European External Action Service (EEAS), a sort of "European diplomatic corps" charged with assisting the High Representative in enacting the CFSP. Some Member States expressed concern that the EEAS would be too independent and unaccountable to other parts of the Union, but further negotiations placed restrictions on the EEAS.

B. Decision-Making Processes and Voting Procedures Within the CFSP.

The evolution of the CFSP has consistently focused on the process to be used in decision-making and setting policies. Decision-making processes are critical to any attempt at regional integration: without an efficient method of making decisions, policies and actions will become haphazard and disjointed. Regional integrations must balance the national interests of member states with the recognition that "common interests can often better be realized by joint efforts" than by unilateral efforts, and adapt their decision-making processes

L. Online 11, 11–12 (2010) ("The TOL is generally understood as a reform treaty of the European Union, as opposed to a foundational treaty . . .") (emphasis original).

107. Id. ("[The TOL's] main aim was to adapt the European Union's constitutional framework in order to make it both suitable and manageable for some twenty-seven Member States.").


110. Id. at 24–25 (noting various reporting duties, budgetary controls, and staffing requirements imposed on the EEAS that strike a "good balance . . . between operative independence and Community accountability").

111. See Stadtmüller, supra note 14, at 113 (listing "an ability to act coherently" as a necessary precondition to regional security partnerships); Muschwig, supra note 4, at 20 ("The fragmentation of decision-making processes with regard to foreign policy, both within Member States and among international institutions is virtually a prescription for a lack of coherence.").

112. See Roy H. Ginsberg, Demystifying the European Union: The Enduring Logic of Regional Integration 288 (2010) ("Member states recognize that they can be more effective at less cost if they respond together to influence international issues too large for any one of them to handle well alone (concept of politics of scale)."
so that a few stubborn members cannot hold up action by the rest of the partnership.

In the EU’s CFSP, this tension over decision-making processes has most often manifested in the context of voting procedures. When not part of a regional integration, sovereign states are not obligated to accept foreign control over domestic systems and policies.\(^{113}\) In recognition of the fact that EU Member States cede control of a crucial aspect of their internal policies by agreeing to join the Union, CFSP decisions were initially required to be reached unanimously.\(^{114}\) An ongoing controversy in CFSP discussions is whether unanimity should be preserved out of respect for the importance of the decisions being made on behalf of Member States under CFSP, at the expense of decision-making efficiency.\(^{115}\)

One apparently beneficial aspect of the Amsterdam Treaty is that it emphasized decision-making rather than strict unanimity.\(^{116}\) Under the AT, the possibility of qualified majority voting on CFSP decisions such as joint actions, common positions, and common strategies was introduced, theoretically making it easier to undertake concerted action.\(^{117}\) However, any Member State that intended to oppose a measure was allowed to object and thereby prevent a vote being taken. Thus, in effect unanimity was still required.\(^{118}\) Additionally, in the AT Members are allowed to make “qualified” abstentions. A qualified abstention means that the Member is not obligated to apply the decision domestically, but has to acknowledge the decision or

113. See Holberg, supra note 106, at 13 (referring to the “principle that sovereign states are not obliged to accept foreign involvement in their internal systems” in international law).

114. Id. (noting that “[a] system based on unanimity is common in international law” and that “[a] principle of unanimity ensures that each and every Member State has the right to veto”).

115. See, e.g., KAREN E. SMITH, EUROPEAN UNION FOREIGN POLICY IN A CHANGING WORLD 25 (2003) ("[T]he member states have sought to retain control over decision-making procedures, and have jealously guarded their own autonomy, especially in the spheres of foreign and security policy . . . .").

116. See Monar, supra note 105, at 415–16 (noting the AT’s changes to the CFSP framework and pointing out “[t]he emphasis here is clearly on decisions and actions to be taken rather than simply engaging in a process”).

117. See Bindi, supra note 94, at 35 (noting that the effect of this provision is limited because it only applies to CFSP decisions made by the European Council).

118. Murphy, supra note 96, at 901.
policy as binding on the Union as a whole.\textsuperscript{119} However, if a sufficient number of Member States, constituting a sufficient amount of the EU's population, abstain in this manner, the decision will be rejected.\textsuperscript{120} The disjointed nature of these decision-making processes potentially removes legitimacy from CFSP decisions and leaves individual Members with more power.\textsuperscript{121} This compromise, seemingly giving "abstentionists" more power to block CFSP decisions in return for the possibility of majority or qualified-majority voting on some issues, is indicative of the Union's muddled priorities when it comes to CFSP decision-making.\textsuperscript{122}

It is interesting to note that the EU's concern with unanimous voting overlooks the example of NATO, which seeks "consensus" in every aspect of its decision-making processes.\textsuperscript{123} NATO members communicate effectively among themselves to harmonize national policies to the extent possible, preventing any diminished effectiveness due to decision-making difficulties.\textsuperscript{124} There are a number of possible reasons for NATO's increased efficiency vis-à-vis the CFSP. First, NATO consensus is achieved not by affirmative voting, but by asking if a member explicitly objects to a proposal.\textsuperscript{125} This allows a country to effectively abstain, refusing to voice its dissension on the record if it knows that the majority of other members wish to take an action. A member state can thereby remove itself from the process without

\begin{itemize}
\item \textbf{119.} See Duquette, \textit{supra} note 77, at 185 ("If the Member State's abstention is 'qualified,' then the Member State is not obliged to apply the decision, but must accept that it binds the Union.").
\item \textbf{120.} See BERMANN ET AL., \textit{supra} note 92, at 1124 ("If the Member States qualifying their abstentions in this way represent more than one-third of the Member States comprising more than one-third of the EU population, the decision would not be adopted.").
\item \textbf{121.} See ROTHACHER, \textit{supra} note 93, at 189 ("T\text{[T]}his fragmented structure for decision-making has all the trappings of multiple hybrid compromises with individual member states remaining the key actors.").
\item \textbf{122.} See Monar, \textit{supra} note 105, at 421 (noting that some Member States are "so desperately attached to majority voting as an ideology" that they are willing to "pay any price for any sort of progress" to that goal).
\item \textbf{123.} See PAUL GALLIS, CONG. RESEARCH SERV., RS21510, NATO'S DECISION-MAKING PROCEDURE 2 (2003), available at http://www.au.af.mil/au/awc/awcgate/crs/rs21510.pdf ("Consensus is clearly differentiated from 'unanimity,' which NATO does not seek. Unanimity would require an actively stated vote in favor of a measure.").
\item \textbf{124.} See Duquette, \textit{supra} note 77, at 188-89 ("[NATO members] exchange information and opinions and disclose plans for national operations . . . all with the goal of ensuring that national policies complement, or at least do not hinder, NATO policy.").
\item \textbf{125.} TAVARES, \textit{supra} note 77, at 147.
\end{itemize}
having to hold up or derail the decision, as can happen in CFSP decision-making procedures.\textsuperscript{126} Second, countries may use the "silence procedure," where they deliver a private letter to the NATO Secretary-General stating objection to a proposed course of action.\textsuperscript{127} The "silence procedure" allows countries to make their objections known without confrontation, and potentially without being leaked to the press, further streamlining decision-making.\textsuperscript{128} Third, NATO's narrower role as a defense organization may naturally lead to fewer disputes when compared to the CFSP's larger role in EU affairs.\textsuperscript{129}

In addition to the occasionally convoluted voting procedures, the CFSP involves numerous EU committees and councils in CFSP decision-making.\textsuperscript{130} The Council of Ministers and the European Council have the leading roles, but the Commission is also heavily involved and the European Parliament is given an advisory role.\textsuperscript{131} This plethora of agencies creates the possibility of a "too many cooks in the kitchen" scenario, whereby CFSP decisions are negatively affected due to the overabundance of voices providing input.\textsuperscript{132}

C. Availability of Different Forms of CFSP Actions

In order to alleviate these potential problems, CFSP decision-makers are able to utilize a number of different forms of action available to them. Which action is taken depends on political will and

\textsuperscript{126} See Gallis, supra note 123, at 3 (describing the NATO decision to intervene in Kosovo, where the Greek government was not in favor of the action but maintained silence so as not to impede the decision-making process).

\textsuperscript{127} See Tavares, supra note 77, at 147.

\textsuperscript{128} See Gallis, supra note 123, at 3 (noting the confrontation-avoidance and media-control benefits associated with the silence procedure, as well as that the procedure allows countries to not send a letter if they do not wish to appear out of touch with allies' actions).

\textsuperscript{129} See id. at 5 ("The EU is different in nature from NATO. The EU must grapple with issues involving the sharing of national sovereignty on a wide range of issues.").

\textsuperscript{130} See Monar, supra note 105, at 421–22 (describing the role of the European Council and the Council of Ministers in CFSP decision-making after the AT).

\textsuperscript{131} See Murphy, supra note 96, at 883–84.

\textsuperscript{132} For an examination of one incident where fragmented CFSP decision-making resulted in embarrassment for Union members, see Jörg Monar, Editorial Comment: The CFSP and the Leila/Perejil Island Incident: The Nemesis of Solidarity and Leadership, 7 EUR. FOREIGN AFF. REV. 251 (2002).
the needs of the situation. There are three types of CFSP action: common positions, joint actions, and common strategies.133

Common positions are broad directives governing Members’ conduct on an issue of a “geographical or thematic nature.” 134 For instance, economic sanctions are frequent subjects of common positions.135 Member States must implement common positions in domestic policies, and Member States must adhere to the common position in international forums.136 However, the exact manner of implementation is left up to each Member State. Under the TEU a common position is supposed to be taken only after unanimous vote; however qualified majority voting is allowed in some circumstances.137

The difference between common positions and joint actions is mainly that joint actions imply the Union is actually taking action in a matter.138 For instance, past joint actions included election monitoring in Russia and South Africa, providing humanitarian aid to Bosnia, and promoting the extension of the nuclear Non-Proliferation Treaty.139 Member States are required to observe and implement the directives of a joint action in their own policies.140 Under the TEU, CFSP decision-makers could only consider a joint action on a matter

133. See, e.g., MARSH & MACKENSTEIN, supra note 86, at 64–65 (2005).
134. See SMITH, supra note 115, at 44.
135. See, e.g., CLARA PORTELLA, EUROPEAN UNION SANCTIONS AND FOREIGN POLICY: WHEN AND WHY DO THEY WORK? (2010) (mentioning frequent use of common positions to enforce sanctions); Bindi, supra note 94, at 28 (noting that between November 1993 and May 1995, fourteen common positions were adopted, “mainly concerning economic sanctions against third parties”).
136. See GINSBERG, supra note 112, at 256 (“In a common position, the member states are obliged to comply with an EU position in the implementation of their national foreign policies.”).
137. See Murphy, supra note 96, at 879–80 (“In a Declaration incorporated into the Final Act of the adoption of the TEU, the Member States agreed that, within CFSP, whenever the Council is to act by unanimity, they would to the extent possible avoid preventing a unanimous vote if a qualified majority favors the decision.”) (internal quotation omitted).
138. See, e.g., SMITH, supra note 115, at 38 (noting that the “action” taken can be as simple as spending money).
139. See Bindi, supra note 94, at 28 (describing various joint actions the Union has undertaken).
140. Duquette, supra note 77, at 183 (“Once the Council adopts a joint action, the Member States must align their foreign policy as necessary.”).
if the European Council referred the matter to them.\textsuperscript{141} This limited the efficacy and efficiency of CFSP decision-making, but served as a political check on undesirable CFSP decisions.\textsuperscript{142}

The AT added a form of action called common strategies.\textsuperscript{143} Common strategies are designed to be less “tactical” than common positions or joint actions, and must clearly state goals and objectives.\textsuperscript{144} It is unclear, however, whether common strategies specifically bind Member States to implementing the policy or position of the common strategy.\textsuperscript{145} The ambiguity of common strategies can also lead to ineffective implementation in the real world,\textsuperscript{146} and the use of common strategies is rare.\textsuperscript{147} Consequently it still appears that for any CFSP policy to have real effect, one of the larger Members such as France, Germany, or Great Britain must advocate for or enforce it.\textsuperscript{148}

\textbf{D. Deference to Outside Bodies}

One of the more effective ways the CFSP has been structured is in its deference to outside bodies. The voting procedures discussed above provide some measure of protection to Member States insofar

\begin{itemize}
\item \textsuperscript{141} See Murphy, \textit{supra} note 96, at 881 (“The Council of Ministers is to decide whether a matter should be the subject of a joint action on the basis of guidelines furnished by the European Council.”).
\item \textsuperscript{142} See Duquette, \textit{supra} note 77, at 183 (“Joint actions will arise only where there is a political will to do so.”).
\item \textsuperscript{143} Bindi, \textit{supra} note 94, at 35.
\item \textsuperscript{144} See SMITH, \textit{supra} note 115, at 14 (“[Common strategies] list the Union’s goals vis-à-vis particular third countries and envisage the use of a wide variety of different instruments . . . to achieve them.”).
\item \textsuperscript{145} See Duquette, \textit{supra} note 77, at 184 (“The [AT] does not, however, specifically provide that common strategies shall commit the Member States, which leaves the issue of their binding nature open to interpretation.”).
\item \textsuperscript{146} For a case study of the ineffectiveness of one common strategy, see Claire Spencer, \textit{The EU and Common Strategies: The Revealing Case of the Mediterranean}, 6 EUR. FOREIGN AFF. REV. 31, 48 (2001) (“The main weakness of the [Common Mediterranean Strategy] is that (paradoxically) it does not read as a ‘strategy’ at all . . . . [T]he document does not establish a clear hierarchy of short, medium and long-term objectives towards achieving [its goals].”).
\item \textsuperscript{147} See Bindi, \textit{supra} note 94, at 35 (noting that the use of common strategies was “quickly dropped” because they “offered no real added value” to common positions and joint actions).
\item \textsuperscript{148} See Spencer, \textit{supra} note 146, at 51 (“The real problem, as ever, is that unless one or more of the larger Member States champions the policy in question, it is unlikely that anything of substance will occur as a result of ‘common strategies.’”).
\end{itemize}
as the use of (or failure to use) unanimous voting impacts Member States’ ability to “trump” CFSP action in protection of their own national interests. The CFSP’s structure is also designed to allow Member States to meet responsibilities under the CFSP while still maintaining compliance with and meeting other treaty obligations.\textsuperscript{149} For instance, Article 47 of the TEU protects European Communities’ right of action where those rights overlap with aspects of CFSP.\textsuperscript{150} Article 42(2) of the TEU states that CFSP policies and decisions must be in accord with NATO policy, and CFSP actions or policies cannot interfere with Member States’ obligations to NATO.\textsuperscript{151} The CFSP also realizes and embraces NATO’s goals of expanding membership east into the former Soviet bloc and preventing “the development of gray areas and dividing lines.”\textsuperscript{152} This may be a nod to a European conception of perimeter security.

E. Enforcement Provisions

One of the areas where the CFSP is generally lacking is in the enforcement mechanisms available to decision-makers to ensure compliance with CFSP policies.\textsuperscript{153} Article M of the TEU provides that the European Court of Justice (ECJ) may review questions with respect to the line between the EC Treaty and the CFSP.\textsuperscript{154} Otherwise, the ECJ’s role in CFSP actions is extremely limited.\textsuperscript{155} Thus the main enforcement mechanisms of CFSP decisions are

\textsuperscript{149} For instance, CFSP policies must be compatible with NATO policies and CFSP actions cannot interfere with Member States’ obligations to NATO. See Duquette, supra note 77, at 177.

\textsuperscript{150} Id. at 175.

\textsuperscript{151} Id. at 177; BERMANN ET AL., supra note 92, at 1125; Treaty on European Union, 7 February 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253.

\textsuperscript{152} Muschwig, supra note 4, at 39.

\textsuperscript{153} See PATRICIA MAGALHÃES FERREIRA ET AL., EUR. CTR. FOR DEV. POLICY MGMT., THE EU’S COMMON FOREIGN AND SECURITY POLICY: OPPORTUNITIES FOR A MORE EFFECTIVE EU RESPONSE TO CRISIS-AFFECTED COUNTRIES IN AFRICA 17 (2001) (“There are no provisions for imposing penalties on EU Member States that do not live up to their commitments . . .”).

\textsuperscript{154} See Murphy, supra note 96, at 893–94 (“Article M [of the TEU] is within the competence of the Court of Justice. Thus, questions with respect to the line between the EC Treaty and CFSP are justiciable.”); Treaty on European Union, 7 February 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253.

\textsuperscript{155} FERREIRA ET AL., supra note 154, at 17 (“[T]he European Court of Justice [is not] allowed to make rulings in this area.”).
political pressure and treaty obligations under the TEU.156 Where these mechanisms prove ineffective, it is possible that pervasive public opinion may be able to play a role in influencing decision-making and enforcement.157

V. UNITED STATES-CANADA PERIMETER SECURITY

The proposed United States-Canada perimeter security plan has attracted a number of critiques from voices on both sides of the border. When applying the lessons learned from regional security integration in the EU to address these concerns, it is important to remember the nature of the United States-Canada situation. The long history of cooperation between the countries and the unique circumstances underlying the United States-Canada paradigm vis-à-vis the EU model are of particular relevance.

On the Canadian side, the concerns over perimeter security echo the worries voiced by critics as early as the Ogdensburg Agreement in the 1940s. First, the critics worry that by ceding some measure of security policy control to the United States, Canada is effectively ceding sovereignty to the Americans.158 Second, the critics claim that any perimeter security plan will force increased security measures on Canadian society, leading to Patriot Act-like domestic policies that will chill Canadian civil liberties.159 Third, the critics argue that by aligning itself ever more closely with the United States, Canada is effectively doubling down on what looks like an increasingly unstable bet due to American political strife and foreign policy

156. See Duquette, supra note 77, at 184 (acknowledging the importance of political pressure and treaty obligations to enforcing CFSP decisions, but “[admitting], however, there is no provision stating that legal action can be taken against a Member State that does not comply with a CFSP provision”).

157. For the argument that public opinion will begin to play an important role in European Union foreign policy decision-making and enforcement, see Kai Oppermann & Alexander Hōse, Public Opinion and the Development of the European Security and Defence Policy, 12 EUR. FOREIGN AFF. REV. 149 (2007).

158. See, e.g., Gabriel, supra note 6 (“The end results of a fully integrated continental security perimeter could sacrifice what is left of Canadian sovereignty and independence.”).

159. See, e.g., Chase, supra note 73 (“The [perimeter security] deal could trigger concerns over privacy and sharing of information with the U.S. Department of Homeland Security, but the [Beyond the Border] statement says a deal would respect sovereignty, privacy and civil liberties.”)
entanglements. Fourth, many Canadians are upset that the negotiations on the perimeter security plan are being conducted in private between the two governments, with little to no consultation with the public. Bearing those concerns in mind, there are a number of lessons to be learned and applied from the experience of the EU.

In any successful security partnership, the parties must willingly subordinate purely national interests to pursue the interests of the partnership. A party pursuing national interests detracts from the pursuit of the common interest. Even if the party pursues a goal consistent with the ultimate goals of the partnership, it is better to have joint action pursued concurrently by all members than to attempt to aggregate consistent unilateral actions.

In the same vein, it is important to balance and equalize the role of each partner. One of the quickest ways to create controversy in a partnership is if there is a perception that one of the parties has a disproportionate influence on the partnership’s decision-making. In the EU this is a very complex issue due to the number of states involved, but the United States-Canada security perimeter situation is obviously only bilateral in nature. However, Canadians still worry that any perimeter security plan would involve the United States gaining unfair influence over Canadian policies.

These concerns must be addressed by limiting the scope of any plan to strictly areas of mutual concern. Such a narrowing of focus could be beneficial overall: recall the comparison in Part IV-B

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160. See, e.g., Whittington, supra note 65 ("Things have reached the point where Canadian policymakers and business are urgently rethinking the country’s economic strategy, which for decades has hinged on maximizing trade south of the border.")

161. See, e.g., Kennedy, supra note 73 (noting critics’ concerns that perimeter security talks were being conducted in secret).

162. See Ginsberg, supra note 112, at 288 ("Member states recognize that they can be more effective at less cost if they respond together to influence international issues too large for any one of them to handle well alone (concept of politics of scale)."").

163. See Murphy, supra note 96, at 878 ("The aggregate effort of the Member States may be more effective than unilateral action of the members, even when the unilateral actions are consistent with each other.").

164. See, e.g., Muschwig, supra note 4, at 15 (noting the European Union’s goal to “adjust[] the predominance of the United States in the area of military co-operation”).

165. See, e.g., Gabriel, supra note 6 ("The end results of a fully integrated continental security perimeter could sacrifice what is left of Canadian sovereignty and independence. This could bring its military, security and foreign policy under the umbrella of a single, U.S.-dominated North American Command.").
between NATO's narrow role and resulting cohesiveness relative to the CFSP.\textsuperscript{166} Additionally, some of the pitfalls of regional integrations mentioned in Part II could be alleviated by narrowing the scope and focus of any U.S.-Canadian agreement. It is highly unlikely, if not outright impossible, for the United States and Canada to create an entirely supranational body to oversee perimeter security; therefore, there should be no concerns with democratic deficit as there are in the EU. Additionally, the EU's problems with transborder crime, illegal immigration, and its ongoing fiscal crisis, can be avoided entirely by limiting the focus of the perimeter security plan to strictly security issues and avoiding over-enmeshment of each country's domestic politics.

A. A New Agency?

The Action Plans released by the respective governments on December 7, 2011 call for extensive coordination between various agencies and departments of the two countries, as well as the creation of various working groups.\textsuperscript{167} However, the myriad agencies involved can lead to confusion and potentially a needless repetition of effort. The December 7 Action Plans address this need for centralized oversight by creating an "Executive Steering Committee," consisting of officials from both countries who are tasked with overseeing implementation of the Action Plan.\textsuperscript{168} The Executive Steering Committee is expected to release yearly reports on its progress.\textsuperscript{169}

The Executive Steering Committee is a laudable recognition of the need for centralized oversight, but it does not go far enough. The most effective means of enacting any perimeter security agreement would be the creation of a joint U.S.-Canadian agency charged with overseeing the coordination of security perimeter policies. This new agency could take a variety of forms. For one, the High Representative/EEAS paradigm used by the EU\textsuperscript{170} can be easily

\textsuperscript{166} See generally GALLIS, supra note 123, at 5.


\textsuperscript{168} American December 7 Action Plan, supra note 167, at 27 (noting that the Executive Steering Committee will be made up of "Assistant Secretary/Assistant Deputy Minister-level" officials).

\textsuperscript{169} Id.

\textsuperscript{170} See Cellerino, supra note 101, at 22.
adapted to U.S.-Canadian purposes. The role of a powerful executive figure is of particular importance. A unified executive is necessary in order to present coherent external representation of the perimeter security organization and its policies, and even more importantly to ensure continuity of perimeter security policies and operations in the face of rapidly changing American and Canadian political landscapes.171 This central executive could be appointed on a basis similar to existing joint U.S.-Canadian commands such as NORAD. In this manner a second-in-command of the opposite nationality would counterbalance the power of the executive position in order to preserve fairness to each country.172

If the United States and Canadian governments prove unwilling to add or create a new agency or department charged with overseeing perimeter security, there are a number of existing security forces suitable for enforcing perimeter security policies. On an agency level, the U.S. Department of Homeland Security and the Canadian Department of Public Safety and Emergency Preparedness (informally known as Public Safety Canada) would be candidates to enforce perimeter security programs.173 On a more tactical, on-the-ground level, the U.S. Coast Guard, U.S. Border Patrol, and the Royal Canadian Mounted Police would be likely candidates for this type of role. Indeed, the December 7 Action Plans call for increased cooperation between the Coast Guard and its Canadian counterpart.174 The Plans also call for two “Next-Generation” programs to coordinate intelligence and criminal investigations and to provide for an “intelligence-led uniformed presence” at points of entry;

171. See Muschwitz, supra note 4, at 34 (noting the importance of the High Representative to ensuring CFSP continuity due to the fact that the Council Presidency of the European Union changes every six months).

172. Note, for example, the rotation of Canadian generals at NORAD (including the deputy commander of NORAD, who is always Canadian) acting as “assessors” who examine intelligence data to determine if North America is under attack. See Joseph T. Jockel, Four U.S. Military Commands: NORTHCOM, NORAD, SPACECOM, STRATCOM – The Canadian Opportunity 5 (Inst. for Research on Pub. Pol’y, no. 2003-03), available at http://www.irpp.org/wp/archive/wp2003-03.pdf (“The United States would trust the military of no other ally in the assessor position, not even the British.”).

173. The December 7 Action Plans call for comprehensive involvement of these two agencies throughout the planning of perimeter security policies, reflecting the capability of each to assert control over the full panoply of perimeter security functions if need be. See American December 7 Action Plan, supra note 167.

174. See id. at 21 (calling for "regularization" of the U.S-Canadian Shiprider program).
these Next-Generation programs are to be deployed in summer 2012.175

If the American and Canadian governments do not wish to add another committee or agency to their already burgeoning bureaucracies, there are a number of existing bodies that could be repurposed for this role. For instance, the Permanent Joint Board on Defence (PJBD), created by the Ogdensburg Agreement, could assume responsibility for perimeter security policy-making. If an existing body could not assume these responsibilities, the accumulated institutional knowledge of those bodies could nevertheless be usefully applied to the newly created perimeter security agency. For instance, the PJBD’s use of consensus in decision-making rather than strict majority voting176 could be an effective basis for a new agency’s decision-making process.

Whatever form the perimeter security agency takes, it will be crucial to manage the “capability-expectation gap.”177 In essence, the agency must be given the actual ability, physically and administratively, to accomplish the tasks it is given. The initial attempts at a EU CFSP were doubted because outside parties did not believe the Union had given itself the means to achieve the lofty objectives of the CFSP.178 The December 7 Action Plans’ proposal for an Executive Steering Committee is distressingly lacking in any language granting the Committee actual power to achieve its directive. Though the United States and Canada would likely face domestic pressure to limit the power of an intergovernmental perimeter security agency, it is essential that each government resist these calls and cede to the agency the necessary power to accomplish the goals that each country has for it. If nothing else, the Executive Steering Committee should be given some measure of budgetary control over the agencies it oversees so as to be able to exert real pressure on them if necessary.

175. Id. (noting that the Next-Generation pilot programs are to integrate the experience gained from Shiprider and the “best practices” from Integrated Border Enforcement Teams and Border Enforcement Security Task Forces).

176. See Keenleyside, supra note 45, at 54–55 (“Throughout [1940–45] no decision was ever taken by a majority vote. Matters were discussed until agreement was reached.”).

177. For an in-depth examination of the capability-expectation gap, and the argument that the gap is a result of inefficient CFSP decision-making rather than lack of actual European Union capabilities, see Asle Toje, The Consensus-Expectation Gap: Explaining Europe’s Ineffective Foreign Policy, 39 SECURITY DIALOGUE 121 (2008).

178. See Duquette, supra note 77, at 190–91 (“After the [TEU] introduced the [CFSP], there was real concern as to whether the Union had the capability to meet its intended goals.”)
B. Decision-Making Processes in the New Agency

Whatever organization is created or repurposed to oversee perimeter security policy, the U.S. and Canadian governments would do well to heed the lessons the CFSP provides in relation to collective security decision-making. One way for negotiators to address Canadian concerns would be to incorporate a highly streamlined and (relatively) transparent decision-making process.

The United States-Canada perimeter security framework should avoid the “too many cooks in the kitchen” problem of the CFSP and limit perimeter security policy-making to the designated inter- or supra-governmental agency. Given the bilateral nature of the perimeter security plan, simple unanimous or qualified majority voting will not work: either country would effectively have a veto power over undesired actions or policies proposed by the other. The most effective method for decision-making would be to create a secretariat within the perimeter security organization. This group would be made up by equal numbers of United States and Canadian representatives, who would all have equal voting power. While it could be argued that the representatives would only vote along nationalistic lines, thus resulting in ties on every contentious vote, the commanding executive of the perimeter security agency at that time could serve as a tie-breaking vote if necessary.

An analogy could be drawn to the success of panels implemented pursuant to Chapter 19 of the North American Free Trade Agreement (“NAFTA”). These bodies are empanelled to adjudicate NAFTA trade disputes outside the normal judicial process of the member countries. Annex 1901.2 of NAFTA provides a set of procedures for the creation of a roster of qualified, unbiased candidates to serve on NAFTA’s bi-national panels. While inevitably controversial at times, the Chapter 19 panels have been a success and could serve as a useful model for adjudicating perimeter security disputes.

179. See generally, Gabriel, supra note 6; See also, KAREN E. SMITH, EUROPEAN UNION FOREIGN POLICY IN A CHANGING WORLD 25 (2003) (“[T]he member states have sought to retain control over decision-making procedures, and have jealously guarded their own autonomy, especially in the spheres of foreign and security policy . . . .”).


182. See Pan, supra note 180, at 445–46 (concluding that the success of “the Chapter 19 experiment demonstrates that international adjudication of international issues can replace domestic adjudication and should be expanded into other areas of law”).

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The December 7 Action Plans only mention decision-making in the context of border screening, saying that each country will “maintain its right to independent decisionmaking [sic] and risk assessment.” This statement may be a warning sign that U.S. and Canadian negotiators are reluctant to cede real decision-making power to any centralized perimeter security agency. Such reluctance could create problems for any perimeter security plans down the road: what will happen when the United States or Canada decides to exercise its independent decision-making power to enact a policy the other country does not agree with?

It is important to note that concerns of unilateral national interests trumping bilateral perimeter security interests may be much ado over nothing anyway. H.L. Keenleyside, one of the original Canadian members of the PJBD, reported that “one of the most interesting and most gratifying features of the discussions within the [PJBD] was the fact that divisions of opinion seldom occurred on strictly national grounds.” More often, disagreements occurred on the basis of service branch or civilian/military grounds. It is possible that if confronted with shared problems in the same manner the PJBD was in Keenleyside’s day, any joint U.S.-Canadian organization could operate in a similarly nationality-neutral manner.

C. Review and Enforcement Mechanism

Another crucial aspect of any successful United States-Canada security partnership is a form of judicial review or accountability. As mentioned above in Part IV-E, one of the main problems with the EU’s CFSP is that there is no effective method for requiring compliance with CFSP policies other than reliance on political pressure and treaty obligations. In the bilateral United States-Canada relationship, political pressure is unlikely to be sufficient to change the mind of a recalcitrant partner.

Additionally, the creation of an effective mechanism for ensuring accountability could ease Canadian concerns about erosion of civil liberties and Canadian sovereignty. The December 7 Action Plans call for a “joint statement of joint United States-Canada privacy

183. American December 7 Action Plan, supra note 167, at 8 (“The United States and Canada do not intend to enforce each others’ laws; instead, the intent is to share information to enable each country to have better information to enforce and administer its own laws.”).

184. Keenleyside, supra note 45, at 55.

185. Id.

186. See id. at 50-77.

187. See FERREIRA ET AL., supra note 153, at 17 (“There are no provisions for imposing penalties on EU Member States that do not live up to their commitments . . .”).

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principles” to be issued by May 30, 2012. This statement is intended to assuage Canadian fears of erosion of civil liberties, but falls short of actually guaranteeing concrete protection of the privacy principles to be expounded. A more tangible protection and enforcement mechanism, as well as an avenue for relief in case of violation, is needed.

The proposed enforcement mechanism could take a number of forms. The United States and Canada have used the International Court of Justice (“ICJ”) to decide disputes in the past, such as in the Gulf of Maine case. A similar ICJ special chamber could be formed to deal with issues relating to the enforcement of perimeter-security decisions. If a more expeditious dispute resolution procedure is desired, the two countries could agree to simple arbitration to settle any disputes. Each government could appoint an equal number of representatives, and then those representatives could collectively elect a perceived neutral party to serve as a tie-breaking vote if necessary. As discussed above, bi-national committees organized along the lines of NAFTA Chapter 19 could likely prove successful as well.

Whatever form the enforcement or review body takes, it is crucial that the body operate as publicly as possible. By making its decisions in public, to the extent possible while still observing national security requirements, the mechanism could show citizens of each country that their privacy interests are still being protected even as their security is improved.

VI. CONCLUSION

The complexity of the EU is without parallel in terms of regional integration. The fact that a multinational body of the EU’s complexity has successfully managed to construct a coherent common

188. See American December 7 Plan, supra note 167, at 27.


190. As noted above, transparency is one of the key concerns of Canadian critics of the perimeter security plan. See, e.g., Dana Gabriel, Canada-U.S. Deep Integration: Establishing the Bi-National “Security Perimeter”, GLOBAL RESEARCH (Mar. 31, 2011), http://www.globalresearch.ca/PrintArticle.php?articleId=24059 (noting a recent poll result that 91% of Canadians “say the [perimeter security] negotiations should take place in public so that [Canadians] can see what is on the table”).

191. See Muschwig, supra note 4, at 37 (“The economic and bureaucratic complexity of integration of the European Union does not have a counterpart within the areas of foreign and security policies.”).
foreign and security policy indicates that the United States and Canada should be able to do the same. A United States-Canada security perimeter can work, but the negotiators must be careful in how they structure the resulting partnership. Weak or ineffective half-measures will meet neither country's goals, and could decrease rather than increase each country's homeland security. Rather, the United States and Canada should commit to a sensibly "broad, ambitious and complex approach." The two countries would do well to heed the example of how the EU has shaped its common foreign and security policy since the TEU. Specifically, the United States and Canada should form an organization dedicated to overseeing the common partnership policies, and to endow that organization with a powerful executive and an effective implementing arm. The decision-making policies of the organization should be streamlined to the maximum extent possible while still preserving the reserved national security prerogatives of each country.

In order to alleviate concerns about erosion of civil liberties and national sovereignty, negotiators should also strive to structure the partnership so that a judicial body or arbitral group along the lines of a Gulf of Maine tribunal or NAFTA Chapter 19 panel can review decisions of the joint organization. By taking measures such as these, the American and Canadian governments can ensure that any resulting joint security partnership and security perimeter will be an effective and sustainable national security measure, and a possible precursor to further mutually beneficial integrations in the future.

Despite Carl Sandburg's admonition, fences are coming down between neighbors around the world. Removing the fence between the United States and Canada, and relocating the fence-posts to the outer perimeter of the two countries' border, is a worthy goal that will reap large benefits for both countries.

192. Balluño, supra note 3, at 547.