# PING-PONG ASYLUM: RENEGOTIATING THE SAFE THIRD COUNTRY AGREEMENT

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## SUMMARY

Asylum seekers crossing the U.S. border into Canada deserve to have their claims dealt with in a timely manner. To accomplish this, Canada should dedicate more resources to processing claims, rather than finding new ways to force these people back into the U.S. by renegotiating the Safe Third Country Agreement (STCA) between the two countries.

During the two years leading up to February 2019, the RCMP intercepted some 42,000 asylum seekers at the border, which amounted to one-third of all asylum claims in that time. Another 70,800 asylum claimants arrived at official ports of entry or applied for asylum from inside Canada.

The STCA permits Canada to return asylum seekers to the U.S. if they first arrived in that country, and vice-versa. However, the STCA applies only to official ports of entry and not to asylum seekers that cross the border illegally. American sentiment at the time the pact was signed held that border officials could only be accountable for areas where they were physically present. However, this gives asylum seekers an incentive to avoid crossing at ports of entry.

Clearly, it is impossible to staff every kilometre of the border between the two countries. But renegotiating the STCA to give officials the power to return to the U.S. all asylum seekers crossing the border at any point, is not the solution. The legalities of such an amendment, including its constitutionality, are murky and there are non-legal pros and cons involved with renegotiating the pact.

There is already a sizable backlog of asylum claims from people who cross at ports of entry. Returning those who cross elsewhere to the U.S. would ease this caseload, and these claimants would still get a fair refugee hearing in the U.S. However, expanding the treaty to include all asylum seekers, regardless of how they enter Canada, may deter those with legitimate claims who are applying for refugee status through regular means at ports of entry or from inside Canada as students or tourists.

Amending the STCA could serve to deter asylum seekers with trivial claims, but people afraid of being turned back to the U.S. might also resort to evasive and riskier measures. They might choose more isolated routes to cross the border and then live for long periods of time illegally in Canada.

It would be far better to hire more personnel and invest in other resources to speed up the overall claims process. This would reduce both the backlog and the potential for new border crossings. When wait times for processing are long, asylum seekers may decide the chance to work, and the opportunity to receive health care and social assistance, are worth the risk of being rejected farther down the line.

Border crossings by asylum seekers have dropped significantly in the past two years. Reducing claim processing times instead of amending the STCA means saving money that might otherwise be spent on providing health care and social assistance to claimants taking their chances on a lengthy process to live here illegally. When processing times are speeded up, legitimate refugees would be dealt with more quickly and those with dubious claims would think twice about crossing illegally.

Canada's debate on border security should focus, not on a solution mired in more legalities, but on creating efficient and effective bureaucratic responses to processing asylum claims.

## INTRODUCTION

From January 2017 to February 2019, the RCMP intercepted approximately 42,000 asylum seekers crossing the Canada-U.S. border (Government of Canada 2019). Asylum seekers intercepted by the RCMP represented just over one-third of all asylum claims over this period. Another 70,800 other asylum seekers claimed protection at a Canadian port of entry upon arrival or at an inland office after having resided in Canada with a form of temporary work, study or visitor status.[1] By contrast, since January 2017, a little more than 607,500 permanent residents arrived in Canada through legal economic, family and humanitarian channels (Government of Canada 2017b).

Recent polling suggests that border security is the most salient immigration issue among the Canadian public (Ipsos 2019). Despite these perceptions, border crossers represent only a fraction of the total asylum claim backlog, an inventory of pending cases of people seeking protection in Canada on the basis of fear of persecution in their home country. In February 2019, 4,170 new asylum claims were registered, of which 808 individuals were intercepted at the Canada-U.S. border, making those border claims less than 20 per cent of the total in that month (Immigration Refugee Board 2019). In August 2018, during summer months when border crossings tend to be higher, 4,965 new claims were registered, while the RCMP intercepted 1,747 asylum seekers crossing the border (35 per cent of all claims in August 2018). The comparison of border crossings versus all claims by month is shown later in this report in Figure 5.
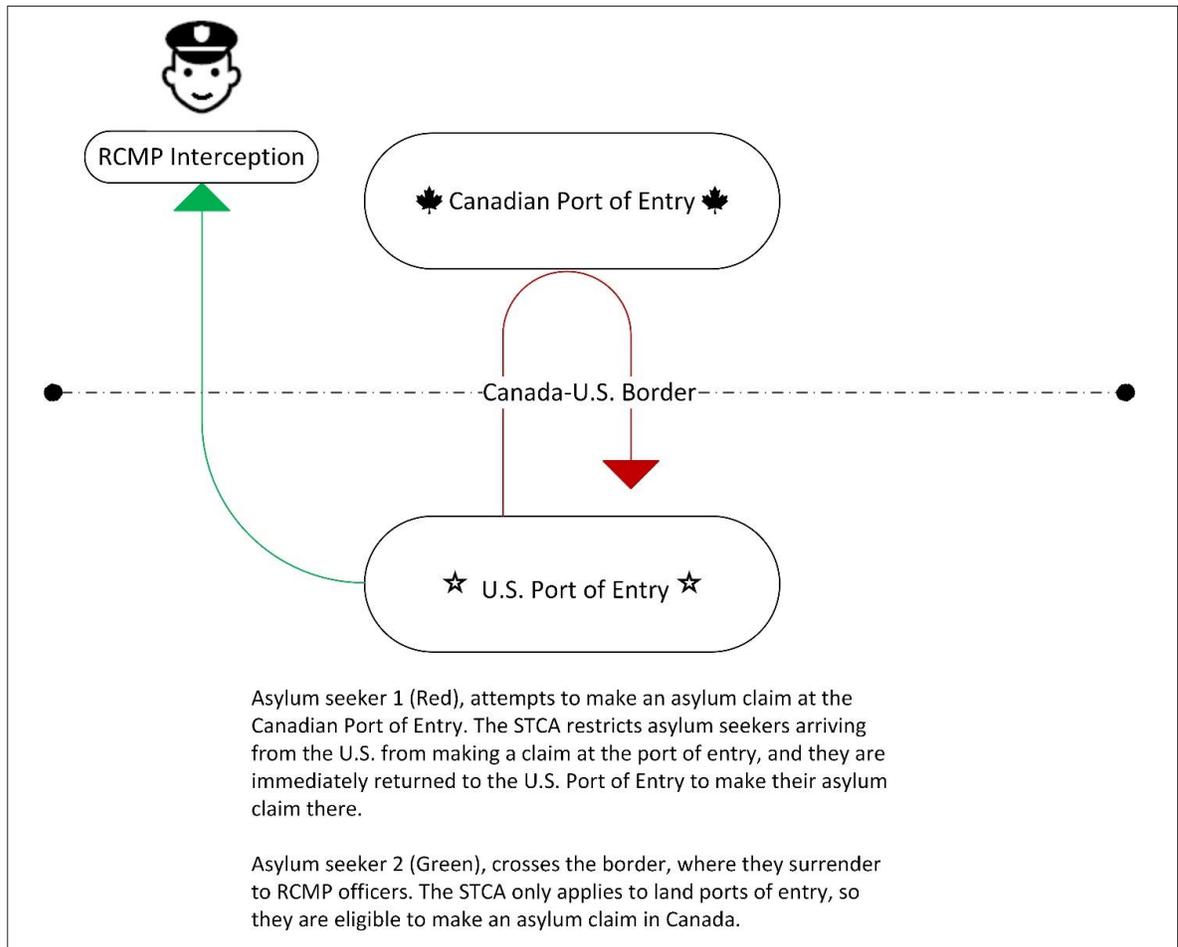
To reduce crossings, the Canadian government is currently exploring renegotiating the Safe Third Country Agreement (STCA) with the United States. This policy brief outlines possible benefits and drawbacks of renegotiating the STCA. It begins with describing the current backdrop to renegotiation of the agreement, including the rise and fall of border crossings, as well as how the STCA works in practice. It then describes reasons why a renegotiated STCA may stem increases to the asylum claim backlog, while also outlining other potential impacts and downsides to a modified agreement. It concludes by proposing alternative solutions to renegotiating the STCA that do not carry the same potential downsides.

## THE SAFE THIRD COUNTRY AGREEMENT IN PRACTICE

The purpose of the STCA, which was signed in the wake of 9/11, is to share responsibility for asylum flows between Canada and the United Sates (Government of Canada 2016). As shown in Figure 1, the STCA allows Canadian border officials to immediately return asylum seekers to a U.S. port of entry if those asylum seekers arrived in the United States first. U.S. border patrol officers may also return asylum seekers to Canadian ports of entry if they first arrived in Canada before attempting to claim asylum. This "ping pong" effect is justified by each country designating the other as a "safe country" that respects the rule of law, and an asylum seeker's right to claim protection (Government of Canada 2002).

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[1]   Calculated by subtracting RCMP interceptions from all new claims posted by the Immigration and Refugee Board of Canada.

RCMP Interception

🍁 Canadian Port of Entry 🍁

Canada-U.S. Border

☆ U.S. Port of Entry ☆

Asylum seeker 1 (Red), attempts to make an asylum claim at the Canadian Port of Entry. The STCA restricts asylum seekers arriving from the U.S. from making a claim at the port of entry, and they are immediately returned to the U.S. Port of Entry to make their asylum claim there.

Asylum seeker 2 (Green), crosses the border, where they surrender to RCMP officers. The STCA only applies to land ports of entry, so they are eligible to make an asylum claim in Canada.

The STCA only applies to ports of entry along the border, and excludes areas between official crossings. As shown in Figure 1, an asylum seeker who evades a port of entry and crosses the border is eligible (with few exceptions) to make an asylum claim (Government of Canada 2017a). They are intercepted by the RCMP crossing the border, and after surrendering are transported to nearby immigration or border agency offices to start the asylum claim process. Recent data on the number of these RCMP interceptions are shown below in Figure 2.

**FIGURE 2       RCMP INTERCEPTIONS AT THE CANADA-U.S. BORDER, JANUARY 2017 – FEBRUARY 2019**
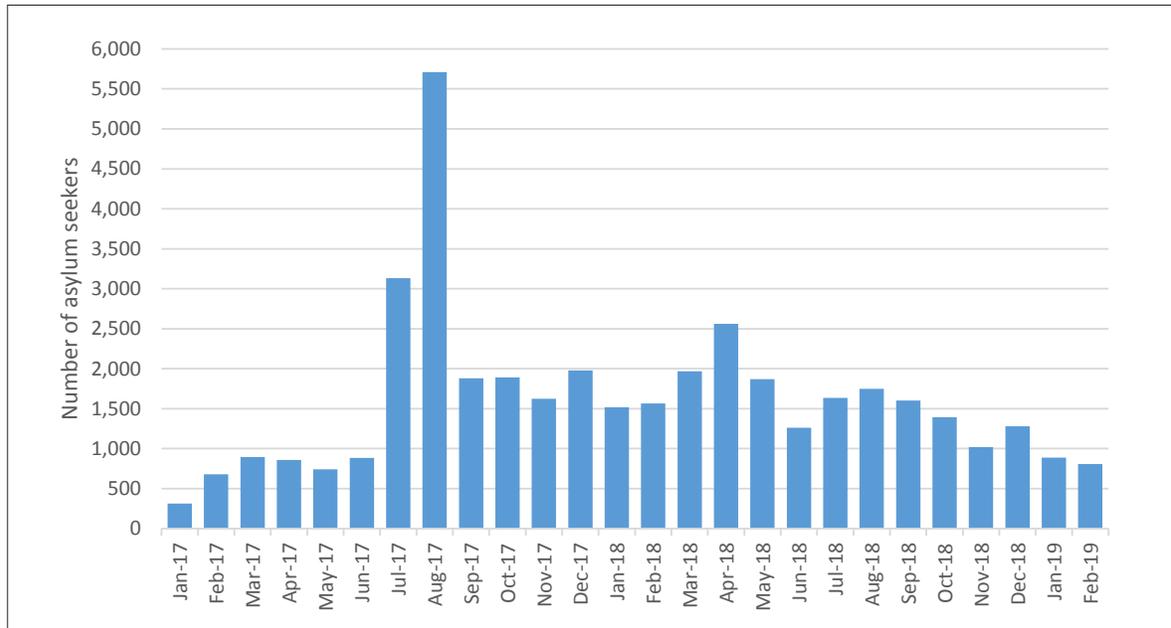


Source: "Asylum claims by year," Immigration, Refugees and Citizenship Canada, 2019

As shown, border crossings have tapered off since the August 2017 peak (Government of Canada 2019). February 2019 marked the lowest number of interceptions since May 2017.
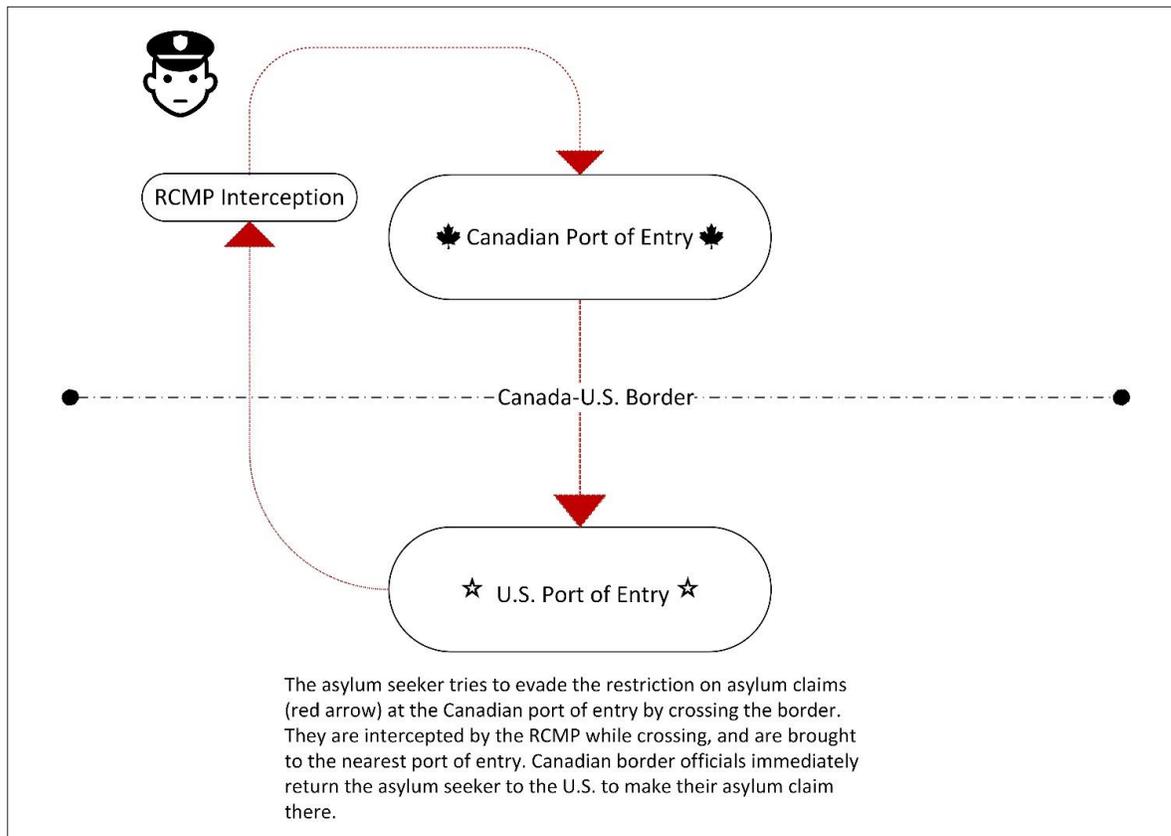
At the time of its signing, then-deputy prime minister John Manley stated that one purpose of the STCA is to prevent "asylum shopping," where some asylum seekers claim asylum in multiple countries (Clark, Oziewicz and Tu 2002). It is unclear why the STCA did not cover the whole border, but just ports of entry. It was recognized at the time of the STCA's signing that this exception created an incentive for asylum seekers to cross the border. One line of reasoning by then-Immigration critic Diane Ablonczy was that the agreement represented "baby steps." As most asylum flows between the U.S. and Canada went north, a more comprehensive agreement would have meant the return of more asylum seekers to the U.S., than the U.S. to Canada. At the time of negotiations, the U.S. was experiencing a large inflow of asylum seekers and other migrants at its southwest border (Bolter and Meissner 2018). The return of more asylum seekers at the Canada-U.S. border, above and beyond those returned at the port of entry, would have stretched border patrol resources even further.

The other reason why the U.S. may not have been willing to accept a more comprehensive STCA is the principle in the *UN Refugee Convention* that seeking asylum overrides regular border security laws, which principle was codified in Canada's *Immigration and Refugee Protection Act* (Canadian Council for Refugees n.d.). It appears from Department of Homeland Security documents that the U.S. used both lines of reasoning in negotiating the agreement (Federal Register 2004). The United States argued that the agreement could only be reasonably applied in areas of shared responsibility, where agents of both countries were present to handle border security, and that the agreement had to preserve asylum seekers' access to a fair asylum system. According to the United States, border officials could only be accountable for areas where they were physically present. They were not responsible for the exit of an asylum seeker into Canada in areas where they were not in close proximity, and thus responsibility for intercepting asylums seekers fell to the country receiving them.

## RENEGOTIATING THE STCA

Article 10.4 of the STCA allows the United States and Canada to agree upon modifications to the agreement (Government of Canada 2002). Under the premise of reducing the number of asylum seekers evading ports of entry to claim asylum, Canada is seeking to renegotiate the STCA to extend across the entire border (Zilio and Morrow 2019). This would allow border officials to immediately return any asylum seekers intercepted crossing the border to their American or Canadian counterparts, whereas the current agreement only allows them to do so if the asylum seeker claims protection at a port of entry. Figure 3 shows this modification to the STCA.

**FIGURE 3      A MODIFIED STCA IN PRACTICE**



RCMP Interception

🍁 Canadian Port of Entry 🍁

Canada-U.S. Border

☆ U.S. Port of Entry ☆

The asylum seeker tries to evade the restriction on asylum claims (red arrow) at the Canadian port of entry by crossing the border. They are intercepted by the RCMP while crossing, and are brought to the nearest port of entry. Canadian border officials immediately return the asylum seeker to the U.S. to make their asylum claim there.

Legal scholars debate the constitutionality of such a change, with some arguing that it would violate the 1985 Singh decision by the Supreme Court that gives asylum seekers a fair hearing (Arbel 2016). Others argue the asylum seekers who crossed into Canada have access to a fair hearing in the United States, and therefore their charter rights are not being violated (Zilio and Morrow 2019). The status of the United States as a "safe country" is currently being challenged in Federal Court, and further modifying the STCA to be more restrictive may result in additional legal challenges. The next section outlines some of the non-legal considerations in renegotiating the agreement, why the United States may or may not consider it, and what other options Canada has for addressing the number of crossings.

### In Favour of Renegotiation

Canada is grappling with a large backlog of asylum claims, though, as previously mentioned, only a portion of those claims come from border crossers (Government of Canada 2018). A modified STCA

that allows Canadian officials to return border crossers to the United States may mitigate border-related increases to the pending case inventory. To see this, the current asylum claim backlog can be compared against what that backlog might be had a hypothetical modified STCA come into effect in January 2018. Each month, the Immigration and Refugee Board (IRB) clears a number of cases from the backlog by granting or denying asylum seekers protection in Canada. The "Modified STCA Backlog" depicted in Figure 4 is calculated from the initial backlog of pending claims in January 2018 (44,401) (Immigration and Refugee Board 2019). To derive this, the number of reported RCMP interceptions is subtracted from all new claims each month, giving us the number of new asylum claims in a scenario where all intercepted asylum seekers are returned to the United States. This resulting number is added to the initial backlog each month. Meanwhile, the number of monthly cleared cases reported by the IRB is subtracted from the backlog. For example:

$$\textit{Modified STCA Backlog} =$$
$$\textit{Pending Cases} + (\textit{All new claims} - \textit{RCMP interceptions}) - \textit{Finalized Cases}$$

For January 2018, this would look as follows:

$$\textit{45,407 Modified Backlog} =$$
$$\textit{44,401 Pending Cases} + (\textit{4,709 all new claims} - \textit{1,517 RCMP interceptions}) - \textit{2,186 finalized}$$
$$\textit{cases}$$

Figure 4 shows the difference between the actual backlog of pending asylum cases over the course of 14 months and "Modified STCA" backlog during the same period.

FIGURE 4      BACKLOG OF ASYLUM CLAIMS VS. "MODIFIED STCA" BACKLOG



Source: "Recent Trends," Immigration and Refugee Board, 2019; Modified backlog calculated by author.

Between January 2018 and February 2019, the actual backlog increases from 44,401 pending cases to 74,235 pending cases. This includes claims from asylum seekers intercepted by the RCMP. When RCMP interceptions are excluded from all new claims, as would be the case with a modified STCA, the backlog rises to 53,119 pending cases in the same period. That is a difference of 21,116 pending cases in the two scenarios. Put another way, while the actual backlog grew by 29,834 cases in 14 months, it would have only grown by 8,718 in the "Modified STCA" scenario.

This scenario ignores some important details. These details include the chill effect a more comprehensive STCA may have on other asylum seekers considering making a claim through more legal routes (for example, flying into Canada, or entering as a student or tourist).[2] A modified agreement may provide an unintended signal to asylum seekers who use regular means to file their claim that they are unwelcome, further reducing the number of all asylum claims.

## In Favour of the Status Quo

### Increased out-of-status population

There are a number of reasons why the status quo may be preferable to renegotiating the agreement. One consideration is the possible increase in out-of-status foreign nationals, the term used to describe those living in Canada without legal status. Asylum seekers at risk of being turned back to the United States may seek to evade the RCMP and border officials, and live illegally within Canada. They may also decide to make riskier crossings into Canada, or take more isolated routes in hopes of evading law enforcement. This is not a guaranteed outcome. Whether this occurs depends on how individual asylum seekers weigh the cost of living illegally in Canada without access to social assistance or health coverage, against the cost of remaining in the United States. As social supports for asylum seekers in the U.S. are few, and as recent policy signals from the U.S. administration warn against seeking asylum, they may consider living in Canada illegally a risk worth taking. Policy-makers should weigh the fiscal and political costs to its current policy of intercepting and processing asylum seekers against the potential costs of a larger population of people living illegally in Canada.

### Non-agreement reforms

As previously noted, asylum seekers intercepted at the border represented on average only about a third of all asylum claims since January 2017. This proportion continues to fall, and in February 2019, fewer than 20 per cent of all asylum claimants cross at the border. Month-to-month variation is shown in Figure 5. While the number of monthly interceptions of border crossers has fallen, the total number of new monthly asylum claims has remained more or less steady. Fewer asylum seekers are crossing the border, but more are entering via regular means, and not necessarily from the United States. This steady number of total claims is the result of those who claim asylum in Canada without first travelling to the United States, or those who fall under certain exceptions to the STCA restrictions, such as unaccompanied minors, or those with family members living in Canada (Government of Canada 2016).

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[2]  A more restrictive STCA may send unwelcoming signals to those considering making asylum claims through regular means, putting a chill on all new claims. This effect is difficult to predict numerically, but may be of sufficient impact to warrant its mention here, even if it is not included in the scenario. Whether or not this dampening effect on all new claims is desirable depends on the policy-makers' goals. Those prioritizing further reductions in the total backlog may consider it a benefit, while others trying to reduce crossings while leaving the door open for regular claims may consider it a negative outcome.

**FIGURE 5      TOTAL ASYLUM CLAIMS VS. RCMP INTERCEPTIONS, JANUARY 2017 – FEBRUARY 2019**
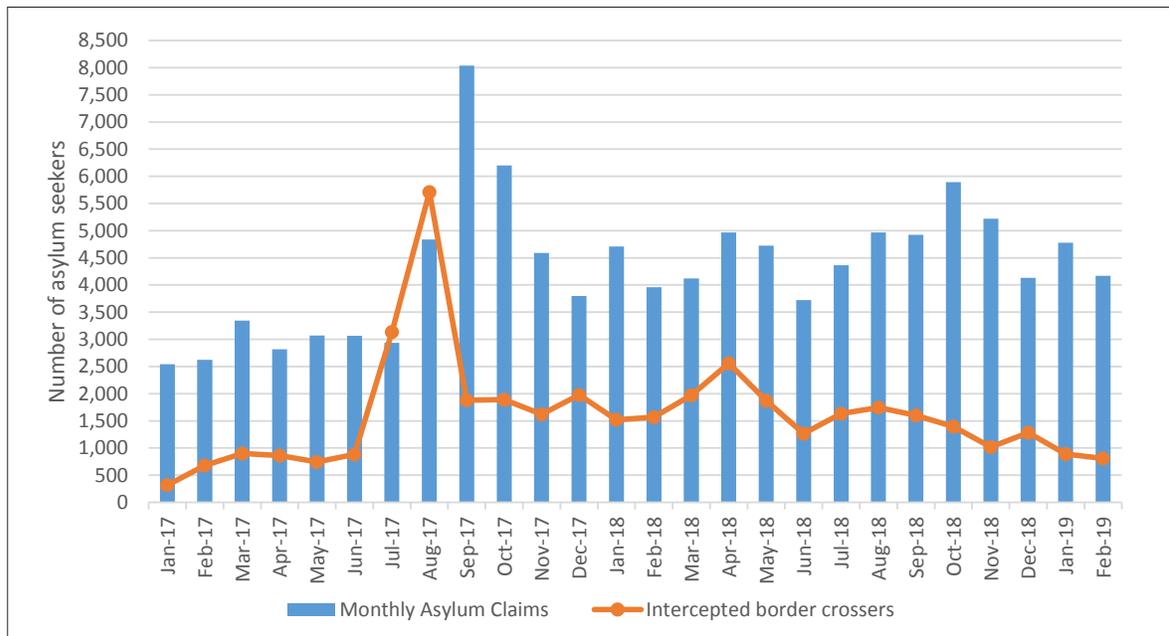


Source: "Asylum Claims by Year," Immigration, Refugees and Citizenship Canada, 2019; "Recent Trends," Immigration and Refugee Board, 2019

The literature on asylum claims suggests that reducing processing times for asylum claims has an added benefit of disincentivizing new claims, especially those with dubious or unfounded fears of persecution (Showler 2009). If an asylum seeker knows they have a trivial claim with a high chance of rejection, they are less likely to make that claim if they are going to be quickly turned down. If an asylum seeker faces a lengthy wait time, they may consider the opportunity to work, receive social assistance and get health care worthwhile, even if they're likely to get rejected down the road.

In recent months, the agencies tasked with processing asylum seekers have undertaken efforts to triage and expedite new asylum claims. With reductions in border crossings predating recent reforms, it may be preferable to focus government efforts on reducing asylum claim processing times rather than modifying the STCA. This could be accomplished by increased hiring, further initiatives to expedite cases, and integrating steps and agencies involved in the process. This would accomplish the dual tasks of reducing the asylum claim backlog as well as reducing new border crossings. While these measures require the federal government to pay additional processing costs, they also save the federal government the cost of providing health care to the backlog of claimants awaiting processing, as well as saving provincial governments the cost of providing social assistance to pending claimants.

### Political considerations

Canada must also consider the possibility that the United States may not want to ultimately modify the agreement, even if it expresses a willingness to open renegotiations. A shared history of co-operation on border security measures may support the possibility of a more comprehensive STCA, but according to former Immigration minister Jason Kenney, the United States has previously declined a stronger agreement (Markusoff 2017). With American southwest border apprehensions of Central American asylum seekers at a 10-year high, then a modification that allows Canada to return asylum seekers exiting the U.S. may not be in the current administration's interest (United States Customs and Border Protection 2019)

Canadian border officials cannot unilaterally return asylum seekers to the American side of the border without the U.S.'s consent. Reopening the agreement also risks U.S. withdrawal. The current U.S. administration has signalled a willingness to use threats as a negotiating tactic when considering other agreements it regards as unfavourable to the United States (Trump 2018). Threats to withdraw may precipitate an even larger influx of asylum seekers. Without the current STCA in place, Canada could not return any asylum seekers to the United States and would be obligated to process the claims of anyone who arrived.

## NO EASY PATH FORWARD, BUT THERE ARE OPTIONS

This policy brief outlines the current issues precipitating and underlying renegotiation of the Safe Third Country Agreement. These include a large backlog of pending asylum claims and increased uncertainty around border security and immigration. Border crossings have dropped since peaking in August 2017, while other asylum claims continue unabated. Modifying the Safe Third Country Agreement to allow Canada to turn back asylum seekers crossing the border has possible benefits and risks. Benefits include mitigating growth in the pending asylum case inventory, and warning away new claims by those with dubious or ungrounded fears of persecution. Risks include the possibility of creating out-of-status asylum seekers entering Canada through precarious means, while seeking to evade border and law enforcement officials. The United States may also not consider a modified agreement, including an extreme scenario, where the U.S. exits from it.

If the Canadian government wants to reduce crossings at the border, it may want to consider focusing efforts on policy reforms and hiring initiatives that further reduce processing times for asylum claims. Reducing processing times would provide quicker protection for those with a credible fear, while reducing both cross-border and other new claims by those with dubious or ungrounded fears. The debate around border security, which tends to focus on physical or legal walls, should be reframed around a timely, effective and responsive asylum system.

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