I. Introduction

The Agreement embodies the commitment made by both governments to more effectively share responsibility with respect to refugee claims. It is based on a mutual recognition that international cooperation is required to share the responsibility for refugee protection between countries, and builds on a strong history of Canada-U.S. bilateral cooperation on migration and refugee protection issues.

International Cooperation through Responsibility Sharing

Canada and the U.S. are both committed to their international obligations toward refugees, which reflect their enduring humanitarian traditions and values of compassion and fairness.

By working collectively, states can increase the effectiveness of their efforts to respond to refugee protection needs while ensuring that they meet their international refugee protection obligations. The 1951 *Convention Relating to the Status of Refugees* affirms in its preamble the importance of international cooperation. The importance of collective action, international solidarity, and effective responsibility and burden sharing among states was reiterated in December 2001 when Heads of State, Heads of Government and Ministers from the States of Parties to the 1951 Convention or its 1967 Protocol met in Geneva to celebrate the 50th anniversary of the Convention.

Canada and the U.S., like other developed countries, face challenges in managing pressures on domestic refugee protection systems resulting from the global growth of migration, in particular the contemporary phenomenon of “mixed flows” of migrants and refugees. As part of these mixed flows, some migrants attempt to make use of refugee protection systems to secure entry to developed countries. In addition, some asylum seekers may pass up earlier opportunities to obtain refugee protection in order to claim refugee protection in a country of their choice, often for reasons unrelated to a need for protection against *refoulement* to a country in which they face the risk of persecution or torture. Others may make secondary movements to pursue repeat refugee applications or multiple applications in different countries.

The complexity and disorderly nature of contemporary mixed migration flows increases the burden on states by making it more difficult for states to properly distinguish between refugees who need protection and other migrants, resulting in significant strains on asylum systems. The smuggling and trafficking of persons, especially women and children, adds to the seriousness of the problem of mixed flows, especially given the need to identify and respond to the particular needs of victims of trafficking. Taken together, these challenges increase the vulnerability of asylum systems to misuse by persons not in need of international protection.[2] This leads to reduced efficiency in decision making which has a number of negative consequences, including (1) delays in the identification and integration of genuine refugees; (2) increased difficulty in enforcing legislation with respect to rejected refugee claimants; (3) an increased financial burden for states, in which spending on asylum systems largely goes to identify persons not in need of

protection while relatively less money is spent protecting genuine refugees[3]; and (4) decreased public confidence in, and support for, the institutions of international refugee protection.

International cooperation based on the principle of responsibility sharing provides a basis for states to respond to these challenges, in part by providing for the more orderly handling of refugee applications. To this end, developed countries, including Canada and the U.S., have articulated a "Safe Third Country" policy. The premise of this policy is that where a refugee claimant could have previously sought protection in another safe country, it is reasonable and appropriate to require the refugee claimant to return and make use of that opportunity.

The European experience illustrates similar cooperation through responsibility-sharing efforts. Several European states, also faced with the serious challenges described above, began to introduce the Safe Third Country concept into their national legislation during the 1980s, including Switzerland (1979), Belgium (1980) and Sweden (1989). In 1990, European Union states built on the original 1985 Schengen Agreement (related to the harmonization of border and visa controls) first by amending Schengen to include criteria by which to assign responsibility for adjudicating asylum applications to one—but only one —participating state. The Dublin Convention, signed in Dublin, Ireland, on June 15, 1990, replaced these Schengen provisions. The Dublin Convention built on previous experience with use of the Safe Third Country concept in national legislation to establish a multilateral framework of criteria to determine which European Union member state would be responsible for adjudicating an asylum claim, and required that state to accept the return of asylum seekers who had moved to another member state and sought protection. Its underlying premise was that all member states of the European Union could be considered as safe third countries for the purposes of responsibility and burden sharing with respect to refugee claims.

Legislative Authorities in Canada and the U.S.

In Canada, the Parliament reaffirmed the safe third concept in the *Immigration and Refugee Protection Act* (IRPA). Canada's immigration legislation permits the designation of safe third countries that apply standards of protection that correspond to those applied by Canada, namely Article 33 of the Refugee Convention and Article 3 of the *Convention against Torture and Other Cruel, Inhuman or DegradingTreatment or Punishment* (hereafter "Convention against Torture").

Similarly, in the U.S., the *Immigration and Nationality Act* (INA), section 208(*a*)(2)(A), allows for the use of bilateral or multilateral agreements to restrict the eligibility of individuals to apply for asylum in the United States. This provision was incorporated into INA section 208 by section 604 of the *Illegal Immigration Reform and Immigrant Responsibility Act* (Pub.L. 104-208, 110 Stat. 3009-690, 30 September 1996), which became effective on April 1, 1997.

These legislative provisions were first exercised in both countries with the enactment of this Agreement. Both governments seek to emphasize protection needs over migratory preferences and share the responsibility of providing protection to those in need. Canada and the U.S. regard the safe third country concept as an important element of well-managed asylum programs.

Canada-U.S. Cooperation

Canada and the U.S. have a strong history of cooperation relating to the movement of persons across their shared border. The question of responsibility sharing with respect to the movement of asylum seekers has long been on the agenda of the two countries.

Following the terrorist attacks against the U.S. in September 2001, the governments of Canada and the U.S. renewed cooperation efforts in many areas of common interest, including enhancing management of our shared border. On December 3, 2001, the then Minister of Citizenship and Immigration, the Honourable Elinor Caplan, and then U.S. Attorney General John Ashcroft announced that our two governments had agreed to pursue discussions concerning a Safe Third Country Agreement. The Minister and Attorney General noted that:

Both Canada and the United States recognize the importance of providing effective protection opportunities for refugees fleeing persecution. Cooperation between our two countries will enhance the orderly handling of refugee claims, strengthen the public confidence in the integrity of our asylum systems and help reduce abuse of refugee programs … Such an arrangement would limit the access of asylum seekers, under appropriate circumstances, to the system of only one of the two countries.

This joint commitment was reaffirmed on December 12, 2001, when the then Minister of Foreign Affairs, the Honourable John Manley, and then Homeland Security Advisor, Governor Tom Ridge, announced the "Smart Border Declaration" and associated action plan.[4] The Declaration and Action Plan committed the two governments to collaborative efforts to manage the movement of goods and people across the shared border. One of the 32 specific commitments agreed to in the Action Plan was the negotiation of a bilateral Safe Third Country Agreement. Ongoing cooperation in this regard continues under the Security and Prosperity Partnership launched on March 23, 2005.[5]

The Agreement—Overview and Objectives

The Agreement was signed on December 5, 2002, and came into force on December 29, 2004, after both countries promulgated implementing regulations. The Agreement reinforces refugee protection by establishing rules for the sharing of responsibility for hearing refugee claims between Canada and the U.S. made by persons at POEs on our shared land border. The Agreement also outlines procedures for processing refugee claims made by individuals who are in transit through Canada or the U.S. while being removed. Its objectives, as articulated in the Smart Border Action Plan, are to enhance the orderly handling of refugee claims, strengthen the public confidence in

the integrity of our asylum systems and help reduce abuse of refugee programs. The general principle of the Agreement requires that the country of last presence take responsibility for adjudicating a refugee claim if the claimant does not qualify for an exception under the Agreement.

The Agreement is founded on the belief that both Canada and the U.S. maintain refugee protection programs that meet international standards and both have mature legal systems that offer procedural safeguards. The Agreement acknowledges the international legal obligations of both governments under the principle of *non-refoulement* outlined in the 1951 Convention and its 1967 Protocol, as well as the 1984 Convention against Torture. The UNHCR has stated that responsibility-sharing agreements between states can, where appropriate safeguards are in place, enhance the international protection of refugees by ensuring the orderly handling of asylum applications.[6]

In the Agreement, Canada and the U.S. emphasize their shared commitment to international cooperation and responsibility sharing, as well as the need to strengthen the integrity of the institution of asylum and public support for refugee protection. The two governments also recognize that the sharing of responsibility for refugee protection must include access to a full and fair refugee status determination in order to guarantee the effective protection of the Refugee Convention and Convention against Torture.

In crafting the Agreement, other key policy objectives were also considered, including the shared commitment to family unity, the need to take into account the best interests of children, and the discretionary authority of each country to take responsibility for any application where it would be in the public interest to do so.

The Agreement incorporates these policy objectives by creating exceptions to the general principle that requires the country of last presence to take responsibility for adjudicating the refugee claim. In doing so, Canada and the U.S. sought to carefully balance their objectives with respect to responsibility sharing and enhancing the orderly handling of refugee claims, in order to curb abuse and strengthen public confidence, against their commitment to providing effective protection for those in need. To assist in this balancing, the views of the UNHCR as well as NGOs were sought and considered.

As set forth in Article 8.2 of the Agreement, a dispute resolution mechanism exists for resolving differences between the Canadian and U.S. governments respecting the interpretation and implementation of the terms of the Agreement. This mechanism is not an appeal process for claimants, but rather a way for the Parties to the Agreement to raise with each other systematic or broad concerns regarding interpretation and implementation.

Monitoring and Review of Agreement Implementation

In order to maintain high protection standards, both governments agreed that transparent and effective monitoring of implementation of the Agreement would be integral to its success. To this end the two governments sought and obtained the consent of the

UNHCR to build a concrete role for that organization into the terms of the Agreement. Article 8.3 states that " The Parties agree to review this Agreement and its implementation … The Parties shall invite the UNHCR to participate in this review. The Parties shall cooperate with UNHCR in the monitoring of this Agreement and seek input from non-governmental organizations."

The UNHCR has played a valuable role in the monitoring and review of the Agreement to date by independently assessing whether implementation is consistent with the terms and principles of the Agreement as well as with international refugee law. This role will be incorporated into the UNHCR's regular supervisory responsibilities and both governments will continue to support monitoring functions.

Throughout this review process, both governments have drawn significantly from input provided by NGOs and stakeholders to identify relevant issues, inform the analysis and develop conclusions. This ongoing collaboration has significantly contributed to this first-year report and serves to better prepare the Canadian and U.S. governments to build upon the successes and learn from the challenges experienced in the first year of implementation in order to more effectively meet the Agreement's objectives in the upcoming years. This review is an important step to identify issues that require attention, find ways to improve implementation and build strong public support and partner confidence in the Canada-U.S. Safe Third Country Agreement.

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[2] In its "Note on International Protection," dated September 13, 2001, the UNHCR observed that "serious apprehensions about 'uncontrolled migration' in an era of globalization are increasingly part of the environment in which refugee protection has to be realized. Trafficking and smuggling of people, abuse of asylum procedures and difficulties in dealing with unsuccessful asylum claimants are additional, compounding factors." UN General Assembly A/AC.96/951, 13 September 2001, p. 4.

[3] Ibid. The UNHCR observed in its 2001 "Note on International Protection" that "The various costs of hosting often large numbers of asylum seekers can be onerous. They include the economic burden of offering asylum, especially when set against competing national priorities for limited resources. They also include security concerns, inter-state tensions, irregular migration, social and political unrest and environmental damage."

[4] In December 2001, U.S. Homeland Security Advisor Tom Ridge and Canadian Minister of Foreign Affairs John Manley signed the "Smart Border Declaration" and associated 32-point action plan to enhance the security of our shared border while facilitating the legitimate flow of people and goods. Negotiation of a Safe Third Country Agreement is action item 5.

[5] The Security and Prosperity Partnership of North America was launched in March of 2005 as a trilateral effort to increase security and enhance prosperity among the United States, Canada and Mexico through greater cooperation and information sharing.

[6] UNHCR Monitoring Plan for the Canada-U.S. Safe Third Country Agreement.