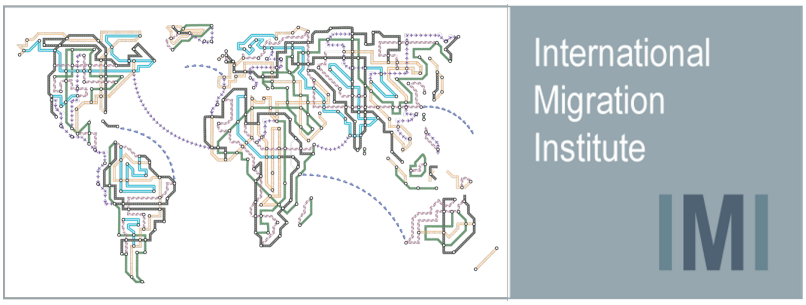

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The Counter-Judicialization of Migration and Asylum Controls:

Safe Third Country in Comparative Context

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Abstract

This article bridges research on the dynamics of judicialization and changes to asylum and immigration controls across Western liberal democracies. Research on judicialization finds that the expanding role of the courts and judicial processes encroaches on the authority of other branches of government. It suggests that the rise of constitutionalism and the globalization of legal norms have empowered courts to increasingly intervene in public policy. We discuss the case of asylum policy in Western liberal democracies as an example of judicialization, where key aspects of immigration policy became judicialized in response to international law via domestic court rulings and the creation of administrative tribunals. However, this case also reveals more recent efforts by states to engage in counter-judicialization by developing international agreements that restore authority and discretion over asylum policy to the executive and legislative branches of government. We examine processes of counter-judicialization by analyzing the politics of the safe third country agreement between Canada and the US (2002; 2023), placing this case in comparative perspective with the EU-Turkey deal and the Greek Joint Ministerial Decision (2016, 2021) and the Australian "Pacific Solution" (2001-2008; 2012). While these agreements and decisions have faced court challenges, they have been largely sustained as legally legitimate frameworks, often by appealing to soft law standards articulated by the United Nations High Commissioner for Refugees Executive Committee. These cases demonstrate how states use international law in order to evade domestic constitutional challenges to the counter-judicial restoration of executive and legislative authority.

Keywords: judicialization, counter-judicialization, asylum policy, immigration control

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Contents

1 Introduction

Over the past 50 years, government decision-making regarding the residency status, detention, and deportation of unauthorized migrants seeking asylum has shifted in many liberal democracies from the executive branch to courts and specialized administrative tribunals. These changes to asylum controls have mirrored broader trends in the judicialization of public policy by which the courts and judicial processes play an increasing role in government functions (Vallinder 1994; Slaughter 2000; Ferejohn 2002; Hirschl 2004, 2008; Hamlin 2014a; Dauvergne 2016; Rothmayr Allison and Soennecken 2024). Vallinder describes two models of the judicialization of politics: "the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators" and/or "the spread of judicial decision-making methods outside the judicial province proper" (1994, 92). Both models apply to Western liberal democracies where decision-making about asylum has shifted away from political centres of authority and towards legal ones. In concrete terms, this has moved many aspects of asylum policy away from elected politicians and senior government bureaucrats and into the hands of judges and administrative decision-makers. While this process has expanded legal protections for the rights of asylum claimants, it has also reduced the ability of elected officials to exert control over unauthorized border crossing.

The literature from scholars of law and politics posits that the process of judicialization is historically unidirectional and irreversible. In Vallinder's seminal article he concludes that the judicialization of politics is a "world-wide phenomenon," and that "it seems hardly likely that the ongoing process of judicialization will be reversed or even brought to a stop" (Vallinder 1994, 98). He predicts that the destination of this process will be a "new equilibrium" between individual rights and the state. Hirschl (2004) is less sanguine, although he agrees with the general conclusion: in more than 80 countries around the world, he observes a "rapid transition" to "juristocracy" (or, rule by judges) from which he does not anticipate a reversal. There are several drivers of this global trend: the strategic delegation of decision-making by political elites to the courts; the spread of social norms around rights, and the use of litigation by social actors; and the functional demand for judicial processes to manage increasingly complex policy issues (Rothmayr Allison and Soennecken 2024). Furthermore, the globalization of social and economic flows and the development of international law and legal institutions have promoted "judicial globalization" (Slaughter 2000). As the concept has gained purchase within the field of law and politics, it has also been liberally deployed to encompass a range of phenomena and processes such that cross-national theorizing is limited (Hamlin and Sala 2018). However, in whatever way the term is used, it is understood to be a fundamentally transformative process. There is little, if any research, on "whether it is possible to reverse the process of judicialization in public policy" (Rothmayr Allison and Soennecken 2024, 6).

In this paper, we consider the case of asylum policy in Western liberal democracies, where key aspects of immigration policy became judicialized in response to international law via domestic court rulings and the creation of administrative tribunals (Dauvergne 2016). This case, however, also reveals efforts by states to engage in *counter-judicialization* through externalization policies. We focus in particular on the development of statutes and international agreements that aim to restore authority and discretion over asylum policy to the executive and legislative branches of government. In this context, we define counter-judicialization as actions by the executive or legislative branches of government to reclaim constitutional authority in areas where judicial constraints limit the pursuit of policy goals. Liberal democratic states engage in counter-judicialization by going "above" and "around" the courts. They go "above" the courts by finding a warrant for executive actions in international law and in the support of international organizations. They go "around" the courts by coordinating policy with other states through international agreements that are resilient in the face of judicial review. Therefore, counter-

judicialization is not a reversal of judicialization, or an effort to advance *de-judicialization* (Zackin and Versteeg 2023)*;* it is a set of actions aimed at pursuing policy goals in ways that circumvent, while implicitly legitimizing, judicial constraints.

Our empirical analysis is focused on the politics of asylum policy in Canada. The 1971 Federal Courts Act expanded the authority of the courts to review cases involving administrative law, including immigration decisions. More far-reaching was the introduction of the 1982 Charter of Rights and Freedoms in Canada, which provided a new constitutional basis for the judicialization of asylum policy. In the wake of the Charter, litigation by refugee advocacy groups produced a series of decisions that shifted direct executive control over asylum decision-making towards quasi-judicial processes, while also asserting a role for the courts in overseeing asylum policy. The post-Charter development of asylum policy follows classical features of the process of judicialization, albeit applied to the rights of noncitizens (Hamlin 2014a, 17). However, bureaucrats in the executive branch responded by pursuing a range of border "externalization" measures, which asserted control over unauthorized arrivals without involving Canadian courts (Banerjee and Cameron, 2025). Key among these measures was the Canada-US Safe Third Country Agreement (STCA), which significantly limits the arrival of asylum seekers along the shared land border. The successful pursuit of the STCA by Canadian officials depended upon reference to emerging "safe country" standards in international soft law, as well as the political support of the United Nation High Commissioner for Refugees (going "above" the courts). By pursuing a safe third country agreement through a broader bilateral border agreement with the United States, they went "around" the courts.

In the final part of this paper, we consider the efforts of other states to engage in counter-judicialization through the use of the safe third country principle. We place the Canadian case in comparative perspective with the EU-Turkey deal and the Greek Joint Ministerial Decision (2016, 2021) and the Australian "Pacific Solution" and its associated statutes and bilateral agreements (2001-2008; 2012). While these agreements and decisions have faced court challenges, they have been largely sustained as legally legitimate frameworks. However, they have become politically untenable for reasons unrelated to their legal status. These cases suggest that the success of counter-judicialization depends upon their ongoing domestic and international political legitimacy.

2 Judicialization: The evolution of RSD in Canada

Canada's approach to international protection has been dominated by government concerns about maintaining discretion and control over admissions, dating back to the founding of the contemporary refugee regime. Canada was directly involved in the negotiations that produced the 1951 Convention Relating to the Status of Refugees: Leslie Chance, Canada's delegate to the UN committee responsible for drafting the agreement, served as its chairman (Masoumi 2023, 33). Despite this initial engagement, Canada was reluctant to sign and ratify the Convention because of concerns about the constraint this would impose on executive authority to deport people (Anderson 2010). Canada did not sign on to the agreement for another 18 years. Despite this initial reticence, the Canadian government continued to engage with the emerging refugee regime, providing significant support for immediate post-war humanitarian resettlement of displaced persons from Europe, as well as joining the UNHCR Executive Committee in 1957.

The first key turning point in Canada's approach toward refugee protection came with its 1969 accession to the Refugee Convention, followed by the passage of the Immigration Act of 1976. The latter incorporated refugees as a distinct class of admissions within Canada's increasingly formalized

migration regime. This regime allowed asylum seekers to make their claims by appealing immigration decisions to an Immigration Appeal Board (IAB), which was introduced in 1967. An accretion of legislative and regulatory changes prompted the first major legal challenge to executive control over refugee claims, with the courts deferring to the executive. This came with the Supreme Court of Canada's (SCC) 1982 ruling in *Kwiatkowski v. Minister of Employment and Immigration*, which upheld the IAB's authority to refuse hearings if it determined a claim was unlikely to succeed.

The second turning point came with the introduction of the Canadian Charter of Rights and Freedoms in 1982. The new constitutional framework introduced by the Charter provided a warrant for the judicialization of asylum policy by shifting authority away from direct executive control, moving key aspects of asylum decision-making towards the courts, and empowering them to direct the development of quasi-judicial processes for managing refugee status determination (RSD). Officials in charge of Canada's pre-Charter system of asylum adjudication under the Refugee Status Advisory Committee (RSAC) had debated incorporating oral hearings into its procedures and indeed experimented with the approach. However, it was only with the SCC's 1985 ruling in the landmark *Singh v. Minister of Employment and Immigration* (1 S.C.R. 177, 1985) that the judges on Canada's highest court drew on both the Canadian Bill of Rights and the newer Charter to establish a fundamental right to procedural justice for refugee claimants. This in turn initiated a significant transformation in the Canadian asylum regime.

The *Singh* case was brought forward by several refugee claimants who had applied for a redetermination of their claims, but had their applications dismissed by the Immigration Appeals Board under section 71 of the Immigration Act of 1976, prompting them to seek judicial review. Their subsequent appeal to the SCC was supported by interventions of the Canadian Council of Churches and the Federation of Canadian Sikh Societies. Rejecting the Government's arguments that the provisions of the Charter were restricted to citizens and permanent residents, the Court found that refugee claimants are legally entitled to the substantive and procedural protections, which entail access to an in-person hearing as part of the status determination process. In doing so, the court rejected the view that considerations of administrative convenience could be used to override the fundamental rights guaranteed by the Charter to citizens and non-citizens alike (Grey 1986, 503).

The outcome of the *Singh* case precipitated developments that formed the foundations of Canada's contemporary asylum regime. These changes were also influenced by the nearly concurrent release of the Plaut Report, commissioned under the prior Liberal government, which put forward 89 recommendations to reform Canada's refugee system, including the creation of an independent body to adjudicate status determinations through the application of quasi-judicial procedures (Adelman 1985). However, the immediate impact of the *Singh* decision was a significant rise in the backlog of asylum claims requiring adjudication. This created a situation of "administrative chaos" for Canada's immigration system (Grey 1986, 500) as the government struggled to manage the increased institutional demands entailed by the obligation that all applicants would be entitled to an oral hearing. In response to the requirements mandated by the outcome of the ruling, the government moved to introduce a new institutional framework for adjudicating asylum claims.

These developments resulted in the subsequent creation of the Immigration and Refugee Board (IRB) in 1989 as an 'arm's length' administrative tribunal, which assumed responsibilities that had previously fallen under executive prerogative. This process would unfold over several years as the government sought to develop and staff a new institution capable of fulfilling these responsibilities. In the intervening time the impact of this restructuring was nearly immediate: the government decided to issue a partial amnesty to asylum seekers who had arrived before May 1986 (Kelley and Trebilcock 2014: 403), reflecting its inability to provide the hearings now legally mandated by the SCC ruling. This was followed by another partial amnesty in March 1987 affecting an additional 23,000 claimants,

representing roughly 85% of the 28,000 refugee applicants (Malarek 1987; Kelley et al. 2025: 76).[1] That the government decided to take these contentious measures to comply with the new legal requirements it faced was a harbinger of a broader transformation of Canada's asylum regime already underway. Indeed, these measures did little to address the deeper challenges faced by the existing system of refugee status determination, with the backlog in cases growing to 85,000 by 1988 (Anderson 2010: 951).

Further judicial interventions over the subsequent decades continue to define the contours of refugee claimants' rights. As noted earlier, the passage of the 1971 Federal Courts Act empowered Canadian courts to review federal administrative decisions, and by extension precipitated a rise in the number of immigration decisions brought before courts for review.[2] In *Baker v. Minister of Citizenship and Immigration* (2 S.C.R. 817, 1999) the Supreme Court significantly expanded judicial oversight of administrative fairness in immigration decisions, with parallel effects on the adjudication of asylum claims. The case concerned the denial of permanent residence on humanitarian and compassionate grounds and the SCC decision further expanded rights to procedural fairness and introduced a requirement for the disclosure of reasons by administrative decision-makers (Aiken et al., 150-72). In *Suresh v. Minister of Citizenship and Immigration* (1 S.C.R. 3, 2002), the government had attempted to deport a refugee claimant on the basis of inadmissibility on security grounds and the denial of refugee status. However, on appeal the court's ruling further restricted executive discretion over removals, drawing on Section 7 of the Charter to prohibit deportations to countries where there is a substantial risk of torture. As with *Baker*, interveners in the *Suresh* case included numerous civil society organizations, such as the Canadian Council of Churches and the Canadian Council for Refugees, among others.

In a less direct, but still meaningful, example of judicialization, a series of unfavourable federal court decisions precipitated the suspension in 2019 of the Designated Country of Origin (DCO) policy. Introduced in 2012 under the Harper government the DCO policy restricted the rights of refugee claimants from dozens of countries that were designated as "safe". The subsequent legal challenges to the DCO addressed restrictions on access to health care, the bar on appealing to the Refugee Appeal Division, as well as a 36-month bar on Pre-Removal Risk Assessment applications in the case of individuals coming from listed countries. After various provisions were struck down by the Federal court, the entire DCO policy was rendered moot in 2019 when the Liberal government finally delisted all countries.

The overall impact of judicial interventions into Canada's immigration regime has transformed Canadian asylum policy. Foremost among these changes has been the creation of the IRB, which is insulated from executive interference (Hamlin 2014a). The creation of an additional Refugee Appeal Division in 2013 also allows claimants to challenge decisions of the IRB's Refugee Protection Division on the basis of either fact or law. The result of this institutional evolution has been the development of an independent and professional RSD system that has been characterized as a "Cadillac" or "Rolls Royce" in comparison to other systems because of its robust procedural guarantees (Hamlin 2014b; McLaren 1991). These judicialized features of the Canadian asylum regime have developed in the wake of the introduction of the Charter of Rights and Freedoms, which has entrenched refugee claimants

[1] Additional temporary measures included an expansion in the size of the Immigration Appeal Board in 1987 (Kelley et al. 2025)

[2] Notably the judicial review of immigration decisions would subsequently incorporate the requirement to obtain leave from the Federal Court by way of the 1989 amendments to the Immigration Act (Liew et al. 2021, 63).

rights in a robust and independent system of administrative justice with substantive appeal mechanisms. In the course of these developments, judicial rulings have "constitutionalized" administrative law (Grey 1986: 504), expanded procedural protections for refugee claimants, and placed substantive limits on the exercise of executive discretion over both RSD and removals.

3 Counter-judicialization: Externalization and the STCA

The judicialization of asylum policy in Canada, as in many other liberal democracies, did not proceed uncontested by the executive branch of government. Within months of the *Singh* decision, immigration officials were tasked with drafting what would become Bill C-55, a core element of which was a "safe third country" provision that would block arrivals by asylum seekers traveling through the US and other "safe" countries (Girard 2025). As MP Sergio Marchi – at the time the Liberal immigration critic – remarked about Bill C-55, "They set up a Refugee Board and then they put a wall around it" (Zisman 1988, 3). The growth of border externalization measures throughout the 1980s, 1990s, and 2000s was a direct response to the legal constraints placed upon governments who sought to manage unauthorized migration alongside their protection obligations (FitzGerald 2019; Gammeltoft-Hansen and Feith Tan 2021).

Immigration officials viewed externalization as a countermeasure to the policy constraints of international and domestic law (Girard 2025). They were "trying to walk that fine line of not undermining the [UN Refugee] convention, but in a sense, managing the flow [of people]" (Harder 2023). Dauvergne (2016) notes that states like Canada did not seek to exit the Refugee Convention in the wake of rising asylum claims; they rather acknowledged (and reinforced) its legality by trying to limit the reach of its application to people seeking protection in Global North countries. Hathaway characterized these actions differently, describing them as "the stubborn refusal of immigration authorities to recognize the legal limitations on their ambition to constrain the operation of the refugee claim process" (1988, 708). The actions of the Canadian government in the 1980s were aimed at a compromise: establishing an asylum regime that is "selectively open and closely controlled" (1988, 706).

The efforts by Canadian officials to control access to the newly-judicialized asylum regime can be characterized as "counter-judicialization". Now subject to legal constraints that insulated refugee status determination (RSD) from political interference, immigration officials sought alternative means of pursuing their policy goals of controlling the movement of people across the border. Counter-judicialization, therefore, was not aimed at challenging the authority and functioning of the Immigration and Refugee Board or contesting the appeals and judicial review roles of the courts. Instead, it was intended to exercise core policy functions of the executive in the context of new legal constraints, rather than simply conceding the ground to these judicialized processes.

The two processes of judicialization and counter-judicialization were entangled throughout the development of Canada's modern asylum regime. Bill C-55, "engineered" by immigration officials[3] and tabled in 1987, outlined the process of RSD that would be followed by the new Immigration and Refugee Board (IRB). However, the bill also contained a "safe country" provision that would exclude or return asylum seekers who received refugee status in another country, applied for refugee status in another country, or who *could* have applied for refugee status in another country (Adelman 1988). This provision was proposed by repeatedly to Cabinet by civil servants, who even went so far as to seek the

[3] A UNHCR report referred to Raph Girard, Director of the Refugee Determination Task Force, as "one of the major engineers of the Bill" (UNHCR 1987).

support of UNHCR for the provision in a bid to win political support for their proposal (Girard 2025). The intent of the bill was to proactively limit the number of people spontaneously accessing Canada's RSD system. Immigration officials believed that Canada could better discharge its humanitarian obligations through a selective resettlement program than by creating a system of "open asylum" (Girard 1990). To do so, the authors of Bill C-55 aimed to develop a framework that not only was "fair" by this standard, but also "charter proof" and therefore capable of withstanding subsequent legal challenges (Girard 2013).

3.1 "Around" the courts

From the outset, officials anticipated that the unilateral implementation of the safe third country provision of Bill C-55 would be challenged in court (Morton 2024). Therefore, despite possessing the legislative warrant to designate third countries as safe, they elected not to proceed along these lines. Officials prioritized a bilateral agreement with the United States, the transit country from which most asylum claimants arrived in Canada (Girard 2023). This proposed agreement would prevent asylum seekers arriving via the United States from making a claim in Canada (and vice versa). At the time, the US liberally issued transit visas without checking that migrants possessed a Canadian visa, and this became a pathway to seek asylum in Canada – often unsuccessfully, according to officials (Girard 2023). Officials, therefore, aimed to go "around" the courts by signing a treaty that could legally prevent asylum seekers from accessing Canada's asylum regime – thereby limiting the demands placed on the system without contesting or interfering with its legal operation. As one senior bureaucrat reflected:

> We have the legislative authority to act unilaterally [by designating other countries as "safe"]. No government ever wanted to do that. The commitment to [pursuing] an agreement [with the United States] had a number of foundations. One was we felt it would be much more survivable in the courts, where you have an agreement, because the agreement provides predictability. When you act unilaterally, you don't know how the other country is going to deal with claims (Anonymous official 2023).

In other words, immigration officials were motivated to seek an agreement with the United States so that mutual legal responsibilities towards asylum seekers could be specified. The upshot was that Canada could legally prevent the arrival of asylum claimants in Canada if their claims could be reviewed in the United States.

The contention of immigration officials was that the system of RSD in the United States, while procedurally different from Canada's, upheld the same legal requirements. "We took the position that even though the United States was not similar in every regard, it did meet international norms and international standards," according to one former government lawyer (Morton 2024). The government saw an agreement with the United States as a form of international cooperation that could permit them to discharge their protection obligations while also declaring certain asylum seekers as ineligible because they came to Canada from a "safe" country where they could access protection instead (Scoffield 2006).

The finalization of a safe third country agreement with the United States could not be reached until 2002, when it became part of a comprehensive border accord between the two countries. Previous efforts to conclude negotiations were frustrated by elections and other complications brought about by changes to US immigration policy in the mid-1990s (Scoffield 2006). A key provision of the final agreement was the restriction of its application to Ports of Entry at the land border. (Earlier drafts would have applied the agreement to "all refugee applications lodged in either country, including at airports, marine ports, border ports, and inland offices") (Scoffield 2006, 8). The reason for the scaled back

provision was to ensure that it would be clear how to assign responsibility between the two countries. Bruce Scoffield, the lead government official in the negotiation of the agreement, notes that these limits were made so that "the movement of refugee claimants across the border can be easily observed and the country of last presence can be readily established" (Scoffield 2006, 12) This was understood in explicit contrast to the EU's Dublin Convention, which at the time was viewed as suffering from challenges in identifying the country of transit and thus giving rise to ambiguity in assigning responsibility as well as creating "refugee in orbit" situations (US House of Representatives 2002), a situation that was subsequently addressed by the development of a shared biometric database that can identify individuals who previously entered another EU member state.

3.2 "Above" the courts

The finalization of the STCA in 2002 did not only go "around" the courts, it also went "above" the courts by seeking justification in international legal concepts and political support from the UNHCR. The concept of a "safe third country"– a neologism reportedly invented by Canadian officials who authored C-55 – derives from European state practice of returning asylum seekers to country of first arrival (Girard 2025). Switzerland and Scandinavian states were among the first to apply it, and it has been elaborated upon within a body of "safe third country law" that includes the conclusions of the UNHCR Executive Committee (Freier, Karageorgiou, and Ogg 2021; Corkery 2006). An early conclusion in 1985 (No. 36, §j) expressed concern about "the growing phenomenon of refugees and asylum seekers who, having found protection in one country, move in an irregular manner to another country." A subsequent conclusion in 1989 notes that refugees and asylum seekers may be returned to a country from which they have moved irregularly if they are protected against *refoulement* and permitted to remain there until a durable solution is found (No. 58, §f). A later conclusion in 1999 (No. 87) recalls No.58 and observes that "safe third country" measures "should be appropriately applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement*."

The application of the "safe third country" concept by Canadian officials and their pursuit of an agreement with the United States between 1991 and 2002 tried to comply with these developing standards. Officials first "lobbied" UNHCR to support the concept in the mid-1980s (Girard 2025). They later sought the advice of the UNHCR, first of all, with a view to applying international legal standards to a safe third country agreement with the United States. Canada requested advice from the UNHCR as early as 1987 and then later on draft agreements in 1992, 1995, 1996, and 2002 (UNHCR 1987; Canada 1996; Scoffield 2006). UNHCR comments primarily focused on "reiterating and highlighting even more the language of the provisions from various executive committee conclusions on international protection" (Canada 1996). This included ExComm No. 15 on taking into consideration "as far as possible" the intentions of the asylum seeker about which country to request asylum. Canadian officials accordingly revised a draft agreement to take into consideration family unity, the vulnerability of children, and discretionary authority to take on public interest applications (Scoffield 2006, 11). The UNHCR recognized that the revised draft text of the agreement "did take into consideration many of the fundamental principles of international refugee law and explicitly committed the contracting parties to uphold these principles" (Canada 1996).

Canadian officials also sought the political support of UNHCR for the agreement because they thought it would allow it to survive court challenges by refugee advocacy groups (Morton 2024; Harder 2023). Refugee lawyers and advocates agreed: "I think if UNHCR blessed it [the STCA], it makes it harder [for courts to overturn it]" (Hathaway 2025). When officials approached the UN High Commissioner for Refugees, Sadako Ogata, for her political support, they indicated that without it the courts may overturn the agreement, leading the Canadian government to use "extraordinary powers" to uphold it

(UNHCR 1993). The reference to "extraordinary powers" here is to the seldom used "notwithstanding clause" of the Canadian Charter of Rights and Freedoms, which permits legislatures to allow laws to come into effect without facing judicial review for violating rights protected by key sections of the Charter.[4]

When the agreement was finalized in 2002, the UNHCR supported it in principle: "Overall, UNHCR recognizes as positive the ultimate objective of this Agreement, which is to ensure an appropriate allocation of State responsibility for determining refugee status" (Scoffield 2006). It later also stated in 2003 that "The UNHCR … considers that both Canada and the United States meet their international obligations," thereby validating an important condition for the legal legitimacy of the agreement (Scoffield 2006). After monitoring the initial implementation of the agreement, the UNHCR reported in 2006 that its "findings on this agreement have been positive [and] the safe third country agreement is being implemented in accordance with the terms of the agreement and international refugee law" (Scoffield 2006).

The STCA was litigated twice before the Canadian courts, and both cases revolved around the designation of the US as a "safe third country." Both cases were ultimately unsuccessful. In the first case, *Canadian Council for Refugees v. Canada (2009)*, the Federal Court of Appeal found that the 2001 Canadian immigration law allows the government to share responsibility for considering refugee claims with countries that are "respectful of their Convention obligations and human rights." This does not extend to ensuring their full compliance with these obligations, but only requires considering these factors when designating the country. The UNHCR declarations about the United States' compliance with its international obligations, quoted in government affidavits, would have supported this finding. In the second case, *Canadian Council for Refugees v. Canada (2023)*, the Supreme Court of Canada found that "a degree of difference as between the legal schemes applicable in the two countries can be tolerated, so long as the American system is not fundamentally unfair." It also found that where there is a real risk of *refoulement* of a returnee, the STCA offers curative provisions (originally developed in response to UNHCR advice) that operate as safety valves to exempt a claimant from return.

The STCA has proven to be both legally and politically resilient. Despite facing continued public criticism in the context of a deteriorating system of refugee protection in the US, political commitment to the agreement by Canadian governments has only strengthened. In 2022, the Trudeau government negotiated a "modernization" of the agreement that extended its application beyond Ports of Entry to encompass the entire land border. New biometric information sharing agreements between the "Five Eyes" countries (Canada, US, Australia, New Zealand, and the UK) have enabled and deepened this expansion of the agreement (Ellis, Atak, Abu Alrob 2021). Prime Minister Mark Carney, elected in May 2025, declared that "Canada and the United States must work in closer collaboration in order to manage this situation [of an influx] of asylum seekers," reiterating his support for the STCA (Riga and Wilson 2025).

[4] The counterfactual of how Canada's government would have proceeded if the implementation or persistence of the STCA had proved untenable is of course hard to ascertain with certainty. However, it appears that the prospect of invoking the notwithstanding clause to deprive claimants of charter rights was raised in cabinet discussions as early as 1988, when officials responsible for developing Bill C-55 had to contend with the possibility that their measures would be rejected in favor of what they viewed as "an absolutely draconian" alternative (Girard 2013).

4 Migration Control and Courts in Comparative perspective

The process of counter-judicialization analyzed above has been pursued by other states through similar safe third country laws and agreements, albeit with notably divergent outcomes. We examine two prominent cases: the EU-Turkey agreement and the subsequent Greek Joint Ministerial Decision, alongside the Australian "Pacific Solution" in its associated statutes and bilateral agreements. These frameworks survived court challenges regarding their legal legitimacy, however, they proved unsustainable or relatively limited in their effect for political reasons not directly related to their legal status.

4.1 Counter-judicialization in Europe

EU asylum policy has been shaped by the evolution of the Common European Asylum System (CEAS), which established a system for determining responsibility for examining asylum claims in the state of first arrival, created harmonized standards and procedures for the reception of asylum seekers, and advanced information sharing on refugee claimants. The CEAS has faced legal scrutiny from UNHCR as well as by courts and scholars due to the protection gaps asylum seekers have faced under the regime (Abell 1997; Costello 2005; UNHCR 2008).[5] Scholars have analyzed how EU governance structures shifted migration control to intergovernmental and transnational levels to bypass domestic judicial constraints, noting the judicialization and 'communitarization' of asylum policy (Soennecken 2014). Our account focuses on more recent developments extending to bilateral agreements between the EU and non-member states designed to bypass judicial constraints on asylum policy.

Following the 2015/16 'refugee crisis' of unprecedented refugee claimants entering Europe, mechanisms were introduced to create a 'safe' route for asylum seekers to Türkiye. These differed markedly from earlier EU-level measures limited to coordination among member states subject to EU procedures and directives. In this context Costello has suggested that the EU's efforts to limit the arrival of refugees represented a turn to "extra-legal means" (Costello 2020, 19). We view these strategies as attempts to circumvent the judicialization of asylum by placing migration control policies beyond the ambit of courts.

The strategy included measures to summarily return maritime arrivals on Greek territory to Türkiye. The first element, the EU-Turkey Statement (also known as the EU-Turkey Deal), centred on a 'one-for-one' readmission scheme, returning all irregular migrants transiting from Türkiye to Greece. For every Syrian refugee returned, another Syrian would be resettlement in the EU based on UNHCR's vulnerability criteria. This was combined with a commitment to send three billion Euros to support refugees in Türkiye, liberalise visa policies for Turkish nationals, and advance Türkiye's EU accession process (Haferlach and Kurban 2017).

These measures raised significant scrutiny regarding risks to refugee claimants. UNHCR issued an immediate statement expressing concern, stating it was "not a party to the EU-Turkey deal" and it would not be "involved in returns or detention" (UNHCR 2016). There has been significant legal debate regarding the status of the agreement. Arribas argued that the joint statement "is not an international agreement" and therefore does not impose binding obligations on any parties (2016: 1098). Ovacik et. al suggested uncertainty whether the EU-Turkey Statement constitutes an international agreement within the scope of the Vienna Convention on the Law of Treaties or is merely a soft law instrument, noting that this uncertain status has impacted court challenges before the CJEU (2024: 160; 161).

[5] Indeed, the initial implementation of the Dublin regime appears to have precipitated general expressions of concern by UNHCR regarding the potential risks of chain refoulment and "refugee in orbit" situations (UNHCR 1999).

Overall, the approach deviates significantly from the frameworks developed through Dublin and the CEAS which remain grounded in formal multilateral arrangements.

In 2020 the Türkish government suspended implementation of returns under the Statement, ending readmissions from Greece. This resulted from worsening EU-Türkiye relations, lack of accession progress, and delays implementing proposed visa liberalization. Subsequently in 2021, Greece issued a Joint Ministerial Decision (JMD) identifying Türkiye as a first country of asylum or safe third country for nationals from Afghanistan, Bangladesh, Pakistan, Somalia, and Syria. This designation used Article 33(2)(c) of the Asylum Procedures Directive under which EU member states are able to render asylum applications inadmissible if the applicant had connection with a third country that is deemed a "safe third country," restricting their access to Greek asylum procedures (Osso 2023: 286; 289).

These considerations have been reflected in legal challenges to the JMD at both the domestic and EU level (Osso 2023); however, more practically, the suspension of Türkiye's support for readmissions under the earlier 2016 statement has effectively prevented any action under the JMD. Human Rights Watch has underscored that the unilateral nature of the JMD and the unclear status of the safe county designation entail that Greece "has no legal way of readmitting rejected asylum seekers to Türkiye" (Frelick 2022). For the purposes of our analysis this appears to represent an ambivalent case of failed counter-judicialization, insofar as subsequent court interventions became theoretical given the breakdown of Türkish cooperation with the EU.

4.2 Counter-judicialization in Australia

Australian policymakers and courts began engaging with the safe third country concept, along with other policy ideas from Europe, as early as 1994. The immigration minister declared that Australia would not admit on humanitarian grounds a person who had a "safe third country in which to reside [where that] country would accept that person" (McAdam 2013: 30-36). Australia proceeded to return certain Vietnamese asylum seekers to China under 1994 revisions to the 1958 Migration Act. Several cases before the Australian courts proceeded to uphold the legitimacy of the principle and even found that it could be applied to countries that are not signatories to the UN Refugee Convention if they provided "effective protection" from refoulement (Mathew 2003).

In September 2001, the Australian government seized the opportunity of the changed security context and passed the Borders Protection Act, which enabled it to not only return asylum seekers to "safe third countries" but to prevent them from arriving in Australia in the first place. The new "Pacific Solution" excised territories from Australia's formal migration zone and established regional processing centres in other countries (Motta 2002; Gibney 2022). These processing centres were located in states identified as "safe third countries" (Mathew 2003). The objective was to effectively block the arrival of asylum seekers from any boats at sea.

In this context, Foster characterized the Australian approach as a "unilateral" transfer scheme, undertaken with little attention to conditions in the "other country" that asylum seekers could face (2008, 65). This highly controversial initiative to restrict the rights of refugee claimants was combined with the implementation of an expansive maritime interdiction policy, offshore processing, and mandatory detention, as part of a broader deterrence strategy against asylum seekers arriving by sea. The development of the Pacific Solution was doubtlessly viewed as politically expedient in no small part because of the absence of a constitutional bill at the domestic level, which means that courts are more limited in their ability to constrain the policy-decisions of the executive (Gibney 2022). However, these policies were the subject of intense public debate and criticism, with the initial core of the Pacific Solution largely dismantled in 2008 after a Labor government came into power.

This proved to be a relatively brief retreat. The Labor government revived a return to control policies in even more expansive form, with the umbrella of exclusion from the Australian migration zone now applied to the entirety of the mainland, in addition to offshore possessions. These transformations were accomplished by the passage of legislation that further modified the Migration Act of 1958. The main impact of this action was to bypass any substantive due-process protections that asylum seekers could have previously accessed. As in its earlier incarnation, the resurrected Pacific Solution combined a significant unilateral remapping of the rights of asylum seekers within Australian jurisdiction with a broader set of interdiction measures and bilateral agreements with neighbouring countries to detain asylum seekers. Australia has made regional processing agreements with Malaysia, Papua New Guinea, and Nauru, which have depended on the legal designation of these countries as "safe".

Since the introduction of the Pacific Solution, the executive had claimed the power to designate the countries to which asylum seekers could be removed for readmission or processing. A growing body of jurisprudence interpreting safe third country provisions have included some safeguards, but have generally upheld the existing laws (Freier, Karageorgiou, and Ogg, 2021: 527). In 2011 the High Court of Australia found that Malaysia could not be so designated because it did not provide 'effective protection' (McAdam 2013: 41). It made clear that "any regional cooperation involving asylum seekers in which Australia is involved must be underscored by minimum human rights protections" (McAdam 2013: 44). However, all other cases brought by refugees detained in Nauru or Papua New Guinea have been unsuccessful (Freier, Karageorgiou, and Ogg, 2021: 529). The scheme has nevertheless remained highly contentious. While the numbers of asylum seekers detained under the scheme has fallen considerably, in part owing to domestic and international criticism, the law, policy, and most agreements remain in effect.

5 Conclusion

Recent work on the normative architecture of the refugee regime has highlighted the varying strategies that states in the Global North have adopted to evade responsibilities to provide international protection. Accounts such as Cohen (2021) have largely explained such developments by focusing on the weak norms of the refugee regime, which provides opportunities for governments to escape these responsibilities. Alternatively, Ghezelbash (2020) has focused on the uptake of domestically grounded strategies of "hyper legalism" and "obfuscation," which respectively rely on a narrow reading of protection obligations or a combination of policy secrecy and deliberately abjuring from providing legal justifications for control policies. Our analysis differs by way of focusing attention on the interplay of *judicialization* and *counter-judicialization* in shaping the behaviour of government officials. Responding to the constraints imposed by courts on executive control over asylum policy and the concurrent entrenchment of rights-base protections for claimants, we have traced how state officials have attempted to reassert governmental discretion over refugee arrivals. In the case of Canada, the strategies we highlight have explicitly drawn on soft law concepts, international agreements, and the authority of the UNHCR to move both above and around the courts, by way of re-articulating the reach of judicial authority.

Despite the surprising resilience of the Canadian approach, the continued success of such efforts to balance respect for rights and state control via *counter-judicialization* is inherently unstable and tenuous, insofar as it relies on the continued support of UNHCR to at least sanction such arrangements as compatible with the refugee regime (not to mention continued political support for cross-border coordination with the United States). Given the dramatic shifts in the political landscape in the United States, both with regard to unprecedented tensions in bilateral relations and significant changes in the reception of asylum claimants in the US, it is not at all certain that such conditions will persist. On the

one hand, it seems increasingly difficult to sustain the characterization of the United States as a 'safe country' for asylum seekers given the Trump administration's policies toward individuals in need of international protection. On the other hand, the broader shift in US-Canadian relations may very well place stress on the endurance of the STCA, which has remained a cornerstone of Canada's framework for balancing rights and control.

There is arguably no sustainable way to solve this tension within the liberal state given the inherently transnational nature of asylum policy and migration more broadly. This suggests the need for more durable forms of responsibility sharing grounded in inter-state cooperation at the international level (Hathaway and Neve 1997; Dauvergne 2016). The alternative to such a shift is the consolidation of a patchwork of ad hoc and potentially cruel and untenable policy measures intended to deflect and deter the arrivals of claimants. At its most extreme, the latter may be enabled by a turn away from counter-judicialization and toward de-judicialization, as governments seek to bypass the constraints of courts at the cost of respecting judicial authority. Such a possibility evokes Hannah Arendt's prescient warnings regarding the interconnection between the treatment of refugees under unconstrained police powers and the broader breakdown of the rule of law (Arendt 1973: 275). In this sense, the ongoing experiences of illiberal US policies may offer a cautionary reminder of the unexpected interconnection between the rights of outsiders and the rights of citizens. This only further underscores the fact that the liberal migration state is unable to unilaterally navigate the tensions between rights and control, as well as the need to move beyond domestic constitutional orders to equitable and effective forms of transnational governance.

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