TRANSFERENCE AND DIVERGENCE: CONSTRUCTING A CHINA–ASEAN MECHANISM FOR THE TRANSFER OF CRIMINAL PROCEEDINGS

A Perspective from Transnational Illegal Wildlife Trade Cases

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ABSTRACT

Transnational crime stands at the forefront of contemporary enforcement priorities, yet conflicts of jurisdiction persistently hinder its effective disposition. Drawing on transnational illegal trade in wildlife and wildlife products involving China and the Association of Southeast Asian Nations (ASEAN) countries, this Article identifies the underlying difficulty as the inadequacy of legal arrangements, both in domestic legislation and in bilateral and multilateral treaties, to resolve such conflicts. The principal mechanism for resolving them is the transfer of criminal proceedings. Two illustrative cases involving China, Myanmar, and Vietnam expose the present-day gaps; comparative analysis of the European experience demonstrates how a mature transfer regime, anchored in the principles of double criminality, ne bis in idem, and the proper administration of justice, can supply that resolution. The construction of a transfer mechanism between China and the ASEAN States is both necessary and feasible. Taking the disposition of transnational illegal wildlife trade cases as its working model, this Article proposes a transfer mechanism for transnational criminal cases that is distinctively suited to China, and

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structured around clear preconditions for transfer, an orderly procedure for initiation, review, and execution, and the protection of the rights of defendants and victims.

Keywords: transnational illegal wildlife trade; China–ASEAN; transfer of criminal proceedings; conflicts of jurisdiction

I. INTRODUCTION

Transnational wildlife crime does not merely cross borders, but fragments the criminal process. The organizer may sit in one country, the carrier may be apprehended in another, the protected species may be classified differently in a third, and the electronic evidence may be stored across several jurisdictions at once. In such cases, the central difficulty is not simply how to obtain evidence from abroad or how to extradite a fugitive. It is more fundamental that one State should exercise criminal jurisdiction over the case, and how should the other States withdraw, assist, or recognize that choice without producing either impunity or duplication of proceedings.

The stakes are concrete. The United Nations Office on Drugs and Crime reports that, between 2015 and 2021, seizures involving roughly thirteen million items and sixteen thousand tons of wildlife and wildlife products were recorded across 162 countries and territories, affecting approximately four thousand plant and animal species.[1] Southeast Asia, by virtue of its biodiversity, its geography, and its economic ties to China, sits at the center of this trade as source, transit, and destination at once.[2] The supply chains that funnel rhino horn, ivory, pangolin scales, and captive-bred tigers from Myanmar, Vietnam, Laos, and beyond into the Chinese market are, in fact, organized even where the offenders, the conduct, and the evidence are dispersed by design. The two cases discussed in Part II are paradigmatic of that pattern.

When such cases reach a courtroom, however, the dispersion that

1 World Wildlife Crime Report 2024: Trafficking in Protected Species 9 (2024), https://www.unodc.org/documents/data-and-analysis/wildlife/2024/Wildlife_SpecialPoint_Final.pdf.

2 Jiao Yunbo, Yeophantong Pichamon & Lee Tien Ming, Strengthening International Legal Cooperation to Combat the Illegal Wildlife Trade Between Southeast Asia and China, 9 Frontiers in Ecology & Evolution 105, (2021).

makes the conduct profitable also makes the conduct procedurally unreachable. China's *Criminal Law* and its bilateral mutual legal assistance and extradition treaties with the ASEAN States are well-developed instruments for the gathering of evidence and the surrender of fugitives.[3] None of them, however, answers the prior question of who tries the case at all, when two or more States each have a colorable claim to jurisdiction and none is prepared to yield. Where territorial, personal, and protective bases of jurisdiction collide, the existing toolkit yields, on the present record, parallel proceedings in the better case and, in the worse case, a quiet shelving of the file: the organizers who never set foot in China remain abroad, untouched.

The mechanism designed to resolve precisely this problem, the transfer of criminal proceedings, has been substantially developed in Europe and is increasingly recognized as a general tool of international criminal cooperation. Beginning with the Council of Europe's 1972 *European Convention on the Transfer of Proceedings in Criminal Matters*,[4] and continuing through the Schengen *acquis*, the 2005 Commission Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem*,[5] and most recently Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters,[6] the European regime has matured into a workable system anchored in three substantive ideas: double criminality, *ne bis in idem*, and the

3 See, e.g., Treaty Between the People's Republic of China and the Socialist Republic of Vietnam on Judicial Assistance in Criminal Matters, China-Viet., Oct. 19, 1998; Treaty Between the People's Republic of China and the Lao People's Democratic Republic on Judicial Assistance in Civil and Criminal Matters, China-Laos, Jan. 25, 1999. These instruments principally regulate the gathering and transmission of evidence and the surrender of fugitives; they do not, in their terms, address conflicts of jurisdiction as such. The same is true of China's Law on International Criminal Judicial Assistance (2018), which is silent on the resolution of positive jurisdictional conflicts.

4 European Convention on the Transfer of Proceedings in Criminal Matters, May 15, 1972, E.T.S. No. 73.

5 Commission of the European Communities, Green Paper on Conflicts of Jurisdiction and the Principle of Ne Bis in Idem in Criminal Proceedings, COM (2005) 696 final (Dec. 23, 2005); see also Council Framework Decision 2009/948/JHA on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings, 2009 O.J. (L 328) 42.

6 Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the Transfer of Proceedings in Criminal Matters, 2024 O.J. (L, 2024/3011) 1. The Regulation entered into force on 7 January, 2025 and is to apply between Member States from 1 February, 2027. Id. art. 36.

proper administration of justice. The device has also been globalized in skeletal form: Article 21 of the United Nations Convention against Transnational Organized Crime to which China and every ASEAN State is a Party, invites States Parties to consider transferring proceedings whenever consolidated prosecution would serve the interests of justice.[7] Scholarship has, in turn, increasingly come to treat transfer not as a residual byway of mutual legal assistance but as a cornerstone of cross-border criminal cooperation.[8]

What is missing, on the Chinese side, is a normative framework that translates these international invitations into operative law. Chinese scholarship has begun to engage with the comparative material, chiefly through the lens of cross-Strait cooperation and the Guangdong–Hong Kong–Macao Greater Bay Area, but sustained engagement with the international practice of transfer of proceedings, and with its application to the China–ASEAN relationship, remains rare. The opportunity, however, is significant. China–ASEAN trade has continued to deepen, the legal, institutional, and linguistic foundations for cooperation are mature, and the volume of transnational wildlife cases supplies a concrete working model in which the principles can be tested before they are generalized to other categories of cross-border offending.

This Article proposes a transfer-of-proceedings mechanism between China and the ASEAN States, designed around the disposition of transnational illegal wildlife trade cases and structured to be generalizable beyond them. The Article proceeds in five further Parts. Part II opens with the problem on the ground: two illustrative cases handled in Guangxi expose the three recurring jurisdictional difficulties that the present treaty network leaves unaddressed, and a comparative reading of the European and North American regimes shows both what such cases need and what the comparators alone cannot supply. Part III then sets out the doctrinal core of the transfer device, its concept and scope, its procedural steps, and the

7 United Nations Convention against Transnational Organized Crime art. 21, Nov. 15, 2000, 2225 U.N.T.S. 209. Article 21 provides that "States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution."

8 See Boudewijn de Jonge, Transfer of Criminal Proceedings: From Stumbling Block to Cornerstone of Cooperation in Criminal Matters in the EU, 21 ERA Forum 449, 449–64 (2020).

preconditions of double criminality, *ne bis in idem*, and evidentiary judicial review, drawing on the European treaty texts and on the case law of the European Court of Justice and the European Court of Human Rights. Part IV brings the doctrine home, developing the implications for the China–ASEAN context: why a transfer mechanism is necessary, why the international trend supports it, what foundations already exist, and where the parties retain room to innovate. Part V then constructs the proposed mechanism, articulating the conditions for application, the procedure for initiation, review, and execution, and the legal effects and rights protections that should attend transfer. Part VI concludes by situating the proposal within the broader project of orderly judicial cooperation between China and its ASEAN partners.

II. CONFLICTS OF JURISDICTION IN TRANSNATIONAL WILDLIFE CASES

The previous part places the China–ASEAN problem in a wider international context. Before turning to solutions, however, it is worth seeing the problem itself at ground level in the case files. This Part does three things in sequence. Combating the illegal trade in wildlife and wildlife products has emerged as a pressing global concern, particularly in the wake of the COVID-19 pandemic. According to the United Nations, this trade most commonly takes the form of cross-border smuggling and the unlawful purchase, transport, and sale of wildlife products, which is a salient form of transnational crime. China and the Member States of the Association of Southeast Asian Nations (collectively referred to in this Article as ASEAN) together host abundant wildlife resources, and the volume of transnational illegal trade involving these jurisdictions has risen sharply in recent years. To take the example of Province G, the procuratorial organs of Province G have, since 2015, prosecuted 275 cases involving 367 individuals (of which 125 cases and 176 individuals involved ASEAN States) for the unlawful purchase, transport, or sale of precious or endangered wild animals and wildlife products, and a further 90 cases involving 194 individuals (of which 89 cases and 192 individuals involved ASEAN States) for the smuggling of precious animals and animal products.[9] In handling such cases, however, the participating States routinely encounter conflicts of jurisdiction. The two cases

9 Unless otherwise indicated, the case-handling figures cited in this Article derive from the unified case-management system of the Supreme People's Procuratorate of the People's Republic of China.

discussed below set the stage for the analysis that follows.

A. Two Illustrative Cases

Case 1: People v. Wang (Smuggling of Wildlife Products). Defendant Wang was hired in Vietnam by a Burmese principal known as "A Jun"(a nickname as "阿俊") to smuggle rhinoceros-horn and ivory products into Chinese territory. A Jun communicated with the Chinese intermediary and the buyer chiefly through WeChat, while Wang carried the wildlife products concealed among other goods across the Dongxing-Mong Cai border crossing in Guangxi. Wang was apprehended by Chinese police while transacting with a broker in a wooded area. During the review-for-prosecution stage, the WeChat exchanges between A Jun, Wang, and the intermediary were seized by the police, and corroborated by the statements of those involved, establishing that A Jun was the principal organizer of the smuggling. Because A Jun's nationality is Burmese and some of the criminal conduct had been carried out in Vietnam, however, neither China's relations with Myanmar nor its relations with Vietnam supplied any operative mechanism for resolving the resulting conflict of jurisdiction, and the proceedings could not be advanced further on this front. The seized rhinoceros-horn and ivory products were ultimately identified as falling within Appendix I of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*[10], with a combined market value of approximately ten million yuan.

Case 2: He (Captive-Bred Wildlife Smuggling and the Limits of Mutual Recognition). Defendant He, a Vietnamese national, had over an extended period purchased and slaughtered captive-bred tigers in Vietnam and resold them across the China–Dongxing border into Chinese territory. After the case was uncovered, He fled to Vietnam. The tigers in question were identified by Chinese forensic authorities as Class II nationally protected wildlife. The Vietnamese authorities, however, declined to recognize that classification, on the view that captive-bred specimens are not protected as precious or endangered wild animals. Consequently, Vietnam refused to exercise

10 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES]. CITES entered into force in 1975 and obliges Parties to administer the trade in endangered species. The Convention contains three appendices: Appendices I and II impose mandatory and strict trade-control obligations on all Parties, while Appendix III imposes selective obligations. China and most ASEAN Member States are Parties.

jurisdiction. Only the participants located in China were ultimately brought to account.

B. Three Underlying Problems

These cases vividly expose the conflicts of jurisdiction that recur in the exercise of judicial power over transnational crime. Articles 6 through 9 of the *Criminal Law of the People's Republic of China* establish a system of jurisdiction founded principally on territoriality, supplemented by personal jurisdiction over Chinese nationals abroad, protective jurisdiction over conduct directed against the State or its nationals, and universal jurisdiction over offenses recognized as such under international treaties to which China is a Party.[11] Applied to cross-border conduct, this framework gives rise to three recurring difficulties.

First, there is no general legal arrangement between China and the ASEAN States for the resolution of jurisdictional conflicts. In Case 1, China's assertion of protective jurisdiction over the Burmese national A Jun would directly collide with both Myanmar's personal jurisdiction over its national and Vietnam's territorial jurisdiction over the place of commission. China has handled a number of transnational illegal-trade cases that present similar conflicts between territorial and personal jurisdiction, between universal and personal jurisdiction and so on.[12] Although China has concluded mutual legal assistance and extradition treaties with most of the ASEAN States, those instruments are largely confined to matters such as the gathering and transfer of evidence and the surrender of fugitives.[13] They leave the resolution of jurisdictional conflicts essentially unaddressed. Neither the Criminal Procedure Law nor the Law on International Criminal Judicial Assistance of the People's Republic of

11 Xingfa (刑法) [Criminal Law] arts. 6–9 (promulgated by the Nat'l People's Cong., July 1, 1979, effective Jan. 1, 1980; rev'd Mar. 14, 1997, effective Oct. 1, 1997) (Chinalawinfo) (China). Articles 6 through 9 together provide for territorial jurisdiction as the principal basis, supplemented by personal jurisdiction over Chinese nationals abroad, protective jurisdiction over conduct directed against the State or its nationals, and universal jurisdiction over offenses recognized as such under international treaties to which China is a Party.

12 In the cases discussed in Part I below, for example, China's assertion of protective jurisdiction over a Burmese national who committed offenses partly on Vietnamese territory comes into direct conflict with both Myanmar's personal jurisdiction over its national and Vietnam's territorial jurisdiction over the place of commission.

13 Treaty Between the People's Republic of China and the Socialist Republic of Vietnam on Judicial Assistance in Criminal Matters, China-Viet., Oct. 19, 1998.

China provides any clear arrangement for these conflicts.

Second, divergences in domestic legal systems and in the application of international law principles compound the difficulty. Transnational cases routinely span multiple jurisdictions, each with its own substantive offenses, procedural rules, and ordering principles for territorial, personal, and protective jurisdiction. Mutual cooperation is further constrained by the principles of double criminality[14] and non-extradition of nationals.[15] Together, these constraints sharpen rather than soften the jurisdictional conflicts arising from transnational cases, making it imperative for China to clarify its position on the matter.

Third, conflicts of jurisdiction make transnational cases difficult to dispose of, which in turn frustrates efforts to dismantle the criminal chain. Of the 90 cases of smuggling of precious animals and animal products handled in Guangxi since 2018, 85 involved foreign accomplices in Vietnam, Laos, and elsewhere supplying overseas purchase channels, yet fewer than 30 such accomplices have ultimately been brought to account; of the 275 cases of unlawful purchase, transport, and sale of precious or endangered wild animals or wildlife products handled over the same period, leads pointing to 200 foreign suspects emerged from defendant confessions and communication records, but fewer than 50 of those suspects have been identified and prosecuted.

Existing scholarship has begun to address these issues, with European Union experience and inter-regional models, such as cross-

14 Double criminality is a foundational principle of international cooperation in criminal matters. It requires that the conduct of the person whose case is the subject of cooperation be criminalized under the laws of both the requesting and the requested State. See Huang Feng (黄风), Guanyu Yindu Anjian Zhong "Shuangchong Fanzui" Yuanze Shiyong Wenti De Rending (关于引渡案件中"双重犯罪"原则适用问题的认定) [Determining the Application of the "Double Criminality" Principle in Extradition Cases], 6 Falü Shiyong (Sifa Anli) (法律适用(司法案例)) [Journal of Law Application(Judicial Case)] 110, 110–112 (2017).

15 The principle of non-extradition of nationals refers to the refusal of a State to surrender its own nationals to another State for the prosecution of crimes committed abroad; it is rooted in, and reinforces, the principle of double criminality.

Strait coordination, which can offer the principal points of reference.[16] Sustained engagement with international transfer-of-proceedings practice remains comparatively rare. The remainder of this Article therefore takes up the transfer of criminal proceedings as a mode of inter-State cooperation, examines its applicable principles and procedural design in depth, and using transnational illegal wildlife trade as the working example, undertakes to construct a transfer regime suited to the China–ASEAN context.

C. Comparative Experience and Its Limits

The European Union's Transfer of Criminal Proceedings Regime

From the early 1970s onward, the European Union, drawing on the European Convention on the Transfer of Proceedings in Criminal Matters, the Schengen acquis, and the Commission's Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem,* has progressively built up a system for the transfer of criminal proceedings that is designed to resolve disputes over jurisdiction. The system pursues three intertwined aims: to consolidate parallel prosecutions, to improve the gathering of evidence across borders, and to unify the conduct of proceedings. In essence, the transfer of criminal proceedings is a form of judicial assistance whereby the requesting State asks a contracting State that also has jurisdiction over the suspect to take over the prosecution and to confirm or assume jurisdiction over a specified criminal matter; once jurisdiction is transferred, the requesting State must terminate its own

16 See Liao Danming (廖丹明), Zhongguo Quji Xingshi Guanxiaquan Chongtu Jiejue Lujing Tanjiu—Yi Goujian Xingshi Susong Yiguan Jizhi Wei Shijiao (中国区际刑事管辖权冲突解决路径探究——以构建刑事诉讼移管机制为视角) [Exploring the Path to Resolving Inter-Regional Criminal Jurisdiction Conflicts in China from the Perspective of Constructing a Criminal Litigation Transfer Mechanism], 3 Fazhi Shehui (法治社会) [Society Under the Rule of Law] 55, 55–99 (2015); Jinan University Law School Research Group (暨南大学法学院课题组), Yue-Gang-Ao Da Wan Qu Xingshi Guanxia Zhidu Yanjiu (粤港澳大湾区刑事管辖制度研究) [A Study of the Criminal Jurisdiction Regime in the Guangdong-Hong Kong-Macao Greater Bay Area], 2 Fazhi Luntan (法治论坛) [Rule of Law Forum] 1, 1–9 (2020); Zhang Shuping (张淑平), Haixia Liang'an Xingshi Susong Yiguan Zhidu Zhi Goujian (海峡两岸刑事诉讼移管制度之构建) [The Construction of the Transfer System of Criminal Proceedings Across the Taiwan Strait], 3 Fuzhou Daxue Xuebao (Zhexue Shehui Kexue Ban) (福州大学学报(哲学社会科学版)) [Journal of Fuzhou University (Philosophy and Social Sciences Edition)] 45, 45–66 (2011).

proceedings.[17]

The procedure for transferring criminal proceedings comprises three stages. First, on the basis of the principles of active personality, the protective principle, or universal jurisdiction, the requesting State may address a transfer request to another contracting State that likewise has jurisdiction over the suspect. Second, the judicial authorities of the requested State review the request against a set of preconditions. Third, the question of jurisdiction is settled in light of considerations such as the proper administration of justice, after which the proceedings are mutually transferred.[18] Once the transfer of jurisdiction has been confirmed, the receiving State may continue the public prosecution initiated by the original requesting State. The most critical element of the procedure lies in the requested State's assessment of whether the preconditions are satisfied. Although the criteria for assessing these preconditions are still largely drawn from domestic law, the Union guided by the principle of European integration, has made clear that, save in cases of an express violation of a precondition expressly enumerated by treaty, no Member State may refuse a transfer request. The European Court of Justice retains jurisdiction to resolve disputes concerning, and to interpret, those preconditions.

The first precondition is double criminality. The principle requires that the conduct in question be classified as a criminal offence in both contracting States.[19] Two dimensions inform this assessment: first, the characterization of the conduct under the domestic law of each Member State and under the Treaties; second, the gravity of the penalty that may be imposed. The substance of the offence is therefore determined not by its formal designation as a criminal matter but by the practical character of the conduct and of the sanctions attached to it. In *Grande Stevens v. Italy*, the applicants argued that, because their conduct in interfering with the free competition of the market had already been found unlawful and punished by a fine in formal Italian administrative proceedings, the Italian criminal courts could not subsequently open a criminal trial

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17 See Wolfgang Schomburg, Criminal Matters: Transnational Ne Bis In Idem in Europe – Conflict of Jurisdictions – Transfer of Proceedings, 12 ERA Forum 311 (2012).

18 Commission of the European Communities, supra note 6, at 3.

19 See Gert Vermeulen, Wendy De Bondt & Charlotte Ryckman, Rethinking International Cooperation in Criminal Matters in the EU: Moving Beyond Actors, Bringing Logic Back, Footed in Reality 173–76 (2012).

against them. The European Court of Human Rights held that the sanctions imposed under Italian law for market manipulation carried the punitive and preventive features characteristic of criminal penalties, rather than the restorative function typical of administrative or civil sanctions. And that, in keeping with Article 4 of Protocol No. 7 to the European Convention on Human Rights, the applicants could not be punished a second time.[20]

The second precondition is the principle of *ne bis in idem*.[21] It bars a person who has been finally convicted or punished for a single act from being tried or punished a second time. Three elements compose the principle, and they are identity of person, identity of the act, and finality of the procedure. Identity of person refers to the same individual offender; identity of the act focuses on the substantive identity of the underlying facts, strictly excluding mere formal or doctrinal similarity; and finality of the procedure requires that the case has been disposed of by a valid judgment or decision of the competent judicial authority. The principal point of contention arises where the same conduct gives rise to multiple offences: where one Member State has tried the offender on the basis of one offence, may another Member State then try the same person on a different charge? The Court of Justice answered this question in *Van Esbroeck*, holding that, where the harm flowing from the offence relied upon by the second Member State is of the same nature as the harm comprised within the offence already disposed of, the second prosecution is barred.[22] Finally, the test of finality is not defined by reference to whether the court has actually conducted a trial or

20 See Grande Stevens and Others v. Italy, App. Nos. 18640/10, 18647/10, 18663/10, 18668/10 & 18698/10, Eur. Ct. H.R. (Mar. 4, 2014), https://hudoc.echr.coe.int/eng?i=001-141794 (last visited May 14, 2026). The European Court of Human Rights held that the administrative sanctions imposed by the Italian securities regulator CONSOB carried sufficient punitive and deterrent, rather than restitutionary, character to qualify as "criminal" for purposes of Article 4 of Protocol No. 7 to the European Convention on Human Rights, such that subsequent criminal proceedings violated the ne bis in idem guarantee.

21 Convention Implementing the Schengen Agreement art. 54, June 19, 1990, 2000 O.J. (L 239) 19; Charter of Fundamental Rights of the European Union art. 50, Dec. 12, 2007, 2012 O.J. (C 326) 391.

22 See Case C-436/04, Criminal Proceedings against Léopold Henri Van Esbroeck, 2006 E.C.R. I-2333. The Court of Justice held that the relevant criterion for the application of Article 54 of the Schengen Implementing Convention is the identity of the material acts, understood as a set of facts that are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.

imposed a sanction. This reflects the spread, throughout Europe, of plea-bargaining and of the trend toward decriminalization and the use of non-custodial measures. The Court of Justice's judgment in *Gözütok and Brügge* is illustrative: Mr. Gözütok was prosecuted in Germany for trafficking narcotics across the German-Dutch border, reached a plea agreement with the prosecutor during the trial stage under which the prosecutor sought from the court an order to pay a fine and withdrew the prosecution, and was subsequently prosecuted in another Member State, where the public prosecutor sought to charge him in respect of the same drug trafficking. The defendant invoked *ne bis in idem*. The Court of Justice held that the German penalty order constituted a final disposition of the proceedings and that the defendant could not be prosecuted again.[23]

The third precondition concerns the sharing and transfer of evidentiary information and the judicial-review procedure. To carry out a transfer effectively, the requesting and executing States must share and translate the evidentiary materials of the case; the recognition and transmission of that information is the gateway to the opening of the judicial-review procedure. Judicial review, in turn, refers to the formal or substantive review undertaken by the judicial authorities of the requested State, on the basis of the evidence transferred, to determine whether the preconditions for transfer have been met. That review is governed largely by domestic law, and it has frequently been criticized as unduly time-consuming: the translation of the file and the lack of communication during the review itself impose significant temporal and financial costs. The principal reason is that, at present, the effect of the judicial-review procedure and of the transfer procedure as a whole remains a matter of domestic law in the Member States, and a minority of national authorities still conduct a substantive review of incoming transfer requests, generating considerable delay.[24] Since the entry into force of the Treaty of Lisbon in 2009, the Union has used legislative instruments

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23 See Joined Cases C-187/01 & C-385/01, Criminal Proceedings against Hüseyin Gözütok and Klaus Brügge, 2003 E.C.R. I-1345. The Court of Justice held that the ne bis in idem principle laid down in Article 54 of the Schengen Implementing Convention also applies to procedures whereby further prosecution is barred, such as the prosecutor's decision to discontinue criminal proceedings once the accused has fulfilled certain obligations including the payment of a sum of money.

24 Guidelines for Deciding "Which Jurisdiction Should Prosecute?" (Eurojust rev. 2016),, https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2016_Jurisdiction-Guidelines_EN.pdf.

to constrain the duration of judicial review and to make clear that a transfer request can be refused only where, on review, the preconditions are not met.

Attention has also gradually turned to the rights of the individuals concerned and to limits on the maximum penalty. From 2009 onward, Member States began to give serious consideration to the protection of the procedural rights of the parties involved in a transfer. Subsequent instruments have made plain that the suspect and his or her counsel may submit observations on the proposed transfer and that those observations are to constitute an important element in the consultations between the requesting and requested States as to the appropriate forum. At the same time, Directive 2010/64/EU[25] reiterates that the maximum penalty to which the suspect may be exposed following transfer should not exceed the lower of the maximum penalties available in either State, a safeguard intended to protect the procedural rights of suspects and to ensure that transfer does not aggravate the punishment the suspect ultimately faces.

The United States–Canada–Mexico Joint Framework for Combating Transnational Wildlife-Trafficking Organizations

According to a 2016 investigation by the United Nations Office on Drugs and Crime, the U.S.–Mexico border is dominated by the smuggling of rhino horn and other rare wildlife products, an activity now organized through transnational criminal syndicates. These networks typically straddle several U.S. states, Mexico, and Canada, with the most sophisticated of them maintaining branches and criminal operations as far afield as South America. Any effort to address cross-border wildlife crime therefore inevitably implicates problems of legal coordination, including the transmission of evidence, the choice of applicable procedure, and the strengthening of enforcement.[26]

1. Judicial Cooperation Between the United States and Mexico in Combating Cross-Border Wildlife-Trafficking Organizations

25 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings, 2010 O.J. (L 280) 1.

26 See United Nations Office on Drugs and Crime, World Wildlife Crime Report: Trafficking in Protected Species (2016), https://www.unodc.org/documents/data-and-analysis/wildlife/World_Wildlife_Crime_Report_2016_final.pdf.

Organized crime along the U.S.–Mexico border has a long pedigree, and is dominated by the smuggling of wildlife and narcotics. Within Mexico, organized criminal groups engaged in the hunting, trade, and smuggling of wildlife are numerous, hierarchical, and accompanied by extensive violence and corruption; within the United States, by contrast, the transport of wildlife is typically handled by small-scale, highly discreet dealers, making detection difficult. Together, these patterns pose a serious threat to the security of the border region. Because of the distinctive U.S. constitutional architecture, in which the federal government and the States operate as separate legal entities, joint border enforcement between the United States and Mexico has taken several forms. First, federal, state, and regional cooperation within the United States has been used to combat border crime: U.S. states and the federal government operate under distinct legal regimes and constitute independent legal subjects, so cross-border enforcement proceeds through a state–federal cooperative model. Second, a joint enforcement programme has been established on the premises of "mutual and shared responsibility, mutual recognition, and sovereign independence." That programme operates through several channels. Policy is mobilized to drive judicial cooperation: the United States has traditionally viewed Mexican organized crime as, in significant part, a political problem, and in 1996 a bilateral working group composed of the U.S. Secretary of State and the Mexican Secretary of Foreign Affairs was tasked with joint research into governmental policies relevant to combating organized crime, including legal, security, and political policies the principal objective being to assist Mexico in building robust control mechanisms and an effective system of criminal justice. The two States have also concluded a mutual legal assistance treaty, which, on the basis of the principle of mutual recognition, provides for the transfer and freezing of specified items of evidence and establishes a regime of investigative requests. Third, in respect of joint investigations in individual cases, the two States have adopted territorial jurisdiction as the principal connecting factor, supplemented by the location of the harm to the protected legal interest, and have established joint investigation teams (composed of investigators and prosecutors from both States) to undertake coordinated enforcement against transnational wildlife crime.[27]

27 See Conny Rijken, Joint Investigation Teams: Principles, Practice, and Problems – Lessons Learnt from the First Efforts to Establish a JIT, 2 Utrecht L. Rev. 99 (2006).

2. Effective Cooperation Among the United States, Mexico, and Canada in Suppressing Illegal Wildlife Trade Within the Free Trade Area

The United States is contiguous with both Mexico and Canada, and in 1992 the three States concluded the North American Free Trade Agreement, which requires the free movement of goods and investment while authorizing restrictions on the cross-border flow of goods for purposes of environmental protection. The question of how to strengthen enforcement against wildlife trafficking without unduly impeding the free movement of goods has therefore become a central issue.[28] The three States have pursued cooperation on several levels in order to safeguard wildlife and to protect the environment of the cross-border free-trade region. First, a cooperative enforcement network for wildlife protection has been established. On the one hand, while respecting each State's sovereign independence, the three have concluded joint conventions and agreements, foremost among them the North American Agreement on Environmental Cooperation and the United States–Mexico–Canada Agreement.[29] On the other, transparent administrative and judicial procedures for wildlife protection have been created, including transparency in administrative processes and the discontinuation of industry subsidies for the captive breeding of wild fauna. Second, a pluralistic institutional architecture for cooperation on wildlife protection has been built. The United States has established environmental enforcement agencies, one part of whose mandate covers the protection of wildlife and the formulation of safety regulations, as well as the monitoring, investigation, and enforcement of cases involving endangered fauna. Congress has vested those agencies with civil and criminal investigative authority in respect of environmental cases and cases involving harm to public health. Canada has established the Canadian Wildlife Service to handle wildlife matters. Cooperation on the U.S.–Canada border on wildlife matters proceeds principally through direct cooperation between these two institutions

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28 See Jan van Dijk, The World of Crime: Breaking the Silence on Problems of Security, Justice, and Development Across the World 207–10 (2008).

29 See North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., Sept. 14, 1993, 32 I.L.M. 1480; Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S., Nov. 30, 2018, T.I.A.S. No. 20-701 (entered into force July 1, 2020).

on legislation, joint monitoring, and joint investigation, while also providing investigative and data support to broader judicial cooperation between the two States.[30]

III. THE PRINCIPAL MODE OF RESOLUTION: THE TRANSFER OF CRIMINAL PROCEEDINGS

Part II showed that the conflicts of jurisdiction recurring in China–ASEAN wildlife cases cannot be resolved by the existing tools of mutual legal assistance and extradition, and that the European and North American comparators, though instructive, do not on their own provide a complete answer. The mechanism that does address those conflicts head-on is the transfer of criminal proceedings. Effective enforcement against transnational crime requires that conflicts of jurisdiction be resolved. Because the transfer of criminal proceedings places that resolution on a footing of clearly defined preconditions, it merits sustained examination from a comparative perspective.

A. The Concept and Scope of the Transfer of Proceedings

Beginning in 1973, in response to the rising incidence of cross-border offending, the Council of Europe and subsequently, the European Union developed a comprehensive system for the transfer of criminal proceedings, articulated through three principal instruments: the *European Convention on the Transfer of Proceedings in Criminal Matters*, the *Schengen Implementing Convention*, and the *Green Paper on Conflicts of Jurisdiction and the Principle of Ne Bis in Idem in Criminal Proceedings*. The chief aim of the regime is to unify parallel proceedings under a single jurisdiction and so to facilitate the more efficient gathering of evidence and disposition of the case.

Substantively, the *transfer of criminal proceedings* denotes a request, made by one Contracting Party (the requesting State) to another Contracting Party that likewise enjoys jurisdiction (the receiving State), for the determination and transfer of jurisdiction over a particular suspect; the transferring State, on transfer, terminates its proceedings and renders the necessary judicial assistance. In substance, the device complements the principle of non-extradition of nationals and safeguards the principle of *ne bis in idem*. Transnational cases routinely involve criminal conduct, suspects, and

30 See Caviar Convictions (Since Jan. 1, 2000), U.S. Department of Justice, https://www.justice.gov/enrd (last visited May 14, 2026).

evidence dispersed across multiple jurisdictions; their disposition cannot avoid the difficulties of foreign suspects in foreign States, of divergences in domestic law, and of the gathering and admissibility of cross-border evidence. Coercive insistence on prosecuting overseas defendants generates a familiar series of international-law difficulties around extradition; in some cases, two States may simultaneously open investigation, prosecution, and trial against the same individual, producing a real risk of duplicative punishment. By consolidating the case in a single forum, the transfer of proceedings effectively resolves these problems. The mechanism is accordingly available, in standard usage, in two principal situations. The first is where the requesting State seeks transfer in respect of a national or habitual resident of the requested State. The other is where on grounds of forum convenience, the State first to open an investigation or to apply coercive measures requests transfer to the State better placed to prosecute. A well-administered transfer can resolve the dispersion of evidence and witnesses across borders, conserve litigation resources, and substantially raise procedural efficiency. Between 2009 and the present, several thousand requests for the transfer of criminal proceedings have been processed among European States, including 288 cases of cross-border wildlife trade.[31]

B. Procedural Steps and Preconditions

The transfer procedure typically unfolds in three steps. First, the requesting State submits to a State holding concurrent jurisdiction, drawing on the suspect's nationality, the place of commission, and the gravity of the conduct, a request for the transfer of jurisdiction. Second, the judicial authority of the requested State conducts a review of the request against the applicable preconditions.[32] Third, the two States, applying principles such as forum convenience, decide on the question of jurisdictional transfer.[33] Once the transfer has been agreed, the receiving State succeeds to the prosecution previously commenced by the requesting State. The crux of the procedure lies in the satisfaction of the preconditions for transfer. Although the assessment of those preconditions is anchored, in the first instance, in

31 Report on Eurojust's Casework in the Field of Prevention and Resolution of Conflicts of Jurisdiction, (Eurojust 2018), https://www.eurojust.europa.eu.

32 See Huang Feng (黄风), Guoji Xingshi Sifa Hezuo De Guize Yu Shijian (国际刑事司法合作的规则与实践) [Rules and Practice of International Justiced Cooperation in Criminal Matters] 183 (2008).

33 Schomburg, supra note 18, at 311–24.

the domestic law of the Member States, the European Union, committed to the policy of European integration, has expressly provided that, save where the request is found on review to violate an explicit treaty-based precondition, no Member State may decline to act on a transfer request. The European Court of Justice has, in turn, exercised the authority to resolve disputes over the preconditions and to render binding interpretations of the regime.

The first precondition is Double Criminality. Double criminality requires that the conduct of the actor concerned be criminalized under the laws of both Contracting States.[34] Two operational dimensions deserve attention. First, the basis of identification is, in the first instance, the domestic criminal law of each Member State and the relevant EU treaty texts as they bear on the character of the conduct. Second, what matters is the substantive content of the conduct and the severity of the penalty potentially imposable, rather than the formal label attached to the offense. In *Zigarella v. Italy*, for example, the European Court of Human Rights held that proceedings nominally classified as administrative could nevertheless qualify as criminal in nature, on the strength of their substantive features.[35]

The second precondition is Ne Bis in Idem. The principle of *ne bis in idem*[36] provides that a person whose conduct has been the subject of a final judicial decision may not be tried or sentenced a second time for that same conduct. As a matter of constitutive elements, the "same matter" comprises identity of the actor, identity of the conduct, and finality of the prior procedure. Identity of actor

34 Commission of the European Communities, supra note 6; Commission Staff Working Document, Annex to the Green Paper on Conflicts of Jurisdiction and the Principle of Ne Bis in Idem in Criminal Proceedings, SEC (2005) 1767 final (Dec. 23, 2005). The Green Paper identifies twelve categories of serious offenses, including murder, robbery, terrorism, and smuggling, that should be uniformly recognized by Member States. See also Council Framework Decision 2009/948/JHA on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings, 2009 O.J. (L 328) 42.

35 See Zigarella v. Italy, App. No. 48154/99, 2002-IX Eur. Ct. H.R. (Oct. 3, 2002). In Zigarella, the European Court of Human Rights held that earlier administrative proceedings imposing a penalty with a punitive and deterrent, rather than purely restitutionary character, qualified, for Article 4 of Protocol No. 7 to the European Convention on Human Rights, as criminal proceedings, so that subsequent criminal prosecution for the same conduct violated the principle of ne bis in idem.

36 See Valsamis Mitsilegas, The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU, 43 Common Mkt. L. Rev. 1277, 1277–1311 (2006).

refers to the same person; identity of conduct refers to the substantive sameness of the underlying facts, formal or doctrinal similarities being expressly excluded, and finality refers to a binding judgment or decision of a judicial authority. A central area of debate concerns the situation in which a single course of conduct violates several criminal provisions, and whether, if one Member State has tried the actor under one provision, another Member State may proceed under a different provision. The European Court of Justice in the *Migra* case held that, where the protected interest infringed by the second charge is of the same nature as that infringed by the charge already adjudicated, no second prosecution may be brought.[37] Finally, finality is not made to depend on whether the court actually imposed a custodial sentence, but an approach that reflects the spread, within Europe, of plea-agreement practice and of mitigated or remitted sentences, illustrated by the Court of Justice's ruling that a defendant given a fine for a drug-trafficking offense in one Member State could not be prosecuted again in another.[38][39]

The Third Precondition is Evidence Sharing and Judicial Review. Effective transfer of proceedings depends on two further conditions. First, the requesting State must transmit and translate the evidentiary record. The recognition and transmission of case materials are the practical key to the opening of judicial review. Second, judicial review proper. After the request has been made, the competent judicial authority of the requested State conducts a formal or depending on the procedural posture, substantive review of whether the transmitted

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37 See Case 30/70, Otto Scheer v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1197 (German AG); see also subsequent ECJ jurisprudence on the prosecution of conduct already addressed in administrative penalty proceedings. The European Court of Justice has held that an administrative penalty bearing a punitive character, such as a market-violation fine assessed under Italian law, qualifies as a criminal sanction for Article 4(7) of the European Convention on Human Rights, with the consequence that further criminal prosecution for the same conduct is barred.

38 See Case 33/76, Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland, 1976 E.C.R. 1989; see also Case C-187/01, Gözütok and Brügge, 2003 E.C.R. I-1345 (holding that a final out-of-court settlement and the imposition of a fine by a public prosecutor in one Member State even without judicial review, triggers the protection of ne bis in idem in another Member State, on the rationale that finality of procedure does not depend on the actual imposition of a custodial sentence).

39 See Maria Fletcher, Some Developments to the Ne Bis in Idem Principle in the European Union: Criminal Proceedings Against Hüseyin Gözütok and Klaus Brügge, 66 Mod. L. Rev. 769, 769–80 (2003).

materials satisfy the conditions for transfer; the assessment is grounded principally in the domestic law of the requested State. Judicial review is regularly criticized as time-consuming: from the translation of the case file through the review itself, the lack of effective communication between the cooperating authorities drives up both temporal and economic costs. The principal cause is that, despite the supranational regime, the legal effect of judicial review and of the transfer procedure remains a matter for the domestic law of each Member State, and certain national authorities subject transfer requests to substantive review of considerable elaboration, producing prolonged dispositional times.[40] Following the entry into force of the Treaty of Lisbon, however, the European Union has, on the strength of the principle of mutual recognition,[41] introduced treaty-based time limits on judicial review and clarified that a transfer request may be refused only where, on review, it is found not to satisfy the applicable preconditions.[42]

C. Legal Effects and the Protection of Parties' Rights

First, once the transfer of proceedings takes effect, the requesting State's right to proceed terminates; the requested State takes receipt of the materials and opens its own proceedings. Second, the protection of the rights of the parties involved, and the question of the maximum sentence imposable on transfer, has come to be taken increasingly seriously. From 2009 onward, EU Member States have devoted concentrated attention to the protection of procedural participants in the transfer process. Subsequent treaty arrangements have provided that the suspect and his counsel may express views on whether the proceedings should be transferred, and have made those views one of the important grounds on which the requesting and the requested States are to consult on the suitability of transfer. Third, the EU treaty resolution of 2010 emphasizes that the maximum custodial sentence imposable on a person whose proceedings have been transferred should not exceed the lower of the maxima provided

40 Eurojust, supra note 25.

41 The principle of mutual recognition originated in the case law of the European Court of Justice and operates as a foundational principle of EU integration: Member States accord recognition to one another's legal systems, with the effect of reducing intra-Union legal barriers, advancing market integration, and strengthening cooperation in justice and home affairs. See Mitsilegas, supra note 18, at 1280.

42 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings, 2010 O.J. (L 280) 1.

by the requesting and receiving States, a rule designed to safeguard the procedural rights of the accused and to prevent transfer from operating, in effect, to increase the maximum penalty available.[43]

IV. Implications for China–ASEAN Context

The previous Part established that a China–ASEAN transfer mechanism is necessary, feasible, and consistent with the prevailing international trend. This Part undertakes the construction. The design proceeds along the same three axes used to analyze the European regime in Part III, now applied to the disposition of transnational illegal wildlife trade cases as the working model. Comparative analysis of the European experience suggests that, in confronting transnational crime, the construction of a robust framework for judicial assistance is indispensable. For China, where transnational illegal wildlife trade overwhelmingly implicates the ASEAN States, the natural starting point is the relationship between China and the ASEAN Member States. The case for constructing a transfer mechanism in this setting rests on four interlocking grounds.

A. The Necessity of Construction

The pressing case for construction lies in the unmet need to resolve jurisdictional conflicts in transnational cases. First, the establishment of the China–ASEAN Free Trade Area and of various Free Trade Pilot Zones has, alongside the liberalization of trade and the movement of persons, produced a steady increase in cross-border criminal activity. Beyond the illegal wildlife trade, the same factors drive cross-border e-commerce fraud, transboundary environmental pollution, and drug trafficking. Whether the harmed interests are those of the Chinese State itself or those of Chinese citizens abroad, the absence of any superior alternative for the resolution of resulting jurisdictional conflicts makes the development of a transfer mechanism a practical necessity. Second, such a mechanism is the more constructive choice given the present configuration of international law. Because most foreign-related cases involve foreign nationals participating in conspiracies inside or outside Chinese territory with at least some of the criminal conduct occurring abroad, the principal options for resolving jurisdictional conflicts under

43 See United Nations Office on Drugs and Crime, Transfer of Criminal Proceedings (2012), https://www.unodc.org/e4j/en/organized-crime/module-11/key-issues/transfer-of-criminal-proceedings.html.

current international law are the transfer of proceedings, extradition, and ad hoc inter-State consultation. China's existing bilateral treaties and its participation in the United Nations Convention against Corruption provide for the transfer of proceedings as a means of dealing with conflicts of jurisdiction. The mechanism is thus already in occasional case-by-case use, even though Chinese law has not formally settled its specific norms, conditions of application, or legal effects. Under the principles of *aut dedere aut judicare* and non-extradition of nationals, extradition is, in any event, unavailable when transnational cases involve foreign nationals committing crimes against China from abroad. And whatever the merits of bilateral consultation in any given case, the resolution of jurisdictional conflicts ultimately requires a stable, long-term mechanism. Effective transfer of proceedings is therefore the more efficient means of disposing of cases under the constraints of international law.

B. The Trend in International Practice

The construction of transfer mechanisms has acquired the status of a discernible international trend. First, with a view to the orderly allocation of criminal jurisdiction and the secure prosecution of offenses, the United Nations has, over recent decades, persistently sought to develop a unified framework. As early as 1990, the United Nations issued a draft *Model Treaty on the Transfer of Proceedings in Criminal Matters*, in the negotiation of which 138 States participated, including China and the ASEAN Member States. Article 21 of the draft provides that, where a criminal case implicates the jurisdiction of more than one State, Member States should establish mechanisms for the transfer of prosecutorial authority so as to facilitate consolidated prosecution. Although the provision is non-mandatory, it provides a recognized basis on which States may negotiate concrete transfer arrangements. Second, as noted above, several of the bilateral treaties to which China is already a Party contain provisions touching on the transfer of proceedings, and the mechanism has been used in particular cases.

C. The Foundations for China–ASEAN Cooperation

The legal, linguistic, and historical foundations for a transfer mechanism between China and the ASEAN States are, on the present record, deeply laid. First, as a matter of institutional architecture, China has concluded treaties on judicial assistance and extradition with Vietnam, Laos, Myanmar, and other ASEAN States, and has participated in numerous bilateral and multilateral consultations on judicial assistance and joint enforcement against transnational crime. Second, the material and linguistic conditions for further judicial cooperation are mature. Trade between China and the ASEAN States has continued to grow even amid the COVID-19 pandemic, with bilateral trade rising by 5.8% in 2020 and trade through border-cooperation zones rising by 6.8%.[44] An effective transfer of proceedings can, in turn, sustain that long-term economic cooperation by curbing the criminal smuggling and trade in wildlife and wildlife products. On the basis of long-running cooperation, China and its ASEAN partners have additionally developed an official linguistic framework using English as the working language and the official languages of the parties as auxiliary. As Chinese and the Chinese legal system have come to exert wider influence in the region, communication has steadily progressed; in the negotiation of bilateral and multilateral instruments, language-based misunderstandings have correspondingly diminished, easing the conclusion of consensus-based treaty texts.

D. Room for Innovation

There is, finally, considerable room for innovation in the design of a China–ASEAN transfer regime. The EU *Convention on the Transfer of Proceedings in Criminal Matters* provides that, where a case implicates the jurisdiction of multiple States, the parties may, on grounds of forum convenience, designate a single State to assume consolidated prosecution. In transnational proceedings involving more than two States, China and its partners can, in dealing with cases over which several States hold concurrent jurisdiction, pursue on the same principle of forum convenience consultations directed toward the consolidation of jurisdiction in a single forum.

V. CONSTRUCTING A CHINA–ASEAN PROCEEDING MODEL OF TRANSFER

In the field of transfer of proceedings, the careful articulation of preconditions is essential to orderly operation: where the conditions are clearly drawn, no Contracting Party may decline a transfer request without reason. The following analysis takes the disposition

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44 See Gu Qingyang (顾清扬), Zhongguo–Dongmeng Jingmao Hezuo Yinglai Geng Duo Jiyu (中国—东盟经贸合作迎来更多机遇) [More Opportunities Ahead for China–ASEAN Economic and Trade Cooperation], Renmin Ribao (人民日报) [People's Daily] (Oct. 1, 2020), https://www.yidaiyilu.gov.cn/xwzx/gnxw/124413.htm.

of transnational illegal wildlife trade cases as its working model.

A. *Subject of Application and Preconditions*

First, double criminality. Cases involving the wildlife trade are uniformly criminalized under Chinese law and the law of the principal ASEAN States, but in the application to specific offenses, both points of agreement and points of divergence emerge. The points of agreement are fivefold. The first is that the trade in wildlife or wildlife products is, as such, an offense in China, Myanmar, and Vietnam. The second is that all three States impose maximum custodial penalties, life imprisonment in China, fifteen years in Myanmar and Vietnam. The third is that all three impose maximum fines—up to USD 100,000 in China, USD 37,000 in Myanmar, and USD 60,000 in Vietnam. The fourth is that all three recognize CITES as the basis for identifying endangered wildlife and wildlife products, although China supplements CITES with the National Catalogue of Wildlife Conservation Registration, while Myanmar and Vietnam rely respectively on the Catalogue of Precious Animal and Plant Protection and the Vietnamese Wildlife/Animal Protection Act. And the last is that all three criminalize, by reference to the for-profit object, the smuggling of domestically protected wildlife or wildlife products, the purchase, transport, or sale of endangered wildlife and their products and of terrestrial wildlife, and the unlawful hunting and killing of endangered wildlife. These shared elements are summarized in Table 1.

Table 1. A Comparative Snapshot of Wildlife-Protection Criminal Provisions: China, Myanmar, and Vietnam

	People's Republic of China	Myanmar	Vietnam
Trade-related conduct criminalized	Yes	Yes	Yes
Maximum custodial penalty	Life imprisonment	15 years	15 years

Table 1. A Comparative Snapshot of Wildlife-Protection Criminal Provisions: China, Myanmar, and Vietnam			
	People's Republic of China	**Myanmar**	**Vietnam**
Maximum fine (USD equivalent)	100,000	37,000	60,000
Basis for identifying protected species and products	CITES; National Catalogue of Wildlife Conservation Registration	CITES; Catalogue of Precious Animal and Plant Protection	CITES; Vietnamese Wildlife/Animal Protection Act
Smuggling of wildlife and wildlife products	For-profit smuggling, irrespective of value; or non-profit smuggling exceeding RMB 100,000; covers captive-bred specimens.	For-profit smuggling of wildlife or products designated as protected by domestic law.	For-profit smuggling of domestic wildlife or wildlife products.
Purchase, transport, or sale of wildlife and products	Endangered wildlife and their products, including terrestrial wildlife.	Native wildlife and wildlife products.	Wild animals; captive-bred specimens may lawfully be purchased, transported, and sold.
Illegal hunting	Unlawful hunting or killing of endangered	Unlawful hunting or killing of endangered	Unlawful hunting or killing of non-captive-bred

Table 1. A Comparative Snapshot of Wildlife-Protection Criminal Provisions: China, Myanmar, and Vietnam			
	People's Republic of China	**Myanmar**	**Vietnam**
	wildlife.	native wildlife.	wild animals.
Note: CITES refers to the Convention on International Trade in Endangered Species of Wild Fauna and Flora.			

The points of divergence are likewise of three respects. First, certain States legislate principally for the protection of *domestic* wildlife: many species not native to the country, but listed in the appendices to CITES, accordingly fall outside the scope of national protection. Myanmar's wildlife law, for instance, accords protection to only twelve non-domestic species, and the resulting gap is exploited by transit-and-market operations in cross-border smuggling and transport. Second, certain States legalize the captive breeding and commercial trade in CITES-listed species. Vietnam, for example, allows the captive breeding of CITES-listed endangered species for scientific research subject to permit, as well as the commercial slaughter of such animals and the sale of their products.[45] The resulting permitting regime can be misused: since 2018, Vietnam has emerged as a principal source of captive-bred tigers and tiger products, with sellers smuggling or trading wild specimens after first obtaining a license to trade in their captive-bred counterparts. Third, Chinese wildlife law generally imposes more stringent penalties than those of its ASEAN partners. In any transfer of proceedings concerning a specific offense, the parties must therefore clarify on a bilateral or multilateral basis (China–Vietnam, China–Myanmar, and others), the criminalization arrangements they recognize as common. Although ASEAN States have, in recent years, gradually expanded the scope of wildlife protection, the application of double criminality in any transfer must take account of the present state of the

45 See Eleanor Nam, The Penal Code Revision: A Wildlife Protection Milestone for Vietnam, Education for Nature–Vietnam (May 1, 2016),
http://www.envietnam.org.

comparative regimes.

Secondly, ne bis in idem. Two operational issues arise. One is the finality of the prior procedure. The premise of any transfer is that the case has not yet been finally disposed of. Because most wildlife cases span more than two jurisdictions, and because the persons implicated are typically dispersed across more than two jurisdictions as well, finality must be assessed in relation to the particular individuals and to the disposition of their respective cases. In a wildlife-smuggling case, for example, where China has already concluded the proceedings against some of those involved, the procedure for foreign-related individuals not yet dealt with should be regarded as not yet commenced for the purposes of the transfer mechanism, and the choice of forum should be determined on the basis of forum convenience. The other is the reviewing authority. The *ne bis in idem* inquiry should be conducted by the judicial authority of the requested State; the precise authority varies according to the procedural posture, with the prosecution service competent at the prosecution stage and the trial court competent at the trial stage, an allocation that promotes procedural efficiency.[46]

Thirdly, the principle of *lex mitior* (most-lenient-law). Compared with its ASEAN partners, China imposes more severe penalties for wildlife-related offenses. The EU experience in operating its transfer mechanism teaches that, both in defense of the rights of the accused and in service of doctrinal coherence across national legal systems, the maximum custodial sentence imposable on transfer should not exceed the lower of the maxima provided by the requesting and receiving States.

B. Procedural Framework

It is important to recall at the outset that the transfer of criminal proceedings is itself a form of judicial assistance *lato sensu* and must accordingly proceed in accordance with the procedures laid down in the *Law on International Criminal Judicial Assistance* of the People's

46 See Wang Jing (王菁) & Zhang Xin (张鑫), Zhongguo Neidi Yu Xianggang Zhiwu Fanzui Quji Sifa Xiezhu Zhidu Zhi Chuyi (中国内地与香港职务犯罪区际司法协助制度之刍议) [A Preliminary Discussion of the Inter-Regional Judicial Assistance System for Duty-Related Crimes Between Mainland China and Hong Kong], 9 Hebei Faxue (河北法学) [Hebei Law Science] 100, 100 (2012).

Republic of China.[47]

Stage One is about the initiation. Where China is the initiating State, the case-handling organ should prepare a request for judicial assistance directed at consolidating jurisdiction in respect of a case that implicates the jurisdiction of more than one State, together with translations of the relevant evidentiary materials. The competent authority, comprising, as appropriate, the Supreme People's Procuratorate, the Supreme People's Court, or the Ministry of Public Security, reviews the prerequisites; the external liaison body, ordinarily the Ministry of Justice, transmits the request to the judicial authorities of the requested State.

Stage Two refers to receipt, review, and execution. On receiving the request, the requested State examines, in accordance with its domestic law, whether the request satisfies the applicable preconditions. Where the conditions are met, the authority of the requested State consults with the external liaison body of the requesting State on the principles of unified disposition and forum convenience, and on the appropriate transfer of the proceedings. Where proceedings have already been opened in China, consultations may turn to the unified exercise of jurisdiction in China; where proceedings have already been opened in the requested State, and where forum-convenience considerations favor unified disposition there, China provides assistance in the transmission of evidentiary materials.

Stage Three can be illustrated as the application to Cases 1 and 2. The two cases discussed in Part I now admit of concrete treatment. Case 1 (the prosecution of A Jun for wildlife smuggling) infers that the Chinese procuratorial authorities could, through the Supreme People's Procuratorate, issue a request for the transfer of criminal proceedings to Myanmar. And the Myanmar authorities would then review whether the case satisfies double criminality and the other applicable preconditions. Because the conduct in question falls squarely within Myanmar's jurisdiction as a matter of domestic law, the parties may proceed to consultations on transfer, with Myanmar opening the proceeding. Case 2 (the prosecution of He Mou Die for the smuggling and sale of captive-bred tigers) is because, under

47 The Commentary on the Law of the People's Republic of China on International Criminal Judicial Assistance expressly classifies the transfer of criminal proceedings as a form of judicial assistance lato sensu.

Vietnamese law, which commercializes the captive breeding of wild animals, the prerequisite of double criminality is not satisfied. Under the present comparative regime, the case cannot be addressed through the transfer of proceedings, and supplementary mechanisms must be developed before such conduct can be effectively pursued across the border.

C. Legal Effects, Subsequent Assistance, and Further Exploration

On the side of legal effects, once the transfer of proceedings has taken effect, the proceedings of the transferring State against the actor in question are concluded; the receiving State opens its own proceedings and reports its progress to the transferring State in a timely manner. On the side of subsequent assistance, the transferring State, for its part, provides timely judicial assistance with the collection, transmission, and supplementation of evidentiary materials. On the side of further exploration, China and the ASEAN States may, on the principle of forum convenience, examine on a case-by-case basis the consolidation of jurisdiction in a single State, particularly in cases implicating the jurisdiction of multiple States. Identification of the State best positioned, on grounds of convenience, to assume consolidated prosecution promotes the unified disposition of cases, conserves litigation resources, and offers a workable means of resolving jurisdictional conflicts within the constraints of international law.

VI. CONCLUSION

The resolution of jurisdictional conflicts in transnational criminal cases calls, at the State level, for the construction of a transfer-of-proceedings mechanism between China and the ASEAN Member States. The first task is to set out clearly the conditions under which transfer may be agreed: drawing on the experience of cases handled in respect of the transnational illegal wildlife trade, the parties must, beginning with their substantive criminal law, clarify the operation of the principle of double criminality. The second task is, having regard to the finality of prior procedure and to the protection of the rights of the parties, to ensure that transfer does not produce duplicative proceedings or aggravate the available penalty. The third task is to clarify, with appropriate specificity, the competent authorities, the time limits applicable to disposition, and the obligation of case-handling organs to comply strictly, in practice, with the statutory rules governing requests for judicial assistance for the transfer of proceedings. In the era of economic globalization, the transfer of criminal proceedings stands as a productive means of resolving jurisdictional conflict. One that, properly constructed, can serve both the suppression of cross-border crime and the orderly cooperation between China and the ASEAN States that the present moment requires.