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Selective Reshaping: China's Paradigm Shift in International Economic Governance

Heng Wang *

ABSTRACT

In contrast with the selective adaptation approach toward external norms seen in its accession to the World Trade Organization, China increasingly plays a proactive role on the international stage, with the Belt and Road Initiative at the center of these activities. How can we understand this new approach by China toward international economic governance? What is responsible for China's shifting approach, and what are the implications of this shift? The paper presents selective reshaping as a new theoretical framework, and argues that China is shifting toward the selective reshaping of institutions and rules within the global economic order. Within this theoretical framework, perception and conception, complementarity and legitimacy are influencing components that affect selective reshaping, and which manifest substantially differently in this context, when compared with selective adaptation. Selective reshaping is likely to transform the institutions and rules within the international economic order, and carry long-term implications.

INTRODUCTION

The international economic legal order (IELO) is arguably comprised of three layers: American dominance, liberal internationalism, and sovereignty and state primacy.¹ In recent history, China has remained only a background player in the IELO, due largely to its limited scientific and technological development, poor economic performance,

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1 G. John Ikenberry and Darren J. Lim, 'China's Emerging Institutional Statecraft: The Asian Infrastructure Investment Bank and the Prospects for Counter-Hegemony' 2 (April 2017), available at <https://www.brookings.edu/wp-content/uploads/2017/04/chinas-emerging-institutional-statecraft.pdf> (visited 3 June 2020).

and 'the lack of other characteristics that a strong power must have.'² China's World Trade Organization (WTO) accession in 2001 represented a major move in the country's engagement with the IEL, as it afforded China the opportunity to contribute to shaping multilateral trade norms.³ That said, China's WTO accession negotiations were seen as a kind of 'a one-way street',⁴ in which China passively accepted external rules, to a large extent. For the most part, China's practice immediately following accession involved the selective adaptation of external rules. Selective adaptation was conceptualized in the seminal work of Pitman B. Potter,⁵ and refers to the reception and assimilation of foreign ideas into local conditions.⁶ It is widely applied in research on China's engagement with the IEL.⁷ However, while China's role was previously that of a rule-taker and rule-follower, it increasingly appears to be shifting toward that of a rule-shaker⁸ and rule-maker through challenges to the applicability of existing rules. This shift toward being a rule-maker is reflected in WTO dispute settlement, particularly regarding the interpretation of China's Accession Protocol, as it 'will likely be difficult' for China to modify rules through WTO negotiations.⁹

Notably, through the China-led Belt and Road Initiative (BRI) initiated in 2013, China's engagement with international economic law (IEL) demonstrates a major shift from the reactive, selective adaptation of external rules, toward a proactive, selective reshaping of IEL institutions and rules. The BRI, which arguably also encompasses the Asian Infrastructure Investment Bank (AIIB) and Multilateral Cooperation Center for Development Finance (MCDF, a China-led multilateral institution being developed under a Memorandum of Understanding (MOU) between China and eight multilateral development institutions¹⁰) under a functional approach as discussed

2 Guiguo Wang, 'China's FTAs: Legal Characteristics and Implications' 105 *American Journal of International Law* 493, (2011) at 509–10.

3 Jacques deLisle, 'China's Rise, the U.S., and the WTO: Perspectives from International Relations Theory', *University of Illinois Law Review Online* 57 (2018) at 60.

4 Wei Liang, 'China and the "One Belt, One Road" Initiative (BRI)', in Ka Zeng (ed), *Handbook on the International Political Economy of China* (Cheltenham, UK and Massachusetts, USA: Edward Elgar, 2019) at 368.

5 See, e.g. Pitman B. Potter, 'Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices' 2 *Washington University Global Studies Law Review* 119 (2003), at 119–50; Pitman B. Potter, *The Chinese Legal System: Globalization and Local Legal Culture* (London and New York: Taylor and Francis, 2001) 1–142.

6 Potter, 'Globalization and Economics Regulation in China', above n 5, at 119–50.

7 See, e.g. Ljiljana Biukovic, 'Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan' 11 *Journal of International Economic Law* 803 (2008), at 803–25; Wenwei Guan, 'Beijing Consensus and Development Legitimacy: The Evolution of China's Foreign Direct Investment (FDI) Regime from a Law & Development Perspective' 12 *Asian Journal of Comparative Law* 115 (2017), at 115, 138, 139.

8 Sikina Jinnah, 'Makers, Takers, Shakers, Shapers: Emerging Economies and Normative Engagement in Climate Governance' 23 *Global Governance* 285 (2017), at 289.

9 Henry Gao, 'China's Ascent in Global Trade Governance' in Carolyn D. Birkbeck (ed), *Making Global Trade Governance Work for Development: Perspectives and Priorities from Developing Countries* (Cambridge, 2011) at 170.

10 Chinese Ministry of Finance, 'Signing Ceremony of MOU on Multilateral Cooperation Center for Development Finance Held in Beijing' (2019), available at http://www.mof.gov.cn/zhengwuxinxi/tupianxinwen/201904/t20190401_3209877.htm (visited 17 July 2020).

below,¹¹ marks a watershed in China's engagement with the IELO. Compared with China's engagement with the WTO, this involves much broader but select issues, including infrastructure, investment facilitation, FinTech, and central bank digital currency (CBDC). One may argue that China's aforementioned rule-maker role in WTO dispute settlement is still largely 'reactive'; that is, a response to stringent obligations imposed on China upon its WTO accession, and China is not a leader or designer of the WTO system. However, in contrast, China is leading the BRI as it achieves certain outcomes: particularly the development of an unprecedented network of BRI agreements¹² (some of which are soft law instruments, including 'nonbinding standards, principles, and rules that influence and shape state behavior'¹³), and China-led institutions (like the AIIB, MCDF, China International Commercial Court (CICC)) under the BRI. China has concluded 197 BRI documents with 137 states and 30 international organizations,¹⁴ most of which are MOUs including memoranda on standards.¹⁵ The BRI primary agreements (e.g. China's MOUs with other governments) operate alongside many BRI secondary agreements (ranging from loan agreements to concession agreements), which promote the use of Chinese standards.¹⁶ To illustrate, the non-binding BRI primary agreements and the AIIB (the first multilateral financial institution created by emerging economies¹⁷) operate parallel to the Western-led hard law approach (e.g. WTO agreements, and the United States–Mexico–Canada Agreement (USMCA) with stringent rules) and multilateral development banks (MDBs, like the World Bank) under the Bretton Woods system, respectively.

China's paradigm shift has been on a fast track, largely leapfrogging from the selective adaption of Western-led external rules to the selective reshaping of international institutions and rules, until the coronavirus disease-2019 (COVID-19) outbreak in 2020. China's practices in the post-COVID-19 era, meanwhile, remain to be seen.

This paper explores the major paradigm shift in China's engagement with the IELO, an issue on which there is currently insufficient legal analysis. This is of considerable theoretical and practical significance given China's rise as a major economic power and the widespread effects of its reshaping of the IELO. Part I draws on China's actions,

11 Heng Wang, 'China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability' 22 *Journal of International Economic Law* 29 (2019), at 32–33.

12 Heng Wang, 'The Belt and Road Initiative Agreements: Uniqueness, Rationale and Challenges' *World Trade Review*, forthcoming.

13 Kern Alexander, et al., *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (New York, NY: Oxford University Press, 2006) at 134.

14 Bei An, 'China Signed 197 BRI Cooperation Documents with 137 Nations and 30 International Organizations' *XinhuaNet* (2019), available at http://www.xinhuanet.com/2019-11/15/c_1125237972.htm (visited 13 July 2020).

15 Chinese Ministry of Foreign Affairs, 'List of Deliverables of the Second Belt and Road Forum for International Cooperation' (2019), available at https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1658767.shtml (visited 3 June 2020).

16 Ying Qin, Fei Peng, and Jun Dong, 'How are China's Construction Standards Used Overseas?' available at http://dzb.jzsb.com/epaper/jzsb/wap/content/201909/30/content_4701.html (visited 15 July 2020) (35% of investigated BRI construction projects adopted Chinese standards, which are more commonly used than other standards).

17 Weifeng Zhou and Mario Esteban, 'Beyond Balancing: China's Approach Towards the Belt and Road Initiative' 27 *Journal of Contemporary China* 487 (2018), at 500.

particularly in respect of the BRI, to argue that China's approach toward the IELO is shifting from selective adaptation toward the selective reshaping of institutions and rules. The major developments used for comparison are China's WTO accession and the BRI, with others also referenced throughout. Part II explores the dynamics that influence and explain selective reshaping. It analyses the influencing factors of selective reshaping (perception and conception, complementarity, and legitimacy) and contrasts these with China's previous reliance on selective adaptation. Finally, Part III concludes with a discussion of the possible implications of selective reshaping for the IELO. Selective reshaping will likely support China in shifting its position from that of an economic power to a governance power. Selective reshaping may result in a significant disruption of US hegemony going forward, as China's role on the world stage necessitates a US response.¹⁸

Several caveats deserve attention here. First, this article endeavors to provide a broad picture of China's engagement with the IELO with a focus on trade, finance, investment, and dispute settlement. China is engaged in wide-range initiatives and this reshaping across various chosen topics and in chosen forms is a key part of selective reshaping. Therefore, the paper seeks to present an overview of China's activity by drawing on wide-ranging examples, rather than an analysis of only a few instances. Such a broad picture is largely lacking in the current literature. The analysis also covers China's efforts to promote selective reshaping as these efforts may continue in the future. Second, the examination of selective reshaping's effects falls outside the scope of this paper. The landmark moves under selective reshaping include the AIIB and a BRI agreement network. However, there are also concerns surrounding the BRI, including in respect of transparency, sovereignty, debt sustainability and other socio-economic issues.¹⁹ The assessment of the effects of selective reshaping deserves separate legal, social and economic analysis. Third, this paper delineates the scope of the BRI through a functional approach, that is, a focus on the functions of measures directed toward BRI implementation, whether or not they are explicitly labeled as part of the BRI.²⁰ Therefore, the BRI here covers, inter alia, the AIIB and RMB internationalization.

I. WHAT IS CHINA'S NEW PATHWAY OF SELECTIVE RESHAPING? SELECTIVE ADAPTATION V. SELECTIVE RESHAPING

Selective adaptation is concerned with the 'downloading' of external norms, in the form of 'rules, structures, processes, and practices.'²¹ Selective reshaping is the 'uploading'

18 Naná De Graaff & Bastiaan Van Apeldoorn, 'US-China Relations and the Liberal World Order: Contending Elites, Colliding Visions?' 94 *International Affairs* 113 (2018) at 115.

19 See, e.g. Gregory Shaffer and Henry Gao, 'A New Chinese Economic Order?' 23(3) *Journal of International Economic Law* [Advance articles 2020], at 14; Christoph Lattemann, et al., 'Final Reflections', in Wenxian Zhang, Ilan Alon and Christoph Lattemann (eds), *China's Belt and Road Initiative: Changing the Rules of Globalization* (Cham, Switzerland: Palgrave Macmillan, 2018) at 338, 341 (various concerns including debt); Roza Nurgozhayeva, 'Rule-Making, Rule-Taking or Rule-Rejecting under the Belt and Road Initiative: A Central Asian Perspective', 8 (1) *The Chinese Journal of Comparative Law* 250 (2020), at 261 (socio-economic issues).

20 See Wang, above n 11, at 32-33.

21 Potter, 'Globalization and Economic Regulation in China', above n 5, at 120.

of China-led institutions and China-preferred rules at the extra-regional level. This Part first reviews China's selective adaptation, and then explores China's shift toward selective reshaping in terms of institutions and rules. Such a shift reflects China's movement from a passive approach to the IELO to a more proactive one.

A. Selective adaptation

Selective adaptation is a theoretical lens through which China's practice, particularly following its WTO accession, has been analyzed.²² It is a refinement of legal transplant theory,²³ depicting a 'process by which foreign ideas are received and assimilated into local conditions', with these local conditions determining the scope for imitation.²⁴ Selective adaptation is 'a coping strategy for balancing local regulatory imperatives with requirements of compliance with foreign norms.'²⁵ However, questions have been raised as to how successfully adaptation is accepted by local communities and underlying norms are assimilated into local practices, given normative tensions in the adaptation process.²⁶

Adaptation is a largely reactive process, involving the local implementation of external norms mediated by local characteristics and needs.²⁷ It is not the direct imitation of external norms, as local governments will attempt to preserve their own policy priorities and shape the adaptation process, resulting in differing degrees of conformity among local and non-local norms.²⁸ Thus, a crucial concern is whether the implementation of international standards locally will also be accompanied by assimilation of the underlying external norms.²⁹

Regarding selectivity, each country is selective when choosing which external rules to implement. However, this selectivity may extend beyond clearly relevant considerations (e.g. the country's needs and legal structure), to more political considerations around the kinds of rules a country wishes to be perceived as endorsing.

Selective adaptation has played a key role in allowing China to join the IELO partly 'on its own terms', by balancing 'international norms of economic regulations with local concerns over social welfare and balanced development.'³⁰ This flexibility in adapting external norms while engaging in the IELO has been enabled by China's size and importance. However, China has largely been perceived as a 'reactive agent, one that is responding to the pressures of others as opposed to taking its own initiatives.'³¹

22 Ibid, at 119.

23 For the analysis of legal transplants, see, e.g. Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens, GA: University of Georgia Press, 1993) 1–121.

24 Pitman B. Potter, *Assessing Treaty Performance in China: Trade and Human Rights* (Vancouver, British Columbia: UBC Press, 2014) 9.

25 Potter, 'Globalization and Economic Regulation in China', above n 5, at 120.

26 Ljiljana Biukovic, 'International Law Interrupted—a Case of Selective Adaptation', 60 *University of New Brunswick Law Journal* 161 (2009), at 176.

27 Potter, 'Globalization and Economic Regulation in China', above n 5, at 120.

28 Biukovic, above n 7, at 804–05.

29 Ibid, at 805.

30 Potter, 'Globalization and Economic Regulation in China', above n 5, at 121.

31 James F. Paradise, 'The Role of "Parallel Institutions" in China's Growing Participation in Global Economic Governance', 21 *Journal of Chinese Political Science* 149 (2016), at 153.

The clearest examples of China's engagement in selective adaptation emerged during the lengthy WTO entry process and around its compliance with WTO requirements. Due to substantial concerns among WTO members regarding inconsistencies between China and the WTO on regulatory practices, China made commitments to comply with WTO rules on matters including non-discrimination, transparency, and uniform administration.³² Transparency, in particular, is one of the WTO 'pillar principles', and lays the foundation for the rule-based trading system.³³ It is an obligation embedded in WTO agreements requiring that rules, judicial decisions and administrative decisions relating to or affecting trade be made public.³⁴ As a result, China was required to undertake substantial legal reform to bring its regulatory practices into compliance with WTO law,³⁵ such as by introducing transparent, consistent procedures to enable persons to challenge and enforce rules and decisions.³⁶

These laws and regulations represent a substantial adaptation of WTO-mandated transparency rules.³⁷ The intermediary effect of local norms, however, can be seen in the broad discretion these rules confer on the government and other bodies, for example, to limit access to information where necessary to prevent 'social instability and protect the safety of the state, the public and the economy', along with the absence of provisions for concrete sanctions on government officials who fail to comply with the provisions.³⁸ Further, meetings, debates, and discussions in the State Council and various local level government administrations, along with many legislatures including the National People's Congress, are not fully open to the public and the mass media.³⁹

The resilience of local norms of non-transparency and non-accountability associated with imperatives of state-driven development, in conflict with liberal norms underlying the WTO system, has given rise to concerns as to the degree of governmental compliance with these provisions.⁴⁰ The WTO accession constitutes a prime example of China's efforts to enter the IELO through the local adaptation of external norms, giving rise to possible normative tensions.

B. China's shift toward selective reshaping

Although selective adaptation may have been the main tool in China's efforts to enter the Western-dominated IELO, as China has gained greater power and experience, it

32 Potter, 'Globalization and Economic Regulation in China', above n 5, at 123–24.

33 Jiangyu Wang, 'The Evolution of China's International Trade Policy: Development Through Protection and Liberalization' in Yong-Shik Lee (ed), *Economic Development through World Trade* (Kluwer Law International, 2007) at 205.

34 Ibid, at 205.

35 Ljiljana Biuković, 'Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan' in Debra P. Steger (ed), *Redesigning the World Trade Organization for the Twenty-first Century* (Ottawa, ON: Wilfrid Laurier University Press, CIGI, IDRC, 2010) at 203.

36 Pitman B. Potter, 'China and the International Legal System: Challenges of Participation' 191 *The China Quarterly* 699 (2007), at 705–08; Biuković, above n 35, at 203–04.

37 Potter, 'Globalization and Economic Regulation in China', above n 5, at 123.

38 Biuković, above n 35, at 205.

39 Wang, above n 33, at 206.

40 Potter, above n 36, at 705–08.

appears to have begun seeking a 'greater voice and representation' in this setting, 'to a degree reflective of its newly-acquired economic power'.⁴¹ China is shifting toward the selective reshaping of institutions and rules. Here, reshaping refers to developments regarding institutions and rules that go beyond existing standards or structures, although they are not necessarily all created by China and may build on previous experience (like the AIIB learning from the World Bank reform ideas). Building upon selective adaptation, selective reshaping may, in its early stages, continue to be a way of mediating legal transplants. However, selective reshaping shifts the focus to developing new institutions and rules. This is particularly the case under the BRI, China's landmark move for extra-regional engagement. As discussed below, the hallmarks of China's institutional reshaping efforts so far include the AIIB, the MCDF, the Belt and Road Forum for International Cooperation (BRF), and the Cross-Border International Payment System (CIPS), while China's efforts to reshape hard and soft law can be found at the multilateral (such as in the WTO, the World Customs Organization (WCO), G20, and the United Nations Commission on International Trade Law (UNCITRAL)), regional (e.g. trade remedy rules in the free trade agreement (FTA) between China and Korea), and domestic levels (like free trade zones (FTZs)). Select reshaping addresses a variety of issues, including trade remedies, e-commerce, FinTech and CBDC, data localization, specific standard-setting (e.g. 'China Standards 2035' launched in 2018⁴²), internet sovereignty, and international finance (e.g. international payment and infrastructure finance given China's financial clout⁴³).

1. Institutional reshaping

China is reshaping formal and informal institutions understood in their broad sense, including mechanisms (e.g. forums) and systems (e.g. the international payment system). In so doing, China appears to be developing 'parallel institutions' to pre-existing ones.⁴⁴ This volume of new institutional developments contrasts with China's previous focus on adapting WTO obligations.

a. Formal institutions In respect of external formal institutions, China leads the AIIB, the New Development Bank (NDB), the CIPS, with more BRI-related institutions to come including the MCDF and the International Commercial Dispute Prevention and Settlement Organization.⁴⁵ The AIIB and NDB have novel governance and policy-making models (like their decision making mechanisms highlighting consensus-building).⁴⁶ As a MDB created by emerging economies, the AIIB arguably reshapes selective aspects of MDB governance structures and overarching legal frameworks, including the formula for setting country voting shares, and a nonresident executive

41 Paradise, above n 31, at 151.

42 Shaffer and Gao, above n 19, at 13.

43 Eswar S. Prasad, *Gaining Currency: The Rise of the Renminbi* (New York, NY: Oxford University Press, 2017) at xvii.

44 Liang, above n 4, at 363.

45 Chinese Ministry of Foreign Affairs, above n 15, at Part III, Item 11.

46 Alex He, *China in the International Financial System: A Study of the NDB and the AIIB* (Papers No 106, CIGI, 2016) at 1.

board.⁴⁷ The NDB selectively reshapes the MDB structure, particularly the principle of equality concerning the NDB members' rights and obligations,⁴⁸ and a capital base built on bonds denominated in BRICS national currencies.⁴⁹ Essentially, the reshaping reflects flexibility in the MDB operation. China also promotes the CIPS, which may replace the Society for Worldwide Interbank Financial Telecommunication for the settlement and clearing of cross-border transactions denominated in RMB,⁵⁰ and strengthen the RMB's international role along with the proposed CBDC.⁵¹

For internal formal institutions like FTZs, China promotes reshaping to address its concerns in IEL. The CICC and International Commercial Expert Committee (ICEC) of Supreme People's Court of China (SPC) handle commercial disputes. The CICC is arguably innovative in promoting mediation,⁵² and establishing the ICEC, which is unique in the sense that it neither solely relies on domestic judges (like those in Germany) nor consists of international judges (as in Singapore). In the view of a SPC Vice-President, judicial activities related to FTZs could promote the upgrading of international economic rules through, inter alia, the innovative interpretation and development of existing international rules by FTZ-related adjudications, and the removal of unreasonable international rules (e.g. discriminatory provisions) through the refusal to apply these rules (e.g. the refusal to recognize or enforce international arbitration awards and foreign court decisions).⁵³

b. Informal institutions China is leading a web of general and issue-specific BRI-related mechanisms in close collaboration with the UN and other international organizations. General mechanisms include the BRF, a multilateral diplomatic platform of unprecedented level and scale, led by China.⁵⁴ Issue-specific mechanisms are concerned with major aspects of cross-border economic activities: trade (such as customs clearance facilitation between China, Hungary, Serbia, and Macedonia under G16 + 1 summits⁵⁵), finance (including Asian Financial Cooperation Association as a regional financial idea exchange platform⁵⁶), investment (e.g. a multilateral dialog mechanism

47 Prasad, above n 43, at 233.

48 Qingzhong Pan, Daokui Li and Ming Feng, 'What is the New in the New Development Bank: Background, Significance and Challenges of the BRICS Development Bank', 2015(2) *International Economic Review* 134 (2015), at 146.

49 Andrew F. Cooper, 'The BRICS' New Development Bank: Shifting from Material Leverage to Innovative Capacity' 8 *Global Policy* 275 (2017), at 275–76.

50 Cameron Rotblat, 'Weaponizing the Plumbing: Dollar Diplomacy, Yuan Internationalization, and the Future of Financial Sanctions' 21 *UCLA Journal of International Law and Foreign Affairs* 311 (2017), at 345.

51 Prasad, above n 43, at 114–17.

52 Supreme People's Court Monitor, 'SPC Reveals New Belt & Road-Related Initiatives' (7 October 2017).

53 Rong He, 'On China's Judiciary Participation in the Formation of International Economic Rules' 1 *Chinese Review of International Law* 3 (2016), at 14.

54 NDRC, 'NDRC: Six Aspects of Achievements of the Belt and Road After Its 5 Years' *Caijing*, available at <http://economy.caijing.com.cn/20180809/4498391.shtml> (visited 13 January 2019).

55 Jędrzej Górski, 'China's Strategy Toward Central and Eastern Europe Within the Framework of 16 + 1 Group: The Case of Poland' in Wenxian Zhang, Ilan Alon and Christoph Lattemann (eds), *China's Belt and Road Initiative: Changing the Rules of Globalization* (Cham, Switzerland: Palgrave Macmillan, 2018) at 117.

56 Li Xiang, 'Asian Financial Cooperation Association Launched in Beijing' *CGTN* (24 July 2017), available at https://news.cgtn.com/news/3d67444e796b444e/share_p.html (visited 17 July 2020).

on public-private partnership under the MOU between China's National Development and Reform Commission and the United Nations Economic Commission for Europe), intellectual property (IP) (e.g. the high-level conference for BRI countries co-organized by Chinese government agencies and World Intellectual Property Organization⁵⁷), digital economy (like the annual World Internet Conferences), and dispute settlement (e.g. the World Enforcement Conference, a permanent dialog between judiciaries of China and Central and Eastern European Countries), among others. Additionally, Chinese-built industrial parks have been developed in 82 new 'economic and trade cooperation zones' in BRI states.⁵⁸

2. Rule reshaping

Institutional reshaping often works to mold rules (e.g. the AIIB Environmental and Social Framework⁵⁹), and thus cannot be completely separated from rule reshaping. The new institutions that China has created or might create are likely to generate rules.⁶⁰ Reshaping involves not only rule interpretation (by domestic courts as discussed above) but also rule development (e.g. the BRI agreement network). China aims to be 'a leader of international economic and trade rules.'⁶¹ Selective reshaping currently involves largely the fine-tuning or challenging of existing hard law in respect of traditional issues, and the development of standards regarding new issues that may lay a foundation for future rule creation. The selected issues are predominantly those that arose after China's WTO accession, including e-commerce, FinTech, CBDC, and investment facilitation. Compared with hard law, selective reshaping is more obvious in soft law.

a. Hard law Concerning hard law, China appears to be endeavoring to shape international rules on selective new aspects of cross-border commerce that it regularly engages with. Investment facilitation provides a typical example. At the WTO, China has endeavored to shape international rules regarding investment facilitation. Notably, China took the initiative to establish 'Friends of Investment Facilitation' at the WTO and put forward a 'Chinese solution for the WTO to promote global investment facilitation.'⁶² This echoes China's efforts to promote investment facilitation through soft law, for example by putting forward the Outlines for BRICS Investment Facilitation⁶³

57 China National Intellectual Property Association, 'The 2018 High-Level Conference on IP for Countries along Belt and Road highlights Inclusiveness, Development, Cooperation, Mutual Benefit', available at <http://english.sipo.gov.cn/news/officialinformation/1131332.htm> (visited 10 July 2020).

58 Shaffer and Gao, above n 19, at 10.

59 Asian Infrastructure Investment Bank, *Environmental and Social Framework* (February 2016).

60 deLisle, above n 3, at 71.

61 Central Committee of the Communist Party of China and the State Council of China, *Several Opinions of the CPC Central Committee and the State Council on Developing a New System of Open Economy* (2015), part VII.

62 Chinese Ministry of Commerce, 'Minister Zhong Shan Attends the Ministerial Breakfast Meeting on Investment Facilitation of the WTO Members and Delivers a Speech', available at <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201712/20171202686115.shtml> (visited 13 December 2019).

63 'Outlines for BRICS Investment Facilitation', available at <http://www.brics.utoronto.ca/docs/170831-investment.html> (visited 17 July 2020).

at the 2017 BRICS Xiamen Summit,⁶⁴ and 'mov[ing] the G20 toward an international investment framework and investment facilitation' that was initiated under China's G20 leadership.⁶⁵

China is involved in the reshaping of hard law in traditional areas, to a lesser extent, due likely to the difficulty in challenging more concrete, pre-existing rules. These more limited efforts include actions related to trade remedies (the China–Korea FTA forbids a methodology based on the surrogate value of a third country,⁶⁶ and the practice of zeroing in dumping margin determination⁶⁷), and certain aspects of IP (like the rule development on a utility model in the China–Korea FTA⁶⁸). In the long term, a possible China-centered FTA network⁶⁹ could emerge and new rules may be gradually developed.

b. Soft law China has made efforts to shape soft law in new issues like e-commerce and FinTech. To illustrate, China is reportedly leading efforts to formulate a standard framework for cross-border e-commerce at the WCO, which is a 'first guidance document for the cross-border e-commerce supervision and service of the world customs' and shows 'China's leading role in formulating the international rules of the cross-border e-commerce in the customs field.'⁷⁰ According to Chinese government officials, this will be the basis for the principles of the cross-border e-commerce supervision of the WCO.⁷¹ At the UNCITRAL, the Commission has for the first time developed a guiding legal document (i.e. the UNCITRAL Technical Notes on Online Dispute Resolution) based on China's plan.⁷²

China is reshaping soft law regarding FinTech. Departing from China's traditional passive stance in the Financial Stability Board and the standard-setting bodies, China is promoting a shift away from shadow banking and toward non-bank financial intermediaries (including mobile banking providers, payday lenders, broker-dealers, and hedge funds) under the overlapping labels of financial inclusion and FinTech.⁷³ This may partially explain why China promotes financial inclusion at the G20, as evidenced

64 Tong Qi, *Research on International Economic and Trade Law Related to the Belt and Road* (Beijing: Higher Education Press, 2018) at 12.

65 Karl P. Sauvant, 'China Moves the G20 toward an International Investment Framework and Investment Facilitation' at 1–23, available at <http://ccsi.columbia.edu/files/2018/04/KPS-China-the-G20-updated-March-2018.pdf> (visited 16 July 2020).

66 China–Korea FTA, Article 7.7.4.

67 Ibid, Article 7.7.5.

68 Ibid, Article 15.16.

69 deLisle, above n 3, at 67.

70 Belt and Road Portal, 'China to Push Formulation of Cross-Border E-Commerce International Rules for World Customs', available at <https://eng.yidaiyilu.gov.cn/qwyw/rdxw/43482.htm> (visited 29 June 2020).

71 Ibid.

72 Chinese Ministry of Commerce, 'Rule of Law in Commerce Becomes Increasingly Developed', available at <http://www.mofcom.gov.cn/article/ae/ai/201710/20171002657289.shtml> (visited 12 May 2020).

73 Peter Knaack and Julian Gruin, 'From Shadow Banking to Digital Financial Inclusion: Regulatory Framework Contestation between China and the FSB' (Working Paper No 134, GEG, 2017) at 2.

by the G20 High-Level Principles for Digital Financial Inclusion.⁷⁴ China is reshaping global financial standards of shadow banking that used to include non-banking financial services. As to other examples, China has made a number of first-time efforts at the International Organization for Standardization (ISO) (e.g. China-led drafting of an international standard on specification of description for banking products,⁷⁵ and ISO 20022 financial exchange message⁷⁶).

CBDC is another crucial area related to FinTech, and is expected to affect how the international monetary system and world economy operate in the digital age. China is expected to influence the development of international standards regarding a CBDC. It is predicted that China 'will be the first major country'⁷⁷ to launch a CBDC that is the cornerstone of the digital economy and the key to 'competition among powers.'⁷⁸ The currency developed by the People's Bank of China, China's central bank, differs in design from those of other countries.⁷⁹ More broadly, China is participating in CBDC concept- and standard-setting through standard-setting bodies (dealing with topics ranging from CBDC definition and categories, issues affecting CBDC and virtual currencies, to regulation), and has 'introduced standards' on CBDC in certain economies involved in the BRI.⁸⁰ At the International Telecommunication Union, China appears to be leading research and the standardization of the CBDC ecosystem and reference architecture.⁸¹

More broadly, China has developed a unique and unprecedented network of agreements under the BRI that affects extra-regional governance. BRI primary agreements, along with BRI secondary agreements, promote the use of Chinese standards, and could affect IEL rule-making in the long run. Soft law may also harden in selective areas (like technical standards, e-commerce, and dispute settlement) over time.⁸²

74 Global Partnership for Financial Inclusion, 'G20 High-Level Principles for Digital Financial Inclusion', available at <https://www.gpfi.org/sites/gpfi/files/documents/G20%20High%20Level%20Principles%20for%20Digital%20Financial%20Inclusion%20-%20Full%20version-.pdf> (visited 17 June 2020).

75 Wei Li, 'Development of Financial Standardisation in the New Era', 2017 (24) *China Finance* 63 (2017), at 64.

76 Qian Yao, 'Prioritizing Standards, Promoting Going-Out of Finance', 2018 *Financial Computerizing* 2 (2018), at 2.

77 Bailey Reutzell and Pete Rizzo, 'Most Influential in Blockchain 2017 #6: Yao Qian' (2017), available at <https://www.coindesk.com/coindesk-most-influential-2017-6-yao-qian/> (visited 1 March 2020).

78 Qian Yao, 'Technological Considerations of Central Bank Digital Currency' *Yicai* (6 March 2018), available at <https://www.yicai.com/news/5404436.html> (visited 13 June 2019).

79 Will Knight, 'China's Central Bank Has Begun Cautiously Testing a Digital Currency' *Technology Review* (23 June 2017), available at <https://www.technologyreview.com/s/608088/chinas-central-bank-has-begun-cautiously-testing-a-digital-currency/> (visited 12 June 2020).

80 Chen Jia, 'China Promotes Global Digital Fiat Currency Standardization' *China Daily* (8 December 2018), available at http://www.chinadaily.com.cn/cndy/2018-12/08/content_37372782.htm?from=timeline&isappinstalled=0 (visited 10 December 2019).

81 Qian Yao, 'National Financial Standardization Technical Committee Secretary General Qian Yao: Prioritizing Standards, Promoting Going-Out of Finance', available at <https://mp.weixin.qq.com/s/EW5asUXbIUHZmvTSyY48Rg> (visited 20 October 2019).

82 Wang, above n 11, at 41–42, 55.

C. Conclusion

Selective reshaping focuses on selected prioritized areas (e.g. FinTech), at selected venues (like international organizations), with selected partners (such as BRI states) and using selected methods (e.g. binding and non-binding instruments, domestic, and international institutions—formal and informal ones). Selective reshaping, seen particularly in the institutions and rules of the BRI, features maximized flexibility and differs from a Western-led international economic governance pathway that largely relies on hard law and stringent rules (like the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and USMCA). That said, China ‘remains deeply committed to’ many traditional institutions,⁸³ and supports existing investment law, which works in China’s favor as an exporter under the BRI.⁸⁴ China can thus be expected to continue supporting the WTO, as the WTO rules help to promote economic activities with BRI states, and China benefits from liberal openness under the multilateral trading system.

Selective reshaping is a possible game changer concerning international institutions and rules, and will likely enable China to translate its economic power into governance power if the obstacles can be properly managed. Selective reshaping reflects China’s philosophy of ‘constant dripping wears away a stone’. The ‘stone’ here appears to be selected existing institutions and rules that China intends to reshape given its preferences. Each individual rule and institutional development may not be necessarily highly groundbreaking. It is observed that China’s strategy has been ‘relatively transactional,’ and ‘thin.’⁸⁵ However, the vision of the BRI indicates the efforts to seek new global governance models.⁸⁶ China is increasingly involved in sponsoring ‘new international economic organizations or initiatives on matters concerning trade, investment, currencies, bond issuance, credit rating, and others.’⁸⁷ The BRI is likely to ‘alter or supplement’ current multilateral and regional institutions,⁸⁸ through new extra-regional institutions (like the AIIB, and BRF) and domestic ones (e.g. the CICC). To illustrate, the AIIB is deemed to represent ‘a dramatic rearranging of international institutions,’⁸⁹ with the rise of new institutions such as the MCDF.

II. HOW TO UNDERSTAND SELECTIVE RESHAPING?

In order to identify and assess China’s transition toward selective reshaping of institutions and rules, it is important to consider the factors influencing how selective reshaping occurs. These factors partially overlap with, while also differing in important ways from, the factors underlying selective adaptation. Selective reshaping and selective

83 Paradise, above n 31, at 154.

84 Shaffer and Gao, above n 19, at 21.

85 deLisle, above n 3, at 68.

86 Chinese National Development and Reform Commission, et al., ‘Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road’ (28 March 2015), available at http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html (visited 24 September 2019).

87 Paradise, above n 31, at 154.

88 Peter K. Yu, ‘Building Intellectual Property Infrastructure Along China’s Belt and Road,’ (Research Paper No 18–52, Texas A&M University School Of Law Legal Studies, 2018) at 13–14.

89 Rotblat, above n 50, at 359.

adaptation can be seen to sit on a nuanced continuum involving multiple shades of gray, rather than a dichotomy.

On the one hand, selective reshaping will continue to co-exist with selective adaptation for the near future, and possibly beyond, due to at least two reasons. First, China is not seeking a complete overhaul of the IELO. China benefits from many existing international rules (like WTO law) and only seeks to reshape selective aspects of the IELO. Therefore, selective adaptation largely continues to be undertaken in respect of many such existing rules. Second, there are limits to China's capacity to reshape the IELO, as these efforts demand much experience and expertise, while selective reshaping also depends on the responses of other stakeholders.

Selective reshaping builds on the concept of the selective adaptation of external norms, and its three major factors of perception, complementarity, and legitimacy. In other words, this article borrows the terms and factors identified by Pitman B. Potter and adapts them to address China's distinctive practices. From this, perception, complementarity, legitimacy, and a new factor, conception, emerge as the major influencing factors of selective reshaping, and help explain the rationale behind the paradigm shift from adaptation to reshaping.

On the other hand, the influencing factors of selective reshaping differ markedly from those in selective adaptation, as discussed below. First, selective adaptation and selective reshaping have different focal points: the former, China's internal reform (following its WTO accession), and the latter, China's external engagement with the IELO (as the BRI leader). Second, conception is largely absent in the influencing factors for selective adaptation, but is crucial in selective reshaping. Selective reshaping is affected more by the conception of rules and institutions than the perception of external rules, as in selective adaptation. This is because China, as the designer of the BRI, plays a key role in its ongoing development. Third, considerable differences exist in respect of other influencing factors; for example, selective reshaping is affected (i) more by complementarity between China's preferences and new rules and institutions than by complementarity between local regulatory imperatives and external norms under selective adaptation; and (ii) more by conscious seeking of international legitimacy than unconscious domestic legitimacy considerations under selective adaptation. These differences are further discussed below.

A. Perception and Conception

In selective adaptation, perceptions concerning the purpose, content, and effect of non-local rules and institutional arrangements help determine the 'focus and parameters of selection and adaptation',⁹⁰ and exert influence on the processes and results of selective adaptation.⁹¹ The actors include local interpretative communities, such as government officials, socio-economic professionals, and other groups exercising authority in the relevant area, along with the public.⁹² Perception is a complex process, influenced by

90 Potter, 'Globalization and Economic Regulation in China' above n 5, at 120; Potter, above n 36, at 701.

91 Potter, above n 24, at 10.

92 Potter, above n 36, at 701.

complicated cognition factors in the recipient country, including a diversity of understanding and 'cognitive dissonance and denial.'⁹³ In particular, interpretive communities encounter, interrogate, and interpret non-local and local standards by reference to their psychological and sociocultural norms.⁹⁴ Significantly, the perceptions of key actors may often differ substantially. To illustrate, conditionalities linked to China's WTO accession process could be perceived as foreign rule imposition by some Chinese actors, but by other, reform-oriented circles, as an opportunity to 'cement a stringent regulatory framework against entrenched vested interests.'⁹⁵ Perception occurs in many areas, including beyond trade law. Taking corporate governance as an example, the adaptation by China of North American and European regulatory models reflects 'perceptions [by Chinese regulators] about the inadequacy of China's regulatory norms for the state-owned sector, as well as assumptions about the relationship between corporate law regimes and economic growth.'⁹⁶

Selective reshaping is more multifaceted than selective adaptation. Foremost, perception in selective reshaping not only refers to the understanding of external rules and institutions (as is the case with selective adaptation), but also the understanding of different options in extra-regional governance.⁹⁷ In selective reshaping, perception is often concerned with the options in respect of specific issue areas (e.g. following the status quo, or developing new hard or soft law, formal or informal institutions) and whether reshaping should occur in this area. The selected areas in selective reshaping are often those in which China has increased economic and possibly geopolitical interest (e.g. related to e-commerce, finance and investment), concerns (e.g. challenges in trade remedies, risks in outbound investment that call for investment facilitation), and capacity (such as FinTech, e-commerce and infrastructure), and where there is room for China to gain advantages through fostering change (e.g. the BRI filling 'the vacuum' left by MDBs).⁹⁸ Further, selective reshaping appears to often avoid sensitive areas where China has not accepted stringent international obligations (e.g. labor).

Second, and relatedly, selective reshaping is influenced by an additional factor (conception). In selective adaptation, China must gain an understanding of external rules, rather than developing plans and ideas. In selective reshaping, conception is concerned with developing new plans, ideas and initiatives in line with China's goals,⁹⁹ such as 'Chinese wisdom' or 'China's project' often presented by China for global governance¹⁰⁰ and the design of the BRI. Such conception is crucial in respect of China's efforts to become a leader in IEL and exert more influence in the making of international

93 Ibid, at 701.

94 Potter, above n 24, at 10.

95 Ivo Krizic and Omar Serrano, 'Exporting Intellectual Property Rights to Emerging Countries: EU and US Approaches Compared', 22 *European Foreign Affairs Review* 57 (2017) at 73.

96 Potter, 'Globalization and Economic Regulation in China' above n 5, at 148.

97 Liang, above n 4, at 364.

98 Ibid, at 370.

99 Central Committee of the Communist Party of China and the State Council of China, above n 61, paragraph 31.

100 Congyan Cai, *The Rise of China and International Law* (New York, NY: Oxford University Press, 2019) 8, 153.

law.¹⁰¹ Specifically, conception requires the identification of selected areas, venues, partners, and methods to promote institutional or rule development.

Conception is reflected in China's efforts to seek 'more norm entrepreneurship' in international law, such as 'advocating principled argument, seeking legal interpretation, building coalitions of the willing, and developing national legal practice.'¹⁰² China's perception of external rules and institutions lays the foundation for conception. Conception often involves new issues (e.g. infrastructure, FinTech and internet) that China understands well, considers less sensitive and views as beneficial for its future. Many of these issues involve the conception of the role of the state in markets¹⁰³ on which different states have different views.

Concerning rules, one example is the network of BRI agreements which reflects China's position that 'breadth is better than concreteness' in rulemaking.¹⁰⁴ BRI agreements, inter alia, promote Chinese standards through BRI practices and provide sufficient room for China in practice. The China–Korea FTA also precludes a methodology based on the surrogate value of a third country in dumping margin determination. It is based on China's perception of WTO rules and addresses China's dissatisfaction with the current international economic order (e.g. non-market economy provisions in its WTO Accession Protocol¹⁰⁵). For areas in which international rules have not been fully developed, the perception of practices forms the basis for conception. To illustrate, China 'meticulously chose infrastructure connectivity investments' as its way to reshape extra-regional governance.¹⁰⁶ China's design of a CBDC appears to build on the observation of virtual currency practices outside China.¹⁰⁷ China also strives to 'redraft' current cyber norms by taking the lead in regional governance initiatives.¹⁰⁸ More generally, China advocates 'broadly principled arguments' (e.g. internet sovereignty to support data localization requirements¹⁰⁹), which affect rule creation and application.¹¹⁰

Concerning institutions, new institutions necessitate the design of these institutions and their rules. Conception can be seen in respect of issues like infrastructure finance and investment facilitation. By considering current international rules and institutions (e.g. the World Bank), China conceives novel multilateral organizations (like the AIIB which necessitates the design of the institution and its rules, and MCDF)¹¹¹ and

101 Ibid, at 102.

102 Ibid, at 153.

103 Adam Dixon, 'The China Investment Corporation and the Rise of Sovereign Wealth Funds', in Ka Zeng (ed), *Handbook on the International Political Economy of China* (Cheltenham, UK and Massachusetts, USA: Edward Elgar, 2019) at 225.

104 Cai, above n 100, at 108.

105 Protocol on the Accession of the People's Republic of China, paragraph 15.

106 Bin Gu, 'MCDF: A New Beacon of Multilateralism in Development Finance', *Journal of International Economic Law* (2020), at 17.

107 People's Bank of China, 'People's Bank of China Held the Video Conference for the Latter Half of 2019', http://www.gov.cn/xinwen/2019-08/03/content_5418386.htm (visited 2 July 2020).

108 Nurgozhayeva, above n 19, at 256.

109 Jinhe Liu, 'China's Data Localization', *13 Chinese Journal of Communication* 84 (2020), at 84.

110 Cai, above n 100, at 107, 109.

111 Gregory T. Chin, 'Asian Infrastructure Investment Bank: Governance Innovation and Prospects', *22 Global Governance* 11 (2016), at 12.

domestic institutions that deal with China's external engagement (like the CICC). As another example, the idea of the Global Infrastructure Connectivity Alliance was proposed by China as the host of the G20 Summit in 2016.¹¹² China's initiation of the Friends of Investment Facilitation at the WTO is arguably based on its extensive experience in international investment law, including investment treaties.

Third, actors need to perceive and conceive a much broader range of rules and institutions under selective reshaping than under selective adaptation. The BRI involves many issues that go far beyond the WTO rules and institutions involved in selective adaptation. As a key example of institutions, over 20 BRI multilateral platforms established during the second BRF (including the International Coalition for Green Development on the Belt and Road) deal with a wide range of issues that go beyond the WTO system, including ports, taxation, energy, environment, culture, think tanks, and the media.¹¹³ For rules, the BRI agreements, for instance, expand from trade to new issues such as investment facilitation and internet governance.¹¹⁴

How perception and conception affect selective reshaping can be expected to change over time. To illustrate, China's position on IP may transform with its IP development and an increased need to protect IP if Chinese high-tech businesses expand along the BRI. The increasing IP-related activities in the BRI will accelerate the IP protection and enforcement process becoming part of China's interests.¹¹⁵

B. Complementarity

In selective adaptation, complementarity describes how apparently contradictory phenomena or priorities, usually local and external norms, can be combined in various ways that preserve the 'essential characteristics of each component', and yet enable them to work together in a mutually reinforcing way to bring new effects (e.g. addressing challenges like unwarranted trade restrictions).¹¹⁶ Complementarity in selective adaptation concerns the relationship between external norms and local regulatory imperatives (and local conditions). Selective adaptation is largely used to enable reform, and thus the focus is on the complementarity of external norms being transplanted into the domestic setting. This reflects the 'downloading' of external norms, and, more broadly, affects whether China signs and is willing to comply with certain rules.¹¹⁷ The challenge is to ensure that international and local norms are capable of 'coexisting and operating together in non-conflicting and effective ways', although they could contradict each other.¹¹⁸

112 Gu, above n 106, at 8.

113 The Second Belt and Road Forum for International Cooperation, 'New Starting Point, New Vision and New Journey: Wang Yi on Outcomes of the Second Belt and Road Forum for International Cooperation (BRF)' (29 April 2019), available at <http://www.beltandroadforum.org/english/n100/2019/0505/c22-1420.html> (visited 3 July 2020).

114 See, e.g. The Belt and Road Digital Economy International Cooperation Initiative, paragraph 14, available at <http://finance.jrj.com.cn/tech/2017/12/04073823734129.shtml> (visited 29 June 2020).

115 Jyh-An Lee, 'The New Silk Road to Global IP Landscape' in Lutz-Christian Wolf and Xi Chao (eds), *Legal Dimensions of China's Belt and Road Initiative* (2016) at 421.

116 Potter, 'Globalization and Economic Regulation in China', above n 5, at 120–21.

117 Cai, above n 100, at 102.

118 Biukovic, above n 7, at 804–05.

However, complementarity in selective reshaping occurs when China's preferences are advanced by the new rules and institutions China develops. As such, a lack of complementarity between external rules and institutions and China's preferences is a driving force for selective reshaping. China appears to have concerns that international law 'is susceptible to being misused or abused as a legal "weapon" to hinder its rise'.¹¹⁹ Therefore, it endeavors to modify external rules and institutions that do not suit its preferences and proactively shape new rules and institutions.

Given these differences, the significant factors in complementarity are necessarily different under selective reshaping and adaptation. The focus of selective adaptation is on China adapting WTO rules to work within the local context when these rules are 'downloaded'. While China's own preferences come into play in selective adaptation, they are not the focus, with China acting more reactively in its WTO accession.

In contrast, the focus of complementarity under selective reshaping is on China's preferences: new rules and institutions largely reflect China's preferences. Compared with its role as a new WTO member under selective adaptation, China is the leader of the BRI and is in a better position to ensure its preferences are accommodated. Complementarity is a crucial criterion for the development of new rules and institutions, and key in accounting for China's proactive approach to developing selected rules, alongside its passivity in respect of more sensitive, largely non-trade-related issues (e.g. governance, labor and other social issues).

What are China's preferences? China has at least three primary preferences, which are much broader than local regulatory imperatives. First, China aims for an enhanced role in international governance, including rule-making and agenda-setting.¹²⁰ China is unsatisfied with its role as a rule-taker,¹²¹ and has transformed into a major economy with 'the capacity and will to alter the rules and institutions to serve its interests and preferences'.¹²² China appears to combine 'new ideas (China Dream, Asia Dream), new policies (comprehensive diplomacy and security), new institutions (AIIB) and new projects (BRI)',¹²³ which reflects China's 'emerging grand strategy as a rule-maker'.¹²⁴

Second, China is focused on the expansion of trade (e.g. e-commerce), investment and finance. Selective reshaping is crucial for developing soft infrastructure (i.e. rules and institutions) with other countries to reduce regulatory hurdles faced by Chinese businesses outside China.¹²⁵ For rules, China's reshaping of investment rules (particularly regarding investment facilitation) promote outbound investment. China endeavors to enhance its norm entrepreneurship in the investment treaty system (e.g. its leading role in approving the Guiding Principles for Global Investment Policymaking during

119 Cai, above n 100, at 4, 8 (regarding South China Sea arbitration).

120 Ibid, at 90.

121 Simon Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures', 27 *European Journal of International Law* 945 (2016), at 966.

122 deLisle, above n 3, at 66.

123 William A Callahan, 'China's "Asia Dream": The Belt Road Initiative and the New Regional Order' 1 *Asian Journal of Comparative Politics* 226 (2016) at 226.

124 Ibid, at 239.

125 China Power Team, 'How Will the Belt and Road Initiative Advance China's Interests?', *China Power*, available at <https://chinapower.csis.org/china-belt-and-road-initiative/> (visited 20 June 2020).

the 2016 G-20 Summit in China, which should lay a foundation for a process toward a multilateral investment framework if everything goes smoothly).¹²⁶ For e-commerce related to the Digital Silk Road, China is 'an advocate of multilateral discussion on e-commerce',¹²⁷ and strives to create standards for the digital economy.¹²⁸ The reshaping of the trade remedy rule also promotes export.

For institutions, the AIIB supplies funding for China's expansion in infrastructure investment and may support the internationalization of the RMB.¹²⁹ As another example, institutional development on dispute settlement (like the CICC) helps to solve disputes in a way that Chinese actors are familiar with.

Third, China strives to respond to external dynamics associated with its rise. The BRI reflects 'a conscious response to the increasingly regionalized world',¹³⁰ and responds to various international factors (e.g. China's concerns over trade tensions with advanced economies and dissatisfaction with certain existing norms).¹³¹ China aims to establish 'a favorable international environment for China's national rejuvenation'.¹³² China's efforts range from reshaping rules (e.g. a BRI agreement network) to face 'rule competition',¹³³ to leading the establishment of the AIIB and NDB, which is mainly attributable to China's disappointment at the slow reform in global financial governance, and its intention to promote so-called 'incremental reform' in the global financial system.¹³⁴

C. Legitimacy

Legitimacy is concerned with the 'quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process',¹³⁵ and affects both selective adaptation and selective reshaping. Selective adaptation needs the support of local communities, which is dependent on the perceived legitimacy of the contents and processes involved in selecting regulatory norms for adoption.¹³⁶ Legitimacy is affected by various factors, including personal

126 Cai, above n 100, at 137.

127 Ibid, at 132, 136.

128 Gregory Shaffer, 'Trade Law in a Data-Driven Economy: The Need for Modesty and Resilience', UC Irvine School of Law Research Paper NO. 2020-49 (2020), at 7.

129 Chi Lo, 'AIIB Outbound Investment Agenda is Key to China's Economic Rebalancing' *South China Morning Post*, (19 May 2015), available at <https://www.scmp.com/print/comment/insight-opinion/article/1802993/aiib-outbound-investment-agenda-key-chinas-economic> (visited 1 June 2020).

130 Shiping Tang, 'China and the Future International Order(s)' 32 *Ethics & International Affairs* 31 (2018), at 37.

131 Liang, above n 4, at 368-69.

132 Jinghan Zeng and Shaun Breslin, 'China's "New Type of Great Power Relations": A G2 with Chinese Characteristics?' 92 *International Affairs* 773 (2016), at 774.

133 Cai, above n 100, at 113.

134 He, above n 46, at 1, 3, 4, 6 (in autumn of 2013 when the AIIB was proposed, the IMF had not achieved 'any substantial progress' regarding its reform).

135 Thomas M. Franck, 'Legitimacy in the International System', 82 *The American Journal of International Law* 705 (1988), at 706.

136 Potter, 'Globalization and Economic Regulation in China', above n 5, at 121.

preferences reflecting individual circumstances and interests, and 'broader social perspectives of idealism, nationalism and identity'.¹³⁷ These factors are also relevant to legitimacy considerations under selective reshaping.

However, selective reshaping faces different kinds of legitimacy concerns compared with those under selective adaptation. In particular, selective reshaping is more greatly affected by international legitimacy.

1. More conscious legitimacy concerns

Legitimacy is a crucial determinant as to whether the institutions and rules reshaped by China will be adopted by the international community.¹³⁸ Legitimacy concerns in selective adaptation are mainly directed toward the, often unconscious, responses of the interpretive communities involved in engaging with local and international rules.¹³⁹ It is hard to consciously select which rules to adapt: for instance, the WTO agreements have been fixed since before China's WTO accession and apply to China. In contrast, selective reshaping requires a conscious process of both choosing which rules and institutions to promote and justify, and addressing legitimacy concerns. One may argue that selectivity (e.g. the selection of certain issues) may undercut legitimacy by focusing on rules that largely suit a number of countries as such rules do not have the inputs of other states. The legitimacy concerns range from debt sustainability and transparency, to sovereignty and social issues (e.g. environment, labor, civil society, and equality).¹⁴⁰ This is particularly the case when the BRI projects involve BRI states who have not joined relevant international treaties (e.g. those related to labor) or face challenges in these areas. The legitimacy concerns help to explain why China has consciously highlighted issues like transparency in the BRI,¹⁴¹ and why China recently appears to 'rebalance' its overseas lending practices given concerns over the debt burdens of developing states.¹⁴²

Moreover, China may be critical of the legitimacy of selected aspects of the IELO that are considered unfavorable to China and are negotiated or developed without China's participation. Related to the BRI, the Chinese government states that 'a more fair, reasonable and balanced global governance system' shall be promoted.¹⁴³ From China's perspective, this may help to justify China's efforts to address these concerns

137 Potter, above n 36, at 701.

138 The legitimacy issue regarding the BRI is obvious as the case with Italy's recent BRI MOU with China, see, e.g. Crispian Balmer, 'Italy's Drive to Join China's Belt and Road Hits Potholes', *Reuters* (15 March 2019), available at <https://www.reuters.com/article/us-italy-china-analysis/italys-drive-to-join-chinas-belt-and-road-hits-potholes-idUSKCN1QW1E2> (visited 22 May 2020).

139 Potter, above n 24, at 11.

140 Nurgozhayeva, above n 19, at 261.

141 'Keynote Speech by Xi Jinping at the Opening Ceremony of Second Belt and Road Forum for International Cooperation (Full Text)' *XinhuaNet* (26 April 2019), available at http://www.xinhuanet.com/politics/leaders/2019-04/26/c_1124420187.htm (visited 13 Feb 2020).

142 Lucy Hornby, 'China "Rebalances" Overseas Lending on Debt Burden Concerns' *Financial Times* (29 January 2019), available at <https://www.ft.com/content/c0c3b840-238d-11e9-8ce6-5db4543da632> (visited 29 January 2019).

143 Ministry of Foreign Affairs, 'Ministry of Foreign Affairs Holds Briefing for Chinese and Foreign Media on President Xi Jinping's Attendance and Chairing of Related Events of the BRI' (18 April 2017), available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1455115.shtml (visited 13 January 2020).

and reshape IEL. An example is the best practices in MDBs in the discussion of the AIIB. China's then-Financial Minister Lou Jiwei reportedly did not acknowledge best practice in the context of MDBs,¹⁴⁴ and stated that there was only 'good practice' instead of 'best practice'.¹⁴⁵ He also suggested that developing countries' needs should be considered and 'sometimes the West puts forwards some rules that we don't think are optimal'.¹⁴⁶ AIIB President Jin Liqun has suggested that China will not agree to anything constituting international best practice unless it 'incorporates the development experience of China and many countries in Asia and elsewhere',¹⁴⁷ and that the AIIB would have a different development model reflecting the experience of China, India and various Asian countries.¹⁴⁸ China has also expressed doubts as to the legitimacy of a USD-led international monetary system,¹⁴⁹ while promoting the CIPS, and actively exploring a CBDC.

2. *More reliance on international legitimacy*

Selective adaptation is a process of China 'downloading' external rules to the local setting, and is thus concerned largely with domestic legitimacy. Dependent on domestic and international legitimacy, selective reshaping is concerned with the possible uploading of China-preferred rules to the extra-regional level and reshaping of institutions. This is because international law is 'a source of legitimacy'.¹⁵⁰

a. Domestic legitimacy Concerned with the local community's support for international rules,¹⁵¹ domestic legitimacy remains an important aspect of selective reshaping. It plays a similar role in selective reshaping and selective adaptation, involving the extent to which members of local communities accept the purposes and consequences of China's measures, which may be influenced by factors including personal preferences, and 'broader social perspectives of idealism, nationalism and identity' that affect the acceptance to external rules.¹⁵² These factors also influence the likelihood that selective reshaping is perceived as legitimate in China.

144 Paul Pennay, 'China Says Western Rules May Not Be Best for AIIB' *The Australian* (23 March 2015), available at <https://www.theaustralian.com.au/business/latest/china-says-western-rules-may-not-be-best-for-aiib/news-story/f227e667fcacff4a7d112c156fb992bc> (visited 17 July 2020).

145 Boao Forum for Asia, 'LOU Jiwei delivered a speech at the luncheon session for the BFA seminar on Infrastructure Connectivity in Asia: The Financing Challenge', available at <http://english.boaoforum.org/iciatfc/14175.shtml> (visited 17 July 2020).

146 Pennay, above n 144.

147 Ben Blanchard, 'China Touts New Bank's Greater Understanding of Developing World' *Reuters* (26 June 2016), available at <https://www.reuters.com/article/us-china-aiib-idUSKCN0ZC05S> (visited 15 July 2020).

148 Ibid.

149 Jue Wang, 'The Rise of a Constrained Power in International Financial Governance', in Ka Zeng (ed), *Handbook on the International Political Economy of China* (Cheltenham, UK and Massachusetts, USA: Edward Elgar, 2019) at 322.

150 Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', 16 (3) *European Journal of International Law* 369 (2005), at 369.

151 Biukovic, above n 7, at 804.

152 Potter, above n 36, at 701.

Since selective reshaping reflects the country's preferences rather than being viewed as an external implant, it may be more likely to be accepted as legitimate by local audiences in China, although certain concerns exist.¹⁵³ Supported by new rules and institutions, for example, the BRI may help to address China's increased demands on energy and resources from outside China¹⁵⁴ and domestic economic concerns (such as industrial overproduction and unemployment),¹⁵⁵ boost growth in western regions of China,¹⁵⁶ and promote export-driven development.¹⁵⁷ This could also provide time for China to shift to a more domestic consumption model.¹⁵⁸ The AIIB would bring different benefits to China, including: (i) contribution to the economic growth of China (relieving excessive production capacity at home, and increasing yields of foreign exchange reserves);¹⁵⁹ (ii) learning the lending experience and knowledge of other creditor states (like those on due diligence) and reducing the lending risk of foreign investments;¹⁶⁰ (iii) increasing the overseas market share of Chinese businesses;¹⁶¹ and (iv) enabling RMB internationalization.¹⁶²

Meanwhile, China uses various mechanisms to test the effects of reshaping efforts and adjust policies to ensure it receives support from local stakeholders. FTZs experiment with new approaches (e.g. investment facilitation, CBDC) to accumulate experience,¹⁶³ and seek domestic legitimacy arguably through their demonstrated positive effects. If the BRI helps to deliver sustained economic prosperity, it will be more likely to foster domestic legitimacy.¹⁶⁴

b. International legitimacy Selective reshaping focuses more on building international legitimacy for new rules and institutions, since enhanced legitimacy via-a-vis the global audience is important for the possible new IELO influenced by selective reshaping.¹⁶⁵ It is supported by AIIB's President Jin Liqun's statement that 'China is more concerned over the legitimacy issue [of the AIIB],' and '[t]here is a legitimate issue if only regionals

153 See, e.g. Jevans Nyabiage, 'Pandemic Takes the Shine off China's Belt and Road Initiative as African Partners Struggle with Coronavirus' South China Morning Post, (2020), available at <https://www.scmp.com/print/news/china/diplomacy/article/3090850/pandemic-takes-shine-chinas-belt-and-road-initiative-african> (visited 30 June 2020)

154 Ikenberry and Lim, above n 1, at 4.

155 De Graaff and Van Apeldoorn, above n 18, at 119.

156 Ibid.

157 Barry Naughton, 'China's International Political Economy', in Ka Zeng (ed), *Handbook on the International Political Economy of China* (Cheltenham, UK and Massachusetts, USA: Edward Elgar, 2019) at 25.

158 Liang, above n 4, at 361.

159 Ikenberry and Lim, above n 1, at 10–11, n 42.

160 Ibid, at 11.

161 Lo, above n 105.

162 Ibid.

163 He, above n 46, at 13.

164 Baogang He, 'The Domestic Politics of the Belt and Road Initiative and its Implications', 28 *Journal of Contemporary China* 180 (2019), at 189.

165 G. John Ikenberry and Darren Lim, 'What China's Institutional Statecraft Could Mean for the International Order' *Brookings* (13 April 2017), available at <https://www.brookings.edu/blog/order-from-chaos/2017/04/13/what-chinas-institutional-statecraft-could-mean-for-the-international-order/> (visited 17 May 2020).

are members' of the AIIB.¹⁶⁶ International legitimacy is a crucial factor for the fruits of selective reshaping to be an alternative or a supplement to existing rules and institutions, and to set new obligations. Selective reshaping requires China to persuade international audiences of the legitimacy of China-led extra-regional developments to ensure adoption and enforcement.

China takes a pragmatic approach to seeking international legitimacy through, *inter alia*, highlighting existing international rules and institutions, and working with international organizations (like the various MOUs with the UN) and other states. For rules, the tying of the non-binding BRI MOUs to existing rules and institutions lends MOUs 'more ability to claim legitimacy',¹⁶⁷ and is a mechanism by which MOUs may 'later be seen to have implied legitimacy'.¹⁶⁸ BRI instruments like the BRF Joint Communiqué¹⁶⁹ repeatedly refer to international rules and highlight good practice, as well as well-accepted values. For institutions, the AIIB commits, at least in some areas, to applying best practices, although it is premature to conclude whether the AIIB will depart from current standards given its limited number of projects.¹⁷⁰

That said, selective reshaping necessarily faces challenges regarding international legitimacy. Legitimacy concerns may arise from the extra costs and risks, and a lack of efficiency, associated with selective reshaping, including the risk that the resulting rules and institutions 'exacerbate the problem or creat[e] new problems that are difficult to anticipate'.¹⁷¹ China might encounter legitimacy concerns relating to skepticism about its intentions and national interests.¹⁷² For institutions, the future of the AIIB largely depends on 'how to convince the world that the AIIB is not a tool exclusively serving' the BRI and that the BRI will benefit other countries in Asia and beyond,¹⁷³ as well as on the AIIB's performance legitimacy (i.e. its effectiveness).¹⁷⁴ The AIIB faces concerns, such as those regarding the indigenous peoples' right in the bank-supported projects.¹⁷⁵ Concerning rules, the wide usage of non-binding agreements in selective reshaping may carry concerns and difficulties regarding legitimacy.¹⁷⁶ The possible involvement of

166 'Building Asia's New Bank: An Address by Jin Lique, President-Designate of the Asian Infrastructure Investment Bank' *Brookings* (21 October 2015), available at https://www.brookings.edu/wp-content/uploads/2015/10/20151021_asia_infrastructure_bank_transcript.pdf (visited 19 June 2020).

167 Chris Devonshire-Ellis, 'Vassal States? Understanding China's Belt and Road MoU', *Silk Road Briefing* (13 February 2018), available at <https://www.silkroadbriefing.com/news/2018/02/08/vassal-states-understanding-chinas-belt-road-mou/> (visited 16 July 2020).

168 *Ibid.*

169 *Joint Communiqué of the Leaders Roundtable of the Belt and Road Forum for International Cooperation* para 14(a) (2017).

170 Jonathan Hillman, 'Belt and Road Summit: Beijing's Push on Trade', *The Cipher Brief* (2 May 2017), available at <https://www.thecipherbrief.com/belt-and-road-summit-beijings-push-on-trade-2> (visited 10 June 2020).

171 Jean Frédéric Morin, et al., 'The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements' 20 *Journal of International Economic Law* 365 (2017), at 383.

172 Paradise, above n 31, at 149.

173 He, above n 46, at 1.

174 Chin, above n 111, at 17.

175 Lowell Chow, 'Is the AIIB Really "Lean, Clean, and Green"?' *The Diplomat* (2 August 2017), available at <https://thediplomat.com/2017/08/is-the-aiib-really-lean-clean-and-green/> (visited 17 July 2020).

176 Ikenberry and Lim, above n 1, at 5.

political factors in non-binding agreements that lack detailed rules and impartial third-party adjudication could heighten legitimacy concerns, since they are subject to the winds of political change. Non-binding rules also have the potential to be more intrusive than treaties, as evidenced in areas like international financial law (like Financial Action Task Force standards, IMF expectations, and the World Bank standards).

A focus on legitimacy, however, involves some tradeoffs and could limit China's capacity regarding selective reshaping. It is hard to retain legitimacy given thorny and complicated 'cooperation problems' in multilateral institutions (like the AIIB) with a large number of actors.¹⁷⁷ Collaboration with other countries may increase legitimacy but reduce China's ability to make decisions in rule shaping. This can be seen in the case of the NDB, given its principle of equality concerning the NDB members' rights and obligations.

Moreover, legitimacy is likely the major challenge that China will face going forward. Other countries' views on the legitimacy of China's selective reshaping efforts will vary significantly from one country to another. These views require further research in the post-COVID-19 era.

D. Conclusion

Perception and conception, complementarity, and legitimacy are crucial factors influencing how rules and institutions are embraced and developed under selective reshaping. There could be overlap in respect of these different factors. For instance, the consideration of the consequences of China's measures is relevant to both perception and legitimacy. As a process of learning by doing, these factors help to explain how the parameters of selective reshaping capture China's thinking and practice in the IEL.

These factors, of course, are subject to institutional capacity constraints. This refers to both China's institutional capacity and the institutional capacity of other states who engage with new rules or institutions (like the AIIB), as their contributions to the development will be critical to the resulting rules and institutions.

Selective reshaping theoretically could be a normal part of any state's process when developing into a major economy. However, China is unique in developing into the world's second largest economy in a short time, and also has a substantially different social and legal system from most other countries. These factors may make selective reshaping unique to China.

III. CONCLUSION

China can be seen to be shifting from the reactive, selective adaptation of external norms (like WTO law), to the proactive, selective reshaping of international institutions and rules (particularly under the BRI). Even though selective adaptation is focused inwards on internal reform, particularly following China's WTO accession, selective reshaping is concerned more with China's external engagement with the IELO, especially in its role

as the BRI leader. Selective reshaping involves the development of China-led international institutions (like the AIIB, NDB, CIPS, and MCDF) and incremental uploading of rules to transnational law (e.g. a growing network of BRI agreements involving a large number of states and international organizations, and the reshaping of rules at pre-existing institutions like the WTO and WCO). China's domestic institutions, such as FTZs and the CICC, also play a key role in selective reshaping.

Selective reshaping by China is influenced largely by the factors of perception and conception, complementarity, and legitimacy. These factors correspond with, but differ from, the factors affecting selective adaptation: the perception of external rules and institutions, complementarity between external rules and local regulatory imperatives, and (usually domestic) legitimacy. Although these factors still remain relevant under selective reshaping, selective reshaping is affected more by: (i) conception (e.g. the design of the BRI as an unprecedented extra-regional initiative); (ii) complementarity between new rules and institutions, and China's preferences, particularly for an enhanced role in international governance, the expansion of trade, investment and finance, and the response to external dynamics in China's rise; and (iii) international legitimacy.

The effects of selective reshaping will depend on the reactions of other states and stakeholders (e.g. international organizations, businesses, and the public), which largely remain to be seen. There is likely to be an increasingly widening gap between China's approach and the approach of developed economies in the IELO. The BRI is observed to provide 'an alternative and parallel global institutional architecture to the postwar Western order'.¹⁷⁸ China has transformed into a major economy that may 'challenge or opt out of regimes that are not sufficiently receptive'.¹⁷⁹ On the other end, the US-led international economic order has been 'put under severe strain' by President Trump.¹⁸⁰ China's rise in international governance may require the USA to take partial steps toward adaptation and accommodation,¹⁸¹ or result in greater confrontation. The IELO could face increasingly divergent pathways, such as BRI-style agreements and US-style trade treaties, all with different rules, approaches and rationales.

The selective reshaping paradigm provides a new and holistic conceptual framework for understanding China's engagement with the IELO. It is key in accounting for idea formation in complex settings like China, which deserves close attention. The evaluation of Chinese efforts at reshaping select rules and institutions, including their adoption by other countries and impact on the IELO, will be a substantial and important research area. In addition, the future of selective reshaping in the post-COVID-19 world, and the effects of US-China interactions (like selective engagement under the trade war¹⁸²) and other IEL shocks (e.g. trade tensions with other states) will need further examination.

178 David Shambaugh, *China's Future* (Cambridge, UK; Malden, MA: Polity Press, 2016) at 162.

179 deLisle, above n 3, at 66.

180 De Graaff and Van Apeldoorn, above n 18, at 130.

181 Ibid, at 115.

182 Heng Wang, 'Selective Engagement? Future Path for US-China Economic Relations and Its Implications' 55(2) *Journal of World Trade* [2021 forthcoming].