China's BRI in Central Eastern European Countries: "17+1" Connectivity, Divisiveness, or Pathway to EU-CHINA FTA?

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ABSTRACT

China's Belt and Road Initiative (BRI) continues to embrace and connect China with European Union (EU) Member countries; the latest in 2019 with Italy, a G-7 member, also joining. EU members participating in the BRI include Poland, Greece, Italy, Hungary, Czechoslovakia, Croatia, Bulgaria, Latvia, Portugal, Romania, and Slovakia. While Germany and France lead the EU in trade and investment with China, political winds may be blowing. The EU has noticed that the seventeen Central and Eastern European countries (CEEC) under the "17+1" format, a majority of which are EU members, are capturing greater amounts of Chinese trade under their BRI cooperation agreements; CEEC trade reportedly totaling over $82 billion in 2018. EU officials are increasingly critical of the 17+1 and wary that the mechanism could further undermine and divide EU unity on policies toward China.

In 2016, the European Commission Joint Communication on Elements for a New EU Strategy on China insisted that any bilateral relations with China—including in-group settings such as the 17+1 format—should be coordinated with the EU to ensure that relevant aspects are "in line with EU law, rules and policies, and that the overall outcome is beneficial for the EU as a whole." Current EU policies and regulations require that process.

Poland is one of the largest countries in this group and has important ports along one of China's strategic BRI corridors. Chinese investments in Poland were estimated between 130 million and one billion Euros from 2016 to 2017. Poland offers China several assets—proximity to key partners in Western Europe, access to the sea or convenient road and rail connections, and access to a qualified workforce.

Labor issues are also a factor in Chinese investment in Poland and the CEEC. Chinese investors, particularly the large SOEs, frequently bring much of their own workforce with them. Poland and other CEEC with low wage levels have been experiencing a labor exodus of Central and Eastern Europe (CEE) workers and an introduction of many foreign workers. With the wage levels in China and Poland not so disparate, both factors could allow a positive fit under BRI.

Attention is given to the relevancy and implications, including legal limitations on foreign trade agreements (FTA) for EU members in the

CEEC, relevant EU Directives, and international treaties influencing a future EU-China FTA.

Discussion includes whether Poland and the CEEC/17+1's developing BRI relationship with China might divide the EU or facilitate a pathway to an eventual EU-China FTA which places trade and investment under the EU. This could diminish the competitive labor advantages of Poland and the CEEC.

I. INTRODUCTION

A group of 17 Central and Eastern European countries (CEEC) is also known as the "17+1."[1] Each country has a cooperation agreement with China for participation in the Belt and Road Initiative (BRI).[2] The 17+1 framework began in 2012 when China convened eleven European Union (EU) member states and five EU candidate countries—all in Central and Eastern Europe—for meetings with China, resulting in cooperation agreements with China to participate in the BRI.[3] With the addition of Greece in August 2018, the 16+1 became the "17+1."[4] Since then, other EU countries, such as Portugal (December 5, 2018) and Italy (March 23, 2019),[5] also signed on as members participating in the BRI, though they are not members of the 17+1.[6]

1. Wang Yiwei, *China and Europe: BRI and the 17+1 Initiative*, VALDAI (Jan. 28, 2020), https://valdaiclub.com/a/highlights/china-and-europe-bri-and-the-17-1-initiative/ [https://perma.cc/8K4Q-9Q4H].

2. *Id.*

3. *See* China, the 16+1 Format and the EU, EUR. PARL. DOC. PE 625.173 (Sept. 2018); *see also* Jonathan E. Hillman & Maesea McCalpin, *Will China's '16+1' Format Divide Europe?*, CTR. FOR STRATEGIC & INT'L STUD. (Apr. 11, 2019), https://www.csis.org/analysis/will-chinas-161-format-divide-europe [https://perma.cc/E3LF-4CP4].

4. Horia Ciurtin, *The "16+1" Becomes the "17+1": Greece Joins China's Dwindling Cooperation Framework in Central and Eastern Europe*, THE JAMESTOWN FOUND. (May 29, 2019, 5:54 PM), https://jamestown.org/program/the-161-becomes-the-171-greece-joins-chinas-dwindling-cooperation-framework-in-central-and-eastern-europe/ [https://perma.cc/4W3R-WATY].

5. Liu Zhen, *Portugal Signs Agreement with China on Belt and Road Initiative*, SOUTH CHINA MORNING POST (Dec. 5, 2018, 08:30 PM), https://www.scmp.com/news/china/diplomacy/article/2176560/portugal-wavers-xi-jinping-presses-europe-belt-and-road [https://perma.cc/L557-SNZ6].

6. Valbona Zeneli, *Italy Signs on to Belt and Road Initiative: EU-China Relations at Crossroads?*, DIPLOMAT (Apr. 3, 2019), https://thediplomat.com/2019/04/italy-signs-on-to-belt-and-road-initiative-eu-china-relations-at-crossroads/ [https://perma.cc/WMU5-YM83]. Italy's

As the largest country in the region, Poland has the potential to be at the center of the BRI in the CEEC, which would bring an advantageous geostrategic location with great economic potential.[7] On June 21, 2016, following discussions on increased cooperation, the presidents of Poland and China issued a joint statement that established a comprehensive, strategic partnership between Poland and China.[8] The joint statement explains, "Poland and China see each other as long-term and stable strategic partners and their development as a significant opportunity for mutually beneficial cooperation."[9] Additionally, Poland and China signed memorandums of understanding regarding the development of the "Silk Road" and strengthening investment cooperation in logistics infrastructure.[10] They also "declared activities promoting cooperation within the Polish Plan for Responsible Development and the Chinese 'Belt and Road Initiative.'"[11]

The EU has expressed concern about China's competition and penetration into EU markets through the CEEC.[12] The EU Commission previously put forth its alternative to BRI in its *Strategy on Connecting Europe and Euro-*

> Memorandum is a non-binding statement of intent, through which Italy expresses its commitment to the initiative. It does not create rights and obligations under international law as a treaty would do. The Memorandum, however, represents an umbrella deal under which 29 other commercial and institutional agreements amounting to €2.5 billion were made.

Femke van der Eijk & Angela Pandita Gunavardana, *The Road that Divided the EU: Italy Joins China's Belt and Road Initiative*, EUR. L. BLOG (June 25, 2019), https://europeanlawblog.eu/2019/06/25/the-road-that-divided-the-eu-italy-joins-chinas-belt-and-road-initiative/ [https://perma.cc/AP72-5USV]. *See also* Andrew Chatzky, *China's Belt and Road Gets a Win in Italy*, COUNCIL ON FOREIGN REL. (Mar. 27, 2019), https://www.cfr.org/in-brief/chinas-belt-and-road-gets-win-italy [https://perma.cc/6ZAN-X5V9].

7. Mercy A. Kuo, *China in Eastern Europe: Poland's Perspective*, DIPLOMAT (Dec. 19, 2017), https://thediplomat.com/2017/12/china-in-eastern-europe-polands-perspective/ [https://perma.cc/48RP-9X83].

8. *Id.*

9. "The joint declaration also refers, among others, to the deepening of cooperation in the areas of economy and trade, finances, transport and logistics, infrastructure, civil aviation, energy, agriculture and commerce, technology and environmental protection." Press Release, Office of the President of the Republic of Poland, Poland and China Sign Strategic Partnership Declaration (June 20, 2016), https://www.president.pl/en/news/art,190,poland-and-china-sign-strategic-partnership-declaration.html [https://perma.cc/U7KY-VA3P] [hereinafter Press Release].

10. *Id.* "Poland was one of the first countries to sign a memorandum of understanding with China about the BRI in 2015." Meiling Chen, *Poland Looking to Bolster Trade with China Under BRI*, CHINA DAILY (May 28, 2019, 10:07 AM), https://www.chinadaily.com.cn/a/201905/28/WS5cec97dca3104842260be305.html [https://perma.cc/434Y-ZFFP].

11. Press Release, *supra* note 9; *see also Joint Communication to the European Parliament, the European Union and the Council EU-China – A Strategic Outlook*, COM (2019) 5 final (Dec. 3, 2019) [hereinafter *Strategic Outlook*].

12. Chatzky, *supra* note 6.

Asia,[13] "based on Western economic and institutional norms and principles, 'a document that completely ignores the BRI.'"[14] The EU and China created an *EU-China Connectivity Platform* to discuss common issues and economic development.[15] Additionally, the EU developed a "Cohesion Fund" to support domestic economic development programs of EU member states that have comparatively lower Gross National Income (GNI), which in many cases are the same CEEC countries under BRI.[16]

Even with the ever-broadening CEEC-China relationship, some Central EU institutions expressed reservations about cooperation with the People's Republic of China (PRC).[17] Specifically noting, "they have displayed intentions to deal with Beijing in a coherent and unitary manner—thereby explicitly leaving a reduced space for developing the 16+1 format as an eccentric offshoot of broader EU-China cooperation efforts."[18]

On the legal front, in 2016, the European Commission Joint Communication on Elements for a New EU Strategy on China insisted that any bilateral relations with China—including in-group settings such as the 17+1 format—should be coordinated with the EU to ensure that relevant aspects are "in line with EU law, rules and policies, and that the overall outcome is beneficial for the EU as a whole."[19] This policy will be further developed

13. Press Release, European Union External Action, Connecting Europe & Asia the EU Strategy (Sept. 26, 2019), https://eeas.europa.eu/sites/eeas/files/eu-asian_connectivity_factsheet_september_2019.pdf_final.pdf [https://perma.cc/KEA7-NHCL].

14. Zeneli, *supra* note 6; *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank Connecting Europe and Asia – Building Blocks for an EU Strategy*, COM (2018) 31 final (Sept. 18, 2018).

15. *The EU-China Connectivity Platform*, EUR. COMM'N., https://ec.europa.eu/transport/themes/international/eu-china-connectivity-platform_en [https://perma.cc/4FJ8-JYYY].

16. *Cohesion Fund*, EUR. COMM'N., https://ec.europa.eu/regional_policy/en/funding/cohesion-fund/ [https://perma.cc/FN2L-NBCH].

17. Ciurtin, *supra* note 4.

18. [S]ome CEE states that are members of the European Union (and close partners of the United States) have started to pursue a path of inertial participation—or outright disengagement—from the 16+1 format. Poland, the Czech Republic (China Brief, February 15), Romania, and the Baltic states are at the forefront of this strategic shift, leaving Hungary and the more China-dependent Balkan states to keep the 16+1 format afloat.

Id.

19. Hillman & McCalpin, *supra* note 3; *see also* Commission Regulation 1219/2012, Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries, 2012 O.J. (L 351), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0040:0046:EN:PDF [https://perma.cc/VC9D-QP2C].

in a later discussion of the limited legal authority of individual EU members to enter into trade agreements with countries outside the EU.[20] Perhaps this BRI presence in the EU will facilitate the EU to move closer to China on trade relations.

Labor issues can also be a factor in increased Chinese investment in Poland and the CEEC. For example, Poland has been experiencing a labor exodus and a surge of foreign migrant labor.[21] At the same time, the wage levels in China and, for example, Poland are not so disparate.[22] Chinese investors, particularly the large SOEs, frequently bring much of their own workforce and managers with them; both factors could allow a positive fit.[23]

An interesting outcome of EU-CEEC developments on BRI issues might be whether these activities of the 17+1 could facilitate a *pathway* to an eventual EU-China FTA which places trade and investment under the EU and could diminish the competitive advantages of Poland and the CEEC countries.

This Article is organized as follows: (I) Introduction; (II) BRI Enters EU through the CEEC and its Implications, discussing economics, political, and labor issues; (III) Legal Aspects, discussing laws under EU's legal limitations on EU members to engage in formal trade agreements with non-EU members; (IV) Analysis of BRI in EU; and (V) Conclusion.

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20. Legal issues are discussed in Part III of this Article.

21. Makana Eyre & Martin Goillandeau, *Poland's Two-Faced Immigration Strategy*, POLITICO (June 6, 2019, 1:47 PM), https://www.politico.eu/article/poland-two-faced-immigration-strategy-ukraine-migrants/ [https://perma.cc/92GW-XD8Y]; Ian Francis, *Poland Short of Workers After Exodus to Britain and Germany*, SKY NEWS (Apr. 29, 2018, 6:21 PM), https://news.sky.com/story/poland-short-of-workers-after-exodus-to-britain-and-germany-11351969 [https://perma.cc/YP2Z-X255]; Dorota Bartyzel, *A Country Reliant on Migrants Frets About Europe's Virus Exodus*, BLOOMBERG (Apr. 8, 2020, 9:00 PM), https://www.bloomberg.com/news/articles/2020-04-09/a-country-reliant-on-migrants-frets-about-europe-s-virus-exodus [https://perma.cc/H6ST-7VXG].

22. Kenneth Rapoza, *China Wage Levels Equal to or Surpass Parts of Europe*, FORBES (Aug. 16, 2017, 12:52 PM), https://www.forbes.com/sites/kenrapoza/2017/08/16/china-wage-levels-equal-to-or-surpass-parts-of-europe/#69c6c8f73e7f [https://perma.cc/W2DB-CG3W].

23. *See* Nyshka Chandran, *China Can Make its Belt and Road Project More Successful if it Taps Locals, Experts Say*, CNBC (Sept. 14, 2018, 4:03 AM), https://www.cnbc.com/2018/09/14/china-must-do-more-to-tap-locals-in-belt-and-road-initiative-panel.html [https://perma.cc/J3C7-A8ZB].

II. BRI ENTERS EU THROUGH CEEC'S 17+1

A. BRI in CEEC: 17+1

1. BRI

China's Belt and Road Initiative (BRI) refers to the combination of the Silk Road Economic Belt (six major land corridors across the Eurasian continent) and the 21st Century Maritime Silk Road (a network of maritime trade routes connecting Asia with Africa and Europe).[24]

> No official or generally accepted definition of the BRI exists. Its geographical scope includes 65 countries which jointly account for some 60% of global Gross Domestic Product (GDP) and 30% of the world's population. . . . China's stated objectives for the BRI refer to a broad intention to foster international understanding and collaboration with the countries involved, which focus on five areas: (i) policy coordination, (ii) capacity building, (iii) liberalization and facilitation of trade and investment, (iv) financial cooperation and (v) people-to-people exchange.[25]

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24. Infrastructure investment along the six economic corridors of the Belt and Road is concerned with covering a large energy- and resource-rich part of the world, as follows:

> 1. New Eurasia Land Bridge: involving rail to Europe via Kazakhstan, Russia, Belarus, and Poland. 2. China, Mongolia, Russia Economic Corridor: including rail links and the steppe road—this will link with the land bridge. 3. China, Central Asia, West Asia Economic Corridor: linking to Kazakhstan, Kyrgyztan, Tajikistan, Uzbekistan, Turkmenistan, Iran, and Turkey. 4. China Indochina Peninsula Economic Corridor: Viet Nam, Thailand, Lao People's Democratic Republic, Cambodia, Myanmar, and Malaysia. 5. China, Pakistan Economic Corridor . . . ; 6. China, Bangladesh, India, Myanmar Economic Corridor.

*China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscap*e, OECD BUS. & FIN. OUTLOOK, at 11 (2018), https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf [https://perma.cc/89UL- NXB6]. It also has been described as

> [t]he analysis of the BRI shows that it: involves a significant amount of communication and branding, with multiple projects labeled as BRI projects apparently because they fall within its geographical scope; is not subject to a clearly-defined development plan, program or budget, and that there is no clear list of projects that it is intended to include; and has no clear geographical or economic boundaries – the BRI appears to have evolved in response to individual countries' engagement, with China rather than in line with an overarching strategy.

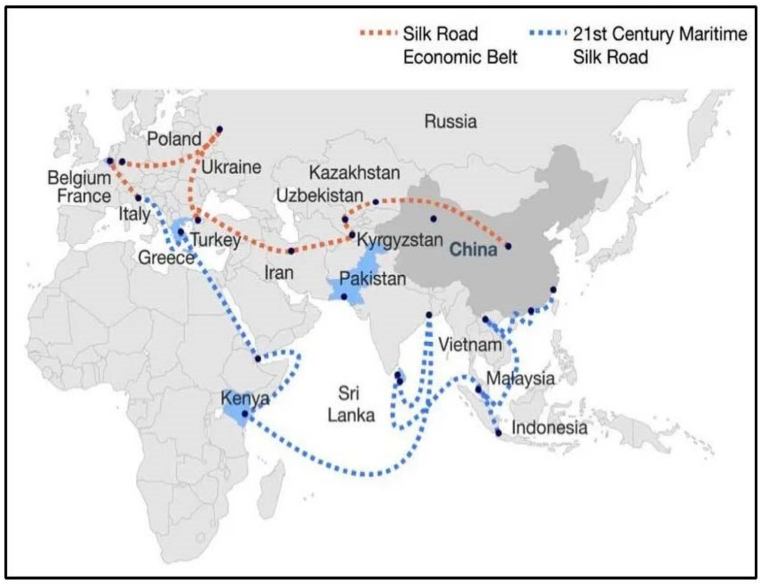
Steer Davies Gleave et al., *Research for TRAN Committee: The New Silk Route – Opportunities and Challenges for EU Transport*, Policy Dep't for Structural & Cohesion Policies, at 15 (Jan. 2018), https://www.europarl. europa.eu/RegData/etudes/STUD/2018/585907/IPOL_STU(2018)585907_EN.pdf [https:// perma.cc/EFF3-76YE].

25. Gleave et al., *supra* note 24.

The BRI and its financial arrangements drive this international cooperation. In 2012, China presented a proposal to "governments in Central and Eastern Europe with a formal offer to boost trade with the region," and China launched its own investment fund.[26] The BRI format is that of 17+1 with each participating country signing BRI cooperation agreements.[27]

> China's Belt and Road Initiative (BRI), sometimes referred to as the New Silk Road, is one of the most ambitious infrastructure projects ever conceived. Launched in 2013 by President Xi Jinping, the vast collection of development and investment initiatives would stretch from East Asia to Europe, significantly expanding China's economic and political influence.[28]

SILK ROAD AND MARITIME SILK ROAD[29]



26. Humphrey Hawksley, *China Paves its Latest Silk Road into Eastern Europe*, NIKKEI ASIAN REV. (Feb. 25, 2016, 7:00 PM), https://asia.nikkei.com/Economy/China-paves-its-latest-silk-road-into-Eastern-Europe [https://perma.cc/L5AR-4DTL].

27. Ciurtin, *supra* note 4.

28. Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN REL. (Jan. 28, 2020), https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative [https://perma.cc/AA9F-4AHC].

29. The map is found in, *Greece Signs BRI Deals, States "China Invested When Everyone Else Stayed Away,"* SILK ROAD BRIEFING (Nov. 19, 2019), https://www.silkroadbriefing.com/news/2019/11/13/greece-signs-bri-deals-states-china-invested-everyone-

2. CEEC

The CEEC/17+1 framework began in 2012 with China, eleven EU member states, and five EU candidate countries—all in Central and Eastern Europe—all of whom signed cooperation agreements with China to participate in the BRI.[30] When Greece joined in August 2018, the 16+1 became the "17+1."[31]

Over the years, the CEEC has become increasingly important to China.[32] In fact, the 16+1 framework "was a carefully designed maneuver to build a stronger presence of China both in a 'soft diplomatic' aspect as well as providing a platform for extended economic cooperation."[33] Most of the CEEC/17+1 countries were part of the former Communist Eastern Bloc and are now EU member states with a combined population of 113.1 million,[34] which is 25.3 percent of the EU's total population.[35] Because of the CEEC's location and economic needs, the CEEC/17+1 countries have been responsive to BRI overtures from China.[36] Of the 17 CEEC members,

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else-stayed-away/ [https://perma.cc/7USY-RUUP] (showing the Silk Road: upper road Italy to China; Maritime Silk Road: lower road Italy-Indonesia-China).

30. *See* China, the 16+1 Format and the EU, EUR. PARL. DOC. PE 625.173 (Sept. 2018); *see also* Hillman & McCaplin, *supra* note 3.

31. Since then, other EU countries, Portugal (Dec. 5, 2018) and Italy (Mar. 23, 2019) also signed on as members participating in the BRI, though they are not CEE countries. Zeneli, *supra* note 6; *see also* Eijk & Gunavardana, *supra* note 6; Chatzky, *supra* note 6.

32. Kuo, *supra* note 7.

33. *Id.*

34. The population of the EU is about 445 million. *European Countries by Population (2020)*, WORLDMETER, https://www.worldometers.info/population/countries-in-europe-by-population/ [https://perma.cc/T6US-QKKS]; *see also* Thomas Ohr, *Global Startup Awards Releases In-Depth Report about the CEE Startup Ecosystem*, EU-STARTUPS (Nov. 26, 2018), https://www.eu-startups.com/2018/11/global-startup-awards-releases-in-depth-report-about-the-cee-startup-ecosystem/ [https://perma.cc/89H3-GTST].

35. WORLDMETER, *supra* note 34; *see also Eastern Europe Population 2020*, WORLD POPULATION REV., https://worldpopulationreview.com/continents/eastern-europe-population/ [https://perma.cc/NX8G-JJS5]; Eurostat Press Office, *EU Population Up to Nearly 513 Million on 1 January 2018*, EUROSTAT (July 10, 2018), https://ec.europa.eu/eurostat/documents/2995521/9063738/3-10072018-BP-EN.pdf/ccdfc838-d909-4fd8-b3f9-db0d65ea457f [https://perma.cc/G9DQ-LU7L].

36. It is noticed that Greece, but not Italy, both EU Members and geographical neighbors, are not defined by OECD as within the CEE, although apparently Greece is close enough by China's calculations to be included in the 17+1. *See* Ciurtin, *supra* note 4; Evelyn Cheng, *China Tackles Worries about Belt and Road Debt as it Notches a Swiss Endorsement*, CNBC (May 1, 2019, 1:14 AM), https://www.cnbc.com/2019/05/01/china-signs-mou-with-finance-giant-switzerland-on-belt-and-road.html [https://perma.cc/JSP3-

only Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, and Serbia are not EU members, though they are in the process of transposing (integrating) EU legislation into national law to qualify for membership.[37]

MEMBERS OF THE CEE-CHINA BRI "16+1" FORMAT[38]

BC46]; Eijk & Gunayardana, *supra* note 6; *Cooperation Between China and Central and Eastern European Countries*, WIKIPEDIA (Aug. 16, 2020), https://en.wikipedia.org/wiki/Cooperation_between_China_and_Central_and_Eastern_European_Countries [https://perma.cc/ETW5-H8E4]; Central and Eastern European Countries (CEECS), ORG. FOR ECON. CO-OPERATION AND DEV., https://stats.oecd.org/glossary/detail.asp?ID=303 [https://perma.cc/AJV2-G79J]; *CEE countries (CEECs)*, STAT. NETH. (CBS), https://www.cbs.nl/en-gb/news/2018/31/international-road-haulage-over-4-percent-up-in-2017/cee-countries—ceecs— [https://perma.cc/5U72-XLLP].

37. Bosnia and Herzegovina do not yet meet the requirements for EU membership but are still considered "potential candidates." *Countries*, EUR. UNION (July 28, 2020), https://europa.eu/european-union/about-eu/countries_en [https://perma.cc/87QS-CEYR].

38. Hawksley, *supra* note 26.

Also, in the landscape of Central Europe is a discrete group of countries known as the Visegrad Group (V4).[39]

> [The V4] is a loosely knit bloc comprising of four Central European countries (Slovakia, Czechia, Hungary, and Poland). The group was founded in 1991. . . . [It] offer[s] a platform for engaging in discussion not only among the V4 members themselves but also with third countries. . . . Currently, the V4 has established a regularized cooperation platform with two East Asian countries: Japan and South Korea. . . . The V4-China dimension has been so far mostly neglected by policymakers from the V4 countries and has thus been relegated to secondary importance when it comes to engaging with China.[40]

Arguably, China could work better with the V4 than with the 17+ because the "17 CEE countries act more like competitors for China's attention and not as partners in promoting their common interests."[41]

B. BRI in CEEC: Economic Expansion

1. Trade and Investment

The World Bank (WBO) lists the CEEC's GDP as follows, indicating relative financial ability to engage in BRI projects with the Chinese.[42]

39. *About the Visegrad Group*, VISEGRAD GRP., http://www.visegrad group.eu/about [https://perma.cc/8P9U-QJ3A].

40. Klára Dubravčíková et al., *Prospects for Developing the V4+China Cooperation Platform*, CENT. EUR. INST. OF ASIAN STUD., at 6–8 (2019), https://ceias.eu/wp-content/uploads/2019/10/V4-China-cooperation_FINAL.pdf [https://perma.cc/8P99-4AC6].

41. *Id.* at 9.

42. EU Members Highest GDP: Poland, Czechia, Romani, Greece, Hungary. Non-EU: Serbia, Bosnia and Herzegovina, Albania, North Macedonia, Montenegro. *Data GDP (Current US$)*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD [https://perma.cc/H94Y-Z4J9]; Emilian Kavalski, *China's "16+1" is Dead? Long live the "17+1"*, DIPLOMAT (Mar. 29, 2019), https://thediplomat.com/2019/03/chinas-161-is-dead-long-live-the-171/ [https://perma.cc/PTZ7-CG6R].

WORLD BANK - GDP (CURRENT US$)[43]
[EU MEMBERS DARK COLOR; NON-EU MEMBERS LIGHT]

Countries	Year	Millions	EU Ranking	Non-EU Rank
Albania	2019	15,278.08		3
Bosnia and Herzegovina	2019	20,047.85		2
Bulgaria	2019	67,927.18	7	
Croatia	2019	60,415.55	8	
Czechia	2019	246,489.25	3	
Estonia	2019	31,386.95	12	
Greece	2019	209,852.76	4	
Hungary	2019	160,967.16	5	
Latvia	2019	34,117.20	11	
Lithuania	2019	54,219.32	90	
Montenegro	2019	5,494.74		5
North Macedonia	2019	12,694.82		4
Poland	2019	592,164.40	1	
Romania	2019	250,077.44	2	
Serbia	2019	51,409.17		1
Slovakia	2019	105,422.30	6	
Slovenia	2019	53,742.16	10	
China	2019	14,342,902.84		

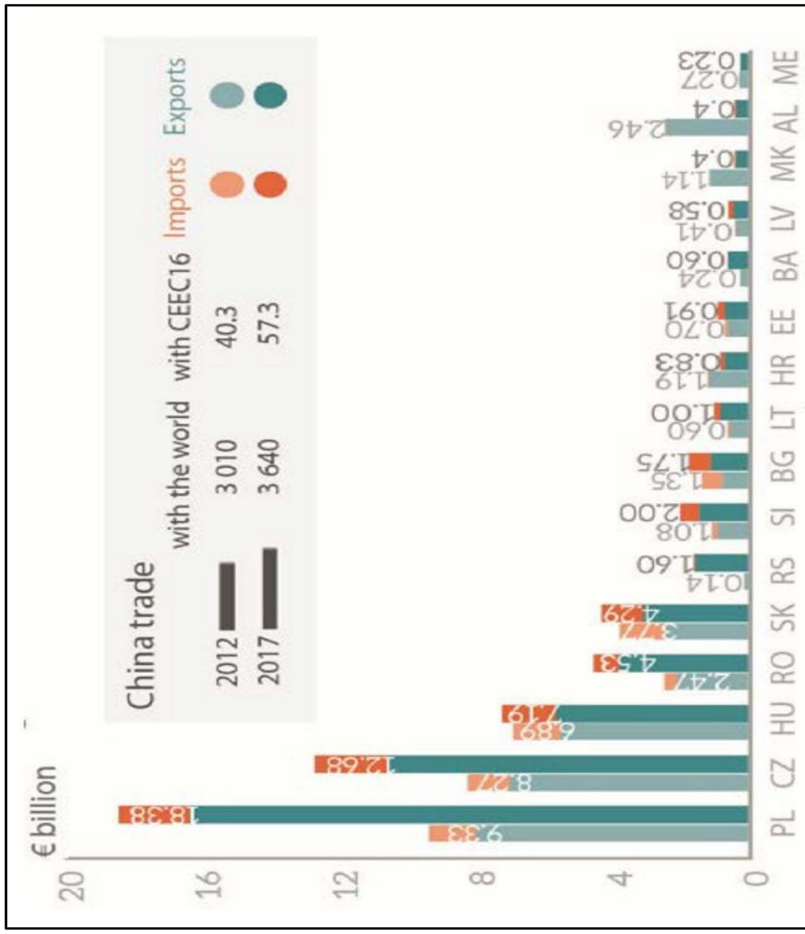
a. Trade

According to Chinese sources, "since the China-CEEC platform was launched in 2012, trade between [these countries] has increased more than 50 percent. The volume reached 82.23 billion U.S. dollars last year [2018], up 21 percent year on year, with Chinese imports from the 16 CEEC rising faster than its exports."[44]

43. THE WORLD BANK, *supra* note 42.

44. *Commentary: China-CEEC Cooperation Booster for European Integration*, XINHUA (Apr. 12, 2019, 2:53 PM), http://www.xinhuanet.com/english/2019-04/12/c_137971608.htm [https://perma.cc/B6EZ-LWDM]. "Bilateral trade reached $82.23 billion last year, up 21 percent year-on-year, according to the Ministry of Commerce (MOC).

CEEC TRADE IN GOODS IN 2012 AND 2017[45]



China's exports to the CEEC totaled $59.19 billion last year, while imports reached $23.04 billion, up 19.6 percent and 24.6 percent respectively, said MOC spokesperson Gao Feng." *China, CEEC See Steady Trade Growth,* XINHUA (Apr. 6, 2019, 3:18 PM), http://www.xinhuanet.com/english/2019-04/06/c_137954793.htm [https://perma.cc/ZM7S-BKZM].

45. China, the 16+1 Format and the EU, EUR. PARL. DOC. PE 625.173 (Sept. 2018).

The following table outlines trade between China and the CEECs in 2015.[46]

SINO-CEEC TRADE[47]

	Import		Export		Total Trade	
	2018 US$ Mn	2014-2018 Growth %	2018 US$ Mn	2014-2018 Growth %	2018 US$ Mn	2014-2018 Growth %
Total	23,585	40%	65,689	37%	89,274	38%
Poland	3,642	24%	20,880	46%	24,521	43%
Czech Republic	4,396	47%	11,900	49%	16,296	48%
Hungary	4,339	33%	6,541	13%	10,880	21%
Slovakia	5,245	55%	2,533	-10%	7,778	25%
Greece	562	62%	6,510	56%	7,072	56%
Romania	2,166	42%	4,507	40%	6,673	40%
Slovenia	591	78%	4,436	123%	5,027	116%
Bulgaria	1,146	16%	1,439	22%	2,586	19%
Lithuania	330	110%	1,761	6%	2,091	15%
Croatia	212	110%	1,328	29%	1,540	36%
Latvia	213	45%	1,162	-12%	1,375	-6%
Estonia	245	9%	1,030	-10%	1,275	-7%
Serbia	224	98%	728	71%	951	77%
Albania	108	-43%	541	43%	649	14%
Montenegro	42	-23%	178	13%	220	4%
Bosnia & Herzegovina	77	122%	110	-61%	187	-41%
North Macedonia [1]	48	-46%	106	38%	154	-8%

Source: China Customs, IHS Markit.

46. Jenny Lam, *Central and Eastern Europe: From 16+1 to 17+1*, HKTDC RSCH. (Feb. 21, 2020), http://m.hktdc.com/business-news/article/Hot-Topics/Central-and-Eastern-Europe-From-16-1-to-17-1/rp/en/1/1X000000/1X0AJYOI.htm [https://perma.cc/VSL2-KB5G].

47. *Id.*

In promoting BRI with the CEECs, China acknowledges there is a trade imbalance, but argues it provides impetus "for a new development model featuring enhanced connectivity with greater investment in infrastructure, such as railroads, highways, tunnels, bridges, power plants, electric grids, industrial and logistic parks, seaports and airports."[48]

b. Investment

China and the CEEC have also seen growing mutual investment. According to reports, "CEEC investment in China [in 2018] ha[d] surpassed 1.5 billion dollars, and Chinese investment in the region ha[d] exceeded 10 billion dollars."[49]

From a Chinese perspective, "the 16+1 format has not only been well-received by member countries but is increasingly used as a leeway to allow cash-strapped CEECs to sidestep possible violations of EU restrictions on sovereign debt levels."[50] From the Chinese perspective, it is a "win-win" situation.

> Strengthening Sino-CEEC co-operation and connectivity is also conducive to the successful implementation of the BRI, which aims to facilitate and promote greater integration among the 60-plus countries along the Belt and Road. CEECs, providing a strategic link between Asia and West Europe, are vital to the success of the BRIFalse China's outbound direct investment (ODI) in CEECs has been flourishing, while bilateral trade has also blossomed. In the five years ending 2014, China's ODI to CEECs grew by nearly 100% from US$853 million to US $1.7 billion. Among the 16 CEECs, three countries – namely Hungary, Poland

48. *Id.*; *Belt and Road Opportunities in Central and Eastern Europe*, CHINA GO ABROAD, http://www.chinagoabroad.com/en/article/21526 [https://perma.cc/6RX7-PUK7]. "Central and Eastern European countries have become increasingly dissatisfied with the economic results of their '17+1' initiative with China, according to a report released on Tuesday [April 7, 2020]." This report, titled "'Empty Shell No More', . . . called for a unified approach to derive greater economic benefit from the relationship with Beijing." The Report, by ten China scholars, each from different Central and Eastern European nations, found that "as of 2018, the 17 countries' total deficit with China stood at US $75 billion" and it "advocated ways for their countries to band together before future summits, such as '17+0' meetings without Beijing at the table to develop agreement on unified demands." Keegan Elmer, *Europe's '17+1' Countries Dissatisfied with China Relations, Report Says, as Summit is Postponed*, SOUTH CHINA MORNING POST (Apr. 7, 2020, 7:38 PM), https://www.scmp.com/print/news/china/diplomacy/article/3078830/europes-171-countries-dissatisfied-china-relations-report-says [https://perma.cc/69X5-LWU5].

49. *Commentary: China-CEEC Cooperation Booster for European Integration*, *supra* note 44.

50. CHINA GO ABROAD, *supra* note 48.

and the Czech Republic – accounted for more than two-thirds of the total, followed by Romania, Bulgaria and Slovakia, which together accounted for another 30%.[51]

Among the 17 CEECs, Poland, Hungary, and Romania accounted for 46% of mainland China's outward FDI to CEECs in 2018, but Chinese investors are also adding investments in Serbia, Croatia, and Montenegro, as seen in the below chart.[52]

MAINLAND CHINA'S OUTWARD FDI (STOCK) IN 17 CEECS[53]

	2014	2015	2016	2017	2018	2014-2018
	US$ Mn	US$ Mn	US$ Mn	US$ Mn	US$ Mn	Growth %
Total	1,817	2,096	1,715	2,033	2,513	38%
Poland	329	352	321	406	524	59%
Hungary	556	571	314	328	321	-42%
Romania	191	365	392	310	305	59%
Czech Republic	243	224	228	165	279	15%
Serbia	30	50	83	170	271	814%
Greece	121	120	48	182	243	101%
Bulgaria	170	236	166	251	171	0%
Slovakia	128	128	83	84	99	-22%
Croatia	12	12	12	39	69	482%
Montenegro	*	*	4	40	63	19,544%
Estonia	4	4	4	4	57	1,524%
Slovenia	5	5	27	27	40	702%
North Macedonia [1]	2	2	2	2	36	1,620%
Lithuania	13	13	15	17	13	3%
Latvia	1	1	1	1	12	2,067%
Albania	7	7	7	5	6	-9%
Bosnia and Herzegovina	6	8	9	4	4	-29%

Source: 2018 Statistical Bulletin of China's Outward Foreign Direct Investment.

* = less than US$1 million

51. *Id.*; *China, CEEC See Steady Trade Growth*, *supra* note 44.
52. Lam, *supra* note 46.
53. *Id.*

Some reports show uneven trade in CEECs. For example, CEE-China trade rose by 86 percent from 2009 to 2014 and hit its 2012 target of $100 billion by 2015,[54] yet "just five out of the sixteen countries—Poland, Czech Republic, Hungary, Slovakia and Romania—received 80 percent of these trade exchanges."[55] Similarly, Chinese investment in the region rose from $400 million in 2009 to $1.7 billion in 2014, but just six countries (Bulgaria being the fifth) received 95 percent of the total in 2014.[56]

While China's BRI investments in the CEEC continue, different political perspectives that exist within the CEEC create some changes in the amount and types of Chinese investment.[57] Furthermore, "China's efforts to make inroads in eastern Europe are being hindered by what nations see as failed promises on money materializing and the strings attached to investments."[58]

In Poland, political considerations have deterred some investments.

> Poland is open to investment from China, . . . even as relations have faltered between the two countries over the role of Chinese technology firms in 5G and state infrastructure projects. A Chinese former Huawei executive was arrested in Poland in January on spying allegations. . . . Polish President Andrzej Duda told Reuters last month that he was opposed to investment by Beijing in strategic infrastructure, including seaports and airports. Nonetheless, the minister said he welcomed investment. "We are also open to Chinese investments, especially greenfields, in the manufacturing and innovative sectors . . . ."[59]

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54. China was clearly a latecomer to the CEE region and is currently trying to build connections and learn the business environment of this [region] saturated predominantly by European and U.S. market players. Chinese efforts in the region already started to bear first fruit with trade and investment increasing year by year from $43.9 billion in 2010 to $58.7 billion in 2016. The main areas of the investment were infrastructure, machinery, chemical, telecom, and new energy projects. In the coming years the CEE region will gain even more significance as the Belt and Road Initiative – a massive Chinese state project – sees it as a crucial hub for its land and sea routes towards western Europe.

Kuo, *supra* note 7.

55. Angela Stanzel, *China's Investment In Influence: The Future of 16+1 Cooperation*, Eur. Council on Foreign Rels., at 6, 8–9 (Dec. 2016), https://www.ecfr.eu/page/-/China_Analysis_Sixteen_Plus_One.pdf [https://perma.cc/JZ72-XWRC].

56. *Id.*

57. *See* Alan Crawford & Peter Martin, *China is Forced to Reconsider its Route into Eastern Europe*, BLOOMBERG (Oct. 18, 2018, 2:00 PM), https://www.bloomberg.com/news/articles/2018-10-18/china-is-forced-to-reconsider-its-route-into-eastern-europe [https://perma.cc/SP8V-DM3Z].

58. *Id.*

59. Joanna Plucinska, *Poland Open to Investment from China: Foreign Minister*, REUTERS (July 8, 2019, 3:57 AM), https://www.reuters.com/article/us-poland-china/poland-

Examples of BRI-funded programs in selected CEECs include:

> Poland, with its well-developed industrial market and logistical importance (it is estimated that 25% of all road transport in Europe is operated by Polish companies) has not only established a strategic partnership with China but is also a founding member of the Asian Infrastructure Investment Bank (AIIB) – the only CEEC joining the bank so far.[60]

Other examples include Hungary, which will build a high-speed rail line between Budapest, its capital, and Belgrade, the capital of Serbia in an 85 percent Chinese-financed project, which "will shorten the travel time between the two capitals from eight hours to three."[61]

In Serbia, China's landmark BRI projects include the "'Mihailo Pupin' Bridge on the Danube River in Belgrade, the construction of sections of the Corridor 11 highway, and the expansion of coal mines near the 'Kostolac' thermal power plant."[62]

Furthermore, the "extension of the Budapest-Belgrade high-speed rail line to Skopje, the capital of Macedonia, and to Athens, the capital of Greece, will give China-bound freight trains another alternative to gain access to the Aegean and Mediterranean Seas."[63] China's "state-owned shipping giant, Cosco, has recently acquired a majority stake in the Piraeus Port Authority," which as the closest port in the Northern Mediterranean to the Suez Canal, Piraeus is a strategic trans-shipment hub for Asian exports to Europe.[64] China's exports "could reach Germany, for example, seven to [eleven] days earlier thanks to the abovementioned high-speed rail connection."[65]

By comparison, on April 2, 2019, the EU announced its adoption of an investment package valued at €8 billion under its Cohesion Fund.[66] The

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open-to-investment-from-china-foreign-minister-idUSKCN1U31LR [https://perma.cc/Z52R-3WNT].

60. CHINA GO ABROAD, *supra* note 48.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. European Commission Press Release IP/19/1872, Commission Adopts €4 Billion Investment Package for Infrastructure Projects Across 10 Member States (Apr. 2, 2019).

> Cohesion policy is the European Union's strategy to promote and support the "overall harmonious development" of its Member States and regions. Enshrined in the Treaty on the Functioning of the European Union (Art. 174), the EU's cohesion policy aims to strengthen economic and social cohesion by reducing disparities in the level of development between regions. The policy focuses on key areas which will help the EU face up to the challenges of the 21st century and remain globally competitive. Approximately 32.5 % of the EU budget 2014-2020 (equivalent to ca. EUR 351.8 billion over seven years at 2014 prices) is

investment package is for infrastructure projects that involve Bulgaria, Czechia, Germany, Greece, Hungary, Italy, Malta, Poland, Portugal and Romania.[67] The infrastructure projects cover "health, transport, research, environment and energy."[68] With national co-financing, the initial investment of €4 billion resulted in a total investment of €8 billion across ten member states.[69] Projects in CEEC include: smoother road and rail connections on the Trans-European Transport Network in Czechia; efficient public services in Greece and affordable energy in Crete; improved connectivity, reduced congestion and increased transport safety around Budapest, Hungary; and better healthcare and greater connectivity in Poland.[70]

2. *Poland as an Illustration*

a. *Economics*

Poland, as one of the big markets of BRI investment and trade, provides a useful illustration of how BRI affects it, having some common characteristics with other CEE countries; though Poland does have an advantageous geostrategic location as well as economic potential.[71] Chinese reports indicate, "Poland is among the top-ranking CEE countries . . . as an attractive prospective investment destination."[72] Poland is situated in Central Europe,

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> allocated to financial instruments which support cohesion policy. These are managed and delivered in partnership between the European Commission, the Member States and stakeholders at the local and regional level. The Cohesion Fund is aimed at Member States whose Gross National Income (GNI) per inhabitant is less than 90% of the EU average. It aims to reduce economic and social disparities and to promote sustainable development.

Cohesion Policy, EUR. COMM'N, https://ec.europa.eu/regional_policy/en/policy/what/glossary/c/cohesion-policy [https://perma.cc/6EVS-GAYF].

67. European Commission Press Release IP/19/1872, *supra* note 66.

68. *Id.*

69. *Id.*; *Priorities for 2014-2020*, EUR. COMM'N, https://ec.europa.eu/regional_policy/en/policy/how/priorities [https://perma.cc/C3BC-FT3J].

70. *Priorities for 2014-2020*, *supra* note 69.

71. Kuo, *supra* note 7.

72. Lukasz Sarek, *Chinese FDI in Poland: Still Just Wishful Thinking*, SINOPSIS (Aug. 25, 2018), https://sinopsis.cz/en/chinese-fdi-in-poland-still-just-wishful-thinking/ [https://perma.cc/JQH9-YUUB].

> Officially, Chinese direct investment in Poland has grown over the last two or three years. But the figures are not so impressive: according to the National Bank of Poland (NBP), in 2016 the total Chinese direct investment reached EUR 123.3 million, while in 2015 it was EUR 198.5 million. Admittedly, experts disagree on the methodology: how to calculate Chinese investment in Poland? The NBP

borders seven countries, and is considered "a portal linking European Union markets."[73]

In 2015, Poland signed a memorandum of understanding with China for the BRI, which Poland expects to support economic cooperation with China.[74] In 2018, "Sino-Polish trade grew by 13.3 percent to reach $33.47 billion."[75] Further, "Polish exports to China amounted to $2.5 billion, up 8.7 percent while imports from China grew 13.7 percent to reach $30.97 billion, maintaining the country's position as Poland's second-largest source of imports."[76] However, some Chinese investors remain unconvinced and claim that "the future does not look so rosy anymore" as Poland is no longer the "biggest recipient of Chinese investment of the Visegrad Group countries and the eighth biggest in the EU."[77] By way of explanation, it is noted that:

> Poland has to step up and show that it is not only a transit country . . . but that it can be the important node connecting north to south and east to west. . . . "There is not much value in just being a corridor," . . . [t]he real value is in becoming an intelligent and well-connected node in the flow. The CEE's prosperity could be significantly accelerated with better north-south connectivity. There is no reason why trains couldn't stop in Poland first. . . . [I]t's all about "infrastructure, infrastructure, infrastructure. We see bottlenecks at the eastern border of Poland. We see that the railway network is not yet developed to the stage where seamless flows of cargo by rail are possible.[78]

> methodology does not include investments by companies registered outside the People's Republic of China – in Europe or elsewhere. For this reason, the Rhodium Group – an independent research provider, for example, reports that about EUR 936 million was invested in Poland in 2016.

Belt, Road, and Humbug. China's Investments in Poland, VSQUARE (Nov. 11, 2018), https://vsquare.org/belt-road-hub-and-humbug-what-are-chinas-investments-in-poland/ [https://perma.cc/5TP5-72QL] [hereinafter *Belt, Road, and Humbug*].

73. Chen, *supra* note 10.

74. *Id.* ("One positive outcome of the BRI is that more China-Europe freight trains, also known as the China Railway Express, pass through Poland to reach other European countries, and this has significantly improved the efficiency of cross-border trade. Large ships are regularly loaded in the two major Polish ports of Gdansk and Gdynia, which account for 95 percent of maritime cargo transportation in the country, with up to 21,000 standard containers for transport to Asia, including Chinese ports in Shanghai, Qingdao, Ningbo and Shenzhen every week. . . . The trade between China and Europe is backed by a network with Poland functioning as a transportation hub."); *see also* Yang Yi, *China, Poland Vows to Strengthen Bilateral Cooperation*, XINHUA (July 9, 2019, 10:54 AM), http://www.xinhuanet.com/english/2019-07/09/c_138211378.htm [https://perma.cc/KT3F-VB72]; *Poland*, OBSERVATORY OF ECON. COMPLEXITY, https://oec.world/en/profile/country/pol/ [https://perma.cc/7PQK-WXVJ].

75. *Id.*

76. *Id.*

77. *Belt, Road, and Humbug*, *supra* note 72; *see also* Chen, *supra* note 10.

78. Frank Schuhholz & Wolfgang Lehmacher, *Poland & CEE: The Buckle on the Belt & Road?*, BELT & ROAD NEWS (Mar. 20, 2019), https://www.beltandroad.news/2019/03/20/poland-cee-the-buckle-on-the-belt-road/ [https://perma.cc/E5Q2-94XQ] ("At

Advocates for expanding BRI in Poland argue "BRI can play a vital role in Poland's future [and] the region's development."[79]

> For instance, the government in Warsaw is currently in talks with the Chinese to get them to finance the new Central Airport for Poland, which will also be a huge logistics center with train lines and cargo facilities. Note that EU does not subsidize building new airports. However, the current EU, dominated by a Franco-German alliance, is not seeing the move as [beneficial], because it leads a way for the CEE to export more goods and services to China, which will threaten the current status quo of these aforementioned countries as leaders of EU-China cooperation.[80]

Also assisting Poland's development is EU's Cohesion Fund of €8 billion provided across ten member states; it has allotted monies for projects in Poland for better healthcare, maritime transports, the Szczecin Metropolitan Railway; and, construction of a section of the S7 express road linking Warsaw to Grójec.[81]

b. Labor Issues: Emigration, Immigration, and Chinese Workers

Wage levels throughout much of the CEEC remained low after their return to the West and are comparative with wage levels in some of China's larger cities, thus inviting Chinese investment. It is reported that using three Chinese cities as a gauge,

> their employees' median salaries are higher than those in the poorest section of Europe: the old Communist Balkans. Just across from the Adriatic Sea on rich Italy's border sits a Chinese-like labor pool. Only they come cheaper, in fact. Chinese workers in Shanghai, Shenzhen, and Beijing, on average, earn more than workers in Albania, Romania, Bulgaria, Slovakia, and new NATO member Montenegro, which has a median income of just $896 a month. Shanghai median wages are not all that much different than Poland's at $1,569. The same goes for the Czech Republic, with its median salary in Prague, its richest city, sitting around $1,400. Hungary's gross average wage is right in Shanghai's wheelhouse,

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the moment, the cargo is stuck at the various border points because of customs issues, change of gauges and the lack of high-performing, efficient terminal infrastructure. And on top of that there are still missing sufficient north-south connections. . . . Up to 90% of current cargo flows traveling by rail between China and Europe and vice versa go through Poland, so other EU and CEE countries see the country as a competitor to their own ambitious plans and go directly to China to show themselves as the future hub for the Chinese. Poland, [it is pointed out] . . . is roughly 1000 km closer than Duisburg to China and should be the more obvious choice to be a logistics hub supporting distribution and supply concepts.").

79. Kuo, *supra* note 7.
80. *Id.*
81. European Commission Press Release IP/19/1872, *supra* note 66.

> at $1,139 per month. China's wage growth is impressive. Great for the Chinese. But it has capped wage growth in many of the lower income states within Europe.[82]

These low wage levels helped propel the CEEC and Polish workers to emigrate within the EU in their quest for better jobs and pay.[83] The gap created by workers leaving is largely filled by hiring migrant workers, in the case of Poland, mostly Ukrainians.[84]

> [A] report by PwC estimates the shortfall to reach 1.5 million workers by 2025. Other booming Central European economies are also feeling the dearth of workers, as populations shrink due to tumbling birth rates and high emigration. Unemployment is below 4 percent in Poland, the Czech Republic and Hungary, and at 5.4 percent in Slovakia, according to Eurostat.[85]

The chart below illustrates the growing number of emigrants from Poland.[86]

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82. Rapoza, *supra* note 22; s*ee also* Ronald C. Brown, *China-Eu BIT and FTA: Building a Bridge on the Silk Road Not Detoured by Labor Standard Provisions*, 29 WASH. INT'L L. J. 61, 74–79 (2019) (discussing wage levels and labor conditions in EU and China).

83. *See* Rapoza, *supra* note 22.

84. Maria Wilczek, *Poland Struggles to Find Workers as Unemployment Hits 28-Year Low*, ALJAZEERA (Aug. 29, 2019), https://www.aljazeera.com/ajimpact/poland-struggles-find-workers-unemployment-hits-28-year-190829195115010.html [https://perma.cc/E4TG-K56T].

> [M]any Ukrainians are now looking to move to Germany in search of higher wages after Berlin passed legislation giving skilled workers from outside the EU access to its labour markets. In response, Polish employers cast their net wider, turning to Asia in search of staff, mainly to work in meat factories and steel mills. Because of recent trends of anti-immigration, the government has not made it easy for companies seeking Asian workers; rather, preference and easier entrance procedures seem to be available only to workers from Russia, Belarus, Ukraine, Georgia, Armenia and Moldova.

Monika Pronczuk & Evon Huber, *Poland's Immigrant Stance at Odds with Need for Workers*, FIN. TIMES (Aug. 4, 2019), https://www.ft.com/content/2dd225a8-a498-11e9-974c-ad1c6ab5efd1 [https://perma.cc/G4JD-3LRK].

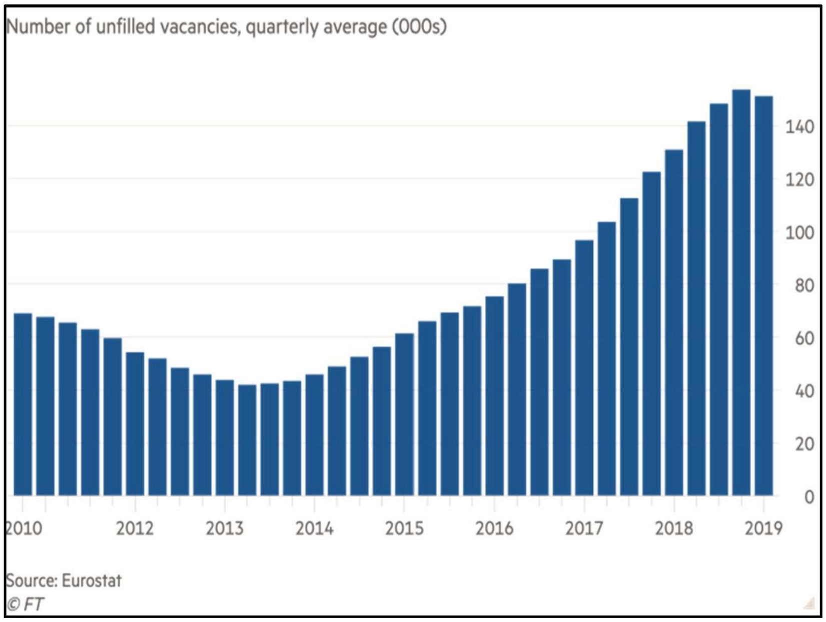
> Poland is the world's most popular destination for temporary labour migrants for the second year running, according to a new report released by the Organisation for Economic Cooperation and Development (OECD). Published this week, the report found that in 2017 1.1 million temporary migrants moved to Poland, putting it ahead of the United States, which received 691,000 workers, and Germany with just over 400,000.

Matt Day, *Increasing Numbers of Workers Heading to Poland as New Report Shows Country Takes on MORE than USA and Germany*, FIRST NEWS (Sept. 27, 2019), https://www.thefirstnews.com/article/increasing-numbers-of-workers-heading-to-poland-as-new-report-shows-country-takes-on-more-than-usa-and-germany-7792 [https://perma.cc/952M-M3PU].

85. Wilczek, *supra* note 84.

86. Pronczuk & Huber, *supra* note 84.

GROWING LABOUR SHORTAGES IN POLAND[87]



The number of Chinese workers coming to Poland has increased, ranking second after Ukraine, and are working in Chinese state-owned companies and in private companies, mainly engaging in trade.[88]

> "A common lament of recipient nations is that despite all the investments from huge infrastructure projects, there's a lack of local employment opportunities" . . . . One of the biggest complaints around the [BRI] is an excessive reliance on Chinese employees for on-the-ground projects, which deprives participating countries of jobs. . . . Beijing basically replicated its traditional state-owned enterprises (SOE) model in other developing nations . . . . These enterprises "tend to air drop the entire ecosystem, from their engineers to the construction workers to the chefs, into the countries to do the project. . . ."[89]

It has also been noted that:

87. *Id.*
88. For Chinese population in Poland, see generally Feng Ping, *Chinese Migration in Poland*, 4 POLISH J. OF POL. SCI. 161, 178 (2018).
89. Chandran, *supra* note 23.

> [E]xcessive reliance on Chinese labor reduces the projects' benefits to host countries and generates social tensions and other problems. Chinese developers point to plausible problems with the local labor pool, such as a lack of qualified candidates, a project's distance from urban areas, or an unsuitable local work ethic, as the rationale for using Chinese labor. Nevertheless, the shortage of opportunities for local labor and other benefits to the local economy results in dissatisfaction and resentment, as do the enclaves of Chinese workers, which contribute to social problems.[90]

It is reported that both local and Chinese workers may be mistreated or exploited by developers or their subcontractors.[91]

C. *Political Winds: Same Bed, Different Dreams 17+1 Dividing EU?*[92]

China values its "geostrategic position as a bridgehead to the EU market and a crucial transit corridor for its Belt and Road initiative (BRI)."[93]

While the EU remains skeptical of China, believing it aims to divide the EU, China does not force participation in the plan.[94] Rather, the 17+1 members may consider joining because BRI presents a "useful mechanism in their [search] for complementary economic opportunities—not to replace the ones provided by the EU."[95] Additionally, it is argued, it "constitutes an important part of Europe-China relationship and complements the EU-China Comprehensive Strategic Partnership and the EU-China 2020 Strategic

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90. Daniel R. Russel & Blake Berger, *Navigating the Belt and Road Initiative*, ASIA SOC'Y POL'Y INST. 15 (June 2019), https://asiasociety.org/sites/default/files/2019-06/Navigating%20the%20Belt%20and%20Road%20Initiative_0.pdf [https://perma.cc/U3KF-JEXK].

91. *Id.* at 16 ("Problems include unpaid wages, confiscated passports, unsafe work conditions, and forced labor. Dispute resolution and grievance mechanisms tend to be unclear if they exist at all, and compensation is often delayed. It is often difficult for either local or Chinese workers to complain about these abuses, let alone obtain remediation. The lack of skilled local candidates is particularly acute for higher-level management or technical positions."). For other instances of labor law violations, see generally Myroslava Keryk, *Working in Poland: Violations of the Labour Rights of Ukrainian Migrants in the Construction and Services Sectors*, NASZWYBÓR [OUR CHOICE FOUND.] (2018), https://pl.naszwybir.pl/wp-content/uploads/sites/2/2018/03/raport-online-en.pdf [https://perma.cc/WFP3-2CNA].

92. The question remains whether EU members will dream of more connections with China, even though they lie in same "political bed" and thus could divide the EU. *See* Hillman & McCalpin, *supra* note 3 (explaining connections between the EU and China under the 16+1 framework).

93. China, the 16+1 Format and the EU, EUR. PARL. DOC. PE 625.173 (Sept. 2018).

94. Press Release, China-CEE Institute, Greece External Relations Briefing: Dubrovnik Summit Welcomes Greece (May 9, 2019), https://china-cee.eu/2019/05/09/greece-external-relations-briefing-dubrovnik-summit-welcomes-greece/ [https://perma.cc/L2C2-PQEU].

95. *Id.*

Agenda for Cooperation."[96] It is also argued that "Chinese investments in infrastructure and energy projects will significantly ease the EU's financial involvement and spending needs, especially with a shrinking budget after Brexit. . . . Chinese capital will improve the infrastructure needed to enhance the integration and economic development of CEEC. It's a win-win situation."[97] Another explanation for the EU's reticence to support BRI is that "the current EU, dominated by a Franco-German alliance, is not seeing the move as beneficial, because it leads a way for the CEE to export more goods and services to China, which will threaten the current status quo of these aforementioned countries as leaders of EU-China cooperation."[98]

Europe's initial openness for BRI has lessened not only due to intra-competitive EU battles, but also due to concern that BRI may be dividing the EU.[99]

> In the eyes of a growing number of critical observers, BRI is not only undermining the EU's internal cohesion, but it is also creating tough competition for European companies in terms of trade, investment and market access in Europe and Asia. . . . [T]he EU has begun to take a more alert attitude toward China's rise. In March 2019, the EU issued a landmark communication stating that Beijing is a systemic rival in some areas, as well as a competitor and potential partner in others. This change in attitude has affected Europe's response to BRI, which has turned more ambivalent.[100]

From 2018 to 2019, not all CEEC relationships with China charged ahead under the BRI.

> [S]ome CEE states that are members of the EU (and close partners of the United States) have started to pursue a path of inertial participation—or outright disengagement—from the 16+1 format. Poland, the Czech Republic, . . . Romania, and the Baltic states are at the forefront of this strategic shift, leaving Hungary and the more China-dependent Balkan states to keep the 16+1 format afloat.[101]

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96. *Id.*; *see also EU-China 2020 Strategic Agenda for Cooperation*, E.U. EXTERNAL ACTION (Nov. 23, 2020), http://eeas.europa.eu/archives/docs/china/docs/eu-china_2020_strategic_agenda_en.pdf [https://perma.cc/AX6D-32CJ].
97. Kuo, *supra* note 7.
98. *Id.*
99. Gustaaf Geeraerts, *Europe and China's Belt and Road Initiative: Growing Concerns, More Strategy*, 118 EGMONT INST. 2 (Nov. 2019), http://www.egmontinstitute.be/content/uploads/2019/11/SPB118.pdf?type=pdf [https://perma.cc/637U-ANY3].
100. *Id.*
101. Ciurtin, *supra* note 4. It is argued, the "Belt and Road constitutes a marginal increase in infrastructure development and improves Chinese access to supplies and markets,

This might partially explain China's recent decision to allow Greece to join the 16+1.[102] Furthermore:

> Chinese investors already own the majority stake in Piraeus Port [in Greece], one of Europe's largest, while the country is strategically positioned as both a maritime and road and rail location for goods travelling through to other parts of the EU. Piraeus acts as the distribution hub for a massive network of ports, railways, roads and industrial parks spanning Asia, Africa, the Middle East and Europe that will see trillions invested in new infrastructure across 126 countries.[103]

The EU remains grounded in its position to not join or consider joining China's BRI.[104] EU officials explain, "The bloc decided not to become a member when the massive plan was presented more than five years ago. Member states are free to join individually, as nearly half of them have already done, but the same official added that all member states are bound by EU rules and European legislation."[105]

In efforts to improve relations between EU and China, together they have created the EU-China Connectivity Platform.[106] It is argued that:

> [T]he EU remains very much interested in engaging with and participating in BRI, hoping to shape the initiative, including through the EU-China Connectivity Platform. This platform offers a concrete possibility to engage in mutually beneficial projects of infrastructure construction, which would not only open up new ground for EU–China cooperation but also offer the opportunity for the two to join forces to promote stability and development in the vast Eurasian continent in between them. . . . The strategy's emphasis is on sustainable, comprehensive, and rules-based connectivity. Investments should respect labor rights, avoid political and financial dependencies, and guarantee a level playing field for businesses. The

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but the real action in infrastructure these days flows from private finance, not Chinese projects." Richard Boucher, *China's Belt and Road: A Reality Check*, DIPLOMAT (Mar. 29, 2019), https://thediplomat.com/2019/03/chinas-belt-and-road-a-reality-check/ [https://perma.cc/XDR9-ZXSS].

102. For its part, China's motives for integrating Greece into its CEE "roadshow" have symbolic and political underpinnings. The dwindling functionality of 16+1 and the increasing reluctance of some key members (such as Poland, Romania and the Czech Republic) to fully commit to the initiative required the introduction of a new element to dispel the diplomatic inertia. This made Greece the perfect candidate for membership: although it had waited on the sidelines since the Sofia summit of 2018, it was welcomed aboard at Dubrovnik, allowing China to capitalize on the alleged attractiveness of the platform and its rediscovered dynamism.

Ciurtin, *supra* note 4.

103. SILK ROAD BRIEFING, *supra* note 29.

104. Jorge Valero, *European Bloc Not Considering Joining China's Belt and Road Plans*, EURACTIV (Apr. 26, 2019), https://www.euractiv.com/section/eu-china/news/european-bloc-not-considering-joining-chinas-belt-and-road-plans/ [https://perma.cc/6QAF-NQPE].

105. *Id.*

106. *The EU-China Connectivity Platform*, *supra* note 15.

> strategy offers Asian and European states an alternative for BRI and indicates how the EU wishes to engage with them and what they can expect.[107]

As a reaction to the BRI, this new EU connectivity strategy reveals concerns that, perhaps, more connectivity with China means less connection and more division within the EU.[108] In order to act prudently, the EU proceeds open-armed, yet open-eyed. This new EU connectivity strategy is an "effort [that] comes on top of a separate push to adopt more stringent EU investment-screening legislation that would impose restrictions on Chinese investments in certain critical sectors."[109]

> The EU's position on the BRI is also based on engagement with China rather than an attempt to isolate it. From the European perspective, the BRI has the potential to be hugely positive as long as it adheres to EU market rules as well as to international requirements and standards, and also complements EU policies and projects. . . . While the EU wants to distinguish its approach on connectivity from the BRI's philosophy, it has also been careful to highlight possible synergies and

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107. Geeraerts, *supra* note 99. The Connectivity Program is further defined as:

> The European Union (EU) and the People's Republic of China (China) are committed to maintaining and developing strong and fruitful relations in the area of transport. In an effort to improve transport connectivity, the European Commission (DG MOVE) and the National Development and Reform Commission of China (NDRC) established a Connectivity Platform in 2015. The main objective of the Platform – as agreed by both sides – is to explore opportunities for further cooperation in the area of transport with a view to enhance synergies between the EU's approach to connectivity, including the Trans-European Transport Network (TEN-T), and China's Belt and Road Initiative (BRI). The platform is also used to work towards greater transparency, reciprocity in market access and a level playing field for businesses in the area of transport infrastructure development.

The EU-China Connectivity Platform, *supra* note 15.

108. Erik Brattberg & Etienne Soula, *Europe's Emerging Approach to China's Belt and Road Initiative*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 19, 2018), https://carnegieendowment.org/2018/10/19/europe-s-emerging-approach-to-china-s-belt-and-road-initiative-pub-77536 [https://perma.cc/USB2-U6CT].

> The CEEC is a loose grouping of 12 EU countries and five candidate members. What unites them is the fact that they are poorer than Western Europe and in need of foreign investments. China is helping fill the investment vacuum in CEE countries but the EU authorities and the US worry that these countries will become beholden to Beijing and undermine a common posture against China.

Manoj Joshi, *China and Europe: Trade, Technology and Competition*, 194 OBSERVER RES. FOUND. 12 (May 22, 2019).

109. Brattberg & Soula, *supra* note 108.

complementarity. The official reaction from China to the EU's new initiative has also been mostly positive.[110]

As the EU proceeds to be receptive to Chinese financing in the EU, at the same time it reaches out to many of the CEE countries to provide the possibility of additional financing.[111]

> In order to promote its overall harmonious development, the European Union is strengthening its economic, social and territorial cohesion. In particular, the EU aims at reducing disparities between the levels of development of its various regions. Among the regions concerned, special attention is paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps, such as the northernmost regions with very low population density and island, cross-border and mountain regions.[112]

Additionally, the EU created a Cohesion Fund for member states with the expressed goal to "reduce economic and social disparities, and to promote sustainable development" and[113] Between 2014-2020, this Cohesion Fund affects "Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia and Slovenia."[114] The projects covered under this fund include "health,

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110. *Id.* ("For instance, the European Fund for Strategic Investments is seeking to invest €500 billion in projects by 2020 while the European External Action Service is expected to guarantee €60 billion toward investments in connectivity over 2021–2027 with the expectation that this will help mobilize additional funding from multilateral development banks and the private financial institutions. Ultimately, the proposed EU budget will need to be approved by the European Council and the European Parliament. Regardless, whatever amount the EU will ultimately allocate will fall way short of the €1.3 trillion a year it estimates is needed for infrastructure investment in Asia."); Geeraerts, *supra* note 99. "EU High Representative for Foreign Affairs and Security Policy/Vice-President of the European Commission, Federica Mogherini and EU Commissioner for Transport Violeta Bulc presented the EU's vision for a new and comprehensive strategy to improve connectivity between Europe and Asia." *The European Way to Connectivity – A New Strategy on How to Better Connect Europe and Asia*, E.U. EXTERNAL ACTION (Sept. 20, 2018), https://eeas.europa.eu/headquarters/headquarters-homepage/50792/european-way-connectivity-%E2%80%93-new-strategy-how-better-connect-europe-and-asia_en [https://perma.cc/BE86-4RMC].

111. *See* Brattberg & Soula, *supra* note 108.

112. Marek Kolodziejski, *Economic, Social and Territorial Cohesion*, at 1 (Aug. 2020), https://www.europarl.europa.eu/ftu/pdf/en/FTU_3.1.1.pdf [https://perma.cc/J3C6-H25Q].

113. *Cohesion Fund*, *supra* note 16.

114. The Cohesion Fund allocates a total of € 63.4 billion to activities under the following categories: trans-European transport networks, notably priority projects of European interest as identified by the EU. The Cohesion Fund will support infrastructure projects under the Connecting Europe Facility; environment: here, the Cohesion Fund can also support projects related to energy or transport, as long as they clearly benefit the environment in terms of energy efficiency, use of renewable energy, developing rail transport, supporting intermodality, strengthening public transport, etc.

transport, research, environment and energy" topics amounting to a total investment of €8 billion with national co-financing.[115] The fund covers ten member states and allotted monies for projects in Poland, such as maritime transports or rail and road transport, that are dedicated to bettering healthcare and increasing connectivity.[116]

While "the emergence of the 17+1 will have direct bearing on China-CEE cooperation," the optimistic view of the apparent competition between the EU and China to support financing infrastructural projects in CEEC may logically lead to closer relations and increased trade and investment, rather than division of EU.[117] Another consideration is that "the development of a 17+1 initiative demonstrates that China has already become a fully-fledged European power. The growing number of Chinese investments and relationships in the continent suggests a much broader and more complex

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Id.; see also 30 Priority Projects, INNOVATION AND NETWORKS EXEC. AGENCY (Sept. 11, 2020), https://ec.europa.eu/inea/ten-t/ten-t-projects/projects-by-priority-project [https://perma.cc/9AGS-9X23] (listing the priority projects of European interest as identified by the EU).

115. European Commission Press Release IP/19/1872, *supra* note 66.

116. In the field of healthcare, almost €61 million of EU funds will help purchase new equipment for the University Hospital of Kraków, Małopolskie, benefitting over 3.3 million inhabitants. Then, €56 million will help build a new hospital complex for the Regional Centre of Children Health in Poznań, Wielkopolskie, centralising healthcare services, extending facilities and buying new equipment. The Centre will be equipped with an emergency care department for children and will enlarge its orthopedics, traumatology and rehabilitation departments. Then, in the field of maritime transports, €155 million will increase the safety of operations in the Port of Gdańsk, Pomorskie, with upgraded breakwater structures. Almost €65 million will help build or modernise quays and hydro-technical engineering structures in the Port of Gdynia, increasing traffic safety. In rail transport, €126 million will help build the Szczecin Metropolitan Railway, connecting the main cities of Western Pomerania including Stargard, Police and Gryfino and benefitting 687,000 inhabitants. Almost €39 million will help purchase 16 electric train units, which will operate in the Warsaw agglomeration. Almost €58 million will help modernise 152 passenger carriages and purchase 20 electric locomotives, which will circulate on the routes operated by PKP Intercity in the country. Finally, in road transport, Cohesion Policy will finance the construction of a section of the S7 express road linking Warsaw to Grójec (€129 million), a section of the A2 motorway between Warsaw's southern bypass and Mińsk Mazowiecki (more than €78 million), a section of the S3 express road towards the Czech border in Lower Silesia (€105 million) and a section of the Olsztyn bypass in Warmińsko-Mazurskie (€87 million). These projects, all located on the Trans-European Transport Network, will increase road safety, reduce travel time and enhance territorial cohesion in the country.

Id.

117. Kavalski, *supra* note 42.

entanglement in European affairs than either Beijing or any European capital expected."[118]

III. LEGAL ASPECTS

A. Connectivity: EU Limits on CEEC/17+'s International Trade Agreements

1. EU Limits on CEEC/17+1

A significant domestic issue is that the "EU [is made of] twenty-eight states, those already with 'good trade deals' with China will be hesitant to support an EU-China FTA, even though the EU may have the legal authority under the Lisbon Treaty" to do so, as discussed below.[119] Furthermore, "Divergences between Member States' interests are especially significant in the forging of the [EU's] coherent external strategy, and, tensions between the [EU] and its individual member states weaken the [EU's] overall influence. In the EU-China relations, these inconsistencies can be exploited."[120]

A political-legal issue is raised by the currently negotiated China-EU BIT as to the legal effect on the member states' international trade agreements and current BITs with China.[121] The EU retains sovereign authority over trade and investment agreements with third party countries, such as China.[122] Therefore, these agreements, such as the currently negotiated China-EU BIT, once in place, would displace any inconsistent agreements entered into by EU members states.[123]

> EU member states have since 1959 concluded 1384 BITs with third countries. Regulation 1219/2012 foresees that in the long run all member state BITs are to be replaced by EU International Investment Agreements [IIAs] but does not

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118. *Id.*
119. Brown, *supra* note 82, at 69.
120. *Id.*
121. China is stepping up its efforts to reach an investment agreement with the European Union, with the vice-premier in charge of trade talks calling his counterparts in Brussels on Friday. Liu He's conversation with the European Commission's executive vice-president Valdis Dombrovskis came as officials described the talks, which the two sides hope to conclude this year, as making slow progress.

Stuart Lau, *China Moves to Keep EU Investment Talks on Track*, SOUTH CHINA MORNING POST (Apr. 18, 2020, 11:30 PM), https://www.scmp.com/news/china/diplomacy/article/3080563/china-moves-keep-eu-investment-talks-track [https://perma.cc/4MHN-YKHC].

122. Stefanie Schacherer, *Can EU Member States Still Negotiate BITs with Third Countries?*, INV. TREATY NEWS (Aug. 10, 2016), http://rspace.iisd.org/itn/2016/08/10/can-eu-member-states-still-negotiate-bits-with-third-countries-stefanie-schacherer/ [https://perma.cc/GN99-USUQ].

123. *See id.*

> set a specific time frame. The current EU negotiating agenda will replace a part of existing member states' BITs.[124]

It is reported that "Germany has practically stopped negotiating new BITs because of the transfer of competency for FDI to the level of the European Union."[125] Therefore, it is not imprudent to predict the China-EU BIT will eventually displace the existing bilateral agreements between China and EU members.[126]

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124. Since the entry into force of the Lisbon Treaty in 2009, foreign direct investment (FDI) falls within the common commercial policy of the European Union and, as such, became part of the sphere of exclusive competence of the European Union. The competence shift is evidenced by the negotiations of international investment agreements (IIAs) that the European Commission is conducting with a number of countries, including important economies, such as China and the United States. Against this background, third countries may be surprised when invited by individual EU member states to start bilateral investment treaty (BIT) negotiations. Does EU law allow member states to initiate BIT negotiations Only the European Union may legislate and adopt legally binding acts concerning areas within its exclusive competence. EU member states may only do so themselves if empowered by the European Union. Accordingly, it falls to the European Union to decide whether to empower member states to conclude international treaties in fields of exclusive EU competence. This 're-empowerment' is usually adopted through secondary EU law (for example, EU regulations) and is often used to provide for transitional arrangements concerning areas over which the European Union newly acquired exclusive competence?

Id.

125. Axel Berger, *Investment Treaties and the Search for Market Access in China* (fn.1), INT'L INST. FOR SUSTAINABLE DEV. (June 26, 2013), https://www.iisd.org/itn/2013/06/26/ investment-treaties-and-the-search-for-market-access-in-china/ [https://perma.cc/DY9G-UN6D] ("As new European investment treaties will replace existing member state BITs and the number of German BITs will decrease in the years to come."). However, Chancellor Merkel stated her support of an EU-China BIT, "Germany attaches great attention to the EU-China investment treaty, adding that the signing of the treaty will be a good start of negotiations on an EU-China free trade agreement." *See China, Germany Agree to Speed Up Talks on China-EU Investment Agreement, Enrich Bilateral Ties*, XINHUA (June 2, 2017, 4:35 PM), http://www.xinhuanet.com//english/2017-06/02/c_136332689.htm [https://perma.cc/4KJT-KHMN].

126. *See China-EU*, BILATERALS.ORG (July 2014), https://www.bilaterals.org/?-china-eu-[https://perma.cc/ZS6Q-GW7T]; Schacherer, *supra* note 122 ("Only the European Union may legislate and adopt legally binding acts concerning areas within its exclusive competence. EU member states may only do so themselves if empowered by the European Union. Accordingly, it falls to the European Union to decide whether to empower member states to conclude international treaties in fields of exclusive EU competence. This 're-empowerment' is usually adopted through secondary EU law (for example, EU regulations) and is often used to provide for transitional arrangements concerning areas over which the European Union newly acquired exclusive competence."); *FAQ EU Competences and Commission Powers*, EUR. COMM'N, https://europa.eu/citizens-initiative/faq-eu-competences-

As member states have fully conferred their sovereignty to the EU, the member states do not conclude individual trade agreements anymore. A brief summary of that conferral follows.

> Since the Treaty of Maastricht 92/93, Trade agreements are singlehandedly negotiated by the European Commission, upon first receiving a negotiation mandate from the Council, which roughly sets their guidelines. When the Commission finalized a deal with a partner country, both, the Council and the European Parliament (since the Treaty of Lisbon 2007) get to vote on whether or not to adopt it with a Qualified and Simple Majority, respectively. The Investment part of an agreement, however, must also be ratified by each of the 27 national parliaments, since the ECJ´s "Singapore Ruling" in 2017. Aside the ratification from investment treaties as can be seen in the EU-Canada Agreement, the conclusion of Trade Agreements is otherwise much quicker and much more effective than if every single state would do it by itself[.][127]

The European Commission further restricted Members' Free Trade Agreements (FTAs) with non-EU countries.[128] In 2012, the EU adopted a "regulation creating a set of rules for bilateral investment agreements between individual EU members and non-EU countries, to make sure that they are consistent with EU law and the EU's investment policy."[129]

The regulation sets the conditions for applying the more than 1400 bilateral investment agreements currently in force.[130] The regulation also creates the conditions for EU members to modify existing agreements and

and-commission-powers_en [https://perma.cc/8FVW-LW7T] (explaining the ability of the EU to supersede previous agreements).

127. Eijk & Gunavardana, *supra* note 6; *see also Joint Communication to the European Parliament and the Council Elements for a New EU Strategy on China 2016*, at 4, COM (2016) 030 final (June 22, 2016).

128. *Investment Agreements Between EU Members and Non-EU Members*, EUR. COMM'N, https://ec.europa.eu/trade/policy/accessing-markets/investment/ [https://perma.cc/YCC4-VWXJ].

129. *Investment*, EUR. COMM'N, https://ec.europa.eu/trade/policy/accessing-markets/investment/ [https://perma.cc/7BJN-5DTV]; *see also* Commission Regulation 1219/2012, *supra* note 19. Polish experience in bilateral agreements "remains limited" in comparison to EU Member States that "have been involved in many bilateral agreements." *Project News: Bilateral Agreements and Memoranda of Understanding on Labour Migration. Training in Warsaw, Poland*, INT'L CTR. FOR MIGRATION POL'Y DEV. (Sept. 11, 2019), https://www.icmpd.org/news-centre/news-detail/project-news-bilateral-agreements-and-memoranda-of-understanding-on-labour-migration-training-in-w/ [https://perma.cc/NWA8-A7ZM].

130. Council Notice (EU) 2018/C 149/01 of Apr. 27, 2018, List of the Bilateral Investment Agreements Referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council Establishing Transitional Arrangements For Bilateral Investment Agreements Between Member States and Third Countries, 2018 O.J. (C 149) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0427(06)&from=EN [https://perma.cc/977V-RLZF].

negotiate or conclude new ones.[131] A summary of those conditions is as follows.

> [T]hat the agreement is not in conflict with EU law; that the agreement is consistent with the EU's principles and objectives for external action; that the Commission did not submit or decide to submit a recommendation to open negotiations with the non-EU country concerned, and; that the agreement does not create a serious obstacle to the EU negotiating or concluding bilateral investment agreements with non-EU countries.[132]

2. *BRI MOU Cooperation Agreements*

When Italy signed on to the BRI, as had others in the CEEC/17+1, a question was raised: whether these "cooperation agreements (MOUs)" were to be considered as "trade agreements."[133] It is argued that the Memorandum is merely a non-binding statement of intent that, if developed further into actual trade agreements, could violate EU law.[134] The law in this area is succinctly summarized below in a discussion of the cooperation agreement signed between Italy and China, which is the common language of MOUs signed by the 17+1.

> A particular aspect of the Memorandum stands out in this context. The second paragraph of the Memorandum concerns areas of cooperation and more specifically the third section herein discusses unimpeded trade and investment.[135] Within this section, the Memorandum discusses the aim of working towards expanding investment and trade and promoting market cooperation between the two countries. Although this section does not explicitly mention the creation of trade or investment agreements, if steps were made in the direction of creating binding intergovernmental

131. *Id.*
132. *Investment*, *supra* note 129.
133. First, it is argued, additional trade may not come.

> Whilst signing this MoU will come at a high political cost in Brussels, there is, however, no reason to believe that signing a MoU is a prerequisite for increased trade with China. Besides this, the Eastern European countries that already signed up on the BRI have complained that China's big promises have not been materialised.

Victor De Decker, *Commentary: To BRI Or Not To BRI? Europe's Warring Member States*, ITALIAN INST. FOR INT'L POL. STUD. (Apr. 8, 2019), https://www.ispionline.it/en/pubblicazione/bri-or-not-bri-europes-warring-member-states-22786 [https://perma.cc/5HTS-Q76Y].
134. Eijk & Gunavardana, *supra* note 6.
135. Memorandum of Understanding Between the Government of the Italian Republic and the Government of the People's Republic of China on Cooperation Within the Framework of the Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiative, It – China (Mar. 23, 2019), http://www.governo.it/sites/governo.it/files/documenti/documenti/Notizie-allegati/Italia-Cina_20190323/Memorandum_Italia-Cina_EN.pdf [https://perma.cc/94CS-T2FM].

agreements that solidify the commitments set out in the Memorandum without the approval of the EU, that would be at odds with EU law for the following two reasons.

> Firstly, trade policy is an exclusive competence of the EU. This means that only the EU can act internationally and not the Member States themselves. The scope of this EU trade policy has been expanded by the Lisbon Treaty and subsequent judgments and opinions of the Court of Justice of the EU, with for example Daiichi Sankyo[136] and Opinion 2/15.[137] It includes today explicitly foreign direct investment.
>
> Secondly, under the duty of sincere cooperation, Member States are to "refrain from any measure which could jeopardize the attainment of the Union's objectives" (Article 4, paragraph 3 TEU). The case law of the CJEU has interpreted this duty widely and according to the Inland Waterways case, this duty includes situations where Member States negotiate agreements with third countries in parallel to the EU and on the same subject matter. Seeing that the EU launched negotiations for an investment agreement with China in 2013, a new bilateral Italy-China investment agreement under this BRI framework would thus amount to Italy violating the duty of sincere cooperation.
>
> Furthermore, modernizing the pre-existing bilateral investment treaty between China and Italy from 1985 would also amount to a violation of EU law without proper coordination with the EU institutions. In addition, the fact that CJEU declared the arbitration clauses in bilateral investment treaties between the EU Member States illegal in the Achmea judgment, strengthens the case that any binding investment agreement with investor-state dispute settlement made between Italy and China in the future under the BRI umbrella could constitute a violation of EU law, if not specifically authorized by the EU.[138]

In sum, the Memorandum of Understanding is merely a political commitment, not a legal one. Therefore, absent further steps being taken to enter into trade agreements, there is no immediate conflict with CEEC's legal obligations under EU law. If such steps were taken, then the divisive impact on the integrity and unity of the EU would be felt.

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136. Case C-414/11, Daiichi Sankyo Co. Ltd. v. DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon, ECLI:EU:C:2013:520, ¶¶ 40–44 (July 18, 2013), http://curia.europa.eu/juris/document/document.jsf;jsessionid=375A8C33A39817A0BF9633E E00B 54F7C?text=&docid=139744&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first &part=1&cid=4791462 [https://perma.cc/5BSN-AUFH].

137. *See* Szilárd Gáspár-Szilágyi, *Opinion 2/15: Maybe it is Time for the EU to Conclude Separate Trade and Investment Agreements*, EUR. L. BLOG (June 20, 2017), https://europeanlawblog.eu/2017/06/20/opinion-215-maybe-it-is-time-for-the-eu-to-conclude-separate-trade-and-investment-agreements/ [https://perma.cc/5AKG-DZUQ] (discussing issues with EU competence).

138. Eijk & Gunavardana, *supra* note 6.

B. Impact and Influence of Past and Future EU FTAs on CEEC

With all of the EU's diversity, the possibility of the EU and China moving toward a closer economic relationship will ultimately be finalized by an EU-China trade agreement that will supersede any EU Members' inconsistent "deals" with China. Sources of developmental funding from BRI will not be affected, but the legal regime within which the BRI operates, is administered, and resolves disputes will be affected by an EU-China BIT and/or FTA. Therefore, it is useful to briefly assess possible influences on CEEC arising from past EU trade and investment treaties with the most recent being CETA.[139]

Poland, by way of example of the CEEC, has explained that there are gains and losses.[140] There are lost revenues and lost protections from lowered tariffs in areas of the economy that were formerly protected under its bilateral agreements. Additionally, Poland was not in favor of the investment court of the dispute resolution provisions proposed in CETA, where companies could sue the government for losses.[141] Despite the Polish protests, acceptance of CETA and its benefits seemed to prevail, though some voices were raised in opposition to Poland's ratification of CETA.[142] Perhaps in the end, it

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139. *See CETA Explained*, GOV'T OF CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/ceta_explained-aecg_apercu.aspx?lang=eng [https://perma.cc/RZ5V-APBX] ("The Canada-European Union Comprehensive Economic and Trade Agreement (CETA) is a bilateral agreement between Canada and the EU. The agreement covers virtually all sectors and aspects of Canada-EU trade in order to eliminate or reduce barriers.").

140. *See The EU-Canada Comprehensive Economic and Trade Agreement (CETA) Opening Up a Wealth of Opportunities for People in Poland* (Feb. 2017), https://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155355.pdf [https://perma.cc/MUQ4-7BGD]; *see also* Maria Świetlik, *PC Explains: How Will CETA Affect Poland?*, POL. CRITIQUE (Jan. 4, 2017, 9:33 AM), http://politicalcritique.org/explains/2017/pc-explains-how-will-ceta-affect-poland/ [https://perma.cc/H9WG-LU7Z].

141. It argued the Investor-State Dispute Settlement (ISDS)

> allows corporations to sue a state for lost revenues as a result of that state's policies. The cases will be decided by judicial officers who are outside of that state's normal judicial system. Despite the procedural changes introduced to CETA's ISDS system, serious concerns remain. The right to sue operates only in one direction; states cannot sue companies for lost revenues as a result of that company's conduct.

Świetlik, *supra* note 140.

142. "One thing is clear, however, contrary to earlier declarations that it will defend Polish agriculture and food, [the governing Law and Justice party] has announced full support for the adoption of CETA, the organisers of the protest said on social media." In terms of CETA, Polish presidential aide Krzysztof Szczerski stated "that in order to fully

was recognized that the positive benefits and boosts to the economy outweighed the concerns and long-term advantages of establishing the ground rules of trade within the FTA as negotiated on an ongoing basis.[143]

While some of the labor rights in CETA may test the limits of labor laws in Poland and CEE countries, only time will reveal whether the same provisions would be included in an EU-China FTA.[144] All CEE countries, unlike China, have ratified all the core ILO labor provisions.[145]

The influence of past FTAs is not yet known but it is worth noting that they help identify issues that the CEEC will need to address, along with all EU countries, and the changes FTAs may bring to existing arrangements domestically and internationally.

IV. ANALYSIS: CONNECTIVITY, DIVISIVENESS, OR PATHWAY TO EU-CHINA FTA?

The best way to bring the EU and China's economic relations closer in a coherent fashion is to expeditiously bind the relationship at the EU level, rather than piecemeal by different member states or by the CEEC as they grow their BRI trade and investments with China.[146]

> The clearest pathway to a successful bilateral [EU-China] FTA would build on the existing EU–China 2020 Strategic Agenda for Cooperation that places an EU-

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enter into force, CETA requires to be ratified by all EU countries. 'Poland has not lost the possibility to reflect on this issue.'" *Protests in Polish Capital Against TTIP and CETA Deals*, RADIO POL. (Oct. 15, 2016, 3:20 PM), http://archiwum.thenews.pl/1/9/Artykul/275590 [https://perma.cc/7NJ8-PH58].

143. Discussion of the value of having rules with Western values arose in Polish discussions about the possible TTIP.

> There are 1.77 million companies in Poland, of which 99.8 percent are small or medium enterprises (SMEs). The totality of companies generates 73 percent of the country's GDP with the SMEs contributing 48.5 percent. However, when it comes to export, it is the SME's who face the biggest obstacles in entering foreign markets, especially those outside the European Union. We also need to create good standards for free trade agreements and global regulatory and investment policies, especially now when similar processes are difficult to carry out within the World Trade Organization. As a long-term perspective we will see Asia (and later Africa) play a growing role independent of which models of international trade are adopted. This process will be safer if Western countries take part in the creation process for a framework of international trade.

Inside TTIP: Discussing Pros and Cons with Polish Business Associations, EMERGING EUR. (Feb. 10, 2016), https://emerging-europe.com/interviews/inside-ttip-discussing-pros-and-cons-with-polish-business-associations/ [https://perma.cc/BAN4-AKGF].

144. *See* Brown, *supra* note 82, at 69.

145. *See Ratifications of Fundamental Conventions by Country*, INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F [https://perma.cc/ZX3D-PJ9R].

146. Brown, *supra* note 82, at 72–73.

> China BIT[147] as central to the EU's long-term bilateral relations with China.[148] The BIT would accelerate the process toward an FTA and create a more open and transparent environment for increased flows of investment. It would also improve investment for European and Chinese investors by creating investment rights and guaranteeing non-discrimination, improving transparency, and providing investment rules on environmental and labor-related aspects of foreign investment, as all are potential obstacles for agreement on an FTA. As the BIT will likely replace existing bilateral agreements between China and EU member states, the groundwork for an EU-China FTA will already exist and could be integrated as was done in CETA and in the EU-Vietnam FTA.[149]

The emergence of the 17+1 directly bears on EU-China cooperation, and the optimistic view of the apparent competition of the EU and China to support financing infrastructure projects in the CEEC may logically lead to closer relations and increased trade and investment, rather than division of the EU.

To arrive at the above conclusions, one begins with the massive amounts of trade and investment China made in the CEEC under its BRI program. Its penetration into the 17+1 countries is memorialized under BRI agreements, which are non-legal MOUs. However, it has caught the interest of EU officials who are concerned about China's BRI bringing CEEC ever closer to China and potentially dividing the EU. As connectivity with China strengthens, it may wane with the EU and allow the EU to become divided.

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147. *Id.*; For example, China also negotiates preferential trade investment agreements (PTIA) of which four include comprehensive rules on investment.

> These treaties where negotiated with Pakistan (2006), New Zealand (2008), Peru (2009) and ASEAN (2009). The PTIA with Singapore just incorporates the China-ASEAN investment agreement and the PTIA with Costa Rica from 2010 just reaffirms the China-Costa Rica BIT signed in 2007. The PTIA recently signed with Iceland follows this approach and 'recognizes the importance' (Art. 92) of the China-Iceland BIT from 1994.

Berger, *supra* note 125; EU-China Bilateral Investment Treaty (BIT) has also been referred to as the Comprehensive Agreement on Investment (CAI) and the terms appear to have flexibility as the latter may omit some terms present in a BIT. *EU-China Comprehensive Agreement on Investment (EU-China CAI)*, EUR. PARL. (Apr. 26, 2020), http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-china-investment-agreement [https://perma.cc/ZP3Y-3B3F].

148. *See EU-China 2020 Strategic Agenda for Cooperation*, *supra* note 96, at 2.

149. Brown, *supra* note 82, at 72–73; *see also EU-China 2020 Strategic Agenda for Cooperation*, *supra* note 96, at 5; *EU and China*, EUR. COMM'N, http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/ [https://perma.cc/37VU-LGXN].

The EU responded by determining China to be a "systemic rival and economic competitor."[150] At the same time, the EU continues to negotiate a BIT with China and established the EU-China Connectivity Platform in 2015, which offers mutually beneficial cooperation for infrastructure construction projects and seeks synergy with China's BRI and the EU's Trans-European Transport Network.

The EU also introduced its Cohesion Fund providing billions of dollars for member states with low Gross National Income levels, such as many CEEC, for funding a vast number of infrastructure projects.

While the EU rejected becoming a BRI partner, it does not seek to interfere with BRI. Instead, the EU recognizes the BRI as additional funding to build up the EU and CEEC.

The CEEC, and by way of illustration, Poland, has struggled to overcome economic vestiges from its former political regimes. Lower wages, better job opportunities, and higher standards of living have motivated many CEEC workers to emigrate to more wealthy EU countries, like Germany. This creates labor shortages that are filled by an influx of immigrants from Ukraine and other countries. China, with its BRI investments, brings in many of its own workers. Thus, there is flux in the availability of professional workers, causing some pause to would-be Chinese BRI investors in CEEC; but, nevertheless, trade and investment between the 17+1 and China continues.

On the legal front, EU law is clear that any international trade agreements cannot be negotiated by CEEC or any EU Members. BITs, or other existing trade agreements, of CEEC or EU members cannot be inconsistent with EU law. If such agreements are found to be inconsistent, then they must be modified in a manner consistent with EU law and will be superseded by a subsequent EU-China BIT or FTA.

While the current BRI MOU Cooperation Agreement does not create an international trade agreement, it possible to expand this agreement in such a way as to violate the EU's legal exclusivity over international trade agreements.

In the final analysis, EU and China are already greatly connected in trade and investment. The economic activities of CEEC under the BRI put EU and China on a mutually supportive footing rather than a divisive one for the EU. Further, the continuing cooperation between CEEC and China shines a light on the pathway toward a future EU-China BIT and FTA with agreed upon ground rules affecting CEEC and all of the EU in diverse yet connective and beneficial ways.

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150. *Strategic Outlook*, *supra* note 11.

V. CONCLUSION

With China seeking to be a global leader and finding some success in that role as United States leadership wanes under its current leadership, it may be in EU's best interests to cement a trade deal with China, while at the same time including a full measure of Western values. This connectivity will house the trade activities of the CEEC, cut back on potential divisiveness, and lay out a pathway along the old Silk Road to increase EU-China trade and investment under a regulating FTA.