

## CHINA'S SCRAMBLE FOR EUROPEAN MARKET AND THE CHALLENGES OF EUROPEAN INTEGRATION\*

### I. INTRODUCTION

“A mountain cannot turn, but a road can.”

(Chinese proverb)

The impact of China's mounting economic and geopolitical strengths and ambitions has been the subject of much academic and political debate around the world. The European Union (EU) recently acknowledged that China is not only its main economic competitor but also its major systemic rival promoting alternative models of governance.<sup>1</sup> At present, the EU is China's biggest trading partner while China is the EU's second biggest trading partner after the US.<sup>2</sup> In 2019, EU-China daily trade in goods amounted to over €1.5 billion.<sup>3</sup> This article contributes to the analysis of the challenges that the interaction between the EU and China have posed for regional integration in Europe and for the commitment that European states are prepared to make to upholding the international laws and values that underlie that integration. The analysis applies the socio-legal theoretical framework of the theory of recursivity of legal change<sup>4</sup> and focuses on two forms of regional integration. One is the economic and political integration of states in accordance with the EU's enlargement policy that has, since the 1958 creation of the European Economic Community (EEC), facilitated the accession of over twenty European states to the Union. The other one, currently known as the “17+1” forum, was created in 2012 by China as the framework for that country's economic cooperation with sixteen European states that had previously conformed to the Soviet state model (the “16+1” forum). In 2019, Greece became the seventeenth European state to join that forum.<sup>5</sup> Eleven of the original sixteen states—Bulgaria,

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<sup>1</sup> European Commission and High Representative of the Union for Foreign Affairs and Security Policy (2019) (hereinafter 2019 Joint Communication), p. 1.

<sup>2</sup> European Union External Action Service (2020), p. 1.

<sup>3</sup> *Ibid.*

<sup>4</sup> Halliday & Carruthers (2007).

<sup>5</sup> Kampouris (2019).

Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia—are Central and Eastern European countries (CEECs). Five—Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, and Serbia—are Western Balkan (WB) states.<sup>6</sup>

Applying the theory of recursivity of legal change to the analysis of the impact of this China-led forum on the participating European countries' commitment to the process of EU integration, this article asks: is China, by creating a less structured and less formalized forum for economic cooperation, challenging the viability of the EU fundamental values in an enlarged EU? Is it contesting the core values of the EU and the rule of law principle that is fundamental to the EU's integrated and liberalized single market, to its transparent process of law making, to the accountability of the member states and EU institutions, and to public participation in the decision-making process at all levels of governance? Finally, can the EU's current legal system and its institutions successfully counter the alternative models of regional integration and the alternative values and standards promoted by powerful international actors who, like China, might want to reshape the international order that the EU has helped to build?

China has begun to target the European market very aggressively during this period in which the EU appears to be struggling to navigate its integration project through the myriad challenges and uncertainties brought about by the rapidly changing geopolitical environment of the twenty-first century. The EU's model of integration has had to meet internal challenges from Brexit and from the emergence of nationalism and "illiberalism" in some of its member states and candidates for membership. External challenges to the process of European integration came from a variety of events, ranging from international terrorism, migration, and financial crises to the new forms of economic cooperation that are being promoted. In addition, the EU's commitment to the functioning of a rule-based international order has faced increasing trade protectionism and isolationism and the growing influence of a number of authoritarian regimes, such as China, Russia, Turkey, and Indonesia, on the functioning of international institutions.

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<sup>6</sup> The term "Western Balkans" is associated with the Stabilization and Association Process and the Thessaloniki Declaration and includes the following countries: Croatia (current EU member); Albania, Montenegro, Serbia, and The Republic of North Macedonia (current candidates for EU membership); and Bosnia and Herzegovina, and Kosovo (under UN Security Council Resolution 1244) (two potential candidates). See Thessaloniki Declaration (EC) No. 10299/03 of 21 June 2003; S.C. Res. 1244, U.N. Doc. S/RES/1244 (10 June 1999). In this article, the term is used to refer only to those WB states that are part of the "16+1 forum." Therefore, Kosovo is not included in the WB unless specifically acknowledged.

This article claims that, in order to fully understand the impact of China on the process of EU integration and the institutionalization of EU laws and values, it is necessary to analyze not only how EU members and candidates for membership internalize the EU laws and values, but also how their local practices, and their interaction with other international actors that may be promoting alternative laws and values, feed back into EU law making. The theory of recursivity invites a historical analysis of legal reforms and focuses on the interaction of the various actors engaged in the process of law making in the international, national and local contexts.

The argument derived from this framework is that the foundational EU values do not settle locally by virtue of the adoption of EU law into national law as required under the EU treaties and pre-accession strategy. Instead, these top-down managed reforms are contested by the competing values advocated by other international organizations and by politically and economically powerful states, such as China and the United States (US), as well as by local norms in the communities targeted for reform. Moreover, local conditions will also shape the understanding and application of the rules and values introduced by the legal reforms. The article concludes that safeguarding the EU fundamental values and its model of economic (and political) integration against the influence of powerful external actors (international, regional, or national) requires a consistent, iterative process of legal reforms at both the EU and the national levels until all of the member states internalize these values.

## **II. THE PROBLEM: PROCESSES OF REGIONAL INTEGRATION ENGAGE INTERNATIONAL AND NATIONAL ACTORS COMMITTED TO DIFFERENT VALUES**

Modern economic integration is concerned with national regulations in so far as they impose beyond-the-border barriers to trade. In the process of economic integration, which is the focus of this article, a variety of national and international values and standards engage in order to facilitate the liberalization of trade and of development policy in the participating states and economic unions. These values and standards include both those traditionally related to the regulation of markets and of trade policy, including competition, the provision of financial services, and the protection of intellectual property rights, and those that impact broader regulatory policies and the good governance of states, including an assessment of whether the

principles of equality, the rule of law, democracy, and human rights are respected. All agreements on economic integration must include provisions that establish trade rules, but they increasingly seek to promote specific values that are fundamental to the principles and standards related to the regulation of trade according to a particular model. States' commitment to specific values and principles help to determine which model of economic integration they find more attractive.

From 1945 to 1989, liberal capitalism and Soviet style communism were the world's two competing models of economic development and integration. The Soviet economic model was based on the communist ideology, a one-party political system, the dominance of state ownership of enterprises and state economic planning, and a suppressed role for market forces.<sup>7</sup> That model collapsed due to the failure to create technological changes needed to bring economic growth to communist economies and the failure of political reforms in the Soviet Union to liberalize its communist regime.<sup>8</sup> After the 1989 end of the Cold War, the model of liberal capitalism, based on the values of a free market, good governance, the rule of law, and the protection of fundamental rights, emerged as the dominant twentieth century model of development and integration of states into economic blocs. The EU has clearly pursued this liberal model.

In the twenty-first century, China's model of "state capitalism,"<sup>9</sup> based on a strong role for the state in the economic, political, and social aspects of life and on the dominance of one political party unconstrained by the liberal principles of good governance, the rule of law, and human rights, has emerged as an alternative model of development and integration. China's unprecedented economic growth and ability to reduce poverty over a short period while ensuring political stability and maintaining state dominance has made its model attractive to many states, including some in Europe. But how does China persuade others to follow its path to development? And how does a liberal capitalist economy, specifically the EU, persuade others to choose or to remain on its path? A good starting point might be to take a quick look at the EU's and China's economic networks and how they have developed over the years.

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<sup>7</sup> For more on communism as a path to development, see Milanovic (2019).

<sup>8</sup> *Ibid.*, pp. 74-5.

<sup>9</sup> Other names are also used for China's socioeconomic system. Chinese leadership and Chinese Communist Party call it "socialism with Chinese characteristics": *infra* notes 21 and 87. For Milanovic it is "political capitalism". See *ibid.*

The EU, a unique experiment in economic and political integration and one of the biggest trading blocs in the world,<sup>10</sup> expanded from the original six Western European states to encompass states in the north and south of the continent, and finally, states in Central and Eastern Europe. Like China and the US, the EU is one of the largest economies in the world.<sup>11</sup> It has created a huge network of economic cooperation arrangements<sup>12</sup> with other countries, within in its immediate Euro-Asian and Mediterranean neighbourhoods<sup>13</sup> and afar, exploiting its historical cultural and colonial links to countries in Africa, Asia and Latin America. That network of regional trade agreements (RTAs)<sup>14</sup> has expanded market access for EU-based businesses to third countries beyond the reach attainable through their individual member states' bilateral investment treaties (BITs).<sup>15</sup>

The EU uses its trade agreements to extend to third countries its own core values and international standards such as the rule of law and human rights.<sup>16</sup> Association Agreements between the EU and countries that had applied for EU membership in the 1990s aimed to establish preferential terms of trade between the signatories and firm political conditionality upon the membership candidates to accept and enforce the EU fundamental values and principles on human rights, equality and functioning of democratic institutions.<sup>17</sup> Other bilateral and regional trade agreements signed between the EU and third countries required those who sought

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<sup>10</sup> According to the World Bank's data from 2019, EU trade amounted to about 27% of the world trade in 2019, while that of the RCEP and USMCA totalled 30% and 18%, respectively. See Sytsma (2020).

<sup>11</sup> Eurostat (2020). In 2017, the Gross Domestic Product (GDP) of the EU was 16% of world GDP, while China's and the US's GDP totalled 16.4% and 16.3%, respectively.

<sup>12</sup> The EU negotiates different types of trade agreements with other countries ranging from preferential trade agreements (such as Free Trade Agreements based on reciprocal market access, Association Agreements, which also include broader political agreements and Economic Partnership Agreements with a strong development component) to non-preferential agreements such as Partnership and Cooperation Agreements. See European Council and Council of the EU (2021).

<sup>13</sup> According to WTO data, as of 13 January 2022, the EU has in force 45 regional trade agreements (RTAs) with other countries and regional groups while it made early announcement of 10 RTAs currently under negotiation. See WTO (2022a).

<sup>14</sup> Note that the WTO defines RTAs as reciprocal preferential trade agreements between two or more partners, constitute one of the exemptions and are authorized under the WTO, subject to a set of rules. See WTO (2022b).

<sup>15</sup> All EU member states except Ireland have numerous BITs in force. According to UNCTAD data, as of 17 January 2022, 26 EU member states have cumulatively 1,323 BITs in force. Since the 2009 Treaty of Lisbon came into force, Art. 207 of the Treaty on the Functioning of the EU (TFEU) provided the EU with jurisdiction over the negotiation of foreign investment treaties on behalf of the member states. In May 2020, 23 EU Member states (all except Austria, Finland, Ireland, and Sweden) agreed to terminate their intra-EU BITs. See Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (OJ L 169/1, 29 May 2020). It is expected that the new EU investment treaties will ultimately replace BITs concluded between individual member states and third countries.

<sup>16</sup> European Parliamentary Research Service (2019a). See also Rabinovych (2021).

<sup>17</sup> Hartnell (1993).

access to the EU market to accept, for example, the EU's position on human rights and transparency not only with respect to their business operations but also in their law making and other government activities.<sup>18</sup>

As a part of its "Go Global"<sup>19</sup> strategy, China has become a very active champion of free trade. Upon its accession to the WTO in 2001, it began encouraging its state-owned enterprises (SOEs) to engage in global trade and to invest abroad. Following that, it started building a network of trade and investment agreements with other countries.<sup>20</sup> China has also been modifying the Western principles of trade liberalization and the rule of law in accordance with its political priorities, giving them what it calls "Chinese characteristics."<sup>21</sup> Many countries that obtain Chinese financing for big infrastructure projects performed by Chinese construction companies are tempted to accept China's development model built on these values as it prioritizes fast economic growth while preserving strong state control over private consumption and the social and political rights of individuals.<sup>22</sup> This source of increased influence is no small matter considering that China currently has the second highest number of BITs in the world after Germany<sup>23</sup> and that it continues to negotiate new RTAs. Altogether, these agreements give the country preferential market access to very large areas across the world.<sup>24</sup>

In recent years, China has initiated the creation of new international organizations that attend to the needs of developing countries in keeping with Chinese principles of international

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<sup>18</sup> See Bartels (2005) and Rabinovych, *supra* note 16.

<sup>19</sup> The need for China to gradually open to foreign direct investments (FDIs) was recognized by Chinese communist leadership in the late 1970s but the decision to expand markets for China's state-owned enterprises (SOEs) was adopted as China's official foreign trade strategy "Go Global" at the third session of the 9th National People's Congress in 2000. See Wang & Miao (2016), p. 144.

<sup>20</sup> According to UNCTAD Investment Policy Hub (2022), as of 17 January 2022, China has concluded 124 BITs and 24 trade agreements with an investment chapter, 20 of which are in force. China currently has 16 RTAs in force, has given early notification of an additional three more agreements and has recently expressed interest to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). See WTO, *supra* note 13; Reuters (2021).

<sup>21</sup> "[S]ocialism with Chinese characteristics [is] blazing a new trail for other developing countries to achieve modernization [and] offers a new option for other countries and nations who want to speed up their development while preserving their independence." See Jinping (2017a).

<sup>22</sup> See Shaffer & Gao (2020); Oh (2021). See also Klein & Pettis (2020), pp. 101-31.

<sup>23</sup> UNCTAD Investment Policy Hub, *supra* note 20.

<sup>24</sup> WTO, *supra* note 13.

cooperation,<sup>25</sup> offering them its “socialist road”<sup>26</sup> to development based on state-led market initiatives. This system provides an alternative to the one followed by traditional Bretton Woods international organizations, the principles of international law on which they were founded, and the liberal market model of economic development. In 2001, China created the Bo’ao Forum for Asia to parallel the World Economic Forum at Davos, Switzerland. In 2008, it led the other major emerging economies – Brazil, Russia, and India – to form BRIC, an annual forum for cooperation among the four countries on issues of global governance, including development, peace and security, and energy. South Africa joined the group in 2010. In 2014, BRICS established the New Development Bank (NDB), as a multilateral development bank for which the founding capital was provided solely by the five countries. And in 2016, China initiated the establishment of a new multilateral investment bank, the Asian Infrastructure Investment Bank (AIIB). China is the principal shareholder in the AIIB and has reserved for itself voting control to an extent not seen in other multilateral development banks.

China also initiated arrangements for annual meetings with leaders of developing countries on issues with a regional focus.<sup>27</sup> In 2013, China initiated the Belt and Road Initiative (BRI), an ambitious foreign policy program to revive the ancient Silk Road, connect the markets and peoples of Europe and Asia, and to provide Chinese SOEs and private companies with access to vast overseas markets, allowing China to diversify its imports of energy and other resource materials, and to deploy its enormous financial and industrial overcapacity overseas.<sup>28</sup>

In April 2019, when the 16+1 forum accepted Greece and extended its membership eligibility to the older EU member states, Chinese premier Li Keqiang said that China respects EU laws and standards and wishes to pursue the forum as an important “supplement” to its relationship with the EU.<sup>29</sup> For its part, the EU views China’s presence in the region as a threat to its own plans for the further enlargement of the single market. One month before Greece joined the forum, in March 2019, the European Commission (the Commission) and the High

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<sup>25</sup> China’s Five Principles of Peaceful Co-existence include principles of non-interference, non-aggression, equality, peaceful co-existence, and respect for state sovereignty. The principles were introduced by China’s Chairman Mao Zedong in 1949 and have been the founding principles of China’s foreign policy since the founding of the People’s Republic of China. See Ministry of Foreign Affairs of the People’s Republic of China (MFA) (2004).

<sup>26</sup> China’s adherence to the socialist road is one of the Four Cardinal Principles of China introduced in 1979 by China’s President Deng Xiaoping.

<sup>27</sup> For example, the Forum on China-Africa Cooperation, the China-Arab States Cooperation Forum, and the China-Latin America (CELAC) Forum.

<sup>28</sup> Oh, *supra* note 22, p. 177.

<sup>29</sup> Elmer (2019).

Representative of the Union for Foreign Affairs and Security Policy issued a strategic document that emphasized the EU's commitment to the rule of law and recognized that China is the EU's systemic rival because it promotes an alternative model of governance.<sup>30</sup>

Some of the states participating in the 17+1 forum have been criticized by the Union's older members in Western Europe for failing to comply fully with EU laws and values. Concerns have grown about violations of the rule of law and other EU values particularly in Hungary and Poland, but other CEECs, such as Romania have come under scrutiny. The Commission and the European Parliament (the EP) initiated numerous legislative changes to build effective mechanisms for protecting the rule of law in the EU.<sup>31</sup> For example, in April 2019, the EP proposed new legislation to empower the Commission to recommend cutting off funds to member states whose national measures fail to protect the rule of law.<sup>32</sup> In December 2020, the EU adopted an additional mechanism for the protection of the EU fundamental values embedded in Article 2 of the TEU. That mechanism would allow the EU to suspend the distribution of financial assistance, loans, and other instruments guaranteed in the EU budget to member states that have breached the rule of law principles.<sup>33</sup> Soon after its adoption, in March 2021, Hungary and Poland filed with the CJEU challenges to the EU mechanism.<sup>34</sup> In June 2021, the EP passed

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<sup>30</sup> 2019 Joint Communication.

<sup>31</sup> They also initiated legal actions against some member states or threatened to do so in the case of other member states for violations of the principle of rule of law. For example, in December 2017, the Commission initiated a procedure under Article 7 of the Treaty on European Union (TEU) against Poland for the "clear risk of a serious breach" of the European values referred to in Article 2 of the TEU. In September 2018, the EP voted to request that the Council of the European Union (the Council) approve opening an EU procedure against Hungary for persistent violation of EU values. This was the first time that the EP had asked the Council to decide whether to commence the Article 7(1) procedure against a member state in order to prevent violation of EU values. See EP (2018). The EP's concerns were related to Hungary's legislative actions in numerous areas of government regulation affecting judicial independence, freedom of expression, education, corruption, the rights of minorities, and the treatment of migrants and refugees. In October 2018, the Court of Justice of the European Union (CJEU), in a case brought by the Commission against Poland for violation of the rule of law, ordered that country to suspend the application of its national law lowering the retirement age for Supreme Court judges. See Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law, COM (2017) 835 final (20 December 2017). See also CJEU (2018). In May 2019, the Commission threatened to put Romania under investigation for introducing measures that weaken the rule of law and undermine the independence of the Romanian courts. See Timmermans (2019).

<sup>32</sup> In that way, the proposed regulation creates a new mechanism, in addition to the Article 7 TEU procedure, to monitor and enforce the rule of law in member states. See EP (2019).

<sup>33</sup> Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, pp. 1–10 (hereinafter the Rule of Law Conditionality Regulation).

<sup>34</sup> Hungary and Poland filed a complaint before the CJEU against the rule of law mechanism that denied the two countries access to the EU budget. The Court has not yet ruled on this complaint at the time of submission of this article. However, on 2 December 2021, Advocate General Manuel Campos Sánchez-Bordona delivered his Opinions on the actions of annulment brought by the two member states. He rejected all grounds of their complaints and

a resolution calling on the Commission to use the tools of the rule of law mechanism to trigger procedures under Article 7 of the TEU against Hungary and Poland by 1 July 2021.<sup>35</sup>

Thus, both the Commission and the EP believe that even 15 years after the accession of the CEECs to the EU and almost three decades after they had signed Association Agreements with the EU committing to adopt and protect the EU values, the principles of the rule of law and human rights have not settled in some of those states, at least not in the same way that they have in the member states located in other parts of the continent.

Does the EU legal system and its institutional structure facilitate its member states' continued violation of the EU values? Has the economic engagement with China through the "17+1" forum led a group of European states to backslide from the EU values and draw closer to those promoted by China? Or is it possible that these states have veered off the EU-sanctioned path because the EU values, like all externally planted values, have been interpreted, adapted, and applied domestically in circumstances of constant and dynamic interaction of different jurisdictions and institutions (international, national, and local) and are being altered through the recursive processes of reform?

### **III. THE THEORY AND PRACTICE: INTERNATIONAL VALUES ARE INCORPORATED NATIONALLY THROUGH LONG AND RECURSIVE EPISODES OF LEGAL REFORMS**

The theory of recursivity of legal change in the international context, developed by Halliday,<sup>36</sup> is helpful in answering the above questions and in understanding the process of integrating the post-communist states into the EU. It also offers hypotheses about the impact that China has had on the process of EU integration. According to Halliday and his collaborators, legal reforms with the aim of incorporating external or international standards or norms into domestic law, as is the

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found the Regulation compatible with Articles 4(2) and 7 of the TEU and Article 269 of the TFEU, and its provisions clear and precise enough to meet the established principle of legal certainty. See AG Opinions in *Hungary v European Parliament and Council of the European Union* (2021) Case C-156/21 and *Republic of Poland v European Parliament and Council of the European Union* (2021) Case C-157/21.

<sup>35</sup> Otherwise, the EP would bring before the CJEU an action against the Commission under Article 258 of the TFEU for its failure to act and perform its duties under the EU treaties. See EP (2021a).

<sup>36</sup> Halliday (2018), p. 238.

case in the pre-accession adoption of EU laws and values, is not a one-dimensional, vertically streamed process of adoption of the international law by national authorities.<sup>37</sup> It is, rather, an ongoing multidimensional process of interconnected and recursive episodes of law making at different levels of governance—international, national, and local.

Halliday asserts that the multidimensional reform process has a beginning and an end, and that it begins with identification of the problem and ends when the resolution to the problem has settled into practice.<sup>38</sup> This particular problem of interpreting, adopting and applying the rule of law in the post-communist countries has its beginnings in the collapse of the communist regimes in Europe and need to resolve the political, economic, and social problems caused by the implosion of those states and their institutions. The intended end is the transformation of those countries' political, economic and social regimes into parliamentary democracies with respect for rule-based law and the countries' economic and political integration into the EU. Halliday also identifies four factors that impact the reform process: diagnostic struggles, actor mismatch, contradictions, and the ambiguity of the law.<sup>39</sup>

The theory of recursivity is also helpful to test two hypotheses of this article. The first one is that the weaknesses in the EU development and integration model reflected in the EU enlargement process have allowed the EU member states and candidates to become more authoritarian and less liberal. The second hypothesis is that, by providing them with an alternative model of development that better fits socio-economic and political goals of their governments, the 17+1 forum has simply facilitated the shift towards illiberality in the countries that have already made that turn.

Application of Halliday's factors of reform to the case of European integration and enlargement reveals how the enormity of the difference between the level of diagnostic struggles and actor mismatch that the post-communist countries would experience compared with the countries that had integrated into the EU earlier would mean that, even after all the extra cycles of recursivity, the post-communist countries (the candidates for membership) would require greater time for the reforms than any of the EU member states. On the other hand, the factors of

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<sup>37</sup> Halliday & Shaffer (2015a), p. 38; Block-Lieb & Halliday (2017), pp. 22-48.

<sup>38</sup> Halliday, *supra* note 36, p. 238.

<sup>39</sup> Halliday & Shaffer, *supra* note 37, pp. 37-40.

ambiguity and contradictions affected reforms not only in the candidate countries but also in the member states and the EU itself.

The EU determined the length of time required for the transitioning of the post-communist states based on its experience in the integration of states in Western Europe. It did not take into consideration the fact that it would be a more difficult, and, therefore, a lengthier process for the post-communist states to adjust to the EU than it had been for states with developed market economies and multiparty political systems to do so. As described in the next segment of this article, the post-communist countries suffered what Halliday calls “diagnostic struggles.” They saw the challenges of the process of economic and political integration very differently from the EU. Furthermore, the blueprint for the legal reforms in the post-communist countries was designed by the EU with little or no input from the national institutions that would be responsible for their implementation. Therefore, those reforms were impacted by what Halliday calls “actor mismatch.” As a result, the legal reforms proceeded more slowly than had been anticipated and required several recursive episodes of law making under the supervision of the EU institutions.

Finally, Halliday’s factors of “ambiguity” and “contradiction” of laws also impacted the legal reforms in the EU and its member states. During the integration process, the EU values that had been vaguely defined met resistance from some member states as they interpreted and appropriated them in accordance with their own local values and practices. Sometimes, the pre-existing national laws became contradictory to newly incorporated EU laws. Members also interacted with each other and recursively influenced each other’s reforms. Briefly, each episode of law making at the international level was followed by a distinct episode of interpretation and incorporation at the national or local level. Thus, the theory of recursivity helps to explain why it would take more than a decade, more time even than had been allocated for the pre-accession phase, for the EU law and values to settle in the new member states. Moreover, the theory of recursivity suggests that the EU legal order itself, in addition to the legal orders of the post-communist states, would be subject to years of legal reform in order for the new members to achieve full compliance with the EU values at every institutional level.

The framework of recursivity is also used to explain China’s influence on the EU’s integration strategy and on that country’s ability to imprint its own national development strategies onto the trade and investment arrangements that it has negotiated with other countries.

It has been argued elsewhere that China has not only already increased its influence in all of the international organizations but has managed to cause alterations to the domestic regulations in countries with which its enterprises trade or in which they invest.<sup>40</sup> China's efforts to bring alternative concepts of the state, politics, and law in the twenty-first century to the attention of other countries have already been compared to those of the Soviet Union during the Cold War era.<sup>41</sup>

The application of this theory requires a two-step analysis of economic integration. The first step sets the temporal and spatial background for application of the theory. Recursivity is introduced as a socio-legal framework that facilitates comprehension of the circumstances that have triggered the legal reforms and an examination of the target countries' commitment to integration. In the case in point, it is necessary first to describe the national context in which the legal change is to be carried out and complex historical circumstances under which the post-communist countries in Europe had repeatedly fallen under the sway of powerful international actors and to outline the challenges of keeping them on the path to integration prescribed by the EU. Therefore, in Section IV, the article examines the four factors that, according to Halliday, drive recursive cycles of legal change—the indeterminacy of the EU norms and values, diagnostic struggles, political and the ideological contradictions that determine how new laws are internalized, and actor mismatch.

The second step in this analysis is presented in Section V. It involves looking at the international context of legal change. In this case, it includes examining EU-China relations and comparing the EU's and China's policies regarding the European post-communist countries—the EU enlargement policy versus the China-led 17+1 initiative – as alternative models of integration and economic development. Particular emphasis is placed on comparison of the post-2013 EU enlargement strategy with China's 2012 “Twelve Measures for Promoting Friendly Cooperation with the CEECs”<sup>42</sup> (the “Twelve Measures”) and on an analysis of the various cycles of interaction between the two models. In this context, the article analyzes China as a competing actor that amplifies the diagnostic struggles associated with legal change because it considers the problem of internalization of EU laws and values in the context of its own foreign policy

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<sup>40</sup> Biddulph & Biuković (2019); Picker & Toohey (2015), p. 6.

<sup>41</sup> Halliday, *supra* note 36.

<sup>42</sup> MFA (2012) (hereinafter Twelve Measures).

principles: in particular, non-interference and what it considers to be “win-win” cooperation combining its version of the rule of law with its advocacy for “peaceful development” with other countries. Here, the article finds that China’s engagement in Europe recursively affects the legal reforms of the EU and its individual member states.

#### **IV. THE NATIONAL CONTEXT OF LEGAL CHANGE: COMMUNIST COUNTRIES COULD NOT TAKE A SHORTCUT TO LEGAL REFORMS**

Signs of the difficulty that the post-communist states were experiencing in adjusting to the circumstances of their accession to the EU have been apparent for decades. Many scholars in Europe warned that an abandonment of the values of the Soviet bloc to which they had belonged for four decades required more financial, technical and institutional support from the EU.<sup>43</sup> Moreover, they argued that Central Europe, unlike post-war Western Europe, had never had a sustained period of development in the presence of “stable party competition” and “commitment to democracy.”<sup>44</sup> Even in states that made successful economic reforms, timely adoption of EU laws, and accession to the EU, as was the case with Hungary and Slovenia, the fast pace of transition within a relatively short period did not allow their democratic institutions and civil society sufficient time to truly embrace the EU values.<sup>45</sup> Hence, the resistance of their national governments and local communities to the external values should not come as a surprise.

Scholars argued that had the Commission paid more attention to local conditions in each of the candidate countries and the broader geopolitical circumstances of Central and Eastern Europe at the time, it might have mitigated the resistance to change encountered in some of the candidate countries.<sup>46</sup> Yet, the EU insisted on a top-down imposition of liberal capitalism as a development model for the CEECs and has used the same mechanisms of enlargement policy with respect to the candidates from the WB only the nomenclature is different.<sup>47</sup> The ultimate

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<sup>43</sup> Konrád (1995), p. 43.

<sup>44</sup> Innes (2014), p. 88.

<sup>45</sup> Bugarič (2014), p. 3.

<sup>46</sup> Dahrendorf (1990), p. 175. Dahrendorf explained that, because the process of instituting multilayered reforms in post-communist societies did not occur in a geopolitical vacuum, it would be difficult for the EU to frame just one model for reforms that would be resistant to all of the internal and external challenges besetting all of the candidates for EU membership. See p. 173.

<sup>47</sup> The Europe Agreements (EAs), which were the legal framework for the CEECs accession, were called Stabilization and Association Agreements (SAAs) in the WB while the financial aid programs known as Phare and

condition was that EU membership would not be granted until all of the 1993 “Copenhagen Criteria,”<sup>48</sup> that set out the candidates' obligation to adhere to EU values, had been met.

The mismatch of actors is an obvious factor that significantly affected the EU legal reforms in general and the internalization of the rule of law principle in particular. As mentioned above, the EU institutions were the law makers not only for the EU but for the candidates as well. They sought no significant input from the national institutions of the post-communist countries that had to apply those laws. Considering the fact that, for example, the rule of law principle was contextualized somewhat differently in member states with different constitutional traditions,<sup>49</sup> it could have been predicted that candidates that inherited socialist values and institutions staffed by the old communist party nomenklatura in charge of internalizing the rule of law, would contextualize the principle very differently from states with Western traditions. They should not therefore have been expected to build efficient, new administrations committed to the values of democracy and the rule of law within the short decade prescribed for those states' accession to the EU.<sup>50</sup> Legal reforms to promote the EU fundamental values such as the rule of law were most successfully adopted in those post-communist states where the national institutions had become independent of political influence and were accountable to society, and where a constitutional system of oversight of state institutions by civil society had been established.<sup>51</sup>

It is not surprising, therefore, that the post-communist state institutions' interpretation and application of the core values upon which the EU has been founded have remained problematic for such a long time after the states' accession to the EU. Several EU and international indicators of good governance, most notably transparency and the rule of law, have revealed serious difficulties with the enforcement of the EU rules and values in Hungary, Poland,

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SAPARD in the CEECs were called Instruments of Pre-Accession Assistance (IPAs) in the WB. The budget for the 2014–2020 period increased slightly to €11.7 billion. See European Commission (2021a).

<sup>48</sup> European Council (1993). Three pillars of the “Copenhagen criteria” are: (i) political: to develop functioning institutions guaranteeing democracy, the rule of law, human rights, and the protection of minorities; (ii) economic: to establish a functioning market economy with the capacity to withstand competitive pressures within the EU; and (iii) legal: to have capacity to undertake the obligations of membership including adherence to the aims of economic and political union.

<sup>49</sup> Mak & Taekema (2016), p. 38.

<sup>50</sup> Dahrendorf, *supra* note 46, p. 170–1. Dahrendorf also claimed that building the institutions and civil society necessary to affect the type of constitutional and economic reforms that could establish new normative foundations for the states would take about sixty years to accomplish. See pp. 99–100.

<sup>51</sup> Mendelski (2015), p. 335.

Romania, and Bulgaria.<sup>52</sup> In 2007, three years after most of the CEECs had become EU members, the Economic Intelligence Unit rated all of them, except for the Czech Republic and Slovenia,<sup>53</sup> as “flawed democracies.”<sup>54</sup> Matters had deteriorated so far that in 2015, more than a decade after its accession to the EU, it was claimed that Hungary was no longer a democratic country; in 2017, it was asserted that Poland could not be considered a liberal democracy; and in 2018, warnings were voiced that some of the newer EU members, such as Hungary, Poland, and Slovenia,<sup>55</sup> were about to create a new “axis of illiberalism” to pervert the EU fundamental values and its principles of democracy, the rule of law, and human rights.<sup>56</sup>

According to the theory of recursivity, the ambivalence of rules, principles or norms in a transnational legal order such as the EU, often triggers reformulations and restatements at all levels of law making, including the transnational, national, and local.<sup>57</sup> As mentioned earlier in this article, the rule of law was a non-defined treaty value with which the Commission had tried to enforce compliance while, during the enlargement process from 1997 to 2004, it was monitoring the CEECs’ progress in institution building and the adoption of EU law.<sup>58</sup> For example, there was no clear distinction in the EU law between the concepts of democracy and the rule of law.<sup>59</sup> The 2009 Treaty of Lisbon settled the issue to some degree by establishing that fundamental rights, as guaranteed by the European Convention on Human Rights (ECHR) “shall constitute general principles of the Union’s law.”<sup>60</sup> However, the impact that consistent changes to the founding EU treaties will have on the legislative and enforcement powers of the EU institutions over national institutions of the member states and whether the changes extend the

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<sup>52</sup> See European Commission (2017); World Justice Project (2018); *supra* text accompanying note 31.

<sup>53</sup> See footnote 55 for more on the current Slovenian government.

<sup>54</sup> Wennerström (2014), p. 608. The following EU members were singled out in the Democracy Index of the EIU as “flawed democracies”: Estonia, Italy, Cyprus, Hungary, Lithuania, Slovakia, Latvia, Poland, Bulgaria, and Romania.

<sup>55</sup> The centre-right wing Slovenian Democratic Party riding on a wave of anti-immigration, social conservatism and populism won the election in 2018. Its Prime Minister Janez Janša’s views are close to those of Hungarian Prime minister Viktor Orbán. Janša is still in power at the time of writing this article and Slovenia held the presidency of the Council from July to December 2021.

<sup>56</sup> Kornai (2015), pp. 34, 47; Ekiert (2017), p. 2; Vezjak (2018), p. 3.

<sup>57</sup> For a discussion about the transnational characteristics of the EU legal order, see Tuori (2014), p. 26; Rajah (2015), p. 342.

<sup>58</sup> Wennerström, *supra* note 54, p. 608. The 1957 Treaty of Rome that established the EEC, the predecessor of the EU, did not include any reference to the Community’s fundamental values. See Kochenov (2017), p. 12. However, the rule of law was first recognized by the CJEU in the 1980s as one principle common to the legal systems of all of the member states but, even as recently as the early 1990s, it had not yet been precisely defined in the main EU legal documents. See *Parti écologiste ‘Les Verts’ v European Parliament* (1986) Case 294/83.

<sup>59</sup> De Ridder & Kochenov (2011), pp. 593, 597.

<sup>60</sup> Article 6(3) of the TEU.

scope of fundamental rights beyond the national constitutional traditions of the individual member states are issues that remain hotly debated in the EU and are therefore a source of interpretative uncertainty.

In sum, it was difficult for the CEECs to comply with requirements to uphold values that had not been clearly stated in the EU laws.<sup>61</sup> Yet, along the way, the Commission assessed the candidates' performance regarding respect for various aspects of the rule of law such as the supremacy of law, the separation of powers, judicial independence, certain fundamental procedural rights, and measures against corruption.<sup>62</sup> Consequently, in its 1997 Opinions on the State of Preparedness of the Candidate Countries for EU Accession, the Commission raised concerns about some candidates' ability to meet the Copenhagen criteria, particularly as related to government respect for the separation of powers and judicial independence, and for their governments' disregard for the political rights of the opposition and the fundamental rights of minorities.<sup>63</sup>

When the modifications to EU law failed to yield a precise definition of the EU values or specify what they were, member states were left free to fill in the interpretative void by resorting to the local context or by applying interpretative practices of other international organizations or third states and then arguing that the EU principles of the rule of law and human rights do not have a common European context. For example, after Hungary and Poland had become EU members, they came up with their own versions of constitutional values, insisting that there was no single interpretation of the rule of law, of democracy, or of fundamental human rights and that local variations, in the case of democracy, ranging from liberal to "illiberal" democracy and to Christian democracy all have authenticity.<sup>64</sup> These countries' constitutional reforms opened the door for the return of authoritarianism under a new name, "illiberal" democracy.

In addition to the ambiguity of law and actor mismatch, other recursivity factors – diagnostic struggle and contradiction – have also created barriers to the effective internalization of EU laws and values. The reforms that some of the post-communist countries made in order to legalize a localized version of the rule of law reveal that their institutions saw the problem of the

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<sup>61</sup> Halliday & Shaffer (2015b), p. 485.

<sup>62</sup> Wennerström, *supra* note 54, p. 609.

<sup>63</sup> Wennerström reports that the Commission was particularly critical of Slovakia's government performance with respect to the rule of law. See *ibid.*

<sup>64</sup> See Tóth (2017), pp. 406-8. In contrast, Poland's constitution, which also refers to the Christian faith, states that Poland is built on universal values coming from sources other than religion. See p. 407.

protection of religious rights differently than other EU member states. For instance, Hungary's 2011 Fundamental Law emphasizes that the country is built on its traditional Christian faith and endorses a "winner-takes-all" concept of democracy and the rule of law without referring to any of the universal secular values referred to in the current EU treaty.<sup>65</sup> In 2019, at a joint press conference with Finnish Prime Minister Antti Rinne, Hungary's Prime Minister Orbán explained to the media and public that the issue of the state of rule of law in Hungary is not "a legal one but rather one of honour" and that officials of other countries and the EU should stick to the principle of mutual respect in international relations rather than criticize his country on the issue of the rule of law.<sup>66</sup> In 2021, the Hungarian government argued before the CJEU that the rule of law on which the Rule of Law Conditionality Regulation is based is an abstract concept that "cannot be the subject of a uniform definition in EU law and must be specifically defined by the legal systems of each member state."<sup>67</sup> That, in fact, resembles Xi Jinping's vision of international community that conditions universality of the principle of rule of law by national conditions.

The resolution of contradictions between the EU laws and the national laws of the post-communist countries formed part of the Commission's screening process and, from the early 1990s until 2004, annual reporting had been required on the candidates' progress in adoption of the EU laws. However, after 2004, the EU established a "Cooperation and Verification Mechanism" in order to monitor the new members' compliance with the EU law post-accession and avoid contradictions.<sup>68</sup> That clearly indicated that the considerable package of legal reforms had not been completed before the new members joined the EU, that some contradictions remained, and that new ones could emerge anytime.

A compounding factor of the growing divergence in application across the EU and especially in the CEECs<sup>69</sup> was that, initially, EU law did not provide an appropriate procedure for efficiently sanctioning members that disregard its values.<sup>70</sup> While the Commission could

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<sup>65</sup> *Ibid.*, pp. 406-8.

<sup>66</sup> Hungary Today (2019).

<sup>67</sup> *Hungary v European Parliament and Council of the European Union* (2021) Case C-156/21 Advocate General Opinion, para. 267. Similar arguments regarding the lack of clarity and precision of the rule of law principle were made by Poland in its action for annulment of the Regulation. See *Republic of Poland v European Parliament and Council of the European Union* (2021) Case C-157/21, Advocate General Opinion, para. 99.

<sup>68</sup> Romania and Bulgaria were subject to the post-accession compliance monitoring after they joined the EU in 2007. See Grabbe (2017).

<sup>69</sup> Mak & Taekema, *supra* note 49, p. 38.

<sup>70</sup> Gormley (2017), p. 78.

bring infringement proceedings against member states for their alleged violation of specific EU laws, it had a much more limited ability to challenge their adherence to the rule of law in general and to other EU values for which there are no specific regulations.<sup>71</sup> Even when the treaty amendments were made to improve members' compliance with their obligations to uphold the Union's values, the EU has consistently resisted applying penalties under Article 7 of the TEU and Article 309 of the Treaty establishing the European Community.<sup>72</sup> The Council and the EP dragged their feet in responding to the Commission's attempts to clarify the procedure for activating the provisions of Article 7 of the TEU against members that fail to promote the common values.<sup>73</sup> All of that resulted in the Commission's call in 2013 for additional rounds of reform to EU law in order to strengthen the rule of law principle.<sup>74</sup> The Commission has also tried to clarify the rule of law concept by codifying a non-exhaustive list of principles and standards considered by the CJEU, the European Court of Human Rights (ECtHR), and the Council of Europe to be one of the EU fundamental values and referred to as such in various cases and documents.<sup>75</sup> The Commission did recognize that the precise wording of the rule of law clauses "may vary at national level, depending on each Member State's constitutional system,"<sup>76</sup> but it pointed out that the core meaning of the principle as a common value of the EU in accordance with Article 2 of the TEU and as a constitutional principle, is defined by the jurisprudence of the CJEU and the ECtHR.<sup>77</sup>

By the time that the Article 7 mechanism had been triggered for the systematic threats to EU values, first from the government of Poland in 2017 and then from the government of Hungary in 2018, the authoritarian regimes in those two countries had not only consolidated power domestically but had gained the support of other CEECs and even some other members of the EU, such as Romania, Bulgaria, and Italy. As a consequence of the growing support that those two countries have been receiving from emerging authoritarian regimes in the EU, another

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<sup>71</sup> Kochenov, *supra* note 58, p. 17.

<sup>72</sup> *Ibid.*, p. 12.

<sup>73</sup> European Commission (2003).

<sup>74</sup> Reding (2013).

<sup>75</sup> The principles listed by the Commission in its Rule of Law Framework are: "legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law". European Commission (2014) (hereinafter Rule of Law Framework), p. 4.

<sup>76</sup> *Ibid.* For more on the Rule of Law Framework and TEU Article 7 procedure, see Kochenov & Pech (2016); Halmai (2018); Pech & Scheppele (2017).

<sup>77</sup> Rule of Law Framework, p. 4.

recursive and far reaching episode of law making in the EU has been triggered, this one bottom-up, and matters have come to the point where members supportive of Hungary's Viktor Orbán have threatened to veto any move by the EU to impose punitive measures on that country for its violation of EU values.

Difficulties of working with a single model that was not appropriate for all of the candidates, of having to make the transition work when former communist leaders were installed in positions in which they could significantly influence policy and the transition, and of facing those challenges over a prolonged period, have led to enlargement fatigue in the region and have pushed the new CEEC and WB political elite, in their search for alternatives to the EU's exacting enlargement package, towards models of government that are less democratic, more authoritarian, and that demand less accountability.<sup>78</sup> Thus, many social groups in the region, including some of the governments, have slipped back into their pre-accession, pro-authoritarian political patterns. They have become attracted to ideas of populism and "illiberal democracy," and they have welcomed the opportunities presented for cooperation with authoritarian regimes such as China, Russia, and Turkey.<sup>79</sup> In addition, the lack of adequate and timely legal reforms in response to the failure of some of the new EU members to internalize the traditional EU values and insufficient institutional adaptation by the EU has led to an erosion of the EU values across the entire EU and has reduced EU's ability to act more effectively within its territory and abroad.<sup>80</sup> At the same time, member states' involvement with China, particularly in the form of trade and investment cooperation and financial assistance, has strengthened the impact of an alternative discourse on the rule of law and human rights in Hungary, Poland and other countries with authoritarian regimes that changed their practices and aligned them more with China's interpretation of the rule of law rather than with the EU's.

## **V. THE INTERNATIONAL CONTEXT OF LEGAL CHANGE: CHINA IS "MARCHING IN CONFIDENT STRIDES"<sup>81</sup> AND THE EU IS SLOW IN CATCHING UP**

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<sup>78</sup> Börzel & Pamuk (2012), p. 93; Ágh (2015), p. 302; Perry & Keil (2018), p. 12.

<sup>79</sup> Buzogány (2017), p. 1308; Auer & Stiegler (2018), p. 84; Dokos (2017), p. 107.

<sup>80</sup> It has been reported that members of the European Parliament from both the far left and right political parties show less support for the EU's measures against authoritarian regimes in Russia and China than other parties. See Sánchez Nicolás (2021).

<sup>81</sup> Jinping (2021).

The EU and China differ significantly in their regulation of economic activities, in their models of economic development, and in their commitment to the rule of law and human rights. While they seem to have an “enduring relationship,”<sup>82</sup> they have not been able to deepen it on the basis of a common interest in maintaining a rule-based international order and sustainable development.

The EU member states, through their membership in international organizations, have participated actively in international law making and the creation of the current international legal order. In addition, the EU itself has influenced international law making and norm setting either as a full member of, or as an observer in, various international organizations. The Commission’s definition of the core meaning of the rule of law as the common value of the EU (ie a non-exhaustive list of the principles and standards, such as transparency and accountability, that limit the powers of government and protect individuals from state actions) is similar to the UN’s definition of the rule of law.<sup>83</sup>

The EU’s Rule of Law Framework demands that the rule of law should not only constitute the basis for the substantive rights of all individuals living in the EU but also impose a limit on the actions and law-making powers of governments and officials. Whether it is described as political conditionality for accession to the EU, as a “human rights”<sup>84</sup> or an “essential elements”<sup>85</sup> clause for preferential trade agreements concluded between the EU and developing countries, or as a “regulatory cooperation” and “transparency” provision<sup>86</sup> in economic and trade agreements with developed countries, the goal is always to ensure that the partners in these agreements uphold the EU values of the rule of law, democracy and human rights and that the parties cooperate on the basis of principles of transparent and accountable governance.

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<sup>82</sup> 2019 Joint Communication, p. 1.

<sup>83</sup> Compare definitions of the rule of law in the Commission’s Rule of Law Framework and the UN General Assembly (2012).

<sup>84</sup> The EU first incorporated a human rights clause into its trade agreement with African, Caribbean and Pacific countries signed on 15 December 1989. See the Fourth ACP-EEC Convention of Lomé, OJ L 229/3, art. 5.

<sup>85</sup> According to Hachez, the wording “essential elements” was first used by the EU in Article 1 of the Framework Agreement for Cooperation between the EEC and the Federative Republic of Brazil, signed on 29 June 1992. See Hachez (2015), p. 9.

<sup>86</sup> Chapters 21 (Regulatory Cooperation) and 27 (Transparency) of the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union, which provisionally entered into force on 21 September 2017.

China's definition of the rule of law is rooted in the "socialist legal system" which is, in itself, an instrument for securing the stability and supremacy of Party-state rule.<sup>87</sup> According to its Constitution, China is a "socialist market economy" under the leadership of the Chinese Communist Party (CCP)<sup>88</sup> and the state holds the means of production for the people of China.<sup>89</sup> Therefore, China's economic system is based on management of the economy by a strong state, with extensive utilization of SOEs.<sup>90</sup> The Chinese leadership insists that the twelve core values of the socialist state (patriotism, democracy, civility, harmony, power through wealth, justice, freedom, equality, the rule of law, industriousness, sincerity, and friendliness)<sup>91</sup> are different from the Western liberal values of democracy, the rule of law, and fundamental human rights. In fact, the CCP sees any promotion of Western values, such as those included in the EU founding treaties and incorporated into the constitutions of its member states, or of values referring to the role of civil society in the governance of a state as "an attempt to undermine the current leadership [of China and its] socialism with Chinese characteristics."<sup>92</sup> This particular sense of the rule of law in China was confirmed by President Xi Jinping in 2017 in the "Four Comprehensives" or four principles of governance: strict governance by the CCP, adherence to the rule of law with Chinese characteristics, the enactment of deeper reforms, and building a moderately prosperous society.<sup>93</sup>

The Chinese values discussed above have been debated in the UN where, along with its increasing monetary contribution, China's influence in decision making and standard setting is growing. For example, China is actively seeking the support of other countries to bring to the UN its model of "win-win" cooperation and "mutual benefit," and the "concept of community of interests and destiny".<sup>94</sup> When China's President Xi Jinping addressed the UN on 18 January 2017, he stated that the relevance of law lies not only in its enforcement but also in its fairness

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<sup>87</sup> Potter (2021), p. 60. Note that other authors characterize the Chinese economic system not as socialist but as "political capitalism". See Milanovic, *supra* note 7.

<sup>88</sup> Constitution of the People's Republic of China, arts. 15 and 1(2) respectively.

<sup>89</sup> *Ibid.*, art. 6.

<sup>90</sup> *Ibid.*, art. 7.

<sup>91</sup> Constitution of the People's Republic of China (2018 amendments), art. 24.

<sup>92</sup> Central Committee of the Communist Party of China's General Office (2013), paras. 1-3.

<sup>93</sup> Wei (2017).

<sup>94</sup> See Godement, Rudolf, Julienne, Schwoob & Isenring-Szabó (2018). In March 2018, China attempted to introduce new values and standards in the UN human rights operation by tabling a proposal at the 37th meeting of the Human Rights Council for a Resolution on Promoting Mutually Beneficial Cooperation in the Field of Human Rights.

and justice, and in the equal and uniform application of international law.<sup>95</sup> At the same time, he noted that the UN should welcome diversity and he implied that uniformity in the application of international law from country to country must be tempered by the conditions prevalent in the particular country in which it is being applied.<sup>96</sup>

Human rights “with Chinese characteristics” reflects the position of China’s legal orthodoxy that requires the UN to reject the concept of universality of human rights standards and instead embrace a plurality of standards that suit the local conditions in each country.<sup>97</sup> China, in its role as a member of the UN Human Rights Council (UNHRC),<sup>98</sup> proposes internal UN reforms and argues that the UN should focus on economic development issues and poverty elimination rather than on political reforms and the enhancement of human rights. It argues that the UN cannot but enhance its legitimacy by accepting that non-Western values should co-exist with Western values, complementing the current UN normative framework.

China is also demanding that any assessment of a UN member’s compliance with the rule of law has to be done in the context of that state’s own constitution rather than in the context of the current interpretation under international law.<sup>99</sup> It argues that international law, as it currently stands, is heavily influenced by Western liberalism and violates China’s own Five Principles of Peaceful Co-existence.<sup>100</sup> Moreover, China insists that the principles of sovereignty and equality impose limits on the universally recognized principle of the rule of law in international law and entitle countries to “independently choose the mode of rule of law that suits their national conditions”.<sup>101</sup> When China advocates for a “pluralistic” interpretation of the rule of law and of democracy, it is in fact exporting its own political discourse of authoritarian orthodoxy to the international community.<sup>102</sup> Such a “pluralistic” interpretation of the rule of law would prevent

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<sup>95</sup> Jinping (2017b).

<sup>96</sup> *Ibid.*: “The ocean is vast because it admits all rivers”.

<sup>97</sup> Potter, *supra* note 87, p. 51.

<sup>98</sup> China was first elected to the UNHRC in 2013. China was re-elected to the Council’s 2021-2023 membership at the General Assembly’s 75<sup>th</sup> session, on 13 October 2020 (GA/122277). See UN (2020).

<sup>99</sup> For example, in 2008, China’s MFA submitted a Position Paper to the 63<sup>rd</sup> Session of the UNGA and explained that “[c]ountries are entitled to independently choose the models of rule of law that are suitable for their national conditions and can learn from each other’s model for common development.” Then in 2015, China stated in a Position Paper on the 70<sup>th</sup> Anniversary of the UN that the rule of law has to be limited in international relations and that “no attempt should be made, in the name of ‘rule of law’ to undermine other countries’ rights and interests.” See MFA (2008) and MFA (2015).

<sup>100</sup> MFA, *supra* note 25.

<sup>101</sup> MFA (2016).

<sup>102</sup> Potter, *supra* note 87, p. 65. In its white paper “China: Democracy That Works”, published on 4 December 2021, China’s State Council not only declares that China is a democracy but it also insists that its “new approach to

international bodies from establishing that China or any other of the world's authoritarian regimes has violated the international standards of the rule of law.

Acting in accordance with its foreign policy principles of peaceful co-existence, including non-interference in other countries' internal affairs and respect for their sovereignty, China does not impose explicit political conditionality in its investments and financial aid, and it cooperates with authoritarian regimes as well as democratic ones. But China is transferring its values to other countries through its "economic diplomacy,"<sup>103</sup> that is, through the looser regional and bilateral economic arrangements for trade, investment and financial cooperation between Chinese banks and third countries. It argues that these are "win-win" arrangements that secure for both parties "the resources, markets, capital, technologies, and skilled labor needed to sustain national development".<sup>104</sup>

In 2012, even before the BRI was officially launched, at the first meeting of the 16+1 group in Warsaw, Poland, China presented its Twelve Measures as the framework for its future relationship with the states involved. The Twelve Measures determine both the governance model for the new forum, which includes annual meetings of the participating governments, and the financial cooperation model.<sup>105</sup> The proposed cooperation emulates China's own successful state-centered model of development that prioritizes industrialization and infrastructure projects over enhancement of the political rights of citizens. In practice, most of these activities seem to be covered by state-to-state arrangements, varying from Memoranda of Understanding (MOUs) to loan agreements, and by infrastructure contracts between China's SOEs and the governments of the individual sixteen European states. China's state banks – the China Development Bank (CDB), the Export-Import Bank of China (China EXIM Bank), and the Construction Bank of China – funded the 16+1 cooperation.<sup>106</sup>

While the WTO has to be notified of the preferential trade agreements and while most of the investment agreements are recorded in the UNCTAD Investment Hub, there is no one reliable public data on China's MOUs or on individual infrastructure and loan contracts. While

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democracy represents a significant contribution to international politics and human progress" and an alternative to Western or liberal democracy. See State Council Information Office of the People's Republic of China (2021).

<sup>103</sup> Okano-Heijmans (2011).

<sup>104</sup> Heath (2016), p.163. See Shaffer & Gao, *supra* note 22, pp. 614-22; Chaisse & Kirkwood (2020), p. 246.

<sup>105</sup> Twelve Measures, measures 1-2.

<sup>106</sup> *Ibid.*, measure 2. The loans were drawn from a US\$10 billion special line of credit for infrastructure, technology and energy projects and participants also had access to funds from those three banks.

there is no EU-China FTA or investment treaty in force,<sup>107</sup> all current EU member states except Ireland have BITs in force with China. There are currently 15 member states that have signed MOUs with China on BRI-related investment projects.<sup>108</sup> A recent study of loan agreements signed between Chinese state banks and various government borrowers found explicit obligations for China's partners to keep their content strictly confidential<sup>109</sup> and that the parties to some contracts have a duty not even to disclose the contract's existence to the public.<sup>110</sup>

That lack of transparency that characterises the Chinese model of governance appeals to autocratic leaders and governments, including some in the EU, that would like to avoid public scrutiny and accountability for making specific economic decisions and undertaking certain legal reforms. The availability of Chinese financial resources is very important to the increasingly autocratic leaders of post-communist countries in Europe because it mitigates the effect of any EU-imposed fines and sanctions on its non-compliant members. In fact, it provides them with an incentive to abandon the EU's set of values in favour of the alternative set actively promulgated by the CCP and embedded in China's twenty-first century foreign policy.

The exact size of China's lending is difficult to capture because of the lack of transparency and what some call the practice of providing "hidden loans".<sup>111</sup> For a comparison of the Chinese and EU banks' investments in projects in the CEEC and WB countries, this article has combined data published by the EU banks, the World Bank and the IMF,<sup>112</sup> as well as several independent think tanks,<sup>113</sup> for the period from 2010 to 2020. Some data suggests that in 2014, 95% of the Chinese foreign direct investments (FDIs) in the area of the 16+1 forum went to no more than six of the cooperation partners, all in the CEEC.<sup>114</sup> In contrast, the same report

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<sup>107</sup> The EU-China Comprehensive Agreement on Investment (CAI) was negotiated by the EU and China from 2013 to 2020 and is yet to be ratified.

<sup>108</sup> European Court of Auditors (2020), p. 43.

<sup>109</sup> Gelpert, Horn, Morris, Parks & Trebesch (2021).

<sup>110</sup> *Ibid.*, p. 4.

<sup>111</sup> Horn, Reinhart & Trebesch (2019). The authors argue that 50% of China's lending is unreported. See p. 7. They see two main difficulties to determining the size of China's lending: first, because it is not a member of the Paris Club or OECD, China is not subject to standard disclosure requirements regarding its lending applicable to lenders from OECD states; and, second, "hidden debts" that are owed to China as a consequence of debt sustainability in recipient developing countries are difficult to detect in the traditional databases of international financial institutions. See p. 2.

<sup>112</sup> International Monetary Fund and World Bank (2020).

<sup>113</sup> Rhodium, MERICS, Kiel, AidData at William & Mary.

<sup>114</sup> The six countries were Bulgaria, Czech Republic, Hungary, Poland, Romania and Slovakia. See European Council on Foreign Relation (2016), p. 8.

found that the Chinese FDI in individual WB economies remains limited and is increasingly focused on Serbia.<sup>115</sup>

The combined data set shown in Table 1 focuses on the EU's and China's financing of infrastructure projects in Hungary, Montenegro and Serbia during the period from 2010 to 2020. It shows that Chinese banks' loans to the candidate countries (Montenegro and Serbia) exceeded the loans from the EU banks,<sup>116</sup> while the EU banks loaned more to Hungary, an EU member state, than China did, although Chinese funding proved to be politically more significant for the government as they centered around projects which could not get EU financial support.

It is not surprising that Hungary, Montenegro, and Serbia—often called “stabilitocracies” for their commitment to political stability and a nationalistic ideology at the expense of democracy and the rule of law—have enthusiastically embraced China's investments and aid through the 16+1 forum.<sup>117</sup> All three states were guilty of backsliding from EU values and showing vulnerability towards foreign influence while being monitored by the EU institutions, thus revealing the weaknesses of the EU enforcement mechanisms created to protect those values, such as the Commission's Rule of Law Framework and enlargement conditionality.<sup>118</sup> China's cooperation with those countries amplifies the internal contradiction in the EU normative framework that allows the national institutions of member states and candidates to embrace state-centric and authoritarian ideologies rather than to apply EU norms created by the EU institutions. It also impacts on diagnostic struggles that accompany cycles of legal reform in the EU and in member states and candidates.

Hungary has shown itself keen to support China's approach to international law and standards more than the EU's approach. In 2017, Hungary was instrumental in preventing the EU from joining other nations in publicly expressing concern about China's detention of lawyers and activists.<sup>119</sup> On 16 April 2021, it blocked the EU statement criticizing China's national security

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<sup>115</sup> *Ibid.*, p. 12.

<sup>116</sup> The majority of the Chinese loans for the infrastructure projects captured in the table had been provided by China EXIM Bank but there was a handful of projects funded by Industrial and Commercial Bank of China, CDB, China Construction Bank, China Agricultural Bank, China Construction and Communications Company, China Civil Engineering Construction Corporation, China State Construction Engineering Corporation, and the AIIB. All of the funding projects were performed by Chinese construction companies with some participation from local subcontractors.

<sup>117</sup> See Bieber (2018).

<sup>118</sup> See International Institute for Democracy and Electoral Assistance (2021) and GLOBSEC (2021).

<sup>119</sup> Greece is another EU member state that received significant Chinese funding and blocked EU criticism of China's human rights record at the UNHRC in Geneva in June 2017. See Emmott & Koutantou (2017).

law in Hong Kong.<sup>120</sup> Montenegro, a candidate for EU membership, has become openly critical of the EU's enlargement policy after it borrowed €1 billion from China EXIM Bank to finance the construction of a highway linking its main seaport, Bar, to Serbia. Its then President Milo Djukanovic, known for his authoritarian governance of the country for thirty years, likened it to colonialism and suggested that his government should reconsider its partnership with the EU.<sup>121</sup> In October 2021, in response to the continuing concerns over Serbia's lack of progress in strengthening democratic institutions and the rule of law and that country's failure to align with the EU foreign policy,<sup>122</sup> Serbian President Aleksandar Vucic defiantly argued that "nobody should object to Serbia wanting to survive" by developing good relations not only with the EU but also with China (and Russia).<sup>123</sup>

It is clear that as China's involvement in and impact on the post-communist countries in Europe grows in the "17+1" forum, so too will the iterative legal reforms in the EU and in some member states and candidates. It is also clear that China's use of its bilateral relations with other EU member states to circumvent the challenges that the current EU regulations and policies<sup>124</sup> pose to its access to the EU internal market have allowed China to gain political influence in several European states and have impeded the functioning of the EU's founding principles and its enlargement policy. Regrettably, as argued below, the EU has been slow to acknowledge China's model of economic governance and its ability to compete with its own model on its own turf. It is still struggling to find the appropriate response and to adjust to the competition.

In 2011, one year before the 16+1 initiative was launched, the Directorate-General for External Policies of the Commission had published a briefing paper, "Export Finance Activities by the Chinese Government,"<sup>125</sup> that focused on China's policy banks (China EXIM Bank, the CDB and the China Agricultural Development Bank). The paper explained how China's export financing activities create an unfair advantage for its exporters and that there is very little

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<sup>120</sup> Chalmers & Emmott (2021).

<sup>121</sup> Sputnik Srbija (2018). It is noteworthy that in March 2021, Montenegro approached the EU for assistance in repaying the loan, arguing that the EU has a duty to protect Montenegro, a candidate for EU membership, from becoming financially dependent on China. The EU rejected Montenegro's request for help with respect to the work that has already been undertaken but is proposing to help finance the remaining work through its Economic and Investment Plan for the Western Balkans. See Strupczewski (2021).

<sup>122</sup> European Commission (2021b).

<sup>123</sup> Gotev (2021) and Euractiv (2021).

<sup>124</sup> The EP passed a resolution on 20 May 2021 to freeze ratification of the CAI in response to Chinese sanctions on European human rights advocates. See EP (2021b).

<sup>125</sup> Massa (2011).

transparency regarding the economic terms of the Chinese loans or about what environmental and social governance standards, if any, they promote.<sup>126</sup> The paper concluded that the Chinese credits are not risk free and pointed out the peril of running up unsustainable debt, as many African countries continue to do.<sup>127</sup>

Rather than being proactive, the EU was reactive in its regulatory response to China's engagement with its member states. The key strategic documents that set out the EU's institutional response to China's outward investment strategy<sup>128</sup> were created after China had already established its 16+1 forum for cooperation with a group of EU member states and candidates and established its presence in the EU market and those of the EU's neighbours.<sup>129</sup> The 2016 Joint Communication set out two principles of EU-China engagement: the parties had to derive reciprocal benefit in both political and economic terms and China had to respect the rule-based international order.<sup>130</sup> The Commission clearly stated that, in their interactions with China, all member states had to be in full compliance with EU laws, rules and policies and had to act in cooperation with the EU institutions.<sup>131</sup> The Commission has pointed out to all EU members and candidates for membership that their bilateral or sub-regional relations with China cannot stand in place of their relations with the EU and that the EU will not allow any external norms and rules to supersede its internal values and laws.

Between 2015 and 2019, and largely in response to China's intensive activity in the WB, the EU introduced several new initiatives for that region. Under what has been termed the "Juncker Investment Plan," it established a new investment fund with the capacity to mobilize about €315 billion.<sup>132</sup> In 2017, it implemented a new strategy, one part of which was set out in "A Credible Enlargement Perspective for Enhanced EU Engagement with the Western

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<sup>126</sup> *Ibid.*, p. 11.

<sup>127</sup> *Ibid.*, p. 14.

<sup>128</sup> European Union and China (2013); European Commission and High Representative of the Union for Foreign Affairs and Security Policy (2016) (hereinafter 2016 Joint Communication); European Commission and High Representative of the Union for Foreign Affairs and Security Policy (2018); 2019 Joint Communication.

<sup>129</sup> When the first strategic partnership negotiations opened in 2003, the EU advocated for the liberalization of trade with China and hoped to establish not only economic links with that country but also the type of social and political links that could inspire internal reforms there and bring about greater democracy, openness and transparency. See Maher (2016), p. 961.

<sup>130</sup> 2016 Joint Communication, p. 5.

<sup>131</sup> *Ibid.*, p. 4.

<sup>132</sup> The Commission President Juncker announced the plan on 24 November 2014, and it started to take shape in 2015, when the European Fund for Strategic Investments was established. See European Commission (2019). For more details on the plan see Bundesverband der Deutschen Industrie e.V. (2015).

Balkans.”<sup>133</sup> The Commission confirmed in the “Credible Enlargement Perspective” that conditionality remains the main mechanism of its enlargement strategy and that it is still its goal to ensure the Europeanization of the WB because the economic and political changes made so far have not succeeded in converting the WB states to functioning market economies or in making them sufficiently competitive to deal with the pressure of EU market forces.<sup>134</sup> The other part was a plan for the transformation of the Central European Free Trade Agreement into a new regional economic area (REA).<sup>135</sup>

China and the EU signed a MOU in September 2015 in which China agreed to contribute to Juncker’s European Fund for Strategic Investment and to the EU connectivity initiative.<sup>136</sup> In January 2016, China became the sixty-seventh shareholder of the EBRD. In June 2016, the EBRD signed a MOU with China’s Silk Road Fund, agreeing to cooperate with China in implementing the BRI.<sup>137</sup> One recent EBRD-commissioned report has recommended that the EU seek closer cooperation with China as a way of bringing more transparency into Chinese lending practices in the region that is serviced by both the China-led BRI and the EBRD.<sup>138</sup>

It has only recently, starting from 2019, taken more robust legislative steps towards controlling China’s engagement with individual member states and candidates involved in the 17+1 forum and towards protecting its fundamental values within the internal market. And although the new key strategies list a number of actions that the EU should take to address the growing influence of China in its territory, they do not include provisions for any specific reporting obligations on the part of the EU member states, nor do they specify methods for assessing the success of the planned actions.<sup>139</sup>

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<sup>133</sup> European Commission (2018) (hereinafter Credible Enlargement Perspective).

<sup>134</sup> *Ibid.*, p. 3.

<sup>135</sup> See Regional Cooperation Council (2017). This document was prepared by the EU and endorsed by the leaders of the WB6, the six Western Balkan countries including Kosovo that are not EU member states, at the Berlin Process summit in Trieste on 12 July 2017. The Regional Economic Area (REA) provides for a deeper integration of the WB6 economies, but it was not planned to substitute for full EU membership.

<sup>136</sup> European Commission (2015).

<sup>137</sup> Pyrkalo (2016).

<sup>138</sup> Bastian (2017), p. 44. A recent example of co-existing investment interests is the Peljesac bridge project in Croatia, which is 85% funded by the EU Cohesion Policy (€357 million) and contracted to China Road and Bridge Corporation, which won the bid in 2018: Xinhua (2018).

<sup>139</sup> European Court of Auditors, *supra* note 108, p. 41.

In its 2019 Joint Communication,<sup>140</sup> the Commission outlined ten actions relevant to the EU's engagement with China in order to limit the impact of China's state-led model of growth that allows for the rise of authoritarianism at the expense of the rule of law and human rights. Action 6 recommends that, by the end of 2019, the EP and the Council adopt an International Procurement Instrument to ensure that the procurement procedures of all member states comply with the EU's international commitments and the Treaty principle of transparency.<sup>141</sup> The Instrument would impose on the Commission a new duty to issue guidelines governing the participation of foreign bidders and foreign goods in the EU market. Other proposed actions suggest that the EU should cooperate with international organizations in order to ensure that China meets its treaty obligations. For example, Action 1 advises that the EU should strengthen its cooperation with China, recognizing their "common responsibilities across all three pillars of the United Nations – Human Rights, Peace and Security, and Development."<sup>142</sup> Action 5 proposes that the European Council work towards achieving a more balanced and reciprocal economic relationship with China by moving to reinforce China's WTO commitments, including those related to subsidies and forced technology transfer.<sup>143</sup>

In an attempt to harmonize the cooperation of individual member states with China as outlined in Action 10 of the 2019 Joint Communication, the EU has introduced legislation to protect its interests by ensuring that investment arrangements between China and individual EU members are transparent and are properly screened both by the EU and by institutions of the relevant member state. Specifically, a new framework for screening FDI in the EU, known as Regulation (EU) 2019/452, received approval from the EP and the Council. That regulation came into force in all member states on 11 October 2020.<sup>144</sup> Under the new rules, both the Commission and the relevant member states will monitor and screen all FDI in a wide range of industries on grounds of security and public order and establish an EU information-sharing framework.

Although Regulation (EU) 2019/452 does not specifically target investments made in the EU by Chinese SOEs, there is little doubt that it was put into place to counteract what are seen to be the consequences of individual EU member states' inadequate monitoring of growing China's

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<sup>140</sup> 2019 Joint Communication.

<sup>141</sup> *Ibid.*, p. 7.

<sup>142</sup> *Ibid.*, p. 11.

<sup>143</sup> *Ibid.*

<sup>144</sup> Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for screening of foreign direct investments into the Union, OJ L 79I, 21.3.2019, pp. 1-14.

FDIs in Europe in general, and its SOEs' share in those FDIs, in particular, especially in its post-communist countries along the commercial routes of the BRI.<sup>145</sup> This fact is of particular concern to the EU because Regulation 2019/452 for screening FDIs entering the EU does not address the problem of subsidies for the acquisition of EU companies, and 95% of Chinese FDIs in the EU fall into that category. If that trend continues, the EU could see its own companies, operating without subsidies, be forced out of its own market by Chinese SOEs.<sup>146</sup> For that reason, in May 2021, the Commission proposed another new regulation, this time to address the problem of foreign subsidies distorting the internal market, often through deals involving acquisition of EU companies or through public procurement proceedings in the EU.<sup>147</sup> Under the proposed regulation, the Commission will have the power to investigate foreign investment in, or financing of, companies operating in the EU market when such investment or financing emanates from public authorities in non-EU countries.<sup>148</sup> However, the EU legislation for establishing more effective and coherent control over FDIs does not apply in those states that are still candidates for EU membership. That gives China, in its cooperation agreements with those countries, the potential to get into the EU market through indirect means.

## **VI. CONCLUSION**

This article has applied the theory of recursivity of legal reforms to explain the challenges that China's development model, promoted by the 17+1 forum, has posed for the commitment of the EU member states and candidates to embrace the EU development model as reflected in its enlargement process, and indeed for the functioning of the EU integration policy as a whole. The article asked whether the economic cooperation between China and 17 European countries, 16 of

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<sup>145</sup> European Parliamentary Research Service (2019b); Rasmussen Global (2017). Rhodium Group found that the cumulative value of the EU FDIs in China since 2009 was US\$176 billion at the end of the first quarter of 2021. During the same period, the cumulative value of Chinese FDIs in the EU27 was estimated at US\$142 billion. See Rhodium Group (2021).

<sup>146</sup> Note that China is also the fourth biggest acquirer of EU companies after the US, UK and Switzerland. See European Commission (2021c), pp. 10-17.

<sup>147</sup> The Commission first addressed the problem of the distortion of the EU market by general operation of companies that receive foreign subsidies in its White Paper on levelling the playing field as regards foreign subsidies. See European Commission (2020).

<sup>148</sup> European Commission (2021d). See Article 7 on the Commission's role in the EU ex officio investigation, Article 8 on the preliminary and in-depth phases of investigation, and Article 9 on the redressive measures adopted by the Commission.

which are post-communist countries and 11 of which are EU member states, has pushed some of those countries away from the EU principles of democracy and the rule of law towards authoritarianism or whether it was weaknesses in the EU's development model itself, such as difficulty in enforcing its fundamental values, that have enabled the non-compliant countries to make that shift.

The two steps of analysis of European integration (the analysis of the national circumstances and the international context) lead to the conclusion that flaws in the EU accession strategy have contributed to the current lack of commitment to EU values on the part of some of the post-communist countries involved in economic cooperation arrangements with China. Furthermore, these flaws have facilitated those countries' switch from democratic to autocratic political leadership.

China's development model and its values promoting a strong ideology, the primacy of political stability over individual rights, and strong one-party leadership have provided the CEEC and WB authoritarian leaders with moral and financial support and the opportunity to solidify their political power and resilience. As long as the Chinese model of governance and the rule of law with Chinese characteristics remain attractive to individual states in Europe, it will take longer for the EU-mandated reforms to settle at the national level. Moreover, it will be more challenging for the EU institutions to ensure that the EU values and fundamental rights are uniformly promoted and protected at the national level. This article does not claim that the cooperation with China has led to the emergence of "illiberal democracies" or autocratic regimes in the CEECs and the WB countries. That occurred before China's initiative was introduced and despite the region's adoption of and harmonization with EU law and its acceptance of the EU integration model. Instead, the article claims that China's engagement in the region, after some of the countries had already begun to move away from the EU values, offered the autocratic regimes an alternative model of development that they embraced because it held out some hope for their survival.

Finally, the article reveals that the EU fundamental values such as democracy and the rule of law, like any other international norms and values, develop and internalize in the national legal systems of member states and candidate countries only through complex, lengthy recursive processes. Therefore, the common meaning of these values can be created only through engagement of lawmakers at the international and national levels of governance.

### Cases

*Parti écologiste 'Les Verts' v European Parliament* (1986) Case 294/83.

*Hungary v European Parliament and Council of the European Union* (2021) Case C-156/21.

*Republic of Poland v European Parliament and Council of the European Union* (2021) Case C-157/21.

**Table 1.** Sino vs European Bank for Reconstruction and Development (EBRD)/European Investment Bank (EIB)-CEE investment data: Financing for infrastructure projects from 2010-2020 (Author: Dylan Bell, JD student, Allard Law)

(USD)	EBRD	EIB	Cumulative EIB + EBRD	China
<b>Hungary</b>	€184,260,069	€2,857,690,602	€3,041,950,671	€1,651,237,315
<b>Montenegro</b>	€260,000,000	€175,150,000	€435,150,000	€684,504,386
<b>Serbia</b>	€1,251,952,000	€1,011,241,740	€2,263,193,740	€3,248,212,342