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The Balkan Loophole: China's Potential Circumvention of EU Protectionism

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The global recession of 2008 appeared to end the honeymoon between globalization and the reduction of international trade barriers. This was especially visible in the European Union, which saw a surge of conservatism as European economies suffered. With the EU unable to assist its members, the countries turned to China for financial aid. In return, China saw this as its chance to enter the EU using the engine of its newly–formed superpower status–its economy. From loans and financial aid to foreign direct investments (FDI), China began to pour money into the EU market. The poorer EU members accepted this money without hesitation while the wealthier EU members saw this as a security threat. Like the old Soviet Union, China was an Eastern superpower that sought to expand its influence across the globe. Europe was no exception.

To counter this threat, the EU contemplated enacting laws that would increasingly regulate foreign investments in the trade bloc. China appeared to already have enough influence over some EU members to frustrate any EU attempts to pass laws with significant regulation over foreign direct investments. In 2017, the EU appeared to have found its answer. It submitted a proposal for a member–wide screening process that would not have binding effects on its members, but could be used to counter inward FDI. Once it became apparent that this proposal could pass, China turned its eye to the Balkans, where the EU plans to expand in the near future. By doing so, China hopes to circumvent any new EU law by pre–emptively solidifying itself in the economies of Balkan countries. Accordingly, China has included the Balkans into its global One Belt, One Initiative economic policy, which hopes to create a modern version of the Silk Road, with China at the center.

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With the EU facing enlargement fatigue and still recovering from the 2008 crisis, current indications are that China is succeeding in its strategy.

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On the cold evening of November 9, 1989, the world watched as the Berlin Wall collapsed. Brick by brick, capitalists rejoiced as the age of the communist threat was over, and the world was opening itself up and tearing down borders. Out of the ashes of the eastern communist empire emerged a new idea: the theory of globalization.[1] Conventional wisdom suggested that opening borders, reducing tariffs, and expanding trade amongst countries would increase gross domestic product (GDP) and allow global economies to grow at an unprecedented scale.[2] This is especially evident in Europe, which was the forefront of the capitalist frontier during the Cold War.

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1 THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 1, 8 (Farrar, Strauss & Giroux, 1999, 2000) ("The driving idea behind globalization is free-market capitalism–the more you let market forces rule and the more you open your economy to free trade and competition, the more efficient and flourishing your economy will be. Globalization means the spread of free-market capitalism to virtually every country in the world. Globalization also has its own set of economic rules–rules that revolve around opening, deregulating and privatizing your economy in order to make it more competitive and attractive to foreign investment."); *see also Globalization: A Brief Overview*, International Monetary Fund Issues Brief (May 2008), https://www.imf.org/external/np/exr/ib/2008/pdf/053008.pdf ("[Globalization] refers to the increasing integration of economies around the world, particularly through the movement of goods, services, and capital across borders.").

2 *See generally Globalization: A Brief Overview*, *supra* note 1 ("The growth in global markets has helped to promote efficiency through competition and the division of labor—the specialization that allows people and economies to focus on what they do best. Global markets also offer greater opportunity for people to tap into more diversified and larger markets around the world. It means that they can have access to more capital, technology, cheaper imports, and larger export markets. But markets do not necessarily ensure that the benefits of increased efficiency are shared by all.").

Yet, the world today finds itself experiencing a backlash against globalization.[3] While removing borders has indeed helped trade grow and economies develop, it has also created the adverse effect of businesses moving production to low–cost labor markets, which allow profit margins to rise further.[4] This phenomenon developed a new type of economic "arms race," one that has the EU contemplating an economic wall to prevent a new eastern threat.[5]

China has emerged as the newest hegemon in geopolitics.[6] It previously announced to the world its arrival as an export goliath but it has only recently entered the playground of developed countries as an investing giant.[7] China has increasingly invested throughout the world, using its economic soft power to flex its political muscles.[8] Europe is no exception and it has seen an enormous increase of Chinese foreign direct investment (FDI) over the past year.[9] Once again, Europe finds itself as a frontier for eastward expansion as it struggles to respond to this growing influx of Chinese capital, and the political influence that comes with it.

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3 Pankaj Ghemawat, *Globalization in the Age of Trump*, HARV. BUS. R. 1, 114 (July-Aug. 2017) (explaining that "[t]raditional pillars of open markets—the United States and the UK—are wobbling, and China is positioning itself as globalization's staunchest defender. In June 2016, the Brexit vote stunned the European Union, and the news coverage about globalization turned increasingly negative in the U.S. as the presidential election campaign progressed.").

4 Constantinos Markides & Norman Berg, *Manufacturing Offshore is Bad Business*, HARV. BUS. R., 1, 113 (Sept.-Oct. 1988) (explaining that "[m]anufacturers defend sourcing from overseas as the only way to compete with inexpensive, high-quality imports. They say that moving to cheap-labor countries like Mexico, Taiwan, and Malaysia for export back to the United States is allowing U.S. industry to regain its world standing. Economists generally approve. They consider the migration to low-wage areas an adjustment caused by changes in international comparative advantage").

5 *See generally* Samantha J. Mobley, *EU to Tighten Control over Foreign Investment*, BAKER MCKENZIE (Sept. 19, 2017), http://www.bakermckenzie.com/en/insight/publications/2017/09/eu-control-foreign-investment/.

6 *China's New World Order*, CNN, http://www.cnn.com/interactive/2017/05/world/chinas-new-world-order/ (last visited Jan. 12, 2017) ("In little more than three decades, China has transformed itself from a closed-off Asian nation mired in poverty to an emerging superpower that rivals the United States. Now, the tendrils of Chinese influence are gradually wrapping themselves around the world, upending roles and relationships that have dominated the global order for half a century. The latest step in China's evolution as a global power is President Xi Jinping's grand plan for the world economy that draws on the millennia-old tradition of the Silk Road trading route.").

7 *See* Tom Mitchell, Guy Chazan & Don Weinland, *Chinese Investment in EU Dwarfs Flow the Other Way*, FIN. TIMES (Jan. 10, 2017), https://www.ft.com/content/79e3a2b2-d6f7-11e6-944b-e7eb37a6aa8e.

8 *See generally* Carrie Gracie, *China's Big Push for its Global Trade Narrative*, BBC NEWS (May 12, 2017), http://www.bbc.com/news/world-asia-china-39880163 (describing Chinese soft power associated with its strategic investing).

9 *See* Mitchell, Chazan & Weinland, *supra* note 7.

In September 2017, the EU proposed legislation ("the Proposal") that sets the stage for restricting non–EU FDI.[10] In response to this influx of Chinese capital, several Western EU countries submitted the Proposal to guide member states to screen non–EU FDI coming into their countries.[11] Although the Proposal appears harmless and non–binding, it could potentially be the stepping stone for future binding legislation with similar intended effects. Moreover, powerful EU countries could exert their own influence in the bloc to "encourage" weaker member states to follow the enacted guidelines, and therefore limit the flow of Chinese capital into the EU.

As the EU mulls to introduce these limitations on inward FDI, the Balkan region has increasingly courted Chinese investment while simultaneously maintaining aspirations to join the EU.[12] This may create a dilemma for the EU because the countries it attempts to expand into could be under Chinese influence by the time any enlargement treaty is ratified. This effectively allows China the opportunity to circumvent any new EU legislation limiting non–EU FDI, which would give China significant geopolitical influence within the EU once the region enters the bloc.[13] The Balkans could be China's investment backdoor into the EU if the bloc chooses to pass protectionist laws such as the Proposal that are designed to curtail Chinese investment in the continent.[14]

I. CHINA'S ECONOMIC EXPANSION INTO EUROPE

As China has emerged as a new world power, it built its economic foundation on its ability to massively export goods to other markets. This surge in exports gave China gains in its capital reserves and with so much money available, it looked where to invest these funds. In Europe specifically, Chinese FDI increased by 76 percent to €35.1 billion in

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[10] Erica Wiking Hager & Carolina Dacko, *EU FDI Screening – Legal Considerations*, MANNHEIMER SWARTLING 1.

[11] *Commission Proposal for Establishing a Framework for Screening of Foreign Direct Investments into the European Union*, COM (2017) 487 final (Sep. 13, 2017) [hereinafter EU Proposal].

[12] *See* Michael Makocki, *China in the Balkans: The Battle of Principles*, EUR. COUNCIL ON FOREIGN REL. (July 6, 2017), http://www.ecfr.eu/article/commentary_china_in_the_balkans_the_battle_of_principles_7210.

[13] *See* Gracie, *supra* note 8 (describing Chinese soft power associated with its strategic investing); *see also* Laurens Cerulus & Jacob Hanke, *Enter the Dragon*, POLITICO, https://www.politico.eu/article/china-and-the-troika-portugal-foreign-investment-screening-takeovers-europe/ (last updated June 25th, 2018, 6:53 PM) (describing Chinese influence on EU decisions through member states that receive Chinese investments).

[14] *See generally* Gracie, *supra* note 8.

2016.[15] In the most productive EU country, Germany, Chinese FDI surged from €1.2 billion in 2015 to €11 billion in 2016.[16] This dramatic increase shows that China is strategically targeting the EU as the recipient of its FDI. According to the Chinese Government, this increase in FDI is part of its new economic global project, the One Belt One Road Initiative, which the Chinese claim is a revival of the ancient Silk Road to facilitate its exports to Eurasia.[17] The goal of this initiative is to put China at the center of Eurasian trade, much like the Silk Road did in ancient history.[18] The EU sees this as a method of soft power, in which China assists countries' development while reaping certain rewards from this investment including expansion of its geopolitical agenda.[19]

By investing in EU companies, China gives itself a footing in the EU market if it is able to purchase enough businesses. Such acquisitions can either create a demand for Chinese raw goods or allow China to reap economic rewards even if EU trade regimes restrict the import of Chinese goods.[20] This Chinese FDI increase also allows China to continue its economic growth in the wake of its domestic export–oriented economy slowing down.[21] Either way, the EU certainly feels threatened by this influx of Chinese capital.

After the 2008 global financial crisis, these countries experienced sharp economic downturns greater than their counterparts within the EU. The most notable were Portugal, Ireland, Greece, and Spain. In an attempt to resolve this internal crisis, Germany proposed that these countries transfer or sell strategic assets to other EU members that were not suffering such financial burdens.[22] Moreover, Germany used its position as one of the most developed economies in the EU to require other members to follow a debt restructuring program that required the sale of strategic state–owned assets.[23] This presented China with an opportunity to invest

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15 Mitchell, Chazan & Weinland, *supra* note 7.
16 Mitchell, Chazan & Weinland, *supra* note 7.
17 Gracie, *supra* note 8.
18 *See* Gracie, *supra* note 8.
19 *See* Gracie, *supra* note 8.
20 *See* Janosch Delcker, *Germany's Chinese Investment Problem*, POLITICO https://www.politico.eu/article/germanys-chinese-investment-problem-sigmar-gabriel-eu/ (last updated Nov. 28, 2016, 9:04 AM) (explaining that "China's mission to buy up companies in Europe is part of a plan called 'Made in China 2025,' designed to turn the country into a manufacturing superpower").
21 *See* Gracie, *supra* note 8.
22 Cerulus & Hanke, *supra* note 13 (using as an example when "politicians in Berlin [sic] urged Portugal to sell off assets and state-owned companies . . . ").
23 Cerulus & Hanke, *supra* note 13 (explaining that in Portugal "[m]any of those acquisitions were required by a debt restructuring program following the Eurozone crisis – on which Germany insisted before lending Portugal the credits that saved it from collapse").

into indebted Europe.[24] As one Portuguese official noted, "[Portugal] just sold to the guys offering the most money–and evidently they were always Chinese in that period."[25] Greece continues to court Chinese investments, most notably allowing China to purchase a controlling stake in the Port of Pirateus, much to the chagrin of powerful EU countries like Germany.[26]

However, some EU governments are seeing through the strategy of Chinese FDI in Europe and the lack of investment reciprocity to EU FDI in mainland China.[27] Chinese FDI in Germany highlighted some unfair trading practices, specifically the limitation on foreign financial services in mainland China.[28] "Unlike Chinese companies in Germany, [German] companies are under growing pressure to hand over technology."[29] This constitutes an unfair business practice that gives China leverage over EU companies by forcing them to surrender key technology that can be replicated into a domestic version, which is produced cheaper.[30] Meanwhile, within the EU itself, China gains an economic foothold over European companies by investing enormous capital into them.[31] This trade practice visibly has the Germans upset over the lack of reciprocity from their Chinese counterparts, alluding to a the same problem in EU–China relations.[32]

The lack of Chinese reciprocity for FDI is not only problematic for Germans, but for the EU as a whole because other EU members also face the same lack of reciprocity.[33] Some EU countries have their own

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24 Cerulus & Hanke*, supra* note 13 ("The share of Portugal, Ireland, Italy, Greece, Spain, and Cyprus in total Chinese inbound EU investment grew from 8 percent in 2009-2011 to 33 percent in 2012-2014.").

25 Cerulus & Hanke*, supra* note 13.

26 *See* Andrew Hosken & Albana Kasapi, *Why is China Investing Heavily in South-East Europe?*, BBC NEWS (Oct. 17, 2017), http://www.bbc.com/news/world-europe-41654346.

27 *See* Mitchell, Chazan & Weinland, *supra* note 7; *see also* Delcker, *supra* note 20 (explaining that "[o]ne aim of 'Made in China 2025' is to replace foreign technology with Chinese technology").

28 Michael Clauss, *China Must Play Fair in Acquiring Foreign Assets and Technology*, SOUTH CHINA MORNING POST (June 7, 2016), https://www.scmp.com/comment/insight-opinion/article/1968113/china-must-play-fair-acquiring-foreign-assets-and-technology.

29 *Id.*

30 *Id.* (explaining that German car companies are required to submit important technology to the Chinese government to be given access to the Chinese market).

31 *See* Cerulus & Hanke, *supra* note 13 (explaining how "Chinese acquisitions of foreign companies are so successful because the Chinese bidder often offers a price far above any other competitors.").

32 *See* Mitchell, Chazan & Weinland, *supra* note 7 (explaining that "German[y's] aim . . . is reciprocity–improving German companies' access to the Chinese market and freeing them from the obligation in certain sectors to form joint ventures with [Chinese] partners").

33 Eric Maurice, *EU Preparing to Screen Chinese Investments*, EU OBSERVER (Sept. 14, 2017), https://euobserver.com/economic/139015 (explaining that Germany, Italy and

protectionist laws that limit non–EU acquisitions if they conflict with "national security."[34] However, the EU as a whole lacks a uniform FDI screening procedure.[35] This poses a problem for the EU because the EU requires members to have free trade with other members.[36] Thus, national laws restricting foreign FDI can still be circumvented by Chinese FDI in other EU countries that do not have similar laws, because those countries have unrestricted access to the EU market as a whole.[37] Additionally, countries that lack protectionist laws limiting FDI are also more susceptible to Chinese influence, which has already shown to affect proposed EU legislation that affects trade with China.[38]

In the June 2017 European Council summit, France and Germany (along with Italy) formally asked the European Commission to seek methods for screening foreign FDI.[39] The idea was to legally restrict non–EU countries from obtaining the EU's most coveted companies.[40] Although aggressive protectionist language existed in the earlier drafts of that legislation, it was "watered–down" to allow the Commission to '"analyze investments from [non–EU] countries in strategic sectors.'"[41] Nevertheless, EU countries with large Chinese investments refused to permit such protectionist language out of fear that it would limit Chinese FDI in their own economies.[42] This shows that not only does the EU lack uniformity, but it also shows that China already has significant influence in the bloc itself.[43] As the director–general of the European Steel Association (EUROFER) explained, "[t]his is not just about stealing key

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France have participated in submitting the Proposal to limit non-EU inward FDI because the EU as a whole must "defend its strategic interests.").

34 Hager & Dacko, *supra* note 10, at 3-4.

35 *See* Cerulus & Hanke, *supra* note 13 (explaining how Chinese investments in the EU created "dividing lines in the [European] Council . . . ").

36 Consolidated Version of the Treaty on the Functioning of the European Union art. 26, May 9, 2008, 2008 O.J. (C 115) 47, 59 [hereinafter TFEU] ("The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."); *see also* TFEU art. 29 at 60 ("Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with . . . and if they have not benefited from a total or partial drawback of such duties or charges.").

37 TFEU, *supra* note 36, art. 29 at 60.

38 *See, e.g.*, Cerulus & Hanke, *supra* note 13 (explaining that in 2012, the EU planned to impose a carbon tax on foreign airlines flying to the EU, but EU countries that produced Airbus aircraft pressured the European Commission to freeze the proposal after China threatened to stop buying Airbus planes).

39 Cerulus & Hanke, *supra* note 13.

40 *See* Cerulus & Hanke, *supra* note 13.

41 Cerulus & Hanke, *supra* note 13.

42 Cerulus & Hanke, *supra* note 13 (explaining how certain EU countries refused to accept the proposal because each "received high levels of Chinese investment . . . ").

43 *See* Cerulus & Hanke, *supra* note 13.

technologies. It's about gaining political control."[44] China is actively trying to reach that level of control by investing to the point where underdeveloped EU countries are heavily relying on Chinese FDI. Because these countries are afraid they will lose this capital if they go against China, they vote down anything against Chinese interests that is presented before the EU Council or EU Parliament.[45]

China clearly has interests in investing its capital into the EU. However, the lack of Chinese reciprocity regarding EU investments in China illustrates the standing of EU–Chinese economic relations. Germany was an example of how China uses its position as the largest market to limit inward FDI by imposing limitations that other countries do not enforce. This one–way traffic of investment leaves the EU in a bad position that in the end would affect all member–states not just the developed ones. When the initial screening proposal was voted down in June 2017, this was because certain members were afraid it would limit the amount of money they could receive from China.[46] Specifically, the language was at issue because it imposed identical restrictions for every EU member.[47] This experience gave the EU an indication of how to begin the process of protecting itself with regards to the influx of Chinese capital and political influence that comes with China's investments.

II. THE EU'S FDI SCREENING PROPOSAL

In the 2017 EU State of the Union Letter of Intent, President of the European Commission, Jean–Claude Juncker, explained that the Commission planned to submit another proposal regarding screening non–EU FDI. On September 13, 2017, the European Commission formally submitted the Proposal.[48]

> The objective of the draft Regulation is to establish a framework for the Member States, and in certain cases the Commission, to screen foreign direct investments in the European Union, while allowing Member States to take into account of their individual situations and national circumstances.[49]

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44 Cerulus & Hanke, *supra* note 13.
45 *See* Cerulus & Hanke, *supra* note 13 (explaining that "the 27 EU member states are incapable of remaining in solidarity with each other'").
46 *See* Cerulus & Hanke, *supra* note 13.
47 *See* Cerulus & Hanke, *supra* note 13.
48 *See generally* EU Proposal, *supra* note 11.
49 EU Proposal, *supra* note 11, at 2.

Ensuring that it does not make the same mistake it made in its previous proposition, the EU carefully crafted the Proposal to not include any legally binding language.[50] The EU specifically stressed this in its explanatory memorandum stating that "[t]he proposed Regulation does not require Member States to adopt or maintain a screening mechanism for foreign direct investment."[51] Thereby, the EU assuages any fears presented in its last proposal by not strictly requiring its members to adopt a screening process, but ensuring that any members that do put a screening system in place must conform to EU common policy.

However, the Proposal defines the scope of the screening process by targeting the types of FDI that China has made in the EU.[52] Although the language may not be legally binding, the intentions of the EU are clear.[53] It wants to protect itself from geopolitical influence of non–EU countries, specifically China, that could disrupt the uniformity in the EU.[54] If the EU becomes divided, then it faces a myriad of problems that are associated with a lack of conformity to a common cause. The recent issues with Chinese investments show how the EU as a trade bloc cannot function to create a common economic policy when all the member states cannot agree.[55]

To further combat this lack of uniformity, the Proposal also has a provision allowing the European Commission to screen FDI in *any* member country regardless if that country has a screening program in place.[56] This establishes a certain level of control over inward FDI coming

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50 *See generally* EU Proposal, *supra* note 11.

51 EU Proposal, *supra* note 11, at 3.

52 EU Proposal, *supra* note 11, at 17 ("In determining whether a foreign direct investment may affect security or public order, Member States and the Commission should be able to consider all relevant factors, including the effects on critical infrastructure, technologies, including key enabling technologies, and inputs which are essential for security or the maintenance of public order, and the disruption, loss or destruction of which would have a significant impact in a Member State or in the Union. In that regard, Member States and the Commission should also be able to take into account whether a foreign investor is controlled directly or indirectly by the government of a third country.").

53 *See* Hager & Dacko, *supra* note 10 at 3 (explaining that similar screening processes are "usually motivated by national security interest, but could also entail economic rationale"); *see also* Angela Huyue Zhang, *The Antitrust Paradox of China, Inc.*, 50 N.Y.U. J. INT'L & POL. 159, 221 (2017) (explaining that "national security review has provided a much more intrusive and flexible intervention into Chinese investment in Europe").

54 *See* Hager & Dacko, *supra* note 10, at 3.

55 *See* Cerulus & Hanke, *supra* note 13; *see also* Zhang, *supra* note 53, at 221 ("[T]he interests of the European Union and some of its Member States might not entirely align, and there could be a situation where a Member State may welcome Chinese investment while the European Union does not.").

56 EU Proposal, *supra* note 11, at 18 (explaining that "[w]here the Commission considers that a foreign direct investment is likely to affect projects or programmes of Union interest on grounds of security and public order, the Commission should have the possibility to

into any member country because it allows the European Commission to monitor all non–EU FDI in the EU.[57] Even if a member accepting non–EU FDI does not have national screening systems in place, by reporting this to the European Commission, the EU can take other measures to limit the socio–economic effects of such unwanted FDI in the remainder of the EU. Such measures must adhere to EU law, but given the clear political and economic interests the EU has towards inward FDI, it is not impossible to see the EU implementing tactics that reduce access to the common EU market in the interest of "national security."

Moreover, by requiring member states to disclose all non–confidential information about potential non–EU investments, this gives EU companies a strategic advantage when they see where and what sectors inward FDI is going. Although the proposal does contain a confidentiality provision,[58] it also states that any opinion the European Commission makes in regard to FDI will be made available to all EU members.[59] Thus, the specific details of the FDI will not be available, but the entire EU will be able to see the European Commission's recommendation regarding the inward FDI from a particular country. This allows the remaining EU members to prepare for the investment and react accordingly, which could reduce the value of the investment if access to members is restricted or another company is created to compete with the acquired company.

Another issue the EU faces is the lack of a common screening practice. Because legislation limiting FDI varies between EU members, Chinese FDI can always relocate to EU members that have no screening process.[60] Thus, Chinese FDI can still target a specific economic sector within the EU as long as there is one EU member that has not enacted national protectionist laws. The EU's common market and free movement articles makes this possible.[61] This would effectively allow a non–EU investor to

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address an opinion to the Member States in which such investment is planned or completed within a reasonable timeframe. The Member States should *take utmost account of this opinion* and provide an explanation to the Commission if they do not follow this opinion, in compliance with their duty of sincere cooperation under Article 4(3) TEU.") (italics added); *see also* Mobley, *supra* note 5 (explaining that "[a]ll EU countries must report to the European Commission on foreign investments taking place in their country irrespective of whether they have national review systems").

57 EU Proposal, *supra* note 11, at 18.

58 *EU Proposal, supra* note 11, at 23 (explaining that "[i]nformation received as a result of this Regulation shall be used only for the purpose for which it was received").

59 EU Proposal, *supra* note 11, at 23 (stating "[t]he opinion of the Commission shall be communicated to the other Member States").

60 *See* Hager & Dacko, *supra* note 10, at 3-4 (explaining that the EU lacks a uniform screening law but individual member countries have enacted similar screening procedures).

61 TFEU, *supra* note 36, art. 28 at 59 ("The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member

penetrate the common EU market and undermine the national policy of certain EU members with screening mechanisms in place.[62] Thus, there is great economic interest in establishing a uniform screening process throughout the entire EU.

Additionally, a more rigorous screening law already exists in the entire EU regarding military technology.[63] The EU Dual Use Regulation restricts all EU exports of "sensitive" products, which is most commonly military technology and other weapons.[64] Much like the Proposal, the Dual Use Regulation gives national governments discretion in determining whether to export products to specific countries.[65] Moreover, the Dual Use Regulation also requires members "to restrict trade with certain products, depending on the country and user of the items to be exported."[66] Similar restrictions can also be seen in laws limiting inward FDI.[67] The Dual Use Regulation is an example of uniformity of trade restriction within the EU that is limited on the rationale of "national security." Thus, there is a precedent limiting economic actions on the basis of "national security" should the EU choose to enhance the Proposal's screening abilities under the same rationale in the future.

Currently, the differences between the Proposal and the Dual Use Regulation are that the Proposal is not binding, its scope is beyond military technology, and it identifies strategic foreign FDI investments as a "national security" matter due to the possible political influence associated with such investments.[68] However, the reasoning behind the EU's Dual Use Regulation may eventually be applied to limit non–EU FDI. For example, the Dual Use Regulation currently allows countries to limit trade with "sensitive" products with countries that have human rights

States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.").

62 Hager & Dacko, *supra* note 10, at 11 ("[T]he acquisition of a company in one Member State . . . , lacking FDI screening laws, would allow the same foreign investor to acquire a company producing a similar product, and thus acquiring the underlying technology. Arguably, the lack of FDI screening in one Member State would undermine the laws and application of other Member States that do have such laws in place.").

63 Hager & Dacko, *supra* note 10, at 9-10 (describing the EU's Dual Use Regulation).

64 Hager & Dacko, *supra* note 10.

65 Hager & Dacko, *supra* note 10 ("The Dual Use Regulation gives the national competent authorities the discretion to decide whether or not to grant an export authori[z]ation depending on the destination country and in many cases the end user.").

66 Hager & Dacko, *supra* note 10, at 10.

67 Hager & Dacko, *supra* note 10 (explaining that "legislation identifies specific sectors as sensitive and the assessment is made in relation to the identity of the foreign investor").

68 Directive 231/2014, of the European Parliament and of the Council of 11 March 2014 on Establishing an Instrument for Pre-Accession Assistance, 2014 O.J. (L 77) 11 [hereinafter Pre-Accession Assistance].

violations.[69] Similar factors may eventually be included in the Proposal, which currently allows the European Commission to intervene if "security or public order" is at stake.[70] It is possible that the EU could include human rights violations in the definition of "security or public order," granting it the future right to limit FDI under this rationale. This would specifically target Chinese investments even further because the EU considers China as a violator of human rights.[71] Such an example is not inconceivable and given the EU's deep concern over the influx of Chinese FDI, other terms could be broadly defined to serve as a precedent and justify future actions limiting Chinese FDI even further than the screening guidelines outlined in the Proposal.

III. China Turns to the Balkans in Response

Although the Proposal has not encountered opposition from current EU members like the initial legislative attempt to restrict FDI, a loophole may exist in the form of future EU members that are now in accession. Currently, the EU's enlargement agenda has been focused in the Western Balkans and these same countries are increasingly becoming of great interest to the Chinese investment strategy.[72] If the Proposal passes and becomes EU law, China could bypass this legislation by investing in future EU member countries that are currently not obliged to adopt EU law.

After the global recession of 2008, the price of European assets fell sharply and China turned its attention to the Balkan region.[73] As part of its

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69 Hager & Dacko, *supra* note 10, at 10 ("The current Dual Use Regulation already allows Member States to decide to restrict exports due to . . . human rights violations.").

70 EU Proposal, *supra* note 11, at 18 (stating that "the [European] Commission should have the possibility to screen [FDI] likely to affect projects and programmes of [EU] interest on grounds of security or public order").

71 Lucrezia Poggetti, *One China – One Europe? German Foreign Minister's Remarks Irk Beijing*, THE DIPLOMAT (Sep. 9, 2017), https://thediplomat.com/2017/09/one-china-one-europe-german-foreign-ministers-remarks-irk-beijing/ (commenting on the EU's coordinated policy of criticizing China's human rights policy since the 2007 Lisbon meeting); *see also* Zhang, *supra* note 53, at 160-61 (explaining that "what concern[s] European policymakers was . . . the Chinese state," and that what was so concerning was "strategically–and politically–motivated takeovers by Chinese firms, particularly those in which the Chinese government holds a controlling interest . . . ").

72 *See generally* Ivana Casaburi, *Chinese Investment Trends in Europe: China Casts its Eye on Southern Europe*, THE ONLINE JOURNAL OF THE CHINA POL'Y INST. (May 24, 2017), https://cpianalysis.org/2017/05/24/chinese-investment-trends-in-europe-china-casts-its-eye-on-southern-europe/.

73 *Id.* ("The factor that is unique to Southern Europe, however, is the opportunity presented to foreign investors in light of the economic crisis, the brunt of which has been borne by Southern European countries. Of particular interest to Chinese investors was the drop in asset prices, including the value of companies, properties, offices, industrial land

One Belt policy, China is looking to acquire advanced European companies and supply them with materials produced in China.[74] So far, Chinese investments in the Balkans have been strategically placed to facilitate this modern Silk Road.[75] The FDI in the Balkans has been mainly infrastructure–based to prepare for the transport of imported Chinese goods into Europe.[76] The most notable recipients that showcase this investment strategy are Greece, Serbia, and Hungary.[77]

Greece, already an EU member, has struggled with debt since the 2008 global financial crisis.[78] The Chinese seized this opportunity to cultivate a friendly economic relationship with Greece when powerful Western EU members imposed measures on Greece to obtain EU monetary aid.[79] In return, China established a foothold in the EU itself, and ultimately obtained its most strategic transit point in Europe when it purchased a controlling stake in the Piraeus port in Athens.[80] With the port secured, China needed further transit points to facilitate its transit of goods to the EU, where it bought controlling stakes in EU companies. This generated interest in the Balkans, where infrastructure was still lacking following the Yugoslav Civil Wars in the 1990s.[81]

The Former Yugoslavia has been the primary subject of EU enlargement since the wars ended in the late 1990s.[82] As of today, only Croatia and Slovenia are full members of the EU with the remaining former Yugoslav countries and Albania classified as candidate or potential candidate countries for EU membership.[83] Candidate countries are given access to pre–accession EU funding to accommodate their economies to

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and labour. This scenario has afforded Chinese investors a greater knowledge of the potential of these countries, enabling them to identify new business opportunities.").

74 Delcker, *supra* note 20.

75 *See generally* Casaburi, *supra* note 72.

76 *See generally* Casaburi, *supra* note 72.

77 *See generally* Casaburi, *supra* note 72.

78 Mark Lowen, *Can China Lead Greece Out of Darkness?*, BBC NEWS (Sep. 9, 2013), http://www.bbc.com/news/world-europe-23887509.

79 *Id.*

80 Hosken and Kasapi, *supra* note 26; *see also* Paolo Balmas, *Where Europe Meets China: The Balkan Silk Road*, LUXEMBURGER WORT (Oct. 10, 2017), https://www.wort.lu/en/business/investment-where-europe-meets-china-the-balkan-silk-road-59dc959156202b51b13c4efe ("On a wave of privatization, the Greek government in April 2016 sold to [China] a 51% stake in the Piraeus Port Authority for $350 million. In August that same year, the stake was increased to 67%. [China] has also set aside another $350 million for Piraeus infrastructure investment over the 2016-25 period.").

81 *See generally* Balmas, *supra* note 80.

82 *See generally* European Neighborhood Policy and Enlargement Negotiations, https://ec.europa.eu/neighbourhood-enlargement/countries/check-current-status_en (Jun. 12, 2016).

83 *Id.*

EU standards as quickly as possible in order to ease the transition on the candidate country and the EU's economy as a whole.[84] However, a large portion of these funds are directed towards privatization of public companies and not towards infrastructure.[85] Any EU funds set for infrastructure come with caveats designed to promote EU standards, which may impose difficulties for the countries receiving them.[86] Thus, the EU is more focused on privatizing companies and reducing the public sector, leaving the infrastructure to the national governments. This presented China with the perfect opportunity to solidify its One Belt initiative by offering funding for infrastructure projects at very favorable terms.[87] The Balkans saw this as a win–win opportunity because it would be able to receive financing for much–needed infrastructural development at little cost to its own budgets, while China would secure its transit routes to Europe by building the needed infrastructure.[88] The EU made a critical error by not increasing support for candidate countries' infrastructural development because it would not give the EU an immediate return on its investments like privatizing nationally–owned companies would.[89] China

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84 Pre-Accession Assistance, *supra* note 68, at 12 ("Assistance should continue to support their efforts to advance regional, macro-regional and cross-border cooperation as well as territorial development, including through implementation of Union macro-regional strategies. It should also enhance their economic and social development, underpinning a smart, sustainable and inclusive growth agenda with a particular focus on small and medium-sized enterprises, with a view to attainment of the targets of the Europe 2020 strategy for smart, sustainable and inclusive growth (the 'Europe 2020 Strategy') and progressive alignment with the Copenhagen criteria.").

85 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,* at 25, COM (2016) 361 final (Nov. 9, 2016) (explaining that "in line with [EU] recommendations and in order to support long-term growth" the Balkans should continue to use EU funds to "continu[e] the restructuring and privatization of state-owned enterprises").

86 Makocki, *supra* note 12 (explaining that "experts complain that EU procedures saddle the [national] administrations with several sets of rules relating to different EU financial instruments or different international institutions . . . ").

87 *See* Jens Bastian, *China's Footprint in Southeast Europe: Constructing the "Balkan Silk Road" (II)*, THE CORNER (Oct. 18, 2017), http://thecorner.eu/news-europe/chinas-footprint-southeast-europe-constructing-balkan-silk-road-2/67948/; *see also* Matthew Karnitschnig, *Beijing's Balkan Backdoor*, POLITICO (July 13, 2017), https://www.politico.eu/article/china-serbia-montenegro-europe-investment-trade-beijing-balkan-backdoor/ (explaining that "[Serbia] generally pays between 2 and 2.5 percent on its Chinese loans which usually run from 20-30 years.").

88 *See* Bastian, *supra* note 87.

89 *See* Tena Prelec, *New Privatization Wave: Serbia has Enough Mistakes to Learn From*, LSE RES. ON SOUTH EASTERN EUROPE BLOG (Sep. 12, 2014), http://blogs.lse.ac.uk/lsee/2014/09/12/new-privatisation-wave-serbia-has-enough-mistakes-to-learn-from/ (explaining that the EU advocates "[t]he introduction of [a] foreign shareholder for [Serbian companies], as it would help establish [EU] corporate governance standards, give

took advantage of this predicament and it has since been heavily investing its FDI into infrastructure sectors of Balkan countries.[90]

In addition to Greece, which has many ports that would serve as bases for China's shipments of its domestic goods, Serbia has been increasingly gaining attention as a major destination for Chinese FDI.[91] Serbia has historically been the center of many geo–political conflicts due to its strategic position in the center of Europe and at the confluence of Eastern and Western cultures.[92] The modern age is no different, as the country currently finds itself delicately balancing its EU interests with its Chinese ones.[93] However, Serbia needs to develop its infrastructure to attract more inward FDI and prepare for EU entry, yet it sees Chinese FDI for infrastructure as more advantageous than EU funding.[94] This resulted in a favorable public perception of China within Serbia that is greater than its public perception of the EU.[95] This positive public perception of China also makes it easier for China to continue investing in Serbia, and it gives China greater opportunities with more leniency from the Serbian Government.[96] China has proven this with its FDI in Serbia as it does not impose conditions on those investments like the EU, and it allows the Serbs to dictate certain terms.[97]

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comfort to international investors in future and help restructure the company even before the EU accession").

90 *Id.*; *see also* Balmas, *supra* note 80 (showing the investment trends of Chinese FDI into Southeastern Europe).

91 *See* Bastian, *supra* note 87.

92 *See generally* Christopher Hartwell, *Serbia's Cooperation with China, the European Union, Russia, and the United States of America*, EUROPEAN PARLIAMENT'S COMMITTEE ON FOREIGN AFFAIRS (Nov. 21, 2017), http://www.europarl.europa.eu/cmsdata/133504/Serbia%20cooperation%20with%20China,%20the%20EU,%20Russia%20and%20the%20USA.pdf.

93 *See* Balmas, *supra* note 80 ("[Serbia is] not going to be removed from the EU and NATO's area of influence . . . and the investments from China have so far had a positive and immediate impact on Balkan economies . . . "); *see generally* Hartwell, *supra* note 92.

94 *See* Makocki, *supra* note 12.

95 Hartwell, *supra* note 92, at 14 (stating that China is viewed favorably by 52% of the Serbian population while the EU is viewed favorably by 28%).

96 *See* Hartwell, *supra* note 92, at 29, 47.

97 Hartwell, *supra* note 92, at 47 (explaining that "the Serbian public has expressed its dissatisfaction with EU conditionality, believing this to be a stumbling block on the road to membership. By contrast, China has been interested in much broader aims (improved transportation and logistics in the Balkans) but has allowed Serbia to be much more involved in how these aims are achieved."); *see also* Karnitschnig, *supra* note 87 (explaining that the agreement between China and Serbia regarding a Serbian railway project split the construction opportunity 50-50 for contractors from each country).

Capitalizing on this favorable public opinion, China has recently expanded its influence in Serbia beyond just investing in infrastructure.[98] By investing in domestic companies and increasing their productivity, China is increasing its favoritism with the Serbian government, which may sway the government to allow China to invest into more lucrative Serbian assets.[99] The recent tender offer for Belgrade Nikola Tesla Airport, which garnered massive interest from EU countries, China, Japan, and South Korea, was considered by many to be potentially the first major reward to China for its expanding interest in the EU Candidate country.[100] A Serbian political and economy analyst said in an interview that '"[i]t seems to [him] that everything China has been doing in the past several years in the field of its investments abroad also has a political background and connotation.'"[101] As an example, Chinese state–owned banks have loaned Serbia around €5.5 billion for infrastructure construction to date.[102] Chinese banks have become so involved with FDI in Serbia that a Bank of China opened a regional branch in Belgrade to give the Balkans easier and faster access to Chinese funds.[103] With favorable public opinion and a friendly government in power, China has the means to develop Serbia into the crucial transit country it requires for its One Belt initiative.[104]

Serbia's importance to China has not eluded the EU, specifically Hungary, which has also managed to secure important Chinese

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98 *How a Serbian Town Shows China's Global Expansion, US Retreat*, SOUTH CHINA MORNING POST (July 11, 2017), http://www.scmp.com/news/china/diplomacy-defence/article/2102160/how-serbian-town-shows-chinas-global-expansion-us (explaining how China's recent investment in a failing Serbian steel mill "is economically irrelevant in the short term to China, which abounds with steel production at home. But the deal saved 5,200 local jobs and gained Serbia's political favour").

99 *See* Karnitschnig, *supra* note 87 (quoting Serbia's then-Prime Minister Aleksandar Vucic saying "'[y]ou'll see what my real passion is,' [Vucic] said, kneeling next to a multicolored map of Serbia criss-crossed with planned highways and rail lines. 'It's roads and economy'").

100 *See* Mercy Kuo, *China in Eastern Europe: Poland's Perspective*, THE DIPLOMAT (Dec. 19, 2017), https://thediplomat.com/2017/12/china-in-eastern-europe-polands-perspective/ ("HNA is the leading consortium bidding for Belgrade Airport as part of BRI and [in search of] a higher profile in the future EU member state.").

101 *Id.*

102 *See id.* ("China has so far loaned some 5.5 billion euros in Serbia for the construction of bridges, highways and railroads that it plans to use as transport routes for its goods into the heart of Europe.").

103 Karnitschnig, *supra* note 87 ("In January, the Bank of China opened a regional hub for the Balkans and Eastern Europe in Belgrade.").

104 *See* Karnitschnig, *supra* note 87 ("Serbia, nestled in the center of the region, is the linchpin of China's plan to create a land bridge to Piraeus.").

investments in its own infrastructure.[105] China has increasingly invested in Hungary since its Prime Minister, Viktor Orban, took office in 2010.[106] Since then, China has begun tying its FDI in Serbia and Hungary to one another.[107] In 2013, China facilitated the creation of the Belgrade–Budapest railway, representing the largest infrastructural investment in the region since the 2014 construction of the Pupin Bridge in Serbia.[108] Construction on the project has yet to commence however, as shortly after the announcement the EU investigated into whether Hungary violated EU law with the deal.[109] Nevertheless, the EU's response to the project shows the fear the bloc has with Chinese investment in the region the EU intends to expand into.[110]

The EU does have legitimate points to make in rationalizing its fear of Chinese influence in the Balkans.[111] Although China announced its global One Belt initiative in 2013, investments in Balkan infrastructure projects began as early as 2009.[112] According to the EU, this would mean that the

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105 Balmas, *supra* note 80 (explaining that "Hungary [is] the third-largest destination of Chinese FDI in Europe, with nearly €2 billion having been invested between 2000 and 2015.").

106 Balmas, *supra* note 80 (explaining how "[i]n 2012, China and Hungary launched the China-CEE Investment Cooperation Fund, registered in Luxembourg. Its main investors are the Exim Bank of China, with €400 million invested, and Exim Bank of Hungary, with €25 million [invested]. The fund aims to support projects in the Balkan region . . . ").

107 *See* Bastian, *supra* note 87 ("In January 2017, the Bank of China (BoC) opened its new branch in Belgrade. It is a subsidiary of the fully licensed BoC bank located in Hungary. BoC has a strategic partnership pact with the Hungarian authorities since January 2017.").

108 *See* Wade Shepard, *Another Silk Road Fiasco? China's Belgrade to Budapest High-Speed Rail Line is Probed by Brussels*, FORBES (Feb. 25, 2017), https://www.forbes.com /sites/wadeshepard/2017/02/25/another-silk-ro . . .o-budapest-high-speed-rail-line-is-probed-by-brussels/#4582c6fd3c00 (valuing the project at $2.89 billion).

109 *Id.* ("Brussels is looking into the possibility that the deal to build the Belgrade-Budapest rail line may have broke the EU rules on public tenders. None were offered for this project. This probe is mainly directed at Hungary, being a full-fledged EU member, rather than Serbia, whose "prospective member" status shields it from all of the EU's regulations. Hungary's deal with China had the development of the rail line going to China Railway International Corporation with financing coming from China's Export-Import Bank.").

110 *See id.*

111 *See generally* Karnitschnig, *supra* note 87 (explaining that the [Chinese] investment flows—unimpeded by oversight or bureaucracy—provide Beijing with influence, goodwill and leverage in the region.").

112 Balmas, *supra* note 80 (explaining that "[b]efore 2013, China had already focused on the development of infrastructure on the Mediterranean Sea to speed up operations, increase port capacity and improve links between Europe's shores with the railway network on the mainland," and noting that "[e]ven in 2009, before the One Belt, One Road was announced, the Chinese strategy in the Balkan region was already taking shape. That year, Chinese FDI in Macedonia skyrocketed by 955% and in Serbia by 1,008%.").

global One Belt strategy is merely a legitimized excuse for China invading the EU's sphere of influence by investing in projects that would facilitate its own national interests. Even though the Balkan countries continually stress the importance of EU accession, increasing dependence on China may open new possibilities in the future that are not available now.[113] The Balkans are in the midst of their long accession process into the EU, and the process was designed to facilitate gradual adaptation of EU laws.[114] The European Bank for Reconstruction and Development ("EBRD") was accordingly designed as a means for funding acceding countries' adaptation of those EU laws.[115] These funds however come with caveats the EU imposes in order to motivate and facilitate adoption of EU law within candidate countries.[116] Essentially, the EU uses these funds in its "carrot and stick" approach to future EU enlargement in the Balkans.[117] Thus, the EU sees China as a general threat to its influence in the region because by offering infrastructure loans at more favorable terms, China is undermining the EU's influence over future members.

More importantly, this could have a significant impact on the Proposal. Currently, candidate and potential candidate countries are not required to adopt EU law, but must do so in order to progress in their accession process.[118] EBRD funding is designed to encourage these candidates to adopt EU laws earlier and accede into the bloc faster.[119] However, with China offering a more favorable alternative for funding infrastructure projects, these countries lose the incentive the EBRD funding provides for earlier accession. Moreover, delaying the accession process will allow China more time to further invest FDI into candidate countries and entrench itself within those countries' foreign policies before they join the EU. This is what the EU fears most. It already has discord amongst its members regarding policies aimed at China due to seemingly imposed political constraints associated with Chinese FDI.[120] If

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113 *See generally* Jens Bastian, *The Potential for Growth Through Chinese Infrastructure Investments in Central and South-Eastern Europe along the "Balkan Silk Road"*, THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT (2017).

114 *See* European Neighborhood Policy and Enlargement Negotiations, *supra* note 82.

115 European Neighborhood Policy and Enlargement Negotiations, *supra* note 82.

116 *See* Makocki, *supra* note 12.

117 Spyros Economides & James Ker-Lindsay, *Pre-Accession Europeanization: The Case of Serbia and Kosovo*, J. COMMON MKT. STUD. 1027, 1030 (2015) (explaining that the EU's approach to preparing the Balkans for integration "rel[ies] on external incentives of the carrot and stick variety (conditionality) which are based on a cost-benefit calculation.").

118 *See generally* European Neighborhood Policy and Enlargement Negotiations, *supra* note 82.

119 *See* Makocki, *supra* note 12.

120 *See generally* Cerulus & Hanke, *supra* note 13.

China is given more time to invest in candidate countries before they adopt EU law, it could potentially undermine any uniformity the EU has when China is in question.[121]

This is precisely what might happen if Chinese FDI is heavily invested in current candidate countries. With China's FDI in the Balkans skyrocketing in recent years and its investment targets gradually evolving to include companies in addition to infrastructure investments, China could have a significant impact on future members' foreign policy regarding China.[122] Current EU members must adhere to EU law, making it difficult for China to exert as much influence as it would like to have within the EU.[123] Because candidate countries can essentially choose when to adopt EU laws and regulations, China's increased FDI and popularity among the public of those countries facilitates China's influence and allows it to get a foothold in the region before it accedes into the EU.[124] A recent EU report confirms these fears and specifically identifies the Chinese methods for expanding their influence through FDI investments in the Balkan region.[125]

> With the availability of capital, technology and a master plan under the heading of the BRI, Chinese investments in EU and non–EU member states create leverage for acquisitions and infrastructure innovation on an unprecedented scale. Embarking on a concerted effort, state– owned Chinese banks are providing loans at low interest rates to companies and political authorities in south–eastern Europe. Equally, through the acquisition of ports, opening of bank branches in the region or official lending for bridge building, highway construction and power plant renovation, an infrastructure of transport and logistics networks is being created.[126]

This puts the EU in a difficult position since it wants to expand into the Balkans, but if China is allowed to gain such influence in the region, it may undermine the EU's uniformity. Although, one can argue that China has already done that by investing in current EU member states to a degree

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121 *See generally* Cerulus & Hanke, *supra* note 13.

122 *See generally* Bastian, *supra* note 87, at 52-53.

123 *See* Shepard, *supra* note 108, at 2 (describing the EU's investigation in to Hungary's procedure for offering rights to the construction of its part of the Belgrade-Budapest highway due to suspicion it violated EU law).

124 *See generally* Bastian, *supra* note 87, at 52.

125 *See* Bastian, *supra* note 87, at 52.

126 Bastian, *supra* note 87, at 52.

that those members are afraid to go against China.[127] Nevertheless, a Chinese–influenced Balkan region entering the EU will surely create problems for the EU when it comes to defining and executing a uniform foreign policy regarding China.[128]

An example that shows this potential outcome is the difference of EU involvement in Hungary and Serbia. Hungary, an EU member, is required to adopt and enforce EU law, giving the EU some control over Chinese FDI in the region.[129] Serbia, by contrast, is not an EU member so the EU can only use external political pressure but does not have the concrete ability to enforce EU law on Serbia.[130] The EU was able to influence Hungary's decision–making process to a degree, with regards to China's largest infrastructural investment in the region, but it could only give warnings to Serbia.[131] Thus, the EU fears that China can utilize this temporary loophole as a bypass of EU law and preemptively establish a geo–political presence in the bloc, which would only take effect after Serbia joins the EU. Such tactics undermines the purpose of the Proposal.[132]

The purpose of the Proposal was to create a uniform method of screening investments, in response to Chinese FDI entering the bloc without similar reciprocity.[133] If China already acquires Balkan companies and Chinese FDI is already used to finance infrastructure construction, then the purpose of the Proposal becomes moot since these investments will not be subject to such screening as they will have already taken place before the region joins the bloc.[134] Unless the EU devises an amendment that will allow screening for future members, China will be allowed to bypass the Proposal by investing in the Balkans *now*. However, such an amendment may be blocked by current EU members susceptible to Chinese influence such as Greece, Portugal, or Finland.[135] Moreover, such an amendment might dissuade the region from continuing accession, as the EU's popularity has decreased over time, especially in Serbia, which

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127 *See* Bastian, *supra* note 87, at 52; *see also* Gracie, *supra* note 8.

128 *See generally* Bastian, *supra* note 87, at 13-15.

129 Shepard, *supra* note 108.

130 *See generally* European Neighborhood Policy and Enlargement Negotiations, *supra* note 82.

131 *See* Shepard, *supra* note 108 (explaining that the EU conducted an internal investigation into the Belgrade-Budapest railway but only focused on the Hungarian Government's dealings not Serbia's).

132 *See* Hager & Dacko, *supra* note 10, at 3 (indicating that the EU's screening process is for national security reasons).

133 *See generally* EU Proposal, *supra* note 11, at 3.

134 *See* EU Proposal, *supra* note 11, at 5.

135 *See* Gracie, *supra* note 8.

has become geo–political focal point of the EU, China, and Russia.[136] Thus, if the EU passes the Proposal, it must also determine how to approach enlargement with regards to the screening process as those countries are not bound by EU law.

IV. COMPARING THE EU'S PROPOSAL TO THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES.

The United States has an investment screening protocol in place since 1975.[137] The Committee on Foreign Investment in the United States ("CFIUS") was created for the purpose of reviewing acquisitions and investments made in the US from foreign countries.[138]

> Since its inception, CFIUS has operated at the nexus of shifting concepts of national security, especially relative to various notions of national economic security, and a changing global economic order that is marked in part by emerging economies such as China that are playing a more active role in the global economy. As a basic premise, the U.S. historical approach to international investment has aimed to establish an open and rules–based system that is consistent across countries and in line with U.S. economic and national security interests. This policy also has fundamentally maintained that FDI has positive net benefits for the economy, except in certain cases in which national security concerns outweigh other considerations.[139]

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136 *See* Vincent Wood, *China and Russia Taking Over Europe Because of EU Failure to Protect the Balkans*, EXPRESS (Nov. 6, 2017, 2:44 PM), https://www.express.co.uk/news/world/876118/China-Russia-EU-Balkans-European-Union-Europe-investment-crisis-Xi-Jinping-Gjorge-Ivanov (summarizing Macedonia's president's statements regarding his feeling that the EU has abandoned the region and allowed China and Russia to exert their influence in the Balkans); *see also* Hartwell, *supra* note 92, at 14 (explaining that support for EU accession in Serbia has decreased from 76% and 64% to 59% and 49% in addition to polls showing that only 36% of the Serbian public sees EU influence on its foreign policy as positive (in comparison with China which polls show as having a 52% positive rating in Serbia)).

137 Hager & Dacko, *supra* note 10, at 4.

138 Hager & Dacko, *supra* note 10, at 4 ("The Committee on Foreign Investment in the United States ("CFIUS") has powers to review, investigate, and impose conditions on foreign investments or acquisitions of US companies if needed to protect US national security interests.").

139 JAMES JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 1, 1 (2017).

The specific procedure gives CFIUS time to review, investigate, and prepare a report for the president to review before he or she decides whether to block the proposed investment.[140] After the 2001 September 11th attacks CFIUS was amended multiple times, expanding its role in screening inward FDI from foreign countries.[141] Recently, due to China's global economic expansion, the US has seen CFIUS screenings rise to record levels in 2016 and 2017.[142] CFIUS's increasingly broad interpretation of national security allowed it to recommend to sitting US presidents to block "suspected" FDI.[143] The recent failed $1.2 billion merger between China's Ant Financial Group and Dallas' MoneyGram International Inc. is an example of CFIUS's increased involvement in inward FDI specifically coming from China.[144] MoneyGram CEO, Alex

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140 *Id.* at 12 (explaining that the formal process requires 30 days to conduct a review, 45 days to conduct an investigation, and 15 days for a presidential determination).

141 *See id.* at 2 ("The DP World transaction revealed that the September 11, 2001, terrorist attacks fundamentally altered the viewpoint of some Members of Congress regarding the role of foreign investment in the economy and the impact of such investment on the national security framework. Some Members argued that this change in perspective required a reassessment of the role of foreign investment in the economy and of the implications of corporate ownership on activities that fall under the rubric of critical infrastructure."); *see also* Meichen Liu, *The New Chinese Foreign Investment Law and Its Implication on Foreign Investors*, 38 NW. J. INT'L L. & BUS. 285, 300 (2018) (noting that currently CIFUS's definition of "control" is more broad and can be triggered when foreign investors account for a small portion of the investment, including ownerships "of less than 10 percent").

142 Reid Whitten & Scott Maberry, *The Waiting Game: When, Why, and How to File with CFIUS in a New Era of Investment Scrutiny*, SHEPPARD MULLEN (Dec. 12, 2017), http://www.mondaq.com/unitedstates/x/656070/international+trade+investment/The+Waiting+Game+When+Why+and+How+to+File+with+CFIUS+in+a+New+Era+of+Investment+Scrutiny ("[T]he OIS received one hundred and seventy-some filings in 2016, the most they had ever received in a year. This year, only in November, the[re] were over 225 submissions."); *see also* Jackson, *supra* note 139, at 22 ("According to data based on notices provided to CFIUS by foreign investors, Chinese investors were the most active in acquisitions, takeovers, or mergers during the 2013-2015 period, accounting for 19% of the total number of transactions.").

143 *See* Jackson, *supra* note 139, at 21-2 (explaining that 89% of investments were approved with Presidents Obama and Trump actively involved in blocking Chinese acquisitions of Aixtron and Lattice Semiconductor Corp. respectively); *see also* Ji Li, *Investing near the National Security Black Hole*, 14 BERKELEY BUS. L.J. 1, 7 (2017) (discussing an instance where a Chinese-owned American company sought to acquire new businesses, but was denied by CFIUS on national security grounds due to their proximity to a '"region of restricted airspace and bombing zone maintained by the U.S. Navy'").

144 Anna Zhang, *Am Law Firms Can't Save China-US Deal from CFIUS*, THE AMERICAN LAWYER (Jan. 6, 2018, 3:13 PM), https://www.law.com/international/sites/international/2018/01/05/amlaw-firms-cant-save-china-u-s-deal-from-cfius/ (explaining that "[t]he effort by Chinese fintech company Ant Financial Services Group and Texas-based MoneyGram International Inc. to merge failed this week due to national security concerns, despite the involvement of Am Law attorneys skilled and experienced in regulatory and

Holmes, even specified the reason for the failed merger was CFIUS, stating that "[d]espite our best efforts to work cooperatively with the US government, it has now become clear that CFIUS will not approve this merger."[145]

CFIUS's increased involvement in Chinese FDI is not accidental, rather a response to what the US perceives is a threat to its national security.[146] Echoing the issues Germany has with Chinese FDI, CFIUS is focusing its attention to FDI in the information technology sector, which currently accounts for nearly 50% of CFIUS–reviewed foreign investments.[147] In June 2017, Senator John Cornyn from Texas addressed these fears about China acquiring American technology and proposed another amendment to CFIUS.[148] The Senator said that "China has sought to 'weaponize' investment as part of a strategy to leapfrog the United States' advantages in technology. He further suggested that there is broad consensus within the U.S. defense and intelligence communities that 'gaps' in CFIUS's authorities present risks to U.S. national security. The proposed bill is intended to fill those gaps."[149]

Much like the EU, the US sees China as a global threat to its hegemony and identifies Chinese FDI in strategic sectors as a specific threat to its national security.[150] CFIUS's expansion in reviewing such targeted FDI is America's response, much like the EU's Proposal.[151] As similar as the situation is, the EU faces more adversity due to the lack of complete uniformity the US has.[152] This presents a major difference between CFIUS and the EU's Proposal because CFIUS's recommendations are passed on

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antitrust law as well as in the traditionally opaque and secretive national security review process administered by the Committee on Foreign Investment in the United States").

145 *Id.*

146 *See id.*; *see also* Li, *supra* note 143, at 6 (explaining that "CFIUS stepped up its scrutiny of foreign investments after FINSA, and investments originating from China continued to grow exponentially, soaring frictions ensued. CFIUS reviewed a disproportionately high percentage of Chinese acquisitions of U.S. assets, and more high profile Chinese investments failed due to issues with the CFIUS review.").

147 Jackson, *supra* note 139, at 22 (explaining that "43% of all the investment transactions notified to CFIUS between 2013 and 2015 were in the computer and electronic products sectors, a share that rose to 49% in 2015").

148 *See Update on CFIUS Developments: Proposed Legislation and Reflections on CFIUS Under the Trump Administration*. COVINGTON & BURLING, LLP (June 23, 2017).

149 *Id.* at 1.

150 *See id.*; *see also* Jackson, *supra* note 139.

151 *See Update on CFIUS Developments: Proposed Legislation and Reflections on CFIUS Under the Trump Administration*, *supra* note, at 4.

152 *See* Cerulus & Hanke, *supra* note 13; *see also* Zhang, *supra* note 53, at 222 ("[T]he establishment of such an E.U.-wide body analogous to CFIUS is likely to be met with significant opposition from some Member States who are reluctant to cede their jurisdictions to the E.U. government.").

to the US president, who has the authority to block any FDI.[153] Contrarily, the EU does not have one person making decisions.[154] Instead, the European Commission, a body consisting of representatives from each member state, makes those decisions.[155] Likewise, CFIUS was allowed to broaden its review precisely because all 50 American states are uniform in protecting America's domestic and foreign interests.[156] The EU clearly lacks this uniformity and is the reason why the Proposal is limited to specific actions that can be undertaken to screen suspected FDI.[157]

Additionally, another difference is that unlike the US, the EU is expanding to include future new members that have not yet adopted EU law and are not required to adopt EU law within a set time frame.[158] In the US, CFIUS has no similar potential loophole so it is difficult to circumvent it. The EU's situation would be akin to US territories like Puerto Rico attempting to become a State, and then China investing heavily in that territory to gain economic and political influence so that when it becomes a fully–fledged State, China's influence will be felt to the remainder of the

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153 *See* Jackson, *supra* note 139; *see also* Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 824-25 (2011) (noting that Presidential decisions carry significant weight and are "not subject to public scrutiny or judicial review").

154 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, 20 [hereinafter Treaty of Lisbon] ("The Commission appointed between the date of entry into force of the Treaty of Lisbon and 31 October 2014 shall consist of one national of each Member State . . . .").

155 Communication to the Commission from President Juncker and First Vice-President Timmermans, Nov. 11, 2017 (C 6915) 1, 5, https://ec.europa.eu/info/sites/info/files/c_2017_6915_final_en.pdf ("The College [of commissioners] establishes the organizational structure of the Commission, which is composed of a number of Directorates-General and equivalent departments forming a single administrative service to assist it in the preparation and performance of its tasks, and in the implementation of its priorities and the political guidelines laid down by the President.").

156 *See* Jackson, *supra* note 139 (describing the history of CFIUS and that multiple amendments granting it broader scope of review were passed since its inception).

157 *See* Cerulus & Hanke, *supra* note 13.

158 Treaty of Lisbon, *supra* note 154 art. 49 ("Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements. The conditions of eligibility agreed upon by the European Council shall be taken into account.").

federation. The EU plans to include at least two new members by 2025, giving China an opportunity to establish itself in those countries and avoid the EU's screening, something that it would not be able to do in the US.[159]

Essentially, the EU is looking for a regulatory organization similar to CFIUS that can make recommendations as to whether suspected FDI constitutes a threat of national security.[160] The Proposal stops short of directing actions that can block such FDI, but it creates a similar screening process that allows the EU to investigate whether such FDI is a threat to its interests.[161] The EU's ultimate goal appears to be parallel to the US where a screening committee issues its report to an executive body that can take concrete action.[162]

V. WHAT THE EU SHOULD DO IN THE BALKANS.

The EU faces a threat to its economic prowess because China is capitalizing on the EU's absence in the Balkan region.[163] When the world's hegemons were solely in the West, it afforded the EU the ability to direct the region toward accession using the "carrot and stick" approach.[164] By investing in companies and forcing these governments into privatization of key regional assets, the EU's investment strategy was focused on short–term quick gains and neglected to invest in what these countries actually needed: infrastructure.[165] These countries responded by turning to China,

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159 Andrew Rettman, *EU Sets Date for Next Wave of Enlargement*, EU OBSERVER (Jan. 9, 2017, 9:29 AM), https://euobserver.com/enlargement/140478 (explaining that because Serbia and Montenegro have already started accession negotiations, they "should be ready for membership by 2025").

160 *See generally* EU Proposal, *supra* note 11.

161 *See* EU Proposal, *supra* note 11.

162 *See* EU Proposal, *supra* note 11.

163 Hager and Dakcko *supra* note 10, at 11.

164 *See e.g. Serbia Rushes to Launch EU Accession Talks*, EURACTIV (Oct. 26, 2010), https://www.euractiv.com/section/enlargement/news/serbia-rushes-to-launch-accession-talks/ (explaining that the EU "accommodate[d] the Netherlands' demand that any further step in Serbia's EU accession must be conditional on Belgrade's cooperation with the International Criminal Tribunal for the former Yugoslavia"); *see also e.g.* Hristo Damyanov, *The Conflict for the Name "Macedonia" Between Greece and Former Yugoslav Republic of Macedonia in Regards to the Application of FYROM to be a Member State of the European Union* at 4 ("The neighboring state of Greece, [sic], does not want this country to be called 'Macedonia', because Greece has a whole region with the same name. The problem is that Greece is a member of NATO and the EU and Macedonia pursues a membership in both organizations, but Greece has the advantage of using its position as a member of the EU to block Macedonia's path to EU membership.").

165 Macocki, *supra* note 12.

and now China is quickly gaining economic and political influence in potential future EU members.[166]

The EU must adapt and ease accessibility to pre–EU accession funds for infrastructure projects if it wants to ensure the success of its Proposal.[167] The function of the Proposal is to protect the EU from China obtaining access to key technologies, replicating them at a fraction of the price, and then selling them in the EU using trade routes created from the One Belt policy.[168] Moreover, the EU should encourage national governments within the bloc to invest in the Balkans as part of the privatization strategy and focus EU funding on public sector projects that the private sector lacks interest in. This will allow acceding countries to fulfill their requirements for privatization and speed their GDP growth to make them closer to EU standards. By doing this, the EU will directly compete with China, and encourage the Balkan region to accept FDI from the bloc it is attempting to join, rather than accepting FDI from its biggest competitor. A French company recently beat Chinese competitors for rights to operate Serbia's Belgrade Nikola Tesla Airport, one of the most profitable non–energy related government assets in the region.[169] This indicates that EU FDI is still desired if the conditions associated with such investments are less restricted than the current economic aid EU institutions provide the region.[170]

Additionally, the Western Balkan region is predominantly acceding into the EU, so it does not need to adopt EU law.[171] This allows China to establish itself in an EU candidate or potential candidate country before it joins the EU, and when that country joins the bloc it will likely succumb to political pressure exerted by China due to the large influx of Chinese FDI.[172] It is imperative that the EU eases the accession process for the region and speeds up the integration process to reduce potential Chinese influence.[173] Serbia and Hungary are an example of the extent of the EU's

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166 Casaburi, *supra* note 72.

167 *See* Macocki, *supra* note 12.

168 *See generally* EU Proposal, *supra* note 11.

169 Ivana Sekularac, *Serbia Awards Belgrade Airport Concession to France's Vinci*, REUTERS (Jan. 6, 2018), https://www.reuters.com/article/us-serbia-airport-concession/serbia-awards-belgrade-airport-concession-to-frances-vinci-idUSKBN1EV0B3.

170 *See id.*

171 *See generally* European Neighborhood Policy and Enlargement Negotiations, *supra* note 82.

172 *See* Cerulus & Hanke, *supra* note 13 (describing Chinese influence on EU decisions through member states that receive Chinese investments).

173 *See* Kuo, *supra* note 100 (explaining that China's current investment strategy in the Balkan region is to increase its political influence in future EU members).

ability to control Chinese influence in the region.[174] By speeding the accession process, including the integration of EU law, the EU can increase its influence in the region and *de facto* apply the Proposal (should it become law).[175] This limits the window China has to invest in the region before the provisions of the Proposal come into full effect.

Accordingly, the EU released its latest Enlargement Strategy ("the Strategy") for the Western Balkans on February 6, 2018, which details the EU's revised plans to speed up accession for the region.[176] In it, the EU stresses the importance of the Western Balkans aligning their laws and foreign policies with the rest of the EU.[177] The Strategy devotes an entire section to implementing EU laws, specifically highlighting that this is the most important step the Balkans can take toward full EU accession.[178] One way of achieving this goal is for candidates to align their foreign policy with the EU by reducing their dealings with Russia and China, who are perceived threats to the EU.[179] Additionally, the EU promises to economically support the region's accession with more investments catered to infrastructure and transportation, two key investment targets for China's One Belt initiative.[180] To meet this objective, the EU will expand its investments to compete with China in key sectors by increasing pre–

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174 *See generally* Shepard, *supra* note 108 (explaining the EU's investigation into the Hungarian Government's dealings with China regarding the planned Belgrade-Budapest Railway).

175 Shepard, *supra* note 108.

176 *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee, and the Committee of the Regions*, COM (2018) 65 final at 1 (Feb. 6, 2018) [hereinafter Enlargement Strategy] (explaining that the "prospect of EU membership for the Western Balkans is in the Union's very own political, security and economic interest. It is a geostrategic investment in a stable, strong and united Europe").

177 *Id.*

178 *Id.* at 6 ("Core issues such as the rule of law, fundamental rights, strengthening democratic institutions, public administration reform, as well as economic development and competitiveness remain key priorities in the enlargement process. They form the *basis* for any aspiring Member State to ensure it has the necessary administrative and judicial capacity in place to properly apply EU rules and standards not only in law but in practice.") (emphasis added).

179 Florian Eder and Andrew Gray, *Brussels' New Balkan Strategy: Tough Love*, POLITICO (Feb. 6, 2018), https://www.politico.eu/article/europe-balkan-membership-new-strategy-tough-love/ ("It also says would-be members must demonstrate 'full alignment' with EU foreign policy — a none-too-coded signal that [the Balkans] could not continue to pursue such close relations with traditional all[ies] [such as] Russia as it does at the moment.").

180 *Id.* ("The new Commission strategy offers greater EU support to the region across a range of domains—from sending Europol advisers to boost security to making new investment commitments in areas from startups to transport infrastructure."); *see also* Enlargement Strategy, *supra* note 176.

accession assistance funding.[181] Other economic programs will also be in place to assist the economies with modernizing themselves to EU standards, with the goal of eventually achieving enough attractiveness for private EU investments to increase in other key economic sectors.[182] Perhaps the most important part of the Strategy is the EU's identification of socio–economic reform through the region's youth.[183] By increasing programs targeting youth unemployment, the EU targets the future population, allowing it to sway negative opinion in its favor through economic reform.[184] Overall, the EU outlines specific goals for the Balkans to reach and discusses economic strategies to be implemented in order to increase socio–economic support for the bloc over China.[185] Targeting youth unemployment and infrastructure appears to be a good approach to counter Chinese socio–economic influence in the region, and it will be interesting to see the effects of this new strategy and China's response to it.

The Balkans has historically been the subject of global power struggles, which account for its turbulent history.[186] It is currently

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181 Enlargement Strategy, *supra* note 176, at 12 ("The Western Balkans Investment Framework financed through the Instrument for pre-Accession Assistance will be increasingly at the core of fostering investments in the region. To that effect, it will be expanded to further attract and coordinate bilateral donors' and International Financing Institutions' investment. Increased funding in the fields of transport, energy, the social sector, the environment, and private sector development, including the digital economy is foreseen. To link socio-economic development in the region to the Union's investment priorities, the Commission aims to significantly boost the provision of guarantees under the Western Balkans Investment Framework to crowd in private investment in the region, in full complementarity with existing initiatives.").

182 Enlargement Strategy, *supra* note 176, at 13 ("The annual economic reform programme exercise led by the Commission with all Western Balkan countries is a crucial tool for supporting the modernisation of their economies and achieving closer economic coordination with the EU. The Commission will strengthen this exercise, bring it even closer in line with the existing European semester for EU Member States and provide more advanced technical assistance.").

183 Enlargement Strategy, *supra* note 176, at 13 ("Through a new reinforced social dimension for the Western Balkans, the Commission will work to support employment and social policy in the region, encouraging appropriate engagement from all levels of government, social partners and civil society. This will include an increased focus on employment and social reforms through greater monitoring of relevant policies, including in the context of the economic reform programmes. The Commission proposes an annual EU-Western Balkans Ministerial meeting on social and employment issues to exchange views.").

184 *See* Eder and Gray, *supra* note 179 (showing that the region does not perceive the EU positively with Albania and Kosovo the only exceptions).

185 *See* Eder and Gray, *supra* note 179.

186 Charles Leroux, *Balkan Turbulence Reflects Its History*, CHICAGO TRIBUNE (May 2, 1993), http://articles.chicagotribune.com/1993-05-02/news/9305020021_1_croatian-yugoslavia-croats-and-slovenes.

becoming the center of socio–economic contention between Chinese and EU influence.[187] It was previously the powder keg that ignited the continent into a world war and it now has the potential to be the powder keg that destroys the functionality of the EU's Proposal.[188] By increasing FDI in the region, China is also increasing its influence in areas that are projected to be EU members in the near future.[189] If protectionism is truly the next stage of global economics, then the EU must do whatever it can to protect its interests by replicating China's investment strategy in the Balkans and speed up the enlargement process for the region to avoid any weakness in a potential trade war with the world's newest economic hegemon.

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187 *See generally* Karnitschnig, *supra* note 87.

188 Matthew Karnitschnig, *US and Europe need to Step Up in the Balkans, McCain Says*, POLITICO (Apr. 27, 2017), https://www.politico.eu/article/us-europe-need-to-step-up-in-balkans-senator-john-mccain-says-kosovo-bosnia-albania-serbia-nato/ (stating that "the Balkans have long been considered a [European] powder keg").

189 *See* Kuo, *supra* note 100.