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HOW TO ESTABLISH LABOR PROTECTION STANDARDS FOR KENYAN LOCAL WORKERS IN CHINESE MULTINATIONAL CORPORATIONS

Qun Zhao[†]

Abstract: China has increased investment into Kenya since it proposed the Belt and Road Initiative. Many Chinese State-Owned-Enterprises (“SOEs”) and private companies have established their presence in Kenya; most of them engage in labor-intensive industries like infrastructure building or manufacturing. Labor-intensive work requires companies to hire many local workers, which gives rise to labor conflicts between Chinese employers and Kenyan employees. Major conflicts between the two parties stem from several factors including informal hiring, wrongful termination, and tense relations with Kenyan labor unions. This article suggests that Chinese companies in Kenya should comply with Kenyan labor law to resolve labor issues resulting in conflicts. Furthermore, this article suggests that Chinese companies in Kenya should internalize the management strategy of compliance with the law and make further efforts in protecting the rights of Kenyan workers through Corporate Social Responsibility (“CSR”). CSR is beneficial to Chinese companies in building positive image, forming social dialogue, improving production efficiency, and achieving sustainable development.

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I. INTRODUCTION

In recent years, China has made efforts to initiate economic and trade cooperation among its neighbors and around the world.¹ In March 2015, China issued an official document outlining the framework, geographic

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¹ People’s Daily, *Xi’s “Common Destiny” for Mankind Enlightens World*, GLOBAL TIMES (Jan. 15, 2017, 7:18 PM), <http://www.globaltimes.cn/content/1028911.shtml>.

coverage, cooperation areas and mechanisms of the Belt and Road Initiative (“BRI”).² BRI is China’s economic and trade cooperation policy proposed by President Xi Jinping, which encourages policy coordination, facilities connectivity, financial and trade cooperation, and development of people-to-people bonds.³ China welcomes the active participation of all countries and international organizations in BRI.⁴ Thus far, 125 countries from Southeast Asia, Africa, and Europe and twenty-nine international organizations have signed BRI cooperation documents with China.⁵

Since 2015, China has become the largest economic partner of African countries in infrastructure financing, trade, investment, and aid.⁶ China proposed ten major China-Africa cooperation plans in 2015 to build partnerships with African countries.⁷ The cooperation plans provide that China should help African countries with industrialization, agricultural modernization, building infrastructure, and alleviation of poverty.⁸ China benefits from the cooperation by exporting Chinese products and Chinese standards.⁹

² *Economic and Trade Information on China*, HKTDC RESEARCH (Nov. 14, 2019), <http://china-trade-research.hktdc.com/business-news/article/Fast-Facts/Economic-and-Trade-Information-on-China/ff/en/1/1X3CGF6L/1X09PHBA.htm>.

³ *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, NATIONAL DEVELOPMENT AND REFORM COMMISSION PRC, (Mar. 28, 2015), https://en.ndrc.gov.cn/newsrelease_8232/201503/t20150330_1193900.html.

⁴ People’s Daily Online, *BRI Explainer: What is the Belt and Road*, GLOBAL TIMES (Apr. 23, 2019, 10:39 AM), <http://en.people.cn/n3/2019/0423/c90000-9570953.html>.

⁵ People’s Daily International, *China has Signed Memorandum of Understanding with 37 African Countries and Union*, GLOBAL TIMES (Sep. 8, 2018, 7:36 AM), <http://en.people.cn/n3/2019/0419/c90000-9569671.html>.

⁶ Irene Yuan Sun, Kartik Jayaram, & Omid Kassiri, *Dance of the Lions and Dragons: How Are Africa and China Engaging, and How Will the Partnership Evolve*, MCKINSEY & COMPANY (June 2017), <https://www.mckinsey.com/featured-insights/middle-east-and-africa/the-closest-look-yet-at-chinese-economic-engagement-in-africa>.

⁷ *Xi announces 10 major China-Africa Cooperation Plans for Coming 3 Years*, F. CHINA-AFR. COOPERATION (Dec. 8, 2015), https://www.focac.org/eng/ljhy_1/dwjbjzhys_1/hyqk/t1322068.htm.

⁸ Zhonghua Renmin Gongheguo Shangwubu (中华人民共和国商务部) [Ministry of Commerce of the PRC], Qian Keming Chuxi Zhongfei Hezuo Luntan Yuehanneisibao Fenghui Jingmao Xinjucuo Zhuantixinwen Fabuhui (钱克明出席中非合作论坛约翰内斯堡峰会经贸新举措专题新闻发布会) [Press Conference for Qian Keming Attending the Johannesburg Forum Summit on New Economic and Trade Measures of China-Africa Cooperation], GLOBAL TIMES (Dec. 9, 2015, 0:34 AM), <http://www.mofcom.gov.cn/article/i/jyjl/k/201512/20151201205786.shtml>.

⁹ *Id.*

Kenya is an East African country with a stable political situation and a good economic foundation.¹⁰ As an East African trading center, Kenya draws increasingly more investment from China. In 2015, China's Foreign Direct Investment ("FDI") to Kenya increased from fourteen billion Ken Shilling ("KES") in 2014 to forty-two billion KES.¹¹ China has become the biggest source of foreign capital and one of the most significant business partners of Kenya.¹² According to the McKinsey Global Institute, a global think tank on business and management, more than 390 Chinese companies focused on the engineering, service, and manufacturing industries have a presence in Kenya.¹³

Labor-intensive work in the engineering and manufacturing industries has raised problems involving the protection of workers' rights. Chinese transnational companies are willing to hire Kenyan local workers because they are more familiar with the local market.¹⁴ Furthermore, a local technician is much cheaper than a Chinese technician because a work permit costs \$4,597.¹⁵ A recent World Bank survey shows that seventy-eight percent of full-time employees and ninety-five percent of part-time employees in Chinese companies are Kenyans.¹⁶ Hiring local workers can also benefit the companies' sustainable development because it helps to avoid social turbulence caused by labor influx if the labor-capital relation is well-handled.¹⁷ However, many companies only seek short-term profits¹⁸ and employ lax labor standards when it comes to hiring or firing workers. For example, many companies do not sign formal employment contracts with

¹⁰ Zhonghuanrenmin Gongheguo Zhukenniya Gongheguo Dashiguan Jingji Canzanchu(中华人民共和国驻肯尼亚共和国大使馆经济商务参赞处) [Economic and Commercial Counsellor's Office of the Embassy of the People's Republic of China in the Republic of Kenya], *Duiwai Touzi Hezuo Guobie Zhinan: Kenniya (对外投资合作国别指南: 肯尼亚)* [Guidance of Foreign Investment and Cooperation: Kenya [hereinafter Guidance] 19 (2017).

¹¹ Li Zhiwei (李志伟), *Zhongqi Touzi Gaibian le Women de Shenghuo (中企投资改变了我们的生活)*, PEOPLE'S DAILY INTERNATIONAL (人民日报国际版) (2018).

¹² *Id.*

¹³ See Sun, *supra* note 6, at 22.

¹⁴ Apurva Sanghi & Dylan Johnson, *Deal or No Deal: Strictly Business for China in Kenya?* 27 (World Bank Working Paper No. 7614, March 2016), <http://documents.worldbank.org/curated/en/801581468195561492/pdf/WPS7614.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ MICHELE RUTA ET. AL., WORLD BANK GROUP, *BELT AND ROAD ECONOMICS: OPPORTUNITIES AND RISKS OF TRANSPORT CORRIDORS* 120 (2019).

¹⁸ Chris Alden & Martyn Davies, *A Profile of the Operations of Chinese Multinationals in Africa*, 13 S. AFR. J. INT'L AFF. 83, 89 (2010).

local workers and treat them as casual workers who receive wages per day or per week.¹⁹ This practice deprives Kenyan workers of the right to join labor unions or the right to be protected by minimum wage standards and other social benefits. Kenyan workers usually go on strikes for better treatment or bring disputes to court regarding wages and wrongful termination.²⁰ Chinese companies have paid a large amount of money to settle these claims.²¹ Nevertheless, the disputes between Chinese companies and Kenyan workers negatively impact the relationship between China and Kenya. Kenyan and international civil society blame Chinese companies for poor labor protection standards.²² Without mutual understanding, these labor issues will become barriers for future China-Africa cooperation.

Looking to Kenyan labor law and labor protection standards provided by the International Labor Organization (“ILO”), this article suggests that Chinese companies should comply with Kenyan labor law regarding employment contracts, labor unions, and dispute resolution to resolve labor conflicts between Chinese companies and Kenyan employees. This article also suggests that Chinese companies should undertake Corporate Social Responsibility (“CSR”) and make investments in protecting Kenyan labor. To support these claims, this article begins by introducing the situation and necessity of labor protection for Kenyan workers in Chinese companies. Next, the article analyzes Kenyan labor regulations and the ILO Conventions to introduce labor dispute settlement mechanisms, individual labor contracts, minimum wage standards, termination procedures, and labor union participation in Kenya. The article further examines CSR goals in labor protection and discusses the benefits and barriers of applying them to Chinese companies. Finally, the article makes suggestions to Chinese companies on how to establish protection standards for Kenyan labor.

¹⁹ Timothy Webster, *China's Human Rights Footprint in Africa*, 51 COLUM. J. TRANSNAT'L L. 626, 650 (2013).

²⁰ Uwe Wissenbach & Yuan Wang, *African Politics Meets Chinese Engineers: The Chinese-built Standard Gauge Railway Project in Kenya and East Africa*, JOHN HOPKINS SCH. ADV. INT'L STUD. 19 (2017), <https://static1.squarespace.com/static/5652847de4b033f56d2bdc29/t/594d739f3e00bed37482d4fe/1498248096443/SGR+v4.pdf>.

²¹ Deng Zhicong, *Chinese Companies Labor Dilemma in Kenya*, THE CHINA-AFR. PROJECT (Sep. 9, 2019), <https://chinaafricaproject.com/chinese-companies-labor-dilemma-kenya/>.

²² Maggie Opondo, *The Impact of Chinese Firms on CSR in Kenya's Garment Sector*, INT'L RESEARCH NETWORK ON BUS. DEV. & SOC. (BDS) 8–12 (2009), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.522.4044&rep=rep1&type=pdf>.

II. CONFLICTS BETWEEN CHINESE COMPANIES AND KENYAN WORKERS

Trade and investment between countries are essential for countries' GDP growth and poverty reduction. Kenya is a political, economic, and financial center in East Africa, which makes it a strategic location for Chinese investment.²³ Chinese investment in Kenya is mainly focused on the engineering, service, and manufacturing sectors, which demand labor-intensive work.²⁴ These labor-intensive jobs increasingly give rise to labor incidents including protests, strikes, and disputes.²⁵

A. Labor Market in Kenya

Kenya is located in the center of East Africa, which gives it an advantage in developing economic and trade with countries nearby.²⁶ Kenya has adopted a series of preferential policies that encourage foreign investment.²⁷ For example, the Kenyan Government issued the Special Economic Zones Act in 2015, which provides protection and benefits to foreign enterprises that are licensed to operate in the Special Economic Zone.²⁸ The Special Economic Zones Act is an active law that encourages FDI and positions Kenya as a prominent business hub in the region.²⁹ Kenya plans to build a newly industrialized middle-income country by 2030, providing a high quality of life to all its citizens in a clean and secure environment.³⁰

Agriculture dominates the Kenyan economy, accounting for about twenty-five percent of the annual GDP and forty percent of the workforce.³¹ Seventy-three percent of the Kenyan population lives in rural areas.³² As the population of Kenya increases, land parcels with high agricultural potential

²³ GUIDANCE, *supra* note 10, at 19.

²⁴ Sun, *supra* note 6, at 22.

²⁵ Deng, *supra* note 21.

²⁶ GUIDANCE, *supra* note 10, at 19.

²⁷ GUIDANCE, *supra* note 10, at 19.

²⁸ The Special Economic Zones Act § 33 (2015), KENYA GAZETTE SUPPLEMENT No. 157 (Acts No. 16).

²⁹ *Kenya Enacts Special Economic Zones Act, 2015*, ERNST & YOUNG (Dec. 4, 2015), [https://www.ey.com/Publication/vwLUAssets/Kenya_enacts_Special_Economic_Zones_Act_2015/\\$FILE/2015G_CM6017_Kenya%20enacts%20Special%20Economic%20Zones%20Act%202015.pdf](https://www.ey.com/Publication/vwLUAssets/Kenya_enacts_Special_Economic_Zones_Act_2015/$FILE/2015G_CM6017_Kenya%20enacts%20Special%20Economic%20Zones%20Act%202015.pdf).

³⁰ *UNDAF Kenya: United Nations Development Assistance Framework*, UNDAF (2018-2022), https://www.unicef.org/about/execboard/files/Kenya-UNDAF_2018-2022-17May2018.pdf.

³¹ *FAO in Kenya: Kenya at a Glance*, FOOD & AGR. ORG. OF THE UN (2019), <http://www.fao.org/kenya/fao-in-kenya/kenya-at-a-glance/en/> (last visited Jan. 26, 2020).

³² *Rural Population (% of Total Population) – Kenya*, WORLD BANK, <https://data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=KE> (last visited Jan. 26, 2020).

are decreasing in size and farmers are being pushed into marginal areas where they become increasingly vulnerable to the weather.³³ Currently, thirty-six percent of Kenyans live below the national poverty line,³⁴ and fourteen percent of Kenyan youth are not receiving education, employment or training.³⁵ In 2018, the average annual wage for laborers in the agricultural sector in Kenya was 3,238 USD per year,³⁶ which was significantly less than the average annual wage for Kenyan labor, generally 7,052 USD per year.³⁷ Yifu Lin, a famous Chinese economist, regarded this wage disparity as a great opportunity for China-Africa cooperation.³⁸

As the cost of labor continues to rise in China,³⁹ many Chinese companies are looking for new countries with potential markets and comparatively low labor costs.⁴⁰ Kenya's great location and growing population makes it an excellent prospect for developing a labor-intensive industry; thus, many Chinese companies are undertaking infrastructure projects in Kenya. For example, China Jiangxi International Company is supported by the National Social Security Fund to build the thirty-nine-story Hazina Towers Trade Centre in Nairobi and East Africa;⁴¹ and China Roads and Bridges Corporation contracted with the Kenyan government to construct the Mombasa-Nairobi Standard Gauge Railway.⁴² Chinese investments in manufacturing activities are generally small, though there are some

³³ *Id.*

³⁴ *Poverty Headcount Ratio at National Poverty Lines (% of Population) – Kenya*, WORLD BANK, Kenya, <https://data.worldbank.org/indicator/SI.POV.NAHC?locations=KE> (last visited Jan. 26, 2020).

³⁵ WORLD BANK, *SHARE OF YOUTH NOT IN EDUCATION, EMPLOYMENT OR TRAINING, KENYA*, <https://data.worldbank.org/indicator/SL.UEM.NEET.ZS?locations=KE> (last visited Jan. 26, 2020).

³⁶ *Kenya Average Wage Earnings: PR: Agriculture, Forestry and Fishing*, CEIC, <https://www.ceicdata.com/en/kenya/average-wage-earnings-by-sector-and-industry-international-standard-of-industrial-classification-rev-4/average-wage-earnings-pr-agriculture-forestry-and-fishing>.

³⁷ *Kenya Average Wage Earning 2008-2018*, CEIC, <https://www.ceicdata.com/en/kenya/average-wage-earnings-by-sector-and-industry-international-standard-of-industrial-classification-rev-4/average-wage-earnings> (last visited Jan. 26, 2020).

³⁸ Lin Yifu (林毅夫), *Feizhou Guojia Weishenme Pinqiong* (非洲国家为什么贫穷), *Zhongguo Jingji Wushiren Luntan* (中国经济 50 人论坛) (July 10, 2017).

³⁹ *China Monthly Earnings 2000-2018*, CEIC, <https://www.ceicdata.com/en/indicator/china/monthly-earnings> (last visited Jan. 26, 2020).

⁴⁰ Lin, *supra* note 38.

⁴¹ *List of Chinese Construction Companies in Kenya*, HOW KENYA, <https://howkenya.com/list-of-chinese-construction-companies-in-kenya/> (last visited Jan. 26, 2020).

⁴² *Chinese-Built Railway Pushes forward Kenya's Modernization Drive*, CHINA DAILY (May 31, 2017), http://www.chinadaily.com.cn/china/2017-05/31/content_29551766.htm.

investments that are looking to expand.⁴³ Industrial development can solve the problem of unemployment and attract the rural population to the city, which is beneficial for both urbanization and poverty reduction.⁴⁴ The construction, service, and manufacturing sectors are not only leading sources of employment, but they are also providing infrastructure and products at lower costs, thereby making Kenya's economy more competitive overall.⁴⁵

B. Important Labor Issues in Chinese Companies that Cause Conflicts

1. Informality

Chinese companies—especially construction companies—tend to operate with a high degree of informality.⁴⁶ This means that companies do not sign formal employment contracts with their Kenyan employees,⁴⁷ and they do not have a human resources department or dedicated personnel, despite a sizeable workforce.⁴⁸ According to a World Bank survey, seventy percent of Kenyan workers in Chinese companies are part-time workers who are paid their wages on a daily basis.⁴⁹ Companies may act informally to cut costs.⁵⁰ By paying workers daily, the companies can avoid paying minimum wage, health care, social security, and overtime pay, and can also save on the cost of setting up human resources departments.⁵¹ Local workers who are not satisfied with working as casual employees, and without HR to talk to, will usually protest or strike to force their employers to renegotiate wages and benefits.⁵²

⁴³ Ying Xia, *Chinese Agricultural and Manufacturing Investment in Kenya: A Scoping Study* 13 (Johns Hopkins School of Advanced Int'l Stud., China Africa Research Initiative, Working Paper No. 30, 2019).

⁴⁴ Gary S. Fields, *The Employment Problem in South Africa*, 16 TRADE & INDUSTRY MONITOR 3, 4 (2000).

⁴⁵ Michael Chege, *Economic Relations between Kenya and China 1963-2007*, in U.S. AND CHINESE ENGAGEMENT IN AFRICA 32 (Jennifer Cook ed., Center for Strategic & International Studies, 2008).

⁴⁶ MING-JER CHEN, *INSIDE CHINESE BUSINESS: A GUIDE FOR MANAGERS WORLDWIDE* 32 (2001).

⁴⁷ Zander Rounds & Hongxiang Huang, *We Are Not so Different: A Comparative Study of Employment Relations at Chinese and American Firms in Kenya* 13 (Johns Hopkins School of Advanced Int'l Stud., China Africa Research Initiative, Working Paper No. 10, 2017).

⁴⁸ *Id.* at 14.

⁴⁹ Sanghi & Johnson, *supra* note 14, at 23.

⁵⁰ Wissenbach & Wang, *supra* note 20, at 18.

⁵¹ *Id.*

⁵² *Id.*

2. *Tense relations with Kenyan labor unions*

Chinese companies are criticized for the low participation rate of their employees in Kenyan labor unions.⁵³ Labor unions in Kenya function as independent organizations that challenge Chinese companies to protect local workers.⁵⁴ Kenyan workers attach great importance to individual rights protection,⁵⁵ and turn to labor unions whenever they are not satisfied with their employers.⁵⁶ In contrast, China only recognizes one labor union, the All China Federation of Trade Unions (“ACFTU”), which is part of the government and party bureaucracy.⁵⁷ In China, workers are not free to form or join labor unions of their choice.⁵⁸ Chinese employers have seldom experienced strikes or collective bargaining in China because ACFTU mainly concerns the stable development of the whole organization rather than organizing employee strikes.⁵⁹ Chinese companies in Kenya are unfamiliar with the operation and function of Kenyan labor unions, and are often surprised to see local workers go on strikes over seemingly “trivial” issues, such as a request for milk instead of water at lunch.⁶⁰ Many inexperienced Chinese managers try to avoid dealing with Kenyan labor unions by not allowing employees to join labor unions and avoid negotiating with labor unions. These practices create tense relationships between Chinese employers and labor unions.⁶¹

C. *Protests and strikes*

Frequent strikes and protests hurt both the daily operations of Chinese companies and the sustainable development of China-Africa cooperation.⁶²

⁵³ Ann-Sofie Isaksson & Andreas Kotsadam, *Racing to the Bottom? Chinese Development Projects and Trade Union Involvement in Africa*, 106 *WORLD DEVELOPMENT* 284, 284 (2018).

⁵⁴ Yijun Xing, Yipeng Liu, Shlomo Yedidia Tarba, & Cary L. Cooper, *Intercultural Influences on Managing African Employees of Chinese Firms in Africa: Chinese Managers’ HRM Practices*, 25 *INT’L. BUS. REV.* 28, 33 (2016).

⁵⁵ Li Fangyuan (李方园), *Lun Zanbiya Zhongzi Qiye dui Dangdi Laogong Quanyi de Falv Baohu*(论赞比亚中资企业对当地劳工权益的法律保护) [On the Legal Protection of Local Labor Rights and Interests by Chinese-Funded Enterprises in Zambia], Xiang Tan University (湘潭大学), 13 (2017).

⁵⁶ Xing, *supra* note 54, at 33.

⁵⁷ Isaksson & Kotsadam, *supra* note 53, at 286.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Wissenbach & Wang, *supra* note 20, at 20.

⁶¹ Isaksson & Kotsadam, *supra* note 53, at 286.

⁶² Max Rebol, *Public Perceptions and Reactions: Gauging African Views of China in Africa*, 5 *AFR. J. AGRIC. RES.* 3524, 3526 (2010).

There are many reasons for the disproportionately high incidence of protests or strikes at Chinese companies in Kenya.⁶³ First, some Chinese companies do not sign employment contracts with workers who are unskilled, recruited on-site, and paid daily.⁶⁴ These workers are not protected by labor unions because unions in Kenya do not accept casual workers as members.⁶⁵ Without proper communication with their employers, representation by labor unions, or resources to resolve labor issues in court, workers tend to use protests or strikes as the last resort to pressure employers to improve working conditions and increase wages.⁶⁶ Second, Chinese employers neglect the importance of communication with Kenyan labor unions. Labor unions in Kenya are influential in negotiating compensation and salary for union members and organizing employee strikes. Many Chinese employers who are unfamiliar with the functions of Kenyan labor unions fail to establish mutual understanding and mutual trust with labor unions.⁶⁷ The labor unions will initiate labor strikes when they cannot reach an agreement with Chinese employers.⁶⁸

D. *Labor disputes between employers and employees*

Kenyan local workers often sue Chinese companies for compensation in the Employment and Labor Relations Court for wrongful termination. In “Kenya Law,” an official database of Kenyan law and cases, there are currently 2,080 cases in dispute between Chinese companies and local workers.⁶⁹ The causes of action are mainly wrongful termination. The details of the cases are variable, but two common issues are often argued in court: (1)

⁶³ Sanghi & Johnson, *supra* note 14, at 24.

⁶⁴ ANTHONY WALKER, LAND, PROPERTY AND CONSTRUCTION IN THE PEOPLE’S REPUBLIC OF CHINA 91 (1991).

⁶⁵ Owidhi George Otieno, *Assessment of The State of Trade Unions in Kenya*, ALREI, <https://alrei.org/education/assessment-of-the-state-of-trade-unions-in-kenya-by-owidhi-george-otieno> (last visited Jan. 26, 2020).

⁶⁶ OECD Employment Outlook, *Collective Bargaining in a Changing World of Work* (2017), https://www.oecd-ilibrary.org/sites/empl_outlook-2017-8-en/index.html?itemId=/content/component/empl_outlook-2017-8-en.

⁶⁷ Sanghi & Johnson, *supra* note 14, at 19.

⁶⁸ China House Student Fellows, *How Chinese Companies Deal with Labor Strikes and Unions in Kenya*, THE CHINA-AFRICA PROJECT (Sep. 3, 2017), <https://chinaafricaproject.com/student-xchange/chinese-companies-deal-labor-strikes-unions-kenya/>.

⁶⁹ KENYA LAW, <http://kenyalaw.org/caselaw/index.php> (searching “China” and “Employment” as the key words in the case law database).

whether the claimant is a fixed-term contract worker; and (2) whether the termination procedure was adequate.

The three cases most representative of the issues are (1) *Sichenyi v. China National Aero-Technology Co.*, (2) *Nyamarika v. China Road & Bridge Co.*, and (3) *Yator & Cheruto v. China Hanan Co.* In *Sichenyi*, the claimant did not sign a written contract with the respondent, but he worked for a period of two years and one month for the corporation.⁷⁰ The Court ruled that the claimant was no longer a casual worker pursuant to Section 37(1) of the Employment Act.⁷¹ The court held that the employer should prove that the termination was grounded on a valid reason and that a fair procedure was followed.⁷² In *Yator*, the court found that the respondent failed to produce a written contract.⁷³ According to Section 10(7) of the Employment Act, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the respondent.⁷⁴ The court also noted that if the reason for termination was redundancy, the employer should follow Section 40(a) and (b) of the Employment Act to give notice to the local labor office and the union, or give written notice to the employee and the local labor officer at least one month before the effective redundancy date.⁷⁵ In *Nyamarika*, the court found that the respondent did not follow the termination procedure specified in Section 41 of the Employment Act to notify and conduct hearings on the grounds of misconduct.⁷⁶

III. COMPLIANCE WITH KENYAN LABOR LAW

A. *Introduction to Kenyan labor law*

The conflict of interest between labor and capital has existed since the Industrial Revolution.⁷⁷ The goal of labor law is to protect employees because

⁷⁰ Harrison Omusashi Sichenyi v. China Nat'l Aero-Tech. Int'l Engineering Cor. (2017) eK.L.R. (Kenya).

⁷¹ *Id.* at 2.

⁷² *Id.*

⁷³ Abigael Jepkosgei Yator & Anotherv. China Hanan Int'l Co. Ltd (2018) eK.L.R. (Kenya).

⁷⁴ *Id.* at 3.

⁷⁵ *Id.* at 4.

⁷⁶ Yobesh Simeon Nyamarika v. China Road & Bridge Corp. (2016) eK.L.R. (Kenya).

⁷⁷ FRIEDRICH ENGELS, THE CONDITION OF THE WORKING CLASS IN ENGLAND 102 (Oxford University Press, 2009).

they suffer from inequality in bargaining power with employers.⁷⁸ Globalization brings free relocation of capital, which can pressure countries to tailor their economies to attract and retain capital investment.⁷⁹ Some scholars believe that economic globalization will result in a race to the bottom that will squeeze out laws and regulations protecting labor among developing countries.⁸⁰ Other scholars are doubtful on the race to the bottom and believe that labor law can survive in the face of interjurisdictional competition⁸¹ because low-cost labor might be an incentive for foreign companies to invest, but lowering the labor protection standard may reduce workers' enthusiasm and even cause social unrest.⁸²

Kenyan labor law contains the rights and duties of employers and employees. Both employers and employees can assert their own rights through negotiation, collective bargaining, strikes, and disputes in court. The ILO provides guidance and supervision for Kenya labor protection standards, which further ensures that foreign companies operate in a stable and reliable legal environment. Chinese companies should comply with Kenyan labor law to mitigate damages from labor strikes and disputes, to create sustainable cooperation relationships with Kenyan workers, and to build a sound business operating environment.

The Kenyan labor movement has a long history of striking and demanding rights.⁸³ The Kenyan labor force struggled and protested for freedom and labor rights for decades prior to Kenya's independence in 1963.⁸⁴ In 1962, Kenya adopted the Industrial Relations Charter, which established organizational rights for workers and committed the government, employers and labor to tripartite consultation, collective bargaining, and peaceful settlement of trade disputes.⁸⁵ Kenya has been a member of the ILO since

⁷⁸ GUY DAVIDOV, BRIAN LANGILLE, *BOUNDARIES AND FRONTIERS OF LABOR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 3* (Oxford and Portland, Oregon, 2006).

⁷⁹ Ruth Dukes, *Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law*, 35 J. OF L. AND SOCIETY 341, 341 (2008).

⁸⁰ Steven L. Willborn, *Labor Law and the Race to the Bottom*, 65 MERCER L. REV. 369, 370 (2014).

⁸¹ *Id.* at 381.

⁸² Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 267 (2012).

⁸³ Tayo Fashoyin, *Collective Bargaining and Employment Relations in Kenya*, *International Labor Organization* (2010), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_158357.pdf.

⁸⁴ *Id.*

⁸⁵ Industrial Relations Charter (1962) (Kenya).

1964. Kenya has ratified seven of the eight ILO Conventions.⁸⁶ The seven ILO Conventions Kenya has ratified are the Right to Organise and Collective Bargaining Convention (1949), Forced Labour Convention (1930) and its 2014 Protocol, Abolition of Forced Labour Convention (1957), Minimum Age Convention (1973), Worst Forms of Child Labour Convention (1999), Equal Remuneration Convention (1951), and the Discrimination (Employment and Occupation) Convention (1958). The Conventions are used by the government and courts as guidelines, even though they are not legally binding.⁸⁷

The labor law system in Kenya provides the legal means to handle conflicts between employers and employees. Article 41 of the Kenyan Constitution recognizes the right of every worker to form or join trade unions and to go on strikes. The Constitution also allows employers to form and join employers' organizations, and encourages trade unions, employers' organizations, and employers to engage in collective bargaining.⁸⁸ The Labor Relations Act, which is the basis for social dialogue and labor relations in Kenya, spells out the establishment, functions, and operations of labor unions and employers' organizations, strikes and protests protected by law, and dispute resolution mechanism.⁸⁹ The Employment Act lays out the requirements of employment regarding employment contracts, wages, termination procedures, working conditions, and other duties employers must perform.⁹⁰ The Labor Institutions Act specifies the foundation of several labor related authorities, including the National Labor Board and the Wages Councils.⁹¹ The Industrial Training Act specifies the establishment of National Industrial Training Board to regulate institutions engaging in skill training for industry.⁹² Other regulations, including the Work Injury Benefits

⁸⁶ *Ratifications for Kenya*, INTERNATIONAL LABOR ORGANIZATION, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103315. (last visited Jan. 26, 2020).

⁸⁷ ILO, *National Labor Law Profile: Kenya*, https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang--en/index.html (last visited Jan. 26, 2020).

⁸⁸ CONSTITUTION art. 41 (2010) (Kenya).

⁸⁹ The Labor Relations Act (2012) Cap. 14 § 4 (Kenya).

⁹⁰ The Employment Act (2007) Cap. 226 § 8-51, 74 (Kenya).

⁹¹ The Labor Institutions Act (2014) Cap. 234 § 5, 43 (Kenya).

⁹² The Industrial Training Act (2012) Cap. 237 § 6 (Kenya).

Act and the Occupational Safety and Health Act, also provide legal requirements of labor protection in Kenya.⁹³

International political responses of concerns of the race to bottom led to the establishment of the International Labor Organization (“ILO”) in 1919.⁹⁴ The ILO is an international body that seeks to improve working conditions, create employment opportunities, and protect labor rights globally.⁹⁵ It engages all relevant actors including the government, employers, and workers’ organizations.⁹⁶ Representative employers’ and workers’ organizations participate in choosing subjects for new ILO standards and in drafting the texts, and their votes determine whether or not the newly drafted standard should be adopted.⁹⁷ This mechanism guarantees that the voice of employees is heard during ILO formulating the labor standard, to avoid competitive distortions and protect the fundamental rights of workers.⁹⁸ The ILO has a supervisory system, which collects information about the ratification process in member states and assists member states in meeting their obligations in relation to international labor standards.⁹⁹

Although countries are not obligated to undertake ratification of ILO Conventions, all ILO members are constitutionally obliged to respect and promote the ILO Constitution, which includes the right to freedom of association, regardless of whether a country has ratified an applicable convention granting that right.¹⁰⁰ Furthermore, the Committee on Freedom of Association in ILO is entitled to review complaints concerning violations of

⁹³ *Labor Laws*, CENTRAL ORGANIZATION OF TRADE UNIONS (COTU-K), <https://cotu-kenya.org/category/labour-laws/> (last visited Jan. 26, 2020).

⁹⁴ ROBERT J. FLANAGAN & WILLIAM B. GOULD, *INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 2* (Stanford University Press, 2003).

⁹⁵ ILO, *Rules of the Game: An Introduction to the Standards-Related Work of the International Labor Organization* 29 (2019), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_672549.pdf.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B. C. INT’L COMP. L. REV. 273, 282 (2002).

⁹⁹ RULES OF THE GAME, *supra* note 95, at 22.

¹⁰⁰ USCIB, U.S. RATIFICATION OF ILO CORE LABOR STANDARDS (April 2007) https://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf; *Ratification of ILO Core Labor Standards*, UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS (April 2007), https://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf.

the freedom of association, whether or not the member state has ratified the relevant conventions.¹⁰¹

Most Chinese companies in Kenya are unfamiliar with the local culture, language, business environment, and workers' customs. These companies are willing to comply with the local labor law to manage Kenyan workers and handle labor conflicts.¹⁰² However, companies'—especially small-scaled companies'—lack of legal knowledge and familiarity with the local language are huge barriers for their compliance with Kenyan labor law.¹⁰³ The next section of the paper will analyze Kenyan labor law to explain the dispute resolution measures and the solution for the most significant labor issues in Chinese companies in Kenya. Further, its purpose is to provide an overview of Kenyan labor law to help Chinese companies with further research and study.

B. Compliance Regarding Dispute Resolution

Kenya has complicated labor dispute resolution mechanisms. When there is a labor dispute in Kenya, the employer and the employee in dispute first go through conciliation or arbitration held by the conciliators or arbitrators that both parties agreed to in the collective agreement.¹⁰⁴ If the parties do not reach an agreement with regard to the conciliators or arbitrators, or the conciliators or arbitrators do not solve the dispute, the employer or the employee may report it to the Labor Minister, who is responsible for labor matters.¹⁰⁵ If the Minister does not resolve the dispute, then it will be referred to the Employment and Labor Relations Court.¹⁰⁶ If the Employment and Labor Relations Court does not have jurisdiction over the labor case (for

¹⁰¹ *The Committee on Freedom of Association*, INTERNATIONAL LABOR ORGANIZATION, <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm> (last visited Jan.26, 2020).

¹⁰² Xing, *supra* note 54, at 33.

¹⁰³ Martin Dewhurst, Suzanne Heywood, & Jon Harris, *The Global Company's Challenge*, MCKINSEY QUARTERLY (June 2012), <https://www.mckinsey.com/business-functions/organization/our-insights/the-global-companys-challenge>.

¹⁰⁴ The Labor Relations Act (2012) Cap. 14 § 58 (Kenya), *supra* note 89.

¹⁰⁵ *Id.* § 62.

¹⁰⁶ *Id.* § 73.

example, the Industrial Court does not deal with white-collar workers' concerns) then an ordinary court will handle the case.¹⁰⁷

1. Conciliation or Arbitration

i) Concluding a Collective Agreement

The Labor Relations Act specifies the rights of employers and employees, including the right to freedom of association.¹⁰⁸ An employer, group of employers or an employers' organization shall conclude a collective agreement with the recognized trade union setting out terms and conditions of service for all employees who are unionized.¹⁰⁹ Under the provisions of the collective agreement, a party in the labor dispute should try to resolve the dispute in conciliation by an independent and impartial conciliator appointed by agreement between the parties.¹¹⁰ A party may also resolve the dispute in arbitration by an independent and impartial arbitrator appointed by the parties.¹¹¹ The arbitral award is final and binding, and can be enforced by the Industrial Court. The award is also subject to appeal on points of law to any court or may be set aside by the Industrial Court on any ground recognized in law.¹¹²

ii) Reporting to The Minister of Labor

A party in a labor dispute who represents a trade union, employer or employers' organization can also report the dispute to the Minister of Labor if there is no resolution in the conciliation or arbitration prescribed in the collective agreement.¹¹³ The Labor Relations Act provides that, "The Minister shall appoint a conciliator to attempt to resolve the dispute, unless the conciliation procedures in collective agreement have not been exhausted, or a law or collective agreement prohibits negotiation on the issue in dispute."¹¹⁴

¹⁰⁷ NATION LABOR LAW PROFILE: KENYA, INTERNATIONAL LABOR ORGANIZATION, https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang-en/index.htm (last visited Jan. 26, 2020).

¹⁰⁸ The Labor Relations Act (2012) Cap. 14 § 4 (Kenya), *supra* note 89.

¹⁰⁹ *Id.* § 57(1).

¹¹⁰ *Id.* § 58(1)(a).

¹¹¹ *Id.* § 58(1)(b).

¹¹² *Id.* § 58(3).

¹¹³ *Id.* § 62.

¹¹⁴ *Id.* § 65.

2. *The Employment and Labor Relations Court*

The Industrial Court, which is also called the Employment and Labor Relations Court, was founded in its current form in 1971.¹¹⁵ If a trade dispute is not resolved after conciliation or arbitration, a party to the dispute may refer it to the Industrial Court.¹¹⁶ When a party issues a notice of a strike or lock-out that is prohibited under the law, or the party failed to participate in conciliation in good faith, another party who received the notice may apply to the Industrial Court without exhausting conciliation procedures.¹¹⁷

It should be noted that the Industrial Court is not part of Kenya's judicial system; it is a permanent and independent tribunal established by the President of Kenya.¹¹⁸ Eight judges are appointed by the Minister of Labor after consultation with the Central Organization of Trade Unions ("CETU") and the Federation of Kenyan Employers ("FKE").¹¹⁹ Each judge can appoint two assessors to help, one to represent labor and one for management.¹²⁰ The decisions made by the Industrial Court are not legally binding. However, the parties are generally willing to accept them to resolve their dispute.¹²¹

3. *The Ordinary Court*

Kenya has four levels of judicial systems: a Court of Appeals, a High Court, and two levels of magistrate courts.¹²² According to the Labor Relations Act, only unions, employers, and their organizations have standing before the Industrial Court¹²³, and since management staff is excluded from membership in trade unions, the Industrial Court does not deal with white-collar workers' concerns.¹²⁴ The High Court can also review cases that are brought to challenge the awards and decisions of the Industrial Court.¹²⁵

¹¹⁵ National Labor Law Profile: Kenya, *supra* note 87.

¹¹⁶ The Labor Relations Act (2012) Cap. 14 § 73 (Kenya), *supra* note 89.

¹¹⁷ *Id.* § 77.

¹¹⁸ John L. Brown & J. Douglas Muir, *The Functioning of the Kenyan Industrial Court*, 14 J. MODERN AFR. STUD. 700, 701 (1976).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Cockar Saeed, *The Industrial Court and Labor Relations in Kenya*, 2 EAST AFR. L.J. 257, 261 (1966).

¹²² CONSTITUTION arts. 61–64 (2010) (Kenya).

¹²³ The Labor Relations Act (2012) Cap. 14 § 73 (Kenya), *supra* note 89.

¹²⁴ National Labor Law Profile: Kenya, *supra* note 87.

¹²⁵ *Id.*

Therefore, a significant number of labor cases are handled by the ordinary court.¹²⁶

C. Compliance Regarding Employment Contracts

In Kenya, employment is generally seen as a relationship negotiated by the employer and the employee based on their special needs.¹²⁷ The relationship between the employer and the employee is governed by contract law, common law principles, and labor laws.¹²⁸ The Employment Act prescribes the form, basic information, and rules that govern wages, working conditions, leave and rest, health and safety, and termination of employment.¹²⁹ The Labor Relations Act states that the terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement, and the award of compensation from the Industrial Court shall be integrated in every employment contract related to the award.¹³⁰

Employment contracts can be in either oral or written form.¹³¹ The written contract should apply if the duration of employment is longer than three months.¹³² Employers who do not sign formal employment contracts with employees will not only face the claim of wages and welfare, but also bear the burden of proving the terms of the employment.¹³³ Without an employment contract, the court will usually accept the evidence of the claimant, unless there is strong evidence that suggests otherwise.¹³⁴ A contract should include payment, working hours, annual leave, and working conditions to comply with The Employment Act.¹³⁵ Once the Minister publishes a wage order in the *Gazette*, it constitutes minimum conditions of employment in the contract between employer and employee.¹³⁶ The employer shall keep a

¹²⁶ *Id.*

¹²⁷ Ruth Tubey, Kipkemboi Jacob Rotich & Margaret Bundotich, *An Overview of Industrial Relations in Kenya*, 5 RES. HUMAN. & SOC. SCI. 221, 222 (2015).

¹²⁸ *Id.*

¹²⁹ The Employment Act (2007) Cap. 226 § 8-51, 74 (Kenya), *supra* note 90.

¹³⁰ The Labor Relations Act (2012) Cap. 14 § 59 (Kenya), *supra* note 89.

¹³¹ The Employment Act (2007) Cap. 226 § 8 (Kenya), *supra* note 90.

¹³² *Id.* § 9.

¹³³ Yobesh Simeon Nyamarika v. China Road & Bridge Corp. (2016) eK.L.R. 4 (Kenya).

¹³⁴ *Id.* at 6.

¹³⁵ The Labor Relations Act (2012) Cap. 14 § 26 (Kenya), *supra* note 89.

¹³⁶ *Id.* § 48.

record to show whether or not he is complying with the wage order and retain the records for at least three years after the date of the last entry.¹³⁷

Kenyan labor law also requires a strict termination procedure. Employers should give notice to their employees regarding the reason for the termination before they fire them.¹³⁸ To determine wrongful termination, a labor office or the Industrial Court shall consider (1) the procedure adopted by the employer in reaching the decision to dismiss the employee, (2) the conduct and capacity of the employee up to the date of termination, (3) the extent to which the employer has complied with the requirements relating to the termination, (4) the previous practice of the employer and the employee.¹³⁹ Furthermore, the reasons of wrongful termination may include: pregnancy, going on leave, an employee's membership of a trade union, an employee's race, color, tribe, sex, religion, political opinion, HIV status or disability, an employee's participation in a lawful strike, or the participation in the activities of a trade union.¹⁴⁰

D. Compliance Regarding Union Participation

The Kenyan Constitution recognizes the right of every worker to form or join trade unions and go on strikes. The Labor Relations Act further elaborates the operational rules of Kenyan labor union and strikes protected by law. When a company has more than half of its employees participate in the same labor union, the labor union is recognized by the company for collective bargaining.¹⁴¹ The company must conclude a collective agreement with the recognized labor union setting out terms and conditions of service for all unionizable employees covered by the recognition agreement.¹⁴² Unionizable employee means employees eligible for membership in the labor union, which include union members and other employees who are not the union members.¹⁴³ The recognized labor union may require the Minister of Labor to order the company to deduct agency fees from the wages of unionizable employees who are not members of the labor union.¹⁴⁴ If more

¹³⁷ *Id.* § 53.

¹³⁸ The Employment Act (2007) Cap. 226 §§ 40, 41 (Kenya), *supra* note 90.

¹³⁹ *Id.* § 45 (Kenya).

¹⁴⁰ *Id.* § 46.

¹⁴¹ The Labor Relations Act (2012) Cap. 14 § 26 (Kenya), *supra* note 54.

¹⁴² *Id.* § 57.

¹⁴³ *Id.* § 2.

¹⁴⁴ *Id.* § 49.

than five employees in one company belong to the same labor union, the labor union may require the Minister of Labor to order the company to deduct the membership fees from the wages of the union members, and submit the money deducted to the labor union.¹⁴⁵

Employees can participate in a strike if (1) the dispute between employers and the employees concerns terms and conditions of employment or recognition of a trade union; (2) the dispute is unresolved after conciliation; and (3) seven days' written notice of the strike has been given to the employers and the Minister of Labor.¹⁴⁶ Employees are prohibited from strikes if the dispute concerns the issue that is regulated by a collective agreement binding on the parties to the dispute, or a collective agreement binding on the employees prohibits strikes on the issue in dispute.¹⁴⁷

Companies often worry that unions will affect employees' productivity by mobilizing them to go on strikes when peaceful negotiations fail.¹⁴⁸ However, companies can reduce the risk of labor strikes if more than half of their employees join the same labor union. Companies can negotiate with the recognized labor union to include regulations for the common issue of labor disputes, which will prohibit employees from striking when disputes occur. Companies can also include conciliation and arbitration clauses in their collective agreements, in this way, employees must go through conciliation or arbitration before they can go on strikes. Furthermore, studies by a Chinese construction firm in Ghana show that forming labor unions can not only improve the working and living conditions of employees, but also improve the relations between Chinese employers and local employees.¹⁴⁹ Joining a labor union can also enhance employees' productivity by enhancing staff

¹⁴⁵ *Id.* § 48.

¹⁴⁶ *Id.* § 76.

¹⁴⁷ *Id.* § 78.

¹⁴⁸ John Warua Mwathe, Hazel Gachunga & Esther W. Waiganjo, *Influence of Trade Union Participation on Employees' Productivity in TVET Institutions in Kenya*, 4 STRATEGIC J. BUS. & CHANGE MGMT. 428, 436 (2017), <https://pdfs.semanticscholar.org/7ed9/66badcb8a96b5a4e4cb1c6c7d6a24c24fd0b.pdf>.

¹⁴⁹ KWABENA NYARKO OTOO, TRADE UNION CONGRESS, UNIONS CAN MAKE A DIFFERENCE: GHANA I AM WORKERS IN A CHINESE CONSTRUCTION FIRM AT BUI DAM SITE 36 (2013), https://www.ghanatuc.org/Unions-Can-Make-a-Difference_Employment-Ghanian-Workers-in-a-Chinese-Construction-Firm-at-Bui-Dam-Site.pdf.

professionalism and production through training, awarding employees, and pushing for enactment of law.¹⁵⁰

IV. UNDERTAKING CORPORATE SOCIAL RESPONSIBILITY

A. *Importance of Undertaking CSR*

Although Kenyan labor law prescribes that companies must form employment contracts that follow the requirements of minimum wages, conditions of employment, and termination procedure, the law can only provide remedies to solve the conflicts rather than establish constructive standards of labor protection. Companies have ways to cut corners and avoid legal punishment such as pressuring employees not to join labor unions by threatening to fire them.¹⁵¹ This may control the labor strike or labor dispute for a while, but it would cause high numbers of unhappy employees, and might even lead to violence or social unrest.¹⁵² The Belt and Road Initiative aims to connect China to the world in multiple dimensions, including physical linkages, economic cooperation, policy coordination, trade and financing partnerships, and social and cultural alliances.¹⁵³ Encouraging Chinese companies in Kenya to undertake social responsibility will help to achieve these goals.

1. *Definition of CSR*

The ILO defines CSR as a way in which enterprises consider “the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors.”¹⁵⁴ Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing more into human capital, the environment and the relations with stakeholders.¹⁵⁵ CSR is

¹⁵⁰ Mwathe, Gachunga, & Waiganjo, *supra* note 148, at 444–46.

¹⁵¹ China House Student Fellows, *supra* note 68.

¹⁵² Dallas, *supra* note 82.

¹⁵³ Muhammad Sabil Farooq, Tongkai Yuan, Jiangang Zhu & Nazia Feroze, *Kenya and the 21st Century Maritime Silk Road: Implications for China-Africa Relations*, 4 CHINA Q. INT’L STRATEGIC STUD. 401, 404 (2018).

¹⁵⁴ ILO, *The ILO and Corporate Social Responsibility (CSR)*, https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_116336.pdf (last visited Jan.26, 2020).

¹⁵⁵ ILO, *International Instruments and Corporate Social Responsibility 1* (2017) https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/instructional material/wcms_227866.pdf (last visited Jan.26, 2020).

a commitment by firms to behave reasonably and responsibly to promote sustainable economic development by working with its employees and the local community to improve their quality of life in ways that are good for both business and development.¹⁵⁶

CSR has different meanings and value in different contexts, depending on local factors including culture, environmental conditions and legal frameworks.¹⁵⁷ Kenya is a developing country with high levels of poverty and inequality. The social challenges should provide an impetus to develop a CSR initiative in such contexts, where it gains resonance among local communities and the general public.¹⁵⁸ However, only a few studies have been undertaken on CSR in African countries.¹⁵⁹ Without guidance, CSR can be abused and misused by corporate and political leaders to gain social and political power. For instance, most CSR initiatives in Africa provide short-term benefits, such as cash, food or other material donations, that are not based on long-term social perspectives.¹⁶⁰

B. Undertaking CSR to Protect Kenyan Labor

1. CSR from ILO Perspective

The labor protection standards in multinational companies promoted by the ILO are laid down in the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (“MNE Declaration”), which provides guidance for achieving decent work, sustainable enterprises, and an improved sharing of the benefits of FDI.¹⁶¹ The MNE Declaration requires governments, employers’ and workers’ organizations to “respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards.”¹⁶²

¹⁵⁶ Thomas Kimeli Cheruiyot & Patrick Onsando, *Corporate Social Performance Cases from Practice*, in *CORPORATE SOCIAL PERFORMANCE IN THE AGE OF IRRESPONSIBILITY: CROSS NATIONAL PERSPECTIVE* 93 (Agata Stachowicz-Stanusch ed., 2016).

¹⁵⁷ *Id.* at 102.

¹⁵⁸ THOMAS KIMELI CHERUIYOT & DANIEL KIPKIRONG TARUS, *CORPORATE SOCIAL RESPONSIBILITY POLICY IN THE UNITED STATES OF AMERICA* 172 (Samuel Idowu ed., 2017).

¹⁵⁹ Cheruiyot & Onsando, *supra* note 156, at 92.

¹⁶⁰ *Id.*

¹⁶¹ RULES OF THE GAME, *supra* note 95, at 20.

¹⁶² ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* 4 (2017), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf (last visited Jan.26, 2020).

The relevant international standards include freedom of association, elimination of forced labor, abolition of child labor, and elimination of discrimination in employment.¹⁶³ According to the Declaration, the goals of CSR inside the company are to: stimulate sustainable economic growth, promote the well-being of employees, and create employment; complement public social security systems; promote non-discrimination principles; and provide stable employment for workers.¹⁶⁴ Minimum wages should be no less favorable than those offered by comparable employers in the host country.¹⁶⁵ The goals of CSR in companies' interactions with other actors include providing relevant training for local workers, to meet the needs of the enterprises as well as the development policies of the countries.¹⁶⁶

2. *Countries' Regulations of CSR*

CSR is generally voluntary. Companies integrate sustainability into their business models to get an edge on the competition, or to preserve their brand reputation and public image. India is the first country to pass a law mandating companies to spend two percent of their profit on CSR activities.¹⁶⁷ China incorporated principles of CSR in Corporation Law to encourage companies fulfilling obligations towards non-shareholders.¹⁶⁸ It provides the legal foundation of CSR stating that corporations are obliged to take social responsibility.¹⁶⁹ China also issued a more specific guideline for state-owned enterprises directly under the central government to fulfill CSR, including labor protection.¹⁷⁰

The *Guidelines for Central State-Owned-Enterprises (CSOEs) regarding Implementation of Corporate Social Responsibility* addresses the

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 6–9.

¹⁶⁵ *Id.* at 11.

¹⁶⁶ *Id.* at 10.

¹⁶⁷ Umakanth Varottil, *Initial Experience in Implementing CSR Law in India*, OXFORD BUS. LAW BLOG (Jul. 6, 2018), <https://www.law.ox.ac.uk/business-law-blog/blog/2018/07/initial-experience-implementing-csr-law-india>.

¹⁶⁸ Gongsì Fǎ (公司法) [Company Law], (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2013, effective Mar. 1, 2014), art. 5, 2013 FALŪ HUĪBIAN [2], *translated in Company Law of the People's Republic of China*, INVEST IN CHINA (Dec. 28, 2013), http://www.fdi.gov.cn/1800000121_39_4814_0_7.html.

¹⁶⁹ *Id.*

¹⁷⁰ *Guidelines to the State-owned Enterprises Directly under the Central Government*, STATE-OWNED ASSETS SUPERVISION AND ADMINISTRATION COMMISSION OF THE STATE COUNCIL, http://en.sasac.gov.cn/2011/12/06/c_313.htm (last updated Dec. 6, 2011).

importance of Chinese companies undertaking CSR in the context of economic globalization.¹⁷¹ It requires CSOEs to sign employment contracts with employees, adhere to equal pay for equal work, avoid any kind of discrimination, provide on-duty training, and implement the employee representatives' convention system.¹⁷² The two regulatory documents mark the beginning of the CSR movement in Chinese companies.¹⁷³ However, both regulations have limitations: the Corporation Law only provides general principles for companies to undertake CSR; the guideline does not mandate CSR spending, and it makes requirements for CSOEs instead of all the Chinese companies.

C. *Benefits and Barriers for Chinese Companies to Undertake CSR*

1. *Benefits*

Chinese multinational companies are often criticized for their labor protection standards that mirror the practices in China.¹⁷⁴ There is no dispute that China's economy has developed rapidly in the past thirty years, but prioritization of economic development over other forms of human development has led to many prominent labor protection issues.¹⁷⁵ For example, China has led the world in deaths attributable to mining accidents.¹⁷⁶ However, China has realized the importance of sustainable development, and is taking more responsibility around the world in developing social responsibility.¹⁷⁷

¹⁷¹ *Id.*

¹⁷² *Id.* §§ 3–14.

¹⁷³ Shuaihua Cheng & Guoyong Liang, *Social Responsibility of Chinese Investment in Africa: What does it Mean for EU-China Cooperation on Development Policy towards Africa?*, INT'L CENTRE FOR TRADE AND SUSTAINABLE DEV. (May 6, 2011), <https://www.ictsd.org/bridges-news/trade-negotiations-insights/news/social-responsibility-of-chinese-investment-in-africa>.

¹⁷⁴ Maggie Opondo, *The Impact of Chinese Firms on CSR in Kenya's Garment Sector* 8 (Int'l Research Network on Bus., Dev., and Society ed., 2009), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.522.4044&rep=rep1&type=pdf>.

¹⁷⁵ Webster, *supra* note 19, at 650.

¹⁷⁶ Mark Gregory, *Why Are China's Mines So Dangerous?*, BBC NEWS (Oct. 7, 2010), <http://www.bbc.co.uk/news/business-11497070>.

¹⁷⁷ CSR-CHINA, *Zhongguo Qiye Shehuizeren Fazhan Qushi Shishenme* (中国企业社会责任发展的趋势是什么?) [*What is the development trend of corporate social responsibility in China?*] (Jan. 6, 2016), <https://www.csr-china.net/a/zixun/wenda/2016/0106/3537.html> (last visited Feb. 28, 2020).

Research has shown that the number of CSR reports issued by Chinese companies has been increasing yearly from 2001 to 2018.¹⁷⁸ The CSR activities in China involve greater government involvement instead of private sector or non-government organization participation.¹⁷⁹ State-Owned Enterprises (“SOEs”) are seen as the representatives of the will and needs of the Chinese government; therefore, they are required to integrate more comprehensive CSR into their business plans.¹⁸⁰ In 2004, State Grid Corporation of China produced the first independent CSR report,¹⁸¹ which demonstrated that Chinese companies have started to understand the importance of CSR.

Companies with more acceptable practices within a society will have more satisfied customers, employees, and communities, which would enhance longevity and the ability to thrive in an adverse environment.¹⁸² The motivation for Chinese companies to undertake CSR has two parts.¹⁸³ First, Chinese companies consider CSR as an effective tool to communicate with their customers and society to gain social recognition with contributions to the public good. CSR helps companies to update employees’ expectations and company systems, broaden business scope, and improve management skills.¹⁸⁴ At the same time, CSR-related activities give employees a higher sense of pride in their work and encourage them to continue to make more contributions to society.¹⁸⁵

Second, publishing CSR reports helps Chinese companies earn a good international reputation and gain easier access to the world supply chain.¹⁸⁶ CSR reports are a communication method through which companies regularly disclose the impact of their CSR concepts, strategies, and activities on

¹⁷⁸ YIN GEFEL, GOLDENBEE RESEARCH ON CORPORATE SOCIAL RESPONSIBILITY REPORTING IN CHINA 14 (2018).

¹⁷⁹ Biyan Tang, *Contemporary Corporate Social Responsibility (CSR) in China: A Case Study of a Chinese Compliant*, 1 SEVEN PILLARS INSTITUTE MORAL CENTS 13, 15 (2012).

¹⁸⁰ XIAOTIAN SUN, CHINESE FDI: A STUDY OF THE IMPACT OF CHINESE INFRASTRUCTURE INVESTMENTS IN KENYA, AFRICA 33 (Columbia Academic Commons 2015).

¹⁸¹ Tang, *supra* note 179, at 17.

¹⁸² Cheruiyot & Onsando, *supra* note 156, at 96.

¹⁸³ *Id.* at 18.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Fangfang Wu (吴芳芳), *Guoyou Zhongzi Qiye zai Haiwai Jingyingzhong de Shehui Zeren Wenti Yanjiu* (国有中资企业在海外经营中的社会责任问题研究) [Doctoral Thesis: The Study of Corporate Social Responsibility of Chinese State-owned Company Overseas] 66 (Peking University June 2013).

economic, social, and other dimensions to stakeholders.¹⁸⁷ Sustainable development has become a norm for multinational corporations from a social perspective.¹⁸⁸ The United Nations Sustainable Development Goals include increasing employment opportunities, reducing informal employment and labor market inequality, promoting safe and secure working environments, and improving access to financial services to ensure sustainable and inclusive economic growth.¹⁸⁹ Chinese companies can promote sustainable development by integrating these goals into their CSR strategies. In addition, undertaking CSR can benefit China's Belt and Road Initiative by enhancing economic cooperation, policy coordination, trade and financing partnerships, and social and cultural alliances between countries.¹⁹⁰

2. Possible Barriers

As discussed before, the Chinese government, which is the shareholder of Chinese SOEs, has much more influence on SOEs' CSR strategies than market imperatives. The lack of corporate governance codes and a developed system of CSR law and regulations lead to uneven CSR practices within SOEs.¹⁹¹ For example, some companies misuse CSR by selecting one isolated issue and attempting to magnify and use it for advertising purposes to try to earn a good reputation.¹⁹² This practice can benefit a limited group of people for a short period of time, but it is not beneficial for long-term sustainable development goals.¹⁹³

Private companies are also major sources of Chinese investment in Kenya.¹⁹⁴ They are more market-driven and less influenced by the

¹⁸⁷ NBD (每日经济新闻), Zhongguo Jingrong Qiye Zeren Baipishu (中国金融企业社会责任白皮书) (2019), http://nbd-panda-food.oss-cn-beijing.aliyuncs.com/zhuanti_file/tFmMGZRBGX.pdf (last visited Jan. 26, 2020).

¹⁸⁸ SHEILA BONINI, STEPHAN GÖRNER & ALISSA JONES, MCKINSEY GLOBAL SURVEY RESULTS: HOW COMPANIES MANAGE SUSTAINABILITY 1 (McKinsey & Company ed., Mar. 2010), <https://www.mckinsey.com/business-functions/sustainability/our-insights/how-companies-manage-sustainability-mckinsey-global-survey-results#>.

¹⁸⁹ *Progress of Goals 8 in 2019*, UNITED NATIONS SUSTAINABLE DEV. GOALS KNOWLEDGE PLATFORM, <https://sustainabledevelopment.un.org/sdg8>.

¹⁹⁰ Farooq, *supra* note 153, at 404.

¹⁹¹ Alden & Davies, *supra* note 18, at 89.

¹⁹² Pratima Bansal, Guoliang F. Jiang & Jae C. Jung, *Managing Responsibly in Tough Economic Times: Strategic and Tactical CSR During the 2008-2009 Global Recession*, 48 LONG RANGE PLANNING 69, 70 (2014).

¹⁹³ *Id.*

¹⁹⁴ Sun, *supra* note 6, at 13.

government than SOEs.¹⁹⁵ Exactly ninety-five percent of private Chinese companies have recognized the importance of undertaking CSR. However, twenty-four-and-a-half percent of the companies believe that undertaking CSR would cause a serious financial burden.¹⁹⁶ Private companies rely on their reputation and connections in local areas to sell their products; they are more sensitive to the needs or responses of local people.¹⁹⁷ However, some of the private companies, especially the start-up companies, are short on capital, which becomes financial barriers for them to undertake CSR. Companies engaging in traditional industries that gain market share by reducing costs are also unwilling to undertake CSR.¹⁹⁸

V. SUGGESTIONS FOR CHINESE COMPANIES IN KENYA TO ESTABLISH LABOR PROTECTION STANDARDS

To resolve the problem of informality, Chinese companies should make efforts to understand local labor laws and regulations through self-study or by hiring experienced human resources (“HR”) personnel who know the local laws and policies.¹⁹⁹ Local HR personnel can help the company select workers for positions, negotiate wages, and keep records of attendance.²⁰⁰ If a company is too small to have an HR department, it can hire workers through a labor agency or educational institute.²⁰¹ For projects lasting more than three months, companies should be careful in selecting workers, and provide employment contracts with terms and conditions according to Kenyan labor law.²⁰²

Chinese companies should also adapt to the law and let employees choose to form or join labor unions. Some Chinese construction companies have signed collective agreements with the Kenya Building, Construction, Timber and Furniture Industries Employees Union.²⁰³ Companies who have

¹⁹⁵ Sun, *supra* note 6, at 10.

¹⁹⁶ Libing Shu, *Empirical Research on Cognition and Practice of Corporate Social Responsibility of Chinese Private Enterprises*, 24 *SOFT SCIENCE* 97, 99 (2010).

¹⁹⁷ Xudong Chen & Xunda Yu, *Status Quo of Awareness of Private Enterprises on CSR and Comments*, 37 *J. ZHEJIANG UNI.* 69, 75 (2007).

¹⁹⁸ Shu, *supra* note 179, at 101.

¹⁹⁹ Rounds & Huang, *supra* note 47, at 14.

²⁰⁰ *Id.* at 15.

²⁰¹ *Id.*

²⁰² The Employment Act (2007) Cap. 226 § 8 (Kenya), *supra* note 90.

²⁰³ Rosemary Mwanza, *Chinese Foreign Direct Investment and Human Rights in Kenya: A Mutually-Affirming Relationship*, 2 *STRATHMORE L.J.* 133, 139 (2016).

established mutual understanding and mutual trust with the labor union can negotiate with employees through the labor union. Companies can also solve disputes before being sued in the Industrial Court by complying with the collective agreement with labor unions to conduct conciliation or arbitration.²⁰⁴ Even when the case goes to the Industrial Court, companies have the chance to prevail by providing employment contracts, attendance records, and evidence regarding reasons for termination.²⁰⁵

To avoid frequent labor strikes, companies should try to communicate with workers to find out their needs, avoid discrimination in recruitment, and try to solve conflicts during conciliation or arbitration. Providing vocational training is a good way to avoid discrimination in recruitment, and it is also beneficial for Chinese companies to get familiar with the language, culture, habits, and needs of Kenyans. In the Mombasa-Nairobi Standard Gauge Railway Project (“SGR Project”), the China Road and Bridge Corporation in Kenya built a Technology Transfer Competence Training facility to train local workers in skills useful for the project and their future career.²⁰⁶ Companies benefit from the training by earning a good reputation and creating a talent pool in Kenya.²⁰⁷ If the company later recruits technicians, it can choose from local workers instead of hiring Chinese workers at relatively high prices. Moreover, youth employment in African countries is widely recognized as a way of giving a person a chance to progress in life beyond the mere material dimension.²⁰⁸

Young Kenyan employees expect their employers to act as an advisor, guardian, and protector.²⁰⁹ But Chinese employers and employees do not often mingle with the locals; they appear to locals as hardworking but they never communicate or engage with the community.²¹⁰ Chinese companies are used to adopting a high-pressure management style and use bonus and overtime

²⁰⁴ The Labor Relations Act (2012) Cap. 14 § 58 (Kenya), *supra* note 89.

²⁰⁵ Abigael Jepkosgei Yator & Anotherv. China Hanan Int’l Co. Ltd (2018) eK.L.R. (Kenya).

²⁰⁶ Wissenbach & Wang, *supra* note 20, at 35.

²⁰⁷ United Nations Dev. Programme Rep. Office in China, 2017 Report on the Sustainable Development of Chinese Enterprises Overseas 47 (2017).

²⁰⁸ Karsten Giese, *Same-Same but Different: Chinese Traders’ Perspectives on African Labor*, 67 CHINA J. 134, 142 (2013).

²⁰⁹ *Id.*

²¹⁰ Wissenbach & Wang, *supra* note 20, at 25.

incentives to solve efficiency issues.²¹¹ This management style pushes Kenyan workers away because work constitutes only part of their life, and community and family are more important.²¹² Therefore, it is essential for Chinese employers to balance the workload and community building.

For the possible barriers of CSR, both China and Kenya can formulate policies to guide companies toward undertaking CSR. For example, Kenya may offer favorable market access conditions for foreign corporations undertaking CSR,²¹³ and China can issue more specific laws or regulations encouraging or requiring SOEs to undertake CSR.²¹⁴ For example, China can require SOEs to produce CSR reports annually to communicate with local communities, Kenyan labor unions, the Kenyan government, and other parties in supply chains.²¹⁵ For private companies, China can provide specific bank loans for start-up companies or small-scaled manufacturing companies that adopt labor protection policies, or encourage public-private partnership in making investments in the foreign countries.²¹⁶ Providing proper training for Chinese companies is also a way to promote awareness of CSR.²¹⁷

VI. CONCLUSION

The most serious labor issues in Chinese companies in Kenya include: (1) not signing employment contract with workers; (2) tense relations with labor unions; and (3) misunderstandings between employers and workers. These issues have caused frequent strikes and labor disputes that are harmful to the operation and the public image of Chinese companies. The basic method to solve these issues is to comply with Kenyan labor laws. Chinese companies should be aware of the importance of signing employment contracts with local employees, which can be offered as evidence in labor disputes. Allowing workers to join labor unions is a great way to encourage social dialogue and enhance communication between workers and employers, which is beneficial in avoiding labor strikes and disputes. Furthermore, Chinese companies can

²¹¹ Duanfang Tao (陶短房), *Zhongfang Guanli Renyuan Weihe Saoshe Zanbiya Kuangong?* (中方管理人员为何扫射赞比亚矿工?), *NANFANG DAILY* (Sept. 19, 2011), <https://view.news.qq.com/a/20110919/000037.htm>. (last visited Jan.26, 2020)

²¹² Xing, *supra* note 54, at 32.

²¹³ The Special Economic Zones Bill (2015) § 33 (Kenya).

²¹⁴ Company Law of the People's Republic of China, *supra* note 152.

²¹⁵ Fangfang Wu, *supra* note 186, at 67.

²¹⁶ *Id.* at 102.

²¹⁷ *Id.* at 78.

internalize the policy of compliance with labor laws, build harmonious relations with Kenyan workers by providing on-duty training, and eliminate discriminatory practices by undertaking CSR. Chinese companies can improve the management skills and gain easier access to global supply chains through producing CSR reports.²¹⁸

²¹⁸ *Id.* at 66.