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The Center cannot Hold: Assessing the Reach of China's Labor Protections of Migrant Workers in Africa

Tonya Rodgers*

*Fordham University School of Law

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THE CENTER CANNOT HOLD:¹ ASSESSING THE REACH OF CHINA'S LABOR PROTECTIONS TO MIGRANT WORKERS IN AFRICA

*Tonya Rodgers**

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* J.D. Candidate, May 2013, Fordham University School of Law; B.A., Anthropology and English, 2004, Case Western Reserve University. The Author would like to thank Professor Carl Minzner and the editorial board of the *Fordham International Law Journal* for their valuable input and guidance. She also would like to thank Nancy, Tom, and Joe Rodgers, and Harry Jean-Pierre for their support and encouragement.

1. "Things fall apart; the centre cannot hold . . ." William Butler Yeats, *The Second Coming*, in WILLIAM BUTLER YEATS: SELECTED POEMS AND FOUR PLAYS 89, 89 (4th ed. 1996).

INTRODUCTION

In November 2011, Human Rights Watch (“HRW”) released, to great media attention, a report documenting the abuses by Chinese state-owned enterprises (“SOEs”) against local miners in Zambia.² A sweeping indictment of their labor practices, the report charges that, among other things, Chinese mine operators routinely coerce Zambian workers to toil in unsafe and unhealthy conditions for long hours at low wages in violation of domestic and international law.³ This is one of the only in-depth studies by a nongovernmental organization (“NGO”) to focus on China’s human rights record in Africa thus far.⁴ Its authors, however, are certainly not the first to allege widespread labor violations by Chinese firms throughout the continent.⁵ A growing body of literature is exposing similar abuse of

2. HUMAN RIGHTS WATCH, “YOU’LL BE FIRED IF YOU REFUSE”: LABOR ABUSES IN CHINESE STATE-OWNED COPPER MINES 1–5 (2011) (documenting numerous abuses by Chinese mine operators in Zambia). *See, e.g.*, David Smith, *Chinese Mining Firms in Zambia Under Fire for Mistreating Workers*, GUARDIAN (U.K.), Nov. 3, 2011, <http://www.guardian.co.uk/global-development/2011/nov/03/chinese-mining-zambia-mistreating-workers> (reporting on the Human Rights Watch (“HRW”) study and additional labor developments in Zambia’s mining industry); Ann M. Simmons, *Chinese Copper Firms in Zambia Abusing Workers, Rights Group Says*, L.A. TIMES—WORLD NOW BLOG (Nov. 3, 2011, 2:17 PM), http://latimesblogs.latimes.com/world_now/2011/11/chinese-companies-zambia-abuse.html (summarizing the report and highlighting key findings); Matt Wells, *China in Zambia: Trouble Down in the Mines*, HUFFINGTON POST (Nov. 21, 2011, 2:20 PM), http://www.huffingtonpost.com/matt-wells/china-in-zambia-trouble-d_b_1102080.html (featuring an editorial by one of the researchers of the HRW report). HRW is a nonprofit, international nongovernmental organization that investigates and reports on human rights issues throughout the world. *See About Us*, HUMAN RIGHTS WATCH, <http://www.hrw.org/about> (last visited Apr. 11, 2012).

3. *See* HUMAN RIGHTS WATCH, *supra* note 2, at 4–6 (reporting failures to properly ventilate mines, frequent injuries, refusal to replace safety equipment, illegally excessive working hours, and withholding pay when workers refuse to engage in unsafe practices and that many of these abuses violate Zambian law and several international conventions to which they are signatories).

4. *See* HUMAN RIGHTS WATCH, *supra* note 2, at 1 (stating that “while many commentaries have examined the ambivalent relationship between China and Africa, few have systematically examined what Chinese investment means in human rights terms”); *see, e.g.*, DEBORAH BRAUTIGAM, *THE DRAGON’S GIFT: THE REAL STORY OF CHINA IN AFRICA* 284–87, 299–301 (2009) (citing, in addition to briefer journalistic works, only the findings of HRW and CHINESE INVESTMENTS IN AFRICA: A LABOUR PERSPECTIVE (Anthony Yaw Baah & Herbert Jauch eds., 2009) in a discussion of human rights issues regarding China in Africa).

5. Describing Chinese labor and business practices in South Africa, Sudan, and Zambia, *The Economist* proclaimed: “Chinese expatriates in Africa come from a rough-and-tumble, anything-goes business culture that cares little about rules and regulations. Local sensitivities

African workers at the hands of Chinese employers across countries and industries.⁶

Less documented, however, are the conditions that Chinese nationals face while working for many of the same private and state-run firms that are under scrutiny for mistreating locals.⁷ Chinese corporations tend to hire more of their own nationals than any other foreign firms operating in Africa.⁸ Although the numbers vary, sources estimate that between five hundred thousand and one million Chinese citizens currently live on the continent, with migrant contract workers comprising the largest portion of this group.⁹ While the

are routinely ignored at home, and so abroad.” *Trying to Pull Together; The Chinese in Africa*, *ECONOMIST*, Apr. 23, 2011, at 74; see SERGE MICHEL & MICHEL BEURET, *CHINA SAFARI: ON THE TRAIL OF BEIJING’S EXPANSION IN AFRICA* 81–83 (2009) (describing abuses by Chinese supervisors against local construction workers in Congo-Brazzaville); Chris McGreal Lusaka, *Thanks China, Now Go Home*, *GUARDIAN* (U.K.), Feb. 5, 2007, at 21 (describing the plight of African workers in Chinese mines and textile factories).

6. See, e.g., BRAUTIGAM, *supra* note 4, at 299–301 (documenting reports of environmental, child labor, and minimum wage violations in the Democratic Republic of Congo (“DRC”), Equatorial Guinea, Namibia, and Sierra Leone). See generally MICHEL & BEURET, *supra* note 5 (describing health, safety, wage, and antiunion violations committed by Chinese firms throughout the continent); Ching Kwan Lee, *Raw Encounters: Chinese Managers, African Workers and the Politics of Casualization in Africa’s Chinese Enclaves*, 199 *CHINA Q.* 647 (2009) (focusing his study on labor conditions at a Chinese owned copper mine in Zambia and a textile factory in Tanzania); *CHINESE INVESTMENTS IN AFRICA: A LABOUR PERSPECTIVE* (Anthony Yaw Baah & Herbert Jauch eds., 2009) (describing, inter alia, wage arrears, excessive hours, unsafe conditions, and physical abuse at Chinese work sites in Africa).

7. See GILES MOHAN & DINAR KALE, *THE INVISIBLE HAND OF SOUTH-SOUTH GLOBALISATION: CHINESE MIGRANTS IN AFRICA* 19 (2007) (declaring that future research is needed to monitor labor policies and relations among Chinese migrants in Africa); Malia Politzer, *China and Africa: Stronger Economic Ties Mean More Migration*, *MIGRATION INFO. SOURCE* (Aug. 2008), <http://www.migrationinformation.org/feature/display.cfm?ID=690> (stating that “there is very little scholarly or empirical research on recent Chinese migration to Africa”); see also Lee, *supra* note 6, at 665 (concluding that although writings on China in Africa are numerous, they provide minimal information about “the foot-soldiers of Chinese projects on the ground”).

8. See HARRY G. BROADMAN, *WORLD BANK, AFRICA’S SILK ROAD: CHINA AND INDIA’S NEW ECONOMIC FRONTIER* 250–51 (2007) (citing a 2006 World Bank survey of African, European, Chinese, and Indian firms in Africa, which found that the Chinese hire the highest percentage of workers from their home country); see also Deborah Brautigam, *Chinese Workers in Africa*, *CHINA IN AFRICA: THE REAL STORY*, <http://www.chinaafricarealstory.com/p/chinese-workers-in-africa-anecdotes.html> (last visited Nov. 29, 2011) (observing that although “[i]t’s widely believed that Chinese companies refuse to hire Africans and bring in all their own workers. . . [t]he real story is more complicated”).

9. See Politzer, *supra* note 7 (stating that migrant workers on contract comprise the largest group of Chinese in Africa). Compare BRAUTIGAM, *supra* note 4, at 155 (estimating that anywhere from 300,000 to 750,000 people from mainland China have come to Africa to work since 1990s), and YOON JUNG PARK, *CHINA IN AFRICA PROJECT, CHINESE MIGRATION*

literature on African workers commonly invokes international and domestic labor standards, it is unclear what domestic protections and remedies are available to Chinese workers in Africa when their rights are violated.¹⁰

Labor practices are merely one of a myriad of concerns surrounding China's rapid expansion and influence in Africa.¹¹ Indeed, with over eight hundred Chinese companies, including mining, timber, telecommunications, construction, and manufacturing enterprises operating in forty-nine countries, the China-in-Africa story provides fertile grounds for analysis.¹² In particular, labor will play an important role as focus turns to the implications of China's investments in Africa's long-term development.¹³ Although cross-border trade and investment involve large state and corporate actors operating on the international stage, their transactions ultimately play out at the local level, with individual workers.¹⁴ For Chinese workers,

IN AFRICA 3 (2009) (indicating that the population of Chinese in Africa ranges from 580,000 to 800,000), with Alex Shoumatoff, *Agony and Ivory*, VANITY FAIR, Aug. 2011, at 128 (reporting that, "[i]n the last decade the number of Chinese residents in Africa has grown from 70,000 to more than a million"), and Grace Ng, *The Dragon's Mighty Roar*, STRAITS TIMES (Sing.), Aug. 20, 2011, at 3 (claiming that "[o]ne million or so Chinese live in Africa"), and MICHEL & BEURET, *supra* note 5, at 4 (stating that many members of the African press routinely refer to "millions of Chinese").

10. See HUMAN RIGHTS WATCH, *supra* note 2, at 6–8 (encouraging Zambia and China to comply with standards set by the International Labour Organization ("ILO")). See generally ILO MULTILATERAL FRAMEWORK ON LABOUR MIGRATION: NON-BINDING PRINCIPLES AND GUIDELINES FOR A RIGHTS-BASED APPROACH TO LABOUR MIGRATION (2006) [hereinafter ILO FRAMEWORK] (acknowledging that international labor migration poses various challenges in assuring migrants' rights are protected and that gaps exist between international and domestic legal protections).

11. See generally BRAUTIGAM, *supra* note 4 (exploring the major aid and investment issues influencing China's relationship with Africa); MICHEL & BEURET, *supra* note 5 (exploring the major investment, trade, and sociocultural issues implicated by China's growing presence in Africa).

12. See BROADMAN, *supra* note 8, at 2 (listing the major industries in which China is involved in Africa); Anthony Yaw Baah & Herbert Jauch, *Chinese Investments in Africa*, in CHINESE INVESTMENTS IN AFRICA: A LABOUR PERSPECTIVE, *supra* note 6, at 35, 35 (reporting that by 2008 about 800 Chinese companies operated throughout forty-nine African states); see also MICHEL & BEURET, *supra* note 5, at 3 (observing that China's presence in Africa has become a central theme in international relations).

13. See Anthony Yaw Baah & Herbert Jauch, *Executive Summary*, in CHINESE INVESTMENTS IN AFRICA: A LABOUR PERSPECTIVE, *supra* note 6, at 11, 14–15 (highlighting the important role labor should play in Africa-China relations and in Africa's overall strategic development); see also Lee, *supra* note 6, at 647 (stating that generally labor policies impact Chinese investments, which in turn impact African development).

14. See Colin Fenwick et al., *Labour Law: A Southern African Perspective*, in LABOUR LAW AND WORKER PROTECTION IN DEVELOPING COUNTRIES 175, 194–96 (Tzehainesh Teklè

this story is complicated by the fact that the protections provided by their home laws may not necessarily reach them in Africa.¹⁵ If the People's Republic of China ("PRC") is to maintain the legitimate cooperative relationship it claims to share with its African partners, the rights and interests of Chinese workers should be secured along with those of local workers.¹⁶

This Note provides an overview of the experience of Chinese workers in Africa. As their situations vary from industry to industry and from country to country, this Note focuses primarily on Chinese workers in South Africa and the protections provided to this group by one of the continent's most developed and democratic states.¹⁷ Because it possesses a sophisticated labor court system, a constitutional commitment to enforcing labor rights, and the continent's largest Chinese migrant population, this Note argues that South Africa's legal system is best equipped, among African states, to provide protections to Chinese nationals working within its borders.¹⁸

ed., 2010) (stating that in sub-Saharan Africa, pursuing economic and political objectives often comes at the expense of worker protection); Lee, *supra* note 6, at 651–52 (predicting that African workers will “bear the brunt” of Chinese attempts to replicate their domestic development and labor policies in Africa).

15. See, e.g., David Greene, *Conflicts of Law and Choice of Law Issues in Crossborder Employment Disputes*, in INTERNATIONAL EMPLOYMENT LAW: THE MULTINATIONAL EMPLOYER AND THE GLOBAL WORKFORCE 53, 53–54 (Christian T. Campbell & Donald C. Dowling, Jr. eds., 1999) (noting that complicated choice of law considerations can have negative consequences on ensuring the rights of international workers); ILO FRAMEWORK, *supra* note 10, at 15–20 (providing guidelines for individual nations to improve labor migration policies so as to ensure that domestic laws protect migrant workers).

16. See Ministry of Foreign Affairs, People's Republic of China, China's African Policy (Jan. 2006), <http://www.china.org.cn/english/features/focac/183721.htm> (citing mutual benefit, common prosperity, mutual support, and common development as some of the policy's central objectives); CHINA IN AFRICA PROJECT, THE CHINA-AFRICA TOOLKIT: A RESOURCE FOR AFRICAN POLICYMAKERS 1–2 (2009) (interpreting China's rapid, sustained expansion throughout Africa as a sign of its commitment to develop long-term partnerships).

17. See BRAUTIGAM, *supra* note 4, at 20 (referring to South Africa as a “high-performing countr[y] with better governance”); ECONOMIST INTELLIGENCE UNIT, ECONOMIST, DEMOCRACY INDEX 2011, at 4 (ranking South Africa number twenty-eighth on its democracy index behind the 24th- and 26th-ranked African nations of Mauritius and Cape Verde, respectively).

18. S. AFR. CONST., 1996, § 23(1) (stating that “everyone has the right to fair labour practices”); see Randall Peerenboom, *Economic and Social Rights: The Role of Courts in China*, 12 SAN DIEGO INT'L L.J. 303, 318 (2011) (noting that “South Africa is generally considered to be a world leader in judicial implementation of [economic and social rights],” including worker rights); see also MOHAN & KALE, *supra* note 7, at 3 tbl.1 (indicating that South Africa possesses a larger population of Chinese migrants than any other African country); Yaw Baah & Jauch, *supra* note 12, at 35 (stating that South Africa attracts the largest amount of Chinese foreign direct investment, an estimated US\$6 billion cumulatively);

Part I defines the scope of the China-in-Africa labor issue, by first describing the general status of Chinese companies and workers across Africa. It then details the experience of Chinese companies and employees in South Africa, host to one of the continent's largest populations of Chinese migrant workers.¹⁹ Next, Part II identifies the applicable Chinese laws that cover workers even as they temporarily migrate to Africa. It then examines South Africa's labor law system and the protections it provides to the foreign nationals it hosts. Further, Part II assesses the effectiveness of Chinese and South African labor law in the context of their successes in protecting domestic migrant workers. Finally, Part III addresses both legal systems' shortcomings in protecting Chinese workers. It concludes by making recommendations to actors in the PRC and South Africa to improve both legal protections to Chinese workers and access to local dispute resolution mechanisms.

1. *CHINA'S GREAT LEAP SOUTHWARD: HISTORICAL AND LEGAL BACKGROUND*

An understanding of the historical, political, and economic foundations underlying the current China-Africa relationship helps illuminate the legal issues surrounding Chinese workers in Africa. Part I provides an overview of Chinese labor in Africa. Section A highlights the salient factors shaping the China-Africa relationship. Section B examines the relationship between Chinese workers and their Chinese employers in Africa. In light of these continent-wide observations, Section C identifies the factors that make South Africa's relationship with China and Chinese enterprises unique.

A. China's Relationship with Africa

Although investment between China and Africa has surged in recent years, its modern roots developed during the early years of Chairman Mao Zedong's communist regime.²⁰ Seeking to legitimize

Politzer, *supra* note 7, at 2 (stating that South Africa hosts the continent's largest population of migrant Chinese workers).

19. See MOHAN & KALE, *supra* note 7, at 3 tbl.1; Politzer, *supra* note 7, at 2 (citing data revealing that more Chinese migrants live in South Africa than any other African country).

20. See BROADMAN, *supra* note 8, at 41–42 (explaining, through statistical analysis, that China and India are at the center of the recent acceleration in commercial activity between nations of the developing global South); see also BRAUTIGAM, *supra* note 4, at 31–42

the new People's Republic of China, Chairman Mao promoted anticolonial solidarity with newly independent nations across Africa.²¹ From the late 1950s to the mid-1970s, the PRC sent about 150,000 Chinese workers to Africa to help develop technology, improve agriculture, build infrastructure, and strengthen medical and education systems throughout the continent.²² Perhaps the single largest and most well-known project of this era was the Tazara Railway, completed in 1975.²³ Financed by the Chinese government and employing roughly 50,000 Chinese migrant workers and 100,000 African workers, the railroad established a vital link from Zambia's copper mines to the Tanzanian port of Dar es Salaam.²⁴

Today, in the wake of market reform, engagement with Africa is characterized by China's desire to meet its own internal development goals.²⁵ Rich in natural resources and largely deficient in basic infrastructure and services, Africa not only supplies China's domestic

(providing a brief history of China's early political and economic engagement with Africa, which began in the mid-1950s).

21. See BRAUTIGAM, *supra* note 4, at 31–34, 38 (explaining that as a young nation seeking recognition as the legitimate Chinese government over Taiwan's Nationalist regime, the People's Republic of China's ("PRC") early engagement with Africa was characterized by politically-motivated efforts to promote fellowship and cooperation with newly independent states, especially those that indicated they may be moving towards a socialist system); PARK, *supra* note 9, at 2–3 (summarizing Chairman Mao Zedong's Africa policy as "purely political," wherein Mao engaged mostly countries that now recognize the communist PRC).

22. See BRAUTIGAM, *supra* note 4, at 38–42 (describing Chinese state farm projects in Benin, Sierra Leone, and Tanzania in the 1960s); PARK, *supra* note 9, at 2–3 (noting that these numbers included 15,000 to 20,000 medical personnel who helped build clinics, over 10,000 agricultural technicians who established farms, hundreds of teachers, and "many more" contract workers employed in transportation, telecommunications, school, and dam projects).

23. See CHINA IN AFRICA PROJECT, *supra* note 16, at 20 (describing the railway as China's "most celebrated" project); PARK, *supra* note 9, at 2–3 (describing the Tazara Railway project as the single largest and most symbolic of China's Africa links during Chairman Mao's reign).

24. See CHINA IN AFRICA PROJECT, *supra* note 16, at 20 (stating that the project was financed by a US\$405 million loan from China); MOHAN & KALE, *supra* note 7, at 12 (stating that the project employed roughly 25,000 Chinese and 100,000 African workers and created a critical route to Tanzania's coast); PARK, *supra* note 9, at 2–3 (estimating that the Tazara Railway project employed 50,000 Chinese migrants).

25. See Lee, *supra* note 6, at 647 (identifying demand for raw materials and financial opportunities as the reasons why China increases its presence in Africa); Yaw Baah & Jauch, *supra* note 13, at 11 (observing that the main objective of China's Africa engagement is to maintain industrialization and economic growth). For a summary of China's "going out" strategy of economic development, see Chih-shian Liou, *The Politics of China's "Going Out" Strategy: Overseas Expansion of Central State-Owned Enterprises 1–3* (May 2010) (unpublished Ph.D. dissertation, University of Texas at Austin), available at <http://repositories.lib.utexas.edu/handle/2152/ETD-UT-2010-05-826?show=full>.

industry with the raw materials necessary to sustain its booming economy, but also provides new investment opportunities for Chinese companies looking to expand overseas.²⁶ Across the continent, Chinese industrial firms are growing more involved in extractive industries such as oil, mining, and timber.²⁷ Meanwhile, construction companies, banks, textile factories, and telecommunications firms are finding additional opportunities to increase their market share in Africa.²⁸ Many of these projects are tied to the huge sums of aid China has pledged to the continent.²⁹ African leaders largely welcome aid and investment from China because it is still a developing nation and therefore tends to be eyed with less suspicion than the former imperialist West.³⁰

Although Chinese firms operate in a broad spectrum of industries throughout economically and politically diverse African

26. See David Haroz, *China in Africa: Symbiosis or Exploitation?*, 35 *FLETCHER F. WORLD AFF.* 65, 71–72 (2011) (citing natural resources, new investment opportunities, and consumer markets as being among China’s interests in Africa); Yaw Baah & Jauch, *supra* note 13, at 12 (reporting that currently there are about 800 Chinese private and state-owned enterprises operating in Africa); see also Liou, *supra* note 25, at 178–86 (describing, generally, how Chinese projects in Africa are driven by domestic demand for natural resources and investment).

27. See BROADMAN, *supra* note 8, at 2, 101–03 (stating that extractive commodities dominate Africa’s exports to China and are rapidly growing); CHINA IN AFRICA PROJECT, *supra* note 16, at 16 (stating that China has carved out a position in Africa’s rich reserves of hydrocarbons, minerals, and timber).

28. See BROADMAN, *supra* note 8, at 2 (explaining that China’s rapidly modernizing industries have led to diversification in its African investments, including, inter alia, apparel, fisheries, commercial real estate, tourism, and telecommunications); CHINA IN AFRICA PROJECT, *supra* note 16, at 16 (stating that Chinese firms are staking out positions in banking, construction, telecommunications, textiles, and other sectors); see also Haroz, *supra* note 26, at 72 (noting that in 2008 alone Chinese construction companies earned US\$20 billion in revenue and formed new contracts worth US\$39.4 billion).

29. See Li Xiaokun, *China Pledges \$10 Billion in Loans to Africa*, *CHINA DAILY*, Nov. 9, 2009, http://www.chinadaily.com.cn/china/2009-11/09/content_8930271.htm (reporting that Premier Wen Jiabao pledged US\$10 billion in loans over three years at the 2009 Forum on China-Africa Cooperation, twice what he pledged in 2006); see also BRAUTIGAM, *supra* note 4, at 11–12 (describing China’s recent pledging patterns to Africa and their links to African contract awards).

30. See BRAUTIGAM, *supra* note 4, at 10–12 (quoting two African leaders complaining of the general ineffectiveness of Western aid and expressing admiration at China’s achievements in dramatically reducing domestic poverty); MICHEL & BEURET, *supra* note 5, at 106 (claiming that the International Monetary Fund, a symbol of “the West,” insulted many African leaders by attaching conditions to loans); Haroz, *supra* note 26, at 65–66, 69 (observing that because of the shortcomings of Western aid and because China is still a developing nation itself—one which never held colonies in Africa—it is largely viewed as a less threatening presence in Africa than the West).

nations, many share the common practice of importing a large portion of their workforce from China.³¹ Compared to other foreign companies, Chinese firms often hire more of their own nationals to staff skilled technical and low-level positions throughout their African ventures.³² In 2007, the PRC officially reported that 67,000 contract workers went to Africa, more than doubling the existing contract labor population to 114,000.³³ Other sources estimate that the total number of Chinese living permanently or semipermanently in Africa ranges anywhere from 300,000 to 1,000,000.³⁴ This broad disparity can be attributed to many factors including the weak enforcement of immigration policies, poor tracking mechanisms, and the tendency of African immigration officials to categorize most Asian visitors as Chinese.³⁵ Despite the wide statistical discrepancy, sources agree that the number of Chinese workers in Africa is only expected to grow.³⁶

31. See Yaw Baah & Jauch, *supra* note 12, at 35–40 (cataloguing the variety of Chinese investments in Angola, the Democratic Republic of Congo, Ghana, Kenya, Nigeria, Sierra Leone, South Africa, and Zambia); PARK, *supra* note 9, at 7 tbl.2 (enumerating several different types of Chinese projects throughout several East, Central, West, and North African countries); BROADMAN, *supra* note 8 at 250–51 (citing World Bank data revealing that Chinese firms hire the highest percentage of workers from their home country than any other international firms in Africa).

32. See BRAUTIGAM, *supra* note 4, at 154 (stating that Chinese projects do routinely use more of their own nationals as staff than projects carried out by any other country); see also Politzer, *supra* note 7 (stating that temporary labor migrants account for the largest portion of Chinese in Africa and that the number is only expected to grow); BROADMAN, *supra* note 8, at 250–51 (revealing research that shows Chinese companies hire more of their own nationals than any another international firms in Africa).

33. See BRAUTIGAM, *supra* note 4, at 155 n.152; Haroz, *supra* note 26, at 72 (citing official figures in the 2008 China Commerce Yearbook, which document that “at the end of 2007, 114,000 Chinese nationals were officially working in Africa 67,000 of whom had arrived in the preceding 12 months”).

34. Compare BRAUTIGAM, *supra* note 4, at 155 (citing data that estimates that anywhere from 300,000 to 750,000 people from mainland China have come to Africa to work since 1990s), and PARK, *supra* note 9, at 3 (analyzing research to indicate that the population of Chinese in Africa ranges from 580,000 to 800,000), with Shoumatoff, *supra* note 9, at 128 (reporting that, “[i]n the last decade the number of Chinese residents in Africa has grown from 70,000 to more than a million”), and MICHEL & BEURET, *supra* note 5, at 4 (observing that some African newspapers regularly refer to the “millions of Chinese” in Africa).

35. See BRAUTIGAM, *supra* note 4, at 155 (attributing the broad discrepancy in reported numbers to inconsistent immigration practices and an apparent inability by many Africans to distinguish among groups of non-Indian Asians); PARK, *supra* note 9, at 3, 5 (observing that Chinese migration patterns usually favor countries that are easier to enter, and that a growing population of Chinese are migrating within Africa).

36. See PARK, *supra* note 9, at 3 (stating that the number of Chinese in Africa is increasing exponentially); Politzer, *supra* note 7 (stating that migration from China to Africa is “only expected to grow as economic ties become stronger”).

Local conditions and cultural attitudes are the two primary reasons, at the ground level, for these hiring practices.³⁷ A shortage of skilled workers and training opportunities plagues many parts of Africa, notably post-conflict regions.³⁸ For these reason, firms prefer to employ Chinese workers even if they garner higher wages than their local counterparts and travel from mainland China to Africa is exceedingly expensive.³⁹ Managers claim that Chinese workers' higher skill level and a lack of language barriers enable them to complete projects at a faster pace.⁴⁰ Additionally, a widely reported cultural perception among Chinese managers is that the Chinese work harder than the local African labor force.⁴¹

Moreover, changing domestic conditions in China also contribute to the available supply of workers willing to go overseas.⁴²

37. See BROADMAN, *supra* note 8, at 280 (explaining that Chinese construction firms prefer to hire Chinese workers because it is easier for managers and engineers to communicate with them); PARK, *supra* note 9, at 6 (citing costs, culture, and productivity as the main justifications for employing Chinese nationals).

38. See BRAUTIGAM, *supra* note 4, at 156 (observing that a Chinese construction project in post-civil war Angola had a limited qualified local labor pool from which to hire); *see also* BROADMAN, *supra* note 8, at 224 (noting a skilled labor shortage in South Africa, and explaining that Chinese firms report this problem as the most critical constraint on business in Africa); Brautigam, *supra* note 8 (identifying the post-conflict nations of Congo-Brazzaville, Sierra Leone, and Sudan as locations where Chinese firms employ significant numbers of Chinese workers).

39. See BRAUTIGAM, *supra* note 4, at 156 (explaining that it is very costly to import Chinese labor); Liou, *supra* note 25, at 182 (quoting a Chinese manager as saying that, although Chinese workers are not necessarily less expensive than local workers, they are generally more skilled and diligent); *see also* BROADMAN, *supra* note 8, at 222–23 (concluding that while it is more expensive to hire Chinese workers, rigidity in local labor markets make the decision the most cost-effective option in many instances).

40. See BROADMAN, *supra* note 8, at 280 (explaining that Chinese construction firms prefer to hire Chinese workers because it facilitates communications between management and workers); PARK, *supra* note 9, at 6 (citing costs, culture, and productivity as the main arguments for employing Chinese nationals).

41. See, e.g., Lusaka, *supra* note 5, at 21 (quoting the general manager of a Chinese-run project in Zambia who told the author: “Chinese people work until they finish and then rest. . . . [Zambians] have tea breaks and a lot of days off. For our construction company that means it costs a lot more”); Liou, *supra* note 25, at 181–82 (quoting the manager of a state-owned construction company: “Chinese workers in general are more skilled and diligent. Most importantly, given the same cultural background, they make our management and communication much easier.”).

42. See Yaw Baah & Jauch, *supra* note 13, at 12 (linking China's tremendous 770 million-worker domestic labor force and growing income inequality to the government's policy of encouraging overseas labor migration); *see also* XIAO CHEN, INT'L LABOUR ORG., SOULS IN EXILE: A STUDY OF CHINESE MIGRATION WORKERS IN ROMANIA 30–32 (2010) (concluding that poverty and low local wages, among other factors, influence large cross-border migration flows from six eastern coastal provinces).

The sweeping market reforms of the 1980s and 1990s empowered China's urban SOEs to take greater responsibility for their profits and losses.⁴³ As a result, many SOEs started pursuing expansion opportunities overseas.⁴⁴ Even more, however, were forced to downsize their domestic operations, shedding twenty to thirty million jobs by 2000.⁴⁵ These changes have disproportionately affected the millions of rural Chinese who moved to urban centers for higher wages and better jobs.⁴⁶ Living outside the cities' official registration systems and facing grim employment prospects in their hometowns and villages, these populations are often left to take whatever work they can get.⁴⁷ Among other strategies, the PRC has dealt with the problem of urban unemployment by sending people to work on SOE projects overseas.⁴⁸

Against this backdrop of economic reform and rising unemployment, labor dispatch agencies have emerged to fill a market

43. See JIFU WANG, *STRATEGIC CHALLENGES AND STRATEGIC RESPONSES: THE TRANSFORMATION OF CHINESE STATE-OWNED ENTERPRISES* 180 (2007) (describing the market reforms that terminated the PRC's financial support of failing industries); Liou, *supra* note 25, at 66–68 (summarizing the changes between 1984 and 1993 that separated state ownership from enterprise management).

44. See CHINA IN AFRICA PROJECT, *supra* note 16, at 12–15 (explaining that the gradual shift to a planned market economy encouraged enterprises to develop global investment strategies); Liou, *supra* note 25, at 4 (describing the PRC's role in encouraging state-owned enterprises ("SOEs") to seek foreign investment opportunities).

45. See WANG, *supra* note 43, at 8 (documenting the historically significant wave of unemployment caused by the socialist market transition); WORLD BANK, *MID-TERM EVALUATION OF CHINA'S 11TH FIVE YEAR PLAN 11* (2009) (noting that market reforms caused many underperforming enterprises to lay off workers or shut down completely).

46. See RONALD C. BROWN, *UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA* 89–91 (2009) (stating that reforms have both increased migrants' freedom of movement while exposing them to greater risk of exploitation and unemployment); see also Li Jing, *China's New Labor Contract Law and Protection of Workers*, 32 *FORDHAM INT'L L.J.* 1083, 1088–89 (2008) (providing a brief history of the migrant labor phenomenon in China and explaining how economic changes have increasingly made them vulnerable to unemployment and exploitations).

47. See Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China*, 30 *FORDHAM INT'L L.J.* 1050, 1054 (2007) (stating that migrants are exceptionally vulnerable to market changes and therefore tolerate poor working conditions because they have no other choice); Jing, *supra* note 46, at 1083 (noting that because of their status, migrant workers are subject to a variety of abuses including low wages, unsafe conditions, overtime with no payment, and lack of social security).

48. See Yaw Baah & Jauch *supra* note 13, at 12 (explaining that one of China's methods of alleviating domestic unemployment is to send workers overseas either through SOEs or labor agencies); Liou, *supra* note 25, at 186 (citing the decrease in workforce redundancy and industrial overcapacity as reasons the PRC advocates firms' overseas expansion).

demand for efficient employee recruitment, both for Chinese and overseas employers.⁴⁹ Traditionally, labor dispatch agencies serve as brokers between foreign employers seeking Chinese labor for projects outside China and Chinese workers seeking better opportunities overseas.⁵⁰ In recent years, however, large numbers of these agencies have emerged to help large-scale industrial, construction, and manufacturing firms efficiently recruit and manage their local workforces.⁵¹ Individuals sign work contracts directly with these dispatch agencies, which then assume responsibility for managing the employment relationship and its ensuing liabilities.⁵² SOEs and other government-run projects increasingly utilize these businesses for their domestic and African employment needs.⁵³ In fact, the majority of Chinese workers in Africa obtain their jobs through labor dispatch agencies.⁵⁴

49. See 劳务派遣制度改革进行时, SINA (China), Mar. 17, 2001, <http://news.sina.com.cn/c/sd/2011-03-17/173522133927.shtml> (describing the labor dispatch system as undergoing three stages of development: foreign related labor dispatch, labor dispatch during state-owned enterprise reform, and marketized labor dispatch) [hereinafter *Labor Dispatch System in Reform*]. An English translation of this news article is available at http://www.cntranslations.org/file_download/139. See also Feng Xu, *The Emergence of Temporary Staffing Agencies in China*, 30 COMP. LAB. L. & POL'Y J. 431, 434–35 (2008) (explaining how, as a result of the economic developments since the 1980s, for-profit labor dispatch agencies are rapidly arising to meet the demand of firms seeking to hire Chinese workers both domestically and internationally).

50. See CHEN, *supra* note 42, at 30–32 (summarizing the origins and evolution of labor dispatch agencies from the 1980s through the 2000s); *Labor Dispatch System in Reform*, *supra* note 49 (describing the original objectives of these agencies when they first emerged in the 1980s).

51. See *Labor Dispatch System in Reform*, *supra* note 49 (stating that in 2005, three years after SOE and private companies began to use labor dispatch agencies, 26,158 such agencies operated in China); Xu, *supra* note 49, at 434–35 (describing how dispatch agencies evolved to accommodate the changing needs of Chinese enterprises).

52. See *Labor Dispatch System in Reform*, *supra* note 49 (detailing how individuals sign contracts with agencies, which then place workers with employers); Xu *supra* note 49, at 431 (describing the mechanics of how labor dispatch agencies recruit and place workers).

53. See PARK, *supra* note 9, at 6 (stating that workers increasingly utilize dispatch agencies to obtain employment in Africa); Xu, *supra* note 49, at 432, 434 (describing labor agencies as transnational operations and noting that “domestic and foreign firms increasingly consider using labor dispatch companies”).

54. See Politzer, *supra* note 7 (stating that most contract workers in Africa obtain employment through labor dispatch agencies); see also, e.g., MICHEL & BEURET, *supra* note 5, at 71–78 (recounting visits to staffing agencies in Central China and Chongqing wherein managers forecast growing demand from enterprises operating in Africa).

B. *The Chinese Worker Experience in Africa*

Although limited statistical data is available on Africa's Chinese workforce, reports indicate that the size and composition of this population varies by country and industry.⁵⁵ As such, the relationship Chinese employers maintain with their Chinese employees is largely determined by a worker's rank and skill-level, local regulatory and economic conditions, and whether the employer is an SOE or private enterprise.⁵⁶ Managers and overseers of Chinese projects in Africa are usually Chinese nationals.⁵⁷ This tends to be true across industries, from mining and oil to construction and manufacturing.⁵⁸

As local heads of enterprise, managers are often hired directly by their employers, either as permanent employees or for fixed terms.⁵⁹ Because of the necessary experience and high demands placed on them, these individuals tend to draw higher wages than they would at

55. See BRAUTIGAM, *supra* note 4, at 156 (reporting that "the ratio of Chinese workers to locals varies enormously, depending on how long a Chinese company has been working in a country, how easy it is to find skilled workers locally, and the local government's policies on work permits"); see also BROADMAN, *supra* note 8, at 255 (noting similar factors play a role in the movement of workers in Africa).

56. See BROADMAN, *supra* note 8, at 222–23 (citing local labor shortages, corruption, and weak regulation as factors that influence the employment relationship between Chinese firms and their workers). See generally Brautigam, *supra* note 8 (discussing local conditions that typically influence Chinese firms' recruiting practices in Africa).

57. See Lee, *supra* note 6, at 652 (stating that supervisors of Chinese projects are almost always Chinese nationals); Yaw Baah & Jauch, *supra* note 13, at 14 (observing that Chinese firms hire Africans for basic tasks and import Chinese managers for higher-paying positions); see also, e.g., MICHEL & BEURET, *supra* note 5, at 215 (summarizing numerous visits to Chinese enterprises and housing compounds where managers and supervisors are consistently Chinese nationals); Thulani Guliwe & Skhumbuzo Mkhonta, *Chinese Investments in South Africa*, in CHINESE INVESTMENTS IN AFRICA: A LABOUR PERSPECTIVE, *supra* note 6, at 300, 323 (documenting that all fifteen supervisors at a textile factory in South Africa are Chinese expatriates).

58. See Yaw Baah & Jauch, *supra* note 13, at 14 (stating that Chinese companies import Chinese managers and supervisors for higher paid positions); see also, e.g., BROADMAN, *supra* note 12, at 224 (observing that a Chinese firm in Senegal has had no success hiring local managers); Lee, *supra* note 6, at 651 (reporting that Chinese expatriates occupy the major managerial and technical positions at China Non-Ferrous Metal Industries Corporation in Zambia).

59. See Thulani Guliwe, *An Introduction to Chinese-African Relations*, in CHINESE INVESTMENTS IN AFRICA: A LABOUR PERSPECTIVE, *supra* note 6, at 16, 33 (stating that Chinese enterprises tend to hire local workers for low-skilled projects, but not necessarily for executive and management positions); see also PARK, *supra* note 9, at 6 (explaining that a small number of Chinese professionals immigrate to Africa via direct government-to-government agreements); see also, e.g., Lee, *supra* note 6, at 652, 655–56 (documenting Chinese managers sent to Africa by their employers in China and the eight- and nine-year tenures of some managers).

home in China.⁶⁰ Likewise, engineers, technicians, and other workers possessing specialized skills sign similar contracts.⁶¹ Although they also report receiving higher salaries than they would for comparable jobs in mainland China, many are paid a fraction of what European companies pay local professionals.⁶² While some companies try to hire local technicians when possible, Chinese nationals still tend to fill out the ranks in technical positions.⁶³

Semiskilled and unskilled laborers are typically recruited from among China's large migrant population and the urban unemployed.⁶⁴ Decisions about whether to import Chinese labor depends upon the needs of the employer and local conditions, such as the available supply of experienced workers, language capacity, and political stability.⁶⁵ No employer has ever been reported to source staff entirely from mainland China.⁶⁶ Where a project demands even minimal skill or experience, however, Chinese companies rely heavily on Chinese

60. See PARK, *supra* note 9, at 9 (reporting that wages in Africa can be 30% to 400% higher than in China); see also MICHEL & BEURET, *supra* note 5, at 72–73 (providing anecdotes on workers' increased African wages).

61. See MOHAN & KALE, *supra* note 7, at 13, 16 (indicating a significant increase in Chinese construction and engineering projects, which has contributed to a growth in short-term labor contracts); PARK, *supra* note 9, at 6 (documenting a class of construction, financial, telecommunications, and media professionals that typically sign one to three year contracts).

62. See PARK, *supra* note 9, at 11 (quoting a researcher who says Chinese workers "are paid much less . . . than Western expats doing comparable work"); Guliwe, *supra* note 59, at 33 (noting that engineers are paid one-sixth what European companies pay).

63. See BRAUTIGAM, *supra* note 4, at 154–58 (asserting that employment of skilled Chinese technicians varies widely throughout Africa, but Chinese firms still frequently staff these positions with their own nationals); see, e.g., BROADMAN, *supra* note 8, at 224 (acknowledging that the shortage of engineers and other technical workers in South Africa makes it difficult for Chinese enterprises to hire locally); Lee, *supra* note 6, at 651–52 (reporting that Chinese nationals fill all major managerial and technical positions in Zambia's Chambishi mine and Tanzania's Urafiki textile mills).

64. See MICHEL & BEURET, *supra* note 5, at 72–74 (documenting the recruitment of Chinese factory workers for positions in Africa and calling them "symbols of a whole generation of Chinese . . . [who] are to [work] in unknown . . . countries"); Liou, *supra* note 25, at 152–53 (noting that to mitigate domestic unemployment, the PRC commonly sends workers overseas); see also MOHAN & KALE *supra* note 7, at 3 (noting that Chinese workers are brought to Africa because they, inter alia, "soak[] up unemployment in China").

65. See *supra* notes 37–41 and accompanying text (explaining the primary reasons why Chinese firms choose to hire Chinese nationals).

66. See Brautigam, *supra* note 8 (stating that there has yet to be a report of a Chinese firm hiring an entirely Chinese workforce); see also Guliwe, *supra* note 59, at 32 (observing that in most projects, locals may comprise up to eighty-five to ninety-five percent of the workforce).

laborers.⁶⁷ Typically hired for a fixed term for anywhere from one to three years, general laborers, like their skilled counterparts, are required to remain in the country for the duration of their employment, or are offered large bonuses to forego time off and return visits home.⁶⁸

Although wages for Chinese general laborers tend to be higher than the wages they would earn in their home country, workers usually see only a small fraction of them.⁶⁹ It is common practice for employers to give workers only a small stipend and deposit the remainder of their wages directly into Chinese bank accounts.⁷⁰ As a result, Chinese laborers live simply, usually in small company-run enclaves, isolated from the local community.⁷¹ Further, Chinese law requires employers to sign work contracts with these laborers.⁷² While studies show that the majority of migrant laborers in Africa sign

67. See MOHAN & KALE, *supra* note 7, at 3 (naming cost reduction, enhancement of labor flexibility, and alleviation of unemployment at home as key reasons why firms bring over Chinese workers); Politzer, *supra* note 7 (stating that throughout the forty-nine African countries where they operate, Chinese infrastructure, public works, oil, and mining operations rely heavily on Chinese migrant labor).

68. See PARK, *supra* note 9, at 6 (reporting that most workers remain in Africa for the full term of their contracts, which are usually one to three years long); Politzer, *supra* note 7 (documenting that migrants generally complete their contracts before returning to China); see also, e.g., MICHEL & BEURET, *supra* note 5, at 72 (describing a contract where salary doubles if a worker waives his one-month home leave).

69. See Guliwe, *supra* note 59, at 32–33 (citing a study that found that Chinese companies often provide workers a daily stipend of US\$1, which means they live below the poverty line); Lee, *supra* note 6, at 653 (quoting managers who explain that the Chinese staff do not get paid in-country).

70. See Lee, *supra* note 6, at 653–54 (stating that wages are commonly deposited directly into Chinese bank accounts so that families may access the funds); see also PARK, *supra* note 9, at 9 (describing the intention of many Chinese contract workers to come to Africa, live frugally and save money to achieve their financial goals upon their return home); see, e.g., MICHEL & BEURET *supra* note 5, at 28 (telling the story of a Chinese worker whose African wages will be deposited into a special account in his hometown bank).

71. See Guliwe, *supra* note 59, at 32–33 (citing a study that found that Chinese companies often provide housing for their workers); Lee, *supra* note 6, at 653–54 (describing two company-owned compounds built outside of the local city centers, guarded by security personnel); Politzer, *supra* note 7 (documenting the spare conditions of migrant housing in Africa).

72. Jiuye Cujin Fa [Employment Promotion Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) art. 31 (China); see BROWN, *supra* note 46, at 30–31 (explaining that China's 2008 Employment Promotion Law requires employers to maintain contracts with migrant workers); Hilary K. Josephs, *Measuring Progress Under China's Labor Law: Goals, Processes, Outcomes*, 30 COMP. LAB. L. & POL'Y J. 373, 380–82 (2008) (explaining that Chinese labor laws require contracts for most types of employment relationships, including migrant worker arrangements).

agreements with labor dispatch agencies, it is unclear exactly how many laborers form contracts directly with employers.⁷³

Despite the fact that labor contracts and legislation, as discussed below, are designed to regulate Chinese employers and the treatment of their employees, this is commonly not the case.⁷⁴ Outcry over China's labor practices in Africa has become increasingly widespread, and consistently focuses on the plight of local African workers.⁷⁵ Moreover, limited information is available from the Chinese worker perspective.⁷⁶ Detailed accounts of China's migrant laborers, where they exist, however, often reveal that unskilled and semiskilled employees are treated much the same as their local counterparts.⁷⁷ Chinese factory workers throughout Africa have reported being forced to work excessively long hours—up to twelve to sixteen hours a day, seven days a week—without overtime pay.⁷⁸

73. See BROADMAN, *supra* note 8, at 99 (concluding that both African and Chinese actors lack key information on investment and employment requirements in Africa); MOHAN & KALE, *supra* note 7, at 19 (stating that knowledge gaps exist in the number of Chinese migrants traveling to Africa and firms' practices of hiring Chinese workers); see also, e.g., Politzer, *supra* note 7 (noting simply that "the majority of temporary migrants" use labor dispatch agencies to obtain work in Africa).

74. See Cooney, *supra* note 47, at 1050–51 (cataloguing the many ways Chinese law fails to protect workers or regulate work environments); Josephs, *supra* note 72, at 374–75 (charging that, although China's written labor law is relatively developed, local governments are unwilling to implement necessary protections).

75. See, e.g., HUMAN RIGHTS WATCH, *supra* note 2 (examining, in depth, the abuse of Zambian miners at Chinese-owned copper mines); Lee, *supra* note 6, at 665 (stating that accounts of Chinese projects in Africa rarely document the experience of Chinese workers); Lusaka, *supra* note 5, at 21 (documenting worker mistreatment at Chinese-owned mines and factories).

76. See Sasha Gong, *Chinese Workers in Africa: Working Conditions and Potential Conflicts* (UCLA African Studies Ctr., Working Paper, 2007) (observing that, "the vast number of Chinese migrant workers in [Africa] rarely attracts attention"); see also, MOHAN & KALE, *supra* note 7, at 4–6, 19 (calling for more research on China's Diaspora in Africa, Chinese labor migrants, and labor relations within factories); Brautigam, *supra* note 8 (undertaking, as a result of wide misconceptions about the nature of China's imported worker population in Africa, to collect information about this group "where it exists").

77. See MICHEL & BEURET, *supra* note 5, at 71–94 (documenting the general safety, security, working, and living conditions of Chinese nationals in Nigeria and Algeria); Gong, *supra* note 76 (documenting the poor living conditions of Chinese migrants throughout Africa).

78. See Brook Larner, "We Were . . . Like Slaves," *NEWSWEEK*, Aug. 12, 2002, at 23 (reporting factory conditions that allegedly caused the deaths of two Chinese nationals in Mauritius); Grace Ng, *Into the Great Unknown*, *STRAITS TIMES* (Sing.), Aug. 20, 2011, Saturday Special Report, available at LEXIS (reporting excessive overtime, underpayment, and, generally, other "harsh conditions" Chinese workers in South Africa experience in Chinese firms).

While firms usually provide local housing, accommodations are often dirty, cramped, and heavily monitored to ensure nationals do not wander far from the work site.⁷⁹ In some cases, firms have been known to retain passports to prevent runaways.⁸⁰

Further, news headlines and anecdotes suggest that Chinese firms fail to take adequate precautions to protect workers from local dangers.⁸¹ The presence of Chinese workers in Africa received perhaps the greatest attention when news agencies worldwide reported on two separate kidnappings of Chinese in Ethiopia and Nigeria.⁸² While these high-profile abductions at least compelled Chinese officials and firms to openly discuss security concerns in Africa, they remain a threat.⁸³ Most recently, in April 2011, regime change in Libya forced 12,000 Chinese citizens to flee the country,

79. See MICHEL & BEURET, *supra* note 5, at 88 (describing the spartan accommodations in Chinese company housing); Gong, *supra* note 76 (reporting that Chinese workers often complain about the living conditions in company housing, notably the strict rules and curfews); Ng, *supra* note 78 (documenting the experience of two Chinese expatriates who were forced to sleep on a factory floor and in cramped hostels).

80. See Ng, *supra* note 78 (reporting the practice by Chinese oil companies in Nigeria of obtaining passports to prevent migrants from overstaying their contracts or moving on to settle in other countries).

81. See, e.g., Jeffrey Gettleman, *Rebels Storm a Chinese-Run Oil Field in Ethiopia, Killing 70*, N.Y. TIMES, Apr. 25, 2007, at A6 (chronicling a 2007 rebel attack and kidnapping at a Chinese project in Ethiopia); Royston Chan & Tom Miles, *China Evacuates 12,000 from Libya, Sends Frigate to Help*, REUTERS, Feb. 25, 2011, <http://af.reuters.com/article/libyaNews/idAFTOE71O00420110225> (reporting on the plight of Chinese workers who evacuated Libya during the 2011 rebel uprising).

82. See Gettleman, *supra* note 81, at A6 (stating that the attack by Ethiopian rebels was motivated by the alleged exploitation, by China, of Ethiopia's mineral resources); Le Tian, *Ethiopia Tragedy Raises Safety Fears*, CHINA DAILY, Apr. 26, 2007, http://www.chinadaily.com.cn/china/2007-04/26/content_860262.htm (reporting on separatist rebels that stormed an Ethiopian oil field and abducted six Chinese nationals); see also MICHEL & BEURET, *supra* note 5, at 75–77 (documenting the kidnapping of two workers in Nigeria and attempting to interview members of the men's village in China); *Released Chinese Workers Back Home from Nigeria*, XINHUA NEWS AGENCY, Jan. 22, 2007, http://news.xinhuanet.com/english/2007-01/22/content_5636706.htm (reporting on the kidnapping, by guerrillas, of two Sichuan men employed by a Chinese telecommunications company to install telephone cables in Nigeria).

83. See *China Evaluates Safety After Ethiopia Killings*, CHINA DAILY, Apr. 26, 2007, http://www.chinadaily.com.cn/china/2007-04/26/content_861069.htm (summarizing PRC government efforts to openly address security concerns at worksites in Africa); see also PARK, *supra* note 9, at 10, 11 (stating that Ethiopian and Sudanese rebel groups profess anti-China views because of the PRC's ties to state officials and noting, in general, that Chinese can be more vulnerable to xenophobia-motivated crimes).

but not before several workers were reportedly stranded temporarily, robbed, or otherwise injured.⁸⁴

But even in stable areas where insecurity and violence do not pose a risk, commonplace safety hazards remain. Landmines litter many of the postconflict areas where Chinese firms work on infrastructure projects, and malaria plagues nearly all of sub-Saharan Africa.⁸⁵ While Chinese nationals have been killed or critically incapacitated by both, Chinese firms and diplomats generally react to such incidents with indifference.⁸⁶

C. South Africa's Unique Relationship with China

As one of the continent's most developed and democratic nations, South Africa's relationship with China tells a somewhat unique story.⁸⁷ On January 1, 1998, South Africa officially

84. See Chan & Miles, *supra* note 81 (reporting on the plight of Chinese workers who evacuated Libya); Leslie Hook & Geoff Dyer, *Chinese Oil Interests Attacked in Libya*, *FIN. TIMES* (U.K.), Feb. 24, 2011, <http://www.ft.com/cms/s/0/eef58d52-3fe2-11e0-811f-00144feabdc0.html#axzz1vBPKalchH> (speculating that the evacuation of approximately 30,000 workers from Libya may be the largest overseas evacuation China has attempted).

85. See MICHEL & BEURET, *supra* note 5, at 72, 222–23 (citing the “ubiquitous risk of malaria” and reporting the death of a Chinese worker who stepped on a landmine while digging a trench in Angola, and noting that “[t]his wasn’t the first time something like this had happened”); see also Yaw Baah & Jauch, *supra* note 12, at 40, 50 (summarizing aspects of Chinese aid to Africa, including the donation of antimalarial drugs and malaria clinics); see also, e.g., Guliwe, *supra* note 59, at 25 (noting that China, a significant arms exporter to Africa, has not signed the Ottawa Declaration on Landmines); Austin C. Muneku, *Chinese Investments in Zambia*, in *CHINESE INVESTMENTS IN AFRICA: A LABOUR PERSPECTIVE*, *supra* note 6, at 160, 183 (describing a Chinese firm’s failure to conduct antimalaria spraying to protect employees).

86. See MICHEL & BEURET, *supra* note 5, at 222–23 (quoting a Norwegian mine clearance worker and a Chinese diplomat who confirmed corporate and official indifference to mine safety); see also Au Yiu Kai, *Chinese Illegal Workers in Liberia*, *MEDECINS SANS FRONTIERES BLOG* (Mar. 15, 2006), http://www.msf.org.hk/blogs/index.php/paul_au/296/?lang=en (recounting her treatment of four Chinese workers who contracted malaria and musing that “there would be more to come”).

87. See Guliwe & Mkhonta, *supra* note 57, at 300 (cataloguing the many factors that contribute to South Africa’s status as one of China’s strategic partners, including several high level exchanges, diplomatic declarations, and a free trade agreement, as well as their recent history); see also PARK, *supra* note 9, at 13 (declaring that because South Africa is the only African nation home to a sizable population of ethnic Chinese citizens, the country “is worth separate consideration”); see also, e.g., Thomas Orr, *Mandela, Diamonds and Crime: The South Africa-China Relationship at a Crossroads*, 29 *CHINA MONITOR* 4, 4–5, 8–9 (2008) (highlighting prominent elements of the China-South Africa relationship, including China’s support of South Africa’s anti-apartheid movement, an economic relationship that corresponded with both countries’ global emergence, and South Africa’s role as a historic destination of the Chinese Diaspora).

established diplomatic ties with the communist PRC, a long-time supporter of its liberation struggle.⁸⁸ Both politics and economics motivated the decision.⁸⁹ As the PRC only maintains diplomatic relations with countries that adhere to the One China Policy, the move required South Africa to cease its recognition of Taiwan, one of the apartheid regime's strongest allies.⁹⁰ Moreover, in a rapidly globalizing world, the two developing nations viewed expanded relations as a wise strategy for economic growth.⁹¹ Indeed, in the last twenty years, bilateral trade has surged and the PRC continues to regard South Africa as an important partner in its own right, but also as the critical gateway to the rest of the continent.⁹²

88. See Guliwe & Mkhonta, *supra* note 57, at 301 (stating that South Africa's recognition of the PRC and derecognition of Taiwan officially took effect on January 1, 1998); Orr, *supra* note 87, at 4 (recording the official establishment of Chinese-South African relations as January 1, 1998, and recounting recent China-South Africa history).

89. See Guliwe & Mkhonta, *supra* note 57, at 302 (citing South Africa's goal of playing a bigger role in international affairs, its desire to conduct bilateral trade with the PRC, and the limited trade opportunities with Taiwan as reasons it decided to de-recognize Taiwan in favor of the PRC); see also Orr, *supra* note 87, at 4–5 (stating that strong historical solidarity motivated diplomatic ties and that the two nations' successful relationship coincides with their respective emergence into the global mainstream economy).

90. See BRAUTIGAM, *supra* note 4, at 3 (noting that critics condemn China's general policy of mutual recognition of any state that officially recognizes the PRC); Guliwe & Mkhonta, *supra* note 57, at 301 (stating that because Taiwan was an "international pariah" like South Africa, it was willing to eschew international sanctions and engage apartheid South Africa "at the highest level"); see also Guliwe & Mkhonta, *supra* note 57, at 301–02 (explaining that the "One China Policy" promulgated by the PRC government states that there is one legitimate Chinese government and Taiwan is a part of mainland China); Joint Communiqué Between the United States of America and the People's Republic of China, ¶ 1 (Aug. 17, 1982), reprinted in 21 I.L.M. 1147, 1147 (setting forth the United States' policy of recognition of the PRC, which adheres to the "One China Policy").

91. See Guliwe & Mkhonta, *supra* note 57, at 302 (arguing that "urgent economic concerns" and future trade and investment objectives motivated Nelson Mandela's decision to establish diplomatic ties with the PRC); Orr, *supra* note 87, at 5 (stating that China's recent wave of investments in South Africa represent more diversified and sustainable attempts for long term success).

92. In 1991 bilateral trade between China and South Africa stood at US\$14 million. See Guliwe & Mkhonta, *supra* note 57, at 303. In 2010, trade with South Africa accounted for approximately fifteen percent, or US\$18 billion, of total Sino-African trade. *Launching Pad: Chinese Firms Have Stumbled Before in South Africa, but the Country's Gateway Position Keeps Drawing Them Back*, CHINA ECON. REV., Mar. 1, 2011, <http://www.chinaeconomicreview.com/content/launching-pad> [hereinafter *Launching Pad*] (identifying South Africa's strategic economic role in the region as a primary reason for China's continued attempts at establishing businesses there); see BROADMAN, *supra* note 8, at 255 (calling South Africa a "predominant platform" for multinationals seeking to expand throughout sub-Saharan Africa); Richard Bowker, *Dancing with the Dragon: Economic Relations Between South Africa and China*, TRADEINVESTSA, (July 25, 2008, 12:18 PM),

Since formalizing relations, over eighty Chinese firms have established operations in South Africa.⁹³ These firms represent a wide range of industries including energy, mining and metallurgy, electronics, telecommunications, commercial banking, shipping, light manufacturing, and automobiles.⁹⁴ In the years leading up to the 2010 FIFA World Cup, business surged for Chinese construction companies, which are known to hire some of the highest percentages of their own nationals.⁹⁵ Outside the country's thriving urban centers, smaller, independently-owned factories have established a substantial foothold in textile and clothing manufacturing.⁹⁶

Despite their seemingly symbiotic economic relationship, Chinese companies face challenges in South Africa.⁹⁷ Across firms and industries, two issues predominate. First, South Africa hosts a significant number of domestic and international companies that are already well-established in the same industries in which Chinese firms are seeking to compete.⁹⁸ Second, South Africa's robust worker

<http://www.tradeinvestsa.co.za/news/687543.htm> (referring to South Africa as a gateway for China to access the rest of Africa).

93. See Guliwe & Mkhonta, *supra* note 57, at 311 (establishing that since 1998 over eighty Chinese companies have settled in South Africa, the majority representing SOE subsidiaries); see also Yaw Baah & Jauch, *supra* note 13, at 35 (stating that of the 800 Chinese companies operating in Africa, South Africa attracts the largest share).

94. See Guliwe & Mkhonta, *supra* note 57, at 313–16 (naming the major construction, financial, electronics, manufacturing, transportation, mining, and retail firms in South Africa and describing the nature of their investments); *Launching Pad*, *supra* note 92, at 2–3 (listing the most prevalent Chinese industries in South Africa).

95. See BROADMAN, *supra* note 8, at 224, 280–81 (calling the construction industry one of the largest employers of Chinese workers in South Africa); see also Guliwe & Mkhonta, *supra* note 57, at 313 (noting that in 2008 there was a growing presence of Chinese construction companies in South Africa); Politzer, *supra* note 7 (stating that Chinese construction workers comprise about thirty percent of the total worker population in Africa, and that this number is increasing).

96. See Geoffrey York, *In South Africa, Jobs that Come at a Price*, *GLOBE & MAIL* (Can.), Dec. 8, 2010, at A19 (claiming that the story of one particular Chinese factory owner in South Africa's rural north is representative of dozens of Chinese entrepreneurs in the region); see also PARK, *supra* note 9, at 8 (describing small, independently-owned Chinese businesses, such as retail shops, wholesalers, and factories, that are emerging throughout South Africa).

97. See Orr, *supra* note 87, at 4 (noting the China has been more successful than South Africa in taking advantage of their bilateral relationship); see also *Launching Pad*, *supra* note 92 (stating that extensive regulation and sophisticated competitors have frustrated the objectives of many Chinese companies in South Africa).

98. See Guliwe & Mkhonta, *supra* note 57, at 311–13 (calling South Africa a “sophisticated market in its own right” and using the example of South Africa's “highly developed and sophisticated financial sector” as an example of an industry where existing South African firms may have a competitive advantage over newly entering Chinese firms); see also *Launching Pad*, *supra* note 92, at 1–2 (naming construction, mining, textiles,

protections and historically strong labor movement present a steep learning curve to Chinese enterprises generally accustomed to operating in the shadows of regulatory compliance.⁹⁹ Rather than invest the resources to compete in South Africa's more open markets and submit to government oversight, most firms have instead retreated to other African nations where both competition and governance are weak.¹⁰⁰

According to local workers and business owners, however, Chinese enterprises still maintain a strong upper hand.¹⁰¹ Complaints abound that Chinese employers routinely pay workers below the prescribed minimum wage.¹⁰² Because unemployment holds steady at an astonishing sixty percent in many parts of the country, many South Africans report that they have no choice but to accept low-paying jobs with Chinese firms.¹⁰³ Also widespread are reports that workers

automobiles, and banking as just some of the Chinese businesses attempting to enter an already well-established South African market).

99. See Guliwe & Mkhonta, *supra* note 57, at 311 (enumerating South Africa's strong local industries and rigorous regulations and investment codes as two structural factors that in the past pushed China to explore other markets); see also *Launching Pad*, *supra* note 92, at 1–2 (stating that strict labor and financial regulations slow the investment process and push Chinese investors to adapt their business practices).

100. See MOHAN & KALE, *supra* note 7, at 12–13; see also Guliwe & Mkhonta, *supra* note 57, at 311 (stating that when firms initially encountered South Africa's robust regulatory systems, many chose to move on to less regulated countries); *Launching Pad*, *supra* note 92, at 1–2 (concluding that strict regulations have even caused a significant number of Chinese enterprises to withdraw from South Africa).

101. See Guliwe & Mkhonta, *supra* note 57, at 308–11 (describing, generally, how South Africa's strong labor laws and China's trade policy combine to disadvantage local workers); see also Orr, *supra* note 87, at 9 (explaining that as a result of China's rising visibility in South Africa, locals increasingly blame the PRC for unemployment and general economic disenfranchisement); York, *supra* note 96, at A19 (suggesting that in the wake of high unemployment, many South Africans face a dilemma between accepting an illegally low paying Chinese job or no job at all).

102. See York, *supra* note 96, at A19 (describing the practices of dozens of Chinese textile factories in South Africa that chronically undercut the legal minimum wage); Susan Stelzner, *Labor and Employment Law in South Africa*, in 11 PHILIP M. BERKOWITZ, ET AL., INTERNATIONAL LABOR AND EMPLOYMENT LAW 221, 224 (2d ed. 2008) (explaining that South Africa does not have a nationwide minimum wage, but rather, determines wages according to sector, employment category, and geographical area).

103. See York, *supra* note 96, at A19 (reporting a sixty percent unemployment rate throughout rural areas where many Chinese firms operate and explaining that, as a result, workers feel coerced into accepting underpaying Chinese jobs); see also Guliwe & Mkhonta, *supra* note 57, at 309 (eluding, generally, to South Africa's severe unemployment problem).

receive few, if any, benefits or skills training, and attempts to unionize are met with hostility.¹⁰⁴

Chinese workers commonly endure similar conditions at the hands of their managers and fellow Chinese nationals in Africa.¹⁰⁵ Since 1998, South Africa has become an increasing popular destination for China's diaspora, hosting an estimated 100,000 to 300,000 legal and illegal mainland immigrants.¹⁰⁶ While a considerable number go into work for themselves as traders and shopkeepers, many have been recruited by large enterprises to work in a capacity equivalent to the local population.¹⁰⁷ They represent a smaller part of the workforce but maintain a significant presence in Chinese companies.¹⁰⁸ Language barriers and rising anti-Chinese sentiment limit channels for these foreign workers to seek redress.¹⁰⁹

104. See Guliwe & Mkhonta, *supra* note 57, at 320–29 (interviewing several South African workers who report no opportunities for on-the-job skills training and strong resistance to unionization); Ng, *supra* note 9 (summarizing the most common complaints voiced by South African employees at Chinese enterprises).

105. See Larmer, *supra* note 78, at 23 (reporting on the poor conditions and long hours Chinese workers endure at textile factories in Mauritius); Ng, *supra* note 78 (documenting abusive practices Chinese nationals have faced working for Chinese employers in South Africa).

106. See MOHAN & KALE, *supra* note 7, at 2 (citing South Africa as one of the primary destinations of the original Chinese diaspora in Africa, now hosting between 100,000 to 300,000 immigrants, and that subsequent migration waves have built upon this earlier pattern); Guliwe & Mkhonta, *supra* note 57, at 315 (documenting the recent influx of Chinese migrants to South Africa and the competitive pressures it has placed on local business). See generally *Immigrant Workers Need to be Protected*, CAPE TIMES (S. Afr.), Apr. 22, 2008, at 10 [hereinafter *Immigrant Workers*]; Wabo Dieudonne Coffie, *Emerging Jurisprudence on the Labour Law Protections for Undocumented Migrant Workers in South Africa: Lessons for Countries* (15th Int'l Lab. & Emp. Rel. Ass'n World Cong., Track 3: Work, Family, Community, 2009) (discussing, generally, issues surrounding illegal immigrants in South Africa).

107. See BROADMAN, *supra* note 8, at 224 (explaining that the labor shortage in South Africa compels some Chinese firms to import their workforce from China); PARK, *supra* note 9, at 7–8 (discussing the experience of Chinese nationals recruited from Fujian to work in South African enterprises).

108. See Guliwe & Mkhonta, *supra* note 57, at 313, 315, 323, 325, 328–329 (describing the impacts Chinese labor has had on construction, retail, and textile enterprises); see also Ng, *supra* note 9, at 3–4 (stating that Chinese migrants constitute a growing population in South Africa, which is beginning to both make significant contributions and place pressure on the economy).

109. See Lee, *supra* note 6, at 654 (identifying an inability to speak local languages and limited knowledge of English as significant influences on the Chinese reluctance to engage with the local community); Gong, *supra* note 76 (stating that resentment towards the Chinese is increasingly visible); see also Liou, *supra* note 25, at 181 (concluding that hostility towards Chinese has not lessened).

II. LEGAL MECHANISMS THAT PROTECT CHINESE WORKERS IN AFRICA

Given that Chinese workers in Africa are vulnerable to excessive overtime, underpayment, and unsafe and insecure conditions, Part II examines the laws designed to protect them. Section A assesses the international law protections that are available to China's international worker population. Section B analyzes China's employment laws and their applicability to workers in Africa. As a result of the dearth of information on this group, this Section assesses the effectiveness of these laws within the context of their success in protecting domestic migrant workers. Finally, Section C explores South Africa's labor system and the protections it may extend to Chinese nationals.

A. Worker Protections Provided by International Law

When transnational labor issues assume a human rights focus, lawyers and advocates usually invoke the International Labor Organization ("ILO") and its prodigious body of conventions.¹¹⁰ An agency operating under the United Nations, the ILO develops and monitors international labor standards, targeting a vast array of different subjects and groups.¹¹¹ Migrant workers are in particular need of international legal safeguards as they are "uniquely impervious" to the protections of domestic laws.¹¹² Ultimately, the ILO offers limited refuge to Chinese workers in Africa, as its general enforcement powers are weak.¹¹³ Adherence to ILO standards often comes down to each nation making a commitment to enact and

110. See *Database of International Labour Standards*, INT'L LAB. ORG., <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited Apr. 9, 2012) (indicating that since its founding in 1919, the ILO has passed 189 conventions).

111. See *About the ILO*, INT'L LAB. ORG., <http://www.ilo.org/global/about-the-ilo/lang-en/index.htm> (last visited Jan. 9, 2012) (describing the agency's objective to develop and enforce standards in, inter alia, decent work, gender equality, and social security).

112. See Sarah H. Cleveland, *Why International Labor Standards?*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 129, 144 (Robert J. Flanagan & William B. Gould IV eds., 2003) (stating that migrant workers are uniquely impervious to protections afforded by domestic laws); see also Cooney, *supra* note 47, at 1054 (explaining that migrant workers in China are often treated worse than permanent workers).

113. See STEPHEN F. DIAMOND, FROM "CHE" TO CHINA: LABOR AND AUTHORITARIANISM IN THE NEW GLOBAL ECONOMY 66-67 (2009) (stating that in the absence of government legislation, ILO conventions do "not form the basis of a cause of action in any jurisdiction"). See generally ILO FRAMEWORK, *supra* note 10 (setting forth nonbinding principles to guide individual states in providing greater protections to migrant workers).

enforce corresponding domestic regulations.¹¹⁴ And while Africa's more democratic republics have taken steps to establish national standards, most are unable or unwilling to effectively enforce them.¹¹⁵ A lack of capacity, fear of alienating transnational corporations, and urgent public health, economic, and security issues push labor low on the priority list.¹¹⁶

Even these minimal state undertakings represent an increasingly elusive goal for the ILO, as a decreasing number of nations continue to sign on to its instruments.¹¹⁷ Notably, China, South Africa, and a significant majority of African nations have neglected to ratify the 1975 Migrant Workers Convention, which promotes equality and the prevention of abuse in migrant labor populations.¹¹⁸ Further, China and South Africa have thus far abstained from signing the United Nations International Convention on the Protection of the Rights of

114. See DIAMOND, *supra* note 113, at 66 (explaining how enforceability remains a major weakness of ILO standards); Tzehainesh Teklè, *Labour Law and Worker Protection in the South: An Evolving Tension Between Models and Reality*, in *LABOUR LAW AND WORKER PROTECTION IN DEVELOPING COUNTRIES* 3, 32–36 (Tzehainesh Teklè ed., 2010) (noting that international labor standards are often violated because nations fail to enforce internal laws in the face of economic and political pressures).

115. See Fenwick et al., *supra* note 14, at 183–94 (concluding that although ILO standards have helped southern African states achieve threshold labor standards, several factors, such as poverty, AIDS epidemic, and increasing labor migration, pose significant challenges to enforcement); see also *Nongovernmental Organizations and Academics: Edward Webster*, in *MONITORING INTERNATIONAL LABOR STANDARDS: INTERNATIONAL PERSPECTIVES; SUMMARY OF REGIONAL FORUMS* 85, 85 (Crispin Rigby ed., 2004) [hereinafter *MONITORING INTERNATIONAL LABOR STANDARDS*] (noting that in South Africa, ratification of ILO Conventions is “merely rhetoric” as illustrated by its many violations, and that judges in the region are interested in enforcing standards, but lack the capacity to effectively do so).

116. See Ulrich Flechsenhar, *ILO Southern Africa Multidisciplinary Advisory Team*, in *MONITORING INTERNATIONAL LABOR STANDARDS*, *supra* note 115, at 8, 8–9 (explaining that HIV/AIDS, Africa's “towering” debt burden, and political instability have “complicated adherence to the provisions of the ILO Declaration”); *Nongovernmental Organizations and Academics: Edward Webster*, *supra* note 115, at 85–86 (describing some critics' belief that enforcing labor standards disadvantages developing countries who urgently need investment); Teklè, *supra* note 114, at 4 (noting that most states are afraid that regulating labor will result in the loss of foreign investment from transnational corporations).

117. See Cleveland, *supra* note 112, at 171 n.114 (noting that the major ILO conventions specifically designed to protect the rights of migrant workers have very low ratification levels); see also BRIAN LANGILLE, *PUB. LECTURE OF THE INT'L INST. FOR LABOUR STUDIES, WHAT IS INTERNATIONAL LABOUR LAW FOR?* 14 (2005) (observing a general “ratification crisis” at the ILO in recent years).

118. See *Database of International Labour Standards*, *supra* note 110 (indicating that, among others, China has not ratified Convention No. 87: Freedom of Association and Protection of the right to Organize and Convention No. 98: Right to Organize and Collective Bargaining and Convention No. 143).

All Migrant Workers and Members of Their Families, which sets forth binding standards for governing and enforcing migrant labor protection.¹¹⁹ While these conventions may not be effective without strong domestic support, the failure of China and its African partners to sign them reflects their reluctance to make a gesture of symbolic support towards evolving labor standards.¹²⁰

As international labor law, in its current state, is ill-equipped to enforce the rights of overseas workers, domestic laws provide the primary source of protection to Chinese workers in Africa.¹²¹ Particularly important is employment contract law, which is the foundation for most international employment disputes.¹²² Because they establish their employment relationships before going overseas, Chinese law governs most disputes between employers and their expatriate employees that arise in contract.¹²³ But, as local employment laws typically will supersede less-protective foreign laws, the domestic laws of African host nations may apply in situations that are not governed by contract, or in situations where local law requires greater protections than those guaranteed by contract.¹²⁴

119. *Status of Treaties: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (last visited Apr. 9, 2012) (indicating that neither China nor South Africa are signatories to the treaty).

120. *See, e.g.*, BROWN, *supra* note 46, at 86–88 (finding that despite China’s ratification of several key international social and labor conventions, discrimination against migrants occurs); Josephs, *supra* note 72, at 377 nn.20–21 (enumerating the key ILO conventions China has not signed and asserting that despite its signing status, China is bound, as a member of the ILO governing board, to certain fundamental declarations whether they follow them or not).

121. *See supra* notes 113–20 and accompanying text (summarizing the general inadequacies of international labor law).

122. *See* LANGILLE, *supra* note 117, at 5, 8 (stating that the starting point of analyzing international labor standards is understanding domestic contract law, which governs the formation of employment relationships); Jack A. Raisner, *Representing the Employee Working Abroad*, in INTERNATIONAL EMPLOYMENT LAW: THE MULTINATIONAL EMPLOYER AND THE GLOBAL WORKFORCE 37, 52 (Dennis Campbell et al. eds., 1999) (explaining that only with great difficulty may a worker successfully argue that domestic contract law governing his employment should not be applied).

123. *See* Xu, *supra* note 49, at 431 (stating that Chinese workers sign Chinese labor contracts either with their employers, or with agencies that place workers with employers); *Labor Dispatch System in Reform*, *supra* note 49; *see also* LANGILLE, *supra* note 117, at 5, 8 (explaining that at the foundation of most international labor disputes is the contract law of a worker’s nation of origin).

124. *See* Raisner, *supra* note 122, at 52 (stating that more protective domestic labor laws will preempt the conflicting, less-protective laws of the contract’s nation of origin); *see also*

B. Protections Provided by China's Employment Laws

The framework of Chinese labor law is shaped by three primary laws: the 1994 Labor Law, the 2008 Labor Contract Law (“LCL”), and the 2008 Law on Mediation and Arbitration of Labor Disputes (“LMALD”).¹²⁵ This Section first discusses the 1994 Labor Law as the root of China's modern contract-based employment system and the key areas expanded by the LCL. It then summarizes relevant provisions of the LMALD and assesses its effectiveness in providing redress to migrant workers. Finally, this Section highlights several scholarly recommendations to improve enforcement of these laws.

1. China's Labor and Labor Contract Laws

Although a source of heavy criticism, the PRC is making progress in providing better legal protections and enforcement mechanism to workers.¹²⁶ The foundation of Chinese employment law is the 1994 Labor Law, which codifies the PRC employment contract system.¹²⁷ It represents the country's first steps to restructure the legal status of employees in light of the socialist market reforms that would reshape SOEs and the economy as a whole.¹²⁸ The law governs all

LANGILLE, *supra* note 117, at 5–6 (explaining that domestic laws may govern international employment relationships that arise in tort or human rights).

125. See, e.g., BROWN, *supra* note 46, at 16 (referring to the 1994 Labor Law as China's “primary labor law”); Josephs, *supra* note 72, at 379 (describing the 2008 Labor Contract Law (“LCL”) as “arguably the most important development since 1994”); Yun Zhao, *China's New Labor Dispute Resolution Law: A Catalyst for the Establishment of a Harmonious Labor Relationship?*, 30 *COMP. LAB. L. & POL'Y J.* 409, 410–18 (2009) (documenting critical developments that led to the passage of the Law on Mediation and Arbitration of Labor Disputes (“LMALD”), which is considered a “focal point” for labor dispute resolution).

126. See, e.g., BROWN, *supra* note 46, at 4 (referring to China's traditionally low wages and labor standards as a source of pressure, and that since the 1990s Chinese leaders have responded by passing legislation that seeks to address these concerns); Cooney, *supra* note 47, at 1055, 1077 (declaring that “China's extraordinary economic success is marred by widespread labor abuses” and that “[m]any kinds of abuse occur in apparent defiance of Chinese labor law” and asserting the existence of “a high degree of dynamism in the process of legal reform”).

127. *Laodong Fa* (劳动法) [Labor Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) (China) [hereinafter 1994 Labor Law]; see HILARY K. JOSEPHS, *LABOR LAW IN CHINA* 11 (2d ed. 2003) (calling the 1994 Labor Law “the most important labor-related aspect” of China's economic reforms because it codified the employment contract system); see also BROWN, *supra* note 46, at 16 (referring to the 1994 Labor Law as China's “primary labor law”).

128. See JOSEPHS, *supra* note 127, at 41–43 (summarizing the history of the 1994 Labor Law's codification within the context of sweeping market reforms); Cooney, *supra* note 47, at

occupations and business organizations, including white-collar professionals, migrant workers, foreign-owned companies, and SOEs.¹²⁹ Most importantly, the law requires a written contract for all employment relationships.¹³⁰ Among other things, contracts must describe the duration of employment, worksite safety and health conditions, compensation, and liability for breach.¹³¹

Although the State Council, the PRC's centralized administrative authority, issues laws at a national level, the 1994 Labor Law obliges businesses to follow regulations as promulgated by local labor bureaus.¹³² These local offices operate under the auspices of the central Ministry of Human Resources and Social Security ("MOHRSS"), which is responsible for overseeing Chinese employment practices abroad.¹³³ Local labor bureaus, therefore, serve as the departure and return point for China's international labor population.¹³⁴ It is through these divisional offices that individuals must address any issues arising from their employment agreements, whether they are formed directly with companies or through labor dispatch agencies.¹³⁵

1055 (calling the 1994 Labor Law "a major legislative achievement" that establishes the contract employment system).

129. 1994 Labor Law, *supra* note 127, arts. 1–2; see JOSEPHS, *supra* note 127, at 43–44 (describing the comprehensive scope of the 1994 Labor Law).

130. 1994 Labor Law, *supra* note 127, arts. 16–17; see JOSEPHS, *supra* note 127, at 45 (stating that the 1994 Labor Law tracks the provisions of a previous law by setting forth the requirement of written contracts for all types of employment).

131. 1994 Labor Law, *supra* note 127, art. 17.

132. *Id.* art. 106; see BROWN, *supra* note 46, at 13 (explaining that local labor bureaus operate under the auspices of the central Ministry of Human Resources and Social Security but must also report to local governments from whom they receive funding).

133. See BROWN, *supra* note 46, at 14–17 (explaining how employment laws are administered at the local and national level); JOSEPHS, *supra* note 127, at 52–65 (explaining that China's legal system allows for local enactment of laws provided they do not conflict with national laws and examining how Beijing, Shanghai, and Shenzhen administer labor laws locally).

134. Laodong Hetong Fa (劳动合同法) [Labor Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), art. 74 (China) [hereinafter Labor Contract Law]; see MICHEL & BEURET, *supra* note 5, at 71–74 (providing a narrative account of a worker's typical experience with a recruitment agency). See generally *Capacity Building for Migration Management in China Update*, CBMM CHINA NEWSLETTER (Int'l Org. for Migration Liaison Office in China, Beijing, China), Jan.–June, 2010, at 3 (describing efforts in Fujian, Liaoning, and Shandong provinces to educate the local population on seeking overseas work).

135. See BROWN, *supra* note 46, at 13–19, 39 (describing the structure of the national and local system and explaining how the Labor Contract Law specifies standards for staffing firms); see also JOSEPHS, *supra* note 127, at 30–33 (describing the obligations of local dispatch

Described by critics as the most important labor law development since 1994, the 2008 Labor Contract Law elaborates upon the older law and creates broader protections that can potentially be extended to Chinese employers and employees overseas.¹³⁶ The LCL more explicitly defines the scope and provisions employers must provide in employment agreements, such as job descriptions, location, working hours, rest days, remuneration, potential health and safety hazards, and the measures the employer will take to guard against them.¹³⁷ If employers fail to include these provisions or fail to pay wages and overtime in accordance with the contracts, employees may be eligible for monetary awards.¹³⁸ The law not only authorizes employees to report poor working conditions, but also creates criminal liability for employers who maintain poor conditions, coerce work that endangers safety, or maintain an environment that leads to physical or mental health harm.¹³⁹

Further, the LCL expressly creates a set of legal obligations for labor dispatch agencies, which, given their recent emergence, were not adequately regulated by the 1994 law.¹⁴⁰ For purposes of establishing the employer-employee relationship, the LCL appoints these agencies as the employing unit, rather than the company for whom their clients ultimately work.¹⁴¹ This requires dispatch agencies to form and sign the mandatory employment contract, and assigns them default liability for the labor standards, conditions, remuneration, and overtime policies of the enterprises that ultimately utilize the employees.¹⁴² For the large number of workers who use agencies to obtain jobs with Chinese enterprises in Africa, this means

agencies (“labor service companies”) under national Ministry Notice policies that are enacted at the local level).

136. See Josephs, *supra* note 72, at 379 (calling the 2008 law “arguably the most important development since 1994”); see also Cooney, *supra* note 47, at 1077 (concluding that the new Labor Contract Law significantly expands employee rights and makes great progress in filling major gaps left by the 1994 law).

137. Labor Contract Law, *supra* note 134, arts. 8, 17.

138. See *id.* arts. 82, 85.

139. *Id.* arts. 32, 88.

140. See BROWN, *supra* note 46, at 28–29 (explaining that the 2008 Labor Contract Law creates operating standards that address some of worst practices by agencies and companies that previously were not illegal, such as using dispatched workers to displace regular employees, and failing to place employees in full-time employment positions); Josephs, *supra* note 72, at 380 (noting that because dispatch agencies were not a factor when the 1994 Labor Law was passed, the new law fills a significant gap in legal coverage).

141. Labor Contract Law, *supra* note 134, art. 58.

142. *Id.* arts. 58, 62.

that any grievances that arise over a broad range of wage, safety and rest policies ultimately must be remedied with the local dispatch agency back home.¹⁴³

Although the 2008 LCL represents a significant achievement, critics complain that poor enforcement remains a crucial shortcoming in China's efforts to grant greater protections to workers.¹⁴⁴ Foremost, commentators find that leaving implementation and enforcement responsibilities to local labor bureaus leads to fragmentation and inconsistency.¹⁴⁵ Moreover, understaffing, corruption, local political pressures, and an unwillingness to devote resources to pursue cases hamper the enforcement powers of most local labor departments.¹⁴⁶ Although the new law was designed with particular consideration to migrant workers, this group tends to suffer most from enforcement deficiencies.¹⁴⁷ The surplus of unskilled labor leaves this massive population with minimal market leverage to compel employers to accord with the law.¹⁴⁸ Thus, migrant laborers continue to face the

143. See *supra* notes 52–54 and accompanying text (explaining that most Chinese workers in Africa form their employment contracts with labor dispatch agencies which in turn accept all liabilities arising from the employer-employee relationship).

144. See Cooney, *supra* note 47, at 1078, 1096 (exploring, generally, why enforcement remains a problem, despite steps to pass progressive legislations); Peerenboom, *supra* note 18, at 322–24 (stating that the enforcement of economic and social rights remains a critical problem in China); Yin Lily Zheng, Note, *It's Not What Is on Paper, but What Is in Practice: China's New Labor Contract Law and the Enforcement Problem*, 8 WASH. U. GLOB. STUD. L. REV. 595, 596 (2009) (summarizing, generally the problem of labor law enforcement and undertaking to address its causes).

145. See, e.g., Cooney, *supra* note 47, at 1060–61 (describing the institutions charged with implementing labor law, and noting that until recently “[t]he precise responsibilities, procedural rules, and enforcement powers of labor inspectors were . . . governed mainly by a complex set of rules promulgated . . . at the provincial and municipal level”); Na Lan, Note, *Is There New Hope in Labor Rights Protection for Chinese Migrant Workers?*, 10 ASIAN-PAC. L. & POL’Y J. 482, 493 (2009) (stating that local government agencies bear partial responsibility for poor labor law enforcement because they often tolerate abusive practices by local businesses).

146. See Cooney, *supra* note 47, at 1063–66 (listing economic, political, and administrative factors that impede enforcement); Lan, *supra* note 145, at 493 (cataloguing the barriers that stand in the way of better enforcement of migrant workers’ rights).

147. See Cooney, *supra* note 47, at 1063 (explaining that firms that hire migrant workers have few incentives to abide by labor regulations); Jing, *supra* note 46, at 1083 (stating that it is “well documented” that migrant workers face numerous labor abuses); Zheng, *supra* note 144, at 598 (noting that “[m]igrant workers from rural areas ‘bear the brunt of labor abuses’”).

148. See Cooney, *supra* note 47, at 1063 (explaining that because migrant workers cannot leverage economic pressure to improve labor standards, firms that hire these groups are more likely to violate labor standards); Lan, *supra* note 145, at 493 (naming lack of “money and time” as a reason migrants rarely pursue enforcement); Zheng, *supra* note 144, at 605–07

same abuses of uncompensated overtime, wage arrears, and occupational safety hazards that have long been documented domestically in China, and that are emerging throughout Africa.¹⁴⁹

2. Law on Mediation and Arbitration of Labor Disputes

To a limited extent, the 2008 Law on Mediation and Arbitration of Labor Disputes helps improve overseas workers' access to labor dispute mechanisms if their Chinese employers violate the Labor and Labor Contract Laws.¹⁵⁰ It allows a broad range of subjects to circumvent litigation and first go to mediation or arbitration.¹⁵¹ These include disputes arising from the confirmation of an employment contract, working hours, and rest.¹⁵² Further, it builds upon the 1994 Labor Law's provision allowing enterprises to establish internal mediation committees to assist in dispute resolution by providing greater opportunities for worker-employer consultation.¹⁵³ For enterprises located far from accessible labor mediation organizations,

(explaining that "filing fees," cost of legal counsel, and "protracted proceedings" make labor dispute mechanisms prohibitively expensive for migrants).

149. See Lan, *supra* note 145, at 489–91 (listing low wages, nonpayment of wages, illegal overtime, and safety hazards as abuses migrants typically face); *supra* notes 74–83 and accompanying text (summarizing the most frequently reported labor, safety, housing, and security issues arising among Chinese workers employed by Chinese firms in Africa). See generally Jing, *supra* note 46 (exploring, generally, the types of labor abuses migrant workers suffer).

150. See Zhao, *supra* note 125, at 410 (explaining that the LMALD was drafted as a response to increasingly complicated employment relationships that arose out of China's economic development); see also BROWN, *supra* note 46, at 168 (noting that the LMALD provides employees with increased accessibility and "greater finality to" arbitration).

151. Laodong Zhengyi Tiaojie Zhongcai Fa (劳动争议调解仲裁法) [Law on Mediation and Arbitration of Labor Disputes] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008) (China) [hereinafter LMALD]. See Zhao, *supra* note 125, at 418 (stating that the new law greatly expands the scope of arbitrable subject matter).

152. See BROWN, *supra* note 46, at 170 (listing labor dispute topics, in order of frequency as "wages, termination, insurance, and work injury"); Zhao, *supra* note 125, at 418 (summarizing the "three new types of disputes" now covered by the new law as disputes arising from "the confirmation of a labor relationship," working hours and time off, and medical compensation for occupation industries, and cataloguing the disputes that fall within these categories).

153. See BROWN, *supra* note 46, at 171 (explaining that the LMALD broadens the scope of allowable mediation forums); Zhao, *supra* note 125, at 418 (describing increased opportunities for internal dispute mechanisms as one of the LMALD's new developments).

such as overseas enterprises, this development opens up new channels for workers to seek remedy.¹⁵⁴

Since the LMALD took effect in May 2008, use of employment arbitration has risen precipitously.¹⁵⁵ Given that the law has only been in place for four years and Chinese workers in Africa sign employment agreements for one to three years, it is yet unclear to what extent these workers are utilizing arbitration committees upon their return.¹⁵⁶ Experts have found, however, that despite the improved access to arbitration, domestic migrants remain unable to utilize these channels because they lack money and adequate knowledge of the legal system.¹⁵⁷ Further, researchers suggest that the correspondingly high rate of court applications indicates that the new labor arbitration system frequently fails to resolve disputes.¹⁵⁸ Even when arbitral awards are made, it is difficult to get committees or court orders to enforce them.¹⁵⁹

154. See BROWN, *supra* note 46, at 89 (surmising that the LMALD “supports the ability of migrant workers to more easily gain access to labor arbitration”); Zhao, *supra* note 125, at 419 (concluding that the LMALD’s broad definition of mediation organization creates new channels for dispute resolution, especially in small villages and towns).

155. See BROWN, *supra* note 46, at 168 (citing that Guangdong Province experienced more than a 100% increase in labor arbitration cases from May 2007 to May 2008); *Statistical Communiqué on Labor and Social Security Development in 2008*, NAT’L BUREAU OF STAT. OF CHINA (May 22, 2009, 10:05 AM), http://www.stats.gov.cn/english/newsandcomingevents/t20090522_402560900.htm (citing that in 2008 labor arbitration committees handled 964,000 cases, a ninety-eight percent increase over the previous year).

156. See Gong, *supra* note 76, at 3 (referring, generally, to several cases in which return workers have sued Chinese companies and employment agencies, but failing, however, to provide further information about these suits); see also Politzer, *supra* note 7 (stating that most migrants return to China after the completion of their one to three year contracts, “[h]owever, there is very little scholarly or empirical research on recent Chinese migration to Africa”).

157. See Cooney, *supra* note 47, at 1070 (explaining that achieving arbitral success often requires multistep procedures and sophisticated legal maneuverings that entail expenses that migrants cannot afford); Jing, *supra* note 46, at 1104 (noting that the long appeals period imposes a critical strain that most migrant workers cannot sustain); Lan, *supra* note 145, at 493 (citing education, discrimination, and significant expenses as some of the barriers that prevent migrants from accessing legal protection).

158. See BROWN, *supra* note 46, at 180 (observing a sharp increase, in recent years, in the number of arbitration cases that claimants have appealed to the courts and suggesting that the LMALD’s attempts to provide greater finality to arbitration were intended to decrease this number); Cooney, *supra* note 47, at 1068 (citing the research of Chinese labor scholar Zheng Shang-yuan).

159. See Cooney, *supra* note 47, at 1070 (explaining that enforcement can involve lengthy proceedings and that legal aid is largely unavailable, resulting in heavy financial burdens on workers); see also Peerenboom, *supra* note 18, at 320, 322–24 (citing the weak capacity of dispute resolution mechanisms and the closure of many businesses during the global recession as two reasons why the courts have been unable to enforce awards).

Finally, these domestic mechanisms supply ex post remedies upon completion of the work contract and return home.¹⁶⁰ If a violation of employment terms requires immediate redress, workers have no choice but to resort to local remedies available in Africa.¹⁶¹ Although the LCL sets standards for a broad range of workplace conditions, local African laws may supersede these provisions where they grant more robust protections—especially where a country has a direct interest in the activities of foreign companies operating on its soil.¹⁶²

3. Recommendations for Improved Enforcement

Commentators cite better enforcement of current law as one of the most essential requirements to achieving adequate protection of migrant worker rights.¹⁶³ Among his recommendations, Professor Sean Cooney advocates for systematic efforts to decentralize control at the national level and empower local labor departments to apply more robust economic and criminal sanctions on labor law

160. See Cooney, *supra* note 47, at 1060–61 (describing China’s “command and control” labor regulatory system that relies heavily on the imposition of sanctions to enforce the law after it has been violated); Jing, *supra* note 46, at 1130 (expressing doubt that imposing penalties on officials and employers who violate the law will improve ongoing implementation and enforcement of the law).

161. See LANGILLE, *supra* note 117, at 5–6 (explaining that domestic law and its accompanying remedies may be available where local law grants greater protections than the law governing the contract); Greene, *supra* note 15, at 54 (noting that liabilities arising in tort will affect jurisdiction and choice of law considerations); see also HUMAN RIGHTS WATCH, *supra* note 2, at 7–8 (making regulatory recommendations to both the Chinese and Zambian governments to improve working conditions in Chinese enterprises in Zambia, indicating that both legal systems bear responsibility for improving legal protections).

162. See Raisner, *supra* note 122, at 52 (stating that, when they provide greater protections, domestic labor laws will preempt conflicting, less-protective laws of a contract’s nation of origin where); see also LANGILLE, *supra* note 117, at 5–6 (explaining that domestic laws may govern international employment relationships that arise in tort or human rights).

163. See, e.g., Cooney, *supra* note 47, at 1071, 1078, 1081–94 (noting that migrant workers infrequently use dispute mechanism because they lack access, alleging that the new Labor Contract Law does not address China’s systematic enforcement failures, and laying out several proposals to improve enforcement); Jing, *supra* note 46, at 1130–31 (naming lack of government oversight as a primary cause of labor violations against migrant workers, and stating that poor enforcement will undermine any legislative attempts to improve labor rights); Peerenboom, *supra* note 18, at 325–37 (identifying the Chinese courts as an institution that can improve economic and social rights through enforcement of existing law and laying out recommendations).

violators.¹⁶⁴ Cooney and several others also call upon corporations, NGOs, and other nonstate actors to promote worker rights through public awareness campaigns and improvement of legal aid services.¹⁶⁵

On the other hand, Professor Randall Peerenboom emphasizes judicial reform as the key method of improving enforcement of worker (as well as other economic and social) rights.¹⁶⁶ Peerenboom calls for the judiciary to be more assertive in providing remedies to workers, especially in cases involving unsafe working conditions and the failure to pay wages.¹⁶⁷ Finding more violations and providing more remedies, he argues, will encourage the PRC to more adequately address general policy issues affecting vulnerable populations.¹⁶⁸ Finally, Peerenboom proposes relaxing judicial standing requirements so that third parties, such as NGOs and other public interest groups, can bring suits on behalf of individuals who lack the resources to file their own complaints.¹⁶⁹

C. *Protections in South Africa's Employment Laws*

South Africa's extensive, constitutionally-based system of labor and labor dispute laws reflect the key role labor rights played in the struggle against apartheid and their continued importance in South African society.¹⁷⁰ In fact, the 1996 Constitution "may be the only

164. See *id.* at 1084–88 (proposing and assessing several alternatives to China's traditional "command and control" labor regulation system). Professor Cooney is a comparative and Chinese labor law professor at Melbourne Law School.

165. See Cooney, *supra* note 47, at 1086–95 (citing the earlier work of Randall Peerenboom and suggesting that increased participation by employers, public interest workers, and the media can improve labor rights implementation); Lan, *supra* note 145, at 516 (calling for the bolstering of legal aid to assist migrant laborers who seek enforcement of rights); Zheng, *supra* note 144, at 612–17 (proposing that workers seek enforcement through class action lawsuits).

166. See Peerenboom, *supra* note 18, at 325–28 (explaining ways in which the judicial system might take a "somewhat more proactive, multipronged approach"). Randall Peerenboom is an expert on Chinese law and a professor of law at La Trobe University.

167. See *id.* at 325–27 (identifying, *inter alia*, wage and termination claims as relatively simple cases that can be resolved efficiently using the structures already in place).

168. See *id.* at 326–28 (noting that this method will allow the courts to develop a more rigorous "jurisprudence of equality and non-discrimination").

169. See *id.* at 327–28 (citing successful experiments that relaxed the standing requirements for bringing environmental actions and advocating for an expansion to actions involving economic and social rights).

170. See SONIA BENDIX, *INDUSTRIAL RELATIONS IN SOUTH AFRICA* 81–83 (4th ed. 2001) (recounting the steps legislators took to ensure that labor rights were adequately represented in the new democratic system being created in the early 1990s); Stelzner, *supra*

[constitution] that establishes fair labor practices as a constitutional right.”¹⁷¹ And although Chinese law will govern the contracts formed between Chinese employees and their employers, a basic tenet of South African employment law holds that contracts may be superseded by statute where the two conflict.¹⁷² Notably, South Africa extends statutory and constitutional labor protections, including access to the justice system, to both documented and undocumented migrant workers.¹⁷³

Two statutes, the 1995 Labour Relations Act (“LRA”) and the 1997 Basic Conditions of Employment Act (“BCEA”), form the foundations of South Africa’s labor law system.¹⁷⁴ Pursuant to Section 23 of the Constitution, they define labor rights and establish a specialized system of courts and commissions to resolve disputes outside of mainstream litigation.¹⁷⁵ Where these laws do not expressly provide a cause of action, complainants may find protections under common law and international law.¹⁷⁶

note 102, at 233 (stating that South Africa’s labor laws were revised extensively during the 1990s postdemocracy era as a result of labor groups’ instrumental political activism).

171. S. AFR. CONST., 1996, § 23(1) (“Everyone has the right to fair labour practices.”); see Andre van Niekerk, *Business South Africa*, in MONITORING INTERNATIONAL LABOR STANDARDS, *supra* note 115, at 65, 65.

172. See BENDIX, *supra* note 170, at 96, 98 (explaining that contracts may not provide for employment terms less favorable than the minimum standards prescribed by statute); Darcy Du Toit, *Oil on Troubled Waters? The Slippery Interface Between the Contract of Employment and Statutory Labour Law*, 125 S. AFR. L.J. 95, 95 (2008) (explaining that although the contract forms the fundamental framework of the employment relationship, its terms will be superseded by statutes that conflict with it).

173. See Coffie, *supra* note 106, at 4, 6 (explaining that although employing illegal migrant workers was prohibited by the Immigration Act 13 of 2002, a 2008 Labor Court ruling extended Labour Relations Act (“LRA”) protection and court access to undocumented workers); *Immigrant Workers*, *supra* note 106, at 10 (summarizing the ruling and reporting on government and labor reactions to it).

174. Labour Relations Act No. 66 of 1995 (S. Afr.); Basic Conditions of Employment Act No. 75 of 1997 (S. Afr.); see BENDIX, *supra* note 170, at 98 (stating that the Basic Conditions of Employment Act (“BCEA”) is the most important statute regarding individual employment relationships and that the LRA provides additional individual rights); Craig Bosch, *Bent Out of Shape?: Critically Assessing the Application of the Right to Fair Labour Practices in Developing South African Labour Law*, 19 STELLENBOSCH L. REV. 374, 375 (2008) (citing a Labour Court opinion that declares that aggrieved employees are obliged, in the first instance, to seek remedies for unfair labor practices under the LRA).

175. See Du Toit, *supra* note 172, at 97 n.10 (calling the LRA a statute that “expressly give[s] effect to [Section] 23 of the Constitution”); van Niekerk, *supra* note 171, at 65 (explaining that in addition to civil courts, domestic labor legislation provides the Constitutional Court and Labour Court as labor disputes forums).

176. Labour Relations Act ch. 1, § 1(b) (declaring that one of the stated objectives of the act is to “give effect to the obligations incurred by the Republic as a member state of the

Foremost, the LRA and BCEA give effect to the constitutional guarantee to fair labor practices, in part, by explicitly defining employee rights and employer obligations.¹⁷⁷ Whereas China's LCL governs mostly administrative and procedural aspects of employer-employee relationships, the LRA and BCEA list substantive guidelines that all employers must follow.¹⁷⁸ Of particular importance to Chinese enterprises in South Africa is the BCEA, which sets out the minimum terms and conditions of employment.¹⁷⁹ For example, Chapter 2 of the BCEA describes, in painstaking detail, precise rules governing overtime hours and wages, meal intervals, and rest periods.¹⁸⁰ China's LCL, on the other hand, requires employers only to include *some* provision for wages, overtime and rest policies, but stipulates no *de minimis* requirements.¹⁸¹

Although the BCEA grants the Minister of Labour general authority to monitor and report on individual labor sectors, exposure of violations largely depends upon individuals or collective groups

International Labour Organisation"); Basic Conditions of Employment Act ch. 1, § 2(b) (declaring one of the law's objectives as to "give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation"); see Bosch, *supra* note 174, at 374, 379 (citing a Labour Court opinion that conceded that the Constitution allows both statutory and common law regulation of labor practices).

177. See BENDIX, *supra* note 170, at 88–89, 93–94 (outlining how the South African Constitution provides for labor rights and explaining how the LRA and BCEA are the key pieces of legislation ensuring these rights); see also Bosch, *supra* note 174, at 379–81 (establishing that the purpose of the LRA is to give effect to Section 23 of the Constitution and exploring instances in which the law could be deemed unconstitutional).

178. Labour Relations Act ch. 1, sched. 2; Basic Conditions of Employment Act chs. 2–5; see BENDIX, *supra* note 170, at 113 (noting that the BCEA applies to all employees except for members of South Africa's national defense and intelligence departments); see also, e.g., Labour Contract Law, *supra* note 134, arts. 4–6, 10–11, 15–17 (establishing several procedural requirements for the formation and execution of labor contracts).

179. See BENDIX, *supra* note 170, at 83, 113 (describing the BCEA's primary purpose as ensuring that all workers receive minimum work conditions and noting that the law places significant responsibilities on employers); Stelzner, *supra* note 102, at 221 (describing the basic structure and goals of the BCEA).

180. Basic Conditions of Employment Act ch. 2, § 10 (forbidding employers from, *inter alia*, permitting or requiring employees to work more than ten overtime hours a week, and requiring overtime payment of at least time and half); *Id.* ch. 2, § 14 (requiring employers to grant, *inter alia*, a one hour meal break to any employee working more than five consecutive hours and prohibiting employers from contracting around meal breaks of less than thirty minutes); *Id.* ch. 2, § 15 (requiring employers to grant employees, *inter alia*, a daily rest of twelve consecutive hours between ending and recommencing work).

181. See *supra* notes 131, 137–39 and accompanying text (describing provisions of the 1994 Labor Law and 2008 Labor Contract Law that list mandatory subject matter that must be included in Chinese employment contracts, but which do not set threshold standards for these subjects).

utilizing South Africa's dual conciliation and court systems.¹⁸² Similar to China's LMALD, the independent Commission for Conciliation, Mediation, and Arbitration ("CCMA") has broad authority to hear and settle disputes.¹⁸³ Whereas the LMALD encourages individuals to use mediation or arbitration before resorting to the courts, the CCMA is the mandatory first stop for parties before they seek adjudication.¹⁸⁴ Importantly for groups unfamiliar with South Africa's legal system, the Commission has authority to connect parties to legal advice or representation.¹⁸⁵ If these nonjudicial mechanisms fail to achieve resolution, parties may resort to the two-tiered labor court system, which consists of the Labour Court and Labour Appeal Court.¹⁸⁶

When the statutes fall short of providing legal coverage to Chinese workers, the common law can extend fair labor protections.¹⁸⁷ Critically, South Africa's vast jurisprudence on the LRA reflects a common law system willing to impute fair labor practices where they have not been expressly written into a contract.¹⁸⁸ And when the claimants cannot show that the terms of

182. Basic Conditions of Employment Act ch. 9, § 59; see *Nongovernmental Organizations and Academics: Evance Kalula*, in *MONITORING INTERNATIONAL LABOR STANDARDS*, *supra* note 115, at 72, 73 (explaining that the Minister's Employment Conditions Commission monitors practices on a sector-wide basis for the purposes of establishing labor policy).

183. See BENDIX, *supra* note 170, at 124–25 (describing the scope of the Commission for Conciliation, Mediation, and Arbitration's ("CCMA") jurisdiction and its additional authority to make recommendations and refer cases elsewhere); van Niekerk, *supra* note 171, at 66 (stating that the CCMA hears all labor disputes).

184. Labour Relations Act ch. 7, § 115; see BENDIX, *supra* note 170, at 124 (explaining that the CCMA is empowered to conduct arbitration or refer the matter to the Labor Court should conciliation first fail); van Niekerk, *supra* note 171, at 66 (describing the policy of mandatory CCMA conciliation prior to adjudication as a major change introduced by the LRA).

185. Labour Relations Act ch. 7, § 115(2); see BENDIX, *supra* note 170, at 125 (listing the authority to assist parties in obtaining legal advice or representation as an additional power of the CCMA).

186. Labour Relations Act ch. 7, §§ 157, 167; see BENDIX, *supra* note 170, at 124 (explaining that the Labor Court may hear cases if conciliation fails).

187. See BENDIX, *supra* note 170, at 88 (explaining that contract law governs employment relationships, which are supplemented by common law principles that can in turn be superseded by statute); see also Bosch, *supra* note 174, at 382 (asserting that when legislation fails to protect fundamental rights guaranteed by the Constitution, courts must develop the common law).

188. See Du Toit, *supra* note 172, at 96–97 n.10 (summarizing how, in a recent decision, the Supreme Court of Appeal ignored LRA jurisprudence and inferred certain labor rights from common law where they did not exist in an employment contract); see also Bosch, *supra*

their employment contract have been per se violated, they may choose to instead bring their claim under the LRA.¹⁸⁹ Some South African commentators have criticized these developments for obscuring the relationship between statute and common law.¹⁹⁰ This more equitable approach, however, potentially removes a high hurdle for Chinese workers who already face an uphill battle if they choose to seek remedies in a foreign legal system.¹⁹¹ Rather than attempting to elucidate the various provisions of their Mandarin contracts, workers can show that employer practices conflict with South African law or general conceptions of fair practice.¹⁹² This also narrows the opportunities for sophisticated Chinese corporations to evade adjudication by asserting that they have not violated a specific statute on the books.¹⁹³

Although South Africa's conciliation system has achieved modest success in resolving disputes, critical barriers prevent Chinese workers from using these channels to resolve their labor issues.¹⁹⁴

note 174, at 379–88 (analyzing numerous court decisions that interpret the LRA in light of the constitution and labor contracts).

189. See *Fedlife Assurance Ltd. v. Wolfaardt* 2002 (1) SA 49 (SCA) at 13 para. 17 (S. Afr.) (holding that the LRA does not explicitly preclude an employee's right to seek remedy under common law); Du Toit, *supra* note 172, at 105–06 (explaining the Supreme Court of Appeal holding creates two possible theories under which employees may bring action, common law breach of contract or violation of the LRA).

190. See Bosch, *supra* note 174, at 375, 387 (arguing that some labor rulings have created confusion and attempting to clarify the practical legal effect of the *Wolfaardt* decision); Du Toit, *supra* note 172, at 96, 106 (concluding that the recent decision effectively creates a complicated dual model of statutory and common law dispute resolution, which “has not gone without criticism”).

191. See, e.g., Du Toit, *supra* note 172, at 106–07 (calling the Constitution the starting point in identifying employment rights and explaining that the common law remains a source of equitable principals); Bosch, *supra* note 174, at 389 (concluding that recent labor rulings “strengthen[] the hand of employees” and create common law remedies that lack the limitations of LRA remedies).

192. See BENDIX, *supra* note 170, at 103–04 (explaining that employment relationships are governed by common law contract principles as well as statutes and that employees make seek remedies under common law). See generally Du Toit, *supra* note 172 (exploring the interplay between statutory labor law and common law and equitable principles).

193. See, e.g., Bosch, *supra* note 174, at 389 (suggesting that recent court decisions undermine the balance between employer and employee rights, shifting the advantage to employees); Du Toit, *supra* note 172, at 108–15 (exploring applications of common law that would result in favorable employee decisions, where, under the LRA, they potentially would not).

194. See van Nierkerk, *supra* note 171, at 66 (calling the Labour Court and CCMA an “effective means of [labor standards] implementation” and noting good settlement rates despite administrative challenges throughout the country); Fenwick et al., *supra* note 14, at 182–83 (explaining that South Africa's labor dispute resolution system has served as a model

First, enforcement of labor law is weak.¹⁹⁵ As Professor Jonathan Klaaren notes, anyone exposed to the South African media would probably not be surprised to learn that labor laws are not followed when it comes to migrant workers.¹⁹⁶ Chronically understaffed and underfunded, the Labour Department cannot effectively monitor labor practices, especially when it comes to foreign workers.¹⁹⁷

Secondly, gaining access to dispute resolution mechanisms remains difficult, even for local workers.¹⁹⁸ Lack of institutional memory, insufficient resources, and fear of alienating large transnational corporations are cited as several reasons why the state does not make more progress in widening access to the CCMA.¹⁹⁹ Chinese nationals are at even greater risk of falling through the cracks created by poor enforcement. Typically congregating in tight-knit enclaves, and rarely speaking the local language, they are largely cut off from their host country's social systems.²⁰⁰ They often have

for surrounding nations and that the flexible system can easily adapt to meet community needs).

195. See Jonathan Klaaren, *A Comment on the Human Rights Watch Report 'Unprotected Migrants: Zimbabweans in South Africa's Limpopo Province,'* 7 AFR. HUM. RTS. L.J. 249, 251 (2007) (stating that South African labor laws are weakly enforced); *Immigrant Workers*, *supra* note 106, at 10 (noting that while migrant workers are vulnerable to exploitation, South Africans are not safe from abuse either).

196. See Klaaren, *supra* note 195, at 251 (critiquing the findings of an HRW report on migrant workers and South African labor law enforcement). Jonathan Klaaren is a professor of law and head of the University Witwatersrand, Johannesburg.

197. See *Immigrant Workers*, *supra* note 106, at 10 (describing the inability of the Labour Department to effectively monitor labor practices throughout South Africa and noting that, as a result, foreign migrants are particularly vulnerable to exploitation); see also Fenwick et al., *supra* note 14, at 193–94 (stating that labor migrants are likely to work under substandard conditions and that, in general, lack of capacity hampers labor law enforcement in southern Africa).

198. See Charles Nupen, *ILO Technical Advisor*, in *MONITORING INTERNATIONAL LABOR STANDARDS*, *supra* note 115, at 10, 10–11 (citing the need for improved access to institutional mechanisms for dispute prevention and resolution); Jeffrey Wheeler, *ILO Strengthening Labour Administration in Southern Africa*, in *MONITORING INTERNATIONAL LABOR STANDARDS*, *supra* note 115, at 13, 13–14 (calling for the capacity-strengthening of dispute resolution systems in the South African region).

199. See Fenwick et al., *supra* note 14, at 186–205 (exploring major challenges to regional labor law enforcement including poverty, underfunding, conflict with economic development goals, and migration); Teklè, *supra* note 114, at 4 (stating that the growing power of transnational corporations has “defied the regulatory power of the nation state”).

200. See PARK, *supra* note 9, at 10–11, 15 (describing the isolation of Chinese work enclaves generally, and explaining that the latest wave of immigrants to enter South Africa lack language skills and isolate themselves within the more remote regions where they tend to settle); Lee, *supra* note 6, at 652–53 (describing Chinese enclaves as secluded and guarded by

limited knowledge of local law or their rights under it.²⁰¹ Moreover, as they become more visible in South Africa, they are increasingly exposed to resentment, often fingered as a cause of South Africa's troubled economy and high unemployment.²⁰² So while the nation's labor and justice systems, in theory, offer considerable protections to Chinese nationals, these channels remain largely closed to them in fact.

Despite the lack of information on the experience of Chinese workers in Africa, news reports and scholarly articles indicate that they are often vulnerable to the same labor abuses documented in the local African populations employed by Chinese enterprises. Although Chinese and South African law reflect significant efforts to regulate employment relationships and labor standards, weak enforcement mechanisms result in a failure to adequately protect Chinese migrant workers. Academics call for judicial reforms and increased public advocacy to improve labor law enforcement and access to dispute resolution mechanisms.

III. DOMESTIC AND INTERNATIONAL LAW PROVIDE INADEQUATE PROTECTIONS TO CHINESE WORKERS IN AFRICA

Although the Chinese and South African legal systems contain sufficient provisions to protect the rights of overseas Chinese workers, in practice, their monitoring and enforcement mechanisms fail to meet this objective.²⁰³ If the China-South Africa relationship is

security personnel and observing that nearly none of the workers speak the local languages, with a few speaking some English).

201. See PARK, *supra* note 9, at 15 (explaining that recent Chinese immigrants to South Africa lack education, business ties, or knowledge of their new home); Lee, *supra* note 6, at 651–53 (describing, generally, efforts by Chinese employers to ensure employees do not become too familiar with their temporary homes); see also, e.g., Ng, *supra* note 78 (reporting on the experience of a Chinese migrant to South Africa who noted that while locals “insist on their labor rights” she dared not voice similar grievances against her Chinese employer).

202. See PARK, *supra* note 9, at 13–15 (illustrating several examples of anti-Chinese sentiment in South Africa, which tends to be politically and economically motivated); Guliwe & Mkhonta, *supra* note 57, at 309 (positing that the influx of Chinese enterprises and cheap Chinese products into South Africa leads to unemployment); Orr, *supra* note 87, at 8–9 (calling people-to-people relations the “weakest link” in China-South Africa relations, and identifying language and China's economic rise in South Africa as causes of local suspicions); York, *supra* note 96, at A19 (surmising that Chinese enterprises' practices of paying below the minimum wage fosters anger in local South African communities and exacerbates poverty).

203. See *supra* notes 144–49, 157–59, 194–201 and accompanying text (describing the generally weak enforcement of Chinese and South African labor law).

to serve as a model to the rest of Africa, improvement is needed in key areas. Section A analyzes the primary shortcomings in Chinese and South African Law. Section B recommends measures the PRC should take to ensure employers comply with Chinese law. Because the status Chinese workers maintain in relation to their employers in Africa parallels that of China's internal migrants, Section B's recommendations will draw from scholarly works on this group. Section C identifies the actions South African actors should undertake to ensure Chinese workers' rights are not violated.

A. Inadequacies Under Chinese and South African Law

Although China's new employment laws represent a major step forward in expanding workers' rights at home, they do not adequately address the particular problems created when Chinese enterprises take their workers overseas.²⁰⁴ And while international and domestic worker migration is a serious issue confronting the PRC, its new labor laws fail to specifically tailor provisions to meet these populations' special needs. Instead the LCL, by default, allocates much of the burden of managing and protecting migrants to labor dispatch agencies.²⁰⁵ As independent enterprises, their profits depend upon their ability to efficiently funnel large numbers of employees through their doors and into jobs. They are not in the best position to monitor the rights of these individuals, especially when Chinese firms take these workers thousands of miles overseas.

Furthermore, the PRC's system of administration cannot adequately ensure that local and provincial governments properly execute and enforce national law.²⁰⁶ Although local administration allows provincial and municipal governments to individualize laws to the particular needs of their population, it can lead to disparate impacts both upon workers who remain employed locally and the workers who form contracts at home, then go overseas.²⁰⁷ Local labor bureaus may have strong ties to the businesses located within their

204. See *supra* notes 144–49, 157–61, 194–201 and accompanying text (describing general deficiencies in the legal protections extended to migrant workers and additional barriers to legal remedies).

205. See *supra* notes 141–43 and accompanying text (citing the provisions of the 2008 Labor Contract Law which allocates employment liability to labor dispatch agencies).

206. See *supra* notes 145–48 and accompanying text (summarizing the primary reasons why local implementation of central government law leads to inconsistent enforcement).

207. See *supra* notes 145–46 and accompanying text (describing how varying local conditions can lead to different enforcement outcomes).

municipalities.²⁰⁸ No matter how friendly the relationship, however, they cannot, at the community level, deploy the necessary resources and expertise to advise and regulate the overseas labor practices of sophisticated Chinese multinational corporations.²⁰⁹ Requiring labor bureaus below the national level to play any role in the regulation of overseas employment relationships will lead to inconsistent treatment as well as enormous administrative costs.

Finally, China's LMALD opens greater channels to labor dispute resolution, but leaves barriers to China's overseas population.²¹⁰ Both the 1994 Labor Law and LMALD allow companies to establish their own internal dispute resolution mechanisms as a first line of conciliation.²¹¹ These, however, are not mandatory requirements.²¹² At the national level, the LMALD's jurisdictional scope can create gaps large enough for overseas companies to slip through. Simply by navigating the LMALD at the local level, large companies with a widespread presence throughout China can evade jurisdiction for complaints brought by returning workers from Africa.²¹³ Although these workers should qualify for an exception to the law's one-year statute of limitations, this requirement places a heavy burden on them to bring timely complaints, especially if their supervisors remain in Africa.

Based upon the conditions described in Part I and the requirements stipulated by Chinese law, Chinese regulations may fall short of the standards South Africa requires of employers in its country.²¹⁴ Thus, South Africa is in a much better position to monitor and enforce labor standards. In practice, however, its system fails to

208. See *supra* notes 132–35 and accompanying text (explaining that municipal labor bureaus are empowered to regulate according to the specific needs of their local business environment); *supra* note 146 and accompanying text (noting that corruption affects the enforcement of local regulations).

209. See *supra* notes 146–47 and accompanying text (summarizing the reasons why legal enforcement tends to be weakest at the local bureau level).

210. See *supra* notes 150–59 and accompanying text (highlighting both the successes and weaknesses of the LMALD).

211. See *supra* note 153 and accompanying text (noting that China's LMALD allows companies to establish internal mediation committees to address work disputes).

212. See *supra* note 153 and accompanying text (explaining that it is not mandatory for firms to create these committees).

213. See *supra* notes 145–46 and accompanying text (summarizing the critical shortcomings in local labor law administration that result in weak enforcement).

214. See *supra* notes 77–80, 137–39 and accompanying text (describing labor violations committed by Chinese companies and the LCL's basic mandatory provisions which fail to adequately address such abuses).

adequately protect the Chinese expatriates working within its borders.²¹⁵

Although labor protections are deeply rooted in the nation's democratic history and jurisprudence, access to these constitutionally guaranteed rights is severely limited in the case of a population that exists at society's margins.²¹⁶ Language and culture present seemingly insurmountable barriers, as does fear of retaliation by employers. Given the developing state of Chinese employment law, it is difficult enough for workers to bring complaints against their employers at home. When the employer has brought them to a foreign country and controls their safe passage back, many workers are likely to find futility in any attempts to address labor violations.

Furthermore, South Africa's general social and economic landscape represents an additional obstacle to relief. As South African leaders continue to engage the PRC in the interest of long-term economic benefits, popular hostility towards the Chinese grows. They are commonly seen as unwelcome interlopers in a country that continues to struggle with widespread poverty and high unemployment.²¹⁷ Therefore, it can reasonably be expected that where limited resources can be expended to address unfair labor practices, South Africa's legal system will make its own citizens a priority over visiting Chinese.²¹⁸

B. China Should Expand Coverage of Its New Labor Laws

China's new labor laws require reform in order to adequately address the particular vulnerabilities of workers who are sent overseas. Because Chinese workers in Africa share similar employment arrangements with China's internal migrants—namely, they form short-term contracts under the same Chinese law, are subject to similar working conditions, and lack access to the same dispute resolution mechanisms—this Section assesses the

215. *See supra* notes 194–99 and accompanying text (citing the critical weaknesses in South Africa's labor law and dispute resolution system).

216. *See supra* notes 105–09 and accompanying text (describing the general experience of Chinese migrant workers in South Africa).

217. *See supra* notes 102–03, 200–02 and accompanying text (discussing South Africa's economic difficulties and other reasons for rising anti-Chinese sentiment in South Africa).

218. *See supra* note 197 and accompanying text (describing general failures by South Africa to protect migrant workers, despite judicial efforts to recognize them).

recommendations advocated by scholars on China's domestic migrants.²¹⁹

While some of these recommendations present promising prospects for migrants within China, others will not adequately address the needs of Chinese workers in Africa. Foremost, decentralizing labor enforcement will not provide effective protections to this specific group.²²⁰ Instead, additional legislation at the national level should streamline the way laws are administered over the Chinese multinationals that take citizens to Africa. The LCL should be amended to require Ministry of Human Resources and Social Security ("MOHRSS") national and provincial offices to oversee all Chinese companies seeking to employ workers for overseas projects. In addition to issuing unified policy on the obligations firms owe to Chinese employees abroad, these offices should develop monitoring strategies to ensure corporate compliance. Among other things, the MOHRSS should require companies to directly report on the number of Chinese citizens they employ abroad and the measures they take to ensure employment contracts adhere to the LCL.

At the municipal level, regulation of overseas employment should be limited to targeted education and feedback programs. While local labor bureaus are not in the best position to keep tabs on the foreign affairs of China's industrial giants, they are, however, best qualified to protect the interests of the individual workers in their communities.²²¹ Although Cooney asserts that nonstate actors should promote awareness among migrants, such policies should not let local labor bureaus off the hook.²²² As a worker's primary point of contact in China, these departments should be charged with designing advocacy and education campaigns to address the specific profile and concerns of the local workforce. If workers tend to be recruited by a particular industry, or tend to be sent to a particular part of Africa,

219. *See supra* notes 163–69 and accompanying text (highlighting the recommendations advanced by Cooney, Peerenboom, and others for improving enforcement of Chinese labor law).

220. *See supra* notes 163–65 and accompanying text (summarizing Cooney's suggestions for labor law enforcement).

221. *See supra* notes 134–35 and accompanying text (describing the relationship local labor bureaus maintain with local workers, even as they migrate to other localities for work).

222. *See supra* note 165 and accompanying text (calling for corporations, nongovernmental organizations, and other nonstate actors to use their expertise to improve labor law enforcement).

municipal bureaus can tailor programs to address the specific issues surrounding the type of work and environment. Most importantly, these bureaus can ensure that individuals are properly informed of their rights under Chinese law and the particular obligations their employers owe to them while overseas.

Additionally, while Peerenboom offers compelling recommendations for judicial reform, namely providing more remedies to workers and relaxing standing requirements, most of them will fail to address the critical problem of access to dispute resolution.²²³ To improve access to labor dispute resolution mechanisms after an employment relationship has been forged, the LMALD should be amended in several key ways. First, the provisions allowing companies to establish their own internal mediation committees should be a mandatory requirement for every firm with an overseas presence, in each foreign office they maintain. The LMALD should also require firms to inform employees, before their relocation, of the existence of these committees and the identity of available arbitration mechanisms locally and in China, should internal conciliation fail.

Further, local bureaus should be charged with ensuring, under the LMALD, that returning Chinese workers have access to local arbitration committees. As part of their education campaigns they should instruct workers, both upon their departure and return, on how to pursue claims. Because of their exceptional circumstances, the LMALD should expressly extend the statute of limitations to overseas workers, allowing them one year, from the day of their return, to file a complaint. And, as Peerenboom suggests, standing requirements should be relaxed so that the third parties that are more qualified to utilize the Chinese court system can represent these groups.²²⁴

Finally, because labor dispatch agencies severely convolute the relationship between overseas firms and their employees, the LCL should explicitly bar them from brokering these arrangements. Although they perform an essential service to the mainland, their recruiting practices have been subject to immense scrutiny in recent

223. *See supra* notes 167–69 and accompanying text (recommending that judges make more rulings in favor of workers and that courts relax standing requirements).

224. *See supra* note 169 and accompanying text (calling for the relaxing of standing requirements to allow better access to legal representation).

years.²²⁵ While the PRC is taking steps to regulate the industry, more progress is necessary.²²⁶ Until a better system is in place to monitor the way these agencies manage employment contracts and deploy workers, the PRC should require enterprises to directly hire the workers for their African projects. This will necessarily require companies to sign employment contracts and assume all liabilities under the LCL. Most importantly, it will give workers in Africa direct and immediate access to the counterparties to their agreements. If violations arise, workers will have better opportunities to remedy the situation while in country, rather than wait for their return home to seek redress.

C. South Africa Should Engage China at the National and Enterprise Levels

South Africa boasts an impressive statutory and judicial system of labor law protection and enforcement. Efforts to improve access to Chinese workers should therefore focus on policy reform. Improved employment conditions for Chinese nationals in South Africa mean improved conditions for the South African citizens who work in Chinese firms. South Africa should, therefore, leverage its position as China's number one partner in Africa to obtain better concessions for its own population. It should condition future investments upon assurances that when the PRC helps Chinese enterprises establish operations in South Africa, they are committed to complying with local employment laws, and to treating African and Chinese workers equally.

Further, South Africa's Minister of Labour should exercise the authority granted to him under the BCEA to formulate a nationwide policy on Chinese employers.²²⁷ Because Chinese enterprises in South Africa remain at a manageable number, a multisector study of their labor practices is feasible.²²⁸ The Minister should use the results of

225. *See supra* notes 51–54, 143, 145 and accompanying text (noting the reasons for the growing presence of labor dispatch agencies in China and the lack of oversight they traditionally received).

226. *See supra* notes 140–43 and accompanying text (explaining the new labor dispatch regulations introduced by the PRC's 2008 Labor Contract Law).

227. *See supra* note 182 and accompanying text (explaining that the BCEA grants the Minister of Labour general authority to set labor policy).

228. *See supra* notes 93, 182 and accompanying text (stating that about eighty Chinese enterprises operate in South Africa and that the Minister of Labour is empowered, under the BCEA, to monitor and report on individual labor sectors).

the study to formulate a strategy specifically targeted to improving compliance among Chinese-owned enterprises. Such an initiative would improve conditions locally for South Africa workers as well as for their Chinese counterparts.

CONCLUSION

While recent labor legislation passed by China's central government represents a substantial step forward in providing greater worker rights, research shows that protections fall apart as workers migrate both within China and overseas to Africa. Better enforcement is necessary to give full effect to these provisions. Similarly, South Africa's highly developed labor system offers robust protections on paper, but fails to adequately address the needs of migrant workers on the ground.

Targeted judicial and legislative reforms can serve to increase enforcement of these laws and improve access to dispute resolution mechanisms. Reform also will represent significant progress in addressing a labor problem that is coming under increasing international scrutiny. Because these two rapidly developing nations share a relationship that is unique to the emerging China-in-Africa story, their efforts to improve these shortcomings can serve as model to the rest of the continent. As this issue continues to emerge, further research should identify, in greater detail, how frequently Chinese workers are accessing dispute resolution mechanisms and how successful they are in providing redress. China's central government in Beijing should use this information to develop a cohesive, sustainable strategy to ensure that workers hold onto their rights wherever they migrate.