



# RESEARCH BRIEF

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## Influence through Infrastructure: Contesting the Chinese-Built Standard Gauge Railway in Kenya

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### Key Points:

- Legal contestation has been crucial for local stakeholders of the Kenyan SGR in making their voices heard and mobilizing resources and public support.
- So far legal contestation seems to have been less effective in influencing strategic decision-making on issues of transparency than in defending the interest of property rights in individual cases;
- There is considerable room for improvement for both the Chinese and Kenyan entities in order to facilitate their long-term strategic economic cooperation.
- Learning to adapt to and effectively engage with the public or civil society actors in the host country is important for China's soft power goal.
- The Kenyan government also needs to develop more comprehensive laws and institutions for regulatory enforcement, in areas such as safeguarding the

implementation of local content requirements and increasing operational efficiency and profitability of the SGR.

### Introduction

In 2008, countries in the East African Community<sup>1</sup> proposed a master plan to revitalize the regional railway network, by constructing new standard gauge railways (SGR), with the input of Chinese capital and Chinese technology. The Kenyan part of the SGR, totaling over \$10 billion, is the largest infrastructure project undertaken since the nation's independence. The project is divided into three phases: from the Mombasa port to Nairobi, from Nairobi to Naivasha, and from Naivasha to Malaba, which borders Uganda. Phase I was completed in August 2017, right before the presidential election, and Phase II was near completion by mid-2019. Financed primarily by the China Import and Export Bank (CHEXIM) and contracted to the China Communications Construction Corporation Group (CCCC), the SGR

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<sup>1</sup> The East Africa Community is a regional intergovernmental organization composed of six East African countries: Burundi, Kenya, Rwanda, South Sudan, Tanzania, and

Uganda. The organization was first founded in 1967, dissolved in 1977, and re-established in 2000.

has sparked controversies throughout all the stages of negotiation, construction, and operation. This study examines the legal contestations surrounding the Kenyan SGR, and by doing so, it hopes to add to the nuances and complexity of the ongoing discussions about the implications of a globalizing China for transnational governance.

Using public information as a starting point, I conducted two months of fieldwork in Kenya between April and June of 2019. I undertook two dozen semi-structured interviews with different actors and stakeholders of the SGR, including Chinese and Kenyan government officials, managers and engineers, social activists, scholars, and journalists. During these interviews, I asked both factual questions about the SGR to corroborate information from public sources, as well as open-ended questions such as challenges facing the SGR as viewed by the interviewees.<sup>2</sup> My discussion is focused on three areas: transparency, local capacity building, and environmental impact.

### **Transparency**

In 2014, the Law Society of Kenya and Okiya Omtatah, a Kenyan human rights activist, brought a constitutional petition against the SGR Phase I before the Kenyan court, challenging the financial agreement and the procurement procedure of the SGR.<sup>3</sup> They claimed multiple accounts of unconstitutionality, particularly, the absence of Parliamentary approval of the SGR expenditure and the lack of competitive bidding for the procurement of the SGR, as violations of the Kenyan Constitution and the Public Procurement

and Disposal Act (PPDA), respectively. The High Court of Nairobi refused to hear the substantive issues, finding that the evidence submitted by the petitioners was inadmissible because it included internal documents unauthorized for release. The court further decided that requirements under the PPDA do not apply to the SGR because the PPDA provides an exemption in instances of negotiated loan or grants. An appeal in this case still awaits determination by the Court of Appeal.

In 2015, Omtatah filed a separate suit, this time relying on the constitutional right to information to request the disclosure of relevant documents and agreements relating to the SGR Phase II.<sup>4</sup> This case was again rejected by the court on the ground of *res judicata*. A closer reading of the court decision reveals several flaws. First, the application of the doctrine of *res judicata* does not seem proper in this case, because the second case is concerned with the SGR Phase II, which is governed by separate agreements. Secondly, the sole judge on the second case was the same one that dismissed the 2014 petition. This calls into question the impartiality of the judge, who was reasonably suspected of bias.

In response to the public suspicion of corruption, the Kenyan Parliament initiated an investigation into the SGR in 2014, which eventually confirmed the project's legality, while highlighting some "irregularities" during the negotiation procedure. For example, the Kenya Railway Corporation (KRC) originally awarded the SGR project to the China Road and Bridge Corporation (CRBC)<sup>5</sup> under the single source provision of the PPDA, but

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<sup>2</sup> To protect the identity of my interviewees, all the interviews and quotes cited in this research are anonymized.

<sup>3</sup> Petition No. 58 of 2014 consolidated with Petition No. 209 of 2014, High Court of Kenya at Nairobi, <http://kenyalaw.org/caselaw/cases/view/103808/>.

<sup>4</sup> Petition No. 548 of 2015, High Court of Kenya at Nairobi, <http://kenyalaw.org/caselaw/cases/view/124066>.

<sup>5</sup> CRBC is a subsidiary of CCCC. Phase I was awarded to CRBC directly; Phase II was contracted officially to CCCC –

later rescinded its own decision and relied instead on the existence of an international agreement (*i.e.*, the financial agreement of the SGR) to preempt the application of the PPDA.<sup>6</sup> This “shopping” of applicable rules of law raises as many questions about the neutrality of the regulatory agency as about the authority of the PPDA in ensuring transparency and competitiveness in public procurement. Concerned about this loophole in the PPDA, proposals were made in the Parliament to amend the law, but consensus has yet to be reached in this regard.

It is noteworthy that the issue of transparency is not merely a legal question, but has also shaped public perceptions of the SGR and of the Chinese influence in Kenya more generally. Since late 2018, Kenyan media have circulated a report that the Kenyan government has used Mombasa Port as a collateral for the SGR loans and will lose the Port to China upon the failure of loan repayment.<sup>7</sup> This further incited the fear of China’s “debt-trap diplomacy,” a term used to criticize China’s strategic use of debt to other developing countries

to secure diplomatic advantages.<sup>8</sup> Both the Chinese and Kenyan governments denounced these reports as ungrounded speculations, but refused to disclose detailed terms of the SGR agreements.<sup>9</sup> In China’s defense, it is rare for countries to publicize their sovereign lending and borrowing agreements; nevertheless, the unwillingness to engage with the public in the host society has undermined the Chinese government’s efforts in improving its soft power and reputation through global economic engagements.

### Regulatory Enforcement

Both Kenyan laws and the SGR agreements provide local content requirements. The SGR agreements set the local content requirements as 40%, because CHEXIM requires no less than 60% of the contents of CHEXIM-financed projects to be procured from China, a practice that can be traced to Japan’s development finance in China during the 1980s and 1990s.<sup>10</sup> However, the implementation of the local content requirements was more problematic, due to the vagueness and inconsistency in local laws. For example, the

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because the parent company wanted to boost its international reputation - but was implemented by CRBC.

<sup>6</sup> Special Report on the Procurement and Financing of the Construction of Standard Gauge Railway from Mombasa to Nairobi (Phase I), Public Investments Committee of the Eleventh Parliament of Kenya, 2014, <https://africog.org/wp-content/uploads/2017/06/PIC-REPORT.pdf>.

<sup>7</sup> George Omondi, *Mombasa Port at risk as audit finds it was used to secure SGR loan*, The East African, Dec. 20, 2018, <https://www.theeastafrican.co.ke/business/Mombasa-port-SGR-loan-default-China/2560-4903360-clh5nn/index.html>; *Does Kenya risk losing port to China?*, Standard, Dec. 19, 2018, <https://www.standardmedia.co.ke/article/2001306837/does-kenya-risk-losing-port-to-china>.

<sup>8</sup> See Deborah Brautigam, *Is China the World’s Loan Shark?* New York Times, Apr. 26, 2019, <https://www.nytimes.com/2019/04/26/opinion/china-belt-road-initiative.html>.

<sup>9</sup> Edith Mutethya, *Kenya, China dismiss claims on Mombasa port ‘takeover’*, China Daily, Dec. 29, 2018, <http://www.chinadaily.com.cn/a/201812/29/WS5c2766b2a310d91214051c20.html>; Edwin Okoth, *Mombasa port is safe from SGR loan, China now says*, Daily Nation, Dec. 2018, <https://www.nation.co.ke/business/Port-is-safe-from-SGR-loan--China-now-says/996-4912882-e8vkvz/index.html>. One KRC manager explained to me how the rumor was started. When the Auditor General of Kenya undertook an annual auditing for the KRC, he wrote a memo to the latter requiring clarifications on the SGR financial agreement, including whether the Mombasa Port is included as a collateral. But the Kenyan media reported this as a confirmed fact rather than a question that awaits answer. Interviewed Chinese and Kenyan officials also clarified that the collateral for the SGR loans is the “revenues of the Mombasa Port,” not its ownership.

<sup>10</sup> Interviews with CRBC management, Apr. 2019, in Nairobi.

PPDA provides that all public procurement projects in Kenya shall have at least 40% local content, while the National Construction Authority (NCA) Act requires only 30% for construction projects. Since the SGR agreements were exempt from the PPDA, as previously discussed, it seems that only the NCA Act will apply and the NCA would be the main regulatory authority. Interviewed Kenyan officials acknowledged that despite the adoption of the NCA Act in 2011, the NCA was not “operational” until late 2017, suggesting that the implementation of the SGR Phase I has gone largely unmonitored by the NCA.<sup>11</sup> Further, as a result of human resource constraints, NCA has focused more on the regulation of contractor registration than supervising local content requirements.

Therefore, in the absence of regulations specifying what counts as local content or who shall monitor the enforcement and how, the implementation of this requirement depends primarily on the discretion of the Chinese contractor. Managers from the KRC and CRBC pointed out that, concerns about the reputation of the Chinese state and the Chinese contractor contributed to ensuring compliance with local content requirements.<sup>12</sup> According to CRBC management, there are three aspects of local content: local labor, local sub-contracting, and local procurement of raw materials; they reported the implementation status of local content to the supervision team and the KRC on a bi-monthly basis. In addition, as a voluntary effort for knowledge transfer, CRBC has agreed to sponsor

about a hundred Kenyan students to pursue a four-year undergraduate degree in engineering in Beijing University of Aeronautics and Astronautics, seeing this as part of its corporate social responsibility and a long-term strategy to reduce the operational cost of the SGR. But a more practical challenge, as one Kenyan engineer from the supervision company noted, lies in the lack of a strong local supply chain. “The priority of the contractor and the supervisor is to guarantee the quality, cost efficiency, and the schedule for completion. We are happy to buy raw materials from the local market as long as they meet the Chinese technical standards, but the capacity of the manufacturing industry in Kenya is very limited. So, we ended up counting products imported by Kenyan vendors such as diesel and steel as local content. Industrialization requires comprehensive government policies and schemes to address. The SGR itself cannot do all the work.”<sup>13</sup>

### **Environmental Impact**

The environmental effects of the SGR have been a contentious issue as the railway passes through several national parks in the country. In 2016, when construction of the SGR Phase II had begun without obtaining an environmental impact assessment (EIA) license from the National Environmental Management Authority (NEMA), Kenyan NGO sued NEMA for failing to intervene.<sup>14</sup> The Environmental Tribunal dismissed the case on the ground that the plaintiff lacked standing under the Environmental Management and Coordination Act, which, as understood by the

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<sup>11</sup> Interview with NCA official, Apr. 26, 2019, in Nairobi.

<sup>12</sup> Interviews with the management of KRC and CRBC, Apr. 2019, in Nairobi.

<sup>13</sup> Interview with management of APEC-CRDC, a joint venture between Chinese and Kenyan engineering

companies that is responsible for supervising the construction of the SGR, Apr. 18, 2019 in Nairobi.

<sup>14</sup> NET 192 of 2016, Okiya Omtatah and Kenya Coalition for Wildlife Conservation and Management vs NEMA and Others at the Environmental Tribunal in Nairobi.

Tribunal, covers only the action, rather than inaction, of the NEMA.<sup>15</sup> A second case on this matter was brought to the Tribunal in 2017, after the NEMA granted an EIA license to the SGR Phase II, and the petitioners argued that there was a lack of public participation during the EIA study and a failure to consider alternative routes in order to minimize the environmental impacts on the Nairobi National Park.<sup>16</sup> Based on the records of public consultations and environmental management plans submitted by the contractor, the Tribunal concluded that there was not sufficient evidence to support the claims. Although the majority of public comments on file have voiced concerns about the SGR's negative environmental impacts on the Nairobi National Park, the Tribunal decided that, given the technicality of the issues in question, greater value shall be attached to submissions of expert witness called by the NEMA.

Balancing environmental and economic interests has been a daunting task in developing countries like Kenya, as it is in other places. While the environmental groups protested against the SGR because of fears of irreparable environmental damage, the Chinese contractor and the Kenyan government stressed that the selected route, which cuts through the Nairobi National Park for about 7 kilometers, is the most economically efficient choice as the cost of relocation and land compensation would be much higher for

alternative routes.<sup>17</sup> In several cases where the plaintiffs sought injunction orders from the court, the Chinese contractor has responded with the argument that it is in the interest of the general public of Kenya to ensure a smooth execution of the SGR, because any delay would increase the financial burden of the Kenyan citizens. In some cases, the Kenyan court has taken a stand to defend environmental interests and individuals' property rights and dismiss the "public interest" argument, while others have found it quite difficult to resist this developmentalist approach, especially when taking into account the fact that the SGR costs roughly 6% of Kenya's GDP.<sup>18</sup>

With that said, the ability of civil society to influence the decision-making and implementation processes of the SGR should not be underestimated. As environmental activists elaborated, "when the Phase I unfolded, we didn't have much experience in engaging the government and the foreign contractor in such a high-profile project. And before we realized it, the SGR was constructed through the Tsavo [National Park]. But we were much more effective with regard to the Phase II, which concerns the Nairobi National Park. It's also easier to mobilize public support because the park is so close to the capital city. One of our achievements was to persuade the government and the CRBC to elevate the railway using high pillars to reduce the impact on the migration of the animals."<sup>19</sup> Another activist

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<sup>15</sup> EMCA Section 129 provides that, any person who is aggrieved by: "1) the grant of a license or permit, 2) the imposition of any condition, limitation or restriction on the persons license, 3) the revocation, suspension or variation of the person's license; 4) the amount of money required to be paid as a fee, 5) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority" may bring a law suit before the Kenyan court.

<sup>16</sup> NET 200 of 2017, Okiya Omtatah vs. NEMA and others at the Environmental Tribunal in Nairobi.

<sup>17</sup> Interview with management at Earth Planners, which was responsible for the EIA study of the SGR Phase II, May 10, 2019 in Nairobi.

<sup>18</sup> Interview with judges in Kenyan courts, Apr. 2019.

<sup>19</sup> Interview with Wildlife Direct, May 2019 in Nairobi.

emphasized that, “the key is to engage as a partner or collaborator, rather than an opponent; the SGR is happening anyway, and what we can do is to make sure that different voices are heard and try mitigating the adverse environmental effects.”<sup>20</sup>

### Conclusion

The SGR offers a valuable window for examining the China-Africa interface. Having been envisioned as the key to revitalizing the regional railway network in East Africa while being financed, constructed, and operated by Chinese entities, the relevant African and Chinese agencies need to engage in a process of mutual adaptation with an extended time horizon. With the existence of a vibrant civil society and emergence of a constitutional revival since 2010,<sup>21</sup> legal contestation has become one of the most important channels for local stakeholders in Kenya to make their voices heard and mobilize resources and public support. On the other hand, however, the politicization of large-scale infrastructure projects such as the SGR as well as the influence of China’s developmental experience have posed serious challenges for the Kenyan judiciary – commonly perceived as one of the most independent judiciaries among African countries<sup>22</sup> – in balancing competing interests:

individual vs. collective interests, and economic vs. social and environmental interests. The SGR is a test case for establishing long-term strategic economic cooperation between China and African countries, and there is considerable room for improvement on both sides. The promotion of Chinese international arbitration and technical standards marks China’s achievement in norm- and standard-setting in the international economic order, but the failure to effectively engage the Kenyan public or civil society actors, such as environmental groups and the media, may jeopardize the country’s soft power goal in Africa. For the Kenyan government, rather than placing the attention mainly on job creation, local laws and institutions ought to play a crucial role in local capacity building, such as safeguarding the implementation of local content requirements and increasing operational efficiency and profitability of the SGR.

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<sup>20</sup> Interview with a representative of Kenya Wildlife Conservancies Association, May 20, 2019 in Nairobi.

<sup>21</sup> In 2010, Kenya adopted a new Constitution, reflecting on the post-election violence in Kenya in 2007. The new Constitution aimed at strengthening the protection of human rights and putting more restrictions on the authority of the government. See Morris Kiwinda Mbonenyi, *THE NEW CONSTITUTIONAL LAW OF KENYA: PRINCIPLES, GOVERNMENT AND HUMAN RIGHTS* (2012).

<sup>22</sup> In 2017, the Kenyan Supreme Court nullified the Presidential Election and ordered a new vote to be held. This

was widely covered by the Western media as manifesting the achievement of judicial independence in Africa. Kimiko de Freytas-Tamura, *Kenya Supreme Court Nullifies Presidential Election*, *New York Times*, Sept. 1 2017, <https://www.nytimes.com/2017/09/01/world/africa/kenya-election-kenyatta-odinga.html>; Daniel Wesangula, *Kenya’s Supreme Court has stood tall instead of ducking. It gives us hope*, *The Guardian*, Sept. 4 2017, <https://www.theguardian.com/commentisfree/2017/sep/04/kenya-supreme-court-stood-tall-hope-win-for-democracy>.