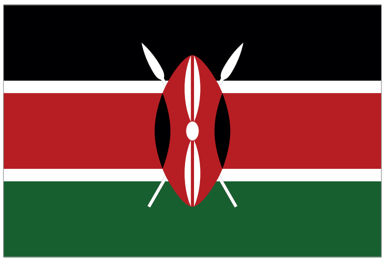


Kenya

Population[1]	51,393,010
Area (km^2)[1]	580,370
GDP per capita (USD)[1]	1,710.51
TPES (Mtoe)[2]	27.04
Energy intensity (toe/10^3 2010 USD)[2]	0.47
CO_2 emissions - energy ($MtCO_2$)[3]	16.26

Data from Orbis Crossborder Investment on energy projects and deals completed between 2015-2020[4]

Target industry	**Number of projects and deals**	**Project/deal type**	**Project CapEx and deal value (million EUR)**
Electric power generation, transmission and distribution	3 projects	new projects	51m EUR total project CapEx

Sources:

1. The World Bank 2018
2. ©IEA, World energy balances, 2020, www.iea.org/data-and-statistics, webstore.iea.org/key-world-energy-statistics-2019
3. ©IEA 2020, CO_2 emissions from fuel combustion, www.iea.org/data-and-statistics, webstore.iea.org/key-world-energy-statistics-2019
4. Orbis Crossborder Investment (2020), Bureau Van Dijk. Kenya is the destination country of the investment. Data represents the period 1 April 2015 - 1 April 2020. For more information see Annex II of this report.

Kenya's overall risk level against the assessed areas is **low**.

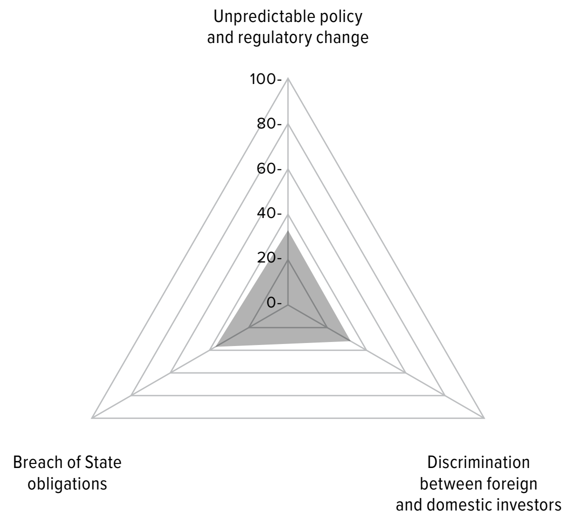
Among the three risks assessed in EIRA, *discrimination between foreign and domestic investors* is the lowest, followed by *unpredictable policy and regulatory change*, and *breach of State obligations*.

Kenya has a good performance on three indicators, and a moderate performance on one indicator. It has once again scored 78 on the indicator *management of decision-making processes,* and 63 on *rule of law*. On *regulatory environment and investment conditions*, its score has increased by two points and now stands at 62. Its score on *foresight of policy and regulatory change* has improved by a point and is at 59.

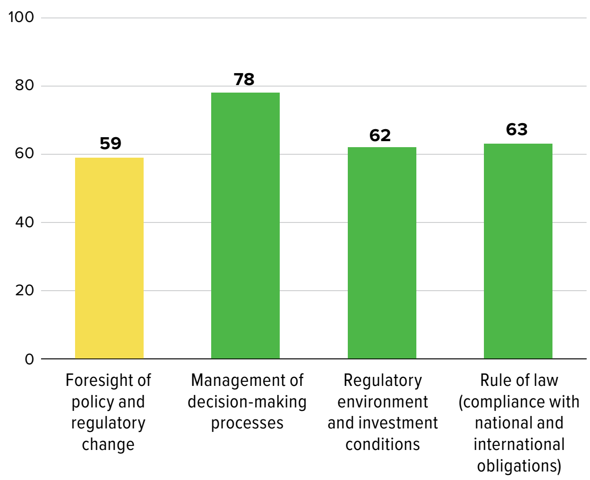
On a more detailed level, Kenya's sub-indicator performance is good. *Management and settlement of investor-State disputes* remains the highest-scoring sub-indicator at 85. On *transparency* (81) and *institutional governance* (75), its score is the same as last year. On the sub-indicator *communication of vision and policies* Kenya's performance has improved by a point and is now 68. Its score on *regulatory effectiveness* has improved by five points, from 59 to 64. It has maintained a score of 60 on *restrictions on FDI*. On *robustness of policy goals and commitments,* it has once again scored 50. The lowest-scoring sub-indicator is *respect for property rights* at 42.

While Kenya has the relevant policies and measures in place, there is potential for improvement. Attention should be given to strengthening respect for property rights.

RISK LEVEL



INDICATOR PERFORMANCE

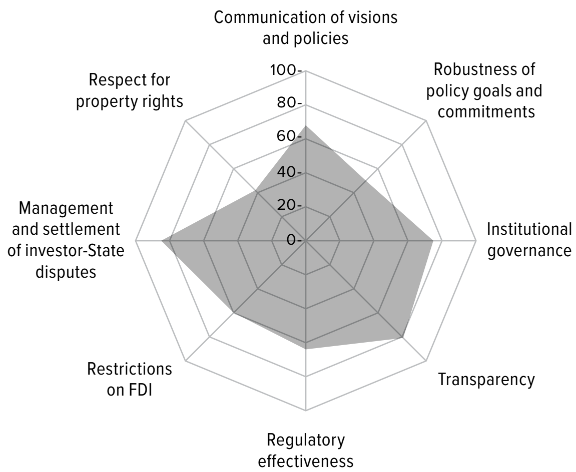


YEAR-ON-YEAR COMPARISON

RISK AREAS	2018	2019	2020
Unpredictable policy and regulatory change	35	33	33
Discrimination between foreign and domestic investors	34	33	32
Breach of State obligations	37	37	37

INDICATORS	2018	2019	2020
Foresight of policy and regulatory change	53	58	59
Management of decision-making processes	78	78	78
Regulatory environment and investment conditions	58	60	62
Rule of law	63	63	63

SUB-INDICATOR PERFORMANCE



INDICATOR 1

SCORE **59**

Foresight of policy and regulatory change

QUICK FACTS

Sessional Paper No. 4 of 2004 sets the policy framework for Kenya's energy sector.

The National Climate Finance Policy of 2018 establishes the institutional and reporting framework to access and manage climate finance.

Kenya ratified the Paris Agreement in 2016 and submitted its NDC.

STRENGTHS

In 2020, the Government of Kenya focused on ensuring affordability, investment, and competitiveness in the energy sector. The main initiatives expected during the year include the development of a Transition Least Cost Power Development Plan 2019-2039 and the alignment of subsidiary regulations with the Energy Act of 2019. The Government also wants to improve the licensing procedures for renewable energy projects so that electricity prices are more competitive. It is developing Africa's largest wind power farm to increase the country's electricity generating capacity and achieve universal energy access by 2022. The excise duty on electric-powered vehicles has been reduced from 20% in 2018 to 10% in 2019. The reason is primarily to encourage vehicles that utilise environmentally friendly technologies.

The Energy Act of 2019 requires a review of the national energy policy every five years. The Central Planning and Project Monitoring Unit, under the Ministry of Energy, is responsible for monitoring and evaluating the Ministry's projects and programmes. It also coordinates the process of performance contracting in the Ministry. For 2019, it has prepared quarterly and annual performance progress reports, as per the targets in the Ministry's performance contract. Kenya's climate change adaptation monitoring and evaluation system is currently under development.

AREAS FOR IMPROVEMENT

By establishing a clear legal framework for the energy sector, the Kenyan government is taking steps in the right direction. Now it is a timely moment for the Ministry of Energy to develop a long-term energy strategy comprising measurable targets and concrete implementation plans. This issue is particularly relevant to the country's climate policy planning. The existing action plans have a vision for the medium term, but there are no quantified emissions reduction targets set for the long-term. Moreover, tracking the progress of climate change mitigation and adaptation measures can be improved. As a starting point, the climate change registry should be made accessible to the public.

INDICATOR 2

SCORE **78**

Management of decision-making processes

QUICK FACTS

The Cabinet Secretary of energy is responsible for developing the national energy policy.

The Intergovernmental Relations Act of 2012 establishes a framework for consultation and cooperation between the national and county governments and amongst the county governments.

The Access to Information Act of 2016 gives effect to the constitutional right of access to information held by public authorities.

STRENGTHS

Each county government has prepared a development plan covering the period 2018-2022 to coordinate its activities with the national government and improve decision-making. In 2019, KenInvest launched the County Investment Handbook to support the county governments in developing investment promotion programmes and adopt best practices on investment facilitation. The combined efforts of the national and county governments are likely to increase investment growth to at least 32% of Kenya's GDP by 2030, in line with the Kenya Vision 2030 target. In November 2019, the Ministry of Energy adopted a Gender Policy to promote a healthy work culture among public sector staff. It is the first such legislative instrument on the African continent.

The Government is taking measures to guarantee public participation in critical policy and regulatory issues. For instance, it launched a stakeholder consultation on the Draft Energy (Solar Photovoltaic) Regulations of 2019. The Regulations set the framework for enforcing standards in the import, design and installation of solar PV systems and for collecting energy data as required by the Energy Act of 2019. The Public Participation Bill of 2019 is currently undergoing discussion in the Parliament. The Bill seeks to establish a legal framework for the public consultation process, set the parameters for such consultation, and define the obligations of State organs during the process. The State authorities are also required to inform citizens of the follow-up actions taken on the discussed issues. All the State authorities must provide notice of 21 days to the public before starting the consultations.

AREAS FOR IMPROVEMENT

The Government should make efforts to increase access to the information held by public authorities. It should avoid excessive control over crucial statistics and project information, so the information flow is updated, uninterrupted, and accurate. The engagement of interested parties during the initial stages of the policy-making process will help avoid objections which may arise, particularly from the private sector, during the policy adoption stage. The Public Participation Bill of 2019 is a positive step because it sets clear ground rules for consultation, and the Government should enact it into law at the earliest.

INDICATOR 3

SCORE 62

Regulatory environment and investment conditions

QUICK FACTS

The Energy and Petroleum Regulatory Authority (EPRA) regulates the generation, import, export, transmission, distribution, supply, and usage of electrical energy, except for the licensing of nuclear facilities.

The Constitution of Kenya 2010 guarantees the right to equality and freedom from discrimination.

STRENGTHS

The Government enacted the Nuclear Regulatory Authority Act in 2019. It creates a comprehensive framework for regulating atomic energy and nuclear technology. The Act provides for the financing of the Nuclear Regulatory Authority and the appointment of its board members. In December 2019, the President of Kenya signed the Competition (Amendment) Bill of 2019 into law. The new Act expands the scope of the prohibition against the abuse of buyer power and creates a separate section to address this issue. It also enhances the enforcement powers of the Competition Authority. The Competition Rules of 2019 were recently adopted to complement and implement the provisions of the new Act.

The legislative framework is well-established for the grid, off-grid and micro-grid projects. In 2019, Kenya launched the green bond market. The Policy Guidance Note on Issuance of Green Bonds, and the amended NSE Listing Rules by the Capital Markets Authority set the legal framework for the market. Moreover, per the Finance Act of 2019, interest income accruing from green bonds with at least three years maturity is exempt from tax. The Government expects this exemption will promote projects that reduce natural resource depletion and encourage climate change mitigation and adaptation.

AREAS FOR IMPROVEMENT

Kenya plans to shift from the “take-or-pay” to the “take-and-pay” tariff model for long-term Power Purchase Agreements. Under the new model, the Government will pay IPPs only for the power evacuated onto the grid. The Ministry of Energy should conduct thorough technical evaluation and feasibility studies before implementing the new model because it will increase the financial and operations risks of IPPs. The Ministry of Energy should also consult the new model with investors to avoid a situation where projects become economically unviable, and investors trigger the termination clause. The new model should be applied only to future projects and not lead to a renegotiation of the existing agreements.

The Government should reconsider section 2 of the Tax Law (Amendment) Bill of 2020, recently introduced in the Parliament, which proposes to remove the exemption on interest income accruing from green bonds with at least three years’ maturity.

INDICATOR 4

SCORE 63

Rule of law

QUICK FACTS

Kenya ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1967.

Kenya acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1989.

STRENGTHS

The Judiciary is taking steps to improve its processes, including the roll-out of the Court Recording and Transcription System, production of Speech-to-Text judgements and proceedings, and an operational E-filing system to file cases online. The Judiciary has deployed a tracking system to monitor the progress of cases. In the last year, the Business Court Users Committee held discussions on improving the delivery of services in the Commercial Division of the High Court and on clearing the case backlog. The Energy Act of 2019 grants any person aggrieved by a decision of the EPRA the right to appeal before the Energy and Petroleum Tribunal.

The Constitution prohibits the State from depriving an individual of its property. Some of the BITs signed by Kenya stipulate that the State must pay compensation against expropriation without any restriction or delay. The compensation amount should include interest at a commercial rate, established on a market basis from the date of dispossession of the expropriated property until the time of actual payment. An investor aggrieved by an expropriation decision may request domestic courts to review the amount of compensation and the legality of expropriation. The BITs grant unqualified national treatment and most-favoured-nation treatment to all investment, including IP rights.

AREAS FOR IMPROVEMENT

The Foreign Investments Protection Act requires the State to pay prompt compensation in the case of property acquisition, but it does not set a deadline for making the payment. Similarly, the Land Act of 2012 states that if the National Land Commission deems a matter urgent, State authorities may take possession of the land before paying the compensation. The Land Act should be amended to include a detailed process for the acquisition of property and set clear timelines for paying compensation. The Foreign Investments Protection Act should be reconciled with the Land Act to avoid conflicting interpretations.

According to the State of the Judiciary and the Administration of Justice Report 2018-2019, the maximum desirable timeline for finalising a case is one year from the date of filing. Statistics on the adjudication of commercial claims should be regularly updated to keep track of any delays in decisions. There should be timelines set for dealing with interim/injunctive applications and, where needed, the judiciary should restructure directorates and court stations to maximise efficiency.

IMPLEMENTATION STATUS

Kenya

PROPOSED IN	EIRA AREAS FOR IMPROVEMENT	IMPLEMENTATION STATUS AS OF 1 APRIL 2020
Indicator 1		
2018	Adopt the draft National Energy Policy pending since 2015.	**Work ongoing.** The National Energy Policy 2019 is drafted but has not been tabled before the Parliament for approval.
2018	Incorporate policy review and reporting requirements in the national energy policy.	**Partially implemented.** A new review mechanism is stipulated in the Energy Act of 2019 and the Petroleum Act of 2019.
2018	Include affected communities in the policy monitoring and evaluation process.	**Partially implemented.** Participation of county governments is provided for in the Energy Act of 2019 and the Petroleum Act of 2019.
2020	Set a long-term climate policy plan that contains quantitative emissions reduction targets.	**Improvement suggested in 2020.** Status will be updated in 2021.
2020	Make the national climate change registry accessible to the public.	**Improvement suggested in 2020.** Status will be updated in 2021.
Indicator 2		
2018	Set a legal and institutional framework for public consultation on draft laws, regulations, and policies.	**Work ongoing.** The Public Participation Bill of 2019 was recently introduced in the Senate to address this issue.
Indicator 3		
2018	Set in law the criteria for the selection of the Energy and Petroleum Regulatory Authority's (EPRA) commissioners.	**Partially implemented.** The Energy Act 2019 stipulates the criteria for the selection of the EPRA commissioners.
2018	Give the EPRA a separate budget, and the right to adjust it without needing Government approval.	**Pending**
2018	Set a legal framework on the local content policy of the country.	**Fully implemented.** The Energy Act of 2019, the Petroleum Act of 2019, and the Model PSC 2019 introduce detailed provisions on local content obligations.
2019	Fast-track the adoption of subsidiary regulations under the Energy Act 2019 to operationalise its key provisions.	**Work ongoing.** The National Energy Policy of 2018 has been adopted. The Nuclear Regulatory Authority was created in 2019 per the provisions of the Energy Act of 2019. The Energy (Solar Photovoltaic) Regulations 2019 have been drafted. The full range of subsidiary laws and regulations are yet to be effected.
2019	Re-evaluate the need for a dedicated law on local content to avoid duplication and contradictions with the Energy Act of 2019 and the Petroleum Act of 2019.	**Work ongoing.** The provisions of the Local Content Bill are undergoing evaluation in the Parliament of Kenya.
2020	Conduct technical evaluation and feasibility studies before replacing the "take-or-pay" model with the "take-and-pay" tariff model in longer-term Power Purchase Agreements. Conduct detailed stakeholder consultations before adopting the new model. Apply changes only to new IPPs with minimal impact on existing investors.	**Improvement suggested in 2020.** Status will be updated in 2021.
2020	Reconsider section 2 of the Tax Law (Amendment) Bill 2020 that proposes the removal of exemption on interest income accruing from green bonds with at least three years' maturity.	**Improvement suggested in 2020.** Status will be updated in 2021.
Indicator 4		
2018	Update the domestic law on expropriation to include a definition of "public purpose or in the public interest".	**Pending**
2018	Set deadlines for the first date of a hearing, timelines for domestic courts to render final judgements, and deadlines for the completion of appeals.	**Work ongoing.** The timeline for judgements under the Civil Procedure Rules is 60 days after the hearing.
2020	Regularly update statistics of adjudication of commercial cases and set timelines for dealing with interim/ injunctive application.	**Improvement suggested in 2020.** Status will be updated in 2021.