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# **Assessing Competitive Resource Tenders as an Option for Mining Rights Allocation in South Africa**

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**South African Institute of International Affairs**

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## ABSTRACT

The Mineral and Petroleum Resources Development Amendment Bill of 2013 (MPRD-AB) has generated fresh debate regarding the appropriate system for allocating mineral prospecting and mining rights in South Africa. The draft bill no longer includes section 9 (1)(b) of the Mineral and Petroleum Resources Development Act of 2002 (MPRDA), which specifies that mining rights are to be allocated according to the first-in, first-assessed (FIFA) principle (see Box 1). This paper aims to inform the current debate, focusing in particular on competitive resource allocation systems (also referred to as mineral rights auction or tender systems), which certain stakeholders have proposed as an alternative to the existing FIFA system. The focus on competitive resource allocation systems is also informed by Minister of Mineral Resources Susan Shabangu's 2012 budget vote speech, in which she stated that the Department of Mineral Resources intended to begin a process of auctioning lapsed or revoked mining licences.

### Box 1

Section 9(1) of the MPRDA states that: 'If a Regional Manager receives more than one application for a prospecting right, a mining right or a mining permit, as the case may be, in respect of the same mineral and land, applications received on –

(a) the same day must be regarded as having been received at the same time and must be dealt with in accordance with subsection (2);

(b) *different dates must be dealt with in order of receipt*' (Emphasis added).

The literature on resource allocation systems generally recognises three likely advantages of competitive resource allocation systems. They can secure a larger share of economic rents of mineral resources to the state, address informational disadvantages of the state vis-à-vis private companies, and, when well designed, engender greater transparency in the rights allocation process. Competitive bidding systems produce best results where existing geoscience data indicates the presence of potentially high-value mineral deposits. Well-structured competitive bidding systems have the advantage of stipulating clear and transparent allocation rules that limit opportunities for favouritism and abuse. However, this requires that evaluation criteria, timelines, geological data and other critical information related to bids are clear to all potential bidders. Such information must also be well publicised. The effective design and administration of a competitive bidding system can present significant challenges in the context of weak institutions.

The FIFA system, by contrast, encourages mineral exploration by the private sector in areas where little is known about potential reserves; is administratively less burdensome; and supports quicker processing of applications. The state must weigh the benefits of the auction system against the risk of delays in the development of the country's mineral resources, and other costs and risks associated with such a system.

Most countries that have implemented a competitive bidding system for awarding mineral rights have retained the FIFA system for areas where poor geoscience data is available. Policymakers therefore are not required to choose between a pure FIFA and a competitive system, but may opt for a mixed system. Moreover, competitive bidding systems need not rely on a simplistic 'highest bid wins' formula, but should also contain pre-qualification criteria related to environmental, social and transformation policy goals.

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## ABBREVIATIONS AND ACRONYMS

DMR	Department of Mineral Resources
FIFA	first-in, first-assessed
IMMTC	Inter-Ministerial Mining Technical Committee of Liberia
MPRDA	Mineral and Petroleum Resources Development Act of 2002
MPRD-AB	Mineral and Petroleum Resources Development Amendment Bill of 2013
SIMS	State Intervention in the Minerals Sector

## INTRODUCTION

An extended period of historically high mineral commodity prices during the first decade of the 21st century has fuelled a broad and intensive debate about the fair distribution of economic rents accruing from mining activities in South Africa and elsewhere on the African continent. In many countries, including established mineral regimes such as Australia, mining legislation and tax structures have been reviewed and amended. Governments believe they are in a position to demand better terms, not only with respect to fiscal considerations but also in terms of the overall development impact of mining.<sup>1</sup>

In South Africa, the debate on the sharing of mineral wealth between various stakeholders can be traced back at least as far as the mine labour disputes of the 1920s and 1940s, and the 1955 Freedom Charter. More recently, calls for the nationalisation of the country's mining assets prompted the governing African National Congress (ANC) to commission a report to inform the party's position on the role of the state in the mineral sector. The resulting State Intervention in the Minerals Sector (SIMS)<sup>2</sup> report made a number of recommendations on the role of the state in governing and exploiting South Africa's mineral wealth. While the report did not support nationalisation of the industry, it did propose a greater role for state-owned mining company, state promotion of beneficiation and a review of the tax structure governing the industry.

The SIMS report further argued that the existing system for awarding mining rights, based on the 'first-in, first-assessed' (FIFA) principle, should be replaced by a competitive bidding system. The FIFA system, according to the report's authors, had allowed South Africa's known mineral resources to be 'given away for nothing', and therefore the best way to 'optimise the developmental impact of all new mineral concessions ... is to go to the market through the public tender ("price discovery") of all known un-concessioned mineral assets against developmental criteria'.<sup>3</sup>

Many of the core recommendations of the SIMS report were adopted by the ANC at the party's 53rd National Conference at Mangaung in December 2012. The recommendation for a fundamental change to the mineral rights allocation system, however, was not included in the conference resolutions. The governing party's central objective of increasing the developmental impact of South Africa's mineral sector has found expression in a number of key public policy initiatives, most notably through the legislative reform process related to the Mineral and Petroleum Resources Development Act of 2002 (MPRDA).

In December 2012, the Minister of Mineral Resources, Susan Shabangu, issued a call for public submissions on the draft Mineral and Petroleum Resources Development Amendment Bill of 2013 (MPRD-AB), which proposes amendments to the MPRDA and the MPRDA Amendment Act, 2008.

There has been some confusion related to the status of the MPRDA Amendment Act of 2008. The Act was signed into law by the president on 21 April 2009, but clause 94 of the Act stated that the Act 'shall come into operation on the date fixed by the President by proclamation in the Gazette'. The MPRDA Amendment Act of 2008 was ultimately enacted by *Government Gazette* in June 2013.

The question of South Africa's mineral rights allocation process came to the fore during public consultations on the MPRD-AB as the draft bill had excised section 9 (1) (b) of the original MPRDA, which dealt with prospecting and mining rights allocation processes in accordance with the FIFA principle. While there is no clear indication whether the rights allocation process will be altered, the removal of provisions outlining mineral rights allocation from the MPRDA has led to speculation that the Department of Mineral Resources (DMR) may intend making such changes. This position is supported by Minister Shabangu's statement in her 2012 budget speech that she intended to begin auctioning lapsed or revoked mining rights in the course of that year, following calls for public submissions on such an auction process in the *Government Gazette* of 9 May 2011 and 6 February 2012.<sup>4</sup>

While the auctioning of lapsed or revoked mining rights had not yet taken place at the time of publication, the amendments to section 9 of the MPRDA may be informed by the Minister's stated intent to implement an auction system, at least in the case of lapsed or revoked mining rights.

Given this context, this paper seeks to outline the relevant considerations and design principles to guide the potential use of a competitive mineral rights allocation system in South Africa.

## CONTEXTUALISING COMPETITIVE RESOURCE ALLOCATION SYSTEMS

Historically, mining rights have generally been allocated according to the FIFA system. In recent years, however, an increasing number of countries have implemented, or stated their intent to implement, an alternative rights allocation system that would rely at least in part on competitive bidding or auction processes. Such auction systems have been used in the allocation of mining licences in the oil and gas sector since the 1970s, where it has been fairly common, given the concentration of hydrocarbon deposits and the good geoscience information that emerges as a result. The adoption of competitive rights allocation systems in the non-liquid hydrocarbons and minerals sector has been promoted through the Natural Resources Charter,<sup>5</sup> a set of 11 principles developed by a group of independent global experts with the aim of strengthening government and society's management of natural resources for improved developmental outcomes. Following its launch in October 2010, the Natural Resources Charter was adopted by the African Union Heads of State steering committee for the New Partnership for Africa's Development in 2011. The fourth precept of the Natural Resources Charter addresses the allocation of mineral rights, arguing that 'competition in the award of contracts and development rights can be an effective mechanism to secure value and integrity'.<sup>6</sup> The World Bank has also published guidelines for countries seeking to award mining rights through tender processes.<sup>7</sup> However, the institution has not directly promoted competitive resource tenders as a preferable rights allocation process, and has further warned that 'trying to capture the rent stream too early ... will dampen future investment'.<sup>8</sup>

The widespread adoption of competitive allocation mechanisms in the oil and gas sector, and the growing interest in these mechanisms from various mining regimes arise from three primary advantages that such systems may hold. These advantages are

the potential for rent maximisation, addressing the information problem and greater transparency.

The most pressing argument for a competitive allocation process is that such systems can secure greater value for governments in the short term by generating revenues through the bidding process. The Natural Resources Charter argues that 'competition between firms that are technically and financially competent has the potential to deliver maximum value to a government which may possess less expert information than the bidders'.<sup>9</sup> As this statement indicates, the issue of rent capture is closely linked to the information problem. While governments may possess some level of knowledge regarding the existence of high-value mineral deposits, they may nevertheless be at an informational disadvantage relative to well-resourced and technically adept mining firms regarding the exact value of those deposits. The true value of the deposit will depend not only on international mineral prices but also on the costs of extraction, which companies are in a better position to evaluate than governments.<sup>10</sup> By establishing a competitive bidding process, an auction reveals information on how valuable the bidders believe the licensing opportunity to be, and which bidder values it most.<sup>11</sup> Competing bidders will only reveal their true valuation of the resource, however, if a sufficient number of firms participate in the bid and there are effective mechanisms to address the threat of collusion.

While the auction system does force bidding companies to reveal their valuation of the mineral deposit under auction, such a system also obliges the state in the initial phase to identify areas of potential high mineral wealth through geological surveys and other geosciences research. The requirement for the state to first identify and subsequently design an auction for mining lease areas implies that a competitive auction system requires significantly more time and entails a far greater administrative burden than a pure FIFA system. The state must therefore weigh the benefits of the auction system against the risk of delays in the development of the country's mineral resources and other costs and risks associated with such a system.

Finally, well-structured competitive bidding systems have the advantage of providing a clear and transparent allocation process that limits opportunities for favouritism and abuse.<sup>12</sup> An important caveat to this argument is that the evaluation criteria, timelines, geological data and other critical information related to the bid be clear to all potential bidders and that such information be well publicised. The World Bank's 'Rents to Riches' publication and its work on the 'Mineral Rights Cadastre',<sup>13</sup> as well as Acemoglu and Robinson's 2013 paper on incentive-compatibility imperatives in policymaking,<sup>14</sup> all suggest that this caveat is extraordinarily difficult to ensure in the context of weak institutions.

It is also vital at this stage to address two common misperceptions regarding competitive resource allocation systems. First, contrary to some perceptions, policymakers can opt for a mixed system where rights are allocated either according to the FIFA principle or through competitive bidding, depending on the availability of geological information on the licence area. Indeed, such a mixed system is often preferred, as FIFA systems tend to encourage exploration by private firms in areas where the state possesses poor geological information, while a competitive bidding process is more suited to licence areas where existing geological data indicates a high probability of valuable resource deposits.<sup>15</sup> Auction systems may therefore be particularly suited to cases where the state seeks to reallocate lapsed or revoked mining rights. A well-implemented mixed system can go some way towards addressing some of the inherent weaknesses of either approach.



However, it is essential that legislation clearly specifies under which conditions each system would be applied within a particular mining jurisdiction.

The second misconception relates to bidding criteria. It is often assumed that a competitive bidding system relies on a simplistic ‘highest bidder wins’ formula, fuelling concerns about the potential neglect of the social and environmental impacts of mining activities. In South Africa there is a particular concern that mining should contribute to the development of adjacent communities and promote the transformation imperatives enshrined in the Mining Charter. It has been argued that, by allocating mining rights to the highest bidder, a competitive allocation system would undermine efforts to encourage emerging, local firms to enter South Africa’s mining industry.<sup>16</sup> In practice, though, there is some scope for a government to clearly articulate specific developmental, social and environmental criteria in its bidding system. A number of design principles are vital for a competitive mining rights allocation system to deliver effectively for government and other stakeholders, some of which are outlined below.

### **General design principles**

Poorly designed rights allocation systems hold a number of risks for mining regimes, including extended legal appeals to rights allocations, a decrease in exploration activity and mine development, and the negative impact of an underperforming mining sector on employment and government revenues.

The World Bank has identified four key criteria for efficient and effective award policies:

- transparent, competitive and nondiscretionary procedures for the award of exploration, development and production rights;
- a clear legal, regulatory and contractual framework;
- well-defined institutional responsibilities; and
- clearly specified environmental and social safeguards.<sup>17</sup>

With regard to the World Bank’s emphasis on a clear legal framework, research supports the view that, over the long term, rules enshrined in legislation are to be preferred over discretionary policy.<sup>18</sup> Discretion may appear beneficial in the short run, especially to justify developmental ambitions, but it invariably produces unintended negative outcomes over time. Furthermore, excessive discretion violates the principle of the ‘rule of law’ that is built into South Africa’s constitution (section 1(C)).<sup>19</sup> As political scientist Barry Weingast has argued, ‘One of the central features of limited government is the rule of law, a society of universalist laws, not of discretionary political power ... To survive, the rule of law requires that limits on political officials be self-enforcing.’<sup>20</sup> Parliaments therefore have a crucial role to play in holding the executive to account by placing limits on discretionary power. The predecessor to the MPRDA, the Draft Minerals Development Bill of 2000, was widely criticised for containing excessive ministerial discretion.<sup>21</sup> It is therefore critical that the MPRD-AB avoids such excessive discretion.

The success of mineral rights tenders or auctions will be determined by a strong governance framework that provides a system of checks and balances throughout the process.<sup>22</sup> Auction systems for mineral rights must be carefully designed in terms of both selecting the bidding variables and the design of the auction itself.<sup>23</sup> Effective competitive

resource tenders therefore require clear frameworks to ensure common understanding of the objectives, processes, and roles and responsibilities of key actors.<sup>24</sup>

At a minimum, the announcement of each individual bidding process should state all the information required for the tender and allow sufficient time for interested parties to prepare their offers. The rights being awarded should be clearly specified. Successful bidders or applicants must know what they will obtain, e.g. exclusive rights to explore, develop and produce in a delineated area, subject to the frameworks referred to, and to the specific terms of the award.<sup>25</sup> In addition, details of documents to be presented, deadlines, particular scoring and evaluation criteria to be applied, and a minimum score that will be considered acceptable, should be precisely stated. The tender conditions, scoring benchmarks and evaluation criteria should be consistent and commensurate with the information available on the potential of the area under bid.<sup>26</sup> It is essential that bidding should take place over observable or verifiable bid variables so that bids can be adequately compared and assessed.<sup>27</sup>

Screening procedures are also desirable to determine the credibility and technical competence of bidders, as well as the availability of important data regarding the bid, including the number of those submitting bids. Clarity on applicable sanctions for specific breaches, as well as clear procedures for appeal, is also needed. Such procedures should be unbiased and fully open to public scrutiny.<sup>28</sup> While a well-designed auction system can increase transparency and guard against rent seeking, the Natural Resources Charter emphasises that there should be 'strong rules to prevent public officials steering business to firms in which they or their relatives and proxies may have a financial interest'.<sup>29</sup>

**Table 1: Jurisdictions employing or considering the bid auction system**

Country	Experience with bid auction system
<b>Afghanistan</b>	Uses a mixed auction/FIFA system. Auctions have included Aynak copper deposit (2007) and Hajigak iron ore mines (2011).
<b>Algeria</b>	Normally prospecting licences for non-hydrocarbon mineral resources are granted by FIFA, but where the relevant deposit has been surveyed with public funds, the Ministry of Energy and Mines periodically invites investors to participate in bidding rounds for mining titles. The Mining Patrimony National Agency holds regular, transparent auctions of mine sites that are open to all investors. <sup>a</sup>
<b>Australia</b>	In January 2012, the state government declared Queensland a restricted area to prevent new mineral exploration activity. Government was to periodically release land for exploration by publishing a call for tenders. For highly prospective tenements, applicants would also be required to submit a cash bid (a proposed purchase price for the rights to explore for resources on the land). <sup>b</sup>
<b>Brazil</b>	In June 2013, the government submitted to Congress a New Mining Code that enshrines an auction bid system for concessioning new mineral prospecting licences (among other options). <sup>c</sup> The code has not yet been passed, and the <i>Wall Street Journal</i> reported that it would probably only be voted on in the first quarter of 2014. <sup>d</sup>

<b>Chile</b>	Employs a mixed FIFA/auction system, but only auctions under very specific conditions: 'If [a company's] annual mining concession fees are in arrears, the designated Court can, after the 1st of June of the same year and at some date proposed by the Chilean Treasury and approved by the designated Court, put up the mining concession for auction.' <sup>e</sup>
<b>Dem. Rep. Congo</b>	Auctioning is only undertaken when a deposit has been examined by the state or its entities and is considered to be an asset of substantial value. Bids are invited on prescribed conditions and considered by an Inter-ministerial Commission. <sup>f</sup>
<b>Ghana</b>	In 2012, the planned introduction of competitive auctions for mineral licences (as for petroleum licences) was proposed. Government is still in the process of mapping mineral deposits before finalising the auction system and opening it to bidders. <sup>9</sup> Environmental Impact Assessments are a prerequisite for bidding companies.
<b>India</b>	In September 2013, India's Cabinet Committee on Economic Affairs announced that it had approved a policy for the auctioning of coal blocks. It appears as though the policy switch will apply across the board, replacing the previous system, in which coal mining licences were allocated on recommendations of a panel of top bureaucrats across ministries. Winning bidders will receive up to two years for exploration and five years for development of coal blocks. <sup>h</sup>
<b>Kazakhstan</b>	In April 2013, the government lifted a four-year moratorium on issuing new mineral exploration licences. The first auction was due to take place in May 2013, but no further information on this is available. <sup>i</sup>
<b>Liberia</b>	Bid system for known deposits (EIAs as part of bid-qualifying criteria). FIFA system is used in areas where mineral wealth potential is as yet unknown.
<b>Mongolia</b>	The 1997 mining law enshrined the FIFA principle; policy change in 2006 to include auctioning, used only where exploration was undertaken by the government or where the prior holder has forfeited its rights. <sup>j</sup>
<b>Mozambique</b>	In 2012, announced plans to auction coal deposits in Tete Province, while retaining FIFA system for areas about which mineral potential remained unknown. <sup>k</sup>
<b>Tanzania</b>	Government may consider and designate any vacant area to be in the public interest and invite tenders for prospecting or mining. The successful bidder is chosen on the grounds of whichever proposal is most likely to promote expeditious and beneficial development of the identified mineral resources. <sup>l</sup>
<b>Zambia</b>	Auctioning is undertaken in areas where known mineral resources exist. The Mining Advisory Committee evaluates the bids in accordance with stipulated requirements and advises the minister on the successful bid. The system has recently come under scrutiny, with Gemfields reporting problems. <sup>m</sup>
<b>Zimbabwe</b>	Zimbabwe's 2013 Draft Minerals Policy states that 'all known deposits and all lapsed or abandoned properties will be publically tendered to optimise the development impact ... A developmental Mineral Policy will cater for the varying levels of resource confidence of potential mineral properties by only permitting exploration (prospecting) licenses over areas that have no known mineral occurrences, by auctioning all known properties and by reserving partially known deposits for further exploration by state agencies ... The development of a new Minerals Development Act (MDA) [is] to cater for a hybrid of FIFA (claims) and a public tender system, for "unknown" and "known" mineral resource terrains, respectively'. <sup>n</sup>

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## POTENTIAL DRAWBACKS OF THE AUCTION SYSTEM

There are some potential downsides to consider when employing the auction bid system. One of the primary challenges is that such a system requires the government to identify bid areas and subsequently administer the bid process. In practice, governments can invite tenders only for areas that have known geological potential. Exploration activity and mine development can therefore be significantly delayed, thereby inhibiting the growth of the

mining sector. An auction bid system generally carries high transaction costs for the state. This is a major issue that policymakers must weigh carefully.

Moreover, international experience has shown that even robust pre-screening processes and non-compliance penalties may not be able to prevent unscrupulous speculation by mining operators, extended legal appeals to rights allocation decisions, and the failure of winning bidders to comply with the commitments that they had specified in their bids.

Afghanistan has employed auctions to allocate mining rights to its Aynak copper deposit in 2007 and three major iron ore mines near the town of Hajigak in 2011. The Aynak mining rights were awarded to two Chinese companies, the Metallurgical Corporation of China and the Jiangxi Copper Corporation. The investment was valued at \$4.4 billion and included the development of a railroad, a 400 megawatt power plant, a smelter and a coal mine. However, in the five years since the awarding of the contract no copper has been produced at the mine. According to press reports, the Chinese companies have asked the Afghan Ministry of Mines for a renegotiation of terms, where royalties to the government would be cut, the construction of the railway line postponed, and the Chinese companies would no longer be required to build a power plant and copper smelter on the site, as they had indicated in their initial bid.<sup>30</sup> The Hajigak iron ore rights were awarded to an Indian consortium led by the Steel Authority of India in 2011. By 2013, however, it was reported that no contract had been signed between the Indian consortium and the Afghan government as there was disagreement about the conditions for exploration and production.<sup>31</sup> The consortium argued that the six-month window for commencement of exploration activities following the signing of the contract was unfeasible and that fluctuations in global iron-ore markets would not allow it to commit to fixed production or selling volume targets.<sup>32</sup> Afghanistan's experience with mineral rights auctions illustrates the difficulty of ensuring that winning bidders deliver on the commitments outlined in their bids, and the significant delays in mine development that can arise from such processes.

Another example of the complexity of auction systems is that of Liberia, which employs a mixed FIFA/auction system. In February 2008, Liberian President Ellen Johnson-Sirleaf announced that the contract for the development of three major iron ore deposits (known as the 'western cluster') had been awarded to the South African-based company, Delta Mining Consolidated. Concerns were immediately raised as to how a relatively junior mining company had won the tender ahead of global iron ore developers that had also submitted bids, including Sino Steel and Tata Steel. There was very little transparency regarding the evaluation of the bids by Liberia's Inter-Ministerial Mining Technical Committee (IMMTC), resulting in allegations of mismanagement and corruption.

Following investigations into the initial rights allocation process, the Liberian government reversed its decision to award the contract to Delta, claiming that the bidding process may have been compromised. Delta and Tata Steel were barred from participating in the second round tender process that would seek to reallocate mining rights for the western cluster. Delta then instituted legal proceedings to prevent the Liberian government from re-tendering the project, but withdrew these proceedings when, in May 2009, the Liberian government cleared Delta of all alleged improprieties related to the initial tender. Following a second tender process, the mining rights were awarded to an Israeli-based mining company, Elenilto, in January 2010. Again, concerns were raised by various stakeholders about the credentials of the winning company, which was said to

have limited experience in mining iron ore and to have failed to meet the requirements prescribed by the IMMTC. In August 2011 Elenilto sold a majority share in the mining concession to Sesa Goa, an Indian iron ore producer in which Vedanta Resources has a majority stake. In 2012 Elenilto sold the remaining shares to Sesa Goa. The Liberian case underlines the challenges of developing effective implementation capacity and oversight, even in a case where the technical capacity of agencies such as the World Bank have been made available to regulatory authorities.

At a minimum, the key guiding questions that South African lawmakers and officials should ask regarding the viability of the bid option in South Africa include the following:

- Is an auction bid process the optimal way to capture rents in the long run?
- Does South Africa possess the institutional capacity to make a bid system work and, more specifically, do the regulatory authorities possess the geosciences expertise and data to ensure a functional auction system?
- If an auction system is introduced specifically for the allocation of lapsed or revoked mining rights, what conditions should the MPRDA contain to denote how an auction system would be employed?
- Given the many safeguards required to optimise a competitive resource allocation system, are there incremental steps that could be taken to improve the FIFA system in the medium term through electronic capturing of a one-stop-shop minerals cadastre?
- What applicable lessons can be drawn from the limited knowledge we have about the functioning of the system in other countries? Are there likely to be unintended negative consequences related to this system and what measures should be in place to mitigate these?

## POLICY IMPLICATIONS

The foregoing analysis of mining rights allocation processes has highlighted the importance of a well-designed allocation process that is conducted within a clear legal, regulatory and contractual framework. This paper therefore makes the following recommendations.

- The Parliamentary Portfolio Committee on Mineral Resources should request the DMR to redraft the MPRD-AB for greater clarity on the prospecting and mining rights allocation process in South Africa.
- If the DMR intends to implement competitive bidding procedures in conjunction with the FIFA principle, the MPRD-AB should specify the conditions under which these would be applied, as well as the relevant administrative structures and procedures that would apply.
- The potential benefits of rents received through a competitive bidding process should be weighed against the additional administrative burden this will place on the DMR, the complexity of such processes and the risks of extended appeals.
- Whichever rights allocation system is preferred (or some combination of both), it must be clearly articulated in law and not be subject to ministerial discretion or regulations published beyond public participation processes.

## CONCLUSION

The optimal choice for a country contemplating the bid option or the FIFA principle (or a combination of both) must be decided on the grounds of what can maximise rents for the state over the long term without incurring unintended negative consequences. The need to incentivise private companies willing to incur the risk of exploration projects must be carefully balanced against the short-term rent-acquisition interests of the state. Allowing the latter to trump the longer-term investment prospects and viability of the sector could ultimately prove counter-productive to the broader development objectives sought through mining policy amendments. It may be also be worth reiterating that where information asymmetry is high and institutional capacity is weak, a simple, transparent system might be preferable to the complexities of auction bids. All of these caveats do not of themselves vitiate the potential viability of a bid system, as long as the critical safeguards and requisite capacity are in place.

A minimum framing condition to guarantee the smooth, impartial and coherent functioning of a bid auction system is to enshrine the key elements of its design and implementation in law. As the World Bank has argued,<sup>33</sup>

Achieving consistency and predictability of political and policy decisions with regard to natural resources may be more sustainable and welfare-enhancing in the long run ... In this respect, a clear, simple and nondiscretionary legal and regulatory framework is a crucial factor for attracting foreign investment.

To be sure, given South Africa's historical context, the functioning of a bid auction system – if indeed this is the system favoured by the government going forward – is likely to be influenced by specific developmental criteria as outlined in several official policy texts. The risk of excessively subjective considerations in determining the scope of these developmental criteria in itself necessitates that the key principles of the system be clearly enshrined in legislation.

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