

Rail and Ports: Why Logistics Corridors Need a Statutory Foundation

South Africa's first private rail-and-port corridor is being built on a corporate workaround. Why the National Rail Bill needs to give it a statutory foundation.

When the National Ports Act was passed in 2005, nobody needed to ask how a port would connect legally to the railway behind it. Transnet owned and operated both as a single state monopoly, so the corridor existed as a matter of corporate fact rather than legal design. That is no longer the case. Rail is now being unbundled and opened to private operators, and the first proposal to hand a full rail-and-port corridor to the private sector has been put to market. The legal framework has not kept pace.

Transnet's Request for Qualification for the Ngqura Manganese Export Corridor (NMEC), issued in late September, tries to close the gap by corporate means rather than by law. The question for the National Rail Bill is whether a corridor can be built on a contractual package of inter-linking shareholders' agreement, access agreements and sub-licences, or whether it needs a statutory foundation.

A gap the Ports Act never had to fill

The Ports Act regulates ports as a separate system. It makes the Transnet National Ports Authority (TNPA) the port authority, provides for terminal operators to be appointed under agreements or licences (sections 56 and 57), and gives the TNPA a role in arranging road and rail access within the port (section 11). It does not look outward along the corridor. There is no mechanism for coordinating the port with the railway serving it, because there was only ever one party on both sides of the interface.

Rail sits at the other end of the spectrum. The statute in force is still, in substance, the 1989 Legal Succession to the South African Transport Services Act. The rail access chapter of the Economic Regulation of Transport Act has not been proclaimed, and the National Rail Bill has not yet reached Cabinet, so network access is governed by contract. The result is a port that is regulated but not corridor-minded, and a railway that is corridor-minded but largely unregulated.

That matters because private capital finances corridors against volume commitments. An operator that commits to 12 million tonnes a year needs to know that the train paths will exist, that the terminal will receive the trains, and that a failure on one side will not simply leave the other exposed. Controlling both interfaces is what makes the commitment deliverable.

What Transnet has proposed for manganese

According to public reports of the RFQ, the NMEC is a corridor of roughly 1,100 km between Hotazel in the Northern Cape and Ngqura in the Eastern Cape. It has a 25-year term, an initial target of around 12 million tonnes a year, and estimated investment of R30 billion to R44 billion across rail upgrades, a new terminal and train operations.

The structure has two companies. An operating company, 51% owned by Transnet and 49% by the private partner, would develop and run the manganese terminal and manage the rail freight operation, which means holding train paths under access agreements with the Transnet Rail Infrastructure Manager (TRIM). A separate infrastructure company, wholly owned by the private consortium, would finance, rehabilitate and maintain the rail infrastructure under an agreement with TRIM. One commercial vehicle therefore sits on both sides of the interface, tied to a single commodity. It is the closest thing to a corridor that current law permits.

A commercial solution on thin legal ground

Common ownership aligns incentives, but it joins together two legal regimes that do not connect. The rail leg rests on contract alone: the operating company's train paths would be secured by an access agreement that no sector regulator currently oversees, so a 25-year volume commitment depends on slot rights that statute does not protect against reallocation or changes to TRIM's network statement. The port leg is statutory, with its own conditions, regulator and dispute route under the Ports Act. A delay at the interface, whichever side causes it, has no single place in which it can be resolved.

Two further problems follow. The first is the concentration of roles. Transnet would be shareholder of the operating company, owner of the infrastructure and of TRIM, and, until TNPA is corporatised, the port authority as well. Other corridor users will want assurance that their access will not be subordinated to the operating company's.

The second is that the infrastructure company would be investing private capital in assets it does not own. Ownership, cost recovery and the consequences of termination would all be left to contract. A well-drafted contract can manage these risks, but only for as long as every counterparty performs.

What the National Rail Bill should contain

If government wants the corridor to become the organising unit of freight logistics, the National Rail Bill must make "corridor" a legal concept, not merely a planning label. In our view that requires at least seven things to be included in the National Rail Bill.

1. A Ministerial power to designate corridors and establish corridor-level governance, building on the bodies contemplated in the draft National Rail Master Plan, with defined authority over capacity planning and slot allocation.
2. Protected long-term capacity rights. Multi-year framework access agreements with volume commitments should be recognised in statute and safeguarded from reallocation within their term (except on defined grounds), while remaining subject to non-discrimination so that other users are not shut out.
3. A mandatory rail–port interface agreement. The infrastructure manager and the port authority should be obliged to conclude interface agreements covering train arrival windows, terminal slots, congestion, delay and performance remedies. That requires a matching amendment to the Ports

Act, extending the TNPA's role in arranging rail access within ports to coordination with the corridor beyond the port boundary.

4. A recognised “corridor operator” status. The National Rail Bill should expressly allow one company to hold both the right to run trains on the network and to operate the port terminal, so that it can plan the two together and stand behind its volume commitments. In return, the corridor operator should be required to keep separate accounts for its rail and port activities, protect other users' commercial information, and give third parties access to train paths and terminal capacity on fair terms. These safeguards allow regulators, lenders and other users to see that the operator is not favouring its own cargo or hiding costs between the two businesses. The infrastructure manager should stay independent of the operator, since it allocates the train paths that the operator and its competitors depend on.
5. A regulator able to see across the interface. The Transport Economic Regulator should have jurisdiction over rail–port interface disputes so that parties do not litigate the same delay in two forums.
6. Clear rules on ownership, compensation, step-in rights and reversion where private capital builds or upgrades state infrastructure, with protection against change in law.
7. Procurement power outside Transnet. Today Transnet alone has statutory power to procure private participation on its network. Vesting that power in the PSP Unit would mean corridor concessions are not offered only where Transnet is content to offer them.

The bottom line

Does a corporate workaround that links rail and port operations need statutory underpinning? Yes. The NMEC structure is a creative response to a real gap and may well attract serious bidders, but it relies on shareholding and contracts to do what legislation should do, which is to join two separately regulated parts of the corridor.

Lenders funding a 25-year corridor will ask three questions. What happens when the rail–port interface fails? Who decides who is responsible? And will the operator's rights survive a change in government policy? A contract can answer these only as between the parties to it. It cannot bind the port authority, the infrastructure manager or a future regulator, and it cannot protect the operator against a change in the law.

The National Rail Bill can answer all three. It will do so only if it is drafted with the port interface in mind from the start. If it is written as a rail-only statute, the port link will have to be added later by amendment, after the first corridor has already been financed on contractual terms alone.

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