

TOWARD TRANSPARENCY: A STUDY ON THE GOVERNANCE OF INVESTMENT
INFRASTRUCTURE FUNDS IN TRANSPORTATION PROJECTS IN INDONESIA



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โครงสร้างพื้นฐานในภาคการขนส่งของประเทศอินโดนีเซีย



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การวิจัยนี้ศึกษาความโปร่งใสของข้อมูลเกี่ยวกับการกำกับดูแลกองทุนรวมเพื่อการลงทุนในอินโดนีเซียรวมถึงความแตกต่างระหว่างแนวคิดของแผนการลงทุนร่วมกองทุนรวมเพื่อการลงทุนระยะยาวแห่งยุโรปและกองทุนรวมโครงสร้างพื้นฐานในประเทศไทย โดยการศึกษาพบว่ากรอบการกำกับดูแลของกองทุนรวมเพื่อการลงทุนโครงสร้างพื้นฐานในอินโดนีเซียยังมีความครอบคลุมที่ไม่เพียงพอที่จะช่วยทำให้เกิดความพร้อมและความชัดเจนของข้อมูลสำหรับการตัดสินใจของนักลงทุน เมื่อเทียบกับภายใต้ระบบอื่นที่นำมาศึกษาเปรียบเทียบ ส่งผลให้เกิดปัญหาความไม่สมมาตรของข้อมูลเนื่องจากปัญหาในการเข้าถึงข้อมูลและจำนวนข้อมูลหรือปัญหาการเผยแพร่ข้อมูลในกรอบเวลาที่แตกต่างกัน นอกจากนี้ปัญหาดังกล่าวอาจนำไปสู่ผลกระทบต่อการบริหารกองทุนและการทำงานของกองทุนในภาพรวมต่อไป จึงจำเป็นต้องมีการปรับปรุงประสิทธิภาพความโปร่งใส โดยการศึกษาได้นำเสนอมาตรการที่สำคัญที่ควรนำมาปรับใช้โดยผ่านการศึกษาเปรียบเทียบกับระบบอื่น ๆ เพื่อนำเสนอแนวทางปรับปรุงอันจะนำไปสู่เป้าหมายเพื่อส่งเสริมการคุ้มครองผู้ลงทุนและแนวปฏิบัติด้านธรรมาภิบาลที่เหมาะสมโปร่งใส และมีประสิทธิภาพต่อไป

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This research examines information transparency on the governance of infrastructure investment funds in Indonesia, including the contrast with the concepts of collective investment schemes, European Long-Term Investment Fund, and infrastructure funds in Thailand. The hypothesis of this study is that the regulatory framework of infrastructure investment funds in Indonesia is less comprehensive in enabling the availability and clarity of information for investors' informed decisions, compared to such concepts. Correspondingly, it finds that information asymmetry occurred due to minimal access and amount of information for assessment. The parties interested in this transaction tend to withhold their key concerns or disseminate them in different timeframes. Since the problems may lead to further consequences to the fund management and operation, improving transparency performance is imperative. Significant countermeasures are proposed to overcome the research problems, aiming to foster investor protection and sounder governance practice.

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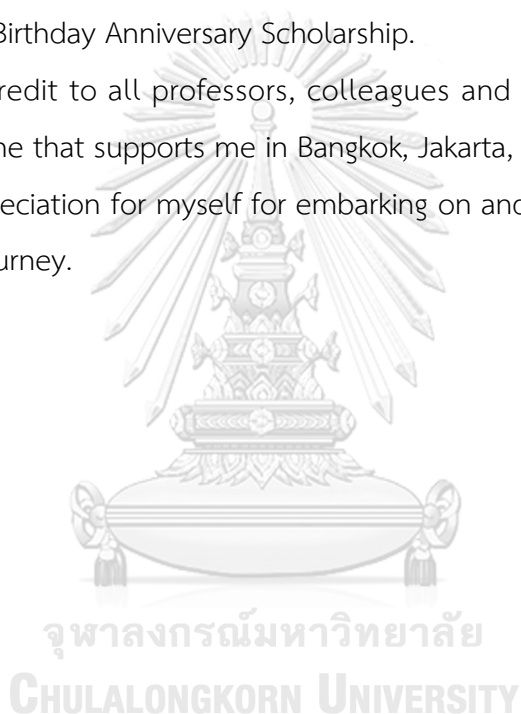


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CHAPTER 1

Introduction¹

1.1 BACKGROUND OF RESEARCH: INFRASTRUCTURE INVESTMENT FUNDS AS TRANSPORTATION FINANCING CHANNEL TO MEET RECENT DEMAND IN INDONESIA

The government of Indonesia utterly emerges extensive infrastructure projects ranging from new construction or developing ones, and up to 2022, approximately USD 440 million would be needed to be spent on such project construction. And in Indonesia, transportation (as one of the infrastructure sectors) still becomes the top priority, predominantly, in achieving milestones and development plans in the sector of railway, toll road, and port,² alongside procuring the implementation of the nation's plan to develop a new capital city.³

1.1.1 Recent demand for transportation provision in Indonesia

Despite most challenges that unavoidably befall, the optimistic side of having advanced transportation facilities (as a result of positive investment realisation) may bring corresponding benefits to the environment, employment, accessibility, and other social benefits; by way of stimulating demand on an intermodal basis, and by upgrading the dependability and quality of transport services.⁴ Globally, transportation investment inevitably covers countrywide and regional support systems.

Expectations of practical benefits from transport services (e.g., wide-ranging connectivity, speedy delivery, and safe and comfortable journeys) have driven the

¹ Some discussion points of this research have been extracted in the article "Indonesian infrastructure funds: governance challenges in managing rights and responsibilities", presented at an international conference "Unlocking investment and business opportunities in the ASEAN community, dated 18 November 2022" held by Chulalongkorn University. Foreign external reviewers, Mr. Tay and Mr. Monteiro, commented on the article paper during the presentation.

² *Enclosure of Presidential Regulation Number 18 of 2020 Concerning Mid Term National Development Plan 2020-2024.*

³ "Indonesia's Bold Infrastructure Plan," *KPMG Insight. The global infrastructure magazine* 2019.

⁴ OECD, "Impact of Transportation Infrastructure Investment on Regional Development," (Paris: The Organisation for Economic Co-operation and Development (OECD), 2002).

demand for transportation facilities development. People with distance gaps from the capital city or who live on a separate island would unquestionably expect an equal expansion of transportation for travel and delivery. Similar logic is also understandable when merchants and fabricators depend on facilities to generate business and profit. Most recent commerce, like cargo shipment and industrial, strongly relies on carriage access and facilities to grow their businesses and profit. The public needs transport facilities.

Realistically, the expected development in the transport sector would address the typical problems of poor facilities, congested highway interchanges, inadequate rail capacity, and overloaded passenger stations in countries with high population rates like Indonesia. Those projects require construction, either in terms of replacement, modernisation, or maintenance of the existing facilities, building on the new ones, or reactivating the used facilities.⁵

1.1.2 Transportation financing bottleneck in Indonesia

Over the benefits of transportation development that could be ideally envisaged if the demands are met, the journey of attaining them would not come effortless. The supply of transport equipment and facilities is tied to the funding needs and availability. Of course, the funding needs are not small. And as for the availability of funds, this is yet another situation and is often a challenge –not merely because the funds are insufficient in numerical terms but also whether the funding sources would be suitable or viable to finance the project cost per the projects' characteristics and status.

The government of Indonesia and some other private players in the transportation and infrastructure industries may always face classical problems regarding the funding gap that restrains their abilities to commit to the initial financing of infrastructure investments; therefore, financial support is expected. And the most problematic one is when the capital is scarce, but a contribution by equity and debt

⁵ ADB, "Innovative Infrastructure Financing through Value Capture in Indonesia," (Manila: Asian Development Bank, 2021), p. xv.

can no longer support, or there are overlapping provisions from existing contractual and regulatory frameworks that refrain the infrastructure projects from using the traditional investment channels for funding or financing purposes. Even worse, the time keeps running behind the target. Handling this funding scarcity would be more complex when some particular interests and concerns need to be aligned to reach mutual and joint benefits among the involved parties.

Especially for large-scale, national and priority projects. Public-private partnership (**PPP**) and going public are the most frequent strategies being approached for transportation financing.⁶ Yet, entirely relying on PPP would not be viable either, as the funds needed more than that, and PPP could no longer afford it. In some cases, the fundraisers may combine with another approach, like arranging debt or credit loans from banks or financial institutions, in addition to capital deposits from project owners and/or government funding. Most Indonesian infrastructure financing uses credit or loan facilities via local or foreign lenders.⁷

In non-traditional approaches, many structures can be created under bond schemes to attract investors and build a more competitive market in the industry. In equity schemes, various options are offered to finance transport and other infrastructure development – using mutual funds or collective investment contracts (**CIC**) under the capital market regime. This scheme is somewhat recognised as an alternative investment scheme or alternative investment fund, e.g., private funds, real estate investment funds (*Dana Investasi Real Estat* – **DIRE**), and infrastructure investment funds (*Dana Investasi Infrastruktur* – **DINFRA**).

⁶ Indonesia's focus on infrastructure is reflected through the government's need for infrastructure development in 2020-2024 for USD429.7 billion, having USD70 billion increased numbers than the previous period of 2015-2019 that were mostly using PPP as the choice of financing.; IDX, "Daftar Saham," Indonesian Stock Exchange (IDX), <https://www.idx.co.id/id/data-pasar/data-saham/daftar-saham/>.

⁷ Most Indonesian infrastructure projects (even mega projects) are backed up with foreign lending via commercial banks or multilateral development banks (MDB). Task Force 8 - T20, "Megaproject Financing and Multilateral Development Bank's Role in Infrastructure Project De-Risking," (Jakarta: Research and Development of Economics and Business (P2EB) FEB UGM, 2022), p. 4-5.; ADB, "Meeting Asia's Infrastructure Needs - Highlight," (Manila: Asian Development Bank, 2017), p. 71.

1.1.3 Emergence of alternative investment funds for transportation financing in Indonesia

The reasons why innovative or alternative financing options are being looked for are to address the financing gap in transportation financing, including to help reduce the reliance on using the state budget and also addressing the complex challenge of accommodating diverse interests from various perspectives amongst the fundraisers, the financial institutions, the fund providers, and even the regulatory sides in transportation project development in Indonesia.

One of the approachable ways to tackle this would be the participation of capital market instruments when the conservative schemes have been seen as inadequate or unsuitable to finance the intended infrastructure project. Instead of relying on traditional financing channels, engaging the investment product under the capital market instruments might be worth trying.⁸ They are open for government and private projects whenever fresh or extra funding is expected. Of the several capital market instruments that might be workable for transportation financing (e.g., private funds, assets securitisation and DINFRA), DINFRA is perceived to suit better as it can both be interpreted as a financing channel and investment instrument, depending on whose side is looking at this model.

1.2 STATEMENT OF PROBLEM: LACK OF TRANSPARENCY WITHIN AND BEYOND THE REGULATORY FRAMEWORK

DINFRA is an excellent initiative. But its growth has been relatively prolonged since its initial launch until now.⁹ To date, only one DINFRA product remains where infrastructure is one of the nation's main priorities for the community's needs,

⁸ SE Dr. Edie Rizliyanto, MM, "Alternatif Pendanaan Proyek Infrastruktur Nasional," *KlikSumut.com*, 10 November 2021.

⁹ Ministry of Finance; Central Bank; OJK, "Strategi Nasional Pengembangan Dan Pendalaman Pasar Keuangan Tahun 2018-2024," (Ministry of Finance, Central Bank of Indonesia, Financial Services Authority of the Republic of Indonesia), p. 59.

sustainability, and prosperity.¹⁰ It is a bizarre phenomenon when DINFRA, as an innovative scheme, could or did not successfully tap the market in its own country, which faces a disparity of infrastructure availability and accessibility within the region.¹¹

DINFRA had inopportunately been seriously regarded as a viable choice either from the investor or the fund-raiser side. The public's knowledge of this scheme and the lack of transparency is presumed as the main reason for its poor market uptake. DINFRA needs to be familiarised since the emergence of this innovative scheme has not been well noticed to offer an alternative solution.

On the regulatory side, the prevailing rule of DINFRA was launched in 2017. It is perceived to be less convenient due to some unclear and vague provisions and relatively loose in protecting the investors' interests, compared to a similar scheme launched by a neighbouring country, Thailand. As the investment rule of thumb, *Otoritas Jasa Keuangan* (OJK) Regulation Number 52/POJK.04/2017 concerning Infrastructure Investment Funds in the Form of Collective Investment Contract (OJK Reg 52/2017) guides the public – as the prospective investors who are attracted to infrastructure investing, and the infrastructure project owner who seeks financing sources, including another common reader who is interested in studying this scheme – with lack of comprehensiveness and clarity to enhance their knowledge. In this instance, information transparency for informed decisions is questioned.

Information transparency in this research relates to regulatory framework factors that deserve improvement or emphasis to give a more precise understanding and protection for potential and existing investors and the investment itself. The author identified and observed several key provisions that deserve countermeasures to foster market participation in the industry. Aside from that, the author also observes another aspect of information transparency (beyond the regulatory framework) that

¹⁰ IDX, "Dire & Dinfra," Indonesian Stock Exchange (IDX), <https://www.idx.co.id/id/data-pasar/dire-dinfra/>.

¹¹ "Infrastructure Funding: Toll Road Investment Still Promising," PwC Indonesia, <https://www.pwc.com/id/en/media-centre/infrastructure-news/december-2021/infrastructure-funding-toll-road-investment-still-promising.html>; Tabita Diela, "Indonesia Needs \$500 Billion Spent on Infrastructure: World Bank President," *Jakarta Globe*, 25 July 2017.

relates to the different investment interests and concerns between the potential investors, the fund managers, and the transport project to be funded, which can be disseminated in an imbalance flow and different timing too. This information asymmetry stems from the divergent circulating information at certain times and on certain materials.

Such different interests and concerns, indeed, would be customarily shared and discussed during the negotiation stage. However, there is always a likelihood that the potential investors, fund managers, and project sponsors will not be on the same page when initiating an investment in DINFRA. When their concerns are shared or disseminated, the information quality and quantity might be imbalanced because one party might hold some key and necessary information from another party in a specific timeframe.

This information asymmetry would affect the value of potential investors' judgement or assessment for informed decisions for closing the investment deal. And suppose DINFRA investment is conducted in a condition with information asymmetry. In that case, there might be a conflict-of-interest situation in the operation phase of fund management undertaken by the fund manager and the custodian bank. Needless to say, should this lack of information transparency occur from the beginning and continues for a long time, the safeguarding of investors and their interests may be questioned.

1.3 REVIEW OF CIS, ELTIF, AND THAI INFRASTRUCTURE FUNDS

Below are slight introductions to the Collective Investment Scheme (CIS), European Long-Term Investment Funds (ELTIF), and Thailand infrastructure funds. These three concepts were reviewed for further observation in the research problems herein.

First, CIS is a concept introduced by a leading international standard-setter organisation in securities regulation, the “International Organization of Securities Commissions” (IOSCO). DINFRA is identified to resemble the structure of CIS, especially for CIS with contractual forms. Discussion of CIS by IOSCO focuses on the securities regulation spectrum, without emphasising any subordinated industry tapped by CIS;

for example, infrastructure in detail. It talks about the governance and disclosure practice within the operation of CIS that overall aims to safeguard the investors. Indonesia and Thailand are members of IOSCO but have not yet participated in ‘Committee 5 of Investment Management’, which deals explicitly with investment management-related issues. Even so, the published papers on CIS by IOSCO can still be measured as useful references should those countries wish to boost CISs and the mutual funds market.

Second, the ELTIF concept which is introduced under the European Securities and Market Authority (**ESMA**). For a closer look at mutual funds or CIS practice in the infrastructure segment, ELTIF helps bring constructive insights. ELTIF concept works in European countries under a collective investment framework of the Alternative Investment Fund (**AIF**). ELTIF is regulated by Directive No. 2015/760 of the European Parliament and of the Council (**ELTIF Directive**). By this year, there were nearly a hundred products of ELTIF in the EU.¹² Though the ELTIF Directive applies only to the EU funds and the EU investors, countries outside the EU may take the constructive concepts as valuable lessons as study references. Thailand is one of the Asian countries that work towards adopting the standards set by the Alternative Investment Fund Manager Directive (**AIFM Directive**).¹³ Unfortunately, Indonesia is yet to adopt a similar approach.

Third, Thailand’s infrastructure funds. Thailand is adept at setting up a regulatory framework, especially regarding infrastructure funds. Even more, the framework and industry are supported by qualified asset management players who are also globally competitive - given the exposure of the investor profiles (both retail and investors), the category or infrastructure assets being developed and the value of the

¹² Linklaters, "European Long-Term Investment Funds (Eltifs) | Framework,"

<https://www.linklaters.com/en/insights/publications/2021/november/is-it-finally-time-for-eltifs-to-shine>.

¹³ AIFM Directive is applicable to Thai funds under the following circumstances: (i) offering units of the AIF established in Thailand to investors in Europe or/and; (ii) establishing and managing AIFs in Europe or/and; (iii) performing a delegated function to the AIFs established in Europe or/and; (iv) being the master fund in which an AIF in Europe invests at least 85% of its assets in units or shares. SEC Thailand, "About Us. International Relations," Securities and Exchange Commission, Thailand, <https://www.sec.or.th/EN/Pages/AboutUs/InternationalRelations.aspx#IOSCO>.

projects.¹⁴ By 2023, there have been nearly ten products of Thai infrastructure funds (IFF) in the jurisdiction. Different from Indonesia, with only one DINFRA product that can be regarded as research material for academics and practitioners who wish to establish another similar product of DINFRA.

1.4 RESEARCH QUESTION

The original research question that was pursued is whether the regulatory framework of Indonesian infrastructure investment funds is reasonably transparent in a way that allows investors to receive and assess essential information for investment decision-making, compared to Thailand. This question further seeks to explain whether the investors' interests can be safeguarded if they receive less information than is ideal or advisable.

1.5 HYPOTHESIS

In response to the above, the author proposes a hypothesis as follows. In comparison with Thailand, the regulatory framework of infrastructure investment funds in Indonesia is less comprehensive in enabling the sufficiency of necessary information for investors' informed decisions, and the performance of information transparency should be improved to promote sounder governance.

1.6 SCOPE OF THE RESEARCH

This research explores the role of transparency in promoting the applicability of DINFRA for transportation financing, including DINFRA's main characteristics (i.e., whether the regulatory framework and the offered scheme are striking enough as a decision-making consideration). This exploratory work examines OJK Reg 52/2017 and other comparable regulations and/or standards in this research that limitedly examine the legal aspects of transparency, information disclosure and fund governance.

In the analysis, the examination is performed by using both comparative and

¹⁴ SET, "Common Shares," The Stock Exchange of Thailand (SET), <https://www.set.or.th/th/market/get-quote/stock/>.

socio-legal methodologies. In the transportation financing context, the discussion would be in a general concept only, although the reviewed cases of Indonesian and Thai infrastructure funds are respectively about toll road financing and urban rail and expressway financing. Hence, since this research generally highlights the reviewed regulatory frameworks in theoretical views and practical outcomes, a deep examination would likely be eliminated to keep this research coherent and compact in answering the research question and hypothesis.

On the relevant regulatory frameworks of Thai IFF that are originally enacted in the Thai language, the author also limits the observation insofar as the English translation of the same is available or discoverable in an informal approach. To this extent, some key regulations have been backed up with the English translation versions (in a compiled version with some adjustments from time to time), comprehensible so they can be used as evaluation references. Although, the recent or amended versions of the key regulations are available in Thai.

1.7 RESEARCH METHODOLOGY

The research method will be utilised by initially collecting the necessary data and further analysing the research problems on the lack of information transparency in DINFRA.

1.7.1 Comparative and social-legal research

This research would use a combination of comparative and socio-legal research, where the author expects to see the ‘law in action’ in two different situations. Thus, a comparative analysis of legal culture can be conducted to understand the similarities and dissimilarities.

The comparative research compares the regulatory frameworks and practical applicability of infrastructure investment funds between Indonesia and Thailand, which have a relatively competitive securities market within the region. The main comparison target is comparing whether those two countries have a sound regulatory framework and supportive environment that can bring a coherent concept that can promote alternative investment and/or financing in the infrastructure industry and investors’

protection.

The comparison was conducted by comparing the features of DINFRA, CIS, and ELTIF regarding the funds' governance and transparency in a general context without profoundly exploring the business of DINFRA's target company in the transportation business. Also, comparing the regulatory framework of DINFRA and IFF, which significantly concentrated on how they elaborate the investment guidance transparently (attempt to be as transparent as they could), especially on the vital information or provisions from the perspective of investor protection (that further may affect the market competition). They are about the duty of the fund manager, the elaboration of fee elements, the offered investment incentives, and the disclosure of DINFRA as a shareholder. Also, to review the samples of their securities offering documents.

In socio-legal research, the author analyses the law in practical experience, regarding transparency and governance implementation of DINFRA and Thai IFF, alongside the investors' interest safeguard, which further affects the applicability of such scheme for transportation investment and financing.

1.7.2 Research data collection

The research findings encompass empirical data support documentary data to discover differences between theory and practice to understand the research problems better.

The documentary data were discovered via desktop study and analysis through relevant textbooks and publications. Notably, the regulatory frameworks of alternative investment funds and transparency in general, specifically in Indonesia and Thailand. The relevant sources that the author uses for reference are sourced from the official websites of OJK, the Indonesian Stock Exchanges (**IDX**), the Securities and Exchanges Commission of Thailand (**Office of Thailand SEC**), the Office of Securities Exchange of Thailand (**Office of Thailand SET**), the funds themselves, where some rules are available for reading and review either in the local language or English. The author also discovered several physical and electronic references from the database of the Office of Academic Resources of Chulalongkorn University, the Maruey Library

and Resource Centre at the Office of Thailand SET, and several other readings and publications from other sources.

The empirical data were discovered employing field research and interviews with selected target interviewees whom confidential sources would like to name. They are from the Indonesian asset management industry (the investment manager and the association of mutual fund and investment participants and institutional investors). This study aims to pursue practical insights on alternative investment through mutual funds or CIS, especially in the infrastructure industry; the challenges in information transparency about the legal and commercial structure are expected to be found. It expects to observe the significant difference and similarities to seek an approachable recommendation for current rules and policy in Indonesia.

1.8 OBJECTIVES AND SIGNIFICANCE OF RESEARCH

This research aims to compare, analyse, and understand how infrastructure funds in the transportation industry have been applied and executed in Indonesia and Thailand. The comparison and analysis were also undertaken regarding their structure as CIS or mutual funds, given IOSCO as an international standard setter for securities regulation and ELTF Directive as the prevailing rule for ELTIF (the alternative investment funds in real assets and infrastructure particular industry).

In theoretical value, this research is pursued to fill the research gap regarding fund governance, particularly for one with distinct characteristics, unlike a regular or common open-ended fund with all retail investors, because most of the relevant publications of infrastructure funds are available from the non-legal background and some of them are outdated (issued or published around five years ago). While in social relevance, this research is envisaged to contribute to practical implications by addressing multidisciplinary insights and a broader horizon not only from an academic perspective but also from business and policymaking. Given that this research contains legal and non-legal aspects, a comprehensive outlook in these integrative studies is expected to be valuable for the readers to widen the understanding between theory and practice.

This research also explores several suggestions or recommendations for

improvements to the relevant legal framework of DINFRA (OJK Reg 52/2017) to solidify the current framework by adopting and harmonising the concepts of CIS, ELTIF and Thai IFF to the extent they are relevant to the observed situations or problems which needs particular improvements. The proposals for improvement may involve the relevant policymakers or regulators to amend or adjust the existing rules or enact new policies whenever the circumstances allow. Another non-regulatory arrangement is also proposed as a supplementary solution to the main transparency problems in this research.



CHAPTER 2

Global overview of infrastructure funds for transportation projects

2.1 PREFACE

This chapter explains the overview of transport projects as one of the infrastructure sectors always looking toward project expansion demand. Development in the transport sector involves various types of investment and financing channels; starting in the 2000s, an alternative option, namely the infrastructure funds, has emerged and is widely used. The basic concepts of infrastructure funds in a typical mutual fund structure will be explored here, alongside some examples of infrastructure fund practices in Thailand and Indonesia.

2.2 OVERVIEW OF TRANSPORTATION PROJECT

Not to forget or underestimate the benefits of other infrastructure sub-sectors, transportation development has become special attention in countries worldwide. Feasible roads and ports are vital examples of transport for national development. Transportation includes distribution, logistics and shipment as delivery activities from trade and manufacturing perspectives. Besides, it also supports services and people movement. In urban commuting, transport helps to connect the workers from downtown to the city centre. The need for transport provision is motivated by the inadequacy of current facilities to support the recent dynamism – population, growth, digitalisation, etc. Inadequacy may be miscellaneously interpreted. It could be less available, not yet available, broken, undersupplied, oversupplied, etc.

2.2.1 Typical projects and ownership

The types of transportation generally include roads (including highways or toll roads), tunnels, bridges, airports, seaports, rails, and other forms of transport. Regarding their recognisable figure and beneficial functions, transportation falls under the categorisation of hard or economic infrastructure rather than soft or social

infrastructure.¹⁵ The transport chain can be subdivided into land transport (road and rail), air transport (air services in the air, ground services at airports and air traffic control), and water and maritime transport (national and international navigation on canals and natural waterways, as well as port facilities).¹⁶

The ownership and possession of transportation projects or assets can be on the government or the private side. Projects owned or protected by the government are typically highly regulated regarding investment and financing purposes. The government's overall global responsibility includes appraisal, spatial planning, licensing, monitoring, drafting applicable policies, budgetary planning, and various activities.¹⁷ As with roads, the ownership tends to remain under public ownership, as roads are broadly regarded as public property for which the state authorities are in charge. Even in European countries like France and Italy, the private companies that manage the motorway services must hand back the concessions to the government once the contract expires.¹⁸

And for toll-road and airport businesses, there are chances of converting the ownership status from the government to private. Many arrangements can be set up for this conversion, including lending arrangements via banks.¹⁹ For the railway sector, it is argued that some rail lines are constructed and operated by private enterprises while most have been nationalised afterwards. These enterprises usually remain in public ownership owing to their monopolistic nature.²⁰

¹⁵ Johan Fourie, "Economic Infrastructure: A Review of Definitions, Theory and Empirics," *South African Journal of Economics* Vol. 74:3 (2006), p. 531.

¹⁶ Barbara Weber, Mirjam Staub-bisang, and Hans Wilhelm Alfen, *Infrastructure as an Asset Class. Investment Strategy, Sustainability, Project Finance and Ppp* (Cornwall: Wiley, 2016), p. 114.

¹⁷ *ibid.*, p. 116.

¹⁸ This arrangement ensures that the road transport infrastructure is consistently implemented following the government's priorities and not solely based on investor considerations. *Ibid.*, p. 124.

¹⁹ Joseph Seliga, "Legal Aspects of Infrastructure Investments," in *The Handbook of Infrastructure Investing*, ed. Michael D. Underhill (New Jersey: Wiley, 2010), p. 182.

²⁰ Weber, Staub-bisang, and Alfen, *Infrastructure as an Asset Class. Investment Strategy, Sustainability, Project Finance and Ppp.*, p. 131.

2.2.2 Project development stages

In addition, the characteristics of infrastructure assets or projects can be seen from their lifecycle project, i.e., planning, construction, and operation phases.²¹ Such phases are generally regarded as investment or financing considerations when investors desire to participate in infrastructure investing. Also, when financial institutions prefer involvement in special financing or funding arrangement, the fund-raising activities typically occur during construction until the operation phases. And like with global practice, developing transportation projects in Indonesia also comprises those three phases.

2.2.2.1 Planning stage



Transport planning involves shaping future rules and policies, including goals, investments, and spatial planning designs, where transportation planners analyse various alternatives and impacts to influence favourable outcomes. This stage would also integrate input from many stakeholders, including government agencies, communities and private businesses that look at national, state, regional and community needs²²

2.2.2.2 Construction stage

The differentiation category of the construction stage is also essential, whether they are about to be constructed or have been constructed. The construction stage is acquainted with brownfield and greenfield categorisation, which often becomes a significant consideration in both investment and financing of infrastructure projects. The greenfield refers to a stage when physical assets that have not yet been

²¹ Louise Savoie, "Phases of Infrastructure Development," IIB Development Group, <http://www.iibdevelopmentgroup.com/home/phases-of-infrastructure-development#:~:text=%20Phases%20of%20Infrastructure%20Development%20%201%20Planning,intended%20operations%2C%20it%20begins%20to%20generate...%20More%20>.

²² The Institute of Transportation Engineers (ITE), "Transportation Planning," <https://www.ite.org/technical-resources/topics/transportation-planning/>.

built; the assets are about to be constructed from scratch or early start.²³ Once designed, built, and commissioned, the investors may subsidise such assets' construction and maintenance. In contrast, investment in the brownfield encompasses specific works on developing or repairing assets that have been operated and generated revenue.²⁴

Conversely, the brownfield refers to a phase when built and maintained assets already had steady and expectable cash flows.²⁵ A sample of brownfield assets is a fully operated highway toll. Projects in the brownfield phase would have a relatively more extended period than in the greenfield phase because, typically, the concession period lasts over twenty years. Nonetheless, investment in the brownfield stage is considered one of the least risky assets for infrastructure investments.²⁶ This construction stage is of the project owner might find financing difficulties; consequently, some investors with long-term profiles are being approached to contribute to the financing and construction of the project together.

2.2.2.3 Operation stage

This stage reflects the phase when the infrastructure assets have been fully operated. It is when the productivity of the transportation business begins, and income is generated based on the relevant contracts. As said earlier, the operation of transport projects is still dominated by government and private sectors (including listed companies), for example, in the road, ports and railway business. In this stage, there are times when the project owners need extra or additional financing to top up their

²³ Johanna Wallén Axehill et al., "From Brownfield to Greenfield Development – Understanding and Managing the Transition," in *31st Annual INCOSE International Symposium* (Linköping: INCOSE, 2021), p. 2-3.

²⁴ Aleksandar Andonov, Roman Kräussl, and Joshua Rauh, "The Subsidy to Infrastructure as an Asset Class," *NBER Working Paper No. 25045* (2018), p. 10.

²⁵ Antonio Lara-Galera, Antonio Sánchez-Soliño, and María Gómez-L, "Analysis of Infrastructure Funds as an Alternative Tool for the Financing of Public-Private Partnership," (2017), p. 403.

²⁶ Probitas Partners, "Investing in Infrastructure: The Closed-End Fund Market," (2018), https://3asstpm1ai412ap5q1o60dzh-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/probitas_partners_Infrastructure_Investing_2018.pdf, p. 4.

existing sources. The reasons are primarily commercial aspects, the occurrence of certain risks, or the current strategic or financial partners intending to exit. Alternative funding may also jump in this stage.

2.2.3 Transport project typical risks

Overall, investing in transportation as part of infrastructure assets would entail adequate comprehension of its assets and project characteristics, including the awareness that this industry is closely attached to strict regulation.

2.2.3.1 Technical risk

This risk is mainly derived from the project's complexity, construction, and technology, as well as the competence of the project's operator and manager, which is asserted to be better transferred to the private sector to create an incentive for efficient project delivery.²⁷ The risk might be severe in construction, especially for complex facilities in the transport or energy sectors within the greenfield stages. They might experience cost overruns or construction disruptions (e.g., caused by planning errors or alteration of project specifications while underway). Technology risk potentially arises when deploying new, untested machinery or equipment, which may result in delayed earnings.²⁸ Also, whenever an infrastructure asset is fully operational, the risk may include performance risk (e.g., shortfall of volume, price targets or incremental cost of operations) or maintenance risk. Regulated assets (e.g., electricity panels) are argued to have more excellent protection against certain risks than non-regulated ones that tend to be more vulnerable.²⁹

²⁷ OECD, "Risk and Return Characteristics of Infrastructure Investment in Low Income Countries," (Paris: The Organisation for Economic Co-operation and Development (OECD), 2015), p. 14-17.

²⁸ Deutsche Asset Management, "Why Invest in Infrastructure?," (2017), https://www.dws.com/globalassets/institutional/research/pdfs/Deutsche_AM_Why_Invest_in_Infrastructure_May_2017.pdf, p. 7.

²⁹ *ibid.*, p. 7.

2.2.3.2 Investment risk

This typical investment is equipped with several relatively arguable risks. Some literature mentions that investment in infrastructure would offer investors a long period with recurring returns, inflation-protected, and low risks.³⁰

Investing in a long tenure can be interpreted as a minimum of ten years up to hundreds of years. It considers the typical period of existence (as reflected through concession, for example), though some may last less than that, like in soft infrastructures. This lifetime is also linked to some financial or economic features on depreciation, cash-flow steadiness, and inflation which would be beneficial in surviving economic downturns and substantial credit burden, which is essential for investors' consideration.³¹

In a long-term investment, inflation will inevitably rise. However, in this sector, inflation can be hedged or protected. This idea is related to the economic concept of 'inelastic demand', where the prices of infrastructure assets may vary, but the demand remains steady.³² Protection against such long-term inflation is cushioned by, for example, basic facilities like power and transport (in some nations, toll roads may include), adjustment of charges or rates resulting the customers encountering higher or new prices.³³ Furthermore, the income or return from the infrastructure assets/projects tends to be stable due to a long period of infrastructure investment.³⁴

The idea of low risk yet would lead to the subsequent argument about infrastructure projects' extensive range may be associated with different risk-return

³⁰ Gordon L. Clark et al., "The New Era of Infrastructure Investing," (2011); Andonov, Kräussl, and Rauh, "The Subsidy to Infrastructure as an Asset Class.", p. 2-3.

³¹ Weber, Staub-bisang, and Alfen, *Infrastructure as an Asset Class. Investment Strategy, Sustainability, Project Finance and Ppp.*, p. 11-12.

³² Rajeev J. Sawant, *Infrastructure Investing. Managing Risks & Rewards for Pensions, Insurance Companies & Endowments* (New Jersey: Wiley, 2011)., p. 35-36.

³³ Management, "Why Invest in Infrastructure?," p. 6.

³⁴ Martin Lawrence and Geoffrey P. Stapledon, "Infrastructure Funds: Creative Use of Corporate Structure and Law – but in Whose Interests?," *U of Melbourne Legal Studies Research Paper*, no. 314 (2008)., p. 6.

profiles.³⁵ To explain, various industries would have different risk and return profiles because of the distinctive project type, location, and other relevant factors. For illustration, return rates in toll road construction in the brownfield stage would have a lesser percentage than in the greenfield stage.³⁶

2.2.3.3 Regulatory risk

Besides the financial risks above, other associated risks that may become challenges in the transportation project are the regulatory risk that could happen in either the planning, development, or operation stages. This risk may encompass the environment review, permitting process, change in tariff and taxation regimes, social acceptance, change in applicable regulatory frameworks, renegotiation of contracts, the enforceability of contracts/agreements, collateral, and security.³⁷ This risk is often called a political risk, too. It covers currency risk (different countries or locations of projects and funds), political turmoil or potential civil conflicts, especially in emerging market countries than in developed ones.³⁸

Another risk that may be relevant to regulatory risks is the public or community acceptance of high user charges levied on infrastructure facilities, notably when the operator's profits are perceived to be unreasonably high.³⁹ Since the typical risks would likely occur on the operational side, thus, a careful calculation must be expected to minimise the impact.

2.2.4 Large capital in transportation provision

The developing countries in Asia, including Indonesia, inevitably need

³⁵ Kelly DePonte, "What Are Infrastructure Funds?," (2009), <http://probitaspartners.com/wp-content/uploads/2014/05/What-are-Infrastructure-Funds-2009.pdf>, p. 3-7.

³⁶ Lara-Galera, Sánchez-Soliño, and Gómez-L, "Analysis of Infrastructure Funds as an Alternative Tool for the Financing of Public-Private Partnership.", p. 406.

³⁷ OECD, "Risk and Return Characteristics of Infrastructure Investment in Low Income Countries.", p. 14-17.

³⁸ DePonte, "What Are Infrastructure Funds?," p. 5-6.

³⁹ David J. Lynn and Matson Holbrook, "Opportunities in Infrastructure Investment," in *Active Private Equity Real Estate Strategy* (New York: Wiley, 2009), p. 244.

infrastructure development with huge investments. They would need more than USD 20 trillion from 2016 until 2023, whereas transportation would need USD 8.4 billion of investment allocation.⁴⁰ Similarly, of the aggregate number of approved investments (around USD 38 million), it is understood that the transport sector (the second largest infrastructure sector after energy) is costly and requires a massive investment and/or financing.⁴¹ The significant capital needed for transportation development reflects the massive projects, as this size matter connects to a 'mega-project' idea.⁴² Though it needs tremendous funding, mega-construction has been popular and widespread. It also has attempted to boost a nation's development by expanding its potential wealth to enhance economic growth. And Indonesia is one of the countries in the Southeast Asian region that has enormously transpired mega-project constructions.⁴³

The significant capital investment in transportation projects generally includes expenditures on land clearing and acquisition, facilities construction and their materials, workforce, including operation and maintenance, plus, in some cases, site disturbance cost, debt servicing cost (for debt funding mechanism), and also planning and monitoring costs.⁴⁴ Other elements of investment cost to be retrospectively considered would be the route switching anticipation from an existing choice to another and the operational productivity. It might happen, for example, concerning the rail occupancy rate in urban and train or road traffic amounts in the regular roads

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⁴⁰ ADB, "Meeting Asia's Infrastructure Needs - Highlight.", p. xi, 10-11.

⁴¹ AIIB, "Project Summary," Asian Infrastructure Investment Bank (AIIB), <https://www.aiib.org/en/projects/summary/index.html>.

⁴² A mega project can be interpreted as a super large project with exceeding USD 1 billion of investment value, a lengthy construction period with high complexity, as it includes the involvement of public and private stakeholders and with project estimation to bring a significant systemic impact on organisations and the community at the regional and national economic level. Roger R. Stough, "The Oxford Handbook of Megaproject Management by Edited by Flyvbjerg, Bent: A Book Review," (Fairfax, VA: Wiley, 2018).

⁴³ T20, "Megaproject Financing and Multilateral Development Bank's Role in Infrastructure Project De-Risking."

⁴⁴ Joseph Berechman, *The Evaluation of Transportation Investment Project* (New York: Routledge Advances in Management and Business, 2009).

or toll-road constructions.⁴⁵ Moreover, when it comes to rebuilding transport infrastructure in populous countries, the costs are likely higher because larger countries with larger populations require enormous capital as it would involve large portions of national or regional transportation plans.⁴⁶

Nevertheless, the need for significant capital has always become the major bottleneck of infrastructure financing; the other surrounding factors may interlock the planning and execution of investments in transport infrastructure, e.g., nature and environmental issues, bureaucracy, and political interferences.⁴⁷ This happens a lot when the sources of funding or financing are unavailable or insufficient.

2.2.5 Transportation financing channel

As elaborated below, the transport sector can be financed using many financial structures and instruments, depending on the infrastructure players' preferences and qualifications. However, specifically from the investors' perspective, several concerns can be underlined when choosing transportation financing. Namely, the duties and competencies, rules and regulations for the relevant projects or assets are crucial for its assessment and commercial performance, including certain boundaries between the parties in the concession contracts.⁴⁸

2.2.5.1 Loan or credit facilities

Since this infrastructure facility provision is costly, many financing schemes can be approached. One of them is lending arrangements through loan or credit facility agreements, which in practical settings, the application of it might entail particular

⁴⁵ Julie Rozenberg and Marianne Fay, *Beyond the Gap : How Countries Can Afford the Infrastructure They Need While Protecting the Planet* (Washington, DC: World Bank Group, 2019).

⁴⁶ David Kerr, "Transportation Infrastructure," in *The Handbook of Infrastructure Investing*, ed. Michael D. Underhill (New Jersey: Wiley, 2010).

⁴⁷ Kevin DeGood, "Infrastructure Investment Decisions Are Political, Not Technical," Center for American Progress (CAP), <https://www.americanprogress.org/article/infrastructure-investment-decisions-political-not-technical/>.

⁴⁸ Weber, Staub-bisang, and Alfen, *Infrastructure as an Asset Class. Investment Strategy, Sustainability, Project Finance and Ppp.*, p. 116.

challenges. The challenge in using loans or credit facilities for infrastructure financing in Indonesia is that the project needs to be bankable and obtain an investment ranking from credit rating agencies.⁴⁹

On the lender side, there has been dynamic deviation and challenges when providing loan facilities because of new securitisation risk retention rules, capital requirements and new mortgage requirements ravaging the big banks; therefore, alternative investments began to fill the gap of the funding solution in the US, the EU and Asia recently.⁵⁰ Likewise, loan facility has also been considered less favourable in connection with banking regulation under Basel III, which requires banks to preserve a greater capital reserve to hedge them from financial hardship, including limiting the number of their lending to borrowers.⁵¹ Henceforth, the chance of using alternative financial instruments might be climbed more than before to handle such requirements.⁵²

2.2.5.2 Government funding

From a global perspective, the World Bank explains varied types of instruments deployed in government funding support.⁵³ First is the funded products which often exist in subsidies, grants, equity investment or debt – without needing to meet bankability, financial viability, or manage specific risks. Next is the so-called contingent products, where the government would take certain contingent liabilities (e.g., guarantees, indemnities, insurance, hedging of project risk, or contingent debt)

⁴⁹ This credit rating requirement is relevant in supporting liquidity and may enable the corporate action of securitization through the capital market. ADB, "Meeting Asia's Infrastructure Needs - Highlight.", p. 66.

⁵⁰ Managed Funds Association, "The Role of Alternative Investments in Today's Capital Markets," *A White Paper by Managed Funds Association*, <https://www.managedfunds.org/wp-content/uploads/2016/05/Alternatives-in-Todays-Capital-Markets.pdf>, p. 4-6.

⁵¹ CFI Team, "Basel iii. The Global Regulatory Framework for Banks," Corporate Finance Institute, <https://corporatefinanceinstitute.com/resources/knowledge/finance/basel-iii/>.

⁵² Sila Kulaksiz, "Alternative Financing Instruments and Resources in Infrastructure Investment," in *International Conference on Economics, Baskent University* (Ankara, Turkey2019)., p. abstract.

⁵³ World Bank, "Government Support in Financing Ppps," World Bank PPP Group, <https://ppp.worldbank.org/public-private-partnership/government-support-financing-ppps>.

instead of providing funds. Last is the financial intermediaries that typically retreat in local financial markets to reduce foreign exchange risk, replace retreating or costly foreign investment, and create new opportunities in local financial markets.

The governments have conventionally financed major projects via taxpayers' money or projects whose costs are recovered by charging the end-users (e.g., toll roads). For one, increasing state budgets for infrastructure financing may not always be politically or economically viable; for another, the end-user tariffs might also not be enough, too.⁵⁴ Hence, an alternate option or solution is anticipated to meet both demand challenges for infrastructure facilities and financing channels.

2.2.5.3 Cooperation or partnership between government and private parties

This typical scheme is also popular with the terms of PPP. It works through a long-term contract between a private party and a government entity to provide public assets or services, where the private party bears management responsibility and significant risk and where the return is allied to the performance.⁵⁵

In practice, PPP may also work with various financing schemes. The first example is 'project financing', which involves a lending arrangement. In other words, this scheme is also known as 'off-balance-sheet financing', where the lenders will only receive repayment through the cash flows generated by these assets. Should cash flows not be sufficient for interest and principal repayments, the lenders could not look to the balance sheet for these payment purposes.⁵⁶ Besides applying debt capital, equity capital is common in this typical scheme. Even more, debt and equity capital can also be combined, as a hybrid instrument, for financing the PPP project.

The second example is 'corporate finance', also known as 'on balance sheet'.

⁵⁴ Clifford Chance, "Alternative Funding Model for Future Infrastructure Project," (London: Clifford Chance, 2021), p. 2.

⁵⁵ World Bank PPP Group, "What Are Public Private Partnerships?," World Bank PPP Group, <https://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships?msclkid=8f4b8ce6b65311ec89d4c83130941dce>.

⁵⁶ "Project Finance – Key Concepts," World Bank PPP Group, <https://ppp.worldbank.org/public-private-partnership/financing/project-finance-concepts>.

For a strategic reason, corporate finance is relatively less complex and less costly than project finance because here, the financing of the project would be based on the balance sheet of the private operator rather than on the project itself. This mechanism is usually used for projects with lower values because, in some circumstances, the financing costs are inadequate for the project financing mechanism or the large size of the operator.⁵⁷ In short, the infrastructure construction cost would be covered by the company's own capital.⁵⁸

2.2.5.4 Capital market opportunity

Though the PPP and loan agreement as the most-used financing channels look more prevalent in infrastructure (including in the transportation sector) because of the familiarity and may be backed up by the government's guarantee, still, some pipeline projects need an innovative model rather than a traditional one. And non-traditional model occasionally is connected to capital market practice which was argued to unravel classical issues of raising funds for infrastructure and other real projects.⁵⁹

In the transportation business, it was claimed that countries with capital market practices are assumed to be able to provide long-term financing for transport projects, particularly for toll road projects.⁶⁰ This is because financing is denominated in a domestic currency, preventing foreign exchange risk (same currencies in capital payment and project revenue). Also, the domestic investors may better understand the project's economics and government policies as they are more ready than foreign investors to take on the local economic and political risk. Lastly, the construction

⁵⁷ World Bank PPP Group, "Main Financing Mechanisms for Infrastructure Projects," World Bank PPP Group, <https://ppp.worldbank.org/public-private-partnership/financing/mechanisms>.

⁵⁸ Scott Lawrence and Peter Dickson, "Clean Energy Infrastructure. Moving from a Niche Opportunity to a Mainstream Asset Class," in *The Handbook of Infrastructure Financing*, ed. Michael D. Underhill (New Jersey: Wiley, 2010).

⁵⁹ OECD, "Infrastructure Financing, Instruments and Incentives," (Paris: The Organisation for Economic Co-operation and Development (OECD), 2015), p. 14.

⁶⁰ Gregory Fisher and Suman Babbar, "Private Financing of Toll Roads," *RMC Discussion Paper Series 117* (1996), p. 19.

supply of labour and equipment can be primarily secured locally by avoiding financing construction costs in foreign currency.

In the 2000s, the capital market in the infrastructure industry was generally still conservative in bonds and equity instruments, not yet aggressive enough to penetrate the mutual funds and securitisation (structured finance) segments.⁶¹ Although, if we look back at the early history of infrastructure funds, collective investments have been attempted since the previous decade with diverse sectors that include transport.

2.3 OVERVIEW OF INFRASTRUCTURE FUNDS

Infrastructure funds originally come from the idea of an alternative investment that initially comes under a mutual fund or CIS structure. It is called an alternative because it can serve as a 'modernised scheme' than the conventional one, for example, shares sale and purchase, bonds issuance and subscription. Indeed, stocks and bonds, including cash, are categorically a traditional asset class compared to the private equities, commodities, hedge funds, and real assets (like infrastructure, real estate, and natural resources)⁶² that fall under the alternative asset class.⁶³

As a part of the alternative investment domain, infrastructure funds cover a variety of investment strategies, procedures and classes that complement the traditional portfolio, like equity and fixed-income instruments.⁶⁴ Correspondingly, infrastructure funds are relatively illiquid and may encompass fairly high costs of sale

⁶¹ Masahiro Kawai; Andrew Sheng, ed. *Capital Market Reform in Asia. Towards Developed and Integrated Markets in Times of Change*, The Role of Capital Markets in Infrastructure Financing (New Delhi, India: Sage Publications, 2012), p. 336-339.

⁶² Donald R. Chambers et al., "Alternative Investments Caia Level I," *CAIA Knowledge Series* (2020), https://caia.org/sites/default/files/2020-12/caia_level_i_4th_edition_chapter_1_new.pdf, p. 4.

⁶³ Thomas Schneeweis, Garry B. Crowder, and Hossein Kazemi, *The New Science of Asset Allocation* (New Jersey: Wiley, 2010), p. 14.

⁶⁴ Maria Swärd, "The Rise of Infrastructure Funds. A Case Study of Macquarie's Arlanda Express Buyout" (Master's Thesis in Corporate Finance, Stockholm School of Economics, 2008), p. 39.

and purchase compared to traditional ones.⁶⁵ An alternative investment is further claimed to be offered as a private investment.⁶⁶ For infrastructure, these investments are argued to involve returns from toll roads, ports, airports, and other real assets (conventionally held and controlled by the public sector or the government). The eligible infrastructure opportunities for investment include securities created through the pre-existing privatisation or the newly existing private financing.⁶⁷

2.3.1 Background history of infrastructure funds

Infrastructure funds have emerged since the 1990s by employing private equity structures⁶⁸ over the continents, including Australia, Europe and America.⁶⁹ Another reference mentioned that these models started in Europe and North America in the early 2000s due to the need for an alternative asset class post the financial crisis and the availability of low-cost debt securities.⁷⁰ Most infrastructure funds in the past have concentrated on industrialised nations due to the quality and strength of the legal framework, the certainty of economics and administration, the support for the projects in a political sense, the experience of the local players, and so forth.⁷¹

In a worldwide context, around 2007, over fifty infrastructure funds were launched, half of which followed the private equity model and raised capital from large institutional investors. The remaining funds were raised from insurance companies

⁶⁵ H. Kent Baker and Greg Filbeck, "Alternative Investments: An Overview," in *Alternative Investments. Instruments, Performance, Benchmarks, and Strategies* (New Jersey: Wiley, 2013), p. 3-4.

⁶⁶ *ibid.*, p. 54.

⁶⁷ Chambers et al., "Alternative Investments Caia Level I", p. 6.

⁶⁸ Martin Haran, Daniel Lo, and Stanimira Milcheva, "Performance Drivers in Private Infrastructure Funds," *Real Estate Finance* (2021), p. 43.

⁶⁹ Infrastructure funds began to emerge in Australia in the 1990s with local pension funds being the first investors, followed by the United Kingdom in 1996 and Latin America in 1993. Swärd, "The Rise of Infrastructure Funds. A Case Study of Macquarie's Arlanda Express Buyout.", p. 9.; Raffaele Della Croce, "Trends in Large Pension Fund Investment in Infrastructure," *OECD Working Papers on Finance, Insurance and Private Pensions, No. 29* (2012), p. 17.

⁷⁰ Lara-Galera, Sánchez-Soliño, and Gómez-L, "Analysis of Infrastructure Funds as an Alternative Tool for the Financing of Public-Private Partnership.", p. 405.

⁷¹ *ibid.*, p. 406.

or pension funds investing their own capital, initial public offering (IPO) on major stock exchanges, or specialised teams within larger commercial banks, asset management companies or family offices.⁷² A few years later, with the alternative fund market established and widely recognised, the European Union enacted harmonised norms and framework, namely AIFM Directive, which applies to AIFs and the management of AIF.⁷³ AIFM Directive principally covers the authorisation, ongoing operation and transparency of AIFs. For the infrastructure and real estate industries, ELTIF allows institutional and private investors across Europe to invest money in companies and projects that need long-term capital or financing.⁷⁴ ELTIF will be examined as one of comparing objects in this research.

2.3.2 Legal and organisational structures

As a managed pool of capital, the organisational structure in infrastructure funds involves parties that will put money and another party that will manage such money. However, there is no definitive legal structure for infrastructure funds globally, mainly because there are different legal systems in the world, coupled with local laws that apply. But along the development journey, infrastructure funds are understood as a professionally managed pool of capital that invests equity or equity-linked securities in infrastructure assets (permanent assets needed by society to facilitate the proper functioning of an economy).⁷⁵

2.3.2.1 Legal structure of establishment

The Organisation for Economic Co-operation and Development (OECD), an international standard setter in policy-making identifies that such capital pooling

⁷² Lynn and Holbrook, "Opportunities in Infrastructure Investment.", p. 244.

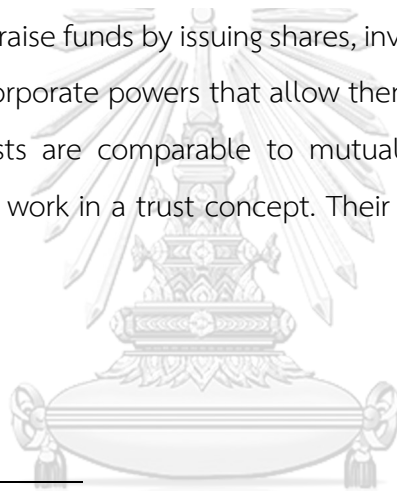
⁷³ European Commission, "Alternative Investment Fund Managers (Aifm) - Directive 2011/61/Eu," European Commission, https://ec.europa.eu/info/law/alternative-investment-fund-managers-aifm-directive-2011-61-eu_en.

⁷⁴ *European Long-Term Investment Funds (Eltifs) - Regulation (Eu) 2015/760*, June 21.

⁷⁵ Swärd, "The Rise of Infrastructure Funds. A Case Study of Macquarie's Arlanda Express Buyout.", p. 8.

activity under the category of a collective investment institution, which includes investment funds, private equity, limited partnership, collective investment scheme (CIS), mutual funds, etc.⁷⁶ IOSCO similarly recognises CIS and uses CIS as recurring terminology to explain capital pooling activity. Depending on countries' relevant capital market regimes, CIS can go by many names, including mutual funds, investment companies, unit trusts, etc.⁷⁷

Both CIS and mutual funds also have two types, open-ended and closed-ended.⁷⁸ They are run by professional fund managers and operated by pooling assets from shareholders to invest in securities and other assets with a structured and maintained portfolio to reflect the investment objectives outlined in its prospectus.⁷⁹ Investment companies raise funds by issuing shares, investing the proceeds in securities and working with full corporate powers that allow them to enter into contracts and to litigate.⁸⁰ And unit trusts are comparable to mutual funds, but they are different because the unit trusts work in a trust concept. Their objective is naturally to enable



⁷⁶ OECD, *Oecd Benchmark Definition of Foreign Direct Investment* Fourth Edition ed., Annex 8. Collective Investment Institutions (Organization for Economic Co-operation and Development 2008).

⁷⁷ Masahiro Kawai; Andrew Sheng, ed. *Capital Market Reform in Asia. Towards Developed and Integrated Markets in Times of Change, Governance of and by Institutional Investors* (New Delhi, India: Sage Publications, 2012), p. 139.

⁷⁸ The first is where the investors are permitted to redeem their interests (wholly or partially) or increase their interests over the funds' lifecycle which might be limitless or indefinite. And for the second, securities redemption or sale on an ongoing basis are typically inapplicable. Matthew Hudson, *Funds, Private Equity, Hedge and All Core Structures* (West Sussex: Wiley, 2014), p. 6.; IOSCO, "Good Practice for Fees and Expenses of Collective Investment Schemes - Final Report," in *Report of the Board IOSCO* (Madrid: International Organization of Securities Commissions 2016), p. 3.

⁷⁹ Adam Hayes, "Mutual Funds: Different Types and How They Are Priced," <https://www.investopedia.com/terms/m/mutualfund.asp>.

⁸⁰ By having a form of an investment company, a mutual fund is owned by shareholders and has a board of directors. A. Joseph Warburton, "Should Mutual Funds Be Corporations? A Legal & Econometric Analysis," *The Journal of Corporation Law*, Vol. 33:3 (2008), p. 748.

an investor to acquire a small stake in an extensive portfolio of investments and spread risk across a large number of shares.⁸¹

2.3.2.2 Organisational structure

Infrastructure funds with collective investment fund structures are generally managed by an investment banking or asset management company that is subject to an inclusive responsibility to establish the fund and register the same under the prevailing laws, manage the portfolio assets in the interests of the fund, including defining the investment objectives and strategy, administration, conducting research and investment analysis, plus analysis on the performance of portfolio they are managing.⁸²

Whether under the name of CIS or investment funds, it said that the pooling money would involve a contractual relationship between the investors and the investment managers (or the fund manager) who develop and manage the funds on behalf of investors based on the investment policy or strategy as set out in the offering document.⁸³ Under this condition, the investor transfers the custody of the money invested in the mutual fund to the fund managers for a specified period. And technically, the fund managers will not serve such custodian services alone; they will liaise with the depository for such custodian service since the funds are obliged to enter into a contractual relationship with another financial institution that functions as custodian.⁸⁴

Depending on the relevant jurisdiction, the depository (or custodian or trustee) will be responsible for the funds' asset safekeeping duty and the oversight of fund

⁸¹ Thomson Reuters, "Glossary. Unit Trust," Thomson Reuters Practical Law, [https://uk.practicallaw.thomsonreuters.com/7-107-7453?contextData=\(sc.Default\)&transitionType=Default&firstPage=true](https://uk.practicallaw.thomsonreuters.com/7-107-7453?contextData=(sc.Default)&transitionType=Default&firstPage=true).

⁸² Mark St. Giles, Ekaterina Alexeeva, and Sally Buxton, *Managing Collective Investment Funds* (West Sussex: Wiley, 2003), p. 20.

⁸³ Daniel Kohlert; Andreas Oehler; Stefan Wendt, "The Agency Dilemma of Investment Fund Management," *Corporate Ownership & Control* 6, no. 2 Spring (2009), p. 285.

⁸⁴ *ibid.*, p. 287.

operation.⁸⁵ The custodian chiefly has to execute its tasks exclusively in the interest of the investors and, therefore, is independent of the investment manager.⁸⁶ And given the above fact, the fund structure is also said to be complex. It is relevant to the theory of asset separation in the rationale that the funds' assets and the investors' capital are two distinct things.⁸⁷ In this matter, portfolio investment assets are combined into a fund (as a single entity) run by a manager (as a separate entity), each with its own internal manager and capital sources. On the operation of funds, henceforth, the funds' assets will be administered by the funds' manager or operator.

2.3.3 Characteristics of infrastructure funds

Infrastructure funds are typically complex-yet-innovative strategies; the transaction would involve multi-parties from various backgrounds, not only investors who subscribe their money into the funds. Their characteristics demonstrate practical operation by combining the infrastructure industry and alternative investment with a capital market touch.

2.3.3.1 Extensive investment duration

Infrastructure funds have a long-standing course that often refers to the concession period of infrastructure assets or projects. The typical lifespan would be approximately ten years, with an extension option of around three years.⁸⁸ This extensive duration has become a particular concern of each involved party in the transaction.

⁸⁵ Giles, Alexeeva, and Buxton, *Managing Collective Investment Funds.*, p. 22.

⁸⁶ Wendt, "The Agency Dilemma of Investment Fund Management.", p. 287.

⁸⁷ John Morley, "The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation," *The Yale Law Journal* 123, no. 5 (2014), <https://www.yalelawjournal.org/article/the-separation-of-funds-and-managers-a-theory-of-investment-fund-structure-and-regulation.>, p. 1232.

⁸⁸ Haran, Lo, and Milcheva, "Performance Drivers in Private Infrastructure Funds.", p. 43.

2.3.3.2 Typical investors

Any investors are welcome to participate in this structure. However, it is claimed that investments in a collective scheme with an infrastructure focus would be more suitable for institutional investors as they will likely have special access to obtaining necessary information on this complex structure.⁸⁹ They expressed great interest in the infrastructure in recent years.⁹⁰ Similarly, the prominent investors in these funds are institutional investors⁹¹ with a motivational background of investment longevity in infrastructure assets, downside protection against volatility and inflation, and diversification.⁹² While there is no restriction that infrastructure funds are only suitable for institutional investors, they have unique characteristics that the average retail investor may not be able to exploit.⁹³

An institutional investor can be defined as a specialised financial institution that collectively manages savings on behalf of small investors for a specific focus relating to tolerable risk, maximisation of yields and maturity returns.⁹⁴ They typically invest through corporations that run infrastructure-related operations and principally search for long-term portfolio investments in infrastructure assets with forecasted long-term contractual cash flow profiles aligned with long-term liabilities.⁹⁵ In contrast, the other type of investor is a strategic investor who purposively invests to gain added value and strategic advantages from the core business beyond financial returns, for example, construction, real estate, and equipment supply companies.⁹⁶

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⁸⁹ Croce, "Trends in Large Pension Fund Investment in Infrastructure.", p. 9.

⁹⁰ Lynn and Holbrook, "Opportunities in Infrastructure Investment.", p. 241.

⁹¹ Institutional investors may comprise of pension funds, insurance companies, sovereign wealth funds, family offices, and funds of funds, endowment funds, investment banks, private equity funds.

⁹² Lara-Galera, Sánchez-Soliño, and Gómez-L, "Analysis of Infrastructure Funds as an Alternative Tool for the Financing of Public-Private Partnership.", p. 405-406.

⁹³ Wendt, "The Agency Dilemma of Investment Fund Management." Page???

⁹⁴ Cyril Demaria et al., *Asset Allocation and Private Markets. A Guide to Investing with Private Equity, Private Debt and Private Real Assets* (Wiley, 2021), p. 7.

⁹⁵ Weber, Staub-bisang, and Alfen, *Infrastructure as an Asset Class. Investment Strategy, Sustainability, Project Finance and Ppp.*, p. 72.

⁹⁶ Sasha N. Page et al., "The Risks and Rewards of Private Equity in Infrastructure," *Public Works Management & Policy* 13, no. 2 (2008), p. 103.

Other literature perceives that the target focuses in alternative investment is on wealthy investors⁹⁷ or anyone qualified to be an accredited investor or an eligible purchaser by satisfying specific requirements concerning yearly net worth and income.⁹⁸ Many alternative investments are unavailable or unsuitable for general investors due to their complexity or structure, which may require due diligence and a high degree of investment analysis before subscribing to them.⁹⁹

In this instance, it has also been claimed that pension funds, alongside retail investors searching for secure long-term returns, have invested in public infrastructure funds because they were enticed by features of infrastructure assets - exposure to steadily increasing returns and liquidity.¹⁰⁰ Likewise, infrastructure funds have been well played by major investment banks, including Macquarie Bank, Goldman Sachs, Citi, Deutsche Bank, and Credit Suisse – and most likely, infrastructure and infrastructure funds will remain one of their investment strategies or targets.¹⁰¹

2.3.3.3 Investment in the infrastructure assets or projects

Infrastructure funds would primarily invest in infrastructure assets and projects. However, not all infrastructure sectors can be funded through infrastructure funds because each jurisdiction has a benchmark of which sectors can receive cash support from infrastructure investment funds, e.g., having a beneficial function for public use. They may include but are not limited to transport and mobilisation systems, energy-related facilities, communication and internet provision, whether in the brownfield or the greenfield stages. Some jurisdictions may require the needs of infrastructure development for public benefit or national interest, like in Thailand and Indonesia.

⁹⁷ Ewelina Sokołowska, *The Principles of Alternative Investments Management. A Study of Global Market* (Sopot: Springer, 2015), p. 2.

⁹⁸ Baker and Filbeck, "Alternative Investments: An Overview.", p. 54.

⁹⁹ *ibid.*, p. 5.

¹⁰⁰ Lawrence and Stapledon, "Infrastructure Funds: Creative Use of Corporate Structure and Law – but in Whose Interests?.", p. 6.

¹⁰¹ Swärd, "The Rise of Infrastructure Funds. A Case Study of Macquarie's Arlanda Express Buyout.", p. 4.

The investment in infrastructure assets or projects could be made directly to the physical assets or project (e.g., through shares, revenue sharing agreement and others) or indirectly via a subsidiary or special purpose vehicle. Many structures can be formed with equity or debt underlying schemes, subject to the applicable laws and the interests of investments' participants. Additionally, infrastructure funds are open and would bring advantages for greenfield or brownfield infrastructure projects. It is said that, as an equity source of financing, infrastructure funds would serve as an important cushion that bridges the critical development at the early year phase,¹⁰² particularly in financing greenfield projects, which barely need immediate cash to commence construction. However, this may be doable when the relevant stakeholders are fully aware of and understand the commercial and legal terms in the concession agreement, loan facility contract and other relevant legal paperwork. For example, regarding loan repayment to lenders sourced from equity dividends of infra-funds, project duration and assignments, whether novation is required.

2.3.3.4 Associated risks

Infrastructure funds also face several risks that would expose on three levels, considering the structure complexity and involved parties in the deal.

(a) At the level of funds

The relevant risks at the levels of infrastructure funds (and their vehicles, if any) would be the risks of small concentration of assets, illiquidity risk, unstable cash flow,¹⁰³ pricing risk and conflicts of interest, including relevant transparency risks to the management of investment vehicles.¹⁰⁴ On top of that, another risk is the complex structure involving some parties with different interests and concerns. Including the

¹⁰² Page et al., "The Risks and Rewards of Private Equity in Infrastructure.", p. 110.

¹⁰³ Stability on cash flow is argued to be only holds if the contract partner does not default and if the legal or regulatory conditions do not change. Florian Bitsch, Axel Buchner, and Christoph Kaserer, "Risk, Return and Cash Flow Characteristics of Infrastructure Fund Investments," *EIB Papers* 15 No. 1 (2010)., p. 111.

¹⁰⁴ Georg Inderst, "Infrastructure as an Asset Class," *ibid.* Vol. 15, No. 1., p. 80.

government, since the infrastructure development and financing would closely work with the nation's political environment.

From this situation, the manager of infrastructure funds is expected to build great inter-functional teamwork amongst specialists or experts in legal and compliance, tax and accounting for assessment and evaluation.¹⁰⁵ This is to create an alignment of interests since the application of infrastructure funds is claimed to be able to overcome the infrastructure financing gap and contribute to economic and social only when the interests between the project and the governments alone are aligned.¹⁰⁶

(b) At the level of the investors

The relevant risks within this range would be poor exposure to asset classes and investment vehicles, investment and reinvestment strategy, alignment with asset-liability management, strategic asset allocation, timing and scheduling, alliance with advisors and counterparties, and legal and reputational risks.¹⁰⁷

(c) At the level of the target companies

Furthermore, risks or threats at the infrastructure company level are relatively wide-ranging, from construction risks, operational and management risks, business risks, leverage, interest rate risks, refinancing risks, legal and title risks, regulatory risks (fees and concessions), political and tax risks, environmental risks to social risks or threats.

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2.3.3.5 Associated fees and expenses

Regarding the associated fees and expenses within the infrastructure funds, several related fees must be considered. They are also often categorised based on who is owed the payment. The fee elements are management, custodian, professional

¹⁰⁵ Dianne M. Sulzbach and Philip T. Masterson, "Offering Alternative Investment Strategies in Mutual Fund Structure: Practical Consideration," *Aspen Publisher* Vol. 15, No. 10 (2008), p. 9.

¹⁰⁶ Haran, Lo, and Milcheva, "Performance Drivers in Private Infrastructure Funds.", p. 43.

¹⁰⁷ Inderst, "Infrastructure as an Asset Class.", p. 80.

¹⁰⁸ *ibid.*, p. 79.

support, advisory, and performance fees. Management fees typically compensate for managing the collected money from investors, which the fund manager handles. And custodian fees characteristically compensate for recording and safekeeping duties within the funds' administration which the custodian handles.

Professional support fees are for any legal, auditor, and independent directors appointed for the infrastructure funds. Advisory fees are charged for certain arranger fees that often involve investment banking advisory work, like arranging debt and equity financing, underwriting, and other services.¹⁰⁹ These fees are set against the fund's assets, and trading costs will increase the purchase cost of portfolio securities and reduce the overall net sales prices.¹¹⁰ Lastly, performance fees usually enable managers to profit from the success of their trading activities.¹¹¹

2.3.3.6 Infrastructure funds as an alternate option

One of the unique characteristics is that infrastructure funds can function as alternatives for avid investors looking for portfolio diversification and those with constrained access to more conventional financing schemes. While alternative investment funds may not replace traditional investment funds, nor are they intended to, they can complement long-term investors as part of a well-diversified portfolio.¹¹²



¹⁰⁹ Lawrence and Stapledon, "Infrastructure Funds: Creative Use of Corporate Structure and Law – but in Whose Interests?."

¹¹⁰ John A. Haslem, "A Tool for Improved Mutual Fund Transparency," Fall (2004), <https://www.researchgate.net/publication/228150935>, p. 55.

¹¹¹ Ben Warwick, "Alpha Generating Strategies: A Consideration," in *The Handbook of Alternative Investments* (Canada: Wiley, 2001), p. 8. Meanwhile, performance fee in the perspectives of UCITS or AIF is set forth in the guideline issued by the Financial Services and Market Authority, however, the English version is unavailable for review. FSMA, "Guidelines on Performance Fees in Undertakings for Collective Investments in Transferable Securities (Ucits) and Certain Types of Alternative Investment Funds (Aifs)," Financial Services and Markets Authority (FSMA), <https://www.fsma.be/en/news/guidelines-performance-fees-undertakings-collective-investments-transferable-securities-ucits>.

¹¹² Sulzbach and Masterson, "Offering Alternative Investment Strategies in Mutual Fund Structure: Practical Consideration.," p. 11.

Some investors may need to try on investment funds when they face expensive pricing given diversifying their portfolio in terms of information collection and assessment.¹¹³

When infrastructure funds serve as an alternative, they may affect compliance, tax, portfolio management and operational aspects that the fund manager must consider and handle.¹¹⁴ Hence, a qualified fund manager with a solid duty to act in the best interests of the investors is anticipated.

2.3.3.7 Governance and transparency in infrastructure funds

The governance in infrastructure funds may refer to the mutual fund or governance in a general context that also needs to consider the overall context of infrastructure. In general, it may cover transparency that touches on the accountability of the fund manager under the operation and organisation of funds. Governance and transparency are inseparable discussions, as transparency helps to form sounder governance in many ways. In investment and business contexts, transparency typically boosts investment. It promotes legitimacy and equal treatment in trades and transactions, stimulates public confidence, strengthens market credibility, and lowers the likelihood of unlawful practices in the market.¹¹⁵ Besides, transparency is also argued as a tool to observe what the organisations are doing by implementing the monitoring activity under the principal-agent theory to mitigate the conflict of interest.¹¹⁶ More discussion on this matter will be explored in the next chapter.

2.3.4 Samples of worldwide funds with a transportation focus

It was noted that alternative funds have started to thrive in the infrastructure industry (including in the transport category) for more than a decade, and even in

¹¹³ Flavia Zoboli Dalmacio; Valcemiro Nossa, "The Agency Theory Applied to the Investment Funds," *Brazilian Business Review* 1, no. 1 (2004), p. 32.

¹¹⁴ Sulzbach and Masterson, "Offering Alternative Investment Strategies in Mutual Fund Structure: Practical Consideration.", p. 9.

¹¹⁵ Laura Manea, "The Transparency and Integrity of the Capital Market in Romania," *Bulletin of the Transilvania University of Braşov, Series VII: Social Sciences, Law* Vol. 7 (56) No. 1 (2014), p. 117.

¹¹⁶ Anoeska Buijze, "The Six Faces of Transparency," *Utrecht Law Review* 9, no. Issue 3 (July) (2013), p. 10-11.

those years, the expansion has been impressive with investments from large institutional investors such as insurance companies, pension funds and some family offices.¹¹⁷ Infrastructure investments with an investment fund structure – expressly in the transport sector – have been argued to demonstrate notably better returns than those in other sectors, which is likely due to less independent regulation.¹¹⁸

According to the historical development of infrastructure funds, several infrastructure funds have been established over the continents until recent years. Not to forget the Asian emerging market, some infrastructure funds have also been successfully launched and promoted, including in Thailand, Singapore, and South Korea.¹¹⁹ Indonesia finally joined this market in 2018 by tapping the toll-road transportation sector. Moreover, it is also understood that in early 2022, half of the ten significant infrastructure funds (sizing a USD 12 billion top target) were headquartered in the United States, while Canadian and Australian investment players held the remaining positions.¹²⁰

Further, the established infrastructure funds may go in various structures across the global perspectives. In India, the practice seeks to invest in public infrastructure assets and fall under the mutual funds category.¹²¹ In Thailand and Indonesia, infrastructure funds work under mutual funds and collective investments.¹²²

¹¹⁷ Lynn and Holbrook, "Opportunities in Infrastructure Investment.", p. 240-241.

¹¹⁸ Bitsch, Buchner, and Kaserer, "Risk, Return and Cash Flow Characteristics of Infrastructure Fund Investments.", p. 129-130.

¹¹⁹ LS Horizon Attorney-at-Law, "Infrastructure Fund," (2009), <https://www.lshorizon.com/publications/1810122019.pdf>, p. 1-4. A sample of South Korean infrastructure funds is Macquarie Korea Infrastructure Fund. MKIF, "About Mkif," Macquarie Korea Infrastructure Fund (MKIF), <https://www.mkif.com/en/about-mkif.html>.

¹²⁰ Infrastructure Investor, "Infrastructure Funds in Market," Infrastructure Investor, <https://www.infrastructureinvestor.com/funds-in-market/>.

¹²¹ KCLau, "What Is Infrastructure Funds and Should You Invest?," <https://kclau.com/investment/what-is-infrastructure-funds-and-should-you-invest/>; Tata Group Company, "Key Information Memorandum of Tata Infrastructure Fund," (2022).

¹²² *Notification of the Capital Market Supervisory Board No. Tor Nor. 38/2562 Re: Rules, Conditions and Procedures for Establishment and Management of Infrastructure Funds.*, clause 11.;

In Bermuda, infrastructure funds work under mutual fund companies.¹²³ In Denmark, one of the samples of infrastructure funds focuses on developing African infrastructure development.¹²⁴ Meanwhile, infrastructure funds work under the unit trust concept in Australia.¹²⁵

2.4 PRACTICE OF INFRASTRUCTURE FUNDS IN THE TRANSPORTATION SECTOR: THAILAND

The practices of infrastructure funds in Thailand (IFF) can be in many infrastructure sectors (including transport). Their investment can be in any way, whether directly or indirectly, through shares purchase, future revenue purchase, or even debt instruments.

2.4.1 Overview of the transportation sector in Thailand

In the transportation sector, Thailand has set up its development master plan for 2015-2022, which encompasses the development of road, rail, mass transit, and ports. As for the road, its focus is enhancing the capacity of highway networks and connectivity among ASEAN countries. Upgrading the rail system, double-track construction, and border extension are the highlights of rail transport. Extending the routes in Bangkok and its vicinity is the target area for mass transit while improving service and safety. And for the seaport and airport, the concentrations are to expand within the gulf of Thailand and the Andaman Sea, enhancing the capacity of airports and establishing aviation industrial estates.¹²⁶

Regulation of Otoritas Jasa Keuangan Regulation Number 52/Pojk.04/2017 Concerning Infrastructure Investment Funds in the Form of Collective Investment Contract., Article 1 number 2.

¹²³ Macquarie Group Company, "Prospectus of Macquarie International Infrastructure Fund Limited," (2005).

¹²⁴ A.P. Moller Capital, "The Africa Infrastructure Fund," A.P. Moller Capital, <https://apmollercapital.com/en/article/the-africa-infrastructure-fund/>.

¹²⁵ First Sentier, "Product Disclosure Statement. First Sentier Global Listed Infrastructure Fund (Hedged and Unhedged Class)," (2022)., p. 2.

¹²⁶ Prapas Kong-led, "The Launch of Thailand Future Fund," in *"Thailand Focus 2018: The Future is Now"* (Bangkok2018)., p. 2.

Thai demands for infrastructure provisions are met with the support of government and private funding together with PPP, especially in support of national projects.¹²⁷ Financing via government funds often faces bottlenecks or challenges (e.g., borrowing limitations and other budget constraints), which further need another source of backups.

And in the infrastructure segment, several schemes can be visualised as alternative financing, such as the infrastructure trusts (IFT) and IFF. IFT works by using a trust as a vehicle, as a fund mobilisation alternative for the public and private sectors, and as an investment option for the investor.¹²⁸ Unlike IFTs which can invest in infrastructure assets in overseas, IFF, which fall under the category of mutual funds, can only invest in Thai jurisdiction with some commercial benefit as offered by the government.¹²⁹ As a recent example, Thailand Future Fund was established under the IFF structure to support national transportation financing.¹³⁰

2.4.2 Overview of IFF's recent practice: Limited case study

Below is a description of how Thailand started applying infrastructure funds, especially in developing transportation projects.

2.4.2.1 Emergence history of infrastructure funds in Thailand

Around 2008-2009, the Office of Thailand SEC launched a new regime for establishing and managing infrastructure funds (IFF). The initiative was seen as an answer to the need for infrastructure funds in Thailand; it offers investors the opportunity to invest in a portfolio of infrastructure assets such as highways and other

¹²⁷ In transport sector, PPP was applied in 'the 2nd Stage Expressway System Project (Si Rat Expressway)'. Ministry of Finance State Enterprise Policy Office, Thailand, "Public Private Partnership (Ppp) in Thailand.", p. 17.

¹²⁸ SEC Thailand, "Infrastructure Trust," Securities and Exchange Commission, Thailand, <https://www.sec.or.th/EN/Pages/LawandRegulations/Infrastructuretrust.aspx>.

¹²⁹ "Infrastructure Fund," Securities and Exchange Commission, Thailand, <https://www.sec.or.th/EN/Pages/LAWANDREGULATIONS/INFRASTRUCTUREFUND.aspx>.

¹³⁰ Kong-led, "The Launch of Thailand Future Fund.", p. 4-8.

transport systems.¹³¹ IFF aims to provide alternative financing for infrastructure across Thailand that is naturally huge in size and requires a tremendous amount of capital.

2.4.2.2 Regulatory framework of IFF

The umbrella rule for IFF is the Notification of the Capital Market Supervisory Board (CMSB) No. Tor Nor. 38/2562 Re: Rules, Conditions and Procedures for Establishment and Management of Infrastructure Funds dated January 10, 2011 (**Notification of CMSB 38/2562**). This rule, however, has been amended or updated from time to time and recently by the Notification of the CMSB No. 8/2565 Re: Rule Conditions and Procedures for Establishing and Managing Infrastructure Funds (No.3). In addition to that, other relevant regulations in respect of IFF are also available, particularly concerning the commitment between the investors and fund managers,¹³² disclosure and prospectus,¹³³ and listing fees in the office of Thailand SET¹³⁴.

2.4.2.3 Legal and organisational structures

According to the relevant regulatory framework, the fund formation of IFF is carried out through an application for approval of establishment to the Office of SEC Thailand. And after such establishment, IFF would be managed by a fund manager who is primarily obligated to administer and work with responsibility, due care, and

¹³¹ Attorney-at-Law, "Infrastructure Fund".

¹³² A more detailed provisions on this commitment are governed under Notification of CMSB No. Tor Nor. 39/2562 Re: Obligations between unitholders of infrastructure funds and management companies.

¹³³ *Notification of the Capital Market Supervisory Board No. Tor Jor. 20/2561 Re: Rules, Conditions and Procedures for Disclosure of Mutual Funds and Real Estate Investment Trusts or Infrastructure Trust*. This rule has been amended or updated from time to time and recently by Notification of the CMSB No. Tor Jor. 10/2565 Re: Rules, Conditions and Procedures for Disclosure of Mutual Funds and Real Estate Investment Trusts or Infrastructure Trust (No.11); *Notification of the Office of Thailand Sec No. Sor Nor. 44/2562 Re: Prospectus for Infrastructure Fund* . This rule has also been amended or updated from time to time and recently by the Announcement of the Office of Thailand SEC No. 12/2565 Re: Prospectus for the offering of investment units of Infrastructure Fund (No.4);

¹³⁴ *Notification of the Board of Governors of the Stock Exchange of Thailand Re: Schedule of Fees for Listing of Investment Units of Infrastructure Fund as Listed Securities, 2011.*

loyalty to the interest of the unitholders.¹³⁵ The fund supervisor would further supervise the management of the fund.¹³⁶ According to Section 121 of Thailand SEA 2535, the fund supervisor shall be a commercial bank or financial institution with particular qualifications determined by the Office of SEC Thailand.

2.4.2.4 Characteristics of IFF

Characteristically, the IFF is a closed-ended fund with no redemption rights by the investors during the investment, otherwise, it is previously specified that such redemption would not affect the funds' viability.¹³⁷ IFF works and operates just as regular mutual funds but more in a sophisticated manner as it focuses on infrastructure investing.

(a) Investment in the infrastructure assets

IFF focuses on investing in infrastructure assets of infrastructure businesses operated for the public interest in Thailand.¹³⁸ Theoretically, the variability of infrastructure businesses qualified for IFF investment is predominantly rail and pipe transportation systems, electricity, water supply, roads, ports, telecommunication, alternative energy, irrigation, natural disaster preventive system, and waste management system.¹³⁹

The investment in infrastructure assets shall be made in at least 75% (seventy-five per cent) of the fund's asset value within six months of the funds' registration,¹⁴⁰ and such investment can be conducted via direct and indirect investments by acquiring

¹³⁵ *Notification Cmsb 38/2562.*, Clause 8.

¹³⁶ The fund supervisor shall at least carry out the duty to strictly check and balance the management of the fund by the fund manager with loyalty by applying professional knowledge for the best interest of the fund and unitholders as a whole, and the duties as specified in the Securities and Exchange Act B.E. 2535 (1992) and the notifications relating to the establishment and management of the infrastructure funds. *Ibid.*, Clause 17(3).

¹³⁷ *ibid.*, Clause 11.

¹³⁸ *ibid.*, Clause 11(5).

¹³⁹ *ibid.*, Clause 5.

¹⁴⁰ *ibid.*, Clause 66.

the infrastructure assets which encompasses ownership, possessory rights, concession rights, right to receive future income, right of claim, shares including debt instrument that closely connects to the infrastructure asset.¹⁴¹ Moreover, this rule impressively has attempted to diversify the interest of potential investors, leaving room for investment in brownfield or greenfield stages of development of infrastructure projects, subject to further specific requirements. This categorisation of greenfield and brownfield also connects to offering requirements under the relevant rule.¹⁴²

(b) Typical investors and investor's rights in IFF

IFF welcomes any investors to subscribe to this typical fund, including retail and major investors, that will be entitled to voting rights and rights to receive dividends once they become the unitholders of the funds. Besides, the investors (unitholders) would also receive tax incentives in the context of dividend tax, value-added tax or special business tax and deduction of fees charged by the Department of Lands of Thailand.¹⁴³

(c) Establishment of IFF and its units offering

IFF is subject to establishment and registration procedure (including payment of the official application fee) before the Office of Thailand SEC to obtain approval.¹⁴⁴ Such registration is conducted by submitting supporting documents relating to the funds' project, the draft commitment between the unitholders and the fund manager, the draft agreement appointing the fund supervisor, the draft prospectus that may not contain information on the units offering, and the other evidentiary documentation. Besides the funds' registration process, IFF is also subject to unit offering procedure

¹⁴¹ *ibid.*, Clause 4.

¹⁴² *ibid.*, Clause 12.

¹⁴³ Boonsong Sorachon, Purachate Manussiripem, and Susama Charoenwongse, "Thai Infrastructure Funds Explained," *International Financial Law Review* (2012).; SET, "Listing in Set. Infrastructure Fund (Iff)," The Stock Exchange of Thailand (SET), https://classic.set.or.th/en/products/listing2/set_iff_p1.html.

¹⁴⁴ *Notification Cmsb 38/2562.*, Clause 12, 17-19

before the Office of Thailand SEC, i.e., the units' allotment and the prospectus disclosure.¹⁴⁵

(d) Information disclosure in IFF

Regarding the information disclosure in IFF, particularly the disclosure in IFF establishment and the infrastructure assets, Notification CMSB 38/2562 requires the fund manager to set up a system to help investors make investment decisions by presenting sufficient and accurate information.¹⁴⁶ Advertisement,¹⁴⁷ prospectus disclosure,¹⁴⁸ and some other periodic disclosure (e.g., Net Asset Value (**NAV**) report and additional regular reporting on the operation and the financial positions of the funds – once the IFF is duly established)¹⁴⁹ are the typical forms of information disclosure in IFF. IFF also procures necessary information dissemination for the public domain in the official website of each IFF, in addition to the available data or information which has been transparently shared on the official website of the Office of Thailand SET.¹⁵⁰

2.4.2.5 Involvement of IFF in Thailand transportation development

From the early introduction of IFF until now, two IFFs in the transportation sectors have been established (on top of other sectors, like power plants and telecommunication), as elaborated in the table below.

¹⁴⁵ *ibid.*, Part 2.

¹⁴⁶ *ibid.*, Clause 9(2).

¹⁴⁷ The advertisement content of units offering must be accurate and not misleading. *Ibid.*, Clause 40.

¹⁴⁸ The prospectus for units offering is distributed by the fund manager and shall contain correct, complete, sufficient and not misleading information to the prospective investors. *Ibid.*, Clause 40.

¹⁴⁹ "Periodic Information Disclosure," The Stock Exchange of Thailand, https://classic.set.or.th/en/regulations/simplified_regulations/periodic_disclosure_p1.html.

¹⁵⁰ The shared or available information includes the benefits of using IFF from multi perspectives (i.e., the private sector, the government agency, and the investors) and some other relevant investment highlight on the past established and listed IFF products from time to time. SET, "Ipo Securities," The Stock Exchange of Thailand (SET), <https://classic.set.or.th/set/ipo.do>.

Table - 1 Two samples of IFF products in the transportation sector

Name of the IFF products	BTS Rail Mass Transit Growth Infrastructure Fund (BTSGIF)	Thailand Future Fund Infrastructure Fund (TFFIF)
Establishment year	2013	2016
Transportation sector	Urban rail in Bangkok	Expressways in Bangkok
Unit redemption	Not permitted. ¹⁵¹	Not permitted. ¹⁵²
Offered investment units	Around 5,788,000,000 units (offering price per unit was THB 10.80). ¹⁵³	Around 4,450,000,000 units (offering price per unit was THB 10). ¹⁵⁴
Investment in infrastructure assets	Purchase of Net Farebox Revenues generated from BTS SkyTrain Core Network (Mo Chit–On Nut and Taksin Bridge–National Stadium). ¹⁵⁵	Purchase of revenues that would be generated from Chalong Rush Expressway and Burapathi Expressway. ¹⁵⁶
Method of securities offering	Private offering in Thailand and internationally. ¹⁵⁷	<i>An English translation is unavailable.</i>
Target of investors	Not specified.	Domestic and foreign. ¹⁵⁸
Current unitholders	Institutional investors. ¹⁵⁹	Institutional investors and

¹⁵¹ "Offering Memorandum of Bts Rail Mass Transit Growth Infrastructure Fund," (Bangkok2013)., p. 13.

¹⁵² TFFIF, "About Tffif," Thailand Future Fund Infrastructure Fund (TFFIF), <https://www.tffif.com/th/about/overview>.

¹⁵³ "Prospectus of Btsgif."

¹⁵⁴ TFFIF, "Thailand Future Fund (Tffif) Annual Report 2021," (Thailand Future Fund Infrastructure Fund (TFFIF), 2021)., p. 3

¹⁵⁵ BTSGIF, "What Is Btsgif," BTS Rail Mass Transit Growth Infrastructure Fund (BTSGIF), <https://www.btsgif.com/en/about-btsgif/what-is-btsgif>; "Prospectus of Btsgif.", p. 1.

¹⁵⁶ TFFIF, "About Tffif"; "Investment Asset Information," Thailand Future Fund Infrastructure Fund (TFFIF), <https://www.tffif.com/th/asset-information/investment-highlights>.

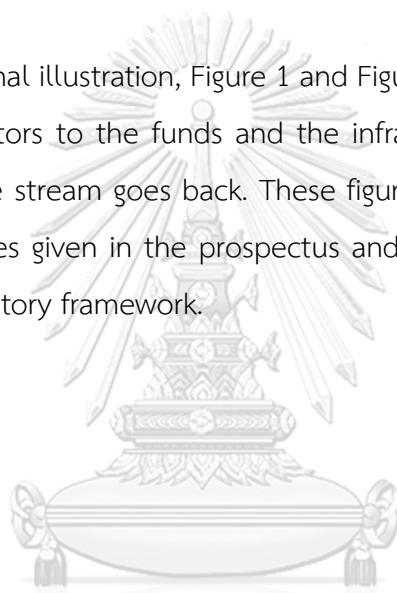
¹⁵⁷ "Prospectus of Btsgif.", p. (iii), 10.

¹⁵⁸ TFFIF, "About Tffif".

¹⁵⁹ Institutional companies include the social security company in Thailand and certain names of major insurance companies in Thailand. BTSGIF, "Unitholders Information," BTS Rail Mass Transit Growth Infrastructure Fund (BTSGIF), <https://www.btsgif.com/en/investor-relations/unitholders-information/major-unitholders>.

		others. ¹⁶⁰
Investment incentives	Tax exemptions. ¹⁶¹	Unknown. <i>An English translation is unavailable.</i>
Element of fees and pricing	Annual management fee and fund supervision fee, fund establishment registration fee, initial and annual listing fees, etc. ¹⁶²	<i>An English translation is unavailable.</i>
Other information disclosure approach¹⁶³	Information disclosure via the official BTSGIF website. ¹⁶⁴	Information disclosure via the official TFFIF website. ¹⁶⁵

For an additional illustration, Figure 1 and Figure 2 below show the stream of money from the investors to the funds and the infrastructure assets, which further shows how the income stream goes back. These figures are made independently by referring to the schemes given in the prospectus and websites of BTSGIF and TFFIF, and the relevant regulatory framework.



¹⁶⁰ Other shareholders include one of a reputable university in Thailand and the Ministry of Finance of Thailand. TFFIF, "Shareholder Information," Thailand Future Fund Infrastructure Fund (TFFIF), <https://www.tffif.com/th/investor-relations/shareholder-information/list-of-major-unitholders>.

¹⁶¹ . "Prospectus of Btsgif.", p. 186-188.

¹⁶² *ibid.*, p. 7-8.

¹⁶³ Besides disclosure for securities offering, regular reporting (e.g., annual report, financial report, and net asset value report).

¹⁶⁴ General presentation including investment and financial highlights are available and accessible in English version. BTSGIF, "Why Is Btsgif," BTS Rail Mass Transit Growth Infrastructure Fund (BTSGIF), [https://www.btsgif.com/en/about-btsgif/why-btsgif](https://www.btsgif.com/en/about-btsgif/why-btsgif;); "Financial Highlight," BTS Rail Mass Transit Growth Infrastructure Fund (BTSGIF), <https://www.btsgif.com/en/investor-relations/financial-information/financial-highlight>; "Webcase and Presentation," *Publications* (2021), <https://btsgif.listedcompany.com/misc/PRESN/20220318-btsgif-general-march2022.pdf>.

¹⁶⁵ General presentation and investment highlights are available and accessible in the official website of TFFIF in Thai version. TFFIF, "Investment Asset Information".

Figure - 1 BTSGIF Investment Scheme

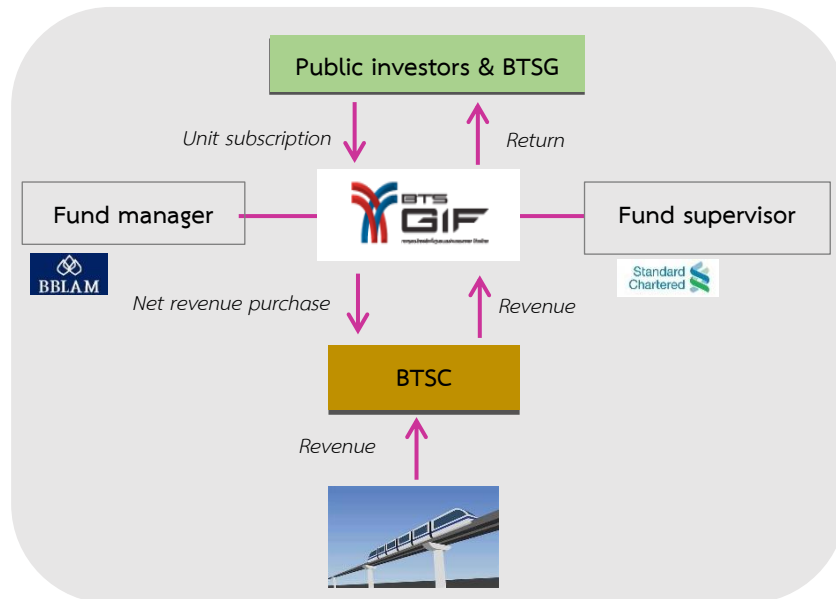
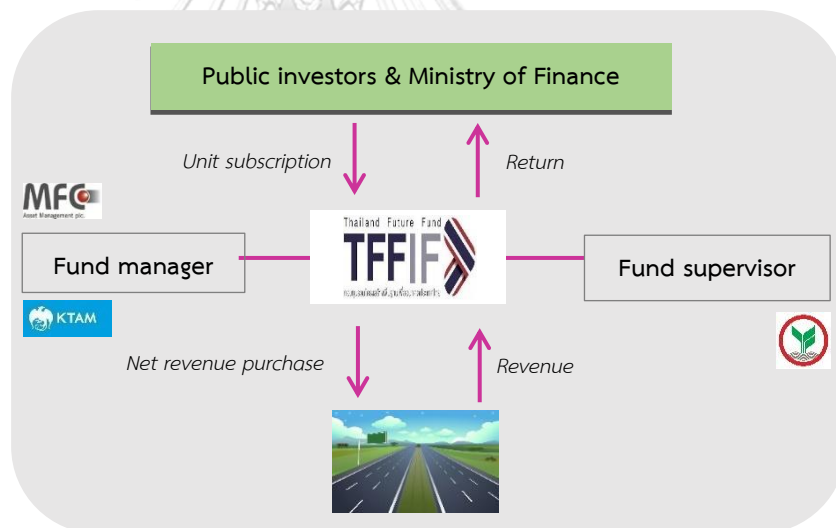


Figure - 2 TFFIF Investment Scheme



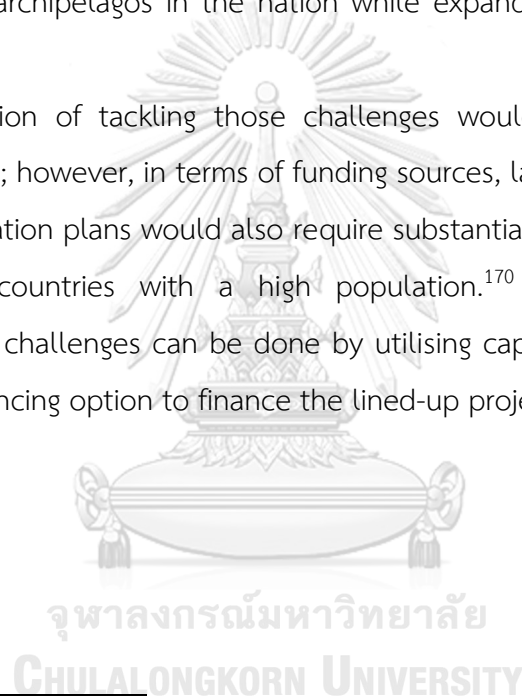
2.5 PRACTICE OF INFRASTRUCTURE FUNDS IN THE TRANSPORTATION SECTOR: INDONESIA

The practices of infrastructure funds in Indonesia can be in many infrastructure sectors. Their investment can be in any scheme, whether directly or indirectly through equity or debt instruments, whether using a special purpose vehicle (SPV) or not. Infrastructure funds in Indonesia are eligible for infrastructure industries, including transport.

2.5.1 Overview of the transportation sector in Indonesia

Like dual sides of coins, transportation projects in Indonesia have both opportunities and challenges. It brings chances to develop the current circumstances,¹⁶⁶ including creating other breakthroughs like what has been set up in the national development plan of 2020-2024, where the transport development will encompass train and railways, toll roads, and seaports.¹⁶⁷ Indonesia's need for transportation is expected to strengthen connectivity and mobility, combat disparities between regions by reinforcing transport accessibility through innovation,¹⁶⁸ and interconnect the archipelagos in the nation while expanding the eastern regions of Indonesia.¹⁶⁹

The mission of tackling those challenges would presumably be on the government's side; however, in terms of funding sources, large portions of national or regional transportation plans would also require substantial capital investments, even more in some countries with a high population.¹⁷⁰ Hence, addressing such opportunities and challenges can be done by utilising capital market instruments as an alternative financing option to finance the lined-up projects that are beneficial and await public use.



¹⁶⁶ Common problems in Indonesian transport facilities are poor facilities, congested highway interchanges, inadequate rail capacity, and overloaded passenger stations. Those projects are either needs of construction, either in terms of replacement, modernisation, or maintenance on the existing facilities, building on the new ones, or reactivate the used facilities. And also, traffic management. Tri Agustina, "14 Interesting Facts About Indonesia Transport," <https://factsofindonesia.com/facts-about-indonesia-transport>; Apacode, "Tuliskan 7 Masalah Transportasi Di Indonesia," <https://apacode.com/tuliskan-7-masalah-transportasi-di-indonesia>.

¹⁶⁷ *Presidential Reg 18/2020*.

¹⁶⁸ Tesa Oktiana Surbakti, "Memenuhi Kebutuhan Infrastruktur Transportasi," *Media Indonesia*, August 16 2017.

¹⁶⁹ "Infrastructure & Transport," Oxford Business Group, <https://oxfordbusinessgroup.com/indonesia-2020/infrastructure-transport>.

¹⁷⁰ Kerr, "Transportation Infrastructure.", p. 46.

2.5.1.1 Recently developed Indonesian transportation projects

Recent transportation projects have been fundamentally financed by state budgets,¹⁷¹ overseas loans,¹⁷² and sovereign wealth funds (Indonesia Investment Authority). Reports said that transport projects are priorities for development in Indonesia; it includes primarily toll roads, ports, as well as mass railways, which will be financed using those schemes.¹⁷³ Urban mobility is also considered to improve accessibility on high-priority corridors, including prioritising pedestrians and cyclists, public transport, promoting environmentally friendly vehicles, and pattern movement for private vehicles (especially in Jakarta).¹⁷⁴

2.5.1.2 Common financing channel for Indonesian transportation projects

Just as in Thailand, conservatively, financing channels for transportation would involve the state budget that is often combined with the PPP structure, especially for large projects, as well as direct investment by private parties. Regarding government funding, the current regime made significant moves by introducing INA,

¹⁷¹ Investment for infrastructure cluster were approximately IDR 86 trillion excluding specific financing as capital subscription in state-owned companies that are engaging in infrastructure business. *Enclosure VII of Presidential Regulation Number 98 of 2022 Concerning the Amendment to Presidential Regulation Number 104 of 2021 Concerning Details of State Revenue and Budget Year 2022.*

¹⁷² There are one toll road and one bridge projects in total amounts around USD 1,5Million that are being proposed to AIIB for lending arrangement. AIIB, "Our Projects," Asian Infrastructure Investment Bank (AIIB), https://www.aiib.org/en/projects/list/year/ALL/member/Indonesia/sector/ALL/financing_type/ALL/status/Proposed.

¹⁷³ INA, "Annual Report 2021," (Indonesia Investment Authority (INA), 2022), p. 61-63.; KPPIP, "Priority Projects. Latest Status of the Kppip Priority Projects," Komisi Percepatan Penyediaan Infrastruktur Prioritas, <https://kppip.go.id/en/priority-projects/>;

¹⁷⁴ World Bank, "Indonesia Mass Transit Project," The World Bank Group, <https://projects.worldbank.org/en/projects-operations/project-detail/P169548>.; Tempo, "Researchers Skeptical of Zero Carbon Emissions Goal in 2050, Transport Agency Reveals 4 Priority Scales," Tempo.co, <https://en.tempo.co/read/1669458/researchers-skeptical-of-zero-carbon-emissions-goal-in-2050-transport-agency-reveals-4-priority-scales>.

*Pembiayaan Investasi Non-Anggaran Pemerintah (PINA)*¹⁷⁵ and the Limited Concession Scheme¹⁷⁶ in response to reducing a state budget reliance on building infrastructure.

PPP in Indonesia is recognised as '*Kerjasama Pemerintah dan Badan Usaha*' (KPBU). It works as a collaboration or partnership between the government and the private parties in the provision of infrastructure and/or its services for the public benefit that would use (either partly or wholly) the resources of the business entity with due regard to the sharing of risks between the parties.¹⁷⁷ PPP is still in high demand for building and developing national infrastructure projects because most government regimes that engage with privates allow them to receive incentives like tax rate reduction, infrastructure guarantee and other facilities.¹⁷⁸ Besides, financing the transportation projects can be done via the direct investment by private parties, mostly involving local or foreign capital subscription, manpower or employment, machinery importation, and transfer of skills and qualifications.¹⁷⁹

2.5.1.3 Transportation financing in the Indonesian capital market

Some Indonesian private and state-owned companies have participated or chosen capital markets as their financing or funding options, and most of them use traditional fund-raising schemes via an initial public offering of shares and bonds. Bonds alone have been expended through project bonds, green bonds, and mandatory

¹⁷⁵ "Bappenas: Kpbu Dan Pina Solusi Pembiayaan Infrastruktur Di Indonesia," Komite Percepatan Penyediaan Infrastruktur Prioritas (KPIP), <https://kpip.go.id/berita/bappenas-kpbu-dan-pina-solusi-pembiayaan-infrastruktur-di-indonesia/>

¹⁷⁶ Andika Putra Bharata, "Skema Sekuritisasi Aset Dalam Implementasi Hak Pengelolaan Terbatas," <https://www.djkn.kemenkeu.go.id/kpknl-bogor/baca-artikel/14132/Skema-Sekuritisasi-Aset-dalam-implementasi-Hak-Pengelolaan-terbatas.html>.

¹⁷⁷ Ministry of Finance of Republic of Indonesia, "What Is Ppp?," <https://kpbu.kemenkeu.go.id/read/32-35/pjpk/apa-itu-kpbu>.

¹⁷⁸ "Infrastructure Guarantee," [https://kpbu.kemenkeu.go.id/read/64-64/pjpk/dukungan-pemerintah/penjaminan-infrastruktur](https://kpbu.kemenkeu.go.id/read/64-64/pjpk/dukungan-pemerintah/penjaminan-infrastruktur;); "Project Development Facility," [https://kpbu.kemenkeu.go.id/read/1094-1255/pjpk/dukungan-pemerintah/fasilitas-penyiapan-proyek](https://kpbu.kemenkeu.go.id/read/1094-1255/pjpk/dukungan-pemerintah/fasilitas-penyiapan-proyek;); "Eligibility Support," <https://kpbu.kemenkeu.go.id/read/37-40/pjpk/dukungan-pemerintah/dukungan-kelayakan>.

¹⁷⁹ *Law No. 25 of 2007 of the Republic of Indonesia Concerning Capital Investment.*

convertible bonds.¹⁸⁰ Essentially, other capital market instruments can be served as an alternative financing channel.

(a) Asset securitisation

Asset securitisation entails the pooling of debt securities (such as loans or receivables) and the formation of securities backed by this pool of debt securities, called asset-backed securities. In this case, the cash flows from the debt securities are used to make interest payments and principal repayments to the holders of asset-backed securities.¹⁸¹

This scheme is widely applied in Indonesia and can be done in two concepts, i.e., collective investment contract (CIC) and participation letter.¹⁸² The use or applicability of asset securitisation in the CIC form is reported to be higher than in the participation letter form. In short, this asset securitisation scheme works by acquiring projects whose costs are recovered by charging the end users, for example, toll road construction.

(b) Private funds

As mentioned above, another instrument called private funds also works through a CIC under a mutual fund scheme. The private funds were first introduced in 2008 by the capital market regulator in Indonesia. They were presented as an alternative investment for investors without explicit details about the purpose of

¹⁸⁰ OJK, "Strategi Nasional Pengembangan Dan Pendalaman Pasar Keuangan Tahun 2018-2024.", p. 118-119.

¹⁸¹ "Introduction to Asset-Backed Securities," CFA Institute, [https://www.cfainstitute.org/en/membership/professional-development/refresher-readings/introduction-asset-backed-securities.](https://www.cfainstitute.org/en/membership/professional-development/refresher-readings/introduction-asset-backed-securities;); Chance, "Alternative Funding Model for Future Infrastructure Project."

¹⁸² "Sekuritisasi Aset. Alternatif Pembiayaan Infrastruktur Dan Peluang Investasi Dalam Pembangunan Infrastruktur," ed. Direktorat Jenderal Pengelolaan Pembiayaan dan Risiko (Kementerian Keuangan Republik Indonesia, 2017).; Bank Indonesia, "Sekuritisasi Aset Sebagai Sumber Pembiayaan Alternatif," news release, March 24, 2021, https://www.bi.go.id/id/publikasi/ruang-media/news-release/Pages/sp_237521.aspx.

collecting funds. The current regulatory framework of private funds has broadly mentioned the urgency of investing in real sector projects as its core characteristic.¹⁸³

(c) Real estate fund and Infrastructure fund

To bring differing lines between real sector projects, real estate, and infrastructure projects, other CIC-formed products called DIRE and DINFRA are introduced with the flexibility of private and public offering methods. Before the regulatory framework was launched, in practical experience, infrastructure business is implicitly regarded as a ‘real sector activity’ that is eligible for receiving funds from private funds, and there are several infrastructure projects that have been funded via private funds, in transport and energy sectors. More elaboration on DINFRA will be in the next section.

2.5.2 Overview of DINFRA’s recent practice: Limited case study

Below is a description of how Indonesia started applying infrastructure funds, especially in developing transportation projects and how they grew in the industry.

2.5.2.1 Emergence history of DINFRA

Infrastructure funds have finally reached the Indonesian market of infrastructure. In 2017, following some fruitful stories of private equity funds establishment to boost real sector projects in Indonesia, the OJK introduced a similar rule regarding a pool of funds under the CIC scheme with a more specified purpose by differentiating the concentration or focus of funds on infrastructure business. This new rule was anticipated as an innovative approach – as a part of a solution – with various characteristics that were expected as an alternative and breakthrough financing to finance the line-up project in the infrastructure industry, including addressing the

¹⁸³ A real sector project is defined as direct or indirect actions related to the production of goods, the provision of services in the real sector, including but not limited to the production of goods, and/or the working capital of these activities. *Regulation of Otoritas Jasa Keuangan Regulation Number 34/Pojk.04/2019 Concerning Limited Participation of Mutual Funds in the Form of Collective Investment Contract.*, Article 1 number 6.

classical funding issue.

2.5.2.2 Regulatory framework of DINFRA

Fundamentally, the umbrella rule governing Indonesia's infrastructure funds is OJK Reg 52/2017. Several regulations further support the enforcement of the same, predominantly concerning securities offering and listing at the Indonesian IDX office, namely: Decree of Directors of PT Bursa Efek Indonesia Number Kep-00030/BEI/04-2019 concerning Rule Number 1-W: Listing of Participation Unit of Infrastructure Investment Funds in the form of Collective Investment Contract in the Stock Exchange (**IDX Rule 1-W**).

2.5.2.3 Characteristics of DINFRA

According to the relevant rule of DINFRA, it has several characteristics that distinguish it from other CIC or open-ended mutual funds in Indonesia.

(a) Legal and organisational structures

DINFRA works under the form of CIC. Though it is not entirely mirroring, it is comparable to the structure of mutual funds or CIS in global practice. The fund formation is carried out through a notarial deed of CIC between the investment manager and custodian bank that binds the unit participation holders.¹⁸⁴ As stated in one Indonesian research paper, the concept of CIC is a contract between fund managers and custodian banks that can bind investors. Hence, the investor becomes a third party.¹⁸⁵

The deed of CIC of DINFRA shall at least encompasses: (1) the name and address of the investment manager; (2) the name and address of custodian bank; (3) the investment objective and policy; (4) the policy of formation and utilisation of SPV, if any; (5) the budget allocation of DINFRA, the investment management, DINFRA, investment manager, unit holder and other, if any; (6) the duties and responsibilities

¹⁸⁴ *Ojk Reg 52/2017*, Article 1 number 2.

¹⁸⁵ Nazaruddin, "Kedudukan Hukum Pemegang Unit Penyertaan Reksa Dana Kontrak Investasi Kolektif," *Jurnal Hukum No. 25 11 (2004)*, p. 70-71.

of investment manager; (7) the duties and responsibilities of custodian; (8) the restriction for DINFRA; (9) information of rights, obligations and authorities of other relevant parties, good governance and investment administration in the infrastructure asset and portfolio, (10) the replacement of investment manager and custodian; (11) the rights of the unit holder; (12) the payment guideline of unit participation; (13) the investment return distribution policy to the unit holder; (14) the initial net asset value; (15) the calculation procedure of net asset value; (16) the asset valuation method; (17) the delivery of annual report of DINFRA; (18) the resignation procedure for investment manager and custodian; (19) the force majeure; (20) the dissolution and liquidation of DINFRA; (21) any cost relating to the liquidated DINFRA; (22) the appointment of alternative dispute resolution in capital market.¹⁸⁶

And just as the other common mutual funds and CICs, the fund management of DINFRA is operated by the investment manager and custodian bank. For the investment manager, the main role is to conduct management on securities portfolio for customer or collective investment portfolio for the collected customer as its business activity, other than an insurance company, pension fund and bank that run their own similar management portfolio under the prevailing rules.¹⁸⁷ According to Article 8 of OJK Reg 52/2017:

“(1) the investment manager shall:

- a. deposits all assets of DINFRA at the Custodian Bank;*
- b. conducts due diligence on Infrastructure Assets that will become the portfolio of DINFRA;*
- c. manages DINFRA in accordance with the provisions of laws and regulations as well as Collective Investment Contract, DINFRA Disclosure Document, and other contracts related to DINFRA;*
- d. separates the assets of DINFRA from the assets of the Investment Manager;*
- e. conducts bookkeeping and reporting, including maintaining all*

¹⁸⁶ Ojk Reg 52/2017., Article 24.

¹⁸⁷ *ibid.*, Article 1 number 9.

important records relating to the financial statements and management of DINFRA separate from the bookkeeping and reporting of the Investment Manager itself;

f. calculates the Fair Market Value of assets in DINFRA portfolio at least one time in three months;

g. appoints a replacement Custodian Bank if necessary;

h. prepares and submits DINFRA's annual financial report to the Financial Services Authority;

i. publishes the update of DINFRA Disclosure Document accompanied by the latest annual financial statement of DINFRA and submit it to the Financial Services Authority at the end of the third month after the date of the annual financial statement ends, if DINFRA is offered continuously;

j. arranges procedures for the purchase, redemption, and/or transfer of DINFRA Participation Units;

k. has procedures that can generate information regarding operational activities, financial condition, and assets of DINFRA; and

l. acts in good faith and with full responsibility to perform duties as best as possible for the interests of DINFRA in accordance with the provisions of laws and regulations.

(2) In the event that the Investment Manager managing DINFRA does not carry out the obligations as referred to in paragraph (1) letter l, the Investment Manager shall be liable for responsible for all losses arising from his/her actions”.

And for the custodian bank, the main role is to provide custody services of securities and other assets relevant to particular securities. Other services include receiving dividends, interest and other rights, securities transaction settlement, and representing the account of its customers.¹⁸⁸ According to Article 9 of OJK Reg 52/2017:

“(1) The Custodian Bank administering DINFRA shall:

¹⁸⁸ *ibid.*, Article 1 number 10.

a. provides collective custody and Custodian services about the assets of DINFRA;

b. registers or records the assets of DINFRA in the name of the Custodian Bank for the benefit of Participation Unitholders in accordance with the provisions of laws and regulations and take necessary actions related to the registration or recording of such assets;

c. separates the assets of DINFRA from the assets of the Custodian Bank;

d. has a system and procedure for carrying out its duties and obligations;

e. conducts bookkeeping and reporting, including maintaining all important records regarding financial statements and management of DINFRA, which is separate from the bookkeeping and reporting of the Custodian Bank itself;

f. calculates the Net Asset Value of DINFRA at least one time in three months;

g. records all changes:

1. Infrastructure Assets and other assets;
2. number of Participation Units
3. expenses;
4. management fee
5. interest income
6. other income; or
7. other costs;

h. settles transactions conducted by DINFRA in accordance with the instruction of the Investment Manager;

i. pays the management fee and other fees charged to DINFRA in accordance with the DINFRA Collective Investment Contract;

j. pays to the Unit Holders of DINFRA any cash distribution related to DINFRA;

k. keeps separate records showing all changes in the number of

DINFRA Participation Units owned by each Unit holder, name, nationality, address, and other identities of the Unitholders;

l. ensures that Participation Units are issued only upon receipt of funds from prospective Participation Unitholders;

m. rejects the instruction of the Investment Manager in writing with a copy to the OJK, if the instruction received by the Custodian Bank clearly violates the laws and regulations in the capital market sector and/or the DINFRA Collective Investment Contract; and

n. acts in good faith and full of responsibility in performing duties as well as possible for the interests of DINFRA in accordance with the provisions of laws and regulations.

(2) In the event that the Custodian Bank administering DINFRA does not perform its obligations as referred to in paragraph (1) letter n, the Custodian Bank shall be liable for all losses arising from its actions”.

The role of an investment manager (also recognised as a fund manager) would be played by a licensed asset management company having rights and obligations under the OJK Reg 52/2017, the relevant CIC and other applicable rules. And the services by the custodian bank would be performed by a commercial bank having a special license by the OJK to perform its rights and obligation under the OJK Reg 52/2017, the relevant CIC, and other applicable rules.

(b) Investment in the infrastructure assets

In avoidance of doubt, in DINFRA, there are two layers of investments. First is the investment by way of subscription of participation units of DINFRA by the prospective investors. The fund subscription is conducted upon the offering process, and further, the collected fund in this layer is like the way regular mutual funds or CIC work. The second investment would be an investment of collected funds in DINFRA to the infrastructure projects or assets.¹⁸⁹

¹⁸⁹ *ibid.*, Articles 14-16.

The latter investment is the fundamental characteristic of DINFRA, as it is indeed purposively initiated to provide alternative financing from the segmented infrastructure market in Indonesia.¹⁹⁰ The investment alone shall be subject to the eligible infrastructure assets, i.e., any form of facilities deemed vital for public services provisions, as long as it supports network structure for the community's economic and social growth.¹⁹¹ The specified sub-category of such infrastructure would include energy, transport, water, waste, telecommunication, urban and housing, education and sport, art and tourism, and prison.¹⁹²

The investment in such infrastructure assets can be either via direct or indirect participation with a significant contribution of fifty-one per cent (at least) without requiring involvement in the infrastructure business's technical or operation.¹⁹³ From a practical viewpoint, direct and indirect participation in infrastructure assets may raise drawbacks from the companies or projects to be funded, by contrast, an attraction from the potential investors.

Direct investment refers to purchasing infrastructure assets in Indonesia attributed to the government's development programs or public benefits. An indirect investment may involve the purchase of equity and debt instruments issued by a company owning infrastructure assets or the purchase of debt instruments for which payments originate from infrastructure assets.¹⁹⁴

(c) Typical investors and investor's rights in DINFRA

In essence, DINFRA is open to all kinds of investors. OJK Reg 52/2017 does not precisely address the criteria of investors. But in practice, the fund manager will likely carry out a pre-assessment to understand the suitability of potential investors' profiles

¹⁹⁰ *ibid.*, Article 1 number 1.

¹⁹¹ *ibid.*, Article 1 number 3.

¹⁹² *ibid.*, Elucidation of Article 15 number 1.

¹⁹³ Direct and indirect investment in infrastructure assets or projects may involve the use of a Special Purpose Company (SPC) or not, provided that, when using an SPC the minimum portfolio held by SPC shall be at least 99.9%. *Ibid.*, Article 1 number 16 and Article 14 number 1.

¹⁹⁴ *ibid.*, Article 15 para (3).

before they put their money in DINFRA.¹⁹⁵ They are expected to be truthful about their financial capabilities, investment literacies, and source of funds,¹⁹⁶ so the fund manager can also assess the risk level of the investors that would be matched with the target project of DINFRA's investment.

Once the investors subscribe to DINFRA, they become the unitholders. Unitholders are entitled to receive specific information and rights that are relevant to their subscription, i.e., the proof of securities ownership, the periodic annual financial report, the information regarding the net asset value of DINFRA, and the return distribution from DINFRA. Besides, they also are given the rights to sell the participation unit through public offering and listing mechanisms in the stock exchange, the vote in the general meeting of the unitholder of DINFRA, and the rights of liquidation proceeds.¹⁹⁷

(d) Securities offering and listing of DINFRA's unit

Like common securities issuance procedures, DINFRA is also subject to offering and registration requirements before the OJK, whereby the investment units can be offered privately or publicly.¹⁹⁸ For public offering, DINFRA is also allowed to offer its participation units overseas, not strictly in the domestic region, Indonesia.¹⁹⁹ For securities offerings in Indonesia, the preliminary action to be taken is filing the registration statement to the OJK, which is further followed by the listing process in the office of IDX. The listing procedures require the document filing that attaches a

¹⁹⁵ This is also recognize as an implementation of 'Know Your Customer' principle is performed by using due diligence checklist and some other measures to gather more information about investor's profile. James Chen, "Know Your Client (Kyc)," Investopedia, <https://www.investopedia.com/terms/k/knowyourclient.asp#:~:text=The%20Know%20Your%20Client%20or%20Know%20Your%20Customer,position.%20KYC%20protects%20both%20clients%20and%20investment%20advisors.>

¹⁹⁶ Whether the money comes from money laundering, terrorism or not, etc.

¹⁹⁷ *Ojk Reg 52/2017.*, Article 10.

¹⁹⁸ *ibid.*, Article 1 number 8 and Article 6.

¹⁹⁹ *ibid.*, Articles 33-35. *Decree of Directors of Pt Bursa Efek Indonesia Number Kep-00030/Bei/04-2019 Concerning Rule Number 1-W: Listing of Participation Unit of Infrastructure Investment Funds in the Form of Collective Investment Contract in the Stock Exchange.*, Section III.

statement letter from the investment manager, including the signed copies of the CIC, proof of payment of the listing application fee, and disclosure documents.²⁰⁰

(e) Information disclosure in DINFRA

The disclosure documents are defined as any written information or material facts of DINFRA in the context of issuing DINFRA with the aim that other parties purchase DINFRA.²⁰¹ The disclosure documents for securities offering are called prospectus or information memorandum, which shall at least comprise an updated version of information for investors' knowledge - especially when material facts or changes occur, the minimum contents of disclosed information in the prospectus, the relevant duties and responsibilities of related parties and professionals on the issuance of DINFRA.²⁰²

The disclosure herein is not limited to disseminating material facts as long as the information does not contain untrue and unnecessary material that may bring misleading interpretations. Other than that, OJK Reg 52/2017 also requires another form of disclosure via certain reporting activities that need to be fulfilled by DINFRA regularly—for example, the annual financial report to the investors.²⁰³

2.5.2.4 Involvement of DINFRA in Indonesian transportation development

Upon the effectiveness of OJK Reg 52/2017, several DINFRA products have been established, but only one is listed in the office of IDX that focuses on the transportation sector, as described in Table 2 below. Its establishment was motivated by stable and recurring income expectations, including optimum investment return by purchasing securities issued by the owner of infrastructure assets that run a toll road operation business. Also, to attract more investors, preserve its financial situation and

²⁰⁰ *Idx Rule 1-W.*, Section IV.

²⁰¹ *Ojk Reg 52/2017.*, Article 10 number 20.

²⁰² *ibid.*, Articles 25-29.

²⁰³ *ibid.*, Articles 36-38.

boost its capital structure amid huge toll road developments.²⁰⁴

Table - 2 The only DINFRA product in the transportation sector

Name of DINFRA product	DINFRA Toll Road Mandiri-001 (DINFRA JMTR-001)
Establishment and offering year	Date of Deed CIC: September 2018; Prospectus date: April 2019
Transportation sector	Toll roads (Central Java and East Java, Indonesia)
Unit redemption	Permitted
Offered units	Around 100Mn to 10Bn units (price per unit was IDR 1,000) ²⁰⁵
Investment in infrastructure assets	99.9% of corporate ownership via an SPV ²⁰⁶
Method of securities offering	Public offering in Indonesia
Target of investors	Not specified
Current unitholders (investors)	Mostly retail investors than institutional investors ²⁰⁷
Other information disclosure approach	Besides prospectus and annual reports, no approach is regarded as information disclosure.
Element of fees and pricing	Allocated fees payable by DINFRA, fund manager, and unitholders. ²⁰⁸

For an additional illustration, Figure 3 shows the money flow from the investors to the funds and the infrastructure asset. Consequently, how the revenue and return can be generated and back to investors. This figure is made independently

²⁰⁴ "Dinfra: Produk Inovatif Untuk Solusi Investasi Dan Alternatif Infrastruktur Indonesia," news release, April 15, 2019,

<https://www.jasamarga.com/public/id/aktivitas/detail.aspx?title=DINFRA:%20Produk%20Inovatif%20untuk%20Solusi%20Investasi%20dan%20Alternatif%20Infrastruktur%20Indonesia>.

²⁰⁵ "Prospectus of Public Offering of Dinfra Toll Road Mandiri-001," (Jakarta 2019).

²⁰⁶ The SPV invests in PT Jasamarga Pandaan Tol and PT Trans Marga Jateng; both are the holders of toll road concessions in Central Java and East Java. "Dinfra: Produk Inovatif Untuk Solusi Investasi Dan Alternatif Infrastruktur Indonesia."; "Dana Investasi Infrastruktur Toll Road Mandiri-001," in *Financial Report December 2020 and December 2021* (The Indonesian Stock Exchange).

²⁰⁷ Specific details of the names of institutional investors have yet to be discovered.

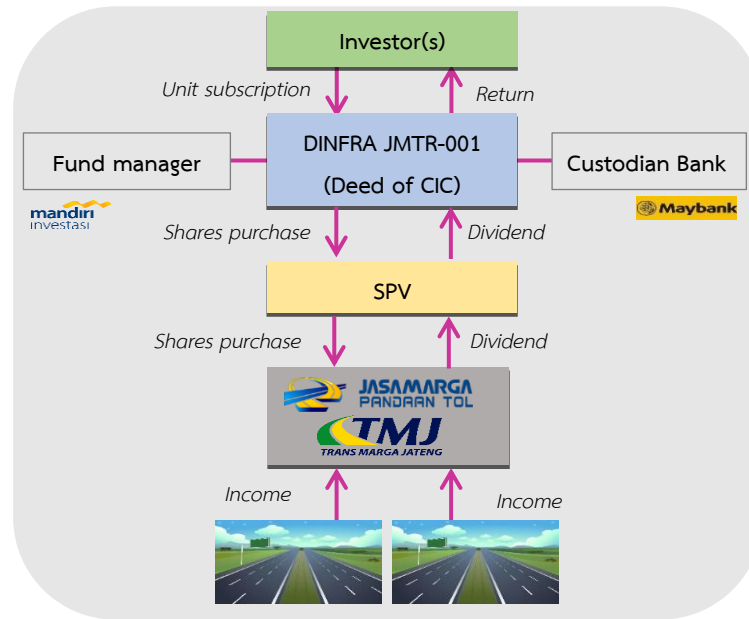
Kompas.com, "Bidik Rp 1 Triliun, Jasa Marga Lansir Kik Dinfra," Kompas.com,

<https://amp.kompas.com/properti/read/2019/04/15/112823621/bidik-rp-1-triliun-jasa-marga-lansir-kik-dinfra>.

²⁰⁸ "Prospectus of Dinfra Jmtr-001.", p. 12, 69-70.

by referring to the scheme in the prospectus, the financial report 2021 of DINFRA JMTR-001, and the regulatory framework.

Figure - 3 DINFRA JMTR-001 Investment Scheme



2.6 CONCLUDING REMARK

Chapter 2 discusses transportation as a crucial sector for expansion and development, aside from the associated risks and challenges that may arise in each stage of planning, development, and operation. There are brownfield and greenfield classifications of the development stage, and the typical projects in this sector can be under government or private ownership. Approach for transport financing is also many, subject to the needs and situations that demand the facility provisions. However, the provision or procurement of transport facilities or assets in one country often meets the financing gap due to funding source limitations to cover the costly investment. And as such, infrastructure funds have begun to emerge as an alternative route, both for infrastructure investment for prospective investors that strive for portfolio diversification and infrastructure financing for fundraisers that look for funding support.

Globally speaking, infrastructure funds may be established in various structures as long as they primarily work by pooling or gathering money from investors and using the collected money for investment in the infrastructure portfolio assets.

The reference structure may include the concept of CIS, mutual funds, limited partnerships, or private equity funds. The overall funds' operation will typically involve management and custodian services. Such funds' operation goes under the governance study that involves transparency as a vital element in securities regulation. Regarding governance, infrastructure funds may refer to CIS and ELTIF.

Likewise, it has almost been a decade since Thailand experienced infrastructure funds. The first launched product touches the transport sector (such as urban rail development in Bangkok) that is still in force now. Besides, there is another product of Thai IFF in the transport sector, which focuses on expressway road development, also in Bangkok. Meanwhile, Indonesia is quite late in embarking on the infrastructure funds market since the relevant market emerged in 2019. DINFRA is introduced to boost the country's infrastructure development and bring attractive options to help financial bottlenecks. The only product of DINFRA now is in the transport sector, particularly toll roads. Both infrastructure funds in Thailand and Indonesia have their own characteristics, and a comparison between them is reviewed in the following couple of chapters.

CHAPTER 3

Governance and Information Transparency for Investors' Informed Decisions in Infrastructure Funds

3.1 PREFACE

This chapter generally explores the governance of funds in the general overview, which can further be relevant to the infrastructure fund. The exploration of fund governance includes transparency, management, and structure of the funds' operation to achieve the capital market objective, especially regarding transparency of necessary information for informed decisions. And as a capital market product or instrument, the concepts of CIS and ELTIF are explored to discover governance and transparency alongside the regulatory framework of Thai IFF and DINFRA.

3.2 OVERVIEW OF THE GOVERNANCE OF INFRASTRUCTURE FUNDS

In this part, the general concept of fund governance will first be discussed, namely, the one regulated by IOSCO regarding CIS, followed by a concept more focused on funds with real assets and infrastructure investing characteristics, namely ELTIF, which is popular in Europe.

3.2.1 Introduction to CIS and ELTIF concepts

3.2.1.1 CIS concept by IOSCO

IOSCO is recognised as a global standard setter for the securities sector by developing, implementing, and promoting compliance with internationally recognised standards for securities regulation.²⁰⁹ Its three main objectives for securities regulation are protecting the investors; ensuring a fair, efficient, and transparent market; and minimising systemic risk.²¹⁰ The membership in IOSCO is voluntary; the security

²⁰⁹ IOSCO, "About Iosco. International Organization of Securities Commissions," International Organization of Securities Commissions, https://www.iosco.org/about/?subsection=about_iosco.

²¹⁰ "Objectives and Principles of Securities Regulation," (The International Organization of Securities Commissions (IOSCO), 2017).

regulator in Indonesia (OJK) became a member in 1984,²¹¹ and the Office of SEC Thailand has joined the membership since the 1990s.²¹²

Considering IOSCO's focus is on securities regulation that includes CIS and mutual fund practices, under Committee number 5 – Investment Management, several discussions and publications are conducted as best practices.²¹³ IOSCO also has several principles, one related to CIS that is set out in the IOSCO Objectives and Principles of Securities Regulation 2017 (**Objective and Principle 2017**). Though the principles regarding CIS indirectly emphasise transparency roles in CIS operation, the goal of attaining market competition by implementing transparency can be comprehended.²¹⁴ Principles number 24-27 are closely relevant to the research transparency problems in this research, as they mainly underline the importance of CIS solid governance standards via a regulatory system that comprises information for investment protection (such as asset valuation, pricing, unit redemption, etc.)

Furthermore, specifically on the CIS concept, Principle for the Regulation of Collective Investment Scheme and Explanatory Memorandum 1994 (**Principle for CIS Regulation 1994**) also recommends transparency practices by pointing to the disclosure of prospectus, regular reporting (e.g., financial statements, annual reports), and advertising. Transparency within CIS is also re-discussed, mainly about the operations, fees, and investment activity, by OECD and IOSCO in 2005-2006.²¹⁵ They

²¹¹ Indonesia joined IOSCO membership in 1984. OJK, "Ojk Takes Part Again in Iosco Gem-C 2016 Forum," Otoritas Jasa Keuangan (OJK), <https://www.ojk.go.id/en/kanal/pasar-modal/berita-dan-kegiatan/info-terkini/Pages/OJK-Takes-Part-Again-in-IOSCO-GEM-C-2016-Forum.aspx>.

²¹² Thailand became an IOSCO member in 1990. SET, "History & Roles," The Stock Exchange of Thailand (SET), https://classic.set.or.th/en/about/overview/history_p1.html?printable=true; Thailand, "About Us. International Relations".

²¹³ Committee 5 covers collective investments schemes and private funds, including hedge, private equity, and venture capital funds, and the advisers to such funds. IOSCO, "Committee on Investment Management (Committee 5)," International Organization of Securities Commissions, https://www.iosco.org/about/?subsection=display_committee&cmtid=16.

²¹⁴ Principles regarding CIS is set out in Section G – Principles for Collective Investment Schemes 24-28. ; "Objectives and Principles of Securities Regulation.", p. 10.

²¹⁵ OECD, "White Paper on Government of Collective Investment Schemes (Cis)," *Financial Market Trends* Volume 2005, no. Issue 2 No. 88 (2005).; IOSCO, "Examination of Governance for Collective Investment

summarised the CIS concept with several highlights on transparency and governance aspects.

3.2.1.2 ELTIF concept by ESMA

Under ESMA, ELTIF is set and introduced as an alternative investment fund that focuses on real asset investment with a long-term period that works or is applicable in the EU. As part of AIF, ELTIF is subject to governance and transparency concepts under ELTIF Directive and AIFM Directive with a keen desire to stimulate Europe's long-term investment in the real economy. Until 2020, ELTIF products have been nearly a hundred with various infrastructure concentrations, including transport.²¹⁶ And though ELTIF's market has not grown as planned, some improvements are considered to attract more participants.

3.2.2 Introduction to the fund governance

The origins of the fund governance movement were in the U.S. (through the Investment Act 1940) and the UK (Prevention of Fraud (Investments) Act). Over time, fund governance developed as the mutual fund market or CIS industry matured in several jurisdictions in the world. The reformation of fund governance is shown via the AIFM Directive and other similar governance of collective investment schemes that involve pooling investors' money.²¹⁷

Within the particular fund sector, the governance consists of three elements to safeguard that the fund managers or operators serve the interests of their owners and avoid placing undue priority on their own interests or their affiliates.²¹⁸ The *first* element is a regulatory framework or legislation that would include mandatory

Schemes Part I," in *A Report of the Technical Committee of IOSCO* (The International Organization of Securities Commissions (IOSCO), 2006).

²¹⁶ Linklaters, "European Long-Term Investment Funds (Eltifs) | Framework".

²¹⁷ Dirk Zetzsche, "Investment Law as Financial Law: From Fund Governance over Market Governance to Stakeholder Governance?," *IFS – Propter Homines Chair Working Paper 003/2013* (2013), p. 341-345.

²¹⁸ Giles, Alexeeva, and Buxton, *Managing Collective Investment Funds.*, p. 297-302.

disclosure, the funds' legal forms and the corresponding obligations of the various parties. The *second* element is the code of conduct which deals with the funds as shareholders in their portfolio investments. The *third* element is a reputational risk when the funds fail to operate appropriately by the rules, the investors become dissatisfied, and the fund management company, in turn, loses its business. Besides, fund governance encompasses efforts to achieve public confidence and investor protection through a robust monitoring system. Fund governance also comprises a triangle relation between investors, fund managers and custodians/depositaries.²¹⁹

From the above, it is understood that fund governance has a similar basic notion to corporate governance. However, the author argues that this is different because the nature of the fund is not identical to a company in general. The critical differences between fund governance and corporate governance are reviewed from the viewpoints that mutual funds actually have a hybrid nature as a product and entity.²²⁰ The hybrid nature means that as a product, mutual funds need professional management from qualified parties who serve as fiduciaries; In contrast, as an entity, mutual funds work just as an institution. Consequently, the investors in mutual funds would have a hybrid character, too, as a customer of the funds' manager and the holder of shares/units of legal entity.

3.2.2.1 Agency relation and agency problem in the fund management

Overall, the governance in fund management and structure context would touch on the contractual relationship between the fund investor and fund administrator that is dominated under the agency theory.²²¹ Such a relationship can be shaped in a verbal or written form insofar as it supports and provides legitimacy for the actions taken by the parties concerned, is that will cause the fund investor (as the principal) expects the fund administrator (as the agent) to manage the investment and

²¹⁹ Zetzsche, "Investment Law as Financial Law: From Fund Governance over Market Governance to Stakeholder Governance?.", p. 341-345.

²²⁰ Eric D. Roiter, "(Draft) Disentangling Mutual Fund Governance from Corporate Governance," *Harvard Business Law Review*, Forthcoming 5 (2015)., p. 5-13.

²²¹ Nossa, "The Agency Theory Applied to the Investment Funds.", p. 32-34.

obtain the best return since the principal entrusts the agents (fund managers) with the power to manage their resources.

From there, the typical duty under the investment funds context is the duty of care, loyalty, etc.²²² Just as what CIS and ELTIF concepts have. The duty of care requires executing services with prudence, care, and skilfulness.²²³ And the duty of loyalty requires the fiduciary to act in the interest of the entrustor and prevents conflicts of interest between the fiduciary and the entrustor.²²⁴ These duties may be explicitly or implicitly set out in a local regulation, depending on whether the jurisdiction follows a common law or civil law system.²²⁵

The implementation of duty would not be free from possible challenges. Agency relationships will correspond to agency problems when principals' and agents' objectives conflict. It is difficult or costly for principals to vet whether the agent has acted appropriately.²²⁶ This relates to the concept of agency costs,²²⁷ which in the operation and administration of funds would comprise monitoring activity, conflict of interests on investment return or profit maximation. As discussed in the next couple parts regarding transparency, this agency conflict may involve the idea of information asymmetry and moral hazard.

3.2.2.2 Reference to CIS and ELTIF concepts

And in this research, the exploration of governance study might go to the concept of CIS structure as outlined by IOSCO and ELTIF structure under ELTIF Directive. CIS is an “*open-end collective investment scheme that issues redeemable*

²²² Hudson, *Funds.*; Giles, Alexeeva, and Buxton, *Managing Collective Investment Funds*.

²²³ Tamar Frankel, *Fiduciary Law* (New York: Oxford University Press, 2011)., p. 108.

²²⁴ *ibid.*, p. 169.

²²⁵ Martin Gelter; Genevieve Helleringer, "Fiduciary Principles in European Civil Law Systems," *Law Working Paper No 392/2018* (2018).

²²⁶ Kathleen M. Eisenhardt, "Agency Theory: An Assessment and Review," *Academy of Management Review* 14, no. 1 (1989)., p. 58.

²²⁷ Agency cost is said to comprise monitoring cost, bonding cost and residual loss. Michael C. Jensen and William H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure," *Journal of Financial Economics* Vol. 3, No. 4 (1976)., p. 4.

*units and invests primarily in transferable securities or money market instruments. These Principles exclude schemes investing in property/real estate, mortgages or venture capital”.*²²⁸

CIS governance is further recognised and defined as a “*framework for the organisation and operation of CIS that pursues to ensure that CIS are organised and operated efficiently and exclusively in the interests of CIS Investors, and not in the interests of CIS insiders*”.²²⁹ From this, it can be extracted that the governance in CIS encompasses the organisation and operation of CIS that highlights the protection of investors’ interests by implementing the role of transparency that is claimed to underpin the investor’s decision-making, as it helps the investors to assess the disclosed information.

The ELTIF concept applies both ELTIF Directive and AIFM Directive interchangeably since those frameworks essentially govern ELTIF. The governance in ELTIF predominantly involves fund incorporation, authorised manager and transparency. Three scopes of transparency comprise annual reports, disclosure, and reporting to the authority, with solid aims to set protections and to ensure that investors in AIFs are adequately informed and protected.²³⁰ AIFM Directive also states the urgency of having robust governance to minimise conflict of interest. One is practising adequate transparency at both the issuer and investment manager levels. Further details on funds transparency, plus its management and structure under the CIS concept by IOSCO and ELTIF concept by ELTIF Directive, will be elaborated in the next section.

²²⁸ IOSCO, "Principles for the Regulation of Collective Investment Schemes and Explanatory Memorandum," in *Report in Investment Management* (International Organization of Securities Commissions, 1994), p. 2.

²²⁹ "Examination of Governance for Collective Investment Schemes Part I.", p. 3.

²³⁰ Lodewijk van Setten and Danny Busch, *Alternative Investment Funds in Europe* (Oxford Legal Research Library, 2014), p. 298-299.

3.2.3 Funds' transparency of necessary information

The phase of investment units offering in the infrastructure funds will inevitably be linked to information transparency. Transparency is crucial to bring investors' knowledge and further foster investors' promotion, as sounder governance can influence the shape of market confidence. Below are some introductions to the concept of transparency from the perspective of CIS and ELTIF.

3.2.3.1 Transparency under the CIS concept

Transparency is fundamentally referred to as the publication of relevant information designed to demonstrate consistency and openness.²³¹ And as highlighted in most IOSCO papers on CIS, transparency is closely relevant to promoting investor protection, predominantly in assisting the investors in making informed decisions by providing adequate information for investor knowledge. It can be done via the prospectus and periodic reports.²³²

Regarding CIS's primary and general concept, IOSCO discusses and recommends various topics, including transparency and disclosure for investors' knowledge and informed decision. In essence, CIS transparency draws on the information shared by the CIS - within the CIS governance that seeks fair market competition and investors' understanding of the strategy and investment risks.²³³ Within the CIS context, OECD also highlights transparency about an approach to attain equitable treatment of investors, the idea of agency relation, the asymmetry of information and market influence which is generally linked to information flows.²³⁴

In addition, here are some papers from IOSCO that discuss transparency from various angles and are related to this research issue:

- (i) *Conflict of Interest of CIS Operator 2000 (COI of CIS Operator 2000)*

This publication explains disclosure as one of the mitigating measures for the

²³¹ Richard Pratt; Alexander Berg, "Governance of Securities Regulators. A Framework,," in *Policy Research Working Paper 6800* (The World Bank, 2014)., abstract.

²³² OECD, "White Paper on Government of Collective Investment Schemes (Cis).", p. 153.

²³³ IOSCO, "Examination of Governance for Collective Investment Schemes Part I.", p. 2-3.

²³⁴ OECD, "White Paper on Government of Collective Investment Schemes (Cis).", p. 139.

conflict of interests of CIS operators, especially by disclosing their general duty to the investors via regulatory mechanisms, plus the information/policy on investment and borrowing limitations by CIS, and the details about associated fees and pricing that CIS operator levies.²³⁵

(ii) *Investor Disclosure and Informed Decisions: Use of Simplified Prospectuses by Collective Investment Schemes 2002 (CIS Simplified Prospectus 2002)*

Here, the highlighted points are the values of a simplified prospectus for disclosing the necessary information. The prospectus conceptually aims to bring the investors' knowledge and awareness of CIS investment, which can lead to informed decisions. It is designed to present material financial and other information about the issuer, risk alerts and other facts relevant to making an informed decision. The simplified version is suggested to help investors to understand better because it would only stress the most basic information,²³⁶ i.e., the purpose and structure of CIS,²³⁷ the significant risks and benefits,²³⁸ the pricing and fees,²³⁹ the rights and obligations of relevant parties (investors, fund manager, custodian), the taxation obligation, the complaint and dispute resolution, the trend in past performances,²⁴⁰ the key rights of investors (e.g., rights to purchase units, the redemption rights, or cooling-off rights), and some other information about accessing the prospectus without cost, as well as the name of the securities regulator.

²³⁵ IOSCO, "Conflict of Interest of Cis Operators," in *Report of the Technical Committee of IOSCO* (International Organization of Securities Commissions, 2000), p. 8-9.

²³⁶ "Investor Disclosure and Informed Decisions: Use of Simplified Prospectuses by Collective Investment Schemes," in *Report of the Technical Committee of IOSCO* (Madrid: International Organization of Securities Commissions, 2002), p. 4.

²³⁷ This includes the dissolution method, strategy on utilising the collected funds as CIS portfolio, strategy for investors to exit and a brief explanation of the typical target of investor (whenever relevant).

²³⁸ This covers the plausible risks during the investment period and projected distribution of capital and income, returns for investors and the target company.

²³⁹ Including a brief explanation of the fees determination method, on whose allocation, and how current pricing information may be obtained.

²⁴⁰ CIS past performance over various time periods, compared to established and consistent benchmarks.

(iii) *Collective Investment Schemes as Shareholders: Responsibilities and Disclosure 2003 (CIS as Shareholders 2003)*

The shareholder rights linked to the securities in the CIS portfolio belong to CIS, and these rights ought to be respected by CIS operators. Any exercise of these rights must be in the best interests of CIS. In other words, the disclosure seeks to gain investors' interests when CIS exercise its rights as shareholders - via CIS operator. Correspondingly, OECD also reviewed this topic and mentioned that CIS must inform its investors about how the ownership rights attached to the assets in their portfolio are exercised.²⁴¹ It is also anticipated to disclose the corporate governance policies in which CIS may have the power or ability to intervene in a company that CIS invest in, as it helps CIS investors to make informed investment decisions.²⁴²

(iv) *Investor Education Initiatives Relating to Investment Services 2013 (Investor Education Initiatives 2013)*

This report explores the importance of providing the necessary information, tools, and motivation that investors need to make informed decisions and manage their savings smartly and prudently.²⁴³ Disclosure in securities offerings aims to enhance the investors' comprehension of the investment characteristics, benefits and risks as well as steps to make a financial investment²⁴⁴ and to minimise the likelihood of being victimised by fraudulent financial schemes.²⁴⁵ Approaches to this include website homepages, mass media, the internet, printed publications, brochures, etc.²⁴⁶

²⁴¹ OECD, "White Paper on Government of Collective Investment Schemes (Cis)", Sect. V.

²⁴² IOSCO, "Collective Investment Schemes as Shareholders: Responsibilities and Disclosure," in *Report of the Technical Committee of IOSCO* (Madrid: International Organization of Securities Commissions, 2003), p. 8.; OECD, "G20/Oecd Principles of Corporate Governance," (Paris: Organization for Economic Co-operation and Development 2015), p. 30.; "The Role of Institutional Investors in Promoting Good Corporate Governance," (OECD Publishing, 2011), p. 23-24.

²⁴³ IOSCO, "Report on Investor Education Initiatives Relating to Investment Services," in *Report of IOSCO* (Madrid: International Organization of Securities Commissions 2013), p. 8.

²⁴⁴ *ibid.*, p. 9-13.

²⁴⁵ *ibid.*, p. 8.

²⁴⁶ *ibid.*, p. 10-12, 16.

(v) *Good Practice for Fees and Expenses of Collective Investment Schemes 2016 (CIS Fees and Expenses 2016)*

This paper categorises the fees as those paid directly by investors and CIS. The fees involve management fees, distribution costs, operating expenses of CIS (custody, accounting, etc.), and transaction costs (sale and purchase of portfolio assets).²⁴⁷ Fee disclosure is intended to enrich the investors' understanding of the character, structure, and impact on the performance of the CIS without solely relying on past performance. This paper also discusses plausible circumstances of fee double charging and conflict of interest threats.²⁴⁸ This paper applies to potential and existing investors but only targets retail investors.

3.2.3.2 Transparency under the ELTIF concept

Since the concept of infrastructure funds is comparable to ELTIF (strives to invest in long-term assets such as infrastructure), a review of the basic transparency concept in ELTIF is anticipated. Considering that ELTIF is subject to EU law, the relevant capital market law said that transparency is closely relevant to disclosure in which risks of facing information asymmetry and agency cost may be reduced via disclosure, which may lead to market failure prevention.²⁴⁹ The same source further said that mandatory or voluntary disclosure minimises the lack of transparency, which further leads to implementing the investor protection principle. Enabling appropriate investor protection enhances investors' confidence in the market and discourages them from exiting because it may lead to detrimental outcomes on the country's economic system.

²⁴⁷ IOSCO, "Good Practice for Fees and Expenses of Collective Investment Schemes - Final Report.", p. 3-4.

²⁴⁸ *ibid.*, p. 1, 11-15, 28.

²⁴⁹ Hendrik Brinckmann, "Foundations," in *European Capital Markets Law*, ed. Rüdiger Veil (Hart Publishing, 2022), p. 270-276.

(a) EU principles on Transparency

As highlighted in the ELTIF Directive, rigorous transparency requirements must be applied to enable potential investors to make informed assessments and be fully aware of the associated risks. Transparency is discussed regarding prospectus, annual reports, and cost disclosure, which will benefit investors' informed decisions. In addition to that, the European capital market law also stipulates Transparency Directive 2004/109/EC as amended by Directive 2013/50/EU and supplemented by Commission Directive 2007/14/EC and Commission Delegated Regulation 2015/761 (**EU Transparency Directive**) and Prospectus Directive 2003/71/EC as repealed by Directive 2017/1129 (**EU Prospectus Directive**) that are applicable for ELTIF too. EU Transparency Directive focus on periodic and ongoing disclosure, while EU Prospectus Directive discusses explicitly the preparation, approval, and distribution of prospectus in technical aspects.

(b) Transparency under ELTIF Directive and AIFM Directive

ELTIF operates in a collective investment framework of AIF in the EU. As part of AIF, ELTIF is subject to its own rule, the ELTIF Directive and AIFM Directive as the umbrella guideline for AIF. On the transparency aspect, both of those rules govern a similar spirit.

- On the AIFM Directive level, Articles 22-24 discuss transparency requirements. *First*, Article 22 discusses the importance of annual report availability for investors. It is whether on a publicly basis or by request of the investors. The annual report is also part of the prospectus disclosure for investors' better assessment of the offered units. *Second*, Article 23 talks about the list of the necessary information to be disclosed to investors by the AIF managers before the investors invest in AIF. The list is relatively comprehensive as it primarily comprises the description or details of (a) investment strategy and objective (including information on the underlying master of fund), (b) legal implication on the contractual relationship in investment, (c) identity of AIF managers and depository, (d) valuation procedure, (e) risk management and redemption right, (f) annual report, (g) procedure and condition for sale of units/shares, (h) NAV, (i) historical performance, if applicable, (j) method of obtaining information.

Article 24 talks about regular reporting to the competent authorities, especially information regarding AIF's exposure to trading in the market.

- On the ELTIF Directive level, Articles 23-24 discuss transparency requirements, particularly on the prospectus for marketing the ELTIF, and annual report. The prospectus shall cover necessary information, predominantly the illiquid characteristic of ELTIF, to enable the investors to make an informed decision on the investment product and risk. The basic content of the prospectus mainly includes the investment objective and strategy, asset category for investment by ELTIF, the jurisdiction of ELTIF, redemption right, and target of investors. And on the annual report, one basic information needed is the cash flow statement.

Further, Article 25 mentions the importance of disclosing the cost breakdown, including an overall ratio of the costs to the capital of the ELTIF. The cost breakdown shall at least comprise (i) costs of setting up the ELTIF; (ii) costs related to the acquisition of assets; (iii) management and performance-related fees; (iv) distribution costs; (v) other costs, including administrative, regulatory, depositary, custodial, professional service, and audit costs.

Specifically for retail investors, the burden of information knowledge is also on the AIF manager's side to ensure that the investors understand the necessary information about the offered units/investment by ELTIF, plus the financial capacity to subscribe to ELTIF.²⁵⁰ This measure is taken in the notion of fair treatment and investment promotion for market confidence and investor protection.

3.2.4 Funds' management and structure

Following the unit's subscription by the investors and funds incorporation, the funds will be subject to management and administration by the appointed investment manager, alongside the custodian or depositary. Fund management activities will play a role in encouraging investor promotion since proper governance can contribute to shaping market confidence. And of the funds' management and structure, it has been noted earlier that fund managers act as the agent of the investors

²⁵⁰ *European Long-Term Investment Funds (Eltifs) - Regulation (Eu) 2015/760.*, Articles 27-28.

as the principal.²⁵¹ Below are some introductions to the concept of management and structure from both CIS and ELTIF viewpoints.

3.2.4.1 CIS management and structure

Within the CIS governance concept, CIS may work on either corporation, contractual, or hybrid basis. Typical countries that apply CIS with corporate type applies are the US, Japan, Ireland, Spain and the UK. Meanwhile, the contractual CIS model is also in Japan, the UK, and Hong Kong under the trust concept, in which the CIS operator enters into an investment trust contract with the trust company. Other EU countries (France, Portugal, Italy, Switzerland) apply contractual CIS with the depositary.²⁵²

Overall, the operation of investment funds will involve management services, custodian services and oversight duty. The investment management company undertakes management services. The custodian services by either the custodian, trustee, or depositary are primarily responsible for the funds' asset safekeeping duty and the oversight of fund operation.²⁵³

3.2.4.2 ELTIF management and structure

In ELTIF, the management activity will be carried out by the authorised AIF manager, which will be further subject to monitoring activity by the depositary. And between the depositary and AIF manager, no affiliated relationship shall exist to avoid conflicts of interest.

As the framework of AIF (including ELTIF) management, Article 12 explains that the “*AIF managers shall act honestly, with due skill, care and diligence and fairly in conducting their activities*”. They are also obligated to act in the best interests of the AIF or AIF investors that they manage, including market integrity. Article 14 further

²⁵¹ David Björe; Felix Naeve, "Exploring the Fund Manager-Fund Investor Relationship through the Lens of the Principal-Agent Model – Agency Conflicts and Mitigators in the Swedish Mutual Fund Industry" (Master's Thesis in Accounting and Financial Management, Uppsala University, 2021)., p. 5.

²⁵² IOSCO, "Examination of Governance for Collective Investment Schemes Part I.", p. 5-9, 14-41.

²⁵³ *ibid.*, p. 5-9.

explains that AIF managers must maintain and operate appropriate organisational and administrative arrangements by taking reasonable measures to prevent conflicts of interest between AIF and its investors. Article 18 adds that AIF managers should engage adequate and appropriate human and technical personnel necessary for the sound management of AIF.

Regarding depositary, the recital part and Article 21 of the AIFM Directive similarly explain one with funds' asset safekeeping and oversight functions. It involves custodian services and ELTIF's (as an AIF form) cash flow monitoring. It is also said that the depositary will be responsible for administering the accounts and securities for and on behalf of the investor and supervising compliance matters.²⁵⁴ And of its responsibility, the depositary must be liable for losses suffered by the AIF manager, AIF, and the investors.

3.3 OVERVIEW OF INVESTMENT INFORMATION TRANSPARENCY URGENCY IN INFRASTRUCTURE FUNDS

All types of investors are entitled to necessary investment information transparently. No matter whether they are in institutional or retail profile, or they are existing or prospective. It was claimed that transparency in so-called funds should evolve to minimum disclosure and little transparency. The regulators, the fund managers, and independent advisors should give the investors of funds what is legally due to them as fund owners.²⁵⁵

3.3.1 Information transparency for the investors' knowledge and informed decisions

Investors' knowledge, in this instance, is relevant to how investors comprehend the disclosed information (by the issuers or the fund manager); consequently, they can provide their informed decisions. In most practices, the

²⁵⁴ Lodewijk van Setten, *The Law of Financial Advice, Investment Management, and Trading* (Kent, England: Oxford University Press, 2019), s. 1.332.

²⁵⁵ John A. Haslem, "Normative Transparency of Disclosure for Mutual Fund Investors," (2006), <https://ssrn.com/abstract=1287483>, p. 5.; "A Tool for Improved Mutual Fund Transparency", p. 63.

investment decisions by investors and target companies would rely upon the information that is transparently available and given by the securities issuer or anyone with access to necessary information.

The information content is also not less important for making an informed decision. Besides the investment guideline, an informed decision by the investor would relate to the manner of information dissemination; and disclosure measure is one of the approaches. Disclosure, in this instance, is closely relevant to the transparency principle. Just as said by Anoeska Buijze, transparency facilitates decision-making that, in the end, would support the investment attraction or promotion.²⁵⁶

Transparency promotes sound decision-making because it allows one to predict the expected consequences of one's actions; information is more accessible and easier to understand in a transparent environment.²⁵⁷ Similarly argued, transparency plays a role in the investors' knowledge and informed decisions by educating them via the relevant regulatory framework and other methods that can be made in an online or offline form so long as it that can supplementarily help the investors to have a better comprehension of the offered securities that they have been interested in.²⁵⁸

3.3.1.1 Typical necessary information for investment assessment and informed decisions

Transparency is an issue that deals with the flow of information, the quality and quantity of information and to whom. In many practices, investment decisions by investors will depend on the information provided by the security issuer or whoever

²⁵⁶ Buijze, "The Six Faces of Transparency.", p. 15.

²⁵⁷ *ibid.*, p. 9.

²⁵⁸ For example, such other methods can be public forums and organizations, websites and other internet media. Masahiro Kawai; Andrew Sheng, ed. *Capital Market Reform in Asia. Towards Developed and Integrated Markets in Times of Change*, Investor Protection in the Asia and the Pacific Region: Survey Findings of the Asia-Pacific Regional Committee (New Delhi, India: Sage Publications, 2012)., p. 214.

has better access to information. However, the content of the information disclosed is also no less important than the method by which it is disseminated.²⁵⁹

And concerning the infrastructure funds (especially in transport financing), the primary information to be transparently shared are the characteristics of infrastructure funds (as set out in Chapter 2 earlier and some other vital concerns from parties in which data is collected via the interview process). From there, it can be further extracted and explored about the highlighted features of infrastructure funds that the investors are entitled to know for their assessment and informed decisions. Plus, subject to the particular deal structure, e.g., the details about the target of investment in infrastructure assets and the strategy for investment in the infrastructure assets. Whether the investments are directly or indirectly to the assets. If it is indirectly to the assets, it is either via corporate ownership (like in DINFRA JMTR-001 in Indonesian practice) or by purchasing future revenue (just as in BTSGIF and TFFIF in Thai practice).

Also, it is crucial to consider whether the infrastructure funds would invest until their maturity date. Or some exit strategies (by the unitholders or DINFRA alone) may influence DINFRA to cease or remain invested in the infrastructure assets. On this matter, it would be necessary for the investors to consider funds with transparent and solid strategies for capitalising growth by hiring or choosing fund managers with established credentials and reputable history.²⁶⁰

Further, it is claimed that institutional investors (rather than retail ones) may need recurring information to be provided, whether it is before or after the investment deal.²⁶¹ This is to give updated information regularly for assessing whether to stay or exit from the agreement or transaction. Also, for institutional investors, customised reports are occasionally compiled to meet their specific concerns because some of the funds may be targeted only at institutional investors (including professional

²⁵⁹ Buijze, "The Six Faces of Transparency.", p. 2-9.

²⁶⁰ Moonfare, "Private Equity Infrastructure Funds, Building the Foundation of the Future," https://assets-global.website-files.com/5ffb7d86352880856dbd363e/60f67db85fec0a10f3503990_Private_Equity_Infrastructure_Funds-Building_the_foundation_of_the_future.pdf, p. 10.

²⁶¹ Giles, Alexeeva, and Buxton, *Managing Collective Investment Funds.*, p. 204.

investors or wealthy individuals who may also invest due to their expertise and qualification under the rules), special marketing tools may be generated.²⁶²

3.3.1.2 Information transparency for the promotion of investors' protection

Information transparency herein is argued to promote investors' protection ultimately. Investor protection is often understood as providing measures within the scope of corporate governance (like shareholder rights, disclosure and accountability), market regulation, trading and settlement system efficiency, reliability and financial institutions' engagement with investors.²⁶³ Likewise, safeguarding from any market misconduct,²⁶⁴ false and misleading statements or omissions in the prospectuses, and recommendation without a reasonable basis by the investment advisers²⁶⁵ also becomes the characteristics of investor protection. Samples of circumstances that lead to specific claims to investor protection, i.e., tort, negligence, or fiduciary duties between the investment managers and the investors.²⁶⁶

Irrespective of the basic framework for investor protection is typically established via statutory instruments alongside relevant rules by the securities exchange regulations,²⁶⁷ the protections for investors can be tailored to the characters



²⁶² *ibid.*, p. 205.

²⁶³ Sheng, *Capital Market Reform in Asia. Towards Developed and Integrated Markets in Times of Change.*, p. 211-212.

²⁶⁴ Behaviours that are considered market misconduct are market manipulation, false trading or market rigging, dissemination information about illegal transaction, false and misleading information, fraudulently inducing persons to deal, dishonest or deceptive product, insider trading, bucketing, failure to disclose (in a continuous manner, including about material information), dealing on behalf of customer without permission. *Ibid.*, p. 216.

²⁶⁵ *ibid.*, p. 211-212.

²⁶⁶ *ibid.*, p. 212.

²⁶⁷ These legal instruments are claimed to ensure the transparency and accountability degree which further may enhance the compliance level and the regulators' capability in the rules enforcement. *Ibid.*, p. 212.

or profiles of the investors, whether they are wholesale (or institutional) or retail investors.²⁶⁸

In the CIS concept, investor protection is closely relevant to the ability of investors assessment on the available information on the offered units or securities. Achieving investor protection can be done by information disclosure. Disclosure in securities markets constitutes three leading roles, namely: (i) as an investor safeguard and market confidence, (ii) as an approach to handle agency problems – especially in large or complex structure organisations, and (ii) as a tool to help the price reflection over information.²⁶⁹ Without disclosure, investors in the capital market may find difficulties in assessing the performance of the securities (for the existing investors),²⁷⁰ and forecasting the impending cash flows before deciding to invest in particular securities (for the potential investors).²⁷¹

Furthermore, disclosure is also argued to subsidise informed trading in the financial market because of its ability to prevent fraud, lessen shareholders' collective action problems, reflect accurate pricing, and promote liquidity.²⁷² However, although the disclosure is claimed to boost the degree of transparency, the thing to keep in mind is that the better the quality of the information disclosed, the greater the cost of collecting, compiling, presenting, and disseminating the information.²⁷³

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²⁶⁸ Mads Andenas and Iris H.-Y. Chiu, *The Foundations and Future of Financial Regulation. Governance for Responsibility* (Oxon, UK: Routledge, 2014), p. 135-139.

²⁶⁹ Luca Enriques and Sergio Gilotta, "Disclosure and Financial Market Regulation," *Law Working Paper No 252/20* (2014), p. 4.

²⁷⁰ Assessment in this instance may be defined as the function of disclosure being the internal control and evaluation tools for further or continuous decision-making (e.g., via regular reporting on an annual or bi-annual basis that covers the financial and commercial aspects in an updated version).

²⁷¹ Ronald J. Gilson, "Transparency, Corporate Governance and Capital Markets" (paper presented at the The Latin American Corporate Governance Roundtable, São Paulo, Brazil, 2000), p. 5.

²⁷² Nicholas L. Georgakopoulos, *The Logic of Securities Law* (Cambridge: Cambridge University Press, 2017), p. 1-199.

²⁷³ Benjamin E. Hermalin and Michael S. Weisbach, "Transparency and Corporate Governance," *NBER Working Paper Series 12875* (2007), p. 19.

3.3.2 Transparency for avoiding asymmetric information

Information asymmetry in the capital market is understood when market participants retain the key information that affects the market price, and the other market participants only receive them in a delayed interval or timeframe.²⁷⁴ Unequal information, hence, existed. It often deals with a contract, transaction or investment decision in which the stakeholders have different proportions in terms of quality or quantity of information at the same point of time.²⁷⁵ Parties with better access to private information tend to maintain their positions because if the dissemination of information is balanced, better transparency would be expected to occur, and wealth shifting from the information-rich to the information-poor parties may come as an outcome.²⁷⁶

Information asymmetries encompass hidden characteristics, hidden intentions, hidden information, and hidden action.²⁷⁷ Hidden characteristics are understood as being unaware of an agent's capacities before making a contract with them. Hidden intentions occur when an agent deliberately acts inequitably against principals after concluding a contract. Hidden information entails complexities in determining what an investment manager will provide and how the current market shapes the investments' performance. Hidden actions, often called moral hazards, occur when the contract is concluded/signed, and the investment managers avoid their responsibility.

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²⁷⁴ Magdalena Mikołajek-Gocejna, *Investor Expectations in Value Based Management*, trans. Klementyna Dec; Weronika Mincer (2014)., p. viii, 147.

²⁷⁵ Bolo\$ Marcel, Tudor Ortan, and Cristian Otgon, "Information Asymmetry Theory in Corporate Governance Systems," (2010), https://www.researchgate.net/publication/49615381_INFORMATION_ASYMMETRY_THEORY_IN_CORPORATE_GOVERNANCE_SYSTEMS?msclkid=6fd6737ece8611ecae4f50e0573d1c34., p. 518.

²⁷⁶ John Board, Charles Sutcliffe, and Stephen Wells, *Transparency and Fragmentation. Financial Market Regulation in a Dynamic Environment* (London: Palgrave McMillan, 2022)., p. 212.

²⁷⁷ Naeve, "Exploring the Fund Manager-Fund Investor Relationship through the Lens of the Principal-Agent Model – Agency Conflicts and Mitigators in the Swedish Mutual Fund Industry.", p. 7.

3.3.2.1 Hidden information before the investment deal

The hidden information is also called an adverse selection. It occurs when the information is undersupplied in the early stage - before the contract is concluded or *ex-ante*.²⁷⁸ This is also named hidden information.²⁷⁹ It is when information is concealed by one party to another, whether deliberately or only because of communication failure. Here, the flow of information may be assumed to be withheld, and the content is hidden. The concept of adverse selection was also outlined by Mark R. Gillen below.

First, when the quality of securities is hard to determine, potential investors might purchase low-quality securities at a high price. Potential investors would hesitate to purchase such securities because the quality over the average price is uncertain. *Second*, an adverse selection would be relevant when the potential investors cannot distinguish the quality of securities offered because making the distinction will require a costly gathering and assessing information about such securities. *Third*, an adverse selection is also linked to the idea of market confidence, whereas the more information and imposing sanctions on false or misleading information are provided, the greater confidence in the market will arise from such mandatory disclosure.²⁸⁰ In some cases, this hidden information also links to the hidden characteristic in terms of comprehending the duty of fund managers when collecting and managing the investors' money.

3.3.2.2 Hidden action upon the investment deal

After noticing that the CIS industry is distinguished by sophisticated agency relationships and asymmetries of market power and information, CIS practices can also

²⁷⁸ Christoph Schneeweiss, *Distributed Decision Making*, Second ed. (New York: Springer, 2003), p. 128.

²⁷⁹ Sugata Bag, *Economic Analysis of Contract Law. Incomplete Contracts and Asymmetric Information* (Delhi: Palgrave MacMillan, 2018), p. 8.

²⁸⁰ Mark R. Gillen, "Securities Regulation English Language Llm Program in Business Law," (Canada2021), p. 102-104.

be attributable to a plausible risk of experiencing abuse of agency relationships.²⁸¹ Such abuse is claimed to be a moral hazard situation.²⁸² This moral hazard is also claimed to happen in the later stage or *ex-post*, once the investment contract is concluded. On the one hand, the principal is not privy to complete information about the agents' behaviour or actions²⁸³ because theirs are hidden from the principal's knowledge to seek their own advantage.²⁸⁴

From the practical perspective, it is understood that the managers' (the agents') decisions are not at all times in the best interests of each principal (the investors or shareholders). In some other sources, this moral hazard problem is also recognised as a conflict of interest due to opposing concerns in view of the same direction. A study discussed that moral hazard occurs when one party to the contract decides to behave based on vested interests rather than the good faith of the agreement, such as managers may engage in actions or decisions that are not in the best interests of investors.²⁸⁵

For example, profit maximisation in the investors' thoughts and revenue maximisation from the fund managers' point of view. One might be unaware of the opposing concerns, and it would be a big deal if such cluelessness is being taken advantage of by one party for personal benefit without due respect to the others. Another example is when the fund manager seeks AUM growth and maximisation without the investors' knowledge, while the collected money of investors is invested in an unknown or unclear portfolio that may endanger the investment risks of the fund unitholder. This hidden action may link to the idea of hidden intention, as mentioned earlier. Furthermore, as this moral hazard may arise within the stages of

²⁸¹ Giles, Alexeeva, and Buxton, *Managing Collective Investment Funds.*, p. 297.

²⁸² Bag, *Economic Analysis of Contract Law. Incomplete Contracts and Asymmetric Information.*, p. 8.

²⁸³ Schneeweiss, *Distributed Decision Making.*, p. 126-130.

²⁸⁴ Bag, *Economic Analysis of Contract Law. Incomplete Contracts and Asymmetric Information.*, p. 8.

²⁸⁵ Naeve, "Exploring the Fund Manager-Fund Investor Relationship through the Lens of the Principal-Agent Model – Agency Conflicts and Mitigators in the Swedish Mutual Fund Industry.", p. 6-7.

monitoring and enforcing the managers' behaviour,²⁸⁶ information disclosure is said to help the monitoring activity by assessing or reviewing the regular reports.

3.3.3 Transparency implementation via information disclosures

Transparency goals can technically be achieved by performing information disclosure to the investors, using the mandated disclosures or another measure beyond that, so long as the essence of information disclosure can be delivered.

3.3.3.1 Mandatory disclosure

Mandatory disclosure governs how disclosure is carried out and at what time and place.²⁸⁷ Information distribution via mandatory disclosure is also argued to be able to handle information credibility issues by referring to the governing rules specifying particular content and format of such information and its manner of dissemination.²⁸⁸ Also, it is argued that reaching transparency goals can be done by addressing information clearly and accurately. In contrast, the information content becomes understandable and reliable because it is shared with proper action and timing.²⁸⁹ It would be much easier when dealing with appropriate time in a mandatory disclosure since the disclosure requirement has been made clear in which timeframe.

Recalling the benefit of transparency for investor protection, as discussed earlier, mandatory disclosure is best argued as a transparent medium for investors to make informed decisions rather than as a means of certifying that the investment is

²⁸⁶ M. Nakabayashi, "Moral Hazard in Corporate Governance," in *Corporate Governance in Japan. From the Viewpoints of Management, Accounting and the Market*, ed. N. Demise, et al. (Tokyo: Springer, 2006), p. 15-24.

²⁸⁷ Frank H. Easterbrook and Daniel R. Fischel, "Mandatory Disclosure and the Protection of Investors," *Virginia Law Review* 70, no. 669 (1984), p. 680.

²⁸⁸ Charlotte Villiers, *Corporate Reporting and Company Law* (Cambridge: Cambridge University Press, 2006), p. 180-181.

²⁸⁹ Andrew K. Schnackenberg and Edward C. Tomlinson, "Organizational Transparency: A New Perspective on Managing Trust in Organization Stakeholder Relationships," *Journal of Management* (2016), p. 1791.

safe or secured.²⁹⁰ This underlines that solid provision by the regulatory framework for disclosure context is vital and advantageous in mitigating conflict of interest by CIS operator, e.g., about any fees and expenses levied by CIS operator to the investors or CIS alone, as well as concerning the performance of its duty as manager of pooled funds and as the party who exercise CIS's rights as a shareholder. Mandatory disclosure ensures fair access to information for investors and helps simplify the already-known information.²⁹¹

Besides, mandatory disclosure is claimed to help transaction protection as it is a regulatory mechanism for preventing any abuse of the investment manager's advanced knowledge and the clients' trust - within the context of the agency relationship between the investment manager and the investor.²⁹² When the investors (as the principal) deal with the investment contribution in such funds, the fund manager (as the agent) deals with investment objectives and strategy, working on some administration and analysing the portfolio performance they are managing.²⁹³ That is, fund investors as principals entrust power to the fund managers as an agent to organise the principals' assets.²⁹⁴ Given this, the principal may assume that the agent would also deal with and be capable of necessary information disclosure about the investment in the funds, especially to see how the agents generate long-term investment value.²⁹⁵

In addition, the minimum details of information in mandatory disclosure have been commonly measured to suffice the investors' expectations before making informed decisions. The requirement typically appears in the section of the disclosure

²⁹⁰ Mandatory disclosure helps the investors in making informed decisions, whether in the primary or secondary markets – via mandatory disclosure and mandatory continuous disclosure. Andenas and Chiu, *The Foundations and Future of Financial Regulation. Governance for Responsibility.*, p. 22-27.

²⁹¹ Mark Blair and Ian Ramsay, "Mandatory Corporate Disclosure Rules and Securities Regulation," in *Securities Regulation in Australia and New Zealand* (LBC Information Services, 1998), p. 66.

²⁹² Andenas and Chiu, *The Foundations and Future of Financial Regulation. Governance for Responsibility.*, p. 22-27.

²⁹³ Giles, Alexeeva, and Buxton, *Managing Collective Investment Funds.*, p. 169-170.

²⁹⁴ Nossa, "The Agency Theory Applied to the Investment Funds.", p. 33.

²⁹⁵ Vikas Agarwal, Rahul Vashishtha, and Mohan Venkatachalam, "Mutual Fund Transparency and Corporate Myopia," *Mutual Fund Transparency and Review of Financial Studies (Forthcoming)* (2017), p. 8.

document, prospectus, and regular reporting sections. Nevertheless, another challenge may occur when parties wish to share their information and interest through informal and independent disclosure (other than the mandated one). The challenge would be to measure whether the information has been substantially adequate for disclosure and prepare the strategic approach to disclose such sufficient information.²⁹⁶ Even though the information has been adequate and ready for disclosure, an evaluation of the relevancy and appropriateness of its content as regulated by the framework is essential in implementing the transparency principle.²⁹⁷

As elaborated earlier, prospective investors use mandatory disclosure as an assessment tool before they decide to invest in funds or find another suitable investment based on the investors' profile. This measure is used for various corporate actions. For the existing investors mandatory disclosure is also applicable for existing investors in making an informed decision on whether to stay in CIS or exercise redemption rights in the funds.

One typical form of mandatory disclosure is an offering prospectus that outlines the offering details for potential investors as marketing and research material. As an essential document, the prospectus must be clear, adequate, and accurate. It should not contain false or misleading statements or exclude important information because investors often consider it the only reliable document.²⁹⁸

3.3.3.2 Voluntary disclosure

This specific disclosure works as a communication medium between stakeholders and business prospects. It is called self-disclosure, too, aiming to exchange information for interest alignment. It expands and augments mandatory

²⁹⁶ Douglas Cumming, Andrej Gill, and Uwe Walz, "International Private Equity Valuation and Disclosure," *Northwestern Journal of International Law & Business* Vol. 29, no. Issue 3 Summer (2009), p. 627.

²⁹⁷ Bernard I. Finel and Kristin M. Lord, "The Surprising Logic of Transparency," *International Studies Quarterly* 43 (1999), p. 318.

²⁹⁸ Sheng, *Capital Market Reform in Asia. Towards Developed and Integrated Markets in Times of Change.*, p. 219-220.

disclosure, including improving the reliability and completeness of the same in favour of a more transparent, richer, and more systematised information disclosure.²⁹⁹ Meanwhile, appropriate timing is crucial and challenging here. For instance, when parties wish to disclose information to one another with a parallel intention to safeguard particular interests, the need to be prudent by not exposing important information in an inappropriate timeframe – just because the information has been solid and dependable. Of course, here, it is not only the applicable laws that need to be considered but also the sense of information content and source. Hence, an adverse consequence would likely occur when the crucial information is not carefully disclosed within the allowable time, such as receiving reduced market incentives.³⁰⁰

3.4 GOVERNANCE AND TRANSPARENCY OF INFRASTRUCTURE FUNDS IN THAILAND AND INDONESIA

The governance and transparency of infrastructure funds in Thailand and Indonesia are analogous as they deal with management activity and fund structure. The difference would be in how the regulatory framework transparently and comprehensively conveys the governance provisions and how they promote the investors' protection.

3.4.1 Introduction to the laws on capital market in Thailand

The regulatory framework of capital markets in Thailand is governed by the Securities and Exchange Act 2535 as amended from time to time and recently in 2562 (2019) (**Thailand SEA 2535**) with the office of Thailand SEC as the securities regulator in Thailand that is authorised to introduce policies for the development and surveillance of the securities market and related activities, including the regulation of

²⁹⁹ Yu Tian and Jingliang Chen, "Concept of Voluntary Information Disclosure and a Review of Relevant Studies," *International Journal of Economics and Finance* Vol. 1, no. 2 (2009), p. 1.

³⁰⁰ Agarwal, Vashishtha, and Venkatachalam, "Mutual Fund Transparency and Corporate Myopia.", p. 7.

securities offerings, and corporate governance of issuers and securities businesses in Thailand.³⁰¹

The capital market instruments in Thailand are manifold, just as in other jurisdictions. Spreading from the stock market, bond market, contractual saving schemes (pension funds), derivative and foreign exchange, and mutual funds. A study found that mutual funds (as collective investment vehicles) in Thailand play an active role in leveraging the resources of small investors. Therefore, they were claimed to minimise entry barriers for retail investors into the stock market and substantially broaden the investor base for debt and equity markets.³⁰² Furthermore, about expanding the mutual funds and alternative investment funds industry in Thailand, the capital market regime also attempts to adopt the standards set by AIMF Directive and participate as a member of IOSCO³⁰³.

3.4.1.1 Governance in Thai IFF

Thailand unexpectedly has a particular governance code that targets institutional investors, including asset managers and asset owners.³⁰⁴ This code touches on driving investment management's responsibility to ensure the delivery of sustainable long-term value for the owners and beneficiaries of their investments.

³⁰¹ Weerawong Chinnavat & Partners Ltd, "In Review: Capital Markets Law in Thailand," Lexology, <https://www.lexology.com/library/detail.aspx?g=c68fa776-49a1-4d7a-839e-d79d4975e8f1#:~:text=The%20broad%20framework%20of%20capital%20markets%20in%20Thailand,and%20Exchange%20Commission%20of%20Thailand%20%28SEC%29%20was%20established.>

³⁰² Richard A. Werner, "Capital Market in Thailand: Issues and Opportunities," *A Study of Financial Market.*, p. 119-121.

³⁰³ As an ordinary member of IOSCO, the office of Thailand SEC participates in the Policy Committee on International Accounting, Auditing, and Disclosure Standards, the Policy Committee on Retail Investors, and the Growth and Emerging Markets Committee. Thailand, "About Us. International Relations".

³⁰⁴ In this code, the asset managers are defined as SEC-licensed asset management companies that are responsible for managing funds on behalf of their clients and asset owners through an investment mandate and generating returns for them. The asset owners are defined as organisations that pool funds of clients in collective investment vehicles. "Investment Governance Code for Institutional Investors," (The Securities and Exchange Commission of Thailand, 2017).

And in terms of IFF, there are several rules in support of Notification CMSB 8/2562 (the regulatory framework of IFF), which can elaborate the governance of funds for investors' benefit. For example, the commitment between fund managers and investors.³⁰⁵

The governance of IFF, as stipulated in Notification CMSB 27/2554, broadly addresses the rights and obligations between investors and fund managers. It includes the fund supervisor's duty to safeguard all the benefits of the unitholders and some other technical and administrative procedures in the operation of IFF.

3.4.1.2 Transparency in Thai IFF

One method to enforce transparency in capital market practice is adopting international standards, like the IOSCO's. It is argued that from a general perspective, adopting international standards may build confidence among domestic investors, and the markets that comply with international standards are more resilient. Also, it helps to attract foreign money and improvement to good governance.³⁰⁶ An examination by the World Bank Group discovered how Thailand's securities market grew with IOSCO's standards, including Principles 24-28 of the Principles for CIS Regulation 1994.³⁰⁷

Regarding transparency of IFF, CMSB Notifications 8/2562 mainly covers information disclosure for investor decision-making, i.e., the prospectus or offering memorandum for the investment units. Another supporting rule is the Notification of the Office of Thailand SEC No. Sor Nor. 44/2562 Re: Prospectus for Infrastructure Fund. However, unfortunately, the supporting English translation is not available.

³⁰⁵ Notification of the Capital Market Supervisory Board No. Sor Nor. 27/2554 Re: Commitment between the Unitholders of an Infrastructure Fund and the Management Company

³⁰⁶ Thirachai Phuvanatanarubala, "Capital Market Development in Emerging Markets " (Barbados2005).

³⁰⁷ World Bank, "Thailand. Assessment of Observance of the Iosco Objectives and Principles of Securities Regulation," ed. Competitiveness Finance, and Innovation Global and Practice (The World Bank Group, 2019),, p. 12.

3.4.2 Introduction to the laws on capital market in Indonesia

The Law of the Republic of Indonesia Number 8 of 1995 concerning the Capital Market (*Pasar Modal*) (**Law No. 8/1995**) was enacted to ensure the legal certainty of any parties that conduct activities in the capital market, including to protect the interests of the investor community from any harmful practices. The capital market industry was formerly governed by the Bapepam-LK, which now has been transformed into OJK according to Law Number 21 of 2011.

As for now, the government just recently issued the Law of the Republic of Indonesia Number 4 of 2023 concerning the Development and Empowerment of the Financial Sector (*Pengembangan dan Penguatan Sektor Keuangan*) (**Law No. 4/2023**) that, overall, it amends several provisions of the authority of securities regulation in granting a license and conducting monitoring and investigation, alongside the management of non-mutual funds investment. On the latter one, however, such amendments do not directly and wholly affect provisions regarding DINFRA and its management (including the administration and operation).³⁰⁸

And relating to the practice of mutual funds or CIS in Indonesia, unfortunately, no study has been discovered to demonstrate how Indonesia attempts to adopt or implement the CIS publication by IOSCO, as elaborated above. But on IOSCO Objectives and Principles, the International Monetary Fund (IMF) in 2010 assessed its implementation in Indonesia.³⁰⁹ The assessment was undertaken toward all IOSCO principles; however, not as outlined in the recent or updated version of 2017; it was when the securities regulation in Indonesia was still BAPEPAM-LK. And regarding CIS-related principles, such study report explained that Principles 17-20 (now in the 2017 version are Principles 24-28) had yet to be fully implemented. Recommendations for further action plans were also detailed; however, until now, there has been no

³⁰⁸ Law No. 4 of 2023 of the Republic of Indonesia Concerning Development and Empowerment of Financial Sector. The amending point is more on allowing the redemption scheme in such non-mutual funds investment.

³⁰⁹ IMF, "Indonesia: Implementation of the Iosco Objectives and Principles of Securities Regulation," in *IMF Country Report*, Detailed Assessment of Observance November 2010 (Washington DC: International Monetary Fund (IMF), 2012).

significant progress to accelerate the level of implementation from ‘broadly and partly implemented’ to ‘fully implemented’.³¹⁰

Indonesian capital market also grows in various instruments, including equity and bond, mutual funds, etc. A study found that mutual funds are gradually increasing - indicated by the average asset under management (**AUM**) growth; however, the growth was somewhat slower for selected mutual funds such as DINFRA.³¹¹ Moreover, dissimilar to Thailand, which has endeavoured to tap into the AIF market (in the EU), Indonesia has not done so in the expansion of mutual funds or collective investment structures.

3.4.2.1 Governance in DINFRA

Among many regulations on mutual funds and/or CICs in Indonesia, a limited number of rules holistically and inclusively concentrate on CIS with industrial purposes like DINFRA. The possible way to enhance knowledge about DINFRA governance is only from the OJK Reg 52/2017. As mentioned earlier, the governance aspect is only limited to the organisation and structure of fund management without explicit exploration of the possibility of the conflict-of-interest situation and mitigating it, which the author believes that it is not sufficiently comprehensive to address the complex structure of DINFRA (which can potentially reach sophisticated institutional investors as DINFRA’s typical investors).

The relevant rules for managing CIC by the fund managers are available. Still, they generally cover corporate governance on the investment manager’s level as a limited liability company. They do not emphasise the fund’s governance, although, by their titles, they look as if they are closely applicable to DINFRA’s management and administration.

The first rule is OJK Regulation No. 10/POJK.04/2018 concerning the Governance of Investment Managers (*Penerapan Tata Kelola Manajer Investasi*) (**OJK Reg 10/2018**). This rule talks about governance in terms of implementing the principles

³¹⁰ *ibid.*, p. 19-22.

³¹¹ OJK, "Strategi Nasional Pengembangan Dan Pendalaman Pasar Keuangan Tahun 2018-2024.", p.

of transparency, accountability, responsibility, independency, and fairness. However, the meaning of transparency in the aforesaid provision is undescribed, unlike in the second rule - OJK Regulation No. 17/POJK.04/2022 concerning the Code of Conduct of the Investment Manager (*Pedoman Perilaku Manajer Investasi*) (**OJK Reg 17/2022**). OJK Reg 17/2022 was issued in connection to liquidity risk management that aims to protect the investors' interests via the transparency principle.³¹²

Furthermore, corporate governance is still spotlighted over fund governance in Indonesian capital market practice. Corporate governance covers limited liability companies (especially the public-listed ones) to ensure the implementation of fairness, transparency, accountability, responsibility, and independence principles for attaining investors' confidence.³¹³ Thus, considering the growth and utilisation of funds or CIC as an alternative financing scheme, fund governance looks no less important to be governed for improved investor protection in Indonesia's capital market.

3.4.2.2 Transparency in DINFRA

In the Indonesian capital market context, discussions on transparency would generally and essentially highlight information disclosure on securities offerings, corporate actions (e.g., merger, shares acquisition, right issues, etc.) and other regular reporting (e.g., annual reports). It applies to instruments, equities, bonds, mutual funds, or CICs.

Disclosure is considered a principle in Law No. 8/1995 and Law No. 4/2023. It is said to have the aim to bring sufficient knowledge of the material facts to the investors at the right time, as it may affect the investors' decisions and the price of

³¹² Regulation of Otoritas Jasa Keuangan Regulation Number 17/Pojk.04/2022 Concerning Code of Conduct of the Investment Manager., Elucidation of Art. 2 (h).

³¹³ According to this roadmap, transparency is expected to prevent the occurrence of adverse selection in information dissemination. Detailed provision about transparency is about the beneficial ownership information, distribution medium of information (through the company's websites), and criteria information of independent commissioners. OJK, "Indonesia Corporate Governance Roadmap, Towards Better Governance of Issuers and Public Companies," (Jakarta: Otoritas Jasa Keuangan (OJK), 2014), p. 37-41.

such securities.³¹⁴ And particularly in DINFRA (as it derives from the structure of mutual fund or CIC), information disclosure would encompass the offering of investment units and the funds' annual reports. Further, offering investment units in DINFRA can be made privately or publicly. As for the only example of a DINFRA product, DINFRA JMTR-001 made a public offering via prospectus as the disclosure document. The prospectus sample is examined in this research and compared with the sample of Thai IFF in the next chapter.

3.5 CONCLUDING REMARK

Based on the preceding discussion, the scope of governance and transparency studies for CIC or fund governance includes transparency, management, and structure, which refers to CIS, ELTIF and Thai IFF legal frameworks.

Under the CIS concept, governance involves approaches to seek investor protection by implementing transparency, which is not expressly highlighted but impliedly described under the disclosure context. While on management and structure, CIS is organised with a corporate or contractual scheme in which the CIS operator will manage the fund. Either depositary, custodian or trustee helps the CIS operator with the asset recording and safekeeping process, as the separation of assets is applicable in CIS. Likewise, CIS Operator shall act for both CIS investor and CIS alone, subject to certain conditions. However, self-dealing that may cause a conflict of interest between CIS operator, and CIS investor is not allowed.

Next, under the ELTIF concept, transparency is stressed as disclosing information for securities offering via the prospectus and annual report. For the prospectus, cost disclosure is governed for enabling the potential investors to have a proper consideration and assessment. Regarding the management and structure, the ELTIF concept has no critical differences; the fund manager and depositary will work together to operate funds. And for the manager of ELTIF, the one who conducts the

³¹⁴ Law No. 4 of 2023 of the Republic of Indonesia Concerning Development and Empowerment of Financial Sector., Art. 1 number (23).

duty is the AIF managers whom the relevant competent regulator has authorised them to do so.

It further explains that the scope of transparency covers information transparency before the investors assess and make informed decisions, with two central points. The first is to ensure that investors have adequate knowledge, and the second is to protect them from unwanted implications due to less prudent assessment because of information asymmetry. Mandatory disclosures are measured to assist transparency, albeit they do not always serve as a reliable and comprehensive source that can satisfy the investors' expectations.

Furthermore, the author limitedly identified the framework and practice of infrastructure funds in Thailand as a comparing country in this research. And considering that Thailand started with this model more than ten years ago, it is unsurprising for Thai infrastructure funds to have more comprehensive regulations than Indonesia. The supporting rules have been amended due to dynamic adjustment on the practical side. By contrast, since Indonesia started this model around five years ago, the supporting laws and regulations to explain DINFRA governance are unfortunately marginal. Those basic governance ideas are available but have a different angle that ambiguously brings the spirit of investment promotion and investor protection under the concept of securities regulation.

CHAPTER 4

Information transparency challenges in Infrastructure Funds Practice in Indonesia

4.1 PREFACE

This section discusses the early observation of information transparency in the theoretical and practical concepts of infrastructure funds in Indonesia. On the theoretical concept, as shown in the regulatory framework (OJK Reg 52/2017), several oddities are detected, leading to opacity or less transparency, which may affect the investors' decision-making. And on the practical concept, information asymmetry is alleged to play a role in exacerbating the difficulties of receiving necessary information for informed decisions.

4.2 EARLY OBSERVATION OF THE PROBLEMS OF INFORMATION TRANSPARENCY IN DINFRA: LESS PROMOTING INVESTOR'S KNOWLEDGE

Just as mentioned in infrastructure investing literature, the practice of infrastructure funds might not be flawless because it may attach to challenges on governance and transparency which need special attention, considering the plausible impact they could bring in the future.³¹⁵ From the beginning of DINFRA's introduction until now, it has been observed that several DINFRAs were issued for urban and housing, as well as transportation sectors. But unfortunately, there is no adequate reference information that can describe the current status of these DINFRAs,³¹⁶ except for the only DINFRA product currently listed on the Indonesian IDX office, the DINFRA JMTR-001. Though DINFRA JMTR-001 was a breakthrough, such fruitfulness did not bring repetitive enticement to other fund-raisers in the infrastructure business to use DINFRA.

And during the observation, DINFRA is sensed as a less popular or familiarised scheme in financing Indonesian infrastructure projects, whilst the Indonesian government wishes to meet the development demands. Some reasons for such

³¹⁵ Warwick, "Alpha Generating Strategies: A Consideration.", p. 11.

³¹⁶ Confidential-2, interview by Tanty Larasati, 2022. Some other DINFRA products have been dissolved, and hence no longer exists, due to several undisclosed reasons.

unfamiliarity are identified and lead to transparency issues about the lack of clear guidance and misaligned interests between the parties interested in DINFRA, – in which they are perceived to lessen the promotion of investor knowledge.

The author sees that, firstly, the regulatory framework of DINFRA needs to be more transparent in promoting the relevant industry. It supposedly serves as the necessary guidance and information to broaden the public's understanding of the investment rule of thumb (including the scheme, strategy, and associated risks). The lack and unclear provisions within the rules seem not to support the public's curiosity to have complete awareness and knowledge about investing or financing through DINFRA. And if they are dissatisfied, DINFRA would be less likely to achieve market competition.

Secondly, the author further sees that disparities exist from diverse information and interests amongst the interested parties in DINFRA, in which DINFRA would undoubtedly comprise complex structure characteristics before and after the investment deal. The information they hold (e.g., their expectations, strategies, concerns, etc.) might differ. And obtaining such information would be challenging, too, because mandatory disclosure under OJK Reg 52/2017 may not be solely reliable as the ultimate tool for finding necessary information about the investment scheme and other particular details. Further exploration and examination of the observed problems will be conducted in the next section.

4.3 TRANSPARENCY PROBLEM IN THE LEGAL AND REGULATORY FRAMEWORK OF DINFRA (OJK REG 52/2017): OPAQUE INFORMATION IN THE RELEVANT PROVISIONS

The information opaqueness herein means unclear and less transparent provisions, which are multi-interpretation and less clear meanings. And since the readers (the public or the potential investors) of the legal framework may not get a complete picture, they may find it challenging when considering and assessing DINFRA as an investment option. Consequently, incomplete information may cause the funds' investors and infrastructure companies to face superfluous costs – in finding adequate and precise information before they make an informed decision.

4.3.1 Information Opacity 01: Provision of the fund manager's general duty and responsibility for the investors' interests

This problem relates to Article 8 of OJK Reg 52/2017, which discusses the details of the fund managers' duties though it is relatively comprehensive and reflects a reasonable job description.³¹⁷ The main problem herein would be: (i) no explicit reference to the fiduciary duty of the fund manager; and (ii) the responsibility of the fund manager is for the funds' interests.

Article 8 of OJK Reg 52/2017 leaves a little odd and less convenient impression to the investors as there is no clear direction about what specific fiduciary duties investment managers must undertake when managing pooled funds. The available clue is only 'acting in good faith' and 'in accordance with the prevailing laws'. Another unusual thing is the fund manager's responsibility that is limited within the funds' context only, without extra explanation to what extent the investors would be entitled to any safeguard from the funds managers' duty and responsibility as per the OJK Reg 52/2017.

The importance of transparency in this section is to provide sufficient understanding for investors before making an informed decision, particularly regarding the investors' funds subscription safeguard throughout the investment period (recalling that those of investors' funds would be managed by the fund managers as a collective investment).

For prospective investors, it might be crucial to know whether the fund manager is accountable and trustable for lengthy and complex deals like DINFRA. Also, it would be essential to think of potential conflicts of interest in the future even though the provisions regarding the fund managers' duty have been equipped with a 'good faith' term. And though the potential investors may be able to do their own research or a kind of investment background checking (especially for the sophisticated ones), plus wait on what the prospectus would present, it is argued that they still need certain clarity on what the regulation says at first.

³¹⁷ Ojk Reg 52/2017., Article 8.

4.3.2 Information Opacity 02: Provision of the investment pricing and associated fees

OJK Reg 52/2017 also minimally explains the investment pricing. Hence, it leaves the investors to bear extra effort to seek additional information about the cost breakdown when opting for DINFRA as a choice of investment. These items are crucial, especially for institutional investors that are interested in contributing to infrastructure financing via DINFRA. The fee is critical in comparing whether this scheme offers more affordable pricing than other schemes. This far, the explicit clue of DINFRA pricing elements is captured as fee allocation, on whose budgets the fees shall be paid.³¹⁸ The implicit details on fees would be about the DINFRA registration fee to the OJK and the listing fee in the office of IDX whenever the offering is made publicly.³¹⁹ A further review of other relevant rules is anticipated.

The investors may also have pricing concerns as much as it is aligned or relevant to the commercial calculation (including the revenue, return, and so forth). If the details of fee elements are unavailable or less transparent, the investors might find it tricky to envisage the pricing breakdown once they review the prospectus or contact professional advisors with such capabilities in DINFRA transactions. The less clear information about fees and pricing would lead to an information asymmetry situation.³²⁰ It's dilemmatic for the potential investors who need the knowledge of investment pricing while they would be charged with other costs in searching the satisfying information for an informed decision.

4.3.3 Information Opacity 03: Provision of the investment incentive

The bright side that can be seen if the investment incentives are available is an opportunity to develop the industry, both for the infrastructure and the asset management, which benefits can be ultimately enjoyed by all parties. And in DINFRA,

³¹⁸ *ibid.*, Article 24, Article 28. Fee allocations are either to be paid by using the budgets of the fund manager, the investors (unitholders) and DINFRA alone.

³¹⁹ *ibid.*, Article 3.

³²⁰ Whereas the potential investors know lesser information (in terms of quality and quantity) than the issuer of DINFRA's unit participation and/or the fund manager.

the anticipated investment incentive can be in many ways as long as it supports the ease of transactions. The nearest example of this is tax rate reduction, as initially observed in a report that said that DINFRA still has a different imposition of the tax compared to the other capital market scheme.³²¹

It also remains uncertain if incentivisation is being made available or not. If they are, this would be beneficial for promotion and market confidence. If the investment incentives are available—but OJK Reg 52/2017 is silent in determining and promoting them—then the investors and any interested parties in DINFRA need to put another effort into discovering such relevant information by themselves.

4.3.4 Information Opacity 04: Provision of the DINFRA's corporate ownership

Per the applicable regulatory framework, DINFRA can indirectly invest in infrastructure assets, for example, through shares purchase in the target company or an SPV company. And if such scheme is opted for, DINFRA becomes a shareholder in the target company. DINFRA will be further entitled to voting rights and some other fundamental rights of a shareholder in the company. But unfortunately, OJK Reg 52/2017 silently discusses the details (including implications) regarding the shareholder rights of DINFRA, which is also essential to be included in one of the requirements in the disclosure information.

Another critical matter in this context is the exposure of foreign direct investment (FDI), which has yet to be touched by OJK Reg 52/2017. If major investors in DINFRA come from overseas jurisdictions, would the FDI regime regarding the permitted threshold of foreign shareholding overlap with DINFRA's regulatory framework? This is related to FDI licensing procedures and compliance. Sufficient transparency on this subject enhances the investment knowledge that further connects to the accountability of fund managers in managing DINFRA.

³²¹ OJK, "Strategi Nasional Pengembangan Dan Pendalaman Pasar Keuangan Tahun 2018-2024.", p. 108.

4.4 Transparency problem beyond the OJK Reg 52/2017: Indication of information asymmetry between the interested parties in DINFRA

The problem in this section is more concerned with information asymmetry between the investors and other relevant parties in DINFRA (e.g., the fund manager and the project owner or sponsor on the infrastructure assets), which plausibly worsen the prior transparency problem (i.e., the uncertain and less transparent provisions for education investors). The information asymmetry in DINFRA might happen when the investors subscribe to the units due to diverse interests among the interested or involved parties and rare information about past DINFRA.

4.4.1 Information Asymmetry 01: Rare information about past deals of DINFRA

It is observed that, at the pre-investment stage, sometimes the available information might not be sufficient for investors' assessment even if the regulatory framework has procured the disclosing party to do so. Another factor that allegedly worsens the asymmetry of information would be the lack of supporting data or information from the relevant industry because they are rare or missing. Even more for now, if a new product of DINFRA is under planning, DINFRA JMTR-001 is the only available product that can be referred to, and knowledge sources regarding the same are minimal. This recalls the idea of investors' expectations and interests. In contrast, the investors would inevitably seek information as much as they could, including from past data that have been publicly shared, e.g., past prospectus, past or recent annual report, and so forth.

Here, the author observes that data searches for past prospectuses and past or recent annual reports are relatively challenging as they are not easily accessible. The essence of gathering past data and information is presumed for comparison and enhancement of knowledge on this particular investment product, so that they can have a sufficient range of knowledge, e.g., what DINFRA offers and does, how the trend is in practice, what needs to be considered, and so forth.

4.4.2 Information Asymmetry 02: Different concerns about DINFRA

On top of the opaqueness regulatory framework of DINFRA, the lack of sufficient information before making an investment decision may come with many interests and information that are necessary, but they are available or come in a scattered way with different quality, timing, and source. At a specific timeframe, one information can be seen or received by one party but not the other. Thus, they are challenging to weigh.

The overall investment interests in DINFRA are about the clarity of return expectation, exit strategy, and investment proceed utilisation. Suppose those concerns at one point are misaligned due to such asymmetry. In that case, another challenging circumstance may affect the promotion of DINFRA to solidify the alternative financing industry within the capital market purportedly for the infrastructure industry. Below is a summary of various interests and expectations of the potential investors, fund managers and project owners or sponsors on the infrastructure assets:

4.4.2.1 Potential investors' interests and expectations

As for the experience in other CIC investments (like in the CIC of private funds and the CIC of asset securitisation), the investors' profile who are interested in similar schemes is mainly in the category of institutional investors in the form of pension funds and social security funds with a state-owned enterprise background. Their expectations may comprise the projection of investment return and safeguard during the lengthy investment period, fees component that would reconnect to the return calculation, investment exit strategy and so forth.

Based on the information gathered during an interview session with one of the institutional investors in Indonesia, some of the prospective investors in DINFRA wish to have the following concerns:

(a) a long-term investment portfolio to spread the risks and have a more diversified investment range, alongside a clear investment strategy for themselves in fund levels by considering whether redemption is permitted or not;

(b) a transparent concept of the fund manager's responsibility and duty over the lengthy and high value of the investment;

(c) regulatory risks concerns, especially regarding compliance with other relevant government agencies;

(d) a transparent investment cost breakdown for calculating the return projection and preparing the availability of good funds technically. Projecting future returns needs to consider the infrastructure characteristic. Especially in the toll road business may have optimistic return projections from tariff calculation, traffic volume, and so on.

4.4.2.2 Fund manager's interests and expectation

Regardless of before or after the DINFRA's effectiveness, the fund manager's dominant interests are likely associated with the following matters:

(a) management fees and advisory fees that raise problems about where those fees are payable to whom and what would be the impactful action (concerning great return expectation and investor protection) to compensate the management fees and advisory fees determined in a high value;

(b) target asset or project of infrastructure to be funded by DINFRA, whether brownfield or greenfield;

(c) investment exit strategy, both regarding investors' investment at the DINFRA level and DINFRA's investment at the target company level;

(d) growth of AUM and compliance with OJK rules and policies.

Additionally, considering their profile (expertise and qualification), the fund managers would likely have better information or understanding about the background of institutional investors that might be interested in DINFRA, including the investment details and procedures on unitholders and funds level (the role of pooling the investors' money). Plus, any important or resourceful information left unclear in the regulatory framework of DINFRA, which the public might not yet know. The fund managers, in some cases, may not be fully open to sharing or exposing such internal concerns and information with the interested or prospective investors and infrastructure projects' owners.

4.4.2.3 Transport project owners or sponsors' interests and expectation

On this side, the expectations would be transparency of information that would give favourable benefits, e.g.:

(a) the investment deal structure that involves DINFRA's investment duration in the target company alongside its chosen scheme;

(b) the cost reduction by applying DINFRA, whether it brings less costly financing expenditures or it may otherwise help the company get another revenue or profit; and

(c) the regulatory threats regarding the possibility of changing or overlapping laws during the lengthy investment of DINFRA in the target company, which may adversely impact to the overall transaction.

4.5 CONCLUDING REMARK

Chapter 4 recaps the research problems initially detected after the regulation of infrastructure funds in Indonesia (DINFRA) was issued. The scheme of DINFRA was not immediately in the spotlight and sought to address the financing problem in infrastructure development at national and regional levels. Also, it was later discovered that the need for more comprehensive information transparency was one of the underdeveloped factors. The highlighted issues on information transparency are regarding the investment rule of thumb (OJK Reg 52/2017) and the information asymmetry as a problem beyond the regulatory framework.

The first problem relates to the lack of transparency in the legal framework of DINFRA, OJK Reg No. 52/2017. At the baseline rule, OJK Reg 52/2017 should be necessary to serve as informative guidelines to educate potential investors who want to diversify into alternative investments (particularly in infrastructure), including providing insights to project owners who look for alternative financing channels. However, while the regulation is supposed to help them understand the basic concepts on day one, some provisions are prone to affect the protection of investors' interests. The observed provisions are opaque or unclear, particularly relating to the fund managers' duty and responsibility, the pricing and fees component, the incentives for the investment, and the corporate ownership by DINFRA.

The second problem relates to information asymmetry. This comprises the rare, minimal, and limited information about past DINFRA products that become an obstacle in comparing and assessing the necessary information for informed decisions. Another information asymmetry relates to the interested and involved parties in the deal who have key differing interests that may not be transparently shared between themselves. When deciding investment decisions under such circumstances, one may assess without optimum consideration because he received information in a different timeframe than the others. In turn, hidden action would be regarded as a corresponding information transparency problem in this research.



CHAPTER 5

Analysis of the Information Transparency Problems in DINFRA

5.1 PREFACE

This section examines the information transparency problems as described earlier. The first is problems within the regulatory framework of DINFRA and information asymmetry (outside the regulatory framework. Since the early problem detection, it was discovered that the scheme of DINFRA could be more business-friendly due to transparency reasons. Regarding information transparency, the problem examination involves comparisons between DINFRA, CIS ELTIF, and Thai IFF concepts. After the analysis section, a few suggestions are offered to address the issue of information transparency.

5.2 INFORMATION TRANSPARENCY PROBLEM IN OJK REG 52/2017: OPAQUE INFORMATION IN CERTAIN PROVISIONS

While OJK Reg 52/2017 is claimed as a sufficient rule of thumb in governing DINFRA,³²² the author examines several aspects that indicate weaknesses in providing direction, reference, and supportive information for the benefit of investors and fundraisers in DINFRA. As initially identified, four provisions in OJK Reg 52/2017 are opaque or less transparent for safeguarding investors' interests. Correspondingly, such opacity is not in line with what IOSCO discusses in its publications on CIS, alongside ELTIF Directive and Thai IFF (as regulated under Notification CMSB 8/2562). Table 3 below is made independently to show the comparison between DINFRA, CIS, ELTIF and Thai IFF concepts, predominantly regarding four opaque provisions in OJK Reg 52/2017. Such brief comparisons among them are as follows:

³²² It is said that there is no problem with the rule, but the enforcement needs strong collaboration with stakeholders and other government agencies too. Confidential-1, interview by Tanty Larasati, 2022.

Table - 3 Significant contrasts between DINFRA, CIS, ELTIF and Thai IFF

Comparing scheme	Fund managers' duty and responsibility	Fees allocation and pricing information	Investment incentive	Corporate ownership by the fund
DINFRA	Duty: acting in a good faith Responsibility: for the funds	Minimal and are not regarded as a disclosure	<i>Not set/unspecified</i>	<i>Not set/unspecified</i>
CIS	Duty: due skill, care, and diligence Responsibility: for funds and investors	Required for disclosure with a breakdown	<i>Not set/unspecified</i>	Required for disclosure
ELTIF	Duty: honestly, due skill, care, diligence, fairness Responsibility: for investors	Cost disclosure is required with a breakdown and the overall ratio	<i>Not set/unspecified</i>	Disclosure for major holdings is required
Thai IFF	Duty: due care, loyalty Responsibility: for the unitholder	Minimal and are not regarded as a disclosure	Tax exemptions	<i>Not set/unspecified</i>

5.2.1 The fund manager's general duty and responsibility for the investors' interests

According to Article 8 para (1) letter (l) of OJK Reg 52/2017, the fund manager of DINFRA must perform many tasks and duties in a good faith and with full responsibility for the best interest of DINFRA. Referring to Table 3 above, the author further analyses this particular topic into several themes as it seems to contradict with the idea of governance and transparency, lack of clarity and is perceived to cause less promotion to the investors' protection.

5.2.1.1 Non-explicit fiduciary duty of the fund's manager and the investors are not the central responsibility

Other than requiring the fund manager to act in good faith and in accordance with the prevailing laws, Article 8 para (1) letter (l) of OJK Reg 52/2007 silently mentions the specific duty of the fund managers in managing the pooled funds, whether it is a duty of care, a duty of loyalty, of other duty as relevant fund management context. The same provision, interestingly, mentions the fund manager's responsibility that should be in the best interest of the DINFRA as funds. This ambiguously says that the investors have nothing to do with receiving any responsibility and protection from the fund managers over the whole investment throughout the investment period.

5.2.1.2 Review of the fiduciary relationship between the fund manager and investor in DINFRA as an investment fund

(a) Investor is a third party in the deed of CIC

Regarding practical structure, DINFRA works resemble the investment fund's structure that collects investors' money and invests them in financial or non-financial assets. Investment funds' structure is similar to mutual funds or CIS. However, from the perspective of establishment structure, DINFRA as CIC was made by virtue of a notarial deed between the fund manager and the custodian bank. This deed of CIC causes the investors to be bound as the third party, while they are the subscriber or unit holders in the funds (DINFRA) by virtue of subscription form or other paperwork that constitutes the sale and purchase of units, plus the delegation from investors to the fund managers for managing the pooled investment.

On this matter, the fund manager and the investors are bound by two unique types of relationship that ambiguously represent an agency relationship, i.e., a seller-and-buyer relationship (regarding unit participation) and a client-and-service provider relationship (regarding investment management). Both relationships, in practice, happen in a blended way. Nevertheless, from the perspective of investor protection,

no explicit reference to what degree the CIC binds the investor.³²³ Likewise, no bridging link is available in OJK Reg 52/2017 that describes the direct relationship from the fund manager to the investor that arises from the fiduciary relationship between them. It implies that their relationship is indirectly connected due to the absence of suggesting particular arrangements or commitments between them.

While investment funds and CIS recognise contractual arrangements between fund managers and investors, interestingly, only the deed of CIC deed is highlighted as a recognised contractual document in OJK Reg 52/2017. The basic clauses of the deed of CIC comprise many aspects (as outlined in Chapter 2), but none express responsibility and duty from the fund manager to the investor.

As observed from the interview session, although the deed of CIC does not have a fixed standard clause, the clauses within it refer to the basic points in the OJK rule without any significant adjustments. It is made as standardised as possible unless related to numbers or commercial aspects.³²⁴ It is further presumed that the details of fiduciary duty and responsibility keep referring to acting in good faith and only being responsible for the funds. Considering that fiduciary duty and relationship arise from a contract or agreement and there is no such contract between the fund manager and the investors, the fiduciary duty arguably existed.

(b) **Subscription form as a delegation of power**

The unit subscription is argued to occur by signing subscription forms or other similar paperwork that likely represents a contractual relationship between the fund manager and the investor, including a delegation of power from the investors to the fund managers for managing the pooled money in DINFRA. Such power delegation can represent duties and responsibilities. Nonetheless, the author observes that there is no such kind of standardised template that is uniformly applicable to all investors and investment managers, which provides information on the terms and conditions

³²³ Recall the provision that clearly says that the main responsibility of the investment manager is at the fund level.

³²⁴ Confidential-3, interview by Tanty Larasati, 2022.

regarding the sale and purchase of participation units and the authorisation to manage funds on behalf of unit holders.

Should the subscription form that DINFRA JMTR-001 had before accommodated terms and conditions with rights and obligations between the seller and the buyer/subscriber of participation units, plus delegation to manage the subscribed participation units, then the contractual relationship would impliedly exist. This supporting rationale is that in an agency relationship, the form of contract that regulates the parties' relationship can be formal (written and signed) or informal insofar as it supports and provides legitimacy for the actions taken by the parties concerned.³²⁵

Once the investors subscribe to the units, their status will become the unitholder and be entitled to receive proof of the unit's ownership. The author here analyses that such proof ownership would impliedly give the unitholder rights to receive portfolio management service by the fund manager, plus the rights to monitor the management activities to avoid potential misappropriation of actions as an excuse from fund governance.

(c) Stewardship as a fiduciary duty

For fund managers, a separate regulation is issued by OJK on the governance of investment managers (OJK Reg 10/2018). Interestingly, it is discovered that stewardship is regarded as the investment managers' fiduciary duty to the managed fund being trusted by the customer.³²⁶ There, stewardship implicitly covers duty related to the funds' corporate ownership (activities that invest in other companies through equity participation, which would cause funds to become a shareholder in the investee company). But it is only to the extent of regular monitoring of the managed funds and policy for voting rights exercise if a CIC invests in an investee company,

³²⁵ In an agency relationship, the form of contract that regulates the relationship of the parties can be formal (written and signed) or informal, insofar as it supports and provides legitimacy for the actions taken by the parties concerned. Nossa, "The Agency Theory Applied to the Investment Funds.", p. 32-34.

³²⁶ *Regulation of Otoritas Jasa Keuangan Regulation Number 10/Pojk.04/2018 Concerning Governance of Investment Manager.*, Art. 1 number (18), Art. 50.

without providing any clues on how such stewardship duty may represent direct responsibility from the fund manager to the investor.

Referring to the concept of stewardship, the associated duty or activity of the investment managers will relate to product development and growth maintenance, and performance of good service which would lead to achievement-oriented and self-actualised.³²⁷ This kind of service is pretty good, in fact. However, there needs to be more appropriate to measure the performance of fund managers who receive entrusted money to be appropriately managed to achieve certain benefits on both sides (investor and target company). Fund management service is unlike in banks, where the customers only deposit money. Investors' entrust given to fund managers to organise, manage and administer the invested funds into a portfolio of assets that match or suit the investor's character. In short, the fund manager should act both as a steward and an agent.

As widely discussed in several literature, the investment managers in fund management essentially serve as an agent to the investors (the principal).³²⁸ Similarly, mutual funds are claimed as an organisation that serves as fiduciary, which would involve fiduciary duty and relationships.³²⁹ As an agent, the fund manager's role is to manage the fund while generating profits, and the investor (as principal) expects profits from their investment subscription while monitoring the agent's behaviour.³³⁰ At the fund level, the fund managers shall care about not only the managed funds (AUM growth targets and profit maximisation) but also the interests of investors.

³²⁷ James H. Davis; F. David Schorrmann; Lex Donaldson, "Toward a Stewardship Theory of Management," *The Academy of Management Review*, no. Jan (1997), p. 27-28.

³²⁸ Nossa, "The Agency Theory Applied to the Investment Funds."; Naeve, "Exploring the Fund Manager-Fund Investor Relationship through the Lens of the Principal-Agent Model – Agency Conflicts and Mitigators in the Swedish Mutual Fund Industry.", p. 4-6.

³²⁹ Frankel, *Fiduciary Law.*, p. 7.

³³⁰ Naeve, "Exploring the Fund Manager-Fund Investor Relationship through the Lens of the Principal-Agent Model – Agency Conflicts and Mitigators in the Swedish Mutual Fund Industry."

(d) Unaccommodating relevant rules (OJK Reg 17/2022 and OJK Reg 10/2018)

If looking for a referring rule to discover more about the fund manager's duty and responsibility is anticipated, OJK Reg 17/2022 and OJK Reg 10/2018 are spotted. Upon reviewing their contents, a lack of explicit reference for protecting the investors' interests is found and still implies that the fund manager's responsibility is to the funds' best interest.³³¹ These rules contain relevant headings but do not expressly address DINFRA as one of their scopes of coverage. They seem to generalise all types of funds without considering a complex structure or transaction DINFRA as one that is more similar to investment funds in AIF or ELTIF.

Such generalisation is identified by the repeated use of 'customers' or 'client' terminology in describing the investors. On the other hand, however, services in fund management are not similar to the bank. The investors do not save money; they contribute to infrastructure financing by purchasing/subscribing to unit participation as the fund manager sells. That is why the investors are called the unitholders. This discussion somewhat links to the concept of stewardship as the fiduciary duty of fund managers that OJK attempts to emphasise rather than fiduciary duty under the agency relation concept. It is acceptable that, on the one hand, regarding the services that the fund manager renders to the investors.

(e) Acting in good faith and reference to civil laws

Contrasting with the Common law system that may describe and categorise fiduciary duties as a particular one (like the duty of care or duty of loyalty), the Civil law system applies an element of 'acting in a good faith' in describing fiduciary duties,

³³¹ *Ojk Reg 17/2022.*, Art. 8, Elucidation of Art. 2 (d) and (g). An investment manager is required put his/her best interests for the fund over the investment manager alone, and the affiliated party. The principle of prioritising the interests of investment products includes prohibitions for investment managers and recommendations to act in good faith. The principle of protecting investment product assets, in terms of register, safekeeping of assets, restrictions, etc.

in some cases, or indirectly use the terminology of ‘fair dealing’.³³² Upon perusing Article 8 para (1) letter (l) of OJK Reg 52/2017, such provision is argued to point to what Civil Law applies; by not being implicit in determining the duty and includes the element of good faith.

Recalls that Indonesia is one of the countries adhering to the Civil Law system, the author further wonders whether the duties and responsibilities of fund managers to the investors in OJK Reg 52/2017 do indeed refer to the Civil Law system. The author further analysed from the perspective of fiduciary law theory and found that a good faith would serve better as supporting action to the fiduciary duty.³³³ Examples of fiduciary duties that can be supported by acting in good faith are the duty of loyalty—provided that, some scholars debate this concept. One agrees with the said ideas (acting in good faith is only an accessory to the primary duty of loyalty), but the other one opposes and considers that the duty of loyalty can be rooted in good faith.³³⁴

As such, the author disagrees that acting in good faith is regarded as the only reference for fiduciary duty, as explicitly stated in OJK Reg 52/2017. One of the reasons is because of the complex character of DINFRA and not just an ordinary mutual fund; carrying out the task of managing investor funds while investing in infrastructure assets is not robust enough if it is only supported by 'good faith'. A solid duty is expected to represent the responsibility of fund managers to the investors, in addition to the managed funds.

Should the reference to civil laws is a true motivation, it is further questionable as to why the relationship between the fund manager and the investors is not suggested to be bound by a ‘mandate contract or agreement’ or certain kind of commitment that might represent a contractual relationship or a relation of rights and obligations. The concept of a mandate is also recognised in the Netherlands’ practice

³³² In the civil law system, fiduciary duty and relationship might not be as boldly named as in the common law system. And instead, the applied concept is mandate duty and relationship. Helleringer, "Fiduciary Principles in European Civil Law Systems.", p. 11-14.

³³³ Andrew S. Gold, "On the Elimination of Fiduciary Duties: A Theory of Good Faith for Unincorporated Firms " 41 (2006), <https://ssrn.com/abstract=965040>., p. 133.

³³⁴ Helleringer, "Fiduciary Principles in European Civil Law Systems.", p. 11.

of asset management industry.³³⁵ In the Netherlands practice, a mandate contract represents the fiduciary relationship between; the asset manager acts as an agent and the client (principal). It serves as a contract of services between them.

5.2.1.3 Review from the viewpoints of CIS, ELTIF and Thai IFF concepts

(a) Viewpoint from CIS concept

On the fiduciary duty matter, the author sees that the Principle for CIS Regulation 1994 recommends that the CIS operator acts with due skill, care and diligence when managing CIS. Though it is not boldly named as a fiduciary duty, the author still finds it acceptable because it represents how the agent shall qualify not only to serve in a good faith. Some jurisdictions with CIS structures apply various names of fiduciary duties. Japan which has the contractual type of CIS, recognises the duty of care as the fiduciary duty of CIS operator.³³⁶ Furthermore, no matter how it is incorporated, CIS with a contractual structure will involve the fund manager and investors to bind in a fund management contract. This relates to the agency relationship theory in the fund management context.

On the responsibility matter, the author agrees with IOSCO publications on CIS that have two different perspectives, (i) putting responsibility in the investors' interests, and (ii) putting main responsibility in the funds' interests. The first perspective refers to the Principle for CIS Regulation 1994, which interestingly explains that the CIS operator shall act in the best interest of CIS.³³⁷ This rationale is in connection to the idea of asset separation,³³⁸ where the CIS operator shall not work in the best interest

³³⁵ Danny Busch and Deborah A. DeMott, *Liability of Asset Managers* (Oxford University Press, 2012), p. 199-201. The practice of asset management in the Netherlands is being reviewed and referred to because most Indonesian laws and regulations are generally rooted in the Dutch law upon the past colonialisation era.

³³⁶ As for the Common Law country, the U.S. recognizes the duty of loyalty as the general duty of CIS operator. IOSCO, "Examination of Governance for Collective Investment Schemes Part I.", p. 14 and 36.

³³⁷ "Principles for the Regulation of Collective Investment Schemes and Explanatory Memorandum.", p. 6.

³³⁸ This refers to a separation between the investment manager's assets and the investment manager's managed assets. Whereas, the portfolio investment assets are pooled within a fund (as one entity)

itself but instead, the interest of CIS to the utmost standards of integrity and equitable dealings.³³⁹ The highlight is on the latter wordings.

Accordingly, it is logical to understand that CIS operators perform duties and be responsible for the interests of the CIS, as long as they are not violating the interests of CIS investors (namely by implementing high standards of integrity and fair treatment when managing the pooled funds of the investors). An example is when CIS acts as an institutional investor or shareholder in the investee company. In doing so, the CIS operator would act on behalf of CIS (as funds) while exercising CIS's shareholder rights (i.e., attending shareholders meetings in the company where CIS put its shares). And it would be improper for the CIS operator to deliberately waive the investors' concern that is also relevant to the funds' best interest.³⁴⁰ If improper action is carried out, then the idea of investor protection might be debated.

The second perspective refers to the IOSCO paper on COI of CIS Operator 2000,³⁴¹ whereas the general duty of CIS operator needs to be in the best interest of CIS investors. It looks opposed from the previous one. However, this concept is in line with CIS purpose and governance, which explain that the investors' interests are the central responsibility of CIS operations³⁴² and are essentially motivated by prioritising the promotion of investor protection, which in turn can promote market confidence. In addition, no matter how CIS is formed (in a contractual model or corporate model), the protection of the best interests of unitholders/shareholders is prioritised with the hands of regulatory oversight.³⁴³

administered by a manager (as another entity) with different internal operating assets and a separate owner group. Morley, "The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation", p. 1232.

³³⁹ IOSCO, "Principles for the Regulation of Collective Investment Schemes and Explanatory Memorandum.", p. 6.

³⁴⁰ "Collective Investment Schemes as Shareholders: Responsibilities and Disclosure.", p.9.

³⁴¹ "Conflict of Interest of Cis Operators.", p. 3.

³⁴² CIS governance can be defined as "a framework for the organization and operation of CIS that seeks to ensure that CUS are organized and operated efficiently and exclusively in the interest of CIS investors, and not in the interests of CIS insider. "Examination of Governance for Collective Investment Schemes Part I.", p. 3-4.

³⁴³ *ibid.*, p. 18, 24, 34 and 38.

And look back to the current rule of DINFRA, it is dilemmatic and perplexing when the applicable rules already set a certain border of responsibility, but the market (including the investors) actually needs security and growth at the same time. If the comprehension of relevant industry (including the asset management industry) on DINFRA's core features (per the applicable rules) is less likely to be solid, the sense and familiarity with infrastructure financing and business are less robust, then the arisen concerns like the above would be challenging to be addressed.

(b) Viewpoint from ELTIF concept

What DINFRA has in the regulatory framework contrasts with what ELTIF Directive and AIFM Directive have for this subject matter. While DINFRA broadly requires the manager to act in good faith, ELTIF and AIF play in a specified way, i.e., requiring the manager to serve his duty with honesty, due skill, care, diligence, and fairness.

As one AIFs type of product, ELTIF essentially works by pooling capital from investors to reinvest it as per a predetermined investment policy for the benefit of those investors. So, it has been clear that the way investment fund works need prudent actions where the asset separation is acceptable on the one hand, but the responsibility to the funds and investors may not be differentiated as the whole investment transaction in infrastructure funds will not work without contribution by the investors at the beginning. AIF managers must also take all reasonable steps to mitigate the possibility of conflicts of interest between AIF and AIF investors. This point contrasts with OJK Reg 52/2017, as it silently discusses this.

ELTIF Directive in Article 32 says that the competent authorities shall supervise the overall compliance under the ELTIF legal framework. And regarding ELTIF management, the competent authority needs to be responsible for supervising the adequacy of ELTIF managers (an authorised AIF managers under the AIFM Directive) in complying with their relevant obligations in managing ELTIF.

(c) Viewpoint from Thai IFF concept

Thai IFF is relatively bold in underlining the fiduciary duty of the fund manager, i.e., due care and loyalty.³⁴⁴ Likewise, the central responsibility apparently goes to IFF investors with such explicit duties. These duties are perceived to be derived from fiduciary relationships, which arise from commitment arrangements between the investors/unitholders and the fund manager, which is also clearly suggested by the regulatory framework of Thai IFF.³⁴⁵

However, this kind of commitment is not openly recognised in Indonesian DINFRA practice because there is no requiring provision. And due to it being silent, this can be regarded as a positive loophole for the investors when negotiating or expressing their concerns before making an informed decision. So, at least, the problem of information asymmetry (as analysed in the next section) can be mitigated. Finally, recall the previous discussion; this commitment between fund managers and investors in Thai IFF looks similar to the idea of a mandate contract in Civil Law countries, like the Netherlands, France and Luxembourg.³⁴⁶

5.2.2 The investment pricing and associated fees

OJK Reg 52/2017 explains minimal information about associated fees and pricing that may guide the public on how the fees would be allocated. The identified fees would only cover management fees, custodian fees and listing fees, should DINFRA be offered and listed publicly.

5.2.2.1 Less detailed fee allocation in OJK Reg 52/2017

In OJK Reg 52/2017, the investment pricing is also minimally referenced, necessitating more research to learn more about the cost or charge breakdown. The allocation of who should pay, the anticipated percentage, and a timeline would be good information on this topic. In determining their investment budget, potential

³⁴⁴ *Notification Cmsb 38/2562*, Clause 8.

³⁴⁵ Detailed provisions on this commitment are regulated under Notification of CMSB No. Tor Nor. 39/2562 Re: Obligations between unitholders of infrastructure funds and management companies.

³⁴⁶ Busch and DeMott, *Liability of Asset Managers.*, p. 180-186, 201.

investors may find these fee details helpful in other ways. Along with the fund manager, who would think of AUM and management fees in between, the fundraisers would also figure out their financing costs and revenues.

5.2.2.2 Review of the less comprehensive details of fee allocation

The significance of capturing this pricing is to assess the total costs and expected returns vis-à-vis the risks that may arise. So far, information on the payable fee allocation can be identified from OJK Regulation No. 52/2017, but not for the details of DINFRA registration fee and the listing fee, which are identifiable in IDX Rule 1-W.

Investors may also have pricing concerns as far as aligned or relevant to the commercial calculation (including revenue, return, and so on). Going forward, if details of the fee elements are not available or are less transparent, the investors may find it discomfoting to predict what the pricing breakdown would be until they see and evaluate the prospectus or contact professional advisors with such capabilities in DINFRA transactions.

The least clear information about fees and pricing would lead to an information asymmetry situation, in which the potential investors know lesser information (in terms of quality and quantity) than the fund manager. The investors may further find it dilemmatic whether it is worth spending another money for information gathering to a certain satisfactory level or just receiving information on an 'as is where is' basis.

5.2.2.3 Review of the prospectus samples

Interestingly, the prospectus disclosure of DINFRA JMTR-001 was relatively comprehensive in itemising the fee allocation for DINFRA, DINFRA's fund manager and DINFRA's investors. One thing to be noted, however, is that the DINFRA prospectus did

not specify the component of the tax rate that is plausibly relevant. It said there would be a tax imposition over the fees, but what aspect is unclear.³⁴⁷

A study by OJK and the Ministry of Finance of the Republic of Indonesia (**MOF of Indonesia**) in 2018 also did not explain the plausible tax component, especially about the income stream in the transaction (both at the funds' and the investors' levels).³⁴⁸ Thus, about disclosing full and extensive details of fees and pricing, the author once agrees on having a detailed one in the prospectus, so long as it is not disseminated excessively and inappropriately. Because, at a certain point, it might reduce the investors' interest in DINFRA.

Figure 4 below describes the extensive range of fee elements and allocation in DINFRA by referring to the prospectus sample. Such extensive details can have a dual perspective, whether it helps out or not. On the one hand, it is suitable for broadening the knowledge for informed decision-making. Imagine if the pricing details are too minimal, the situation becomes a dilemma too because the investors would perceive a lack of complete picture and bear another cost of finding adequate information to satisfy their concerns.³⁴⁹ It would be beneficial for easier calculation of the commercial projection. The parties that need financing via DINFRA may assess whether the fee elements are costly and whether they would affect their financial and legal capabilities – compared with the other financing channel.

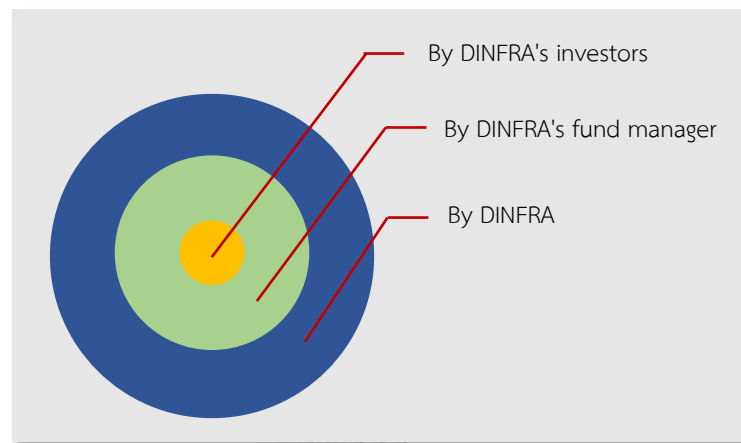
But on the other hand, if the complex nature of DINFRA's transaction is not adequately understood, the investors might walk away after reviewing how extensive the pricing is because such extensive details might be perceived as burdensome and too multifaceted rather than the traditional infrastructure financing channel.

³⁴⁷ It is limitedly mention to refer to the applicable law in taxation. "Prospectus of Dinfra Jmtr-001.", p. 12.

³⁴⁸ OJK, "Strategi Nasional Pengembangan Dan Pendalaman Pasar Keuangan Tahun 2018-2024.", p. 108.

³⁴⁹ It might be acceptable when the prevailing rules (plus, the prospectuses) should not be necessarily regarded as the sole source of reference. But their provisions or contents are not supposedly be super minimal in describing the pricing detail.

Figure - 4 Fee allocation of the Prospectus of DINFRA JMTR-001



The details of fees to be paid by DINFRA are much larger than the fund manager and the investors. Below is the breakdown:

Fees to be paid by DINFRA based on the AUM balance:³⁵⁰

- (i) annual management fees and annual custodian fees for the funds
- (ii) management fees for infrastructure assets
- (iii) cost transaction by the funds (including fees for all professional advisors)
- (iv) fees on funds' assets (including registration fees, formation fees, document keeping fees)
- (v) fee for depository of units
- (vi) financial auditor fee and asset valuation fee
- (vii) funds' rating fee
- (viii) any fees on land & building (including permitting, tax and insurance premium)
- (ix) any fees on the deed of CIC (in case there will be an amendment)
- (x) fees on the general unitholder meeting
- (xi) prospectus and reporting printing and distribution fees
- (xii) fees for any claims toward the fund manager and/or custodian bank
- (xiii) services fees for integrated investment management system
- (xiv) printing and distribution fee of updated prospectus and annual report

³⁵⁰ "Prospectus of Dinfra Jmtr-001.", p. 12, 69-70.

- (xv) newspaper publication fees
- (xvi) liquidation fees of DINFRA
- (xvii) tax on the above fees

Fees to be paid by DINFRA's fund manager:³⁵¹

- (i) transaction fees in the Office of IDX and the securities account
- (ii) transaction cost in any event of the units is being transferred to another unitholder
- (iii) payment to the tax office in relation to applicable tax to the unitholders

Fees to be paid by DINFRA's investor/unitholder:³⁵²

- (i) internal administration of funds' assets (e.g., phones, facsimile, photocopy, and transport)
- (ii) printing and distribution fees of certain forms/letters.

5.2.2.4 Review from the viewpoints of CIS, ELTIF and Thai IFF concepts

(a) Viewpoint from CIS concept

This problem is closely relevant to Principle 27 of the IOSCO Objective and Principle 2017 due to the elements of associated fees and expenses being minimally disclosed. Different from the IOSCO paper on CIS Fees and Expenses 2016, which has broken down the fees and expenses, OJK Reg 52/2018 still needs to explain the fees associated with DINFRA transactions in a fairly detailed version. No adequate reference that can enlighten whether some other fees and expenses may arise – apart from management fees, custodian fees and listing fees (if the funds are to be publicly listed in the office of IDX). Although the paper primarily targets retail investors to understand CIS's pricing details better, the author sees that the basic concept can still be used as a reference for institutional investors (who are interested in DINFRA). The urgency of disclosing fees and expenses is still relevant to informed decisions.

³⁵¹ *ibid.*, p. 69-70.

³⁵² *ibid.*, p. 12, 69-70.

In this instance, some investors who are familiar with CIS or have easier access to the industry may be undoubtedly able to estimate the components and portion of such fees due to their experience and qualifications, especially for specific fees/costs details that can be found using search engines or technology supports. But still, there are times when the prospective investors do not have any clue at all about typical CIS (and DINFRA) because of the limited source of information and complexity characteristics. Thus, discovering this kind of information might be another challenge.

(b) Viewpoint from ELTIF concept

As discussed earlier, the ELTIF Directive considers cost disclosure as an application of transparency. The cost disclosure involves several categories of cost, i.e., the cost of ELTIF establishment, asset acquisition, fees on management and performance, cost of distribution and others (like administrative, regulatory, depositary, custodial, professional and audit costs), with ELTIF's aggregate cost-to-capital ratio.³⁵³ Compared to the DINFRA and Thai IFF versions (that only provide some hints and not classifying the fees as particular component), the ELTIF framework more straightforwardly underlines cost disclosure as vital information for informed decisions of investors.

(c) Viewpoint from Thai IFF concept

Just as in DINFRA, the regulatory framework of Thai IFF gives a clue on what elements of fees are involved in the transaction, e.g., annual management fees, annual listing fees, etc. And as for the breakdown detail version of fee elements, BTSGIF offering memorandum comprehensively itemised them more than what is required.³⁵⁴ Such circumstances, however, may have dual impressions. Either it makes the prospectus reader (the public or potential investors) feel intimidated by the projected pricing component of a complex deal with a high investment value, or it is of assistance and hence, beneficial.

³⁵³ *European Long-Term Investment Funds (Eltifs) - Regulation (Eu) 2015/760.*, Art. 25.

³⁵⁴ "Prospectus of Btsgif.", p. 7-8.

In BTSGIF, fees collected from the unitholders are related to the transfer of subscription proceeds, transfer of units, issuance of evidence certifying the transfer of investment units, and others (registration of pledge of units, etc.). However, it is also understood that the Thai IFF scheme does not recognise fees collected from investment managers, as is the case with DINFRA. And relating to the collected payments from the funds, they are extensively elaborated, as below:³⁵⁵

- (i) Management fees and fund supervisor fees;
- (ii) Registrar fee;
- (iii) Financial advisor, sole domestic book-runner, and initial purchaser fee;
- (iv) Fee for the allocation of units in the offering;
- (v) Selling agent fee;
- (vi) Fee for other advisors;
- (vii) Fee for deposit bank to retain subscription proceeds from the combined offering;
- (viii) Advertisement and marketing fee and expenses;
- (ix) Incentive fees;
- (x) Application fees to the Office of the SEC and the SET;
- (xi) Registration fee and listing fee (initial and annual);
- (xii) Expenses relating to the fund (audit of account, asset sale or acquisition, tax and stamp duty, appraisal fee, assets administration and maintenance, insurance premium or safekeeping of funds' assets, tax, legal expenses on claims (including debt or litigation), expenses on capital reduction and/or dividend payment, production and printing cost of necessary forms and applications, expenses on notices and announcements, expenses on organising meetings of investment advisory committee and/or unitholders, remuneration of investment advisory committee, expense or fee on the registrar relating to dividend payment (including capital increase or reduction), expense on the amendment of fund scheme, cost on account recording (if any), legal cost related to operation and asset management of BTSGIF, Fee and/or other expenses on dissolution of funds or change of management company, expenses to be paid by the fund under the

³⁵⁵ *ibid.*, p. 130-135.

transaction documents, and additional fees and/or expenses relating to operation of BTSGIF).

5.2.3 The investment incentives or stimulus

Most of the fee elements in DINFRA are considered investment costs and expenses from an accounting perspective. By contrast, the investment incentive can otherwise be treated as cost reduction that can promote the interest of applying DINFRA in infrastructure financing.

5.2.3.1 Absence of investment incentives as selling points

The problem of having an absence of incentives actually relates to market promotion. Market promotion can be achieved via transparency. While incentive does not expressly link to the core meaning of transparency, it is argued that it may affect the investors' informed decisions. Incentives are just like bonuses or rewards; they provide benefits; however, this does not mean that the investment is doomed to lose without stimuli. However, OJK Reg 52/2017 leaves the investors with hanging provisions about plausible investment incentives.

5.2.3.2 Review of the unregulated investment incentives

(a) Samples of investment incentives that can be approached

Various investment incentives that can be offered as a selling point would be a reduction of tax rate and avoidance of multiple taxations of the same income stream (double taxation). This relates to the investors' investment return and revenue from the sale or redemption of units. These taxation matters have been argued to affect the suboptimal growth of DINFRA because, in practice, there have been different tax impositions between various types of structured products despite having the same characteristics.³⁵⁶

³⁵⁶ OJK, "Strategi Nasional Pengembangan Dan Pendalaman Pasar Keuangan Tahun 2018-2024.", p. 59-60.

Provided that, incentives are, in fact, not a mandatory provision that needs to exist in this DINFRA context. With few market participants on the one hand and transport development on the other hand, a little incentive as a sweetener or attraction would be a good move. If incentives are available, these better are offered transparently to attract investors and fundraise for a larger market participant.

(b) No incentives or facilities are available to date

It is observed that, indeed, there are not yet any incentives until now. Whether it relates to the investors' investment (unit subscription) in DINFRA or DINFRA's investment in the infrastructure portfolio. The weak public introduction of DINFRA exacerbates this situation. No universal definition of alternative financing or investment causes DINFRA not always to be regarded or promoted as one, while the regulatory framework already provided hints on the recital part. Some websites from the search engines also show that PPP and SWF are more introduced or promoted as alternative financing schemes for infrastructure projects (including transport) than DINFRA.

Recalls the indirect investment scheme of DINFRA (corporate ownership). There is also an obstacle in the corporate registration and licensing process. The government seems to undermine the ease of implementing this scheme, particularly concerning the company registration and licensing at the Ministry of Law and Human Rights of the Republic of Indonesia (MOLHR) system. On the technical side, the electronic registration system only conservatively recognised general legal and business entities' types (for example, limited liability companies, cooperations, and foundations). It implies that the system can only read entity types that generally engage in trade and business activities and are registered as shareholders in the corporation. They have yet to recognise a CIC as a shareholder.³⁵⁷ As a result of this obstacle, this inconvenient circumstance may add to the complexity of the DINFRA structure and affect the attraction of choosing DINFRA. Here, the categorisation of funds as an entity needs to be explored to facilitate the practical enforcement that leads to investment promotion and market confidence under securities regulation.

³⁵⁷ Confidential-1, "Dinfra in Indonesian Market, Challenges and Opportunities."

It is also learned that following the launch of the DINFRA regulation, an effort was also made by one of the associations in an asset management industry (around 2017-2018) that proposed incentives stimulus about tax for promoting market participants. Nonetheless, unfortunately, further updates have yet to be heard.³⁵⁸

5.2.3.3 Review from the viewpoints of CIS, ELTIF and Thai IFF concepts

(a) Viewpoint from the IOSCO

Since its publications about CIS have yet to address this topic specifically, the author views that the incentives for investing in CIS might be under the discretion of each regulator within the relevant jurisdiction. The investment facilities or incentives might not be considered mandatory in building market confidence, though. But, if the investment incentives are truly available and can be applied, they could be regarded as a mutual and beneficial selling point. And if there is one, it would be better to have a clause or provision on the said incentives easily accessed for transparency performance and, again, foster investment promotion.

(b) Viewpoint from ELTIF Directive

ELTIF only talks about incentivising the retail investor by enabling a redemption policy for certain/limited purposes instead of a strictly non-redemption policy. Other than that, no significant provision represents a particular incentive for any parties in the transaction. The author further assumes that investment incentives may be offered or be governed by regional frameworks (relevant countries or jurisdictions in the EU) in separate frameworks. Due to scope of limitations, the author did not thoroughly examine such matters.

(c) Viewpoint from Thai IFF

While the Indonesian regime in DINFRA has not recognised investment incentives, the Thai regime, by contrast, is relatively bold in incentivising taxation

³⁵⁸ Confidential-3, "Local and Foreign Investors Views in Indonesian Funds Practice."

treatment in the form of tax exemptions when the investors participate in IFF.³⁵⁹ The tax exemptions for infrastructure funds are divided into two forms: (i) an exemption from the income tax payment to individual unitholders (except the unitholders who are in the forms of ordinary partnerships or non-juristic groups of persons) concerning the dividends received from infrastructure funds for ten years since funds registration; and (ii) an exemption from the value added taxes, specific business taxes and stamp duties.

Interestingly, Indonesia has even looked at such an IFF model with this tax incentive feature.³⁶⁰ Nonetheless, there has been no constructive feedback regarding the said research study until now. No regulatory adjustments have been made to boost the attractiveness and popularity of this DINFRA product. In other words, there is no available updated rules or information regarding tax incentive in DINFRA, including when DINFRA would receive the dividend from the company that owns infrastructure assets.

5.2.4 The corporate ownership by DINFRA

The issue of this topic is essentially only relevant to DINFRA's scheme with indirect investment via shares ownership in the SPV or target company that owns or possesses the infrastructure assets.

5.2.4.1 Absent concept of corporate ownership in disclosure and FDI contexts

This problem is only relevant when DINFRA indirectly invest in the infrastructure asset/project via equity participation. Clear guidance in the legal framework about the mechanism and implication of corporate ownership will be useful for helping the investors and fundraisers in considering this scheme.

³⁵⁹ The tax exemptions for infrastructure funds are granted by virtue of the Royal Decree dated October 9, 2012. "Prospectus of Btsgif.", p. 186-188.

³⁶⁰ The Indonesian government apparently has conducted research study (even in Thailand which does have incentives in the form of tax exemptions. OJK, "Strategi Nasional Pengembangan Dan Pendalaman Pasar Keuangan Tahun 2018-2024.", p. 64.

5.2.4.2 Review of the absent concept of corporate ownership in disclosure

(a) Unspecified implication of corporate ownership and no requiring provision to make it disclosed

As a brief overview, corporate ownership exists when a DINFRA makes an indirect investment in an infrastructure asset by purchasing shares of the company that owns the asset with or without an SPV. This investment is a minimum of 51% of the AUM in the DINFRA and is implicitly interpreted by industry participants as representing the stake of the DINFRA in the target company.

As such, DINFRA will hold majority shares that cause it to have voting rights and controlling positions in the investee company. This position raises pros and cons. Per the data obtained from interviews, from the perspective of infrastructure asset owners, the schemes may cause confusion and concerns as their existing shareholders may be diluted due to the inclusion of the DINFRA significant shareholding. As for prospective investors, they have no excessive concerns about this position, and they are even happy if it will have an impact on great returns. However, they are more concerned about other potential indirect risks that may accompany them, such as regulatory risks and operational risks.

To address this, transparency provisions are essential to make this information available to the public (investors' informed decisions, plus the target company's consideration). It aims to provide an outlook on the investment strategy, implications of rights and obligations towards major corporate ownership for DINFRA and the parties involved in DINFRA during the transaction, including the capacity of DINFRA when exercising its rights as shareholders. However, it is also understandable that such kind of disclosure may be challenging for investors to be well-informed, given the complex commercial and technical aspects.³⁶¹ But unfortunately, as it stands now, OJK Reg

³⁶¹ it involves data of the infrastructure asset, its risk and returns calculation that may include profit and loss, balance sheets and cash flow statements, alongside transaction value. Christopher Niesche, "Building Transparency into Infrastructure Investment," *The Australian Finance Review* (2021), <https://www.afr.com/companies/infrastructure/building-transparency-into-infrastructure-investment-20210804-p58fux>, p. 1-4.

52/2017 has not yet regulated anything as in-depth as what CIS and ELTIF have discussed.

(b) DINFRA as a shareholder in the SPV

As discussed earlier, infrastructure investment by DINFRA can be made via an SPV. The concept of having an SPV attempts to help the target company (one with infrastructure assets/projects) have indirect or less exposure from DINFRA's participation, which can be in a majority proportion of shareholding composition. And if this scheme is chosen, then the concept of DINFRA's shareholder rights might not be as crucial as a direct investment, because DINFRA might control the target company without immediate exposure that can dilute the existing shareholders' proportion. Although, the minimum percentage for DINFRA to invest in SPV shall not represent less than ninety-nine per cent of shares.

A more complex situation is when the majority shareholding of DINFRA is directly in the target company that operates or possesses the infrastructure assets/projects. This often becomes the critical concern of whether DINFRA would be workable from the perspective of projects' owners or sponsors.

The implication of such major shareholding mechanics regarding corporate governance at the target company or SPV level is anticipated. For example, this may relate to the right to vote of DINFRA in the shareholder's meeting. Hence, disclosure about the corporate ownership of DINFRA is anticipated to be made for investors' awareness and potential projects' understanding that looks for funding options.

5.2.4.3 Review of the absent link on the possibility of foreign unitholding to overlap the FDI regime

The legal framework now has an unclear position on whether major foreign unitholding in DINFRA will be regarded as a foreign entity subject to FDI regulation. And in the case of the only DINFRA product, it is observed that its unitholders are Indonesian investors only (which means that there is no foreign investor). And accordingly, overlapping FDI would not be an issue.

However, should DINFRA has potential future investors that come from overseas, this concept needs to have a solid justification for making them aware of the concept comprehensively. Irrespective of the terms of the ‘Negative Investment List’ are no longer applicable in Indonesia, there is still a percentage restriction for specific industries that need to be considered.

In this case, would there be an issue if there is a limitation of foreign and local ownership within such corporation’s business line? In toll road construction, it is fortunate that it is fully open for foreign ownership because it is a prioritised project and subject to a tax-deductible facility.³⁶² But on other sub-sectors of transportation, such as courier activities; air, sea, and water freights; commercial air carriers for passenger and cargo, the maximum threshold for foreign ownership is around 49%.³⁶³ Since OJK Reg 52/2017 does not regulate to the extent that foreign unitholders will be subject to this FDI regime or not, it leaves an unclear situation on which laws should survive.

5.2.4.4 Review of the prospectus sample

A review of the prospectus sample is conducted to see whether there was an adjustment or expansion to explain corporate ownership via DINFRA, plus any hints regarding any chance to overlap the FDI. Since there is no requirement to disclose it as per the legal framework, it is observed that the prospectus complied with the rule without any adjustment and said that DINFRA would invest nearly hundred per cent in the SPV. It left hanging information on the details of DINFRA shareholder rights in the SPV that owns shares in PT Jasamarga Pandaan Tol and PT Trans Marga Jateng (holders of toll road concession), associated fees and pricing, taxation treatment and investor’s protection.

For this reason, the current sample prospectus does not explain the impact, the mechanism that will be taken, and so on. Although there is a keyword of ‘to

³⁶² *Presidential Regulation Number 49 of 2021 Concerning Amendment to the Presidential Regulation Number 10 of 2021 Concerning Investment Business Activity.*, Annex I, p. 63.

³⁶³ *ibid.*, Annex III, p. 2-3.

disclose material facts', its meaning or coverage is sometimes ambiguous and causes the concept of corporate ownership to become excluded as a material fact to be considered. Extra approaches are anticipated to enhance the investors' knowledge as they might seek additional sources of information by themselves.

Likewise, regarding FDI, since DINFRA invested via an SPV, there would be no specific implication on major foreign unitholding to overlap with Indonesian FDI rule. It is observed that unitholders in DINFRA JMTR-001 are not foreign investors, and an SPV normally engages in management or business consultancy activity free from foreign ownership restriction.

5.2.4.5 Review from the viewpoints of CIS, ELTIF and Thai IFF concepts

(a) Viewpoint from CIS concept

This particular problem is closely related to Principle 25 of IOSCO Objectives and Principles 2017, in which OJK Reg 52/2017 is absent in regulating the structure of DINFRA and the governance of funds, mainly when DINFRA opts for an indirect investment scheme (causing it to act as a shareholder in the investee company that owns infrastructure assets). The absence includes the failure to specify the shareholder rights as one of the requirements in the disclosure information, contrary to what IOSCO says. The lack of explicit provisions that discuss DINFRA shareholders' rights and the disclosure requirement for public knowledge is argued to deprive the investors' interests. Whereas those items are seemingly unnoticed or missing to be known by the prospective investors; hence, their informed decisions may be affected. The shareholder rights arise from the corporate ownership of DINFRA (link back to the idea of indirect investment of infrastructure assets), on one day, would be exercised.

In CIS settings, CIS operators should be aware that the shareholder rights associated with securities held by a CIS (including voting rights) are important rights that belong to the CIS and should be considered and exercised in its best interests alone. A CIS operator may conclude that it will not vote or take other action as a shareholder if it believes this decision is in the best interests of the CIS investors. For example, where the costs of voting are significant, those costs may outweigh the

potential benefits of voting to the funds.³⁶⁴ Hence, it would be appreciated if the DINFRA operator always keeps respect for the ultimate investor of CIS while the CIS operator acts on behalf of CIS in exercising the rights of CIS' shareholders. And speaking of voting rights, OJK Reg 10/2018 has required the fund manager to set up policies. Lastly, to the best of the author's findings, the concept of CIS has not touched any discussion on the local FDI regime in particular.

(b) Viewpoint from ELTIF concept

ELTIF Directive does not explain the implication of corporate ownership of ELTIF in detail, including whether corporate ownership needs to be publicly disclosed or not; instead, AIFM Directive explain it more. If ELTIF invests in non-listed companies with a major proportion (or shareholding), AIFM Directive (Articles 26-28) requires notification and disclosure about such acquisition of control, along with pre-determined policies to mitigate any possible conflict of interests due to such major shareholding (including voting rights matters) and the requirement to disclosure about the said acquisition of control. Lastly, as for the FDI matter, it is certainly not a concept that ELTIF recognises.

(c) Viewpoint from Thai IFF concept

On corporate ownership matters, Thailand has a similar concept in its legal framework which does not explicitly address the funds' shareholder rights. Arrangement or treatment on this is argued to be on the parties' convenience and creativity in structuring the deal.

And regarding the linkage between corporate ownership and FDI rules, interestingly, the applicable rule of Thai IFF discussed such potential exposure. The relevant framework suggests that the IFF comply with the applicable FDI rule in Thailand, which means not overlapping or waiving the FDI regime.³⁶⁵ As a brief note, under the Thai FDI regime, it is understood that domestic transportation on land, water

³⁶⁴ IOSCO, "Collective Investment Schemes as Shareholders: Responsibilities and Disclosure.", p.9.

³⁶⁵ *Notification Cmsb 38/2562.*, Clause 49.

and air is restricted from foreign shareholding unless it obtains certain approval from the relevant government institution.³⁶⁶

Furthermore, upon checking on the sample of BTSGIF Offering Memorandum, the shareholder rights of BTSGIF are not specified because the applied investment scheme by IFF in such deal is purchasing future revenue of BTS SkyTrain Core (which is more similar to CIC of asset securitisation in Indonesian practice), not purchasing the shares of the operator of such BTS. For that reason, there is no information on FDI compliance in it.

5.3 INFORMATION TRANSPARENCY PROBLEM BEYOND OJK REG 52/2017: INFORMATION ASYMMETRY

The transparency problem in this section is information asymmetry as an additional problem to the opacity of key provisions in OJK Reg 52/2017, as analysed earlier. The asymmetric information involves minimal access and availability of information from the past transaction of DINFRA. With only one DINFRA in the market, evaluation through data compilation is hampered by the lack of access and the amount of information that can be extracted, not to mention the lack of promotion from the government, which should ideally socialise this scheme for the betterment of the common good.

Correspondingly, key concerns of the parties interested in DINFRA led to information asymmetry when they were held for two reasons. One reason is that the parties with such concerns seek benefits by holding information with particular 'value'; another reason is that they do not know which information is needed to share and obtain. The last reason recalls the opacity of OJK Reg 52/2017 as a rule of thumb.

5.3.1 Rare and minimal information about DINFRA

This problem arises due to limited sources of information availability, particularly about the past trends of DINFRA products, for assessment purposes before the investors make their informed decisions. How it becomes minimal is driven by the

³⁶⁶ *Foreign Business Act B.E. 2542 (1999)*, Section 8, Annex List Two.

small number of participants, as shown by the only one DINFRA product in Indonesia, DINFRA JMTR-001, as listed in the office of IDX.

5.3.1.1 Limited source and quantity of information about past and current DINFRA products

This information or data shortage may be considered a manifestation of information asymmetry that connects to how deficient DINFRA's transparency is from a regulatory perspective. Despite the regulatory framework of DINFRA requiring mandatory disclosure of information and the practice has attempted to comply with it, unfortunately, the available information was disseminated in the market and was obtained by some institutional investors (due to their sophisticated profile) remained scarce, redundant, or even scattered. It is understood. Therefore, mandatory disclosure apparently does not meet the investors' expectations, and information asymmetry would happen again. And in turn, the parties with less adequate information would be affected by an increased aggregate investment cost.

5.3.1.2 Review of no comparing data and minimal promotion by government

(a) Minimal amount of information and difficult access to it

Information details about the overall concept in theory and practice of DINFRA transactions, including its sole product, is scarce. Whether it is regarding the recent status or the past trends. This minimalism or rareness also reflects the difficulties in accessing information, like the annual report, the past prospectus, and other information that are ideally available in the public domain. The clues about that information and data also were found on the websites of IDX, but they are not entirely and easily accessible.

Regrettably, even the website of OJK and their respective investment manager has minimal information about that. In addition, sources that can be used as references are certain news through mass media, which is arguably reliable to be used as the primary basis, and it may not fully capture the significant or key information as desired by the parties interested in this transaction. Likewise, it also observed through interview data that there were some other DINFRA products in the past, but they were liquidated

due to some commercial. This situation worsens the information evaluation stage, data that was expected to broaden comprehension is not available. Other samples of less support or introduction can be seen from several websites that are not maintained to provide updated information, to mitigate misleading and perplexing conceptions when assessing the same.³⁶⁷

(b) Less introduction and promotion by the government

This observation also relates to less introduction and advertising by the government bodies in Indonesia about DINFRA which may influence the rareness of information. In the so-called digitalised era, in which public information is primarily available in search engines, like websites, news, blogs, articles, etc., there is only a minimum amount of information from such sources that introduce DINFRA, whether as alternative financing. If the capital market industry (plus all relevant agencies to DINFRA and infrastructure projects) does nothing to promote this scheme, then who will recognise and consider DINFRA? As mentioned earlier, PPP is still being marketed as alternative funding.³⁶⁸ Just as SWF and ordinary public offering of shares.

This discussion is in line with the absent provision about investment incentives in the OJK Reg 52/2017, as above. Though the absence of investment incentives and the lack of investment promotion do not directly connect to the governance concept, the highlighted transparency point refers to the securities regulation concept; how market confidence can be shaped if more transparency within needs to be better implemented.

For the above reasons, a conservative approach still can be pursued (e.g., asking for help from professional advisors), however, it would be better if the relevant

³⁶⁷ For example, data as shown in websites (<https://pasarmodal.ojk.go.id/DanaInfrastruktur>; <https://www.bowsprit-am.com/dinfra>) do not seem to be updated with the latest one. PT Aberdeen Standards Indonesia left Indonesian market in 2021.

³⁶⁸ IFC World Bank Group, "Indonesia's Infrastructure Investments: Finally Taking Off," https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/indonesia+infrastructure+investments

data for investors and public knowledge about DINFRA could be publicly opened or shared in an accessible platform. The author regrets that given the situation, DINFRA JMTR-001 is the only existing product; greater efforts are anticipated to promote and mobilise the market interest and applicability of using this scheme in fostering infrastructure development without relying on the state budget. The author further sees that the information rareness might discourage the attractiveness of investors in participating in DINFRA.

Should the potential investors face this typical problem, instead of being curious and looking for information as much as possible, they may walk away and search for other investment options that fit with their profiles (i.e., long-term investments with a certain percentage of IRR). In other practical cases, information shortage may serve as a 'deal-breaker' because it can also affect the transaction's aggregate pricing detail, timing, or indicative schedule. In contrast, however, even if the investors do not opt to walk away, the problem of the additional cost may come back again as they need to discover complete information that would not be likely free of charge and have a quicker schedule.³⁶⁹

Other samples of less support or introduction can be seen from the promotion of PPP as an alternative approach to finance infrastructure assets/projects by the Ministry of Finance of the Republic of Indonesia and the Ministry of Public Work Housing in some electronic news and media.

5.3.1.3 Review of prospectus disclosure that could not suffice the information demand

Theoretically, a prospectus has been designed to expose important information for investors' assessment and knowledge to avoid the increased cost of finding the missing information. It is expected to deliver sufficient information, regardless of whether it is entirely reliable. However, its implementation as a mandatory disclosure tends to be carried out as a formal compliance without

³⁶⁹ Stephen Bainbridge, *The New Corporate Governance in Theory and Practice* (Oxford: Oxford University Press, 2008), p. 1-260.

underlining the substance to disseminate non-misleading, true, material, relevant facts for public knowledge and assessment into an informed decision.

Reviewing the regulatory framework, it attempts to provide adequate measures for information disclosure on securities offerings, i.e., elaborating the standards of information to be disclosed. Regrettably, the rule has less solid liability provisions if the disclosure is not carried out appropriately; it says to the extent that disclosure shall not represent misleading and untrue facts.

Prospectuses in Indonesia actually resemble those in other ASEAN countries (including Thailand); they entail a pre-screening or regulatory compliance review by the securities regulator.³⁷⁰ But such screening or assessment is doubted to permit supplementary information to complement the basic information already made available because of complying with the applicable rule. Adding data or information is debatably allowed so long it can be directly relevant and not misleading.

For DINFRA with only one product, the information that the public can access and utilise for analysis are minimal or limited, e.g., the past prospectus and financial statements. As a part of mandatory disclosure, the prospectus exposes what the regulation merely requires. As such, the presented or disclosed information might not satisfy investors' needs before deciding to invest in DINFRA.

The prospectus sample also shows that the disclosed information was based on what the regulatory framework requires, just as a tick-list task. It complied with the minimum requirements of information or data to be disclosed, and the public or potential investors might need additional assistance for additional information. Here, it is observed that mandatory disclosure (e.g., prospectus) may not necessarily suffice the information needs.

In practice, the requirement of minimum standards for information disclosure restricts any adjustment or expansion because no law allows or prohibits doing so. Plus, there is no universal benchmark to help interpret the sufficiency and clarity of information for the investor's benefit. It is difficult to measure whether there is non-

³⁷⁰ Sheng, *Capital Market Reform in Asia. Towards Developed and Integrated Markets in Times of Change.*, p. 221.

relevancy or missing links to the material facts, confidentiality issues by another rule that limits full openness, or other particular intentions to hide. It is left hanging without any expanded information.

It is understandable if there might be any inside information that could not be publicly disclosed to prevent public confusion or misleading. However, playing safe by merely adhering to the minimum standards would not only leave retail investors confused but also institutional ones. Given that DINFRA is a unique and novel scheme in Indonesia, efforts to balance the information are necessary should DINFRA be intended for alternative infrastructure financing. And due to such a shortage of the required information, the investors may perceive an increasing budget for their investment. As severally denoted, the parties with less adequate information would bear an unavoidable cost of finding information that may affect their aggregate investment costs due to extra effort and time to obtain the full/complete picture of information.

5.3.1.4 Review from the viewpoints of CIS, ELTIF and Thai IFF

Regarding rare or minimal information for comparison and assessment purposes, from a Thai perspective, it is reviewed that almost every IFF product has its own website and is mostly complemented with an English version for easier reference.³⁷¹ So long as the past or current data are made publicly available, they would not be solely advantageous for the potential investors, but also for the existing investors (to determine whether they stay or exit from the investment). As for DINFRA, the Thai approach is worth adopting, considering the complex nature and characteristics might not be deeply understood by every professional advisor in the same industry, and, likely, they are also still adapting to what DINFRA and CIS best practices are. And from the perspectives of CIS and ELTIF, the past data and information (e.g., recent annual report) to be made available are generally recognised, though it was not stressed under the idea of information asymmetry. And regarding

³⁷¹ As elaborated in Chapter 2, IFF procures the necessary information dissemination for the public domain in each official website of BTSGIF and TFFIF, in addition to some other data or information about IFF that has been transparently shared on the official website of the Office of Thailand SET.

the prospectus as a compliance, the author limits thorough review on CIS, ELTIF and Thai IFF concepts.

5.3.2 Different concerns about DINFRA

DINFRA is conceptually a complex investment product that involves a wide range of parties (e.g., the funds alone, the fund manager and supervisor, the investee company, the funds' investors, and other professional supports). That circumstance would inevitably lead to diverse or even mismatched interests and expectations, especially on transportation financing. Transportation financing, especially in toll road or highway business, will involve government interference in licensing, concession, and other administrative matters.

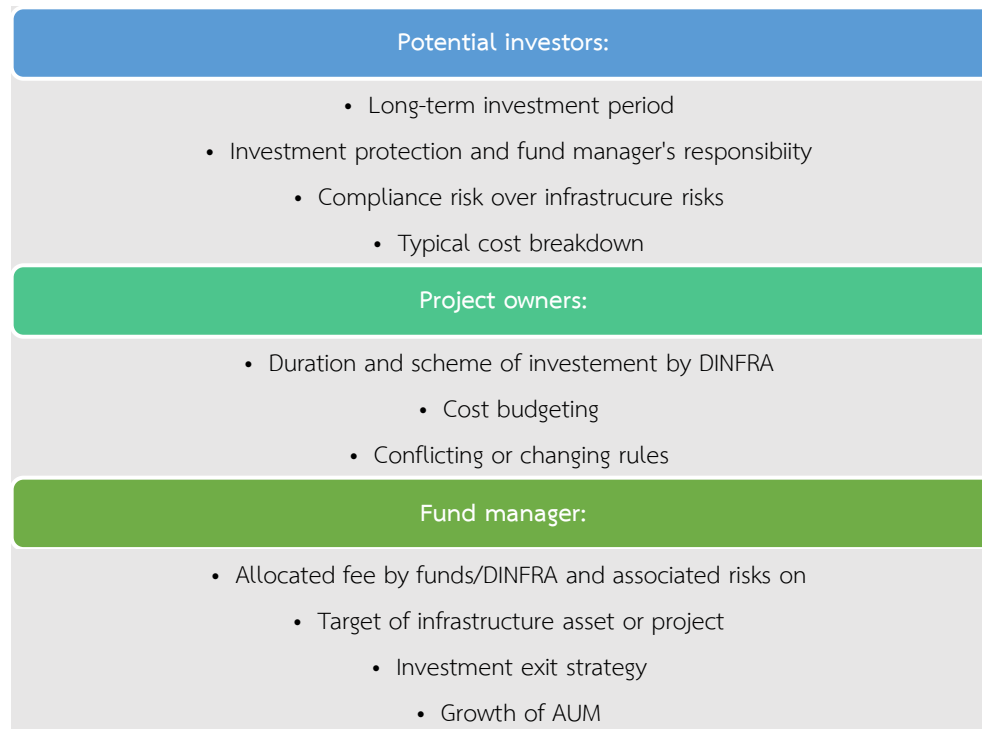
Aligning such diverse interests would be another challenging task. All parties tend to seek quicker routes and less risky structures but with cheaper costs and expenses. In turn, pricing is crucial information. Regarding pricing, what they have in mind is how to maximise the return with little or huge expense. However, how reliable information about pricing and other relevant details can be obtained before the investment is concluded.

5.3.2.1 Different concerns that are disseminated at different times and qualities

Given the fact that an information asymmetry occurs when one has better access or quality of information than the others, the author further analyses that each party in DINFRA might think that they have their own key information that is characteristically different between one and the others and would serve better quality for closing the deal.

As individually prepared and sourced from interview data collection, Figure 5 below itemises the typical concerns of the parties in DINFRA, while the explanation of them will be in the next part.

Figure - 5 Typical concerns of the parties in DINFRA



5.3.2.2 Review of the parties' typical concerns in DINFRA

(a) The concerns of the potential investors

It is observed that the potential investors in DINFRA tend to be ones with institutional profiles rather than retail ones. Observation from an interview shows that public pension funds, social security funds and some other insurance companies were interested in participating in DINFRA. Their primary and key concerns are a long-term investment that may link to the associated risks and a plan to exit from the subscription (considering that DINFRA is open for unit redemption during the investment period).³⁷² Alongside a predictable cash flow and a low sensitivity of infrastructure characteristics to swings in the business cycle – as argued in one literature.³⁷³ Just as in the perspective of public pension funds (as institutional investors) in the U.S., they are likely to invest in the infrastructure funds with a better offer exit strategy without making them stand longer in the investment.³⁷⁴

³⁷² Confidential-2, "Private Funds and Dinfra in Indonesian Market ".

³⁷³ Andonov, Kräussl, and Rauh, "The Subsidy to Infrastructure as an Asset Class.", p. 2.

³⁷⁴ *ibid.*, p. 19.

Further, the author analyses several aspects of investors' concerns on Associated risks throughout the long-term investment in the fund. Before deciding to invest in DINFRA, the potential investors will need to understand the investment strategy in the infrastructure asset (deal structure and typical scheme to be chosen, whether with equity underlying or debt underlying). The purpose is to match with the concern of projected return as they will invest in a long-term period.

(i) Long-term period and investment strategy

The perception of a long-term investment may vary on different investors' profiles. Those with a state-owned enterprise background have additional concerns about whether their decision to invest in DINFRA may or may not influence and attract plausible negative findings that can jeopardise them in the future if investigations or audits are carried out. Indonesian companies with a state-owned enterprise background are likely to draw attentiveness from the relevant government authorities in terms of the expenditure of funds and the determination of the investment scheme to avoid losses to the state. It is observed that one typical institutional investor interprets long-term as a range that is not to be longer than the job tenures of the management team (who has decision-making powers) of the relevant institutions. The investment period is expected to be around five years counting from their board or management tenure.

Due to their profiles, their management team tends to maintain their internal performance and expect incentives from the investment proceeds, on the one hand. But on the other hand, they would like to avoid undue risks within their tenure. Therefore, they would be extra careful in making long-term investment decisions, especially using alternative schemes like DINFRA.³⁷⁵ And thorough consideration of this matter often entail a longer time, and when they decide, the opportunity might be already gone. In turn, the chosen infrastructure financing channel tends to return to the traditional or common one due to leniency or familiarity. This finding and analysis are relevant to the idea of the limited raising of institutional funds, which claims that

³⁷⁵ Confidential-2, "Private Funds and Dinfra in Indonesian Market ".

choosing low-risk investment opportunities with a record of positive returns in the past is influenced by social roles.³⁷⁶

And regarding the investment strategy, this also relates to the investors' confusion about when and how to divest their investment. The consideration covers whether they withdraw by redemption scheme or unit transfers to new investors, etc., in what year they should exit and get the most optimum return.

As for DINFRA JMTR-001, it indirectly invests in toll-road with more than 20 years of the concession period. Though there is an opportunity for unit redemption, due to the long-term characteristic, such redemption needs careful calculation and consideration to avoid a particular impact on financial position.

(ii) Investor protection and the fund managers' responsibility

This concern recalls the earlier discussion on the relationship between the investors and the fund manager. The fund managers' responsibility for the investor's interest apparently becomes a crucial topic for certain profiles of investors. Research interview observes that several local and foreign institutional investors raised questions on how the investors would get a safeguard in this large/significant and lengthy investment. Foreign investors were interested in joining DINFRA and private funds to diversify their portfolio and expand their market in Indonesia, as they thought of long-term characteristics just as in AIF practice in the EU.³⁷⁷

The primary consideration was regarding how the implementation of investor protection goes whenever there is an opportunity for adverse behaviour by the system, including how the professionals conduct funds management and operation. They were perplexed with the idea of a contractual relationship between the fund managers and investors, which is not explicitly suggested by the applicable regulatory framework, in addition to the deed of CIC that is said to bind the investors, too, as the third party. Recalls that the deed of CIC is made between the fund manager and custodian bank, and the investors do not act as the signatory.

³⁷⁶ Akintola Akintoye and Matthias Beck, *Policy, Finance & Management for Public-Private Partnership* (Oxford: Blackwell Publishing, 2009), p. 169.

³⁷⁷ Confidential-3, "Local and Foreign Investors Views in Indonesian Funds Practice."

As DINFRA is a relatively long investment, the potential investors with high-value sources particularly consider the investment strategy on protection and responsibility in case of any unwanted situations that may jeopardise the funds and the investors during such a long-term period. This idea is relevant to the prior discussion on no provision in the regulatory framework that suggests commitment between the fund manager and investor. In essence, while the potential investors are interested in the scheme and understand the risks in general, they want to be cautious and make an unprotected decision.

(iii) Regulatory compliance risk over infrastructure risk

The potential investors in DINFRA tend to be more sensitive to regulatory or compliance risks of choosing funds as their option of asset or portfolio diversification (e.g., infrastructure financing channel due to their expectation of specific benefits rather than the risks that are normally derived from the infrastructure nature. It is similar to the findings in the reading references, in which there are some cases when the striking characteristics of infrastructure investment (such as attractive cash flows with inflation protection) were not often captured by the potential investors when investing in infrastructure funds.³⁷⁸ It is also in line with the profile and common interests of institutional investors that seek investment types that best match their preferences, i.e., maximising return and liquidity exposure without participating in the operation or technical side of the infrastructure business.

Meanwhile, in fact, calculations on infrastructure risks are crucial because of their linkage to the revenue projections from the infrastructure asset level to the investor level. For example, in the transport business, it is necessary to consider traffic volume, tariff increases, force majeure, pandemics, etc. The commencing period of receiving recurring projected returns can be identified if proper or careful consideration is conducted by expressing the investors' concern to the other parties. There are times that the return can start to be distributed at certain years following the initial stage/years of investors' fund placement in DINFRA because the income at the asset

³⁷⁸ Inderst, "Infrastructure as an Asset Class.", p. 95

infrastructure level has not yet been generated or can be generated but is eroded by other costs/expenditures.

Furthermore, it is observed that the typical investors in DINFRA and similar CIC models like private funds would seek the brownfield project because it has already generated cashflow, for example, toll road.³⁷⁹ For example, in DINFRA JMTR-001, the construction phase was completed in 2019.³⁸⁰ Thus, to match or align the interest of these investors with the availability or readiness of projects in the field, there are times when schedules and commercial business calculations become a challenging task.

Hence, the idea of confidence in the market is relevant to their ability to assess the securities' value because the shared information reflects the accuracy of such information's material being shared. As part of the governance study, market confidence would lead to preserving well-maintained securities, thereby supporting their growth.³⁸¹

(iv) Investment cost breakdown and high return

The concern is what costs are borne by the investors since they will not only need to prepare money for the unit's subscription, but they (together with the fund managers) also need to consider the rate and schedule of payment of management fees and some other fees, like custodian fees. Management fees and custodian fees are typically charged by the fund or AUM balance. But it might be possible, too, that at the beginning of the investment and in the first few years, the AUM balance is insufficient to pay those fees due to pending growth.

How to deal with this negotiation takes an extended time until the parties reach joint interests. Information on costs and pricing are inherently sensitive and may not be suitable for public exposure. Hence, in most cases, information dissemination on key or inside information is disseminated via voluntary disclosure.³⁸²

³⁷⁹ Confidential-1, "Dinfra in Indonesian Market, Challenges and Opportunities."

³⁸⁰ Eko Widiyanto; Endri Kurniawati, "Persingkat Waktu Tempuh, Jokowi Resmikan Tol Pandaan - Malang," Tempo.co, <https://bisnis.tempo.co/read/1204848/persingkat-waktu-tempuh-jokowi-resmikan-tol-pandaan-malang>.

³⁸¹ Enriques and Gilotta, "Disclosure and Financial Market Regulation.", p. 10-12.

³⁸² Confidential-3, "Local and Foreign Investors Views in Indonesian Funds Practice."

Correspondingly, some sophisticated investors are aware that besides management fees and custodian fees (the standardised component of fees), advisory fees and performance fees might also be charged for fund formation and management. A clear perception and the same pictures are expected to avoid future confusion or blaming due to non-transparent information. Especially with the target company. For example, DINFRA JMTR-001. Since the deal involved toll road concessions then the calculation needs to consider traffic volumes, tariff adjustment and other costs that are payable by using the money from the funds' investment.

Additionally, savvy investors (especially ones with foreign exposure familiarity and institutional profile) must be aware of advisory fees and performance fees that can also be incurred within the fund inception and management. Addressing these key concerns to the fund managers is anticipated to prevent conflicting perceptions in future circumstances due to non-transparent material information. Since this specific information is likely to be shared and discussed privately, even when they understand the fee component. The tricky point is calculating the suitable and appropriate amount for the investment value, duration, responsibility, target return, etc.

And regarding the high return orientation of the potential investors, it is observed that they do not have similar perceptions with the project owners and the fund manager because some factors may influence the reduction or increase of return that can be guaranteed as the beginning.

(b) The concerns of the transport project owners' or sponsors' side

The lack of transparency in DINFRA stems from the infrastructure project itself, which adds to the complication of information transparency issues at the regulatory framework level and information dissemination. The OECD has conducted a study highlighting that in some of the infrastructure projects financed by PPP, a situation happened where limited and scattered information on the risk profile, and

performance growth of the infrastructure market in general, in turn, would make certain challenges.³⁸³

From the fundraisers' viewpoint, the author analyses that several concerns influence them in choosing DINFRA as an alternative route for financing.

(i) Duration and scheme of investment by DINFRA

The central concern here is transparency about the deal structure, both generally and specifically. Based on an interview data collection, it is observed too that there are times that the project owners generally wish to ensure that financing through DINFRA would not affect their opportunity of seeking financial aid from other sources (if any), their operations would not be adversely affected or interrupted because DINFRA will invest in at least 51% (fifty-one per cent) of its NAV. Another central issue is about the chosen scheme in DINFRA, whether it is equity contribution or debt instrument issuance, and for how long. Bond issuance (debt underlying) has been considerably drawn attraction compared with the equity underlying. While for equity contribution, the owners of infrastructure assets might think of the maximum percentage that DINFRA and whether DINFRA will be the shareholder in the target company (that owns infrastructure assets) until DINFRA's period of incorporation or not. Also, they would consider whether DINFRA will hold the shares via an SPV or directly to the target company since this would touch on different legal and commercial implications.

Should DINFRA directly hold majority shares in the target company, the target company might see it as challenging since current relevant shareholders need to dilute their shares for DINFRA. And if DINFRA invests via an SPV (just as in the reviewed sample case), it would be slightly less complicated because DINFRA may indirectly control the infrastructure assets that the target company owns. Next, they would also be concerned about the plan of DINFRA once it expires in the future.

³⁸³ Infrastructure projects are prone to be opaque due to their loose and varying structures. OECD, "Infrastructure Financing, Instruments and Incentives.", p. 8.

(ii) Cost budget consideration

It is examined that before deciding to fundraise via DINFRA, the project owners would calculate their financing budget by measuring the associated risks and other factors like the existing situation with their current lender (or financing providers), restrictions from other ongoing contracts, regulatory compliance, license, etc.³⁸⁴ Their assessment goal is basically whether choosing DINFRA would be less costly and less complex than any different offered scheme of infrastructure financing, especially if there are tax treatment and other incentives - as cost reduction. Likewise, this budget consideration may also connect to the projected income stream calculation from the infrastructure assets/projects against the investors' return, as there might be a delayed distribution due to operational matters.

(iii) Possibility of conflicting or changing rules

This concern can also be relevant to the FDI requirements, in which the maximum allowance for foreign shareholding shall be considered. Although the restrictions for foreign ownership in Indonesia's current FDI regime are not as stringent as before, prudent cross-reference to relevant law and practice might always be needed. Besides, this concern can also be related to any rules or permitting requirements within the operational/business licenses as required by the relevant regulations (for example, toll road business) and any provisions in the current financing contract with other financiers. The project owners or sponsors of the infrastructure assets need to ensure that DINFRA scheme would not make any overlaps.

Another thing that becomes one of their biggest concerns would be the regulatory threats or risks that relate to the changing rules that can happen due to the political environment. In Indonesia, different government eras might bring different movements or innovations, bringing positive and negative impacts. It is understandable that the concerns of regulatory change coupled with the lack of participants in the market are perplexing and can cause lesser attractiveness. However, by carefully calculating the transaction structure and exit strategy, such measures help mitigate the impact of such regulatory changes whenever they occur. Based on the reviewed

³⁸⁴ Confidential-2, "Private Funds and Dinfra in Indonesian Market ".

prospectus, other risks that were envisaged comprise the threats of losing revenue, force majeure, destruction on the toll road access, traffic volume, etc.

On the above concerns, how the project owners often address their goals might not go as smoothly as expected. The information disseminated from them may come from many layers of corporate bureaucracy and in different timeframes. Assessing the complete picture to align the interests would take a lot of work.

(c) The concerns of the fund managers' side

It is undeniably understood that the fund managers may have much better information or knowledge about DINFRA. Such as, the prospective investors' background, the investment details and procedures, and anything left unclear in the OJK Reg 52/2017. And from the standpoint of the fund managers, the author analyses that several concerns influence them in promoting the establishment and application of DINFRA as both infrastructure investment and financing.

(i) Allocated fees and associated risks

In this part, the fund managers are observed to have better access to the key information on DINFRA's pricing and the associated risks. This pricing links to the allocated fees for each party in DINFRA. In particular, it touches on the management fees for the fund managers that shall be paid annually from the AUM balance; and the advisory fees that normally will be paid before establishing the funds or upon request.

The discussion about management fees would be inseparable from the agency relation concept, where the agent is justified in making decisions to satisfy the principal's interests, even though the agent (investment manager) may have competing interests with return maximisation for the investors. The management fee can be interpreted as remuneration for the fund manager in managing the collected funds. Their interest in revenue might be reflected in the value or percentage of the management fee, which will normally be charged annually. One literature has said that if the fund managers are compensated with a flat rate irrespective of the profitability

of the fund under management, then they will have no reason to strive to maximise investor returns.³⁸⁵

The method of determining the fee can differ depending on to what extent they seek such revenue. They can set it up by having a flat or non-flat rate throughout the investment period within five years or more. In a similar structure of private funds (back when the DINFRA scheme has not launched yet), determining the management fee rate can be challenging as the investors may object to the fund managers' proposal on such management fee rates.³⁸⁶ This shows how agents and principals can have differing concerns.

In DINFRA JMTR-001, OJK Reg 52/2017 states that the management fee rate is silently regulated, while the prospectus states that the maximum percentage rate would be around 2% of AUM to be paid annually. In practice, the exact rate might not be as precise as 2%; the would be the maximum rate as there would be no investors willing to go with such high price. By this circumstance, the author believes that the fund managers are expected to be transparent or open by sharing what they have in mind – without a hidden agenda or intention of seeking particular interests that may endanger investors' protection.

Next, about the advisory fee. It compensates for the research work and funds initiation before the terms and conditions are met and the funds are ready for establishment. This fee includes negotiation and preparation of funds formation. The problem arises regarding whose party is due to this fee, the scope of advisory, and the rate, which is often relatively costly. The investors deserve an explanation or clarity on this pricing component, should this fee be payable by them. In DINFRA JMTR-001, this notion is not transparently identified, but there might be one with a separate arrangement.

(ii) Target of infrastructure asset or project

Albeit the asset managers' comprehension of the above pricing matter, they might not necessarily be spotless when it comes to information access. While it's true

³⁸⁵ Nossa, "The Agency Theory Applied to the Investment Funds.", p. 36.

³⁸⁶ Confidential-3, "Local and Foreign Investors Views in Indonesian Funds Practice."

that they understand the investment scheme, typical investors that would be interested in long-term investment, the rules of the game, and access to coordinating with regulators. However, the fund managers may have knowledge limitations of the details of the project's internal risks and the infrastructure's character.

Information about the pipeline projects and value of funding needs (for example, who are project owners, whether the projects are privately owned or state-owned, the investment value and so forth) are crucial to be pre-owned as their basis for marketing and structuring the deal. Correspondingly, for some technical reasons (including risk calculation), the fund managers might only consider establishing funds if the target company has reached the planning stage of development, or in the financing process or at any stage where the operation is about to start (not in the greenfield stage). There are also due diligence activities and feasibility studies, in which the results will be matched with the needs of investor diversification and calculation for management fees.

Specific infrastructure sectors might also become particular concerns, interests, or preferences. For example, in DINFRA, asset managers accustomed to transport sectors are perceived as having better networks in such industries and may gather quicker information. As well as shortlist some of their client or investor bases as potential investors for early market identification.

(iii) Investment exit strategy

The fund managers also see the funds' exit strategy as their concern because it reconnects to investment gains and other commercial calculations for the funds that may indirectly incentives the fund managers.³⁸⁷ Despite the legal standpoint in reviewing exit strategies that may also need to be considered (e.g., restrictions by any laws or any applicable agreements), the concerns of withdrawal from the deal might not be understood at the same timeframe and meaning as the other parties. This means that, at a certain point of time, the investors and the fund owners might not

³⁸⁷ This is claimed as crucial not only because it may affect the returns of beneficial investors, but also to maintain the KPIs of fund managers (which can affect internal incentives) or to protect funds from potential enforcement (liquidation at the worst) by OJK due to poor performance. Confidential-2, "Private Funds and Dinfra in Indonesian Market".

have the same page as the fund managers in respect of investment exit strategy – while this is crucial or the project owner to calculate the revenue and profit of the projects that at the end, such things would be retrieved by the unitholders (investors) in the form of investment return.

The concern of exit strategy also covers how DINFRA may exit from its major shareholding in the target company. Though in DINFRA JMTR-001, DINFRA invests through an SPV, a prudent projection needs to anticipate the most viable strategy for exit, whether in a normal business or in a crisis situation that may affect the annual projection; supposed there was a pandemic or other force majeure event that may hamper the normal business transaction scenario.

(iv) Growth of AUM

This issue or concern relates to the fund management and operation stage or when the investment has been made, or the money has been subscribed by the investors. Once taken place and the returns started to generate, the proceed of investment in infrastructure assets will connect to the idea where the fund managers would receive potential gains, dividends and so on. This gain, revenue or profit is one of the crucial KPI points from the perspective of fund managers' orientation, because it is considered to affect their reputation and judgement as a capable manager.

It is interesting, indeed, when it is known that AUM growth is regarded as of the benchmarks of fund management achievement. Nevertheless, it is equally essential to maintain the consistency of qualifications by providing optimal accountability and execution of duties for the benefit of funds, without disregarding the interests of investors. Again, the role of investors is not only as depositors; and fund managers are also not only as service providers. This issue is intriguingly overlooked or unnoticed by investors. exploration will be further discussed in the next section.

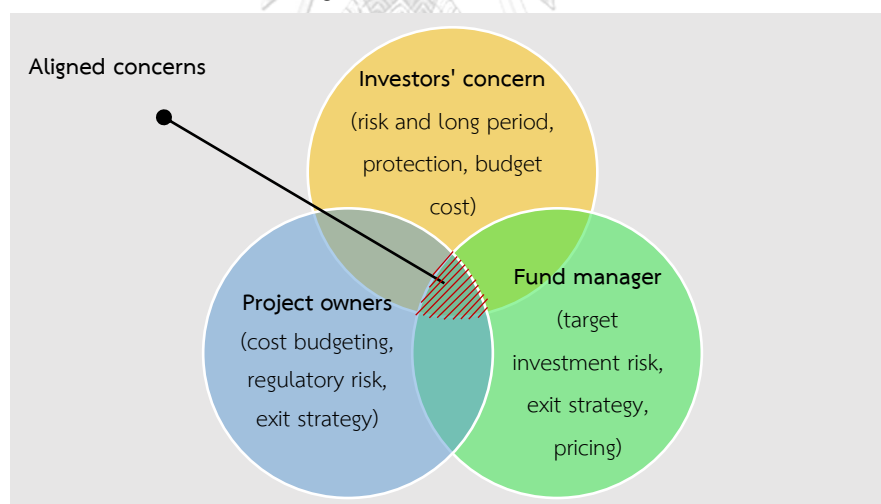
5.3.2.3 Importance of having aligned interests

In the information gathering process and its dissemination to the public, a due diligence process is conducted to understand the potential opportunities and problems that may arise, both before the issuance of DINFRA and afterwards. This due

diligence process is regulated in OJK Reg 52/2017 and will not only cover legal aspect.³⁸⁸ The audit findings will be presented in the prospectus with an expectation to provide knowledge and joint interest between the parties. However, there are times when the information from such due diligence would not be adequate to satisfy the information needs in the overall transaction. Another approach for gathering information is anticipated if crucial information is still unfilled.

Figure 6 below, which is individually prepared, shows the slice of each party's concerns that is regarded as the aligned position of interests. One interviewee argues the aligned interest or concerns that may help the formation of DINFRA as funds and minimise the potential conflicting motivation because the investment strategy and concerns have been 'locked' as a joint verbal commitment. This verbal commitment of aligned interests can be emphasised via binding paperwork, if it is desirable and the parties are daring enough to create something that is not suggested by applicable rule.

Figure - 6 The position of aligned interests/concerns of the parties in DINFRA



Furthermore, one interviewee said that some potential investors tend to walk away from using DINFRA because there is no similar or mutual enthusiasm between the fund manager and the fundraisers. The arrangement is unclear, and the potential

³⁸⁸ *Ojk Reg 52/2017.*, Article 8 para (1) b. In practice, the due diligences are done not limitedly in legal aspect, but also in financial, tax and operation. And according to DINFRA JMTR-001 Prospectus, the due diligences cover the business prospect and financial projection, business risks, investment viability analysis of DINFRA. "Prospectus of Dinfra Jmtr-001.", p. 24.

investors were unwilling to spend time on something unclear. In contrast, it is also noted that some prospective ones were daring enough to go with DINFRA, however, the matching interests between the parties were not met.³⁸⁹

5.3.2.4 Review from the viewpoints of CIS, ELTIF and Thai IFF

From a Thai perspective, a study discussed the factors that influence investors' decision-making in the context of mutual funds. The results show that investor decision-making in Thai mutual funds is strongly influenced by the prospectus supported by additional information from mouth-to-mouth, printed and electronic news, and social media.³⁹⁰ Although the said research did not directly focus on Thai IFF, and Thai IFF and hedge funds have their own characteristics, the authors believe that this research still has general relevance to mutual fund practices in Thailand, irrespective of. As for ELTIF and CIS concepts, the author limits further exploration in this particular discussion.

5.4 FURTHER REVIEW: CHALLENGES AND OPPORTUNITIES AS CONSEQUENCES TO THE INFORMATION TRANSPARENCY PROBLEMS

Even after making an informed decision, the consequence of lacking sufficient information would plausibly give rise to subsequent challenges and opportunities as further plausible consequences during the whole investment period. This relates to the situation or practice where DINFRA operators' fiduciary duty is not specified, and its responsibility is not in the investors' interests, plus the differing concerns between parties about key and inside information.

³⁸⁹ Confidential-3, "Local and Foreign Investors Views in Indonesian Funds Practice."

³⁹⁰ Wilaiwan Muensanthi, "Factors Influencing Investment Decision and Behaviors of Thai Mutual Funds Investors" (Chulalongkorn University, 2020).

5.4.1 Additional challenges to the information transparency problems

Some additional challenges are identified in relation to the fund management or operation phase. This involves agency problem between the fund managers and the unitholder, that will also connect to the increased monitoring cost.

5.4.1.1 Agency problem in the fund management

Agency problems in the operation or management of funds occur where the goal of principal and agency conflicts, and there would be an expensive monitoring process of agency performance.³⁹¹ The notion of agency problem herein would also like to the concept of hidden action by one party without the knowledge of another party, which is called 'moral hazard'. This may happen when the fund managers (acting as the agent of investors/unit holders) do or decide certain matters beyond the oversight and interests of their principal (the investors/the unit holders).

It has been noted that the collective investment sector is characterised by complex agency relationships and asymmetry in market power and information. The possible threat is that some participants in the collective investment process would experience abuse of agency relationships.³⁹² And considering the regulatory framework of DINFRA only recognises the fund managers' central responsibility to the funds themselves, a hidden action or moral hazard may plausibly occur. For example, the fund managers seek maximum profit for fund management services by charging specific management fees and striving to keep the fund's AUM growing. At the same time, investors expect optimal returns by entrusting, delegating, or authorising the fund managers to manage their funds to be invested in infrastructure assets. On this matter, the author observes as follows:

³⁹¹ Eisenhardt, "Agency Theory: An Assessment and Review."

³⁹² Giles, Alexeeva, and Buxton, *Managing Collective Investment Funds.*, p. 297.

(a) The investors' return and the fund managers' fees

Agency conflicts are frequently ascribed to the fact that contracting parties have different interests, information, and risk profiles.³⁹³ This is in connection with the fund managers' expectation of maximising the profit from their remuneration fee for managing the funds.

The source of remuneration (management fee) comes from the balance of AUM. The balance of AUM originally came from the investors' fund subscription that further gets multiplied value due to investment in the designated assets. It is logical when it is said that 'the more investors' subscriptions, the more they seek greater returns'. But there is no such guarantee of a definite great return.

In practical terms, this management fee can be agreed as a fixed amount during the investment period and alternatively for a certain number of years and then subsequently adjusted. According to one literature, it is implied that a fixed remuneration model does not drive a fund manager's best efforts to deliver significant returns for investors.³⁹⁴ The beginning of the agency conflict may start here, then.

It is observed that the high value of management fees will not always provide excellent service for the investors as the unitholders and clients. There is no definite formula for delivering such services. Yet, if the applicable rule 'locks' the responsibility of the fund managers is only limited to the managed funds, high remuneration for the fund managers (which were initially sourced from the investor's capital contributions and have been multiplied by the investment portfolio) may not necessarily have a significant impact on the investor protection.

The agency conflict will be avoidable if disclosure of inside and key information is well disseminated between the respective parties. Followed up with finalising the calculation of AUM-based management fee for each year during the investment period by aligning interests and projected return targets. This prevention is better carried out at the beginning (negotiation phase) stage. Mainly when the information dissemination contains several key information that can affect the operation of funds, as well as the

³⁹³ Naeve, "Exploring the Fund Manager-Fund Investor Relationship through the Lens of the Principal-Agent Model – Agency Conflicts and Mitigators in the Swedish Mutual Fund Industry.", p. 6-7.

³⁹⁴ Nossa, "The Agency Theory Applied to the Investment Funds.", p. 36.

inside information that needs to consider confidentiality issues for certain sensitive material information, direct concern to the issuer, future circumstances, etc.³⁹⁵

The remedy in addressing this conflict might be a practical approach that needs mutual alignment of interest between the fund managers and the investors under the unitholders' meeting. Both can initiate this unitholder meeting to request an amendment to the pre-determined management fee (to be aligned with the investor's ability, the balance of AUM and remuneration). In the DINFRA context, the stipulation of the management fee is governed in the deed of CIC, and an amendment to such provision needs unitholders' approval via the unitholders' meeting.

(b) Compliance with the rule and investor protection as the excuses

It is also observed that the fund manager may use the idea of investors' protection as an excuse by asserting that if the funds are well-complied with all the applicable rules (especially ones under capital market area), then the funds (including the investors and their fund managers) would be considered safeguarded. It is understandable if the fund managers are subject to strict compliance and permitting checklists under the laws and regulations, including their internal policies (if they have one). However, being over-compliant and taking it as an excuse—without recalling the essence of DINFRA as a unique investment product—might bring another consequence only if the investors are aware of it. This is another sample of hidden action. Once the investors know this, they might withdraw from the deal, request fund manager replacement, etc. If unit redemption has opted in multiple numbers, it arguably may affect the market competition in the industry.

If only the fund managers could have thought of a bigger view, they could have been more open. While at the same time, they could also have improved the investors' trust/confidence and capitalised their AUM by encouraging DINFRA in the rampant demand for infrastructure demands in Indonesia. Overcompliance can be

³⁹⁵ Philipp Koch, "Disclosure of inside Information," in *European Capital Markets Law*, ed. Rüdiger Veil (Hart Publishing, 2022), p. 355-360.

addressed by providing reasonable explanations to support the reasons or justifications of ‘not doing something or doing something instead of the required one’.³⁹⁶

(c) Focus on AUM growth, but overlook the ultimate management duty

This part relates to the idea of boosting the AUM as their endeavour to improve their target of KPI, plus as a manifestation of the fund managers’ responsibility for the managed funds. Here, the author observes that asset managers’ most pursued KPI throughout their profession are AUM growth. And this is also somewhat linked to the rationale of OJK Reg 10/2018 points stewardship as the fund manager’s fiduciary duty.

Some Indonesian investment management companies seek more exposure or start to work on the CICs in infrastructure or real assets with a motivation of AUM growth because they believe that such typical assets can generate greater AUM.³⁹⁷ Though it is not mirroring, it is surprisingly in line with literature mentioning that if one investment manager closely works in the infrastructure sector, it would be likely that its interest would be cultivating the project’s performances for generating improved returns, including focusing on acquiring new assets in the emergent markets.³⁹⁸

If the growth of AUM is more regarded as an ultimate concern rather than the growth of asset management and infrastructure industries as a whole, it would be challenging for the fund managers to carry out their duties with ultimate responsibility to their funds (as requested by OJK Reg 52/2017). While at the same time, they also understand that the unitholders’ interests (as the beneficial investors of DINFRA) anticipate excellent management of the invested money. Even if the fund managers are subject to a limitation of conduct (i.e., limitation to act beyond what they are

³⁹⁶ OJK, "Indonesia Corporate Governance Roadmap, Towards Better Governance of Issuers and Public Companies.", p. 14-17.

³⁹⁷ Confidential-2, "Private Funds and Dinfra in Indonesian Market "; OJK, "Strategi Nasional Pengembangan Dan Pendalaman Pasar Keuangan Tahun 2018-2024."

³⁹⁸ For example, the Australia-based Macquarie Group has several infrastructure funds in the U.S. and has a particular business concentration on airport services, airport parking, gas production and distribution, district energy, and bulk liquid storage. Neil S. Grigg, *Infrastructure Finance, the Business of Infrastructure for a Sustainable Future* (New Jersey: Wiley, 2010), p. 213-214.

allowed) under the applicable provisions; still, it would be challenging for the public, including the investors, to oversee or control the fund managers' hidden actions.

Hence, in DINFRA practice, if the unitholders subscribed the investment units under the situation of information asymmetry (and a limited source of information that can fill such information gap), protection for investors from any actions done by the fund managers that are beyond the scope of investors' concerns and knowledge might be questionable—recalling the provision under the OJK Reg 52/2017 where the fund manager is obligated to be fully responsible for the best interests of DINFRA.³⁹⁹ Vigilance to the action or decisions by the fund managers is anticipated to prevent improper execution of what the fund managers have in minds (e.g., the concerns on profits, AUM, and compliance with OJK rules and policies), that in turn, might imply little effort to uphold the principle of investors protection.

5.4.1.2 Upsurge cost of monitoring DINFRA operation by the unitholders

This relates to the investment monitoring once DINFRA is established and its investment in the infrastructure assets has been concluded. This monitoring cost is relevant to the previous discussion on agency conflict and agency cost within the principal-agent relationship.⁴⁰⁰ In the DINFRA context, the principal-agent-relationship might cover both levels of the fund manager and the investors (which arguably existed or formed) and the fund manager (as the shareholder) and the director of the target company or SPV.

Agency conflict is also recognised as a kind of shirking and oversight problem that arise from information asymmetries within the relationships between the management, which could embrace losses to the parties that arise from such a

³⁹⁹ Ambiguously, the interests of the investors/unitholders are not regarded as priority or ultimate responsibility - as opposed as the IFF practice in Thailand where the fund manager shall be responsible for the unitholders.

⁴⁰⁰ The agency costs comprises of the sums of 'monitoring expenditures' by the principal, 'bonding expenditures' by the agent, and 'residual loss' Jensen and Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure.", p. 6.

misalignment of interests.⁴⁰¹ And in this matter, exercising mandatory disclosure measures is, again, argued to save up the organisation's cost of capital in the end because the information that is publicly disclosed would decrease the monitoring and bonding expenditures incurred between the principals and the agents.⁴⁰²

In this instance, the author agrees with the idea that mandatory disclosure is one to handle monitoring issues in the agency cost. Nonetheless, for an optimal disclosure (given the regulatory environment in Indonesia), a different approach to consolidate and solidify the existing measures is desirable. For example, having competent management and control would also help to diminish agency costs by lowering the conflicts of interest and relevant expenses of management oversight and information gathering.⁴⁰³

Similar argumentation lies in the corporate governance practice that was claimed to reduce agency costs by assuring that the interests of investors are protected by their appointed managers.⁴⁰⁴ Responding to these, the author strongly agrees to have well-qualified managers, especially in handling the complex structure of DINFRA. Even if the DINFRA regulation is not or cannot be changed, once the industry is supported by the savviness or capabilities of qualified investment managers, the practice of reducing monitoring costs can be accomplished. This, in turn, allows DINFRA to become a competitive investment product that protects investors' interests.

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⁴⁰¹ Robert Sitkoff, "An Agency Costs Theory of Trust Law," *Cornell Law Review* Vol. 89 (2004), p. 637. While this resource is more orientated on the trust concept, the author is of the opinion that the fundamental ideas on monitoring are still acceptable and relatable.

⁴⁰² Enriques and Gilotta, "Disclosure and Financial Market Regulation.", p. 7-10.

⁴⁰³ Markus Stiglbauer, "Transparency & Disclosure on Corporate Governance as a Key Factor of Companies' Success: A Simultaneous Equations Analysis for Germany," *Problems and Perspectives in Management* Vol. 8, no. 1 (2010), p. 162-163.

⁴⁰⁴ Alexander Styhre, "The Making of the Shareholder Primacy Governance Model: Price, Theory, the Law and Economic School, and Corporate Law Retrenchment Advocacy," *Account Econ Law* (2017), p. 2-3.

5.4.2 Opportunity from the information transparency problems

Though the problems are serious, especially when it touches on the transparency of duty and responsibility, an opportunity can still be approached. Such a 'loose' provision leads to a legal loophole that serves as a temporary way out to overcome the missing bridge of the fund manager and investor relationship.

In this instance, though an agreement between the fund manager and the investor is not regulated, it does not mean that the agreement between them cannot be made, i.e., by not referring to existing regulations; instead, referring to best practice or the basic concept of fiduciary duty in investment management. This means that, even if the investors do not sign the deed of CIC, there is still a chance to shape the fiduciary relationship between the fund managers and the investors (the unitholders). It can be formed and give rise to liability to act in the best interest of the investors.

For those with strict concerns about investors' protection, the flexible structure can be regarded as a positive loophole when structuring the deals and aligning the parties' interests. Though, it would depend on the 'creativity' of the parties, subject to a willingness to bind themselves deliberately (in a situation where there is no prohibition to filling the missing relationship between the investors and fund managers). The plus point is to accommodate the relationship and highlight a more solid duty and responsibility between them.

For illustration, unlike Thai IFF, which set up a requirement for minimum funds' capital, Indonesia DINFRA has no such rule. This could be seen as a non-barrier to tapping the market because any project can join without limiting it to national or mega projects. Also, there is no rule on the maximum foreign ownership under the FDI regime and its implication. This can be seen as lenience to lessen the challenges of prospective foreign investors who wish to put in a lot of money but are unwilling to be fussed with operational and technical details, just as the FDI rule may require.

Infrastructure players already involved or getting used to the capital market environment must be familiar enough with the reasonably complex pattern of rules and compliance. Such familiarity may perceive that DINFRA has an acceptable structure. Simply because they have been accustomed to the heavy documents, permitting, and audits. It might be manageable for them. Even more,

5.5 PROPOSAL TO ADDRESS THESE INFORMATION TRANSPARENCY PROBLEMS

Assuming a new product of DINFRA is about to be established because there is a promising transport project. Of course, the potential investors would seek necessary information as much as possible – other than from what OJK Reg 52/2017 says. Some of them with institutional profiles might find it easy due to their expertise and qualification to seek such information from their past records of investments, from their hired/appointed professional advisers and so on. But for other investors that are not as large as institutional investors but have strong enthusiasm for a long-term investment (like infrastructure), how could they gather the information if the available information is very limited? Concerning transport financing, transparency problems may influence more complexity due to the combination scheme of funds structuring and infrastructure financing. The transport business, which has been highly regulated,⁴⁰⁵ may face challenges in combining the structure of DINFRA. Upon analysing both transparency problems in this context, the author sees that improvement towards transparency and governance practices is anticipated. Technically, such improvement can be made either via regulatory or non-regulatory intervention. Or both, whenever the circumstances allow.

5.5.1 Regulatory interventions

For the regulatory intervention, the author envisages that the improvement may include addressing both transparency problems. Theoretically, the author proposes that the OJK Reg 52/2017 adopt some parts of CIS and ELTIF governance, including some of the Thai IFF regulatory framework.

5.5.1.1 Adjustment to the regulatory framework of DINFRA

In avoidance of confusion and to help the investors' assessment before making an informed decision, an adjustment is proposed for the regulatory framework

⁴⁰⁵ It touches more than one exposure from the government's involvement, especially when the companies are publicly listed and a state-owned enterprise, e.g., Ministry of Public Works and Housings, Ministry of Transportation, Ministry of State-Owned Enterprise, OJK, and so forth.

of DINFRA (alongside the associated rules and policies) to solidify the disclosure measure, which has not yet been strong enough or is loose. It is also suggested to enable voluntary disclosure to complement the mandatory one. So, the basic concept of information disclosure can be served optimally and reach investors' protection goals.

Should this regulatory intervention be doable, the key points to be accommodated in the OJK Reg 52/2017 would relate to the first and the second transparency problems by referring to what the applicable rules of Thai IFF have made alongside CIS and ELTIF, as follows:

(a) Clearer and firmer fiduciary duty and responsibility of the fund manager for the investors' best interest

This proposal is to overcome the first issues on the opaqueness of OJK Reg 52/2017. The author suggests setting up a definite or typical duty for the fund manager in DINFRA, for example, a duty of loyalty and/or duty of care, which can be supported by good faith. Should the concept of stewardship claimed as an investment manager's duty apply to DINFRA, the firmer and clearer fiduciary duty may serve as the core duty complemented by stewardship. This revisits the status or nature of investors in DINFRA who act not only as the fund manager's client but also as the unitholder.

Besides, if deemed necessary, there are in fact no specific negative restrictions for the fund managers to make agreements with the investors for investment commitments (although it is not silently governed by the legal framework). For the parties who are courageous, this approach can be implemented. However, the author still considers that the issue of fund managers' duty and responsibility should be clarified and emphasised.

The author suggests that the unitholders of DINFRA shall be entitled to the fund managers' responsibility. The rationale is due to the complex characteristics of infrastructure investment, and the size of DINFRA's ability to finance infrastructure assets or projects is conditioned by the size of AUM collected from the investors or the unitholders of the funds. Hence, accommodating the investors' interests as the main responsibility is strongly expected in the view of appreciating the investors'

position who act more than just as a customer/client but also as the subscriber/contributor to the AUM balance of the fund.

(b) Reaffirm the relationship between the fund manager and investors via a binding contract

For any potential investors who have strong concerns about the investor protection aspect, they are uncomfortable with the linkage of investors' and fund managers' responsibilities. They are prone to look for other financing options or revert to traditional financing channels for the comfort of investor protection; whilst also mindful that it may not be commercially viable for some projects. Many cases or issues have arisen about fund managers' responsibility for managing funds that lead to investor losses, albeit in ordinary mutual fund settings. As such, some investors are apprehensive about how the complex funds would be operated, while ordinary ones can perceive such abuse of conduct. Investors who act both as customers and unitholders certainly have a serious concern about investment protection.

Hence, it is suggested to reaffirm the commitment agreement or mandate agreement that binds the fund manager and investors (unitholders). This is recommended to reflect a clear duty and responsibility between them, in addition to what deed of CIC has governed. The advantage of this model is to mitigate the unwanted and hidden actions by the fund managers and the investors. Many problems or cases have arisen with fund manager liabilities on mutual fund investments that arguably happened due to a lack of central liability to investors from a regulatory perspective. Suggestions here may lead to improvements for the benefit of all.

(c) Clear direction on fee elements

This proposal is to overcome the second issue on the opaqueness of OJK Reg 52/2017. Considering fee and pricing are sensitive issues in the deals; therefore, it is recommended to encourage the transparency of fee elements associated with DINFRA for better quality informed decisions. The scope of transparency or disclosure provision is anticipated to outline the average or range of fee components. However, how fee disclosure is made shall prudentially consider possible drawbacks for overexposing in

detail. The suggested fee elements to be described include the management fee, distribution cost, operating expenses, and associated transaction costs.

(d) Approach for investment incentive

This proposal is to overcome the third issue on the opaqueness of OJK Reg 52/2017, where the investment incentive is unregulated. The recommendation is whether the government can work on taxation treatment for this particular investment product. This is in line with a study by the OJK and MOF of Indonesia which explained that a harmonisation of the taxation regime for CIC and similar products are expected to avoid double taxation and, thus, provide an incentive to the market, including the investors.⁴⁰⁶

Given this absence, the author suggests that the regulator and the relevant industry anticipate considering one. The benefits would not only make the investor happy but also create a competitive market for public benefit at the end goal. If infrastructure business and industry are indeed prioritised (and some projects are viable or feasible enough to apply DINFRA as an investment product or financing channel). The previous proposal of tax incentives can also be re-approached as this would be attractive for the investors (alongside the project owners as fundraisers) and, subsequently, build more solid market confidence.

(e) Disclosure of corporate ownership

This proposal is to overcome the fourth/last issue on the opaqueness of OJK Reg 52/2017 regarding unspecified corporate ownership concept. Recalls the CIS best practice, it is said that other CIS regulators in other jurisdictions have chosen to provide specific guidance to CIS regarding this shareholder rights matter.⁴⁰⁷ Hence, it would be reasonable for the OJK to adopt similar rules due to the value of such knowledge,

⁴⁰⁶ OJK, "Strategi Nasional Pengembangan Dan Pendalaman Pasar Keuangan Tahun 2018-2024.", p. 124.

⁴⁰⁷ Othe countries that implement independent or special guidance regarding CIS as shareholders including its relevant shareholder rights are Brazil, France, Germany, Italy, Japan, Portugal and the US. IOSCO, "Collective Investment Schemes as Shareholders: Responsibilities and Disclosure.", p. 6.

which may be not only beneficial for the investors (as the party who bear the assessment task of such information) but also for the company the operator of DINFRA and the DINFRA alone. Even more, given that the investment in DINFRA constitutes a complex set of transactions and engages with many parties, mitigating conflicts of interest is henceforth encouraged by disclosing the shareholder rights of DINFRA. So, the interest of the parties can be aligned.

Similarly, the OECD publication said that the CIS, as institutional investors, should disclose their corporate governance concerning their investment in the portfolio holdings as a part of its investment strategy. The disclosure may involve the details about the fiduciary capacity of CIS, including managing the material conflict of interest when exercising the shareholder rights of CIS in the portfolio holding.⁴⁰⁸

(f) Compliance with the FDI regime

This proposal is to overcome the fourth/last issue on the opaqueness of OJK Reg 52/2017, whereas details of corporate ownership by DINFRA (alongside the shareholder rights) are untouched. As described earlier, when DINFRA chooses the corporate ownership option, compliance with the relevant FDI requirement needs to be clarified. Hence, the author suggests making a clear border in which the regulator thinks of complying with foreign shareholding requirements and then kindly regulates so, and vice versa. This suggestion is to avoid the ambiguity that often found no solution because each department in the relevant authority may not have a uniform concept.

5.5.1.2 Setting up a particular governance code

Since the idea that the 'capital market might bring beneficial value for transportation investing or financing' cannot be entirely accepted by the particular common perspective of Indonesian practitioners, there should be an alternative that can help them see capital market instruments like DINFRA has distinctive features in legal aspect; so, it worth applying. The situation right now is that they still

⁴⁰⁸ OECD, "G20/Oecd Principles of Corporate Governance.", p. 30-31.

conservatively opt to play safe by choosing a plain scheme rather than jumping into a complex transaction by using a capital market instrument which already heavily regulated.⁴⁰⁹ To most, raising funds through an IPO (shares or bonds) would be the favoured approach. Easy access to the information and practical guideline (including corporate governance matters) would be the striking characteristic, rather than raising funds through DINFRA or other CIC structures. And in Indonesia, most transportation operators have already raised funds using a traditional capital market scheme of IPO with various subsequent corporate actions like the right issue, etc. However, until around 2017, only a few attempted to participate in an alternative instrument like the CIC scheme under the capital market.⁴¹⁰

Given that governance and transparency are ultimately crucial in funds' performance, the author sees that it would be beneficial if the regulatory body could set up a governance code for a CIC-specified industry because, currently, none is closely relevant or nearly addressing the targeting issue. This code is expected to cover DINFRA and other related CICs or mutual fund structures in Indonesia with similar characteristics and target institutional investors. This also ensures that governance and transparency in infrastructure funds are treated not as a tick-box compliance mechanism but as a catalyst to growth in product performance. Where the driving force itself indeed influences a successful governance system.⁴¹¹

Certain approaches can also supplement this kind of code through an education handbook or program that can facilitate the improvement of introduction, socialisation and comprehension of DINFRA, similar to the improvement targets set by OJK and MOF of Indonesia.⁴¹² Likewise, to reduce the information asymmetry within the funds' operation, the author agrees to adopt the idea of regulating the information

⁴⁰⁹ It is argued that as an examples, direct participation through the equity or shares (either within FDI regime or domestically) is still preferred due to the plain and simple characteristics.

⁴¹⁰ Private funds and asset securitization are comparably similar in terms of popularity when choosing alternative financing. OJK, "Strategi Nasional Pengembangan Dan Pendalaman Pasar Keuangan Tahun 2018-2024.", p. 59.

⁴¹¹ Confidential-4, "Digital Governance," in *Webinar Digitalisasi Governance* (2022).

⁴¹² OJK, "Strategi Nasional Pengembangan Dan Pendalaman Pasar Keuangan Tahun 2018-2024.", p. 124.

stream between the external company and internal management, as said in the OJK Corporate Governance Roadmap.⁴¹³ Such adoption can also be incorporated in the CIC or DINFRA governance code as proposed herein.

In addition to the points stated in the above section [5.5.1.1](#), one other point can be put as a certain provision, i.e., an approach for DINFRA's corporate governance if it participates in equity participation in the infrastructure asset. As a measure to overcome the fourth/last issue on the opaqueness of OJK Reg 52/2017, this particular point looks better to be governed in the governance code. Regarding DINFRA's shareholders' rights, it is recommended to capture the salient points of such rights (in case of indirect investment to the infrastructure assets) in view of mitigating the possibility of conflicts of interest in the performance of fiduciary duties by the DINFRA operator. Many problems have arisen with fund manager liability for mutual fund investments, arguably due to a lack of central liability to investors from a regulatory perspective. Suggestions here may help lead to improvements for the benefit of all. Finally, the provision regarding corporate ownership is also suggested to comprise mechanics for exercising such rights and the corresponding legal implications (it can be both in the disclosure section as part of the basic content to be disclosed in the offering document).

5.5.2 Non-regulatory interventions

Should the above proposals be deemed unfeasible due to technical or bureaucratic reasons, the other suggestion would be to create relevant consents or policies as integral and inseparable paperwork to the core regulatory framework of DINFRA. This proposal is also suggested for addressing both information transparency problems and is envisaged that it would work better with the liaison or collaboration with the asset management industry that closely works with the players in the market. So that not only the investment management and the custodian (as the central actors in funds operation) would experience better concepts for a better market. The

⁴¹³ OJK, "Indonesia Corporate Governance Roadmap, Towards Better Governance of Issuers and Public Companies.", p. 37.

potential investors and the projects that need fundraising can also understand better whenever there is another DINFRA deal soon. The critical points in this paperwork can be manifold, but the author suggests primarily covering the same items as elaborated earlier in section [5.5.1.1](#).

And to avoid information asymmetry within the funds' initial formation and subsequent operation, the author proposes the paperwork herein to enable voluntary disclosure between the parties – in support of mandated disclosure under the regulatory framework. The involved parties are anticipated to be open about their key concerns and interests, so their profile and suitability to DINFRA's characteristics can be examined, and interests' alignment can be sought. In this instance, though any prospective investor may have an institutional investment profile, challenges in interest alignment may always be available because dealing with a prospective target company or infrastructure project that is not familiar with the investment fund scheme entails extra insights by exchanging information to get on the same page.

This approach can be regarded as a preventive measure for any future investment in DINFRA should the market grow constructively in response to queueing transportation projects in Indonesia. Besides, it can also be regarded as a remedy for the past experience of information asymmetry. So, the investors or unitholders can assess their investments more comprehensively and decide whether to remain invested in DINFRA or withdraw from the transaction by redeeming the units. The notion of remedy, however, can cause fund managers to be held liable if they indeed carry out activities outside the knowledge and interests of unitholders as investors, which potentially or could adversely affect the investment interests of unitholders in DINFRA. The drawback in this view is that the cost allocation under the fund budget may be eroded due to the balance needed to compensate for the claim or indemnification.

5.6 CONCLUDING REMARK

This chapter analyses two research problems regarding the information transparency in DINFRA. The analysis involves observations from literature reviews and interviews. Comparisons with the concept of CIS, ELTIF and Thai IFF were also

conducted to see significant differences and possible solutions to overcome the problems.

The first observed problem involves the opaqueness of provisions set out in OJK Reg 52/2017, which limits the investors and fundraisers in assessing the information reflected in the guideline. The opacity or lack of clarity includes several provisions, namely, the fund managers' duty and responsibility, the associated fees and pricing, the investment incentives, and the corporate ownership of DINFRA, which has certain unseen implications.

The duty and responsibility are criticised because Article 8 para 1) letter (l) does not clearly explain what constitutes a fiduciary duty other than to act in good faith and clearly explains that the fund manager's responsibility is only to the funds or managed funds, not to the investors. This phenomenon may bother potential investors who are interested in infrastructure investment in the context of investment protection. Referring to the comparative sources herein, adopting a concrete form of fiduciary duty is expected, not just acting in good faith and stewardship, by considering the character of investment in DINFRA.

The associated fees and pricing are also reviewed due to the minimal visualisation of allocation fees payable by the parties. As pricing has always been an essential topic in any investment transaction, a breakdown and ratio are anticipated for disclosure. While it need not be overly detailed, it should also not only minimally describe management fees and custodial fees without suggesting other components, including any possible tax rates that may apply. Likewise, investment incentives are examined in the context of finding a selling point to attract investors as compensation for the complex and lengthy structure of DINFRA. Unfortunately, there is none in the current regime, although this topic has been previously raised and discussed in the relevant industry.

Corporate ownership by DINFRA is also assessed from the point of view of the disclosure of DINFRA's ownership and its rights in the target company (either through SPV or directly) along with FDI. In terms of disclosure, this is important to provide awareness for investors and prospective companies that are eyeing DINFRA on the mechanics of corporate governance at the target company level, where DINFRA will

be the majority holder. This point has become a concern for prospective investors and target companies due to its broad implication, as the tenor of the investment is relatively lengthy. And in terms of FDI, it often serves as a concern for prospective investors and fundraisers whether the major shareholding by DINFRA in the target company needs to be subject to FDI rules if the majority unitholding in the managed fund is foreigners.

The second observed problem involves information asymmetries from the minimal and rare information and differing concerns (which also were disseminated at different timing) between the investors, the fundraisers, and the fund managers. The one and only DINFRA might be a barrier to comparing similar structures because there is one for doing so. Some of the available data is not easily accessible compared to Thailand. And regarding the parties' concerns, some have similar themes or ideas but could oppose each other if they are not well addressed/disseminated and become asymmetrical. Such circumstances lead to an increase in investment cost from the investors' angle because finding missing, or less transparent information may not be free of charge. Thus, it may affect the aggregate investment costs in and financing infrastructure assets.

Apart from the above information transparency issues, further research also observed the possibility of hidden action and intention as a moral hazard due to information asymmetry and lack of transparency in the legal and regulatory framework. Although the agency relationship between investors and fund managers does not exist in an expressed form, yet when it involves the outlooks of fund managers' profit maximisation and investors' return optimisation of investors. Hence, the monitoring costs after the investment deals may be affected, primarily when the transaction schemes are structured in an information asymmetry situation.

To end, though the research also observed that the opaqueness of OJK Reg 52/2017 might bring flexibility for one without investor protection as a significant concern, improvement for transparency is seriously anticipated in tackling the information asymmetry and lack of transparency in the legal and regulatory framework. Sounder governance in the infrastructure funds and transparency performance is highly awaited by amending the existing rules that can be supplemented or complemented

by other paperwork within the industries that may work as a guideline or code. And should the proposal be workable, more transparent provisions and symmetric information can help optimise the decision-making process and thereby gradually help market confidence and competition grow.



CHAPTER 6

Conclusion and Recommendations

6.1 CONCLUSION OF THE INFORMATION TRANSPARENCY PROBLEMS

The only DINFRA product amidst widespread Indonesian infrastructure development triggers this study to discover information transparency problems that deserve improvement for sounder governance. The information transparency problems are interconnected to the less incomprehensiveness of OJK Reg 52/2017 as the rule of thumb of DINFRA and the information asymmetry due to rare information and differing key information (concerns and expectations of the relevant parties) that are crucial to be disseminated in the right time, quality, and place for matching the interests, that in turn would help the formation of DINFRA.

Apart from examining OJK Reg 52/2017, the analysis involves reviewing and comparing the concepts of CIS and ELTIF to see any gaps between them and DINFRA, primarily how transparency and governance are implemented. Comparison with Thailand's infrastructure funds is also undertaken from the perspective of legal framework and samples of securities offering documents.

6.1.1 THE GAPS BETWEEN THE CONCEPTS OF CIS , ELTIF AND THAI IFF

To summarise the comparison part, there are gaps between the DINFRA, CIS, ELTIF and Thai IFF structures. The gaps arise in a way that DINFRA differently demonstrates itself as funds compared to CIS, ELTIF and Thai IFF. Also, some parts of the implementing rules of OJK Reg 52/2017 generalise DINFRA as an ordinary mutual fund or CIC product with retail investors-focus only. While in fact, no 'one size fit for all' or universal size can uniformly govern all types of mutual funds or CIC. It is anticipated to distinguish and highlights the uniqueness of the DINFRA scheme for investor protection and market confidence goal. As this relates to the underlying asset in DINFRA is originally invested using the investors' collected money, and it will make sense if the investors expect a proportionate safeguard. And should the investment in the infrastructure assets go as projected, it would contribute to maximising AUM (funds'

value) that brings a double effect, i.e., influences the manager's performance and capitalisation of the investors' returns.

As for CIS and ELTIF concepts, the gaps with DINFRA arise in how their legal frameworks clearly govern key parameters of management or operation of the funds, information disclosure (for fees and other associated costs, and shareholder rights), including on how the information is suggested to be disseminated for investors' better knowledge and assessment. Due to the different markets and approaches in facing the industry, the growth of DINFRA products could be much higher than ELTIF. While Indonesia only has one existing product of DINFRA since the launch of the legal framework in 2017, Luxembourg (as one of European countries that apply ELTIF) had approximately 300% more ELTIF products since 2015. And although Thai IFF has emerged since 2011 (earlier than ELTIF), the number of established products is still below ELTIF.

As for the comparison between DINFRA and Thai IFF, on top of similarities that are not explicitly explained, the author concludes that the gap also arises within the way both regulatory frameworks transparently show and guide the readers (including the potential investors to make an informed decision) and the way Indonesian and Thailand market industries see infrastructure funds as a worthy choice of financing. It includes the typical target of investors, investment focus, performance target and developed systems (especially in the capital market area, particularly in CIS or mutual fund sector). Due to such reasons, their legal products have dissimilar stresses on how to grow the market or make the investors more protected. Correspondingly, the launched infrastructure funds product would have distinct features for investors and fundraisers.

6.1.2 OPAQUE AND LESS TRANSPARENT INFORMATION IN THE OJK REG 52/2017 NEEDS IMPROVEMENTS

The first transparency problem involves less comprehensive provisions in the regulatory framework of DINFRA (OJK Reg 52/2017), in which they are opaque or less transparent in educating the investors. On this problem, four themes were analysed: (i) provision of the fund manager's fiduciary duty and responsibility, (ii) provision of

investment price and related fees, (iii) provision of investment incentives, and (iv) provision of shareholder rights of DINFRA. All of them were analysed from the outlook of CIS, ELTIF and Thai IFF, and it appears that such opaqueness leads to less attractive market confidence in the relevant industry.

The first theme. Regarding the fund manager's fiduciary duty and responsibility to the investors, the analysis reviewed several aspects from different perspectives, i.e., fiduciary relationship, stewardship, unaccommodating rules, acting in good faith and reference to the civil laws. From the analysis, it can be extracted that (a) the fiduciary relationship between the fund manager and the investors is ostensibly shaped in an implied form, (b) stewardship duty might not be adequate or reliable to represent the complex nature of the DINFRA scheme, (c) in response of the unaccommodating rules, some improvements or adjustment to the existing regulatory framework of DINFRA is anticipated as part research recommendations, (d) reference to the civil law system on expressing the idea of the fund manager's basic duty is understandable (knowing that Indonesia adheres Civil law legal system post-Dutch colonisation era), so long as it adopts the idea of investors' protection without being ambiguous. Also, acting in good faith cannot be the sole or basic duty of the fund managers who represent the operation and management of DINFRA as a complex structure.

And in a cross-comparison stage with CIS, ELTIF and Thai IFF, it was analysed how the regulatory framework of the DINFRA scheme insufficiently brings business comfort to the potential investors and the infrastructure project owners due to such less robust provisions on the fund managers' duties and responsibilities. It is further concluded that OJK Reg 52/2017 has not yet been provided with attractive provisions that explain how their interests can be protected, also by considering the high value and long-term investment, and the management fee that the initial value of AUM that is used for investing in infrastructure assets came from the collected money of the investors for both maximising the funds' value.

The second theme. Concerning the investment pricing and related fees in the OJK Reg 52/2017, the author correspondingly concludes that OJK Reg 52/2017 is still inadequately transparent to boost investor protection, especially when it touches on

commercial aspects like pricing components and calculation as well as the probable tax treatment and rules that might be applicable. While the regulatory framework minimally breakdown the pricing detail other than the management fee and the custodian fee, the prospectus sample explains more comprehensively. Nonetheless, the calculation of management and custodian fees needs careful estimation because those fees are payable annually during the long-term period. At the same time, the collected money in the AUM is subject to optimal investment in the target infrastructure project. Information transparency (on data update) and joint interest between all involved parties (the fund manager, custodian bank and investors, as well as the project fundraiser) are anticipated to avoid the possibility of a cash shortage in the AUM balance that further may jeopardise the investors to subscribe more money to the fund.

Compared with the CIS, ELTIF and Thai IFF concepts, they have endeavoured to regulate in a more detailed version to enlighten the investors' knowledge. On top of the management fee, they allocate other relevant costs within the transaction purposes and on whose responsibility. On the practical side, both offering documents by DINFRA and Thai IFF were reviewed; and it turned out that their respective fee elements and allocation were itemised in different ways or approaches, regardless of whether such extensive information may cause other impressions that leave a deadlock situation in the negotiation phase, weighing whether DINFRA is a viable approach or not.

The third theme. Because of the investment incentive that was not highlighted in OJK Reg 52/2017, the analysis found that such absence represents the lack of promoting features for potential investors. Incentives are not obligatory; once they are available or set up, they will help boost market participation. The anticipated investment incentives can be in many ways, and the nearest example is related to tax and other facilities that can help to do the transaction. On tax matter, since there will be two levels of investment in DINFRA (i.e., investment by the unitholders at the DINFRA level and investment by DINFRA in the infrastructure assets), taxation treatment would be a crucial topic, and it would not be surprising if the relevant parties will expect for a tax rate reduction. The relevant industry has approached the government

on this matter, but there is still no feedback until now, and the investment incentives remain absent. In turn, the sample prospectus of DINFRA did not describe anything about the incentive. From the CIS and ELTIF perspective, the incentive topic is not discussed and treated as a recommendation as it may be subject to each country's policies. Just as in Thailand, the Thai government's approach to providing tax incentives in Thai transactions might be a good move to be emulated.

The last/fourth theme. Concerning the silent discussion about DINFRA's shareholders' rights (in any case that corporate ownership is opted by DINFRA to invest in the infrastructure assets), it was examined that OJK Reg 52/2017, again, has nothing to explain the meaning of such rights and the implication of having indirect investment in the infrastructure assets, while under CIS concept, disclosure of CIS corporate governance policy is recommended should CIS invest in the target company. The notion of a corporate governance policy in the investee company appears in another OJK regulation (OJK Reg 10/2018) in the context of stewardship that is regarded as the fund manager's fiduciary duty by the said rule. It is also unclear whether OJK Reg 10/2018 would apply to DINFRA because the rule seems to generalise all types of mutual funds and CIC as one model without considering the uniqueness of DINFRA as CIC. As a result, the observed prospectus of DINFRA also said nothing about such shareholder rights matters. Likewise, the absent provision on DINFRA's corporate ownership also causes a disjointed relationship regarding FDI exposure when DINFRA invests indirectly in the target company.

Whilst in Thailand, the shareholder rights of IFF are also silently discussed because the applicable rule of IFF opens several schemes for IFF to invest in infrastructure assets or projects. One with corporate ownership is not found in the strategy applied by BTSGIF and TFFIF. And regarding the foreign shareholding matter, the Thai IFF regulatory framework suggests IFF comply with the prevailing rule of FDI in Thai, which means it shall not overlap or waive the FDI regime.

6.1.3 INFORMATION ASYMMETRY FROM PAST DATA RARENESS AND DIFFERING CONCERNS OF THE PARTIES IN DINFRA

On top of the opaqueness of OJK Reg 52/2017 as above, the second transparency problem in this research is information asymmetry that exists before the investors make informed decisions. This information asymmetry is in line with the sensitive issue of pricing, in which the aggregate investment budget of the investors might be affected. No matter it is related to the transport sector or not, their initial money for unit subscriptions needed to be added up with another cost of services since collecting or compiling high-value information that is scattered involves professional bodies or institutions that can work together or separately. Some professional advisors like tax, financial and legal consultants, etc., may help with this task. Some other database service providers can also be of assistance.

The analysis of the information asymmetry problem was categorised into two themes, i.e.: (i) rare and minimal information about DINFRA's past data, and (ii) differing interests and concerns between the parties that may worsen the first problem as outlined earlier.

The first theme. On the rareness of past data and information, it was found that there is a shortage of historical data about DINFRA because there is none that supports previous details or status of DINFRA products that are now closed (have been liquidated), and the current availability of data on the only surviving DINFRA product is minimal. The scattered information also led to an unclear, which hampered the problem analysis, though data on the transport industry can be obtained separately. Conversely, IFF practice is keen to uphold information transparency for investors and public readers. This is exemplified by a bespoke website and the readily accessible availability of information via online sources, albeit the language barrier is also challenging.

Considering the presence of only one DINFRA product at this time and its limited access to information, the author sees that the objective of information disclosure needs to be better executed. The result examination of the sample prospectus shows that the content presented is restricted to what is mandatorily prescribed by OJK Reg 52/2017. This leaves information gaps to enlighten investors'

knowledge. As a result, potential investors may perceive that mandatory disclosure may not always satisfy the information needs. An increase in aggregate investment costs would be affected due to extra spending of time and expense in finding more sufficient and complete information for assessment before making an informed decision. Additional charges on this may possibly increase another cost of monitoring the operation of funds' activities.

The second theme. On the differing interests and concerns, it was analysed that the fund's investors, fundraiser, and fund manager have their own key information that tends to be disseminated asymmetrically. Interview data was presented here to bring practical insight into what they mostly have in mind when thinking of DINFRA. However, unfortunately, the author had not had a chance to seek further details on the Thai IFF practical side.

Data from the interviews with Indonesian sources discovered that many aspects become the parties' most interests. From the potential investor's side, the most concern goes to the investment entry and exit strategy, elements of fee and pricing, plus the responsibility of fund managers. Likewise, the project owners also consider how long DINFRA should invest in the infrastructure assets (predominantly when DINFRA invests as a shareholder in the SPV or the target company) and how DINFRA would exit; considering an investment in infrastructure assets (like transportation) touches long-term concessions and careful commercial calculation. Meanwhile, the fund managers' typical concerns are unquestionably rooted from management fee calculation and KPI that can connect to the idea of deal structure.

6.1.4 CHALLENGES AND OPPORTUNITY IN THE LESS COMPREHENSIVE FRAMEWORK OF DINFRA

On top of analysing those two information transparency problems, further review was also undertaken and observed that challenge and opportunity befall, which in line with the characteristics of infrastructure funds, the complexity in their structures and organisations. Two themes are reviewed in this segment.

On the challenge. The information asymmetry problem does not necessarily end when investment in DINFRA has been successfully concluded. Once the investment deal was carried out within information asymmetry, hidden action or moral

hazard in the fund operation or administration might happen as the agency problem. It is the lack of oversight from one party to another because of limited capacity or ability that leads to conflicting expectations or interest situations.

The author observes that a plausible hidden action may occur due to both information transparency problems in this research. Hidden action or moral hazard can occur in various circumstances as a manifestation of agency problems in fund management. Such as when there is no clear linkage that shows the fund managers' responsibility to the investors. This recalls the opaqueness of OJK Reg 52/2017 and the profit or return orientation of the investors, in which the fund investors seek greater returns just as the fund managers seek higher management fees as compensation for managing the collected funds. Hidden action may also happen when the fund managers envisage investor protection as an excuse to help them achieve KPI by 'saving their face' to the regulator, acting as if they are the most compliant manager; while the approach to promote protection might not be concretely implemented.

Difficulties in monitoring the funds' activity and operation may also happen because the way DINFRA works involves complex due to the structure, bureaucratic and investment layers (that involve capital market compliance and infrastructure financing). Though the applicable law governs the limitation and prohibition for the fund managers when managing the fund, there is no guarantee that the fund manager will not undertake something without the investors' knowledge to get personal or covert advantages. The consequence of this problem might jeopardise one party to another (in the fund management and operation). It may discourage investors' attractiveness and adversely impact investment protection in an external setting.

On the opportunity. While the overall DINFRA's framework is concluded as less comprehensive and transparency under the goal of securities regulation seems not totally to work., there is still an opportunity – especially regarding investor protection that vaguely exists. Reaffirming the missing relationship between the fund manager and the investor can be approached via separate arrangements depending upon willpower, courage and strong motivation to shape solid governance and transparency between them.

6.2 RECOMMENDATIONS FOR TACKLING THE INFORMATION TRANSPARENCY PROBLEMS

The promotion of using infrastructure funds is motivated by two reasons that are in line with financing gap anticipation via an extraordinary approach. Uniquely, DINFRA can apply as the primary financing channel or the secondary (alternative or supplementary) one. It depends on the relevant case and the comprehension of how to use them in the practical deal. This is subject to how the rule of thumb guides the prospective parties and how the disseminated information is available for an informed decision.

Lack of clear guidance and information about the level playing fields, predominantly about the investors' interest protection, might be the most triggers in deciding DINFRA as the worthy choice in supporting infrastructure and transportation developments in Indonesia. These are added up by rare and limited data and information of past deals for comparison purposes and the information asymmetry between the parties. Also, less promotion by the government may influence the business environment to overlook DINFRA as an alternative investment and financing for infrastructure development. Except for daring parties, who may see potential loopholes and may proceed with DINFRA and its relevant transparency issues, the regulatory framework of DINFRA, indeed, needs considerable approaches for improvement.

Hence, the resources of knowledge and familiarity of the DINFRA practitioner need improvement, e.g., insights in both theoretical and practice within all relevant involved parties in the transaction. Preparing a separate code of conduct or reformation to the existing laws of DINFRA is desired and anticipated to the extent it addresses the disclosure measures for an improved one that may help establish an alignment interest between all the parties involved in the transaction. Plus, the following points need improvement due to the opaqueness of OJK Reg 52/2017 and information asymmetry matters.

6.2.1 Improvement to the existing legal framework of DINFRA and establishment of governance code

By referring to the idea of transparency and market confidence under securities regulation, a robust regulatory framework would undoubtedly be anticipated to get the market educated at the first step. Just like the capital market goal views transparency in the legal and regulatory framework as a tool that may influence investment protection, which will play a role in shaping the market confidence.

If the investment guidance is unclear or insufficient, prospective investors will find it difficult to measure their interests and whether they could be protected. Also, whether they would consider DINFRA as worth applying scheme instead of the other ordinary or traditional schemes. In turn, the attractiveness of DINFRA could be debatable because the regulatory framework (as the first reference of investment guidelines does not cover nor accommodate the essential procedure and guidance.

To help the potential investors and the public obtain and comprehend adequate information for their informed decisions, the author suggests improving the quality of the current rules and policy of DINFRA and its relevant subject matters to bring representative or proper investment guidelines. This suggested improvement is to amend or adjust the regulatory framework and set up inseparable and integral policies to solidify the investors' protection implementation and boost the market confidence in the industry.

Recalling the above analysis, adopting some parts of CIS, ELTIF Directive, and Thai IFF frameworks is anticipated, although official adoptions of their concepts might need specific administrative arrangements on political or multilateral relations within the international organisation. Several inputs are recommended as improvements in the regulatory framework of DINFRA, other supporting rules or the governance code that can be applied in DINFRA as CIC, should the circumstances allow a regulatory intervention.

- *On the fiduciary duty and responsibility of the fund manager*, it is suggested to describe the duty of care and loyalty like in the US dan Japan. And regarding the fund manager's primary responsibilities, it is also recommended to be in the best interests of investors. Save for exceptional cases when CIS acts as a

shareholder in the target company, the CIS operator is supposed to consider the investor's interest when they are about to exercise such shareholder rights in shareholders' meetings. Revisiting the idea of interest protection, the advantage of having such fiduciary duty is to help mitigate the potential conflict of interest; because the concerns or interests between the fund managers and the investors are profit maximization and high return, that can go differently. Once they become the unitholders, the investors can monitor their investment status or progress, which the fund manager manages. It is also suggested to reaffirm the relationship between the fund manager and the investors to bring protection and convenience for both parties.

- *On the fees and pricing matter*, it is recommended to have a more straightforward provision that elaborates on the crucial components to bring insights to the investors before making informed decisions. It is understandable that too many details may bring another negative impression and further challenges from the investors to deal with that. However, the pricing component with too minimal description may also limit the assessment of investors and other parties interested in DINFRA. As a part of fee components, the probable taxation treatment is critical information for them, too, considering that there will be layers of investment that are unavoidably subject to particular imposition. Double taxation may be charged.

- *On the investment incentive matter*, it is recommended to set up a particular investment facility or stimulus that can incentivise the parties (especially the potential investors) as an attractive selling point or sweetener. Hence, apart from promoting how robust the DINFRA governance is, the sweetener is also there so that market confidence can be built up. As DINFRA will be advantageous for many industries (asset management, transportation, etc.), it would be much appreciated if the relevant government institutions could collaborate to formulate such kinds of incentives. For example, reduction of taxation rate for dividends of incomes that go from infrastructure assets to DINFRA and then to the investors/unitholders.

- *On the corporate ownership of DINFRA*, though the indirect scheme with equity underlying might not always be chosen, the governance on this subject matter is anticipated to avoid conflicting interests. Plus, if the potential investors come from overseas and in major proportions, creating a linking bridge on how to deal with

DINFRA's shareholding and the FDI regime is expected. Besides, due to the current provision of the liability for non-compliance with relatively loose disclosure measures, it is recommended to create a more robust one.

6.2.2 Separate accompanying instrument to the existing legal framework of DINFRA

Alternatively, should the above proposal be deemed impractical on administrative or regulatory grounds, the recourse would be to set out the relevant agreement or policy, which accompanies the core regulatory framework of the DINFRA. The recommendation in this part is called non-regulatory intervention, as it limits the exposure of governments' involvement. And as for what aspects to regulate, similar points in the above regulatory intervention recommendation can be adopted, alongside suggestions to adopt voluntary disclosure to address the differing concerns of parties in DINFRA before the investment deal as well as mitigating the possibility of moral hazard situation in the performance of fund operation.

- *On the differing concerns of parties in DINFRA*, no matter if the background of potential investors is retail or institutional, they are entitled to have the same perspective in receiving information for assessment into informed decisions. The aligned common interests between them, fund managers, and project owners are expected to exist. Hence, the author suggests adopting the voluntary disclosure concept, whilst, indeed, there is no explicit or solid rule regarding it in OJK Reg 52/2017. Suggestion on this is motivated by aligning the respective interests to ensure that the distinctive features of DINFRA investment scheme are not only imaginary.

Voluntary disclosure is perceived to provide information more openly or transparently. Technically, this can be conducted by solidifying the disclosure measures that have already existed or are governed in OJK Reg 52/2017. And though this research does not examine whether a voluntary disclosure will be less costly, such a measure has been said to help the information dissemination and gathering process. It will support or supplement the mandatory one, especially when mandatory disclosures are inadequate to satisfy investors' needs. When information regarding past data (including similar samples of prospectus and the annual reports, etc.) is a shortage

in the database or public domain, the relevant parties who are interested in DINFRA (together with the fund manager too) can 'work together' in procuring the necessary information being well-spread transparently. Comparing DINFRA with other financing options is more constructive when a voluntary disclosure is also carried out.

From the author's observation, DINFRA transactions can also be established on a tailor-made basis. As noted by one scholar, infrastructure funds are not necessarily the kind of vehicle that has an 'all size' or 'universal'. As such, creative and exclusive customisation is needed when structuring these deals (regarding the investment duration and strategy).⁴¹⁴ The market that comprises parties with similar enthusiasm, such as advancing infrastructure projects and alternative investment via capital markets, can work together in 'tailoring' the deals. They can weigh the pluses and minuses in terms of time, cost, risks, and legal exposures at the same time. In turn, they benefit proportionally according to their respective portions and characters. This approach, of course, needs collaboration or liaison with the fund manager, as the party with particular qualifications and a superior understanding of DINFRA (especially about the transaction, DINFRA's characteristics, and the existing market conditions).

- *On the fund managers' hidden actions or moral hazards*, voluntary disclosure is also suggested, together with specific policies or mutual consent that can mitigate such unwanted situations. This suggestion can also be regarded as an additional measure to reaffirm the fund manager's duty and responsibility for investors' best interests and protection. Likewise, the approach of voluntary disclosure can be viewed as a preventive measure for any future investment in DINFRA, should the market grow constructively in response to queueing transportation projects in Indonesia. Besides, it can also be regarded as a remedy for the experiences of information asymmetry. So, the investors or the unitholders can assess their investments more thoroughly and decide whether they want to remain invested in DINFRA or withdraw from the transaction by redeeming the units.

⁴¹⁴ DePonte, "What Are Infrastructure Funds?", p. 13.

6.3 FINAL REMARKS

For Indonesia, should the global development of infrastructure funds foresee advanced improvements, the author suggests that all the relevant industries emulate the salient points under CIS, ELTIF, and Thai IFF concepts. Especially for transparency, management, and organisation of the funds (from those three concepts) that might be relevant to Civil law system orientation and the recent capital market development. More sufficient sufficiency that the public and investor receive would help sounder governance in the management and structure of the funds; accordingly, it would help foster investor protection for market participant increase.

For Thailand, it deserves credit for going a few steps ahead of Indonesia in developing the market and regulatory framework. Notably, Thailand has preceded (compared to Indonesia) signed a memorandum of understanding on consultation, cooperation, and information exchange concerning AIFM Directive, and several alternative investment funds established in Thailand have been marketed in European countries under the AIF scheme. However, this does not imply that the framework and implementation are impeccable. Study and adjustment to accommodate some of the CIS and ELTIF concepts provisions can be carried out whenever necessary.

Finally, an improvement for this research is also welcomed, given that the scope of this research leaves ample room for further exploration in an interdisciplinary study between business law, investment, and capital markets, as well as infrastructure that can touch on several sub-sectoral industries.

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