Report on

Temporary & Permanent Cash *Waqf Ṣukūk* Structure for Awqāf New Zealand

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ISRA CONSULTANCY

ISRA الأكاديمية العالمية للبحوث الشرعية
International Shari'ah Research Academy for Islamic Finance

بسم الله الرحمن الرحيم

In the Name of Allah the Most Gracious the Most Merciful

ISRA COUNCIL OF SCHOLARS

3 November 2016

Subject: Awqaf New Zealand Sukuk Structure

All praise is due to Allah, prayers and peace be upon the last Prophet Mohammad, and be upon his relatives and all his companions; now therefore,

ISRA Consultancy has presented its research on Sukuk Awqaf New Zealand structure as well as all possible Shariah issues to the Council of Scholars. After a lengthy deliberation on the proposed structure (Appendix I) and its Shariah matters, the Council approved in general the sukuk structure based on temporary and permanent cash waqf as well as the Shariah preferences related to it.

ISRA Council of Scholars

Sheikh Datuk Dr Mohd Daud Bakar	Sheikh Dr Abdulrahman bin Salih Al-Atram
Sheikh Dr Abdul Sattar Abdul Kareem Abu Ghuddah	Sheikh Dr Nizam M. S. Yaquby
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Executive Summary

As a socio-economic development institution, Awqāf New Zealand (NZ) has taken numerous initiatives to responsibly serve the society, especially in the area of Awqāf [*Awqāf*/*waqf* is an endowment trust, typically for charitable purposes, discussed in Section 2]. The objective of Awqāf NZ in issuing the *ṣukūk* is to raise monies globally to acquire New Zealand farm lands and farm operating apparatus and expertise. These farm lands will help solve major logistics by securing livestock/halal food supply, overcome bridging finance, exchange rate and charities' last minute orders. The other objective of Awqāf NZ is to turn the unused parts of the sacrificed animals like wool, skin and bones into *waqf* revenues. The income generated from these sales will benefit the *awqāf* beneficiaries seamlessly and give assurance to the *ṣukūk* contributors that all parts of the animal are optimised effectively.

Awqāf NZ seeks to issue *ṣukūk* based on a structure that is strictly for social purposes. Social fund-raising is an area which Awqāf NZ aims to promote and hopes to successfully accomplish. In this structure, the *ṣukūk*holders are motivated and focused towards the delivery of sustainable social outcomes and philanthropic objectives over the long-run. Although there will be no profit or return-on-capital distributed to the *ṣukūk*holders, the *ṣukūk* will be structured to return their capital. It is also proposed for the *ṣukūk* to have a liquidity feature whereby it can be traded so that social subscribers can sell their *ṣukūk* at par before maturity. The establishment of an international Smart Waqf within the structure is another interesting feature of this effort by Awqāf NZ. The Smart Waqf which is proposed to reside outside New Zealand will maintain a contractual relationship with the *waqf* farm established in New Zealand. Revenues from this relationship will be distributed to beneficiaries globally to promote *awqāf*.

In order to achieve the above objectives, a structure termed as "Temporary and Permanent Cash *waqf ṣukūk*" has been proposed.

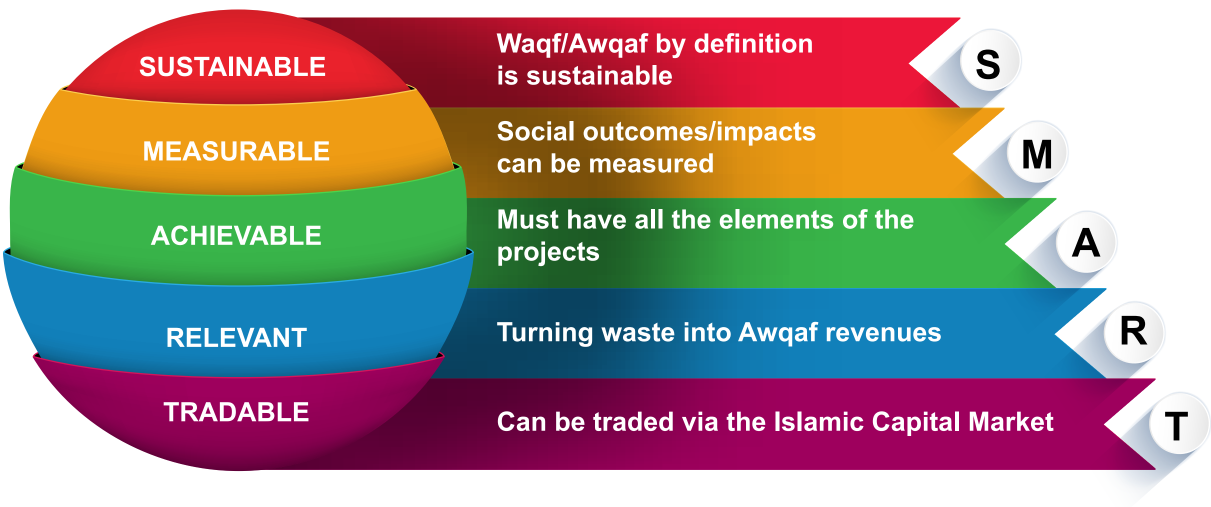
The first part of this report clarifies the structure of the proposed *ṣukūk*. A description and flow of the transactions are explained. The structure consists of a few Sharīʿah contracts namely *waqf*, *qarḍ* (loan), *ḍamān* (collateral), sale and purchase, *wakālah*, *ujrah* (fee), and *takāful* coverage and reserve fund. These contracts and their role in the structure have been elaborated. The topic of *zakāh* in temporary cash *waqf* is clarified in the report to give a clear justification of the importance of *zakāh* in the process. The temporary cash *waqf* in the form of loans extended by individuals and private entities is an issue of debate with regard to whether a *zakāh* obligation is due on that loan. Further discussion and elaboration is included in this part of the report. The relationship between Awqāf NZ and Smart Waqf is also described.

The next part of the report addresses some main Sharīʿah issues related to the proposed *ṣukūk* structure. The main issue is related to the status of "temporary cash *waqf*". The opinions of classical and contemporary scholars have been discussed and it has been concluded that it is allowed. Justifications for this preferred view have been explained. The other issue that has been addressed by this report is related to the issue of using *waqf* assets as collateral. The finding of this report indicates that it is permissible. The issue of extending a guarantee to *ṣukūk*holders has also been highlighted. The guarantee can be provided with or without fees.

The following part of this report is related to legal concerns. This part is considered as a preliminary guide based on desktop research and does not constitute formal legal advice. Among concerns that have been highlighted are land ownership, equity ownership by overseas persons, overseas lending, taxation and others. This part also suggests areas of capital markets regulatory infrastructure that could facilitate and support the Awqāf NZ *ṣukūk* structure. The final part of this report addresses business concerns and other risk issues. Although the primary focus of this report is Sharīʿah compliance, given the groundbreaking nature of the project, certain business concerns and other issues that will impact the fundraising and ongoing governance of the *ṣukūk* are highlighted. This part recaps the high-level aims of the *ṣukūk*, the major parties and assets involved, major risks and mitigants of each party and asset. It also discusses issues related to the structure and governance of the proposed *ṣukūk* and Smart Waqf. Other risks have been outlined and the need for an expert farm manager and operator as well as a robust financial model are recommended. Last but not least, corporate structuring and the relationship between the parties are also been discussed.

This report is prepared subsequent to a Kuala Lumpur Industry Workshop held on 18th August 2016. There are further discussions planned to seek regional validations (i.e. industry workshop in Dubai, Canada, UK, France and Australia) of the model, including an approval of the structure by the ISRA Council of Scholars scheduled in November 2016.

What does S.M.A.R.T Stand for in the Awaqf Sukuk Industry?



Introduction

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- Scope and Limitation
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Introduction

The Background

Awqāf New Zealand (NZ) was established in February 2011 as a result of the successful implementation of an approximately NZD 2 million *Aḍāḥī/Qurbānī* (ʿEid Sacrifice) project. Being a dynamic *waqf* organisation aimed at serving *Awqāf* stakeholders and beneficiaries, Awqāf NZ is currently venturing into structuring one of the world's first Awqāf *ṣukūk*. The model was first unveiled at the World Foundations Conference that was held on 23rd-24th September 2013 in Istanbul, Turkey. The combination of important tools such as Awqāf, charity, *qarḍ al-ḥasan* (benevolent loan) and *ṣukūk* provide an ideal model to promote the Awqāf sector. It is intended that the successful issuance of the Awqāf NZ *ṣukūk* will aid the supply of the *ḥalāl* livestock during the *Aḍāḥī/Qurbānī* season (as well as supplying to relief industries) through the acquisition of farmlands in New Zealand. The unused parts of the sacrificed animals like wool, skin, bone will not be wasted, instead they will be turned into *awqāf* revenues, which will be channelled back to the *awqāf* beneficiaries and invested into other charitable productive tools and initiatives.

Leveraging on Malaysia's position as the global leader of Islamic finance and *ṣukūk* issuance, ISRA Consultancy Sdn. Bhd. (ICSB), is advising on the Sharīʿah compliance of the Awqāf NZ *ṣukūk* model. ICSB's accreditation, expertise, competency and experience in the local and international Islamic finance industry adds value and assurance to the Sharīʿah compliance of the *ṣukūk* model. Furthermore, ICSB shares wholeheartedly the sentiment of Awqāf NZ of having an Islamic platform to better serve the society.

The Objective of the Awqāf NZ *Ṣukūk* Initiatives

There have been a handful of successful *awqāf ṣukūk* issuances in recent times; for example, the Singapore Mushārakah *ṣukūk* and the Mecca Al-Intifāʿ *ṣukūk*. The structure of these *ṣukūk*, allows *ṣukūk* owners to earn income from the development of *waqf* lands. However, at present, there is no *ṣukūk* issued based on a structure that is strictly for social purposes. This is a new innovation that Awqāf NZ *ṣukūk* seeks to establish and hopes to be the first in the world to successfully accomplish.

In this Awqāf *ṣukūk* structure proposed by Awqāf NZ, the *ṣukūk* owners are not motivated by financial return. Instead they are focused towards the delivery of sustainable social outcomes and philanthropic objectives over the long-run. The structure provides options to social subscribers on either to be paid back their capital (based on the temporary *waqf* model) or to waive fully or partially their capital. The structure also allows for secondary market trading of the *ṣukūk* giving social subscribers a liquidity feature for the *ṣukūk*.

The proposed structure is also intended to be a form of Socially Responsible Investment (SRI) *ṣukūk* with some innovations. SRI *ṣukūk* are usually underwritten by a governmental body or sovereign entity and they are usually private placements. The Awqāf *ṣukūk* proposed by Awqāf NZ is intended to be a public placement by a non-profit non-government entity.

The objective of Awqāf NZ is to raise monies globally to acquire farm lands in New Zealand/other countries in later stages (e.g. Australia & Canada) and farm operating expertise on a non-interest basis. These farm lands will help solve major logistics by securing livestock/halal food supply specifically to the *Aḍāḥī/Qurbānī* and humanitarians industries, overcome bridging finance and charities' last minute orders. The other objective of Awqāf NZ is to turn the unused parts of the sacrificed animals (such as wool, skin and bones) into *waqf* revenues. The income generated from these sales will benefit *awqāf* beneficiaries seamlessly and give assurance to the *ṣukūk* contributors that all parts of the animal are optimised effectively.

The Aim of the Report

The aim of this report is to present the research findings based on an in-depth Sharīʿah research and analysis. It endeavours to:

a. Structure a proper model in order to achieve the objectives of the proposed Temporary and Permanent Cash *waqf ṣukūk*.
b. Clarify the Sharīʿah justification of the *ṣukūk*.
c. Highlight legal and commercial concerns noted during the analysis of the model 4.

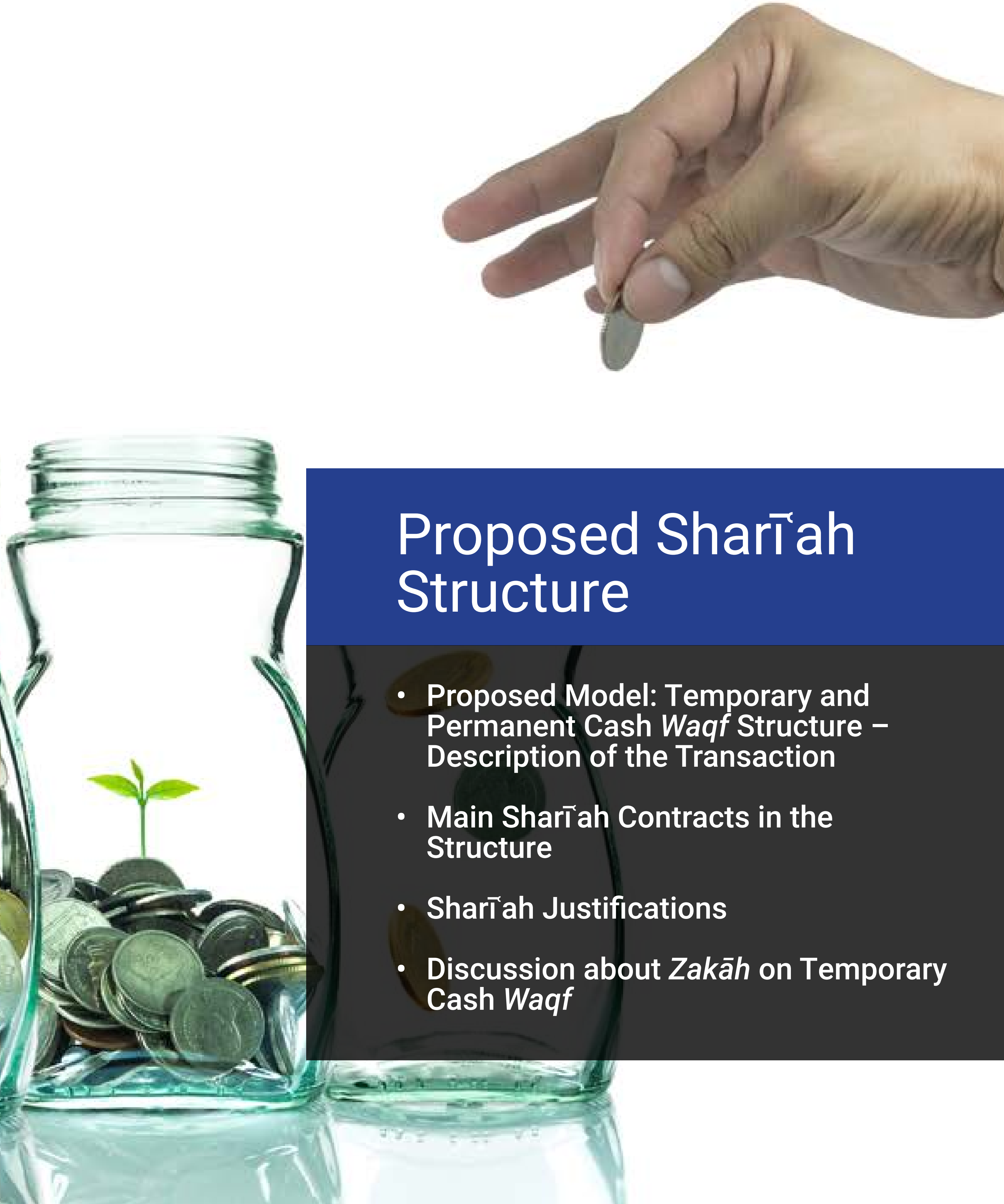
Scope and Limitation

The focus of this report is Sharīʿah research findings on the Smart Waqf and fund-raising via *ṣukūk*. This report also highlights commercial and regulatory requirements affecting the acquisition and ownership of the farmland, extending loans and other legal matters. It is important to note that ICSB's expertise is in Sharīʿah research and not in legal and commercial areas (especially for the farming industry in New Zealand). These legal and commercial issues are highlighted given that the project is at a preliminary stage of development and Sharīʿah compliance covers all aspect of a project, not just the structuring of a financial instrument.

Verification through Workshop and Discussion

The first industry workshop was held on 18 August 2016 with the main objective of bringing together stakeholders to brainstorm on the viability and practicality of the proposed *Awqāf ṣukūk* structure. Additionally, it served as a venue to assess the market interest and appetite for the Awqāf *ṣukūk* product. Among attendees to the said workshop were prominent Sharīʿah scholars, representatives from regulators (Securities Commission Malaysia), Islamic financial institutions (potential *ṣukūk* arrangers), rating agencies (Rating Agency Malaysia – RAM), legal advisors and sovereign wealth funds (e.g. Khazanah Nasional Berhad), Tabung Haji and others. The comments and suggestions made in the workshop(s) have been taken into account in finalising this final report.

Other workshops in other regions (Dubai, Edmonton, London, Paris and Sydney) are also in the pipeline. It is hoped that through these workshops will strengthen the structure of the *ṣukūk* and will secure the support of all the stakeholders.



Proposed Sharīʿah Structure

- Proposed Model: Temporary and Permanent Cash *Waqf* Structure – Description of the Transaction
- Main Sharīʿah Contracts in the Structure
- Sharīʿah Justifications
- Discussion about *Zakāh* on Temporary Cash *Waqf*

Proposed Sharīʿah Structure

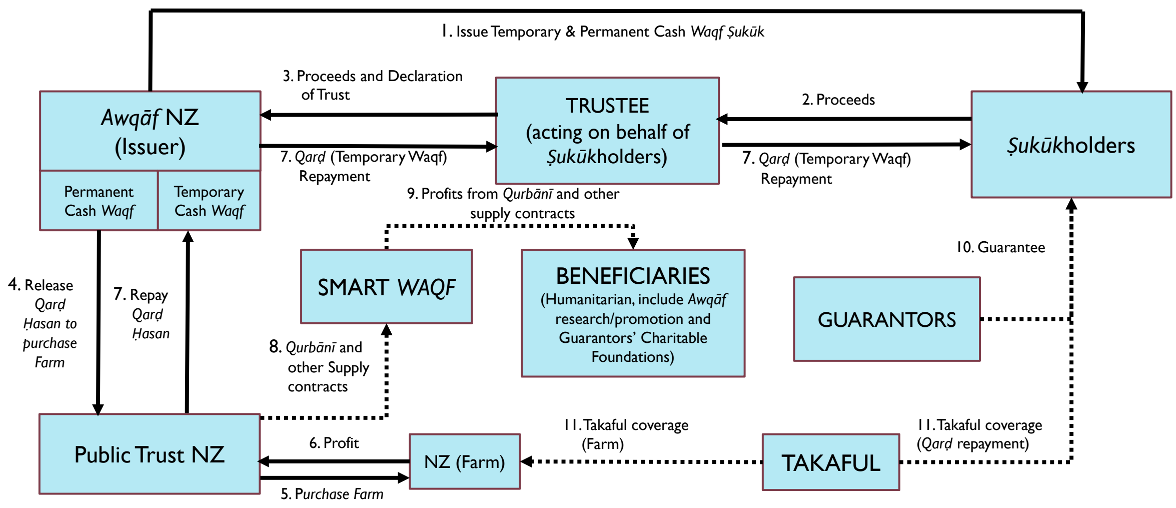
The proposed model for the *ṣukūk* described in this section includes a temporary and permanent cash *waqf* structure as well as *qarḍ*. The proposed model incorporates the main parameters and aims of the *ṣukūk* - that the *ṣukūk* is a "social" *ṣukūk* and not a pure "investment" *ṣukūk* and that the *ṣukūk* results in the establishment of a Farm in New Zealand which is perpetually held in trust (after the *ṣukūk* is repaid) for the benefit of the Awqāf beneficiaries.

The model may be adapted somewhat to be optimal from a commercial, legal, regulatory and tax perspective. For example, the issuer of the *ṣukūk* may be a social enterprise or any other vehicle that is deemed fit instead of Awqāf NZ. An important consideration for the *ṣukūk* model is the restrictions on ownership of farmland in New Zealand. As such, the model utilised a *qarḍ* structure such that the farm is purchased by a New Zealand entity, a newly established Public Trust NZ (described in more detail below).

In addition to the structure outlined in this report, ICSB considers that other *ṣukūk* structures aside from temporary cash *waqf* may be viable given the objectives of Awqāf NZ. These structures include utilising *wakālah* (agency) and *salām* (advance sale). If desired, further work may be undertaken by ICSB to fully develop these structures.

Proposed Model

Temporary & Permanent Cash Waqf Structure



The Temporary and Permanent Cash *waqf* *ṣukūk* Structure depicted in the diagram above will operate as follows:

1. The *ṣukūk* Trustee (acting on behalf of the *ṣukūk*holders) will enter into a Trust Agreement (the Trust Deed) with the major parties to the transaction, including the Issuer (Awqāf NZ) and Public Trust NZ (proposed new owner of the Farm) to receive and manage the *waqf* contributions from the *ṣukūk*holders. Pursuant to the Trust Deed, the Issuer (Awqāf NZ), will issue the Temporary and Permanent Cash *waqf* *ṣukūk*

2. The *ṣukūk*holders will subscribe to the relevant tranche of the Temporary and Permanent Cash *waqf* *ṣukūk* by payment of the issue proceeds of the relevant *ṣukūk* to the Issuer.

   The Proceeds will flow through the Trustee and be disbursed to the Issuer who will hold the funds as Permanent and Temporary Cash *waqf* according to the Trust Deed.

3. Based on the Trust Deed, the Issuer (Awqāf NZ) will manage two pools of cash *waqf*:

   a. Temporary Cash *waqf* (repayment required)

   b. Permanent Cash *waqf* (no repayment required)

4. Benevolent Loan (*Qarḍ Ḥasan*)

   When a suitable farm has been identified and purchased according to the pre-defined required procedures, the Cash *waqf* Fund (both permanent and temporary funds) will extend a non-interest bearing Benevolent Loan (*Qarḍ Ḥasan*) to Public Trust NZ to pay the sale price for the Farm as well as to purchase equipment and establish working capital for the operation of the Farm by Public Trust in NZ.

5. Public Trust NZ will enter into a contract with a selected contractor to manage and operate the Farm. The proposed contract to be applied here is al-*ujrah ʿlā al-ʿamal* (work with fees).

6. The Farm will commence operations and surplus profits will flow to Public Trust NZ.

7. Public Trust NZ to repay the loan over time to the Cash *waqf* Fund. The Cash *waqf* Fund will in turn return the temporary cash *waqf* contributions to the Trustee who will transfer the amount to the *ṣukūk*holders who have subscribed to Temporary Cash *waqf* portion of the *ṣukūk*.

   Awqāf NZ will continue to manage the Cash *waqf* Fund. The contribution to this fund will come from two sources:

   (i) Permanent Cash *waqf* *ṣukūk*holders who have given their consent and instruction that the profit (if any) from their contribution be channeled to Smart Waqf,

   (ii) Temporary Cash *waqf* *ṣukūk*holders may receive back their contributions (free of interest and profit) from surplus profits generated by the Farm. They may further choose to relinquish their rights to the repayment of their capital and convert their temporary contribution to a permanent contribution. This could be conditional to the fulfilment of the Key Performance Indicator (KPI) or any other reason.

8. There will be an ongoing contractual relationship between the Public Trust NZ owning the Farm Project and Smart Waqf. Smart Waqf will arrange for Aḍāḥī and other projects with end-customers and commission Public Trust NZ to undertake these *Aḍāḥī/Qurbānī* and other projects.

9. Surplus Profits will thus be generated by both Public Trust NZ and Smart Waqf. Public Trust NZ profits will be utilised to maintain and enhance operations of the Farm and Smart Waqf will distribute profits to beneficiaries which may include charitable foundations of parties connected with the *ṣukūk*, including guarantor(s) and major primary subscribers (on an arms-length basis).

10. *ṣukūk*holders may also benefit from guarantor(s). The Guarantor(s) would provide an unconditional and irrevocable guarantee, as a continuing obligation, in favour of the *ṣukūk* Trustee for and on behalf of the *ṣukūk*holders under which the Guarantor(s) shall irrevocably guarantee all of Awqāf NZ financial obligations in relation to the Temporary Cash *waqf ṣukūk*.

    If any default occurs, the Guarantor(s) shall repay the *ṣukūk*holders and the farm will be liquidated to repay the Guarantor(s). If the farm sale proceeds are insufficient to repay the Guarantor(s) they will suffer a loss, otherwise, surplus proceeds will be kept with the Cash *waqf* and distributed as stipulated in the Cash *waqf* Trust Deed.

11. Takāful coverage may also be procured to mitigate defined operational losses of the Farm and may also be procured to mitigate any risks to the loan repayment to *ṣukūk*holders.

Public Trust NZ will play an important role in the *ṣukūk*:

a. To act as the NZ-based trustee to own and operate the Farm project in perpetuity in line with the objective of the endowment.

b. To ensure the overall governance of the Farm project meets the required commercial, legal and regulatory requirements.

c. To facilitate the liquidation process of the farm in the case of default of the Temporary Cash *waqf ṣukūk*.

Main Sharīʿah contracts in the structure

Waqf

Waqf in Arabic language means to stop, contain or preserve. Technically, it refers to a religious endowment, i.e. a voluntary dedication of one's wealth or a portion of it in cash or kind (such as a house or land), and its use/disbursement for Sharīʿah compliant projects.

This is the major contract in the structure and will be discussed further in the ensuing section.

Qarḍ (loan)

Qarḍ refers to a contract of lending money by a lender to a borrower where the latter is bound to return an equivalent replacement amount to the lender. Money may include cash, all forms of currency, gold and silver. A Qarḍ contract is established when ownership of a sum of money belonging to the lender is transferred to the borrower which gives the effect of the borrower having an obligation to repay the lender in full. The inherent nature of a Qarḍ contract is the obligation of the borrower to return the money borrowed in full. Terms and conditions of the Qarḍ contract that have been mutually agreed upon between the contracting parties and consistent with the Sharīʿah must be binding on the contracting parties. (BNM, 2016). In the structure above, *Qarḍ* contract is applied at:

- Stage 4: Cash *waqf* Fund will extend loan (*qarḍ*) to Awqāf Project (Farm).
- Stage 7: Returns from the project will be used to:

a. Pay back the loan (*qarḍ*) of the Temporary Cash *waqf* portion. This will be done through the Trustee who will transfer the amount to the *ṣukūk*holders who have subscribed to Temporary Cash *waqf* portion of the *ṣukūk*. The *ṣukūk*holders will get back their capital through this process.

Proceeds from the loan, will be utilised, among others:

- To purchase a farm. The land will be owned by NZ Public Trust (directly or indirectly). The assets (the farm and land) will be registered as collateral so long as the loan under this *ṣukūk* programme is outstanding.
- To be injected as working capital of the farm.
- To purchase livestock and other relevant assets such as machines, building, vehicles, etc. from the vendors/ suppliers.

Rahn (Collateral)

An element of collateral for the benefit of the *ṣukūk*holders in case the loan is not repaid in a timely manner.
In the structure above, collateral prerequisite is required at:

- If any default occurs, the farm will be liquidated in order to pay compensation to the *ṣukūk*holders.

Sale and Purchase

Sale - Contract involving transfer of the possession and ownership (title) of an asset or property, or the entitlement to a service, in exchange for money or value.

In the above *waqf* structure, the Awqāf Project will receive a loan from the Cash *waqf* Fund to purchase farm land. This farm land will be held under trust by the Public Trust NZ. For the avoidance of the doubt, the land is not declared as *waqf* land at this stage. Therefore, whilst the loan is outstanding the Public Trust will be able to sell the land to repay the loan, if needed. This is to ensure that the Cash *waqf* Fund remains intact. After the loan is fully paid, the Public Trust will not be able to sell the land except under extraordinary defined circumstances.

Wakālah (Agency)

Wakālah refers to an agency contract in which a party, as principal (*muwakkil*) authorises another party as his agent (*Wakīl*) to perform a particular task in matters that may be delegated, with or without imposition of a fee. The inherent nature of *wakālah* is based on delegation or authorisation of the *Wakīl* by the *muwakkil* resulting in the Wakīl having fiduciary duties (*amānah*) towards the *muwakkil* within what has been authorised to him. (BNM,2015). In the structure above, *wakālah* contract is applied at:

- The *ṣukūk* Trustee (acting on behalf of the *ṣukūk*holders) will enter into a Wakālah Agreement with the Issuer Awqāf NZ pursuant to which the *ṣukūk* Trustee shall appoint the Issuer as its agent (*wakīl*) to manage:
  a. Temporary Cash *waqf* (repayment required)
  b. Permanent Cash *waqf* (no repayment required)

Ujrah (Fee)

Ujrah in Islamic finance is a generic term for a fee, especially one charged for a service. In the structure above, a specific contractor will be appointed to manage the operation of Awqāf Project with fees.

Guarantee

Possible guarantors of the *ṣukūk*:

Guarantors would pay amounts to *ṣukūk*holders in the event of default instead of the *ṣukūk*holders having to undertake a credit assessment solely on Awqāf NZ and the project themselves. This would enable the *ṣukūk* to be issued to less-sophisticated retail investors. The guarantors would need a high credit-rating to achieve the purpose, as well as have national and international repute. Possible guarantors include sovereign institutions such as *waqf* ministries of various countries and corporate entities (preferably those who have charitable foundations).

Takāful Coverage and Reserve Fund

The Wakīl may procure one or more Takāful policies to benefit the Farm and the *ṣukūk*holders. The premium for the Takāful policies can be paid from the initial funds raised via the *ṣukūk* and from profits generated from operation of the Farm thereafter. Given there is a trade-off between *Takāful* coverage and *takāful* premium, a careful cost/benefit assessment would need to be undertaken, as is customary, such that appropriate (and not excessive and costly) Takāful coverage is procured. Possible Takāful policies for the Farm would include coverage for normal risks related to Farm operations and livestock whereas possible Takāful policies for the *ṣukūk*holders could cover risks including non-payment and other risks outlined in Section 6.

Another possibility to mitigate risks is for a Reserve Fund to be built-up from the Farm operating profits. This Reserve Fund would be set-aside to repay *ṣukūk*holders and would accumulate funds in profitable years and would use funds in unexpectedly bad periods such that regular payments may be made despite economic cycles.

Relationship between Public Trust and Smart Waqf

The relationship between the Public Trust and Smart Waqf is critical. There are various possibilities to structure the relationship given this legal restriction such as:

- Board/Trustee representation by the Smart Waqf in New Zealand
- Commercial contracts between Smart Waqf and NZ entities
- Shareholding in NZ entities

It is intended that the farm in New Zealand will be the first of many assets under the purview of Smart Waqf. In order to manage the global activities of the Smart Waqf, its representatives could be a Trustee or representative in the major country-based *awqāf* established so as coordinate and disseminate best practices. Smart Waqf may also contribute fee-based management services to country-based *waqf*

An ongoing contractual relationship between the *Awqāf* Project (Farm) and Smart Waqf whereby the latter will commission the former with *Aḍāḥī/Qurbānī* [sacrificial meat paid for by Muslims and distributed to the poor] and other projects would allow Smart Waqf to earn income. For example, the New Zealand Farm issues a *Qurbānī* sale undertaking or supply contract to the Smart Waqf. The undertakings/contracts can be perpetual or long-term time-bound in nature.

Smart Waqf could also own shares (ordinary or preference) in New Zealand entities established for the purpose of the Farm, noting the restriction in overseas shareholding in New Zealand Farm Land.

Equity shares could be in a Farm-owning Co or minority shares in the Land-owning Co (if possible). Preference shares (structured to be Sharīʿah-compliant) in a Land-owning Co or in the Farm-owning Co could be established to avoid any ownership restrictions.

Smart Waqf could provide a loan to Awqāf NZ in the form of Qarḍ. If it is structured as a *Qarḍ*, loan repayments will cease once the *Qarḍ* has been repaid in full.

Sharīʿah Justifications

This in-depth Sharīʿah research and analysis is conducted to ascertain possible Sharīʿah issues in the Awqāf *ṣukūk* (Endowment Bonds) Project initiated by Awqāf NZ. These Sharīʿah issues will be addressed in a manner that suits the objectives of Awqāf. In addition to the above, the Sharīʿah justifications will also identify the appropriate means and efforts required for Awqāf NZ to address those issues.

Sharīʿah issues in the proposed structure (Classical and Contemporary Views)

1. *Waqf* in general

Literally, the term *waqf* (plural *awqāf*) and *ḥabs* (plural *aḥbās*), are *maṣdar* (verbal nouns, infinitives, in Arabic) and they both mean 'to stop', to prevent, to restrain for example *al-ḥabs wa al-man*'. Although the two terms, *waqf* and ḥabs, carry the same meaning, different countries prefer different customary usage. For example, the term *waqf* is used in the Middle East and Asia, while the term ḥabs is more commonly used in West Africa. (Mohsin, 2009 with alteration).

Legally, *waqf* is defined as a gift of a corporeal property (*'ain*) for the benefit of either: the donor's family or someone else or something, in perpetuity or temporarily, as a charity promised and executed normally during the lifetime of the donor, which is not capable of transfer, gift, and transmission thereafter.

2. Cash *Waqf*

Cash *waqf* is a fungible *waqf* that has been established with money to promote services to mankind in the name of Allah S.W.T. According to Muslim jurists, cash *waqf* can be invested in *muḍārabah* and other safe investments so as to preserve the endowment capital and the revenue generated can be invested in various undertakings or activities which have charitable purposes. This approval had been followed by the other schools of law which also permitted this type of *waqf*. (Mohsin, 2009).

waqf assets are typically permanent fixed assets such as land that do not diminish through time or use, though movable properties and cash is also permitted. From the Ḥanafī school of fiqh, a disciple of Abū Ḥanīfah, Imām Zufar approved all fixed and movable properties to be dedicated as *waqf* including the *waqf* of *dirhām* and *dīnār* for example *waqf al-nuqūd* (cash *waqf*). Along the same lines, Imām Zufar confirmed that jewelry could also be dedicated as *waqf*.

He based his opinion on the act of Ḥafṣah (may Allah be pleased with her), the wife of the Prophet (pbuh), who dedicated her jewelry to her relative. Similarly, both Imam Muḥammad and al-Sarakhsī had approved all movable properties as the subject matter for *waqf*. (Mohsin, 2009).

Imam Mālik bin Anas had also agreed on both immovable and movable properties as a subject matter of *waqf* even if it is cash *waqf*. With respect to the other two schools of fiqh, both Imams, al-Shāfiʿī and Ibn Ḥanbal had agreed on the validity of both immovable and movable properties as a subject matter of *waqf*.

The issue of cash *waqf* has been discussed by *fuqahā* (jurists) under the rubric of *waqf* of something that perishes by consumption (*waqf al-mithlīyāt*) such as *waqf* of foodstuff. The essence of *waqf* is to benefit from its usufruct of a property and corpus intact, however in cash *waqf* the corpus (money) is consumed and therefore disappears, what remains is its equivalent. This has pushed some *Fuqahā* (Jurists) to reject such *waqf* and some of them to make it *makrūh* (abhorred).

The position of Abū Ḥanīfah and Abū Yūsuf (a prominent Ḥanafī jurist) was the impermissibility of making *waqf* of movable things. Abū Yūsuf stated that *waqf* is only valid if it is irrevocable and thus cannot be reverted back to the founder, but must be made in perpetuity. Regarding the movable properties to be made into *waqf*, Abū Yūsuf was of the view that no movable property can be endowed as *waqf*, but weapons of war, cattle and implements of animal husbandry attached to the dedicated *waqf* land and books can be dedicated as *waqf*.

He based his opinion on the tradition of the Prophet (pbuh) which stated as follows, 'The Prophet (pbuh) said; Khālid Ibn al-Walīd has appropriated his horse and armour for the cause of Allah'. According to him *waqf* of movable property is valid only if it was customary during the time of the Prophet (pbuh). In contrast to this last view, another disciple of Abu Ḥanīfah, Imām Zufar approved all movable properties to be dedicated as *waqf*. He also included the *waqf* of *dirhām* (pl. *darāhim*) and *dīnār* (pl. *danānir*) i.e. *waqf al-nuqūd* (cash *waqf*). (Mohsin, 2009).

Some classical texts that reflect the above discussion are as follows:

ومذهب الشافعية عدم جواز وقف ما لا يحصل الانتفاع به إلا بإتلافه كالذهب والفضة والمأكول

(مجلة مجمع الفقه الإسلامي ، 12/68)

"According to the Shāfiʿī School, *waqf* is not permissible on objects that benefits cannot be derived from without affecting its essence, such as gold, silver and foods."

ذَهَبَ الْحَنَابِلَةُ وَالشَّافِعِيَّةُ فِي الأْصَحِّ وَابْنُ شَاسٍ وَابْنُ الْحَاجِبِ مِنَ الْمَالِكِيَّةِ إِلَى أَنَّ وَقْفَ النُّقُودِ غَيْرُ جَائِزٍ؛ لأِنَّ النُّقُودَ لاَ يُنْتَفَعُ بِهَا مَعَ بَقَاءِ عَيْنِهَا، بَل الاِنْتِفَاعُ بِهَا إِنَّمَا هُوَ بِإِنْفَاقِهَا، وَهُوَ اسْتِهْلاَكٌ لأِصْلِهَا، وَذَلِكَ مُخَالِفٌ لِمَوْضُوعِ الْوَقْفِ. (الموسوعة الفقهية الكويتية ، 41/193)

According to the most agreed opinion of the Ḥanbali and Shāfiʿī School and Ibn Shās and Ibn al-Hājib of the Mālikī School, monetary *waqf* is not permissible because cash cannot be utilised while it original essence remains since the usage of its essence requires it to perish which is done by consuming it. This is contrary to the principles of *waqf*.

The cash *waqf* is not permissible by these Schools/Scholars because the money does not stay with the same benefit of it but it is used by spending. The consumption of cash is thus contrary to *waqf* and more of a donation.

وأما الشافعية فقد ذكر الإمام الشيرازي الخلاف فقال: (واختلف أصحابنا في الدراهم والدنانير؛ فمن أجاز إجارتها أجاز وقفها، ومن لم يجز إجارتها لم يجز وقفها) (النووي ، المجموع شرح المهذب 15/321)

Imām Shīrāzī from the Shāfiʿī School highlighted the conflict and said:

Our scholars have different opinions regarding dirham and dinar. Those who permit the rental of dirham and dinar, permit that they can be given as *waqf* and those who did not permit the rental of dinar and dirham did not permit to be given as *waqf*.

ومذهب الإمام أحمد عدم جواز وقف ما لا ينتفع به إلا بإتلافه مثل الذهب والورق والمأكول والمشروب، والمراد بالذهب والفضة هنا الدراهم والدنانير وما ليس بحلي لأن ذلك هو الذي يتلف بالانتفاع به، أما الحلي فيصح وقفه واختار ابن تيمية صحة وقفها (مجلة مجمع الفقه الإسلامي ، 12/68)

Imām Aḥmad is of the view that it is impermissible to make *waqf* of property that its benefit cannot be derived except by consuming it for example gold, paper, food and drink. What is meant by gold and silver here is dirham and dinar not in the jewellery form because it perishes while being utilised and in this case the *waqf* is permissible in the jewellery form. As for jewellery, it is permissible to donate it as *waqf* and this is the opinion of Ibn Taymiyyah.

وقف النقود للسلف ينبغي أن يقرر، وذلك لأن الأموال وإن كانت لا تتعين فإن بدلها يتعين، ولكنه يلزم مع ذلك ضمان هذا الوقف بتأسيس صندوق للسلف الوقفي ضمن شروط الاستثمار الإسلامية (مجلة مجمع الفقه الإسلامي ، 12/90)

Cash *waqf* needs to be accepted. Because money, although normally need not be specified, but its substitutes should be specified. However, the *waqf* should still be guaranteed by establishing an endowment fund based on Islamic investment conditions.

Imām Mālik in Mudawwanah and the Mālikī school allow cash *waqf* if it is for the purpose of lending it to those who are in need. Late Ḥanbalī scholars such as Ibn Taymiyyah allow cash *waqf*. The outcome of the view of Muḥammad Ibn Ḥassān al-Shaybānī is the permissibility of such *waqf* if it is accepted by custom and practiced. There is a narration of Imām Zufar allowing cash *waqf*. The later Ḥanafī allow cash *waqf* based on the principle of custom.

قال ابن عابدين في حاشيته: "قلت إن الدراهم لا تتعين بالتعيين، فهي وإن كانت لا ينتفع بها مع بقاء عينها، لكن بدلها قائم مقامها لعدم تعينها فكأنها باقية، ولاشك في كونها من المنقول، فحيث جرى تعامل دخلت فيما أجازه محمد، ولهذا لما مثل محمد بأشياء جرى فيها التعامل في زمانه، قال في الفتح إن بعض المشايخ زادوا أشياء من المنقول على ما ذكره محمد لما رأوا جريان التعامل فيها، وذكر منها مسألة البقرة الآتية ومسألة الدراهم والكيل حيث قال: ففي الخلاصة وقف بقرة على ما يخرج من لبنها وسمنها يعطى لأبناء السبيل قال: إن كان ذلك في موضع غلب ذلك في أوقافهم رجوت أن يكون جائزاً، وعن الأنصاري -وكان من أصحاب زفر- فيمن وقف الدراهم أو ما يكال أو يوزن قال نعم، قيل: وكيف؟، قال: يدفع الدراهم مضاربة ثم يتصدق بها في الوجه الذي وقف عليه، وما يكال أو يوزن يباع ويدفع ثمنه لمضاربة أو بضاعة، قال: فعلى هذا القياس إذا وقف كراً من الحنطة على شرط أن يقرض للفقراء الذين لا بذر لهم ليزرعوه لأنفسهم ثم يؤخذ منهم بعد الإدراك قدر القرض، ثم يقرض لغيرهم من الفقراء أبداً على هذا السبيل يجب أن يكون جائزاً، قال: ومثل هذا كثير في الري وناحية دوماوند" (مجلة مجمع الفقه الإسلامي ، 12/68)

Ibn ʿĀbidīn said in his book Ḥāshiyyah: Dirhams are not specified by identification [i.e. are fungible]. Although they cannot be utilised while being kept, substitute [dirhams] can take their place since they are not specified; therefore, it is as if they still remain. Moreover, there is no doubt that they are movable, and since it has become customary practice [to make endowments of dirhams], they should be included into what was permitted by Muḥammad Ibn Hassan al-Shaybānī. Hence, since Muḥammad gave examples of things that were being treated in that way during his time, [the author of] al-Fatah stated that some scholars added things to what was mentioned by Muḥammad when they saw them being treated in that way. Examples he mentioned are the issue of a cow, dirhams and what is sold by volume. The author of al-Khulāṣah said regarding the *waqf* of a cow [which will perish after time, unlike land] on the basis that the milk and the butter should be given to wayfarers: if this is in a place where such practices are common in their endowments, then it should be permissible. Al-Anṣāri - the companion of Zafar – was asked about endowment of dirhams and items that are sold by volume or weight; he replied: Yes. He was asked how. He said: He would give the dirhams as *muḍārabah* capital; then he would give [the profits] in charity to the entity he has identified as the beneficiary of the *waqf*. Items sold by volume or weight would be sold and the proceeds would be paid as *muḍārabah* capital or merchandise. He said: This principle would be applied to an amount of wheat that is endowed on the condition that it be lent to the poor who have no seed to cultivate for themselves; the amount loaned to them would then be recovered after the harvest. It would then be lent to other poor people continuously in a similar manner.

This should be permissible. This is popular in Al-Rayy and the District of Dawmāwand.

Contemporary Views on Cash *Waqf*

Some contemporary Islamic fatwa bodies have discussed this matter on the status of the cash whether it can be considered as a *waqf* asset or not. According to Majma` Fiqh al-Islamī (2004) Resolution 140 (6/15), the amount of cash itself is regarded as *waqf* asset and not the purchased asset later. When the cash is invested on buying a property or shares for example, those assets will not be regarded as *waqf* asset by itself and it is permissible to sell those assets for purpose of investment. Thus, the ruling of *istibdāl* shall not be applicable here as the *waqf* asset is the value of the cash endowed and not the assets purchased with the cash.

”إذا استثمر المال النقدي الموقوف في أعيان كأن يشتري الناظر به عقاراً أو يستصنع به مصنوعاً، فإن تلك الأصول والأعيان لا تكون وقفاً بعينها مكان النقد، بل يجوز بيعها لاستمرار الاستثمار، ويكون الوقف هو أصل المبلغ النقدي“

Therefore, the status of whether cash can be considered as a *waqf* asset depends on the intention of the *wāqif* and model than they want to embark in. To consider cash as a *waqf* asset by itself, the *wāqif* shall ensure that all utilisation of it must be in manner that preserves its perpetuity.

International Islamic Fiqh Academy Council (Majmaʿ Fiqh Islamī, 2004) in its 15th meeting on 2004 in Muscat, Oman resolved that:

(a) Cash *waqf* is permissible because the main objection of *waqf* by preserving the corpus while disseminating its benefits could be achieved through cash *waqf*. Since money cannot be specified by separation (لا تتعين بالتعيين), by giving back its equivalence is the same as preserving the original.

(b) It is permissible to use the cash *waqf* for the purpose of giving benevolent loan (*qarḍ ḥasan*), or to be directly invested or channelled by collective contributors in an investment portfolio or by issuing shares designated for *waqf* to accelerate the *waqf* in collective spirit.

(c) When the cash has been invested e.g. buying a property or shares, those assets will not be regarded as *waqf* asset by itself and it is permissible to sell those assets for purpose of investment. The *waqf* asset is the amount of money that has been endowed.

The Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) (2010) in its Sharīʿah standard no.33 on *waqf* (3/4/3/2) stated that:

يجوز وقف النقود، ويكون الانتفاع بها بما لا يؤدي إلى استهلاكها مع الانتفاع بها مثل: الإقراض لمشروع أو باستثمارها بالطرق المشروعة المأمونة غالباً مثل المضاربة بها، ويُصرف نصيب الوقف من الربح في الموقوف عليه. مستند صحة وقف النقود أنه الأصل. وهو قول محمد بن عبد الله الأنصاري صاحب الإمام زفر، واختاره ابن تيمية. ونحوه وقف الأسهم والصكوك.

"*waqf* is permissible in the form of money. The income generated from utilisation of the money is to be spent, while retaining the principal amount [as a permanent *waqf* endowment]. Utilisation may include, for instance, Sharīʿah based loan facility as well as permissible and safe investments like Muḍārabah where the profit share owned by the *waqf* goes to beneficiaries"

Majelis Ulama Indonesia (n.d) allows the practice of Cash *waqf* on condition that it will be used in a manner that could guarantee its sustainability.

The 77th Muzakarah (Conference) of the Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia (2007) held on 10th -12th April 2007 has discussed the rulings regarding the development of *waqf* land under the Ninth Malaysia Plan. In this meeting the committee had decided that Cash *Waqf* is permissible.

Selangor Fatwa Committee (2006) in its meeting on the 5th of September 2006 had resolved that gains from the Saham Wakaf Selangor Scheme must be used for the purchase of permanent assets. While money from *waqf* benefits may be used to provide aid and other expenses deemed appropriate by the Selangor Islamic Religious Council. (Muhd, Ahmad & Muḥammad, 2015)

It can be observed from the above discussion that the rationale for the permissibility of cash *waqf* is that money is a fungible asset *māl mithlī* and its equivalent can replace it. And even if it is consumed by using it, its equivalent, that needs to be paid back, remains. Allowing cash *waqf* means considering this cash as a fixed asset that can be utilised (through providing loans or safe investment) but remains intact through recovery of the principal (original) amount. This is consistent with the definition of *waqf* that says: The retention of an asset and the devotion of its profit or products "الوقف تحبيس الأصل مع تسبيل الثمرة".

There is no difference between making *waqf* of palms and *waqf* of cash money: both are a fixed asset from one perspective, therefore if it is allowed to make *waqf* of palm dates, cash *waqf* should be also be allowed.

Temporary *Waqf*

There are two possible types of *waqf* which are (i) perpetual and (ii) temporal. In temporary *waqf*, adequate attention must also be given to the importance of temporality. In this regard, we note that all jurists, with no exception, approve the temporality of *waqf* if it comes from the nature of the *waqf* asset, for example the *waqf* of trees, horses and books etc. is accepted even thou naturally these assets will be no longer in existence in the future They did not consider this *waqf* as non-perpetual on the claim that this is a *waqf* for the lifetime of the asset itself. (Kahf, 2009)

There are two views regarding the temporary *waqf*:

First view: Ḥanafī, Shāfiʿī and Ḥanbalī schools of law are of the view that perpetuity is a condition for *waqf* and a condition to make *waqf* temporary make it void.

إِنَّ الْوَقْفَ إِزَالَةُ الْمِلْكِ لاَ إِلَى حَدٍّ فَلاَ يُحْتَمَلُ التَّوْقِيتُ كَالْإِعْتَاقِ، وَجَعْلُ الدَّارِ مَسْجِدًا.
(الصنعاني ، بدائع الصنائع ، 14/144)

waqf is defined as renunciation of ownership without restrictions, therefore it is not to constrain to a specific period such as a freed slave or making a house [temporarily] into a mosque.

Second view: Mālikī School is the only group of jurists who explicitly accept temporality in *waqf* by virtue of the will of the founder. Mālikīs, however, do not accept temporality in a *waqf* for a mosque and they say that even if a *wāqif* (founder) decreed that his/her *waqf* for a mosque is temporal, the *waqf* is considered perpetual and the temporality condition is nullified. It may be interesting to note that the Mālikīs, who rejected temporality in mosque's *waqf*, accepted it if the founder is a lessee of a structure and he/she made his/her usufruct, owned by virtue of the lease contract into *waqf* as a mosque.

However, it must be noted here that temporality in a *waqf* by a lessee is caused by the nature of the property not by the will of the founder. (Kahf, 1999). Temporal *waqf* is allowed by Imām Aby Yūsuf and Mālikīs and is recognized by the Egyptian law of *waqf*.

Ḥanbalī in one view and Imām Abu Yūsuf recognized temporary *waqf* and refused to accept its revocation by the donor. (Kahf, 1999).

Temporary *waqf* is not permitted by the Ḥanafī, Mālikī and Shāfiʿī school of laws. However, Imām Abū Yūsuf and Mālikī jurists, the practice of the later Ḥanafī scholars, Ibn Taymiyyah (Ḥanbalī), Majmaʿ al-Fiqh and many contemporary scholars allow temporary *waqf*. This is in addition to the enactments of: Sudan, Egypt, Iraq, Syria, Iran, Turkey, India, Pakistan, Malaysia in some states (Selangor and Johor that include cash *waqf* and contemporary *waqf*), Indonesia, and Singapore.

Classical Statements in favour of Temporary *waqf* are as follows:

قال الدسوقي: ”ولا يشترط في صحة الوقف التأييد“ (مجلة مجمع الفقه الإسلامي ، 13/516)

Al-Dusūkī Said: *waqf* does not require perpetuity.

قال أبو العباس ابن سريج: ”يجوز الوقف المؤقت، لأنه لما جاز له أن يتقرب بكل ماله وببعضه جاز له أن يتقرب به في كل الزمان وفي بعضه”
(الماوردي ، الحاوي ، 7/521)

Abū Al-ʿAbbās Ibn Surayj said: Temporary *waqf* is allowed, since it is allowed for him to give his wealth in whole or part, he should be allowed to make charity on perpetual or temporary basis.

وقال الماوردي: ”أجاز مالك أن يقف على أنه إن احتاج إليه باعه أو رجع فيه أو أخذ غلته. لقول الرسول صلى الله عليه وسلم: ((المسلمون عند شروطهم)) ولما روي عن علي رضي الله عنه في وقفه“ (مجلة المجمع الفقه الإسلامي ، 13/516)

Al-Māwardī stated that Mālik allowed to make *waqf* on the condition that if he needs it he is allowed to sell it or reclaim it back or benefit from its harvest based on the statement of the Prophet (pbuh) that says: (Muslims are bound by their conditions) and based on the narration on ʿAlī (May Allah Be Pleased with him) with regards to his *waqf*.

وقال السرخسي : "... وَعِنْدَ أَبِي يُوسُفَ رحمه الله يَجُوزُ الْوَقْفُ مُؤَقَّتًا وَمُؤَبَّدًا ؛ لِأَنَّ فِي هَذَا تَمْلِيكَ الْمَنَافِعِ، وَقَدْ جَازَ مُؤَبَّدًا، فَلَأَنْ يَجُوزَ مُؤَقَّتًا أَوْلَى. أَلَا تَرَى أَنَّ الْإِجَارَةَ تَجُوزُ مُؤَقَّتَةً وَلَا تَجُوزُ مُؤَبَّدَةً، ثُمَّ التَّأْبِيدُ لَمَّا لَمْ يُبْطِلْ الْوَقْفَ، فَالتَّوْقِيتُ أَوْلَى أَلَّا يُبْطِلَهَا"

Al-Sarakhsī said: It is reported from Abū Yūsuf (may Allah have mercy on him) saying that *waqf* can be donated on either temporary or perpetual basis because it is an ownership transfer of usufructs. Since it is allowed on a perpetual basis, it is, a fortiori, allowable on a temporary basis. Do you not see that lease is permissible on a temporary basis and it is not permissible on a perpetual basis? Moreover, since perpetuity does not invalidate the *waqf*, temporary transfer of ownership would, a fortiori, also not invalidate it.

AAOIFI standard No. 33, 3/1/4 on *waqf* stated that in principle *waqf* should be eternal. Nevertheless, temporary *waqf* is also permissible when the donor desires to get back his property after a specific period.

"الأصل أن يكون الوقف مؤبداً ويجوز أن يكون مؤقتاً لمدة إذا نص الواقف على توقيته بحيث يرجع الموقوف بعدها إلى المالك."

In Indonesia according to Act No: 41/2004: "A *Wāqif* may legally act to separate/donate his belongings, to be benefited forever or for some period according to the need for worship and/or prosperity Islamically"
The Article 12 (3) of the act states that the movable *waqf* may be in the form of money, precious metal, Capital Certificate, vehicle, intellectual right, rental rights and other moveable assets which comply to the Islamic Teaching"

Perpetuity of the subject matter is not expressed in legal texts and is not held by consensus. It has restrictive effects on the development of *waqf*, therefore, perpetuity should not be the core characteristic of *waqf*.

There is no reason for blocking its validity as *waqf* as long as it benefits the institution of *waqf* and society.

The prohibition of temporal *waqf* could be considered as refusing the wishes of the founder of a temporary *waqf*. Charity and ʿibādah [act of worship] will be achieved with temporary *waqf* as it will have two benefits: the benefit of usufruct during this temporary period and the benefit to the *wāqif* as he may need his property in in the future and above all this will encourage more people to do *waqf* and support charitable organisations.

4. Temporary Cash *Waqf*

Temporary cash *waqf* occurs when the *wāqif* lends his money for a specific duration and receives it back at the expiry of the period. The justification for temporary cash *waqf* is the logical outcome of the justification for the permissibility of temporary *waqf* and of cash *waqf* and a combination of both evidences. It is also based on the permissibility to make conditional *waqf* mentioned by Muslim Jurists.

Benefiting from *waqf* asset/property has been stated in AAOIFI *waqf* Standard No 33 clause 4/1/2; it states that it is permissible for the *wāqif* to put a condition in his *waqf* to pay his debt from the outcome of *waqf* after his death, or put in a condition to benefit from his *waqf* during his life and to his children and after that to charity.

The text reads as follows:
4/1/2 Regarding the form of the *waqf*, the *wāqif* can make a condition that his debts should be settled from the *waqf* income; after his death, or he may stipulate a condition that the income of his *waqf* should go to him first as long as he is alive, then to his family and finally to charitable purpose. Another condition of the *wāqif* could be that the *waqf* income has to be spent first on any member of his family who becomes poor, and then on charity purposes.

2/1/4 يجوز أن يشترط الواقف في صيغة الوقف قضاء ديونه من ريع الوقف بعد موته، أو أن يشترط الانتفاع

بوقفه مدة حياته ثم من بعده لذريته ومن بعدهم للخيرات، أو أن يصرف من ريع الوقف الخيري على من افتقر من ذريته ثم يستمر صرف الريع في الخيرات.

5. Using the Farm as Collateral

The structure proposes using the farm as collateral to be used to pay the *ṣukūk*holders in the event of default or bankruptcy of the project. This is not an issue in this structure project as the farm is not the *waqf* asset. The *waqf* is rather the cash fund.

Even though as explained above that the farm is not *waqf*, one may have a different view stating that the land itself is considered a *waqf* land because it has been purchased with *waqf* money. In this regards, this proposed risk mitigation (the farm as collateral) may raise the issue of defeating the objective of *waqf* which is the perpetual continuous benefit the asset brings to *waqf* beneficiaries. This report is therefore discussing the issue of using the *waqf* asset as collateral where Muslim Jurists are divided into two views:

The majority of classical Muslim jurists prohibit the use of *waqf* asset as collateral. This view is also the established opinion among contemporary scholars and the one adopted in the AAOIFI standard on *waqf* under the title "What shall not be done by the *waqf* Superintendent": "Mortgaging the *waqf* assets for a debt to be obtained for the *waqf* or the beneficiaries" (AAOFI, clause 5/3/4).

The main justifications for this prohibition are:

- The perpetuity and imperishability nature of *waqf* that may be affected in the event of default in debt payment or project failure which may cause the *waqf* asset used as a collateral to be surrounded to the creditor.
- The general *fiqhī* rule that says: What is not allowed to be sold is not allowed to be used as collateral.
- Defeating the purpose of *waqf* that is used for the benefit of the beneficiary (al-*mawqūf* ʿalayhim) as it may affect negatively the beneficiaries of the *waqf* asset in the event of default and compensation of creditors by mean of renouncing *waqf* asset.

This above view is opposed by the view of some classical Mālikī scholars that allow using the usufruct of *waqf* as collateral. It is also the view of many contemporary scholars among them Shaykh Siddīq al-Ḍarīr, Prof. ʿAli al-Quradaghi and Dr. Aḥmad ʿAlī ʿAbdullah the Secretary General of the Higher Sharīʿah Committee of the Central Bank of Sudan.

Their justifications can be summarised in the following:

- Stressing that the classical opinion prohibiting mortgaging a *waqf* asset is mainly based on the prohibition of temporary *waqf*. Since this view is challenged and overruled by the established contemporary opinion permitting such temporary *waqf*, therefore the concern of losing perpetuity is not applicable to the established temporary *waqf* view.
- The flexibility applied by *fuqahā* in implementing whatever brings interest to the *waqf* asset or project and its beneficiaries including using a *waqf* asset as collateral to secure a loan or financing that brings economic benefit to the *waqf* beneficiary. The strongly related examples are: the permissibility of making *waqf* of a mortgaged asset (al-Zarqā, p83), the permissibility of exchanging *waqf* asset by selling it and buying another one that generates profit and the permissibility of cash *waqf* that is used mainly for the purpose of lending it to those who are in need, despite the possibility of default and bankruptcy of the debtor that affects the *waqf* asset.
- The new contemporary status of *waqf* that has witnessed a huge development with regards to *waqf* as an independent legal entity with a clear status and comprehensive governance. These developments

establish strong procedural measures to mitigate the risk of misuse or abuse of *waqf* assets, therefore addressing all concerns of risking the *waqf* asset and the beneficiaries' interests.

Our Preferred View

After presenting both views, we prefer the second view as it addresses the concerns of the first group of scholars. It also ensures the combination of serving donor interests and mitigating the risk of abuse of position of the *waqf* trustee (*nāzir al-waqf*).

Nevertheless, it is important to emphasis here that the concerns raised with regards to the *waqf* beneficiary losing their benefit is not present in this particular *waqf* structure as Majma` Fiqh al-Islāmī (2004), as discussed above are of the view that, the amount of cash itself is regarded as *waqf* asset and not the purchased asset to be mortgaged. They stress that when the cash is invested on buying a property or shares for example, those assets will not be regarded as *waqf* asset by itself and it is permissible to sell those assets for purpose of investment. Furthermore, the core objective of using the farm as collateral in the structure - even if we consider it as *waqf*- is to protect the Cash *waqf* Fund and, therefore the concerns of those opposing using *waqf* asset as collateral is not applicable in this situation.

6. Extending Guarantee to *ṣukūk*holders

Extending guarantee to *ṣukūk waqf* holders is usually executed by governments, government link entities, financial institutions or other corporations. The guarantee is either extended free of charge or with a fee and each has its potential Sharīʿah issues.

Potential Sharīʿah Issues in Extending Guarantee Free of Charge

If the guarantee is extended free of charge, there is no Sharīʿah issue as it is considered a benevolent act by the guarantors. However, since it is no guarantor risking to pay money without getting a return, it is proposed to include guarantors. They may also be proposed to be potential beneficiaries of the Smart Waqf to entice them to extend guarantees as they will ultimately benefit from the Smart Waqf fund. This is in addition to previous proposal to use the farm asset as collateral to ensure the repayment of the loan to the *ṣukūk*holders.

The proposed structure however, needs a careful examination as it may raise the issue of "*Qarḍ jarra nafʿan*" (benefiting from a loan) that is prohibited as any benefit from a loan may be considered a form of interest which is prohibited in Sharīʿah based on the legal maxims that says: "*Kullu qarḍ jarra nafʿan fahuwa ribā*" (All loans with benefits are regarded as interest-bearing/usurious).

However, by examining the structure of the *ṣukūk waqf* project it can be concluded that proposing guarantors to be included in the beneficiary of the Smart Waqf fund will not have this Sharīʿah issue due to the following:

- The benefit that the guarantor will get is not from the *ṣukūk*holders (creditors) who will claim back their principal capital, it is rather from the Smart Waqf which is independent from the *ṣukūk*holders.
- The benefit generated from the Smart Waqf to the guarantor is not going to benefit the guarantors directly, it is rather benefitting the beneficiaries of the foundations established or sponsored by the guarantors and these legal entities are not profit making organisations.

Potential Sharīʿah Issues in Extending Guarantee with Fee Charges

Taking fees from a guarantee or benefiting from guarantee is a controversial issue. The classical predominant view is the prohibition of taking any fees from the guarantee. This is also the view of Majmaʿ and AAOIFI that prohibit paying other than any actual expenses of the guarantee. Contrasting this opinion is the view of the minority allowing taking fees for the provision of a guarantee. The core justifications of those prohibiting such guarantee fees are:

- The claim that there is a consensus in prohibiting such guarantee reported by classical scholars among them Ibn al-Mundhir.

- The guarantee as stated in the books of fiqh is a benevolent act (not a commercial act) that should be extended free of charge.
- If it is prohibited to take interest or fees for a loan, it should also be prohibited to take interest-like charges or fees to guarantee a loan without extending money (even though the guarantor's capital at risk is contingent compared to the one who has extended his money).

On the other hand, those allowing the charging of guarantee fees justify their stand by the following:

- The *ijmāʿ* [consensus] claimed by some scholars is defeated/ invalidated by statements of some renown classical scholars allowing taking fees for guarantee and the practice of "wajaha" where someone agreed to pay a fee if a renowned person aided him in procuring a loan.
- The benevolent nature of a guarantee can be changed due to the change of customary circumstances, the proof for that is the changing of the nature of agency (*wakālah*) from an act of benevolence to a *wakālah* with fees agreed by all scholars.
- There is a difference in the contractual relationship of extending a loan with interest and charging fees by extending a guarantee. The first one is a relationship between a creditor and debtor, whereas, there is no such contractual relationship as there is no debt between the guarantor and guaranteed party.

There were also attempts by some Sharīʿah scholars and practitioners to narrow the gap of disagreement due to the modern commercial importance of guarantees as it is a core feature of modern-day business, especially international trade finance, and an Islamic bank should be mindful of risking depositors' money by extending guarantees free of charge. The most recent outcome of these attempts is the view that it is permissible to take fees from extending guarantees as long as there is no indebtedness relationship between the guarantor and the guaranteed, however whenever the indebtedness relationship occurs the guarantor should take only the actual expenses connected with extending a guarantee, and not a "fee".

Given this contentious issue, Awqāf NZ may consider the first option, or may take one of the views stated in the second option taking into consideration global acceptance to facilitate the market acceptance of the proposed *ṣukūk*.

Discussion about *Zakāh* on Temporary Cash *Waqf*

The Concept of Financial Debts and The Technical Definition of Non-Current Cash *Waqf* Debt

Technically, debt means any transaction in which one of the two compensations is delivered spot while the other is deferred and is thus a liability on the deferring party (Ibn al-ʿArabī, 1/247; al-Qurṭubī, 1965: 3/277). Ibn ʿĀbidīn says, "Debt is what is due in liability by way of contract or consumption" (Ibn ʿĀbidīn, 1399AH: 5/157). A non-current or deferred *waqf* debt is one with a stipulated payment date that has not yet arrived.

Zakāh on Non-Current Cash *Waqf* Loan

Two issues can be highlighted with regards to *zakāh* on cash *waqf* loans. The first is whether *zakāh* is obligatory on creditors extending cash *waqf* loans as they are going to get it back, and the second is whether *zakāh* is obligatory on Awqāf NZ on the cash received when reaching *niṣāb*.

Zakāh on the Providers of Non-Current Cash *Waqf* Loan - the Nature of Parties Extending Cash *Waqf*

The parties extending cash *waqf* loans may be government entities, private entities or individuals. The Majority (*jumhūr*) view is that no *zakāh* is due upon the wealth of governmental institutions either cash or loans because it is categorized as a type of public wealth since it is not owned by a particular owner; thus, it has no owner and does not fulfil the condition that the ownership must be complete (*al-milk al-tāmm*). This has been stated in the International Islamic Fiqh Academy Resolution (No. 28: 3/4): "Certain types of shares are exempted from the wealth upon which *zakāh* is due. They include the shares of the public treasury, the shares of charitable endowments (*Awqāf*), charitable organizations, and shares owned by non-Muslims."

Whereas, temporary cash *Waqf* in the form of loans extended by individuals and private entities is an issue of debate with regard to whether a *zakāh* obligation is due on that loan. The following is a summary of the *fiqhī* discourse on *zakāh* on debts in the form of temporary cash *waqf*. Before presenting the *fiqhī* discourse it is important to highlight that the disagreement over the *zakāh* obligation of temporary cash *waqf* falls under the same general disagreement over the obligation of *zakāh* on non-current debt.

Short Presentation of the *Fiqhī* Discourse on *Zakāh* of Temporary Cash *Waqf*

There is minor disagreement among scholars of doubtful debt as the vast majority view is that there is no *zakāh* on doubtful debt (*dayn ghayr marjū*), however, they disagreed about *zakāh* on non-current good debts. Shaykh al-Ṣiddīq al-Ḍarīr has enumerated nine separate opinions about it in his research for the Islamic Fiqh Academy (al-Ḍarīr, 2/29). Since this report discusses non-current debt related to temporary cash *waqf*, three major views with their main arguments will be highlighted and the preference view will be suggested:

The First Opinion: *zakāh* is obligatory on the debt at present when the debtor is prosperous, even if the creditor does not collect it. This is one opinion of the Shāfiʿīs (al-Shāfiʿī, 2/54; al-Ramlī, 3/131).

Their supporting arguments are as follows:
First: The general indication of evidence on the obligation of *zakāh* on wealth; for example, the statement of Allah, the Sublime:

﴿خُذْ مِنْ أَمْوَالِهِمْ صَدَقَةً تُطَهِّرُهُمْ وَتُزَكِّيهِم بِهَا﴾

"Take alms from their wealth in order to cleanse and purify them" (al-Tawbah: 103).

The angle of argument is that the wealth that is subject to *zakāh* is what a person owns, whether it is in the owner's possession or in the possession of someone else.

Second: *Qiyās* (analogy) between deferred expected debt and *wadīʿah* (property entrusted to another). This is because it is possible to take possession of deferred debt without impediment; therefore, it is obligatory to pay *zakāh* on it upon completion of a year even if the creditor does not possess it. A person who entrusts another with property for safekeeping is obliged to pay *zakāh* on it, even though it is not in his possession, because he is able to possess it when he chooses to do so, and the same rule applies to good debt (al-Shāfiʿī, 3/132; al-ʿImrānī, 1421H, 3/291; al-Māwardī, 1419, 3/263).
Third: Whether debt is current or deferred, it is still wealth that is completely owned by its owner because it is, as Abū ʿUbayd expressed it, "tantamount to being in his hand and in his house" (Abū ʿUbayd, 432). That is because he has the ability to dispose of it through *ḥawālah* and *ibrāʾ* for instance; therefore, *zakāh* is obligatory on it (Ibn Qudāmah, 2/271; al-Mardāwī, 6/327; al-Buhūtī, 1414H, 2/174).

Discussion of the Arguments of the First Opinion

The analogy between deferred debt and *wadīʿah* is flawed because *wadīʿah* is a physical asset in the possession of a trustee. The proponents of this view seek to extend the ruling of the physical asset to debt. Whereas debt is an intangible financial obligation whose value is only fully realizable upon conversion to cash (and thus is contingent upon the ability and willingness of the debtor to settle the debt), a physical asset has an intrinsic value not contingent on solvency or willingness to pay. Even if this line of reasoning was valid, it would only be valid for current debt because the creditor has the right to demand it from the debtor. He does not have that right for deferred debt (Ibn Qudāmah, 3/270; al-Qudūrī, 3/1337).

The Second Opinion: *zakāh* is obligatory on the debt for the past years when the creditor collects it. This is the apparent view of the Ḥanafīs, based on their unqualified expressions regarding debt whose payment is expected (al-Sarakhsī, 2/194; al-Kāsānī, 2/392; Ibn ʿĀbidīn, 5/44). It is also the accepted view among the Shāfiʿīs (al-Shīrāzī, 1/520; al-Nawawī, 1405AH/1999, 2/194; al-Ramli, 3/13) and the Ḥanbalīs (al-Mardāwī, 6/326; al-Buhūtī, 1999, 4/320).

Their most prominent arguments for the obligation of *zakāh* for the past years are the same arguments that the first group put forward. However, they have argued that there is no obligation to pay *zakāh* on deferred debt before collecting it based upon analogy with the ruling that no *zakāh* is due on current debt before collecting it.

The latter ruling is on the grounds that *zakāh* is a charitable institution and that it is not charitable to make someone pay *zakāh* on wealth from which they receive no benefit.

The creditor does not benefit from the debt while it is in the hands of the debtor; therefore, no *zakāh* is due upon it unless he collects it. When this is the case with current debt, it is even more so for deferred debt (al-Ḍarīr, 2/29; al-Aṭram).

Discussion of the Arguments of the Second Opinion

The objection can be raised against the opinion that *zakāh* is due on debt for all the past years once it is collected on the basis that the debt during that period is tantamount to nonexistence. That is "because all the owner of the debt possesses is a number in the liability of his debtor; it is only an attribute; the debtor does not have in his possession any tangible property owned by the creditor. So how can *zakāh* be obligatory on something of this nature?" (Ibn Ḥazm, 6/105). Even if we accept that *zakāh* is due on this debt, we do not accept that it is due for all the past years because it is wealth that lacks the capacity of growth while out of his possession and is, therefore, similar to goods purchased merely to own them (Ibn Qudāmah, 3/46).

The Third Opinion:

According to the Mālikīs, if the debt is generated by a charitable loan which is intended to help the recipient, the creditor is not obliged to pay *zakāh* on it until he receives it back where he needs to pay *zakāh* just one time for the previous years, as opposed to the ruling when the purpose of the debt is trade and investment.

Ibn Rushd the Grandfather (al-Jadd) said:" zakat of the debt established because loan is to be paid one time for the years it was extended" (Ibn Rushd:1/303)

قال ابن رشد الجد: "... وأما دين القرض فيزكيه غير المدير إذا قبضه زكاة واحدة لما مضى من السنين"

The Mālikī exclusion of charitable loans from the *zakāh* obligation has been endorsed by a number of contemporary jurists, including the General Authority of Islamic Affairs and Awqāf in the United Arab Emirates (n.d.). This is also the view of Dr. ʿAbd al-Raḥmān al-Aṭram in his research, *zakāh* on Deferred Debt.

The most prominent evidence for this opinion is that the lender did not seek profit from providing the loan. Also, it does not result in growth; in fact, from an economic perspective, it causes a loss in terms of profit opportunity. The Mālikīs extend the logic behind that ruling to the debt arising from a loan, arguing that it is not subject to *zakāh* as long as it is with the borrower because it does not grow. Based on this, when the creditor collects it, he should start a new year on it (Ibn ʿAbd al-Barr, 1/293; al-Dasūqī, 1/466-469).

Discussion of the Arguments of the Third Opinion

It is possible to debate the arguments of the third opinion by saying that they do not have any evidentiary basis for differentiating between debt generated from a loan and debt generated from trade and that none of the views reported from the Companions on *zakāh* of debt mention this differentiation. This can be addressed by emphasising that other opinions do not rely on an explicit evidence as the complexity of disagreement can be attributed to the fact that there is no explicit text in the Qurʾān or the authentic Sunnah that describes the mechanism of paying *zakāh* on debt. That lacuna means that jurists had to exercise *ijtihād* based on general texts, comprehensive principles and conflicting views of the Companions. Imām al-Shāfiʿī says, “I do not know of any authentic tradition about *zakāh* on debt that we are obliged to take and cannot ignore” (al-Bayhaqī, 3/303).

Preference

After presenting the arguments of earlier jurists about *zakāh* of deferred debts, we are of the view that *zakāh* is not obligatory in the case of deferred debt generated through *qarḍ ḥasan* extended by temporary cash *waqf* providers. This is because the creditor did not intend to profit by offering the loan but intended to help the recipient *waqf* NZ. The debt also did not result in growth in the wealth of the providers, furthermore it is not a pure loan but *waqf* for general interest.

Zakāh Obligation on the Receivers of Cash *Waqf* Loan (Awqāf NZ)

Scholars disagree on whether *zakāh* is to be imposed on *waqf* assets either cash, goods or property.

The majority of scholars are of the view that *zakāh* is not to be imposed on *waqf* assets whereas Mālikī school of law are of the view that *zakāh* is to be imposed regardless whether *waqf* is general (*waqf ām*) or specific *waqf* (*waqf al-muʿayyan*) such as family (*waqf dhurri*). Since the second type of *waqf* is not an issue of concern as Awqāf NZ is for general interest not for a family or specific individuals, it will not be discussed in this research.

The root of disagreement is whether the act of *waqf* transfers the ownership of the asset or transfers just the usufruct.

Majority of scholars (*Jumhūr*) are of the view that making *waqf* of assets transfers the ownership from the *wāqif* to general public or benefit. This means that the *waqf* assets will have no specific owner *(laysa lahā mālik muʿayyan*), therefore does not qualify to be zakatable assets because it is incomplete ownership (*milk ghayr tāmm*) and complete ownership is one of the core conditions for obligation of *zakāh*. Ibn Qudāmah in explaining this view said:” as for the poor they will not be required to pay *zakāh* from what they have as *waqf* wealth, either it has reached *niṣāb* or not, and they are not obliged to pay *zakāh* before the distribution of the wealth even if it has reached *niṣāb*. Because *waqf* on poor and needy is not specified to each individual proof of this is that everyone can be deprived from this *waqf* and *waqf* can be given to others”. (Ibn Qudāmah:6/33)

قال ابن قدامة: ”أما المساكين فلا زكاة عليهم فيما يحصل في أيديهم، سواء حصل في يد بعضهم نصاب من الحبوب والثمار أو لم يحصل. ولا زكاة عليهم قبل تفريقها – وإن بلغت نصابا – لأن الوقف على المساكين لا يتعين لواحد منهم، بدليل أن كل واحد منهم يجوز حرمانه، والدفع إلى غيره“

On the other hand, Mālikī school of law are of the view that *zakāh* is to be imposed on *waqf*. Imām Mālik when asked if a person may make cash *waqf* for the purpose of lending it to those who are in need. Is there any *zakāh* on this money? His reply was: yes, there is *zakāh* on it. (Mālik, p343)

فقلت لمالك، أو قيل له: فلو أن رجلا حبس مائة دينار موقوفة، يسلفها الناس ويردونها، على ذلك جعلها حبسا هل ترى فيها الزكاة؟ فقال: نعم، أرى فيها الزكاة.

The argument of Māliki school is that *waqf* wealth remains under the ownership of the *wāqif*, therefore *zakāh* is obligatory on it if it reaches *niṣāb*.
Al-Qarāfi said:" the discussion in this chapter remains on whether the *waqf* transfers the ownership of the physical assets or their benefits only and the *waqf* assets remains under the ownership of the respective donors even if they die?... the second is the famous Mālikī view" (al-Qarāfi: 3/53).

قال القرافي: والكلام هذا من الباب يتوقف على بيان الوقف هل ينقل الأملاك أو المنافع فقط، وتبقى الأعيان على ملك الواقفين – ولو ماتوا –؟ فكما يكون لهم آخر الريع بعد الموت يكون لهم ملك الرقبة – وهو المشهور–.

They supported their view with the hadith of the Prophet that says: "… If you like, you may keep the corpus and give its produce as charity (*ṣadaqah*)" (Al-Shāfiʿī:1/308)

قوله صلى الله عليه وعلى آله وسلم لعمر رضي الله عنه " حبس الأصل وسبل الثمرة "

The angle of the argument is that the Prophet advised him to keep the corpus which mean that it remains under his ownership. They also supported their view with some narration from the companions of the Prophet.

Our view is that the opinion of the majority (*jumhūr*) is stronger, clearer and consistent with the general rules and objectives of *waqf*. This is because the objective of the *waqf* is to relinquish the right over the *mawqūf* and make it available for the beneficiaries. Ibn Rushd who is a Mālikī scholar commented on the opinion of the Mālikī school by saying: "there is no basis for those imposing *zakāh* on poor and needy who are benefiting from *waqf*, because it combines two issues, first: it is incomplete ownership, and second it is for people who are eligible to receive *zakāh* not to pay *zakāh*.

Furthermore, even if the Mālikī view prevails, it will not be applicable to the Awqāf NZ case. This is because Awqāf NZ is a temporary cash loan that is to be paid back to the creditors, whereas the *waqf* discussed by *jumhūr* and Mālikī school is a permanent *waqf* that is going to be used continuously by the *mawqūf ʿalayhim*. This is in addition to the nature of this cash *waqf* that is temporary and needs to be paid back to the temporary *wāqif*. This makes the *wāqif* (creditor) still the owner of this cash *waqf*, therefore shifting the *fiqhī* issue of *zakāh* obligation to the creditors (as discussed in the first part) and not Awqāf NZ.

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Legal, Regulatory and Taxation Issues

- Land ownership in New Zealand
- Equity Ownership in New Zealand by an Overseas Person
- Overseas Lending in New Zealand
- Regulatory Matters
- Taxation and others

Legal, Regulatory and Taxation Issues

This section has been prepared in-house by ICSB. Advice from New Zealand and other jurisdiction legal and tax experts is essential and required for a *ṣukūk*, as such, this section must be read as a preliminary guide based on desk research from Malaysia and not formal advice.

Land Ownership in New Zealand

The Awqāf NZ *ṣukūk* is proposed to be structured in a way that it allows for Awqāf NZ to raise or source the needed funds to purchase farm land located in New Zealand. Nevertheless, the law in New Zealand restricts non-citizens to acquire or own a farm land. The NZ Overseas Investment Act 2005 states that people who are not New Zealand citizens or who do not ordinarily reside in New Zealand must apply for consent to invest in sensitive assets. Under this law, 'sensitive' assets include land of a particular type, such as farm land, that exceeds a particular area threshold. For example, five hectares of farmland is considered sensitive land, but three hectares of the same land is not. Land is also sensitive if it adjoins land of a particular type and exceeds an area threshold. For example, three hectares of farmland would be considered sensitive if it adjoined a recreation reserve on the edge of a lake. An interest in sensitive land is a freehold estate or a lease, or any other interest, for a term of 3 years or more, including rights of renewal, and is not an exempted interest.

Sensitive assets include also high value businesses (worth more than NZ$100 million) and fishing quota. The imposition of consent on ownership also affects overseas owned or controlled companies, other incorporated or unincorporated bodies, such as partnerships or joint ventures, and trusts, as well as associates of overseas investors (who may be New Zealanders).

Having said the above, in the event that there is a need to apply for Overseas Investment Approval (consent to purchase) the farmland from the New Zealand Overseas Investment Office (OIO), the applicants must ensure that:

(a) the four investor core criteria of any overseas investment are met - good character, business acumen, financial commitment and absence of ineligible individual(s) for visas or entry permissions under the Immigration Act 2009. Collectively these are referred to as the investor test; and

(b) in the case of an individual, the relevant overseas person intends to reside in New Zealand indefinitely, or

(c) in the case of a non-individual, all the individuals with control of that overseas person are New Zealand citizens, ordinary New Zealand residents or are intending to reside in New Zealand indefinitely or the transaction will, or is likely to, benefit New Zealand (and in some cases, that benefit is substantial and identifiable).

Equity Ownership in New Zealand by an Overseas Person

As mentioned in the earlier, consent may be needed if there is element of overseas ownership in the business. The Overseas Investment Act 2005 provides that consent may be required for:

- a transaction by an overseas person to acquire 25% (or more) ownership or control interest.
- a transaction to acquire less than 25% ownership or control interest if the aggregated ownership or control interest of unrelated overseas persons is 25% (or more)
- the loan of money by an overseas person to a New Zealand individual or entity that invests in New Zealand.

The measurement for ownership or control interest is relevant to determining if a company, trust, partnership or unincorporated joint venture requires consent to invest in sensitive New Zealand assets.

A company incorporated outside New Zealand is an overseas person regardless of who owns or controls it.

Regulation 33(1) of the Overseas Investment Regulations 2005 exempts certain situations relevant to ownership and control, such as:

- internal restructuring arrangements
- the transfer of property to an overseas person beneficiary of the trust
- the replacement of a trustee with an overseas person trustee.

Overseas Lending in New Zealand

In addition to the issue of consent as raised above, there seems to also be additional legal impediments under the Overseas Investment Act 2005 where consent may be required for the lending/loan of money by an overseas person to a New Zealand individual or entity that invests in New Zealand. This may be very relevant as the potential model for the Awqāf *ṣukūk* will be based on *qarḍ* (loan) structure.

Regulatory Matters

Given the highly regulated nature of the global *ṣukūk* market, specialist legal advice should be sought given the following intended characteristics of the *ṣukūk*:

(i) Foreign currency

The *ṣukūk* is intended to be foreign currency denominated issuance (USD) to attract the international market. This may raise regulatory concerns in different jurisdictions, for example on free-convertibility and movement of foreign currency and retail offerings [as well as Islamic Sharīʿah hedging requirements discussed below]. In Malaysia, this would include approval from the Controller of Foreign Exchange.

(ii) Retail offering and Institutional offering

The *ṣukūk* is planned to be offered to both the institutional and retail markets (i.e. the public and private capital markets) and thus the offering should be of a small denomination (i.e. not more than USD5,000). Most countries have regulatory restrictions on the offerings of securities (domestic and international) in their public and private capital markets. Furthermore, public/ retail offerings are generally highly restricted and compliance to regulatory requirements may be prohibitively costly in some countries, if even possible at all.

In Malaysia, for example, the Guidelines on Issuance of Private Debt Securities and *ṣukūk* to Retail Investors were issued by the Securities Commission Malaysia on 15 June 2015. To-date there have been very few retail *ṣukūk* offerings in Malaysia. The requirements in these Guidelines are more restrictive than those for non-Retail offerings and include the following that might not suit the structure of the proposed *ṣukūk*:

- Issuers (section 4.01) may only be: (a) public listed companies; (b) a licensed bank [including Islamic and investment banks]; (c) Cagamas Bhd [a Malaysian mortgage corporation]; or (d) unlisted public companies guaranteed by one of (a) - (c) or Danajamin Nasional Bhd or Credit Guarantee and Investment Facility (CGIF).
- Currency must be in Ringgit Malaysia (section 4.02 of the Guidelines) and the *ṣukūk* must be rated (section 5.01 of the Guidelines)

In contrast, for non-Retail offerings (available only to institutional and sophisticated investors) in Malaysia, the Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework issued by the Securities Commission Malaysia on 9 March 2015 apply. This is the most popular framework for *ṣukūk* issuance in Malaysia.

The requirements in these Guidelines are less restrictive than those for Retail offerings, for example, foreign currency *ṣukūk* may be issued by foreign companies and foreign currency *ṣukūk* need not be rated (2.02c of the Guidelines), but care should be taken on the nature of the issuer:

- Issuers may be Malaysian and foreign corporations (1.03) but excludes the following [as defined in sub-section 2(1) of the Capital Markets and Services Act 2007]:
  - (a) Anybody corporate that is incorporated within Malaysia and is, by notice of the Minister charged with the responsibility for companies published in the Gazette, declared to be a public authority or an instrumentality or agency of the Government of Malaysia or of any State or to be a body corporate which is not incorporated for commercial purposes;
  - (b) any corporation sole;
  - (c) any society registered under any written law relating to co-operative societies; or
  - (d) any trade union registered under

(iii) Offering in multiple jurisdictions

Each country has its own rules and regulations and approval of a *ṣukūk* issuance by one country's capital markets regulator does not ordinarily validate/endorse the issuance in another country; some form of approval (exempt, partial or full) is normally required by each country's capital market regulator. As such, it is likely to be challenging, time-consuming and costly to obtain additional/multiple approvals for *ṣukūk* issuance by a non-sovereign and new issuer in multiple jurisdictions.

(iv) Programme issuance

This *ṣukūk* is intended to be the first of many *ṣukūk* to be issued for the purpose of promoting waqf and social-investing and fund raising. Ordinarily, issuers would seek to obtain approval for a programme issuance for multiple planned issuances. For example, Awqāf NZ could seek approval for a

USD 1 billion programme, with the first issuance being a USD100m *ṣukūk* for the purpose of acquiring a Farm in New Zealand; subsequent offerings may then be made "under" the USD 1 billion programme.

(v) Tradability of the *Ṣukūk*

The *ṣukūk* is intended to be tradable. It is customary for market makers to be appointed to subscribe to the *ṣukūk* and maintain a small holding of the *ṣukūk* for the purpose of enhancing market liquidity. Given this is intended to be a qarḍ structure, the *ṣukūk* will be tradable at par value only.

(vi) Alternative offering formats for the proposed *ṣukūk*

Given these regulatory requirements, legal advice should be sought to ascertain the optimal issuance and offering format, bearing in mind legal complexity, costs and time-to-market amongst other factors. Alternatives that might suit the proposed *ṣukūk* offering include:

» *Ṣukūk* Unit Trust Fund [or Mutual Fund]

Using a *ṣukūk* Unit Trust Fund to subscribe to a USD institutional *ṣukūk* offering and the *ṣukūk* Unit Trust Fund offering units of the fund to retail investors in multiple jurisdictions (after seeking necessary regulatory approvals). The Unit Trust Fund could be dedicated to socially-responsible *ṣukūk*. Using a Unit Trust Fund could potentially avoid the restrictions on the offerings of retail securities (*ṣukūk*) in different jurisdictions.

» Crowdfunding (Peer-to-peer or Rewards)

Awqāf NZ may consider utilising peer-to-peer crowdfunding, a format that is growing rapidly worldwide, or, rewards crowdfunding. The equity crowdfunding format is not suitable as it is an offering of equity ordinary shares and has various restrictions in different jurisdictions including an offering cap which is generally small (e.g. in New Zealand the maximum funding is only NZ$ 2 million).

Peer-to-peer financing is potentially suitable as it is generally not subject to a regulatory funding cap on the amounts to be raised although individual operators often do place caps as they cater to individuals and small businesses. There are dedicated crowdfunding operators for non-profit organisations that may be able to assist in raising funds for the proposed *ṣukūk* offering. We are not aware of many large peer-to-peer crowdfunding offerings, though the market is developing. Notably, the Wall Street Journal reported on 19 June 2015 that a Chinese conglomerate, Dalian Wanda Group, raised 10% of a USD805 million equivalent offering via Chinese crowdfunding in June 2015 (the remainder was funded by institutions).

Rewards crowdfunding is also potentially suitable, however, the fund raising structure would need to be changed from the proposed *ṣukūk qarḍ* structure to a rewards structure; potential rewards for funders could include future discounts on *Aḍāḥī/ Qurbānī*. Amounts raised via rewards crowdfunding also tend to be small but some campaigns have raised substantial amounts, notably in March 2015, Flow Hive [an Australian honey extracting company] raised over USD12 million on Indiegogo and Pebble Technology [a USA smartwatch company] raised over USD20 million on Kickstarter.

» A combination of offering formats

A combination of offering formats can be considered to meet the offering aims of Awqāf NZ. For example, an institutional offshore

USD *ṣukūk* offering in Malaysia and select Gulf Cooperation Council countries, coupled with a *ṣukūk* Unit Trust Fund and multiple peer-to-peer crowdfunding offerings for retail markets in Malaysia, European and North American markets.

Again, the optimal course of action will ultimately be determined by expert advice on capital markets regulations, costs, complexity and time-to-market.

Taxation and Others

Though there is no explicit information in the NZ government agencies websites on the tax effects of the proposed Awqāf NZ *ṣukūk* structure, the following may potentially be of concern:

(i) if the ownership of the livestock, machineries etc. of the farmland belongs to an overseas owned operating company, this operating company will be subject to income tax.

(ii) if Awqāf NZ leases farmland to an overseas owned operating company or enter into some profit sharing arrangement with an overseas-owned operating company the income from the farm may attract taxation.

(iii) if there is involvement of a partnership/a shared model of Profit and non-Profit organisation this will attract taxation compared to a direct loan/money lending model.

(iv) The issuance of Awqāf NZ *ṣukūk*, if likely deemed a debt securities issuance, may subject Awqāf NZ to conform to the standard obligation under the Financial Markets Conduct Act 2013 where Awqāf NZ may be required to disclose certain information and to have a licensed supervisor.

(v) if Smart Waqf is established under the Labuan International Waqf Foundation, would this require consent from the NZ authorities and would the income deriving from this arrangement be subject to withholding tax?

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Legal Infrastructure to Facilitate the Awqāf NZ *ṣukūk* Structure

- Land ownership in New Zealand
- Equity Ownership in New Zealand by an Overseas Person
- Overseas Lending in New Zealand
- Regulatory Matters
- Taxation and others

Legal Infrastructure to Facilitate the Awqāf NZ *Ṣukūk* Structure

The following are three important areas of regulatory infrastructure that could facilitate and support the Awqāf NZ *ṣukūk* structure:

Socially Responsible Investment (SRI) *Ṣukūk* Framework Securities Commission Malaysia

In March 2015 the Malaysian Securities Commission issued Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework [issued 9 March 2015]. These Guidelines incorporate provisions pertaining to SRI *ṣukūk* in Chapter 7.

According to section 7.03 of these Guidelines

"Eligible SRI projects refer to projects that aim to:

(a) Preserve and protect the environment and natural resources;

(b) Conserve the use of energy;

(c) Promote the use of renewable energy;

(d) Reduce greenhouse gas emission; or

(e) Improve the quality of life for the society."

The Awqāf NZ project would qualify under 7.03 (a) and (e), as well as the other aims potentially.

Furthermore, section 7.04 specifies the sectors that are eligible and states: "Only a project or physical assets/activities relating to an existing project in any of the following sectors is deemed to be an eligible SRI project:

(a) Natural resources – projects relating to:
- (i) Sustainable land use;
- (ii) Sustainable forestry and agriculture;
- (iii) Biodiversity conservation;
- (iv) Remediation and redevelopment of polluted or contaminated sites;

(v) Water infrastructure, treatment and recycling;or

(vi) Sustainable waste management projects,

(b) Renewable energy and energy efficiency – projects relating to:

(i) New or existing renewable energy (solar, wind, hydro, biomass, geothermal and tidal);

(ii) Efficient power generation and transmission systems; or

(iii) Energy efficiency which results in the reduction of greenhouse gas emissions or energy consumption per unit output,

(c) Community and economic development – projects relating to:

(i) Public hospital/medical services;

(ii) Public educational services;

(iii) Community services;

(iv) Urban revitalisation;

(v) Sustainable building projects;

(vi) Affordable housing; or

(d) *Waqf* properties/ assets – any projects that undertake the development of *Waqf* properties/ assets."

The Awqāf NZ project would qualify directly under 7.04 (d) and potentially some of the other sectors as well.

Sections 7.05 to 7.08 discuss the processes for an SRI *ṣukūk*, namely that:

- an independent expert should undertake an assessment of the project (7.05).
- a disclosure document should (a) include details of the project and impact objectives, and, (b) compliance with relevant ESG standards and other relevant best practices (7.06).
- Disclose the assessment report (7.07).
- Provide annual reporting on amounts planned, utilised and impact objectives (7.08).

SMART Waqf Beneficiaries

The beneficiaries of the Smart Waqf are intended to include the needy and those deserving of humanitarian aid (both Muslims and non-Muslims), including the charitable and relief sectors. Furthermore, beneficiaries are intended to include organisations committed to promoting and researching social investing and social finance as well as Awqāf in particular.

NZ Public Trust

NZ Public Trust is a New Zealand Crown Entity. Its establishment and independence is guaranteed under the Public Trust Act 2001. Its Corporate Trustee Services, at the same time the New Zealand's sole Crown-owned trustee company, is a leading specialist corporate trustee company in New Zealand, with more than NZ$50 billion under supervision. Due to its expertise and credibility in fund management and custodial services, it is suggested that it be appointed to manage the purchased farmland. As trustee, the Public Trust can play the role in supervising or monitoring the farm managers and their compliance with the trust deeds and existing laws. Its legal duties include holding securities (mortgages) for the *ṣukūk* contributors. In the event that the *ṣukūk* is in default, the NZ Public Trust could potentially manage the process of liquidating the farm based on the contractual agreements and distribute the sale proceeds to the *ṣukūk*holders.
Presently, the NZ Public Trust manages over 400 charitable trusts, which generate funding for interests as diverse as science, medicine, disability and agriculture. They also manage around 25 farms, including Smedley Station, New Zealand's largest training farm.

Labuan International Waqf Foundation

Labuan is a Malaysian offshore financial centre and the Labuan International Waqf Foundation (LIWF) is an Islamic foundation established under the Labuan Financial Services and Securities Act 2010. Its purpose is to hold *waqf* properties with the objective of managing the *waqf* properties for identified beneficiaries and purposes based on the Sharīʿah principles of *waqf*.

Given the objectives of the Smart Waqf it may consider registering with LIWF as the *waqf* platform to hold and manage the temporary/permanent *waqf* property. LIWF would act as the trustee (*nāẓir* or *mutawallī*) of the *waqf* property. The duration of LIWF can be perpetual or for a specific period of time. *Waqf* property under LIWF includes immovable and moveable assets, money/ cash, shares and *ṣukūk* and any other property acceptable by Sharīʿah for *waqf*. This *Waqf* property can be invested in a Sharīʿah compliant manner and the excess return proceeds (profit, rental etc.) may be spent on *waqf* beneficiaries. *Waqf* immovable property under LIWF may be property outside and inside Malaysia.

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Business Concerns and other Risk Issues

(Challenges and Recommendation)

- High-level Aims
- Major Business Parties and Assets
- Corporate Structuring and Relationship between the Parties

Business Concerns and other Risk Issues
(Challenges and Recommendation)

Although the primary focus of this preliminary report is Sharīʿah compliance, given the groundbreaking nature of the project, we would like to highlight certain business concerns and other issues that would likely impact the fundraising and ongoing governance. A full Sharīʿah-compliance report would not limit itself to consider the legal structure of the financial instrument, but would consider the broader elements of the project to ensure the *Waqf* operates according to best compliant practices.

This section will: (a) recap the high-level aims; (b) recap the major parties and assets; (c) outline major risks and mitigants of each party and asset; (d) discuss structural issues; (e) discuss Board governance matters; (f) discuss Smart Waqf governance issues; (g) outline other risks; (h) discuss needs for the financial model, and; (i) discuss corporate structuring and the relationship between the parties.

High-level Aims

We understand the high-level aims to be as follows:

(a) Awqāf NZ seeks the establishment of an international Smart Waqf to promote Awqāf activities globally.

(b) The first *Waqf* asset is intended to be a NZ farm, purchased by raising *ṣukūk* funds.

(c) Raise monies globally through a not-for-profit *ṣukūk* structure.

(d) No founder "equity" available, all funds raised through *ṣukūk*.

(e) Guarantors may be available and they may act through a Security Trustee.

(f) Farm to be kept in perpetual *waqf*, self-sustaining and income-generating.

(g) No preferred currency, though likely international currency.

(h) Benefit/aim is to develop Awqāf and give ongoing charity, not to return profits to investors.

(i) To be tax-efficient as well as cost efficient.

(j) Highest standards of governance and transparency.

(k) Highest standards of ecologically responsible farming as well as humane treatment of animals.

Major business parties and assets

The high-level aims of the project generate a list of the major business parties and assets. The table below provides some high-level comments on each of these parties and assets.

Party / Asset	Role and comments
NZ Farm	To be acquired. Major assets of NZ Farm are: farm land, livestock and farm operating personnel and equipment (discussed below). Revenue from the Farm will be used to repay the *ṣukūk*holders and contribute to the charitable activities of Awqāf NZ and Smart Waqf. The Farm is intended to be collateral for the *ṣukūk*
NZ Farm - Farm Land	Must be held under trust by Public Trust NZ. A mortgage over the Farm Land will be registered in favour of the Guarantor/*ṣukūk*holders (via their security trustee) so long as amounts are outstanding
NZ Farm - Farm operating assets	May be an existing company or newly-established [if incorporated as a separate entity, to check if a foreign shareholding is possible]
NZ Farm - Farm livestock	To supply livestock to Aḍāḥī/Qurbānī and humanitarian industry in NZ or likely exported. Will be halal and may be sold commercially or for Aḍāḥī/Qurbānī purposes. [The farm may sell high-value lamb and purchase lower-value mutton for Aḍāḥī/Qurbānī purposes]
Awqāf NZ	An established NZ-based charity that has been engaging in Awqāf and Aḍāḥī/Qurbānī activities and has been promoting this *ṣukūk* initiative.
NZ Public Trust	A NZ Public Trust established to own the NZ Farm and manage any mortgage over the NZ Farm.
Smart Waqf	An international organisation, not yet established. Depending on the structure, its role may be to: • Contract to receive livestock for sale (*Aḍāḥī/Qurbānī* or commercial) from the NZ Farm • Be a trustee in Awqāf NZ • Manage payment to the intended beneficiaries

Farm Land Valuation

- Assumed to be the single most valuable asset and thus will be a primary concern. All matters concerning the land acquisition must be according to best practices (3rd-party arms-length basis and fully disclosed).
- A survey and valuation of the land is essential. The survey and valuation report would consider the suitability of the land and general desirability/marketability as well as an environmental impact assessment report amongst other factors.
- Typical qualities affecting the value of the land are its location and character/ quality.
- The survey and valuation report would ordinarily be undertaken by at least two independent and registered and qualified/reputable expert entities, experienced in dealing with valuations of assets of this nature for international buyers. The surveying companies would normally be liable for any defects in their report and this liability should be at least at market norms.
- The Farm Land value must be at least a certain percentage of the value of the *ṣukūk*, for example 70% [the percentage should be determined by an expert]. This is because the Farm Land is the most easily realizable asset (used equipment and machinery typically sells at a considerable discount to cost).

Farm Land – Ownership and Security

- Subject to legal advice, it may be preferable (from a security viewpoint) for the Farm Land to be owned by a ring-fenced entity (a newly established NZ company or NZ Public Trust), rather than directly be NZ Public Trust or Awqāf NZ, in which case a pledge [or other form of security] over the shares of that company may be taken in favour of the Security Trustee.
- A mortgage over the land should also be registered in the name of the Security Trustee (the NZ Public Trust).
- Legal advice is required to optimise the security over the Farm Land to ensure that the security arrangements are fully enforceable, i.e. that it may be sold and proceeds paid to the *ṣukūk*holders who will predominantly be non-NZ persons.

Farm Operating Assets, Farm Livestock and Bank Accounts

- Subject to legal advice, it may be preferable (from a security viewpoint) for the Farm operating assets and Farm livestock to be owned by a separate newly established company or NZ Public Trust.
- If the Farm operating and Farm livestock are owned through a separate company, the Security Trustee may take a pledge [or other form of security] over the equity shares of that company.
- Furthermore, the Security Trustee may take a pledge [or other form of security] over the bank accounts of the farm-owning company.

Farm Management Team

- Given the expectations that the farm will be managed to a high-level of operational excellence, it is critical that a suitably qualified and incentivized management team is engaged. The quality of management will help determine whether the full vision of the farm will be realized, and thus is a major source of risk.
- Renowned experts with proven capability should be engaged to select the management team; e.g. from Smedley Station [a training farm owned by a NZ Public Trust].
- It may be preferable to have an engagement with an established farming company in initial years (with a management fee or revenue sharing arrangement) to provide some assurance to farm operating performance (e.g. Smedley Station).
- Other structuring options include an equity-partnership with an existing Farm management team.

Security Trustee

- Given the high-value and sophistication of the assets, it is recommended that a professional entity (e.g. a NZ-based bank or NZ Public Trustee) is appointed as Security Trustee on behalf of the Guarantor (if there is a guarantor) or the *ṣukūk*holders (if no guarantor).

Structural Issues

1. No "equity/capital" buffer

- Ordinarily there is an equity buffer or down-payment made when raising external funds. This can range from 10-50% and the amount is dependent upon many factors including project risks and projected cash flow generation to service repayment obligations.
- Given the *waqf* nature of the project, no commercial equity is permissible.
- To overcome this, several solutions may be considered:
  - » A second class of *ṣukūk* are issued for institutional investors willing to take this risk profile. There may be a need for this *ṣukūk* to be profit-based.
  - » An institutional investor (or an established Farm operating company) is sourced to invest the funds initially (a type of bridging facility) with a buy-out option when the Farm has accumulated sufficient funds.

2. Board Governance Matters

(a) Board Representation on the Farm-owning Company

- » Board must comprise of experts in farm management
- » The Board chairman can be independent or a Chairman appointed by Smart Waqf.
- » Generally, the number of board members should be manageable, between 5 and 9 members.
- » A professional independent board member can be appointed by the *ṣukūk* Trustee. This board member could have certain veto rights to protect the interests of *ṣukūk*holders while the *ṣukūk* is outstanding.

(b) Board/Trustee membership of NZ Public Trust and Awqāf NZ

- Given the expanded scope of the activities of Awqāf NZ and the newly established NZ Public Trust, it is recommended that additional highly-respected independent trustees be appointed, possibly New Zealand retired/active judges (need not be Muslim).
- It is also recommended that a representative from Smart Waqf be appointed as a Trustee to NZ Public Trust and Awqāf NZ.

(c) Smart Waqf Governance

Establishment:

- It is critical that the Smart Waqf be established in a stable, politically neutral and accommodative environment. Possibilities include Labuan (offshore Malaysia with an *awqāf* framework), Oman or other country or offshore jurisdiction.
- Board/Trustee members:

  Must be of the highest caliber and reputation and broadly representative in terms of skills and cultural background. There should also be representation from persons' expert in Islamic legal matters.

Other Risks (Summary)

(a) Macro Risk

- This is a key risk and generally difficult to manage and may be costly to procure risk (*takāful*) coverage. However, the project's New Zealand location reduces these risks given its reputation for good governance and established expertise in farming.

(b) Market/Price Risk and Offtake Risks

- This is also a key risk and generally difficult to manage and may be costly to procure risk (takāful) coverage. This may be mitigated by long-term supply contracts with reputable buyers.

(c) Foreign Exchange Risk

- The structure will undoubtedly involve different currencies: (i) the amounts raised through the *ṣukūk*; (ii) Asset and expenses costs in New Zealand; (iii) Revenue base from sale of Livestock and other merchandise; (iv) donation of surplus funds etc.
- It is recommended that expert advice is sought to seek to mitigate the major Forex exposures in the most cost-effective and Sharīʿah-compliant manner.

(d) Sharīʿah Compliance Risk

- Periodic Sharīʿah audits should be undertaken alongside other statutory audits to ensure ongoing Sharīʿah-compliance.

(e) Operational risks

- These risks from the complex nature of the project and *ṣukūk* structure and must be managed by engaging professional management.
- Takāful insurance can be acquired where necessary and cost-effective.

(f) Regulatory Risks

- These risks are remote but potentially high and arise from changes in the regulatory framework. Care should be exercised to select the appropriate regulatory regimes.

(g) Legal risks

- Expert local and international legal advice will need to be appointed to ensure that risks are identified and the structure is optimized for the intended security arrangements and that all legal documentation is enforceable in the various jurisdictions.

(h) Taxation Risks

- Similarly, expert local and international tax advice will need to ensure that the structure is optimized to avoid extraordinary taxes and take advantage of tax exemptions and rebates given the not-for-profit nature of the project.

(i) Financial Model

- It is critical that an expert financial model is prepared to ensure that the Farm operations are able to generate enough surplus to repay the *ṣukūk* within the timeframe specified.

The model should ideally be prepared by the Farm operating management and checked by external consultants who would benchmark the projections against other farms as well as comment upon the integrity of the model and reasonableness of its major assumptions.

Corporate Structuring and Relationship between the Parties

Farm-operating company

- A New Zealand registered company, ideally a NZ Public Trust, either existing or newly incorporated. This company will own and operate the Farm.

Farm Land

- Must be owned by a New Zealand-registered person or company (not foreigners) [to check if a minority shareholding is possible].

Farm land could possible owned by:

» The NZ Public Trust or Awqāf NZ and leased (*ijārah)* to the Farm-owning company.

» A newly established company (Land Co) and leased (*ijārah*) to the Farm-owning company.

» Land Co can possibly be owned by the NZ Public Trust or Awqāf NZ and the Farm-owning Co and/or foreign shareholders in a minority [<25%], including Smart Waqf.

» Land Co could be a new NZ Public Trust or Charity with local and international trustees.

Options for the Relationship between Awqāf NZ and Smart Waqf

- Smart Waqf has a Board Trustee representative in Awqāf NZ and the NZ Public Trust and vice versa.
- Sole Sales Agency Contract
- Awqāf NZ or Public Trust NZ appoints Smart Waqf (or a company wholly-owned by Smart Waqf) as its sole sales agent for the sale of livestock and/or *Aḍāḥī/Qurbānī* and other products, thereby enabling Smart Waqf to earn a percentage of the sales price for its ongoing benevolent activities.
- Equity share ownership of entities in New Zealand.
- Smart Waqf owns shares in the Farm-owning Co and minority shares in the Farm Land-owning Co (if possible).
- Sharīʿah-compliant preference shares.
- Although controversial, it may be possible to utilize these in the structure, to avoid, for instance, foreign ownership restrictions and to maximise returns to Smart Waqf.


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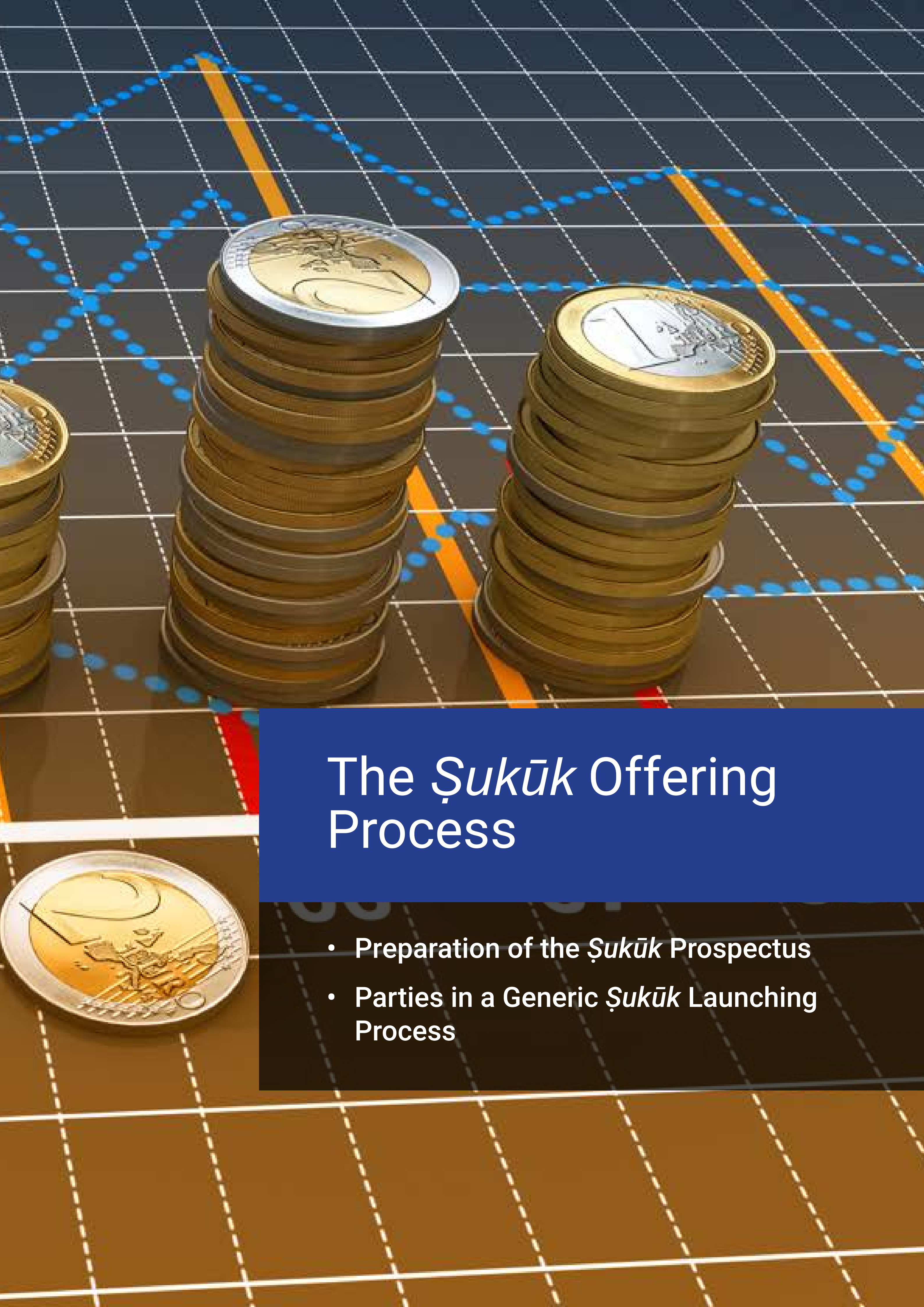


The *Ṣukūk* Offering Process

- Preparation of the *Ṣukūk* Prospectus
- Parties in a Generic *Ṣukūk* Launching Process

The *Ṣukūk* Offering Process

In the following sections we will describe some of the key elements of the *ṣukūk* offering, being the Preparation of the *ṣukūk* Prospectus and also provide an overview of the various parties involved in a generic *ṣukūk* offering.

Capital Raising	**Appoint Advisors** (Corporate Finance, Capital Markets, Ratings, Legal)	**Determine Funding** - Needs/Wants - Objectives	**Ascertain Market funding options**
Structuring *Ṣukūk*	**Appoint Sharī'ah Advisors** - Identify structures that meet objectives	**Produce term sheet and stucture diagram** **Preliminary Sharī'ah Approval** Draft Documentation	**Finalise *Ṣukūk* documentation** **Obtain shari'ah fatwa and legal opinion** **Initial Ratings**
Prospectus	Start **Due Diligence** exercise Prepare Prospectus Disclosure	Obtain **necessary approvals**; Internal & external	Submit **Prospectus and receive Regulator approval**
Offering	Discuss Market strategy with **Bookrunners** Soft-circle **key/anchor investors**	Incorporate necessary SPVs, appoint Trustees, Agents, Account Banks etc.	**Investor Presentation** **Launch *Ṣukūk*** **Launch Close Order Book** **Settlement and Closing**

Preparation of the *Ṣukūk* Prospectus

The *ṣukūk* Prospectus (alternatively called the Offering Circular) is the main document that will be prepared in connection with the *ṣukūk*. It will need to comply with regulatory guidelines of each jurisdiction in which the *ṣukūk* is offered (or *ṣukūk* may be exempt offerings in certain jurisdictions).

The Prospectus normally covers the following items:

- Introduction with salient points of the offering.
- Important information disclaimers (e.g. on any forward-looking statements).
- Contact details of major parties.
- Summary of the *ṣukūk* Issuer.
- Summary of the *ṣukūk* programme.
- Summary of the offering (Term sheet). May include a structure diagram.
- Summary of financial information related to the issuer and, if necessary, the underlying assets.
- Sharīʿah approval and names and brief biography of the Sharīʿah Committee members.
- Risk Factors.

  This is a very important section, normally required for public/retail offerings, as it identifies and describes the major risks under the offering in a single section, from macro risks to risks related to the parties to risks related to the structure and underlying assets.

- Detailed Term Sheet (detailed terms and conditions).
- Use of Proceeds.
- Description of the *ṣukūk* Assets and summary valuation report.
- Summary of the *ṣukūk* Documents (e.g. Qarḍ or Ijārah documents and guarantees).
- Commercial information e.g. Industry/ Sector overview.
- Description of the issuer and obligor – quite detailed, may be more information than provided in an annual report. Will include commercial information, Management details, Management discussion, including recent developments.
- Commercial information related to the underlying *ṣukūk* assets.
- Taxation. Typically contains general information on taxation for holders including withholding tax but not detailed tax advice for holders.
- Subscription and sale information in major jurisdictions where the *ṣukūk* is offered.
- General information.
- Glossary.
- Summary of issuer's bylaws.
- Appendix: Latest financial statements of the obligor.

The *ṣukūk* prospectus is normally prepared by a law firm so that it complies with all applicable regulations in terms of format and content. The law firm works closely with the Issuer and advising banks to complete the information required and a due diligence process is undertaken to ensure all relevant information is included and is up-to-date.

Parties in a Generic *Ṣukūk* Launching Process

The following table provides a description of some of the parties involved in a generic *ṣukūk* issuance.

Party	Description	Roles
Seller / Originator	Entity selling the assets to *ṣukūk*holders	*Receives proceeds from sale of ṣukūk. Normally also the issuer and obligor or related to the issuer/obligor*
*Ṣukūk*holders	Owners of the *Ṣukūk*	Have paid an amount to own the *ṣukūk*, either as primary subscriber, or secondary owner. May be acting on own behalf or on behalf of others (e.g. a nominee agent or trustee fund manager)
Issuer	Entity offering and issuing the *ṣukūk*	Either the obligor or an SPV. If an SPV then its cash flows are derived from the assets and the obligor
Obligor	Entity responsible to pay the *ṣukūk* cash flows	The entity obliged to primarily generate cash from the *ṣukūk* assets
Underlying Assets	Underlying assets sold by the Issuer	May be tangible or intangible. Holders' ownership of underlying assets is typically limited (e.g. no step-in rights, no right to sell to a third-party, etc.).
Ṣukūk Assets	All assets, rights and obligations transferred to the *ṣukūk*holders	Includes the underlying assets and also any other rights such as put options or purchase undertakings, guarantees, insurance/takāful, reserve accounts etc.
Ṣukūk Assets Valuation	Expert reputable valuation company	Where underlying assets are involved in a *ṣukūk* offering, a valuation is typically undertaken by two or more qualified valuers and the summary aspects of the valuation report may be included in the prospectus.
Sharīʿah Advisor	Scholar(s) or entity comprised of scholars	Advise parties on matters relating to the Sharīʿah, and different parties may have different Sharīʿah Advisors
Sharīʿah Approving Authority	Formal authority	The regulator may require Sharīʿah advisor's and/or the *ṣukūk* to be formally approved by a centralized body e.g. the SAC of the SC in Malaysia
Regulator	Sovereign approving and supervisory body	All capital market offerings need to be approved or exempted by a regulator. Typically, there is a main regulator where the *ṣukūk* is primarily offered (in the country of the obligor) but international currency issuances would need to be approved or exempted by the relevant regulators

Party	Description	Roles
Listing / Registrar	Capital market where the *ṣukūk* are listed	Not all *ṣukūk* are listed. Listing means included in the official list of an exchange. Listing requires ongoing disclosure. Registrar records the names of holders.
Exchange	Capital market facilitating *ṣukūk* trading	Trading may be undertaken through an exchange where *ṣukūk* are listed or, more typically, over-the-counter (and the trades are reported to the exchange)
Market makers	Investment banks holding *ṣukūk* for trade	Typically hold a quantity of *ṣukūk* to facilitate ready buying and selling of small amounts. Can source larger lots from holders and quote bid/offer prices
Broker Dealer	Investment banks, brokerage houses	Authorised entities allowed to officially trade *ṣukūk* listed on an exchange.
Underwriters	Investment banks underwriting a *ṣukūk* offering	Typically, a few investment banks that commit to purchase an amount of *ṣukūk* being offered. Successful *ṣukūk* tend to be pre-sold and oversubscribed reducing underwriting risk.
Legal Advisors	Law firms advising on legal and regulatory requirements	Each major party would have their own legal advisor and advice includes a legal opinion on the structure and enforceability and may include legal due diligence (which may be a requirement) and commercial matters.
Tax and Accounting Advisors	Licensed tax and accounting firms	Typically advise on tax, accounting and related commercial matters. Each major party might have their own advisor. The offering documents typically include accounts and taxation information (but not tax advice).
Trustee / Agent for the *ṣukūk*holders	A professional firm or unit of a bank or law firm	Normally act mechanically, acting on pre-agreed instructions. The trustee/agent is not expected to take discretionary decisions or give advice and will hold the *ṣukūk* assets on behalf of the holders.
Custodian	A professional firm or unit of a bank or law firm	Hold the *ṣukūk* assets on behalf of the holders.
Credit enhancer / Guarantor	Sovereign, Bank, Takāful or a holding company	A third-party (e.g. a government agency, bank or *takāful* company) or a related-party (holding company) that provides a guarantee or some form of credit enhancement

Party	Description	Roles
Security Trustee / Agent over any collateral	A professional firm or unit of a bank or law firm	Normally act mechanically, acting on pre-agreed instructions. The security trustee/agent acts to realise/liquidate any mortgages or other collateral (e.g. equity shares) in the event of a default and is not expected to take discretionary decisions or give advice but holds specified security assets for the benefit of the holders.
Payments Administrator	Commercial bank	Typically, a mechanical function where the bank acts according to standing instructions for payments to/from holders.
Accounts banks	Commercial bank	Typically, a mechanical function where the bank acts according to standing instructions. As well as handling cash flows, in a separate capacity may also hold any cash reserve accounts or cash security.
Rating Agency	A regulated dedicated credit rating agency	A pre-approved professional firm that opines on credit risk examining the parties to the *ṣukūk* and the structure. Credit rating opinions issued on or soon after issuance and updated during *ṣukūk* life.
Ratings Advisor	Investment banks	Advises on achieving an optimal rating being familiar with *ṣukūk* and the ratings methodology of agencies.
Arranger	Investment banks	Normally a single or small group of investment banks primarily arranging the *ṣukūk* offering, advising the issuer/obligor on market conditions and coordinating the offering, including marketing
Book Runner	Investment banks	Normally a single or small group of investment banks that manages the fund raising, approaching potential investors, providing guidance on pricing, market conditions and appetite and monitoring *ṣukūk* demand and orders
Lead Manager	Investment banks	Normally a bank that is a significant subscriber to the *ṣukūk* issuance, providing credibility.
Hedging Provider	Investment banks	A bank or group of banks that hedge cash flows to enable the *ṣukūk* cash flows to be met, e.g. local currency to foreign or floating rate to fixed. Some Sharīʿah scholars have approved some hedging structures.
Primary Subscribers/ Investors	Entities, individuals	These subscribe to the *ṣukūk* offering and are the first holders. They can sell *ṣukūk* to secondary investors. There may well be offering restrictions, limiting the type of holders (e.g. to sophisticated investors only)

Party	Description	Roles
Secondary Investors	Entities, individuals	Become holders and purchase the *ṣukūk* after it has been issued to the primary subscribers
SPV	Entities incorporated in onshore or offshore jurisdictions	These corporate entities are used to nominally own assets and/or facilitate other aspects of the *ṣukūk* structure for various purposes, including tax efficiency and asset protection

Glossary

Aḍāhī	*Sacrifice.*
ʿAin	A tangible asset.
Al-ḥabs wa al-manʿ	To stop, to prevent and to restrain.
Al-Mawqūf ʿalayhim	The beneficiary's benefit.
Al-milk al-tāmm	Complete ownership.
Awqāf	Plural of *Waqf*. See *Waqf*.
Baitulmāl	The public treasury.
Danānir	Plural of dinar. See dīnār.
Darāhim	Plural of dirham. See dirham.
Ḍamān	Guarantee.
Dīnār	Gold money.

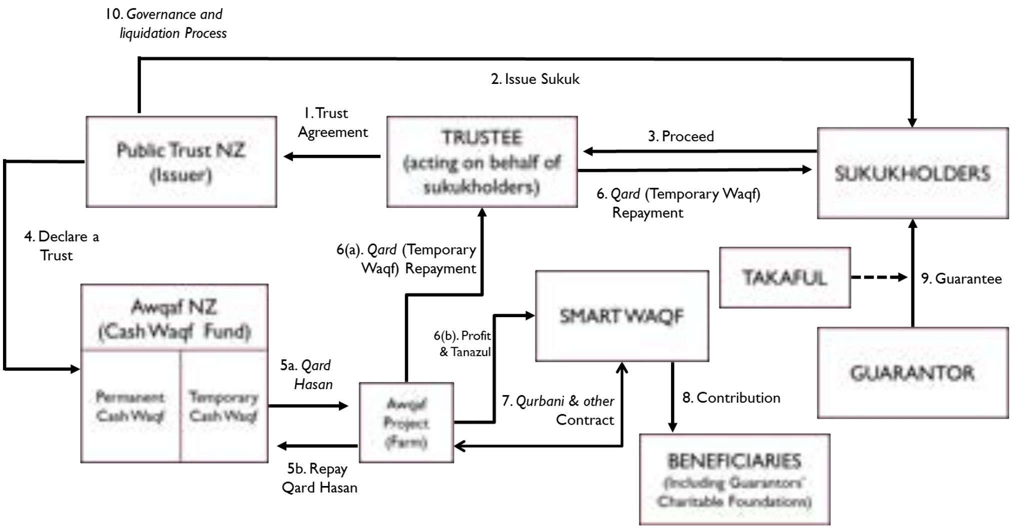
Dirham	Silver money.
Dayn ghayr marjū	Doubtful debt.
Fatwā	A juris consult's evidence-based clarification of the Sharīʿah ruling in response to a question about a specific issue.
Fiqh	The Islamic term for jurisprudence. It refers to the whole corpus of Islamic jurisprudence. It may also be termed as the jurists' understanding of the Sharīʿah. It compromises, among other things, the exercise of intelligence in deciding a point of law in the absence of a binding text (*naṣṣ*) of the Quran or the Sunnah.
Fuqahā	Muslim jurists.
Ḥanafī	One of the four major sunni schools of jurisprudence (*fiqh*).
Ḥanbalī	One of the four major sunni schools of jurisprudence (*fiqh*).
ʿIbādah	Worship; man-to-God relationship.
Ijārah	Leasing; sale of the usufruct of an asset for a defined period.
Ijmāʿ	Consensus of Islamic Scholars or jurists.
Istibdāl	A topic discussed in the field of Islamic endowment (*Waqf*) which means exchanging something with something else.
Jumhūr	Majority
La tataʿayyan bi al-taʿyīn	Cannot be specified by separation.
Majelis Ulama Indonesia	Indonesian Islamic Scholars Council.
Makrūh	A disliked or offensive act. Literally detestable or abominable.
Māl Mithlī	Fungible Asset.
Mālikī	One of the four major sunni schools of jurisprudence *(fiqh*).
Maṣdar	verbal nouns, infinitives in Arabic.
Muḍārabah	An investment partnership with profit-sharing implications. One or more partners as investors (*rabb al-māl*) provide capital to a *muḍārib* (the partner who provides entrepreneurship and management) to undertake a business activity. Profit is shared between the partners on a pre-agreed ratio; any financial loss is borne solely by the investors [muḍārib only loses time and effort as well as potential profit share].
Murābaḥah	Markup sale; a contract of sale in which the seller discloses his cost and the profit. *Murābaḥa*h has been adopted by Islamic banks as a mode of financing, also called cost-plus sale financing. As a financing technique, it can involve a request by the client to the bank to purchase a certain item for him. The bank does that for a disclosed profit, stipulated in advance, over the cost.

Mushārakah	A partnership contract with profit-and-loss sharing. In a typical *mushārakah* contract, two or more parties provide capital *(ra's al-māl)* to venture into a business, share profits according to a pre-agreed ratio, and share losses based on the equity participation.
Mutawallī	Trustee; similar definition of *nāẓir al-waqf*.
Muwakkil	The principal in a wakālah contract.
Muzākarah	Discussion.
Milk ghayr tāmm	Incomplete ownership
Nāẓir Al-Waqf	The custodian of an endowment (*waqf*) who undertakes responsibility for management of its assets and resources as its everyday affairs. In other words, the custodian is required to carry out the task of safeguarding it, growing it, implementing the stipulations of the person who created it (*al-wāqif*), leasing its property, resolving disputes over it, collecting its return and distributing it to its rightful eligible persons. The custodians have a fiduciary responsibility and should act prudently, e.g. set aside some of the proceeds and assets as precautionary reserves.
Niṣāb	The minimum amount of wealth upon which payment of *zakāh* is obligatory
Qarḍ	Loan; a payment of money given to someone to benefit from it, with the recipient being bound to repay the equivalent amount.
Qarḍ Hasan	Benevolent loan; an interest-free loan extended on a goodwill basis, primarily for welfare purposes, i.e, the borrower pays back only the amount borrowed.
Qarḍ Jarra Nafʿan	Loan that generate benefits.
Qiyās	Literally, measure, example, comparison or analogy; technically, extending the application of an existing law by analogy because the law for the original case shares the same effective cause (*ʿillah*) with the new case.
Qurbānī	Sacrifice.
Rahn	Pledge; debtor.
Saham Wakaf	*Waqf* Shares / Endowment shares.
Shāfiʿī	One of the four major *sunni* schools of jurisprudence (*fiqh*).
Sharīʿah	Literally, a path leading to a source of water; the corpus of Islamic law based on the Qur'an and the Sunnah.
ṣukūk	Certificates of equal value representing undivided shares in defined ownership of tangible assets, usufruct and services, assets of particular projects or special investment activity.
Takāful	Mutual guaranteeing through mutual support and shared responsibility whereby a group of people agree to jointly guarantee one another against to defined loss. *Takāful* is an alternative to contemporary insurance.

Tawarruq	An arrangement consisting of two sale and purchase contracts used to seek liquidity. The first involves the sale of an asset by a seller to a purchaser on deferred basis. Subsequently, the purchaser of the first sale will sell the same asset to a third party on a spot basis.
Ujrah	A fee or service charged.
Ujrah ʿalā al-ʿamal	Work with fees.
Ummah	Community; supra national community with a common history. It is commonly used to mean the collective community of Muslims.
Wadīʿah	Literally, custody or safekeeping. In Islamic banking, *wadīʿah* refers to acceptance of sums of money for safekeeping in a Sharīʿah-compliant framework.
Wajaha	Acceptability; Notability; where someone agrees to pay a fee if a renowned person aided him in procuring a loan.
Wakālah	A contract of agency in which one party appoints another party to perform a certain task on its behalf, usually for payment of a fee or commissions.
Wakīl	The agent in a *wakālah* contract.
Waqf	An endowment, normally a charitable, whereby a certain property is held in trust and preserved (normally indefinitely, but may be temporarily) whilst its usufruct is provided for defined beneficiaries, normally a certain charitable objective.
Waqf Al-Mithliyyāt	Endowment or *Waqf* that perishes by consumption. Literally it means its consuming. i.e.; *Waqf* of foodstuff or an animal.
Waqf Al-Muʿayan	Specific *Waqf.*
Waqf Al-Nuqūd	Cash Endowment / Cash *Waqf*.
Wāqif	One who initiates a *waqf.*
Waqf Am	General *Waqf.*
Waqf Dhurri	Family *Waqf.*
Zakāh	Religious tax; an obligatory contribution which every wealthy Muslim is required to distribute directly to the poor or to pay to the Islamic state, or another agent, to distribute on their behalf.

Annexure I:
Other Proposed Structures

a) Temporary and Permanent Cash *Waqf* Structure – Public Trust NZ is the Issuer



The description of the transaction of the above models are as follows:

1. The *ṣukūk* Trustee (acting on behalf of the *ṣukūk*holders) will enter into a trust agreement with Public Trust New Zealand (or its subsidiary as the case may deem fit) to receive and manage *Waqf* contribution from the *ṣukūk*holders.

2. Public Trust New Zealand will enter into Wakālah agreement and appoint Awqāf NZ as its agent (Wakīl) to manage:
    a. Temporary Cash *Waqf*.
    b. Permanent Cash *Waqf*.

3. Pursuant to the Wakālah Agreement, the Issuer will issue the Temporary and Permanent Cash *Waqf ṣukūk* from time to time and the *ṣukūk*holders will subscribe to the relevant tranche of the Temporary and Permanent Cash *Waqf ṣukūk* by payment of the issue proceeds of the relevant *ṣukūk* ("Proceeds") to the Issuer.

4. The Proceeds will flow to the Trustee. The Trustee will disburse the Proceeds to the Issuer according to the Trustee Deeds. Awqāf NZ in its capacity as a Wakīl shall declare a trust over the Proceeds for the benefit of the *ṣukūk*holders.

5. Awqāf NZ in its capacity as a *wakīl* shall establish a Cash *Waqf* Fund with the following combination:
    a. Permanent Cash *Waqf*.
    b. Temporary Cash *Waqf*.

6. Loan (*Qarḍ*)

    a. Cash *Waqf* Fund will extend a non-interest Loan (*Qarḍ*) to *Awqāf* Project (Farm), likely held in trust by NZ Public Trust.

    b. The Farm project will repay the loan over time to the Cash *Waqf* Fund.

7. Returns from the Awqāf project will be used to:

    b. Pay back the Loan (*Qarḍ*) of the Temporary Cash *Waqf* portion. This will be done through the Trustee who will transfer the amount to the *ṣukūk*holders who have subscribed to Temporary Cash *waqf* portion of the *ṣukūk*. The *ṣukūk*holders will get back their capital through this process.

    c. Contribute to Smart Waqf. This contribution will come from two sources:

        (i) Permanent Cash *Waqf ṣukūk*holders who have given their consent and instruction that the profit (if any) shall be channelled to Smart Waqf.

        (ii) Temporary Cash *Waqf ṣukūk*holders who may relinquish their rights to the repayment of their capital due to the fulfilment of the Key Performance Indicator (KPI) or any other reason.

8. There will be an ongoing contractual relationship between the Awqāf Project (Farm) and Smart Waqf whereby the latter will commission the former with Qurbānī and other projects. "Profit" from contractual *Aḍāḥī/Qurbānī* and other projects will be channelled to Smart Waqf. "Profit" here comes from by-products derived from the *Aḍāḥī/Qurbānī* animals such as *ḥalal* gelatin from bones, fertilizer from blood and clothes from skin.

9. Profit from activities (7) above will be channelled to beneficiaries including Guarantors' Charitable Foundations.

10. The structure may be further enhanced by the Guarantor(s). The Guarantor(s) shall provide an unconditional and irrevocable guarantee, as a continuing obligation, in favour of the *ṣukūk* Trustee for and on behalf of the *ṣukūk*holders under which the Guarantor(s) shall irrevocably guarantee all of Awqāf NZ financial obligations in relation to Temporary and Permanent Cash *Waqf ṣukūk* pursuant to the *ṣukūk* Programme ("Guarantee").

    If any default occurs, the farm will be liquidated in order to pay compensation to the *ṣukūk*holders. If the amount is insufficient, the Guarantor(s) will fulfill the gap.

11. Public Trust NZ will play five important roles:

    a. To act as the issuer of the *ṣukūk*.

    b. To act as the trustee/advisor to the project in line with the objective of the endowment.

    c. To ensure the overall governance of the project meets the required legal and regulatory requirement.

    d. To facilitate the liquidation process of the farm in the case of default.

    e. To hold the *Waqf* land and other fixed assets in trust according to the Trust Deed.

12. *Takāful* coverage may be procured to mitigate defined losses.

Kuala Lumpur Industry Workshop

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He is the Chief Executive Officer of ISRA Consultancy. He is also a Senior Researcher at International Shari'ah Research Academy for Islamic Finance (ISRA) and a Professor at International Centre of Education in Islamic Finance (INCEIF). Dr Ashraf currently sits on the Central Bank of Malaysia's Shari'ah Advisory Council (SAC BNM) as Deputy Chairman and the Securities Commission of Malaysia's Shari'ah Advisory Council (SAC SC). He is also the Chairman of Shari'ah Committee of Bursa Malaysia (Malaysia Exchange House). In addition, he also serves as member of National Fatwa Council of Malaysia, a registered Shari'ah adviser of Security Commission, advising a few REIT companies particularly in Singapore. He is also a member of Shari'ah Committee for Tabung Haji (Pilgrimage Fund) and Association of Islamic Banking Association Malaysia (AIBIM). He is actively involved in many consultation works related to Islamic finance in Malaysia and abroad, among others the Islamic Bank of Australia (Project) and Noor Takaful Nigeria. Recently, he has also been appointed as Chairman for Panel of Experts in Muamalat Matters under the Islamic Development Division, Prime Minister Department. Dr Ashraf obtained his PhD (Islamic Law) from University of Birmingham, United Kingdom. His Masters in *Fiqh* and *Usul Fiqh* from University of Jordan and his BA in Shari'ah from Islamic University in Medina, Saudi Arabia.

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He holds a Bachelor Degree of Art and Education, with a major in Islamic studies, from the University of Saba', Republic of Yemen. He also completed his Masters Degree in Islamic Banking, Finance and Management from University of Gloucestershire, UK. In January 2012, he joined International Shari'ah Research Academy for Islamic Finance ("ISRA") as an Associate Researcher. Since July 2012, he holds the post of Manager (training and translation) under the ISRA Consultancy Sdn. Bhd. He is also an interview committee for ISRA Scholarship. He was also the coordinator of the 6th Muzakarah Cendekiawan Shari'ah Nusantara (the Regional Shari'ah Scholars Dialogue). Currently, he is also the Shari'ah Committee of Malaysia Industrial Development Finance and BNP Paribas. Prior to joining ISRA, he worked as a consultant for Majlis Syura Muslimun, an Islamic youth movement for Malaysian students in UK and Eire. He has published a number of research papers related to *takaful*, Islamic capital market, Islamic banking and finance and waqf (Islamic endowment). His research interest is in Islamic banking and finance, microfinance, *fiqh mu'amalat*, *takaful*, Islamic capital market and *waqf*.

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She is currently the Manager, Administration and Finance at ISRA Consultancy Sdn. Bhd. She attained her Bachelor of Science in Business Administration from the University of the Pacific, Stockton, California, USA. She has more than 20 years of working experience in private education in Malaysia. During this period of time, she gained vast experience in dealing with Malaysian Qualifications Agency(MQA) in preparing the documents required to obtain the approval, accreditation and recognition of academic programs. Prior to joining ISRA, she served Al-Madinah International University(MEDIU) as the Head of Academic and Regulatory Unit and HELP Institute of Technology(HICT) as the person who deals with MQA and Ministry of Education (MOE).

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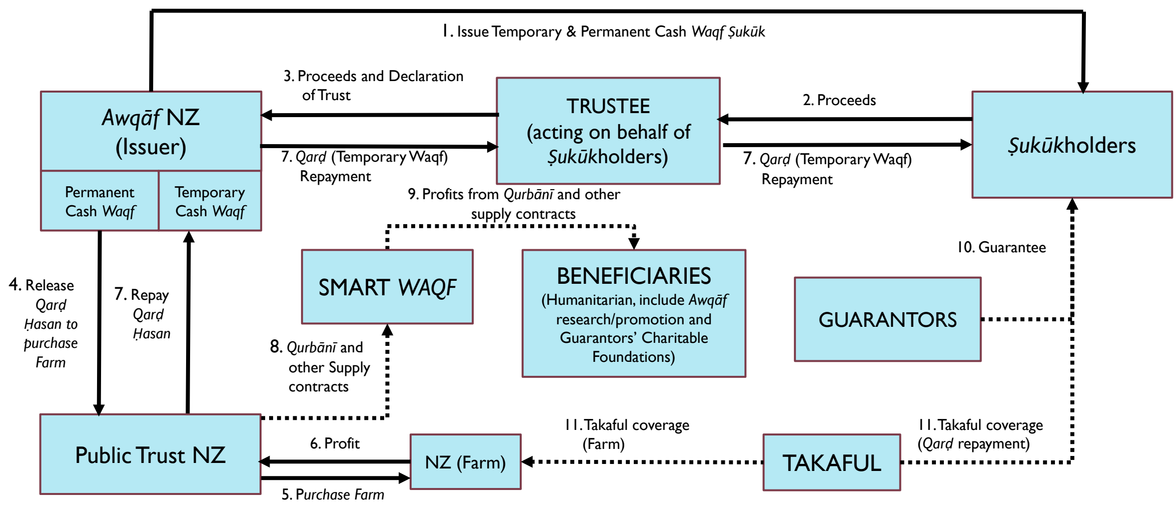
She represents the fresh talented generation of Islamic Finance expert in the making. She attained her Bachelor of Islamic Finance and Banking from the International Islamic University College Selangor (KUIS) and currently pursuing her studies in Master of Islamic Economics (Islamic Finance) at National University of Malaysia (UKM). She joined the International Shari'ah Research Academy for Islamic Finance (ISRA) as an Industrial trainee in November 2014. During her training period, she was exposed to various areas and skills of Islamic Finance inclusive of Capital Market, Banking and Takaful. Presently, she is assisting the workload of advisory, training, translations and research as the Executive of ISRA Consultancy Sdn Bhd.

Appendix 1 (ISRA Council of Scholars)

Temporary & Permanent Cash Waqf Structure



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