1. Introduction

Responsible finance has grown in prominence in recent years, with an influx of green, social and sustainability investment opportunities now available. By blending the goal of financial returns with concerns for broader societal impact, responsible finance covers financial activity targeting a non-exhaustive range of sectors that fit certain ethical, environmental, social and/or governance criteria. Like responsible finance,
contemporary Islamic finance is a relatively new addition to the global financial markets. This industry is arranged around financial activity that is structured to adhere to financial principles of Islamic law\(^3\) and entwines principles derived from religious teachings with financial objectives. While universally accepted standards of behaviour classified as ‘ethical’ or ‘responsible’ are difficult to identify in a contemporary economic context,\(^4\) the ethical code that is seen by some as inherent within Islamic law, and so within Islamic finance,\(^5\) has been highlighted as underpinning a natural compatibility between Islamic finance and responsible finance.\(^6\) Yet despite any suggested commonalities, the two market sectors have remained largely distinct and have overlapped only occasionally, something that is reflected in the sukuk market today.

Sukuk are Islamic capital markets instruments that evidence the proportionate interest of holders (who are referred to in this article as ‘certificateholders’) in underlying assets, revenues or services.\(^7\) In economic effect, sukuk today share characteristics with conventional bonds but provide an opportunity for market participants to issue, or to invest in, capital markets instruments that structurally align with financial principles of Islamic law. However, a review of the sukuk market to date suggests that the goals of those participating in issuances of sukuk certificates have not always focused directly on the impact of those instruments on society or collective well-being more generally. In practice, sukuk certificates endorsed as also being responsible finance occupy only a tiny segment of the sukuk market, where the majority of issuances appear to be value-neutral with respect to their wider societal impact.\(^8\)

‘Responsible finance sukuk’, therefore, look to broaden the goals of Islamic capital markets activity to pursue both financial and extra-financial objectives, while still complying with Islamic law. Unlike sukuk generally, responsible finance sukuk have not been the subject of substantial academic analysis, particularly from a legal perspective. Instead, academic discourse has largely focused on the alignment of Islamic finance with responsible finance without considering how responsible finance instruments are structured in practice and their place within the broader Islamic finance market. This

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\(^{3}\) The terms ‘Islamic law’ and ‘shari’ah’ are often used interchangeably. This article will use the term ‘Islamic law’ unless quoting directly or where the context requires otherwise. There is also no single correct means of expressing Arabic terms and sounds in the Latin alphabet. Throughout this article, quotations and the official names of products and organizations, which contain a transliteration of Arabic terms and use of italicization that are different from that used in this article, will be reproduced without adjustment.


\(^{5}\) Islamic Research and Training Institute and others, Akram Laldin, Mustafa Adil and Ahmed Iskanderani (eds), Islamic Commercial Law Report 2018 (The International Shari’ah Research Academy for Islamic Finance, ISRA Consultancy Sdn Bhd and Islamic Research and Training Institute 2018) 7.


article addresses this under-researched area and presents a detailed discussion of the responsible finance sukuk market. It first introduces relevant aspects of conventional responsible finance bonds by considering the classification system used and standards applied. A range of responsible finance sukuk issuances are then discussed in chronological order, providing an in-depth description of their respective contractual structures. Finally, this article considers the application of Islamic law’s ethical framework to contemporary Islamic finance and reflects on claims that Islamic finance and responsible finance are naturally compatible. In doing so, this article argues that Islamic finance today cannot be understood as being automatically aligned with responsible finance. However, the nascent responsible finance sukuk market could offer a mechanism through which Islamic finance market participants can move beyond finance that is value-neutral in its societal impact and towards a more active pursuit of greater collective well-being.

2. Conventional responsible finance bonds

Conventional responsible finance bonds (‘responsible finance bonds’) are structurally similar to standard bonds but direct proceeds generated by the issue of bond certificates towards the funding of projects\(^9\) that meet prescribed environmental, social or other ethical criteria.\(^{10}\) As most responsible finance bonds are fixed-income debt instruments, returns paid to holders (who are referred to in this article as ‘bondholders’) are typically\(^{11}\) assured and are not tied to the income generated by the funded project.\(^{12}\) As a result, responsible finance bonds provide bondholders with an opportunity to finance activity meeting particular societal objectives while still generating periodic interest payments and return of capital upon redemption of the bonds.

While the remit of an individual responsible finance transaction will be influenced by the subjective goals of transaction participants,\(^{13}\) the responsible finance bond market has developed a series of titles to attach to individual issuances of responsible finance bonds. The title used will typically relate to the nature of projects to be funded using the bond issue proceeds. Reflecting this, ‘green bonds’ are instruments whose issue proceeds are

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9 The term ‘project’ is used in this article to cover enterprises, activities and projects that may be invested in.
10 See, for example, HSBC Holdings plc’s USD1,000,000,000 sustainability bonds due 2023, whose use of proceeds aligns with the ICMA’s Sustainability Bond Guidelines, while its eligible projects were classified based on specified United Nations Sustainable Development Goals.
11 Social impact bonds (discussed at text to n 17), in contrast to other types of responsible finance bonds, typically do not guarantee returns to investors.
12 For example, the Türkiye Sinai Kalkınma Bankası A.Ş. issue of USD300,000,000 4.875% Green/Sustainable Bonds due 2021 (Final Terms dated 16 May 2016) provide for investment of the proceeds into projects meeting climate change mitigation and climate change adaptation or sustainable infrastructure criteria. The rate of return paid pursuant to these bonds is fixed at 4.875% per annum payable semi-annually—the terms and conditions of the bonds confirm payment of this fixed rate of interest for the full tenor of the bonds and return of capital on redemption of the bonds [Condition 8.1, USD750,000,000 Global Medium Term Note Programme (base prospectus dated 19 April 2016)]. Non- or partial-recourse responsible finance bonds that are repaid with cash flows from an underlying project or project assets are possible, but are less common than responsible finance bonds that are full recourse to the issuer, see ICMA, Green Bond Principles (ICMA, 2018) app I.
applied to fund environmentally beneficial projects, ‘social bonds’ provide funding for projects that seek to address or mitigate identified social issues or to achieve positive social outcomes and ‘sustainability bonds’ fund projects that have both green and social objectives. ‘Social impact bonds’ represent a fourth category of responsible finance bonds, although they are structurally distinguishable from other bonds. Social impact bonds are outcomes-focused and performance-based, and as a result, they are not pure fixed-income debt instruments. Instead, they are structured so that payments made to bondholders are not assured but are contingent on the ability of a service provider to achieve pre-agreed outcomes from a funded project.

Although the distinguishing characteristic of all responsible finance bonds is the connection between their use of proceeds and the green and/or social project being funded, the categories of projects that can benefit from this funding have not been clearly defined or universally accepted. Like conceptions of ethics more generally, what is meant by ‘green’ or ‘social’ in the context of responsible finance is a matter of interpretation. While some countries have introduced disclosure and certification standards for green bonds, a general absence of central regulation of what projects are eligible for funding has encouraged a market-led approach to voluntary self-governance. For the green bond market, there are two sets of guidelines in place: the Green Bond Principles (the GBPs) issued by the International Capital Markets Association (ICMA) and the Climate Bonds Standard issued by the Climate Bond Initiative (the CBI). Both sets of guidelines emphasize transparency, issuer disclosure of eligible projects and independent verification of an issuance’s green credentials.

15 ICMA, Social Bond Principles (ICMA, 2018) Social Bond Definition.
20 See, for example, India (Securities and Exchange Board of India, Disclosure Requirements for Issuance and Listing of Green Debt Securities (30 May 2017, Circular No: CIR/IMD/DF/51/2017)) and China (People’s Bank of China Announcement 2015) No 39). Belgium has also introduced a green bond framework (February 2018, The Kingdom of Belgium, ‘Green OLO Framework’), although this is designed to enable the Belgian Debt Agency to issue green bonds, rather than acting as a national benchmark for Belgian issuers.
21 There have been calls for greater official standardization. See, for example, EU High-Level Expert Group on Sustainable Finance, Financing a Sustainable European Economy (European Commission 2018) 30 <https://ec.europa.eu/info/sites/info/files/180131-sustainable-finance-final-report_en.pdf> accessed 30 April 2019, noting that ‘the EU should introduce an official EU Green Bond Standard’.
22 ICMA (n 12).
23 CBI, ‘Climate Bonds Standard’ (Version 2.1, 2017). The Climate Bonds Standard confirm at 3 ‘[f]ull alignment with the latest version of the [ICMA] Green Bond Principles.’ As of the date of this article, the CBI has issued a draft version of the Climate Bonds Standard 3.0, which have been updated to align with the June 2018 update of the GBPs.
24 ICMA (n 12) s 1 Use of Proceeds, CBI, ibid, cl 3 Reporting Prior to Issuance.
also set out categories of eligible green projects, including those linked to renewable energy and clean transportation.\(^{25}\) In the social bond market, the Social Bond Principles (the SBPs)\(^{26}\) issued by ICMA closely follow the GBPs and encourage transparency and standardization in social bond issuances. Eligible social projects under the SBPs include those providing affordable basic infrastructure and food security.\(^{27}\) Reflecting the fact that a project may not fit squarely within the individual categories of green or social, ICMA has also issued the Sustainability Bond Guidelines.\(^{28}\) These guidelines acknowledge that a bond can be classified as a sustainability bond if it complies with both the GBPs and the SBPs.\(^{29}\) Finally, unlike green, social and sustainability bonds, social impact bonds are not subject to market-led guidelines. The legitimacy of an intended social outcome and the level of disclosure provided to social impact bondholders are not, therefore, subject to standardization.

### 3. Responsible finance *sukuk*

In drawing parallels between Islamic finance and responsible finance, commentators have referred to ethical and moral values underpinning Islamic law, such as *tawhid* (unity), *khilafah* (vicegerency) and *adalah* (justice) to emphasize Islamic law’s inherent concern for the Earth and society within it.\(^{30}\) Such principles are highlighted as presenting Islamic finance participants with a predetermined set of values upon which an ethical financial framework can be constructed.\(^{31}\) As Moghul notes, ‘Islamic spirituality, in its norms as well as its practices, establishes a methodological framework and impetus to establish businesses and markets that support sustainability and social and environmental well-being.’\(^{32}\) Reflecting these ethical principles, Islamic finance is said to provide ‘a unique perspective and a value-based approach to finance’\(^{33}\) where its participants are driven not solely by self-interest or personal maximization. Like conventional responsible finance, Islamic finance is presented as implementing a form of ‘blended finance’ under which both financial and broader societal goals are pursued.

In practice, as the conventional responsible finance sector has diversified and expanded, transactions that intentionally incorporate financial and societal motivations...
have been slow to feature in the mainstream Islamic finance market.\(^{34}\) Consistent with this trend, the *sukuk* market is dominated by instruments that use contractual structures to avoid contravening the Islamic legal prohibitions of *riba* (unjustified gain (most notably, interest) in a financial transaction), *gharar* (excessive risk), *maysir* (gambling) and *haram* (forbidden) activities but which have no wider societal objectives. Instead, these instruments address general funding requirements of the issuer or obligor.\(^{35}\)

There have, to date, been only a small number of successfully issued responsible finance *sukuk* within global financial markets. These instruments are structured so that the proceeds from the issue of the *sukuk* certificates are, directly or (more typically) indirectly, invested in projects meeting predetermined extra-financial criteria. Periodic payments to certificateholders during the tenor of the *sukuk* (referred to in this article as ‘periodic distributions’), and ultimate return of capital on redemption of the *sukuk* certificates, may in theory be influenced by the performance of a project with a defined societal purpose. This creates a link between certificateholders and funded projects. In practice, however, while Islamic finance is said to encourage the equitable sharing of profits and losses in financial activity, and to connect the generation of profit with production in the real economy, tying payments made to certificateholders to the economic success or failure of the funded project restricts the extent to which these payments can be made predictable and periodic. Reflecting the *sukuk* market’s preference for fixed-income instruments, payments made to certificateholders of responsible finance *sukuk* have more typically been generated through a separate contractual arrangement between certificateholders and the issuer and are funded only indirectly from income linked to the funded project.\(^{36}\)

The following section considers the responsible finance *sukuk* market. It outlines standards developed to facilitate growth of this market and provides a detailed discussion of a range of responsible finance *sukuk* issuances.\(^{37}\) This situates responsible finance *sukuk*...
as a segment of the broader Islamic finance market and discusses, in an academic context, the contractual structures used in these instruments. In each case, the underlying Islamic finance agreements are considered, together with the nature of the eligible project. This section also outlines how certificateholders’ periodic distributions are generated, the nature of certificateholders’ relationship with the funded project and the manner in which capital is ultimately returned to certificateholders.

**Responsible finance sukuk standards**

Unlike the market-led growth of the responsible finance bond market, issuances of responsible finance sukuk have generally followed specific government-led initiatives. A ‘top-down’ approach to encouraging the responsible finance sukuk market is reflected in the development of relevant standards. The first responsible finance sukuk standards were published in 2014 by the Securities Commission of Malaysia (the SC, a statutory body with authority to oversee, regulate and develop the Malaysian capital markets) as part of its broader goal of promoting socially responsible finance and investment. These standards (the ‘SC’s SRI Sukuk Standards’) are built into Malaysia’s existing regulatory framework for sukuk and are mandatory for issuances of responsible finance sukuk within Malaysia. The threshold requirement for classification as a sukuk complying with the SC’s SRI Sukuk Standards is that the use of proceeds from the issue of the sukuk certificates is directed towards funding eligible projects. This list of eligible projects is finite and prescriptive and includes both environmentally friendly projects and projects

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38 In 2012, the Green Sukuk and Working Party (the GSWP) was established by the CBI, the Clean Energy Business Council (MENA) and the Gulf Bond and Sukuk Association. The stated aims of the GSWP are to promote and develop sukuk products that are compliant with Islamic law and are also structured to invest in climate change solutions. Climate Bonds Initiative, ‘Green Sukuk’ [https://www.climatebonds.net/projects/facilitation/green-sukuk] accessed 30 April 2019. Since then, the market has largely followed government-led initiatives. For example, in 2014, the Dubai Supreme Council of Energy and the World Bank (in its capacity as the International Bank for Reconstruction and Development) signed an advisory services agreement to develop Dubai’s green investment programme, including the issuance of responsible finance sukuk. World Bank, ‘Dubai Supreme Council of Energy and World Bank Partner to Design a Funding Strategy for Dubai’s Green Investment Program’ [World Bank, 15 April 2014] [https://www.worldbank.org/en/news/press-release/2014/04/15/dubai-supreme-council-of-energy-and-world-bank-partner-to-design-a-funding-strategy-for-dubais-green-investment-program] accessed 30 April 2019.


41 In the 2014 revised edition of the SC’s ‘Guidelines on Sukuk’, a new pt D was added to address the additional requirements to be met for the issue, offering an invitation to subscribe or purchase ‘sustainable and responsible investment (SRI) sukuk’ [Securities Commission Malaysia, ‘Guidelines on Sukuk’ (Revised 28 August 2014) pt D]. The Guidelines on sukuk have since been superseded by the SC’s ‘Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework’ [SC-GL/4-2015 (R3-2018) first issued 9 March 2015, revised 11 October 2018] (‘SC LOLA Guidelines’) and the SC’s ‘Guidelines on Issuance of Corporate Bonds and Sukuk to Retail Investors’ [SC-GL/5-2015 (R3-2018) first issued 9 March 2015, revised 11 October 2018] (‘SC Retail Guidelines’), each of which has a separate chapter dedicated to responsible finance sukuk.

42 SC Retail Guidelines, Ibid, para 1.06.

43 SC LOLA Guidelines (n 41), pt 3, para 7.02; SC Retail Guidelines (n 41), para 20.02.

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with positive social objectives. The SC’s SRI Sukuk Standards also detail the level of disclosure, reporting and independent assessment required for issuances of responsible finance sukuk.

In 2017, the Association of Southeast Asian Nations (ASEAN) Capital Markets Forum, an intergovernmental forum for regulatory authorities from ASEAN countries, published the ASEAN Green Bond Standards. These standards seek to ‘enhance transparency, consistency and uniformity of ASEAN Green Bonds’ while facilitating the development of specifically designated ASEAN green bonds and sukuk. The ASEAN Green Bond Standards are based on ICMA’s GBPs with respect to eligible projects, issuer disclosure and independent verification, although unlike the GBPs, the ASEAN Green Bond Standards specifically confirm that fossil fuel power generation projects cannot be funded using ASEAN green bonds or sukuk. In October 2018, the ASEAN Green Bond Standards were followed by the publication of the ASEAN Social Bond Standards and the ASEAN Sustainability Bond Standards.

Following the publication of these standards, the responsible finance sukuk market has gained some momentum, with most of the recent responsible finance sukuk issuances structured specifically to align with published standards.

**Responsible finance sukuk issuances—an analysis**

**Social sukuk**

The first responsible finance sukuk issuances provided funding for projects with socially beneficial objectives. In each case, these social sukuk were issued by a multilateral or government-backed entity, rather than a corporate issuer. This lack of corporate issuers reflects, perhaps, the nature of the projects that have been funded through the issue of social sukuk and the level of government involvement in these projects. Nevertheless, these social sukuk structures were pioneering within the responsible finance sukuk market and, in the case of the Sukuk Ihsan (defined below), were the first sukuk certificates to be approved under responsible finance sukuk standards.

**Sukuk IFFIm**

In 2014, 2015 and 2019, the International Finance Facility for Immunisation Company (IFFIm) acted as obligor for three standalone issues of sukuk certificates (the 2014 and 2015 issuances together, the ‘Sukuk IFFIm’), in each case through a special purpose vehicle (SPV).

Although presented as the first ‘green’ or ‘socially responsible...
investment\textsuperscript{53} sukuk, the Sukuk IFFIm do not optically display characteristics of responsible finance instruments. The descriptions of the Sukuk IFFIm do not label the sukuk as green, social or sustainability sukuk and the use of proceeds of each issue provides simply that ‘[t]he net proceeds received by IFFIm . . . will be applied by IFFIm to fund its general operations.’\textsuperscript{54} However, the nature of IFFIm and its general operations facilitate the socially beneficial nature of the Sukuk IFFIm.\textsuperscript{55} IFFIm is a multilateral development institution and registered charity whose primary function is to provide funding for the programmes of Gavi, an international organization responsible for operational activities related to immunization, vaccine procurement and health system strengthening programmes in developing countries.\textsuperscript{56} Following Gavi’s establishment, the governments of nine countries\textsuperscript{57} committed to make scheduled payments for up to 20 years to fund Gavi’s operations (these commitments together, the ‘Grant Agreements’).\textsuperscript{58} The right to receive these payments was assigned to IFFIm, who was tasked with procuring immediate and upfront funding for Gavi’s programmes.\textsuperscript{59} By applying the proceeds from the issue of sukuk to fund its ‘general operations’, therefore, IFFIm directs those proceeds to Gavi to be used for programmes with stated social objectives.\textsuperscript{60}

Periodic distributions made to certificateholders are generated through a sukuk structure based on a commodity murabaha arrangement (which involves a sales agreement, where the purchase price of commodities is payable on a deferred and marked-up basis).\textsuperscript{61} Pursuant to this structure, the Sukuk IFFIm were issued to certificateholders. The issuer then declared a trust in favour of certificateholders over its the documentation for this issuance was not publicly available as of the date of this article, the following discussion will focus on the 2014 and 2015 issuances.

\begin{itemize}
  \item \textsuperscript{51} IFFIm Sukuk Company Limited, IFFIm Sukuk Company II Limited and IFFIm Sukuk Company III Limited, respectively.
  \item \textsuperscript{52} Dey and Ure (n 36) 36.
  \item \textsuperscript{54} Private Placement Memorandum dated 1 December 2014, IFFIm Sukuk Company Limited issue of USD500,000,000 Trust Certificates due 2017 (‘IFFIm I PPM’), 46 Use of Proceeds; Private Placement Memorandum dated 28 September 2015, IFFIm Sukuk Company II Limited issue of USD200,000,000 Trust Certificates due 2018 (‘IFFIm II PPM’), 46 Use of Proceeds.
  \item \textsuperscript{55} With respect to conventional IFFIm ‘vaccine’ bonds, IFFIm has specifically confirmed that ‘IFFIm complies with all four components of the SBPs’, IFFIm, ‘Socially Responsible Investing through Vaccine Bonds’, <https://www.iffim.org/bonds/vaccine-bonds/> accessed 30 April 2019.
  \item \textsuperscript{56} The Memorandum of Association of IFFIm confirms that ‘the Charity [IFFIm]’s objects . . . are to promote the effective use of the resources of GAVI Organisations for Charitable Purposes [defined as the relief of sickness and the promotion, protection and preservation of good health among people in developing countries] for the benefit of the public by providing services and facilities which will assist GAVI Organisations to raise funds’, para 3, Memorandum of Association of International Finance Facility for Immunisation Company (23 June 2006, lodged with the UK Companies House on 6 October 2006).
  \item \textsuperscript{57} The Republic of France, the Republic of Italy, the Kingdom of Norway, the Republic of South Africa, the Kingdom of Spain, the Kingdom of Sweden, the UK, the State of the Netherlands and the Commonwealth of Australia.
  \item \textsuperscript{58} The GAVI Fund Affiliate was the original grantee of the scheduled payments. Pursuant to a Deed of Novation, on 8 February 2013, the GAVI Fund Affiliate transferred by novation all of its duties, liabilities, covenants, undertakings and obligations under each grant agreement to Gavi, IFFIm I PPM, 52 and IFFIm II PPM, 52.
  \item \textsuperscript{59} IFFIm I PPM, 49 and IFFIm II PPM, 49.
  \item \textsuperscript{60} Ibid.
  \item \textsuperscript{61} IFFIm I PPM, 17 and IFFIm II PPM, 17. The commodity murabaha used in these structures can also be referred to as tawarruq.
\end{itemize}
rights, title, interest and benefit in, to and under the transaction documents related to the particular issue of Sukuk IFFIm, any monies standing in a defined account, and in each case, any related proceeds generated. This gives certificateholders an undivided proportionate ownership interest in those assets.

Pursuant to the commodity murabaha arrangement, the issuer (as trustee) purchases commodities for cash at a price equal to the proceeds from the relevant issue of Sukuk IFFIm certificates. The issuer sells these commodities to IFFIm at their original cost price, plus a pre-agreed profit, payable on the periodic distribution date. The trustee uses the cost price-plus-profit paid by IFFIm to purchase further commodities and (using the profit element of the payment only) to pay periodic distributions to certificateholders. Upon receipt of the commodities, IFFIm immediately on-sells these for cash at their original cost price. The commodity murabaha process then repeats on each periodic distribution date until maturity or early redemption of the relevant Sukuk IFFIm certificates. On redemption of the Sukuk IFFIm certificates, the full cost price-plus-profit due from IFFIm with respect to the last sale of commodities is used to pay certificateholders the aggregate outstanding principal amount of the relevant Sukuk IFFIm and all accrued but unpaid periodic distributions. No further commodities will be purchased.

The commodity murabaha structure used in the Sukuk IFFIm provides certificateholders with periodic payments throughout the tenor of each issue and assured repayment of capital on redemption of the Sukuk IFFIm certificates. Concurrently with this, the net proceeds received by IFFIm from the commodity murabaha must be used by IFFIm to fund its general operations. While the sukuk issue proceeds will, therefore, ultimately be used for the social purposes for which IFFIm operates, they do so indirectly.

62 IFFIm I PPM, Condition 5 The Trust and the Murabaha Arrangements and IFFIm II PPM, Condition 5 The Trust and the Murabaha Arrangements.
63 IFFIm I PPM, Condition 4.1 Status and Limited Recourse—Status and IFFIm II PPM, Condition 4.1 Status and Limited Recourse—Status.
64 IFFIm I PPM, Condition 1 Definitions and Interpretation—Definition of ‘Cost Price’ and IFFIm II PPM, Condition 1 Definitions and Interpretation—Definition of ‘Cost Price’.
65 The amount of profit payable is pegged to the London Interbank Offered Rate and will fluctuate during the tenor of the relevant series of Sukuk IFFIm. IFFIm I PPM, Condition 1 Definitions and Interpretation—Definition of ‘Murabaha Profit’ and Condition 7.2 Periodic Distributions—Benchmark Rate and IFFIm II PPM, Condition 1 Definitions and Interpretation—Definition of ‘Murabaha Profit’ and Condition 7.2 Periodic Distributions—Benchmark Rate.
66 IFFIm I PPM, 18 and IFFIm II PPM, 18.
67 IFFIm I PPM, 17 and IFFIm II PPM, 17. In practice, the parties have agreed to net off amounts due in respect of the payment obligations, and so, on each periodic distribution date, IFFIm will only be required to pay to the issuer the profit element of the amount due.
68 Early redemption of the certificates can occur following the occurrence of a dissolution event (that is, an event of default) (pursuant to IFFIm I PPM, Condition 9.3 Redemption and Dissolution of the Trust—Dissolution Following a Dissolution Event and Condition 13 Dissolution Events and IFFIm II PPM, Condition 9.3 Redemption and Dissolution of the Trust—Dissolution Following a Dissolution Event and Condition 13 Dissolution Events) or following the occurrence of an early redemption for tax reasons (pursuant to IFFIm I PPM, Condition 9.2 Early Dissolution for Taxation Reasons and IFFIm II PPM, Condition 9.2 Early Dissolution for Taxation Reasons).
69 IFFIm I PPM, 18 and IFFIm II PPM, 18.
70 IFFIm I PPM, 18 and IFFIm II PPM, 18.
71 IFFIm I PPM, 46 Use of Proceeds and IFFIm II PPM, 46 Use of Proceeds.
Certificateholders do not invest directly in those social purposes nor are payments made to certificateholders derived directly from them. Instead, the periodic distributions paid to certificateholders are contractually based on commodity murabaha arrangements with no articulated social objective. Despite this contractual separation between certificateholders and Gavi’s programmes, IFFIm’s primary revenue stream is the scheduled payments due under the Grant Agreements connected directly with those programmes. In practice then, IFFIm’s ability to make payments under the commodity murabaha depends on it receiving the scheduled payments related to the funded social programmes.

While the Sukuk IFFIm were not subject to independent verification of their social objectives, both the 2014 and 2015 issues were oversubscribed and received accolades from the finance industry. Through the issue of the Sukuk IFFIm, IFFIm has been able to provide Gavi with the immediate upfront capital needed to fund social programmes that are not, in and of themselves, able to generate periodic payments of profit.

Sukuk Ihsan:
In 2015, Khazanah Nasional Berhad (‘Khazanah’), the investment fund of the Government of Malaysia, established a responsible finance sukuk programme with an SPV issuer, Ihsan Sukuk Bhd (the ‘Sukuk Ihsan Programme’). The Sukuk Ihsan Programme was the first approved under the SC’s SRI Sukuk Standards, and since the programme’s establishment, there have been two series of responsible finance sukuk issued under it (together, the ‘Sukuk Ihsan’). The proceeds from the issue of the Sukuk Ihsan were invested in the Yayasan AMIR Trust Schools Programme, a programme run by a non-profit foundation to address the quality of education in government schools in Malaysia.

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72 A failure by IFFIm to invest the issue proceeds in socially beneficial programmes will not trigger the early redemption of the Sukuk IFFIm certificates. IFFIm I PPM, Condition 1 Definitions and Interpretation—Definition of ‘IFFIm Event’ and IFFIm II PPM, Condition 1 Definitions and Interpretation—Definition of ‘IFFIm Event’.
73 IFFIm I PPM, 7 and IFFIm II PPM, 7.
75 The 2014 IFFIm sukuk won 2014 Social Impact Deal of the Year from Islamic Finance News, Best Supranational Sukuk for 2014 from EMEA Finance and the 2015 Innovation in Islamic Finance Award from Euromoney.
77 Noordin and others (n 6) 416. Prospectus dated 13 July 2017 for the proposed issue by Ihsan Sukuk Berhad of up to RM5.0 million 4.60% retail sukuk due 2024 (‘Series 2 Ihsan Sukuk Prospectus’), s 3.3.
78 For the purposes of this article, I have referred to non-simultaneous issuances of responsible finance sukuk under a programme as ‘series’ and simultaneous issuances of responsible finance sukuk under a programme or as part of a standalone issuance as ‘tranches’.
79 Ihsan Sukuk Berhad issue of RM100,000,000 4.30% sukuk certificates due 2022 and Ihsan Sukuk Berhad issue of RM100,000,000 4.60% sukuk certificates due 2024.
80 Series 2 Ihsan Sukuk Prospectus, s 8.1; Ihsan Sukuk Berhad, Information Memorandum dated 11 June 2015 for the proposed issue of RM100.0 million in sukuk (‘Series 1 Ihsan Sukuk Information Memorandum’), s 1.4.
The Sukuk Ihsan Programme is unique amongst responsible finance sukuk issued to date. The contractual structure of both series of Sukuk Ihsan involves wakalah (Islamic agency), commodity murabaha and istithmar (Islamic investment agency) agreements. Under this arrangement, the sukuk trustee (CIMB Islamic Trustee Berhad) acting on behalf of certificateholders entered into a wakalah agreement with the issuer. The sukuk trustee appointed the issuer as agent (wakeel) with respect to the investment of the issue proceeds from the relevant series of Sukuk Ihsan. The issuer in turn appointed Khazanah as subagent (the investment wakeel) to invest these issue proceeds on behalf of certificateholders. The issuer issued the Sukuk Ihsan certificates and declared a trust in favour of certificateholders over the issue proceeds and any assets purchased using those proceeds. This gives certificateholders an undivided proportionate beneficial ownership interest in the issue proceeds, the purchased assets and, in each case, the rights, title, interest, entitlement and benefit in relation thereto. With the issue proceeds, Khazanah (as investment wakeel) purchased shari’ah-compliant tangible assets (unconnected with the funded project) from itself (as seller) and shari’ah-compliant commodities purchased and sold using a commodity murabaha. Under this commodity murabaha, Khazanah (as buyer on its own behalf) requested commodities from Khazanah (as investment wakeel on behalf of certificateholders). The investment wakeel purchased the commodities at a price equal to the balance of the issue proceeds remaining after the purchase of the tangible assets. The commodities were sold to Khazanah at their original cost price, plus the aggregate pre-agreed profit margin to be paid in instalments. Khazanah immediately on-sold the commodities for cash at their original cost price. This cash payment, together with the amount paid to Khazanah for the purchase of the tangible assets, provides Khazanah with an amount equal to the Sukuk Ihsan issue proceeds to be used for investment in the Yayasan AMIR Trust Schools Programme. During the tenor of the relevant series of Sukuk Ihsan,
returns generated by investment in the tangible assets and the commodities up to a pre-agreed amount form the semi-annual periodic distributions payable to certificateholders.91 Any returns generated above the pre-agreed amount are retained by Khazanah as an incentive fee for its work as investment wakeel.92

At maturity or early redemption of the Sukuk Ihsan certificates,93 Khazanah will purchase the certificateholders’ interest in the tangible assets at their market value (or, if these tangible assets are unlisted shares, at a value based on the net tangible assets of the underlying company).94 Any outstanding amounts due from Khazanah under the commodity murabaha will also become payable.95 These amounts will be used to repay to certificateholders the outstanding principal amount of the relevant series of Sukuk Ihsan, together with accrued but unpaid periodic distributions. Following repayment, the Sukuk Ihsan certificates will be redeemed and cancelled.96

It is this amount payable upon redemption of the Sukuk Ihsan certificates that distinguishes the Sukuk Ihsan from other responsible finance sukuk. For each series of Sukuk Ihsan, the parties agreed a series of performance targets. These targets are indicators of the success of the Yayasan AMIR Trust Schools Programme and require teachers, senior management and students in selected schools to achieve pre-agreed benchmarks of competency within a five-year period.97 In the event that the key performance indicators are achieved, the principal amount of the relevant series of Sukuk Ihsan will be adjusted downwards by an agreed amount,98 and so the amount payable on
redemption of the Sukuk Ihsan certificates will be reduced.\textsuperscript{99} In the event the key performance indicators are not met, the principal amount, together with accrued but unpaid periodic distributions, will be paid in full.\textsuperscript{100} Representing a financial penalty for attaining prescribed targets, this step-down returns mechanism was described by Khazanah as part of certificateholders’ ‘social obligation in recognizing the positive impact’\textsuperscript{101} of the funded programme. As a result, while the certificateholders do not invest directly in the Yayasan AMIR Trust Schools Programme, and their returns are derived from income generated by assets that are unconnected with that programme, payments to certificateholders on redemption of the sukuk certificates will reflect the programme’s performance.

As required by the SC’s SRI Sukuk Standards, the issuer confirms in the Sukuk Ihsan offering documents that it has and will continue to comply with applicable environmental, social, governance and recognized best practice standards.\textsuperscript{102} It also undertakes to report annually to certificateholders on the use of proceeds and, to the extent possible, the attainment of the funded programme’s impact objectives.\textsuperscript{103} The offering documents do not explicitly set out what these impact objectives are, although they do detail the key performance indicators to be achieved. While no external assessment of the social purposes of the Yayasan AMIR Trust Schools Programme was included in the Sukuk Ihsan offering documents, an independent auditors’ report to be delivered prior to maturity of each series of Sukuk Ihsan will confirm whether the key performance indicators have been met.\textsuperscript{104}

The returns structure of the Sukuk Ihsan distinguishes these certificates from social impact bonds (which reward attainment of key performance indicators) and social bonds (which pay agreed returns notwithstanding the performance of the funded project). They are, therefore, ‘[n]ot your typical SRI’,\textsuperscript{105} something that commentators noted could impact the popularity of the Sukuk Ihsan amongst investors.\textsuperscript{106} While two series of sukuk


\textsuperscript{100} Khazanah Nasional Berhad (n 76). As noted by RAM Ratings in the context of its rating of the Ihsan SRI Sukuk Programme, ‘the repayment of the Sukuk Ihsan will depend on the eligible SRI project’s ability to meet identified key performance indicators’. RAM Ratings, ‘RAM Ratings Assigns AAA(s) Preliminary Rating to Malaysia’s First SRI Sukuk Programme’ (23 April 2015).

\textsuperscript{101} Khazanah Nasional Berhad (n 76).

\textsuperscript{102} Series 1 Ihsan Sukuk Information Memorandum, s 4.5 The Issuer—Compliance statement from the Issuer, Series 2 Ihsan Sukuk Prospectus, s 8 Information about Yayasan Amir.


\textsuperscript{104} Series 1 Ihsan Sukuk Information Memorandum, s 2.0 item (2)(y)(vii) Principal Terms and Conditions of the Sukuk Programme—Key Performance Indicators (‘KPIs’) and Series 2 Ihsan Sukuk Prospectus, s 4.1 item (2)(mm)(vii) Information on the Sukuk Programme and Retail Sukuk Ihsan—Principal Terms and Conditions—Key Performance Indicators (‘KPIs’). Should the sukuk be redeemed early and prior to this report being made available, the key performance indicators will be deemed not to have been met.

\textsuperscript{105} Khouri (n 99).

\textsuperscript{106} Ibid.
were issued under the Sukuk Ihsan Programme, the programme’s structure has not been replicated in subsequent responsible finance sukuk issuances. Instead, the economic substance of subsequent issues has aligned more closely with that of typical responsible finance bonds.

**Green and sustainability sukuk**

In 2012, two green sukuk issuances were announced. The first, the Orasis Sukuk, was marketed as the first French green sukuk issuance. The proceeds from the issue of the Orasis Sukuk were to be invested in solar energy production assets through a joint venture and *ijarah* (Islamic lease) structure. However, limited records exist for these instruments or the continued operation of the entities that marketed them. Green sukuk were also to be issued by SGI-Mitabu, a joint venture between two Australian solar companies. The proceeds of these green sukuk certificates were to be used to fund the first phase of an Indonesian solar project through an *istikana‘* (Islamic construction) structure (during construction of the project) and *ijarah* and *musharaka* (Islamic partnership) structures (for the post-completion period). Initially publicized in 2012, this issuance was considered again in 2015. The limited documentation available suggests, however, that these sukuk certificates never came to market.

Notwithstanding these initially unsteady steps in the market, 2017, 2018 and 2019 saw the successful issue of several green or sustainability sukuk. The ultimate use of proceeds from these sukuk issuances has largely focused on environmentally beneficial projects, particular solar energy, although broader sustainability benefits were also highlighted in the projects funded by the Sukuk PNBMV and the HSBC Amanah Sustainability Sukuk (each defined below). While most of these sukuk have been issued by Malaysian corporates and marketed to domestic Malaysian investors, the green sukuk issued by the Republic of Indonesia were marketed to international investors as the first sovereign green sukuk issuance.

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109 Hassoune Conseil’s company licence appears to have been cancelled on 4 June 2015. In 2016, the *Autorité des Marchés Financiers* (AMF) in France fined Legendre Patrimoine €500,000 and prohibited it from carrying out activities as a financial investment advisor for a period of three years due, among other things, to Legendre’s failure to fulfil its obligation to communicate accurate, clear and not misleading information with respect to its green investment products. AMF La Commission des Sanctions, 7 June 2016, ‘Decision de la Commission des Sanctions à l’égard des Sociétés Global Patrimoine Investissement, Kalys Investissements et de M. Louis Sanguinetti’ Référence: SAN-2016-07.


111 Ibid.

Sukuk Tadau.
In July 2017, Tadau Energy Sdn Bhd (‘Tadau’), a Malaysian company operating in the electricity sector, issued RM250,000,000 (approximately USD63,000,000) worth of green sukuk (the ‘Sukuk Tadau’) pursuant to an Islamic medium term note programme (the ‘Sukuk Tadau Programme’).113

The proceeds from the issue of each tranche of Sukuk Tadau have been used for shari’ah-compliant purposes involving the financing, construction and operation of two solar photovoltaic plants and associated facilities in Malaysia (the ‘Sukuk Tadau Assets’).114 Investment of these issue proceeds and generation of income for certificateholders are based on a combination of istisna’ and ijarah agreements. Following issue of the Sukuk Tadau, the sukuk trustee (Malaysian Trustees Berhad) declared a trust in favour of certificateholders over assets comprising rights, interest and benefit in, to and under the completed Sukuk Tadau Assets and related transaction documents.115 This gives certificateholders an undivided proportionate beneficial ownership interest in the completed Sukuk Tadau Assets themselves.116 Pursuant to an istisna’ agreement, the sukuk trustee paid the issuer (as contractor) an amount equal to the issue proceeds to build, construct and deliver the Sukuk Tadau Assets.117 This amount is payable in instalments during the construction phase of each Sukuk Tadau Asset.118 Using funds received from the istisna’ agreement, the issuer in turn entered into a parallel engineering, procurement and construction (EPC) arrangement with a contractor to procure the required building, construction and delivery of the Sukuk Tadau Assets.119 To provide certificateholders with periodic distributions during the tenor of the Sukuk Tadau, the sukuk trustee agreed to lease each (as yet uncompleted) Sukuk Tadau Asset to the issuer during that asset’s construction phase in exchange for payment of predetermined advance rental.120 From the point of completion and delivery of the Sukuk Tadau Assets to the maturity date of the last outstanding tranche of Sukuk Tadau, the sukuk trustee will then lease each completed Sukuk Tadau Asset to the issuer for a predetermined rental.121 Both forms of rental payment will be equal in size and timing to

113 The Sukuk Tadau were issued in 15 tranches with maturities of between 2 and 16 years.
114 Tadau Energy Sdn Bhd, Information Memorandum dated 16 June 2017 for the ‘proposed issue of Islamic medium term notes pursuant to an Islamic medium term notes programme under the shari’ah principles of istisna’ and ijarah of up to RM250,000,000 in nominal value’, as supplemented by a Supplementary Information Memorandum dated 31 July 2017 (‘Tadau Information Memorandum’), s 4.1.1 Project Information—Description of the Solar PV Plant.
115 Ibid, s 5 Principal Terms and Conditions of the Sukuk Programme—Facility description, Trust Deed dated 19 June 2017 between Tadau Energy Sdn Bhd and Malaysian Trustees Berhad.
116 Tadau Information Memorandum, s 5 Principal Terms and Conditions of the Sukuk Programme—Facility Description; cl 2.1 Trust Deed dated 19 June 2017 between Tadau Energy Sdn Bhd and Malaysian Trustees Berhad, cl 3.1.
117 Tadau Information Memorandum, s 5 Principal Terms and Conditions of the Sukuk Programme—Facility Description.
118 Ibid.
119 Pending utilization of the sukuk issuance proceeds as provided for in the documents, these proceeds may be invested in Shari’ah-compliant investment products approved by the Shari’ah Advisory Council of SC, the Shari’ah Advisory Council of Bank Negara Malaysia and/or other recognized Shari’ah authorities, ibid, s 5 Principal Terms and Conditions of the Sukuk Programme—Permitted Investments, if applicable.
120 Ibid, s 5 Principal Terms and Conditions of the Sukuk Programme—Facility Description.
121 Ibid.
the periodic distributions due to certificateholders. The issuer will also be appointed as servicing agent to perform ownership-related obligations and to pay ownership expenses in relation to the Sukuk Tadau Assets.\footnote{Ibid.}

Should a Sukuk Tadau Asset not be completed and delivered, or should a dissolution event\footnote{Such as non-payment of any amount due under the Sukuk Tadau by the issuer, misrepresentation, or the winding-up, dissolution or liquidation of the issuer, ibid, s 5 Principal Terms and Conditions of the Sukuk Programme—Events of Default or Enforcement Events, where applicable, including recourse available to investors. It is a dissolution event if various stages of the Sukuk Tadau Assets are not completed.} be declared prior to completion and delivery, the issuer will refund to the sukuk trustee the istisna’ price, together with compensation amounting to the periodic distributions already paid and any accrued but unpaid periodic distributions due.\footnote{Ibid, s 5 Principal Terms and Conditions of the Sukuk Programme—Facility Description.} The sukuk trustee will repay any advance rentals paid.\footnote{This amount will be set-off against the compensation amount.} Should a dissolution event be declared following completion and delivery, the issuer will purchase the relevant Sukuk Tadau Asset pursuant to a purchase undertaking. The price payable will equal the original istisna’ price for that Sukuk Tadau Asset, together with any ownership expenses and all accrued but unpaid periodic distributions.\footnote{In addition to the issuer’s obligations upon the occurrence of a dissolution event, Kagayaki Energy Sdn Bhd (a shareholder of the issuer), acting as sponsor, will provide an unconditional and irrevocable letter of undertaking for the period from the issue date of the SRI Sukuk Tadau to the date, that is, six months from the commercial operation date of the second Sukuk Tadau Asset to inject equity into the project and to fund cost overruns. ibid, s 5, Principal Terms and Conditions of the Sukuk Programme—Sponsor Completion Support.} The Sukuk Tadau certificates will then be redeemed and cancelled.\footnote{Redemption and cancellation of the Sukuk Tadau will also occur upon a total loss of a Sukuk Tadau Asset with the insurance proceeds being used to pay the outstanding principal amount of the Sukuk Tadau plus any accrued but unpaid periodic distributions. ibid, s 5, Principal Terms and Conditions of the Sukuk Programme—Facility Description.} At maturity of each tranche of Sukuk Tadau, the final rental payment made by the issuer will consist of the last periodic distribution, the outstanding principal amount of the maturing tranche and any ownership expenses (which will be set-off against a reimbursement of ownership expenses paid to the issuer as servicing agent).\footnote{Ibid.} This final lease payment will be sufficient to repay to certificateholders their capital and any accrued but unpaid periodic distributions. Certificateholders of a maturing tranche of Sukuk Tadau will then transfer by way of gift their proportionate ownership interest in the relevant Sukuk Tadau Asset to certificateholders of any outstanding Sukuk Tadau.\footnote{Ibid.} Once all tranches of Sukuk Tadau have matured, the Sukuk Tadau Assets will be transferred to the issuer by way of gift.\footnote{Ibid.}

The Sukuk Tadau were the first green sukuk to be issued under the SC’s SRI Sukuk Standards.\footnote{Affin Hwang Capital, ‘Tadau Energy Sdn Bhd Issues RM250 Million Sri Sukuk; the First Green Sukuk in Malaysia’ (Press Release, 27 July 2017) <https://affinhwang.com/press-releases/tadau-energy-sdn-bhd-issues-rm250-million-sri-sukuk-the-first-green-sukuk-in-malaysia/> accessed 30 April 2019.} As required by these standards, the Sukuk Tadau Programme offering document confirms the impact objectives of the Sukuk Tadau Assets as being to ‘conserve the environment by providing an environmentally friendly, clean and sustainable power
supply and [to be] part of creating a sustainable world’. The issuer also provides confirmation that it has and will continue to comply with relevant environmental, social, governance and best practice standards relating to the Sukuk Tadau Assets and covenants to periodically report to certificateholders on the use of proceeds and attainment of the outlined impact objectives. Notwithstanding this clear attempt by the issuer to adhere to the SC’s SRI Sukuk Standards, the commissioned independent assessment (in the form of a second opinion) given by the Center for International Climate Research (CICERO) addressed the adherence of the issuer’s Green Sukuk Framework to ICMA’s GBPs, rather than to the SC’s SRI Sukuk Standards. CICERO rated the Green Sukuk Framework ‘Dark Green’ meaning that the funded project represented a realization of the ‘long-term vision of a low carbon and climate resilient future’. However, CICERO highlighted shortcomings in the transparency and reporting commitments of the issuer, a lack of substantial environmental policies for the issuer’s operations, and potential controversy with respect to land-use and local environmental impact of renewable energy power plants.

The Sukuk Tadau were oversubscribed and reflect the fact that approval under the SC’s SRI Sukuk Standards will not prevent an issuance from also being assessed against market-based international green bond standards. Unlike the majority of other responsible finance sukuk, the Sukuk Tadau certificateholders received proportionate ownership interest in the funded project. As a result, although supported by credit enhancements to ensure payment of periodic distributions and return of capital on redemption, the returns paid to certificateholders are derived from that funded project. In this way, the Sukuk Tadau connect certificateholders directly to a green project.

Sukuk QSP:
Within days of the establishment of the Sukuk Tadau Programme, Quantum Solar Park (Semenanjung) Sdn Bhd (QSP) a Malaysian company carrying out solar power generation and related activities, published an offering document (as supplemented,

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132 Tadau Information Memorandum, s 7.4, Industry Overview—Eligible SRI Project.
133 Ibid.
134 Ibid, s 5, Principal Terms and Conditions of the Sukuk Programme—Information Covenants.
135 Center for International Climate Research, ‘Second Opinion’ on Tadau Energy’s Green Sukuk Framework (24 July 2017) 6 <http://tadau.com.my/second-opinion-on-tadau-energy-green-sukuk-framework-final24072017.pdf> accessed 30 April. This Second Opinion was not originally annexed to the Tadau Information Memorandum dated 16 June 2017 but was subsequently appended as a new app 6 as a result of the Supplemental Information Memorandum dated 31 July 2017.
136 Ibid 5.
137 Ibid 12.
140 Trust Deed dated 19 June 2017 between Tadau Energy Sdn Bhd and Malaysian Trustees Berhad, cl 3.1.
141 QSP Information Memorandum (defined below), s 3.2.
the ‘QSP Information Memorandum’)\(^{142}\) for a standalone issue of green *sukuk*. In October 2017, RM1,000,000,000 (approximately USD250,000,000) worth of *sukuk* certificates were issued pursuant to this QSP Information Memorandum (the ‘*Sukuk QSP*’)\(^{143}\) to fund the construction and operation of three solar photovoltaic plants located in Malaysia (the ‘*Sukuk QSP Assets*’).\(^{144}\)

The structure of the *Sukuk QSP* is based on a commodity *murabaha*, while the issuer invested the issue proceeds in the *Sukuk QSP Assets* through a separate intercompany financing arrangement. Under the commodity *murabaha* structure, the *sukuk* trustee (Pacific Trustees Berhad) appointed the issuer as agent with respect to the purchase and sale of commodities.\(^{145}\) The issuer then appointed the *sukuk* trustee as subagent for this same purchase and sale.\(^{146}\) The *sukuk* trustee (acting as subagent) purchased commodities for cash at a price equal to the *Sukuk* QSP issue proceeds.\(^{147}\) This price was paid by the issuer (as agent for the certificateholders)\(^{148}\) giving certificateholders an undivided proportionate ownership interest in the purchased commodities (but not the *Sukuk QSP Assets*).\(^{149}\) The *sukuk* trustee then sold the commodities to the issuer at a price equal to their original cost price, plus the aggregate pre-agreed profit margin for the relevant tranche of *Sukuk QSP*.\(^{150}\) This cost price-plus-profit is payable on a deferred basis, with the profit element payable in instalments and then used to pay periodic distributions to certificateholders.\(^{151}\) Following their sale, the commodities were immediately on-sold on behalf of the issuer for cash at their original cost price.\(^{152}\)

Prior to the issue of the *Sukuk QSP* certificates, project companies for each of the *Sukuk QSP Assets* (the ‘Project Companies’) entered into power purchase agreements with Tenaga Nasional Berhad (TNB) (a public energy company).\(^{153}\) Pursuant to these power purchase agreements, the Project Companies agreed to design, construct, own, operate and maintain the *Sukuk QSP Assets* and TNB agreed to purchase the generated electrical output.\(^{154}\)

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142 Quantum Solar Park (Semenanjung) Sdn Bhd Information Memorandum dated 19 June 2017 for the ‘proposed issue or offer for subscription or purchase of or invitation to subscribe for or purchase of sukuk based on the shariah principle of murabaha (via a tawarruq arrangement) of up to RM1,000,000,000 in principal amount’, as supplemented by a Supplementary Information Memorandum dated 8 September 2017.

143 The *Sukuk QSP* was issued in 33 tranches with maturities of between 2 and 18 years.

144 QSP Information Memorandum, s 7.2.1 *Information on the Projects—Technical Description*.

145 Ibid, s 2.1, item (4) *Principal Terms and Conditions—Facility Description*.

146 Ibid.

147 Ibid.

148 Ibid.

149 Ibid. Trust Deed dated 3 August 2017 between Quantum Solar Park (Semenanjung) Sdn Bhd and Pacific Trustees Berhad, cl 3.2.

150 QSP Information Memorandum, s 2.1, item (4) *Principal Terms and Conditions—Facility Description*. If the *Sukuk QSP* are being sold at a discount, the sales price will include the discounted amount, which is the difference between the principal amount of the *Sukuk QSP* and the original purchase price of the commodities.

151 Ibid, s 2.1, item (4) *Principal Terms and Conditions—Facility Description*.

152 Ibid.

153 Ibid, s 7.6.1, *Information on the Projects—Summary of Key Project Documents*.

154 Ibid. In January 2019, the Malaysian Rating Corporation downgraded the *Sukuk QSP*’s rating following a delay in the completion of the *Sukuk QSP Assets*, Malaysian Rating Corporation Berhad, ‘MARC Extends MARCWatch Negative on QSP
were partially funded by QSP through intercompany finance agreements.\textsuperscript{155} In order to provide this funding on an intercompany basis, QSP advanced an amount equivalent to the \textit{Sukuk} QSP issue proceeds that it received following on-sale of the commodities from the commodity \textit{murabaha} arrangement.\textsuperscript{156} Once the \textit{Sukuk} QSP Assets are constructed, the Project Companies will use revenue generated by these assets to make periodic payments to QSP under the intercompany finance agreements.\textsuperscript{157}

At maturity of the \textit{Sukuk} QSP or upon the declaration of a dissolution event,\textsuperscript{158} the full cost price-plus-profit due under the commodity \textit{murabaha} becomes payable by the issuer, less amounts already paid.\textsuperscript{159} To ensure that the issuer is in a position to make this payment, the Project Companies unconditionally and irrevocably guaranteed to pay the outstanding principal amount of the \textit{Sukuk} QSP certificates and any accrued but unpaid periodic distributions upon a declaration of a dissolution event.\textsuperscript{160} Repayment of the principal due from the Project Companies under the intercompany finance agreements will also align with the maturity dates of the \textit{Sukuk} QSP.\textsuperscript{161} Once all amounts due to certificateholders have been paid, the \textit{Sukuk} QSP certificates will be redeemed and cancelled.\textsuperscript{162}

Unlike the \textit{Sukuk} Tadau, then, where the certificateholders have an ownership interest in the funded project and returns paid to certificateholders are generated by that project, the \textit{Sukuk} QSP certificateholders have an ownership interest in commodities being bought and sold. The funding of the \textit{Sukuk} QSP Assets arises contractually from the intercompany finance agreements to which certificateholders are not a party. Certificateholders are instead granted security in the form of charges over each Project Company’s (and the issuer’s) rights, interests, titles and benefits under the project documents, certain specified accounts and all present and future assets of each Project Company and the issuer.\textsuperscript{163} Nevertheless, the QSP Information Memorandum acknowledges that capital paid by the Project Companies pursuant to the intercompany finance
agreements will be used by the issuer to fund payments due under the Sukuk QSP certificates. As is the case for the Sukuk IFFIm, while there is a contractual separation between the certificateholders and the funded project, that project ultimately provides a revenue stream that is used to pay certificateholders. Reflecting this, the 2019 delay in the completion of the Sukuk QSP Assets resulted in the issuer having to top up the fund out of which periodic distributions are to be paid.

As required by the SC’s SRI Sukuk Standards, the QSP Information Memorandum confirms that QSP has and will continue to comply with applicable standards relating to the QSP Sukuk Assets and that it will periodically report to certificateholders on use of the issue proceeds. It also outlines the impact objectives to be achieved from the Sukuk QSP Assets as being the facilitation and promotion of sustainable and responsible investments in Malaysia, supporting Malaysia with respect to reaching its solar power targets, and contributing to the sustainable electricity supply and reduction of carbon emissions in Malaysia. These impact objectives are more closely tied to Malaysian government policies than those articulated in the Sukuk Tadau Programme. CICERO provided the independent assessment of QSP’s Green Bonds Framework, classifying it as ‘Dark Green’. In doing so, CICERO noted the potential for a funded project to impact on the broader community in a way that may or may not be climate friendly.

Sukuk PNBMV:
In December 2017, PNB Merdeka Ventures Sdn Berhad (PNBMV) issued RM690,000,000 (approximately USD170,000,000) worth of sukuk certificates (the ‘Sukuk PNBMV’) under its Islamic medium term note programme (the ‘Sukuk PNBMV Programme’).

PNBMV, whose principal activities involve management and development of land, is a wholly owned subsidiary of Permodalan Nasional Berhad (PNB), a fund management company. Unlike other Malaysian entities that have issued, or acted as obligor for an issue of, green sukuk, the principal activities of PNBMV and PNB are not environmentally focused. Reflecting this, the proceeds from the issue of the Sukuk PNBMV were used to partly fund costs relating to the development and construction of 83 storeys of offices.
and related infrastructure (the ‘Office Tower’) within the multi-use Merdeka PNB118 Tower in Malaysia. Concurrently with the issue of the Sukuk PNBMV, PNBMV issued non-green sukuk certificates to part finance not only the Office Tower but also the broader development project in which the Office Tower will be situated (the project, including the Office Tower, the ‘PNBMV Project’). The Office Tower was deemed by the issuer to be both an eligible project under the SC’s SRI Sukuk Standards (as a sustainable building project) and as an eligible green project under the ASEAN Green Bond standards. PNB also confirmed that the Merdeka PNB118 Tower will have sustainability and social benefits.

The contractual structure underpinning the Sukuk PNBMV is a wakalah and commodity murabaha arrangement. The lead manager (MIDF Amanah Investment Bank Berhad) acting as facility agent and the certificateholders (acting through the sukuk trustee, AmanahRaya Trustees Berhad) entered into a wakalah agreement. Pursuant to this agreement, the facility agent was appointed as agent for the certificateholders for the purchase and sale of commodities. At the same time, pursuant to a commodity murabaha agreement, the facility agent purchased commodities for cash at a price equal to the Sukuk PNBMV issue proceeds. These commodities were sold to the issuer at their original cost, plus the pre-agreed profit margin for each tranche of Sukuk PNBMV, payable on a deferred basis. By subscribing for the Sukuk PNBMV, certificateholders receive an entitlement to this payment, with the pre-agreed profit element payable semi-annually. The commodities were then on-sold for cash at their original cost price. The issuer used this cash to partly fund the construction and development costs of the Office Tower, as well as to fund the periodic distributions due to certificateholders during the construction phase of the Office Tower. As was the case for the Sukuk IFFIm, Sukuk Ihsan and Sukuk QSP, returns paid to the Sukuk PNBMV certificateholders are generated through the commodity murabaha arrangement and certificateholders receive no ownership interest in the funded project. Instead, the Sukuk PNBMV are secured by a

174 Sukuk PNBMV Programme, Other Terms and Conditions, item (d) Details on the Utilisation of Proceeds.
175 PNBMV, RM1,184,000,000 5.680% Sukuk due 2032 issued under a RM3,650,000,000 Sukuk programme, Other Terms and Conditions, item (d) Details on the Utilisation of Proceeds.
176 Sukuk PNBMV Programme, Other Terms and Conditions, Definitions 'Eligible SRI Project'.
178 Sukuk PNBMV Programme, Principal Terms and Conditions, item (D)(3) Details of Facility/Programme—Shariah Principles (for Sukuk).
179 Ibid, item (D)(4) Details of Facility/Programme—Facility Description.
180 Ibid.
181 Ibid. Sukuk PNBMV Programme, Other Terms and Conditions, item (e) Profit/Coupon Rate and (f)—Profit/Coupon Payment Frequency.
182 Sukuk PNBMV Programme, Principal Terms and Conditions, item (D)(4) Details of Facility/Programme—Facility Description.
183 Ibid, item (D)(22) Details of Facility/Programme—Details of Designated Account(s).
security package that includes security with respect of the Office Tower\(^{184}\) and shared security (with PNBMV’s non-green *sukuk*) over assets relating to the PNBMV Project more generally.\(^{185}\) This shared security includes a completion guarantee under which PNB unconditionally and irrevocably guarantees to complete the PNBMV Project by a specified date.\(^{186}\) Once constructed and delivered to PNBMV, the Office Tower will be leased to PNB on a renewable 15-year term. Returns generated from this lease will fund periodic distributions to certificateholders under the *Sukuk* PNBMV.\(^{187}\)

At maturity or early redemption\(^{188}\) of the *Sukuk* PNBMV certificates, all amounts due under the commodity *murabaha* will become payable by the issuer.\(^{189}\) This amount will be used to repay the aggregate outstanding principal amount of the *Sukuk* PNBMV, together with accrued but unpaid periodic distributions.\(^{190}\) The relevant tranche of *Sukuk* PNBMV will then be redeemed and cancelled.\(^{191}\)

The *Sukuk* PNBMV Programme is structured to align with both the SC’s SRI *Sukuk* Standards and the ASEAN Green Bond Standards. Reflecting this, the terms and conditions of the *Sukuk* PNBMV impose a positive covenant on the issuer to comply ‘at all times’ during *Sukuk* PNBMV Programme with the ASEAN Green Bond Standards and the SC’s SRI *Sukuk* Standards.\(^{192}\) As required by the ASEAN Green Bond Standards, the *Sukuk* PNBMV Programme terms and conditions set out how the issue proceeds will be used and managed.\(^{193}\) The issuer also undertakes to report annually on the use of those issue proceeds.\(^{194}\) However, while the issuer’s Green *Sukuk* Framework confirms the sustainability features and broader social and environmental benefits of the Merdeka PNB118 Tower,\(^{195}\) it does not outline these features for the Office Tower specifically.

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\(^{184}\) Ibid, item (D)(15) Details of Facility/Programme—Details of Security/Collateral Pledged. This includes security over the strata title in respect of the Office Tower, the Office Tower lease and proceeds, insurance or *takaful* (Islamic insurance) policies taken out with respect to the Office Tower, certain specified accounts, a first ranking fixed and floating charge over the present and future assets of the issuer and assignment of present and future rights, titles, benefits and interests in documents relating to the management and project documents for the Office Tower.

\(^{185}\) Ibid, item (D)(15) Details of Facility/Programme—Details of Security/Collateral Pledged. This shared security includes charges over land, as well as stratum and subterranean titles to land to be used for the PNBMV Project, the assignment of construction contracts in relation to the PNBMV Project and a completion guarantee given by PNB in relation to the PNBMV ASEAN *Sukuk* Programme and the PNBMV non-green *Sukuk* programme.

\(^{186}\) Ibid.

\(^{187}\) *Sukuk* PNBMV Programme, Other Terms and Conditions, *Definition of ‘MLA’*.

\(^{188}\) Either at the instigation of the issuer or upon a declaration of a dissolution event (referred to in the *Sukuk* PNBMV Programme as an event of default), which includes a breach, omission or failure to observe or perform a covenant. *Sukuk* PNBMV Programme, Principal Terms and Conditions, item (D)(26) Details of Facility/Programme—Events of Default or Enforcement Events, where applicable, including recourse available to investors and *Sukuk* PNBMV Programme, Principal Terms and Conditions, item (D)(29) Details of Facility/Programme—Provisions on Early Redemption. It is a dissolution event if any of the project companies fails to carry out the PNBMV Project.

\(^{189}\) Ibid, item (D)(4) Details of Facility/Programme—Facility Description. Principal Terms and Conditions, item (D)(29) Details of Facility/Programme—Provisions on Early Redemption.

\(^{190}\) Ibid, item (D)(4) Details of Facility/Programme—Facility Description.

\(^{191}\) Ibid.

\(^{192}\) Ibid, item (D)(21)(a)(xi) Details of Facility/Programme—Details of Covenants—Positive Covenants—ASEAN GBS and the Guidelines on LOLA Framework on Sustainable and Responsible Investment (SRI) *Sukuk* Compliant.

\(^{193}\) Ibid, item (D)(22) Details of Facility/Programme—Details of Designated Account(s). This is required by standard 4.3 of the ASEAN Green Bond Standards.

\(^{194}\) Ibid, item (D)(21)(d)(iii) Details of Facility/Programme—Details of Covenants—Information Covenants. This is required by ASEAN Green Bond Standards, para 4.4 and SC LOLA Guidelines pt 3, para 7.08.

\(^{195}\) PNB Merdeka Ventures Sdn Berhad (n 176) 2.
Instead, the issuer confirms that it will subsequently disclose to certificateholders the environmental sustainability objectives of the Office Tower, the process for determining how the Office Tower fits within the ASEAN Green Bond Standards’ green categorization, and the eligibility criteria applied to identify and manage environmental and social risks associated with the Office Tower.\(^{196}\)

PNBMV’s Green Sukuk Framework was assessed by CICERO\(^{197}\) against ICMA’s GBPs. CICERO assigned this framework a ‘Medium Green’ rating, reflecting ‘projects and solutions that represent steps towards the long-term vision, but are not quite there yet’.\(^{198}\) As part of its assessment, CICERO noted that neither PNB nor PNB has a sustainability strategy, making it difficult to understand how the Green Sukuk Framework would support a broader corporate green strategy.\(^{199}\) CICERO also noted that green building certifications alone will not ensure energy efficient, low-carbon or carbon-neutral buildings.\(^{200}\)

\textbf{Sukuk SKSB:}

In January 2018, Sinar Kamiri Sdn Bhd (SKSB), a Malaysian company operating in the power generation business,\(^{201}\) issued a standalone issuance of RM245,000,000 (approximately USD61,000,000) worth of green \textit{sukuk} (the ‘Sukuk SKSB’).\(^{202}\)

The contractual structure of the Sukuk SKSB is based on a \textit{wakalah} and commodity \textit{murabaha} arrangement. Unlike similar \textit{sukuk} structures used by other Malaysian corporate issuers, a portion of the Sukuk SKSB issue proceeds is invested directly into a solar photovoltaic energy generating facility in Malaysia (the ‘SKSB Project’), connecting certificateholders directly to that funded project. Pursuant to this arrangement, the sukuk trustee (MTrustee Berhad) acting on behalf of certificateholders appointed the issuer as agent under a \textit{wakalah} agreement.\(^{203}\) The issuer issued Sukuk SKSB certificates and declared a trust in favour of certificateholders over the Sukuk SKSB proceeds and the assets acquired using those proceeds (the ‘Wakalah Investments’).\(^{204}\) This gives certificateholders an undivided proportionate beneficial ownership interest in the Sukuk SKSB proceeds, the Wakalah Investments and the rights, title, interest, entitlement and benefit in, to and under the related transaction documents (the ‘Sukuk SKSB Assets’).\(^{205}\)

Pursuant to the \textit{wakalah} agreement, the issuer (as agent) must invest at least 33 per cent

\(^{196}\) Sukuk PNBVM Programme, Principal Terms and Conditions, item (D)(21) item (d)(vi) Details of Facility/Programme—Details of Covenants—Information Covenants.


\(^{198}\) Ibid 5.

\(^{199}\) Ibid 11.

\(^{200}\) Ibid.

\(^{201}\) Sukuk SKSB, Principal Terms and Conditions, item (C)(10) Corporate Information of Issuer—Structure of Shareholdings and Names of Shareholders or, in the Case of a Public Company, Names of All Substantial Shareholders.

\(^{202}\) The Sukuk SKSB were issued in 17 tranches with maturities of between 2 and 18 years.

\(^{203}\) Sukuk SKSB, Principal Terms and Conditions, item (C)(4)(1) Details of Facility/Programme—Facility Description.

\(^{204}\) Ibid, item (C)(4)(2) Details of Facility/Programme—Facility Description.

\(^{205}\) Ibid.
of the issue proceeds in the issuer’s shari’ah-compliant business in respect of the SKSB Project. 206 The balance of the Sukuk SKSB issue proceeds is invested in commodities under a commodity murabaha arrangement. 207 Pursuant to this commodity murabaha, the issuer (on behalf of certificateholders) purchases commodities (through a subagent) for immediate cash payment at a price equal to the residue of the Sukuk SKSB issue proceeds. 208 These commodities are then sold to the issuer (as buyer for itself) at a price equal to their original cost price plus pre-agreed profit margin, payable on a deferred basis. 209 This cost price-plus-profit will equal the full outstanding principal amount and the aggregate expected periodic distributions with respect to the Sukuk SKSB. 210 The commodities are then immediately on-sold for cash at their original cost price. 211 For each tranche of Sukuk SKSB, the periodic distributions paid to certificateholders semi-annually will be generated by the combined Wakalah Investments (which include the SKSB Project) and are capped at the periodic distribution amount agreed for each tranche of Sukuk SKSB. 212 Any returns generated in excess of this amount will be kept by the issuer as an incentive fee. 213

With respect to the SKSB Project itself, the issuer will use the cash generated from the sale of the commodities, together with the portion of the Sukuk SKSB issue proceeds invested directly in the issuer’s shari’ah-compliant business, to part-fund costs associated with the design, construction, operation and maintenance of the SKSB Project. 214 The issuer will also repay in full a loan facility used to fund the remaining part of the SKSB Project. 215 To procure the construction of the SKSB Project, the issuer entered into an EPC contract with a contractor. 216 It also entered into a power purchase agreement with TNB under which TNB will purchase the SKSB Project’s future electricity output. 217 In the event of cost overruns or a shortfall in the payments made by TNB due to any delay in payment, Mudajaya Group Berhad (‘Mudajaya’), the issuer’s ultimate parent, will provide an equity injection and/or intercompany financing facility to the issuer, providing certificateholders with a layer of capital protection. 218

206 Ibid.
207 Ibid.
208 Ibid.
209 Ibid.
210 Ibid.
211 Ibid.
212 Ibid, item (C)(4)(3) Details of Facility/Programme—Facility Description.
213 Ibid.
214 Sukuk SKSB, Other Terms and Conditions, item (ii) Details on Utilisation of Proceeds by Issuer.
215 Ibid.
216 Sukuk SKSB, Other Terms and Conditions, item (x) Definitions—Definition of ‘Project Agreements’.
217 Ibid.
218 Sukuk SKSB, Principal Terms and Conditions, item (C)(15) Details of Facility/Programme—Details of Security/Collateral Pledged.
At maturity or early redemption of Sukuk SKSB certificates, the full amount due under the commodity murabaha will become payable. Concurrently with this, the issuer will repurchase, pursuant to a purchase undertaking, certificateholders’ interest in the issuer’s shari’ah-compliant business at market value on the relevant date. Once the outstanding principal amount of the Sukuk SKSB and any accrued but unpaid periodic distributions have been paid, the trust declared over the SKSB Sukuk Assets is dissolved and the Sukuk SKSB certificates are redeemed and cancelled.

As with other sukuk issued in compliance with the SC’s SRI Sukuk Standards, the terms and conditions for the Sukuk SKSB confirm that the issuer will periodically report on the use of proceeds from the issue of the Sukuk SKSB. The issuer also confirms that it has and will comply with all applicable laws, guidelines, permits and regulations, including relevant environmental laws, permits and guidance. From the documents publicly available, however, SKSB does not explicitly confirm that it will also comply with social, governance or recognized best practice standards relating to the SKSB Project. Instead, the annual report of Mudajaya confirms that its board of directors ‘takes into consideration its environmental, social and governance impact’ when developing the company’s corporate strategy and takes a ‘proactive approach in managing potential environmental risks and impacts across the [Mudajaya] Group’s operations’. The terms and conditions of the Sukuk SKSB also do not disclose the impact objectives of the SKSB Project but include an undertaking by the issuer to periodically report on these impact objectives where feasible and to the extent possible. These characteristics of the Sukuk SKSB were sufficient for the Malaysian agency, RAM Consultancy Services Sdn Bhd (RAM) to confirm in its second opinion that SKSB’s Green Sukuk Framework aligned with both the SC’s SRI Sukuk Standards and ICMA’s GBPs. Due, perhaps, to the less detailed disclosure provided by the issuer in the terms and conditions of the Sukuk SKSB as compared with other responsible finance sukuk, RAM’s second opinion...

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219 Whether at the issuer’s initiative or following the occurrence of a dissolution event (referred to in the Sukuk SKSB Principal Terms and Conditions as an event of default—such as non-payment of any amount payable by the issuer under the Sukuk SKSB), Sukuk SKSB, Principal Terms and Conditions, item (C)(26) Details of Facility/Programme—Events of Defaults or Enforcement Events, where applicable, including recourse available to investors and Sukuk SKSB, Principal Terms and Conditions, item (C)(29) Details of Facility/Programme—Provisions on Early Redemption. While the Sukuk SKSB, Principal Terms and Conditions do not explicitly provide that a failure to invest in the SKSB Project will be a dissolution event, it does contain a negative covenant restricting the issuer’s ability to alter the use of proceeds of the Sukuk SKSB, Sukuk SKSB, Principal Terms and Conditions, item (C)(21) Details of Covenants.

220 Ibid, item (C)(4)(4) Details of Facility/Programme—Facility Description.

221 Ibid, item (C)(4)(2) Details of Facility/Programme—Facility Description; ibid, item (C)(26) Details of Facility/Programme—Events of Defaults or Enforcement Events, where applicable, including recourse available to investors.

222 Ibid, item (C)(4)(4) Details of Facility/Programme—Facility Description.

223 Ibid, item (C)(21)(d)(h) Details of Covenants—Information Covenants.


226 Ibid.

227 Sukuk SKSB, Principal Terms and Conditions, item (C)(21) item (d)(h)(iv) Details of Covenants—Information Covenants.

includes an element of conjecture and it provides, for example, RAM’s opinion on the likely impact of the SKSB Project. Nevertheless, based on its review of the SKSB Green Sukuk Framework, RAM assigned the Sukuk SKSB a Tier-1 Environmental Benefit rating, the highest of the three tiers of ratings that it assigns.

**Indonesian Green Sukuk:**

In February 2018, the Republic of Indonesia (the ‘Republic’) became the first sovereign to issue responsible finance sukuk with its issue of USD1,250,000,000 worth of green sukuk (the ‘2018 Indonesian Green Sukuk’) under a sukuk issuance programme (the ‘Indonesian Sukuk Programme’). In February 2019, the Republic again accessed the Islamic capital markets with the issue of USD750,000,000 worth of green sukuk (the ‘2019 Indonesian Green Sukuk’ and, together with the 2018 Indonesian Green Sukuk, the ‘Indonesian Green Sukuk’). The Indonesian Green Sukuk were issued through an SPV (Perusahaan Penerbit SBSN Indonesia III or PPSI-III) and were listed on Nasdaq Dubai and the Singapore Exchange as part of separate international offerings. They were the first two series of sukuk to be issued under the Republic’s Green Bond and Green Sukuk Framework.

The Indonesian Sukuk Programme facilitates the issue of sukuk based on either an ijarah or a wakalah contractual structure, with the wakalah structure chosen for the Indonesian Green Sukuk. Pursuant to this structure, PPSI-III issued sukuk certificates to certificateholders and used 51 per cent of the issue proceeds to purchase beneficial rights in and to certain properties from the Republic (the ‘Ijarah Assets’). The balance of the issue proceeds were used to purchase beneficial rights in and to certain assets from the Republic and to procure the construction and delivery of such assets (the ‘Project Assets’ and, together with the Ijarah Assets, the ‘Indonesian Sukuk Assets’).

229 Ibid 9.
230 Ibid 2.
231 Pricing Supplement dated 22 February 2018 for the issue by Perusahaan Penerbit SBSN Indonesia III of USD1,250,000,000 3.75% Trust Certificates due 2023 under the USD25,000,000,000 Trust Certificate Issuance Program (the ‘2018 Indonesian Green Sukuk Pricing Supplement’).
232 Pricing Supplement dated 12 February 2019 for the issue by Perusahaan Penerbit SBSN Indonesia III of USD750,000,000 3.90% Trust Certificates due 2024 under the USD25,000,000,000 Trust Certificate Issuance Program (the ‘2019 Indonesian Green Sukuk Pricing Supplement’).
236 For example, on the date of issuance of the 2018 Indonesian Green Sukuk, the total Ijarah Assets invested in were valued at Indonesian Rupiah (IDR) 8,547,793,088,667 (converted at the average IDR/USD exchange rate for January 2018, as set out on page (v) of the Offering Memorandum dated 23 January 2018, Indonesian Sukuk Programme, this represented a value equivalent to approximately USD636,849,433 or 51% of the proceeds from the issue of the 2018 Indonesian Green Sukuk).
237 For example, on the date of issuance of the 2018 Indonesian Green Sukuk, the total Project Assets invested in were valued on the date of issuance of the Indonesian Green Sukuk at IDR8,207,526,467,700 (converted at the average IDR/USD exchange rate for January 2018, as set out on page (v) of the Offering Memorandum dated 23 January 2018, Indonesian Sukuk Programme, this represented a value equivalent to approximately USD611,498,023 or 49% of the proceeds from the issue of the 2018 Indonesian Green Sukuk).
benefit in, to and under the Indonesian Sukuk Assets, the related transaction documents, all monies standing to the credit of a specified account and all connected proceeds. As a result, PPSI-III holds these assets on trust absolutely for certificateholders. PPSI-III (as lessor) then leases the Ijarah Assets to the Republic and, following completion and delivery of the Project Assets, will also lease these to the Republic. The amount payable periodically from the lease of the Ijarah Assets will be an amount equal to the pre-agreed periodic distributions payable to certificateholders during the tenor of the Indonesian Green Sukuk. Pursuant to a wakalah agreement, the Republic has been delegated responsibility for collecting all rental payments due (from itself as lessee), insuring the properties making up the Indonesian Sukuk Assets, paying property taxes and performing major maintenance and structural repairs of those properties.

Although tangible and income-generating, the Indonesian Sukuk Assets are not the green projects that will ultimately be funded through the issue of the Indonesian Green Sukuk. Instead, with cash received from the purchase of the Indonesian Sukuk Assets by PPSI-III, the Republic will finance or refinance expenditure relating directly to green projects. Consistent with the trend seen in the majority of other responsible finance sukuk, therefore, certificateholders do not invest directly in the funded projects but do so indirectly through an intermediary contractual structure. As part of the offering documents for each series of Indonesian Green Sukuk, no specific eligible projects were disclosed. Projects to be funded are instead to be determined following issue of the Indonesian Green Sukuk by reference to the requirements of the Republic’s Green Bond and Green Sukuk Framework. In order to be an eligible project within this framework, a project must be identified for budget allocation based on its ability to address climate change mitigation and adaptation. The project must then fall within at least one of a number of specified sectors, which include renewable energy and sustainable agriculture. Projects related to fossil fuel-based electric power generation, large-scale hydropower plants and nuclear or nuclear-related assets are not eligible under the framework. The Republic, acting through the Ministry of Finance, undertakes to

238 Offering Memorandum dated 23 January 2018, Indonesian Sukuk Programme, Condition 4.1 Summary of the Trust and Offering Memorandum dated 23 January 2019, Indonesian Sukuk Programme, Condition 4.1 Summary of the Trust.
239 Ibid.
240 Offering Memorandum dated 23 January 2018, Indonesian Sukuk Programme, 63 Summary of the Principal Transaction Documents—Lease Agreement and Offering Memorandum dated 31 January 2019, Indonesian Sukuk Programme, 62 Summary of the Principal Transaction Documents—Lease Agreement.
241 Ibid.
242 Ibid, 64 and 65, Summary of the Principal Transaction Documents—Servicing Agency Agreement and Wakala Agreement, and 63 and 64, Summary of the Principal Transaction Documents—Servicing Agency Agreement and Wakala Agreement.
243 2018 Indonesian Green Sukuk Pricing Supplement, pt A Use of Proceeds and 2019 Indonesian Green Sukuk Pricing Supplement, pt A Use of Proceeds. A failure to invest in eligible projects will not result in the early redemption of the Indonesian Green Sukuk.
244 Ibid.
246 Ibid, Appendix, The Green Bond and Green Sukuk Framework, s II(1).
report annually on the use of the issue proceeds and the estimated beneficial impact of the funded projects.\(^{248}\) This annual report and the continued compliance of the Indonesian Green Sukuk with the Republic’s Green Bond and Green Sukuk Framework will be verified by an independent third party.\(^{249}\)

In order to ensure that on redemption of the Indonesian Green Sukuk certificates all amounts due are repaid to certificateholders, the Republic confirmed pursuant to a unilateral undertaking that at maturity or upon early redemption\(^{250}\) of the Indonesian Green Sukuk, it will purchase all of PPSI-III’s rights, title, interest and benefit in, to and under the Indonesian Sukuk Assets at a price equal to the outstanding principal amount of the relevant series of Indonesian Green Sukuk, plus any accrued but unpaid periodic distributions.\(^{251}\) Once the Indonesian Sukuk Assets have been repurchased, the certificates will be redeemed and the trust declared by PPSI-III in favour of certificateholders will be dissolved.\(^{252}\)

CICERO provided a second opinion on the Republic’s Green Bond and Green Sukuk Framework.\(^{253}\) This confirmed that the framework aligns with ICMA’s GBPs, the ASEAN Green Bond Standards and the Regulation on the ‘Issuance and the Terms of Green Bond’ published by the Republic’s Financial Services Authority.\(^{254}\) CICERO assigned the Green Bond and Green Sukuk Framework a rating of ‘Medium Green’.\(^{255}\) While noting the support that the framework will provide to the Republic with respect to meeting its greenhouse gas emission reduction targets, CICERO highlighted the possibility that some eligible projects may include an element of deforestation.\(^{256}\)

The Republic provided assurances that this would not happen in the context of sustainable agriculture,\(^{257}\) however, a failure of the Republic to comply with these assurances would not result in the early redemption of the Indonesian Green Sukuk certificates.\(^{258}\)

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\(^{248}\) Ibid, s II(4).

\(^{249}\) Ibid, s III.

\(^{250}\) Upon the occurrence of a dissolution event, ibid, Condition 9.2 Dissolution Following a Dissolution Event and Condition 9.4, No Other Dissolution. In the case of a total loss with respect to the properties underlying the Indonesian Sukuk Assets, the amount payable to investors will be funded using insurance proceeds, ibid, Condition 9.3, Dissolution Following a Total Loss Event.

\(^{251}\) Ibid, Condition 9 Capital Distributions of the Trust.

\(^{252}\) Ibid.

\(^{253}\) Center for International Climate Research, ‘“Second Opinion” on The Republic of Indonesia’s Green Bond and Green Sukuk Framework’ (3 January 2018).

\(^{254}\) The Republic of Indonesia’s Financial Services Authority has published a regulation on the ‘Issuance and the Terms of Green Bond’ (Financial Services Authority Regulation 60 /POJK.04/2017). However, this regulation refers to ‘green bonds’ and ‘debt securities’ rather than referring to sukuks, and there is no indication in the regulation that the reference to ‘bond’ is to be given a broader meaning of also including sukuks.

\(^{255}\) Center for International Climate Research (n 253) 2.

\(^{256}\) Ibid 16 and 17.

\(^{257}\) Ibid 17.

\(^{258}\) Offering Memorandum dated 23 January 2018, Indonesian Sukuk Programme, 19 Investment Considerations—where the proceeds of a series are specified as being used to finance or refinance Eligible Green Projects, as defined under the Green Bond and Green Sukuk Framework, such certificates may not be suitable for environmentally focused prospective investors and Offering Memorandum dated 31 January 2019, Indonesian Sukuk Programme, 18 Investment Considerations—where the proceeds of a series are specified as being used to finance or refinance Eligible Green Projects, as defined under the Green Bond and Green Sukuk Framework, such certificates may not be suitable for environmentally focused prospective investors. Concern over the ultimate use of proceeds from the issue of the Indonesian Green Sukuk has been highlighted by some commentators. See, for example, Morgan Davis, ‘Indonesia’s
HSBC Amanah Sustainability Sukuk:
Finally, in October 2018, HSBC Amanah Malaysia Berhad (‘HSBC Amanah’) issued RM500,000,000 (approximately USD120,000,000) worth of sustainability sukuk (the ‘HSBC Amanah Sustainability Sukuk’) under its existing multi-currency sukuk programme (the ‘HSBC Amanah Sukuk Programme’). This was the first issuance of sukuk certificates to identify the United Nations’ Sustainable Development Goals (SDGs) as the framework to align with when determining the eligible projects into which the sukuk proceeds will ultimately be invested.

Sukuk issuances under the HSBC Amanah Sukuk Programme are based on a wakalah and commodity murabaha contractual structure. For the HSBC Amanah Sustainability Sukuk, Malaysia Trustees Berhad (acting as trustee for the certificateholders) appointed HSBC Amanah as agent (or wakeel) for the purchase and sale of tangible assets in the form of HSBC Amanah’s Islamic financing assets and for the purchase and sale of commodities. In preparation for the issuance of the HSBC Amanah Sustainability Sukuk, the trustee requested HSBC Amanah (as agent) to purchase on behalf of the trustee the beneficial ownership of pre-identified tangible assets from HSBC Amanah (as issuer). At the same time, the issuer requested the trustee to sell commodities to the issuer. The issuer then issued HSBC Amanah Sustainability Sukuk certificates, and the trustee declared a trust in favour of certificateholders over the HSBC Amanah Sustainability Sukuk issue proceeds and the assets acquired using those proceeds. This gives the certificateholders an undivided proportionate beneficial ownership interest in the tangible assets and any commodities purchased. However, like many of the previous issuances of responsible finance sukuk, HSBC Amanah Sustainability Sukuk certificateholders do not receive a proportionate ownership interest in the sustainable projects ultimately being funded. Using a minimum of 10 per cent of the HSBC Amanah Sustainability Sukuk issue proceeds, HSBC Amanah (as agent on behalf of the trustee) purchased the tangible assets from HSBC Amanah (as issuer). Income generated by these tangible assets during the tenor of the sukuk will be

259 RM500,000,000 4.3% Sustainability Sukuk due 2023.
260 The RM3 billion Multi-Currency Sukuk Programme.
262 HSBC Amanah Malaysia Berhad, Information Memorandum dated 5 September 2012 for the multi-currency sukuk programme of up to RM3 billion in nominal value (or its equivalent in foreign currencies) (the ‘HSBC Amanah Information Memorandum’) s 2, item (2.0)(b) Principal Terms and Conditions of the Sukuk—Facility Description.
263 Ibid s 2, item (2.0)(b)(1) Principal Terms and Conditions of the Sukuk—Facility Description.
264 Ibid s 2, item (2.0)(b)(2) Principal Terms and Conditions of the Sukuk—Facility Description.
265 Ibid s 2, item (2.0)(b)(3) Principal Terms and Conditions of the Sukuk—Facility Description.
266 Ibid s 2, item (2.0)(b)(4) Principal Terms and Conditions of the Sukuk—Facility Description. See also Trust Deed dated 20 September 2012 between HSBC Amanah Malaysia Berhad and Malaysian Trustees Berhad, s 1A.1.
267 Ibid s 2, item (2.0)(b)(4) Principal Terms and Conditions of the Sukuk—Facility Description.
retained by the issuer as an incentive fee for its services as agent.\textsuperscript{269} The remaining balance of the issue proceeds was used by the trustee to purchase commodities from a commodities broker.\textsuperscript{270} These commodities were sold to HSBC Amanah (as issuer) for a price equal to their original cost price plus a pre-agreed profit margin, payable on a deferred basis. Upon completion of this purchase, HSBC Amanah on-sold these commodities for cash at their original cost price. During the tenor of the HSBC Amanah Sustainability Sukuk, the profit element of this deferred price will be distributed to the certificateholders semi-annually as periodic distributions.\textsuperscript{271}

At maturity or early redemption\textsuperscript{272} of the HSBC Amanah Sustainability Sukuk, the issuer will, pursuant to a purchase undertaking, repurchase the tangible assets at their original sale price and will also repay the full amount due under the commodity \textit{murabaha} with respect to the commodities.\textsuperscript{273} These amounts will be used to repay to certificateholders the outstanding principal amount of the HSBC Amanah Sustainability Sukuk, together with accrued but unpaid periodic distributions. Following repayment to certificateholders, the HSBC Amanah Sustainability Sukuk certificates will be redeemed and cancelled.\textsuperscript{274}

The cash generated from the sale of the tangible assets and commodities provides HSBC Amanah with an amount equivalent to the issue proceeds of the HSBC Amanah Sustainability Sukuk. As the HSBC Amanah Sustainability Sukuk certificates are issued under a \textit{sukuk} programme that was not established specifically for the issue of responsible finance \textit{sukuk}, the use of proceeds in the underlying programme documentation simply notes that the issuer shall use the proceeds from the issue of \textit{sukuk} under the HSBC Amanah \textit{Sukuk} Programme as ‘working capital in the ordinary course of [HSBC Amanah’s] Islamic banking business . . . [and] all utilisation of proceeds from the issuance of the Sukuk shall be Shariah compliant’.\textsuperscript{275} However, the issuer has confirmed that the HSBC Amanah Sustainability Sukuk issue proceeds will ultimately be used to finance eligible projects and businesses in line with HSBC’s Sustainable Development Goal (SDG) Bond Framework,\textsuperscript{276} which include those contributing to achieving good health and well-being, quality education, clean water and sanitation, and sustainable cities and communities.\textsuperscript{277} This framework is based on, and aligns with, the United Nations’

\textsuperscript{269} Ibid s 2, item (2.0)(b) (7) \textit{Principal Terms and Conditions of the Sukuk—Facility Description}.
\textsuperscript{270} Ibid s 2, item (2.0)(b) (3) \textit{Principal Terms and Conditions of the Sukuk—Facility Description}.
\textsuperscript{271} Ibid s 2, item (2.0)(b) (7) \textit{Principal Terms and Conditions of the Sukuk—Facility Description}.
\textsuperscript{272} Upon the occurrence of a dissolution event (referred to in the HSBC Amanah Information Memorandum as an event of default), such as non-payment. HSBC Amanah Information Memorandum, s 2, item (2.0)(s) \textit{Principal Terms and Conditions of the Sukuk—Events of default}.
\textsuperscript{273} HSBC Amanah Information Memorandum, s 2, item (2.0)(b)(8) \textit{Principal Terms and Conditions of the Sukuk—Facility Description}.
\textsuperscript{274} Trust Deed dated 20 September 2012 between HSBC Amanah Malaysia Berhad and Malaysian Trustees Berhad, s 1A.12.
\textsuperscript{275} HSBC Amanah Information Memorandum, s 2, item (2.0)(j) \textit{Principal Terms and Conditions of the Sukuk—Details on Utilisation of Proceeds}.
SDGs and has already been used as the investment framework for the issue of conventional sustainable bonds by HSBC Holdings plc. While no second opinion was provided specifically for the issue of the HSBC Amanah Sustainability Sukuk, Sustainalytics provided a second opinion on HSBC’s Sustainable Development Goal Bond Framework in 2017. In its second opinion, Sustainalytics confirmed that HSBC’s Sustainable Development Goal Bond Framework aligned with ICMA’s GBPs, SBPs and Sustainability Bond Guidelines and that the eligible categories for use of proceeds are recognized as being impactful by the GBPs and SBPs.279

4. Islamic finance and responsible finance—a natural match?

Islamic law’s inherent ethical framework has been cited by commentators to highlight an innate congruence between Islamic finance and responsible finance. As a financial sector whose very existence is based on interpretations of religious teachings and whose purpose is, at least in theory, to pursue not just material gains but broader extra-financial objectives, Islamic finance does appear to share conceptual similarities with conventional responsible finance.

In the context of Islamic finance as it operates today, structural compliance with Islamic legal prohibitions of riba, gharar, maysir and haram activities represents a form of visible adherence to rules of Islamic law and ensures that Islamic finance products and services are contractually distinguishable from their conventional counterparts. At the same time, contemporary Islamic finance has faced criticism for falling short of Islamic law’s enduring ethical benchmarks and for failing to uphold the spirit of Islamic finance’s religious underpinnings by replicating the economic substance of conventional finance instead.280 In practice, the application of Islamic law to modern financial transactions has generally manifested itself in formal compliance with that law through the structural avoidance of prohibited activities, rather than in explicitly striving to achieve broader ethical objectives or societal well-being.281 Reflecting on this, Asutay notes that Islamic finance has ‘been pursuing policies away from the theoretical underpinnings and systemic understanding of Islamic economics and has located a surrogate financial framework in

278 HSBC Holdings plc’s USD1,000,000,000 sustainability bonds due 2023.
neo-classical economics’. The implication of this ideological struggle within Islamic finance, and the reality that some financial transactions will simply be social value-neutral, is that the practice of contemporary Islamic finance cannot always be described as synonymous with responsible finance just because of its connection with a religion.

However, the recent development of responsible finance *sukuk* arguably represents a movement towards a more overt emphasis on social and ethical concepts in Islamic finance transactions. These instruments have been consciously structured to address the requirements of both the Islamic and responsible finance markets, rather than naturally fitting within one market simply because of adherence to the rules applicable to the other. As is the case with conventional responsible finance, there is an intentionality behind responsible finance *sukuk* to pursue positive extra-financial objectives and to consider the broader consequences of a transaction. This is something that some have suggested is not currently present in the Islamic finance market more generally. Actively providing capital on the basis that it will ultimately be used to fund projects with environmentally friendly and/or socially conscious objectives arguably aligns with normative principles of common good, justice and respect for God’s creation that are advocated in Islamic law.

In this way, responsible finance *sukuk* that are specifically structured to combine the objectives of positive societal effect, compliance with Islamic law and attainment of monetary rewards could provide Islamic finance with a mechanism that goes beyond simply formal adherence to Islamic law. Instead, the dual pursuits of positive financial and extra-financial outcomes place responsible finance *sukuk* as a class of financial product through which Islamic finance market participants may move closer to implementing broader notions of societal benefit and communal well-being, while still being able to generate financial returns. These financial instruments could, therefore, go some way towards bridging the gap between the aspirational ideals and the practice of Islamic finance today.

Responsible finance *sukuk* are not, of course, the solution to all of the criticisms directed at contemporary Islamic finance and a pursuit of extra-financial outcomes alone will not automatically address broader structural concerns raised by industry commentators. Criticisms that the *sukuk* market more broadly has faced, such as its use of debt-like contractual structures and profit-smoothing mechanisms to protect certificateholders

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283 Cattelan (n 281) 80.

284 Ibid 106, discussing the connection between Islamic finance and ‘green’ financing.

from project risk and to safeguard their capital, all remain valid with respect to the responsible finance sukuk issued to date. Reflecting this, the responsible finance sukuk market has shown a distinct preference for sukuk structures based entirely or predominantly on commodity murabaha arrangements that guarantee periodic returns and repayment of capital. The majority of responsible finance sukuk also reflect some level of contractual separation between certificateholders and the funded project. As a result, while the sukuk issue proceeds may ultimately be invested in a project with positive green or social characteristics, by subscribing for the sukuk certificates, certificateholders are typically not themselves investing directly in that project nor does the project’s economic performance solely determine those certificateholders’ returns. Even in responsible finance sukuk where certificateholders are granted some level of ownership interest in the funded project (such as in the Sukuk Tadau and Sukuk SKSB), the contractual structure and credit enhancements in place safeguard payment of pre-agreed returns on a periodic basis and ultimate repayment of certificateholders’ capital.

This current dominance of responsible finance sukuk based on commodity murabaha arrangements is likely to be reflective of the disproportionately large number of Malaysian issuers of these instruments. Growing concerns among Islamic scholars (particularly outside of the Malaysian financial market) over the Islamic finance market’s over-reliance on commodity murabaha contracts could result in a reduction of responsible finance sukuk structures based on these contracts as the market expands beyond Malaysia. A move away from predominantly commodity murabaha arrangements outside of Malaysia has already been seen in the Indonesian Green Sukuk, which used a wakalah structure to invest in income generating assets in order to generate periodic distributions and to fund the repayment of capital on redemption of the sukuk certificates.

The extent to which certificateholders will be willing to assume more project risk as the responsible finance sukuk market matures, is, however, more uncertain. Contractual separation between certificateholders and the funded projects protects certificateholders from the risks associated with investing directly in a project and allows these instruments to function in a way that is economically similar to conventional bonds. This protection reflects current expectations of certificateholders in the contemporary sukuk market. As a result, the extent to which this aspect of the responsible finance sukuk market will change may depend on a more general reassessment of certificateholders’ willingness to accept project risk as part of their sukuk investments.

5. Conclusion

Although the first responsible finance sukuk certificates were issued in 2014, it has only been from the second half of 2017 that the responsible finance sukuk market has started to gain momentum. As a result, the number of issuances of responsible finance sukuk...
remains small and largely localized in Asian markets. The recent issue of green *sukuk* by the Republic of Indonesia may be the step needed to bring responsible finance *sukuk* to the broader *sukuk* market and to act as a benchmark for future international issuances.

Other than the *Sukuk Ihsan*, whose step-down returns mechanism distinguishes these *sukuk* from other responsible finance instruments, the economic effect of responsible finance *sukuk* issued to date has largely aligned with that of responsible finance bonds. Like responsible finance bonds, responsible finance *sukuk* have generally been structured to protect certificateholders from the risks associated with the funded project. In order to achieve this, while still complying with financial principles of Islamic law, responsible finance *sukuk* have generally involved a layered contractual structure in which certificateholders invest in a contract that will generate periodic distributions and return of capital on redemption, while the issuer or obligor then uses the money that has been channelled through this contract to invest in a green or social project. Notwithstanding this contractual separation, the distinguishing feature of responsible finance *sukuk* is always the deliberate use of proceeds generated through the *sukuk* structure to ultimately (even if indirectly) fund projects meeting specified extra-financial benchmarks. These instruments intentionally add an additional level of consideration to a financial transaction beyond simply the impact of that transaction on its participants. Instead, responsible finance *sukuk* enable transaction participants to consider the instrument’s broader societal consequences.

In practice, the product-defining need for the proceeds from an issue of responsible finance *sukuk* to be invested in projects that comply with Islamic law and align with predetermined environmental and/or social benchmarks may restrict the types of entities that can raise capital through the issue of these instruments. As a result, while responsible finance *sukuk* may develop as a segment of the *sukuk* market more generally, they are unlikely to emerge as a successor to the current *sukuk* structures used. Yet in the context of an Islamic finance market that has been criticized for disengaging with its ethical framework and religious underpinnings, the development of responsible finance *sukuk* may represent a step towards reconciling the theory of Islamic finance with its practice. With the growing use of these instruments, then, issuers and investors in the Islamic finance market may now be able to participate in financial transactions that not only comply with Islamic law in legal form but also facilitate an active pursuit of positive societal objectives.

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289 Dey and Ure (n 36) 37.