Why The U.S. Should Accommodate *Sukuk*? And How Accommodating *Sukuk* Will Protect And Benefit The American Financial System?

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I. INTRODUCTION

Although Muslims have been conducting business and financial affairs in accordance with *Shar'ia* for over 1,400 years, the modern Islamic finance industry is fairly young. The sector started to garner attention following the worldwide financial crisis in 2008. When the vulnerabilities of the current financial system were exposed, Islamic finance offers an alternative method for conducting business. Additionally, the growth and development of Islamic finance and *sukuk* has encouraged non-Muslim countries to take serious steps towards facilitating the incorporation of Islamic finance into their financial systems.

This Note seeks to answer two questions: why should the U.S. accommodate *sukuk* and how the U.S. should go about accommodating *sukuk*. The background section is divided into four parts: Part I of the note briefly outlines the historical background and core doctrines of the Islamic finance. It defines *sukuk*, shows the difference between *sukuk* and conventional bonds, and explains the types and usages of *sukuk*. Part II discusses the development and growth of Islamic finance in general and *sukuk* in particular. Part II also reviews the regulations of Islamic finance in non-Muslim countries. The

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analysis section is divided into two main parts. First, Part IV explains *why* the U.S. should accommodate *sukuk*. Next, Part V discusses *how* the U.S. should accommodate *sukuk*. This Note concludes that the US should accommodate *sukuk* within its financial system by taking serious steps towards creating the necessary legal framework.

II. BACKGROUND

A. INTRODUCTION TO ISLAMIC FINANCE IN GENERAL:

Before discussing the development and growth of Islamic finance, it is important to explain what Islamic finance is. This section offers a brief overview of the Islamic financial system, its history, and its core doctrines. It also introduces and defines *sukuk*, notes the difference between *sukuk* and traditional bonds, delineates the types of *sukuk*, and details the usage of *sukuk*.

1. Brief overview of Islamic Financial Systems

a. History

Muslims have been conducting business and financial affairs in accordance with *Shari'ah* for over 1,400 years.[1] The modern Islamic financial industry, however, is a fairly young sector.[2] Most scholars attribute the origins of modern Islamic banking to Egypt, where, in 1963, Ahmad El Najjar established the Mit Ghamr Savings Bank as an interest-free savings option in the Nile Delta town of Mit Ghamr.[3] In the mid-1970s, more robust private efforts swiftly took root in Malaysia, the United Arab Emirates (notably, the Dubai Islamic Bank), and throughout much of the Middle East. Islamic finance even spread to select markets in the West.[4] The sector has gained a sizable market share, especially in the Gulf region, and is considered to be an integral part of the overall financial system

1. *See* FRANK E. VOGEL & SAMUEL L. HAYES, III, ISLAMIC LAW AND FINANCE: RELIGION, RISK, AND RETURN 10 (Kluwer Law Int'l., 1998).
2. *See id.* at 4.
3. *Id.*
4. *See* IBRAHIM WARDE, ISLAMIC FINANCE IN THE GLOBAL ECONOMY, 1 (Edinburg Univ. Press, 2dn ed.2010).

of a number of Muslim countries.[5] With an average annual growth 0f 19% over past four years, Islamic banking assets within commercial banks globally grew to $1.3 trillion in 2011.[6] Studies show that Islamic finance is growing 50% faster than the overall banking sector.[7] According to Ernst & Young "Islamic banking assets are forecast to grow beyond the milestone of $2 trillion by 2014."[8]

b. *Core Doctrines of Islamic Finance*

One of the fundamental rules in *Shari'ah* law is that everything is permissible except that for which there is evidence to show that it is forbidden.[9] Applying this rule to commercial transactions means that every transaction is permissible unless there is evidence to show that it is impermissible**.** This principle provides a platform from which Islamic finance is to be applied in compliance with the objectives (*maqasid*) of the *Shari'ah*.[10] With the development of Islamic commercial law, *Shari'ah* scholars were able to formulate core doctrines of government. For example, "if something is immoral one cannot profit from it,"[11] "[t]o share reward, one must also share risk,"[12] and "[o]ne cannot sell what one does not own"[13] are doctrines created by the *Shari'ah* scholars and derived from the Quran and Sunnah.[14]

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5. *See id.* at 2.

6. ERNST & YOUNG REPORT, WORLD ISLAMIC BANKING COMPETITIVENESS REPORT 2012-2013 GROWING BEYOND DNA OF SUCCESSFUL TRANSFORMATION, 2012-2013, (Dec. 2012) (herein after the E&Y *SUKUK* report).

7. *Id.*

8. *Id.*

9. Mohamed Hashim Kamali, Shari'ah Law: An Introduction 85 (Oneworld Publ'n, 2008).

10. *See* AAMIR A. REHMAN, GULF CAPITAL & ISLAMIC FINANCE 92 (McGraw-Hill, 2010).

11. *Id.*

12. *Id. See also* Rishad Sadikot, *Islamic Project Finance: Shari'ah Complaint Financing of Large Scale Infrastructure Projects*, TUFTS U., ONLINE J. ON SW. ASIA. & ISLAMIC CIVILIZATION, 2. (2012) (Islamic finance is based on a risk sharing philosophy: the lender must share in the borrower's risk. As a result, fixed returns in the form of predetermined interest rates (which place the burden on the borrower) are eschewed in favor of profit and loss sharing (PLS)).

13. REHMAN, *supra* note 10.

14. It was narrated that Hakeem ibn Hizaam (may Allah be pleased with him) said: I came to the Messenger of Allah (blessings and peace of Allah be

Shari'ah sets a general prohibition against working with any religiously forbidden products such as pork; alcohol; and activities involving speculation, gambling, or any sort of immorality, such as pornography.[15] Additionally, *Shari'ah* prohibits certain types of transactions such as financial transactions that include *riba*, *maysir,* or *gharar*.[16] *Riba* means increase or addition, which means the interest accrued in the modern finance system.[17] It is considered the fundamental distinction between Islamic and conventional finance systems. However, "*riba* is not necessarily about interest as such, and it certainly is not exclusively about interest. It really refers to any unlawful or undeserved gain derived from the quantities inequality of the counter-values."[18] For example, late fees are considered *riba*.[19] *Maysir* means speculation and gambling. Unlike conventional financial systems, which have a benign attitude toward speculation, Islamic prohibits speculation and gambling.[20] *Gharar* is often, and inaccurately, translated as uncertainty.[21] However, *Gharar* is much broader than uncertainty and includes speculation, excessive risk, ignorance,

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upon him) and said: A man may come to me wanting to buy something that I do not possess; should I buy it for him from the marketplace then sell it to him? He said: "Do not sell that which you do not possess." Narrated by at-Tirmidhi, 1232; an-Nasaa'i, 4613; Abu Dawood, 3503, Ibn Maajah, 2187, Ahmad, 14887. Classed as saheeh by al-Albaani in Irwa' al-Ghaleel, 1292.

15. *See* U.S. SEC. & EXCH.COMM'N., AMENDMENT NO.1 TO FORM S-1: REGISTRATION STATEMENT UNDER THE SEC. ACT OF 1933. CARIBOU COFFEE CO. INC. (Aug. 25, 2005).

16. WARDE, *supra* note 4, at 52, 56–58.

17. *Id.* at 52.

18. *Id.* For more on the concept of Riba, see MAHMOUD AMIN EL-GAMAL, A BASIC GUIDE TO CONTEMPORARY ISLAMIC BANKING AND FINANCE 1-8 (Rice Univ., 2000).

19. WARDE, *supra* note 4, at 52. Riba is not only forbidden in Islam, indeed the prohibition exists in the other Abrahamic religions of Christianity and Judaism. In the Bible God says: "He lends at usury and takes excessive interest. Will such a man live? He will not! Because he has done all these detestable things, he will surely be put to death and his blood will be on his own head" Ezekiel 18:10-13 "do not take interest of any kind from him, but fear your God, so that your countryman may continue to live among you." Leviticus 25:36.

20. WARDE *supra* note 4, at 56. *See also* MAHA-HANAAN BALALA, ISLAMIC FINANCE AND LAW 25 (I.B. Tauris Co Ltd., 2011). For this reason many Islamic financial institutions have been discouraged from participating in derivative transactions; *and* WARDE *supra* note 5, at 58 ("The primary reason for condemning Maysir was that it caused enmity and distracted the faithful from worship.").

21. Balala *supra* note 20, at 26.

and generally hints at consumer or investor protection.[22] These doctrines, combined with the fundamental rules of *Shari'ah*, are always taken into consideration by the Islamic financial institutions and by the conventional financial institutions that offer Islamic finance instruments.

2. Sukuk

a. Definition of Sukuk

"*Sukuk* is the Arabic term for bonds that are structured according to *Shari'ah* principles."[23] "It is also referred to sometimes as Islamic bonds, Islamic debt security, or Islamic trust certificates . . . but a more accurate translation of the Arabic word would be an Islamic investment certificate."[24] In May 2003, the *Shari'ah* board of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI)[25] adopted *Shari'ah* Standard No.17 on Investment *Sukuk*.[26] Therein, investment *sukuk* are defined as: "certificates of equal value representing, after closing subscription, receipt of the value of the certificates and putting it to use as planned, common title to shares and rights in tangible assets, usufructs and services, or equity of a given project or equity of a special investment activity."[27] "The standard was backed by fourteen

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22. *Id.* Gharar also includes the dissatisfaction of one of the transactions' parties when it is revealed; it includes defrauding people and improperly taking away people's money and properties. YAHIA ABDUL-RAHMAN, THE ART OF ISLAMIC BANKING AND FINANCE 43 (John Wiley & sins, Inc., 2010) (citing FIQH AL SUNNAH, AL SAYED SABIQ IN ARABIC- Vol. 3 § 12, 13,14, 79 (1971)).

23. 6 MUHAMMAD AL-BASHIR MUHAMMAD AL-AMINE, GLOBAL SUKUK AND ISLAMIC SECURITIZATION MARKET 57 (Eugene Cotran, Mark Hoyle & Martin Lau eds., 2012).

24. *Id.*

25. *See* ACCOUNTING AND AUDITING ORGANIZATION FOR ISLAMIC FINANCIAL INSTITUTIONS, http://www.xn--shariah-c36c.aaoifi.com/en/about-aaoifi/about-aaoifi.html (last visited Oct. 15, 2014) (AAOIFI "is an Islamic international autonomous non-for-profit corporate body that prepares accounting, auditing, governance, ethics and Shari'a standards for Islamic financial institutions and the industry. Professional qualification programs . . . are presented now by AAOIFI in its efforts to enhance the industry's human resources base and governance structures.").

26. *See generally* AAOIFI, SHARI'A STANDARD NO. (18) INVESTMENT SUKUK, ACCOUNTING AND AUDITING ORGANIZATION FOR ISLAMIC FINANCIAL INSTITUTIONS (2002), *available at* http://www.kantakji.com/media/7860/f240.pdf.

27. *Id.* at 4.

prominent Islamic scholars from the Middle East, Malaysia, Indian Sub-continent (especially Pakistan) and Africa (especially Sudan) and helped create cross-border convergence on *sukuk* across the four main schools of Islamic jurisprudence."[28]

By paying their subscriptions to the issuer, investors (*sukuk*-holders) subscribe for the trust certificates. [29] "If the issuer is a special purpose vehicle, then it will use the subscription monies to purchase the relevant *sukuk* assets from the originator."[30] "In return for subscribing for trust certificates, the *sukuk*-holders are entitled to receive income generated from the underlying *sukuk* assets."[31] "This income is typically benchmarked against a market rate or index such as LIBOR and in most cases is capped by reference to the relevant benchmark."[32]

Because of the prohibition of interest mentioned above, the financial institution cannot "issue interest bearing instruments."[33] Additionally, the AAOIFI standard makes it clear that *sukuk* must be asset backed and subject to a *Shari'ah*-compliant contract.[34] It is worth noting that the key concepts of a *Shari'ah* compliant contract are: "1) transparency and clarity of rights and obligations; 2) that income from securities must be related to the purpose for which the funding is used and not simply comprise interest; and 3) that securities should be backed by real underlying assets, rather than being simply paper derivatives",[35] and the assets must be halal (permissible) in nature and being utilized as a part of halal activity,

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28. DUBAI INT'L FINANCIAL CENTRE, SUKUK GUIDEBOOK 10 (2009) [hereinafter DIFCSG].

29. *See* Atif Hanif & Julian Johansen, *Sukuk, in* ISLAMIC FINANCE: LAW AND PRACTICE 254, 258 (Craig R. Nethercott & David M. Eisenberg eds., Oxford Univ. Press, 2012) (describing what Sukuk is to help distinguish it from bonds).

30. *Id.*

31. *Id.*

32. *Id.*

33. *See id.* at 260 (assisting in explaining how sukuk differs from bonds).

34. *See generally* Rodney Wilson, *Overview of the Sukuk Market, in* ISLAMIC BONDS: YOUR GUIDE TO ISSUING, STRUCTURING AND INVESTING IN SUKUK 3, 3 (Euromoney Books, 2004) *available at* http://kantakji.com/media/8435/n403.pdf (explaining the need for sukuk to be asset back and comply with *Shari'ah* essential concepts so as to conform with the law and be legally utilized).

35. *Id.* at 3.

b. The distinction between sukuk and conventional bonds:

"A bond is a contractual debt obligation whereby the issuer is contractually obliged to pay to bondholders, on certain specified dates, interest and principal."[36] "Bonds have guarantee features in which creditors guarantee capital repayment with capital charge to the borrowers."[37] While in *sukuk*, the *sukuk*-holders each hold an undivided . . . ownership interest in the underlying assets"[38] or profits of the business venture, which characterizes *sukuk* as an asset-backed financing instrument.[39] Accordingly, "*sukuk*-holders are entitled to share in the revenues generated by the *sukuk* assets, as well as being entitled to a share in the proceeds of the realization of the *sukuk* assets."[40] Unlike conventional bonds, *sukuk* requires tangible assets, as opposed to conventional bonds, which can be represented by simple receivable sold to investors.[41] "Therefore, the sale of *sukuk* represents a sale of a share of an asset while the sale of a bond, in general, is the sale of a debt except to some extent for the case of asset backed securities."[42] Thus, the risks of *sukuk* are broader than conventional fixed income instruments in that they involve not only credit risk, but also market risk, asset-quality risk, regulatory risk, and so forth.[43]

It is worth noting that *sukuk* are not meant to mimic fixed-rate bills and floating-rates notes.[44] They are, however, meant to be innovative assets that comply with *Shari'ah* law.[45]

36. Tamara Box & Mohammed Asaria, *Islamic Finance Market Turns to Securitization*, 24 INT'L FIN. L. REV. 21, 21 (2005).

37. Jhordy Kashoogie Nazar, *Regulatory and Financial Implications of Sukuk's Legal Challenges for Sustainable Sukuk Development in Islamic Capital Market*, *from* 8th International Conference on Islamic Economics and Finance at 4 (2011), *available at* http://conference.qfis.edu.qa/app/media/298.

38. Box & Asaria, *supra* note **Error! Bookmark not defined.**, at 22.

39. *See generally Id.* at 23 (explaining the basic principles of Islamic finance being asset backed and tradability).

40. *Id.* at 22.

41. *See* Al-Amine, *supra* note **Error! Bookmark not defined.**, at 95 (detailing the difference between sukuk and conventional bonds).

42. *Id.*

43. *See generally Risks Underlying Sukuk* FINANCIAL ISLAM- ISLAMIC FINANCE, http://www.financialislam.com/risks-underlying-sukuk.html (last visited Oct. 21, 2014).

44. *See* Wilson, *supra* note 34, at 3.

45. *See id.* (explaining the purpose of sukuk being to create a new "innovative" asset that still complies with proper law).

> A number of industry practitioners describe the distinction between Islamic and conventional finance as follows: (A) Under a conventional loan, money is lent to a borrower, who pays the lender the principal amount of the loan at a later date. In the meantime, the borrower pays the lender interest on the outstanding amount of principal. (B) Under an Islamic financing, the 'lender' provides goods and/or services to the obligor. The return earned by the lender depends on the arrangement it has as the provider of such goods and/or services has with the obligor. For example, the obligor may pay to the provider a purchase price where they have purchased goods under a Murabaha contract, rent where they have entered into an Ijara contract, or a share in profits generated by a specified business in a *Musharaka* contract.[46]

"This distinction helps to clarify why *sukuk* are not necessarily 'Islamic bonds."[47] Therefore, *sukuk* ensures returns in a manner similar to conventional bonds. The difference is that the return of *sukuk* is generated from the underlying real asset ownership, not interest payment obligations, as found in conventional bonds.[48]

To summarize, conventional bonds are interest bearing debt instruments.[49] *Sukuk*, on the other hand, are asset-backed financial instruments.[50] *Sukuk* are not interest bearing financial instruments, rather *sukuk* holders have a right toownership in the assets or properties of the corporation or the issuer.[51] Because interest is forbidden in Islam,[52] *sukuk* does not bear interest to the holders, instead they have a right to the profit made by the company.[53] Losses are also to be shared

46. REPORT ON DEVELOPING A SUKUK MAKET IN THE REPUBLIC OF MALDIVES 7 (Simmons & Simmons ed., Capital Market Development Authority, 2013) [HEREINAFTER SIMMONS & SIMMONS MALDIVES REPORT], *available at* http://cmda.gov.mv/docs/CMDA-Summary-Report-April-2013.pdf.

47. *Id.*

48. *See* Neil D. Miller et al, *UK Welcomes the Sukuk*, 26 INT'L FIN. L. REV. 24, 24 (2007) (explaining the difference between return from *sukuk* versus return from conventional bonds).

49. *See, e.g.*, Box & Asaria, *supra* note 36. (explaining that conventional bonds is a "contractual debt obligation" involving payment of interest).

50. *See, e.g.*, *id.* at 22.

51. *See id.*

52. *See* Wilson, *supra* note 34, at 5.

53. *See* Box & Asaria, *supra* note 36, at 22.

among the *sukuk* holders and the issuer according to the contract between the two parties.

c. *Types of Sukuk*

Sukuk can be structured in various ways, depending on the nature of the underlying asset. The most commonly used structure is *sukuk* al-ijarah, where the *sukuk* relates to a partial ownership of an asset. *Sukuk* al-ijarah "are certificates of equal value issued either by the owner of a leased asset or a tangible asset to be leased by promise."[54] Other *sukuk* structures relate to partial ownership in a debt such as *sukuk* murabaha, which are "certificates of equal value issued for the purpose of financing the purchase of goods through a *murabaha* contract so that the certificates holders become the owners of the *murabaha* commodity."[55] Another type of *sukuk* is known as *sukuk* al-istisna, which are "certificates of equal value issued with the aim of mobilizing funds to be employed for the production of goods so that goods produced will be owned by the certificates holders."[56] Finally, the most commonly used structure is *sukuk* al-musharaka, which are based on the partnership and profit-and-loss-sharing contract. *Sukuk* al-musharaka are certificates of equal value issued with the aim of using the mobilized funds for establishing new projects, developing an existing project, or financing business activity.[57] Each of these broad categories of *sukuk* has different usages and structures.

B. ISLAMIC FINANCE DEVELOPMENT AND GROWTH

The Islamic finance sector has gained a sizable market share, especially in the Gulf region, and is considered to be an integral part of the overall financial system in a number of Muslim countries.[58] The sector witnessed an average annual

54. Al-Amine, *supra* note **Error! Bookmark not defined.**, at 58.
55. *Id.* at 60.
56. *Id.* at 60.
57. INT'L ISLAMIC FINANCIAL MKT., SUKUK REPORT: A COMPREHENSIVE STUDY OF GLOBAL SUKUK MARKET 18 (3d ed. 2013), *available at* http://www.assaif.org/index.php/content/download/60321/295392/file/IIFM%20Sukuk%20Report%20(3rd%20Edition)%20A%20Comprehensive%20study%20of%20the%20Global%20Sukuk%20Market.pdf.
58. *See generally* WARDE, *supra* note **Error! Bookmark not defined.** at

growth of 19% over the past four years and Islamic banking assets within "commercial banks globally grew to $1.3 trillion in 2011."[59] Studies show that Islamic finance is "growing 50% faster than the overall banking sector."[60] According to Ernst & Young "Islamic banking assets are forecast to grow beyond the milestone of $2 trillion by 2014."[61]

1. The Development of the Islamic finance industry

The Islamic finance industry has experienced a period of rapid growth, evolution, and expansion during the last decade. "The growth of Islamic finance was largely organic and concentrated in countries where the Muslim population was significant."[62] However, Islamic finance "is now being recognized as a viable and competitive form of financial intermediation . . . outside the Muslim world, offering a wide range of financial products and services."[63]

In 1963 in Mit Ghamr, a small town in Egypt, there was the debut of Islamic banking in its modern form.[64] Mitt Ghamr Saving bank was the first Islamic bank which accepted savings and deposits from local businessmen and invested them in local businesses.[65] The growth of Islamic finance began in the 1970s with the establishment of Dubai Islamic Bank, the first commercial Islamic bank, in 1975.[66] Currently there are more than 300 institutions in more than sixty-five countries with total assets exceeding $600 billion US.[67]

Studies have shown that Islamic finance continues to be an area with great potential.[68] In 2002, global Shari'ah assets reached $1 trillion US for the first time.[69] From 2007 to 2011,

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59. E&Y *SUKUK* report, *supra* note 6 at 4.
60. *Id.*
61. *Id.*
62. Al-Amine, *supra* note 23, at 9.
63. *Id.*
64. Warde, *supra* note 4 at 71.
65. *Id.*
66. *Id.* at 72.
67. Askari et al., *supra* note 2.
68. *See supra* pp. 6–7.
69. Melissa Hancock, *Will Islamic finance's asset management potential finally be fulfilled* (Last visited 11/4/2013), http://Sukuk.thebanker.com/Markets/Islamic-Finance/Will-Islamic-finance-s-asset-management-potential-finally-be-fulfilled.

Islamic banking continued to grow.[70] "In terms of assets under management *Shari'ah*-compliant funds (US$39.16 billion as of March 30, 2013) make up only a small part of the global fund industry at the moment."[71] However, Islamic banking assets are expected to experience a significant expansion "with an estimated 15% to 20% annual growth rate considerably outstripping the growth projected for the conventional banking industry."[72]

Interestingly, the growth of Islamic finance is not exclusive to Muslim countries. "The top 15 countries, by size of Islamic assets, include a non-Muslim country–the United Kingdom, which comes in tenth place with *Shari'ah* compliant assets of US$10.4 billion, largely due to successful operations by HSBC Amanah, which has US$9.7 billion of *Shari'ah* compliant assets."[73] The growth explains why "banks like HSBC, Royal Bank of Scotland, BNP Paribas, and Deutsche Bank, Société Générale have all created separate desks to cater to Islamic structuring."[74]

2. Development of *sukuk* market

The global *sukuk* market has experienced huge change in the last ten years. "Although *sukuk* were widely used by Muslim traders in the Middle Ages as a form of promissory note, they have reemerged and evolved as important financial instruments within the global Islamic financial market."[75] The first modern *sukuk* was a US$33M Bai Bithaman Ajil issuance in 1990 by Shell MDS Sdb Bhd in Malaysia.[76]

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70. E&Y *SUKUK* report, *supra* note **Error! Bookmark not defined.** at 4.

71. KARIM ARAFA & DETLEF GLOW, THOMSON REUTERS, ISLAMIC FUNDS MARKET HIGHLIGHTS - Q1-2013 (2013).

72. Melissa Hancock, *Islamic Finance in 2013: Beyond the Growth*, THE BANKER (Mar. 1, 2013, 9:02 AM), http://www.thebanker.com/Markets/Islamic-Finance/Islamic-finance-in-2013-beyond-the-growth.

73. ASKARI ET AL, THE STABILITY OF ISLAMIC FINANCE: CREATING A RESILIENT FINANCIAL ENVIRONMENT FOR A SECURE FUTURE, *supra* note **Error! Bookmark not defined.** at 184.

74. Shaik Abdul Majeeb Pasha, *Role and Progress of Islaminc Banking in India, Ethiopia and Rest of the World-An Analysis*, 6 EUR. J. BUS. & MGMT. 107, 113 (2014), *available at* http://www.iiste.org/Journals/index.php/EJBM/article/viewFile/13573/13842.

75. SIMMONS & SIMMONS MALDIVES REPORT, *supra* note 46, at 9.

76. *Id.* at 10.

By 2002, "the market ha[d] grown exponentially and the cumulative issuance outstanding topped the symbolic bar of [US]$100 billion."[77] In October 2011, Aramco Total Refining and Petrochemical Company (Satorp), a Saudi company, issued a $1 billion project *sukuk* to finance the planned 400,000-barrels-per-day crude oil refinery in Jubail, estimated to cost more than $13 billion.[78] Significant demand led to an oversubscription of roughly three and a half times the original offering size.[79] However, the *sukuk* market is no longer limited exclusively to the Muslim World.[80]

"*Sukuk* are being structured in different parts of the world as Islamic investors want to include securities with these differing risk profiles in their portfolios."[81] In August 2010, the UK issued its first *sukuk* through "a company called International Innovative Technologies (IIT)", which "raised [US]$10 million from a Dubai-based private equity firm."[82] Other examples of this trend can be seen in the US$165 million Cameroon *sukuk*; the US$500 million GE *sukuk* in the U.S.; the *sukuk* by Singapore; and the German Federal State of Saxony-Anhalt, which issued a US$120 million *sukuk* in 2004.[83] Ernst & Young, estimates that Islamic financial institutions will require US$400 billion in short term *sukuk* by 2015 for liquidity and capital management purposes.[84]

C. REGULATION OF ISLAMIC FINANCE

Although Islamic financial institutions have boomed in the global economy, their compliance with western regulations has sometimes been problematic.[85] Most Islamic financial

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77. Al-Amine, *supra* note 23, at 61 (citing Mohamed Damak & Christian Esters, *The Sukuk Market is Likely to Show Steady Growth in 2010*, *in* ISLAMIC FINANCE OUTLOOK 2010, at 13).

78. *Saudi Aramco, Total Refinery JV Not Affected By EU Debt Woes -CEO*, EPCENGINEER (Oct. 09, 2011), http://www.epcengineer.com/news/post/6333/saudi-aramco-total-refinery-jv-not-affected-by-eu-debt-woes-ceo.

79. *Id.*

80. *Id.* at 62.

81. *Id.*

82. ELAINE HOUSBY, ISLAMIC FINANCIAL SERVICES IN THE UNITED KINGDOM 153 (Rodney Wilson ed., 2011).

83. Al-Amine, *supra* note 23, at 62.

84. The E&Y *SUKUK* report, *supra* note 6 at 19.

85. WARDE, *supra* note 4 at 192.

institutions work under conventional bank laws, without any special provision.[86] With the exception of Iran, Malaysia, Indonesia, and Kuwait, almost all countries that provide Islamic financial services do not offer specific laws to govern these services.[87] Some other countries have begun to consider the importance of revising legal framework for Islamic finance. For example, in February 2011, Turkey enacted the Finance Bill, which provided tax modifications for *sukuk al-ijara* to facilitate corporate *sukuk al-ijara* issuance.[88] Similarly, Australia, Singapore, Hong Kong, and Kenya have all taken steps to encourage the development of Islamic finance within their jurisdictions.[89]

In Europe, the presence of Islamic finance can be traced back to the beginning of the 1980s, through the provision of some commodity *Murabaha* in the London market,[90] and the establishment of some financial institutions such as Islamic insurance (Takaful),[91] with one location in Luxemburg,[92] and Al-Baraka International in London.[93] Some countries, such as the UK and Luxemburg, had to make changes to their laws in order to facilitate Islamic financial transactions in their financial markets.[94] However, there are other countries, such as France, which concluded that new specific regulation is unnecessary and their current regulations are efficient for

86. RODNEY WILSON, LEGAL REGULATORY AND GOVERNANCE ISSUES IN ISLAMIC FINANCE 5 (Rodney Wilson ed., 2012).

87. *Id.*

88. Nethercott, *supra* note 29 at 269.

89. *Id.* (citing James Swift, Sukuk *Model Grows in Strength in Spite of Islamic Compliance Doubts*, THE LAWYER, Sep. 27, 2010).

90. Rodney WILSON, *Islamic Finance in Europe* 9, (Robert Schuman CTR. for Advanced Studies, European UNIV. INST., RSCAS PP No. 2007/02, 2007), *available at* http://cadmus.eui.eu/bitstream/handle/1814/7739/?sequence=1.

91. *See* ZAMIR IQBAL, *supra* note **Error! Bookmark not defined.**, at 75 (explaining that Takaful is an Islamic insurance contract through mutual or joint guarantee).

92. Raymond Krawczykowski et al., *Luxembourg Tax Authorities Issue Guidance on Islamic Finance,* DELOITTE (Jan.14, 2010), https://www.deloitte.com/view/en_gb/uk/about/annual-reports/c42f39606dc26210VgnVCM100000ba42f00aRCRD.htm.

93. Rodney Wilson, *Challenges and Opportunities for Islamic Banking and Finance in the West: The United Kingdom Experience*, 7 ISLAMIC ECON. STUD. 35, 40 (1999–2000).

94. *See infra* pp. 15–19

Islamic financial transactions.[95] Finally, the US has shown reluctance in reforming its regulatory system to accommodate Islamic finance products in the American financial markets.

III. ANALYSIS

After the financial crisis in 2008, many non-Muslim countries such as the UK,[96] France, Luxemburg, Australia, Hong Kong, Japan,[97] and Singapore started to consider offering Islamic financial tools as an alternative in their financial markets. Yet the U.S. is still far behind. The analysis section will discuss first why the U.S. should consider incorporating Islamic finance in general and *sukuk* in particular. The second part of the analysis section will discuss how the US should go about incorporating Islamic finance.

A. WHY SHOULD THE US ACCOMMODATE *SUKUK*?

The US should accommodate *sukuk* for several reasons. First, it will invite and attract different types of investors to the American market. Second, it will help the government raise money for infrastructure projects. Third, it will encourage American Muslim investors to involve themselves with current investment markets. Fourth, the US will guarantee the US

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95. *See* Ahmed Belouafi & Abderrazak Belabes, *Islamic Finance In Europe: The Regulatory Challenge,* 17 ISLAMIC ECON. STUD. 33, 48 (2010) (citing ARNAUD. A., *The French Licensing authority faced with globalization of Islamic Finance*, *in* ISLAMIC BANKING AND FINANCE IN THE EUROPEAN UNION: A CHALLENGE 167-74 (M. F. Khan et al. eds., 2010)). *See also infra* note **Error! Bookmark not defined.**.

96. Press Release, David Cameron, the British Prime Minister (Oct. 22, 2013) ("In his speech before the Eid al-Adha reception at Downing Street, David Cameron, the British PM said,

I want Britain to be one of the world's centers of Islamic finance - from the highest and mightiest financial institutions all the way to start-ups. We've got tens of thousands of young people starting their own businesses and tonight I can announce that we will make sure that there is a type of Start-Up Loan that is totally consistent with all the principles of Islamic finance. We must do that for Start-Up Loans, we must do that for student loans and we must do it for the Enterprise Allowance. That's what a welcoming, tolerant, multi-racial country does.").

97. Miller, *supra* note 48 at 25.

dollar as the preferred currency of issuance in the sukuk market. Fifth, by accommodating *sukuk*, the US will decrease the negative impact of speculation. Finally, *sukuk* will provide stability for the financial system.

1. First: Inviting and Attracting New Investors

Observers of the Islamic financial market see *sukuk* as a significant contributor to the effectiveness and efficiency of the mobilization and allocation of funds within national and international financial systems.[98] Estimates show that 2015 would see in excess of US$400 billion in new *sukuk* issuances.[99] The importance of attracting new investors and "Arab money" to the American market has been addressed in other notes.[100] Because of the oil boom, investors from the Gulf Cooperation Council ("GCC") "have invested almost $1 trillion abroad while individuals from those countries hold another $500 billion in overseas portfolio."[101] This is why some scholars have anticipated that "[i]f Islamic principles governed as little as 5% of those funds, it could revolutionize western financial markets."[102]

The same idea was in the mind of British Prime Minister David Cameron in his speech at the 9th World Islamic Economic Forum in London, "When Islamic finance is growing 50% faster than traditional banking and when global Islamic investments are set to grow to £1.3 trillion by 2014, we want to make sure a big proportion of that new investment is made here in Britain."[103] Compare Cameron's efforts to attract foreign money, specifically "Arab money," to Obama's broad invitation two days later to foreign investors before the

98. Nethercott, *supra* 29. at 61–62.

99. THE E&Y *SUKUK* REPORT, *supra* note 6, at 19.

100. *See* Mushfique Shams Billah, *Arab Money: Why Isn't the United States Getting Any?* (2011).

101. Al-Amine, *supra* note 23, at 9.

102. *Id.*

103. Shane Croucher, *Islamic Finance: David Cameron Unveils UK Government Sukuk in Effort to Make London Global Muslim Money Centre*, International Business Times (Oct. 29, 2013), http://Shari'ah.ibtimes.co.uk/articles/517950/20131029/islamic-finance-london-uk-wief-david-cameron.htm. For the full speech see Prime Minister David Cameron, Speech at the Ninth World Islamic Economic Forum (Oct. 29, 2013) *available at* https://Shari'ah.gov.uk/government/speeches/world-islamic-economic-forum-prime-ministers-speech [hereinafter Cameron's speech].

SelectUSA Investment Summit.[104] President Obama should take initiative and invite Islamic finance investors to come to the US. Instead of giving a general and broad invitation to all investors, he should work on creating a better atmosphere for Islamic Finance investors.

Furthermore, Gulf Capital is not only spent in the Gulf. In his book *Gulf Capital & Islamic Finance*, Amir Rahman shows how Gulf Capital has reached the western world through investing "Islamically" in prominent global companies. For example, in the fashion industry, Gucci and Tiffany & Co. have been owned by Bahrain-Based Investcorp.[105] In the auto industry, "Gulf investors hold major stakes in Daimler, Ferrari and Aston Martin."[106] In the tech industry, AMD, the US chipmaker, is owned by Mubadala,[107] an Abu-Dhabi based public joint stock company. Mubadala also owns 80.2 million shares of GE Common Stock, or 0.76 percent of the company.[108]

Accommodating *sukuk* will not only invite "Islamic investors," but will also invite conventional investors. If the issuer is a conventional bank with an "Islamic finance" window, conventional investors will be among the invitees. According to Iqbal Khan, the key architect in the founding of HSBC Amanah and now the chief executive of Fajr Capital, "When you issue a *sukuk*, you can attract both conventional and Islamic investors. If you're a conventional institution that's offering investment banking then I think you're taking a huge risk by not having an Islamic offering."[109] Accommodating *sukuk* in the United States will encourage both "Islamic investors" who are reluctant to invest their monies in the interest-based market and the conventional investors who have lost faith in the financial system or those who are looking for a more stable, less risky market. The Arcapita-Caribou relationship is an example of how American companies could be an attractive target to Arab and Middle Eastern investors.

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104. President Barack Obama, Remarks by the President at SelectUSA Investment Summit (Oct. 31, 2013) *available at* http://www.whitehouse.gov/the-press-office/2013/10/31/remarks-president-selectusa-investment-summit.

105. REHMAN, *supra* note 10 at 3.

106. *Id.*

107. *Id.* at 213.

108. *GE is a US-Based International Technology, Media and Financial Services Company*, GE-MUBADALA, http://Shari'ah.mubadala.com/en/what-we-do/investments/ge (last visited Oct. 16, 2014).

109. Hancock, *supra* note **Error! Bookmark not defined.**.

Caribou Coffee Case Study

In 2002 Arcapita[110] purchased Caribou Coffee, a Minnesota coffee and espresso retailer. Under the agreement between Acrapita and Caribou, the latter was prohibited from "engaging in derivative hedging transactions such as interest rate swaps or futures, forward options or other instruments designed to hedge against changes in interest rates or the price of commodities we purchase. Also, a *Shari'ah*-compliant company is prohibited from dealing in the areas of alcohol, gambling, pornography, pork and pork-related products."[111] Therefore, until 2011, when Acrapita sold its shares to Caribou, Caribou did not serve ham sandwiches or any other food that include pork-related products.

2. Creating Alternative Financial Market

Accommodating *sukuk* is not meant to only benefit international investors from the Middle East, but also those who live in the United States[112] and who are looking for an alternative financial market. As mentioned above[113] Judaism, Christianity, and Islam prohibit *riba*. Accommodating and interest-free secondary market would encourage investment from those who follow their religions strictly. Additionally, "[i]nterest-free Islamic banks may even be appealing for American citizens who no longer trust conventional financial

110. Arcapita is a Delaware incorporated company. Headquartered in Bahrain with offices in Atlanta, London, and Singapore, Arcapita is a global *Shari'ah*-compliant alternative investments firm. Arcaptita's current principal lines of business are real estate, private equity and venture capital. *Corporate Information*, ARCAPITA,
http://Shari'ah.arcapita.com/about/corpinfo/overview.html (last visited Oct. 16, 2014).

111. Amendment No. 1 to Form S-1, Registration Statement Under The Securities Act Of 1933, Caribou Coffee Company, Inc, 17 *available at* .http://Shari'ah.sec.gov/Archives/edgar/data/1332602/000095014405009087/g96252a1sv1za.htm (last visited Oct. 16, 2014).

112. "The size of the Muslim-American population has proved difficult to measure because the U.S. Census does not track religious affiliation. Estimates vary widely from 2 million to 7 million. What is clear, however, is that the Muslim-American population has been growing rapidly as a result of immigration, a high birth rate, and conversions." Muslims In America – A Statistical Portrait U.S. EMBASSY IN BAGHDAD, IRAQ,
http://iraq.usembassy.gov/resources/information/current/american/statistical.html (last visited Oct. 18, 2014).

113. *See supra* note 4.

institutions."[114] Purchasing *sukuk* has proven very popular with non-Muslim investors, as has been witnessed in a number of countries such as Malaysia.[115] For example, "it has been reported that 63% of HSBC's total Amanah customers in Malaysia are non-Muslim."[116] Therefore, offering *sukuk* in the U.S. will not only be beneficial to Muslim investors, but also non-Muslims investors.

3. Funding Infrastructure projects

Sukuk could also be used to fund large infrastructure projects, which usually require large sums for long-term project financing and which are generally raised through the capital market. Indeed, *sukuk* has been used to finance infrastructure projects in Malaysia, Qatar, Indonesia, Saudi Arabia, and The United Arab Emirates.[117] Many observers have addressed the problems with American infrastructure.[118] In their "Report Card," the American Society of Civil Engineers ("ASCE") gave the US a GPA of D+ for infrastructure.[119] According to the report, the US needs to invest $3.6 trillion in infrastructure by 2020. "The growth and development of the *sukuk* market has been backed by unprecedented infrastructure development in many countries, whereby trillions of dollars are required to help finance various infrastructure projects. The *sukuk* market is expected to be a major factor in financing these

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114. Shams Billah, *supra* note 100, at 1076.

115. Al- Amine, *supra* note 23, at 9–10.

116. *Id.*

117. For example, Qatar announced $65 billion of investments in infrastructure projects ahead of the World Cup in 2022 which is just a fraction of the country is planning to invest in the oil and gas sector; approximately $278 billion over the period 2011-2015. Similarly, Indonesia is looking to spend $200 million between 2010 and 2014 to upgrade its roads, airports, and electricity generation. *See* STANDARD & POOR'S, *Islamic Finance Outlook* 57-66 (Sept. 1, 2012) *available at* http://www.standardandpoors.com/spf/upload/Ratings_EMEA/2012-09-01_IslamicFinanceOutlook.pdf [herein after The Standard & Poor's Report].

118. *See generally* THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK. (2011). (The book analyzes the infrastructure problem in the US and compares the US efforts to solve this problem to other developing countries such as Malaysia and China).

119. Am. Soc'y of Civil Eng'rs, Executive Summary, 2013 Report Card for America's Infrastructure, http://Shari'ah.infrastructurereportcard.org/a/#p/overview/executive-summary (last visit 11/4/2013).

infrastructure projects."[120] The importance of *sukuk* for financing infrastructure projects was also mentioned by British Prime Minister David Cameron in a speech before the World Islamic Finance.[121] "The government's Islamic bonds issue will act as a catalyst for corporate institutions to follow suit further expanding the use of *sukuk* as an asset class in the global capital markets, and helping to promote more needed overseas investment in Britain's infrastructure."[122] And he continues, "We are investing in new infrastructure – including the massive Crossrail scheme, the biggest construction project in Europe, tunneling right under where we are today."[123] Thus, *sukuk* could be a good tool to provide the needed funds for infrastructure projects.

4. Ensuring that the US Dollar is the *Sukuk* Currency Of Choice.

Although most of the *sukuk* issuance around the world is done with the dollar as the currency of choice, there has been a trend toward local-currency-denominated *sukuk*.[124] Indeed, the "percentage of US dollar-denominated *sukuk* declined to 41.8% in 2007 from 85% in 2002."[125] This reflects both the dollar's declining value as well as growing demand for domestic currency issues. The decline in the use of the dollar as the currency of *sukuk* occurred for several reasons: the weakness of the US dollar in response to the financial crises, the growing number of institutional and retail investors who sought local-currency *sukuk*, and the disinterest of regional investors in buying US bonds.[126] However, the dollar made a gradual comeback in 2009, with 30% of 2009 *sukuk* issuances denominated in dollars after only 10% in 2008.[127] But other currencies, such as the Malaysian Ringgit, could take the lead..[128] Indeed, the Malaysian Ringgit is currently the largest

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120. Al- Amine, *supra* note 23, at 2.
121. David Cameron's speech, *supra* 96.
122. George Osborne , London can lead the world as an Islamic finance hub (Nov. 4, 2013, 3:16 PM) http://Shari'ah.ft.com/intl/cms/s/0/42766334-3fc2-11e3-a890-00144feabdc0.html#axzz2jQdGF86d
123. David Cameron's speech, *supra* 89
124. Al- Amine, *supra* note 23, at 84.
125. *Id.*
126. *Id.* at 84-84.
127. *Id.*
128. The UK planned to issue *Sukuk* worth of 200 million pounds in 2013

currency of choice for sukuk followed by the United States Dollar and the Indonesian Rupiah.[129] Additionally, the Malaysian Ringgit is becoming now the currency of choice for *sukuk* issuance in the Asian and GCC *sukuk* markets and it is becoming a credible alternative to the US dollar for non-Malaysian issuers.[130] Accommodating *sukuk* in the United States could guarantee that the US dollar would remain the preferred currency of issuance. In cross-border issuances, where an entity chooses to issue and market *sukuk* in another country, the *sukuk* is typically denominated in the currency of the country where the *sukuk* is being sold.[131] For instance, "GCC-based entities have been crossing the figurative border with ringgit-denominated issues over the past few years, beginning with pioneering entities such as Abu Dhabi National Energy Co., PJSC, Bahrain-based Gulf Investment Corp., and National Bank of Abu Dhabi."[132] Although the amounts remain low, "ringgit-denominated *sukuk* issuances in the GCC have been gradually growing, up to $571 million in 2012 from $323 million in 2010."[133] Therefore, providing the necessary atmosphere for *sukuk* issuance in the United States will encourage issuers to choose the US dollar as their *sukuk* currency.

5. Avoiding The Negative Consequences Of Speculation

There is no doubt that speculation is one of the major causes of the financial crisis in 2008.[134] Speculation does not

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with a goal to reach £1.3 trillion in 2014. (Nov. 4, 2013, 3:16 PM) http://Shari'ah.telegraph.co.uk/finance/newsbysector/banksandfinance/10410467/Britain-to-become-first-non-Muslim-country-to-launch-Shari'ah-bond.html

129. Nursilah Ahmed and Muhamad Muda, Currency of Choice For Sukuk, (March 2013). Available at http://www.internationalconference.com.my/proceeding/icber2013_proceeding/063_215_4thICBER2013_Proceeding_p0797.pdf

130. Investor Appetite Is Pushing Sukuk Into The Mainstream, Standard & Poor's, 10 (March 2013) Available at http://www.standardandpoors.com/spf/upload/Ratings_EMEA/InvestorAppetiteIsPushingSukukIntoTheMainstream.pdf (Herein after The Standard & Poor Report) see also Lessons for Sukuk from London's emergence as the Eurobond Center, available at http://www.sukuk.com/index.php/article/lessons-sukuk-londons-emergence-eurobond-centre-1160/

131. *Id.*

132. The Standard & Poor Report, *supra* note 120 at 10

133. *Id.*

134. Forget About Housing, The The Real Cause Of The Crisis Was OTC

only pose problems from a religious point of view, but also from economic point of view. As John Maynard Keynes said, "Speculators may do no harm as bubbles on a steady stream of enterprise. But the position is serious when enterprise becomes the bubble on a whirlpool of speculation. When the capital development of a country becomes a by-product of the activities of a casino, the job is likely to be ill-done."[135] Religiously, speculation is considered *gharar*, which is forbidden under *Shari'ah* law.[136] For this reason many Islamic Financial Institutions have been discouraged from participating in derivative transactions.[137] *Shari'ah* committees generally view speculative investments on the capital market suspiciously and Islamic financial institutions rarely invest in speculative instruments.[138] For instance, scholars have viewed the opaqueness of certain debt-based instruments, such as collateralized debt obligations (CDOs), as contemporary example of *gharar*.[139] "In non-Islamic stock markets, there exist excessive speculative activities, which result in bubbly prices and inefficient stock markets, i.e., an economic suicide in the stock markets."[140] Accommodating *sukuk* would stabilize the American economy and provide an alternative investment that avoids the problems associated with speculation. Investors who lost faith in the market could be attracted to the market again by providing an alternative market that avoids the previous problems that caused the financial crisis.

6. Providing Stability For The Financial Market

One of the major attributes of Islamic finance, compared to conventional finance, is stability. After the financial crisis in

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Derivatives, Ron Hera available at http://www.businessinsider.com/bubble-derivatives-otc-2010-5#ixzz3EAhkQyTu

135. John Maynard Keynes, *Keynes The Money Manager*, http://Shari'ah.maynardkeynes.org/keynes-the-investor.html

136. *Gharar is* uncertainty and it includes speculation, excessive risk, and ignorance and generally hints at consumer/investor protection. *See supra* note 11.

137. Balala *supra* note 16, at 26.

138. *Id.*

139. Rehman, *supra* note 9.

140. Amir Kia, *Islam and the Stock Market: Evidence from the United States*, 13 (0000) http://Shari'ah.uvu.edu/woodbury/pdfs/workingpapers/WorkingPaper1-13.doc.pdf

2008, Islamic finance was viewed as a more stable and strong alternative to the current conventional system. This premise is well supported by empirical studies. For example in a study by Aniss Boumediene & Jerome Caby, which examined the stability of Islamic banks during the subprime crisis, it was concluded that Islamic banks were less affected than their conventional peers.[141] The study examined a sample of fourteen Islamic banks and fourteen conventional banks.[142] The conditional variance (volatility) of returns was used to measure financial stability.[143] The EGARC Hand GJR-GARCH asymmetric models were used to estimate volatility due to their ability to take into account the leverage effect.[144] The results of this study show that conventional bank returns were highly volatile during the crisis period, while Islamic banks saw their volatility – initially low – increase during the crisis, though to a much more moderate extent.[145] The study corroborates both the hypothesis that Islamic banks were at least partially immune to the subprime crisis and the underlying hypothesis that Islamic banks are not subject to the same risks as conventional banks. However, due to their links with the real economy, Islamic banks did eventually suffer the consequences of the subprime crisis.[146] The same result was found in a study conducted by the International Monetary Fund.[147] The Study found that:

> Islamic banks were less affected than conventional banks by the initial impact of the global crisis, likely reflecting a stronger first-round impact on conventional banks through mark to-market valuations on securities in 2008. For 2009, H1 data indicate slightly larger declines in profitability for Islamic banks, which could be attributed to second-round effects of the crisis on the

141. Aniss Boumediene & Jerome Caby, The Stability of Islamic Banks During the Subprime Crisis 1 (2009) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524775

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *See* May Khamis et al, *Impact of the Global Financial Crisis On the Gulf Cooperation Council Countries and Challenges Ahead*, International Monetary Fund, 67 (2010) *available at* http://Shari'ah.imf.org/external/pubs/ft/dp/2010/dp1001.pdf

> real economy and the real estate market. Islamic banks are better poised to face additional shocks due to their larger capital and liquidity buffers. Looking ahead, the risk-sharing aspect of Shari'ah-compliant contracts could add to this buffer.[148]

A similar result was found by a study conducted by the Islamic Financial Services Board, The Islamic Development Bank, and the Islamic Research and Training Institute. The study compared the performance of the top 10 conventional banks with the top 10 Islamic banks and found the following[149]:

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148. May Khamis et al, *Impact of the Global Financial Crisis On the Gulf Cooperation Council Countries and Challenges Ahead*, International Monetary Fund 67 (2010)

149. ISLAMIC FINANCIAL SERVICES BOARD, THE ISLAMIC DEVELOPMENT BANK AND THE ISLAMIC RESEARCH AND TRAINING INSTITUTE, ISLAMIC FINANCE AND GLOBAL STABILITY 34 (Apr. 2010) *available at* http://Shari'ah.ifsb.org/docs/IFSB-IRTI-IDB2010.pdf

a. The combined market capitalization of top-10 conventional banks suffered a decline of 42.8% vs. 8.5% decline in market capitalization by Islamic banks for the period between December 2006 and May 2009.

b. Aggregate net profits of conventional banks fell dramatically from US$116 billion in 2006 to a net loss of US$42 billion in 2008. In contrast, Islamic banks' net profit increased 9% during the same period, from US$4.2 billion to US$4.6 billion. While four of the conventional banks experienced losses, none of the Islamic banks suffered losses in 2008.

c. Between 2006 and 2008, total assets of conventional banks grew by 36% to US$17.4 trillion while assets of the Islamic banks grew by 55% from US$94 billion to US$147 billion. The growth in total equity during this period was 24% and 36% for conventional and Islamic banks, respectively.

d. Conventional banks' leverage ratio (Assets/Equity) was 16.6:1 in 2006 and increased further to 18.2:1 in 2008. This was nearly three times the leverage ratio of Islamic banks, which was 5.8:1 in 2006 and 6.6:1 in 2008.

e. Five of the top-10 conventional banks received government financial assistance to the extent of US$163 billion in aggregate, or 26% of the affected banks' combined equity. In contrast, only one Islamic financial institution required government assistance to restructure and trading of its shares was suspended. As of the end of 2009, none of the Islamic banks needed any government rescue scheme.

These studies prove that accommodating *sukuk* and Islamic finance products in the American financial market would provide the stability that the market lacked in 2008. Providing stability to the market would also encourage those who lost faith in the system after the crisis, as mentioned above.

B. How Should the US accommodate *Sukuk*?

This Part will answer the question of how the United States should accommodate *sukuk*. Accommodating Islamic finance in general, and *sukuk* in particular, should be the result of legal and educational reforms. After realizing the potentially important role of Islamic finance in the global market, the government of the United States should translate this realization into legal and educational reforms to facilitate *Shari'ah*-compliant businesses.

1. Legal Reform

One of the most important hindrances to Islamic finance in the United States is that there is no regulatory support. Structuring *sukuk* outside of the Islamic world is more problematic both from "jurisprudential and pragmatic reasons."[150] "*Sukuk* in non-Islamic jurisdictions must abide by all of the traditional limitations of *Shari'ah*, but face the additional challenge of operating in legal and regulatory environments unaccustomed to Islamic finance techniques."[151] In part, the financial transactions must meet the *Shari'ah* compliant requirements mentioned above. Most of the time, those who want to conduct financial transactions that do not contradict Islamic rules do so under conventional laws. Therefore, with the rapid development of the *sukuk* market, the US should consider working on its regulatory framework in order to facilitate Islamic financial transactions and *sukuk* issuance. "The need to continually strengthen the legal framework for the financial services industry is imperative given the powerful forces of change continually transforming the functioning of the global economy and the international financial system."[152]

Countries around the world that have accommodated Islamic finance in their legal systems followed different approaches. Some of them relied on their existing legislation, such as Saudi Arabia and Algeria. Other countries had to make minimal changes such, as the UK, France, and Luxemburg.

150. Ayman SHARI'AH. Abdel-Khaleq & Christopher F. Richardson, *New Horizons For Islamic Securities: Emerging Trends In Sukuk Offerings*, 7 CHIJIL [?] 409, [pin cite] (2007).
151. *Id.* at 417.
152. Al-Amine, *supra* note 24 at 280.

Others had to create dual systems, like Bahrain and Malaysia. Sudan and Iran, on the other hand, needed to make full-fledge changes, while others, such as Kuwait, simply needed to make a few special arrangements. Out of all these approaches, the approach taken by the UK and Luxemburg seems more suitable to the United States and therefore the note will discuss both countries' efforts to accommodate Islamic finance in their legal systems in depth.

a. Islamic Finance Regulation in the UK

Most of the growth of Islamic finance in the UK has taken place in the last ten years, but the existence of *Shari'ah* compliant transactions in the London financial markets goes back to the 1980s.[153] In the 1990s, banks from the Middle East and South Asia started to offer Retail products, such as home financing.[154] However, most of these products fell outside the regulatory framework.[155] Since then, a lot has changed in the British market and "today, London is seen by many firms, including Islamic as well as non-Islamic, as an increasingly important global center for Islamic finance."[156] In 1995, the then governor of the Bank of England, Sir Edward George, recognized the "growing importance of Islamic banking in the Muslim world and its emergence on the international stage" as well as the need to put Islamic banking in the context of London's tradition of "competitive innovation."[157] In July 2003, HSBC introduced an Islamic current account and Islamic home purchase financing in the UK.[158] Currently, approximately twenty banks across the UK – six fully Shari'ah-compliant – offer Islamic banking services.[159] The growth of Islamic finance in the UK is the result of progressive policies and reforms,

153. *See* MICHAEL AINLEY ET AL., FINANCIAL SERVICES AUTHORITY, ISLAMIC FINANCE IN THE UK: REGULATIONS AND CHALLENGES 1, 6 (2007), http:// *Sukuk*.fsa.gov.uk/pubs/other/islamic_finance.pdf

154. SHAH M. NIZAMI, *Islamic Finance: The United Kingdom's Drive To Become The Global Islamic Finance Hub And The United States' Irrational Indifference To Islamic Finance* 34 Sfktlr (?) 219, [pin cite] (2011).

155. Ainley, *supra* note 109 at 6.

156. *Id.*

157. *Id.* at 8.

158. Housby, *supra* note 37, at 29-30.

159. Manish Jain, *UK Carves A Space In Islamic Finance*, November 14, 2013, *available at* http://Shari'ah.globalbankingandfinance.com/uk-carves-a-space-in-islamic-finance/

whereby amendments have been made to conventional banking legislation to allow Islamic features, as well as a strong ecosystem of infrastructure and support services.

In 1997, the Financial Services Authority ("FSA") was established.[160] The FSA combined 11 different regulators into a single body under a single piece of legislation.[161] The FSA has a wide range of rule-making, investigatory and enforcement powers in order to meet the statutory objectives.[162]

By the early 2000s, the government of the UK introduced a series of tax and legislative changes specifically designed to remove obstacles to the development of Islamic finance.[163] In 2003, the UK enacted the Finance Act. The Act introduced relief to prevent multiple payments of Stamp Duty Land Tax on Islamic mortgages.[164] Following the 2003 Act, the UK enacted the 2005, 2006, and 2007 Acts with significant changes and support for the Islamic finance market, specifically in tax treatment.[165]

In 2013, British Prime Minister David Cameron declared England's desire to be the world capital of Islamic finance.[166] The government of England decided to issue *Sukuk* worth 200 million Pound Sterling with expected investment of £1.3 in 2014.[167]

However, regulating Islamic finance within its existing financial system was not that easy for the UK. There have been some complications that the FSA had to discuss with *Shari'ah* scholars to figure out a solution in order to avoid enforcing laws that could conflict with *Shari'ah*. One of the main issues that arose was the definition of a 'deposit.'[168] In the UK, a deposit is defined as a "sum of money paid on terms under which it will be repaid either on demand or in circumstances agreed by parties."[169] This is an important issue because deposit-takers are regulated and the customer is assured of full repayment as

160. Ainley, *supra* note 109 at 8.
161. *Id.*
162. The "what we do section" on the FSA website. http://*Sukuk*.fsa.gov.uk/about/what
163. Ainley, *supra* note 109 at 8.
164. *Id.*
165. *Id.*
166. David Cameron's speech, *supra* 89.
167. *See supra* note 77.
168. *Id.*
169. Ainley, *supra* note 145 at 15.

long as the bank remains solvent.[170] Therefore a *Mudaraba* transaction, where the customer is required by *Shari'ah* to accept the risk of losing the original capital, is invalid under the FSA's definition of a 'deposit' "which requires capital certainty" under British law.[171] After consultation with the IBB, it was agreed that the depositors will be legally entitled to full repayment, which makes the transaction valid under the FSA.[172] To make sure that the transactions comply with *Shari'ah* rules, the FSA gave the customers the right to "turn down the deposit protection after the event on religious grounds"[173] if they chose to manage the transaction under the *Shari'ah* rules and comply with the risk and loss sharing formula.[174]

In accommodating Islamic finance within its legal system, the UK passed a number of changes between 2003 and 2010 in order to facilitate the offering of Islamic finance products. For example, in 2003 the UK removed the double charge of Stamp Duty Land Tax (SDLT) for the *Murabaha* and *Ijara* contracts that allow individuals to purchase homes.[175] "Other measures were introduced to offer Islamic products for Child Trust Fund, asset finance, and ISAs."[176] In 2005, extension of the removal of diminishing *Musharaka* was adopted.[177] In 2006, an extension of removal to beneficiaries (i.e. companies) and the introduction of *Waklah* (profit share agency) was adopted.[178] In 2007, the discussion of applying the same tax rules of conventional debt instruments, like bonds, to *sukuk* had begun.[179] In 2008, more steps were taken towards the issuance of *sukuk*.[180] In 2009, legislative measures for SDLT, Capital Gains Tax (CGT), and capital allowance rules for land transactions involved in the structuring of *sukuk* instruments were enacted.[181] In 2010, the

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. Ahmed Belouafi And Abderrazak Belabes, *Islamic Finance In Europe: The Regulatory Challenge*, 17 Islamic Economic Studies [first page number], [pin cite](Jan. 2010).
176. *Id* at 46.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*

Financial Services and Markets Act 2000 Order 2010 exempted alternative finance investment bonds (AFIBs), a class of debt-like security that includes *sukuk*, from collective investment scheme (CIS) regulations.[182]

Due to the absence of an international legal framework for Islamic finance, most of the Islamic financial institutions, whether they offer *Sukuk* transactions or agreements of other transactions, choose English law as the law for jurisdiction.[183] Under the Arbitration Act of 1996, Muslims in the UK were empowered to resolve certain legal matters within their faith in a similar way to that already granted to Jewish Beth Din courts.[184] Because of the non-existence of well-recognized *Shari'ah* courts that are able to decide on Islamic financial matters, parties usually choose the English court as a court of jurisdiction.[185]

b. Islamic Finance Regulation in Luxemburg

During a time when other European countries are still reviewing their domestic laws in order to become more attractive for Islamic finance, Luxemburg has quietly established itself as a European hub in the sector.[186] In 1978, Luxemburg became the first country in Europe to host an Islamic financial institution.[187] In 1982, Luxemburg became the first non-Muslim country to domicile a *Shari'ah*-compliant

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182. *Id.*

183. Al-Amine, *supra* note 24 at 283.

184. Yasir Suleiman, Contextualising Islam In Britain II, University of Cambridge, January 2012. Available at http://www.cis.cam.ac.uk/assets/media/cib2-complete-report.pdf

185. Al- Amine, *supra* note 24 at 286. For more explanation of the non-existence of *Shari'ah* courts in almost all Muslim countries see generally Al-Amine, *supra* note 12 at 286-291.

186. It is worth noting that Luxembourg is considered "the premier captive reinsurance market in the European Union, the premier private banking center in the Eurozone and the second largest investment fund center in the world behind the US". Bishr Shiblaq, *Islamic finance regulation in Luxembourg,* (last visited Nov. 4, 2013), http://Shari'ah.arendt.com/publications/documents/lawyerspublications/10.08.2011%20-%20islamic%20finance%20regulation%20in%20luxembourg%20-%20bishr%20shiblaq.pdf

187. Luxembourg: The Gateway For Islamic Finance and The Middle East, Ernst & Young (Feb. 2013) http://Shari'ah.ey.com/Publication/vwLUAssets/Luxembourg_the_gateway_for_Islamic_finance_and_the_Middle_East/$FILE/Luxembourg-the-gateway-for-Islamic-finance-and-the-Middle-East.pdf

insurance company.[188] In 2002, the Luxemburg Stock Exchange (LuxSE) became the first stock exchange in Europe to list *sukuk*.[189] Since then, issuers from Malaysia, Pakistan, Saudi Arabia, the UAE, and Europe have listed *sukuk* in Luxembourg.[190] In 2008, the Luxembourgian government assigned the Association of the Luxembourg Fund Industry (ALFI) and the Luxembourg For Finance (LEF) to lead efforts in identifying obstacles to the development of Islamic finance in Luxembourg.[191] In 2009, the Luxembourg Central Bank became the first European central bank to become a member of the Islamic Financial Service Board (IFSB).[192] In 2010, Luxembourg issued two circulars that clarified the tax treatment of several Islamic financing arrangements and issuances.[193] Since 2012, there have been forty-one *Shari'ah*-compliant funds housed in Luxembourg, with a total of 4 billion euros worth of assets under management.[194]

Although Luxemburg has engaged in Islamic finance since the beginning of the 1980s, its legislative initiative only began in 2008. Currently, Luxemburg is "the leading non-Muslim domicile for *Shari'ah*-compliant investment funds"[195] and it is considered a popular choice for the "international investment structure of a number of sovereign wealth funds."[196] In 2008, the Ministry of Finance formed a committee to identify obstacles to the development of Islamic finance and pave the way for its growth.[197] In 2009, the government requested tax authorities to study the characteristics of Islamic finance products and to come up with solutions that provide a level playing field with conventional counterparts.[198] In early 2010, the Ministry of Finance produced a comprehensive document detailing the regulatory and tax treatment of Islamic finance

188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. Luxemburg for Finance (2010), "Luxemburg Vehicles for Islamic Finance Structures", http://Shari'ah.luxembourgforfinance.lu/sites/luxembourgforfinance/files/lff-brochure-islamic-finance-2011.pdf
198. *Id.*

transactions and operations in Luxemburg.[199] The document focused more on investment funds, private equity, capital venture, real estate investments, and wealth management.[200] Additionally, the document suggested tax treatment relating to the well-known modes of finance, such as *murabaha* and *sukuk*.[201] The guiding principle of these procedures was to treat revenues of Islamic finance products as if they 'were interest.'[202]

One of the driving factors of Luxemburg's success in attracting investment funds and becoming a financial center for Islamic finance is its "regulatory environment"[203] and the "responsiveness of its regulator."[204] The support of the government and the satisfactory regulatory environment "encourage Islamic companies and financial institutions to set up operations in Luxembourg."[205]

c. Regulation Impact On Islamic Finance in The United States of America

Unlike the European countries, recognition of Islamic finance in the United States is very limited. Not until 1997 was an Islamic financing product both publicly approved by a "U.S. regulatory agency and sanctioned by a board of Islamic scholars."[206] "Islamic providers were unable to offer products that conformed to both Islamic religious doctrine and state and federal banking regulation."[207] Due to US reluctance in removing the regulatory obstacles that hinder Islamic bankers from offering Islamic financial products, "only nineteen providers of Islamic financial products in the United States,

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199. *Id.*
200. Belouafi And Belabes, *supra* note 167. *See* also Administration des contributions directes (2010), "Circulaire L.G.-A n°55", Luxembourg: Ministère des Finance, 12 January 2010. (In French) Available at http://www.impotsdirects.public.lu/legislation/legi10/Circulaire_L_G__-_A_n___55_du_12_janvier_2010.pdf
201. *Id.*
202. *Id.*
203. Luxembourg: The Gateway For Islamic Finance and The Middle East, Ernst & Young (Feb 2013)
204. *Id.*
205. Luxembourg : A hub for Islamic finance investments http://Shari'ah.kpmg.com/LU/en/IssuesAndInsights/Articlespublications/Documents/Luxembourg-hubforislamicfinanceinvestments-copy.pdf
206. Nizami, *supra* note 110 at 5.
207. *Id.*

none of which is a full-fledged Islamic commercial bank."[208]

Offering *sukuk* in the US under the current legal system could raise several legal questions. Applicable laws regarding bankruptcy, tax, trusts, corporations, securities regulations, real property, and secured transactions all influence the proper structuring and documentation of asset-backed *sukuk* transactions in non-Islamic jurisdictions."[209] For example, in some *sukuk* offerings, the asset is not located in the same country as the investors and, sometimes, the asset is accompanied by a special purpose vehicle (SPV) that resides in a third jurisdiction.[210] For example, the Qatar global *sukuk*-offering Circular states the following:

> The Declaration of Trust, the Agency Agreement, the Certificate Purchase Agreement And the Certificates will be governed by English Law. While, the Purchase Agreement, the Master Ijara Agreement, the Purchase Undertaking, The Sale Undertaking, the Agency Declaration, the Share Agency Declaration and the Costs undertaking will be governed by Qatari law.[211]

This complexity in the transaction might require involvement from all of these jurisdictions in order to facilitate this process either by tax treaty or special tax treatment.

Islamic finance in general, and *sukuk* in particular, face legal obstacles in different areas of law such as Banking, Tax, and Contract law. If the US wants to break into this market, it needs to consider adopting legal reforms.

a. Banking laws

The major obstacle facing providers of Shari'ah compliant products results from a provision in the National Bank Act of

208. Shams Billah, *supra* note 56 at 1082 (citing Abdi Shayesteh, Islamic Banks in the United States: Breaking Through the Barriers, 171 New Horizon 1, 1 (2009), available at http://Shari'ah.kslaw.com/Library/publication/6-09%20New%20Horizon%20Shayesteh.pdf) For more description of the current Islamic financial institutions in the US see Shams Billah 1082-1083.

209. Ayman SHARI'AH. Abdel-Khaleq & Christopher F. Richardson, *New Horizons For Islamic Securities: Emerging Trends In Sukuk Offerings*, 7 CHIJIL 409 (2007).

210. *Id.*

211. Qatar Global *Sukuk* Offering Circular QSC, (2003) http://Shari'ah.*Sukuk*.com/files/*Sukuk*/offering_circular/1215378262.pdf

1864 (NBA) which prohibits banks "from the purchase, holding of legal title, or possession of real estate to secure any debts due it for a period exceeding five years." [212] According to that provision *Shari'ah* compliant mortgage products were prohibited. Consequently the Office of the Comptroller of the Currency (OCC) issued two explanatory letters, which recognized the concepts of *ijara* and *murabaha*.[213] Letter No. 806, issued in 1997, concluded that the *ijara*-based mortgage is "functionally equivalent to, and in substance has the characteristics of a conventional real estate mortgage."[214] Similarly in 1999, the OCC issued another letter, letter No. 867, and recognized that *murabaha*-based mortgages were "functionally equivalent to . . . a real estate mortgage transaction."[215] Subsequently the OCC reached the conclusion that the Islamic mortgage transactions are credit transactions and that the US financial institutions have the ability to identify those credit risks. [216] Additionally, the OCC addressed the restrictions placed on ownership of real estate by US financial institutions. [217]

Although the OCC letters removed some of the obstacles to Islamic finance, they failed to facilitate offering Islamic finance products in the US. For example, Islamic financial institutions in the United States have found it hard to comply with the

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212. NIZAMI, *supra* note 142.

213. Shayerah Ilias, Cong. Research Serv., RS22931, Islamic Finance: Overview and Policy Concerns 5 (2009), available at http://fas.org/sgp/crs/misc/RS22931.pdf

214. Officer of the Comptroller of Currency, Interpretive Letter No. 806 (1997), http://www.occ.gov/static/interpretations-and-precedents/dec97/int806.pdf (last visited Sep. 23, 2014) (recognizing ijara-based mortgages).

215. Office of the Comptroller of Currency, Interpretive Letter No. 867 (1999), http://www.occ.gov/interp/nov99/int867.pdf (last visited Oct. 13, 2010) (noting murabaha-based mortgages equivalent to real estate mortgage transaction); see Hashmi, supra note 92, at 729 (stating murabaha-based mortgages are permissible).

216. US banks are not permitted to own real estate, other than to house the operations of the bank, or real estate acquired as a result of a foreclosure. US banks are not permitted to own real estate, other than to house the operations of the bank, or real estate acquired as a result of a foreclosure. The purpose of these restrictions is to prevent banks from engaging in speculative real estate investment activities. *See* Isam Salah, Legal Issues Arising in Islamic Finance Transactions in the US, in Islamic Finance in North America 2009 56, 58 (2009), available at http://Shari'ah.kslaw.com/Library/publication/9-09%20Yasaar%20Media%20Salah.pdf

217. *Id.*

Truth in Lending Act.[218] Under the Act, financial institutions are required to use the term "annual percentage rate," which conflicts with Islam's prohibition of interest as mentioned above.

b. Tax Obstructions:

Not only does the Tax Code in the United States favor interest-based transactions, it also imposes double-taxation treatments on Islamic financial instruments.[219] For instance, profits received from assets will be taxed, but the issuer is not entitled to deductions for payments made to *sukuk* holders.[220] The UK solved this problem by enacting a new law that treats the income payments as if they were payments of interest.[221] Therefore, the issuer of the *sukuk* will receive deduction in computing its tax liability.[222] Additionally, the UK added "provisions that equate *sukuk* to traditional debt securities for other tax purposes, such as the qualifying corporate bond regime and the tax treatment of discounts."[223]

The United States should take serious steps towards amending the current tax code to facilitate Islamic financial transactions. Some have raised a constitutionality concern in this regard.[224] The Establishment Clause might obstruct such efforts since the government is prohibited under the First Amendment from making laws respecting the establishment of religion.[225] However, the government does not have to enact

218. Warde, *supra* note 4 at 205.

219. Like in the case of purchasing houses "Muslims often finance their homes with a murabaha transaction, which is when the bank buys the home and sells it to the customer at a markup. Even though this is essentially one transaction, the transfer tax is levied twice, once on the bank when the bank buys it and again on the homeowner when he buys the house from the bank." *See* Shams Billah, *supra* note 56 at 1087; see also See Salah, supra note 155, at 58 (explaining that New York tax authorities have recognized the tax inequity, and have only chosen to redress the double taxation on a case-by-case basis, not at a broad statutory level).

220. Warde, *supra* note 4 at 205.

221. Miller, *supra*

222. *Id.*

223. *Id.*

224. See Abdi Shayesteh, Islamic Banks in the United States: Breaking Through the Barriers, 171 New Horizon 1, 1 (2009), avail- able at http://www.kslaw.com/Library/publication/6-09%20New%20Horizon%20Shayesteh.pdf

225. U.S. Const. amend. I (″Congress shall make no law respecting an

specific "Islamic finance" regulation. Instead, it could enact natural amendments to the current Tax Code. The legislation does not need to specifically refer to Islamic finance instruments, but it could define certain types of transactions or instruments and cater to them by specifying a tax treatment for them.[226]

c. Contract law:

Contract law also causes legal complexity in *sukuk* contracts. The laws that govern the interpretation and enforcement of these agreements are mostly ignorant of Islamic rules governing contracts.[227] When interpreting sukuk contracts, US courts may unintentionally apply principles that contradict Islamic law. For example, if a contract is based on an interest-free transaction, awarding damages that are based on interest might be problematic.[228]

2. How the US should accommodate *sukuk*?

The first thing that the US should do is create a committee to study the current laws and define the problems that Islamic finance investors face. This committee should also study the efforts and legal reforms that have been conducted by other legal systems in this area – *e.g.* the UK and Luxemburg[229] in order to benefit from the experience of other nations. The

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establishment of religion.").

226. Mushfique Shams Billah proposed a three-tiered solution to this problem, see Mushfique Shams Billah, *Arab Money: Why Isn't The United States Getting Any?* 32 U. Pa. J. Int'l L. 1055, (2011).

227. Al- Amine, *supra* note 12 at 281.

228. *Id.*; *see generally* Al-Amine, *supra* note 24 at 285 for suggested solutions to the problems occur in contract law.

229. Singapore formulated the new changes to meet the following objectives:

"Changes have to enhance the capability of banks operating in Singapore to undertake Islamic finance transactions; Changes have to increase the capacity of the Islamic banking system in managing the liquidity and investment risks; the changes are supposed to facilitate the creation of Islamic finance products for banks and other investors to have access to wide range of Shari'ah-complaint investment opportunities; finally the changes have to incentivize financial institutions to undertake Shari'ah complaint financial activities and to provide for a competitive tax regime for investors." *See* ANGELO M VENARDOS, CURRENT ISSUES IN ISLAMIC BANKING AND FINANCE: RESILIENCE AND STABILITY IN THE PRESENT SYSTEM 20-21 (2010).

committee would decide whether the US laws will need to be significantly, or only slightly, modified to allow Islamic finance investments.[230] The committee may also reach the conclusion that signing a treaty with other countries would facilitate the accommodation of Islamic finance in the US.[231]

A similar committee was created in the UK.[232] The committee, chaired by Lord George, was created to identify the obstacles faced by Islamic finance in the UK.[233] This committee took the following steps: first, it worked on identifying specific products of Islamic finance on a case by case basis; second, the committee worked on identifying the obstacles, such as the stamp duty or risk weighing, for the different products; and third, the committee worked on approaching the relevant authorities, such as the FSA, the Treasurer, and Inland services.[234] The American government should also meet with the Islamic finance investors and scholars to discuss the

230. Some countries on the other hand found that its current legal system is ready for Islamic finance and doesn't require new regulations. At the end of 2008, the French authorities took a pro-active attitude in promoting Paris as a European hub for Islamic finance. France's goals in this respect are twofold; attracting global funds to French soil and making France more competitive in the area of Islamic finance. 230. In order to achieve that, the authorities have looked into how legislative amendments can be made to fattain these goals. The process went through various stages, and in the end, the authorities concluded that:

"Islamic finance should not need any exceptional consideration under the French law; the only point is that the structure of the products be examined on a case-by-case basis . . . institutions and customers using Islamic financing schemes are protected by the same level of strength and legal soundness using conventional schemes . . . [as a result] specific issues that arise could be dealt with in the existing framework".

See Ahmed Belouafi And Abderrazak Belabes, *Islamic Finance In Europe: The Regulatory Challenge* Islamic Economic Studies Vol. 17 No. 2, (January, 2010) (citing

ARNAUD, A, THE FRENCH LICENSING AUTHORITY FACED WITH GLOBALIZATION OF ISLAMIC FINANCE, 2010).

231. Currently "there are thirty-nine conventions for the harmonization of rules of private international law and for the promotion of international judicial and administrative co- operation in civil and commercial matters." See International Convention for Islamic finance: towards standardization, Hakimah Yaacob, Marjan Muhammad, Edib Smolo, ISRA, Research Paper (No: 20/2011). There paper suggested that the International Islamic Fiqh Academy of the Organization of the Islamic Conference (frequently referred to as OIC) could take the lead to propose international convention for Islamic finance.

232. Belouafi, *supra* note 159.

233. *Id.*

234. *Id.*

obstacles that they face when conducting investments ruled by Islamic laws. The recommendations of the committee and the suggestions of the investors and the scholars should be taken into consideration by the government and used as a framework upon which to base legislative steps.

Additionally, the US government needs to equip the legal community with the necessary tools to accommodate Islamic financial transactions. Educating judges and lawyers will be a necessity. Contracts governed by Islamic finance usually require the engagement of lawyers from diverse areas of the law. Courts have to be prepared to read contracts and agreements that are governed by Islamic principles. As mentioned above, the interpretation of contractual terms could lead to the opposite conclusion desired by the parties of the contract.

Finally, the private sector, through universities and financial institutions, should play a significant role in the reform process. For example, despite the size of Islamic finance in the global financial market, only five law schools from the top twenty-five law schools in the US offered an Islamic finance class in 2013.[235] In comparison, the first twenty large law firms in the world, by revenue, offer Islamic financial services. This gap causes a lack of expertise in the field of Islamic finance. Therefore, universities should offer courses, seminars, and workshops to educate and prepare future lawyers and accountants to work in the area of Islamic finance.

IV. CONCLUSION

With the development and growth of Islamic finance and *sukuk* in the global market, the US should take initiative and

235. The ranking is based on the US news ranking. The current law schools that offer Islamic finance law-related class are: Chicago, NYU, Penn Law, Georgetown, and George Washington. Additionally other schools, such as Duke, Penn Law, Northwestern, Cornell, Vanderbilt, UCLA, Emory, and Maurer Indiana, offer general Islamic law classes; most of them focus on the Middle East and comparative studies. http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings In Business schools only two, MIT and NYU, out of the first 25, according to the Economist ranking, offer Islamic finance classes. In the UK at least 9 schools offer Islamic finance classes (and degrees) including Durham, Aston, Bangor, Salford and Cass Business School.

accommodate Islamic finance into its financial system. Accommodating *sukuk* in the American financial system would offer several benefits to the US. First, it will invite new investors to the American financial market; second, it will create an alternative financial market for those who are reluctant – either because of religious reasons or a lack of confidence in the current system – to participate in the investment market; and third, the US could benefit from *sukuk* by using it to funding large infrastructure projects. Additionally, accommodating *sukuk* within the American financial system would guarantee the US dollar will be the preferred currency of issuance in the *sukuk* market.

To accommodate *sukuk* within the American financial system, the US needs to develop its regulatory system in order to facilitate Islamic financial investment. The US needs to take serious steps in this regard, such as creating a committee to research the current laws and define the problems that Islamic finance investors face in the US. Listening to Islamic finance investors and scholars themselves is crucial and will provide the information necessary to know where to start the reforms. Learning from the experience of other countries will be also valuable. Additionally, Universities and academic institutions have to prepare its students to work in the Islamic finance market by offering courses, seminars, and workshops to educate and prepare future lawyers and accountants to work in the area of Islamic finance.