



# PHILANTHROPICATION *thru* PRIVATIZATION

Building Permanent Endowments for the Common Good

## A Case Study

A product of the PtP Project | Lester M. Salamon, Director

# The BOTA Foundation:

*A Model for the Safe Return of Stolen Assets?*

by **Aaron Bornstein**

edited with a foreword by Lester M. Salamon





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A PROJECT OF EAST-WEST MANAGEMENT INSTITUTE

under the direction of Lester M. Salamon

# THE BOTA FOUNDATION: A Model for the Safe Return of Stolen Assets?

**Aaron Bornstein**

*Edited with a Foreword by Lester M. Salamon*

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**Cover photo captions (clockwise from top):** Youth Livelihood training beneficiary, Akmola oblast; Building at BOTA supported preschool in Issyk, Kazakhstan; Early Childhood Development beneficiaries, Kyzylorda oblast.

**All photos courtesy of the BOTA Foundation.**

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# FOREWORD

## The PtP Project and the Safe Return of Stolen Assets

**Lester M. Salamon**

Director, Philanthropication thru Privatization (PtP) Project

This report represents one in a series of case studies undertaken under the umbrella of the Philanthropication thru Privatization (PtP) Project operated through the East-West Management Institute with the support of a wide consortium of private foundations.

The objective of the PtP Project is to identify, examine, and bring to much wider awareness a promising, but largely overlooked, route to the formation of private charitable endowments around the world through the capture of all or a portion of the proceeds of what are here referred to as “privatization transactions.”

Such transactions involve the sale or other transformation into private, for-profit hands of assets that are owned, significantly subsidized, substantially regulated, or contested by governments. These assets can take at least six different forms:

- I. Government owned-enterprises;
- II. Other government-owned or controlled assets, such as buildings, facilities, or equipment;
- III. A stream of revenue under significant government control (e.g., lottery proceeds or revenues resulting from mineral extraction or air rights auctions);
- IV. Debt swaps;
- V. Quasi-public institutions (e.g., mutual or nonprofit organizations); or
- VI. Stranded or stolen assets resulting from being abandoned by owners, generated from bribes, or imposed as penalties arising from illegal individual or corporate behavior.

### Why Foundations?

Where concerns exist about the ownership of such assets, where the transaction itself is controversial, or where other issues are involved, PtP offers a potential win-win option for all stakeholders. Properly structured, charitable foundations bring



considerable advantages as a route to the safe re-use of such assets. Among the most salient of these advantages are the following:

→ **Pluralism.** The existence of charitable foundations ensures an important degree of pluralism in efforts to solve public problems. Foundations can respond to issues that may not yet have attracted government attention and can promote innovations that governments can subsequently adopt. Nobel Prize laureate Vaclav Havel put this issue well when he defended the idea of creating a Czech Foundation Investment Fund to absorb 1% of the proceeds of that country's privatization transactions in the early 1990s by noting:

*“The state should not be based on the idea that it, and it alone, knows best what society needs and that it alone should finance that area from centrally levied taxes. Centralized financing leads inevitably to centralized management. In this area, too, we should trust the citizens more and enable them to take on more responsibility. This means nothing less than delegating to other subjects, in a properly thought-out way, part of the function of redistributing resources.”<sup>1</sup>*

→ **Flexibility.** Foundations can be shaped in a variety of ways to accommodate the circumstances that lead to their creation. Such flexibility can apply to their governance, their geographic focus, their programmatic focus, their beneficiaries, their modes of operation, and the time period over which they are allowed to exist. The boundaries of foundation operations can be extended to encompass a particular problem, be narrowly focused on a particular community or region, or be framed broadly to accommodate new challenges as they arise over time.

→ **Public Purpose.** By law in virtually all countries, foundations must serve a valid and legitimate public purpose. Over time, a solid body of common practice has emerged to ensure that foundations adhere to such purposes. These include provisions for transparency, protections against conflicts of interest, and procedures for grant-making and other means of distributing foundation benefits. Properly structured, foundations can thus instill trust among citizens and ensure that assets built up through the sweat and toil of a country's people, or forming part of a country's or region's birthright of natural resources, are used for the benefit of these people or regions.

Writing specifically about foundations established in the mining industry, the World Bank thus noted that: “Foundations, trusts, and funds (FTFs) can be good instruments for companies and governments to use to share the benefits of

<sup>1</sup> Václav Havel, “New Year's Speech,” January 1, 1994.

mining operations with communities.”<sup>2</sup> The same holds for government-owned businesses, debt swaps, stolen assets, and other assets that can be involved in privatization-type transactions.

- **Permanence.** Foundations can ensure that important resources are dedicated to particular problems over time. They thus have advantages over government budgets, which can often siphon resources into short-term fixes instead of remaining dedicated to issues requiring long-term commitments. As Wilhelm Krull, Secretary-General of the Volkswagen Foundation, has noted: “Compared to the still prevailing practice of dumping ...proceeds [from privatization transactions] into regular state budgets, [the PtP] option has the advantage of permanently preserving such assets for priority common-good purposes on a long-term basis.” Foundations can thus function as “lock boxes” for resources that could otherwise be diverted from priority public purposes to other uses.<sup>3</sup>
- **Visibility.** Assets involved in privatization-type transactions are significantly imbued with a public character. They result from government-owned enterprises in which citizens have invested their sweat and toil, from debts that governments have taken on, from revenues resulting for a country’s birthright of natural resources, and from money taken through bribes or other criminal activity. Visibility about what happens to these resources when they are transformed through various privatization transactions is thus crucial to the retention of public trust. When such proceeds are simply dumped into government budgets, this visibility is put in jeopardy. Even when special government funds are created, experience has shown that governments can simply divert existing resources dedicated to the fund’s purpose to other uses, defeating the objective of creating a special dedicated fund. This may be one of the reasons that privatization transactions have increasingly encountered citizen resistance.

One recent survey in Central and Eastern Europe, for example, revealed that 80% of respondents opposed the status quo achieved through privatization and wanted to change it in some way. Interestingly, only 29% favored returning the assets to government control—suggesting that respondents favor private ownership if they can see some more tangible benefit from the transactions that lead to it.<sup>4</sup> Surveys carried out by Latinobarometer covering 19,000 people in 18 Latin American countries found that the percentage of respondents who disagree or disagree strongly with the statement that “privatization of state

<sup>2</sup> Elizabeth Wall and Remi Pelon, *Sharing mining benefits in developing countries*. Extractive industries and development series, no. 21. (Washington, DC: World Bank, 2011). Available at: [documents.worldbank.org/curated/en/359961468337254127/Sharing-mining-benefits-in-developing-countries](http://documents.worldbank.org/curated/en/359961468337254127/Sharing-mining-benefits-in-developing-countries).

<sup>3</sup> For examples of how this advantage of foundations positively affected the progress of privatization discussions, see Lester M. Salamon, *Philanthropicization thru Privatization: Building Permanent Assets for the Common Good*. (Bologna: il Mulino, 2014) pp. 51-2. Also available at: [bit.ly/PtPSalamon](http://bit.ly/PtPSalamon).

<sup>4</sup> Timothy Frye and Ekaterina Zhuravskaya, “Support for Revising Privatization in the Postcommunist World,” *The PB Report 2007*. (Milan: Fondazione Eni Enrico Mattei, n.d.), pp. 49-5. Available at: [feem.it/userfiles/attach/20091161610354PB\\_Annual\\_Report\\_2007.pdf](http://feem.it/userfiles/attach/20091161610354PB_Annual_Report_2007.pdf).

enterprise has been beneficial for the country” rose from 54% in 1978 to 78% in 2003 and stayed close to 65% in four surveys taken since then.<sup>5</sup>

Equipped with transparency provisions that are now the norm in the global foundation community, foundations can offer a significantly higher level of visibility on the uses of such captured assets. As identifiable institutions typically governed by public reporting requirements, foundations are inherently more exposed than far more complex government agencies. As one recent report puts it: “Social reuse ensures great transparency for confiscated assets.”<sup>6</sup>

And the record of existing PtP foundations suggests that these institutions have been especially effective in this regard. Thus, a detailed study of the operations of 22 PtP foundations found that:

*“With just a few exceptions, these organizations have matured as institutions and have incorporated some of the leading-edge concepts about how to operate a modern foundation. Thus, they have developed respectable transparency procedures, solid conflict of interest protections, and internal guidance systems organized around coherent and regularly updated mission statements.”<sup>7</sup>*

→ **Social Trust.** Because of the visibility that can be achieved, channeling all or a portion of the proceeds of privatization transactions into charitable foundations can contribute importantly to social trust. The importance of building such trust was highlighted by U.S. Secretary of State John Kerry in remarks to an international conference on financial corruption convened in London by Prime Minister David Cameron in May of 2016. Noted Kerry:

*“The extremism that we see in the world today comes in no small degree from the utter exasperation that people have with the sense that the system is rigged. And we see this anger manifesting itself in different forms in elections around the world, including ours. People are angry, and the anger is going to grow unless we shut the doors and try to prove to people there’s a fairness that can be established in the system.”<sup>8</sup>*

<sup>5</sup> Corporación Latinobarometer, *2010 Report*, cited in John Nellis, *The International Experience with Privatization: Its Rapid Rise, Partial Fall and Uncertain Future* (January 2, 2012). SPP Research Paper No. 12-3, p. 20. Available at: [dx.doi.org/10.2139/ssrn.1999098](https://dx.doi.org/10.2139/ssrn.1999098). See also: Carol Graham and Sandip Sukhtankar, “Does Economic Crisis Reduce Support for Markets and Democracy in Latin America?” *Journal of Latin American Studies*, 36(2): 349-377. Available at: [doi.org/10.1017/S0022216X0400745X](https://doi.org/10.1017/S0022216X0400745X).

<sup>6</sup> Radu Nicolae, Emanuel Răuță, Vadim Chiriac, *Reuse of confiscated criminal assets for social purposes*. (Bucharest: The Centre of Legal Resources, 2015) p. 80. Available at: [crj.ro/wp-content/uploads/2015/10/Reutilizarea-bunurilor-confiscate-EN.pdf](https://crj.ro/wp-content/uploads/2015/10/Reutilizarea-bunurilor-confiscate-EN.pdf).

<sup>7</sup> Salamon (2014:118-9).

<sup>8</sup> Stephan Castle and Kimiko de Freytas-Tamura, “David Cameron Leads a Call to Thwart Financial Corruption,” *New York Times*, May 12, 2016, [nyti.ms/23JCo0F](https://nyti.ms/23JCo0F).



When government-owned businesses or public infrastructure is sold to insiders and the proceeds mysteriously absorbed into government coffers, public distrust is created. When royalties from extractive industries flow into government budgets, or worse into the overseas bank accounts of leading politicians, public trust suffers. And when the proceeds of bribes are repatriated and returned to the same governments that acquired them in the first place, public distrust skyrockets.

On the other hand, as one recent report notes, when direct social reuse of privatized assets is achieved, “social justice is done.”<sup>9</sup>

→ **Partnerships and Empowerment.** Foundations can also help build partnerships among key stakeholders in a region or field of activity, and foster the empowerment of disadvantaged communities. Foundations have the flexibility to be thought-leaders in a field, to build connections with other institutions, both public and private, and to rally added resources and bring them to bear on their chosen region or issue. Foundations can establish governance structures that give citizens a direct voice in the uses of the resulting assets. Foundations can thus become vehicles for transforming communities into partners of privatized firms or extractive industries, giving communities a stake in the success of the venture. Similarly, seeing the proceeds of assets captured from bribery and corruption dedicated to social purposes can mobilize citizens to help identify corrupt practices in the first place, one of the absolute necessities to reduce the incidence of such practices.

In short, whether the transaction in question is the sale of a government enterprise, the capture of the proceeds of mineral extraction, the execution of a debt swap, the restitution of stolen assets, or the transfer to for-profit status of a nonprofit that has benefited from government benefits, PtP offers a way to ensure that a nation’s people directly receive some of the benefits that result from such transactions. To do so, however, care must be taken to ensure that the foundations so created are equipped with reliable transparency and conflict of interest protections, as well as open and accessible governance structures and are dedicated to improving the quality of life of citizens, particularly citizens most directly affected by the transactions. In the process, PtP can reduce citizen opposition to legitimate privatization transactions by ensuring citizens they will share in the benefits that can flow from the sale, extraction, or restitution of assets that are their birthright or the product of their sweat and toil. Properly designed and executed, PtP can revolutionize the charitable landscape of countries while transforming privatization into a “win-win” process for citizens, governments, and investors alike.

<sup>9</sup> Nicolae, Răuță, and Chiriac (2015: 8).

## 550 and Counting

Because of these advantages, the foundation instrument has come to be used time and again to handle the distribution of important societal resources, particularly those with some significant public-sector involvement. To date, the PtP Project has identified over 550 foundations that have emerged from some such privatization transactions.<sup>10</sup> Included here are some of the largest and most reputable foundations in the world, such as Germany's Volkswagen Foundation, Italy's foundations of banking origin, New Zealand's network of "community trusts," Belgium's King Baudouin Foundation, the Mozambique Community Development Foundation, Japan's Nippon Foundation, the huge "la Caixa" Banking Foundation in Spain, and close to 200 health conversion foundations in the U.S. Most of these resulted from situations where questions existed about who owned the underlying asset or about how to ensure that the proceeds of a privatization transaction went to a suitable purpose.

## The BOTA Case and Stolen Assets

The present document reports on perhaps the major example to date of the application of the PtP concept to stolen or stranded assets: the case of the BOTA Foundation in Kazakhstan. As will be detailed more fully in the following document, the BOTA Foundation arose from the seizure of the assets that an American citizen secured from a number of U.S. oil companies in the 1990's and delivered to officials in the Government of Kazakhstan in order to secure prospecting and oil drilling rights for the companies in the Caspian Sea. Such bribes and other forms of stolen assets, as well as the criminal penalties arising from such corrupt practices, constitute an enormous loss of precious resources to the people of many developing nations. Because restoring these resources to the governments of these countries often raises the specter of having them misused again, the option of creating charitable endowments clearly and unequivocally dedicated to the improvement of the lives of citizens has gained considerable attention, and the BOTA Foundation is the major example of how this can come about and how it can be made to work.<sup>11</sup>

While this is the major example of the use of a charitable foundation to channel stolen assets into social purposes, however, it is not the only example. At the very least, something quite close to the PtP option has been in place for some time in Italy as

<sup>10</sup> See: Salamon (2014:21-34, and Appendix A). For updates, see the PtP Project website at: [p-t-p.org](http://p-t-p.org).

<sup>11</sup> See, for example: Gretta Fenner Zinkernagel, Charles Monteith, and Pedro Gomes Pereira, *Emerging Trends in Asset Recovery*, International Centre for Asset Recovery, Basel Institute on Governance (Bern: Peter Lang, 2013). While the treatment of the channeling of the proceeds of the restitution of stolen assets into charitable endowments as a form of "philanthropic privatization" may strike some readers as odd, in fact these assets do arise from a form of privatization. This is so because bribes are paid by private interests seeking to gain access to some asset that is under government control, such as a license to prospect or mine minerals or to secure air wave frequencies for cell phones. Such access is sold to private interests, but instead of competing openly for them, payments are made personally to government officials or those with influence over them. This is every bit as much a form of privatization as is the sale of a government-owned company, except that in this case both the proceeds and the assets end up in private hands.

well as a number of other European countries, and has recently been encouraged by a Directive approved by the EU Parliament and Council.

Italy's Law n. 109/96, known popularly as the Mafia law, provides for the granting to third parties—including particularly private charitable organizations and social cooperatives—of all property and other assets acquired through criminal activities. The third parties then return them to the community by converting the properties into socially beneficial uses. During the first 13 years since its passage, the law has converted to use for the community more than 4500 real estate properties (apartments, villas, and lands). The confiscated lands in Sicily, Calabria, Campania, Puglia, and Lazio have been taken over by cooperatives of students and thus function as something akin to charitable endowments, helping to generate streams of revenue for the resulting social ventures.<sup>12</sup> Directive 2014/42, issued by the European Parliament and Council, builds on this Italian experience and urges European Union Member States to “consider taking measures allowing confiscated property to be used for public interest or social purposes.”<sup>13</sup>

While the Italian law permits the distribution of such illicit assets by local governments, in cases where government entities are too complicit in the creation of the ill-gotten assets, where the likelihood is slim that the assets will be returned to a valid social purpose, and/or where public sentiment would not consider assignment of the proceeds to government authorities to be legitimate, alternatives to placing such seized assets into the hands of governmental authorities are likely to be of increased interest. And this is precisely the situation with regard to many of the most likely restitution cases now in process, as it was in the case of the BOTA Foundation. Indeed, with the publication of the so-called Panama Papers revealing the extent of money-laundering through overseas accounts,<sup>14</sup> and the convening of a high-level conference on government corruption by the government of the U.K. in May of 2016, the likelihood has increased that more such proceeds involving similar circumstances may be identified and subjected to seizure and ultimate restitution.

All of this makes the BOTA case, and the PtP model it incorporates, especially relevant and explains why the PtP Project has made special efforts to investigate this case and bring the results to broader public attention.

## The BOTA Foundation Field Guide

To prepare this case study, the PtP Project enlisted Mr. Aaron Bornstein, who served as a program director, and later as the executive director, of the BOTA Foundation

<sup>12</sup> See: [libera.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/70](http://libera.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/70).

<sup>13</sup> Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, para. 35. See: [eur-lex.europa.eu/eli/dir/2014/42/oj](http://eur-lex.europa.eu/eli/dir/2014/42/oj). For a fuller explication of European laws on social re-use of confiscated assets, see: Nicolae, Răuță, Chiriac, (2015).

<sup>14</sup> “What are the Panama Papers,” *New York Times*, April 4, 2016, [nyti.ms/238IQV1](http://nyti.ms/238IQV1). Accessed May 22, 2016.

on behalf of IREX, a U.S.-based nonprofit organization selected by the World Bank in response to a competitive tender to operate this foundation. Mr. Bornstein has more than 25 years of experience in the international development field, having served as Executive Director, Director of Technical Assistance, Country Director, Program Director, and Chief of Party in various long-term development assignments in a number of countries, including Zimbabwe, Ethiopia, South Africa, Azerbaijan, Kazakhstan, Bulgaria, Cambodia and the U.S. From January 2011 until December 2014 he served as executive director of the BOTA Foundation, giving him an extraordinary insider's view of this unique institution. To ensure the objectivity of this account, moreover, the draft has been submitted for review by personnel from the World Bank and IREX that were involved in the BOTA case.

The work on this case study, as on 22 others that the PtP Project has undertaken, was structured by means of a Field Guide developed by the PtP Project Director and used to understand key features of each PtP case.<sup>15</sup> The Field Guide called for the investigation of five central features of each of these PtP cases:

- 1) The basic transaction that transferred all or a portion of the assets resulting from the privatization action into a charitable endowment;
- 2) The background and context of the transaction, to assess how and why a PtP outcome came to pass;
- 3) The governance and management of the resulting institution;
- 4) The programs and procedures that the foundation adopted; and
- 5) The implications or lessons the case holds for the operation of existing or future PtP transactions.

The result, in this case as in the others examined, is a comprehensive picture of how this important institution came to be, how it was governed, how it operated, what it achieved, and what implications it holds for future restitutions of ill-gotten assets, especially in circumstances where direct return to governments may be problematic and ill-advised and alternative arrangements needed.

**Lester M. Salamon**

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<sup>15</sup> For a report drawing on the results of these other 22 case studies, see Salamon (2014).



# The BOTA Foundation:

A Model for the Safe Return of Stolen Assets?

## PART I

### The Deal



Conditional Cash Transfer department team, Almaty office, 2014  
Photo courtesy of the BOTA Foundation

# PART I:

## The Deal

As noted above, Philanthropication thru Privatization, or PtP, is a newly discovered social and economic process that involves three critical elements:

- a) A public or quasi-public asset—that is, an asset that is either (i) government-owned or controlled, or (ii) privately owned but enjoying some significant government benefit (e.g. tax exemption or eligibility to receive tax-benefited charitable gifts that imbue the asset with some public character.
- b) A process of transformation of this asset from public or quasi-public to private for-profit ownership or control in the course of which all or a meaningful portion of the asset value is set aside for charitable use; and
- c) A resulting charitable endowment, that is, a pool of resources, or a guaranteed stream of revenue available over an extended period of time, that is under the control of a privately operated institution dedicated to using it for charitable purposes.

This section seeks information on all three of these elements in the case of the BOTA Foundation.

### The Transferred Asset: Nature and Background

**The Asset.** The asset that was used to create the BOTA Foundation was a bank account in Switzerland that was allegedly funded from a series of bribes paid to officials in Kazakhstan and that was frozen in 1999 by the Government of Switzerland following an Interpol investigation. When it was seized, the account held US\$84 million. By 2009, when the account was made available to fund what became the BOTA Foundation, it had grown with interest to US\$115 million.

This asset was *disputed* by the Government of Kazakhstan, as well as by the governments of the United States and Switzerland, and therefore falls into the sixth type of PtP asset described in the Foreword to this report—in this case bribes paid by private companies to an influential individual in a country to secure privileged treatment from governmental authorities.

The money in the bank account was initially under the control of the Government of Kazakhstan, more specifically the Ministry of Finance. At the time of its transfer to



what became the BOTA Foundation, the money was under the control of the U.S. Department of Justice and the Swiss Federal Department of International Affairs' Directorate of International Law.

## The Transaction

Privatization transactions can take any of four major forms:

- Outright transfer of ownership of an asset;
- Direct sale of an asset to a private entity;
- Conversion of entity into a stock company and issuance or sale of stock; or
- Assignment of a stream of revenue resulting from an asset to a recipient charitable institution.

**Legal basis.** The negotiations that led to the transaction transferring funds frozen in the Pictet and Cie (P&C) bank to what became the BOTA Foundation stretched over nearly a decade. Discussions between the U.S. and Switzerland started in 1999, after the U.S. requested that the P&C account connected with Kazakhstani government officials and James Giffen be frozen. Following the arrest of Giffen for contravening the Foreign Corrupt Practices Act by soliciting bribes from American oil companies to secure oil drilling contracts for U.S. oil companies in 2003 (see Part II for more detail), talks between the two countries began on the disposition of the frozen assets, and these discussions eventually were expanded to include Kazakhstan. The World Bank was brought into the tripartite discussions about the assets in 2005 to act as intermediary, honest broker, and technical adviser. A final agreement between the three governments was reached in May 2007. The key legal document which laid out the terms and conditions for the transfer of funds from Switzerland to the BOTA Foundation was a Memorandum of Understanding signed by representatives of Kazakhstan, Switzerland, and the U.S.

Under this agreement, a decision was made to use the US\$84 million plus interest in the P&C account to underwrite a charitable foundation to be called the BOTA Foundation.<sup>16</sup> The agreement, brokered by the World Bank, was formalized in a Memorandum of Understanding (MoU) signed by the three governments (known collectively as "The Parties").<sup>17</sup>

The agreement between the Parties to establish BOTA led the U.S. Department of Justice (DoJ) to issue a forfeiture action against the funds "allegedly traceable to ille-

<sup>16</sup> "BOTA" means "baby camel" in the Kazakh language. In the Kazakh culture, the baby camel is akin to a teddy bear in the West, a warm and cuddly child-friendly symbol. "BOTA" was capitalized when it was named in the founding Memo of Understanding, and subsequently always capitalized in documents and reports.

<sup>17</sup> This Memorandum of Understanding is available at: [www.state.gov/documents/organization/108887.pdf](http://www.state.gov/documents/organization/108887.pdf).

gal payments" in the P&C account. According to a May 3, 2007 DoJ press release, the United States Attorney's Office for the Southern District of New York filed a Stipulation and Order setting forth an agreement between the United States and the Republic of Kazakhstan that "will take effect if there are no other claims to the funds after a notice period pursuant to the applicable civil forfeiture procedures."<sup>18</sup> This meant, in effect, that the U.S. and Kazakh governments agreed to "forfeit" their claims to the funds in the P&C account for the purposes stipulated in the above described Memorandum of Understanding. While the DoJ was confident that there would not be additional claims on the P&C account, it made the forfeiture conditional on that being the case—as many asset recovery cases get bogged down in the court system while one or more claimants attempt to get a share of the disputed monies.

**Key Actors.** Four key actors were thus involved in the development of the legal document that structured this transaction, the three governments that signed the MoU ("the Parties") and the World Bank:

- The **Government of the U.S.**, represented by the U.S. Department of Justice's Asset Forfeiture and Money Laundering Section and federal prosecutors in charge of the civil forfeiture proceedings. U.S. DoJ issued the restraining order on the P&C account based on violations by James Giffen of the Foreign Corrupt Practices Act.
- The **Swiss Federation Government**, represented by the Federal Department of Foreign Affairs' Directorate of International Laws. This office is responsible for the freezing of assets resident in Switzerland that are the result of illegal activity taken place outside of the country.
- The **Government of Kazakhstan** (GoK), represented by the presidency, the prime minister's office, the Ministry of Foreign Affairs and the Ministry of Justice, all of which were involved in negotiations leading up to the establishment of the BOTA Foundation as well as in overseeing its operations.
- The **World Bank** (WB), represented by its office of General Counsel, which participated in the negotiations among the three governments and offered due diligence in relation to the establishment of BOTA, and the regional WB office in Kazakhstan, which also assisted in discussions with GoK officials in relation to the establishment of BOTA.

The BOTA Foundation would likely never have been created without the World Bank, which assumed the role of "honest broker," suggesting a foundation mechanism to repatriate the disputed funds, and then agreeing to play a technical and

<sup>18</sup> Available at: [justice.gov/archive/usao/nys/pressreleases/May07/pictetforfeiturecomplaintpr.pdf](https://www.justice.gov/archive/usao/nys/pressreleases/May07/pictetforfeiturecomplaintpr.pdf).

fiduciary watchdog role for the three governments. Beginning even before BOTA opened its doors in February 2009 and continuing through its closure in December 2014, the WB devoted hundreds of person-hours of effort at very senior levels in the following areas:

- Facilitating the negotiations between the three governments to establish BOTA;
- Due diligence on the capabilities of existing local Kazakhstani foundations to determine whether they had the capacity and independence to “handle” the asset return (the decision was “no”);
- Designing BOTA's three programs;
- Developing an operations manual for the foundation;
- Negotiating a Charter for the Foundation with the three governments and civil society representatives in Kazakhstan;
- Producing terms of reference for the bidding documentation to select a Program Manager (PM) for the foundation, and subsequently conducting the tender exercise and selecting IREX/Save the Children for the PM role; and
- Monitoring and supervising the operation of the BOTA Foundation once it was up and running.

## The Resulting Asset—Not Quite an Endowment

To be considered a valid PtP case, a transaction must lead to the creation of an endowment owned and controlled by a private, charitable foundation or other similar institution. An endowment is an asset with a life of more than a year. It thus differs from a time-limited grant. A stream of revenue guaranteed by law can be the equivalent of an asset.

In the case of BOTA, the asset used to create the foundation took the form of funds in a confiscated bank account in the Pictet and Cie bank in Switzerland, which when it was released in 2009, ten years after it had been seized, was valued at US\$115 million. These funds were ultimately transferred to an entity that was a locally registered foundation governed, as will be outlined more fully in Part III of this report, by a mostly local Board, but managed by two international development organizations—IREX, with the assistance of Save the Children—and supervised by the World Bank and three governments.

The funds in the P&C account were not transferred to the BOTA Foundation at once, however. Rather, the funds were retained in the frozen account and

transferred to the account of the BOTA Foundation in Kazakhstan on a semi-annual basis, following the submission by BOTA staff every six months of work programs and associated budgets and the approval of these submissions by BOTA's Board of Trustees, the World Bank and the U.S., Swiss, and Kazakh governments.

Doling out the funds on an “as needed” basis, rather than transferring the whole amount to BOTA, was a fundamental component of the control strategy put in place by the three governments to ensure that all funds were spent for their intended purpose, and could be easily tracked, audited, and halted at any time if any of the conditions in the agreements underpinning BOTA were not followed.

An important clause in the MoU that set the procedures for handling the BOTA funds stated that after the end of the BOTA Program, initially planned for mid-2014, BOTA would continue as a “functioning” foundation (Article 3.2 of the BOTA MoU). In 2013, the Foundation's board and management developed a plan to carry out this mandate. Under this plan, the Foundation was to invest US\$10 million of the P&C funds in an endowment that could be used to purchase an income-producing building that would also house a scaled-down BOTA. In addition, the plan called for setting aside another US\$10 million for a two-year transition period, from 2014 to 2016, which would allow BOTA a grace period during which it could continue operating while raising funds for its future existence.

As detailed more fully below, however, the three governments placed in control of the BOTA funds did not go along with this plan. Instead, they pressed the Foundation to spend down the funds as quickly and responsibly as possible. The possibility of an endowment raised a number of red flags for the U.S. and Swiss governments. For example: who would control and benefit from money invested on behalf of the foundation, the Government of Kazakhstan? Would having an endowment mean that international oversight would have to continue indefinitely? Would the “new BOTA,” operating independently, be mistaken for the “old BOTA” with its many governance rules and controls? Under normal circumstances, such oversight is unheard of, yet BOTA was not a “normal” foundation. The lack of clear and convincing answers to such questions, coupled with the original tranche draw-down control strategy, ended up working very much against the establishment of an endowment for the foundation.

BOTA did receive practically all of the money in the P&C account pledged to it, but it took five and a half years—from February 2009, when the foundation started its operations, until the end of December 2014. At the time of BOTA's closure at the end of 2014 there was approximately a US\$300,000 unexpended balance from the US\$115 million originally available to the foundation. With the approval of the Board of Trustees, the World Bank, and the three governments overseeing the foundation, the residual amount was transferred to UNICEF in support of strengthening child welfare in Kazakhstan.

In addition to making arrangements for controlling the release of the available asset to the BOTA Foundation, the MoU leading to the formation of a foundation also stipulated the programs that the foundation would be required to implement. As detailed more fully in Section IV of this report, the resulting “BOTA Program” consisted of three programs targeted at poor and vulnerable children and youth.



# The BOTA Foundation: A Model for the Safe Return of Stolen Assets?

## PART II

### The Background and Context of the Deal



Informal Early Childhood Development center, Akmola oblast  
Photo courtesy of the BOTA Foundation



# PART II:

## Background and Context of the Deal

This section of the case study explores the circumstances that allowed this transfer of publicly-owned, or claimed, assets to a charitable foundation. It provides more of the background of this transfer and then focuses, in turn, on the social and political circumstances, legal context, and economic pressures that led to this result.

### The Background

The story of BOTA's capital and creation starts with politics and oil in Kazakhstan, the last of the ex-Soviet republics to gain its independence in 1991. As well chronicled in Steve LeVine's definitive account of the era, *The Oil and the Glory*, during the 90's there was a scramble amongst Western interests to secure oil drilling rights in the Caspian Sea, which had some of the largest untapped reserves in the world.<sup>19</sup> Nothing happened in Kazakhstan without the greasing of palms, especially the president's and prime minister's. A U.S. citizen, Mr. James Giffen, was the main intermediary between the likes of Mobil and other companies on one side, and President Nursultan Nazarbayev and his underlings on the other. While it was never proven in court, a U.S. federal indictment under the U.S. Foreign Corrupt Practices Act (FCPA) alleged that payouts of millions of dollars were made through Giffen to Kazakhstan's political elite. From 1996 to 1998, four U.S. companies working with Giffen's Mercator Corporation landed deals—Mobil, Amoco, Texaco, and Phillips Petroleum.<sup>20</sup>

Ironically, the investigation which ended up implicating Kazakhstan's president was initiated by Nazarbayev himself. In the run-up to Kazakhstan's second presidential election held in 1999, Mr. Nazarbayev was looking for ways to discredit his main political challenger, a former prime minister named Akezhan Kazhegeldin. Nazarbayev pressed Swiss authorities to investigate bank accounts that could have been tied to his rival, but this investigation ended up implicating the president himself in the utilization of a Swiss bank account for money laundering. At the time, Nazarbayev publicly stated that he maintained no foreign bank accounts—a position that later shifted once the account's existence was in the public spotlight.

<sup>19</sup> Steve LeVine, *The Oil and the Glory*. (New York: Random House, 2007).

<sup>20</sup> Although it was never proven in court that the money in the Swiss account originated from bribes, it is interesting to note that while Giffen's guilt was never proven, or the oil companies alleged involvement in the bribery prosecuted, J. Bryan Williams, an associate of Giffen and executive at Mobil Oil in the 1990's, was not so lucky. Prosecutors said the Virginia lawyer took a US\$2 million kickback from Giffen for helping to negotiate a deal involving Kazakhstan's Tengiz oil field. He pleaded guilty in September 2003 to tax charges and was sentenced to 46 months in prison.

According to a seminal *Washington Post* article published in September 2000,<sup>21</sup> in the early years following independence in 1991, Kazakhstan's government leaders regularly established and used a variety of foreign bank accounts, particularly in havens like the Bahamas and Cayman Islands, to park bribes and fees collected from the sale of raw materials and the development of the oil industry. Some accounts were in the name of the government; others were set up in the name of foundations that allegedly benefited Kazakh politicians and their families.

The *Post* reported that, based on the Interpol investigation request from Nazerbayev's government, Swiss investigating magistrate Daniel Devaud examined between 50 and 60 accounts in at least four different banks: Credit Agricole Indosuez, Credit Suisse, Pictet and Cie, and United European Bank. Devaud's investigation revealed about US\$100 million in transfers from oil companies to escrow accounts at Credit Agricole. Roughly one third of this amount was wired to accounts benefiting senior Kazakh officials, including Nazarbayev. Devaud's findings were sent to the U.S. Department of Justice (DoJ) in January 1999.

The DoJ wrote to the Swiss police in August identifying "Giffen and others" as subjects of its own FCPA investigation, highlighting three large oil deals as "highly suspicious." These involved payments from Amoco, Phillips Petroleum, and a consortium of oil companies that included Mobil between May 1997 and September 1998. All of these payments were thought to be sent through a pyramid of escrow accounts and shell companies to the Liechtenstein-based foundations of Kazakh officials and their families.

Many of the payments for oil deals that the DoJ was investigating were up to US\$12 million each, and sent to the account of Orel Capital Ltd. This firm was pegged as the shell company that ultimately benefited Kazakhstan President Nazarbayev. According to Swiss court documents, the Orel Capital account grew to around US\$84 million by August 1999. After Swiss magistrates launched a money laundering investigation, nearly this entire amount was then transferred to an official Kazakh government account at the Swiss Pictet and Cie bank.

A Swiss magistrate lifted an order freezing the Pictet and Cie (P&C) account in the early summer of 2000 after finding that the US\$84 million had returned to "the sphere of Kazakh authority," according to the *Post* account. However those funds, and the funds in the Credit Agricole accounts, remained frozen at the request of the U.S. DoJ.

It is not known if all of the bribe payments made by U.S. oil companies were channeled through Mr. Giffen, or if all ended up in the P&C account that was used to fund BOTA. What is known is that the account was initially secret. Once revealed to the public, its existence was first denied by the government, but then in April 2002, several months

<sup>21</sup> Michael Dobbs, David Ottaway, and Sharon LaFraniere. "American at Center of Kazakh Oil Probe: Insider Linked to Payments to Foreign Officials," *Washington Post*, (September 25, 2000): p.1. [washingtonpost.com/wp-srv/WPcap/2000-09/25/069r-092500-idx.html](http://www.washingtonpost.com/wp-srv/WPcap/2000-09/25/069r-092500-idx.html).

after the news of the account became increasingly known, the then-Prime Minister admitted to Parliament the possibility of such an account in President Nazerbayev's name but "denied the head of state had a role in opening it."<sup>22</sup>

Following a three-year investigation by the DoJ, in March 2003 Giffen was arrested as he was boarding a Paris-bound plane at JFK Airport in New York. The arrest was based on a federal grand jury indictment alleging that Giffen used US\$84 million collected from the U.S. oil companies to bribe Kazakhstan's president and other officials. Giffen was indicted on 65 counts in connection with violations of the Foreign Corrupt Practices Act, mail and wire fraud, failing to disclose foreign bank accounts, money laundering, and filing false tax returns.

The 75-page indictment of James Giffen, issued by the U.S. DoJ in 2003, makes for fascinating reading, especially because the investigation revealed the direct ties between Giffen and the highest of Kazakhstan's political elite.<sup>23</sup> The Kazakhstani president, as well as a former prime minister, featured prominently in the indictment. These politicians were not named directly, but referred to as "KO-2" (commonly understood to refer to President Nursultan Nazarbayev) and "KO-1" (commonly understood to refer to former Prime Minister Nurlan Balgimbayev). The indictment states that more than US\$78 million were paid in bribes to these individuals.

In sum, a connection was made by the U.S. DoJ between James Giffen, oil company bribes, and money laundering activities that led to a Swiss bank account controlled by the President of Kazakhstan. Consequently, the reputation of the President was in question, and the money that was frozen in the Swiss P&C account—which subsequently was made available to capitalize BOTA—was extremely tainted.

## Political Context

As already noted, the BOTA Foundation was created to recover disputed assets and use them for the benefit of the people of Kazakhstan. These funds were frozen in accounts in Geneva in the framework of international mutual assistance proceedings involving the United States and the Swiss Federation. Given that the confiscated assets related to legal proceedings in Switzerland and in the U.S., the two countries sought to find a common solution for their repatriation. And because the Government of Kazakhstan (GoK) retained a claim to the same assets, the GoK also had to be involved.

Discussions between the Parties—Switzerland, the U.S., and Kazakhstan—started in 2003 and aimed to identify a restitution mechanism that would guarantee that the returned assets would be used appropriately. Because the ownership of the assets

<sup>22</sup> "Kazakhstani Prime Minister Admits to Existence of Secret Government Fund," Eurasianet, April 4, 2002, [eurasianet.org/departments/insight/articles/eav040502a.shtml](http://eurasianet.org/departments/insight/articles/eav040502a.shtml).

<sup>23</sup> The Giffen indictment is available at: [justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/04-02-03giffen-indict.pdf](https://justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/04-02-03giffen-indict.pdf).

was in dispute—they were still claimed by Kazakhstan—this had consequences for the modalities involved in the restitution of the funds.

That the restitution of the stolen funds identified by the Swiss and American authorities led to their placement in a newly created PtP foundation was due to four fundamental realities:

- **First**, the fact that the existence of these assets became an important political embarrassment for the sitting President of Kazakhstan, making him willing to go along with an unconventional approach to restitution;
- **Second**, the eagerness of the Swiss and American authorities to make sure these assets, which originated from illicit payments, did not revert back to Mr. Nazerbayev or his associates;
- **Third**, the absence of any viable alternative options due to the lack of any existing Kazakhstani institutions that were seen by the World Bank as being able to manage the repatriation of the substantial sum available in the Pictet and Cie bank account transparently and accountably; and
- **Finally**, the unwillingness of the World Bank to manage the funds directly because the ownership of the funds was in dispute.

***The Vulnerability of the Government of Kazakhstan.*** So far as the first factor is concerned, the fact that the assets in question were linked directly to the sitting president of Kazakhstan was decisive. To understand this, it is necessary to understand the political context of Kazakhstan at the time.

While the race for oil contracts was taking place in the early 1990's, Kazakhstan was in the midst of its economic and political transition from a Soviet state to one based (at least in theory) on free elections and market economy principles. At that time there was real political debate, opposition candidates, and alternative media outlets. This is likely why, in the run-up to Kazakhstan's second presidential election in 1999, the sitting President, Nursultan Nazerbayev, was looking for ways to discredit his main political challenger, a former prime minister named Akezhan Kazhegeld. Ironically, therefore, it was Nazerbayev who pressed Swiss authorities to investigate bank accounts that could have been tied to his rival. But this investigation ended up implicating the president himself in the utilization of a Swiss account in the Pictet and Cie Bank for money laundering.

James Giffen was a trustee on that Swiss account. As noted above, in 2007, the U.S. DoJ brought a civil forfeiture action against this account in U.S. District Court in Manhattan charging that the funds were traceable to unlawful payments to senior Kazakh officials in connection with oil and gas transactions arranged by Giffen's firm, Mercator, for Kazakhstan.

The indictment of Giffen revealed the extent of bribes made directly to Kazakhstan's top two political leaders. While the bulk of these monies were transferred by Giffen through shell corporations to bank accounts controlled by former Prime Minister Nurlan Balgimbayev and President Nazerbayev, the indictment also describes conspicuous other payments by Giffen for the Kazakhstans. These included tuition for the president's daughter to attend an exclusive Swiss high school, luxury vacations for the ex-prime minister, and hundreds of thousands of dollars of jewelry.

In Kazakhstan, Giffen's indictment led to a political crisis known as "Kazakhgate," which started percolating in 1999, shortly after Swiss authorities froze the account in the Pictet and Cie bank connected to Giffen and the president. Key to this outcome was an active opposition movement and media outlets that took every opportunity to make allegations of corruption against the ruling elite, causing political headaches for President Nazerbayev.

These efforts point up the crucial role that civil society organizations can play in the resolution of bribery cases. These groups were part of the embryonic civil society sector that took shape beginning in 1991 following the break-up of the Soviet Union and Kazakhstan's independence. The Nazerbayev government tolerated and even encouraged CSO development. This is especially true with regard to CSOs involved in "non-political" domains, such as assisting the disabled and providing other social services needed to fill in for the government's inability to provide a social safety net in the period following independence. Additionally, a raft of new CSOs focused on the "democracy agenda" and human rights also surfaced in the 1990's despite the limited legal and political space made available for such organizations.

One of the more prominent of these CSOs was the Kazakhstan International Bureau on Human Rights, founded by Yevgeniy Zhovtis, an attorney and tireless human rights campaigner, who functioned as a highly respected interlocutor between civil society, the Government of Kazakhstan, local media outlets, and Western governments seeking an accurate read-out of the political situation in Kazakhstan. Once the funds in the Swiss account that lay at the core of what became the capital available to the BOTA Foundation were frozen in 1999, and articles appeared in *The Washington Post* in 2000 and in *The New Yorker* in 2001 tying James Giffen, President Nazerbayev, oil company bribes, and the Swiss P&C account together, Mr. Zhovtis and like-minded colleagues became extremely active in promoting a return of the frozen funds to Kazakhstan in a transparent and accountable way. To this end, Mr. Zhovtis was instrumental in placing an open letter to the U.S. DoJ entitled "Please Return our Funds" in *Taszhargan*, an opposition newspaper, helping give rise to the "Kazakhgate" political crisis. The letter, signed by other civil society activists, parliament members, and political party factions, demanded that the Swiss funds be returned to Kazakhstan to be "used as pensions, allowances, scholarships, allocations for education and culture, for the benefit of our people."

Over and above the desire to overcome the problems associated with the domestic fallout of the Giffen case, moreover, Nazerbayev was extremely concerned about his international reputation and the resulting potential loss of foreign direct investment. The Kazakhstani president was proud of his strong ties to the Bush administration. He wanted the world to acknowledge the strategic importance Kazakhstan played in the Afghanistan war as well as be recognized as a leader in nuclear non-proliferation (Kazakhstan gave up all of its nuclear weapons in 1994). What would happen if Giffen's trial went forward and President Nazarbayev lost his legitimacy? What would potential foreign investors think about risking their capital if it was proven that corruption starts at the top?

*In short, the US\$84 million, plus interest, in the Swiss Pictet and Cie Bank account was an embarrassment for Kazakhstan's president—a political liability domestically with the potential to derail future foreign investment as well. As a result, Kazakhstan was in a disadvantaged position going into the negotiations that resulted from the indictment of Giffen. BOTA thus became President Nazerbayev's face-saving solution to the “problem” of having an account in the GoK's name that was associated with bribes from oil companies. Without having to admit guilt or its claim to the funds, the government could say that the funds were going to be used for the benefit of poor Kazakhstani citizens. The hope was that the stain of “Kazakhgate” would quickly fade, and be forgotten by both Nazerbayev's supporters and opponents.*

***The Concerns of the U.S. Department of Justice and Swiss Federation.*** For their part, the U.S. DoJ and Switzerland were extremely cautious about how the funds in the Swiss Pictet and Cie Bank account associated with Giffen and Kazakhstani President Nazerbayev would be spent. At a minimum, they were determined not to let them go back into the same hands that had placed them in a tainted Swiss bank account in the first place. The officials involved in these discussions were well aware that corruption of this type was endemic to the country at this time. As noted in the previously cited September 2000 *Washington Post* article,<sup>24</sup> Kazakhstan's government leaders regularly established and used a variety of foreign bank accounts, particularly in havens like the Bahamas and Cayman Islands, to deposit illegal payments collected from the sale of raw materials and the development of the oil industry. Some accounts were in the name of the government; others were set up in the name of foundations that allegedly benefited Kazakh politicians and their families. Returning the funds to the government, or to any entity capable of coming under government control, therefore could cause an embarrassment to the entire process of recovering stolen assets by making it appear to be a shell game. Several more specific considerations were also at work for the affected parties, including:

<sup>24</sup> Dobbs, Ottaway, and LaFraniere, *Washington Post*, September 25, 2000.



- For the **U.S. DoJ**, the fact that the P&C Bank account had already been frozen in the name of the Government of Kazakhstan meant that direct negotiations on its forfeiture and use could be undertaken without the need for a lengthy trial or post-trial asset recovery effort.
- For the **Government of Switzerland**, the fact that it had campaigned particularly hard for the inclusion of an obligation to return illegitimate assets and compensate victims in the negotiations that created the 2005 UN Convention against Corruption (UNCAC) made it particularly eager to find a solution that returned the frozen assets to the people of Kazakhstan in a safeguarded way.
- For the **World Bank**, the fact that its most important shareholder, the U.S., joined by Switzerland and Kazakhstan, asked for its assistance played a key role, as did the judgment of some key officials that this range of activity could provide a useful additional activity for the Bank and help reduce the substantial impact that corruption was known to be having on economic development in many countries.

**The Lack of Suitable Alternatives.** Also working toward the adoption of the PtP option of creating an independent charitable foundation to receive the frozen assets in the P&C account was the absence of suitable alternatives. Two such alternatives were considered.

The first idea of the Swiss and U.S. authorities was to give the money directly to the World Bank for redistribution in Kazakhstan, but this did not work for the WB. Why? The source of the funding, and its ties to an active FCPA prosecution, gave pause and there was serious concern within the WB that Kazakhstan had not given up its claim to the funds.

The only real option considered beyond starting a new independent foundation was channeling the P&C funds through existing Kazakhstani foundations. The WB did an assessment of such foundations in 2006 and found them unsuitable for two key reasons: 1) lack of experience managing such a large pot of funds, and/or 2) lack of independence from the Government of Kazakhstan—an essential requirement of the U.S. and Swiss governments. A limited number of civil society organizations were investigated by the WB as part of this assessment mission—these were ones that had some experience managing funds and grants. Most Kazakhstani foundations at the time of BOTA's founding, and still at the time of this writing, have absolutely no experience in managing multi-million dollar pots of money, and do not have an endowment or steady source of funding. A “foundation” in Kazakhstan is simply an organizational form under which non-commercial organizations can register their legal existence (see Part III below).

After exploring the capabilities of existing foundations in Kazakhstan and finding them lacking, the WB raised the idea of setting up an independent foundation as a possible solution. However, many in the WB were cautious. There had never been a “BOTA-like” foundation set up before—would this go according to plan or become an administrative, or more significantly, a reputational nightmare for the WB? In the end, according to my WB sources, the then-WB President, James Wolfensohn, made the decision. He saw a new opportunity for the World Bank to become increasingly involved in the restitution of assets from corruption cases. From 2005 to 2007 the Bank worked out the modalities leading to the May 2007 agreement between the Kazakh, Swiss, and U.S. governments to establish the BOTA Foundation.

**Civil Society Reactions.** Despite the significant role that civil society organizations played in helping move the Nazerbayev regime toward the negotiating table and ultimately to acceptance of a PtP foundation outcome, the decision to create BOTA was very much made by the central authorities in Kazakhstan, diplomats in Switzerland, and the U.S. DoJ, and there is no evidence that members of civil society organizations were consulted in the course of this decision process. The letter calling for the return of the affected funds signed by various CSO and political opposition leaders and released early in the development of the Kazakhgate crisis was reprinted in 2007, before the BOTA MoU was announced, but there was no significant domestic or international opposition apparent to the MoU—though media sources close to the opposition in Kazakhstan made it known that they were very suspicious that the foundation was a ruse established by Nazerbayev as a way to re-acquire control of the money.

Once the decision was made to found BOTA, and the MoU was signed in May 2007, a small number of CSO representatives were involved in discussions on the foundation’s programs and governance. Indeed, this was required by the provision in the MoU calling for BOTA to be a local Kazakhstani organization, with local founders and a board that was predominantly composed of Kazakhstan nationals. This necessitated a lot of discussion with the founders about both the MoU and the Charter of the Foundation. The MoU therefore had to be amended and re-signed by the governments in April 2008, and the Charter of the Foundation and the Foundation Agreement signed by the five local founders, including Mr. Zhovtis, in May 2008.

## Legal Context

There were no specific laws in Kazakhstan that made the establishment of BOTA a more or less likely outcome as a way of using the funds frozen in the P&C account. Kazakhstan had passed a law authorizing the formation of charitable foundations as a form of “non-commercial organization” in January 2001, and while there have been several amendments over the years, the key features of this law have remained constant.

Under this law there are several possible organizational forms under which non-commercial organizations (NCOs) can register, with “foundation” being one of them.<sup>25</sup> Of all of these types of organizations, foundations—which can be private, public or corporate—are the easiest to form in terms of legal requirements. Public foundations require two individuals as founders, with a board of trustees. A private foundation only requires one person as a founder, whereas a corporate foundation requires at least one organization to be its founder, which may be a commercial entity. No matter which type of foundation it is, under the Kazakhstani law, there is no requirement that the organization have a certain minimum amount of capital, or use any of its capital to assist any class of beneficiaries. There is a conflict of interest provision in this law which, in theory, regulates commercial deals between the foundation and interested parties (such as the foundation’s management or board), but this provision is more or less on paper only. The law lacks clear guidelines and mechanisms for dealing with real or perceived conflicts of interest.

The need for stricter controls for BOTA than called for under Kazakhstani law on non-commercial organizations required Kazakhstan officials to establish special rules of operation and engagement for BOTA. Once the authoritarian President of Kazakhstan, Nurlan Nazerbayev, agreed to the principle of establishing a foundation to repatriate the capital that was frozen in the P&C account in Switzerland, his government did whatever was needed to get BOTA going and facilitate its operations. Under Kazakhstan law, as mentioned above, a single individual was all that was required to organize a private foundation. As will be noted more fully below, however, the BOTA Foundation was established in Kazakhstan by five Kazakh citizens appointed by the U.S., Swiss, and Kazakhstan governments, and the governments of the U.S. and Switzerland each had one additional representative on the board who were empowered to remove any or all of the five nominated trustees (BOTA Charter, Article 7.8). This, as well as other special BOTA charter provisions, had to be approved by Kazakhstani authorities in order to make the BOTA Foundation legal.

Similarly, while existing law on foundations in Kazakhstan stipulated that all legal entities that employ staff pay a range of taxes, such as income tax, a provision within the MoU signed by the three governments stated that: “The Parties agree that neither the Funds nor any property of the BOTA Foundation shall be used for payments or other benefits, directly or indirectly to...the Government of the Republic of Kazakhstan, its officials, or their personal or business associates.” To comply with this provision, the tax code had to be changed for BOTA so that employee salaries were not subject to income tax. Even though it was a locally registered institution, moreover, BOTA was also given the status of an international grant-maker so that grants it gave to local NGOs would not be subject to tax, as grants made by a local foundation would be.

<sup>25</sup> Other organizational forms which can be registered under this law are: Institutions (Private, Public, State); Associations (a public union); Religious organizations; Cooperatives; and Political parties.

Another example of a regulation that could not be enforced on BOTA was the standard Kazakhstan requirement that official documents be written in Russian or Kazakh. In the case of the BOTA Foundation, however, English was the legally binding language of its Charter. In spite of these anomalies, the GoK Ministry of Justice, which was the entity within the Kazakhstani government responsible for BOTA, expedited its legal registration in one business day.

As noted in the Foreword, at least one other precedent for the channeling of proceeds from illegal activity into a charitable foundation or institution existed at the time the BOTA settlement was reached. This was the 1996 Italian law on the benevolent use of assets seized from Mafia crimes.<sup>26</sup> There is no evidence that this precedent was known to the actors involved in the negotiations that led to the BOTA MoU, however. Nor were they aware of the range of other PtP foundations that have been surfaced by the PtP Project.

## Economic Context

Economic factors *per se* did not enter into the BOTA decision except indirectly. As noted, President Nazerbayev and his political allies were intent on attracting foreign direct investment into Kazakhstan. From the evidence at hand, Western investors were more than willing to play by Kazakhstan rules in securing access to the country's riches, including particularly the oil reserves thought to be available in the Caspian Sea. The discovery of the P&C account with US\$84 million of proceeds from bribes obviously was an embarrassment, to say the least, for all parties—and one likely to put an extended cloud over Kazakhstan's reputation and ability to attract such investment. This factor doubtless helped incline Kazakhstani authorities to bend to the will of the troika of the U.S., Switzerland, and the World Bank and accept the terms of the settlement that they devised. This, coupled with the pressures coming from civil society and the media, helped lead to the government's acceptance of the PtP outcome that resulted.

<sup>26</sup> See: [libera.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/70](http://libera.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/70).



# The BOTA Foundation:

A Model for the Safe Return of Stolen Assets?

## PART III

### Governance and Management



BOTA Directors at Board of Trustees meeting, 2014  
Photo courtesy of the BOTA Foundation



# PART III:

## Governance and Organizational Structure of the Resulting Foundation

A key premise of the PtP concept is that the foundations that emerge from transactions involving publicly owned or controlled assets be held to the highest standards of transparency, avoidance of conflicts of interest, and independent governance. How well did the BOTA Foundation reflect adherence to these standards? This section explores the answer to this crucial question.

### Legal Form

The entities that come into possession of formerly state-owned or quasi-public assets through PtP transactions can take a number of different forms. They can be:

- **Private, grant-making foundations.** These are organizations that are set-up chiefly or exclusively to make grants to other nonprofit organizations;
- **Operating nonprofit organizations** (e.g. schools, hospitals, museums, human rights groups, NGOs). These are organizations prevented by law from distributing any profits they may earn to their directors, managers, investors or other stakeholders and that operate programs and deliver services but generally do not make grants. PtP only covers cases where these organizations acquire “endowments,” i.e. permanent assets the earnings on which are used to finance their programs;
- **Operating foundations.** These are private foundations that use the bulk of their resources to provide charitable services or run charitable programs of their own, but that also sometimes make grants. In some places they finance their activities in part from their endowments and in part from resources they raise from outside sources:
- **Cooperatives, mutuals, or social enterprises.** These are organizations that are owned by their “members” or that serve social purposes and that operate under some limitation on their distribution of profits.

In the case of the assets secured through the seizure of the funds in the Pictet and Cie (P&C) account in Switzerland, the entity authorized to receive the assets was a grant-making foundation, legally registered as such according to regulations in Kazakhstan.



According to the MoU signed by the Governments of Kazakhstan, Switzerland, and the U.S., to establish BOTA (clause 3.2):

*"The BOTA Program shall be implemented through the creation of an independent, nongovernmental, nonprofit foundation (the "BOTA Foundation") established to receive and disburse the Funds in accordance with the MoU and constituted under Kazakhstan's Law of Non-Commercial Organizations with the assistance of the World Bank as provided in the Service Agreement. The Parties agree that in order to receive any of the Funds, such a foundation must be a purpose-built organization, founded for the purposes of implementing development projects for poor children and youth in Kazakhstan ...and must be entirely independent of the Government of the Republic of Kazakhstan, its officials, and their personal or business associates."*

## Governance Structure

The governance and management structure of BOTA was one of the most unusual features of this foundation. Essentially, because the source of the asset was a cache of stolen money, special care was felt necessary to ensure that the money would really be used for the benefit of Kazakhstan young people and not siphoned off into the personal fortunes of leading politicians. To this end, a complex **governance structure** was established consisting of a Board of Directors containing Kazakhstani and international members, as well as a **management structure** that involved international monitors, professional managers, and restrictions on what the Board could do. Both components therefore deserve attention. We focus here on the formal governance structure before turning in the next section to the management structure that oversaw BOTA.

BOTA's unusual governance structure started with how it was founded. According to local Kazakhstani law, non-commercial organizations, of which BOTA was one, have to be founded by Kazakhstani citizens. As none of the three governments fit this description, the authors of the MoU had to establish a process to create local founders for BOTA. Under it the Government of Kazakhstan named three of five local legal founders, and the U.S. and Switzerland each nominated one individual. All nominees had to be acceptable to the three governments, and be "completely independent of the Government of Kazakhstan (GoK)" (MoU clause 3.4). Once the foundation was registered as a legal entity by the GoK, the founders became the Board of Trustees. Nominees for the Board were meant to be a "combination of respected international individuals and Kazakh citizens, preferably known for their championing of children's causes" (MoU clause 3.4).

In practice, the Swiss government nominated the famous civil society activist and human rights campaigner, Yevgeniy Zhovtis, who had been active since 2001 in advocating for the return of the stolen funds to Kazakhstan. Mr. Zhovtis was also Board Chair until his arrest in 2009 by the GoK (see below). The U.S. Government

nominated a well-known medical faculty doctor, Zhamilya Nugmanova (who assumed the title of Board Chair from 2009 until Zhovtis was released in 2012). Both Mr. Zhovtis and Dr. Nugmanova were fluent English speakers with broad exposure to Western management principles. The GoK nominated the head of the local Transparency International chapter, Sergei Zlotnikov, and two other individuals (a school principal from Astana and a pediatrician who taught at the medical school). The latter two individuals came to the first Board of Trustee (BoT) meetings, which started in 2008 with World Bank support, and then stopped coming altogether. One can speculate why these individuals quickly abandoned BOTA, but it would probably be fair to say that they were “drafted” by the Government of Kazakhstan to get BOTA going, but did not have sufficient motivation or incentive to continue to carry out the responsibilities of a board member, such as participating in BoT meetings.

In 2011, these non-attending Board members resigned and the World Bank proposed two new individuals to serve as Trustees for the three governments’ consideration: Dr. Meruert Makhmutova, an economist; and Mr. Manen Omarov, the rector of a private university in Astana. These replacement Trustees were subsequently approved by all three governments to take seats on the Board.<sup>27</sup>

In addition to the five local Board members, there were two international representatives on the Board, one each for the U.S. and Switzerland, making the total number of members seven. The advantage that the U.S. and Swiss Governments had in the negotiations as well as governance structure, compared to the GoK, was evident in the fact that the U.S. and Switzerland both had two local Board nominees, and two government representatives, with the latter having the right to remove local members with whom they had objections, while the GoK initially had three nominated individuals on the Board, two of whom resigned and were replaced. The Swiss representative to the Board, Pietro Veglio, was a retired Swiss civil servant, who was Switzerland’s Executive Director at the World Bank for many years. He remained on the Board from start to finish of BOTA. The U.S. representative changed several times throughout the life of BOTA. The first U.S. representative, John Ordway, was the U.S. Ambassador to Kazakhstan, while subsequent U.S. representatives included two from USAID, and the U.S. Charge D’Affaires to Kazakhstan. These “super” delegates had the power, according to BOTA’s Charter, to vote local members off the

<sup>27</sup> According to BOTA’s Charter (Article 7.5), “Any of the Non-government Trustees may resign as a Non-government Trustee by providing a written notice to the Board. In such event the Government of the United States or Swiss Confederation, or any member of the Board or any Founder may propose a replacement member for consideration, subject to the approval or objection of the Governments of the Republic of Kazakhstan, the United States, and the Swiss Confederation.” Why did the World Bank take the lead in vetting potential replacement Board members? The World Bank was viewed as a neutral and trusted party, with a country office in Almaty, a network of local professionals it had dealings with, and resources to conduct due diligence on prospective candidates. Still, some earlier board candidates nominated by the WB were rejected by the Parties.

board.<sup>28</sup> Although there was serious consideration of this with at least one board member, this never happened.

While many foundations have diverse perspectives reflected on their boards, in BOTA's case checks and balances were deliberately built into its structure, in part to ensure that no particular faction—particularly one beholden to the Government of Kazakhstan—could hijack the operation, and in part due to the circumstances of its founding. In addition, Kazakhstan, like most countries in the former Soviet Union, did not have much experience in the creation and functioning of effective boards, with many nonprofits not having boards at all. As a result, BOTA's Board was not, on balance, a well-functioning body. Thus, for example, some of BOTA's local Trustees expected to be paid for their efforts, and never clearly understood their roles. There were certain board members who were very constructive, and offered well-reasoned guidance and suggestions for BOTA's management. There was another camp, however, that seemingly positioned itself against the foundation itself—showing no or little interest in actual issues before the board, not preparing at all for Board meetings (or paying attention to BOTA in-between Board meetings), and understanding their role as looking for opportunities to challenge and even attack management during meetings. This volatile mix often made for difficult, inefficient and contentious board gatherings. It was hard to understand why the “difficult” camp members were nominated to be on the board in the first place, and, when it became clear how obstructive they were, why they continued to serve on the board—given that they could have resigned at any time, or that the U.S. and Swiss Trustees could have required them to leave the board. Complicating things further, the 2009 arrest and imprisonment of BOTA's BoT Chair, Yevgeniy Zhovtis, was widely viewed by observers as a way to silence a harsh critic of Kazakhstan's democracy and human rights record a year before the country was to take over the chairmanship of the Organization for Security and Cooperation in Europe (OSCE) in 2010.<sup>29</sup> While Dr. Nugmanova provided leadership of the BoT as best she could, Mr. Zhovtis' experience as a board chair was missed, especially in relation to handling difficult board meetings, though he reassumed the Chairmanship of the BOTA Board after his release from prison in February 2012.

In spite of these difficulties, the BOTA Board ultimately made rational decisions (often with the “disgruntled camp” on the losing side of the vote) and BOTA thrived as the largest and most effective child welfare foundation in Central Asia. What is more,

<sup>28</sup> Article 7.8 of BOTA's Charter stated: “In the event that any member of the Board and/or Founder, in the opinion of the Government of the United States of America or the Swiss Confederation: (a) no longer meets the requirements set forth in Article 3.3 or Article 3.7, respectively; or (b) has acted, or failed to act, in a manner which has caused or may cause harm to the Foundation or its reputation, or frustration of its purpose; or (c) fails to perform his or her duties or responsibilities competently; or (d) misuses or create the appearance of misuse of funds provided under the BOTA Program or the property of the Foundation, then the Government Trustee of the United States of America or the Swiss Confederation may at any time initiate proceedings before the Board to remove any such non-Government Trustee and/or Founder. In the event the Board does not agree to remove such Non-Government Trustee and/or Founder, the Government Trustees, by joint decision, are authorized to remove such Non-Government trustees and/or Founder without regard to the vote of the Board.”

<sup>29</sup> For more detail on this, see: [opensocietyfoundations.org/litigation/zhovtis-v-kazakhstan](https://opensocietyfoundations.org/litigation/zhovtis-v-kazakhstan)

the presence on the Board of Mr. Zhovtis, one of the most respected non-governmental leaders in Kazakhstan and the local head of Transparency International, gave local citizens a high degree of confidence that BOTA's funds were being used properly, and not being recaptured by the political elite. Other civil society representatives who were not Board members—if they had doubts or questions about BOTA's work—could and did contact BOTA's local Trustees to get whatever information was needed. This was also true of Kazakhstani media: BOTA held regular press conferences to announce new initiatives or highlight achievements, and as a rule local Board members were at press conferences and available for follow-up interviews. The Board also approved BOTA's work plans and budgets, the progress of its programs, and all large procurements. Thus, there was huge value in BOTA's BoT civil society composition, even though the functionality of BOTA's Board as a governance body was not optimal.

## Management Structure

In addition to this complex board structure, the MoU imposed a number of other restrictions and mandates on BOTA's operations in order to ensure that the funds available would not be re-stolen or otherwise misused. In particular:

- BOTA's Charter stipulated that all important decisions approved by the Board had to be further approved by the three Governments.<sup>30</sup> The Governments expected that the WB would vet and sign off on all important decisions and recommendations before they were put forward for their approval. This multi-layered bureaucratic structure was far from ideal for BOTA's management.
- BOTA's funds had to be used for a specific set of programs (the “BOTA Program”), which were identified in the MoU (and discussed in Part IV below).
- The foundation had to be managed by a “reputable international NGO, serving as the Program Manager” and selected through an international tender process organized by the WB. Ultimately, IREX, a U.S.-based international development organization with substantial experience in grant-making, civil society development, and international exchanges, won the tender in cooperation with Save the Children, another U.S.-based international development agency working specifically with children. The MoU further stated that “the specific responsibilities of the Program Manager shall be set forth in a Management Agreement between the BOTA Foundation and the Program Manager” and such an Agreement was drafted by the WB, and approved by the Board and the three Parties to the MoU.

<sup>30</sup> In fact, any changes in a BOTA program's budget allocation, geographic focus, approach, etc., proposed by Foundation staff, had to be approved by IREX, the World Bank, the BoT, and finally, the three governments.

- The World Bank had to “supervise and monitor the BOTA Program, and the administration and expenditure of funds.” A “Supervisory Agreement” was formulated, which noted all of the Bank’s responsibilities. The WB was to be paid a Service Fee by the GoK for its costs in monitoring and supervising BOTA.
- The WB provided an “Operations Manual” to the Program Manager, which described the three BOTA Programs and how they were to be organized and implemented. This document was a “living” one that was substantially changed by the Program Manager during the course of BOTA’s life. All of these changes had to be approved by the WB and the BoT. Changes that impacted how the funds were to be spent also had to be approved by the Parties to the MoU.
- Continued availability of the funds was contingent not only on getting the endorsement of the WB, but also on the participation by the GoK in a five year “Public Finance Management Review” (PFMR) process designed to *“examine and analyze the country’s entire budget management process in order to formulate a comprehensive, realistic and strategic plan for improving public financial management in Kazakhstan.”*
- In a similar vein, continued availability of funds required that the GoK *“prepare and implement a comprehensive strategy and action plan to increase transparency over payments and revenues of the extractive industries operating in Kazakhstan (including oil, gas and mining) through participation in the Extractive Industry Transparency Initiative (EITI).”*
- Any of the three governments could terminate the agreement if it determined that sufficient progress had not been made in the establishment and implementation of BOTA, or in Kazakhstan’s implementation of the PFMR or EITI.
- To keep the closest tabs on BOTA’s money, as noted earlier, the governing MoU stipulated that the Foundation could only secure portions of the available funds at six-month intervals, and even then only on the basis of progress reports, a budget, and a work plan for the next six-month period approved by BOTA’s BoT, the WB, and the three governments.
- None of the funds or property of BOTA could be used for corrupt practices or to benefit *“the Government of Kazakhstan, its officials, or their personal or business associates.”*
- BOTA’s financial management system had to be established to WB standards and requirements.
- The Program Manager had to provide financial reports to the WB for approval on a semi-annual basis.



- An international standard auditor for BOTA had to be selected on a competitive basis, in a process approved by the WB, and an audit of BOTA's finances completed on an annual basis.
- Records related to financial transactions of BOTA had to be kept for five years following the end of the BOTA Program and made available to the MoU Parties and the WB.

These restrictions did not change throughout BOTA's operations.

## Board vs. Overseer Responsibilities

BOTA's Charter mirrored these MoU provisions. It essentially stipulated that the BoT had control over more routine decisions, while the three governments had to endorse all decisions that were "substantial in nature." Any change to how the money was spent, amendments to the Charter, work plans, budgets, and the release of money to the Foundation, required not only BoT and WB approval, but approval of the three governments as well.

BOTA's BoT very much relied on the WB for guidance. In most cases, the Board rubber stamped recommendations and approvals made by the WB, especially if the decision had to do with operating issues for BOTA. A rare exception occurred at the start of one of the Foundation's major programs, the conditional cash transfer program, when the WB's preference for implementing the program in Kazakhstan's poorest regions was overruled. While poverty was still an important factor, the BoT insisted that there had to be a balance between Russian and Kazakh majority regions for political reasons.<sup>31</sup> In almost every other case, the Program Manager was given free rein to design and propose programmatic options, including operating budgets, and in almost every case, the WB approved, as did the BoT.

The BoT also had final say over the size of BOTA's staff, which was initially capped at 100. With exceptions, and individuals working on service contracts rather than full time contracts, the number of staff at BOTA's peak in 2013 was over 125. The BoT also approved the hiring of the Executive Director, whose employment contract was made with IREX, but signed by the Chair of the Board. The Board also approved the hiring of the Chief Accountant, as required by local legislation. However, beyond these exceptions, the hiring and firing of staff were left up to the Executive Director of BOTA, and, in cases involving expatriate staff, IREX and Save the Children.

The Board (and the Parties) required that IREX present and implement a transition plan within a 24- to 30-month period so that five of the seven director positions within BOTA would be held by Kazakhstani nationals, with the exceptions of the

<sup>31</sup> Throughout BOTA's existence, the BoT was always sensitive to making sure that BOTA could not be accused of focusing its resources predominantly on one ethnic group or the other.

Executive and Financial Directors. This required that BOTA management actively hire, coach, and train local professionals to take over key positions from expatriates, and involve these individuals in the leadership team. This transition was expected not only to lower operating costs of the Foundation, but to ensure that the “public face” of BOTA reflected Kazakhstan to the maximum extent possible.

One of the areas in which the BoT had substantial (and final) involvement was in relation to large grants, defined as over US\$25,000. One of the foundation’s programs did have a large grant category (maximum US\$50,000 in a 12-month period) and all such grants were presented to the Board and discussed in depth. There were occasions when the BoT rejected proposed grants for one reason or another.

Investment decisions were left to the discretion of the Program Manager. However, all investments were short-term in nature, and used for BOTA programming rather than for endowment purposes.

The question of “independence” from the GoK was a constant factor in the design of the governance and management structures of the BOTA Foundation and throughout the subsequent life of the institution. The concern of the U.S. and Swiss was to avoid letting the BOTA funds wind up in the hands of GoK officials again, either directly, or indirectly through control over how the funds would be used. BOTA was to be an independent foundation, but one set up and managed by an international NGO chosen through a competitive tender, and watched carefully on behalf of the governments, by the World Bank.

While this governance and management structure accomplished its mission of protecting the independence of the BOTA Foundation, its effectiveness was called into question by almost all stakeholders. In essence, the multi-layered governance structure led to situations where the BoT’s decisions were ignored by one or more of the governments, which called the shots on all substantive matters. This was seen as strange by observers—especially when the U.S. and Swiss Parties ignored recommendations that were made by the Board in which they had official representation.

Officials at the highest levels of the Parties’ governments were involved in key aspects of BOTA’s routine activities. For example, BOTA’s work plan and budget approvals were signed personally by the Kazakhstani Prime Minister. At times, however, this caused problems. In the case of the U.S., the DoJ staff responsible for the Foundation was not particularly knowledgeable or experienced in foundation management or child welfare issues in Kazakhstan and given what was considered other pressing matters, BOTA was not seen as an urgent priority. This situation led to several instances where the Foundation’s cash flow came to a halt, and outlays for BOTA’s grant and other obligations were postponed. It should be noted, however, that usually the GoK was the most timely and responsive to requests for approvals, even if these required the Prime Minister’s signature, because that government was strongly committed to BOTA’s smooth operation.

## Sustainability vs. Spend-Down?

One of the prime indications of where the power lay in the operation of the BOTA Foundation occurred in connection with the issue of the foundation's sustainability. As a concept, the PtP idea focuses on the creation of true charitable endowments on the theory that this is the type of institution most likely to have a lasting impact on the creation of independent civil society organizations and long-term solutions to pressing societal problems. As noted earlier, the 2007 MoU that led to the creation of the BOTA Foundation made provision for BOTA to continue as a "functioning" foundation at the end of the MoU's period of operation, initially set for 5 years (MoU Article 3.2). However, no procedures were articulated in the MoU to keep BOTA going after its initial pot of funds was spent.

Given all of the effort and investment made to implement the BOTA Program, there was widespread agreement among a wide array of stakeholders, such as the WB, the Program Manager team, and of course the trained staff that ran the Foundation, that the "sustainability" provision of the MoU should be honored. Among the stakeholders interested in the future of BOTA, perhaps none was more vocal on this topic than the members of the foundation's BoT. At the October 2011 Board meeting, BOTA's Midterm Strategy was approved. Within this Midterm Strategy were two strategic objectives for the Foundation—one focused on promoting the impact and reach of current BOTA programs, and the second focused on ensuring the Foundation's long-term sustainability. When the Board approved the Midterm Strategy, it was with the proviso that the Program Manager would produce a long-term sustainability plan by the fall of 2012.

Such a sustainability plan was produced and approved by the BoT in early 2013 containing three provisions: 1) the commitment of US\$10 million of the P&C funds to an endowment; 2) the purchase of an income-producing building that would also house a scaled-down BOTA; and 3) the commitment of another US\$10 million of the P&C funds for a two-year transition period, from 2014 to 2016, during which the Foundation could raise funds for its future existence. While the BoT agreed with these recommendations, they were not approved by any of the three governments, and therefore the Foundation was forced to close its doors at the end of 2014. The chief reason for this appears to have been the reluctance of the Parties to keep a foundation named "BOTA" operational once the MoU expired and the strict control mechanisms that were in force (such as WB monitoring and IREX management) went away. There is also some anecdotal evidence to suggest that the GoK felt strongly that it had lived up to its side of the bargain by helping BOTA succeed during the five and a half years of BOTA's existence, but it had no obligation to keep the Foundation going after the MoU period, as BOTA, to some, always conjured up the memory of the source of its funds: bribes to top GoK officials.



# The BOTA Foundation:

A Model for the Safe Return of Stolen Assets?

## PART IV

### Programs and Procedures



Conditional Cash Transfer beneficiaries, Akmola oblast  
Photo courtesy of the BOTA Foundation



# PART IV:

## Programs and Procedures

This section of the case study explores the programmatic operations of the BOTA Foundation and what the Foundation has done with the resources it managed.

### Vision and Mission

Well-run nonprofit organizations, including foundations, articulate both a vision and a mission statement to guide their work, and they publicize these statements openly. The BOTA foundation followed this practice completely, articulating both a vision and a mission statement soon after its establishment in 2009 and posted both on the organization's website.

The foundation's **vision statement** envisaged a future in which:

*Impoverished and vulnerable children and youth in Kazakhstan are safe, healthy, well-educated, and able to exercise their rights and achieve their full potential.*

To achieve this, the BOTA Foundation set its **mission** as follows:

*BOTA will improve the lives of vulnerable children and youth suffering from poverty in Kazakhstan through investment in their health, education, and social welfare.*

This mission statement was based on language found in Part III of the Memorandum of Understanding (MoU) signed by the three governments, which stated that the funds available to BOTA will be used for:

*...the preparation, administration, and implementation of the 'BOTA Program', which shall constitute a program for the benefit of poor children and youth in Kazakhstan. The Funds will be utilized to support activities aimed at improving child and youth welfare, including: reducing child labor, provision of community-based services to disabled children, shelters for runaway and homeless children, improving child nutrition, promoting and developing family-based care for children deprived of parental care, raising awareness of, and decreasing, child abuse and violence, reducing juvenile delinquency, expanding youth activities and resource centers, and skills development for school drop-outs, and other such projects as may be determined by the BOTA Board of Trustees, BOTA Program Manager and the World Bank to be of benefit to poor children and youth of Kazakhstan and their families... (BOTA MoU, Part III).*



The vision and mission statements were articulated by the Executive Director of BOTA and key senior management staff, based on the MoU. Following discussions with staff and the Board of Trustees (BoT), they were ultimately approved by BOTA's BoT and remained in force throughout the life of the foundation.

The BOTA Foundation also developed a mid-term strategy, written in 2011, with a goal towards maximizing foundation impact, program integration, and sustainability. A key feature of this strategy was the goal to “manage its available assets to improve the poverty and welfare status of over 100,000 poor children and youth nationwide” through the foundation’s core programs. To ensure program integration, the strategy identified four key target areas as cutting across BOTA’s three programs:

1. Maternal and child health (MCH), including pregnant and lactating women and other reproductive health considerations;
2. Early childhood development (ECD);
3. Child protection (CP), including youth in crisis and disability; and
4. Youth livelihoods (LLH).

## Program Activities

The "BOTA Program" was stipulated in the MoU and consisted of three main offerings: a Conditional Cash Transfer Program (CCT); grants to NGOs (the Social Service Program, or SSP); and scholarships to impoverished youth for vocational training or university degrees (the Tuition Assistance Program, or TAP).

***The Conditional Cash Transfer Program (CCT).*** CCT was BOTA's main vehicle for returning the money made available to the Foundation, with more than US\$56 million of the available funds given to poor households through CCT grants. The program was implemented by BOTA staff in conjunction with four local NGO partners and more than 2000 volunteers. CCT provided direct grants, training, and support to over 150,000 individuals living in 95,000 households in six of Kazakhstan's 14 regions. Besides offering eligible households supplemental cash payments, meant to address short-term household needs, CCT was designed to address conditions aimed at breaking the medium to longer-term cycle of poverty—increasing access by poor families to health, education, and social services. The program delivered regular cash payments to three categories of beneficiaries within poor households—those with children aged four and over until they were eligible to start school; pregnant women, or women with infants up to the age of six months; and households who had children with disabilities up to the age of 16—as well as to a fourth category of target beneficiaries consisting of young people aged 16-19 who had completed school and had not yet found employment. BOTA was one of the only foundations in the world to operate an income supplement program of this sort—a function more typically undertaken by governments to reduce poverty.

All payments were done electronically directly to beneficiary bank accounts to eliminate the possibility of middle-man "leakage." The CCT payments, equal to about US\$30 to \$45 a month per household beneficiary, were "conditional" in that the beneficiaries (or their parents) had to take actions associated with their category in order to receive payments. Parents of 4-6 year olds had to send their children to preschools, for example, while pregnant women had to go for health check-ups. Beneficiaries had to meet these "hard conditions," as well as "softer" accompanying measures (such as attending nutrition, parenting, and family planning seminars). BOTA staff and their partners and volunteers monitored, and delivered, tens of thousands of hours of training to beneficiary households. Participation in CCT was completely voluntary.

***The Social Service Grant Program (SSP).*** The SSP was also a very innovative program for Kazakhstan. It gave grants to local NGOs to help poor and vulnerable children, youth, and their guardians in a wide range of areas—e.g., to improve the lives of disabled children, promote preschool education, and reduce youth suicide (Kazakhstan has one of the highest per capita youth suicide rates in the world). NGOs were also funded to provide youth leadership and business training, reduce baby abandonment (Kazakhstan's orphanages are full of children with living parents), and provide BOTA's target groups a range of other opportunities. SSP had a long menu of grant types NGOs could get depending on their interests and expertise. About 75% of SSP grants were around US\$25,000, given to local NGOs to actually provide social services. All in all, SSP used about US\$12.5 million from the P&C account to fund more than 600 NGO projects, which in turn directly benefited some 50,000 Kazakhstani children and youth. Complementing this funding was a robust NGO training program: BOTA worked with IREX and Save the Children to offer workshops designed to help NGOs improve their technical and management effectiveness.

***The Tuition Assistance Program (TAP).*** The TAP program used about US\$10 million of BOTA's funds to give full university or technical college scholarships to over 800 disadvantaged youth. The idea of TAP was to break the cycle of poverty within households by providing higher education and skills to young people who otherwise would likely only be qualified for menial jobs. TAP staff gave all students individualized support and life skills training, which helped keep the program's student retention rate at around 90%. An innovative aspect of TAP was that all students had to spend 20 hours in an academic year volunteering in community service assignments—e.g. working with SSP grantees, sometimes at old age homes or at orphanages. This was considered by all a chance for TAP students to "give back" while gaining valuable work and people skills. Many TAP students logged hundreds of hours volunteering, as they immensely enjoyed and benefited from the experience. Getting good jobs was the underlying goal of the program, and many students had secured these as the BOTA program wound down.

**Program Development.** The activities of the BOTA Foundation did not change from its inception until its closure, but following the development and approval of the Foundation's mid-term strategy in 2011, the activities became increasingly more integrated and complex. For example, SSP developed “inclusivity” grants to benefit CCT beneficiaries who were disabled. SSP grantees provided volunteer opportunities for TAP scholarship holders to complete their required 20 hours of community service. CCT became increasingly active in distributing TAP applications, resulting in several instances of youth from CCT households winning TAP educational grants.

## Accomplishments

The BOTA Foundation surpassed most of the expectations that its founders had in mind for it. BOTA was able to efficiently and effectively return the vast majority of its resources (US\$115 million—the original US\$84 million plus accrued interest) to poor Kazakhstani children, youth and their families. The proportion of funds spent for grants was higher than expected, while the proportions for direct program costs and administration were lower than expected. Close to US\$80 million—nearly 69% of the total funds—were disbursed directly through BOTA's three programs to poor children, youth, and their families. About 15% of the funds were spent on direct program costs, and only 15.6% were spent on operations and overhead (including the costs of an independent evaluation). Every dollar spent for BOTA was transparently accounted for, and BOTA's annual audited financial statements were published on the foundation's website.

While the initial design of BOTA envisioned that the Foundation would help around 75,000 people, and the 2011 strategy plan envisioned that it would help 100,000, by the fall of 2014, more than two and a half times that number—208,000 poor children, youth and their families—had been assisted, as reported in **Table 1** below. As indicated, CCT beneficiaries were more than 100% greater than the 2011 target; SSP's were 78% greater; while TAP served 16% fewer beneficiaries than expected.

**Table 1: Beneficiaries of BOTA Foundation Programs as of Fall 2014**

Sector	Maternal and Child Health		Early Childhood Development (ECD)		Child Protection (CP)		Youth Livelihoods (LLH)		TOTAL Beneficiaries	
	2011 Target	Actual 9/2014	2011 Target	Actual 9/2014	2011 Target	Actual 9/2014	2011 Target	Actual 9/2014	2011 Target	Actual 9/2014
CCT	23,000	50,072	34,000	74,470	7,000	8,635	6,000	21,064	70,000	154,241
SSP	2,000	2,221	2,500	2,524	13,500	26,119	12,000	22,708	30,000	53,572
TAP	-	-	-	-	-	-	1,000	841	1,000	841
<b>TOTALS</b>	<b>25,000</b>	<b>52,293</b>	<b>36,500</b>	<b>76,994</b>	<b>20,500</b>	<b>34,754</b>	<b>19,000</b>	<b>44,613</b>	<b>101,000</b>	<b>208,654</b>

Beyond these direct accomplishments, BOTA's activities have had broader impacts as well. In particular:

- BOTA's CCT Program is serving as the basis for a pilot program that could lead to restructuring how social assistance is delivered in Kazakhstan, including using many former CCT volunteers as intermediaries between citizens from poor households and state provided services to increase access and usage.
- The TAP leaves behind hundreds of graduates who are on their way to breaking the cycle of poverty through finding gainful employment. TAP also piloted an institutionalized volunteerism program, which is the basis for a new US\$48 million World Bank supervised program in Kazakhstan called "Youth Corps"—which is also funded with recovered "disputed assets."
- Through the SSP, BOTA strengthened hundreds of child welfare NGOs, which in turn provided services to tens of thousands of beneficiaries. Moreover, SSP engendered the "birth" of many new social service NGOs, gave a broad spectrum of such NGOs their first experience in managing small, medium, and large-size grants, and led in 2014 to the creation of the first national coalition of social service organizations, supported by an exit grant channeled through UNICEF with a mission to continue the type of work funded by BOTA.

BOTA's work was subject to a range of internal and external checks. The WB, which supervised the Foundation's finances and programmatic work for the U.S., Swiss, and Kazakhstani governments, was continually satisfied with BOTA's progress. From 2009 on, BOTA received clean financial audits by a WB-vetted firm.

BOTA was independently evaluated extremely positively by a well-respected social research firm called Oxford Policy Management (OPM). The evaluations, which can be found [here](#), "confirmed that the BOTA programs have been implemented across all three activities with high levels of effectiveness for those that receive the benefit, and BOTA has been having a positive impact on recipients across all three activities."

## Investment Management

As noted earlier, due to concerns over government ability to gain control over the BOTA resources, BOTA did not receive an endowment. Rather, the asset to which it was entitled under the three-party agreement was kept in the P&C bank and invested, earning interest over time. BOTA itself invested money not immediately needed for programming purposes in short-term interest-bearing bank accounts, earning approximately US\$500,000 over the 5.5 years of its life.

BOTA took care to ensure that the banks in which it deposited these investments were majority foreign controlled. This was a requirement set by the MoU clause on prohibited use of the funds, which stipulated that BOTA's money could not benefit the GoK or business associates of GoK officials. Due to close ties between the banking sector and the GoK, BOTA had an extremely limited set of foreign-controlled banks it could work with; WB and DoJ approval of these accounts was required.

## Operating Procedures

**Transparency and Public Notice Practices.** Given the care that was taken to establish strict oversight procedures, BOTA went to great lengths to promote transparency in its operations and activities, using its website, social media, corporate magazine, press conferences/interactions with media, and annual reports to disseminate information about its activities, values, grantees, and beneficiaries, and about problems connected with poverty/child and youth welfare. Key decisions made by the BoT were made public via the Foundation's website, and the FAQ section of the website addressed questions such as where BOTA received its money and salary ranges for staff. BOTA had a dedicated department for communications and external relations to coordinate these transparency initiatives. More opaque were decisions made by the three governments, especially on questions related to sustainability of the Foundation.

Key features of BOTA's transparency and public notice practices included:

- **Website.** BOTA established an accessible website in three languages (Kazakh, Russian, and English) soon after its founding.
- **Mission statement.** The Foundation's mission statement was made available in the FAQ section of the website starting in 2009.
- **Grant guidelines.** Educational grant (scholarship) guidelines were published starting in April 2009, when the first scholarship competition opened. NGO grant guidelines were published October 2009, the date of first grant round opening. Both sets of guidelines in three languages were available on BOTA's website throughout the life of the foundation.
- **Annual reports.** BOTA published an annual report from 2009 to 2013. It did not publish such a report for 2014 as there were no foundation staff in 2015 to prepare this following the foundation's closure in December 2014.
- **Annual conferences.** BOTA's SSP had an annual conference to promote networking and information sharing amongst all of its grantees from 2009 to 2013. CCT had a knowledge/lessons-learned roundtable in 2014 to which practitioners, donors, and NGOs were invited. A BOTA-wide national conference was held in 2013 to increase public and donor awareness of the Foundation's innovations and lessons. All of these were well covered by Kazakhstani media.
- **Grantee lists.** BOTA routinely published the list of its NGO grantees on its website starting in 2010. However for privacy reasons, the Foundation did not publish the list of over 800 youth that were awarded educational grants.



- **Board of Trustees.** Names and short biographies of BOTA's BoT were published on the foundation's website. Information on how Board members were selected was available in the FAQ section of the website, as were decisions of the Board following BoT meetings. This information was available from 2009 through 2014.
- **Advertising.** BOTA benefited from free advertising of its activities and program announcements on national and regional TV outlets, radio and newspapers due to the Foundation's close working relationship with GoK—in this case, the Ministry of Information.
- **Other outlets.** BOTA held press conferences on an average of twice a year from 2009 through 2013, and supplemented these by issuing press releases in connection with important events such as results of grant rounds. BOTA also published a magazine in Kazakh and Russian (subsequently translated into English) to highlight BOTA programs, successes, and challenges in child and youth welfare in Kazakhstan. It had an active Facebook page and a YouTube channel where its many programmatic videos were available. BOTA and its programs were also regularly featured in local TV news magazine shows.

Publicity and public notices in regard to decisions made by the three governments in relation to BOTA were not the norm either before or after the Foundation became operational. Decisions on BOTA's funding requests or any matters related to BOTA's operation and future, including its 2012 Sustainability Plan, were not publicized. Approximately one year after BOTA's closure, in December 2015, the U.S. DoJ issued a press release celebrating the successful completion of the BOTA asset repatriation titled "Justice Department Settlement Successfully Releases More than \$115 Million in Alleged Corruption Proceeds to People in Kazakhstan;"<sup>32</sup> this press release included the final reports on BOTA prepared by the Executive Director and the final report on BOTA prepared by the World Bank.

**Conflict of Interest Provisions.** BOTA maintained a strict conflict of interest policy consisting of two parts:

- **General prohibition on conflict of interest.** Representatives of the BOTA Foundation, including staff and board members, their family members, and entities in which they have material financial interest, were required to avoid conflicts of interest in the implementation of programmatic and operational activities of the Foundation. In this regard, the following situations were prohibited:
  - Provision of goods and/or services for the Foundation other than those performed under the Executive Director's official agreement (consultancy, volunteer agreement, etc.);

<sup>32</sup> See: [justice.gov/opa/pr/justice-department-settlement-successfully-releases-more-115-million-alleged-corruption](https://www.justice.gov/opa/pr/justice-department-settlement-successfully-releases-more-115-million-alleged-corruption).

- Employment by any organization that has received, or may receive, a grant/contract from the Foundation;
  - Application for, or receipt of, grants, CCT transfers, and/or other programmatic allowances from the Foundation by staff;<sup>33</sup> and
  - Receipt of financial or other material remuneration, services, and/or gifts for Foundation work/activities except official salary or other payments by the Foundation (e.g. against employment agreement, volunteer or service agreement, etc.).
- **Prohibition on interaction with the Government of Kazakhstan.** The property of the Foundation or funds provided under the BOTA Program could not be used to make payments, extend grants, etc., directly or indirectly, to or for the benefit of the GoK, its officials, or their personal or business associates, except in the instances of social insurance and pension funds payments made on behalf of individuals by the Foundation, payments to public educational institutions under the TAP, ecological tax, and payments for normal use of postal services of KazPost. In all other instances, representatives of BOTA were required to get a clearance from the Executive Director before interacting with government structures, establishments, and/or officials in their implementation of programmatic and operational activities of the BOTA Foundation.

These policies were established in 2009, the first year of BOTA's operation. There were clarifications made on the second area in regard to interacting with representatives of the GoK. With the agreement of the World Bank, a distinction was made between individuals that worked for the GoK that were involved in making government policies and groups like teachers, social workers, university administrators, etc., that were employed by the state and involved in helping improve the lives of BOTA's target population but were not policy makers. The latter group could benefit from trainings and be involved in NGO grantee projects as it was impossible to be involved with the delivery of social services without the occasional or frequent engagement with these categories of government employees.

There was strict monitoring of both aspects of BOTA's conflict of interest policies. Because of the source of the funds, the Foundation had a zero tolerance attitude towards any behavior that could be construed as a conflict of interest (COI) or unethically benefiting staff or board members—who were required to sign COI statements upon joining the Foundation. BOTA's Director of Administration was charged with oversight of the first aspect of the COI policy. The entire management of BOTA, especially the Executive Director, was in charge of monitoring the Foundation's ac-

<sup>33</sup> After discussion with the World Bank and the BoT, it was decided that it was not a conflict of interest for CCT volunteers (who monitored adherence of CCT beneficiaries to conditions and provided trainings) to be CCT beneficiaries. Volunteers were given a small stipend to cover cost of transport and food while performing their work.

tivities and programming to ensure that GoK officials in no way benefitted from BOTA funds. This was also closely monitored by the WB. Exceptions were made based on agreements by the WB, BoT, and the three governments. For example, BOTA received permission to work closely with the Ministry of Labor and Social Protection on a pilot project that employed BOTA CCT volunteers to connect CCT beneficiaries with government-provided employment-boosting services.

The Foundation did experience one theft of funds by employees stationed in a regional office. Thanks to a whistleblower, followed by intensive internal investigation by BOTA staff and IREX, the theft was discovered, the employees in question were fired, and the accused parties were investigated by the police, convicted in court, and ultimately required to pay back all funds. There was also one case of fraud by the director of a SSP grantee, who used BOTA funds for personal use. In this matter as well, there was a court case, a conviction, and the Foundation recovered all of its funds. Given the origin of the Foundation's capital and the need to strictly enforce a zero-corruption policy, these cases were taken extremely seriously by BOTA staff, the BoT, the WB and the three governments. Interestingly, the perpetrators of the CCT embezzlement and SSP fraud seemed to think that BOTA and its stakeholders would look the other way in the case of these thefts to avoid negative publicity, while the situation was the exact opposite.

# The BOTA Foundation: A Model for the Safe Return of Stolen Assets?

## PART V Implications and Lessons



Enrolling BOTA beneficiaries, Issyk, Kazakhstan  
Photo courtesy of the BOTA Foundation





# PART V:

## Implications and Lessons

A number of important implications and corresponding lessons flow from this BOTA experience for the PtP strategy of handling the return of stolen assets through the creation of an independent charitable foundation.

### **Lesson 1: Proof of Concept for PtP**

***BOTA provides "proof of concept" for a foundation model for safely and responsibly returning corruption assets to a country's needy citizens.***

The transaction that led to the creation of BOTA was the seizure of a bank account in Switzerland that was suspected of being associated with money laundering and bribery. To be sure, some of the circumstances surrounding the BOTA case were unusual (e.g. the fact that there was only one owner of the subject bank account—the Government of Kazakhstan (GoK)—and that that owner, for largely political reasons, was ultimately willing to forfeit its rights to the funds in order to establish an independent foundation). But while this precise set of circumstances may not recur often in the future, similar circumstances are not hard to imagine in the all-too-common situations where corruption is so endemic that returning stolen assets to even a new government is highly likely to lead to misuse, or where popular pressures make it desirable for political leaders to agree to a similar arrangement.

From the evidence at hand, the BOTA Foundation fundamentally met all three of the key goals it was established to achieve: 1) spending the funds available in the frozen Swiss bank account in a highly controlled, time-bound manner for the benefit of children and youth in Kazakhstan; 2) excluding GoK officials and their associates from benefiting from the funds or influencing how they were spent (in part by allowing civil society representatives to play a governance role); and 3) creating sustainable models that would advance the delivery of social services in Kazakhstan. Outside of the six month extension to the originally agreed five-year period for spending down the funds, the US\$115 million available to BOTA from the Swiss account were spent down in a timely manner—with no apparent government interference, and with good effect.

## Lesson 2: Ramp-Up Possibilities

***BOTA also provides proof of concept for the idea that a foundation can efficiently and responsibly deploy significant resources in support of valid social-purpose goals in a constrained timespan and thereby spend down the resources made available to it.***

A key requirement placed on the BOTA Foundation by the MoU that led to its establishment was that the Foundation spend down the funds that came to it quickly. While there were some doubts about whether a foundation could accomplish this given the start-up requirements of establishing a new institution, in practice it did so very close to the deadline originally established. A key to this achievement was the Foundation's development of the Conditional Cash Transfer Program through which it distributed targeted cash assistance to needy Kazakhstani families. Whether this or some other mechanism is used, this experience highlights the feasibility of this goal.

## Lesson 3: External Fund Management

***In situations where the recovered corruption assets under consideration for placement in a PtP-type foundation are substantial and concerns exist about the potentials for misuse if they are parked in domestic institutions, a viable solution is to place these assets into an external financial management institution that can make agreed shares available in accord with specified conditions. Such an arrangement can also make it possible to take full advantage of the time and effort needed to establish a well-run charitable foundation by extending the life of the institution so long as it meets pre-set performance indicators.***

The BOTA Foundation experience not only proved the point that it is possible to spend tens of millions of dollars that emanate from corruption efficiently, effectively, and honestly, but also that housing the assets in a “holding vat” outside the country where the corruption occurred is a workable way to protect these assets from coming under the control of undesirable elements. In BOTA's case, the core of the corpus was kept in the Swiss bank in which they had been deposited and were drawn down only as needed and justified by the Foundation, with the consent of its Board and external overseers. Similar arrangements with even more effective asset management could also be imagined—such as housing the assets in another foundation with a history of effective asset management or outsourcing fiduciary responsibility to a large international accounting firm that would report to the Board and be responsible for regular financial checks before funds are released. This would make it more likely to be able to take advantage of the time taken to create a foundation, establish procedures, and amass experience and contacts and not have these dissipated due to artificial deadlines or inefficient asset management.



## Lesson 4: Outside Management

*An external manager can be very helpful in operating a PtP foundation arising from the repatriation of stolen assets.*

The BOTA case also highlights the advantage of vesting the management of a PtP foundation, at least during an extended start-up period, in an outside management team if concerns exist about safeguarding the funds and where local capability or experience in operating such an institution is limited. In BOTA's case, an international tender was conducted in which a reputable international development organization was selected to implement and manage the foundation's program, with widely considered good effects. The total cost for this arrangement over the five plus years of the foundation's operations was about US\$11 million, equal to approximately 10% of the total money available for repatriation. Whether such arrangements are needed in other similar cases would depend on factors such as:

- **Local capacity.** Is there an existing local foundation or large NGO with substantial grants management experience that could be trusted to manage millions of dollars transparently, accountably, and efficiently?
- **Programming mix.** Is the programming mix anticipated not overly complex, or are there local organizations with knowledge and experience in the field selected for the foundation's work?
- **Politics.** Is it possible to identify a local organization that is seen as neutral and respected by national stakeholders and able to withstand pressures from all sides—government, civil society, and even business.
- **Cost.** Are the costs of having an international program manager reasonable in proportion to the overall amount of money to be managed?

## Lesson 5: The Importance of Business and Civil Society Engagement

*Despite their legal and other constraints, settlements of stolen asset recovery cases are also potentially open to citizen and other stakeholder pressures that can lead to alternative return mechanisms—such as starting a PtP foundation—and this option can usefully be made a part of the negotiations from the outset.*

A key to the success of the BOTA arrangement was the political pressure that the president of the country was under to find a solution to what had become a national and international political embarrassment. This pressure arose in part from domestic civil society and media building on publicity about the case generated abroad. Also at work was the eagerness of Kazakhstan leaders to retain a positive international reputation for probity in order to continue to attract international investment. This made the reluctance of both the U.S. and Switzerland to agree to a

simple return of the stolen funds to the Government of Kazakhstan doubly powerful—it meant that Kazakhstan faced a potentially difficult and lengthy negotiation that could further tarnish the President’s political reputation and threaten the country’s economic attractiveness to investors. Pressure from citizens and investors thus played crucial roles in making a PtP outcome a “win-win” outcome for everyone.

## Lesson 6: Honest Brokers

***“Honest brokers” can be highly useful in putting PtP deals together.***

A key actor in the creation of BOTA was the World Bank, which played the role of “honest broker” among the three governments involved in the creation of the Foundation and then lent a crucial hand both in fashioning the resulting MoU and in overseeing the day-to-day operation of the Foundation. While the World Bank has special features that make it an ideal broker in these situations by virtue of its reputation for probity and the huge stake that countries have in its good will and financial assistance, other organizations are also possible, such as the United Nations Development Program, the OECD, the IMF, the Asian Development Bank, the Inter-American Development Bank, and the European Central Bank, to name just a few.

## Lesson 7: Adaptation of Local Legal Framework

***While the legal and governance structures of future PtP foundations emerging from the recovery of stolen assets should be tailored to local laws and procedures as much as possible, achieving the ultimate objective of ensuring that corruption assets are repatriated transparently, accountably, and for the benefit of citizens may require non-customary legal and governance measures.***

BOTA was a hybrid institution. It was created as a result of an international treaty among three countries, yet it was set up as a registered organization in just one of these three countries. Though a Kazakhstan entity subject to local foundation legislation, it was nevertheless freed from some local legal requirements in order that it be compliant with the MoU that created it. Making clear from the outset that such deviations from established practice may be necessary should thus be made clear from the outset to avoid unfavorable results.

## Lesson 8: Appropriate Supervisory Structures

***BOTA’s top-heavy supervisory structure should be avoided, if possible, for future PtP foundations. While corruption controls are important, they should be as efficient and workable as possible.***

BOTA’s governance structure was heavy. With a local board, the World Bank, and three governments to report to, there were excessive layers of oversight, which ultimately was often not helpful or efficient. The heavy oversight was the result of how

BOTA was created—by lawyers working for the U.S. and Swiss governments and the World Bank, seeking to put in place every precaution they could imagine to insulate BOTA's funding from corruption risks. However, it was clear even to these governments that the high degree of oversight was not efficient—especially when BOTA experienced cash flow problems and had to delay grant payments.

Of the three oversight mechanisms—the World Bank, the foundation's Board, and the three governments—oversight by the World Bank was the most benign, operating more in a partnership mode than a command-and-control mode. The weakest link in BOTA's governance structure were the three governments, which generally were extremely slow to respond to approval requests, resulting in predictable cash-flow problems all too regularly. The governments were mostly represented by lawyers skilled in the laws governing the restitution of stolen assets, but lacking operational experience in the management of development aid programs.

If countries returning stolen assets legitimately want to ensure the wise and lawful use of the resulting assets by use of a PtP-type foundation mechanism, they might usefully consider the following options:

- Placement of representatives of governments returning assets on foundation Boards of Trustees, but with the decisions of these boards made final;
- Vesting of responsibility for monitoring such foundations in agencies familiar with the subject matter of the foundations;
- Outsourcing fiduciary responsibility over the PtP foundation to one of the large international standard accounting firms that would monitor foundation operations and be responsible for regular financial checks before funds are released; and
- Procedures allowing Board decisions to go into effect if overseer entities do not respond within certain time periods.

## Lesson 9: Multi-stakeholder Governance

***PtP foundations resulting from the restitution of stolen assets must be equipped with governance structures that ensure the engagement of respected and independent citizens selected through open processes and provided with effective training on the appropriate roles, responsibilities, and duties of board members.***

The BOTA governance structure made ample provision for the vetting of potential Board members and the recruitment of relevant stakeholders, including in particular prominent civil society leaders who could help legitimize the foundation and ensure effective visibility for its activities. This was achieved by giving all three Parties to the MoU responsibilities for nominating and approving Board members, and by

equipping the two outside parties, Switzerland and the U.S., with seats on the Board itself with the power to remove local Board members who performed poorly. While these procedures worked well in guaranteeing the probity of the Foundation's operations, it became clear not all the Board members had the same level of interest, commitment, or knowledge about the areas of the foundation's work, or about how a foundation board is supposed to operate. This points up the need—especially in countries, like Kazakhstan, where there is little tradition of effective board governance—for training PtP foundation board members in their proper roles and ways to make their involvement meaningful and constructive.

## Lesson 10: Contextually Relevant and Uncontroversial Mission

***Having an easily understandable, uncontroversial, and critically important mission based on a priority of key government officials and/or other stakeholders in a target country will be key to the successful adoption of a PtP foundation.***

BOTA's mission was to improve the lives of vulnerable children and youth suffering from poverty in Kazakhstan through investment in their health, education, and social welfare. This mission was well aligned with the Government of Kazakhstan's own social development priorities and the needs of poor households in Kazakhstan. Much of the focus of BOTA was piloting new approaches and solutions to development problems, including through the Foundation's flagship CCT program, as well as building up the capabilities of natural allies in the NGO sector in the effort to improve child and youth welfare. By focusing resources on Kazakhstan's vulnerable children, youth, and their families, BOTA was able to meet the overall objectives of the three founding Parties, model new approaches to solving development problems, and engage in activities that could be easily understood and supported by local citizens and interested observers worldwide.

## Lesson 11: The Need for Transparent and Effective Operating Procedures

***PtP foundations, particularly those arising from the recovery of stolen assets, must have strong and comprehensive transparency and conflict of interest procedures.***

Having an easily understandable, uncontroversial, and critically important mission is a necessary condition for the successful operation of a PtP foundation. But it is not sufficient. That mission was be clearly articulated and effectively transmitted to all relevant stakeholders. What is more, this must be supplemented by effective conflict of interest procedures capable of giving citizens confidence that the organization is operating in a fair and legitimate fashion.

The BOTA Foundation was assiduous in promoting the transparency of its operations, using its website, social media, corporate magazine, press conferences and

other interactions with media, and annual reports to disseminate information about its activities, values, grantees, beneficiaries, and problems connected with poverty and child and youth welfare. BOTA had a dedicated department for communications and external relations to coordinate these transparency initiatives.

In addition, the Foundation put in place strict conflict of interest provisions to prohibit all forms of self-dealing by those involved with the foundation, to exclude payments from being made to the GoK or those affiliated with it, and to make all grant competitions and decision processes visible and open. BOTA also took pains to have these provisions rooted firmly in its legal structure and founding documents.

All of these precautions and protections paid off well for the Foundation, giving it an unusual level of visibility and credibility locally. And they are necessities for any PtP foundation in the future as well.

## Lesson 12: Innovation

***BOTA's experience suggests that PtP foundations can, and should, be innovative in their programming and not necessarily be bound by tried and true strategies pursued by existing foundations.***

One of the great strengths of charitable foundations is their freedom to innovate, to find novel solutions to long-standing problems, and to act on them. From the evidence available, the BOTA Foundation made good use of this strength. Two of BOTA's three programs—NGO grants and scholarships—were fairly standard development interventions. But Conditional Cash Transfers (CCT), the third BOTA program, was unique for a foundation to undertake and fairly complex to design and implement because of the conditionality of the grants and the resulting need for monitoring to ensure that the conditions were being met. It was through CCT, however, that 70% of BOTA's grant funds were returned, to the benefit of 150,000 individuals. Scaling up CCT allowed BOTA to have a substantial impact and remain within an agreed administration-to-grant cost ratio. Even in its more traditional grant programs, moreover, BOTA's rigorous procedures and willingness to support innovative organizations allowed it to stand out as a model and helped it to foster similar follow-on activities.

## Conclusion

The BOTA Foundation was, by-and-large, a very successful undertaking. Funds emanating from corruption, meant to enrich Kazakhstan's political elite, were repurposed to assist more than 200,000 poor children and youth, and spent in a transparent, accountable way. While there were problems—for example with top-heavy controls, a less-than-effective board, and insufficient support to achieve its strategic objective of institutional sustainability—the BOTA Foundation stands out as a useful example of how a PtP foundation can not only solve difficult problems related to the disposition of stolen assets, but also serve as a model for how other contested assets owned or controlled by governments can be handled in ways that deliver important benefits to citizens.



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# The BOTA Foundation:

## A Model for the Safe Return of Stolen Assets?

## About the Author

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Aaron Bornstein is an anti-corruption expert with expertise in creating and leading the first foundation in the world established with funds from a U.S. Foreign Corrupt Practice Act settlement—the BOTA Foundation. From 2011 through the end of 2014, Aaron was the Executive Director of BOTA Foundation, the largest child and youth welfare support institution in Central Asia, where he was in charge of government and board relations, strategic visioning and execution, operations oversight including budget control, and representation to a diverse set of stakeholders. He has managed technical assistance and grants programs around the world dealing with diverse topics such as improving governance, child and youth welfare, and higher education strengthening. Throughout 2016 Aaron collaborated closely with PtP and Professor Lester Salamon on writing this case study on BOTA, and a "how to" paper on stolen asset return, expected to be published in 2017. Aaron has also been a consultant to the Stolen Assets Recovery Initiative of the World Bank and other nonprofit organizations.

## About the PtP Project

**Directed by Lester M. Salamon** | [p-t-p.org](http://p-t-p.org)

The Philanthropication thru Privatization (PtP) Project seeks to promote an option for the creation of independent charitable foundations around the world by capturing all or a portion of an assortment of "privatization" transactions involving the transformation of publicly-owned or -controlled assets into private wealth. The Project has thus far identified over 550 foundations with assets over US\$155 billion that have emerged from such transactions, including some of the largest foundations in the world, such as the Volkswagen Foundation, the King Baudouin Foundation, the Nippon Foundation, the 200 U.S. health conversion foundations, and the enormous Italian foundations of banking origin. The PtP Project is directed by Dr. Lester M. Salamon, a professor at the Johns Hopkins University and director of the Johns Hopkins Center for Civil Society Studies. Administrative and technical support for the Project is provided by the East-West Management Institute (EWMI). For more information about the PtP Project, visit [p-t-p.org](http://p-t-p.org).

