

## Möbius Strip

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**Are you in any way involved in a public foundation? Then please read on. If not, then feel free to do something else. Foundations do not have stockholders. Nor do they have members. From a legal perspective foundations are closed bulwarks. The board calls the shots. Public foundations do not exist, even though the nation sometimes believes that they do. At a 'public foundation' the board also calls the shots. This may be different with public limited corporations. The nation is then the stockholder.**

The nation can have a special relationship with a foundation. Sometimes this is based on a care agreement; sometimes it is based on the law. The instance of a care agreement is actually the best. There is question of reciprocal equality. The foundation supplies services for the benefit of the nation or society and receives a fee for it on the basis of an agreement. If the nation does not pay the foundation then the foundation stops supplying the services. The nation cannot influence the policy and the course of affairs, other than by determining the content of the agreement. As a foundation you can say yes or no to this.

If you receive a subsidy as a foundation then it is a very different story. A subsidy does not create equality. As a foundation you depend on a subsidy. There is no such thing as a right to subsidy. On Curacao there is not even certainty of subsidy for the coming year for most of the foundations. From the perspective of continuity this is often very difficult for the board. You often need to enter into obligations that cover multiple years. It becomes even more difficult if a foundation qualifies as a 'public foundation' according to the National Corporate Governance Ordinance. This is the case when the nation has the statutory right to appoint one or more board members or members of the supervisory board or if the nation also has the right to amend the bylaws. As the occasion arises certain legal acts of the nation with regard to the said foundation are subject to a prior opinion of the Corporate Governance Adviser. For instance, if the officer or supervisor must be nominated by the nation then the Adviser must first ask the government for an opinion. The same applies to an amendment of the bylaws, at least if the bylaws include that the nation must give prior consent to the amendment of the same. And this is where the truth is revealed. The nation (and also the Corporate Governance Adviser) would like these kinds of public foundation to adopt the so-called model bylaws. The board can resolve on this. Is the nation (only) entitled to appoint one board member of a foundation then this kind of amendment of the bylaws depends on whether the other board members, not appointed by the nation, are willing to do this. If they give it a proper thought then the chance is considerable that they do not have this willingness. After all, the model bylaws include that the nation appoints *all* board members. After the amendment of the bylaws the nation then has the exclusive right in case of vacancies. In the pocket! This does, for that matter, not mean that the nation also has the power within the foundation, like the power within a public limited corporation where it holds all the stocks. Even if all the board members of a foundation were appointed by the nation, they adopt their resolutions on the basis of the bylaws and without having to accept any instruction of those who appointed them. Then does this mean that they can independently amend the bylaws again in order

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that the nation again loses the right to appoint all board members? Unfortunately not. It is a one-way relationship. Because the same model bylaws state that any amendment of the bylaws is subject to prior consent of the nation. Hence, you never get rid of it anymore.



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