

**8th Biennial Conference of the Caribbean Ombudsman Association**  
**Theme: Human Rights, Good Governance and the Ombudsman**

**“Corporate Governance And State-Owned Enterprises”**

Speech by

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Ladies and Gentlemen!

First of all, I would like to thank the Curaçao Ombudsman, Alba Martijn, for inviting me to speak at this conference. Unfortunately, she will leave office in about a month. She did an excellent job, and her professionalism, dedication and impartiality leave a lasting legacy. Thank you Alba!

I have only half an hour, so I won't travel back in time to the early days of mankind. I just start with Plato (427 - 347 B.C.E.). You may have heard of this philosopher. And of 'Platonic love' of course. Plato himself mistrusted and generally advised against physical expressions of love.

Ladies and gentleman, we are real people. Human beings of flesh and blood. We are no zombies! So I imagine that Plato would have advised people like you and me: “govern yourself, put restrictions on yourself, and do whatever is necessary to avoid lust and temptation”.

Yes, those were the earliest days of good governance!

Plato mentioned with regard to 'good governance' four cardinal virtues namely: *prudentia* (prudence), *justitia* (justice), *fortitudo* (courage, strength) and *temperantia* (temperance, self-control). Although these virtues were originally intended for public governance they are just as relevant to all economic sectors including the private sector.

At that time the term good governance meant more than merely 'doing good things'. It was all about 'doing things' in a proper institutional context with effective checks and balances as we would say nowadays.

Our - current - practice shows that those so-called cardinal virtues are under pressure in a society characterized by the race for profit and personal success. However, it is also good to know that during the Greek-Roman antiquity those virtues were 'reserved' for a small elite class: the upper layer of a strict authoritarian society.

Even in the Rome of the first century BC in which the well-known phrase *Senatus Populusque Romanus (SPQR)* - the Senate of the Roman populace - acted as the official name of the Roman Empire, and which could be found as an inscription on public buildings and triumphal arches, we cannot ignore the fact that the governance wasn't in the hands of the Senate and the population: the Senate consisted of the 'distinguished', the aristocrats (the socio-economic elite), had most of the power and had to approve the resolutions of the representative body of the people.

So much for other times, now back to ours. The current reality seems to be denied by politicians in general, especially those holding office. I must confess that I am skeptical about uplifting talk by politicians about being "transparent", about "hope and trust", about "promoting good governance", about "integrity". The rhetoric is real though. The government and many others are spending a lot of time reiterating their commitments at conferences as well as in declarations and working papers. But much of their supposed effort is just smoke and mirrors; the reality is quite disappointing.

### **Why is good corporate governance necessary?**

Let's now turn to the subject of good corporate governance. Basically, corporate governance is about the structures and processes for the direction and control of a company.

Corporate governance is intended to increase the accountability of a company and to avoid massive disasters before they occur. It is held that good corporate governance helps companies operate more efficiently, improve access to capital, mitigate risk and safeguard against mismanagement.

According to the International Finance Corporation of the World Bank Group:

*"It makes companies more accountable and transparent to investors and gives them the tools to respond to legitimate stakeholder concerns such as sustainable environmental and social development. Corporate governance also contributes to development. Increased access to capital encourages new investments, boosts economic growth, and provides employment opportunities."*<sup>1</sup>

This of course is just as relevant to state-owned enterprises (SEOs). The Organization for Economic Co-operation and Development (OECD) has issued guidelines (Guidelines on Corporate Governance of State-owned Enterprises) on this matter, which state:

*"The state should act as an informed and active owner and establish a clear and consistent ownership policy, ensuring that the governance of the state-owned enterprises (SOEs) is carried out in a transparent and accountable manner, with the necessary degree of professionalism and effectiveness. (...) The government should not be involved in the day-to-day management of SOEs and allow them full operational autonomy to achieve their defined objectives. (...) The state should let SOE boards exercise their responsibilities and respect their independence."*

The OECD believes that policies should be formulated so that it is clear how the government should behave as shareholder. The basic principles of transparency and accountability to the state (the public) should be adhered to, with the government taking a professional and results-

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[http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/corporate+governance/overview/why+corporate+governance](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/corporate+governance/overview/why+corporate+governance)

oriented approach. The OECD Guidelines are the international benchmark with respect to corporate governance.

The government:

- should not be involved in the daily management of the enterprise (day-to-day business) and
- should allow the enterprise full operational autonomy.

Policies should be formulated that:

- make it clear how government will behave as shareholder;
- adopt the basic principles of transparency and public accountability; and
- encourage the government to adopt a professional and results-orientated position.

### **The state of affairs in Curaçao**

Ladies and gentlemen, according to Confucius: "*It is not difficult to recognize the good, but difficult to turn it into deeds.*"

I will now talk about state-owned companies ('NVs') in Curaçao but my argument is just as relevant to state foundations as well as to other parts of the Dutch Caribbean.

Some five years ago, corporate governance rules came into force which were designed to protect companies from politicians, in particular from the government. Government-owned companies should be kept out of the political sphere as much as possible, so that they may benefit from commercial, businesslike and market-oriented management. In doing so, they also run less of a risk of being milked or used as political toys.

One would expect the Curaçao government and Members of Parliament to adhere to the rules and more in particular the principles of good corporate governance as laid down in the Curaçao legislation and as promoted by the OECD.

Unfortunately, this is not the case. There are several politicians who want more, rather than less, political influence on state-owned entities. These politicians want to continue (and keep to continue) appointing their friends or other persons they consider loyal to their party instead of loyal to the public at large.

Being a director of a government-owned company is certainly not always easy. Neither is being a shareholder in a government-owned company. The directors will usually complain that there is too much influence from politicians, while conversely the politicians will argue that they have too little influence over government-owned companies. This conflict raises two principal concerns that ought to be considered:

- Where are the boundaries between the government and the market?
- How much distance should there be between government and government-owned companies?

Let us first consider the boundaries between the government and the market. Which activities should be considered as duties of the government and which can be left to the market? Generally speaking, there is a consensus of opinion that the government should regulate

public interests through legislation and regulations (for instance consumer protection). As a result, to use an example, the government shouldn't have to nationalize bread production in order to guarantee that this daily necessity remains affordable, though it may effectively control affordability by means of price regulation.

What the government calls 'policy' will usually relate to its public duties: those duties must be carried out by the government via law and regulations according to public law and precisely not as shareholder of a state-owned company.

However, as we have seen with the banking crisis, there are sometimes special situations where it is necessary for the government to intervene (for example, the government in The Netherlands has become shareholder of ABN Amro Bank and Fortis Bank Nederland (which merged in 2010)). However, even with this intervention the starting point is that the government will eventually dispose of these shares again. There is no reason to keep these shares in the hands of the government indefinitely.

But what about the second question: how much distance should there be between government and government-owned companies? It has been my opinion for many years already that government-owned companies should be kept out of the political sphere as much as possible. In other words, government-owned companies must be managed and run commercially from a business perspective. There are several reasons that support this argument:

- Politicians are too busy to concern themselves with business operations
- Politicians have no powers of judgment regarding “business” matters
- Politicians manage from a social perspective and undermine the business aspect
- The involvement of politicians risks too much party-political interference, which puts the company's integrity in danger

The direct participation by political parties in the supervisory board and board of directors increases the influence that politicians have on the government-owned company. As a result, political parties indirectly exert influence on important decisions within a government-owned company, including:

- Appointments
- Recruitment of staff
- Tendering processes

Politicians promote member loyalty by giving away positions within the government-owned company, and this phenomenon has been a concern in Curaçao for quite some time.

It is probably true for most government-owned companies that their activities originally belonged within the remit of regular governmental duties. At some point, these activities were grouped together, forming one united organization (often some form of legal spin-off), concluding with the creation of a publicly held company (NV) which then oversees those activities.

It is my opinion that a government-owned company is no longer part of the public sector, but (apart from matters regarding concessions, licenses and other public interests) must be safeguarded against, and be able to function independently from, direct or indirect politically determined government influence, with the exception of the influence that directly ensues from the business position of the government as shareholder.

The Director of a state-owned company (especially the one who wants to operate as an independent professional) often hasn't got it easy. He is stuck between on the one hand

- (i) a government usually active as a shareholder and by Supervisory Directors appointed by the same government (often at least as active), and on the other hand
- (ii) the multi-headed "*interest of the company*" which he is supposed to serve and which consists of a multi-colored palette of partial interests (continuity of the business, interests of employees, creditors etc.).

As far as I am concerned the government should make a clear choice: either activities are carried out in the form of a public service and under the direct responsibility of a minister (and then everybody is a civil servant) or activities are carried out in the form of a company (NV or BV), but then they must be kept as much as possible outside the political sphere of influence.

The current situation has a hybrid nature: the company form was indeed chosen but with the retention of as much political influence as possible. This situation is unhealthy and sometimes leads to considerable tension.

When the role of the Supervisory Directors is taken into consideration one cannot get away from the impression that some (current and former) Supervisory Directors stretched the supervisory duties imposed on them by law and by the articles of association quite a lot. Not seldom do they appear to sit in the Director's chair or they consider the Director as someone who is supposed to follow blindly the instructions of the Supervisory Board or even of individual Supervisory Directors.

Some Supervisory Directors in a manner of speaking spend more time in the company office than the Director himself or they drop in on a Director many times a day to discuss business. Those types of situations are unhealthy. It also impairs the autonomous performance of the Management Board.

On top of that, there are some supervisory Directors who inform the political party, which put them forward as a candidate, about their activities. This doesn't sit well with corporate governance and is in contravention of the duty of secrecy they have where confidential information is involved. There was even a politician who stated openly that he gave 'his' Supervisory Directors specific instructions about what they had to do or not to do. Such practices should be stopped.

Ladies and gentlemen, we do have corporate governance legislation in place in Curaçao. Unfortunately, this legislation is primarily about processes, about the rules of the game. And in addition, there are no sanctions in the event of a violation by the government.

The National Ordinance concerning corporate governance of Curaçao (*Landsverordening corporate governance*) and the Corporate Governance Code (*Code corporate governance*) cannot prevent political appointments being made.

Transparency International stated in its *National Integrity System Assessment: Curaçao 2013*: "*Public companies and public foundations face important issues with transparency and accountability, and neither the letter nor the spirit of the corporate governance code in place is yet fully observed.*"

There is a growing recognition of the universality of the principles of good corporate governance although political realities may express them in different ways or with different

priorities. But again, the OECD Guidelines are the international benchmark with respect to corporate governance.

One of the central challenges (in Curaçao and elsewhere) is how to restore the government's integrity. It has become a bad habit to replace managing directors and supervisory directors each time the government changes party. That bad habit still exists. It must be changed!

Generally speaking, the core business of an Ombudsman is about 'good governance'. According to Ontario Ombudsman André Marin: "*The Ombudsman can serve as a bulwark of democracy in troubled times, protecting citizens and helping government to improve in the face of a tough economy and fiscal constraint.*" (Annual Report 2009 - 2010).

Good corporate governance in relation to state-owned companies and good public governance are leaves of the same tree: they are both about conscientious behavior, integrity, transparency and accountability.

Who owns the state-owned company? In legal terms, the state does, meaning the government is in control of the voting rights attached to the shares. But who owns the government? We do, the people; it's not the other way around. The government doesn't own the people! The government is accountable to the people. Parliaments represent the people, but Ombudsmen in particular are charged with safeguarding the interests of the public. It is not without reason that an Ombudsman is also known as a 'public advocate'.

So even if state-owned companies fall not within your mandate, by investigating complaints in other areas and subsequently reporting to the government and the public in general, you may help governments to improve their behavior in general.

Ladies and gentlemen, I conclude with a quotation from Plato: "*There will be no end to the troubles of states, or of humanity itself, till philosophers become kings in this world, or till those we now call kings and rulers really and truly become philosophers, and political power and philosophy thus come into the same hands.*"

Ombudsmen are probably not the new philosophers, and they are certainly no Kings, but they are for sure important watch dogs of democracy. We are counting on you!

Thank you very much!