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Beschadigd vertrouwen: vertrouwenwekkend schadebeleid na door de overheid gefaciliteerde schade

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Summary

Damaged trust. Building trust through compensation policies after government-facilitated damage
(Beschadigd vertrouwen. Vertrouwenwekkend schadebeleid na door de overheid gefaciliteerde schade: Engelstalige samenvatting)

For the sake of the public interest, governments initiate or facilitate projects and policies to encourage growth and development; these projects or policies may in turn cause damage for a group of citizens. ‘Damage’ in this sense can encompass all kinds of suffering and may describe various consequences of government actions. Damage may be physical, for example, but also financial or intangible: any adverse consequences that citizens may experience as a result of government policy. In projects involving many parties and interests, there is a high chance that citizens will suffer unexpected damage. This can also harm the trust citizens have in their government, because in their view the government is acting in an unpredictable and possibly incompetent and unjust manner. *How can government create trust-building compensation policy if it has facilitated damage for a group of citizens as part of a large-scale infrastructure project, for the sake of the public interest?*

Based on existing literature, this research first constructed a theoretical framework of trust-building compensation policy. *Chapter 2* reviewed literature on increasing trust in government, based on the definition of trust as ‘a psychological state comprising the intention to accept vulnerability based upon positive expectations of the intentions or behavior of another’¹. From literature focused on features of reliable and trustworthy government, four categories or characteristics could be distilled that citizens may use to determine whether their government can be deemed trustworthy. First of all, citizens expect a reliable government to do what it says it will do and to keep its promises (*predictability* and *openness*). A reliable government must also provide information and signals to indicate it is functioning efficiently (*efficiency* and *effectiveness*). In addition, citizens develop trust when the government seems to listen to the priorities set by citizens, and to listen in a timely manner (*responsiveness* and *timeliness*). Finally, citizens trust a government that shows that it is willingly committed to a fair and equal treatment of its citizens (*justice* and *benevolence*).

Chapter 3 provided an overview of literature on the needs of victims during claim settlement processes. First, victims desire *recognition and compensation* for the damage they have suffered. Citizens expect their government to protect them and hold it to account; acknowledgement and recognition may be offered

1 Rousseau et al. 1998, p. 395.

through apology; financial compensation may also provide a sense of recognition. Second, the way in which victimized citizens are treated during claim settlement processes, their *perceived justice*, has a major effect on the satisfaction and trust of those citizens. Victims want opportunities to participate, and wish to be treated with respect. They benefit from a relatively simple procedure with sufficient guidance, clear and targeted communication, a central claims office, and a flexible and cooperative approach during damage assessment. In addition, some victims will want to seek the judgment of independent decision makers. Finally, victims have a need for *information*, including clear explanations and accountability, and for *meaning*, a coherent story through which people can process what happened; they want their preoccupation with the damage and claims to be settled as soon as reasonably possible.

Chapter 3 also set out the Dutch legal framework for dealing with damage. Citizens may request compensation by reason of a wrongful act (*onrechtmatige daad*), or by reason of no-fault state liability (*nadeelcompensatie* and *planschade*). Receiving compensation can however be complicated for citizens, since they have to determine, among other things, whether damage is (un)lawful, who has directly caused the damage, and which court might have jurisdiction. Government can therefore also decide to create a special compensation scheme or to compensate citizens through voluntary allowances (*onverplichte tegemoetkomingen*), which lack a legal framework so that more generous rules may be applied. Since all government payments are ultimately borne by the treasury, an over-generous attitude should nevertheless not be expected. At the same time, for those projects where government has facilitated damage for the sake of public interest, it seems reasonable for citizens to expect that same government to distribute the burden on society somewhat equally. Moreover, in such situations, the government may want to achieve more than just damage repair; the citizen-government relationship has also been harmed, so government could feel called on to commit itself to restoring trust.

On the basis of this literature focusing on the characteristics of a reliable or trustworthy government and the needs of victims during claims settlement, a theoretical framework of trust-building compensation policy was compiled in *chapter 4*. By combining the trust-building properties from *chapter 2* and victims' needs from *chapter 3*, I arrived at six principles of trust-building compensation policy: recognition, participation, comprehensibility, openness, independence and timeliness. In this context, seventeen underlying policy instruments were also identified, which the government can put to use if it intends to pursue these principles.

Chapter 5 discussed my research method. I applied the qualitative method of process tracing, where the aim is to arrive at a carefully composed narrative of a case. For my research, this meant compiling how compensation policy was created in the cases and whether trust-building principles and (policy) instruments could be identified, based on as many sources as possible. The chapter therefore reflected on the operationalization of compensation policy and trust in government and the sources that were analyzed. The empirical part of this research is based on a comparative analysis of three cases with a variance in outcome: in one case the project's organization and the facilitating government seem to have been

able to restore the trust of local residents (construction of the North/South metro line in Amsterdam), in the second the outcome is more mixed (expansion of Schiphol Airport), and in the third the government's compensation policy seems to have resulted in a loss of trust in government (seismicity after gas extraction in Groningen).

The construction of the Amsterdam metro line from the North to the South of the city was described in *chapter 6*. Construction was delayed for many years, cost three times as much as budgeted, and caused subsidence through leaks in sheet piles. Despite the setbacks, in 2009 the municipality, in line with the advice of the Veerman Committee, decided to continue with the project and made efforts to restore the trust of local residents by dealing with damage proactively and leniently. The new approach resulted in improved relations between the neighborhood and the municipal organization in charge of the project. This was the case where most trust was recovered; the majority of identified principles and instruments of trust-building compensation policy were also applied. Those involved with the case attribute the restoration of trust through the compensation policy to the improved communication and dialogue (participation), openness and transparency (openness), and the central claims office (comprehensibility and independence).

The environment around Schiphol Airport experiences considerable noise nuisance, as described in *chapter 7*. The national government expected financial damage for surrounding citizens on the eve of the expansion of the airport via its fifth runway, and government took a proactive approach by crafting a compensation protocol and central claims office. Government also decided to invite the involved parties to the table to reach consensus-based agreements on harm reduction and nuisance. This interactive setup between government, airport and local residents was regarded as a success: agreements were reached and many of the airport's neighbors were compensated. However, the agreements came under pressure as the airport's operations intensified more quickly than anticipated. In this case, compensation policy seems to have restored some trust, but to a limited extent; although measures were taken to combat noise nuisance, some of the residents living in the vicinity of the airport continued to be inconvenienced. The strongest effects on trust seem to have been achieved through the use of public participation and the attempt to reach consensus at the 'Alders table' (participation) and the independence of both the claims office (Schadeschap luchthaven Schiphol), the foundation aimed at improving the living environment (Stichting leefomgeving Schiphol), and of the experts involved (independence). Although an attempt was made to make policy more comprehensible, this often proved difficult due to the complex subject matter so that improvements were only made gradually.

Gas extraction in Groningen, the focus of *chapter 8*, unexpectedly caused major damage due to extraction-induced earthquakes. Although government was involved in claims settlement on the sidelines and set up all kinds of agencies, it only actively intervened in compensation policy after many calls for leniency and generosity towards the people of Groningen. The trust of Groningen residents in their government has declined during this period, while government expressed its commitment to restoring that trust multiple times. The relative successes achieved

in compensation policy were often the result of victims seeking judicial review; however, government also decided to implement a reversed burden of proof which eased the processing of claims and acknowledged the position of Groningen's citizens as blameless victims. Cautious improvements in the settlement of claims under public law are now visible, especially concerning participation and comprehensibility; in addition, the introduction of an independent claims office and standardized, more expeditious compensation ensured that claims were handled in a more trustworthy manner. However, the laborious reinforcement operation and the long time it took for public law claims settlement to get up to speed caused a great deal of dissatisfaction and mistrust of the government.

Based on a comparison of the three cases, the construction of the Noord/Zuidlijn, the expansion of Schiphol airport, and gas extraction in Groningen, a number of conclusions were drawn in *chapter 9* about the principles and policy instruments that arose from my literature review. First of all, government can try to regain trust by recognizing its role in having caused the damage. If the government has facilitated damage, citizens will expect it to then help shape compensation policy. Sticking to regular, fairly strict liability law, which assumes that everyone bears one's own damage and in principle points to the private actor as the perpetrator, will not help restore the relationship between citizens and government. Although government is of course free to apologize, this action has less of an effect than actually *exhibiting* change and improvement; the absence of an apology does not seem to stand in the way of restoring trust if changed behavior is observed. A financial contribution from the government can be desirable if this leads to more generous standards and can lead to satisfaction among citizens. However, government does not have to take on all financial debt to restore trust. Citizens will expect that the private actor that caused the damage will also contribute financially and thus also acknowledge responsibility. Citizens expect their government to strive for a fair distribution of the financial burden. Finally, the government can offer citizens recognition and acknowledgment of their damage and ensure a simpler claims settlement process by, in principle, placing the burden of proof – as much as reasonably possible – on the actor that caused the damage instead of on the victims.

Second, government could provide citizens the opportunity to participate in compensation policy. This can be done by including opportunities for participation as part of the decision-making with regards to the compensation policy, so that the needs of citizens are taken into account and mutual understanding can arise. This can be organized through institutionalizing 'critical friends'. Trust can be increased when victims are given the opportunity to participate as part of the claims settlement procedure, so that they may share their experiences and stories. Although governments may be inclined to make decisions based on consultation with all concerned, it is not advisable to seek consensus. If damage has occurred and will continue to occur, it will be difficult to get all parties to agree; the democratically legitimized government must ultimately weigh all interests and make its decision.

The third principle is that the government must ensure a comprehensible compensation policy. The explanation of policy choices is important, not only so that people then cognitively understand the policy – which reduces their uncertainty

– but also because explanation can give them more proper understanding as to the design and implementation of the compensation policy, so that they can adjust expectations about the claims settlement process. Government should aim to communicate with citizens in an individualized manner, preferably not through the use of a ‘one-way street’, but by setting up a dialogue through various participation options while decreasing the burden for victims so that they know what is expected of them. Additionally, government can appoint civil servants to serve as guides or counselors – not just points of contact – for victims. Although it costs money to also guide citizens with more simple claims (‘simple’ from the perspective of the government), proper and holistic assistance and guidance is highly appreciated by citizens. This may even decrease spending, as citizens can more easily find their way through the claims settlement process, preventing delays and potentially legal action. The last step to make compensation policy more comprehensible is to set up a single central claims office. From the citizen’s perspective, this will form a clear place to take their issues and problems; additionally, it can keep complicated liability issues away from citizens, as the government can attempt to solve these in the ‘back office’ without burdening citizens with specifics.

The fourth principle is aimed at an open attitude on the part of the government regarding both (risks of) damage and compensation policy. If citizens understand how compensation policy is made, they better comprehend how and why the government has decided to deal with the damage. Citizens may also better monitor the influence of the (liable) private actor. In addition, the government would do well to communicate openly about the risks of further damage. Painting a rosy picture of the risks will likely result in disappointment and surprise as soon as damage occurs; citizens much prefer to know where they stand. To improve a sense of openness, government can arrange for independent research into (further) risks, so that information comes from a (more) reliable source. Being open, also about risks, reduces uncertainty among citizens and gives them a sense that any possible future damage as well as the claims settlement procedure are more predictable and manageable.

Fifth, the government can make an effort so that decisions during the claims settlement procedure are taken or guided as much as possible by independent third parties. Since technical and legal considerations, such as causality and attributability, are often a necessary part of damage appraisal, it is strongly recommended that these considerations and appraisals are not executed by the actor(s) that caused the damage. It is also important that independent experts are not obliged to conform to protocol or procedure as drawn up by the party that caused the damage, at least not to such an extent that they cannot avoid the appearance of partiality. Citizens who have doubts about appraisals or decisions should have an easily accessible option to request a second opinion. This second opinion can be offered by an independent complaints advisory committee (*bezwaaradviescommissie*) or arbitrator. In addition, there should be a way for citizens to easily access judicial review, so that they may easily request an independent judgment from the judiciary if they have lost trust in the executive authority that facilitated the damage.

Finally, the sixth principle is that of timeliness. It is imperative that the previous five principles do not result in a lengthy claims settlement procedure. Government

should actively focus on expeditiousness: it should help citizens decrease their sense of uncertainty regarding the damage and claims settlement procedure as quickly as possible. It can encourage promptness by including reasonable time limits during claims settlement, which means that citizens must be given sufficient time to prepare and submit a well-considered application as well as that government itself is bound to act within the period it has promised. A reasonable term is therefore also a realistic term: depending on the complexity of the damage and the number of expected claims, government must determine what can be considered doable and workable for both citizens and government itself. Especially in the event of complicated or large-scale damage, this will likely mean longer periods of time than the six weeks that are considered a regular timeframe in Dutch administrative law. The government may focus on accelerating the process by standardizing damage appraisal in the event of large numbers of comparable victims with relatively smaller damage. Although it might be attractive to paint a rosy timeline for the compensation policy, this is often counterproductive. In order to help citizens adjust their expectations and to reduce uncertainty, the government should communicate and adhere to a realistic timeline about both the project that caused the damage and the claims settlement process.

These six principles of trust-building compensation policy, shown in figure S.1, reinforce each other if they are taken into account in the design of compensation policy, but they may also sometimes clash. In particular, timeliness is often compromised as a procedure includes more (legally) prudent characteristics, offers more opportunities for participation, or opportunities to request a second opinion. The principles must therefore always be seen in context; a government can make its compensation policy most trust-building by looking at it as a whole, instead of splitting it up into parts or (policy) departments. From a citizen's perspective, 'the government' has (partially) caused damage, so 'the government' must also remedy it as reasonably and properly as possible.

The restoration of trust in the case of the North/South metro line can be connected to the transformed, generous and holistic compensation policy that the municipality of Amsterdam implemented, which scored well on almost all six principles and seventeen instruments. In the case of Schiphol Airport, the number of victims was reduced through various preventative measures and compensation policy, but satisfaction about the policy was reduced due to shortcomings and trust was not restored for some residents who experienced insufficient recognition, comprehensibility and openness. The reticent government policy after induced seismicity due to gas extraction in Groningen, in which few of the principles could initially be recognized, caused a deep breach of trust. Only recently does trust seem to be improving due to an emphasis on the independence of the bodies in charge of the claims settlement process.

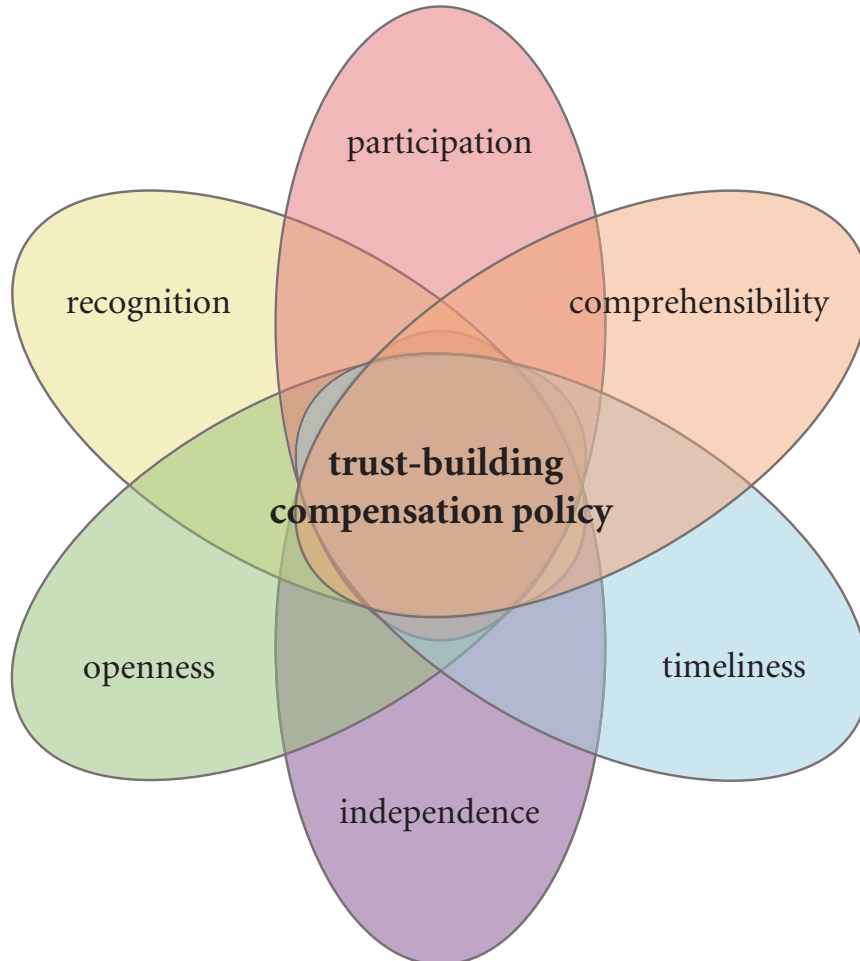


Figure S.1 Relationship between six principles of trust-building compensation policy.

In the comparative analysis, compensation policy most often appears to fall short on the principle of timeliness: attention to (legal) prudence and extensive claims procedures almost automatically result in a fairly tedious claims settlement process. A core problem can also be identified for the other principles within the context of my research into facilitated damage: recognition may lack because government directs claims to the private actor for fear of (financial) liability and setting a precedent; participation is insufficiently efficient because the government adheres to hierarchical relationships and formalizes participation processes; comprehensibility is absent if the government assumes (too much) self-reliance on the part of the victims; openness is avoided as government fears it will cause unrest if it were to discuss uncertainties; and independence is overlooked when

government believes itself to be unbiased so that it decides on claims, or considers offering a second opinion unnecessary or unnecessarily expensive.

The relative importance of the principles therefore has to do with contextual factors. The presence of a private actor and the degree of cooperation or even entanglement of public and private interests may cause citizens to strongly desire their representative governments to recognize their damage and suffering when facilitated damage occurs. This effect is strengthened as the damage becomes more drastic: victims will very much want to feel seen by their government. When there is a relatively higher degree of potential entanglement between the interests of government and private parties, victims will pay closer attention to the principles of independence and openness. Openness is also vital if uncertainties remain about the development of future damage. In the event of large-scale damage and large numbers of victims, a complicated claims settlement process usually arises; in these situations, comprehensibility and timeliness appear to be of great importance so that victims sense they are not just 'one of many' but that their individuality is recognized. If there are different groups of victims with differentiated types of damage, it is key to work on comprehensibility of the claims settlement process. Finally, government would do well to focus on participation opportunities during the entire claims settlement process so that it can continue to adjust its policies to the expectations and preferences of (different groups of) victims.

Although there may be reason to focus more on certain principles and instruments depending on contextual circumstances, my comparative analysis demonstrates that the most successful trust-building approach consistently paid attention to elements of all six principles. Trust-building compensation policy therefore requires an integrated and holistic approach.