

## Summary

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The trigger for this study is the settlement of the damage caused by the flood disaster in Limburg in July 2021. The State applied the Wts for the reimbursement of the damage at that time and this application was evaluated in 2022. This evaluation revealed that the damage settlement did not go well in a number of ways. This was firstly related to the systematics of the Wts: the process of drafting ministerial regulation(s), determining by whom and for what damages a Wts allowance could be obtained, was not very transparent and it took a long time. Victims, on the contrary, were in dire need of clarity and quick settlement. Second, the actual implementation was slow and complex compared to the method of settlement and speed that insurers could offer. Third, it turned out that many individuals and business owners did not have insurance coverage. The latter has improved. Since 2021 the damage to houses caused by the flooding of so-called regional water defenses<sup>1</sup> next to small rivers, streams and channels, canals and lakes is better insured than before. However, there are still important gaps in the insurability of other flood risks and earthquakes, about which more below. Victims felt left out in the cold; this was also related to the sometimes substantial damages people were left with.

The main question of the present study is whether the Wts in its current form is future-proof, also in case of disasters caused by extreme weather or climate change and considering the insurance possibilities. The second main question of this study is whether there are good reasons to make the current Wts applicable in the Caribbean Netherlands: the islands of Bonaire, St. Eustatius and Saba (the BES).

Both questions are answered in the negative, but for the Caribbean Netherlands (the BES) it is recommended to create a special arrangement outside the Wts.

To answer these questions, first, in Chapter 2, the Wts was analyzed to identify any bottlenecks in the law. That analysis shows that the Wts has a limited scope in light of its purpose. The law is intended as a structural solidarity safety net for uninsurable and unrecoverable disaster damage. This purpose is twofold: 1. to provide a scheme by which victims can find (limited) reimbursement for damage that is not insurable and not recoverable and 2. to provide a general legal framework, which can promote legal certainty and equality.

The Wts lists three flood risks as the disasters the Wts primarily provides for, in addition to major earthquakes: freshwater floods that result from the overflow of regulated water defenses (for example dikes), freshwater floods that result from the failure of regulated freshwater defenses under pressure and flooding of areas where there are (as yet) no water defenses (Article 1, sub *b* Wts). However, the central government has discretion to apply the Wts also to other disasters (Article 3 Wts), particularly in the instance of a saltwater floods. Whether and to what extent the Wts will then be applied, is decided by Royal Decree. Article 3 only offers room if there is a disaster (in the legal sense of Article 1 Wvr), if that disaster is of a similar order to the freshwater floods or earthquakes mentioned in Article 1 Wts and if there is a large number of people affected. For risks other than the freshwater floods and earthquakes regulated in the Wts, it is therefore uncertain whether the Wts can and will be used via the route of Section 3 Wts.

Then, in Chapter 3, all documented experiences and evaluations of the six applications of the Wts were analyzed and non-applications of the Wts were considered. This analysis shows that

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<sup>1</sup> See par. 2.4.3.

the Wts deployments in large-scale disasters (in 1998 and in 2021) and also some non-applications, led to critical reactions and questions among victims and among professionals.

In the first place, this concerns the uncertainty about the deployment of the Wts by the government. In some events this caused social upheaval, for instance in cases in which the Wts was not deployed because, in the government's opinion, there was no disaster or legal grounds for exclusion were applied. Also, uncertainty is caused by the complexity of Article 1 (sub *b*) Wts: in some disasters this has resulted in delays before it became clear whether and on what grounds exactly the Wts could be deployed.

Second, even in cases where the Wts did apply, the damage and cost categories of the Wts were perceived by victims as too limited. In particular in the July 2021 water damage in Limburg this point of attention emerged (in addition to the evaluation points mentioned above) with regard to victims who had become in financial distress due to double housing costs. A one-off arrangement was introduced in 2024 specifically for this purpose.<sup>2</sup> In our broad analysis of disasters and major events for which the Wts was not deployed, double housing costs and, in addition, the loss of working capacity in case of physical injury and the loss of livelihood for surviving relatives in case of death emerge as forms of damage that are limited or even not reasonably insurable and may call for social solidarity. These damages can arise again, among others, in the scenario where flood defenses are overloaded by water and collapse, resulting in homes becoming temporarily uninhabitable.

Third, the invocation of some grounds for exclusion under the Wts has raised critical questions from injured parties and professionals. The exclusion ground for 'reasonably insurable' damages (Article 4, section 3, at *a* Wts) is assessed (predominantly) objectively. This has the risk that victims in a vulnerable financial position cannot derive any claims from the Wts, even if taking out insurance specifically for this target group cannot be required of those involved due to limited financial capacity. This is difficult to reconcile with the rationale of the Wts. It raises the question whether more leeway can be provided in the Wts specifically for this target group (with limited financial capacity), for instance in the form of a hardship clause. Our analysis further shows that the assumption of personal responsibility, which is at the forefront of the Wts, is problematic and requires attention in view of the consequences of climate change.

In disasters with a human cause, the Wts has never even been applied due to the exclusion ground for recoverable damages (Article 4, section 3, at *b* Wts). Although the damage was declared recoverable, due to reasons outside the Wts (in particular the lack of adequate third-party insurance), this proved not to be the case or to be very limited.

An important fourth point, which has frequently led to critical questions in the past, concerns policy consistency. In several cases, under political and social pressure, the central government has made *ad hoc* arrangements that are at odds with the limits of the Wts, often stating that the exception was a one-off. This is not in conformity with the purpose of the Wts to ensure legal certainty and equality. Moreover, this may reduce the incentive for insurers to offer insurance and may affect the choice of citizens and entrepreneurs to obtain insurance (which then indirectly undermines the safety net character of the Wts).

Chapter 4 assessed the future resilience of the Wts in the light of the current climate insights as well as the insurability of disaster risks. That analysis shows that the assumption of personal responsibility, which is at the forefront of the Wts, is problematic and requires attention in view of the consequences of climate change.

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<sup>2</sup> Decree of 5 June 2024, no. 5462324, concerning the announcement of a policy rule for the one-off arrangement for victims in financial distress (Beleidsregel financiële nood als gevolg van de wateroverlast in juli 2021), *Stcrt.* 2 July 2024. See para. 3.2.6.5.

Insurability is key here, as the Wts chooses insurance to be its starting point. The Wts requires private individuals and entrepreneurs to take out insurance, but the risks of earthquakes and of flooding of primary defenses (in case of high waters of the major rivers and/or flooding from the sea) are (virtually) not insurable. If this leads to material damage, to houses and furniture for example, the Wts is, as things stand, virtually the only possible damage modality. Insurers cannot or will not bear these risks alone and, in short, the State is unwilling to act as a reinsurer: the probability of flooding of primary flood defenses is not high, while, if it occurs, it will involve very large damages and will only be insurable at relatively high premiums.

This was estimated quite differently when the Wts was introduced in 1998: the danger of flooding of the major rivers and lakes would become manageable and thus insurable with the strengthening of the dikes. This has turned out to be an underestimation, which means that the Wts has to cover the failure or overflow of primary flood defenses, without the possibility for victims to be insured *en masse*.

The Wts can only be used for these uninsurable flood risks through the discretionary provision of Article 3 Wts. As these risks become more frequent in the coming years, that uncertain route will gain relevance. This is problematic from the perspective of victims; they will not know where they stand in the chaotic post-disaster situation. This uncertainty about a possible reimbursement scheme from the state can simultaneously discourage insurers from making these risks insurable (and may also discourage potential policyholders from taking out insurance).

Another point of interest concerns the concept of freshwater flooding (Article 1 at *b* Wts). This is highly technical and complex in design and, in the light of the purpose of the Wts, looks unnecessarily restrictive: freshwater floods caused by runoff water from outside the Netherlands or by damaging a flood defense or by drought damage are excluded from the Wts. Our recommendation is that a possible revision of the Wts should opt for a more neutral and somewhat broader wording of Article 1 Wts for freshwater floods, which is also disconnected from the numerical flood probabilities mentioned in the current Article 1 Wts. For example: 'the overtopping of waters in the Netherlands in the absence of regulated flood defenses or in the event of overflow, collapse or failure of these defenses'. This broadens the applicability for freshwater risks that have a higher probability of occurrence than currently stipulated by Article 1 at *b* Wts. Floods of Dutch waters that are caused by runoff water from neighboring countries (such as in 2021) are also covered by this newly proposed wording, as well as causes that have led to the failure of flood defenses, such as damage or deterioration of dykes. This further enhances the transparency of the legal text with regard to deployment in respect of freshwater risks.

No leads were found in this study for possible extension of the disaster concept of the Wts to damage caused by heavy rainfall (as in flooded streets) or other extreme weather situations. Such damage is generally insurable. Furthermore, such an extension could negatively affect the choice of individuals or entrepreneurs to insure themselves for these risks.

Also in view of the bottlenecks identified in Chapter 3, we explored in Chapter 5 the (theoretical) possibilities of insurance as an alternative solution to disaster damage. This shows that there is no reason why insurers should not be able to bear uninsurable disaster damage with the help of the state. In line with this, in Chapter 6 we looked at surrounding countries, where public-private cooperation in support of insurance has worked relatively well for years. Based on this, Chapter 9, offers further insights from multiple perspectives into insurance models that can serve as alternatives to the Wts.

Here lies a fundamental choice for politicians; based in part on our analyses in Chapters 2 through 6, we see two options. The first option is to retain the Wts as a structural safety net for disaster damage. In that case, three adjustments to the Wts can address important gaps in the future-proofing of the law. First: an expansion of Article 1 Wts to include (causes of) freshwater floods other than those currently mentioned in the legal text (whereby an open, neutral wording in the aforementioned sense is our preference). Second: extension to some forms of damage that make the Wts more broadly applicable in the event of disasters, namely double housing costs, the loss of working capacity in the event of injury, and the loss of maintenance for surviving relatives in the event of death, insofar as the damage is not reasonably insurable. The relief may be further limited by standardizing amounts and capping income. Furthermore, if the Wts is retained, thirdly, it is advisable to take measures that can speed up and make more flexible the implementation of the Wts immediately after the disaster in the form of advance payments, lump-sum amounts of damages and compensation percentages. Even apart from these three points, it remains essential that the deployment and application of the Wts be consistent and consequential, which means treating (requests for) *ad hoc* compensation outside the Wts with prudence and restraint.

The second option is to replace the Wts with insurance. This will only work if there is mandatory insurance, either in the form of a new insurance policy or as a mandatory surcharge on an existing policy, such as homeowners insurance (which, given the practice of mortgage lending, is *de facto* mandatory, but is strictly voluntary). This requires legal intervention, preferably with disaster coverage as broad as possible. Since this option most meets the goal of providing a structural solution to disaster damage, we have considered it in more detail in Chapter 9.

The second part of the central research question, whether there are good reasons to make the Wts applicable in the Caribbean Netherlands, is addressed in Chapter 7. Our starting point is that disaster victims in the Caribbean Netherlands need equal protection compared to disaster victims in European Netherlands; principally there should be no difference in this regard. To that extent there are no principled reasons to deviate from the policy premise of compliance (and thus applicability of the Wts in the Caribbean Netherlands). We did note, however, that the Wts is not designed well for the scale and the kind of disaster risks in the Caribbean Netherlands and its meaning and relevance would be limited if it would be made applicable.

In at least two respects, it seems more appropriate to us to create a regulation outside the Wts that is tailored to uninsurable and unrecoverable damage caused by disasters in the Caribbean Netherlands, but that offers at least the level of protection of the (revised) Wts.

First, the heart of the Wts, the disaster concept of Article 1 Wvr, does not allow for impactful events where there is no coordinated deployment of various emergency services. Consider natural fires, heavy rainfall leading to water damage (such as on Bonaire in 2022) and storm damage (especially on Statia and Saba): in principle, these fall outside the scope of the Wts, even though, given their insularity and small scale on the islands, they can lead to major and far-reaching consequences on the BES.

Second, the risks of natural disasters for the Caribbean Netherlands (in particular extreme weather and saltwater risks) are on a different plane than the disasters primarily covered by the Wts (in particular freshwater floods due to the failure or overflow of regulated flood defenses). Applicability of the Wts (compliance) would be tantamount to letting the discretionary provision of Article 3 Wts apply. This is accompanied by legal uncertainty for victims and, in

addition, the possible use of Article 3 Wts for damage caused by extreme weather in the Caribbean Netherlands could set a precedent for the application of the same provision in the European Netherlands (the Wts has so far not been applied to large-scale damage caused by extreme weather without involving flooding).

Also, in light of the exclusion of 'reasonably insurable' damage in the Wts, the insurance market on the BES requires special attention. In theory, the prospect of (the possibility of obtaining) a state contribution could put a 'brake' on any further developments of the insurance market on the BES. For the design of any disaster damage scheme for the BES, it is important to closely align it with the insurance possibilities for potentially affected parties. There is catastrophe coverage on the BES, but for whom exactly it is significant, to what extent it provides protection and at what cost (including for the financially vulnerable target groups) is unclear. That market, in which there are hardly any, if any, European Dutch insurers, therefore has potentially important implications that could not be fully considered in the present study. It is recommended that further research be conducted in this area of the insurability of disaster cover on the BES, as this is beyond the scope of the present study (and the questions underlying it).