

INTERSOL 2010



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FROM POLLUTER PAY TO OWNER PAY PRINCIPLE
FROM CIVIL CODE TO EXPROPRIATION CODE
FRENCH EXAMPLES

Président de la Compagnie Nationale des Experts de Justice en Environnement
INTERSOL – PARIS March 18th 2010

AGENDA

- ❑ BUY AND SELL : REAL ESTATE ON FORMER BROWNFIELDS
- ❑ EXPROPRIATION
- ❑ POLLUTER / OWNER / PURCHASER : OPEN LITIGATION
- ❑ OWNER PURCHASER : PUBLIC PURCHASE
- ❑ WAY OF SOLUTION

BUY AND SELL : REAL ESTATE ON FORMER BROWNFIELDS

- A need for public housing and urban planning :
re use of brownfields is often a matter of public
interest serving through real estate opportunity
- An area for public management through public
agencies :
 - Decide what to do : Plan
 - Make the conditions for execution : Buy and manage
urban development
 - Build
 - Possibly : Transfer

Reasons for discrepancies

- Price for a « fair » ground,
- Loss of value for soil pollution or invisible flaws

Process and steps

- Inside trial to set up price, a separate investigation under court supervision
 - To assess pollution if any
 - Provide the court with data relevant with
 - History of past contaminations
 - Hazards and pollutions to be monitored
 - Assessment of remediation costs

What is at stake, who is the villain

- ❑ Remediation costs can rise to such a level as real estate value
- ❑ Who is the villain : front to the purchaser, the owner is part of the litigation, so is the tenant if still on duty
- ❑ What with the former plant operator, and true polluter ?

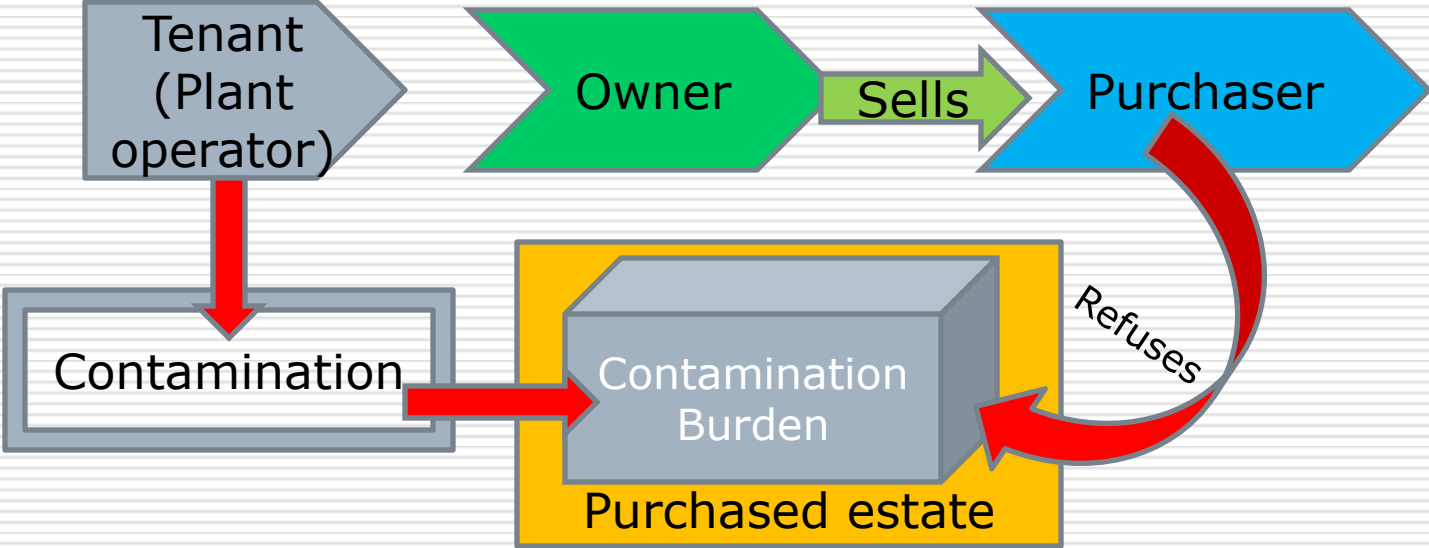
Legal basis : who is concerned

- Public purchaser
- Owner
- Tenant (if any)
- Former operator (may be different from present tenant)

Liabilities : general provisions

- Private : remediation from **tenant to owner** : suppress what makes the estate inadequate for its last (former) use
- Public : from **operator to environmental agencies** : make the estate compliant with general provisions of environmental quality (soils and water)
- Public : from **owner to public purchaser** : make the estate so to its future use

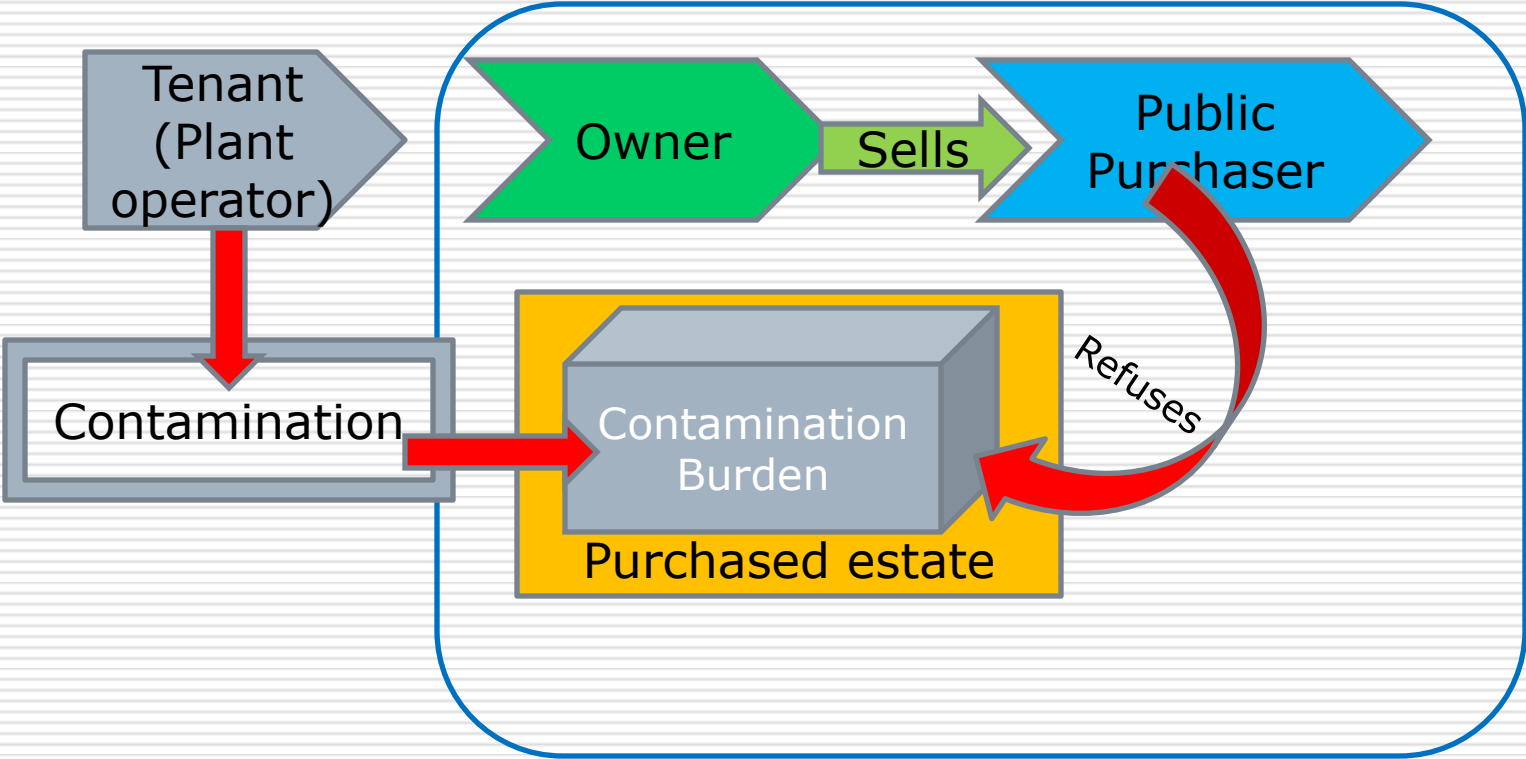
Links and relations



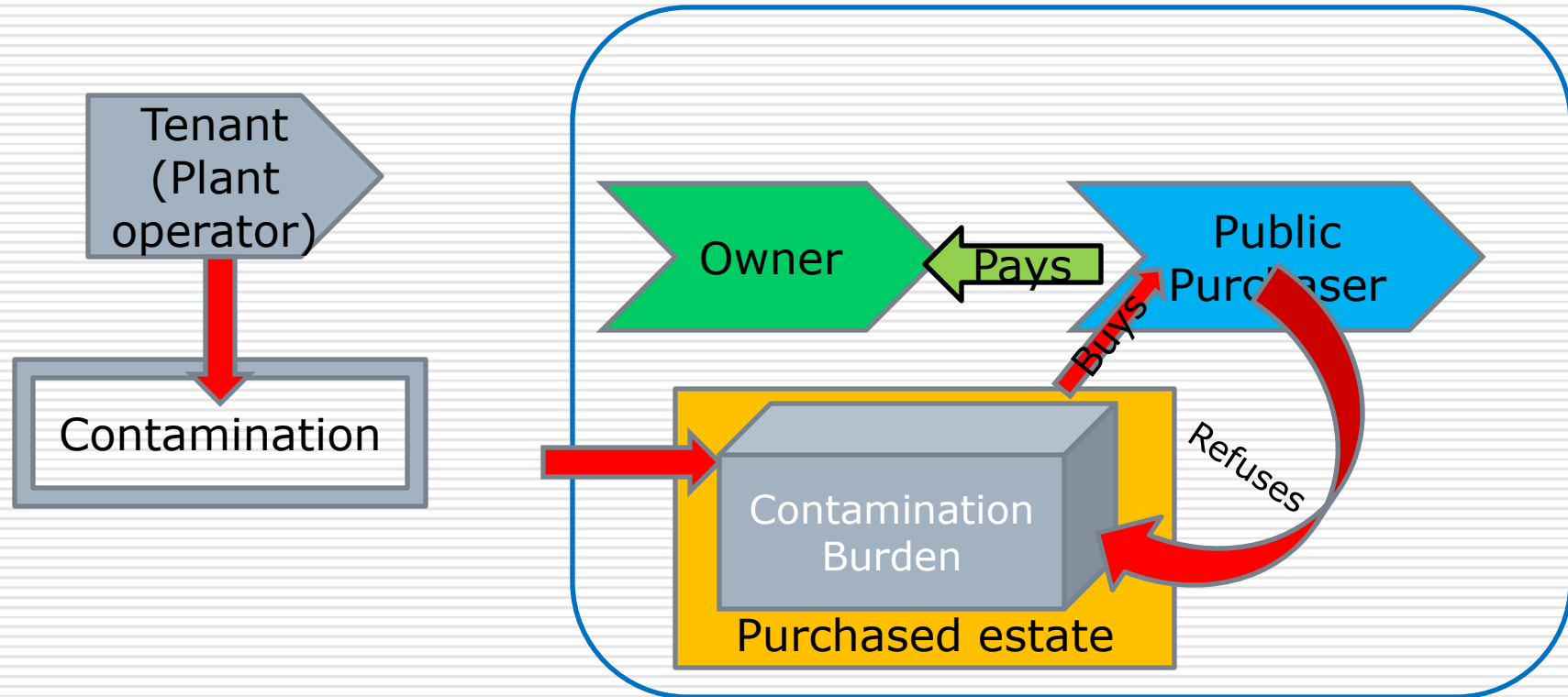
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Perimeters for litigation : Expropriation



Actors for litigation : Expropriation



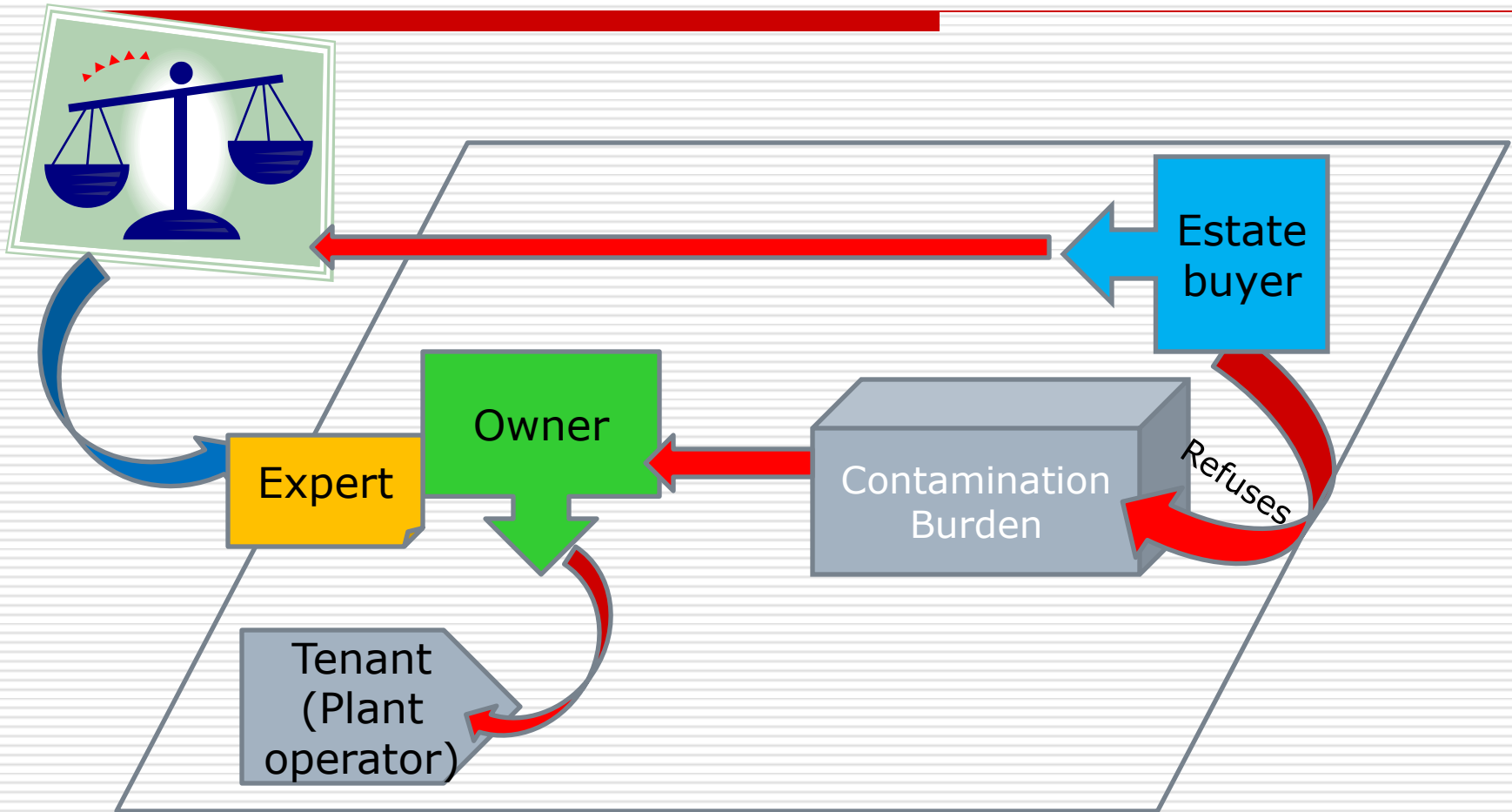
Actors in front of court : Expropriation

- The technical part of the litigation encompasses
 - Technical stand point
 - The contamination problem is limited inside the estate to be purchased
 - Legal stand point
 - The litigation is between purchaser and owner
 - A « commissaire du gouvernement » gives a public opinion upon real estate prices, notwithstanding hidden flaws

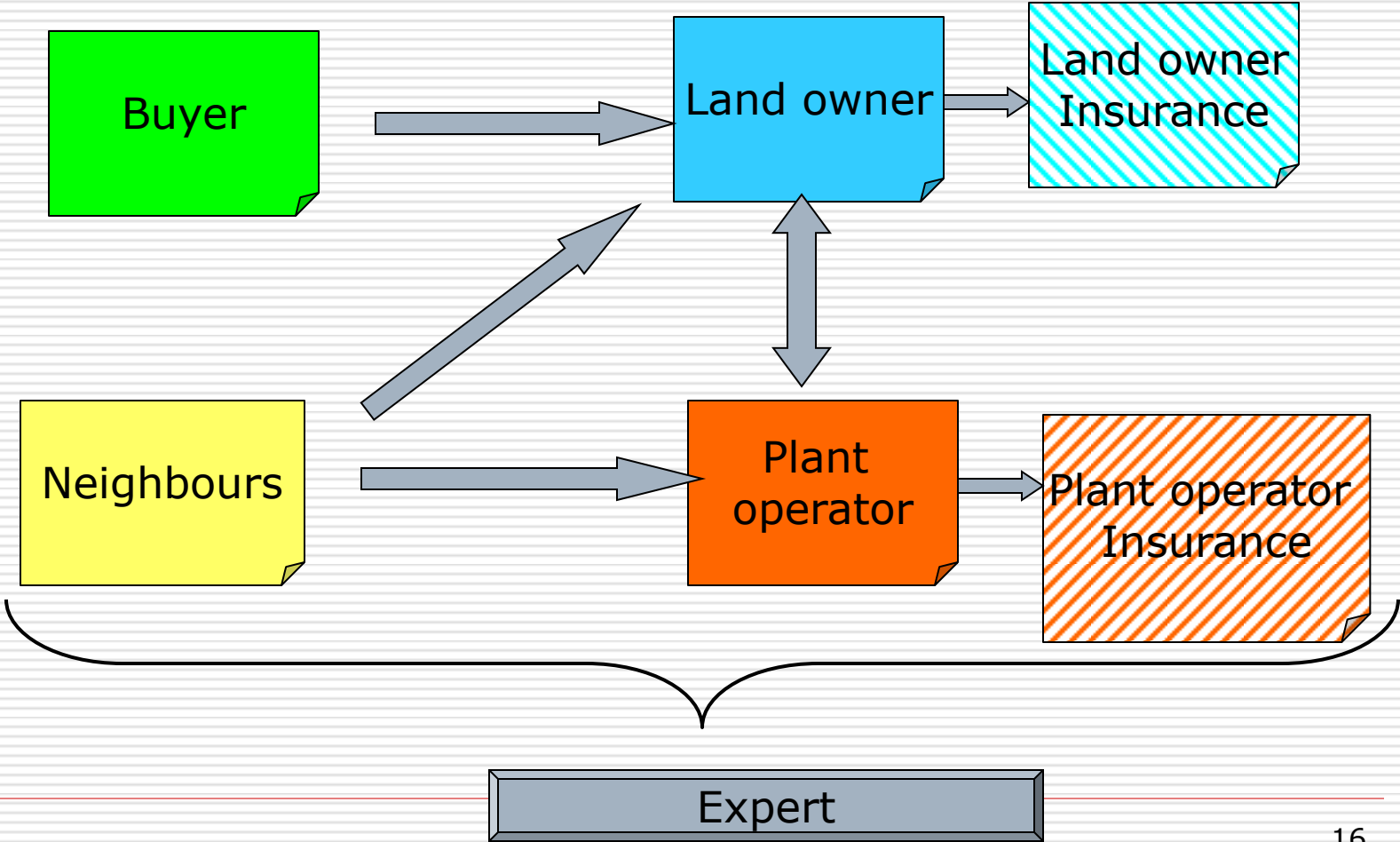
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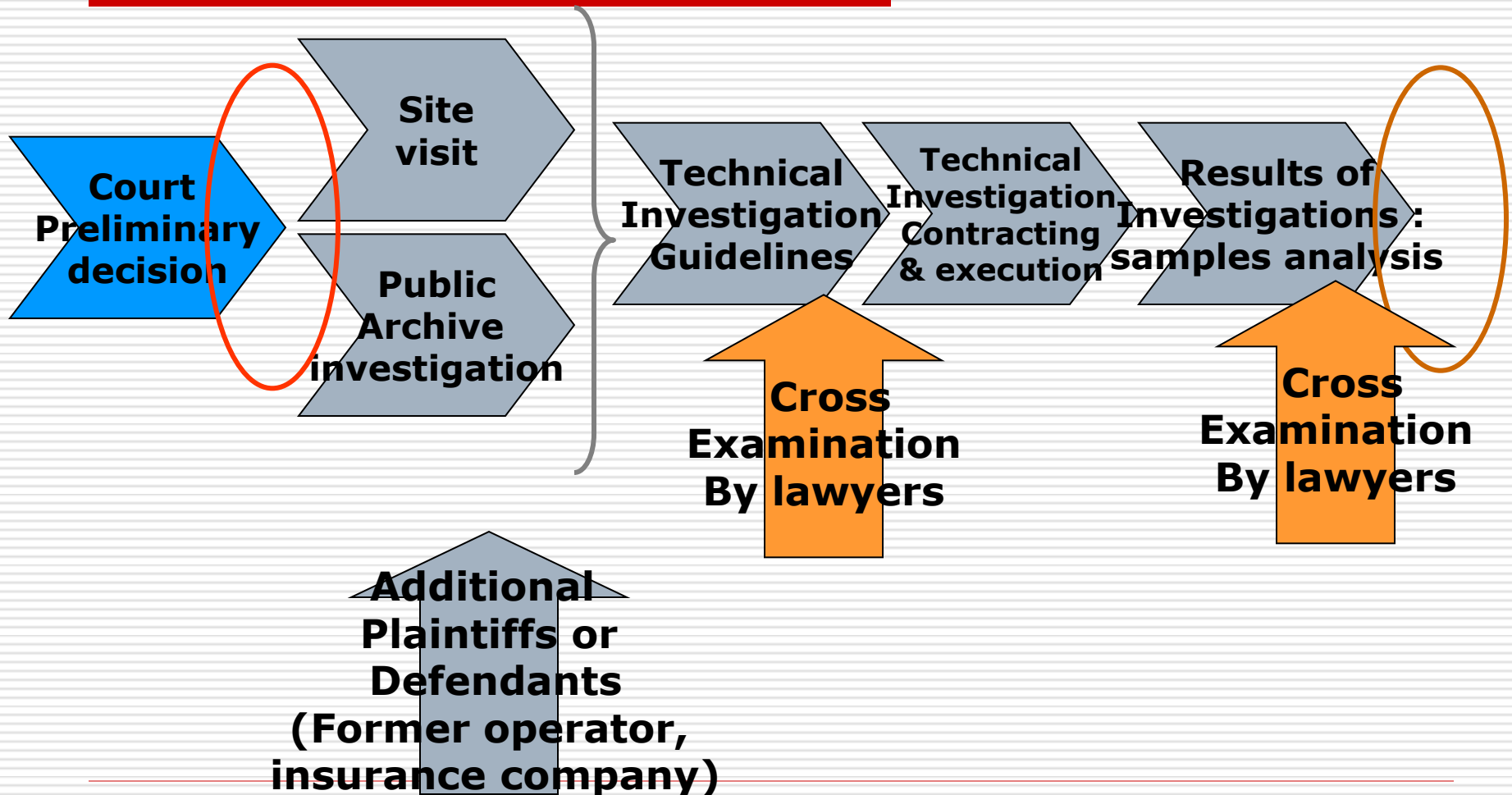
Actors in front of court : private litigation



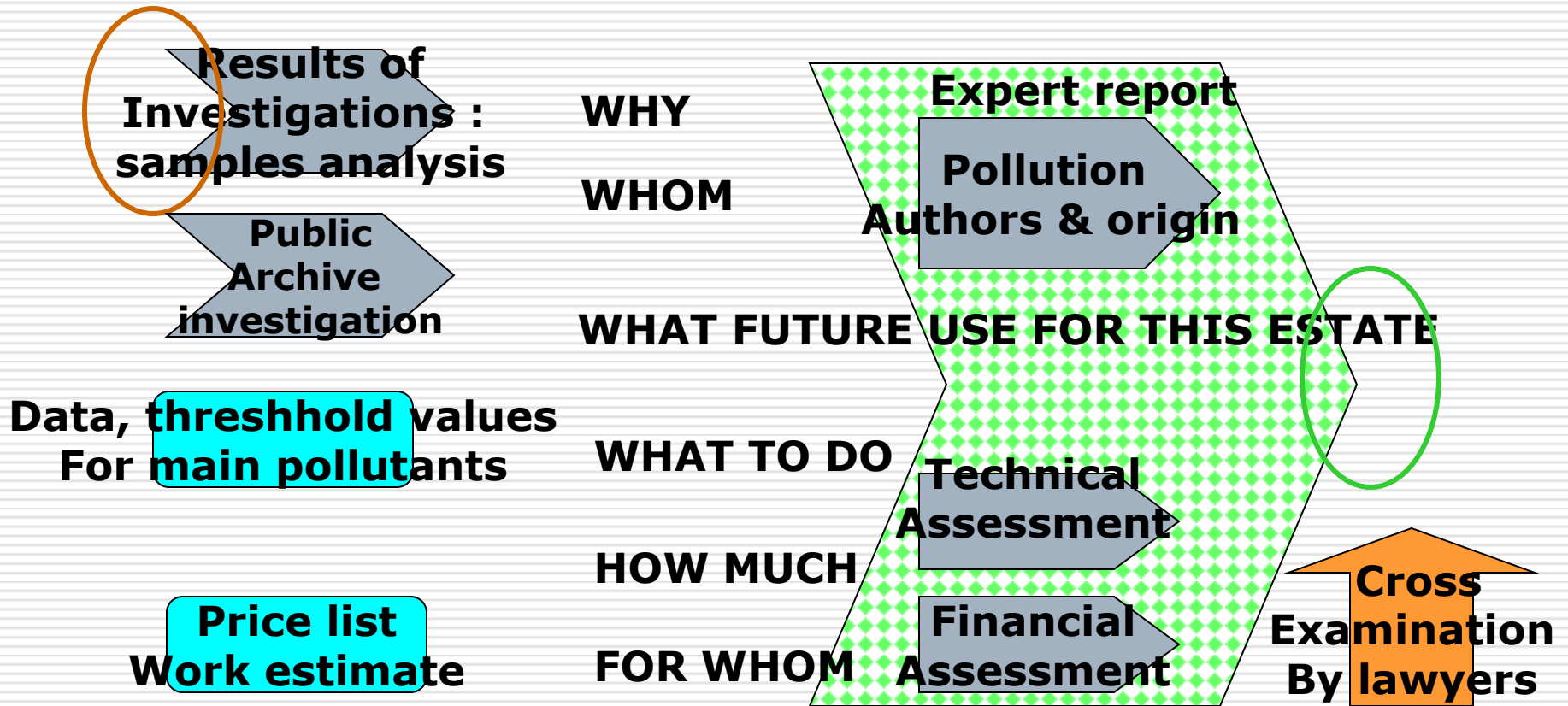
Plaintiffs & Defendants (Liability)



Expert mission : preparation (liability)



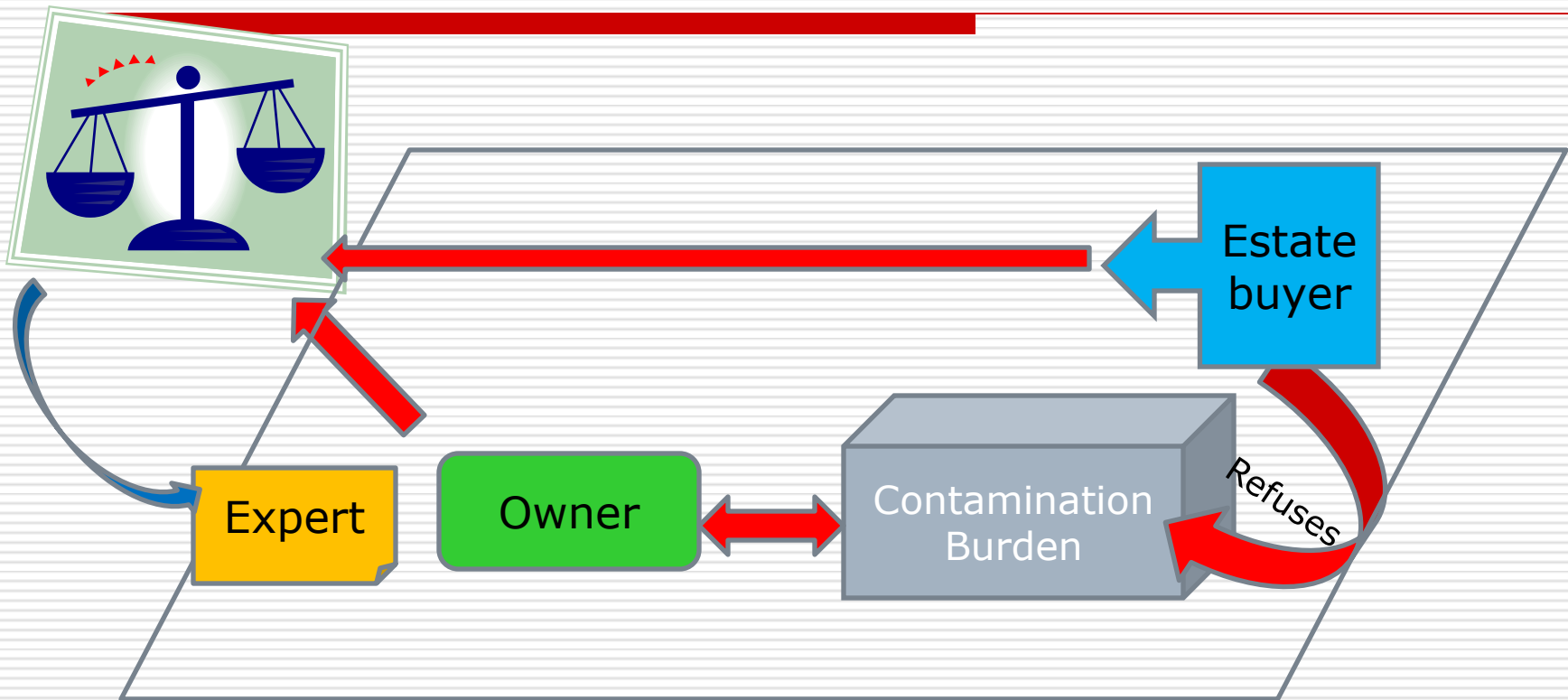
Expert mission : conclusion (liability)



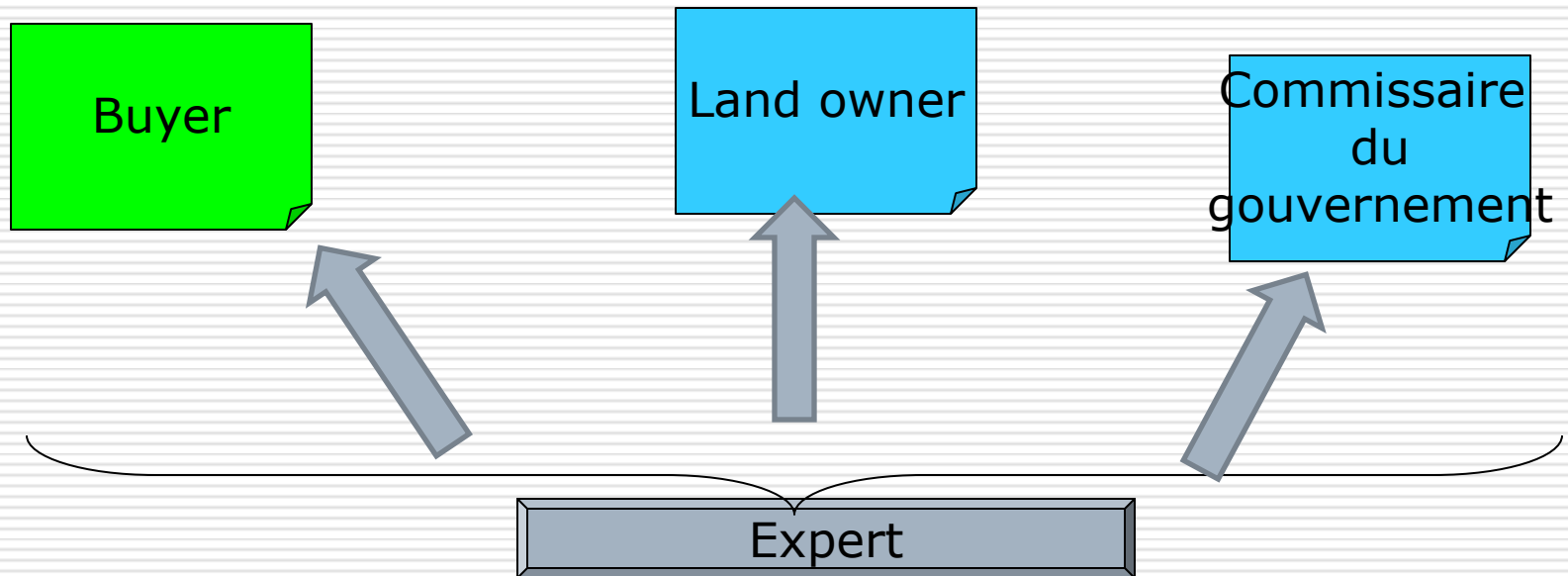
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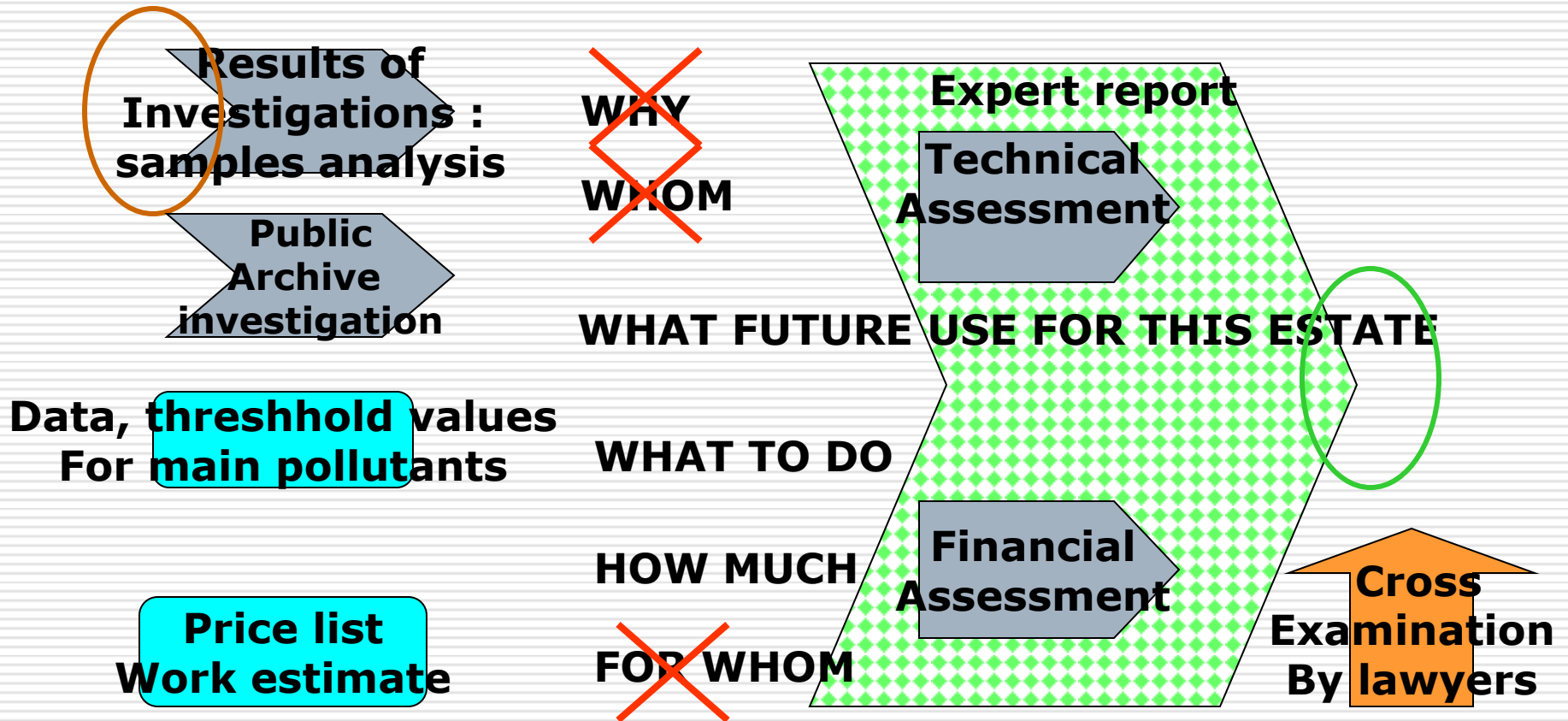
Actors in front of court : Expropriation (public purchase)



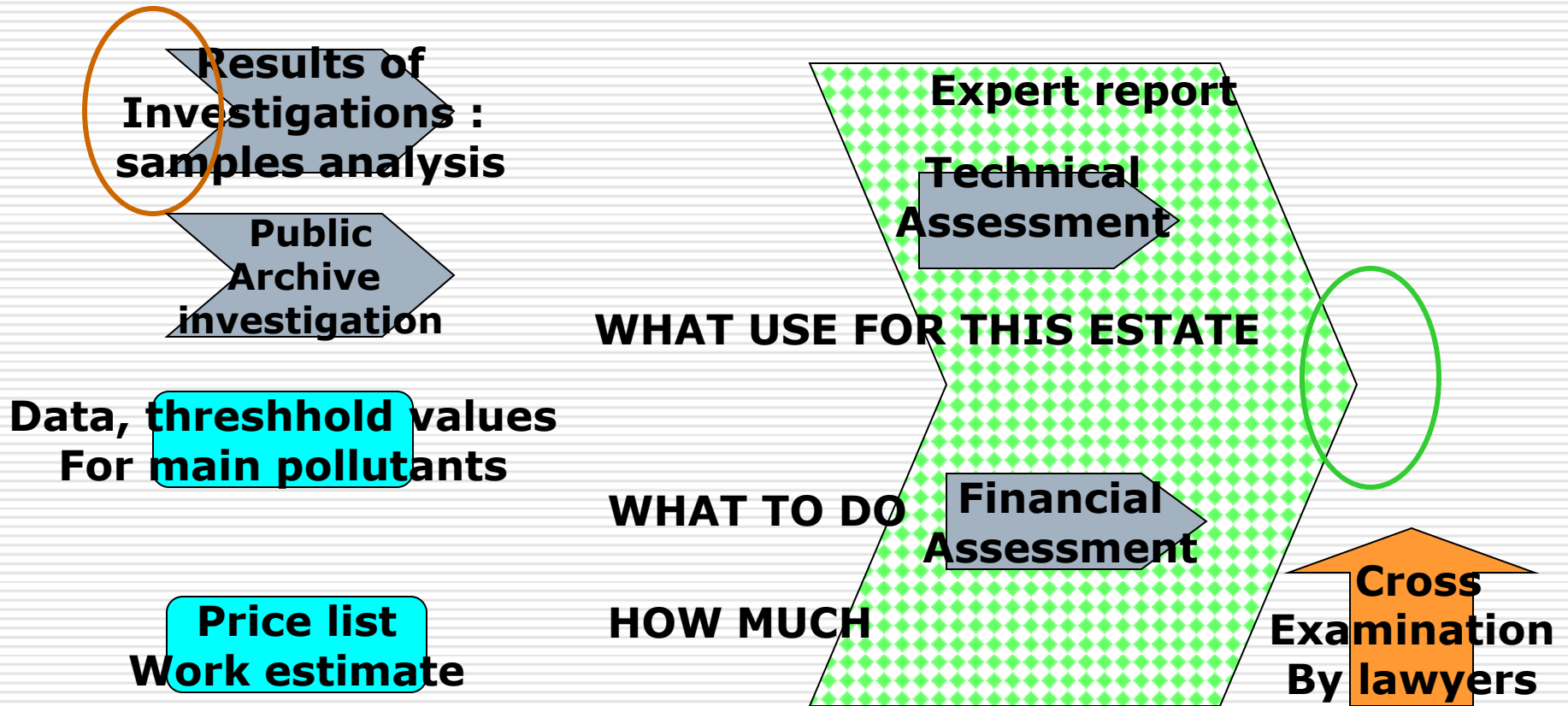
Plaintiffs & Defendants (Expropriation)



Expert mission : conclusion (expropriation)



Expert mission : conclusion (expropriation)



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Actors in front of court : private litigation

- The technical part of the litigation encompasses
 - On the technical stand point
 - The whole contamination problem with possible extension beside the original estate
 - On the legal stand point
 - All the members of the pollution chain
 - Are part in the litigation
 - Are asked for cross examination of expert's investigation
 - Mays be asked to share the burden

What for the owner : the solutions are two fold

- Contamination cost is charged upon the owner,
 - let him go on in a further litigation with former polluter, former plant operator
- Contamination cost is considered as outside expropriation scope
 - The public purchaser will go on for a further litigation either with owner or polluter (called back by the owner)

What for the owner / purchaser

□ For the owner :

- Two trials instead of one : after purchaser, former polluter
- An additional delay

□ For the purchaser :

- If contamination is considered as external to expropriation, a second litigation front to former polluter
- A possible uncertainty in final cost

Which ways of solution : let owner have their own expertise

- Having plant operator complying with regulatory provisions before he leaves the estate is by far the better way
- Instead, the owner can conduct his own investigation while urban planning is under way
- Duty of the owner to have his (former) tenant and plant operator complying with assessment and remediation provision

Legal basis : Expropriation Code : determinating contamination cost

□ **Article **R13-28**

- With the aim of the determination of the value of buildings and not transferable real estate elements presenting particular difficulties of evaluation, the judge can appoint an expert by motivated decision or be attended, during the visit of places, by a solicitor or an honorary solicitor indicated(appointed) on a list established for the set(group) within the competence of the Court of Appeal by the first president, on a proposition of the Regional Council of the solicitors.
- He can also, exceptionally, indicate(appoint) a person who would seem to him(her) qualified to light(enlighten) him(it) in case of difficulties of technical order concerning the determination of the amount of the compensations(allowances) others than those mentioned in the paragraph which precedes.

□ **Article **R13-28**

- En vue de la détermination de la valeur d'immeubles et d'éléments immobiliers non transférables présentant des difficultés particulières d'évaluation, le juge peut désigner un expert par décision motivée ou se faire assister, lors de la visite des lieux, par un notaire ou un notaire honoraire désigné sur une liste établie pour l'ensemble du ressort de la cour d'appel par le premier président, sur proposition du conseil régional des notaires.
- Il peut également, à titre exceptionnel, désigner une personne qui lui paraîtrait qualifiée pour
- l'éclairer en cas de difficultés d'ordre technique portant sur la détermination du montant des
- indemnités autres que celles mentionnées à l'alinéa qui précède.

Legal basis : Expropriation Code : is contamination cost part of the claim ?

- Article L13-8
- When there is a serious contesting on the bottom of the right or on the quality of claimants and all the times when it rises difficulties foreign to the fixation of the amount of the compensation and with care of articles L. 13-10, L. 13-11, L. 13-20 and L. 14-3, the judge settles the compensation independently of these contestings and difficulties on which the litigants are sent back in front appropriate court.
- **Article L13-8**
- Lorsqu'il existe une contestation sérieuse sur le fond du droit ou sur la qualité des réclamants et toutes les fois qu'il s'élève des difficultés étrangères à la fixation du montant de l'indemnité et à l'application des articles L. 13-10, L. 13-11, L. 13-20 et L. 14-3, le juge règle l'indemnité indépendamment de ces contestations et difficultés sur lesquelles les parties sont renvoyées à se pourvoir devant qui de droit.

**THANK YOU FOR YOUR
ATTENTION**

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