

Soil Pollution and judicial trials - Search for evidence under French law : methods, traps to avoid, success factors

By Jean François DAVID

Expert près la Cour d'Appel de Versailles

Président de la Compagnie Nationale des Experts de Justice en Environnement (FRANCE)

jf.david@experts-judiciaires.org

Pollution des sols et décisions de justice; la recherche des preuves (selon la loi française) : méthode, facteurs de succès en matière d'expropriation comme dans les litiges purement de droit privé / Soil pollution and judicial decisions - Search for evidence under French law: methods, success factors, in public expropriation and private trials **Jean-François David** – **Compagnie Nationale des Experts de Justice en Environnement**

More and more project involving both urban developement and former industrial areas use sooner or later judicial evidence. Managing proof or evidence is a new form of requirements on the boundary of urban planning, public health and real estate development.

Brownfiels are a new target for both housing and new techonologies.

A judicial expert when appointed by court has to answer after cross examination of plaintiffs arguments and cross examination, by plaintiffs, of expert evidence and conclusions, where they be preliminary or stage conclusions . That must be consistent with necessary independance of the expert and somewhat lengthy search for evindence.

So environmental expert has three roles :

Historian : what are the causes, what is the concatenation leadint to present situation

Journalist : subject of immediate cross examination from a present standpoint

and also - may be later inside the mission - scientist : Using transverse scientific subject disciplines to back up hypothesis and assert evidences.

Those roles have their particular success factors and are to be now performed in a project manager's way.

SUMMARY

1	The subject and the problems	2
2	Methods and steps	3
2.1	Legal background and framework	3
2.2	Main steps in the trial	5
2.3	Legislation concerning installations registered for environmental purposes	6
2.4	Method :	6
3	Pitfalls & Success factors	9
3.1	Collecting evidence	9
3.2	Assessing evidence	9
3.3	Managing the process	10
3.4	Pitfalls to avoid and success factors	10
3.5	Conflict of interest	10
4	Results	10
4.1	Answers and contributions to trial solution.....	10
4.2	Economy of judicial process	10
4.3	Time span	11

1 The subject and the problems

Soil pollution is a source of concern for neighbors of industrial areas, inhabitants present or future and urban planners.

A concern for neighbors : risks for health and use of their land and home, loss of amenities

A concern for urban planners : what to do with and upon former industrial areas, what are the costs and expenses to foresee.

Three sources of conflict can be raised in front of tribunal will be presented :

- complaints by neighbors, for fear of actual prejudice to their properties, or loss of amenities, on general liability basis,
- complaints by buyers on liability for “hidden flaws”
- complaints by public bodies in matter of expropriation (compulsory purchase) looking for both :
 - o a motive to get a rebate on the price to be decided by tribunal,
 - o an external stand point on the technical content (history, pollution hazard, consistency with urban planning objectives) of a deal they have not negotiated, due to legal procedure.

2 Methods and steps

2.1 Legal background and framework

2.1.1 Civil proceedings

2.1.1.1 General scope

Civil proceedings on general liability basis encompasses management of claims issued by any person, a neighbor for example, contesting a pollution originating in a nearby location.

In those consideration, courts can forward the management of evidence to a technical expert in order to bring to the court, after cross examination, the causes of harm and damage, if any, assessment of losses :

- actual losses (vegetables, trees...)
- losses of amenity,
- losses or restrictions in future use of their property, (loss of opportunity, odds..).

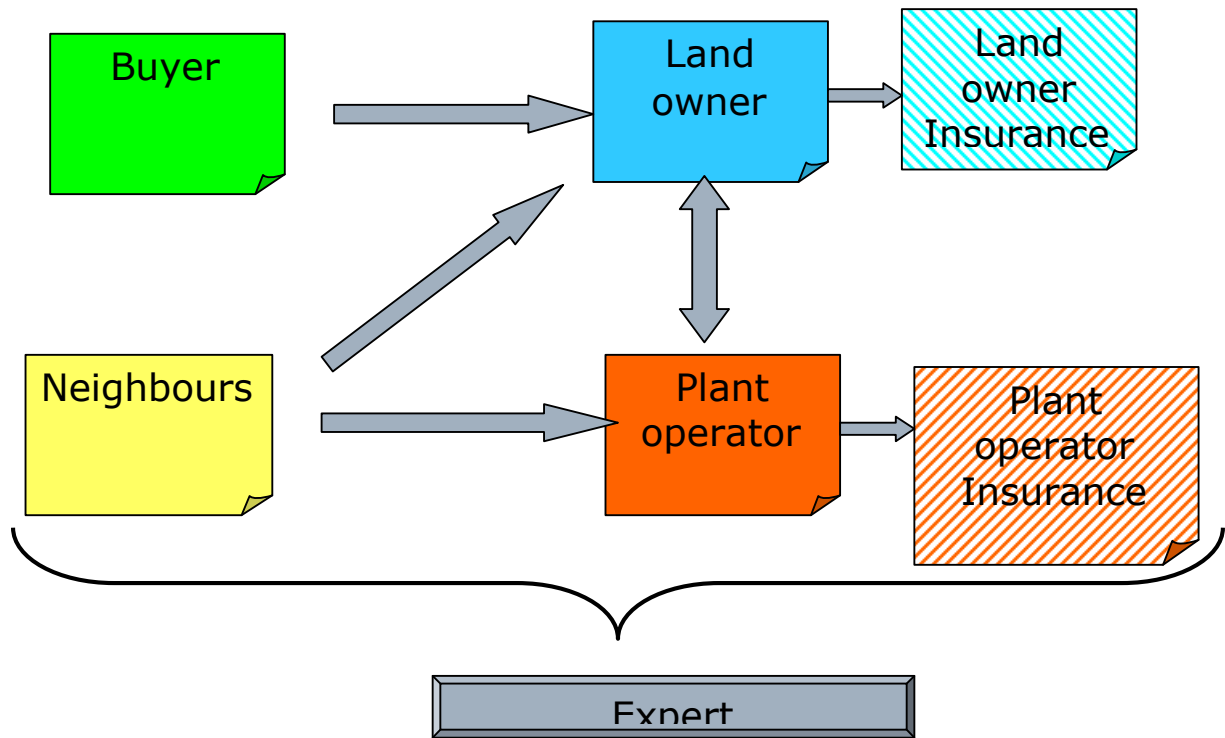
Code of civil procedure sets up detailed rules to communicate documents, prepare visits and meetings ; the main principle is cross examination of documents and more generally of every evidence submitted by any of the parties.

Civil proceedings on general liability involves buyers, sender (land owner) but also, through call for guarantee, former plant management and insurances companies.

Expertise in criminal affair is a different matter, with different rules are edicted so far as cross examination is at stake, and I do not know such cases of criminal procedures in soil pollution affairs.

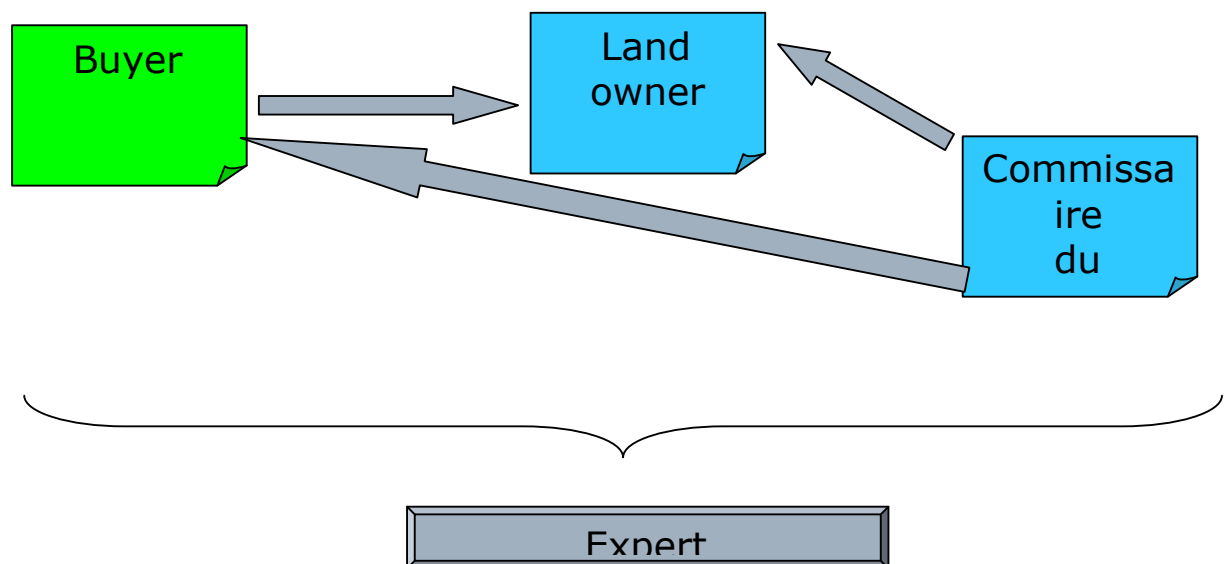
2.1.1.2 Who may litigate

The number of plaintiffs and defendants is unlimited :



2.1.2 Expropriation for public use

By law, the trial is strictly limited between buyer and owner, and the “commissaire du gouvernement” which has in front of the courts a role of public attorney.



2.1.2.1 General provisions

In case of expropriation of public use, public bodies (often towns through their urban planning or public work department), want to have certainties about the true value of the estate they

buy (problem of hidden default such as former pollution), and sheltered from public criticism on the basis of unknown pollution discovered later and decontaminated at additional taxpayer expense.

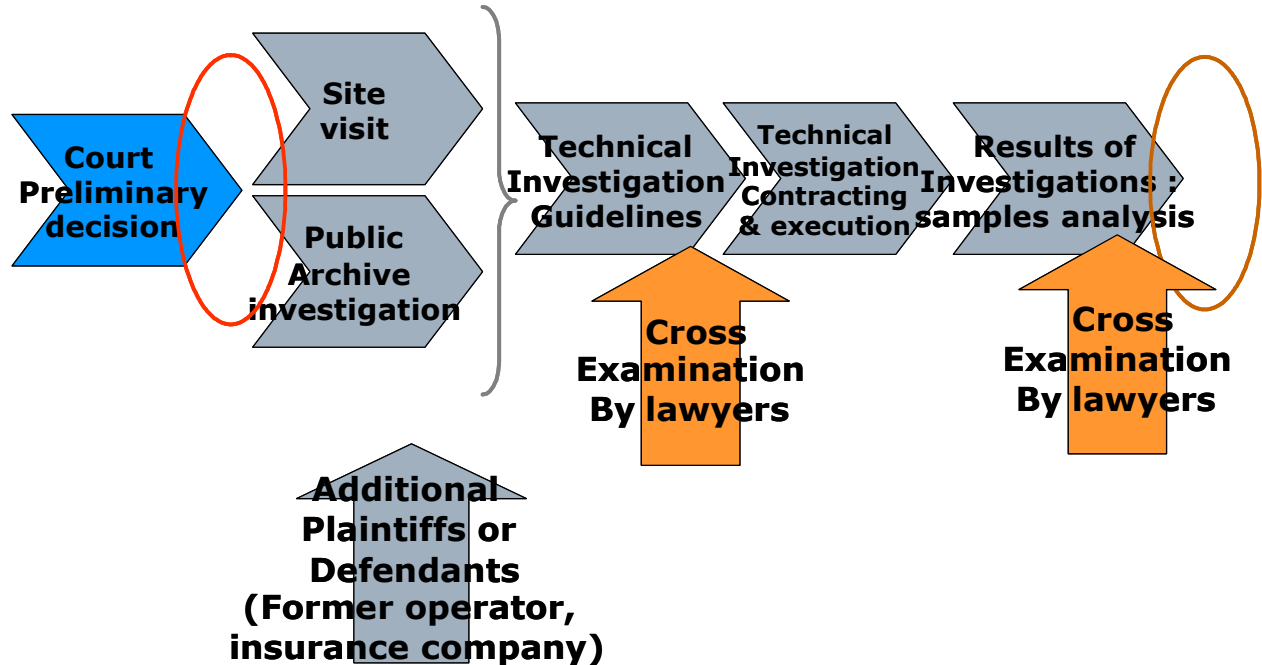
In that situation, although there is no expertise on the ground of civilian code, a technician may be assigned by the tribunal to estimate the amount of rebate due to the buyer for reasons of “particular difficulties” among which is soil pollution.

The mission is conducted in a similar mode as civilian proceeding, particularly with respect to cross examination at every step and a rigorous sharing of all documents used to build the final report.

2.1.2.2 Particular issues : pre-emption

In case of pre-emption, according to specific provisions of Land Use Planning Rules (for example Plan Local d’Urbanisme) the price is defined “as in matter of expropriation”. Anyway, in case of pre-emption, the public body is opposed to the pre existing contract between seller and (private) buyer. Those contracts include generally provisions linked with soil pollution and soil remediation, and related financial conditions.

2.2 Main steps in the trial



2.3 Legislation concerning installations registered for environmental purposes

Since 1810 in France, industrial plants causing nuisance or pollution (air pollution, stench, wastes of any kind) are placed under government scrutiny ; since the years 1970 more and more results were gathered by inspectors ; mean while, since 1977 environment impact statement (EIS) are compulsory for the major plants and that EIS includes description of ways and means of protecting soils and water tables.

Applications must include since that year a description of means of prevention and when the plant ceases its activity, a decommissioning file is produced by the plant operator.

So difficult problems exist mainly either in the neighborhood of industrial sites (out of the scope of decommissioning file) or on old industrial locations.

2.4 Method :

2.4.1 Technical references :

If a judicial expert is largely independent, as a consequence of separation of institutional powers, it is commonly agreed that methods (analytical methods, laboratory accreditation, threshold values...) and tools developed to manage administrative compliance are also appropriate to provide a technical opinion provided in court litigation.

Values not to be exceeded, in consideration with land use (either actual or future as defined in land planning documents) exist now for main pollutants : the Report Impact Value ¹

Several Report Impact Value have been set up in France or borrowed from foreign public authorities for hazardous substances, arsenic, chromium, mercury, zinc, benzene, or HAP (hydrocarbons, BTEX Benzene, Toluene, Ethyl benzene, Xylene.

The value considers :

- the chronic risk to public health related to the use of such sites
- integrate several exposure pathways
- are defined for sensitive and non sensitive land use ; land use is considered in compliance with provisions of land planning documents, unless other relevant contracts or documents decide differently.

In a judicial process, it is useful to hold to shared technical references. Those are :

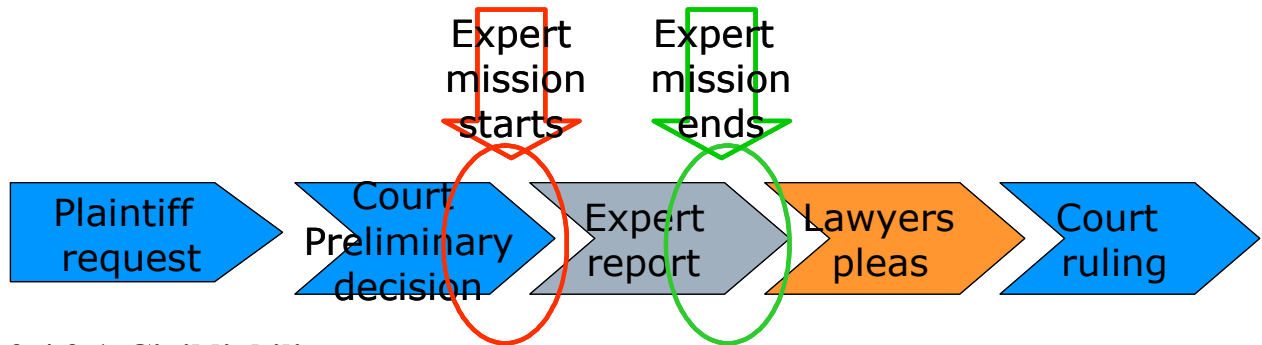
- urban planning rules defining land use
- level of concentration for pollutants according to that use, sensitive or not .

Technical references lay upon the values measured for investigated chemicals, according to :

- history results
- and level of results front to Report Impact Value.

2.4.2 Steps to go across

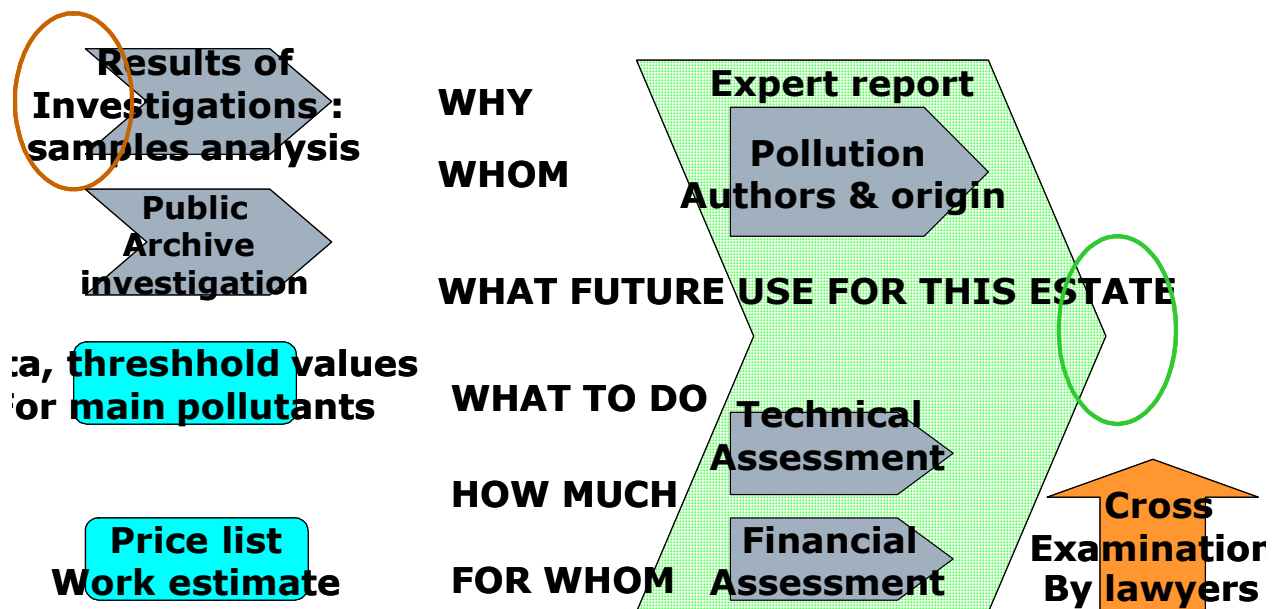
Judicial expertise is part of a trial (“trial inside the trial”). Main steps are figured here after :



2.4.2.1 Civil liability

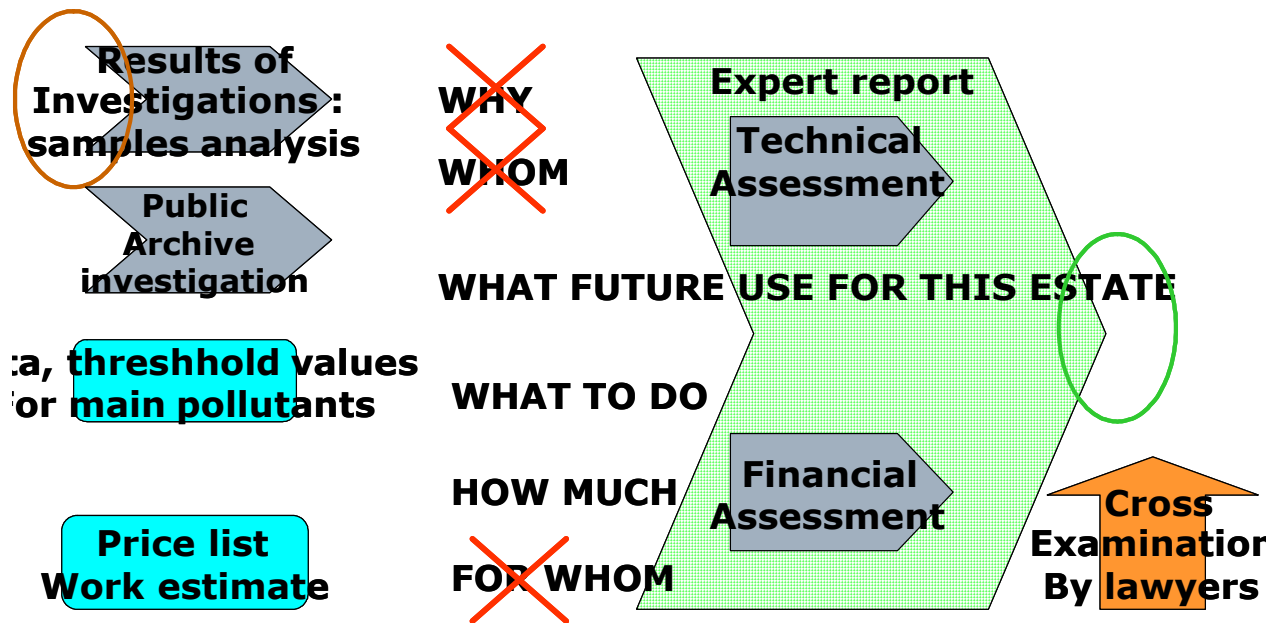
The mission may encompass a wide lot of questions to answer, corresponding to a set of plaintiff which can be listed as follow :

Land owner
Site operator(s)
Site operator insurance(s)
Neighbors



2.4.2.2 Expropriation

The mission is limited to a point : helping in price evaluation between a seller (owner) and a buyer (public body) with a third party “commissaire du gouvernement” who delivers the court his opinion



Judicial expert is also historian and journalist:

- Historian: public archive visit is still a good track to understand what can have happened on the site, and in fact existence of an old legislation, however the fact it has not been enforced with the same demanding level across ages, has left tracks, documents, the existence of which has often been forgotten by defendants and may be a surprise for landowners
- Journalist : listening watchfully what has been issued in local papers according both activities and inconveniences related to the site and activities which occurred there.

He has to:

- deduce from those materials and one's experience the guidelines of technical investigations to be efficiently conducted, and prepare the need for funding
- conduct gathering evidence, through technical interventions (soil drilling, sample collection), technical observation and conservation of evidence if any, and analysis for relevant chemicals.

What is at stake:

- having forgotten to trace particular types of pollutants not listed in investigations prevents expert (and plaintiffs) from accessing true causes of pollution ; expert opinion and preliminary work is here the pledge of the relevance of investigations and it is the reason why I deeply insist to separate steps as >> site visit then >> scheduling investigation program then >> conducting investigation program,

- but comprehensiveness would be economically out of reach, and the objective is in no way academic, but is bringing technical basis upon which a legal answer will be given to a litigation.

3 Pitfalls & Success factors

3.1 Collecting evidence

Archives can give the hints to build an investigation schedule and chemical analysis program.

What with insufficient results of analysis :

Chemical results can give evidence when they are clear cut, which happens often, but what when they are scattered amidst the grey bottom line of Report Impact Value ?

Other sources of information may complete the scope to get the puzzle completed.

For example in a case where expert intervention occurred several years after initial pollution events, the presence of low cyanide concentration in the roots of a tree and the history of decreasing cyanide concentration in a piezometer on the neighboring former industrial estate allowed to conclude about the path way and the cause of damages to trees.

But it is the duty of expert to validate data (or more generally any information) produced outside or before expertise procedure.

3.2 Assessing evidence

Evidence is mainly a documentary evidence; human witnesses, human testimony is of small interest in those cases.

Any way such documents as local leaflets, journals can bring information about what has been the true past activity of the polluted site.

Solution to gather convincing evidence lies upon a cross examination of :

- history
- results of investigations, first of which is a site visit,
- results of monitoring conducted under administrative regulation, which are in France as elsewhere in European Union public documents (freedom of access to environmental information).

In fact soil pollution are generally slow and long lasting processes ; results of analysis at a period linked only with plaintiff claims and judge decision can be if alone, of narrow evidence : it is a snapshot, and you need to rebuild a film.

Practically, to drive his own opinion an expert needs to apply to other sources and :

- assess their reliability, which is rather easy for administrative information, but is more difficult when it is part of old industry files dotted with loopholes,

- find hints to cope with subject to be investigated in order to find (and not spend time and money in unefficient search).

3.3 *Managing the process*

3.4 *Pitfalls to avoid and success factors*

Conducting the expertise in absolute compliance with the text of the mission issued by the court (or the judge) ; if unexpected events or discover appear making relevant a modification of the mission content, it must be asked to the magistrate in charge of the case, what ever the delays.

For example, if court decision mentions “expert will assess pollution related to hydrocarbons..”, Expert is not allowed to investigate heavy metals, unless committed by an additional judge decision, after a plaintiff request for example. Answering to such questions as “what to do to.....”, “how much will it cost...”. is not trivial ; a judicial expert must give a best estimate without entering what could be the job of an engineering firm ; an expert provide judicial expertise, neither engineering or “horresco referens” what could be seen as consultancy or technical advice to any of plaintiffs or defendant. Experts may have and keep an unquestionable even-handedness along their mission (and after).

Any attitude or action which could exceed the strict content of their mission might be regarded as an infringement to that mandatory even-handedness.

3.5 *Conflict of interest*

One of the question is : WHAT IS THE FUTURE FOR THAT ESTATE, and the answer, through urban planning rules can be issued by the same public body who conducts compulsory purchase.

So far it has never been my duty to interfere with such a question which, luckily, has never been raised.

4 Results

4.1 *Answers and contributions to trial solution*

It is the duty of the expert to give answers, to help a tribunal in shaping its decision.

So nobody expects expert adding new questions without answers, court and plaintiffs expects certainties and assurance. Our discussion may tackle that subject.

4.2 *Economy of judicial process*

4.2.1 Costs & expenses

Generally, cost of a mission amounts to :

- drill, samples : 5000 - 15000€
- chemical analysis : 1000€ - 3000€
- expert fee : 3000 – 5000 €,

Report content (average) :

- estimate of works to be done : from 20k€ to 200 k €
- answer to the question of consistence with land use (present or foreseen).

It can be compared with estate evaluation : from 300k€ to 1 000 000k€.

But an expert opinion can be, after spending 8000€ : “there is no additional expense to be charge to defendant”, and in that event, the court will probably charge the plaintiff the whole cost of expertise.

4.2.2 Expert fee

4.2.2.1 Civil litigation

Expert is paid when his opinion is delivered to the court, which decides the amount of the fee.

A fee is allocated first on the retainer fee, deposit in the clerk’s office of the court. If it is insufficient, the court order decides the amount to be paid and by whom.

4.2.2.2 Expropriation

Expert fee is paid by public body driving the compulsory purchase, according the court order ; first fee is paid in advance ; additional fees can be asked if particular expenses have been done. In fact, drilling, sampling, analysis invoices are paid by the plaintiff (public body) when by the expert.

In every case, contracts for drilling, sampling, analysis are managed by the expert as public contracts, commitment of plaintiff to pay the invoices is collected before every step.

4.3 Time span

Justice is seldom fast, and so is judicial expertise :

Cross examination, necessity to find common dates to visit site, appropriate duration given to plaintiffs and defendants to answer at each step add to a 6 – 9 months ; adding mobilization of additional funding for drilling and related execution, times span is from 8 month to 16 months (if you need an additional judge order to define better the scope and funding of investigations).

TOPICS FOR DISCUSSION : MANAGEMENT OF EVIDENCE : A BALANCE BETWEEN USE OF ACADEMIC KNOWLEDGE AND JUDICIAL EFFICIENCY THROUGH MANAGEMENT RULES

¹ [Impact Report Value](#) : VALEUR DE CONSTAT D'IMPACT (in french)