

UNEP GLOBAL JUDGES PROGRAMME

APPLICATION OF ENVIRONMENTAL LAW BY NATIONAL
COURTS AND TRIBUNALS

PRESENTATION 9

REMEDIES IN ENVIRONMENTAL CASES

OUTLINE OF PRESENTATION

- CONTEXT FOR REMEDIES

- PURPOSE OF REMEDIES

- BASIS OF REMEDIES

- TYPES OF REMEDIES

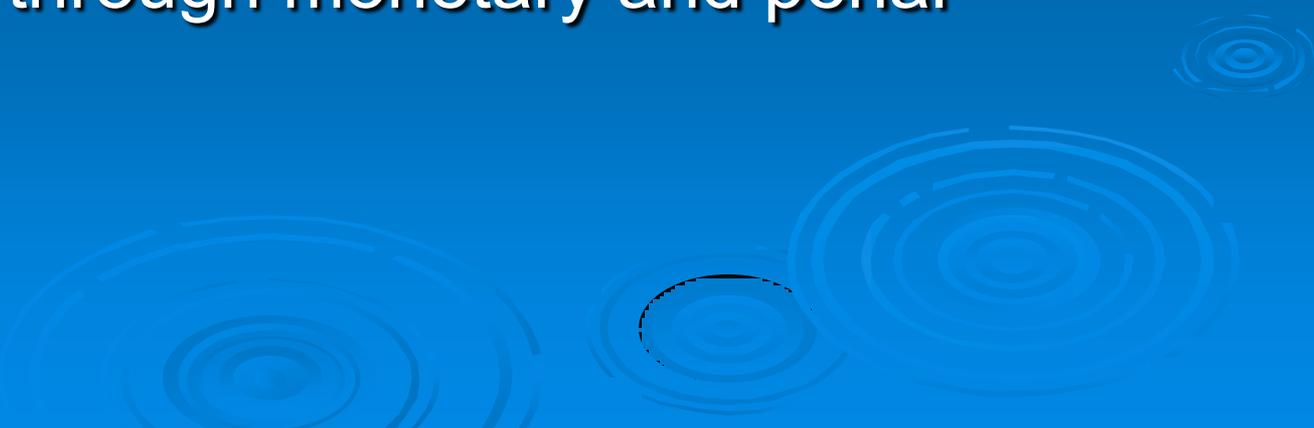
- JUDICIAL OVERSIGHT

- CONCLUSIONS

SUSTAINABILITY CONCEPTS RELEVANT TO REMEDIES

- Sustainability: Confluence of concerns regarding economic growth, social progress, and environmental protection
 - Common questions for a Judge
 - Should an enterprise be allowed to begin or continue operations?
 - What are the social/environmental costs of remedy choice?
 - How should available environmental capital be deployed?
- Polluter Pays Principle
- Prevention Principle

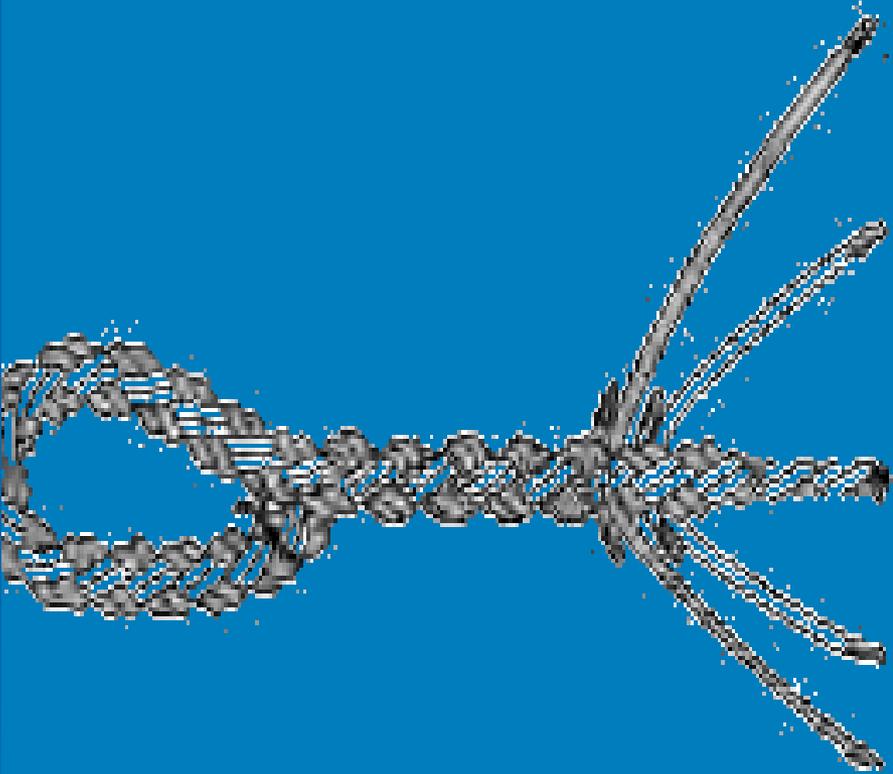
ASSUMPTIONS IN DISCUSSING REMEDIES

- The legal and factual means to establish liability are present
 - Courts have either statutory authority or inherent equitable power to fashion judgments
 - Courts have coercive power to enforce judgments through monetary and penal sanctions
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CASE MANAGEMENT CONSIDERATIONS

- Remedy issues can be complex
- Technical assistance/expertise commonly required
- Bifurcation may be advisable
- Court supervision of remedies is often necessary
- Continuing jurisdiction and docket management issues

PURPOSE OF REMEDIES

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- ENVIRONMENTAL RESTORATION
 - REDRESS THOSE AFFECTED
 - IMPLEMENT LEGISLATION
 - REINFORCE THE RULE OF LAW
 - PROMOTE SUSTAINABLE DEVELOPMENT

BASIS OF THE REMEDIES



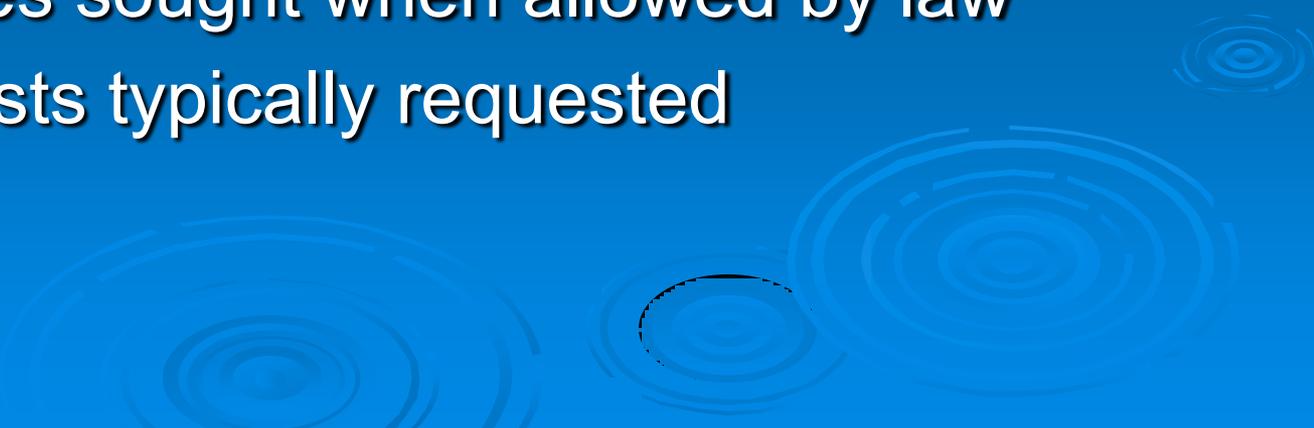
CONSTITUTIONAL VIOLATIONS AND ENVIRONMENTAL LAW

- Constitutional mandates are typically expressed generally and without remedial guidance.
- Remedies for constitutional violations may require judicial discretion and creativity.

ENFORCEMENT OF STATUTES AND ADMINISTRATIVE REGULATIONS

- Actions brought by government departments normally involve criminal enforcement of environmental statutes
- In addition to the criminal enforcement provisions, many jurisdictions now provide for civil enforcement and appropriate civil remedies under the environmental statutes

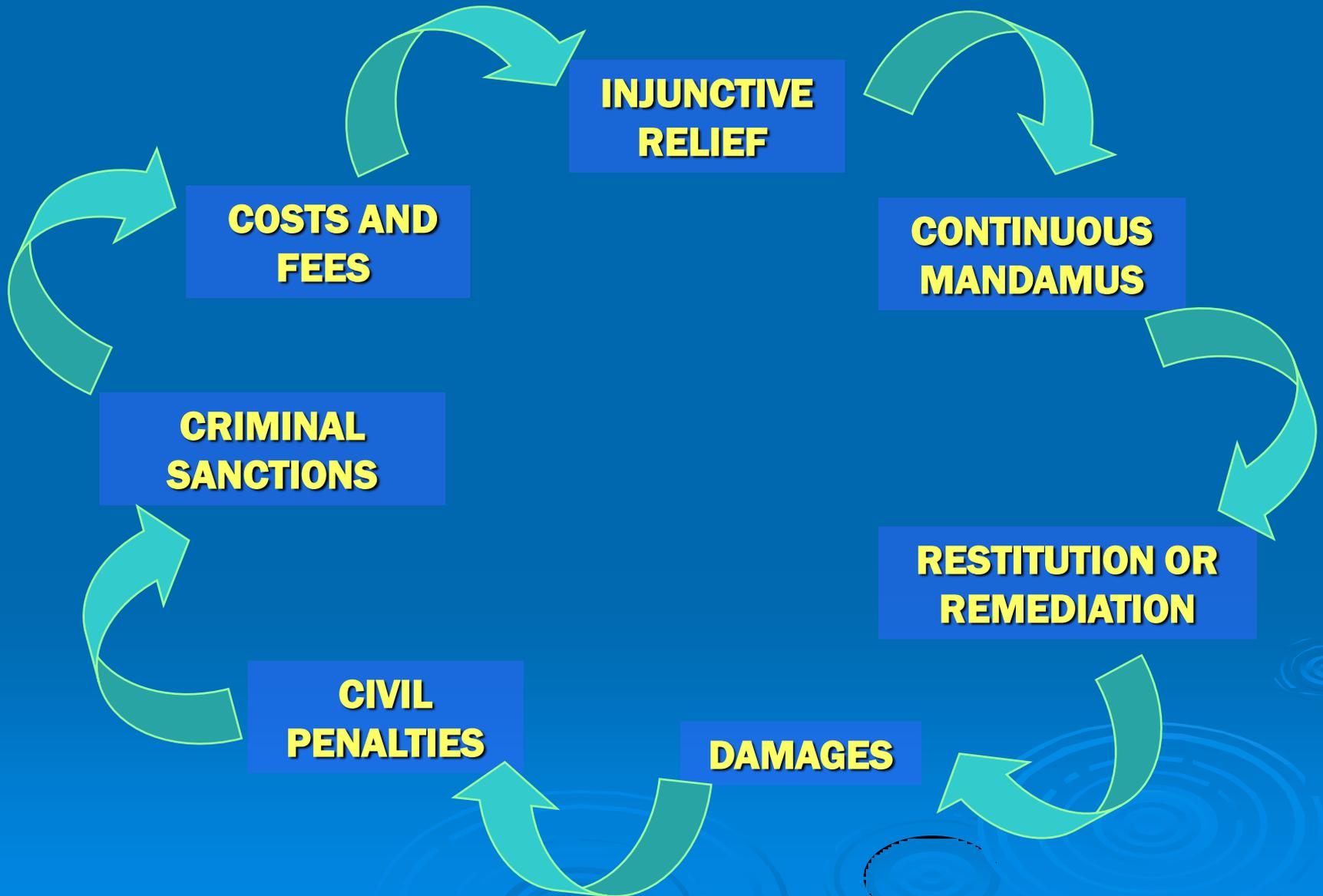
PUBLIC INTEREST LITIGATION

- Non-government organisations or individuals bring actions (citizen suits) to prevent or stop a harmful activity
 - Remedies: injunction, or a declaration on a point of law
 - Normally monetary damages not sought
 - Civil penalties sought when allowed by law
 - Order for costs typically requested
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PRIVATE ACTIONS BY CORPORATIONS OR INDIVIDUALS

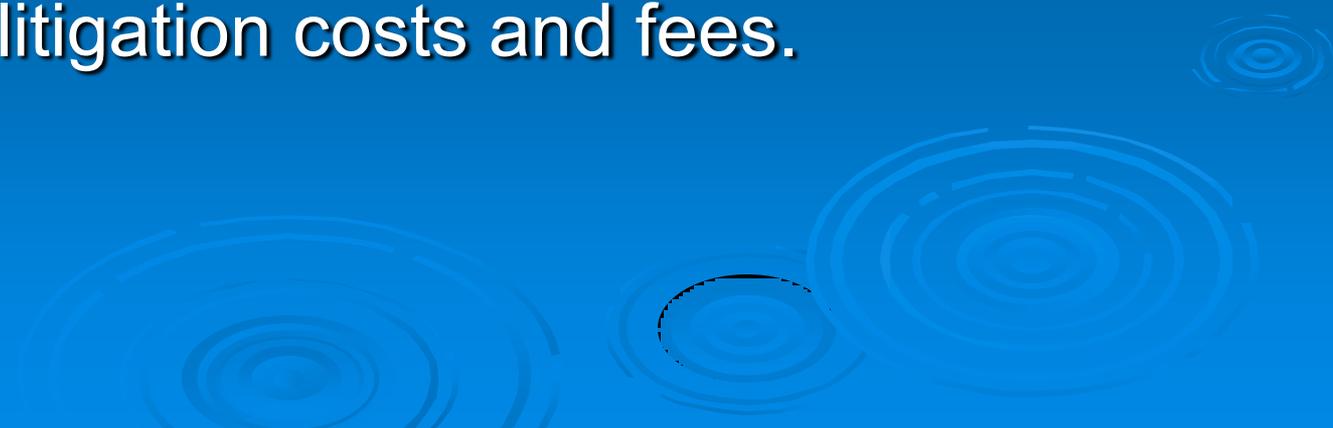
- In common law countries, these actions can be brought in nuisance or negligence
 - These actions are generally brought for property damage, economic loss, and personal injury arising from environmentally harmful activity
 - The main remedy sought is usually monetary damages
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TYPES OF REMEDIES AND COURT ORDERS



REMEDIAL PRIORITIES

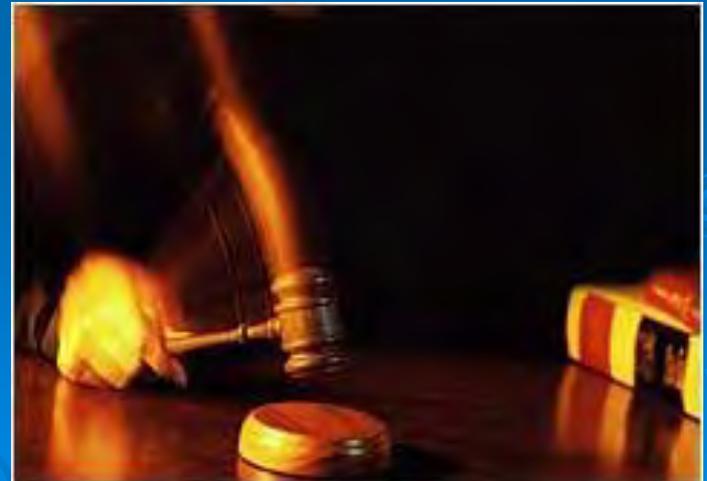
Courts tend to give priority to the following kinds of remedies in environmental cases:

1. Injunctive relief to halt the harmful activity;
 2. Damages to compensate for the harm suffered;
 3. Orders of restitution or remediation;
 4. Sanctions to punish the wrongdoer and to deter future violations; and
 5. Awards of litigation costs and fees.
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- The bottom half of the slide features a decorative background of concentric, light blue circles resembling ripples on water, set against the solid blue background.

INJUNCTIVE RELIEF TO HALT THE HARMFUL ACTIVITY

Types of injunctions:

1. Preliminary or interim injunction
2. Temporary injunction
3. Permanent injunction



MORE ON PRELIMINARY INJUNCTIONS

PRELIMINARY INJUNCTIONS TYPICALLY REQUIRE:

- Irreparable Harm to party seeking relief
- Movant's likelihood of success on merits
- Risk of Harm to the party required to comply
- Public Interest

CONTINUOUS MANDAMUS

- Orders of mandamus are mandatory orders to force public officials to take an action or to enjoin them from taking an action in order to comply with statutory obligations

OBSERVATIONS ABOUT MANDAMUS: CHIEF JUSTICE KIRPAL OF INDIA

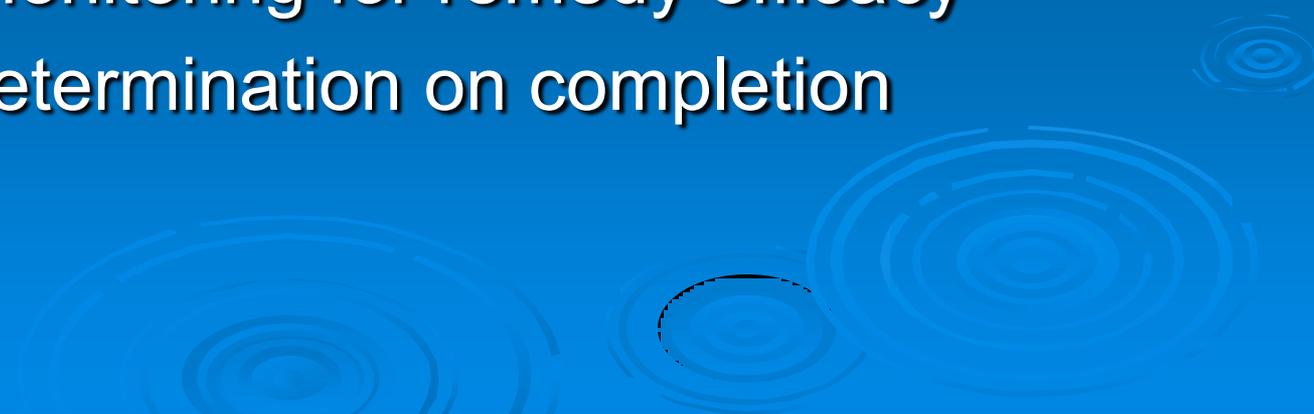
- “The judiciary has, in the recent times had to give directions which may give the impression to some people that it is an encroachment on a field demarcated for others. The label of judicial activism is given for this process by them. Nothing can be further from the truth. The directions which have been issued in various cases have the effect, in the nature of continuous mandamus, of directing the authorities and the industries to discharge duties and fulfil obligations as contained in the laws.”

RESTORATION AND REMEDIATION

- The preferred remedy in many cases is the restitution of the environment to the condition it was in before the harmful activity



PHASES OF LONG-TERM REMEDIATION

- Phase I: Scientific study to assess extent of damage and options for addressing damage
 - Phase II: Identification and pricing of remedial options
 - Phase III: Remedy selection
 - Often multi-year projects
 - Phase IV: Monitoring for remedy efficacy
 - Phase V: Determination on completion
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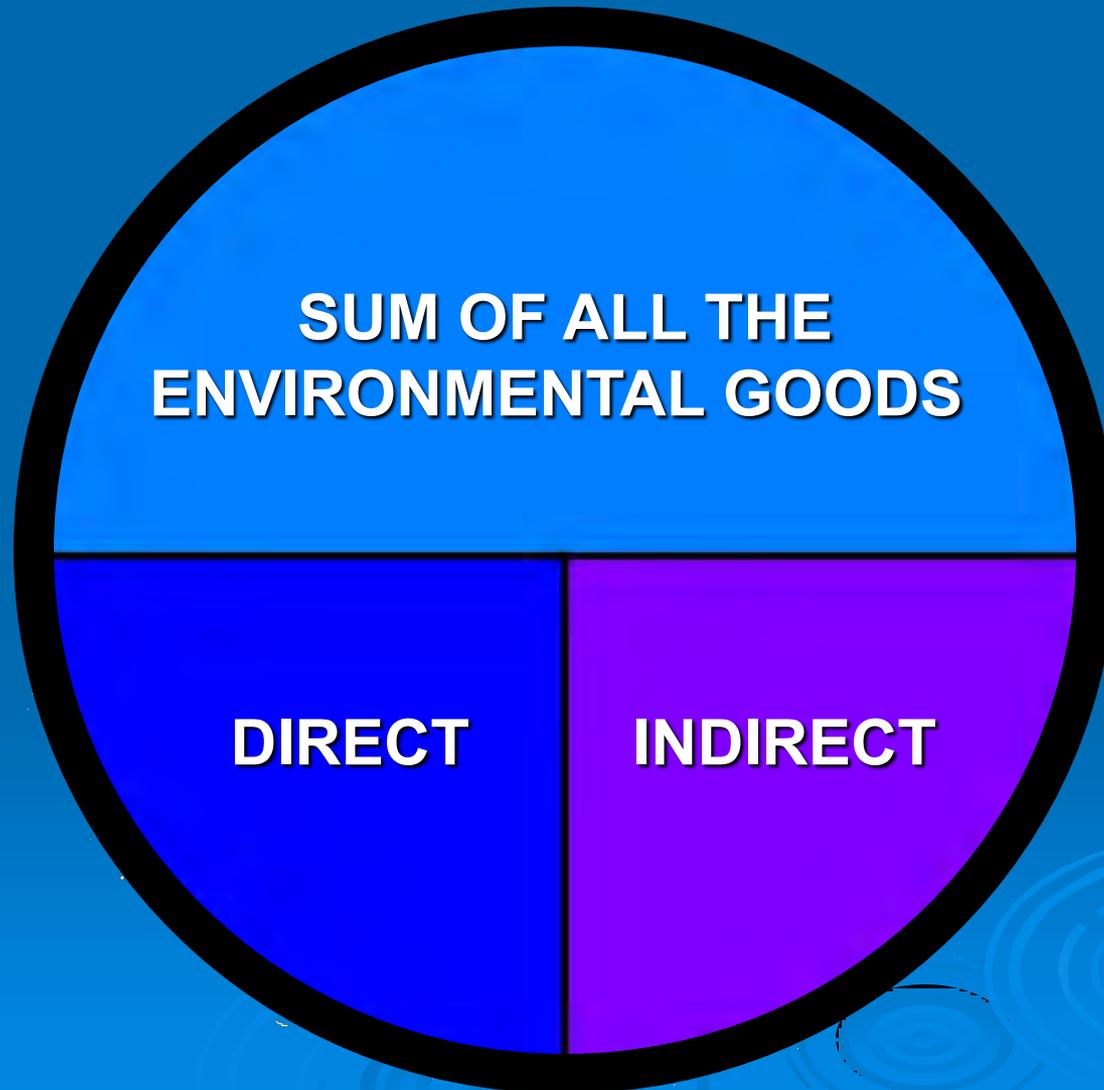
CHALLENGES WITH LONG-TERM REMEDIES

- Who does the work?
 - Polluter?
 - Third-party?
 - Government?
 - Acquiring needed expertise
 - Use of special experts or “masters”
 - Declaring completion
 - Continuing jurisdiction
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DAMAGES

- Types of damages:
 - Natural resource damages (NRD)
 - Traditional private party damages:
 - Actual or compensatory
 - property damages
 - physical injury and health damages
 - Punitive damages (where available)

ASSESSING THE VALUE OF NATURAL RESOURCE DAMAGES



DIRECT AND INDIRECT USES

- Direct uses can involve consumption of goods or non-consumptive use
- Indirect uses:
 - prevention of flooding and erosion
 - keeping waterways and oceans pristine
- Valuation methods must be adapted



PRIVATE PARTY DAMAGES SUITS

- Court can award indemnities or monetary damages to compensate for property damage or personal injury associated with environmentally destructive activity under traditional legal authorities
- Level of damages depends on the nature of the harm or injury
- Judges must quantify economic value of the losses
- Aggravated circumstances allow for punitive damages in some jurisdictions

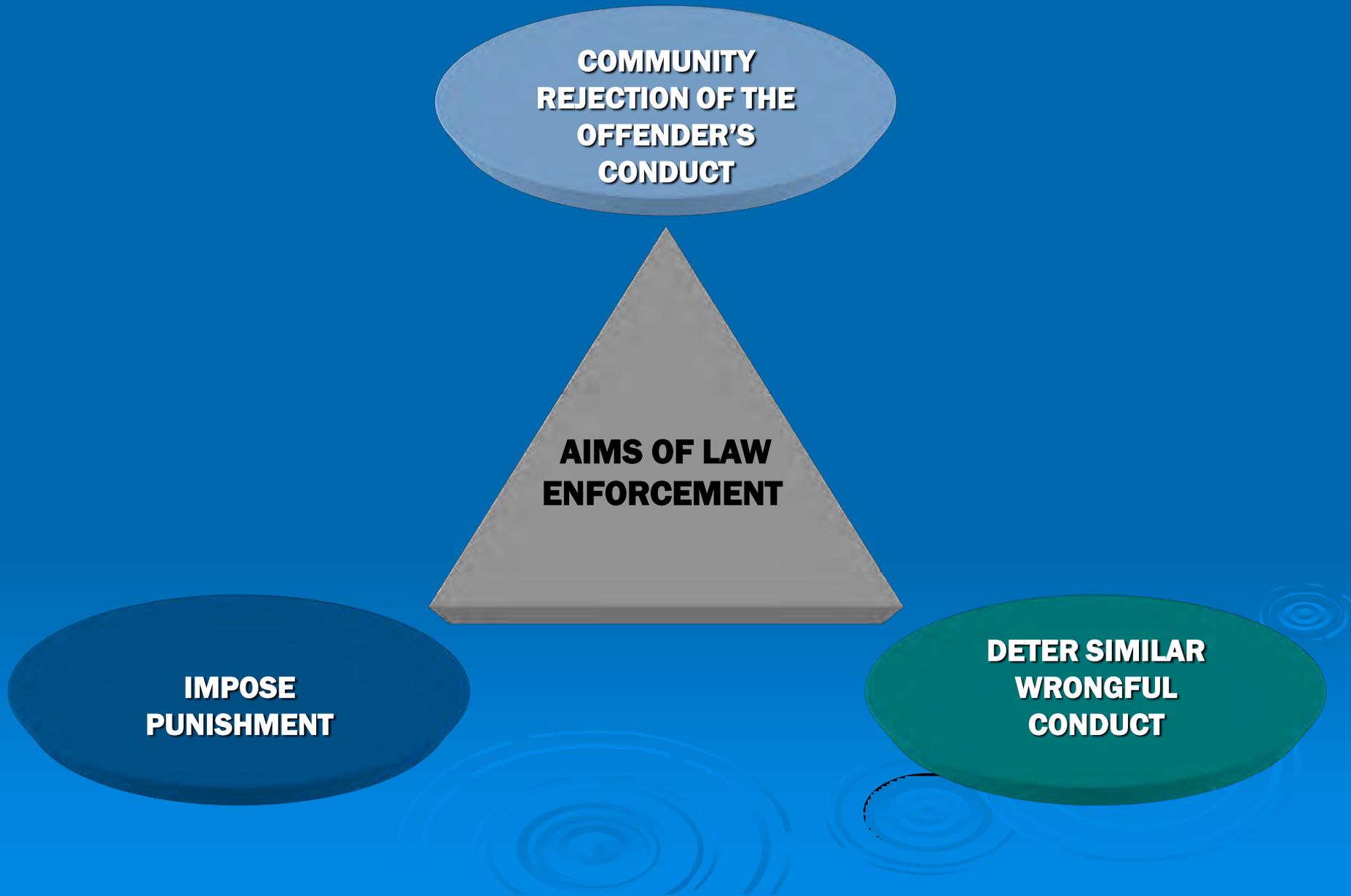
PUNITIVE SANCTIONS

Basic Tools

- Criminal sanctions
 - Incarceration
 - Monetary fines
- Civil penalties



AIM OF PUNITIVE REMEDIES = COMPLIANCE WITH THE LAW



PUNISHMENT BY IMPRISONMENT

- Judges are increasingly using imprisonment to punish and deter environmental wrongdoing



FINANCIAL SANCTIONS

- Financial sanctions
- Civil Penalties
 - Less commonly available under law than criminal fines
 - Can be negotiated in some jurisdictions



ECONOMIC BENEFIT OF NONCOMPLIANCE (EBN) – A FLOOR FOR FINANCIAL SANCTIONS?

- Increasingly, legislators and courts alike recognize that financial sanctions, whether civil or criminal in nature, should disgorge the “economic benefit of noncompliance”

“Whether a judge is assessing a criminal fine or a civil penalty, it is valuable for the judge to consider the deterrence value, and measure of consistency in approach, offered by assessing fines and penalties that, at a very minimum, disgorge the economic benefit that a polluter realized by virtue of its noncompliance .”

CALCULATING EBN

■ Deferred Costs

- Value to violator of deferred compliance
 - Money that should have been spent on environmental improvements was presumptively invested elsewhere, earning a rate of return on an annual basis
- Formula: Amount deferred x annual rate of return x years of violation = deferred cost EBN

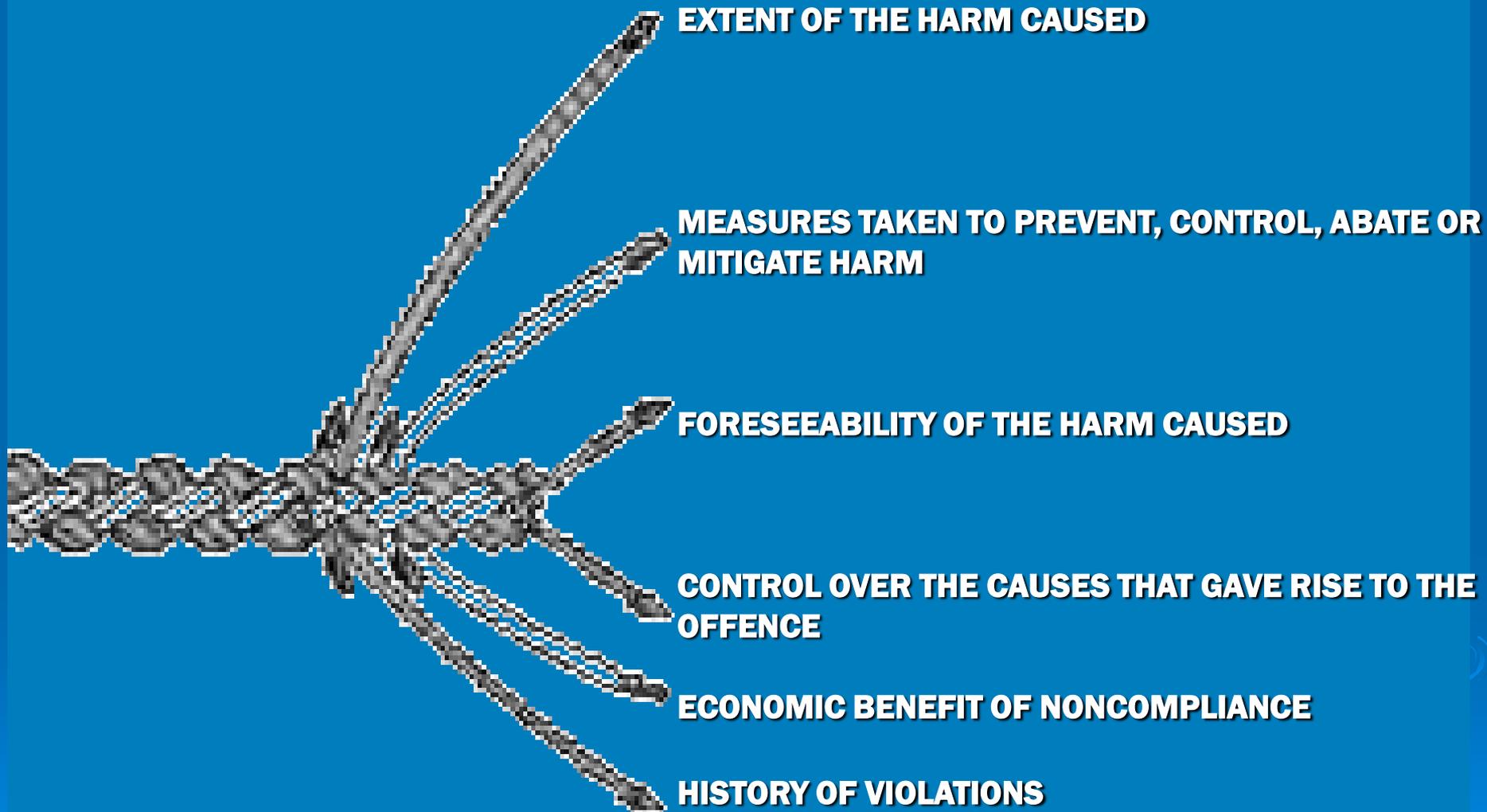
■ Avoided Costs

- Deferred cost EBN + Total Avoided costs = Total EBN

ALTERNATIVE SANCTIONS

- COMMUNITY SERVICE
- RESTORATION AND PREVENTIVE ACTION
- COSTS, EXPENSES AND COMPENSATION
- ORDERS TO PUBLICISE THE OFFENCE AND ITS ENVIRONMENTAL AND OTHER CONSEQUENCES
- ORDERS TO CARRY OUT SPECIFIED ENVIRONMENTAL PROJECTS
- ORDERS TO CARRY OUT A SPECIFIED ENVIRONMENTAL AUDIT

CONSIDERATIONS FOR PUNITIVE REMEDIES



AWARDS OF COSTS AND FEES

- Awards often allowed for “prevailing parties”
- Some jurisdictions have special costs rules for public interest litigation



JUDICIAL OVERSIGHT OF REMEDY IMPLEMENTATION



- **MONITORING BY COURT**

- **REPORTS TO COURT**

- **CONTEMPT OF COURT**

TECHNIQUES FOR JUDICIAL OVERSIGHT OF REMEDY IMPLEMENTATION

- Requiring parties to report back
 - Regular monitoring by the court
 - Appointment of oversight commission
 - Contempt proceedings
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CONCLUSION REGARDING ENVIRONMENTAL REMEDIES

- PUNITIVE AND COMPENSATORY DIMENSIONS

- TECHNICALLY COMPLEX

- ACTIVE JUDICIAL OVERSIGHT OFTEN REQUIRED