Intellectual Property Rights, And Competition Law
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Lecture - 41
TRIPS and Competition Law

Hello all. In the last few weeks we have discussed extensively about the various competition law provisions in India as well as in European Union. Now we all are aware about what are the anti-competitive agreements, what practices may lead to abuse of dominant position in India as well as in Europe. And, also in the previous classes, you have seen lots of anti-trust issues in the United States also.

These were all country specific rules regarding competition laws and now we have to see how this competition policy has been perceived in the international trade arena. So, in this module we are going to read about the international trade and competition policy. Particularly we would look into the various provisions of Competition Laws in TRIPS Agreement.

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So, in this module we will be dealing with the brief history of how this competition policy has been incorporated in the international trade and particularly in TRIPS agreement.

And what are the main provisions of the TRIPS agreement which talk about the competition policy. So, there are three main provisions which directly point towards competition policy or competition law issues. We would discuss one by one all three of them.

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So, let us start with the brief history of competition policy in international trade So, the rules for investment as well as competition policy in the international trade Investment, and how the competition policy and investment will go side by side has been deliberated since 1940s particularly during the preparation of GATT agreement i.e. General Agreement on Trade and Tariffs. So, during that time it was dealt about how the competition policies can be incorporated in the GATT agreement, so that if certain monopoly situation arises or monopolistic issue arises during these international trade that can be dealt with.

But the formation of International Trade Organization did not materialise. So, these rules particularly the aspects of trade and competition policy could not be finalised. However,

after the formation of the World Trade Organization, both GATT as well as WTO are increasingly dealing with both the principles and the specific aspect of trade investment and competition issues.

So, they have laid down specific rules regarding what if certain anti-competitive situation arises, how to deal with those kind of situations as well as the GATT agreement, the General Agreement on Trade Services. Both of them contain rules on monopolies as well as exclusive service suppliers. Particularly the rules on monopolies has been extensively dealt with in the *commitments on telecommunications*. The principles have been elaborated in the commitments on the telecommunication.

Particularly the TRIPS agreement recognises the National Government's rights to act against any anti-competitive practices and their rights to work to limit these practices which we will be discussing later in this module, how the national authorities have been provided with competence, power to deal with the anti-competitive situation and what are their rights to stop or limit those practices.

So, this is just to introduce brief history, where the competition policy was tried to get incorporated into the International Trade Agreements.

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Now, coming to the TRIPS agreement as you all know TRIPS is the agreement on trade related to intellectual property rights. So, basically in the TRIPS agreement the mandate of the agreement was to enact minimum provisions of the intellectual property right, so that each member country, which is a part of the WTO agreement can formulate their National IP laws keeping in view these minimum standards which are prescribed in this TRIPS agreement.

So, that if certain IP issues arises all the member countries will be in a position to respect or to balance the IP which each particular country gives. So, during 1970s and 1980s particularly during the negotiation of the international code of conduct on technology transfer, which did not materialise at the end, the developing nations per se showed their reluctance and showed their concern regarding the effect of IP monopoly.

So, the developing countries in particular raised their issue that because the developed nation has maximum number of IPs or major share of IPs, i.e. the IP belongs to the developed nation. So, there is a chance of anti-competitive practices due to the IP monopoly. So, based on concerns of the developing nation it was thought that there should be some provision of competition policy in the TRIPS agreement, not TRIPS agreement during 1970s but in the code of conduct on the technology transfer.

So, even at that time the developed nations were not in favour of bringing any competition law clauses or competition law policy, competition policy in the agreement because they had their own competition law at that time. But to have a balanced situation or to create a form of negotiation, certain points on competition policy was incorporated in the later, in the TRIPS agreement.

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Particularly in Uruguay round of discussion, thereafter in the Doha declaration certain provisions regarding the competition policy were incorporated in the TRIPS agreement. So, these were not per se any policy, a stringent policy that national countries have to adhere to, but these are kind of guidelines which the country has to take into consideration before enacting their IP laws. Because we have to make it clear that the TRIPS agreement is all about the intellectual property related trade.

And competition law does not per se include only intellectual property; it may include all kind of trades. So, here the provisions for competition policy were only related to intellectual property related trade. So, coming to the basic provisions of the competition law in the TRIPS agreement, there are three main articles which talk about the competition laws. First is the Article 8 sub-section (2), then the second one is the Article 31 sub-section (k) and the third one is the Article 40.

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The Article 8 sub-section (2) reads as follows. "Appropriate measures provided that they are consistent with the provisions of this agreement may be needed to prevent the abuse of intellectual property rights by the right holders or the resort to the practices which unreasonably restrain the trade or adversely affect the international transfer or technology."

So, here in this article like TRIPS acknowledges that the member states may take appropriate measures to prevent the abuse of the intellectual property. So, here it did not specifically elaborate what can constitute as an abuse of intellectual property right, but it gives us three pointers which can be considered as an anti-competitive behaviour or the abuse in anti-competitive behaviour from the perspective of the competition law.

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It gives the members the power to adopt appropriate measures to prevent three interdependent kinds of IPR related practice. First: the abuse of IPR by the right holders as it was directly mentioned, second: practices that unreasonably restrain the trade, third: practices that adversely affect the international technology transfer. So, these three have been directly mentioned in the article. But again interpretation of this article should not be restricted to these three.

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Even though in WTO or in TRIPS the anti-competitive practices are not well defined, however the WTO panel in the *Mexico Telecom cases* which was the first real competition case in the WTO, the term anti-competitive practices has been interpreted very broadly and it may include actions that lessen rivalry or the competition in the market, any behaviour or any action that may lead to decreased competition in the market, it may include the horizontal price fixing, market sharing agreements by the suppliers which on national or international level are generally discouraged or disallowed.

So, interpretation of the anti-competitive practices should not be restricted to those three which are directly mentioned in Article 8 sub-section (2), but it should be interpreted broadly. It depends in which situation it has to be interpreted how.

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One of the drawbacks of this Article 8 sub-section (2) is as I mentioned the TRIPS agreement is all about the practices of trade or trade related to intellectual property right. So, the provision does not apply to other potentially anti-competitive practices which primary are not directly related to the intellectual property rights. So, normal mergers and acquisition or joint ventures where there is no IP per se involved cannot be regulated by these provisions.

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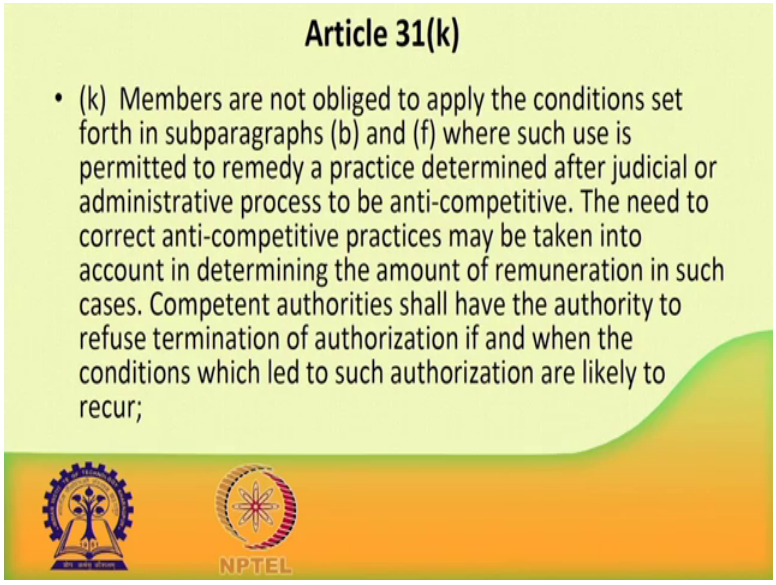

So, this was the first Article 8 sub-section (2) which talks about the members country's power to adopt measures to prevent the abuse of intellectual property right. Now, the very next Article 31 gives other measures where in situation where a patent has not been fully used or in case of national emergency or public health emergencies some patents are required and it was not available or not being given by the patent holder. So, in those cases the country may adopt measures such as the compulsory licensing system where without the due permission from the patent holder, the country may authorise other firm or company to produce the goods or substances which involves the intellectual property.

So one of the provisions of this Article 31, Article 31 sub-section (k) it reads as members are not obliged to apply the conditions set earlier such as where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases.

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This article tells us that if the conduct of a patent holder is judged to be anti-competitive by a judicial or the administrative process, there should be a judicial or the administrative process, due process that should determine whether a conduct is anti-competitive or not. So, if any conduct is found to be anti-competitive, then the competent authority of the member can authorise the compulsory licensing system neither with the prior negotiation with the patent holder.

So, without prior negotiation of the patent holder the member country has the power to authorise for the compulsory licensing. And, it does not have to supply the product which involves the intellectual property to the domestic market necessarily. So, this clause gives the power to member country to issue the compulsory licensing for the product required and it is not necessarily that the product has to be supplied in the domestic market.

And finally the determination of the amount of royalty or the remuneration is also independent of patent holder's discretion. So, the amount of remuneration may be smaller than in the case of commercial transaction if in a situation the patent holder has given a license for that technology, he may have asked for a higher amount, but when member country is issuing a compulsory licensing, the remuneration amount is also negotiated and it may be a smaller amount as the country thinks so.

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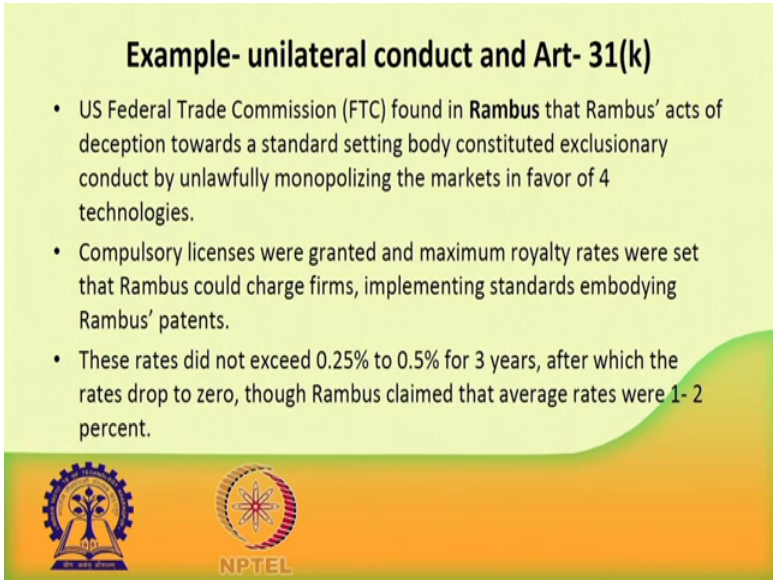

So, one of the example for this kind of behaviour, the unilateral conduct particularly where a patent holder refuses to give the technology or the IP. In one of the cases the US Federal Trade Commission, FTC in the Rambus case there are four patents with which the Rambus has deceived the standard setting bodies by the exclusionary conduct, by monopolising the market with its four technologies.

So, for these four technologies the compulsory license were granted and the maximum royalty rates were set which the Rambus could charge from the firm. So, basically in the compulsory licensing negotiation the charges rates were decided as 0.25 percent to 0.5 percent for 3 years and after which the rate was dropped to 0, but Rambus claimed that the average rate should be 1 to 2 percent. As you may see it hardly exceeded from 0.5 percent.

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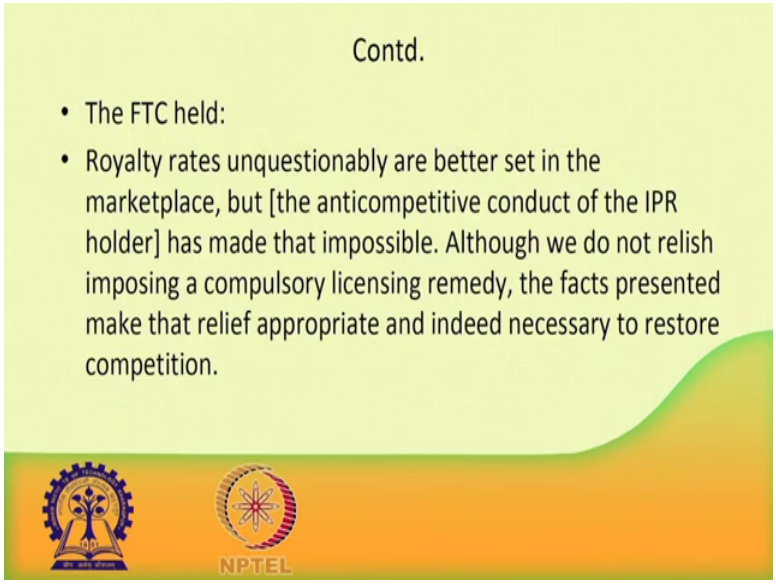

Rambus was dissatisfied with this, but the FTC held that the "royalty rates unquestionably are better set in the market place, but given the anti-competitive conduct of the IPR holder" i.e. the Rambus, it "has made impossible" to deal that in the open market place. So, the FTC said that "although we do not relish imposing a compulsory licensing remedy. The fact presented make the relief appropriate and indeed necessary to restore competition" (emphasis added).

So, in order to restore the competition in the market and the monopoly which the Rambus has executed by not giving the license for those four technology in question, Rambus has created such a situation where the FTC is now bound to give the compulsory licenses with the rate decided by them. So, again Article 31 sub-section (k) is the measure by which compulsory licensing can be issued by the member country.

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The next and one of the most important provisions are in IP and TRIPS agreement related to competition policy is Article 40. So, now we have seen that the section 8 has provided the power to the member countries to take necessary measures against any anti-competitive practices in the contractual licenses. So, as a specialised provision for this Article 18 now Article 40 stands as a specialised provision and it provides that members agree that some licensing practices or conditions pertaining to the intellectual property rights which restrain competition may have adverse effect on the trade and may impede or transfer and for dissemination of the technology.

So, the sub-section (1) of Article 40 directly admits that the anti-competitive behaviour of this IPR holder may have adverse effect on the trade as well as the dissemination of the technology which we have seen in the competition law, it is generally considered as anti-competitive and this article particularly acknowledges the fact.

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And, it also goes on without saying that nothing in this agreement shall prevent the members from specifying in the legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect in the competition in the relevant market. So, it has given the powers to the member countries to include in their legislation or they can specify in their legislation what may constitute as an abuse of intellectual property right, what kind of contractual licenses may become a part of anti-competitive behaviour.

So, it says that a member may adopt consistently with the other provisions in this agreement appropriate measures to control such practices, again it goes on defining the practices which may lead to abuse of dominant position by giving some examples and these examples were like exclusive grant-back conditions, conditions preventing the challenge to validity of the patent or IP in question or the coercive package licensing.

So, in the relevant laws and regulation of the member, it gives an example of what may constitute the practices which may lead to abuse of dominant position and member country may adopt specific measures to put the details of what may constitute as practices leading to abuse of intellectual property right.

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If you analyse this section broadly again the list of anti-competitive behaviour here is not exhaustive and it has given just few examples like the exclusive grant-back condition which I have underlined in the slide, the conditions preventing the challenge to validity, coercive package licensing. So, this is not an exhaustive list. The interpretation should not be restricted to these three conditions or three practices.

Because as a part of the negotiation history of TRIPS agreement, the Brussels draft listed 14 anti-competitive licensing practices which are also listed in the draft of International Code of Conduct on Technology Transfer, the 1985 version. So, there they have broadly classified what kind of practices may lead to abuse of dominant position and 14 anti-competitive licensing practices were listed in that draft.

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So, Article 40 sub-section (1) and (2) gives the measures which we have gone through. Now there are other provisions in this article like Article 40 sub-section (2) to subsection (4). Apart from the substantive procedure these are the procedural rules. So, the Article 40 sub-section (2), (3) and (4) stipulates procedural rules for consultation and co-operation between members who are enforcing its licensing related competition control and another member whose national or the domiciliary is alleged under the law of the former to be engaged in the licensing related to anti-competitive practices.

So, in situations where a member country when it is in trade with another member country, if it is facing the anti-competitive behaviour which is regulated by the laws of the particular country then in those cases what should be the procedure for the dispute resolution is particularly laid in the sub-section (2), (3) and (4) of the Article 40.

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So, now after going through all these provisions if you just read the Article 40 sub-section (1) in connection with the other provisions, it seems to be an affirmative obligation imposed on the WTO member. But, in reality it is not an obligation for the WTO members. These are certain guidelines or the leeways which are given to the member countries which they may adopt in their national legislation.

So, basically the national legislative bodies alone have the right to reasonably determine which practices are anti-competitive or the forbidden practice. It is a kind of guideline which has been given. Now it is upto the member countries to adopt or list out the practices which may lead to anti-competitive behaviour or the forbidden practices.

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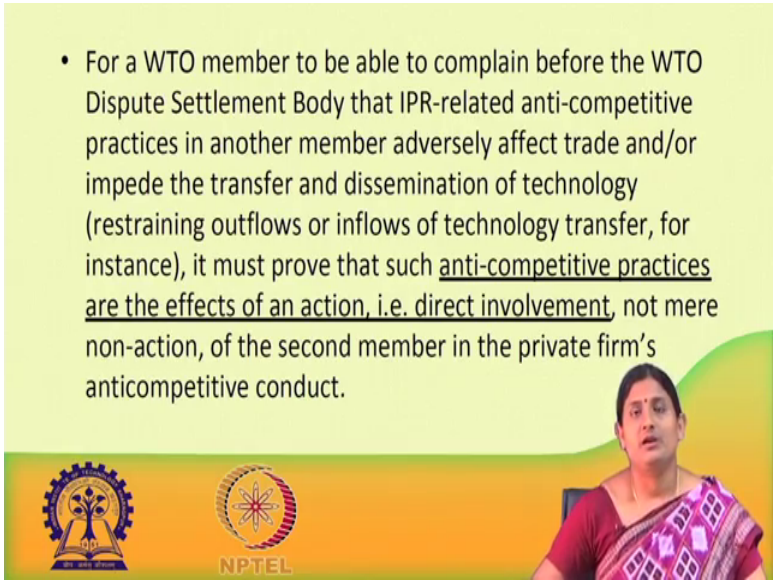

So, as per this Article 40 for a WTO member to be able to complain before the WTO dispute settlement body that IPR related anti-competitive practices has been adopted in certain member countries and it has adversely affected the trade or impeded the transfer of the technology, the member has to prove that such anti-competitive practices are the effect of the action i.e. there is direct involvement of the company and the anti-competitive practices has lead to this kind of situation.

And, it is not by mere non-action of the second member, in the private firm's anti-competitive conduct. So, now it has to be proved in the dispute settlement body that the anti-competitive practices are the effect of action only. If there is in reality direct involvement, then only the probable theoretical situation cannot be taken as a proof. So, it has to be proved that anti-competitive practices are the effect of certain actions.

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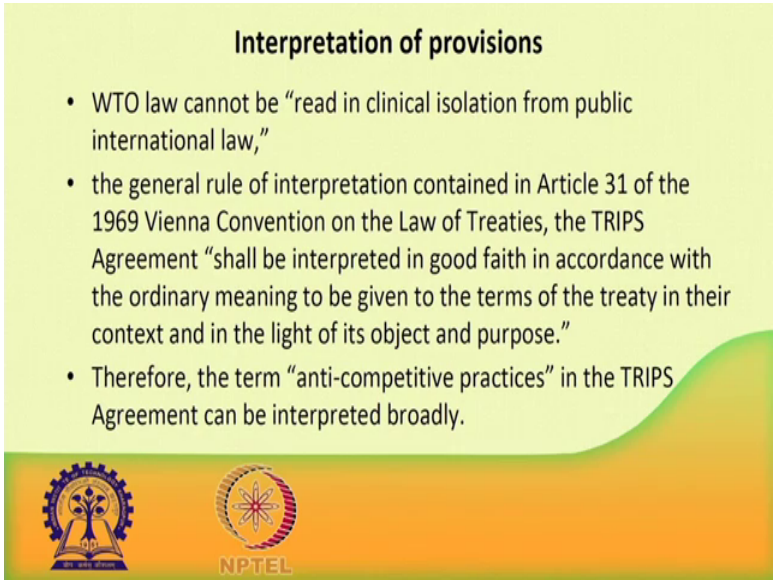

So far we have dealt with all the three provisions mentioned in the TRIPS agreement which is directly talking about the competition policy. As we saw there are certain specific example given that may constitute abuse of dominant position and that are the anti-competitive practices, but again these are not exhaustive list. There are just few example.

The WTO laws cannot be read in clinical isolation from the Public International Law. The general rule for interpretation which is contained in Article 31 of the *1969 Vienna convention on the law of treaties*, the TRIPS agreement shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of their treaty in the context and in the light of its object and the purpose. Therefore, the anti-competitive practices which are mentioned in the TRIPS can be interpreted broadly.

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Now, so all these provisions laid down in Article 8, Article 40(1) and 40(2) taken together will be applicable for the anti-competitive practices relating to all the different IPRs covered by the TRIPS agreement and as I mentioned earlier, it is not an obligation on the member countries. So, the competition rules in the TRIPS agreement do not contain precise obligation subjecting the exercise of the IPRs to the competition law principles.

So, as we know the TRIPS agreement lays down the basic required minimum standards for the intellectual properties which the member country should adopt. So, as per the TRIPS agreement if the member country should adopt the minimum basic standards as specified in the TRIPS, there won't be any competition issue per se. But if competition issues arises, then it has certain provisions by which the national, the member may adopt their own specific measures. So, this is not an obligation. Now, it is up to the discretion of the member states.

And the Article 8, 31 as well as 40 of the TRIPS agreement recognise the powers of the member to control the IPR related anti-competitive practices. So, it gives a pointer or guidelines for the member countries to adopt specific measures to prevent the anti-competitive practices.

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As per the TRIPS agreement these are the basic provisions which member country may adopt again. It is not so easy to enforce the competition policy flexibility in member countries legislation because the Article 8 as well as sub-section (2) of Article 40 limits the member's sovereign powers to adopt competition legislation concerning the IPRs, how does it limit?

The rules require that the measures adopted to control IPR related anti-competitive practices to be consistent with the TRIPS agreement and should be appropriate. Please take important note of the word ***"consistent and appropriate"***. So, the member countries are not free to take any measures as they wish. It should be consistent as per the TRIPS agreement as well as appropriate. Now appropriate is a very broad word. In general it is open ended where the member country may think fit. As it appears to be necessary, the member country can take the appropriate measures.

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These three sections which we discussed directly speak about all the relevant provision related to the competition policy. However the competition rules preventing the anti-competitive practices are also specifically addressed in *note 3* of the TRIPS agreement which says that, *for the purpose of the article 3 and 4, the protection shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of the intellectual property rights as well as matters affecting the use of the IPR specifically address in this agreement.*

In matters affecting the use of IPR comes the competition law, so those three sections are quite relevant for a competition policy. Also Article 3 and 4 are where the protection has been defined. So, there they have also taken the matter related to the competition issue.

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Article 63 sub-section (1) deals with the transparency, also list the subject matters of the TRIPS agreement and one of the subject is Prevention of Abuse of Intellectual Property Right. So, the Article 63 as well as the Article 2, 3 and 4 indirectly talks about the competition policy.

And the WTO member's exercise of its right to adopt or enforce the domestic IPR related competition should be in principle of good faith and must be consistent.

So, flexibilities of competition law is not easy to enforce. It should be consistent and appropriate with the TRIPS agreement and appropriate as per the country.

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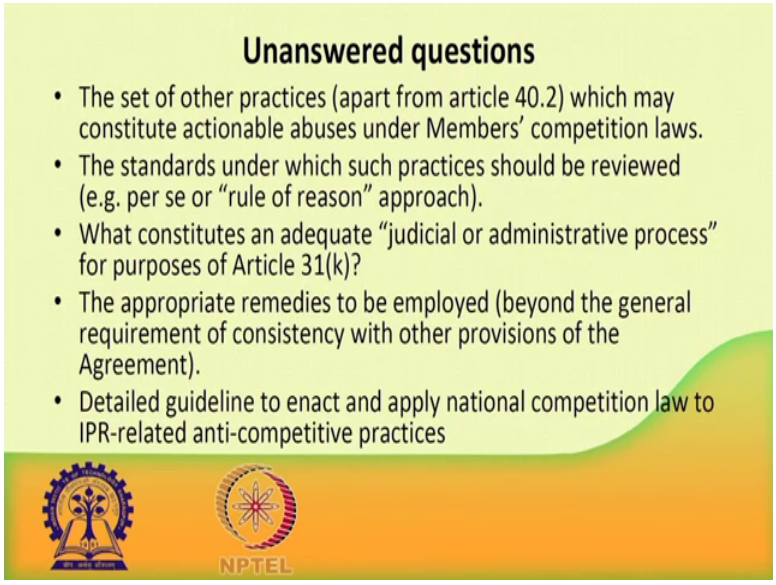

So, briefly we have disused all the provisions of TRIPS agreement which is about the competition law, however these are guideline or pointers to the national or the members of the WTO, but there are certain unanswered questions for all these provisions. As we saw there are certain examples of the anti-competitive practices, even though that was listed in the draft negotiation bill, 40 anti-competitive practices were listed there. But, set of other practices may constitute actionable abuse under the members competition law are missing here.

As we have seen the European as well as the Indian perspective, how to determine whether a behaviour is anti-competitive or not, whether we should go for a per se rule approach like cartel formation like per se anti-competitive or rule of reason approach like abuse of dominant position. So, we have to go by the rule of reasoning approach under which standard, the practices should be reviewed here.

In subsection (k) of Article 31 where the compulsory licensing is in question like where a process is found to be anti-competitive as per the judicial or administrative process what will constitute an adequate judicial or administrative process, that definition or that clarity is also missing. And, the appropriate remedies to be employed beyond general requirement of the consistency with the provisions of the agreement is also missing here.

Again the detailed guideline to enact and apply the national competition law to the IP related anti-competitive practices is also not here. A few pointers which the national, the member countries may refer to, these condition and draft their or enact their national legislation on the anti-competitive practices for IPR related matter. Again as this is for the TRIPS agreement so, these are all restricted to the trade related to intellectual property.

So, it is not applicable for the normal competition anti-competitive behaviour which are unrelated to the intellectual property. So, these are the basic provision just to give you a little bit awareness regarding how the TRIPS agreement has included the various provisions of the competition law and apart from that how member countries are taking this as a guideline or how member countries are adopting this.

So, I hope this should be quite useful to you to understand that a competition policy is not only a national matter. International trade also involves the competition law policy and the TRIPS agreement has also taken care of this. So, in the next section we will just give you an example of how EU has taken stands in case of international trade like TRIPS agreement and the IP issues from the EU perspective.

Stay tuned for that. Thank you.