Intellectual Property Rights, And Competition Law
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Lecture - 17
The United States Anti - Trust Law

Dear students, in the coming class we are going to discuss the *Anti-Trust Law* in the United States. So, why we should look into the United States? Because, United States is the one country where the Competition law or the Antitrust law are synonymously used. In the United States Antitrust law is known because there is a history to it. Because the law was originally enacted to curb or control the trust, the huge enterprises having massive assets in the nature of trust.

They enacted this particular law to control these trusts that is why it is known as Antitrust Law in the United States; in the modern era it is called Competition Law. So, we have to look into this particular law and mostly the jurisprudence emerged in the United States to look into various aspects of the competition law as well as the interface with IPR. Specifically we are going to look into, in the beginning classes, in the initial classes, into the law, the Antitrust law.

And today we are going to look into the antitrust law, from next class onwards we are going to look into the specific interface between this antitrust law and intellectual property. And we are elaborately going to discuss the jurisprudence emerged in the US jurisdiction; so that we can identify and we can understand the veracity of the interface between Intellectual Property Law and Competition Law.

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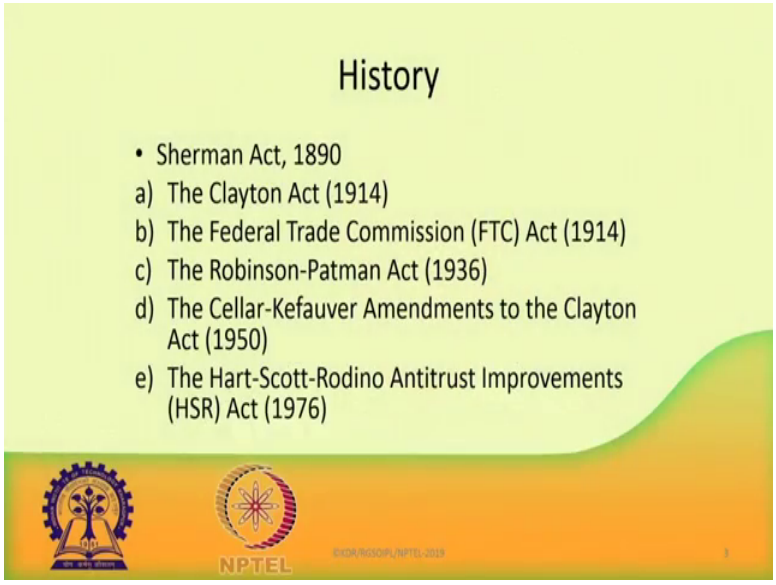

So, as I said the Antitrust law was passed in the name of Sherman Act.

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Because it was propounded by one of the senator at that particular point of time. The US Congress passed this particular act in response to the growing fear of accumulation of capital by the trusts. The trusts were business enterprises at that point of time in the industrial age controlling the market, monopolising the market and exploiting the market. So, the US Congress was forced to pass this particular act, because mostly these

trusts formed cartels and were trying to control the steel sector, the rail sector, the petroleum industries and other industries.

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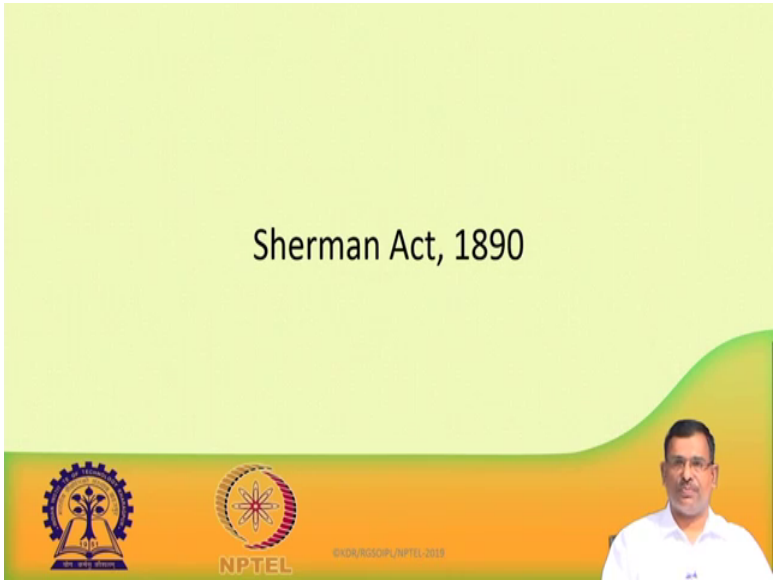

So, the Sherman Act, 1890 was actually passed because of the compulsions, compulsions on the US Congress.

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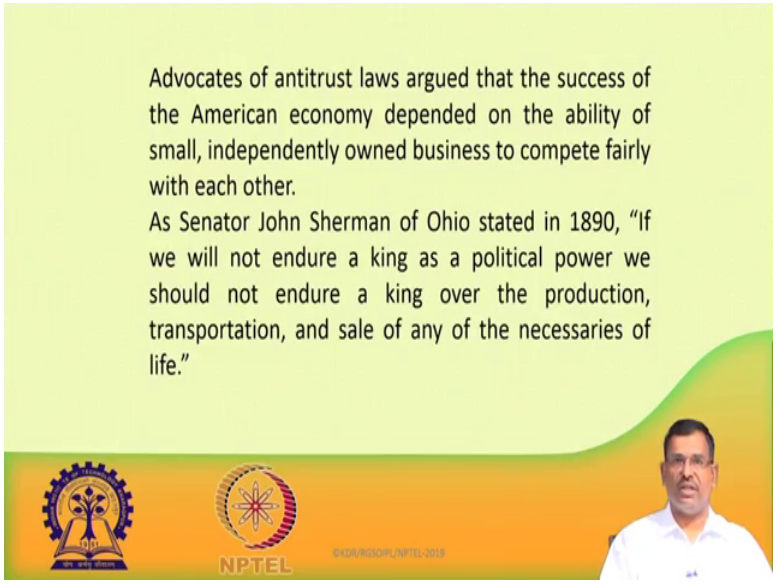

Because of the exploitative nature, in order to curb the exploitative practices of these particular trust. The Senator *John Sherman* of Ohio at that point of time was the

propounder of this particular act. That is why you can see the name of the Act is Sherman Act. I would say that he was a good economist who could envision the bad effects of monopolisation and he advocated and argued that there must be competition in the economy.

So that the small enterprises, small business firms should grow and compete with the large enterprises like trust. And Senator John says, "if we will not endure a king as a political power we should not endure a king over the production, transportation and sale of any of the necessaries of life". The king can do no wrong, but business firms, business enterprises can do wrong. They can monopolize the market, they can exploit the market against the consumer welfare, against the necessary day to day life of people. This is exactly the feeling which was expressed by Senator John Sherman at that point of time and the end result is the Sherman Act of 1890.

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The Antitrust law, the law is not against trust, but the practices of the trust at that point of time. This law is still considered to be very important component of economic enterprises or free enterprises in America. This Antitrust law of 1890 is considered as the *Magna Carta* of free enterprises because the Competition law, the competition provisions in order to curb the monopolies is starting from this particular Act. The roots

of this particular law can be traced back to the common law principles of tort law of unfair competition.

Any common man can understand unfair competition is harmful to the market, unfair competition is harmful to the life of people, unfair competition is harmful to the society at large, unfair competition is harmful to economy. So, there must be certain principles to regulate the monopolisation.

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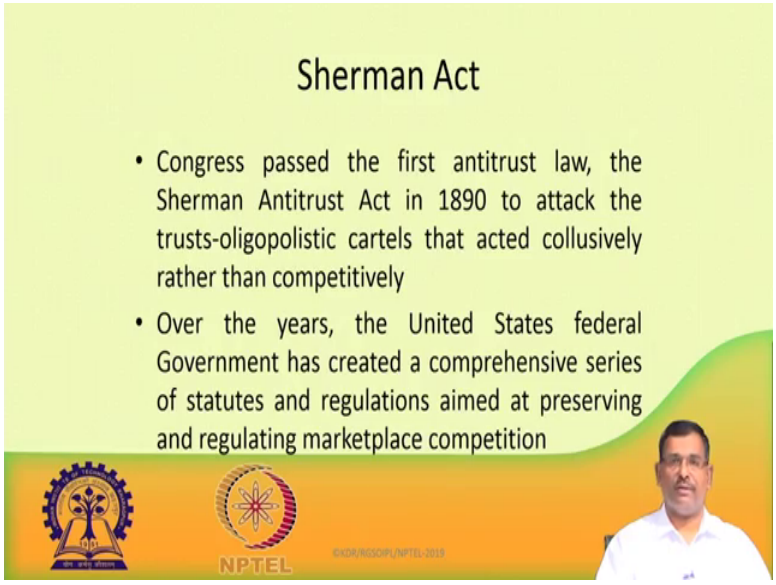

You can see that the objective of the Act is primarily to attack the trust, the huge oligopolistic or monopolistic cartels, those who act collusively to form huge cartels and run it parallel to completely control the market. So, over the years the United States Government created a comprehensive series of statutes which are supplementing the Sherman Act to control and regulate the marketplace.

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So, if you look into the Sherman Act, it is very important to look into the provisions. Hardly there are few provisions, few sections in the Antitrust Act, in the Sherman Act which controls the entire jurisprudence, which control the entire competition, which promotes competition in the entire US market.

So, Section 1 says that trust etc. in restraint of trade illegal, this is the heading which is given to Section 1. Section 1 of the Sherman Act says that every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several States or with foreign nations is declared to be illegal.

Every person who shall make any contract or engage in any combination, conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by a fine not exceeding. You can see that there is a huge amount in the penalty, there is a lesser amount in case of persons and huge penalty in case of corporation.

Not only the damages, there is imprisonment not exceeding 3 years or by both. The said punishments are in the discretion of the court. This Section 1 of the Sherman Act says many things; Section 1 gives the complete plethora of activities or antitrust activities so it talks about contracts, it talks about combinations, it talks about restraint of trade and

commerce, the restraint of trade between states, the restraint of trade between nations. It talks about the kind of the restrictions, it talks about the conspiracies, the conspiracy to do these above activities and also it talks about penalties, huge penalties, damages and even imprisonment for and punishment for violation of this particular provision.

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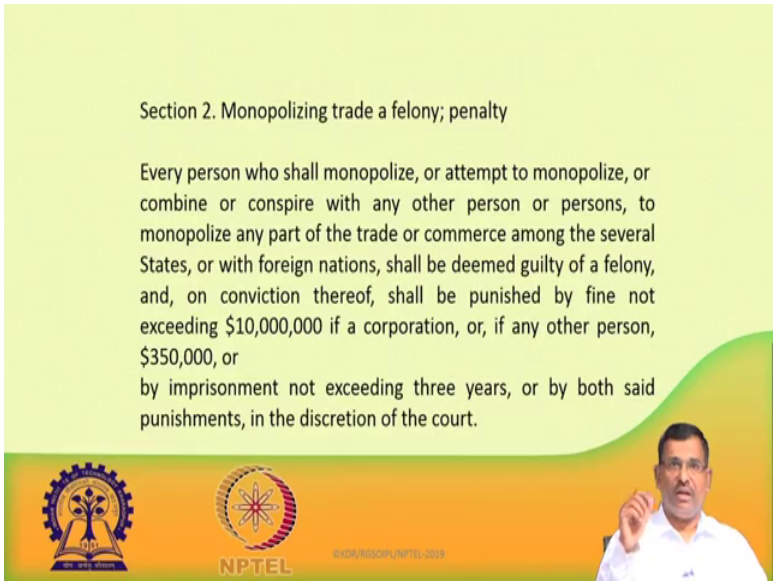

If you look into Section 2, again it says that monopolising trade a felony and penalty. What do you mean by monopolising? Section 2 of the Sherman Act says every person who shall monopolise or attempt to monopolise or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several States or with foreign nations shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding, the fines are same in both the provisions.

There is a huge fine for corporation and lesser fine for the individuals and imprisonment of 3 years, the same punishment which is given in the Section 1. So, if you look into Section 1, restraint of trade is illegal and Section 2 talks about monopolising trade and both are considered to be a felony. You can see a huge amount, 10 million US dollars is not a small amount, so the damages are very huge, its consequences are very huge.

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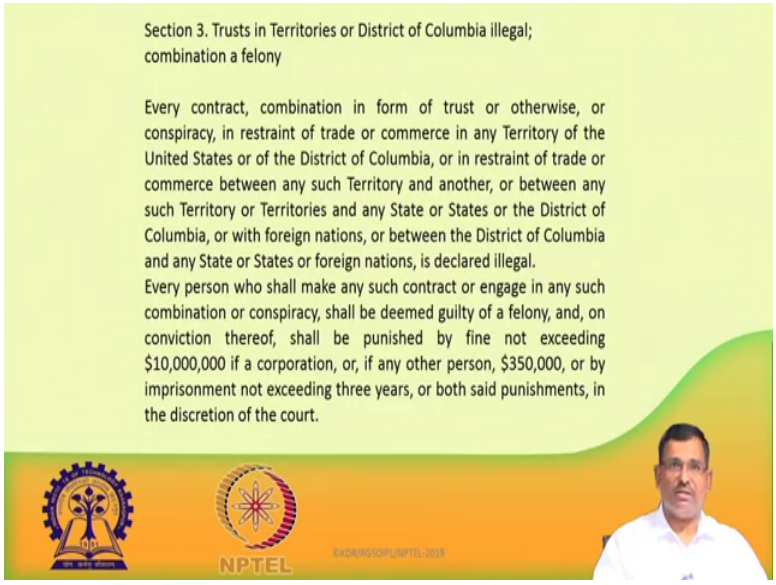

Specifically Section 3 for Districts of Columbia; this portion was added to include the state activities. It says that its the combination of Section 1 and 2, every contract combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce in any Territory of the United States of the District of Columbia or in restraint of trade or commerce between any such Territory and another between any such territory or territories. It is the combination of Section 1 and 2, specifically applicable to the District of Columbia.

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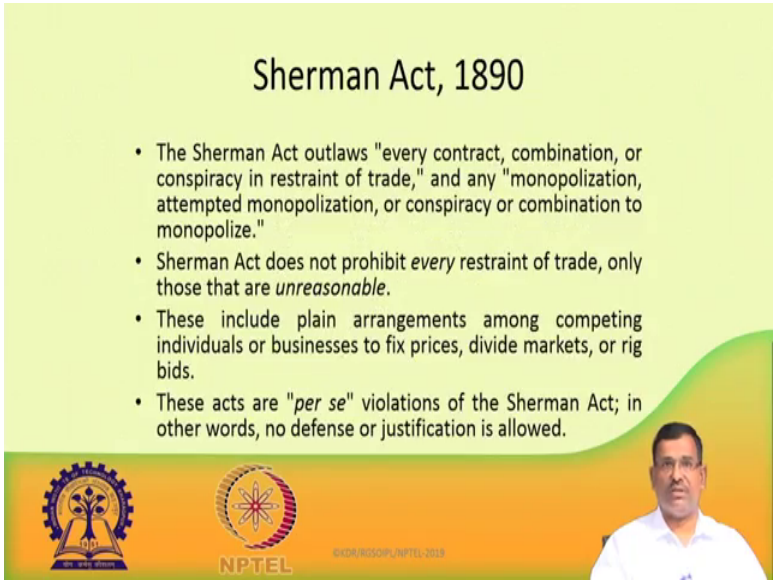

The Sherman Act outlaws every contract, combination, or conspiracy in restraint of trade. In section 2 monopolisation or attempt to monopolisation or conspiracy or combination to monopolise is illegal. And it prohibits not every restraint of trade, it only prohibits the one which are unreasonable. Every activity which are unreasonable are considered to be in restraint of trade and violative of the provisions of the Sherman Act.

So, it can include plain arrangements, competing individuals, business to fix prices, divide markets or bid rigging. All of these will come under the purview of these particular provisions. And these activities are considered as per se illegal by the Sherman Act, so you can say that no justification, no defence is allowed. So, these activities are considered to be per se violation of the Sherman Act.

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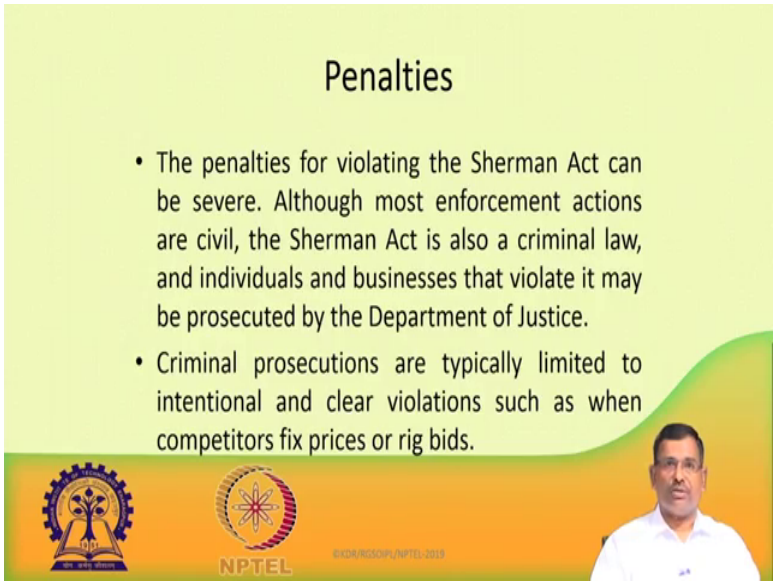

The penalties are actually severe, very severe and considered as felony, and there are civil damages as well as there are punishments, prescribed jail term. The competition law is in the realm of civil law, but you can find it in criminal law as well. It rarely happens, but there is a provision to send somebody to jail for a term of 3 years.

Typically the criminal prosecutions are limited to intentional violations. If competitors fix prices or bid rigs or intentional activity is there, then only they are prosecuted otherwise the civil law will take care of it by huge damages.

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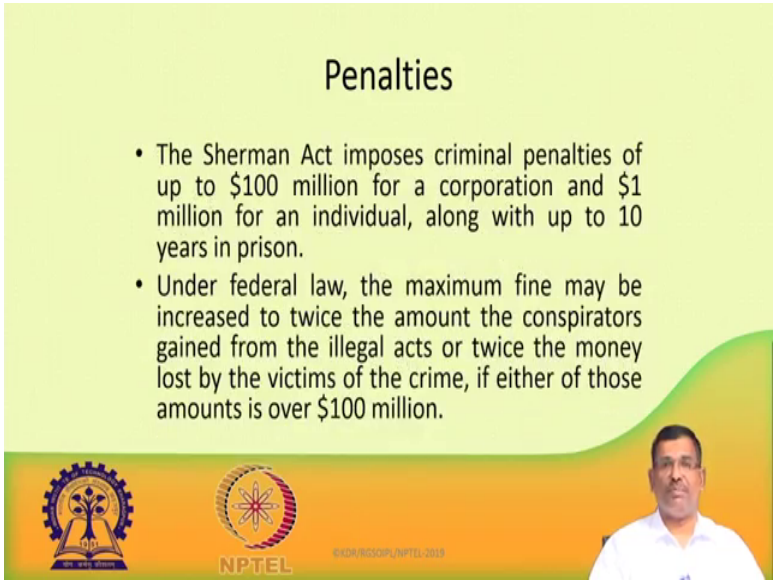

100 million US dollar for the corporation and 1 million for individuals. You can see that there is a huge difference. 100 million amount is a huge amount as far as the business enterprises are considered. It means that the US Congress intend to curb these practices very severely and to thrash these kind of activities with their hammer. And so, there are huge financial implications, cost implication involved for any violation.

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And the Federal Trade Commission in 1914 Act bans unfair methods of competition and unfair or deceptive acts or practices. It says that it is a violation of the Sherman Act. US Supreme Court says these are the violation of the Sherman Act. The enforcement is with the federal trade commission.

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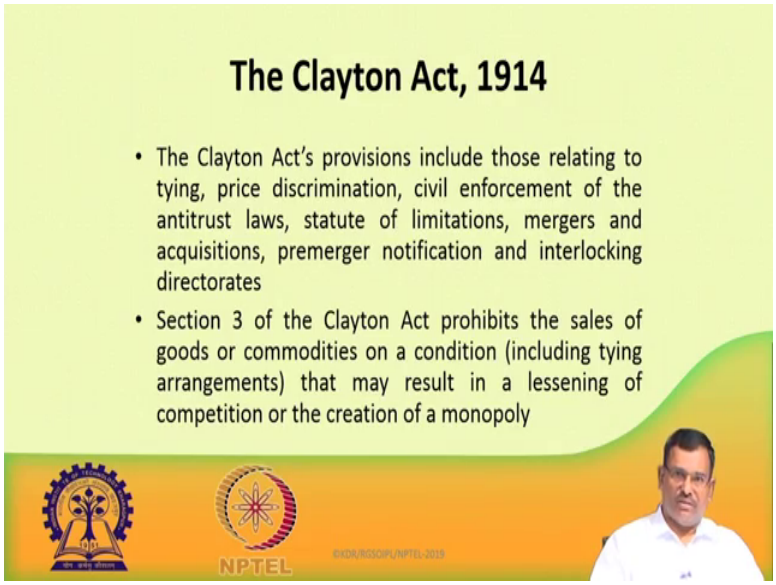

Trusts find it very difficult to operate under the Sherman Act, so what they did is that they formed mergers, many mergers and acquisitions happened after the Sherman Act came into existence. They want to evade the provisions of the Sherman Act by mergers and acquisitions with other firms. Then the Clayton Act of 1914 was passed,

The provisions of the Clayton Act includes relating tying other activities, other anti-competitive activities, activities of trust like tying, price discrimination, then the enforcement of civil laws, statute of limitations, mergers and acquisitions, then pre-merger notification required to the FTC and interlocking of directorates.

So, section 3 of the Clayton Act specifically prohibits the sale of goods or commodities on a condition; that means, tying one product with the other unwanted product resulting in lesser competition or the creation of a monopoly.

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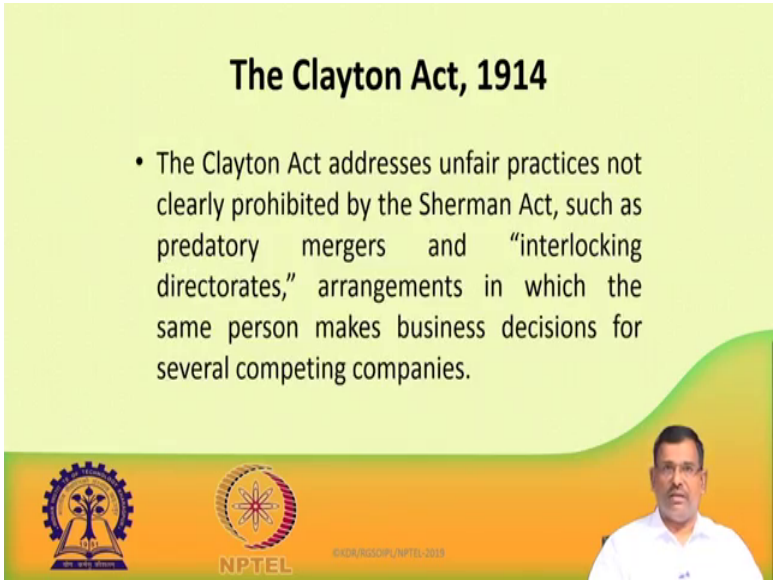

It addresses unfair practices not clearly prohibited by the Sherman Act; for example, the mergers or predatory mergers and acquisitions or interlocking directorates. In such arrangements the same person makes business decisions for several competing companies.So, a person may be a director in many companies and he may be contributing or taking decisions of many companies which is addressed by the Clayton Act.

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And if you look into the critical component of Antitrust law: the jurisdiction is very important. All these harmful activities are forbidden under the Antitrust laws. The federal courts have the jurisdiction to deal with anti-competitive practices. Section 6 of the Clayton Act specifically exempts labour unions and agricultural land, horticulture cooperatives from Antitrust laws or proscriptions against illegal combination or conspiracies. So, these co-operatives are not considered to be combinations.

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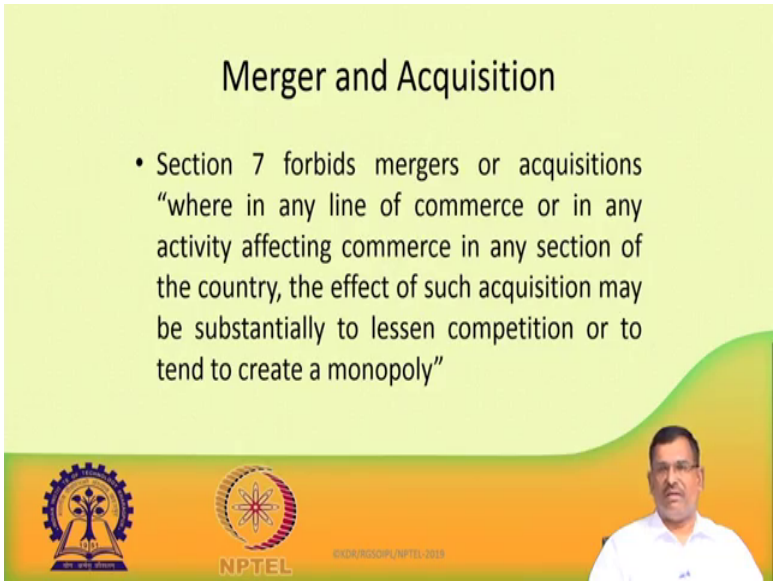

Then Section 7 focuses on forbidding mergers and acquisitions in any line of commerce or in any activity affecting commerce in any section of the country. The effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly forbidden under Section 7. So, it severally puts restrictions on the mergers and acquisitions for curbing competition in the market.

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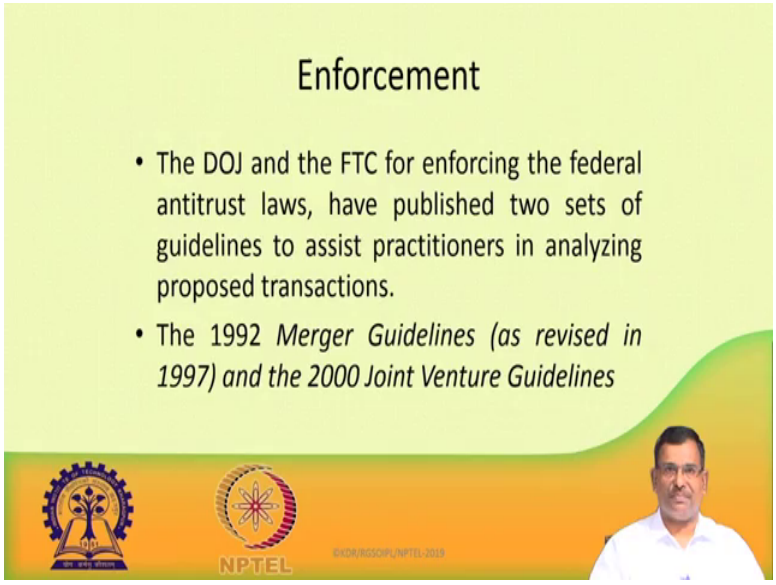

The department of justice and the federal trade commission work hand in hand for enforcing the Antitrust laws in the United States. So, these two agencies separately issues guidelines for mergers and acquisitions and joint ventures. Forming joint ventures per se is not illegal, but if they are not in conformity with the Antitrust laws then it is going to be considered not in accordance with the Clayton Act and considered to be anti-competitive in nature.

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If we look into the merger guidelines, we can see that the ultimate purpose of merger is to create a bigger entity for the welfare of the society or welfare of that particular industry or to enhance the market power or to facilitate the exercise. But if it is for curbing the market then it is definitely anti-competitive in nature.

So, the merger guideline acknowledges that mergers can create efficiencies if not inefficiencies in the market. So mergers can increase the efficiencies in the market, the mergers can reduce the prices as well. Because the allocation of resources can be effectively done through a merger, and the efficiencies can increase which leads to lower prices, improved quality and enhanced services or even to new products. So, mergers and acquisitions can be pro-competitive as well.

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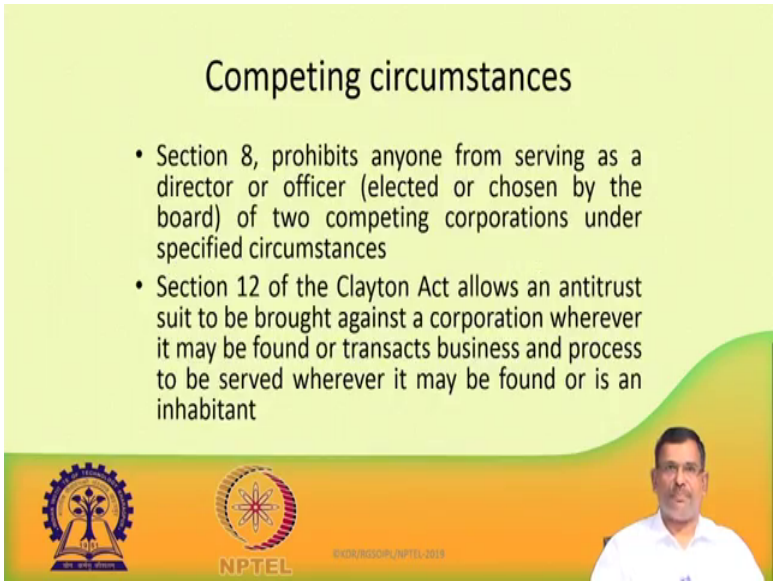

But you can see the competing circumstances which we can find under Section 8 which prohibits anyone from serving as a director or officer in a decision making power in many corporate enterprises, many corporations. Section 12 of the Clayton Act also allows an antitrust suit to be brought against the corporation, whenever it may be found or transact business and process served whenever it may be found or is an inhabitant. So, it means that the Clayton Act is specifically focused on mergers, acquisitions and the activities of the officers, those who are taking decisions in many companies.

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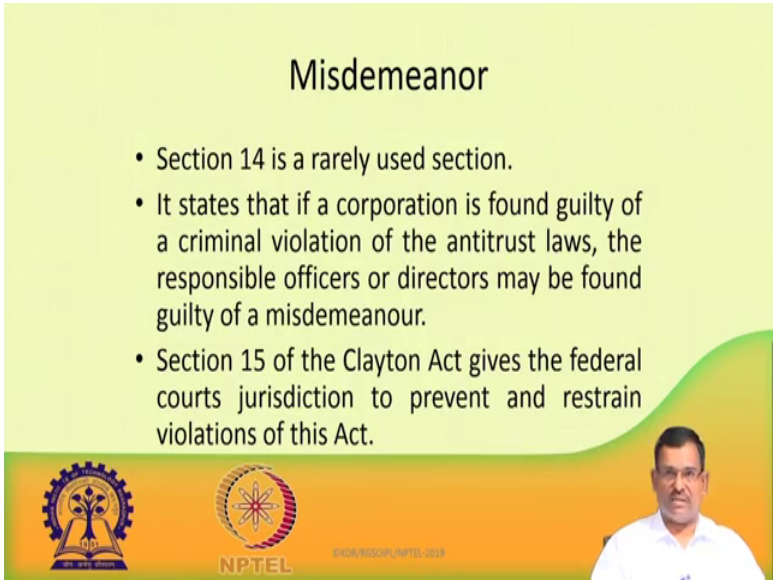

Some of the other section which you can find are guilty of criminal violation of Antitrust laws and the officers and directors those who are found to be guilty of a misdemeanour. Section 14 talks about misdemeanour, but sending some director or responsible officer to the jail rarely happens because the United States is pro-enterprise in nature.

So, sending high officials to jail may send a wrong impression, a wrong message to the industry. The authorities, the department of justice and the FTC takes decision very prudently. Section 15 of the Clayton Act gives the federal court jurisdiction to prevent restrain violations of this particular Act.

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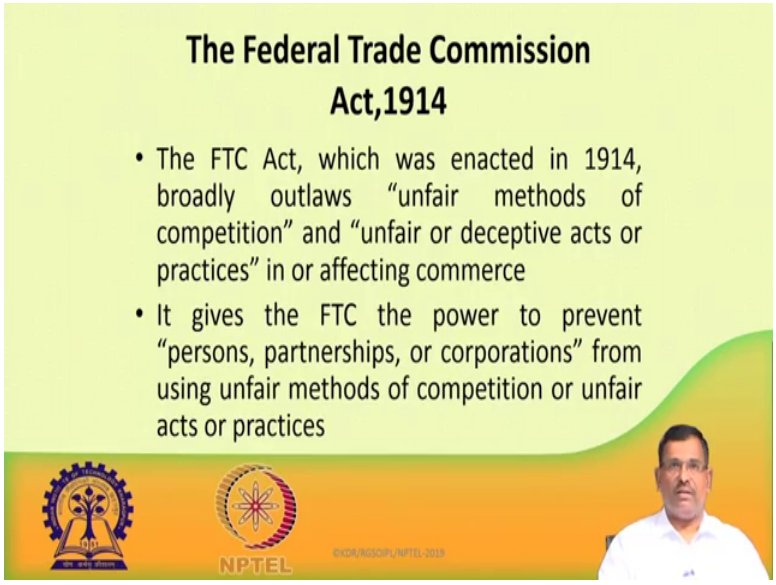

FTC i.e. the enforcement authority was also formed under this particular act. Section 14 outlaws unfair methods of competition, unfair deceptive acts or practices affecting commerce.

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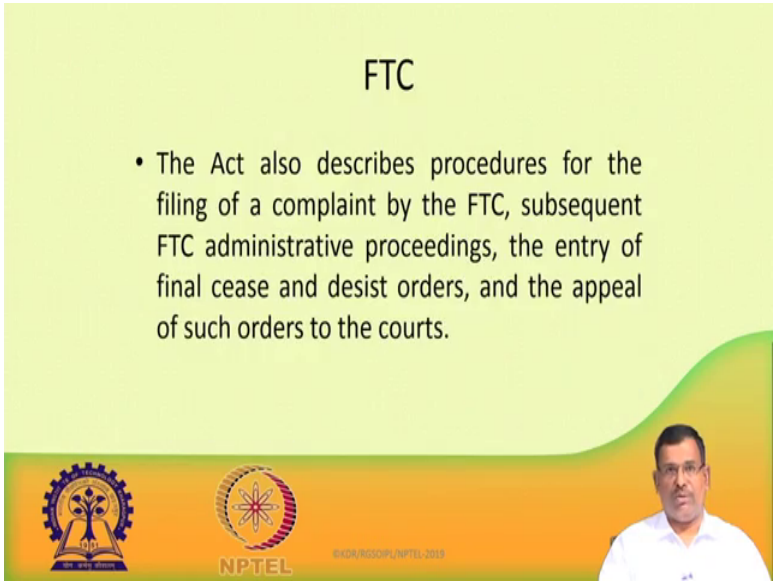

The enforcement authority created through this particular law from 1914 onwards is effectively working to prevent anti-competitive activities in the United States markets. The Act also provides procedure for filing complaint and other things which are not the

matter of subject for our discussion. The FTC is the agency that looks into the anti-competitive practices or to deal with the antitrust provisions or to enforce the antitrust provisions.

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The department of justice is a part of the executive branch. The FTC is an independent regulatory authority, which looks into all anti-competitive practices or violation of the antitrust provisions. So, these two agencies act hand in hand and look into the consumer protection, the entire market economics.

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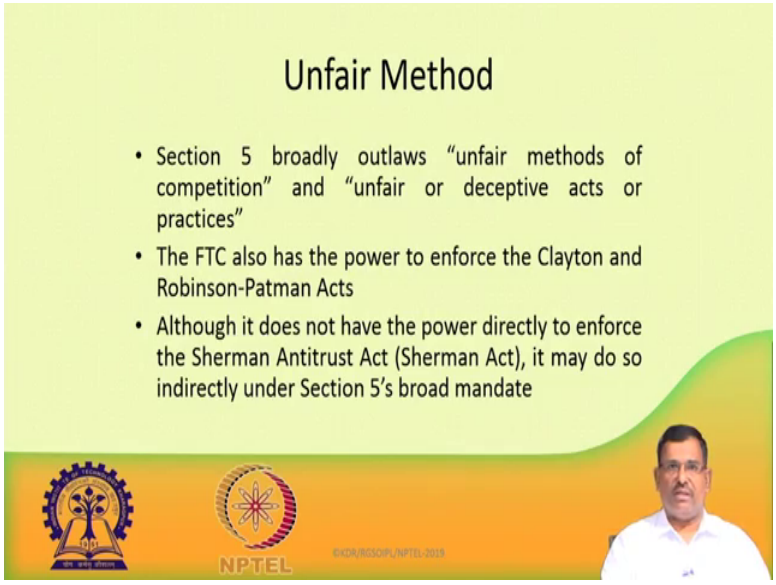

Clayton Act supplements the Sherman Act of 1890, which gives provisions for merger, acquisitions as well as for the creation of the enforcement authorities and the responsibility of the officers are also fixed through this particular provision.

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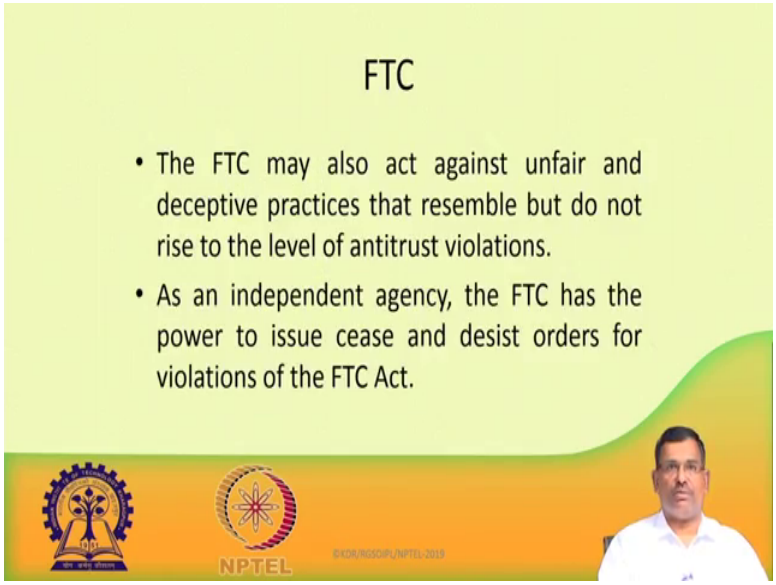

We have talked about this particular subject, the enforcement of unfair provisions and the deceptive practices.

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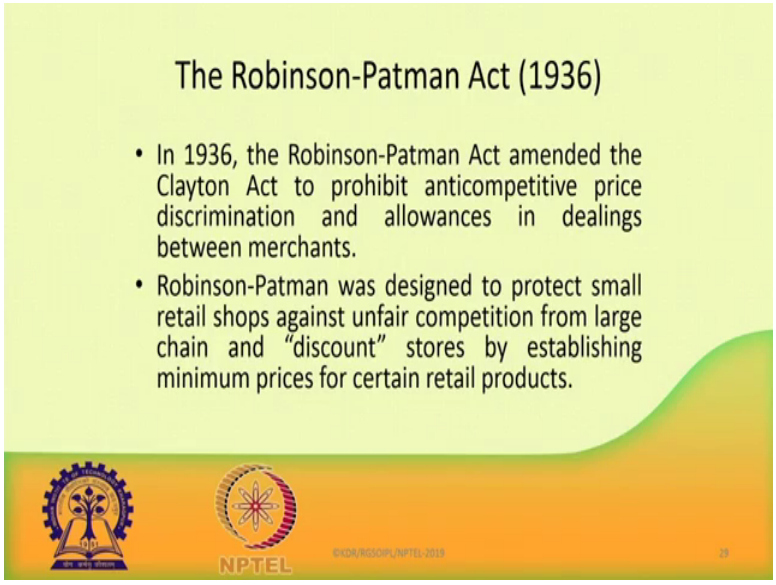

Then comes the *Robinson-Patman Act* which was passed in 1936. This Act was enacted mainly to prohibit anti-competitive price discrimination and allowances in dealings between merchants, for there are many allowances which the merchants can provide to the consumers, which are anti-competitive in nature.

So, the Robinson-Patman Act basically amended the Clayton Act to include the anti-competitive practices. It is basically to protect the small retail shops against unfair practices, unfair competition from the large chain of huge firms like *Walmart* and the so-called discount stores like *Walmart* or *Spencer*, by establishing minimum prices for certain retail products. So, there must be a fair play in the market between huge enterprises and small enterprises that is the objective of the Robinson-Patman Act. If there is no fair play between the large enterprises and small enterprises then the market is going to be distorted.

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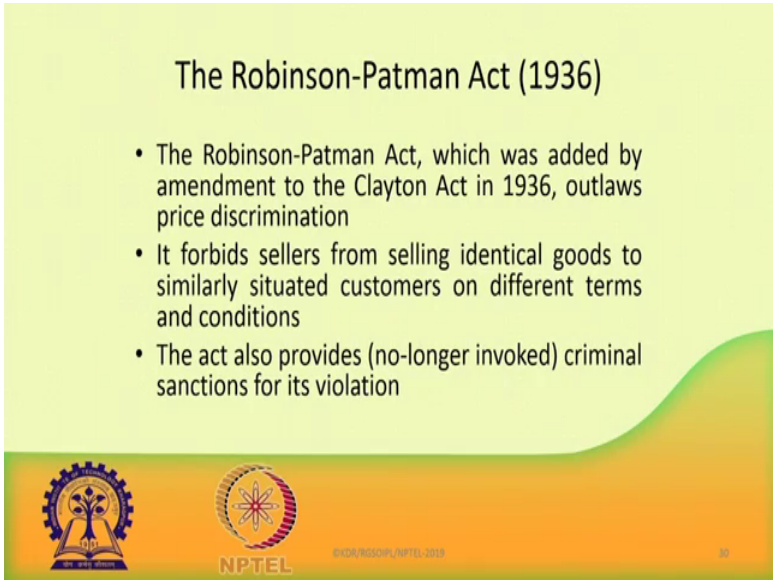

So, the Robinson-Patman Act dded these particular provisions on price discrimination. It actually forbids sellers from selling identical goods to similarly situated customers on different terms and conditions. So, the Act also provides for criminal sanctions for its violations.

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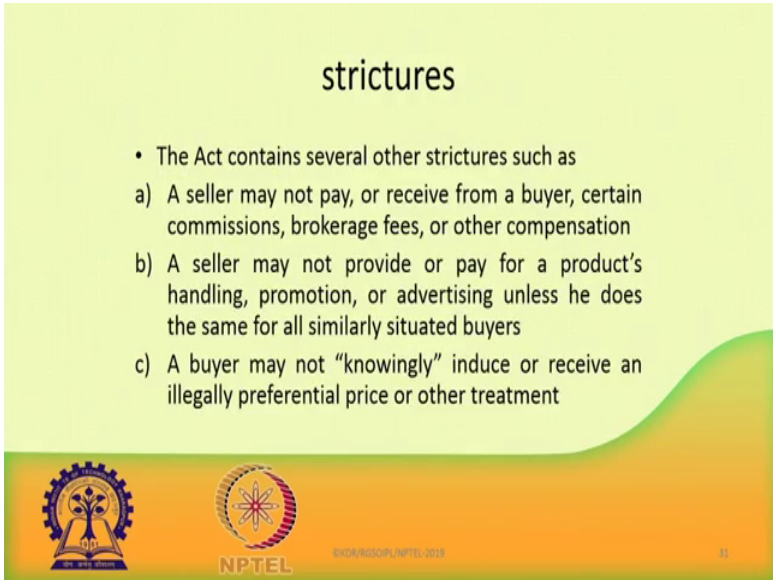

And the Act also puts several restraint or strictures such as the seller may not pay or receive from a buyer, certain commissions, brokerage fees or other compensations. So, a

seller may not provide or pay for a producer's handling, promotion, advertising unless he does the same for all similarly situated buyers. A buyer may not knowingly induce or receive an illegally preferential price or other treatment.

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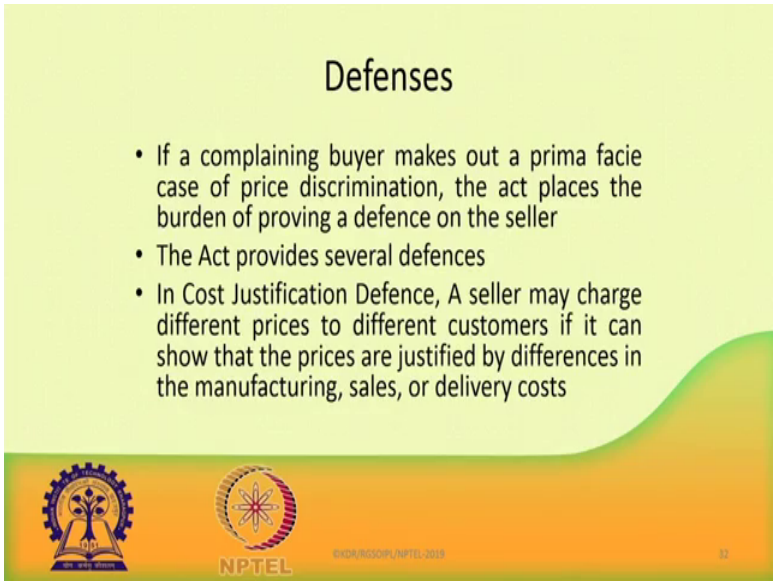

So, these are the old strictures put in this particular Act. What are the defences available? So, if a complaining buyer makes out a prima facie case of discrimination, the Act places the burden of proof on the seller.

It is the duty of the seller to prove that he has not discriminated. So, the burden of proof is always with the seller and the Act also provides several defences, for example, the cost justification defence. So, the seller can charge different prices to different customers in different markets. This is basically the price justification because of different manufacturing, sales or delivery cost. It depends upon the market, the potential of the market as well as the transportation, sales and delivery cost which are involved.

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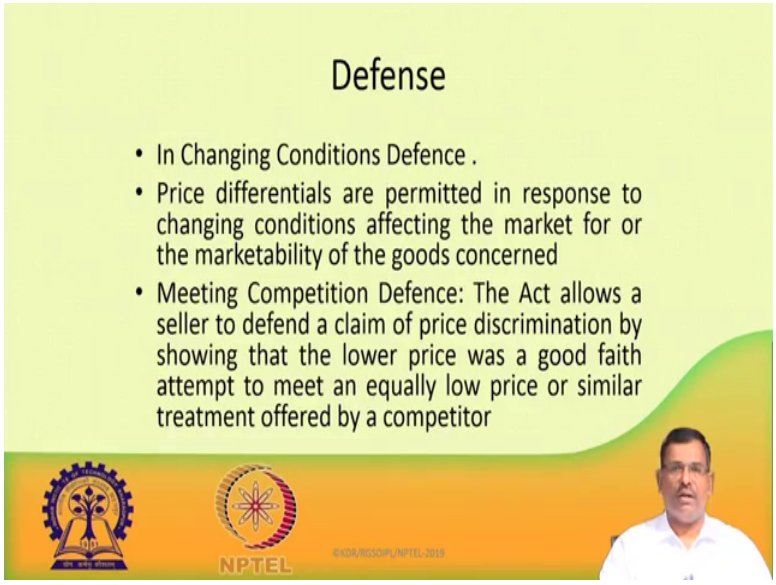

And also there can be changing conditions of defence. So, the price differentials, price discrimination happens mainly due to the market conditions, different market conditions. These market conditions are in response to changing conditions of the market or marketability of the products. So, if there is a high demand and there is an increase in price which is considered to be unreasonable price, then the provisions of the Act will come into play.

This act also allows the seller to defend a claim of price discrimination by showing that, the lower price was a good faith attempt to meet an equally low price or similar treatment offered by the competitor. So, these are some of the defences available to the enterprises for justifying their action.

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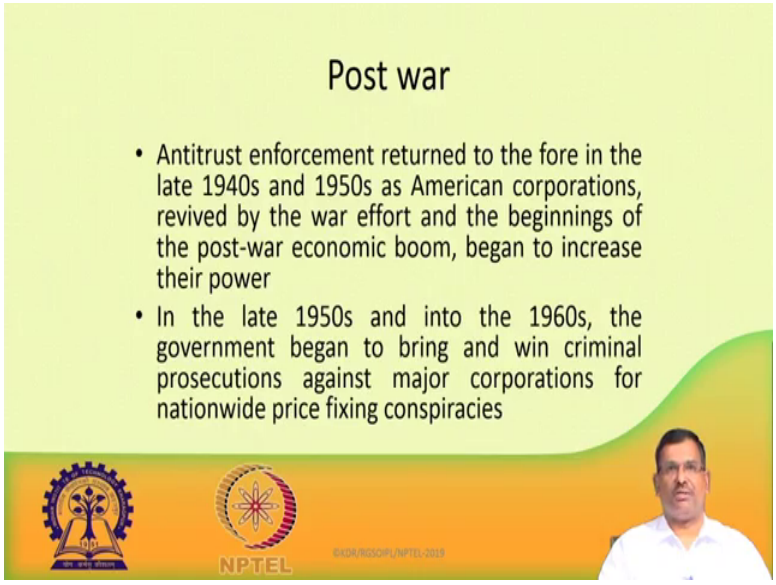

In the post World War scenario, the scenario of the US enterprises has completely changed. After the World War, US enterprises have an advantage over the world market and they used some of the practices which were banned under the Sherman Act, Clayton Act and Robinson-Patman Act as well.

These American corporations had a high advantage, the business advantage or economic boom happened after the Second World War. During the 1950s and 1960s the government started criminal prosecutions against major corporations for price fixing conspiracies, cartels and such other anti-competitive activities. This is because suddenly if the market conditions become favourable these market corporation, these big corporations will start exploiting the market.

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They made huge combinations during the 1970s and these agencies are basically firms, mergers and acquisitions. The aggressive theories as well as the policies of the government will affect the business policies.

In the Supreme Court decisions, the courts came heavily upon these particular corporations or their anti-competitive practices. And in 1960s the government took measures to enforce. Increased enforcement mechanisms took place, for example actions were taken against big corporations like IBM and AT&T under this particular provisions. It means that in the post war scenario from 1950s to 1980s we can find a sizeable number of jurisprudence in the United States, actions were taken by the FTC as well as the DOJ against huge corporations.

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Then comes the 1976 Hart-Scott-Rodino Act. The Clayton Act got amended in 1976 by this particular improvement which requires the companies planning major mergers and acquisitions to notify both the federal trade commission as well as the department of justice for their plans well in advance before mergers and acquisitions.

So, it means it extended the Clayton Act for a pre-approval of mergers and acquisitions. Because the business advantages got by these American firms after the Second World War were immense. Once they got the advantages, they started abusing it or exploiting it. So an amendment was required in Clayton Act which came in 1976.

The Clayton Act allows private parties including the consumers to sue companies for triple damages or when they have been harmed by the action of company, that violates any one of the provisions of either the Sherman Act or the provisions of the Clayton Act to obtain a court order prohibiting anti-competitive practices in the future.

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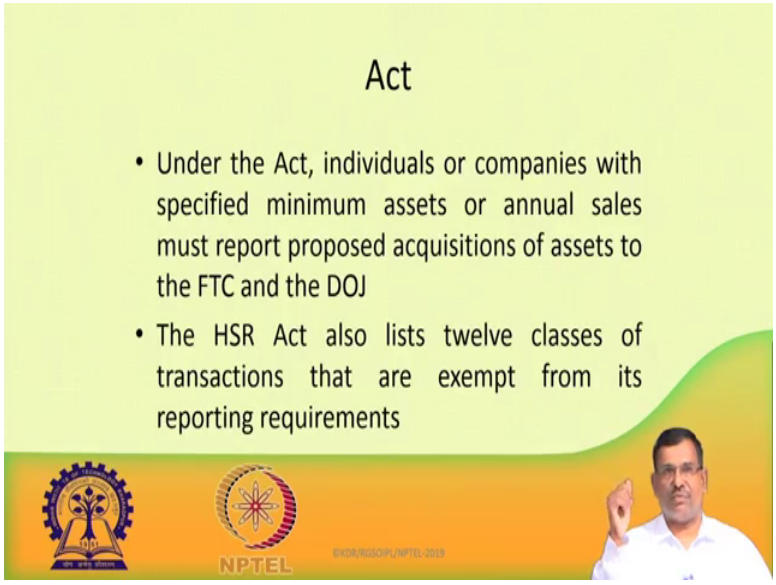

So, under the new Act, individuals or companies with specified minimum assets or annual sales must report their proposed acquisitions and mergers and assets to the FTC and as well as the DOJ. So, that they can use due diligence, the FTC can do the due diligence and allow or permit or not permit such mergers or acquisitions. And this Act also lists twelve classes of transaction that are exempt from this reporting requirement.

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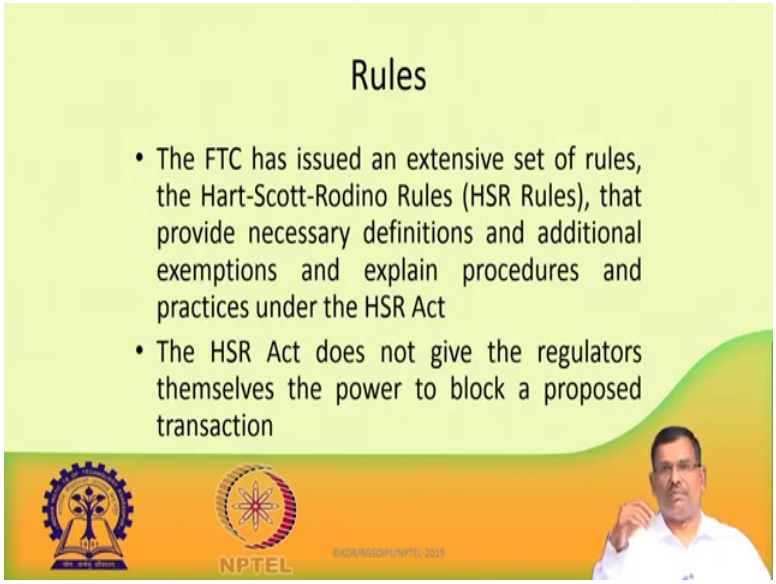

This is to ease the business because each and every merger or acquisition is not going to be a harm to the market. But there must be prudence and due diligence should be used for the mergers and acquisitions.

This Act also issued extensive set of rules that provide necessary definitions and additional exemptions, explaining procedures and also the practices to be adopted for mergers and acquisitions. This Act does not give the regulators themselves the power to block the proposed transactions. Civil litigations are also proposed.

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The response on this particular Act, the amendments from the Clayton to the Robinson-Patman to this particular Act are very quick. There are different schools of thought on the economics of market regulation. One of the very famous school is the Chicago school of law and economics. This group of academic lawyers and economists and judges argue for application of economic principles, pure economic principles in legal decision making. So, that it is a prudent legal decision making leading to prudent judgments on the control of markets.

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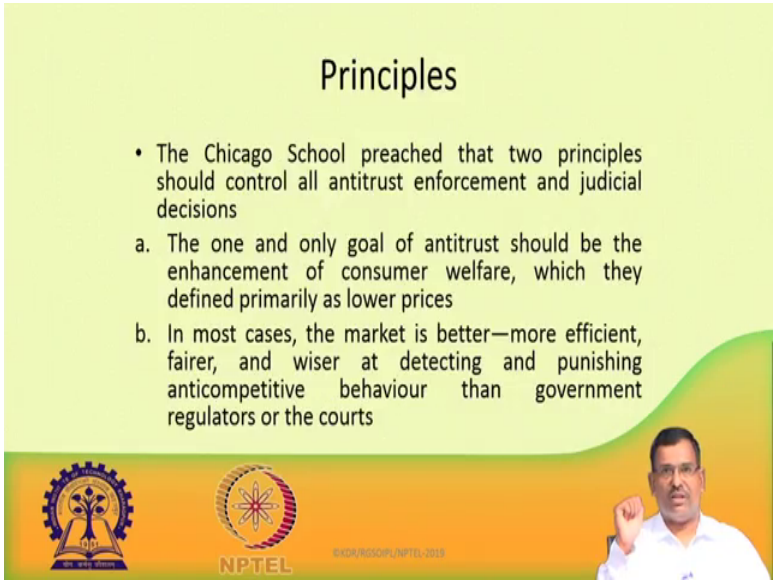

All economic parameters should be taken into consideration of each and every case and the legal judgment should be based on economic prudence; that is what the Chicago school propounded. Still the Chicago school is very strong in their arguments. And they preach that two principal should control all antitrust enforcement and judicial decisions. They are the one and the only goal of antitrust law which are the enhancement of consumer welfare which are primarily defined as lower prices. And the market is better, efficient, fairer, wiser in punishing anti-competitive behaviour than government regulators or the courts.

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So, you can see that the school argument is very clear. Consumer welfare, the society welfare, the cost to the society should be taken, the economic parameters should be taken into consideration in all judgments, all the antitrust judgments.

United States president's policies will severely affect the business practices in the United States. Ronald Reagan in the 1980s, the president of United States, signalled major changes in the government antitrust enforcement efforts. So, they acted on the belief of Chicago school and liberalised the antitrust provisions and said that the antitrust provisions facilitate business rather than curb or put hurdles on the business especially on the areas of enforcement of mergers and acquisitions.

So, here you can see that these companies, the business of the companies mergers and acquisitions are required to form a big enterprises for ease of business. So, they eased the business in the sense that the Reagan government has eased the provisions, regulations in favour of the corporations at that point of time, but unfortunately the global meltdown or the depressions happened.

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So, the depressions in world, depressions in the economy, the world economy will have a complete impact on the activities, these policies. So, here you can see that the lack of regulatory oversight always leads to economic failure in markets and the lack of enforcement also will lead to the prevention or the failure of the market. So, this will lead to the monopolies and monopolistic or oligopolistic activities which leads to the economic failure in the market which may lead to the depression in the markets.

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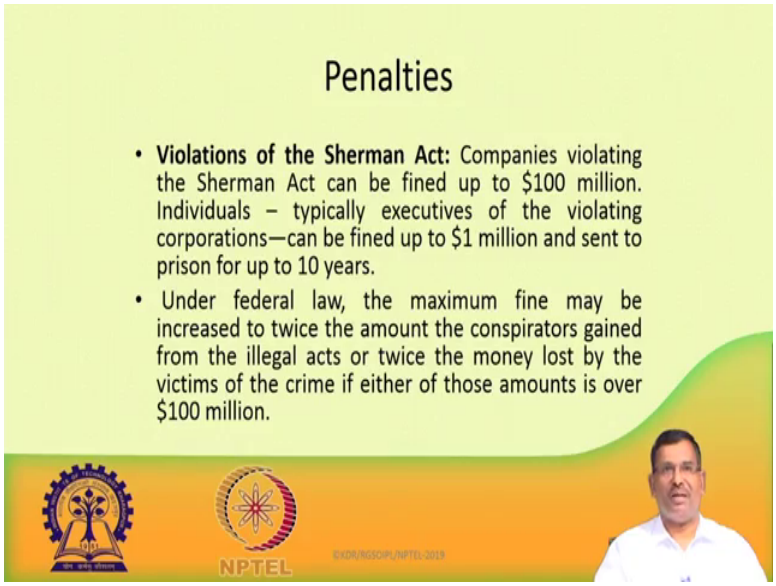

We have already seen that huge penalties are imposed, these penalties are not based on the Chicago school.

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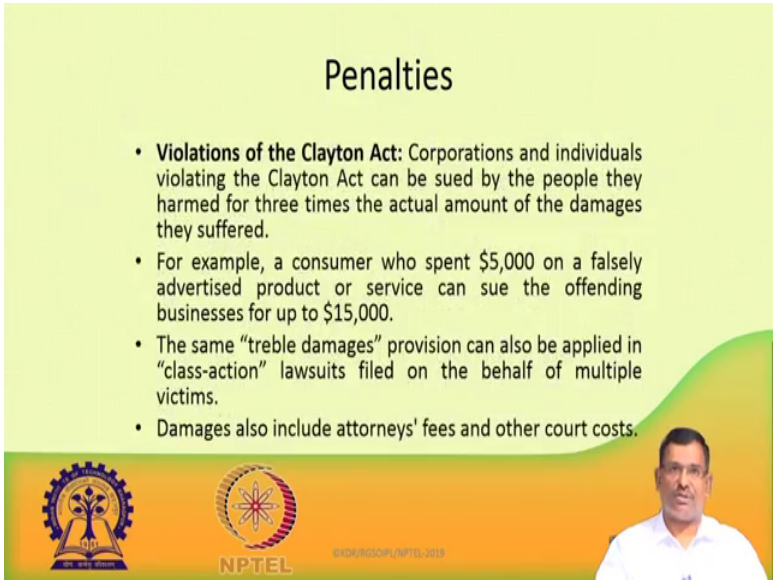

So whether it is 1 million or 10 million or 100 million US dollars, this will depend upon the activities, the amount of activities of these corporations. So, in the Clayton Act also we can find civil damages as well as treble damages in the place of class actions. So, the damages include even the attorney fees, court cost and other cost which are involved in the treble damages in the case of class action. The class action rules are allowed under the Clayton Act. So, I would say that if you look into the Antitrust Act in general, we can see that the Antitrust Acts are the bone or very cardinal cornerstone of the American enterprise system.

So, the American enterprises are based on the anti competitive laws especially starting from the Sherman Act.There are severe stringent penalties for the violation of any of the provisions, the competition provisions and the monopolies. The intellectual property rights, intellectual property laws are the modern laws of the American law in accordance with the TRIPS agreement, but the antitrust provisions are very old in nature.

And we have to see in the next classes the interface between these modern laws of intellectual property law versus old laws of Antitrust laws time to time improved or

amended. How these interface happens? Whether the Antitrust laws are liberal in nature or whether the Antitrust laws are very severely meeting the requirement of monopolies or severely enforcing the monopolistic provisions of the intellectual property law? Whether they are liberally approaching? What is the correlation between these two laws?

We will see in the next coming classes and we will divide the next classes into different areas, we will do theme wise. We will look into these anti-competitive practices; different anti-competitive practices which we have discussed in the earlier classes, the horizontal as well as the vertical agreements.

Then we will look into the jurisprudence and what all the enforcement authorities do? And what the courts judgments and the court decisions are? And what is the jurisprudence? What are the awards which is very important to look into, because the developing countries are actively depending upon the jurisprudence from other countries; especially, the rich jurisprudence from the United States.

Thank you.