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CIN : U24211DL1970NPL005200



Policy Brief, August 2024

Abuse of Pesticide Patent Rights in India and Untenable Demands for Data Exclusivity

“The patent monopoly is abused when the economic and social objectives of the patent system are jeopardized by the behaviour of the patentee. The monopoly could be abused by lack of use or inadequate use of the patented invention.”

~Pedro Roffe, UNCTAD in “Abuses of patent monopoly: A legal appraisal”.

Final message first

The primary objective of the Indian Patents Act has been the promotion of science and technology for the benefit of our own social and economic development, and to a balance of rights and obligations under the Act.

Owning patents in India for new pesticide molecules but not commercializing them for the benefit of Indian agriculture and the agrochemical industry should be considered as a planned abuse of the monopoly rights granted under the Indian Patents Act, 1970. The abuse involves any action that intentionally harms or injures another person for private gain. The abuse of patent rights occurs when a firm obtains patent for a product that it does not intend to commercialize. This kind of abuse is rather rampant in India in recent years in the field of agrochemicals/pesticides.



Our analysis shows that for every ten patents granted since 2010 to the western MNCs for new pesticide chemistries/molecules, six have not been commercially introduced in India though they were promptly commercialized in other countries. The summary of our analysis is given below:

Particulars	No. of pesticides
No. of pesticides (new molecules) patented in India between 2010-2022	62
No. of patented pesticides commercially launched in India between 2010-2022	27 (44%)
No. of patented pesticides commercially not launched in India between 2010-2022 though launched outside India	35 (56%)

Data Source for analysis: Agribusiness by S&P Global and CIB&RC (Ministry of Agriculture)

A detailed analysis is given in the annexure. It gives empirical evidence to the extent of pesticide patent abuse in India from 2010 till 2022.

This planned abuse brazenly contravenes the mandatory requirements in **Section 83** of Indian Patents Act which states *inter-alia* that “**patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent.... without undue delay**”. The abuse doesn’t not stop here. The western MNCs who do not commercially introduce all their patented molecules are now actively lobbying for “data exclusivity” to bring their old and off patent pesticide molecules to the Indian market.

Data exclusivity is a form of intellectual property protection outside the ambit of TRIPS Agreement. It is a TRIPS plus privilege. This is a double whammy for India. It would only end up creating yet another market monopoly to the western MNCs.



The patent abuse explained:

Article 5 A(2) of the **Paris Convention** considers that a failure to work a patent in a country that granted the patent protection could amount to an abuse of monopoly rights conferred on the patent owner. The term “**working a patent**” refers to commercialization of the patent in the country that granted the patent. A “**patent not worked**” means the invention (in this case new pesticide molecule) has not been commercially exploited in the country (India in this case) that granted the patent.

The WTO-TRIPS Agreement 1995 sets out the objective of intellectual property rights in **Article 7** which says that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. **Article 8(2)** of the TRIPS Agreement permits Members to take appropriate measures to prevent the abuse of intellectual property rights by the holders.

Even before the TRIPS Agreement, the Justice N Rajagopala Ayyangar in his work titled “**Report on the Revision of Patents Law**” assertively observed that “**Patent systems are not created in the interest of inventor but in the interest of national economy**” – a *quid pro quo* system. The *quid pro quo*, according to the report, also includes the obligation on the part of the patentee to work the invention in India.

Patents are strictly territorial rights. The patent rights are limited to the country that granted the patent. The patent can act as a fuel for economic growth only if it has worked (commercialized) in the country that granted the patent.

The Intellectual Property Appellate Board (IPAB) in their order 45 of 2013 against Bayer Corporation asserted that patented invention refers to invention that is worked (commercialize) in the territory of India and made available to the public.



Under our Patents Act, a failure to commercialize the patent is unacceptable and actionable. **Section 83** of our Patents Act carries several obligations to achieve this. They include:

Understanding Section 83	What it requires?
83(a)	<i>Patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay;</i>
83(b)	<i>[Patents] are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article;</i>
83(c)	<i>The protection and enforcement of patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users ...,"</i>
83(f)	<i>"... the patentee does not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology;</i>
83(g)	<i>Patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public.</i>

In an open defiance of these mandatory requirements given in the **Section 83** of Indian Patent Act, the western MNCs operating in India fail to commercially introduce many of the patented molecules in India though they introduce them in other countries.

Section 84(1)(c) of the Patents Act allows grant of compulsory licence if a patented invention has not been worked in the territory of India.



Abuse of Patent Rights and Competition Act 2002

The objective of Competition Act is to ensure a fair functioning of the market, creation of the market and there is no undue denial of the market access.

When a dominant company holding Indian patents for a new pesticide, fails to commercialize it in India is an abusive exclusionary conduct. Patent holders are barred from abusing their rights by Section 83(f) of the Patents Act.

According to Competition Commission of India (CCI) “as long as there exists an anti-competitive and abusive behaviour on the part of the patentee, the Competition Act will be triggered”.

Failure to introduce new pesticides even 10 years after the patent demonstrate prima facie that the patentee is abusing the patent rights in India. This abusive behaviour is anti-competitive.

Data exclusivity. A subject conclusively dealt with.

It is pertinent to note that data exclusivity is a TRIPS plus measure that the Government of India and various Parliamentary Committees have steadfastly opposed in various forums.

Our Parliamentary Standing Committee on Patents & Trademark (24th Oct 2008) strongly advised the Government not to succumb to data exclusivity demands from the foreign companies.

The TRIPS Agreement does not require undisclosed test data be treated as a form of “property”.



The Delhi High Court in its order dated 1st July 2009 (Syngenta vs Union of India, WP 8123/2008) observed that there is no statutory support to granting data exclusivity in India. The High Court of Gujarat also took the same stand in the Civil Application No. 6462 of 2016.

In the Parliamentary Committee report of 2022 on Pesticide Management Bill, the Committee observes that the patent period of 20 years is sufficient to get the returns on the investments made in R&D of a new molecule and hence the demand of data exclusivity/patent term extension is not justifiable.

In the recent European Free Trade Agreement (EFTA), India has rejected the data exclusivity demand.

Final word

A simple reading of Indian Patents Act - especially Section 83 - would show that the Act does not allow the abuse of patent rights in any manner. The Act does not allow enjoying patent rights ignoring the duties.

At **\$567 bn** (2023 - World Bank), India ranks the second largest in global agricultural production. Any illegitimate attempt by the western MNCs to delay or deny our farmers legitimate access to patented pesticide molecules requires collective attention for remedial action. Crop Care Federation of India (CCFI) is committed to secure this for the benefit of Indian agriculture.

We will continue to monitor the progress in commercial launch patented pesticides in India.

We urge the patent holders of new pesticide molecules (**see annexure**) to abstain from acts that are designed to frustrate the object and purpose of Indian Patents Act. Patent abuse is patently wrong.



Annexure

List of pesticides (new molecules) patented in India between 2010 to 2022 and their commercial status as of 2024.

Sr. No	Pesticide Name (New Molecules)	Patentee	Year of commercial launch outside India	Whether or not commercially launched in India
1	Bixafen	Bayer Crop Science	2010	Not Launched
2	Isopyrazam	Syngenta	2010	Launched
3	Ametoctradin	BASF	2010	Launched
4	Isotianil	Bayer Crop Science / Sumitomo Chemical	2010	Not Launched
5	Indaziflam	Bayer Crop Science	2011	Launched
6	Sedaxane	Syngenta	2011	Launched
7	Aminocyclopyrachlor	Corteva Agriscience	2011	Not Launched
8	Pyriofenone	Ishihara	2011	Launched
9	Fluxapyroxad	BASF	2012	Launched
10	Cyantraniliprole	FMC	2012	Launched
11	Fluopyram	Bayer Crop Science	2012	Launched
12	Sulfoxaflor	Corteva Agriscience	2012	Launched
13	Metazosulfuron	Nissan Chemical	2012	Not Launched
14	Penflufen	Bayer Crop Science	2012	Launched
15	Benzovindiflupyr	Syngenta	2013	Not Launched
16	Tebufloquin	Meiji Seika Pharma	2013	Not Launched
17	Flupyradifurone	Bayer Crop Science	2014	Launched
18	Tetrachlorantraniliprole	Sinochem	2014	Not Launched
19	Fluensulfone	ADAMA	2014	Launched



20	Isofetamid	Ishihara	2014	Not Launched
21	Kappa-Tefluthrin	FMC / Cheminova	2014	Not Launched
22	Bicyclopyrone	Syngenta	2015	Not Launched
23	Oxathiapiprolin	Corteva Agriscience	2015	Launched
24	Halauxifen	Corteva Agriscience	2015	Launched
25	Pyflubumide	Nihon Nohyaku	2015	Not Launched
26	Triafamone	Bayer Crop Science	2015	Launched
27	Tolprocarb	Mitsui Chemicals	2015	Not Launched
28	Pyriprole	Nihon Nohyaku	2016	Not Launched
29	Pydiflumetofen	Syngenta	2017	Launched
30	Tolpyralate	Ishihara	2017	Not Launched
31	Cyclaniliprole	Ishihara	2017	Launched
32	Picarbutrazox	Nippon Soda	2017	Not Launched
33	Florpyrauxifen (Florpyrauxifen-Benzyl)	Corteva Agriscience	2017	Launched
34	Triflumezopyrim	Corteva Agriscience	2017	Launched
35	Afidopyropen	Meiji Seika Pharma	2018	Launched
36	Tiafenacil	FarmHannong	2018	Not Launched
37	Fenquinotrione	Kumiai Chemical	2018	Not Launched
38	Pyraziflumid	Nihon Nohyaku	2018	Not Launched
39	Flometoquin	Meiji Seika Pharma	2018	Not Launched
40	Cypyrafluone	KingAgroot	2018	Not Launched
41	Mefentrifluconazole	BASF	2019	Launched
42	Acynonapyr	Nippon Soda	2019	Not Launched
43	Isoflucypram	Bayer Crop Science	2019	Not Launched
44	Inpyrfluxam	Sumitomo Chemical	2019	Not Launched
45	Cinmethylin	BASF	2019	Not Launched
46	Broflanilide	Mitsui Chemicals / BASF	2020	Launched



47	Tetraniliprole	Bayer Crop Science	2020	Launched
48	Fenpyrazone	KingAgroot	2020	Not Launched
49	Tripyrasulfone	KingAgroot	2020	Not Launched
50	Cyclopyrimorate	Mitsui Chemicals	2020	Not Launched
51	Fluazaindolizine	Corteva Agriscience	2021	Launched
52	Fluindapyr	FMC	2021	Not Launched
53	Spiropidion	Syngenta	2021	Not Launched
54	Bixlozone	FMC	2021	Launched
55	Trifludimoxazin	BASF	2021	Not Launched
56	Flupyrimin	Meiji Seika Pharma	2021	Launched
57	Benzpyrimoxan	Nihon Nohyaku	2021	Launched
58	Ipflufenquin	Nippon Soda	2021	Not Launched
59	Anisiflupurin	Syngenta	2021	Not Launched
60	Cyclobutrifluram	Syngenta	2022	Not Launched
61	Fluoxapiprolin	Bayer Crop Science	2022	Not Launched
62	Oxazosulfyl	Sumitomo Chemical	2022	Not Launched

Source: Agribusiness by S&P Global (Accessed on 16th July 2024) and CIB&RC
(Ministry of Agriculture and Family Welfare)
