ALIFAR
Asociación Latinoamericana de Industrias Farmacéuticas

Buenos Aires, November 8th 2011

Dr. Francis Gurry
Director General of the
World Intellectual Property Organization
By e-mail

Dear Sir:

We have the pleasure to address you regarding the Note C. 7998, concerning the submission of comments on the topic of "Quality of Patents", the revised Proposal by the Delegations of Canada and the United Kingdom (documents SCP/16/5 and SCP/17/8), and the Proposal by the Delegation of Denmark (document SCP/17/7).

To begin with, let us express that ALIFAR shares the statements about the importance of safeguarding the quality of patents. In line with the proposal submitted by Canada and the United Kingdom (documents SCP/16/5 and SCP/17/8), we agree that the quality of patents is essential to make the patent system work, reach its social and economic policy goals and to enable an adequate balance between the interests of innovators, third parties and the population.

However, we are highly concerned that the treatment awarded to the "Quality of Patents" topic in the SCP might result in an increased harmonization of the Substantive Patent Law, in particular, concerning the patentability requirements and exclusions, and the criteria for the assessment thereof. Such harmonization will undermine the flexibilities that the current international treaties award to developing countries, which are essential for an adequate, fair and correct enforcement of their public policies.

Therefore, we affirm the need to continue analyzing the topic of "Quality of Patents" in depth before implementing any work program that might not adapt to the interests of the Member States.

With the purpose of cooperating with such analysis, we are compelled to put forward the following comments related to the proposal by Canada and the United Kingdom (documents SCP/16/5 and SCP/17/8):

- Paragraph 10 of the proposal from Canada and the United Kingdom includes a description of the expression "quality of patents", which encompasses "the quality of the totality of features and characteristics of the work national and regional patent offices and judicial systems pursue in satisfying their legal, social and economic requirements".

In our opinion, this definition recognizes that the scope of the topic named "Quality of patents" include the patentability requirements, the exclusions from patentability, and the standards applied by the local offices to evaluate those requirements and exclusions. Therefore, it becomes evident that the concerns expressed by the developing countries in this regard are well grounded.

We insist that any analysis and work programs aimed at the international harmonization of such criteria does not adapt to the interests of developing countries, included but not limited to the interests of the Latin American pharmaceutical industry which our Association represents. Therefore, this implies even more restrictions to the margin of freedom to adopt local policies aimed at the promotion of development and the achievement of public interest goals, mainly in the field of public health.

- Regarding the work plan exposed in paragraphs 14, and the subsequent ones, of the proposal by Canada and the United Kingdom, we point out that the technical infrastructure development, the information access and exchange on quality of patents, , and the process improvement may lead to the harmonization of the criteria to evaluate the patentability requirements and the exclusions from patentability, which harmonization does not adapt to the interests of developing countries.

  In fact, the patent offices in developing countries should be set up and structured according to their own legal traditions and economic, political and cultural realities. However, the training and technical assistance provided by foreign offices to those offices is often carried out without considering the differences existing in developing countries and, in particular, the different interests and public policies of each country. Therefore, foreign training and technical assistance increase the risk of adoption of criteria, by developing countries, that do not adjust to their local needs, standards and policies.

- Regarding paragraph 16, ALIFAR considers as "users" of patent offices not only patent applicants but, mainly, people as a whole and the State itself.

  In fact, patent offices should not only attend to the interests of patent applicants but they should also guarantee people an adequate protection of the public domain, and ensure the effective implementation of the public policies of the State.

  Patent offices should not have the goal of granting more and more patents. The objective of the patent offices must necessarily be to grant better patents, more strictly adjusted to the local criteria on requirements and exclusions from patentability, without considering if such objective implies granting more or fewer patents.

  At the same time, patent offices should not have as an objective to grant patents in an increasingly reduced timeframe, nor should they consider promptness as an objective itself. Instead, patent offices should carry out the necessary research and evaluations to ensure that a legitimate right is being granted, which effectively rewards an invention, and not merely an illegitimate competitive advantage.

Also, regarding the proposal by the delegation of Denmark (document SCP/17/7), we would like to comment the following:

- The proposal by the delegation of Denmark evidences, more clearly, that the analysis of the topic of "Quality of Patents" implies a higher risk of patent harmonization at a global level. .

- In its paragraph 4, the proposal from Denmark states that it seeks to "explore the subject of improving the quality of the search and examination of national patent applications by using foreign search and examination work performed by other patent offices".

  In our opinion, the use of search and examination efforts of foreign patent offices may lead to a lack of local search and examination by automatically adopting the foreign results.

  We consider that the search and examination efforts performed simultaneously by several offices do not represent doubling the work, as each office must carry out an analysis based on the laws, public policies and criteria of its country. Therefore, it is necessary that each office carries out their own search and examination, without resorting to the work performed abroad, unless as a mere reference after completing their own search.

- Also, paragraphs 11 and 13 of such proposal state that foreign reports are used as a "starting point" and not as a "foundation" for local own search and examination.

  We do not agree with the proposal in this point. We believe that the use of foreign search and examination necessarily implies an influence on the work to be performed and on the decision to be made by the local office. For this reason, foreign searches and examinations should only be used by local offices after completing their own search and examination, as mere reference.

  It is worth to emphasize that the process of search and patentability examination is not a merely technical and neutral process that can be performed globally without the existence of local differences in terms of criteria. Instead, such process implies the application of local policies, laws and standards in a particular case, and should be necessarily performed taking into account the rules and policies that lead the process towards the achievement of local public objectives.

- Paragraphs 15 and 18 of the proposal by Denmark state that the use of the search and examination work performed abroad leads to more robust patents of high quality and that such use can only cause an improvement of the search efforts performed by the local office.

  We understand that such use may, instead, lead to a repetition of search and examination mistakes and to a world spread of low quality patent grants.

  Also, we insist on the fact that the use of foreign search and examinations may imply the adoption of patentability standards that do not adapt to the local policies and standards.

- Finally, with regard to the questions included in paragraph 33 that the Denmark proposal seeks to submit for SCP consideration, while we do not agree with the work program proposed, should this be finally adopted, we understand it is necessary to pose the following additional questions:

  - When the local patent offices use the search and examination work carried out abroad, are the local offices aware of the risks that such use poses (risks mainly related to the automatic adoption of patents granted abroad and the non-compliance with local public policies, laws and standards)?

- When the local patent offices use the search and examination work carried out abroad, what practices and procedures are followed to ensure the proper enforcement of local public policies, laws and standards?

Thank you for your attention and consideration.

Sincerely yours,

Rubén Abete
Secretary General