

DEFINING "NEW LINES OF PRODUCTS" UNDER MEXICO'S FOREIGN INVESTMENT LAW

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Five years after its enactment, Mexico's Law to Promote Mexican Investment and Regulate Foreign Investment¹ (FIL) continues to be shrouded in uncertainty as to its exact interpretation and scope. Some of the doubts engendered by the wording of the statute have been solved by the general² and specific resolutions³ of the National Foreign Investment Commission (FIC). Comments by the practicing bar and legal scholars⁴ also have helped to clarify some of the ambiguity of the

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The author wishes to acknowledge those who assisted in the research of this article. The researchers were Daniel Colner, Antonio Durán, José B. Martínez, Richard Page, and Jennifer M. Pierce. The views expressed in this article are solely those of the author and do not necessarily represent the views of the researchers.

1. The Law to Promote Mexican Investment and to Regulate Foreign Investment (*Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera*) in Official Daily of Mexico (*Diario Oficial*), Mar. 9, 1973 [hereinafter cited as FIL].

2. Pursuant to article 53 of the National Registry of Foreign Investments Regulation (RFIR), Official Daily of Mexico (*Diario Oficial*), Dec. 28, 1973, the National Foreign Investments Commission (FIC) may issue general and specific recordable resolutions. General resolutions may be consulted by any person, while specific regulations may be reviewed only by interested parties evidencing a legal interest. The FIC has issued 11 general resolutions that have been published in the Official Daily of Mexico (*Diario Oficial*), Nov. 5, 1975, and Jan. 15, 1976.

3. Despite RFIR's article 53 provision regarding registration of specific resolutions, the National Registry of Foreign Investment does not keep a registry of such resolutions. Therefore, these resolutions are not consulted. Nevertheless, it is public knowledge that aside from resolutions issued by the FIC to applicants, the RFIR has issued resolutions answering consultations to professional bodies such as the Federal District Notary's Association (*Colegio de Notarios del Distrito Federal*). These resolutions seem to fall within the category of specific resolutions. See I. GOMEZ-PALACIO, ANÁLISIS DE LA LEY DE INVERSIÓN EXTRANJERA EN MÉXICO 133-34, 233-42 (1974).

4. The main books on the subject are J. GRAF, *INVERSIONES EXTRANJERAS* (1975), which is a highly recommended monograph due to its analytical approach, and I. GOMEZ-PALACIO, ANÁLISIS DE LA LEY DE INVERSIÓN EXTRANJERA EN MÉXICO (1974). Other authors comment on the FIL in a broader context. See O. GARZA, *MÉXICO ANTE LA INVERSIÓN EXTRANJERA* 39-62, 284, 334-42 (1974) and C. GARCIA, *DERECHO INTERNACIONAL PRIVADO* 433-51 (1974). For a strictly economical point of view, see B. SUPULVEDA & A. CHUMACERO, *LA INVERSIÓN EXTRANJERA EN MÉXICO* (1973). For a recent comment in English, see Hyde & Ramirez de la Corte, *Mexico's New Transfer of*

FIL.⁵ Nevertheless, many matters regarding the FIL remain unsolved.

The most pressing issue in this respect, is the participation of existing foreign investment in "new lines of products". At this juncture in the development of the FIL,⁶ a foreign investor wishing to market a new product, provide a new service, or generally vary his activity in Mexico is forced to determine his new legal status sans the assistance of approved guidelines. Faced with such a proposition, the foreign investor must decide whether he is legally obligated by the FIL to request the FIC's approval, since he must determine whether he is investing in a "new line of product" or in a "new economic field of activity".⁷ Ultimately, he must decide whether to take the matter before the FIC and await their decision.⁸ All of these decisions must be made without any guidance from the FIC.

To assist the FIC in determining the correct interpretation of the concept of "new line of products", this article shall make a definitional analysis of that concept. This analysis shall be followed by some specific, albeit flexible, solutions that take Mexico's desire to regulate foreign investment into consideration.

Technology and Foreign Investment Law—To What Extent Have They Changed?, 10 INT'L LAW. 231 (1976).

5. None of the various interpretations have been tested by the courts.

6. This article does not consider developments occurring after November 17, 1976.

7. Article 12, section IV, of the FIL refers to the participation of foreign investment in "new economic fields of activities". It appears that this is a broad term and that as analysis of "new lines of products" is more important.

8. The sanctions that may be imposed upon the foreign investor who fails to obtain FIC approval when investing in a new line of products are numerous:

Article 28. Transactions which are carried out in violation of the provisions of this law or which, being required to be registered in the National Registry of Foreign Investment, are not so registered shall be null and void and shall not be enforceable before any authority. Furthermore, a fine of up to the amount of the transaction shall be imposed on the violator by the corresponding Ministry or Department of the government. Violations the amount of which cannot be measured shall be subject to a fine of up to \$100,000.00 Mex. Cy.

Article 29. Administrators, directors, general managers and examiners of enterprises shall be jointly and severally liable, within the scope of their functions for the observance and the obligations imposed by this law. Non-compliance shall be subject to a fine of up to \$100,000.00 Mex. Cy. The penalties shall be imposed by the Ministry of Industry and Commerce after hearing the interested party.

Article 31. Imprisonment of up to nine years and fines of up to \$50,000.00 Mex. Cy. shall be imposed on anyone who through misrepresentation permits enjoyment or actual control by individuals, enterprises or economic units, to which Article 2 of this law refers of assets or rights reserved to Mexican Nationals, for the acquisition of which would be subject to requirements or authorizations which had not been met or obtained, as the case may be.

FIL, *supra* note 1, arts. 28, 29, 31 (as translated by Commerce Clearing House, Inc., 1976).

I. ANALYSIS OF THE CONCEPT OF "NEW LINE OF PRODUCTS"

The Foreign Investment Law is designed to regulate three fundamental aspects of direct foreign investment in Mexico. These three aspects are the incorporation of new enterprises with the participation of foreign investors,⁹ acquisitions by foreign investors of established enterprises,¹⁰ and the growth and expansion of existing foreign investment.¹¹

To regulate the growth of existing foreign investment, the FIC is empowered "to decide on the participation of foreign investment existing in Mexico in . . . new lines of products."¹² Thus, the foreign

9. For purposes of this law, foreign investment is considered to be that made by: I. Foreign legal entities; II. Foreign individuals; III. Foreign economic units without judicial personality; and IV. Mexican enterprises with a majority of foreign capital, or in which foreigners have, for any reason, the power to control the management of the enterprise.

FIL, *supra* note 1, art. 2, § IV (translated by Commerce Clearing House, Inc., 1976). The incorporation of new enterprises is principally regulated by articles 4 and 5 of the FIL.

10. FIL, *supra* note 1, art. 8.

11. FIL, *supra* note 1, art. 12. In connection with trust, the FIL regulates along the forbidden zones, which are a 100 kilometer strip along the borders and a 50 kilometer strip along the beaches. Additionally, the FIL created the National Registry of Foreign Investment.

12. The National Commission on Foreign Investment shall have the following functions: . . . IV. To decide on the participation of foreign investment existing in Mexico in . . . new lines of products.

FIL, *supra* note 1, art. 12, § IV.

One matter that has not been decided by the judicial branch is the problem of the FIL's lack of legislative technique, due to the absence of a complimentary provision forcing the investor to request FIC authorization when the events under article 12, section III and IV, arise. See I. GOMEZ-PALACIO, *ANÁLISIS DE LA LEY DE INVERSIÓN EXTRANJERA EN MÉXICO* 97 (1974). The FIC's Executive Secretary, while attending various conferences in Mexico and abroad, has stated the FIC's opinion that the foreign investor is subject to approval. Also, the FIC through its General Resolution No. 8 regarding "new establishments" has stated:

Pursuant to Article 2; article 12, section III; and article 15 of the Law for the Promotion of Mexican Investment and Regulation of Foreign Investment, all foreign investment intended to be made in new establishments is hereby subject to prior resolution of the National Commission of Foreign Investment . . . in the terms and conditions indicated in this resolution.

The Official Daily of Mexico (*Diario Oficial*), Nov. 5, 1975. Since the FIC requires prior approval for foreign investment in "new establishments", it necessarily follows that the same requirement is applicable concerning "new fields of economic activity" and "new lines or products". The legal basis for the FIC's position, however, is weak since they rely on article 2; article 12; section III; and article 15 of the FIL. Articles 2 and 15 do not relate to this matter because article 2 lists what the FIL considers foreign investors to be, and then states that "foreign investment made in the capital of the enterprises, in the acquisition of assets and in the operations to which the law refers is subject to the provisions of this Law." Thus, the FIL is referring regulated foreign investors to

investor is required to obtain the FIC's approval when he decides to expand. According to the criteria of article 13 of the FIL, the FIC will determine whether the expansion would contribute to Mexico's economy.

Yet, the FIL has not provided a definition and the FIC has not provided any criteria to assist in interpreting the phrase, "new lines of products." Reaching a proper interpretation of this term and determining its scope is a problem facing the FIC. This article will attempt to arrive at an acceptable interpretation through an analytical study of the national, foreign and international factors.

However, prior to undertaking such a study, certain basic assumptions must be stated. There are three levels of economic activity. These levels form a continuum of economic activity starting with investment in a new product, followed by investment in a new line of products, and ending with investment in a new field of economic activity. As the foreign investor moves along the continuum from the first level of new products to the third level of new economic fields of economic activity, he moves further away from his existing economic activity. When the foreign investor passes beyond the first level of new products, his activity falls within the FIL regulation.

The concept of "new lines of products" refers not only to manufacturers and merchants, but also to the service providers.¹³ If one

provisions which do not require prior approval. Furthermore, article 15 only establishes the procedure to be followed in handling applications, stating that "requests . . . shall be processed through the Executive Secretary of the National Commission on Foreign Investment . . . and resolutions issued by the Commission shall be turned over to the corresponding Ministries . . . who shall issue the proper authorizations" FIL, *supra* note 1, art. 15 (FIL translation by Commerce Clearing House, Inc., 1976). Therefore, the only legal basis remaining is article 12, section III, which empowers the FIC to decide on the referred investments. As stated above, this section lacks the complementary provisions stating the foreign investor's obligation to request such approval. When deciding this matter, the courts may consider the legislative intent to regulate all of the direct foreign capital invested in the country. Such regulation may extend not only to the establishment of new enterprises by foreign investors, FIL, *supra* note 1, art. 5, and the acquisition of existing enterprises, FIL, *supra* note 1, art. 8, but also to the expansion of existing foreign investment.

The FIC also is empowered to decide on the participation of foreign investment existing in Mexico in "new economic fields of activity" under article 12, section IV, of the FIL IV and its investment in "new establishments" under article 12, section III.

13. The foreign investor providing laundry services, who wishes to increase his activity to tailoring suits is a good example. Such an activity falls within the legal term "new lines of products". No reference is made to the economic sectors of agriculture, transportation, communications, mining, forestry, fishing, electricity, banking, insurance, and bonds because the participation of foreign investments in these areas is

literally were to interpret the word "product", it might be assumed that it would not apply to service providers because they do not work with products. Nevertheless, the FIL is a general regulation and applies to all foreign investors, regardless of their economic activity. Thus, the service providers are regulated under the FIL. For purposes of clarity, this article will refer only to manufacturers.

Any definition of "lines of products" that fails to consider the consumer as well as the seller would be incomplete. Consequently, the three elements that must be considered are the seller, the consumer, and the competitor.

In order to discover the proper scope and interpretation of the phrase "new lines of products", it is essential to pinpoint the national interest to be protected and the governmental purpose to be furthered by the passage of the FIL. These concerns are best determined by focusing on the legislative intent behind the FIL.¹⁴

The legislature wanted to regulate the competition between the foreign investor and the national investor in the national market. Before the foreign investor is able to actively participate in a different market by means of a new line of products, the FIC must determine the advisability of such an investment. If a favorable decree results, the FIC regulates and directs foreign investment to those fields or lines where the national economy will be benefited.

The initial purpose of the FIL is to direct existing foreign investment to those fields that are not adequately covered by domestic investors. The FIL Exposition of Motives¹⁵ states:

This is an agreement more generalized day by day, that gives foreign investment a complementary role. . . . The State

minimal, due to the regulation of particular industries in Mexico. The construction business also falls within the legal term although foreign investment participation in this area is also minimal.

14. All legislators must take the idiosyncrasies of a nation and of its judicial and administrative authorities into consideration when creating law. Moreover, the practical elements surrounding its application play a major role in making decisions.

15. The Exposition of Motives of the FIL (*Exposition de Motivos de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera*) The National Daily (*Diario el Nacional*), Dec. 27, 1972, is prepared not by the legislature but by the executive branch; it is not enacted law. Congress only enact statutes, such as the FIL. The Exposition of Motives expresses the reasons behind enactment of a law. In this case, the Exposition of Motives sets out the reasons that the executive branch had in sending the bill to the Congress for consideration. If, as in this case, the Executive's initiative is not substantially changed by Congress, the President's reason becomes closely connected with the legislature's will. Mexican courts have used the Exposition of Motives of other laws to assist them in the interpretation of the law's provisions. This was the case when the courts interpreted the Civil Code.

does not deem it advisable that foreign investment remove Mexican enterprise, because this would signify the frustration of decades of effort in benefit of an independent industrialization. It is also undesirable for foreign capital to result in monopolistic activities. . . . Foreign capital is useful and that is why we receive it in equitable conditions in the fields of activity that meets our own needs.¹⁶

When the FIL's bill was brought before the Chambers of the Federal Legislative Branch, it was mentioned that

[t]he Law's second purpose is to regulate foreign capital. We try to . . . regulate it so that it subordinates to our laws. We will accept it as an instrument that complements and not displaces the Mexican's savings and efforts. . . . We will accept it as long as it collaborates with us in achieving the goal that we ourselves have decided. . . . We will accept it in the measure that does not displace the enterprises that are satisfactorily operating in the country; we will accept it in the measure that does not come to fields that are adequately covered by the national enterprises.¹⁷

Our country has generally demonstrated that it accepts direct foreign investment when it constitutes in a certain way an economic complement that does not displace the Mexican capital¹⁸ . . . Foreign capital is beneficial when it acquires characteristics of complementation. . . . The purposes to which the Law to Promote Mexican Investment and Regulate Foreign Investment is oriented, state the concern to . . . regulate foreign capital so that it efficiently complements the development levels that the country demands.¹⁹

The FIL's purpose therefore is to regulate the participation of existing foreign investment within the national market to make certain that the foreign investment does not displace, but rather, complements

16. *Id.*

17. Diary of the Debates of the Senators' Chamber of the Congress of the United States of Mexico (*Diario de los Debates de la Cámara de Senadores del Congreso de los Estados Unidos Mexicanos*), XLVIII Legislature, Book III, No. 41, at 6-7. The presentation was made by Mr. José Campillo Sáinz in his capacity as Under-Secretary of Industry in charge of office, representing the Ministry of Industry and Commerce.

18. Diary of the Debates of the Senators' Chamber of the Congress of the United States of Mexico (*Diario de los Debates de la Cámara de Senadores del Congreso de los Estados Unidos Mexicanos*), XLVIII Legislature, Book III, No. 2, at 3. The presentation was made by Senator Francisco Luna Kan.

19. Diary of the Debates of the House of Representatives of the Congress of the United States of Mexico (*Diario de los Debates de la Cámara de Diputados del Congreso de los Estados Unidos Mexicanos*), XLVIII Legislature, Book III, No. 10, at 12-13, which reflects the participation of Deputy Enrique Soto Reséndiz.

domestic investment. This intention should be remembered when analyzing and considering the physical characteristics of a new product, or the change of technology used in its manufacture. These characteristics actually are secondary to the legislature's intent and must be treated as aspects that influence. They, however, do not determine the solution. The FIL is not intended to regulate the new product, the raw materials, the productive processes used in the products manufacture, or service providing systems. The FIL is broader in scope. Thus, it regulates foreign investment in a different market or directed at a different customer where the foreign investor is competing with national investors. Such is the case when there are new lines or products. The legislature did not wish to regulate industrial modifications regarding the manufacture of new products, or the acquisition of raw materials related to the product to be manufactured. Rather, the regulations are directed at the active "participation"²⁰ of the foreign investor in a new line of products. An example of this is seen when a new product is introduced in a different market and directed toward a different consumer.

II. PROPOSED SOLUTIONS

Five solutions are proposed in order to solve the problem presented by the phrase "new lines of products". These five possible solutions include subjective criteria, objective criteria, economic criteria that provide values based on extrinsic and intrinsic product changes, criteria that establish general guidance to distinguish lines of products and mixed criteria. An analysis of each proposed solution will be accomplished by comparing the new product or service to be manufactured or provided, with existing products or services.

A few caveats must be mentioned before the various solutions are presented. It should be remembered that the seller, consumer and competitor must be considered in the analysis. Of these three factors, the consumer is the most important, followed by the seller, and finally the competitor. The reason for this order is because of the legislature's expressed intent to regulate the participation of foreign investment in a different market. This reason has more impact when the existence of a different market is measured principally by the existence of different consumers. Another caveat is the use of terms

20. Participation is the precise word used by article 12, section IV, of the FIL. Notice the difference from article 12, section III, which refers to "foreign investment intended to be made".

that are difficult to define. This has particular importance to this analysis because the phrase "new lines of products" is regularly and extensively used by economists who have not yet defined it.²¹ Moreover, legislators increasingly are using economic terms that lack precise definition.²² Thus, an attempt to define "new lines of products" may necessitate the inclusion of terms of greater ambiguity than the object to be defined.

A. Subjective Criteria

This solution attempts to provide a definition of the phrase "new line of products". Before issuing a definition, circumstances or facts indicating an estrangement by the investor of its existing activity must be taken into consideration. Such facts are used to compare the products or services that the foreign investor manufactures, sells, or provides with those to be manufactured, sold, or provided. The following questions may be used to determine the necessary facts for a comparison.

- 1) Does the new product have the same form?
- 2) Does the new product have the same presentation?
- 3) Does the new product have the same quality?
- 4) Does the new product have identical functioning?
- 5) Does the new product have the same end-use?
- 6) Is the new product going to be used by the same consumers?
- 7) Would the new product be distributed through the same distribution channels?
- 8) For purposes of internal classification by lines of products, both of the domestic as well as the parent foreign company, does the new product fall under the same line of products?

21. In an attempt to find an economic definition of "new lines of products", research with negative results was conducted by several scholars. D. HOPKINS, *OPTIONS IN NEW PRODUCT ORGANIZATION* (1974); E. MARTING, *NEW PRODUCTS-NEW PROFITS* (1964); P. MCGUIRE, *EVALUATING NEW PRODUCT PROPOSALS* (1973); O. NORD, *GROWTH OF A NEW PRODUCT* (1963); E. PESSEMIER, *NEW PRODUCT DECISIONS* (1966); B. SANDKULL, *ON PRODUCT CHANGES AND PRODUCT PLANNING* (1968); M. WARSHAW & G. MURPHY, *NEW PRODUCT PLANNING FOR CHANGING MARKETS* (1968); L. WELLS, JR., *THE PRODUCT LIFE CYCLE AND INTERNATIONAL TRADE* (1972); CALIFORNIA DEPARTMENT OF COMMERCE, DIVISION OF INTERNATIONAL TRADE, *CALIFORNIA INTERNATIONAL BUSINESS DIRECTORY* (3rd ed. 1975).

22. This is the case in current European and United States antitrust legislation. In Europe it is the term "relevant market". Treaty Establishing the European Economic Community, *done* Mar. 25, 1957, art. 85, 86, 298 U.N.T.S. 5, 48. In the United States, it is the term "line of commerce". Clayton Act 15 U.S.C.A. § 18 (1973).

- 9) Will the same machinery and equipment used to manufacture the existing products be used to manufacture the new products?
- 10) Will the same technology used to manufacture the existing products be used to manufacture the new products?
- 11) Will the new product be manufactured by the same specialized and trained personnel used for the existing products?
- 12) Will the same raw materials used to manufacture the existing products be used to manufacture the new product?
- 13) Will the new product be sold under the same trademark?
- 14) Will the new product be covered by a new patent or an inventor's certificate, different from those currently issued on behalf of the domestic company or its licensor?

Certainly not all of the foregoing questions have the same value. The fact that, under questions 1 to 5, the new product does not have the same form, presentation, quality, functioning, and end-use as the existing products, does not mean necessarily that it must be catalogued under a new line. It may be catalogued simply as a new product. On the other hand, question 6, which refers to a different consumer, is important because it implies a different destination market.²³

B. Objective Criteria.

This criteria consists in identifying all existing lines of products. Through the use of exhaustive indexes, listing every known line of product, a determination of the products that fall under each line is possible. To prepare such a list, some international, domestic, or foreign classifications that have been prepared for other purposes, such as statistical purposes, could be used as a starting point. Nevertheless, the final classification must reasonably reflect an effective regulation of existing foreign investment. This is to say that the lines or products must be classified in accordance with the Mexican economy. Classifications which have purposes different from Mexico's national interest, and which do not reflect adequate regulation, should not be relied upon.

23. "It is generally agreed that whether goods or services are of the same type is determined not by considering their physical or technical characteristics, but their ability to satisfy a particular consumer demand." 3 H. BLAKE, *BUSINESS REGULATION IN THE COMMON MARKET NATIONS* 163 (1970).

There are three national classifications that may be used as a basis for preparing a lines of products list. These classifications include those used for statistical purposes by the General Bureau of Statistics of Mexico's Ministry of Industry and Commerce, the General Import Tariff, and the General Export Tariff.

A number of international classifications prepared by the United Nations may provide some guidance. The first classification is the International Standard Industrial Classification of All Economic Activities,²⁴ which is used together with Indexes.²⁵ This statistical classification provides economic data according to economic activity, based on the class of goods produced or services rendered.²⁶ Standard Industrial Trade Classification, Revised Second,²⁷ is another classification used in conjunction with consultation indexes.²⁸ It provides statistical classification of commodities entering external trade. It is designed to provide statistics needed for economic analysis and international comparison of the trade-by-commodity data.²⁹ The final international classification is one of Broad Economic Categories.³⁰ It provides the statistical classification for analysis of data pertaining to very broad economic categories such as food, machinery, and fuels.

24. U.N. Doc. ST/STAT/SER.M/4/Rev. 2 (1968) (Department of Economic and Social Affairs).

25. Indexes to the International Standard Industrial Classification of All Economic Activities, U.N. Doc. ST/STAT/M/4/Rev. 2/Add. 1 (1971) (Department of Economic and Social Affairs).

26. The Standard Industrial Classification Manual used in the United States follows the same system and indexes as this classification.

27. U.N. Doc. ST/ESA/STAT/SER.M/34/Rev. 2 (1975) (Department of Economic and Social Affairs).

28. Commodity Indexes for the Standard Industrial Trade Classification, Revised, Vols. I and II, U.N. Doc. ST/STAT/SER.M/38/Vols. I and II (1963) (Department of Economic and Social Affairs).

29. This classification incorporates the Brussels' Tariff Nomenclature (B.T.N.) numbering system. Thus, it is easy for countries utilizing that system, to use this classification.

Also, refer to the Classification by Industrial Origin, U.N. Doc. ST/STAT/SER.M/43/Rev. 1 (1971) (Department of Economic and Social Affairs). Its purpose is to provide a cross-reference between the Standard International Trade Classification and the International Standard Industrial Classification. A bridge is provided between the foreign trade commodity classification and the industrial classification. This is necessary because while they classify much of the same goods, the numbering system is different.

30. U.N. Doc. ST/STAT/SER.M/53 (1971) (Department of Economic and Social Affairs). This classification makes use of the Standard Industrial Trade Classification numbering system, but groups commodities into a limited number of subgroups. If the FIC decides to follow the objective criteria, regarding the participation of existing foreign investment in "new economic fields of activity" under article 12, section IV, this classification study would be advisable because it expressly refers to broad fields of economic activity.

Classifications published by the United States also may prove helpful. The 1972 Standard Industrial Classification Manual³¹ is one such classification. Its purpose is to promote the comparison of statistics describing various facets of the economy within the United States. This classification defines industries in accordance with the composition and structure of the economy and covers the entire field of economic activity. Another useful United States classification is the 1967 Numerical List of Manufactured Products.³² Its purpose is to classify the products and services of manufacturing industries within the United States for use by the Bureau of Census.

The foregoing classifications may be used as a basis for preparing the objective criteria, as long as they are directed to the domestic activity that they regulate. In short, the classifications must be directed toward the regulation of existing foreign investment in Mexico.

If the FIC were to use exhaustive indexes, numerous issues may arise. First among these issues is the obstacle of defining each term included. For example, when defining the line of products for the manufacture of shoes, it must be determined whether a moccasin or a boot falls within the "shoe" definition. In addition, when defining lines of products for soap and detergents, the question as to whether window cleaner falls within that definition may be at issue. The foregoing issues are not as difficult as those regarding certain types of machinery and their parts, particularly highly sophisticated electronic equipment. The issues arise because the products frequently are identified with non-Spanish terms, because of the lack of a corresponding word in the Spanish language. This concern may be diminished with the issuance of consulting indexes, such as those used in some United Nations' classifications.

It will be necessary for the FIC to hire a substantial number of highly trained personnel such as electrical engineers, industrial engineers, biologists, pharmaco-biologists, and chemists. These professionals will be needed for consultation and guidance when interpreting the terms that surely will arise in test cases.

31. Office of Management and Budget, U.S. Government Printing Office, Washington, D.C., Stock No. 4101-0066.

32. U.S. Bureau of Census, Census of Manufacturers, Series MC67-1, U.S. Government Printing Office, Washington, D.C., (1968). This classification makes use of the Standard Industrial Classification Manual numbering system, but includes more detailed breakdowns. An example of such a detailed breakdown is the distinction drawn between the various types of ball point pens depending upon their sales price.

Further issues to be dealt with include the need to establish precedents when issuing criteria so as to distinguish and define products or services included in the list. Inequity also may arise with the use of differing degrees of broad lines of products. An example of such inequity occurs when one compares the manufacture of sporting goods with the narrower category of the manufacture of tools for the construction industry. The issue becomes clearer if one compares the above mentioned lines of products with the less broad degree of the manufacture of shaving blades. There is also the possibility of omitting lines of products by failing to include certain existing products at the time the list is prepared, or by the creation of new unclassified products. Constant review of the classification will be necessary to insure complete, but flexible regulation of existing foreign investment within the country.

Determining the degree to which to classify lines of products is, unquestionably, a challenge to the wise regulation of foreign investment in the country. The use of a narrow set of criteria to identify lines of products may discourage desirable foreign investment. Yet, when using broad criteria, a displacement of domestic investment is possible, which would allow foreigners to achieve monopolistic positions. For this reason, it is necessary to follow a mixed system despite any inequitable result that may occur. This system would create both broad and narrow criteria for determining lines of products. Classification then would depend upon the economic field that is being classified.

C. Economic Criteria That Provide Values Based Upon Extrinsic and Intrinsic Product Changes.

Based on market repercussion, a determination can be made of when the manufacture of "new products" becomes a "new line of products". A product change can have relevance only when considering the corresponding effects in the market, and upon the consuming public and competing businesses.³³

Not only can the nature of the product change in a number of ways,³⁴ but various extrinsic changes can occur. The changes may be sufficient to distinguish an old from a new product. For example, a drastic price increase or reduction easily could result not only in a change within the market, but also in the actual use of the product.³⁵ Substantial changes in availability, the need for servicing, the ease of

33. See B. SANDKULL, *supra* note 21, at 184.

34. See E. MARTING, *supra* note 21, at 82.

35. See L. CURRIE, *OBSTACLES TO DEVELOPMENT* 50 (1967).

installation, the breadth of distribution, product size, and product packaging are potential changes that could have a drastic effect on the market.³⁶

A value from 0.1 to 1.0, based on the importance of the product's change, is assigned to each one of the intrinsic and extrinsic product changes. As the product's intrinsic and extrinsic characteristics change, the sum of the values assigned to each change will be altered. The decision-making body sets an arbitrary total value above which the product's changes constitute a "new line of products". The values are as follows:³⁷

<u>Intrinsic Changes:</u>	<u>Extrinsic Changes:</u>
1) Characteristics (0.4)	Increased Availability to Consumer (0.1)
2) Quality (0.6)	Price Increase:
3) Functioning (0.2)	1) Up to 50% (0.1)
4) Presentation (0.8)	2) Up to 100% (0.2)
5) End-use (0.5)	3) More than 100% (0.3)
	Price Reduction:
	1) Up to 10% (0.3)
	2) Up to 25% (0.5)
	3) Up to 50% (0.7)
	4) More than 50% (1.0)
	New Consumer (1.0)

The problems that the foregoing solution present are threefold. The most important is the extreme difficulty of assigning a fair value to each change. Of less importance is the need to include a definition of each change in order to avoid doubts as to when the change occurs. Finally, a problem occurs when an investor makes changes over a long period of time and, thus, avoids falling within the classification of a new line of products. The last-mentioned problem may be remedied by introducing a rule, whereby all changes during a given period of time,

36. Note that the reference is to a "new product" analysis and not an analysis of the broader term of new "lines of products".

37. The list is merely an example of changes and is not exhaustive. Another method of determining product changes is the use of a grid showing the products' intrinsic and extrinsic changes. Such a grid would consist of two lines on a 90° angle. One line would represent the extrinsic and the other line would represent the intrinsic product changes. The vertex would signify no change, but as the product undergoes changes, these lines would be drawn up to the point that indicates a new line of products. See E. PESSEMIER, *NEW PRODUCT DECISIONS* 8 (1966).

such as three years, would be added for the purpose of determining the investor's participation in a new line of products.

*D. Criteria That Establish General Guidance
to Distinguish Lines of Products.*

This solution accepts the fact that it is not possible to issue a clear and precise definition of "new lines of products". It also rejects the position that the FIC should have a broad discretionary authority to solve each case brought to its consideration. This solution positions itself midway between the subjective solution and the free exercise of discretionary authority by the FIC. Therefore, its purpose is to establish certain criteria that will be used to determine when the investor is participating in a new line of products.

As mentioned above, the legislative intent is to regulate not only changes in the nature of the product itself, but also the participation of existing foreign investment in a different market. The product changes may be used as secondary factors in the analytical determination of whether the investor has entered a new market. The legislative intention in enacting the FIL and antitrust legislation is similar, for both regulate entering into new markets or lines of products.³⁸ Consequent-

38. Article 28, paragraph II, of Mexico's Constitution states:

[T]he law will severely punish and the authorities will effectively pursue . . . every act or procedure that restricts or intends to restrict the free participation in the production, industry or commerce, or public services . . . and in general all that constitutes an improper exclusive advantage on behalf of one or various persons, damaging the public in general or certain social class.

A similar regulation is included in article 1 of the Organic Law of Constitutional Article 28 Related With Monopolies (*Ley Orgánica del Artículo 28 Constitucional en Materia de Monopolios*) which was amended by Decree on December 27, 1974, and published in the Official Daily of Mexico (*Diario Oficial*), Dec. 20, 1974. Similarities with Mexico's constitutional provision is found in article 85 of the 1957 Treaty of Rome. In connection with the European Economic Community, the treaty states in paragraph 1:

The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concentrated practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market. . . .

Treaty Establishing the European Economic Community, *done* Mar. 25, 1957, 298 U.N.T.S. 5, 48. In the United States, the Clayton Act states:

[N]o corporation engaged with commerce shall acquire, directly or indirectly, the whole or any part of the assets of another corporation also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly.

15 U.S.C. § 18 (1953). *See also* Sherman Antitrust Act § 2, 15 U.S.C. § 2 (1973).

In Mexico the antitrust legislation is rarely used and, therefore, the judicial power has not had many opportunities to issue decisions relevant to the analysis of the problem.

ly, there are numerous factors to be considered when determining when an investor falls into a "new line of product" situation. The factors to be considered are whether the product is directed to a different consumer, whether the product has peculiar characteristics, and whether the product can be interchanged with other products. Further considerations are the total picture of the product and services, the pricing procedure, purchaser identity, and the product's price.

1. *Different Consumer.* This may be the most important criteria because when efforts are directed to a different consumer market, it must be presumed that the manufacturer is participating in a new line of products. The consumer is difficult to define because the concept may be interpreted in a broad or narrow sense. For example, note a manufacturer of stoves who wishes to manufacture refrigerators. He could insist that he is directing his product to the same consumer, such as the housewife or the home appliances consumer, and thereby cause his new product to fall within the same line of products as that already being manufactured. The issue is whether to form a distinction between the stove-home appliance consumer and the refrigerator-home appliance consumer. Similarly, there is the question of whether the hairdresser consumer is the same consumer for purposes of after-shave lotion and other products of a similar nature. These problems show that it is best to presume that the investment is directed to a new line of products.³⁹

2. *Sufficient peculiar characteristics.* Certain products may have sufficient peculiar characteristics to distinguish them from others that apparently may be classified under the same line of products. Such is the case when persian rugs are compared with rugs in general. The persian rugs have distinctive characteristics sufficient to constitute different lines of products.⁴⁰

39. In a United States antitrust case, the court of appeals reasoned:

In view of distinct pricing and purchaser identity of florist foil compared with other decorative foil and in view of industry and customer recognition of florist foil converting industry as a separate economic entity, the florist foil market was found to be a distinguishable product market, and thus the production and sale of decorative aluminum foil to the florist trade a line of commerce

Reynolds Metals Co. v. Fed. Trade Comm'n, 309 F.2d 223 (D.C. Cir. 1962). A further decision by a United States district court stated that the production and sale of "all beer", regardless of its classification as either "premium" or "nonpremium" beer, was "the only relevant line of commerce" United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129, 146 (N.D. Cal. 1966); cf. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

40. In a United States antitrust case, the Supreme Court held that "automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them

3. *Reasonable interchangeability of products.* When the same consumer is able to reasonably interchange different products for the same purpose, all the products constitute the same line of products. Gelatine derived from a vegetable or an animal is a good example of an interchangeable product. Another example is the acquisition of hormones that may be obtained through different methods and raw materials.⁴¹

4. *Cluster of products and services.* Different products or services with various physical or technical characteristics, having the same end-use, and acquired in the same place, may be identified under the same line of products.⁴²

as products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' within meaning of the Clayton Act." *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586, 594 (1957).

41. This criteria has been used in both West Germany and the United States. Blake has mentioned that

the delimitation of the relevant market is made according to the functional exchangeability of the products offered and demanded on the market. . . . Products are deemed to be interchangeable if they generally satisfy the same demand or would do so in the event of minor changes in the price or quality of either product.

3 H. BLAKE, *supra* note 23, at 163.

See United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377 (1956), where the Court held that the entire "flexible packaging material market" constitutes the single line of commerce and not "cellophane" because of "cellophane's" interchangeability. In *Am. Crystal Sugar Co. v. Cuban Am. Sugar Co.*, 259 F.2d 524 (1958), the court treated the relevant market as including both beet and sugar cane. The court noted that for all practical purposes the two kinds of sugar were substantially identical. In *Int'l Boxing Club of N.Y. v. United States*, 358 U.S. 242 (1959), the Court held that "the promotion of professional championship boxing contests, as distinguished from the promotion of all boxing contests" is a different and distinct line of commerce. Although "the market is composed of products that have reasonable interchangeability for the purpose for which they are produced—price, use and qualities considered," it does not necessarily place the physically identical product in one and the same market. Thus, the Court found that the "separate, identifiable market" for championship boxing contests existed. This finding was further supported because the sources of average revenue, television rates, Nielson ratings, and movie rights revenue, were all more profitable to the professional boxing contest:

42. In *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), the Court held "that the entire accredited central station service business, including such services as automatic burglar alarm, automatic fire alarms, sprinkler supervisory services and watch signal service, was properly treated as a single 'relevant market'" The Court reasoned that "[i]n case of a product it may be of such a character that substitute products must also be considered, as customers may turn to them if there is a slight increase in the price of the main product. . . ." The Court combined all the services because they all have a single use— "the protection of property, through a central station that receives the signals." Commercial realities are such that central station companies recognize that to compete effectively they must offer all or nearly all types of services.

5. *Pricing and purchaser identity.* It is important to analyze the opinion of both the consumer and the seller sectors, since both may differentiate one market from another in such a way that they are distinguishable as different lines of products. An example of such opinion is the manufacture of rubber tires where a distinction is drawn between automobile, bicycle, and motorcycle tires. Each tire is acquired in different places, distributed by different merchants, and manufactured by different industries. For both the industry and the consumers, bicycle tires constitute a different and segregated line of products from automobile tires.⁴³

6. *Products Price.* A product's price may be sufficient to distinguish it as a separate line of product. This is a way to distinguish paintings of well known painters from paintings of novices, persian rugs from rugs in general, mink coats from coats in general, and luxury automobiles from economy automobiles.⁴⁴

Based on these factors, the FIC may issue a resolution stating the presumption that the foreign investor is participating in a new line of products when it manufactures or commercializes a new product, or renders a new service directed to a different consumer. This presumption is based on both the consumer's identity and the products' price. A distinction may be made if the new product has sufficient peculiar characteristics to be identified as a separate line of products, or when the purchaser's or the seller's specific sector recognizes it as a separate line of products. Further, it may be presumed that the foreign investor is not participating in a new line of products when there exists a reasonable interchangeability of products by the same consumer, or if they all have the same purpose.

The foregoing is only a basic scheme that must be followed by the mechanic. This solution may be criticized on the grounds that legal

43. In *United States v. Grinnell Corp. of America*, 233 F. Supp. 718 (E.D. Md. 1964) an antitrust case, the court found that "metal curtain walls" was a line of commerce and that "aluminum curtain walls" was a well defined submarket. The broad outer boundaries included "curtain walls", where all types of building materials competed. Within that outer market "metal curtain walls" and "aluminum curtain walls" were meaningful product markets or lines of commerce. The court found that the industry recognized "metal curtain walls" as distinct from precast or any other type of curtain wall; that specialized vendors existed; and that production facilities for aluminum curtain walls were unique and specialized. *Id.* at 725. See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), where for the same basic reasons a distinction was made among shoes for men, women, and children.

44. See note 40 *supra*. Other criteria that could be used to distinguish one line of products from another are the investment in facilities with sufficient peculiar characteristics and the utilization of specialized distribution channels.

security would be at a minimum. In any event, if the FIC were to establish precedents, and if the judicial power were to create decisions and jurisprudence, the initial criticism would disappear and a body of open information would be available for the foreign investor's analysis. This solution, however, would pose serious practical problems because Mexico, as a civil law country, is unaccustomed to the use of case law and precedent.

E. Mixed Criteria

Under the mixed criteria solution, the various groupings could be accomplished by combining: 1) the subjective with the objective criteria, 2) the subjective with the economic criteria, 3) the objective criteria with the criteria that establish general guidelines to distinguish one line of products, and 4) the economic criteria with the criteria that establish general guidance to distinguish one line of products from another. Combinations that are excluded from consideration are the subjective criteria with the criteria that establish general guidance to distinguish one line of products, and the objective with the economic criteria.

The second and fourth mixed criteria combinations outlined above have serious difficulties utilizing the economic criteria. The latter presents problems when assigning fair values to the extrinsic and intrinsic product changes. The first mixed criteria outlined above which combines subjective with objective criteria, may be accomplished by combining the lines of products list with a definition of "new lines of products". When the foreign investor falls within any of the criteria, he must request FIC approval. Although the definition of lines of products has problems, it is supported by the list which should diminish the need to obtain a complete and clear definition.

The third mixed criteria listed above combines objective with general guidance to distinguish one line of products, and differs from number one above in the utilization of the criteria that establish general guidance to distinguish one line of products. Instead of including a definition of "new lines or products", presumptions are established on behalf of the foreign investor not only regarding his investment in a new line of products, but also when it is understood that he is not investing in a different line.⁴⁵ Therefore, the problem lies in determining definitions or general guidance which, in turn, should establish presumptions.

45. This may also be established by the use of the subjective criteria, if a definition of "new lines of products" is included as well as a negative definition, such as one that states when the foreign investor is not participating in a new line of products.

III. CONCLUSION

The answer to this problem seems to be the adoption of the third mixed criteria solution listed above, which combines the objective criteria with criteria that establish general guidelines for the purpose of distinguishing one line of products from another. The FIC through the broad exercise of its discretionary authority, will be in a better position to deal with the regulation of foreign investment.

This solution comports with the Federal Executive's position as expressed by a representative of the Ministry of Industry and Commerce:

On the subject of foreign investment it is not possible to establish a fixed and permanent policy. If that would be the case, that policy, or such a provision would mean a straight jacket and not really a useful instrument for the country's development.⁴⁶

If the FIC were to issue a definition of "new lines of products", amendments would be sure to follow. This, however, is inconvenient, particularly if the definition is subject to constant and continuous amendments. Thus, by providing general guidance a greater degree of flexibility can be achieved which should insure the proper amount of regulation for foreign investments now and in the future.

The adoption of general guidelines in conjunction with objective criteria to distinguish between new products and new lines of products will provide a sound framework for assuring adequate regulation of foreign investment. In addition, desirable foreign investment will not be discouraged because legal security will be established. Certainly, the FIC does not have an easy task. The goal must be to direct existing foreign investment into fields that will not result in a displacement of domestic investors.

46. Diary of the Debates of the Senators' Chamber of the Congress of the United States of Mexico (*Diario de los Debates de la Cámara de Senadores del Congreso de los Estados Unidos Mexicanos*) XLVIII Legislature, Vol. III, No. 41, at 9. Mr. José Campillo Sainz participated as the Under-Secretary of Industry, on behalf of the Minister of Industry and Commerce. He also referred to the FIL's Exposition of Motives, which disclose the desire to provide the FIC with the necessary flexibility to regulate foreign investments pursuant to changing national economic needs. Certainly where discretionary authority exists, legal security loses strength; but in certain fields, such as economics, such authority is imperative. It may be either fortunate or unfortunate that in certain cases, the economic guidance of the country must be left to the discretion of government officials.