DRAKE-FINLEY, S. DE R.L. DE C.V.; DRAKE-MESA, S. R.L. DE C.V AND FINLEY RESOURCES

AMPARO DIRECT TRIAL:74/2019

REF: RECOURSE OF REVIEW IN DIRECT AMPARO

[…]

IT IS ALSO IMPORTANT TO SPECIFY THAT THE CONCEPTS OF VIOLATION OF STRICT CONSTITUTIONALITY BY MEANS OF WHICH IT IS CONTESTED THE IRREGULARITY OF DIVERSE LEGAL PRECEPTS CONTAINED IN LAWS IN A FORMAL AND MATERIAL SENSE, AS WELL AS IN GENERAL LEGAL NORMS, WAS NOT ANALYZED EXHAUSTIVELY BY THE COLLEGIATE COURT, where in a literal and summarized form it was asserted as a question of constitutionality to be resolved in the sense of:

> **NINTH CONCEPT OF. VIOLATION**
>
> **Violation of the provisions of article 1 of the Political Constitution of the United Mexican States, in relation to Article 50 of the Federal Law of Administrative Litigation Procedure, as well as Article 1105 of the North American Free Trade Agreement.**

The complainant is aggrieved by the final judgment of October 4, 2018, issued by the H. Section of the Federal Court of Administrative Justice, issued within the trial number 20356117- 17-12-2/1599/18-SI-04-04, in which the Court declared the legality and validity of the disputed resolutions, for being in violation of the principles of legal certainty, the essential formalities of the procedure, access to full administration of justice, consistency and completeness of judgments, since THE H. RESPONSIBLE CHAMBER CONTRARY TO LAW ESTABLISHED in the challenged decision in its SEVENTH CONSIDERATION that *"In connection with the plaintiff's argument that PEP's breach of contract caused it several damages by having Drake's personnel, equipment and machinery suspended indefinitely,*

notwithstanding that according to the International Public Bidding Terms and Conditions, Appendix "A", as well as the Fourth of the FTA, expressly in Article 1001, paragraph 4, it is stated that none of the parties shall conceive a contract in a way that avoids the obligations of such chapter; Likewise, Article 1002, paragraph 2 of the same law states that the value of the contract shall be the estimated value at the time of the solicitation and paragraph 4 of the article states that in addition to the provisions of Article 3003 (4), an entity may not choose a method of valuation or split the purchase requirements in separate contracts, in order to avoid the obligations contained in that chapter and finally Exhibit DT-2 itself indicates PEP's obligation to deliver "monthly" Equipment Movement Schedules. It is unfounded, since it is insisted that in the contract PEP was not obliged to exercise the minimum amount by a certain date, hence if on November 29, 2016 when it, was notified of work order 28/2016, PEP still did not exercise such minimum amount, this did not relieve the claimant in the fulfillment of its contractual obligations", which violates Articles 1 of the Political Constitution of the United Mexican States, in relation to Articles 8, 10 and 17 of the Universal Declaration of Human Rights and Articles 8 and 17 of the American Convention on Human Rights, as well as 50 of the Federal Law of Administrative Litigation Procedure, 1105 of the North American Free Trade Agreement.

The foregoing is so, since any interpretation and analysis that the First Section of the Superior Chamber of the Federal Court of Administrative Justice had to carry out was the most favorable to the interests of my principals, specifically to Finley Resources, Inc., since the business of Contract No. 421004821 is a foreign investment protected by the North American Free Trade Agreement, in terms of Chapters X and XI of the of said Treaty. This is so since the Contract was entered into under the North American Free Trade Agreement (hereinafter referred to as "NAFTA"), since it derives from the International Public Bidding number 18575088-542-13, based on Chapter X of the NAFTA Government Procurement.

This Chapter X of the FTA regulates public tenders and procurements between nationals of the States Parties[1] and the States Parties to the NAFTA, as well as the conditions of safety and protection granted to foreign investors at

[1] Mexico, United States of America and Canada

the time of signing contracts with any of the State Parties and their governmental enterprises (including PEMEX[2]).

Likewise, the NAFTA, in its Chapter XI, Section A - Investments, regulates the investments[3] made by nationals of a State Party in the territory of another State Party, which according to Articles 1101, 1104 and 1105 must be protected fully and with all the benefits that the State Party can provide.

In addition to the above, article 1105 of the NAFTA establishes the following:

> ***Article 1105: Minimum Standard of Treatment***
>
> *1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*

[2] Annex 1001 .1 a-2 of Chapter X of the NAFTA.

[3] Article 1139: Definitions Section C Definitions of Chapter XI of the NAFTA, establishes that investments are, among other things, what is referred to in subparagraph (h) *"interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or…"*

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*"**Article 1101**: Scope and Coverage*

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) investments of investors of another Party in the territory of the Party; and

(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

2. A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).

4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter."

***"Article 1104**: Standard of Treatment*

Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103."

> ***"Article 1105**: Minimum Standard of Treatment*
>
> *1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*
>
> *2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.*
>
> *3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b)."*

From what is transcribed it is clear that my client, being an investor company with residence in the United States of America, who made such investments in the national territory of the United Mexican States, the provisions of the aforementioned articles of the North American Free Trade Agreement were applicable to it, a situation that did not occur, but rather, in a totally illegal manner, the contract that at the time was executed in Mexican territory was terminated.

Likewise, said illegality was validated by the Jurisdictional Bodies before whom the relevant means of defense were filed, without observing, in a manner totally contrary to law, the feasibility and even the obligation of the application of the aforementioned articles, even denying the possibility of carrying out an interpretation in accordance with the *pro persona* principle, in order to grant the maximum protection that could be granted to my client in relation to the rights to which he has access as guaranteed by the article 1of the Political Constitution of the United Mexican States.

By virtue of this, it is clear that such illegal action violated my client's human rights and the concomitant guarantees of legal certainty and security, as well as those related to legality, as set forth in Articles 14 and 16 of the Political Constitution of the United Mexican States.

The foregoing is so since the authorities did not observe the obligation to, in the first place, make the interpretation most favorable to my client, given that, if such interpretation had been made in strict observance of the *pro homine*

principle, the provisions of Articles 1101, 1104 and 1105 of the North American Free Trade Agreement would have had to be applied to the matter before them.

Furthermore, it is clear that in order to grant legal certainty and security to investors coming from the signatory countries of the aforementioned trade agreement, it must be applied as an integral rule of the Mexican legal system, and consequently, it must have full effect on the contracts and acts entered into by the parties.

Indeed, the parties to the international agreement in question must be able to know what they are abiding by, so that there are no irregularities that generate uncertainty and legal insecurity for their investments or work carried out in Mexican territory, since this contravenes one of the pillars of the Democratic Rule of Law, namely, legal certainty and security, as established in the Political Constitution of the United Mexican States.

Thus, by not having applied the relevant regulations, uncertainty and legal insecurity was generated for my client, since he is not certain about the destination of his investment and about the payment to which she is entitled for the work performed, which is derived from an illegal action of the authorities and jurisdictional bodies, being totally contrary to what is established in the Magna Carta of the Mexican State.

Finally, the undue substantiation by the authorities is also lost of sight, since the corresponding normative portion was not applied, being the one contained in the previously mentioned articles of the commercial treaty in question.

The foregoing results from the fact that the North American Free Trade Agreement, being an integral part of the Mexican legal system, should have been applied in a mandatory manner, since the legal assumptions contained in said international agreement have been updated; therefore, the content of said agreement should have been considered in order to comply with the rights and guarantees related to the legality that must be observed by the acts of the authorities.

In view of the foregoing, it is hereby requested in the most attentive manner to this H. Supreme Court of Justice of the Nation, to make a constitutionally valid pronouncement and to opt for the interpretation of the law that is in accordance with the text of the Constitution, declaring that the

interpretation in accordance with the pro persona principle is appropriate, with the purpose of respecting the human rights and guarantees contained in Articles 1, 14 and 16 of the Political Constitution of the United Mexican States, in relation to Articles 8, 10 and 17 of the Universal Declaration of Human Rights, as well as Articles 8 and 17 of the American Convention on Human Rights.