

RECENT DEVELOPMENTS. SPAIN

Fracking

In its judgment 8/2018, the Constitutional Court has ratified previous case law on *fracking* by holding that the Autonomous Communities cannot absolutely and unconditionally prohibit the use of this technique under their health-related competences, nor under territorial planning. This latter power does not cover regional regulations that (a) qualify the use of *fracking* as an infringement of town and country planning legislation and (b) order the public authorities to adopt appropriate measures to stop activities that are carried out in contravention of the *fracking* prohibition, as well as to replace the situation altered to its original state. The powers of the Autonomous Communities to set out additional environmental protection rules, foreseen in Article 149.1.23 of the Spanish Constitution do not cover an ‘absolute and unconditional prohibition’ of *fracking*. Such prohibition in the entire territory of an Autonomous Community contradicts in a ‘radical and insurmountable manner’ the provisions of the Law on fossil fuels.

In accordance with State law, projects involving the use of *fracking* are subject to environmental impact assessment, which involves a mandatory procedure for public information, consultations with the public authorities affected and persons interested in the project and the environmental impact study presented (which must include adequate measures to prevent, correct and, where appropriate, compensate for the possible adverse effects of the activity on the environment, as well as a program of environmental monitoring to ensure compliance with preventive, corrective and compensatory measures, in all phases of the project). Within the framework of this procedure, the maximum protection of the environment and natural resources must be guaranteed, and no project lacking a previous favorable declaration on its environmental impact can be authorised. The Court upheld a rule in a Basque law according to which it was forbidden to use *fracking* for the exploitation of fossil fuels in spaces classified at risk of medium, high or very high vulnerability in a map regarding the pollution of aquifers in that Autonomous Community. According to the Court, that rule could not be considered unreasonable or disproportionate in relation to the proposed purpose since State laws contemplated analogous measures of protection and prevention with respect to groundwater.

Plastic bags

The Spanish government has adopted Royal Decree 293/2018, of May 18, on reduction of the consumption of plastic bags, transposing Directive 2015/720. As of July 1, 2018, the free delivery of plastic bags to consumers is prohibited, except for very light plastic bags and of plastic bags with thickness equal to or greater than 50 microns with a percentage equal to or greater than 70% recycled plastic. As of January 1, 2020, delivery to consumers is prohibited, at the points of sale of goods or products, of fragmentable plastic bags. Plastic bags with a thickness of 50 microns or more shall contain a 50 % minimum of recycled plastic. As of January 1, 2021, the delivery of lightweight plastic bags is prohibited unless they are of compostable plastic.

Renewables

In May 2018, the International Center for the Settlement of Investment Disputes (ICSID), under the World Bank, has upheld a claim brought by Masdar Solar & Wind Cooperatief, a fund based in the Netherlands and owned by the Emirate of Abu Dhabi, in the lawsuit that maintained against Spain for the cut of incentives to renewables approved by the Spanish government in the energy reform of 2013. The fund claimed 394 million euros. It seems that it has been awarded more than 64 million euros. This the third international

arbitration relating to the 2013 cuts that has been resolved and the third one that Spain loses. A previous ruling was issued on February 15, 2018 by the Arbitration Institute of the Stockholm Chamber of Commerce (Sweden). It upheld the allegations of a company, based in Luxembourg, which claimed 60.4 million euros and was finally awarded 53 million. Spain faces more than 40 lawsuits before arbitral courts claiming approximately 7.500 million euros).¹

¹ A list of October 5, 2017 is available at:
<https://www.ecestaticos.com/file/d88ce7a07265dbf8d809b453b848f239/1514204320-186-881-tribunals-arbitratge.pdf>.