JUDGMENT OF THE COURT (Grand Chamber)

12 September 2006 *

In Case C-131/03 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 24 March 2003,

R.J. Reynolds Tobacco Holdings, Inc., established in Winston-Salem, North Carolina (United States),

RJR Acquisition Corp., established in Wilmington, New Castle, Delaware (United States),

R.J. Reynolds Tobacco Company, established in Jersey City, New Jersey (United States),

R.J. Reynolds Tobacco International, Inc., established in Dover, Kent, Delaware (United States),

Japan Tobacco, Inc., established in Tokyo (Japan),

represented by P. Lomas, Solicitor, and O.W. Brouwer, avocat,

appellants,

* Language of the case: English.

the other parties to the proceedings being:

Philip Morris International Inc., established in Rye Brook, New York (United States),

applicant at first instance in Cases T-377/00 and T-272/01,

Commission of the European Communities, represented by C. Docksey, X. Lewis and C. Ladenburger, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

supported by:

Council of the European Union, represented by M. Bishop and T. Blanchet, acting as Agents, with an address for service in Luxembourg,

intervener in the appeal,

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

French Republic, represented by G. de Bergues, acting as Agent,

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

Portuguese Republic, represented by L.I. Fernandes and A. Seiça Neves, acting as Agents, with an address for service in Luxembourg,

Republic of Finland, represented by T. Pynnä and A. Guimaraes-Purokoski, acting as Agents, with an address for service in Luxembourg,

European Parliament, represented by H. Duintjer Tebbens and A. Baas, acting as Agents, with an address for service in Luxembourg,

interveners at first instance,

Federal Republic of Germany, represented by M. Lumma and W.-D. Plessing, acting as Agents,

Hellenic Republic,

interveners at first instance in Cases T-260/01 and T-272/01,

Kingdom of the Netherlands, represented by J. van Bakel, acting as Agent,

intervener at first instance in Cases T-379/00, T-260/01 and T-272/01,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Schiemann and J. Makarczyk, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr (Rapporteur), P. Kūris, E. Juhász, J. Klučka, U. Lõhmus, E. Levits and A. Ó Caoimh, Judges,

Advocate General: E. Sharpston,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 January 2006,

after hearing the Opinion of the Advocate General at the sitting on 6 April 2006,

gives the following

Judgment

1 By their appeal, the appellants ask the Court to set aside the judgment of the Court of First Instance of the European Communities of 15 January 2003 in Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris and Others* v

Commission [2003] ECR II-1 (hereinafter 'the judgment under appeal') in which it dismissed as inadmissible their applications for annulment of the decisions of the Commission of the European Communities of (i) 19 July 2000 adopting 'the principle of a civil action, in the name of the Commission, against certain American cigarette manufacturers' in accordance with which a civil action was brought against several companies belonging to the Philip Morris group ('Philip Morris') and the Reynolds group ('Reynolds') and against Japan Tobacco, Inc. ('Japan Tobacco') before the United States District Court, Eastern District of New York, a federal court of the United States of America ('the District Court') and (ii) 25 July 2001 adopting 'the principle of a new civil action in the US courts, jointly by the Community and at least one Member State, against the groups of cigarette manufacturers who had been defendants in the previous action' in accordance with which two further actions were brought before the District Court (hereinafter 'the contested decisions').

The facts

2 The facts at the origin of the dispute, as they appear from the judgment under appeal, are therein described as follows:

'1 As part of its efforts to combat the smuggling of cigarettes into the European Community, the Commission approved, on 19 July 2000, "the principle of a civil action, in the name of the Commission, against certain American cigarette manufacturers". It also decided to inform the Permanent Representatives Committee (Coreper) through the appropriate channels, and empowered its President and the Commissioner responsible for the budget to instruct the Legal Service to take the necessary measures.

2 On 3 November 2000, a civil action was brought by the European Community, represented by the Commission and "acting on its own behalf and on behalf of the Member States it has power to represent", against [Philip Morris, Reynolds and Japan Tobacco] before [the District Court].

3 In that action (hereinafter "the first action"), the Community alleged involvement on the part of the applicants, which are tobacco companies, in a system of smuggling aimed at bringing cigarettes into the territory of the European Community and distributing them there. The Community was seeking in particular compensation for the loss resulting from the smuggling, consisting mainly in lost customs duties and value added tax (VAT) which would have been paid on legal imports, as well as injunctions aimed at having the alleged activities stopped.

4 The Community based its claims on a federal law of the United States, the Racketeer Influenced and Corrupt Organisations Act 1970 (hereinafter "RICO"), as well as on certain common law doctrines, namely, common law fraud, public nuisance and unjust enrichment. RICO is aimed at combating organised crime, particularly by facilitating proceedings against economic operators when they engage in criminal activities. To that end, it provides for a right of action for civil parties. In order to encourage such civil proceedings, RICO provides that the plaintiff may be awarded damages corresponding to three times the loss actually incurred by him ("treble damages").

5 By decision of 16 July 2001, the District Court dismissed the claims of the European Community.

6 On 25 July 2001, the Commission approved "the principle of a new civil action in the US courts, jointly by the Community and at least one Member State,

against the groups of cigarette manufacturers who had been defendants in the previous action". It also empowered its President and the Commissioner responsible for the budget to instruct the Legal Service to take the necessary measures.

7 On 6 August 2001, a fresh action was filed with the District Court against Philip Morris and Reynolds by the Commission, on behalf of the European Community and the Member States it was empowered to represent, and by 10 Member States, namely the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic and the Republic of Finland, in their own name. In that action (hereinafter "the second action"), the Community no longer based its claims on RICO, but solely on the common law doctrines invoked in the first action. The Member States, however, based their claims both on RICO and on the common law doctrines invoked by the Community. In addition, the second action alleged economic and non-economic loss which the Community had not alleged in the first action, and introduced additional elements with respect to the doctrines of public nuisance and unjust enrichment.

8 The Community did not appeal against the District Court's decision of 16 July 2001 referred to in paragraph 5 above. However, on 10 August 2001 it submitted to the [US] court a motion to vacate that judgment and to amend the complaint. That motion was dismissed by a decision of the District Court of 25 October 2001.

9 On 9 January 2002, the Community, represented by the Commission, and the 10 Member States mentioned in paragraph 7 above filed a third action with the District Court against [Japan Tobacco] and other associated companies (hereinafter "the third action").

10 On 19 February 2002, the District Court dismissed the second and third actions of the Community and the Member States, on the basis of the common law revenue rule, under which United States Courts refrain from enforcing the fiscal legislation of other States.

11 On 20 March 2002, the Commission approved the principle of appealing against the judgment of the District Court. On 25 March 2002, an appeal was filed on behalf of the Community and the 10 Member States before the United States Court of Appeals for the Second Circuit.'

Procedure before the Court of First Instance

3 By applications lodged with the Registry of the Court of First Instance on 19 and 20 December 2000, the appellants brought actions seeking, inter alia, annulment of the decision by the Commission to bring the first action (Cases T-377/00, T-379/00 and T-380/00).

4 By order of 2 July 2001, the President of the Second Chamber (Extended Composition) joined the three cases for the purposes of the written and oral procedure and judgment.

5 By applications lodged with the Registry of the Court of First Instance on 15 October 2001, Reynolds and Philip Morris brought actions against the Commission's decision to bring the second action (Cases T-260/01 and T-272/01).

6 By order of 31 January 2002, the President of the Second Chamber (Extended Composition) joined the five cases (T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01) for the remainder of the written and oral procedure and judgment.

7 In each of those cases the Commission raised an objection of inadmissibility on the ground that the contested decisions are not acts which may be the subject of an action such as that provided for in the fourth paragraph of Article 230 EC.

The judgment under appeal

8 By the judgment under appeal, the Court of First Instance allowed the objections of inadmissibility raised by the Commission and consequently dismissed the actions.

9 In paragraphs 74, 76 and 77 of that judgment, the Court of First Instance first of all reiterated the content of the fourth paragraph of Article 230 EC and the consistent case-law according to which, firstly, in order to ascertain whether a measure whose annulment is sought is open to challenge, it is necessary to look to its substance as the form in which it is cast is, in principle, immaterial and, secondly, only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position are acts or decisions which may be the subject of an action for annulment, the Court referring inter alia to Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9.

10 Therefore, the Court of First Instance examined whether the contested decisions produce such effects.

11 In that regard, the Court observed in paragraph 79 of the judgment under appeal that the commencement of legal proceedings constitutes an indispensable step for the purpose of obtaining a binding judgment but the definitive determination of the obligations of the parties to the case can result only from the judgment of the court. Referring by analogy to Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 47, concerning a decision by the Commission to bring an action under the second paragraph of Article 226 EC, the Court found that the decision to commence legal proceedings does not in itself alter the legal position in the context of which that decision is taken and that it cannot therefore in principle be considered to be a decision which is open to challenge.

12 The Court then examined whether the contested decisions, in view of the fact that they concern the commencement of proceedings not before the Court of Justice or a court of a Member State but before a court of a non-Member State, have produced definitive legal effects beyond those necessarily flowing from the commencement of proceedings before any court and which brought about a distinct change in the legal position of the applicants.

13 Examining the effects of the contested decisions within the Community legal order to begin with, the Court first rejected as unfounded, in paragraph 91 of the judgment under appeal, the applicants' argument that those decisions produced binding legal effects with regard to the Commission's powers and the institutional balance.

14 On that point the Court found, in paragraph 86 of that judgment, that, like any act of a Community institution, the contested decisions carry an incidental implication that the institution in question has adopted a position as to its competence to adopt them, but that the adoption of a position of that kind cannot be viewed as a binding legal effect for the purposes of Article 230 EC because even if it is erroneous, it has no significance independent of the act adopted. It added that the adoption of such a position, unlike an act designed to confer competence, such as the act giving rise to the judgment in Case C-366/88 *France* v *Commission* [1990] ECR I-3571, which the applicants relied on, is not intended to alter the division of powers provided for by the EC Treaty.

15 In paragraph 87 of the judgment under appeal, the Court also held that the Commission's alleged lack of powers and the undermining of the institutional balance which might result therefrom cannot give rise to an exception to the rules governing admissibility of actions for annulment laid down by the Treaty. That type of reasoning would be tantamount to concluding that an act is open to challenge because it may be unlawful. In that regard, the Court referred, by analogy, to the order in Case C-345/00 P *FNAB and Others* v *Council* [2001] ECR I-3811, paragraphs 39 to 42.

16 In respect of the question, referred to inter alia in paragraph 23 of *IBM* v *Commission*, whether, as regards preparatory acts, a judicial review at an early stage may be considered compatible with the system of remedies provided for by the Treaty in exceptional circumstances where the measures concerned lack even the appearance of legality, the Court observed in paragraph 88 of the judgment under appeal that the Community courts have never confirmed that it is possible, by way of exception, to carry out such review of preparatory acts or other acts which have no legal effects. It added that the decisions in which that possibility was mentioned were before the order in *FNAB and Others* v *Council*, in which the Court of Justice clearly ruled against making the admissibility of an action contingent on the seriousness of the infringements of Community law alleged.

17 Secondly, in paragraph 107 of the judgment under appeal, the Court rejected as unfounded the argument that the contested decisions produced binding legal effects by subjecting the applicants to another legal order or by bringing about a change in their legal position at the substantive or procedural level.

18 In that regard, it stated in paragraph 93 of the judgment under appeal that the rule that the commencement of proceedings before a court does not per se alter the legal position of the parties to the case for the purposes of Article 230 EC is true regardless of whether the proceedings are brought before the Community judicature, a court in a Member State, or even a court in a non-Member State, such as the United States. According to the Court that rule is not affected by the fact

that all courts are required to apply the procedural rules of their own legal order and the substantive rules determined in accordance with their own rules governing conflict of laws. Regardless of which rules are applicable, the resulting legal effects, whether they arise by operation of law or from the decisions of the court seised, cannot be attributed to the party who brought the proceedings.

19 In paragraphs 95 and 96 of the judgment under appeal the Court accepted that some procedural decisions may produce binding and definitive legal effects for the purposes of Article 230 EC, as interpreted in the case-law. Among those decisions it mentioned, first, those which, whilst being stages in an administrative procedure in progress, do not merely establish the conditions for the subsequent conduct of that procedure, but produce effects which go beyond the procedural framework and substantively alter the rights and obligations of the parties concerned.

20 After citing, in paragraph 97 of the judgment under appeal, a certain number of decisions which, according to the case-law of the Community courts, fall into that category, the Court found, in paragraph 98, that that is not true of the contested decisions. It observed in particular that the absence of a Community procedure for the recovery of taxes and customs duties cannot be likened to the immunity expressly conferred by Article 15(5) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-62, p. 87) on the parties to an agreement notified pursuant to that regulation. Moreover, although it may be true that the contested decisions entail a provisional assessment by the Commission of the applicants' conduct under United States law, they are different from the decision to initiate the procedure for examining State aid because Community law does not attach specific legal consequences to that assessment. According to the Court, the commencement of proceedings before a United States court does not, therefore, impose new obligations on the applicants and does not oblige them to modify their practices.

21 Secondly, in paragraphs 99 and 100 of the judgment under appeal the Court observed that certain procedural decisions are actionable because they prejudice the procedural rights of the parties concerned. However, it found that in the present

case the applicants would not have enjoyed procedural rights in the infringement proceedings which, they maintain, the Commission should have initiated and on the basis of that concluded that the commencement of proceedings before the District Court could not have deprived them of any rights in this regard. The Court added that in the absence of Community competence to recover the duties and taxes in question, there is equally no relevant procedure laid down by Community law conferring safeguards which the applicants would have been denied.

22 In paragraph 101 of the judgment under appeal, the Court also found that the applicants had not shown either that the contested decisions affected their legal position in terms of the procedures for the recovery of taxes and customs duties existing in the Member States.

23 In reply to the applicants' argument that the proceedings before the District Court differ from those which might be instituted before the courts in the Member States in that there is no mechanism for a reference for a preliminary ruling pursuant to Article 234 EC, the Court stated, in paragraph 105 of the judgment under appeal, that it is normal, in cases with elements of an international nature, that the court seised must apply foreign legal rules and that it does so within the context of its own procedural rules. According to the Court, commencement of legal proceedings before any court necessarily entails application by the court of its own procedural rules and cannot therefore be viewed as a legal effect for the purposes of Article 230 EC. It added that whilst Article 234 EC enables courts in Member States to refer questions for a preliminary ruling and imposes on some of them an obligation to refer, it does not confer any right of referral on the litigants in proceedings pending before those courts.

24 The Court found, in paragraph 108 of the judgment under appeal, that the contested decisions do not produce binding legal effects in the Community legal order for the purposes of Article 230 EC, as interpreted in the case-law.

25 Secondly, examining the effects arising from the commencement of civil actions under United States law, the Court held, in paragraph 110 of the judgment under appeal, that the procedural consequences of the commencement of proceedings before the District Court relied on by the applicants do not, for the most part, differ from those which necessarily arise when any court is seised and that some of them are purely factual.

26 Furthermore, in paragraphs 111 and 112 of the judgment under appeal, the Court pointed out that although the federal courts in the United States can, by virtue of their procedural law, adopt decisions having binding effects for the parties to the case, obliging them in particular to disclose facts and documents, those effects result from the independent exercise of the powers with which those courts are vested under United States law and cannot therefore be attributed to the Commission.

27 As regards the substantive effects of the commencement of proceedings before the District Court, the Court held, in paragraph 114 of the judgment under appeal, that the decision to commence proceedings before the District Court merely sets in motion proceedings intended to establish the applicants' liability, the substantive existence of which is not determined by the filing of the action. Therefore, referring by analogy to paragraph 19 of *IBM* v *Commission*, the Court found that while the contested decisions may have had the effect of informing the applicants that they were running a real risk of having penalties imposed on them by the United States court, this is a mere consequence of fact and not a legal effect which the contested decisions are intended to produce.

28 In paragraphs 115 to 117 of the judgment under appeal, the Court found that certain matters raised by the applicants, namely that the actions accuse them of criminal conduct, that parties to a lawsuit enjoy immunity from defamation actions for statements made in those proceedings, that the Commission's complaints were published on the internet by the District Court, as well as the negative consequences

that the filing of the legal proceedings may have for the reputation of quoted companies are either factual in nature or result solely from the US statutory provisions and are not, therefore, effects of the contested decisions which may be attributed to the Commission.

29 The Court held, in paragraph 118 of the judgment under appeal, that the effects arising from the commencement of the civil actions in question under United States law relied on by the applicants cannot be held to be binding legal effects for the purposes of Article 230 EC, as interpreted in the case-law.

30 As regards the need for effective judicial protection and the applicants' argument that if their actions were found to be inadmissible, they would have no legal means of challenging the contested acts because since the court seised of the case is in a non-Member State neither the Community courts nor the courts of the Member States can rule on the lawfulness of the Commission's conduct, the Court held:

'121 In this connection, the Court of Justice has stated that access to justice is one of the constitutive elements of a Community based on the rule of law and is guaranteed in the legal order based on the EC Treaty in that the Treaty has established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions (Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23). The Court of Justice uses the constitutional traditions common to the Member States and Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a basis for the right to obtain an effective remedy before a competent court (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18).

122 The right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has, moreover, been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1). Although this document does not have legally binding force, it does show the importance of the rights it sets out in the Community legal order.

123 It must be stated that individuals are not denied access to justice because conduct lacking the features of a decision cannot be challenged by way of an action for annulment, since an action for non-contractual liability under Article 235 EC and the second paragraph of Article 288 EC is available if the conduct is of such a nature as to entail liability for the Community.

124 Although it may seem desirable that individuals should have, in addition to the possibility of an action for damages, a remedy under which actions of the Community institutions liable to prejudice their interests but which do not amount to decisions may be prevented or brought to an end, it is clear that a remedy of that nature, which would necessarily involve the Community judicature issuing directions to the institutions, is not provided for by the Treaty. It is not for the Community judicature to usurp the function of the founding authority of the Community in order to change the system of legal remedies and procedures established by the Treaty (Joined Cases T-172/98 and T-175/98 to T-177/98 *Salamander and Others* v *Parliament and Council* [2000] ECR II-2487, paragraph 75).'

Forms of order sought

31 The appellants request that the Court:

— annul the judgment under appeal;

— declare their applications for annulment admissible on the basis that the contested decisions are manifestly illegal and give final judgment in the matter;

— in the alternative, declare their applications for annulment admissible and refer the case back to the Court of First Instance for judgment on the merits;

— in the further alternative, refer the case back to the Court of First Instance for consideration of the issue of admissibility in conjunction with the merits and for judgment accordingly;

— order the Commission to pay the costs pursuant to Article 69(2) of the Rules of Procedure of the Court of Justice.

32 The Commission requests that the Court:

— declare the appeal inadmissible in part inasmuch as the Court is being asked to examine new issues which were not raised at first instance or to re-examine arguments which were already raised at first instance;

— dismiss the remainder of the appeal;

— order the appellants to pay the costs.

33 The German, Spanish, Italian, Netherlands and Portuguese Governments, the Parliament and the Council request that the Court dismiss the appeal and order the appellants to pay the costs.

34 The Finnish Government requests that the Court:

— declare the appeal inadmissible in so far as it asks the Court to examine new matters which were not raised during the proceedings before the Court of First Instance and to re-examine matters which were raised before it without showing that the Court of First Instance erred in law.

— dismiss the remainder of the appeal;

— order the appellants to pay the costs.

The appeal

35 In support of their appeal, the appellants put forward five pleas in law, alleging respectively:

— misinterpretation of Article 230 EC as regards the effects of the contested decisions within the Community legal order;

— misinterpretation of Article 230 EC as regards the effects arising from the commencement of civil actions under United States law;

— infringement of the fundamental right to effective judicial protection;

— misapplication and misinterpretation of the Court's case-law on whether manifestly illegal measures may be challenged;

— infringement of Article 292 EC.

The first plea, alleging misinterpretation of Article 230 EC as regards the effects of the contested decisions within the Community legal order

Arguments of the parties

36 Within the context of that plea, which is divided into five parts, the appellants submit first that the Court of First Instance erred in law inasmuch as it held, in paragraph 79 of the judgment under appeal, that, in principle, the decision by a Community institution to commence proceedings cannot be considered to be a decision which is open to challenge.

37 It is apparent from the case-law that the only measures adopted by the institutions which are not open to judicial review are those forming part of a continuing Community law procedure leading to a later decision that, itself, would be open to judicial review and where all allegations of prior illegality or lack of competence of the institution concerned and their effects can be properly considered by a court competent and obliged to apply Community law. In that context the appellants rely on *IBM* v *Commission* (paragraph 20), and *Commission* v *Germany* (paragraph 44).

38 Secondly, the appellants submit that in considering whether the contested decisions have legal effects the Court of First Instance failed correctly to interpret or apply the case-law to the wholly novel circumstances of this case. The case-law to date has concerned challenges to measures adopted by the Commission in the exercise of powers that were granted by the Treaty and those actions led inexorably to a decision within the Community legal order which was either taken by a Community court or subject to review by such a Court. On the other hand, it must be noted that if the contested decisions are not subject to review by the Community courts, no other act or consequence will be subject to such a review and Community institutions will be able to initiate litigation outside the Community legal order on any novel matter and in any circumstance.

39 Thirdly, the Court of First Instance misinterpreted Community case-law when it found that no legal effects ensued from the loss of the possibility of obtaining a preliminary ruling from the Court of Justice as to the Commission's competence to commence proceedings in a non-Member State in an attempt to recover allegedly unpaid customs duties and VAT.

40 In that regard, the appellants submit that if the Commission had brought an action before a Court of a Member State they would have had the right to raise the central issue of the Commission's competence, an issue which the national court, at its highest level, would have been compelled to refer to the Court pursuant to the third subparagraph of Article 234 EC in the light of the rule in Case 314/85 *Foto-Frost* [1987] ECR 4199, and the evident inapplicability of Case 283/81 *Cilfit and Others* [1982] ECR 3415. Depriving litigants of that opportunity has obvious legal consequences for them.

41 Fourthly, in concluding that commencing proceedings in a non-Member State, rather than in a Member State, does not have legal effects, the Court of First Instance also misinterpreted the case-law to the effect that where a choice has been made for one procedure over another, the decision embodying that choice has legal effects for the purpose of Article 230 EC.

42 The Court of First Instance erred in failing to recognise, in paragraph 98 of the judgment under appeal, that the decisive factor in the judgment in Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117 was that the Commission had preferred one procedure to another, thereby excluding the latter procedure. In that regard, the appellants also rely on Cases 8/66 to 11/66 *CBR and Others* v *Commission* [1967] ECR 75. By commencing the proceedings in question in the United States, the Commission made a choice of procedure which resulted in the exclusion not only of a reference for a preliminary ruling to the Court, but also of the material procedural guarantees attached to the relevant Community law procedures for the collection of the taxes and duties at issue.

43 Fifthly, the appellants submit that the Court of First Instance failed to recognise that by the contested decisions, the Commission took a definitive position as to its

competence as a matter of Community law, which according to the established case-law creates legal effects.

44 The Commission could only act if secondary legislation had been adopted to enable it to commence legal proceedings in a non-Member State seeking to recover allegedly unpaid customs duties and VAT. The contested decisions thus produced the same legal effects as such an act of secondary legislation.

45 Furthermore, those decisions had the effect of authorising expenditure by the Commission in order to initiate and pursue legal proceedings before United States courts. Such decisions are open to challenge under Article 230 EC, as is apparent inter alia from the order in Joined Cases C-239/96 R and C-240/96 R *United Kingdom* v *Commission* [1996] ECR I-4475.

46 As they were substituted for primary or secondary legislation altering the division of powers provided for by the Treaty, the contested decisions also seek to alter that division and that constitutes an alteration of powers along the same lines as that in *France* v *Commission*.

47 The Commission submits that all the parts of this plea are inadmissible since the appellants are merely repeating arguments which they set out at first instance.

48 It also submits, as regards the fifth part and the argument that the Commission can act to recover taxes in non-Member States only on the basis of specific legislative authorisation, first, that the appellants have incorrectly described the approach adopted by the Court of First Instance. The Court of First Instance pointed out, in paragraph 104 of the judgment under appeal, that the applicants had not established that the Commission disregarded or circumvented existing procedures applying to recovery of taxes and customs duties or anti-fraud procedures. Secondly, there has never been any question of the Commission itself lodging a claim for lost taxes. Thirdly, the Court of First Instance stated, in paragraph 102 of the judgment under appeal, that the argument that the Commission sought to recover taxes by means of an action for damages could not establish that the applicants' procedural rights had been infringed, and that that argument was moreover an argument going to the merits of the case.

Findings of the Court

49 To begin with, it must be recalled that, according to settled case-law, it follows from Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, in particular, Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 34; Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1, paragraph 68; and Case C-41/00 P *Interporc* v *Commission* [2003] ECR I-2125, paragraph 15).

50 Thus, where an appeal merely repeats or reproduces verbatim the pleas in law and arguments submitted to the Court of First Instance, including those based on facts

expressly rejected by that Court, it fails to satisfy the requirement to state reasons under those provisions (see inter alia the order in Case C-174/97 P *FFSA and Others* v *Commission* [1998] ECR I-1303, paragraph 24, and *Interporc* v *Commission*, paragraph 16). Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake (see the order in Case C-26/94 P *X* v *Commission* [1994] ECR I-4379, paragraph 13, and *Bergaderm and Goupil* v *Commission*, paragraph 35).

51 However, provided that an appellant challenges the interpretation or application of Community law by the Court of First Instance, the points of law examined at first instance may be discussed again in an appeal (see Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 43). Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the Court of First Instance, an appeal would be deprived of part of its purpose (see inter alia *FNAB and Others* v *Council*, paragraphs 30 and 31; Case C-321/99 P *ARAP and Others* v *Commission* [2002] ECR I-4287, paragraph 49; and *Interporc* v *Commission*, paragraph 17).

52 In the present case, it must be found that by their first plea in law the appellants are not in fact merely requesting re-examination of the application submitted to the Court of First Instance. In each of the parts of that plea in law the appellants clearly state the passages of the judgment under appeal which they consider to be vitiated by errors of law.

53 The first plea in law is therefore admissible.

54 As regards the first part of that plea in law, as the Court of First Instance rightly pointed out in paragraph 77 of the judgment under appeal, it is settled case-law that only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position are acts or decisions which may be the subject of an action for annulment (see, inter alia, *IBM* v *Commission*, paragraph 9; Case C-117/91 *Bosman* v *Commission* [1991] ECR I-4837, paragraph 13; and Case C-123/03 P *Commission* v *Greencore* [2004] ECR I-11647, paragraph 44).

55 Therefore, contrary to what the appellants maintain, it is not only preparatory acts which fall outside the scope of the judicial review provided for in Article 230 EC but any act not producing legal effects which are binding on and capable of affecting the interests of the individual, such as confirmatory measures and implementing measures (see, in particular, Case C-46/03 *United Kingdom* v *Commission* [2005] ECR I-10167, paragraph 25), mere recommendations and opinions (Case C-476/93 P *Nutral* v *Commission* [1995] ECR I-4125, paragraph 30) and, in principle, internal instructions (see *France* v *Commission*, paragraph 9).

56 Accordingly, the Court of First Instance did not err in law by inferring from the fact that the contested decisions did not produce binding legal effect for the purposes of Article 230 EC that they could not be the subject of an action without restricting the scope of that approach to preparatory acts.

57 Consequently, the first part of the first plea in law must be rejected.

58 As regards the second part of the plea, inasmuch as it does not coincide with the third, fourth and fifth parts, it must be stated that the Court of First Instance rightly found, by reference to paragraph 47 of the judgment in *Commission* v *Germany*, that although the commencement of proceedings constitutes an indispensable step for the purpose of obtaining a binding judgment it does not per se determine definitively the obligations of the parties to the case, so that, *a fortiori*, the decision to bring legal proceedings does not in itself alter the legal position in question.

59 The question whether the contested decisions are subject to review by the Community courts is irrelevant in that regard.

60 The second part of the first plea in law must therefore be rejected.

61 As regards the third part of the plea, the Court of First Instance was also right in finding, in paragraph 105 of the judgment under appeal, that the commencement of legal proceedings before any court necessarily entails the application by the court of its own procedural rules, which cannot therefore be viewed as a legal effect, for the purposes of Article 230 EC, of the decision to bring an action.

62 It must be added that whether the Commission's contested decisions can be categorised as legal acts which are open to challenge for the purposes of the case-law set out in paragraph 54 of this judgment cannot be dependent on the fact that if the Commission had commenced legal proceedings before a court in a Member State a reference for a preliminary ruling under Article 234 EC would have been possible in the context of those proceedings.

63 Consequently, the third part of the first plea in law cannot be upheld.

64 As regards the fourth part of the plea, the Court of First Instance correctly interpreted the judgment in *Spain* v *Commission*, paragraphs 12 to 20, when it stated that the effect of that judgment is that a decision to initiate the procedure for examining State aid produces legal effects as referred to in Article 230 EC. Specific legal consequences flow from the assessment and classification of the aid mentioned and from the choice of procedure which follows from that. By contrast, the mere fact that, by the contested decisions, the Commission made a choice as to the procedure to be undertaken against the appellants and thus excluded other procedures cannot, in itself, be a legal effect for the purposes of that article.

65 The fourth part of the first plea in law must therefore be rejected.

66 As regards the fifth branch of the plea, as the Court of First Instance rightly found, if, like any act of a Community institution, the contested decisions carry an incidental implication that the institution in question has adopted a position as to its competence to adopt them, that adoption of a position cannot itself be viewed as a binding legal effect for the purposes of Article 230 EC, as interpreted in the case-law.

67 As regards the use of budgetary resources, implicitly authorised by the contested decisions, to initiate and pursue the proceedings in question, it is enough to state that that fact has no bearing on whether those decisions produce legal effects which are binding on, and capable of affecting the interests of, the appellants by bringing about a distinct change in their legal position.

68 It is apparent from the foregoing that the fifth part of the first plea in law, and therefore that plea in its entirety, must be dismissed.

The second plea, alleging misinterpretation of Article 230 EC as regards the effects arising from the commencement of the civil actions under United States law

Arguments of the parties

69 According to the appellants, in paragraph 105 of the judgment under appeal the Court of First Instance incorrectly held that the District Court could remedy the lack of a preliminary reference mechanism in the United States by applying Community law itself. In that regard, they submit that as a consequence of the Act of State doctrine, the District Court is unlikely to rule on fundamental Community law issues raised before it. Contrary to what the Commission maintains, the appellants have already relied on that doctrine, at least in substance, before the Court of First Instance.

70 The Commission maintains that this plea is inadmissible because it raises a new issue. The appellants did not rely on the Act of State doctrine before either the Court of First Instance or the District Court although they could have done so.

Findings of the Court

71 First of all, it must be stated that, as the Advocate General observed at point 66 of her Opinion, paragraph 72 of the judgment under appeal shows that the Act of State doctrine was relied upon by the appellants before the Court of First Instance, and therefore the second plea is admissible.

72 However, in so far as this plea differs from the third and fourth parts of the first plea, it must be dismissed as unfounded.

73 The issue of whether the competent United States court applied the Act of State doctrine or not is irrelevant in the light of the concept of challengeable act for the purposes of Article 230 EC.

The third plea, alleging breach of the fundamental right to effective judicial protection

Arguments of the parties

74 The appellants submit that the Court of First Instance denied them effective judicial protection and erred in law in so far as it held, in paragraph 123 of the judgment

under appeal, that the relevant test in that regard was access to justice rather than the existence of effective remedies on which case-law focuses. In that context they rely on the judgment in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39.

75 Furthermore, the fact that in paragraph 40 of that judgment and in Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651 the Court referred to the existence of a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, but without including Article 288 EC, demonstrates the inaccuracy of the Court of First Instance's statement, in paragraph 123 of the judgment under appeal, that it is not contrary to the need for effective judicial protection to deny the admissibility of an action for annulment because of the possibility of bringing an action for non-contractual liability on the basis of that article. Furthermore, mere lack of competence on the part of the Community institutions does not give rise to non-contractual liability on the part of the Community, so that an action for damages does not suffice to provide the appellants with effective judicial protection.

76 The Commission submits that the principle of effective judicial protection guarantees protection against acts of Community institutions which are capable of violating the rights and freedoms guaranteed by Community law, namely those which have legal effects on the persons concerned. The contested decisions do not constitute such acts.

77 As regards *Unión de Pequeños Agricultores* v *Council*, the Commission observes that in paragraph 44 of that judgment the Court affirmed that although the condition that a person must be individually concerned to be able to bring an action challenging a regulation must be interpreted in the light of the principle of effective judicial protection, taking account of the various circumstances that may distinguish an applicant individually, such an interpretation cannot have the effect of setting aside the condition in question.

78 As regards Article 288 EC, the Commission submits that the real issue confronting the appellants is not whether that article offers them an effective remedy, but lies rather in the difficulty of demonstrating that the Commission committed an unlawful act in seeking to obtain a ruling from the District Court that the appellants had carried out the various unlawful and tortious activities alleged in the civil actions, and that the harm suffered is a direct consequence of bringing such an action.

Findings of the Court

79 First of all, it must be stated that the Court of First Instance correctly relied, in paragraph 123 of the judgment under appeal, on the finding that measures which do not produce legal effects which are binding on and capable of affecting the interests of the individual cannot be challenged by way of an action for annulment.

80 It is true that, as the Court of First Instance observed in paragraph 121 of the judgment under appeal, by means of Articles 230 EC and 241 EC, on the one hand, and Article 234 EC, on the other, the Treaty establishes a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions and has entrusted such review to the Community courts (see *Les Verts* v *Parliament*, paragraph 23; *Foto-Frost*, paragraph 16; and Case C-461/03 *Gaston Schul Douane-expediteur* [2005] ECR I-10513, paragraph 22).

81 However, the fact remains that, although the requirement as to legal effects which are binding on, and capable of affecting the interests of, the applicant by bringing

about a distinct change in his legal position must be interpreted in the light of the principle of effective judicial protection, such an interpretation cannot have the effect of setting aside that condition without going beyond the jurisdiction conferred by the Treaty on the Community courts (see, by analogy, *Unión de Pequeños Agricultores* v *Council*, paragraph 44, as regards the condition that the contested act must be of individual concern to the natural or legal person lodging an application).

82 The Court of First Instance was also right to hold, in paragraph 123 of the judgment under appeal, that even though individuals are unable to bring an action for annulment of those measures, they are not denied access to justice since an action for non-contractual liability under Article 235 EC and the second paragraph of Article 288 EC is available if the conduct in question is of such a nature as to entail liability on the part of the Community.

83 Such an action is not part of the system of review of the legality of Community acts with legal effects which are binding on, and capable of affecting the interests of, the applicant, but it is available where a party has suffered harm on account of unlawful conduct by an institution.

84 Furthermore, the fact that the appellants may be unable to establish the existence of unlawful conduct on the part of the Community institutions, of the damage alleged and of a causal link between such conduct and such loss does not mean that they are denied effective judicial protection.

85 It is apparent from the foregoing that the third plea must be dismissed as unfounded.

The fourth plea, alleging misapplication and misinterpretation of the Court's case-law on whether manifestly illegal measures may be challenged

Arguments of the parties

86 The appellants submit that no provision of the Treaty or of secondary legislation entitles the Community to commence legal proceedings outside the Community legal order or allows the Commission to take any executive action in the field of the collection of customs duties and VAT. In that regard, the appellants observe that Article 211 EC is not a general enabling provision which renders Article 7 EC irrelevant. Since the contested decisions are thus manifestly unlawful, the Court of First Instance should have held that the actions for annulment were admissible in accordance with *IBM* v *Commission*.

87 As regards the order in *FNAB and Others* v *Council*, referred to by the Court of First Instance in paragraphs 87 and 88 of the judgment under appeal, the appellants maintain that when the Court mentioned in paragraph 40 of that order 'the rules for admissibility expressly laid down by the Treaty', it was referring to the conditions relating to direct and individual concern mentioned in the fourth paragraph of Article 230 EC, irrespective of whether, in exceptional circumstances, measures that lack even the appearance of legality can be challenged by an action for annulment.

88 In any event, the appellants submit that the Court of First Instance misapplied the case-law stemming from, inter alia, Case C-366/88 *France* v *Commission* and Case C-325/91 *France* v *Commission* [1993] ECR I-3283 and failed to comply with an essential procedural requirement by not joining the issue of admissibility to the substance of the case.

89 The Commission considers, first, that the plea is inadmissible because the arguments expounded are merely a repetition of those raised at first instance.

90 Secondly, it observes that before the Court of First Instance the parties who have a right of review under the second paragraph of Article 230 EC and whose institutional prerogatives are directly affected by the unilateral adoption of a position by the Commission as regards its powers unequivocally supported the right of the Commission to adopt the contested decisions. Furthermore, the Commission itself pointed out the prerogative concerning representation of the Community conferred on it by Article 282 EC, which is the application of the general principle that the Commission alone is entitled to represent the Community before the courts. In its reply to the application for dismissal put forward before the District Court, the Commission relied on Article 211 EC as well as on other articles of the Treaty. As the Commission thus has, at the very least a priori, the competence in question it cannot be maintained that there is manifest lack of competence or that the contested decisions lack any appearance of legality.

91 Thirdly, as regards the order in *FNAB and Others* v *Council* and the appellants' argument that the Court of First Instance should have joined the issue of admissibility to the substance of the case, the Commission points out that in order to be able to challenge a decision an individual must first prove that the decision has produced some definitive legal effects, which is not the case.

Findings of the Court

92 At the outset, the objection of inadmissibility raised by the Commission must be dismissed on the same grounds as those set out in paragraphs 49 to 52 of this judgment.

93 Secondly, without it being necessary to rule on whether it follows from the judgment in *IBM* v *Commission* that in exceptional circumstances actions for annulment of measures that lack even the appearance of legality must be declared admissible, it must be stated that, in any event, that is obviously not the case here.

94 It is sufficient to point out in that regard that Article 211 EC provides that the Commission is to ensure that the provisions of the Treaty and the measures taken pursuant thereto are applied, that under Article 281 EC the Community has legal personality and that Article 282 EC, although restricted to Member States on its wording, is the expression of a general principle and states that the Community has legal capacity and is, to that end, to be represented by the Commission.

95 As to the claim that the Court of First Instance should have joined an appraisal of the objection of inadmissibility to the substance of the case, it must be stated that, unlike the position in the judgments cited by the appellants, an appraisal as to whether the objection of inadmissibility raised before the Court of First Instance was well founded was not dependent, in the circumstances of this case, on the appraisal to be made of the substantive pleas put forward by the appellants.

96 Consequently, the fourth plea cannot be upheld.

The fifth plea, alleging infringement of Article 292 EC

Arguments of the parties

97 The appellants submit that in holding that any dispute as to the Commission's competence to bring the proceedings in question in the United States could be

determined by the District Court, the Court of First Instance adopted an approach contrary to Article 292 EC and the system of the Treaties.

98 The autonomy of the Community legal order would be compromised by any extra-Community system which would have the effect of binding the Community and its institutions to a particular interpretation of the rules of Community law in the exercise of their internal powers (see, inter alia, Opinion 1/91 [1991] ECR I-6079, paragraphs 41 to 46, and Opinion 1/00 [2002] ECR I-3493, paragraph 45), which would be the case if the District Court were to determine the Commission's competence to commence proceedings in a non-Member State for recovery of allegedly unpaid customs duties and VAT.

99 The Commission observes, first of all, that Article 292 EC relates to the Member States and not the Commission.

100 Next, it submits that the Community is not attempting to substitute the District Court for the Court of Justice as arbiter of questions of Community law. Any arguments concerning the Commission's powers and competence which may be brought before the District Court by the appellants will be treated by that court in the same way as any other preliminary questions arising out of a civil lawsuit brought against them by the Community. Where it is necessary to have regard to Community law for the purpose of applying the rules of its own legal order, the District Court will collect all necessary information.

101 As regards the choice of court, that is a question of strategy for the Commission, which makes sure that it opens or intervenes in proceedings in the State where the activities complained of took place and where enforcement will take place. The District Court is the court in the jurisdiction where, firstly, one or more of the appellants is established and, secondly, where the illegal activities took place, and consequently it is the court which is best placed to secure effective enforcement of the judgment sought.

Findings of the Court

102 It must be found that, contrary to what the appellants maintain, a decision by a United States court as to the Commission's power to bring legal proceedings before it is not capable of binding the Community and its institutions to a particular interpretation of the rules of Community law in the exercise of their internal powers. As the Advocate General observed at point 90 of her Opinion, such a decision would be binding only in relation to the specific proceedings.

103 The fifth plea in law must therefore be dismissed as unfounded.

104 Since none of the pleas in law put forward by the appellants in support of their appeal is well founded, the appeal must be dismissed.

Costs

105 Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs against the appellants and the latter have been unsuccessful in their pleas, they must be ordered to pay the costs. Pursuant to Article 69(4) of the Rules of Procedure, which also applies to appeals by virtue of Article 118 thereof, the Member States and institutions which have intervened in the proceedings are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **The appeal is dismissed.**

2. **R.J. Reynolds Tobacco Holdings, Inc., RJR Acquisition Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., and Japan Tobacco, Inc., are ordered to pay the costs.**

3. **The Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Republic of Finland, the European Parliament and the Council of the European Union are to bear their own costs.**

[Signatures]