2. The Court has no jurisdiction under Article 178 and the second paragraph of Article 215 of the EEC Treaty to hear and determine an action for damages seeking compensation for damage allegedly arising from adjustments to acts of the institutions made by the Act of Accession of Spain and Portugal because, as is clear from Article 237 of the Treaty, that act is an agreement concluded between the Member States and the States which applied for accession.

REPORT FOR THE HEARING
delivered in Joined Cases 31 and 35/86 *

I — Summary of the facts

1. Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector (Official Journal 1981, L 177, p. 4) lays down the rules applicable to beet sugar, cane sugar, sugar beet, sugar cane, certain other types of sugar and isoglucose. Since the situation in the Community in respect of sweeteners is characterized by structural surpluses, the regulation provides for a system of production quotas supplemented in the case of beet sugar and cane sugar by a price-support mechanism.

2. Article 26 of Part Three (entitled: 'Adaptations to acts adopted by the institutions') of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (hereinafter referred to as 'the Act of Accession', Official Journal L 302 of 15 November 1985) provides that: 'The Acts listed in Annex I to this Act shall be adapted as specified in that Annex'.

Under heading 'XIV. Agriculture . . . (c) Sugar', Annex I provides for the amendments of Regulation No 1785/81 concerning the application to Spain of the system of quotas for sugar and isoglucose.

3. The applicants are two of three Spanish producers of isoglucose. They contest the validity of Article 24 (3) (a) and (5) (a) read in conjunction with Article 24 (2) I (b) and II (b) relating to the allocation of production quotas for isoglucose to the undertakings established in Spain.

4. On the question of the admissibility of the action, the applicants submit that the aforementioned amendments of Regulation No 1785/81 have the same legal nature as the secondary legislation which they amend and that its provisions are of direct and individual concern to them.

As regards the substance, they claim that the principle of equal treatment has been infringed because they are discriminated

* Languages of the Case: French and English.

against in relation to Spanish sugar producers. CPC España claims in addition that the principle of proportionality has been infringed and as an alternative ground for annulment further submits that the allocation of quotas between the three Spanish isoglucose producers is inappropriate.

As regards the claim for damages under the second paragraph of Article 215 of the EEC Treaty, the applicants consider that the conditions laid down in this regard are fulfilled in this case.

II — Written procedure and conclusions of the parties

1. The actions of the applicants Laisa and CPC España were lodged at the Court Registry on 6 and 10 February 1986 respectively.

Laisa claims that the Court should:

Declare that Council Regulation No 1785/81, as amended by the Act of Accession, constitutes an individual decision concerning the applicant inasmuch as the regulation determines its production quota for isoglucose;

Declare that the quota as fixed involves discrimination against the applicant and in consequence declare the provisions fixing the quota to be invalid;

Determine the quota applicable to the applicant on the basis of the rules applicable to the other producers of isoglucose in the Community or declare that the Council must fix the quota on the basis thereof;

Alternatively, declare that the Community is non-contractually liable and that an action based on the provisions of Article 215 of the Treaty is admissible and well founded;

Order the Council of the European Communities to pay the costs.

CPC España claims that the Court should:

Declare invalid Article 24 (3) (a) and (5) (a) read in conjunction with (2) I (b) and II (b) of Council Regulation No 1785/81 as amended by Annex I to the Act of Accession to the extent that they determine the applicant's maximum production quota for isoglucose on the basis of production levels attained during the 1983 calendar year;

Declare that the Council determine the applicant's quota on the basis of non-discriminatory and proportionate criteria to be specified by the Court;

In the alternative, declare the Council liable for the damage suffered by the applicant on account of the adoption of Article 24 (3) (a)

and (5) (a) read in conjunction with (2) I (b) and II (b) of Regulation No 1785/81 as amended by Annex I to the Act of Accession;

Order the Council to pay the costs.

2. By a separate document lodged on 18 April 1986 the Council requested the Court pursuant to Article 91 of the Rules of Procedure for a decision on the question of admissibility, to reject the applications as inadmissible and to order the applicants to pay the costs.

3. By a letter lodged at the Court Registry on 29 April 1986 the Council requested the Court to join Cases 31/86 and 35/86. By an order dated 18 June 1986 the Court joined the two cases.

4. By orders dated 15 October and 18 June 1986 the Court granted leave to Campo Ebro Industrial SA to intervene in support of the applicants' conclusions and to the Asociacion General de Fabricantes de Azucar de España (AGFA) and the Commission to intervene in support of the Council's conclusions.

5. In its observations lodged on 27 May 1986, Laisa, the applicant in the main proceedings, states that its action is not directed against the Treaty of Accession but solely against Article 24 of Council Regulation No 1785/81 in so far as that article determines its production quota for isoglucose and is of individual concern to it and maintains the claims set out in its application.

In its observations lodged on 23 May 1986, CPC España, the applicant in the main proceedings, requests that the Court, should it not reserve a decision on the objection of inadmissibility raised by the Council, should

(i) dismiss the objection of inadmissibility raised by the Council and declare admissible both the action for annulment and the action for damages;

(ii) in the alternative, declare admissible the action for annulment;

(iii) again in the alternative, declare admissible the action for damages;

(iv) in any case, order the Council to pay the costs.

6. In its observations lodged on 5 August 1986, the Commission, acting as intervener, requests that the Court should:

(i) declare the application inadmissible as a preliminary issue;

(ii) order the applicants to pay the costs of the Commission's intervention.

7. In its observations lodged on 12 January 1987 the second intervener, Asociacion General de Fabricantes de Azucar de España, requests the Court to declare the applications inadmissible.

8. In its observations lodged on 12 January 1987, the third intervener, Campo Ebro Industrial SA, requests the Court to declare the applications admissible.

9. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure on the objection of admissibility without any preparatory inquiry.

III — Submissions and arguments submitted by the parties in the written procedure on the admissibility of the action

A — *Admissibility of the action for annulment*

1. *The absence of an act which may be annulled under Article 173 of the EEC Treaty*

The Council

The Council contends in the first place that the provisions of an accession treaty which amend acts of secondary legislation retain their legal nature of primary law with the result that the measure in question cannot be the subject of an action under Article 173 of the EEC Treaty.

The Council puts forward essentially two arguments in this regard.

(i) First of all, referring to Articles 4, 43, 189 and 190 of the Treaty, the Council observes that the basic quantities applicable to isoglucose production in Spain were not fixed by the Council as the institution competent for agricultural matters by the adoption of a regulation which amended its Regulation No 1785/81, in particular Article 24 thereof.

The Council states that those basic quantities were set by the provisions of the Accession Treaty concluded pursuant to Article 237 of the EEC Treaty which provides that the conditions of admission of a State applying for accession are the subject of an agreement between the Member States and the applicant State and that the agreement is submitted for ratification by all the Contracting States in accordance with their respective constitutional requirements.

Since Article 1 (2) of the Treaty of Accession provides that the conditions of accession are set out in the Act attached to the Treaty and Article 26 of that Act provides that the acts of secondary legislation listed in Annex I are adapted as specified in that Annex, the Council concludes that those adaptations form an integral part of all the conditions of accession of the new Member States, including the adjustments to the basic sugar regulation which is the subject of this action.

That amendment to the basic sugar regulation is consequently in no way a result of an act adopted *proprio motu* by the Council. Quite on the contrary, the provisions which are the subject of the action for annulment form an integral part of a Treaty which has the same value in law as the original Treaties. The provisions being challenged are consequently not 'an act of the Council' within the meaning of Article 173 of the EEC Treaty and are thus not open to the review of legality provided for in that article.

Even though the case-law of the Court reveals its intention to look at the contents of acts rather than their formal designation (judgment of 31 March 1971 in Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraphs 38 to 42 at p. 276), the Council points out that that case-law refers to the measures adopted by the institutions.

(ii) The Council points out next that Article 8 of the Act of Accession cannot be invoked in justification of the applicability of Article 173 of the EEC Treaty in this case. In its view, that article, which must be read in its context (formed by Articles 6, 7 and 8 of

the Act of Accession) is purely procedural. The Council considers that Articles 7 and 8 contain two specific derogations from the revision procedure principle laid down in Article 6, namely that for future amendments of the Act of Accession the procedure for revising the original Treaties must be applied. In the Council's view, those two articles are complementary and are directed towards the same procedural objective, although in two separate hypotheses. Article 7 safeguards the institutions' powers to amend *in futuro* acts of secondary legislation to which the transitional provisions of the Act of Accession apply. Article 8 safeguards those same powers in cases where provisions of the Act of Accession have amended acts of secondary legislation.

The treatment as secondary legislation of provisions of the Act of Accession which have amended otherwise than provisionally acts adopted by the institutions envisaged in Article 8 is therefore confined to the future amendment procedure of such measures.

That conclusion is strengthened by the fact that in the case of an amendment to an act of secondary legislation by an accession treaty, both the legal source and the procedural rules are fundamentally different from what applies in the case of a normal amendment of that act of secondary legislation.

In the first case, the legal source is a treaty having, in principle, the same value in law as the original Treaties. In this case, the procedural rules provide for an unanimous agreement between the Member States of the Community and the acceding States which is subject to ratification by all the Contracting States in accordance with their respective constitutional requirements. In the Contracting States this ratification procedure normally implies a parliamentary approval procedure.

In the second case, that of an amendment under the normal procedure applicable to secondary legislation, the legal source is another act of secondary legislation adopted by a competent Community institution. In the present case, this normal procedure requires, for an amendment to the basic sugar regulation, a regulation adopted by the Council pursuant to Article 43 of the EEC Treaty which forms the basis of Community competence in matters of the common agricultural policy. The Article 43 procedure presupposes a Commission proposal, an opinion from the European Parliament and a Council decision by a qualified majority. Furthermore, a regulation adopted by the Council to amend the basic sugar regulation must state the reasons on which it is based and must refer to the proposals and opinions required under Article 190 of the EEC Treaty.

As a result, the Council considers that Article 8 of the Act of Accession cannot, as the applicants claim, have the effect of equating completely and with immediate effect the provisions of that Act amending acts adopted by the institutions with the latter acts.

Furthermore, the basic quantities in dispute form an integral part of all the conditions of accession of the new Member States, which were the fruits of protracted, laborious negotiations between the Member States and the acceding States involving reciprocal concessions. The calling into question by legal action of some of those conditions could compromise the overall balance of the outcome of the accession negotiations.

The Commission's observations

The Commission entirely endorses the Council's conclusions on admissibility contained in its separate document lodged on 18 April 1986 and considers that there is nothing which it can add at this stage of the procedure.

Observations of the Asociacion General de Fabricantes de Azucar de España (AGFA), intervener

AGFA submits that the action should be disallowed because the matter appealed against is not one of those referred to in Article 189 of the EEC Treaty which are subject to the judicial control of the Court of Justice by virtue of Article 173 of the Treaty but is a treaty executed by two sovereign States in accordance with the provisions of Article 237 of the EEC Treaty and therefore excluded from the judicial control of the Court.

In its view, according to the provisions of Article 237 of the EEC Treaty, where the admission of new States is concerned, the conditions for accession are established by the Member States in the exercise of their national sovereignty and therefore they and the beneficiaries of such Treaties (Spain and Portugal) are the only parties entitled to appeal to the Court of Justice under the provisions of the first paragraph of Article 173 if they consider that there has been any misuse of power in the carrying out of the Treaties adopted.

As regards Article 8 of the Act of Accession, AGFA submits that it is limited to establishing the equality of the range of laws amongst the former laws in force and the approved amendments.

Article 1 of the Treaty of Accession clearly establishes that the contents of the Annexes are conditions of accession. They cannot therefore be given the character of Community regulations and evidence for this is that they do not conform to the requirements of Article 190 of the EEC Treaty.

The applicants' observations

(1) CPC España SA submits that it is only *de facto* that the aforementioned adjustments of secondary legislation have been assimilated to 'the adjustments to the Treaty' mentioned in the second paragraph of Article 237 of the EEC Treaty. Rather than being referred to the Community institutions in their enlarged composition, in which event they would without doubt keep their rank as secondary legislation, those adjustments are included in the procedures leading to an accession treaty.

Referring to Articles 26 and 27 of the Act of Accession, CPC España considers that the method chosen for adjusting secondary legislation is the result of considerations of a pragmatic nature.

In accordance with Article 27, the guidelines set out in Annex II require implementing measures on the part of the Community institutions which have without doubt the rank of secondary legislation and constitute acts within the meaning of Article 173.

The method chosen in Article 26 is to stipulate the text of the amendment in question. According to that article, the amendments provided for in Annex I do not require an implementing act on the part of the Community institutions but are conceived as being directly applicable in all the Member States, including the new Member States.

Although it is true that normally the rank of a legal rule within the hierarchy of Community legislation is derived from the procedure by which it has been adopted, it is fully within the powers of the competent legislator to give the rule a lower rank than that resulting from the procedure by which it has been adopted. The authors of the Act of Accession have explicitly indicated in Article 8 of that Act that the amendments to secondary legislation retain the rank and status of the acts which they amend.

(2) The applicants CPC España and Laisa consider that Articles 7 and 8 of the Treaty of Accession are not exclusively procedural but also concern substantive matters and that the amendments in question acquire in all respects the nature of the secondary legislation, whatever the method and procedure of their adoption.

The wording of Article 8 clearly confirms that that article is both procedural and substantive. The expression 'the same status in law' means that the amendments provided for with regard to Council regulations acquire the nature of acts of the Council with the status of secondary legislation and the expression 'subject to the same rules' means that the amendments are subject not only to the rules applicable to later amendments but also to those which govern the review of acts, in particular the rules laid down in Article 173. Similarly, the use of the expression 'in particular' in Article 7 shows that the amending procedure is cited by way of example, the general principle being that the acts of the Community institutions shall 'retain their status in law'.

The applicants once again point out that the Council's argument means admitting that a regulation may be secondary legislation as regards some of its provisions and primary legislation as regards the rest.

Laisa points out that those provisions of primary law might be amended by the Council under Article 8 of the Act of Accession, which would have the effect of again conferring on them the nature of secondary legislation.

CPC España states that it cannot be claimed that the authors of the Act of Accession intended to maintain the Council's normal authority over secondary Community legislation without at the same time enabling the Court to perform its function of reviewing the legality of the acts of the institutions and protecting the rights of all those affected thereby.

(3) CPC España refers to the comprehensive character of the Community system of judicial review of legality and claims that the Council's thesis is contrary to the letter and spirit of the Treaty, expressed in Article 164.

The consequence of the Council's thesis is that not only the actions brought by the applicant in this case but also references to the Court by national tribunals under Article 177 would be inadmissible. Actions brought before national courts in order to challenge the legality of amendments to secondary legislation would likewise be inadmissible.

The legal nature of the acts in question cannot justify their immunity from judicial review, which would deprive Article 164 of all useful effect and compromise the efficiency of the Community system of legal protection, the value of basic Community principles and the uniformity of Community law.

CPC España cites in this regard the judgment of the Court of 23 April 1986 in Case 294/83 *Les Verts* v *European Parliament* [1986] ECR 1339, of 31 March 1971 in Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42 at p. 277, and of 29 January 1985 in Case 147/83 *Münchener Import-Weinkellerei Herold Binderer GmbH* v *Commission* [1985] ECR 257, paragraph 14 at p. 271, which are applicable in the present case, especially since the adoption procedure for the measures referred to in Article 8 of the Act of Accession is not a determining factor in the assessment of an act within the meaning of the second paragraph of Article 173 of the EEC Treaty.

(4) CPC España further considers that the exclusion of the contested act from the system of legal protection established by the Treaty would lead to inequitable results in so far as the distinction made between the acts listed in Annex I and those listed in Annex II to the Act of Accession is quite arbitrary and their inclusion in one or the other Annex was dictated by reasons of convenience and expediency and was based for example on the volume of a text (Annex II) or the degree of completion (Annex I).

CPC España further submits that for the 'overall balance' of the accession negotiations invoked by the Council it is necessary to consider not only the adaptations listed in Annex I to the Act of Accession but also those in Annex II. It is wrong to claim that only legal action against the acts listed in Annex I could have adverse effects. Legal action may be brought against the acts listed in Annex II and such action is not regarded as upsetting the balance. Furthermore, the distinction made between the Annexes has absolutely no relation with the balance of the outcome of the accession negotiations.

The applicants conclude that the contested amendment to Regulation No 1785/81 constitutes an act whose legality may be reviewed under Article 173 of the Treaty.

Observations of Campo Ebro Industrial SA, intervener

The intervener states that the contested act may be the object of an appeal for annulment.

(1) First of all Campo Ebro contends that the contested act is a mere measure of adjustment to secondary legislation and not a condition of admission within the meaning of Article 237 of the EEC Treaty.

Article 237 of the Treaty mentions only the conditions of admission and the adjustments to the Treaty; it does not mention adjustments to secondary legislation rendered necessary as a result of accession.

The aforementioned adjustments of secondary law cannot constitute 'conditions of admission' since there is nothing to prevent them from being modified unilaterally immediately after accession in accordance with the procedures provided for amendment to secondary legislation. It would not be possible to consider that the admission of a State is 'conditioned' by provisions that can be modified later against the State's will. It is therefore erroneous to consider that the act complained of constitutes an essential element of the overall balance of the outcome of the accession negotiations, so that it would be unacceptable to call into question its validity in judicial proceedings.

(2) Secondly, Campo Ebro Industrial SA considers that the Council's argument that

the act complained of has the same value in law as the original Treaties is contrary to the clear text of Article 8 of the Act of Accession. It is clear from that provision that the authors of the Act of Accession did not intend to confer the same value in law on all of its provisions. No mandatory rule of international law or of Community law obliged them to attribute to all of the provisions on which they agreed a legal status equivalent to that of the original Treaties; the contested provision, amongst those which modify (otherwise than by way of a transitional measure) an act of an institution, has the value in law of the act which it modifies.

As regards the Council's argument that Article 8 has a purely procedural character, Campo Ebro Industrial SA takes the view that if one considers as procedural the fact that an act can be modified according to the normal procedure applicable to modifications of secondary legislation, there is no reason not to consider as also 'procedural' the fact that this act can be submitted to the control of the Court of Justice.

It points out that the Council's argument would make it necessary to consider that some of the provisions of a regulation constitute secondary legislation while others constitute primary law. The provisions of primary law could be amended by the Council, in accordance with Article 8 of the Act of Accession, with the result that they would once again acquire the character of secondary legislation.

(3) Thirdly, Campo Ebro Industrial SA states that since the act complained of has, according to Article 8 of the Act of Accession, the same status in law as Regulation No 1785/81 and is subject to the same rules as that regulation, it necessarily follows that the act complained of can be the subject of an appeal for annulment under the same conditions as if it had been adopted by the Council itself.

If one accepted that the act complained of could be modified by the Council under the same conditions as those required for amending Regulation No 1785/81 but that it could not be subjected to the control of the Court, one would arrive at a paradoxical result.

Indeed, Articles 24 to 32 of Regulation No 1785/81, as amended by the Act of Accession, were due to expire, by virtue of Article 23 of that regulation, at the end of the 1985/86 marketing year. On 24 March 1986, the Council extended, by Regulation No 934/86 (Official Journal 1986, L 87, p. 1), the application of those provisions until the end of the 1990/91 marketing year. Therefore, the legal basis for the applicability of the Spanish and Portuguese isoglucose quota regime is no longer the Act of Accession, but Regulation No 934/86.

It follows that if the Council were right, it would be necessary to consider that Article 24 of Regulation No 1785/81 has been subjected successively to the following legal regimes:

(i) possibility of instituting proceedings since the entry into force of Regulation No 1785/81 until 31 December 1985;

(ii) no such possibility from 1 January 1986 until 30 January 1986;

(iii) renewed possibility of instituting proceedings since 1 July 1986 (date on which Regulation No 934/86 came into force).

The intervener further points out that in Case 185/73 *Hauptzollamt Bielefeld* v *Offene Handelgesellschaft in Firma H. C. König*

[1974] ECR 607, the Council had argued that the Act of Accession of Denmark, Ireland and the United Kingdom had the effect of validating Regulation No 7 *bis*, so that the Court had no jurisdiction to rule on its validity. According to the Council, as a supplement to the EEC Treaty that regulation was 'validated' by the effect of Article 1 of the Accession Treaty, which provided that the acceding countries acceded to the Treaties establishing the Communities 'as amended or supplemented'.

In its judgment of 29 May 1974 in that case (Case 185/73 cited above at pp. 615 and 616) the Court rejected that argument, considering that even though some of the provisions of the Act of Accession could be considered as implying an acknowledgement by all parties, of the binding character of decisions adopted within the framework of the general system of Community law, none of the provisions of the Treaty or of its accompanying provisions could be interpreted as validating measures, whatever their form, contrary to the Treaties establishing the Communities.

2. *The legislative nature of the contested provisions*

The Council

The Council submits that even supposing that Article 173 of the EEC Treaty could be applied with respect to the provisions contained in an accession Treaty, the conditions of admissibility of Article 173 are not met in the case in point. Article 24 of Regulation No 1785/81, as amended by the Act of Accession, has, taken as a whole, legislative nature.

(1) By that provision (Article 24 (2)) the Act of Accession lays down the global basic quantities applicable to isoglucose production in Spain. These quantities (A + B) determine the total isoglucose production level in Spain as well as the global thresholds for the collection of production levies.

The aforementioned global quantities apply to all present and future producers of isoglucose in Spain. The applicants cannot therefore be concerned, either directly or individually, by the fixing of this global limit; their capacity as current producers may be acquired by any other person wishing to exercise this economic activity.

Although it is true that the Act of Accession also provides (in Article 24 (3)) for a scale for the allocation of the global quantities among individual undertakings (the individual quotas are established by allocating the basic quantities amongst the undertakings concerned on the basis of their respective production attained during the 1983 calendar year), the Council disputes that that provision concerns the applicants individually since only three undertakings, including the applicants, satisfy the condition of having produced in 1983. Nor are they directly concerned, since the allocation of quotas according to the scale of allocation does not leave the Member States any margin for discretion.

The Court has consistently ruled, in particular in its judgments in Case 101/76 *Koninklijke Scholten Honig NV* v *Council and Commission* [1977] ECR 797, paragraphs 21 and 23 at p. 808, in Case 64/80 *F. Giuffrida and Another* v *Council* [1981] ECR 693, paragraph 6 at p. 703, and in Case 242/81 *Roquette Frères SA* v *Council* [1982] ECR 3213, paragraph 7 at p. 3230, that a provision of Community law has a legis-

lative nature if it applies to objectively determined factual situations and produces legal effects with regard to categories of persons defined generally and in the abstract. A provision of this type does not lose its legislative character if, at the time of its adoption, the number — or even the identity — of the persons concerned may be determined more or less precisely if the latter circumstance results from the *de facto* and *de jure* objective situation addressed by that provision.

(2) The Council then points out that the purpose of the quota arrangement applied in the sugar and isoglucose sector is to limit the expansion of production, given the structural surpluses in the sector, and that achieving this objective involves fixing overall limits, which in the sector concerned are applied by the Member States, and criteria for allocating individual quotas to the undertakings concerned within those overall limits.

Even before it was amended by the Act of Accession, Article 24 of Regulation No 1785/81 fixed the limits for those two matters. According to the applicants' line of argument, the first sentence of Article 24 (3), which provides that the A quota of each sugar-producing or isoglucose-producing undertaking shall be equal to the basic quota allocated to it for the period 1 July 1980 to 30 June 1981, is an individual decision in respect of undertakings having been provided with a quota during that period. On the other hand, Article 24 is alleged to leave the Member States no margin for discretion in the allocation of individual quotas.

The Council observes that, under those circumstances, all Community rules on quotas applied in the sugar and isoglucose sector would lose their general legislative nature. Enlarging the concept of an individual decision in that way would jeopardize the Treaty system itself under which individuals may in principle apply for annulment only of individual decisions taken in respect of them.

The Council further points out that Article 24 itself in no way allocates individual quotas to the undertakings concerned. Paragraph (1) thereof entrusts this task to the Member States, which must allocate the individual quotas under the conditions laid down in Title III (Quotas) of Regulation No 1785/81).

In Spain, individual quotas must be allocated to sugar undertakings taking into account their production rights applicable before 1 January 1986. It is clear that this allocation criterion, which refers, in very broad terms, to the previous national arrangements applied in Spain, leaves the competent Spanish authorities a margin of discretion in the matter. Similarly, the allocation criterion for isoglucose makes provision for the allocation of individual quotas on the basis of the respective production obtained in 1983. The general terms used — 'on the basis of' instead of 'depending on' — leaves the national authorities a certain margin of discretion in fixing the actual figure for individual quotas.

(3) Finally, the Council states that the provisions in the Act of Accession amending Article 24 belong to a series of provisions in Regulation No 1785/81, in particular Article 25, which allows the Member States, within an overall limit of 10%, to reduce the individual quotas that they have allocated to the undertakings concerned on

the basis of Article 24. That option, which is designed to meet the restructuring requirements of sugar-producing and isoglucose-producing undertakings, leaves the Member States a considerable margin of discretion.

Article 25 gives the Member States the power to reduce the A and B quota of each individual undertaking by up to 10% and re-allocate the quantity withdrawn to another undertaking in the sector in the interests of restructuring. That provision allows transfers of quotas from the sugar sector to the isoglucose sector, and vice versa.

It follows that the allocation of the individual quotas on the basis of the allocation scale inserted in Article 24 (3) is subject to the exercise of the option available to the Member States subsequently to amend the quotas allocated (see the Opinion of Mr Advocate General Reischl in Case 242/81 *Roquette Frères*, cited above) and cannot therefore directly concern the applicant.

(4) Finally, the Council emphasizes that the judgment in Case 138/79 *Roquette Frères SA* v *Council* [1980] ECR 3333 and in Case 139/79 *Maizena GmbH* v *Council* [1980] ECR 3393 cannot be cited as a precedent in this case. In those cases the Court found that Regulation No 1293/79 itself applied, concretely and individually, the general and abstract rules for the allocation of quotas which it laid down. An annex to that regulation contained the exact figures of individual quotas allocated to each undertaking and named the undertakings. However, Article 24, as amended by the Act of Accession, simply lays down general abstract rules for the allocation by the Member States of individual quotas to the undertakings concerned.

The Commission

The Commission entirely endorses the Council's conclusions on admissibility contained in its separate document lodged on 18 April 1986 and considers that there is nothing which it can add at this stage of the procedure.

Nevertheless it points out with reference to the reply lodged by Laisa that Article 25 of Regulation No 1785/81, which allows the Member States to reduce the A and B quota of each sugar-producing undertaking or isoglucose-producing undertaking established in its territory, does not restrict that possibility to restructuring cases only.

In the Commission's view, that interpretation is confirmed by the wording of the second subparagraph of Article 25 (2), which allows the 10% limit laid down in the first subparagraph to be exceeded in two of the Member States as part of restructuring plans. It follows that a reduction of 10% or less may be made otherwise than as part of a restructuring plan.

The intervener AGFA

The intervener AGFA considers that Article 24 of Regulation No 1785/81, as amended by the Act of Accession, is applicable in a general way, its application being based on objective data which prohibit individual identification of special situations and

render it the equivalent of a decision. AGFA cites case-law of the Court in this regard, in particular the judgment in Case 6/68 *Zuckerfabrik Watenstedt GmbH* v *Council* [1968] ECR 409 and in Case 64/80 *Giuffrida* v *Council* cited above, according to which the regulatory nature of an act cannot be questioned on the ground that it is possible to determine, more or less precisely, the identities of those to whom it applies at any given moment, if that application is based on an objective situation.

In AGFA's view, this is the situation provided for in Article 24, which only establishes the basic elements for the quota to be calculated by the Spanish State but without identifying individually the various isoglucose producers. The intervener points out that in the Court's judgment in Case 138/79 *Roquette Frères* (cited above), the Court declared the action admissible because the contested regulation contained an annex in which the various manufacturers concerned were listed, together with the apportionment of their respective quotas. In the present case, the recipients are not defined by reference to the production for the year 1983 since Article 25 (3) provides for the possibility of awarding a quota to an undertaking which did not previously have one.

Furthermore, the contested regulation does not directly concern the applicants. Article 25 of Regulation No 1785/81 allows the Member States to modify by 10% the quotas which may be allocated to each undertaking. That discretionary power has in fact been exercised by Spain by means of an order of 23 June 1986, which establishes the isoglucose quotas for the 1986/87 marketing year.

The applicants' observations

The applicants consider that Article 24 of Regulation No 1785/81, as amended by the Act of Accession, is in the nature of a decision which is of direct and individual concern to them.

(1) CPC España SA maintains that the provisions of Article 24 are in fact in the nature of a decision. The provisions of Article 24 (2), establishing a basic quantity A of 75 000 tonnes and a basic quantity B of 8 000 tonnes, are in the nature of a decision addressed to that Member State but indirectly concerning the applicant, and the provisions of the second indent of Article 24 (1) and Article 24 (3) (a) and (5) (a) are in the nature of a decision directly affecting the applicant inasmuch as they provide for the basic quantities A and B fixed for Spain to be allocated exclusively to the undertakings in question, that is to say to those undertakings which produced isoglucose in the 1985 calendar year, and are to be allocated on the basis of their respective production in the 1983 calendar year.

CPC España SA states that in the case-law cited by the defendant the provisions in question concerned a category of persons regarded generally and in the abstract, whereas the measures at issue in this case are confined to a closed group of three precisely known undertakings which were in business prior to the entry into force of the measures. The basic quantity of 83 000 tonnes for the A and B quotas was chosen precisely as the rounded sum of their production levels reached in 1983 so as to cut substantially the respective production levels achieved by those undertakings.

Although included in a regulation, the contested provisions are not measures with a general and abstract economic scope but constitute in reality a collective decision concerning both Spain and the three Spanish isoglucose producers.

Furthermore, according to the Court's case-law on dumping (judgment of 21 February 1984 in Joined Cases 239 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005, paragraph 12 at p. 1030), the action must also be regarded as admissible since the applicant has been identified as being one of the three undertakings concerned and was concerned by the investigations and procedures which preceded accession. Indeed, for the purpose of the accession negotiations, the three Spanish producers had to keep the competent authorities informed of their production and capacity.

The applicant Laisa further observes that the Council itself recognizes that Regulation No 1785/81 contains not only the quota figure for each country but also the allocation scale of those quotas between the various producers. That is how the applicant was able to calculate its quota. Although the attainment of the aim of limiting the expansion of production entails fixing overall limits, it is not at all necessary in order to achieve that aim to lay down in the provision the formula for allocating individual quotas.

Moreover, that situation seems to have been assessed by the Member States differently than by the Council. Although the Italian Government notified Italian isoglucose producers of individual quotas for the 1986/87 marketing year for the first time in May 1986, France and Germany have never done so, no doubt considering this formality unnecessary.

(ii) In the applicants' view, the Council does not seriously contest that they are individually concerned by the disputed measure. They consider that the reference to such circumstances as the individual production level attained in a certain year individualizes the applicants as if they were the addressees of a decision and distinguishes them from all other undertakings.

Furthermore, the applicants are directly concerned.

CPC España SA points out that, according to the Court's established case-law, measures are considered to be of direct concern when, in order to have practical effect, they require no implementing measure on the part of the national authorities or when they leave the Member State in question no margin of discretion. Consequently, the Court has held measures to be of direct concern in cases in which there was no doubt how the Member State would exercise its discretion (judgment of 1 July 1965 in Joined Cases 106 and 107/63 *Alfred Töpfer and Another* v *Commission* [1965] ECR 405; judgment of 23 November 1971 in Case 62/70 *Bock* v *Commission* [1971] ECR 897; Joined Cases 41 to 44/70 *International Fruit Company NV and Others* v *Commission* [1971] ECR 411) and in cases where the implementation is purely automatic and, moreover, done in pursuance not of intermediate national rules but of Community rules alone (judgment of 29 March 1979 in Case 113/77 *NTN Toyo Bearing Company Ltd and Others* v *Council* [1979] ECR 1185, paragraph 11 at p. 1205).

As regards the Council's argument that the use of the expression 'on the basis of' as opposed to 'depending on' the 1983

production level would leave the national authorities a certain margin of discretion, CPC España SA considers, however, that the expression 'on the basis of' clearly prohibits the Spanish Government from using, for the purpose of quota calculation, any criterion different from that prescribed and leaves no margin of discretion.

(iii) As regards the Council's argument concerning Article 25 of Regulation No 1785/81, CPC España SA points out that the fixing of quotas now by the Community institutions and the provision for a later limited change by the Member State are two factually, legally and procedurally distinct matters. The action for which provision is made by Article 25 is not the granting of quota amendments but a transfer of existing quotas to other producers under the specific conditions laid down in that article.

Referring to the Court's line of reasoning in its judgment of 17 January 1985 in Case 11/82 *Piraiki-Patraiki Cotton Industry AE and Others* v *Commission* [1985] ECR 207, paragraphs 7 to 9 at pp. 241 and 242, CPC España SA further argues that, unless the Community institutions take further specific initiatives in this regard, the application of this provision by the Spanish Government is an entirely theoretical possibility.

In the absence of detailed rules in Article 25 (5) for the application of that article, no clear distinction is made between the Member States' authority under this article and that of the Community institutions. In particular, it is unclear whether and to what extent a quota transfer from the sugar sector to the isoglucose sector is at the discretion of the Member States.

In fact, as yet only transfers within the sugar sector have taken place. In any event, it considers that the possibility of a transfer from sugar to isoglucose has no practical meaning since Regulation No 1785/81 does not apparently entitle Member States to exceed, as a result of a quota transfer, the basic quantities fixed for sugar and isoglucose respectively. The option of a transfer from one isoglucose producer to another is likewise entirely theoretical because the quotas for isoglucose in Spain, as in the entire Community, are fully utilized. The applicant Laisa also observes that in the case of young undertakings with large production capacity which have made many investments, new undertakings with low quotas are not viable. Furthermore, according to the 15th recital of the preamble to Regulation No 1785/81 and Article 15 thereof, quota transfers should take account of the interests of the parties concerned and in particular those of sugar beet and sugar cane producers.

Observations of the intervener Campo Ebro Industrial SA

The intervener takes the view that Article 24 of Regulation No 1785/81, as amended by the Act of Accession, has the nature of a decision of direct and individual concern to the applicants and to itself.

(a) *Individual interest*

Campo Ebro Industrial SA contests in particular the following arguments of the Council:

(1) *The provision complained of applies to all Spanish isoglucose producers, present or future.* The provisions inserted by the Act of Accession at the end of Article 24 (3) and of Article 24 (5) provide that the global quantities A and B fixed for Spain will be allocated 'between the undertakings in question on the basis of their respective production attained during the 1983 calendar year'; it follows that only undertakings which produced isoglucose in 1983 may participate in the allocation of the global basic quantities applicable to the production of isoglucose in Spain and be allocated A and B quotas.

The authors of the Act of Accession not only fixed the total basic quantity which may be produced in Spain but also determined the criteria according to which those basic quantities must be allocated within those global limits between the three undertakings that had produced isoglucose in Spain in 1983.

The measure in question is not therefore a measure having as its sole object to limit the expansion of production in the general interest. The act complained of affects a fixed number of traders identified by reason of the individual course of action which they pursued during a particular period.

(2) *If the applicants' reasoning was accepted, the result would be that all the Community rules in question would lose their general legislative nature.* Although the first sentence of Article 24 (3) of Regulation No 1785/81 provides that the A quota of each undertaking producing sugar or isoglucosis equal to the base quota attributed to that undertaking by the Member State in which it is established for the period 1 July 1980 to 30 June 1981, this does not mean that all undertakings having been provided with a quota during that period are individually concerned by that provision.

If the contested provision is of individual concern, this is because the allocation of the quotas to each undertaking individually has been effected by the Community rules in accordance with criteria that take into account the particular situation of each undertaking during the reference period.

(3) *The contested provision is part of the provisions of Regulation No 1785/81.* With regard to this argument the intervener points out that the Court has stated in its judgment of 14 December 1962 in Joined Cases 16 and 17/62 *Confédération nationale des producteurs de fruits et légumes* v *Council* [1962] ECR 471 at p. 479 that:

'... if a measure entitled by its author a regulation contains provisions which are capable of being not only of direct but also of individual concern to certain natural or legal persons, it must be admitted, without prejudice to the question whether that measure considered in its entirety can be correctly called a regulation, that in any case those provisions do not have the character of a regulation and may therefore be impugned by those persons under the terms of the second paragraph of Article 173'.

Thus, there is no difficulty in recognizing, in accordance with the case-law of the Court, that the provision complained of is in the nature of a decision of individual concern to the applicants and to the intervening party.

(b) *Direct interest*

(1) Campo Ebro Industrial SA contends that the Member States do not have any margin of discretion in the allocation of the

basic quantities A and B fixed for Spain for isoglucose. They are obliged to allocate these quantities between the producing undertakings 'on the basis of their respective production attained during the 1983 calendar year'.

That clearly means that the quota of each producer must be proportional to the share of that producer's production in the total production of isoglucose during the 1983 calendar year.

The intervener does not understand why the words 'on the basis of' rather than 'depending on' would indicate an intention to allow the national authorities a margin of discretion when fixing the actual figure for individual quotas.

(2) As regards Article 25 of Regulation No 1785/81, Campo Ebro Industrial SA points out that, in accordance with paragraph (1) of that article, transfers of quotas between undertakings may be effected only 'under the conditions laid down in this Article' and provided that the conditions laid down by the general rules adopted by the Council under paragraph (4) of that article are observed.

In this regard Campo Ebro Industrial SA observers that on 26 January 1982 the Council adopted Regulation No 193/82 containing general rules applicable to the transfer of quotas in the sugar sector (Official Journal 1982, L 21, p. 3). That regulation is based on Article 25 (4) of Regulation No 1785/81. According to Article 3 of Regulation No 193/82, applicable to isoglucose-producing undertakings, Member States are not allowed to depart from the principle that the basic quantities must be allocated among producers on the basis of the production attained in 1983, save in the case of merger or transfer of a production unit or of closure of an undertaking or of one or more production units.

The fact that the Member States are not entirely free to modify the allocation of quotas, even within the 10% limit provided for in Article 25 (2) of Regulation No 1785/81, is also apparent from the 14th recital of the preamble to that regulation in which it is stated that in order to meet 'the restructuring needs of ... the isoglucose production sector ... there are good reasons for giving Member States, in the form of rules and special Community criteria, in addition to the power to allocate the quotas on the basis of ... isoglucose producing undertakings, the power to amend subsequently the quotas of existing undertakings'.

The intervener observes that, considered in the light of that recital, the system of the regulation is clear: the Member States must first fix the quotas of each undertaking on the basis of its production during 1983; once this has been done, Member States may modify those quotas within the limits set forth in Article 25 if the conditions provided for such a modification are fulfilled. Article 25 does not therefore give to the Member States an unlimited possibility to fix the quotas at a level different from that which would result from an allocation proportionate to the production of each undertaking in 1983.

Campo Ebro Industrial SA points out that the Council accepts that the possibility granted to Member States to reduce, within an overall limit of 10%, the individual quotas that they have allocated to the undertakings concerned on the basis of Article 24 is designed for the case where restructuring occurs. Since no restructuring has occurred in the present case, there was no justification to depart from the rule of allocating basic quantities in proportion to production attained in 1983.

As a result, the contested provisions must be considered to be of direct concern to the applicants and to the intervener.

B — *Admissibility of the claim for damages*

The Council

(1) The Council considers that the alleged damage arises from the provisions of an act of accession and not from any act adopted by the Council in the performance of its duties as the Community institution competent for agricultural matters. It follows that Article 215 of the EEC Treaty concerning the Community's non-contractual liability for damage caused by its institutions is not applicable in this case.

It is certainly neither the purpose nor the effect of Article 8 of the Act of Accession to equate any damage arising out of that Act with damage caused by an institution in the performance of its duties, for the purposes of applying Article 215.

Moreover, since there has been no action on the part of the Council as regards the fixing of the disputed rules, the Council considers that the decisions of the Court regarding non-contractual liability cannot apply in this case.

(2) In any case, the aforementioned remedy should not be available since the procedure laid down in Article 177 for a preliminary ruling could in this instance provide the applicants with adequate legal protection.

Since production levies are collected by the national authorities, the applicants could wait until they are actually collected and then contest their legal basis before the competent national court, which may, or even must, submit questions to the Court.

The applicants' observations

(1) Referring to the Council's pre-eminent role in the accession procedure (Article 237 of the EEC Treaty) and to the decisions adopted on 11 June 1985 (Official Journal 1985, L 302, pp. 5 to 8) the applicant CPC España SA submits that it is the Council (and not the contracting parties) which has in reality determined the content of the adjustments to secondary legislation and the method applicable to them, on the basis of the negotiations with the acceding States.

It is the Council which, after consultation with the Commission, formally opens the negotiations (Article 237 of the EEC Treaty); the Council presides over all the negotiations with the acceding States and defines and determines the common position of the Member States; the Council supervises the Commission's determination of the common position with respect to the adjustment to existing common policies; the Council approves the outcome of the negotiations; finally, it is the Council which, having regard to the opinion of the Commission and the European Parliament, formally decides on the admission of the new Member States.

The Council's arguments to the effect that the Treaty of Accession is in all respects identical to any other international treaty concluded by States and thus outside the Community's legal order is manifestly contrary to the procedures actually applied. The Council misrepresents the vital role played by the Community institutions, in particular in the adjustment of secondary legislation. It is not in harmony with the principles of the Treaty to give the Council such responsibilities while at the same time exempting it from any liability.

(2) CPC España SA also refutes the argument that Article 177 of the Treaty gives it adequate legal protection. First, it has no adequate legal remedy before the Spanish courts (the Spanish authorities have not yet adopted implementing measures) and, secondly, it would not be able to wait until production levies were collected by the national authorities and contest their legality, as the rules on production levies have not yet been extended to Spain (see Commission Regulation No 580/86 of 28 February 1986, on certain transitional measures in the sugar sector following the accession of Spain and Portugal).

Laisa, the other applicant, considers that, since the contested measure is an act of the Council, the proposition that there is no act attributable to the Council can only be rejected.

J. C. Moitinho de Almeida
Judge-Rapporteur