REPORT FOR THE HEARING
in Case C-182/89 *

I — Facts and procedure

1. *Legal background*

(a) The Washington Convention

1. The Washington Convention on international trade in endangered species of wild fauna and flora of 3 March 1973 (Official Journal 1982 L 384, p. 7) is aimed at protecting certain endangered species of wild fauna and flora. For these purposes it regulates international trade in certain species and easily identifiable products obtained from them. The species covered by the Convention are set out in its appendices.

Appendix I includes all species threatened with extinction which are or may be affected by trade. Trade in such species is to be authorized only in exceptional circumstances.

Appendix II includes species which may be threatened with extinction unless trade in them is subject to strict regulation in order to avoid utilization incompatible with their survival.

Appendix III includes species which a contracting party intends to subject to regulation in order to prevent or restrict their exploitation.

The Convention provides for the establishment of a procedure for the grant and presentation of permits for the export, re-export and import of species covered by the Convention. The strictness of the procedure to be followed depends upon the classification of the species in the appendices.

As regards Appendix II, which includes *Felis wiedii* and *Felis geoffroyi* (two species of wild cat) the rules are as follows:

'The export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:

(i) a scientific authority of the State of export has advised that such export will not be detrimental to the survival of that species;

(ii) a management authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora.

A scientific authority in each party shall monitor both the export permits granted by that State for specimens of species included in Appendix II and the actual exports of such specimens. Whenever a scientific authority determines that the export of specimens of any such species should be

* Language of the case: French.

limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I, the scientific authority shall advise the appropriate management authority of suitable measures to be taken to limit the grant of export permits for specimens of that species.

The import of any specimen of a species included in Appendix II shall require the prior presentation of either an export permit or a re-export certificate.

The re-export of any specimen of a species included in Appendix II shall require the prior grant and presentation of a re-export certificate. A re-export certificate shall only be granted when the following condition has been met:

a management authority of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of the present Convention.'

As regards the abovementioned management authority and scientific authority, the Convention provides that each party shall designate one or more management authorities competent to grant permits or certificates on behalf of that party and one or more scientific authorities.

2. The Convention also provides for the setting up of a secretariat and a conference of the parties.

The Convention's secretariat has to convene regular meetings at least once every two years and extraordinary meetings at any time on the written request of at least one-third of the parties.

At meetings, the parties review the implementation of the Convention and may, *inter alia*, consider any reports presented by the secretariat or by any party and make recommendations for improving the effectiveness of the Convention.

The secretariat may, *inter alia*, undertake scientific and technical studies in accordance with programmes authorized by the Conference as will contribute to the implementation of the Convention, study the reports of parties, prepare reports, make recommendations for the implementation of the aims and provisions of the Convention, including the exchange of information, of a scientific or technical nature.

3. The Convention requires the parties to take appropriate measures to enforce the provisions of the Convention and to prohibit trade in specimens in violation thereof. In addition each party must maintain a registrar of exporters and importers and the number and type of permits and certificates granted. It must also prepare periodic reports on its implementation of the Convention and transmit them to the secretariat.

Article XIV of the Convention provides that parties may adopt stricter domestic measures regarding the conditions for trade, taking

possession or transport of specimens of species included in the appendices.

Finally the provisions of the Convention in no way affect the provisions or obligations of the parties deriving from any international agreement creating a union or regional trade zone.

Apart from Greece and Ireland, all the Member States of the EEC are parties to the Convention. The Community as such cannot (yet) be a party to the Convention. An amendment to the Convention making accession possible for regional organizations economically integrated has still to be adopted by the parties.

(b) Regulation (EEC) No 3626/82

4. At the Community level it has proved necessary to ensure the uniform application of certain instruments of commercial policy which implement the provisions of the Convention. Accordingly the Council adopted Regulation No 3626/82.

Article 5 of the regulation provides that the introduction into the Community of specimens covered by the regulation shall be subject to the presentation of an import permit or import certificate.

The species protected by the regulation are the same as those which are the subject of the Convention. However, as regards certain species, the Community decided to apply stricter protection than that afforded by the Convention. Thus Article 3(2) of the regulation provides that the importation of the species *Felis geoffroyi* and *Felis wiedii* shall require an import permit which may be granted only if the conditions of Article 10(1)(b) are satisfied.

Article 10(1)(b) reads as follows:

'The import permit referred in Article 3(2) shall be issued only where:

(i) it is clear, or where the applicant presents trustworthy evidence, that the capture or collection of the specimens in the wild will not have a harmful effect on the conservation of species or on the extent of the territory occupied by the population in question of the species . . .'

Applications for import permits are dealt with by the management authority responsible for the place of destination of the specimen. Member States must forward to the Commission the names and address of the management and scientific authorities appointed under the Convention (see (1) above) and, where appropriate, other competent authorities referred to by the regulation.

Import permits issued by a management authority of a Member State are valid throughout the Community. In addition every Member State must recognize the decisions of the competent authorities of other Member States.

5. Article 19 provides that a Committee on the Convention is to be established, consisting of representatives of the Member States and presided over by a representative of the Commission. The Committee is to examine any question relating to the application of the regulation. In addition, in accordance with a kind of 'management committee procedure' provided for by Article 21(2) and (3), the Committee has to determine the design of the documents referred to in the regulation and lay down uniform conditions for their issue. Pursuant to Article 21 the Commission adopted Regulation (EEC) No 3418/83 of 28 November 1983 laying down provisions for the uniform issue and use of the documents required for the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora (Official Journal 1983 L 344, p. 1).

cooperation between the competent authorities of the Member States and the Commission within the Committee on the Convention. The main object of that cooperation is the uniform application of the provisions of the regulation and of the Convention throughout the Community.

In particular, as regards the application of Article 10(1)(b), the Commission proposed to the Committee a procedure for close cooperation when applications for import permits for the species concerned are considered.

6. Finally, Article 17 of the regulation provides for the Member States and the Commission to exchange the information necessary for its implementation. Member States, for example, must forward to the Commission any information needed to draw up the records and reports which have to be made under the Convention (see (3) above) (Article 8 of the regulation), to inform the Commission of stricter measures than those of the regulation, as is possible under Article 15, and to forward to the Commission all necessary information relating to research into the situation regarding endangered species and into methods of controlling trade (Article 18 of the regulation).

The proposal requires Member States to inform the other Member States by telex directly or through the Commission of applications for an import permit for quantities of specimens considered substantial in relation to the species. A Member State must request the opinion of its scientific authority before issuing a permit. It may also consult the scientific authorities of other Member States, other scientific institutions or the Commission. The other Member States are to make the scientific information available to the Member State concerned within a period of 10 days. If the Member State refuses to grant the permit it must inform the Commission without delay and state its reasons. The Commission must forward the information immediately to the other Member States. If there is no reaction it means that each Member State will also refuse a permit in comparable cases. If, however, a Member State wishes to depart significantly from a decision notified by another Member State it must give prior notice thereof to the Commission.

(c) Community practice

7. The provisions of Regulation No 3626/82 have led to extensive administrative

For reasons which have not been explained the Committee did not agree to that proposal. Nevertheless no Member State opposed working on the basis of the proposed procedure. In fact, since the meeting of the Committee when the proposal was discussed, the Member States have generally observed the unofficial procedure.

Moreover, the Commission stated that it would consider all cases of import falling under Article 10(1)(b) in the light of that procedure and would not hesitate to initiate the appropriate procedure for infringement in the event of grant of permits without application of the proposed procedure. In the Commission's view such conduct could directly affect the functioning of the common market and distort competition.

2. *Background to the case*

(a) Imports from Bolivia

8. Application of the Washington Convention in Bolivia is far from being satisfactory, in particular because of the lack of scientific information, staff and instruments, which makes it impossible to stop smuggling of specimens coming from Bolivia itself or from neighbouring countries where export bans or restrictions exist.

At the Conference of the parties to the Convention which took place in Buenos Aires from 22 April to 3 May 1985 the application of the Convention in Bolivia was discussed. It was found that there was substantial illegal trade originating in Bolivia and the existence of numerous false export or re-export permits. The Bolivian delegation recognized the problems which application of the Convention posed in their country.

On 30 April 1985 the Conference adopted a resolution in which it recommended 'if the Bolivian Government has not within 90 days demonstrated to the Standing Committee that it has adopted the measures needed properly to apply the Convention' all parties to the Convention should 'refrain from accepting consignments of specimens covered by the Convention accompanied by Bolivian documents or declared to originate in Bolivia until the Bolivian Government has demonstrated to the Conference of the parties or to the Standing Committee that it has adopted all the measures within its power properly to apply the Convention' (Conference Resolution 5.2 of 30 April 1985).

Following the adopting of that resolution, the Commission, after consulting the Member States represented at the Conference, sent a telex message to the management authorities of the Convention in the Member States. The telex message informed the management authorities of the adoption of the resolution and that no import permit should be issued for any export or re-export from Bolivia.

After the adoption of the resolution at the Conference in Buenos Aires, Bolivia delivered certain documents which by letter dated 1 August 1985 the Secretariat of the Convention forwarded to the Contracting Parties. In that letter the Secretariat expressed the opinion that the measures adopted by the Bolivian Government were

not sufficient to convince it that the situation in Bolivian had been rectified.

On 8 August 1985 the Bolivian Government wrote again to the Secretariat of the Convention informing it of new measures to be adopted.

At its meeting from 28 October to 1 November 1985 held in Lausanne, the Standing Committee of the Convention considered that this time the measures adopted by the Bolivian Government were significant. Accordingly, it asked the Secretariat to recommend to the parties who had imposed an import ban on specimens from Bolivia to suspend it. The Committee's opinion was notified to the parties on 17 December 1985.

(b) Imports of wild cats from Bolivia into the Community

9. By letter dated 5 April 1985 the Belgian authorities informed the Commission that in their opinion the culling in the wild of more than 14 000 skins of *Felis geoffroyi* and more than 5 500 skins of *Felis wiedii* could have injurious repercussions on the conservation of the said species or on the extension of the area of distribution of the populations concerned, especially in Bolivia. Requests for import permits made to the Belgian authorities were therefore refused. That decision was adopted on the basis of information given by the scientific authorities of other Member States. Moreover, Bolivian law considers that species to be endangered.

At its meeting from 12 to 14 November 1985 the Convention Committee of the Community prepared a draft opinion to the effect that the Member States, after consulting their scientific authority, might treat the requirements of Article 10(1)(b) and those concerning imports of specimens covered by Appendix II to the Convention as satisfied in respect of imports from Bolivia as far as the quota system and other implementing measures agreed between the Bolivian Government and the Convention Secretariat allowed. However, as regards *Felis geoffroyi* and *Felis wiedii*, it was stated that quotas could not be drawn up and that consequently Bolivia and the Convention Secretariat would not issue export permits for skins of those two species until scientific and commercial data were available.

The Member States reached no agreement on the draft opinion. However, the difference was not one of principle but related solely to the level of export quotas. Therefore the Commission took the view that the import ban on skins of wild cats in question continued to apply in the Community until a contrary decision was taken. No such decision has ever been adopted.

(c) The importation of wild-cat skins into France

10. On 6 February 1986 the French authorities issued import permits for some 6 000 wild-cat skins originating in Bolivia. The

import permits expressly referred to export permits issued by the Bolivian authorities on 5 August 1985.

Subsequently, the French company ARSI SA, the owner of the skins and an exporter to Germany, applied for and obtained certificates for intra-Community circulation of the skins. On 13 February 1986 the German authorities seized the 6 000 skins at Munich airport. An action against that seizure is pending before the German courts.

By letter dated 16 July 1986 addressed to the German Ministry of the Environment the French authorities recognized that the permits in question had been granted during the period of suspension, under the Convention, of all imports from Bolivia, that they had been wrongly issued to ARSI and that it was a regrettable error for which the French authorities apologized.

(d) Administrative procedure

11. By letter dated 30 July 1986 the Commission informed the French Government that in its opinion the French authorities had not correctly applied Article 10(1)(b) of Regulation No 3626/82 and that consequently France had failed to fulfil its obligations under that regulation and under Article 5 of the EEC Treaty. The Commission referred in that respect to the resolution of the Convention Conference in Buenos Aires from which it appeared that Bolivia was not in a position correctly to apply the Convention and that consequently its export documents could not be accepted. It then requested the French Government to submit its observations and to withdraw or cancel the decision to permit the imports.

The French Government replied by letter dated 3 December 1986. In that letter the government stated that the Buenos Aires resolution was only a recommendation without any legal effect. In the French Government's view observance of Article 10(1)(b) was a matter for the Member States. In the present case, the French scientific authority was consulted and considered that the import permits could be issued. Moreover, the French Government observed that there was no Community decision banning imports from Bolivia. Finally, it stated that French administrative law did not allow the withdrawal of a regular individual measure that created rights.

12. In the Commission's view, the observations did nothing to meet its objections. Consequently, it issued a reasoned opinion which was communicated to the French Government on 4 November 1987. In that opinion the Commission observed that it was not failure to observe the resolution of the Conference which was the subject of the proceedings but the incorrect application of Article 10(1)(b). The resolution was only one factor, albeit a very important one, on which the Commission's opinion was based. As regards consultations with the scientific authority, the Commission stated that the authority could not have reasonably reached its opinion. It was very clear from the resolution that imports of specimens from Bolivia, without any guarantee from Bolivia of a correct application of the Convention, would have a harmful effect upon the conservation of the species. The

Commission also observed that problems raised by French administrative law were irrelevant. Furthermore, it was not a regular individual measure. Accordingly, the Commission requested the French Government to withdraw or cancel the decision issuing the import permits in question.

By letter dated 25 May 1988 the French Government replied to the reasoned opinion from the Commission. The government observed in particular that the decisive factor at the origin of the infringement of Article 10(1)(b) was the failure to apply the Buenos Aires resolution. However, from that point of view the Commission had not taken into account the fact that the object of the resolution was to sanction the Bolivian administrative shortcomings but on the other hand it had no direct relevance to the biological degradation of the natural habitat or with the situation of the cat species. Since the scientific authority appointed under the Convention, namely the Secrétariat faune-flore of the Musée nationale d'histoire naturelle, considered that import permits might be issued, the government took the view that the conditions of Article 10(1)(b) were satisfied.

In those circumstances the Commission brought an action before the Court pursuant to the second paragraph of Article 169 of the Treaty.

3. *Procedure*

13. The Commission's application was received at the Court Registry on 25 May 1989.

The written procedure followed the normal course.

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

II — Conclusions of the parties

14. The *Commission*, the applicant, claims that the Court should:

(1) declare that, by issuing in February 1986 import licences for more than 6 000 skins of the species *Felis geoffroyi* and *Felis wiedii* originating in Bolivia, the French Republic failed to fulfil its obligations under Article 10(1)(b) of Council Regulation No 3626/82 of 3 December 1982 on the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora and Articles 5 and 189 of the EEC Treaty;

(2) order the French Republic to pay the costs.

The *French Republic*, the defendant, contends that the Court should:

(1) dismiss the application;

(2) order the Commission to pay the costs.

III — Submissions and arguments of the parties

15. The *Commission* observes first of all that its complaint against the French Government is not disregard of the Buenos Aires resolution but the incorrect application of Article 10(1)(b) of Regulation No 3626/82. That article lays down clear and precise conditions for the issue of an import permit into the Community. It is clear that the conditions were not satisfied in relation to the imports from Bolivia, the export permits for which had been issued in August 1985. It was clear from the Buenos Aires resolution that the situation in Bolivia in relation to the application of the Washington Convention was such that it was not at all apparent that the capture of the specimens in the wild habitat had no harmful effect upon the conservation of the species or on the area of distribution of the populations concerned in the present case.

Wild cats were classified by the Convention as 'species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation'. Strict regulation was precisely what was missing in Bolivia.

Moreover, the Commission had several times informed the Member States, as for example by the telex message of 30 April 1985, that the conditions laid down in Article 10(1)(b) were not satisfied in the case of imports from Bolivia. All the Member States had always agreed with that view.

16. The *French Government* repeats that the Commission's complaints are in fact based on texts which are not binding, namely the Buenos Aires resolution and the telex message of 30 April 1985. In addition, it considers that when the import permits were issued in February 1986 the resolution was already out of date. At its meeting in Lausanne on 28 October and 1 November 1985 the Standing Committee on the Convention recognized that the measures adopted by the Bolivian Government were significant. Accordingly, it requested the Convention Secretariat to recommend that the contracting parties suspend the import ban on species originating in Bolivia.

17. France further contends that the Commission is attempting to transfer its own responsibilities to the Member States. If the Commission considered that the situation in Bolivia demanded an import ban, it ought to have followed the procedure laid down in Article 21 of Regulation No 3626/82 as, for example, in the case of imports of crude ivory which is prohibited by a regulation.

18. The Commission confused considerations of expedience with scientific criteria. France admits that the issue of the permits in question was perhaps inexpedient in so far as the conditions under which exports of *Felidae* from Bolivia might resume were still the subject of discussions between the Convention Secretariat and France. Nevertheless, the establishment of export quotas was an informal agreement between the Secretariat and the contracting parties. It was not a binding procedure making the importation of specimens by the parties subject to the Convention. The issue of

import permits was solely subject to a favourable opinion from the scientific authority responsible for checking whether the conditions of Article 10(1)(b) were satisfied.

19. Finally, the French Government adds that the procedure adopted by the French authorities cannot be invalidated by the fact that in April 1985 the Belgian authorities concluded that the wild cats in question were endangered (see above at 9) and that France did not make use of the consultation procedure (see above at 7) before issuing the import permits.

The situation which led to the Belgian authorities' view was not comparable and the unofficial consultation procedure was in embryo and not binding at the relevant date.

20. In its reply, the *Commission* claims that recourse to regulation under Article 21 is not the only means of bringing about an import ban. There was an established practice under Regulation No 3626/82 of specifying the obligations of the Member States under Article 10 of the regulation at meetings to coordinate the positions of the authorities of the Member States and of the Commission, that is to say usually at meetings of the Community Committee of the Convention. After such meetings the Commission sends telex messages to the authorities of the Member States defining the position to be adopted in applying Article 10. Thus in the present case such a telex message was sent on 30 April 1985.

21. The Commission observes that the Bolivian export permits were issued on 5 August 1985, thus at a time when the objections in relation to the application of the Convention by Bolivia were still quite valid. Moreover, in February 1986 the situation was still unchanged in relation to wild cats as is apparent from the draft opinion of the Convention Committee after its meeting on 12 to 14 November 1985 (see 9 above). The Commission therefore considers that the French scientific authorities were mistaken when in those circumstances they gave a favourable opinion. That is what the French authorities themselves recognized in the letter of 16 July 1986 (see 10 above).

22. Finally, the Commission states that it is not complaining that France took no account of the position of the Belgian authorities or did not make use of the unofficial consultation procedure.

P. J. G. Kapteyn
Judge-Rapporteur