OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 18 October 1990 *

Mr President,
Members of the Court,

1. On 6 February 1986 the competent authorities of the French Republic issued import permits for approximately 6 000 wild-cat skins of the *Felis geoffroyi* and *Felis wiedii* species from Bolivia, on the basis of export permits issued by the Bolivian authorities on 5 August 1985.

2. The Commission of the European Communities considers that by so doing the French Republic failed to fulfil its obligations under Council Regulation (EEC) 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 (Official Journal 1982 L 384, p. 1). This Convention is also known as the 'Washington Convention' or 'CITES'.

3. The adoption of Regulation No 3626/82 was necessary in order to coordinate the commercial policy measures entailed by the fact that the majority of the Member States are parties to the Convention even though the Community as such is not. It provides in particular for the Member States to issue various certificates and permits in order to ensure adequate control of trade in the species listed in the Convention subject to conditions which are stricter in some cases than in others.

4. At the material time wild cats of the *Felis geoffroyi* and *Felis wiedii* species appeared in Part 2 of Annex C to the regulation. Under Article 3(2) of the regulation, they could be imported only after an import permit had been issued in accordance with the conditions laid down in Article 10(1)(b), which provides as follows:

'The import permit referred to 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 populations in question of the species,

(ii) the applicant provides proof by means of documents issued by the competent authorities of the country of origin that the specimen has been obtained in accordance with the legislation on the protection of the species in question,

(iii) in the case of the importation of a living animal, the applicant provides evidence that the intended recipient possesses adequate facilities suitable for accommodating the species and suited to its behaviour and that the animal will be properly cared for,

* Original language: French.

(iv) there are no other requirements relating to conservation of the species which militate against the issue.

The permits shall, if need be, contain additional stipulations to ensure compliance with these conditions.'

5. The Commission considers that the defendant issued the import permits in question without the conditions laid down in Article 10(1)(b) being satisfied and in support of its claim sets out the factual context in which the decision was adopted.

6. The competent French authorities issued the documents in question on 6 February 1986, but the documents refer to export permits issued by the Bolivian authorities on 5 August 1985. The Commission states that at that time there were considerable difficulties which prevented the system introduced by the Convention from functioning in Bolivia and consequently, on 30 April 1985, a resolution was adopted at the Fifth Conference of the contracting parties to the Convention in Buenos Aires, which recommended that all the parties:

'should, if the Bolivian Government has not within 90 days demonstrated to the Standing Committee that it has taken the measures needed properly to apply the Convention, refrain from accepting consignments of specimens covered by the Convention accompanied by Bolivian documents or specimens 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'.

7. After that resolution was adopted and apparently after consulting the Member States represented at the Conference, the Commission on the same day sent a telex message to the CITES management authorities in the Member States which stated that import permits should no longer be granted for the Bolivian specimens concerned.

8. It was not until it met in Lausanne from 28 October to 1 November 1985 that the CITES Standing Committee stated that it was prepared to consider that the measures subsequently adopted by the Bolivian Government were significant. Accordingly it requested the Secretariat to recommend that the contracting parties which had imposed an import ban on specimens from Bolivia should consider suspending it. Its opinion was notified to the parties by the Secretariat on 17 December 1985.

9. The CITES Committee of the Community, which was established under Article 19 of the regulation to ensure that the regulation was properly applied, discussed the situation at a meeting between 12 and 14 November 1985.

10. Following the meeting, a draft opinion was drawn up which stated that Member States might, after consultation with their scientific authority, consider that the requirements of Article 10(1)(b) and those for imports of specimens in Appendix II were being met for imports from Bolivia in the context of the quota system and other implementation measures agreed between the Government of Bolivia and the CITES Secretariat. The draft stated that quotas for *Felis geoffroyi* and *Felis wiedii* could not yet

be established, which implied that Bolivia would not issue export permits for skins of those two species until the necessary scientific and trade data were available. The Commission would inform the Member States of any decisions in that respect. The quotas set would apply to all exports between 1 May 1985 and 30 April 1986 and would not be higher than 50% of the average annual legal exports from Bolivia over the previous five years.

11. It is common ground that some Member States did not agree to these draft Minutes. At the hearing, the French Government denied that there had been any question at this meeting of quotas for the two species in question.

12. The Commission claims that a disagreement existed solely in regard to the percentage of 50%, that the basic solution provided for in the draft report was therefore agreed and that consequently imports could still not be resumed.

13. The Commission therefore considers that the French authorities responsible for issuing import permits could not reasonably have considered that the contested application satisfied the criteria laid down in Article 10(1)(b).

14. The French Government contends first of all that the contested application was granted in February 1986, that is to say after the CITES authorities had reconsidered the resolution of April 1985.

15. In my view, the extract of the summary report of the meeting of the CITES Standing Committee which was held at Lausanne between 28 October and 1 November 1985 is not entirely clear. It might be inferred from it that the resolution of 30 April 1985 was from then on to be considered to be withdrawn, at least with regard to exports accompanied by Bolivian permits issued after that meeting. Except with regard to skins of caiman crocodiles (see point 5 of the Notification to the parties dated 17 December 1985), the CITES Secretariat recommends the suspension of the import ban not because of the introduction of quotas but because of the 'significant measures' already taken by the Government of Bolivia, namely new legislation to ban the export or re-export of live fauna, the establishment of a high-level committee to supervise CITES implementation, the measures already taken to obtain scientific advice and the agreement of the Bolivian authorities to submit copies of all export permits to the Secretariat (see the second and third paragraphs of the extract from the report). The letter accompanying this extract of the report also refers, among other new factors, to the fact that from now on CITES permits issued by Bolivia will have to be signed by the Jefe nacional de vida silvestre, the management authority, *and* the Directeur général du Centro de desarrollo forestal, the scientific authority (emphasis in the original, namely point 4 of the Notification to the parties).

16. Moreover, it is clear from a document submitted to the Court by the Commission at the hearing (a passage in English in the 'Vermerk' of the BMU of 4 September 1986) that the CITES Secretariat considered that, since the Standing Committee had only discussed the situation of caimans and

no limit had been set for exports of wild-cat skins, imports of such skins should have been refused until the conclusions of a field study on the species became available.

17. I consider, however, that the true outcome of the meeting in Lausanne is of no relevance for the solution of the dispute with which we are concerned. It is established that the consignments of wild skins for which the French authorities issued import permits were accompanied by Bolivian export permits dated 5 August 1985, which were therefore issued during the period in respect of which the CITES Conference had called for an import ban. (The 90-day period referred to in the resolution of 30 April 1985 had in fact expired on 30 July 1985, without the Bolivian Government having taken measures regarded as satisfactory by the CITES authorities.) Furthermore, and in particular, the issue in the present case is whether the French Republic complied with Article 10(1)(b) of Council Regulation No 3626/82, which imposes on the Member States stricter obligations than those fixed by the Washington Convention. Article XIV of the Washington Convention permits the contracting parties to adopt stricter domestic measures regarding the conditions for trade, taking possession and so on of species covered by the Convention, or even the complete prohibition thereof.

18. Accordingly, the Community decided to treat certain species listed in Appendix II to the Washington Convention as if they appeared in Appendix I: these are the species listed in Part 1 of Annex C to the regulation. Secondly, whereas according to the Convention the importation of the species included in Appendix II is subject only to presentation of an export permit (Article IV), the importation of the species included in Part 2 of Annex C to the regulation is subject to an import permit as well. *Felis geoffroyi* and *Felis wiedii*, which were at the time included in Appendix II to the Convention,[1] were classified in Part 2 of Annex C to the regulation.

19. Thirdly, the conditions prescribed by Article 10 of the regulation for the issue of an import permit are stricter than those laid down in Articles III and IV of the Convention for the issue of export permits. Under those provisions, the scientific authority of the State of export must *advise* that such export 'will not be detrimental to the *survival* of that species'. According to Article 10 of the regulation, by contrast, it must be '*clear* . . . that the capture . . . of the specimen . . . will *not have a harmful effect* on the *conservation* of species or on the *extent of the territory occupied*[2] by the populations in question of the species'.

20. The real question raised by this case is therefore whether, with regard to a consignment of skins accompanied by an export permit issued before the new Bolivian measures entered into force, it was possible for a competent national authority to consider that the condition which I have just cited was satisfied and also that the applicant had provided proof, by means of documents issued by the competent authorities of the country of origin, that the specimen had been obtained in accordance with the legislation on protection of the species in question. In my view, that is not the case.

1 — They have since been transferred to Appendix I to the Convention.

2 — None of these words is emphasized in the original.

21. The sixth and seventh recitals to the resolution of the Conference of the contracting parties to CITES, dated 30 April 1985, refer to

'the limited success of all the efforts made by the Secretariat of the Convention to ensure that the Government of the Republic of Bolivia assumes the responsibilities arising out of ratification of this international agreement',

and

'the concern expressed by the countries in the region, in particular by certain countries bordering Bolivia, whose natural resources are directly affected by illegal trade on an increasingly wide and destructive scale in the wild fauna and flora originating in those countries'.

22. These factors were considered so alarming that, on 30 April 1985, they induced the Conference of the contracting parties to CITES to make the recommendation cited in paragraph 6 above. In the same resolution the Conference accepted:

'the Bolivian Government's undertaking to reduce CITES exports of each species to 50% of the average in the last five years'.

23. I consider that in the light of this resolution and the discussions which took place between the Member States in Buenos Aires after the resolution was adopted, the deliberations of the CITES Standing Committee at Lausanne (28 October to 1 November 1985) and of the EEC Committee in Brussels (12 to 14 November 1985), *it was no longer possible* for the authority responsible for issuing import permits to *consider that it was clear* that the capture of wild cats in Bolivia in the spring or summer of 1985 (since the export permit was dated 5 August) had *not* had a harmful effect on the conservation of the species concerned or on the extent of the territory occupied by the populations in question of the species. Nor was it certain, in view of all that had been said in the Conference of the contracting parties in April 1985 concerning the inadequacy of the controls operated in Bolivia and the discovery of many forged Bolivian CITES permits (Annex 13 to the application), that the condition laid down in the second indent to Article 10(1)(b) was satisfied.

24. I cannot therefore accept the French Government's argument that, although the issue of the permits in question was perhaps *inopportune* in so far as discussions were still taking place between the CITES Secretariat and the Bolivian Government on the conditions in which imports of *Felidae* from Bolivia might be resumed, the favourable opinion of the national scientific authority was the only decisive factor.

25. Under the regulation, the issue of an import permit does not depend upon the opinion of the national scientific authority in the country of importation, which is not even referred to in Article 10. The regulation states only, in Article 8, that 'the competent authorities' of the Member States are themselves to issue the permits, subject to the conditions laid down in Article 10. The Washington Convention itself provides for an opinion to be given by the scientific authority of the importing State only in the case of the species in Appendix I (see

Article III(3)(a), as compared with Article IV(4)). The French Government's argument might ultimately call in question the legislative nature of Article 10(1)(b), which could be turned into a provision of a purely procedural nature referring to the opinion of the national scientific authority. It should be noted that the scientific opinion in question made no reference to the very strict criteria in Article 10 of the regulation.

26. In the present case, the authorities responsible for issuing permits were therefore obliged to disregard the favourable opinion of the scientific authorities and refuse the import permits for the reasons set out above, of which it is quite possible that the national scientific authority had not been aware.

27. I therefore propose that the Court should uphold the Commission's application and it is only for the sake of completeness that I shall now consider the other arguments put forward by the parties to this dispute.

28. The defendant states that in reality the Commission is accusing it not of infringing Regulation No 3626/82 but of failing to implement the recommendation of the CITES Conference, whereas it has not been established that it was bound by that recommendation. The Commission sought to make it a binding measure through its telex message of 30 April 1985.

29. This argument cannot in my view be accepted. The applicant states very clearly that the telex message in question was merely a warning to inform the Member States that, in the Commission's opinion, the conditions laid down in Article 10(1)(b) were no longer satisfied at that time. This telex message cannot be regarded as the legal basis for the Commission's complaints.

30. The French Government further contends that the Commission's true complaint is in fact that it did not apply the consultation procedure which the Commission proposed to the members of the CITES Committee of the Community in order to guarantee the uniform application of the conditions in Article 10 by the Member States, but which that Committee did not adopt.

31. In its reply (point 6), however, the Commission states that is not complaining that the defendant did not use the concertation procedure. The Commission also denies that it is criticizing France for not having taken account of the position adopted by the Belgian authorities which, in April 1985, had concluded that the wild cats in question were under threat. Consequently, there is no need to examine these aspects of the dispute any further.

32. The defendant also states that it was for the Commission, if it considered that the conditions in Article 10 were not satisfied, to adopt the necessary ban on the basis of Article 21(1)(b) of the regulation. This provision provides as follows:

'In accordance with the procedure laid down in paragraphs 2 and 3, the committee shall . . . lay down uniform conditions for the issue of the documents referred to in Articles 10 and 11.'

The Commission also considers that this provision permits it to adopt such a ban. However, like the defendant, it raises no

argument other than referring to one of its own regulations[3] which provides for such a ban.

33. In any event it seems to me clear that, even if Article 21 permits such a ban in individual cases, it certainly does not provide that the authorities may not refuse to issue an import permit unless a Commission regulation prohibiting the imports in question has been adopted. Indeed, it could be argued that it subjects the application of Article 10 to the entry into force of general uniform rules stating the conditions which must be satisfied by any certificate referred to in Article 10. Such a regulation has in fact been adopted.[4] Therefore Article 21 could not preclude the application of Article 10 in the present case.

34. The defendant further contends that a refusal to grant the import permits applied for would not have been justified since the recommendation adopted by the Conference of the contracting parties and all the measures required of Bolivia were not directly linked to the survival of the species but rather to the need to sanction the Bolivian authorities for their inadequate implementation of the Convention.

35. I do not share that view. It should be stressed that the Convention provides for administrative measures solely with a view to ensuring the protection of the species listed in its various appendices and this protection is therefore inextricably linked with the implementation of those measures. Thus Article II of the Convention precisely provides that Appendix II, which covers all the species listed in Part 2 of Annex C to Regulation No 3626/82, is to include:

'all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival'.

36. The defendant also states that under French administrative law it is not possible to withdraw retroactively an individual measure that is lawful and has created rights. This consideration cannot, however, have any influence on the existence of the contested breach of obligations, even if it affects the means by which it may be remedied. It is clear from Article 171 of the Treaty that a Member State which has been found by the Court to have failed to fulfil its obligations must take the necessary measures to comply with the judgment of the Court, and the Court has consistently held that the defendant cannot free itself of an obligation imposed on it under Community law by relying on 'provisions, practices or situations in its domestic legal system'.[5] Furthermore, and in particular, it should be stressed that the individual measure in question infringed a Community regulation that is directly applicable under Article 189 of the Treaty and which therefore cannot be regarded as lawful.

3 — See Commission Regulation (EEC) No 2496/89 of 2 August 1989 on a prohibition on importing raw and worked ivory derived from the African elephant into the Community (OJ L 240, p. 5).

4 — See Commission Regulation (EEC) No 3418/83 of 28 November 1983 laying 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 (OJ 1983 L 344, p. 1).

5 — See the judgment in Case C-48/89, *Commission* v *Italian Republic* [1990] ECR I-2425.

37. In conclusion I would point out that in a letter produced by the Commission (Annex 9 to the application) addressed to the Federal German Ministry of the Environment, the French authorities recognized that the permits in question:

'were issued by Bolivia in August 1985, during the period in which CITES had suspended all imports from Bolivia. That is why the application made by the ARSI company ought to have been refused'.

38. Since at the hearing the Commission withdrew its complaint alleging infringement of Articles 5 and 189 of the Treaty, I propose that, for all the reasons set out above, the Court should declare that by granting the contested import permits the French Republic failed to fulfil its obligations under Article 10(1)(b) of Council Regulation No 3626/82 and should order the defendant to pay the costs.