CASE NO. 2437
REPORT IN WHICH THE COMMITTEE REQUESTS
TO BE KEPT INFORMED OF DEVELOPMENTS

Complaint against the Government of the United Kingdom presented by

— the Association of United States Engaged Staff (AUSES)

— the International Federation of Professional and Technical Employees (IFPTE)

— the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and

— Public Services International (PSI)

Allegations: The complainants allege that the Embassy of the United Kingdom to the United States refused to recognize and negotiate with the trade union chosen by the locally engaged staff to represent them; on the contrary, it allegedly unilaterally implemented changes in the terms and conditions of employment of locally engaged staff and announced plans to set up a management-dominated "Staff Representative Council", inviting employees to go through the Council rather than their union

1249. The complaint is contained in a communication from the Association of United States Engaged Staff (AUSES), the International Federation of Professional and Technical Employees (IFPTE), the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and Public Services International (PSI) dated 23 June 2005. The

IFPTE and AUSES provided additional information in a communication dated 7 September 2006.

1250. The Government replied in communications dated 23 March and 25 September 2006.

1251. The United Kingdom has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

1252. In their communication of 23 June 2005, the complainants provide first of all information on the Association of United States Engaged Staff (AUSES) and the International Federation of Professional and Technical Employees (IFPTE), indicating that the IFPTE was founded in 1918, is an affiliate of the AFL-CIO and the Canadian Labour Congress and represents more than 86,000 workers in professional, technical administrative, research and associated occupations in the United States and Canada. The AUSES, Local 71 of the IFPTE, represents more than 600 United States-hired or "locally engaged" employees who perform a variety of staff functions at the Embassy of the United Kingdom, consulates, United Nations mission, British trade offices and other British government facilities in the United States.

1253. According to the complainants, the Embassy of the United Kingdom to the United States (hereinafter the Embassy), had recognized and bargained with the AUSES as the representative of locally engaged staff for almost 50 years on terms and conditions of employment and adjustment of grievances. Most recently, while the Embassy still recognized and bargained with the AUSES, bargaining had resulted in agreement on changes in pensions and health insurance.

1254. In a democratic process beginning in December 2004, a substantial majority of United States-engaged staff joined the IFPTE and chose it as their bargaining representative by freely signing cards to that effect. In terms of the relevant ILO Conventions, they joined an organization of their own choosing to further and defend their interests. The IFPTE granted the AUSES a charter making it Local 71 of the Federation.

1255. According to the complainants, the embassy management responded to the employees' choice of representative by cancelling dues check-off and refusing to recognize and bargain with the AUSES/IFPTE Local 71. Instead, management acted unilaterally to implement several changes in terms and conditions of employment injurious to employees, without bargaining with their chosen representative. Beyond that, embassy management had launched a campaign to undermine, marginalize, and de-legitimatize the employees' chosen representative. In a number of self-serving, contradictory, ambiguous and incorrect statements, the embassy management said that it welcomed staff "input" and "positive communication and dialogue" but behind this verbiage lay unilateral management power. The complainants attached a letter dated 31 January 2005 from the Embassy Counsellor on Change Management to the AUSES chairman, which indicated: "It is our duty to run the Embassy in as efficient and productive a manner as possible. This means we will on occasion have to change policies and practices, even where they have been in place for many years. It is in all our interests that the United States network responds and adapts to the changing environment, rather than resists change."

1256. The complainants added that the AUSES/IFPTE went to great lengths offering to indeed be
responsive and responsible in adapting to change, as long as change was managed in the context of a collective bargaining relationship where workers' rights were respected and

protected. However, management moved to force significant changes on its own behind a pretence of employee "input". On 1 April 2005, the management unilaterally implemented new Terms and Conditions of Employment with changes affecting employees' salaries, pensions, health insurance, sick leave, overtime pay and other matters central to the employment relationship and universally recognized as a subject for collective bargaining where workers had chosen a representative to further and defend their interests. Citing paragraph 799 of the *Digest of decisions and principles of the Freedom of Association Committee*, fourth edition, 1996, the complainants considered that the above ran directly counter to one of the main objects of Convention No. 87 to enable employers and workers to form organizations capable of determining wages and other conditions of employment by freely concluded collective agreements.

1257. In a *Memorandum to Heads of U.S. Post* dated 11 March 2005 (attached to the complaint), the Embassy Counsellor on Change Management raised the question of "whether the International Labour Organization Conventions on core labour standards … oblige the Embassy to collectively bargain with staff over changes to terms and conditions of employment". The *Memorandum* indicated that the answer was that "they do not". Purporting to rely on "the advice of FCO [Foreign and Commonwealth Office] lawyers", the Counsellor declared that the reason for refusing to bargain with the AUSES/IFPTE was

that Convention No. 98 "does not deal with the position of public servants engaged in the administration of the State". According to the complainants, the definition of "public servants engaged in the administration of the State" does not reach locally engaged staff of an embassy. This staff does not make diplomatic or equivalent policy. The complainants noted that most of the diplomatic staff posted to the Embassy were in fact represented by a public servants' union of the United Kingdom. The collective agreement between the FCO and the union that represented the United Kingdom-hired employees in the United States (namely, the FDA) contained a clause stating that "Staff are encouraged to join and be active in trade unions recognized by the FCO." Among other things, the agreement provided for bargaining over terms and conditions of employment including pay, leave time, use of facilities and other accommodations for union business, and arbitration of unresolved disputes. Thus, according to the complainants, a fortiori, locally engaged staff have the right to form and join a trade union for the defence of their interests under Conventions Nos. 87 and 98.

1258. The complainants also attached a letter dated 13 May 2005, in which the Embassy Counsellor on Change Management and the Consul General reiterated, according to the complainants, the Embassy's total refusal to recognize and bargain with the AUSES/IFPTE. The letter was addressed to the AUSES/IFPTE national committee, saying that it was "not realistic to expect the Embassy to engage in formal collective bargaining over terms and conditions of employment with the AUSES or any other group". The complainants added that, this time, in the Counsellor's constantly shifting and consistently mistaken arguments for denying bargaining rights to United States-engaged employees, he said that the Embassy's "relatively limited autonomy over its budgets and the way it operates them" excused a refusal to recognize and bargain with the AUSES/IFPTE. The complainants cited paragraphs 895 and 899 of the *Digest*, op. cit., according to which, the authorities should give preference as far as possible to collective bargaining in determining the conditions of employment of public servants; a fair and reasonable compromise should be therefore sought between the need to preserve as far as possible the autonomy of the parties to bargaining, on the one hand, and measures which must be taken by governments to overcome their budgetary difficulties, on the other. The complainants emphasized that instead of "preference as far as possible to collective bargaining" the embassy management ruled out *ab initio* any bargaining with the AUSES/IFPTE.

1259. The complainants added that another reason proffered for refusing to bargain with the AUSES/IFPTE was that the union included some supervisors and managers. The complainants cited paragraph 231 of the *Digest* [op. cit.] in support of the view that "it is not necessarily incompatible with the requirements of Article 2 of Convention No. 87 to deny managerial or supervisory employees the right to belong to the same trade union as other workers …".

1260. The complainants added that the Embassy's negative response to the staff's choice of representative was at odds with the official position of the FCO as expressed in a telegram by the Foreign Secretary dated 5 February 2005 addressed to all diplomatic posts. The telegram (attached to the complaint) championed the ILO Declaration on Fundamental Principles and Rights at Work, recognized the importance of core labour standards and strongly supported them. According to the Foreign Secretary, "this means that we must respect the core labour standards in our own working practices". The Embassy's refusal to recognize the AUSES/IFPTE also ran counter to a letter from the Foreign Secretary dated 17 March 2005 addressed to the General Secretary of the Trades Union Congress (attached to the complaint), in which it was indicated that:

[T]he FCO, and its missions overseas, is always ready to recognize trade unions …

[T]here is no reason in principle to prevent the Embassy in Washington from recognizing voluntarily the AUSES staff association and the IFPTE union. The Embassy has recognised the staff association since 1957.
We would like to see a more formal framework for relations with staff in the US, setting out the rights and responsibilities on each side. This should include recognition of the role of the staff association and union …What I would like to suggest … is that … both sides sit down together to discuss the question of a voluntary agreement.
[I]f, as I hope, discussions get under way soon on a voluntary recognition agreement, the implementation of the package could be discussed at the same time.

Instead, however, according to the complainant, the Embassy did not recognize the AUSES/IFPTE and unilaterally implemented changes in terms and conditions of employment. Worse still, the Embassy announced plans to set up a managementdominated "Staff Representative Council" and invited employees to go through the Council rather than their union. In its bulletin entitled *In the know: News about your pay and benefits from the HR Review Team*, edition 9, dated 31 March 2005, the embassy management characterized the Council as the organization "with whom management can discuss all issues relevant to your employment with the Embassy". In its next bulletin dated 21 April 2005 it openly solicited support for its "Council", in place of the AUSES, saying:

We have … asked Heads of Post to provide us with consolidated views of the staff in their posts.
Some of the questions you will wish to consider when feeding in your views are:
Is the idea of a Staff Representative Committee/Council a good one?
If so, who should sit on the Committee?
What issues should the Committee discuss?
How often and where should the Committee meet?
Should each post be represented?
How should committee members be selected?
Should membership be rotational (i.e. each post representative would spend, say, a year on the committee, with the membership then moving to another member of the post)?
Finally, what should the Committee/Council be called?

We encourage you all to take time to discuss these questions – and any others you can think of – and feed in your views to your Head of Post/Group.
Any new Staff Committee/Council is for you. We hope it will become a key forum for discussing issues that matter most to staff with staff. If we are to get it right, we need you to tell us what you want.
Many thanks,
HR Review Team

1261. According to the complainants, underneath the language about "feeding in your views", these communications demonstrated blatant disregard for the trade union rights of United States-engaged staff and the role of their chosen representative. Instead of negotiating with the locally engaged employees' chosen representative, embassy management created and solicited employee "input" for what is known as a "company union", a managementdominated group. Citing paragraphs 771 and 779 of the ***Digest***, op. cit., the complainants recalled the importance of independence of the parties in collective bargaining and that negotiations should not be conducted on behalf of workers or their organizations by bargaining representatives appointed by or under the domination of employers or their organizations. They added that, besides setting up a management-dominated organization, the management of the Embassy, especially its personnel director, launched a campaign to undermine the union chosen by the locally engaged staff. In a series of meetings with locally engaged staff at embassy facilities around the country, he inveighed against the

employees' choice of the AUSES/IFPTE as their bargaining representative and inveigled them to look to the management-dominated "Staff Representation Council" for their dealings with management.

1262. The complainants specified that in a letter of 13 May 2005 the Embassy Counsellor on Change Management had stated that they were "willing to consider dropping for now the proposal for a staff representative committee" but only in the context of the management's outright refusal in the same letter to recognize and bargain with the AUSES/IFPTE and its insistence on unilateral management (letter attached to the complaint).

1263. The complainants further added that the embassy management unilaterally implemented changes taking advantage of retrograde features of United States labour law, refusing to bargain with the locally engaged staff's chosen representative over the changes. For example:

– United States law tied employee and family health insurance to their employer, not to a national health service. Employers who did not recognize and bargain with trade unions could impose huge new costs on employees in the form of deductibles, copayments and premium contributions. The Embassy took this dramatic step in its 1 April implementation of new terms and conditions of employment without bargaining with the AUSES/IFPTE. Management was unilaterally forcing employees to choose between increasing their out-of-pocket costs or reducing their benefits for family medical insurance, with potential liability of $3,000 in personal costs for health services. The union recognized that health care "cost-sharing" was a complex problem in collective bargaining throughout the United States, because of the lack of a national health plan. However, the way to address the problem where workers had chosen a representative was through collective bargaining, not through unilateral management action.

– United States law permitted employers, where there was no union, to require unlimited mandatory overtime work by employees (at no extra compensation for "exempt" employees) under pain of discipline, including discharge, if an employee did not work all overtime hours demanded by management, however unreasonable.

However, where employees had union representation, management should bargain with the union on overtime policy. Embassy management had negotiated with the AUSES on overtime policy before the association's affiliation with the IFPTE, but then acted unilaterally to deprive many employees of a right to pay for hours worked over the normal work week, without bargaining with the AUSES/IFPTE.

– United States law had no provision for paid sick leave but only protected an employee's right to return to her job after unpaid leave of up to 12 weeks under the Family and Medical Leave Act. Embassy management acted unilaterally to eliminate accumulated sick leave for many AUSES/IFPTE-represented staffers without bargaining with the AUSES/IFPTE.

1264. The complainants also referred to similarities between the present case and Case No. 2197 concerning the South African Embassy in Ireland (334th Report of the Committee on Freedom of Association approved by the Governing Body at its 290th Session (May–June 2004), paras 95–131). They highlighted in particular that, in response to a challenge by the Government of South Africa on grounds of non-receivability of the complaint, the Committee on Freedom of Association affirmed that:

[T]he application of the fundamental international principles of freedom of association embodied in the ILO Constitution and the Declaration of Philadelphia are applicable to all member States … [i]f there has been a violation of international labour standards or principles relevant to freedom of association and collective bargaining in this case, it is the South

African Government that is most assuredly in a position to take the necessary measures to address such a violation. The Committee thus concludes that the complaint is receivable and will now proceed with its analysis and examination of the substantive issues concerned [paras 106, 108].

Moreover, in response to the South African Government's argument that it was Irish national law, not ILO principles on freedom of association, that governed the Embassy's relationship with locally engaged staff (thus precluding collective bargaining with the union chosen by the locally engaged staff), the Committee framed the issue in that case as "whether non-recognition of the complainant [union] was a violation of international labour standards and principles concerning freedom of association". The Committee further noted that "the issue at hand is not which national law is applicable to the locally recruited personnel … but rather whether the actions at issue are contrary to international standards and principles of freedom of association". It also found that "Conventions Nos. 87 and 98 are applicable to locally recruited personnel" according to "the right of all workers, without distinction whatsoever … to form and join organizations of their own choosing" under Article 2 of Convention No. 87, and that "locally recruited staff … are not deemed to be public servants in the administration of the State".

1265. The complainants concluded by asking the Committee to invite the Governing Body to recommend that the Embassy of the United Kingdom in the United States recognize and bargain with the AUSES/IFPTE as the representative of its locally engaged staff. They also asked the Committee to request establishment of a direct contacts mission to the Embassy of the United Kingdom in the United States to promote the full implementation of freedom of association for United States-engaged staff.

1266. In a communication dated 7 September 2006, the IFPTE and AUSES added that the Embassy management's claim to offer terms and conditions of employment "which meet or exceed those offered by a good local employer" meant a change in the comparative "marker" from United States government employment standards to standards in the private sector, based on information supplied by the Mercer consulting group. As a result of this change, the Embassy management unilaterally reduced the terms and conditions of employment of locally engaged staff without bargaining with AUSES/IFPTE, the staff's

chosen trade union representative. Management sought to take advantage of downward pressure on private sector workers' wages and benefits, not least because fewer than 8 per cent of private sector workers in the United States were union represented (despite surveys indicating that millions of private sector workers would prefer to have union representation but were fearful of reprisals if they joined a union). The management used private sector comparisons to reduce employees' benefits, but insisted that the same employees were public servants without recourse to ILO protection. This kind of "cherry picking" characterized the Government's approach to the locally engaged staff's exercise of rights to freedom of association. Moreover, after using private sector comparisons to reduce benefits, the Government insisted that staff were public employees and thus excluded from coverage under United States law protecting the right to organize and bargain collectively.

1267. Thus, according to the complainants, the Government rejected those elements of United States law which required employers to bargain in good faith with the employees' chosen representative with a view to reaching a written contract. However, this was the employee representation system in the United States public employment sector as well. Where collective bargaining for public employees was permitted, public sector employers were obligated to recognize exclusive representation by a majority-selected representative of a defined bargaining unit, and to bargain in good faith toward a collective agreement. Exclusive representation by majority choice and a duty to bargain in good faith were

fundamental elements of the United States labour relations system, inside or outside the National Labor Relations Act, in the private sector and in the public sector. The complainants recalled that the Committee had already considered arguments that these elements of the United States system run afoul of Conventions Nos. 87 and 98 and had decided that exclusive representation and a duty to bargain were compatible with the Conventions. Moreover, in paragraph 821 of the *Digest*, op. cit., the Committee had noted that "Employers, including governmental authorities in the capacity of employers, should recognize for collective bargaining purposes the organizations representative of the workers employed by them." Exclusive representation met ILO standards as long as employees had a reasonable opportunity to select a different representative if a majority so chose and a minority union was permitted to function freely, though it may not have bargaining rights. As paragraph 834 of the *Digest*, op. cit., put it, "It is not necessarily incompatible with the Convention to provide for the certification of the most representative union in a given unit as the exclusive bargaining agent for that unit."

1268. Moreover, the Government's reliance on the Committee's view that "nothing in Article 4 of Convention No. 98 places a duty on the Government to enforce collective bargaining by compulsory means with a given organization" because it would "clearly alter the nature of bargaining" was misplaced according to the complainants. This constraint went to government enforcement of collective bargaining *results*, not to the employer's duty to bargain in good faith where required by law. As paragraph 849 of the *Digest*, op. cit., explained, "The opportunity which employers might have, according to the legislation, of presenting proposals for the purposes of collective bargaining – provided these proposals are merely to serve as a basis for the voluntary negotiation to which Convention No. 98 refers – cannot be considered as a violation of the principles applicable in this matter." The duty to bargain in the United States system did not alter the voluntary nature of collective bargaining because management was not compelled to *agree* to any union proposal. It was only compelled to bargain with a sincere desire to reach an agreement and to put agreements into a written contract when an overall accord was achieved. This preserved the voluntary nature of negotiations in the United States labour relations system. Since AUSES/IFPTE was the chosen representative of locally engaged staff in the United States and the Embassy purported to employ its local staff on the basis of local employment law, the complainants repeated their request that the Committee invite the Government to meet its ILO obligations and United States employment law standards by recognizing

AUSES/IFPTE as the locally engaged staff's bargaining representative and bargaining in good faith with the union toward a collective agreement.

B. The Government's reply

1269. In a communication dated 23 March 2006, the Government invited the Committee to reject the complainants' arguments on the grounds that the Government had not breached its obligations under the relevant ILO Conventions or in any way violated fundamental international principles of freedom of association.

1270. With regard to the legal framework for the employment of staff at the government offices of the United Kingdom in the United States, the Government indicated that it had an overseas network of 233 diplomatic posts. In the United States, the Government was represented by the British Embassy in Washington, the subordinate consulates-general and consulates and a number of other offices throughout the country. The Government used the term "the Embassy" in order to refer to all government offices of the United Kingdom in the United States. In addition to the 250 United Kingdom-based staff (drawn from a variety of government ministries in the United Kingdom), the Government employed some 600 locally engaged staff in the United States. Their employment was the single largest

cost to the Embassy's budget, amounting to well over $20 million per year. United Kingdom-based staff served in the United States on a temporary basis while remaining in the employment of their parent ministry at home. Their employment was governed by the law of the United Kingdom. The terms and conditions of most staff were the result of collective agreements arrived at by voluntary negotiation between the employer (the Government) and the relevant British trade unions.

1271. The 10,000 locally engaged staff in British diplomatic posts were all employed by the Secretary of State for Foreign and Commonwealth Affairs. It was the established policy and practice of the Foreign and Commonwealth Office (FCO) to act as a good and responsible employer with respect to its local staff. Their contracts of employment were governed by local law. The FCO had recently made submissions to the House of Lords in a case concerning staff who worked abroad, which included a submission to the effect that locally engaged staff were governed by local employment law. This was accepted by the Appellate Committee, who concluded that such staff did not benefit from the application of United Kingdom employment law (*Serco* v. *Lawson* [2006] UKHL 3, paragraph 39). Terms and conditions of employment for local staff had been developed through a longstanding process of voluntary negotiation and consultation, using the local staff association where one existed.

1272. In the United States, the Embassy employed its local staff on the basis of local employment law. The Embassy's stated policy was to offer terms and conditions of employment which met or exceeded those offered by a good local employer. The Association of United States Engaged Staff (AUSES) and the International Federation of Professional and Technical Employees (IFPTE) sought to represent the locally engaged staff of the Embassy, not United Kingdom-based staff.

1273. The system in the FCO for determining the pay and conditions of locally engaged staff was as follows. Since 2003, responsibility for determining the best pay and conditions for local staff had been delegated to Heads of Post within the following constraints: arrangements must be consistent with local law, fall within the budget allocated by the parent department, be affordable and sustainable in the long term and comply with Treasury rules on local staff pay. Finally, "[they] should have regard to market forces and should not exceed what is required to attract, retain and motivate suitable staff taking account, where appropriate, of the practice of the generality of local employers".

1274. The Government added that whereas in the past there was in British Embassies worldwide a significant distinction between the functions fulfilled by United Kingdom-based and locally engaged staff, with United Kingdom-based staff holding the majority of senior management positions and playing traditional diplomatic roles (such as political, press and economic work), this position had changed considerably in the last 15 years. Within the United States network, locally engaged staff had risen to senior managerial positions (including the heads of finance and human resource management at the Washington Embassy) and taken on traditional diplomatic roles previously filled by United Kingdombased staff. There were, for example, locally engaged second secretaries working in the political section of the Embassy, reporting on sensitive political issues with full security clearance and supervising United Kingdom-based administrative staff. The Embassy's press team which handled relations with the British and United States press was, with one exception, staffed by locally engaged employees.

1275. With regard to the relationship between the Embassy and the staff association, the Government indicated that the Embassy had always sought to involve its local staff in decision-making and to consult them on issues affecting their employment. The

Association representing local staff (AUSES) was set up nearly 50 years ago (in 1957) and embassy management had maintained throughout the years a close working relationship with the AUSES leadership. While there was never any formal process of negotiation with the association, they were consulted on any changes affecting employment. There were regular meetings between embassy management and the AUSES committee to discuss issues of mutual interest. While the two sides did not always agree, the meetings took place in a constructive atmosphere. Although the Embassy did not grant the formal recognition to the AUSES that the current complaint was demanding, it gave staff the necessary time to devote to AUSES business, access to embassy facilities to organize AUSES meetings, and facilitated the organization of a membership drive by allowing the display of recruitment posters and the use of official means of communication for the association to communicate with staff. When the AUSES affiliated with the IFPTE, the Embassy wanted to continue this relationship, and said so publicly (letter of 31 March 2005, attached to the response). The Embassy adopted an open and constructive approach to both the AUSES and IFPTE and acted consistently in line with good employment practice and the requirements of the relevant ILO Conventions.

1276. With regard to the factual background to the dispute, the Government indicated that, in early 2004, the Embassy embarked on a major overhaul of its employment policy. The aim of the review (set out in a communication from the Ambassador of 1 April 2004, attached to the response) was to modernize employment practices in order to be more consistent with employment conditions in United States organizations. The employment package, which had developed over the years up to 2004, had given locally engaged staff terms and conditions which were out of kilter with standard United States labour law practice. The differences were increasingly anomalous. The situation had reached a point where the effective functioning of the British diplomatic network in the United States was under pressure because of the unsustainable cost of the wages and benefits package. It was also necessary to amend the terms and conditions as a matter of urgency to remove the provision imposing a mandatory retirement age.

1277. Following the Ambassador's note to staff of 1 April 2004, embassy management continued the process of consultation and communication with staff throughout the year-long review. The need for the review was discussed with the AUSES, and a timetable published for its work. The AUSES, its members and other locally engaged staff were given every opportunity to contribute to the review (anonymously if they wished) and emerging findings were published for all staff to see and comment upon. Staff meetings were held throughout the United States network and comments received were reviewed by the human

resources (HR) team. Meetings took place with the AUSES virtually every month from March 2004 to July 2005, and several meetings were held with locally engaged staff themselves to discuss the review. Some important elements of the change proposals (e.g. the continuation of the existing pension scheme for staff already participating) were modified as the result of representations from staff. The proposal to set up a Staff Representative Council was made to address staff concerns in order to improve communication between staff and management and was abandoned in the face of opposition from staff, particularly the staff association. Far from forcing the Council upon staff, as alleged, the Embassy dropped the proposal in view of widespread opposition. The Embassy's management also committed itself to a thorough review once the new terms and conditions had been in place for one year. The AUSES would be fully involved in this process.

1278. The new package introduced in April 2005 brought the Embassy more into line with United States employment law and practice and offered a competitive package of pay and

benefits to recruit, retain and motivate the most professional possible cadre of locally engaged staff. In February 2005, the IFPTE wrote to embassy management welcoming some of the proposed changes. The union's position, as outlined in the complaint, failed to recognize that many of the changes implemented provided the majority of local staff with an improved benefits package, such as paid maternity and paternity leave (not a requirement under United States law). The union specifically criticized changes to the health benefits offered to staff in its complaint. In doing so, it failed to recognize that the new system was fairer to all staff, unlike the old one which offered anomalous advantages to staff who had been with the Embassy for many years. Employees with many years' service were able to "accumulate" their unused sick leave, giving them the opportunity to use it, for example, as unofficial maternity leave. Recently recruited staff who had been unable to accumulate sick leave enjoyed no such benefit. The new system offered proper short- and long-term disability benefit to all staff.

1279. Following the AUSES's affiliation with the IFPTE, the union called for the abandoning of the new policies and demanded that the Embassy formally negotiate the modifications through a collective bargaining process. The union made a number of demands and refused to consider any arrangement which fell short of these. An attempt to establish a voluntary framework for consultations which had been made by the Embassy (letter of 31 March 2005 attached to the response) had to be set aside with the submission of the complaint. The union was insisting on formal recognition which implied collective bargaining rights over any changes affecting the terms and conditions of locally engaged staff and exclusive rights to communicate with management over employment issues, including mandatory union involvement in disciplinary cases. The Embassy was not prepared to accept these demands. The Embassy would continue to communicate directly with staff, and there was no question of it granting exclusive rights to a union to communicate with staff on employment issues or indeed anything else. The Embassy was however prepared to discuss with the union, on a voluntary basis, pay and other employment matters, as had been indicated repeatedly, including in the letter of 17 March 2005 attached to the response. It was also of course prepared to involve the AUSES in disciplinary cases where the individual concerned wished this to happen, as was made clear in the letter of 13 May 2005 attached to the response. The offer to engage in discussions about a voluntary agreement remained open (letter of 2 August 2005, attached to the response).

1280. As for the letter by the Foreign Secretary referred to by the complainants as agreeing to "formal recognition" of the IFPTE, the Government considered that what this letter actually said was that there was no reason of principle to prevent the Embassy from recognizing voluntarily the AUSES staff association and the IFPTE union. The union, as a representative (not *the* representative) could sit down with the Embassy to discuss a voluntary agreement. There had been some such discussions and the Embassy was willing

to continue them. The Embassy never agreed, however, to compulsory collective bargaining with the union nor was it obliged to do so.

1281. The Government added that, despite the breakdown in relations, the AUSES had since June been actively involved in many of the policy issues stemming from the review. The Embassy remained determined to maintain a working relationship with representatives of its staff. The AUSES representatives had therefore observed the work of two committees: the first dealt with appeals stemming from an exercise to grade jobs across the network, and the second examined applications for bonus payments under the new performance pay scheme. Senior staff, including the management counsellor and head of human resources, held regular meetings with the AUSES chairman. This had been a positive experience, and one the Embassy saw as setting the tone for relations with staff representatives in the

future.

1282. The Government further explained that the Embassy was not prepared to agree to collective bargaining for a number of legal and practical reasons. First, the US Labor Relations Act specifically exempted federal, state and local governments from its provisions so there is no legal framework governing the standards by which the Embassy should approach its dealings with local staff. Furthermore, United States labour law did not allow for managers and people they managed to be part of the same union (clearly the case in the Embassy where AUSES membership is open to all staff). Some 26 per cent of the Embassy's locally engaged staff held management positions. Including such supervisors in the same union as non-managers would risk pitting the individuals responsible for developing and implementing policies against the Embassy. The Embassy would have no objection to such staff forming their own association, or affiliating with a union, but would not accept either compulsory membership or agree to formal collective bargaining with it.

1283. The Government added that the union chose not to pursue its case through the National Labor Relations Board (NLRB) because it was seeking protection in excess of that provided in United States labour law for other employers. Collective bargaining as demanded by the union was not a right under the legislation. If the union had chosen to go to the NLRB, it would have been obliged to comply with a number of United States labour law requirements regarding, for example, the separation of managerial and non-managerial employees and the organization of the staff association, such as the organization of elections to positions of responsibility. In adopting a progressive and constructive approach to these issues, the Embassy had gone far beyond what was required of it under United States law.

1284. According to the Government, where the United Kingdom acted as employer of locally engaged embassy staff outside its own territory, the contracts of employment were governed by the law of the receiving State and so the United Kingdom was bound to comply with the employment law of the receiving State. So, in this case, the Embassy was bound to comply with the terms of United States employment law. The complaint did not indeed allege that rights available to the union under United States law had been denied by the Embassy and the United Kingdom maintained that it had complied with all applicable rights under United States law for the reasons given above.

1285. With regard to the allegations of breach by the Government of its obligations under Conventions Nos. 87 and 98, the Government indicated that the obligation of a State party to an ILO Convention was to give effect to its provisions in its own territory. The complaint concerned acts or omissions by the British Embassy in the territory of the United States The premises of a diplomatic or consular mission did not form part of the territory of the sending State: see articles 21 and 22 of the Vienna Convention on Diplomatic Relations and articles 30 and 31 of the Vienna Convention on Consular

Relations. In contrast to other human rights instruments, the ILO Constitution and Conventions did not contain a jurisdictional clause extending protection to those "within the jurisdiction of" a contracting party. Such provisions had been considered to extend Convention rights to acts occurring outside the territory of the State concerned, including to the acts of diplomatic and consular agents outside the territory of the State, but none such existed in the case of ILO instruments. The Government believed that it was not therefore under any legal obligation to give effect to ILO Conventions in a diplomatic or consular mission overseas.

1286. With regard to Case No. 2197 (which concerned the Embassy of South Africa in Ireland), the Government indicated that, although the Committee had decided that Conventions

Nos. 87 and 98 were applicable to locally recruited personnel, the basis on which this decision was reached was not clear. It was also not clear whether the Committee had the benefit of any argument as to whether the Conventions were applicable outside the territory of the contracting party concerned – in that case, South Africa. Paragraph 109 of the Committee's report described the claim as being that "South Africa has failed to secure the effective observance within its jurisdiction, and specifically within its Embassy to Ireland, of ILO Conventions Nos. 87 and 98". According to the Government, if the Committee was applying a "jurisdictional" approach rather than a territorial approach, it should be respectfully submitted that this was not the correct approach.

1287. In the alternative, if the Committee decided that the United Kingdom's obligations under ILO Conventions did apply to its actions as employer in the United States then the United Kingdom would maintain that it was not in breach of those obligations for the following reasons.

1288. First, with regard to Convention No. 87, the Government did not interfere in any sense with the freedom of association or the right to organize as provided in the Convention. The Embassy complied with the requirements of the Convention by allowing the union to recruit members, organize meetings, communicate with its members, etc. The Embassy maintained a close working relationship with the AUSES leadership from the days when the AUSES, as a staff association, first came into being. It granted facilities to organize meetings and a membership drive by allowing the display of recruitment posters and the use of official means of communication to communicate with staff. None of this changed when the AUSES affiliated with the IFPTE. The Embassy wanted to continue the constructive relationship and said so publicly. It dealt with the union as a legitimate representative of embassy staff, and has had many meetings with the union about the review and other matters. It dropped the proposal for a Staff Representative Council at the request of the staff association/union. The union's complaint to the Committee was focused on the Embassy's refusal to recognize it for collective bargaining purposes, and therefore fell to be considered primarily under Convention No. 98.

1289. Second, with regard to Convention No. 98, the Government recalled that the complainants' reliance on Case No. 2197 in support of the argument that embassy staff were not public servants engaged in the administration of the State, and thus were not subject to the exception of Article 6 of the Convention, was misplaced for several reasons. In the first place, the complainants misrepresented the Case's holding, citing it for the proposition that "locally recruited staff … are not deemed to be public servants in the administration of the State". However, the complainants used only a partial quotation of the case and took the language out of context. A closer review of the South African Embassy case would demonstrate that it was inapposite. With regard to embassy employees as public servants, the Committee had stated that: "As for Convention No. 98, at no time does the Government contend that the employees in question, stated to be in the administrative support section, are excluded under Article 6, and even the Government's own assertion that these locally engaged staff are covered by Irish rather than South African legislation,

would confirm that they are not deemed to be public servants engaged in the administration of the State" [Case No. 2197, op. cit., para. 130]. Accordingly, then, the Committee did not decide in the South African Embassy case that all locally engaged embassy staff are not public servants within the meaning of Article 6 of Convention No. 98. Rather, the Committee merely noted in its response that the South African Government had not maintained that its locally engaged staff were public servants. The Committee clearly recognized that locally engaged staff could in principle fall within the exclusion of Article 6 of Convention No. 98.

1290. The position of the Government was that locally engaged staff represented by the union were public servants engaged in the administration of the State, for the purposes of Article 6 of Convention No. 98. The criteria for the applicability of Article 6 were related to the functions that an employee performed and were not determined by an employee's nationality or whether they were United Kingdom-based or locally engaged staff. Many of the Embassy's locally engaged staff were clearly engaged in identical activities to their United Kingdom-based colleagues. The governing law of the employment contract of the locally engaged staff was not a determining factor. In the British Embassy in the United States, some 26 per cent of locally engaged staff were performing senior managerial and other functions on behalf of the United Kingdom and were obviously engaged in the administration of the United Kingdom, which included its foreign relations. However, it was not just those performing senior managerial functions who were engaged in the administration of the United Kingdom: all locally engaged staff employed by the Foreign Secretary in the United States were Crown servants, and had the status to act as agents of the Government of the United Kingdom. They all worked in an environment where they either dealt with or might become aware of highly sensitive government information. They were all clearly working as public servants, working for the Government of the United Kingdom, a public entity. It followed that, in the submission of the Government, all of the locally engaged staff in the United States were engaged in the administration of the State for the purposes of Article 6 of Convention No. 98.

1291. Finally, always with regard to Convention No. 98, the Government maintained that it complied with its obligations under Article 4 of that Convention, to the extent that it might be held to apply and in respect of any members of staff to whom it applied. The Government considered that Article 4 of Convention No. 98 did not mandate collective bargaining between the Embassy and the union which was demanding formal collective bargaining. While the Embassy was eager to return to the constructive dialogue it enjoyed with the staff association (and the union) prior to the complaint, it was not prepared to consent to a formal collective bargaining arrangement and was not required to engage in such bargaining under the terms of any ILO Convention. In facilitating the union and staff association's activities and involving them in an open and consultative process on the new terms and conditions, the Embassy took every possible step to "encourage and promote" measures for voluntary negotiation. It was well established that the obligations under Convention No. 98 did not include a uniform system of compulsory collective bargaining. What it required was merely that measures be taken to encourage and promote machinery for collective bargaining. Further, the wording of Article 4 itself made clear both that the measures needed to be no more than was appropriate to national conditions and that this was a voluntary system – the Article referred explicitly to the machinery in question being for voluntary negotiation and the measures needed only be taken where necessary, implying a margin of discretion for the State party. It was the long-standing view of the Committee on Freedom of Association and the Committee of Experts that "nothing in Article 4 of Convention No. 98 place a duty on the Government to enforce collective bargaining, by compulsory means, with a given organization, an intervention which, as the Committee has already stated [in a previous case], 'would clearly alter the nature of such bargaining'" [Case No. 96 (1954), 13th Report, para. 137]. When faced with observations

against the United Kingdom by the British Trades Union Congress and the National Union of Journalists, the Committee of Experts concluded, as had the Committee on Freedom of Association, that conformity with Article 4 did not impose a duty to have in place machinery whereby employers can be obliged to negotiate with trade unions representing the staff imposed in any particular industry. To impose such an obligation would alter the

voluntary nature of collective bargaining [78th Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4A), pp. 290–291]. Thus, nothing in Convention No. 98 required a government to impose, either on other employers or on itself as employer, a duty to recognize for collective bargaining purposes a trade union.

1292. Moreover, according to the Government, nothing in Conventions Nos. 87 or 98 conferred on the union the particular status which it was seeking as the sole representative of embassy staff. The Embassy had been willing to have discussions with the union and to consult with it in the ways described earlier.

1293. As the Embassy had little control over the budget allocated to it, and many other aspects of its ownership, it was impossible for the Embassy to agree to recognize an exclusive employees' union or to agree to binding collective bargaining. The Embassy had, however, taken measures within its control to promote the full development and utilization of machinery for consultations with its locally engaged staff; it had worked with the AUSES for over 50 years and had recently indicated its willingness to enter into a voluntary arrangement with the IFPTE. Moreover, the Embassy was eager to continue such dialogue with its employees and their representatives.

1294. The Government further noted that, to the extent that Convention No. 98 applies to the Embassy and that some or all members of the Embassy were excluded under Article 6 of that Convention, it might be that Convention No. 151 was relevant. The complainants had not raised Convention No. 151 in the complaint and the Government mentioned it solely for completeness and the avoidance of doubt. However, even Convention No. 151 contained an exemption for certain employees. Article 1(2) provided that the extent to which the guarantees in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations. The Government was prepared to accept for the sake of argument that Convention No. 151 could apply to embassy staff to whom Article 6 of Convention No. 98 applied. Even if that were so, Convention No. 151 did not provide a right to collective bargaining. Like Convention No. 98, Convention No. 151 only required that "measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organizations …". In addition, it gave the State party the option of employing alternatives to meet the obligation by referring to "of such other methods as will allow representatives of public employees to participate in the determination of these matters" (Article 7). Provisions which allowed the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall budgetary package were compatible with the Convention, provided they left a significant role to collective bargaining [General Survey on freedom of association and collective bargaining by the Committee of Experts on the Application of Conventions and Recommendations, 1994, paras 262 and 263]. Workers and their organizations should of course be able to participate fully and meaningfully in designing the overall bargaining framework. The Government believed this to have been the case with locally engaged staff and the union, and assured the Committee that this would continue to be so.

1295. Finally, the Government indicated with regard to the request for a direct contacts mission, that this would be unnecessary and wholly inappropriate.

1296. In a communication dated 25 September 2006, the Government provided additional

information with regard to its position that locally engaged staff are public servants engaged in the administration of the State. The Government submitted a statistical table (see annex) and examples of the duties performed by locally engaged staff across the United States network, ranging from support staff at pay reference point one through to the most senior level positions at pay reference point ten. The Government also attached detailed job descriptions of a representative sample of locally engaged staff. The Government added that all these jobs (including those at lower reference points) involved access to Embassy buildings and facilities and might provide opportunities for hostile persons to infiltrate; accordingly, they were all subject to security clearance. Most job holders worked with or might become aware of highly sensitive government information, even those at low reference points (e.g. passport clerk at point two, passport examiner at point three, visits and administration officer, personal assistant to press secretary at point four) and this was obviously the case for all jobs at points five to ten inclusive. The duties of nearly all the job holders showed quite clearly that they were "engaged in the administration of the State" to the same extent as if they were working for the Government of the United Kingdom.

1297. Finally, with regard to the complainants' allegation that the Embassy management "responded to the employees' choice of representative by cancelling dues check-off", the Government denied that this was the case and indicated that prior to AUSES affiliating with the IFPTE, the Embassy deducted membership fees twice yearly from the salaries of staff who were members of AUSES. The last fees were deducted in December 2004. By the time the next fees would have been due to be deducted, AUSES had affiliated with IFPTE and was insisting as part of the recognition issue that the Embassy deduct union dues from all staff, regardless of whether they were members of the union. The Embassy declined to do so. Nothing in Convention No. 98 required a government to impose, either on other employers or on itself as an employer, a duty to recognize for collective bargaining purposes a trade union. Nor did it oblige an employer to agree to a check-off arrangement. However, setting aside the issue of recognition, the Government confirmed that it had no problem in principle with the Embassy making deductions from its payroll for AUSES/IFPTE members.

C. The Committee's conclusions

1298. *The Committee notes that the present case concerns allegations that the Embassy of the United Kingdom to the United States – hereinafter the Embassy – refused to recognize and negotiate with the trade union chosen by the locally engaged staff to represent them and unilaterally implemented changes in the terms and conditions of employment of locally engaged staff while it announced plans to set up a management-dominated "Staff Representative Council", inviting employees to go through the Council rather than their union.*

1299. *The Committee notes that, according to the complainants, the Embassy had recognized and bargained with the Association of United States Engaged Staff (AUSES) as the representative of locally engaged staff on terms and conditions of employment for almost 50 years. In a democratic process beginning in December 2004, a substantial majority of locally (United States) engaged staff joined the International Federation of Professional and Technical Employees (IFPTE) and chose it as their bargaining representative. Thus, the AUSES became Local 71 of the IFPTE. The embassy management responded to the employees' choice of representative by cancelling dues check-off and refusing to recognize*

and bargain with the AUSES/IFPTE Local 71. Instead, management acted unilaterally to implement several changes in terms and conditions of employment injurious to employees and launched a campaign to undermine, marginalize and de-legitimatize the employees'

chosen representative.

1300. *In particular, according to the complainants, on 1 April 2005, the management unilaterally implemented new Terms and Conditions of Employment with changes in the terms and conditions of employment of locally engaged staff in relation to salaries, pensions, health insurance, sick leave, overtime pay and other matters central to the employment relationship, taking advantage of retrograde features of United States labour law (e.g. in the areas of health insurance, overtime and sick leave), while refusing to bargain with the locally engaged staff's chosen representative over the changes. The complainants attach various communications in which the Embassy expresses the view that it has no obligation under Convention No. 98 to collectively bargain with staff over changes to terms and conditions of employment (*Memorandum to Heads of United States Post *dated 11 March 2005) and categorically refuses to recognize and bargain with the union (letter dated 13 May 2005 by the Embassy Counsellor on Change Management and the Consul General). The arguments put forward for this refusal are, in particular, that Convention No. 98 does not deal with the position of public servants engaged in the administration of the State.*

1301. *In response to these objections, the complainants contend that the definition of public servants engaged in the administration of the State does not include locally engaged staff of an embassy as this staff do not make diplomatic or equivalent policy. Moreover, that most of the diplomatic staff posted to the Embassy are in fact represented by a United Kingdom public servants' union and are covered by a collective agreement which provides for bargaining over terms and conditions of employment (the Government confirms this point in its reply)*; a fortiori, *therefore, locally engaged staff should have the same rights.*

1302. *The complainants further note that the Embassy's negative response is at odds with the official position of the Foreign and Commonwealth Office (FCO) as expressed in a telegram and a letter by the Foreign Secretary dated 5 February and 17 March 2005 respectively, in which the Foreign Secretary indicates that "there is no reason in principle to prevent the Embassy in Washington from recognizing voluntarily the AUSES staff association and the IFPTE union" and suggests that "both sides sit down together to discuss the question of a voluntary agreement". The complainants assert that, instead of conforming with this position, the Embassy not only refused to recognize the union for collective bargaining purposes but also announced plans to set up a managementdominated "Staff Representative Council" and invited employees to go through the Council rather than their union (in this respect, the complainants quote the bulletin entitled* In the know: News about your pay and benefits from the HR Review Team *dated 31 March and 21 April 2005). This proposal was subsequently dropped, according to the complainants, but only in the context of the management's outright refusal to recognize and bargain with the AUSES/IFPTE (the complainants attach in this respect a letter from the embassy management dated 13 May 2005).*

1303. *The Committee notes that, in its reply, the Government indicates that the 10,000 locally engaged staff in British diplomatic posts are all employed by the Secretary of State for Foreign and Commonwealth Affairs. Their contracts of employment are governed by local law. Since 2003, responsibility for determining the best pay and conditions for local staff has been delegated to Heads of Post within the following constraints: arrangements must be consistent with local law, fall within the budget allocated by the parent department, be affordable and sustainable in the long term and comply with Treasury rules on local staff pay. Finally, they should have regard to market forces. The Government adds that, whereas in the past there was in British Embassies worldwide a significant distinction*

between the functions fulfilled by United Kingdom-based and locally engaged staff, this

position changed considerably in the last 15 years. Within the United States network, locally engaged staff has risen to senior managerial positions (including the heads of finance and human resource management at the Washington Embassy) and taken on traditional diplomatic roles previously filled by United Kingdom-based staff. There are, for example, locally engaged second secretaries working in the political section of the Embassy.

1304. *With regard to the issue of relations between the Embassy and the staff association, the Committee notes that, according to the Government, the Embassy has always sought to involve its local staff in decision-making and to consult them on issues affecting their employment. Embassy management had maintained for almost 50 years a close working relationship with the AUSES leadership. While there was never any formal process of negotiation with the association, they were consulted on any changes affecting employment. When the AUSES affiliated with the IFPTE, the Embassy wanted to continue this relationship and said so publicly. The Government attaches in this respect a letter of 31 March 2005 (see below).*

1305. *With regard to the factual background to the dispute, the Committee notes that, according to the Government, in early 2004 the Embassy embarked on a major overhaul of its employment policy in order to modernize employment practices so as to be more consistent with employment conditions in United States organizations. The Ambassador's note to staff of 1 April 2004, attached to the Government's reply, provides that:*

Heads of United States Posts and the Washington Board of Management have decided to review the terms and conditions of employment of locally engaged staff in the United States. We believe that the present arrangements do not represent the best professional employment practices for our staff, and that we need a new approach. This note describes the principles that will guide this new approach, how the new arrangements will be put in place, and how you can be involved. … Consultation will be an important part of how the [HR] team operates. The team will have a rolling programme for consulting AUSES and other staff on the emerging options. They will draft and consult on a revised staff handbook setting out terms and conditions of employment. … You are welcome individually and collectively to offer advice at every stage. We are setting up an electronic suggestion box to which people can send comments and suggestions on this or any other subject.

According to the Government, pursuant to this note, the embassy management continued the process of consultation and communication with staff throughout the year-long review. The AUSES, its members and other locally engaged staff were given every opportunity to contribute to the review (anonymously if they wished) and emerging findings were published for all staff to see and comment upon. Meetings took place with the AUSES virtually every month from March 2004 to July 2005.

1306. *The Government also indicates that a proposal to set up a Staff Representative Council was made to address staff concerns in order to improve communication between staff and management and was abandoned in the face of opposition from staff, particularly the staff association. The new package introduced in April 2005 brought the Embassy more into line with United States employment law and practice and offered a competitive package of pay and benefits to recruit, retain and motivate the most professional possible cadre of locally engaged staff. The Government expresses the view that the union's position, as outlined in the complaint, fails to recognize that many of the changes implemented provide the majority of local staff with an improved benefits package in relation to United States law; the union specifically criticizes changes to the health benefits offered to staff, failing to recognize that the new system is fairer to all staff, unlike the old one which offered anomalous advantages to staff who had been with the Embassy for many years.*

1307. *The Committee also notes that, according to the Government, following the AUSES's*

affiliation with the IFPTE (after December 2004), the union called for the abandoning of the new policies and demanded that the Embassy formally negotiate the modifications through a collective bargaining process. The union was insisting on formal recognition which implied collective bargaining rights over any changes affecting the terms and conditions of locally engaged staff and exclusive rights to communicate with management over employment issues, including mandatory union involvement in disciplinary cases. The Embassy was not prepared to accept these demands. It was however prepared to discuss with the union, on a voluntary basis, pay and other employment matters (the Government attached letters dated 13 May and 2 August 2005 in this respect). The Government indicates that this is in conformity with the letter by the Foreign Secretary referred to by the complainants which actually said that there was no reason of principle to prevent the Embassy from recognizing voluntarily the AUSES staff association and the IFPTE union. The union, as a representative (not the representative) could sit down with the Embassy to discuss a voluntary agreement. There had been some such discussions and the Embassy was willing to continue them. However, the attempt by the Embassy to establish a voluntary framework for consultations had been set aside with the submission of the present complaint by the AUSES/IFPTE.

1308. *According to the Government, the Embassy never agreed to compulsory collective bargaining with the union, nor was it obliged to do so, for a number of legal and practical reasons. In the first place, the Government states that, where it acts as employer of locally engaged embassy staff outside its own territory, the contracts of employment are governed by the law of the receiving State and so the Government is bound to comply with the employment law of the receiving State (according to the Government, this was confirmed in a recent decision by the Appellate Committee of the House of Lords:* Serco *v.* Lawson *[2006] UKHL 3, paragraph 39). However, the US Labor Relations Act specifically exempts federal, state and local governments from its provisions so there is no legal framework governing the standards by which the Embassy should approach its dealings with local staff. In general, the AUSES/IFPTE is seeking protection in excess of that provided in United States labour law, the reason for which it chose not to pursue its case through the National Labor Relations Board (NLRB) in the United States.*

1309. *In this respect, the Committee recalls the conclusions reached in a similar case concerning the locally recruited staff of the Embassy of South Africa in Ireland [Case No. 2197, 334th Report, approved by the Governing Body at its 290th Session (May–June 2004), paras 95-131]. The Committee recalls that the Government of the sending State (South Africa) had argued that the relationship between an embassy as employer and its locally recruited personnel is governed by the law of the country in which the embassy is situated. The Government of the receiving State (Ireland) had informed the CFA that the question of whether local staff was subject to the law of the receiving State or, on the contrary, was vested with immunity, had not been settled (in Ireland) and depended on the specific functions performed by such staff. In that context, the Committee had considered that, "while the question of whether the law of the receiving State applies to the locally recruited personnel in a given embassy is dependent on a variety of circumstances that can only be determined on a case-by-case basis, the application of the fundamental international principles of freedom of association embodied in the ILO Constitution and the Declaration of Philadelphia are applicable to all member States." "In view of this principle which binds ILO member States, it would be anomalous to abandon the locally recruited personnel, in this case, at the international level, merely because of an ambiguous situation relevant to the application of national law. Thus, while the national laws applicable to the locally recruited personnel have yet to be determined, the Committee, in the interests of justice, may look to the authority relevant to the employer, the Embassy, which in this case is clearly the Government, in light of the uncontested*

around the world" [op. cit., paras 106–107]. The Committee therefore concluded that "if there has been a violation of international labour standards or principles relative to freedom of association and collective bargaining in this case, it is the South African Government [the sending State] that is most assuredly in a position to take the necessary measures to address such a violation" [op. cit., para. 108].

1310. *The Committee notes that the Government questions the Committee's previous decision in Case No. 2197 on the ground that, although the Committee had decided that Conventions Nos. 87 and 98 were applicable to locally recruited personnel, the basis on which this decision was reached was not clear. According to the Government, if the Committee was applying a "jurisdictional" approach rather than a "territorial" approach, it should be respectfully submitted that this was not the correct approach. The obligation of a State party to an ILO Convention is to give effect to its provisions in its own territory. The Government refers to articles 21 and 22 of the Vienna Convention on Diplomatic Relations and articles 30 and 31 of the Vienna Convention on Consular Relations in support of the argument that the premises of a diplomatic or consular mission do not form part of the territory of the sending State. It adds that, in contrast to other human rights instruments, the ILO Constitution and Conventions do not contain a jurisdictional clause extending protection to those "within the jurisdiction of" a contracting party which would extend Convention rights to acts occurring outside the territory of the State concerned, including to the acts of diplomatic and consular agents outside the territory of the State. Thus, the Government is not under any obligation to give effect to ILO Conventions in diplomatic or consular missions with regard to locally engaged staff as the appropriate criterion in this respect is territorial and not jurisdictional. According to the Government, ILO Conventions apply throughout the territory of a State but do not extend to acts occurring outside the territory of the State concerned, including to the acts of diplomatic and consular agents outside the territory of the State.*

1311. *The Committee notes that by referring to the articles of the Vienna Conventions on Diplomatic and Consular Relations, the Government raises an important issue which is that of the sovereign immunity of the officers of the embassy, consulate and other offices of a State, in carrying out their functions. The Committee is of the view that the fact that the officers of the embassy, consulate, etc., are covered by immunity in the exercise of their functions, including the exercise of functions as employer of locally engaged staff, indicates two things: first, that it is the government of the sending State that exercises sovereign authority over the embassy, consulate, etc., including its staff; in particular, even if local law is applicable to locally engaged staff, it cannot be enforced against the embassy or consulate authorities, as employers, due to their immunity (thus, it is questionable whether the locally engaged personnel might indeed have recourse to the NLRB against the embassy); and second, that the government of the sending State is in the best position, as employer of the locally engaged staff, to take the necessary measures to ensure that fundamental principles relative to freedom of association and collective bargaining are observed with regard to such staff. As a result of the above, the Committee has difficulty accepting the Government's argument that it has no obligation to give effect to fundamental principles on freedom of association and collective bargaining in embassies, consulates and other offices, given that it is the Government that exercises sovereign authority over the offices in question and it is the Government, in its quality as employer, that is in a position to ensure the effective implementation of the principles in the offices in question.*

1312. *The Committee wishes to emphasize in this respect that, when a State decides to become a*

*Member of the Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association [**Digest of decisions and principles of the Freedom of Association**

***Committee**, fifth edition, 2006, para. 15]; all ILO member States are therefore expected to give effect to these principles as expressed and developed in the fundamental Conventions on freedom of association and collective bargaining and this duty extends, in the Committee's view, to the embassies, consulates and other offices, as an integral part of the public administration. The Committee observes that this is reflected in the Foreign Secretary's communication dated 5 February 2005 which indicates that all diplomatic posts of the United Kingdom "must respect the core labour standards [based on the eight ILO core Conventions] in our own working practices". Thus, even if the Committee were to accept the Government's argument that ILO Conventions were not applicable to embassies because they do not form part of its territory, the Committee considers that this argument does not apply to the fundamental principles of freedom of association, respect for which it has been mandated to promote. The Committee will therefore proceed with its examination of the Government's further arguments relating to the substantive application of the freedom of association Conventions in so far as they are relevant to the fundamental principles of freedom of association.*

1313. *The Committee further notes that the Government maintains that, even if ILO Conventions on freedom of association and collective bargaining are found to be applicable, it is still not in breach of any obligations under the ILO Conventions as it is under no obligation to engage in collective bargaining with the AUSES/IFPTE or to recognize this union for collective bargaining purposes, for the following reasons: (1) locally engaged staff of the Embassy are public servants engaged in the administration of the State falling under the exclusion of Article 6 of Convention No. 98; (2) in respect of any member of staff who might not fall within this exclusion, Article 4 of Convention No. 98 does not mandate collective bargaining or place any duty on the Government to enforce collective bargaining by compulsory means, as it refers explicitly to machinery for voluntary negotiation; and (3) by facilitating the union and staff association's activities and being ready to engage in constructive dialogue (instead of formal collective bargaining), the Embassy took every possible step to "encourage and promote measures for voluntary negotiation" in accordance with the provisions of the Convention; it will therefore continue to communicate directly with staff and there is no question of granting exclusive rights to a union in this respect; it has offered to engage in discussions about a voluntary agreement and is prepared to discuss with the union, on a voluntary basis, pay and other employment matters as indicated in the letters of 17 March and 13 May 2005. The Government also considers that it has not violated Convention No. 87 as it has never interfered in any sense with freedom of association or the right to organize and has allowed the AUSES/IFPTE to recruit members, organize meetings, communicate with its members, etc.*

1314. *With regard to whether Article 4 of Convention No. 98 places a duty on the Government to enforce collective bargaining (point (2) raised by the Government above), the Committee recalls that Article 4 of Convention No. 98 requires measures to encourage and promote the full development and utilization of machinery for voluntary negotiation with a view to the regulation of terms and conditions of employment by means of collective agreements; the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners is a fundamental aspect of the principles of freedom of association. Collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such*

*bargaining. Thus, nothing in Article 4 of Convention No. 98 places a duty on the Government to enforce collective bargaining by compulsory means with a given organization; such an intervention would clearly alter the nature of bargaining [**Digest**, op. cit., paras 925-927]. At the same time, the Committee considers that, whereas governments are not under a duty to enforce collective bargaining by compulsory means, they are under a duty to encourage and promote voluntary collective bargaining in good faith between the parties, including the government itself in the quality of employer. The*

*Committee emphasizes the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations. Both employers and trade unions should bargain in good faith and make every effort to come to an agreement, and satisfactory labour relations depend primarily on the attitudes of the parties towards each other and on their mutual confidence; genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [**Digest**, op. cit., paras 934-936].*

1315. *The Committee notes in this respect that, according to the Government, the AUSES/IFPTE adopted an uncompromising attitude by insisting on formal recognition which implied collective bargaining rights over any changes affecting the terms and conditions of locally engaged staff and exclusive rights to communication with management over employment issues – something that the Government would not accept. The Committee notes that, according to the complainants, the Embassy should recognize the union as the exclusive representative for the bargaining unit, as long as AUSES/IFPTE is the majority-selected union and the Embassy purports to employ its locally engaged staff on the basis of United States law which in fact establishes an exclusive representation system both in the private and public sectors. The Committee recalls that, while the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other party is a matter for negotiation between the parties, both employers and trade unions should bargain in good faith making every effort to reach an agreement [**Digest**, op. cit., para. 938]. With regard to the issue of exclusive representation in particular, the Committee recalls that systems of collective bargaining with exclusive rights for the most representative trade union and those where it is possible for a number of collective agreements to be concluded by a number of trade unions within a company are both compatible with the principles of freedom of association [**Digest**, op. cit., para. 950].*

1316. *Moving on to the question of whether collective bargaining was in fact encouraged and promoted (point (3) above), the Committee takes due note of the Government's statement that measures were taken by the Embassy in order to allow the union to recruit members, organize meetings, use official means of communication to communicate with staff and use facilities to organize meetings. Moreover, the Committee takes due note of the Government's reply to the allegation that the proposal for setting up a staff council, which was initially promoted, was dropped in the light of opposition from the union. It also notes, however, that the Embassy cancelled the dues check-off once the AUSES affiliated with the IFPTE on the ground that the union insisted, as part of the recognition issue, that the Embassy deduct union dues from all staff. The Committee recalls in this respect that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [**Digest**, op. cit., para. 475]. The Committee does, however, consider it inconsistent with the principles of freedom of association to unilaterally extend the check-off facility to all staff without a collective agreement between the parties to that effect.*

1317. *Furthermore, the Committee observes that the Embassy repeatedly and categorically*

refused to engage in negotiations with the union, proposing to establish a framework for consultations instead. For instance, the Committee notes that in the letter dated 13 March 2005, the embassy management indicated that:

… it was not realistic to expect the Embassy to engage in formal collective bargaining over terms and conditions of employment with AUSES or any other group … We would be willing to commit to discussing any proposed changes with you in advance, before any action is taken. However, we would reserve the right, where there are compelling business reasons, to make the changes we deem necessary even if we have not been able to reach agreement with you. …

As I said previously, the result of our [proposed] discussions is not going to be a "bargaining agreement" or "final package".

The Committee also notes from the letter dated 31 March 2005 that the Embassy's offer for voluntary discussions did not constitute in any way an invitation to collective bargaining as it focused mainly on union involvement in individual grievances and was based on language which avoided any allusion to negotiating a collective agreement, or renegotiating the unilateral decision to change the terms and conditions of employment of locally engaged staff. In particular, the letter indicated, among other things, that "there are compelling business reasons why the Embassy must introduce the new handbook of employment policies on 1 April 2006" but that the Embassy did "want to continue the dialogue with the staff and their representatives on our employment policies". Recognizing that the Embassy does not "currently have a forum for the exchange of ideas and concerns on employment issues between staff, their representatives and management", they "would like the staff association and union to play an active part in these discussions" and were pleased to discuss "the possible terms of a voluntary agreement between us to recognize your role. In particular, we believe that there is a good deal of common ground between us on the role of the union in grievance and disciplinary procedures".

1318. *The Committee observes that the question of whether voluntary consultations can be envisaged as an alternative to negotiations is linked to the question of whether locally engaged staff are public servants engaged in the administration of the State falling under the exclusion of Article 6 of Convention No. 98 (point (1) raised by the Government above). The Committee notes that, according to the complainants, the definition of public servants engaged in the administration of the State does not reach locally engaged staff of an embassy as this staff do not make diplomatic or equivalent policy. The Committee also notes however that, according to the Government, many of the Embassy's locally engaged staff are clearly engaged in identical activities to their United Kingdom-based colleagues. There are locally engaged second secretaries working in the political section of the Embassy, reporting on sensitive political issues with full security clearance and supervising United Kingdom-based administrative staff. The Committee also notes that, according to the Government, some locally engaged staff hold senior management positions (head of finance and human resource management) and that 26 per cent of locally engaged staff perform senior managerial and other functions. The Government considers that these are therefore obviously engaged in the administration of the State, which includes its foreign relations. However, it is not just those performing senior managerial functions who are engaged in the administration of the State: all locally engaged staff employed by the Foreign Secretary in the United States are Crown servants, and have the status to act as agents of the Government of the United Kingdom. They all work in an environment where they either deal with or might become aware of highly sensitive government information and are subject to security clearance. They are all clearly working as public servants for the Government of the United Kingdom. It follows that, in the submission of the Government, all of the locally engaged staff in the United*

States are engaged in the administration of the State for the purposes of Article 6 of Convention No. 98. The Committee further notes that, in a subsequent communication, the Government provided a statistical table (see annex) and detailed job descriptions of a representative sample of locally engaged staff.

1319. *The Committee observes that the tasks of locally engaged staff as communicated by the Government include building-related maintenance, property management and procurement, administrative assistance to various departments as well as lobbying, consultancies and advisory services (at various pay levels) in the following areas: human resources (including comparative analyses of the United States-United Kingdom systems in the areas of pensions, welfare and labour market policy); trade and investment; United Kingdom-United States business relations; United States regulations affecting United*

Kingdom economic interests; environmental policy; and science and innovation. With the possible exception of the vice-consul and passport examiner, the Committee has difficulty considering that the above employees constitute, as a whole, public servants engaged in the administration of the State given that the tasks performed by them do not seem to involve the exercise of state authority. Furthermore, the Committee has difficulty in understanding the justification for granting locally engaged staff lesser collective bargaining rights in relation to those enjoyed by their United Kingdom-engaged colleagues who are, according to the Government, occupied in identical activities and represented by British trade unions and covered by collective agreements, regardless of whether they are engaged in the administration of the State or not.

1320. *The Committee would like to emphasize that all public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights, and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of the terms and conditions of employment in the public service [**Digest**, op. cit., para. 886]. The mere fact that public servants are white-collar employees is not in itself conclusive of their qualification as employees engaged in the administration of the State. If this were not the case, Convention No. 98 would be deprived of much of its scope [**Digest**, op. cit., para. 892]. Similarly, the Committee does not consider that the mere fact that public servants are subject to security clearance vests them with the quality of employees engaged in the administration of the State. The Committee thus considers that the Embassy should negotiate with the AUSES/IFPTE in respect of the terms and conditions of employment of the locally engaged staff. The Committee therefore requests the Government to take all necessary measures with a view to encouraging and promoting negotiations between the Embassy, consular missions and other offices of the United Kingdom in the United States, on the one hand, and the AUSES/IFPTE on the other, with a view to reaching an agreement on the nature of their relationship and on the terms and conditions of employment of locally engaged staff, and to keep it informed of developments.*

The Committee's recommendation

1321. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:***

The Committee requests the Government to take all necessary measures with a view to encouraging and promoting negotiations between the Embassy, consular missions and other offices of the United Kingdom in the United States, on the one hand, and the AUSES/IFPTE on the other, with a view to reaching an agreement on the nature of their relationship and on the terms and conditions of employment of locally engaged staff, and to keep it

informed of developments.