

## MEMORANDUM

TO: National Organization for Women  
FROM: Martha F. Davis\*  
RE: Analysis of Possible CEDAW RDUS  
DATE: June 12, 2009

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It will surprise no one that the National Organization for Women supports rapid U.S. ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW is the major international treaty addressing women's rights. Ratification of CEDAW would enable the U.S. to participate directly in the global dialogue among and between nations about the best means to ensure women's equal access to, and participation in, the full range of societal institutions. It addresses women's equality in a broad range of critical areas including the economy, the political and educational spheres and the family.

However, CEDAW is not new to the American political scene, and it reaches 2009 with some questionable baggage. The U.S. was active in CEDAW's drafting and the treaty was signed by President Carter in 1980. He transmitted it to the Senate Foreign Relations Committee for its advice and consent that same year, shortly before he left office. In the intervening years, the treaty has been festooned with a growing number of Reservations, Declarations and Understandings (RDUs), proposed by both the particular Administration-in-power and members of the Senate Foreign Relations Committee. These RDUs undermine CEDAW's meaning and effectiveness. If CEDAW is to really contribute to the national and international effort to achieve equality for women, these RDUs must be rejected or at least narrowed considerably.

In preparation for renewed consideration of CEDAW ratification, NOW asked me to prepare an analysis of the RDUs that it anticipates might be attached to CEDAW during its renewed consideration by the Senate Foreign Relations Committee. The analysis below begins by setting out the case against RDUs as a general matter before examining the propriety of the eleven specific RDUs that have been proposed in the past. This Memorandum builds on an analysis of proposed RDUs prepared by the NOW Legal Defense and Education Fund and the Lawyers Committee for Human Rights, submitted to the Senate Foreign Relations Committee in 1994.<sup>1</sup>

### **THE CASE AGAINST RDUs**

In the 1994 letter submitted to the Senate, the NOW Legal Defense and Education Fund and the Lawyers Committee for Human Rights observed that the substantive provisions of CEDAW are

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1 The 1994 submission was signed by Deborah Ellis, then-Legal Director of NOW LDEF and Michael Posner, Executive Director of the Lawyers Committee. As a staff attorney at NOW LDEF in 1994, I assisted with preparation of the NOW LDEF/Lawyers Committee analysis. NOW LDEF is now known as Legal Momentum. The Lawyers Committee for Human Rights is now known as Human Rights First.

consistent with the letter and spirit of the United States Constitution and laws, both state and federal. The United States can and should accept virtually all of CEDAW's obligations and undertakings without qualification. Despite this, numerous RDUs were proposed with the sole purpose of ensuring that the U.S. need not make any changes in domestic law, now or in the future, to comply with CEDAW's provisions. This approach is troubling as there are several areas (for example, paid family leave) where the U.S. fails to meet CEDAW's standards and lags behind much of the industrial world – and even some of the developing world – in guaranteeing full equality to women. It appears that past Administrations have sought to identify such areas and then, through RDUs, to preclude any obligation to work to improve the record of the United States on these issues. This use of RDUs to preclude all domestic law changes that might flow from CEDAW ratification is inappropriate and misguided.

The purpose of treaties generally is to undertake new obligations or to make the commitment to the international community to adhere to existing obligations. In both cases, the basis for evaluating treaty compliance tests whether “appropriate measures” have been pursued in good faith. The mere fact that the treaty establishes benchmarks to which the U.S. does not currently adhere is not sufficient reason for a reservation. A specific reservation may be added if a particular treaty provision is found to be unacceptable, but there should not be a wholesale rejection of change. If the United States ratifies CEDAW subject to broad limitations that imply a lack of political commitment to observe international standards, its actions will rightly be decried by the international community. Such an approach will suggest that the U.S. views these international norms as being applicable only to other countries. In fact, there has been just such a reaction by other countries in regard to the RDUs the U.S. attached to the ICCPR, with numerous countries filing objections with the United Nations. The U.S. can expect to provoke similar international criticism if it ratifies CEDAW subject to numerous and broad caveats.

An additional impact of U.S. ratification with extensive RDUs is even more troubling. Internationally, women have made great collective strides in recent decades, but women's equality is still a dream in many countries. If the U.S.'s ratification evinces only lukewarm commitment to CEDAW, it will give aid and comfort to those nations that persist in perpetuating discrimination against women and girls. Further, it may chill the efforts within some nations to take CEDAW and women's equality seriously. For example, as recently noted by Janet Benshoof of the Global Justice Center, the Protocol on the Rights of Women in Africa,<sup>2</sup> ratified by nearly half of the African nations, takes concrete steps to implement CEDAW in the region by requiring that governments take affirmative measures to ensure women's equality and by defining equality to encompass reproductive rights and equal participation in the judiciary. A U.S. approach that effectively excises such provisions out of CEDAW through extensive RDUs runs the risk of slowing efforts in developing countries that would have a tremendously positive impact on the nations' development and women's lives.

## ANALYSIS OF SPECIFIC RDUs

### RESERVATIONS

**(1) The Constitution and laws of the United States establish extensive protections against discrimination, reaching all forms of governmental activity as well as significant areas of non-governmental activity. However, individual privacy and freedom from governmental interference**

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<sup>2</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, entered into force Nov. 25, 2005. See Janet Benshoof, *How International Law Could Radically Change the Definition of Gender Equality in the United States: CEDAW and Reproductive Rights*, Global Justice Center White Paper, Nov. 2008.

**in private conduct are also recognized as among the fundamental values of our free and democratic society. The United States understands that by its terms the Convention requires broad regulation of private conduct, in particular under Articles 2, 3 and 5. The United States does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States.**

**Analysis:**

This proposed reservation is undesirable. Even if there were a conflict between U.S. law and CEDAW which required the U.S. to enact new laws to meet the requirements of CEDAW, the mere fact that a treaty establishes standards to which the U.S. does not currently adhere is not a sufficient reason for a reservation. The purpose of treaties is to undertake new obligations or to make a commitment to the international community to adhere to existing obligations. If the U.S. ratifies CEDAW subject to this broad limitation that implies a lack of political commitment to observe international standards, its actions will rightly be decried by the international community. It suggests that the U.S. views these international norms as being applicable only in other countries and sees no room for improvement in its own rights performance and no role for the federal government in deterring private discrimination. Further, the U.S. position may chill important efforts in other nations to promote women's equality.

If the concern of the Administration is that CEDAW might require the U.S. to forbid private discrimination which is affirmatively protected by the Constitution, the Administration might, at most, include a reservation clarifying that under this article the U.S. is not required to forbid that narrow category of private discrimination which receives affirmative Constitutional protection. An example of such private discrimination might be certain instances of discriminatory "hate speech" protected by the First Amendment. *See also Boy Scouts of America v. Dale*, 530 U.S. 630 (2000) (upholding first amendment protection for non-governmental associational acts of discrimination).

**(2) Under current U.S. law and practice, women are permitted to volunteer for military service without restriction, and women in fact serve in all U.S. armed services, including in combat positions. However, the United States does not accept an obligation under the Convention to assign women to all military units and positions which may require engagement in direct combat.**

**Analysis:**

This reservation is objectionable. Indeed, the underlying facts regarding women in the U.S. military have changed dramatically since the reservation was initially proposed. Many of the significant legal restrictions on women's participation in the military were lifted long ago. Prior to 1994, the Department of Defense (DoD) imposed a "risk rule" for women's military assignments, providing that "risk of direct combat, exposure to hostile fire or capture [were considered] proper criteria for closing non-combat positions or units to women; when the type, degree and duration of such risk are equal to or greater than the combat units with which they are normally associated within a given theater of operations." *Presidential Comm'n on the Assignment of Women in the Armed Forces, Report to the President B-2* (1992). However, the risk rule was rescinded in January 1994 because, in the DoD's opinion, the rule was obsolete. Indeed, based on its own detailed studies, the DoD found that women are fully capable of performing combat roles. In both Panama and the Persian Gulf, women proved that they could perform in combat as well as men. *See Department of Defense, Conduct of the Persian Gulf War, Final Report to Congress, App. R at R-4* (April 1992); Bureau of International Organization Affairs, U.S. Dep't of State, U.S. Report to the U.N. on the Status of Women 1985-1994 93-94 (1994). The reforms of the 1970s 1980s and 1990s largely lifted women's exclusion from indirect combat roles.

Nevertheless, women are still excluded from assignments to units, below the brigade level, whose primary mission is direct ground combat or collocation with direct ground combat units. *See Annual Report of Status of Female Members of the Armed Forces of the United States, FY 2002-2006*; 10 U.S.C.A. § 652. A 2006 report identified nineteen Army Positions (involving infantry, armor, special forces and ranger services) closed to women because they involve direct ground combat as their primary mission and eight Army positions (involving field artillery) closed because they involve collocation with direct ground combat units. The Air Force reported thirteen positions closed because they involve collocation with direct ground combat units. The Navy reported seven positions (involving special warfare and special operations) closed because they involve direct ground combat as their primary mission, thirty-five positions closed because they involve collocation with direct ground combat units and two area of service (submarines and patrol coastal ships) closed on the ground that the costs of appropriate berthing and privacy arrangements are prohibitive. The Marines reported twenty-five positions closed because they involve direct ground combat as their primary mission. *See Annual Report of Status of Female Members of the Armed Forces of the United States, FY 2002-2006, available at www.defenselink.mil.dacowits/.*

Significantly, the military itself has questioned the need for a combat restriction, with DoD officials emphasizing how essential women's military service, including combat service, is to the armed forces. *See, e.g.,* Rowan Scarborough, *Report Leans Toward Women in Combat*, Wash. Times, Dec. 13, 2004, at A01 (reporting on military's desire to collocate co-ed units with combat troops); Bryan Bender, *Combat Support Ban Weighed for Women: Pentagon Opposes GOP Proposal*, Boston Globe, May 18, 2005, at A1 (quoting Colonel Joseph Curtin of the Pentagon: "Women soldiers have made incredible contributions in the war on terrorism through service and their demonstrated bravery."). *See generally* Linda Murnan, *Legal Impediments to Service: Women in the Military and the Rule of Law*, 14 Duke J. Gender & Pol. 1061 (2007) (arguing for removal of barriers to women in the military; the author is a retired USAF Colonel); Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 Duke J. Gender & Pol. 1011 (2007) (arguing that the combat exclusion is obsolete in light of contemporary warfare conditions; Colonel McSally, currently on active duty, was the first U.S. woman to fly in combat after the lifting of USAF restrictions in 1991).

Further, the military's policy of restricting women's participation in direct combat units denies women significant opportunities for job advancement and thus restricts women from advancing along the main routes to those branches' senior leadership. The number of military jobs available to women is heavily tied to the ground combat exclusion rule and the relative level of ground combat engagement for each branch of service. Since by law women are excluded from combat positions and most three-star and four-star general positions require combat experience, women are typically not promoted to such rank. It was not until November 2008 that Ann Dunwoody became the nation's first female 4-star general. She remains the only woman in that position, with only a handful of female 3-star generals behind her.

In sum, this is the appropriate time to reject the proposed reservation. Contrary to the proposed reservation, women cannot volunteer for military service without restriction, as women are precluded from certain designated combat positions. But rather than abdicating any obligation to open direct combat positions to women, the U.S. should, at a minimum, commit to continuing the decades-long efforts to open all military positions to women. In doing so, the U.S. would fulfill the good faith requirement of taking "appropriate measures" as the phrase was construed during drafting of the Convention. *See Draft Convention on the Elimination of Discrimination Against Women - Report of the Secretary General*, United Nations General Assembly, UN Doc A/32/218/Add.1 (12 October, 1977), at 4.

**(3) U.S. law provides strong protections against gender discrimination in the area of remuneration, including the right to equal pay for equal work in jobs that are substantially similar. However, the United States does not accept any obligation under this Convention to enact legislation establishing the doctrine of comparable worth as that term is understood in U.S. practice.**

**Analysis:**

This proposed reservation is unnecessary. During drafting of the Convention, it was understood that the phrase "appropriate measures" would obligate a State to make a good faith effort to implement a provision of the Convention. *See Draft Convention on the Elimination of Discrimination Against Women - Report of the Secretary General*, United Nations General Assembly, UN Doc A/32/218/Add.1 (12 October, 1977), at 4. *See also* Comm. on Econ., Soc. and Cultural Rights, Report on the Fifth Session, General Comment No. 3: The Nature of States Parties' Obligations (art. 2, para. 1 of the Covenant), P 10, U.N. Doc. E/1991/23 Annex III (1990), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003) (discussing content of "appropriate means" in the context of the International Covenant on Economic, Social and Cultural Rights). Instead of taking a blanket reservation to enacting comparable worth legislation, the U.S. should commit to bringing U.S. law into conformity with the international standards of wage equity evidenced by Article 11(1)(d) of CEDAW, General Recommendation No. 13 of the CEDAW Committee (encouraging State Parties to ratify ILO Convention No. 100), the Constitution of the International Labor Organization (Preamble) and the ILO Convention No. 100 ("equal remuneration" interpreted as "rates of remuneration established without discrimination based on sex").

In undertaking this obligation, the U.S. would not be starting from scratch. Twelve states already have comparable worth legislation: Arkansas, Idaho, Kentucky, Maine, Maryland, Massachusetts, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, and West Virginia. *See* Elizabeth J. Wyman, *The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution from Maine*, 55 Me. L. Rev. 23, 40-42 (2003) (citing state statutes, discussing affirmative defenses for employers and state case law interpreting those comparable work statutes). Three other states do not use "comparable" but use other words to describe the same standard *Id.*

At a minimum, the U.S. should state that it will continue to implement the object and purpose of Article 11(1)(d) by developing legislative measures where appropriate. Though federal legislation is silent on the issue of comparable worth, there continue to be significant developments expanding the implementation of equal pay principles to redress wage discrimination in female-dominated occupations. For example, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 (P.L. 111-2) into law, thus ensuring the redressability of discriminatory pay practices that have accumulated over a career. Furthermore, the proposed federal Fair Pay Act (S. 1087) currently pending in Congress would expand the protections of the federal Equal Pay Act to cover work of "equivalent" value in both the public and private sector.

The persistence of the wage gap, with women earning 77 cents for every dollar paid to a man and even more dramatic gaps when race, national origin and disability are taken into account, indicates that current U.S. law is falling far short of achieving economic equality. This is comprehensively documented by *The Wage Project*, [www.wageproject.org](http://www.wageproject.org). Ratification of the Convention without the proposed reservation would reiterate the U.S.'s continued commitment to increase women's access to fair wages.

**(4) Current U.S. law contains substantial provisions for maternity leave in many employment situations but does not require paid maternity leave. Therefore, the United States does not accept**

**an obligation under Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.**

**Analysis:**

Rather than take this broad reservation, the U.S. should make a commitment to take appropriate steps to expand the availability of paid maternity leave. Such an undertaking would fill a significant gap in U.S. law. The Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601-54, mandates that employers of 50 or more employees provide twelve weeks of unpaid leave after childbirth or for other family-related medical purposes. However, no federal law provides for paid maternity or parental leave, nor does U.S. law require an employer to reinstate a woman who has taken maternity leave without loss of seniority or allowances. Laws such as the FMLA and the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), are of little practical benefit to most women, given that few can afford unpaid parental leave.

Paid maternity and parental leave policies are already in place in many industrialized countries, including Germany, France, Italy, Canada, Austria, Belgium, the Netherlands, Luxembourg, the United Kingdom, Ireland, Denmark, Finland, Greece, Portugal, Japan, Sweden, and Spain. Likewise, states are beginning to extend paid leave, with California leading the way, followed by Washington and New Jersey, all of which offer paid family leave. Bills for paid family leave are pending in several more states, and even Congress is considering the provision of 4 weeks of paid parental leave for federal employees in the event of a birth, adoption or placement (S. 354, H.R. 626). Given these efforts, the proposed reservation is unwarranted.

**UNDERSTANDINGS**

**(1) The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the State and local governments. To the extent that State and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.**

**Analysis:**

The proposed language is not constitutionally necessary, nor is it desirable. Federal authority in this area is clear. *Missouri v. Holland*, 252 U.S. 416 (1919) (confirming that the treaty power resides with the federal government). Under the Constitution and international law, the federal government has the responsibility and the authority to carry out obligations under CEDAW. Although the federal government has the ultimate responsibility to see that these obligations are carried out, it is entirely appropriate to leave some implementation to the states so long as the United States government sees to it that this is done. But there are few, if any, matters covered by CEDAW that are subject exclusively to state jurisdiction. Under the Fourteenth Amendment and other constitutional provisions, these matters are subject to the treaty and legislative powers of Congress and the jurisdiction of the federal courts.

**(2) The Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression, and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 5, 7, 8 and 13, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.**

## **Analysis:**

Under the First Amendment of the U.S. Constitution, the government may only penalize speech that incites to imminent lawless action. Similar limits apply to restrictions of expression and association. An understanding emphasizing that U.S. compliance cannot restrict the free speech, expression or association protections of the First Amendment would be appropriate.

**(3) The United States understands that Article 12 permits States Parties to determine which health care services are appropriate in connection with family planning, pregnancy, confinement and the post-natal period, as well as when the provision of free services is necessary, and does not mandate the provision of particular services on a cost-free basis.**

## **Analysis:**

This understanding is unnecessary. Article 12 makes clear that State Parties shall decide which health services are "appropriate" and when it is "necessary" to grant free services. Given the lack of conflict between U.S. law and the requirements of Article 12, the proposed understanding is entirely superfluous.

**(4) Nothing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning.**

## **Analysis:**

This proposed reservation is objectionable and unnecessary. CEDAW does not address abortion directly. Some foreign and international courts have cited CEDAW as a factor when striking down criminal abortion bans. Similarly, the European Court of Human Rights has cited CEDAW when holding governments accountable to providing abortions necessary to protect the woman's health. However, these decisions are already reflected by the status quo in the U.S., where abortion has been de-criminalized since the 1973 landmark decision *Roe v. Wade*, 410 U.S. 113. A woman's right to access such health care was reaffirmed in *Planned Parenthood v Casey*, 505 U.S. 833 (1992), where the Supreme Court struck down unduly burdensome restrictions, and again in *Stenberg v Carhart*, 530 U.S. 914 (2000), the Court this time emphasizing the preeminence of a woman's continuing life and health. The states have similarly enacted legislation underscoring the importance of providing appropriate reproductive health care, thirty-eight specifically mandating that abortions be performed by licensed physicians. With one exception, every state provides some degree of public funding for abortions. *See, e.g.*, The Guttmacher Institute, An Overview of Abortion Laws, March 1, 2009, at [http://www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf). President Obama recently brought this national commitment to women's reproductive health to the international stage by overturning the Mexico City Policy on U.S. AID funding, also known as the "global gag rule."

This proposed reservation, which seems to derogate from existing U.S. law, could have the effect of undermining these longstanding federal and state policies protecting the fundamental right of reproductive choice, and the reservation would have a deleterious effect on U.S. foreign policies that address abortion as one aspect of women's reproductive health and well-being. Since U.S. law is not inconsistent with CEDAW's provisions, no reservation is necessary.

**(5) The United States understands that the Committee on the Elimination of Discrimination Against Women was established under Article 17 “for the purpose of considering the progress made in the implementation” of the Convention. The United States understands that the Committee on the Elimination of Discrimination Against Women, as set forth in Article 21, reports annually to the General Assembly on its activities, and “may make suggestions and general recommendations based on the examination of reports and information received from the States Parties.” Accordingly, the United States understands that the Committee on the Elimination of Discrimination Against Women has no authority to compel actions by States Parties.**

**Analysis:**

This understanding is unnecessary. The U.S. Supreme Court made clear in *Medellin v. Texas*, 128 S.Ct. 1346 (2008), that non-self-executing treaties require Congressional action before they can be implemented, and that even self-executing treaties do not create private rights of action in domestic courts. The Supreme Court's assertion of its own central role in determining the self-executing status of treaties renders this understanding meaningless.

Rather than merely asserting U.S. domestic sovereignty, this understanding, with its implication that states should not aspire to meet CEDAW goals, undermines the ability of both U.S. courts and fledgling democracies to cite Committee recommendations when striking down oppressive laws. Indeed, the statements of the CEDAW Committee itself underscore its role in guiding, rather than dictating, the implementation process. The twenty-five General Recommendations released by the Committee since 1986 repeatedly note actions parties “should” take along with various “suggestions” for parties in reviewing and applying their current laws. *See, e.g.*, CEDAW, General Recommendations, at <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>. Since it is wholly unnecessary given the relevant domestic and international law, this reservation would only serve to further alienate the U.S. from the international development of human rights standards.

**DECLARATIONS**

**(1) The United States declares that, for purposes of its domestic law, the provisions of the Convention are non-self-executing.**

**Analysis:**

This declaration is not constitutionally required and it is undesirable. In *Medellin v. Texas*, 128 S.Ct. 1346 (2008), the U.S. Supreme Court made clear that it is “our obligation to interpret treaty provisions to determine whether they are self-executing,” slip op. at p. 18, by examining the treaty text and its negotiating history. A Congressional gloss on the CEDAW treaty text is thus superfluous.

Further, there is no reason for such a blanket insistence that neither the Executive nor the courts should give effect to a treaty until Congress adopts legislation. To do so would go against the spirit of Article 6 of the Constitution as the framers intended it. It would undermine one of the principle reasons why the Constitution made treaties the law of the land, and gave the President and the Senate the power to make such treaties without the consent of the House of Representatives. Incorporation of this declaration runs the risk of unnecessarily delaying U.S. compliance with some provisions and setting up unnecessary political obstacles to U.S. compliance generally. Many of the articles will in fact require Congressional implementation, but some might not. Determination of what is or is not self-executing

should be made article by article after ratification and by each branch of government for purposes within its responsibility. The U.S. Supreme Court's recent ruling in *Medellin v. Texas* articulates clearly the preeminent role of the courts in determining, based on text and the history of the treaty itself, whether particular provisions of an international treaty are self-executing.

**(2) With reference to Article 29(2), the United States declares that it does not consider itself bound by the provisions of Article 29(1). The specific consent of the United States to the jurisdiction of the International Court of Justice concerning disputes over the interpretation or application of this Convention is required on a case-by-case basis.**

**Analysis:**

This proposed declaration is objectionable. When the United States ratified the International Covenant on Civil and Political Rights, it declared that it accepted the competence of the Human Rights Committee to receive and consider communications in which one State Party claimed that another State Party was not fulfilling its obligations under the Covenant. Indeed, the U.S. is already party to over 75 treaties which provide for submission of disputes to the ICJ. There is no basis to suspect that the Court will fail to render a fair and impartial verdict under those treaties, or under CEDAW. If the U.S. is committed to the rule of law, there is no reason to resist the jurisdiction of the ICJ in the event of a dispute.