



United States Department of State  
*United States Permanent Mission to the  
Organization of American States*  
*Washington, D.C. 20520*

April 3, 2019

Dr. Paulo Abrão  
Executive Secretary  
Inter-American Commission on Human Rights  
Organization of American States  
Washington, D.C. 20006

**Re: Asunción Rivera, Cacimar Zenón, Ida Vodofsky Colon, and others,  
P-1561-13  
Response of the United States**

Dear Dr. Abrão:

The United States Government has the honor of submitting to the Inter-American Commission on Human Rights this response to the Petition your office transmitted to us on December 10, 2018. The Petition, with exhibits, was submitted by Natasha Lycia Ora Bannan, Annette Martínez-Orabona, Lauren Carasik, and Alianza de Mujeres Viequenses, on behalf of ten named Petitioners, and forwarded to the United States as Petition No. P-1561-13 ("Petition"). The Petition was apparently submitted to the Commission in September 2013. Please find enclosed the United States' response to the Petition. We trust this information is useful to the Commission and thank the Commission for its attention to this matter.

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read 'C. Trujillo', written over a faint circular stamp.

Carlos Trujillo  
Ambassador

Enclosures: as stated

Enclosures:

1. Report to Congress on Vieques and Culebra Environmental Restoration (December 2018).
2. Fact Sheet: Controlled Burning in the Submunitions Area of Vieques.
3. OPNAV Instruction 8020.15A, Explosive Safety Review, Oversight, and Verification of Munitions Responses.
4. Fact Sheet: Munitions Cleanup and Air Quality on Vieques.
5. Agency for Toxic Substance and Disease Registry (“ATSDR”), U.S. Department of Health and Human Services, An Evaluation Of Environmental, Biological, and Health Data from the Island of Vieques (March 2013).
6. Fact Sheet: Depleted Uranium in the Live Impact Area of Vieques.

**ASUNCIÓN RIVERA, CACIMAR ZENÓN, IDA VODOFSKY COLON,  
AND OTHERS, P-1561-13  
RESPONSE OF THE UNITED STATES**

The United States appreciates the opportunity to submit these observations on the documents submitted by ten named petitioners (“the Petitioners”) to the Inter-American Commission on Human Rights (“Commission”) and forwarded to the United States as Petition No. P-1561-13 (“Petition”). The Petition was received by the Commission in September 2013 and forwarded to the United States in December 2018. The United States requested an extension to submit this response pursuant to Article 30(3) of the Rules of Procedure (“Rules”).

The Petition is inadmissible and must be dismissed because it fails to meet the Commission’s established criteria in Articles 31 and 34 of the Rules. Claims presented by Petitioners are beyond the *ratione temporis*, *ratione personae*, and *ratione materiae* competence of the Commission. Moreover, a panoply of domestic remedies available in the United States to redress precisely the types of violations Petitioners allege in the Petition have not been exhausted, as required by Article 31 of the Rules. The Petition is also plainly inadmissible under Article 34 of the Rules: the Petition fails under Article 34(a) to state facts that tend to establish violations<sup>1</sup> of rights set forth in the American Declaration of the Rights and Duties of Man (“American Declaration”) and is manifestly groundless under Article 34(b). Accordingly, the United States respectfully requests that the Commission find the Petition inadmissible. Should the Commission nevertheless declare the Petition admissible and examine its merits, the United States urges it to deny the Petitioners’ request for relief, as the Petition is entirely without merit.

The United States, through various agencies including the United States Navy (“the Navy”), the Department of Interior (“DOI”) and the Environmental Protection Agency (“EPA”), is conducting an unprecedented environmental cleanup on the island of Vieques at the former Vieques Naval Training Range (“VNTR”) and the former Naval Ammunition Support Detachment (“NASD”) under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).<sup>2</sup> As part of this whole of United States Government response, the Navy has to date spent over \$280 million dollars on the cleanup. In fiscal year 2018 alone, the

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<sup>1</sup> As the American Declaration of the Rights and Duties of Man is a non-binding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States, the United States understands that a “violation” in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration. The United States respects its political commitment to uphold the American Declaration. For an elaboration of the United States’ longstanding position on the non-binding nature of the American Declaration, see Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, available at <http://hrlibrary.umn.edu/iachr/B/10-esp-3.html>.

<sup>2</sup> 42 U.S.C. §§ 9601–9675.

Navy obligated approximately \$28.7 million toward environmental restoration efforts on Vieques. As noted in a recent report to the United States Congress, the Navy makes every effort to expedite the pace of cleanup of Vieques while emphasizing safety, engagement with local stakeholders and the highest standard of safety for the workforce and the residents of Vieques.<sup>3</sup> These efforts were recently recognized when the Vieques cleanup team received the United States Secretary of Defense Environmental Restoration Team 2018 award for effective cleanup, use of innovative approaches, and engagement with stakeholders.<sup>4</sup>

Petitioners allege violations of the American Declaration by the United States at Vieques, making, among others, baseless claims that the United States has stifled scientific research,<sup>5</sup> knowingly subjects locally hired workers to unsafe conditions,<sup>6</sup> and has engaged in substandard cleanup practices.<sup>7</sup> While the United States conducted important military training on the island of Vieques, the United States has also taken responsibility for the cleanup of Vieques by placing Vieques on the National Priorities List<sup>8</sup> at the request of the then-Governor of Puerto Rico, Sila M. Calderon. Vieques does not represent a failure of the United States; in fact, it represents what can be accomplished when a government dedicates resources and works closely with its citizens to redress the consequences of historic activities.

## **I. FACTS AND PROCEDURAL HISTORY**

### **A. Background**

The island of Vieques lies over six miles off the southeastern coast of Puerto Rico. Situated on an east-west axis, Vieques is nearly twenty miles long with an average width of four miles. Fringe and offshore coral reefs are found in the coastal waters of Vieques, primarily off the northern, eastern, and southern shores. Seagrass flourishes along the ocean floor adjacent to the coasts; the largest concentration runs from Punta Caballo on the north coast eastward around Punta Arenas to the southwest coast. There are also several large mangrove stands located along the shores; in the west near Punta Arenas and in the south around Puerto Mosquito, Puerto Ferro, and Ensenada Honda. Three of the seven bioluminescent bays known to exist in the world are located along the southern coast of Puerto Mosquito, Puerto Ferro, and Bahia Tapon.

Vieques, together with the rest of Puerto Rico, became a Territory of the United States after the Spanish American War of 1898. The island's economy was traditionally dominated by

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<sup>3</sup> Report to Congress on Vieques and Culebra Environmental Restoration December 2018.

<sup>4</sup> Article available online at <https://dod.defense.gov/News/Article/Article/1499655/pentagon-honors-secretary-of-defense-environmental-award-recipients/> (last visited 29 January 2019).

<sup>5</sup> Petition at 13.

<sup>6</sup> Petition at 33.

<sup>7</sup> Petition at 33.

<sup>8</sup> “The National Priorities List (NPL) is the list of sites of national priority among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States and its territories. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation.” See <https://www.epa.gov/superfund/superfund-national-priorities-list-npl> (last visited 29 January 2019).

sugar cane cultivation, ranching, and fishing.<sup>9</sup> Viequenses enjoy remarkable rights and freedoms as residents of a Territory of the United States.<sup>10</sup>

The sugar cane industry formed the backbone of the Puerto Rican economy and was important to the island of Vieques. However, from the mid 1940's the sugar cane industry on Vieques declined in importance to the island.<sup>11</sup> The United States Navy acquired land and built facilities on Vieques Island between 1941 and 1943.<sup>12</sup> At the time, little to none of it was used for sugar cane production and nearly all of it was owned by only 10 persons.<sup>13</sup> The Navy used 22,000 of the island's 33,000 acres as a training ground and live ordnance range at various points between 1941 and 2003. It established an ammunition facility on the western end of the island and used the eastern half of the island as a training range, which included a "live impact area" and an adjacent "maneuver area." Training exercises incorporated live munitions to simulate combat conditions, including artillery, mortar, small arms fire, naval surface fire, and aircraft strikes. The Navy also operated an open burning/open detonation facility on the island, where it incinerated and detonated unused ordnance. In May 2000, the Navy discontinued all live-fire training exercises; all military exercises in Vieques were terminated as of April 30, 2003.<sup>14</sup>

#### B. The Environmental Cleanup of Vieques

Petitioners claim that the cleanup of Vieques has demonstrated "a tremendous reluctance by the U.S. government to fund a full, adequate and appropriate decontamination effort that would restore the land to the pristine state that predated its military activities and address the continued harm to the health of Viequenses."<sup>15</sup> The facts demonstrate a commitment by the Navy to an expedited, safe, and transparent cleanup of the island.

The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601–9675 ("CERCLA" or "the Act"), was enacted in response to the dangers of uncontrolled releases or threatened releases of hazardous substances and releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an

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<sup>9</sup> This summary is taken from *Romer-Barcelo v. Brown*, 643 F.2d 835 (1<sup>st</sup> Cir. 1981).

<sup>10</sup> *See, e.g., Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1868 (2016).

<sup>11</sup> *See Romer-Barcelo v. Brown*, 643 F.2d 835 (1<sup>st</sup> Cir. 1981).

<sup>12</sup> *Abreu v. United States*, 468 F.3d 20 at 22.

<sup>13</sup> United States Marine Corps Draft Environmental Impact Statement Vieques Military Training Complex Vieques, Puerto Rico, 29 February 1972. Available as part of the Navy's comprehensive publicly available record collection documenting the CERCLA related cleanup at: [https://www.navfac.navy.mil/products\\_and\\_services/ev/products\\_and\\_services/env\\_restoration/administrative\\_records.html?p\\_instln\\_id=VIEQUES](https://www.navfac.navy.mil/products_and_services/ev/products_and_services/env_restoration/administrative_records.html?p_instln_id=VIEQUES). Petitioners attempt to paint a picture of mass displacement of individuals from their land. The reality is that the land was purchased from the relatively few people that owned the land in question. Despite this, the Navy compensated these individuals who nonetheless resided in the area. Petitioners' claims to the contrary are supported only by unproven assertions made for purposes of their Petition.

<sup>14</sup> *Sanchez ex rel. D.R.-S v. United States*, 671 F.2d 86 at 89.

<sup>15</sup> Petition at 12.

imminent or substantial danger to the public health or welfare.<sup>16</sup> CERCLA represents the United States authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. It is critical to note that the United States waived sovereign immunity and made CERCLA applicable to United States federal facilities, “in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.”<sup>17</sup> This means that neither the Defense Department nor the Navy execute CERCLA free from oversight. The broad waiver of sovereign immunity included in CERCLA means the U.S. Federal agencies are subject to enforcement by EPA and, depending on the nature of contamination, State regulatory agencies.<sup>18</sup>

The Secretary of Defense exercises authority under CERCLA with respect to releases or threatened releases where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody, or control of the Department of Defense (“DoD”).<sup>19</sup> The Secretary of Defense has delegated this authority to the Secretary of the Navy for sites the Department of the Navy controlled after 1986, which includes both the eastern and western portions of Vieques.<sup>20</sup> An important consideration is that the cleanup at Vieques is being carried out under the Defense Environmental Restoration Program (DERP) that consists of: (1) the Installation Restoration Program, which addresses cleanup of hazardous substances, and (2) the Military Munitions Response Program, which addresses cleanup of munitions.<sup>21</sup>

Pursuant to 42 U.S.C. § 9605(a)(8)(B), each State may designate a single site as its top priority to be listed on the National Priorities List (“NPL”). On June 13, 2003, the then-Governor of Puerto Rico, Sila M. Calderon, requested that portions of Vieques be placed on the

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<sup>16</sup> Proposed Rule, National Priorities List for Uncontrolled Hazardous Waste Site, Federal Register Vol. 69, 51116.

<sup>17</sup> 42 U.S.C. § 9620(a)(1).

<sup>18</sup> The term “State” includes the Commonwealth of Puerto Rico. 42 U.S.C. § 9601(27). *See* <https://www.epa.gov/enforcement/comprehensive-environmental-response-compensation-and-liability-act-cercla-and-federal>. As a general matter, CERCLA has waived sovereign immunity for enforcement by States against Federal agencies for releases of hazardous substances when a site is not included on the NPL. 42 U.S.C. § 9620(a)(4). Even if a site is listed on the NPL, like Vieques, State and local officials must be afforded the opportunity to participate in the planning and selection of remedial actions. 42 U.S.C. § 9620(f). For this reason, States are often signatories on cleanup agreements along with EPA and the Federal agency. The Government of Puerto Rico, through the Puerto Rico Environmental Quality Board and the Puerto Rico Department of Natural and Environmental Resources is an active participant in the ongoing remediation effort on Vieques.

<sup>19</sup> Executive Order 12580 (Jan. 23, 1987), implementing 42 U.S.C. §§ 9604 and 9615.

<sup>20</sup> Dept. of Defense Environmental Restoration Program Manual 4715.20 (Mar. 9, 2012).

<sup>21</sup> *See* Department of Defense Manual 4715.20, Defense Environmental Restoration Program (DERP) Management, March 9, 2012. DERP is more expansive than CERCLA in that it addresses not only hazardous substances covered by CERCLA, it also authorizes remediation of substances that are not covered by CERCLA, such as petroleum contamination, unexploded ordnance, the correction of other environmental damage that creates an imminent and substantial endangerment to the public health or the environment, and certain other actions that normally are not governed by CERCLA. *Id.* at Encl. (3), at 17.

CERCLA NPL.<sup>22</sup> This request initiated the placement of Vieques on the list of highest priority cleanup sites in the United States.<sup>23</sup> The proposal to include Vieques on the NPL was published in the Federal Register, giving the public of the United States, including the public on Vieques, the opportunity to comment on whether the site should be included on the NPL.<sup>24</sup> The Governor's utilization of this authority bypassed a lengthy regulatory process and placed Vieques on the NPL, which ensured that the Navy would prioritize addressing the environmental contamination at Vieques.

On May 26, 2004, all stakeholders concurred with the designation of the former naval facilities of eastern and western Vieques as an NPL site.<sup>25</sup> As a result of the NPL listing, a Federal Facilities Agreement (FFA) was signed by the Navy, EPA, the Commonwealth of Puerto Rico<sup>26</sup>, and DOI on September 7, 2007. The FFA establishes the procedural framework and schedule for implementing the CERCLA Response Actions on Vieques.<sup>27</sup> The FFA also provides for enforcement of the CERCLA response by EPA should the Navy fail in its legal obligations under CERCLA and the FFA, including stipulated penalties that would be assessed for failing to meet FFA requirements.<sup>28</sup>

Community involvement is a critical component of the CERCLA process, and is mandated by law, and both EPA and Navy regulations. CERCLA sections 113 and 117 require public involvement at specific stages of the remediation process. CERCLA's implementing regulations provide detailed requirements for community involvement, information sharing, and public comment.<sup>29</sup> Throughout the CERCLA cleanup process, the community is provided information and opportunities to participate as active partners in the decisions that affect the cleanup site in their community.<sup>30</sup> Once the cleanup program has begun, the community has a voice during all phases of the CERCLA process, and plays an important role in assisting the Navy and EPA with gathering information about the site.<sup>31</sup>

Individuals affected by CERCLA sites can get involved with the cleanup process through attending public meetings, reviewing/commenting on site decision documents (where

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<sup>22</sup> Proposed Rule, National Priorities List for Uncontrolled Hazardous Waste Site, Federal Register Vol. 69, 51119.

<sup>23</sup> 42 U.S.C 9605(a)(8)(B). *See also*, <https://www.epa.gov/superfund/national-priorities-list-npl-sites-state#PR>.

<sup>24</sup> "This is Superfund: A Community Guide to EPAs Superfund Program," *available at* <https://semspub.epa.gov/work/HQ/175197.pdf>.

<sup>25</sup> NAVFAC Final Site Management Plan For Fiscal Year 2019, at 1-3, *available at* [https://www.navfac.navy.mil/content/dam/navfac/Environmental/PDFs/env\\_restoration/vieques/Site\\_Management\\_Plan\\_FY2019\\_Final.pdf](https://www.navfac.navy.mil/content/dam/navfac/Environmental/PDFs/env_restoration/vieques/Site_Management_Plan_FY2019_Final.pdf).

<sup>26</sup> The Puerto Rico Environmental Quality Board (EQB) signed on behalf of the Commonwealth.

<sup>27</sup> *Id.*

<sup>28</sup> FFA §§ XXI and XXIII.

<sup>29</sup> *See* 40 C.F.R. §§ 300.415i, 300.435(c).

<sup>30</sup> This is Superfund A Community Guide to EPAs Superfund Program. *See* <https://semspub.epa.gov/work/HQ/175197.pdf>.

<sup>31</sup> *Id.*

applicable), and participating at information sessions.<sup>32</sup> DoD encourages community involvement in the environmental restoration process through Restoration Advisory Boards (RAB).<sup>33</sup> RABs provide a forum for stakeholder input on and discussion about cleanup activities on active installations, Base Realignment and Closure locations, and Formerly Used Defense Sites properties. For example, RAB participants review environmental cleanup progress and provide input to installation decision makers. RAB participants may include representatives from the local communities, Commonwealth officials, Federal, and local regulatory agencies; and other stakeholders (e.g., parties that may be affected by environmental restoration activities at the installation). DoD provides funding to establish, operate, and support RABs. This support ensures that local citizens have a forum to provide meaningful input regarding cleanup activities in their communities.<sup>34</sup> For Vieques, at the request of the community, the Navy converted a previously established Technical Review Committee into a RAB in 2004.<sup>35</sup>

The Navy's responsibilities during the response action process include informing the community of any action taken, responding to inquiries, and providing information about each stage of the remediation process. In fact, recognizing the importance of proactive community involvement, the Navy's community involvement requirements are more comprehensive than the requirements required by CERCLA. For example, the Navy prepares a Community Involvement Plan (CIP) for all Navy remediation sites, not just those listed on the National Priority List. The CIP, which is available to the public,<sup>36</sup> provides a site-specific strategy for meaningful community involvement throughout the CERCLA process. The CIP is updated approximately every 5 years, and the most recent version of the CIP for Vieques is dated October 2015. When the CIP was updated in 2015, community input on the CIP was provided through interviews, a survey of Vieques residents and business owners, and community feedback at agency-community meetings.<sup>37</sup> The suggestions offered by the community were incorporated into the

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<sup>32</sup> *Id.*

<sup>33</sup> 10 U.S.C. § 2705(d).

<sup>34</sup> Restoration Advisory Boards and Technical Assistance for Public Participation. *See* <https://www.denix.osd.mil/rab/home/>.

<sup>35</sup> CRS Report for Congress, Vieques and Culebra Islands: And Analysis of Cleanup Status and Costs. 7 July 2005.

<sup>36</sup> *See* [https://www.navfac.navy.mil/niris/ATLANTIC/VIEQUES/N69321\\_003704.pdf](https://www.navfac.navy.mil/niris/ATLANTIC/VIEQUES/N69321_003704.pdf).

<sup>37</sup> CIP at 4. Through one-on-one community interviews, a public survey, RAB meetings, and ongoing public outreach in 2014, the Navy, EPA, and PREQB identified current concerns and topics of particular interest to Vieques community members. This effort involved 3,005 survey questionnaires mailed to addresses on Vieques and 169 survey questionnaires electronically mailed (emailed) to community members who have requested to receive information from the Navy electronically; 164 survey questionnaires were completed and returned. In addition, the Navy, EPA, and PREQB conducted 88 in-person interviews on January 28, 29, and 30, 2014.

The results of the interviews and survey responses provide a representative distribution of the community members and their perspectives about the cleanup of the former Navy lands on Vieques. Appendix D of the CIP contains the survey tool and interview questions and a detailed evaluation of the survey and interview responses is in Appendix E.



CIP, which included more robust use of a Vieques remediation Facebook page and other social media. Navy officials also distribute information fliers every several weeks throughout the island to provide the latest information about the cleanup process. As noted above, the Navy conducts quarterly RAB meetings with the community, and all of the material presented at the RAB is available to the public. RAB meetings are held quarterly and are open to the general public. Attendees have an opportunity to ask questions and provide input during and at the end of each meeting. Simultaneous translation is provided for nonbilingual participants. RAB meetings are advertised to the public in informational flyers, and by broadcasts on the megaphone trucks that are typically used to announce public events on Vieques. RAB meetings are held at the Vieques Multiple Use Center, or popular local establishments such as the Icehouse, another establishment known as the Lighthouse, or other facilities, depending on the availability of the facilities. Stakeholder agencies (Navy, EPA, DOI, and the Puerto Rico Environmental Quality Board (“PREQB<sup>38</sup>”)) schedule, prepare for, and attend all RAB meetings. When scheduling and other logistical considerations allow, the Navy will provide RAB members with the agenda and presentations in advance of the meetings. The Navy is in the process of updating the CIP, and will once again solicit community input on suggestions to improve communication further.

The United States uses numerous other methods to engage the Vieques community, including school visits and education outreach, the use of maps and visual aids, and community events. The Navy has even hosted community site visits to the remediation sites themselves.

The Navy maintains an information repository, including the official Administrative Record, at the Vieques public website at <http://www.navfac.navy.mil/vieques>. The public website is accessible from any computer with access to the Internet, including at the Vieques Public Library (Oficina de Asuntos de la Juventud) and the Luz de La Esperanza Public Library at La Esperanza. EPA maintains a repository of documents at its Vieques Field Office.

Related to the issue of community involvement, the listing of Vieques on the NPL also makes grant funds available for technical assistance to help citizens interpret and review information on cleanup actions being considered. CERCLA authorizes EPA to award up to a total of \$50,000 in grants for technical assistance to communities located adjacent to an NPL site.<sup>39</sup> Technical assistance grants authorized under CERCLA are available only to communities that live next to an NPL site, meaning the citizens of Vieques are afforded benefits not ordinarily available to other United States citizens living near non-NPL cleanup sites.<sup>40</sup>

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<sup>38</sup> The Environmental Quality Board is the agency of the Commonwealth of Puerto Rico whose main function is protect and conserve the environment, wisely and judiciously, using the necessary resources to prevent and eliminate damage, as well as maintain a balance between economic development and the environment. See <https://www.ecos.org/members/puerto-rico/>.

<sup>39</sup> 42 U.S.C. § 9617(e).

<sup>40</sup> The Navy’s Technical Assistance for Public Participation (TAPP) allows for up to \$100,000 over the life of the project of funding to be available for the public to use to obtain technical assistance in reviewing and interpreting project documents or to understand technical issues associated with the restoration process. To date, approximately \$25,000 has been utilized. For additional information on

### C. The December 2018 Report to Congress on Environmental Cleanup of Vieques<sup>41</sup>

Since the CERCLA cleanup of Vieques began in 2004 the Navy has engaged extensively with Vieques residents, Vieques local and commonwealth officials, the Puerto Rico Conservation Trust, the PREQB, and the Puerto Rico Department of Natural and Environmental Resources among other parties. A RAB<sup>42</sup> has been established specifically for the Vieques cleanup.<sup>43</sup>

In order to maximize public participation for the Vieques cleanup, the Navy leads an active Community Involvement Program, with the goals of communicating cleanup activities, promoting public safety, and encouraging public participation in the cleanup process. The Navy reaches out to local residents, government officials, nonprofit organizations, law enforcement agencies, civic groups, the news media, and the RAB. Since 2004, there have been 57 RAB meetings, 24 site visits (to show cleanup activities to stakeholders and obtain feedback), 21 community outreach events, and countless updates provided in English and Spanish through informational flyers, mass mailings, email, social media, news media, and the local megaphone truck. In 2018, the Vieques team received the Secretary of Defense (SECDEF) Environmental Restoration Team award for effective cleanup, use of innovative approaches, and engagement of stakeholders.<sup>44</sup>

In coordination and consultation with local, commonwealth, federal regulators, and members of the public, the Navy generates an annual Site Management Plan (SMP) that describes all proposed site activities, including estimated remediation timelines for the upcoming fiscal year. In order to maintain transparency, the SMP and the other CERCLA documents associated with the cleanup are publicly available in the Vieques administrative record at <https://go.usa.gov/xRHxY>.<sup>45</sup>

During preliminary site inspections, the Navy identified a total of 54 sites: 16 on the former NASD in west Vieques and 38 on the former VNTR in east Vieques. To date, 51 of the

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TAPP, *see* [https://www.navfac.navy.mil/navfac\\_worldwide/specialty\\_centers/exwc/products\\_and\\_services/ev/erb/prog/comm.html](https://www.navfac.navy.mil/navfac_worldwide/specialty_centers/exwc/products_and_services/ev/erb/prog/comm.html).

<sup>41</sup> Report to Congress on Vieques and Culebra Environmental Restoration December 2018. Report to Congress required by the House Report 115-769, page 56, which accompanied H.R. 6157 the Department of Defense Appropriation Bill, 2019.

<sup>42</sup> Prior to its status as a Superfund site, the Navy had established a Technical Review Committee to inform citizens about the status of cleanup on western Vieques that was initiated in advance of the federal directive. A similar forum, however, had not yet been established for the eastern areas being investigated under a separate environmental law. With the Superfund designation, and at the request of the community, the Navy converted the Technical Review Committee into a Restoration Advisory Board (RAB) in FY2004. As Vieques is now listed as a single site, residents are able to receive information about the cleanup of both the western and eastern portions of the island through the RAB as one centralized forum.

<sup>43</sup> Report to Congress on Vieques and Culebra Environmental Restoration December 2018.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

sites are at a Site Closure status<sup>46</sup>, whereby the sites are suitable for unrestricted use and require no further action. For the three remaining sites, two sites have final remedies ongoing, and the final remedy for one site is anticipated to begin in 2021.

The Navy also identified 19 additional munitions response sites associated with former Navy activities on Vieques: 18 sites are on land, while underwater areas offshore are grouped as one site. Significant efforts to remove munitions have been ongoing since 2005. Approximately 4,000 acres have been surface cleared of munitions, and 23 miles of roads and beaches have been subsurface cleared. During this effort, over 7.7 million items of Material Potentially Presenting an Explosive Hazard (MPPEH) have been safely recovered and processed. To date, the Navy has removed approximately 102,000 munitions items, including 39,000 projectiles, 32,000 bombs, 4,300 mortars, 1,300 rockets, 16,000 submunitions, and 9,400 grenades, flares, pyrotechnics, and other munitions. The remaining 7.6M items were scrap metal or other material documented as safe. Approximately 57,000 munitions items have been destroyed in controlled detonations, and 45,000 munitions items have been processed by other means. Approximately 18.7 million pounds of munitions-related scrap metal have been safely processed, and 16.4 million pounds of scrap metal have been shipped off-site for recycling. Prior to undertaking these clean up actions, the Navy has sought input from all stakeholders, including the Vieques public, regulatory agencies, and local and commonwealth leaders.

Based on feedback from stakeholders, the priority areas for munitions removal actions include beaches, roads, hunting and crabbing areas, parking areas, paths, and picnic areas.

For the underwater work around Vieques, the timeline for CERCLA removal actions, investigations, and remedial actions has a significant level of uncertainty. During the past several years, significant research and development has focused on technologies to locate munitions underwater, but limitations remain in certain situations (e.g., working near endangered species of coral and in areas with high currents or wave action), which make up a significant portion of the underwater area around Vieques. In addition, technologies for safe and effective removal of underwater munitions are still being developed by the Navy and others.

In 2017 a comprehensive assessment was completed across 12,000 underwater acres to investigate the general location of underwater munitions around Vieques. As a follow-up to the assessment, more detailed underwater investigations have been initiated, and these CERCLA investigations are anticipated to be completed by 2027. In addition, a CERCLA removal action for underwater munitions was initiated in 2017. As the first step, underwater munitions were safely removed from the offshore area near a public beach.

This underwater removal action is programmed to continue through 2031 in areas around Vieques that have the greatest potential exposure to underwater munitions. Final CERCLA remedial actions for the underwater sites are expected to be completed by 2032.

The Navy has worked with its regulatory partners to accelerate cleanup and allow public access to desirable areas. These areas have been prioritized with input from local residents, local

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<sup>46</sup> ‘Site closure’ means that a site has been remediated pursuant to a remediation plan approved by the EPA and Puerto Rico regulatory officials, and the U.S. Fish and Wildlife.

businesses, community leaders, the Puerto Rico governor's office, and other commonwealth leaders. In 2014, the Navy completed the accelerated cleanup of land and beaches around the Puerto Ferro historic lighthouse, and the United States Fish and Wildlife Service (USFWS) opened this area for public use in March 2015. In 2017, accelerated cleanup was completed at the former NASD Open Burn/ Open Detonation site in west Vieques, and this area of approximately 400 acres is available for USFWS to open to the public, but lingering effects from Hurricane Maria have delayed the opening. Currently, accelerated cleanup is ongoing at the Carenera peninsula, which has several beaches, a sheltered bay, and snorkeling areas that residents and local outfitters wish to access. In addition, by 2021, approximately 5000 acres in the former Eastern Maneuver Area are expected to be available for hiking and other activities managed by the USFWS.

In September 2017, Hurricane Maria caused extensive damage on Vieques, including damage to Navy support facilities, equipment, and access roads. During the three months immediately after the hurricane, Navy work on Vieques focused almost exclusively on hurricane recovery. As part of this effort, Unexploded Ordnance (UXO) technicians inspected all of the beaches and determined that no munitions had been exposed or washed ashore in areas accessible to the public. In mid-January, 2018, the Navy resumed cleanup operations along with the ongoing recovery efforts. In fiscal year 2018, the Navy obligated approximately \$28.7 million toward environmental restoration efforts on Vieques, including \$5 million to cover the additional cost of hurricane recovery. The hurricane recovery money was spent to repair buildings, equipment, fences, electrical service, and roads in order to operate safely.

#### D. Environmental Cleanup Procedures on Vieques

Petitioners allege that the Navy has followed unsafe cleanup processes such as detonating unexploded ordnances and initiating open-air burning as a low budget alternative to safe and effective decontamination efforts.<sup>47</sup> The Navy provides the community with all of the information related to cleanup goals, status, and procedures. This information is often provided in the form of Fact Sheets that are handed out at RAB meetings and are available on the Vieques cleanup website. In an Environmental Restoration Fact Sheet the Navy explained to the public why controlled burning is sometime necessary for safety reasons and that over 12 years of extensive air sampling have shown that the smoke from these burn events does not contain toxic chemicals and does not reach Vieques residences or businesses:

Within the former bombing range on Vieques, the 75-acre Submunitions Area contains thousands of dangerous submunitions that are lying on the ground surface and are hidden under vegetation. These submunitions are shock-sensitive and may explode if moved or disturbed in any way. This situation poses a very high risk to anyone who may enter the area, including local residents, tourists, wildlife managers, and cleanup workers. In order for cleanup workers to see the submunitions, avoid accidental contact, and clear the submunitions safely, the vegetation must be removed. The Navy has determined that the only safe method for vegetation removal is to conduct small (approximately 2 acre) controlled burns.

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<sup>47</sup> Petition at 13.

Air modeling and extensive air sampling over a period of 12 years indicate that the burn events comply with air quality standards, and smoke does not reach any residences or businesses, which are 8 miles from the Submunitions Area. Therefore, controlled burning in the Submunitions Area is done in a manner that is protective of human health and the environment.<sup>48</sup>

With regard to potential environmental and health impacts of smoke:

Since the populated areas of Vieques are approximately 8 miles from the Submunitions Area, smoke from the controlled burns does not reach any residences or businesses. This conclusion has been confirmed many times during the past 12 years. Since 2005, the Navy has collected over 50 air samples during 19 accidental brush fires in the former bombing range. Additional air sampling occurs during each burn event in the Submunitions Area. No explosive compounds have been detected in any air samples, and all concentrations of particulate matter and metals are in compliance with air quality standards. In addition to the sampling, the Navy has completed air modeling of a hypothetical 103 acre fire in the Submunitions Area, which is highly conservative since the controlled burns cover approximately 2 acres. The air modeling of the hypothetical fire showed no effect on the residential areas of Vieques. Overall, the air sampling and air modeling show that burning in the Submunitions Area is conducted in a manner that is protective of human health and the environment.<sup>49</sup>

Regarding the open air detonation of munitions, it is important to understand the Vieques site conditions. Most of the former munitions range is remote undeveloped land that is difficult to access. Travel is conducted via unimproved access roads using off-road vehicles. Moving through the remediation site is difficult. The roads frequently erode due to weather and must be continuously maintained. Even with this maintenance, roads may develop deep crevices, ruts, or holes due to rain and erosion. The Vieques cleanup involves enormous amounts of unexploded ordnance located in these remote areas of the island. The only alternative to open detonation would be to use detonation chambers. In order to use detonation chambers on Vieques, site workers would need to carry UXO across difficult terrain, transport UXO on unimproved roads, move UXO into and out of storage, and set up each UXO item in the chamber. Such repeated handling of UXO would expose site workers to the very real danger of being injured or killed in an accidental explosion. In contrast, open detonation is a much safer process for the site workers because it requires little or no handling of UXO. Open detonation is also safer for the public because it is the quickest and most efficient way to complete the cleanup, thus reducing the likelihood that residents or tourists may encounter UXO. Any detonation conducted on Vieques is coordinated closely with the Naval Ordnance Safety and Security Activity (NOSSA), which is responsible for establishing explosive safety standards.<sup>50</sup> The open detonation of unexploded

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<sup>48</sup> Controlled Burning in the Submunitions Area of Vieques Fact sheet *available at* [www.navfac.navy.mil/Vieques](http://www.navfac.navy.mil/Vieques).

<sup>49</sup> *Id.*

<sup>50</sup> See generally OPNAV Instruction 8020.15A, Explosive Safety Review, Oversight, and Verification of Munitions Responses, *availbale at*

ordnance is not unique to Vieques, or the United States, but one of many tools in dealing with UXO when discovered and when appropriate.<sup>51</sup>

Despite Petitioners' unsupported allegations to the contrary, the Navy has sampled and modeled air quality at Vieques throughout the remediation process, and the results have been shared with the public and are available in the administrative record. The Navy produced another fact sheet for the public describing that, in order to protect the safety of site workers, the munitions cleanup on Vieques involves open detonation of munitions. The health effects of these operations have been evaluated by air dispersion modeling and 8 years of on-site air sampling. The results show that the open detonations are conducted in a manner that is protective of human health and the environment:

From 2005 to 2013, the Navy conducted air sampling during open detonation events to measure the air concentration of particulate matter (dust and soot), metals, and explosive chemicals.

Over 1,600 air samples were collected during 177 detonation events. In addition, numerous accidental brush fires occurred during these years, and over 50 air samples were collected during 19 accidental brush fires, some of which were several hundred acres in size.

Air samples were collected at locations near the former Live Impact Area (LIA) as well as the populated areas of Vieques. In 2007 and 2008, air dispersion modeling was conducted to estimate the highest air concentrations of particulate matter (dust and soot), metals, and organic contaminants that could result from the open detonations and the proposed controlled burning in the Submunitions Area. The modeling approach was developed in a collaborative effort among the Navy, the U.S. Environmental Protection Agency, and the Puerto Rico Environmental Quality Board.

What did the air samples show? No explosive chemicals were detected in any of the samples. The detected concentrations of all metals were at least 99% below health based standards. There were no detections of mercury or lead in any of the samples. There were no violations of the National Ambient Air Quality Standards (NAAQS)<sup>52</sup> for particulates (dust and soot).

What did the air dispersion modeling show? All predicted concentrations in the community were below regulatory and health based standards, such that there

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<https://www.secnav.navy.mil/doni/Directives/08000%20Ordnance%20Material%20Management%20and%20Support/08-00%20General%20Ordnance%20Material%20Support/8020.15A.pdf>.

<sup>51</sup> See, e.g., "Navy safely detonate unexploded WW2 ordnance in Smeale", *available at*, <https://www.bbc.com/news/world-europe-isle-of-man-43964800> (last accessed Feb. 14, 2018); "WWII-era artillery shell in Litchfield National Park won't be Top End's last explosive discovery," *available at* <https://www.abc.net.au/news/2018-08-15/unexploded-ordnance-in-litchfield-darwin-top-end/10118062> (last accessed Feb. 14, 2019).

<sup>52</sup> NAAQs are ambient air standards that must be met for an area pursuant to the Clean Air Act.

was no indication of risk to the residents of Vieques. Overall, the model results agreed with the on-site air sampling.<sup>53</sup>

Petitioners complain that the cleanup has not been effected quickly enough, or alternatively, that it has been starved of resources and hence been delayed. These unsupported assertions belie the fact that Vieques represents the Department of Navy's largest single munitions response project. The nature of munitions recovery requires that the cleanup be conducted in a deliberate and safe manner. In addition, petitioners allege, without support, that the Navy's cleanup is driven solely by cost. The CERCLA process requires that exploration and analysis of different cleanup alternatives for sites, and numerous regulatory factors must be balanced in selecting the appropriate remedy.<sup>54</sup> While cost is a regulatory factor,<sup>55</sup> it is only one of several. Other factors include the implemenability of a remediation alternative, the alternative's overall protection of human health and the environment, compliance with other applicable laws and regulations, and the alternative's effectiveness.<sup>56</sup> The Navy prepares its analysis of remediation alternatives and shares its analysis with the public and regulatory agencies. It also discusses these alternatives at RAB meetings, and solicits public comment. While petitioners speculate that different or more thorough cleanup alternatives are available, this ignores the technical and environmental challenges in reality. Often, cleanup alternatives are selected to avoid unnecessary environmental damage in light of planned land uses, to avoid wasteful use of finite remediation resources where there is low or no risk to the public, or to reflect the reality that certain areas simply cannot be cleaned without significant risk of injury or death to site workers or the public, or because of the geography.

The Navy also solicits community input on what areas to prioritize for cleanup in order to allow their beneficial use. For example, as mentioned above, based on community input, the Navy has prioritized the cleanup of areas that would be attractive to tourists. As such, many area beaches have been remediated and opened to public use. Moreover, the Navy is proceeding with cleanup of areas that will be converted to parks, hiking trails, nature observatories, and hunting areas.

A simple review of the facts clearly demonstrate that the Navy cleanup of Vieques is proceeding as quickly as technically permissible while protecting overall public health and the environment.

#### E. The Current Status of the Former Naval Resources at Vieques

In 2001, the U.S. Congress directed DOI to designate portions of Vieques as a wildlife refuge or wilderness area.<sup>57</sup> The legislation that established both the eastern (Public Law 107-107) and western (Public Law 106- 398) portions of the refuge stated that the Secretary of the

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<sup>53</sup> Vieques Environmental Restoration Fact Sheet, Munitions Cleanup and Air Quality on Vieques, available at [www.navfac.navy.mil/Vieques](http://www.navfac.navy.mil/Vieques).

<sup>54</sup> 40 C.F.R. § 300.425(e)(9).

<sup>55</sup> *Id.* at 430.300(e)(9)(iii)(G).

<sup>56</sup> *Id.* at 430.300(e)(9).

<sup>57</sup> National Defense Authorization Act 2001, § 1504. (Closure of Vieques Naval Training Range and Disposal of Closed Range).

Interior shall administer the lands as wildlife refuges under the National Wildlife Refuge Administration Act of 1966 (16 U.S.C. 668dd et seq.). In 2003, the U.S. Congress directed the Navy to transfer its 14,700 acre (5,949 ha) eastern landholdings, the site of its Eastern Maneuver Area and Atlantic Fleet Weapons Training Facility, to the Department of Interior, which would administer most of those properties as wildlife refuges under the National Wildlife Refuge Act of 1966. The “live impact area,” the 900 acre (364 ha) bombing range within the eastern territory, was treated differently. With respect to the “live impact area” on eastern Vieques, Public Law 107-107 further stated that the Secretary of the Interior shall administer that area as a wilderness area under the Wilderness Act (16 U.S.C. 1131 et seq.), and deny public access<sup>58</sup> to the area.

In essence, Congress instructed the Department of Interior to administer that area as a “wilderness area” under the Wilderness Act and “deny public access to the area.”<sup>59</sup> This designation was a recognition that Vieques offered significant conservation value.<sup>60</sup>

To be sure, Vieques is not unique as a former military range being designated as a Wilderness area or set aside for ecological conservation. Many former military ranges have been designated for environmental protection throughout the United States. This is in part because military ranges tend to remain undeveloped compared to surrounding communities. In fact, military ranges often offer some of the best and, in some cases the only, preserved ecosystems for species, including many endangered species.<sup>61</sup> The Kofa National Wildlife Refuge in California, 80 percent of which is designated as wilderness, was a former military training area

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<sup>58</sup> Petitioners argue that the United States “confiscated” 24,000 acres in the 1940s, inhibiting their freedom of movement. However, under PL 107-107 DOI must only deny public access to the live impact area. The live impact area is only 900 acres. Navy transferred 14,700 acres to DOI. Arguably the Vieques public now has greater access to public lands than when the land was in private hands before Navy acquired the land.

<sup>59</sup> Sec 1504. National Defense Authorization Act 2001 (Closure of Vieques Naval Training Range and Disposal of Closed Range).

<sup>60</sup> P.L. 88-577, *codified at* 16 U.S.C. §§ 1131-1136. The 1964 Wilderness Act established a National Wilderness Preservation System of federal lands “where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.” The Wilderness Act identified the purposes of wilderness in § 2. Specifically, § 2(a) stated that the purpose was to create a National Wilderness Preservation System of federal lands:

administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness...

The Wilderness Act and subsequent wilderness laws contain several provisions addressing management of wilderness areas. These laws designate wilderness areas as part of and within existing units of federal land, and the management provisions applicable to those units of federal land, particularly those governing management direction and restricting activities, also apply.

<sup>61</sup> See, e.g., <https://www.nytimes.com/1996/01/02/science/wildlife-finds-odd-sanctuary-on-military-bases.html>. For example, the Plum Tree Island Wildlife Refuge in Virginia was a former bombing and gunnery range. See [https://www.fws.gov/refuge/plum\\_tree\\_island/](https://www.fws.gov/refuge/plum_tree_island/).



established shortly after the start of World War II known as the Laguna Maneuver Area.<sup>62</sup> The Rocky Mountain Arsenal Wildlife Refuge in Colorado was a former chemical weapons manufacturing facility established during World War II that was closed and extensively remediated. At Fort Meade, Maryland, the headquarters of the National Security Agency, more than 8,000 acres of forest and wetland have been transferred to the neighboring Patuxent Research Refuge of the Fish and Wildlife Service, tripling the size of the refuge.<sup>63</sup> Even many active installations have large swaths of land that are managed by DoD to ensure ecological conservation.<sup>64</sup>

The Vieques National Wildlife Refuge provides outstanding conservation benefits. The Vieques National Wildlife Refuge was honored in 2015 when it was voted by the general public to be the fourth best national wildlife refuge within the entire Refuge System. This refuge offers great natural beauty and it is the second largest conservation area in all of the Puerto Rico Archipelago and the U.S. Virgin Islands. It is considered to be a remote location, yet it is also technically an urban refuge, providing year around access to thousands of visitors. The Refuge borders the population center of Vieques, is within 20 miles of an urban population of 100,000+ people and within 40 miles of an urban population of 1,000,000+ people. The objectives of the Vieques NWR are to maintain this rare local subtropical dry forest habitat and wetlands ecosystem for resident and migratory birds and rare and endangered species, to protect historical and archeological resource sites, and to provide a safe environment for people to enjoy wildlife oriented public use.<sup>65</sup>

## II. DISCUSSION

The matters addressed by the Petition are not admissible and must be dismissed because the Petition fails to meet the Commission's established criteria in Articles 31 and 34 of the Rules of Procedure ("Rules"). Claims presented in the Petition are beyond the *ratione temporis*, *ratione personae*, and *ratione materiae* competence of the Commission. Moreover, Petitioners have not exhausted the domestic remedies available in the United States, as required by Article 31 of the Rules. The Petition is also inadmissible under Article 34 of the Rules. In particular, the Petition fails under Article 34(a) to state facts that tend to establish violations<sup>66</sup> of rights set forth in the American Declaration, and it is manifestly groundless under Article 34(b).

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<sup>62</sup> <https://www.spl.usace.army.mil/Missions/Formerly-Used-Defense-Sites/Kofa-National-Wildlife-Refuge/>.

<sup>63</sup> <https://www.fws.gov/refuge/Patuxent/about.html>.

<sup>64</sup> <http://www.dodnaturalresources.net/Resources.html>.

<sup>65</sup> <https://www.fws.gov/refuge/vieques/>.

<sup>66</sup> As the American Declaration of the Rights and Duties of Man is a non-binding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States, the United States understands that a "violation" in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration. The United States respects its political commitment to uphold the American Declaration. For an elaboration of the United States' longstanding position on the non-binding nature of the American Declaration, see

A. Claims Related to the Acquisition of Land on Vieques are Inadmissible because they are Outside the Commission's Competence *Ratione Temporis*.

The Commission may not consider claims in the Petition relating to alleged “expropriation” that occurred between 1941 and 1943 in violation of Petitioners’ “right of residence and movement” (alleged violations of Article VIII of the American Declaration) because these events do not fall within the Commission’s competence *ratione temporis*. These events occurred before the adoption of the American Declaration and the establishment of the Commission, and they do not constitute continuing acts that would otherwise bring them within the Commission’s jurisdiction.

i. *Prohibition on Retroactive Application of the American Declaration*

The principle that relevant instruments, in this case the American Declaration, cannot be applied retroactively is well-established in Inter-American<sup>67</sup> and international<sup>68</sup> jurisprudence and has been consistently applied by the Commission to reject the consideration of claims that predate the commitments set forth in the instrument. Here, the acquisition of land between 1941 and 1943 predates the Commission’s competence as to claims brought against the United States, which began in 1951. Thus, the Commission does not have the competence *ratione temporis* to review Petitioner’s claims related to the transfer of land on the island of Vieques, including alleged violations of Article VIII of the American Declaration.

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Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988.

<sup>67</sup> See, e.g., I.-A. Court H.R., *Alfonso Martín Del Campo Dodd Case*, Preliminary Objections, Judgment of September 3, 2004, Ser. C N° 113, (2004), ¶ 85 (holding that Court lacked competent *ratione temporis* because alleged events ceased to exist prior to Court having cognizance over supposed violations); I.-A. Comm. H.R., Report N° 62/03, P.12.049, *Kenneth Walker*, October 10, 2003, United States, Annual Report 2003, at ¶ 38 (Commission only competent *ratione temporis* to examine those complaints that allege facts that occurred “on or after the date on which the United States’ [commitments] under the American Declaration took effect”).

<sup>68</sup> See, e.g., Vienna Convention on the Law of Treaties, 8 ILM 679, art. 28 (“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”); I.-A. Court H.R., *Cantos v. Argentina*, Preliminary Objections, Judgment of September 7, 2001, Ser. C N° 85, ¶ 37 (recognizing that principle of non-retroactivity of international norms is embodied in Vienna Convention). See also *R.A.V.N. v. Argentina*, Hum. Rts. Comm., Communication No. 343/1988 (5 April 1990), ¶ 2.3 (International Covenant on Civil and Political Rights “cannot be applied retroactively” and that the Committee is “precluded *ratione temporis*” from examining alleged violations of Covenant that occurred before Covenant entered into force for Argentina).

ii. *Events at Issue Do Not Constitute a Continuing Act*

The Commission has held that events predating the relevant commitments may only be considered if they constitute continuing acts.<sup>69</sup> However, by their very nature, the acquisition of property in 1941-1943 is not a continuing act. The acquisition of land on Vieques by the United States Navy was a discrete event. Moreover, the ten petitioners identified in the Petition have presented no facts to suggest any claim to the land purchased by the Navy and, in fact, no Petitioner was even alive at the time that the Navy acquired land on Vieques.<sup>70</sup> It is therefore impossible as a factual matter for Petitioners to articulate a claim that the acquisition of property in 1941-1943 constitutes a continuing act in violation of their rights.

In some respects, this claim resembles the petition in *Isamu Carlos Shibayama et al. v. United States*,<sup>71</sup> which is highly relevant to the present case. In that petition, the Commission was asked to consider alleged violations related to a World War II-era internment program, and the petitioners attempted to argue, as they do in the instant Petition, that the violations dating from the 1940s were continuing acts. In its decision on admissibility, the Commission rejected that argument and correctly concluded that these events were outside of its competence *ratione temporis*.<sup>72</sup> The Commission should do the same in this case with regard to the acquisition of land by the Navy on Vieques in 1941-1943.

iii. *No Obligation to Provide a Remedy Without a Cognizable Underlying Violation*

The Petitioners go to great efforts to demonstrate that the alleged violations committed during and after the 1941-1943 acquisition of land on Vieques are attributable to the United States and consequently that the United States has violated the American Declaration by “continuing to impose conditions that impede the return of the Petitioners” to that land.<sup>73</sup> But these arguments do nothing to change the fundamental fact that the events during and after the acquisition of land on Vieques are outside the competence *ratione temporis* of the Commission and therefore may not be considered by the Commission, either directly or indirectly through a legal argument that the alleged harm suffered as a result of the acquisition somehow brings that acquisition itself within the Commission’s jurisdiction. Such an argument is without foundation in the American Declaration or international jurisprudence more broadly.

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<sup>69</sup> See, e.g., I.-A. Comm. H.R., *João Canuto de Oliveira v. Brazil*, Report N° 24/98, Annual Report of the IACHR 1997, ¶¶ 13-18 (holding Commission had jurisdiction *ratione temporis* to hear case regarding alleged violations that occurred prior to establishment of the IACHR “inasmuch as they may constitute a continuous violation” of Convention).

<sup>70</sup> See Petition at 13-16.

<sup>71</sup> Report N° 26/06, Petition 434-03, *Isamu Carlos Shibayama et al.*, United States, Admissibility, Annual Report 2006 (2006).

<sup>72</sup> See *id.* at ¶ 42.

<sup>73</sup> Petition at 70.

Indeed, it is a fundamental principle that the obligation to provide a remedy only accrues when there has been a cognizable violation of an underlying human rights commitment. The Human Rights Committee's consideration of this issue in *R.A.V.N. et al. v. Argentina*<sup>74</sup> is instructive. In that case, the Committee held that "under article 2 [of the International Covenant on Civil and Political Rights], the right to a remedy arises only after a violation of a Covenant right has been established. However, the events of disappearance and death, which could have constituted violations of several articles of the Covenant, and in respect of which remedies could have been invoked, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina. Therefore, the matter cannot be considered by the Committee, as this aspect of the communication is inadmissible *ratione temporis*."<sup>75</sup> In the present case, where the underlying alleged human rights violations are inadmissible *ratione temporis*, the Commission should similarly hold claims related to a remedy for those alleged violations inadmissible. To do otherwise would create a backdoor mechanism for claims related to events that would otherwise not be admissible.

**B. Claims based on Instruments beyond the American Declaration are Inadmissible because they are outside the Commission's Competence *Ratione Materiae*.**

Petitioner alleges that the United States has "violated"<sup>76</sup> certain specific rights recognized in the American Declaration of the Rights and Duties of Man ("American Declaration"). As noted in numerous prior submissions, the United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS).<sup>77</sup>

<sup>74</sup> UNDOC CCPR/C/38/D/343/1988 (1990).

<sup>75</sup> *Id.* at ¶ 5.3.

<sup>76</sup> As the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States, *see supra* n. 1, the United States understands that a "violation" in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration. The United States respects its political commitment to uphold the American Declaration.

<sup>77</sup> The United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the OAS. U.S. courts of appeal have independently held that the American Declaration is nonbinding and that the Commission's decisions do not bind the United States. *See, e.g.,* *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001); *accord, e.g.,* *Flores-Nova v. Attorney General of the United States*, 652 F.3d 488, 493–94 (3rd Cir. 2011); *In re Hicks*, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in *Garza*, "[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission's decisions before the American Convention goes into effect. To the contrary, the OAS Charter's reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission's statute similarly shows that the Commission does not have the power to bind member states." *Accord* Commission Statute, art. 20 (setting forth recommendatory but not binding powers). For a further discussion of the U.S. position regarding the nonbinding nature of the American

Article 20 of the Statute of the Commission sets forth the Commission's powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights, including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. The Commission lacks competence to issue a binding decision vis-à-vis the United States on matters arising under other international human rights treaties, whether or not the United States is a party, or under customary international law.

Moreover, although Petitioners anchor their claims in specific provisions of the American Declaration, in every instance, they attempt to expand the competence of the Commission by invoking an array of other international instruments to substantiate their claims that international legal obligations have been violated. Such recourse to international instruments and authorities beyond the American Declaration reflects the reality that Petitioners' claims do not implicate provisions of the American Declaration, leaving them to look to other instruments in their attempt to construe cognizable claims. As a result, the Commission lacks the competence *ratione materiae* to entertain the claims contained in the Petition.

Under Article 34(a), the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights [(‘American Convention’)] and other applicable instruments ... ." Article 20 of the Commission's Statute and Article 23 of the Rules identify the American Declaration as an "applicable instrument" with respect to nonparties to the American Convention such as the United States. The United States is not a party to any of the other instruments listed in Article 23, and in any event, Article 23 does not list various instruments and bodies Petitioners rely on to articulate their claims.<sup>78</sup> Consequently, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States.<sup>79</sup> As such, Petitioners' claims, which at base are rooted in these instruments, are inadmissible under Article 34(a) as outside the Commission's competence.

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Declaration, *see* Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, available at <http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html>.

<sup>78</sup> These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration of the United Nations Conference on the Human Environment, the Convention on the Rights of the Child, the Principles on Access to Information, the Declaration of Principles on Freedom of Expression, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, and the Declaration of the Aims and Purposes of the International Labour Organization.

<sup>79</sup> *See, e.g.*, U.S. Hearing Presentation, *Ameziane v. United States*, Case No. 12.865, 164th Period of Sessions, Mexico City, Sept. 7, 2017 ("Ameziane U.S. Hearing Presentation"), available at

C. Claims based on *Actio Popularis* are Inadmissible because they are outside the Commission's Competence *Ratione Personae*.

To the extent that Petitioners articulate generalized allegations of violations of the American Declaration beyond those cognizable in relation to Petitioners, the Petition must be dismissed because the Commission lacks competence *ratione personae* to entertain claims based on a theory of *actio popularis*.

The Petition is filed on behalf of ten residents of Vieques: Zaida Torres, Wanda Bermúdez, Ivis Cintrón Díaz, Ida Vodofsky Colón, Norma Torres Sanes, Cacimar Zenón, Asunción Rivera, Ismael Guadalupe, Ilsa Ortiz Ortiz, and Nilo Adams Colón.<sup>80</sup> Therefore, the Commission only has competence to review particularized claims with respect to these ten individuals. As it has explained on numerous occasions, the Commission has competence to review individual petitions that allege “concrete violations of the rights of specific individuals, whether separately or as part of a group, in order that the Commission can determine the nature and extent of the State’s responsibility for those violations ... .”<sup>81</sup> The Commission’s governing instruments “do not allow for an *actio popularis*.”<sup>82</sup> Consequently, an individual petition is not the proper means by which to request a decision about alleged violations suffered by particular industries in Vieques (e.g., “the commercial fishing industry”),<sup>83</sup> the “people of Vieques” as a whole,<sup>84</sup> or indeed, in the absence of an allegedly aggrieved individual or group of individuals altogether.<sup>85</sup> While the matters Petitioner complains about may be a proper subject for a thematic hearing before the Commission,<sup>86</sup> they are improper in the context of an individual petition.

D. The Petitioners Have Not Pursued or Exhausted Domestic Remedies.

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<https://www.youtube.com/watch?v=sbN4tBcBbtQ> (U.S. delegation providing legal reasons for Commission’s lack of competence over extraneous instruments).

<sup>80</sup> Petition at 15-18.

<sup>81</sup> *Operation Gatekeeper* Inadmissibility Decision, Petition No. 65/99, Report No. 104/05, ¶ 51 (Oct. 27, 2005); *accord*, e.g., *Undocumented Migrant, Legal Resident, and U.S. Citizen Victims of Anti-Immigrant Vigilantes v. United States*, Case No. 12.720, Admissibility, Aug. 5, 2009, ¶¶ 41–44 (dismissing claims relating to unidentified group of alleged victims of anti-immigrant violence for lack of competence *ratione personae*).

<sup>82</sup> *Operation Gatekeeper* Inadmissibility Decision, *supra* n. 81, at ¶ 51. *Accord* *International Abductions*, Petition No. 11.082, Inadmissibility, Nov. 7, 2014, ¶ 27.

<sup>83</sup> Petition at 78.

<sup>84</sup> Petition at 34.

<sup>85</sup> Petition at 53-59 (failing to identify any individual or group of individuals who have allegedly suffered a violation of their “right to freedom of investigation, of opinion, and of the expression and dissemination of ideas” under Article IV of the American Declaration).

<sup>86</sup> *See* Rules Art. 61.

To the extent that Petitioners articulate alleged violations of the American Declaration that fall within the competence of the Commission, the Commission should declare the Petition inadmissible because Petitioners have not satisfied their duty to demonstrate that they have “invoked and exhausted” domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules.

The Commission has repeatedly emphasized that a petitioner has the duty to pursue all available domestic remedies. Article 31(1) of the Rules states that “[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.” As the Commission is aware, the requirement of exhaustion of domestic remedies stems from customary international law, as a means of respecting State sovereignty. It ensures that the State on whose territory a human rights violation allegedly has occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system.<sup>87</sup> A State conducting judicial proceedings for its national system has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resorting to an international body.<sup>88</sup> The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.”<sup>89</sup> The Commission has repeatedly made clear that petitioners have the duty to pursue *all* available domestic remedies.<sup>90</sup>

As an initial matter, the Petition does not evidence that the Petitioners have pursued *any* domestic remedies to attempt to redress their claims and, on that basis alone, the Petition should be deemed inadmissible. In addressing the Commission’s exhaustion requirement, the Petition states that 7,125 residents of Vieques filed a complaint against the United States under the Federal Tort Claims Act (FTCA) in 2005.<sup>91</sup> Reference to the *Sanchez* litigation is insufficient to satisfy the requirement that Petitioners exhaust domestic remedies with respect to their alleged violations of Articles I, IV, VI, VII, VIII, IX, XI, XIV, XVIII and XXIV of the American Declaration. Even if the reasoning of the *Sanchez* litigation might apply to some of the claims presented by Petitioners, it is their responsibility to pursue those claims in U.S. courts. It therefore is not possible for Petitioners to invoke that litigation here as a panacea for their failure to pursue and exhaust domestic remedies for each of the claims presented in the Petition. To be

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<sup>87</sup> See, e.g. *Interhandel Case* (Switzerland v. United States) [1959] I.C.J. 6, 26–27; *Panevezys-Saldutiskis Railway Case* (Estonia v. Lithuania), 1939 P.C.I.J., Ser. A/B, No. 76.

<sup>88</sup> THOMAS HAESLER, *THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS* (1968) at 18–19.

<sup>89</sup> *Velásquez Rodríguez Case*, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

<sup>90</sup> See, e.g. *Páez García v. Venezuela*, Petition No. 670-01, Report No. 13/13, Mar. 20, 2013, Analysis § B(1) & Conclusions ¶ 35 (finding petition inadmissible for failure to exhaust because petitioner did not avail himself of remedies available to him in the domestic system).

<sup>91</sup> See Petition at 79-80 (citing *Sanchez v. United States*, 707 F. Supp. 2d 216 (D.P.R. 2010), *aff’d sub nom. Sanchez ex rel. D.R.-S. v. United States*, 671 F.3d 86 (1st Cir. 2012)).

sure, the Petition makes no showing that Petitioners who have submitted the Petition even participated in the *Sanchez* litigation or that they lodged their particularized claims against the United States. But even if it had, the requirement that Petitioners exhaust domestic remedies is a *particularized* requirement that requires individual petitioners to pursue their specific claims under domestic law to address their concerns before invoking the Commission's authority. For their claims to be admissible, Petitioners must demonstrate that "remedies of the domestic legal system have been pursued and exhausted." There is absolutely no indication in the Petition that the Petitioners have satisfied this requirement.

Therefore, even if some residents of Vieques have pursued some remedies under U.S. law alleging the Navy was negligent because it violated particular statutes and regulations and did not alert residents of Vieques to certain safety risks related to military operations, Petitioners have failed to demonstrate that they have pursued or exhausted all available domestic remedies in several ways. First, with respect to claims based on property rights, Petitioners have not pursued or exhausted Constitutional remedies for alleged takings. Second, with respect to claims based on environmental contamination, Petitioners have not pursued or exhausted statutory mechanisms for judicial review. Third, and more broadly, Petitioners have not pursued or exhausted avenues to challenge U.S. Government action. Finally, with respect to claims based on access to information, Petitioners have failed to pursue existing mechanisms to receive the information they appear to desire. Each of these avenues of redress that Petitioners have failed to pursue will be described in turn.

*i. Constitutional Remedies for Property Claims*

The Takings Clause of the Fifth Amendment of the United States Constitution requires the United States to provide just compensation to property owners when their property is physically taken by the government.<sup>92</sup> Under United States law, there are two methods wherein the United States obtains title to property through exercise of sovereign powers. First, there is what is called a direct condemnation. In that instance, the United States files a lawsuit to condemn the property of an individual. The condemnation must serve a public purpose, such as building a road.

There is also what is called an inverse condemnation. This may occur when some action by the United States, other than the filing of a lawsuit, results in depriving a private individual of the use of his or her property. This can be caused, for instance, by the flooding of property in connection with the building and filling of a dam. Again, the action of the United States is an official action for a public purpose. In both instances, just compensation may be awarded.

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<sup>92</sup> U.S. Constitution, Am. V ("nor shall property be taken for public use, without just compensation.").



Compensation for such condemnation is required by the Fifth Amendment of the United States Constitution.<sup>93</sup>

In the instant Petition, Petitioners allege that the United States “expropriated” property at Vieques, i.e., took such property without compensation.<sup>94</sup> If Petitioners’ property was taken without just compensation, they would have had a remedy (prior to the expiration of the applicable statute of limitations) to seek compensation in U.S. courts with jurisdiction over such claims, most likely the Court of Federal Claims. The Petition contains no evidence that this remedy under the U.S. Constitution was pursued or exhausted.

*ii. Statutory Remedies for Environmental Claims*

CERCLA section 113(h)<sup>95</sup> was a carefully crafted provision to protect the integrity of environmental remediation, and Domestic law provides Petitioners an avenue for remedy for their broader claims. To be sure, as noted in the Petition, “Petitioners cannot, at this time, challenge the activities that the Navy is undertaking, because section 113(h) of CERCLA deprives federal courts of jurisdiction to review “challenges to removal or remedial action[s]” that have been selected following the appropriate procedure.”<sup>96</sup> Petitioners’ ostensible environmental claims may become ripe under CERCLA once the environmental remediation efforts being conducted by the United States under the CERCLA are complete, to the extent permitted by one of the express exceptions to the section 113(h) bar against challenging removal or remedial actions. This is entirely consistent with the margin of appreciation afforded to states in this arena.<sup>97</sup>

At the outset, it is important to understand section 113(h), its relationship to other aspects of CERCLA, and U.S. jurisprudence regarding this provision. Section 113(h) disallows federal or state court jurisdiction to review challenges to removal or remedial actions selected pursuant to the CERCLA, with certain enumerated exceptions. There are critically important reasons why Congress enacted this provision. Congress was concerned, first and foremost, that clean-up of substances that endanger public health would be delayed if EPA were forced to litigate each detail of its removal and remedial plans before implementing them.<sup>98</sup> Thus, the Senate Judiciary

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<sup>93</sup> See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922) (“The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.”).

<sup>94</sup> See, e.g., Petition at 19, 69 (although at points Petitioners concede that compensation was provided in some instances).

<sup>95</sup> 42 U.S.C. § 9613(h).

<sup>96</sup> Petition at 8.

<sup>97</sup> See discussion *infra*, Section II.E.i-ii (discussing margin of appreciation in the context of environmental claims).

<sup>98</sup> *Reardon v. United States*, 947 F.2d 1509, 1513 (1<sup>st</sup> Cir. 1991). See, also, *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1390 (5<sup>th</sup> Cir. 1989). “Although review in the case at hand

Committee Report stated that section 113(h) barred pre-enforcement review because such review “would be a significant obstacle to the implementation of response actions and the use of administrative orders. Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlement and voluntary cleanups.”<sup>99</sup>

Moreover, information needed to decide legal challenges may not be available at the time such challenges are made and before cleanup is deemed complete.<sup>100</sup> In the case of Vieques, the democratically-elected Governor participated in the decision to designate the Vieques cleanup as a NPL site under CERCLA. That cleanup and that freely made decision must be allowed to run its course, and the cleanup completed. Petitioners will be free to seek redress in federal court, to the extent their claim is permitted under one of section 113(h)’s enumerated exceptions. Despite this reasoned balance between protecting the public health and preventing never-ending litigation from preventing remediation enacted by the U.S. Congress, petitioners would ask the Commission to do just that – to delve into a highly complex environmental remediation project and potentially substitute its judgement with those of Federal and Commonwealth regulators, environmental specialists, engineers, and explosives experts conducting one of the most extensive remediation projects in history.

### *iii. Legal Mechanisms to Challenge Government Action in Court*

Under the above programs, members of the public are given broad rights of participation as well as the ability to challenge government actions in court. Administrative proceedings such as rulemakings to promulgate or revise emission standards and permit proceedings typically involve notice to the public and an opportunity to comment on the state or federal government’s proposed action. When the United States Government takes definitive administrative action -- be it the promulgation of a regulation, issuing a permit or some other action -- such actions typically are subject to challenge and judicial review in federal court.

Two bedrock principles underlie the United States’ legal system, including the scheme of environmental regulation. First, final administrative action by the Government, or in some instances the Government’s failure to act, is generally subject to review in the courts. Second, citizens have the right to petition the Government to take action. Any final action taken by the Government in response is subject to judicial review. These rights are embodied in specific provisions of the various federal environmental statutes and implementing regulations or, in the absence of such provisions, might be enforced through the Administrative Procedure Act

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would not delay actual cleanup of hazardous wastes, it would force the EPA -- against the wishes of Congress -- to engage in "piecemeal" litigation and use its resources to protect its rights to recover from any [potentially responsible party] filing such an action. ... Moreover, the crazy-quilt litigation that could result from allowing [potentially responsible parties] to file declaratory judgment actions prior to the initiation of government cost recovery actions could force the EPA to confront inconsistent results.” *Id.*

<sup>99</sup> S. Rep. No. 11, 99th Cong. (1st Sess.), at 58 (1985).

<sup>100</sup> *Reardon*, 947 F.2d at 1513.

(APA).<sup>101</sup> The APA also provides mechanisms to compel Government action. As to nondiscretionary duties, federal courts can compel agency action that has been “unlawfully withheld or unreasonably delayed.”<sup>102</sup>

*iv. Judicial Remedies for Personal Injury or Property Damage*

The Federal Tort Claims Act (“FTCA”) provides a judicial remedy for personal injury or property damage resulting from negligent government conduct.<sup>103</sup> The FTCA contains a limited waiver of the immunity of the U.S. Government in U.S. courts, thereby allowing some tort claims to be pursued against the United States.<sup>104</sup> The FTCA generally authorizes such action “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”<sup>105</sup> Such action may only be brought in a district court of the United States.<sup>106</sup>

Although the Petition asserts that Petitioners pursued a claim under the FTCA,<sup>107</sup> Petitioners have made no showing that they were parties to the *Sanchez* litigation, much less that their individual claims against the United States were pursued under the FTCA. The Petition contains no evidence that this remedy under the FTCA was pursued or exhausted by Petitioners.

*iv. Administrative and Judicial Mechanisms to Access Information*

Vieques residents and others have the right to request access to Navy records. The United States Freedom of Information Act (“FOIA”) was enacted by Congress in 1966 and has since been amended numerous times, most recently in 2016.<sup>108</sup> The President and Attorney General of the United States have issued memoranda to all agencies emphasizing that the Freedom of Information Act reflects a “profound national commitment to ensuring an open Government” and directing agencies to “adopt a presumption in favor of disclosure.”<sup>109</sup>

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<sup>101</sup> 5 U.S.C. § 551 *et seq.*

<sup>102</sup> 5 U.S.C. § 706(1).

<sup>103</sup> 28 U.S.C. § 2674.

<sup>104</sup> 28 U.S.C. § 2679.

<sup>105</sup> 28 U.S.C. § 1346(b).

<sup>106</sup> *Id.*

<sup>107</sup> Petition at 63.

<sup>108</sup> 5 U.S.C. § 552 *et seq.*

<sup>109</sup> Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama’s FOIA Memorandum]; accord Attorney General Holder’s Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 49892 (Sep. 29, 2009) [hereinafter Attorney General Holder’s FOIA Guidelines]; see FOIA Post, “OIP Guidance: President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines - Creating a New Era of Open Government” (posted 4/17/09).

FOIA authorizes “any person” to request access to any record that is maintained within the control of a federal agency. A “person” is broadly defined and may be a U.S. or foreign citizen, institution, company, etc. With respect to the Navy in particular, the Department of the Navy adheres to the policy and disclosure regulations set forth in 32 Code of Federal Regulations Chapter VI Part 701, to implement the FOIA uniformly and consistently and to provide maximum allowable disclosure of agency records upon request by an individual.<sup>110</sup>

In order to make a valid FOIA request, a person must reasonably describe the record(s) sought and comply with the agency’s regulations governing how to make a request, but need not provide any justification for submitting the request. In all, FOIA applies to over 100 federal agencies. An agency is generally required to comply with a FOIA request within twenty working days of its receipt (or, in some instances, thirty working days). In response to a FOIA request, an agency must make available any requested record, or reasonably segregable portion of a requested record, that does fall within one or more of the FOIA’s nine exemptions. “Exemptions” are categories of information that Congress determined need not be released in response to a FOIA request because disclosure would be harmful to a government or private interest. The FOIA’s nine exemptions protect a wide range of institutional, commercial, and individual interests, such as national security, law enforcement effectiveness, and personal privacy, and confidentiality of information protected by other federal laws, including information pertaining to individual visa files.

In the event a FOIA requester is not satisfied with an agency’s response to a FOIA request, the requester may obtain a second-level review of the agency’s adverse FOIA action by filing an administrative appeal to a higher authority within the agency. Once the requester has exhausted his or her administrative remedies, he or she may seek judicial review of the agency’s action by filing a lawsuit in federal court. A requester can also raise concerns regarding an agency’s action on his or her FOIA request with the agency’s FOIA Public Liaison, a person whom each agency is required by law to designate. In addition, requesters may seek mediation services from the Office of Government Information Services within the National Archives and Records Administration.

Although Petitioners allege that “the United States government has refused [to] divulge important information concerning its military practices in Vieques,”<sup>111</sup> there is no indication that Petitioners have pursued and exhausted the mechanisms available under FOIA to seek and obtain the information to which they believe they are entitled.

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<sup>110</sup> *Id.*

<sup>111</sup> Petition at 57.

For the foregoing reasons, Petitioners have failed to exhaust their local remedies and the Petition is inadmissible under Article 31.

E. The Petitioners Fails to Establish Facts that Could Support a Claim of Violation of the American Declaration

The Petition is also inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration and it is manifestly groundless.

i. *Article I (Right to Life, Liberty, and Security of Person)*

Petitioners allege that the United States has violated Article I of the American Declaration due to contamination by military practices in Vieques. To the extent that contamination in connection with military activity has impacted enjoyment of this right, the U.S. Government has been actively engaged in providing a comprehensive remedy to address this contamination.<sup>112</sup> As discussed in great detail above, these extensive efforts include more than a quarter of a billion dollars spent on clean-up and remediation efforts at Vieques.<sup>113</sup> Because the United States is actively engaged in these efforts, Petitioners' claim is mooted because a remedy has been provided and is currently being administered by the United States.

To the extent that Petitioners take issue with the remedy provided by the United States, such complaint is insufficient to constitute a claim under Article I of the American Declaration because the Commission should provide the United States with a margin of appreciation in the provision of a remedy. The Commission should defer to the discretion of local actors who are required to make difficult decisions based on their own factual assessments.<sup>114</sup> Such a margin of appreciation is particularly useful when implementation of a legitimate state goal requires fact-intensive judgment calls. The complicated medical and scientific circumstances in this matter counsel strongly in favor of deferring to the discretion of those responsible for decision-making. In these types of difficult cases, international bodies such as the Commission and the Inter-American Court of Human Rights use this "margin of appreciation" standard to respect State sovereignty and conserve their limited resources while still ensuring that human rights are protected.<sup>115</sup>

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<sup>112</sup> See discussion *supra*, Section I (Facts and Procedural History).

<sup>113</sup> See discussion *supra*, Section I.B (The Environmental Cleanup of Vieques).

<sup>114</sup> See, e.g., *Hertzberg v. Finland*, Comm'n No. R. 14/61, U.N. Doc. A/37/40 (1982), ¶ 10.3 ("[P]ublic morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities."); *Sunday Times v. U.K.*, (1979) Eur. Ct. H.R. 1 (holding that the United Kingdom's injunction against the publication of an article violated the European Convention of Human Rights, but recognizing that domestic courts should be granted a margin of appreciation because of their proximity to the events in question).

<sup>115</sup> See, e.g., *Vejarano v. Peru*, Case No. 11.166, Report No. 48/00, Merits, Apr. 13, 2000, ¶ 55; Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion.

In this context, it is worth recalling the cautionary words of *Fadeyeva v. Russia*, a European Court of Human Rights case that has been cited by the Commission.<sup>116</sup> *Fadeyeva* emphasized that “States have a wide margin of appreciation in the sphere of environmental protection,” that “the national authorities . . . are in principle better placed than an international court to evaluate local needs and conditions,” and that it is not for such a court “to substitute for the national authorities any other assessment of what might be best policy in this difficult technical and social sphere.”<sup>117</sup> In this case, Petitioners’ arguments invite the Commission to intervene in domestic policy matters and substitute its policy judgment for that of national authorities with technical expertise in the relevant subject matter, legal competence to address the claims, and authority to impose appropriate remedies. This approach must be rejected because it is not supported by the provisions of the American Declaration on which Petitioners rely or by the facts in the record. Accordingly, Petitioners’ claim under Article I of the American Declaration is inadmissible under Article 34 of the Rules.

ii. *Article XI (Right to Preservation of Health through Sanitary and Social Measures)*

Article XI of the American Declaration provides that every person “has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.” Petitioners have failed to establish facts that could support a claim of violation of this provision. Importantly, Article XI of the American Declaration articulates the “right to the preservation of health” through specific means: “sanitary and social measures” relating to “food, clothing, housing and medical care.” The right to the preservation of health through such measures under Article XI is further qualified “to the extent permitted by public and community resources.”

Critically, Petitioners have failed to articulate any violation of their rights to the preservation of health in the context of “sanitary and social measures” relating to “food, clothing, housing and medical care.” Instead, the Petition overstates the reach of Article XI, misinterprets Commission cases pertinent to that Article, and relies on cases interpreting other, inapposite international instruments. It is important to emphasize that Article XI is not an open-ended right encompassing all things related to the concept of “health.” Rather, Article XI specifically contemplates the right to the preservation of health through “sanitary and social measures” and further qualifies that right with the clause “to the extent permitted by public and community resources.” Article XI not only allows, but in fact requires, the balancing of the considerations enumerated therein, including scientific and technical resources and economic and social impacts. In other words, even if Petitioners had successfully articulated a claim with respect to

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<sup>116</sup> *Fadeyeva v. Russia* (June 9, 2005), analyzed in Report No. 43/10 at 12 & n. 36. Although jurisprudence arising under the European Convention on Human Rights is not useful in interpreting the American Declaration substantively, *Fadeyeva* very clearly explains the reasons why, as a prudential matter, international tribunals defer to domestic authorities in the area of environmental and public-health regulation and protection.

<sup>117</sup> *Id.* at ¶¶ 102 & 103.

sanitary and social measures—which they have not—such claim must further be weighed against the margin of appreciation expressly contemplated by Article XI itself.

The evaluation and balancing required by Article XI rests with the regulatory regime of the State and, for the reasons so cogently expressed in *Fadeyeva*, discussed above, must be accorded great deference. Section I of this Response demonstrates that the United States’ system for the protection of the environment and public health is comprehensive and affords ample opportunity for participation by affected individuals and groups, and that this system has been, and continues to be, actively engaged in addressing the concerns raised by Petitioners. This system may not be perfect, but it is among the best in the world, and its processes and results are entitled to the “wide margin of appreciation” demanded by *Fadeyeva*. Such deference to the expertise of domestic institutions is particularly mandated here, where the process of environmental protection and remediation is ongoing and evolving, and where Petitioners have provided no information to cast doubt on the efficacy of that process. And, even if Petitioners had, their claim is not cognizable *ab initio* under Article XI of the American Declaration because it falls beyond the preservation of health through sanitary and social measures relating to food, clothing, housing and medical care. Petitioners’ claim under Article XI of the American Declaration is therefore inadmissible under Article 34 of the Rules because it does not establish facts that could support a claim of a violation of this provision of the Declaration.

Regarding alleged health impacts of U.S. operations at Vieques, Petitioners’ claims are also without merit. Petitioners assert that while the Navy stifles research, significant evidence exists linking the Navy’s activities to long-term damage to the health of residents and possibly to the island’s environment. They claim that as a result of these harmful practices, generations of Viequeses suffer from inflated rates of cancer, hypertension, asthma, birth defects, higher infant mortality rates and low birth weights, respiratory illnesses, kidney failure and skin rashes.<sup>118</sup> Petitioners offer tragic but individual anecdotal situations as evidence, and information from now-dated sources that was used in previous litigation on a narrower question of law only tangentially related to the larger cleanup. In fact, the United States Government and independent researchers have analyzed whether health on the island is impacted by historic naval activities.<sup>119</sup> Repeated studies have shown no causal link.

The Agency for Toxic Substances and Disease Registry (ATSDR) is a United States Federal public health agency of the U.S. Department of Health and Human Services established by CERCLA.<sup>120</sup> ATSDR protects communities from harmful health effects related to exposure to natural and man-made hazardous substances. ATSDR responds to environmental health

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<sup>118</sup> Petition at 13.

<sup>119</sup> Agency for Toxic Substance and Disease Registry (“ATSDR”), U.S. Department of Health and Human Services, *An Evaluation Of Environmental, Biological, and Health Data from the Island of Vieques* (“ATSDR 2013 Report”), xii - xiv Puerto Rico, March 19, 2013, available at [http://www.atsdr.cdc.gov/hac/pha/vieques/Vieques\\_Summary\\_Final\\_Report\\_English\\_2013.pdf](http://www.atsdr.cdc.gov/hac/pha/vieques/Vieques_Summary_Final_Report_English_2013.pdf).

<sup>120</sup> See generally <https://www.atsdr.cdc.gov/about/orgstruct.html>.

emergencies; investigates emerging environmental health threats; conducts research on the health impacts of hazardous waste sites; and builds capabilities of and provides actionable guidance to state and local health partners.<sup>121</sup>

On March 19, 2013, the ATSDR published, “An Evaluation of Environmental, Biological, and Health Data from the Island of Vieques, Puerto Rico.”<sup>122</sup> The report was produced in both English and Spanish. This thorough analysis of Viequense environmental data resulted in a nine-chapter report which endeavored: 1) to assess critically all of the available exposure and health information relevant to Viequense public health issues, 2) to draw conclusions - albeit often with some degree of uncertainty, and 3) to make recommendations for environmental and public health agencies as well as for scientific researchers that will assist in reducing that uncertainty.<sup>123</sup>

The report’s principal focus was to review and update environmental data on Vieques air, water, soil, seafood, and locally grown foods. The report also addressed human biomonitoring and health outcome data. Put directly, the “public health question in the chapters on food, air, soil, and water is whether residents were or are exposed to bombing-related contaminants and whether there were or are any public health consequences.”<sup>124</sup> The report acknowledges that when reaching conclusions about hazardous waste and public health, some degree of uncertainty will always remain. The report was peer reviewed.<sup>125</sup>

The report evaluated the known environmental data associated with military activities and showed that residents living in the central portion of the island did not have direct contact with soils from the live impact area (LIA) at levels that could harm their health. Nor were residents likely to be exposed to contaminants in air at levels that could harm their health. While explosive compounds were found in a few sampled marine animals, residents did not consume these animals. Therefore, the available data indicate that no exposure occurred at levels that would harm health. Additional findings from the report include:

- There was no relationship between mercury in fish and military operations on Vieques.
- ATSDR reviewed the data on airborne contaminants from military exercises at the former Vieques Naval Training Facility. This review confirmed their previous findings and indicated that airborne contaminants from past military operations were very unlikely to have had health effects on Viequenses.

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<sup>121</sup> *Id.*

<sup>122</sup> Agency for Toxic Substance and Disease Registry (“ATSDR”), U.S. Department of Health and Human Services, *An Evaluation Of Environmental, Biological, and Health Data from the Island of Vieques* (“ATSDR 2013 Report”), xii - xiv Puerto Rico, March 19, 2013, available at [http://www.atsdr.cdc.gov/hac/pha/vieques/Vieques\\_Summary\\_Final\\_Report\\_English\\_2013.pdf](http://www.atsdr.cdc.gov/hac/pha/vieques/Vieques_Summary_Final_Report_English_2013.pdf).

<sup>123</sup> *Id.* at ix.

<sup>124</sup> *Id.*

<sup>125</sup> The 2013 report is not the first US Government effort to investigate Vieques related exposures. As noted in the 2013 report, from 2001 to 2003, the ATSDR undertook four Vieques related health studies. Because of input received from Viequenses and other Puerto Ricans among others, the ATSDR revisited available data from previous health assessments, revisited Vieques and identified new environmental, biomonitoring and health outcome data. *See Id.*



- Statistical analysis showed that some fish and shellfish from certain reefs surrounding Vieques had higher levels of some metals and lower levels of other metals - iron, aluminum, copper, zinc, arsenic, barium, potassium and selenium were all slightly higher - compared with other reefs surrounding Vieques. These metals are materials found in bombs and in metal ships, suggesting possible localized contamination. But the levels were only slightly higher and the difference was statistically significant only for some reefs compared with other reefs surrounding Vieques.
- The data from biomonitoring studies in Vieques showed elevated levels of some metals in residents' blood, urine, hair, or feces. While cigarette use, seafood consumption, or hair dyes might explain some elevated levels in these studies, the Puerto Rico Department of Health (PRDOH) manuscript reported they do not explain all. Because the source of these metals could not be identified, the biomonitoring results do not permit any conclusions about whether these elevated levels resulted from exposure to military exercise-related contaminants.
- ATSDR did not recommend a comprehensive, systematic biomonitoring effort at that time. It found little evidence of current exposure to contaminants from past military activities.
- Data indicate elevations in chronic disease prevalence, cancer incidence, and cancers mortality among the Viequense population relative to the rest of Puerto Rico.<sup>126</sup>
- Sufficient data are available to conclude that people who lived on the Live Impact Area during the 1999-2000 protests were not exposed to soil contaminants at levels high enough to cause adverse health effects.
- With the possible exception of one private well found to contain harmful nitrate-nitrite<sup>127</sup> levels, all drinking water supplies in Vieques are acceptable for their current uses.<sup>128</sup>
- Radiation levels that were allegedly high on the island due to the accidental use of depleted uranium rounds were in fact well within background levels observed throughout the United States, and significantly lower than radiation levels encountered at cities in the U.S. in elevated locations.

A more recent independent study was completed in 2017. These researchers accessed a plethora of information regarding historical Navy activities from numerous sources, including Congressional reports and the National Archives. The researchers compared cancer rates of Vieques residents from residents of Puerto Rico's main island, and mainland U.S. While some unique aspects of Vieques made the research challenging, such as Vieques' relatively small and transient population, nonetheless, the study's overall conclusion was that "[i]t is not possible

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<sup>126</sup> As noted below, more recent data contradicts this finding.

<sup>127</sup> Nitrate-nitrite levels are generally associated with fertilizer from agricultural activities.

<sup>128</sup> ATSDR recommended no one drink from the one private well until further testing confirms its water is safe. The likely cause of the elevated nitrates was from agricultural activities. Focused Public Health Assessment, Drinking Water Supplies and Groundwater Pathway Evaluation, Agency for Toxic Substances and Disease Registry, 2001.

based on the data to identify Viequenses, or sub-groups (e.g. children), as having a very high incidence of rates compared to Puerto Rico or neighboring areas in the study period[.]”<sup>129</sup> The study also found that “overall, the cancer incidence rate is lower on Vieques than in Puerto Rico[.] ... The overall cancer incidence rate on Vieques is in the 25<sup>th</sup> percentile lowest among municipalities in Puerto Rico (2008-2012) and for men significantly lower than comparable countries, and on par for women in Puerto Rico and Martinique and lower than U.S.A., for 2011-2012.”<sup>130</sup> The study found that there was, in general, no significant difference in the cancer incidence rates between Vieques and Puerto Rico.”<sup>131</sup> The study did find one five-year period (1992-1997) with elevated lung and colon cancer rates, but the pattern was not consistent as it was the only period with elevated cancer rates, and therefore the researchers were unable to ascribe causality.<sup>132</sup>

iii. *Article VI (Right to Freedom of Expression)*

Article VI of the American Declaration provides that “[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.” Petitioners’ claim that their right under Article VI has been violated by the United States is baseless and Petitioners have plainly failed to establish facts that could support a violation of this provision of the Declaration. As with other provisions of the American Declaration, the Petition overstates the reach of Article VI, misinterprets Commission cases pertinent to that Article, and relies on cases interpreting other, inapposite international instruments. Article VI plainly does not contemplate some unbridled access to information—or even the disclosure of information at all. Petitioners have therefore failed to establish facts that could support a violation of this provision of the Declaration.

Moreover, Petitioners’ claim that they have been denied access to information about the Navy’s military operations at Vieques is plainly baseless. A vast amount of information is publicly available about the Navy’s cleanup at Vieques, including information about the military munitions used during military operations at Vieques.<sup>133</sup> With respect to other mechanisms to access such information, as described in greater detail above, citizens affected by hazardous waste sites can get involved with the cleanup process through attending public meetings, review/comment on site decision documents (where applicable), participate at information sessions, join/form a Community Advisory Group (CAG), apply for grants under the TAPP

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<sup>129</sup> Civilian Exposure to Munitions-Specific Carcinogens and Resulting Cancer Risks for Civilians on Puerto Rican Island of Vieques Following Military Exercises from 1947 to 1998, Sanderson *et al.*, *Global Security: Health, Science, and Policy*, at 56 (2017).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 57.

<sup>132</sup> The researchers did note that it was possible that this elevated rate could have been onset in 1979-1984, which could correlate with some of the higher levels of training at Vieques between 1974 and the mid- to late-1990s. The study found that further investigation was warranted. *Id.* at 56.

<sup>133</sup> See “Former Atlantic Fleet Weapons Training Area – Vieques, Naval Facilities Engineering Command, available at [www.navfac.navy.mil/Vieques](http://www.navfac.navy.mil/Vieques) (last visited 14 February 2019).

program, and contact the site's Community Involvement Coordinator (CIC).<sup>134</sup> The Department of Defense, encourages community involvement in the environmental restoration process through Restoration Advisory Boards. RABs provide a forum for stakeholder input on and discussion about cleanup activities on active installations, Base Realignment and Closure locations, and Formerly Used Defense Sites properties. For example, RAB participants review environmental cleanup progress and provide input to installation decision makers. RAB participants may include representatives from installations and local communities; state, local, and tribal governments; Federal, state, and local regulatory agencies; and other stakeholders (e.g., parties that may be affected by environmental restoration activities at the installation). DoD provides funding to establish, operate, and support RABs. This support ensures that local citizens have a forum to provide meaningful input regarding cleanup activities in their communities.<sup>135</sup> For Vieques, at the request of the community, the Navy converted the long standing Technical Review Committee into a RAB in 2004.<sup>136</sup>

It should be specifically noted that Petitioners' claim that the Navy "is intentionally withholding information regarding its activities, including the use of depleted uranium," is simply untrue.<sup>137</sup> The Navy engages the public in a manner that exceeds those required by law and regulation as noted above. The Navy has been active in the community, sharing information, and soliciting comment since the remediation began. Navy officials have an enduring and permanent presence on the island. Navy employees live on the island, and interact with the community daily. Information pertinent to the remediation is publicly available, including countless studies that analyze the environmental conditions on the island.<sup>138</sup> Contrary to Petitioner's assertions, these studies do not show pervasive contamination on the island of Vieques. Telling is that, despite the public availability of tens of thousands of pages of technical data, sampling results, reports, and investigations, Petitioners cite no study, investigation or report issued by the Navy in support of the Vieques remediation that is inaccurate. Petitioners do not identify a single environmental monitoring report prepared by the Navy that is in error. Petitioners may not want to believe them, but threadbare assertions or conspiracy theories are insufficient. Petitioners also offer no current competing studies that contradict Navy data.

Also telling is that Petitioners can site to no information that is currently being withheld. Petitioners continuously assert that the Navy is hiding the nature of historical activities, yet researchers have been able to obtain this information with apparently little trouble.<sup>139</sup> Specific to the use of depleted uranium, Petitioners would have the Commission believe this was routine

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<sup>134</sup> *Id.*

<sup>135</sup> Restoration Advisory Boards and Technical Assistance for Public Participation.  
<https://www.denix.osd.mil/rab/home/>.

<sup>136</sup> CRS Report for Congress, Vieques and Culebra Islands: And Analysis of Cleanup Status and Costs. 7 July 2005.

<sup>137</sup> Petition at 24.

<sup>138</sup> All Vieques information is available at  
[https://www.navfac.navy.mil/products\\_and\\_services/ev/products\\_and\\_services/env\\_restoration/administrative\\_records.html?p\\_instln\\_id=VIEQUES](https://www.navfac.navy.mil/products_and_services/ev/products_and_services/env_restoration/administrative_records.html?p_instln_id=VIEQUES).

<sup>139</sup> *See supra* n. 51.

practice. The Navy has been transparent that this was a one-time accident and one that the Navy took responsibility for immediately. The Navy communicated this information to the public. The Navy published a fact sheet regarding the use of depleted uranium in the live impact area of Vieques:

During training exercises in 1999, Marine Corps aircraft mistakenly expended 263 depleted uranium (DU) rounds (called penetrators) at the North Convoy Site of the Live Impact Area (LIA) on Vieques. Over the following year, the Navy completed three DU recovery operations and numerous radiation surveys in cooperation with the Nuclear Regulatory Commission (NRC) and the Puerto Rico Department of Health. The surveys indicated that members of the public were not exposed to radiation resulting from Navy training. With the cooperation and approval of the Puerto Rico Environmental Quality Board and the US Environmental Protection Agency, the Navy has performed additional radiological investigations in the LIA, under the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as “Superfund.”<sup>140</sup>

The United States has been transparent and openly shares information regarding the contamination and cleanup at Vieques. As discussed previously, the Navy routinely publishes information regarding Vieques and maintains publicly available websites.<sup>141</sup> The official Navy Vieques cleanup website has web links to site description, community outreach, administrative records, technical data, research reports, and site assessments. The administrative records maintained for the CERCLA cleanup date back to 1972 and can be accessed at any time by the public.<sup>142</sup>

Therefore, even if Petitioners’ claim of access to information was cognizable under Article VI—which it is not—the claim is manifestly groundless given that the information Petitioners seek is publicly available and various mechanisms to affirmatively enable access to such information have been afforded to Petitioners. Petitioners’ claim under Article VI of the American Declaration is inadmissible.

*iv. Article XVIII (Right to a fair trial)*

Article XVIII of the American Declaration provides that “[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.” Petitioners plainly fail to articulate any violation of their right to resort to courts in the United States. As discussed above, the Petition contains no facts to support that Petitioners have pursued or exhausted their domestic remedies

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<sup>140</sup> Depleted Uranium in the Live Impact Area of Vieques Fact Sheet, *available at* [www.navfac.navy.mil/Vieques](http://www.navfac.navy.mil/Vieques).

<sup>141</sup> *See, e.g.,* [www.navfac.navy.mil/Vieques](http://www.navfac.navy.mil/Vieques).

<sup>142</sup> [https://www.navfac.navy.mil/products\\_and\\_services/ev/products\\_and\\_services/env\\_restoration/administrative\\_records.html?p\\_instln\\_id=VIEQUES](https://www.navfac.navy.mil/products_and_services/ev/products_and_services/env_restoration/administrative_records.html?p_instln_id=VIEQUES).

with respect to the claims contained in the Petition,<sup>143</sup> much less that Petitioners have been denied their ability to “resort to the courts.” Any suggestion to the contrary is entirely baseless.

To support their allegation of a violation of Article XVIII, Petitioners refer to litigation unrelated to this Petition lodged under the FTCA in 2005 (the *Sanchez* litigation, discussed above).<sup>144</sup> To be sure, the plaintiffs in *Sanchez* were not denied access to the courthouse and made no claim that their right to a fair trial had been violated. Instead, their claims—predicated on a “failure to warn” legal theory without basis in statute or jurisprudence—were defeated.<sup>145</sup> Petitioners seek to take advantage of that defeat here to claim that plaintiffs’ defeat in that case somehow constitutes a violation of Petitioners’ right to a fair trial under Article XVIII. Setting aside the fact that there is no indication that Petitioners here were the plaintiffs in the *Sanchez* litigation—thereby compromising the premise of their claim—the lack of success of a claim before a court does not equate to a denial of the right to petition. The mere fact that plaintiffs’ claims in the *Sanchez* litigation were unsuccessful obviously cannot constitute a denial of the right to resort to the courts for those plaintiffs, much less the Petitioners here. Article XVIII does not guarantee a successful outcome in litigation. Moreover, although plaintiffs in the *Sanchez* litigation did not prevail in court, their ability to pursue their novel legal theory fully refutes Petitioners’ allegation here: plaintiffs had access to the courts, which is precisely what Article XVIII of the American Declaration protects.

Moreover, as demonstrated above, a whole host of other administrative and legal remedies are available to Petitioners which they have simply not pursued.<sup>146</sup> Domestic remedies remain avenues available to Petitioners to seek redress for the allegations contained in the Petition.

Petitioners have failed to evidence any facts that their rights under Article XVIII of the American Declaration have been violated. Moreover, their claim in this regard is manifestly groundless. Petitioners’ claim under Article XVIII of the American Declaration is therefore inadmissible under Article 34 of the Rules.

v. *Article VIII (Right to residence and movement)*

As discussed above, the allegations contained in this claim are predicated on events which predate the Commission’s competence as to claims brought against the United States. Thus, the Commission does not have the competence *rationae temporis* to review Petitioner’s claims related to the transfer of land on the island of Vieques, including alleged violations of Article VIII of the American Declaration.

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<sup>143</sup> See discussion *supra*, Section II.D.

<sup>144</sup> *Id.*

<sup>145</sup> Petitioners’ simplistic description of the doctrine of sovereign immunity as it applied in the *Sanchez* case in no way represents a denial of access to courts.

<sup>146</sup> See discussion *supra*, Section II.D.

Article VIII provides that “[e]very person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.” Petitioners’ claim that their right under Article VIII has been violated by the United States is baseless and Petitioners have plainly failed to establish facts that could support a violation of this provision of the Declaration with respect to them. As with other provisions of the American Declaration, the Petition overstates the reach of Article VIII, misinterprets Commission cases pertinent to that Article, and relies on cases interpreting other, inapposite international instruments.

As an initial matter, Petitioners have failed to establish facts that could support a claim of a violation of Article VIII. There is no evidence that Petitioners have been denied the right to fix their residences in the territory of the United States, to move about freely within the United States, or to leave the United States except by their own will. To attempt to buttress their claim, Petitioners cite the Commission’s *Report on the Situation of Human Rights in Chile*, in which the Commission identifies four elements of Article VIII: “(a) to freely leave any country, including one’s own country; (b) not to be expelled from the territory of the state of which one is a national or deprived of the right to enter it; (c) to choose residence in the country of which one is a national; and (d) to move freely within it.”<sup>147</sup> However, Petitioners have simply failed to allege facts to substantiate a claim of a violation of this right. Moreover, the Commission further recognized in its *Report on the Situation of Human Rights in Chile* that the “‘the State must recognize and regulate’” the exercise of this right, granting the State a wide margin of appreciation.<sup>148</sup> Any claim that the United States has failed to live up to its commitment under this provision is manifestly groundless.

vi. *Article XIV (Right to work and to fair remuneration)*

Article XIV provides that “[e]very person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.” Petitioners’ claim that their right under Article XIV has been violated by the United States is baseless and Petitioners have plainly failed to establish facts that could support a violation of this provision of the Declaration with respect to them. As in the context of other provisions of the American Declaration, the Petition overstates the reach of Article XIV, misinterprets Commission cases pertinent to that Article, and relies on cases interpreting other, inapposite international instruments. While Petitioners attempt to disguise their failure to substantiate violations of this right by citing generalized statistics about the fishing industry in Vieques over time, this approach plainly fails to satisfy the requirements of Article 34 of the Rules. Petitioners have therefore failed to establish facts that could support a violation of this provision of the Declaration.

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<sup>147</sup> Report on the Situation of Human Rights in Chile, Ch. VI, ¶ 1, OEA/Ser.L/V/II.66, Doc.17 (Sept. 9, 1985).

<sup>148</sup> *Id.* ¶ 8 (quoting *La Tercera*, December 9, 1982).

It bears noting at the outset that the right to work under Article XIV is qualified by “under proper conditions,” and the protection “to follow his vocation freely” is similarly qualified “insofar as existing conditions of employment permit.” In other words, Article XIV explicitly accounts for the reality that the “proper conditions” for work may not pertain and that “existing conditions of employment” may not permit a person “to follow his vocation freely.” In so doing, Article XVI expressly does not impose expectations upon the State to ensure that “proper conditions” or “existing conditions of employment” persist, nor could it: the dynamics of a free market preclude the state from imposing the sort of stasis that Petitioners apparently seek in their demand that states “respect, protect and fulfill the human right to work.”<sup>149</sup>

Even if Petitioners’ invasive interpretation of Article XIV could be sustained, they have failed to allege that they have suffered any violation of this right. The Petition states that Petitioner Zenón, a scuba-diver and fisherman, “has seen the reduction in sea life in the surrounding waters of Vieques” and has had his “livelihood[] effected.”<sup>150</sup> Even so, the Petition contains no facts to substantiate a claim that Mr. Zenón has been denied his “right to work, under proper conditions” or to “follow his vocation freely, insofar as conditions of employment permit.” Instead, the Petition is replete with sweeping generalizations—without substantiation—about how the United States “has interfered with the livelihood of local fishermen” and how the actions of the United States “have resulted in the decimation of Vieques’ commercial fishing industry.”<sup>151</sup> Importantly, however, Petitioners present no facts about how their rights under Article XIV have been purportedly infringed by the United States. They have plainly failed to evidence any facts that their rights under Article XIV of the American Declaration have been violated. Moreover, their claim in this regard is manifestly groundless. Petitioners’ claim under Article XIV of the American Declaration is therefore inadmissible under Article 34 of the Rules.

What is more, the prevailing facts about Vieques coastal waters sharply refute Petitioner’s unsubstantiated claims. While, petitioners cite to historical times when the range was active—and, for safety, individuals were kept at a safe distance from the range—outside of those areas impacted by the range, individuals were free to fish where and when they chose. Today, of course, there are fewer restrictions on local activities in the water.<sup>152</sup> Many of the beach areas of the former range have been remediated and are open to the public, specifically on

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<sup>149</sup> Petition at 73, 77-78.

<sup>150</sup> Petition at 15.

<sup>151</sup> Petition at 75-78.

<sup>152</sup> As a matter of prudence, the United States does caution mariners to avoid certain areas surrounding the former Navy ranges on Vieques because of the presence of UXO. *See* Local Notice to Mariners, U.S. Coast Guard District 7, March 2019, *available at*, <https://www.navcen.uscg.gov/pdf/lnms/lnm07102019.pdf>. A danger zone surrounding the former Navy range was established in 1948 in order to protect the public during range activities. The zone was open to navigation at all times except when firing was being conducted. *See* 33 C.F.R. § 334.1460.

the southern portion of the former Navy range.<sup>153</sup> The only accessible public boat launches are those located in municipal areas of Vieques and are available to the local community – the United States has no control over who or when individuals use those launches. Contrary to Petitioners’ unsubstantiated claims, studies of fish, invertebrates, and sediment by the National Oceanic and Atmospheric Administration (NOAA) have shown no elevated levels of contaminants different from the overall region.<sup>154</sup> NOAA research concluded:

The main finding was that overall, there was little difference in marine resources, nutrients, or chemical contaminants around Vieques offshore of the various former land-use zones. ... Nor does it appear to be the case that the marine resources around Vieques are particularly depressed or elevated relative to those of other nearby islands. Instead, the biota, nutrients, and chemical contaminant levels around Vieques generally match those for other coral reef ecosystems in the Puerto Rico and U.S. Virgin Islands region and are likely to have been shaped primarily by regional-scale processes rather than local factors.<sup>155</sup>

Research also disproves petitioner’s claims that fish availability has been negatively impacted by historic activities. In fact, research found that not only are fish communities similar to those seen elsewhere in the Caribbean, at least one species (snapper) were significantly higher near Vieques.<sup>156</sup>

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For the foregoing reasons, the Petition is inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration and it is manifestly groundless.

### III. CONCLUSION

The Commission should declare the Petition to be inadmissible because it fails to meet the Commission’s established criteria in Articles 31 and 34 of the Rules of Procedure. Claims presented in the Petition are beyond the *ratione temporis*, *ratione personae*, and *ratione materiae* competence of the Commission. Moreover, Petitioners have not exhausted the various domestic remedies available in the United States, as required by Article 31 of the Rules. The Petition is also plainly inadmissible under Article 34 of the Rules. In particular, the Petition fails under Article 34(a) to state facts that tend to establish violations of rights set forth in the American Declaration; it is manifestly groundless under Article 34(b). Should the Commission

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<sup>153</sup> See <https://vieques.com/island-puerto-rico-beaches>. These include Playauela Beach, Caracas Beach, Pata Prieta Beach, La Chiva Beach, La Escondida Beach, and Playa La Pata.

<sup>154</sup> DAVID WHITALL, *ET. AL.*, CONTAMINANTS IN QUEEN CONCH (STROMBUS GIGAS) IN VIEQUES, PUERTO RICO (2016).

<sup>155</sup> *Id.* at Ch. 7.

<sup>156</sup> AN ECOLOGICAL CHARACTERIZATION OF THE MARINE RESOURCES OF VIEQUES, PUERTO RICO. PART II: FIELD STUDIES OF HABITATS, NUTRIENTS, CONTAMINANTS, FISH, AND BENTHIC COMMUNITIES (2010).



nevertheless declare the Petition admissible and examine its merits, the United States urges it to find the Petition without merit and deny Petitioners' request for relief.