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The Honduran ZEDE Law, from Ideation to Action

Jeffrey Mason^{1*}, Carl Peterson¹, and Daniela Ivette Cano²

1. Charter Cities Institute
2. Fundación para la Libertad Económica
*jeffrey@cci.city

Abstract

Honduras has struggled to attract the investment needed to spur sustained economic growth in recent decades, and as a result remains one of the poorest countries in Latin America and the Caribbean. To attract greater foreign investment, the Honduran government passed a groundbreaking special economic zone (SEZ) law in 2012 creating Zonas de Empleo y Desarrollo Económico (Zones for Employment and Economic Development) or ZEDEs. Among the most innovative special jurisdictions in the world, ZEDEs grant sweeping legal and regulatory autonomy to allow for improved governance and economic competitiveness, in order to attract greater investment in Honduras. In this paper, we detail the political and legislative history of the ZEDE law, offer a textual analysis of the ZEDE statute, discuss the principal objections to the ZEDE law and responses to those objections, and provide case studies of the first two ZEDEs.

Keywords: ZEDE; Honduras; special economic zones; ciudades modelo; decentralized governance; economic development; Próspera; Ciudad Morazán

Resumen

Honduras ha luchado por atraer la inversión necesaria para impulsar un crecimiento económico sostenido en las últimas décadas y, como resultado, sigue siendo uno de los países más pobres de América Latina y el Caribe. Para atraer una mayor inversión extranjera, el gobierno hondureño aprobó una innovadora ley de zonas económicas especiales (ZEE) en 2012, creando Zonas de Empleo y Desarrollo Económico (Zonas de Empleo y Desarrollo Económico) o ZEDEs. Entre las jurisdicciones especiales más innovadoras del mundo, las ZEDE otorgan una amplia autonomía legal y regulatoria para permitir una mejor gobernanza y competitividad económica, con el fin de atraer una mayor inversión en Honduras. En este documento, detallamos la historia política y legislativa de la ley ZEDE,



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ofrecemos un análisis textual del estatuto de la ZEDE, discutimos las principales objeciones a la ley ZEDE y las respuestas a esas objeciones, y proporcionamos estudios de caso de las dos primeras ZEDE.

Palabras clave: ZEDE; Honduras; zonas económicas especiales; ciudades modelo; gobernanza descentralizada; desarrollo económico; Próspera; Ciudad Morazán



1. INTRODUCTION

Honduras is among the least developed countries in Latin America and the Caribbean. The average Honduran's income is only two-thirds that of their neighbors in El Salvador and Guatemala (World Bank, 2019). Honduras requires better governance and sustained investment to have even the slightest opportunity to reach economic parity with its neighbors, let alone become a fully developed, high-income country.

In 2009, economist and future Nobel Laureate Paul Romer developed the idea of charter cities—new cities with special jurisdictions to allow for significant improvements in governance to help alleviate poverty. In 2010, Romer found willing partners in the Honduran government to implement this vision. And in 2013, Zonas de Empleo y Desarrollo Económico (Employment and Economic Development Zones) or ZEDEs, were signed into law. Among the most innovative special jurisdictions in the world, ZEDEs devolve nearly all administrative, fiscal, regulatory, and judicial authority to the city level.

ZEDE advocates contend that the zones have the potential to create the same kind of special economic zone-driven growth that pulled hundreds of millions out of poverty in China over the last four decades in Honduras (Fernández and Dirkmaat, 2019). ZEDE detractors contend the zones are a mechanism to usurp land rights and impose foreign corporate governance on indigenous populations and the poor (Geglia, 2016).

This article aims to provide a clear analysis of the ZEDE law and the issues surrounding it. Section 2 details the political and legislative history of the ZEDE law, including precursor legislation, up to the latest developments as of early December 2020. Section 3 provides a rigorous textual analysis of the ZEDE law itself, explaining ZEDE governance and the powers devolved to ZEDE administrators. Section 4 addresses principal objections to the ZEDE law and responses to those objections. Section 5 offers case studies on the two ZEDEs that have been declared—Próspera and Ciudad Morazán. The article concludes by briefly considering the immediate future of the ZEDEs.



2. POLITICAL AND LEGISLATIVE HISTORY OF THE ZEDE LAW

2.1. Precursor to the ZEDES—REDS

In 2009, economist Paul Romer gave a now-famous TED Talk introducing the concept of charter cities—new cities with new special jurisdictions in low-income countries, administered by a well-governed “guarantor” country (Romer, 2009). Romer theorized that effective governing institutions are the principal requirement to raise living standards, rather than from resource rents or new technologies, and that effectively importing good governance through a special zone or charter city could alleviate substantial poverty. Introduced in 1980, China’s special economic zones offered evidence in favor of Romer’s theory, that allowing for city-led innovations in governance could generate tremendous economic growth (Romer, 2010).

Romer first gained traction with this idea in Madagascar, where he won support from then-President Marc Ravalomanana in late 2008. However, an unrelated political crisis emerged at the same time over a deal to lease large tracts of land to South Korean auto manufacturer Daewoo. In January and February 2009, violence broke out and nearly 30 civilians were killed by police outside of the presidential palace, with Ravalomanana subsequently forced to leave office, ending any chance of a Malagasy charter city (Mallaby, 2010).

Romer’s next, and final, attempt at creating a charter city was in Honduras. After hearing the 2009 TED Talk, President of the Honduran National Congress Juan Orlando Hernández began advocating for a Honduran charter city. Romer met with Hernández and President Porfirio Lobo, who was also convinced of the idea. Shortly thereafter, a constitutional amendment was passed in February 2011 to create the precursor to the ZEDEs, Regiones Especiales de Desarrollo (REDs), or Special Development Regions, with only one vote in opposition. (Romer, 2011).



In July 2011, the statute detailing the powers and governance structure for REDs was also passed by an overwhelming margin. The statute described REDS as: “entities created with the purpose of accelerating the adoption of technologies that allow producing and providing services with high added value, in a stable environment, with transparent rules capable of attracting national and foreign investment.” (Decreto No. 123-2011, Art. 2). REDs were declared to be an indivisible part of Honduras subject to the authority of the Constitution and the national government, but with substantially devolved administrative, fiscal, judicial, and other authorities (Decreto No. 123-2011).

Because REDs would be granted such a significant degree of autonomy, the RED Statute established that each RED would initially be governed by a nine-member transparency commission (Decreto No. 123-2011, Ch. IV, Sec. 1). These transparency commissions would first be appointed by the President, and then the commissions would appoint a governor for their RED (Decreto No. 123-2011, Art. 80).

In December 2011, the first transparency commission was appointed by President Lobo. The first five pro tempore appointees included Romer, former Singapore Power and Temasek Holdings executive Ong Boon Hwee, Center for Global Development President Nancy Birdsall, former INCAE Business School Rector Harry Stratchan, and Nobel Laureate in economics George Akerlof (Fuller, 2011).

2.2. The End of the REDs

Despite the apparent progress towards a RED being established, within a year the development began to unravel. Romer released a statement on September 22, 2012 stating that he and the other four transparency commission members were no longer involved with the project, as the Honduran government had reportedly signed an agreement with a private firm to develop a RED without the commission’s knowledge. The agreement was kept secret from the commission members, and because the commission appointments had never been



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formally published in the Honduran government gazette, Romer and the other commission members possessed no legal right to see the private agreement upon demand (Cowen, 2012).

The Memorandum of Understanding in question had been signed several weeks prior with MGK, a private group led by libertarian theorist and businessman Michael Strong (Fernholz, 2012). MGK planned to invest \$15 million in infrastructure for a project near the town of Puerto Castilla, which would create an estimated 5,000 jobs within six months. Upwards of 200,000 jobs were expected to be created in the years following. The project was opposed by various groups, including the indigenous Garifuna community, whose land was included in the planned development (Doherty, 2012). However, the project would never move forward and within a month of the announcement of the agreement and the collapse of the transparency commission, Honduras' experiment with REDs would be over.

On October 17, 2012, the full Honduran Supreme Court declared the RED law unconstitutional by a vote of 13 to one, after the Constitutional Chamber of the Supreme Court previously voted four to one against the RED amendment (Miller, 2015). The court declared that the amendment establishing the REDs was unconstitutional on the grounds that the changes made to Articles 304 and 329 of the Constitution violated Honduran territorial integrity, sovereignty, and independence (El Heraldo, 2014).

Later in the year, the same four justices of the Constitutional Chamber voted against a police reform bill supported by the ruling National Party. President Lobo publicly denounced the members of the Supreme Court that had voted against the police reform bill in response to the ruling. On December 12 in a 4:00am session with the military stationed outside the congressional building, the Congress voted to remove the same four justices from the Supreme Court. New justices were quickly appointed by President of the Congress Hernández (Williams, 2012). The dismissal of the Supreme Court justices was described by commentators as an illegal violation of Congressional authority, as justices can only be removed for administrative reasons, not on the basis of their rulings (Acre, 2012).



2.3. Enter the ZEDEs

In January 2013, a new constitutional amendment was approved that replaced the REDs with Zonas de Empleo y Desarrollo Económico (Employment and Economic Development Zones) or ZEDEs, followed by an enabling statute in September (Decreto No. 236-2012; Decreto No. 120-2013). The new ZEDE amendment and statute remedied the unconstitutional elements that led to the RED legislation being struck down, discussed below in the textual analysis.

In addition to creating the legal framework for ZEDEs, the ZEDE Statute also created the Comité para la Adopción de Mejores Prácticas (CAMP), or the Committee for the Adoption of Best Practices, to oversee the ZEDEs. The 21 members of CAMP are responsible for approving the internal regulations of ZEDES in line with global best practices, overseeing the Technical Secretary in charge of each ZEDE, and other related advisory and administrative functions (Decreto No. 120-2013, Ch. III, Sec. 1).

The first 21 CAMP appointees were a global collection of conservative and libertarian free market advocates with experience in government, business, academia, and the nonprofit sector (Lutter, 2014). While the ZEDEs represent a reduction in the autonomy that had been granted to REDs, the initial CAMP appointees versus that of the RED transparency commission suggests a shift in approach to ZEDE governance by the ruling National Party. While the RED transparency commission was comprised of largely non-ideological academics with interests in international development, CAMP was dominated by more openly ideological appointees with a clear inclination for market-oriented policymaking.

In February 2014, the 21 CAMP appointees were announced in the government gazette: Georgian politician and businessman Kakha Bendukidze; conservative activist and Leadership Institute President Morton Blackwell; Atlas Network CEO and President Alejandro Chafuen; Danish banker Lars Seier Christensen; American oil and gas executive Alex Cranberg; Honduran Congressional advisor Ebal Díaz, Peruvian intellectual Enrique Gherzi; Austrian economist and free market advocate Barbara Kolm; Ronald Reagan and



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George H.W. Bush administration official Mark Klugmann; former Honduran President Ricardo Maduro; American anti-tax activist Grover Norquist; advisor to President Lobo Octavio Rubén Sánchez Barrientos; Panamanian businessman and free zone administrator Surse Pierpoint; American economist and Cato Institute scholar Richard Rahn; American conservative media personality Michael Reagan; American economist Mark Skousen; American federal court judge Loren Smith; Honduran Presidential Secretary Ricardo Leonel Cardona López; European architect Gabriela von Habsburg; Omani government official Salem Ben Nasser Al-Ismaily; and Reagan administration official Faith Whittlesey (Decreto No. 368-2013).

With CAMP established and a Supreme Court ruling in favor of the ZEDE law's constitutionality in May 2014, the government appeared well-positioned to begin pushing for ZEDE projects to commence (Kroth, 2014). And since becoming President in 2014, Juan Orlando Hernández campaigned extensively on the potential benefits of ZEDEs. A McKinsey study commissioned by the Honduran government estimated that 600,000 jobs in auto manufacturing, call centers, and other such industries could be created with several ZEDEs, a strong campaign pledge. However, action towards creating an actual ZEDE was limited until 2017. The original CAMP group only met once, in March 2015 (The Economist, 2017).

The delay between the formation of CAMP and the approval of the first ZEDE has been attributed to a combination of infighting and fiscal mismanagement within CAMP, a lack of actual interest in developing ZEDEs from President Hernández, electoral distractions, and potential investors shying away amid political uncertainty, according to an individual familiar with the details that spoke to the authors of this paper on condition of anonymity.

However, CAMP's performance appears to have improved since Honduran attorney and consultant Carlos Pineda Pinel became CAMP Secretary in 2016. On December 29, 2017, the first ZEDE was authorized when CAMP issued a certificate declaring what would later become the Próspera ZEDE (Próspera 2020a). The second ZEDE, Ciudad Morazán, was declared by CAMP on December 6, 2019 (ZEDE Morazán, 2020). Both ZEDEs are discussed



in detail in detail later in this article. To date, these are the only two declared ZEDEs and both have begun actual on-site operations. In response to the new ZEDEs, popular opposition from Honduran municipal governments, indigenous groups, legal associations, and other organizations has been on the rise (Criterio, 2020). However, there is no indication that the ruling National Party intends to roll back the ZEDE law and so it appears likely that ZEDE development will continue, absent an opposition coalition victory in the 2021 general election.

3. TEXTUAL ANALYSIS OF THE ZEDE LAW

The ZEDE Statute itself presents three types of legal issues that need analysis: (1) constitutional issues within the Honduran Constitution; (2) the powers of the ZEDE itself as laid out in the ZEDE Statute; and (3) the influence and power of treaties and international law

3.1. The Honduran Constitution

As discussed above the Honduran Constitution was amended in 2013 after the failure of the RED Amendment and Statute, so that any future statute that sought to allow special jurisdictions would be upheld as constitutional. To that end, this amendment, known as the ZEDE Amendment, altered three articles in the Honduran Constitution: (1) Article 294; (2) Article 303; and (3) Article 329 (Decreto No. 120-2013). Each alteration to an article addressed an issue of sovereignty or alienation of territory, which had been the prime concerns of the Honduran Supreme Court when it struck down the RED Amendment and Statute (Bell, 2013).

These concerns were centered around Article 374, which prohibits the amendment of any Article of the Honduran Constitution dealing with “...the form of government [or] national territory...,” among other items (Honduran Const. Art. 374). Furthermore, Article



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374 allows for the Honduran Supreme Court to declare an amendment as unconstitutional if that amendment alters the national territory (Miller, 2015). When the Honduran Congress passed the ZEDE Amendment it took care to word the language of the Amendment in such a manner as to avoid being struck down again on the same grounds that the RED Amendment and Statute had been.

First, Article 294 is the article in the Honduran Constitution which creates political sub-divisions within the country. The Article reads: “The national territory shall be divided into departments. Their establishment and boundaries shall be determined by the National Congress. The departments shall be divided into autonomous municipalities administered by corporations elected by the people, according to law. Without prejudice to that established in the previous paragraphs, the National Congress may create zones subject to special regimes in accordance with Article 329 of this Constitution” (Honduran Const. Art. 294).

The amendment consisted of the addition of the final sentence of the Article, which addressed the Honduran Supreme Court’s objection that the creation of a zone alienated Honduran territory in violation of the unamended Article 294, which specified the manner in which the country could be subdivided (Bell, 2012). Amending this article clarified that the zones were in fact a part of Honduran national territory and could not be alienated.

Second, Article 303 creates independent courts and lays out the basic structure of the Honduran Courts. The relevant part of the Article as amended in 2013 reads: “The judicial branch consists of a Supreme Court of Justice, the Courts of Appeals, the courts, by tribunals with exclusive competence in zones of the country subject to special regimes created by the Constitution of the Republic and additional offices specified by law” (Honduran Const. Art. 303). This was amended from the previous language which read “The Judicial Power is composed of a Supreme Court of Justice, by the Courts of Appeals, the Courts and other dependencies that the Law specifies” (Honduran Const. Art. 303). The addition of the language about tribunals with “exclusive competence” and “additional offices specified by law” gave the Honduran Congress the constitutional authority to write a law allowing for the



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creation of a special court system within the zones. Creating an independent court structure and legal system provides zones with greater autonomy, because they must no longer be tethered to the existing Honduran legal system (Miller, 2015). Amending this article clarifies that the creation of a legal system with greater autonomy is not a violation of Honduran sovereignty, because the autonomous court system is subject to Honduran constitutional and legal restraints.

Third, Article 329 addresses economic and social development, and the language in this article was altered extensively with the ZEDE Amendment. In the 2012 form, the Article used sweeping language which allowed for the zones to sign treaties and international agreements (Honduran Const. Art. 329). Furthermore, while the 2012 form of Article 329 required the zones to be subject to Articles 12, 13, 15, and 19 of the Constitution, this left out Articles 10 and 11, which like the Articles 12, 13, 15, and 19 deal with Honduran territory, and serve to explicitly describe that territory (Miller, 2015). By removing the zones' ability to enter into treaties and international agreements, and adding the incorporation by reference of Articles 10 and 11, the ZEDE Amendment sought to assuage concerns that the zones violated the prohibition against altering the government or territorial integrity of Honduras (Miller, 2015). Amending this article painted the zones in a less radical light than had been done with the Article's previous form, which helped to avoid the appearance of the article being in violation of Article 374 (Miller, 2015).

By addressing the issues in the ZEDE Amendment that caused the RED Amendment and Statute to be struck down, the Honduran Congress sought to ensure that the ZEDE Amendment and subsequent statute would not face the same fate as its predecessor. It appears that the effort was likely successful (National Lawyers Guild, 2014).

3.2. The ZEDE Statute

The ZEDE Statute itself provides the structure for what ZEDEs can and cannot do. A significant amount of this relates back to the Honduran Constitution, but there are powers given to the ZEDEs that derive from the ZEDE Statute without specific relation back to the Honduran Constitution. The analysis of the ZEDE Statute follows the structure of the law, beginning with the Preamble and then going through the six chapters of the law: (I) General Principles; (II) Fundamental Rights and Duties of the Residents; (III) Administrative Structure; (IV) Economics and Finance; (V) Education, Health, Social Security, Science, Religion, Work, and Environment; and (VI) Final and Transitional Provisions. However, this analysis is not exhaustive and does not include an assessment of every article within the ZEDE Statute, only those which strike the authors as the most innovative or relevant to this article, and the authors hope that other scholars examine the law in even greater detail.

The Preamble of the ZEDE Statute introduces the statute, the statute's purpose, and cites where in the Honduran constitution the authority to create the law comes from. This part of the statute begins by acknowledging the ZEDE Amendment that altered Articles 294, 303, and 329 of the Honduran Constitution, which are discussed above (Decreto No. 120-2013). Articles 303 and 329 are cited specifically for the purpose of asserting that the "Constitution authorize[s] the establishment of courts with exclusive competence over the [ZEDEs]" (Decreto No. 120-2013). Finally, the Preamble notes that the Honduran Congress is enacting this law pursuant to its powers under Article 205, Attribution 1 of the Honduran Constitution, which gives the Congress the power "[t]o make, enact, interpret, amend, and repeal laws" (Decreto No. 120-2013). By taking care to cite to Constitutional Articles in three separate paragraphs, the Preamble serves as an appeal to a higher legal authority which makes the associated statute constitutional.

The first chapter of the ZEDE Statute, Chapter I: General Principles, both cites back to the Constitution and provides law that establishes what the Statute is supposed to do



generally. The citations to the Constitution that the General Principles chapter makes are to Article 329 and to Articles 10, 11, 12, 13, 15, and 19 (Decreto No. 120-2013, Ch. I, Art. 1). Article 329 being the Article of the Constitution that specifically gives enabling power to create ZEDEs (Honduran Const. Art. 329), and Articles 10, 11, 12, 13, 15, and 19 that all deal with the territorial definition and integrity of Honduras (Miller, 2015). All of these articles were addressed above in the section addressing constitutional issues surrounding the passage of the ZEDE Amendment, but the inclusion of these articles in the Statute itself must be addressed independently. This inclusion of these articles in the General Principles chapter acts in a similar manner to the inclusion of Articles 294, 303, and 329 in the Preamble of the Statute, which is to create an attachment between the Constitution and the Statute (Decreto No. 120-2013). By creating an explicit attachment between the Statute and the Constitution, the Statute seeks to give itself legitimacy.

As noted above, Article 329 in the 2012 Constitution under the RED Amendment was more expansive in the scope of powers that special jurisdictions were given, whereas the ZEDE Amendment is less radical in the powers that are given to the zones (Miller, 2015). In conjunction with the inclusion of the Articles defining the territory of Honduras and protecting its integrity, the inclusion of Article 329 serves to ground the ZEDE Statute within the Honduran Constitution and to protect the Statute from constitutional attacks using Article 374, which is the article prohibiting the amendment of any constitutional article dealing with the form of government or national territory. The reference to these Articles in the Statute is a clear signal to a court that the ZEDE Statute does not seek to alter either the form of government for Honduras where it applies or in any way to remove the zones from the sovereignty or territorial integrity of Honduras.

However, the chapter on General Principles does not only act as a bridge between the Constitution and the Statute. This chapter also includes four notable articles which define and delegate powers to the zones: Article 2, which states the aims of the zones; Article 3, which gives the zones independent courts and legal systems; Article 4 which gives the zones



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fiscal independence; and Article 8, which provides the hierarchy of law that the zones must follow.

First, Article 2 states that the aim of the zones is to develop various types of institutions such as National and International Financial Centers, International Business Courts, and Renewable Energy Districts, among others (Decreto No. 120-2013, Ch. I, Art. 2). Second, Article 3 gives the zones operational and administrative autonomy equivalent to that enjoyed by municipalities under the Honduran Constitution, and autonomous and independent courts which can follow “legal systems or traditions from elsewhere” (Decreto No. 120-2013, Ch. I, Art. 3). The ability to adopt legal systems and traditions from elsewhere is significant because it allows zones to adopt a common law system that is often favored by businesses. Furthermore, this article allows not only for the straight adoption of a foreign jurisdiction’s legal system, like was done with the Dubai International Financial Center (DIFC, 2020), but also allows for the adoption of truly innovative legal systems, such as the open-source Ulex legal system (Bell, 2018).

Third, Article 4 gives the zones the ability to “create their own budgets, the right to collect and manage their taxes, to determine the rates they charge for their services, and to be held to all types of agreements or contracts to meet its objectives over time” (Decreto No. 120-2013, Ch. I, Art. 4). Fiscal independence is a critical part of autonomy and allows for the zones to pursue the development aims stated in Article 2 without needing to rely on the Honduran government for backing.

Fourth, Article 8 provides that the hierarchy of rules in the zones begins with the Honduran Constitution, followed by international treaties to which Honduras is a party, the ZEDE Statute, laws mentioned in Chapter VI of the ZEDE Statute, and finally the internal regulations of the zones (Decreto No. 120-2013, Ch. I, Art. 8). This article serves two functions, to further ground the zones within the Honduran Constitutional order, and to layout for legal professionals a clear hierarchy to follow if and when legal conflicts arise between the stated laws. Chapter I not only further grounds the ZEDE Statute within the



Honduran constitutional order, it also gives the zones autonomous powers to adopt innovative legal systems and operate their own finances, and provides critical legal guidance in the form of the hierarchy of law that the zones must follow.

The second chapter of the ZEDE Statute, Chapter II: Fundamental Rights and Duties of the Residents, does not touch on any overt constitutional issues or explicitly reference any article in the Honduran Constitution. Instead, this chapter deals with the relationship of Hondurans and non-Hondurans within the zones. Article 9 provides that “All persons in the [zones] are equal in rights and duties without discrimination of any kind” except for certain functions that are reserved for Hondurans or ZEDE residents given in the Constitution or the Statute (Decreto No. 120-2013, Ch. II, Art. 9).

The only other article in Chapter II, Article 10, states the intent is that all those who are residents of the zones should respect each other, humanity, and the law (Decreto No. 120-2013, Ch. II, Art. 10). Furthermore, Article 10 requires the zones to establish agreements of coexistence and create public spaces where residents can assemble to defend their rights (Decreto No. 120-2013, Ch. II, Art. 10). While it is the shortest chapter in the Statute, Chapter II establishes that all residents are equal before the law, except where otherwise carved out, and that residents have both the freedom to demonstrate to defend their rights and will have specially designated places to do so. These articles serve as both signals to Hondurans and non-Hondurans that their rights will be respected, and to the international community that the zones are not areas exempt from democratic freedoms.

The third chapter of the ZEDE Statute, Chapter III: Administrative Structure, is broken into four sections: (I) Committee for the Adoption of Best Practices; (II) Technical Secretariat; (III) Audit; and (IV) Dispute Resolution and Internal Security. The first three of these sections each has only a single article, but the fourth section has a total of nine articles. The articles in each of the first three sections are examined, as well as five of the articles in Section IV.



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In Section I, Article 11 creates the Committee for the Adoption of Best Practices (Decreto No. 120-2013, Ch. III, Sec. I, Art. 11). This committee serves as the governing body of the ZEDEs and is composed of 21 persons of “of recognized integrity, leadership, executive capacity, and international reputation” across the public and private sectors, as well as nonprofits and academia (Decreto No. 120-2013, Ch. III, Sec. I, Art. 11).

This article lays out the Committee’s ten functions: (1) approving regulations; (2) approving or disapproving of actions taken by the zone’s executive, the Technical Secretary; (3) to appoint or remove the Technical Secretary; (4) “[t]o establish general guidelines for domestic policy and transparency; (5) “[t]o approve or disapprove the regulations approved by the Technical Secretary;” (6) to propose to the Judicial Council a list of qualified candidates for judicial office, and to recommend the removal of judicial officers when appropriate; (7) to fill its own vacancies; (8) designate areas for future expansion; (9) engage the services of an internationally recognized auditing firm, and to publish respective reports; and (10) to fulfill any other duties given to it by the Statute (Decreto No. 120-2013, Ch. III, Sec. I, Art. 11). Furthermore, this article requires that the Committee be appointed by the President of Honduras and their appointment must be ratified by the Honduran Congress (Decreto No. 120-2013, Ch. III, Sec. I, Art. 11).

Finally, this section also provides that the Committee can begin its duties when a quorum of 12 members has been appointed and ratified (Decreto No. 120-2013, Ch. III, Sec. I, Art. 11). While this committee effectively serves as an oversight and quasi-legislative body of the zones, the structural form is more analogous to a corporation with a board which appoints corporate officers, and passes major resolutions, while also approving, disapproving, or ratifying actions taken by those officers. This structure both falls within the constitutional order of Honduras, with Committee members being appointed by the Honduran President and ratified by the Honduran Congress, while providing access to foreign stakeholders by allowing non-Hondurans to be appointed to the Committee. Furthermore. The article serves



as a delegation of the powers to the legislative body within a governance structure that separates powers.

Section II of Chapter III contains Article 12, which provides the structure of the executive body of the zones, the Technical Secretariat. The article provides that the Technical Secretariat is the chief executive of a zone and its legal representative, and is a position that runs for a seven year term that can be renewed or revoked (Decreto No. 120-2013, Ch. III, Sec. II, Art. 12). Furthermore, the article requires that the Technical Secretariat must be a Honduran national by birth (Decreto No. 120-2013, Ch. III, Sec. II, Art. 12).

Next, the article lays out the eleven functions of the Technical Secretariat: (1) to represent the zone; (2) “[s]ubscribe to legal stability agreements for matters deemed necessary;” (3) establishing fiscal and budgetary management measures and instruments necessary for the function of the zone; (4) managing the administration and government of the zone, and implementing policy measures prescribed by the Committee; (5) suggest to the committee appropriate measures for compliance with the purposes of the zone; (6) enacting legislation and submitting it to the Committee for approval or disapproval; (7) applying the rules of the zone within the framework of the Statute; (8) appointing ad hoc Secretaries to assist in the management of the zone; (9) issuing temporary resolutions, called ordinances, to ensure the efficient delivery of public services and competitive markets; (10) developing a plan for the promotion of the zone and its operation; and (11) any other powers governed by the Statute or delegated by the Committee (Decreto No. 120-2013, Ch. III, Sec. II, Art. 12). Article 12’s requirement that the executive must be a natural born Honduran citizen is a further bulwark against the perception that a zone is at risk of being alienated from Honduran territory. Additionally, this article follows a similar function as Article 11, by providing a description of the powers of a zone placing them in a system of separation of powers.

Section III of Chapter III contains Article 13, which requires an audit (Decreto No. 120-2013, Ch. III, Sec. III, Art. 13). Specifically, the article mandates the Committee employ



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a “prestigious international organization” to perform the audit (Decreto No. 120-2013, Ch. III, Sec. III, Art. 13). Furthermore, the resulting reports must be published and presented to the Honduran President and Congress (Decreto No. 120-2013, Ch. III, Sec. III, Art. 13). This article serves to provide transparency into the finances and workings of a zone, which is beneficial for both public perception in Honduras and the perception of outside stakeholders and investors.

Section IV of Chapter III contains nine articles related to dispute resolution and internal security, five of which are examined here. First, Article 14 establishes that zones are subject to a special jurisdiction and “shall have autonomous and independent courts.” These courts have exclusive jurisdiction within the zone over all matters that are not subject to binding arbitration (Decreto No. 120-2013, Ch. III, Sec. IV, Art. 14). This article also stipulates that the courts are to be established by a Judicial Council at the proposal of the Committee, and that the courts may use “Anglo-Saxon” common law or any other legal system permitted by Honduran constitutional Article 329 (Decreto No. 120-2013, Ch. III, Sec. IV, Art. 14). Finally, this article also gives parties who contract in the zone the right to have choice of law clauses in contracts (Decreto No. 120-2013, Ch III, Sec. IV, Art. 14). Businesses engaged in international operations often prefer to use “friendlier” common law jurisdictions, and so permitting zones to select their legal systems allows for a wide range of experimentation and innovation. Furthermore, allowing for parties to enter into contracts that have choice of law clauses increases the appeal of the zones to business interests which often use such clauses in contracts.

Second, Article 15 mandates that judicial officers are appointed by a Judicial Council from a list compiled by the Committee (Decreto No. 120-2013, Ch. III, Sec. IV, Art. 15). This article also requires that the list be “composed of those who hold the greatest ability to perform such work” (Decreto No. 120-2013, Ch. III, Sec. IV, Art. 15). This article is yet another example of the separation of powers principle, where in this case the judicial officers



of the zone must go through a selection process performed by the Committee and an approval process by the Judicial Council.

Third, Article 16 requires that a zone have “a Court of Protection of Individual Rights” (Decreto No. 120-2013, Ch. III, Sec. IV, Art. 16). This court may be comprised of as many judicial officers as the Committee sees fit to appoint and protect the fundamental rights of residents (Decreto No. 120-2013, Ch. III, Sec. IV, Art. 16). Additionally, this article allows for appeals from this court to “international tribunals.” Finally, this article requires that zones must indemnify Honduras in the event that Honduras is condemned for rights violations in the zone, and that zones must “comply with the recommendations, injunctions, or regulations issued by international human rights bodies” (Decreto No. 120-2013, Ch. III, Sec. IV, Art. 16). This article is further assurance to concerned parties and stakeholders that the rights of residents will be respected. It provides this assurance via a two-part mechanism that first, has an internal recourse in the form of a Court of Protection of Individual Rights, and second, an external recourse in the form of the right to appeal to international human rights tribunals.

Fourth, Article 19 requires that the courts are able to exercise their functions independently and free from outside interference, and also mandates that penalties be established for those who attempt to interfere with the independence of these courts (Decreto No. 120-2013, Ch. III, Sec. IV, Art. 19). This article also establishes judicial immunity for judicial officers, which protects them from legal action over matters related to the performance of their judicial office (Decreto No. 120-2013, Ch. III, Sec. IV, Art. 19). The protections that this article provides are important to ensure the independence of the courts and the officers of these courts.

Fifth, Article 22 requires that a zone form its own internal security organs, ranging from police and intelligence bodies to penitentiary bodies, and also to link the security strategy of the zone to the security strategy of Honduras (Decreto No. 120-2013, Ch. III, Sec. IV, Art. 22). This article serves two functions, to once again link the zones back to the



constitutional order and territorial integrity of Honduras, and to require the zones to provide their own security.

The fourth chapter of the ZEDE Statute, Chapter IV: Economics and Finance, deals with the fiscal duties of the zone, property rights within the zone, expropriation, taxation, monetary policy, trade policy, and customs. First, Article 23 requires that zones maintain a fiscal balance, and transfer resources to the rest of Honduras as provided for in the Statute (Decreto No. 120-2013, Ch. IV, Art. 23). This helps ensure that the zones do not become financial burdens to Honduras, and that Honduras as a whole can benefit from the successes of the zones.

Second, Article 24 requires that when a zone is declared in an urban area that title rights to real estate in that area are recognized, taxes on the value of land are created, and that for those taxation purposes periodic appraisals of the value of the land in the zone be made (Decreto No. 120-2013, Ch. IV, Art. 24). This article both protects the rights of urban residents who get subsumed into a zone and sets out clear taxation policies in the zones.

Third, Article 25 allows for the zones to administer ownership issues in the zone when the zone has been established in an area of low population, and that Honduras may expropriate land after indemnifying the owners with the fair value of the land as determined by comparison to similar land outside of the zone (Decreto No. 120-2013, Ch. IV, Art. 25). This article clarifies that Honduras has the ability to expropriate the land of a zone in a low population area, but also gives limitations on how that may be done.

Fourth, Article 28 gives Honduras the power to expropriate land for the purpose of creating a zone, requires the payment of just compensation for the expropriation of such land, and requires that opposition to such expropriation be made in arbitration at the expense of the zone (Decreto No. 120-2013, Ch. IV, Art. 28). Article 28 ensures that landowners subject to expropriation are treated fairly in both legal proceedings and in compensation for that expropriation.



Fifth, Article 29 requires that zones have a separate tax regime, that this policy should be guided by a policy of low taxes, and then delineates what a zone's options are for implementing this policy (Decreto No. 120-2013, Ch. IV, Art. 29). The policies in Article 29 favor ideas of free markets and ensure that these ideas will be supported with policy by limiting what a zone can do regarding tax policy.

Sixth, Article 30 states that the monetary exchange control policies of Honduras do not apply to zones, that zones may create their own monetary exchange control policies and even their own monetary policy, but that zones must ensure that the flow of capital into the rest of Honduras complies with the relevant national standards (Decreto No. 120-2013, Ch. IV, Art. 30). The ability of zones to create their own monetary policy is an enormous grant of autonomy to the zones and allows the zones to be much more economically competitive than they would be without the ability to engage in their own monetary policy.

Seventh, Article 31 is another article that promotes the ideas of free markets, but in this case more directly by requiring the zones to operate on a policy of free trade and competition (Decreto No. 120-2013, Ch. IV, Art. 31). This article also gives zones the ability to manage sea and air travel, as well as ports of entry (Decreto No. 120-2013, Ch. IV, Art. 31). Article 31's mandate for zones to operate in a free-market system ensures that the zones will be economically competitive, and the power to control commercial traffic and ports of entry gives the zones a tool to increase their competitive edge.

Eighth, Article 32 creates ZEDEs as offshore tax and customs areas, which allows them to avoid having to enforce the standard tariffs and fees that goods being imported to the rest of Honduras are subject to (Decreto No. 120-2013, Ch. IV, Art. 32). The exemption of the zones from the standard customs laws of the rest of Honduras allows for the zones to further create their own trade policies in line with free market principles. Overall, Chapter IV aims to ensure that ZEDEs operate as low tax-free trade zones that are easy to do business with. Such policies are aimed at ensuring that ZEDEs are profitable jurisdictions which can in turn help bring prosperity to Honduras as a whole.



The fifth chapter of the ZEDE Statute, Chapter V: Education, Health, Social Security, Science, Religion, Work, and Environment, provides the framework for ensuring that the people of ZEDEs are able to live productive, healthy, fulfilled, and protected lives. This chapter has one article, Article 35, which cites back to the Honduran Constitution. Otherwise, the remaining articles independently create law for the ZEDEs. Article 35 of the Statute protects the labor rights of workers in the zones and does so by citing provisions coming from organizations like the International Labor Organization (ILO) (Decreto No. 120-2013, Ch. IV, Art. 35). Furthermore, the article cites Article 139 of the Honduran Constitution, which states: “The State has an obligation to promote, organize and regulate conciliation and arbitration procedures for the peaceful settlement of labor disputes” (Honduran Const. Art. 139). Article 35 of the Statute then requires that this constitutional mandate be met with “mechanisms of mediation, conciliation and arbitration for the peaceful settlement of disputes” (Decreto No. 120-2013, Ch. V, Art. 35). This article helps to reassure residents of zones that their labor rights will be looked after, and that those rights will be defined not by a market oriented ZEDE government, but by respected international bodies like the ILO. This reassurance is further bolstered by the incorporation by reference of Article 139 of the Honduran Constitution, which requires arbitration and promotes the peaceful settlement of labor disputes.

There are three other notable Articles in Chapter V of the ZEDE Statute: (1) Article 33; (2) Article 34; and (3) Article 36. First, Article 33 gives ZEDEs broad authority to establish “their own systems of education, health, social security, and promotion of science, as well as to guarantee freedom of conscience, religion, labor protection, and freedom of association” (Decreto No. 120-2013, Ch. V, Art. 33). The article mandates that ZEDEs do this through the promulgation of their own rules (Decreto No. 120-2013, Ch. V, Art. 33). This article once again is giving broad authority and autonomy to the zones to create their own policies. Such a high degree of latitude in the ability to design and implement these social systems allows for the



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zones to engage in experimentation and innovation that would not be available with more prescribed methods.

Second, Article 34 requires the zones to create their own curriculum and policy at all levels, and prohibits licensing or mandatory association, but allows for accreditation requirements for certain professions (Decreto No. 120-2013, Ch. V, Art. 34). This article is notable because it requires that the zones create their own curriculum, thereby implying a duty to provide an education within a zone's jurisdiction. However, this article also does more work advancing the ideas of a market-oriented system by prohibiting licensing systems or mandatory membership in a professional or labor association. Though, the article also promotes standards for professionals by allowing zones to implement accreditation requirements for certain professions.

Third, Article 36 mandates that: "All things being equal, preference shall be given to Honduran workers over foreign workers" (Decreto No. 120-2013, Ch. V, Art. 36). Furthermore, the article requires that no less than 90 percent of the workers in a zone are Hondurans, and that those Honduran workers must make at least 85 percent of the wages that their employers pay out (Decreto No. 120-2013, Ch. V, Art. 36). Like many other articles in the Statute, this article has two functions, in this case to bolster the perception of the zone being an integral part of Honduran territory, and to ensure that the bulk of the benefits of the economic success of a zone goes to the Honduran people. It is notable that this article is in the chapter advancing positive social policies within the zones and not the chapter addressing the economic policies of the zones. The social policies of the zones strike a balance between advancing market-oriented solutions to social problems and mandating that the zones still provide social services.

The final chapter of the ZEDE Statute, Chapter VI: Final and Transitional Provisions, has articles that both refer back to the Honduran Constitution and articles that advance policies that are not rooted in the Constitution. There are two articles in the Statute that make reference to the Constitution: (1) Article 38; and (2) Article 39. First, Article 38 sets



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forth the rules that the Honduran Congress must follow when creating ZEDEs by decree (Decreto No. 120-2013, Ch. V, Art. 38). This article has two prongs, one for determining the rules for declaring a ZEDE in a low population density area, and one another for determining the rules for establishing a ZEDE in a high population density area, and each prong has a different reference to the Honduran Constitution (Decreto No. 120-2013, Ch. V, Art. 38).

The first prong requires that “[w]hen the area to be declared has a low population density, the National Statistics Institute (NSI) must certify the situation in accordance with the provisions of Article 329” (Decreto No. 120-2013, Ch. V, Art. 38). The provisions of Article 329 are discussed extensively above. The second prong requires that when a zone is declared in a high population density area, that a plebiscite must first be conducted, and that a ZEDE may only be established if the result is favorable under Article 5 of the Honduran Constitution (Decreto No. 120-2013, Ch. V, Art. 38). Article 5 of the Honduran Constitution requires that the government is to “be founded on the principles of popular sovereignty, the self-determination of the people, and participatory democracy” (Honduran Const. Art. 5) Furthermore, Article 5 of the Honduran Constitution lays out the requirements for a referendum or plebiscite (Honduran Const. Art. 5).

Second, Article 39 of the Statute deals with the establishment of zones in “areas with low population density in the municipalities in the departments adjoining the Gulf of Fonseca and the Caribbean Sea” (Decreto No. 120-2013, Ch. VI, Art. 39). This article lays out specific requirements for establishing zones in these areas. Additionally, this article incorporates by reference Articles 10 and 329 of the Honduran Constitution (Decreto No. 120-2013, Ch. VI, Art. 39). Both articles are discussed extensively above. The constitutional articles that are cited in Article 39 of the Statute are mostly familiar, Article 10 dealing with the sovereignty and definition of Honduran territory, and Article 329 that establishes the structure that the ZEDEs can operate under (Honduran Const. Art. 10, 2013; Honduran Const. Art. 329). Both references help ensure that any court reviewing the validity of the ZEDE Statute can find



more evidence that the Statute passes scrutiny when examined with a Constitutional Article 374 test.

There are three additional articles in Chapter VI that must be examined for the purposes of this analysis: (1) Article 41; (2) Article 42; and (3) Article 43. First, Article 41 gives the Honduran national laws that must apply in a ZEDE. These laws are the laws which establish “the national anthem, national emblem, national flag and other national symbols;” the laws “concerning the Territorial Sea and the Contiguous National Zone;” and criminal laws, which can either be incorporated by reference from the laws of Honduras or which the ZEDEs can create themselves (Decreto No. 120-2013, Ch. VI, Art. 41). This article is once again doing multiple things at once, ensuring that Honduran territorial integrity is promoted through the presence of Honduran national symbols and recognition of Honduran territorial claims, and giving the zones a relatively easy way to establish a sensitive area of law, criminal law.

Second, Article 42 allows for outstanding foreign judges, attorneys, or academics to be employed as judicial officers while “human resources are being formed and capabilities [are being] developed” in the zones (Decreto No. 120-2013, Ch. VI, Art. 42). This article gives the ZEDEs greater flexibility in the appointment of judicial officers by being able to select those officers from a larger pool of qualified candidates.

Third, Article 43 prohibits the ZEDEs from “[carrying] out acts that violate the property rights of indigenous peoples and Afro-descendants on the land they have been granted by certificates granted by the [Honduran] Government” (Decreto No. 120-2013, Ch. VI, Art. 43). Article 43 also incorporates by reference Convention 169 of the ILO and applies it to all ZEDEs (Decreto No. 120-2013, Ch. VI, Art. 43). This article seeks to assure both Hondurans and international stakeholders that the rights of Honduran minority groups will be respected and protected, and that those protections will be determined by an international standard set by the ILO. Chapter VI contains a range of articles that address areas that are not addressed in other parts of the Statute. This Chapter also reinforces the assertion that



the Statute falls safely within the requirements for not altering the government or territorial integrity of Honduras.

The ZEDE Statute provides a highly autonomous framework for establishing innovative jurisdictions within Honduras, and it does this by methods that ensure the government and territory of Honduras are not altered in a way that would fail a constitutional Article 374 test. However, the ZEDE Amendment and ZEDE Statute are not the only bodies of law that are relevant to the legal landscape of ZEDEs. There are also relevant treaties and international agreements.

3.3. International Legal Issues

There are seven treaty instruments or international agreements to which Honduras is a member state and have been cited as impacting the legality, legitimacy, and powers of ZEDEs. These instruments are addressed in accordance with their relationship to the rights of Hondurans that they protect: (1) Rights Concerning Self-Determination and Democratic Participation; (2) Property Rights; (3) The Rights of Indigenous Peoples; and (4) Obligations of Business and Human Rights.

First, Rights Concerning Self-Determination and Democratic Participation are backed by three separate documents: the American Convention on Human Rights (ACHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant of Economic, Social, and Cultural Rights (ICESCR). Article 23 of the ACHR provides a right to participate in government (Organization of American States, 1969). Detractors of the ZEDEs assert that the governance structure is not sufficiently democratic (National Lawyers Guild, 2014). However, this argument is likely not strong enough to invalidate the ZEDE Statute (Miller, 2015). Additionally, the ICCPR contains language that is substantially similar, though as noted above, this line of attack is unlikely to invalidate the ZEDE Statute (International Covenant on Civil and Political Rights, 1966; Miller, 2015). Third, both the ICCPR and the ICESCR stipulate that “All people have the right to self-



determination” (UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 1966). Yet, once again, this line of attack likely does not invalidate the ZEDE Statute (Miller, 2015).

Second, Property Rights are backed by two documents: the ACHR, and the Bay Islands and Wyke-Cruz Treaty of 1859. The ACHR confers the right to the use and enjoyment of property, and the prohibition against state seizure of property without just compensation (OAS, 1969). However, the ZEDE Statute clearly addresses these issues in Articles 25 and 28 discussed above. Furthermore, arguments that the Bay Islands and Wyke-Cruz Treaty of 1859 prevents the formation of ZEDEs based on the treaty’s prohibition against ceding the right of sovereignty over any of the described territories “to any nation or State whatsoever” (Bay Islands and Wyke-Cruz Treaty, 1859). Objections to the ZEDE Statute using the Wyke-Cruz Treaty also likely do not carry any weight as the Statute is already well insulated from an attack using Article 374 of the Honduran Constitution, which is a much more relevant document asserting the inviolability of Honduran territory.

Third, the Rights of Indigenous Peoples are backed by the Indigenous and Tribal Peoples Convention of 1989 (ILO 169), and the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP). ILO 169 and UNDRIP both require Honduras to consult with indigenous peoples whenever there are administrative changes that will affect them directly. Detractors have asserted that they are “not aware of any efforts that the government has made to initiate consultations with affected groups” (National Lawyers Guild, 2014). However, Article 43 of the ZEDE Statute does prevent the ZEDEs from violating the property rights of indigenous groups and also incorporates ILO 169.

Fourth, Obligations of Business and Human Rights are backed by the United Nations Guiding Principles on Business and Human Rights (Guiding Principles). The Guiding Principles expect businesses to recognize “at a minimum...those [rights] expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization’s Declaration on Fundamental Principles and Rights



at Work” (UN Human Rights Council, 2011). Detractors of the ZEDE Statute assert that they are concerned about the possibility of business interests becoming “complicit in the human rights violations committed by the Honduran state” (National Lawyers Guild, 2014). These detractors claim that any business operating in a ZEDE would be complicit in any violation of rights that the Honduran government was engaged in, such as a denial of the right to political participation (National Lawyers Guild, 2014). However, as addressed above, it is not likely that ZEDEs violate any right to political participation or self-determination, as Article 5 of the Honduran Constitution has been incorporated into the ZEDE Statute by reference, and this article requires the government to “be founded on the principles of popular sovereignty, the self-determination of the people, and participatory democracy” (Honduran Const. Art. 5).

4. PRINCIPAL OBJECTIONS TO THE ZEDE LAW

This section will address two of the most notable criticisms of the ZEDE law, that ZEDEs are (1) a violation of Honduran sovereignty and (2), that ZEDEs represent a threat to property rights through expropriation, especially with regard to indigenous communities.

The sovereignty criticism was used to strike down the original RED legislation, and similar charges have been levied against the ZEDE legislation, including recently by the Honduran Bar Association (Márquez, 2020). The previous section evidenced the weakness of this line of attack against the constitutionality of the ZEDE law. Therefore, it will not be discussed further in this section. However, the concerns regarding the violation of property and indigenous land rights through expropriation warrants further discussion.

4.1. Property Rights and Expropriation

Expropriation of land by eminent domain to create or expand a ZEDE is a chief concern of the law's critics. Fears of expropriation tend to revolve, although not exclusively so, around lands held by Honduras' Afro-indigenous minority, the Garifuna. For years, the Garifuna have been subject to intimidation and outright violence over their lands by the Honduran police and military, drug cartels, and private firms (Clark, 2020).

Under the ZEDE statute, ZEDEs are supposed to be developed in accordance with International Labor Organization Convention 169 on free, prior, and informed consent of indigenous communities. However, Alford-Jones (2017) notes that the Garifuna have criticized the Honduran government for failing to ensure that such consent was given for a (now seemingly abandoned) ZEDE project near the coastal city of Trujillo. Alford-Jones also alleges that the broad expropriation powers enumerated in Article 25 of the ZEDE statute are a violation of Inter-American Development Bank policies on involuntary resettlement and indigenous peoples. The National Lawyers Guild (2014) is similarly critical of the expropriation clauses in the ZEDE statute, and Martin and Geglia (2019) note that ambiguities surrounding the process by which expropriations can occur has exacerbated fears of future displacement.

From a legal perspective, concerns about the expropriation clauses have been addressed in the previous section—titled land cannot be expropriated *carte blanche* without just compensation, as is standard in virtually all countries in the Global North. For example, the Fifth Amendment to the United States Constitution states that no private property may be taken by the government for public use, such as the construction of a road, without just compensation, typically in the form of the fair market value of the property (Legal Information Institute, 2021). Key international laws and conventions relating to land rights are either directly referenced in the ZEDE law or apply to ZEDEs by virtue of Honduras being a signatory.



Fodder (2019) notes that the recognition of the rights of landowners at all, and that any takings of titled land must be accompanied by just compensation, is a significant departure from past policy of the Honduran government. Furthermore, Fodder argues that the protections afforded to indigenous peoples in the ZEDE statute are “among the most innovative” when compared to other special jurisdictions. While laws on paper are not an ironclad guarantee of land rights for low income and indigenous Hondurans, thought has been afforded to this issue.

Despite a trend towards less arbitrary and uncompensated expropriation by the Honduran government, the poor state of land titling in rural Honduras and the communal nature of land ownership by indigenous peoples leave open the possibility of expropriations that result in insufficient or nonexistent compensation. Continuing to pursue land titling, including communal land titling, could help the Honduran government preempt such disputes from arising in the first place when titling is unclear (World Bank, 2017).

It is worth noting that Honduras scores incredibly poorly on indices that account for access to justice, such as the rule of law indicator within the Worldwide Governance Indicators. Honduras ranks within the 15th percentile of all countries, significantly underperforming Latin America and the Caribbean (49th percentile) and low-income countries (20th percentile) (Worldwide Governance Indicators, 2019). As previously stated, laws and policies on paper do not guarantee perfect access to justice, but a ZEDE with a functional and low-cost court system may indeed represent a substantial improvement in access to justice for ordinary Hondurans.

As is discussed later in the case studies of Próspera and Ciudad Morazán, ZEDE developers are clearly aware of the public relations challenges they face in developing ZEDEs, especially regarding expropriation. To that end, neither ZEDE developer has engaged in acts of expropriation to date and each has either issued a blanket public statement against expropriation or requires compensation well above what is required by law.



5. ZEDE CASE STUDIES – PRÓSPERA AND CIUDAD MORAZÁN

To date, two ZEDEs have been declared: Próspera and Ciudad Morazán. Both ZEDEs were announced in 2020, seven years after the ZEDE law was first passed. Although both projects are still in the early stages of development, they represent two contrasting visions of how the ZEDE law can be applied in practice.

5.1. Próspera

Próspera is a 58-acre development on the Caribbean island of Roatán, a popular tourist destination where English is the primary language (Próspera 2020b). The Próspera development plan targets a variety of knowledge economy sectors like finance, education, and medical tourism, but also traditional tourism and manufacturing (Próspera 2020c). In addition to business development, Próspera is also pursuing luxury housing development through a partnership with British firm Zaha Hadid Architects (Próspera, 2020d).

Próspera is governed by a common law framework that incorporates restatements of US common law and international common law standards based partially on the open-source common law Ulex system developed by Chapman University law professor Tom Bell (Brimen, 2020). Próspera features a unique and highly flexible regulatory regime, where businesses may choose to adopt the regulatory code of Honduras or any OECD country, adopt common law regulation with three times enhanced liability and injunctive relief, or propose an entirely new regulatory framework subject to approval from the Próspera Council (Próspera, 2020e).

In addition to the flexible regulatory framework, Próspera has adopted a series of business regulations targeted at making the ZEDE among the most competitive business environments in the world while also benefiting the local population of Roatán. To register a business, Próspera only requires three steps (sign a coexistence agreement, fill out a brief application with information for a background check, and purchase liability insurance) that can be completed in a single day, outperforming Honduras in ease of business registration by



several orders of magnitude, at much lower cost. Permitting compliance is also orders of magnitude cheaper and easier than in Honduras or in the United States (Próspera 2020e).

Regarding labor law, Próspera requires that at least 90 percent of day labor employees are Honduran and that the minimum wage paid must be at least 10 percent above the Honduran national minimum wage. Employer contributions to employee savings accounts equal to 8 percent of gross compensation is also mandated. Employers can choose to adopt either a six day/48-hour workweek or provide 125 percent overtime compensation (Próspera, 2020e).

Próspera also boasts a light tax burden—a 10 percent tax on presumed income sourced within the ZEDE, a five percent retail value-added tax, and a one percent tax on the unimproved value of land. Estimated aggregate tax revenue as a percentage of GDP is just 7.5 percent, compared to 23.36 percent in Honduras or 33.3 percent in the United States (Próspera 2020e).

Finally, Próspera has its own arbitration center that will serve as the default court for the ZEDE. Unlike traditional arbitration centers, the Próspera Arbitration Center (PAC) is intended to be open to the public. Details of resolved cases will be made available, rather than kept private. In addition to commercial dispute resolution, the PAC will also handle labor disputes and even criminal matters, which for relatively minor offenses may be addressed in Próspera through a schedule of criminal fees, rather than imprisonment (Brimen, 2020).

Despite Próspera's ambitious development plan, innovative legal system, and competitive business environment, the project has encountered difficulties in recent months. In September 2020, a video showing local police confronting Próspera CEO Erick Brimen during a meeting with Crawfish Rock (a community of Roatán) residents about the project quickly went viral. The video was accompanied with accusations that Próspera was planning to use eminent domain powers granted under the ZEDE law to confiscate property on Roatán



to expand the ZEDE, and that local residents had not been consulted about the project prior to its commencement (Ernst, 2020).

In response, Próspera issued a statement rejecting the allegations of property expropriation and affirmatively stated that all past land acquisitions had been through voluntary transactions, as would all future acquisitions. The statement notes that it would not be legal for Próspera to expropriate land under the ZEDE law, and that only the Honduran government possesses this power. The statement also condemns both the beating of Próspera officials and threats of illegal arrest by the local police (El Herald, 2020). Próspera also shared a resolution that had been adopted the previous month affirming the ZEDE's commitment to respecting the property rights of Roatán residents, including indigenous communities on the island. The resolution proclaims that Próspera does not have the power to, and will not, engage in any expropriation of land, will only incorporate new territory with the voluntary request of property owners, and shall not use its resources to assist any other governmental body in executing an expropriation (Próspera 2020f).

5.2. Ciudad Morazán

Ciudad Morazán is a 50-acre development near the city of Choloma, north of San Pedro Sula. While the economic focus of Próspera is clearly international in nature, targeting knowledge-based economic activity and high-income residents, Ciudad Morazán is focused entirely on attracting industrial development and Honduran residents (La Prensa, 2020). Although less information about Ciudad Morazán is available compared to Próspera, a recent interview with Technical Secretary Carlos Alfonso Fortín Lardizábal and the ZEDE's first published regulations offer insight into its objectives and business environment.

Ciudad Morazán intends to mirror the typical *maquila*-style industrial park, but to also provide residential areas and public services. While the Choloma area attracts significant in-migration already, Ciudad Morazán is intended to help fill the gap in quality housing, schools, public services, security, and more. The first round of investment,



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approximately \$100 million, will build out the infrastructure and services to support 8,000 residents. The first 100 families are expected to move in by Spring 2021 (La Prensa, 2020).

A common criticism of ZEDEs is that they lack democratic legitimacy, however, Ciudad Morazán allows for residents to vote for a Technical Secretary and certain members of the Morazán Council, once the city hits a minimum population threshold. Other seats of the Morazán Council are voted on by landowners, with votes allocated by land owners (ZEDE Morazán, 2020). This distribution of representation somewhat mirrors Hong Kong's Legislative Council, where seats are split between geographic constituencies and "functional" constituencies that represent various interest groups like trade unions, financial services, agriculture, and others (Registration and Electoral Office, 2020).

Regarding the business environment, all individuals and firms are taxed at a fixed rate of seven percent of all Morazán-sourced income, although options for lump-sum annual payments may be made available (ZEDE Morazán, 2020). Technical Secretary Lardizábal has specifically noted that the ZEDE is not intended as a tax haven, and that an individual living in Ciudad Morazán but working elsewhere in Honduras or abroad would be subject to standard Honduran taxation (La Prensa, 2020). Furthermore, starting on January 1, 2030 or when the city reaches 50,000 residents, aggregate tax revenues in excess of seven percent of Ciudad Morazán GDP will be returned to taxpaying residents and landowners. Beyond taxation, a new court and a default arbitration service provider will be established by the ZEDE (ZEDE Morazán, 2020).

In addition to the regulatory policies detailed in the bylaws, Ciudad Morazán has also published an extensive labor law statute. Weak labor protections have been a principal objection to the ZEDEs, although Ciudad Morazán offers protections that appear to challenge this categorization (National Lawyers Guild, 2014). Many of Ciudad Morazán's labor provisions are similar to those advertised by Próspera, like a minimum wage greater than that in the rest of Honduras (Ciudad Morazán Labor Statute Chapter V; Villela, 2020). The labor statute also includes legal protections for collective bargaining and union membership,

another common area of criticism, among other labor protections (Ciudad Morazán Labor Statute Chapter IV).

The Ciudad Morazán Charter and Bylaws also establish a Resident Bill of Rights, which includes a requirement that any eminent domain powers shall not be exercised without compensating the property owner 200 percent of whichever is greater, the fair market value of the property prior to the taking or the monetary value of the loss sustained by the property owner. The Resident Bill of Rights further recognizes rights to life, property, contract, due process, thought, speech, conscience, religion, security and privacy, liberty, and protection against ex post facto prosecutions (ZEDE Morazán, 2020).

Although Ciudad Morazán has been subject to some criticism as part of a general political backlash against the ZEDEs in Honduras, it has not received the same level of scrutiny as Próspera following the September 2020 incident in Crawfish Rock.

6. CONCLUSION

Próspera and Ciudad Morazán are moving closer to having their first operational businesses and first residents. It remains to be seen if these ZEDEs end up closer to the advocates' dream of a Latin American Shenzhen or the detractors' fears of corporate abuse run amok. Given the information available about the governing frameworks for each ZEDE, there is reason to be optimistic about their potential for their economic and popular success.

At the same time, ZEDE developers must tread carefully. Much of the Honduran public is hostile to the ZEDEs and any abuses of power or failure to deliver on key responsibilities could signal the death knell for a ZEDE and permanently scare off investors. The ongoing uncertainty regarding President Hernández's connections to drug trafficking and money laundering, including the conviction on drug trafficking charges of his brother in U.S. federal court, threatens the integrity of the ZEDE experiment (Asmann, 2020). Since the 2009 coup and constitutional crisis that brought Hernández's National Party to power,



the Party and its leaders have become increasingly authoritarian—undermining Honduran democracy and with it the legitimacy of the ZEDEs (Olson, 2019).

As Próspera and Ciudad Morazán develop both in a physical sense and in terms of their governing frameworks, the authors hope that scholars will thoroughly analyze each project as the first true applications of the ZEDE law. Implemented well, the ZEDEs can be an extremely powerful anti-poverty tool that provides economic opportunities for all Honduras, especially the poor and marginalized. The next five to 10 years will prove decisive for the success or failure of the ZEDE experiment in Honduras.

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